IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

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

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

Assignment of Error[1]

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

[1] Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant respectfully requests this court consider the information provided in the Appendix.

Statement of the Case

On 12 August 2022, an officer panel sitting as a general court-martial convicted appellant, First Lieutenant Dalton Clark, contrary to his pleas, of five specifications of domestic violence, one specification of child endangerment, and two specifications of obstruction of justice in violation of Articles 128b, 119(b), and 131(b) Uniform Code of Military Justice [UCMJ], 10 U.S.C. §§ 919(b), 928(b), 931(b). (R. at 621). The military judge sentenced appellant to eighteen months and eight days confinement and a dismissal. (R. at 671).

On 30 August 2022, the convening authority approved the findings and sentence. (Convening Authority Action). On 15 September 2022, the military judge entered judgment. (Judgment of the Court). This court docketed appellant's case on 13 January 2023. (Referral and Designation of Counsel).

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

Facts Relevant to Assignment of Error

a. The defense requested production of [redacted], a former boyfriend of [redacted], who believed she is untruthful.

In late January or early February 2020, [redacted], a police officer, began an intimate relationship with the alleged victim, [redacted]. (App Ex. II(a)). [redacted] brought the child she and appellant shared to visit [redacted] in Mississippi. (App. Ex II). The three moved in together in April 2020.

Afterwards, [redacted] began noticing [redacted] frequently lying, [redacted] even attempted to frame [redacted] for domestic violence, going so far as to injure herself and her child. (App. Ex. II(a)). She also called the sheriff's office and attempted to get [redacted] fired. (App. Ex. II(a)). [redacted] was even aggressive toward [redacted] mother. (App. Ex. II(a)).

In [redacted] opinion, [redacted] is a "narcissist…and known for being a compulsive liar and master manipulator." (App. Ex. II(a)).

On 21 March 2022, the defense first requested production of [redacted] to testify to [redacted] character for untruthfulness. (App. Ex. II(b)). After being unable to contact [redacted], the defense employed a private investigator to find him. (App. Ex II). Once located, 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 [redacted] and a disagreement over his testimony's relevance and necessity. (App. Ex. V(g)).

On 29 June 2022, the defense moved to compel production of [redacted] and proffered his relevance based on the fact he lived with [redacted] and formed an opinion that she was untruthful and violent. (App. Ex. II). Contrary to the government's claims, the defense argued he was not cumulative of other character witnesses because the other character witnesses were members of appellant's family and could be characterized and impeached as biased. (App. Ex. II). The

defense supplemented their motion with additional details about the relevance of [redacted] testimony. (App. Ex. VII). 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). However, the defense filed a request to file out of time and argued the good cause was its inability to reach [redacted] until a private investigator was retained. (App. Ex VI).

On 25 July 2022, the military judge denied the motion to compel [redacted] production. (App. Ex. IX). The court found the defense failed to show good cause for filing the request out of time. (App. Ex. IX).

b. [redacted] denied having a relationship with [redacted].

During trial, the defense cross-examined [redacted] on her romantic relationship with [redacted], and [redacted] denied traveling to see him. (R. at 255). Despite agreeing they moved-in together, she also denied ever being in a relationship with [redacted]. (R. at 256).

To impeach [redacted] testimony, appellant attempted to testify that [redacted] told him he and [redacted] were romantically involved. (R. at 398). The government objected on hearsay. (R. at 398). The defense counsel explained the denial of [redacted] production left them with no other option for impeaching [redacted] on the relationship. (R. at 399).

The military judge explained that when production was denied he believed [redacted] was only going to be a character witness. (R. at 400-402). The defense contended it could not have foreseen [redacted] denying the relationship and thus needed [redacted] for impeachment. (R. at 400-402). The defense explained that, in their pretrial interview, [redacted] refused to answer questions about her relationship with [redacted]. (R. at 400- 402).

The military judge sustained the objection and would not allow appellant to testify that [redacted] told him he was in a relationship with [redacted]. (R.at 405). The military judge claimed it would be unfair to allow this testimony, ironically, because [redacted] was not present to be cross-examined by the government. (R. at 405).

In closing, the defense argued the relevance of [redacted], stating, "Members, you can use your common sense and knowledge of the ways of the world, as the judge instructed, to realize [redacted] wasn't [just] a friend." (R. at 583). "She admitted to the friendship with [redacted]. She wouldn't say it was romantic." (R. at 583).

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). Once 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)).

Law

"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 government cannot claim a witness is unavailable without an attempt to personally deliver a subpoena along with the fees and mileage required by statute. *United States v. Dorgan*, 39 M.J. 827, 831 (A.C.M.R. 1994) (holding that once the defense provides a reasonable method for the government to locate a witness, the military judge must delay the trial long enough for the government to demonstrate they have diligently attempted to personally serve a subpoena on the witness).

The precursor to this court found that timeliness of the request for production is not a per-se reason to deny production. 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).

In *Brown,* the court found the military judge erred by finding a production request untimely when the government had over forty-eight hours to get the witness to trial. *Brown*, 28 M.J. at 647. Further, the court found the military judge's determination that the witness was cumulative was error.

> "The other witnesses' testimony may have been cumulative with the testimony of [redacted] to some extent in that they would have also testified that [redacted] was constantly 'bugging' appellant and that appellant had good military character. However, these witnesses, as immediate supervisors of appellant, would have testified regarding appellant's character based on their day-to-day observations. Other witnesses who were present at trial and testified regarding appellant's character did not have the close contact with appellant as did the witnesses who were not produced. Furthermore, these witnesses would have testified that they counselled [redacted] 'several' times about staying away from appellant which is contrary to [redacted] testimony. At trial, [redacted] denied being counselled to stay away from appellant more than once." *Brown*, 28 M.J. at, 648.

Argument

The issues presented in the instant case and in *Brown* are nearly identical. The military judge erred both on his analysis of timeliness and on finding [redacted] testimony to be cumulative all while failing to appreciate the impeachment value [redacted] would have offered the defense.

A. The defense motion to compel [redacted] was timely and the government failed to comply with their obligation to attempt to produce him before declaring him unavailable.

The military judge erred in focusing his denial of production on the request's timeliness. In *Brown*, forty-eight hours before trial was enough time to produce the witness. Here, the defense gave the government updated contact information for [redacted] on 9 June 2022. (App Ex. V(f)). Trial was not set to begin until two months later, on 8 August 2022. Even, if only considering the 29 June 2022 date when the defense moved the court to compel production, the government still had over a month to secure the availability and production of [redacted]. This is, of course, well beyond the forty-eight hours the court found reasonable in *Brown*. Clearly, the production of [redacted] would not have "interfered with the orderly prosecution of the case." *Brown,* 28 M.J. at 647.

The military judge failed to hold the government to its obligations to subpoena [redacted]. The government replied to the supplemental production request and claimed its attempts to call [redacted] had all failed. (App. Ex. V (g)). The government made *no mention* of any attempt to "personally deliver the subpoena." *Dorgan*, 39 M.J. at 831. Because the government never upheld its obligation to at least try to secure [redacted] testimony, it was error for the military judge to accept the government's contention that he was unavailable and to allow the case to continue to trial.

B. [redacted] had a unique perspective not shared by other opinion witnesses.

By finding [redacted] testimony cumulative to other witnesses, the military judge committed the same error as in *Brown*. The judge failed to appreciate the differences in perspective of the witnesses when determining the evidence would be cumulative. "Other witnesses who were present at trial and testified regarding appellant's character did not have the *close contact* with appellant as did the witnesses who were not produced." *Brown,* 28 M.J. at 648 (emphasis added).

Here, the witnesses appellant called all came from the same perspective – they were members of appellant's family who had negative experiences with [redacted]. This is categorically different than another man who was in a relationship with [redacted] and saw the same problems with [redacted] behavior as appellant saw, and subsequently, came to the same opinion – [redacted] was an extremely untruthful person. (App. Ex. II (a)). [redacted] had *close contact* with [redacted] in a way no other witness did – this made his opinion unique and not cumulative.

C. [redacted] was needed to impeach [redacted].

By failing to appreciate the impeachment value of [redacted], the military judge again committed another error identical to *Brown*. "[T]hose witnesses would have testified that they counselled [redacted] 'several' times about staying away from appellant which is contrary to [redacted] testimony.

At trial, [redacted] denied being counselled to stay away from appellant more than once." *Brown*, 28 M.J. at, 648.

At trial, [redacted] denied having a relationship with [redacted]. (R. at 255, 256). [redacted] would have testified that, not only did they have a relationship, but [redacted] made the same false accusations against him that she made against appellant. (App. Ex. II(a)). The impeachment value of [redacted] cannot be understated. [redacted] credibility was crucial to the case and the military judge refused to order the production of the strongest impeachment evidence.

In an ironic twist, when the defense tried to introduce this evidence through appellant's testimony, the military judge found, "I agree with [SVP], that it would be unfair to elicit that testimony in the absence of an ability to cross-examine." (R. at 405). This ruling allowed the government to effectively able to keep [redacted] off the stand and then prevent relevant exculpatory evidence from being elicited because [redacted] did not testify.

D. The absence of [redacted] was not harmless beyond a reasonable doubt.

[redacted] presence would have had a profound impact. As the defense contended in their motion to compel, "[redacted] has others who will testify that [redacted] is dishonest, but they are family members who could be considered biased. [redacted], however, has never met [redacted], and has no

interest in his vindication. For this reason, he is the most necessary defense witness." (App. Ex. II).

The defense was limited to arguing the "ways of the world" instruction in closing and imploring the panel to assume a relationship existed between [redacted] and [redacted]. There can be no comparison between argument by supposition and the panel hearing intimate details of the relationship directly from [redacted] which contradict [redacted] testimony. The government cannot meet their burden to show that [redacted] would have no impact on the outcome of the case.

Conclusion

The military judge's refusal to hold the government to their obligation to even attempt to subpoena [redacted], and to hold that the motion to compel was untimely was error. [redacted] should have been produced and his testimony would have changed the case. The findings of guilt should be set aside.

[redacted]

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APPENDIX

Appendix: Matters Submitted Pursuant to *United States v. Grostefon*

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the Appellant, through Appellate defense counsel, personally requests that this court consider the following matters:

1. The panel was not randomly selected. There were two rating chains within the jury. Despite all members claiming they could give their own opinions I do not believe soldiers are free to contradict their superiors. I do not believe the trial was fair because of this.
2. The trial counsel clearly worked with members of the panel before. From the moment she introduced herself, it was clear the members of the panel had a favorable opinion of her. They were smiling at each other and it was apparent that she already had a rapport with the panel. This was a conflict of interest and constituted an unfair trial.
3. [redacted] served as witness for the prosecution. Many members of the panel knew him. This is a conflict of interest. Their favorable views of [redacted] automatically gave him credibility in the eyes of the panel. All members who knew him should have been stricken from the panel.
4. I believe I had ineffective representation from my TDS and civilian counsel. First, my TDS counsel seemed incompetent to me. He did not have much experience. I raised this as a concern and was told that he would not be

representing me in court, and would only be doing paperwork, but that he needed experience. I did not feel it was right for my case to be where this attorney developed experience in court. I felt he failed to advise me correctly on how often military cases resulted in convictions. This prevented me from making informed decisions. Also, my TDS counsel did not communicate with my civilian counsel. This prevented my civilian counsel from preparing my case to the best of his abilities to be successful.

5. After the trial, my civilian defense counsel informed me about a plea offer from the government for 0-60 days confinement. This offer was never communicated to me. My lawyers had an ethical responsibility to present me with all plea offers, this failure constitutes ineffective assistance of counsel and may have changed my decision making in the case.
6. The previous military judge was biased against me. After making a number of rulings against me he went off the case. However, he stayed for the entire trial and sat in the back. Before I testified he audibly stated "guilty!" loud enough for everyone to hear including the panel. If I knew he was going to step off my case I would have reconsidered my decision on forum and possibly gone judge alone. His actions caused me to have an unfair trial.

7. The military judge would not allow my attorneys to admit the recordings and text messages I had which refuted the alleged victim's complaints. If they had considered this evidence I would have been acquitted of many of the charges.
8. Appellant was denied the right to a unanimous verdict. This warrants a new trial
9. The GOMOR introduced as Prosecution Exhibit 26 during sentencing was introduced under a business record exception to hearsay. This was wrong and warrants a new sentencing proceeding. Also, at the Article 32 Preliminary hearing the government stated they would not be introducing the GOMOR. They went against that and did it anyway.

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to Army Court and Government Appellate Division on May 30, 2023.

[redacted]

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[redacted]