IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	REPLY BRIEF ON BEHALF OF APPELLANT
v.	Crim. App. Dkt. No. 20200644
Sergeant (E-5) **ASHRAF S. WARDA**, United States Army, Appellant	USCA Dkt. No. 22-0282/AR

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

WILLIAM E. CASSARA, Esq.
Appellate Defense Counsel
PO Box 2688
Evans, GA 30809
(706) 860-5769
USCAAF Bar No. 26503

TUMENTUGS D. ARMSTRONG
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 693-0692
USCAAF Bar No. 37591

INDEX

TABLE OF AUTHORITIES

Court of Appeals for the Armed Forces

Federal Courts

Service Courts of Criminal Appeals

Rules for Courts-Martial (2016)

Other Sources

COMES NOW, Appellant, Sergeant [SGT] Ashraf S. Warda, 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 December 30, 2022 [Appellee Br.]. Appellant relies on the facts, law, and arguments filed with this Court on December 2, 2022, [Opening Br.] and provides the following additional arguments for this Court's consideration.

Argument

1. MAB's immigration records were relevant and necessary.

The government fails to acknowledge before this Court that it conceded the relevance and necessity of MAB's immigration records to the court-martial. (JA 408). Instead, it quotes, via footnote, the Army Court of Criminal Appeals' [CCA's] finding that "'the government dutifully conceded at the outset that [MAB]'s immigration records were relevant and necessary[.]'" (Appellee Br. at 15, n.5) (quoting *United States v. Warda*, 2022 CCA LEXIS 438 at*6 (Army Ct. Crim. App. July 21, 2022) (summ. disp.) (unpub. op.)).

The government then directs this Court's attention to *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004), for the proposition that the appellant failed to establish the existence of the evidence he sought, such that "'[c]onsequently, he did not show that they were relevant and necessary and should

have been produced through compulsory process.'" (Appellee Br. at 15-16, n.5). The citation to *Rodriguez* is inapposite because the government conceded the relevance and necessity of MAB's records in its June 5, 2020, response to the motion to dismiss or abate the proceedings.[1] (JA 408). At no time did the government retract its concession or otherwise assert that the records were irrelevant and unnecessary to appellant's defense. Indeed, the government has not done so before this Court; to the contrary, the government "grant[s] that they would be relevant to Appellant's defense. . . ." (Appellee Br. at 15). Accordingly, appellant and the government agree that MAB's immigration records were relevant and necessary for appellant's defense at trial.

2. The defense proved by a preponderance of the evidence that MAB's immigration records existed.

On May 17, 2019, the defense supplemental discovery request sought documentation of MAB's immigration status in the United States and not just those records involving claims of abuse. (JA 352). The Immigration and Nationality Act requires the federal government, including the Department of Homeland Security [DHS], of which the United States Citizenship and Immigration Service

[1] The government's June 5, 2020, response to the motion to dismiss or abate the proceedings states that the government had "previously" conceded the relevance of MAB's records. (JA 408). Thus, the government conceded the records' relevance on at least one occasion prior to filing its response to the motion.

[USCIS][2] is part, to maintain an Alien-File [A-File] for each documented immigrant. *See Dent v. Holder*, 627 F.3d 365, 372 (9th Cir. 2010); 72 Fed. Reg. 1755, 1757 (2007) ("The A-File is the record that contains copies of information regarding all transactions involving an individual as he/she passes through the U.S. immigration and inspection process. Previously, legacy Immigration and Naturalization Services (INS) handled all of these transactions. Since the formation of DHS, however, these responsibilities have been divided among USCIS, [Immigration and Customs Enforcement], and [Customs and Border Protection]. While USCIS is the custodian of the A-File, all three components create and use A-Files.").

The government contends that that the defense failed to establish by a preponderance of the evidence "that *any* records existed." (Appellee Br. at 12-13, n.4) (emphasis in original). This conclusion is absurd. The USCIS failed to comply with the trial counsel's subpoena for MAB's immigration records and defied the military judge's order to produce the requested records. Furthermore, this conclusion suggests that the DHS, including the USCIS, had no records whatsoever pertaining to MAB, a documented immigrant. The DHS and USCIS maintain an A-File for all documented immigrants, to include MAB. "DHS maintains an 'alien file' or 'A-file' on every non-citizen in the United States, filled

[2] Appellant incorrectly referred to the USCIS as the United States Customs and Immigration Service in the Opening Brief. (Opening Br. at 7).

with application forms, notes, and interview transcripts." Geoffrey Heeren, *Shattering the One-Way Mirror: Discovery in Immigration Court*, 79 Brook. L. Rev. 1569, 1570 (2014) (footnote omitted). To accept the government's contention would require this Court to ignore the relevant provisions of a) the Code of Federal Regulations in the defense's unopposed request for judicial notice; b) the Federal Register; c) the Violence Against Women Act, as cited by the USCIS attorney in his June 25, 2020, letter defying the military judge's order; d) the Immigration and Nationality Act as cited by the CCA; and e) MAB's testimony that she applied for a green card. (JA 4, 195). In other words, to accept the government's contention would require this Court to conclude that the federal government did not have an A-File for MAB despite her the uncontested evidence that she applied for and received a green card, that her green card expired in January 2019, and that she remained in the United States without appellant's participation in the process to remove the conditions on her green card.

Next, despite MAB's testimony about her "file," "information," and "documents" and her decision to release her records to the military judge and the prosecutors, the government insists that MAB misspoke because of "a considerable language barrier" and that the defense "misreads the exchange." (Appellee Br. at 13-14). The government desperately seeks to convince this Court that MAB did not mean what she said, but an examination of the relevant exchanges reveals that

MAB acknowledged the existence of her immigration records and that she understood the nature and context of the defense counsel's [DC's] questions:

> DC: And [your Special Victims Counsel [SVC]] informed you about this court order, correct?
>
> MAB: Yeah.
>
> DC: And additionally that court [order] also required the judge to view the records before anybody else, right?
>
> MAB: Yeah.
>
> DC: And then the judge would decide what information we should get and what information is not relevant to us, correct?
>
> MAB: I don't know, I didn't know but I know the judge can see everything. But, I didn't want Ashraf to see.
>
> DC: And the judge would protect certain information that he did not need to see, correct?
>
> MAB: I have heard that if he looked at my file he will see everything.
>
> DC: And you also are aware that court order had a provision in there that did not allow Sergeant Warda to take possession of your records, correct?
>
> MAB: Can you say it another way?
>
> DC: Sure. You're also aware that order had a clause in there, a provision, that prevented Sergeant Warda from ever taking possession

of your records?

MAB: I'm sorry, there's a couple of words that.

DC: I'll try and rephrase that for you. So, the judge's order said that Sergeant Warda couldn't have the records himself, right?

MAB: Well, when I talked about this what I had understood that he will get a copy forever and know everything about me where I live where I work, everything.

(JA 113-14).

First, there was not a "considerable language barrier" in this exchange. MAB apparently did not understand the words "provision" and/or "clause," but she asked for clarification, just like many witnesses ask an attorney to clarify certain words or phrases with legal terminology. After the DC clarified the question, MAB answered the question by testifying that she had an immigration "file" and that she did not want appellant to know where she lived and worked. While the government may not like MAB's answer because it is inconvenient for its argument, it is clear that MAB understood the question and acknowledged that her immigration records – her "file" – existed.

Shortly after the aforementioned exchange, MAB testified that she did not read the military judge's order but that her SVC told her that "Ashraf's defense wanted a copy of it, this is what I understood, that's why I refused." (JA 118). The following colloquy occurred:

DC: So, your testimony is that for the government and for the military judge you don't mind, correct?

MAB: Correct.

DC: That's your testimony?

MAB: [Affirmative response.]

DC: And the government asked you for the documents for the military judge to review, correct?

MAB: Yes.

DC: To determine if any documents should be seen not by Ashraf, but by his defense counsel, right?

MAB: Yes, Ashraf's defense would know so Ashraf would know.

DC: And you didn't tell them you didn't tell the government, that you were okay with them seeing the documents did you?

MAB: For the government?

DC: Mhmm.

MAB: The question was about Ashraf's defense, not the government.

DC: Well, I am asking you about the government right now. Did you tell the government that you were ok with them seeing the documents?

MAB: I don't remember this question, I only

remember about Ashraf's defense.

MJ: When you're referring to the government, just be more specific.

DC: Yes, Your Honor.

DC: Ma'am, what I'm specifically saying is that you just testified that you are okay with the government, meaning the prosecutors sitting at that table right there, seeing the documents? Is that right?

MAB: Yes.

DC: And you testified that you are okay with the military judge, sitting up there, seeing the documents, right?

MAB: Yes.

DC: But, that you weren't okay with Sergeant Warda seeing the documents?

MAB: Yes.

DC: Did you ever tell the prosecutors, sitting right there, that?

MAB: I said, "I don't want Ashraf to know my information." That's why I don't want to share.

. . .

DC: And you asked why the reason, and the reason for you not wanting Ashraf to see it was because your personal information would be on there?

MAB: Yes.

DC: Despite the fact that this document says your personal information would have been redacted out?

MAB: I don't know about this.

DC: Your testimony is that your attorney didn't explain to you what redacting out means?

MAB: No, he did tell me that he doesn't have access.

DC: So, he told you that Sergeant Warda wouldn't [have] access?

MAB: But, I asked also some people from immigration if my ex-husband gets a copy of my information. They told me that he will know everything and he will [have] the file forever, even if I update where I have changed my address, he will know the new address.

(JA 118-21).

Once again, there was no "considerable language barrier" in this exchange. The only point of confusion concerned the DC's use of the word "government" when referring to the prosecutors. In this exchange, MAB explicitly acknowledged that she had "documents" and "information" and that she asked "immigration" if appellant got a copy of her "information." Through this cross-examination of

MAB, the defense proved by a preponderance of the evidence that her immigration records existed.

Next, the government argues that MAB was not "in a position to verify the existence of her immigration records" because she "would have been the subject and not the proponent of her USCIS file, and could not have authenticated the file's authenticity even if it existed." (Appellee Br. at 14). This argument posits that immigration files exist independently of the immigrant. Here, MAB applied for a green card in 2017. It is reasonable to conclude that this application is in her file along with all other documents required to be included in her A-File. The government's argument is nonsensical. In addition, authentication of the record is immaterial to the issue at hand. Moreover, it is disingenuous for the government to use the key witness's supposed language barrier and ignorance on the subject matter as lack of proof, after they denied appellant's request for an immigration expert who could have submitted this information to the court.

The government argues that "[t]he military judge's determination that Appellant had failed to meet his burden was predictably unchanged following MAB's testimony." (Appellee Br. at 14). This argument attempts to give some cover for the military judge's failure to make additional findings of fact following MAB's aforementioned testimony which addressed her immigration records at length. Had the military judge made any additional findings of fact specifically

regarding MAB's testimony, then there may be some support for the government's argument, but he did not. The military judge's failure to make additional findings of fact when ruling on the requests for reconsideration was clearly erroneous. *See* R.C.M. 905(c)(2)(B).

3. The government concedes that MAB's immigration records were unavailable.

The government concedes that MAB's records were unavailable under R.C.M. 703(f)(2) because they were not subject to compulsory process upon the USCIS's refusal to comply with the subpoena and its defiance of the military judge's order. (Appellee Br. at 15-16). After making this concession, the government insists that appellant was not entitled to the records because they were "not 'within the possession, custody, or control of military authorities' and which the government had no legal means to provide." (Appellee Br. at 16) (quoting R.C.M. 701(a)(2)(A). Contrary to the government's assertion, the production of evidence is not limited to that which is not within the possession, custody, and control of military authorities. R.C.M. 703(f)(4)(A), governs the procedures for the production of evidence "under the control of the Government" and R.C.M. 703(f)(4)(B), governs the procedures for evidence "not under the control of the Government." Here, MAB's immigration records were not within the possession, custody, and control of military authorities, but they were evidence "under the control of the Government," that is, under the control of the DHS and its

subordinate agencies, including the USCIS. Appellant was entitled to the production of MAB's immigration records which were relevant and necessary to his defense, as the government concedes here and which it conceded at trial. Because the USCIS defied the subpoena and the military judge's order, the records were unavailable.

4. The government agrees with appellant that R.C.M. 703(f)(2) is the correct framework for analyzing the issue.

The government agrees with appellant and the CCA that R.C.M. 703(f)(2) is the correct framework for analyzing the issue because MAB's records were unavailable. (Appellee Br. at 17). Nonetheless, the government insists that the military judge did not abuse his discretion even though the military judge incorrectly applied R.C.M. 701 instead of R.C.M. 703(f)(2). Given that the government concedes that R.C.M. 703(f)(2) governs the analysis and the military judge did not apply the correct framework, it follows that the military judge abused his discretion because of an erroneous application of the law.

5. The government's arguments are mutually exclusive.

The government's analysis of the issue is even more bewildering than the CCA's. While the government agrees with appellant that R.C.M. 703(f)(2) and *United States v. Simmermacher*, 74 M.J. 196 (C.A.A.F. 2015), are the authorities for this issue (Appellee Br. at 11, 15-17), the government also argues that the "even if the evidence did exist, the military judge did not commit clear error in

declining to analyze the evidence under R.C.M. 703(f)(2) because the evidence was not of central importance to appellant's defense and an adequate substitute to the evidence was available through more permissive cross-examination of the victim and admission of the court order to USCIS." (Appellee Br. at 11). In other words, the government's argument is that the military judge correctly declined to apply R.C.M. 703(f)(2) and that he also is to be "commend[ed]" and "praise[d]" for "adhering to the procedures of R.C.M. 703(f)(2). . . ." Either the military judge applied R.C.M. 703(f)(2) or he did not. He clearly did not.

Additionally, the government misunderstands the analysis itself. Contrary to the government's argument, an analysis of the central importance of the evidence is not the threshold question; to the contrary, a determination that the evidence is unavailable is the threshold question. *See* R.C.M. 703(f)(2), *Simmermacher*, 74 M.J. at 201-202.

6. MAB's immigration records were of central importance to the issue of her motive to fabricate the allegations, such that the records were essential to a fair trial.

The government maintains that MAB's immigration records were not of central importance "because Appellant's guilt or innocence did not turn on MAB's immigration status. In fact, the records were not evidence of Appellant's crimes at

all, much less the 'sole evidence' as was the case in *Manuel*[3] and *Simmermacher*." (Appellee Br. at 19).

The government's argument is flawed for three reasons. First, R.C.M. 703(f)(2) requires relief – in the form of a continuance or other relief to attempt to produce the evidence or an abatement of the proceedings – when the unavailable evidence "is of such central importance to an *issue* that it is essential to a fair trial." *See Simmermacher*, 74 M.J. at 201-202) (emphasis added). Thus, neither R.C.M. 703(f)(2) nor *Simmermacher* require the evidence to prove appellant's guilt or innocence. As discussed in the Opening Brief, MAB's immigration records were central to an issue – MAB's motive to fabricate the allegations against appellant – that this evidence was essential to a fair trial. (Opening Br. at 39-42). Next, the government contends that the records could have corroborated, rather than undermined, the rape allegation or that they could have been irrelevant to the defense theory that MAB fabricated the allegations to secure continued immigration benefits. (Appellee Br. at 19). The government's speculation mirrors the military judge's speculation that the records could have been used by the government as a prior consistent statement. (JA 310). As discussed in the Opening Brief, the same piece of evidence can be material to both sides but that does not negate the materiality of the evidence. (Opening Br. at 40). Moreover,

[3] *United States v. Manuel*, 43 U.S. 282 (C.A.A.F. 1995).

the defense conceded the relevance and necessity of MAB's records, so much so that the government issued a subpoena for them and the military judge ordered their production.

Second, the government asserts that MAB's immigration records must constitute the sole evidence of appellant's crimes for a determination of the central importance of the unavailable evidence. (Appellee Br. at 19). This assertion misunderstands *Manuel* and *Simmermacher,* neither of which require the unavailable evidence to be the sole evidence of the charged offense. *See Manuel*, 43 U.S. at 288; *Simmermacher*, 74 M.J. at 201.

Finally, while the CCA insists that the military judge concluded that MAB's records were not of central importance to a fair trial, the military judge did not make such a determination because the military judge did not conduct an R.C.M. 703(f)(2) analysis. (JA 5).

7. There was no adequate substitute for the unavailable records.

Appellant relies on the facts, law, and argument in the Opening Brief regarding the lack of a substitute, adequate or not, for MAB's immigration records.

8. The government does not address the military judge's improper variance from the prescribed remedy.

Because appellant satisfied the requirements of R.C.M. 703(f)(2), the military judge had two options in order to attempt to compel MAB to consent to the release of her records: (1) grant a continuance or other relief in order to attempt

to produce the evidence or (2) abate the proceedings. The government fails to address the military judge's improper variance from these two options and *Simmermacher*'s direction that "military judges do not have discretion to vary from the prescribed remedy."[4] (Appellee Br. at 22-23). Accordingly, appellant relies on the facts, law, and argument in the Opening Brief regarding the military judge's error.

9. The military judge's ruling deserves no praise, commendation, or endorsement.

In citing *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010), for the proposition that a challenge to a military judge's ruling "must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous," the government acknowledges that a clearly erroneous application of the law constitutes an abuse of discretion. (Appellee Br. at 22). Here, the military judge's application of R.C.M. 701 instead of R.C.M. 703(f)(2) was clearly erroneous.

Although the military judge did not apply R.C.M. 703(f)(2) to the issue, the CCA found that he did. (JA 5-6). The government notes that "the ACCA specifically singled [the military judge] out for praise" and cites to this statement by the CCA:

> We write today to *commend the trial judge* for adhering to the procedures of R.C.M. 703(f)2) and *endorse his approach* to this difficult scenario.

[4] 74 M.J. at 201.

(Appellee Br. at 22) (citing *Warda*, 2022 CCA LEXIS 438 at *7) (emphasis added by Appellee).

The CCA's commendation is inexplicable. As discussed in the Opening Brief, the military judge failed to conduct an R.C.M. 703(f)(2) analysis. (Opening Br. at 35). In its discussion of the military judge's ruling, the government does not address, discuss, or cite to any R.C.M. 703(f)(2) analysis because the military judge did not conduct one. (Appellee Br. at 9). This Court cannot affirm the military judge's decision because he made clearly erroneous findings of fact and his decision was influenced by an erroneous view of the law, nor should this Court praise, commend, or endorse the military judge's abuse of discretion.

PRAYER FOR RELIEF

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

William E. Cassara
WILLIAM E. CASSARA, Esq.
Appellate Defense Counsel
PO Box 2688
Evans, GA 30809
706-860-5769
bill@courtmartial.com
USCAAF Bar No. 26503

TUMENTUGS D. ARMSTRONG
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 693-0692
tumentugs.d.armstrong.mil@army.mil
USCAAF Bar No. 37591

CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing was sent via electronic mail to the Court and served on the Government Appellate Division, the Army Court of Criminal Appeals, and the Defense Appellate Division on January 6, 2023.

CERTIFICATE OF COMPLIANCE WITH RULE 21(B)

1. This brief complies with the type-volume limitation of Rule 24(c) because it contains 4,065 words.

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

William E. Cassara

WILLIAM E. CASSARA, Esq.
Appellate Defense Counsel
PO Box 2688
Evans, GA 30809
706-860-5769
bill@courtmartial.com

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Warda, Crim App. Dkt. No. 20200644, USCA Dkt. No. 22-0282/AR was electronically filed with the Court and Government Appellate Division on January 6, 2023.

MICHELLE L.W. SURRATT
Paralegal Specialist
Defense Appellate Division
(703) 693-0737