

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES

Appellant

v.

Sergeant (E-5)

MICHAEL S. DELISFORT

United States Army

Appellee

BRIEF ON BEHALF OF APPELLEE

Docket No. ARMY MISC 20240488

Tried at Fort Moore, Georgia, on 14 May, 10 June, 21 June, 1 July, 13-14 July, and 23 August 2024, before a general court-martial appointed by Commander, Headquarters, U.S. Army Maneuver Center of Excellence and Fort Moore, Lieutenant Colonel Pamela Jones, military judge, presiding.

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

Issue Presented

WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION BY DISMISSING THE COURT-MARTIAL AFTER IMPROPERLY SUPPRESSING DERIVATIVE EVIDENCE, FAILING TO ARTICULATE ACTUAL PREJUDICE TO THE APPELLEE, AND SELECTING AN EXTREME REMEDY THAT WAS NOT JUST UNDER THE CIRCUMSTANCES

Summary of Argument

In light of the government's missteps, its misunderstandings of the military judge's instructions, and its misunderstanding of its burden under the Constitution, the military judge did not abuse her discretion by dismissing the case without prejudice when the government failed to provide discovery relating to the

identification of appellee. The military judge arrived at this remedy only after considering escalating remedies under Rule for Courts-Martial [R.C.M.] 703.

The military judge's comprehensive twenty-eight-page ruling is supported by the record. Her remedy is not arbitrary, fanciful, or outside the range of choices reasonably available. To the contrary, her ruling is a careful reconsideration of her previous remedy of dismissal with prejudice. Her ruling highlights the government's failure to conduct due diligence in this case and addresses the prejudice defense faced mid-trial due to the government's discovery violation.

Statement of the Case

Appellee adopts the Statement of the Case presented by the government with the following additions:

On 31 October 2024, appellee filed a Motion to Dismiss. On 7 November 2024, the government filed a response to appellee's Motion to Dismiss. On 31 October 2024, the government filed its brief in support of this appeal.

Statement of Facts

A. The CID Investigation Begins

On 15 September 2023, as part of a larger undercover operation, Investigator (INV) [REDACTED] of Fort Moore Criminal Investigation Division (CID) posed as a 14-year-old girl, "[REDACTED]," on the social communication platform Whisper. (R. at 163). INV [REDACTED] began chatting with an individual identified as "[REDACTED]" and

“[REDACTED]” on Whisper and other social communication platforms. (R. at 128; App. Ex. XXIII). On 18 September 2024, INV [REDACTED], as “[REDACTED],” posted that she was 14 years old. (R. at 128). During their chat, “[REDACTED]” sent photographs of himself to “[REDACTED].” (R. at 316). During their chat, INV [REDACTED], as “[REDACTED],” arranged an in-person meeting with “[REDACTED]” for the evening of 21 September 2023 near the Fort Moore dog park. (R. at 177).

B. The Clearview Facial Recognition Identification Search

In order to learn “[REDACTED]” actual identity prior to the dog park meet-up, Fort Moore CID requested a Clearview facial recognition identification search of the photographs “[REDACTED] sent to “[REDACTED].” (R. at 185-86). Fort Moore CID submitted the photographs to CID headquarters in Quantico, Virginia, where this Clearview search was run. (R. at 185). CID agents Ms. [REDACTED] and SFC [REDACTED] located in Quantico, conducted the Clearview facial recognition search using the photographs submitted by Fort Moore CID. (R. at 185-86). The Clearview search identified appellee as a potential match for “[REDACTED] (R. at 329).

SFC [REDACTED] generated a Department of Public Safety (DPS) printout of appellee. (R. at 315, 403). The DPS printout included a DEERS photograph of appellee as well as other basic information such as his address, gender, UIC, and unit address. (R. at 315; App. Ex. XX). The DPS printout also included

information about appellee's vehicle, a black Mazda. (R. at 185-86). SFC [REDACTED] emailed the DPS printout to INV [REDACTED] at Fort Moore. (R. at 403).

Ms. [REDACTED] account emailed INV [REDACTED] a link to the full report of the Clearview search, containing the complete list of possible matches. (R. at 288). There are typically "a lot" of results of "similar like" faces to the photograph submitted into the Clearview software. (R. at 289).

INV [REDACTED] was unable to open the link containing the Clearview results sent from Ms. [REDACTED] email account. (R. at 320). INV [REDACTED] never informed Ms. [REDACTED] or SFC [REDACTED] that he was unable to access the link. (R. at 300, 401-403). Despite the failed link, INV [REDACTED] was satisfied because he was able to access the DPS printout sent by SFC [REDACTED]. (R. at 401-03). Nothing in the record indicates the defense has yet to this day received these emails, the link, or the full results of the Clearview search.

C. The Meeting at the Dog Park

On the evening of 21 September 2023, Fort Moore CID agents observed a black Mazda parked in the dog park parking lot with an individual in the driver's seat, appellee. (R. at 182). Fort Moore CID agents believed appellee was the driver because they recognized the black Mazda from the DPS report despite [REDACTED] telling "[REDACTED]" in the chat that he would be in a red truck that night. (R. at 118, 185). Fort Moore CID arranged for a petite, female CID agent to

walk down the adjacent street posing as “██████████,” however, this agent became lost and never arrived at the location. (App. Ex. XXIII).

As the black Mazda drove out of the dog park parking lot, Fort Moore CID agents, including INV █████ and INV █████, conducted an investigative traffic stop and arrested appellee. (App. Ex. XXIII; R. at 177).

D. Preferral, Referral, Discovery, and Motions

On 10 January 2024, the government preferred charges. (Charge Sheet).

On 13 February 2024, Special Trial Counsel NCOIC, SSG █████, disclosed discovery to the defense. (R. at 402). This discovery included CCTV footage capturing appellee’s arrest. (R. at 402).

On 2 May 2024, the case was referred to a General Court Martial. (Charge Sheet).

On 3 May 2024, defense requested discovery. (App. Ex. XXVIII, p. 8)

On 8 May 2024, the government disclosed over 18 discs as well as 44,000 pages of discovery, predominantly cell phone records in PDF format. (R. at 403).

The identification made via facial recognition search was referred to as “investigative activity.” (R. at 323). Nothing in this discovery mentioned Clearview, facial recognition software, and/or a facial recognition search. (R. at 323).

On 14 May 2024, appellee was arraigned. On the same day, the government provided Section III disclosures to the defense. (App. Ex. XXII-a).

On 16 May 2024, the military judge scheduled a motions hearing for 10 June 2024 and trial for 1-3 July 2024. (App. Ex. II).

On 10 June 2024, the first motions hearing in this case, the military judge chastised the government on the record for its lack of preparation. (R. at 415). She rebuked the government for its ignorance of the evidence contained within its own casefile. She criticized the government for failing to submit proper evidence to support its argument and sufficiently review the defense's evidence in support of its motion. (R. at 59-62, 415).

On 26 June 2024, three duty days before trial, the government disclosed a disc of CCTV footage to the defense. (R. at 107, 402). This disc contained the same CCTV footage the government provided the defense on 13 February 2024. (R. at 107, 402). The government represented to the defense that they had just recently uncovered that this evidence existed via pre-trial interviews. (R. at 281). The government claimed it was unaware the CCTV footage existed prior to their pre-trial interview, apparently unaware that the evidence was in its possession, and unaware that it had previously been disclosed to the defense months earlier. (R. at 281).

E. The Trial and the Discovery Violation

On 1 July 2024, the trial commenced. (R. at 114). The government promised in its opening the evidence would show appellee as the one who messaged ██████████ ██████████,” (R. at 118), under a variety of usernames and aliases, on various platforms, and who planned to meet up with “██████████” at the Fort Moore dog park. (R. at 115).

The government called its first witness, INV ██████████. Shortly after INV ██████████ testimony, and only after the defense raised evidentiary challenges to the government’s case, did the government realize it had a fundamental issue with its case and discover the correct identity of the witness needed to prove its case.¹ (R. at 204). Defense made several objections to the testimony of INV ██████████ regarding the identity of the individual INV ██████████ as “██████████,” was chatting with. (R. at 127-33). The defense objected to INV ██████████ identification of appellee based on the Confrontation Clause and testimonial hearsay, but the military judge determined that the issue was not yet ripe.² (R. at 137).

The defense continued to object through the government’s second witness, INV ██████████. Investigator ██████████ testified that appellee had “not yet been fully identified”

¹ The government maintained that Ms. ██████████ was the appropriate witness to satisfy the Confrontation Clause. (R. at 188).

² Defense raised an additional objection to INV ██████████ testimony on the basis of deficient Section III disclosures; an Article 39(a) was held during INV ██████████ testimony. (R. at 137-72).

by Fort Moore CID, prior to assistance from Quantico's Clearview search team. (R. at 175). Defense *voir dire*d INV [REDACTED]. (R. at 184-85). Investigator [REDACTED] admitted that but for the assistance of Clearview facial recognition software, and the agents at Quantico who performed the search, he would not have known appellee's identity at the time of the investigative stop and arrest. (R. at 185).

After argument, during which it was established the government failed to disclose the Clearview results to defense, the military judge ruled that testimony about facial recognition software is testimonial hearsay and violates the Confrontation Clause. (App. Ex. XXVIII, pp. 18, 25). The military judge prohibited any reference to the facial recognition and results from the facial recognition. (App. Ex. XXVIII).

The military judge recessed to allow the government to secure the witness who conducted the Clearview search. During the recess, the government telephoned Ms. [REDACTED], who, on 1 July 2024, they believed had conducted the Clearview identification search. After "some back and forth," the government learned that Ms. [REDACTED] did not conduct the Clearview identification search. (R. at 204). Government counsel learned that SFC [REDACTED] conducted the Clearview search utilizing Ms. [REDACTED] account. (R. at 204). The government also learned during this mid-trial recess that SFC [REDACTED] had strep throat and was unavailable to travel to Fort

Moore based upon his quarters orders. (R. at 204).³ The request for a continuance was based upon his unavailability. (R. at 204, 337).

At this time, on 1 July 2024, the government requested the military judge provide one of two remedies: (1) either a continuance to secure SFC [REDACTED] as a witness; or (2) an additional Article 39(a) session to establish independent probable cause for the traffic stop and arrest. (R. at 196, 199, 204). The military judge expressed concern that the government was “just now speaking to the witness and actually getting the left and right limits of who actually needs to be produced.” (R. at 209). The military judge granted the government’s request for a continuance to secure SFC [REDACTED]. (R. at 208).

F. The Defense Motion to Dismiss

On 3 July 2024, the defense moved to dismiss for speedy trial and discovery violations. (R. at 390). On 13 July 2024, the military judge held an Article 39(a) session to address the motion to dismiss. At the hearing, Ms. [REDACTED] testified she first spoke to government counsel on 1 July 2024; she remembered the date because she had never been a witness before. (R. at 285). She was completely unaware of the court-martial until 1 July 2024. (R. at 285, 289). The government claimed it spoke with her briefly prior to submission of its initial witness list in May 2024. (R. at

³ SFC [REDACTED] availability for trial was not fully explored by the government until after the court had granted the government’s request for a continuance. (R. at 204, 337).

206). But Ms. [REDACTED] testified that she was first interviewed regarding her testimony on 13 July 2024. (R. at 290).

SFC [REDACTED] testified that he had strep throat on 1 July 2024 but returned to work in person on 2 July 2024. (R. at 335). The government first asked SFC [REDACTED] availability to testify after he returned to work on 2 July. (R. at 335). The government requested a continuance based upon SFC [REDACTED] illness, but it did not ask him for his availability until after securing the continuance. (R. at 337).

On 14 July 2024, the military judge found a speedy trial violation and a discovery violation, granted the defense's motion to dismiss, and dismissed the case with prejudice. (R. at 420).

G. The Government's Request for Reconsideration

On 15 July 2024, the government filed a request for reconsideration. (R. at 420; App. Ex. XXIII). The government argued the following: (1) the military judge should not have sustained the defense objection to the facial recognition as facial recognition is non-testimonial hearsay and, therefore, not subject to the Confrontation Clause; and even if it is testimonial hearsay, it was not offered for the truth of the matter asserted; (2) the military judge should have allowed the government an additional Article 39(a) session to establish an independent basis for the investigative traffic stop; (3) the military judge should not have granted the defense motion to dismiss as there was not a speedy trial violation; and (4) the

military judge erred in choosing the most drastic remedy, dismissal with prejudice, and did not consider other lesser remedies that were available. (Gov't Br. at 14-24).

On 29 July 2024, the military judge issued her written ruling, granting in part the government's request for reconsideration. (App. Ex. XXV).

On 23 August 2024, the military judge held an Article 39(a) session to address the reconsideration motion. The government offered no new evidence or witnesses at that hearing. (R. at 420, 422; App. Ex. XXVIII).

H. The Military Judge's Ruling on Reconsideration

On 11 September 2024, the military judge ruled that there was no speedy trial violation, but that there was a discovery violation. The military judge dismissed the case without prejudice, noting that the government's failure to conduct due diligence created actual prejudice to the accused. (App. Ex. XXVIII, pp. 25, 27).

Standard of Review

"In an Article 62, UCMJ appeal, [this court] reviews the military judge's decision directly and reviews the evidence in the light most favorable to the party which prevailed at trial." *United States v. Henry*, 81 M.J. 91, 95 (C.A.A.F. 2021).

This court reviews a military judge's choice of remedy for discovery violations for an abuse of discretion. *United States v. Vargas*, 83 M.J. 150, 153

(C.A.A.F. 2023). “The abuse of discretion standard calls for more than a mere difference of opinion.” *United States v. Wicks*, 73 M.J. 93, 98 (C.A.A.F. 2014) (citation omitted) (internal quotation marks omitted). Instead, an abuse of discretion occurs only “when [the military judge's] 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. Stellato*, 74 M.J. 473, 480 (C.A.A.F. 2015) (quoting *United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F. 2008)).

This court is bound by the military judge’s factual determinations unless they are unsupported by the record or clearly erroneous. *United States v. Becker*, 81 M.J. 483, 489 (C.A.A.F. 2021) (citations omitted).

When reviewing matters under Article 62, this court may act only with respect to matters of law. *United States v. Gore*, 60 M.J. 178, 185 (C.A.A.F. 2004); *United States v. Becker*, 81 M.J. 483 (C.A.A.F. 2021) (“A reviewing court may not “find its own facts or substitute its own interpretation of the facts.”). “When a court is limited to reviewing matters of law, the question is not whether a reviewing court might disagree with the trial court’s findings, but whether those findings are ‘fairly supported by the record.’” *Id.* (quoting *United States v. Burris*, 21 M.J. 140, 144 (C.M.A. 1985)). Where a judge makes detailed findings of fact,

and the findings are clearly supported by the record, those facts are adopted.

United States v. Pugh, 77 M.J. 1, 3 (C.A.A.F. 2017) (citations omitted); *United States v. Villareal*, 52 M.J. 27, 30 (C.A.A.F. 1999).

Additionally, appellate courts rarely entertain an argument that was not advanced at the lower court. *United States v. Carpenter*, 77 M.J. 285 (C.A.A.F. 2018) (“our review for error is properly based on a military judge’s disposition of the motion submitted to him or her – not on the motion that appellate [] counsel now wish trial [counsel] had submitted”). On an Article 62 appeal, this court “may not consider arguments or theories of the evidence that were advanced for the first time on appeal.” *United States v. Suarez*, ARMY 20170366, 2017 CCA LEXIS 631, *10 (Army Ct. Crim. App. 27 September 2017) (mem op.).

Law and Argument

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. “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). This court has held that trial counsel's

“obligation under Article 46” 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); *Stellato*, 74 M.J. at 481.

A. The Military Judge’s Finding That “But For” the Facial Recognition Software, CID Would Not Have Known the Identity of the Accused is Supported in the Record

A finding of fact is only clearly erroneous when this court is “left with a definite and firm conviction that a mistake has been committed.” *United States v. Martin*, 56 M.J. 97, 106 (CA.A.F. 2001).

Here, the military judge’s conclusion that “but for” the facial recognition software the government would not have known the identity of the accused is clearly supported in the record. The *voir dire* of SA [REDACTED] demonstrated the facial recognition software was necessary to the government’s *prima facie* case. Special Agent [REDACTED] testified:

ADC: And but for that agent, you would not know what the identity of that person is?

SA [REDACTED]: At that point in time, I would say we wouldn’t have known.

ADC: Because using the identification through those means you identified the associated address, a car, license plate, all of those things?

SA [REDACTED]: Yes, ma’am.

(R. at 186).

The factual development on the record, detailed in the military judge’s twenty-eight-page ruling, establish that SA [REDACTED] statement “at that time . . . we wouldn’t have known,” combined with his confirmation that CID actually and exclusively relied upon Clearview facial recognition software to identify the accused, is a logical “but for” statement. The practical impact of SA [REDACTED] testimony is that *but for* Clearview facial recognition software, CID would not have known appellee’s identity before the sting. As of 20 September 2023, the accused “had not yet been fully identified” and that was only done via “some assistance from our investigative analyst to attempt to identify who it was that [INV [REDACTED]] was chatting with on the 20th.” (R. at 175).

This finding is not clearly erroneous. The government’s own witnesses testified they solely relied upon Clearview facial recognition software to identify appellee. (R. at 175). Without that, CID would not have identified him. CID may have been able to identify appellee via independent means, but CID did not.

The government now argues the military judge “stifled” evidence by granting a continuance rather than the prosecution’s alternative requested remedy of an additional Article 39(a) to “establish independent probable cause” as a basis for the traffic stop. (Gov’t Br. 16). But the military judge had just ruled that introducing the identification of appellee without the agent who performed the identifying facial recognition search was a violation of the Confrontation Clause.

(R. at 197-98.). Therefore, granting an additional Article 39(a) to establish an “independent” means would simply serve as an “end-run” around her ruling finding a constitutional violation.

Further, the record shows that CID actually used Clearview facial recognition software to identify appellee. Perhaps CID may have been able to identify appellee by other means. But in this case, CID actually identified appellee using Clearview facial recognition software. Here, the military judge found that, pursuant to the Confrontation Clause, the government must produce the witness who conducted the Clearview search. (R. at 197-98). During trial, the military judge asked the government for any precedent supporting its argument that this identification was not testimonial hearsay; the government provided no new case law. (R. at 197). Later, in its motion for reconsideration, the government provided caselaw regarding machine-generated information surviving a testimonial hearsay challenge; the military judge found them inapplicable. (App. Ex XXIII, p. 11).

During the 1 July 2024 recess, the court instructed both parties to discuss discovery, specifically regarding investigative activity and facial recognition software. (R. at 195). The defense asked the government about independent avenues of identification other than the Clearview search. The government responded by saying “oh, we don’t have any.” (App. Ex. XXVIII, pp. 10-11). When the court reconvened, the government asked for either reconsideration of the

court's ruling on testimonial hearsay or a continuance. (R. at 196). The military judge granted the government's request for a continuance to allow for the production of the actual evidence in this case—production of a government law enforcement agent.

The government also contends it was the military judge's fault—not the government's—that the trial was disrupted by the government's violation of the rules. (Gov't Br. 17). The government even claims the military judge was at fault for the government's delay in producing the Clearview-related witnesses. (Gov't Br. 17). However, the government could have contacted its witnesses, reviewed its evidence, and prepared for trial to eliminate the need for this delay entirely.

B. The Military Judge Detailed the Prejudice Suffered by Appellee

The government argues that because the Clearview facial recognition software results benefit the government's case and are inculpatory of the accused, no prejudice exists. “At worst, the government failed to disclose inculpatory evidence that further strengthen their case against appellee.” (Gov't Br. 17).

The government's assertion that these results “further strengthen” its case is speculative. The defense has not yet even been provided the Clearview facial recognition software results, and from the record it is fairly clear the government has yet to review the evidence it trumpets as inculpatory. (App. Ex. XXVIII, p. 26). After all, Ms. [REDACTED] sent them to INV [REDACTED], but INV [REDACTED] was unable to open the

link. (App. Ex. XXVIII). Investigator [REDACTED] never informed anyone involved with the government's case that the link was broken or inaccessible. (App. Ex. XXVIII). If this evidence was indeed so inculpatory, it could have changed defense's entire approach to the case, resulting in a vastly different trial strategy, additional discovery requests, even a different approach as to whether to contest the case at all.

Even if the results were inculpatory, the government still could not introduce the results without conducting its due diligence by preparing and identifying its witnesses.

Appellee suffered prejudice due to the government's failure to disclose this evidence. The government failed its due diligence under R.C.M. 701, causing delay, confusion of the issues, and unfair prejudice to the accused by compelling defense to engage in unnecessary pre-trial litigation mid-trial.

Accused suffered actual prejudice without equal access to this evidence. "At a minimum," the judge notes that defense could have used this evidence to challenge the facial recognition software process and the subsequent identification and investigative activity. (App. Ex. XVIII, pp. 25-26). The defense could have developed other evidence and other possible defenses had the government disclosed this relevant evidence. (App. Ex. XVIII, p. 26).

The military judge took particular note of the temporal nature of the prejudice to the accused. Because this litigation occurred *after* assembly of court, opening arguments, and receipt of evidence, the defense was adversely impacted in preparing its defense:

The court does find that the Accused defense has been impaired by the delay. By way of example . . . the Defense noted that they had to reveal its trial strategy to the Government to proffer evidence in support of the Government's alleged discovery violations. This weakened the Accused's ability to raise specific defenses, elicit specific forms of evidence, raise certain objections, and otherwise present in this case.

(App. Ex. XXVIII, p. 24).

Here, the military judge found specific prejudice to appellee because of the government's failure to conduct its due diligence. The government's poor preparation and continued lack of ability to get a grip on its discovery obligations impacted the preparation and tactical decision making of the defense.

Elsewhere in the record, the defense established and the continued prejudice to the accused: "the longer this matter proceeds, the greater the anxiety and the deterioration of his family relationship. (R. at 370) (citing *Troxel v. Granville*, 530 U.S. 57, 90 (2000)). At the time of trial, the accused had not communicated with his four biological children for approximately ten months because a military protective order, intended to be reviewed every thirty days, prohibited any contact. (R. at 369).

C. The Military Judge's Remedy Is Within the Range of Choices Reasonably Arising from the Facts of This Case

The military judge considered available remedies under R.C.M. 701(g)(3). She selected remedies that were just under each evolving set of circumstances—circumstances of the government's making. As the government's failure to comply with its discovery obligations became more clear, the military judge modified the remedy to meet the evolving circumstances. Finally, the military judge determined, under the final set of circumstances, the most just remedy would be a dismissal *without prejudice*. This remedy appropriately considered the original and ongoing prejudice suffered by the defense, and was within the permissible range of remedies available to her. She did not abuse her discretion in dismissing without prejudice.

Contrary to the government's assertion, the military judge articulated her rationale for her selected remedy in her robust ruling. The government claims that the military judge's ruling runs counter to *Vargas*, 83 M.J. at 152. (Gov't Brief 21), because she did not articulate why any of the other listed remedies under R.C.M. 701(g)(3) were or were not just under the circumstances. But the *Vargas* does not require the military judge provide an analysis of all the alternatives, only that she determine what is *just under the circumstances*. *Vargas*, 83 M.J. at 152.

In this case, the military judge did not abuse her discretion in considering the appropriate proposed remedies.

If at any time during the court-martial it is brought to the attention of the military judge that a party has failed to comply with this [R.C.M. 701], the military judge may take one or more of the following actions: (A) Order the party to permit discovery; (B) Grant a continuance; (C) Prohibit the party from introducing evidence, calling a witness, or raising a defense not disclosed; and (D) Enter such other order as is just under the circumstances.

R.C.M. 701(g)(3).

The military judge considered each of these remedies in turn. She in fact proposed to adopt the lesser remedies, only increasing the impact of the remedies on the government as the government's failure to comply with its discovery obligations came into sharper focus. As her ruling shows, the military judge appropriately analyzed the applicable facts, the law, and the remedies available, and she elected the remedy that she determined would be just under the circumstances.

R.C.M. 701(g)(3)(A). Here, the judge attempted to order discovery, the first remedy under R.C.M. 701(g)(3). The government failed to comply with the court's instructions to discuss discovery with the defense during an hour-long recess. (App. Ex. XXVIII, p. 10). As of 23 August 2024, the defense still had yet to receive the results of the Clearview facial recognition search, provided to the government via SFC [REDACTED] on 21 September 2023. (App. Ex. XXVIII, p. 9).

R.C.M. 701(g)(3)(C). The military judge next issued a ruling limiting the evidence the government could introduce regarding Clearview facial recognition

software and the identification of the appellee therefrom. After lengthy mid-trial litigation regarding Clearview facial recognition, and after *voir dire* of SA [REDACTED], the military judge sustained the defense's objection to "any evidence about the facial recognition." (R. at 193). Action under R.C.M. 701(g)(3)(C) did not remedy the discovery violation and the ensuing evidentiary issues for the government.

R.C.M. 701(g)(3)(B). Immediately after the judge prohibited the government from introducing evidence from the Clearview identification, the government asked the court to reconsider its ruling. The court declined. The government then requested either a continuance to begin conducting due diligence and secure the correct witness *or* an Article 39(a) session to establish independent grounds for identification of the appellee. (App. Ex. XXVIII, p. 8). Of the two requested options, the military judge granted the government a continuance in order to create an equitable remedy to the government's discovery violations and avoid an end-run around her ruling. Upon the military judge's ruling that testimony regarding Clearview facial recognition and identification of the appellee would amount to testimonial hearsay without the agent who conducted the facial recognition activity, the government *began* to exercise its due diligence and investigate its case file for the actual agent who completed that investigative activity. Upon identification of the correct CID agent, mid-trial, and initial communication with that agent, the government requested a continuance to secure that witness. The

judge granted that continuance, the next prescribed remedy under R.C.M. 701(g)(3).

R.C.M. 701(g)(3)(D). Here, the military judge clearly considered remedies under R.C.M. 701 and how each remedy would be most just under the circumstances. The military judge walked through each listed remedy in R.C.M. 701 as she attempted to create a fair playing field mid-trial, acknowledging defense's prejudice amidst the government's discovery violations. As each remedy failed to create a fair environment for the trial to proceed, the judge considered another remedy that would be just under the circumstances.

The government's repetitive failures demanded escalating remedies from the military judge.

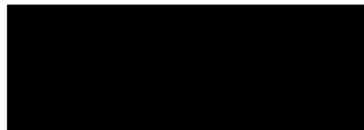
The government's violations include the following: failure to disclose discovery to defense; failure to conduct due diligence in investigation; failure to prepare its case; failure to identify necessary witnesses to present its case; failure to interview and prepare its witnesses; failure to comply with court instructions; and failure to comply with discovery obligations under the Constitution.

The military judge crafted escalated remedies as a forcing function to incentivize government compliance. As of the military judge's ruling, the government remains in non-compliance.

The ultimate remedy by the military judge was appropriate, and she did not abuse her discretion. The remedy of dismissal without prejudice resets the playing field, reestablishes equal opportunity to obtain evidence and witnesses, and provides the defense adequate time to prepare for trial. By dismissing the case without prejudice, the military judge fashioned a remedy that was just under the circumstances.

Conclusion

Appellee requests that this honorable court deny this appeal and affirm the military judge's ruling.



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Certificate of Filing and Service

I certify that a copy of the foregoing was electronically submitted to the
Army Court and Government Appellate Division on 20 November 2024.



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