IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	BRIEF ON BEHALF OF APPELLEE
v.	)	
Sergeant (E-5) **ASHRAF S. WARDA,** United States Army, Appellant	)	Crim. App. Dkt. ARMY 20200644 USCA Dkt. No. 22-0282/AR

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

Issues Presented[1]

I. WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN DENYING THE MOTION TO DISMISS OR ABATE THE PROCEEDINGS WHERE THE UNAVAILABLE EVIDENCE WAS OF SUCH CENTRAL IMPORTANCE THAT IT WAS ESSENTIAL TO A FAIR TRIAL, THERE WAS NO ADEQUATE SUBSTITUTE FOR THE UNAVAILABLE EVIDENCE, THE UNAVAILABLE EVIDENCE WAS NOT APPELLANT'S FAULT, AND THE MILITARY JUDGE VARIED FROM THE PRESCRIBED REMEDY UNDER R.C.M. 703(f)(2).

II. WHETHER APPELLANT WAS DEPRIVED OF HIS RIGHT TO A UNANIMOUS VERDICT AS GUARANTEED BY THE SIXTH AMENDMENT, THE FIFTH AMENDMENT'S DUE PROCESS CLAUSE, AND THE FIFTH AMENDMENT'S RIGHT TO EQUAL PROTECTION.

[1] This court ordered briefing on Issue I only. (JA 1).

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (ACCA) reviewed this case pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 [UCMJ]. The statutory basis for this Court's jurisdiction rests upon Article 67(a)(3), UCMJ.

Statement of the Case

On October 2, 2020, an enlisted panel sitting as a general court-martial convicted Appellant, contrary to his pleas, of one specification of rape (by exception and substitution), in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920 (2016). (JA 7).[2] The panel sentenced Appellant to reduction to the grade of E-1, forfeiture of all pay and allowances, confinement for seven years, and a dishonorable discharge. (JA 7). On May 25, 2021, the convening authority approved the adjudged sentence and credited Appellant with one day of confinement. (JA 12, 20).

On appeal, the ACCA addressed the Issue Presented and affirmed the findings and sentence. *United States v. Warda*, ARMY 20200644, 2022 CCA LEXIS 438 (Army Ct. Crim. App. July 21, 2022) (sum. disp.) (unpub. op.) (JA 3–6).

[2] The panel acquitted Appellant of one specification of sexual assault, in violation of Article 120, UCMJ, and one specification of communicating a threat, in violation of Article 134, UCMJ. (JA 8–9).

Statement of Facts

A. MAB and Appellant were married in Jordan in 2015.

MAB and Appellant first met on social media in 2012. (JA 34). At the time, Appellant lived in the United States and MAB lived in Jordan. (JA 33–34). Appellant and MAB conversed daily through different online platforms, ordinarily video calls, until they met in Jordan in December 2015. (JA 34–35). MAB and Appellant—who moved to the United States from Egypt when he was twenty-six years old—conversed in Arabic. (JA 35).

In December 2015, Appellant traveled to Jordan and married MAB under Islamic law. (JA 37, JA 92). Appellant stayed in Jordan with MAB for several weeks before he returned to the United States alone. (JA 36). In May 2017, MAB came to the United States to visit Appellant's family. (JA 38). On July 17, 2017, Appellant and MAB held a wedding party in Jordan before returning together to the United States to live in appellant's townhome in Calcium, New York. (JA 37–39, 282).

B. Appellant raped MAB.

On August 10, 2017, Appellant and MAB began to have consensual sex on the couch in the living room of their home. (JA 41–42, 72). The sex was "very painful," and MAB told Appellant to stop. (JA 42). Appellant told her "not to say any words" and continued to penetrate her vagina from behind, "push[ing] strongly." (JA 43). MAB could not get Appellant off her because "he [was] so

heavy, he's very strong and has muscles. I [could not] move him." (JA 43).

Appellant called 911 after MAB began to lose consciousness during the rape. (Pros. Ex. 1). The next thing MAB remembers is waking up in an ambulance. (JA 44, 73).

C. Appellant submitted a supplemental discovery request for MAB's immigration records.

The convening authority referred the charges on November 7, 2018. (JA 23). On May 17, 2019, Appellant submitted a supplemental discovery request to the government for documentation of MAB's immigration status in the United States. (JA 352). On June 10, 2019, Appellant moved the court to compel discovery and production of these records, specifically requesting:

> Documentation of [MAB]'s immigration status in the United States, including any requests, petitions, affidavits, applications, or other paperwork pending or submitted by her, or on her behalf by a third party, to the U.S. Customs and Immigration Service (USCIS), National Visa Center (NVC), Consular Electronic Application Center (CEAC), U.S. State Department, or other government entity, for a visa (non-immigrant or immigrant), permanent resident card (Green card), or other class of authorization to enter or remain in the United States[.]

(JA 353).

On June 12, 2019, the government subpoenaed the Department of Homeland Security for any material responsive to Appellant's request. (JA 411–14).

D. US Customs and Immigration Service [USCIS] did not produce the records.

On August 16, 2019, USCIS formally responded that it was precluded by law from complying with the subpoena. (JA 395–97). In its response, USCIS declined "to provide any documentation in response to this request, or confirm the existence or non-existence of any records relating to this individual." (JA 395). On August 28, 2019, the government asked USCIS whether it would release the records if the military judge were to issue a non-disclosure order to Appellant's defense attorney. (JA 398–99). The same day, USCIS again responded that even with the proposed non-disclosure order, it would still be unable to comply with the subpoena. (JA 398). The response cited the agency's concern that "if these records can be utilized by defense counsel in the subject's court-martial then there is a substantial likelihood that any applicable confidentiality provisions meant to safeguard the integrity of these records and ensure protection of the records[']subject could be breached." (JA 398).

On September 13, 2019, the government and defense counsel agreed that all outstanding discovery requests had been satisfied. (JA 423). The parties did not discuss immigration documents again until February 2020, when the government confirmed that it was no longer seeking any immigration records pertaining to the victim. (JA 400–01). The government emphasized its reliance on defense counsel's September 2019 confirmation that all outstanding discovery requests

were satisfied, and it noted that Appellant had neither mentioned nor filed a motion to compel the records in the intervening six months. (JA 400).

E. Appellant filed a second supplemental discovery request and moved to dismiss the charges and abate the proceedings.

On April 27, 2020, Appellant filed a second supplemental discovery request for MAB's immigration records. (JA 389–90). Appellant noted that 8 U.S.C. § 1367 provided a basis for disclosure if MAB, as the applicant, waived the requirements to prevent disclosure. (JA 389). On May 13, 2020, the government notified Appellant that MAB was unwilling to waive the requirements to prevent the disclosure of any records. (JA 394).

On June 2, 2020, Appellant moved to dismiss the charges or abate the proceedings. (JA 362–74). In the alternative, Appellant asked the court to prohibit the government from calling MAB as a witness or from offering any hearsay statements under Mil. R. Evid. 801. (JA 374). The government responded on June 5, 2020, arguing that neither dismissal nor abatement were appropriate remedies. (JA 403–09). Rather, the government suggested that a proper remedy might be for the court to order USCIS to provide MAB's records to the military judge for in camera review. (JA 408–09).

F. The court ordered USCIS to produce any responsive records.

Upon receiving the government's response, Appellant agreed to pursue the government's proposed course of action and drafted a court order in consultation

with trial counsel. (JA 443–44). On June 19, 2020, the military judge signed the order and the government served the order upon USCIS soon after. (JA 444).

On June 25, 2020, USCIS responded directly to the military judge, noting that USCIS could not comply with the court order. (JA 448–50). Specifically, the agency maintained its unwillingness to confirm or deny the existence of any responsive records, as well as the statutory prohibition for the release of "information relating to those who have sought immigration benefits based on [. . .] battery or extreme cruelty by a U.S. citizen or lawful permanent resident spouse." (JA 449).

G. The parties litigated Appellant's motion to dismiss the charges or abate the proceedings.

On July 16, 2020, the parties litigated Appellant's motion to dismiss or abate the proceedings. (JA 192–251). Following argument from both sides, the military judge asked both parties to provide a memorandum of law on the issue of privilege, and specifically, whether MAB held a privilege with respect to the records in question. (JA 242).

Immediately prior to adjournment, MAB's special victim's counsel (SVC), who was present for the motions hearing via telephone, clarified to the court the SVC's understanding that USCIS did not regard MAB as holding a privilege with respect to her immigration records. (JA 244). He asserted that MAB did not have the records and did not even know if the records existed. (JA 245). The SVC

further explained that USCIS's guidance led him to believe that "there was no waiver process":

> [T]he process for her to waive this privilege that we keep speaking about, they did not indicate that was a possibility, they simply said she could seek request for the records. Of course nobody had any idea as to what would actually be released through that process, what time those records would be released. Even if [MAB] did want to declare that she waives this privilege, that the defense is claiming—or I guess the government is claiming she may have, it doesn't appear that the records holder believes that this is [a] situation where there is privilege, they simply just [do not] want to give the records because they view [the] law as not allowing them to do so.
>
> [. . .] I think this is part of the record that the government has filed, what is the process for waiver, they [USCIS] simply pointed us in the direction not that we need her written waiver of privilege so that we can comply with the court order.
>
> So, in effect, if the Court would want to compel [MAB] to act, her compliance would literally be a FOIA request to the office that has the records. [. . .] I'm just trying to make sure that it's not the case that the Court believes that my client is able to produce these records, because I don't think that's necessarily clear."

(JA 245–46).

The military judge then explained to the parties that he expected clarification on the distinction between a waiver and a FOIA request in this context. (JA 251). Nevertheless, he observed that:

> [I]t would seem that the analysis is the same in that the complaining witness, whether it's a written waiver to

> disclose the information, or she actually files a FOIA request, the witness is refusing to do so. I think the analysis is similar, if not the same, discussing the issue of whether or not there is in fact a privilege, and what discretion the Court has to craft—to allow defense adequate cross-examination, potential adverse inference, and if there is no privilege as defense maintains what—addressing the issue of whether allowing defense wide latitude to cross-examine the witness on her refusal to submit a FOIA request why that is not sufficient.

(JA 251).

H. The military judge denied Appellant's motion to dismiss but allowed the defense great latitude in cross-examination of MAB.

Following submission of memoranda of law from the parties on July 21, 2020, (JA 453–63; JA 464–68), the military judge issued his findings and conclusions on September 26, 2020. (JA 469–71). Denying Appellant's motion to dismiss, the military judge found that Appellant had "not established by a preponderance of the evidence that the requested records exist. The USCIS did not confirm that there are any responsive records. But even if the records exist, they are not in the control of military authorities." (JA 471).

On September 29, 2020, prior to panel selection, Appellant requested that the court reconsider its ruling to deny Appellant's motion to dismiss or abate the proceedings. (JA 252). After hearing argument from both parties, the military judge once again denied Appellant's motion, but noted that the court would "grant defense counsel substantial leeway on cross-examination of [MAB]." (JA 262).

I. Appellant introduced the production order into evidence.

During Appellant's cross examination of MAB, Appellant asked her whether she was aware that the military judge issued an order for her immigration records. (JA 112). She said she was aware of the order, but she was not aware that the order specifically said her personal information would be protected from disclosure to Appellant. (JA 112). MAB was under the impression that Appellant would "get a copy forever and know everything about me, where I live, where I work, everything." (JA 114). Appellant then sought to admit the court's order into evidence as Def. Ex. Q, and the government objected for lack of foundation, irrelevance, and hearsay. (JA 114). The judge did not admit the exhibit at that time but allowed Appellant to show it to the witness and read verbatim from the exhibit while continuing cross-examination. (JA 115).

MAB ultimately testified during cross-examination that while she would have been okay with the government and the military judge reviewing her records, it was her understanding that her protected information would be disclosed to Appellant personally if she did not refuse to release her records. (JA 118–22).

After the defense rested and the government offered no rebuttal evidence, the court recessed for the day on September 30, 2020. Following an R.C.M. 802 session that evening and another the next morning, the parties agreed on the record to introduce the court's June 19, 2020 production order into evidence. (JA 300).

Summary of Argument

The military judge did not abuse his discretion in declining to dismiss or abate the proceedings because he correctly found that Appellant failed to establish that the evidence at issue existed. Moreover, 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.

Standard of Review

A military judge's decision not to abate the proceedings is reviewed for abuse of discretion. *United States v. Simmermacher*, 74 M.J. 196, 199 (C.A.A.F. 2015) (citing *United States v. Ivey*, 55 M.J. 251, 256 (C.A.A.F. 2001)). An abuse of discretion occurs when a court's findings are clearly erroneous or the decision is influenced by an erroneous view of the law. *Id*. (citing *United States v. Lubich*, 72 M.J. 170, 173 (C.A.A.F. 2013).

Law & Analysis

A. Appellant failed to establish by a preponderance of the evidence that the records in question existed.

In support of his motion to dismiss, and specifically in support of a factual finding that MAB's immigration records were "within the possession, custody, or

control of military authorities," (R.C.M. 701(a)(2)(A)), Appellant offered as evidence: Appellant's testimony that MAB came to the United States as a result of their marriage and that he never filed a joint petition to remove conditions on her green card, (JA 192); excerpts from 8 C.F.R. § 216,[3] (JA 425–26); email correspondence from July 8, 2020 in which MAB's SVC notified the government that his client declined to participate in the production of immigration records, (JA 440–41); email correspondence from July 10, 2020 between government and defense counsel discussing MAB's declination to participate, (JA 442); and a government witness list from May 21, 2019 reflecting MAB's residence as Staten Island, New York, (App. Ex. LI). (JA 195). Appellant urged the court that these facts led inexorably to a conclusion that "she's either an over-stay and doesn't have a valid legal status in the country or she applied for some sort of adjustment." (JA 258).[4]

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[3] Title 8, section 216.1 of the Code of Federal Regulations defines a conditional permanent resident as an alien who has been lawfully admitted for permanent residence but remains subject to additional conditions; section 216.4 provides the procedures for an alien and the alien's spouse to jointly petition to remove the conditional basis of the alien spouse's lawful permanent residency; and section 216.5 addresses waiver of the requirement to file joint petition to remove conditions by an alien spouse. Appellant requested judicial notice of the regulation. (JA 194).

[4] The ACCA apparently viewed "the records sought" at issue as "records of a claim of abuse." *Warda*, 2022 CCA LEXIS 438 at *7. Appellant emphasizes that "the defense request was not limited to any records involving claims of abuse[.]" (Appellant's Br. 37). The distinction is nevertheless irrelevant to the analysis, however, because Appellant failed to establish by a preponderance of the evidence

Under R.C.M. 905(c), "the burden of proof on any factual issue the resolution of which is necessary to decide a motion shall be by a preponderance of the evidence." Here, by pointing out that MAB immigrated to the United States in 2017 under a two-year visa, and given that MAB alleged that Appellant committed violence against her, Appellant raised—at best—a reasonable inference that MAB applied for a waiver of the requirement to file the joint petition prescribed by 8 C.F.R. § 216.5 to account for her continued presence in the country. The ACCA agreed: "While it is reasonable to infer their existence, the preponderance of evidence does not support this." *Warda*, 2022 CCA LEXIS 438 at *7.

Appellant argues here that MAB's reference to her "file" and her "information" during cross-examination "amounted to confirmation that the records existed." (Appellant's Br. 38). However, Appellant's construction of MAB's testimony as a concession of the existence of responsive records to Appellant's discovery request is unsupported by the context of the examination. MAB's responses to Appellant's leading questions—in the face of a considerable language barrier—reflected her primary concern that Appellant was not granted access to her information; specifically, her home address. (JA 121). Interpreting this specific concern as a concession of the existence of immigration records

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that *any* records existed. The distinction is similarly irrelevant with respect to the records' availability, their importance, or the adequate substitute provided by the military judge.

misreads the exchange. Moreover, MAB's SVC asserted on the record that his client "[did not] even know if the records existed." (JA 245). Finally, it is far from obvious that MAB was even in a position to verify the existence of her immigration records. 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. In other words, her opinion and belief as to the *likely* existence of the records has very little bearing on the records *actual* existence.

The military judge's determination that Appellant had failed to meet his burden was predictably unchanged following MAB's testimony. Denying Appellant's request for an adverse inference instruction before the panel's deliberation, the military judge reiterated his view that

> "the defense did not establish by preponderance of the evidence that the requested records exist. USCIS did not confirm there were any responsive records and they are not in control of the military authorities and that the government did in fact go to considerable efforts to attempt to attain these records for defense that are not in its control."

(JA 310).

Accordingly, Appellant failed to establish by a preponderance of the evidence that MAB's immigration records existed. The military judge's finding was not clearly erroneous.

B. Even if the victim's immigration records did exist, they were unavailable.

Rule for Court-Martial 701(a)(2)(A) provides, in relevant part, that upon

request of the defense, the government shall permit the defense to inspect documents which are within the possession, custody, or control of military authorities, and which are material to the preparation of the defense. Under R.C.M. 703(f)(1), "[e]ach party is entitled to the production of evidence which is relevant and necessary." However,

> [n]otwithstanding subsection (f)(1) of this rule, a party is not entitled to the production of evidence which is destroyed, lost, or otherwise not subject to compulsory process. However, if such evidence is of such central importance to an issue that it is essential to a fair trial, and if there is no adequate substitute for such evidence, the military judge shall grant a continuance or other relief in order to attempt to produce the evidence or shall abate the proceedings, unless the unavailability of the evidence is the fault of or could have been prevented by the requesting party.

R.C.M. 703(f)(2).

Appellant observes that the military judge did not analyze the unavailability of the records under R.C.M. 703(f)(2) in his written findings and conclusions. (Appellant's Br. 35). Nevertheless, the military judge's factual findings demonstrate that Appellant was not entitled to relief under the rule.

Here, even assuming arguendo that the records existed, and further granting that they would be relevant to Appellant's defense, [5] the records would have been

[5] "Here, the government dutifully conceded at the outset that [MAB]'s immigration records were relevant and necessary[.]" *Warda*, 2022 CCA LEXIS 438 at *6. *But see United States V. Rodriguez*, 60 M.J. 239 (C.A.A.F. 2004). In

unavailable within the meaning of R.C.M. 703(f)(2) because they were "not subject to compulsory process." Neither the June 12, 2019 subpoena nor the June 19, 2020 court order resulted in production of the records. Appellant concedes and indeed premises his application of the R.C.M. 703(f)(2) analysis on the fact that the records were not subject to compulsory process. (Appellant's Br. 36, 39).

However, Appellant overstates his case when he argues that the "records were unavailable because they were not subject to compulsory process *and MAB refused to request them through the FOIA*." (Appellant's Br. 39) (emphasis added). While an apparent recourse to produce the records would have been for the victim to request the records through FOIA, this course of action was beyond the power of the government or the court to compel, and which at any rate was not guaranteed to result in USCIS's release of the records.

Accordingly, Appellant was not entitled to the production of records which were not "within the possession, custody, or control of military authorities" and which the government had no legal means to provide. R.C.M. 701(a)(2)(A).

C. The military judge did not abuse his discretion when he declined to dismiss the charges or abate the proceedings.

The military judge's decision not to dismiss the charges or abate the

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Rodriguez, the appellant failed to establish the existence of the evidence he was seeking. "*Consequently*, he did not show that they were relevant and necessary and should have been produced through compulsory process." *Id*. at 246 (emphasis added).

proceedings did not constitute clear error and was not influenced by an erroneous view of the law. *Simmermacher*, 74 M.J. at 199. In *Simmermacher*, this Court reviewed R.C.M. 703(f)(2) and held that a military judge abused his discretion when he failed to abate proceedings related to a charge of wrongful use of cocaine after the appellant's urine sample was destroyed. 74 M.J. at 202. This Court held that "R.C.M. 703(f)(2) is an additional protection the President granted to servicemembers whose lost or destroyed evidence fall within the rule's criteria" and goes beyond constitutional due process standards, which require a showing of bad faith on the part of the government. *Id*. at 201. The Court determined the evidence in that case was of such central importance to the defense that it was essential to a fair trial, that the government had been negligent in destroying the evidence, and that the destroyed urine sample was the sole evidence of the accused's crime. *Id*.

Therefore, when seeking abatement because relevant, material evidence was destroyed or lost, the defense must show that: (1) the evidence is of such central importance to an issue that it is essential to a fair trial; (2) there is no adequate substitute for the evidence; and (3) the defense was not at fault for the evidence being destroyed. *Id*. at 201–03; R.C.M. 703(f)(2).

1. Even if the victim's immigration records existed, they were not of central importance to Appellant's defense and were not essential to a fair trial.

Appellant argues that the victim's immigration records—assuming they existed—were of such central importance to the issue of MAB's motive to fabricate that they were essential to a fair trial, and that the judge's allowance for "strenuous cross-examination" and admittance of the court's order to USCIS were inadequate substitutes for the records.[6]

In *United States v. Manuel*, 43 M.J. 282 (C.A.A.F. 1995), this Court upheld a lower court decision excluding the results of a positive urinalysis after the sample tested had been lost or destroyed. *Id*. at 289. Citing R.C.M. 703(f)(2), the Court concluded that since "the urinalysis result was the *only evidence* of the accused's wrongful use of cocaine, the urine sample was of central importance to the defense." *Id*. at 288 (emphasis added). In *Simmermacher*, this Court found "no meaningful distinction between the situation in *Manuel* and [Simmermacher's] situation." *Simmermacher*, 74 M.J. at 201. Reasoning that "[i]n both cases … the samples were the sole evidence of drug use," the Court held that the appellant's urine sample was of such central importance that it was essential to a fair trial. *Id*.

Appellant's case is easily distinguished from both *Manuel* and

[6] With respect to the third prong, the parties agree that Appellant was not at fault for the evidence's unavailability. Notably, the third prong discussed by *Simmermacher* specifically addresses the matter of *destroyed* evidence.

Simmermacher. Even if MAB's immigration records existed, they were not of central importance to Appellant's defense 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* and *Simmermacher*.

In addition, the existence of the records, or the terms of MAB's immigration status they may have reflected, were not even of central importance to Appellant's theory that MAB had a motive to fabricate. First, if MAB's immigration records did not exist, this fact would not have supported Appellant's theory that MAB had a motive to fabricate the rape at the time of her outcry in October 2017 in order to apply for immigration relief as a victim of abuse. Further, if the records did exist and they reflected that MAB had applied for a waiver under 8 C.F.R. § 216.5, this information would have corroborated rather than undermined the rape allegation. Finally, if the records existed and revealed some *other* authority under which MAB legally remained in the country—such as a student or work visa, or even on account of extreme hardship upon her removal—such information would not have supported Appellant's motive to fabricate theory or have any bearing on the credibility of MAB's allegation.[7]

[7] Appellant's *ipse dixit* assertion that MAB "did not have a viable path to staying in the United States without appellant's participation in the petition to remove the conditions on her green card" finds no support either in the record or in common

In denying Appellant's motion for an adverse inference instruction on the issue of MAB's decision not to assist the government in obtaining her immigration records, the military judge correctly noted that "[w]e don't even know if [MAB's immigration records] actually exist and if they do exist that they are even favorable in any way shape or form to the accused. In fact an argument can be made that they are not helpful to the accused just as easily." (JA 310).

The ACCA agreed: "[The military judge] noted that even if the records existed and were produced they were arguably just as helpful to the government, as they would potentially serve as a prior consistent statement once the defense attempted to impeach MB." *Warda*, 2022 CCA LEXIS 438 at *8–9.

For these reasons, MAB's immigration records were neither of central importance to Appellant's defense nor were they essential to a fair trial.

2. The latitude provided to Appellant for cross-examination of the victim on her immigration status, combined with the admission into evidence of the court order, was an adequate substitute for the unavailable records.

As the military judge observed, "strenuous cross-examination" of MAB's immigration status, "to include the fact there was a court order that indicated

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sense. (Appellant's Br. 41). The trial counsel alluded to other possibilities during the argument on the adverse instruction: "There are so many different visas and green card types you can get whether it be employment, or school, as [MAB] said she's in college here as well, so we don't know what visa she has, Your Honor." (JA 306).

[protected information] would be redacted," as well as admission of the court's order, were adequate substitutes to the immigration records for purposes of establishing that MAB had a motive to fabricate sexual assault allegations. (JA 261). Even without MAB's immigration records, Appellant was able to establish his theory of MAB's motive to fabricate. Insofar as the law provided MAB a means to remove conditions on her green card by claiming that she was the victim of Appellant's abuse, Appellant was free to explore this theory even without documentation that she had actually availed herself of those means.

In closing argument, Appellant repeatedly argued that his oral divorce decree on September 23, 2017 created a motive for MAB to fabricate the rape allegation in order that she might have grounds to request waiver of the requirement to file a joint petition to remove conditions by an alien spouse under 8 C.F.R. § 216.5. (JA 323, 334, 335–37, 344). Appellant also argued that MAB "refused to allow [her immigration records] to be disclosed" and that her excuse for doing so was "bogus because you also know that there is a court order." (JA 335). Appellant urged the panel that the only inference to be drawn from MAB's refusal to release the records was "that the records would have been helpful to [Appellant], the records would have shown you that she's lying, the records would have shown you that she used these allegations to try and get status here. And you can't exclude it because the government can't deny it, can't present you the records

to say it didn't happen." (JA 337). Notwithstanding the apparent futility of these arguments, Appellant was nevertheless afforded the opportunity to advance them in support of his theory.

In sum, the military judge's provision of "substantial leeway" on cross-examination, combined with admission of the court's order to USCIS, was an adequate substitute for evidence Appellant never even established existed. (JA 262).

D. Conclusion

"The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010). Here, the military judge did not abuse his discretion in declining to dismiss or abate the proceedings on account of the unavailability of records whose existence Appellant failed to establish by anything more than speculation. Moreover, even if the records did exist, they would not have been of central importance to Appellant's defense because he was still able to advance the defense the records might have supported. The military judge was well within his discretion when he crafted an appropriate substitute for what MAB's immigration records *might* have shown in the form of greater latitude on cross-examination and admission of the court's production order of the records.

The military judge's decision here was not arbitrary, fanciful, clearly unreasonable, or clearly erroneous. Indeed, the ACCA specifically singled him out for praise:

> "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."

Warda, 2022 CCA LEXIS 438 at *7 (emphasis added).

This court should therefore affirm the findings and sentence.

Conclusion

The United States respectfully requests that this Honorable Court AFFIRM the judgment of the Army Court.

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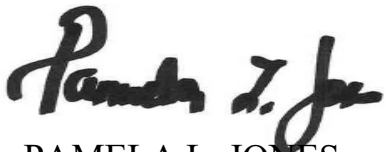

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c)(1) because this brief contains **5,235** words.

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

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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on December 30, 2022.

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