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	**REPLY BRIEF ON BEHALF OF APPELLANT** Crim.App. Dkt. No. 201700248 USCA Dkt. No. 22-0065/NA

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

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Argument

A. The Government asks this Court to disregard Supreme Court precedent. Insurmountable burdens cannot be placed on accused raising equal protection claims.

"[R]equiring a defendant to 'investigate, over a number of cases, the race of persons tried in the particular jurisdiction, the racial composition of the venire and petit jury, and the manner in which both parties exercised their peremptory challenges' pose[s] an 'insurmountable' burden."[1] The Government's position creates the exact burden that the Supreme Court condemned.[2]

Throughout its answer, the Government argues that LTJG Jeter should have investigated and attached statistics on the percentage of African Americans available for trial, the amount of African Americans stationed in Norfolk, the amount of African Americans in the Navy at large, and the amount of African Americans in the Navy throughout history.[3] Effectively, the Government expects military accused to "investigate, over a number of cases, the race of persons tried in the particular jurisdiction, [and] the racial composition of the venire[.]"[4] The Supreme Court

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[1] *Flowers v. Mississippi*, 139 S. Ct. 2228, 2241 (2019) (quoting *Batson v. Kentucky*, 476 U.S. 79, 92, n.17 (1986)).
[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] Answer at 5-6, 8-9, 13, 16, 31, 34, 36-37, 40, 43-44, 55, 57.
[4] *Flowers*, 139 S. Ct. at 2241 (internal quotations omitted); Answer at 5-6, 8-9, 13, 16, 36-37, 43-44, 55, 57.

explicitly held that, once a *prima facie* case is established, such burden is on the Government—not the accused.[5]

The Supreme Court in *Alexander v. Louisiana* emphasized that while statistical data was useful, their decision was based on the fact that a non-race-neutral selection process was employed and the resulting panel was monochromatic.[6] Such is the case here. Lieutenant Junior Grade Jeter objected to the Convening Authority employing a non-race-neutral member selection process to create an all-white panel. Lieutenant Junior Grade Jeter preserved the members' race on the Record when he objected to the selection process, when the military judge found as fact that the panel was all-white, and when he renewed his objection after the members entered the courtroom. Under *Avery v. Georgia* and *Alexander v. Louisiana*, LTJG Jeter's objections were sufficient. And, after considering the surrounding facts and circumstances (to include that the Convening Authority followed the same pattern in three other cases that year), a *prima facie* case was also established under *Batson v. Kentucky* and *Castaneda v. Partida*. The additional fact-finding and investigation the Government expects the Defense to have conducted was the Government's burden.

[5] *Compare* Answer at 5-6, 8-9, 13, 16, 36-37, 43-44, 55, 57 *with Flowers*, 139 S. Ct. at 2241.
[6] *Alexander*, 405 U.S. at 630.

B. Contrary to the Government's assertion, the Defense moved to compel evidence about the selection process.

The Government argues that LTJG Jeter never moved to attach or produce evidence about the selection process of his panel.[7] But the trial defense counsel asked the military judge to "compel[] the convening authority to show that there was no improper criteria considered[.]"[8] And he later renewed his motion and explained that the "questionnaire shows that the Convening Authority was soliciting this [racial] 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[.]"[9]

Thus, the Defense did indeed move to compel evidence about the selection process of LTJG Jeter's panel.

C. The Record does not support the assertion that the military judge found no systematic exclusion occurred. Rather, the military judge made factual findings sufficient to establish a *prima facie* case of discrimination.

The Government argues that "The Military Judge correctly found 'no systematic, purposeful exclusion,'" but the Record does not support this assertion.[10] While the military judge believed there was no evidence in front of him of systematic

[7] Answer at 5-6.
[8] J.A. 57.
[9] J.A. 61.
[10] *Compare* Answer at 21, 27 *with* J.A. 56, 58, 63.

exclusion or discriminatory intent, this is hardly the same as finding that systematic exclusion never occurred.[11] The military judge never made such a finding.

The military judge held that the Convening Authority solicited members using questionnaires that included racial identifiers and that the resulting panel was all-white.[12] These findings of fact were sufficient to establish a *prima facie* case and shift the burden to the Government.[13]

D. The Government misunderstands LTJG Jeter's equal protection claim.

The Government writes that LTJG Jeter's claim fails because "under *Avery* and *Alexander*, the mere identification of race in the process is not dispositive."[14] But LTJG Jeter's equal protection rights were not violated merely because race was identified in the selection process. Identification of race in the process of selecting members—a non-race-neutral process—is evidence of only one of three elements required to raise a *prima facie* case of discrimination under *Avery* and *Alexander*.[15]

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[11] J.A. 56, 58, 63.
[12] J.A. 54-56.
[13] *Avery*, 345 U.S. at 560-63.
[14] Answer at 45.
[15] *Avery*, 345 U.S. at 560-63. The three elements to establish a *prima facie* case of discrimination under *Avery* and *Alexander* are (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. *Alexander*, 405 U.S. at 626-31; *Avery*, 345 U.S. at 560-63.

The Government makes several arguments that highlight its confusion. It attempts to distinguish this case from *Avery* and *Alexander* because in this case "members were not required to answer and 'frequently declined to answer' the race question[.]"[16] But this is incorrect and irrelevant. None of the members declined to answer the race question. And the Convening Authority solicited and received information regarding the majority of the members' race. Thus, the selection process was non-race-neutral.

The Government argues that this case is distinguishable because "not all questionnaires included the race identifier question."[17] But the majority of questionnaires solicited race—indicating that the process was non-race-neutral, and satisfying one of the three elements under *Avery* and *Alexander*.[18]

The Government argues that "the race identifier was one of over fifty questions listed in the questionnaire," but this is also irrelevant.[19] Does it really matter if the Convening Authority solicited forty-nine questions in addition to the race-soliciting question? The Supreme Court never held that racial identifiers can be tempered by the amount of information solicited from potential jurors.

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[16] Answer at 44.
[17] Answer at 44-45.
[18] *Avery*, 345 U.S. at 560-63.
[19] Answer at 45.

E. Despite attempting to distinguish this case from *Alexander*, the Government demonstrates how *Alexander* is comparable.

In its discussion of *Alexander*, the Government argues that the jury commissioner process in that case is distinguishable from the member selection process here.[20] But when discussing *Batson*, the Government provides the opposite. In the latter argument, the Government argues that the jury commissioner process in *Alexander* demonstrates *Batson's* inapplicability to the selection process in this case.[21]

Thus, the Government is having it both ways. It treats the selection process in *Alexander* as distinguishable, but separately treats it as a comparable and analogous precedent. These contradictory analyses cannot both be correct. The selection process in *Alexander* mirrors the selection process in this case and this Court should reach a similar conclusion here.

F. Contrary to the Government's assertions, a Convening Authority's selection process is subjective, inclusive, and exclusive. *Batson* applies to a Convening Authority's member selection process.

The Government attempts to distinguish the Convening Authority's member selection process from a prosecutor's peremptory challenges by arguing that the

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[20] Answer at 44.

[21] Specifically, the Government writes "the Supreme Court does not view jury commissioners using statutory criteria to select members as exercising 'the functional equivalent of an unlimited number of peremptory challenges'" and it cites *Alexander* in making this argument. Answer at 50 (citing *Alexander*, 405 U.S. at 628–30).

former is an objective process of inclusion whereas the latter is a subjective process of exclusion.[22] This argument has three problems.

First, the subjective versus objective argument is legally unsupported: Article 25, UCMJ, directs Convening Authorities to select members who "*in his opinion*, are best qualified[.]"[23] Because Article 25 requires Convening Authorities to make decisions based on their opinions, the selection process is inherently subjective. Thus, Article 25 does not protect servicemembers from racist decisions. A Convening Authority can exercise their member selection authority while being influenced by racist opinions and without violating their Article 25 powers.

For example, consider a racist Convening Authority who believes that a potential member has the right age, education, training, experience, and length of service to properly serve as a member. This hypothetical racist Convening Authority happens to believe that African American people do not have the judicial temperament to properly serve as members and, for that reason, the racist Convening Authority removes potential black members from his list of members. In this example, there is no violation of Article 25, UCMJ—the racist Convening Authority limited their decision purely to the factors contained in Article 25 and, as directed by Article 25, did so based on his or her own opinion.[24] However, the subjective

[22] Answer at 52.
[23] 10 U.S.C. § 825(e)(2) (2016) (emphasis added).
[24] *Id*.

nature of this selection process is precisely why equal protection frameworks must protect military accused from racist opinions.

Second, the Government argues that *Batson* does not apply because Convening Authorities include, rather than exclude, members from panels.[25] But whether Convening Authorities include or exclude potential members is a question of semantics. Convening Authorities, in selecting members, take a list of potential members, review their questionnaires, and exclude those who do not have the requisite age, education, training, experience, length of service, or judicial temperament.[26] Whenever they include members, they also exclude members. A servicemember's equal protection rights cannot hinge on the academic and unrealistic distinction between whether a Convening Authority chooses the venire by affirmatively selecting members from a list or by whittling down that list through process of elimination.

Third, even if this Court does not consider inclusion versus exclusion to be mere semantics, consider the facts of this case. There were two black members on the original convening order, but the Convening Authority removed them. The lower court, applying its Article 66 fact-finding powers, found that these two

[25] Answer at 52.
[26] 10 U.S.C. § 825(e)(2) (2016).

removed members were indeed African American.[27] How can their removal be anything other than the exclusion of potential members?

G. The Record does not support the Government's assertions regarding the Convening Authorities' statements.

The Government makes four assertions regarding the Convening Authorities that are not supported by the Record. First, the Government quotes the Convening Authority's affidavit when it writes that the Convening Authority "did not make 'any effort to screen potential members based on race[.]'"[28] However, the full quote reads: "*I am not aware of* any effort to screen potential members based on race."[29] Redacting the words "I am not aware of" and adding "did not make" before quoting this sentence completely changes its meaning.[30] The Convening Authority never provided that he made no effort to screen members by race—he just said he is not sure if he did.[31]

Second, the Government quotes the lower court and writes, "the Convening Authority and his staff 'were not aware of the race of the members detailed in either

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[27] *United States v. Jeter*, 81 M.J. 791, 797 (N-M. Ct. Crim. App. 2021).
[28] Answer at 60. The Government also wrote that "the Convening Authority made no 'effort to screen potential members based on race.'" Answer at 12.
[29] J.A. 94.
[30] *Compare* Answer at 12, 60 *with* J.A. 94.
[31] J.A. 94.

the standing convening order or the amended convening orders[.]'"[32] But the Record does not support this assertion.

The Convening Authority stated:

- "*I may have been aware* of the race of some of the prospective members[.]"[33]
- "*I do not recall* being aware of, or otherwise being able to infer, the race of the members selected."[34]
- "*I do not recall* if there were any African American members detailed[.]"[35]
- "*I do not know* if he [the Acting Convening Authority] was aware of, or able to infer the race of the members detailed. Additionally, *I do not recall* being aware of, or being able to infer the race of the members detailed[.]"[36]
- "*I do not recall* being aware of, or otherwise able to infer, the race of the member detailed by GCMCO lB-17."[37]

The Acting Convening Authority similarly provided, "*I do not recall* the availability or use of racial information to detail members[.]"[38] Not remembering if one knew the members' race is hardly the same as not knowing their race. The Government's assertion is thus unsupported: at no point did the Convening Authority or Acting Convening Authority ever state that they did not know the

[32] Answer at 14, 28.
[33] J.A. 93 (emphasis added).
[34] J.A. 91 (emphasis added).
[35] J.A. 91 (emphasis added).
[36] J.A. 92 (emphasis added).
[37] J.A. 92 (emphasis added).
[38] J.A. 96 (emphasis added).

members' race. Quite the opposite—the Convening Authority admitted that he may have known their race.[39]

Third, the Government quotes the lower court and asserts that both Convening Authorities "never discussed the accused's or the member's race."[40] But the Record also does not support this assertion. The Convening Authority provided "*I do not recall* any specific discussion on the diversity make-up of the court-martial panels[.]"[41] The Acting Convening Authority similarly wrote, "*I do not recall* the availability or use of race as a criteria for screening potential eligible members."[42] And while the Staff Judge Advocate provided that he never discussed race, the Convening Authorities never made this assertion.[43] Both Convening Authorities merely provided that they could not remember discussing race or using it as a criteria—an odd assertion given that they did not simply deny considering race. Regardless, the Government's assertion that they never discussed race is unsupported.

Fourth, and finally, the Government quotes the Staff Judge Advocate and asserts that "Neither the Convening Authority nor the Acting Convening Authority were provided, nor did they ever ask for, 'information about the racial makeup of

[39] J.A. 93.
[40] Answer at 14, 28.
[41] J.A. 93 (emphasis added).
[42] J.A. 96 (emphasis added).
[43] J.A. 99.

any court-martial venire.'"[44] But this is unsupported by the Record as well. The Convening Authorities were clearly provided information about the racial makeup of members because they solicited that information through the questionnaires that they reviewed.

H. Given the Convening Authorities' actual statements, there is no need for additional affidavits or a *DuBay* hearing.

The Government argues that, if this Court finds that a *prima facie* case was established, the United States should be able to present rebuttal evidence.[45] But the Government contradicts itself. At the lower court on remand, it argued that additional fact-finding in this case was unnecessary.[46] It asserted that Appellant's case could be decided "even if his factual claims are true."[47]

Since then, and upon being ordered by the lower court, the Government produced declarations from the Convening Authority, Acting Convening Authority, and their Staff Judge Advocate.[48] The Government was thus already given an opportunity to present rebuttal evidence. Nothing indicates that the Convening Authorities or their Staff Judge Advocate will change their answers. And regardless, no further information is needed to decide this case.

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[44] Answer at 12.
[45] Answer at 61.
[46] Answer at the lower court on remand ("*Jeter II* Answer") at 30-31.
[47] *Jeter II* Answer at 31.
[48] Appellee's response to the lower court order to produce declarations on remand.

United States v. Riesbeck demonstrates why this Court does not need additional information to decide this case.[49] In *Riesbeck*, this Court considered whether a Convening Authority intentionally stacked a members' panel with women.[50] The lower court had ordered a *DuBay* hearing to receive evidence regarding the panel's composition.[51] The hearing received stipulations of expected testimony from four Admirals who served as Convening Authorities, and it received evidence from their Staff Judge Advocate.[52] Such evidence was sufficient for this Court to find that the Convening Authority stacked the panel and for this Court to dismiss the charges and specifications with prejudice.[53]

The same type of information obtained through a *DuBay* hearing in *Riesbeck* is already in front of this Court. This Court has affidavits of both Convening Authorities and their Staff Judge Advocate. This Court thus has all the information it needs to rule on this issue. Moreover, this Court has previously denied requests for additional fact-finding after a lower court used its Article 66, UCMJ, fact-finding powers to gather affidavits.[54] This Court should do the same here. Further information is unnecessary.

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[49] *United States v. Riesbeck*, 77 M.J. 154, 160 (C.A.A.F. 2018).
[50] *Id*.
[51] *Id*.
[52] *Id*. at 168-76.
[53] *Id*. at 167.
[54] *United States v. Ginn*, 47 M.J. 236, 241 (C.A.A.F. 1997).

I. The presumption of regularity does not apply. However, even if it does apply, it does not elevate the burden of proof and has been rebutted.

1. The presumption of regularity does not apply because Article 25, UCMJ, is a race-neutral statute.

The Government argues that the presumption of regularity requires finding that there was no equal protection violation.[55] But this argument fails for two reasons. First, as previously discussed, Article 25, UCMJ, is a race-neutral statute. A Convening Authority can discharge their duties in accordance with Article 25 while inserting racial discrimination into their subjective selection process. Thus, the presumption of regularity has no bearing on this equal protection analysis.

Second, while the Government argues that *United States v. Bess* and *United States v. Armstrong* demonstrate that the presumption of regularity applies, these cases do not support their assertion.[56] This Court in *Bess* discussed the presumption of regularity in the *Castaneda* context, but *Bess* did not explain how Article 25—a race-neutral statute—imposes a duty on Convening Authorities to avoid racial considerations when selecting members.[57] In *Armstrong*, the Supreme Court did not discuss the *Avery*, *Alexander*, *or Castaneda* frameworks, and it explicitly provided that the presumption of regularity does not apply to *Batson* challenges.[58] The

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[55] Answer at 20, 41.
[56] Answer at 20, 41 (citing *United States v. Armstrong*, 517 U.S. 456, 464 (1996); *United States v. Bess*, 80 M.J. 1, 10 (C.A.A.F. 2020)).
[57] *Bess*, 80 M.J. at 10.
[58] *Id*. at 467-68.

Supreme Court in *Avery*, *Alexander*, *Batson*, and *Castaneda* did not consider the presumption of regularity, and neither should this Court.[59]

2. Even if the presumption of regularity applies, it does not elevate the burden of proof to establish a *prima facie* showing of discrimination.

The Government argues that *Bess* and *Armstrong* demonstrate that the presumption of regularity raises LTJG Jeter's burden of proof to establish a *prima facie* case from a preponderance of the evidence standard to the "clear evidence" standard.[60] But neither case supports the Government's position. *Bess* does not discuss requisite burdens of proof and does not demonstrate that LTJG Jeter's burden should be raised.[61] And the Government misapplies *Armstrong*.

In *Armstrong*, the Supreme Court examined a selective prosecution equal protection claim.[62] The Court held that "clear evidence" needed to be shown in order to overcome the presumption of regularity that prosecutors properly discharged their duties.[63] But this burden of proof applied to overcoming the presumption of regularity—not to establishing a *prima facie* case of discrimination itself.[64] Indeed,

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[59] *See Batson*, 476 U.S. at 79, *Castaneda v. Partida*, 480 U.S. 482 (1976); *Alexander*, 405 U.S. at 625; *Avery*, 345 U.S. at 562; *see generally Parke v. Raley*, 506 U.S. 20, 25 (1992) (applying the presumption of regularity to state governments and thereby demonstrating that the Supreme Court could have applied this presumption in *Avery* or *Alexander*).
[60] Answer at 20, 41 (citing *Armstrong*, 517 U.S. at 464; *Bess*, 80 M.J. at 10).
[61] *Bess*, 80 M.J. at 10.
[62] *Armstrong*, 517 U.S. at 464.
[63] *Id*.
[64] *Id*. at 464-65.

the *Armstrong* Court explained that, after rebutting the presumption of regularity with clear evidence to the contrary, a claimant must then establish the requisite showing in order to make a *prima facie* case of selective prosecution in violation of equal protection.[65]

Thus, the Government misapplies *Armstrong* by attempting to graft the burden of proof to overcome the presumption of regularity onto the requirements for a *prima facie* claim itself. If this Court were to adopt the Government's interpretation of *Armstrong*, and expect military accused to show "clear evidence" of discrimination in order to establish a *prima facie* case, then this Court would effectively nullify the ability to establish *prima facie* cases of discrimination altogether. If such *prima facie* showings required "clear evidence," then they would not be *prima facie* at all and there would be no point in shifting the burden to the Government. Requiring military accused to have to prove "clear evidence" of discrimination would place the "insurmountable burden" on the Defense that the Supreme Court prohibited.[66]

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[65] *Id*. at 465 (providing that, after overcoming the presumption of regularity, a claimant raising a selective prosecution equal protection claim must show that the prosecutorial policy had a discriminatory effect, that it was motivated by a discriminatory purpose, and that similarly situated individuals of a different race were not prosecuted).

[66] *Flowers*, 139 S. Ct. at 2241; *see Alexander*, 405 U.S. at 631-32; *Whitus*, 385 U.S. at 551; *Avery*, 345 U.S. at 562.

3. Even if the presumption of regularity applies, it has been rebutted. A non-race-neutral selection procedure was employed, but the resulting panel was devoid of diversity.

Citing *Riesbeck*, the Government argues that the presumption of regularity requires presuming that racial identifiers were in place for a valid purpose.[67] The Government writes that in the military "[r]ace and gender identifiers are neutral; they are capable of being used for proper as well as improper reasons" and "a convening authority may 'seek[] in good faith to make the panel more representative of the accused's race or gender.'"[68]

The Government makes a critical point. If the Convening Authority used racial identifiers in soliciting members to properly ensure that the panel would be more representative, then there would be no issue. But that is not the case. The Convening Authority used racial identifiers, yet the resulting panel was not diverse—it was all-white. As the Government highlights: racial identifiers can be used for proper or improper purposes.[69] Here, the racial identifiers were not used for a proper purpose because the resulting panel was entirely composed of white men. If the racial identifiers were not used for a proper purpose, then what does that leave? And if the Convening Authority (who admitted that he likely knew LTJG

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[67] Answer at 45 (citing *Riesbeck*, 77 M.J. at 163).
[68] Answer at 45 (quoting *Riesbeck*, 77 M.J. at 163); *see also United States v. Loving*, 41 M.J. 213, 285 (C.A.A.F. 1994).
[69] *See also Loving*, 41 M.J. at 285 (providing that racial identifiers "are capable of being used for proper as well as improper reasons").

Jeter's race) acted with regularity, then why did he solicit potential members' races only to ultimately select an all-white panel?

These facts show that the presumption of regularity has been rebutted. The Convening Authority solicited the members' race yet, rather than use that information to create a diverse veneer, the resulting monochromatic panel was guaranteed to ensure that LTJG Jeter's racial group was underrepresented. Under *Avery* and *Alexander*, this was enough. A *prima facie* case of racial discrimination was established.

Respectfully submitted.

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Certificate of Compliance

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