

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

**BRIEF ON BEHALF OF
APPELLANT**

v.

Docket No. ARMY 20220429

Private First Class (PFC)
DAVY J. HALCHIMAI,
United States Army,

Appellant

Tried at Fort Bliss, Texas, on 14
February, 11 July, 5 August, and 16-
19 August 2022, before a general
court-martial appointed by the
Commander, Headquarters, 1st
Armored Division, Colonel Robert
Shuck and Colonel Joseph R. Distaso,
military judges, presiding.

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

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Assignments of Error¹

**I. WHETHER THE MILITARY JUDGE ABUSED HIS
DISCRETION IN FINDING NO DISCOVERY VIOLATION.**

**II. WHETHER THE MILITARY JUDGE ABBUSED HIS
DISCRETION IN DENYING APPELLANT’S MOTION TO
INSPECT APPELLANT’S SEIZED PHONE.**

**III. WHETHER THE MILITARY JUDGE ABUSED HIS
DISCRETION IN DENYING THE DEFENSE MOTION FOR A
CONTINUANCE.**

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.

INTRODUCTION

Appellant's case demonstrates, as Attorney General Robert Jackson well-understood, a prosecutor's immense power can be abused. Sometimes the prosecutor's "sensitive[ity] to fair play and sportsmanship" is abandoned and the prosecutor fails to "temper[] zeal with human kindness, [to] seek[] truth and not victims," and fails to "approach[] his task with humility." Robert H. Jackson, U.S. Att'y Gen., The Federal Prosecutor, Address at the Second Annual Conference of U.S. Attorneys in Washington, D.C. (Dec. 1, 1940), *in* 24 J. Am. Jud. Soc'y 18, June 1940, at 18-20. In those circumstances, the military justice system relies on its judges to ensure a fair outcome. When the government fails to provide discovery, we rely on our military judges to ensure disclosure. When the government games the system, we rely on our military judges to guarantee fair play. But the military judge conspicuously failed to do so in appellant's case.

Here, the government made an agreement with [REDACTED] the alleged victim, about her testimony, and the military judge failed to even find that the government had a duty to disclose that agreement. Further, the government, with abounding cynicism, violated that agreement it had with the alleged victim. Here, the government at the last instance seized appellant's phone, and the military judge not only denied the defense motion for expert assistance, but he also denied defense counsel the opportunity to even independently inspect the phone. Here, even

though the government approved appellant's one expert request at the last instance, gamed the victim and the system, and seized appellant's phone right before trial, the military judge made the defense pay for the government's shenanigans, denying the defense motion for a continuance. All these erroneous decisions independently and collectively prejudiced appellant.

Statement of the Case

On 19 August 2022, an enlisted panel, sitting as a general court-martial, found appellant guilty, contrary to his pleas, of one specification of sexual assault without consent, one specification of simple assault, and one specification of communicating a threat, in violation of Articles 120, 128, and 115, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 928, and 915 (2019) [UCMJ]. (Statement of Trial Results). On that same day, the military judge sentenced appellant to serve five years confinement for sexual assault, two months confinement for assault, and five months confinement for communicating a threat, all to be served concurrently. (Statement of Trial Results; R. at 996). The military judge also sentenced appellant to reduction to the grade of E-1 as well as a dishonorable discharge. (Statement of Trial Results; R. at 996). The convening authority approved the findings and sentence on 21 September 2022. (Convening Authority Action). The Judgment of the Court was issued on 5 October 2022. (Judgment of the Court). This case was docketed with this court on 7 June 2023. (Referral Letter).

I. WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN FINDING NO DISCOVERY VIOLATION.

Facts Relevant to Assignment of Error

Appellant was charged with rape and sexual assault of his wife, [REDACTED] as well as aggravated assault and two specifications of communicating a threat. (Charge Sheet). The rape, sexual assault, and one of the threats allegedly occurred on 4 April 2021. (Charge Sheet).²

On 8 July 2022, the defense moved to compel the government to produce notes and memoranda related to interviews with witnesses on the government's witness list. (App. Ex. X). According to the motion, the government interviewed [REDACTED] between 20 June 2022 and 5 July 2022. (App. Ex. X, p. 2). The motion also noted the government denied the request, claiming the notes of its interview(s) did not contain discoverable information. (App. Ex. X, p. 2).

A. 11 July 2022 Hearing

On 11 July 2022, Colonel [REDACTED] ("[REDACTED]") took the bench as the military judge in appellant's case and asked if either party desired to question him. (R. at 11-12). MAJ [REDACTED], the special victim's prosecutor (SVP), asked the military judge if he had "an opinion as to whether the government could go

² Appellant was found not guilty of rape, not guilty of aggravated assault but guilty of the lesser included offense of simple assault, and not guilty of one specification of communicating a threat on 25 November 2020. (Charge Sheet, R. at 955).

forward in a case without the complaining witness present?” (R. at 12). The military judge said he would allow the government “to present whatever evidence they feel is appropriate in order to prove the case.” (R at 12).

The military judge addressed a number of motions at the 11 July 2022 hearing. After deferring a ruling on unreasonable multiplication of charges (UMC), the military judge asked the parties to “talk about the motion to compel.” (R. at 18).

The defense asked for discovery related to the government’s June interview with [REDACTED] (R. at 18-19). The defense believed “any notes from a recent interview with the victim that was conducted, presumably in preparation for this hearing would be relevant.” (R. at 19). The government claimed it had nothing discoverable, arguing that “*United States v . Jaffey*³ . . . will--will keep, potentially, relevant evidence out of trial and not subject to disclosure.” (R. at 19). The government said that it would be required to produce any “new or different information,” but nothing resulted from the interview relevant to defense preparation. (R. at 20). The government also asked the military judge to focus on the defense’s reciprocal obligations. (R. at 24-25).

³ Undersigned counsel does not know what case trial counsel is referencing, perhaps *Jaffee v. Redmond*, 518 U.S. 1 (1996). But that *Jaffee* addresses psychotherapist/patient privilege, not work product.

The defense responded that something relevant to the defense preparation clearly occurred. “[T]hey’ve decided to call her as a witness, presumably, in part, based on what happened in that conversation.” (R. at 21).

The military judge interjected that “there is no evidence -- you are -- you are kind of just, in a sense, speculating.” (R. at 22). The military judge thought perhaps the government was merely discussing procedural steps with [REDACTED] and he did not see a legal basis for discovery. (R. at 22). The defense reiterated it believed the government had failed to disclose discoverable material. (R. at 22).

The government responded the defense had failed to prove by a preponderance of the evidence that the government had failed to produce something that was discoverable. (R. at 23). “So obviously, Your Honor, this is a defense motion they have to prove--prove by a preponderance of the evidence. They have to support their motion with evidence. And they’ve supported it with nothing other than our denial.” (R. at 23). The government noted it had a duty of candor as professionals. (R. at 23). “So if we conduct a full length interview or we conduct an interview where new or different information, is – is spoken or stated by a witness the government understands our obligations” (R. at 23).

The military judge, focusing on the defense’s obligations (even though it was the defense moving for discovery), asked the government what the government thought the defense had failed to produce. (R. at 23). “[W]hat about

the people's—what's your—"people's". That's my civilian nomenclature coming in. I apologize for that. . . . [W]hat do you think the defense has?" (R. at 23). The government responded that the defense had "an affirmative obligation. So we don't have to prove that they may have something." (R. at 24). The government argued that the defense would be introducing evidence at trial, such as a Good Soldier Book, and the defense had to provide by rule that information before trial, and the government wanted that material now. (R. at 24).

The military judge asked the defense for its "position on the government's request for discovery." (R. at 25). The defense responded it would "obviously" comply with its discovery obligations, but "would like to just kind of shift the focus back to our motion to compel." (R. at 25). The defense argued it was entitled to a memorandum for record or notes setting forth what was said at the meeting with [REDACTED]. The defense believed it was "relevant to [its] preparation for the motion *in limine*, as well as trial." (R. at 25-26). The defense noted that anything that might be considered work-product could be redacted. (R. at 25).

The military judge asked the government if [REDACTED] was testifying at the motions hearing. (R. at 26). The government replied she was. (R. at 26).

The military judge again focused on the defense's reciprocal discovery obligation. (R. at 26). The military judge noted the defense said it would follow

the rules, and he did not make a specific finding regarding the defense obligation. (R. at 26).

The military judge said the government had “affirmatively state[d] on the record there’s no *Brady* [*v. Maryland*, 373 U.S. 83 (1963)] information in there, no inconsistent statements.” (R. at 26). The military judge asked the government to “[c]ome up to the podium” to address why the government would not disclose what, in the military judge’s view, “such a nothing.” (R. at 26-27).⁴ The government replied, “Your Honor, because this is a very obvious slippery slope problem where the government will be conducting preparation of witnesses in advance of trial and by setting a precedent that we have to produce all of our notes, basically, towns [sic.] the defense that they don 't need to do their own trial preparation or interview their own witnesses” (R. at 27). The military judge denied the defense’s motion for discovery. (R. at 27-28).

At the same hearing, following ██████ testimony on a motion *in limine*, the government moved to add ██████ to the government’s witness list for trial. (R. at 105). According to the SVP, the government was asking to add her to the government witness list in violation of the pretrial order (PTO) because the government was not sure she would show up at the pretrial hearing and was not

⁴ Although nowhere reflected in the record, this entire hearing, as well as the other motions hearings, appear to have been conducted by video-feed, with the military judge at a separate location from appellant.

sure she would testify as the government wished. (R. at 105). “When we saw her this morning we still weren’t 100 percent certain what she would say on the stand. But she did testify consistently with what we were hoping to hear.” (R. at 105).

The defense objected to the government adding [REDACTED] as a witness because the witness request was too late. (R. at 105). The defense also argued the government’s request indeed showed that the government had failed to comply with its discovery obligation. (R. at 105-06). It “exemplifies [the defense] argument that these notes are necessary for trial.” (R. at 106).

The SVP claimed prior experience was the reason the government failed to timely put [REDACTED] on the witness list. (R. at 106). “We didn’t put her on our witness list because we’ve got experiences in the past here, sir, where complaining witnesses in domestic violence cases are put on the witness list, then we’re forced to produce them and then they disappear and we cannot produce them and it leads to either a continuance or an abatement” (R. at 106). The SVP said that, instead of timely placing [REDACTED] on the witness list, he knowingly decided to violate the PTO. (R. at 106). “Throughout my career, I’ve had been in this position before as a prosecutor and we made a decision in this case that we were going to wait until today to see if she would show up and testify.” (R. at 107).

The military judge nonetheless granted the government's request to add [REDACTED] to the witness list and maintained his denial of defense's motion to compel discovery related to the government's June interview of [REDACTED] (R. at 107).

B. The Defense Motion to Dismiss for Discovery Violations

On 20 July 2022, the defense moved to dismiss the charges against appellant because the government had failed to comply with its discovery obligation. (App. Ex. XV). The defense noted the military judge had a range of options but argued that the nature of the violation called for dismissal. (App. Ex. XV). The motion emphasized what the government had said at the 11 July 2022 hearing but established that much had occurred before that 11 July 2022 hearing that had not been disclosed by the government.

According to the motion, the government, represented by the SVP and trial counsel (TC), met with [REDACTED] and her Special Victims' Counsel (SVC) on 23 June 2022. (App. Ex. XV, p. 3). At that previously undisclosed meeting, the government agreed to call [REDACTED] only at the Article 39(a) hearing—but not for trial. (App. Ex. XV, p. 3). The motion also noted the defense had emailed the SVP and the TC on 15 July 2022, asking for more information about the meeting, but had not received a response. (App. Ex. XV, p. 3).

The defense motion also established the court-martial was proceeding against [REDACTED] expressed wishes. [REDACTED] made it very clear to the government early-on

she did not want appellant to be court-martialed. (App. Ex. XV-A, p. 3). In a memo to the government, dated 10 May 2021, ■■■ stated, “After careful consideration and consultation with my Special Victim’s Counsel, it is my desire that no charges or action be taken against my husband” (App. Ex. XV-A, p. 3). ■■■ informed the government that she and appellant were in “couple’s counseling” and she wanted him to return to his family. (App. Ex. XV-A, p. 3).

On 19 October 2021, ■■■ reiterated her desire that no action be taken against appellant. (App. Ex. XV-A, p. 4). She advised the government that appellant was undergoing therapy and counseling. (App. Ex. XV-A, p. 4). She also informed the government that she was “not willing to testify and will oppose, to whatever extent possible, any subpoena . . . issued to [her].” (App. Ex. XV-A, p. 4). She believed that a court-martial would hurt her and her family. (App. Ex. XV-A, p. 4).

On 13 July 2022, ■■■ submitted a memo in support of appellant’s Chapter 10 request. (App. Ex. XV-A, p. 1). In addition to ■■■ communications with appellant’s chain-of-command, she was also engaged in communications with the prosecutors about circumstances in which she would testify. In her memorandum, ■■■ said that she had been placed on the witness list against her wishes, and indeed “contrary to the conversations she has had with the litigation team.” (App. Ex. XV-A, p. 1). ■■■ was told by the government if she testified at the Article 39(a) session on 11 July 2022, “she would not have to testify at trial.” (App. Ex. XV-A,

p. 1). She now believed that the assurance was just “a ruse to compel her testimony against her wishes.” (App. Ex. XV-A, p. 1).

█████ SVC submitted a memorandum included in the defense motion. (App. Ex. XV-C). That memorandum stated that █████ and the government began discussing an agreement for her to testify “on or around 8 April 2022.” (App. Ex. XV-C). Per that memo, █████ understood the government would call her as a witness at the Article 39(a) session, but she would not be called or subpoenaed for appellant’s court-martial. (App. Ex. XV-C).

The defense motion noted that appellant had already been prejudiced by the government’s failure to disclose the agreement with █████ by not having that information in preparation of the Article 39(a) hearing. (App. Ex. XV, pp. 6-7). The defense moved for dismissal with prejudice because, in its view, all other remedies would fail to remedy the harm. (App. Ex. XV, p. 7).

On 5 August 2022, the defense submitted a memorandum from Captain (CPT) Daniel █████ prior SVC. (App. Ex. XXV). In that document, CPT █████ stated the government was in discussions with him and his client in April 2022 about her testimony. (App. Ex. XXV). Captain █████ wrote that the government agreed that, if █████ testified at the Article 39(a) hearing, the government would not subpoena her to testify at trial. (App. Ex. XXV).

C. The Hearing on the Motion to Dismiss

At the 5 August 2022 hearing, the military judge began the hearing by stating he had essentially decided the issue. (R. at 122). “So to me, those are the two main issues here. . . . I think there was some . . . allegation of government misconduct in the motion.” (R. at 122). But the military judge did not think the allegation rose to the level of “outrageous government conduct” or believe the government violated a “substantial right[]” of appellant. (R. at 122). The military judge noted the government did not agree with the defense’s facts, but even so he did not believe it rose to a flagrant violation. (R. at 122). “[T]his does not rise to a situation of outrageous government conduct where the court-martial process would be imperiled if it was allowed to proceed.” (R. at 122).

After the defense introduced CPT [REDACTED] memorandum, CPT [REDACTED] testified telephonically. (R. at 125-131). Captain [REDACTED] testified he had several discussions with government counsel regarding [REDACTED] testimony in April 2022. (R. at 127). He also testified that [REDACTED] and the government had an oral agreement that, if she testified at the Article 39(a) hearing, she would not be subpoenaed for trial. (R. at 127-28). Captain [REDACTED] testified that if [REDACTED] refused to testify at the Article 39(a) hearing, the government would subpoena her for trial. (R. at 127-28). When

asked by the defense about the Department of Defense (DoD) policy⁵ (about which the military judge appeared to be unaware), the government objected because, in its view, DoD policy was not relevant. (R. at 128). The military judge sustained the objection. (R. at 128).

The government asked CPT [REDACTED] if the agreement with [REDACTED] was in writing. (R. at 125). Captain [REDACTED] said it was not. (R. at 125). The government also asked CPT [REDACTED] if the “government [had] anything to offer [REDACTED] in exchange for her testimony.” (R. at 125). Captain [REDACTED] replied that the government had only the promise to not subpoena her. (R. at 126).

Following CPT [REDACTED] testimony, the defense argued that the government had an obligation to disclose agreements it had with witnesses because such agreements could impact witness credibility. (R. at 132). The military judge responded that immunity did not appear to be the issue, so he did not see why the government had a duty to disclose an agreement, even if an agreement existed between [REDACTED] and the government. (R. at 133). The military judge said “the only issue that’s particularly relevant” is whether he should dismiss the charges. (R. at 133). Arguing relevant case law, the defense reiterated the prejudice that resulted

⁵ Dep’t of Def. Instr. (DoDI) 6495.02, Vol 1, Sexual Assault Prevention and Response: Program Procedures, Encl. 4, para. 1.c. (Non-Participating Victim) (28 March 2013, incorporating Change 7 (6 September 2022)).

to appellant from the government's discovery violation had already occurred and could occur again at trial. (R. at 133-34).

The government argued it could not bind the convening authority and, in any event, appellant was not prejudiced (R. at 142). The government also argued it did not disclose the agreement because "the government [did not believe it] ha[d] any impeachment value." (R. at 142). The government claimed that the defense was already aware that ■■■ did not want appellant prosecuted, so the agreement the government reached with ■■■ had no impact on appellant's case. (R. at 144).⁶ The government also claimed that, in a domestic violence case, "there are obvious reasons why the accused . . . where the victim has stated she's afraid of the accused [sic]." (R. at 140).

The military judge denied the defense motion. (R. at 144-45). The military judge found no discovery violation. (R. at 144). The military judge found that appellant did not have a right to assert any rights on behalf of ■■■ (R. at 144). Any agreement by the government was "amorphous," and the government's decision to abrogate any agreement it had with ■■■ was "a strategy decision." (R. at 144). The military judge did not address the actual discovery violation.

⁶ The government never denied promising ■■■ she would not be subpoenaed if she testified at the motions hearing and admitted it had never previously disclosed anything about those talks. The government argued that no agreement really existed because the two contractual parties had "no meeting of the mind [sic]." (R. at 141).

In his written ruling, the military judge found appellant had no right to assert [REDACTED] Article 6b, UCMJ rights. (App. Ex. XXIX, p. 2). He also found that appellant was aware [REDACTED] did not desire appellant to be prosecuted. (App. Ex. XXIX, p. 2). Thus, according to the military judge, no discovery violation occurred, and appellant was not prejudiced even if the government failed to comply with discovery rules. (App. Ex. XXIX, p. 2).

Standard of Review

This court reviews a military judge's discovery rulings for an abuse of discretion. See *United States v. Jones*, 69 M.J. 294, 298 (C.A.A.F. 2011); *United States v. Roberts*, 59 M.J. 323, 326 (C.A.A.F. 2004). A military judge abuses his discretion “when his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law.” *United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F. 2008).

Law

Article 46, UCMJ, provides the trial counsel, defense counsel, and the court-martial with the “equal opportunity to obtain witnesses and other evidence in accordance with” the rules prescribed by the President. UCMJ article 46(a). “Discovery in the military justice system, which is broader than in federal civilian criminal proceedings, is designed to eliminate pretrial gamesmanship, reduce the

amount of pretrial motions practice, and reduce the potential for surprise and delay at trial.” *United States v. Jackson*, 59 M.J. 330, 333 (C.A.A.F. 2004) (citation omitted) (internal quotation marks omitted). The Court of Appeals for the Armed Forces (CAAF) has held that trial counsel's obligation under Article 46, UCMJ, includes removing “obstacles to defense access to information” and providing “such other assistance as may be needed to ensure that the defense has an equal opportunity to obtain evidence.” *United States v. Williams*, 50 M.J. 436, 442 (C.A.A.F. 1999).

The Rules for Courts-Martial (R.C.M.) further define the trial counsel's obligations under Article 46, UCMJ. *See United States v. Pomarleau*, 57 M.J. 351, 359 & n.9 (C.A.A.F. 2002). Two provisions are particularly relevant here. First, “[e]ach party shall have . . . equal opportunity to interview witnesses and inspect evidence.” R.C.M. 701(e). Second, “[t]rial counsel shall, as soon as practicable, disclose to the defense the existence of [possible impeachment] evidence known to trial counsel.” R.C.M. 701(a)(6); *see United States v. Eshalomi*, 23 M.J. 12, 24 (C.M.A. 1986).

Discovery rules “ensure compliance with the equal-access-to-evidence mandate in Article 46.” *Williams*, 50 M.J. at 440. In doing so, the rules “aid the preparation of the defense and enhance the orderly administration of military

justice.” *Roberts*, 59 M.J. at 325. “The parties to a court-martial should evaluate pretrial discovery and disclosure issues in light of this liberal mandate.” *Id.*

In *United States v. Stellato*, the trial counsel visited the purported victim’s mother, who disclosed to the defense the mother possessed a box of “evidence” she claimed was pertinent to appellant’s case. 74 M.J. 473, 477 (C.A.A.F. 2015). In that case, the military judge dismissed the charges with prejudice, and CAAF upheld his determination. *Id.* at 491. In doing so, the CAAF “heartily endorse[d]” Army Regulation 27-26’s “principle that ‘a trial counsel is not simply an advocate but is responsible to see that the accused is accorded procedural justice.’” 74 M.J. at 491 (quoting Dep’t of the Army Reg. 27-26, Legal Services, Rules of Professional Conduct for Lawyers, R. 3.8 Comment (May 1, 1992)).

Similarly, in *United States v. Bowser*, the Air Force Court of Criminal Appeals upheld a military judge’s dismissing charges with prejudice where the trial counsel failure to turn over witness interview notes because, so the trial counsel claimed (like in appellant’s case), the notes contained attorney-client material. 73 M.J. 889, 894 (A.F. Ct. Crim. App. 2014), *aff’d* 74 M.J. 326 (C.A.A.F. 2015). And in *United States v. Vargas*, CAAF determined that a military judge need not necessarily employ the least drastic remedy for a discovery violation, but could choose from a range of remedies, choosing whatever remedy she deems appropriate under the circumstances. 83 M.J. 150, 156-57 (C.A.A.F. 2023). The

military judge's remedy "must cure the prejudice to the accused," but also must be just under the circumstances. *Id.* at 157.

Additionally, and particularly relevant here, the government must disclose information that might call into question the credibility of a witness, and particularly when it has a material agreement with a witness. *Giglio v. United States*, 405 U.S. 150, 153-54 (1972). Indeed, *Brady* and *Giglio* "require[] disclosure of tacit agreements between the prosecutor and a witness. A deal is a deal—explicit or tacit." *Douglas v. Workman*, 560 F.3d 1156, 1186 (10th Cir. 2009).

Argument

A. The Military Judge Abused His Discretion

The military judge erred because he failed to recognize that the agreement between the government and the prime government witness was discoverable; failed to focus on the impeachment value of such an agreement, instead focusing on Article 6b, UCMJ; and failed to understand that he had a range of options to remedy a discovery violation. Indeed, his discussion on the record establishes he had predetermined that no discovery violation occurred even before he heard any evidence of the negotiations between the government and [REDACTED]

B. The Agreement Was Discoverable

The military judge clearly erred in finding the agreement was “amorphous.” The government never denied it had an agreement with [REDACTED]. Instead, the SVP stated clearly what his goal was in making the agreement with [REDACTED]. To conduct a dry run of [REDACTED] testimony. “When we saw her this morning we still weren’t 100 percent certain what she would say on the stand. But she did testify consistently with what we were hoping to hear.” (R. at 105). After the government had her testify acceptably to the government and cement her testimony should she testify otherwise at the trial, the government decided, as a matter of trial strategy, to subpoena [REDACTED] (R. at 106). As the SVP blithely informed the military judge, he “made a decision in this case that we were going to wait until today to see if she would show up and testify.” (R. at 107). This is the very type of gamesmanship the discovery rules are meant to prevent. *Stellato*, 74 M.J. at 477; *United States v. Adens*, 56 M.J. 724, 733-34 (Army Ct. Crim. App. 2002) (finding error when the trial counsel intentionally withheld discovery to gain a tactical advantage).

Furthermore, even if the military judge was somehow correct in finding no formal agreement existed between [REDACTED] and the government, [REDACTED] and the government had a tacit agreement which had to be disclosed. *See Wisehart v. Davis*, 408 F.3d 321, 323-24 (7th Cir. 2005) (government counsel is required to disclose agreements, whether express or tacit); *United States v. Shaffer*, 789 F.2d

682, 690 (9th Cir. 1986) (facts that imply an agreement exists must be disclosed). The military judge's finding that such meetings were merely "strategy sessions" and not discoverable was erroneous.

He also erred in believing that only an agreement that included immunity would be discoverable. (R. at 132-33). *See Shaffer*, 789 F.2d at 689 (an agreement to pay the expenses of a witness must be disclosed). And he further erred in believing he had only one option: to dismiss the charges. *See Vargas*, 83 M.J. at 156-57. The military judge said "the only issue that's particularly relevant" is whether he should dismiss the charges. (R. at 133). But he had a range of other options. *Vargas*, 83 M.J. at 156-57. For example, he could have refused to allow the government to use the Article 39(a) testimony at appellant's court-martial. *Id.* He could have ruled the government was prohibited from calling █████ at trial. *Id.* But he did nothing.

Furthermore, had the defense been aware of the agreement, it could have used it to impeach █████ at the motions hearing. █████ had a motive to tell the government what it wanted to hear in return for its promise not to subpoena her. The government cynically reneging on its deal with █████ does not change that conclusion. Also, the defense may have been aware █████ did not want appellant prosecuted. But the defense was not aware █████ was going to testify at the Article 39(a) session and was not aware she had been made promises that if she testified at

the Article 39(a) hearing she would not be subpoenaed. The government's "strategy session" with the leading witness was discoverable.⁷

The military judge also erred in believing the discovery violation was cured after the fact when the defense learned of the agreement. The military judge had a duty to cure a discovery violation. *Vargas*, 83 M.J. 156-57. The opportunity to impeach [REDACTED] at the motions hearing had already passed. The government used the pretrial hearing to dry run [REDACTED] testimony, get that testimony on the record so it could be used at trial, and then break its promise with [REDACTED] and have her subpoenaed. "[S]he did testify consistently with what we were hoping to hear." (R. at 105).

The government's discovery violation was willful, premeditated, and a wanton act of gamesmanship—precisely what the discovery rules were promulgated to avoid. The military judge erred in allowing the government to get away with it. This court should rectify his error.

⁷ Article 6b, UCMJ affords victims' certain rights, but it does not recognize a right for the government to reach *sub rosa* agreements with a victim. DoDI 6495.02, Encl. 4, para. 1.c.(1) provides this guidance: "The victim's decision to decline to participate in an investigation or prosecution should be honored by all personnel charged with the investigation and prosecution of sexual assault cases, including, but not limited to, commanders, DoD law enforcement officials, and personnel in the victim's chain of command."

II. WHETHER THE MILITARY JUDGE ERRED IN DENYING APPELLANT ACCESS TO THE SEIZED TELEPHONE.

Facts Relevant to Assignment of Error

On 8 August 2022, appellant and [REDACTED] executed sworn statements in which they stated that, prior to 4 April 2021, the date of the alleged offense, they had engaged in consensual sex that included role-playing. (App. Ex XXXVI-H; App. Ex. XLIV, p. 7). On 11 August 2022, five days before trial was scheduled to start, the government seized appellant's and [REDACTED] mobile phones. On 15 August 2022, the government produced to the defense text messages between [REDACTED] neighbor [REDACTED] and [REDACTED] (R. at 215-16). The government claimed it failed to earlier timely produce the texts because of a technical glitch on a paralegal's phone despite the fact they had been in its possession since 25 May 2022. (R. at 216). On 16 August 2022, the defense moved (1) to physically inspect appellant's phone outside the government's presence and (2) have a digital forensic examiner (DFE) appointed to the defense team. The military judge denied both requests.

In his written ruling, the military judge focused not on the seizure, but on the sworn statements issued by appellant and [REDACTED] (App. Ex. LX, p. 2). The military judge believed seizure "was precipitated by the defense filing the identical statements from the accused and [REDACTED] on 8 August 2022." (App. Ex. LX, p. 2). The military judge determined that no legal authority required him to grant the defense the right to independently physically inspect the phone outside the

government's presence. (App. Ex. LX, p. 2). And he also found that allowing that type of defense inspection would change the evidentiary value of the phone, thus the defense could not independently review the phone outside of the government's presence. (App. Ex. LX, p. 2).

Although the government had not seized the phone to conduct the present extraction until August 2022, the military judge found the defense motion for a DFE was too late. (App. Ex. LX, p. 2). According to the military judge, the defense would have had to request the DFE by 20 June 2022 to be timely. (App. Ex. LX, pp. 2-3).

Even if defense's motion was timely, the military judge found that any DFE would merely review relevant text messages, for which an expert was unnecessary. (App. Ex. LX, p. 3). The military judge emphasized that the government was introducing only evidence that it found no text messages discussing role-playing. (App. LX, p. 3). So, in the military judge's view, the government introduced no actual evidence from the phone. (App. Ex. LX, p. 3). Thus, according to the military judge, the defense failed to show why an expert was needed. (App. Ex. LX, pp. 3-4).

The military judge also determined the DFE would provide the defense nothing it could not obtain through its own effort. (App. Ex. LX, pp. 3-4).

"Reviewing text messages is a standard use of cell phone technology and no expert

assistance is required to accomplish this task.” (App. Ex. LX, pp. 3-4). But on the other hand, the defense could not be allowed to independently physically inspect the phone outside the government’s presence because, in doing so, the evidentiary value of the evidence would be destroyed. (App. Ex. LX, p. 3).

Standard of Review

A military judge’s ruling on a motion to compel discovery is reviewed for an abuse of discretion. *Roberts*, 59 M.J. at 326 (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. *Id.* at 327. “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, 187 (C.A.A.F. 2013); see *United States v. Hart*, 29 M.J. 407, 409 (C.M.A. 1990).

Law

A. Article 46, UCMJ

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. at 187; *Hart*, 29 M.J. at 409-10. Rule for Courts-Martial 701(e) provides “[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.” 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.” *Roberts*, 59 M.J. at 325.

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.” (emphasis added). Consistent with R.C.M. 701(g)(1), 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 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. at 186 (citing *Brady*, 373 U.S. at 87). “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. at 325.

Argument

A. The Defense Was Not Limited to the Government's Search Parameters

The military judge abused his discretion when he denied appellant an opportunity to inspect the phone and employ a DFE. Specifically, the military judge erroneously believed the defense was limited only to the parameters of the government's search.

Instead of providing the defense the same opportunity to inspect appellant's phone that the government enjoyed, the military judge believed the defense was limited to viewing only the same evidence, in this case, text messages, that the government had sought. No plain reading of R.C.M. 701 requires that the defense be limited to the parameters of the government search. Further, in his finding that the defense was only allowed to view the material viewed by the government—text messages, the military failed to balance an 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 to evidence. *Roberts*, 59 M.J. at 325. However, CAAF has never held that

equal access requires equal access to the same scope or methods, especially where an accused's constitutional rights are implicated. Here, the government had adequate opportunity and unimpeded access to appellant's phone. The government searched the phone until it reached its desired outcome, claiming it found no messages discussing role-playing, and stopped looking. The defense had the right to independently review the phone to not only determine whether the government was right, but also to determine whether the phone contained favorable evidence for appellant.

In *United States v. Walker*, 66 M.J. 721, 743 (N.M. Ct. Crim. App. 2008), the military judge erred when he refused to allow the defense experts to examine and conduct independent testing of physical evidence admitted at trial. The military judge's error here was even more fundamental. He did not even allow appellant's counsel to be outside the hovering presence of the government.

The military judge, by requiring appellant to only inspect the phone with government supervision, deprived appellant of a fundamental right pursuant to Article 46, UCMJ, his right to discovery, and his Fifth Amendment right against self-incrimination. The military judge relied on the odd notion that allowing the defense access outside the presence of the government would destroy the evidentiary value of the phone. In other words, once the government accessed the phone and found the evidence it sought using the parameters it thought appropriate,

no one could ever again inspect the phone. On one hand, he found that inspecting the phone would irreparably damage its evidentiary value, a result the defense DFE could prevent. On the other, he determined no expert assistance was needed because “[r]eviewing text messages is a standard use of cell phone technology and no expert assistance is required to accomplish this task.” In any event, he denied the defense the opportunity to inspect appellant’s phone outside the presence of the government.

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

It is patently unreasonable to the adversarial nature of our judicial system to expect defense counsel to simply accept the government’s examination results. 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 equality 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. The Military Judge's Timing Finding is Erroneous

The military judge found that the motion to inspect the phone was untimely. But it was the government's choices to again focus the litigation on the phone. First, it was the government that seized appellant's phone. That was a choice. It was the government that sought to introduce the absence of role-playing texts at the last minute. Again, a choice. And it was the government that produced the [REDACTED] texts on 15 August 2022, just hours before trial.

The defense reasonably believed that an independent inspection of the phone might indeed discover relevant evidence. The defense also reasonably believed the government inspection had been too narrow, only looking for that which the government sought. Under the circumstances, when the government raises matters at the last moment, the defense has a right to conduct an independent investigation. The military judge erred in finding the motion untimely.

D. 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 used the absence of evidence from the phone to attack appellant's defense; and (2) the government used evidence from the phone to impeach its own witness, [REDACTED]. Due to the ruling, the defense had no ability to counter or contextualize the government's claims.

The government clearly believed appellant's phone was important to refute his defense. The defense had no opportunity to inspect that phone and thus no opportunity to investigate the government's claim the cell phone had no role-playing texts.

While the military judge was correct in voicing concerns about the timing of events in appellant's case, he pointed his finger at the wrong party. As the record makes clear, it was the government's eleventh-hour seizure and production that dictated the timing in appellant's case. The military judge erred in denying the defense the ability to inspect appellant's phone.

III. THE MILITARY JUDGE ERRED IN REFUSING TO GRANT APPELLANT A CONTINUANCE.

Facts Relevant to Assignment of Error

Per the PTO in appellant's case, all government witnesses were ordered to be identified by 15 April 2022. (App. Ex. I, p. 1). On 7 June 2022, while appellant's trial defense counsel was on annual leave, the government supplemented its witness list by adding an expert in forensic chemistry. (App. Ex. XXI, p. 2). Upon returning from leave on 19 June 2022, the defense consulted with its technical chain and interviewed experts before submitting a request for an expert in forensic chemistry. (App. Ex. XXI, p. 2). On 6 July 2022, the defense submitted an expert request for [REDACTED] ern. (App. Ex. XXI, p. 2).

As already established but worth repeating, the government was allowed to add, in violation of the PTO and over defense objection (and indeed over [REDACTED] objection), [REDACTED] to the witness list. (R. at 105). The government admitted it was late. (R. at 105). She was added because “she testif[ied] consistently with what [the government] were hoping to hear.” (R. at 105). The SVP boldly proclaimed he waited “until today” to add her to the list. (R. at 107).

On 25 July 2022, the defense requested an update on the forensic chemist request and also requested a digital forensic expert. (App. Ex. XXI, p. 2). On 26 July 2022, the defense submitted a supplemental discovery request, asking the government to provide contact information for earlier disclosed witnesses. (App. Ex. XXI, p. 2). On 27 July 2022, the government informed the defense the expert requests were still outstanding, but might be addressed on 29 July 2022, less than three weeks before trial. (App. Ex. XXI, p. 2).

On that same day, 27 July 2022, the defense requested a continuance. (App. Ex. XXI, p. 1). Because the defense had yet to receive the convening authority’s decision on funding the defense experts, let alone the experts doing the necessary analysis, the defense believed it had good cause for a continuance. (App. Ex. XXI, p. 4). The defense also had yet to receive contact information for some of the government witnesses. (App. Ex. XXI, p. 4). Additionally, the defense believed the experts were necessary to prepare its defense. (App. Ex. XXI, p. 4).

On 30 July 2022, the military judge denied the continuance. He issued his written ruling on 17 August 2022. (App, Ex. XXVIII). Apropos of his other rulings in the case, he treated the government's factual rendition of events as gospel. "The Court accepts the timeline of facts as stated by the government regarding the defense request for an expert forensic chemist." (App. Ex. XXVIII, p. 1). In the ruling, the military judge chides the defense for not indicating it would need a continuance earlier. (App. Ex. XXVIII, p. 2). The military judge found the extension untimely. (App. Ex. At XXVIII, p. 2).

Standard of Review and Law

A military judge's decision to grant or deny a continuance must be tested for an abuse of discretion. *United States v. Thomas*, 22 M.J. 57, 59 (C.M.A. 1986) (citation omitted). "An abuse of discretion exists where reasons or rulings of the military judge are clearly untenable and . . . deprive a party of a substantial right such as to amount to a denial of justice; it does not imply an improper motive, willful purpose, or intentional wrong." *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987) (cleaned up).

"The factors used to determine whether a military judge abused his or her discretion by denying a continuance include surprise, nature of any evidence involved, timeliness of the request, substitute testimony or evidence, availability of witness or evidence requested, length of continuance, prejudice to opponent,

moving party received prior continuances, good faith of moving party, use of reasonable diligence by moving party, possible impact on verdict, and prior notice.” *United States v. Miller*, 47 M.J. 352, 358 (C.A.A.F. 1997) (internal quotation marks omitted), quoting F. Gilligan and F. Lederer, *Court-Martial Procedure* § 18-32.00 at 704 (1991) (footnotes omitted). Judges cannot deny a continuance if it deprives a party of essential evidence. *United States v. Browers*, 20 M.J. 356, 360 (C.M.A. 1985).

Argument

Looking at the above factors, the military judge erred in denying the defense motion for a continuance. The defense was constantly playing catch-up as the government violated the PTO time and again. The government originally violated the PTO when it late-listed a forensic chemist as a witness. It flagrantly violated the PTO, and knowingly did so, when it late-listed [REDACTED] as a witness. The military judge allowed those violations, providing the defense no remedy, not even chiding the government for its scheming. Indeed, when the government, in the guise of the SVP, admitted he knowingly violated the PTO for strategic reasons, the military judge did not blink. He accepted the late-listing of [REDACTED] over the defense objection.

In deciding whether to grant the continuance, the military judge was not limited to factors enunciated in *Miller*. Two factors not listed there, but surely appropriate, are (1) the opposing party’s compliance with the PTO and (2) the

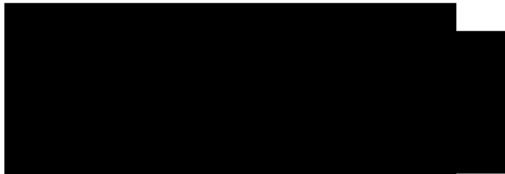
closely aligned question of bad faith. Both are naturally contemplated by the expressed factors of “surprise” and “good faith.” And the government fell far short in both.

The government provided no excuse for its delay in listing a forensic chemist. It did explain its failure to list [REDACTED] But the reason it provided (not to mention the undisclosed agreement it had with [REDACTED] cannot excuse its lateness in listing [REDACTED] The government’s conduct, and the reciprocal delays that behavior caused the defense, should have resulted in a defense continuance.

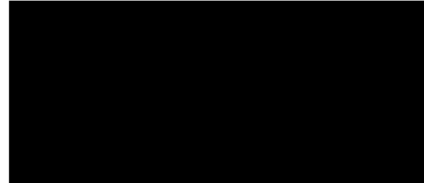
It was the government who belatedly approved the defense expert on 29 July 2022, less than three weeks before trial. It was the government who, by choice and as part of its strategy, added [REDACTED] to the witness list late. These were all choices made by the government. The government’s choices drove the need for defense delay, not the other way around.

Conclusion

For the foregoing reasons, this court should set aside the findings and sentence with prejudice.



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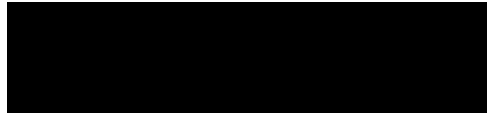
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to Army
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