IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellee	REPLY BRIEF ON BEHALF OF APPELLANT
v.	Crim. App. Dkt. No. 20210376
Major (O-4) **ANTHONY R. RAMIREZ,** United States Army Appellant	USCA Dkt. No. 23-0080/AR

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

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

COMES NOW, appellant, Major [MAJ] Anthony R. Ramirez, by and through his undersigned counsel pursuant to Rule 19(a)(7)(B) of this Honorable Court's Rules of Practice and Procedure, hereby replies to the government's Brief on Behalf of Appellee filed on May 30, 2023 [Appellee Br.]. Appellant relies on the facts, law, and arguments filed with this Court on April 28, 2023, [Opening Br.] and provides the following additional arguments for this Court's consideration.

Argument

1. Appellant did not waive or forfeit the issue.

The government halfheartedly suggests in a footnote that appellant "may" have waived the issue of whether the military judge abused his discretion in denying appellant's proposed voir dire question. (Appellee Br. at 21, n. 15). It

provides no authority for its suggestion that failure to request reconsideration of a military judge's ruling means that a party waived or forfeited the issue. By this logic, anytime a party fails to request reconsideration, that party has waived or forfeited the issue. The Army Court of Criminal Appeals [ACCA] did not address waiver or forfeiture in appellant's case.

In support of its proposition, the government cites to *United States v. Cezaire,* 939 F.3d 336 (1st Cir. 2019). The facts of appellant's case are markedly different from *Cezaire*. There, the defendant was charged with disclosure of social security numbers and aggravated identity theft and his counsel "wondered" if the court "would consider giving a race question to the jury." *Cezaire*, 939 F.3d at 338. The court and defense counsel then agreed that it was "not that kind of case," with defense counsel remarking that they were thinking of the "current climate...in the country." *Id*. Defense counsel did not ask for a specific question. Appellant's case is much closer to the case of *United States v. Bates*, 590 F. App'x 882 (11th Cir. 2014), where "the district court was faced with a request to ask a question concerning bias on the basis of sexual orientation in 'clear and simple' terms and 'specifically denied it.'" *Cezaire*, 939 F.3d 336, 339 n.3 (citing *Bates*, 590 F. App'x at 885 n.2). The court in *Bates* did not stop to consider whether the issue was waived or forfeited. Appellant did not waive or forfeit the issue of the proposed voir dire question.

2. The military judge's ruling is entitled to less deference.

The military judge's denial of appellant's proposed voir dire question was ambiguous. He ruled that the proposed question was "too confusing, a trick question, *or* unhelpful to ferreting out sincerity and ability to sit as member." (JA 310) (emphasis added). The unclear, disjunctive language of his ruling leaves the government between a rock and a hard place. It must argue that the military judge did not abuse his discretion in denying the proposed voir dire question, (Appellee Br. at 12-13), yet cannot admit that it is unclear from the ruling *why* he denied it. It is telling that the government's brief explains why it believes the question is confusing[1] or unhelpful but does not attempt to explain how it could be a "trick," the third possible reason for his denial of the question. (Appellee Br. at 12-14).

"It is difficult to defer to a decision when the record does not reflect what the basis of the decision was." *United States v. Acton*, 38 M.J. 330, 334 (C.A.A.F. 1993); *see also United States v. Williams,* No. ACM 38454, 2015 CCA LEXIS

[1] Also confusing is the government's argument that because the question does not directly address the jurors' commitment to impartiality because "it doesn't ask if the potential juror can put aside their personal beliefs and biases, if any, to fairly evaluate the evidence and law in the case." (Appellee Br. at 13). A question that merely asks the member if they will be impartial without background is insufficient, as it does not "[provide] sufficient context for a juror to be able to self-identify their relevant biases before jury selection is complete." *United States* v. *Nieves*, 58 F.4th 623, 638 (2d Cir. 2023). This type of question is often used to "rehabilitate" possible members rather than to uncover the bias in the first place.

258, at *12-13 (A.F. Ct. Crim. App. June 19, 2015) ("It is very difficult for an appellate court to determine the facts relied upon, whether the appropriate legal standards were applied or misapplied, and whether the decision amounts to an abuse of discretion or legal error without a proper statement of essential findings."). Because of this lack of clarity, the military judge's ruling is entitled to less deference than it otherwise would be under the abuse of discretion standard. *See United States v. Flesher*, 73 M.J. 303, 312 (C.A.A.F. 2014).

3. The military judge had sufficient information to allow the question.

Citing to *Rosales-Lopez v. United States,* 451 U.S. 182, 191, n. 7 (1981), the Government argues that appellant did not assert a "meaningful ethnic difference" between himself and Wife. (Appellee Br. at 14-15). It provides no standard, test, or framework for how this assertion must occur, which is unsurprising, given that *Rosales-Lopez* only briefly mentions that a defendant must claim such a difference in a footnote and does not impose a structure for how this assertion must occur. A review of military, federal, and state court decisions similarly reveals no such test for this assertion, yet the government and the CCA both made much of what they saw as appellant's failure to do so.

A closer review of what the military judge knew at the time of his ruling reveals that he had sufficient information to allow the question. He was aware that appellant was charged with crimes of a sexual nature and knew that appellant

wanted to ask a question concerning panel members' perceptions of interracial relationships. These facts gave the military judge more than enough information to understand why appellant wanted to ask this question.

Military judges often allow voir dire questions when they have little to no information about why counsel want them to be asked. For example, the trial counsel in this case requested (and was allowed) to ask, "can you understand why someone might trust someone that is older and a professional?" (JA 310). This would inform the military judge that the government viewed appellant as "someone that is older and a professional." Similarly, the government requested to ask, "does everyone understand that sexual crimes do not have to involve a weapon?" (JA 310). In allowing this question, the military judge anticipated that the issue of a sexual crime occurring without a weapon would probably arise at trial. This is the very essence of voir dire – counsel know more about the case than either the military judge or the members and are best positioned to know what areas of possible bias need to be probed during questioning.

In fact, the military judge comments upon this fact in his preliminary instructions to the members: "Counsel have interviewed witnesses and know more about the case than we do. Very often they do not ask what may appear to us to be obvious questions, because they are aware that this particular witness has no knowledge on the subject." (JA 31). Similarly, during voir dire, counsel may

choose to ask the members a particular question because they know more about the facts of the case. Here, appellant's counsel wanted to ask a question about the members' perception of interracial relationships, thus indicating that he expected it to arise at trial.

The government makes much of the fact that appellant supplemented the record on appeal with the fact that Wife is of Caucasian descent/appearance and that he is Hispanic (Appellee Br. at 15, 22), as if this somehow proves that race was not at issue in the case. This flies in the face of common sense, as the military judge and the members sat in the courtroom with appellant and Wife and had plenty of opportunity to observe them. Supplementing the record allowed the ACCA to have information that was before the members and military judge which was not able to be captured in the Record of Trial. Finally, while the government does not concede that Wife is of Caucasian descent/appearance, (Appellee Br. at 15), neither did they take the opportunity to supplement the record to show that she is not.

4. *Rosales-Lopez* required the inquiry because there was a reasonable possibility of racial prejudice influencing the panel members.

Despite the clear language of *Rosales-Lopez*, the government continues to argue that it is ambiguous and does not require an inquiry into racial bias when requested by a defendant accused of a violent crime when the victim and defendant are of different races. (Appellee Br. at 16-17). While it is true that *Rosales-Lopez*

was a plurality opinion, federal courts have had no trouble interpreting this provision for the last four decades. *See, e.g., United States v. Mercado-Gracia,* 989 F.3d 829, 840 n.7 (10th Cir. 2021); *Cezaire*, 939 F.3d at 338; *United States v. Borders*, 270 F.3d 1180, 1183 (8th Cir. 2001); *United States v. Kyles*, 40 F.3d 519, 524 (2d Cir. 1994); *United States v. Greer*, 968 F.2d 433, 442 (5th Cir. 1992); *United States v. Dickens*, 695 F.2d 765, 774 (3d Cir. 1982); In *Turner v. Murray*, 476 U.S. 28, 40 (1986), the Supreme Court reaffirmed the *Rosales-Lopez* plurality opinion, explaining that "in exercising our supervisory powers over the federal courts, we held in *Rosales-Lopez* that when a violent crime has been committed, and the victim and the accused are of different races, a *per se* inference of a 'reasonable possibility' of prejudice is shown." There is no ambiguity in what was required under *Rosales-Lopez* in appellant's case.[2]

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[2] The government also argues that *Rosales-Lopez* may not be binding on this court because the military justice system may not fall under the supervisory authority of the Supreme Court. (Appellee Br. at 19, n.12). It is true that the Supreme Court has held that its supervisory powers do not extend to state courts. *Mu'Min v. Virginia*, 500 U.S. 415, 423 (1991). This logic does not extend to military courts. Servicemembers tried by court-martial are convicted under the United States Code and receive a federal conviction. *See United States v. Weiss*, 36 M.J. 224, 249 (C.A.A.F. 1992) (explaining that military judges are empowered to impose federal convictions under the United States Code). "The legal precedents on this issue are undisputed and clear: The federal government, which includes the military, is regarded as a separate sovereign from the states." *Hennis v. Hemlick*, 666 F.3d 270, 280 (4th Cir. 2012) (citing *Bartkus v. Illinois*, 359 U.S. 121, 132-33 (1959); *see also United States v. Stokes*, 12 M.J. 229, 231 (C.M.A. 1982) (holding that because of the protections of double jeopardy, "trial by a court-martial is barred . . .

Additionally, in arguing that race was not a "salient variable" in appellant's case, the government ignores the very issue which *Rosales-Lopez* was meant to address: "[i]t remains an unfortunate fact in our society that violent crimes perpetrated against members of other racial or ethnic groups often raise such a [reasonable possibility that racial prejudice would influence the jury]." 451 U.S. at 192. The government's view fails to account for the possibility that a juror harbored a prejudicial sentiment, such as believing that a victim would never consent to sexual activity with an individual of another race.

The government also suggests in a footnote that the inquiry was not required because appellant's crimes of abusive sexual contact and attempted sexual assault are not obviously violent crimes for *Rosales-Lopez* purposes. (Appellee Br. at 10). This argument falls flat for several reasons. First, it conveniently chooses to leave out the fact that appellant was also convicted of assault consummated by battery, the elements of which are "(a) that the accused did bodily harm to a certain person; (b) that the bodily harm was done unlawfully; and (c) that the bodily harm was done with *force or violence*." Article 128, UCMJ, 10 U.S.C. § 928 (2019) (emphasis added).

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only if the accused has already been tried in a court which derives its authority from the Federal Government."). As noted by the government, Justice Alito recently identified the Supreme Court as a "supervising" court in *Ortiz v. United States*, 138 S. Ct. 2165, 2191 (2018) (Alito, J. dissenting).

Second, the government argues that abusive sexual contact and attempted sexual assault are not obviously violent crimes because they were charged under a theory of "without consent." (Appellee Br. at 10), even though abusive sexual contact and attempted sexual assault *cannot* be charged as "through force or violence." Article 120, UCMJ; 10 U.S.C. § 920 (2019). The only charging theories under the current version of Article 120, UMCJ, are a) without consent; b) by threat/fear, fraudulent representation, or artifice; c) when victim is incapable of consenting. *Id*. Additionally, the pattern instructions in the Military Judge's Benchbook raise the specter of force or violence as it relates to consent, stating that "[s]ubmission resulting from the use of force, threat of force, or placing another person in fear also does not constitute consent." Dept. of the Army Pam. 27-9, Military Judges Benchbook (February 29, 2020), para. 3a-44-4. Appellant was accused of violent crimes and was a member of a different racial group than Wife, fitting directly into the category of cases described in *Rosales-Lopez*.

5. The error was not harmless beyond a reasonable doubt.

As evidenced by Chief Justice Rehnquist's dissent in *Rosales-Lopez*, the question of whether to test for harmlessness when the trial court does not permit racial bias questions is not settled. 451 U.S. at 191. (Rehnquist, J., concurring in the result) ("I would also not rule out the possibility of a finding of harmless error, but that may well be embraced in footnote 7 to the plurality's opinion."). As

explained in appellant's opening brief, the issue of whether to conduct such a test is unsettled among the federal appellate courts. Appellant urges this Court not to test for harmlessness.

Pena-Rodríguez v. Colorado, 580 U.S. 206 (2017), is instructive. There, the Supreme Court ruled that the trial court should be allowed to consider post-verdict evidence of a juror's racial bias in an attempt to impeach the verdict. While *Pena-Rodriguez* did not consider the propriety of questions allowed during voir dire, it is telling that the Supreme Court considered one juror's racial prejudice enough to allow the defendant to attempt to show that the verdict was tainted by racial prejudice. Even one member's racial prejudices can be fatal to the impartiality of the panel. Thus, this Court need not apply a test for harmlessness.

Even if this Court does test the failure to inquire into racial prejudice for harmlessness, the government cannot succeed. The government cannot identify a single question that would have allowed insight into the panel's potential prejudice in this area. *See United States* v. *Nieves*, 58 F.4th 623, 638 (2d Cir. 2023) ("the [trial] court must provide *some* opportunity for prospective jurors to be meaningfully screened for biases relevant to a particular [accused] or the charges against that [accused]."). Because there was not "sufficient questioning to produce, in light of the factual situation involved in the particular trial, some basis for a reasonably knowledgeable exercise of the right of challenge," the military judge

clearly abused his discretion in denying the proposed question, and the error was not harmless. *United States v. Hasting*, 739 F.2d 1269 (7th Cir. 1984) (internal citations omitted). Appellant should have been permitted to ask his proposed question to the panel as a group, and to follow up on it during individual voir dire.

PRAYER FOR RELIEF

WHEREFORE, appellant respectfully requests that this Honorable Court reverse the CCA and set aside and dismiss the findings of guilty and set aside the sentence.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(b)

1. This brief complies with the type-volume limitations of Rule 24(b) because it contains 2,719 words.

2. This brief complies with the typeface and type style requirements of Rule 37.

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CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing in the case of United States v. Ramirez, Crim. App. Dkt. No. 20210376, USCA Dkt. No. 23-0080/AR was electronically filed with the Court and Government Appellate Division on June 13, 2023.

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