

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

**APPELLANT’S MOTION FOR  
LEAVE TO FILE  
SUPPLEMENTAL CITATION OF  
AUTHORITY**

v.

Docket No. ARMY 20210440

Private (E-2)

**NATHANIEL I. GILKEY**

United States Army

Appellant

Tried at Camp Humphreys, Republic of Korea and Fort Leavenworth, Kansas, on 29 October and 28 December 2020, 13 and 23 January, 1–4 February, and 19–20 July 2021, before a general court-martial appointed by the Commander, 19th Expeditionary Sustainment Command, Lieutenant Colonel Christopher E. Martin and Colonel Jeffrey W. Hart, military judges, presiding.

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

COME NOW the undersigned appellate counsel, pursuant to Rule 23.4 of the Rules of Appellate Procedure, and move for leave to cite the following supplemental authority in the above-captioned case for matters raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). Appellant does not object to the government receiving an extension to respond, should it desire.

*United States v. Grindstaff*, ARMY 20200315 (Army Ct. Crim. App. 30 Aug. 2022), which held that it was error for the government to introduce testimony regarding the contents of a video recording that all parties believed was deleted,

without introducing the recording itself and without an applicable exception under Military Rule of Evidence [Mil. R. Evid.] 1002.

In *Grindstaff*, a third party allegedly recorded a sexual assault occurring on Snapchat. *Id.* at 10. At trial, both parties addressed the video in opening statements, and the victim testified about the video, to which Grindstaff objected under Mil. R. Evid. 1002. *Id.* The military judge did not make a determination whether the missing video was available through normal avenues, but allowed the prosecution to lay a foundation that the video no longer existed. *Id.* A lay witness testified about the functionality of Snapchat, and both parties agreed that the original video was deleted and the loss was not attributable to the prosecution. *Id.* After the foundation was laid Grindstaff failed to renew his objection. *Id.*

This court noted the government was negligent in not attempting to retrieve the video, but acknowledged that the lapse in time led all parties to believe the video was unrecoverable. *Id.* Nonetheless, a proponent is still required to prove an applicable exception. *Id.* at 11. The relevant exceptions in *Grindstaff* would have been that the original was lost or destroyed, or unobtainable by any judicial process. *Id.*; Mil. R. Evid. 1004(a)-(b).

This court held that, even if the original on the phone was deleted, the prosecution could not avail itself of Mil. R. Evid. 1004(a) because the government did not make a valid attempt to obtain the video directly from Snapchat. *Id.* The

court did not find sufficient the testimony of a police officer who said he contacted Snapchat to see if he could retrieve the video, but was ultimately unsuccessful. *Id.* This court also easily dismissed the exception that the video was unobtainable, because the government never tried any judicial process. *Id.*

After finding the military judge abused his discretion in admitting the testimony regarding the video, this court held that Grindstaff was not prejudiced. *Id.* It determined that while the testimony regarding the video was powerful, the government's case was otherwise strong and the defense's case was otherwise weak. *Id.* Therefore, the government satisfied its burden that the erroneous admission of the evidence was harmless. *Id.* at 10–11.


Like *Grindstaff*, the alleged victim in appellant's case also testified, extensively, about the existence—at one point—and contents of photos and videos he sent and received over Snapchat, notwithstanding the government's failure to lay an appropriate foundation for an exception under Mil. R. Evid. 1002. (R. at 123–145). Also like in *Grindstaff*, only a lay witness, in this case the alleged victim, testified—during cross-examination—that the contents of Snapchat disappear. (R. at 149). This error was plain and obvious. Even without an objection, the military judge did not satisfy his obligation under Mil. R. Evid. 1008.

With respect to prejudice, *Grindstaff* is readily distinguishable. There, the video was a recording of a crime which the victim and others could testify to independently, and could be corroborated other ways. Slip op. at 11–12. Here, the photos and videos are the crime. Had the alleged victim been unable to testify regarding their contents, no evidence would have existed to find appellant guilty of the Specification of Charge II, or Specifications 4 and 5 of Charge IV.

WHEREFORE, appellant respectfully requests that this court grant appellant leave to cite supplemental authority.


PANEL 4


MOTION FOR LEAVE TO FILE  
SUPPLEMENTAL CITATION OF  
AUTHORITY

GRANTED: 

DENIED: \_\_\_\_\_

DATE: 1 September 2022

  
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**Certificate of Filing and Service**

I certify that a copy of the foregoing was electronically submitted to the Army

Court and Government Appellate Division on 31 August 2022.



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