IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee v. Private (E-2) **OSCAR A. BATRES** United States Army Appellant	**REPLY BRIEF ON BEHALF OF APPELLANT** Docket No. ARMY 20220223 Tried at Fort Bragg, North Carolina, on 18 January, 27 January, 21 March, and 2 – 5 May 2022, before a general court-martial appointed by the Commander, 82d Airborne Division, Colonel Gregory B. Batdorff, military judge, presiding. .

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

Assignments of Error

I. WHETHER THE MILITARY JUDGE ERRED BY ADMITITNG [redacted] 911 CALL

II. WHETHER THE MILITARY JUDGE ERRED BY PROHIBITING APPELLANT FROM PRESENTING TEXT MESSAGES BETWEEN HIMSELF AND [redacted] UNDER THE RULE OF COMPLETENESS

Statement of the Case

On 15 March 2023, appellant, Private Oscar A. Batres filed his initial brief. On 13 July 2023, the government filed its answer brief. This is appellant's reply.

I. WHETHER THE MILITARY JUDGE ERRED BY ADMITITNG [redacted] 911 CALL

A. Argument by Counsel is Not Analysis By the Military Judge

The military judge permitted the playing of the entire 911 call and a transcript to be presented to the members with no Mil. R. Evid. 403 analysis. (R. at 189)

The government misconstrues arguments by counsel with analysis by the military judge. To rebut appellant's contention that the military judge failed to conduct a Mil. R. Evid. 403 analysis (App. Brief at 12), the government claims "the military judge arrived at his decision after considering multiple briefs from the parties, two motions hearings . . . stipulation of an accurate transcript of the recording, and extensive argument from both parties." (Gov't Br. at 17). Just because the defense raised the issue and the judge heard it, does not mean the military judge adequately followed the mandate to conduct a Mil. R. Evid. 403 analysis. *United States v. Berry*, 61 M.J. 91, 97 (C.A.A.F. 2005).

The dearth Mil. R. Evid. 403 analysis by the military judge was highlighted when the judge was made aware that the Mil. R. Evid. 403 issue was the crux of

the defense's argument against playing the entire call. "That's what's prejudicial, Your Honor. It's all the other stuff." (R. at 188). The military judge responded, "Understood. So it's just the 403 part of your objection that remains?" (R. at 188). The judge overruled the objection without Mil. R. Evid. 403 analysis on admitting the entire call for context. (R. at 189).

The government attempts to enter the military judge's mind and justify his lack of analysis. "When viewed from the military judge's perspective . . . [b]y allowing admission of the entire recording, along with the stipulated transcript and crafting a robust instruction, the military judge addressed both the government and defense concerns." (Gov't Br. at 16- 17).

The government essentially argues, because the judge ruled he must have performed an analysis and if we just peek into his mind we would see that. For the government, reaching the destination means the military judge was not required to show how he managed the journey.

No factors were weighed or facts analyzed. It certainly was not done on the record – only in the military judge's mind. Therefore there is no deference to the military judge's ruling. *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000).

B. The Instruction Was Insufficient to Cure the Prejudice

The government highlights the instruction as dispositive evidence the military judge conducted a Mil. R. Evid. 403 analysis and limited the prejudice to appellant.[1] (R. at 178; Govt. Br. at 16-17). The problem is the limiting instruction failed to provide the clarity the military judge assured it would. "[T]he court is more than confident that the court can and will draft a limiting instruction. *The court will clearly explain to the members exactly what portions they can consider* as it relates to the statements of the accused . . ." (R. at 176-77) (emphasis added).

The military judge demonstrably failed to explain exactly what portions the members could consider. The military judge instructed:

> "[y]ou may consider statements made by [redacted] for the truth of the matter asserted only if they were clearly adopted by the accused as his own statement. Statements made by [redacted] that the accused did not clearly adopt as his own may only be considered for the limited purpose of providing context to the recording and not for the truth of the matter asserted." (R. at 587-88).

Which statements? What does it mean to be adopted? What is the truth of the matter asserted? These are the questions that remained unanswered for the

[1] The Supreme Court in *Bruton v.United States*, 391 U. S. 123 (1968) recognized a narrow exception to the presumption that juries follow limiting instructions, holding that a defendant is deprived of his Sixth Amendment right of confrontation when the facially incriminating confession of a non-testifying codefendant is introduced at their joint trial, even with a proper instruction.

panel. The military judge promised an abundantly clear instruction to check the Mil. R. Evid. 403 concerns and failed to do the very basic work to parse out the statements that could be offered for the truth and which ones would come in for context only.

The defense objected to the admissibility of the entire call, the judge agreed, and then despite that ruling allowed the entire call into the case with an instruction to the panel that was no clearer than for them to simply figure it out.

C. The Context Was Irrelevant and Prejudiced Appellant

The government can cite no rule, no case law, nothing to support the military judge in playing the entire call and offering a transcript to the members for "context." Context is not an actual reason to allow inadmissible evidence before the factfinder. The government never had any intention of presenting it cabined into only context. Rather, the government presented the 911 call in closing argument as "the most important evidence for [the panel] to consider." (R. at 993). The government cannot prove the evidence did not have a "substantial impact on the findings" when the error would mean the loss of the government's "most important evidence." *United States v. Kohlbeck*, 78 M.J. 326, 334 (C.A.A.F. 2019)

II. WHETHER THE MILITARY JUDGE ERRED BY PROHIBITING APPELLANT FROM PRESENTING TEXT MESSAGES BETWEEN HIMSELF AND [redacted] UNDER THE RULE OF COMPLETENESS

Either context matters, or it is irrelevant. Between issues I and II the government takes a dramatic shift in its approach to the importance and scope of context. The government concedes the text messages show "a much clearer picture of an intense and escalating relationship where both parties fully wanted to pursue a sexual relationship." (Gov't Br. at 27). The government claims this context does not explain his apology.

As the saying goes, what is good for the goose, is good for the gander. If context was sufficiently important to allow the admission of [redacted] guilt to be imputed on appellant, then the complete text exchange demonstrating the relationship between appellant and the alleged victim was necessary to put appellant's apology in its appropriate context. This court has allowed the remainder of statements to be introduced when they are "explanatory of o*r in any way relevant* to the confession or admission, even if such remaining portions would otherwise constitute inadmissible hearsay." *United States v. Yancey*, ARMY 20120393, 2014 CCA LEXIS 892, at *8-9 (Army Ct. Crim. App. Dec. 8, 2014) (mem. op.) (emphasis added).

If context is "in any way relevant", then their relationship informing his confession is relevant and must have been allowed in.

Conclusion

Because the military judge's erroneous rulings had a substantial impact on the findings, the findings should be set aside.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to Army Court and Government Appellate Division on July 17, 2023.

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