IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee

REPLY BRIEF ON BEHALF OF APPELLANT

Crim.App. Dkt. No. ARMY 20230632

v.

USCA Dkt. No. 25-0032/AR

Lieutenant Colonel (O-5)
JONNY GONZALEZ,
United States Army,
Appellant

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

Argument

Whether appellant had fair notice that the portions of Specification 2 of The Charge alleging an Article 133 violation for an extramarital kiss constituted conduct that was forbidden and subject to criminal sanction.

1. Treatment of extramarital charging language below

At the outset, an examination of how the extramarital charging language was treated at trial, and on appeal before the Army Court, is relevant to this Court's consideration of the government's various defenses of including the extramarital charging language within Specification 2, despite now acknowledging that such conduct is not criminally actionable.

The government crafted two specifications, both of which used identical language with respect to extramarital conduct – each alleging appellant was "a married man" and engaged in the charged conduct with "a woman not his wife." *See* (JA at 4). This, of course, is classic charging language for extramarital conduct. With respect to Specification 1, it was repeatedly acknowledged at trial that this language alleged extramarital conduct as part of the underlying offense. *See* (JA at 80, 81, 82, 83). Now, however, despite including identical language in Specification 2, the government attempts to argue the language served a different function in Specification 2 than in Specification 1.

Additionally, the processing and litigation of this case show that the extramarital aspect of both specifications was a central theme. Even at the preliminary hearing, trial counsel emphasized the extramarital conduct as a motivating reason why the case was being charged, concluding his closing argument by noting that appellant, "*a married individual*, disgraced himself as an officer in the U.S. Army. And that is why we are here and moving forward with this case." (JA at 19) (emphasis added). The theme continued throughout the litigation. In voir dire, trial counsel asked the members if they had previously "made a recommendation for disposition for a Soldier accused of adultery?" (JA at 22). The military judge repeatedly referred to Specification 1 as charging both adultery and fraternization, a proposition the government never took issue with

either at trial or on appeal. (JA at 80, 81, 82, 83). And the military judge and the parties later noted that Specification 2 – although it used identical adultery-type language as Specification 1 – did not meet the definitions of extramarital sexual conduct, which, of course, is the root of the problem underlying the granted issue. (JA at 146).

The record also indicates the panel was focused on the extramarital conduct portion of both specifications. *See* (JA at 157) (panel member questions: "Did [JT] ask if [appellant] was married? Did [appellant] tell [JT] he was married?"); *see also* (JA at 158) (similar panel member questions with respect to Specification 1). The military judge instructed on the extramarital aspects of both charges as elements. *See* (JA at 144-45). The government also explicitly listed the extramarital aspects of both specifications, as elements, in their closing slides. *See* (JA at 163) (explicitly listing "The Accused was a married man;" and that "The Accused and JT were not married . . ." as "Elements"; *see also* (JA at 173) (similarly listing the extramarital aspects of Specification 1 as elements).

Finally, on appeal before the Army Court, the government defended notice as to the extramarital kiss by comparing Article 133's examples of "cheating on an exam and failing without good cause to support the officer's family." (Gov. Army Court Br. at 8-9) (citing 2019 MCM, Pt. IV, para. 90.c.(3)). The government's continued defense of the validity of criminally sanctioning an extramarital kiss

demonstrates that the government intended the extramarital charging language to constitute part of the underlying criminal conduct for the Article 133 offense.

In sum, the processing and litigation of this case below show it was intended as an adultery case, charged like an adultery case, litigated like an adultery case, and the panel members treated it like an adultery case. Even on appeal before the Army Court, the government defended it as such.

2. The government points to no source of fair notice for an extramarital kiss

Turning to the heart of the granted issue, the government does not contend that any law, regulation, or custom of the service provides fair warning that an extramarital kiss is criminally sanctionable. Indeed, the government concedes that "[e]xtramarital kisses . . . without more, may not be sufficient for Article 133, UCMJ." (Gov. Br. at 9). Appellant respectfully posits these concessions are case dispositive on the limited issue under review: notice as to "the *portions* of Specification 2 of The Charge" alleging extramarital conduct. *See United States v. Gonzalez*, No. 25-0032/AR, __ M.J. __, 2025 WL 465173, at *1 (C.A.A.F. Jan. 29, 2025) (Grant Order) (emphasis added).

3. Notice as to fraternization is not at issue

Instead of defending fair notice as to the portions of the specification at issue, the government pivots to the uncontroversial proposition that there are sources of fair notice as to fraternization. Pointing to fraternization as a source of

notice, the government argues that the charged kiss was merely the means of appellant committing fraternization, contending that a kiss between an officer – "married or single" – and an enlisted person is simply actionable as fraternization. *See* (Gov Br. at 5). The government strawmans appellant's position, arguing that "Congress could not have intended to carve out an exception to fraternization for extramarital non-sexual conduct. . . ." (Gov. Br. at 12). These arguments are non-responsive to the issue at hand. Appellant has not challenged the fraternization portions of the specification on notice grounds and does not dispute that fraternization could be accomplished via a kiss.

Here, however, the government elected to combine two underlying offenses – fraternization *and* extramarital conduct – into each of the two charged Article 133 offenses. The government expressly adopted both portions ("a married man" and "a woman not his wife") of the extramarital charging language *as elements* at trial. If the kiss was, as the government now contends, merely the means of accomplishing the fraternization then appellant's marital status would clearly not be an element. The government cannot undue its charging choices by now telling this Court something directly contradictory to what it told the panel. Similarly, the government's argument before the Army Court – defending the validity of an extramarital kiss as a valid theory of liability under Article 133 by comparison to the MCM's examples of "cheating on an exam and failing without good cause to

support the officer's family" – further belies any suggestion now that these portions of the charge were intended as anything other than a substantive portion of the underlying offenses. *See* (Gov. Army Court Br. at 8-9).

4. Government argument that extramarital charging language was superfluous

Intermixed with the above arguments, the government seems to suggest that the extramarital language at issue was simply superfluous. As previously quoted, the government suggests that whether appellant was "married or single" the kiss could have constituted fraternization. (Gov. Br. at 5). Similarly, the government argues that the fraternization would have been actionable "irrespective of whether the officer was married." (Gov. Br. at 13).

The present case, however, is not comparable to one where the language at issue was never included in the first place. Rather, the government combined two underlying offenses into a single specification and asked the panel to evaluate whether the combined conduct rose to the level of conduct unbecoming an officer and a gentleman. Both the military judge and trial counsel clearly articulated to the panel that the extramarital aspects of Specification 2 constituted elements of the offense. And, as noted above, it is apparent from the panel members' question on this exact point that it was a factor in their consideration. (JA at 157-58).

Where the government inserted and leveraged the extramarital conduct aspect of the encounter, *as elements*, it became central to the charge itself. While it

may be true that the government could have excluded this language altogether and had a valid fraternization charge, the government cannot include charged conduct, submit it to the panel, and then later demur that the specification would have been valid if it had been drafted differently. Similarly, the fact that the underlying conduct might have constituted a different offense does not mean the government can pad an Article 133 charge by adding an additional underlying offense for which there is no notice.

5. Government suggestion that the extra-marital language anticipated and pre-rebutted a potential defense

The government then suggests the extramarital charging language "was relevant because if they were married then the conduct would likely not have been forbidden." (Gov. Br. at 13) (citing AR 600–20, para. 4-14c(2)(a)). While it is true that marriage between appellant and JT may have constituted a defense to fraternization, disclaimers of potential defenses are not routinely placed in the charging language. For example, self defense is a defense to assault consummated by battery. R.C.M. 916(e)(3). That does not mean, of course, that a disclaimer of the defense is inserted into the charging language. An example of the model specification for assault consummated by a battery is:

> In that [the accused], did, unlawfully strike [the victim] in the nose with his fist.

2019 MCM, Pt. IV, para. 77.e.(2). By the government's theory, proper charging would apparently be:

> In that [the accused], **not apprehending, upon reasonable grounds, that bodily harm was about to be inflicted wrongfully on the accused and that the force that accused used was necessary for protection against bodily harm** . . . did, unlawfully strike [the victim] in the nose with his fist.

This is simply not how charges are drafted.

Additionally, if the purpose of the extramarital charging language was simply to defeat any potential defense that appellant and JT were married, the "a married man" language would not have been included. The government's inclusion of the "a married man" element clearly shows that neither the intent, nor the effect of the extramarital language in Specification 2, was merely to pre-rebut a defense. Additionally, given the underlying facts, there was no reasonable expectation of a defense of marriage in this case.

The government's suggestion is further refuted by its own explicit adoption of both portions ("a married man" and "a woman not his wife") of the extramarital charging language as *elements* at trial, and defense of the validity of an extramarital kiss as a valid theory of liability before the Army Court.

Finally, the fact that the government used the same language in Specification 2 as in Specification 1 – when Specification 1 clearly alleged extramarital sexual

conduct as part of the underlying offenses – further belies any suggestion that this exact same language was included in Specification 2 for a wholly different reason.

6. The government does not dispute appellant's requested remedy

As noted in appellant's opening brief, while the notice defect specifically plagues the portions of the specification alleging extramarital conduct, the proper remedy is setting aside the entire specification. Where as here, the government charged both fraternization elements and extramarital conduct elements within the same specification and asked the panel to evaluate whether the charged conduct – in amalgamation – rose to the level of conduct unbecoming an officer and a gentleman, the specification cannot be saved simply by deleting the defective portions. The panel's conclusion on the conduct unbecoming element might have been different but for the extramarital aspect of the specification.

This is particularly true on the facts of the present case, because numerous factors reduced the severity of the fraternization aspects of the specification. For example, appellant was on terminal leave and there was no expectation he would ever perform command functions in the future; JT and appellant were in separate services; there was no military affiliation between them; appellant had no authority or control over JT; they met under purely civilian circumstances; the kiss was apparently posed for a picture; and JT expressly disavowed having been wronged. Under these circumstances, the panel may well have found that, but for the

extramarital aspects of the specification, it did not rise to the level of conduct unbecoming an officer and a gentleman. As there is no way to tell whether the panel still would have convicted appellant if the extramarital conduct portion of the specification had not been included, the entire specification should be set aside. While the panel's deliberations cannot be breached, the panel member questions on the extramarital aspect indicate it was important to the panel. *See* (JA at 157-58).

The government does not challenge this dynamic nor dispute that, if error is found, the proper remedy is setting aside of the specification as a whole.

Conclusion

WHEREFORE, appellant respectfully requests this Honorable Court set aside the findings and sentence.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of United States v. Gonzalez, Crim. App. Dkt. No. 20230632, USCA Dkt. No. 25-0043/AR was electronically filed with the Court and Government Appellate Division on March 18, 2025.

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