USCA Dkt. No. 19-0086/NA

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,

Appellee,

v.

PEDRO M. BESS
Hospital Corpsman, Second Class Petty Officer (E-5)
United States Navy,

Appellant.

Crim. App. Dkt. No. 201300311

BRIEF OF *AMICUS CURIAE* NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF APPELLANT

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

DANIEL S. HARAWA
Counsel of Record
USCAAF BAR NO. 37202
KERREL MURRAY
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
700 14th Street NW
Washington, DC 20005
(202) 682-1300
dharawa@naacpldf.org

SHERRILYN A. IFILL
President and Director-Counsel
JANAI S. NELSON
SAMUEL SPITAL
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
40 Rector Street, 5th floor
New York, NY 10006

Counsel for *Amicus Curiae*

June 28, 2019

INDEX OF BRIEF

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

Page(s)

Cases

Page(s)

Cases

Page(s)

Cases

Page(s)

STATUTES & RULES

OTHER AUTHORITIES

Page(s)

OTHER AUTHORITIES

Page(s)

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*

The NAACP Legal Defense & Educational Fund, Inc. ("LDF") is the nation's first and foremost civil rights legal organization. Through litigation, advocacy, public education, and outreach, LDF strives to secure equal justice under the law for all Americans, and to break down barriers that prevent African Americans from realizing their basic civil and human rights.

LDF has a long-standing concern with the influence of racial discrimination on the criminal justice system in general, and on jury selection in particular. We represented the defendants in, *inter alia*, *Swain v. Alabama*, 380 U.S. 202 (1965), *Alexander v. Louisiana*, 405 U.S. 625 (1972), and *Ham v. South Carolina*, 409 U.S. 524 (1973); pioneered the affirmative use of civil actions to end jury discrimination in *Carter v. Jury Commission of Greene County*, 396 U.S. 320 (1970), *Turner v. Fouche*, 396 U.S. 346 (1970); and appeared as *amicus curiae* in *Batson v. Kentucky*, 476 U.S. 79 (1986), *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), *Georgia v. McCollum*, 505 U.S. 42 (1992), *Miller-El v. Cockrell*, 537 U.S. 322 (2003), *Johnson v. California*, 545 U.S. 162 (2005), and *Miller-El v. Dretke*, 545 U.S. 231 (2005). LDF also has a history of advocating against racial discrimination in the armed forces. *See, e.g.*, *Chappell v. Wallace*, 462 U.S. 296 (1983).

LDF submits this brief in support of HM2 Pedro Bess's claim that his Fifth Amendment rights were violated by the exclusion of Black servicemembers from his court-martial.

ISSUES PRESENTED BY APPELLANT

This Court granted review on three issues:

I. WHETHER THE CONVENING AUTHORITY'S SELECTION OF MEMBERS VIOLATED THE EQUAL PROTECTION REQUIREMENTS OF THE FIFTH AMENDMENT.

II. WHETHER THE CONVENING AUTHORITY'S SELECTION OF MEMBERS CONSTITUTED UNLAWFUL COMMAND INFLUENCE.

III. WHETHER THE LOWER COURT ERRED IN AFFIRMING THE MILITARY JUDGE'S DENIAL OF APPELLANT'S MOTION TO PRODUCE EVIDENCE OF THE RACIAL MAKEUP OF POTENTIAL MEMBERS.

This brief will focus on the first issue and also address the third issue.

SUMMARY OF ARGUMENT

The Supreme Court has warned against the danger of jury-selection systems where subjectivity provides "a clear and easy opportunity for racial discrimination."[1] When faced with a subjective jury-selection system, the Supreme Court has granted relief when there are stark racial disparities in the jury pool's composition.[2]

As this Court recently recognized, under Article 25 of the Uniform Military Code of Justice, "[a] convening authority has significant discretion when selecting panel members . . . ."[3] The "significant discretion" Article 25 grants convening authorities means that the court-martial system is particularly susceptible to unlawful discrimination. Indeed, a 2001 Commission chaired by retired Judge Walter T. Cox, III (the "Cox Commission"), examined the court-martial system and found it to be "antiquated" and an "invitation to mischief."[4] As such, when faced with a claim of systematic discrimination, it is important that trial judges carefully weigh the claim

---

[1] *Alexander v. Louisiana*, 405 U.S. 625, 630 (1972).

[2] *See e.g.*, *id.*; *Turner v. Fouche*, 396 U.S. 346, 360 (1970) (finding a prima facie case of jury discrimination because there was a "substantial" racial disparity in the jury pool that resulted from a "subjective" jury-selection process).

[3] *United States v. Riesbeck*, 77 M.J. 154, 163 (C.A.A.F. 2018).

[4] Capt. Kevin J. Barry USCG (Ret.), *A Face Lift (And Much More) for an Aging Beauty: The Cox Commission Recommendations to Rejuvenate the Uniform Code of Military Justice*, 2002 L. Rev. Mich. St. U. Det. C.L. 57, 59, 100 (2002) (quoting *Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice* 7 (2001)).

to ensure that no bias, or even the appearance of bias, features in a member's court-martial.

HM2 Bess is an African American man who was charged with committing or attempting to commit incident acts against three white women. Although the Navy is racially diverse, the panel convened for HM2 Bess's court-martial consisted solely of white servicemembers. Furthermore, HM2 Bess presented evidence that at least three other courts-martial convened in the same judicial circuit over the course of a one-year period similarly excluded Black servicemembers from panels. In all three cases, the defendant was an African American man accused of a sex-related offense. In short, HM2 Bess presented substantial evidence that his panel was convened in violation of his Fifth Amendment due process rights.

In light of this evidence and as explained below, amicus curiae NAACP Legal Defense & Educational Fund, Inc. respectfully asks this Court to reverse HM2 Bess's conviction and remand for further proceedings.

ARGUMENT

I. THE CONVENING AUTHORITY DETAILED AN ALL-WHITE PANEL IN VIOLATION OF HM2 BESS'S FIFTH AMENDMENT RIGHTS.

A. The Convening Authority Assembled All-White Panels to Hear HM2 Bess's Case and Other Cases Involving Black Members Accused of Sex-Related Offenses.

This case involves a Black man accused of being sexually inappropriate with white women. Given this country's history, that accusation creates a special risk that racism will undermine "a basic premise of our criminal justice system"—that "[o]ur law punishes people for what they do, not who they are."[5] This history has generated powerful and stubbornly pervasive stereotypes that continue to infect our criminal justice system.

In the colonial days, Black men accused of sexually assaulting white women were often castrated and/or sentenced to death.[6] After slavery, the "most common justification for lynching was the claim that a Black man had raped a white woman."[7] And still today, the harshest sentences for sexual offenses are reserved for Black

---

[5] *Buck v. Davis*, 137 S. Ct. 759, 778 (2017); Jennifer Wriggins, *Rape Racism, and the Law*, 6 Harv. Women's L.J. 103, 103, 108, 116 (1983).

[6] *See* Bennett Capers, *The Unintentional Rapist*, 87 Wash. U. L. Rev. 1345, 1355 (2010).

[7] Wriggins, *supra* note 5, at 108.

men accused of assaulting white women.[8] Studies have also "found that white jurors [are] more likely than black jurors to convict black defendants charged [ ] with sexually assaulting white victims . . . ."[9] Thus, as numerous Supreme Court cases demonstrate, many prosecutors have often endeavored to try Black men accused of committing sex crimes against white women in front of all-white juries.[10]

It is against this historical backdrop that this Court must review HM2 Bess's case. HM2 Bess was charged with committing and attempting to commit indecent acts against three white women.[11] These charges present the most salient example of when the race of the defendant and the race of the complainant matters, and this case is the archetypal example of the well-documented practice of prosecutors aggressively seeking to empanel all-white juries to ensure a Black defendant's

---

[8] *Id.* at 116.

[9] Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 Mich. L. Rev. 63, 88 (1993).

[10] *See, e.g.*, *Swain v. Alabama*, 380 U.S. 202 (1965); *Smith v. Texas*, 311 U.S. 128 (1940); *Norris v. Alabama,* 294 U.S. 587 (1935); *Neal v. Delaware*, 103 U.S. 370 (1880). In each of these cases, the Court had to reverse a Black defendant's rape conviction because he was either unconstitutionally indicted or tried by an all-white jury.

[11] *United States v. Bess*, No. 201300311, 2018 WL 4784569, at *1 (N-M. Ct. Crim. App. Oct. 4, 2018), *review granted*, No. 19-0086/NA, 2019 WL 2071084 (C.A.A.F. Apr. 18, 2019).

conviction.[12] Under these circumstances, it was critically important that no bias, or even the specter of bias, featured in the convening of HM2 Bess's panel. Unfortunately, that is not what happened here.

"At the beginning of the trial, a white military judge, asked a white bailiff, to call in the all-white jury."[13] Defense counsel objected to the composition of the panel, specifically noting its lack of any Black servicemembers, and then argued that this seemed to be a pattern: "that [with] at least . . . two [other] panels . . . we've had all white panel members with an African-American client."[14]

Defense counsel was right. What happened in HM2 Bess's case was not an anomaly. All-white panels were convened in at least three other courts-martial in a

---

[12] *See generally*, Harry Zirlin, *Unrestricted Use of Peremptory Challenges by Criminal Defendants and Their Counsel: The Other Side of the One Color Jury*, 34 N.Y.L. Sch. L. Rev. 227, 229-30 (1989) ("After the decision in *Strauder v. West Virginia*, which held that a black defendant was denied equal protection when blacks were systematically excluded from the jury pool, the peremptory challenge became a tool in the hands of both prosecutors and defense lawyers to keep blacks from serving on juries. Apparently, the object was to keep the races segregated so that the only circumstance in which a black citizen might be impaneled on a jury was when both the accused and the victim were black and the entire jury impaneled was also black.").

[13] J.A. at 110.

[14] *Id.* at 198.

one-year period, all in Navy Region Mid-Atlantic. And like HM2 Bess's case, the courts-martial involved Black members accused of sex-related offenses.

The convening authority for all of the cases was Rear Admiral John C. Scorby, Jr.[15] Rear Admiral Scorby served as Commander of Navy Region Mid-Atlantic from March 10, 2016 until July 20, 2018.[16] As convening authority, Rear Admiral Scorby had almost unbridled discretion to determine which members got detailed to courts-martial. The only statutory constraint on the convening of a general court-martial for an enlisted member like HM2 Bess is that the "convening authority shall detail as members thereof such members of the armed forces as, *in his opinion*, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament."[17] Furthermore, as admitted below, Rear Admiral Scorby's detailing ability was not limited to Navy Region Mid-Atlantic or to

---

[15] *See* J.A. at 809.

[16] *See* U.S. Navy Biography, *Rear Admiral John C. "Jack" Scorby, Jr.*, https://www.navy.mil/navydata/bios/navybio.asp?bioID=628 (last visited June 19, 2019); Commander, Navy Region Mid-Atlantic, *Rear Admiral Charles W. Rock*, https://www.cnic.navy.mil/content/cnic/cnic_hq/regions/cnrma/about/biographies/rear_admiral_c_w_rock.html (last visited June 19, 2019) (reporting Rear Admiral Rock "assumed command of the Navy's Mid-Atlantic Region July 20, 2018"); *see also* 10 U.S.C. § 822 (listing the commanding officer as a person who has the power to convene general courts-martial).

[17] 10 U.S.C. § 825(e)(2) (emphasis added).

members subordinate to his command.[18] And because HM2 Bess is an enlisted member, any officer or enlisted member of equal or senior rank was eligible to serve on his panel.[19]

Rear Admiral Scorby issued his instruction on how he planned to conduct the "nominations of courts-martial panel members" on June 15, 2016.[20] This instruction included a detailed questionnaire that potential panel members had to complete that asked questions about their background, including hometown, level of education, and marital status; social patterns, including their primary source for news, websites frequently visited, television programs frequently watched and types of books and magazines frequently read; and contact with the criminal justice system, including whether they or anyone close to them had been charged with a crime, whether any member of their family had ever been the subject of a police complaint, and whether they or anyone they know had been wrongly accused of a crime.[21]

Three months after issuing his instruction, in September 2016, Rear Admiral Scorby detailed an all-white panel for Chief Machinist's Mate Sherman Rollins's

---

[18] *Bess*, 2018 WL 4784569, at *8.
[19] *See* 10 U.S.C. § 825(a)-(c); Artl. 25(d)(1).
[20] *See* Dep't of Navy, COMNAVREG MIDLANT INSTRUCTION 5813.1C, at 1 (June 15, 2016).
[21] *See id.* at Encl. 2

court-martial—a Black servicemember charged with sexual assault.[22] Two months later was HM2 Bess's court-martial. Then, five months later, the convening authority detailed another all-white panel for the court-martial of Lieutenant Willie Jeter—a Black servicemember also charged with sexual assault.[23] And just two months after that, the convening authority detailed a fourth all-white panel, this time for Lieutenant Joshua Johnson's court-martial, yet another Black member accused of sexual assault.[24]

Thus, in the first year the convening authority's selection instruction was in effect, he detailed four all-white panels for four Black defendants charged with sex-related offenses. Defense counsel filed an affidavit in the court below detailing these cases.[25] Only 18 general courts-martial in the region went to trial over that same period.[26]

---

[22] *See United States v. Rollins*, No. 201700039, 2018 WL 3616867, at *1 (N-M. Ct. Crim. App. July 30, 2018); U.S. Navy Judge Advoc. Gen.'s Corps, *Reports of the Results of Special and General Courts-Martial Tried and Completed within the United States Navy in September 2016* at 2, https://www.jag.navy.mil/news/rot/SEPT2016.pdf (last visited June 24, 2019).
[23] *See United States v. Jeter*, 78 M.J. 754, 761 (N-M. Ct. Crim. App. 2019).
[24] *See* J.A. at 811-12.
[25] Br. of Appellant at 6-7.
[26] This data is taken from the U.S. Navy Judge Advocate General's Corps reports of all courts-martial. *See* U.S. Navy Judge Advoc. Gen.'s Corps, *Results of Trial*,

Because the trial judge denied HM2 Bess's discovery requests,[27] the racial identities of the defendants in the other trials is presently unknown, as is the racial composition of their panels. Likewise, this Court cannot know the exact racial breakdown of available members to serve on HM2 Bess's panel because the trial judge denied that discovery request too.[28]

But the available data leaves no doubt that, given the convening authority's ability to detail members from across the Navy, if he desired to include Black members or other minorities "on [HM2 Bess's] jury . . . to insure a fair representation of that class,"[29] he had plenty of servicemembers to choose from. The Navy is extremely diverse. In 2016, the year of HM2 Bess's court-martial, official Military data reports that there were 320,101 enlisted members and officers in the Navy,

---

https://www.jag.navy.mil/news/ROT_2016.htm (last visited June 14, 2019) (archiving the results from 2016 courts-martial); U.S. Navy Judge Advoc. General's Corps, *Results of Trial*, https://www.jag.navy.mil/news/ROT_2017.htm (last visited June 14, 2019) (archiving the results from 2017 courts-martial).

Military Rule of Evidence 201 provides that judges can take "judicial[ ] notice [of] a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." *United States v. Paul*, 73 M.J. 274, 277 (C.A.A.F. 2014) (quoting Military Rule of Evidence 201). Because these numbers are derived from a military-maintained database, this Court should take notice of these facts.

[27] *See Bess*, 2018 WL 4784569, at *8.

[28] *See id*.

[29] *United States v. Crawford*, 35 C.M.R. 3, 13 (1964) (quotation marks omitted).

122,556 (38%) were racial minorities, and of that number 55,115 (17% of the total population) were Black.[30]

Indeed, in Lieutenant Johnson's court-martial, after the convening authority detailed an all-white panel for a Black servicemember for the *fourth* time in short succession, his lawyer wrote the convening authority a letter regarding the panel's composition. In the letter, counsel asserted that it appears "race is being improperly considered when selecting members for General Court[s]-Martial . . . ."[31] Therefore, counsel requested that the convening authority issue an amended convening order that "include[d] minority members."[32] In response, the convening authority issued two amended convening orders, detailing one Black, one Latino, one Asian American, and one Native American member to Lieutenant Johnson's panel.[33] The Black and Latino members served at trial, and Lieutenant Johnson was acquitted of all charges. *Id.*

---

[30] *See* U.S. Dep't of Def. Military OneSource Network, *2016 Demographics*, 13, 26, 27 (2016), https://download.militaryonesource.mil/12038/MOS/Reports/2016-Demographics-Report.pdf. This Court should also take judicial notice of these facts. *See supra* note 26.
[31] J.A. at 811.
[32] *Id.* at 812.
[33] *Id.* at 810.

B. The Fifth Amendment's Due Process Clause Forbids a Convening Authority from Excluding Servicemembers from Courts-Martial Because of their Race.

It is axiomatic that the Equal Protection Clause, or in this case the equal protection component of the Fifth Amendment's Due Process Clause, prohibits racial discrimination in jury selection. As the Supreme Court explained: "Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice."[34] The selection of jurors "because they are of one race and not another destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process."[35] And the exclusion of Black people "or any group otherwise qualified to serve, impairs the confidence of the public in the administration of justice."[36] The Supreme Court "repeatedly has emphasized [that] such discrimination 'not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government.'"[37] "The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." [38]

---

[34] *Rose v. Mitchell*, 443 U.S. 545, 555 (1979).
[35] *Id.* at 555-56.
[36] *Id.* at 556.
[37] *Id.* (quoting *Smith v. Texas*, 311 U.S. 128, 130 (1940)).
[38] *Ballard v. United States*, 329 U.S. 187, 195 (1946).

Because racial discrimination in the jury selection process imposes such serious injuries on both the defendant and the rule of law, the Supreme Court has repeatedly held that a criminal conviction cannot stand if racial discrimination tainted the selection of persons who served on either the grand jury that indicted the defendant, or on the petit jury that convicted him.[39]

As Appellant explains,[40] the selection process for members of a court-martial implicates aspects of the Supreme Court's decisions in both *Batson v. Kentucky*,[41] concerning the prosecution's discriminatory use of peremptory strikes, and *Castaneda v. Partida*,[42] concerning the discriminatory exclusion of citizens from grand jury service. Those cases both create evidentiary framework to enforce the constitutional principle prohibiting racial discrimination in jury selection. This Court has employed *Castaneda*'s burden-shifting framework in considering a claim similar

---

[39] *See Flowers v. Mississippi*, No. 17-9572, —S. Ct.—, 2019 WL 2552489, at *11 (2019) ("The Constitution forbids striking even a single prospective juror for a discriminatory purpose."); *Rose*, 443 U.S. at 556, ("[T]he Court has recognized that a criminal defendant's right to equal protection of the laws has been denied when he is indicted by a grand jury from which members of a racial group purposefully have been excluded.").

[40] *See* Appellant's Br. at 24-30.

[41] 476 U.S. 79 (1986).

[42] 430 U.S. 482 (1977).

to that presented here.[43] *Amicus* applies that framework here, paying due regard for certain unique features of the convening authority's power and for the general constitutional principle that *Castaneda* enforces—that a conviction must be set aside if the jury selection process was tainted by racial discrimination.

Under the *Castaneda* framework, a defendant must first make out a prima facie case of systematic exclusion.[44] This Court has set forth three factors to determine whether a defendant has satisfied this burden:

- One, the defendant must show that the group alleged to have been excluded "is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied."
- Two, the defendant must show a "degree of underrepresentation," which is shown "by comparing the proportion of the group in the total population to the proportion called to serve as jurors, over a significant period of time."

---

[43] *United States v. Loving*, 41 M.J. 213, 284-85 (C.A.A.F. 1994) (citing *Castaneda*, 430 U.S. at 494).
[44] *See id.* at 285.

- Three, to "support[] the presumption of discrimination raised by the statistical showing," the defendant can show that the "selection procedure [ ] is susceptible of abuse or is not racially neutral."[45]

Once a defendant establishes a prima facie case, there is a "presumption of unconstitutional action."[46] At that point, the "burden of proof shifts to the [government] to rebut the presumption" and "dispel the inference of intentional discrimination" "by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result.'"[47] And the Supreme Court has warned that "affirmations of good faith in making individual selections are insufficient to dispel a prima facie case of systematic exclusion."[48]

Officer Bess has made out a prima facie case that Black servicemembers were systematically excluded from his panel in violation of the Fifth Amendment. The trial judge erred by concluding otherwise.

---

[45] *Loving*, 41 M.J. at 285 (quoting *Castaneda*, 430 U.S. at 494).
[46] *Castaneda*, 430 U.S. at 494.
[47] *Id.* at 494, 497-98 (quoting *Alexander*, 405 U.S. at 632). This Court has said that the same burden-shifting framework applies in other contexts. *See, e.g.*, *Loving*, 41 M.J. at 287 (stating that the same framework applies for claims of systematic exclusion on the basis of gender); *United States v. Roland,* 50 M.J. 66, 69 (C.A.A.F. 1999) (applying the same framework for claims that servicemembers were systematically excluded because of rank).
[48] *Alexander*, 405 U.S. at 632 (citing *Turner*, 396 U.S. at 361).

C. HM2 Bess Presented Substantial Evidence Showing Black Servicemembers Were Systematically Excluded from His Court-Martial Panel.

1. African Americans are a cognizable group.

HM2 Bess clearly satisfied the first *Loving/Castaneda* factor. Longstanding Supreme Court precedent makes plain that African Americans are a "distinct" group historically "singled out for different treatment under the law[ ]."[49] This is so especially in the jury context. Said the Supreme Court: it is "clear from the cases dealing with racial discrimination in the selection of juries that the systematic exclusion of Negroes is itself such an unequal application of the law . . . ."[50] The Court has also said that a defendant "is entitled 'to require that the [government] not deliberately and systemically deny to members of his race the right to participate as jurors in the administration of justice.'"[51] This precedent makes clear that African Americans constitute a "distinct group" necessary to make out a systematic exclusion claim.

2. African Americans have been significantly underrepresented.

HM2 Bess also showed a "degree of underrepresentation" of Black members

---

[49] *Loving*, 41 M.J. at 285.
[50] *Washington v. Davis*, 426 U.S. 229, 241 (1976) (quoting *Akins v. Texas*, 325 U.S. 398, 404 (1940) (quotation marks omitted).
[51] *Id.* (quoting *Alexander*, 405 U.S. at 628-29).

when "comparing the proportion of the group in the total population to the proportion called to serve as jurors over a significant period of time."[52] While, in the civilian system, defendants typically satisfy this factor by showing that minorities have been statistically underrepresented in the venire or grand jury pool over a period of years,[53] here, given the uniqueness of courts-martial,[54] different considerations are necessary.[55]

---

[52] *Loving*, 41 M.J. at 285.

[53] *See, e.g.*, *Hobby v. United States*, 468 U.S. 339, 341 (1984) (seven years); *Castaneda*, 430 U.S. at 487 (eleven years); *Hernandez v. Texas*, 347 U.S. 475, 481 (1954) (twenty-five years).

[54] As one federal court of appeals noted, "civilian justice and military justice differ in ways even as fundamental as the purposes that the two systems of justice serve." *Sanford v. United States*, 586 F.3d 28, 36 (D.C. Cir. 2009). It is appropriate to consider these differences when applying the *Loving/Castaneda* factors. *Cf. Woodfox v. Cain*, 772 F.3d 358, 373 (5th Cir. 2014) ("*Castaneda*'s holding is also limited by its context.").

[55] The Supreme Court "has never announced mathematical standards for the demonstration of 'systematic' exclusion of blacks, but has, rather, emphasized that a factual inquiry is necessary in each case that takes into account all possible explanatory factors." *Castaneda*, 430 U.S. at 512 (quoting *Alexander*, 405 U.S. at 630). As the Court has explained, "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (relied on heavily in *Castaneda*). Therefore, an analysis that accounts for the unique circumstances of courts-martial is in line with Supreme Court precedent.

First, the relevant point of comparison should not be all courts-martial; rather, the analysis should focus on underrepresentation of minorities in particular types of cases (e.g., sexual assault cases) or when there is a certain type of defendant (e.g., Black defendants). This is because a convening authority has the discretion to convene panels on a case-by-case basis and knows the defendant and the charges he or she faces ahead of time. Given this scenario unique to courts-martial, a convening authority can skew panels by the type of case or based on the characteristic of the defendant; this ability does not exist in the civilian system. Considering this, a more nuanced analysis is necessary. Thus, when "comparing the proportion of the group in the total population to the proportion called to serve as jurors,"[56] the court should compare the makeup of panels in particular cases to the makeup of the total population of servicemembers available to be detailed.

Second, what constitutes a "significant period of time" in the court-martial context should be different than a significant period of time in the civilian context considering that convening authorities serve in that role for a limited period. For example, the convening authority for HM2 Bess's case served as Commander of Navy Region Mid-Atlantic and therefore convening authority from March 10, 2016 to July 20, 2018.[57] His tenure as convening authority was only 27 months. Because

---

[56] *Loving*, 41 M.J. at 285.
[57] *See supra* at 9-10.

convening authorities generally have a limited tenure, it makes sense to accordingly limit the consideration of any disparities to that tenure given that each convening authority has the power to exercise their "significant discretion" in vastly different ways.[58] Put another way, it does not make sense to amalgamate what takes place under different convening authorities when considering disparities given their nearly unbounded discretion. And given that the relevant period should be truncated in the court-martial context, so too should be the period over which a disparity must be shown for it to be "significant."

Third, the necessary showing should also be adjusted based on the starkness of the disparity. Usually, in the civilian context, claims are based on minorities being statistically underrepresented; it is rare that they are outright excluded.[59] This makes this case different from the average civilian case, because here, there is evidence that minorities were excluded altogether in certain kinds of cases. This wholesale exclusion is much more egregious and should be treated as such. In other words, if the disparity is extremely stark, as is the case here, courts should not wait for the pattern of discrimination to repeat itself over several years before finding a

---

[58] *Riesbeck*, 77 M.J. at 163.

[59] *See, e.g.*, *Woodfox*, 772 F.3d at 375 ("[T]he Supreme Court has specifically allowed the following disparities to make out a prima facie case of grand jury discrimination: 14.7%; 18%; 19.7%; 23%.") (footnotes omitted; collecting cases).

constitutional violation. This is consistent with the purpose of *Castaneda*'s second factor, which is to determine when a disparity is significant enough to raise an inference of discrimination.

With these considerations in mind, HM2 Bess also satisfies the second *Loving/Castaneda* factor. First, HM2 Bess showed that for certain cases—where Black defendants were charged with a sex-related offense—there was a pattern of the convening authority detailing all-white panels. Second, HM2 Bess showed that this all-out exclusion of Black members happened over a significant period of the convening authority's tenure: within one year of the convening authority issuing his instruction, he had convened four all-white panels in similar types of cases. Third, the Navy is incredibly diverse—in 2016, close to 40 percent of enlisted members and officers were racial minorities and close to 20 percent were Black.[60] Given the Navy's diversity, it is "hard to believe that there [were] no African-American Officers or Sailors in the largest fleet concentration area in the word to sit on panels where African-American accused face trial for sexual assault allegations."[61] African Americans (and minorities more generally) were starkly underrepresented when compared to the total Navy population. HM2 Bess therefore satisfied the second *Loving/Castaneda* factor.

---

[60] *See supra* at 12-13.
[61] J.A. at 812.

3. The court-martial selection system is susceptible to bias.

Turning to the third factor, the "presumption of discrimination" raised by the convening authority's repeated exclusion of Black members is "support[ed]" by the fact that the court-martial "selection procedure [ ] is susceptible of abuse."[62] The convening authority could detail any member or officer of equal or greater rank to HM2 Bess that "*in his opinion* [was] best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament."[63] Exercising this type of "subjective judgment" in the jury selection process has been warned against by the Supreme Court.[64]

Moreover, this subjective selection procedure is susceptible to bias, whether actual or inferred, given the amount of information the convening authority collects about potential panel members before detailing a panel. For example, by asking potential panel members whether they or anyone close to them had been charged with a crime, the convening authority could make an educated guess about a member's race,[65] given the Department of Defense's finding that "Blacks had a

---

[62] *Loving*, 41 M.J. at 285.
[63] 10 U.S.C. § 825(e)(2) (emphasis added); *see also id.* § 825(a)-(c)
[64] *Turner*, 396 U.S. at 360.
[65] The Supreme Court has also warned against jury selection systems that have "readily identifiable" racial signifiers. *Castaneda*, 430 U.S. at 495-96.

much higher rate of being court martialed,"[66] and the fact that African American civilians are arrested at a disproportionate rate.[67] Further, it is public knowledge that the Military collects demographic information about its members.[68] And in a separate court-martial, the convening authority was able to access information that enabled him to detail minority members to a Black defendant's panel after the defendant's lawyer raised the issue of all-white panels repeatedly being detailed for courts-martial of Black servicemembers accused of sexual assault.[69]

---

[66] Military Leadership Diversity Comm'n, *From Representation to Inclusion: Diversity Leadership for the 21st-Century Military*, at 105 (Mar. 15, 2011), https://diversity.defense.gov/Portals/51/Documents/Special%20Feature/MLDC_Final_Report.pdf.

[67] The Sentencing Project, *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System* (Apr. 19, 2018), https://www.sentencingproject.org/publications/un-report-on-racial-disparities/; *see also* Aliza Plener Cover, *Hybrid Jury Strikes*, 52 Harv. C.R.-C.L. L. Rev. 357, 391 (2017) (noting that while questions regarding "distrust of or negative interactions with law enforcement" may be "race-neutral" on their face, they are "race-correlated"); Vida Johnson, *Arresting* Batson: *How Striking Jurors Based on Arrest Records Violates* Batson, 34 Yale L. & Pol'y Rev. 387, 391 (2016) (arguing that, on account of racial disparities in arrest rates, "questions about arrests during *voir dire* should be precluded, as should the practice of using a person's arrest record as the sole basis for the exercise of peremptory strikes").

[68] *See* Appellant's Br. at 48-49.

[69] J.A. at 810. *Cf. Crawford*, 35 C.M.R. at 13 (condoning convening authorities expressly considering members' race when attempting to diversify a panel).

The subjectivity and discretion built into the convening process gives HM2 Bess's systematic exclusion claim heft, because it strongly "supports" an already established "presumption of discrimination."[70] Given the subjectivity built into the system and the fact that the convening authority specifically details members to a panel, it "is unlikely that [the convening of all-white panels was] due solely to chance or accident"; this Court should thus "conclude that racial or other class-related factors entered into the selection process" absent "evidence to the contrary."[71]

* * *

HM2 Bess made out a prima facie case of systematic racial exclusion. The trial judge was therefore required to shift the burden to the government so it could attempt to adequately explain away the disparities,[72] keeping in mind the Supreme Court's admonition that "affirmations of good faith" will not suffice.[73] Or when faced with the information, the convening authority could have detailed minority servicemembers to HM2 Bess's court-martial, as he did in Lieutenant Johnson's case after Lieutenant Johnson challenged the racial composition his panel. But because the trial judge erred by summarily denying HM2 Bess's claim, the taint of racial bias

---

[70] *Castaneda*, 430 U.S. at 494.
[71] *Id*. at 494 n.13.
[72] *Id.* at 494.
[73] *Alexander*, 405 U.S. at 632.

clung to the rest of the proceedings. The trial judge erred by denying HM2 Bess's claim. This Court should therefore reverse.

At a minimum, as Appellant explains,[74] the Court should vacate and remand because the trial judge did not permit the discovery requested by defense counsel. To the degree the Court determines that additional facts are necessary to inform the analysis of the prima facie case, those additional facts are not in the record because the trial court denied defense counsel's request for discovery.

CONCLUSION

LDF respectfully asks this Court to reverse HM2 Bess's conviction and to remand for further proceedings.

Dated: June 28, 2019

Respectfully Submitted,

/s/ Daniel S. Harawa
Daniel S. Harawa
Counsel of Record
USCAAF Bar No. 37202
Kerrel Murray
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
700 14th Street NW
Washington, DC 20005
(202) 682-1300
dharawa@naacpldf.org

[74] *See* Appellant's Br. at 46-55.

Sherrilyn A. Ifill
President and Director-Counsel
Janai S. Nelson
Samuel Spital
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
40 Rector Street, 5th floor
New York, NY 10006
Counsel for *Amicus Curiae*

CERTIFICATE OF COMPLIANCE

The foregoing BRIEF OF *AMICUS CURIAE* NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF APPELLANT complies with the type-volume limitations of Rules 24(c) and 26(f) because it contains less than 7,000 words, and it complies with the typeface and style requirements of Rule 37. Undersigned counsel used Times New Roman, 14-point type with one-inch margins on all four sides.

/s/ Daniel S. Harawa
Daniel S. Harawa
Counsel of Record
USCAAF Bar No. 37202
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
700 14th Street NW
Washington, DC 20005
(202) 682-1300
dharawa@naacpldf.org

Counsel for *Amicus Curiae*

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on June 28, 2019, I electronically mailed the foregoing BRIEF OF *AMICUS CURIAE* NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF APPELLANT to the Court, and that a copy was electronically delivered to:

Counsel for Appellant

Counsel for Appellee

Director, Appellate Government Division

Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity

/s/ Daniel S. Harawa

Daniel S. Harawa
Counsel of Record
USCAAF Bar No. 37202
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
700 14th Street NW
Washington, DC 20005
(202) 682-1300
dharawa@naacpldf.org

Counsel for *Amicus Curiae*