

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

**REPLY BRIEF ON BEHALF OF
APPELLANT**

v.

Docket No. ARMY 20210520

Staff Sergeant (E-6)
LESLY J. LINDOR
United States Army

Appellant

Tried at Fort Hood, Texas, on 30 June
and 21 September 2021, before a
general court-martial appointed by the
Commander, III Corps, Colonel
Maureen A. Kohn, military judge,
presiding.

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

Statement of the Case

Appellant filed his brief on 18 October 2022. The government filed its
response on 6 February 2023. Appellant now submits his reply.

A. Waiver

In arguing that appellant's claims are waived, the government fails to cite,
let alone distinguish, *United States v. Webster*, 65 M.J. 936 (Army Ct. Crim. App.
2008). There, this court evaluated, de novo, Webster's claim that his plea of guilty
for refusing to deploy to Iraq violated the Free Exercise Clause. *Id.* at 945 n.6.
Additionally, the government assumes claims of hostility to religion can be
waived, but it provides no analysis to support its assumption.

The government has no legitimate interest in using a servicemember's religion against him. Regardless of the benefits the government may leverage in a plea agreement, or the willingness with which a servicemember may surrender his rights, the government is never permitted to exploit an accused's religious faith to gain a litigation advantage. *Cf. Marshall v. Baltimore & Ohio R.R.*, 57 U.S. 314, 334 (1854) ("It is an undoubted principle of the common law, that it will not lend its aid to enforce a contract to do an act that is illegal; or which is inconsistent with sound morals or public policy . . .").

If appellant's claim is waived, few—if any—injuries beg more for piercing waiver than hostility to religion. This court recently pierced waiver in a case where the military judge omitted an element. *United States v. Rodriguez*, ARMY 20210213, 2022 CCA LEXIS 744, at *12 (Army Ct. Crim. App. 30 Dec. 2022) ([mem. op.](#)). Likewise, this court recently pierced waiver in a pretrial confinement case and granted five days of confinement credit. *United States v. Turk*, ARMY 20210104, 2022 CCA LEXIS 728, at *5–6 (Army Ct. Crim. App. 13 Dec. 2022) ([summ. disp.](#)). The use of appellant's religion as evidence in aggravation is the sort of government overreach that cries out for relief.

B. Evidence in Aggravation as a Burden on Religion

The government believes that because its actions were *ex post facto*, appellant's ability to practice his religion was not actually infringed. (Appellee's

Br. at 15–16). This cannot be true. A later punishment for doing something is as much a burden as a prior prohibition on doing it. *See Cooper v. Pate*, 378 U.S. 546 (1964) (setting aside a dismissal order because, taken as true, petitioner’s claim that he was denied privileges afforded to other prisoners because of his religion stated a cause of action). *Cf. Kaspersky Lab, Inc. v. United States Dep’t of Homeland Security*, 909 F.3d 446, 455 (D.C. Cir. 2018) (“A ‘punishment’ is something more than a burden.”) (citing *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 851 (1984)).

C. Use of Religion

The government asserts that the evidence of appellant’s religion was not used against him. Then what was its purpose? At sentencing, the government is permitted to introduce evidence in aggravation. Rule for Court-Martial 1001(b). The military judge did not need to be introduced to [REDACTED] and [REDACTED], (Pros. Ex. 1, para. 25), or [REDACTED] and [REDACTED]. (Pros. Ex. 1, para. 51). No appropriate purpose was served to inform the military judge the location a cat was dying was a djevo—or even what a djevo was, (Pros. Ex. 1, para. 65), and the military judge did not need to be informed about the particulars of a Vodou expedition, (Pros. Ex. 1, paras. 24–25, 49, 53; Pros. Ex. 20), to adjudge a proper sentence. This superfluous information was intentionally included to make appellant appear bizarre, scary, and a worshipper of a fearsome religion.

The government implicitly concedes this point. For example, regarding the portion of Prosecution Exhibit 1 labeled “Evidence in Aggravation,” the government emphasizes, “[t]he aggravating fact in this passage is contained in its first sentence.” (Appellee’s Br. at 30). Then what is the purpose of the rest of the passage discussing the rituals of appellant’s religion? Prosecution Exhibit 20, the video source of this passage, is a product of appellant’s request for an obstruction spell. But the government provides no further context into what appellant sought from that spell. It may have been as simple as a request for his case to go away, or for his chain of command and the prosecutors to be lenient. Is it wrong for an accused to pray for mercy? And is it proper for the government to use the means effectuating a prayer as evidence in aggravation? The government acknowledges the evidence is “‘jarring and disturbing’ in its effect.” (Appellee’s Br. at 30). The rooster’s violent death had no probative value, nor was it appropriate in any form to appellant’s sentencing case for a wholly separate crime.

The government argues that it made only “some” references to appellant’s religion, and that those references were merely “neutral, objective statements.” (Appellee’s Br. at 4–5). This is not supported by the record. Indeed, the Appendix to the government’s brief—consolidating trial counsel’s references to vodou during argument—stretches across nearly three single-spaced pages. (Appellee’s Br. at Appendix A). Furthermore, the government selectively highlights the professed

factual assertions about appellant's religion yet fails to analyze those referencing "the occult" and "evil and supernatural forces." (R. at 270). The government recognizes "[t]he Free Exercise clause bars even 'subtle departures from neutrality' on matters of religion." (Appellee's Br. at 17) (quoting *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018)). However, it makes no effort to—and cannot—explain how references to the occult and evil do not stray far beyond the boundary of subtle departures from neutrality.

D. *United States v. Hartman*

If a charge against a servicemember implicates constitutionally protected conduct, the military judge must ensure an accused understands the distinction between permissible and impermissible behavior. *United States v. Hartman*, 69 M.J. 467, 468 (C.A.A.F. 2011). This protection should also extend to matters in aggravation. If it is impermissible to punish an accused with a conviction and confinement for conduct which implicates constitutionally protected conduct without a thorough colloquy, it is also impermissible to increase his punishment for the same conduct without a similar inquiry. At a minimum, the evidence introduced regarding appellant's religion implicated the Free Exercise Clause. But at no point on the record did the military judge ensure appellant understood the evidence was impacting protected conduct.

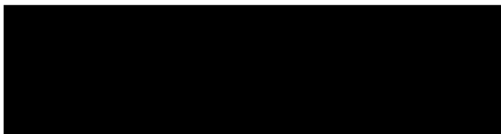
E. Prejudice

In a footnote, the government disputes appellant’s position that no prejudice analysis is required in this case. However, in terms of a remedy, it does not even attempt to distinguish appellant’s case from *Masterpiece Cakeshop*, 138 S. Ct. at 1731. Moreover, the government fails to acknowledge *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2422 n.1 (2022) (“A plaintiff may also prove a free exercise violation by showing that ‘official expressions of hostility’ to religion accompany laws or policies burdening religious exercise; in cases like that we have ‘set aside’ such policies without further inquiry.”). The abhorrent nature of government action that is hostile to the fundamental principle of religious liberty does not require an independent showing of prejudice to warrant relief.

Even if this Court finds the government may attempt to show the violation was harmless beyond a reasonable doubt, the government cannot carry its burden. As the Court of Appeals in the Armed Forces noted in *United States v. Edwards*, applying the prejudice test to erroneously admitted evidence at sentencing “is considerably more difficult” because, unlike for the merits where there is a binary question as to guilt, at sentencing “there is a broad spectrum of lawful punishments that” may be adjudged. 82 M.J. 239, 247 (C.A.A.F. 2022). The government cannot show, beyond a reasonable doubt, the military judge would not have sentenced appellant to less than the seventy years imposed but for the gruesome

death of a rooster and the other evidence hostile to appellant's religion. The plea agreement had no floor, and no statutory minimum existed.

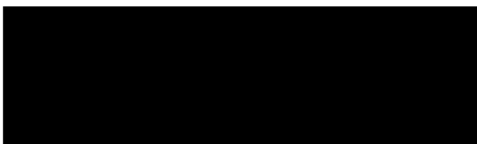
The government focused on appellant's religion during its sentencing case, inappropriately highlighting the rituals of his faith, all to portray appellant as bad because of his faith. The government used appellant's faith as a sword to argue he should be punished more severely. This was wrong, and it strikes at the very heart of the First Amendment.



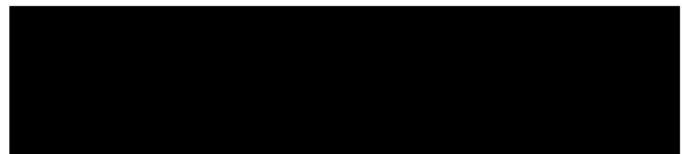
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I certify that a copy of the foregoing was electronically submitted to the
Army Court and the Government Appellate Division on 13 February 2023.



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