

**IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS**

UNITED STATES

Appellee

**REPLY BRIEF ON BEHALF OF  
APPELLANT**

v.

Docket No. ARMY 20210376

Major (O-4)

**ANTHONY R. RAMIREZ**

United States Army

Appellant

Tried at Fort Bragg, North Carolina,  
on 22-23 June and 25-26 June 2021  
before a general court-martial  
convened by the Commander,  
Headquarters, 82d Airborne Division,  
Colonel J. Harper Cook, Military  
Judge, presiding.

**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES  
ARMY COURT OF CRIMINAL APPEALS**

Pursuant to Rule 18(d) of the United States Army Court of Criminal Appeals  
Rules of Appellate Procedure, dated 15 January 2019, appellant hereby replies to  
the Brief on Behalf of Appellee filed on 19 September 2022.

**I.**

**THE EVIDENCE IS LEGALLY AND FACTUALLY  
INSUFFICIENT TO SUPPORT FINDINGS OF  
GUILTY FOR ABUSIVE SEXUAL CONTACT,  
ASSAULT CONSUMMATED BY A BATTERY, AND  
CONDUCT UNBECOMING AN OFFICER.**

- 1. The government ignores all evidence of appellant's reasonable mistake of fact as to Mrs. [REDACTED] consent.**

The government's case at trial rested solely on the word of Mrs. [REDACTED] Its case relied on her testimony, her statements to her husband, and an audio recording she

made of herself and appellant “so [her] husband would believe [her].” (R. at 376). On appeal, the government once again rests its argument for legal sufficiency solely on the shoulders of her statements – or more accurately, the portions of her statements that help the government’s case. It fails to address the overwhelming evidence of appellant’s reasonable mistake of fact as to Mrs. [REDACTED] consent.

The government downplays the depth and breadth of the interaction between Mrs. [REDACTED] and appellant. Despite meeting appellant for the first time 24 hours earlier, Mrs. [REDACTED] felt comfortable enough to share information usually reserved for a trusted friend. Rather than acknowledging this, the government describes the conversation between the two vaguely as a discussion of “the difficulties of deployment and family life.” (Appellee Br. at 4). This description does not accurately illustrate the intimate details shared between appellant and Mrs. [REDACTED] while sitting at the kitchen table.

During the hours-long one-on-one conversation between Mrs. [REDACTED] and appellant, Mrs. [REDACTED] told appellant that 1LT [REDACTED] had not been engaged in their marriage and was not sleeping with her. (R. at 402). Going even further, she confided in appellant about a text message she had seen on 1LT [REDACTED] phone, telling a noncommissioned officer that he loved her. It is unclear from the record whether she had even spoken to her husband about this text message at the time she disclosed it to appellant (or, in fact, whether she *ever* disclosed to her husband

that she had seen the message). Despite having just met the day before, Mrs. [REDACTED] and appellant formed some sort of connection to the point where Mrs. [REDACTED] felt comfortable revealing intimate details about her relationship with her husband. The government's assertion that "Mrs. [REDACTED] was trying to manage an unruly houseguest and minimize the fallout from appellant's drunken behavior" is belied by the fact that she chose to spend hours talking to him, alone, about personal and delicate matters. (Appellee Br. at 18).

It is in this context that the alleged physical contact between Mrs. [REDACTED] and appellant began. Strikingly, the government barely addresses the actions and words of Mrs. [REDACTED] and appellant just prior to the first charged misconduct, in Charge I, Specification 2. The government alleges that solely because Mrs. [REDACTED] "testified that he 'reached down and grabbed [her] butt' without her consent," the elements of abusive sexual contact were met. (Appellee Br. at 13). The government paints Mrs. [REDACTED] testimony in a vacuum. Just as it ignores the import of the lengthy conversation between appellant and Mrs. [REDACTED] it apparently gives no weight to what occurred between them immediately before the physical contract.

Just prior to appellant allegedly grabbing Mrs. [REDACTED] buttocks, appellant verbally, explicitly asked Mrs. [REDACTED] for a hug, and she verbally, explicitly agreed. (R. at 357). Several moments later, he asked her for another hug, to which she again verbally agreed. While Mrs. [REDACTED] testified that she "felt obligated" to agree to

these hugs because appellant was her husband's boss, there is no evidence whatsoever that she expressed this feeling of obligation to appellant. Then, when during the second hug appellant reached down and "grabbed" her buttocks, she did not move away. She did not exclaim, jump, or move away, – in fact, she did nothing at all when appellant then kissed her. Even the government admits that appellant was the one who pulled away from interaction. (R. at 360; Appellee Br. at 5).

The government offers no explanation for how appellant should have been aware that Mrs. ■ did not consent to appellant touching her buttocks and kissing her, when 1) he had just had a lengthy conversation with Mrs. ■ about highly personal subjects; 2) Mrs. ■ had just verbally agreed to not one, but two hugs; 3) appellant, not Mrs. ■ was the one who pulled away from this physical interaction; 4) Mrs. ■ provided no verbal or physical indications that she did not consent.

Contrary to the government's position, the analysis does not end with Mrs. ■ assertion that she did not consent. The context of the rest of the evening, as well as the crucial moments prior to the physical contact, show that appellant had a reasonable mistake of fact as to her consent. The reason the government cannot point to any indications that Mrs. ■ did not consent to this contact is simple: there are none. The government failed to prove beyond a reasonable doubt that

Mrs. ■ did not consent to appellant touching her buttocks or kissing her on the lips.

**2. The government places its entire case on the shoulders of Mrs. ■ who contradicted herself and had an admittedly poor memory as well as twin motives to fabricate.**

Not only does the government fail to prove beyond a reasonable doubt that appellant had a mistake of fact as to Mrs. ■ consent, but it also conveniently ignores every contradiction, ambiguity, and inconsistency in her account of the event of the evening in question. First, the government contradicts itself concerning to Mrs. ■ motives to fabricate. It insists that Mrs. ■ decision to describe this encounter as non-consensual could not have been motivated by a desire to protect her marriage and her husband's career because, as noted above, she was simply trying to manage an "unruly houseguest." (Appellee Br. at 18). Elsewhere, however, it concedes that "Mrs. ■ understood that . . . she could have been jeopardizing her husband's career" when she made disclosures to appellant concerning her husband's inappropriate text message to a noncommissioned officer. (Appellee Br. at 4). The government is left to argue that while she was fully aware of the possible serious consequences of her disclosures to appellant shortly after she made them, her awareness had absolutely no effect on her behavior.

Next, the government argues that Mrs. [REDACTED] memory of the events in question was clear, going so far as to say that “in suggesting that Mrs. [REDACTED] memory was poor, [a]ppellant has taken an unwarranted liberty with the transcript.” (Appellee Br. at 12). However, Mrs. [REDACTED] admitted on both direct and cross examination that she could not remember key facts about a variety of events at a variety of points throughout the night:

Mrs. [REDACTED] “I slept most, if not all of the Super Bowl. I don’t really remember.” (R. at 353).

Mrs. [REDACTED] “I’m not sure how long Ramirez is asleep, if he was awake before or after me. I’m not sure.” (R. at 353).

Mrs. [REDACTED] “After the Super Bowl was off, we turned on something else in the background. I don’t remember what the show was.” (R. at. 353)

Mrs. [REDACTED] “He started to—at some point I turned on the recording on my phone. I don’t know the exact order of events.” (R. at 368).

Mrs. [REDACTED] “I don’t know the exact sequence of how everything happened in the kitchen.” (R. at 375).

Mrs. [REDACTED] “I can’t remember” (R. at 379).

Mrs. [REDACTED] “I don’t remember if I said stop at that moment.” (R. at 403).

Mrs. [REDACTED] “I don’t remember if---I don’t remember.” (R. at 413).

Mrs. [REDACTED] Agrees with counsel that she “remembers the sequence of what happened before the kitchen, remember the sequence of what happened after the kitchen, but [she]

doesn't remember the sequence of events that happened in the kitchen." (R. at 414).

Mrs. [REDACTED] "I don't remember at what point I started the recording." (R. at 415).

Mrs. [REDACTED] "I don't remember him ever asking to text." (R. at 424).

Mrs. [REDACTED] "I don't recall that." (R. at 425).

Mrs. [REDACTED] repeated admissions that she could not recall certain facts shows that her memory of the events was poor. The government cannot explain Mrs. [REDACTED] insistence that appellant said "when are we going to fuck" during the time that she was making an audio recording, even though those words cannot be heard on the recording and do not appear on the transcript of the recording created and introduced by the government. Thus, Mrs. [REDACTED] testimony concerning Charge IV, The Specification, was contradicted by the audio recording created by Mrs. [REDACTED] herself.

Similarly, the government cannot explain the total lack of corroboration of Mrs. [REDACTED] account of events. As noted, its entire case rested on the testimony of Mrs. [REDACTED] the testimony of 1LT [REDACTED] as to what Mrs. [REDACTED] told him happened, and an audio recording created under circumstances that suggest that Mrs. [REDACTED] made it as an insurance policy against trouble with 1LT [REDACTED]. The government argues that "any rational fact-finder could have found all essential elements of the offense beyond a reasonable doubt" based solely upon the testimony of the victim in this case.

(Appellee Br. at 15). That could be true, if said victim was credible, reliable, and consistent. Here, she is not. Appellant's convictions are legally and factually insufficient.

## II.

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

In arguing that “race was not a salient variable” in the case at hand, the government chooses to ignore the reality that racial bias unfortunately remains a factor in society at large, and in the military specifically. It further ignores the fact that “the Supreme Court has specifically required federal trial courts to question a venire about racial biases in cases involving interracial crimes of violence.” *United States v. Torres*, 191 F.3d 799, 809 (7th Cir. 1999), (citing *Rosales-Lopez v. United States*, 451 U.S. 182, 192 (1981)); see also *United States v. Witherspoon*, 12 M.J. 588, 589 (A.C.M.R. 1981) (“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.”). Additionally, the government's position that “appellant has failed to claim a meaningful ethnic difference between himself and Mrs. [REDACTED] is confusing given the contents of Defense Appellate Exhibit A, which clearly states that appellant is Hispanic while Mrs. [REDACTED] and 1LT [REDACTED] are Caucasian.



The mere fact that neither side stated on the record that this was a crime of interracial violence does not mean that it was not an issue at trial, as the identities of the victim, her husband, and appellant were on display to the panel members throughout the entire trial. Further, the government’s suggestion that the fact that appellant was acquitted of certain offenses means that race was not an issue at trial is nonsensical.

The government misconstrues the military judge’s ruling about the proposed question, writing that “the military judge used his discretion to prevent a ‘confusing’ question which would have been ‘unhelpful to ferret[] out sincerity and ability to sit as member.’” (Appellee Br. at 27). However, the military judge actually ruled the proposed question was “too confusing, a trick question, *or* unhelpful to ferreting out sincerity and ability to sit as member.” (App. Ex. I at 5) (emphasis added). Using a table, the military judge made this same ruling on numerous questions proposed by both the defense and government. Because of the format of the ruling, it is unclear which of the three stated reasons caused the military judge to strike the question. What is clear is that in using the conjunctive “or,” it was only *one* of the reasons, not all three, as argued by the government.

This case involved allegations of interracial sexual violence, but it would have been impossible for the panel members to know this during voir dire, as they would not have been aware of the race of Mrs. [REDACTED] until it came time for her to

testify. Defense counsel should have been allowed to inquire into issues of possible racial prejudice during group voir dire and allowed to follow up on this crucially important and potentially sensitive issue during individual questioning.

### III.

#### **THE MILITARY JUDGE ABUSED HIS DISCRETION IN ADMITTING THE ALLEGED VICTIM'S STATEMENT TO A WITNESS AS AN EXCITED UTTERANCE UNDER MIL. R. EVID. 803(2).**

At some interval after leaving appellant in the guest bedroom of her home, Mrs. ■ walked to the bedroom where her husband slept, told him that appellant had made some sort of unwanted sexual advances, and played the audio recording that she made on her phone. The government argues the military judge did not abuse his discretion in admitting her statements over defense objection because they qualify as excited utterances under Military Rule of Evidence 803(2). (Appellee Br. at 30-34).

Yet the evidence at trial pointed squarely to the conclusion that that Mrs. ■ statements to her husband were not spontaneous but formulated well before she made them and should not have been admitted as excited utterances. First, Mrs. ■ was already worried about the ramifications of her disclosures to appellant on her husband's career as their conversation continued. (R. at 355). These concerns

did not occur to her later, but while she was still with appellant during the course of the evening.

Second, Mrs. ■■■ was thinking about what she would tell her husband while she was still in the kitchen with appellant, when she decided to make an audio recording of their interaction:

TC: And what was your thought process for making a recording at this point?

Mrs. ■■■ So my husband would believe me, not that he wouldn't, but it's his boss.

TC: What were you thinking—or how were you thinking that he might react?

Mrs. ■■■ He would be upset and hurt.

(R. at 376). In other words, Mrs. ■■■ realized she needed an insurance policy against possible problems with her husband and took steps to make one while she was still with appellant.

Third, Mrs. ■■■ had repeatedly chosen *not* to go to the bedroom where 1LT ■■■ slept throughout the night. Despite testifying that she knew that her husband was in their bedroom, and never testifying that she was prevented from going to him, she remained with appellant throughout multiple alleged unwanted sexual advances. She moved from the living room to the kitchen, back to the living room, back again to the kitchen, before escorting appellant to the guest room. Only when she had collected evidence which proved, in her mind, that the entire interaction

between herself and appellant had been nonconsensual did she choose to go to speak to her husband, a choice she could have made at any time earlier in the evening.

Finally, the stark difference between Mrs. [REDACTED] demeanor at the end of the recording – calm, joking, and telling appellant to “go jack off in the bathroom” – is a steep departure from the distressed and panicked demeanor described by her husband. Mrs. [REDACTED] statements to her husband were not spontaneous or spur-of-the-moment. They were the result of a deliberative thought process Mrs. [REDACTED] engaged in to try to ensure that her husband would believe her story. As the military judge did not articulate the basis for his ruling on the record, it is entitled to less deference before this court. *United States v. Ediger*, 68 M.J. 243, 248 (C.A.A.F. 2010). The military judge abused his discretion in admitting Mrs. [REDACTED] statements to her husband.

The government does not even attempt to argue that the admission of 1LT [REDACTED] statements was not prejudicial. The admission of 1LT [REDACTED] testimony about Mrs. [REDACTED] statements to him were the only corroboration of most of her allegations. The audio recording she created only mentioned that appellant had “kissed” her. 1LT [REDACTED] testimony was highly prejudicial to appellant.

#### IV.

#### **THE MILITARY JUDGE ERRED IN ADMITTING AN UNAUTHENTICATED TRANSCRIPT OF AN AUDIO RECORDING AND FAILING TO INSTRUCT THE PANEL ON ITS USE.**

The government argues that appellant waived the issue of whether the government's transcript of the audio recording was properly authenticated.

"Whether an accused has waived an issue is a question of law [appellate courts] review de novo." *United States v. Ahern*, 76 M.J. 194, 197 (C.A.A.F. 2017). Appellant acknowledges that defense counsel told the military judge that he did not object to the admission of the transcript. (R. at 373). However, the issue presented is not just that the transcript was not properly authenticated, but that the military judge failed to properly instruct the panel on its proper use.

"Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." *United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F. 2020) (quoting *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009)). "A forfeiture is basically an oversight; a waiver is a deliberate decision not to present a ground for relief that might be available in the law." *United States v. Campos*, 67 M.J. 330, 332 (C.A.A.F. 2009) (quoting *United States v. Cook*, 406 F.3d 485, 487 (7th Cir. 2005)) (quotation marks deleted). Defense counsel did not affirmatively state on the record that he did *not* wish the military judge to instruct

the jury as the Court of Appeals for the Armed Forces outlined in *United States v. Craig*, 60 M.J. 156, 160 (C.A.A.F. 2004) (“The jury should be instructed that the tape recording constitutes evidence of the recorded conversations and the transcript is an interpretation of the tape. The jury must be instructed that they should disregard anything in the transcript that they do not hear on the recording itself. Moreover, the court must ensure that the transcript is used only in conjunction with the tape recording.”). Because this issue was forfeited, not waived, the military judge’s failure to so instruct the panel should be reviewed for plain error.

### **Conclusion**

WHEREFORE, appellant respectfully requests that this Honorable Court grant the requested relief.

[REDACTED]

FOR: WILLIAM E. CASSARA, Esq.  
Civilian Appellate Defense Counsel

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**CERTIFICATE OF FILING AND SERVICE**

I certify that an electronic copy of the foregoing was sent via electronic mail to the Court and served on the Government Appellate Division, the Army Court of Criminal Appeals, and the Defense Appellate Division on 7 October 2022.



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