IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee v. Second Lieutenant (O-1) **DALTON C. CLARK** United States Army, Appellant	**BRIEF ON BEHALF OF APPELLEE** Docket No. ARMY 20220541 Tried at Fort Riley, Kansas, on 5 January and 8–12 August 2022, before a general court-martial convened by Commander, 1st Infantry Division and Fort Riley, Colonel Steven Henricks and Lieutenant Colonel Thomas Calhoun-Lopez, Military Judges, presiding.

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

Assignments of Error[1]

WHETHER THE MILITARY JUDGE ERRED BY REFUSING TO GRANT APPELLANT'S REQUEST FOR A WITNESS DUE TO UNTIMELINESS.

[1] The government has reviewed appellant's *Grostefon* matters and agrees with the appellate counsel that they do not warrant full briefing as an assignment of error. Furthermore, the government respectfully submits that they lack merit. Of note, the first *Grostefon* matter submitted by appellant has been resolved by *United States v. Anderson, _M.J.__* (C.A.A.F. 29 June 2023). The government recognizes this court's authority to elevate *Grostefon* matters deserving of increased attention. *United States v. Grostefon*, 12 M.J. 431, 437 (C.M.A. 1982). Should this court exercise such authority, finding any of appellant's *Grostefon* matters meritorious, the government requests notice and an opportunity to file a supplemental brief addressing the claimed error.

Statement of the Case

On 12 August 2022, an officer panel sitting as a general court-martial convicted appellant, contrary to his pleas, of five specifications of assault consummated by battery, one specification of child endangerment, and three specifications of obstruction of justice in violation of Articles 119b, 128, and 131b Uniform Code of Military Justice [UCMJ], 10 U.S.C. §§ 919b, 928, 931b. (R. at 621). The military judge sentenced appellant to eighteen months and eight days of confinement and a dismissal. (R. at 671). On 30 August 2022, the convening authority approved the findings and sentence. (Action). On 15 September 2022, the military judge entered judgment. (Judgment).

Statement of Facts

Appellant was convicted of physically abusing his wife (and endangering their child during that abuse), Ms. [redacted], from May through December of 2019. (STR, R. at 621). In late January or early February 2020, after the events that formed the basis for the appellant's assault convictions, Ms. [redacted] allegedly began an intimate relationship with Mr. JS. (App Ex. II(a)). On 21 March 2022, the defense requested production of Mr. JS to testify to Ms. [redacted]'s character for untruthfulness. (App. Ex. II(b)). Prior to this request, Mr. JS purportedly authored an email making several allegations about Ms. [redacted], including that she attempted to frame him for domestic violence, attempted to get him fired from his job, would

frequently lie to him, and was known for being a compulsive liar. (App. Ex. II(a)). After being unable to contact Mr. JS, the defense employed a private investigator to find him. (App. Ex II). Once the defense team was able to locate Mr. JS and presumably speak with him for the first time, on 9 June 2022, the defense submitted a supplemental production request. (App. Ex V(f)). On 16 June 2022, the government denied the request due to an inability to contact Mr. JS and a disagreement over his testimony's relevance and necessity. (App. Ex. V(g)).

In its pretrial order, issued 7 January 2022, the military judge set deadlines for, among other things, non-expert defense witness requests (15 March 2022); government denial of such requests (22 March 2022); motions filings (7 June 2022); and, if needed, scheduling a motions hearing for 21 June 2022. (App. Ex. VI(a)). Prior to the scheduled motions hearing, the parties informed the military judge that the hearing was not needed, and requested that the hearing be canceled; the military judge obliged. (App. Ex. IX).

On 29 June 2022, the defense moved to compel production of Mr. JS and proffered his relevance based on the fact he lived with Ms. [redacted] and formed an opinion that she was untruthful and violent. (App. Ex. II). The defense's position was that Mr. JS was not cumulative of other character witnesses for untruthfulness because the other character witnesses were members of Ms. [redacted]'s or appellant's family, and that Mr. JS's position of being in a relationship with Ms. [redacted] gave him

a unique insight. (App. Ex. VII). Mr. JS was the only non-family character witness the defense would have called at trial. (App. Ex. II). The defense supplemented their motion with additional details about the relevance of Mr. JS's testimony. (App. Ex. VIIe). The government responded by arguing the motion was out of time and it had been unable to contact the witness to confirm the defense's proffer. (App. Ex. VIII). The defense filed a request to file out of time and argued the good cause was its inability to reach Mr. JS until a private investigator was retained. (App. Ex VI). On 5 August 2022, the military judge denied the motion to compel Mr. JS's production (a ruling that had been made orally as well on 25 July 2022). (App. Ex. IX). The court found the defense failed to show good cause for filing the request out of time, as well as stating that "[s]pecifically, the court harbors significant doubts as to whether the defense has shown the requested witness is necessary." (App. Ex. IX).

During trial, the defense cross-examined Ms. [redacted] on her alleged romantic relationship with Mr. JS, and Ms. [redacted] denied anything more than a friendship and denied traveling to see him. (R. at 255–56). Despite appellant claiming in his brief that Ms. [redacted] admitted to moving in with Mr. JS, Ms. [redacted] made no such statement at trial. (Appellant's Br. 4; R. at 255–56). During the cross examination of Ms. [redacted]'s mother, Ms. B[redacted], defense counsel asked if Ms. [redacted] told her she was living with Mr. JS and Ms. B[redacted] replied in the negative. (R. at 312).

To impeach Ms. [redacted]'s testimony, appellant attempted to testify that Mr. JS told him he and [redacted] were romantically involved. (R. at 398). The government objected on hearsay grounds. (R. at 398). The military judge explained that when production was denied he believed Mr. JS was only going to be a character witness (as that was the basis listed by appellant's defense counsel). (R. at 400–02; App. Ex. IX). The defense's response at trial was that they did not know Ms. [redacted] would deny the relationship and that Mr. JS's testimony would now include impeachment as well as character for untruthfulness. (R. at 400–02). The defense had asked Ms. [redacted] whether she was in a relationship with Mr. JS during a pre-trial interview but she refused to answer those questions.[2] (R. at 400–02). The military judge sustained the objection and would not allow appellant to testify that Mr. JS told him he was in a relationship with Ms. [redacted]. (R. at 405).

At trial the defense elicited testimony on various levels of untruthfulness by Ms. [redacted]. Ms. B[redacted] (the victim's mother) admitted that her daughter had periods of untruthfulness on cross-examination. (R. at 309–10). Ms. KL, appellant's cousin, testified that she found Ms. [redacted] to be an untruthful person based on their interactions. (R. at 466). Ms. TM, appellant's aunt, testified that she found Ms.

[2] Significantly, following this pre-trial interview with Ms. [redacted], the defense team neither renewed its motion to compel Mr. JS, nor asked the court for reconsideration, on the additional basis that Mr. JS may be needed to impeach Ms. [redacted]'s testimony at trial.

[redacted] to be an untruthful person and appellant to be truthful. (R. at 471). Lieutenant Colonel (Retired) RC, appellant's aunt, and Ms. SC, appellant's sister, testified the same as Ms. TM. (R. at 476, 479, 488). Ms. CN, the current girlfriend of appellant, testified that appellant was peaceful and truthful. (R. at 493). Finally, appellant's mother, Ms. CC, testified that Ms. [redacted] was not truthful and that she had seen her hit appellant. (R. at 496–98).

Assignment of Error

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Standard of Review

A military judge's ruling on the production of a witness is reviewed for an abuse of discretion. *United States v. Brown,* 28 M.J. 644, 648 (A.C.M.R. 1989). If found to be an abuse of discretion, the court tests the loss of that witness to the defense by the harmless beyond a reasonable doubt standard. *Id.* (citing *United States v. Fisher*, 24. M.J. 358, 362 (C.M.A 1987)). "We will not set aside a judicial denial of a witness request unless [we have] a definite and firm conviction that the [trial court] committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *United States v. McElhaney*, 54 M.J. 120, 126 (C.A.A.F. 2000) (alterations in original).

Law and Argument

"The Sixth Amendment to the United States Constitution grants to an accused in a criminal prosecution the right to have compulsory process for obtaining witnesses in his favor." *United States v. Hinton*, 21 M.J. 267, 269 (C.M.A. 1986). An accused has the right to a witness's testimony when such testimony is material to an issue before the court. *United States v. Combs*, 20 M.J. 441, 442 (C.M.A. 1985). Testimony is material if it "negate[s] the government's evidence or . . . support[s] the defense." *United States v. Fisher*, 24 M.J. 358, 361 (C.M.A. 1987). The "touchstone for untimeliness should be whether the request is delayed unnecessarily until such a time as to interfere with the orderly prosecution of the case." *Brown,* 28 M.J. at 647 (citing *United States v. Hawkins*, 6 U.S.C.M.A. 135 (C.M.A. 1955)).

United States v. Dorgan, 39 M.J. 827 (A.C.M.R. 1994), cited by appellant for its rule that, "[t]he government cannot claim a witness is unavailable without an attempt to personally deliver a subpoena along with the fees and mileage required by statute," is a case with nearly no factual similarities to this situation. (Appellant's Br. 6 (citing *Dorgan*, 39 M.J. at 831)). In *Dorgan*, the defense requested and had been requesting since a preliminary hearing the only witness to numerous parts of a drug deal be produced in a prosecution for said drug transaction. Not only did the government refuse to provide contact information for

this witness, a confidential informant, but it then attempted to deny production because the defense did not have the information. *Id*. at 829. The military judge denied the witness's production. The appellate court reversed, not only due to the steps not taken by the government to locate the witness but because of the clear necessity of that witness to the defense case. *Id*. at 830.

The military judge denied production of Mr. JS for two reasons: first, that the defense request for his production was untimely, and second, that his purported testimony was cumulative to other defense witnesses who would testify that Ms. [redacted] was an untruthful person. (App. Ex. IX). During the discussion that took place at trial the military judge (who was a different military judge than the one who denied defense's pre-trial motion to compel) stated that he understood the initial request as a request for a character for untruthfulness witness, a characterization with which defense counsel agreed. (R. at 400).

The military judge was correct that the request for witness production was untimely as it did not comply with the pretrial order issued in this case. (App. Ex. VIa). The request was additionally untimely as there was no indication that defense counsel had solved the problem of Mr. JS's availability. Mr. JS had already demonstrated that he would refuse contact for long periods of time. (App. Ex. VI). After government counsel raised their concerns regarding Mr. JS's reliability and the authenticity of who he was, defense counsel took no additional

steps. Despite the supplemental defense request for production of Mr. JS on 9 June 2022 and the government denial on 16 June, the parties informed the military judge there was no need for the Article 39(a) session previously scheduled for 21 June. (App. Ex. V(f); App. Ex. V(g); App. Ex. IX). After the same email proffer was submitted to the court again, the government was not able to contact him at all. (App. Ex. VIII). There is no indication that service of process (for a witness with no established relevance) could have taken place in a timely manner and that would certainly have impacted the trial date.

The military judge's original ruling was correct. Mr. JS's proffered testimony, that Ms. [redacted] was untruthful, was cumulative and did not provide the unique perspective appellant claims. At trial Ms. [redacted] testified that she had lived with appellant's parents and sister for a month. (R. at 147). Lieutenant Colonel (Retired) RC, the appellant's aunt, testified that she had known Ms. [redacted] since 2018, and during that time saw her six to seven times a year at her sister's house when family would gather on the weekends, during holidays, and at her own house when family met to spend weekends on the lake together. (R. at 476–78). Ms. S[redacted], appellant's sister, testified that Ms. [redacted] lived with her family for a month and a half. (R. at 484–85). Appellant's proffer regarding Mr. JS is that he would have testified to meeting Ms. [redacted] in late January or early February of 2020, beginning a relationship that eventually had them living in the same state and moving in

together at some point near April 2020. (App. Ex. VIIe). The relationship between the two apparently ended soon after moving in together. (App. Ex. VIIe). Far from providing the only source of "close contact" testimony or a unique perspective, Mr. JS in fact had fewer interactions with Ms. [redacted] than most of the witnesses the defense called for the same type of testimony.

Even if this court were to find that the absence of Mr. JS and subsequent exclusion of testimony regarding his living situation with Ms. [redacted] was error, it was harmless beyond a reasonable doubt. The limited scope of testimony offered by Mr. JS would have had no impact on the trial as it would be the testimony of someone who knew Ms. [redacted] for an extremely short period of time *after* the crimes had all taken place. This is especially true when appellant himself testified to the circumstances surrounding that relationship. (R. at 397–98).

The critical evidence in this case was the recorded abuse of Ms. [redacted] by appellant. (Pros. Ex. 1; R. at 178–88). Once the panel heard physical violence and appellant admitting his reasons for that violence, getting their own window into the crime free of bias, there was never a doubt what the verdict would be regardless of what the relationship was between Ms. [redacted] and Mr. JS. (Pros. Ex. 1; R. at 426–36). The panel did not have to rely on the general truthfulness of Ms. [redacted] when the evidence in front of them was, independent of her truthfulness, damning for appellant. For that reason, any error was harmless beyond a reasonable doubt.

Conclusion

WHEREFORE, the government respectfully requests that this honorable court affirm the findings and sentence.

[redacted]

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CERTIFICATE OF FILING AND SERVICE,
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I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at [redacted] [redacted] on this 22 day of September 2023.

[redacted]

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