

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

**REPLY BRIEF ON BEHALF OF  
APPELLANT**

v.

Docket No. ARMY 20220427

Sergeant First Class (E-7)

**BRIAN J. DIVINE**

United States Army,

Appellant

Tried at Fort Hood, Texas, United  
State of America on August 24, 2022,  
before a General Court-Martial  
convened by Commander, III Corps,  
Lieutenant General Robert P. White,  
Colonel Maureen A. Kohn, military  
judge, presiding.

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

COMES NOW, the undersigned civilian appellate counsel, and respectfully  
submits the following in reply to the Brief on Behalf of Appellee, filed on 5  
January 2024.

SFC Divine reiterates that the Trial Counsel violated R.C.M. 701(a)(6) and  
will rely on the facts, law, and argument submitted in his brief, filed on 25 August  
2023. However, it should be emphasized that the Government's brief argues that  
any such violation would constitute "harmless error" because of SFC Divine's  
decision to plead guilty. This logic ignores the obvious fact that SFC Divine would  
not have pled guilty if he had been provided with the evidence that was not  
disclosed. The undersigned also disagrees with the Government's assertion that its  
case was "strong," and cross-examination would have revealed the obvious motive

to fabricate. A discovery violation of this nature is not “harmless” by any definition of the word.

SFC Divine also disagrees with the Government’s analysis for the second assignment of error and largely relies upon the facts, law, and argument presented in his brief, filed on 25 August 2023. Again, the Government relies on the notion that SFC Divine waived the issue by pleading guilty, but again fails to accept the commonsensical notion that SFC Divine would not have pled guilty if he had been provided the requested expert. The requested expert, as explained in SFC Divine’s brief, would likely have been able to recover deleted or missing messages, but this was dismissed as “speculative,” which imposes an impossible standard for an Accused to articulate and describe an item that he has never seen and cannot be found. SFC Divine, through counsel, presented sufficient evidence to prevail in the motion to compel, and the Military Judge abused her discretion by denying it.

Finally, SFC Divine disagrees with the Government’s analysis and its argument against the third assignment of error should not prevail. SFC Divine will rely upon the facts, law, and argument that he presented in his brief, filed on 25 August 2023.

### **Conclusion**

WHEREFORE, SFC Divine respectfully requests that this Honorable Court set aside the findings and sentence.

Respectfully submitted.

[REDACTED]

John R. McGuire  
Civilian Appellate Counsel

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

### **CERTIFICATE OF FILING AND SERVICE**

I certify that this document was emailed to the Court's filing address on 18 January 2024, that a copy was uploaded into the Court's case management system on 18 January 2024, and that a copy of the foregoing was emailed to counsel for the United States on 18 January 2024.

[REDACTED]

John R. McGuire  
Civilian Appellate Counsel

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]