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	**REPLY TO APPELLEE'S ANSWER** Crim. App. Dkt. No. 201300311 USCA Dkt. No. 19-0086/NA

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

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Pursuant to Rule 19(a)(7)(B) of this Court's Rules of Practice and Procedure, Hospital Corpsman Petty Officer Second Class (HM2) Pedro Bess, USN, the Appellant, hereby replies to the Government's brief concerning the granted issues, filed July 19, 2019.

"Why aren't there any black people?"[1] That was HM2 Bess's first question when the panel members[2] entered the courtroom more than two years ago. Today, despite raising it at trial before the military judge and on appeal, the government has not answered his question. To be fair, the government has neither affirmatively claimed that the convening authority detailed African-Americans to HM2 Bess's panel nor produced evidence demonstrating that the selection process was proper. Nevertheless, the government remains steadfast in its refusal to acknowledge the existence of an issue while disclaiming any burden of proof or duty to ensure HM2 Bess's panel complied with the equal protection component of the Fifth Amendment.[3]

Given the "powerful and stubbornly pervasive stereotypes that continue to infect our criminal justice system,"[4] the government's position perpetuates a

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[1] J.A. at 0110.
[2] This reply uses the term "venire panel" to describe the ten members the convening authority detailed to HM2 Bess's court-martial.
[3] Appellee's Br. at 38 ("The United States bears no burden . . . .").
[4] Br. of NAACP Legal Defense and Educational Fund, Inc., June 28, 2019, at 6 (hereinafter "Amicus Br.").

troubling appearance of "prosecutors aggressively seeking to empanel all-white juries to ensure a Black defendant's conviction."[5] In a situation where it is "critically important" to dispel "even the specter of bias,"[6] the government has done the opposite. At trial, the trial counsel remained remarkably silent as the military judge and defense counsel discussed the lack of African-American representation on HM2 Bess's panel.[7] On appeal below, the government cited the "presumption of regularity" to justify the lack of African-American representation.[8]

Now, the government goes even further in its answer, claiming that the eyewitness accounts of the panel's racial composition—observations from HM2 Bess, two attorneys, and a military judge—constitute "speculation" insufficient to warrant this Court's attention. Such a claim, however, is detached from reality. HM2 Bess is African-American. This Court can see his race by looking at his

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[5] Amicus Br. at 7-8.
[6] Amicus Br. at 8. *See also United States v. Boyce*, 76 M.J. 242, 246 (C.A.A.F. 2016) (describing this Court's duty to foster "public confidence in the . . . fairness of our system of justice.") (quoting *United States v. Harvey*, 64 M.J. 13, 17 (C.A.A.F. 2018)); *United States v. Weisen*, 56 M.J. 172, 177 (C.A.A.F. 2001) ("Implied bias undermines public confidence in the military justice system . . . .").
[7] J.A. at 0193-98.
[8] Appellee's Br. at 24-25, *United States v. Bess*, 2018 CCA LEXIS 476 (N-M. Ct. Crim. App. Oct. 4, 2018).

picture.[9] As HM2 Bess, two attorneys, and the military judge personally observed at trial, the members on the venire panel were not the same race as HM2 Bess.[10]

Unfortunately, what is lost in the government's steadfast effort to both convict HM2 Bess before a panel lacking African-American representation and maintain his convictions on appeal is an answer to HM2 Bess's initial question about the panel: "Why aren't there any black people?"[11] The question is simple and straightforward. It is a question that, unfortunately, African-Americans have had to ask too many times throughout American history in order to protect their constitutional rights.[12] And, as the Supreme Court's recent decision in *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019) demonstrates, it is a question that remains as important as ever to ensuring the equal protection of the laws. Accordingly, in instances where the government declines to answer the question, as it has done here, it is necessary for this Court to remain on high alert, to examine the record

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[9] J.A. at 0790.

[10] HM2 Bess identified a lack of African-American representation. J.A. at 0110. One defense attorney stated to the military judge: "Our client is African-American, and there's no African-American representation on the panel . . . I am fairly confident that there is no African-American on the panel of 10 . . ." J.A. at 0192, 0195. The other defense attorney stated the military judge: "I think it is important for the record to reflect that at least 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." J.A. at 0198. And the military judge made the following statement in response to the defense: "I agree with you that I don't see anyone who I think is obviously of the same race as your client . . . ." J.A. at 0195.

[11] J.A. at 0110.

[12] *See, e.g.*, Amicus Br. at 7 n.10.

for constitutional violations, to order additional inquiry when necessary, and to grant appropriate relief in cases where violations are found. HM2 Bess presents such a case and respectfully asks this Court for appropriate relief.

Law and Argument

I. During *voir dire*, the defense brought an equal protection challenge to the convening authority's selection of members, preserving the issue for appeal.

The government and HM2 Bess agree that the "equal protection component of the Fifth Amendment applies to a convening authority's selection of members."[13] Indeed, that applicability gave rise to the defense objection. During *voir dire*, the defense objected to the venire panel, describing the objection as a "combination of an Article 25 challenge" and "a preventative *Batson* [*v. Kentucky*, 476 U.S. 79 (1986)] challenge."[14] As this Court has explained, *Batson* "applies to courts-martial, just as it does to civilian juries,"[15] and the constitutional principle in *Batson* is that the requirements of equal protection "guarantee[] 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 . . ."[16] Accordingly, through its challenge under Article

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[13] Appellee's Br. at 14.
[14] J.A. at 0193; 10 U.S.C. § 825.
[15] *United States v. Santiago-Davila*, 26 M.J. 380, 389-90 (C.M.A. 1988).
[16] *Batson*, 476 U.S. at 86.

25, Uniform Code of Military Justice (UCMJ) and *Batson*, the defense preserved a constitutional challenge to the racial composition of HM2 Bess's panel, making the standard of review de novo.[17]

The government's answer, however, ignores the record and argues that the defense failed to "raise a constitutional objection at trial," making it necessary for this Court to review for plain error.[18] That is not the case. While the defense may not have cited *Castaneda v. Partida*, 430 U.S. 482 (1977) in their initial objection, to say that the objection was not constitutional is a complete mischaracterization. The objection at trial referenced two things: (1) Article 25 to invoke the statutory process a convening authority uses to select members; and (2) *Batson*—a case that both cites and builds on *Castaneda*—to invoke the constitutional principle at stake—equal protection. Accordingly, the scope of the granted issue is the same as the defense objection at trial: whether the convening authority's selection of members violated the equal protection requirements of the Fifth Amendment. The standard of review is de novo.

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[17] *United States v. Sullivan*, 74 M.J. 448, 450 (C.A.A.F. 2015) ("We review 'claims of error in the selection of members of court-martial de novo as questions of law.'") (quoting *United States v. Bartlett*, 66 M.J. 426, 427 (C.A.A.F. 2008)).
[18] Appellee's Br. at 13.

II. Addressing the racial composition of a military venire panel through a *Batson*-like framework at trial is both workable and appropriately tailored to the selection of members to courts-martial.

In section I.D. of its answer, the government mischaracterizes HM2 Bess's position, asserting that "Appellant . . . requests this Court require a convening authority to provide a race-neutral explanation any time a minority is not 'selected' for a panel."[19] Building on this mistaken proposition, the government argues that the *Batson* framework is unworkable in the context of a convening authority's selection of members because it would require the convening authority to provide individual race-neutral explanations for the exclusion of thousands of potential members in a given court-martial.[20] The government's argument, however, is a strawman. It neither accurately characterizes HM2 Bess's position nor responds to it. And having erected this strawman, the government proceeds with "demolishing the pitiful scarecrow of its own creation."[21]

As outlined in HM2 Bess's brief, application of a *Batson*-like burden shifting framework to a convening authority's selection of members results in a workable process that ensures a convening authority makes an informed decision about the racial composition of the venire panel. Under this framework, the process would operate as follows. First, the defense identifies that the panel does

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[19] *Id.* at 34.
[20] *Id.* at 35.
[21] *United States v. Havens*, 446 U.S. 620, 630 (1980) (Brennen, J., dissenting).

not include any members from the same cognizable racial group as the accused and raises the issue with the military judge before the members are empaneled, requesting to have the convening authority detail additional members of the same race as the accused.[22] The military judge, after appropriately inquiring into the matter, then adjourns the *voir dire* proceedings so that the convening authority can be notified. Finally, upon notification, the convening authority—consistent with the equal protection framework in *Batson*—either details additional members on the basis of race for the purpose of inclusion or provides a race-neutral reason for declining to do so.

This is a framework that is demonstrably workable. It mirrors the framework that is already in place to detail additional members when the membership of a court-martial is reduced below quorum.[23] And it ensures Article 25 is operable in a manner that is consistent with the equal protection requirements of the Fifth Amendment.[24]

In response, the government offers no reason to suggest this framework is unworkable as a mechanism to address the equal protection challenge in HM2

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[22] Appellant's Br. at 27-35 (discussing a *prima facie* showing under *Batson*).
[23] "[T]he proceedings should be adjourned and the convening authority notified so that new members may be detailed." R.C.M. 912(g)(2), Discussion.
[24] In interpreting Article 25, the canon of constitutional avoidance pertains insofar as it involves a "reasonable presumption that Congress did not intend" an interpretation of a statute that "raises serious constitutional doubts." *Clark v. Suarez v. Martinez*, 543 U.S. 371, 381 (2005).

Bess's case. Instead, the government, in the span of one page, asks this Court to import a modified unlawful command influence framework in order to resolve HM2 Bess's equal protection challenge in their favor.[25] Citing the "court stacking" framework, which is a form of unlawful command influence,[26] the government argued that absent some evidence of a convening authority's "improper motive" there is no equal protection issue.[27]

The government's use of the unlawful command influence framework in this way, however, conflates Issue II with Issue I and directly contradicts this Court's precedent. For example, in *United States v. Barry*, 78 M.J. 70, 78 (C.A.A.F. 2018), a majority held that unlawful command influence can be "effectuated unintentionally," which means there is no requirement to prove a specific motive.[28] Moreover, in proposing its modified unlawful command influence framework, the government neither offered a justification for its use in resolving HM2 Bess's equal protection challenge nor addressed why it was necessary to depart from this Court's precedent in order to do so.[29]

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[25] Appellee's Br. at 15.
[26] *United States v. Riesbeck*, 77 M.J. 154, 159 (C.A.A.F. 2018).
[27] Appellee's Br. at 15.
[28] *Barry*, 78 M.J. at 78. *See also Boyce*, 76 M.J. at 251 ("No showing of knowledge or intent on the part of government actors is required in order for an appellant to successfully demonstrate that an appearance of unlawful command influence arose in a specific case.").
[29] While not expressly asking this Court to overrule precedent, the government's answer proposes a framework that departs from unlawful command influence

III. The government's *Castaneda* response is flawed and takes advantage of the military judge's erroneous denial of discovery—Issue III before this Court—arguing that HM2 Bess should have presented the information the military judge declined to order produced.

Under the *Castaneda* framework, the government argues that HM2 Bess failed to demonstrate two factors:[30] (1) African-Americans were underrepresented on panels over a significant period of time; and (2) the member selection process is susceptible to abuse.[31] The government's argument, however, benefits from the military judge's erroneous denial of discovery and is otherwise flawed in several respects.

As the government concedes, proof of systematic exclusion under *Castaneda* traditionally involves a statistical showing that compares the "proportion of the group in the total population to the proportion called to serve . . . ."[32] This statistical comparison makes sense and is consistent with the military judge's suggestion to the defense that their argument would be "slightly stronger" if they "knew more information about the racial and statistical makeup of the pool of members for this particular convening authority."[33] In response to the

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precedent without providing a corresponding justification. *Cf. United States v. Andrews*, 77 M.J. 393, 399 (C.A.A.F. 2018) (discussing the principle of *stare decisis*).

[30] The government and the defense agree that the first prong is satisfied. "Appellant is African American, meeting the first factor." Appellee's Br. at 17.

[31] Appellee's Br. at 29.

[32] *Id.* (quoting *Castaneda*, 430 U.S. 494).

[33] J.A. at 0196.

military judge's suggestion, the defense moved for discovery of just that—"a statistical breakdown of the population as far as race . . . ."[34] And, for the reasons outlined under Issue III of HM2 Bess's brief, the military judge erroneously denied it. Now, the government seeks to benefit from the military judge's erroneous denial, compounding the prejudice to HM2 Bess. When placed in the context of his case, the government's argument is, in effect, that the defense should have presented the statistical information the military judge refused to order produced. To the extent this Court agrees with the government, HM2 Bess respectfully asks this Court to grant the appropriate relief on Issue III—either order a *DuBay* hearing so the defense can access the required statistical breakdown or set aside HM2 Bess's convictions based on the military judge's erroneous denial.

Moreover, the government's answer is flawed in two respects on this issue. First, it attempts to apply *Castaneda* without taking into account the distinction between a civilian grand jury system and the convening authority's selection of members under Article 25.[35] Because of this distinction, *Castaneda* is not a perfect fit as precedent. Nevertheless, its reasoning about the underlying equal protection principle is an important guidepost. Unlike the government, HM2 Bess and *Amicus* both discuss this distinction and tailor their equal protection arguments to

[34] J.A. at 0196.
[35] Appellee's Br. at 26.

the construct of the military justice system. Notably, as *Amicus* points out "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 explanatory factors."[36] Therefore, "given the uniqueness of courts-martial, different considerations are necessary."[37] HM2 Bess and *Amicus* have presented such considerations, and they merit this Court's consideration.

Second, the government claims the selection process was not susceptible to abuse because there is no evidence that the convening authority could "distinguish African Americans from other races during the selection process."[38] To support this claim, the government cites the questionnaires for all ten members, nine of which did not list the member's race.[39] The government's argument, however, is wrong and fails to consider the entire member selection process. It ignores that the process involved more than just reading the ten questionnaires of the selected members. The convening authority issued an instruction that required commands to nominate potential members.[40] Someone, likely a subordinate of the convening

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[36] Amicus Br. at 19 (quoting *Castaneda*, 430 U.S. at 512 (quoting *Alexander v. Louisiana*, 405 U.S. 625, 630 (1972)).
[37] *Id.*
[38] Appellee's Br. at 30.
[39] *Id.*
[40] Amicus Br. at 10-11.

authority, disseminated questionnaires and later collected them. When it came time to select the members in HM2 Bess's case, the convening authority presumably considered more than just the ten members he selected. And to be clear, there is evidence that this process produced racial information about some people in the pool of potential members. As the convening authority demonstrated in *United States v. Johnson*, he was capable of distinguishing members based on their race in order to detail minority members to a panel.[41] Accordingly, given this demonstrated capability, as well as the "subjectivity and discretion"[42] built into Article 25, the selection process is something that is susceptible to abuse, and HM2 Bess respectfully asks this Court to consider it as such.

IV. Given the government's suggestion that had defense counsel obtained additional "materials" in discovery the results of the proceeding would have been different, a *DuBay* hearing is the appropriate vehicle for addressing the issue.

In its answer the government suggests Trial Defense Counsel were "ineffective for failing to move for the materials necessary to demonstrate . . . a claim" under *Castaneda*.[43] As this Court is aware, an ineffective assistance of counsel claim involves a two-pronged analysis under *Strickland v. Washington*, 466 U.S. 688 (1984). The first prong requires a showing of "deficient

[41] J.A. at 0809-10
[42] Amicus Br. at 25.
[43] Appellee's Br. at 31.

performance," and the second prong requires a showing that "there is a reasonable probability that, absent the error, there would have been a different result."[44]

Regarding the first prong—deficient performance—the government claims HM2 Bess's counsel made several discovery-related errors, such as:

- The defense "never moved to compel discovery that could support a *Castaneda* claim."[45]
- The defense "never moved to compel data showing the racial breakdown of persons selected for courts-martial service by the Convening Authority . . . over a period of time."[46]
- The defense "never requested data related to the racial breakdown of all court-martial panels throughout the Navy or military over any period of time." [47]
- The defense "did not request information related to the racial compositions of court-martial panels detailed by the Convening Authority, or any other convening authority."[48]

The government's suggestion that failing to request, or to move to produce, the information listed above constitutes ineffective assistance of counsel is surprising, especially in the context of the second prong of the analysis—prejudice. By raising the issue, the government suggests that had HM2 Bess's counsel obtained additional information—from the government—the results of the

[44] *United States v. Quick*, 59 M.J. 383, 384-87 (C.A.A.F. 2004).
[45] Appellee's Br. at 9.
[46] *Id.*
[47] *Id*.
[48] *Id.* at 10.

proceeding would have been different. Such a claim acknowledges the existence of relevant undisclosed information and presents two questions. What information did the government not provide to HM2 Bess's defense counsel that would have resulted in a reasonable probability of a different outcome and why? To be clear, HM2 Bess disputes the assertion that his counsel did not request any statistical data, which makes the government's claim all the more surprising and concerning.[49] Therefore, should this Court find it necessary to address this issue, HM2 Bess respectfully submits that a *DuBay* hearing is the appropriate mechanism for doing so.

V. The government repeatedly misused the label "speculation" to describe evidence of the lack of African-American members on HM2 Bess's venire panel.

The venire panel the convening authority detailed to sit in judgment of HM2 Bess did not include any African-Americans. That is a fact, and the record contains ample evidence demonstrating it. First, HM2 Bess personally observed it, asking his attorneys about the lack of African-Americans on the panel.[50] Second, the trial defense counsel personally observed it, highlighting the absence of African-Americans for the military judge and explaining HM2 Bess's preference to have African-American representation on his panel.[51] Third, the military judge

[49] *See* Section VI; J.A. at 0757, 0767.
[50] J.A. at 0110.
[51] J.A. at 0192, 0195.

personally observed it, explaining that she knew HM2 Bess's race and did not see "anyone" who was "obviously of the same race" as him.[52] And contrary to the government's claim, personal observations about a matter in question do not constitute "speculation." Rather, they are evidence.[53]

The government likely understands this point, especially given that to convict HM2 Bess it relied on witnesses who made identifications based on personal observations of their x-ray technician, to include his race.[54] Therefore, even though the government's argument is cloaked with the label "speculation," its underlying rationale must be something else.

The thrust of the government's argument, on the one hand, is that the trial participants' visual observations of the racial composition of the panel are too unreliable for this Court to consider. That rationale, however, ignores how the passage of time impacts the reliability of personal observations. Unlike the statements and testimony at trial about the physical appearance of the x-ray technician in question—observations that occurred months and years later when witnesses were more likely to have forgotten or misremembered what they

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[52] J.A. at 0195.
[53] *Cf.* Mil. R. Evid. 602 (stating the requirement for a witness to have personal knowledge of a matter in order to testify about it).
[54] Notably, the defense has challenged the reliability of these identifications throughout the course of litigation based on a variety of factors, see, e.g., Appellant's Br. at 12, 43-45, but has never gone so far as to say that eyewitness descriptions are too speculative to constitute evidence.

observed—the cited observations of the trial participants occurred minutes after they personally observed the members, making them more reliable.[55] Accordingly, not only is the government misusing the term "speculation," the rationale underlying its argument is flawed.

On the other hand, this Court can take the government's argument at face value and decide whether the personal observations of the accused, uniformed attorneys, and a military judge constitute "speculation." The government's position is that they do, and accordingly, the government argues that this Court should disregard them. Doing so, however, would require this Court to read the term "speculation" so expansively that it would lead to an absurd, unprecedented result. If "speculation" includes visual observations made immediately after an individual observes an event or condition, then, by extension, all eyewitness testimony would be inadmissible as speculation under M.R.E. 602. That conclusion, of course, is absurd, and this Court should not adopt it. The convening authority did not detail any African-Americans to HM2 Bess's venire panel. That is not speculation. It is a fact, and there is ample evidence in the record demonstrating it.

[55] *Cf.* Mil. R. Evid. 803(1) (deeming admissible observations about an "event or condition" made "immediately after" a declarant perceives it).

Moreover, in addition to these personal observations, the Executive Officer of Defense Service Office Southeast—a supervisor of the trial defense counsel[56]—provided confirmation of the racial make-up of the venire panel. As the Executive Officer it was his duty to supervise all of the trial defense counsel at Defense Service Office Southeast in the performance of their duties.[57] From the vantage point of his position, he made the following statement in a sworn declaration filed in the court below:

> Like LTJG Johnson, the accused service members in *United States v. HM2 Bess*, *United States v. MMC Rollins*, and *United States v. LTJG Jeter* were African-American. Unlike LTJG Johnson, the Convening Authority did not detail any African-American members to their panels. All three service members were convicted.[58]

Faced with this evidence,[59] the government's answer chose to ignore it. The government does not address the "appearance in the Central Judicial Circuit that race is being improperly considered when selecting members for General Court-Martial Convening Orders."[60] It does not assert that the convening authority's

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[56] COMNAVLEGSVCCOMINST 5800.1G, § 0304.
[57] *Id.*
[58] J.A. at 0810. Notably, it was only after the Executive Officer sent a letter to the convening authority in LTJG Johnson's case that the convening authority "detailed one African-American, one Hispanic-American, one Asian-American, one Native-American and one Caucasian female member to a panel that began with 11 officers." *Id.*
[59] At a minimum this constitutes evidence of an equal protection violation under Issue I or alternatively "some evidence" of unlawful command influence under Issue II.
[60] J.A. at 0811.

member selection process appropriately considered race. And it does not cite any statements from the convening authority about his intent in the member selection process. Rather, it relies on semantics. It describes eyewitness observations as "speculation" and then asserts that the "United States bears no burden to rebut" them.[61] Doing so, however, does not change the fact that the eyewitness observations occurred and are a part of the record. Accordingly, this Court should give the statements referenced above the weight they are due, shifting the burden to the government as required under Issues I and II.

VI. The government, similar to the court below, has taken the trial defense counsel's discovery motion out of context.

In order to prevail on Issue I, the government claims that HM2 Bess is unable to make a prima facie showing under *Castaneda* without "statistics . . . to determine any alleged underrepresentation," acknowledging the relevance of a statistical breakdown according to race.[62] Then, in order to prevail on Issue III, the government takes an opposite position, arguing that "a statistical breakdown of the population as far as race with respect to the convening authority's command" is irrelevant information, and thus the military judge did not abuse her discretion in

[61] Appellee's Br. at 35.
[62] *Id.* at 18.

denying the defense motion to produce it.[63] These positions conflict, and the government cannot have it both ways.

In the context of HM2 Bess's equal protection claim, the defense requested statistical information is relevant, as the government concedes in its response to Issue I. At a minimum, it is relevant under the *Castaneda* framework. Additionally, it is relevant under the court-stacking framework of Issue II. Even the military judge sensed its relevance at trial when *she suggested* it would make the defense argument "slightly stronger."[64]

Unfortunately, the government continues to maintain its contradictory positions, and in doing so, it went even further, adopting the lower court's logical fallacy on Issue III, misconstruing the requested information as limited to the convening authority's command and arguing that such information is irrelevant.[65] It is not. As demonstrated in the briefs from both parties, the requested information is at the heart of the issues before this Court. For the reasons outlined in HM2 Bess's brief, it is apparent from the record that while the defense counsel used the words "convening authority's command," he was referencing the pool of

[63] Appellee's Br. at 44.
[64] J.A. at 0196.
[65] Appellee's Br. at 44-48.

potential members for this particular convening authority.[66] That is how the military judge understood it.[67]

Moreover, even if that were not the case, members from the convening authority's command *are part of the pool of potential members* and thus the requested statistical information was relevant. It was an abuse of discretion for the military judge to deny its production, and as the government has repeatedly highlighted on Issue I, the inability of the defense to obtain this information has made it more difficult for HM2 Bess to present his equal protection challenge—materially prejudicing his substantial rights.

VII. The staff judge advocate failed to acknowledge the applicability of *United States v. Crawford*, 15 C.M.A. 31 (C.M.A. 1964) and *United States v. Smith*, 27 M.J. 242 (C.M.A. 1988) when advising the convening authority, and the government's answer does the same, signaling that the flow of incomplete legal advice to convening authorities will continue if this Court allows it to go unchecked.

The government's answer misconstrues *United States v. Riesbeck*, 77 M.J. 154 (C.A.A.F. 2018), mistakenly citing it for the proposition that Article 25 "generally prohibits convening authorities from selecting members on the basis of race."[68] That proposition is both inaccurate (or at least incomplete) and contrary to longstanding precedent. While it is true that Article 25 does not list race as one of

[66] Appellant's Br. at 51-55.
[67] J.A. at 0195-98.
[68] Appellee's Br. at 35.

the criteria for the selection of members, in *Riesbeck* this Court also made something else clear. It is permissible for convening authorities to depart from the Article 25 criteria "when seeking in good faith to make the panel more representative of the accused's race . . . ."[69] To that end, *Riesbeck* cited longstanding precedent—*United States v. Crawford*, 15 C.M.A. 31 (C.M.A. 1964) and *United States v. Smith*, 27 M.J. 242 (C.M.A. 1988)—establishing that it is permissible for convening authorities to select members on the basis of race when doing so to make a "more *representative* or *inclusive* panel."[70] The government's answer notably failed to cite both *Crawford* and *Smith.*

Unfortunately, the government's answer is not the first time that a reference to *Crawford* or *Smith* was missing in connection with the convening authority's selection of members. The record demonstrates a persistent omission of any reference to the cases. First, the Article 34 advice to the convening authority omitted any citation to them.[71] This is noteworthy since the Article 34 advice discussed how the convening authority would initiate the detailing of members in HM2 Bess's case and enclosed both a copy of the Article 32 Investigating Officer's Report and this Court's opinion following his first trial. These two enclosures summarized testimony describing the x-ray technician in question as

[69] *Riesbeck*, 77 M.J. at 163
[70] *Id.* at 163 (emphasis in original).
[71] J.A. at 0103.

African-American, highlighted the identity of the x-ray technician as a contested issue, and described HM2 Bess as African-American.[72]

Second, the military judge omitted any reference to *Crawford* or *Smith* when she denied HM2 Bess's equal protection challenge, demonstrating a misunderstanding of the law. For example, the military judge made the following statement: "if the convening authority actively sought out to select members based on race, that would be inappropriate."[73] In making this statement, she did not caveat it with a reference to *Crawford* and *Smith*, but instead expressed a general (and mistaken) view that it is impermissible for convening authorities to ever consider race when detailing members to a court-martial. Moreover, because the military judge summarily denied the challenge, she did not afford the parties an opportunity to address the issue directly with the convening authority before moving on with the trial.

Third, the Staff Judge Advocate's Recommendation omitted any citation to the cases. Responding to the HM2 Bess's clemency request, which renewed his challenge to the racial composition of the venire panel under the equal protection principles in *Batson*, the staff judge advocate mischaracterized the issue as a Sixth Amendment challenge and advised the convening authority that no corrective

[72] J.A. at 0022-23, 0064-0105.
[73] J.A. at 0194.

action was warranted.[74] There is no evidence in the record that the staff judge advocate either advised the convening authority that he could "intentionally select[] a black servicemember to serve as a court member"[75] on HM2 Bess's panel or informed the convening authority that HM2 Bess expressed a preference for African-American representation on his panel.

Now, in its answer before this Court, the government perpetuates this pattern of omission. Not only does the government fail to cite *Crawford* and *Smith* in its answer, it also misconstrues the most recent case in that line of precedent—*Riesbeck*[76]—in order to claim that it is generally impermissible for convening authorities to consider race when detailing court-martial members. Therefore, this Court should view the endorsement of the government's claim as a perilous proposition, both in the context of HM2 Bess's case and the military justice system in general. It would signal that convening authorities should remain "race-ignorant" when selecting members, which is inconsistent with this Court's precedent and the requirements of equal protection.[77] Moreover, it would limit the ability of the judiciary to ensure Article 25 applies in a manner that is consistent

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[74] J.A. at 0107.
[75] *Riesbeck*, 77 M.J. at 163.
[76] Notably, the issue in *Riesbeck* involved gender as opposed to race. Nevertheless, this Court followed the same reasoning as *Crawford* and *Smith* in its decision. *Riesbeck*, 77 M.J. at 163-65.
[77] *United States v. Loving*, 41 M.J. 213, 285 (C.A.A.F. 1994) (quoting *United States v. Green*, 37 M.J. 380, 384 (C.M.A. 1993)).

with the Fifth Amendment, which is critical to its ability to maintain the public perception of fairness in the court-martial system. Accordingly, it is necessary for this Court to both grant relief to HM2 Bess and clarify the distinction between considerations of race that are proper and improper.

VIII. An objective, disinterested observer, fully informed of all the facts and circumstances of HM2 Bess's case, would harbor a significant doubt about the fairness of his proceeding.[78]

Consider how an objective, disinterested observer would view the following facts and circumstances. White women accused HM2 Bess, an African-American servicemember, of sex offenses. Months after the alleged incidents, they described him by his race, but not his name, and he went to trial. At trial, the following scene unfolded:

> [A] white military judge, asked a white bailiff, to call in the all-white military venire panel. . . . [The] white defense attorneys and the white prosecutors stood at attention as the panel members filed in . . . . This all-white panel would hear evidence from the four complaining witnesses in the case—each of them white.[79]

Upon seeing the convening authority's hand-selected panel, the defense brought an equal protection challenge, expressing that HM2 Bess "would prefer African-American representation . . . ."[80] The trial defense counsel also noted that

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[78] *Boyce*, 76 M.J. at 249 (stating the standard for apparent unlawful command influence).
[79] J.A. at 0110.
[80] J.A. at 0192.

"at least the last two panels that [the trial counsel], myself, and [the military judge] have been on . . . had all white panel members with an African-American client."[81] In response, the military judge "mov[ed] on," and the panel convicted HM2 Bess of two offenses.[82]

Later, the same thing happened again to another African-American servicemember,[83] and when it appeared as if it might happen to yet another African-American servicemember, the Executive Officer of the Defense Service Office intervened. He sent the convening authority a letter that recounted the following:

> In a number of cases . . . 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. By contrast, minority members have been detailed to cases involving Caucasian accused facing court-martial for sexual assault . . . .
>
> . . .
>
> While the Defense understands the pressures on a General Court-Martial Convening Authority to obtain members, we find it hard to believe that there are no African-American Officers or Sailors in the largest fleet concentration area in the world to sit on panels where African-American accused face trial for sexual assault allegations.[84]

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[81] J.A. at 0198.
[82] *Id.*
[83] J.A. at 0809-12.
[84] J.A. at 0811-12.

On appeal at the court below, HM2 Bess renewed his equal protection challenge based on the racial composition of his panel. In response, the government cited the "presumption of regularity" and claimed that because nine of the ten member questionnaires did not list their race, it was impossible for the convening authority to distinguish members on the basis of race. Accordingly, the government's position was that the lack of African-American representation on HM2 Bess's venire panel was an accident, or at least unintentional. That claim, however, ignored a critical fact. In response to the Executive Officer's letter, the convening authority demonstrated that he had the capability to distinguish on the basis of race when he detailed minority members to LTJG Johnson's court-martial.

An objective disinterested observer, knowing all of the facts and circumstances, would harbor a significant doubt about the fairness of HM2 Bess's proceedings. As the record demonstrates, the lack of African-American representation on HM2 Bess's panel was not an isolated incident. The convening authority possessed the capability to distinguish between potential members on the basis of race. And in HM2 Bess's case the convening authority was informed that the complaining witnesses identified their x-ray technician as African-American *before selecting a panel that lacked African-American representation*. Whether the lack of African-American representation is attributable to the convening authority's improper consideration of race or to some other structural flaw in the

selection process he oversaw, the end result is the same. HM2 Bess did not receive even the "appearance of a fair panel"[85] in violation of his rights under the Fifth Amendment.

Conclusion

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

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[85] *United States v. Ward*, 74 M.J. 225, 228 (C.A.A.F. 2015).

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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 July 29, 2019.

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Certificate of Compliance

This reply brief complies with the type-volume limitations of Rule 24(c) 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.

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