IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Willie C. JETER Lieutenant Junior Grade (O-2) United States Navy, Appellant	**BRIEF ON BEHALF OF APPELLANT** Crim.App. Dkt. No. 202000169 USCA Dkt. No. 22-0065/NA

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

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Issue Presented

WHETHER THE CONVENING AUTHORITY VIOLATED LTJG JETER'S EQUAL PROTECTION RIGHTS, OVER OBJECTION, WHEN HE CONVENED AN ALL-WHITE PANEL FOR A MINORITY ACCUSED USING A RACIALLY NON-NEUTRAL PROCESS FOR SELECTION AND PROVIDED NO EXPLANATION FOR THE MONOCRHOMATIC RESULT BEYOND A NAKED AFFIRMATION OF GOOD FAITH.

Introduction

For over a century, the Supreme Court has battled invidious discrimination in the jury selection process.[1] Time and again, our nation's highest Court has held that an accused should not have to overcome an insurmountable burden to establish a *prima facie* case of racial discrimination.[2] We are far from having concluded that battle—racism sadly persists in our institutions.[3] But safeguards exist to protect minority accused from this pernicious evil.

Seventy years ago, in *Avery v. Georgia*, and fifty years ago, in *Alexander v. Louisiana*, the Supreme Court created and re-affirmed a framework for addressing discrimination in the selection of jurors.[4] This framework applied to a system in which an administrative agent who, despite operating under race-neutral statutory guidelines to select jurors, utilized a selection process that identified potential members by race. The military in this case employed a process that is generally akin to the systems in *Avery* and *Alexander*—a convening authority (an administrative agent) applied Article 25, UCMJ (race-neutral statutory guidance) to select members using questionnaires that solicited and identified their race.

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[1] *See generally Flowers v. Mississippi*, 139 S. Ct. 2228, 2235 (2019); *Strauder v. West Virginia*, 100 U.S. 303, 306-07 (1879).

[2] *Flowers*, 139 S. Ct. at 2241; *see Alexander v. Louisiana*, 405 U.S. 625, 631-32 (1972); *Whitus v. Georgia*, 385 U.S. 545, 551 (1967); *Avery v. Georgia*, 345 U.S. 559, 562 (1953).

[3] *See Flowers*, 139 S. Ct. at 2235.

[4] *Alexander*, 405 U.S. at 625; *Avery*, 345 U.S. at 559.

Under the *Avery* and *Alexander* tests, LTJG Jeter established a *prima facie* showing of racial discrimination in the selection of his initial member panel. He did so by showing that he is a member of a cognizable racial group, that his panel was selected using a non-race-neutral process, and that his monochromatic panel had no minority representation. The Supreme Court is clear—the burden shifted to the Government to demonstrate no improper discrimination.

Lieutenant Junior Grade Jeter also established a *prima facie* case of racial discrimination under *Batson v. Kentucky*. By replacing all members on the original convening order, the Convening Authority removed the only two black members ever detailed to this case and replaced them with an all-white panel. That, accompanied with the facts and circumstances here, shifted the burden.

This Court should apply the Supreme Court's pre-established frameworks. If racism exists in the civilian world then surely the armed forces, which draws from all walks of life, must contain this taint. There is no magic bullet that strikes racism from the hearts of military ranks. Convening Authorities are no exception, and should not be given special deference. The right to equal protection should never be "essentially unenforceable in the military."[5] The scrutiny necessary to extirpate the deep-seeded taint of racial discrimination must apply to the armed forces.

[5] *United States v. Bess*, 80 M.J. at 20 n.10 (Ohlson, J., with whom Sparks, J. joined, dissenting) ("under the majority's view of *Castaneda*, the constitutional right to equal protection would be essentially unenforceable in the military").

Statement of Statutory Jurisdiction

Lieutenant Junior Grade Jeter's approved general court-martial sentence included a dismissal and confinement for more than one year.[6] The lower court exercised jurisdiction under Article 66(b)(1), Uniform Code of Military Justice ("UCMJ").[7] Thus, this Court has jurisdiction under Article 67(a)(3), UCMJ.[8]

Statement of the Case

At a general court-martial in 2017, LTJG Jeter was found guilty, contrary to his pleas, of one specification of sexual harassment, two specifications of drunken operation of a vehicle, three specifications of sexual assault, one specification of extortion, one specification of burglary, two specifications of conduct unbecoming an officer and gentleman, one specification of communicating a threat, and two specifications of unlawful entry in violation of Articles 92, 111, 120, 127, 129, 133, and 134, UCMJ, respectively.[9] The members sentenced him to confinement for twenty years and a dismissal.[10] The Convening Authority approved the sentence as adjudged and, except for the dismissal, ordered it executed.[11]

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[6] Joint Appendix ("J.A.") 072.
[7] 10 U.S.C. § 866(b)(1) (2016).
[8] 10 U.S.C. § 867(a)(3) (2016).
[9] 10 U.S.C. §§ 892, 911, 920, 927, 929, 933, 934 (2016); J.A. 070-71.
[10] J.A. 072.
[11] J.A. 073-79.

The Record of Trial was first docketed with the lower court on August 22, 2017. In a published opinion, the lower court affirmed LTJG Jeter's findings and sentence.[12]

On March 4, 2019, LTJG Jeter first petitioned this Court for review of this case. This Court granted LTJG Jeter's petition but ordered no briefs be filed. After deciding *United States v. Bess*, this Court summarily vacated the lower court's decision and remanded LTJG Jeter's case for further consideration in light of *Bess*.[13]

The remanded case was re-docketed at the lower court on July 1, 2020. On remand, the lower court ordered the Convening Authority, his Acting Convening Authority, and his Staff Judge Advocate to submit affidavits related to the member-selection process. On October 20, 2021, after briefing and oral argument, the lower court issued a published opinion affirming LTJG Jeter's findings and sentence.[14]

Lieutenant Junior-Grade Jeter petitioned this Court on December 20, 2021 and this Court granted review on May 3, 2022.

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[12] *United States v. Jeter*, 78 M.J. 754 (N-M. Ct. Crim. App. 2019).
[13] *United States v. Jeter*, 80 M.J. 200 (C.A.A.F. 2020); *Bess*, 80 M.J. at 1.
[14] *United States v. Jeter*, 81 M.J. 791 (N-M. Ct. Crim. App. 2021).

Statement of Facts

A. After soliciting potential members' race, the Convening Authority selected a panel composed entirely of white men for the trial of a black man.

The Convening Authority solicited information about the race and gender of potential members.[15] This information was provided to the Convening Authority through questionnaires that the Convening Authority used to select the members.[16] All questionnaires except for two identified their race.[17]

There were three convening orders in this case: an original and two amending orders.[18] The original convening order contained two black men, but the first amending order removed and replaced all members.[19] The panel in the first amending order contained eight new members.[20] Of note, the name of one of the [redacted] members [redacted] was highlighted, without explanation, on the first amending order.[21] All selected members were white men.[22]

Lieutenant Junior Grade Jeter is a black man. The Convening Authority later admitted "it is likely I would have known the race of the Appellant."[23]

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[15] J.A. 105, 133, 142, 151, 160, 169, 178; *Jeter*, 81 M.J. at 794.
[16] J.A. 093, 099, 105, 133, 142, 151, 160, 169, 178; *Jeter*, 81 M.J. at 794.
[17] J.A. 093, 099, 105, 133, 142, 151, 160, 169, 178; *Jeter*, 81 M.J. at 794 n.9.
[18] J.A. 091-103.
[19] J.A. 091-97; *Jeter*, 81 M.J. at 797.
[20] J.A. 049.
[21] J.A. 049, 124-131.
[22] J.A. 056; *Jeter*, 81 M.J. at 794.
[23] J.A. 094.

B. The Defense objected to the exclusion of members based on race and gender at a court-martial onboard the world's largest naval base.

At the beginning of the first day of trial on the merits, the military judge raised concerns about the peculiarly small composition of the panel provided by the first amending order.[24] He stated, "we're the largest naval base in the world, but the waterfront is literally littered with ships parked left and right side-by-side, and we have eight members."[25] In response, the Government told the military judge that the Convening Authority identified four additional members.[26] Of these four additional members, the Convening Authority ultimately only detailed one more member—another white male.[27]

As a black man, LTJG Jeter found the absence of minority representation to be peculiar and was seriously concerned that racism may have played a part in the selection of this all-white panel. His counsel raised the issue of invidious discrimination in the member-selection process.[28] Specifically, he objected to the "systematic exclusion of members based on race and gender" through "the Convening Authority's ability to select members ahead of time."[29] After reviewing

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[24] J.A. 051.
[25] J.A. 051.
[26] J.A. 051.
[27] J.A. 050, 178.
[28] J.A. 054.
[29] J.A. 054-55.

the members' questionnaires, the military judge found that the panel was composed of "all white men."[30]

C. The Government argued that the exclusively white male panel was representative of the composition of the military.

The trial counsel argued that the absence of minorities was to be expected because "the military itself is made up of a large majority of what the panel is representative of" (white men).[31] The military judge disagreed, stating "I don't know if I agree with your statement that the military is made up generally of white males."[32] He held that "[t]he military is quite a diverse tapestry of people."[33]

D. The military judge refused to compel the Convening Authority to explain the selection process. He declined to find discrimination without evidence of a pattern of the Convening Authority detailing all-white panels.

The military judge stated that he did not have any evidence of purposeful, systematic exclusion of minorities or women based on the composition of the panel.[34] The trial defense counsel attempted to fill the evidentiary vacuum regarding whether invidious discrimination was involved in the member-selection process by moving for the military judge to compel the Convening Authority to explain the

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[30] J.A. 056; *Jeter*, 81 M.J. at 794 ("Based on the military judge's factual finding at trial, all nine of these members of the venire were white").
[31] J.A. 056.
[32] J.A. 056.
[33] J.A. 056.
[34] J.A. 056.

result.[35] The Defense noted it was unable to "delve into the thought processes of the Convening Authority" when "all we have is the makeup [of the panel] to go on."[36]

The military judge denied this request.[37] He ruled that there was no evidence of purposeful discrimination in the selection process—"other than the bare makeup of the panel."[38] Although the Defense did not request that minority members be added to the panel, the military judge volunteered that he did not have authority to order the Convening Authority to include diversity on the panel.[39] But he also noted that the Defense could re-raise the issue if they somehow discovered more evidence.[40] He stated that evidence of a pattern of the Convening Authority detailing all-white member panels was the type of evidence he referred to.[41] He then warned the Convening Authority by stating "with that said, Convening Authority of this region[,] I wouldn't do it twice."[42]

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[35] J.A. 057.
[36] J.A. 057.
[37] J.A. 057.
[38] J.A. 057.
[39] J.A. 057.
[40] J.A. 057-58.
[41] J.A. 057-58.
[42] J.A. 058-59.

E. The Defense presented some evidence of a pattern of the Convening Authority detailing all-white member panels. The military judge again denied LTJG Jeter's request.

After the members were seated in open court, the Defense re-raised its original objection based on discrimination in the member-selection process.[43] The Defense presented to the military judge a portion of the record of trial from *United States v. Bess* that included an open-court colloquy in which the defense counsel alleged that in "at least the last two [other] panels [convened by the same Convening Authority] . . . we've had all-white panel members with an African-American client."[44] Evidence of this pattern was later strengthened when the lower court attached to the record a declaration from the former Executive Officer of Defense Service Office Southeast who observed the pattern.[45]

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[43] J.A. 060.
[44] J.A. 061, 069.
[45] J.A. 080-85. The Executive Officer, who supervised defense counsel in the region, confirmed the pattern of all-white panels. He sent a letter to the Convening Authority after the Convening Authority detailed an all-white panel in *United States v. LTJG Johnson*, providing:

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

Id.

After presenting the portion of the record from *Bess* to the military judge, the Defense re-raised its objection, stating:[46]

> ADC: The defense's contention is that the questions regarding race and gender on the questionnaire shows that the Convening Authority was soliciting this information and considering it, and that combined with the makeup that we have should be sufficient to at least require the government to show that there was no improper consideration

The panel had been seated, confirming for the parties that the panel was comprised of all white males, and the Government did not challenge the fact.[47] The Defense specifically articulated that the issue was an equal protection violation, and the military judge again denied the Defense request.[48] Initially, he framed his ruling as a response to an Article 25, UCMJ issue.[49] Although it is inaudible, it appears the defense counsel re-oriented the military judge to the fact that the Defense raised the issue of improper exclusion based on race rather than Article 25.[50] This is because the military judge responded, "Okay. But in this case, I still don't see the systematic exclusion of those people."[51]

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[46] J.A. 061.
[47] J.A. 061-63.
[48] J.A. 063.
[49] J.A. 063.
[50] J.A. 063.
[51] J.A. 063.

In sum, by the time of this final ruling, the military judge was aware that:

1. On the largest naval base in the world, the two men serving as the Convening Authority decided that not a single black person was best qualified to serve as a member in LTJG Jeter's court-martial.[52]

2. The panel was unusually small (as first noted by the judge himself), and the Convening Authority remedied this by adding another white man.[53]

3. The Convening Authority added the additional white man despite having four individuals (whose race was not established) available.[54]

4. The process for selecting members was not race-neutral (race was indicated on the majority of the questionnaires).[55]

5. And this was not the first time the issue of discrimination during member-selection had been raised regarding this Convening Authority.[56]

And yet the military judge denied the Defense request to simply have the Convening Authority explain how an all-white-male member panel was selected under these circumstances.[57] The all-white court-martial panel convicted LTJG Jeter and sentenced him to a dismissal and confinement for twenty years.[58]

F. The lower court ordered affidavits related to the member-selection process four-and-a-half years after the court-martial.

On remand after oral argument, the lower court "found the evidence presented to this Court sufficient to question the presumption of regularity of the convening

[52] J.A. 051, 054.
[53] J.A. 050, 178.
[54] J.A. 051.
[55] J.A. 105, 133, 142, 151, 160, 169, 178; *Jeter*, 81 M.J. at 794 n.9.
[56] J.A. 060-61.
[57] J.A. 063.
[58] J.A. 070-72.

authorities' member-selection."[59] The lower court ordered affidavits explaining the member-selection process from the Convening Authority, the Acting Convening Authority, and their Staff Judge Advocate.[60] By this time, both the Convening Authority and Acting Convening Authority had retired from the Navy. All three men (who are all white themselves) answered the majority of the lower court's questions by stating they "do not recall."[61]

For example, the Acting Convening Authority (who signed the first amending order) stated "I do not recall" to every question the lower court asked specific to LTJG Jeter's case.[62] Of the nineteen questions he responded to, the only answers that did *not* include "I do not recall" were two questions regarding the general process of member-selection, a statement that he is white, and a caveated denial that he was aware of LTJG Jeter's race when selecting the panel.[63]

Likewise, even though the Convening Authority (who signed the original convening order and the second amending order) acknowledged that he reviewed the court-martial member questionnaires (the majority of which indicated the members' race), he claimed he did not remember knowing the race of the members.[64]

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[59] *Jeter*, 81 M.J. at 795.
[60] J.A. 086-88.
[61] J.A. 091-103.
[62] J.A. 049, 095-97.
[63] J.A. 095-97.
[64] J.A. 091.

However, he also provided that he "may have been aware of the race of some of the prospective members."[65] Of note, his Staff Judge Advocate stated that the Convening Authority would ordinarily spend at least a full day reviewing the questionnaires.[66] But like the Acting Convening Authority, the answers the Convening Authority gave with regard to member-selection all referred to the process generically, not with regard to this specific case.[67] He did note that he likely "would have known the race of the Appellant."[68]

The Staff Judge Advocate provided slightly more detail regarding the member-selection process.[69] Notably, he acknowledged that the Convening Authority drew court-martial members not only from his own staff, but the entire panoply of "commands resident within Navy Region Mid-Atlantic."[70] Beyond a generic claim to have followed statutory Article 25 criteria, he provided no explanation as to how nine of nine members ended up being white men, despite having an enormous body of individuals to choose from.[71]

While the Staff Judge Advocate stated "the race of a particular accused never came up," the Convening Authority acknowledged that he likely knew that LTJG

[65] J.A. 093.
[66] J.A. 099.
[67] J.A. 091-94.
[68] J.A. 094.
[69] J.A. 098-103.
[70] J.A. 098.
[71] J.A. 098.

Jeter was black based on the "significant amount of paperwork and investigation material" that would have been provided by the Staff Judge Advocate.[72]

Finally, the Staff Judge Advocate acknowledged that this was not the only time concerns regarding an all-white panel had been raised during his and the Convening Authority's tenures.[73]

Ultimately, the Convening Authority, Acting Convening Authority, and their Staff Judge Advocate acknowledged that the court-martial questionnaires—most of which plainly indicated the members' races—were thoroughly reviewed.[74] None of the declarations provided substantive information as to how, on the largest naval installation in the world, a black man ended up with an all-white panel of members.

[72] J.A. 094, 103.
[73] J.A. 101-02.
[74] J.A. 091-103, 105, 133, 142, 151, 160, 169, 178; *Jeter*, 81 M.J. at 794 n.9.

Summary of Argument

The Supreme Court in *Avery v. Georgia* and *Alexander v. Louisiana* provided that minority accused can establish a *prima facie* case of racial discrimination in a jury selection process by showing: (1) they are a member of a cognizable racial group; (2) their member panel was selected using a non-race-neutral process; and (3) members of their race were either absent from, or statistically underrepresented, on their panel.

Lieutenant Junior Grade Jeter established such a *prima facie* case. First, he is a black man, and thus a member of a cognizable racial minority group. Second, the Convening Authority employed a non-race-neutral member-selection process by soliciting race through all but two of the nine member questionnaires. Finally, the resulting panel was composed entirely of white men. Pursuant to *Avery* and *Alexander*, these factors established a *prima facie* case.

Having established a *prima facie* case of racial discrimination, the burden shifted to the Government to adequately explain the exclusion. The Government failed to make such a showing at trial and the military judge failed to require it. The Convening Authority's naked affirmations of good faith failed as well. The Supreme Court specifically provided that "affirmations of good faith in making individual selections are insufficient to dispel a *prima facie* case of discrimination."[75] Thus,

[75] *Alexander*, 405 U.S. at 632.

under *Avery* and *Alexander*, LTJG Jeter established an unrebutted *prima facie* case of racial discrimination.

Alternatively, this Court should find that LTJG Jeter established a *prima facie* case of racial discrimination under *Batson v. Kentucky*. The Supreme Court in *Batson* provided three factors to establish such a *prima facie* case: (1) the defendant is a part of a cognizable racial group; (2) the Government removed venire members of the same racial group; and (3) the facts and circumstances raised an inference of exclusion on account of race. Here, these factors are met because (1) LTJG Jeter is a black man, (2) the Government removed venire members of his racial group, and (3) the facts and circumstances raise an inference of exclusion on account of race.

This Court could also depart from its decision in *United States v. Bess* and find LTJG Jeter established a *prima facie* case of discrimination under *Castaneda v. Partida*. This Court's holding that a one-year pattern is insufficient to demonstrate discrimination, and its strong implication that even a five-year pattern would be insufficient, disregards the fact that convening authorities serve for two to three years. Thus, this Court should depart from *Bess* and render the *Castaneda* framework of establishing a *prima facie* case enforceable in the military.

Ultimately, because LTJG Jeter established an unrebutted *prima facie* case of racial discrimination in the member-selection process, this Court should dismiss the findings and specifications in this case.

Argument

THE CONVENING AUTHORITY VIOLATED LTJG JETER'S EQUAL PROTECTION RIGHTS, OVER OBJECTION, WHEN HE CONVENED AN ALL-WHITE PANEL FOR A MINORITY ACCUSED USING A RACIALLY NON-NEUTRAL PROCESS FOR SELECTION AND PROVIDED NO EXPLANATION FOR THE MONOCHROMATIC RESULT BEYOND A NAKED AFFIRMATION OF GOOD FAITH.

Standard of Review

Whether the Convening Authority's selection of members violated the Fifth Amendment's equal protection guarantee is a question of law reviewed *de novo*.[76]

Discussion

The major aspects of the military's member-selection process in this case directly mirror historical civilian jury selection practices the Supreme Court has already reviewed in *Avery v. Georgia* and *Alexander v. Louisiana*.[77] As such, the Supreme Court's precedents involving these civilian jury selection practices provide relevant guidance on how equal protection rights should be applied in the context of the military—including the Convening Authority's venire selection.

Accordingly, in light of these Supreme Court precedents, this Court should hold that an accused who is a member of a racial minority can establish a *prima facie*

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[76] *Bess*, 80 M.J. at 7.
[77] *Alexander*, 405 U.S. at 625-631; *Avery*, 345 U.S. at 559-563.

case of racial discrimination by showing that: (1) the accused is a member of a cognizable racial group; (2) the member panel was selected using non-race-neutral processes; and (3) members of the accused's race were either absent from, or statistically underrepresented on, his panel.

A. Equal protection against invidious racial discrimination applies to the court-martial member-selection process.

The Supreme Court more than a century ago held that the Government denies a minority accused equal protection under the laws when members of his or her race have been purposefully excluded from deciding guilt or innocence.[78] *United States v. Strauder* "laid the foundation for the Court's unceasing efforts to eradicate racial discrimination in the procedures used to select the venire from which individual jurors are drawn."[79] "In the decades after *Strauder*, the Court reiterated that States may not discriminate on the basis of race in jury selection."[80] Although "critical problems persisted," the Court has maintained that "even a single instance of race discrimination against a prospective juror is impermissible."[81]

Two years after *Batson* was decided, the Court of Military Appeals considered how it applied to the military. The Court observed that *Batson* "is not based on a right to a representative cross-section on a jury but, instead, on an equal-protection

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[78] *Strauder*, 100 U.S. at 303.
[79] *Batson v. Kentucky*, 476 U.S. 79, 84-85 (1986).
[80] *Flowers*, 139 S. Ct. at 2239.
[81] *Id*. at 2239-42.

right to be tried by a jury from which no 'cognizable racial group' has been excluded."[82] The Supreme Court had also previously clarified this point in *Alexander v. Louisiana*, holding that while there was no right to minority representation on a jury panel, the equal protection right still entitles defendants to a jury selected without invidious discrimination.[83]

Ultimately, the Court of Military Appeals held that the Fifth Amendment equal protection right to a jury selected without invidious discrimination applies to courts-martial "just as it does to civilian juries."[84]

B. Lieutenant Junior-Grade Jeter established a *prima facie* case of an equal protection violation in accordance with *Avery* and *Alexander*.

1. The military's venire selection process in this case mirrors the system Georgia employed in *Avery v. Georgia*.

The military employed a selection process for the initial venire panel similar to Georgia's jury member-selection process that the Supreme Court evaluated in *Avery v. Georgia*. The major aspects of the jury-selection process considered in *Avery* were threefold and similar to the military in each key aspect.

First, just like the military in this case, Georgia's system was not race-neutral because it identified most individuals in the pool of prospective jurors by race.[85] Tax

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[82] *United States v. Santiago-Davila*, 26 M.J. 380, 389-90 (C.M.A. 1988).
[83] *Alexander*, 405 U.S. at 628-29.
[84] *Santiago-Davila*, 26 M.J. at 389-90.
[85] *See Avery*, 345 U.S. at 560-63.

rolls in Georgia included racial identifiers, and it was these tax rolls from which jury pools were drawn.[86] Likewise, although the use of race on military members' questionnaires was not required, the Convening Authority and his agents in this case used questionnaires that identified the races of most of the members.[87] Thus, as in *Avery*, a non-race-neutral procedure was employed in this case.

Second, both Georgia at the time of *Avery* and the present-day-military have statutory guidance on who should be selected for jury service.[88] The Georgia statute required commissioners to select jurors who were "upright" and "intelligent."[89] In accordance with Article 25, UCMJ, Convening Authorities are required to select members "best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament."[90] The statutory requirement in force at the time of *Avery* is thus similar to Article 25's present-day military requirements.

Finally, both systems employ the use of an administrative agent directed by law to choose members from a larger population of available individuals. In *Avery*, the process involved administrative agents referred to as "commissioners" who

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[86] *Id.*
[87] Manual for Courts-Martial, Rule for Court-Martial 912(a)(1)(C)(2016).
[88] *Avery*, 345 U.S. at 562.
[89] *Avery*, 345 U.S. at 562; *see also Whitus*, 385 U.S. at 548.
[90] 10 U.S.C. § 825 (2016).

selected jury members from their communities based on statutory criteria.[91] In the military, a convening authority operates in the same way. He or she acts as an administrative agent using the statutory Article 25 criteria to choose available individuals from the military community to sit on the panel.

In sum, the military member-selection process in this case is the same in all key respects as the process Georgia utilized in *Avery*. As such, the Supreme Court's analysis and ruling in *Avery* should guide this Court in evaluating whether Appellant's equal protection rights were violated.

2. The Supreme Court has twice held that where a non-race-neutral system was employed and a monochromatic panel resulted, a *prima facie* violation of an accused's equal protection rights is established.

a. *Avery* provided that a *prima facie* violation of an appellant's equal protection rights is established by a total absence of minorities where a racially non-neutral selection process was employed.

In *Avery*, the Supreme Court held that the absence of any minority members from a venire panel when a racially non-neutral selection process was employed was sufficient to establish a *prima facie* case of racial discrimination, which the state could then rebut.[92]

[91] *Avery*, 345 U.S. at 560-61.

[92] *Avery*, 345 U.S. at 560; *see also Washington v. Davis*, 426 U.S. 229, 241 (1976) ("A *prima facie* case of discriminatory purpose may be proved as well by the absence of Negroes on a particular jury combined with the failure of the jury commissioners to be informed of eligible Negro jurors in a community, or with racially non-neutral selection procedures."); *Hill v. Texas*, 316 U.S. 400, 414 (1942).

In doing so, the Supreme Court rejected the rationale that the appellant was required to show "a particular act of discrimination by a particular officer responsible for the selection of the jury."[93] The simple fact that jurors were identified by their race meant "opportunity was available to resort to it at other stages in the selection process."[94] Where not a single minority was selected to the panel, the Court found that was enough to establish a *prima facie* case even though no actual discrimination was shown.[95]

The Supreme Court also rejected the argument that it was the appellant's duty to fill any "factual vacuum."[96] The Supreme Court placed that burden on the Government, holding that "if there is a 'vacuum' it is one which the state must fill, by moving with sufficient evidence to dispel the *prima facie* case of discrimination."[97] Where not a single African American was selected to the panel, and the jury selection process was racially non-neutral, the Court found that was enough to establish a *prima facie* case.[98]

[93] *Avery*, 345 U.S. at 562.
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.*

b. In *Alexander*, the Court went further and held that even statistical underrepresentation can establish a *prima facie* equal protection violation where a racially non-neutral selection process was employed.

In *Alexander v. Louisiana*, the Supreme Court found that a *prima facie* case of discrimination is established by the use of jury questionnaires that identify members by race when the result is minority underrepresentation on the panel.[99] The Court noted that regardless of which part of the jury-selection process is being evaluated, "[t]he principles that apply to the systematic exclusion of potential jurors on the ground of race are essentially the same."[100]

The appellant in *Alexander* relied on statistical data to establish a *prima facie* case of discrimination based on the fact that minorities were only included on his grand jury and venire in token numbers.[101] The process of selecting members in *Alexander* involved a panel of five white men who compiled a list of names of potential jurors and sent questionnaires to individuals on the list.[102] As in this case, the questionnaires included a question about the recipient's race.[103] The panel then selected roughly 2,000 potential jurors, ruling out roughly 5,000 others "ostensibly on the ground that these persons were not qualified."[104] The panel then selected a

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[99] *Alexander*, 405 U.S. at 630-31.
[100] *Id*. at 626 n.3.
[101] *Id*. at 626-31.
[102] *Id*. at 627-28.
[103] *Id*.
[104] *Id*.

smaller group of individuals purportedly at random.[105] Although some black jurors were selected, the numbers were not representative of the population at large.[106]

While acknowledging that "a defendant has no right to demand that members of his race be included in the grand jury that indicts him," the Court still found that the statistical underrepresentation was evidence that established a *prima facie* case of invidious discrimination because the non-race-neutral process presented "a clear and easy opportunity for racial discrimination."[107] Thus, the Court found that where a non-race-neutral jury selection process is employed, a *prima facie* case can be established even if there are *some* minority members present on the panel.[108]

In this case, the lower court directed that the Convening Authority, the Acting Convening Authority, and the Staff Judge Advocate to provide information regarding the number of available potential minority members. Importantly, the Staff Judge Advocate acknowledged that this information was ascertainable at the time of trial. Thus, if the military judge had granted the Defense's request at trial, the command could have provided this information. Nevertheless, on the largest Naval installation in the world, where the "waterfront is literally littered with ships parked left and right, side by side," black members were statistically

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[105] *Id*.
[106] *Id*. at 628-30.
[107] *Id*.
[108] *Id*. at 628-29.

underrepresented—zero percent of black individuals were detailed as members in this case.[109] In *Alexander*, statistics were useful because there were black members included in the panel, albeit in suspiciously low numbers. But here, where none were detailed at all, the statistical data is self-evident.

Further, the *Alexander* Court reiterated from *Avery* that while statistical data was useful to evaluate underrepresentation during the selection process writ-large, their decision was also based on the fact that a non-race-neutral method of selection was employed and ultimately the grand jury who indicted the accused was monochromatic.[110] The Court reaffirmed their holding from *Avery* that evidence of specific discrimination is unnecessary "given the fact that no Negroes had appeared on the final jury: 'obviously that practice makes it easier for those to discriminate who are of a mind to discriminate.'"[111] In both *Avery* and *Alexander*, the Supreme Court noted that a *prima facie* case was established even though there was no evidence of conscious discrimination.[112]

Accordingly, minority accused can establish a *prima facie* case of racial discrimination by showing: (1) they are a member of a cognizable racial group; (2) their member panel was selected using non-race-neutral processes; and (3) members

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[109] J.A. 051, 056.
[110] *Alexander*, 405 U.S. at 630.
[111] *Id.* at 631 (citing *Avery*, 345 U.S. at 562).
[112] *Alexander*, 405 U.S. at 630.

of their race were absent from, or statistically underrepresented, on their panel. As the Supreme Court reaffirmed in *Batson*, "This combination of factors raises the necessary inference of purposeful discrimination because the Court has declined to attribute to chance the absence of black citizens on a particular jury array where the selection mechanism is subject to abuse."[113]

3. Lieutenant Junior Grade Jeter established a *prima facie* case of an equal protection violation.

The facts in this case establish a *prima facie* case of discrimination. First, LTJG Jeter is black, and thus a member of a cognizable racial minority group. Second, the Convening Authority employed a non-race-neutral member-selection process. Race was indicated in all but two of nine questionnaires. Finally, the resulting panel was composed entirely of white men. Pursuant to *Avery* and *Alexander*, these factors are sufficient to establish a *prima facie* case.

Additionally, the military judge suggested that the Defense needed to submit evidence that this had occurred on other occasions—despite that Supreme Court precedent holds that the Defense is not required to show specific discrimination or a pattern of discriminatory actions in order to establish a *prima facie* case where a racially non-neutral selection process was used.[114] But when the Defense ultimately presented some evidence to show that further inquiry was necessary (that this

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[113] *Batson*, 476 U.S. at 95.
[114] *Batson*, 476 U.S. at 95-96; *Alexander*, 405 U.S. at 631; *Avery*, 345 U.S. at 562.

convening authority selected all-white panels in other cases), the military judge still did not change his original ruling that there was no evidence of discrimination in the member-selection process. He did not even compel additional testimony, which could have explained whether discrimination was involved in the panel selection.

Lastly, while the lower court found LTJG Jeter did not make a *prima facie* case of racial discrimination, its actions raise an interesting question: if LTJG Jeter did not establish a *prima facie* case of racial discrimination, then why did the lower court order the Convening Authority, Acting Convening Authority, and their Staff Judge Advocate to explain their actions?[115]

The lower court noted that it found the circumstances suspicious enough to require an explanation from these individuals, stating, "We found the evidence presented to this Court sufficient to question the presumption of regularity of the convening authorities' member-selection."[116] It seems they were simply unwilling to call it what it really was—a *prima facie* case of discrimination that shifted the burden to the Government. The lower court's actions demonstrate that the threshold of a *prima facie* case was met. And regardless, the facts here show that a *prima facie* case was established. The burden shifted to the Government.

[115] *See Jeter*, 81 M.J. at 795.
[116] *Id.*

C. The Convening Authority's naked affirmations of good faith are insufficient to rebut a *prima facie* case of discrimination.

"Once the defendant makes the requisite showing [of a *prima facie* case] the burden shifts to the State to explain *adequately* the racial exclusion."[117] In *Alexander*, the Supreme Court stated, "affirmations of good faith in making individual selections are insufficient to dispel a *prima facie* case of discrimination."[118] This Court has further noted that "If these general assertions were accepted as rebutting a defendant's *prima facie* case, the Equal Protection Clause 'would be but a vain and illusory requirement.'"[119]

In *Alexander*, "[t]he clerk of court, who was also a member of the jury commission, testified that no consideration was given to race during the selection procedure."[120] Likewise, in *Avery*, the commissioners never explained their process and the judge, who picked the panel using names selected by the commissioners, "testified that he did not, nor had he ever, practiced discrimination in any way, in the discharge of that duty."[121] The Court specifically noted that there was "no contradictory evidence" of discrimination.[122]

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[117] *Batson*, 476 U.S. at 94 (citing *Alexander*, 405 U.S. at 632) (emphasis added).
[118] *Alexander*, 405 U.S. at 632.
[119] *Santiago-Davila*, 26 M.J. at 392 (citing *Norris v. Alabama*, 294 U.S. 587, 598 (1935)).
[120] *Id*.
[121] *Avery*, 345 U.S. at 561; *see also Whitus*, 385 U.S. at 549.
[122] *Avery*, 345 U.S. at 561.

The words of the Convening Authority, Acting Convening Authority, and their Staff Judge Advocate in this case could be taken straight from the mouths of the commissioners in either *Avery* or *Alexander*.[123] But here, the lower court inexplicably found the general denials adequate to explain how an all-white panel resulted.[124] Blanket denials were not good enough for the Supreme Court in *Avery* and *Alexander*, and they should not satisfy this Court either. This Court should find, as in *Avery* and *Alexander*, that the mere denials of untoward member-selection are insufficient to overcome the *prima facie* case LTJG Jeter established. The Convening Authority and Acting Convening Authority had an opportunity to explain themselves and they failed.

By comparison, in *United States v. Gooch*, the accused, an African American man, claimed that members were improperly excluded on the basis of race in violation of the Fifth Amendment.[125] The Government responded to this allegation at trial by providing a thorough explanation of the specific member-selection process employed, often accounting for the unavailability of individual members.[126] And they accomplished this without even needing to call the Convening Authority as a witness.[127] Based on the detailed information the Government provided through the

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[123] *See Avery*, 345 U.S. at 561; *Alexander*, 405 U.S. at 632.
[124] *Jeter*, 81 M.J. 797-98.
[125] *United States v. Gooch*, 69 M.J. 353, 358 (C.A.A.F. 2011).
[126] *Id*. at 355-56.
[127] *Id.*

testimony of a clerk from the Staff Judge Advocate's office who was intimately familiar with the selection process in that case, the Court agreed with the military judge that there was clearly no invidious discrimination during the member-selection process.[128] *Gooch* demonstrates the proper way for a command to show that no discrimination has taken place during the member-selection process. Unlike in this case, there was more than just general assertions and blanket denials from Government agents.

D. Alternatively, this Court should evaluate the Convening Authority's selection of members under *Batson v. Kentucky*.

1. Convening authorities effectively exercise an unlimited number of peremptory challenges.

Convening authorities have the broad discretion to select panel members who, "*in [their] opinion* [are] best qualified."[129] Accordingly, a convening authority "*has the functional equivalent of an unlimited number of peremptory challenges*."[130] But these challenges occur behind closed doors, in the privacy of convening authorities' offices, and outside the observation of court or counsel.

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[128] *Id*. at 359.
[129] 10 U.S.C. § 825(e)(2) (2016) (emphasis added).
[130] *United States v. Carter*, 25 M.J. 471, 478 (C.M.A. 1988) (Cox, J., concurring) (emphasis added).

2. **The principles in *Batson* apply to convening authorities' functional exercise of peremptory challenges through Article 25 member-selection.**

Before *Batson*, "prosecutors' peremptory challenges [were] largely immune from constitutional scrutiny."[131] *Batson* changed this paradigm, which previously required a defendant to demonstrate a history of racially discriminatory strikes.[132] The Supreme Court found that the lack of scrutiny created a "crippling burden of proof" that was "insurmountable."[133] The Court recognized its duty to protect jury-selection practice against government action "through its administrative officers in effecting the prohibited discrimination."[134] The Court found that it is a "denial of equal protection" where "procedures implementing a neutral statute [are] operated to exclude persons from the venire on racial grounds."[135]

Article 25, UCMJ, is a race-neutral statute.[136] Through its procedures, convening authorities exclude persons from venires.[137] In this respect, convening authorities are Government officers effectuating peremptory challenges outside *voir*

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[131] *Batson*, 476 U.S. at 92-93.
[132] *Id*. at 92, n.17.
[133] *Id*.
[134] *Id*. at 88.
[135] *Id*.
[136] *See* 10 U.S.C. § 825 (2016).
[137] *See id.*

dire. *Batson*'s equal protection principles should thus apply to these private peremptory challenges.[138]

The *Batson* Court noted that it aimed to "eradicate racial discrimination in the procedures used to select the venire from which individual jurors are drawn."[139] Judge Ohlson and Judge Sparks have stated, "it simply cannot be the state of the law that the shield of the Fifth Amendment is strong enough to protect an African American defendant from the impermissible exclusion of panel members on the basis of race *during voir dire*, but is impotent in similarly protecting those servicemembers *during the selection of the venire panel in the first instance*."[140]

The Court of Military Appeals applied *Batson* and its principles to the military justice system in *Santiago-Davila*.[141] As such, the *Batson* framework for establishing a *prima facie* showing of racial discrimination must apply to the convening authority's peremptory selection of members.

3. Lieutenant Junior Grade Jeter established a *prima facie* case of racial discrimination by the Convening Authority under *Batson*.

The *Batson* Court provided three factors to establish a *prima facie* case of discrimination raising an inference of purposeful discrimination in selection of the

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[138] *Id*. at 89.
[139] *Id*. at 85.
[140] *Bess*, 80 M.J. at 20 (Ohlson, J., with whom Sparks, J. joined, dissenting) (citing *Batson*, 476 U.S. at 89).
[141] *Santiago-Davila*, 26 M.J. at 389-90.

venire.[142] The factors are: (1) the defendant is a part of a "cognizable racial group;" (2) the Government removed venire members of the same racial group from the venire; and (3) the facts and circumstances raised an inference of exclusion on account of race.[143]

Here, all three factors are met because (1) LTJG Jeter is a black man, (2) the Government removed venire members of his same racial group by removing two black members, and (3) the facts and circumstances raise an inference of exclusion on account of race because:

- The black members on the original convening order were replaced with an all-white panel;
- The questionnaires asked the majority of the members about their race;
- The name of one of the [redacted] members [redacted] [redacted] was highlighted on the first amending order;
- The Convening Authority knew the race of LTJG Jeter;
- The Convening Authority detailed another white member *after* LTJG Jeter first objected to the racial makeup of the panel *and* the military judge noted that the panel was unusually small;
- This took place at "the largest naval base in the world . . . [where] the waterfront [was] literally littered with ships parked left and right side-by-side;"[144]

[142] *Batson*, 476 U.S. at 96.
[143] *Id.*
[144] J.A. 051.

- The Convening Authority detailed one additional white male member despite having identified four available individuals;

- Neither the Convening Authority, the Acting Convening Authority, nor the Staff Judge Advocate could provide an explanation beyond a naked affirmation of good faith; and

- This was one of four courts-martial of an African-American accused in which the same Convening Authority hand-selected all-white panels.

If this Court does not apply *Batson* in this case, convening authorities' discretion to select members will remain immune from constitutional scrutiny—like prosecutors' peremptory strikes before *Batson*.

E. This Court could also depart from its decision in *Bess* and evaluate the Convening Authority's selection of members under *Castaneda.*

1. *Castaneda* provided a framework to establish *prima facie* violations of equal protection rights in cases where only a pattern of racial discrimination could be shown.

The Supreme Court in *Castaneda* created a framework through which minority accused could establish a *prima facie* showing of racial discrimination by demonstrating substantial underrepresentation of minority jurors over significant periods of time.[145] The Court created this framework because "[s]ometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face."[146]

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[145] *Castaneda v. Partida*, 430 U.S. 482, 494-495 (1977).
[146] *Id*. at 493 (internal citation and quotation omitted).

2. This Court rendered *Castaneda* unenforceable in the military.

In *United States v. Bess*, this Court considered whether a *prima facie* showing of racial discrimination could be established in the military under the *Castaneda* framework.[147] *Bess* was convened by the same Convening Authority as this case. And it was not the first court-martial in which his selection of members was questioned as discriminatory. *Bess* was one of four cases in which the same Convening Authority selected an all-white panel within one year, and, like here, the same Convening Authority knew the appellant's race.[148]

This Court declined to apply *Castaneda* in *Bess* because "one year is not a 'significant period of time' and therefore would not establish a *prima facie* case of a pattern of discrimination under the *Castaneda* framework."[149] In support of this position, this Court cited a string of decisions from other courts in which one, two, three and a half, and even five year patterns were insufficient periods of time to make a *prima facie* showing of discrimination.[150] This Court pointed to cases in which seven and eleven year patterns were sufficient.[151] But the unique nature of convening authorities' relatively short periods of tenure should prompt a departure from such an extensive time requirement.

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[147] *Bess*, 80 M.J. at 9-10.
[148] *Id*. at 5-6.
[149] *Id*. at 9.
[150] *Id*.
[151] *Id*.

As Judge Ohlson noted in his dissent, "[c]onvening authorities serve in their roles for a finite period of time, often for a few years or less. In the instant case, for example, the convening authority served from March 10, 2016, to July 20, 2018, for a total of just twenty-seven months."[152] If the precedents this Court cited apply equally to the military—and a five year pattern is insufficient to demonstrate racial discrimination—then no racist convening authority will *ever* have to worry about their racist patterns being questioned. Because of this Court's decision, military accused throughout the armed forces are essentially prohibited from establishing *prima facie* showings of racial discrimination through the *Castaneda* framework. *Castaneda* has been rendered unenforceable in the military.

Convening authorities should not receive special treatment in equal protection analyses. If the Fifth Amendment equal protection right to a jury selected without invidious discrimination applies to courts-martial "just as it does to civilian juries," then the protective framework of *Castaneda* should apply to the military as well.[153] Military commanders are not immune from the racist evils of society, but if this Court's reasoning in *Bess* controls, the military is the only criminal jurisdiction essentially shielded from an entire sphere of equal protection analysis.

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[152] *Id*. at 20 n.10 (Ohlson, J., with whom Sparks, J. joined, dissenting).
[153] *Santiago-Davila*, 26 M.J. at 389-90.

3. Lieutenant Junior Grade Jeter established a *prima facie* case of racial discrimination by the Convening Authority under *Castaneda*.

The Supreme Court in *Castaneda* created a three-step framework through which minority accused could demonstrate substantial underrepresentation of minority jurors and thereby make a *prima facie* showing of discrimination in the member-selection process.[154] First, the defendant must belong to a "recognizable, distinct class, singled out for different treatment under the laws."[155] Second, "the degree of underrepresentation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve as grand jurors, over a significant period of time."[156] Third and finally, the selection procedure must be susceptible to abuse or it must be non-race-neutral.[157] Once a defendant makes this requisite showing, a *prima facie* case is established, and the burden shifts to the Government to rebut the case.[158]

Here, all factors are met because (1) LTJG Jeter is a black man, (2) his court-martial was one of four cases within a year in which the same Convening Authority selected an all-white panel for the trial of a minority, and (3) the selection procedure was non-race-neutral because the majority of questionnaires indicated race.

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[154] *Castaneda*, 430 U.S. at 494-495.
[155] *Id*. at 494.
[156] *Id*.
[157] *Id*.
[158] *Id*. at 495.

Unlike *Bess*, LTJG Jeter clearly established a *prima facie* case. In *Bess*, the majority of questionnaires were race-neutral.[159] Here, the majority of questionnaires indicated the members' race. In *Bess*, the trial defense counsel conceded that the panel may not have been all-white and the military judge specifically declined to make a finding as to the racial makeup of the panel.[160] Here, the Defense twice asserted that the panel was all-white, the military judge found the panel was all-white, and the Government never challenged this finding. In *Bess*, the military judge did not see any indication of impropriety by the convening authority.[161] Here, the military judge warned the Convening Authority not to do it again.

The factual predicate necessary to raise a *prima facie* case of discrimination was established. When LTJG Jeter's counsel objected, highlighted the race-indicating questionnaires, and presented the record of trial from *Bess*, he made a *prima facie* showing of racial discrimination. The burden shifted to the Government.

An accused's burden, like LTJG Jeter's, is insurmountable if he is required to prove a convening authority repeatedly excluded people by race from panels over periods longer than convening authorities actually serve in their roles.

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[159] *Bess*, 80 M.J. at 5.
[160] *Id*. at 4.
[161] *Id*. at 10.

Conclusion

Lieutenant Junior Grade Jeter established a *prima facie* case of an equal protection violation because the Convening Authority used a non-race-neutral member-selection process and the resulting panel had no minority representation. The Government had the burden to demonstrate this was an innocent omission, but it did not. Despite the Government failing to meet its burden, the lower court gave it a second chance by ordering the Convening Authority, Acting Convening Authority, and their Staff Judge Advocate to provide an explanation. But instead of providing a detailed explanation, as the Government provided in *Gooch*, they provided the type of blanket denials and assertions of regularity that the Supreme Court has rejected. Accordingly, the Government violated LTJG Jeter's equal protection rights.

Alternatively, this Court should find that Lieutenant Junior Grade Jeter established a *prima facie* case of an equal protection violation under the *Batson* or *Castaneda* frameworks. Convening Authorities' unlimited number of peremptory challenges, and their patterns of selecting substantially underrepresented panels, should not receive special protections from constitutional scrutiny.

Relief Requested

This Court should set aside the findings and sentence.

Respectfully submitted.

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and seven copies of the foregoing were delivered to the Court on July 11, 2022, that a copy was securely transmitted to Deputy Director, Appellate Government Division, and that a copy was securely transmitted to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on July 11, 2022. I also certify that a copy with the sealed portions redacted was electronically filed and submitted to all aforementioned parties on July 11, 2022.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

This Supplement complies with the type-volume limitations of Rule 24(c) because it does not exceed 14,000 words, and complies with the typeface and style requirements of Rule 37. The brief contains 8,363 words. Undersigned counsel used Times New Roman, 14-point type with one-inch margins on all four sides.

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