

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,

Appellee

v.

Staff Sergeant (E-6)

ALEX J. SECORD

United States Army,

Appellant

**REPLY BRIEF ON BEHALF OF
APPELLANT**

Docket No. ARMY 20210667

Tried at Fort Bragg, North Carolina, on 15 July 2021, 2 September 2021, 3 December 2021, and 12-18 December 2021, before a general court-martial appointed by the Commander, 82d Airborne Division, Colonel Travis Rogers, military judge, presiding.

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

Assignments of Error¹

**I. THE MILITARY JUDGE ERRED IN DENYING THE
DEFENSE’S MOTION TO COMPEL THE DISCOVERY OF
APPELLANT’S CELL PHONE AND THE ERROR WAS NOT
HARMLESS BEYOND A REASONABLE DOUBT.**

**II. THE MILITARY JUDGE ERRED IN FAILING TO
PROVIDE APPELLANT RELIEF FROM THE
GOVERNMENT’S DESTRUCTION OF FAVORABLE AND
MATERIAL INFORMATION IN ITS POSSESSION.**

Statement of the Case

On 1 June 2023, appellant, Staff Sergeant Alex J. Secord filed his initial brief. On 25 September, the government filed its answer. This is appellant’s reply.

¹ This reply brief address the first assignment of error only.

Argument

A. The military judge's order was erroneous in that it required appellant, to gain access to the phone, to forego his Fifth Amendment Right against self-incrimination and disclose a confidential communication, and it required a broader disclosure than that which was authorized.

In its brief, the government states “[t]he court’s order granting appellant’s motion to compel insofar as it gave appellant’s █████ full access to the phone but required that to be done alongside the government rather than in confidence simply translated the dual obligations of R.C.M. 701(a) and R.C.M. 701(e) into a concrete reality.” (Gov. Br. at 9-10). For this proposition, the government cites *United States v. Rhea*, 33 M.J. 413, 418 (C.M.A. 1991). But *Rhea* runs counter to the government’s claim.

In *Rhea*, the victim testified at an Article 32, UCMJ, hearing, that Rhea possessed a calendar in which the victim documented instances of sexual abuse. *Rhea*, 33 M.J. at 415. The government obtained a valid authorization to search Rhea’s residence for the calendar. *Id.* Rhea’s defense counsel discovered the calendar in a box owned by Rhea. *Id.* Following an ex parte hearing, a military judge ordered the defense counsel to surrender the calendar to “to the trial counsel at the earliest possible time so as not to hinder his pretrial preparation.” *Id.* at 416. The military judge further stated, “ ‘No recitation of the circumstances surrounding the defense’s acquisition is necessary, other than that the calendar had come into the defense’s possession.’” *Id.*

On appeal, in addressing Rhea’s claim of ineffective assistance of counsel, the Court of Military Appeals (C.M.A.) ruled against Rhea, stating, “It would have been entirely at odds with the principles underlying these rules – and, indeed, with RCM 701(e) itself – for defense counsel to withhold physical evidence that was the subject of a lawful search authorization but that had been removed by the accused from the location designated in that authorization.” *Id.* at 418. However, the court added, “*The one caveat to counsel’s duty is that, in the course of surrendering the physical evidence, he must honor his client’s confidences disclosed to counsel pursuant to the attorney-client relationship.*” *Id.* (internal citations omitted) (emphasis added). Significantly, the court found “[t]he calendar itself was not a ‘communication’ of any form between Rhea and defense counsel.” *Id.* However, the court did find Rhea’s production of the calendar to his defense counsel pursuant to their suggestion of bringing documents constituted a communication. *Id.* at 418-19.

Here, the military judge required something specifically prohibited by *Rhea*, the disclosure of a confidential communication, i.e., the PIN code. While the military judge did not specifically require appellant to provide the government the PIN code, by requiring the defense to disclose what the DFE discovered to the government, the military judge was requiring the disclosure of an attorney-client communication that would reveal “the source and authenticity” of the phone. *Id.* at

419; *see also Doe v. United States*, 487 U.S. 201, 210 (1988) (An accused’s communication is testimonial when it “explicitly or implicitly, relate[s] a factual assertion or disclose[s] information.”).

Intertwined with the requirement to disclose a confidential communication was the requirement for appellant to forego his right against self-incrimination. Requiring appellant to provide a PIN code that CID would use to view the phone with the defense DFE would explicitly disclose a fact, i.e., that he knew the PIN code and that it was his phone. *See Doe*, 487 U.S. at 210. Therefore, in order to obtain access to evidence the government deemed as material, appellant would have been required to forego a constitutional right and force his counsel disclose a protected communication.

Additionally, the military judge’s ruling required the defense to disclose more than authorized by the search authorization. The search authorization allowed the government to seize “SSG Secord’s Cellular device.” (App. Ex. IV-A). The authorization further allowed the government “to subsequently conduct a digital forensic examination of said device for SMS, MMS messages, photos, and videos *for evidence pertaining to the wrongful use, possession and distribution of cocaine.*” (App. Ex. IV-A) (emphasis added). The military judge’s ruling stated, in pertinent part, “the Defense has been granted leeway to access that data in conjunction with simultaneous Government access.” (App. Ex. XIV). A

reasonable interpretation of the ruling is the military judge would allow the government access to everything on appellant's phone.

The military judge's broad ruling on disclosure is inapposite to both *Rhea* and Rules for Courts-Martial [R.C.M.] 701(b)(3) and 701(b)(4). Here, the phone is equivalent to the box in *Rhea*. In *Rhea*, the government was not entitled to every item in the box but only what was contained in the search authorization. Similarly, the government was not entitled to look at all information on appellant's phone but only that authorized by the search authorization. Moreover, absent information specifically fitting the terms of the search authorization, R.C.M.s 701(b)(3) and 701(b)(4) only require defense disclosure if it "intends to use the item in the defense case-in-chief at trial," R.C.M. 701(b)(3)(B) and R.C.M. 701(b)(4)(A), or if "the item was prepared by a witness who the defense intends to call at trial and the results or reports relate to that witness' testimony." R.C.M. 701(b)(4)(B). It appears the military judge assumed any information on the phone would be readily inculpatory. However, unlike the readily apparent inculpatory nature of the calendar in *Rhea*, a review of SMS, MMS messages, photos, and videos would likely be open to exculpatory and neutral interpretations thereby removing them from the realm of *Rhea*.

B. Equal Opportunity Does Not Equate to Equity in Outcome

Akin to the military judge, the government equates equal opportunity to inspect and/or access with equity in outcome. The government claims “any inspection of that object by appellant that yielded access to the evidence contained within the phone would trigger appellant’s obligations under R.C.M. 701(e) to give the government an ‘equal opportunity’ to ‘inspect [the] evidence’ contained on the phone and prohibiting appellant from ‘unreasonably impeded[ing] the access of [the government] to . . . evidence.’” (Gov. Br. at 9). This statement misinterprets “equal opportunity to inspect,” what constitutes an impediment to access, and the rules governing reciprocal discovery.

With respect to “opportunity,” the government had an equal opportunity to examine the phone. “Opportunity” is defined as: “(1) a favorable combination of circumstances, time, and place; (2) a chance for advancement.” MERRIAM WEBSTER’S DICTIONARY AND THESAURUS (2006). On 6 May 2021, the government took possession of appellant’s phone. (App. Ex. III). From 6 May 2021 and up to and including the trial dates of 13-18 December 2021, the government had the ability to use every resource available to it to examine the phone. The government’s sole possession and use of resources constituted a favorable combination of circumstances in time and place. Furthermore, the government had a chance for advancement. Simply because the government’s chosen methodology

did not work, which is no fault of appellant, does not require the defense to assist the government.

With respect to “access,” R.C.M. 701(e) reads, in pertinent part, “[n]o party may *unreasonably* impede the access of another party to a witness or evidence.” (emphasis added). Here, appellant did not impede the government’s access whatsoever. This is not a situation where appellant failed to deliver his phone after the search authorization was granted. Assuming *arguendo* there was an impediment, the impediment was not unreasonable because it involved appellant exercising his Fifth Amendment right against self-incrimination, i.e., making a statement to the government either directly or through a member of his defense team. An impediment does not exist simply because a client is willing to provide information to his defense team to assist in investigating a case, but not the government.

An analog hypothetical illustrates this point. Assume an individual’s car is seized for suspicion of containing illegal drugs. The government has its access but cannot find drugs. Then, the defense team gets its opportunity, and the client discloses there are several hidden compartments in the vehicle; however, no drugs are currently located in the compartments. The defense is under no obligation to reveal that information to the government because it would interfere with the client’s right to have his attorney investigate. *See Kansas v. Ventris*, 556 U.S. 586,

590 (2009) (stating, the core of the Sixth Amendment right to the assistance of counsel “has historically been, and remains today, ‘the opportunity for a defendant to consult with an attorney and to have him investigate the case and prepare a defense for trial.’” (quoting *Michigan v. Harvey*, 494 U.S. 344, 348 (1990)).²

Finally, the government’s statement about R.C.M. 701(e) is incorrect because it ignores R.C.M. 701(b)’s reciprocal discovery limitations. Contrary to the government’s statement, absent something falling within a specific term of a search authorization, the defense would only be required to comply if reciprocal discovery was triggered under either R.C.M. 701(b)(3) or 701(b)(4).

Conclusion

For the reasons above, appellant respectfully requests this court set aside appellant’s convictions of Charge II and reevaluate the adjudged sentence.



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² Additionally, failure to disclose information adverse to a client does not violate Army Rule of Professional Conduct 3.4 if the disclosure is not required by law or court order. Army Reg. 27-26, Legal Services: Rules of Professional Conduct for Lawyers, Rule 3.4, comment (4) (28 June 2018). To rule otherwise would nullify a defense counsel’s purpose and duty.

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to Army
Court and Government Appellate Division on October 2, 2023.



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