No. _____

IN THE
Supreme Court of the United States

PEDRO M. BESS,
HOSPITAL CORPSMAN PETTY OFFICER SECOND CLASS,
UNITED STATES NAVY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Exercising his authority under 10 U.S.C. § 825, a military commander hand-selected ten White members to sit on a general court-martial panel—the military equivalent of a jury—for a Black man charged with sexual misconduct against White women. Before selecting this all-White panel, the commander received a report showing the White women first identified their perpetrator not by a name, but by the color of his skin: Black.

As the members entered the courtroom, the accused Black man, Hospital Corpsman Petty Officer Second Class (HM2) Pedro Bess, leaned towards his counsel and asked about the panel's racial composition. His counsel stood, presented the issue to the military judge, challenged the panel on equal protection grounds, and moved for discovery. Reasoning that she could not see the members' race, the military judge found no issue with the all-White panel. Later, the hand-selected White members convicted HM2 Bess. The lower courts affirmed without additional fact-finding, and to date, no one has answered HM2 Bess's question about his panel:

"Why aren't there any Black people?"

The Questions Presented are:

1. Whether 10 U.S.C. § 825, as applied in Petitioner's case, violates the Fifth Amendment.

2. Whether the lower court erred in declining to remand Petitioner's case for additional fact-finding.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Constitution

Supreme Court of the United States

United States Court of Appeals for the Armed Forces

United States Circuit Court of Appeals

United States Navy-Marine Corps Court of Criminal Appeals

Statutes

Other Authorities

INTRODUCTION

Under the Uniform Code of Military Justice (UCMJ), Congress gave military commanders the authority to convene courts-martial[1] and hand-select court-martial members.[2] Like civilian jurors, court-martial members adjudge verdicts following a trial and can also adjudge sentences after a sentencing hearing. Unlike civilian juries, the "venire pools . . . are not chosen at random . . . ."[3] Rather—as 10 U.S.C. § 825(e)(2) requires—the convening authority[4] (CA) hand-selects the members who, "in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament."[5]

Congress gave CAs wide discretion in selecting members, but in doing so, it created an "invitation to mischief."[6] Without the safeguards of random

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[1] 10 U.S.C. §§ 822, 823.

[2] 10 U.S.C. § 825.

[3] *United States v. Bess*, 80 M.J. 1, 20 (C.A.A.F. 2020) (Ohlson, J. dissenting). "A court-martial is tried, not by a jury of the defendant's peers," but by "a panel" of officer and enlisted members selected pursuant to the requirements of 10 U.S.C. § 825. *O'Callahan v. Parker*, 395 U.S. 258, 263-64 (1969).

[4] Military commanders authorized to convene courts-martial are generally referred to as "convening authorities."

[5] 10 U.S.C. § 825(e)(2).

[6] Honorable Walter T. Cox III, et al., *Report of the Commission of the 50th Anniversary of the Uniform Code of Military Justice*, 7 (May 2001), https://www.loc.gov/rr/frd/Military_Law/pdf/Cox-Commission-Report-2001.pdf [hereinafter Cox Commission]; *see also* Kevin J. Barry, *A Face Lift (and Much More) for an Aging Beauty: The Cox Commission Recommendations to Rejuvenate the Uniform Code of Military Justice*, 2002 L. REV. M.S.U.-D.C.L.

selection, a court-martial panel reflects the bias—both conscious and unconscious—of the CA who selects it. "There is no aspect of military criminal procedures that diverges further from civilian practice . . . ."[7]

This makes judicial review of member selection critical to safeguarding the constitutional rights of servicemembers, especially where, as here, the threat is racial bias and prejudice. The Court of Appeals for the Armed Forces (CAAF) has recognized as much. While not stated in the UCMJ, the CAAF permits CAs to consider race in the selection process "when seeking in good faith to make the panel more representative of the accused's race . . . ."[8]

Unfortunately, when it comes to prohibiting racial discrimination against an accused, the CAAF's precedent falls short of the Fifth Amendment's equal protection guarantee. Indeed, under the precedent established in HM2 Bess's case, CAs now have an opportunity to discriminate on the basis of race without any meaningful judicial oversight.

At trial and on appeal, HM2 Bess asked every judge for an explanation as to how the CA's hand-selection of an all-White panel complied with the Fifth Amendment's equal protection guarantee. With the exception of the two dissenting judges below, the response was the same. They claim it is not possible to see race and presume there is nothing wrong with

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57, 100-02 (2002) (putting the Cox Commission's "invitation to mischief" language in historical context).

[7] Cox Commission at 7.

[8] *United States v. Riesbeck*, 77 M.J. 154, 163 (C.A.A.F. 2018).

an all-White panel sitting in judgment of a Black man.[9]

As recent events demonstrate, however, there is something wrong. One month after the CAAF's decision in HM2 Bess's case, the Secretary of Defense said the military is "not immune to the forces of bias and prejudice—whether visible or invisible, conscious or unconscious."[10] Recognizing that racial bias and prejudice within the military are both real and an ongoing burden on minority servicemembers, the Secretary announced the need for a new initiative to ensure "equal opportunity and respect for all . . . ."[11]

The Secretary's initiative comes in response to a moment of national reckoning on racial discrimination in America. Weeks after the CAAF denied Petitioner's appeal, a White Minneapolis police officer killed George Floyd, a Black man. George Floyd's death prompted protests,[12] congressional

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[9] *Bess*, 80 M.J. at 10; *see also id.* at 15 n.1 (Maggs, J., concurring).
[10] Mark Esper, U.S. Sec'y of Def., Message to the Force on DOD Diversity and Inclusiveness (June 18, 2020), https://www.defense.gov/Newsroom/Transcripts/Transcript/Article/2224438/secretary-mark-t-esper-message-to-the-force-on-dod-diversity-and-inclusiveness/.
[11] *Id.*
[12] Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES, July 10, 2020, https://www.nytimes.com/ article/george-floyd-protests-timeline.html.

hearings,[13] legislative efforts,[14] moments of reflection, and new initiatives, including the Secretary's new initiative within the Department of Defense (DoD).

Of course, issues of racial bias and prejudice are neither new to the military nor the military justice system. They span American history, from the African-Americans who served in the Union Army during the Civil War to the race-charged "Houston Riots Courts-Martial of 1917"[15] to the DoD task force appointed in 1971 to study racism in "the administration of military justice"[16] to the congressional hearing on the issue last June.[17]

Yet despite the military's history of confronting racism, the Government Accountability Office (GAO) reports that racial disparity in the military justice

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[13] H. Comm. on the Judiciary, Oversight Hearing on Policing Practices and Law Enforcement Accountability (June 10, 2020), https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=2984; S. Comm. on the Judiciary, Police Use of Force and Community Relations, (June 16, 2020), https://www.judiciary.senate.gov/meetings/police-use-of-force-and-community-relations.

[14] George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. (2020).

[15] Fred L. Borch III, *Lore of the Corps: "The Largest Murder Trial in the History of the United States": The Houston Riots Courts-Martial of 1917*, 2011 Army Law. 1 (2011).

[16] Cox Commission at 2-3 (noting that Secretary of Defense Melvin Laird commissioned a study of the military justice system in 1971 following "allegations of racism at courts-martial").

[17] H. Subcomm. on Military Personnel, Racial Disparity in the Military Justice System – How to Fix the Culture (June 16, 2020) https://armedservices.house.gov/2020/6/subcommittee-on-military-personnel-hearing-racial-disparity-in-the-military-justice-system-how-to-fix-the-culture.

system still exists. The GAO found "Black servicemembers were about twice as likely as White servicemembers to be tried in general and special courts-martial."[18] As the GAO explained, recent events, such as the deaths of Ahmaud Arbery[19] and George Floyd, raised awareness about issues of racial bias that "carry over to the military justice system."[20]

When set against today's moment of national reckoning, the CAAF's decision in HM2 Bess's case is both troubling and tragic. While the CAAF majority agreed, in theory, that an intentional exclusion of potential members on the basis of race was unconstitutional,[21] it made its legal rhetoric toothless. Make no mistake, the majority below placed its imprimatur on the all-White panel in HM2 Bess's case—one of four instances in less than a year[22] where the CA hand-selected an all-White panel to sit in judgment of a Black servicemember.

Even if done unintentionally, the CAAF's decision puts a CA's selection of members outside the Fifth Amendment's reach. With the potential for CAs to abuse their authority under 10 U.S.C. § 825, the

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[18] U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-648T, MILITARY JUSTICE: DOD AND THE COAST GUARD NEED TO IMPROVE THEIR CAPABILITIES TO ASSESS RACIAL DISPARITIES (2020) [hereinafter GAO Report].

[19] *Id.* at 1; *see also* Richard Fausset, What We Know About the Shooting Death of Ahmaud Arbery, N.Y. TIMES, Sept. 10, 2020, https://www.nytimes.com/article/ahmaud-arbery-shooting-georgia.html.

[20] GAO Report at 1.

[21] *Bess*, 80 M.J. at 8.

[22] "Only eighteen general courts-martial went to trial over that same period." *Bess*, 80 M.J. at 16 n.2 (Ohlson, J., dissenting).

reported issues of racial bias and prejudice in the military justice system, and the unresolved questions about HM2 Bess's all-White panel,[23] the CAAF's decision is not only wrong, it has "grave implications for all future courts-martial involving African American servicemembers."[24]

Given the CAAF majority's decision to ignore its precedent, "attendant responsibilities, and the fundamental principles underlying" this Court's equal protection decisions, HM2 Bess must now ask this Court to address the uncomfortable issues of racial bias and prejudice that the lower courts avoided.[25] In doing so, what he asks for only requires one thing—uphold the Fifth Amendment's equal protection guarantee.

As statutes, initiatives, and task force findings shift with the political winds of the day, the Fifth Amendment's steadfast guarantee of equal protection is as important now as it has ever been. HM2 Bess's case is an appropriate vehicle for this Court to reaffirm the judiciary's basic commitment to equal protection and ensure minority servicemembers—volunteers providing our country's national defense—will have access to the Fifth Amendment's protection in the future.

In HM2 Bess's case, upholding the Fifth Amendment's equal protection guarantee starts with

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[23] *Id.* at 17 n.5 (listing the unresolved questions in Petitioner's case).
[24] *Id.* at 21.
[25] *Id.*

remanding his case for an evidentiary hearing.[26] Only then will HM2 Bess have a meaningful chance to "vindicate his legal and constitutional rights"[27] while seeking an answer to the question he asked the moment he saw the hand-selected members who would decide his fate:

"Why aren't there any Black people?"[28]

PETITION FOR A WRIT OF CERTIORARI

Hospital Corpsman Second Class Petty Officer Pedro M. Bess, United States Navy, respectfully petitions this Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Armed Forces.

OPINIONS BELOW

The CAAF's published opinion appears at pages 4a through 60a of the appendix to this petition. It is reported at 80 M.J. 1. The unpublished opinion of the United States Navy-Marine Corps Court of Criminal Appeals (NMCCA) appears at 61a through 94a of the appendix. It is available at 2018 CCA LEXIS 476.

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[26] *Id.* at 17 (describing an evidentiary hearing pursuant to *United States v. DuBay*, 17 C.M.A. 147 (C.M.A. 1967) as "reasonable, appropriate, and prudent"); *id.* at 23 (Sparks, J., dissenting) ("The prudent step at this point in the proceedings would be for the Court to authorize a *DuBay* hearing to shed further light on the panel selection process . . . .").

[27] *Id.* at 21 (Ohlson, J., dissenting).

[28] Clemency Letter, Mar. 13, 2017 at 2 [hereinafter Clemency Letter]; *Bess*, 80 M.J. at 16 n.1 (quoting Petitioner's clemency request).

JURISDICTION

The CAAF issued its decision on May 14, 2020. Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1259(3).[29]

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law[.]"[30]

STATUTE INVOLVED

10 U.S.C. § 825 appears at pages 1a through 3a of the appendix to this petition.

STATEMENT OF THE CASE

I. Ten days before trial, the Convening Authority hand-selected ten White members to replace the ten original members detailed to sit on Petitioner's general court-martial panel.

Ten White members filed into the courtroom on November 14, 2016 to begin *voir dire* in the general court-martial for HM2 Bess—a Black man.[31] "[T]he White defense attorneys and the White prosecutors

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[29] *See also Ortiz v. United States*, 138 S. Ct. 2165, 2170 (2018) ("[T]his Court has jurisdiction to review decisions of the CAAF, even though it is not an Article III court.").

[30] U.S. CONST. amend V.

[31] R. at 103-06; Clemency Letter at 2.

stood at attention" as the White members entered.[32] No one could reassure HM2 Bess as he realized an "all-White panel would hear evidence from the four complaining witnesses in the case—each of them White."[33]

These ten hand-selected White members, however, were not the first members the CA assigned to the case. Eight months earlier, on March 16, 2016, the CA had issued General Court-Martial Convening Order 2-16, establishing a general court-martial with ten different people.[34] The CA referred the charges against HM2 Bess to the general court-martial established under Convening Order 2-16.[35]

But then, just ten days before trial, the CA hand-selected ten White members for HM2 Bess's case.[36] The members arrived at the courtroom under the CA's order, General Court-Martial Amending Order 2J-16, which formally directed them to sit on HM2 Bess's general court-martial panel.[37] Neither an accident nor random, the CA's selection of each person was intentional, as required under 10 U.S.C. § 825.

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[32] Clemency Letter at 2.
[33] *Id.*
[34] Commander, Navy Region Mid-Atlantic, General Court-Martial Convening Order 2-16, Mar. 16, 2016 [hereinafter Convening Order 2-16].
[35] *Id.*
[36] Commander, Navy Region Mid-Atlantic, General Court-Martial Amending Order 2J-16, Nov. 4, 2016 [hereinafter Amending Order 2J-16].
[37] *Id.*

A. Before making the decision to refer Petitioner's charges to a general court-martial, the Convening Authority's Staff Judge Advocate provided legal guidance.

In January 2016, the CAAF set aside the convictions from HM2 Bess's first general court-martial and remanded the case for a new disposition decision from the CA.[38] In a unanimous opinion, the CAAF observed that HM2 Bess's case "turned in part on the identity of the alleged perpetrator . . . ."[39] On remand, the CA's Staff Judge Advocate (SJA) reviewed the CAAF's opinion and provided written advice to the CA as required under 10 U.S.C. § 834 (Article 34 Letter).[40]

The Article 34 Letter enclosed a copy of the Investigating Officer's Report of June 22, 2012 (IO's

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[38] *United States v. Bess*, 75 M.J. 70 (C.A.A.F. 2016). HM2 Bess challenged the Government's identification evidence during his first general court-martial. *Id.* at 75. As the members deliberated, they asked the military judge to provide them with additional evidence on this point. *Id.* at 72-73. Granting the members' request in part, the military judge allowed the prosecution to give "controverted evidence to the factfinder with no opportunity for the accused to examine or cross-examine witnesses or in any way rebut that evidence in front of the members . . . ." *Id.* at 73, 75. The CAAF described the military judge's decision as "unprecedented in our legal system" and something that "cannot be reconciled with due process." *Id.* at 75. It then concluded that HM2 Bess's "constitutional rights were violated" and set aside his convictions. *Id.*

[39] *Bess*, 75 M.J. at 73.

[40] 10 U.S.C. § 834; Article 34 Letter from the Staff Judge Advocate to Commander, Navy Region Mid-Atlantic [hereinafter Article 34 Letter].

report)[41] where alleged victims described the alleged perpetrator as "[t]he black technician," "younger black male," and "African American male."[42] Thus, the CA "had reason to know" that HM2 Bess was Black before deciding to pursue a retrial. In addition, the Article 34 Letter explained that the CA could "detail other members, additional members, and/or members not listed" in Convening Order 2-16 to sit on HM2 Bess's new general court-martial panel.[43]

In providing this advice, the SJA omitted any mention of *United States v. Crawford*[44] or *United States v. Smith*.[45] With these omissions, the SJA failed to advise the CA how he could appropriately consider race as a factor when selecting members in HM2 Bess's case.[46]

B. The parties to Petitioner's general court-martial litigated issues involving racial identification in front of the military judge before the Convening Authority hand-selected ten White panel members.

From April through November 2016, HM2 Bess's military judge addressed pre-trial issues.[47] The

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[41] The Investigating Officer produced the report in carrying out an investigation under 10 U.S.C. § 832.
[42] IO's report at 10, 14.
[43] Article 34 Letter at 2.
[44] 15 C.M.A. 31 (C.M.A. 1964) (permitting a CA to select members based on race for inclusive purposes when done to make the panel more representative of the accused's race).
[45] 27 M.J. 242 (C.M.A. 1988) (reaffirmed *Crawford*).
[46] *Riesbeck*, 77 M.J. at 163.
[47] R. at 1-77.

Defense requested discovery from the Government, which included information connected to the CA's selection of members.[48] And the Defense moved for the production of a witness—a government investigator—integral to HM2 Bess's mistaken identity defense.[49]

In September the military judge held a hearing on the Defense motion. The Defense argued that "a crucial part . . . of this case . . . is identification," and moved for the production of a government investigator who had contacted the complainants.[50]

Before ruling, the military judge opined on the issue of race.[51] She acknowledged that some testimony "would be admissible and highly relevant" if a complainant "specifically, 100 percent recalls him being a Caucasian female . . . ."[52] Yet the military judge denied the Defense motion to produce the government investigator.[53] Reasoning from personal experience, she said, "[E]xcept for [the court reporter], who I know personally, I don't know that I could identify anyone's race after we leave the courtroom this morning."[54]

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[48] The Defense sent a discovery request to the Government on June 7, 2016—five months before Amending Order 2J-16. App. Ex. IX at 8. The request asked for the production of "all information known to the Government as to the identities of potential alternate and/or additional panel members," along with additional information connected to the CA's selection of members. *Id.* at 8, 18.

[49] App. Ex. VI; R. at 17-41.

[50] R. at 17.

[51] R. at 34.

[52] R. at 36.

[53] R. at 40.

[54] R. at 34.

After the hearing, the CA replaced the ten members—all officers—listed in Convening Order 2-16 with five enlisted members and five *new* officers.[55] The CA never provided a reason for the change of personnel.[56]

On appeal, the CAAF majority theorized the CA made this change to accommodate HM2 Bess's request for enlisted representation.[57] In doing so, however, the majority neither acknowledged nor explained why the CA removed all ten officers listed in Convening Order 2-16, replacing five of them with *new officers*. HM2 Bess "elected trial by members with *enlisted representation*," not the removal of the ten officers listed in Convening Order 2-16.[58]

II. The Convening Authority's member selection process resulted in four hand-selected all-White general court-martial panels (juries) for four Black servicemembers accused of sex offenses in less than a year.

To implement 10 U.S.C. § 825 in HM2 Bess's case and others, the CA issued an instruction on June 14, 2016.[59] This instruction outlined the CA's process

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[55] Amending Order 2J-16.

[56] *Id.*

[57] *Bess*, 80 M.J. at 13 n.14 ("The single change to the convening order *appears* to be only in response to Appellant's request for enlisted representation.") (emphasis added).

[58] R. at 82 (emphasis added). Nothing in 10 U.S.C. § 825 requires removal of officers to add enlisted members.

[59] Amicus Br. of NAACP Legal Defense and Educational Fund, Inc., *United States v. Bess*, No. 19-0086/NA, at 10 (C.A.A.F. June 28, 2019) [hereinafter NAACP Brief].

for the "nominations of courts-martial panel members."[60] It included a "detailed questionnaire that potential panel members had to complete," with requests for the following information:

> [T]heir background, including hometown, level of education, and marital status; social patterns, including their primary source for news, websites frequently visited, television programs frequently watched and types of books and magazines frequently read; and contact with the criminal justice system, including whether they or any member of their family had ever been the subject of a police complaint, and whether they or anyone they know had been wrongly accused of a crime.[61]

The CA's instruction also outlined the nominative process for distributing the questionnaire and identifying potential members.[62] It established a "quota" system by which a set number of nominees were provided to the CA.[63] The CA ostensibly used this nominative process when selecting the ten White members in HM2 Bess's case.

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[60] *Id.*

[61] *Id.*

[62] *Id.*; *see also United States v. Mohead*, No. 201400403, 2015 CCA LEXIS 465, at *13 (N-M. Ct. Crim. App. Oct. 29, 2015) (unpublished) (describing the nominative process under an earlier version of the instruction, 5813.1B).

[63] NAACP Br. at 10; *Mohead*, 2015 CCA LEXIS 465, at *13.

A. Even though the Convening Authority used two types of questionnaires—one that asked the nominee to identify their race and one that did not—the lower court presumed the practice was regular.

Both the CAAF majority and the NMCCA acknowledged that the CA considered two types of nomination questionnaires.[64] The first questionnaire asked the nominee to identify their race. The second one omitted the race question. Each prospective member received only one of the forms.[65] The CA never explained the reason for the different nomination questionnaires or the process he used for distributing the different forms.

At trial, the military judge missed this issue altogether. She said, "[T]he race that each member most strongly identifies with is noted on the questionnaire."[66] However, only one of the selected members completed a questionnaire with a "racial identifier" question, who self-identified their race as "Caucasian."[67]

On appeal, neither the CAAF majority nor the NMCCA addressed why the CA used two different forms. No court ordered additional fact-finding to

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[64] *Bess*, 80 M.J. at 5-6; *United States v. Bess*, No. 201300311, 2018 CCA LEXIS 476, at *21 (N-M. Ct. Crim. App. Oct. 4, 2018) (unpublished).
[65] App. Ex. XXVII (sealed).
[66] R. at 145.
[67] App. Ex. XXVII (sealed); *Bess*, 80 M.J. at 5; *Bess*, 2018 CCA LEXIS 476, at *21 n.32.

determine if the CA excluded all nominated members self-identifying as African-American or Black. No court inquired into how the CA distributed the two different forms. No court resolved whether the CA or his subordinates targeted minorities with the form containing the "racial identifier" question.[68]

Instead, "cleav[ing]" to the "presumption of regularity," the CAAF majority entirely ignored the CA's use of two different questionnaires.[69] For the majority, it was sufficient to "presume the convening authority . . . acted in accordance" with the law when he hand-selected an all-White panel to sit in judgment of someone "he had reason to know" was Black.[70]

B. After selecting at least four all-White panels for four Black servicemembers accused of sex offenses, the Convening Authority demonstrated that he had the capacity to identify and select additional minority members.

Within three months of issuing the selection instruction, the CA began hand-selecting all-White panels. During the first year of his selection

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[68] The dissenting judges at the CAAF outlined nine questions requiring resolution through a factfinding hearing ordered pursuant to *United States v. DuBay*, 17 C.M.A. 147 (C.M.A. 1967). *Bess*, 80 M.J. at 17 n.5 (Ohlson, J., dissenting). An important preliminary question left unresolved is whether "the convening authority's subordinate commanders or staff judge advocate (or other staff members) screen[ed] potential panel members based on race, thereby effectively excluding African-Americans from the convening authority's consideration[.]" *Id.*

[69] *Bess*, 80 M.J. at 10.

[70] *Id.* at 10-11.

instruction, the CA hand-selected at least four all-White general court-martial panels for trials involving four Black men charged with sex offenses.[71] "Only eighteen general courts-martial [under the CA's purview] went to trial over that same period."[72]

In September 2016, the CA selected an all-White general court-martial panel for Chief Machinist's Mate Sherman Rollins—a Black servicemember charged with sexual assault.[73] Two months later, the CA selected a second all-White general court-martial panel for HM2 Bess. In early 2017, the CA selected a third all-White general court-martial panel for Lieutenant Junior Grade Willie Jeter—a Black officer charged with sexual assault.[74] After that, the CA selected a fourth all-White general court-martial panel for Lieutenant Junior Grade Joshua Johnson—another Black officer charged with sexual assault.[75]

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[71] *Id.* at 16 n.2 (Ohlson, J., dissenting); *United States v. Bess*, No. 201300311, 2018 CCA LEXIS 476 (N-M. Ct. Crim. App. Mar. 27, 2018) (order Granting Attachment to the Record); *United States v. Bess*, No. 201300311, 2018 CCA LEXIS 476, at App. 1 (N-M. Ct. Crim. App. Mar. 5, 2018) (Mot. for Leave to File Out of Time Motion to Reconsider *En Banc* Motion to Attach and Motion to Reconsider *En Banc* Motion to Attach) [hereinafter Supervisor's Affidavit]. The record suggests a possible fifth instance. Without naming the case, the Defense explained that HM2 Bess's general court-martial was "the second time in a row" that the CA hand-selected all-White members for a Black servicemember's court-martial panel. R. at 145-46.

[72] *Bess*, 80 M.J. at 16 n.2 (Ohlson, J., dissenting).

[73] Supervisor's Affidavit at Attachment 1.

[74] *Id.*

[75] *Id.*

After the fourth all-White panel, the region supervisor for military defense counsel took action.[76] He challenged the CA's practice of detailing all-White panels, finding "it hard to believe there are no African-American Officers or Sailors in the largest fleet concentration area in the world to sit on panels where African-American[s] . . . face trial for sexual assault allegations."[77]

In response, the CA added members to Lieutenant Junior Grade Johnson's general court-martial panel. From his pool of potential members, the CA identified and hand-selected "one African-American, one Hispanic-American, one Asian-American, one Native American and one Caucasian female," demonstrating the capacity to select members based on race.[78]

C. Petitioner challenged the Convening Authority's repeated selection of all-White panels as an equal protection violation under the framework this Court established in *Castaneda v. Partida*, 430 U.S. 482 (1976).

On appeal below, HM2 Bess challenged the CA's pattern of selecting all-White panels for Black servicemembers accused of sex offenses. The Defense cited the supervisory defense counsel's sworn affidavit and argued for relief under the *Castaneda*

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[76] *Id.*
[77] *Id.*
[78] *Id.*

framework.[79] The CAAF majority held that, even assuming the CA hand-selected all-White general court-martial panels for four Black servicemembers in less than a year, it did not constitute a "prima facie case under the *Castaneda* framework" because "one year is not a 'significant period of time.'"[80]

III. Neither the trial judge nor the appellate courts examined why the Convening Authority excluded African-Americans from Petitioner's general court-martial panel.

Petitioner did two things after the all-White panel entered the courtroom. First, the Defense made an oral discovery motion, asking for the production of "a statistical breakdown of the population as far as race with respect to the convening authority's command."[81] This motion came in direct response to the military judge's suggestion. She explained, "[Y]our argument could be slightly stronger . . . if you knew more information about the racial and statistical makeup of the pool of members for this particular convening authority."[82]

Second, the Defense challenged the racial composition of the panel under both 10 U.S.C. § 825 and the equal protection component of the Fifth

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[79] Br. on Behalf of Appellant, *United States v. Bess*, No. 19-0086/NA, at 6-7, 30-31 (C.A.A.F. June 19, 2019).
[80] *Bess*, 80 M.J. at 10. In total, the CA only served for twenty-seven months in the position, from March 10, 2016 to July 20, 2018. *Id.* at 20 n.10 (Ohlson, J., dissenting).
[81] R. at 144.
[82] *Id.*

Amendment's due process guarantee,[83] describing it as a "preventative *Batson* challenge."[84] Seeing an absence of Black servicemembers on the panel, the Defense argued that the "command is preventing that race from representation on the panel so that they can avoid a *Batson* challenge."[85]

A. After suggesting the Defense needed additional discovery to support its equal protection challenge, the military judge denied the Defense motion to produce it.

Even though the Defense made its discovery motion at the military judge's suggestion, she found it was untimely,[86] required an impracticable "feat,"[87] and sought irrelevant information.[88] Then she said, "I have sat on numerous panels and *observed* members of other panels while here, and I have not *seen* any indication of any pattern of discrimination by excluding minority members."[89]

On appeal, the NMCCA and the CAAF majority upheld the military judge's ruling. The NMCCA held the military judge erred in declaring the discovery

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[83] *Bess*, 80 M.J. at 7 n.7 (finding HM2 Bess's objection at trial "adequately preserved his Fifth Amendment arguments").
[84] R. at 141 (citing *Batson v. Kentucky*, 476 U.S. 79 (1986)).
[85] *Id.*
[86] R. at 145.
[87] *Id.*
[88] *Id.*
[89] *Id.* (emphasis added).

motion untimely "but did not abuse her discretion . . . ."[90] The CAAF majority "agree[d] with the NMCCA."[91]

In dissent, Judges Ohlson and Sparks found the military judge "abused her discretion" in denying the discovery motion.[92] As a result, they viewed a "remand for a *DuBay* hearing" as "clearly warranted" so "that the information may now be obtained" and the question about the absence of Black servicemembers on HM2 Bess's panel resolved.[93]

The dissenting judges cited several points supporting their view. First, the military judge's untimeliness ruling "was faulty—both factually and legally."[94] Second, the military judge described production of the requested evidence as an impracticable "feat" even though there was no evidence showing "it would be difficult to obtain . . . ."[95] Third, the military judge erred "factually and legally" in describing the requested information as "irrelevant" after she "conceded" its relevance to the Defense.[96]

Finally, they addressed the military judge's findings on her ability to perceive the race of the members.[97] The military judge "claimed she could *not* determine the race of the members of the panel *based*

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[90] *Bess*, 2018 CCA LEXIS 476, at *21.
[91] *Bess*, 80 M.J. at 12.
[92] *Id.* at 18-19 (Ohlson, J., dissenting).
[93] *Id.* at 18.
[94] *Id.*
[95] *Id.*
[96] *Id.* at 18-19.
[97] *Id.* at 19.

on her personal observations."[98] Yet at the "same time" she also "claimed that *based on her personal observation* of *other panels*, she *could* determine there was no pattern of discrimination based on the race of the members."[99] In the "charitable" view of the dissenting judges, "these claims were in tension with one another" and "constituted an abuse of discretion."[100]

B. The court below issued a fractured decision on Petitioner's equal protection challenge under *Batson v. Kentucky*, 476 U.S. 79 (1986).

In addition to denying the discovery motion, the military judge summarily denied HM2 Bess's "preventative *Batson* challenge" before trial.[101] She explained that she learned of HM2 Bess's race based on "how his identification was made" at his first general court-martial and did not see "anyone" on the panel who was "obviously of the same race" as him.[102] Yet she denied the motion before individual voir dire, finding she could not determine the "actual racial makeup" of the members.[103]

On appeal, the NMCCA considered the equal protection challenge under *Batson* and affirmed. In the NMCCA's view, the Fifth Amendment does not require the CA to provide a "race neutral reason for

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[98] *Id.* (emphasis in original).
[99] *Id.* (emphasis in original).
[100] *Id.*
[101] R. at 140-46.
[102] R. at 143.
[103] R. at 146.

not having any African-Americans on the panel."[104] The NMCCA described such a requirement as unprecedented.[105]

The CAAF majority split on the application of *Batson* to the CA. Judges Ryan and Stucky viewed the CA as outside the reach of *Batson*'s holding. They confined *Batson* to peremptory challenges, even in cases like HM2 Bess's where the CA hand-selected an all-White general court-martial panel to sit in judgment of a person he had "reason to know . . . was African-American."[106]

Judge Maggs issued the deciding vote against HM2 Bess. He held in a separate concurring opinion that HM2 Bess failed to raise the "factual predicate" necessary for application of *Batson* to the CA.[107] In his view, the military judge made no "finding . . . as to the members' races," leaving the CAAF with "no reason to decide the important and difficult issues of whether or how *Batson* hypothetically might apply to member selection by a convening authority."[108] He then went on to find that HM2 Bess "waived any right to further discovery."[109]

In applying the waiver doctrine, Judge Maggs omitted any mention of the military judge's express directive to defense counsel. After denying the discovery motion and summarily rejecting the

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[104] *Bess*, 2018 CCA LEXIS 476, at *23.
[105] *Id.* at *24.
[106] *Bess*, 80 M.J. at 5, 8.
[107] *Id.* at 14-15 (Maggs, J., concurring).
[108] *Id.*
[109] *Id.* at 15.

"preventative *Batson* challenge," she said, "This issue has been *noted for the record*, and we are moving on."[110]

Unlike Judges Ryan, Stucky, and Maggs, Judges Ohlson and Sparks found HM2 Bess made "a prima facie showing of a violation of his constitutional right to equal protection under the Fifth Amendment based on the intentional and impermissible exclusion of African-Americans from a court-martial panel hand-selected by a convening authority."[111] They explained that "the fundamental equal protection principles espoused in *Batson* must apply broadly to the *entire* jury-selection process—to specifically include the convening authority's selection of the venire panel—to ensure the constitutional rights of accused servicemembers are protected."[112] This also "includes subordinate authorities tasked with providing candidates for the convening authority's consideration."[113]

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[110] R. at 145 (emphasis added). Notably, the military judge gave this direction *before* the Defense had the opportunity to ask the members to identify their race in individual *voir dire*. R. at 145-46. While it is true the defense counsel could have attempted to ask each member about their race during individual *voir dire,* doing so would have contravened the military judge's direction. She had already ruled on the issue and instructed the parties to move on. *Cf. Bess*, 80 M.J. at 15 (Maggs, J., concurring) ("Both sides agreed at oral argument that trial defense counsel could have asked the members during individual voir dire to identify their races, but trial defense counsel did not do so.").

[111] *Bess*, 80 M.J. at 21 (Ohlson, J., dissenting).

[112] *Id.* at 20.

[113] *Id.* at 22 (Sparks, J., dissenting).

Given the *prima facie* showing, Judges Ohlson and Sparks would have remanded for "a simple *DuBay* hearing"—a fact-finding hearing that is "often-used" in military practice—so that HM2 Bess "may seek to vindicate his legal and constitutional rights."[114]

REASONS TO GRANT REVIEW

I. Through Judge Maggs's misapplication of the waiver doctrine, the lower court erred in avoiding Petitioner's equal protection claim—a constitutional issue of national importance.

With respect to HM2 Bess's equal protection challenge under *Batson*, Judge Maggs departed from the majority's rationale. Because Judge Maggs issued the third—and decisive—vote against HM2 Bess on the issue, his concurrence represents the CAAF's holding.[115] In applying the waiver doctrine to avoid addressing the merits of the issue, Judge Maggs clearly erred.

Waiver is a defendant's "intentional relinquishment or abandonment of a known right."[116] In general, appellate courts "indulge every reasonable

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[114] *Id.* at 17, 21 (Ohlson, J., dissenting).

[115] *See Marks v. United States*, 430 U.S. 188, 193 (1977) (explaining that when no single rationale enjoys the support of a majority, then the "position taken by those Members who concurred in the judgements on the narrowest grounds" represents the holding).

[116] *United States v. Olano*, 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

presumption *against* waiver of fundamental constitutional rights . . . ."[117]

Here, as four judges concluded, HM2 Bess did not waive his equal protection claim under *Batson*. He raised it at trial and moved for additional discovery. The military judge denied any relief. Defense counsel even pressed the issue after the military judge's summary denial, and the military judge made it clear that HM2 Bess had preserved his equal protection claim for appeal. She said, "*This issue has been noted for the record, and we are moving on*."[118]

The record belies any claim that HM2 Bess knowingly and intentionally waived either his equal protection claim under *Batson* or his corresponding motion for additional discovery. When the members walked in, HM2 Bess—a Black man—saw that no one looked like him, which prompted him to raise the issue. Even though the military judge simultaneously claimed that she could not ascertain the race of the members while agreeing that none of them looked like HM2 Bess,[119] she nevertheless *issued a ruling* against him.[120] The NMCCA *reviewed the military judge's ruling* and affirmed.[121] Yet Judge Maggs went two steps further, concluding that not only did HM2 Bess fail to raise an equal protection issue under *Batson*, he affirmatively waived it. To be sure, the record

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[117] *Johnson*, 304 U.S. at 464 (internal quotation omitted) (emphasis added).
[118] R. at 145.
[119] R. at 146.
[120] R. at 144-46.
[121] *Bess*, 2018 CCA LEXIS 476, at *18-24.

demonstrates otherwise, just as every other judge who has reviewed this issue has concluded.

A Black servicemember's equal protection challenge to a hand-selected, all-White court-martial panel is an issue too important to let the CAAF avoid it through one judge's rewriting of the record and misapplication of the waiver doctrine.[122] HM2 Bess is entitled to a ruling from *all five judges* at the CAAF on his equal protection challenge under *Batson*—a challenge he *unambiguously preserved in the record*. And all servicemembers under the CAAF's jurisdiction deserve guidance from a CAAF majority on the issue. Accordingly, this Court's review is warranted so that it can remand to the CAAF.

II. Setting a precedent that allows Convening Authorities to escape meaningful judicial review of their selection of members, the lower court's interpretation and application of 10 U.S.C. § 825 violates Petitioner's equal protection rights under the Fifth Amendment.

As this Court recently observed in *Flowers v. Mississippi*, "many jurisdictions" used "discriminatory tools to prevent Black persons from

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[122] *Cf. Swain v. Alabama*, 380 U.S. 202 (1965); *Smith v. Texas*, 311 U.S. 128 (1940); *Norris v. Alabama*, 294 U.S. 587 (1935); *Neal v. Delaware*, 103 U.S. 370 (1880). In each of these cases, this Court had to reverse a Black defendant's rape conviction because he was either unconstitutionally indicted or tried by an all-White jury.

being called for jury service." [123] Historically, "when those tactics failed, or were invalidated, prosecutors could still exercise peremptory strikes in individual cases to remove most or all Black prospective jurors."[124] These discriminatory practices eventually gave rise to *Batson v. Kentucky*.[125] Petitioner presents his equal protection issue here against this historical backdrop, which is especially relevant given that it appears the "[CA] is preventing [Black persons] from representation on the panel so that [the prosecution] can avoid a *Batson* challenge."[126]

A. In its decision below, the lower court put Convening Authorities outside the reach of the Fifth Amendment's equal protection guarantee.

"Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice."[127] When discrimination plagues the jury selection process, "the injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts."[128] The equal protection component of the Fifth Amendment is a safeguard against such discrimination.

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[123] 139 S. Ct. 2228, 2238-41 (2019).
[124] *Id.*
[125] 476 U.S. 79 (1986)
[126] R. at 141.
[127] *Rose v. Mitchell*, 443 U.S. 545, 555 (1979).
[128] *Ballard v. United States*, 329 U.S. 187, 195 (1946).

Under the Fifth Amendment's equal protection guarantee, a criminal defendant has a right to a jury "from which no 'cognizable racial group' has been excluded."[129] The CAAF made clear that this right applies to courts-martial panels with the same force as it does to civilian juries.[130] Thus, whether in the context of a civilian trial or a court-martial, the exclusion of Black people, "or any group otherwise qualified to serve, impairs the confidence of the public in the administration of justice."[131]

The CAAF's decision in HM2 Bess's case undermines public confidence in the administration of justice. In the CAAF majority's view, it is permissible for CA's to repeatedly hand-select all-White panels to sit in judgment of Black servicemembers accused of sex offenses.[132] For at least three reasons, the CAAF majority is wrong.

First, the CAAF majority concluded the CA did not *intentionally* select an all-White panel in HM2 Bess's case.[133] As 10 U.S.C. § 825 mandates, however, this conclusion is wrong. The dissenting judges highlighted as much, explaining that "*there was nothing random about the selection of the venire panel in this case*."[134] To the contrary, "the commander who

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[129] *Batson*, 476 U.S. at 96.
[130] *United States v. Santiago-Davila*, 26 M.J. 380, 389-90 (C.M.A. 1988) (quoting *Batson*, 476 U.S. at 96).
[131] *Rose*, 443 U.S. at 556.
[132] *Bess*, 80 M.J. at 10.
[133] *Id.* at 11.
[134] *Id.* at 16 (Ohlson, J. dissenting).

convened [HM2 Bess's] court-martial personally selected the venire panel," as the UCMJ required.[135]

Second, the CAAF majority's decision rests, in part, on a "presumption of regularity."[136] Strikingly, the CAAF majority found nothing out of the ordinary with the CA's hand-selection of all-White panels in four cases.

Again, the CAAF majority erred. The military is racially diverse. The CA was stationed in the largest fleet concentration area in the world,[137] meaning he had a diverse pool of potential members to choose from. Yet he hand-selected all-White panels in one out of every five cases and, in particular, for trials of Black servicemembers accused of sex offenses.[138] He used two different questionnaires—one that asked for a potential member's race and one that did not. He did not disclose the guidance for how his subordinates used the two different questionnaires. And when the supervisory defense counsel challenged his selection process, the CA demonstrated that he could both find and select minority members. To this end, the CA's selection process was anything but "regular."

Third, the CAAF majority created an unprecedented hurdle for HM2 Bess to clear in order to just *raise an issue* with his all-White panel. Under the CAAF's precedent, "even reasonable doubt concerning the use of impermissible selection criteria

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[135] *Id.*
[136] *Id.* at 10.
[137] Supervisor's Affidavit at Attachment 1.
[138] *Bess*, 80 M.J. at 16 n.2 (Ohlson J., dissenting).

for members cannot be tolerated."[139] Where such doubt exists, the CAAF's precedent—at a minimum—required it to remand for a fact-finding hearing.[140] Yet despite the CAAF's "clear-cut" precedent, the majority ignored it and imposed a more strenuous *prima facie* standard on HM2 Bess. For HM2 Bess—and other Black servicemembers—CAAF precedent now requires proof of the ultimate issue (intentional discrimination) to even make out a *prima facie* case.

The CAAF majority is "wrong—fundamentally and egregiously . . . ."[141] The result of the CAAF majority's misguided decision is that a CA's selection of members, for all practical purposes, sits outside the Fifth Amendment's reach. Absent direct evidence of a CA's discriminatory intent, minority defendants in the military cannot challenge an all-White court-martial panel and military judges have no duty to examine the CA's selection process. Thus, where servicemembers could once count on judicial review as a safeguard against the CA's wide discretion under 10 U.S.C. § 825, that is no longer the case. Under the precedent set in HM2 Bess's case, CA's now have what amounts to unbridled, unreviewable discretion.

B. This Court should use *Castaneda* and *Batson* as guideposts to uphold the Fifth Amendment's equal protection guarantee.

While the legal requirements for selecting court-martial members diverge significantly from the

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[139] *Riesbeck*, 77 M.J. at 163.
[140] *Id.*
[141] *Bess*, 80 M.J. at 21 (Ohlson J., dissenting).

requirements for jury selection in civilian trials, both systems aim to provide defendants with "a fair trial in a fair tribunal."[142] Given this similarity, two cases from the civilian jury context provide useful guideposts for the CA's selection of members: *Castaneda* and *Batson*. While the fit is imperfect, the underlying equal protection principles transcend the civilian jury context and should inform this Court's view of the *prima facie* criteria for an equal protection challenge to a court-martial panel.

a. Petitioner presented *prima facie* evidence of an equal protection violation under *Castaneda*.

In *Castaneda*, this Court prohibited a state government's "systematic exclusion" of minorities from service as grand jurors.[143] To that end, this Court set out a three-part framework for establishing a *prima facie* case of systematic exclusion:

> The first step is to establish that the group is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied. Next the degree of underrepresentation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve . . . over a significant period of time. . . . Finally . . . a selection procedure that is

[142] *Weiss v. United States*, 510 U.S. 163, 178 (1994) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).
[143] *Castaneda*, 430 U.S. at 484.

> susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing.[144]

When tailored to the military justice system, HM2 Bess satisfies all three parts. He is Black, which is a clearly identifiable class that has historically been singled out for different treatment.[145] In addition, given the CA's wide discretion under 10 U.S.C. § 825, the member selection process for courts-martial is susceptible to abuse.[146]

Where *Castaneda* is an imperfect fit—and where the CAAF majority erred in its decision—is the second part. The military justice system does not sync with the second part's "significant period of time" requirement for civilian juries. Military commanders serve relatively brief tours as CAs,[147] much shorter than the eleven and seven years of underrepresentation this Court deemed sufficient to satisfy the second factor.[148]

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[144] *Id.* at 494-95.

[145] *White v. Regester*, 412 U.S. 755, 767-68 (1973); *see also Whitus v. Georgia*, 385 U.S. 545 (1967).

[146] *See Smith*, 27 M.J. 248-50 (discussing the CA's subjective discretion under 10 U.S.C. § 825); *see also Castaneda*, 430 U.S. at 497 (finding the "key man" system susceptible to abuse because the selection process is "highly subjective.").

[147] *Bess*, 80 M.J. at 20 n.10 (Ohlson, J., dissenting) (explaining "convening authorities serve in their roles for a finite period of time, often for a few years or less.").

[148] *Id.* at 487 (eleven years was significant period); *Hobby v. United States*, 468 U.S. 339, 341 (1984) (seven years was significant period).

Yet despite the differences between court-martial panels and civilian juries, the CAAF majority adopted a literal application of *Castaneda*'s second factor.[149] It held that one year was "not a 'significant period of time,'" making four all-White panels a non-issue.[150] In doing so, the CAAF majority left unanswered the question of how *Castaneda's* framework "*could* be extended to a convening authority's selection of court-martial members."[151]

The majority's decision missed the mark. The equal protection guarantee must be applied in a way that conforms to uniqueness of the military justice system, given the differences between civilian juries and court-martial panels. Otherwise, "compelling and highly disturbing" issues of racial discrimination, such as those presented here, go unaddressed, are likely to recur, and will continue to evade judicial review.[152]

In HM2 Bess's case, the CA served from March 10, 2016 to July 10, 2018—just twenty-seven months.[153] HM2 Bess presented evidence of underrepresentation and the potential exclusion of

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[149] *Bess,* 80 M.J. at 9-10 (citing *Hobby*, 468 U.S. at 341; *Castaneda*, 430 U.S. at 487) (highlighting *United States v. Quinones*, No. 93-10751, 1995 U.S. App. LEXIS 1635, at *30-31 (9th Cir. Jan. 25, 1995) (unpublished) (one year not significant period); *Ramseur v. Beyer*, 983 F.2d 1215, 1233 (3rd Cir. 1992) (two years not significant period)).

[150] *Bess*, 80 M.J. at 10-11.

[151] *Id.* at 9 (emphasis in original).

[152] *Id.* at 21 (Ohlson, J. dissenting).

[153] *Bess*, 80 M.J. at 20 n.10 (Ohlson, J., dissenting) (explaining "convening authorities serve in their roles for a finite period of time, often for a few years or less").

Black members through almost half of the CA's tenure. Considering that 10 U.S.C. § 825 requires CAs to exercise their personal discretion, it makes no sense to amalgamate selection practices under different CAs. Yet, by implication, that is what the CAAF's precedent now requires. And as a result, a military defendant's "right to equal protection [is] essentially unenforceable . . . ."[154]

Notably, the CAAF majority could have tailored *Castaneda*'s equal protection principles to the military justice system. For example, the CAAF could have used racial disparity ratios as evidence of systematic exclusion. Here, the CA had only eighteen general courts-martial go to trial over the period where he hand-selected four all-White panels.[155] This makes the disparity ratio 22%. By comparison, this Court found the following disparities "made out a *prima facie* case of grand jury discrimination: 14.7%; 18%; 19.7%; 23%"—three of which are lower than the disparity HM2 Bess presents.[156] To be sure, there is evidence of racial injustice in HM2 Bess's case and others. Yet the CAAF majority ignored it.

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[154] *Id.*

[155] *See* U.S. Navy Judge Advocate Gen.'s Corps, *Results of Trial*, https://www.jag.navy.mil/news/ROT_2016.htm (last visited Sept. 5, 2020); U.S. Navy Judge Advocate Gen.'s Corps, *Results of Trial*, https://www.jag.navy.mil/news/ROT_2017.htm (last visited Sept. 5, 2020).

[156] *Woodfox v. Cain*, 772 F.3d 358, 375 (5th Cir. 2014).

b. Petitioner presented *prima facie* evidence of an equal protection violation under *Batson*.

More than once, the CAAF has likened a CA to a prosecutor.[157] And because of that likeness, *Batson*'s equal protection principles are implicated here. In *Batson*, this Court held that a prosecutor's peremptory strike of a Black juror from the jury venire was *prima facie* evidence of an equal protection violation.[158] Similar to *Castaneda*, once a defendant makes a *prima facie* case, the burden shifts to the Government to provide a race-neutral explanation for the strike.[159]

To make a *prima facie* case under *Batson*, a defendant must show: (1) they are part of a "cognizable racial group;" (2) the Government removed members of that same racial group from the panel; and (3) the "facts and any other circumstances raise an inference" that members were excluded on account of their race.[160] While *Batson* may have only dealt with peremptory challenges to potential jurors "solely on the basis of their race," this Court grounded its underlying rationale in the equal protection guarantee—a protection the CAAF majority failed to

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[157] *See United States v. Greene*, 37 M.J. 380, 384 (C.M.A. 1993) (comparing a CA to a prosecutor and stating "race should not be the basis for a convening authority's decision to refer charges to a court-martial"); *United States v. Carter*, 25 M.J. 471, 478 (C.M.A. 1988) (Cox, J., concurring) (highlighting the CA "has the functional equivalent of an unlimited number of peremptory challenges").

[158] *Batson*, 476 U.S. at 96-97.

[159] *Id.*

[160] *Id.* at 96.

uphold not just for HM2 Bess, but all similarly situated servicemembers.

The CAAF majority again got it wrong. For three reasons, as Judge Ohlson explained, *Batson*'s underlying equal protection principles extend to a CA's selection of members.[161] First, this Court did not limit its equal protection holding in *Batson* to the facts of the case. Rather, it noted "the Constitution prohibits *all forms* of purposeful racial discrimination in selection of jurors."[162] Second, this Court specifically referenced the need "to eradicate racial discrimination *in the procedures used to select the venire from which individual jurors are drawn*."[163] Third, to find otherwise would prohibit the exclusion of panel members based on race during voir dire but not extend those same protections to an accused during the selection of the panel in the first instance.[164]

Whether couched as the exclusion (or removal) of Black members, as in *Batson*, or the underrepresentation of Black members, as in *Castaneda*, HM2 Bess made a *prima facie* case of discrimination in the courts below. As such, the available evidence indicates that Black members were not only underrepresented on (or excluded from) HM2 Bess's panel, but in a series of cases. The

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[161] Referencing *Batson*, Judge Ohlson emphasized "the constitutional scope of that opinion—if not its literal holding—extends beyond the context of peremptory challenges during voir dire." *Bess*, 80 M.J. at 20 (Ohlson, J., dissenting) (quoting *Batson*, 476 U.S. at 89).

[162] *Id.*

[163] *Id.*

[164] *Id.*

Government—including the CA—has neither provided a race-neutral explanation for the exclusion of Black members nor evidence to rebut HM2 Bess's *prima facie* case.

Unfortunately, under the CAAF majority's mistaken view, the Government has no obligation to provide a race-neutral explanation. The majority looked at HM2 Bess's challenge to his all-White panel and affirmed. Ignoring obvious issues of racial injustice, the majority bent over backwards to reach this result. It ignored its own precedent, presumed HM2 Bess's all-White panel was "regular" in the face of disturbing evidence to the contrary, ignored the equal protection principles in *Castaneda* and *Batson*, and developed more stringent *prima facie* criteria for HM2 Bess (and similarly situated minorities).

Judges Ohlson and Sparks, however, saw the majority's opinion for what it was—a dangerous precedent with "grave implications for all future courts-martial involving African American servicemembers."[165] As they explained, the "disturbing" evidence of racial injustice in HM2 Bess's case mandates an evidentiary hearing.[166] Accordingly, this Court's review is warranted so that it can remand for the evidentiary hearing that is necessary for HM2 Bess to vindicate his constitutional and statutory rights.

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[165] *Bess*, 80 M.J. at 21 (Ohlson, J., dissenting).
[166] *Id.* at 21-23.

III. The lower court's flawed decision is of national importance and warrants this Court's review.

At a moment in time where the nation and military are reflecting on racial bias and discrimination in its justice systems, this case comes before this Court. Although "the Armed Services ha[s] been a leader in eradicating racial discrimination,"[167] does not now make it "immune to the forces of bias and prejudice."[168]

Above all, the military continues to be a "globally-recognized leader" and "America's most respected institution."[169] And whether serving in this nation's military or not, the Equal Protection guarantee of the Fifth Amendment extends to all Americans. HM2 Bess's question was simple and straightforward: "Why aren't there any Black people?" To that end, the answer cannot be to presume regularity, as the lower courts suggest, when the facts indicate the contrary.

In the past, this Court has had to address issues of racial discrimination in the venire-selection processes when lower courts throughout the country have been unable to do so adequately. Notably, in *Batson*, this Court saw the need to "put an end to

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[167] *Santiago-Davila*, 26 M.J. at 390.

[168] Mark Esper, U.S. Sec'y of Def., Message to the Force on DOD Diversity and Inclusiveness (June 18, 2020), https://www.defense.gov/Newsroom/Transcripts/Transcript/Article/2224438/secretary-mark-t-esper-message-to-the-force-on-dod-diversity-and-inclusiveness/.

[169] *Id*.

governmental discrimination on account of race" and identified that prosecutors' peremptory challenges were "largely immune from constitutional scrutiny."[170] Strikingly similar to a prosecutors' peremptory challenges, the CAAF's opinion allows for the CAs' member selection process to go largely immune from constitutional scrutiny.

To preserve the fabric of the military, America's most respected institution, this Court should grant certiorari to make plain to the lower courts that they cannot be dismissive to any indicium of discrimination. The lower courts' message to the justice system—even if unintentional—is clear: To avoid issues of race, claim you do not see color. Although blindness to race is an ideal justice system, it is not reality, as this Court has seen just this past year.[171] Pretending as though it is has "grave implications for all future courts-martial involving Black servicemembers."[172]

CONCLUSION

Accordingly, HM2 Bess petitions for a grant of certiorari respectfully asking this Court to vacate the CAAF's opinion and remand for additional fact-finding pursuant to *United States v. Dubay*—as the dissenters suggest—to vindicate HM2 Bess's Due Process rights. For the reasons stated above, such review is warranted in HM2 Bess's case.

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[170] *Batson*, 476 U.S. 85, 92-93.
[171] *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019).
[172] *Bess*, 80 M.J. at 21 (Ohlson, J., dissenting).

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