No. 20-489

In the Supreme Court of the United States

PEDRO M. BESS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Court should vacate and remand this case for an evidentiary hearing on petitioner's claim that the convening authority violated equal protection principles in selecting court-martial panel members under Article 25, Uniform Code of Military Justice, 10 U.S.C. 825.

ADDITIONAL RELATED PROCEEDINGS

General Court-Martial (Navy Region Mid-Atlantic):

United States v. *Bess* (Mar. 8, 2013) (no docket number assigned)

United States v. *Bess* (Nov. 18, 2016) (no docket number assigned)

United States Navy-Marine Corps Court of Criminal Appeals:

United States v. *Bess*, No. 201300311 (Oct. 28, 2014)

United States v. *Bess*, No. 201300311 (Oct. 4, 2018)

United States Court of Appeals for the Armed Forces:

United States v. *Bess*, No. 15-0372 (Jan. 6, 2016)

United States v. *Bess*, No. 19-0086 (May 14, 2020)

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (Pet. App. 4a-60a) is reported at 80 M.J. 1. The opinion of the Navy-Marine Corps Court of Criminal Appeals (Pet. App. 61a-94a) is not reported in the Military Justice Reporter but is available at 2018 WL 4784569.

JURISDICTION

The judgment of the Court of Appeals for the Armed Forces was entered on May 14, 2020. The petition for a writ of certiorari was filed on October 9, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Following a trial by court-martial, petitioner was convicted of four specifications of indecent acts, in violation of Article 120 of the Uniform Code of Military

Justice (UCMJ), 10 U.S.C. 920, and two specifications of attempting to commit indecent acts, in violation of Articles 80 and 120 of the UCMJ, 10 U.S.C. 880, 920.* 75 M.J. 70, 72. The court-martial sentenced petitioner to confinement for two years and a dishonorable discharge. *Id.* at 73. The convening authority approved the adjudged sentence, and the Navy-Marine Corps Court of Criminal Appeals (NMCCA) affirmed. *Ibid.* The United States Court of Appeals for the Armed Forces (CAAF) reversed. 75 M.J. 70.

On remand, the convening authority referred the charges to a new court-martial. Pet. App. 5a. Petitioner was convicted of two specifications of indecent acts, in violation of Article 120 of the UCMJ, 10 U.S.C. 920. The court-martial sentenced petitioner to confinement for one year, a reduction to pay grade E-3, and a reprimand. Pet. App. 5a. The convening authority approved the adjudged sentence, and the NMCCA affirmed. *Ibid.* The CAAF affirmed. Pet. App. 4a-60a.

1. The UCMJ, 10 U.S.C. 801 *et seq.*, governs courts-martial of servicemembers. The President, Secretary of Defense, and certain commanding officers are authorized to convene general courts-martial. 10 U.S.C. 822(a) and (b). The accused has a statutory right to a general court-martial composed of a panel of members of the Armed Forces with a military judge. See 10 U.S.C.

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* In December 2016, Congress amended various provisions in the UCMJ with a delayed the effective date of those amendments. Military Justice Act of 2016, Pub. L. No. 114-328, Div. E, § 5001 *et seq.*, 130 Stat. 2894; *id.* §§ 5182, 5203(e)(2), 130 Stat. 2899-2900, 2906 (amending, *inter alia*, Article 25(c) and (d)); *id.* § 5542(a), 130 Stat. 2967 (effective date). Unless otherwise noted, citations in this brief refer the pre-amendment version of UCMJ in the 2012 edition of the United States Code, which remained in force during the period relevant to this case.

816(1); Rule for Courts-Martial (RCM) 501(a)(1)(A). Where, as here, a court-martial is convened to try an enlisted servicemember, the accused may personally request that the panel include other enlisted members. 10 U.S.C. 825(c)(1). If such a request is made, at least one-third of the panel's total membership must normally be enlisted personnel. *Ibid.* (providing exceptions based on physical conditions and military exigencies).

Article 25 of the UCMJ, 10 U.S.C. 825, identifies the individuals who are "eligible to serve" on general courts-martial. 10 U.S.C. 825(a)-(c) and (d)(2). All active-duty commissioned officers are generally "eligible to serve" as court members. 10 U.S.C. 825(a). All active-duty warrant officers are also generally "eligible to serve" as court members, if the accused is not a commissioned officer. 10 U.S.C. 825(b). And if the accused is an enlisted servicemember who has requested that court membership include enlisted personnel, all active-duty enlisted servicemembers who are not members of the same unit as the accused are generally "eligible to serve" as court members. 10 U.S.C. 825(c). Article 25(d)(2) provides that "the convening authority shall detail as members" of the court-martial those eligible servicemembers who, "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(d)(2).

Although there is no upper limit to the number of members the convening authority may detail to the court-martial, in non-capital cases where the accused selects to be tried by a panel of members, a general court-martial must include no fewer than five members. RCM 501(a)(1)(A). During voir dire, the judge, prosecutors, and accused question the detailed members as a group, as well as individually, outside the presence of

other members. RCM 912(d). After questioning, the prosecutor and accused may challenge members "for cause" without limit. RCM 912(f)(3). After challenges for cause, both the prosecutor and the accused are each allotted one peremptory challenge. RCM 912(g)(1). The convening authority may detail new members to the court-martial should the granting of challenges during voir dire reduce the number of members below five, or, where the accused has requested enlisted members, the number of enlisted members is reduced below one-third of total membership. RCM 505(c)(2)(B).

2. Petitioner is an African-American radiological technician who, in 2011, worked at the Naval Air Station Oceana Branch Health Clinic in Virginia Beach, Virginia. Pet. App. 64a. In February 2011, without any medical justification, petitioner persuaded two white female patients that they had to be fully undressed while he took their x-rays. *Id.* at 64a-65a. In the first incident, petitioner convinced the dependent daughter of an active-duty field grade officer, who had been in a head-on car collision, that he needed her to pose on the x-ray table completely naked with her buttocks in the air, exposing her vaginal area to petitioner. *Id.* at 66a. In the second incident, petitioner presented a petty officer second class with a forged doctor's note ordering that x-rays be taken of the officer nude. *Id.* at 66a-67a. He then purported to take a series of x-rays of her standing up with her breasts, buttocks, and vaginal area exposed to petitioner, while he "encouraged her not to cover her pelvic area with her hands." *Id.* at 67a.

Based on those and other similar incidents, a general court-martial consisting of officers and enlisted members convicted petitioner in 2013 of four specifications of indecent acts, in violation of Article 120 of the UCMJ,

10 U.S.C. 920, and two specifications of attempting to commit indecent acts, in violation of Articles 80 and 120 of the UCMJ, 10 U.S.C. 880, 920. See 75 M.J. at 72-73. The NMCCA affirmed the court-martial's finding and sentence. 2014 WL 5449625. But the CAAF reversed, finding that the military judge presiding over the court-martial had erred by providing certain business records to the members during deliberations, without giving petitioner an opportunity to challenge their reliability. 75 M.J. at 77.

3. On remand, petitioner was charged with three specifications of indecent acts and one specification of attempting to commit indecent acts. U.S. CAAF Br. 3. The convening authority, Rear Admiral John Scorby, serving as Commander of Navy Region Mid-Atlantic, Norfolk, Virginia, referred petitioner's charges to his standing general court-martial to which ten officers had been detailed. *Ibid.* After petitioner requested enlisted representation, the convening authority amended the convening order, replacing the ten officers with five new officers and five enlisted members. *Id.* at 4.

About one week before trial, the government provided petitioner with the ten questionnaires completed by the members. U.S. CAAF Br. 4. No member indicated that he worked at the same command as the convening authority. *Ibid.* Nine members were not asked to identify, and did not identify, their race. *Id.* at 5. The tenth member, using a different version of the questionnaire, was asked about race, and checked a box for "Caucasian." *Ibid*; Pet. App. 10a.

Immediately prior to individual voir dire, petitioner's counsel stated to the presiding military judge that counsel "ha[d] noticed" that the court-martial panel was "all white," whereas petitioner was African-American. CAAF

J.A. 192; see Pet. App. 7a. "[G]iven that the population of America" is approximately "13 percent African-American, and in the Navy it might even be higher," counsel stated that he "just wanted to get on the record that that seemed odd," and that petitioner "would prefer African-American representation on the panel." CAAF J.A. 192.

When asked to explain his objection, petitioner's counsel explained that it was "basically a combination of an Article 25 challenge and, I guess, it's almost like a preventative *Batson* challenge." CAAF J.A. 193; see Pet. App. 7a-8a; see also *Batson* v. *Kentucky*, 476 U.S. 79 (1986). "If you don't put any African-Americans on the panel from the get-go," counsel continued, "then you can't get a *Batson* challenge because nobody is getting eliminated based on their race." CAAF J.A. 193; see Pet. App. 8a. When asked how he knew the race of each member of the panel, petitioner's counsel stated that he "may have misspoke[n]" when he said that the panel was "all Caucasian," but he was "fairly confident" that no African-Americans were on the panel. CAAF J.A. 195; see *id.* at 194-195. And he reiterated petitioner's concern that the panel was "not an equal reflection of the racial population in th[e] area." *Id.* at 195-196.

The military judge noted petitioner's objection, but declined to take any further action "absent any evidence of anything inappropriate being done by the convening authority in assembling the panel." CAAF J.A. 193. The judge explained that, were it not for the reading she had done prior to the proceeding, she herself would not have known petitioner's race. *Ibid.* She further explained that while no member of the panel was "obviously of the same race" as petitioner, she was not "con-

fident that [she] kn[e]w the race of several of the members of the panel" and therefore could not "speak to [its] racial makeup." *Id.* at 193, 195. With respect to equal representation, the judge stated that petitioner's argument "could be slightly stronger" if petitioner knew "more information about the racial and statistical makeup of the pool of members for this particular convening authority." *Id.* at 196. But she "still d[id]n't see a basis for it." *Ibid.*

Petitioner 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." CAAF J.A. 196. The military judge also denied that motion on multiple grounds. *Id.* at 196-197; see Pet. App. 8a. The judge first deemed the request untimely, asserting (mistakenly) that each of the members' questionnaires reflected their race. CAAF J.A. 196-197. She stated that petitioner should have raised the issue of racial representation before individual voir dire. *Ibid.* The military judge separately reasoned that acquiring the requested statistics would be impractical. *Ibid.* And she also explained that such statistics were irrelevant "absent any evidence of impropriety." *Ibid.*

Petitioner immediately observed that only "some" of the questionnaires included racial information. CAAF J.A. 197. Petitioner did not, however, object to the panel questionnaires or request supplemental questionnaires; nor did he move to stay the proceedings for improper member selection under RCM 912(b). The military judge declined to revisit her ruling, noting that the "issue ha[d] been noted for the record, and [the court-martial was] moving on." *Ibid.* During voir dire, the members were not asked and did not provide any further information about their race. Pet. App. 10a. Each

member did state that he or she neither personally knew, nor worked with, the convening authority. *Ibid.*

After trial, the court-martial convicted petitioner of two specifications of indecent acts, in violation of Article 120 of the UCMJ, 10 U.S.C. 920, and sentenced petitioner to confinement for one year, a reduction to pay grade E-3, and a reprimand. Pet. App. 5a. The court-martial acquitted petitioner of one additional specification of indecent acts and one specific of attempted indecent acts. *Id.* at 5a n.1.

Petitioner submitted a clemency request to the convening authority, arguing that the military judge erred by not requiring the convening authority to articulate the reasons for excluding all African-Americans from the courts-martial. Pet. App. 11a. The convening authority denied relief and affirmed the court-martial's finding and sentence. *Id.* at 11a-12a.

4. The NMCCA affirmed. Pet. App. 61a-94a.

As to petitioner's discovery request, the NMCCA determined that, while the military judge erred in initially finding the request untimely, the judge did not abuse her discretion in denying the request on relevancy grounds. Pet. App. 79a-84a. The court explained that the racial makeup of the convening authority's command would be irrelevant to petitioner's objection to the racial makeup of the courts-martial because the convening authority was not limited to detailing members in his command and, indeed, no members of the court-martial were drawn from the convening authority's command. *Id.* at 82a-83a. The court declined to "reconstrue the request to be more relevant," observing that the record did not reveal what commands should be included in such request, over what time periods, or which groups of servicemembers in each command

would be appropriately considered. *Id.* at 83a. The court also declined to order a belated hearing for the petitioner to explore such questions in the first instance at this stage of the proceedings. *Id.* at 83a-84a.

Turning to the merits of petitioner's representation claim, the NMCCA agreed with the military judge that, even assuming that the framework specified in *Batson* v. *Kentucky*, *supra*, for evaluating peremptory strikes of potential jurors in civilian criminal trials, applied to the convening authority's designation of panel members, "absent further evidence of some intentional exclusion of a particular group by the [convening authority], the absence of African-Americans on the panel does not constitute prima facie evidence of systematic exclusion" that would shift the burden to the government to provide a race-neutral reason for the panel's composition. Pet. App. 85a. "With the exception of the one member's questionnaire that had a racial or ethnicity identifying question and response," the court observed, "there is no evidence that the [convening authority] knew the race of any of the other nine members detailed to the court-martial" and "no evidence that the [convening authority] selected members by using any criteria other than those found in Article 25" of the UCMJ. *Id.* at 86a, 87a.

5. On discretionary review, the CAAF affirmed by a three-to-two vote. Pet. App. 4a-60a.

a. In an opinion by Judge Ryan, the CAAF rejected petitioner's contention that the convening authority violated equal protection principles in his designation of petitioner's court-martial panel. Pet. App. 13a-17a. As an initial matter, the court observed that it was not, in fact, clear that the panel did not include any African-American members "because the questionnaires did not

have this information[] and because [petitioner] declined to inquire into the races during voir dire." *Id.* at 14a. In any event, the court found "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." *Ibid.* (citing *Powers* v. *Ohio*, 499 U.S. 400, 404 (1991)). The CAAF explained that "the Fifth Amendment provides * * * not a promise to include, but rather protection against intentional racial discrimination through exclusion." *Ibid.* And it reasoned that the "mere failure to include, which is what [petitioner] complained of at trial," is "insufficient" to support such a claim. *Id.* at 17a.

The CAAF declined to "apply the frameworks of either *Batson* or *Castaneda*" v. *Partida*, 430 U.S. 482 (1976), which applies to grand jury selection, "to find that the absence of African Americans on [petitioner's] panel constitute[d] an equal protection violation." Pet. App. 17a. In a portion of the opinion joined by one other judge, Judge Ryan observed that *Batson* addressed only a "prosecutor's exercise of peremptory challenges at the defendant's trial." *Id.* at 18a (citation omitted). She noted that *Batson* permits a defendant to establish a prima facie case of purposeful discrimination in that context based solely on the prosecutor's conduct at trial, shifting the burden to the government to provide a race-neutral explanation for the strike. *Ibid.* Judge Ryan explained that while that holding "appl[ies] in the military justice system when a party makes a peremptory challenge," petitioner cited no decision that required application of such procedures outside that context. *Ibid.*; see *id.* at 18a-19a & n.9.

Writing again for the court, Judge Ryan accepted that *Castaneda*'s "framework for addressing systematic

discrimination in the selection of grand jurors" was "not so limited." Pet. App. 19a. But she reasoned that, even if that framework "*could* be extended to a convening authority's selection of court-martial members, it would not change the outcome in this case," because petitioner failed to establish his claim under that framework. *Ibid.*; see *id.* at 19a-21a. *Castaneda* requires a defendant to (1) identify "a recognizable, distinct class, singled out for different treatment under the laws"; (2) establish underrepresentation of that class, as compared to its proportion in the total population, "over a significant period of time"; and (3) demonstrate that the selection procedure is "susceptible of abuse or is not racially neutral." *Id.* at 19a-20a (citation omitted). And she observed that petitioner and his amici had offered only anecdotal allegations that over a one-year period, "the convening authority detailed all-white panels in four cases." *Id.* at 21a. "Even if mere allegations constitute competent evidence (and we do not believe they do)," she explained, "one year is not a 'significant period of time' and would not establish a prima facie case under the *Castaneda* framework." *Ibid.* (citation omitted).

Finally, the CAAF rejected petitioner's argument that the military judge erred in denying petitioner's motion for discovery, and it denied petitioner's request for a remand for an evidentiary hearing to gather additional evidence for his equal protection claim at this point. Pet. App. 26a-32a. The court agreed with the NMCCA that petitioner's discovery request had sought irrelevant information, explaining that "the information requested had little to do with the available pool of members" and because "bare population statistics" "would do nothing to add to the legal force" of his claims. *Id.* at 27a. For similar reasons, the CAAF determined that a

remand for additional evidence gathering was unwarranted. The court found "'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," and determined "the population statistics [petitioner] now seeks would * * * prove nothing" different. *Id.* at 30a (citation omitted).

b. Judge Maggs concurred in part and concurred in the judgment. Pet. App. 33a-37a. Judge Maggs joined Judge Ryan's opinion in full, except for its *Batson* analysis. *Id*. at 33a. On that issue, Judge Maggs stated that the CAAF need not take a view on how or whether *Batson* applies to a convening authority's member selection for a court-martial because "the record does not establish the factual predicate for [petitioner's] proposed constitutional test." *Id.* at 35a. "For the reasons thoroughly explained by the Court," Judge Maggs observed, "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.'" *Ibid.* (brackets in original). Judge Maggs recognized that while the CAAF could, in theory, order a hearing to supplement the record on that question, he found that petitioner waived his right to such further discovery by failing even to take the initial steps at trial of either requesting that the members' questionnaires all include a question asking for the members to identify their race or inquiring into each members' race during individual voir dire. *Id.* at 36a-37a. And Judge Maggs noted that because there was no majority opinion on the *Batson* issues, "they remain open for decision" in a future case "if the record * * * properly presents them." *Id.* at 37a.

c. Judges Ohlson and Sparks each dissented and joined the other's dissent. Pet. App. 38a-55a (Ohlson,

J.); *id.* at 56a-60a (Sparks, J.). Those judges agreed that the record, as it exists, does not establish an equal protection violation. See *id.* at 42a-43a (Ohlson, J., dissenting) ("[I]t is important that this Court not prematurely reach any conclusions—or cast any aspersions—regarding precisely what happened in this, and similarly situated, cases."); *id.* at 56a (Sparks, J., dissenting) (agreeing that "the state of this record does not allow a proper resolution" of the *Batson* issues). But both judges would have remanded the case for further factual development. *Id.* at 54a; *id.* at 56a-57a.

ARGUMENT

Petitioner asks (Pet. 40) this Court to "vacate the CAAF's opinion and remand for additional factfinding * * * to vindicate [his] Due Process rights." The Court should decline that request. In the decision below, the CAAF correctly declined to set aside petitioner's convictions based on his allegations of racial discrimination in the selection of his court-martial panel and permissibly declined to order a belated evidentiary hearing for additional factfinding. The CAAF's affirmance of the judgment does not conflict with any decision of this Court or of another court of appeals, and petitioner's request for factbound error correction on the CAAF's determination whether to remand the case for an evidentiary hearing does not warrant this Court's review. The petition for a writ of certiorari should be denied.

1. "Equal justice under law requires a criminal trial free of racial discrimination in the jury selection process." *Flowers* v. *Mississippi*, 139 S. Ct. 2228, 2242 (2019). Although "a defendant has no right to a 'petit jury composed in whole or in part of persons of his own race,'" equal protection principles of the Fifth Amendment "guarantee[] the defendant that the State will not

exclude members of his race from the jury venire on account of race or on the false assumption that members of his race as a group are not qualified to serve as jurors." *Batson* v. *Kentucky*, 476 U.S. 79, 85-86 (1986) (quoting *Strauder* v. *West Virginia*, 100 U.S. 303, 305 (1880)); see *id.* at 86 ("Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection.").

The CAAF has held that those same principles apply to courts-martial and, in any event, "should be followed in the administration of military justice." *United States* v. *Santiago-Davila*, 26 M.J. 380, 390 (1988). And they are reflected in the criteria for a convening authority's selection of members to be detailed to a court-martial, listed in Article 25 of the UCMJ, which do not include race. See 10 U.S.C. 825(d)(2); see also Pet. App. 16a ("Race is not one of the criteria."). In the decision below, the CAAF correctly and unanimously determined that petitioner has not demonstrated a violation of those principles here.

"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.'" *Batson*, 476 U.S. at 93 (citation omitted). Although petitioner claims (*e.g.*, Pet. 13), that his court-martial panel did not include any African-American members, in fact, the record does not reflect the race of the panel members, except for the one member who identified his or her race on the member questionnaire. Pet. App. 14a. In any event, the Constitution does not guarantee a jury "composed in whole or in part of persons of [a defendant's] own race." *Batson*, 476 U.S. at 85. And the CAAF found "precisely zero evidence" that petitioner's convening authority "engaged

in any impropriety" in the selection of the court-martial or even "knew or had reason to know the race of the persons he detailed to the court-martial." Pet. App. 14a; see *id.* at 42a-45a (Ohlson, J., dissenting) (acknowledging that the current record does not establish impermissible consideration of race); *id.* at 56a (Sparks, J., dissenting) (agreeing with Judge Ohlson that "the state of this record does not allow" a finding of racial discrimination).

Petitioner asserts (Pet. 29) that the convening authority must have "*intentionally* select[ed] an all-White [court-martial] panel," because Article 25 required the convening authority to "hand-select" the court-martial's members. But the mere fact that Article 25 required the convening authority to personally select the members of the court-martial that heard petitioner's case does not show intentional discrimination. As noted above, Article 25 dictates the criteria that a convening authority must apply in making such a selection—namely, "age, education, training, experience, length of service, and judicial temperament." 10 U.S.C. 825(d)(2). Race is not among them, and petitioner does not explain how the convening authority would even have been aware of any member's race, save one, when he selected those members who were "best qualified for the duty," as Article 25 requires. *Ibid.* "[N]one 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." Pet. App. 10a.

Petitioner faults (Pet. 30) the CAAF for relying on the presumption of regularity. But this Court has repeatedly made clear that such a presumption should be "accorded to prosecutorial decisionmaking" in the civilian justice system. *Hartman* v. *Moore*, 547 U.S. 250,

263 (2006); see, *e.g.*, *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489-490 (1999); *United States* v. *Armstrong*, 517 U.S. 456, 464-466 (1996). And to whatever extent convening authorities in the military justice system are analogous to prosecutors, rather than adjudicators, petitioner identifies no basis for not affording them the same respect. See *Hartman*, 547 U.S. at 263 ("[J]udicial intrusion into executive discretion of such high order should be minimal."). The "presumption that a prosecutor has legitimate grounds for [any] action he takes is one" that this Court "do[es] not lightly discard." *Ibid.*

Petitioner suggests (Pet. 30) that any presumption should be overcome by the fact that one member of the court-martial panel was given a different version of the member questionnaire than the others and by allegations concerning the racial makeup of other court-martial panels, which petitioner submitted for the first time to the NMCCA on appeal. See Pet. App. 9a n.2 (recounting declaration from Executive Officer of Defense Service Office Southeast describing, "[w]ithout providing a foundation," three recent court-martial panels in which "all of the members were Caucasian"). But despite his awareness of the inconsistency at the time, petitioner failed to object at the court-martial to the original questionnaires or request supplemental questionnaires. See generally CAAF J.A. 197; see also Pet. App. 7a-9a. And the CAAF correctly determined that petitioner's anecdotal allegations of "all-white panels" in other cases panels were not "competent evidence"—let alone conclusive evidence—supporting petitioner's claim. Pet. App. 21a. Indeed, the declarant "did not claim [that] the convening authority knew the race of any member detailed to those cases" either or

that he "intentionally excluded any person because of race." *Id.* at 9a n.2. Not even the dissenters suggested that the declaration was sufficient to demonstrate wrongdoing by the convening authority here.

Petitioner overstates (Pet. 31) matters when he argues that the decision below grants convening authorities "unbridled, unreviewable discretion" in selecting members. To the contrary, the CAAF made clear that the UCMJ itself "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." Pet. App. 16a (citing 10 U.S.C. 837(a)). And it also emphasized that, "[o]f 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." *Ibid.* (emphasis omitted). Petitioner simply failed to make any showing—through direct or circumstantial evidence—that any such impermissible discrimination occurred here.

2. Petitioner contends (Pet. 31-38) that the CAAF erred in declining to apply the evidentiary frameworks from *Castaneda* v. *Partida*, 430 U.S. 482 (1976), and *Batson* v. *Kentucky*, *supra*, for evaluating his equal protection claim. But the CAAF correctly declined to definitely determine whether and how those frameworks might apply in this context in light of the lack of record support for a claim under either of them. This case thus presents no opportunity to consider those issues.

a. In *Castaneda*, this Court established a framework for considering allegations of racial discrimination "in the context of grand jury selection." 430 U.S. at 494. In that setting, the Court explained that to make a prima facie case of discrimination, a defendant must establish

that (1) he belongs to a group that "is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied"; (2) his racial group has been substantially underrepresented in grand juries—as compared to the proportion of the group in the total population—"over a significant period of time"; and (3) the selection procedures for grand juries "is susceptible of abuse or is not racially neutral." *Ibid.* If a defendant is able to demonstrate such a "substantial underrepresentation of his group, he has made out a prima facie case of discriminatory purpose, and the burden then shifts to the State to rebut that case." *Id.* at 495.

The CAAF declined to determine whether *Castaneda*'s framework for evaluating the selection of grand juries in the civilian justice system should apply to the selection of a court-martial in the military justice system, because petitioner failed to make a prima facie case of purposeful discrimination even under that framework. Pet. App. 19a-23a. As the court explained, even if it had credited petitioner's anecdotal allegations concerning other panels, four examples of underrepresentation on a given panel over a one-year period is not underrepresentation for the "significant period of time" that *Castaneda* requires. See *Castaneda*, 430 U.S. at 494 (considering an 11-year period); *Ramseur* v. *Beyer*, 983 F.2d 1215, 1233 (3d Cir.) (finding two years of underrepresentation not significant), cert. denied, 508 U.S. 947 (1993); *Bryant* v. *Wainwright*, 686 F.2d 1373, 1377-1378 (11th Cir. 1982) (five year period), cert. denied, 461 U.S. 932 (1983).

Petitioner suggests (Pet. 33) that he should not have to satisfy the second prong of *Castaneda*'s framework because military commanders "serve relatively brief tours" as convening authorities. He contends (Pet. 35)

that the CAAF should have "tailored" *Castaneda*'s second prong to look to "racial disparity ratios," by which he appears to mean the number of alleged "all-White panels" compared to total number of panels over some period of time. In *Castaneda* itself, however, "[t]he 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." Pet. App. 21a-22a n.11 (citing *Castaneda*, 430 U.S. at 495-496). And in any event, neither petitioner nor his amicus urged that tailoring of *Castaneda* before the CAAF. He offers no reason why the Court should consider it in the first instance now. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

b. Petitioner's alternative contention (Pet. 31, 36-38) that the CAAF should have applied *Batson*'s framework to his claim also lacks merit. In *Batson*, the Court held that a criminal defendant could establish a prima facie case of purposeful discrimination in the selection of a petit jury by (1) establishing that he is a member of a cognizable racial group; (2) relying on the fact that "peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate'" and (3) demonstrating that all the relevant circumstances "raise an inference that the prosecutor used that practice to exclude" jury members "on account of their race." 476 U.S. at 96 (citation omitted). As with *Castaneda*, if a defendant makes such a prima facie showing, "the burden shifts to the State to come forward with a neutral explanation for" its actions. *Id.* at 97.

Since deciding *Batson*, this Court has "extended [it] in certain ways." *Flowers*, 139 S. Ct. at 2243. "A defendant of any race may raise a *Batson* claim, and a defendant may raise a *Batson* claim even if the defendant and the excluded juror are of different races." *Ibid.* But the Court has not applied *Batson* outside the context of peremptory challenges. And the lower courts have expressly declined to do so. See, *e.g.*, *United States* v. *Elliott*, 89 F.3d 1360, 1364-1365 (8th Cir. 1996), cert. denied, 519 U.S. 1118 (1997); *United States* v. *Blackman*, 66 F.3d 1572, 1575 n.3 (11th Cir. 1995), cert. denied, 517 U.S. 1126, and 519 U.S. 967 (1996); *United States* v. *Bergodere*, 40 F.3d 512, 515-516 (1st Cir. 1994), cert. denied, 514 U.S. 1055 (1995). Petitioner provides no sound reason why *Batson*'s evidentiary framework—as opposed to the broader (and undisputed) equal protection principles it implements—should be extended here.

In any event, as with *Castaneda*, the decision below did not ultimately determine whether *Batson*'s framework should apply in this context. Although two judges would have held that *Batson* does not "extend * * * to a convening authority's selection of members * * * even if [petitioner's] supposition about the race of his panel's members was an established fact," that portion of the opinion was not joined by a majority of the court. Pet. App. 18a (plurality opinion). Instead, Judge Maggs wrote separately to reserve that question in light of petitioner's failure to establish whether the court-martial panel in this case did, in fact, include any African-American members. *Id.* at 35a (Maggs, J., concurring). And Judge Maggs emphasized that due to the absence of a majority decision on that question, it "remain[s] open for decision if the record in a case ever properly presents [it]." *Id.* at 37a; see Pet. 25 (acknowledging

that Judge Maggs's concurring opinion "represents the CAAF's holding" on petitioner's "equal protection challenge under *Batson*").

3. Petitioner contends (Pet. 39-40) that this case presents issues of "national importance" that warrant this Court's review. But petitioner's failure to develop the record makes this case a poor vehicle for plenary consideration—as petitioner implicitly acknowledges by asking only for a remand for an evidentiary hearing. See, *e.g.*, Pet. 27 ("[T]his Court's review is warranted so that it can remand to the CAAF."). As to that request, petitioner's factbound contention (*e.g.*, Pet. 31) that the CAAF erred in rejecting his request for a belated evidentiary inquiry does not warrant this Court's review.

In *United States* v. *DuBay*, 37 C.M.R. 411 (1967) (per curiam), the CAAF's predecessor, the Court of Military Appeals, established a procedure for resolving "serious" claims of unlawful command influence under Article 37 of the UCMJ, 10 U.S.C. 837. *Dubay*, 37 C.M.R. at 413. "In the nature of things," the court stated, "command control is scarcely ever apparent on the face of the record, and, where the facts are in dispute," appellate courts are not well-situated to resolve claims. *Ibid.* *DuBay* accordingly adopted a procedure under which a court presented with a credible Article 37 claim should remand the case for "an out-of-court hearing, in which [a military judge] will hear the respective contentions of the parties on the question, permit the presentation of witnesses and evidence in support thereof, and enter findings of fact and conclusions of law." *Ibid.*

In this case, the CAAF declined petitioner's request for a *DuBay* hearing on his equal protection claim. As the court explained, a request for a *DuBay* hearing must be based on "more than a bare allegation or mere

speculation." Pet. App. 30a (citation omitted). And petitioner has offered "not a scintilla of evidence" that 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." *Ibid.* (citation omitted). Indeed, despite his repeated references (*e.g.*, Pet. i, 2, 3, 5, 13, 16, 19) to the "all-White panel," he has not even proven that his panel did not include any black members. And "[t]he inadequate record regarding the members' races in this case was not inevitable," Pet. App. 36a (Maggs, J., concurring), but instead due to his own failure to take steps that were available to him in the court-martial. In particular, after petitioner learned that the questionnaires did not include each member's race, he could have requested supplemental questionnaires; he could have asked the members about their race during voir dire. He did neither.

Petitioner criticizes (Pet. 25-27) Judge Maggs for describing petitioner's failure to develop the record as "waiv[ing]" his right to a *DuBay* hearing. Pet. App. 37a. As petitioner observes (Pet. 25), the term "waiver" describes the "intentional relinquishment or abandonment of a known right." *United States* v. *Olano*, 507 U.S. 725, 733 (1993) (citation omitted). But petitioner is wrong to assert (Pet. 26) that Judge Maggs found that he "waived" the *Batson* claim itself, see Pet. App. 37a ("I agree with the [plurality's] conclusion * * * that [petitioner's] Batson argument lacks merit."), and any imprecision in Judge Maggs's terminology with respect to the evidentiary-hearing request provides no grounds for disturbing the judgment. Even if petitioner's failure to avail himself of the multiple opportunities before trial to inquire into the racial makeup of his panel may be more accurately described as forfeiture, rather than

waiver, see *Olano*, 507 U.S. at 733 ("[F]orfeiture is the failure to make the timely assertion of a right."), "[f]orfeiture is 'not a mere technicality,'" and is itself "'essential to the orderly administration of justice.'" *Freytag* v. *Commissioner*, 501 U.S. 868, 894-895 (1991) (Scalia, J., concurring in part and concurring in the judgment) (citation omitted). Whichever way petitioner's conduct is viewed, petitioner himself bears responsibility for the inadequate record that he now seeks leave to try to supplement in further proceedings. The CAAF appropriately held him accountable for his failure to take previously available steps, and its factbound decision to do so does not warrant this Court's review. See Sup. Ct. R. 10.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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