IN THE 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	**BRIEF ON BEHALF OF APPELLANT** Crim. App. Dkt. No. 201300311 USCA Dkt. No. 19-0086/NA

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

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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.

Statement of Statutory Jurisdiction

The lower court had jurisdiction under Article 66(b)(1), Uniform Code of Military Justice (UCMJ).[1] The jurisdiction of this Court is invoked under Article 67(a)(3), UCMJ.[2]

Statement of the Case

This is an appeal of HM2 Bess's retrial and marks the second time his case has come before this Court. On appeal from his first trial, this Court set aside the

[1] 10 U.S.C. § 866(b)(1).
[2] 10 U.S.C. § 867.

findings and sentence and remanded the case to the Judge Advocate General of the Navy with a rehearing authorized.[3] HM2 Bess stood trial a second time and a panel of five members, officer and enlisted, sitting as a general court-martial, convicted him, contrary to his pleas, of two specifications of indecent conduct in violation of Article 120, UCMJ.[4] The members acquitted him of one specification of indecent conduct and one specification of attempted indecent conduct.[5] The members then sentenced HM2 Bess to be reduced to E-3, to be confined for one year, and to be reprimanded.[6] The Convening Authority (CA) approved the adjudged sentence and ordered the sentence executed.[7]

On October 4, 2018, the lower court affirmed the findings and sentence.[8] On December 3, 2018, HM2 Bess petitioned this Court for review and moved to file the supplement to the petition separately. This Court granted the motion andHM2 Bess timely filed the supplement on December 26, 2018 with a motion to exceed the word limitation, which this Court denied. HM2 Bess timely filed a

[3] *United States v. Bess*, 75 M.J. 70 (C.A.A.F. 2016) (holding Appellant was denied his right to present a complete defense in violation of the Fifth and Sixth Amendments).
[4] 10 U.S.C. § 920; J.A. at 0409.
[5] J.A. at 0409.
[6] J.A. at 0410.
[7] J.A. at 0060.
[8] J.A. at 0001-0014. (*United States v. Bess*, No. 201300311, 2018 CCA LEXIS 476, *33 (N-M. Ct. Crim. App. Oct. 4, 2018)).

revised supplement on March 11, 2019. This Court granted review on April 18, 2019.

Following this Court's order granting review and directing briefs to be filed in accordance with Rule 25, HM2 Bess moved for an enlargement of time. On May 9, 2019, this Court granted HM2 Bess's motion and set June 19, 2019 as the filing deadline. Accordingly, this filing is timely.

Statement of Facts

After this Court's remand in *United States v. Bess*, 75 M.J. 70 (C.A.A.F. 2016), the CA's Staff Judge Advocate (SJA) provided written advice to the CA as required under Article 34, UCMJ (hereinafter "Article 34 letter").[9] In the Article 34 letter, the SJA enclosed a copy of the Article 32 Investigating Officer's Report of June 22, 2012 (hereinafter "IO's report"), explaining that it "documents the alleged misconduct of HM2 Pedro M. Bess, Jr. USN."[10] After reviewing the IO's report, the SJA recommended referral of the remaining Charges and Specifications against HM2 Bess to a general court-martial and referenced the CA's authority to "detail other members, additional members, and/or members not listed" in the CA's general court-martial convening order of March 16, 2016.[11]

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[9] 10 U.S.C. § 834; J.A. at 0103.
[10] J.A. at 0103.
[11] J.A. at 0103. The Article 34 letter does not reference *United States v. Crawford*, 15 C.M.A. 31 (C.M.A. 1964), *United States v. Smith*, 27 M.J. 242 (C.M.A. 1988),

The IO's report summarized testimony from several complaining witnesses that described their x-ray technician as "[t]he black technician," "younger black male," and "African American male."[12] It also included summaries of testimony from complaining witnesses whose allegations HM2 Bess was acquitted of during his first trial.[13] Consistent with his SJA's advice, on April 8, 2016, the CA referred the Charges and Specifications to a new general court-martial convened on March 16, 2016 by General Court-Martial Convening Order 2-16.[14] The order detailed ten officers as court-martial members.[15]

On June 7, 2016, in order to prepare HM2 Bess's defense on the charged offenses, the trial defense counsel sent the trial counsel a request for discovery.[16] The discovery request asked for the following, among other things:

> 1. Disclosure of . . . convening orders, and any amending orders, all requests for excusal of court members and any written documents memorializing the denial or approval of such requests. . . .
>
> 54. The defense requests trial counsel to promptly submit to each court-martial member the written questions listed in R.C.M. 912(a)(1) and provide the signed responses of each member to the defense. R.C.M. 912(a)(1).

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or the CA's ability to detail members on the basis of race for the purpose of inclusion.

[12] J.A. at 0064.

[13] *Id.* The Article 34 letter referenced the acquittals and that the acquitted charges had been dismissed.

[14] J.A. at 0056.

[15] J.A. at 0105.

[16] J.A. at 0757.

> 55. Disclosure of all written matters provided to the convening authority concerning the selection of the members detailed to the court-martial. R.C.M. 912(a)(2).
>
> 56. Disclosure of all information known to the government as to the identities of potential alternate and/or additional panel members. *United States v. Beaulieu*, 21 M.J. 528 (C.G.C.M.R. 1985).[17]

On November 4, 2016—less than two weeks before the trial was scheduled to begin—the CA issued General Court-Martial Amending Order 2J-16.[18] In Order 2J-16, the CA relieved the members he originally appointed in Order 2-16 and detailed ten new members, both officer and enlisted.[19] The trial counsel provided the trial defense counsel with the members questionnaires, and only one member was asked to list their race.[20] In response to the question, the member self-identified as Caucasian.[21]

A. Defense challenge to court-martial panel and discovery motion.

The court-martial convened on November 14, 2016 to begin the members selection process.[22] As the ten members detailed in Order 2J-16 entered the courtroom, the trial defense counsel noticed that none of the new members were

[17] J.A. at 0757, 0767.
[18] J.A. at 0106.
[19] *Id.*
[20] J.A. at 0899.
[21] *Id*.
[22] J.A. at 0156.

African-American.[23] This was the first time the defense learned of the race of the members,[24] and later, the trial defense counsel described the moment as follows:

> At the beginning of the trial, a white military judge, asked a white bailiff, to call in the all-white military venire panel. As the white defense attorneys and the white prosecutors stood at attention as the panel members filed in, it was difficult to reassure HM2 Bess as he leaned over to ask, "Why aren't there any black people?" This all-white panel would hear evidence from the four complaining witnesses in the case—each of them white.[25]

Before beginning individual voir dire of the members, the defense objected, challenging the composition of the panel under Article 25, UCMJ; the defense argued that it appeared the CA declined to put any African-American members on the panel so that he could "avoid a *Batson* challenge."[26] The defense also made it clear that HM2 Bess, who is African-American, "would prefer African-American representation on the panel" and described a pattern of the CA detailing all-white panels, stating "that [with] at least two [other] panels . . . we've had all white panel members with an African-American client."[27] In an affidavit filed with the lower court and attached to the Record of Trial, the former Executive Officer of Defense Service Office Southeast confirmed this pattern of all-white panels, describing that the CA repeatedly detailed all-white panels to courts-martial for African-American

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[23] J.A. at 0192.
[24] J.A. at 0197, 0825-0929.
[25] J.A. at 0109.
[26] J.A. at 0193; *Batson v. Kentucky*, 476 U.S. 79 (1986).
[27] J.A. at 0198.

service members accused of crimes.[28] He sent a letter to the CA after the CA detailed an all-white panel in *United States v. LTJG Johnson*, stating:

> There is an appearance in the Central Judicial Circuit that race is being improperly considered when selecting members for General Court-Martial Convening Orders. In a number of cases, most recently *United States v. HM2 Bess*, *United States v. MMC Rollins*, and *United States v. LTJG Jeter* where defense counsel have raised the issue, African Americans were convicted in the Central Judicial Circuit by all-white panels. All of the members detailed to the courts-martial of these accused were Caucasian.[29]

In response to the motion from the defense in HM2 Bess's trial, the military judge agreed that she did not "see anyone who . . . is obviously of the same race as" HM2 Bess.[30] But she declined to "speak to the racial makeup" of the panel.[31] Instead, she focused on HM2 Bess, stating "I would not have known, frankly, that he is of the race that he is, absent reviewing materials of the previous case and how his identification was made."[32] On this point, the military judge was clear. Absent "the reading" she had done "about the prior proceeding," she "would not

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[28] J.A. at 0809, 0813; *United States v. Bess*, No. 201300311, 2018 CCA LEXIS 476 (N-M. Ct. Crim. App. Oct. 4, 2018)).
[29] *Id*.
[30] J.A. at 0195. There was speculation concerning the race of some members, but the defense and the military judge agreed there were no African-American members detailed to the panel.
[31] J.A. at 0195.
[32] *Id.*

personally have known the race" of HM2 Bess "by observing him."[33] And likewise, she did not "feel confident that" she knew "the race of several of the members of the panel."[34] She related that she was "surprised at how small the population base" was for the CA's pool of potential members and reasoned that "if the convening authority actively sought out to select members based on race, that would be inappropriate."[35]

The military judge then had the following exchange with the defense:

> MJ: Your argument could be slightly stronger, although I still don't see a basis for it, if you knew more information about the racial and statistical makeup of the pool of members for this particular convening authority. . . .
>
> IMC: At this point in time, ma'am, we move to—based on our initial discovery request, which we requested the Article 25 documents that accompanied the empaneling of the members, kind of like to expand that to then ask for a statistical breakdown of the population as far as race with respect to the convening authority's command.
>
> MJ: Your request is denied for several reasons: One, because we've all had the members' questionnaires for a week, and the race that each member most strongly identifies with is noted on the questionnaire. If this was an issue you wanted to raise prior to now, when we are in individual voir dire, that would have been a more appropriate time. Secondly, I have no idea how the command would go about accomplishing such a feat. And I don't see, frankly, how it is relevant absent any evidence of impropriety. I have sat on numerous panels and observed members of other panels while here, and I have not seen any

[33] J.A. at 0193. To put the military judge's statement in context, it should be compared to the picture of HM2 Bess included in the Record of Trial. J.A. at 0790.
[34] J.A. at 0193.
[35] J.A. at 0194.

indication of any pattern by excluding minority members.

IMC: Ma'am, you made reference to making this argument in advance. If you look at the questionnaires, only some of them have racial information listed upon the questionnaire.

[DC][36]: Your Honor, with regard to the panel, I just wanted to----

MJ: This issue has been noted for the record, and we are moving on.

[DC]: Yes, ma'am. Can I just make a quick record with the last members panel that [the trial counsel], myself, and you were on? We had a different African-American client, and also it was an all-white panel. So, this is the second time in a row that we've been on a case where the same issue has occurred. We didn't raise an issue then. I just wanted to point that out for the record.

MJ: And how is that—how are the two examples indicative of something?

[DC]: Your Honor, I am just pointing out, in light of—you mentioned whether you've seen a pattern. I think that is important for the record to reflect that the last two panels that [the trial counsel], myself, and you have been on, we've had all white panel members with an African-American client.

MJ: Okay. And I will again note for the record that I am frequently surprised at the actual racial makeup of someone that was not consistent with the stereotypical characteristics that I might have prescribed them. So, moving on.[37]

After denying HM2 Bess's challenge to the composition of his panel and his

[36] The record of trial lists the trial counsel as the speaker. However, based on the context of the statements, undersigned counsel believes this is the trial defense counsel.
[37] J.A. at 0197-0198.

motion for additional discovery, the military judge began individual *voir dire*.[38] Following *voir dire*, she excused five members,[39] and as a result, HM2 Bess's panel was composed of only five members, none of whom were African-American.[40]

B. The clemency request and staff judge advocate's recommendation.

After trial, on March 13, 2017, HM2 Bess's counsel sent a request for clemency to the CA and highlighted HM2 Bess's objection to the "all-white make-up of the members venire panel."[41] The defense counsel cited *United States v. Dowty*, 60 M.J. 163 (C.A.A.F. 2004), and acknowledged that the Sixth Amendment right to a jury trial did not apply to HM2 Bess's case.[42] He then explained that HM2 Bess challenged the composition of HM2 Bess's panel under "[t]he same principle as in *Batson*"—a case that does apply in military practice.[43] "Based on *Batson* principles, the military judge should have required the Convening Authority to articulate the non-race based reason for excluding all African-Americans, but [the military judge] did not. This was prejudicial error."[44]

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[38] *Id.* The military judge, however, confirmed that the defense "noted the issue for the record." *Id.*
[39] J.A. at 0273-0274.
[40] *Id.*
[41] J.A. at 0110.
[42] *Id.*
[43] *Id.*; *United States v. Santiago-Davila*, 26 M.J. 380, 389-90 (C.M.A. 1988) (quoting *Batson*, 476 U.S. at 96).
[44] J.A. at 0111.

One day after receiving HM2 Bess's clemency request, the SJA sent the CA an addendum to the Staff Judge Advocate's recommendation.[45] In the addendum, the SJA characterized the defense challenge as an allegation "that the all-white make-up of the venire panel violated the Sixth Amendment of the U.S. Constitution, citing the principles underlying the *Batson* ruling."[46] In doing so, the SJA neither clarified the applicable equal-protection principles underlying *Batson* nor advised the CA of the applicability of *Batson* to military practice. He also did not explain to the CA, at least in writing, that it is permissible to detail members on the basis of race when done for the purpose of inclusion.[47] Ultimately, the SJA recommended that the CA approve the sentence as adjudged and order the sentence executed.[48]

C. The lower court's ruling.

On appeal below, HM2 Bess challenged the composition of his panel as both an equal-protection violation and unlawful command influence; he also challenged the military judge's denial of his motion for the production of the "racial and statistical makeup" of the pool of potential members.[49] The lower court found the military judge "erred in declaring the [defense] objection to the panel untimely,"

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[45] J.A. at 0107.
[46] *Id.*
[47] *See United States v. Smith*, 27 M.J. 242 (C.M.A. 1988).
[48] J.A. at 0108.
[49] J.A. at 0195-0198; *Bess*, 2018 CCA LEXIS 476 at *20.

but that "she did not abuse her discretion by denying the discovery request."[50] The lower court explained that only "one of the ten questionnaires had a question asking the member to identify her race," and thus the military judge "misapprehended the content of the members' questionnaires."[51] Moreover, citing *United States v. Riesbeck*, 77 M.J. 154, 160 (C.A.A.F. 2018), the lower concluded that race-based challenges to the composition of the members panel are "always timely and never waived."[52] Yet the lower court denied relief, characterizing the requested discovery as "irrelevant" because the defense asked for the racial make-up of the CA's "command" instead of the CA's "pool of available members."[53] It also denied relief on equal-protection grounds, citing a lack of "precedent," and on unlawful command influence grounds, citing a lack of evidence concerning the CA's knowledge of the race of nine members detailed to the court-martial.[54]

D. Cross-racial eyewitness identifications.

As the defense highlighted at the outset of the court-martial, a "crucial part" of the subject case involved the issue of "identification."[55] HM2 Bess, an x-ray technician, was convicted of wrongfully "observing the nude body" of two x-ray

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[50] *Id.* at *21.
[51] *Id.* at *20-21. The lower court described this finding as "incorrect." *Id.* at *21.
[52] *Id.* at *21.
[53] *Id.* at *22-23.
[54] *Id.* at *22-26.
[55] J.A. at 0135.

patients—PG and Aviation Structural Mechanic Second Class Petty Officer (AM2) AL—over a two-day period in February 2011.[56] After more than five years passed, he was tried and convicted based on testimony from PG and AM2 AL. Both PG and AM2 AL are white females.[57]

There is no evidence that either of them visually identified HM2 Bess as their x-ray technician before the Article 32 hearing.[58] There was no record of a line-up or show-up prior to the hearing.[59] Rather, while HM2 Bess sat in the Article 32 hearing, with two white attorneys sitting next to him, PG and AM2 AL visually identified HM2 Bess as the x-ray technician that instructed them to be nude during their respective x-ray sessions over a year beforehand.[60]

Notably, PG and AM2 AL did not file complaints after their x-ray sessions. Rather, special agents from the Naval Criminal Investigative Service (NCIS) screened and cold called several people listed as HM2 Bess's patients in the Composite Health Care System (CHCS), the database the Oceana and Dam Neck medical clinics used to track medical services for patients.[61] It was through a series of cold calls based on the CHCS records that investigators found PG and

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[56] J.A. at 0409.
[57] J.A. at 0070, 0787.
[58] J.A. at 0064.
[59] *Id.*
[60] *Id.*; *see also* J.A. at 0627.
[61] J.A. at 0740, 0574-0579.

AM2 AL in October/November 2011.[62] What was unknown to the NCIS agents at the time, however, was that CHCS did not accurately list an x-ray technician's patients.[63]

During the cold calls, investigators asked patients a series of questions related to their experience while receiving x-rays," including questions about the physical appearance of the x-ray technician that took their x-rays.[64] The interviewee's answers were documented in a questionnaire.[65] If an interviewee described herself as undressed during her x-ray session, then NCIS agents asked her for a follow-up interview.[66] After the follow-up, they referred the interviewee to the lead special agent for an interview. Several of these interviewees became the complaining witnesses who ultimately accused HM2 Bess at trial of being their x-ray technician.[67] PG and AM2 AL were two such patients.[68]

1. PG's identification.

PG received an x-ray at the Oceana medical clinic on February 24, 2011.[69]

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[62] J.A. at 0740, 0577.
[63] J.A. at 0740.
[64] *Id.*
[65] *Id.*
[66] J.A. at 0134-0140.
[67] J.A. at 0291, 0341.
[68] *Id.*
[69] J.A. at 0411.

Months after her x-ray, "NCIS called" her,[70] and she spoke to two agents.[71] The two agents interviewed PG according to the screening questionnaire.[72] There is no recording of the conversation or any record of the precise phrasing of the questions the investigators posed to PG over the phone. The screening questionnaire had several questions, and the agents hand-recorded PG's answers to the questions. In response to the question, "[d]o you recall if the [x]-ray technician was male or female," the agents recorded PG's answer as follows: "BLACK MALE – 20 YRS – 5' 9"."[73] Nowhere on the questionnaire did the agents describe PG as able to identify HM2 Bess by name.[74]

After the initial phone call, the NCIS agents stated they wanted to talk to PG.[75] She agreed, and "two gentleman" met her at "a random location."[76] After talking to the agents, PG went to the NCIS office at Little Creek, spoke to the lead special agent, and made a written statement.[77] In her written statement, PG stated that a "black technician" walked her to the x-ray room for her first of two sets of x-rays on February 24, 2011 and that she was nude from the waist up while two

[70] J.A. at 0358.
[71] J.A. at 0550.
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] J.A. at 0359.
[76] *Id.*
[77] *Id.*

individuals were in the room—the "black technician" and "a white male, older, shorter, with balding grey [sic] hair and pudgy belly."[78] During trial, PG contradicted her initial statement, testifying that she was clothed during her first set of x-rays.[79] When confronted with her statement to NCIS, PG testified that she could not "remember writing that."[80]

PG then recounted in her NCIS statement that the two technicians left the room and only the "black technician" came back to take a second set of x-rays.[81] According to her statement, "the black technician" directed her to disrobe again, and once she was nude he took a series of x-rays in various positions.[82] At no point in time in her statement to the lead special agent did PG identify the "black technician" as HM2 Bess.[83] Yet when she testified at the Article 32 hearing, she responded with the name "Bess" when asked to "describe" her x-ray technician.[84]

Additionally, the CHCS record of PG's first set of x-rays lists MR as the "performing tech."[85] MR was a white, civilian x-ray technician employed at the Oceana Medical Center in the February 2011 timeframe.[86] During its

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[78] J.A. at 0787.
[79] J.A. at 0362-0364.
[80] J.A. at 0363.
[81] J.A. at 0787.
[82] *Id.* at 2.
[83] *Id.* at 1-3.
[84] J.A. at 0635-0636.
[85] J.A. at 0411.
[86] J.A. at 0370.

investigation, an NCIS representative called MR and asked him to come to the NCIS office to give a statement.[87] He agreed and provided a statement to the same special agent who took PG's statement several months earlier.[88]

Despite PG's initial statement that both a black technician and a white technician conducted her first set of x-rays while she was nude, the special agent never suspected MR—the white technician listed on PG's CHCS report—as having wrongfully viewed PG's nude body.[89] Rather, the special agent focused her questions on general x-ray procedures and two black x-ray technicians, one of whom was HM2 Bess.[90] Afterwards, the special agent did not investigate MR.[91]

Finally, while HM2 Bess was listed as the performing technician in the CHCS record for PG's second set of x-rays,[92] his marker does not appear on her x-rays.[93] Moreover, HM2 Bess testified that he had never seen PG while she was

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[87] *Id.*
[88] J.A. at 0076-0078.
[89] J.A. at 0370.
[90] J.A. at 0076-0078.
[91] J.A. at 0370.
[92] J.A. at 0411.
[93] J.A. at 0814-0818. While the x-ray technicians at the Oceana and Dam Neck clinics did not always use their assigned "marker," one purpose of the markers was to identify "who the performing technologist was." J.A. at 0335. The x-ray technicians placed these markers on the board behind the x-ray, and the markers appeared in the x-ray itself, bearing either an "R" or "L" and an alphanumerical identifier such as the performing technician's initials or an assigned "generic marker." J.A. at 0335-0338. Petty Officer Bess had his own marker—a skull and crossbones with his initials "PMB"—that did not appear on PG's x-rays. J.A. at 0336-0338; 0368.

nude.[94] Like MR, HM2 Bess testified that when a patient was required to disrobe for their x-ray, he would instruct them to put on a robe or paper shorts.[95] Yet HM2 Bess, a "black technician," was investigated, charged, and convicted of viewing a white female patient in the nude, while MR, a white technician, was never suspected of any wrongdoing.[96]

2. AM2 AL's identification.

AM2 AL received x-rays during two different sessions at the Oceana medical clinic on February 25, 2011. During her initial cold-call interview, AM2 AL described one of her technicians as "MALE, BLACK, MID-20s."[97] Later, during a conversation with the lead NCIS agent on the case, AM2 AL learned HM2 Bess's name.[98] At trial, she accused HM2 Bess of viewing her nude body during an x-ray session.[99]

In her testimony, AM2 AL described going to the Oceana medical clinic for two separate x-ray sessions. CHCS listed HM2 Bess as the performing technician

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[94] J.A. at 0375.
[95] J.A. at 0390.
[96] J.A. at 0374.
[97] J.A. at 0557.
[98] J.A. at 0324. And while she described the technician as an "HM2," there is no record of her mentioning his rank during her initial screening interview. J.A. at 0557. Moreover, there is no record of AM2 AL making a visual identification of HM2 Bess before the Article 32 hearing.
[99] J.A. at 0291.

for both.[100] However, the muster report listed HM2 Bess as the x-ray technician at the Dam Neck medical clinic, not the Oceana medical clinic.[101] Additionally, AM2 AL testified that for the first x-ray session, a female "maybe average height" with "long hair" wearing NWUs took the x-rays, as opposed to a black x-ray technician.[102]

Later, "around 1500," AM2 AL received a phone call instructing her "to go back to Oceana to get more x-rays . . . ."[103] She went back to the Oceana medical clinic and at trial she testified that she checked in with "an HM2," remembering another "civilian" male was present as well.[104] She testified that her x-ray technician was a "tall, black male in his NWUs."[105] Before taking the x-rays, the x-ray technician "instructed" her to "change into just the gown and to take everything else off."[106] Upon returning, AM2 AL testified that the x-ray technician said she "needed to remove the gown" and sign a form.[107] She testified that she then removed her clothes, signed the form, and remained nude during the x-rays.[108]

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[100] J.A. at 0416, 0423.
[101] J.A. at 0421.
[102] J.A. at 0281.
[103] J.A. at 0282.
[104] J.A. at 0320.
[105] J.A. at 0284.
[106] *Id.*
[107] J.A. at 0285.
[108] J.A. at 0284-0289. She also testified that the x-ray technician did not touch her. J.A. at 0323.

Once they were done, AM2 AL got dressed.[109] The x-ray technician came back to the room and showed her the x-rays on a computer screen.[110] After reviewing the x-rays, AM2 AL left the clinic and went back to work.[111] And while she described the x-ray session as "uncomfortable," she did not talk to anybody about it, discuss it with her doctor during her next appointment, or report it to law enforcement.[112]

At trial, HM2 Bess testified that he never observed AM2 AL while she was nude.[113] And while CHCS listed him as the performing technician, his marker does not appear on her x-rays.[114]

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[109] J.A. at 0290.
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] J.A. at 0375.
[114] J.A. at 0819-0823. In its factual sufficiency review, the lower court reasoned that HM2 Bess used someone else's marker in order "to avoid identifying himself[.]" *Bess*, 2018 CCA LEXIS 476, at *10. Yet the lower court declined to apply that reasoning to the CHCS entry—another record that x-ray technicians used to self-identify as the performing technician and one the government relied on to prove HM2 Bess was the x-ray technician in question. *Id.* By the lower court's logic, if the performing x-ray technician wanted to conceal his identity, he should have both selected a different technician from the dropdown menu in CHCS and used another technician's marker. However, that is not what happened. HM2 Bess is listed in CHCS as the performing technician but his markers are not on the x-rays. Another explanation is that HM2 Bess did not take the x-rays in question, and someone without access to his personal markers listed him as the performing technician in CHCS in order to conceal their identity.

Summary of the Argument

The Fifth Amendment's equal protection requirements prohibit a CA from using race to exclude from the venire members of the same cognizable racial group as the accused. HM2 Bess, an African-American, has made a *prima facie* showing that the CA improperly excluded African-Americans from his court-martial panel. Applying the burden-shifting framework outlined in *Batson*, the government should have provided a race-neutral explanation for removing African-American members or asked the CA to consider detailing African-American members to HM2 Bess's court-martial for the purpose of inclusion. Neither occurred. Therefore, to ensure HM2 Bess receives a trial that is consistent with the equal protections requirements of the Fifth Amendment, a new trial is warranted.

HM2 Bess presented some evidence that the CA's selection of members constituted unlawful command influence. The evidence at trial coupled with the sworn declaration from the former Executive Officer of Defense Service Office Southeast, established a pattern of court-stacking (in this case the exclusion of African-American members when there is an African-American accused). As a result, there is the appearance, if not the reality, of unlawful command influence. The government has not and cannot prove beyond a reasonable doubt that the CA's selection methods were proper or that his intent was benign. As such, this Court should set aside his convictions and sentence.

The military judge abused her discretion when she denied HM2 Bess's motion to produce evidence of the racial makeup of potential members for the CA to choose from. The military judge's findings of fact were clearly erroneous, and she misapprehended the law. In affirming the military judge's decision, the lower court misapplied the abuse of discretion standard, made additional clearly erroneous findings of fact, and failed to conduct a prejudice analysis. Consequently, this Court should set aside HM2 Bess's convictions and sentence.

Argument

I

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

Standard of Review

This Court reviews "claims of error in the selection of members of courts-martial de novo as questions of law."[115]

Discussion

While the use of criteria not listed in Article 25, UCMJ, is generally prohibited in the member selection process, this Court has recognized one

[115] *United States v. Sullivan*, 74 M.J. 448, 450 (C.A.A.F. 2015) (quoting *United States v. Bartlett*, 66 M.J. 426, 427 (C.A.A.F. 2008) (internal quotation marks omitted)); *see also United States v. Riesbeck*, 77 M.J. 154, 162 (C.A.A.F. 2018).

exception to that general rule. The CA can "depart from the factors present in Artice 25, UCMJ, . . . when seeking in good faith to make the panel more representative of the accused's race or gender."[116] Regarding race, more than thirty years ago, in *United States v. Smith*,[117] this Court made it clear that it is permissible for a CA to "intentionally" consider a member's race and detail African-American members to a court-martial panel when the accused is African-American, provided the CA does so "in order to have a more representative panel."[118] More than forty years before *Smith* (and more than twenty years before *Batson*), this Court, in *United States v. Crawford*,[119] affirmed a CA's decision to "intentionally select[] a black [servicemember] to serve as a court member where the accused was black."[120] In doing so, Chief Judge Quinn reasoned: "[i]f deliberately to include qualified persons is discrimination, it is discrimination in favor of, not against, an accused. Equal protection of the laws is not denied, but assured."[121]

Much has changed since this Court decided *Smith* and *Crawford*, both in society and the military. Yet the legal principle at stake in those decisions remains

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[116] *Riesbeck*, 77 M.J. at 163.
[117] *Smith*, 27 M.J. at 242.
[118] *Id.* at 248 (citing *Crawford*, 15 C.M.A. at 31); *see also Riesbeck*, 77 M.J. at 163.
[119] *Crawford*, 15 C.M.A. at 31.
[120] *Smith*, 27 M.J. at 248 (describing the facts of *Crawford*).
[121] *Crawford*, 15 C.M.A. at 41.

as important today as it was in past decades. *Smith* and *Crawford* harmonize Article 25, UCMJ, with the equal protection requirements of the Fifth Amendment. And in the absence of a Sixth Amendment right to a "representative cross-section of the community,"[122] *Smith* and *Crawford* empower CAs to consider the representativeness and inclusiveness of an accused's panel and detail members in a way that makes the panel "more representative of the accused's race . . . ."[123] In so doing, this Court has recognized that CAs must exercise their discretion under Article 25, UCMJ, in a manner that complies with the Fifth Amendment's equal protection requirements.

To that end, this Court also recognizes it is possible for CAs to consider the race of potential members in an improper way during the member selection process.[124] Notably, the exclusion of members on the basis of race violates the equal protection requirements of the Fifth Amendment.[125] In *United States v.*

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[122] *United States v. McClain*, 22 M.J. 124, 128 (C.M.A. 1986) ("[C]ourts-martial have never been considered subject to the jury-trial demands of the Constitution.").
[123] *Riesbeck*, 77 M.J. at 163.
[124] *See, e.g.*, *United States v. Loving*, 41 M.J. 213, 285 (C.A.A.F. 1994) (noting that CAs can use race for reasons that are both "proper" and "improper").
[125] *Batson*, 476 U.S. at 84 n.3 (1986) (affirming the basic principle of equal protection in the context of jury selection); *see also United States v. Greene*, 37 M.J. 380, 384 (C.M.A. 1993) (comparing a convening authority to a prosecutor and stating "race should not be the basis for a convening authority's decision to refer charges to a court-martial"); *Loving*, 41 M.J. at 286 (applying the Fifth Amendment's equal protection requirements to a CA's detailing of members).

Loving,[126] the appellant argued as much, and this Court considered his claim. It analyzed whether the appellant made the required *prima facie* showing to establish an equal protection violation.[127] In the case at hand, HM2 Bess asks this Court to conduct a similar analysis and find that he has made a *prima facie* showing of an equal protection violation.

A. The equal protection principle in *Batson* applies to a CA's selection of members.

Contrary to the lower court's framing of the issue, HM2 Bess does not seek to "extend" *Batson*,[128] but rather to apply it—"the Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race . . . or on the false assumption that members of his race as a group are not qualified to serve as jurors . . . ."[129] As this Court has applied it to court-martial practice, *Batson* establishes that an accused has a Fifth Amendment right to a panel "from which no 'cognizable racial group' has been excluded."[130] Just as the Fifth Amendment prohibits a trial counsel from using

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[126] *Loving*, 41 M.J. at 285.
[127] *Id.*
[128] *Bess*, 2018 CCA LEXIS 476 at *23.
[129] *Batson*, 476 U.S. at 86.
[130] *United States v. Santiago-Davila*, 26 M.J. 380, 389-90 (C.M.A. 1988) (quoting *Batson*, 476 U.S. at 96). In *United States v. Santiago-Davila*,[130] this Court found that the protections afforded to criminal defendants in *Batson* also applied to an accused in the military. "Th[e] right to equal protection is a part of due process under the Fifth Amendment . . . so it applies to courts-martial, just as it does to civilian juries." *Santiago-Davila*, 26 M.J. at 390 (citing *Frontiero v. Richardson*,

race as the basis to remove potential members during member selection, it also prohibits a CA from using race to exclude members of the same cognizable racial group as the accused from the venire. To conclude otherwise would except a CA's selection of members from the equal protection requirements of the Fifth Amendment. Such a conclusion is not only unprecedented,[131] but dangerous. It would give CAs unbridled discretion in a space outside the reach of the Fifth Amendment, making it more challenging, if not impossible, for military courts to guard against the "human bigotry and insensitivity" that "rot[s] public and governmental institutions."[132]

Because the Fifth Amendment's equal protection requirements apply to a CA's selection of members, the burden-shifting framework in *Batson* is instructive. When an accused makes a *prima facie* showing that the CA excluded potential members who were a part of a "cognizable racial group" (such as African-Americans), then the equal protection requirements of the Fifth Amendment shift

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411 U.S. 677 (1973); *Bolling v. Sharpe*, 347 U.S. 497 (1954)); *see also Batson*, 476 U.S. at 86.

[131] *Riesbeck*, 77 M.J. at 163 (finding a convening authority's discretion under Article 25, UCMJ, is not "unfettered").

[132] *United States v. Greene*, 36 M.J. 274, 282-83 (C.M.A. 1993) (Wiss, J. concurring). As highlighted in a recent report from the Government Accountability Office, it is important for military courts to continue to guard against discriminatory action. Government Accountability Office, DOD and the Coast Guard Need to Improve their Capabilities to Assess Racial and Gender Disparities (May 2019), https://www.gao.gov/assets/700/699380.pdf.

the burden to the government (here, the CA) to either provide a "race-neutral explanation" for excluding members of that group or detail additional members who are of the same race as the accused.[133] Accordingly, it makes sense for this Court to draw on *Batson*'s burden-shifting framework in cases where an accused has made a *prima facie* showing that the CA improperly excluded members on the basis of race.

B. HM2 Bess has made a *prima facie* showing that the CA improperly excluded a "cognizable racial group" from the court-martial panel.

Unlike Article III courts, "courts-martial are not subject to the jury trial requirements of the Sixth Amendment."[134] Consequently, the member selection process in courts-martial operates differently than the jury selection process in Article III courts. In the "military justice system," after the convening authority refers charges to a court-martial, he or she then hand-selects and details the members who will sit on the court-martial panel pursuant to the requirements outlined in Article 25, UCMJ.[135] Given that this process is unique to the military,

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[133] *Id.* at 277; *Loving*, 41 M.J. at 286 (citing the CA's detailing of minority members in response to the defense objection as a basis for denying relief); *see also United States v. Kirkland*, 53 M.J. 22, 24 (C.A.A.F. 2000) (holding an accused must be provided the appearance of a fair trial); *United States v. Ward*, 74 M.J. 225 (C.A.A.F. 2015) (affirming that "an accused must be provided both a fair panel (*Bartlett*) and the appearance of a fair panel (*Kirkland*)").

[134] *McClain*, 22 M.J. at 128.

[135] 10 U.S.C. § 825; *United States v. Wiesen*, 57 M.J. 48, 50 (C.A.A.F. 2002) (denying reconsideration).

Supreme Court precedent on the issue of jury selection does not precisely fit the selection of members in court-martial practice. Nevertheless, two cases provide useful guideposts on what the defense must show to establish a *prima facie* equal protection violation based on the CAs selection of members: *Batson v. Kentucky*, 476 U.S. 79 (1986) and *Castaneda v. Partida*, 430 U.S. 482 (1977).

To make a *prima facie* showing under the equal protection principle in *Batson*, the defense must show that 1) the accused is a part of a "cognizable racial group," 2) that the CA has removed members of that same racial group from the panel, and 3) that "the facts and any other relevant circumstances raise an inference" that members were excluded on the basis of race.[136] As an equal-protection matter, this Court should look to these same criteria in the context of a CA's selection of members under Article 25, UCMJ. While a CA has quasi-judicial responsibilities under the UCMJ,[137] this Court has recognized that CAs also function "in a prosecutorial role" when they refer cases to trial.[138] In their prosecutorial role, CAs have constraints that are similar to those of a prosecutor, such as the prohibition on using an accused's race as "the basis for . . . [their]

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[136] *United States v. Tulloch*, 47 M.J. 283, 284-85 (C.A.A.F. 1997) (citing *Batson*, 476 U.S. at 96-97).
[137] *See, e.g.*, 10 U.S.C. § 837 (describing some of a convening authority's acts as "judicial")).
[138] *Greene*, 37 M.J. at 384.

decision to refer charges to a court-martial."[139] Therefore, *Batson*, while not a perfect fit given its focus on a prosecutor's removal of potential members, is nevertheless a useful guidepost for this Court, especially given this Court's recognition that CAs function in prosecutorial roles.[140]

Additionally, both this Court and the lower court have looked to *Castaneda v. Partida*, 430 U.S. 482 (1977), for guidance on the showing that is required to make a *prima facie* case.[141] In *Castaneda*, the Supreme Court considered an equal protection challenge to the Texas grand jury selection process, which used the "'key man' system"—a procedure where "jury commissioners . . . select prospective grand jurors from the community at large."[142] Citing the following three factors as establishing a "*prima facie* case of discriminatory purpose," the Supreme Court found the "key man" procedure constituted an equal protection violation:

> [I]n order to show that an equal protection violation has occurred . . . [t]he first step is to establish that the group is one that is a recognizable, distinct class, singled out for different treatment under the laws, as

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[139] *Id.*

[140] Trial defense counsel recognized the imprecise fit of *Batson*, describing the issue as a "combination of an Article 25 challenge and . . . a preventative *Batson* challenge." J.A. at 0193. Elaborating on what he meant, the trial defense counsel stated to the military judge, "[i]f you don't put any African-Americans on the panel from the get-go, then . . . [the] command is preventing that race from representation on the panel" in a way that "avoid[s] a *Batson* challenge." *Id.*

[141] *Loving*, 41 M.J. at 284-85, 310-19; *United States v. Jeter*, 78 M.J. 754, 767 (N-M. Ct. Crim. App. 2019).

[142] *Castaneda*, 430 U.S. at 484.

> written or as applied. Next the degree of underrepresentation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve . . . over a significant period of time. . . . Finally, . . . a selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing.[143]

Here, drawing on both *Batson* and *Castaneda*, HM2 Bess has established a *prima facie* equal protection violation. First, he is African-American,[144] and a member of a cognizable racial group (or recognizable class). Second, his case is one of four cases where the CA detailed an all-white panel to sit in judgment of an African-American accused.[145] The trial defense counsel highlighted this fact when objecting to the member selection process at trial,[146] and the former Executive Officer at Defense Service Office Southeast confirmed it in a sworn declaration attached to the record in the court below.[147] Whether couched as the exclusion (or removal) of African-American members, as in *Batson*, or the underrepresentation of African-Americans, as in *Castaneda*, the problem is the same—in several

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[143] *Id.* at 494-95.
[144] J.A. 0808.
[145] J.A. at 0810-0811; *cf. Flowers v. Mississippi*, 240 So. 3d 1082 (Miss. Nov. 2, 2017), *cert. granted* (U.S. Nov. 2, 2018) (considering the probative value of a prosecutor's history of discrimination in jury selection).
[146] The relief sought in connection with the trial defense counsel's objection was African-American representation on the panel, which implied the need for the military judge to stay the proceedings so the parties could address the issue with the CA. J.A. at 0198. As this Court is aware, the military judge is authorized to issue a stay "on the ground that the members were selected improperly." R.C.M. 912(b).
[147] J.A. at 0809-0813.

prosecutions of African-American servicemembers the CA completely excluded African-Americans from the court-martial panel. As such, the available evidence shows that African-Americans were not only excluded from (and underrepresented on) the panel in HM2 Bess's case, but in a series of cases.[148]

Third, the selection process set out in Article 25, UCMJ, is susceptible to abuse due to the inherent subjectivity involved.[149] When combined with the facts and circumstances of HM2 Bess's case, there is an inference that potential members were excluded on the basis of race. The racial identity of the offending x-ray technician was a known issue before trial. In the cold-call interviews with NCIS agents, AM2 AL and PG—two white women—identified their x-ray technician using his race (black). At his first trial, HM2 Bess recognized this cross-racial identification issue and moved for the production of an expert on the issue of eyewitness identifications, citing research that found "cross-race

[148] While the defense has not presented data to compare the racial make-up of the pool of potential members with the racial make-up of the detailed members, the defense did move for discovery of such data at trial. J.A. at 0196. The military judge, however, denied production. J.A. at 0196-0198. For the reasons outlined in Assignment of Error III, the military judge's ruling was an abuse of discretion. That said, even without the data, it is "hard to believe that there are no African-American Officers or Sailors in the largest fleet concentration area in the world" who could "sit on panels where African-American accused face trial . . . ." J.A. at 0812.

[149] *See Smith*, 27 M.J. at 248-50 (discussing the CA's subjective discretion under Article 25, UCMJ).

identification was less accurate than own-race identification."[150] The military judge denied the motion, and HM2 Bess was convicted.

After this Court set aside his convictions and sentence, the CA reviewed the case and considered referring charges to a new court-martial. In conducting this review, the CA received guidance from his SJA who presumably reviewed the first trial. In his written advice to the CA, the SJA enclosed the Article 32 Investigating Officer's Report,[151] which summarized testimony from several witnesses that described their x-ray technician as "[t]he black technician," "younger black male," and "African American male."[152] After receiving the SJA's advice, the CA referred charges against HM2 Bess.

At the outset of his second trial, HM2 Bess again highlighted the eyewitness identification issue in a motion to compel the production of an NCIS investigator involved in the cold calls. In a motions hearing on September 6, 2016, the defense noted the race-based identifications and highlighted the inaccuracy of the CHCS records that were used to create the list of patients for the cold calls, pointing to an example where the CHCS records listed HM2 Bess as the performing x-ray

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[150] J.A. at 0492 (referencing Gary Wells, Amina Memon, & Steven D. Penrod, *Eyewitness Evidence: Examining Its Probative Value*, 7(2) PSYCH. SCI. PUB. INTEREST 45 (2006)).
[151] J.A. at 0103.
[152] *Id.*

technician and the patient described her x-ray technician as "Caucasian."[153] The military judge, however, denied the motion, reasoning that with the exception of the court reporter she would not be able to personally "identify anyone's race" after they left the courtroom.[154]

Two months after the motions hearing, on November 4, 2016, the CA detailed an all-white panel to HM2 Bess's court-martial,[155] just as he did in *United States v. MMC Rollins*, *United States v. LTJG Jeter*, and *United States v. LTJG Johnson*.[156] Together, the CA's detailing of members in this series of cases created "the appearance . . . that race [was] being improperly considered when selecting members for General Court-Martial Convening Orders."[157] In HM2 Bess's case, even though defense counsel raised the issue with the military judge before individual *voir dire* of the members, the military judge neither stayed the proceedings nor took action to remedy the issue. As a result, this Court is left with

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[153] J.A. at 0142-0143.
[154] J.A. at 0117. While the race of the court reporter is not mentioned in the record, the trial counsel, trial defense counsel, and military judge were all described as white. J.A. at 0109. In addition, the military judge further reasoned that she would not be able to remember anyone that she saw "at medical in the last . . . 3 months or so." J.A. at 0152. Notably, the first descriptions that PG and AM2 AL provided to an investigator—descriptions that focused on the race of the x-ray technician—came eight to nine months after the x-ray appointments at issue. J.A. at 0787.
[155] *See* J.A. at 0106.
[156] J.A. at 0810.
[157] *Id.*

the "unresolved appearance of exclusion" on the basis of race.[158] Accordingly, reversal is warranted in order to maintain "the integrity of the military justice system" and to give HM2 Bess a new trial with a panel that is free of the taint of exclusion on the basis of race.[159] As this Court recently reaffirmed, "even reasonable doubt concerning the use of impermissible selection criteria for members cannot be tolerated."[160]

In response, the government will likely highlight, as the court did below, that most of the member questionnaires do not contain information about a member's race.[161] For at least four reasons, that fact does not change the appearance in this case. First, it says nothing about the information contained in the questionnaires of excluded members and whether the CA excluded them on the basis of their race. Second, it does not account for structural issues in the process of gathering and presenting a group of potential members to the CA. Given his repeated detailing of all-white panels, it is necessary to consider whether race was improperly used to screen potential members from the CA's consideration.[162] Third, it does not

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[158] *Kirkland*, 53 M.J. at 24; *Ward*, 74 M.J. at 228 ("[A]n accused must be provided both a fair panel (*Bartlett*) and the appearance of a fair panel (*Kirkland*).").
[159] *McClain*, 22 M.J. at 129.
[160] *Riesbeck*, 77 M.J. at 161 (quoting *United States v. Bertie*, 50 M.J. 489, 493 (C.A.A.F. 1999)).
[161] *Bess*, 2018 CCA LEXIS 476 at *25.
[162] *See, e.g.*, *Washington v. Davis*, 426 U.S. 229, 241 (1976) (citing *Hill v. Texas*, 316 U.S. 400, 404 (1942)) ("A prima facie case of discriminatory purpose may be proved as well by the absence of [African-Americans] on a particular jury

account for all the information available to the CA when he made his selection decision. And fourth, there is evidence that the CA both had access to information about the race of potential members and was willing to use it. In response to the defense counsel's objection in *United States v. LTJG Johnson*, the CA properly considered the race of potential members and detailed several minority members to the panel, including a member of the same race as the accused.[163]

In sum, HM2 Bess has established a *prima facie* equal protection violation, and the government has neither provided a race-neutral explanation for the complete exclusion of African-American members nor evidence to rebut HM2 Bess's *prima facie* case. Therefore, relief in the form of a new trial is warranted to ensure HM2 Bess receives a trial that is consistent with the equal protection requirements of the Fifth Amendment.[164] A new trial will allow the CA to either (1) ensure that African-Americans are not wholly excluded from the panel venire or, at a minimum, (2) consider detailing African-Americans for the purpose of inclusion based on HM2 Bess's request for African-American representation.

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combined with the failure of the jury commissioners to be informed of eligible [African-American] jurors in a community . . . ."); *Avery*, 345 U.S. at 562-63.

[163] J.A. at 0810.

[164] *Kirkland*, 53 M.J. at 24, *Ward*, 74 M.J. at 225.

C. The circumstances surrounding the selection of members in HM2 Bess's case are different than the circumstances in *United States v. Loving*, 41 M.J. 213 (C.A.A.F. 1994).

The appellant in *Loving* made an argument similar to HM2 Bess's argument. However, while this Court ruled against the appellant in *Loving*, HM2 Bess's case is distinguishable. In rejecting the appellant's claim, the *Loving* majority found the defense lacked the population data that was necessary to establish the number of potential African-American members who were eligible and available for court-martial duty.[165] It then cited three reasons for ruling against the appellant: (1) the absence of minorities on a single panel does not constitute a *prima facie* claim of discrimination; (2) the panel the appellant complained about did not hear the case; and (3) in response to an objection from the defense, the CA detailed African-American members "in numbers exceeding their proportionate share of the eligible population."[166] These three reasons, however, are not present in the case at hand.

First, unlike the focus on a single panel in *Loving*, HM2 Bess has presented evidence of multiple panels lacking African-American representation in cases where the accused servicemember was African-American. The trial defense counsel raised this point with the military judge during their objection at trial, arguing this was the second time "in a row" that the CA detailed a panel without

[165] *Loving*, 41 M.J. at 286.
[166] *Id.*

African-American members in a case involving an African-American accused.[167] And the former Executive Officer for the servicing Defense Service Office later confirmed the pattern, stating in a sworn declaration that the CA "did not detail any African-American members" in a series of four cases.[168]

Second, unlike *Loving*, the panel the defense challenged is the same panel that convicted and sentenced HM2 Bess. Upon discovering the lack of African-American representation in HM2 Bess's panel when the members walked into the courtroom, the trial defense counsel objected and requested additional discovery—the population data for the pool of potential members. The military judge, however, refused to stay the proceedings or allow the parties to investigate the matter further. She denied any relief or discovery and let the proceedings continue with the all-white panel sitting in judgment of HM2 Bess.

Finally, because the military judge elected to "move[] on,"[169] the CA in HM2 Bess's case, unlike the CA in *Loving*, never had the opportunity to detail additional members in response to the defense objection. Had the military judge allowed the parties to inquire about the member selection process further, there is

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[167] J.A. at 0198.

[168] J.A. at 0810-0811. Notably, the lower court misconstrued the evidence on this point. To fit the issue under *Loving* and deny it as meritless, the lower court only considered the absence of African-Americans on HM2 Bess's panel. *Bess*, 2018 CCA LEXIS 476 at *24. In doing so, it effectively ignored the record the parties created at trial and the former Executive Officer's declaration.

[169] J.A. at 0198.

evidence to suggest that the CA would have detailed African-American members to HM2 Bess's panel. In *United States v. LTJG Johnson*, the CA detailed minority members in response to a letter from the defense counsel, demonstrating that he was both able and willing to do so in response to a challenge from defense counsel.

Therefore, while HM2 Bess's argument is similar to the argument Loving made, the two cases are factually distinct. The reasons underpinning this Court's ruling against Loving are not present in HM2 Bess's case, and accordingly, *Loving* is not dispositive on the issue before this Court.

II

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

Standard of Review

This Court reviews "allegations of unlawful influence de novo . . . ."[170]

Discussion

The CA is prohibited from "stacking" a court-martial panel in order to "achieve a desired result."[171] "Improper stacking may occur by inclusion or exclusion."[172] It may involve the use of an impermissible factor such as race or

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[170] *United States v. Barry*, 78 M.J. 70, 77 (C.A.A.F. 2018) (citing *United States v. Salyer*, 72 M.J. 415, 423 (C.A.A.F. 2013)).
[171] *United States v. Upshaw*, 49 M.J. 111, 113 (C.A.A.F. 1998); *see also Riesbeck*, 77 M.J. at 160-76.
[172] *Upshaw*, 49 MJ at 113.

gender, and it can even occur "if a subordinate stacks the list of [nominated members] presented to the convening authority."[173] While not a jurisdictional issue, improper stacking constitutes "unlawful command influence;" an issue this Court has described as the "mortal enemy of military justice."[174]

"Two types of unlawful command influence can arise in the military justice system: *actual* unlawful command influence and *the appearance of* unlawful command influence."[175] Actual unlawful command influence "occur[s] when there is an improper manipulation of the criminal justice process that negatively affects the fair handling and/or disposition of a case"[176] and can be "effectuated unintentionally."[177] Moreover, this Court views even the appearance of unlawful command influence as "devastating to the military justice system . . . ."[178] Where the appearance of unlawful command influence exists, no showing of prejudice is required for an appellant to obtain relief.[179] "Rather, the prejudice involved . . . is

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[173] *Id.*
[174] *United States v. Boyce*, 76 MJ 242, 253 (C.A.A.F. 2017).
[175] *Id.* at 247 (emphasis in original).
[176] *Id.*
[177] *Barry*, 78 M.J. at 78.
[178] *Boyce*, 76 M.J. at 248 (quoting *United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006)).
[179] *Id.*

the damage to the public's perception of the military justice system as a whole . . . ."[180]

To address issues of unlawful command influence, this Court set out the following framework. "Once an appellant presents 'some evidence' of unlawful command influence, the burden then shifts to the government to rebut the allegation."[181] "Specifically, the government bears the burden of proving beyond a reasonable doubt that either the predicate facts proffered by the appellant do not exist, or the facts as presented do not constitute unlawful command influence."[182] And should the government fail to "meet its evidentiary burden, . . . this Court will fashion an appropriate remedy."[183]

A. HM2 Bess has presented some evidence of unlawful command influence.

On appeal, the defense has the initial burden to present some evidence of unlawful command influence.[184] And as this Court observed in *United States v.*

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[180] *Id.* at 248-49; *Lewis*, 63 M.J. at 415 ("Even if there was no actual unlawful command influence, there may be a question whether the influence of command placed an intolerable strain on public perception of the military justice system.") (internal quotations and citation omitted).
[181] *Boyce*, 76 M.J. at 249.
[182] *Id.* at 252 (citing *Salyer*, 72 M.J. at 423). The government can also prevail by proving beyond a reasonable doubt that the conduct at issue "did not place an intolerable strain upon the public's perception of the military justice system." *Id.*
[183] *Id.* at 250 (citing *Lewis*, 63 M.J. at 416).
[184] *United States v. Biagase*, 50 M.J. 143 (C.A.A.F. 1999).

Lewis,[185] an appellant can establish unlawful command influence by showing some evidence of "a pattern of court-stacking."[186] Here, the evidence presented at trial, along with the sworn declaration of the former Executive Officer from Defense Service Office Southeast, establish a pattern of court-stacking that included HM2 Bess's court-martial panel.[187]

First, the evidence at trial raised the issue of whether the CA stacked HM2 Bess's panel based on race:[188] (1) HM2 Bess's case involved allegations from white female x-ray patients who identified the suspect, their x-ray technician, as African-American; (2) the Investigating Officer's report summarized testimony from several witnesses that described their x-ray technicians as "[t]he black technician," "younger black male," and "African American male[;]"[189] (3) after receiving the SJA's recommendation, which included the Investigating Officer's report, the CA detailed ten non-African-American members to HM2 Bess's general court-martial;[190] (4) the trial defense counsel highlighted for the military judge that this was not the first time the CA detailed a panel without any African-American

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[185] 46 M.J. 338, 341 (C.A.A.F 1997).
[186] *Id.*
[187] J.A. at 0809.
[188] *Cf. Riesbeck*, 77 M.J. at 165; *Avery v. Georgia*, 345 U.S. 559, 562-63 (1953) (holding the petitioner established a prima facie case of discrimination by showing that not a single African-American "was selected to serve on a panel of sixty—though many were available").
[189] J.A. at 0071.
[190] J.A. at 0106.

members in a case involving an African-American accused; and (5) in 2015, according to the trial defense counsel, "17.3% of active duty Navy sailors were African-American," which meant the "chances of randomly selecting ten Sailors for the venire panel and having each of them be white" was "2.3%."[191]

Second, the former Executive Officer for Defense Service Office Southeast corroborated the evidence at trial, describing a pattern that involved the "[r]epeated assignment of all-white members to the courts-martial of African-American[s]" and listed four specific cases.[192] The lower court granted HM2 Bess's motion to attach the former Executive Officer's declaration to the record of trial,[193] and accordingly, HM2 Bess has met his burden of providing some evidence of court-stacking; a form of unlawful command influence.[194]

[191] *Id.* at 2. While these numbers may not accurately reflect the CA's pool of potential members, it should be noted that the trial defense counsel moved for the production of an accurate statistical breakdown and the military judge improperly denied the motion. J.A. at 0196-0198; Assignment of Error III.
[192] J.A. at 0811.
[193] J.A. at 0813, *United States v. Bess*, No. 201300311, 2018 CCA LEXIS 476 (N-M. Ct. Crim. App. Oct. 4, 2018).
[194] HM2 Bess also attempted to obtain evidence of the CA's improper member selection through a motion to produce information on the pool of potential members. J.A. at 0196-0198. As outlined in Assignment of Error III, through an abuse of discretion the military judge denied that motion, and as a result, deprived HM2 Bess of potential evidence on this issue.

B. The government cannot prove harmlessness beyond a reasonable doubt.

Since HM2 Bess has met his initial burden, the "burden shifts to the government to demonstrate beyond a reasonable doubt that improper selection methods were not used, or, that the motive behind the use of the selection criteria was benign."[195] Here, the government has neither proven beyond a reasonable doubt that the selection methods were proper nor that the CA's intent was benign. As a result, this Court is left with the appearance, if not the reality, that the CA improperly used race as a factor in selecting members in HM2 Bess's case, and thus the CA's selection of members constitutes unlawful command influence.[196]

Moreover, given how central AM2 AL and PG's cross-racial identifications of HM2 Bess were to the government's case, the government cannot prove beyond a reasonable doubt that HM2 Bess "received a fair trial, free from the effects of unlawful command influence."[197] The CA completely excluded African-American members from HM2 Bess's panel and that exclusion was significant. "Social science research on the influence of racial composition on group decision making

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[195] *Riesbeck*, 77 M.J. at 165. In cases involving evidence of court-stacking, this Court "may not affirm unless [it is] convinced beyond a reasonable doubt that the court members were properly selected." *Lewis*, 46 M.J. at 341.
[196] *Id.* at 18-19.
[197] *Riesbeck*, 77 M.J. at 162.

has demonstrated . . . observable benefits from diversity."[198]

As one "experimental study" demonstrated, "racially mixed juries [are] more willing to discuss issues of race than all-white juries."[199] Racially mixed juries "tend[] to deliberate longer, discuss more case facts, and bring up more questions about what was missing from the trial[.]"[200] Such "[j]ury diversity expands the breadth of information and viewpoints expressed during deliberation[, and] also 'activates jurors' motivations to [both] avoid prejudice' and . . . [be] more attentive to evidence of race bias."[201]

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[198] Brief of Amici Curiae the Magnolia Bar Association, The Mississippi Center for Justice, and Innocence Project New Orleans at 27, *Flowers v. Mississippi*, 240 So. 3d 1082 (Miss. Nov. 2, 2017), *petition for cert. filed,* (U.S. Jul. 26, 2018) (No. 17-9572).

[199] Andrew E. Taslitz, *"Curing" Own Race Bias: What Cognitive Science and the Henderson Case Teach about Improving Jurors' Ability to Identify Race-Tainted Eyewitness Error*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 1049, 1096 (2013). The notion that jury diversity benefits jury decision making is not new. Justice Marshall observed as much decades ago:

> When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.

Peters v. Kiff, 407 U.S. 493, 503-04 (1972).

[200] Taslitz, *supra* note 194, at 1096.

[201] *Id.*

For HM2 Bess, the benefits of diversity mattered. His case hinged on the accuracy of the cross-racial identifications made by the complaining witnesses. Given the research on the issue, a panel with African-American representation would have been more willing to discuss issues of race, such as the relative lack of accuracy in cross-racial eyewitness identifications, and more attentive to issues of race bias. Therefore, the lack of African-American members on HM2 Bess's panel was indeed consequential.[202] Accordingly, the government cannot prove the unlawful command influence in HM2 Bess's case was harmless beyond a reasonable doubt.

C. The appropriate remedy is to set aside HM2 Bess's convictions and sentence.

Here, just as in *Riesbeck*, the military judge refused to investigate whether the CA improperly detailed members to the panel. Had the military judge in HM2 Bess's case done so, she could have resolved the issue at the outset of trial and ensured the selection process was free of unlawful command influence before seating the panel. However, the military judge chose to avoid any investigation

[202] "[A] disproportionate number" of wrongful convictions "involve cross-racial misidentification"—"a witness misidentifying someone of another race." Taki V. Flevaris & Ellie F. Chapman, *Cross-Racial Misidentification: A Call to Action in Washington State and Beyond*, 38 SEATTLE U. L. REV. 861, 863 (2015); *see also* Taslitz, *supra* note 194 ("[E]yewitnesses of one race are more likely to misidentify innocent persons when those persons . . . are of another race.").

into the matter, and as a result she let the appearance, if not the reality, of unlawful command influence persist.

In *Riesbeck*, after an appellate fact-finding hearing, this Court found unlawful command influence as a result of the CA stacking the appellant's sex-assault court-martial panel with women.[203] To that end, HM2 Bess's case, which involves the improper use of race instead of gender in the CA's selection of members, parallels *Riesbeck*.

On review, this Court found in *Riesbeck* that the failure of the military judge and the Coast Guard Court of Criminal Appeals to "attend" to the allegation constituted "a stain on the military justice system."[204] The refusal of the lower court and the military judge to investigate the CA's selection of members in HM2 Bess's case constitutes a similar stain and marks an "abdicat[ion] . . . [of the] responsibility to cleanse Appellant's court-martial of . . . unlawful command influence."[205] Therefore, to remedy the appearance, if not the reality, of unlawful command influence, and to ensure HM2 Bess receives a fair trial free of the effects of unlawful command influence, he respectfully asks this court to set aside his convictions and sentence.

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[203] *Riesbeck*, 77 M.J. at 160-76.
[204] *Id.* at 159 n.6.
[205] *Id.* at 166.

III

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.

Standard of Review

This Court reviews a military judge's ruling on a motion for the production of evidence under an abuse of discretion standard.[206] "When reviewing a decision of a Court of Criminal Appeals on a military judge's discretionary ruling," this Court has "'typically . . . pierced through that intermediate level' and examined the military judge's ruling."[207] This Court "then decide[s] whether the Court of Criminal Appeals was correct in its examination of the military judge's ruling."[208]

Discussion

Pursuant to R.C.M. 703(f)(1), "each party is entitled to the production of evidence which is relevant and necessary."[209] Relevance is a "low threshold."[210] Here, the military judge explained that evidence of the "racial and statistical makeup of the pool of members for this particular convening authority," would

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[206] *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004).
[207] *United States v. Feltham*, 58 M.J. 470, 474-75 (C.A.A.F. 2003) (quoting *United States v. Siroky*, 44 M.J. 394, 399 (C.A.A.F. 1999)).
[208] *Id.* at 475.
[209] R.C.M. 703(f)(1).
[210] *United States v. Reece*, 25 M.J. 93, 95 (C.M.A. 1987).

strengthen the defense challenge to HM2 Bess's venire.[211] Yet when the defense moved to produce that evidence, the military judge denied the motion as untimely, impracticable, and irrelevant.[212]

The military judge elaborated on these three reasons as follows. First, she reasoned that because the member questionnaires delineated each member's race, it was too late for the defense to bring the motion.[213] Second, she did not think the CA could accomplish the "feat" of providing the requested statistical breakdown.[214] And third, she reasoned that relevance was contingent on "evidence of impropriety," summarily finding—without any investigation—that there was not a "pattern of discrimination by excluding minority members."[215] In each instance, the military judge abused her discretion.[216]

A. The military judge abused her discretion in denying the defense motion to produce evidence of the racial makeup of potential members.

First, in denying the motion as untimely, she found "the race that each member most strongly identifies with is noted on the questionnaire."[217] She then

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[211] J.A. at 0191.
[212] *Id.*
[213] J.A. at 0192.
[214] *Id.*
[215] *Id.*
[216] A military judge abuses her discretion when her "findings of fact are clearly erroneous" or she "misapprehends the law." *United States v. Eugene*, 2018 CAAF LEXIS 676, at *5 (C.A.A.F. 2018) (citing *United States v. Clayton*, 68 M.J. 419, 423 (C.A.A.F. 2010)). Here, the military judge did both.
[217] J.A. at 0197.

used this finding to rule that the defense should have raised the issue "prior to" individual *voir dire*.[218] Contrary to the military judge's finding, only one questionnaire listed a venire member's race. Yet when the trial defense counsel attempted to point that out to the military judge, she dismissed it and moved on.[219] Moreover, her denial of the motion as untimely misapprehended the law. As the lower court correctly observed, "an objection that the CA . . . exclude[d] members based on race . . . is always timely and never waived."[220]

Second, in denying the requested evidence as impracticable for the government to produce, the military judge both made a clearly erroneous factual finding and misunderstood the law. Contrary to the military judge's skepticism about how the CA would gather the requested evidence, it is public knowledge that the Department of Defense collects biographical data on servicemembers that includes their race.[221] The CA could try to access the source data collected by the Department of Defense for his region, and the CA could also supplement such data with any other information collected in the member selection process. Moreover,

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[218] *Id.*
[219] *Id.* at 0197-0198.
[220] *Bess*, 2018 CCA LEXIS 476, at *21 (citing *Riesbeck*, 77 M.J. at 160).
[221] *See, e.g.*, DEPARTMENT OF DEFENSE, OFFICE OF THE DEPUTY ASSISTANT SECRETARY OF DEFENSE FOR MILITARY COMMUNITY AND FAMILY POLICY, 2015 DEMOGRAPHICS: PROFILE OF THE MILITARY COMMUNITY, https://download.militaryonesource.mil/12038/MOS/Reports/2015-Demographics-Report.pdf.

the military judge's concern about the practicability of production seems tethered to the amount of time it would take to produce the requested evidence, which suggests her concern was misplaced and reflected a misapprehension of the law. The military judge could have stayed the proceedings pursuant to R.C.M. 912 in order to give the government enough time to produce the requested evidence.

Finally, in denying the motion as irrelevant, the military judge once again misunderstood the law and made a clearly erroneous factual finding. Regarding the relevance of the requested evidence, her ruling contradicted itself. At first, she correctly recognized the relevance of the requested evidence. In fact, it was her suggestion that the defense obtain "the racial and statistical makeup of the pool of members for this particular convening authority" in order to strengthen their objection.[222] Yet when the defense moved for production of that evidence, she incorrectly ruled it was irrelevant "absent any evidence of impropriety."[223]

Contrary to the military judge's ruling, however, R.C.M. 703(f)(1) does not condition the relevancy of evidence on first proving the proposition the party

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[222] J.A. at 0191. Such a suggestion makes sense given the showing an accused must make to establish either an equal protection violation or unlawful command influence. *See* Assignments of Error I and II.

[223] J.A. at 0192; *cf. Loving*, 41 M.J. at 285 (citing *Alston v. Manson*, 791 F.2d 255, 257-59 (2d. Cir. 1986)) ("When a Fifth Amendment . . . violation is asserted, statistics may be used to prove discriminatory intent.").

intends to establish with the requested evidence.[224] Unfortunately for HM2 Bess, however, that is how the military judge applied the law to the discovery motion. Moreover, her finding that there was no evidence of impropriety was clearly erroneous insofar as it ignored the trial defense counsel's proffer that this was the second time "in a row" where he had an African-American client standing trial before the military judge and the panel members were "all white."[225]

B. The lower court erred in affirming the military judge's ruling.

On appeal, the lower court affirmed the military judge's erroneous ruling, concluding that while she erred in denying production of the requested evidence, she did not abuse her discretion. In reaching its conclusion, the lower court erroneously confined the request in the defense motion to evidence from the "convening authority's command" and found the requested evidence was too narrow to be relevant.[226] For at least five reasons, the lower court erred.

First, in confining the discovery motion to the CA's immediate command, the lower court took the motion out of context. While the defense requested information "with respect to the convening authority's command," it did so in response to the military judge's suggestion—on the record—that the defense

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[224] To the contrary, relevant evidence is evidence having "any tendency to make a fact more or less probable than it would be without the evidence; and the fact is of consequence in determining the action." Mil. R. Evid. 401.
[225] J.A. at 0198; *cf.* J.A. 0809-0812.
[226] *Bess*, 2018 CCA LEXIS 476 at *21-23.

needed to obtain "more information about the statistical make-up of the pool of members for this particular convening authority," which is important. This dialogue provides the context for both the defense motion and the military judge's ruling. When the military judge denied the motion, she cited the practicability of gathering the requested information as a basis for her denial.[227] This concern demonstrated that the military judge understood the request to be for a "racial and statistical makeup of the pool of members for this particular convening authority,"[228] which, contrary to the lower court's opinion, included members from commands subordinate to the CA's immediate command and members from outside Navy Region Mid-Atlantic. If the military judge understood the scope of the request as only addressing members from the CA's immediate command (e.g., personnel assigned to his Unit Identification Code), then her concern seems odd and misplaced. The CA could have easily gathered such information about personnel assigned only to his command.

Second, the lower court misapplied this Court's precedent regarding the abuse of discretion standard. Where the lower court finds the military judge's ruling reflects a misapprehension of the law (i.e., she denied as untimely a motion that "is always timely and never waived"), as happened here, that finding

[227] J.A. at 0197.
[228] J.A. at 0196.

demonstrates an "abuse of discretion."[229] "By definition, a court 'abuses its discretion when it makes an error of law.'"[230] Therefore, the lower court erred when it found the military judge had a misapprehension of the law, but did not abuse her discretion.

Third, the lower court did not apply a prejudice standard. The thrust of the lower court's ruling appears to be that to the extent the military judge denied the motion due to untimeliness, such denial was not prejudicial because the request was otherwise irrelevant. Therefore, it should have articulated and applied a prejudice standard. But it did not.

Fourth, in order to affirm the military judge's ruling, the lower court relied on a rationale that the military judge did not. It abandoned the abuse of discretion standard with respect to the relevancy of the requested information. Instead, the lower court reviewed the military judge's relevancy ruling de novo, substituting its own judgment for that of the military judge. As the record reflects and as briefly discussed above, the military judge seemingly understood the discovery motion as broadly requesting "the racial and statistical makeup of the pool of members for this particular convening authority."[231] In denying that motion, she did not express

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[229] *Eugene*, 2018 CAAF LEXIS 676, at *5.
[230] *United States v. Moye*, 454 F.3d 390, 398 (4th Cir. 2006) (quoting *United States v. Prince-Oyibo*, 320 F.3d 494, 497 (4th Cir. 2003)).
[231] J.A. at 0196.

any belief that the defense counsel's particular language made his request too narrow to be relevant.[232] Yet the lower court ignored this, and instead it inserted its own rationale to uphold her ruling.[233] A rationale created for the first time on appeal and substituted for the military judge's rationale at trial.

Finally, the lower court's de novo ruling contained two substantive errors on the issue of relevancy. First, it conditioned its relevancy determination on the fact that no member on appellant's panel was from the CA's immediate command.[234] While that may be true, it also misses the point. The underlying issue was a concern with the CA's selection of the actual members from a larger pool of potential members.[235] To that end, the motion sought relevant information about the larger pool of potential members, whether that was the entire pool as the military judge seemed to understand the request, or only a small portion of the entire pool, as the lower court misconstrued it. Second, even *assuming arguendo* that the defense counsel's motion only sought information about the personnel assigned to the CA's immediate command, such information was still relevant as it

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[232] *See* J.A. at 0196-0197. The phrase "convening authority's command" can be understood in the context of Article 25, UCMJ to mean the entire pool of potential members. *See*, *e.g.*, *United States v. Jeter*, No. 201700248, at 41:55 (N-M. Ct. Crim. App. Oct. 16, 2018), available at http://www.jag.navy.mil/courts/oral_arguments.htm.
[233] *Bess*, 2018 CCA LEXIS 476 at *21-23.
[234] *Id.* at *21-22.
[235] J.A. at 096-0198.

would provide some insight into the "makeup of the pool of members."[236] Admittedly, it would have made it less dispositive, but less dispositive is different than less relevant.[237]

As a result, even if there was a need to request evidence on a wider scope of potential members, that did not make the requested evidence less relevant. Indeed, had the CA provided the "racial . . . makeup of the pool of members" from his immediate command, that information would have at least served as a starting point for resolving HM2 Bess's challenge to his panel, and it would have allowed the military judge to make a more informed ruling on the issue. Accordingly, both the military judge and lower court misapprehended the law and made clearly erroneous factual findings.

C. The military judge's abuse of discretion prejudiced HM2 Bess's substantial rights.

As Assignments of Error I and II show, evidence of "the racial and statistical makeup of the pool of members for this particular convening authority" is relevant to the resolution of HM2 Bess's equal protection claim, as well as his unlawful command influence claim. In denying the production of the requested evidence, the military judge's abuse of her discretion has exacted harm on HM2 Bess's ability to vindicate his equal protection and due process rights, both at trial and on

[236] *Bess*, 2018 CCA LEXIS 476 at *22.
[237] R.C.M. 703(f)(1); Mil. R. Evid. 401.

appeal. Therefore, to remedy this abuse of discretion and to ensure that he receives a trial that is both free of unlawful command influence and in compliance with the Fifth Amendment's equal protection requirements, HM2 Bess requests this Court set aside his convictions and sentence.

Conclusion

For the reasons set forth above, HM2 Bess respectfully ask this Court to set aside his convictions and sentence.

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I certify that the foregoing was electronically delivered to this Court, and that a copy was electronically delivered to Director, Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on June 19, 2019.

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