IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee v. Specialist (E-4) **ESTEBAN OLAH PRADO** United States Army, Appellant	**REPLY BRIEF ON BEHALF OF APPELLANT** Docket No. ARMY 20220200 Tried at Joint Base Lewis-McChord, Washington on 15 November 2021, 23 February 2022, 18-21 April 2022, before a general court-martial convened by the Commander, 7th Infantry Division, Lieutenant Colonel Jessica R. Conn, 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 ABUSED HER DISCRETION BY DENYING APPELLANT'S MOTION TO COMPEL EXPERT ASSISTANCE.

II. WHETHER APPELLANT'S CONVICTION FOR COMMUNICATING A THREAT MUST BE OVERTURNED BECAUSE THE PANEL INSTRUCTIONS VIOLATE THE SUPREME COURT'S TRUE THREATS DOCTRINE.

PANEL NO. 3

Statement of the Case

On 11 October 2023 appellant filed his initial brief raising two assignments of error. On 9 November 2023 the government filed its response. This is appellant's reply.

I. WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION BY DENYING APPELLANT'S MOTION TO COMPEL EXPERT ASSISTANCE.

A. The Issue Is Not Moot

The government advances a single argument concerning appellant's first assignment of error—mootness. (Gov't Br. at 6) "The proposed expert forensic pathology assistance that appellant complains of did not relate to Specifications 9–11 of Charge I but only related to Specification 8 of Charge I." (Gov't Br. at 10).

The government must concede the inverse—if the error had any relevance to Specifications 9-11, there was error, and those findings of guilt must be set-aside

1. Prosecution Exhibit 12 Went Back With The Fact Finder

In support of their mootness argument, the government looks to the military judge's ruling at sentencing that she would not consider Prosecution Exhibit 12 to determine an appropriate sentence. (Gov't Br. at 12). This ignores the reality that Prosecution Exhibit 12 went back with the factfinder to determine guilt *after* the dismissal of Specification 8. (R. at 773.) By the government's own logic,

permitting Prosecution 12 to go back with the factfinder was obvious error. If it *would hav*e been error for the military judge to consider Prosecution Exhibit 12 for sentencing, then it *was* error for the panel to consider Prosecution Exhibit 12 in making a guilty finding on Specifications 9-11 of Charge I. Therefore the denial of expert assistance related to Prosecution Exhibit 12 is not moot.

2. The Government Made The Photographs The Focus of Their Argument

Second, Specification 8 dealt with appellant allegedly punching [redacted] in the face, while Specification 9 alleged appellant slapped [redacted] in the face. (Charge Sheet). At trial, the government relied heavily on the photographs contained in Prosecution Exhibit 12—offering it as proof of all offenses related to [redacted]. (R. at 719). "That culminated with [redacted] when he punched her in the stomach, punched her in the face, pulled her off the bed and slapped her." (R. at 719). "The government is going to ask you to look at these messages, *and the pictures*, and consider the testimony you heard and make a finding of guilty." (R. at 719) (emphasis added).

It is unclear how the government is certain the panel considered Prosecution Exhibit 12 only for Specification 8 and not 9-11—they certainly were not instructed to do so and Specification 8 was dismissed before their deliberations. Moreover, the government made Prosecution Exhibit 12 a central part of their

merits and rebuttal argument. Focusing on Exhibit 12, the government said "let's talk about the photographs and the laws of physics. When you are hit in the face, it depends on where you're hit in the face, we have teeth. And that force can break where you can cut your skin, which is what happened here." (R. at 746).

As stated above, the panel was sent to deliberate with exhibit 12 even after they were informed specification 8 was dismissed—this suggests it was relevant to the other specifications. The fact the government argued its relevance to both the punch and the slap easily could have contributed to the guilty finding for Specification 9. "Legal and competent evidence. You have that before you. You have the messages, you have the pictures. You heard testimony. Even putting that together aside, look at the words of the accused. *Look at the pictures*." (R. at 758) (emphasis added). The only pictures relevant to [redacted] were in Prosecution Exhibit 12—so it must be the case that the panel considered the pictures for the specifications that remained.

3. Prosecution Exhibit 12 Bolstered [redacted] Credibility and The Expert Was Needed to Undermine It

It is fundamental that, "evidence directly probative of a witness's truthfulness is always relevant to the issue of credibility." *United States v. Ellerbrock*, 70 M.J. 314, 319-20 (C.A.A.F. 2011). Indeed, the government asserted this case was about, "credibility and corroboration." (R. at 744). The defense

needed their expert to undermine [redacted] credibility—and contend that [redacted] testimony about Prosecution Exhibit 12 was not credible because it was inconsistent with physics. They even tried in vain to make this technical argument without the aid of the expert, but the defense counsel's argument was weak because as he stated, he is not a "scientist." (R. at 729).

On appeal, the government concedes Specification's 9-11 of Charge I were supported by only [redacted] testimony and no other photographic evidence. (Gov't Br. at 10). They cannot account for the fact that the photographs in Exhibit 12 were used to corroborate [redacted] testimony, and thus to bolster her credibility with respect to all specifications. It defies logic that the government can contend now that the *only piece of photographic evidence* related to [redacted], which was introduced (R. at 578), argued about (R. at 718, 746, 718), and ultimately went back with the fact-finder (R. at 773) had no impact on a case that was, as the government claimed, about "credibility and corroboration." Taking this case from a testimony alone case, to one with corroboration significantly assisted the government in securing a conviction. The issue is not moot.

B. This Court Should Not Consider Arguments Not Made By the Government

Despite having the opportunity, the government on appeal chose to limit their argument on this assignment of error to mootness—no argument about the

merits of the assignment of error or whether appellant suffered prejudice. Therefore, if this court disagrees with the government on mootness, appellant should win by default. *See, Burwell v. Hobby Lobby Stores, Inc.,* 573 U.S. 682, 721 (2014); *Knetsch v. United States*, 364 U.S. 361, 370 (holding that the Supreme Court would not entertain argument not raised or advanced by any party when they had the opportunity to do so).

II. WHETHER APPELLANT'S CONVICTION FOR COMMUNICATING A THREAT MUST BE OVERTURNED BECAUSE THE PANEL INSTRUCTIONS VIOLATE THE SUPREME COURT'S TRUE THREATS DOCTRINE

Once this court finds instructional error for failure to give the panel the required recklessness mens rea, this court must also find prejudice. The government contends the error was harmless beyond a reasonable doubt because appellant's "threat constitutes what *Counterman* deems unprotected speech." (Gov't Br. at 19).

The government claims to know what was in appellant's mind despite no statement offered by appellant. (Govt' Br. at 19). Simply because [redacted] attested at trial that she took the threats as genuine, does not speak to appellant's subjective intent to threaten her, and this intent is belied by the facts. Appellant and [redacted] had an on again off again relationship where even after the alleged threats, she still wanted to be "friends with benefits." (R. at 437).

[redacted] even requested the protective order be lifted. (R. at 422). [redacted] was in love with appellant and they continued being intimate. (R. at 421). This included [redacted] having sex with appellant *immediately,* after one of the alleged threats was issued. (R. at 453).

Most likely, appellant believed speaking to [redacted] in this way was part of their courtship—and he was right, [redacted] continued an intimate relationship with appellant. While the government might find appellant speaking to [redacted] in this manner odious, it is the private behavior of consenting adults. These facts cannot support a finding of harmlessness beyond a reasonable doubt in the face of instructions insufficiently defining the required mens rea.

Conclusion

Because the military judge erroneously denied appellant expert witnesses, and because of instructional error the findings of guilt must 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 November 14, 2023.

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