IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES	Appellee	**REPLY 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 and 8-12 August 2022, before a general court-martial appointed by Commander, Headquarters. 1st Infantry Division and Fort Riley, Colonel Steven Hendricks and Lieutenant Colonel Thomas Calhoun-Lopez, military judges, presiding.

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

Statement of the Case

Appellant, filed his initial brief on 30 May 2023. The government filed its answer brief on 22 September 2023. This is appellant's reply.

Argument

A. The Government Failed To Comply With the Requirement to Subpoena the Witness

The government quibbles with appellant's assertion that the government cannot claim a witness is unavailable until they have "attempt[ed] to personally deliver a subpoena along with the fees and mileage required by statute." (Gov't Br. at 7 citing Appellant's Br. at 6, *United States v. Dorgan*, 39. M.J. 827 (A.C.M.R. 1994). Rather than contend with the requirement, highlighted in

Dorgan, requiring the government to make the effort to subpoena a witness, the government argues *Dorgan*, "is a case with nearly no factual similarities to this situation." (Gov't Br. at 7).

The government is wrong for two reasons. First, the specific facts of *Dorgan* do not matter to this case. The only fact at issue is in both cases the government refused to produce a necessary witness.

In 1988, the Court of Military Appeals held an alleged victim could not be deemed unavailable, for confrontation clause purposes, "unless the government has *exhausted every reasonable means* to secure his live testimony." *United States v. Burns,* 27 M.J. 92 at 97 (C.M.A. 1988) (emphasis added) (citing *United States v. Barror*, 23 M.J. 370, 373 (C.M.A.1987)); *United States v. Hines*, 23 M.J. 125 (C.M.A.1986); *United States v. Cokeley*; *United States v. Hinton*, 21 M.J. 267 (C.M.A.1986). Even the United States Supreme Court requires prosecutorial authorities to make a good faith effort to obtain a witness's presence at trial. *Barber v. Page*, 390 U.S. 719, 723-724 (1968).

In *Dorgan*, the predecessor to this court took the principle from *Burns*, *Barror*, *Cokely*, and *Hinton* from confrontation clause "unavailability" jurisprudence, and found it equally important when an accused person is attempting to secure witnesses in order to present a defense. "The defense is entitled to the compulsory production of any witness whose testimony on the

merits would be relevant and necessary, unless the witness is "unavailable" within the meaning of Military Rule of Evidence 804(a) [Mil. R. Evid.]. R.C.M. 703." *Dorgan*, 39 M.J. at 830 citing *United States v. DeHart,* 33 M.J. 58 (C.M.A. 1991).

The government can cite to *no precedent* absolving them of their duty to attempt to subpoena a defense witness.

Second, even if the facts of *Dorgan* did matter, contrary to government contention, they are similar to the instant case. *Dorgan*, ". . . hinged on a credibility contest between appellant and [redacted]." 39 M.J. 831. This case, as most domestic violence cases are, was also a credibility contest between [redacted] and appellant, who testified in his own defense. (R. at 376).

In *Dorgan*, the military judge erroneously concluded, "it remains a truism that you've got a witness who is either avoiding subpoena or is simply unavailable." *Dorgan,* 39 M.J. at 830. The military judge there also erred when he found that inasmuch as the [witness] could not be located or contacted after five months to obtain a statement, there wasn't any real likelihood that she would be found in the next couple of months. Moreover, the judge noted his view that much of the information the defense counsel had "tossed out" relating to reliability and credibility, could be elicited through cross-examination of government witnesses or by calling other defense witnesses. *Id.*

The military judge made shockingly similar conclusions here, "I also note that the initial request was denied by the court because it lacked sufficient description of his testimony and indications that he had been sufficiently interviewed, such that, it was a relevant and material witness. I do also note you will have other character witnesses." (R. at 405).

Simply put, the government did not comply with their requirements to attempt to use compulsory process and could offer no valid reason for that failure.

B. The Government Invents New Requirements for Production of Witnesses

Despite received the motion to compel over a month before trial, the government claims the defense request for production was "untimely" because, "there was no indication that defense counsel had solved the problem of [redacted] availability. [redacted] had demonstrated that he would refuse contact for long periods of time. . . the defense counsel took no additional steps. . . the government was not able to contact him at all." (Gov't Br. at 9). The government also claimed "there is no indication that service of process could have taken place in a timely manner. . . ." (Gov't Br. at 9).

Here, the government sets forth additional requirements not contained in the Rules for Courts-Martial for defense counsel to seek production of witnesses. Rule for Courts-Martial 703(2)(B)(i) requires defense counsel to provide the government with "A list of witnesses whose testimony the defense considers

relevant and necessary." *Id*. The request shall include, "the name, telephone number, if known, and address or location of the witness such that the witness can be found upon the exercise of due diligence and a synopsis of the expected testimony sufficient to show its relevance and necessity." *Id*.

The defense counsel *complied* with this requirement. In their initial production request they provided a phone number for [redacted]. (App Ex. VII(d) pg. 2). In addition, the defense retained a private investigator to provide an updated phone number and location for [redacted]. (App. Ex. II(c)). Contrary to the government's contention, defense counsel kept on the case—in their motion to compel, they provided a phone number, date of birth, email address, and physical address. (App. Ex. II). Short of arresting and delivering the witness to trial themselves, it is unclear what more the defense counsel could have done.

The government cites no authority for their argument that the government counsel is entitled to a phone call with a witness before they must do their due diligence and engage compulsory process. Sometimes witness will refuse to cooperate, this is far from unheard of, and the Rules for Courts-Martial even provide the government guidance for when a witness may not respond to a subpoena. "Formal Service is advisable whenever it is anticipated that the witness will not comply voluntarily with the subpoena. Appropriate fee and mileage must be paid or tendered." R.C.M. 703(g)(3)(E)discussion. Indeed, Article 47 of the

Uniform Code of Military Justice (UCMJ) makes clear defying a subpoena is a crime even for non-military members.

Even if it is difficult to secure a witness's testimony the remedy is, ". . . a continuance or other relief in order to attempt to secure the witness' presence or abate the proceedings. . . ." R.C.M 702(b)(3). If this court fails to remedy this situation, government counsel will be given carte blanche to defy the Rules for Courts-Martial, impose additional burdens on the accused, and deny witnesses.

C. [redacted] Was Not Cumulative of Any Other Witness

[redacted] would have testified the alleged victim had a character for untruthfulness and if challenged, his basis of knowledge was he developed a relationship with her, moved in together, caught her frequently lying, attempted to frame him for the same crimes she accused appellant of, and even tried to get him fired. (App. Ex. II(a)).

The government unjustifiably claims this relationship (which [redacted] could also have been impeached on for denying its existence) was somehow less familiar than [redacted] relationship with appellant's aunt, whom she met, "six or seven times a year" since 2018. (Gov't Br. at 9). To characterize these viewpoints as even remotely similar is wrong. No reasonable person could contend the character testimony of a relative of the appellant (who would undoubtedly be accused of bias) interacting with someone over a few "weekends and holidays" is qualitatively

as important to the defense as an ex-boyfriend who lived with [redacted] and faced similar accusations.

D. The Denial of [redacted] Was Not Harmless Beyond a Reasonable Doubt

To get over the beyond a reasonable doubt standard for prejudice, the government puts emphasis on the fact that [redacted] relationship with [redacted] occurred ". . . *after* the crimes had taken place. (Gov't Br. at 10) (emphasis in original). Why the government focuses on the relationship coming after the alleged crimes is unclear.

The credibility attack which would have been offered through the opinion testimony of [redacted], impeaches [redacted] *report* which occurred in winter 2021 (R. at 214) and *ultimate testimony* which occurred in 2022. All of which are predated by [redacted] relationship with [redacted] which occurred in January or February of 2020 (App. Ex. VII(c) pg. 1).

For example, if an alleged victim reported in 2023 that a sexual assault occurred against them from four years ago in 2019, the character testimony of the person they were in a relationship with in 2021 would, of course, be relevant and highly important—especially if they were also similarly falsely accused of sexual assault.

The government has no pictures or videos of the alleged assaults. They have selectively edited audio and [redacted] word for it. To say the testimony of [redacted]

would have had no impact is unreasonable. [redacted] would have impeached [redacted] on the existence of their relationship, on her character for truthfulness and could have even provided relevant testimony of [redacted] pattern for making these allegations when a relationship is failing.

Conclusion

WHEREFORE, the appellant respectfully requests this honorable court set aside his conviction and sentence.

[redacted]
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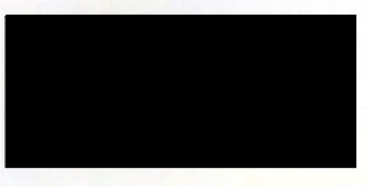
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to the Army Court and Government Appellate Division on 29 September 2023.



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