

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,

Appellee

v.

Staff Sergeant (E-6)  
**ALEX J. SECORD**  
United States Army,  
Appellant

**BRIEF ON BEHALF OF  
APPELLANT**

Docket No. ARMY 20210667

Tried at Fort Bragg<sup>1</sup>, 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 Error<sup>2</sup>**

**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**

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<sup>1</sup> Fort Bragg, North Carolina was recently redesignated Fort Liberty. For purposes of clarity and to coincide with the record of trial, this brief uses the prior name of Fort Bragg.

<sup>2</sup> 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.

On 17 December 2021, an enlisted panel, sitting as a general court-martial, convicted Staff Sergeant (SSG) Alex J. Secord (appellant), contrary to his pleas, of five specifications of wrongful use of a controlled substance (cocaine) and one specification of violation of a lawful general regulation (Army Regulation 600-20), in violation of Articles 92 and 112a, Uniform Code of Military Justice [UCMJ]. (R. at 1587; Charge Sheet).

On 18 December 2021, an enlisted panel sentenced appellant to a reprimand, reduction to E-2, eighty-five days confinement, and a bad-conduct discharge. (Statement of Trial Results; R. at 621).

### **Statement of Facts**

At his court-martial, appellant had over ten years of service. (R. at 1494). The government charged appellant with nine specifications of wrongful use of controlled substances throughout the summer of 2020, into the spring of 2021, and fraternization. (Charge Sheet). Those charges revolved around the off-post apartment of then-Private [REDACTED], a junior-enlisted soldier in appellant's battalion who frequently invited appellant and others to her apartment to use drugs.

A. [REDACTED].

[REDACTED], who is no longer in the Army, was a junior enlisted soldier assigned to the 505th PIR from June 2018 through October 2021. (R. at 891). [REDACTED] testified that, on numerous occasions at her apartment, she and

appellant consumed cocaine. (R. at 897, 902, 903). [REDACTED] would pay for her share by sending appellant money through Cash App, which is a phone application that allows users to send money to others. (R. at 903). [REDACTED] also invited others to her apartment to use drugs, including [REDACTED] and [REDACTED]. (R. at 930).

Prior to her administrative separation and while on active-duty, [REDACTED] was given testimonial immunity and ordered to testify against appellant. (R. at 949). In exchange for her testimony, [REDACTED] was administratively separated from the Army and did not face criminal prosecution, despite admitting to cocaine use on five separate occasions. (R. at 948-949). [REDACTED] received an honorable discharge. (R. at 949).

Prior to trial, [REDACTED] told the military judge that she spoke to an attorney and intended to invoke her Fifth Amendment right against self-incrimination. (R. at 552). [REDACTED] indicated that while she was in the Army, she had testimonial immunity to testify against appellant, but as a civilian, she no longer had such immunity. (R. at 553). Further, her drug use occurred in her off-post apartment and was subject to state prosecution. (R. at 899). The military judge found [REDACTED] Fifth Amendment invocation was not substantial or based upon a real threat of incrimination, because “the likelihood of Cumberland County pursuing this is so remote that it makes it a trifling reason.” (R. at 564). Ms. [REDACTED] was

ultimately compelled to testify, and testified that she has used heroin, cocaine, ecstasy, and hosted others in her apartment for the purpose of using and distributing drugs.

B. [REDACTED].

[REDACTED] was assigned to the same battalion as appellant and [REDACTED], and the two were at a party at [REDACTED] apartment between 14-15 August 2020. (R. at 960). Others present included [REDACTED], appellant, [REDACTED], and [REDACTED]. (R. at 962). [REDACTED] testified that during the party he, [REDACTED], and [REDACTED] all used cocaine. (R. at 984).

On 3 May 2021, the government preferred a number of charges against [REDACTED], including three specifications of wrongful use, possession with intent to distribute, simple possession, and wrongful introduction onto a military installation of lysergic acid diethylamide (LSD). (Def. Ex. A). [REDACTED] trial was scheduled for the week after appellant's court-martial. (R. at 990). However, [REDACTED] was also granted testimonial immunity, and in exchange for his testimony against appellant, [REDACTED] charges were dismissed. (R. at 1003). During his testimony, [REDACTED] admitted to introducing drugs onto Fort Bragg, and selling LSD to other soldiers. (R. at 997-998).

C. [REDACTED].

[REDACTED] joined the Army in November 2019 and was administratively separated in November 2021 with a general (under honorable conditions) discharge. (R. at 1328-1329). While stationed at Fort Bragg, [REDACTED] was in the same battalion as appellant, [REDACTED], and [REDACTED], but only considered [REDACTED] a friend. (R. at 1328, 1344). [REDACTED], like [REDACTED] and [REDACTED], used cocaine at [REDACTED] apartment. (R. at 1331).

In January 2021, Special Agent (SA) [REDACTED], from the Fort Bragg Criminal Investigation Command (CID) office, interviewed [REDACTED]. (R. at 1347). While at CID, SA [REDACTED] told [REDACTED] she had evidence that [REDACTED] was using and distributing illegal drugs, for which he could face prosecution. (R. at 1348). But instead of prosecuting [REDACTED], the government offered him U.S. citizenship. (App. Ex. XXXVI).

During his January 2021 interview, SA [REDACTED] told [REDACTED], who was born in Tehran, Iran, he knew he was not a United States citizen. (R. at 1350). As a member of the United States Armed Forces, [REDACTED] feared any possible deportation “could have potentially ended[his] life.” (R. at 1349). So, to save his life, [REDACTED] became a CID confidential informant (CI). (R. at 1352). As a CI, [REDACTED] would participate in a “controlled buys” of drugs on Fort Bragg while

under surveillance. (R. at 1358-1359). Appellant was never the subject of a controlled buy. (R. at 1359).

██████████ agreed to become a CI to avoid prosecution or administrative separation, believing “if I helped them uncover other cases along with what I already told them, they were going to make sure that my chapter packet, I don’t get administratively separated from the Army.” (R. at 1359-1360).

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

**Facts**

On 6 May 2021, CID seized appellant’s cellphone. (R. at 29). On 10 May, CID received a written search authorization for appellant’s cellphone from a military magistrate. (R. at 30). On 2 August 2021, CID agents determined appellant’s phone could not be searched “because the Cellebrite<sup>3</sup> software does not support the new version of the iPhone.” (App. Ex. III-A, pg. 3).

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<sup>3</sup> Cellebrite is a software tool that allows law enforcement to attempt to access (also referred to as an extraction) data on certain cellphones. <https://sites.google.com/site/endpointforensics/how-cellebrite-works> (Accessed 18 May 2023).

On 13 August 2021, defense counsel filed a motion to compel discovery, requesting the military judge order the government to provide the defense's appointed digital forensic examiner an opportunity to conduct an extraction of appellant's cell phone. (App. Ex. II, pg. 1). The defense also requested the court prohibit the government from installing any software on appellant's cellphone. This request was to prevent tracking or copying the phone's password when entered by the defense expert. (App. Ex. II).

The government opposed the motion on two grounds: (1) allowing the defense access to appellant's cellphone would thwart "ongoing investigative efforts into criminal activity involving individuals other than the accused";<sup>4</sup> and (2) if the information is necessary and relevant to the defense, the defense should provide the phone's passcode to unlock it. (App. Ex. III, pg. 1).

At the 2 September 2021 motions hearing, the trial counsel suggested that, if the defense's expert examined the phone, the government would have no way of determining whether he altered, erased, or modified its data. (R. at 61). The government insisted the refusal to grant the defense access to the cellphone was reasonable, because the purpose for maintaining "sole custody and control" is for

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<sup>4</sup> When the government filed its response to the defense's motion to compel, CID had already determined that the Cellebrite software could not access appellant's cellphone. (App. Ex. III-A, pg. 3).

the further prosecution of “other individuals both known and unknown to the government.” (R. at 60).

The military judge ruled he would not order appellant to disclose his cellphone passcode, but, if the defense elected to provide their expert with the passcode, “they would do so in concert with the government’s forensics expert.” (R. at 63). In his written ruling, the military judge made multiple findings that appellant’s cellphone was relevant to the charges appellant faced. (App. Ex. XIV, pg. 2). The military judge did not address appellant’s rights against self-incrimination under Article 31(a) or the Fifth Amendment, but instead reasoned “it is understandable that the Government would be reluctant to completely turn over sole physical possession of that which is evidence of a crime.” (App. Ex. XIV, pg. 4).

On 8 November 2021, the defense filed a motion for reconsideration of the ruling. (App. Ex. XIX). On 3 December 2021, the military judge held another motions hearing where he again denied the defense confidential access to appellant’s cell phone. (R. at 111).

### **Standard of Review**

A military judge’s ruling on a motion to compel discovery is reviewed for an abuse of discretion. *United States v. Roberts*, 59 M.J. 323, 326 (C.A.A.F. 2004) (citation omitted). “A military judge abuses his discretion when his findings of



fact are clearly erroneous, when he is incorrect about the applicable law, or when he improperly applies the law.” *Id.*

In evaluating discovery errors, where the defense has made a specific request, the court applies the heightened constitutional standard of harmless beyond a reasonable doubt. *United States v. Roberts*, 59 M.J. 323, 327 (C.A.A.F. 2004). “Failing to disclose requested material favorable to the defense is not harmless beyond a reasonable doubt if the undisclosed evidence might have affected the outcome of the trial.” *United States v. Coleman*, 72 M.J. 184 (C.A.A.F. 2013); see *United States v. Hart*, 29 M.J. 407 at 409 (C.M.A. 1990).

## **Law**

### **A. Article 46.**

Under Article 46, UCMJ, the discovery rights available to an accused are broader than the constitutional due process rights afforded to his civilian counterpart. *Coleman*, 72 M.J. 184 at 187; *Hart*, 29 M.J. 410. Rule for Court Martial (R.C.M.) 701(e) provides “[e]ach party shall have adequate opportunity to prepare its case and equal opportunity to interview witnesses and inspect evidence...[n]o party may unreasonably impede the access of another party to a witness or evidence.” R.C.M. 701(e). “The military rules pertaining to discovery focus on equal access to evidence to aid the preparation of the defense and enhance

the orderly administration of military justice.” *United States v. Roberts*, 59 M.J. 323, 325 (C.A.A.F. 2004).

Rule for Court Martial 701(e) provides that “[e]ach party shall have adequate opportunity to prepare its case and equal opportunity to interview witnesses and inspect evidence . . . No party may unreasonably impede the access of another party to a witness or evidence.” After service of charges and a request from the defense, R.C.M. 701(a)(2)(A) requires the government to “permit the defense to inspect any books, papers, documents, data, photographs, tangible objects, buildings, or places, or copies of portions of these items . . . .” Pointedly, this rule applies “if the item is within the possession, custody, or control of military authorities and the item is relevant to defense preparation or the item was obtained from *or* belongs to the accused.” R.C.M. 701(a)(2)(A) (emphasis added). Congruent with R.C.M. 701, a military judge may “specify the time, place, and manner of making discovery and may prescribe such terms and conditions as are just.”

## **B. The Fifth Amendment.**

Under the Fifth Amendment, “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.” Article 31(a), UCMJ provides “no person subject to this chapter may compel any person to incriminate himself or answer any question the answer to which may tend to incriminate him.” 10 USCS

§ 831(a). Courts have recognized the production of cellphone passwords constitutes testimony protected by the Fifth Amendment. *United States v. Doe (In re Grand Jury Subpoena Duces Tecum)*, 670 F.3d 1335, 1346 (11th Cir. 2012).

### **C. The Due Process Clause.**

“The failure of the trial counsel to disclose evidence that is favorable to the defense on the issue of guilt or sentencing violates an accused’s constitutional right to due process.” *Coleman*, 72 M.J. 184 at 186 (citing *Brady v. Maryland*, 373 U.S. 83 at 87 (1963)). “Our review of discovery/disclosure issues utilizes a two-step analysis: first, we determine whether the information or evidence at issue was subject to disclosure or discovery; second, if there was a nondisclosure of such information, we test the effect of that nondisclosure on the appellant’s trial.” *Roberts*, 59 M.J. 323, 325 (C.A.A.F. 2004).

## **Argument**

### **A. Equity in Opportunity is Not Equity in Outcome.**

The military judge abused his discretion when he forced appellant to choose between two principles: (1) his statutory right to evidence that may assist in his defense; and (2) his constitutional right against self-incrimination. Specifically, the military judge improperly equated the concept of equal opportunity and/or access provided in R.C.M. 701(e) with what may be characterized as equity in outcome or methodology. Before the defense was given the same access and

opportunity to appellant's phone that the government enjoyed, the military judge sought to ensure equity in the outcome of that opportunity and access. No plain reading of R.C.M. 701 requires such equity. Further, in his attempt to enforce equity, the military judge failed to balance an equally important constitutional consideration – appellant's right under the Fifth Amendment.

The CAAF has made clear Article 46 and the discovery rules focus on equal access. *Roberts*, 59 M.J. at 325. However, CAAF has not stated that equal access requires equal access to methods or opportunities, especially where an accused's constitutional rights are implicated. Here, the government had equal opportunity and access to appellant's phone. Specifically, by the time of the Article 39(a) session addressing the defense motion to compel discovery, the government had almost four months of access. The government's problem is that it couldn't reach its desired outcome, i.e., searching appellant's phone for incriminating evidence. It was not incumbent upon appellant to provide the government its desired method for a particular outcome.<sup>5</sup>

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<sup>5</sup> In his ruling, the military judge cited *United States v. Walker*, 66 M.J. 721 (N-M Ct. Crim. App. 2008). In *Walker*, a capital case, the military judge erred when he refused to allow the defense experts to conduct independent testing of physical evidence admitted at trial. The military judge's error in relying on *Walker* is two-fold: (1) *Walker* does not stand for the proposition that defense must be granted the exact same method in examining evidence; and (2) *Walker* did not involve the sacrifice of a constitutional right in order to access required discovery.

The military judge, by requiring appellant to provide his passcode to the government should the defense expert examine the cellphone, forced appellant to choose between his Article 46, UCMJ, right to discovery and Fifth Amendment right against self-incrimination. It appears the military judge relied on the notion that allowing the defense access would unreasonably impeding the government's access. However, the reality is the opposite. It was reasonable for the defense to withhold the passcode because disclosing it would involve appellant relinquishing his Fifth Amendment right.<sup>6</sup>

#### **B. The Military Judge Failed to Balance the Interests at Stake.**

The military judge had a number of options to address the government's concerns. He could have: (1) provided a protective order, instructing the defense expert that no tampering or edits to the phone should occur; (2) required CID's presence for the extraction, but not present for the passcode's input; or (3) ordered a CID agent to act as a special master and conduct the extraction but not provide any information to the government or law enforcement.

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<sup>6</sup> At trial, the government cited to *United States v. Rhea*, 33 M.J. 413 (C.M.A. 1991). However, *Rhea* is inapplicable. Although *Rhea* involved evidence subject to a valid search authorization, the issue was the appellant removed the evidence prior to the search and brought it to his attorney. It was the act of removing evidence from a location authorized to be searched that required *Rhea's* attorney to turn the evidence over to law enforcement. Here, no evidence would be removed given the preventative measures available to the military judge.

It is patently unreasonable to the adversarial nature of our judicial system to expect defense counsel to acquiesce. Had the military judge granted the defense's request, both parties would still have had an equal *opportunity* to inspect evidence, as required by R.C.M. 701. The rules for discovery do not require equity in the *outcome* of discovery – they require equity in opportunity. This is often true when defense counsel seeks to interview hostile government witnesses - trial counsel cannot prohibit the defense from requesting an interview, but trial counsel cannot require witnesses to speak to the defense. When there are competing constitutional or statutory interests at stake, the military judge must carefully consider and balance those interests.

### **C. Appellant Suffered Prejudice.**

The government cannot establish that the erroneous denial of access to the cellphone was harmless beyond a reasonable doubt for two reasons: (1) the government repeatedly emphasized the importance and evidentiary value of appellant's cellphone in their filings; and (2) the government introduced evidence that allegedly came from appellant's cell phone to the panel. (Pros. Ex. 2). The government relied on this evidence to corroborate the testimony of [REDACTED], [REDACTED], and [REDACTED]. Due to the ruling, the defense had no ability to counter or contextualize this evidence.

The government clearly believed that appellant's phone held incriminating evidence against him and possibly others. The government introduced evidence of phone calls made by appellant that were overheard by [REDACTED], but was also allowed to introduce evidence that [REDACTED] sent appellant money over Cash App. (R. at 1341, Pros. Ex. 2). The defense had no opportunity to inspect evidence that belonged to appellant to investigate these claims made at trial.

The most damning witnesses in this case were all government witnesses with significant motives to fabricate – [REDACTED] legitimately feared for his life if deported to Iran (R. at 1349); [REDACTED] was facing lengthy charges with a maximum punishment of 115 years confinement (Def. Ex. A); and [REDACTED] was similarly under investigation until she agreed to testify against appellant and offered an Honorable discharge (R. at 949).

#### **D. Appellant's Due Process Rights Were Violated.**

In addition to the Article 46 violation, Appellant's due process right to a fair trial was also violated because he was denied relevant impeachment evidence against three crucial government witnesses: [REDACTED], [REDACTED], and [REDACTED].

It is more than fair to assume that appellant's phone contained information both relevant and necessary to his defense and examination of government witnesses with substantial motives to fabricate, and as such, this court cannot be

convinced that the military judge's error was harmless beyond a reasonable doubt. While the military judge was correct in voicing concerns about equity between the parties, he erred by failing to consider the posture of the case at the time of the defense request.

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

### **Facts**

#### **A. [REDACTED] Two iPhones.**

In January 2021, [REDACTED] provided written consent for CID to search his iPhone 7 Plus and iPhone 12. (App. Ex. XXIX). [REDACTED] believed that if he did not provide consent, CID would keep both phones pursuant to a search warrant. (R. at 1351). [REDACTED] watched and assisted as CID performed an extraction of his iPhone 12. (R. at 1352). After extracting the data, CID returned [REDACTED] iPhone 12 but kept the iPhone 7. (R. at 1351). At the time of appellant's trial, [REDACTED] still had and used his iPhone 12. (R. at 1351).

#### **B. The Destroyed Extraction.**

##### *i. How CID Records Investigative Activity.*

During an investigation, CID uses an online system of records known as the Army Law Enforcement Tracking System (ALERTS) to track its investigative activity. (R. at 1393). Any activity conducted by a case agent is recorded in



ALERTS through a case activity summary (CAS) entry. (R. at 1392-1393). Case Activity Summary entries log the name of the agent who makes the recording, and the date the entry was made. (R. at 1394). After fifteen days, any CAS entry is locked, and cannot be edited. (R. at 1394). If a CAS entry requires correction after fifteen days, the correct action is to make another CAS entry, and indicate the new entry is a correction and make the appropriate changes. (R. at 1395). The correction and use of CAS entries is governed by CID regulations. (R. at 1396).

An Agents Investigative Report (AIR) is a report generated by a case agent that encapsulates all significant investigative activity. (R. at 1398). Agents Investigative Reports in their draft form are maintained as word documents. (R. at 1398). Once the AIR goes through supervisory review, the AIR is printed, signed by the case agent, and placed in CID's physical case file. (R. at 1400).

██████████ was the lead CID case agent assigned to appellant's case. (R. at 1455). Case agents are supervised by a team chief – in this case, ██████████ team chief was ██████████ (R. at 1455).

*ii. The Extraction of Mr. ██████████ iPhones.*

In January 2021, ██████████ obtained ██████████ two iPhones, and extractions were conducted on both phones. (R. at 1404). According to ██████████ team chief, the extraction of the iPhone 12 was saved to the computer that performed the extraction. (R. at 1406). After an extraction is temporarily saved to

the computer, CID regulation requires that the extraction be saved to some form of portable media that can be stored in the evidence room. (R. at 1407). In addition to keeping a copy of the extraction in the evidence room, a working copy of the extraction would also be kept in the physical CID case file as a “redundancy” to avoid losing evidence. (R. at 1408). The digital extraction of [REDACTED] iPhone 12 was never copied onto any portable digital medium. (R. at 1409). The digital extraction of [REDACTED] iPhone 12 was destroyed.

### **C. The Missing SD Card.**

#### *i. The Original Reports.*

The original CAS entry related to the extraction of [REDACTED] iPhones, made on 28 January 2021, indicated that the extraction of the iPhone 12 was copied onto a portable media device known as an SD card. (R. at 1412, App. Ex. XXXVII). The CAS entry stated: “INV [REDACTED] and INV [REDACTED] received consent to extract messages and contact information from [REDACTED] phone. *An extraction of his phone was made and saved to an SD card.*” (App. Ex. XXXVII, pg. 1). A January 2021 AIR reflected the same information. (R. at 1413). Almost one year later, a few days before appellant’s trial on Sunday, 12 December 2021, team chief [REDACTED] asked the uncomfortable question to his lead case agent – if the CAS entry and AIR indicates that an SD card with the digital extraction of the iPhone 12 was

made, where is it? (R. at 1414). In response, [REDACTED] was informed that “there was never an SD card for that.” (R. at 1414).

*ii. The Edits.*

On Monday, December 13, 2021, at 0716, government counsel sent a copy of “finalized” AIRs to the defense. (App. Ex. XXXVII, pg. 2). The “finalized” AIR changed the following: “About 1930, 28 Jan 21, INV [SA] coordinated with [REDACTED] who provided consent to the search of his cell phone. INV [TS] conducted an extraction of [REDACTED] phone which was saved to the UFED computer.” (App. Ex. XXXVII, pg. 5). The entry also includes a new investigator’s comment that states: “A copy of the UFED extraction of [REDACTED] [REDACTED] cellphone was not copied onto an SD card. [REDACTED] cellphone was submitted as evidence under EPCD DN: 048.21.” (App. Ex. XXXVII, pg. 5). The investigators comment includes information regarding both of [REDACTED] cellphones, without providing any context. The failure to save the extraction onto an SD card involved the iPhone 12, but the cellphone submitted as evidence was the iPhone 7.

When questioned at trial, team chief [REDACTED] said he did not make edits to the January 2021 AIRs, but indicated that his lead case agent, [REDACTED] made the changes. (R. at 1418). [REDACTED] admitted at trial that she did not know what the CID regulation requires when editing or correcting an AIR. (R. at 1470).

Special Agent [REDACTED]. admitted that she edited the AIR on 12 December 2021 after CID was unable to locate the SD card mentioned in the January 2021 AIR and CAS entry. (R. at 1471).

Special Agent S.A. also testified the reason [REDACTED] iPhone 12 was returned to him was “because he was potentially going to work as a source.” (R. at 1477). In justifying the return of [REDACTED] phone, [REDACTED] testified that CID believed that the iPhone 7 and iPhone 12 were a “mirror image” of each other. (R. at 1478). The defense forensics expert, [REDACTED], provided unrefuted expert testimony that it was “impossible” for the iPhone 7 and iPhone 12 in question to have the exact same data. (R. at 1436-1437).

### **Standard of Review and Law**

#### **A. The Due Process Clause.**

The government violates an accused’s “right to due process if it withholds evidence that is favorable to the defense and material to the defendant’s guilt or punishment.” *Smith v. Cain*, 565 U.S. 73, 75 (2012) (citing *Brady v. Maryland*, 373 U.S. 83 at 87 (1963)). The “suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Brady*, 373 U.S. at 87.

The Supreme Court has expanded that ruling, holding “the duty to disclose such evidence is applicable even though there has been no request by the accused,” and “the duty encompasses impeachment evidence as well as exculpatory evidence.” *Strickler v. Green*, 527 U.S. 263, 280 (1999) (quoting *United States v. Agurs*, 427 U.S. 97, 107 (1976), *United States v. Bagley*, 473 U.S. 667, 676 (1985)). Requested or not, evidence is considered material “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *Kyles v. Whitley*, 514 U.S. 419, 433–434 (1995) (citing *Bagley*, 473 U.S. at 682); *see also United States v. Behenna*, 71 M.J. 228, 238 (C.A.A.F. 2012).

Ultimately, there “are three components of a true *Brady* violation: (1) The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice<sup>7</sup> must have ensued.” *Strickler*, 527 U.S. at 281–82.

For evidence to be considered so material that its loss is of constitutional importance, it must “possess an exculpatory value that was apparent before the

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<sup>7</sup> Courts need not test for harmlessness in the context of *Brady*, because “if there is a reasonable probability that the evidence would have changed the result at trial, then, by definition, the failure to disclose cannot be harmless.” *Behenna*, 71 M.J. at 238 n.9 (citing *Kyles*, 514 U.S. at 435).

evidence was destroyed and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.” *California v. Trombetta*, 467 U.S. 479, 489 (1984). “In addition, *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988), established that an appellant must prove bad faith by the government to establish a violation of the due process clause when potentially useful evidence has not been preserved.” *Simmermacher*, 74 M.J. 196, 199 (C.A.A.F. 2015).

**B. Rule for Court Martial 703(f)(2).**

The protections afforded servicemembers under R.C.M. 703(f)(2) are in addition to the rights afforded by the due process clause. *Simmermacher*, 74 M.J. 196, 200 (C.A.A.F. 2015). Rule for Court Martial 703(f)(2) states that a party is not entitled to the production of evidence that is destroyed, lost, or otherwise not subject to compulsory process. However, “if such evidence is of such central importance to an issue that is essential to a fair trial, and if there is no adequate substitute for such evidence, the military judge shall grant a continuance or other relief in order to attempt to produce the evidence or shall abate the proceedings, unless the unavailability of the evidence is the fault of or could have been prevented by the requesting party.” R.C.M. 703(f)(2). “If a continuance or other relief cannot produce the missing evidence, the remaining remedy for a violation of

R.C.M. 703(f)(2) is abatement of the proceedings.” *Simmermacher*, 74 M.J. 196, 201 (C.A.A.F. 2015).

## **Argument**

### **A. Appellant’s Due Process Rights Were Violated.**

#### *i. The Destroyed iPhone 12 Evidence was Favorable.*

██████████ is an admitted drug user and trafficker who was called by the government to testify against appellant. His dealings, and motivations in testifying were certainly questioned by the defense. What is missing is the actual evidence contained on ██████████ iPhone 12 that could have been used to confront and discredit his testimony. The defense was able to introduce evidence that ██████████ and ██████████ rarely communicated with each other and that it would take “something very important” for them to communicate with each other. (R. at 1446). The defense was able to elicit that on 18 September 2020, the same day ██████████ made allegations against appellant to her command, she also communicated with ██████████. (R. at 1446). This evidence was produced from the extraction of ██████████ iPhone 7 that was still in CID custody. The defense was unable to determine the content of that communication between ██████████ and ██████████, as the content of that 18 September discussion was no longer stored on the iPhone 7. (R. at 1445).

It is entirely reasonable to conclude that [REDACTED] iPhone 12, a newer phone with presumably greater storage capacity, still had evidence of this 18 September 2020 communication between [REDACTED] and [REDACTED]. Due to the government's failure to preserve evidence, the defense was only able to provide a limited picture to the panel.

*ii. The Evidence was Suppressed by the Government.*

It is clear the government obtained relevant and favorable evidence, and later destroyed it. This destruction need not be intentional or nefarious to violate the due process rights of appellant, but rather, law enforcement and the government must be held accountable for its negligence. *Strickler v. Green*, 527 U.S. 263, 280. This is especially true when evidence is gathered during the pre-prefferal investigation phase, when an appellant is less likely to have legal counsel through which he may advocate or ensure that his rights are protected for future legal proceedings. Law enforcement must protect the integrity of each step in the process, most critically during the gathering of evidence.

*iii. Prejudice Ensued.*

Appellant attempted to impeach [REDACTED] and [REDACTED] through the limited evidence they were able to gather from the iPhone 7 extraction. That evidence, and the literal absence of content, was wholly inadequate to provide the tangled web of motivations and criminality of the government witnesses who



testified against appellant; the defense was left with the fact that [REDACTED] and [REDACTED] communicated on the day she reported appellant but had no way to provide any context of that communication to the panel.

The panel convicted appellant of using cocaine during the party held at [REDACTED] [REDACTED]s apartment – the same party that [REDACTED] and [REDACTED] provided testimony about. (R. at 1330, 902). Appellant should have been entitled to the evidence that law enforcement collected to fully prepare a defense in this case. Due process demands that the rights of an accused never break to accommodate law enforcement's desires.

**B. Under R.C.M. 703(f)(2), The Military Judge Was Required to Abate Appellant's Trial.**

*i. The lost or destroyed evidence was of such central importance that it was essential to a fair trial.*

The importance of [REDACTED] credibility as a witness, and his testimony in appellant's trial, cannot be overstated. Thus, the destruction of the iPhone 12 extraction represents a severe blow to the essential fairness of appellant's trial. The evidence from [REDACTED] phone could have significantly discredited both his and [REDACTED] testimony – they were both in communication with each other on the day [REDACTED] made her allegations against appellant. The substance of these communications was never retrieved because the government wanted [REDACTED] [REDACTED] cooperation in future law enforcement investigations. Law enforcement

investigations, and the use of confidential informants are an important part of the criminal justice system – but future law enforcement investigations against one subject should never come at the expense of an accused and the right to a fair trial.

*ii. There was no adequate substitute for the lost or destroyed evidence.*

As stated above, the iPhone 7 extraction was not an adequate substitute for the destroyed iPhone 12 extraction. To this end, the military judge conceded as much, stating “I don’t believe that [the iPhone 12] was identical to the iPhone 7 in terms of substance.” (R. at 815). The iPhone 7 evidence recovered by the defense expert indicated that critical communications between [REDACTED] and [REDACTED] occurred on the day she made allegations against appellant. They were not recoverable on [REDACTED] outdated and older iPhone, but no evidence in the record suggests that these messages would not have been recoverable from [REDACTED] iPhone 12.

*iii. The loss or destruction of the evidence was not the fault of not could have it been prevented by the requesting party.*

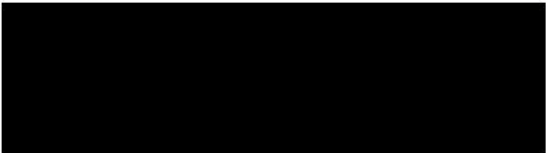
The loss of this evidence, and the responsibility of that loss, rests exclusively with law enforcement. The government never disputed this fact. Special Agent SA, the lead case agent, failed to protect and preserve critical evidence that appellant needed for his defense. When this failure was discovered, she edited law enforcement CAS reports and AIRs to cover up her mistake.

*iv. The military judge was required to abate the proceedings.*


Where a violation of R.C.M. 703(f)(2) is found, and the requested evidence is permanently lost or destroyed, there is no discretion as to the remedy – abatement is required. *Simmermacher*, 74 M.J. 196, 201. Here, the military judge erred when he attempted to provide a remedy of “leeway” in favor of the defense on a number of objections throughout the trial. (R. at 980, 988, 1442). Leeway is not a remedy for a violation of R.C.M. 702(f)(2), and where evidence is lost or permanently destroyed, and no adequate substitute can be provided, the remedy of abatement is required. For the reasons set forth above, appellant respectfully requests this court set aside the specifications of Charge II.

### **Conclusion**

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



SARAH H. BAILEY  
CPT, JA  
Appellate Defense Counsel  
Defense Appellate Division



MITCHELL HERNIAK  
MAJ, JA  
Branch Chief  
Defense Appellate Division



DALE C. McFEATTERS  
LTC, JA  
Deputy Chief  
Defense Appellate Division

## **Appendix A**

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:

### **I. WHETHER THE EVIDENCE IS FACTUALLY SUFFICIENT TO SUPPORT APPELLANTS CONVICTIONS.**

#### **Standard of Review and Law**

This court reviews factual and legal sufficiency issues de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for factual sufficiency is, “whether after weighing the evidence in the record of trial, and making allowances for not having personally observed the witnesses, [this court is] convinced of [appellant’s] guilt beyond a reasonable doubt.” *United States v. Walters*, 58 M.J. 391, 395 (C.A.A.F. 2003).

The evidence before this court is given a “fresh, impartial look.” *United States v. Billings*, 58 M.J. 861, 867 (Army Ct. Crim. App. 2003). This review of the evidence is limited to the entire record which includes only the evidence admitted at trial and subject to cross-examination. *United States v. Bethea*, 46 C.M.R. 223, 224-225 (C.M.A. 1973); see also *United*

*States v. Stokes*, 65 M.J. 651 (Army Ct. Crim. App. 2007) (discussing *Bethea*).

“In sum, to sustain appellant’s conviction, [this court] must find that the government has proven all essential elements and, taken together as a whole, the parcels of proof credible and coherently demonstrate that appellant is guilty beyond a reasonable doubt.” *United States v. Gilchrist*, 61 M.J. 785, 793 (Army Ct. Crim. App. 2005) (citing *United States v. Roukis*, 60 M.J. 925, 930 (Army Ct. Crim. App. 2005)). The term “reasonable doubt” does not mean that the evidence must be free from conflict. *United States v. Reed*, 51 M.J. 559, 562 (N-M. Ct. Crim. App. 1999), *aff’d* 54 M.J. 37 (C.A.A.F. 2000). It does, however, mean that the government must prove guilt of every element beyond “an honest conscientious doubt” and beyond “mere conjecture.” Rule for Court Martial 918c, Discussion.

### **Facts and Argument**

Appellant relies upon the facts stated within the brief above and personally asserts the following additional facts and argument.

#### **Specifications 5-9 of Charge II, Article 112a.**

The government failed to prove these specifications beyond a reasonable doubt because their witnesses were not credible. Specifically, [REDACTED] (then

██████████) testified that she invited multiple individuals over to her off-post apartment for the *alleged* purpose of consuming drugs. Not only did appellant deny ever consuming drugs at ██████████ off-post apartment, the government introduced no reliable or credible evidence to support this testimony. The only evidence that the government was able to introduce from ██████████ beyond her own words were CashApp transactions. Specifically, these CashApp transactions indicate that ██████████ paid appellant for drinks – nowhere do these transactions indicate that any money was exchanged between appellant and ██████████ for drugs.

██████████, another government witness, never specifically testified that he personally witnessed appellant consuming cocaine. Instead, he provided vague testimony that everyone at the party consumed cocaine – this testimony is unreliable and does not amount to evidence beyond a reasonable doubt.

Finally, ██████████, the self-admitted drug dealer turned government witness in order to protect his citizenship, admitted that although he performed controlled purchases of drugs on behalf of CID, appellant was never the subject of a controlled purchase of drugs. Additionally, as briefed above, the government lost critical and relevant evidence that was contained in ██████████ phone.

Due to these errors, the unreliable evidence introduced at trial, and the insufficient evidence to support the convictions, appellant respectfully requests this court set aside his convictions.

## **II. WHETHER APPELLANT'S SENTENCE WAS INAPPROPRIATELY SEVERE.**

### **Facts**

In addition to a reprimand and reduction in rank, the panel sentenced appellant to be confined for 85 days, and to receive a bad conduct discharge. Appellant has deployed three times to Afghanistan (2013, 2016, and 2019), and spent four years with the 505th Parachute Infantry Regiment (PIR) of the 3d Brigade Combat Team, 82d Airborne Division. (R. 1494-1495). Upon release from confinement, appellant has been an upstanding member of society. After his release from confinement, appellant received several awards for his service to his community from the California State Treasury and the California District Attorneys Office.

### **Standard of Review**

Under Article 66, UCMJ, the service Courts of Criminal Appeals (CCAs) review sentence appropriateness de novo. *United States v. Kelly*, 77 M.J. 404, 406 (C.A.A.F. 2018).

Article 66(c), UCMJ, mandates that this Court “affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved.” Given this statutory mandate, this court has “wide discretion” in determining whether a particular sentence is appropriate. *United States v. Lacy*, 50 M.J. 286, 287-88 (C.A.A.F. 1999). In “exercising this statutory authority, a CCA has discretion to approve only that part of a sentence that it finds ‘should be approved,’ even if the sentence is ‘correct’ as a matter of law.” *Id.* (quoting *United States v. Nerad*, 69 M.J. 138, 142 (C.A.A.F. 2010)).

### **Law**

A service court has near complete discretion to review a sentence and rectify injustice. “A Court of Criminal Appeals must determine whether it [personally] finds the sentence to be appropriate.” *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005). It is a “widely adopted view ‘that the punishment should fit the offender and not merely the crime.’” *United States v. Mack*, 9 M.J. 300, 317 (C.M.A. 1980) (quoting *Williams v. People of State of N.Y.*, 337 U.S. 241, 247 (1949)). This court must consider the totality of the circumstances, including the character of the offender, the seriousness of his offenses, and all matters contained in the record of trial. *United States v. Martinez*, 76 M.J. 837, 841-842 (Army Ct.



Crim. App. 2017); *United States v. Healy*, 26 M.J. 394, 395-396 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

### **Argument**

The circumstances of this case do not warrant the sentence appellant received. Appellant was a respected noncommissioned officer with more than fifteen years of service in the Army. Further, upon release from the Army, appellant has spent a great deal of time and energy improving his community and himself, receiving multiple accolades and recognition for his efforts.

Appellant respectfully requests this court set aside his bad conduct discharge because it is not warranted. This is especially true given the results of his co-defendants. [REDACTED] was given a general (under honorable conditions) administrative separation and was awarded United States citizenship. [REDACTED] received an honorable discharge, despite her admission that she hosted multiple individuals who consumed cocaine in her home, and her own admission of drug use. [REDACTED] avoided a court-martial that exposed him to potentially 115 years of confinement and received an administrative separation. None of these individuals have any sort of criminal record and none face the stigma and challenges associated with a bad-conduct discharge.

In conclusion, appellant respectfully requests this court set aside his bad-conduct discharge.

**CERTIFICATE OF FILING AND SERVICE**

Undersigned counsel certifies that a copy of the foregoing was electronically delivered to Court and Government Appellate Division on: June 1, 2023



Sarah H. Bailey  
CPT, JA  
Appellate Defense Counsel  
Defense Appellate Division