IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee	**SPECIFIED ISSUE BRIEF ON BEHALF OF APPELLEE**
v.	Docket No. ARMY 20210662
Sergeant (E-5) **RYAN C. THOMAS,** United States Army, Appellant	Tried at Fort Stewart, Georgia, on 30 April, 30 June, 31 August, 1 September, and 13–17 December 2021, before a general court-martial convened by the Commander, Third Infantry Division, Colonel G. Bret Batdorff and Colonel Alyssa Adams, Military Judges, presiding.

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES ARMY COURT OF CRIMINAL APPEALS

THE SPECIFIED ISSUE:

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

Statement of the Case

On 31 August 2021 a military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of 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.

Panel No. 3

(Statement of Trial Results [STR]; R. at 72). On 17 December 2021, contrary to his pleas, an enlisted panel found appellant guilty of two specifications of cruelty and maltreatment, and two specifications of sexual assault of a child, in violation of Articles 93 and 120b, UCMJ, 10 U.S.C. §§ 893 and 920b. (STR; R. at 589).[1] The panel sentenced appellant to confinement for eight years and a dishonorable discharge. (STR; R. at 688). On 26 January 2022, the convening authority took no action on the findings or sentence, and on 11 February 2022 the military judge entered judgment. (Action; Judgment).

On 3 August 2023 appellant filed his opening brief with this court; the government filed its answer on 1 December 2023. On 10 January 2024, this court specified the above issue, and appellant filed his specified issue brief on 19 January 2024. This is the government's answer.

Facts

The government incorporates all facts from its answer brief and supplements with following additional facts relevant to the court's specified inquiry:

During voir dire, Major (MAJ) SK was one of six panel members who revealed that he or someone he knew had been subject to "racially discriminatory language, gender bias language, religion motivated language."[2] (R. at 105, 132,

[1] The panel found appellant not guilty of one specification of sexual assault of a child. (STR; R. at 589).

[2] Though he did not describe his racial background, the record reflects that the

167). During his individual voir dire, MAJ SK went into further detail, explaining that he grew up in Germany near a town with the largest Neo-Nazi presence in the country. (R. at 132). As an adult, he had also been referred to as "the [n-word]" while working at the Joint Readiness Training Center. (R. at 132). When asked how those experiences made him feel, MAJ SK expressed that he would generally "ignore [the slurs] and move on" unless the racism impacted him professionally. (R. at 133). 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. (R. at 132–36). Major SK even said he would find it acceptable for a white person to use the "n-word" in certain contexts. (R. at 137).

At the close of voir dire, after all challenges for cause had been exhausted, the government used its peremptory challenge against MAJ SK. (R. at 203). In response, defense counsel requested "a *Batson* racially, facially, neutral basis," for the government's challenge. (R. at 203). Government counsel expressed concern about MAJ SK'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." (R. at 203–04).

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parties assessed MAJ SK to be of apparent "mixed race," to include partial African-American and Caucasian descent. (R. at 204).

In response, defense counsel appeared to concede that the government had stated a "facially neutral reason," but called it a "façade to cover up" their true intent.[3] (R. at 204). Government counsel further elaborated, explaining that MAJ SK seemed to believe that dealing with racist language was simply "just a part of life," that an individual "move[s] through" without consideration of any "lasting emotional effect" of such racist language or behavior. (R. at 204–05). Citing MAJ SK's comments, body language, and "personal resiliency," government counsel questioned whether MAJ SK would consider crimes "like cruelty and maltreatment as seriously as another panel member would." (R. at 205).

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 the challenge was granted. (R. at 205).

At the conclusion of voir dire, upon motion by defense, the three specifications involving appellant's alleged use of racially disparaging language were dismissed with prejudice. (R. at 209–10; App. Ex. XIX).

[3] In addition to referring to the reason offered as racially neutral, defense counsel appears to further concede that the government was motivated by reasons other than race—namely, MAJ SK's stated objectivity: "I believe [MAJ SK] 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) (R. at 204).

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). "A military judge abuses his discretion when his 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. Frost*, 79 M.J. 104, 109 (C.A.A.F. 2019). "This standard requires more than just [this court's] disagreement with the military judge's decision." *United States v. Bess*, 75 M.J. 70, 73 (C.A.A.F. 2016) (citing *United States v. Stellato*, 74 M.J. 473, 480 (C.A.A.F. 2015)).

Law

"A person's race simply is unrelated to his fitness as a juror." *Batson v. Kentucky*, 476 U.S. 79, 87 (1986)). The Supreme Court in *Batson* found peremptory challenges based on race violate a defendant's equal protection rights under the Fourteenth Amendment. *Id*. 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. *Id*. at 83. 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 v*. *Alabama*, 380 U.S. 202 (1965)). The *Batson* Court established new procedures for examining allegations of discriminatory use of peremptory challenges in jury selection. *Id*. at 96.

Though jury selection differs greatly between civilian and military practice, the *Batson* standard and its lineage has been applied to courts-martial. *See United States v. Jeter*, ___ M.J. ___, 2023 CAAF LEXIS 676, *7 (C.A.A.F. 25 Sep. 2023) ("Fifth Amendment equal protection includes the 'right to be tried by a jury from which no cognizable racial group has been excluded." quoting *United States v*. *Santiago-Davila*, 26 MJ 380, 390 (C.M.A. 1988)).

By invoking *Batson* after a peremptory challenge has been made against a panel member, the defense triggers a three-part analysis. *Batson*, 476 U.S. at 95–98; *Hernandez v*. *New York*, 500 U.S. 358–59 (1991) (plurality opinion); *Purkett v*. *Elem*, 514 U.S. 765, 767 (1995) (per curiam). First, defense 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)). Subsequent jurisprudence has established, however, that here is no requirement that the defendant and challenged juror be of the same race. *See Powers v. Ohio*, 499 U.S. 400, 406 (1991).

If defense successfully raises an inference that the prosecutor struck potential jurors based on race (or other purposefully discriminatory reason[4]), 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 at 359–60 (citing *Arlington Heights v. Metropolitan Housing*

[4] The underlying principle of *Batson*—that one's genetic makeup or identity is unrelated to their fitness as a juror—has been extended to include, for example, 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).

Development Corp., 429 U.S. 252, 264–65 (1977)). This is a low bar, as the explanation need not be "persuasive or even plausible," nor must it be "a reason that makes sense."[5] *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).

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

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[5] 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.

Argument

Appellant has failed to establish any of the three prongs under *Batson*: he failed at trial and on appeal to make a prima facie showing of purposeful discrimination; when challenged, the government offered a race-neutral explanation for exercising its peremptory challenge on MAJ SK; and the military judge correctly found no showing of purposeful racial discrimination by the government. Accordingly, the specified issue should be answered in the negative.

A. Appellant failed to make a prima facie showing of racial discrimination.

At the time of voir dire, appellant was charged with several specifications involving his use of the "n-word" or disparaging remarks about "black people." (R. at 152–53). Members of the venire were asked questions about their experiences with racially discriminatory language. (R. at 105). Major SK was not the only member of the venire who had experienced racist slurs or knew someone who had; for example, Colonel (COL) PM, Lieutenant Colonel (LTC) MP, LTC KC, Command Sergeant Major CH, and First Sergeant CF all answered in the affirmative when asked by defense counsel during group voir dire.[6] (R. at 105, 167). As trial counsel argued, "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

[6] Two of these members—COL PM, of apparent Chinese descent, and LTC MP, who identified as "multiracial"—were not challenged by either party and sat for appellant's trial. (R. at 117, 125, 206).

doesn't really make sense that the government would have a racial reason to try to remove African-American members of the panel." (R. at 204). Merely because MAJ SK was of mixed race, had been a victim of racial slurs in the past, and appellant was charged with using racist language does not establish a prima facie case of discrimination.[7] Even if it did, however, the government met its burden under the second *Batson* prong.

B. The government provided a race-neutral explanation.

Despite not being the only member of the venire who had been the target of racial epithets, MAJ SK was, however, the only such member who seemed unaffected by such slurs unless they impacted his professional life. (R. at 133). In his personal life, MAJ SK said he prefers to "ignore it and move on." (R. at 133). This sentiment appears to be genuinely supported by his life experiences that he provided during individual voir dire. (R. at 132). However, MAJ SK'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 SK's ability to be a fair and impartial juror. "While the reason offered by the prosecutor for a peremptory strike need not rise to the level of a challenge for cause, the fact that it corresponds to a valid for-cause challenge will demonstrate its race-neutral character." *Hernandez* 500 U.S. at 363.

[7] Notably, the government made no challenges for cause. (R. at 202).

When asked to provide a race-neutral justification for the peremptory challenge, the trial counsel cited these sentiments:

> 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.

(R. at 205). The concern of a potential panel member not taking the criminal misconduct at issue seriously is a legitimate one. Such a panel member could potentially require a higher level of proof than that required by law. Even if such a concern was ill-founded, however, it need only be race-neutral, and it was here.

Appellant argues that because MAJ SK's personal opinions on racial slurs have been informed by his race, any strike based on his opinion towards racial slurs would therefore be race-based. (Appellant's Br. on Specified Issue 6). That standard is analogous to the one considered, and rejected, by the Supreme Court in *Hernandez*. The *Hernandez* Court was asked whether the use of peremptory challenges to exclude Spanish speakers, in a case that anticipated the use of a translator for certain portions of testimony, constituted racial classification on its face. *Hernandez*, 500 U.S. at 355–56. 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*. To accept appellant's interpretation of what constitutes a racially-motivated reason—i.e., any opinion formed through life experience—would unreasonably broaden the scope of *Batson*'s second prong.

C. Appellant has failed to show purposeful discrimination.

Turning to the third and final part of the analysis, the military judge correctly found that the reasoning offered by the trial counsel was "racially neutral" and granted the peremptory challenge. (R. at 205). 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.

The courtroom is a live, dynamic environment, full of emotion, gestures,

tones, and facial expressions that cannot be completely captured in the two-dimensional, four corners of the record of trial. The determination of whether a peremptory strike was due to purposeful racial discrimination hinged on the military judge's evaluation of the credibility of the parties. *Batson* 476 U.S. at 98, n. 21. Having observed MAJ SK during voir dire, the military judge was best situated to judge 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.

Appellant has failed to make a prima facie showing of purposeful discrimination; even if he has, however, the government provided a racially neutral explanation for exercising its peremptory challenge on MAJ SK, and thus, the military judge committed no error in denying appellant's *Batson* challenge.

Conclusion

WHEREFORE, the government respectfully requests this honorable court answer its specified issue in the negative.

[redacted]

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I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at [redacted] on the 26 day of January 2024.

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