IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES Appellant v. Private First Class (E-3) **Erick Vargas** United States Army Appellee	**BRIEF ON BEHALF OF APPELLEE** Docket No. ARMY MISC 20220168 Tried at Fort Campbell, Kentucky, on 14 July and 9 November 2021, and 7–9 March 2022, before a general court-martial appointed by Commander, 101st Airborne Division, 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.

Statement of the Case

On 6 April 2021, the government charged appellee, Private First Class Erick Vargas, with two specifications of sexual assault and four specifications of abusive sexual contact, in violation of Article 120, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 920. (Charge Sheet). On 7 March 2022, the government dismissed one specification of sexual assault and one specification of abusive

sexual contact with prejudice. (Charge Sheet; R. at 147). On 9 March 2022,[1] the military judge granted the defense motion to dismiss the charge and its remaining specifications with prejudice. (R. at 626). The government appealed this ruling in accordance with Article 62, UCMJ. (App. Ex. XXXVII).

Statement of Facts

On 28 July 2021, the government informed the defense it intended to use uncharged acts to prove appellee's intent to have sex with HS. (App. Ex. VIII, p. 2; App. Ex. XI, p. 4). According to the government, on a porch prior to the alleged sexual assault on 8 November 2020, appellee moved closer to the purported victim, [redacted], and told her it had been "forever" since he'd had sex. (App. Ex. XI, p. 4).

On Friday, 4 March 2022, four days before panel selection, while trial counsel was preparing [redacted] to testify, [redacted] told trial counsel that, on the porch prior to the alleged sexual assault, appellee kissed her on the head three to four times and called her a beauty queen. (R. at 622). A government paralegal took notes of the witness preparation, which included this new statement by the alleged victim. (R. at 617–18, 621; App. Ex. XXXVII). The government did not disclose this new information to the defense on Friday or over the ensuing weekend. (R. at 623).

[1] The government mistakenly notes this as 8 March 2022 and as the first day of trial. (Appellant's Br. 1).

On Monday, 7 March 2022, the court held an Article 39(a) session regarding an "unruled upon 404(b) matter" and a Military Rule of Evidence [Mil. R. Evid.] 412 hearing. (R. at 153). A great deal of this closed hearing focused on the interactions between appellee and [redacted] while on the porch. (R. at 154–240 (sealed)). Even at this hearing, the government still did not disclose the new information regarding appellee's alleged conduct or statement to [redacted]. (R. at 622).

On Tuesday, 8 March 2022, the panel was selected to hear appellee's case. (R. at 258). Once again, the government still did not disclose to the defense appellee's alleged statement or conduct. (R. at 622). The next day, Wednesday, 9 March 2022, [redacted] told the government she had been counseled for being late, and the government disclosed that information to the defense, but it still failed to disclose any information from the Friday, 4 March 2022 interview of [redacted]. (R. at 604).

The parties presented opening statements later that Wednesday. (R. at 526). The government's first witness was [redacted]. (R. at 542). The government questioned [redacted] for over twenty pages of transcript, and the defense then asked for a recess. (R. at 565–66). At no point during the recess, even though [redacted] had already taken the stand and testified, did the government disclose the new information to the defense. (R. at 566–67, 622). At around 1050, still during the government's direct

examination of [redacted], the court recessed again. (R. at 588–89). The government did not disclose the relevant information during this recess either. (R. at 622).

During the government's examination of [redacted], following some questions about her background, the government asked questions about her relationship with appellee (R. at 549–553) and about what happened on the porch of appellee's brother's house preceding the alleged sexual assault. (R. at 585–96). According to [redacted], she and appellee discussed their significant others, each expressing frustrations about the state of their respective relationships. (R. at 590–93). Both were sitting on a bench on the porch, and both had been drinking alcohol. (R. at 588).

According to [redacted], appellee told her that she "deserve[d] the best" and moved closer to her so that their knees were touching. (R. at 594). Trial counsel asked [redacted], "What did you decide at that point?" She responded, "Well, after he had already been that close and he started grabbing my head and kissing my forehand [sic], telling me I was a beauty queen, and not to let ---" (R. at 596). Defense counsel objected, and asked for an Article 39(a) session. (R. at 596).

After the members were excused, the defense stated that "what she's about to testify to" had not been disclosed to the defense. (R. at 597). The government admitted that it had failed to disclose the new information. (R. at 598). The government claimed its "intent wasn't to elicit that particular statement" when questioning [redacted] and asked the military judge to "strike" her answer. (R. at 598).

Defense counsel noted that, no matter whether it wanted to elicit the testimony, the government knew about it and had failed to disclose it. (R. at 599). Defense counsel emphasized that the government's response indicated it never intended to disclose the information to the defense. (R. at 599). "They knew, apparently, that there was kissing between the parties before the alleged sexual contact and they didn't tell us about it, and they weren't going to elicit it from - - from their witness." (R. at 599).

The trial counsel admitted to knowing about the kiss on the forehead and the "beauty queen" statement, but claimed he only knew about it "a day or two" before trial, and it was not written down anywhere. (R. at 601). Trial counsel also admitted he never disclosed the new statements to the defense. (R. at 601). The military judge pressed the government on when, exactly, it knew about this information to which the trial counsel replied, "Two days ago, Your Honor." (R. at 601).

Following a recess, the military judge again pressed the government about when he had first heard the statement, to which the other trial counsel again replied "Two days ago, Your Honor." (R. at 602). The government claimed [redacted] made this disclosure at a meeting on 7 March 2022 at around 1700–1800, in other words, after the hearing. (R. at 602). The government justified not disclosing the statement because it "was made in passing," and it had not asked [redacted] any follow-up

questions about it. (R. at 603). The government admitted it immediately disclosed information it received that morning about [redacted] being counseled for being late. (R. at 604).

The military judge found that "it was a fact" that [redacted] told trial counsel on 7 March 2022 that appellee called her a "beauty queen" and that those statements were not disclosed to the defense. (R. at 605). The government was asked to again confirm that the meeting with [redacted] occurred after the hearing on Monday, 7 March 2022. (R. at 605). Trial counsel responded, "That is correct, Your Honor." (R. at 605).

In his subsequent request for dismissal with prejudice, defense counsel noted that the government was quick to disclose the counseling [redacted] received but had failed to disclose the kiss or the "beauty queen" statement. (R. at 609). Trial defense counsel believed the government made a strategic decision not to disclose the information. (R. at 610). "[T]he obvious inference is that they did it because they thought . . . disclosing it would be harmful to them in some way or that surprising us at trial would help them in some way." (R. at 610).

After ordering a hearing regarding the appropriate remedy for the discovery violation, the military judge excused trial counsel from further participation in the court-martial and noted the Staff Judge Advocate could assign new counsel to the case. (R. at 615).

At the hearing addressing the appropriate remedy for the discovery violation, the new trial counsel informed the military judge that the information the former trial counsel presented to the court was false. (R. at 617). The new trial counsel admitted the interview with [redacted] took place on 4 March 2022, not on 7 March, and that, contrary to the former trial counsel's representation to the court, a paralegal had indeed taken notes. (R. at 617–18).

After concluding the hearing, the military judge made the following, among other, findings of fact and conclusions of law: (1) the government was aware of the statements at issue on 4 March 2022; (2) the trial counsel did not disclose the statements before or during the prior evidentiary hearing; and (3) that, when questioned about when he learned of the new statements, former trial counsel claimed they only found out about the statements *after* the two hearings on 7 March 2022. (R. at 622–27). The military judge also noted that, although trial counsel failed to disclose the 4 March 2022 statements, trial counsel immediately informed the defense about [redacted] negative counseling, indicating that trial counsel knew they had a continuing duty to disclose. (R. at 623). The military judge observed she had to fashion a remedy for the government's discovery violation to the facts of the individual case. (R. at 624). She also noted she did not have to find willful misconduct to dismiss a case with prejudice, and she stopped short of finding willful misconduct in appellee's case. (R. at 624).

The military judge found that the government's discovery violation "hampered" the defense's ability to prepare its case and impacted the defense strategy in a number of ways.

> 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).

The military judge recognized she was required to "craft the least drastic remedy" to cure the discovery violation. (R. at 625). But, after exploring other options, the military judge determined that other options did not adequately cure the violation. (R. at 625–26). The military judge therefore dismissed the case with prejudice. (R. at 626).

Standard of Review

In an Article 62, UCMJ appeal, this court must review the evidence in the light most favorable to the appellee. *United States v. Lewis*, 78 M.J. 447, 452 (C.A.A.F. 2019). A military judge's discovery ruling is reviewed for an abuse of discretion. *United States v. Stellato*, 74 M.J. 473, 480 (C.A.A.F. 2015). "[T]he abuse of discretion standard of review recognizes that a judge has a range of

choices and will not be reversed so long as the decision remains within that range." *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004) (citations omitted). "The abuse of discretion standard calls for more than a mere difference of opinion." *United States v. Wicks*, 73 M.J. 93, 98 (C.A.A.F. 2014) (citation omitted).

Law and Argument

Rule for Courts-Martial 701(g)(3)(D) allows a military judge to enter an order, with respect to discovery violations, that is just under the circumstances. The military judge's dismissal of this case with prejudice was not an abuse of discretion in light of the government's failure to comply with its discovery obligations and the impact that failure had on the defense's strategic options and preparation for trial.

A. Dismissal with prejudice is the appropriate remedy.

After obtaining information that it had an obligation to disclose, despite numerous opportunities, the government failed to disclose the evidence. These opportunities included: a full weekend; multiple court sessions in which the government contested the admissibility of evidence similar to the evidence it failed to disclose; voir dire; panel selection; opening statements; and the partial direct examination of its chief witness. Yet the government remained silent.

The statement only came to light because [redacted] said it, unprompted, during direct examination. Even then, trial counsel *still* failed to tell the truth, claiming

HS made the statement after the 7 March evidentiary hearing, not before, and that the statement had not been written down, when it indeed had been. Just as the initial nondisclosure hampered the defense's strategic options and ability to prepare for trial, the government's false statements regarding the timeline likewise hampered the defense counsel's ability to properly research and articulate its motion to dismiss. Considering the government's failure to disclose, and failure to provide an accurate accounting of that failure, a severe sanction is appropriate and just.

The military judge did not abuse her discretion. She fully considered all the options, weighed the impact of the government's failure on the defense case, and only then made her decision. As discussed above, she considered other, less drastic, options and she analyzed how the failure to disclose hampered the defense's ability to prepare for trial and even the decision to go to trial. Even if this court disagrees with the military judge's decision to dismiss with prejudice, mere disagreement does not warrant reversal. *Wicks*, 73 M.J. at 98.

The military judge was there. She observed the panel, the government counsel, the defense counsel, and the witness. She understood, as she told both parties during the second closed hearing, [redacted] (R. at 239 (sealed)). She decided, after recognizing she was "required to

craft the least drastic remedy," to dismiss the case with prejudice. (R. at 625–26). That decision was appropriate.

B. The government's conduct constituted, at a minimum, gross negligence.

The government argues that the discovery violation was unintentional and isolated. But, as the government admits, (Appellant's Br. 22), willful misconduct is not required in order for a military judge to dismiss with prejudice. *Stellato*, 74 M.J. at 489. Relying on trial counsel's self-serving statements, as opposed to the military judge's findings, the government portrays the discovery violation as an "honest mistake" and an "accidental misstep." (Appellant's Br. 21). But the military judge did not find this was an honest mistake or an accidental misstep. The military judge only stated she did not find willful misconduct. (R. at 624).

Next, in arguing this discovery violation stands alone, the government hangs its hat on the pains the trial counsel apparently took to disclose, and run down evidence related to, some tardiness by [redacted]. (Appellant's Br. 22–23). As the defense pointed out at trial, the government's disclosure of some innocuous failure to report by [redacted] does not mean it would, as a matter of course, disclose evidence that is actually relevant to the case. (R. at 609). Indeed, the government never disclosed the relevant evidence here, even at trial, [redacted] did.

The government attempts to excuse trial counsel's failure to disclose this information as wholly innocent and the result of "the flurry of pretrial preparation."

(Appellant's Br. 21). Even if that were true, that in no way excuses the repeated statements by the trial counsel that [redacted] did not provide the information until after the evidentiary hearing on 7 March 2022. The hearing was a significant event in appellee's court-martial; indeed, the hearing's focus was on what happened between appellee and [redacted] on the porch prior to the alleged sexual assault. It strains credulity that [redacted] told trial counsel that appellee called her a beauty queen and kissed her on the forehead, and the thought never occurred to either of them that they had an obligation to disclose it at or after the hearing.

Critically, one of the trial counsel made a significant admission to the military judge. When asked why the information had not been disclosed, the trial counsel justified not doing so because [redacted] "made [the statement] in passing," and trial counsel did not ask [redacted] any follow-up comments about the statement. (R. at 603). In other words, trial counsel turned a blind eye to this new information. The government similarly ignored relevant information in *Stellato*. *See* 74 M.J. 487–88. Just as in *Stellato*, it is not necessary that the government apparently had no use for this evidence, or intended to ignore it. They still had an obligation to disclose.

The government's brief twice points out that [redacted] disclosed the information to the government three days earlier than the trial counsel told the military judge. This is apparently an effort to demonstrate that the failure to disclose must not

have been meant to skirt any later ruling issued by the military judge. (Appellant's Br. 10 n.3 and 21 n.5). Hearing this same argument at trial, the military judge was appropriately skeptical that more time between the government's awareness of information and its ultimate disclosure was "better." (R. at 620). She instead noted that the increased length of time the government sat on the information, especially given the government's false representations about when it learned about it, was worse. (R. at 622).

Furthermore, the government was not averse to turning over paralegal notes when it would benefit its case. On 21 September 2021—five months before the discovery violation and trial—the government filed its response to a defense motion under Mil. R. Evid. 412. (App. Ex. X (sealed)). In support of its motion, the government provided paralegal notes from an interview with [redacted]. (App. Ex. X-B (sealed)). Again, on 18 November 2021, the government responded to a defense supplemental motion under Mil. R. Evid. 412 with a memorandum from a paralegal about a meeting with [redacted]. (App. Ex. XVII (sealed); App. Ex. XVII-A (sealed). This typed memorandum was dated 18 November 2021, the same day the government submitted its motion, even though the interview occurred on 16 November 2021. (App. Ex. XVII (sealed); App. Ex. XVII-A (sealed).[2]

[2] It is unclear why, for the 18 November 2021 disclosure, the government did not just submit written paralegal notes as it did in App. Ex. XVII (sealed).

Nonetheless, the original trial counsel did not disclose the paralegal notes or the content of [redacted] statement from the Friday before trial. In fact, trial counsel denied [redacted] statement was written down. (R. at 601).

Finally, even though the military judge did not find willful misconduct by the government, she did chastise them on the record. "By the way, government counsel, none of this is her fault. This is all your doing." (R. at 612). Furthermore, she excused them from further participation in the case. (R. at 615). This demonstrates she did not view this failure to disclose as some "honest mistake." The government's conduct demanded a consequence, and the military judge reasonably found that a consequence short of a dismissal with prejudice was not "sufficient given the gravity of the government's discovery violation." (R. at 627).

C. Any other remedy would be insufficient.

The government argues that dismissal with prejudice was simply too harsh a remedy by presenting what it believes to be more appropriate remedies. But none of the government's proffered remedies cure the discovery violation here.

1. A curative instruction would not be sufficient in this case.

In support of the notion that a curative instruction would remedy its discovery violation, the government cites *United States v. Carter*. 79 M.J. 478 (C.A.A.F. 2020). But its explanation of *Carter* is incomplete and its reliance

misplaced. Carter was charged and convicted of numerous crimes: five specifications of sexual abuse of a child, one specification of extortion, and two specifications of possession of child pornography. *Id.* at 479. The government also tried Carter for adultery. *Id.* at 482. During testimony related to the adultery, the witness, instead of confirming her sexual encounter with Carter, stated Carter was not the person she met. *Id.* The trial counsel then asked if the witness had been bribed to misidentify Carter. *Id.* The defense objected and requested a mistrial on all charges and specifications, but the military judge only granted a mistrial for the adultery specification. *Id.* The military judge also issued an instruction to the members to disregard the witnesses' testimony and bribery allegations. *Id.*

Carter does not support a curative instruction in this case. Carter was facing multiple charges and specifications, and the questioning that led to a mistrial involved only one offense. A curative instruction easily remedied the violation. The Court of Appeals for the Armed Forces actually affirmed the military judge's harsher remedy for the relevant specification while keeping the unrelated specifications intact. *Id.* at 482–83.

Appellee faced allegations related to *one* night with *one* alleged victim. (Charge Sheet). The discovery violation here related directly to the *res gestae* for

all the specifications, and unlike in *Carter*, a remedy could not be individually tailored to cure it.

As the military judge found, the discovery violation impacted the defense's total approach to the case—from tactical cross-examination questions to strategic plea decisions. A curative instruction to the factfinder simply could not cure all the harm done to the defense's case—it would not "unring that bell." (R. at 626).

2. Precluding the government from using the evidence at trial is also not sufficient.

The government also claims that denying it the use of the evidence at trial is an adequate remedy. But this is no remedy at all. The government never intended to use the evidence in the first place. As the government notes, trial counsel did not try to elicit this information with the questioning of [redacted]. (R. at 598). If it is information the government did not intend to introduce to the factfinder, then prohibiting the government from using the evidence is a remedy in name only. The government would remain in the exact same position it intended, and "[t]rial would [have] proceed[ed] unaffected" even with an admitted discovery violation. (Appellant's Br. 32).

3–4. Excusing the trial counsel from the case and granting a continuance are also insufficient.

The government also asserts that excusing the trial counsel placed the government in a somewhat difficult situation, and thus that was a sufficient cure-

all. (Appellee's Br. at 33–34). But this did not remedy the government's discovery violation. As the military judge found, the discovery violation impacted all aspects of appellee's trial. (R. at 625). Therefore, dismissal of the trial counsel did not cure the violation.

Additionally, a continuance does not cure the discovery violation. The military judge had excused the trial counsel by the time she deliberated on what remedy was appropriate for the discovery violation. A continuance at that point negates the benefits of the excusal to appellee. The new trial counsel would use any delay to study the case and build rapport with [redacted] and other government witnesses. A continuance would not be a sufficient remedy.

5. A mistrial without prejudice is also an insufficient remedy.

As noted by the military judge, granting a mistrial and allowing the government to try the case again just gives them another "bite at the apple," (R. at 621), and a chance to "perfect their case." (R. at 622). Here, the government had a chance to run through its voir dire, opening, and much of the direct examination of the alleged victim, its key—and only eye—witness. The government's discovery violation should not make it more prepared. But if it is allowed to try this case again, the government will only be benefited.

Furthermore, as intimidating as a court-martial may be for attorneys, the anxiety of a witness, especially a victim, is greater. If permitted to retry the case,

the government gets the benefit of a dress rehearsal with [redacted]. The government, in preparing [redacted] to testify, may have shown her the courtroom or even asked her some questions while she sat in the witness stand. However, that, and anything else the government or her attorney could do to prepare her, pales in comparison to sitting on that stand in front of a real panel giving real testimony. Additionally, the government and her attorney have the benefit of over fifty transcribed pages of her testimony. She, and thus the government, will be better prepared next time.

The defense would gain nothing. The military judge acknowledged that the defense would possess HS's testimony, (R. at 614; Appellant's Br. 36), but this does not tip the scales. The impeachment value of [redacted] hometown and why she joined the Army is minimal, (R. at 543), especially when compared to the benefits to the government. Ultimately, this remedy also harms appellee. A dismissal with prejudice is appropriate and this court should not set aside the military judge's findings.

D. The military judge should be given the chance to supplement her findings before her ruling is set aside.

Contrary to the government's suggestions, (Appellant's Br. 16, 17, 19), the military judge's findings of fact are sufficient to support her ruling. However, if this court should determine that the record is not developed enough to support a dismissal with prejudice, the proper action is to "return [the] case to the trial court to further develop the factual predicate supporting the ruling on this motion."

United States v. Mitchell, 2016 CCA LEXIS 179, at *2 (Army Ct. Crim. App. 18 Mar. 2016) (mem. op.) rev'd in part on other grounds, 76 M.J. 413 (C.A.A.F. 2017). If the government is correct that an "abbreviated verbal ruling is unsatisfactory" to affirm the military judge's ruling, (Appellant's Br. 17), then it is also too undeveloped to set aside her ruling permanently. If the problem is "a limited record," (Appellee's Br. 17), then this court should order the military judge to complete it instead of ruling on something limited.

WHEREFORE, appellee respectfully requests this honorable court allow the military judge's ruling to stand.

[redacted]

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Certificate of Filing and Service

I certify that copies of the foregoing were electronically submitted to the Court and the Government Appellate Division on 16 May 2022.

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