# United States Navy–Marine Corps Court of Criminal Appeals

Before
HOLIFIELD, HACKEL, and KISOR
Appellate Military Judges

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**UNITED STATES**
*Appellee*

**v.**

**Ralph C. MENCIAS**
Logistics Specialist Second Class (E-5), U.S. Navy
*Appellant*

**No. 202200021**

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Argued: 28 June 2023—Decided: 10 August 2023

Appeal from the United States Navy-Marine Corps Trial Judiciary

Military Judges:
Geoffrey G. Hengerer (arraignment)
Ann K. Minami (motions, trial)

Sentence adjudged 15 October 2021 by a general court-martial convened at Naval Base Kitsap, Bremerton, Washington, consisting of officer and enlisted members. Sentence in the Entry of Judgment: reduction to E-1, confinement for 12 months, and a dishonorable discharge.

For Appellant:
*Lieutenant Megan E. Horst, JAGC, USN*

For Appellee:
*Lieutenant James P. Wu Zhu, JAGC, USN* (argued)
*Tyler W. Blair, USMC* (on brief)

Amicus Curiae:
*The United States Coast Guard, Army, and Air Force Appellate Defense Divisions*

Chief Judge HOLIFIELD delivered the opinion of the Court, in which Senior Judges HACKEL and KISOR joined.

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**PUBLISHED OPINION OF THE COURT**

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HOLIFIELD, Chief Judge:

Appellant was convicted, contrary to his pleas, of three specifications of indecent recording and two specifications of attempted indecent recording, in violation of Articles 120c and 80, Uniform Code of Military Justice [UCMJ], for making video recordings of the private areas of twenty-five men, including twenty-four fellow Sailors, without their consent, and attempting to make similar recordings of two additional Sailors.[1]

Appellant asserts five assignments of error [AOEs]: (1) the convening authority's selection of members who volunteered for such service prejudiced Appellant's right to a fair and impartial jury; (2) the military judge abused her discretion when she denied Appellant's challenge for cause of Petty Officer William;[2] (3) the military judge abused her discretion when she denied Appellant's *Batson* challenge where the Government used its peremptory challenge on the only self-identified homosexual member;[3] (4) Appellant's sentence is inappropriately severe; and (5) Appellant was denied his right to a unanimous verdict.[4] We find merit in Appellant's third AOE, rendering moot the other AOEs, and take action in our decretal paragraph.

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[1] 10 U.S.C. §§ 920c, 880.

[2] All names in this opinion, other than those of Appellant, the judges, and appellate counsel, are pseudonyms.

[3] *Batson v. Kentucky*, 476 U.S. 79 (1986).

[4] Raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

## I. BACKGROUND

Appellant was charged with using the camera on his phone to covertly record the private areas of his shipmates in the stalls of a shipboard men's head, and to record one unknown male through the window of a residence. As evidenced by images found on his phone, he succeeded in indecently recording over two dozen men over a 6-month period. He was also charged with attempting to make similar recordings of two others. In one of these, his attempt was foiled when he was caught in the act by the Sailor he was filming. Appellant elected to proceed to trial by court-martial with members. On 8 October 2021 the court-martial was assembled and the parties conducted voir dire of the potential members.

During individual voir dire, one potential member, Electrician's Mate Nuclear First Class [EMN1] Chess, referred several times to his husband, correcting trial counsel when he referred to EMN1 Chess' spouse as "she."[5] Neither trial counsel nor defense counsel specifically asked EMN1 Chess about his sexual orientation. But, in discussing the potential effect of EMN1 Chess' husband's employment as a parole officer, it was clear that EMN1 Chess was married to another man. No other potential member indicated in any way that he or she was a homosexual or had a same-sex spouse.

Trial counsel also asked EMN1 Chess about his prior service as a member on a court-martial involving, in the latter's words, "attempted sexual interactions with a minor."[6] When asked whether his experience on that court-martial would influence him in anyway during the present court-martial, EMN1 Chess answered, "I don't believe it will."[7]

In response to defense counsel's questions regarding EMN1 Chess' previous court-martial experience, the latter responded: "That it was—it's different than my usual job. It wasn't bad. I would say the overall experience wasn't bad."[8] He added, "I felt like it was fair."[9]

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[5] Although the transcript indicates Trial Counsel correctly said "he," the audio recording shows that Trial Counsel twice said "she." *Compare* Official Audio R. of Voir Dire at 3:40:30 (October 8, 2021) *with* R. at 292.

[6] R. at 292.

[7] *Id*.

[8] R. at 294.

[9] *Id*.

After the military judge ruled on all challenges for cause, the members were randomized and selected for the panel. At this point, trial counsel used the Government's peremptory challenge to strike EMN1 Chess from the panel. Defense counsel objected on the grounds that trial counsel's use of the peremptory challenge violated *United States v. Batson.*[10] The following colloquy ensued:

> DC: Your Honor, . . . homosexuality is a protected class, and it's the [D]efense's belief that . . . the Government is striking [EMN1 Chess] because he is a homosexual.
>
> MJ: Alright. Government?
>
> TC: Your Honor, . . . we are exercising our peremptory for one response this perspective member made. When asked about how his last court-martial experience was, he said, "Not bad. Different than a usual job." And so his lack of enthusiasm and lack of seeming eagerness to serve as a member made us exercise our challenge.
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> MJ: Alright. Say that again.
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> TC: When asked about his—he served as a member of a court-martial in the past, and he was asked about that experience, and he said it wasn't bad. That indicates that it wasn't good, and that lack of eagerness, that seeming lack of enthusiasm or positive experience in that trial is leading the Government to our peremptory challenge.[11]

When defense counsel described trial counsel's explanation as "pretty thin"[12] and argued that it was "pretty transparent" [13] that the real reason for the challenge was EMN1 Chess' sexual orientation, trial counsel asked for an opportunity to consult with supervisory counsel. After a seven-minute recess, trial counsel stated that he had nothing further to say on the matter. Defense counsel again called trial counsel's motive "transparent," adding that "no other member here had to demonstrate enthusiasm to survive a peremptory challenge."[14] The military judge issued her ruling as follows:

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[10] *Batson*, 476 U.S. 79.

[11] R. at 360.

[12] R. at 360.

[13] R. at 361.

[14] R. at 361.

> Alright. The [D]efense *Batson* challenge is—is denied. Whereas it appears that [EMN1 Chess] may be the only homosexual on the panel, the Government has stated a neutral reason as to why they chose to exercise their peremptory challenge on [EMN1 Chess].
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> As I recall, there . . . was only one other member who actually sat [on a] court-martial panel. . . . When she was asked about her experience on the panel she described it as—in very positive terms. Listening to how the military judge was explaining the law and how to apply it to—to the facts was just something positive and memorable to her about that experience.
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> When [EMN1 Chess] was asked about his prior experience, he did indicate that it was not bad. He did indicate that it was a fair process but he didn't have strong feelings either way. So the Court believes that that is a neutral reason for the Government's peremptory challenge.[15]

The military judge subsequently granted the Government's peremptory challenge and excused EMN1 Chess. Additional facts necessary to address the AOE are provided below.

## II. DISCUSSION

### A. Law.

We review a military judge's ruling to allow a peremptory challenge for an abuse of discretion.[16] "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."[17]

1. *Peremptory Challenges and Race*

In *Batson v. Kentucky*, the Supreme Court held that peremptory challenges based on race violated a defendant's equal protection rights under the Four-

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[15] R. at 362. The military judge's findings of fact were not in dispute.

[16] *United States v. Williams*, 44 M.J. 482, 485 (C.A.A.F. 1996).

[17] *United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F. 2008) (citation omitted).

teenth Amendment, where the defendant and the peremptorily challenged jurors are part of the same "cognizable racial group."[18] "The Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race, . . . or on the false assumption that members of his race as a group are not qualified to serve as jurors."[19]

Such discriminatory use of peremptory challenges harms not only the defendant. For over 140 years the Supreme Court has recognized that "by denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror."[20] Furthermore, "[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice."[21]

To address this harm, the *Batson* Court laid out the procedures for examining allegations of discriminatory use of peremptory challenges in civilian courts. The first step in making a successful "*Batson* challenge" requires a defendant to "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."[22] If this evidence, combined with a showing that the prosecutor has used these challenges to remove members of the defendant's cognizable racial group, raises an inference that the prosecutor struck potential jurors based on race, the burden shifts to the prosecution to offer a "neutral explanation."[23]

Articulating a neutral explanation for a peremptory challenge is a low bar. The reason need not rise to the level of a challenge for cause.[24] Rather, the

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[18] *Batson*, 476 U.S. at 96.

[19] *Id*. at 86 (cleaned up).

[20] *Id*. at 87 (citing *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880)) (additional citations omitted).

[21] *Id*.

[22] *Id*. at 96.

[23] *Id*. at 97.

[24] *Id*.

civilian prosecutor's explanation need only be race-neutral; it need not be "persuasive or even plausible."[25] Nor must it be "a reason that makes sense."[26] Based on the reason given by the prosecutor, the judge is then required to decide whether "the defendant has established purposeful discrimination."[27]

Five years after *Batson* the Supreme Court, citing its earlier recognition of the harm such discriminatory practices cause to both excluded jurors and the community, removed the requirement that the defendant and challenged juror be of the same racial group. In *Powers v. Ohio* the Court reasoned that, "to bar [a] 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."[28]

The Court in *Powers* also explained the nature and extent of the harm caused by such arbitrary exclusion. "The discriminatory use of peremptory challenges by the prosecution causes a criminal defendant cognizable injury, and the defendant has a concrete interest in challenging the practice. 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. Rather, it is because racial discrimination in the selection of jurors 'casts doubt on the integrity of the judicial process,' and places the fairness of a criminal proceeding in doubt."[29]

*2. Peremptory Challenges and Gender*

In *J.E.B. v. Alabama ex rel. T.B.*, the Supreme Court shifted its focus somewhat when addressing whether the Constitution permitted the use of peremptory challenges based on gender.[30] While the Court's decision in *Batson* was primarily focused on a defendant's "right to be tried by a jury whose members are selected pursuant to non-discriminatory criteria,"[31] its reasoning in *J.E.B.* placed more emphasis on the potential juror's right to participate and the po-

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[25] *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (citation omitted).

[26] *Id*. at 769.

[27] *Batson*, 476 U.S. at 98.

[28] *Powers v. Ohio*, 499 U.S. 400, 415 (1991).

[29] *Id*. at 411 (quoting *Rose v. Mitchell*, 443 U.S. 545, 556 (1979)) (additional citations omitted).

[30] *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994).

[31] *Batson,* 476 U.S. at 85-86.

tential harm to the community caused "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."[32]

Citing our nation's long history of sex discrimination, the Court held that "gender, like race, is an unconstitutional proxy for juror competence and impartiality."[33] In doing so, the Court "reaffirm[ed] what, by now, should be axiomatic: Intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where, as here, the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women."[34] Under the Court's "equal protection jurisprudence, gender-based classifications require an exceedingly persuasive justification in order to survive constitutional scrutiny. Thus, the only question is whether discrimination on the basis of gender in jury selection substantially furthers the State's legitimate interest in achieving a fair and impartial trial."[35]

*3. Discrimination for sexual orientation is gender discrimination*

While the Supreme Court has never directly addressed sexual orientation within the context of peremptory challenges, it has held sexual orientation and gender are treated the same for purposes of employment discrimination. In *Bostock v. Clayton County*, the Court stated: "It is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[36] The Court reasoned: "An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII [of the Civil Rights Act of 1964] forbids."[37]

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[32] *J.E.B.*, 511 U.S. at 140.

[33] *Id.* at 129.

[34] *Id.* at 130-131.

[35] *Id.* at 136-37 (internal quotation marks and citations omitted). The Court underscored its application of a higher level of scrutiny by distinguishing gender-based challenges from "peremptory challenges to remove from the venire any group or class of individuals normally subject to 'rational basis' review.'" *Id.* at 143.

[36] *Bostock v. Clayton County*, 140 S. Ct. 1731, 1741 (2020).

[37] *Id.* at 1737; 42 U.S.C.S. § 2000e.

4. *Peremptory Challenges and Courts-Martial*

The race-based protections of *Batson* are applicable to courts-martial.[38] Likewise is the Supreme Court's extension of *Batson* to gender.[39] This is true regardless of the accused's race or gender.[40] But, based on fundamental differences in the selection of jurors in civilian trials and members of courts-martial, our superior court has both lowered the bar for the defense to make a *Batson* challenge and raised the bar for the Government to overcome one. In *United States v. Moore*, the Court of Military Appeals removed the requirement that the defense establish a prima facie case of discrimination, adopting instead a per se rule that "any objection by the accused to trial counsel's peremptory challenge to a member of the same racial group as the accused" shifts the burden to the prosecution to provide a race-neutral, "clear and reasonably specific explanation of legitimate reasons."[41]

The Court of Appeals of the Armed Forces [CAAF] further explained the need for this different standard in *United States v. Tulloch*.[42] "[A] civilian jury is derived from a representative, randomly selected cross-section of the population. . . . In civilian trials, numerous peremptory challenges are provided to each party as a means of selecting the final composition of the jury."[43]

In contrast, "the court-martial panel is selected by the convening authority on the basis of a best-qualified standard. All members selected by the convening authority serve on the panel unless removed by a challenge for cause, exercise of the one peremptory challenge generally permitted to each party . . . or under the military judge's limited power to excuse a member."[44] And, as the convening authority has already deemed the potential panel members to be "best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament," there is less need for counsel to

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[38] *United States v. Santiago-Davila*, 26 M.J. 380 (C.M.A. 1988).

[39] *United States v. Witham*, 47 M.J. 297, 298 (C.A.A.F. 1997).

[40] *United States v. Tulloch*, 47 M.J. 283, 291-92 (C.A.A.F. 1997).

[41] *United States v. Moore*, 28 M.J. 366, 369 (C.M.A. 1989)).

[42] *Tulloch*, 47 M.J. at 287.

[43] *Id*.

[44] *Id*. To this we would add excusal of members pursuant to the recent changes to Articles 16, 25a, and 29, UCMJ, requiring a specific number of members for each type of court-martial. 10 U.S.C. §§816, 825a, and 829. This addition does not affect our analysis.

cull members than there is in a civilian court. For courts-martial, then, "it is a misnomer to talk about selecting a jury. It is really a question of deselecting a jury."[45]

Accordingly, it is not enough for a military prosecutor simply to provide a race- or gender-neutral explanation for a peremptory challenge. Our system of justice demands more. Unlike their civilian counterparts, trial counsel may not strike a person for any reason that is "unreasonable, implausible, or otherwise makes no sense."[46]

**B. Are *Batson* and its progeny applicable to sexual orientation?**

The threshold question—whether or not *Batson* applies to sexual orientation—is not a disputed issue in this case. There was absolutely no discussion of this at the trial level and the Government's appellate brief sidestepped the issue. At oral argument, however, the Government counsel stated that the Government would make no argument that *Batson* did *not* apply.

In fact, at oral argument, Government counsel—while ambiguously "not conceding the issue"—announced it was "the Government's policy" that *Batson* applies to sexual orientation.[47] Despite this vague, unexplained reference to "policy," we are compelled to thoroughly examine the question. Two distinct paths lead us to conclude that *Batson* applies.[48]

*1. Discrimination Based on Sexual Orientation is Sex Discrimination*

While *Bostock* dealt with employment law and focused on the language of the Civil Rights Act, we see no reason that the rationale of *Bostock* does not

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[45] *Tulloch*, 47 M.J. at 287.

[46] *Id*. The CAAF specifically considered but rejected the Supreme Court's holding in *Purkett* that, so long as it was race-neutral, the prosecutor's stated reason need not make sense.

[47] Certainly it is Navy policy that unlawful discrimination based on race, religion, color, gender, or national origin is strictly prohibited and will not be tolerated. Sec'y of the Navy Instr. 5350.16A, *Equal Opportunity (EO) within the Department of the Navy (DON)* (Dec. 18, 2006) [SECNAVINST 5350.16A]. Sexual orientation was added to this list by an ALLNAV message on 23 July 2015. SECNAVINST 5350.16A does not contain an exception for the exercise of peremptory challenges at courts-martial, and the Government makes no argument in this case that exercising a peremptory challenge against a homosexual servicemember would somehow be lawful discrimination.

[48] *See Smithkline Beecham Corporation v. Abbot Laboratories*, 740 F.3d 471, 484 (9th Cir. 2014); *Commonwealth v. Carter*, 172 N.E. 3d 367, 380 (Mass 2021).

apply to peremptory challenges. If trial counsel's intent here was to challenge EMN1 Chess based on his being married to another man, the challenge constituted sex-based discrimination. In light of such intent, the fact a potential panel member is married to a man would not have caused the trial counsel to use the peremptory challenge had the member been female. Put another way, the challenge was for a trait the trial counsel would not have questioned in members of a different sex. "Sex plays a necessary and undisguisable role in the decision."[49] And, as discussed above, it is beyond question that using gender as a basis for excluding potential members is constitutionally impermissible.

Applying *Bostock*'s rationale to peremptory challenges leads us to the conclusion that discrimination based on sexual orientation is equivalent to gender discrimination for purposes of *Batson* applicability. But our analysis does not end here. We cannot ignore the history of discrimination particular to homosexuality, which brings us to our second, distinct line of reasoning.

*2. Historical practice and current treatment of sexual orientation supports extending* Batson

> Since *Batson*, we have reaffirmed repeatedly our commitment to jury selection procedures that are fair and nondiscriminatory. We have recognized that . . . potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice.[50]

Although in making this observation the Supreme Court was specifically addressing gender-based stereotypes, we see no reason this right to such jury selection procedures does not apply equally to sexual orientation-based stereotypes.

The historical evidence of discrimination based on race, described in *Batson*, and discrimination based on gender, described in *J.E.B.*, find an equally disturbing analogue in historical discrimination based on sexual orientation. On this point we need look no further than the clear record of discrimination in the military.

Prior to 1994, it was official Department of Defense [DoD] policy that: "Homosexuality is incompatible with military service. The presence in the

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[49] *Bostock*, 140 S. Ct. at 1737.

[50] *J.E.B.*, 511 U.S. at 128.

military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission."[51] Accordingly, DoD regulations mandated the processing for separation of homosexuals, with very limited exceptions, with no individualized showing of detrimental effect required.[52]

This policy was amended by DoD Directive 1304.26, of 21 December 1993, which implemented what became known as the "Don't Ask, Don't Tell" [DADT] policy.[53] In the legislation authorizing DADT, Congress stated, "[t]he prohibition against homosexual conduct is a longstanding element of military law that continues to be necessary in the unique circumstances of military service."[54] The policy required, with limited exceptions, separation of any servicemember who engaged in homosexual activity, admitted to being homosexual or bisexual, or was married to a person of the same sex. Essentially, a homosexual could serve in the military, but only so long has he or she kept their sexual orientation hidden and did not act on it.

This policy remained in effect until repealed in 2011, when it became possible for homosexuals and bisexuals to serve openly without fear of separation based on their sexual orientation.[55] Since that time, the military has taken steps to reverse course; it is now unlawful to discriminate based on sexual orientation.[56] Specifically, it is DoD policy to "(e)nsure that Service members are treated with dignity and respect and are afforded equal opportunity in an environment free from prohibited discrimination on the basis of race, color, national origin, religion, sex (including pregnancy), gender identity, or sexual orientation."[57]

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[51] United States General Accounting Office Report, "DoD's Policy on Homosexuality," (June 1992) at 3.

[52] *See* DoD Directive 1332.14, "Enlisted Administrative Separations" (29 January 1982) and DoD Directive 1332.30, "Separation of Regular Commissioned Officers for Cause" (12 February 1986).

[53] *See* National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 571(a), 107 Stat. 1547 (1993).

[54] *Id*.

[55] Don't Ask Don't Tell Repeal Act of 2010, Pub. L. 111-321. 124 Stat. 3515 (2010).

[56] DoD Directive 1350.2, "Department of Defense Military Equal Opportunity (MEO) Program" (amended 8 June 2015).

[57] *Id*. at para 1.2(a)(1).

Not surprisingly, nowhere does current DoD policy address the use of peremptory challenges. But, based on the military's current efforts to allow homosexuals to openly serve, including the clear message that discrimination based on sexual orientation will not be tolerated, we cannot see how this would not apply to members selection in a court-martial. The CAAF in *Tulloch* noted that "the Armed Services have been a leader in eradicating racial discrimination" and, "with this history in mind, [was] sure that Congress never intended to condone the use of a government peremptory challenge for the purpose of excluding a 'cognizable racial group.'"[58] In the same sense, we find no exception to DoD policy that allows the use of a Government peremptory challenge to exclude a "cognizable sexual orientation group."

Just as gender discrimination "serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women," we find that discrimination based on sexual orientation perpetuates such stereotypes about the relative abilities of heterosexual and homosexual personnel. [59] As our sister court said when confronting racial discrimination in member selection, "[w]e do not condone the use of stereotypes for any purpose within the court-martial system."[60]

In sum, we hold that the rationale that precludes race and gender discrimination in members selection applies with equal force to discrimination based on sexual orientation. We now apply this to the facts of the instant case.

**C. Did the military judge abuse her discretion in denying the defense's challenge to the Government's peremptory strike of EMN1 Chess?**

*1. The military judge applied the wrong standard*

When a military judge makes detailed findings of fact and fully explains her conclusions of law, we will give great deference to her decision on whether to grant or deny a *Batson* challenge.[61] Unfortunately, that is not the record before us. With a finding that "it appears that [EMN1 Chess] may be the only homosexual on the panel," a short summary of two of EMN1 Chess's responses, and a terse assessment that he "didn't have strong feelings either way," the military judge found that the Government had provided "a neutral reason" for

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[58] *Tulloch*, 47 M.J. at 285.

[59] *J.E.B.*, U.S. 511 at 131.

[60] *United States v. Moore*, 26 M.J. 692, 699 (A.C.M.R., 1988) (en banc) *rev'd* 28 M.J. 366 (C.M.A. 1989).

[61] *See United States v. Williams*, 44 M.J. 482, 485 (C.A.A.F. 1996).

its challenge.[62] Given the military judge's scant treatment of the issue, we find little basis for deference to her conclusion that Appellant had not shown purposeful discrimination.

During oral argument, the Government urged us to rely on the presumption that military judges know and apply the law. But the only indication of the standard applied by the military judge was her use of the word "neutral"—the in-a-word definition of the standard applicable in civilian courts. And there is nothing in the military judge's extremely limited analysis that hints that she knew of, or applied, the more stringent *Tulloch* test.

As explained above, the *Tulloch* test requires the Government to provide more than a neutral reason; it must also be reasonable, be plausible, and make sense. But it is clear that the military judge never moved past "neutral" in her ruling. She began her short analysis with, "the Government has stated a neutral reason as to why they chose to exercise their peremptory challenge on Petty Officer [Chess]."[63] She ended it with, "the Court believes that [EMN1 Chess' responses regarding his prior court-martial experience] is a neutral reason for the Government's peremptory challenge."[64] As it appears that the military judge applied the standard applicable at *civilian*, not military, trials, we find her conclusion was influenced by an erroneous view of the law.

*2. The Government's response was unreasonable*

Even were we to conclude that the military judge applied the correct standard, we still find she abused her discretion here. We find that the Government's offered reason falls so short of the heighted burden of *Tulloch* as to render the military judge's ruling "outside the range of choices reasonably arising from the applicable facts and the law."[65]

The Government's proffered reason—lack of enthusiasm or eagerness—is simply nonsensical.[66] First, we note that trial counsel's "'it wasn't bad' means

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[62] R. at 362.

[63] R. at 362.

[64] R. at 362.

[65] *Miller*, 66 M.J. at 307.

[66] We note that the Government's brief in this case mischaracterizes the record at a critical point. Although it is appellate counsel's obligation to persuasively argue the facts, the statement that "Petty Officer Chess displayed a nonchalant and careless attitude towards his previous court martial experience" is pure invention, unsupported by anything in the verbal exchange at trial. Gov't Brief at 53. Government counsel

'it wasn't good'" statement is a flawed tautology. It makes no more sense than to say, conversely, "'it wasn't good' means 'it wasn't bad.'" Second, nothing in the record supports the Government's claimed assessment of EMN1 Chess. Neither his responses nor the tone of his voice belied a lack of eagerness to serve as a member, either in the past or present.[67]

Third, in one of the few findings of fact, the military judge found EMN1 Chess "didn't have strong feelings either way." That trial counsel essentially cited this *lack* of strong feelings about a previous court-martial as a basis for challenging the member's service on a different court-martial simply makes no sense in the absence of further explanation.

Fourth, "lack of enthusiasm" is akin to the reason the CAAF found lacking in *Tulloch*. There, the trial counsel challenged a Black staff sergeant because the latter "blinked" and "looked uncomfortable" during voir dire. The CAAF noted that these are "characteristics likely exhibited by many who sit on courts-martial."[68] Given the specific selection criteria applied by the convening authority, trial counsel's statement "that a member 'seemed uncomfortable' does not, without further explanation, provide a sufficiently articulated reason to sustain" the challenge.[69] We find trial counsel's opinion of EMN1 Chess' purported lack of enthusiasm and eagerness is similarly so vague and commonplace as to be meaningless.[70] Therefore, it makes no sense.

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conceded at oral argument that nothing in the record indicated a nonchalant or careless attitude in EMN1 Chess's responses or demeanor.

[67] Official Audio of Voir Dire at 3:39:00 – 3:44:46 (October 8, 2021). This highlights the confusing nature of trial counsel's proffered reason. At one point he seems to say the reason is that EMN1 Chess has demonstrated a lack of eagerness or enthusiasm to serve as a member *again*. Yet, when asked to restate his reason, trial counsel says that EMN1 Chess' "lack of eagerness, its [sic] seeming lack of enthusiasm or positive experience in that [previous] trial" is the basis for the peremptory challenge. R. at 360. Appellee's briefing on this issue muddied, rather than clarified, trial counsel's actual position.

[68] *Tulloch*, 47 M.J. at 288.

[69] *Id*.

[70] Service on court-martial panels, by definition, involves judging fellow servicemembers charged with criminal activity. The process often involves reviewing evidence most people would rather never see. It often involves hearing painful and disturbing testimony from victims. And, when an accused is convicted, it involves the weighty, necessary, but unpleasant duty of imposing an appropriate sentence. (It is understandable, then, that neither "enthusiasm" nor "eagerness" to serve on a court-martial is included in the Article 25, UCMJ, selection criteria.) Given this, EMN1 Chess stating

The greatest deficiency in trial counsel's stated reason, however, is that it *lacks any reasoning*. The Government made no attempt to explain how EMN1 Chess' supposed lack of enthusiasm about a previous court-martial would affect his ability to properly perform his duties as a member in the present one. And the military judge did not require the trial counsel to connect the dots. (Nor did the military judge connect them herself.) The only evidence on this point is that EMN1 Chess specifically said, in response to the Government's questions, that he did not believe his experience on the former court-martial would in any way influence his ability to serve on this one. Nothing in his other responses indicates otherwise. Thus, the Government failed to meet its burden to provide a "clear and reasonably specific explanation of legitimate reasons."[71]

Having offered no reasonable justification for its use of the peremptory challenge, the Government left the military judge with an unrebutted *Batson* challenge. Accordingly, the military judge abused her discretion by denying the defense counsel's objection to the Government's exercise of its peremptory challenge and excusing EMN1 Chess from the court-martial.

We do not test this error for prejudice, noting that neither the Supreme Court nor the CAAF has done so in any of the cases in which it found constitutional violations based on *Batson* and its progeny. And we conclude that a required showing of prejudice would present an insurmountable obstacle that would only serve to erase the protections these and related cases provide.[72]

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"it wasn't bad" to describe sitting on a week-long court-martial involving "attempted sexual interactions with a minor" is, arguably, a rather positive response.

[71] *Id*. at 286 (citing *Moore*, 28 M.J. at 368).

[72] At least four Federal Circuits Courts have deemed *Batson*-type violations to be structural errors, and thus not subject to a test for prejudice. *See*: *Ford v. Norris*, 67 F. 3d 162, 171 (8th Cir 1995); *Rosa v. Peters*, 36 F.3d 625, 634, n. 17 (7th Cir. 1994); *United States v. Tomlinson*, 764 F. 3d 535, 539 (6th Cir 2014) (holding that "because a *Batson* error is structural and not subject to harmless error review, only reversal of the conviction and a new trial could remedy any *Batson* error found"); *United States v. Kimbrel*, 532 F. 3d 461, 469 (6th Cir 2008.) (same); *Tankleff v. Senkowski*, 135 F. 3d 235, (2d Cir. 1998)(holding that "a *Batson/Powers* claim is a structural error that is not subject to harmless error review").

## III. CONCLUSION

After careful consideration of the record, as well as the briefs and argument of appellate counsel, the findings and sentence are **SET ASIDE**, with a rehearing authorized.

FOR THE COURT:

MARK K. JAMISON
Clerk of Court