IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellee	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:

ISSUE PRESENTED

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN NOT ALLOWING THE DEFENSE TO INQUIRE INTO RACIAL BIAS DURING VOIR DIRE.

STATEMENT OF STATUTORY JURISDICTION

The Army Court of Criminal Appeals [CCA] had jurisdiction over this matter pursuant to Article 66(d), Uniform Code of Military Justice [UCMJ]; 10 U.S.C. § 866(d) (2019). This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2019).

STATEMENT OF THE CASE

On June 22-23 and 25-26, 2021, Major [MAJ] Anthony R. Ramirez [appellant] was tried at Fort Bragg, North Carolina, before a general court-martial

composed of officer members. Contrary to his pleas, the panel convicted appellant of abusive sexual contact, assault consummated by a battery (two specifications), and conduct unbecoming a gentleman in violation of Articles 120, 128, and 133, UCMJ, 10 U.S.C. §§ 920, 928, and 933 (2019).[1]

The military judge sentenced appellant to confinement for five months, with the individual terms of confinement to be served concurrently,[2] and to be dismissed from the service. (JA 19). The convening authority took no action on the findings or sentence, and approved appellant's request for deferment and waiver of automatic forfeitures for five months. (JA 15).

Appellant assigned four errors to the CCA. The CCA addressed three of the assigned errors and affirmed the findings and sentence. *United States v. Ramirez*, ARMY 20210376, 2022 CCA LEXIS 667 (A. Ct. Crim. App. November 16, 2022) (mem. op.) (JA 2-13). This Court granted review of appellant's petition on Issue II only. (JA 1).

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[1] The panel acquitted appellant of abusive sexual contact (two specifications) and attempted sexual assault. (JA 16-18).

[2] The military judge sentenced appellant to five months of confinement for Charge I, Specification 2 (abusive sexual contact). The military judge sentenced appellant to four months of confinement for Charge III, Specification 1 (assault consummated by a battery) and three months of confinement for Charge III, Specification 2 (assault consummated by a battery). He was sentenced to no confinement for The Specification of Charge IV (conduct unbecoming an officer and a gentleman). (JA 16-19).

STATEMENT OF FACTS

Appellant was charged with, *inter alia*, attempted sexual assault and abusive sexual contact of the wife ["Wife"] of one of his subordinates ("First Lieutenant") (JA 20-22; 303-305). Both government witnesses on the merits, Wife and First Lieutenant, were of Caucasian descent/appearance, while appellant was Hispanic.[3] (JA 25; 317-318).

On June 18, 2021, the defense submitted its proposed voir dire questions to the military judge. (JA 312-316). In its proposed question 16, the defense requested to ask the panel "[d]oes anyone's cultural background influence your perception on relationships between individuals of different races?" (JA 313). The military judge denied this proposed question in a written ruling. (JA 310). He ruled that the defense could not ask proposed question 16 because it was "too confusing, a trick question, or unhelpful to ferreting out sincerity and ability to sit as member." (JA 310). The ruling did not specify which of the three stated reasons applied to the question and did not provide further explanation. He gave the parties a deadline of 1700 on June 21, 2021, to identify any questions on which either party requested reconsideration (JA 27).

[3] Appellant filed a Motion to Attach Defense Appellate Exhibit A contemporaneously with its opening brief to the CCA. The CCA denied the motion, but granted it upon a motion for reconsideration. (JA 319-322).

At a June 21, 2021, Article 39(a), UCMJ, session, the military judge noted that he had not received a request for reconsideration of his ruling from either side. He stated that he was happy to hear any motions for reconsideration "on the fly." (JA 27). Appellant's civilian defense counsel [CDC] did not request reconsideration. (JA 27-29). None of the other questions proposed by the government or the defense related to bias related to interracial relationships. (JA 307-316).

The military judge did not address the issue of interracial relationships and did not perform an inquiry on this question during group or individual voir dire. (JA 30-302). The military judge issued *pro forma* warnings concerning impartiality, informing the members that "if you know of any matter that you feel might affect your impartiality to sit as a court member, you must disclose that matter when asked to do so," "[a]ny matter that might affect your impartiality is a ground for challenge," (JA 34, 177), and "you must impartially hear the evidence, the instructions on the law." (JA 35, 179). These instructions are part of the basic script for every court-martial. Dept. of the Army Pam. 27-9, Military Judges Benchbook (February 29, 2020) [Benchbook], para. 2–5. The military judge also asked, "having seen the accused and having read the charges and their specifications, does anyone believe you cannot give him a fair trial for any

reason?" (JA at 46, 190). This question is also standard to every court martial. *Id*. at para. 2-5-1, question 4.

The CCA Decision

Citing *United States v. Witherspoon*, 12 M.J. 588 (A.C.M.R. 1981), the CCA stated that the military judge did not abuse his discretion in denying the defense's proposed question because the question was "broad" and the CDC did not narrow his request or propose a more specific question. (JA 7).

The CCA found that there was no indication that the military judge was aware of Wife's race at the time of his ruling. (JA 7). Acknowledging the Supreme Court's holding in *Rosales-Lopez v. United States*, 451 U.S. 182 (1981) (plurality opinion), that defense requests for inquiry into racial prejudice should be granted when the defendant claims a "meaningful ethnic difference" between himself and the victim, the CCA concluded that the defense had failed to assert such a meaningful difference in appellant's case. (JA 7). The CCA also concluded that the military judge had not abused his discretion because racial issues were not "inextricably bound up with the conduct of the trial." (JA 7). Finally, the CCA concluded that because there was "no reasonable possibility of racial or ethnic prejudice influencing the jury," "any such error was harmless." (JA 7).

Summary of Argument

The military judge abused his discretion in not allowing the defense to inquire into bias regarding interracial relationships during voir dire, and his failure to do so constitutes reversible error. First, the military judge did not permit the defense to inquire into the bias of members concerning interracial relationships and did not otherwise adequately screen jurors for their biases on this topic. Second, the military judge's failure to allow any inquiry is reversible error because there was a reasonable possibility of racial or ethnic prejudice infecting the jury. Third, the error relates to the impartiality of the finder of fact and should be tested to determine if there is a reasonable possibility of racial or ethnic prejudice infecting the jury. Alternatively, the government cannot prove that it is harmless beyond a reasonable doubt.

Argument

THE MILITARY JUDGE ABUSED HIS DISCRETION IN NOT ALLOWING THE DEFENSE TO INQUIRE INTO RACIAL BIAS DURING VOIR DIRE.

Standard of Review

This Court reviews a military judge's limitations on voir dire for a clear abuse of discretion. *United States v. Hennis*, 79 M.J. 370, 383 (C.A.A.F. 2020) (citing *United States v. Williams*, 44 M.J. 482, 485 (C.A.A.F. 1996)). "[T]he abuse of discretion standard recognizes that a judge has a range of choices and will not be

reversed so long as the decision remains within that range." *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004). Generally, appellate courts will not find an abuse of discretion when counsel is given an opportunity to explore possible bias or partiality. *United States v. Belflower*, 50 M.J. 306, 309 (C.A.A.F. 1999).

If the military judge fails to place his findings and analysis on the record, less deference will be accorded to his ruling. *United States v. Flesher*, 73 M.J. 303, 312 (C.A.A.F. 2014)*; see also United States v. Benton*, 54 M.J. 717, 725 (A. Ct. Crim. App. 2001) ("When the standard of review is abuse of discretion, and we do not have the benefit of the military judge's analysis of the facts before him, we cannot grant the great deference we generally accord to a trial judge's factual findings because we have no factual findings to review. Nor do we have the benefit of the military judge's legal reasoning in determining whether he abused his discretion . . .").

Law

"As a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel." *United States v. Commisso*, 76 M.J. 315, 321 (C.A.A.F. 2017) (internal quotations omitted) (quoting *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001)). This constitutional right to impartial court-members is "sine qua non for a fair court-martial." *United States v. Modesto*,

43 M.J. 315, 318 (C.A.A.F. 1995). This includes a panel "free from racial bias or taint." *United States v. Gooch*, 69 M.J. 353, 355 (C.A.A.F. 2011).

"Fundamentally, '[v]oir dire examination serves to protect [the right to a fair trial] by exposing possible biases, both known and unknown, on the part of potential jurors.'" *United States v. Parker*, 71 M.J. 594, 621 (N-M Ct. Crim. App. 2012) (quoting *United States v. Richardson*, 61 M.J. 113, 118 (C.A.A.F. 2005)). It is within the trial judge's discretion to set the limits and procedures for voir dire. Rule for Courts Martial [R.C.M.] 912(d).

Voir dire has long served as a method of ensuring that the courtroom remains free from the shadow of racial bias. In *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 209 (2017), the Supreme Court identified voir dire as a "standard and existing safeguard" to preventing racial bias from contaminating the deliberation room. "Without an adequate voir dire, the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." *Rosales-Lopez*, 451 U.S. at 189 (citing *Connors v. United States*, 158 U.S. 408 (1895)).

"In an effort to ensure that individuals who sit on juries are free of racial bias, the Court has held that the Constitution at times demands that defendants be permitted to ask questions about racial bias during *voir dire*." *Pena-Rodriguez*, 580 U.S. at 223 (citing *Ham* v. *South Carolina*, 409 U.S. 524 (1973)); *Rosales-Lopez*,

451 U.S. at 192; *Turner* v. *Murray*, 476 U.S. 28 (1986); *see also Witherspoon*, 12 M.J. at 589 ("Depending on the circumstances of the particular case, counsel for an accused may properly inquire into possible racial or ethnic prejudice on the part of court-members.").

In *Rosales-Lopez,* the Supreme Court held that when racial issues are "inextricably bound up with the conduct of the trial," a trial court's "denial of a defendant's request to examine the jurors' ability to deal impartially with this subject amount[s] to an unconstitutional abuse of discretion." 451 U.S. at 190. It explained that these were the circumstances present in *Ham*, 409 U.S. at 528, where a black defendant charged with a drug offense based his defense on an argument that law enforcement officers had framed him because of his participation in civil rights activities. *Id.* at 189; *see also Turner*, 476 U.S. 28 (holding that defendants in capital case involving interracial crime are constitutionally entitled to have jurors informed of victim's race and questioned about potential racial bias).

The *Rosales-Lopez* Court then identified a second category of cases, stating that "under our supervisory authority over the federal courts, we would require that questions directed to the discovery of racial prejudice be asked in certain circumstances in which such an inquiry is not constitutionally mandated." 451 U.S. at 190. The Court explained that "it is usually best to allow the defendant" to

determine whether "he would prefer to have the inquiry into racial or ethnic prejudice pursued," but that denial of the defendant's request "will be reversible error only where the circumstances of the case indicate that there is a reasonable possibility that racial or ethnic prejudice might have influenced the jury." *Id*. at 191. The Court explained that it "remains an unfortunate fact in our society that violent crimes perpetrated against members of other racial or ethnic groups often raise such a possibility." *Id*. at 192. It noted that its prior precedent "fairly impl[ies] that federal trial courts must make such an inquiry when requested by a defendant accused of a violent crime and where the defendant and the victim are members of different racial or ethnic groups." *Id*.

In *Mu'Min v. Virginia*, 500 U.S. 415, 423 (1991), the Court reiterated this holding, stating that in "*Rosales-Lopez*…we held that such an inquiry as to racial or ethnic prejudice need not be made in every case, but only where the defendant was accused of a violent crime and the defendant and the victim were members of different racial or ethnic groups." The Court further explained that "the Constitution does not require a state-court trial judge to question prospective jurors as to racial prejudice in every case where the races of the defendant and the victim differ." *Mu'Min*, 500 U.S. at 423; *see also Rosales-Lopez*, 451 U.S. at 190 ("the Constitution leaves it to the trial court, and the judicial system within which that court operates, to determine the need for such questions.").

Since *Rosales-Lopez*, "[t]he Court has continued to rely on the fact that the defendant and the victim are members of different racial or ethnic groups in assessing the need for inquiry into racial matters at voir dire." *United States v. Greer*, 968 F.2d 433, 444 (5th Cir. 1992). *See also United States v. Torres*, 191 F.3d 799, 809 (7th Cir. 1999), (citing *Rosales-Lopez*, 451 U.S. at 192) ("[T]he Supreme Court has specifically required federal trial courts to question a venire about racial biases in cases involving interracial crimes of violence.").

Analysis

1. The military judge's failure to permit adequate inquiry into bias concerning interracial relationships was a clear abuse of discretion.

Appellant was charged with, *inter alia*, attempted sexual assault and abusive sexual contact of Wife without her consent. (JA 20-21). Appellant is Hispanic, and both government witnesses on the merits, Wife and First Lieutenant, are of Caucasian descent/appearance. (JA 317-318). Given the charged offenses, the military judge should have allowed the defense to inquire into possible biases of panel members concerning interracial relationships. His ruling meant there was no way for the defense to probe this crucial area of bias prior to making its challenges.

The proposed question would have directed panel members to consider if their cultural backgrounds affected their perception of relationships between people of different races. This potential bias could have applied to any panel member, regardless of their specific cultural background. The thrust of the question

concerned their attitudes towards interracial relationships in general, rather than towards any particular race. Thus, the question was relevant to all potential panel members, no matter their race or gender.

The military judge's voir dire colloquy was not a fair substitute for the question proposed by the defense. The colloquy also occurred before the panel had seen Wife, and thus had no way to know that they would be considering a sexual crime involving an accused and alleged victim of different races. It did not fairly orient the panel to the area of potential bias they needed to consider before answering questions during voir dire. *See United States v. Lewin*, 467 F.2d 1132, 1138 (7th Cir. 1972) (finding that although "the [trial] court did ask the prospective jurors whether there was any reason why they could not give the defendants a fair and impartial trial," its failure to ask the specific organizational bias questions requested by the defense was reversible error).

In failing to allow any screening on the topic of bias against interracial relationships, the military judge failed to provide any "opportunity for prospective jurors to be meaningfully screened for biases relevant to a particular [accused] or the charges against that [accused]." *United States* v. *Nieves*, 58 F.4th 623, 638 (2d Cir. 2023). While the military judge may not have had to take the "specific path," *id*., of the question requested by the defense, his failure to take any steps at all to uncover prejudice related to interracial relationships was an abuse of discretion.

See id. at 639 (noting that the specific bias inquiry requested by the defense was not required and there are "are many other tacks a [court] might justifiably deem more prudent under the particular circumstances of a case," such as asking generalized questions or warning jurors about their duty of impartiality if the court "provides sufficient context for a juror to be able to self-identify their relevant biases before jury selection is complete.")

In similar cases in federal court, defense counsel have been allowed to ask more specific and probing questions concerning race, even if limited or molded in some way by the trial judge. *See, e.g. United States v. Hasting*, 739 F.2d 1269, 1273 (7th Cir. 1984) (in trial involving crime of interracial violence, trial court did not abuse its discretion when it asked three questions regarding racial prejudice, including if jurors felt that the race of the participants at the trial would affect their verdict, rather than all eighteen of the race-related questions requested by defense); *United States v. Guy*, 924 F.2d 702, 708 (7th Cir. 1991) (finding that the trial court sufficiently inquired into possible racial bias when "the court repeatedly urged the venirepersons to probe their consciences to uncover any racial bias," even though it did not individually question each possible juror).

The CCA determined that the military judge did not abuse his discretion under *Witherspoon*, "[g]iven the broad nature of the requested voir dire question, combined with the fact that the defense counsel did not narrow his request or

propose a more specific question." (JA 7). In *Witherspoon*, the defense requested to ask the members if they felt they were in "in any way racially prejudiced." The military judge found that the question was too broad, and the defense counsel declined to ask a more specific question. *Witherspoon*, 12 M.J. at 589.

Here, the question requested by defense was whether the members' cultural backgrounds could influence their perception on relationships between individuals of different races. (JA 308). The military judge did not rule that the question was too broad, as implied by the CCA's ruling, but that it was "too confusing, a trick question, or unhelpful to ferreting out sincerity and ability to sit as member." (JA 310). The proposed question here was much narrower than the requested question in *Witherspoon* and related to the specific facts of this case. Thus, the CCA imposed its own finding that the defense's proposed question was too broad – a finding that the military judge did not make – and then stated that the CDC did not request a more specific or narrow question – an unsurprising event, given that overbreadth of the question was not the reason for the military judge's ruling.

The CCA also stated that appellant "failed to assert a meaningful ethnic difference between himself and the victim" as required by *Rosales-Lopez*,[4] and that

[4] The CCA correctly noted that appellant's reference in its briefing to the CCA to *Rosales-Lopez* was part of a "non-binding four-justice plurality, and expressly rejected by the two concurring justices." (JA 7). However, the right of a criminal defendant to inquire into possible racial prejudices during voir dire has been deeply rooted in Supreme Court jurisprudence since long before *Rosales-Lopez*. In

there is no indication that the military judge was aware of Wife's race when he made his ruling. However, the CCA did not cite to an existing test for how appellant must "assert a meaningful ethnic difference" when requesting to ask the panel questions about possible racial bias during voir dire. Its only reference to this "requirement" is a footnote in *Rosales-Lopez* which reads "[o]f course, the judge need not defer to a defendant's request where there is no rational possibility of racial prejudice. But since the courts are seeking to assure the appearance and reality of a fair trial, if the defendant claims a meaningful ethnic difference between himself and the victim, his voir dire request should ordinarily be satisfied." *Rosales-Lopez*, 451 U.S. at 191 n.7. Contrary to the CCA's interpretation, this footnote actually supports the argument that the defense's

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Aldridge v. United States, the Supreme Court held that the lower court had wrongly refused to question jurors about racial prejudice in a case of an interracial crime. Nearly one hundred years ago, Chief Justice Hughes wrote:

> We think that it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred. No surer way could be devised to bring the processes of justice into disrepute.

283 U.S. 308, 315 (1931).

requested question should have been permitted. What the CCA deemed a requirement was simply dicta in a footnote of the Court's opinion.

By requesting a question concerning interracial relationships, appellant signaled to the judge that this was an issue that could come up at trial, and thus sufficiently asserted a meaningful ethnic difference. Military judges regularly make rulings on proposed voir dire questions without prior knowledge of the issues that counsel expect to come up at trial. In fact, these questions often give the military judge a window into what counsel expect to be the issues at trial. For example, in this case, the government asked, "does everyone understand that sexual crimes can occur without causing physical injuries?" (JA 59, 205). This would have given the military judge an indication that the government did not expect to introduce evidence of injuries to Wife. Similarly, the question requested by the defense would have given the military judge a "heads-up" that it expected the issue of interracial relationships to be at play.

The military judge did not cite any law in his ruling. Instead, he provided only a box check on a form stating that the ruling was "it was "too confusing, a trick question, or unhelpful to ferreting out sincerity and ability to sit as member." (JA 310). This ruling was made without any further explanation. Because it was made in the disjunctive, it is impossible to tell which of the three reasons given was the actual reason for the ruling. Because of this lack of analysis, this court

does not "have the benefit of the military judge's legal reasoning in determining whether he abused his discretion." *Benton*, 54 M.J. at 725 (citations omitted), and his ruling should be afforded less deference. By failing to allow the requested question – and therefore removing the possibility of further follow-up during individual voir dire – there was not "sufficient factfinding at voir dire to allow for facts probative of any of these forms of bias to reveal themselves." *Nieves*, 58 F.4th at 633. While trial judges "are afforded broad discretion in conducting voir dire, their discretion "is not boundless," and here, it was abused. *Id*. at 626.

2. The military judge's failure to make an inquiry regarding racial bias is reversible error because there was a reasonable possibility of racial or ethnic prejudice infecting the jury.

The CCA stated that "because there is no evidence in the record, either at trial or on appeal, that racial issues were 'inextricably bound up with the conduct of the trial,'" the military judge did not abuse his discretion. (JA 7). In a footnote, it also stated "even if the military judge did err in refusing to give the requested voir dire instructions, because there is no evidence suggesting a 'reasonable possibility that racial or ethnic prejudice might have influenced the jury,' any such error was harmless." (JA 7).

Appellant did not argue below – and does not argue here – that racial issues were "inextricably bound up" in the conduct of the trial. Rather, appellant argues that the failure to inquire into biases surrounding interracial relationships is

reversible error because there was a reasonable probability that racial or ethnic prejudice might have influenced the jury. That is, appellant argues that this case falls within the second category of cases delineated by *Rosales-Lopez.*

The plain language of *Rosales-Lopez* required the inquiry related to interracial relationships: "federal trial courts must make such an inquiry when requested by a defendant accused of a violent crime and where the defendant and the victim are members of different racial or ethnic groups." *Id*. at 192. It explained that "[t]his supervisory rule is based upon and consistent with the 'reasonable possibility standard'" that it had articulated. *Id*. In *Rosales-Lopez*, the Court ultimately held that the trial court had not abused its discretion in failing to inquire into racial prejudice because the defendant's crime in that case was "victimless." It noted that there were no "special circumstances" of a constitutional dimension, and that "the case did not involve a violent criminal act with a victim of a different racial or ethnic group." *Id*.

In contrast, this case involved allegations of interracial attempted sexual assault. It was not a "victimless" crime like *Rosales-Lopez*.[5] It was impossible for

[5] In *United States v. Kyles*, 40 F.3d 519, 525 (2d Cir. 1994), the court noted that "it is by no means clear what crimes are 'violent' for purposes of *Rosales-Lopez*." It compared *Aldridge,* 283 U.S. at 309*,* where "a black defendant was accused of murdering a white police officer," and *Ristaino v. Ross,* 424 U.S. 589, 590 (1976), where "a black defendant was charged with the armed robbery, assault, and battery (with intent to kill) of a white security guard," with the circumstances of its case, where the defendant was accused of armed robbery, but the bank tellers who

the panel members to know this during voir dire, as they could not have been aware of the race of Wife until it came time for her to testify. The mere fact that neither side stated on the record that this was a crime of alleged interracial sexual violence does not mean that it was not an issue at trial, as the identities of Wife, First Lieutenant, and appellant were on display to the panel members throughout the entire trial.

In *Pena-Rodriguez*, the Supreme Court considered a case where a juror's racial bias was not detected during voir dire and ultimately infected the deliberation room where he was convicted. 580 U.S. 206. There, the jury was considering the case of a Hispanic male accused of sexual crimes. During voir dire, members of the venire were asked basic, broad questions about their ability to sit fairly on a jury. A written questionnaire asked if there was "'anything about you that you feel would make it difficult for you to be a fair juror." and "[t]he court repeated the question to the panel of prospective jurors and encouraged jurors to speak in private with the court if they had any concerns about their impartiality." *Pena-Rodriguez*, 580 U.S. at 211-12. After this broad questioning, "none of the

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"were, in some sense, 'victims' of the robbery…suffered no physical or proprietary injury." It found that crime did not "rise to the level of violence that would likely ignite a jury's potential prejudices" because the bank tellers did not suffer any injury. *Id*. In appellant's case, the CCA did not question whether he was charged with a violent crime – nor could it, as appellant was charged with attempted sexual assault, abusive sexual contact, and assault consummated by a battery.

empaneled jurors expressed any reservations based on racial or any other bias." *Id.* at 212.

After the trial ended and the jury had convicted the defendant, two jurors spontaneously came forward and reported that a third juror had made repeated anti-Hispanic comments in the deliberation room, such as "Mexican men had a bravado that caused them to believe they could do whatever they wanted with women….Mexican men are physically controlling of women because of their sense of entitlement," and "'I think he did it because he's Mexican and Mexican men take whatever they want.'" *Id*. The issue before the Court in *Pena-Rodriguez* was the ability of the trial court to consider post-verdict evidence of the juror's racial bias. The Court held that the traditional "no-impeachment" rule must give way when a juror makes a clear statement that he or she relied on racial stereotypes to convict. However, the case is also illustrative of the fact that basic, non-specific questions about general bias can fail to bring to light possible race-related biases during voir dire, leading to unacceptable and unjust outcomes.

"Prejudice and bias are deep running streams more often than not concealed by the calm surface stemming from an awareness of societal distaste for their existence." *Lewin*, 467 F.2d at 1137. "Modern statistics . . . show a marked disparity in conviction rates according to the race of the rape victim." Tania Tetlow, *Discriminatory Acquittal*, 18 Wm. & Mary Bill of Rts. J. 75, 90 (2009).

Asking questions of potential jurors is not a mere exercise or empty gesture. A 2006 study revealed that individuals who were asked race-related voir dire questions in a mock jury environment "were less likely to vote guilty before deliberating and gave lower estimates of the likelihood of the Black defendant's guilt." Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberation*, 90 J. Personality & Soc. Psychol. 597, 601 (2006). The results of this study "suggest that engaging a juror with questions about race diminishes the effects of embedded individual bias on the trial process." Patrick C. Brayer, *Hidden Racial Bias: Why We Need to Talk with Jurors about Ferguson*, 109 Nw. Univ. L. Rev. 163, at 164-165 (2015).

By not allowing even a single specific question concerning possible bias towards interracial relationships, the military judge foreclosed a significant avenue of inquiry for appellant. Appellant was accused of numerous sexual crimes against a female of a different race. Thus, there was a reasonable possibility that prejudice related to interracial relationships could have affected the panel, and it was reversible error for the military judge not to allow this inquiry.

3. The military judge's failure to allow this inquiry should be tested to determine if there was a reasonable possibility of racial or ethnic prejudice influencing the jury.

The CCA subjected the failure to ask the defense's question regarding bias towards interracial relationship for harmless error, citing to *Rosales-Lopez*. (JA 7). However, *Rosales-Lopez* did not settle the question of whether failing to ask such a question about racial biases should be tested for harmlessness. In his *Rosales-Lopez* dissent, Chief Justice Rehnquist wrote that he would "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." *Rosales-Lopez,* 451 U.S. at 195 (Rehnquist, J., dissenting). As noted by the former Chief Justice, *Rosales-Lopez* did not directly address whether the error must be tested for harmlessness, and has not directly addressed this issue since.

The Supreme Court has held that that there are certain basic trial rights that "can never be treated as harmless," and among those is an accused's "right to an impartial adjudicator, be it judge or jury." *Gray* v. *Mississippi*, 481 U.S. 648, 668 (1987) (quoting *Chapman* v. *California*, 386 U.S. 18, 23 (1967) (improperly excusing a juror for cause in a capital case not subject to harmless-error analysis)); *Batson v. Kentucky*, 476 U.S. 79, 86-87 (1986) (discrimination on the basis of race in the selection of petit jurors not subject to harmless-error analysis); *Vasquez v. Hillery*, 474 U.S. 254, 261-62 (1986) (discrimination on the basis of race in the

selection of grand jurors not subject to harmless-error analysis); *Gomez v. United States*, 490 U.S. 858, 876 (1989) (jury selection completion by federal magistrate judge in violation of federal statute not subject to harmless-error analysis).

The failure to inquire into racial bias during voir dire should not be subjected to harmless error analysis because once such bias has infected the voir dire process, there is no way to know if the panel was truly impartial. In *Turner v. Murray*, 476 U.S. 28, the Supreme Court held that it was reversible error for jurors in a capital case involving an interracial crime not to be questioned on racial bias, without considering whether the error was harmless. In a recent dissent from a denial of a writ of certiorari, Justice Sotomayor noted that in a death penalty case involving interracial violence, "had defense counsel requested individual *voir dire* of the three prospective jurors [who had expressed opposition to interracial marriage in their jury questionnaires], it would have been reversible error for the trial judge to deny that line of questioning." *Thomas v. Lumpkin*, 143 S. Ct. 4, 9 (2022) (Sotomayor, J. dissenting). While these cases fall in the category where the Supreme Court has held that questions concerning racial bias *must* be asked, it is instructive to note that the Court has not tested for harmlessness in these cases.

Federal appellate courts considering whether voir dire was insufficient to reveal prejudices are not united on whether such failure should be tested for harmlessness. *See Nieves,* 58 F.4th at 639 n.7 (noting that whether "the district

court's voir dire errors could be rendered harmless by other steps taken outside of voir dire is "a hypothetical question that we do not decide today."); *Lewin*, 467 F.2d at 1139 (finding trial court's failure to inquire into "significant lines of inquiry" was "reversible error" without considering whether the error was harmless); *cf., e.g. United States v. Bates*, 590 F. App'x 882, 887-88 (11th Cir. 2014) (unpublished op.) (finding that failing to inquire into bias concerning sexual orientation was error and not harmless); *United States v. Johnson*, 527 F.2d 1104, 1106 (4th Cir. 1975) (finding that failing to inquire into racial bias as requested was error and that the error was not harmless); *United States v. Grant,* 494 F.2d 120, 121-22 (2d Cir. 1974) (finding that error, if any, was harmless because of overwhelming evidence of guilt); *United States v. Robinson*, 485 F.2d 1157, 1159-60 (3d Cir. 1973) (finding that failure to ask requested question concerning racial bias was error and was not harmless).[6] Because this error affected "the framework within which the trial proceeds" and was not "simply an error in the trial process

[6] In *United States v. Lovett,* No. ARMY 20140580, 2016 CCA LEXIS 276, at *2 n.2 (A. Ct. Crim. App. April. 29, 2016) (unpub. op.), the CCA considered appellant's assertion in his *Grostefon* matters that the trial judge "impermissibly restricted appellant's general voir dire questions" after "neither party followed the military judge's pretrial order on the submission of general voir dire questions." The CCA found that the military judge did not abuse his discretion and found that "any error was harmless given the liberal individual voir dire of every member." This case is distinguishable because it did not involve any allegation that the military judge failed to allow sufficient inquiry into a particular area of bias relevant to the case, much less an area as sensitive and important as racial bias.

itself," *Arizona v. Fulminante,* 499 U.S. 279, 310 (1991), this Court should apply the Supreme Court's structural error test and reverse.

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

If this Court finds that the harmless error standard applies, appellant is still entitled to reversal because the government cannot "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24 (1967). When applying the *Chapman* standard,

> the question is not whether in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee.

Sullivan v. Louisiana, 508 U.S. 275, 279 (1993). "Applied here, this standard requires us to ask not whether a jury free from the taint of potential prejudice would have rendered a guilty verdict, but whether we are confident beyond a reasonable doubt that this particular jury's verdict was untainted." *Bates*, 590 F. App'x at 888.

Bates provides a useful explanation of why the military judge's error in this case was not harmless. There, the Eleventh Circuit found that the trial court "abused its discretion when it failed to inquire about prejudice on the basis of

sexual orientation during voir dire." *Id*. at 887. It further found that the government did not meet its burden to show that this error was harmless beyond a reasonable doubt. This was because the court "refused to ask any questions at all about prejudice on the basis of sexual preferences," leaving the appellate court with "no way to discern whether the jury was biased against the defendant for that reason." *Id*. at 889. The court also noted that because jurors had no way of knowing that "same-sex sexual practices would be a part of the evidence at trial, they had no reason to offer up prejudices they might harbor on that basis when the [trial court] posed its general questions." *Id*. at 889. During the presentation of evidence, "the jury was repeatedly reminded of [the defendant's] sexual activities." *Id.* at 889.

Similarly, the panel members in appellant's case had no way of knowing an interracial sexual interaction would be part of the evidence during voir dire. This is because the court gave no instructions and asked no questions that would have fairly raised the issue in the venire's minds. Because of this, panel members had no way to contextualize the court's general questions about impartiality. Further, while it is true that neither side "repeatedly reminded" the panel members of the fact that Wife and appellant are of different races, it was not necessary to do so, as the panel could and did observe them in court throughout the trial.

Appellant's case is not, therefore, the "extremely unusual case" where the "prosecutor [is] able to sustain his heavy burden of showing that the error [of

failing to ask racial bias questions] was harmless." *Johnson*, 527 F.2d at 1106-07 (not harmless error for judge to refuse to ask about racial prejudice during voir dire); *United States v. Robinson*, 485 F.2d 1157, 1159 (3d Cir. 1973) (not harmless error to deny defendant's requested question about racial prejudice); *Nieves,* 58 F.4th at 639 (declining to decide if the court's error in not inquiring into gang-related bias could be rendered harmless but noting that the court did not take any steps to render the error harmless, such as giving limiting instructions, and reversing and remanding). Thus, even if the court does test this error for harmlessness, the government cannot meet its burden to show harmlessness beyond a reasonable doubt.

PRAYER FOR RELIEF

WHEREFORE, appellant respectfully requests that this Honorable Court reverse the CCA and set aside and dismiss the findings of guilty and 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 6,612 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 April 28, 2023.

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