

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellant

v.

Sergeant (E-5)
MICHAEL S. DELISFORT,
United States Army,
Appellee

**GOVERNMENT APPEAL AND
BRIEF IN SUPPORT PURSUANT
TO ARTICLE 62, UCMJ**

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 24, before a
general court-martial, convened by
Commander, 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**

Statement of the Case

The government charged appellee with four specifications of attempted
sexual abuse of a child, in violation of Article 80, Uniform Code of Military
Justice, 10 U.S.C. § 880 [UCMJ]. (Charge Sheet). On 14 July 2024, the military

judge granted a defense motion to dismiss the case with prejudice for speedy trial and discovery violations. (App. Ex. XXIII). On 29 July 2024, the military judge granted the government’s motion for reconsideration. On 11 September 2024, the military judge granted the government’s motion in part, instead dismissing the cause *without prejudice* and only for the discovery violations. (App. Ex. XXVIII¹). On 13 September 2024, the government filed notice of appeal under Article 62, UCMJ, and Rule for Courts-Martial [R.C.M.] 908. (App. Ex. XXVII).

Statement of Statutory Jurisdiction

The United States may file an interlocutory appeal of “[a]n order or ruling which terminates the proceedings with respect to a charge or specification.” UCMJ art. 62(a)(1)(A). This court has jurisdiction over this appeal because the military judge’s dismissal of all charges and specifications without prejudice “terminate[d] the proceedings.” *See, e.g., United States v. Hill*, 71 M.J. 678, 680 (Army Ct. Crim. App. 2012) (finding that the government “act[ed] within its discretion under Article 62(a)(1)(A), UCMJ,” when it appealed a military judge’s ruling dismissing a case with prejudice). Therefore, this court has jurisdiction under Article 62(a)(1)(A).

¹ This appellate exhibit should be labeled XXVI; however, since it was labeled XXVIII, the government will continue using that number for clarity.

The trial counsel provided Notice of Appeal on 13 September 2024 (App. Ex. XXVII) and mailed this case to the Government Appellate Division on 4 October 2024. By not forwarding the appeal, including the record, within 20 days to the Government Appellate Division, the government violated Rule 20 of this Court's Rules of Appellate Procedure. However, this court should still grant this appeal. The delay is only one day, and government provided good cause; mainly disruptions Hurricane Helene caused and the closure of Fort Moore. Moreover, the local OSJA needed the court reporter to assist a Soldier suffering from suicidal ideations. These factors justify the one-day delay in mailing the record for this appeal.

Statement of Facts

A. Appellee, SGT Michael Delisfort, attempted to sexually abuse a child.

Appellee's criminal act stemmed from his attempt to sexually abuse a child, "Jessie Taylor," that he believed he met online. On 15 September 2023, appellee contacted a purported 14-year-old female named "Jessie Taylor" over on online application, Whisper. (R. at 126-28; App. Ex. XXIII-a, p. 5). Unbeknownst to appellee, "Jessie Taylor" was an online persona of Investigator [INV] of the Fort Moore Criminal Investigation Division [CID] office. (R. at 126-27; App. Ex. XXIII-a, p. 5). Investigator established "Jessie Taylor's" age through the Whisper application, which indicated she was 14 years old. (R. at 128; App. Ex.

XXIII-a, p. 5). At the time appellee contacted “Jessie Taylor,” CID did not have appellee’s identity, but he used the username “Werewolf” in his account. (App. Ex. XXIII-a, p. 5).

Investigator ■ failed to bring his government phone home that weekend, but resumed the conversation with appellee on Monday, 18 September 2023. (R. at 128). “Jessie Taylor” disclosed that she was a 14-year-old girl. (R. at 128; Pros. Ex. 1, p. 3). Appellee disclosed his age—37. (Pros. Ex. 1, p. 3). Investigator ■ sent a digitally altered photo that made him appear as a young female. (R. at 129-30, Pros. Ex. 1, p. 2).

The photo, in which the girl appears under the age of legal consent, and the actual disclosure of “Jessie Taylor’s” young age did not dissuade appellee. Instead, appellee’s sexual intent quickly became evident in the chat conversation with “Jesse Taylor.” “Jessie Taylor” identified where she lived on Fort Moore and claimed her parents were away on vacation. (Pros. Ex. 1, p. 4-5). Appellee then asked whether “Jessie Taylor” had been with an older man, to which she replied, “no I havent but I think older guys are attractive.” (Pros. Ex. 1, p. 6). Appellee responded, “Most older guys only want one thing, especially from a beautiful girl like yourself.” (Pros. Ex. 1, p. 6). He further clarified that those things were, “Sex, blow jobs, anything sexual etc...”. (Pros. Ex. 1, p. 6). The sexually suggestive conversation continued, with appellant asking her what her favorite

sexual thing to do was and providing examples, “Getting blow jobs, eating a girl out. Doggy is the best position.” (Pros. Ex. 1, p. 8).

“Jessie Taylor” responded to the sexual suggestions, stating, “Sounds like fun tho,” but otherwise suggesting ignorance to the sexual acts. (Pros. Ex. 1, p. 8-9). “Jessie Taylor” then asked appellee when he was normally free because she was “just curious cause I’m home alone for a week.” (Pros. Ex. 1, p. 9). Appellee suggested it would be safer for him to come at night and requested another picture, which INV [REDACTED] sent. (Pros. Ex. 1, p. 10).

Following a prompt from INV [REDACTED], appellee sent a photograph of himself to “Jessie Taylor.” (Pros. Ex. 1, p. 11). They discussed their respective locations and determined they lived within a four-minute drive of each other. (Pros. Ex. 1, p. 13). At that point, appellee suggested coming over the next day. (Pros. Ex. 1, p. 13). As they talked about meeting, “Jessie Taylor” asked appellee about condoms, which he agreed to bring. (Pros. Ex. 1, p. 15). Appellee then asked her to move the conversation to KIK, an instant messaging application, which they did. (Pros. Ex. 1, p. 17).

On KIK, appellee identified himself as “Michael,” but claimed that was his middle name. (Pros. Ex. 1, p. 20). He asked for another picture, which INV [REDACTED] provided. (Pros. Ex. 1, p. 21). “Jessie Taylor” requested a picture of appellee in

uniform. (Pros. Ex. 1, p. 20). While he later sent another photo (Pros. Ex. 1, p. 32), appellee never provided a photo in uniform.

As appellee continued planning his meeting with “Jessie Taylor,” they agreed that appellee would pick-up “Jessie Taylor” later in the day. “Jessie Taylor” told appellee that she was “craving a Snickers candy bar.” (Pros. Ex. 1, p. 47). Appellee agreed to pick up a Snicker’s bar for their meetup. (Pros. Ex. 1, p. 47). They then established that they would meet around 2030. (Pros. Ex. 1, p. 48). Investigator ■ suggested appellee meet “Jessie Taylor” at the dog park near her house and then return to one of their houses. (Pros. Ex. 1, p. 49). Appellee agreed to this plan. (Pros. Ex. 1, p. 49). He confirmed he would bring a Snicker’s bar and condoms. (Pros. Ex. 1, p. 51-2). Appellee messaged “Jessie Taylor” that he was leaving. (Pros. Ex. 1, p. 55). He told her he was in the red truck.² (Pros. Ex. 1, p. 56).

Prior to meeting with appellee, CID agents placed cameras in the planned meeting spot. (R. at 225). These cameras would record activity during the planned operation, and did in fact record appellee and his car during the operation.³ (R. at 229).

² Appellee drove a sedan to the location, a Mazda 3. (App. Ex. XXIII-a, p. 52).

³ The footage did not record appellee’s face. (R. at 230). The video shows a dark sedan pull into the parking lot across the street from the dog park and sit for approximately 40 minutes before departing. (App. Ex. XVII-b).

That night, CID agents waited at the dog park and observed a vehicle pull into the parking lot across from the dog park. (App. Ex. XXIII-a, p. 9). At this time, appellee communicated to “Jessie Taylor” that he had not left his house yet. (App. Ex. XXIII-a, p. 9). As he attempted to leave the dog park, CID agents initiated a traffic stop and arrest of appellee. (App. Ex. XXIII-a, p. 9).

That evening, CID agents interviewed appellee after advising him of his rights. (App. Ex. XXIII-a, p. 12). While he denied sexual intent and suggested he believed it was actually a guy trying to setup Soldiers, he admitted to sending the messages and bringing the Snickers bar for “Jessie Taylor.” (App. Ex. XXIII-a, p. 12).

B. The Clearview facial recognition of appellee.

Investigator ■ received a photo of appellee and sent it for potential identification using a program called Clearview. (R. at 287-88; App. Ex. XXVI, p. 9). Clearview is a program that allows investigators to identify a person based on a photograph. (R. at 288, 425). The CID agent can receive a photo, provide some background information, upload the photo to Clearview, and the program will scan the photo and identify potential matches. (R. at 425-26). It filters the matches, identifying the most likely and other possible matches based off the photo. (R. at 426). Once the matches are made, the agent visually checks the matches against the scanned photo and confirms the identity of the individual. (R. at 426).

In this case, INV [REDACTED] forwarded the photo provided by appellee to Sergeant First Class [SFC] [REDACTED] who was location in Virginia. (R. at 428). Sergeant First Class [REDACTED] ran the photo and returned the results to INV [REDACTED]. (R. at 428). These included results of individuals other than appellee. (R. at 428). Using the Clearview software, the investigating agents were able to identify appellee's address, car, license plate, and other identifying information *prior* to the planned meeting with appellee. (App. Ex. XXVI, p. 6).

C. The court-martial.

The government opened its case by calling INV [REDACTED]. (R. at 124). Investigator [REDACTED] testified that he worked at CID from August 2022 until March 2024 with the Internet Crimes Against Children (ICAC) team. (R. at 124-25). After testifying about his credentials and methods, INV [REDACTED] described how the case began. (R. at 125-26).

Investigator [REDACTED] explained that he opened a profile on Whisper and KIK applications using the username "Jessie Taylor GA." (R. at 126). He portrayed a 14-year-old girl. (R. at 127). As the government attempted to elicit a response, "Can you tell me how you came to know the accused in this case," the defense objected, citing hearsay. (R. at 127). The military judge overruled the defense objection. (R. at 127). The government introduced the text messages appellee sent

to INV [REDACTED] and covered much of the information described in subsection “A”, above. (R. at 133-172).

The government next called Special Agent [SA] [REDACTED]. (R. at 173). Special Agent [REDACTED] testified that he served as a supervisory special agent at the Fort Moore CID office and planned the operation that apprehended appellee. (R. at 173-74). On 21 September, he drafted an operational plan and requested assistance from their investigative analysis to attempt to identify appellee based on the chat conversations on 20 September. (R. at 175).

The defense objected to the government’s steps to identify appellee, arguing that any testimony violated the Confrontation Clause. (R. at 175-177). Initially, the military judge allowed the government to continue the examination of SA [REDACTED]. (R. at 177). He explained that the plan included a decoy who would enter the dog park and either sit on a bench or a swing and wait for appellee. (R. at 178). The vehicle with appellee would enter and the CID agents would execute a takedown with him inside the vehicle. (R. at 178-79). The agents arrived between 2000-2010 that night for a meeting at 2030. (R. at 179).

At this point, the defense objected as to the identity of appellee. The government counsel attempted to elicit an answer about the type of car appellee drove. (R. At 183). Defense again objected, stating that the government could only identify the car through the facial recognition program. (R. at 183-84). The

defense requested to individually *voir dire* SA [REDACTED], which the judge granted. (R. at 184).

During the *voir dire*, defense elicited that they identified the vehicle through the DPS search of appellant's name. (R. at 184). They identified his name through a photograph provided during the undercover chatter with appellee. (R. at 185). Agents provided the photograph to Quantico, where an agent not in the courtroom used facial recognition technology to identify appellee. (R. at 186). Special Agent [REDACTED] testified that, "*at that point in time*, I would say we wouldn't have known" the identity of appellee. (R. at 186) (emphasis added).

In a subsequent session under Article 39a, the defense argued that this identification was testimonial hearsay, and the government needed to produce the witness who ran the search. (R. at. 189). Moreover, the defense claimed that they only learned of the facial recognition technology a week prior, during a pretrial interview. (R. at 190). Following argument by counsel, the court sustained the defense objection to "any evidence about the facial recognition." (R. at 193).

Following an hour break, the court resumed. (R. at 196). The government counsel requested that the court reconsider its ruling. (R. at 196). It argued that the facial recognition evidence was not testimonial hearsay but did not provide the court with any case law supporting that proposition. (R. at 197). Later that day, the government requested the court allow a 39a session to establish probable cause

for traffic stop through telephonic testimony. (R. at 204). The court denied this request, later explaining the denial was because “SA [REDACTED] had already testified that “But For” the facial recognition device, they would not have known the identity of the Accused, the court did not entertain the Government's request to issue a preliminary ruling as to the admissibility of independent evidence received after the Accused initial traffic stop.” (App. Ex. XXII, p. 6). On the same day, defense submitted a request for speedy trial and opposing any further delay. (R. at 209).

The court granted the government’s request for a continuance—“mainly, again, because the Court is who is asking that this witness appear.” (R. at 210). On 3 July 24, the defense filed a motion to dismiss for Speedy Trial and Discovery Violations. (App. Ex. XVI). The government responded on 11 July. (App. Ex. XVII). The military judge initially granted the defense motion and dismissed the case with prejudice. (App. Ex. XXII). The government promptly filed a motion for reconsideration, which the court granted. (App. Ex. XXIII, XXV)

D. The military judge’s findings.

On 11 September 2024, the military judge issued her ruling, granting in part the defense motion. (App. Ex. XXVIII). Amongst her factual findings, the military judge made the following findings of fact relevant to this appeal:

1. Special Agent [REDACTED] testified for the government as the second government witness on 1 July 2024. The military judge granted a defense request to voir dire

the witness. During the voir dire, SA [REDACTED] stated that “but for” the facial recognition software, CID would not have known the identity of the accused. (App. Ex. XXVIII, p. 6)

2. During a recess the same day, the defense sent an email to the court demanding speedy trial. (App. Ex. XXVIII, p. 7).

3. The government asked the court to reconsider its position that the testimony concerning facial recognition software amounted to confrontational hearsay. (App. Ex. XXVIII, p. 6).

4. The government also asked the court to conduct another Article 39a session to allow the government to establish probable cause for the traffic stop and demonstrate an independent means to arrest appellee. The court denied this request. (App. Ex. XXVIII, p. 7).

5. On 13 February 2024, Staff Sergeant [SSG] [REDACTED], the Special Trial Noncommissioned Officer-In-Charge [NCOIC], sent discovery to the defense, including security camera footage from a mobile closed circuit television [CCTV] camera used at the time of the accused’s arrest. (App. Ex. XXVIII, p. 8).

6. On or about 26 June 2024, the government provided the defense with a CD that included the CCTV footage that they previously provided. At the time, the government claimed that “The government was unaware of this footage prior to the interview.” (App. Ex. XXVIII, p. 8).

7. As part of the discovery, the Government provided the defense with approximately 44,000-page pdf and 18 CDs. (App. Ex. XXVIII, p. 9).
8. During a recess, the defense asked the government counsel what other leads they had to identify appellee, and the government counsel responded, “oh, we don’t have any.” The government then stated they were confused about the court’s guidance. (App. Ex. XXVIII, pp. 10-11).
9. As of 23 August 2024, the defense had still not received the possible matches revealed by the facial recognition software. (App. Ex. XXVIII, p. 9).

Following the government’s Motion to Reconsider and the Defense Response, the military judge determined that a Speedy Trial violation did not occur. (App. Ex. XXVIII, p. 25). However, the court found that the “Government’s lack of preparation, lack of due diligence, and negligence led to discovery violations, which amounted to a failure to comply with R.C.M. 701.” (App. Ex. XXVIII, p. 25). The court specifically found that the discovery violation prejudiced the defense but did not specify how the defense was prejudiced. (App. Ex. XXVIII, p. 28). Based off this conclusion, the court dismissed the case without prejudice, finding that “dismissal is just under the circumstances.” (App. Ex. XXVIII, p. 28).

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). A 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). This court reviews conclusions of law de novo. *United States v. Wicks*, 73 M.J. 93, 98 (C.A.A.F. 2014).

“A military judge’s choice of remedy for discovery violations is reviewed for an abuse of discretion. A military judge abuses her discretion ‘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. Vargas*, 83 M.J. 150, 153 (C.A.A.F. 2023) (quoting *United States v. Stellato*, 74 M.J. 473, 480 (C.A.A.F. 2015)) (alteration in original).

Law and Argument

This court should reverse the military judge’s decision because she abused her discretion in dismissing this case. While the government concedes that the trial counsel’s failure to provide the Clearview search results to the defense violated the

government's discovery obligations, the dismissal was not warranted under the circumstances. First, the military judge's factual conclusion that "but for" the Clearview results, the government could not identify the appellee was a clearly erroneous factual finding. The military judge's decision merits less deference than is ordinarily afforded because her conclusions rested on an erroneous factual finding. Second, dismissal was an erroneous remedy in this case because the discovery violation did not prejudice appellee's ability to mount a defense, the military judge failed to cite any specific prejudice stemming from the discovery violation, other remedial options would correct the error, and dismissal was not "just under the circumstances." *United States v. Vargas*, 83 M.J. 150, 154 (C.A.A.F. 2003). Accordingly, this court should set aside the military judge's ruling.

A. The military judge's ruling merits limited deference.

As an initial matter, this court should give the military judge limited deference in this case. While the judge generally receives "broad discretion" when selecting an appropriate remedy under an abuse of discretion standard of review, *United States v. Douglas*, 68 M.J. 349, 354 (C.A.A.F. 2010) (quoting *United States v. Houser*, 36 M.J. 392, 397 (C.A.A.F. 1993)), the military judge's ruling here should receive limited deference.

First, the military judge based much of her decision on the factual finding that SA [REDACTED] stated that “but for” the Clearview software, the government would not have identified appellee. She then refused the government’s request to hold a 39a session to establish other grounds to establish appellee’s identity. This court has recently found that a military judge’s stifling of evidence can “short-circuit[]” the proceedings and create a limited record making it “virtually impossible” for this court to properly evaluate the record. [*United States v. Nievesvele*, 2023 CCA LEXIS 549, *4, fn.6 \(Army Ct. Crim. App. 21 Dec. 2023\)](#). This finding was clearly erroneous, and her refusal to allow the government the opportunity to establish a record was an abuse of discretion. Specifically, the testimony in question went as follows:

Q (Defense Counsel): And but for that agent, you would not know what the identity of that person is?

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

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

A: Yes, ma’am.

(R. at 186).

In her findings of fact and ruling on the record, the military judge erroneously focused on the conclusion that CID would not have known the identity of appellee prior to his arrest, but she ignored the clear temporal nature of the SA DT's statement—that *at that point of time* CID would not have known appellee's identity. She magnified the seriousness of the government's error, erroneously suppressed evidence, and caused delay in the case by insisting the government needed to produce the Clearview witnesses as opposed to continuing their case and identifying the appellee through other means, such as his seized items, statement to CID, or very presence in the parking lot across the dog park at the proposed time. The military judge wrongly concluded that the government could not know the identity of appellee without the Clearview software and then denied the government the opportunity to show otherwise. That was not the case. At worst, the government failed to disclose inculpatory evidence that further strengthened their case against appellee.

The government would have identified the appellee without the Clearview software. Appellee showed up at the location where he expected to meet "Jessie Taylor." When he showed up, he brought Snickers as discussed with "Jessie Taylor." CCTV footage provided to the defense on or about 13 February 2024 recorded his car in the parking lot across the dog park with him inside—where he waited for almost 40 minutes. Once arrested, appellee admitted to the

conversations with “Jessie Taylor,” even if he denied a sexual intent. (App. Ex. XXIII-a, p. 12). The government had multiple avenues through which it would identify appellee during trial. The Clearview software enabled earlier identification, but the software was never the only method of identifying appellee.

This clearly erroneous finding contributed to the military judge’s flawed application of the law to the facts and tainted every aspect of her ruling. First, rather than simply preventing the government from introducing the Clearview search results due to the Confrontation Clause, the military judge barred the government from using *any* evidence derived from the Clearview search results. (App. Ex. XXVIII, p. 28). She erroneously suppressed all derivative evidence from the Clearview search results—this remains true even if the Clearview software were the only means to identify appellant prior to his arrest. At the time of her ruling there was no basis to bar all evidence stemming from the Clearview search results. While there are times a pre-court identification must be excluded, it does not apply here. (see MRE 321, *United States v. Brown*, 2018 CCA LEXIS 107, *10 (Army Ct. Crim. App. 2018) (stating an identification is inadmissible under two circumstances: (1) if it is so suggestive as to create a substantial likelihood of misidentification, or (2) as “required by the Due Process Clause of the Fifth Amendment to the Constitution of the United States as applied to members of the Armed Forces”). There is no evidence that the Clearview search results were

unnecessarily suggestive; as the military judge noted, “the Clearview AI program is able to identify the photo from the most likely to least likely matches; however, a photo lineup does not provide this detail...The program is a completely computer-generated data and puts out computer generated results based upon biometric data ran internally.” (App. Ex. XXVIII, p. 11).

The military judge should have sustained the defense objection based on the Confrontation Clause; however, her decision to suppress all evidence derived from the search results, even evidence connecting the appellee that did not violate the Confrontation Clause, was erroneous. This erroneous suppression, based on her erroneous understanding of the facts and the law, further supports a conclusion that she abused her discretion.

The military judge’s conclusion that the government would not have identified appellee “but for” the Clearview software permeates her reasoning throughout the trial transcript and ruling; it influenced her determination of prejudice and final dismissal of the case. For example, the judge concluded that earlier disclosure of the Clearview results would enable the defense to “challenge the process used to identity [sic] of the Accused, and to develop other possible defenses.” (App. Ex. XXVIII, p. 25-26). This conclusion ignores the other evidence pointing to the appellee and amplifies the prejudice of the discovery violation. As previously noted, CCTV cameras recorded appellee drive to the

parking across the dog park where he discussed meeting “Jessie Taylor.” He waited there for almost forty minutes. Police arrested appellee and found the Snickers bar on his person. He admitted to conversations with “Jessie Taylor,” even if he denied sexual intent. The Clearview results only provided a preliminary identification of appellee. The evidence gathered post-appellee’s arrest was far more important to the government’s case (and far more important for appellee to challenge, which he did through motions practice (App. Ex. V)). This played a direct role into the court’s conclusion that “the Government’s lack of preparedness was so significant that it caused not only discovery violations but also actual prejudice to the Accused.” (App. Ex. XXVIII, p. 27).

The government should have disclosed the Clearview search results, but the failure minimally prejudiced appellee. There is no evidence that the Clearview search results were illegal or could be suppressed. At trial, the defense counsel did not claim as much. The government’s failure did not implicate *Brady*; the evidence pointed to the appellee and did not provide exculpatory evidence, particularly considering the other evidence pointing to appellee. *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999) (a *Brady* violation occurs when (1) the evidence was favorable to an appellant, (2) the government suppressed the evidence, inadvertently or intentionally, (3) accused was prejudiced by suppression). Ironically, the trial counsel’s careless discovery prejudiced one party:

the government, who did not even have the witnesses in place to present evidence from the Clearview search results.

B. The military judge applied an extreme remedy when she dismissed the case.

The military judge's remedy of dismissal was extreme and unwarranted under the facts of this case. "If an error can be rendered harmless, dismissal is not an appropriate remedy." *Stellato*, 74 M.J. at 488. (internal quotations removed). Dismissal is appropriate when the "effects of the Government's discovery violations have prejudiced the accused and no lesser sanction will remedy this prejudice." *Id.* Although dismissal of charges is "one particular remedy" available to the military judge, it is "a drastic remedy" and the "military judge must consider whether any alternatives are available before imposing it." *Vargas*, 83 M.J. at 152 (analyzing a military judge's decision to dismiss a case with prejudice). Here, the military judge could have (and did) exclude the Clearview search results. In a case like this, where the evidence in question supports the government's case, and does not aid the appellee, such a remedy would appropriately correct the government's discovery violation.

Unlike cases where dismissal was warranted, there is no specific prejudice to appellee. For example, in *United States v. Stellato*, the military judge dismissed a case with prejudice after finding multiple discovery violations by the government.

United States v. Stellato, 74 M.J. 473, 476 (C.A.A.F. 2015). There, the [Court of Appeals for the Armed Forces] CAAF noted that “the discovery violations delayed the Government's production—and thus delayed the accused’s receipt—of exculpatory evidence in the form of e-mails, the recantation note, and Miss LRE's statements.” *Stellato*, 74 M.J. at 489. Moreover, the numerous continuances caused by the discovery violations “prevented the accused from calling a key witness, Dr. Krieg, who passed away before trial could begin. *Id.* Finally, the court found that “the continuances “significantly prejudiced” the accused by: (1) interfering with his career progression; (2) preventing him from communicating with his family to resolve custody issues; and (3) placing him under “extreme and unwarranted restrictions.” *Id.* (quotations in original).

Here, the military judge concurred with the defense allegation that “the Government’s lack of preparedness was so significant that it caused not only discovery violations but also actual prejudice to the Accused.” (App. Ex. XXVIII, p. 27). Any prejudice is speculative, and the court did not elaborate on the prejudice, but instead in the next paragraph it determined that “dismissal is just under the circumstances.” (App. Ex. XXVIII, p. 27). This conclusory finding by the military judge failed to “articulate why any of the proposed remedies under R.C.M. 701(g)(3)(D) were or were not just under the circumstances.” *Vargas*, 83 M.J. at 155. In the defense motion to dismiss, most of the claimed prejudice came

from the speedy trial motion, but the judge did not find a speedy trial violation in her reconsideration ruling. (*See* App. Ex. XVI, p. 38; App. Ex. XXVIII, p. 25). Moreover, by erroneously barring the government from using any evidence pointing to the appellee and insisting the government produce a witness to testify about the Clearview search results, the judge caused the delay in this case. As for the defense claims of discovery violations and prejudice, the court did not find any *Brady* violations—the evidence defense claimed as *Brady* was included in the 44,000-page pdf submitted by the government—the government does not violate *Brady* when the defense possesses the evidence in question. “The state has no obligation to point the defense towards potentially exculpatory evidence when that evidence is either in the possession of the defendant or can be discovered by exercising due diligence. *United States v. Ellis*, 77 M.J. 671, 676 (C.A.A.F. 2018) (quoting *Rector v. Johnson*, 120 F.3d 551, 558-59 (5th Cir. 1997)). Instead, the defense attempted to place the responsibility to sift through the documents and determine what would be exculpatory for the defense on the feet of the government, as opposed to the defense attorneys, who have a responsibility to review evidence and build a case. (App. Ex. XVI, p. 44-45). The defense did not claim prejudice from the Clearview search results because there was no prejudice to the defense.


The judge did not use lesser means to remedy the prosecutor's violation. For example, in *United States v. Trigueros*, the government failed to turn over a rape victim's mental health records in response to a specific defense discovery request. 69 M.J. 604 (Army Ct. Crim. App. 2010). The military judge denied a request for a mistrial and instead barred the government from presenting any victim impact evidence or any aggravation evidence in its sentencing case-in-chief. *Id.* at 608. This court affirmed the military judge's ruling, noting, "the military judge properly explored and enacted another remedial action commensurate with the government's discovery violation." *Id.* at 611. Likewise, precluding the government's use of the Clearview search result would be commensurate with the discovery violation.

The military judge also raised concerns about the prosecutor's overall diligence in the case and suggested possibly other, yet unknown, discovery violations. (App. Ex. XXVIII, p. 27). There is a clear remedy, the military judge did not explore, for the prosecutor's failures: excusing the trial counsel from the case. New counsel, who would conceptually be unfamiliar with the case and have limited time to prepare, would put the government in the same position as the defense counsel with respect to time with the evidence in the case. *See United States v. Morrison*, 449 U.S. 361, 364 (1981) (noting any action taken "had to be tailored to the injury suffered") (internal quotations omitted).

The military judge's decision to dismiss this case was not just under the circumstances. Lesser, less drastic, remedies would have cured the error and been just under the circumstances. By dismissing the case, the judge selected an extreme option that prevented the adjudication of a court-martial for an attempted sexual abuse of a child. The ruling was inappropriate and unjust. This court should reverse.


Conclusion

WHEREFORE, the United States respectfully requests this honorable court grant its appeal and vacate the military judge's ruling.



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CERTIFICATE OF SERVICE, U.S. v. DELISFORT (Misc 20240488)

I certify that a copy of the foregoing was sent via electronic submission to the
Defense Appellate Division at [REDACTED]

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