

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

UNITED STATES,  
Appellant

v.

Private First Class (E-3)  
**ERICK VARGAS**,  
United States Army,  
Appellee

) GOVERNMENT APPEAL AND  
) BRIEF IN SUPPORT PURSUANT  
) TO ARTICLE 62, UCMJ  
)  
) **Docket No. ARMY MISC 20220168**  
)  
) Tried at Fort Campbell, Kentucky on  
) 14 July, 9 November 2021, and 7–8  
) March 2022 before a general court-  
) martial, convened by the  
) Commander, 101st Airborne Division  
) (Air Assault), Colonel Jacqueline  
) Tubbs and Lieutenant Colonel Sasha  
) Rutizer, military judges, presiding.

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

**Issue Presented**

**WHETHER THE MILITARY JUDGE ABUSED  
HER DISCRETION WHEN SHE DISMISSED THE  
CASE WITH PREJUDICE.**

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## **Statement of the Case**

On 6 April 2021, the government charged appellee with two specifications of sexual assault and four specifications of abusive sexual contact, in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920 (2019) (UCMJ). (Charge Sheet). On 30 June 2021, the convening authority referred appellee's case to a general court martial. (Charge Sheet). On 7 March 2022, the government dismissed one specification of sexual assault and one specification of abusive sexual contact with prejudice.<sup>1</sup> (R. at 147). On 8 March 2022, on the first day of trial, the military judge granted defense's request to dismiss the charge and specifications with prejudice. (R. at 626). The United States appeals the ruling of the military judge granting the defense request to dismiss the charge and specifications with prejudice. (App. Ex. XXXVII).<sup>2</sup>

## **Statement of Statutory Jurisdiction**

The United States may file an interlocutory appeal of "[a]n order or ruling of the military judge which terminates the proceedings with respect to a charge or specification." UCMJ art. 62(a)(1)(A). Here, the military judge terminated the

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<sup>1</sup> At the direction of the GCMCA, the government dismissed specifications 2 and 6 of the Charge. (R. at 131). The charge sheet was not renumbered to reflect the new order of the specifications. (R. at 132–33).

<sup>2</sup> Two documents have been labeled as Appellate Exhibit XXXVII: the paralegal notes provided by the government in an Article 39(a), UCMJ session, (R. at 616–17), and the government's notice of appeal pursuant to Rule for Courts-Martial (R.C.M) 908, dated 11 March 2022.

entire proceedings when she dismissed the case with prejudice. (R. at 626); *United States v. Hill*, 71 M.J. 678, 681 (Army Ct. Crim. App. 2012) (noting generally jurisdiction arises when “a military judge dismisses some or all of the charges with or without prejudice.”). Therefore, this court has jurisdiction under Article 62(a)(1)(A), UCMJ.

### **Statement of Facts**

Appellee was charged with violating Article 120, UCMJ, for penetrating Specialist (SPC) [REDACTED] vulva with his finger without her consent, for touching SPC [REDACTED] breast without her consent and when appellee knew or reasonably should have known that SPC [REDACTED] was asleep, and for touching SPC [REDACTED] buttocks without her consent. (Charge Sheet). On 7 March 2022, the parties conducted pretrial litigation regarding Mil. R. Evid. 404(b), Mil. R. Evid. 412, and appellee’s motion for appropriate relief requesting a requirement for unanimous verdict. (R. at 153, 243). The military judge ruled that the government could introduce the accused’s statements “that he has not had sex in a while, that he was in a relationship,” and that he moved closer to SPC [REDACTED] while he talked with her. (App. Ex. XXXI). On 8 March 2022, appellee’s court-martial began with voir dire and opening statements. (R. at 258, 526).

### **A. Pretrial interviews of SPC [REDACTED]**

On 4 March 2022 in the days leading up to scheduled pretrial litigation, trial counsel met with SPC [REDACTED], the putative victim, for another interview. (R. at 602). The special victim prosecutor (SVP) [Major (MAJ) [REDACTED]], trial counsel [Captain (CPT) [REDACTED]], the paralegal, SPC [REDACTED], and the special victim's counsel (SVC) were all present. (R. at 617). The paralegal took a page of notes during the course of the interview. (App. Ex. XXXVII). During this interview, SPC [REDACTED] said appellee called her a "beauty queen" and kissed her on the forehead "3–4 times" prior to the sexual assault. (App. Ex. XXXVII). This was new information, and the government failed to disclose it to defense. (R. at 601).

The first morning of trial, SPC [REDACTED] informed trial counsel that her command twice counseled her for being late. (R. at 694). Trial counsel immediately disclosed this to defense. (R. at 604). It was unclear whether these were "written [or] verbal" counseling statements. (R. at 604). Then, defense notified the military judge during the morning's R.C.M. 802 session that "they were interested in getting her [personnel] file to see if those [counseling statements] existed." (R. at 604). As the day unfolded, trial counsel actively tried to find these counseling statements and turn them over to defense counsel. (R. at 604).

**B. Defense's voir dire focused on credibility and alcohol's influence on memory.**

Defense counsel conducted extensive group voir dire—spanning twenty-two pages of the record. (R. at 284–306). A majority of the questions centered on the nature of the charges and the resulting political pressure, reasons a person may lie about or embellish details of a sexual assault allegation, the influence of alcohol on a person's ability to consent, and the influence of alcohol on memory. (R. at 289–93, 299–301, 303–04).

Defense counsel requested to individually voir dire each member. (R. at 317). Specifically, defense counsel requested to individually question each member concerning their beliefs as to whether a person can consent to sexual activity after consuming alcohol. (R. at 317). The effects of alcohol became a pervasive concern through individual voir dire, to the point where defense counsel asked the judge to limit voir dire to avoid any perception that this was a sexual assault by substantial incapacitation case. (R. at 384–84). Defense explained their alcohol-related questions were more concerned with SPC [REDACTED] ability to perceive and remember the accused's alleged wrongdoing. (R. at 385–86).

**C. The government's opening statement focused on SPC [REDACTED] immediate report, and the history between SPC [REDACTED] and the accused—not their interactions on the porch.**

The government bookended its opening statement by explaining that SPC [REDACTED] called her friend, SPC [REDACTED], in the middle of the night to report that she had



been sexually assaulted and that she needed help. (R. at 526–27, 533). In order to explain the relationship between SPC [REDACTED] and the accused, the government explained that the panel would hear evidence that the two of them met in basic training in 2019, attended the same advanced individual training (AIT) class, became friends, and were both assigned to Fort Campbell. (R. at 527).

The government continued explaining the pair’s history—telling the panel they would hear that SPC [REDACTED] and the accused continued their friendship once they arrived at Fort Campbell. (R. at 527). The accused and SPC [REDACTED] were both in separate relationships at this point, but they continued to socialize, went to dinner, and talked about their personal lives. (R. at 528).

When explaining the events that led to the charged offenses, the government stated that on 7 November 2021, SPC [REDACTED] called the accused and made plans to accompany him to his brother’s home. (R. at 528). When SPC [REDACTED] arrived, she and the accused ate, briefly attended another party, and returned to the accused’s brother’s home. (R. at 528). At this point, the two of them started drinking from a bottle of Fireball whiskey that SPC [REDACTED] brought with her. (R. at 529). At some point in the evening, SPC [REDACTED] and the accused moved onto the porch because they were afraid they were being too loud. (R. at 529).

The government told the panel that they would hear testimony that after midnight, on what is now 8 November 2021, SPC [REDACTED] received a phone call from

another soldier asking her if she can drive them home; she explained that she had been drinking and could not drive. (R. at 529). After this phone call, the conversation between SPC [REDACTED] and the accused “kind of shifted.” (R. at 529). At this point, SPC [REDACTED] and the accused started talking about their respective relationships—in that discussion, “there [were] conversations about sex, but not sex between [SPC [REDACTED]] and the accused.” (R. at 529). The government explained that the panel would hear how at this point, SPC [REDACTED] realized it was late and that they should go inside to sleep. (R. at 529).

The government informed the panel that they would hear SPC [REDACTED] testify that she awoke and realized that there was someone behind her. (R. at 530). Specialist [REDACTED] realized that it was the accused, that he had his hand underneath her shirt, and that he was touching her breasts. (R. at 530). The government stated SPC [REDACTED] would go on to testify that she did not get up and decided that if she did not move, maybe the accused would stop. (R. at 530). The government stated SPC [REDACTED] would testify that the accused continued rubbing her genitals over her underwear and eventually penetrated her vulva with his finger. (R. at 530).

The penetration caused SPC [REDACTED] to tense and squeeze her legs together. (R. at 531). When the accused realized this, he removed his hand from under her pants, licked his fingers, and began to rub SPC [REDACTED] buttocks. (R. at 531). Realizing that her actions did not cause the accused to stop, SPC [REDACTED] got up from

the couch, got in her car, and began to drive away. (R. at 531–32). Specialist ■ decided to drive away even though she knew she was too drunk to drive. (R. at 532). As she drove, SPC ■ frantically tried to call her friends and eventually reached SPC ■. (R. at 532–33). While she tried to reach someone, the accused constantly called her—he called approximately forty-five times. (R. at 533).

**D. The defense focused its opening on SPC ■ credibility.**

The defense began its opening statement with a simple concept: “This case boils down to one word, credibility.” (R. at 535). They continued:

You see at the heart of every court-martial, at the heart of every criminal trial, is the issue of credibility and most importantly, the credibility of the alleged victim. The issue of credibility raises a simple question, ‘Can you trust the witness is telling the truth, the whole truth, and nothing but the truth?’ and you’re going to see in this court-martial that [SPC ■], the alleged victim, has a serious problem with credibility.

(R. at 535).

Defense counsel explained that the panel would hear some of the same facts that the government outlined in their opening, but that there would be important additions. (R. at 536). Importantly, defense counsel stated the panel would hear that SPC ■ and the accused each discussed issues that they were having in their respective relationships. (R. at 537–38). Defense counsel added that the panel would hear that when the topic of sex came up, SPC ■ voiced her frustrations with her boyfriend and their relationship. (R. at 538).

Defense counsel next focused the panel on what they would hear happened on the couch—that they would not hear SPC ■■■ testify that she told the accused no, stop, or ouch. (R. at 538). Defense counsel told the panel that SPC ■■■ would testify that she did not say anything while the accused touched her. (R. at 538).

Continuing with their theme of credibility, defense counsel stated that SPC ■■■ had a motive to fabricate. (R. at 539). Specifically, defense counsel told the panel that SPC ■■■ “had a motive to lie and that she had a motive to cheat.” (R. at 539). They continued and said that SPC ■■■ will testify that she felt her boyfriend was distant, that she wanted his attention, and when she did not get it, she got upset. (R. at 539–40). The defense told the panel how they would hear that these frustrations were on SPC ■■■ mind when she was on the porch talking with the accused about sex and as she went to lay on the couch with him. (R. at 540).

The defense concluded by stating that the government would not be able to produce any independent evidence to support SPC ■■■ allegations—that there were no eyewitnesses that saw the events and no medical evidence, even though SPC ■■■ was given the opportunity to preserve physical evidence. (R. at 540). Because of this lack of physical evidence, defense counsel told the panel, as they did at the beginning of their opening statement, “this case boils down to one thing, credibility, and after you consider the credibility of the government’s witnesses

and the quality of the government's evidence, you're going to see that the government cannot prove the allegations beyond a reasonable doubt." (R. at 542).

**E. The government's direct examination of SPC [REDACTED] at trial.**

During trial, the government called SPC [REDACTED] to the witness stand. (R. at 542). The government asked contextual questions leading up to the offense, including, "What was his level [of] intoxication at this time?" (R. at 595), and "What did you think when he started moving his knees closer to you? How did that make you feel?" (R. at 595). Specialist [REDACTED] explained that she began to feel uncomfortable. (R. at 596).

Trial counsel asked SPC [REDACTED], "What did you decide at that point?" (R. at 596). In a somewhat nonresponsive manner, SPC [REDACTED] responded: "Well, after he had already been that close and he started grabbing my head and kissing my foreh[ead], telling me I was a beauty queen[.]" (R. at 596). Defense objected, requested an Article 39(a), UCMJ session outside the presence of the members, and asked the witness to leave the courtroom for the hearing. (R. at 596–97).

**F. The Article 39(a), UCMJ session after SPC [REDACTED] testimony.**

Defense counsel said, "this is the first time we have ever heard this testimony." (R. at 597). Specifically, they "received no disclosure from the government about some sort of kissing on the forehead on the porch; him calling

her a beauty queen.” (R. at 597). The military judge turned to the trial counsel and asked for an explanation. (R. at 598).

Trial counsel acknowledged they did not disclose the information. (R. at 598). At first, trial counsel said they learned of the information “two days ago” on 7 March 2022, although that was later corrected to 4 March 2022. (R. at 601–02).<sup>3</sup> Trial counsel explained they did not intend “to elicit that particular statement,” and proposed an instruction to the members “to disregard that particular portion of the testimony” as a remedy. (R. at 598–99). Defense correctly noted the issue was not whether trial counsel intended to elicit the information, but whether they “knew about it and they didn’t disclose it to the defense.” (R. at 600).

During the Article 39(a), UCMJ session, the trial counsel explained this was not an intentional “ambush[ ],”<sup>4</sup> but an oversight:

Your honor, at that time, I did not—we did not recognize the significance of it. That was an oversight. I did—we did not believe that it rose to the level of anything inconsistent from it was an oversight. We did not deliberately say this is disclosure and decided not to. It

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<sup>3</sup> Initially, trial counsel mistakenly believed SPC █████ disclosed this information during an interview after “the 412 hearing.” (R. at 608–09). Based on this timeline, defense argued this was government’s way of skirting the military judge’s ruling on Mil. R. Evid. 404(b), such that they are able to prove the accused had “the specific intent” to commit the charged offense. (R. at 608–09). Upon review of the paralegal’s notes, however, SPC █████ actually disclosed this information prior to the hearing on 4 March 2022. (R. at 618; App. Ex. XXXVII).

<sup>4</sup> Civilian defense counsel argued that the evidence “could be helpful to us, it could be hurtful to us. We don’t know because we just got ambushed with it at trial.” (R. at 600).

was an oversight on us, the—like, the potential significance. We did not believe it negated any guilt. Certainly now, it's impeachment or an inconsistent statement, but at the time we did not recognize its—the—obviously its value.

(R. at 606).

By way of remedy, defense first asked for dismissal with prejudice, claiming this “was not an accident.” (R. at 609). Alternatively, defense wished to (1) cross examine SPC [REDACTED] in an Article 39(a), UCMJ session to learn “the extent” of her testimony; and (2) cross examine her on this omission. (R. at 610–11). Defense also requested the government “be forbidden from making any argument, inferential or otherwise, that this alleged conduct form[ed] the basis for some sort of motive or specific intent.” (R. at 612).

#### **G. The military judge's response.**

After sorting through a range of options, the military judge took a lunchtime recess in preparation for “a hearing on whether or not dismissal is the appropriate remedy.” (R. at 615). Before the recess, the military judge “excused from further participation [in the] court-martial” the SVP and assistant trial counsel detailed to the case. (R. at 615). This was without request from the defense, and without citing authority for this action. (R. at 615). She informed them, “if the SJA wants to send new trial counsel to participate and to make this argument, so be it.” (R. at 615).

After this recess, two new trial counsel appeared on the record and announced their detailing and qualifications. (R. at 616). The new trial counsel provided a copy of the paralegal's notes from the pretrial interview with SPC [REDACTED]. (R. at 617). These notes clarified that the interview actually occurred on 4 March 2022, and it noted that SPC [REDACTED] stated that the accused kissed her on the forehead and told her she was a beauty queen. (R. at 618; App. Ex. XXXVII). The new trial counsel explained that this was not "something that was crafted and then intentionally hidden after the Court's [404(b)] ruling," and agreed the defense could impeach SPC [REDACTED] with this new information, ask for a continuance, or be granted a limiting instruction. (R. at 619–20).

After the military judge concluded that a discovery violation occurred, she wanted to ensure that the government did not "benefit from . . . having some other bite at the apple at this." (R. at 621). The military judge was not convinced that dismissing the trial counsel or the other remedies was "enough." (R. at 621–22). Then, the military judge verbally issued her findings of fact. (R. at 622). She found: 1) Specialist [REDACTED] told the government on 4 March 2022 that the accused kissed her on the forehead and called her a beauty queen; 2) the court held a Military Rule of Evidence 412 and 404(b) hearing on 7 March 2022 that dealt with events that occurred at the same time as the kisses and beauty queen comment; 3) the government originally told the court that they learned of these comments on 7



March 2022 after the Article 39(a), UCMJ session; and 4) the government counsel disclosed that SPC [REDACTED] was counseled twice for failure to report on 9 March 2022—the morning trial started. (R. at 622–23).

The military judge did “not find willful misconduct in this case.” (R. at 624). She noted that Rule for Courts-Martial [R.C.M.] 701(g)(3) governs the sanctioning of discovery violations, and that willfulness is not required before ruling that charges are dismissed without prejudice. (R. at 624). The military judge continued:

When considering discovery violations, we look at the following: injury to an accused’s right to a fair trial; whether the delayed disclosure hampered or foreclosed a strategic option. I do find that the delay in disclosing this hampered or foreclosed a strategic option for the defense; whether the delay disclosure hampered the ability to prepare a defense. I do find that a delayed disclosure hampered the ability to prepare a defense. There are a number of things the defense could have done. They could have prepared a different direct examination or cross-examination of her. They could have crafted a new theory. They could have if they felt that that evidence was overwhelming, sought a pretrial agreement to some or all of the offenses, or pled without the benefit of a pretrial agreement to some or all the offenses if that was a consideration for them. The non-disclosure of that information foreclosed them from considering that strategy. Whether the non-disclosure would have allowed the defense to rebut evidence more effectively. Had they had that information earlier, they could have used that information in their opening statement, in their *voir dire*.

This Court is required to craft the least drastic remedy to obtain a desired result. I have considered the number of

remedies. I have already dismissed the original trial counsel. I have considered not allowing any additional direct examination of the victim, but, of course, would result in -- that has no -- that is an absurd result. There is no evidence presented. I have considered allowing a delay. I don't think a delay cures the issue. I've considered bringing the alleged victim back in here to allow the defense to fully cross-examine her on that issue, and then putting her back on in front of the panel members. That does not cure the issue. It doesn't cure what I previously stated with respect to a strategic option, with what they could have done with that information ahead of time. I've considered a curative instruction, but you cannot unring that bell, not when you consider the government's opening statement. I've considered precluding the government from being able to argue anything about linking a basis of the kiss on the forehead. But that doesn't cure the issue, which is non-disclosure, failure to allow them to prepare, and foreclosing the ability to create a strategic option. So the fact is, there is not another remedy.

(R. at 625–26).

The military judge dismissed the case with prejudice. (R. at 626). After taking a seven-minute recess, the military judge came back on the record during a two-minute Article 39(a), UCMJ, session and stated she “considered a mistrial under [] R.C.M. 915” but found that a mistrial is inappropriate given “the gravity of the government’s discovery violation.” (R. at 627).

The new trial counsel made several requests, all of which were denied by the military judge:

TC: Your Honor, if I may be heard?

MJ: Yep.

TC: The government would move under 905 -- R.C.M. 905(f) for reconsideration, but would ----

MJ: Denied

TC: ---- would also ask for the victim to be heard on this matter under her Article 6(b) rights, her reasonable right to be heard.

MJ: I've already ruled.

TC: Yes, Your Honor. The government moves for reconsideration under R.C.M. 905(f). And if the Court would allow, it also requests a continuance, breaking for the day, to file a written response.

MJ: No. Denied.

(R. at 627). The military judge called the members and informed them she “granted a motion that terminates these proceedings.” (R. at 628).

### **Standard of Review**

For Article 62, UCMJ appeals, this court reviews the evidence in the light most favorable to the prevailing party and is bound by the military judge’s factual determinations unless they are unsupported by the record or clearly erroneous.

*United States v. Pugh*, 77 M.J. 1, 3 (C.A.A.F. 2017). This court reviews conclusions of law de novo. *United States v. Wicks*, 73 M.J. 93, 98 (C.A.A.F. 2014).

This court reviews a military judge’s discovery rulings for an abuse of discretion. *United States v. Stellato*, 74 M.J. 473, 480 (C.A.A.F. 2015) (citing *United States v. Jones*, 69 M.J. 294, 298 (C.A.A.F. 2011)). The same abuse of discretion applies to a military judge’s determination of a remedy for a discovery violation. *Stellato*, 74 M.J. at 480 (citing *United States v. Trimper*, 28 M.J. 460,

461-62 (C.M.A. 1989)). “The abuse of discretion standard calls for more than a mere difference of opinion.” *Wicks*, 73 M.J. at 98 (internal quotation marks omitted). A military judge abuses her discretion when her ruling is based on findings of fact that are not supported by the record, she uses incorrect legal principles, she applies correct legal principles to the facts in a way that is clearly unreasonable, or she fails to consider important facts. *United States v. Commisso*, 76 M.J. 315, 321 (C.A.A.F. 2017).

### **Law & Argument**

This court should reverse the military judge’s decision because she abused her discretion in dismissing this case with prejudice. First, in this case the military judge merits less deference than is ordinarily afforded because her factual findings and conclusions of law were inadequate—not only to assess her ruling, but especially so in context of granting such a drastic remedy. Second, dismissal with prejudice was an erroneous remedy in this case because the discovery violation did not prejudice appellee’s ability to mount a defense, and other remedial options would correct the error. Accordingly, this court should set aside the military judge’s ruling.

#### **A. The military judge’s ruling merits limited deference in this case.**

While military judges generally enjoy “broad discretion” in selecting an appropriate remedy under an abuse of discretion standard of review, *United States*

*v. Douglas*, 68 M.J. 349, 354 (C.A.A.F. 2010) (quoting *United States v. Houser*, 36 M.J. 392, 397 (C.M.A. 1993)), the military judge’s ruling here merits limited deference. See *United States v. Flesher*, 73 M.J. 303, 311–12 (C.A.A.F. 2014) (where “a reasoned analysis will be given greater deference,” the “reverse is also true” in that “less deference will be accorded” where “the military judge fails to place his findings and analysis on the record”); *United States v. Benton*, 54 M.J. 717, 715 (Army Ct. Crim. App. 2001) (“When the standard of review is abuse of discretion, and we do not have the benefit of the military judge’s analysis of the facts before [her], we cannot grant the great deference we generally accord a trial judge’s factual findings because we have no factual findings to review.”).

Here, the military judge provided insufficient findings and analysis. After quoting the applicable law but without exactly identifying her conclusions of law, the military judge briefly listed why she found certain remedies inadequate. (R. at 625–26). This abbreviated verbal ruling is unsatisfactory, as it provides a limited record and hinders a full review of her ruling.

The military judge’s ruling also merits limited deference because she foreclosed the parties’ attempts to build the record. See *United States v. Kirk*, ARMY MISC 20100443, 2010 CCA LEXIS 82, at \*13 (Army Ct. Crim. App. 28 July 2010) (mem. op.) (“When . . . the military judge is aware a party anticipates seeking an interlocutory appeal, he should make every effort to state his findings

contemporaneous with his ruling.”). During the Article 39(a), UCMJ session, the “first thing” defense wanted to do was to “get [SPC ■■■] back on the stand in the [Article 39(a), UCMJ session] and ask her what else we haven’t been told . . . .” (R. at 600). Defense also wanted to “take a break” to decide how to handle the situation. (R. at 600). Even when the military judge asked defense outright “what remedy would you like,” defense still requested to ask SPC ■■■ “a couple of questions.” (R. at 605). The military judge dismissed the case with prejudice without seeking any additional information of SPC ■■■ or otherwise building the record. All told, less than sixty minutes of litigation elapsed. (R. at 596–97, 601, 615, 626, 628).

The military judge’s ruling also merits less deference because she denied all written pleadings and rulings. Not only did trial counsel request “to file a written response,” (R. at 627), but they also sought a written ruling. (App. Ex. XXXVII-B). Likewise, defense counsel stated, “Assuming you are inclined to issue a written ruling, do you prefer pleadings from either party prior to your written ruling?” (App. Ex. XXXVII-B). However, the military judge denied the government’s request to file a written response and also declined to issue a written ruling, stating, “My oral ruling on the record stands.” (R. at 627; App. Ex. XXXVII-B). The military judge continued to deny the government’s attempts at building a record when she denied their reconsideration request. (R. at 627).

Without waiting to hear the basis for reconsideration, the military judge denied it. (R. at 627) (TC: “The government would move under 905 – R.C.M. 905(f) for reconsideration, but would – MJ: Denied.”).

A “dissertation” may not be required, but more analysis is appropriately expected here—especially in light of the parties’ requests. *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002) (expecting “a clear signal that the military judge applied the right law”); *see also Flesher*, 73 M.J. at 312 (finding the most “important” concern to be the fact that the military judge did not conduct a *Daubert* hearing, “despite the fact that the defense specifically and repeatedly requested one”).

This drastic remedy demands a more prudently developed record. Before ruling on a mistrial motion or determining what type of remedy is appropriate, if any, a military judge must “adequately investigate” the material issues and “consider important facts.” *Commisso*, 76 M.J. at 321. To the extent questions remain, it is the result of the military judge’s decision not to permit the parties to build the record and her insufficient findings of fact and conclusions of law. *Contra United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004) (noting the judge “precisely identified the extent and negative impact of the unlawful command influence in his findings”). Therefore, while the military judge placed some findings of fact and analysis on the record, it merits only limited deference, even in

light of what is ordinarily a “strict” standard of review. *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010) (cleaned up).

**B. Dismissal with prejudice was too drastic a remedy.**

Context matters. Indeed, the evidence—that the accused called SPC [REDACTED] a “beauty queen” and kissed her on the forehead prior to the sexual assault—was subject to disclosure. (R. at 606); *see also* R.C.M. 701(a)(6)(D) (“Trial counsel shall, as soon as practicable, disclose to the defense the existence of evidence known to trial counsel which reasonably tends to adversely affect the credibility of any prosecution witness or evidence.”). Upon learning of this information, trial counsel should have provided timely notice to the accused. Mil. R. Evid. 304(d) (“Before arraignment, the prosecution must disclose to the defense the contents of all statements, oral or written, made by the accused that are relevant to the case, known to trial counsel, and within the control of the Armed Forces.”); R.C.M. 701(a)(6)(D). Moreover, a finding of willful misconduct is not required in order for a military judge to dismiss a case with prejudice. *Stellato*, 74 M.J. at 489. Still, this is a case where dismissal with prejudice was too severe a remedy in relation to the nature of the undisclosed matters.

**1. This was an unintentional, single discovery violation.**

First, there was no bad faith or intent to commit this discovery violation, but instead it was an honest mistake. *See United States v. Trimper*, 28 M.J. 460, 469



(C.M.A. 1989) (noting that a trial counsel’s “cunning” scheme to ambush would provide stronger ground for discovery sanction of excluding evidence); (R. at 624) (The military judge did “not find willful misconduct in this case.”). Here, during the pretrial interview, SPC ■ made this statement “in passing” and trial counsel apparently did not “follow-up” on the information. (R. at 603). Instead, at the time, the trial counsel “didn’t recognize in [his] head it was statements” that needed to be disclosed or its potential value to defense. (R. at 606). Trial counsel acknowledged his “oversight” and explained to the military judge why he was wrong to not disclose the contents of the statement to defense. (R. at 606) (recognizing its “impeachment or an inconsistent statement” value).

Based on the record, it appears this was an accidental misstep occurring in the flurry of pretrial preparation.<sup>5</sup> Far from a trial counsel’s “continual and egregious” failures to provide discovery, this was certainly not the “recklessly cavalier” approach that amounted to “an almost complete abdication of discovery duties” that merits such a drastic remedy like dismissal with prejudice. *Stellato*, 74

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<sup>5</sup> Initially, trial counsel mistakenly believed SPC ■ disclosed this information during an interview after “the 412 hearing.” (R. at 605). Based on this timeline, defense argued this was government’s way of skirting the military judge’s ruling on Mil. R. Evid. 404(b), such that trial counsel would be able to prove the accused had “the specific intent” to commit the charged offense. (R. at 608–09). Upon review of the paralegal’s notes, however, SPC ■ actually disclosed this information prior to the Mil. R. Evid. 412 hearing on 4 March 2022. (R. at 618; App. Ex. XXXVII). New trial counsel specifically introduced these paralegal’s notes to “clarify the record.” (R. at 617).

M.J. at 476. While bad faith is not required to dismiss a case with prejudice, it remains “an important and central factor for a military judge to consider” in determining an appropriate remedy. *Id.* at 489 (quoting three federal cases and one military case that all held that the willfulness, intentionality, or bad faith of the discovery violation should be considered in determining the remedy for a discovery violation).

The manner in which the information came out at trial also demonstrates how this was a mistake, and not meant to ambush the defense. Specifically, the information surfaced when SPC [REDACTED] was unresponsive to the trial counsel’s question. Once SPC [REDACTED] described becoming “uncomfortable” near the accused, the trial counsel asked, “[w]hat did you decide at that point?” (R. at 596). Injecting the undisclosed details on her own accord, SPC [REDACTED] responded, “Well, after he had already been that close and he started grabbing my head and kissing my fore[head], telling me I was a beauty queen . . . .” (R. at 596). Clearly, trial counsel was not expecting this answer, and he explained to the military judge that it was not his intent “to elicit that particular statement.” (R. at 598). This is not an egregious, unscrupulous use of the undisclosed evidence, and it was certainly not of a nature that merited the most drastic remedy available.

Finally, trial counsel’s management of the newly disclosed counseling statement on the morning of trial further demonstrates their lack of intent to skirt

discovery obligations. “[I]mmediately” upon learning that SPC [REDACTED] had been “counseled in some form” for being tardy, trial counsel notified defense. (R. at 606, 607, 609, 623). Government counsel were actively “trying to get that” information, as defense expressed interest “to see if those existed,” even despite the military judge’s opine that its probative value would be “dubious.” (R. at 604, 623). For this reason, the government merits some tolerance in managing this single, unintentional discovery violation—given their practice of making good-faith attempts at responding to defense discovery requests. *Cf. United States v. Bowser*, 73 M.J. 889, 902–03 (A.F. Ct. Crim. App. 2014) (where the lead prosecutor defied a judge’s order to disclose witness interview notes for an *in camera* review following defense claims of a discovery violation).

**2. No prejudice resulted, as the discovery violation did not interfere with the accused’s ability to mount a defense.**

In cases involving discovery violations, Article III courts—and the Court of Appeals for the Armed Forces [CAAF]—have held that the proper inquiry is whether there was “injury to [an accused’s] right to a fair trial.” *Stellato*, 74 M.J. at 490; *United States v. Garrett*, 238 F.3d 293, 299 (5th Cir. 2000); *United States v. Valentine*, 984 F.2d 906, 910 (8th Cir. 1993) (noting that discovery sanctions are warranted where violations prejudice the defendant’s substantive rights). In making this determination, these courts have examined: (1) whether the delayed disclosure hampered or foreclosed a strategic option, *United States v. Mathur*, 624

F.3d 498, 506 (1st Cir. 2010) (belated *Brady* disclosure); (2) whether the belated disclosure hampered the ability to prepare a defense, *United States v. Warren*, 454 F.3d 752, 760 (7th Cir. 2006) (noting that belated discovery disclosure did not interfere with ability to prepare a defense); (3) whether the delay substantially influenced the fact-finder, *United States v. De La Rosa*, 196 F.3d 712, 716 (7th Cir. 1999); and (4) whether the nondisclosure would have allowed the defense to rebut evidence more effectively, *United States v. Accetturo*, 966 F.2d 631, 636 (11th Cir. 1992).

More specifically, in *Stellato*, the CAAF found that prejudice can arise from discovery violations when those violations interfere with an accused's ability to "mount a defense." 74 M.J. at 490. The CAAF found that a dismissal with prejudice was appropriate because the appellant was unable to call a key witness and exculpatory evidence was forever lost due to the government's non-disclosure. *Id.* None of these circumstances are present in this case.

Here, the military judge found:

[T]hat a delayed disclosure hampered the ability to prepare a defense. There are a number of things the defense could have done. They could have prepared a different direct examination or cross-examination of her. They could have crafted a new theory. They could have if they felt that that evidence was overwhelming, sought a pretrial agreement to some or all of the offenses, or pled without the benefit of a pretrial agreement to some or all the offenses if that was a consideration for them. The non-disclosure of that information foreclosed them from considering that

strategy. Whether the non-disclosure would have allowed the defense to rebut evidence more effectively. Had they had that information earlier, they could have used that information in their opening statement, in their *voir dire*.

(R. at 625). This demonstrates her abuse of discretion because she only considered potential uses of the evidence—not whether they were significant enough that they interfered with the accused’s ability to “mount a defense” as a matter of law.

*Stellato*, 74 M.J. at 490. The evidence would have negligible value in the defense examination of SPC ■■■, as they already planned to introduce evidence that the two discussed “matters that were more personal in nature” on the porch, including the “topic of sex.” (R. at 537–38). Defense had essentially already mounted a defense, highlighting that SPC ■■■ “never did or said anything that a reasonable person could construe as non-consent.” (R. at 539). Further, defense already expected the evidence to show that SPC ■■■ “had a motive to fabricate,” such that any prior omission of this information did not foreclose their ability to propose she was not going to be “a credible witness.” (R. at 539, 541). Thus, it is speculative that the defense strategy would be different, or would have changed based on this new information. Likewise, it is also speculative that the accused would have pled guilty to the charges of sexual assault. *See United States v. Trigueros*, 69 M.J. 604, 610 (Army Ct. Crim. App. 2010) (“[W]e find it entirely speculative that appellant would have altered his pretrial strategy and sought a pretrial agreement had he known of the mental health records’ existence. It is also entirely speculative that

the convening authority would have approved a pretrial agreement acceptable to the accused as there was never a ‘meeting of the minds.’ In sum, the government’s nondisclosure was harmless beyond a reasonable doubt.”). Therefore, the military judge’s statement that the “delayed disclosure hampered the ability to prepare a defense” is simply incorrect, and amounts to an abuse of discretion. (R. at 625).

Even defense counsel proposed several alternative remedies that would have rendered the non-disclosure harmless, allowing them to buttress their theme that SPC ■ was not credible. *See United States v. Barry*, 78 M.J. 70, 79 (C.A.A.F. 2018) (quoting *Gore*, 60 M.J. at 187) (“The dismissal of charges is warranted ‘when an accused would be prejudiced or no useful purpose would be served by continuing the proceedings.’”). The military judge stated on multiple occasions that her concern was the impact on defense preparation; yet, she does nothing to link how any one of the less-drastic available remedies, or a combination thereof, would have failed to succeed in that goal. Defense counsel’s second choice of remedy would actually have cured this concern—additional time to question SPC ■ and determine how this new information fit with what they already knew. (R. at 611).

**3. Despite the availability of less severe remedies, the military judge erroneously dismissed the case with prejudice.**

The military judge further abused her discretion in this case because she went for the last resort first—despite other remedies that would render the error

harmless. Dismissal is a drastic remedy, and “courts must look to see whether alternative remedies are available.” *Gore*, 60 M.J. at 187. Where an error can be rendered harmless, “dismissal is not an appropriate remedy.” *Id.* A dismissal “is appropriate only where an accused would be either prejudiced in the presentation of his case at a rehearing or no useful purpose would otherwise be served by continuing the proceedings.” *United States v. Green*, 4 M.J. 203, 204 (C.M.A. 1978) (quoting *United States v. Gray*, 22 U.S.C.M.A. 443, 445, 47 C.M.R. 484, 486 (C.M.A. 1978)).

Here, other remedies would cure the error. Perhaps most precisely, a limiting instruction as well as barring trial counsel from any later use of the evidence would most effectively restore the neutral playing field. *United States v. Diaz*, 59 M.J. 79, 92 (C.A.A.F. 2003) (quoting R.C.M. 915(a) discussion) (“A curative instruction is the preferred remedy, and the granting of a mistrial is an extreme remedy which should only be done when ‘inadmissible matters so prejudicial that a curative instruction would be inadequate are brought to the attention of the members.’”). A review of possible options, and the imprecision with which the military judge weighed her options, demonstrates why it was an abuse of discretion to dismiss the case with prejudice. The government addresses each in turn.

**a. Curative instructions—the preferred remedy—would best resolve the error.**

A curative instruction is the “preferred remedy” when “court members have heard inadmissible evidence, as long as the instruction is adequate to avoid prejudice to the accused.” *United States v. Taylor*, 53 M.J. 195, 198–99 (C.A.A.F. 2000) (where a trial counsel devoted much of his opening statement to inadmissible evidence about gang-related clothing, and panel members even asked questions about this inadmissible evidence, a limiting instruction was still appropriate). “A curative instruction is preferred to granting a mistrial.” *United States v. McFadden*, 74 M.J. 87, 89 (C.A.A.F. 2015). Only in extreme cases have a limiting instruction been inadequate. *See Diaz*, 59 M.J. at 92 (where an expert witness “identified Appellant as the murderer” in his murder trial).

The CAAF found a more narrowly crafted remedy—which included a curative instruction—most appropriate following a far more egregious discovery violation than what occurred here. *United States v. Carter*, 79 M.J. 478, 482 (C.A.A.F. 2020). In *Carter*, appellant faced adultery charges with a young woman, MR. *Id.* When MR took the stand, ostensibly to identify appellant as her paramour, her “testimony took a dramatic turn” and she stated appellant was not the man she met. *Id.* Following her equivocation, trial counsel wielded nondisclosed discovery and asked MR whether “she had been offered \$1000 to misidentify” the appellant—suggesting attempted bribery of a witness. *Id.*



Upon learning this information for the first time at trial in front of the members, *Carter*'s defense counsel requested an Article 39(a), UCMJ session, called this a "serious discovery violation," and requested a mistrial on all charges and specifications. *Id.* The military judge refused to grant a full mistrial, instead granting only a mistrial as to the adultery specification, and he also issued "curative instructions to the members informing them that he had conducted a hearing about the vague bribery allegations and found them unsubstantiated and instructing them to disregard all of MR's testimony and any inferences that anyone attempted to bribe a witness in this case." *Id.*

*Carter* first illustrates how the military judge in the present case failed to link the error to the particular remedy. The CAAF approvingly noted how "the military judge carefully considered the bribery allegation's effect on the trial." *Id.* Here, the military judge failed to conduct any analysis of the effect on appellee's trial, stating merely "you cannot unring that bell, not when you consider the government's opening statement." (R. at 626). She never explained what in the government's opening statement was so permanent that an instruction could not cure the issue. The government spent a mere five lines of transcript on the events that took place on the porch, telling the panel merely that there was a "discussion involving sex." (R. at 529). This is a far contrast from the military judge in *Carter* who fully explained how the "alleged payments were not attributed to the accused"

nor was there anything “connecting MR to any of the other victims or crimes in the case.” *Id.* Therefore, when this military judge failed to conduct the “‘tolerable’ risk assessment” that the members would be able to put aside the inadmissible evidence, that amounted to an abuse of discretion. *Diaz*, 59 M.J. at 91 (quoting *United States v. Pastor*, 8 M.J. 280, 284 (C.M.A. 1980)).

*Carter* also demonstrates how less drastic remedies could cure the taint of a discovery violation, even in a much more egregious scenario. Here, the military judge noted that appellee “would help draft[]” the instruction, as defense “want[ed] an instruction from the Court that this can be considered directly on the issue of credibility as an omission.” (R. at 611). The instruction could also neutralize any alleged misconduct by the accused, redoubling the benefit of the curative instruction. Still, the military judge briefly concluded that “the bell” could not be unrung, a clearly erroneous conclusion when the government did not rely on any alleged actions by the accused on the porch in their opening. (R. at 626). The government placed no reliance on the accused’s previous actions as evidence of intent, planning, preparation—in fact, they did not rely on the incidents on the porch *at all*. (R. at 529). An instruction of this nature would amply suit, especially in light of the presumption that, absent evidence to the contrary, panel members are presumed to follow the military judge’s instructions. *United States v. Sewell*, 76 M.J. 14, 19 (C.A.A.F. 2017) (“We presume, absent contrary indications, that the

panel followed the military judge's instructions that trial counsel's arguments were not evidence and that it must not engage in spillover when determining Appellant's guilt").

Finally, the military judge never analyzed why her initial instructions that "I advise you that opening statements are not evidence in this case. Rather, they are what counsel expect the evidence will show," would be insufficient. (R. at 526). Ultimately, in light of the context of this case, an instruction would be adequate to avoid prejudice to the appellee, and it was an abuse of discretion for the military judge not to employ this less drastic remedial option.

**b. Preclude the government from using this evidence at trial.**

Forbidding the government from using this evidence would neutralize any harm to appellee's case, especially if this remedy is combined with a curative instruction. *See Trigueros*, 69 M.J. at 611 (approving of the military judge "enact[ing] another remedial action commensurate with the government's discovery violation" by "barr[ing] the government from presenting any victim impact evidence and aggravation evidence"). This would be especially effective since, as the accused proposed to the military judge, the government could be forbidden from "making any argument, inferential or otherwise, that this alleged conduct forms the basis for some sort of motive or specific intent." (R. at 612).

This could extend even from “specific intent” to “a motive for him to commit the sexual assault.” (R. at 612).

Further, the military judge’s consideration of alternate remedies—  
“precluding the government from being able to argue anything about linking a basis of the kiss on the forehead,” (R. at 626)—was inconsistent to the concern that she stated on the record. Specifically, the military judge was most concerned with “failure to allow [defense] to prepare, and foreclosing the ability to create a strategic option.” (R. at 626). This is inapposite because the preclusion of that evidence prevents the need to prepare for the evidence at all, as it would not be admitted at trial. In other words, where the government cannot assert that appellee kissed SPC [REDACTED] on her forehead or called her a “beauty queen” as evidence that he had the specific intent to gratify his own sexual desire, this negates the need for defense to “prepare” anything. (R. at 612, 626). Trial would proceed unaffected, and no option would be foreclosed for defense. Therefore, this remedy would entirely invalidate the government’s actions, and it is an alternative remedy that would solve the problem. Thus, the military judge abused her discretion in refusing to employ this remedy.

**c. Excusing the trial counsel from the case.**

The military judge “excused” the SVP and the assistant trial counsel “from further participation [in] this court-martial.”<sup>6</sup> (R. at 615). Then, when she listed the remedies she considered, she acknowledged that she “already dismissed the original trial counsel” but failed to explain why that was insufficient. (R. at 625) (“What I am struggling with is, I’ve already kicked off two counsel so, you know, maybe you all can do something with this. And is that enough, on top of all these other remedies? I don’t know if that’s enough. So that’s what I’m thinking about.”).

This is further evidence of an abuse of discretion because—in light of her expressed concerns that the government could not get “some other bite at the apple at this”—this remedy would proficiently cure the error. (R. at 621). The best way to prevent the government from getting another chance is to make two brand new counsel, who would conceptually be unfamiliar with the case and have limited time to prepare, try the case. *See United States v. Morrison*, 449 U.S. 361, 364 (1981) (noting any action taken “had to be tailored to the injury suffered”) (internal quotations omitted). That way, government counsel would not get a “do over,”

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<sup>6</sup> The military judge does not cite the authority that authorizes this action, nor does she put on the record her reason for removing the two counsel from the case. The Military Judge may have “[e]ntered such other order as is just under the circumstances[.]” R.C.M. 701(g)(3)(D). However, this is speculation as the record is silent regarding this issue.

given they were on the sidelines; rather, these two counsel who are unfamiliar with the case would have had to prove a sexual assault charge beyond a reasonable doubt in front of a panel.

**d. Grant a delay to afford defense time to adjust its strategy.**

The military judge's brief consideration of a delay further demonstrates internally inconsistent analysis. Initially during litigation, the military judge listed a number of ways the defense conceivably could have used this information to help them prepare for trial—"they needed to do something to create a defense," or "maybe they would have decided to plead" or "re-figure out how to cross her on that." (R. at 621). Based on these examples alone, a delay would have aided the defense in that regard. However, without analysis, she dismissed this remedy with two sentences: "I have considered allowing a delay. I don't think a delay cures the issue." (R. at 625). The inherent contradiction between her logic on the record and her dismissal of the remedy exposes her holding as arbitrary and capricious. *See United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000) (reasoning that actions by the military judge that are "arbitrary, fanciful, clearly unreasonable, or clearly erroneous" are an abuse of discretion).

**e. Mistrial without prejudice.**

A military judge may declare a mistrial when "manifestly necessary in the interest of justice because of circumstances arising during the proceedings which

cast substantial doubt upon the fairness of the proceedings.” R.C.M. 915(a). “The power to grant a mistrial should be used with great caution, under urgent circumstances, and for plain and obvious reasons,” including times “when inadmissible matters so prejudicial that a curative instruction would be inadequate are brought to the attention of the members.” R.C.M. 915(a), discussion. Indeed, a “mistrial is an unusual and disfavored remedy. It should be applied only as a last resort to protect the guarantee for a fair trial.” *Diaz*, 59 M.J. at 90. Mistrials are “reserved for only those situations where the military judge must intervene to prevent a miscarriage of justice.” *United States v. Vazquez*, 72 M.J. 13, 19 n.5 (C.A.A.F. 2013) (quoting *United States v. Garces*, 32 M.J. 345, 349 (C.M.A. 1991)). “The power to grant a mistrial should be used with great caution, under urgent circumstances, and for plain and obvious reasons . . . .” R.C.M. 915(a), discussion.

Even a mistrial without prejudice would have been too drastic of a remedy here, but the military judge dismissed this remedy with a lone sentence. (R. at 627) (“I considered a mistrial under -- under R.C.M. 915 and do not find that that remedy is sufficient given the gravity of the government’s discovery violation.”). Defense counsel was even hesitant to request a “mistrial,” as “that’s something we would like to discuss with the client first,” (R. at 611), and defense counsel later expressed dissatisfaction about a mistrial because it “gives the government a pass,”

as the government “just get[s] a do over” and is “more prepared next time.” (R. at 614). The military judge, countering this point, stated one benefit—“all of this is now transcribed and you have the ability to do whatever you want to do with that.” (R. at 614). Arbitrarily, however, this notion disappeared from her subsequent ruling. (R. at 626).

As stated *supra*, pp. 28-31, the preferred remedy of a curative instruction would have successfully remedied the error. The limited effect of the non-disclosure of this evidence did nothing “so prejudicial that a curative instruction would be inadequate . . . .” R.C.M. 915(a), discussion. The government, based on their opening statement, was not relying on the accused’s actions on the porch to buttress the allegations on the charge sheet. (R. at 529). The panel was not expecting anything other than a “discussion about sex” and general discussion regarding the parties’ relationships. (R. at 529). This evidence was hardly prejudicial, and it was certainly not prejudicial enough to warrant this drastic of a remedy. Despite this, the military judge went even further and chose the remedy of last resort—dismissal with prejudice. (R. at 626).

**f. Dismissal with prejudice was too drastic a remedy.**

Without asking more details of the trial counsel involved in the interview, without questioning SPC [REDACTED] about the statement, and without giving parties an opportunity to submit written pleadings, the military judge dismissed the case with



prejudice. (R. at 597–626). While a military judge generally has “considerable latitude in determining” the appropriate remedy, this was an arbitrary exercise of discretion that amounted to an abuse of discretion. *United States v. Seward*, 49 M.J. 369, 371 (C.A.A.F. 1998).

Here, dismissal was “not an appropriate remedy” because the error “could be rendered harmless.” *Douglas*, 68 M.J. at 354–55 (C.A.A.F. 2010). As noted, *supra*, pp. 28-36, there are several other less drastic remedies that would have quashed the concerns that the military judge noted in her verbal ruling. Although she stated she had considered these alternative remedies, she did not analyze why they inhibited the accused’s ability to mount a defense. *Stellato*, 74 M.J. at 490. Conclusory statements are insufficient because they do not provide the underlying analysis such that this court can assess the military judge’s reasoning. She also declined to accept any written pleadings on the matter. R. at 627). When pressed for a written ruling, she denied the request. (App. Ex. XXXVII-B). Instead, she summarily notified the panel members that she “granted a motion that terminates these proceedings” and adjourned the court. (R. at 628). This remedy was not within the range of reasonable remedies, and consequently it was a clear error of

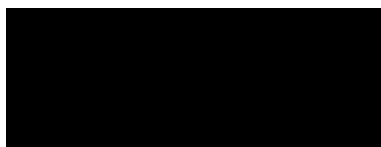
judgment.<sup>7</sup> *Gore*, 60 M.J. at 189. This was “arbitrary, fanciful, clearly unreasonable, [and] clearly erroneous.” *McElhaney*, 54 M.J. at 130.

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<sup>7</sup> The military judge also did not consider a combination of remedies. The role of instructions and a robust opportunity for cross examination also would have cured the discovery violation. Specifically, when a witness is impeached on cross-examination, the fact finder will then weigh that discrepancy and “consider whether it resulted from an innocent mistake or a deliberate lie.” *See* Dep’t of Army, Pam. 27-9, Legal Services: Military Judges’ Benchbook, para. 7-7-1 (20 Mar. 2020) [Benchbook]. As the military judge would instruct, the members could consider SPC [REDACTED] omission of this detail in prior statements as evidence of her “inclination . . . to tell the truth.” Benchbook, para. 7-7-1. Here, the military judge “considered bringing [SPC [REDACTED]] back in here to allow the defense to fully cross-examine her on that issue, and then put[] her back on in front of the panel members.” (R. at 625–26). This seems to blend remedies, and it does not explain why allowing the defense to impeach SPC [REDACTED] with her prior omission in front of the panel members would inadequately address the error. Instead, the military judge found this option did “not cure the issue . . . with respect to a strategic option, with what [defense] could have done with that information ahead of time.” (R. at 626). Again, this is an abuse of discretion.

## CONCLUSION

WHEREFORE, the United States respectfully requests this honorable court set aside the military judge's ruling and remand for further proceedings.



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Appellate Division

**CERTIFICATE OF SERVICE, U.S. v. VARGAS (Misc 20220168)**

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at *usarmy.pentagon.hqda-otjag.mbx.dad-accaservice@mail.mil* on the 25th day of April, 2022.



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