IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee	**BRIEF ON BEHALF OF APPELLEE**
v.	Docket No. ARMY 20220429
Private First Class (E-3) **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 convened 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

Assignments of Error[1]

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

II. WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN DENYING APPELLANT'S MOTION TO INSPECT APPELLANT'S SIEZED PHONE

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

[1] The government has reviewed appellant's *Grostefon* matters and submits that they lack merit. The government recognizes this court's authority to elevate *Grostefon* matters deserving of increased attention. *United States v. Grostefon*, 12 M.J. 431, 437 (C.M.A. 1982). Should this court exercise such authority, finding any of appellant's *Grostefon* matters meritorious, the government requests notice and an opportunity to file a supplemental brief addressing the claimed error.

Statement of the Case

On 19 August 2022, an enlisted panel sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of sexual assault, one specification of simple assault, and one specification of communicating a threat, in violation of Articles 120 and 128, and 115, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 928, 915 [UCMJ]. (Statement of Trial Results [STR]; R. at 955). The military judge sentenced appellant to be confined for five years, reduced to E-1, and dishonorably discharged. (STR; R. at 996). On 21 September 2022, the convening approved the findings and sentence. (Action). On 5 October 2022, the military judge entered judgment. (Judgment).

Statement of Facts

On 4 April 2021, appellant returned home from a multi-week field exercise. (R. at 460–61). While appellant was at the exercise, he and his wife, Mrs. [redacted] (hereinafter, "the victim") got into arguments for various reasons. (R. at 536–37). Nonetheless, once appellant returned home the two reconciled. (R. at 540–41). In the early morning hours of 4 April 2021, appellant and the victim were sexually intimate. (R. at 547). The initial sexual intercourse was consensual and consisted of vaginal intercourse. (R. at 547).

As the sexual intercourse continued, appellant turned on pornography and forced the victim to watch over her objection. (R. at 547–49). Appellant went as

far as to use his fingers to hold the victim's eyelids open so she could not avoid watching the pornography she objected to. (R. at 551). While appellant was forcing the victim to keep her eyes open, he also had placed her in a chokehold by wrapping his arm around her neck. (R. at 551). Appellant then penetrated the victim's anus with his penis. (R. at 551).

Appellant repeatedly forced the victim to watch the pornography, over her verbal and physical demonstrations of a lack of consent, while he continued to penetrate her anus with his penis. (R. at 550–54). Appellant kept the victim in a chokehold the entire time he was penetrating her anus with his penis, and only let her go after he had ejaculated inside of her anus. (R. at 554–55). While appellant had the victim in this chokehold he told her, "As long as we are together and married, I will rape you whenever I want." (R. at 574–75).

On the evening of 4 April 2021, appellant and the victim were in their bedroom after putting their daughter to sleep. (R. at 559). Appellant and the victim then became intimate and engaged in consensual sexual intercourse. (R. at 560–61). The victim indicated her sexual preference is for vaginal sexual intercourse, and that she be on her back. (R. at 563). After a period of consensual vaginal sexual intercourse, appellant turned the victim over onto her stomach, placed her in a chokehold, and penetrated her anus with his penis. (R. at 565–66). While the two had reconciled for the sexual assault that occurred earlier that day,

appellant stated, "You know what? Just one more rape," prior to penetrating the victim's anus with his penis. (R. at 563).

Additional facts relevant to each respective assignment of error are incorporated below.

Assignment of Error I

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

Additional Facts

A. Appellant's motion to compel production of notes.

On 11 July 2022, an Art. 39(a) hearing was conducted on appellant's motion to compel production of notes from meetings between the Trial Counsel and victim. (R. at 18). Appellant was aware meetings between Trial Counsel and the victim occurred prior to the date of his request, and the government denied production on the basis that the only notes taken were subject to privilege as attorney work product. (R. at 19–20). The Trial Counsel acknowledged that any interview wherein "new or different information" is "spoken or stated by a witness" would need to be memorialized in writing and turned over to opposing counsel. (R. at 23).

B. Appellant's allegation of an undisclosed "agreement."

On 13 July 2022, the Special Victims' Counsel [SVC] for the victim submitted a memorandum detailing the victim's non-participatory disposition and claimed there was an agreement between the victim and the government that if she testified at the 11 July 2022 Art. 39(a) hearing, she would not be subpoenaed for trial. (App. Ex. XV-A). On 20 July 2022, appellant filed a motion to dismiss alleging discovery violations. (App. Ex. XV). Counsel argued the motion on 5 August 2022. (R. at 121).

The victim's SVC, when called as a witness on appellant's motion to dismiss, offered:

> [Trial Counsel]: [SVC], you just submitted a memorandum for record as evidence in this hearing. And in that MFR, you're talking a conversation that we had over the phone, correct?
>
> [SVC]: Yes.
>
> [Trial Counsel]: And during that conversation, I never told you that the government promised under all circumstances to not call [the victim] as a witness, correct?
>
> [SVC]: That ' s correct.
>
> [Trial Counsel]: And I never -- we never entered into any kind of written agreement with you?
>
> [SVC]: That ' s correct.

(R. at 125).

[Defense Counsel]: And did you understand in your conversations with [Trial Counsel] that there was an oral agreement between [the victim] and the government that if she testified at the 39(a) that she would not testify -- she would not be called to testify at the trial?

[SVC]: That's right, yeah. I thought that if she didn't testify if she testified at the 39(a) that she wouldn't be called to testify at the trial. And that if she did - if she chose to not testify at a 39(a), or resisted it then, she would probably be called to testify at the trial.

(R. at 127–28).

[Trial Counsel]: And you understand me, as the trial counsel, that I can't bind the convening authority[?]

[SVC]: I understand that, yes.

[Trial Counsel]: And you also understood that if you believe there was an actual agreement between your client and the convening authority, that should have been in writing?

[SVC]: Well, I thought it was a strategy decision. And so, I didn't think that the CG had to provide us input to that decision.

[Trial Counsel]: Correct. So, it was at the government's discretion in terms of strategy, whether we intended to call her as a witness. And at that point, I was informing you that we did not intend, and we would like to honor her request, and we intend to call her at the motions hearing, correct?

[SVC]: That's right. I understood it to be a strategy decision.

(R. at 129–30).

[Defense Counsel]: [SVC], did your client understand there to be an agreement between [the victim] and the government?

[SVC]: Yes.

(R. at 130).

> [Trial Counsel]: And [SVC], this agreement that your client believed, that wasn't communicated to her by the government, right?
>
> [SVC]: It was communicated through me. So the – my understanding of the purpose of the conversation, to myself and to you, was to pass that message out to her since I 'm just a conduit for [the victim's] seceding.

(R. at 130–31). Appellant did not call the victim as a witness on his motion.

C. The victim's testimony regarding her meetings with the government at trial.

At trial, appellant sought to re-visit the underlying basis for his motion to dismiss, and explore any motive the victim had for testifying at the aforementioned 39(a):

> [Defense Counsel]: So they talked about testifying in a motions hearing before that motion hearing did you have a conversation with any representatives from the government?
>
> [Victim]: I don ' t remember.
>
> [Defense Counsel]: Okay. Did you conduct any preparation for that motions hearing with the government?
>
> [Victim]: Like how the prep trial would have been or --
>
> [Defense Counsel]: Like any meeting where you, you know, discussed expected testimony with -- with the government prior to the motions hearing?
>
> [Victim]: I don't remember.
>
> [Defense Counsel]: Okay. I can move on. I 'm sorry, Your Honor. One moment.

(R. at 587–88). The SVP cleared any confusion caused by appellant's abandoned impeachment:

> [SVP]: Did anyone from my office force you to say anything with regards to this case?
>
> [Victim]: As in, like, when you go to trial, you should say this?
>
> [SVP]: Right.
>
> [Victim]: No.
>
> [SVP]: Because we've never met, right?
>
> [Victim]: I'm not sure.
>
> [SVP]: So the two of us and [Trial Counsel] as well, we have never personally sat down in an office and discussed your testimony, right?
>
> [Victim]: I think just about the motions hearing and what's going to happen.

(R. at 608–09).

Standard of Review

"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 nondisclosure of such information, we test the effect of that nondisclosure on the appellant's trial." *United States v. Roberts*, 59 M.J. 323, 325 (C.A.A.F. 2004). This court reviews a military judge's ruling on a motion to compel discovery for an abuse of discretion. *Id*. at 326 (citation omitted).

Law

Rule for Court-Martial [R.C.M.] 701 codifies numerous obligations and responsibilities surrounding disclosure and discovery of evidence. Trial Counsel has a duty to turn over any evidence favorable to the defense, which includes inter alia evidence that tends to "adversely affect the credibility of any prosecution witness or evidence." R.C.M. 701(a)(6). This duty is continuous and enduring. R.C.M. 701(d).

In *United States v. Coleman*, the Court of Appeals for the Armed Forces [CAAF] found the government's failure to disclose a cooperation agreement with a co-accused constituted error but was harmless beyond a reasonable doubt. 72 M.J. 184, 189 (C.A.A.F. 2013). The CAAF outlined:

> A military accused also has the right to obtain favorable evidence under Article 46, UCMJ, 10 U.S.C. § 846 (2006), as implemented by R.C.M. 701-703. This Court has held that Article 46 and its implementing rules provide greater statutory discovery rights to an accused than does his constitutional right to due process. *United States v. Roberts*, 59 M.J. 323, 327 (C.A.A.F. 2004); *see United States v. Hart*, 29 M.J. 407, 409-10 (C.M.A. 1990). As a result, we have established two categories of disclosure error: (1) "cases in which the defense either did not make a discovery request or made only a general request for discovery"; and (2) cases in which the defense made a specific request for the undisclosed information. *Roberts*, 59 M.J. at 326-27. For cases in the first category, we apply the harmless error standard. *Hart*, 29 M.J. at 410; *see United States v. Behenna*, 71 M.J. 228, 238 (C.A.A.F. 2012). For cases in the second category, we apply the heightened constitutional harmless beyond a reasonable doubt standard. *Roberts*, 59 M.J. at 327; *Hart*, 29 M.J. at 410 (dictum). 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. *See Hart*, 29 M.J. at 409 (dictum).

Id. at 186-87. Notably, the Staff Judge Advocate offered to recommend that the convening authority grant the co-accused twelve months clemency in exchange for truthful testimony at appellant's trial. *Id*. at 185–86.

In *Giglio v. United States*, a federal prosecutor promised a material witness leniency in his own criminal matter if he cooperated in the appellant's trial. 405 U.S. 150, 153 (1972). The government's case relied almost entirely on the material witness's testimony; as such, the Supreme Court found "evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it." *Id*. at 155.

Argument

A. There was no "agreement" between the victim and the government.

Appellant claims there was an agreement between the victim and the government to procure her attendance at the 11 July 2022 motions hearing, thus "[the victim] had a motive to tell the government what it wanted to hear in return for its promise not to subpoena her." (Appellant's Br. 21). The government's response to appellant's motion to dismiss outlines the discussions between the government, the victim, and the SVC:

> Prior to the Article 39a hearing in this case, the Trial Counsel notified the SVC that the Government intended to subpoena the AV for that hearing, but at that time, did not intend to issue her a subpoena for trial

> in accordance with her preference. Based on the memoranda that the AV submitted, Government Counsel was uncertain whether she would comply with the subpoena even for the Article 39a hearing. The Government did not enter into any form of an agreement with the SVC or the AV-written, verbal, or otherwise.
>
> While the Government knew that the AV had shown up to the courthouse, prior to the commencement of the Article 39a hearing in this case, the Government was still unsure whether she would actually testify if called upon to do so. Prior to her testimony, the Government questioned the Military Judge to determine if he was open to the idea that an accused could be convicted of a crime without the in-court testimony of the AV.

(App. Ex. XX, p. 5).

In discussing the victim's testimony at the motions hearing and requesting leave of court to add the victim to the government's witness list, the Special Victim Prosecutor [SVP] offered "[w]e were not aware whether she was going to show up today. 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). In its subsequent response to appellant's motion to dismiss the government noted, "[the victim's] testimony at [the 39(a)] hearing was consistent with her earlier statements to law enforcement and [medical providers]." (App. Ex. XX, p. 5).

The SVP's statement regarding the victim's testimony, that it was "what we were hoping to hear," does not demonstrate gamesmanship on behalf of the government, as appellant suggests. (Appellant's Br. 20). The record is abundantly

clear that the victim did not want to participate and urged the government to take no action against her husband. The government was not confident the victim would appear, and that even if she did, whether she would tell the truth.[2] Here, the victim declined to meet with the government but did meet with the defense to prepare for trial. (R. at 609). The victim even provided appellant with a signed statement to assist in establishing a reasonable mistake of fact as to consent defense. (App. Ex. XLIV, p. 7). Rather than gamesmanship, the SVP articulated the challenging nature of working with victims that are reluctant to participate, or are non-participatory, in criminal trials.

The military judge properly found there was no agreement between the victim and the government. The military judge supported this decision by highlighting facts elicited during the motions hearing on the matter:

> The parties discussed whether or not the [victim] would testify at the Article 39(a) hearing on 11 July 22 and what effect, if any, that her testimony would have on the government's intent to subpoena her for trial. There was no "agreement" reached between the parties on this issue and as [the SVC] testified, he believed that the government's statements regarding perhaps not having the [victim] testify at trial was simply a strategy decision by the government. There was no written agreement between the parties on this issue and the oral discussions regarding the [victim]'s potential testimony at trial were simply a strategy discussion and was not binding on either party.

[2] This fact is best demonstrated by the government's questioning of the military judge when he entered the record. The government's question to the military judge suggested there may be a need to proceed in a prosecution where the victim did not testify. (R. at 12).

(App. Ex. XXIX, p. 2). The military judge further noted the abundance of evidence in the record from the outset of the case that demonstrated the victim's desire for no action to be taken and to not participate in the proceedings. (App. Ex. XXIX, p. 2). The military judge went as far as to highlight the inconsistency between the SVC's MFR and his testimony at the motion hearing; the SVC offered in the MFR that there was an agreement, but when confronted about why nothing was ever put in writing, the SVC pivots and explains the absence of a written agreement is likely due to the fact that these discussion were more akin to the government's "trial strategy." The SVC's communication of any "agreement" to the victim was not a result of any offer the government made, and any confusion the SVC created does not obligate the government.

This case is distinguishable from *Giglio* and *Coleman*. In those cases, there was clear evidence from the government regarding agreements with cooperating witnesses in the form of leniency. Here, no such agreement existed. The government here had nothing to offer the victim and was proceeding to trial despite her objection; as such, it was unclear to the government if the victim would honor any subpoenas issued or recant the allegations when placed under oath. Given the uncertainty surrounding the victim's testimony, the government prepared for the prospect of prosecuting the case without her participation. When the victim

showed up to the 39(a) and told the truth, the government subsequently added her to their witness list. This case is neither *Giglio* nor *Coleman*.

B. Disclosure would not have affected the outcome of the trial.

The military judge reasoned *arguendo* that even if a discovery violation occurred, the issue was substantively cured when appellant learned of the discussion prior to trial. (App. Ex. XXIX, p. 3). The military judge noted in his ruling that appellant could "inquire of [the victim] what effect, if any, the government's discussions with her impacted her testimony either at the Article 39(a) hearing or at trial. (App. Ex. XXIX, p. 3). Accordingly, the military judge found appellant failed to demonstrate how he suffered any prejudice. (App. Ex. XXIX, p. 3).

Appellant argues that had he known of this "agreement" in advance of the motions hearing, he could have impeached the victim. (Appellant's Br. 21). As noted in the military judge's ruling, appellant still retained that ability if the victim testified at trial. (App. Ex. XXIX, p. 3). The victim testified at trial, and appellant briefly attempted to bring up her pre-trial conversations with the government. (R. at 587–88). When appellant's questions regarding those alleged pre-trial discussions confused the victim, he quickly abandoned the line of questioning. (R. at 587–88). After the victim testified at trial that the reported sexual assault was actually consensual (R. at 588), it is likely he abandoned his attempted

impeachment of the victim because he wanted the panel to find her testimony credible.

Ultimately, the victim attempted to recant the allegations she made against appellant. In addition to her 39(a) testimony, the SVP impeached the victim using her statements to more than six witnesses: Nurse [redacted], (R. at 589–90); the SAMFE, (R. at 590–93); her recorded CID Interview, (R. at 595–600); her statement to her neighbor, Mrs. [redacted], (R. at 601–03); her statements to medical providers, Dr. [redacted] and Nurse [redacted], (R. at 603); and her statements to SA [redacted] and various other law enforcement officers, (R. at 603–06). As such, while the 39(a) was used to impeach portions of the victim's attempted recantation, it was neither the sole evidence used nor the most impactful. Had the military judge found a discovery violation and refused to allow the use of the victim's 39(a) testimony at trial, there would have been no impact on the outcome.[3]

[3] Appellant highlights refusing to allow use of the victim's 39(a) was one of the remedies available to the military judge had he found a discovery violation. (Appellant's Br. 21).

Assignment of Error II

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN DENYING APPELLANT'S MOTION TO INSPECT APPELLANT'S SIEZED PHONE

Additional Facts

On 8 August 2022, appellant provided written statements from himself and the victim which asserted the two engaged in role-playing which encompassed similar conduct to the underlying charges. (App. Ex. XLIV, p. 7–8). The memorandum from the victim and the sworn statement from appellant both contained the verbatim language, "[t]he role-playing we engaged in sometimes extended to text-messages." (App. Ex. XLIV, p. 7–8).

Following receipt of this new information, law enforcement sought and received a magistrate authorization to seize and search appellant and the victim's cell phones. (App. Ex. XLIV, p. 1). The magistrate authorization was approved and executed on 11 August 2022. (App. Ex. XLIV, p. 3; App. Ex. LIII, p. 2). Appellant subsequently challenged whether probable cause existed for the seizure and search of his cell phone in a motion to suppress. (App. Ex. LIII). The military judge denied appellant's motion to suppress. (App. Ex. LIX). On appeal, appellant does not challenge the denial of his motion to suppress.

Appellant sought the opportunity to access his phone after law enforcement seized it. (R. at 220). The government provided appellant with the opportunity to

review all of the content that had been extracted from his phone pursuant to the logical extraction. (R. at 225). Appellant would not consent to the government conducting a complete extraction of the phone. (R. at 225). The military judge found as a matter of fact:

> Here, it is undisputed that the 11 August 2022 seized phone belongs to the accused so the defense has the right to inspect the item pursuant to RCM 701. The government did not dispute that the accused has the right to inspect the phone. Rather, the government disputed the accused's right to inspect the phone outside of the government's presence as the government expressed concern that the phone's evidentiary value would be diminished if such an inspection took place.

(App. Ex. LX, p. 2). "**Further, it is undisputed that the government did provide the accused an opportunity to inspect the phone, albeit with a CID agent being present.**" (App. Ex. LX, p. 2) (emphasis added).

Appellant's argument succinctly frames the issue, "[w]e need an opportunity because the government has raised that, to look at the entire phone. And we have the consent of our client to do that. He does not give his consent to the government to search his entire phone." (R. at 227). The military judge stated:

> Here's the thing. Defense, your request to examine the cell phone outside of the presence of the government or the CID agents or whoever is going to be denied. I don't think that they - I do agree. I think if there's some kind of copy they can get to you - get you, of what has been examined so far, I think you're entitled to that. I don't think you're entitled to take the evidence and, you know, have like an unrestricted examination of it. I don't think that that's permitted. So I'm not going to allow that.

(R. at 230). Appellant also failed to articulate with any specificity what evidence, if any, he needed to get from his phone:

> [Defense Counsel]: We have a good faith belief that there could be relevant evidence on the phone. Obviously, you know, we - people aren't going to remember exactly, exactly what kind of text messages or other messages.
>
> [Military Judge]: Right.
>
> [Defense Counsel]: - that were sent at a particular time. So we can't articulate that.
>
> [Military Judge]: I know, so you said you have a good faith belief. I'm not at all doubting that you think that there might be something on the phone. I'm not at all doubting that. That' s not sufficient, though. That's purely speculative. You haven't provided me any substantive evidence that there's something on there that I need to order the government to go get.

(R. at 234).

Standard of Review

"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 nondisclosure of such information, we test the effect of that nondisclosure on the appellant's trial." *Roberts*, 59 M.J. at 325. This court reviews a military judge's ruling on a motion to compel discovery for an abuse of discretion. *Id*. at 326 (citation omitted).

Law

"[T]he trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." Article 46(a), UCMJ. Rule 701 of the Rules for Courts-Martial (R.C.M.) requires the government, upon defense request, to permit the inspection of any "data" or "tangible objects . . . within the possession, custody, or control of military authorities" that was "obtained from or belongs to the accused." R.C.M. 701(a)(2)(A)(iv). Further, R.C.M. 701(e) states that "[e]ach party shall have . . . equal opportunity to interview witnesses and inspect evidence," and that "[n]o party may unreasonably impede the access of another party to a witness or evidence." R.C.M. 701(e); *see also* R.C.M. 703(a) ("The prosecution and defense and the court-martial shall have equal opportunity to obtain witnesses and evidence . . . ."). Finally, Rule 701(g) provides, "The military judge may, consistent with this rule, specify the time, place, and manner of making discovery and may prescribe such terms and conditions as are just." R.C.M. 701(g)(1).

Argument

A. The military judge properly denied appellant's request.

The military judge did not abuse his discretion when he denied appellant's request to examine their seized cellphone outside the presence of the government.

Appellant offered no basis to support his request aside from the statement, "We have a good faith belief that there could be relevant evidence on the phone." (R. at 234). The military judge properly responded, "That's purely speculative. You haven't provided me any substantive evidence that there's something on there that I need to order the government to go get." (R. at 234).

This court should follow the framework outlined in *Secord*, as the issue, the requested relief, and the evidentiary challenges posed, are closely related.[4] *United States v. Secord*, ARMY 20210667, 2024 CCA LEXIS 263 (Army Ct. Crim. App. 26 Jun. 2024) (mem. op.). In *Secord*, this court recognized the difference between the government's possession of the appellant's physical device, and the possession of the data contained within that device. *Id*. at *8. In reviewing the appellant's motion to inspect the cellphone this court noted "[t]he essence of trial defense counsel's request was two-part: (1) to obtain access to the cellphone (the container of evidence) which was in the government's physical possession; and (2) to extract the cellphone's data (the alleged relevant evidence) which was not in the government's physical possession." *Id*. Notably, "Trial defense counsel did not request to extract specific files or documents, but instead asked for access to the

[4] The government acknowledges this court's explanation "our decision is narrowly tailored to the unique facts of this case and does not stand as precedent to any future application of R.C.M. 701(e) or the military judge's authority under R.C.M.(g)(1) regarding any other types of evidence." *Secord*, 2024 CCA LEXIS 263 at n.7.

cellphone to allow appellant's DFE to apparently extract all of the cellphone's data." *Id*.

Here, appellant requested "to physically inspect appellant's phone outside the government's presence." (Appellant's Br. 23). Appellant here also failed to "request to extract specific files or documents[;]" rather, appellant wanted unfettered access to the seized device and its contents outside the supervision of the government. This court should once again recognize, as it did in *Secord*:

> Had appellant opted to grant access to his cellphone, both appellant and the government would then be given equal opportunity to inspect the evidence as it existed at that time. Because appellant decided not to provide access, both appellant and the government maintained their equal lack of opportunity to inspect the evidence.

2024 CCA LEXIS 263, at *10.

Similarly, this court should recognize the military judge properly denied appellant's request to compel expert assistance in the form of a Digital Forensic Examiner (DFE). The military judge found appellant failed to make the requisite showing pursuant to *United States v. Gonzalez* to demonstrate the need for expert assistance. (App. Ex. LX, p. 3); 39 M.J. 459, 461 (C.M.A. 1994). Appellant fails to articulate how this denial was based on any erroneous view of the facts or application of the law.

B. Appellant cannot demonstrate prejudice.

Appellant suggests the government cannot disprove prejudice beyond a reasonable doubt because "(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, [the victim]." (Appellant's Br. 30). Appellant claims he suffered prejudice because "due to the ruling, the defense had no ability to counter or contextualize the government's claims." (Appellant's Br. 30). First, with respect to the denial of the DFE, the military judge went as far as to note in his written ruling, which was completed post-trial, "Further, no evidence was admitted from the seizure of the accused's cellphone on 11 August 2022." (App. Ex. LX, p. 3). As such, appellant cannot demonstrate prejudice.

Second, in *Secord* this court found the appellant failed to demonstrate prejudice because the record failed to yield "any actual evidence or testimony that any specific impeachment text messages or other data existed on appellant's cell phone that would constitute an 'item…relevant to defense preparation.'" 2024 CCA LEXIS 263, at *11–12. This court highlighted defense counsel's failure to demonstrate the existence of evidence by a preponderance of the evidence. *Id*. This court should find the absence of any prejudice for those same exact reasons here.

Assignment of Error III

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

Additional Facts

On 7 June 2022, the government moved to supplement its witness list with an expert witness in the field of forensic chemistry. (App. Ex. XXI, p. 2). On 6 July 2022, appellant requested an expert consultant in the same field. (App. Ex. XXI, p. 2). On 25 July 2022, appellant submitted a request for a DFE. (App. Ex. XXI, p. 2).

On 27 July 2022, appellant filed a motion requesting a continuance. (App. Ex. XXI). Appellant's trial was scheduled for 16 August 2022, and he requested the case be moved to 26 October 2022. (App. Ex. XXI). Appellant sought a continuance as two of his requests for expert consultants, a chemist and a DFE, were still pending Convening Authority action. (App. Ex. XXI).

On 30 July 2022, the military judge denied appellant's requested continuance. (App. Ex. XXVIII). The military judge noted that appellant's request for a continuance, submitted three weeks prior to trial, was untimely. (App. Ex. XXVIII, p. 2). The military judge also found appellant had failed to demonstrate that a continuance was necessary or that its denial would impact the verdict. (App. Ex. XXVIII, p. 2). The military judge ruled:

> Further, the defense has not proven that a continuance is necessary. The convening authority approved their request for a chemical expert and the defense has almost three weeks to consult with their expert regarding trial strategy and preparation to rebut the findings of the government chemical expert.
>
> The court has no reason to believe the defense is not acting in good faith. The government has a vested interest in bringing this case to trial. Although the alleged victim has expressed a desire that the government not prosecute the case, the government still has an interest in bringing cases to trial in a timely manner. On balance, the defense has failed to show that a continuance is necessary by a preponderance of the evidence. There has not been a sufficient showing that denial of a continuance would impact the verdict.

(App. Ex. XXVIII, p. 2). Appellant's request for an appointment of a DFE was denied by the military judge. (App. Ex. LX).

Standard of Review

A military judge's decision to deny a motion for a continuance is reviewed for an abuse of discretion. *United States v. Jacinto*, 81 M.J. 350, 353 (C.A.A.F. 2021) citing *United States v. Brownfield*, 52 M.J. 40, 44 (C.A.A.F. 1999).

Law and Argument

To determine whether or not the military judge abused his discretion, this court should consider the factors as articulated in the CAAF's decision in *Miller,* "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. Wiest*, 59 M.J. 276, 279 (C.A.A.F. 2004) quoting *United States v. Miller,* 47 M.J. 352, 358 (C.A.A.F. 1997).

A. The military judge properly denied appellant's request for a continuance.

In applying the *Miller* factors to the instant matter, the military judge properly found appellant's request for a continuance three weeks prior to the scheduled trial was untimely, appellant failed to provide prior notice that he would require or request a continuance, and failed to demonstrate by a preponderance of the evidence that a continuance was necessary. (App. Ex. XXVIII, p. 2). Appellant initially requested an expert in the field of forensic chemistry on 6 July 2022, modified their request on 12 July 2022, and the convening authority approved the modified request on 29 July 2022. (App. Ex. XXVIII, p. 1–2). The military judge properly recognized appellant had three weeks to prepare for trial with their expert, and appellant failed to explain how that was not a sufficient amount of time to do so. As such, the *Miller* factors disfavored appellant, and the military judge did not abuse his discretion in denying appellant's request.

B. Assuming arguendo the military judge erred, there was no prejudice.

Appellant does not suggest any specific prejudice resulting from the denial of his request for a continuance, rather appellant argues the government's overall

conduct preceding appellant's request for a continuance warranted the continuance. (Appellant's Br. 34–35). The record, however, demonstrates appellant was able to effectively prepare for trial and cross-examine the government's expert on the scientific findings involved in the sexual assault forensic examination. (R. at 753–55). It is noteworthy the government did not call Ms. [redacted], the forensic chemist noticed on 7 June 2022, to testify at trial; rather, Ms. [redacted], a forensic DNA examiner from the United States Army Criminal Investigation Laboratory who was included on the government's first witness list, dated 4 April 2022, provided the evidence. (App. Ex. XXIII-C; R. at 740).

Conclusion

WHEREFORE, the government respectfully requests this honorable court deny appellant's request for relief and affirm the findings and sentence.

[redacted]

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CERTIFICATE OF SERVICE, U. S. v. HALCHIMAI (20220429)

I hereby certify that a copy of the foregoing was sent via electronic submission to the Army Court of Criminal Appeals and the Defense Appellate Division at [redacted]***@mail.mil*** on the 31st day of July, 2024.

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