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	REPLY BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 20210662 USCA Dkt. No. 24-0147/AR

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.

Argument

The Government's arguments fail for three reasons. First, the record is not sufficiently developed for this Court to reconsider its decision in *Tulloch*, in which this Court adopted a heightened burden for determining whether the proffered reason for the peremptory challenge is race neutral. Second, the Government fails to address Appellant's argument that, in accordance with *Greene*, all of the challenging party's explanations must be free of discriminatory intent. Third, the Government fails to fully address Appellant's argument that the military judge's ruling is entitled to little deference because she made no findings and provided no

analysis after the defense disputed trial counsel's proffered race-neutral explanation.

A. The Record Is Not Sufficiently Developed to Reconsider *Tulloch*

This Court ordered the parties to brief "whether the military judge erred by denying Appellant's *Batson* challenge." (JA001). While the Government does this, it then concludes its brief by asking this Court to overrule its decision in *Tulloch*. (Appellee's Br. 22-23). In *Unites States v. Tulloch,* this Court adopted a heightened burden for step two of the *Batson* inquiry and held that the proffered race-neutral reason may not be one "that is unreasonable, implausible, or that otherwise makes no sense." 47 M.J. 283, 287 (C.A.A.F. 1997). The *Tulloch* standard modified the standard the Supreme Court set out in *Purkett v. Elem*, which sets a different bar for step two in civilian trials, where the proffered race-neutral reason need not be "persuasive or even plausible," nor must it be "a reason that makes sense." 514 U.S. 765, 768. (1995) ("Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.").

The Government argues that *Tulloch* should be reconsidered because it "serves no purpose in the military justice system" and because "there is no litigated

history of discriminatory usage of peremptory challenges in the military."[1] (Appellee's Br. 23). In support of its argument, the Government cites to a "recent survey of all courts-martial from 2021-2022 [that] found that the race and gender of panel members across all services were representative of the branch's overall demographic data." (Appellee's Br. 23).

As a preliminary matter, the Government's assertion that the survey was of "all courts-martial" is incorrect, as the survey was limited to sexual assault offense cases. (JA053, 062). Further, the Government inaccurately states the survey's findings that "the race and gender of panel members across all services were representative of the branch's overall demographic data." For example, "[i]n the Navy, the representation of racial and/or ethnic minorities on details and panels was lower than their overall representation in the Navy; these differences are statistically significant," and "[i]n all the Services, women were impaneled at lower rates than men; these differences are all statistically significant." (JA053-54).

[1] The Government also argues that *Tulloch* should be reconsidered because "[g]iven that any violation of *Tulloch* is a foundational error, the only available remedy creates windfalls for appellants." (Appellee's Br. 3). But if there is discriminatory intent in any particular case, and *Tulloch's* heightened standard helps reveal this, then a military appellant gets the same relief as a civilian counterpart, whether labeled a "windfall" or not. *Batson v. Kentucky*, 476 U.S. 79, 100 (1986) ("[O]ur precedents require that petitioner's conviction be reversed.").

Beyond this survey of an extremely narrow slice of time and circumstances, the Government ignores that *Tulloch* set out a detailed rationale for why the differences between civilian trials and court-martial practice warrant a different standard for assessing the validity of a race-neutral proffer. *Tulloch*, 47 M.J. at 287. As this Court found, there is less need for military counsel to exercise peremptory challenges to ensure members are qualified because the convening authority has already taken this into account under Article 25, UCMJ. *Id.*

Furthermore, the consideration of race in panel constitution and selection is still an issue in military justice. As this Court recently held in *United States v. Jeter*, a convening authority may not depart from the Article 25 factors by seeking to use race, even in good faith, as a criterion to make the panel more representative of the accused's race. 84 M.J. 68, 71 (C.A.A.F. 2023) (citing to *Batson*, 476 U.S. 79). "A person's race simply is unrelated to his fitness as a juror." *Id.* 73 (quoting *Batson*, 476 U.S. at 87) (internal quotation marks omitted).

Even if this Court were to entertain reconsidering *Tulloch*, the record in this case is not the vehicle for that undertaking. The Government cites to the dissent in *Tulloch*, the survey, and nothing else. (Appellee's Br. 3, 22-23). The record in this case is not developed to overrule *Tulloch*, the parties have not fully briefed this issue, and overruling *Tulloch* would have implications for all the services.

B. The Government Fails to Address *Greene*

In *United States v. Greene*, this Court held that "an explanation that includes 'in part' a reason, criterion, or basis that patently demonstrates an inherent discriminatory intent, cannot reasonably be deemed race neutral." 36 M.J. 274, 280 (C.M.A. 1993) (requiring that all reasons proffered by trial counsel be "untainted by any inherently discriminatory motives"). The Government fails to address Appellant's argument pursuant to *Greene*; in fact, the Government does not cite to *Greene* at all.

The trial counsel failed to provide a reasonably race-neutral reason for its peremptory challenge. (JA007). As noted in the dissent below, three of the trial counsel's four reasons reinforced race.[2] (JA007). If even one of the reasons proffered by trial counsel is tainted by an inherently discriminatory motive, then the military judge erred.

In the Law section of its brief, the Government cites to *United States v. Paz*, 2004 CCA LEXIS 369, *3 (Army Ct. Crim. App. 2004) (mem. op.), an unpublished Army Court decision. (Appellee's Br. 15-16). Although the Government does not cite to *Paz* in its argument, it seemingly relies on *Paz* to

[2] The Government argues the military judge's ruling can be sustained because trial counsel's fourth reason was a reference to Major (MAJ) Kriegler's "body language." (Appellee's Br. 2, 6, 17, 20, 22). This Court should reject that argument because the record does not disclose what about MAJ Kriegler's "body language" disturbed trial counsel. (JA007, 038).

support its argument that a Black panel member's race and his beliefs and actions are not inextricable. (Appellee's Br. 18).

Paz is distinguishable from this case. First, *Paz* was a case about drugs, not about race and racist language. Second, as the dissent below noted, it is in this case, "[o]n this record," that "it is fair to describe MAJ [Kriegler's] race and his outlook on racist language as inextricable." (JA007). Third, unlike in *Paz*, the defense in this case disputed trial counsel's proffered race-neutral explanation that MAJ Kriegler would minimize racist language and expect others to do the same, arguing it was a misstatement of what MAJ Kriegler actually said and also a façade, seemingly to cover up trial counsel's true motive. (JA036-38).

C. The Military Judge's Ruling Warrants Little Deference

Lastly, the Government fails to fully address Appellant's argument that the military judge's ruling is entitled to little deference. The Government makes several references to the proposition that a military judge's *Batson* ruling receives "great deference." (Appellee's Br. 7, 12, 21). While this is true in the general sense, it ignores the specifics of this case.

The military judge made no findings of fact and provided no analysis for her ruling other than to say she "considered both of the positions and I find that the government has offered a racially neutral reason for their peremptory challenge, so I'm going to grant the challenge." (JA038). This came after the military judge

asked no questions of either party during the *Batson* challenge. (JA036-38). This is especially concerning when defense argued that MAJ Kriegler had an "objective approach to this process"—a quality presumably the government would want in a panel member—and that trial counsel's explanation was a façade. (JA037).

What ultimately persuaded the military judge? It is impossible to know because "[t]he record does not indicate which of the prosecution's responses prompted the military judge's brief ruling." (JA007). Therefore, the military judge's ruling warrants little deference. As this Court explained in *Tulloch*, while the argument of counsel is normally enough to provide the record upon which a *Batson* challenge may be assessed, "[t]he military judge should make findings of fact when the underlying factual predicate for a peremptory challenge is disputed." 47 M.J. at 288 ("[T]he military judge may be able to make findings of fact based upon his or her own observations as to whether the member exhibited the behavior referenced by counsel."); *see also United States v. Finch*, 79 M.J. 289, 397 (C.A.A.F. 2020) (a military judge's ruling will typically receive more deference when the record reflects findings of fact and conclusions of law).

The military judge's ruling should also receive little deference because she failed to properly apply the law. For example, the military judge was ready to move on from the *Batson* issue as soon as the government proffered its race-neutral explanation, and it was the defense who insisted she address *Batson*. (JA037).

Nothing in the record indicates the military judge applied *Tulloch's* heightened burden, that she applied *Greene's* mandate that all reasons be untainted, or she knew she had to make an ultimate finding of fact about purposeful discrimination. (JA038).

Conclusion

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

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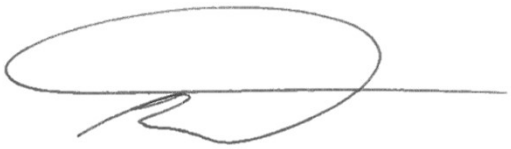

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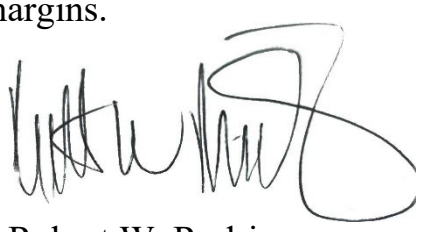

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I certify that a copy of the foregoing in the case of *United States v. Thomas*, Crim. App. Dkt. No. 20210662, USCA Dkt. No. 24-0147/AR, was electronically filed with the Court and Government Appellate Division on December 23, 2024.

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