10 U.S.C. § 825

Art. 25. Who may serve on courts-martial

(a) Any commissioned officer on active duty is eligible to serve on all courts-martial for the trial of any person who may lawfully be brought before such courts for trial.

(b) Any warrant officer on active duty is eligible to serve on general and special courts-martial for the trial of any person, other than a commissioned officer, who may lawfully be brought before such courts for trial.

(c)(1) Any enlisted member on active duty is eligible to serve on a general or special court-martial for the trial of any other enlisted member.

(2) Before a court-martial with a military judge and members is assembled for trial, an enlisted member who is an accused may personally request, orally on the record or in writing, that—

(A) the membership of the court-martial be comprised entirely of officers; or

(B) enlisted members comprise at least one-third of the membership of the court-martial, regardless of whether enlisted members have been detailed to the court-martial.

(3) Except as provided in paragraph (4), after such a request, the accused may not be tried by a general or special court-martial if the membership of the court-martial is inconsistent with the request.

(4) If, because of physical conditions or military exigencies, a sufficient number of eligible officers or enlisted members, as the case may be, is not available to carry out paragraph (2), the trial may nevertheless be held. In that event, the convening authority shall make a detailed written statement of the reasons for nonavailability. The statement shall be appended to the record.

(d)(1) Except as provided in paragraph (2) for capital offenses, the accused in a court-martial with a military judge and members may, after the findings are announced and before any matter is presented in the sentencing phase, request, orally on the record or in writing, sentencing by members.

(2) In a capital case, the accused shall be sentenced by the members for all offenses for which the court-martial may sentence the accused to death in accordance with section 853(c) of this title (article 53(c)).

(3) In a capital case, if the accused is convicted of a non-capital offense, the accused shall be sentenced for such non-capital offense in accordance with section 853(b) of this title (article 53(b)), regardless of whether the accused is convicted of an offense for which the court-martial may sentence the accused to death.

(e)(1) When it can be avoided, no member of an armed force may be tried by a court-martial any member of which is junior to him in rank or grade.

(2) When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. No member of an armed force is eligible to serve as a member of a general or special court-martial when he is the accuser or a witness for the prosecution or has acted as preliminary hearing officer or as counsel in the same case.

(3) The convening authority shall detail not less than the number of members necessary to impanel the court-martial under section 829 of this title (article 29).

(f) Before a court-martial is assembled for the trial of a case, the convening authority may excuse a member of the court from participating in the case. Under such regulations as the Secretary concerned may prescribe, the convening authority may delegate his authority under this subsection to his staff judge advocate or legal officer or to any other principal assistant.

UNITED STATES,
Appellee

v.

Pedro M. BESS, Hospital Corpsman Second Class Petty Officer, United States Navy, Appellant

United States Court of Appeals for the Armed Forces

October 23, 2019, Argued;

May 14, 2020, Decided

No. 19-0086

Prior History: Crim. App. No. 201300311. Military Judge: Heather D. Partridge. *United States v. Bess*, 2018 CCA LEXIS 476 (N-M. Ct. Crim. App. Apr. 27, 2017).

For Appellant: Lieutenant Clifton E. Morgan III, JAGC, USN (argued); Lieutenant Commander William L. Geraty, JAGC, USN, and Lieutenant Commander Jacob E. Meusch, JAGC, USN (on brief).

For Appellee: Lieutenant Kurt W. Siegal, JAGC, USN (argued); Colonel Mark K. Jamison, USMC, Captain Brian L. Farrell, USMC, and Brian K. Keller, Esq. (on brief); Lieutenant Joshua C. Fiveson, JAGC, USN.

Amicus Curiae for Appellant: Daniel S. Harawa, Esq., Sherrilyn A. Ifill, Esq., Kerrel Murray, Esq., Janai S. Nelson, Esq., and Samuel Spital, Esq., for the NAACP Legal Defense and Educational Fund, Inc. (on brief).

Judges: Judge RYAN delivered the opinion of the Court, in which Chief Judge STUCKY joined, and Judge MAGGS joined, except as to Part II.B.1. Judge MAGGS filed a separate opinion, concurring in part and concurring in the judgment. Judge OHLSON filed a dissenting opinion, in which Judge SPARKS joined. Judge SPARKS filed a dissenting opinion, in which Judge OHLSON joined.

Judge RYAN delivered the opinion of the Court.

Appellant's original conviction was set aside for legal error, and a rehearing was authorized. United States v. Bess, 75 M.J. 70, 77 (C.A.A.F. 2016). The convening authority then referred charges to a new general court-martial. A panel of three officer and two enlisted members, convicted Appellant, an X-ray technician, contrary to his pleas, of two specifications of indecent conduct in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (2012),[1] for his wrongful requirement that two women undress during their respective X-ray examinations. The court-martial sentenced Appellant to be reduced to the grade of E-3, to be confined for one year, and to be reprimanded. The convening authority approved the adjudged sentence, and the United States Navy-Marine Corps Court of Criminal Appeals (NMCCA) affirmed the findings and sentence. *United States v. Bess*, No. NMCCA 201300311, 2018 CCA LEXIS 476, *33, 2018 WL 4784569, *12 (N-M. Ct. Crim. App. Oct. 4, 2018).

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[1] The members acquitted Appellant of one specification of indecent conduct and one specification of attempted indecent conduct.

On appeal, Appellant alleges racial discrimination and unlawful influence in the convening authority's selection of members. We granted review to consider three issues:

> I. Whether the convening authority's selection of members violated the equal protection requirements of the Fifth Amendment.
>
> II. Whether the convening authority's selection of members constituted unlawful command influence.
>
> III. Whether the lower court erred in affirming the military judge's denial of Appellant's motion to produce evidence of the racial makeup of potential members.

We answer all three questions in the negative. While racial discrimination is clearly unconstitutional, absent intentional racial discrimination or an improper motive or criteria in the selection of members, the mere fact a court-martial panel fails to include minority representation violates neither the Fifth Amendment nor Article 37, UCMJ, 10 U.S.C. § 837 (2012)'s prohibition against unlawful command influence. Additionally, Appellant's oral discovery request sought irrelevant information, thus the military judge did not abuse her discretion by denying it.

I. Background

In November 2016, immediately prior to individual voir dire, while the members were not present, Appellant's individual military counsel stated to the military judge: "The defense has noticed that the panel is all white. . . . [O]ur client is African-American, and there's no African-American representation on the panel." Upon further discussion, counsel refined his observation, stating: "I may have misspoke and said that [the members] were all Caucasian, and that might not be true. I am fairly confident that there is no African-American on the panel . . . ." The military judge responded:

> I can't speak to the racial makeup of our panel. I agree with you that I don't see anyone who I think is obviously of the same race as your client, but then again, I would not have known, frankly, that he is of the race he is, absent reviewing materials of the previous case and how his identification was made.

Trial defense counsel did not inquire about the members' races during individual voir dire. Following individual voir dire, the military judge excused five members at defense counsel's request—three of which requests the Government joined—leaving five members on the panel.

In response to trial counsel's request that he explain the basis for his objection to the composition of the panel, individual military counsel explained:

"[I]t's . . . basically a combination of an Article 25 challenge and, I guess, it's almost like a preventative Batson challenge. If you don't put any African-Americans on the panel from the get-go, then you can't get a Batson challenge because nobody is getting eliminated based on their race." The military judge rejected this challenge because of the "absen[ce] [of] any evidence of anything inappropriate being done by the convening authority in assembling the panel."

Individual military counsel then made an oral discovery request for a "statistical breakdown of the population as far as race with respect to the convening authority's command." The military judge denied the request on the grounds the members' questionnaires noted their races and had been available for a week, the request was untimely, acquiring the data would be impracticable, and the resultant statistics were not relevant absent evidence of impropriety or a pattern of discrimination in other panels, which she had not seen.

Responding to the first reason given by the military judge, individual military counsel countered: "If you look at the questionnaires, only some of them have racial information listed upon the questionnaire." The military judge noted this response but did not change her ruling. In addition, apparently responding to the military judge's statement that she had not seen any pattern of discrimination, individual military counsel said:

> Can I just make a quick record with the last members panel that [the trial counsel], myself, and you were on? We

> had a different African-American client, and also it was an all-white panel. So, this is the second time in a row that we've been on a case where the same issue has occurred.

The military judge replied that she did not believe that two examples evidenced a pattern.[2] Appellant never moved to stay the proceedings under Rule for Courts-Martial (R.C.M.) 912(b) "on the ground that members were improperly selected."

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[2] Appellant and amicus NAACP now claim the same convening authority detailed all-white panels in three other courts-martial in which the accused was African American. Appellant first introduced this allegation at the NMCCA—not at the court-martial—through a declaration by the Executive Officer of Defense Service Office Southeast. The declaration averred the author sent a letter to the convening authority concerning the racial diversity of members detailed in three recent cases (described without further detail as "*United States v. LTJG Johnson*," "*United States v. MMC Rollins*," and "*United States v. LTJG Jeter*"). Without providing a foundation, the letter asserted that in each of those courts-martial, the accused was African American and all of the members were Caucasian. He did not claim the convening authority knew the race of any member detailed to those cases or intentionally excluded any person because of race. Rather, he requested minority representation in his client's case. While it granted the motion to attach the declaration, the NMCCA made no finding of fact as to the truth of any matter alleged therein or the race of any panel member. The declaration further avers that upon receiving the letter, the convening authority amended the court-martial convening order in LTJG Johnson's case to include "one African-American, one Hispanic-American, one Asian-American, one Native-American and one Caucasian female member."

The record demonstrates that the convening authority had reason to know that Appellant was African American, as that information was included in a report that summarized testimony from the complaining witnesses. The record, however, contains no evidence that the convening authority either actually knew or had reason to know the races of the members when he detailed them to Appellant's court-martial.[3] As discussed *infra* Part II.C., none of the members selected were from his command, and all members confirmed during voir dire they neither personally knew nor worked with the convening authority. Moreover, only one member's questionnaire asked for the member's race. That member checked a box for "Caucasian." The other members were not asked, and did not provide, any information about their races. Though he received the trial questionnaires a week before trial, trial defense counsel neither objected to the questionnaires nor requested supplemental questionnaires.[4]

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[3] The NMCCA found that, excepting the one member whose questionnaire indicated race, there was "no evidence that the CA knew the race of any of the . . . members detailed to the court-martial" and "no reason to suspect that the CA personally knew [the members] and would therefore have known their race." 2018 CCA LEXIS 476, at *25, 2018 WL 4784569, at *10. The Courts of Criminal Appeals have factfinding authority under Article 66, UCMJ, 10 U.S.C. § 866 (2012); under Article 67, UCMJ, 10 U.S.C. § 867 (2012), we do not. *See, e.g.*, *United States v. Piolunek*, 74 M.J. 107, 110 (C.A.A.F. 2015). Where, as here, a CCA's findings are neither clearly erroneous nor unsupported by the record, this Court defers to those factual findings. *United States v. Tollinchi*, 54 M.J. 80, 82 (C.A.A.F. 2000).

[4] In his initial written discovery request, Appellant requested the Government produce "Panel Selection" information, including

After the trial, Appellant's counsel submitted a request for clemency to the convening authority, asserting that "[b]ased on Batson principles, the military judge should have required the Convening Authority to articulate the non-race based reason for excluding all African-Americans, but [the military judge] did not. This was prejudicial error."[5] The

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court-martial member questionnaires responsive to the items listed in R.C.M. 912(a)(1), which includes race, "all written matters provided to the convening authority concerning selection of the members detailed to the court-martial" under R.C.M. 912(a)(2), and "all information known to the government as to the identities of potential alternate and/or additional panel members." Appellant never followed up on these requests, despite filing a supplemental discovery request "highlight[ing] material discovery yet to be delivered" and, later, a motion to compel "discovery which is material to the preparation of the defense." The only material in the record responsive to discovery requests regarding the panel is the member questionnaires, but the defense never presented the other requests to the military judge as R.C.M. 912 permits.

[5] Appellant also raised this argument to the military judge, and the NMCCA. 2018 CCA LEXIS 476, at *23–24, 2018 WL 4784569, at *9. In his briefing to this Court, Appellant urges a "workable process" outside of Article 25, UCMJ, 10 U.S.C. § 825 (2012), wherein:

> First, the defense identifies that the panel does not include any members from the same cognizable racial group as the accused and raises the issue with the military judge before the members are empaneled, *requesting to have the convening authority detail additional members of the same race as the accused*. The military judge, after appropriately inquiring into the matter, then adjourns the *voir dire* proceedings so that the convening authority

convening authority denied relief, approving the findings and sentence. The NMCCA affirmed. 2018 CCA LEXIS 476, at *33, 2018 WL 4784569, at *12.

The NMCCA found the military judge erred in declaring that the defense objection was untimely and that she was mistaken about the content of the questionnaires, but concluded she did not abuse her discretion. The NMCCA found that the requested data was "irrelevant" because trial defense counsel had asked for the racial makeup of the convening authority's "command" instead of the convening authority's "pool of available members," and no members were selected from the convening authority's command. 2018 CCA LEXIS 476, at *22, 2018 WL 4784569, at *8. The NMCCA also rejected the claim of unlawful command influence, citing a lack of evidence concerning the convening authority's knowledge of the

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> can be notified. Finally, upon notification, the convening authority . . . either details additional members on the basis of race for the purpose of inclusion or provides a race-neutral reason for declining to do so.

Reply Brief for Appellant at 6–7, *United States v. Bess*, No. 19-0086 (C.A.A.F. July 29, 2019) (emphasis added). There is no procedure to ensure a particular racial composition in any court in the United States, and, as discussed infra Part II.A., the legal precedent is to the contrary. While the process is both different than its civilian counterpart and the subject of numerous appeals, if what Appellant seeks is an extraconstitutional and radical overhaul of Article 25, UCMJ, and the member selection system in the military—a system that has been in place for a very long time—his suggestions are better addressed to Congress. No one has challenged the constitutionality or soundness of Article 25, UCMJ, and we decline to judicially craft a rule encroaching on Congress's legislative province.

races of members detailed to the court-martial. 2018 CCA LEXIS 476, at *25–27, 2018 WL 4784569, at *9–10. Additionally, the NMCCA found no precedent to extend *United States v. Batson*, 476 U.S. 79 (1986), to the convening authority's selection of members and held the mere absence of African Americans on the panel did not demonstrate systematic exclusion. 2018 CCA LEXIS 476, at *23–24, 2018 WL 4784569, at *9.

II. Discussion

The issues in this case are relatively straightforward. Appellant's complaint at trial rested on his supposition that the court-martial didn't include members of his race; his complaints on appeal allege violations of the Due Process Clause of the Fifth Amendment and Article 37, UCMJ, because he objected to the panel composition and no action was taken. Moreover, Appellant appears to believe that the fact a court-martial panel doesn't include members of an accused's race remedies deficient requests for irrelevant discovery at trial, or otherwise entitles an accused on appeal to further factfinding at a *DuBay*[6] hearing. His arguments— both at trial and now—have no support in the law for the reasons set forth below.

A. The Fifth Amendment

Appellant argues that the convening authority's selection of members violated the Fifth Amendment's implicit guarantee of equal protection of

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[6] *United States v. DuBay*, 17 C.M.A. 411, 37 C.M.R. 411 (1967).

the laws. We review this question of law de novo. See *United States v. Riesbeck*, 77 M.J. 154, 162 (C.A.A.F. 2018).[7]

The sole basis for Appellant asserting a constitutional violation *at trial* was his claim that there were no African American members included on his court-martial panel and one other. There are several logical flaws with this. First, because the questionnaires did not have this information, and because Appellant declined to inquire into the races during voir dire, we don't know with certainty what race any member save one identifies as. Second, there is no constitutional or statutory right to have members of your own race (or any other) included on either a court-martial panel or a civilian jury. *See Powers v. Ohio*, 499 U.S. 400, 404 (1991). And third, there is precisely zero evidence that this convening authority knew or had reason to know the race of the persons he detailed to the court-martial or engaged in any impropriety.

What the Fifth Amendment provides is not a promise to include, but rather protection against intentional racial discrimination through exclusion. *Cf. Flowers v. Mississippi*, 139 S. Ct. 2228, 2242 (2019)

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[7] The Government asserts that we should review the Fifth Amendment issue for plain error because Appellant at trial did not specifically argue that a racial group was systematically excluded from his court-martial panel in violation of the standards set forth in *Castaneda v. Partida*, 430 U.S. 482 (1977). We conclude that Appellant's citation of *Batson*, 476 U.S. 79, and reference to a possible pattern of discrimination in recent cases adequately preserved his Fifth Amendment arguments.

("Equal justice under law requires a criminal trial free of racial discrimination in the jury selection process."); *Batson*, 476 U.S. at 93 ("As in any equal protection case, the burden is, of course, on the defendant who alleges discriminatory selection of the venire to prove the existence of purposeful discrimination." (internal quotation marks omitted) (citation omitted)); *United States v. Santiago-Davila*, 26 M.J. 380, 390 (C.M.A. 1988) (Fifth Amendment equal protection includes the "right to be tried by a jury from which no 'cognizable racial group' has been excluded." (quoting *Batson*, 476 U.S. at 96)).

Neither in civilian courts nor in a court-martial does the Fifth Amendment guarantee an accused jurors or members who are of the same race. *See, e.g., Powers*, 499 U.S. at 404; *Batson*, 476 U.S. at 85; *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975); *Virginia v. Rives*, 100 U.S. 313, 323 (1879); *United States v. Adkinson*, 916 F.3d 605, 609 (7th Cir. 2019); *Sanchez v. Roden*, 753 F.3d 279, 290 (1st Cir. 2014); *United States v. Mitchell*, 502 F.3d 931, 952 (9th Cir. 2007); *Lowery v. Cummings*, 255 F. App'x 409, 420 (11th Cir. 2007); *United States v. Brooks*, 161 F.3d 1240, 1246 (10th Cir. 1998); *United States v. Steen*, 55 F.3d 1022, 1030 (5th Cir. 1995).

An accused has an absolute right to a fair and impartial panel, guaranteed by the Constitution and effectuated by Article 25, UCMJ's member selection criteria and Article 37, UCMJ's prohibition on unlawfully influencing a court-martial. *See also Riesbeck*, 77 M.J. at 163. Neither of those articles requires affirmative inclusion. Rather, Article 25(d)(2), UCMJ, provides in relevant part: "When

convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." Race is not one of the criteria.[8] And by its terms, Article 37(a), UCMJ, expressly prohibits the convening authority from selecting members in an attempt to influence the outcome of the court-martial, on the basis of race or otherwise. *See infra* Part II.C.

Of course, if a convening authority, in selecting the members to detail to a court-martial, intentionally *excluded* potential members on the basis of race, the convening authority's actions would be unconstitutional. But that is entirely different than a

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[8] This Court has held, however, that the convening authority may consider race in detailing members if that consideration serves "deliberately to include qualified persons," rather than to exclude members based on race. *United States v. Crawford*, 15 C.M.A. 31, 41, 35 C.M.R. 3, 13 (1964); *see also Riesbeck*, 77 M.J. at 163 (*Crawford* allows a convening authority to "seek[] in good faith to make the panel more representative of the accused's race or gender"). Even these decisions are constitutionally problematic in some sense, given that they seemingly stem from some notion that an accused "has a better chance of winning if more members of his race are on the jury. But that thinking relies on the very assumption that *Batson* rejects: that jurors might be partial to the defendant because of their shared race." *Flowers*, 139 S. Ct. at 2270 (Thomas, J., dissenting) (internal quotation marks omitted) (citation omitted); *see also Castaneda*, 430 U.S. at 499 ("Because of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group."). In any event, "may" does not equate to "must."

mere failure to include, which is what Appellant complained of at trial, and which many courts, see supra, including our Court in *United States v. Loving*, found insufficient to support a Fifth Amendment claim. 41 M.J. 213, 285 (C.A.A.F. 1994) ("A *prima facie* case of systematic exclusion is not established by the absence of minorities on a single panel.").

B. Request to Extend Batson and Apply Castaneda

Nevertheless, *on appeal* Appellant now urges us to apply the frameworks of either *Batson* or *Castaneda* to find that the absence of African Americans on his panel constitutes an equal protection violation. We decline this invitation.

1.

Batson held that, under the Equal Protection Clause, *peremptory strikes* of an African American from the jury venire may establish a prima facie case of purposeful discrimination, and once that prima facie case is established, the burden shifts to the government to provide a race-neutral explanation for the strike. 476 U.S. at 96–97.

> Just as the Equal Protection Clause forbids the States to exclude black persons from the venire on the assumption that blacks as a group are unqualified to serve as jurors, so it forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black.

> The core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors' race.

Id. at 97–98. The Court's holding further took into account the fact that peremptory strikes may "permit those to discriminate who are of a mind to discriminate," *id.* at 96 (internal quotation marks omitted) (citation omitted), and previous cases imposed too high a bar by requiring proof of repeated racial strikes outside of the defendant's particular case, *id.* at 92–93. Recognizing the truism that "the Constitution prohibits all forms of purposeful racial discrimination in selection of jurors," *id.* at 88, the Court distilled from its broad discussion of equal protection principles the narrow conclusion that "a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial." *Id.* at 96.

Batson procedures do apply in the military justice system when a party makes a peremptory challenge, *Santiago-Davila*, 26 M.J. at 389–90, but the narrow terms of *Batson*'s holding neither compel nor impel us to extend it to a convening authority's selection of members, the manner of which Article 25, UCMJ, limits and directs, even if his supposition about the race of his panel's members was an established fact. Nor does Appellant cite any

precedent that would require extending Batson's holding outside the context of peremptory challenges. Indeed, the only extensions of Batson have been within the peremptory strike context itself. *See Flowers*, 139 S. Ct. at 2243 (recognizing application to gender discrimination, criminal defendant's peremptory strikes, and civil cases).[9]

2.

Castaneda is not so limited in scope. Nevertheless, even if *Castaneda*'s framework for addressing systematic discrimination in the selection of grand jurors *could* be extended to a convening authority's selection of court-martial members, it would not change the outcome in this case. There, in evaluating a prisoner's claim alleging systematic discrimination against Mexican Americans in the selection of members of the grand jury that indicted him, 430 U.S. at 485–86, the Supreme Court held that there is a three-step process for making a prima facie showing that a procedure employed for selecting grand jurors violates the Equal Protection Clause. *Id.* at 494. The Supreme Court explained:

> The first step is to establish that the group is one that is a recognizable,

[9] Other federal and state courts have held that *Batson* should not be extended to other contexts. *See, e.g.*, *United States v. Elliott*, 89 F.3d 1360, 1364–65 (8th Cir. 1996) ("*Batson* applies only to peremptory strikes. We know of no case that has extrapolated the *Batson* framework to for-cause strikes."); *State v. Gould*, 142 A.3d 253, 261 (Conn. 2016) ("[T]he *Batson* framework has been limited to peremptory challenges.").

> distinct class, singled out for different treatment under the laws, as written or as applied. *Hernandez v. Texas*, 347 U.S. [475, 478–479 (1954)]. 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 as grand jurors, over a significant period of time. Id. at 480. . . . Finally, . . . a selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing. *Washington v. Davis*, 426 U.S. [229, 241 (1976)]; *Alexander v. Louisiana*, 405 U.S. [625, 630 (1972)].

Id.[10]

We have not determined whether and how *Castaneda* applies in the military justice system where specific criteria for selecting members exist, *see* Article 25, UCMJ, none of which are race, and where deployments and other factors would likely skew a straight percentage comparison. Yet, in *Loving*, we ruled that the absence of minorities on a single court-martial panel does not make out a prima facie case of systematic exclusion. 41 M.J. at 285. To support this rule, we noted that a prima facie case of underrepresentation was established in *Castaneda* "by comparing [the] population 'to the proportion

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[10] Though *Castaneda* itself dealt with grand jurors, its framework applies to petit jury venires as well. *See Batson*, 476 U.S. at 94.

called to serve . . . over a significant period of time.'" *Id*. (internal quotation marks omitted) (quoting *Castaneda*, 430 U.S. at 494). In particular, that prisoner presented statistics, which the government did not contest, showing that 79.1% of his county's population was Mexican American, but that over an eleven-year period, only 39% of grand jurors in the county were (or appeared to be) Mexican American. *Castaneda*, 430 U.S. at 486–87.

Were *Castaneda* to apply—however imperfectly given the unique characteristics of the military justice system—we need decide nothing more than that Appellant fails to meet the second prong of *Castaneda*. Appellant and the amicus NAACP have proffered allegations that within a one-year period, the convening authority detailed all-white panels in four cases. Even if mere allegations constitute competent evidence (and we do not believe they do), one year is not a "significant period of time" and would not establish a prima facie case under the *Castaneda* framework. *See, e.g.*, *Hobby v. United States*, 468 U.S. 339, 341 (1984) (seven years was significant period); *Castaneda*, 430 U.S. at 487 (eleven years was significant period); *United States v. Quinones*, No. 93-10751, 1995 U.S. App. LEXIS 1635, at *30–31, 1995 WL 29500, at *10–11 (9th Cir. Jan. 25, 1995) (unpublished) (one year of data insufficient); *Ramseur v. Beyer*, 983 F.2d 1215, 1233 (3d Cir. 1992) (two years was not significant period); *Bryant v. Wainwright*, 686 F.2d 1373, 1377–78 (11th Cir. 1982) (minor statistical variations over five-year period insufficient).[11] What

[11] Of note, *Castaneda* itself involved a process wherein the

we said in *Loving*—that the absence of minorities on a single panel does not make out a prima facie case of systematic exclusion—is likewise true if there are allegations concerning several panels over a short period of time. *See Bryant*, 686 F.2d at 1379 (for grand jury foreperson selection, "ten selections from a brief three and one-half year period simply is not sufficiently large to allow a meaningful statistical comparison"); *cf. Truesdale v. Moore*, 142 F.3d 749, 756 (4th Cir. 1998) ("[A]llegations of statistical disparity will not suffice to show a violation of the Fourteenth Amendment where no discriminatory purpose was afoot.").

The case law makes clear that even if no African American members were included in Appellant's case, a fact that is unknown, even when combined with other anecdotal allegations raised by the trial defense counsel and now amici and the appellate defense counsel, it does not establish a prima facie case of exclusion based on race. Rather, we cleave to the ordinary rule that without contrary indication, "the presumption of regularity requires us to presume that [the convening authority] carried out the duties imposed upon him by the Code and the Manual." *United States v. Wise*, 6 C.M.A. 472, 478, 20

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authority selecting grand jurors turned over periodically: under the "key man" system, the state district judge would appoint three to five jury commissioners, those commissioners would then select the pool of grand jurors, and the judge would then test their qualifications. 430 U.S. at 484. The district judge who impaneled the respondent's grand jury was in charge for only two and one-half years of the eleven-year period considered in that case. *Id.* at 495–96.

C.M.R. 188, 194 (1955); *see also United States v. Scott*, 66 M.J. 1, 4 (C.A.A.F. 2008) (applying a "presumption of regularity" to the convening authority's actions (internal quotation marks omitted) (citation omitted)). We thus presume the convening authority acted in accordance with Articles 25 and 37, UCMJ, here. The military judge stated that she had "not seen any indication of any pattern of discrimination by excluding minority members" in prior panels, or any indication of impropriety by the convening authority. Based on our review of the record and the pertinent case law, we agree with the military judge.[12]

C. Unlawful Influence

Appellant also fails to show unlawful command influence. We review such claims de novo. *United States v. Salyer*, 72 M.J. 415, 423 (C.A.A.F. 2013). Article 37(a), UCMJ, provides in relevant part: "No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case." Court stacking is a form of unlawful command influence. *Riesbeck*, 77 M.J. at 165. For actual unlawful command influence, the accused must show beyond "mere . . . speculation": (1) facts, that if

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[12] We reject Appellant's suggestion that the military judge's denial of his discovery request "compound[ed] the prejudice" by preventing him from producing evidence to support his equal protection claim. As discussed below in Part II.D., the military judge properly denied the request because it sought irrelevant information and the request would not have furthered Appellant's equal protection or unlawful command influence claims.

true, constitute unlawful command influence; (2) the prior proceedings were unfair; (3) the unlawful command influence caused the unfairness. *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999).

On one end of the spectrum are cases like *Riesbeck*, where we found unlawful court stacking because, inter alia, the record "paint[ed] a clear picture of court stacking based on gender in an atmosphere of external pressure to achieve specific results in sexual assault cases," the panel was "seventy percent female, most of whom [were] victim advocates," the enlisted pool "was only thirteen percent female," and the impaneling authorities thought it "'very important' to have a 'large number of women'" decide the case, 77 M.J. at 164, 166.

On the other end of the spectrum are cases like *United States v. Lewis*, where we found no improper motive when presented with a statistically high and anomalous number of women on the panel given the comparatively low number of women on panels over the preceding three years at the same air force base. 46 M.J. 338, 339, 341–42 (C.A.A.F. 1997); *see also id.* (bare numbers in unit strength report showing total officers and enlisted members as well as how many were women "d[id] not adequately reflect the pool of individuals eligible and available to serve as court members," so did not evidence improper selection). The paucity of evidence here is even greater than that found to be deficient in *Lewis*.

The record shows the convening authority neither knew nor had reason to know the races of nine of the ten members whom he detailed to Appellant's

court-martial; it does not reveal with certainty the actual racial makeup of Appellant's panel; it contains no findings of fact by the NMCCA with respect to allegations regarding the races of members in other courts-martial, and at most Appellant presents a potential anomaly with a few cases within a short period of time, with no evidence whatsoever of intentional discrimination. Appellant fails to carry his burden to show unlawful command influence by more than mere speculation. With due respect to the dissents, *United States v. Bess*,__M.J.____,____(5 n.5, 12) (Ohlson, J., with whom Sparks, J., joined, dissenting) (C.A.A.F. 2020); *id*. at____(2) (Sparks, J., with whom Ohlson, J., joined, dissenting), the mere absence of African Americans on Appellant's panel does not itself raise reasonable doubt as to the procedure used to select his panel. *See supra* Part II.A.

Nor does Appellant show apparent unlawful command influence—that "an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding." *United States v. Boyce*, 76 M.J. 242, 249 (C.A.A.F. 2017) (internal quotation marks omitted) (citation omitted). A fully informed observer would know the convening authority only knew one member's race, that no member knew or worked with the convening authority, and—taking the declaration at face value—the convening authority was amenable to including diverse members when asked to do so, which Appellant failed to do prior to trial. Appellant presents no reasonable grounds for "an objective, disinterested observer, fully informed of all the facts and circumstances"—to include the legal fact that no one is entitled to members of the same

race in either a military or civilian court—to "harbor a significant doubt about the fairness of the proceedings." *Id.* (internal quotation marks omitted) (citation omitted).

D. Appellant's Discovery Request

The third assigned issue is whether the NMCCA erred in affirming the military judge's denial of the oral discovery request that Appellant made at trial. We review a military judge's ruling on a request for production of evidence for an abuse of discretion. *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004). A military judge abuses her discretion when her findings of fact are clearly erroneous or her ruling is influenced by an erroneous view of the law. *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008). A military judge also abuses her discretion when a "decision . . . is outside the range of choices reasonably arising from the applicable facts and the law." *United States v. Criswell*, 78 M.J. 136, 141 (C.A.A.F. 2018) (internal quotation marks omitted) (quoting *United States v. Irizarry*, 72 M.J. 100, 103 (C.A.A.F. 2013)).

An accused is entitled to production of "relevant and necessary" evidence. R.C.M. 703(f)(1). Appellant requested "a statistical breakdown of the population as far as race with respect to the convening authority's command." The military judge denied the request on three grounds, and as noted *supra* Part I, the NMCCA disagreed with her in part but upheld the denial for a different reason, which is permissible. *See Murr v. Wisconsin*, 137 S. Ct. 1933, 1949 (2017) (explaining that a "judgment below . . . may be affirmed on any ground permitted by the law and record"); *United*

States v. Robinson, 58 M.J. 429, 433 (C.A.A.F. 2003) (affirming a military judge's denial of a motion to suppress evidence where "the military judge reached the correct result, albeit for the wrong reason").

We agree with the NMCCA that the information sought by Appellant was irrelevant because, in fact, the information requested had little to do with the available pool of members. We further conclude that the information requested is not relevant because it would do nothing to add to the legal force of his observation at trial that he was African American and it appeared the members were not. Just as the bare population statistics in the unit strength report in Lewis did "not adequately reflect the pool of individuals eligible and available to serve as court members," 46 M.J. at 341–42, so too would Appellant's request here not produce relevant information. In *Lewis*:

> [w]ith respect to the officer members, [the evidence did] not reflect how many officers were ineligible or disqualified because of their involvement in law enforcement or the investigation of this case, and it [did] not reflect how many were unavailable because of absence from the command or operational duties. With respect to the enlisted members, the defense evidence lack[ed] the same information. In addition, it fail[ed] to identify how many enlisted airmen were presumptively unqualified because they lacked the

> experience and maturity contemplated by Article 25, UCMJ, 10 U.S.C. § 825.

Id. Appellant's request for a racial breakdown of the convening authority's command suffers the same shortcomings. First, the request covered only the convening authority's command, which is only a subset of the total eligible pool of members. Second, a racial breakdown alone does not reveal enough detail to discern who would be eligible to serve on a panel. As *Lewis* describes, far more factors bear on that determination, *see id.*, and that is the legally relevant question.

Appellant's argument is that although trial defense counsel specifically asked for statistical information concerning the convening authority's command, this was clearly meant to include everyone whom the convening authority could detail to the court-martial. Appellant asserts that trial defense counsel's broad meaning is discernible from the military judge's response that the discovery request was impracticable.

We agree that the wording of any motion must be understood in the context in which it was made, especially an oral motion in the middle of a trial. See R.C.M. 905(a). But in this case, Appellant's argument about what the context shows is unpersuasive. Looking at the entire exchange, the most reasonable understanding of Appellant's request was that he was seeking only the information that he asked for. Moreover, even if he had received what he now says he wanted, it would still do nothing to change the legal

landscape.[13] The military judge did not abuse her discretion in denying Appellant's oral discovery request.

E. Appellant is Not Entitled to a *DuBay* Hearing

Finally, Appellant argues that, in the alternative, he is entitled to a *DuBay* hearing. A creature of judicial fiat rather than statute, *see United States v. Ginn*, 47 M.J. 236, 243 (C.A.A.F. 1997); *United States v. Ingham*, 42 M.J. 218, 224 (C.A.A.F. 1995), the *DuBay* hearing was created to permit an accused to gather additional evidence and resolve conflicting evidence where (1) an issue, such as ineffective assistance of counsel, was discovered after trial, *see Ginn*, 47 M.J. at 244, or (2) a request made at trial was improperly denied, *see United States v. Riesbeck*, No. 1374, slip op. at 1 (C.G. Ct. Crim. App. Jan. 20, 2015). The goal in either case is to develop a record so that the appellate court can resolve the issues presented. *United States v. Flint*, 1 M.J. 428, 429 (C.M.A. 1976). But it is decidedly not the case that a *DuBay* hearing is either necessary or warranted in an instance, such as this case, where there was no effort made at trial to develop a record on any relevant

[13] The *Castaneda* framework and the unlawful influence framework require a proffer of something more than statistical disparity. As explained above, Appellant still fails the *Castaneda* requirement of a comparison of the statistics over a significant period of time, and the unlawful influence framework requires some evidence of improper motive. In sum, the mere racial composition of a court-martial, without more, does not make discovery into the detailing process relevant and necessary.

facts, and the claims on appeal rest on pure speculation. *Cf. Ingham*, 42 M.J. at 224.

We have long held that where a post-trial claim is inadequate on its face, or facially adequate yet conclusively refuted by the record, such a hearing is unnecessary. *United States v. Campbell*, 57 M.J. 134, 138 (C.A.A.F. 2002). "[T]he threshold triggering further inquiry should be low, but it must be more than a bare allegation or mere speculation." *United States v. Johnston*, 39 M.J. 242, 244 (C.M.A. 1994). Because the appellant in *Johnston* showed "not a scintilla of evidence" of unlawful command influence, the Court declined to order a hearing. *Id.* at 244–45. And that's what we face in this case: "not a scintilla of evidence" the convening authority even knew the race of more than one person detailed to the panel or had any malintent in exercising his duty under Article 25, UCMJ. Moreover, the population statistics Appellant now seeks would, as in *Lewis*, prove nothing.

This case differs from *Riesbeck*. There, defense counsel at trial produced evidence that, inter alia, the member questionnaires indicated each member's gender; the convening order was amended multiple times to add women; the final panel had seven women, five of whom were victim's advocates; and defense counsel produced the rosters of potential members. *United States v. Riesbeck*, No. 1374, 2014 CCA LEXIS 946, at *7–11 (C.G. Ct. Crim. App. Aug. 5, 2014) (unpublished). It similarly differs from cases like *United States v. Sales*, where "there [was] a reasonable probability that there would have been a different result if the factual conflicts among the affidavits were resolved in appellant's favor"

regarding his ineffective assistance of counsel claim. 56 M.J. 255, 258 (C.A.A.F. 2002). These cases presented a dispute of material fact or otherwise raised a reasonable possibility of a colorable claim that could be developed through a *DuBay* hearing. The record here does neither: only one questionnaire indicated race; there is zero evidence that the convening order was amended to add or remove racially representative members for this particular case;[14] the record does not reflect with certainty the actual racial composition of Appellant's panel. Appellant's speculative assertions do not merit a *DuBay* hearing.

And the military judge did not erroneously deny Appellant's opportunity to develop the equal protection and unlawful command influence claims—fully articulated only on appeal—which were grounded in truth on nothing more than suppositions about the racial composition of his panel. First, the military judge properly denied his mid-voir dire oral discovery request. *See supra* Part II.D. Second, while Appellant did include a broader request for panel selection information in an initial discovery request and the record does not show what—beyond the member questionnaires—he received in return, this appeared not to concern Appellant at the time. *See supra* note 4.

Appellant's supplemental discovery request did not reiterate the request for panel selection

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[14] The single change to the convening order appears to be only in response to Appellant's request for enlisted representation.

information; Appellant's subsequent motion to compel did not ask for the information; the military judge thus made no ruling with respect to the request for panel selection information in that June 2016 request; and Appellant did not assign any errors at this Court or the NMCCA regarding that June 2016 discovery request, *see supra* Part I; *Bess*, 2018 CCA LEXIS 476, at *2–3, 2018 WL 4784569, at *1. Nor did Appellant move to stay the proceedings on the ground that improper selection criteria were used by the convening authority. *See* R.C.M. 912(b)(1).

To the extent Appellant now seeks information that was available yet neither requested nor pursued at trial, Appellant has waived any right to further exploration in a *DuBay* hearing. *See United States v. Curtis*, 44 M.J. 106, 133 (C.A.A.F. 1996) ("If the defense wanted to explore the convening authority's role and knowledge [in appointing members], they could have raised this issue at trial. Because it was not raised at trial, we hold that this issue was waived.").

III. Conclusion

The decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

Judge MAGGS, concurring in part and concurring in the judgment.

I concur in the judgment affirming the U.S. Navy-Marine Corps Court of Criminal Appeals, and I join all of the Court's opinion except for Part II.B.1. In Part II.B.1., Judge Ryan, joined by Chief Judge Stucky, concludes that Appellant's argument based on *Batson v. Kentucky*, 476 U.S. 79 (1986), lacks merit. I agree that Appellant's argument lacks merit but, as I explain below, my reasoning is different.

I. Analysis

Appellant makes two arguments advancing his claim under the Fifth Amendment. One argument is based on *Castaneda v. Partida*, 430 U.S. 482 (1977), a decision concerning the selection of grand jurors. Appellant acknowledges that "*Castaneda* is not a perfect fit as precedent" given the differences between court-martial panel selection and grand jury selection. But Appellant argues that we should adapt *Castaneda*'s analysis for deciding when court-martial member selection violates the equal protection guarantee implicit in the Fifth Amendment. He asserts that, under *Castaneda* as it should be adapted to the military justice system, he has established a prima facie equal protection violation by showing (1) that he is African American, (2) that "African-Americans were not only excluded from (and underrepresented on) the panel in [his] case, but in a series of cases," and (3) that "the selection process set out in Article 25, UCMJ, is susceptible to abuse due to the inherent subjectivity involved."

In addressing Appellant's argument, the Court recognizes that "[w]e have not determined whether and how *Castaneda* applies in the military justice system." The Court then decides that resolving these constitutional issues is unnecessary because the record does not establish one of the factual predicates of Appellant's argument. The Court explains: "Were *Castaneda* to apply—however imperfectly given the unique characteristics of the military justice system—we need decide nothing more than that Appellant fails to meet the second prong of *Castaneda*." Put simply, for reasons the Court demonstrates, the record does not establish that African Americans in fact have been excluded from panels for a significant period. I agree with the Court's restrained approach. There is no need to decide how *Castaneda* might apply in the military justice system when the facts do not present the issue. *See City of W. Covina v. Perkins*, 525 U.S. 234, 244 (1999) (reasoning that when the record "undermines the factual predicate for [an] . . . argument . . . we need not discuss it further").

Appellant's other argument advancing his Fifth Amendment claim is based on *Batson*, a case concerning peremptory challenges to members of the venire. Appellant recognizes that the *Batson* precedent is also "not a perfect fit" in a case involving a convening authority's selection of panel members, but he argues that the Court can use *Batson* as a "guidepost." Appellant contends that if (1) "the defense identifies that the panel does not include any members from the same cognizable racial group as the accused" and (2) "raises the issue with the military judge before the members are empaneled," then the equal protection principle in *Batson* requires the

convening authority either to "detail[] additional members on the basis of race for the purpose of inclusion or provide[] a race-neutral reason for declining to do so."

In my view, the Court ought to address Appellant's *Batson* argument in the same restrained manner that it addresses Appellant's *Castaneda* argument. Specifically, we need decide nothing more than that the record does not establish the factual predicate for Appellant's proposed constitutional test. For the reasons thoroughly explained by the Court, the record in this case does not establish that the "panel [did] not include any members from the same cognizable racial group as the accused."[1] Accordingly, we do not need and have no reason to decide the important and difficult issues of whether or how *Batson* hypothetically might apply to member selection by the convening authority. For this reason, I do not join Part II.B.1. of the Court's opinion.

The conclusion that Appellant has not established the factual predicate necessary for his *Batson* argument raises the question whether we should order a hearing pursuant to *United States v.*

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[1] I see no reason to question the good faith of Appellant and his counsel in assuming that none of the panel members at his court-martial was African American based on outward appearances. But this Court cannot rely on this assumption in deciding this case because nothing in the record provides a basis for concluding that the assumption is correct. The military judge made no finding as to the members' races and explained that she was uncertain of their races based on their appearances. She properly refused to infer their races based on stereotypes.

DuBay, 17 C.M.A. 147, 37 C.M.R. 411 (1967), to allow Appellant to discover the race of each of the members at his court-martial. Our decision in *United States v. Curtis*, 44 M.J. 106 (C.A.A.F. 1996), *on reconsideration*, 46 M.J. 129 (C.A.A.F. 1997), answers this question. In *Curtis*, the appellant requested a *DuBay* hearing to determine whether the convening authority knew that he could have appointed a panel of all enlisted members under Article 25, UCMJ, 10 U.S.C. § 825. 44 M.J. at 132. We rejected the request for the *DuBay* hearing, explaining: "If the defense wanted to explore the convening authority's role and knowledge, they could have raised this issue at trial. Because it was not raised at trial, we hold that this issue was waived." *Id.* at 133.

The same conclusion follows here. The inadequate record regarding the members' races in this case was not inevitable. Appellant could have insisted, through a motion to compel, that all of the questionnaires submitted to the members asked the members to identify their races. *See* Rule for Courts-Martial 912(a)(1)(C) (expressly requiring questionnaires to include this question upon the request of defense counsel). Appellant, however, made no such motion. Although Appellant timely requested that trial defense counsel submit questionnaires to each of the members the convening authority detailed to his panel, he did not move to compel that all the questionnaires include a question regarding the member's race. And even after Appellant had seen the members detailed to his court-martial, and had raised an issue about the composition of the panel, he gave up a second opportunity to inquire about their races. 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. Because Appellant did not avail himself of either of these opportunities to determine the races of the members of his panel, he has waived any right to further discovery regarding the members' races in a *DuBay* hearing.

II. Conclusion

For these reasons, I agree with the conclusion in Part II.B.1. that Appellant's Batson argument lacks merit. But I would not resolve the legal questions of whether or how Batson principles might apply to member selection by the convening authority because those questions are not presented by the facts. Given that there is no majority view on those issues in this case, they remain open for decision if the record in a case ever properly presents them.

Judge OHLSON, with whom Judge SPARKS joins, dissenting.

The record before this Court unquestionably compels the remand of this case for an evidentiary hearing in order to ensure that Appellant's court-martial was not subject to the pernicious effects of unlawful command influence, and to ensure that Appellant's constitutional right to equal protection under the Fifth Amendment was not violated by the impermissible exclusion of panel members on the basis of race. Because the majority holds to the contrary, I must respectfully dissent.

I. Unlawful Command Influence

Issue II in this case reads as follows: "Whether the convening authority's selection of members constituted unlawful command influence." *United States v. Bess*, 79 M.J. 46 (C.A.A.F. 2019) (order granting review). As we recently held in *United States v. Boyce*, 76 M.J. 242, 248 (C.A.A.F. 2017), "[T]he appearance of unlawful command influence [exists] where an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceedings." Thus, it is necessary to begin an analysis of this case by reviewing "all the facts and circumstances" relevant to the issues before us.

The filings and the joint appendix reflect the following:

- Appellant was an African American male who was charged with sex-related offenses. His

accusers were white females.

- Appellant's defense was mistaken identity caused by difficulties with cross-racial identification. Specifically, Appellant argued that his white accusers confused him with a different but similar-looking African American male who also worked as an x-ray technician at the hospital where the offenses occurred. Brief for Appellant at 12–20, *United States v. Bess*, No. 19-0086 (C.A.A.F. June 19, 2019).

- As in all criminal cases in the military, the commander who convened Appellant's court-martial personally selected the venire panel. That is, he selected the pool of personnel from which the court-martial panel members (i.e., the jurors) ultimately would be chosen. Thus, it is essential to note that there was nothing random about the selection of the venire panel in this case. See Articles 22 and 23, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 822, 823 (2012).

- As soon as the members of the venire panel walked into the courtroom, Appellant observed that each and every one of them appeared to be white.[1]

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[1] In a request for clemency after Appellant's conviction, trial defense counsel described the scene in the courtroom as follows:

> At the beginning of the trial, a white military judge, asked a white bailiff, to call in the all-

- During voir dire, trial defense counsel challenged the racial composition of the panel. He pointed out to the military judge that all of the panel members appeared to be white, and he also noted that this was the second court-martial in a row where the accused was African American but all of the panel members appointed by this particular convening authority appeared to be white.[2] Trial defense

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> white military venire panel. As the white defense attorneys and the white prosecutors stood at attention as the panel members filed in, it was difficult to reassure HM2 Bess as he leaned over to ask, "Why aren't there any black people?" This all-white panel would hear evidence from the four complaining witnesses in the case—each of them white.

[2] In a sworn declaration written after Appellant's court-martial but included in the Joint Appendix to this case, Commander Christopher W. Czaplak, JAGC, USN, the Executive Officer of Defense Service Office Southeast, cited a letter he sent to the Commander, Navy Region Mid-Atlantic, which stated in relevant part:

> 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. LTG Jeter* where defense counsel have raised this issue, African-Americans were convicted in the Central Judicial Circuit by all-white panels. All of the members detailed [by the convening authority]

counsel characterized his motion "almost like a preventative *Batson* challenge."[3]

> to the courts-martial of these accused were Caucasian. By contrast, minority members have been detailed to cases involving Caucasian accused facing court-martial for sexual assault . . . .

Further, an amicus brief submitted to this Court by the NAACP Legal Defense & Educational Fund, Inc., states that during the course of one year this particular convening authority "detailed *four* all-white panels for *four* Black defendants charged with sex-related offenses." Brief of Amicus Curiae NAACP Legal Defense & Education Fund, Inc., in Support of Appellant at 11, *United States v. Bess*, No. 19-0086/ (C.A.A.F. June 28, 2019) (emphasis added) [hereinafter Brief of Amicus NAACP]. Only eighteen general courts-martial went to trial over that same period. *Id.* (citing U.S. Navy Judge Advocate Gen.'s Corps, *Results of Trial*, https://www.jag.navy.mil/news/ROT_2016.htm (last visited June 14, 2019); U.S. Navy Judge Advocate Gen.'s Corps, *Results of Trial*, https://www.jag.navy.mil/news/ROT_2017.htm (last visited June 14, 2019)).

[3] Trial defense counsel explained to the military judge what he meant by a "preventative *Batson* challenge":

> If you don't put any African-Americans on the panel from the get-go, then you can't get a *Batson* challenge because nobody is getting eliminated based on their race. It is almost as though [the] command is preventing [African Americans] from representation on the panel so that [the prosecution] can avoid a *Batson* challenge. . . .
>
> . . . .

- In furtherance of his motion, trial defense counsel specifically asked the military judge to give him the opportunity to discover the "statistical breakdown of the population as far as race with respect to the convening authority's command." The military judge denied the defense motion.

- Appellant was subsequently convicted by the panel members and sentenced to prison.

Based on these facts, would "an objective, disinterested observer . . . harbor a significant doubt about the fairness of the proceedings"? *Boyce*, 76 M.J. at 248. In light of the current state of the record, the answer is an unequivocal and emphatic, "Yes."

Because of the grave and broad implications of this matter, however, it is important that this Court not prematurely reach any conclusions—or cast any

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> . . . With respect to the evidence and the burden, with a *Batson* challenge, the burden would be on the attorney challenging that member to show evidence why they are challenging that member but for the[ir] race, so we would argue that, by avoiding a *Batson* challenge, by not putting . . . African-Americans on the panel, the same burden should apply to the people [i.e., the convening authority and those acting on behalf of the convening authority] that didn't put any African-Americans on the panel.

aspersions—regarding precisely what happened in this, and similarly situated, cases. Simply stated, we need more information. Accordingly, at this juncture I merely seek to remand this case for a *DuBay* hearing so that additional facts can be developed and included in the record.[4] *DuBay*, 17 C.M.A. at 147, 37 C.M.R. at 411.

Indeed, that is exactly what occurred in the recent case of *United States v. Riesbeck*, 77 M.J. 154 (C.A.A.F. 2018), which also involved the issue of unlawful command influence resulting from a convening authority's selection of court-martial members. Specifically, in that case there were allegations of "court stacking" because of the disproportionately large number of females selected to serve on the court-martial panel of a servicemember charged with rape, and the court below "ordered a post-trial hearing in accordance with *DuBay* . . . to receive testimony and evidence regarding the composition of Appellant's court-martial panel." *Id.* at 159–60, 163. Surely a *DuBay* hearing is similarly reasonable, appropriate, and prudent in the instant case.[5] And yet, the majority inexplicably has chosen to foreclose this basic and necessary avenue of inquiry.

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[4] Ordering a factfinding "*DuBay* hearing" is an often-used practice in the military when information relevant to deciding an issue before the Court is not "apparent on the face of the record." *United States v. DuBay*, 17 C.M.A. 147, 149, 37 C.M.R. 411, 413 (1967).

[5] The types of questions that could be answered in the course of a *DuBay* hearing are self-evident: Were there any African Americans on the panel at Appellant's court-martial? What was

In concluding that no *DuBay* hearing is necessary, the majority assumes—and rests its holding on the conclusion that—"[t]he record shows the convening authority neither knew nor had reason to know the races of nine of the ten members whom he detailed to Appellant's court-martial." But the record reveals no such thing. In actuality, the record is devoid of any information regarding what the convening authority knew about the race of the members he selected or how he selected those

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the racial composition of the pool of potential panel members from which the convening authority could have selected? Was the convening authority aware of the race of the members he detailed, either through personal knowledge or through documents or other information presented to him? What was the process the convening authority used in selecting members for Appellant's court-martial? Did the convening authority's subordinate commanders or the staff judge advocate (or other staff members) screen potential panel members based on race, thereby effectively excluding African Americans from the convening authority's consideration? How did the convening authority know how to identify minority members to be added to a later court-martial when that African American defendant similarly objected to the original all-white panel? *See United States v. Bess*, M.J., (4 n.2) (C.A.A.F. 2020). In how many instances did the same convening authority convene an all-white venire panel when the accused was a member of a racial minority, and in how many instances were these members of a racial minority accused of sex-related offenses? If the answers responsive to the questions above are supportive of Appellant's position, can the convening authority identify race-neutral reasons why he appointed all-white panels in several cases where an African American was accused of sex-related offenses?

members for Appellant's court-martial panel.

II. The Defense Discovery Motion

The majority's decision to affirm the Navy-Marine Corps Court of Criminal Appeals is particularly surprising because even if we were to remove our analysis of this case from an unlawful command influence context and instead analyze it simply as a mundane discovery motion, a remand for a *DuBay* hearing still would be clearly warranted.[6] This conclusion is supported by the following points.

In essence, trial defense counsel was making an oral discovery motion when he asked the military judge to give him the opportunity to discover the "statistical breakdown of the population as far as race with respect to the convening authority's command." The standard we use in reviewing a military judge's discovery ruling is an abuse of discretion. *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004) (citing *United States v. Breeding*, 44 M.J. 345, 349 (C.A.A.F. 1996)). By definition, the military judge in this case abused her discretion because her ruling on the motion was grounded in her misunderstanding of both the law and the facts. *See United States v. Graner*, 69 M.J. 104 (C.A.A.F. 2010).

First, the military judge concluded that Appellant's discovery motion was untimely.

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[6] Issue III in this case reads as follows: "Whether the lower court erred in affirming the military judge's denial of Appellant's motion to produce evidence of the racial makeup of potential members." *Bess*, 79 M.J. at 47.

Specifically, she stated:

> [W]e've all had the members' questionnaires for a week, *and the race that each member most strongly identifies with is noted on the questionnaires*. If this was an issue that you wanted to raise prior to now, when we are in individual voir dire, that would have been a more appropriate time.

(Emphasis added.) Her reasoning, however, was faulty—both factually and legally. The factual assertion that the race of each member was noted on the questionnaires was inaccurate. For unexplained reasons, only one of the questionnaires listed race. Moreover, as we noted in *Riesbeck*, Rule for Courts-Martial (R.C.M.) 912(b)(3) "provides an *exception* to the requirement that a timely motion be made *where an objection is based on an allegation that the convening authority selected members for reasons other than those listed in Article 25, UCMJ*."[7] 77 M.J. at 160 (emphasis added). Thus, the military judge was wrong when she ruled that Appellant's discovery motion was untimely when he raised it during voir dire.

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[7]Article 25(e)(2), UCMJ, states in relevant part: "When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." 10 U.S.C. § 825(e)(2).

Second, the military judge erred in basing her ruling on her unsubstantiated belief that obtaining statistical information about Navy personnel would be a difficult "feat," stating that she had "no idea how the command would go about accomplishing" this task. There was no evidence adduced at the court-martial which supported this contention that it would be difficult to obtain the requested information, and in fact, intuitively the opposite is true; the military is very adept at tabulating data about its personnel and that information is readily available.[8] Therefore, the military judge's purported finding of fact was not supported by the record and is an abuse of discretion. *See United States v. Gore*, 60 M.J. 178, 185 (C.A.A.F. 2004).

Third, the military judge erred both factually and legally when she ruled that the information sought by trial defense counsel was irrelevant to his claim that the convening authority had improperly excluded African American servicemembers from the court-martial panel. Specifically, the military judge averred:

> I don't see, frankly, how it is relevant, absent any evidence of impropriety. I have sat on numerous panels and observed members of other panels while here, and I have not seen any

[8] *See, e.g.*, U.S. Navy Demographic Data, https://www.navy.mil/strategic/Navy_Demographics_Report.pdf (last visited on May 8, 2020).

> indication of any pattern of discrimination by excluding minority members.

To begin with, the military judge herself had previously acknowledged that trial defense counsel's argument would be "slightly stronger" if he "knew more information about the racial and statistical makeup of the pool of members for that particular convening authority." Thus, she conceded that the information was relevant. But then when trial defense counsel requested that type of information in order to support his argument, the military judge executed an about-face and denied his request.

Further, in ruling on the discovery motion, the military judge claimed she could not determine the race of the members of the panel based on her personal observations. However, at virtually the same time she claimed that based on her personal observations of other panels, she could determine there was no pattern of discrimination based on the race of the members. To put it charitably, these claims are in tension with one another. Moreover, in making these claims the military judge used her personal observations—rather than in-court evidence—to find the defense discovery request was not relevant. Again, this constituted an abuse of discretion. *See Gore*, 60 M.J. at 185.

It is evident that relevant statistical information regarding the convening authority's command would have been instrumental in supporting—or refuting—Appellant's claim that there

had been an improper exclusion of members from the court-martial panel on the basis of race. And yet, the majority asserts that Appellant's claim must fail because the discovery motion at trial "covered only the convening authority's command, which is only a subset of the total eligible pool of members." The majority's concern is misplaced. In *United States v. Datz*, 61 M.J. 37, 42 (C.A.A.F. 2005), this Court properly noted that an oral motion or objection made during a court-martial must be considered in context to determine if the basis for the motion was sufficiently clear to the military judge. Here, it was clear to everyone at the court-martial exactly what the defense was seeking—information that would help to determine whether there was an improper exclusion of members from the venire panel on the basis of race.

In light of the fact that trial defense counsel already had noted that this was the second case in which an African American servicemember accused of a sex-related offense was tried by a hand-selected panel that appeared to be all white, the military judge's blanket refusal to let trial defense counsel simply "peer behind the curtain" at how the convening authority had selected these panel members was an abuse of discretion. Thus, contrary to the military judge's ruling, trial defense counsel should have been permitted to obtain such information. Because the military judge abused her discretion in deciding this matter, the instant case should be remanded for a *DuBay* hearing so that the information may now be obtained.

III. Appellant's Constitutional Right to Equal Protection Under the Fifth Amendment

Even standing alone, the two issues cited above—i.e., Appellant's unlawful command influence claim and the military judge's abuse of discretion in resolving Appellant's discovery motion—provide compelling and conclusive reasons mandating the remand of this case for a *DuBay* hearing. And that is before I even have had the opportunity to address Issue I, which serves as the very core of Appellant's claim; namely, whether the convening authority's selection of members violated his constitutional right to equal protection under the Fifth Amendment.[9]

In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Supreme Court made the following observation:

> More than a century ago, the Court decided that the State denies a black defendant equal protection of the laws

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[9] The majority characterizes Appellant's Fifth Amendment claim as one seeking "to have members of [his] own race . . . included on . . . [his] court-martial panel." Although trial defense counsel's initial objection stated, "[O]ur client is African-American, and there's no African-American representation on the panel," he later clarified that the basis for his objection was a "preventative *Batson* challenge." In doing so, trial defense counsel explained, "If you don't put any African-Americans on the panel from the get-go, then you can't get a *Batson* challenge because *nobody is getting eliminated based on their race*." Thus, contrary to the majority's portrayal, Appellant's claim is rooted *not* in a failure to *include* African Americans on the panel, but in the possible *intentional exclusion* of potential members on the basis of race.

> when it puts him on trial before a jury from which members of his race have been purposely excluded. *Strauder v. West Virginia*, 100 U.S. 303 (1880). *That decision 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.*

Id. at 85 (emphasis added).

Consistent with this line of jurisprudence, the Supreme Court has unequivocally held that "the systematic exclusion of [African Americans in the jury selection process] is . . . an 'unequal application of the law.'" *Castaneda v. Partida*, 430 U.S. 482, 493 (1977) (quoting *Washington v. Davis*, 426 U.S. 229, 241 (1976)). Similarly, the Supreme Court has held that the equal protection component of the Due Process Clause of the Fifth Amendment prohibits the United States from engaging in governmental action that "invidiously discriminat[es] between individuals or groups." *Washington*, 426 U.S. at 239. In *United States v. Santiago-Davila*, this Court made clear that this equal protection component of the Fifth Amendment applies to the military, holding that the "equal protection right to be tried by a jury from which no 'cognizable racial group' has been excluded" applies to courts-martial panels with the same force as it applies to civilian juries. 26 M.J. 380, 390 (C.M.A. 1988) (quoting *Batson*, 476 U.S. at 96).

Although *Batson* holds that the Equal

Protection Clause "forbids *the prosecutor* to challenge potential jurors solely on account of their race," the constitutional scope of that opinion—if not its literal holding—extends beyond the context of peremptory challenges during voir dire. *Batson*, 476 U.S. at 89 (emphasis added). First, in *Batson* the Supreme Court specifically noted that "the Constitution prohibits *all forms* of purposeful racial discrimination in selection of jurors." *Id*. at 88 (emphasis added). Second, as noted earlier, the Supreme Court in *Batson* tellingly referred to the need "to eradicate racial discrimination *in the procedures used to select the venire from which individual jurors are drawn*." *Id*. at 85 (emphasis added). And third, 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*. *Id.* at 86.

The uniqueness of the role of the convening authority in the military justice system underscores the importance of this point. Unlike in the civilian jury system, venire pools in the military are not chosen at random from, for example, voter registration rolls or Department of Motor Vehicles databases.

Rather, a convening authority has significant and broad discretion to detail to the court-martial panel anyone who, "*in his opinion*, [is] best qualified for the duty." Article 25(e)(2), UCMJ. Accordingly, the

convening authority "has the *functional equivalent of an unlimited number of peremptory challenges*." *United States v. Carter*, 25 M.J. 471, 478 (C.M.A. 1988) (Cox, J., concurring) (emphasis added). Thus, 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 that the constitutional rights of accused servicemembers are protected.[10]

In the instant case, Appellant properly and

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[10] In *Castaneda*, a case relied upon by the *Batson* court, the Supreme Court outlined the process by which an accused could make a prima facie showing of an equal protection violation in the context of grand jury selection. 430 U.S. at 494–95. The second step of the analysis requires an accused to prove the underrepresentation of a cognizable racial group in the pool of those called to serve as grand jurors "over a significant period of time." *Id*. at 494. The majority implies that *Castaneda* requires an accused to produce data covering a lengthy number of years before a court could intervene to halt pernicious racial discrimination. However, the majority fails to explain how their expansive time frame fits within the unique features of the military justice system. Convening 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. Brief of Amicus NAACP, *supra* note 2, at 20. Thus, under the majority's view of *Castaneda*, the constitutional right to equal protection would be essentially unenforceable in the military where a convening authority serves in that particular role for less than a lengthy number of years—as happened in Appellant's case.

timely sought to avail himself of his constitutional rights by challenging the composition of the venire panel during voir dire.[11] And yet, the military judge thwarted his efforts by improperly denying his discovery motion. This Court must now remedy this error, and can begin doing so by simply remanding this case for an evidentiary hearing so that the facts can be gathered that will either expose and rectify an invidious pattern of racial discrimination in the member-selection process, or reveal Appellant's court-martial to be a mere "anomaly . . . with no evidence whatsoever of intentional discrimination." *Bess*, M.J. at (15) (C.A.A.F. 2020). Only then can we be assured that Appellant's constitutional rights have been protected.

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[11] The majority faults Appellant for failing to ask the convening authority to "includ[e] diverse members [on his court-martial panel] . . . prior to trial." However, Appellant did not raise his Fifth Amendment claim prior to trial because only one of the ten deficient member questionnaires created by the Government listed race, and thus Appellant was not aware of the suspicious nature of his all-white panel until he saw the members for the first time in court during voir dire. As soon as Appellant learned the racial composition of his panel, he raised his preventative *Batson* objection. Further, to be clear, *an accused has no right to a member panel "composed in whole or in part of persons of* [*his*] *own race*." *Powers v. Ohio*, 499 U.S. 400, 404 (1991) (emphasis added) (internal quotation marks omitted) (quoting *Strauder*, 100 U.S. at 305). But, an accused such as this Appellant "*does* have the right to be tried by a jury whose members are selected by nondiscriminatory criteria," and it is *this* constitutional right of which Appellant sought to avail himself *at trial*. *Id*. (emphasis added).

IV. Conclusion

When a member of our Armed Forces makes 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, a remand for an evidentiary hearing is mandated. Indeed, as we recently and unanimously stated, "[I]t is *incumbent upon this Court to scrutinize carefully* any deviations from the protections designed to provide [the] accused servicemember with a properly constituted panel. . . . [*E*]*ven reasonable doubt concerning the use of impermissible selection criteria for members cannot be tolerated*." *Riesbeck*, 77 M.J. at 163 (emphasis added) (internal quotation marks omitted) (citations omitted).

And yet, despite the clear-cut mandate of *Riesbeck* and despite the compelling and highly disturbing facts in the instant case, the majority has chosen to ignore this precedent, our attendant responsibilities, and the fundamental principles underlying a number of relevant Supreme Court cases by denying Appellant a simple *DuBay* hearing so that he may seek to vindicate his legal and constitutional rights. This decision by the majority is wrong—fundamentally and egregiously—and has grave implications for all future courts-martial involving African American servicemembers. Therefore, I respectfully dissent.

Judge SPARKS, with whom Judge OHLSON joins, dissenting.

I agree with Judge Ohlson that the military judge abused her discretion and I join his dissent. The military judge's somewhat cursory treatment of the issues and her desire to move on demonstrated her frustration with the timing of defense counsel's request. Nonetheless, given the significance of the issue, the military judge should have at least ordered a brief recess to allow the parties time to investigate whether a compromise could be reached to resolve the issue. Indeed, there is some indication in this record that the convening authority might have obviated the issue all together. True, it is just as possible that an effort seeking such a compromise might not have been successful, but in my view an attempt would have been worthwhile.

I especially agree with Judge Ohlson that even if *Batson v. Kentucky*, 476 U.S. 79 (1986), itself does not explicitly apply to the convening authority, "the fundamental equal protection principles espoused in *Batson* must apply broadly to the *entire* jury-selection process." *United States v. Bess*, ___M.J., (11) (C.A.A.F. 2020) (Ohlson, J., with whom Sparks, J., joined, dissenting). That includes subordinate authorities tasked with providing candidates for the convening authority's consideration. I also agree that the state of this record does not allow a proper resolution of Issues I and III. I believe Appellant presented enough evidence of inconsistencies in and questions about the member selection process that this Court should order a post-trial hearing in accordance with *United States*

v. DuBay, 17 C.M.A. 147, 37 C.M.R. 411 (1967), to gather further information.

As articulated in *United States v. Campbell*, the bar for ordering further collection of evidence through a *DuBay* hearing is not high:

> A [*DuBay*] hearing need not be ordered if an appellate court can conclude that the motion and the files and records of the case…*conclusively* show that [an appellant] is entitled to no relief …. [A] hearing is unnecessary when the post-trial claim (1) is inadequate on its face, or (2) although facially adequate is conclusively refuted as to the alleged facts by the files and records of the case, *i.e.*, they state conclusions instead of facts, contradict the record, or are inherently incredible. 57 M.J. 134, 138 (C.A.A.F. 2002) (alterations in original) (internal quotation marks omitted) (quoting *United States v. Ginn*, 47 M.J. 236, 244 (C.A.A.F. 1997)).

Here, Appellant introduced enough uncertainty about racial disparities in the member selection process in his and other cases that his claim was neither inherently incredible nor conclusively refuted. As the record currently stands, we do not know if or why all-white panels may have been assigned to cases involving African American defendants accused of sexual offenses. The letter and signed affidavit from Commander Czaplak, the Executive Officer of the

Defense Service Office Southeast, raises questions about a possible pattern of improper selection that this Court should investigate further, especially given the Supreme Court's recent reliance on "historical evidence" to identify patterns in jury selection in *Flowers v. Mississippi*. 139 S. Ct 2228, 2245 (2019).[1] Therefore, I believe a *DuBay* hearing is merited.

This Court has acknowledged that the military justice system's member selection process, though not bound by the strictures of the Sixth Amendment jury trial requirements, merits vigilance and careful scrutiny to ensure that protections afforded a military accused are not violated. *United States v. Riesbeck*, 77 M.J. 154, 162–63 (C.A.A.F. 2018). We have also recognized that the convening authority has "significant discretion" to select panel members as he or she sees fit consistent with Article 25, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 825. *Id.* at 163. Therefore, it is vitally important that our military justice system take seriously any claim that the member selection process in a particular court-martial may have improperly disadvantaged the accused in any way.

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[1] In *Flowers*, the Supreme Court reiterated a defendant's right to cast a wide net in gathering relevant historical evidence pertaining to the government's discriminatory jury selection process (in the case of *Flowers*, a pattern of preemptive strikes of black jurors in direct violation of *Batson*, 476 U.S. 79. 139 S. Ct. at 2245. To paraphrase that opinion, we cannot take the history out of the case. *Id*. at 2246.

In my view, a remand for a *DuBay* hearing would be in the convening authority's interest. From a good order and discipline standpoint, the convening authority, like any commander, would want to be informed and to take measures to tamp down any perception, even an erroneous one, that racial animus might have found its way into the court-martial process. Commanders, unlike judges and lawyers, are uniquely positioned to understand how easily perception can transform into fact in the minds of some members of the command.

The current record leaves a number of unanswered questions surrounding the concerns raised by Appellant. 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 including the actual racial composition of Appellant's panel, the information available to the convening authority and how he or any subordinate commanders might have gone about selecting prospective members for this court-martial, and *relevant* racial statistics of the member pool. We might all agree that trial defense counsel could have done better in presenting and following up on his claim. However, defense counsel's actions notwithstanding, given the serious nature of the issues—and that they potentially impact other African American accuseds under this convening authority—it is this Court's responsibility to gather a complete enough record that we may fully assess whether any impropriety has occurred. Importantly, such an inquiry does not, in and of itself, suggest anything improper.

For these reasons, I respectfully dissent.

UNITED STATES OF AMERICA
Appellee

v.

PEDRO M. BESS,
Hospital Corpsman Second Class (E-5), U.S. Navy
Appellant

United States Navy-Marine Corps

Court of Criminal Appeals

October 4, 2018, Decided

NMCCA 201300311

Reporter
2018 CCA LEXIS 476

Notice: THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

Prior History: Appeal from the United States Navy-Marine Corps Trial Judiciary. Military Judge: Commander Heather D. Partridge, JAGC, USN.

For Appellant: Lieutenant Jacob E. Meusch, JAGC, USN.

For Appellee: Captain Brian L. Farrell, U.S. Marine Corps; Captain Sean M. Monks, U.S. Marine Corps.

Judges: Before WOODARD, FULTON, and JONES, Appellate Military Judges.

OPINION OF THE COURT

JONES, Senior Judge:

This case is before us for a second time. On 8 March 2013, the appellant was convicted of two specifications of attempting to commit an indecent act and four specifications of committing indecent acts, in violation of Articles 80 and 120, (UCMJ), 10 U.S.C. §§ 880 and 920 (2007).[1] On 28 October 2014, we affirmed the findings and sentence.[2] On 6 January 2016, the Court of Appeals for the Armed Forces (CAAF) held that the military judge erred by denying the appellant an opportunity to impeach evidence requested by the members during deliberations. The CAAF set aside the findings and sentence and remanded the case with authorization for a rehearing. *United States v. Bess*, 75 M.J. 70 (C.A.A.F. 2016). The results of that rehearing are before us now.

On remand, a general court-martial consisting of members with enlisted representation convicted the appellant, contrary to his pleas, of two specifications of indecent acts in violation of Article 120, UCMJ.[3]

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[1] *United States v. Bess*, No. 201300311, 2014 CCA LEXIS 803 (N-M. Ct. Crim. App. 28 Oct 2014) (unpub. op.).

[2] *Id.*

[3] The appellant was acquitted of two other specifications involving similar crimes on separate alleged victims: one specification of Article 80, UCMJ, 10 U.S.C. § 880 (2007), and one specification of Article 120, UCMJ, 10 U.S.C. § 920 (2007).

The convening authority (CA) approved the adjudged sentence of confinement for one year, reduction to pay grade E-3, and a reprimand.

The appellant raises ten assignments of error (AOEs), which we have reordered: (1) the appellant's convictions for indecent acts are legally and factually insufficient; (2) the government violated his due process rights in failing to notify him that he was being held on active duty beyond the end of his active duty service obligation; (3) the military judge erred by denying his request for the production of a witness; (4) the military judge abused her discretion by denying production of a statistical breakdown of the racial make-up of the population within the CA's pool of potential members; (5) the military judge violated the Equal Protection Clause of the Constitution by failing to require a race-neutral reason for the CA's exclusion of black members from the appellant's venire; (6) the CA engaged in unlawful command influence (UCI) by excluding black members from the venire; (7) the military judge abused her discretion by denying the appellant's motion for a mistrial; (8) the government illegally punished the appellant by taking his uniforms after his first trial; (9) the panel violated his due process rights because it consisted of less than six members, and their verdict did not require unanimity; and (10) the guilty verdict should be set aside and dismissed under the cumulative error doctrine.

We have considered AOEs nine and ten, and find them to be without merit.[4] Having carefully considered the remaining AOEs, the record of trial, and the parties' submissions, we conclude the findings and sentence are correct in law and fact and that no error materially prejudiced the appellant's substantial rights. Arts. 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a) and 866(c).

I. BACKGROUND

The appellant is an African-American x-ray technician who was assigned to the Naval Air Station Oceana Branch Health Clinic (Oceana Clinic), Virginia Beach, Virginia. While in the performance of his duties at the clinic in February 2011, the appellant told two female patients, PG, the dependent daughter

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[4] *United States v. Clifton*, 35 M.J. 79 (C.M.A. 1992). It is settled law that a fivemember court-martial panel does not violate due process. *See United States v. Wolff*, 5 M.J. 923, 925 (N.M.C.M.R. 1978) (holding there was no due process deprivation for a five-member panel in the military, in spite of the Supreme Court's ruling in *Ballew v. Georgia*, 435 U.S. 223 (1978) which required juries of at least six members in Article III courts); Article 16, UCMJ; 10 U.S.C. § 816. It is also settled law that the panel's vote need not be unanimous. *See* Article 52(a)(2), UCMJ; 10 U.S.C. § 852(a)(2). *See also United States v. Matias*, 25 M.J. 356, 361, (C.M.A. 1987).

When an accumulation of errors deprives an appellant of a fair trial, Article 59(a), UCMJ, compels us to reverse it. *United States v. Banks*, 36 M.J. 150, 171 (C.M.A. 1992). Here, given our findings on the other AOEs, the cumulative error doctrine is inapposite.

of an active duty field grade officer, and Aviation Support Equipment Technician (Mechanical) Petty Officer 2nd Class (ASM2) AL, that they had to be naked while he took their x-rays. Both women complied by removing their clothing, and the appellant purportedly took x-rays of them.[5] At trial, Dr. B, a radiologist, testified that patients are never required to be naked for any type of x-ray.

A. PG

On 24 February 2011, PG's doctor ordered x-rays from the Oceana Clinic because PG was having back and neck pain after a car accident. When PG went to the x-ray room, she met two people, an "older white gentleman" and the appellant.[6] The older gentleman and the appellant conducted chest x-rays of PG while she was wearing jeans and t-shirt, but with her bra removed.[7]

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[5] We say "purportedly" because no x-rays of the women nude were found during the investigation. At trial, a radiology technician testified that it is possible for a technician to cause the x-ray machine to make sounds without actually capturing an image. Also, x-rays not sent to doctors were automatically and systematically purged from the Oceana Clinic's computers.

[6] Record at 504-05.

[7] At trial, PG was cross-examined on her October 2011 statement to NCIS, where she stated that the older gentleman was present during the original x-rays and that she was topless at that time. *Id*. at 526-27. On re-direct examination, PG reiterated that—in spite of what the NCIS agent had written—she was naked only during the second set of x-rays when she and the appellant were alone in the room. *Id*. at 532-33.

After these initial x-rays, the older gentleman left. The appellant then told PG that he needed to take more x-rays because she was in a head-on collision and he instructed her to get completely undressed. The appellant left the room. PG did as she was directed and lay on the table completely naked. The appellant returned and appeared to take x-rays of PG in several positions while she was completely naked. These positions included having PG lay on her stomach and stick her buttocks in the air and get into a "frog-like position."[8] The positions completely exposed PG's naked vaginal area to the appellant. During this time, PG was never given a gown or other clothing to wear, and had only a small cloth that she tried unsuccessfully to use to cover her breasts and genitalia. Finally, PG asked if they had to continue taking more x-rays, and the appellant said he would "check with [her] doctor."[9] The appellant left the room and returned a few moments later to tell PG she could leave.

B. ASM2 AL

ASM2 AL's flight surgeon ordered x-rays for her back. On the morning of 25 February 2011, ASM2 AL went to the x-ray department at the Oceana Clinic and a female technician took x-rays of her back while she was lying down. ASM2 AL remained fully clothed during this procedure. Later that evening, she was instructed to return to the Clinic's x-ray department

[8] *Id*. at 515-16.
[9] *Id*.

because her doctor needed x-rays of her back "taken standing up."[10]

When ASM2 AL went back to the x-ray room with the appellant, he instructed her to remove her clothing and wear nothing except a gown. After she had changed, the appellant came back into the room and told her that "the doctor had requested that [she] wear nothing and that [she] be completely nude to take the x-rays."[11] The appellant left the room again and she took off the gown as directed, leaving her completely naked. When the appellant returned, he had ASM2 AL sign a consent form which appeared to be "a statement from [her doctor] saying that [she] had to be nude for the x-rays so that they would show up more clear [sic]."[12] The appellant then took a series of x-rays while she was standing and completely naked. Throughout the entire process, ASM2 AL's breasts, buttocks, and vaginal area were exposed, and the appellant encouraged her not to cover her pelvic area with her hands.

Additional facts necessary to resolution of the AOEs are included below.

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[10] *Id*. at 341-42; Prosecution Exhibit (PE) 20.
[11] Record at 343.
[12] *Id*. at 347.

II. DISCUSSION

A. Legal and factual sufficiency

The appellant argues that the evidence is legally and factually insufficient to find him guilty of both specifications of indecent conduct. We disagree.

We review questions of legal and factual sufficiency de novo. Art 66(c), UCMJ; *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for factual sufficiency is whether "after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [this court is] convinced of appellant's guilt beyond a reasonable doubt." *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017) (citation, internal quotation marks, and emphasis omitted). In conducting this unique appellate function, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Washington*, 57 at 399. Proof beyond a reasonable doubt does not mean, however, that the evidence must be free from conflict. *United States v. Goode*, 54 M.J. 836, 841 (N-M. Ct. Crim. App. 2001). "The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Robinson*, 77 M.J.

294, 297-98, (C.A.A.F. 2018) (quoting *Rosario*, 76 M.J. at 117).

The appellant disputes only his identification as the perpetrator. He avers that "the government failed to prove beyond a reasonable doubt that [he] was the performing [x-ray] technician."[13] Therefore, we will focus on the government's burden to prove beyond a reasonable doubt that it was the appellant that committed the indecent acts of unlawfully viewing the nude bodies of PG and ASM2 AL during their x-ray examinations.[14]

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[13] *Id*. at 504-14; Appellant's Brief of 1 Dec 2017 at 59.

[14] The elements for the indecent acts alleged in Specification 1 of Charge II are:

(1) The appellant engaged in wrongful conduct by wrongfully and without necessity having PG remove all of her clothing in order to receive an x-ray examination and having her lay on an examination table with her legs splayed, knees bent, and feet together while she was nude and on her stomach with her back arched and hips propped up while she was nude and thereby observing her genitalia, buttocks, and nipples; and

(2) The conduct was indecent.

The elements for the indecent acts alleged in Specification 2 of Charge II are:

(1) The appellant engaged in wrongful conduct by wrongfully and without necessity having ASM2 AL remove all of her clothing in order to receive an x-ray examination and thereby observing her nude body, to include the genitalia, buttocks, and nipples; and

(2) The conduct was indecent.

10 U.S.C. § 920(k) (2007); MANUAL FOR COURTS-MARTIAL, UNITED STATES (MCM) (2007 ed.), Part IV, ¶45b.(11); Record at 803-04; Charge Sheet.

Of the five x-ray technicians at the Oceana Clinic, only two would appear to be black. One was the appellant; the other was a native of Haiti, and spoke with a "really thick" accent.[15] In addition to his accent, the other technician was readily distinguishable from the appellant—he was tall and thin, and had a dark-complexion. The appellant was comparatively stockier and had a lighter complexion. The other technician was a third class petty officer. The victims testified that their technician was a second class petty officer, like the appellant.

Both victims had ample opportunity to both observe the appellant's physical description and clearly hear his voice while they were alone in the x-ray room with him. Both spent several minutes talking to the appellant while he pretended to provide them with medical care. Neither victim testified that the x-ray technician that made them remove all of their clothes had an accent. At trial, PG and ASM2 AL positively identified the appellant as the x-ray technician who took their x-rays while they were nude.

The government submitted various records to corroborate that it was the appellant who took x-rays of PG and ASM2 AL while they were nude. The appellant avers that these records were unreliable. First, the government submitted documents from a

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[15] Record at 409. We use the term "black" in the opinion because we are not certain the Haitian x-ray technician identifies as African-American.

medical care records system called the Composite Healthcare System (CHCS), which is used to track medical services for patients, including x-rays. Per the CHCS, PG received her x-rays between 1709 and 1751 on 24 February 2011 from the appellant.[16] Also per the CHCS, ASM2 AL received her x-rays between 1645 and 1710, and then again at 1801 on 25 February 2011 from the appellant.[17] The government also presented the appellant's unit's muster reports for the two days in question. They revealed that only one x-ray technician was on duty for both of these late shifts at the Oceana Clinic—the appellant.

The corroborating evidence from the CHCS presented by the government, however, is not infallible. Any x-ray technician had the ability to manipulate the CHCS report by simply putting a different technician's name into the system before taking an x-ray. Also, it was not uncommon for a technician to take x-rays of a patient while a different technician was logged in to the CHCS system. In this case, however, both PG's and ASM2 AL's x-rays were taken after normal working hours when the appellant was the only x-ray technician on duty, and therefore not sharing the x-ray machine with other technicians. We also accept that the unit's muster reports were not fail-safe evidence; after a muster report was taken, technicians still rotated between the Oceana Clinic and another nearby clinic based on work assignments and personal necessities. But the CHCS records, in conjunction with the appellant's unit muster reports,

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[16] PE 12 at 4; Record at 439.
[17] PE 14 at 2; Record at 430-31.

corroborate the victims' unwavering identification of the appellant as the x-ray technician who took their x-rays when they were nude.

We are convinced that the appellant was the x-ray technician who took PG's and ASM2 AL's x-rays while they were nude. The evidence of his guilt is overwhelming. The victims' allegations and their in-court identifications are supported by other testimonial and documentary evidence establishing that the appellant was their x-ray technician.[18] We do not believe the victims confused the appellant for any other x-ray technician working at the Oceana Clinic. Each victim's testimony at trial supported the charges resulting in the convictions. We find unpersuasive the appellant's argument that his identification was merely the result of government suggestibility and that the victims confused him with the other black technician. After carefully reviewing the record of trial and considering the evidence in the light most favorable to the prosecution, we are convinced that a reasonable fact-finder could have found all the essential elements beyond a reasonable doubt. Furthermore, after weighing all the evidence in the record of trial and having made allowances for not having personally observed the witnesses, we are convinced beyond a reasonable doubt of the appellant's guilt.

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[18] We also reject the appellant's contention that because his personal marker—a skull and crossbones with his initials—was not visible on the victims' x-rays he was not the technician who conducted the x-rays. We are not surprised that the appellant would seek to avoid identifying himself while committing crimes.

B. Failure to notify the appellant that he was on legal hold

The appellant alleges his due process rights were violated because the government failed to provide him notice that it was retaining him on active duty past his End of Active Obligated Service (EAOS) date.

After the appellant served his confinement for his first court-martial, his command failed to administratively change the expiration of his EAOS from 20 October 2016 to 20 April 2017. This change should have been made because days spent in confinement do not count towards fulfilling a servicemember's enlistment.[19] On 11 April 2017, the appellant's command realized the error and issued him a counseling entry documenting that he had been on legal hold from 20 October 2016 to 11 April 2017.[20] The appellant argues this lack of notice of his legal hold violated his right to due process, and that this violation caused the court-martial to lose jurisdiction over him. We disagree.

As the appellant raises this due process concern for the first time on appeal, we apply the plain error standard. *See United States v. Lewis*, 69 M.J. 379, 383 (C.A.A.F. 2011) (applying the plain error standard to a due process claim first raised on appeal). Under the plain error standard, the appellant must show that: "(1) an error was committed; (2) the error was plain,

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[19] Appellant's Motion to Attach of 20 Nov 2017, App. 2 at 2.
[20] *Id*. at 2-3.

or clear, or obvious; and (3) the error resulted in material prejudice to substantial rights." Id. (quoting *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F. 2008)).

Here, the appellant fails to show that the government's failure to provide this notification plainly or obviously violated his right to due process. The appellant cites no authority—and we find none—supporting the proposition that the government's failure to notify him that he was being retained on active duty amounted to a violation of the Fifth Amendment guarantee of due process. Even if it did, the record does not reveal that the appellant was actually prejudiced. The record contains no indication that the appellant did not know that he remained on active duty. He was not discharged after his first court-martial. The appellant's brief makes plain that the appellant wore a uniform and returned to active service after having been confined.

The appellant erroneously links this perceived failure of due process with jurisdiction. The appellant incorrectly concludes that "as a result of the government's failure to provide such notice, government officials were able to retain personal jurisdiction" over the appellant.[21] But notification is not the source of, and does not affect, jurisdiction over a service member. Rather, the appellant was subject to the court-martial's jurisdiction because he had never been discharged from active duty. And the record does not contain any reason to find that the

[21] Appellant's Brief at 35.

appellant would have been discharged had he brought the government's error to its attention. Doubtless the government would have simply notified him that he was being retained for a second trial.

We find that the government did not violate the appellant's Fifth Amendment right to due process, and that no administrative error severed court-martial jurisdiction over the appellant.

C. Military judge's denial of motion to produce a witness

The appellant avers that the military judge abused her discretion in denying the appellant's pre-trial motion to compel production of Investigator S as a witness at trial. We disagree.

Investigator S was an investigator for the Naval Criminal Investigative Service assigned to the appellant's case. During his investigation, Investigator S used the CHCS to identify and then cold-call numerous females who might have been potential victims of the appellant. In one of these calls, a female patient—who was never a victim in the appellant's case—indicated that her x-ray technician might have been Caucasian. This was significant because the CHCS indicated the appellant had been signed in as her x-ray technician during the taking of her x-rays. The agent noted that the patient stated her technician was "Male (Caucasian)–Not too sure."[22]

[22] Appellate Exhibit (AE) VI at 6.

The defense argued that Investigator S could testify about this phone call with the unknown female. They argued this would show the CHCS was too unreliable to identify which x-ray technician took certain x-rays.

The military judge denied the motion, ruling that the testimony of Investigator S was not relevant or necessary. She stated that she could not "see how it is any more likely that this is a flaw in the CHCS than it is [the female patient's] memory of describing the x-ray technician."[23] The military judge found that Investigator S was cumulative with the defense's own expert consultant on the CHCS. She also found that the defense could effectively cross-examine other government witnesses with direct knowledge of the CHCS—witnesses who would readily admit that the CHCS showed only which x-ray technician was signed in at any given time and not which technician took certain x-rays.

We review witness production rulings for an abuse of discretion. *United States v. McElhaney*, 54 M.J. 120, 126 (C.A.A.F. 2000). "The military judge's decision should only be reversed if, 'on the whole,' denial of the defense witness was improper." *United States v. Ruth*, 46 M.J. 1, 3 (C.A.A.F. 1997) (citations omitted) (alteration in original). We will not reverse a military judge's ruling on a witness production motion "unless [we] have a definite and firm conviction that the [military judge] committed a clear error of judgment in the conclusion [she] reached upon a

[23] Record at 37.

weighing of the relevant factors." *Id*. (citations and internal quotations omitted).

The test for whether a witness should be produced is whether that witness is relevant and necessary. R.C.M. 703(b)(1). To determine if the testimony would be relevant, the trial judge must consider whether the testimony would have any tendency to make a fact of consequence more or less probable, and that its probative value is not outweighed by the danger of unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence. MILITARY RULE OF EVIDENCE (MIL. R. EVID.) 401 and 403, MANUAL FOR COURTS-MARTIAL (MCM), UNITED STATES (2016 ed.).

To determine whether a witness is necessary, we consider such factors as the issues involved in the case and the importance of the requested witness as to those issues; whether the witness is desired on the merits or the sentencing portion of the trial; whether the witness's testimony would be merely cumulative; and the availability of alternatives to the personal appearance of the witness, such as deposition, interrogatories or previous testimony. *Ruth*, 46 M.J. at 4 (quoting *United States v. Tangpuz*, 5 M.J. 426, 429 (C.M.A. 1978)).

We agree with the military judge's finding that Investigator S's testimony would have had very minimal, if any, relevance. The unidentified female patient's memory was inconclusive, and Investigator

S could only speculate about what her testimony actually meant regarding the reliability of the CHCS. We concur with the military judge's finding that a faulty memory of one patient would shed little, if any, light on the trustworthiness of the CHCS.

We also conclude that the military judge did not err in finding the evidence was not necessary. Although she did not spell out all of the Ruth factors for determining when a witness is necessary, the military judge did address two of the factors in her ruling: She addressed the first Ruth factor— the issues involved in the case and the importance of the requested witness as to those issues—when she found Investigator S's testimony unimportant regarding the reliability of the CHCS. She also addressed the third Ruth factor—whether the witness's testimony would be merely cumulative—in finding that there were already several witnesses who were going to testify about the reliability of the CHCS. In fact, the defense conceded that the government was going to call at least three x-ray technicians who would testify that the CHCS did not always portray who a patient's actual x-ray technician was because the technicians could "select any name from the drop-down menu" when they took the x-rays.[24]

As the military judge anticipated, the issue of the CHCS's reliability was addressed by several witnesses at trial. No fewer than three government witnesses and three defense witnesses—including the

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[24] *Id*. at 22.

appellant himself—testified regarding the reliability of using the CHCS to positively identify which x-ray technician took a certain x-ray.[25] Production of Investigator S's testimony was not necessary. Accordingly, we conclude that the military judge did not abuse her discretion in denying the production of Investigator S.

D. Denial of discovery

The appellant asserts that the military judge abused her discretion in denying production of a statistical breakdown of the racial make-up of the population of the CA's command.

1. Background

After general voir dire, but before the first member was brought in for individual voir dire, the trial defense counsel (TDC) stated the defense team had noticed that the "the panel [was] all white," their client was African-American, and they "would prefer African-American representation on the panel."[26] The TDC indicated they were making "a combination of an Article 25 [UCMJ,] challenge . . . almost like a preventative Batson challenge. . . . It is almost as though a command is preventing that race from representation on the panel so that they can avoid a *Batson* challenge."[27]

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[25] *Id*. at 402-79; 540-647; 675-97; 737-45; 746-78.
[26] *Id*. at 140.
[27] *Id*. at 141.

The military judge responded:

> [A]bsent any evidence of anything inappropriate being done by the convening authority in assembling the panel, you know, all I can state for the record is that, if it wasn't for frankly some of—the reading that I did about the prior proceeding, I would not personally have known the race of your client, and I certainly would not know necessarily by observing him, nor do I feel confident that I know the race of several of the members of the panel. I suspect that we have some minority participation on the panel . . . .[28]

In response, the TDC stated, "I may have misspoke [sic] and said that [the panel] were all Caucasian, and that might not be true. I am fairly confident that there is no African-American on the panel of 10, which statistically speaking, you would think that there would be at least one."[29]

The TDC then requested to expand their initial discovery request—which had been for the documents accompanying the selection of members under Article 25, UCMJ—to include "a statistical breakdown of the population as far as race with respect to the convening authority's command."[30] The military judge denied

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[28] *Id*.
[29] *Id*. at 143.
[30] *Id*. at 144.

the discovery request. First, she found that the defense had been in possession of the member's questionnaires for a week before trial and should have raised the issue earlier. Second, she found that a statistical breakdown of the CA's command based on race was not feasible, and was irrelevant absent any evidence of impropriety.

Finally, the TDC argued that this was the second members panel in a row in which he was representing an African-American client and the members appeared to be "an all-white panel."[31] The military judge noted the TDC's objection for the record and then directed that the first member be called in for individual voir dire.

2. Denial of request for discovery

We review a military judge's ruling on a request for production of evidence for an abuse of discretion. *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004). The military judge abuses her discretion when her findings of fact are clearly erroneous or her ruling is influenced by an erroneous view of the law. *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008). Here, although we find the military judge erred in declaring the TDC's objection to the panel untimely, she did not abuse her discretion by denying the discovery request.

With regard to timeliness, the military judge misapprehended the content of the members'

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[31] *Id*. at 146.

questionnaires. Only one of the ten member's questionnaires had a question asking the member to identify her race.[32] The appellant would have had no way of knowing what race the members appeared to be until they actually arrived at the trial. The military judge's finding, therefore, that the defense could have used the questionnaires to bring the motion sooner was incorrect. The defense brought the issue to the military judge's attention when it came to their attention. Our superior court has ruled that an objection that the CA selected members for reasons other than those listed in Article 25, UCMJ—such as excluding members based on race—is always timely and never waived. *United States v. Riesbeck*, 77 M.J. 154, 160 (C.A.A.F. 2018).[33]

Although the military judge erred with regard to the timeliness of the motion, we find that she did not abuse her discretion in denying the motion. First, the defense request for "a statistical breakdown of the population as far as race with respect to the convening authority's command" is not relevant. The record reveals that the CA was able to detail members from outside Navy Region Mid-Atlantic, and even from commands not subordinate to his command. The record also reveals that no members detailed to the appellant's court-martial listed Navy Region Mid-

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[32] AE XXVVII at 76. The member with the racial identifier question self-identified as Caucasian.

[33] The CAAF equated this attack on member selection to UCI. "We also noted that improper member selection can constitute unlawful command influence, which cannot be waived." *Riesbeck*, 77 M.J. at 176. *See* Section F, *infra*.

Atlantic—the CA's command—as their current command. Knowing the racial makeup of the CA's command, therefore, would not have been useful to the court-martial.

We are unable to re-construe the request to be more relevant. The record does not reveal what additional commands made up the CA's pool of available members. We cannot know—and the appellant has not demonstrated—what a request for more relevant information might have looked like. What commands' demographic information should be used? Over what period of time? In terms of eligibility under Article 25, UCMJ, what would be the appropriate groups of people to consider? The appellant's request at trial was for irrelevant information, and the military judge did not abuse her discretion by denying it.

On appeal, the appellant asks us to re-tool the request and order a *DuBay* hearing to "require the government to produce the racial and statistical makeup of the pool of members for the CA and 'articulate[ ] a neutral explanation relative to this particular case, giving a clear and reasonably specific explanation of legitimate reasons' for excluding black members from HM2 Bess' venire."[34] We find, however, that the record is sufficient for us to determine that the military judge did not abuse her discretion by denying the request as it was made at trial. The

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[34] Appellant's Brief at 47 (quoting *United States v. Moore*, 28 M.J. 366, 369 (C.M.A. 1989) (alteration in original).

appellant presented no evidence that the CA used anything other than the Article 25, UCMJ, criteria for selecting members, or that he even knew the race of all but one of the members he selected. The appellant's mid-voir dire request was for irrelevant information, and the military judge rightly denied it at the time. We decline the appellant's invitation to litigate new requests post-trial. This assignment of error is without merit.

E. No African-Americans on the panel

The appellant urges us to extend *Batson v. Kentucky*, 476 U.S. 79 (1986) and hold that the military judge erred by not requiring the CA to give a race-neutral reason for not having any African-Americans on the panel. We decline to do so.

Batson, as applied to the military in *United States v. Santiago-Davila*, 26 M.J. 380 (C.M.A. 1988), allows an accused to require a prosecutor to give a race-neutral reason for exercising a peremptory challenge on a minority member. The appellant argues that the CA circumvented Batson by not including any African-Americans on the panel. The appellant argues that the absence of African-Americans on the panel is prima facie evidence that the CA systematically excluded them, and that, under Batson, the burden shifted to the government—presumably the CA—to give a race-neutral reason for not including African-Americans.

There is no precedent for this application of Batson in courts-martial, and we decline to create it

here. Additionally, we are bound by precedent that establishes that, absent further evidence of some intentional exclusion of a particular group by the CA, the absence of African-Americans on the panel does not constitute prima facie evidence of systematic exclusion. *See United States v. Loving*, 41 M.J. 213, 285 (C.A.A.F. 1994). This assignment of error is without merit.

F. Unlawful Command Influence

The appellant claims that the commander exerted UCI by excluding African-American members from the panel. We disagree.

To prove UCI on appeal the appellant must show (1) facts, that if true, constitute UCI, (2) the prior proceedings were unfair, and (3) the UCI "was the cause of the unfairness." *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999) (citing *United States v. Stombaugh*, 40 M.J. 208, 213 (C.M.A. 1994)). The appellant must show facts that, if true, allege the members were selected on an impermissible basis to affect the result of the trial. *Riesbeck*, 77 M.J. at 159. Proximate causation between the alleged UCI and court martial outcome must be proven as well. *Biagase*, 50 M.J. at 150 (citing *United States v. Reynolds*, 40 M.J. 198, 202 (C.M.A. 1994)).

Allegations of UCI are reviewed de novo by this court. *United States v. Sayler*, 72 M.J. 415, 423 (C.A.A.F. 2013) (citing *United States v. Harvey*, 64 M.J. 13, 19 (C.A.A.F. 2006)). The appellant alleges that the CA used race to select an all-white panel in

order to engage in court stacking, a form of UCI. Riesbeck, 77 M.J. at 165. "The initial burden of showing potential [UCI] is low, but is more than mere allegation or speculation." *Id*. (citing *United States v. Stoneman*, 57 M.J. 35, 41 (C.A.A.F. 1999). If the defense presents some evidence of UCI, the burden shifts to the government to show either that there was no UCI, or that any UCI did not taint the proceedings. *Stoneman*, 57 M.J. at 41.

We find that the appellant has not met his initial burden. With the exception of the one member's questionnaire that had a racial or ethnicity identifying question and response, there is no evidence that the CA knew the race of any of the other nine members detailed to the court-martial. Again, we observe that none of the members listed Navy Region Mid-Atlantic as their parent command on their member questionnaires. As all of the members denied personally knowing the CA during voir dire, we have no reason to suspect that the CA personally knew them and would therefore have known their race. This court cannot even be sure of the members' race as the record is absent of any questions posed during voir dire to the members by either counsel or the military judge regarding the members' racial or ethnic background.

We note that the appellant's counsel was in possession of the matters the CA used to select members, and that he failed to introduce these matters as evidence. Also, the appellant did not call the CA as a witness to ask him about how he selected members.

We have considered the affidavit provided by trial defense counsel's executive officer. In that affidavit, the executive officer notes that he represented an African-American officer at court-martial seven months after the appellant's trial. Before that officer's trial, the executive officer sent a letter to the CA asking for minority representation at the officer's trial. The CA complied with that request. In the affidavit the executive officer goes on to state that he is aware of three other cases in which African-Americans were tried by all-white panels convened by the CA. We find that this anecdotal observation by the executive officer of a defense command, which cuts both in favor of and against the appellant's allegation of CA bias, does not shift the burden to the government to disprove UCI.

In addition to considering the case for actual UCI, we have considered apparent UCI, asking whether "an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding." *Sayler*, 72 M.J. at 423 (citing *Lewis*, 63 M.J. at 415). We find that there are insufficient facts on the record that would lead a reasonable person to harbor significant doubt about the fairness of the proceeding. In possession of the CA's members' selection material, the appellant presented no evidence that the CA selected members by using any criteria other than those found in Article 25, UCMJ. This assignment of error is without merit.

G. Failure to grant a mistrial

The appellant avers that the military judge abused her discretion in failing to grant a mistrial. We disagree.

Before the beginning of the trial, the TDC reminded the military judge that the parties had agreed "to reference any testimony from the first trial . . . as 'prior testimony at a prior hearing,' rather than . . . that it was an actual contested trial." The military judge agreed:

> As you stated, we—our goal is to preclude any indication to the members that there was a previous court-martial. And, as indicated, counsel should refer to any prior testimony as something of the nature of, "At a prior hearing," or, "During prior testimony," something of that nature, and not refer to a court-martial.[35]

During trial, the government called Dr. B, an expert in radiology. On redirect examination, the prosecutor asked Dr. B if he had reviewed certain x-rays on the high resolution monitors at his office before trial. Dr. B responded, "Not for this particular trial. I did for the original trial."[36] The military judge quickly excused the members and discussed issuing a curative instruction with the parties. The defense

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[35] Record at 80.
[36] *Id*. at 647.

refused to participate in the drafting of the curative instruction and asked for a mistrial. The military judge denied the mistrial and provided the members with the following curative instruction:

> Members, you are to completely disregard Dr. [B's] statement concerning a prior proceeding. There are many ways and reasons why a prior proceeding that may have occurred could've terminated. And you may make no inference concerning the guilt or innocence at [sic] the accused. You are to determine the accused's guilt or innocence based solely on the evidence presented to you in court. Is there any member who cannot follow this matter?[37]

All of the members indicated that they could follow the instruction. The military judge gave the appellant the overnight recess to draft a written motion for mistrial. The defense filed the written motion the next morning, which the military judge denied. In her ruling, the military judge pointed out that Dr. B mentioned only that there was a prior trial—not a prior conviction—and that the defense failed to provide any source of law for the proposition that such a statement was worthy of a mistrial. The military judge ruled that a curative instruction was the appropriate remedy.

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[37] *Id*. at 664.

> [T]here were multiple and various inferences the members could draw if permitted to make inferences regarding the mere mention of a previous trial. That is exactly why I deemed a curative instruction to be the appropriate remedial action to stop as quickly as possible the members from making any inferences. I do not agree with the defense that the only acceptable curative instruction would require lying to the members.[38]

"We will not reverse a military judge's determination on a mistrial absent clear evidence of an abuse of discretion." *United States v. Ashby*, 68 M.J. 108, 122 (C.A.A.F. 2009) (citing *United States v. Rushatz*, 31 M.J. 450, 456 (C.M.A. 1990)). A military judge "may, as a matter of discretion, declare a mistrial when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings." R.C.M. 915(a). But "a mistrial is an unusual and disfavored remedy. It should be applied only as a last resort to protect the guarantee for a fair trial." *United States v. Diaz*, 59 M.J. 79, 90 (C.A.A.F. 2003). "A curative instruction is the preferred remedy, and the granting of a mistrial is an extreme remedy which should only be done when 'inadmissible matters so prejudicial that a curative instruction would be inadequate are brought to the

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[38] *Id.* at 671.

attention of the members.'" *Id.* at 92 (quoting R.C.M. 915(a), Discussion).

Here, we find the military judge did not abuse her discretion by denying the request for a mistrial. We do not believe the mere mention of a previous trial by Dr. B casts substantial doubt upon the fairness of the proceedings. *See* R.C.M. 915(a). The doctor's comment was not so prejudicial that a curative instruction did not cure it. In fact, the curative instruction alleviated any possible prejudice that might have arisen. We presume "absent contrary indications, that the panel followed the military judge's instructions." *United States v. Sewell*, 76 M.J. 14, 19 (C.A.A.F. 2017).

H. The government taking the appellant's uniforms

The appellant claims he was unlawfully punished under Article 13, UCMJ, when the government kept his uniforms after his first conviction was overturned and he was released from the brig. We disagree.

Before findings, the appellant made an oral Article 13, UCMJ, motion alleging illegal pretrial punishment. The appellant testified that he was required to turn in his uniforms when he entered confinement after his first court-martial. He was then ordered back to active duty when his convictions were set aside. The appellant testified that he then bought $400.00 worth of new uniforms because none of the command's spare uniforms fit him. The military judge

denied the motion because she found no punitive intent by the command to punish the appellant, and "multiple legitimate[,] non-punitive government interests" for taking uniforms from servicemembers receiving a dishonorable discharge.[39]

Article 13, UCMJ, prohibits pretrial punishment: "[n]o person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him[.]" The CAAF has determined that for the appellant to receive relief, he must show that the government intended to punish him. "[T]he question of whether particular conditions amount to punishment before trial is a matter of intent, which is determined by examining the purposes served by the restriction or condition, and whether such purposes are reasonably related to a legitimate governmental objective." *Howell v. United States*, 75 M.J. 386, 393 (C.A.A.F. 2016) (quoting *United States v. Palmiter*, 20 M.J. 90 (C.M.A. 1985)) (alteration in original) (internal quotation marks omitted).

"The burden is on [the] appellant to establish entitlement to additional sentence credit because of a violation of Article 13[, UCMJ]." *United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002) (citing R.C.M. 905(c)(2)). Whether an appellant is entitled to relief for a violation of Article 13, UCMJ, is a mixed question of law and fact. *Id.* (citing *United States v. Smith*, 53 M.J. 168, 170 (C.A.A.F. 2000) and *United States v.*

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[39] *Id.* at 671.

McCarthy, 47 M.J. 162, 165 (C.A.A.F. 1997)) (additional citation omitted). "We will not overturn a military judge's findings of fact, including a finding of no intent to punish, unless they are clearly erroneous. We will review de novo the ultimate question whether [this] appellant is entitled to credit for a violation of Article 13[, UCMJ]." *Id*. (citing *Smith*, 53 M.J. at 170).

Here, the appellant presented no evidence that the government acted with a punitive intent when it appropriated his uniforms after his first conviction. Accordingly, the military judge found no intent to punish: "[T]here does not appear to be any punitive intent in the lack of retention of [the appellant's] uniforms while he was in the brig, or those items being returned to him."

The military judge also found legitimate, nonpunitive purposes for the government's policy of confiscating uniforms of servicemembers who had received punitive discharges. Those reasons included: (1) preventing servicemembers who had received punitive discharges from wearing their uniforms out in town; (2) complying with the Naval Military Personnel Manual's requirement for persons with punitive discharges to surrender their uniforms;[40] and (3) compliance with 10 U.S.C. § 771a's requirement that when an enlisted servicemember is discharged dishonorably his issued clothing must be retained by the military.[41]

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[40] MILPERSMAN, Art. 1910-228, p.1 (CH-11, 1 Jun 2005).
[41] Record at 1089-90.

The military judge's findings of fact are supported by the record and are not clearly erroneous. Her conclusions of law are correct. Accordingly, we find that the appellant is not entitled to relief under Article 13, UCMJ.

III. CONCLUSION

The findings and sentence as approved by the CA are affirmed.

Chief Judge WOODARD and Senior Judge FULTON concur.

FOR THE COURT

RODGER A. DREW, JR.
Clerk of Court