IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	ANSWER ON BEHALF OF APPELLEE
v.	)	Crim.App. Dkt. No. 201300311
Pedro M. BESS, Jr., Petty Officer Second Class (E-5) U.S. Navy Appellant	)	USCA Dkt. No. 19-0086/NA

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UNIFORM CODE OF MILITARY JUSTICE (UCMJ), 10 U.S.C. §§ 801-946:

STATUTES, RULES, BRIEFS, OTHER SOURCES

Issues Presented

I.

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

II.

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

III.

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

Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2016), because Appellant's approved sentence included one year or more of confinement. This Court has jurisdiction over this case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2016).

Statement of the Case

At Appellant's first court-martial in 2013, a panel of members with enlisted representation sitting as a general court-martial convicted Appellant, contrary to

his pleas, of two Specifications of attempting to commit an indecent act and four Specifications of committing indecent acts in violation of Articles 80 and 120, UCMJ, 10 U.S.C. §§ 880, 920 (2007).

The Navy-Marine Corps Court of Criminal Appeals affirmed the Findings and Sentence. *United States v. Bess*, No. 201300311, 2014 CCA LEXIS 803 (N-M. Ct. Crim. App. Oct. 28, 2014).

This Court set aside Appellant's Findings and Sentence and authorized a rehearing. *United States v. Bess*, 75 M.J. 70, 77 (C.A.A.F. 2016) (military judge abused discretion by allowing evidence to be presented to members without providing appellant opportunity to challenge its reliability).

At Appellant's rehearing, a panel of members with enlisted representation sitting as a general court-martial convicted Appellant, contrary to his pleas, of two Specifications of indecent acts in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2007). Appellant was acquitted of one Specification of attempted indecent acts and one Specification of indecent acts in violation of Articles 80 and 120, UCMJ, 10 U.S.C. §§ 880, 920. The Members sentenced Appellant to one year of confinement, reduction to pay grade E-3, and a reprimand. The Convening Authority approved the sentence as adjudged and ordered the sentence executed.

Statement of Facts

A. At his rehearing, the United States charged Appellant with attempted indecent acts, and indecent acts.

On rehearing, the United States charged Appellant with wrongfully observing the nude bodies of three women, and attempting to wrongfully view the nude body of a fourth woman. (J.A. 56-59.)

B. The Convening Authority referred Appellant's Charges to a General Court-Martial and initially detailed officer members.

The Convening Authority—Rear Admiral John Scorby, USN, serving as Commander, Navy Region Mid-Atlantic—referred Appellant's Charges to his standing General Court-Martial to which ten officers had been detailed. (J.A. 105.)

C. In discovery, Appellant requested the United States provide materials related to members' selection. Appellant never moved to compel those materials.

Before trial, Appellant submitted a standardized, thirteen-page discovery request. (J.A. 757-69.) In that request, Appellant sought, *inter alia*, discovery materials related to the detailing of members to his court-martial, including: (1) convening orders and amending orders; (2) any requests for excusal of court members, as well as documents memorializing the grant or denial of those requests; (3) "written matters provided to the convening authority concerning the selection of the members detailed to [Appellant's] court-martial"; and (4) "all

information known to the government as to the identities of potential alternate and/or additional panel members." (J.A. 767.)

Appellant also requested that the United States submit written questions to each court-martial member in accordance with Rule for Courts-Martial 912(a)(1), and provide each members' signed responses to those questions. (J.A. 767.)

The Record does not indicate the Government's response to these requests, but Appellant never moved to compel any of the above items in a Motion.

D. The Convening Authority amended the Convening Order after Appellant elected trial before a panel with enlisted representation.

Appellant orally requested to be tried by a panel of members with enlisted representation. (J.A. 155.) The Convening Authority then amended the convening order, replacing the ten officers with five new officers and five enlisted members. (J.A. 106.)

E. The United States provided Appellant with the Members' questionnaires; only one questionnaire indicated that Member's race.

One week before trial, the United States provided Appellant with the ten questionnaires completed by the Members. (J.A. 197, 824-929.) No Member indicated they worked at the same command as the Convening Authority. (J.A. 826, 836, 847, 857, 867, 878, 889, 900, 911, 921.)

Nine Members were not asked to identify—and never indicated—their race. (J.A. 824-929.) The final Member, using different version of the questionnaire, was asked about race and she "consider[ed] [her]self" to be Caucasian. (J.A. 899.)

F. At trial, Trial Defense Counsel questioned the racial composition of the panel—but never asked any Member about racial identity.

At trial, the Military Judge and the Parties conducted voir dire of the Members. (J.A. 167-267.)

1. No Member indicated his or her race during general voir dire.

During general voir dire, no Party asked the Members about their racial identities. (J.A. 167-90.) When asked, all Members denied knowing or working with the Convening Authority. (J.A. 184.)

2. After general voir dire, Trial Defense Counsel questioned the racial composition of the panel. He and the Military Judge discussed whether any Member was African American.

Following general voir dire, Trial Defense Counsel questioned the racial composition of the panel. (J.A. 192.) He claimed that: (1) the panel was "all white"; (2) "there's no African-American representation on the panel"; and (3) it "seemed odd" that there was "no African-American representation" because "the population of America is, like, 13 percent African-American, and in the Navy it might even be higher." (J.A. 192.) Trial Defense Counsel stated the defense "would prefer African-American representation on the panel." (J.A. 192.) He later

described this as "basically a combination of an Article 25 challenge and . . . like a preventative *Batson* [*v. Kentucky*, 476 U.S. 79 (1986)] challenge." (J.A. 193.)

The Military Judge acknowledged it would be "inappropriate" for the convening authority to "actively . . . select members based on race." (J.A. 194.) But she twice stated that she had no evidence that the Convening Authority had done "anything inappropriate . . . in assembling the panel." (J.A. 193-94.)

The Military Judge also questioned "how [Trial Defense Counsel] kn[ew] that there [was] no [racial] minority representation on [the] current panel." (J.A. 194.) While she did not "feel confident" she knew the race of the Members, the Military Judge "suspect[ed]" there was "some [racial] minority participation." (J.A. 193.) She noted that people "frequently make judgments about whether someone is a [racial] minority or not" without knowing if they were "mixed race" or "just don't typically look like stereotypic[al] images that [people] have of their race." (J.A. 194-95.)

Trial Defense Counsel responded that he "may have misspoke[n]" when he claimed the Members were "all Caucasian"—admitting that "might not be true." (J.A. 195.) He nevertheless expressed that he was "fairly confident" none of the Members was African American. (J.A. 195.)

The Military Judge agreed that she did not see any Member who was "obviously" the same race as Appellant. (J.A. 195.) But she stated she would not

have known Appellant's race based on his appearance alone, and declined to "speak to the racial makeup of [the] panel." (J.A. 195.) Finally, she stated that an argument that the panel was not reflective of the racial population eligible to serve as members would be "slightly stronger" if Appellant "knew more information" about the racial and statistical makeup of the Convening Authority's "pool of members." (J.A. 195-96.) But she nevertheless did not see a basis for an argument that members were excluded based on race. (J.A. 196.)

3. Appellant moved for a "statistical breakdown" of the racial population of the Convening Authority's "command."

Appellant moved for discovery of "a statistical breakdown of the population as far as race with respect to the convening authority's command." (J.A. 196.)

The Military Judge denied Appellant's request because: (1) Appellant had had the Members' questionnaires for one week; and (2) such a statistical breakdown was infeasible. (J.A. 196-97.) She also found a statistical breakdown of the command to be irrelevant "absent any evidence of impropriety." (J.A. 197.) The Military Judge stated that she had observed "other panels while here" and had "not seen any indication of any pattern of discrimination by excluding minority members." (J.A. 197.)

Trial Defense Counsel then proffered that Appellant's case was the "second time in a row" that he had represented an African American client before the

Military Judge where there was "an all-white panel." (J.A. 197-98.)[1] The Military Judge told Trial Defense Counsel that the Parties were moving on to individual voir dire, adding that she was "frequently surprised at the actual racial makeup of someone that was not consistent with stereotypical characteristics." (J.A. 198.)

At trial, Appellant never moved under R.C.M. 912 for: (1) copies of "any written materials . . . pertaining solely to persons who were not selected for detail as members"; or (2) a stay of proceedings "on the ground that members were improperly selected." *See* R.C.M. 912(a)(2), (b)(1); (J.A. 167-267).

4. Appellant never asked any Member about their racial identity during individual voir dire.

The Parties conducted individual voir dire of each of the ten Members. (J.A. 198-267.) Despite asking all ten Members questions, Appellant never asked any of the ten Members about his or her racial identity. (J.A. 198-267.)

5. The Military Judge granted a joint challenge for cause against the sole Member who had self-identified as Caucasian.

Following voir dire, the Parties jointly challenged several Members for cause, including the sole Member who had identified her race. (J.A. 106, 268, 899.) The Military Judge granted those challenges. (J.A. 268.)

[1] The Record of Trial mistakenly indicates "TC" for this discussion when it was Trial Defense Counsel speaking. (*See* Appellant Br. at 9 n.36.)

G. At trial, Appellant never filed a Motion related to *Castaneda v. Partida*, 430 U.S. 482 (1977), and never moved to compel discovery that could support a *Castaneda* claim.

Appellant never filed a Motion at trial for relief under *Castaneda v. Partida*, 430 U.S. 482 (1977), or alleged that African Americans were systematically underrepresented on court-martial panels.

Appellant never moved to compel data showing the racial breakdown of persons selected for courts-martial service by the Convening Authority in his case, or any other convening authority, over any period of time. (J.A. 1-929.) He also never requested data related to the racial breakdown of all court-martial panels throughout the Navy or military over any period of time. (J.A. 1-929.)

H. The Members convicted Appellant of wrongfully observing the nude bodies of two women, and sentenced him.

The Members convicted Appellant of two Specifications of indecent acts. (J.A. 409.) They sentenced him to one year of confinement, reduction to pay grade E-3, and a reprimand. (J.A. 410.)

I. Appellant's clemency request alleged that his "members venire panel" was "all-white," and did not request any statistical data related to members' selection.

Appellant submitted a post-trial clemency request to the Convening Authority. (J.A. 109-14.) There, Trial Defense Counsel indicated Appellant had "faced an all-white members venire panel—one not racially representative of the United States Navy in 2016." (J.A. 110.) Trial Defense Counsel further alleged

that this "all-white venire panel served as a prejudicial prophylactic against any *Batson* issues" and that "all African-Americans had been preemptively excluded." (J.A. 110.)

Appellant did not request information related to the racial compositions of court-martial panels detailed by the Convening Authority, or any other convening authority. (J.A. 109-14.) Nor did Appellant request a fact-finding hearing to develop facts for a *Castaneda* claim. And Appellant did not attach supporting evidence related to the selection process for his panel or the racial composition of his panel.

J. For the first time on appeal, Appellant alleged the Convening Authority engaged in unlawful command influence during his member-selection process.

Following this Court's decision in *United States v. Riesbeck*, 77 M.J. 154 (C.A.A.F. 2018), Appellant assigned a supplemental error at the Navy-Marine Corps Court of Criminal Appeals. (Appellant Mot. to File Suppl., Jan. 29, 2018.) There, Appellant alleged the evidence at trial "raised the issue of whether the convening authority stacked [Appellant's] panel based on race," and warranted shifting the burden to the United States to rebut Appellant's allegation under the unlawful command influence framework. (*Id.* at 5.)

K. Appellant has never alleged Trial Defense Counsel were ineffective for failing to sufficiently challenge his court-martial panel.

Appellant filed: (1) an initial brief with the Navy-Marine Corps Court of Criminal Appeals; (2) a supplement to that initial brief; and (3) a reply brief at the lower court. (Appellant Br., Nov. 20, 2017; Appellant Mot. to File Suppl., Jan. 29, 2018; Appellant Reply, Apr. 11, 2018). He never alleged Trial Defense Counsel was ineffective for failing to sufficiently challenge his court-martial panel.

L. Appellant attached a defense counsel's Declaration to the Record which, alleged that—when requested to do so—the Convening Authority detailed minority members to a completely different court-martial approximately seven months after Appellant's court-martial.

After Appellant assigned his supplemental error at the lower court, he submitted the post-trial, post-*Riesbeck* Declaration of Commander C.C., the then-Executive Officer of Defense Service Office Southeast. (J.A. 809-13.) That Declaration attached as supporting evidence a letter Commander C.C had written—in his role as "Defense Counsel" for an African American accused approximately seven months after Appellant's trial—to the Convening Authority requesting that the Convening Authority "include minority members in any . . . convening order" in his client's case. (J.A. 809-12.) According to Commander C.C. and based on his specific request, the Convening Authority then detailed several minority members to his client's panel. (J.A. 810.)

In his Declaration, Commander C.C. alleged that the Convening Authority "did not detail any African-American members" to three other courts-martial, one of which being Appellant's. (J.A. 810.) His supporting evidence alleged Appellant's panel, and the panels of the two other African American accused, were "all-white." (J.A. 811.)

Commander C.C.'s Declaration did not indicate how he knew the racial make-up of the panels for the three other courts-martial. The Declaration did not indicate Commander C.C. was a detailed defense counsel on those other cases, or whether he had been present in the court room. Nor did the Declaration attach evidence related to the selection or racial composition of the panels in any of those cases.

M. The lower court affirmed the Military Judge's denial of Appellant's request for "a statistical breakdown of the population as far as race with respect to the convening authority's command."

The lower court held that: (1) the Military Judge "did not abuse her discretion by denying the discovery request"; (2) Appellant had not presented sufficient evidence of exclusion of African Americans to shift the burden to the United States under the Fifth Amendment; and (3) Appellant failed to present "some evidence" of unlawful command influence. (J.A. 1-14.)

Related to Appellant's trial discovery request, the lower court determined the Military Judge "erred in declaring [Trial Defense Counsel]'s objection to the

panel untimely." (J.A. 10.) The court nonetheless upheld denial of Appellant's trial request because it "was for irrelevant information." (J.A. 9-11.)

The lower court also found that Appellant modified his discovery request on appeal. (J.A. 9-11.) At trial, Appellant requested the Military Judge order production of "a statistical breakdown of the population as far as race with respect to the convening authority's command." (J.A. 9-11.) On appeal he sought "the racial and statistical makeup of the pool of members for the CA." (J.A. 9-11.). The court "decline[d] [Appellant's] invitation to litigate new requests post-trial." (J.A. 9-11.)

Argument

I.

APPELLANT FAILS TO DEMONSTRATE, AND NO EVIDENCE SUPPORTS, THAT THE CONVENING AUTHORITY EXCLUDED ANY POTENTIAL MEMBERS BASED ON RACE. THERE IS NO EQUAL PROTECTION VIOLATION.

A. Standard of review.

This Court reviews whether a court-martial panel was selected free from systematic exclusion *de novo*. *United States v. Bartee*, 76 M.J. 141, 143 (C.A.A.F. 2017). But where an appellant fails to raise a constitutional objection at trial—such as an objection that a racial group was systematically excluded from his court-martial panel under *Castaneda v. Partida*, 430 U.S. 482 (1977)—this Court

reviews for plain error. *See United States v. Jones*, 78 M.J. 37, 44-45 (C.A.A.F. 2018) (applying plain error where appellant did not make Confrontation Clause objection at trial).

When a constitutional issue is reviewed for plain error, this Court must determine whether: (1) there was error; (2) the error was plain and obvious; and (3) the error was harmless beyond a reasonable doubt. *Id.*

B. The equal protection component of the Fifth Amendment applies to a convening authority's selection of members.

The Fifth Amendment Due Process Clause contains an equal protection component that prohibits the United States from engaging in governmental action that "invidiously discriminat[es] between individuals or groups." *See Washington v. Davis*, 426 U.S. 229, 239 (1976). An appellant alleging an equal protection violation bears the burden to prove "the decisionmakers in *his* case acted with discriminatory purpose." *McCleskey v. Kemp*, 481 U.S. 279, 292 (1986) (emphasis in original).

The Fifth Amendment's equal protection component applies to a convening authority's selection of members under Article 25, UCMJ, 10 U.S.C. § 825 (2016). *See United States v. Loving*, 41 M.J. 213, 283-86 (1994).

1. This Court's "court stacking" precedent provides the framework for analyzing allegations of purposeful racial discrimination in the member selection process.

"Court stacking" is a form of unlawful command influence and occurs when a convening authority selects members with "the improper motive of seeking to affect the findings or sentence by . . . excluding classes of individuals on bases other than those prescribed by statute." *United States v. Riesbeck*, 77 M.J. 154, 165 (C.A.A.F. 2018). Selecting members based on race—not "prescribed by statute"—therefore falls within the unlawful command influence framework when done with an "improper motive." *See id.*; Article 25, UCMJ.

Under this framework, one alleging court stacking need only show "some evidence" of excluding members with an improper racial motive. *See Bartee*, 76 M.J. at 143. And once raised, "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." *Riesbeck*, 77 M.J. at 165.

2. Appellant fails to present any evidence of court stacking in his case.

As discussed below and in section II, *infra*, Appellant has not provided "some evidence" of either exclusion or an improper motive to exclude potential members based on race. Because of this, Appellant's claims fail.

C. Appellant fails to demonstrate error, much less plain error, as he fails to prove a prima facie case of purposeful racial discrimination.

In *Castaneda*, the Court held that the government failed to rebut a prima facie case of purposeful racial discrimination in the civilian grand jury selection process. *Castaneda*, 430 U.S. at 483, 500-01. In dicta, the Court noted a three-step framework civilian defendants could use to establish a prima facie case of purposeful racial discrimination in the selection of grand jurors. *Id.* at 494-95. One alleging purposeful racial discrimination must: (1) show he belongs to a "recognizable, distinct class, singled out for different treatment under the laws"; (2) prove the "degree of underrepresentation [on grand juries] . . . over a significant period of time"; and (3) show the selection procedure is "susceptible to abuse or is not racially neutral," which would support a "presumption of discrimination." *Id.*

No military court has relied on the *Castaneda* framework to grant relief for a Fifth Amendment claim in the convening authority's member selection process. This Court has once discussed the *Castaneda* framework in this context, but did not expressly adopt—and has never expressly adopted—this civilian framework that was developed "in the context of grand jury selection." *See Loving*, 41 M.J. at 284-286 (citing *Castaneda*, 430 U.S. at 494); *see also Castaneda*, 430 U.S. at 494. This Court has not discussed it since *Loving*.[2] *Cf. United States v. Garcia*, No. 15-

[2] This Court has only cited *Castaneda*, without applying it, three times besides *Loving*. *See United States v. Kirkland*, 53 M.J. 22, 24 (C.A.A.F. 2000); *United*

2844, 674 F. App'x 585, 588 (8th Cir. Dec. 30, 2016) (applying *Castaneda* to civilian jury venire process); *United States v. Horne*, 4 F.3d 579, 588 (8th Cir. 1993) (same).

Assuming *Castaneda* applies to the military member selection process, Appellant satisfies only one of the three *Castaneda* factors. As a result, Appellant fails to demonstrate the Convening Authority engaged in purposeful racial discrimination.

1. Appellant is a member of a recognizable, distinct class.

African Americans qualify as a "recognizable, distinct class" for purposes of the equal protection framework. *See Rose v. Mitchell*, 443 U.S. 545, 565 (1979). Appellant is African American, meeting the first factor. (*See* J.A. 22-23.)

2. Appellant fails to establish any substantial underrepresentation.

An appellant must demonstrate the "degree of underrepresentation [on grand juries] . . . over a significant period of time" by comparing "the proportion of the group in the total population to the proportion called to serve as grand jurors." *Castaneda*, 430 U.S. at 494. However, the absence of racial minorities on a single panel cannot establish a prima facie case of systematic exclusion. *Loving*, 41 M.J. at 285. The *Castaneda* framework is designed to allow "[p]roof of systematic

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States v. Santiago-Davila, 26 M.J. 380, 390 (C.M.A. 1988); *United States v. McClain*, 22 M.J. 124, 130 (C.M.A. 1986).

exclusion from the venire" to "raise[] an inference of purposeful discrimination" where direct evidence may not exist. *See Batson v. Kentucky*, 476 U.S. 79, 94 (1986).

In *Castaneda*, the Court found statistics showing a forty percent disparity between the proportion of the local Mexican American population and those summoned for grand jury service—over an eleven-year period—was "enough to establish a prima facie case of discrimination." 430 U.S. at 495-96. There, the respondent presented: (1) census statistics showing the local population to be seventy-nine percent Mexican American; and (2) eleven years of data compiled from grand jury records, which showed thirty-nine percent of persons summoned for grand jury service were Mexican American. *Id.* at 486-87. Mexican Americans composed fifty percent of the grand jury that indicted the respondent. *Id.* at 487.

Here, Appellant has failed his burden to show underrepresentation for three reasons. First, he cannot show the racial makeup of his own panel, as he only speculates to the race of nine Members. And he did not ask any Member about his or her racial identity during individual voir dire. Second, he provides no competent evidence showing the racial makeup of any other panel this Convening Authority referred to a court-martial. Third, he fails to provide statistics sufficient to conduct comparison to determine any alleged underrepresentation.

a. Appellant presents speculation—not evidence—about his own panel's racial composition.

One challenging the selection of a jury venire must "introduce, or . . . offer, distinct evidence in support of [a] motion," and cannot exclusively rely on the unsworn and unsupported statements of counsel. *See Frazier v. United States*, 335 U.S. 497, 503 (1948).

Here, Appellant presents no evidence to support his allegation that the Convening Authority detailed an "all-white panel to sit in judgment of an African-American accused." (Appellant Br. at 30.) The Members' questionnaires and statements during voir dire do not support his claim that the Convening Authority "detailed an all-white panel to sit in judgment" of him at his court-martial. (*See* J.A. 167-267, 824-929.)

Absent evidence, Appellant speculates to his panel's racial composition and its resulting meaning. (*See* Appellant Br. at 5-10.) First, he relies on Trial Defense Counsel's various efforts to classify the Members' racial identities based on his perception of their appearance. (J.A. 110-11, 192-95.) Second, he erroneously claims the Military Judge confirmed no African Americans sat on his panel. (Appellant Br. at 7 n.30.) Third, Appellant provides post-trial allegations from another defense counsel in an unrelated case, Commander C.C., who asserts without evidence that the Convening Authority "did not detail any African-American members" to his court-martial. (J.A. 809-12.)

None of Appellant's efforts actually establishes the racial composition of his panel, much less the absence or exclusion of African Americans members.

i. Trial Defense Counsel merely alleged the racial composition of Appellant's panel.

Contrary to what Appellant now asserts as fact, Trial Defense Counsel was unsure of the panel's racial composition. First, he asserted "that the panel was all white." (J.A. 192.) Then, when the Military Judge challenged that assertion, he acknowledged it "might not be true." (J.A. 195.) But he remained "fairly confident" no Member was African American. (J.A. 195.) Yet, when presented with the opportunity, he never sought to confirm his "confiden[ce]" by asking any Member about race during individual voir dire. (J.A. 198-267.)

Trial Defense Counsel's speculation only grew after trial. In a post-trial clemency request, he once again claimed—without qualification or evidence—that Appellant's panel was "all-white." (J.A. 110-11.) He provided no rationale reconciling his newfound post-trial confidence that the Members were "all-white" with his acknowledgment at trial that this "might not be true." (*See* J.A. 110-11, 192-95.) Nothing in the interim supports an evidence-based change in certainty.

Because no evidence supports Trial Defense Counsel's assertions that Appellant's panel was "all-white"—which even he admitted at trial "might not be true"—his post-trial attempt to racially classify the Members amounts to mere speculation.

ii. The Military Judge did not "agree[] there were no African-American members detailed to the panel."

At trial, the Military Judge declined "to speak to the racial makeup of [the] panel," only agreeing with Appellant that she did not see any Member who was "obviously" African American. (J.A. 195.)

Appellant now claims "the defense and military judge agreed there were no African-American members detailed to the panel." (Appellant Br. at 7 n.30.) That is not correct; the Military Judge never expressed such agreement. (J.A. 195.) Indeed, the Military Judge made clear that she was "frequently surprised" when a member's race did not conform to her original observation. (J.A. 198.)

iii. Commander C.C. speculated as to the composition of various panels, as his claims are not based upon personal knowledge.

A witness "may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Mil. R. 602. This applies to post-trial submissions, which "have no automatic value as evidence where they are . . . not based upon personal knowledge of the declarant." *United States v. Bush*, 68 M.J. 96, 104 n.9 (C.A.A.F. 2009) (citing Mil. R. Evid. 602); *see also United States v. Dugan*, 58 M.J. 253, 259 (C.A.A.F. 2003) (post-trial letter had evidentiary value because it was detailed and "based on [the author's] own observations").

In *Bush*, this Court determined that an appellant's post-trial declaration alleging he lacked employment opportunities did not constitute evidence of prejudice because the appellant lacked personal knowledge as to "the reasons [a] particular employer declined to hire him." *See Bush*, 68 M.J. at 104 n.9. There, the Court noted that post-trial submissions did not have "automatic value as evidence" if not based on personal knowledge. *Id.*

Like the post-trial submission in *Bush*, Commander C.C.'s post-trial Declaration does not indicate his assertions are based on his own observations or personal knowledge. It provides mere conclusory statements—that Appellant's and two other court-martial panels were both "all-white" and without "any African-American members." (*See* J.A. 810-11.) Commander C.C. provides no further detail for these claims.

Most importantly, with respect to Appellant's and other cases, the Declaration provides no basis for concluding he has personal knowledge of the race of each of the members on each of the panels he describes. (J.A. 809-12.) He does not claim to have reviewed members' questionnaires, discussed race with the relevant members, observed voir dire for cases to which he was not detailed, or discussed this issue with relevant counsel on any of these cases. (J.A. 809-12.) Yet he expresses, months after Appellant's trial, higher confidence of the racial composition of Appellant's panel than Trial Defense Counsel did at trial. (J.A.

195, 810-11.) Commander C.C. provides no factual basis to support his implicit claim to superior knowledge of the racial composition of Appellant's panel.

Because Commander C.C.'s Declaration contains no basis for finding he had personal knowledge as to the racial makeup of Appellant's panel, it amounts to mere speculation.

b. Appellant fails to provide necessary statistics to determine any alleged "underrepresentation" under *Castaneda* or *Loving*.

In *Castaneda*, the respondent provided census data to demonstrate the "proportion of [Mexican-Americans] in the total population" in his county, and eleven years of grand jury data to demonstrate "the proportion [of Mexican-Americans] called to serve . . . over a significant period of time." *Castaneda*, 430 U.S. at 486-87.

In *Loving,* defense counsel presented demographic data for two military installations around the time of the appellant's court-martial. *Loving,* 41 M.J. at 285-86. But the *Loving* court agreed with the trial judge that the raw data was "somewhat irrelevant." *Id.* at 286. Among several factors, the data did not reflect who was ineligible for court-martial duty; did not reflect those likely unable to meet the "best qualified" requirement of Article 25; and did not account for rotations on and off base of African American officers who might be eligible for court-martial duty. *Id.* at 286.

Here, unlike *Castaneda*, Appellant provides neither: (1) data showing the proportion of African Americans in the Convening Authority's "pool of members";[3] nor (2) data showing the proportion of African Americans "called to serve [as members] . . . over a significant period of time." Nor does Appellant provide the level of proof this Court found to be insufficient to establish a prima facie case in *Loving*. No statistics show the racial breakdown of the "total population," or the racial breakdown of any other panels—let alone panels "over a significant period of time."

Because Appellant fails to provide necessary statistics to conduct the *Castaneda* analysis, his claim fails, and he cannot establish a prima facie case.

i. Appellant's anecdotal, "four cases" claim fails to show the Convening Authority detailed an "all-white" panel to his, or any other, court-martial.

Rather than providing relevant statistics, Appellant claims his is one of "four cases" in which the Convening Authority "detailed an all-white panel to sit in judgment of an African-American accused." (Appellant Br. at 7, 30, 33) (citing, in addition to his own case, cases of "MMC Rollins," "LTJG Jeter," and "LTJG Johnson").

[3] As discussed in Issue III, the Military Judge properly denied Appellant's trial request for "a statistical breakdown of the population as far as race with respect to the convening authority's command." (J.A. 196.)

Once again, Appellant's claims rely on speculation, not evidence. First, as discussed *supra* in section I.C.2.a, Appellant merely speculates as to the racial composition of his own panel. Second, the sole evidence he presents for Chief Machinist's Mate Rollins' case, Commander C.C.'s Declaration, is not based on personal knowledge, as discussed in section I.C.2.a.iii. Third, Rear Admiral John Scorby, USN—the Convening Authority in Appellant's case—did not detail eight of the nine members to Lieutenant Junior Grade Jeter's court-martial. *See United States v. Jeter*, 78 M.J. 754, 764-65 (N-M. Ct. Crim. App. 2019). Finally, the Convening Authority detailed four minority members and a female member to Lieutenant Junior Grade Johnson's court-martial. (J.A. 809-12); *see also Loving*, 41 M.J. at 286 (rejecting equal protection claim against "all-white, all-male panel" in part because convening authority detailed minority members when asked).

Even assuming Appellant's allegations were true, this would fail to demonstrate systematic exclusion of African Americans from the Convening Authority's court-martial panels, or elsewhere in the Navy. As discussed in section I.C.2.b.iii, *infra*, *Castaneda* claims require years of supporting data to demonstrate exclusion or underrepresentation.

ii. Appellant waived any right to materials pertaining to persons not selected by the convening authority.

Copies of "materials pertaining solely to persons who were not selected for detail as members need not be provided" unless: (1) a party requests them; and (2)

the military judge, upon a showing of good cause, directs they be provided. R.C.M. 912(a)(2). If not raised before a court-martial adjourns, a request for these materials is waived. *See* R.C.M. 905(e).

Here, Appellant never requested the Military Judge direct the provision of materials related to persons not selected to serve on his court-martial panel. As a result, Appellant waived any request for materials related to persons considered, but not selected, by the Convening Authority. *See* R.C.M. 905(e), 912(a)(2).

iii. *Castaneda*'s statistical framework for proving systematic exclusion need not be watered-down. To prove systematic exclusion by a convening authority, in the Navy, or the military, litigants must present facts at trial. Articles 25 and 37 remedy discrimination targeted at specific accuseds or types of cases.

The *Castaneda* framework requires an appellant to provide statistics showing a group was substantially underrepresented in selections "over a significant period of time." 430 U.S. at 494. Courts typically consider a period of time to be "significant" where it shows the group's representation over years. *See Castaneda*, 430 U.S. at 495-96 (analyzing group representation over eleven-year period); *Hernandez v. Texas*, 347 U.S. 475, 482 (1954) (twenty-five year period). This method of proof is based off the "rule of exclusion"—the idea that that "[i]f a statistical disparity is sufficiently large, then it is unlikely that it is due solely to chance or accident." *Id.* at 494 n.13. The "rule of exclusion" applies even where

those who select jurors for grand jury service are appointed "at each term of court." *See Hernandez*, 347 U.S. at 476 n.1, 480.

Recognizing *Castaneda*'s framework requires significant evidence to demonstrate purposeful discrimination, *amicus* suggests that the "uniqueness of courts-martial" requires "different considerations" in the military context. (Br. of NAACP Legal Defense and Educational Fund, Inc., June 28, 2019, at 19-22.) Amicus suggests that *Castaneda* analysis in the military should: (1) focus on underrepresentation in "types of cases" or for "type[s] of defendant[s]"; and (2) require a truncated timeline because convening authorities serve for a limited period of time. But *amicus* fails to present evidence to support his contentions that *Castaneda* must apply differently in the military.

First, the *Castaneda* framework applies to the "proportion [of a group] called to serve as grand jurors, over a significant period of time." 430 U.S. at 494. Nothing in *Castaneda* supports a different framework for different "types of cases" or "type[s] of defendant[s]"; the framework applies to substantial underrepresentation in member selection writ-large. To the extent *amicus* believes the convening authority will "skew panels by the type of case or based on the characteristic of the defendant," his claims are addressed by unlawful command influence, not *Castaneda*. *See*, *e.g.*, *United States v. Howell*, No. 201200264, 2014 CCA LEXIS 321 (N-M. Ct. Crim. App. May 22, 2014).

Moreover, *amicus*' suggestion for truncated timelines to establish underrepresentation in the military is unnecessary and unworkable for three reasons. First, courts have found *amicus*' proposed truncated time period to be insufficient under *Castaneda*. *See Rose*, 443 U.S. at 566, 570 (testimony from three witnesses covering "five or six years," "several years," and "two years" not significant); *see also Ramseur v. Beyer*, 983 F.2d 1215, 1233 (3d Cir. 1992) (two-year period insufficient).

Second, the Supreme Court applies *Castaneda*'s "rule of exclusion" to grand jury selection processes even where the persons selecting grand jurors are appointed "at each term of court." *See Hernandez*, 347 U.S. at 476 n.1, 480. Because the Court has found the *Castaneda* framework to be applicable to selection procedures where commissioners change with a "term of court," it can also—as it currently exists—be applied to the military's convening-authority-driven selection process.

Third, a truncated military timeline significantly increases the risk of examining statistical disparities based on "chance or accident," something the *Castaneda* framework seeks to avoid. *See also Rose*, 443 U.S. at 568-74 (appellant failed to show prima facie case based on lack of evidence of exclusion for "significant period of time"). Given the fluid nature of military populations forming the basis for courts-martial selection, it would be difficult to ascertain the

representative racial makeup of a convening authority's command at each moment of referral. *See, e.g., United States v. White*, 48 M.J. 251, 253 (C.A.A.F. 1998) (convening authority noting that during recent selection process more than twenty percent of nominated officers "were not available because of leave or TDY . . . commitments").

Assuming *Castaneda* applies to convening authority selection, this Court should not depart from the requirement for an appellant to provide statistics "over a significant period of time."

3. Appellant failed to show the Convening Authority's selection process was susceptible to abuse, as he fails to present evidence the Convening Authority knew, or could have known, the race of potential members.

In *Castaneda*, the Court found the grand jury selection procedure at issue to be "not racially neutral," with respect to Mexican-Americans, because: (1) it involved jury commissioners picking names from the local population to compile a grand jury list; and (2) "Spanish surnames are . . . easily identifiable." 430 U.S. at 484-86, 495.

Similarly, in a concurring opinion in *Loving*, Judge Sullivan found the "use of racial identifiers" on the members' selection sheets, combined with the convening authority's broad discretion under Article 25, UCMJ, "clearly constitute[d] a system which . . . is susceptible to abuse." *Loving*, 41 M.J. at 305

(Sullivan, J., concurring);[4] *see also Alexander v. Louisiana*, 405 U.S. 625, 630 (1972) (grand jury selection procedures "not racially neutral" because "racial identifications were visible on the forms used by the jury commissioners").

Here, unlike *Castaneda* or *Loving*, Appellant fails to show that—in his case—the Convening Authority could distinguish African Americans from other races during the selection process. (Appellant Br. at 31-35.) Only one of ten Members' questionnaires contained a racial identifier and none of the Members indicated they personally knew the Convening Authority. (J.A. 184, 899.) Appellant presents no evidence showing the Convening Authority had another method for distinguishing African American potential members from other races, and has therefore failed to show the process used in his case was "susceptible to abuse" or "not racially neutral."

Appellant erroneously attempts to shift his evidentiary burden to the United States, claiming the lack of racial identifiers in the Record "says nothing about the information contained in the questionnaires of excluded members." (Appellant Br. at 34.) Appellant waived any right to the "materials pertaining" to the members not selected by the Convening Authority by failing to request them at trial or establishing good cause before the Military Judge. R.C.M. 912(a)(2), (b)(3).

[4] The *Loving* majority did not address this *Castaneda* factor. *See Loving*, 41 M.J. at 283-87.

Regardless, Appellant "has the burden of proving the existence of purposeful discrimination," and he provides no evidence that—in his case—the Convening Authority could distinguish between the races of potential members. *See McCleskey*, 481 U.S. at 292 (internal quotations omitted).

Because Appellant fails to provide information sufficient to demonstrate a prima facie case under *Castaneda*—and has never claimed Trial Defense Counsel was ineffective for failing to move for the materials necessary to demonstrate such a claim—his claims here fail.

D. The *Batson* framework for establishing a prima facie case of purposeful discrimination does not apply to a convening authority's selection of members under Article 25.

A convening authority's member selection process is "substantially different from civilian jury selection practice." *United States v. Bertie*, 50 M.J. 489, 491 (C.A.A.F. 1999). This process "contemplates that a court-martial panel will not be a representative cross-section of the military population." *Santiago-Davila*, 26 M.J. at 389; *see also United States v. Dowty*, 60 M.J. 163, 169 (C.A.A.F. 2004) (noting court-martial members are not "randomly chosen"). But the Fifth Amendment nonetheless prohibits excluding members of any "cognizable racial group" from court-martial service. *See Santiago-Davila*, 26 M.J. at 389-90.

As discussed *supra* in section I.B, an appellant alleging an equal protection violation bears the burden to prove "the decisionmakers in *his* case acted with discriminatory purpose." *McCleskey*, 481 U.S. at 292.

1. *Batson* applies to peremptory challenges, not members' selection.

In *Batson v. Kentucky*, the Court held a defendant could establish a prima facie case of purposeful discrimination in the selection of a petit jury based solely on a prosecutor's exercise of peremptory challenges at trial. 476 U.S. 79, 96 (1986); *see also Flowers v. Mississippi*, No. 17-9572, 588 U.S. ___, slip op. at 16 (June 21, 2019) (discussing various expansions of *Batson* holding in civilian context); *Santiago-Davila*, 26 M.J. at 389-90 (adopting *Batson* for court-martial practice). To do so, the defendant must show: (1) he is a member of a "cognizable racial group," and the prosecutor removed a member of the defendant's race with a peremptory challenge; (2) the facts and circumstances "raise an inference" the prosecutor used the peremptory challenge "on account of [the juror's] race." *Id.* The defendant is "entitled to rely on the fact . . . that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" *Id.* (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)).

a. The military does not apply the traditional *Batson* framework to peremptory challenges.

Because a convening authority has already determined court-martial members to be "best qualified" to serve, this Court has "declined to apply . . . *Batson*'s procedure for determining whether there is a prima facie case of discrimination" in the use of peremptory challenges. *United States v. Tulloch*, 47 M.J. 283, 287 (C.A.A.F. 1997) (citing *United States v. Moore*, 28 M.J. 366, 368 (C.M.A. 1989)). Instead, the military applies a "per se rule": "every peremptory challenge by the Government of a member of the accused's race, upon objection, must be explained by trial counsel." *Moore*, 28 M.J. at 368.

Here, Appellant claims "the burden-shifting framework in *Batson* is instructive" to equal protection claims for military member selection, but fails to identify whether he seeks to apply the civilian, or military, framework. (*See* Appellant Br. at 25-27.)

To the extent Appellant seeks an extension of the military's "per se rule" as articulated in *Tulloch* and *Moore*—which Appellant does not cite—Appellant's reasoning is flawed. The "per se rule" applies, in part, because a convening authority has already determined members on a venire to be "best qualified." *See Tulloch*, 47 M.J. at 287. That rationale does not apply during convening authority selection—before any determination as to which members are "best qualified" under Article 25.

b. Not detailing members to courts-martial is not equivalent to using peremptory challenges; *Batson*'s rationale applies to purposeful exclusion—not lack of inclusion.

Convening authorities must select members based on identified statutory criteria. *See* Article 25(d)(2), UCMJ. A decision not to select a member, utilizing statutory criteria, is not equivalent to exercising a peremptory challenge—which was "the component of the jury selection process at issue [in *Batson*]." *See Tulloch*, 47 M.J. at 303; *Batson*, 476 U.S. at 89. Consequently, this Court has never held that *Batson*'s framework for establishing purposeful discrimination applies to the Convening Authority's members-selection process under Article 25.

Peremptory challenges involve the striking or removal of potential members. *See* Article 41(b), UCMJ, 10 U.S.C. § 841(b) (2016). Member selection under Article 25, UCMJ, on the other hand, involves selecting qualified members based on statutory criteria—not "removal" in the traditional sense. And while a convening authority may not be "precluded by Article 25 from appointing . . . a representative cross-section of the military community," he or she is not required to do so. *United States v. Smith*, 27 M.J. 242, 249 (C.M.A. 1988).

Using *Batson* as a "guideline," Appellant now requests this Court require a convening authority to provide a race-neutral explanation any time a minority is not "selected" for a panel. (Appellant Br. at 27-28.)

But Appellant's "removal" framework is not appropriately tailored to the selection of members to courts-martial. First, unlike peremptory challenges, which remove members from panels, the failure to select a member does not "remove" members of a particular group. Second, there is no presumption that the lack of members of a particular group resulted from improper consideration. *Bertie*, 50 M.J. at 492.

Third, this requirement is unworkable—since a convening authority routinely considers a "full roster" of potential members. *See*, *e.g.*, *Bartee*, 76 M.J. at 143 (court found no appearance issues when convening authority considered "roughly 8,000" potential members before selecting same members to a panel originally held improper). A prosecutor's requirement to provide a race-neutral explanation for a peremptory challenge is limited to that member—while Appellant's framework would require a convening authority to potentially explain his or her rationale for not selecting any number of potential members based on the selection process.

Finally, *Batson* protects an accused from racially motivated peremptory challenges—procedures with little to no statutory or regulatory protections. *See* R.C.M. 912(g); *Batson*, 476 U.S. at 89. But the convening authority selection process already includes these protections through operation of Article 25, which generally prohibits convening authorities from selecting members on the basis of

race. *See Riesbeck*, 77 M.J. at 162. *Batson* need not be extended to a process already protected by Articles 25 and 37, UCMJ. *See* Part II.

Batson's framework—never held to apply to Article 25, UCMJ—need not be applied to the convening authority's member-selection process.

2. Even assuming *Batson* applies, Appellant fails to: (1) present evidence the convening authority "removed" any African American members; or (2) present facts and circumstances sufficient to "raise an inference" of a "practice to exclude [members] . . . on account of their race."

In *United States v. Gooch*, this Court held that an appellant failed to demonstrate that a court-martial member selection method improperly excluded African American members. 69 M.J. 353, 358-59 (C.A.A.F. 2011). There, evidence showed the selection process used "exclude[d] three of the four eligible African American members from [the convening authority's] consideration." *Id.* Citing *Batson* and *Santiago-Davila*, this Court found those cases to be "distinguishable" because the appellant presented no evidence showing an "improper motive" to "exclude members based on race." *Id.*

Here, as in *Gooch*, any supposed *Batson* issue is "distinguishable," and Appellant fails to make a prima facie case for three reasons. First, as discussed *supra* in section I.C.2.a, Appellant cannot show African Americans were absent from his panel. Second, unlike *Gooch*, where evidence showed several "eligible African American members" were excluded, Appellant presents no evidence that

eligible African American members were excluded by the Convening Authority. Finally, Appellant presents no evidence establishing the Convening Authority had an improper motive in his member-selection process.

Because Appellant fails to show that African Americans were absent—let alone excluded—from his panel, any supposed *Batson* claim fails.

II.

APPELLANT MERELY SPECULATES THAT THE CONVENING AUTHORITY IMPROPERLY APPLIED ARTICLE 25. HE PROVIDES NO EVIDENCE THAT AFRICAN AMERICANS WERE ABSENT FROM HIS PANEL, MUCH LESS THAT THEY WERE EXCLUDED.

A. Standard of review.

This Court reviews allegations of unlawful command influence *de novo*. *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).

B. Appellant must present "some evidence" of unlawful influence before the United States bears any burden to rebut his allegation.

Persons subject to the Uniform Code of Military Justice may not engage in unlawful command influence. Article 37(a), UCMJ, 10 U.S.C. § 837(a) (2016). This occurs where one subject to the Code either "attempt[s] to coerce," or influences—"by any unauthorized means"—the action of a court-martial. *Barry*, 78 M.J. at 78. Assigning members to, or excluding members from, a court-martial

panel "in order to achieve a particular result as to findings or sentence," constitutes "court stacking." *Riesbeck*, 77 M.J. at 165. Court stacking is "a form of unlawful command influence." *Id.*

Two types of unlawful command influence exist: actual and apparent. *United States v. Boyce*, 76 M.J. 242, 247 (C.A.A.F. 2017). Actual unlawful command influence involves "an improper manipulation of the criminal justice process which negatively affects the fair handling and/or disposition of a case." *Id.* Apparent unlawful command influence, on the other hand, exists where "an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceedings." *Id.* at 248 (quoting *United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006)).

An appellant bears the initial burden to raise either type of unlawful command influence on appeal. *See Barry*, 78 M.J. at 77 (actual); *Boyce*, 76 M.J. at 249 (apparent). To sufficiently raise the issue, he or she must show "some evidence" of unlawful influence—"more than mere allegation or speculation." *Barry*, 78 M.J. at 77. The United States bears no burden to rebut mere allegation or speculation. *Id.*

C. Appellant fails to present evidence of "court stacking," as he speculates that the Convening Authority excluded African Americans from his panel.

Convening authorities must select members for court-martial service who are "in [their] opinion . . . best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." Article 25(d)(2), UCMJ, 10 U.S.C. § 825(d)(2) (2016). Race is not a criterion for selection, and "nothing . . . permits selecting members to maximize [or minimize] the presence of a particular [race] serving on a court-martial." *Riesbeck*, 77 M.J. at 158, 163.

An appellant bears the burden to establish "the improper exclusion of qualified personnel from the selection process." *Bartee*, 76 M.J. at 143 (citing *Kirkland*, 53 M.J. at 24). The government need only demonstrate there was no impropriety in the member selection process "[o]nce the defense establishes such exclusion." *Id.*

Appellant does not specify which type of unlawful influence allegedly occurred: actual or apparent. (Appellant Br. at 39-42.) Regardless, he fails to show "some evidence" of either type for the same reasons.

1. Appellant fails to establish there were no African Americans on his—or any other—panel, as he speculates about the racial identities of various members.

As discussed *supra* in section I.C.2.a, Appellant provides mere speculation and allegation as to the racial composition of his panel. Nine Members never identified their race, either in a court-martial questionnaire or at trial.

2. Assuming no African American representation on Appellant's panel, Appellant presents no evidence of court stacking.

A convening authority's "intent" or "purpose" when selecting members is an "essential factor" in determining compliance with Article 25. *Bertie*, 50 M.J. at 492; *see also Gooch*, 69 M.J. at 359 (distinguishing between selection methods having "effect" of excluding group from those with "improper motive" to exclude group). "Deliberate" and "systematic" exclusion of potential members based on non-Article 25 criteria is "not permissible." *Bertie*, 50 M.J. at 492.

When raising a court stacking claim, an appellant must demonstrate an "improper motive" while selecting members. *See Riesbeck*, 77 M.J. at 165.

a. No evidence suggests the Convening Authority was even aware of the race of nine of the Members he selected to be part of Appellant's panel.

There is no evidence the Convening Authority was aware of the races of nine Members in Appellant's panel. The Record demonstrates that: (1) nine Members never indicated their race on their questionnaires; (2) no Member's questionnaire listed the Convening Authority's command as his or her current duty

station or assignment; and (3) every Member denied knowing or working with the Convening Authority in general voir dire. (J.A. 184, 824-929.)

b. Appellant fails to show the Convening Authority had an improper "intent" or "purpose" in selecting Members, and there is no presumption of impropriety.

There is no presumption that the absence of a particular group resulted from a convening authority "purposefully utilizing" improper considerations. *Bertie*, 50 M.J. at 492. As a result, the mere absence of a particular group from a panel does not establish impropriety in the members' selection process. *See Loving*, 41 M.J. at 285 (absence of racial minorities from single panel does not establish prima facie case of systematic exclusion); *United States v. Gray*, 51 M.J. 1, 49 (C.A.A.F. 1999) (same for absence of female members).

In *Bertie*, this Court rejected an appellant's allegation of court-stacking, based on "the composition of his court-martial panel and other panels within his command," because: (1) the appellant presented no evidence of improper intent; and (2) there was no "presumption of irregularity" from the absence of a group on courts-martial panels. 50 M.J. at 492. Because there was no evidence of the convening authority's improper intent, this Court noted the appellant's claim could "be denied on this basis alone." *Id.*

Here, like *Bertie*, Appellant presents no evidence that the Convening Authority had any improper "intent" or "purpose" when selecting Members for his case. His court-stacking claim can be rejected "on this basis alone."

D. Assuming Appellant provided "some evidence" of unlawful command influence, the appropriate remedy is for this Court to order a fact-finding hearing pursuant to *Dubay*.

An evidentiary hearing is a "method to develop facts necessary for appellate review." *United States v. Harvey*, 64 M.J. 13, 21 (C.A.A.F. 2006). Such a hearing affords the parties "the opportunity to address both the nature and the extent of . . . command influence, and its impact on the proceedings." *Id.*

If this Court determines Appellant has presented "some evidence" of unlawful command influence such that it would shift the burden to the United States to rebut his allegations, it should order an evidentiary hearing pursuant to *United States v. DuBay*, 17 C.M.A. 147 (C.M.A. 1967).

III.

THE MILITARY JUDGE PROPERLY DENIED APPELLANT'S TRIAL REQUEST—NOT HIS DISTINCT APPELLATE REQUEST. APPELLANT FAILED TO SHOW THE REQUESTED INFORMATION EXISTED, LET ALONE WAS "RELEVANT AND NECESSARY," AT TRIAL. FINALLY, THE LOWER COURT APPROPRIATELY AFFIRMED THE MILITARY JUDGE'S RULING.

A. Standard of review.

This Court reviews a military judge's ruling on a request for production of evidence for an abuse of discretion. *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004). A military judge abuses her discretion where: (1) her findings of fact are clearly erroneous; (2) she is influenced by an erroneous view of the law; or (3) her decision is outside the range of choices reasonably arising from the applicable facts and the law. *United States v. Graner*, 69 M.J. 104, 107 (C.A.A.F. 2010) (citation omitted).

B. The Military Judge properly denied Appellant's mid-trial discovery request.

An accused is entitled to have "relevant and necessary" evidence produced. R.C.M. 703(f)(1). Evidence is "relevant" if it "has any tendency to make a fact [of consequence] more or less probable than it would be without the evidence." Mil. R. Evid. 401. A party requesting evidence must "as a threshold matter . . . show that the requested material exist[s]." *Rodriguez*, 60 M.J. at 246.

1. The Military Judge properly denied Appellant's trial request for discovery related to the Convening Authority's "command"—not his disparate appellate request for discovery related to the Convening Authority's "pool of members."

Defense requests for production of evidence must: (1) "list the items of evidence to be produced"; (2) "include a description of each item sufficient to show its relevance and necessity [and] a statement where it can be obtained"; and (3) include, "if known, the name, address, and telephone number of the custodian of the evidence." R.C.M. 703(f)(3).

In *Graner*, this Court held that, because the appellant failed to satisfy his burden under R.C.M. 703(f)(3), a military judge did not abuse his discretion by declining to order production of evidence. 69 M.J. at 108. There, the appellant had requested, without specificity, various memoranda from Department of Defense officials. *Id.* at 106-07. Because the appellant had failed to describe each piece of evidence "sufficient to show its relevance and necessity," this Court held the appellant had "failed to meet [his] burden with respect to any document encompassed by this issue." *Id.* at 108.

Here, Appellant requested—and the Military Judge denied production of—"a statistical breakdown of the population as far as race with respect to the convening authority's command." (J.A. 196.) Contrary to Trial Defense Counsel's actual words, Appellant now claims this was a "motion to produce evidence of the racial makeup of potential members." (Appellant Br. at 47.)

Appellant's attempt on appeal to recharacterize his trial request is a direct result of his failure at trial to "descri[be] . . . each item sufficient[ly] to show its relevance and necessity [and] a statement where it [could] be obtained." *See* R.C.M. 703(f)(3). And because Appellant failed to adequately satisfy his burden under R.C.M. 703(f)(3), the Military Judge did not abuse her discretion in denying Appellant's motion.

This Court should reject Appellant's attempt to modify his trial motion because he failed to satisfy his burden, at trial, under R.C.M. 703(f)(3).

2. Appellant failed to meet his "threshold" burden to show that any requested statistical breakdown existed.

In *Rodriguez*, this Court held that a military judge did not abuse his discretion by denying an appellant's request for production of evidence because he had failed to "show that the requested material existed." 60 M.J. at 246. This Court determined that a party moving for production of evidence must, as a "threshold matter," show that the evidence requested actually existed. *Id.*

Here, as in *Rodriguez*, Appellant failed to show at trial that "a statistical breakdown of the population as far as race with respect to the convening authority's command" ever existed. (*See* J.A. 192-98.) Appellant admits this information does not exist today, suggesting instead that the Convening Authority create this evidence by "try[ing] to access" Department of Defense data and supplementing it with other data. (Appellant Br. at 49.) Appellant thus assumes:

(1) the data he desires exists; (2) exists in an accessible format; and (3) has "evidentiary value" to his claim of exclusion.

Because Appellant failed to demonstrate to the Military Judge that his requested statistics existed, denial of his request was not an abuse of discretion.

3. Assuming a racial breakdown of the Convening Authority's command did exist, Appellant failed to demonstrate its relevance.

Here, Appellant failed to demonstrate the relevance of any "statistical breakdown of the population as far race with respect to the convening authority's command." (*See* J.A. 192-98.)

a. Appellant failed to show his panel did not include African Americans.

As discussed *supra* in section I.C.2.a, Appellant failed to demonstrate at trial that his panel did not include African Americans. As result, any statistical breakdown was irrelevant.

b. Assuming no African American representation on Appellant's panel, a statistical breakdown would not have been relevant to show court stacking or a Fifth Amendment violation.

While "statistics may be used to prove discriminatory intent," they are "generally not sufficient" without other supporting facts to show purposeful discrimination. *Riesbeck*, 77 M.J. at 164; *Loving*, 41 M.J. at 285.

In *United States v. Lewis*, this Court held an appellant failed to establish court stacking because he failed to show "a pattern of court stacking or improper actions or motives on the part of the Government." 46 M.J. 338, 342 (C.A.A.F. 1997). There, the appellant presented three years of member selection data, as well as a "unit strength report," which showed that the appellant's court-martial panel had a statistically anomalous number of women on the case. *Id.* at 339. But because appellant's statistical data did not reflect "the pool of individuals eligible and available to serve as court members," this court found the evidence to be insufficient. *Id.* at 341-42.

Here, as in *Lewis*, Appellant's requested data—"a statistical breakdown of the population as far as race with respect to the convening authority's command"—would not have made it more or less probable that he could show court stacking. Appellant's requested data would not have reflected "the pool of individuals eligible to serve as court members," and would not have reflected how many people would have been ineligible or disqualified from serving as members in his case.

Further, Appellant's requested data would not have been relevant to his Fifth Amendment claim. As discussed *supra* in section I, Appellant needed to provide statistical data related to: (1) the proportion of African American members in the eligible population; and (2) the proportion of African Americans selected for court-

martial panels over a "significant period of time." *See Castaneda*, 430 U.S. at 494-95. A statistical breakdown of the Convening Authority's "command" would demonstrate neither factor.

Because Appellant's requested data would not have reflected the eligible pool of members to establish a claim, it was irrelevant—even assuming there were no African Americans on his panel.

C. The Navy-Marine Corps Court of Criminal Appeals properly affirmed the Military Judge's denial of the discovery request.

An appellate court must affirm the decision of a lower court "if the result is correct although the lower court relied upon a wrong ground or gave the wrong reason." *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943) (citation omitted). This principle applies in military courts. *See, e.g.*, *United States v. Perkins*, 78 M.J. 381 (C.A.A.F. 2019) (upholding suppression ruling on grounds different from trial court); *see also United States v. Robinson*, 58 M.J. 429, 433 (C.A.A.F. 2003) (affirming military judge's ruling because she "reached the correct result, albeit for the wrong reason").

In *Robinson*, this Court held that a military judge "did not err by denying [a] motion to suppress," even though she gave "the wrong reason" for denying suppression. 58 M.J. at 433. There, the military judge concluded—based on an incorrect legal standard—police were justified in conducting an investigative stop of the appellant. *Id.* This Court held the military judge's erroneous legal

conclusion harmless because—after applying the correct legal standard—it determined the military judge "reached the correct result [on the motion], albeit for the wrong reason." *Id.*

Here, as in *Robinson*, the Court of Criminal Appeals found the Military Judge reached an erroneous legal conclusion when she denied Appellant's discovery motion as untimely, but still affirmed the Ruling. (J.A. 10-11.) This was proper under *Robinson*, and Appellant's claims the Court of Criminal Appeals erred are meritless. (*See* Appellant Br. at 52-53.)

Conclusion

Wherefore, the Government respectfully requests that this Court affirm the findings and sentence as adjudged and approved below.

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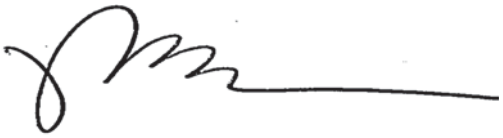

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