IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee

v.

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

BRIEF ON BEHALF OF APPELLANT

Crim.App. Dkt. No. ARMY 20230632

USCA Dkt. No. 25-0032/AR

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

SCOTT R. HOCKENBERRY
Civilian Appellate Defense Counsel
Daniel Conway and Associates
12235 Arabian Place,
Woodbridge, VA 22192
Tel. 586-930-8359
hockenberry@militaryattorney.com
www.militaryattorney.com
USCAAF Bar Number 37385

PATRICK MCHENRY
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, VA 22060
Tel. 703-693-0725
patrick.r.mchenry.mil@army.mil
USCAAF Bar Number 37900

Granted Issue

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

Statement of the Case

On June 2, September 19, and December 5-8, 2023, appellant was tried by a general court-martial composed of officer members at Joint Base San Antonio, Texas. Appellant was convicted, contrary to his pleas, of one specification of conduct unbecoming an officer and a gentleman in violation of Article 133, UCMJ, 10 U.S.C.A. § 933 and acquitted of another specification conduct unbecoming an officer and a gentleman.[1] (JA at 7).

On the united recommendation of trial counsel and trial defense counsel, the members sentenced appellant to a reprimand and no other punishment. (JA at 6).

The convening authority took no action on the findings or the sentence. (JA at 184). The Army Court affirmed the findings and sentence without elaboration. (JA at 2).

---

[1] Unless otherwise noted, all references to the UCMJ and Rules for Courts-Martial (R.C.M.) are to the Manual for Courts-Martial, United States (2019 ed.) [2019 MCM].

Statement of Facts

1. Background Facts

On August 1, 2021 Appellant was on terminal leave in San Antonio, Texas, celebrating his upcoming retirement from the Army with two friends who had flown in. (JA at 130-31, Pros. Ex. 15). KD and JT, enlisted Navy trainees in the dental field, were also out together in the same area. *See* (JA at 27).[2] The two groups met at a bar called Coyote Ugly. *See* (JA at 27; Pros. Ex. 15). They later moved to a local restaurant called Mad Dogs where the charged events occurred. (JA at 33; Pros. Ex. 15).

Specification 2 of the Charge (the only conviction) involved a kiss – posed for a photo – between JT and appellant while sitting at a table at Mad Dogs:

> SPECIFICATION 2: In that Lieutenant Colonel Jonny Gonzalez, U.S. Army, a married man, did, at or near San Antonio, Texas, on or about 1 August 2021, engage in conduct unbecoming an officer and a gentleman, to wit: while knowing that Seaman Recruit (E-1) [JT] was a junior enlisted trainee and a woman who was not his wife, he kissed her ~~cheek~~ and lips.

(JA at 4, 7) (struck word excepted by the panel).

It was uncontested that the kiss had occurred. It was further uncontested that it was part of a pose for a photograph taken by a third-party photographer. *See* (Pros. Ex. 1, 11, 12, 13, 15; JA at 38-39). Besides the posed kiss, JT stated there

---

[2] Although a recruit, JT was 26 years old. (JA at 24).

was no other physical contact between her and appellant at the table. (JA at 43).[3] JT acknowledged telling the government that she did not believe she had been wronged in any way, and she did not want to come to trial if she did not have to. (JA at 55).

Summary of Argument

Novel specifications are only constitutional in the military because fair notice is provided through law, regulation, or custom. None of these sources provide notice that an extramarital kiss is subject to criminalization. Indeed, the President has expressly delineated the types of "extramarital conduct" that are subject to criminalization in an enumerated Article 134 offense on this very topic – and kissing is not included. It is unjust to expressly inform servicemembers of prohibited activities within a certain category and then surprise them with criminal prosecution for an unlisted – and much less serious – act within that same category. Using a novel specification to charge an extramarital kiss is an example of the prohibited practice of attempting to criminalize conduct that doesn't quite meet the definition of prohibited conduct in a given category.

---

[3] While the exact role of the photographer has to be pieced together from the record, it is clear from context, and particularly from the CCTV footage, that he was a professional photographer who took pictures at various local establishments, printed them on the spot, and then sold the printed pictures to the patrons. *See* (Pros. Ex. 1) (CCTV footage).

Argument

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

Standard of Review

When not objected to at trial, claims of a lack of fair notice are reviewed for plain error. *United States v. Rocha*, 84 M.J. 346, 349 (C.A.A.F. 2024) (citing *United States v. Warner*, 73 M.J. 1, 3 (C.A.A.F. 2013)). Under plain error review, Appellant has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused. *Id.* (quotation omitted).

Law

Constitutional "[d]ue process requires 'fair notice' that an act is forbidden and subject to criminal sanction" before a person can be prosecuted for committing that act. *United States v. Vaughan*, 58 M.J. 29, 31 (C.A.A.F. 2003) (quoting *United States v. Bivins*, 49 M.J. 328, 330 (C.A.A.F. 1998)); *see also Rocha*, 84 M.J. at 349-50. "The test for constitutional notice that conduct is subject to criminal sanction is one of law. It does not turn on whether we approve or disapprove of the conduct in question." *Warner*, 73 M.J. at 3.

This Court has observed of Article 133 that: "In civilian life, this broadly worded statute would be subject to challenge as unconstitutionally vague in a

criminal law proceeding." *United States v. Brown*, 55 M.J. 375, 382 (C.A.A.F. 2001) (citing *Parker v. Levy*, 417 U.S. 733, 753-56 (1974)). "The Supreme Court has held, however, that Article 133 is constitutional as applied to members of the armed forces, so long as the accused has received 'fair warning of the criminality' of his or her conduct." *Id.* To this end, the Supreme Court noted that the MCM has "narrowed the very broad reach of the literal language of [Article 133]" and "further content may be supplied . . . by less formalized custom and usage." *Id.*

This Court has further explained: "Potential sources of fair notice may include federal law, state law, military case law, military custom and usage, and military regulations." *Warner*, 73 at 3 (*citing Vaughan*, 58 M.J. at 31). With respect to "custom" the MCM elaborates:

> "custom" means more than a method of procedure or a mode of conduct or behavior which is merely of frequent or usual occurrence. Custom arises out of long established practices which by common usage have attained the force of law in the military or other community affected by them. No custom may be contrary to existing law or regulation. A custom which has not been adopted by existing statute or regulation ceases to exist when its observance has been generally abandoned. Many customs of the Service are now set forth in regulations of the various armed forces.

2019 MCM, Pt. IV, para. 91.c.(2)((b)); *see also United States v. Wales*, 31 M.J. 301, 308 (C.M.A. 1990) (applying this language from the 1984 MCM to Article 133, UCMJ). Presidentially enumerated Article 134 offenses are one source of notice. *Rocha*, 84 M.J. at 350-51.

Analysis

No law, regulation, or custom of the service provides fair warning that an extramarital kiss is prohibited.[4] Indeed, the military's policy on extramarital conduct expressly *excludes* a kiss from criminal sanction. For many years Article 134's Adultery this prohibition applied only to "Sexual Intercourse." *See* 2016 MCM, Pt. IV, para. 62. This prohibition was recently expanded to include additional forms of extramarital sexual conduct, specifically:

(a) genital to genital sexual intercourse;

(b) oral to genital sexual intercourse;

(c) anal to genital sexual intercourse; and

(d) oral to anal sexual intercourse.

2019 MCM, Pt. IV, para. 99.c.(2).[5]

As this Court recently stated, enumerated Article 134 offenses are one source of notice. *Rocha*, 84 M.J. at 350-51.[6] Nothing in the current or prior

---

[4] Relatedly, the specification contained no words of criminality with respect to the extramarital kiss. While words of criminality are not required for every Article 133 offense, this Court may find that when – as here – the government seeks to criminalize ordinarily noncriminal behavior words of criminality should be included.

[5] These acts, of course, are only prohibited if they also meet the terminal element of Article 134.

[6] *Rocha* also noted that, while not dispositive, the appellant's attempts to hide his conduct provided some evidence that he had notice of its criminality. 84 M.J. at

enumerated Article 134 provisions, however, provide notice that an extramarital *kiss* is prohibited. To the contrary, by expressly listing the prohibited acts, and expressly excluding a kiss, they provide a sort of "anti-notice" indicating an extramarital kiss *could not* be criminally prosecuted. This is especially so in that the prohibition on extramarital conduct was recently expanded – and the expansion did not extend to the conduct at issue in this case. *See, e.g.*, *United States v. Hamilton*, 82 M.J. 530, 534, n.5 (A. Ct. Crim. App. 2022) (under *expressio unius est exclusio alterius* (to express or include one thing implies the exclusion of the other), explicit listing of body parts constituting sexual contact precludes charging of an unlisted body part). It is unjust to expressly inform servicemembers of prohibited activities within a certain category and then surprise them with criminal prosecution for an unlisted – and much less serious – act within that same category.

By using a novel specification to charge an extramarital kiss, the government is attempting to criminalize conduct that doesn't quite meet the definition of prohibited conduct in a given category, a practice clearly prohibited by precedent. *See Warner*, 73 M.J. 1 (A novel Article 134 offence could not be used to criminalize conduct that resembled a child pornography offence, but did not quite meet the elements thereof because "[n]one of the potential sources" of

---

358. The precise opposite is the case here: where appellant openly posed the kiss for a photo.

notice provided notice that this conduct was subject to criminal sanction);[7] *see also United States v. Nelson*, 80 M.J. 748 (N.M. Ct. Crim. App. 2021) (A novel Article 133 offense could not be used to criminalize conduct that almost, but not quite, met the definition of False Official Statement under Article 107, UCMJ).

While this defect specifically plagues the portions of the specification alleging the extramarital kiss, the proper remedy is setting aside of the entire specification. Because of the charging method adopted by the government, the panel was asked to evaluate – in amalgamation – whether the charged conduct rose to the level of conduct unbecoming an officer and a gentleman. The panel's conclusion on that critical question might have been different but for the extramarital aspect of the specification. As there is no way to tell whether the panel still would have convicted if this portion of the specification had not been included, the entire specification should be set aside.[8]

---

[7] In a similar case, decided the day before *Warner*, this Court reached the same result when analyzing a charge of *viewing* child pornography, noting that, during the charged time frame, "the 'viewing' of child pornography was not criminalized under the UCMJ, the MCM, military custom or usage, the federal statute, or the majority of state statutes." *United States v. Merritt*, 72 M.J. 483, 488 (C.A.A.F. 2013).

[8] Even if this Court could predict whether appellant would likely have been convicted under a different charging scheme, it still could not affirm on a different basis than the panel convicted on. *See Dunn v. United States*, 442 U.S. 100, 107 (1979) ("[A]ppellate courts are not free to revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial."); *United States v. Medina*, 66 M.J. 21, 27 (C.A.A.F. 2008) (noting that "an appellate court

Conclusion

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

SCOTT R. HOCKENBERRY
Civilian Appellate Defense Counsel
Daniel Conway and Associates
12235 Arabian Place,
Woodbridge, VA 22192
Tel. 586-930-8359
hockenberry@militaryattorney.com
www.militaryattorney.com
USCAAF Bar Number 37385

PATRICK MCHENRY
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, VA 22060
Tel. 703-693-0725
patrick.r.mchenry.mil@army.mil
USCAAF Bar Number 37900

---

may not affirm on a theory not presented to the trier of fact and adjudicated beyond a reasonable doubt.") (citation omitted).

Certificate of Compliance with Rules 24(c) and 37

1. This Brief on Behalf of Appellee complies with the type-volume limitation of Rule 24(c) because it contains 2,251 words.

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

Patrick McHenry
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 693-0725
USCAAF Bar No. 37900

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of United States v. Gomzalez, Crim App. Dkt. No. 20230632, USCA Dkt. 25-0043/AR was electronically with the Court and Government Appellate Division on February 19, 2025.

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