IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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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 (Army Court) 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 June 26, 2021, an officer panel sitting as a general court-martial convicted Appellant, contrary to his pleas, of one specification of abusive sexual contact, two specifications of assault consummated by a battery, and one specification of conduct unbecoming an officer, in violation of Articles 120, 128,

and 133, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 928, and 933 (2018) [UCMJ]. (JA016–18). The panel acquitted Appellant of abusive sexual contact (two specifications) and attempted sexual assault in violation of Articles 120 and 80, UCMJ, 10 U.S.C. §§880 and 920. (JA016–18). The military judge sentenced Appellant to confinement for five months and a dismissal.[1] (JA019). The convening authority took no action on the adjudged sentence, and approved Appellant's request for deferment of waiver of automatic forfeitures for five months. (JA015). On August 6, 2021, the military judge entered judgment. (JA014).

Appellant assigned four errors to the Army Court of Criminal Appeals (Army Court). The Army Court 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. Nov. 16, 2022) (mem. op.) (JA002–13). This Court granted review of Appellant's petition on Issue II only. (JA001).

[1] The military judge sentenced Appellant to five months for Specification 2 of Charge I, four months for Specification 1 of Charge III, three months for Specification 2 of Charge III, and no confinement for The Specification of Charge IV. All sentences to confinement were to be served concurrently. (JA019).

Statement of Facts

A. Summary of Appellant's crimes against Mrs. LH.

In June 2020, First Lieutenant (1LT) LH and Appellant were deployed to Iraq with the 82d Airborne Division, where Appellant served as the senior ranking officer and mentor to 1LT LH. (JA305; R. at 433, 435). Upon their return in early 2021, Appellant spent two consecutive nights at 1LT LH's home in North Carolina due to unexpected housing issues. (R. at 435–37).

During the second night, Appellant began to behave inappropriately towards Mrs. LH, 1LT LH's wife. (R. at 358–70). He initiated unwelcome physical contact and made explicit sexual propositions despite Mrs. LH's repeated refusals. (R. at 358–70). Appellant's actions escalated further and culminated in the acts of abusive sexual contact, assault consummated by battery, and conduct unbecoming an officer for which he was ultimately convicted. (JA016–18).

B. Appellant's proposed voir dire question.

On Friday, 18 June 2021, Appellant submitted proposed voir dire questions to the military judge. (JA312–16). In proposed question sixteen, Appellant requested to ask the members:

> "[d]oes anyone's cultural background influence your perception on relationships between individuals of different races?"

(JA313). Over the following weekend the military judge denied Appellant's request because the question was "too confusing, a trick question, or unhelpful to

ferreting out sincerity and ability to sit as member." (R. at 9; JA310). The military judge asked for the submission of any requests for reconsideration before 1700 on June 21, 2021—the night before trial.

Following arraignment on June 22, 2021, the military judge summarized the pre-trial discussions concerning voir dire:

> [MJ]: Next on my to-do list is voir dire. I gave you a deadline of 1700 last night to identify any questions which you requested reconsideration. I didn't receive notice from either side, but I'm happy to entertain a motion on the fly if anyone wants a reconsideration of the court's voir dire ruling. How about you, government?
>
> TC: No, Your Honor.
>
> MJ: And defense?
>
> CDC: Your Honor, I just had a question about your ruling.
>
> MJ: Sure.
>
> CDC: *It's not an objection*. I just want to make sure I understand before we begin.

(JA027–28) (emphasis added). The civilian defense counsel then requested clarification on an unrelated procedural matter. (JA028–29).

Notably, throughout the trial, neither Appellant's nor his victim's racial

backgrounds were addressed or discussed by any party.[2, 3]

Procedural History

The Army Court found that the military judge did not abuse his discretion in denying the defense's request for the voir dire question. (JA007). Because Appellant did not narrow his request or propose a more specific question, the trial judge's decision was in accordance with the principle established in *United States v. Witherspoon*, 12 M.J. 588 (A.C.M.R. 1981), *aff'd on other grounds*, 16 M.J. 252 (C.M.A. 1983).[4] (JA007).

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[2] Appellant's Officer Record Brief, submitted into evidence during presentencing, reflects Appellant's "racial and ethnic designation category" (REDCAT) as "Hispanic." (R. at 632; Def. Ex. A, p. 81).

[3] A brief mention of race occurred during individual voir dire. Major (MAJ) DJ, in response to a defense query, stated that her discussions with her children about the Fort Hood investigation into Vanessa Guillén's murder included not only aspects of sexual harassment/violence, but also racial issues. (JA231). After neither Appellant nor the government challenged MAJ DJ, she was impaneled on Appellant's court-martial. (R. at 317).

[4] In *Witherspoon*, the court considered a case where the military judge denied a voir dire question from the defense counsel about potential racial prejudice, deeming it "too broad." 12 M.J. at 589. The court recognized the right of the defense to inquire about possible racial or ethnic prejudice among court-members, depending on the case specifics. *Id*. In this context, the court found "it would have been appropriate to permit the defense to question the members concerning any racial prejudice they might have held against blacks." *Id*.
However, the court did not agree with the appellant's claim that the military judge prevented him from exploring this topic. *Id*. The court found no error in the judge's actions as the defense counsel did not propose a more specific question when the initial question was ruled as too broad. *Id*. Therefore, the responsibility for the lack of inquiry into potential racial bias was ultimately attributed to the defense counsel's decision not to refine the question. *Id*.

Furthermore, the Army Court found that the defense failed to demonstrate a "meaningful ethnic difference" between Appellant and the victim at the time of arraignment, which was the first day of trial. (JA007). Given there was no indication the military judge knew of the victim's race at that time, the court found no basis for Appellant's proposed voir dire question. (JA007).

Moreover, the Army Court noted there was no evidence—either at trial or on appeal—showing that racial issues were fundamentally tied to the trial proceedings. (JA007). This absence of evidence further affirmed the military judge's decision to deny the proposed voir dire question. (JA007).

Lastly, the Army Court held that even if there was an error in refusing the requested voir dire question, it was harmless. (JA007). Because there was no evidence suggesting a reasonable possibility that racial or ethnic prejudice could have influenced the panel, the court found that any potential error did not materially affect the fairness of the trial. (JA007).

Summary of Argument

The military judge's decision to disallow the Appellant's proposed voir dire question—"does anyone's cultural background influence your perception on relationships between individuals of different races?"—did not constitute an abuse of discretion. The question was potentially confusing and did not contribute to assessing a member's capability to serve on the panel. Additionally, the military judge's ruling comported with Supreme Court precedent. Finally, even if the military judge's denial of the proposed question was in error, the error was clearly harmless.

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)). An abuse of discretion must be "more than a mere difference of opinion"; rather, "the challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous.'" *United States v. Solomon*, 72 M.J. 176, 179 (C.A.A.F. 2013) (quoting *United States v. White*, 69 M.J. 236, 239 (C.A.A.F. 2010)).

Law

A. Sixth Amendment.

The Sixth Amendment to the Constitution guarantees the right to an "impartial jury" in criminal prosecutions. U.S. CONST. amend. VI. This right is

"fundamental" and "essential to a fair trial." *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (citing *Gideon v. Wainwright*, 372 U.S. 335, 343–44 (1963)). *See also United States v. Ai*, 49 M.J. 1, 4 (C.A.A.F. 1998) ("A servicemember similarly has, as a matter of 'fundamental fairness,' the right to impartial court members to decide his guilt.").

Voir dire is the primary means of securing an impartial panel. This questioning process allows courts-martial to probe potential members for biases or conflicts, ensuring their capacity to render a fair verdict. The Supreme Court addressed the importance of voir dire for ferreting out potential racial bias in *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981).

B. *Rosales-Lopez v. United States*.

In *Rosales-Lopez*, the Court considered whether the trial court's refusal to question prospective jurors about racial or ethnic bias during voir dire constituted a violation of the petitioner's rights under the Sixth Amendment.

1. Plurality Opinion.

The four-justice plurality opinion recognized two circumstances where courts are required to question prospective jurors about racial or ethnic bias. The first category (the "constitutional standard") holds that the Constitution requires courts to question prospective jurors about racial or ethnic bias whenever racial issues are "inextricably bound up with the conduct of the trial." *Id*. at 189 (*citing*

Ristaino v. Ross, 424 U.S. 589, 596–597 (1976)). Where these "special circumstances" obtain, it will be an unconstitutional abuse of discretion for a court to deny a defendant's request to examine the jurors' ability to deal impartially with them.

The second category (the "nonconstitutional" or "supervisory standard") requires the federal courts under the Supreme Court's supervision to inquire into racial bias when requested by the accused "in certain circumstances in which such an inquiry is not constitutionally mandated." *Id*. at 190. The plurality proposed that "federal trial courts must [inquire into racial bias] 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*. 192. However, the plurality also emphasized that:

> Of 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.

Id. at n. 7 (emphasis added). "Failure to honor [this] request, however, 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.

2. Concurring Opinion.

Justice Rehnquist, joined by Chief Justice Burger, largely agreed with the plurality but expressed concern about the perceived establishment of a per se rule requiring reversal of a "violent crime" conviction involving individuals from "different racial or ethnic groups" if racial bias voir dire was denied. *Id*. at 194 (J. Rehnquist, concurring). While not wholly disagreeing with the plurality, the justices feared the ambiguous terms "violent crime" and "different racial or ethnic groups" would spur further litigation. *Id*. at 194. *See also United States v. Kyles*, 40 F.3d 519, 525 (2nd Cir. 1994) ("The inquiry [into whether an accused is charged with a violent crime] is not that simple, however, because it is by no means clear what crimes are 'violent' for purposes of *Rosales-Lopez*.")[5] They

[5] The 2nd Circuit observed that the armed robbery charge against Kyles was considered a "violent crime" in other contexts (such as under the Sentencing Guidelines) but found that the victims of the appellant's crime "did not suffer any physical or proprietary injury" and his crime "did not rise to the level of violence that would likely ignite a jury's potential prejudices." *Kyles*, 40 F.3d at 525–26. Appellant argues that his charges of attempted sexual assault, abusive sexual contact, and assault consummated by a battery are unquestionably "violent crimes" for the purposes of *Rosales-Lopez*. (Appellant's Br. 18-19, n. 5). However, Appellant's charges for abusive sexual contact and attempted sexual assault are not obviously violent crimes for *Rosales-Lopez* purposes, as the government charged under "without consent" theories in which neither force nor violence were elements of the offenses. (Charge Sheet, R. at 504–13). *Cf. United States v. McCrae*, 16 M.J. 485 (C.M.A. 1983) (per curiam) (dismissing adultery charge where the appellant was also convicted for rape for the same act because rape was a crime of violence while adultery included an element of consent). *But see* 18 U.S.C. 16 (defining "crime of violence" in the federal context); Dep't of Def. Instr. 1325.07, Administration of Military Correctional Facilities and Clemency and

advocated for leaving the decision to inquire about racial or ethnic prejudice during voir dire mainly to the trial court's discretion. *Id*. at 195. Additionally, the justices disagreed with the notion of an inherent "reasonable possibility" of prejudice due to the violent nature of the crime and reiterated the possibility of a harmless error finding. *Id*.

3. Dissenting Opinion

Justice Stevens, joined by Justices Brennan and Marshall, dissented, arguing that the Constitution should require an inquiry into racial or ethnic bias upon request in all cases, regardless of the particular facts. *Id*. at 195–203 (J. Stevens, dissenting). They contended that the plurality approach, which only requires an inquiry in certain cases, did not go far enough to protect defendants' rights to an impartial jury. *Id*. at 196. They argued that the potential for racial or ethnic bias is always present and should always be addressed during voir dire. *Id*. at 196–97.

C. Rule for Courts-Martial 912(d)

Rule for Courts-Martial [R.C.M.] 912(d) addresses voir dire in the court-martial context, where it is called "examination of the members." The rule states in relevant part:

> The military judge may permit the parties to conduct examination of members or may personally conduct examination. In the latter event the military judge shall

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Parole Authority, p. 91 (Mar. 11, 2013) (Update, Aug. 19, 2020) (defining "crime of violence" in the Department of Defense correctional facilities context).

> permit the parties to supplement the examination by such further inquiry as the military judge deems proper or the military judge shall submit to the members such additional questions by the parties as the military judge deems proper.

R.C.M. 912(d).

Argument

A. The military judge did not clearly abuse his discretion.

"The nature and scope of the examination of members is within the discretion of the military judge." R.C.M. 912 discussion.[6] Here, the military judge exercised that broad discretion by denying Appellant's proposed question, finding that it was "too confusing, a trick question, or unhelpful to ferreting out sincerity and ability to sit as a member." (JA310).

1. The question was confusing.

The question, by convoluting the influence of cultural background with perceptions on interracial relationships, is inherently confusing. Arguably, any

[6] *See also Rosales-Lopez*, 451 U.S. at 189 ("Because the obligation to impanel an impartial jury lies in the first instance with the trial judge, and because he must rely largely on his immediate perceptions, federal judges have been accorded ample discretion in determining how best to conduct the voir dire. In *Aldridge v. United States*, 283 U.S. 308 (1931), the Court recognized the broad role of the trial court: '[The] questions to the prospective jurors were put by the court, and the court had a *broad discretion* as to the questions to be asked.' *Id*., at 310. *See also Ham v. South Carolina*, 409 U.S. 524, 528 (1973) (recognizing 'the traditionally *broad discretion* accorded to the trial judge in conducting voir dire . . .').") (emphasis added).

"perception on relationships between individuals of different races"—whether positive, negative, or ambivalent—would be influenced by a person's cultural background. Therefore, either a "yes" or a "no" answer to the yes-or-no question would fail to meaningfully illuminate a member's possible racial or ethnic prejudice.

2. The question was unhelpful to ferreting out sincerity and ability to sit as a member.

By focusing on cultural influences and perceptions of interracial relationships, the question neglects to directly address a potential juror's commitment to fair and unbiased judgement, which is a crucial aspect of their role. It doesn't ask if the potential juror can put aside their personal beliefs and biases, if any, to fairly evaluate the evidence and law in the case.[7]

Because an abuse of discretion "must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous," all (or any) of these reasons illustrate that the military judge here was clearly acting within his discretion when he denied

[7] Conversely, the military judge warned the panel members that "[a]ny matter that might affect your impartiality is a ground for challenge," (JA034); "if you think of any matter that might affect your impartiality, you have a continuing duty to bring that to the attention of the court," (JA035); "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," (JA177). *See also Rosales-Lopez*, 451 US. at n.8 ("[T]here is little reason to believe that a juror who did not answer [general questions concerning the jurors' ability to sit as 'fair and impartial' jurors] would have answered affirmatively a question directed narrowly at racial prejudice.").

Appellant's confusing, unhelpful question. *Solomon*, 72 M.J. at 179.

B. Neither *Rosales-Lopez* nor its progeny required the military judge to allow Appellant's question or further inquire into potential racial bias.

Appellant argues that despite the military judge's stated reasons for the denial, *Rosales-Lopez* nevertheless required him to allow the question. Appellant's argument falls short for three reasons.

1. Racial issues were not "inextricably bound up with the conduct of the trial."

Appellant explicitly declines to argue that racial issues were "inextricably bound up with the conduct of [his] trial," conceding that any error was not of constitutional dimension. (Appellant's Br. 17).[8] Given that the record reflects not even a single instance of the parties referencing any racial component to the case, Appellant's concession is as understandable as it is obvious. Race was simply (and plainly) unimplicated by the facts of Appellant's case, and Appellant cannot claim that the military judge's refusal was unconstitutional, reversible error.

2. There was no "meaningful ethnic difference" between Appellant and his victim.

Being unable to advance a constitutional argument, Appellant must rely upon the nonconstitutional standard for racial bias inquiry suggested by *Rosales-Lopez* under its supervisory authority over the federal courts. However, Appellant

[8] "Appellant did not argue below – and does not argue here – that racial issues were 'inextricably bound up' in the conduct of the trial."

fails to offer an argument that there was a "meaningful ethnic difference" between Appellant and Mrs. LH, except to say in passing that by merely proposing his question "Appellant signaled to the judge that this was an issue that could come up at trial, and thus sufficiently asserted a meaningful ethnic difference." (Appellant's Br. 16). To the contrary, Appellant did not establish any ethnic difference, meaningful or otherwise.

Appellant is Hispanic[9] and alleges on appeal that Mrs. LH "[is] of Caucasian descent/appearance." (JA317). The record does not otherwise mention the race or appearance of Mrs. LH. Accordingly, the government does not concede Mrs. LH's race here.

Appellant elected sentencing by the military judge, so the panel never had any evidence showing Appellant was Hispanic. *See* n. 2, supra. The members certainly had no evidence that the victim was Caucasian. Moreover, when the military judge denied Appellant's question there was no evidence before him that Appellant and the victim were of different races. The ACCA specifically noted this fact and cited to *United States v. Lloyd* for the proposition that "[i]n reviewing a military judge's ruling for abuse of discretion … we review the record material before the military judge." *Ramirez*, 2022 CCA LEXIS 667 at *10 (citing *United States v. Lloyd*, 69 M.J. 95, 100–01 (C.A.A.F. 2010)); (JA007). Appellant argues

[9] *See* n. 2, supra.

that his requested question "would have given the military judge a 'heads-up' that [the defense] expected the issue of interracial relationships to be at play." (Appellant's Br. 16). But this claim assumes what Appellant is trying to argue: namely, that interracial relationships was an "issue …at play" in the case.[10] The implication is that there must have been some feature of the interactions between Appellant and Mrs. LH which turned upon a racial disparity which Appellant failed to establish at trial and has failed to establish on appeal.

In sum, it is unsurprising that Appellant cannot propose a racial nexus on appeal because he never established—or even attempted to establish—a connection at trial.

3. *Rosales-Lopez* does not require inquiry into racial bias in every case of violent crime between a defendant and victim of disparate races.

The *Rosales-Lopez* plurality observed that:

> *Aldridge* and *Ristaino* together, fairly imply that federal trial courts must make such an inquiry [into racial bias] 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. Appellant argues that the "plain language" of this passage required the military judge to grant Appellant's question here because the government charged Appellant with crimes of violence. (Appellant's Br. 18–19, n. 5).

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[10] Appellant could have also informed the military judge of the "issue" when his proposed question was denied but chose not to. (JA007).

On the contrary, this language is ambiguous in that it proffers a rule by way of a "fair implication." *Rosales-Lopez*, 451 U.S. at 192. The contingent language is no doubt intentional, given that it appears in the context of a non-binding plurality. Justice Rehnquist, joined by Chief Justice Burger, alluded to this ambiguity in his concurring opinion which noted that the justices could not "embrace the language" in the plurality opinion's passage in question because they felt it:

> may be perceived as creating a *per se* rule requiring reversal of any criminal conviction involving 'violent crime' between members of different racial or ethnic groups if the district court refused to *voir dire* on the issue of racial prejudice.

Id. at 194 (Rehnquist, J. concurring).

Federal Courts have overwhelmingly interpreted this provision as subject to a harmless error analysis.[11] This is unsurprising, given that "[w]hen a fragmented

[11] *See, e.g., United States v. Escobar-de Jesus*, 187 F.3d 148 (1st Cir. 1999) (finding harmless error where trial court denied violent crime defendant's request for voir dire on racial bias); *United States v. Nieves*, 58 F.4th 623, n. 7 (2nd Cir. 2023) (discussing—without deciding— the possibility of applying harmlessness analysis to district court's voir dire errors); *United States v. Diaz*, 854 Fed. Appx. 386 (2nd Cir. 2021) (affirming murder conviction where district court declined to ask the appellant's proffered racial bias question); *United States v. Kyles*, 40 F.3d 519, 526 (2nd Cir. 1994) (finding "while the wiser course would have been for the district judge to ask the prospective jurors about racial bias, as requested, … refusal to do so was not reversible error [because] [t]here was no 'reasonable possibility' that the jury might be affected by bias."); *Goins v. Angelone*, 226 F.3d 312 (4th Cir. 2000) (declining to extend the supervisory requirement to a capital murder conviction in a state court on petition to the 4th Circuit for a writ of habeas

United States Supreme Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taking by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977) (internal citation omitted). In any event, this Court should not undersign the per se rule, particularly under the facts of this case where Appellant has not even attempted to establish a "meaningful ethnic difference" between himself and his victim and "where the circumstances [did not] indicate [] a reasonable possibility that racial or ethnic prejudice might have influenced the [panel]." *Rosales-Lopez*, 451 U.S. at 191, n. 7.[12]

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corpus); *United States v. Erwin*, 793 F.2d 656, 668 (5th Cir. 1986) ("[W]hile we agree that the court should have asked the proposed questions, we find no reversible error in its failure to do so."); *United States v. Ellick*, 1988 U.S. App. LEXIS 3470 (6th Cir. Mar. 18, 1988) (per curiam) ("In the circumstances presented here, however, given the nature of the proof, the absence of any special circumstances which might lead to a possibility of prejudice, and the absence of any irregularities otherwise noted in the trial, we are convinced that the error committed was harmless[.]"); *United States v. Hasting*, 739 F.2d 1269 (7th Cir. 1984) ("This court will not find that a trial court abused its discretion in conducting voir dire where there is 'sufficient questioning to produce, in light of the factual situation involved in the particular trial, some basis for a reasonably knowledgeable exercise of the right of challenge.'") (internal citations omitted).

[12] Appellee also notes that the *Rosales-Lopez* plurality opinion, insofar as it applies to federal courts falling under its supervisory authority, may not be binding on this Court even with the force of a majority opinion. *See Rosales-Lopez*, 451 U.S. at 191–92, 190 (citing *Ristaino*, 424 U.S. at 597, n. 9) ("[I]n *Ristaino*, the Court also made clear that the result reached in *Aldridge*, was based on this Court's supervisory power over the federal courts," and "[i]n the federal court system, we have indicated that under our supervisory authority over the federal courts, we

C. Assuming error, the military judge's decision to disallow Appellant's question was clearly harmless.

1. "Harmlessness" is the appropriate lens through which to view potential error.

Even *Rosales-Lopez* acknowledged the possibility that a trial judge's error in excluding a racial bias question in an interracial violent crime case will be found harmless where "there is no rational possibility of racial prejudice" or where the defendant has failed to "claim[] a meaningful ethnic difference between himself and the victim[.]" 451 U.S. 182, 191, n. 7 (1981). *See also id.* (Rehnquist, J., concurring in the result) ("I would also not rule out the possibility of a finding of harmless error, but that may well be embraced in footnote 7 to the plurality's opinion.").

Appellant provides several examples of scenarios in which the Supreme Court has declined to test the error for harmlessness, recognizing that the examples

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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."). *See also Parisi v. Davidson*, 405 U.S. 34, 41 n. 7 (1972) ("Military courts are legislative courts; their jurisdiction is independent of Art. III judicial power."). *But see Ortiz v. United States*, 138 S. Ct. 2165, 2191 (2018) (J. Alito, dissenting) ("Echoing Blackstone, we have held that our appellate jurisdiction permits us to act only as "[a] supervising Court, whose peculiar province it is to correct the errors of an inferior Court.") (citing *Cohens v. Virginia*, 19 U.S. 264, 6 Wheat. 264, 396, 5 L. Ed. 257 (1821) (Marshall, C. J.)). If the Supreme Court does not exercise supervisory authority over this Court, then only the constitutional standard for inquiry into racial bias would have been implicated, which Appellant concedes was not the case. (Appellant's Br. 17). In fact, Appellant seems to urge this Court to adopt the *Rosales-Lopez* dissent.

he cites involved application of the Court's constitutional standard but suggesting that they are nevertheless instructive here. (Appellant's Br. 22–23).[13] However, these cases are not instructive precisely because the constitutional requirement is plainly *not* applicable here, as Appellant concedes. *See* Analysis, para. B.1 supra.

2. Appellant declined to ask a different question.

Appellant's repeated contention that the military judge's ruling was a blanket denial of *any* inquiry into panel members' racial bias is not supported by the record.[14] Rather, the military judge merely denied Appellant's single,

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[13] *E.g., Gray v. Mississippi*, 481 U.S. 648 (1987) (improper excusal of a juror for cause in a Mississippi capital case constituted reversible constitutional error and was not subject to harmless-error analysis); *Batson v. Kentucky*, 476 U.S. 79 (1986) (Equal Protection Clause forbade Kentucky prosecutor to challenge potential jurors solely on account of their race); *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986) ("When constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm."); *Turner v. Murray*, 476 U.S. 28 (1986) (refusal to question prospective jurors on racial prejudice violated defendant's constitutional right to an impartial jury in a capital sentencing case); *Thomas v. Lumpkin*, 143 S. Ct. 4 (2022) (Sotamayor, J. dissenting to denial of certiorari) (defense counsel's failure to exercise peremptory strikes on individuals expressing firm opposition to interracial marriage and procreation in written questionnaires violated defendant's constitutional right to effective assistance of counsel).
Appellant also cited to *Gomez v. United States*, where the court held that jury selection by a federal magistrate judge in violation of federal statute was not subject to harmless-error analysis. 490 U.S. 858 (1989).

[14] "[T]he military judge did not permit the defense to inquire into the bias of members concerning interracial relationships"; "[T]he military judge fail[ed] to allow any inquiry"; "His ruling meant there was no way for the defense to probe this crucial area of bias"; "[The military judge] fail[ed] to allow any screening on the topic of bias against interracial relationships"; "By not allowing even a single

confusing question, and even offered Appellant two opportunities to revisit the issue. (JA027, JA310).

Moreover, Appellant's question as worded did not obviously address racial prejudice at all. As stated in Analysis, paras. A.1-3 supra, any answer to the yes-or-no question posed by Appellant would have been unlikely to reveal a bias one way or the other. Nevertheless, and despite two separate opportunities to revise or reword his question, Appellant declined to do so. (JA027–28). His failure to offer alternative questions to further explore potential racial bias strongly suggest that even his defense counsel did not regard the issue as critical to the case, further supporting a finding that the error was harmless.[15]

3. Any error was harmless because there was no "reasonable possibility that racial or ethnic prejudice might have influenced the [panel]."

Because he cannot support an argument that racial issues where inextricably bound up with his trial, Appellant must show that there was a "reasonable

---

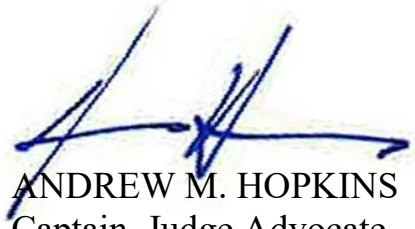
specific question concerning possible bias towards interracial relationships[….]" (Appellant's Br. 6, 11, 12, 21).

[15] Appellant may have waived this issue when he expressly declined to either object to the military judge's denial of his question or offer an alternatively worded question (or questions) on the issue of racial bias. Additionally, the Army Court did not explicitly address waiver or forfeiture but relied upon the fact of Appellant's failure to narrow his request or propose a more specific question as supporting the military judge's discretion to deny the question as stated. (JA007). *Accord United States v. Cezaire*, 939 F.3d 336 (1st Cir. 2019) (reviewing for plain error the appellant's forfeiture of objection to trial court's failure to inquire into prospective jurors' racial bias).

possibility that racial or ethnic prejudice might have influenced the [panel]." *Rosales-Lopez*, 451 U.S. at 191. But race was simply not a salient variable in the disposition of Appellant's case, accounting for the absence of any discussion of anyone's race during the trial, and for Appellant's need to supplement the record with both his and his victim's alleged race on appeal. (Def. App. Ex. A). Additionally, "there is no rational possibility of racial prejudice" in his case, particularly given that Appellant was acquitted of the most serious offenses charged by the government. (JA017). *E.g.*, *United States v. Gelin*, 712 F.3d 612, 622 (1st Cir. 2013) (noting that the appellants' acquittals for some of the charges against them "suggest[ed] that the evidence adduced at trial was impartially considered."). Accordingly, this Court should affirm Appellant's conviction and sentence.

Conclusion

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



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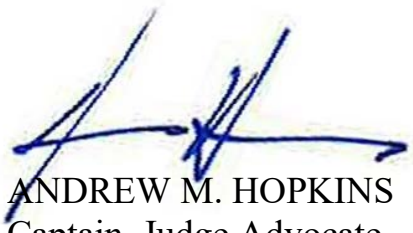
CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c)(1) because this brief contains **5,476** 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 May 30, 2023.

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