IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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FEDERAL RULES

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

Granted Issue

WHETHER THE MILITARY JUDGE ERRED IN 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, UCMJ; 10 U.S.C. § 866. This Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

On December 16, 2021, an enlisted panel found Appellant guilty, contrary to his pleas, of two specifications of sexual assault of a child and two specifications of cruelty and maltreatment, in violation of Articles 120b and 93, UCMJ, 10 U.S.C. §§ 920b and 893. (JA013, 039).[1,2] On December 17, 2021, the panel sentenced Appellant to confinement for eight years and a dishonorable discharge. (JA040). On February 8, 2022, the convening authority took no action on the findings or sentence, and on February 11, 2022 the military judge entered

[1] The panel found Appellant not guilty of one specification of sexual assault of a child. (JA039).

[2] On 31 August 2021, Appellant pleaded guilty to one specification of failing to obey a general regulation and one specification of adultery in violation of Articles 92 and 134, Uniform Code of Military Justice [UCMJ], 10 U.S.C. §§ 892 and 934. (JA021, 010–011).

judgment. (JA019, 020). The Army Court affirmed the findings and sentence. *United States v. Thomas*, Army 20210662, 2024 CCA LEXIS 154 (Army Ct. Crim. App. 29 March 2024). This Court granted Appellant's petition for review on September 11, 2024 and ordered briefing under Rule 25. (JA001).

Summary of Argument

Major (MAJ) Kriegler, a black panel member at appellant's court-martial, had experienced racial slurs throughout his life. When asked how those experiences made him feel, he responded, "I don't categorize . . . unless . . . it impacts me professionally I ignore it and move on." (JA024–25). These attitudes and beliefs were relevant concerns to the trial at hand, as it involved Appellant's use of similar racial slurs. (JA011).

When asked for a race-neutral proffer for their peremptory challenge of MAJ Kriegler, the trial counsel cited MAJ Kriegler's experiences and his perceived attitude that "if I can get through this, [then] anyone else can as well." (JA036–37). The trial counsel further cited MAJ Kriegler's body language and questioned whether MAJ Kriegler would consider crimes "like cruelty and maltreatment as seriously as another panel member would." (JA038).

Appellant argues the Government's justification "reinforced race," but this argument ignores a crucial distinction. (Appellant's Br., p. 17). Major Kriegler's experience with racial slurs stems from an immutable feature: his race. His

reaction, his attitude, and his personal beliefs on the subject were not a mere product of his skin color. Therefore, they were a fair consideration for a peremptory challenge and trial counsel's explanation was race-neutral, reasonable, plausibly supported by the record, and made sense given that appellant was on trial for using racial slurs. *United States v. Tulloch*, 47 M.J. 283, 287 (C.A.A.F. 1997).

Further, this Court should reconsider its decision in *Tulloch*, as applying a stricter *Batson test* to peremptory strikes in the military justice system does not serve the purpose for which it was intended and in most circumstances creates a potential windfall when a peremptory strike is challenged. *Id*. at 289–90 (Crawford, J., dissenting). Unlike the civilian justice system, peremptory challenges play a minor role in panel composition as each party only gets one peremptory challenge. (Article 41, UCMJ; 10 U.S.C. § 841). There is also no litigated history of discriminatory usage of peremptory challenges in the military. A recent survey of all courts-martials from 2021–2022 found that the race and gender of panel members across all services were representative of the branch's overall demographic data. (JA062). The military is applying a stricter test upon peremptory strikes and doing so without redressing a history of discriminatory procedural practice. Given that any violation of *Tulloch* is a foundational error, the only available remedy creates windfalls for appellants.

Statement of Facts

a. Major Kriegler experienced racially defamatory remarks throughout his life.

Appellant, a white male, contested charges of sexually assaulting his step-daughter and making derogatory statements about Muslims, women, and black people. (JA016–18). Throughout voir dire, the parties asked the members about their experience with similar crimes. (JA023). Major Kriegler was one of five panel members who revealed that he or someone he knew was a victim of crime similar to those charged against appellant. (JA023).

Seeking clarity on this issue, the parties asked MAJ Kriegler to elaborate on these similar crimes during individual voir dire. (JA024). He explained that he grew up in Ketting, Germany, a town with the largest Neo-Nazi presence in the country. (JA024, 26). "[T]here was [sic] frequent encounters in regards to racial discrimination in certain stores that you would go to." (JA024). These encounters occurred when he was a child. (JA026). He also encountered similar attitudes at Fort Polk, Louisiana. (JA024). There, civilians asked his coworkers "how it [was] to work with the nigger and so on." (JA024).

Though he was never asked his racial background, the parties assessed MAJ Kriegler to be of apparent "mixed race," to include partial African-American and Caucasian descent. (JA037).

b. Major Kriegler described the impact of these experiences on his personal beliefs.

When asked how those experiences made him feel, MAJ Kriegler stated, "[f]or 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). When pressed to explain further, he elaborated that he would base his judgment on who was making the comment, where that person came from, the context of the word's use, and whether it was intended to be derogatory. (JA025–28). Major Kriegler went as far to say that he would find it acceptable for a white person to use the "n-word" in certain contexts. (JA029).

c. Defense invoked *Batson* after government peremptory challenge.

After all challenges for cause had been heard and panel randomization, the government used its peremptory challenge against MAJ Kriegler. (JA036). Defense counsel objected, requesting "a *Batson* racially, facially, neutral basis," for the government's challenge. (JA036). Government counsel responded by expressing concern about MAJ Kriegler's "minimization" of the impact of racist language, and what counsel perceived as an "attitude" of "if I can get through this, [then] anyone else can as well." (JA036–37).

In rebuttal, defense counsel characterized the Government explanation as a

"façade to cover up" their true intent to remove a "mixed-race" panel member. (JA037). In addition to referring to the reason offered as a "facially neutral reason," defense counsel appeared to further concede that the Government was motivated by reasons other than race—namely, MAJ Kriegler's stated objectivity: "I believe [MAJ Kriegler] is mixed race, African-American/potentially Caucasian. And he seemed to have an objective approach to this process. And my position is *because of that* this facially neutral reason that the government stated is more of a façade to cover up *that approach*." (emphasis added) (JA037).

d. Government counsel further explained challenge was due to MAJ Kriegler's attitude and body language.

Responding to defense counsel's claim, Government counsel emphasized that Appellant's trial would involve "negative racial remarks about a black person." (JA037).

> He seemed to minimize them and have an attitude that – you know, it was something that was just a part of life and you just move through rather than consider that they might have a lasting emotional effect. 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). After hearing and considering argument from both parties, the military judge found "that the government [had] offered a racially neutral reason for their

peremptory challenge," and granted the peremptory challenge of MAJ Kriegler. (JA038). At the conclusion of voir dire, the military judge dismissed the three specifications involving Appellant's use of racial slurs due to their unconstitutionally vague construction. (JA049).

Standard of Review

This court reviews a military judge's decision to deny a *Batson* challenge for an abuse of discretion. *United States v. Williams*, 44 M.J. 482, 485 (C.A.A.F. 1996). "The trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal." *Hernandez v. New York*, 500 U.S. 352, 365 (1991) (plurality opinion).

Law

a. The Supreme Court has long recognized an individual's right to participate in jury service.

The Equal Protection Clause of the Fourteenth Amendment prohibits excluding jurors on the basis of their race. *Strauder v. W. Va.*, 100 U.S. 303, 307–09 (1879). This prohibition respects the interests of the accused: to have a jury composed of his peers, as well as the interest of the wrongfully excluded juror to participate in the administration of justice. *Id*.

Though *Strauder* nullified legislative measures aimed at prohibiting entire classes of people from participating in jury service, the Court continued to address

discrimination against jurors through courtroom procedural practices. *See Thiel v. S. Pac. Co.*, 328 U.S. 217, 225 (1946)(motion to strike jury panel should have been granted when the court and jury commissioner deliberately excluded all people who worked for a daily wage). These practices ranged from requiring prohibitive qualifications for jury service (*Carter v. Jury Comm'n of Greene Cnty.*, 396 U.S. 320, 340 (1970)), to discriminatory jury summons practices (*Norris v. Alabama*, 294 U.S. 587, 596 (1935)), and discriminatory use of peremptory strikes (*Swain v. Alabama*, 380 U.S. 202, 205 (1965).

b. The *Batson* objection to peremptory challenges.

In *Batson*, a prosecutor used peremptory challenges to remove all four black members from the venire, guaranteeing that the black defendant would be tried before an all-white jury. *Batson v. Kentucky*, 476 U.S. 79, 83 (1986). The defendant objected, but the standard at that time required the defendant to prove purposeful discrimination on account of race yet prevented him from examining the prosecutor for the reasoning behind their peremptory challenges. *Id.* at 84 (citing *Swain*, 380 U.S. 202). The *Batson* Court resolved this issue by establishing new procedures to investigate allegations of discriminatory use of peremptory challenges in jury selection. *Id.* at 96.

The *Batson* decision attempted to balance the need to prevent discrimination against the risk of obliterating an essential part of the jury selection process: the

peremptory challenge. *Batson*, 476 U.S. at 88. "Peremptory challenges, along with challenges for "cause," are the principal tools that enable litigants to remove unfavorable jurors during the jury selection process." *United States v. Annigoni*, 96 F.3d 1132, 1137 (9th Cir. Ct. App. 1996). "The central function of the right of peremptory challenge is to enable a litigant to remove a certain number of potential jurors who are not challengeable for cause, but in whom the litigant perceives bias or hostility." *Id*. "The function of the [peremptory] challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise." *Swain*, 380 U.S. at 219. *Batson* and its lineage expressly preserved the practice of peremptory challenges, "for any reason at all, as long as that reason is related to his view concerning the outcome." *Batson*, 476 U.S. at 89.

1. *Prima facie* showing of discrimination.

By invoking *Batson* after an opposing party makes a peremptory challenge against a panel member, the party triggers a three-part analysis. *Batson*, 476 U.S. at 95–98; *Hernandez*, 500 U.S. at 358–59; *Purkett v. Elem*, 514 U.S. 765, 767 (1995). First, the party must establish a prima facie case of "purposeful discrimination" based "solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial." *Batson*, 476 U.S. at 96;

Hernandez, 500 U.S. at 358; *Purkett*, 514 U.S. at 767. This prima facie burden could be met when a defendant establishes a pattern of peremptory challenges, by the prosecutor, targeting black jurors. *Batson*, 476 U.S. at 97. It could also be met by establishing that, for example, "[the defendant] was a member of a cognizable racial group," and that the prosecutor had used peremptory challenges to remove "venire members of the same race." *Id*. (citing *Castaneda v. Partida*, 430 U.S. 482, 494 (1977)).

Though shared race between the defendant and excused juror may aid in developing a *prima facie* showing of discrimination, it is not required. *Powers v. Ohio*, 499 U.S. 400, 416 (1991). Moreover, the race of the defendant is "irrelevant to a defendant's standing to object to the discriminatory use of peremptory challenges. *Id*.

Finally, this *prima facie* case of "purposeful discrimination," may be made not only on the grounds of race, but also gender (*United States v. Witham*, 47 M.J. 297, 298 (C.A.A.F. 1997) (citing *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 128 (1994)) and sexual orientation (*United States v. Mencias*, 83 M.J. 723, 727 (N-M Ct. Crim. App. 2023).

2. Striking party offers a neutral explanation.

If the party successfully raises an inference that the peremptory strike was based on race, step two of the analysis is a burden shift to the prosecution to offer a

"neutral explanation" for the peremptory challenge. *Batson*, 476 U.S. at 97; *Purkett*, 514 U.S. at 767.

> In evaluating the race neutrality of an attorney's explanation, a court must determine whether, assuming the proffered reasons for the peremptory challenges are true, the challenges violate the Equal Protection Clause as a matter of law. A court addressing this issue must keep in mind the fundamental principle that "*official action will not be held unconstitutional solely because it results in a racially disproportionate impact*. . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.

Hernandez, 500 U.S. at 359–60 (citing *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–65 (1977)(emphasis added)). This is a low bar, as the explanation need not be "persuasive or even plausible," nor must it be "a reason that makes sense."[3] *Purkett*, 514 U.S. at 768. "Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Id*. (citations omitted).

3. Judge determines if there is purposeful discrimination.

The final, third step addresses "whether the opponent of the strike has

[3] For example, the Supreme Court in *Purkett* found a prosecutor's explanation that he "[didn't] like the way [two prospective jurors] looked" to be a neutral one: "I struck [one juror] because of his long hair. He had long curly hair. He had the longest hair of anybody on the panel by far. He appeared to me to not be a good juror for that fact, the fact that he had long hair hanging down shoulder length, curly, unkempt hair. Also, he had a mustache and a goatee type beard . . . the mustaches and the beards look suspicious to me." *Purkett*, 514 U.S. at 766.

proved purposeful racial discrimination." *Hernandez*, 500 U.S. at 359. This final finding of fact is left to the trial judge. *Batson*, 479 U.S. at 98. It is acknowledged that this determination "largely will turn on evaluation of credibility." *Id.*; *Hernandez*, 500 U.S. at 365. This deference assumes that the trial judge is best situated to evaluate the demeanor and credibility of the parties as well as the members of the venire. *Hernandez*, 500 U.S. at 365.

A military judge's ruling that a government peremptory challenge did not violate *Batson* "is entitled to 'great deference' and will not be reversed in the absence of 'clear error.'" *United States v. Williams*, 44 M.J. 482, 485 (C.A.A.F. 1996) (citing *United States v. Curtis*, 33 MJ 101, 105 (C.M.A. 1991)); *Hernandez*, 500 U.S. at 364.

4. *Tulloch* test for military panels.

Though jury selection differs greatly between civilian and military practice[4], the *Batson* standard and its lineage have been applied to courts-martial. *United States v. Santiago-Davila*, 26 M.J. 380, 390 (C.M.A. 1988)). However, military courts apply a modified *Batson* test to peremptory strikes. *Tulloch*, 47 M.J. at 287.

First, the objecting party need not establish a prima facie case of purposeful

[4] The federal rules allow three peremptory challenges per side for misdemeanor cases, six for felony cases, and twenty "when the government seeks the death penalty." FED. R. CRIM. P. 24(b).

discrimination. *Id*. at 286. Second, "[o]nce the convening authority has designated a servicemember as "best qualified" to serve on a court-martial panel" the race neutral explanation offered may not be "unreasonable, implausible, or otherwise make[] no sense." *Id*. at 287. In doing so, the *Tulloch* majority rejected *Purkett*, justifying the heightened standard upon the differences between jury selection in the civilian verses military contexts: the lack of numerous peremptory challenges available to the parties, the possible familiarity between counsel and panel members, and chiefly, the court's belief that military panel members are better qualified for jury service than typical civilian jurors.[5] *Id*. at 287 (citing Art. 25(d)(2), UCMJ).

This departure from *Purkett* spurred dissents from Judge Sullivan and Judge Crawford. *Id*. at 289. Though acknowledging the importance of applying equal protection rights to servicemembers, Judge Crawford observed a conspicuous absence from the majority opinion of: "any evidence of past patterns of discrimination in the military community such as existed in the civilian community." *Id*. at 289. According to her dissent, the questions that should have

[5] "In contrast to a prospective civilian juror, who is not required to possess any significant degree of education, experience, or judicial temperament, the military member comes to the court-martial panel cloaked with the designation by a senior commander, the convening authority, that the member is 'best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.'" *Id*.

been answered by the majority were, "(1) whether there was a deprivation of this right in the military as there was in many civilian systems, and, (2) whether the prophylactic measures of *Batson*, and especially its more restrictive progeny in this Court, . . . were necessary in the military context to remedy a phantom deprivation." *Id*. at 290.

c. Race-neutral explanations may disproportionately effect a protected class.

The Supreme Court has considered cases where prosecutors offer a race-neutral explanation that nevertheless creates a disproportionate racial effect. In *Hernandez*, the Court found that the use of peremptory challenges to exclude Spanish speakers, in a case that anticipated the use of a translator for certain portions of testimony, did not violate *Batson*. 500 U.S. at 355–56, 361. At trial, the prosecutor explained his reasoning for the peremptory challenges: "I feel very uncertain that they would be able to listen and follow the interpreter." *Id*. at 356. Though the Court acknowledged the disproportionate racial impact that such exclusion would incur, it found that on its face, the explanation was race-neutral. *Id*. at 361. "A neutral explanation . . . here means an explanation based on something other than the race of the juror. At this step . . . the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Id*.

Other courts have considered whether a non-white juror may be peremptorily struck based on personal experiences with racial discrimination. *State v. Miller*, 510 P.3d 17, 31 (Mont. 2022). In *Miller*, a member of the venire volunteered that she had been "the victim of a lot of discrimination in this town[,]" and that she might not be fair due to those experiences. *Id*. at 26. The prosecutor moved to strike her for cause, which the judge denied, expressing that a juror's discomfort did not "afford her 'the luxury of' being sent 'home.'" *Id*. At the conclusion of voir dire, the government used it's final peremptory strike upon the juror, to which the defense objected to as a violation of the Equal Protection clause. *Id*. at 27. The government offered the following explanation for the strike: "the [j]uror's own repeated and unequivocal statements that she could not be fair due to her asserted traumatic experiences as the subject of racial discrimination." *Id*. at 31. The court found that the government's explanation for peremptorily striking the juror was race-neutral, "as distinct from her own non-race-neutral explanation for why she could not be fair." *Id*.

In *United States v. Paz*, the Army Court applied *Batson*, *Moore*, and *Tulloch* to the trial counsel's use of a peremptory challenge on a black panel member in a drug-related court-martial. 2004 CCA LEXIS 369, *3 (Army Ct. Crim. App. 2004) (mem. op.). Four of the nine members disclosed during individual voir dire that they had relatives who were involved in drugs and described the personal

impact of those relationships. *Id*. Following defense's *Batson* challenge, trial counsel proffered that "[i]t seemed like it wasn't a significant deal to [the challenged member] to be involved in drugs." *Id.* at *4–5. The military judge accepted this explanation to be race-neutral and granted the peremptory challenge. *Id.*at *5.

The Army Court in *Paz* endorsed the military judge's acceptance of the trial counsel's proffer, finding it was not unreasonable, implausible, or otherwise nonsensical. *Id.* at *10. The court distinguished the proffer from the "vague reference to the challenged member's demeanor [in *Tulloch*, which] 'did not articulate any connection, race-neutral or otherwise, between what she observed of the member's demeanor and what the demeanor indicated concerning the . . . member's ability to faithfully execute his duties on a court-martial." *Id.* at *10 (quoting *Tulloch*, 47 M.J. at 288) (additional citations omitted).

Argument

a. The trial counsel proffered a race-neutral explanation. [6]

As Judge Hayes put it, the trial counsel "assessed MAJ [Kriegler] as someone who would not appreciate the severity of a number of the specifications he would be required to adjudicate." (JA006). The trial counsel proffered race-neutral concerns: that MAJ Kriegler had experienced slurs similar to appellant's charged misconduct, and in his own words he preferred to "ignore it and move on." (JA025). Major Kriegler was one of many panel members who had experienced racial slurs, but that wasn't the reason the trial counsel challenged him, it was his "body language, his attitude when he talked about that, just made the [G]overnment 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).

Appellant claims that the trial counsel challenged MAJ Kriegler "because as a Black man he could handle [racist language]." (Appellant's Br., p. 17).

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[6] The Government agrees with Appellant that, under *Tulloch*, a *prima facie* showing of purposeful discrimination was raised, as merely raising the objection and identifying the panelist as a member of a protected group is sufficient. *Tulloch*, 47 M.J. at 286 ("any objection by the accused to trial counsel's peremptory challenge . . . would impose upon trial counsel a requirement to offer a race-neutral explanation.")(citation omitted).

Reaching Appellant's interpretation requires an acceptance that almost any quality of MAJ Kriegler must be viewed primarily as a product of his race.

To accept such an idea would be to commingle what is immutable with what is personal and subject to change: belief. Though MAJ Kriegler was called "the nigger" based on the color of his skin, his response was based off his character and principles. (JA024). The two are not "inextricable," as Senior Judge Penland's dissent claims, and upon which Appellant's argument relies. (JA007). Though the experience of being verbally degraded for being black was due to his race, his reaction, his attitude, and his personal beliefs regarding racial slurs were not. Therefore, the trial counsel provided an explanation that was race-neutral. *Tulloch*, 47 M.J. at 287.

To accept Appellant's interpretation of what constitutes a racially-motivated reason—i.e., opinion formed through life experience—would unreasonably broaden the scope of *Batson*'s second prong.

b. The Government's proffer was reasonable, plausible, and made sense.

MAJ Kriegler's resilience in the face of such experiences, while potentially not rising to grounds for a challenge for cause, could still give a litigant pause when contemplating MAJ Kriegler's ability to be a fair and impartial juror. "This concern that MAJ [Kriegler] may not give certain charged offenses the weight or scrutiny they were due was both plausible and irrespective of MAJ [Kriegler's]

race." (JA006).

Major Kriegler had been exposed to racial slurs since his childhood, and he said he prefers to "ignore it and move on." (JA025). While other members of the panel also experienced racial slurs, MAJ Kriegler was the only member who seemed to accept them as a part of life unless they impacted someone professionally. (JA025).

Just as one might be too sensitive to a particular crime in order to fulfill their duties as a panel member, they may also be too callous. The panel member who is overly sensitive may not fairly judge an accused, but a panel member who minimizes the seriousness of the crime may also be excused. Either might say they would be objective, as MAJ Kriegler did, but such guarantees are largely aspirational. The prosecutor or defense counsel may objectively observe the panel member and challenge that member—either for cause or using a preemptory strike. These litigants' concerns need not rise to the level of a challenge for cause in order for them to be reasonable. Further, "the fact that it corresponds to a valid for-cause challenge will demonstrate its race-neutral character." *Hernandez* 500 U.S. at 363. "The function of the [peremptory] challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise." *Swain*, 380 U.S. at 219.

The proffer was also plausible and made sense, as it was supported by the record. MAJ Kriegler identified himself as someone who had experienced racially derogatory language. (JA024). Though MAJ Kriegler explained that he would "judge the individual" and that "even if [he heard] the same thing from two different people, [he] would judge [them] independently of each other," he also said that in his personal life he ignores it. (JA025, 27). These statements gave the trial counsel a perceived attitude that "if [MAJ Kriegler] can get through this, [then] anyone else can as well." (JA036–37).

The trial counsel also observed MAJ Kriegler's body language throughout the voir dire and questioned whether MAJ Kriegler would consider crimes "like cruelty and maltreatment as seriously as another panel member would." (JA038). Defense never challenged the trial counsel's description of MAJ Kriegler's body language and the military judge apparently accepted the description.

It is plausible that a panel member who does not take the crime seriously, or believes a victim should get over such crimes, may require a higher level of proof than required by the law, or may impose a disproportionately lenient sentence because of their opinions. The trial counsel's race-neutral proffer about the panel member was therefore reasonable, plausible, and made sense under this court's precedent.

c. The military judge correctly denied Appellant's *Batson* challenge.

Having observed MAJ Kriegler during voir dire, the military judge was best situated to appraise the legitimacy of the government's challenge, and her ruling is owed "great deference." *Batson,* 476 U.S. at 98; *Hernandez,* 500 U.S. at 346; *Williams*, 44 M.J. at 485. The courtroom is a live, dynamic environment, full of emotion, gestures, tones, and facial expressions that cannot be compressed into the two-dimensions of the trial record. Therefore, the military judge was best situated to evaluate of the credibility of the parties. *Batson,* 476 U.S. at 98, n. 21.

Though the analysis on the record was brief, it resolved the issue of whether the trial counsel's challenge was racially motivated. *Batson* does not require long, detailed rulings on the record: "[t]he analysis set forth in *Batson* permits prompt rulings on objections to peremptory challenges without substantial disruption of the jury selection process." *Hernandez*, 500 U.S. at 358.

Appellant argues that the Government's proffer "reinforced that race was the explicit reason for the government challenge." (Appellant's Br., p. 18–19). This argument misinterprets the trial counsel's incredulous statement that "this is a case where the [Appellant] 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). Context matters, and this statement was made after defense

counsel invoked *Batson* on behalf of a white accused, on trial for using racial slurs, and argued that the challenge of a black juror was made for a racially discriminatory purpose. In that context, trial counsel did not "reinforce[] that race was the explicit reason," he merely remarked on the irony of defense counsel's position. (Appellant's Br., p. 19).

The military judge was best positioned to observe MAJ Kriegler's responses to counsels' questions, as well as his perceived attitude and body language. Though the military judge did not provide her analysis on the record, she did not abuse her discretion by finding the proffer race-neutral and granting the peremptory challenge. (JA006, 38).

d. *Tulloch* should be reconsidered.

The majority in *Tulloch* declined to follow the Supreme Court precedent of *Purkett*, while expanding the rights afforded by *Batson*, without articulating a legitimate necessity. *Tulloch*, 47 M.J. at 287. "This Court is "generally not free to 'digress' from applicable Supreme Court precedent" on matters of constitutional law. *Witham*, 47 M.J. at 300. "Absent articulation of a legitimate military necessity or distinction, or a legislative or executive mandate to the contrary, this Court has a duty to follow Supreme Court precedent." *United States v. Cary*, 62 M.J. 277, 280 (C.A.A.F. 2006). The CAAF also lacks the authority to "expand rights as a matter of state law under a state constitution." *Tulloch*, 47 M.J. at 290

(citing *California v. Greenwood*, 486 U.S. 35, 43 (1988))(Crawford, J., dissenting).

Accordingly, this Court should apply *Batson* in a manner consistent *Purkett*. The military does not need a stricter interpretation of *Batson*. Unlike the historical circumstances that led to *Batson* and its progeny, there is no litigated history of discriminatory usage of peremptory challenges in the military. A recent survey of all courts-martials from 2021–2022 found that the race and gender of panel members across all services were representative of the branch's overall demographic data. (JA062). So not only is the military applying the stricter *Tulloch* test upon peremptory strikes, it is doing so without redressing a history of discriminatory procedural practice.

Though the doctrine of *stare decisis* generally favors existing precedent, "it is not an inexorable command." *United States v. Falcon*, 65 M.J. 386, 390 (C.A.A.F. 2008). The principle is even less compelling in constitutional matters, where "correction through legislative action is practically impossible." *United States v. Rorie*, 58 M.J. 399, 406 (C.A.A.F. 2003). Further, stare decisis need not be applied when the precedent at issue is 'unworkable or . . . badly reasoned." *Id.* (citing *United States v. Tualla*, 52 M.J. 228, 231 (C.A.A.F. 2000)). While the *Tulloch* application of *Batson* is certainly workable, it serves no purpose in the military justice system. This Court should question the reasoning behind any rule that serves no purpose, especially when it departs from Supreme Court precedent.

Conclusion

WHEREFORE, the government respectfully requests this honorable court affirm the findings and sentence.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(b) and 37

1. This brief complies with the type-volume limitation of Rule 24(b)(1) because it contains no more than 14,000 words, nor does it contain more than 1,300 lines of text.

2. This brief complies with the typeface and type style requirements of Rule 37. It has been typewritten in 14-point font with proportional, Times New Roman typeface, with one-inch margins.

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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on December _____, 2024.

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