IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellee v. Sergeant (E-5) **RYAN C. THOMAS** United States Army Appellant	BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 20210662 USCA Dkt. No. 24-0147/AR

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

Granted Issue

WHETHER THE MILITARY JUDGE ERRED BY DENYING APPELLANT'S *BATSON* CHALLENGE.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § 866. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

On 31 August 2021, a military judge sitting as a general court-martial convicted Appellant, Sergeant Ryan C. Thomas, in accordance with his pleas, of one specification of violating a general regulation and one specification of

adultery, in violation of Articles 92 and 134, UCMJ. (JA021, 010-11). On December 16, 2021, an enlisted panel convicted Appellant, contrary to his pleas, of two specifications of cruelty and maltreatment and two specifications of sexual abuse of a child, in violation of Articles 93 and 120b, UCMJ. (JA039, 013). On December 17, 2021, the panel sentenced Appellant to eight years of confinement and a dishonorable discharge. (JA040). On February 8, 2022, the convening authority took no action on the findings and approved the sentence. (JA019). On February 11, 2022, the military judge entered Judgment. (JA020).

On March 29, 2024, the Army Court affirmed the findings and sentence. *United States v. Thomas*, ARMY 20210662, 2024 CCA LEXIS 154 (Army Ct. Crim. App. 2024) (JA002-08). Senior Judge Penland dissented from the majority opinion because in his view "the military judge erred in denying appellant's *Batson* challenge." (JA006). This Court granted Appellant's petition for grant of review on September 11, 2024, on the issue above and ordered briefing under Rule 25. (JA001).

Summary of Argument

"A person's race simply is unrelated to his fitness as a juror." *Batson v. Kentucky*, 476 U.S. 79, 87 (1986) (citation omitted) (internal quotation marks omitted). In this case, Appellant, a white male, was charged with using racial slurs, including the N-word. (JA011). The government was called upon to offer a

race-neutral explanation for its peremptory challenge of Major (MAJ) Sam Kriegler, a Black venire member, who explained he would evaluate the evidence objectively—that context and the speaker's intent mattered. (JA036, 024-29). The trial counsel argued that MAJ Kriegler would be too lenient on this type of misconduct because of his past experiences being the victim of racial slurs, which he testified he ignored unless they impacted him professionally. (JA036-38). The trial counsel also argued that given appellant was white, and MAJ Kriegler was black, "it [didn't] really make sense that the government would have a racial reason to try to remove African-American members of the panel." (JA037).

But, as Senior Judge Penland's dissent recognized, not one of the reasons provided by the government was race neutral. (JA007). In fact, the government's reasons were race dependent. (JA007). MAJ Kriegler was wrongfully excluded from the panel based on his race. (JA008). His "*independent* constitutional right not to be excluded from the panel based on his race" was violated. (JA007). The military judge erred by denying appellant's *Batson* challenge.

Statement of Facts

Appellant, a white male, was charged with, among other offenses, wrongfully using derogatory comments about gender, religion, and race—including uttering the N-word. (JA010-11). The comments about gender and religion were charged as violations of cruelty and maltreatment in violation of

Article 93, UCMJ, and the wrongful use of racial slurs as novel offenses under Article 134, UCMJ. (JA010-11).

A. MAJ Kriegler Said He Could Be Objective

During the individual voir dire of MAJ Kriegler, a Black venire member, MAJ Kriegler told trial counsel about two instances of racial discrimination: (1) growing up in Germany near the hub of Germany's largest neo-Nazi organization and (2) in the Army in Louisiana, where civilian role players asked his co-workers what it was like to work with the "N-word." (JA024). Trial counsel asked MAJ Kriegler how those experiences made him feel. (JA024. MAJ Kriegler gave a measured answer: "For me, I just -- I don't categorize. I see the individuals where they're coming from and unless it has a -- I'm saying potential professional long term impact, or it impacts me professionally I ignore it and move on." (JA025). Trial counsel asked MAJ Kriegler if he could "be objective" in judging the facts in this case given his personal experiences, to which MAJ Kriegler answered yes. (JA025).

Appellant's civilian defense counsel (CDC) asked MAJ Kriegler about his thought process when responding to racism. (JA027). MAJ Kriegler objectively evaluated the circumstances "because I judge the individual. So I always look for the person that it comes from." (JA027). He further explained, "I do not

categorize . . . . [e]ven if I hear the same thing from two different people, I would judge that independently of each other." (JA027).

Appellant's counsel asked if MAJ Kriegler believed "just saying [the N-word], in and of itself, is criminal." (JA027-28). MAJ Kriegler answered no. (JA028). MAJ Kriegler agreed "that people can, however misguided, say it and not intend it to be derogatory." (JA028). MAJ Krielger believed "[t]he context in which it's said, and the context where it comes from absolutely matters." (JA028). When asked if he could place it in context in Appellant's case, he answered yes. (JA028). Appellant's counsel asked MAJ Kriegler if it was ever okay for a white man to say the N-word, "you can objectively say okay let's talk about that or how dare you." (JA028-29). MAJ Kriegler rejected the latter premise and answered "No. We can talk about this." Trial counsel did not ask MAJ Kriegler any follow-up questions. (JA029).

B. The Government Made No Challenges for Cause

At the conclusion or voir dire, the military judge took up challenges for cause. (JA031). The defense challenged four members for cause, all of which were granted by the military judge. (JA031-34). The government made no challenges for cause. (JA035).

C. The Government Used Its Peremptory Challenge on MAJ Kriegler

After panel member randomization, the government used its peremptory challenge on MAJ Kriegler. (JA036). Appellant objected per *Batson*, and the military judge asked the government to state a race-neutral basis. (JA036).

Trial counsel provided the following basis:

> So while Major Kriegler was being asked questions about being a victim of a similar crime, not only did he say it would not influence his bias, he seemed to go -- in the government's opinion, too far the other way where he sort of minimized the fact. And his attitude seemed like if I can get through this, than anyone else can as well.

(JA036-37).

At that point, without making any findings, the military judge rejected the defense's *Batson* objection, stating, "Okay. Thank you. Defense, do you have a peremptory challenge?" (JA037)

But CDC disagreed with trial counsel's characterization of MAJ Kriegler's answers, arguing the trial counsel's proffered reason was "more of a façade to cover up that approach." (JA037).

Trial counsel responded by reinforcing that MAJ Kriegler's race played a significant role in the government's peremptory challenge:

> Your honor, first just note that this is a case where the accused is white and he's being accused of making negative racial remarks about a black person. So, it doesn't really make sense that the government would have a racial reason to try to remove African-American members of the panel.

(JA037). Trial counsel reiterated his first reason:

> And then we just stand by that, you know, it is because of the -- it wasn't because of his race or because of his attitude when he talked about having encountered similar crimes in the past. He seemed to sort of -- he seemed to minimize them and have an attitude that he get that -- you know, it was something that was just part of life and you just move through rather than consider that they might have a lasting emotional effect.

(JA037-38). Trial counsel then mentioned MAJ Kriegler's body language—without describing it—and MAJ Kriegler's personal resilience:

> Just his body language, his attitude when he talked about that, just made the government believe that he would not -- because of his personal resiliency, he would not consider these crimes, things like cruelty and maltreatment, as seriously as another panel member would.

(JA038).

D. The Military Judge Denied Appellant's *Batson* Challenge

The military judge did not ask CDC why he thought trial counsel's proffered reason was a façade or why the government might be striking MAJ Kriegler because of his race. (JA036-38). In fact, the military judge did not ask any questions of either party about the *Batson* challenge. (JA036-38). Instead, without providing any analysis, the military judge found "the government has offered a racially neutral reason for their peremptory challenge, so I'm going to grant the challenge." (JA038). The military judge did not indicate which "race-neutral" reason put forth by the government prompted her ruling. (JA038).

After impanelment, the military judge dismissed the novel Article 134 offenses for the wrongful use of racial slurs, including the N-word, because the specifications were unconstitutionally vague. (JA041-49).

Granted Issue

WHETHER THE MILITARY JUDGE ERRED BY DENYING APPELLANT'S *BATSON* CHALLENGE.

Standard of Review

This court reviews a military judge's decision denying a *Batson* challenge for an abuse of discretion. *United States v. Williams*, 44 M.J. 482, 485 (C.A.A.F. 1996). "A military judge abuses [her] discretion when [her] findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F. 2008).

Law

A. *Batson's* Holding

In *Batson v. Kentucky*, the Supreme Court held that it is a violation of the Equal Protection Clause for a prosecutor, in exercising a peremptory challenge, to "challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." 476 U.S. at 89. The Court explained that a juror's

competence to serve "depends on an assessment of individual qualifications and ability impartially to consider evidence presented at trial." *Id.* at 87 (citation omitted). "A person's race simply is unrelated to his fitness as a juror." *Id.* (internal quotation marks omitted).

This Court has repeatedly held that *Batson* and its progeny apply in the military justice system. *E.g.*, *United States v. Santiago-Davila*, 26 M.J. 380, 390 (C.M.A. 1988); *United States v. Greene*, 36 M.J. 274, 278 (C.M.A. 1993); *United States v. Witham*, 47 M.J. 297, 300 (C.A.A.F. 1997); *United States v. Bess*, 80 M.J. 1, 8 (C.A.A.F. 2020). A criminal defendant may challenge the prosecutor's discriminatory use of a peremptory challenge whether or not the defendant is of the same race as the challenged juror. *Powers v. Ohio*, 499 U.S. 400, 406, 416 (1991) ("[R]ace is irrelevant to a defendant's standing to object to the discriminatory use of preemptory challenges.");[1] *United States v. Norfleet*, 53 M.J. 262, 271 (C.A.A.F. 2000).

In *United States v. Jeter*, this Court expanded *Batson* to the convening authority's panel constitution. 84 M.J. 68, 71 (C.A.A.F. 2023). In *Jeter*, this Court held that to the extent its prior precedent "allows a convening authority to depart from the factors present in Article 25(d)(2), UCMJ, by seeking, even in good faith,

[1] "To bar petitioner's claim because his race differs from that of the excluded jurors would be to condone the arbitrary exclusion of citizens from the duty, honor, and privilege of jury service." *Powers*, 499 U.S. at 415.

to use race as a criterion for selection in order to make the members panel more representative of the accused's race, it has been abrogated by *Batson*." *Id.* "It is impermissible to exclude or intentionally include prospective members based on race." *Id.* at 73.

B. *Batson's* Rationale

Batson was meant to address multiple harms. First, although a defendant "has no right to a petit jury composed in whole or in part of persons of his own race," the Supreme Court has recognized "the defendant does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria." *Batson*, 476 U.S. at 85-86 (internal quotation marks omitted); *Bess*, 80 M.J. at 7.[2] The defendant is harmed "by the risk that the prejudice that motivated the discriminatory selection of the jury will infect the entire proceedings." *J.E.B. v. Ala. ex. rel. T.B.*, 511 U.S. 127, 140 (1994).[3]

Second, racial discrimination in jury selection harms not only the defendant, but it also harms the excluded juror who is unconstitutionally discriminated against on account of race. *Batson*, 476 U.S. at 87. Potential jurors have an independent

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[2] "Fifth Amendment equal protection includes the right to be tried by a jury from which no cognizable racial group has been excluded." *Jeter*, 84 M.J. at 71 (internal quotation marks omitted).

[3] "A prosecutor's wrongful exclusion of a juror by a race-related peremptory challenge is a constitutional violation committed in open court at the outset of the proceedings." *Powers*, 499 U.S. at 412.

constitutional right not to be discriminated against based on race. *J.E.B*, 511 U.S. at 128 ("We have recognized that whether the trial is criminal or civil, potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free form state-sponsored group stereotypes rooted in, and reflective of, historical prejudice.")

Third, the harm "touch[es] the entire community" and can "undermine public confidence in the fairness of our system of justice." *Batson*, 476 U.S. at 87*; J.E.B.*, 511 U.S. at 140 ("The community is harmed by the State's participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders."). The concern about public confidence is acute in cases involving race-related crimes. *Georgia v. McCollum*, 505 U.S. 42, 49 (1992).

C. *Batson's* Three-Step Inquiry

The government's discriminatory use of peremptory challenges causes a defendant "cognizable injury" and the defendant "has a concrete interest in challenging the practice." *Powers*, 499 U.S. at 411.[4] The defendant and the excluded juror have a "common interest in eliminating racial discrimination in the courtroom." *Id.* at 413. This "congruence of interests" makes it necessary for the

[4] "This is not because the individual jurors dismissed by the prosecution may have been predisposed to favor the defendant; if that were true, the jurors might have been excused for cause." *Powers*, 499 U.S. at 411.

defendant to "raise the rights of the juror." *Id.* at 414. "To ensure that justice is not tainted by purposeful discrimination," military courts follow the *Batson* three-step inquiry, with some modifications, when analyzing a party's challenge to a discriminatory peremptory challenge. *Norfleet*, 53 M.J. at 271; *see also Greene*, 36 M.J. at 278 n.2.

The burden of proving purposeful discrimination is on the party opposing the peremptory challenge. *Batson*, 476 U.S. at 93. When deciding whether that party has carried its burden, "a court must undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id.* (internal quotation marks omitted).

1. The Objecting Party Makes a Prima Facie Showing

In step one, the opponent of a peremptory challenge must establish "a prima facie case of purposeful discrimination." *Batson*, 476 U.S. at 96. *Batson* held that a party may make a prima facie case based "solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial," such as "a pattern of strikes" or the offending attorney's "statements and questions during voir dire and while exercising challenges." *Id.* at 96-97.

In applying *Batson* to military practice, this Court has adopted a "per se application of *Batson*, placing the burden on the challenging party, upon timely objection, to provide a race-neutral explanation for the challenge." *United States v.*

Hurn, 58 M.J. 199, 200 n.2 (C.A.A.F. 2003) (citing *United States v. Moore*, 28 M.J. 366, 368 (C.M.A. 1989)). The per se rule "represents a departure from Supreme Court practice because it requires no *prima facie* showing of an intent to discriminate by a party before that party is required to provide a race-neutral explanation for its peremptory challenge." *United States v. Ruiz*, 49 M.J. 340, 348 (C.A.A.F. 1998) (Sullivan, J., dissenting).

The per se rule is necessary "to make it fairer for the accused" because in the military justice system "it would be difficult to show a pattern of discrimination from the use of one peremptory challenge in each court-martial." *Moore*, 28 M.J. at 368 (internal quotation marks omitted); Rule for Courts-Martial 912(g)(1) ("Each party may challenge one member peremptorily."). After *Moore*, every *Batson* challenge "must be explained by trial counsel." 28 M.J. at 368.

2. The Challenging Party Proffers a Race-Neutral Explanation

In step two, "the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation." *Purkett v. Elem*, 514 U.S. 765, 767 (1995). This Court has held that "the differences between civilian trials and courts-martial practice warrant a different standard for assessing the validity of race-neutral reasons offered in support of a peremptory challenge." *Norfleet*, 53 M.J. at 272. In *United States v. Tulloch*, this Court discussed the differences: (1) in civilian trials, few of the prospective jurors are likely to be known by counsel; (2)

in civilian trials, numerous peremptory challenges are provided to each party; (3) in civilian trials, prospective jurors are not required to possess any significant degree of "education, experience, or judicial temperament"; and (4) in the military, members of the panel are selected by the convening authority as "best-qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." 47 M.J. 283, 287 (C.A.A.F. 1997) (citing Article 25(d)(2), UCMJ). Because of these differences, there is a less of a need for military counsel to exercise peremptory challenges to ensure members are qualified—the convening authority has already taken this into account under Article 25, UCMJ. *Id.*

Therefore, in *Tulloch*, this Court adopted a heightened burden for step two and held that the proffered reason for the challenge may not be one "that is unreasonable, implausible, or that otherwise makes no sense."[5] *Id.* Because of *Moore's* per se rule and because of *Tulloch's* heightened burden, this Court "has both lowered the bar for the defense to make a Batson challenge and raised the bar for the Government to overcome one." *United States v. Mencias*, 83 M.J. 723, 720 (N.M. Ct. Crim. App. 2023).

For the purposes of *Batson*, a race-neutral explanation means "'an explanation based on something other than the race of the juror.'" *Greene*, 36 M.J.

[5] The challenging party also cannot rely on "mere general assertions that its officials did not discriminate or that they properly performed their official duties." *Batson*, 476 U.S. at 94.

at 279 (quoting *Hernandez v. New York*, 500 U.S. 352, 360 (1991) (plurality opinion)). In *Greene*, this Court held that if the challenging party's explanation includes multiple reasons, then it is "require[ed] that all the reasons proffered by trial counsel be untainted by any inherently discriminatory motives." *Id.* at 280. "[A]n explanation that includes 'in part' a reason, criterion, or basis that patently demonstrates an inherent discriminatory intent, cannot reasonably be deemed race neutral." *Id.*

If the explanation is not race neutral, then the military judge need not reach the third step, and the peremptory challenge must be denied. *Id.* at 281.

3. The Military Judge Determines Discriminatory Intent

If a race-neutral explanation has been proffered, this "does not end the military judge's duties under *Batson*." *Id.* In step three, the trial court must then decide "whether the opponent of the strike has proved purposeful racial discrimination." *Purkett*, 514 U.S. at 767; *see also Batson*, 476 U.S. at 97-98. It is the "ultimate responsibility of the military judge" to determine the existence of purposeful discrimination. *Greene*, 38 M.J. at 281. The military judge must determine whether the asserted justification is "merely a pretext" for intentional race-based discrimination." *Id.* Ruling on the race-neutrality of the proffer is different than ruling on the "true motive in lodging [the] peremptory challenge."

Id. at 282. In making this factual determination, the military judge must "review the record and weigh trial counsel's credibility." *Id.* at 281.

The "argument of counsel normally will suffice to provide the record upon which the basis for a peremptory challenge may be assessed, although the military judge has discretion to fashion more extensive proceedings in order to make a proper record." *Tulloch*, 47 M.J. at 288 (internal quotation marks omitted). "When the dispute involves in-court observations about a member, the military judge may be able to make findings of fact based upon [their] own observations as to whether the member exhibited the behavior referenced by counsel." *Id.*

"In any case, the military judge should make findings of fact when the underlying factual predicate for a peremptory challenge is disputed." *Id.* (citation omitted). "The obligation to make such a finding is not a burdensome requirement within the court-martial system." *Id.* at 289.

Argument

The military judge erred by denying appellant's *Batson* challenge. First, the government's proffered reasons for its peremptory challenge of MAJ Kriegler were not reasonably race neutral; instead, they reinforced race. Second, there is nothing in the record that indicates the military judge applied *Tulloch's* heightened burden. And third, even if she did, the military judge did not make an ultimate finding regarding trial counsel's true motive in lodging the peremptory challenge.

A. Appellant Made a Prima Facie Showing of Racial Discrimination

As soon as trial counsel exercised a peremptory challenge on MAJ Kriegler, CDC objected and asked for a race-neutral explanation. (JA036). Because of *Moore's* per se application of *Batson*, appellant satisfied the first step of the analysis, and the burden shifted to the government to provide a race-neutral explanation. *Hurn*, 58 M.J. at 200 n.2 (citing *Moore*, 28 M.J. at 368).

While the military judge asked the government to provide a race-neutral explanation, she made no finding regarding trial counsel's race-neutral explanation (step two) and no finding about purposeful discrimination (step three). (JA036-38). Indeed, the military judge appeared ready to move on from the *Batson* issue as soon as the government proffered a race-neutral explanation. (JA037). It was Appellant who redirected the military judge to the *Batson* issue. (JA037).

B. The Government's Explanation Was Not Race Neutral

1. The Government's Explanation Reinforced Race

As Senior Judge Penland's dissent noted, the government failed to provide a reasonably race-neutral reason for its peremptory challenge. (JA007).

First, trial counsel expressed concern about MAJ Kriegler's failure to take racist language seriously enough because as a Black man he could handle it. (JA007, 036-37). This reason is based on MAJ Kriegler's race.

Indeed, CDC pointed out that trial counsel's characterization of MAJ Kriegler's answers was a "misstatement" of what MAJ Kriegler actually said. (JA037). Major Krieger explained he would take an objective approach. (JA024-29, 037). He said that "context . . . absolutely matters" and he would consider the individual speaker and all the facts and circumstances of each situation before rendering judgment. (JA027-28). In short, he would judge each situation "independently of each other" and he would not automatically find any racial slur to be unlawful. (JA027-29).

Trial counsel told the military judge that MAJ Kriegler "seemed to go . . . too far the other way" such that he "minimized" racist incidents and had an "attitude" that "if [he]can get through this, than anyone else can as well." (JA036-37). Contrary to "the government's opinion," MAJ Kriegler said only that he personally ignored racial slurs unless the slurs impacted him professionally. (JA036, 025). Just because MAJ Kriegler personally ignores slurs does not mean he expects others to react the same.

The record does not support trial counsel's purported concern about MAJ Kriegler. Trial counsel asked MAJ Kriegler no follow-up questions during voir

dire when presented with that opportunity by the military judge.[6] (JA029). Also, trial counsel did not challenge MAJ Kriegler for cause. (JA035).

Second, trial counsel "reason[ed] that it would make no sense for the prosecution to purposefully exclude an African-American panel member in light of the alleged misconduct." (JA007, 037). But trial counsel's reasoning reinforced that race was the explicit reason for the government challenge. (JA007, 037). As Senior Judge Penland noted in his dissent, trial counsel's reason "reflected a misunderstanding of the law, for it is never acceptable, and it never 'make[s] sense,' to include or exclude a panel member based on race." (JA007 n.2).[7] Senior Judge Penland recognized, per *Jeter*, trial counsel was considering race when determining which panel members should sit in judgment of Appellant. 84 M.J. at 70 (quoting *Batson*, 476 U.S. at 87, "[a] person's race simply is unrelated to his fitness as a juror."). *Jeter* makes plain that purposeful racial discrimination, whether in favor of or against a party, is prohibited. *See id.*

Third, trial counsel expressed concern about MAJ Kriegler's "personal resilience." (JA007, 038). Senior Judge Penland correctly noted that this reason

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[6] Ferreting out bias is one of the purposes of voir dire. *See J.E.B.*, 511 U.S. at 143-44 ("*Voir dire* provides a means of discovering actual or implied bias and a firmer basis upon which the parties may exercise their peremptory challenges intelligently.").

[7] *See also J.E.B.*, 511 U.S. at 137 n.8 ("What responded fails to recognize is that the only legitimate interest it could have in the exercise of its peremptory challenges is securing a fair and impartial jury.").

also "reinforced race." (JA007). Again, MAJ Krielger presumably developed his personal resilience because of the racial discrimination he experienced as a Black man.

The government struck MAJ Kriegler because of his race, because he is a Black man who was subjected to racial discrimination and racist language because he is Black, and that he might not consider racism against other Black soldiers seriously enough. This is not a race-neutral explanation, it is instead an explanation based explicitly on race.

Fourth, trial counsel expressed concern about MAJ Kriegler's "body language." (JA007, 038). But trial counsel did not describe what about MAJ Kriegler's body language supported trial counsel's concern, and the record says nothing about MAJ Kriegler's body language. (JA038). Trial counsel's reference to "body language" was so vague as to be meaningless. *See Mencias*, 83 M.J. at 733.

2. The Military Judge Did Not Apply Tulloch's Heightened Burden

Even if trial counsel's reasons were race-neutral, the heightened burden of *Tulloch* requires the government to provide more than a race-neutral reason; it must also be reasonable, be plausible, and make sense. *Tulloch*, 47 M.J. at 283. There is nothing in the military judge's conclusory analysis that reveals she knew of, or applied, this heightened burden. (JA038). The military judge cannot just

rest on "race-neutral" in her ruling. *Mencias*, 83 M.J. at 732. To do so suggests she was influenced by an erroneous view of the law. *Id.*

Because none of trial counsel's four reasons were reasonably race-neutral or satisfied the more stringent *Tulloch* burden, this should have ended the *Batson* inquiry, and there was no reason for the military judge to move on to step three. *Greene*, 36 M.J. at 281; *see also Mencias*, 83 M.J. at 733 (holding that military judge erred in denying defense counsel's *Batson* challenge when "[h]aving offered no reasonable justification for its use of the peremptory challenge, the Government left the military judge with an unrebutted *Batson* challenge"). And even if some of trial counsel's reasons were reasonably race-neutral, *Greene* mandates that all the reasons "be untainted" in order to satisfy *Batson*. 36 M.J. at 280.

C. The Military Judge Did Not Rule on Discriminatory Intent

Even if trial counsel satisfied step two of the *Batson* inquiry, the military judge erred when she did not analyze or make an ultimate finding about trial counsel's true motive—whether his peremptory challenge was purposefully racially discriminatory. (JA038). "Optimally, an express ruling on this question is preferred." *United States v. Gray*, 51 M.J. 1, 34 (C.A.A.F. 1999). The military judge should be given almost no deference because she failed to rule on the purported race neutrality of trial counsel's proffer. (JA038). This Court has found it to be concerning when a military judge "expressly ruled only on the race-

neutrality of trial counsel's proffer and not on his true motive in lodging th[e] peremptory challenge." *Greene*, 36 M.J. at 282.[8]

The lack of a finding about trial counsel's true motive is especially noticeable in this case because CDC disputed trial counsel's justifications, arguing that trial counsel misrepresented what MAJ Kriegler actually said during voir dire. (JA037). CDC further argued that trial counsel's justifications were a "façade" and meant to "cover up" MAJ Kriegler's "objective approach." (JA037). Despite this, the military judge did not inquire any further as to what CDC meant by his use of "façade" and "cover up." (JA037-38). This is error, because CDC essentially argued that trial counsel's explanation was a pretext for the trial counsel's consideration of race. Trial counsel's response revealed he was, in fact, considering race: "[T]his is a case where the accused is white and he's being accused of making negative racial remarks about a black person. So, it doesn't really make sense that the government would have a racial reason to try to remove African-American members of the panel." (JA037).

It is impossible to know how the military judge analyzed step three and how she reasoned her way to her decision to deny the *Batson* challenge. For this

[8] "Such judicial inaction, at least under the circumstances of this case, constituted clear legal error." *Greene*, 36 M.J. at 282.

reason, the military judge's ruling warrants little deference. *United States v. Finch*, 79 M.J. 389, 397 (C.A.A.F. 2020).

Conclusion

Appellant respectfully requests that this Honorable Court set aside the findings of the contested specifications and the sentence.

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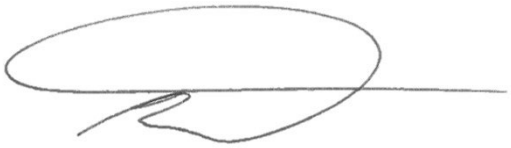

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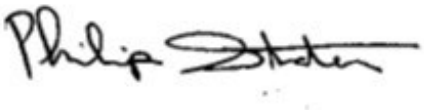

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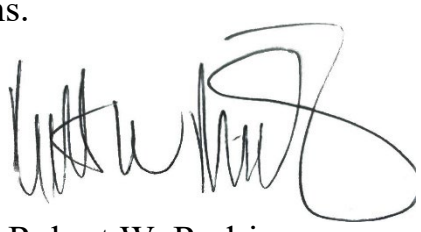

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Certificate of Filing and Service

I certify that a copy of the foregoing in the case of *United States v. Thomas*, Crim. App. Dkt. No. 20210662, USCA Dkt. No. 24-0147/AR, was electronically filed with the Court and Government Appellate Division on November 12, 2024.

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