IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Allyssa K. SIMMERMACHER Hospital Corpsman Third Class (E-4) United States Navy, Appellant	BRIEF ON BEHALF OF APPELLANT Crim.App. Dkt. No. 201300129 USCA Dkt. No. 14-0744/NA

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

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Issue Presented

WHEN THE GOVERNMENT DESTROYS EVIDENCE ESSENTIAL TO A FAIR TRIAL, THE RULES FOR COURTS-MARTIAL REQUIRE THE MILITARY JUDGE TO ABATE THE PROCEEDINGS. HERE, THE GOVERNMENT NEGLIGENTLY DESTROYED THE SOLE PIECE OF EVIDENCE THAT PROVIDED THE BASIS FOR HM3 SIMMERMACHER'S CONVICTION PRIOR TO BOTH THE REFERRAL OF CHARGES AND THE ASSIGNMENT OF DEFENSE COUNSEL. SHOULD THE MILITARY JUDGE HAVE ABATED THE PROCEEDINGS?

Statement of Statutory Jurisdiction

Hospital Corpsman Petty Officer Third Class (HM3) Allyssa K. Simmermacher, U.S. Navy, received an approved court-martial sentence that included a punitive discharge. Her case fell within the Article 66(b)(1), UCMJ, 10 U.S.C. § 866(b)(1) (2012), jurisdiction of the Navy-Marine Corps Court of Criminal Appeals (NMCCA). She invokes this Court's jurisdiction under Article 67, UCMJ, 10 U.S.C. § 867 (2012).

Statement of the Case

A general court-martial, consisting of members with enlisted representation, convicted HM3 Simmermacher, contrary to her pleas, of one specification of false official statement and one specification of wrongful use of a controlled substance in violation of Articles 107 and 112a, UCMJ, 10 U.S.C. §§ 907, 912a.[1] HM3 Simmermacher was sentenced to a reduction to pay-grade

[1] JA at 220.

E-3 and a bad-conduct discharge.[2] The Convening Authority approved the adjudged sentence, and, except for the bad-conduct discharge, ordered the sentence executed.[3]

On May 29, 2014, the NMCCA affirmed the findings and sentence.[4] On August 14, 2014, HM3 Simmermacher filed a Petition for Grant of Review with this Court. On November 5, 2014, this Court granted review of HM3 Simmermacher's case and ordered briefing.

Statement of the Facts

On March 7, 2011, HM3 Simmermacher was ordered to provide a urine sample for random urinalysis testing for her command.[5] On March 14, 2011, Navy Drug Screening Lab, Jacksonville (NDSL JAX) notified her command that her urine contained cocaine metabolite above the allowable Department of Defense (DoD) levels.[6] NDSL JAX also notified her command that, per DoD policy, the urine sample would be destroyed on March 16, 2012—which it was.[7] Despite this, the Government preferred charges on March 28, 2012, twelve days after the sample had been destroyed.[8]

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[2] JA at 222.
[3] JA at 219.
[4] *United States v. Simmermacher*, No. 201300129, 2014 CCA LEXIS 334 (N-M. Ct. Crim. App. May 29, 2014).
[5] JA at 123.
[6] JA at 213.
[7] JA at 122.
[8] JA at 6.

The Government provided initial discovery to the defense on April 3, 2012.[9] Defense counsel was assigned to the case on April 6, 2012.[10] On June 18, 2012, defense counsel requested to have the urine sample retested at an independent laboratory.[11] On 10 July, 2012, the Government notified the defense that the sample had been destroyed on or about March 16, 2012.[12] Thus, defense counsel had no opportunity to inspect the evidence, examine it, retest it, or verify the lab accession number.[13]

These dates are illustrated in the following timeline:

Mar 7, 2011 – urine sample collected

Mar 14, 2011 - command was informed that sample was positive and that it would be destroyed on March 16, 2012

Mar 16, 2012 - sample destroyed

Mar 28, 2012 - charges preferred

Apr 3, 2012 - government provided initial discovery

Apr 6, 2012 - defense counsel detailed

Jun 18, 2012 - defense counsel asked for retest of sample

Jul 10, 2012 - government notifies defense that sample was destroyed on or about March 16, 2012

HM3 Simmermacher's command was on notice for twelve months that the primary evidence for its case would be destroyed. The

[9] JA at 52; *see* JA at 6 (charges preferred on March 28, 2012).
[10] *Id*.
[11] JA at 189-90.
[12] JA at 207.
[13] JA at 18.

Government could easily have prevented its destruction by simply submitting a letter to NDSL JAX requesting an extension.[14] The Government failed to submit such a request.

At trial, the defense moved to suppress the drug lab report.[15] The military judge denied the motion.[16] Instead, he gave an instruction allowing the members to "infer the missing evidence would have been adverse to the prosecution."[17] After receiving the lab report and this instruction, the members convicted HM3 Simmermacher of wrongful use of a controlled substance.

Summary of Argument

The Government's case depended entirely on whether HM3 Simmermacher's March 7, 2011, urine sample contained cocaine metabolite in excess of the Department of Defense (DoD) standards. As the sole direct evidence of cocaine use, the urine sample was of central importance to the case. The Government negligently failed to request its preservation. As a result, the only evidence was knowingly destroyed before the defense had the opportunity to request a retest or any kind of independent analysis. Access to this evidence was essential to a fair trial.

[14] JA at 122.
[15] JA at 167-75.
[16] JA at 213-15.
[17] JA at 115, 216-17.

For this reason, the military judge was required to either abate the proceedings or suppress the Government's lab report.

Argument

THE PROCEEDINGS SHOULD HAVE BEEN ABATED BECAUSE THE DESTROYED EVIDENCE WAS ESSENTIAL TO A FAIR TRIAL, THERE WAS NO ADEQUATE SUBSTITUTE, AND ITS DESTRUCTION COULD NOT HAVE BEEN PREVENTED BY THE DEFENSE.

Standard of Review

This Court reviews a military judge's ruling on a motion to suppress for an abuse of discretion.[18] A military judge abuses his discretion if his conclusions of law are incorrect.[19] This Court reviews a military judge's conclusions of law de novo.[20]

Discussion

An accused is entitled to have access to both exculpatory and inculpatory evidence under Article 46, UCMJ.[21] R.C.M. 703(f)(2) governs destroyed, lost, or otherwise unavailable evidence and states, in pertinent part:

> [I]f such evidence is of such central importance to an issue that it is essential to a fair trial, and if there is no adequate substitute for such evidence, the military judge shall grant a continuance or other relief in order to attempt to produce the evidence or shall abate the proceedings, unless the unavailability of the evidence is the fault of or could have been prevented by the requesting party.

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[18] *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995).
[19] *Id*.
[20] *Id*.
[21] 10 U.S.C. 846 (2012)(JA at 227-28); *United States v. Kern*, 22 M.J. 49, 51 (C.M.A. 1986); *see also* R.C.M. 703(f)(1) (JA at 227-28).

This rule goes "even further than the Constitution and the Uniform Code in providing a safeguard for military personnel."[22] Under both Article 46 and the Constitution, an accused is generally required to show that lost or destroyed evidence "possessed an exculpatory value that was or should have been apparent to the Government before it was lost or destroyed and that he is unable to obtain comparable evidence by other reasonably available means."[23] But R.C.M. 703(f)(2) does not require such a showing.[24]

R.C.M. 703(f)(2) requires relief when: (1) the lost or destroyed evidence is of such central importance to an issue that it is essential to a fair trial, (2) there is no adequate substitute for such evidence, and (3) the unavailability of the evidence could not have been prevented by the requesting party.[25]

A. The destroyed urine sample was essential to a fair trial because it was the only direct evidence of cocaine use.

In *United States v. Manuel*, this Court found that a destroyed urine sample was essential to a fair trial in a drug-

[22] *United States v. Manuel*, 43 M.J. 282, 288 (C.A.A.F. 1995).
[23] *Id*. (quoting *United States v. Kern*, 22 M.J. 49, 51-52 (C.M.A. 1986)).
[24] *Manuel*, 43 M.J. at 288-89.
[25] *See Manuel*, 43 M.J. at 288-89; *United States v. Madigan*, 63 M.J. 118, 121 (C.A.A.F. 2006).

use prosecution.[26] In that case, the appellant was convicted of using cocaine based solely on a urinalysis test.[27] The appellant's urine sample was subjected to three rounds of testing—twice using radioummunoassay (RIA) screening and once using gas chromatography/mass spectrometry (GC/MS).[28] The results showed a reading of 242 ng/ml of the cocaine metabolite benzoylecgonine, which was 92 ng/ml above the Department of Defense cutoff of 150 ng/ml.[29]

Roughly five months after notification of the positive result, appellant's defense counsel requested a government retest of the sample and an independent retest by a private laboratory.[30] The retests would have allowed the appellant to (1) reevaluate the presence of cocaine metabolite, (2) test for adulteration of the sample with raw cocaine, and (3) test whether the sample matched the appellant's blood type.[31] These requests were denied because the urine sample had already been destroyed in violation of service regulations requiring that

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[26] 43 M.J. at 288-89; *see also United States v. Seton*, No. 2013-27, 2014 CCA Lexis 103, *11 (A.F. Ct. Crim. App. Feb. 24, 2014), *aff'd*, No. 14-6008/AF, 2014 C.A.A.F. Lexis 565 (May 12, 2014) (holding that surveillance videos showing interactions between appellant and alleged victim before and after alleged sexual assault would have provided a basis for impeachment and were therefore essential to a fair trial)(JA at 229-34).
[27] *Manuel*, 43 M.J. at 284.
[28] *Id.*
[29] *Id*.
[30] *Id*.
[31] *Id*.

positive samples be preserved for one year after the testing date.[32]

In concluding that the Government violated the appellant's right to essential evidence under R.C.M. 703(f)(2), this Court focused its attention on the service directives requiring retention of positive samples.[33] While such regulations are designed to ensure reliable evaluation of urine samples,

> [T]hey are not for the exclusive benefit of the Government. Rather the regulations relating to retention of the urine sample guarantee an accused's Article 46 right of the opportunity to discover evidence.
>
> Thus, these regulations reflect the attempt to operate the urinalysis program in a manner consistent with the protections with which Congress has clothed servicemembers. They increase confidence of servicemembers in a fair testing process, which is a cornerstone of legitimacy for the urinalysis program. We consider that the retention requirement is not merely for management purposes but is also to protect the statutory right of each servicemember's access to evidence.[34]

The Court went on to find that "[a]s the urinalysis result was the only evidence of the accused's wrongful use of cocaine, the urine sample was of central importance to the defense."[35] The loss of the sample was "particularly significant" because of the relatively low level of cocaine metabolite, the fact that the

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[32] *Manuel*, 43 M.J. at 284-85.
[33] *Id*. at 286-88.
[34] *Id*. at 287 (internal citations omitted).
[35] *Id*. at 288.

appellant denied having used cocaine, and the appellant's sincere desire to obtain an independent retest.[36]

Here, even though the Government did not violate its own policies as it did in *Manuel*, the prejudice to the accused is identical. If the service regulations are designed in part to guarantee an accused's right to discover evidence, that right cannot disappear simply because the Government chooses to delay preferring charges until after the regulatory retention period expires. For HM3 Simmermacher, the situation is the same as in *Manuel*: the Government denied her an opportunity to prepare a complete defense before it even preferred charges.

In this case, as in *Manuel*, the drug screening lab report was the sole direct evidence of cocaine use.[37] The report indicated a cocaine metabolite level of 151 ng/ml, which was 51 ng/ml above the DoD cutoff. As soon as HM3 Simmermacher was notified of the positive result, she denied ever using cocaine.[38] She also asked to submit another urine sample and to take a polygraph test.[39]

The lab report and the testimony of the drug screening lab's expert also indicates there was a "bar code read error"

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[36] *Manuel*, 43 M.J. at 288-89.
[37] The only other evidence presented on the drug-use charge was testimony from Mr. Cameron Davis, HM3 Simmermacher's ex-boyfriend, which was admitted to show alleged consciousness of guilt. (JA at 104-12, 115).
[38] JA at 62.
[39] JA at 166, 186-87.

when the lab processed HM3 Simmermacher's urine sample.[40] This error required a lab technician to verify the sample and notate the accession number by hand.[41]

In destroying the urine sample, the Government denied HM3 Simmermacher the opportunity to contest: (1) that the accession number on the sample subjected to the GC/MS test matched the number initially assigned to her sample; (2) that there was no contamination of the sample at the lab; (3) that that the urine sample matched HM3 Simmermacher's DNA; and (4) that the cocaine metabolite reading was accurate.

Both the military judge and the lower court noted in their rulings the testimony of the defense expert on the motion to suppress the lab report.[42] The expert stated that he would have expected a retest of the sample to result in a slightly lower level of cocaine metabolite, but not below the Department of Defense cutoff level.[43] The lower court's and military judge's reliance on this statement in their R.C.M. 703(f)(2) rulings shows a fundamental misunderstanding of the value of a retest. It assumes the initial testing was accurate and that there was no adulteration or misidentification of the sample.[44] It is this very assumption the defense was prevented from exploring when

[40] JA at 157, 98-99.
[41] JA at 98-99.
[42] JA at 3, 213.
[43] JA at 46.
[44] JA at 44-46.

the Government destroyed the urine sample. This misunderstanding also highlights why this evidence was so essential to a fair trial.

To allow HM3 Simmermacher's conviction to stand under such circumstances not only undermines servicemembers' confidence in the fairness of the urinalysis program, it undermines the fundamental fairness of the military justice system.

B. There was no adequate substitute for the destroyed urine sample.

In contrast to this case and *Manuel* is *United States v. Ellis*.[45] In *Ellis*, this Court affirmed the appellant's conviction for involuntary manslaughter and assault upon a child after the appellant's infant son died of blunt-force trauma to the head.[46] The Government's theory was that the appellant inflicted the trauma four days prior to the child's death.[47]

The defense contended that either the daughter inflicted the fatal injuries several weeks earlier with a baseball bat, or that the victim's self-abusive head-banging behavior caused his own death.[48] The appellant was unable to fully develop and present that defense because the Government discarded the

[45] 57. M.J. 375 (C.A.A.F. 2002).
[46] *Id*. at 376-77.
[47] *Id*. at 379.
[48] *Id*. at 380.

child's brain. No independent examination of the evidence was possible.[49]

The military judge denied appellant's requests under R.C.M. 703(f)(2) to dismiss the charges or to give an adverse inference instruction to the members. On appeal, this Court ultimately affirmed the conviction on other grounds. However, in *dicta*, this Court noted that relief under R.C.M. 703(f)(2) was not required because there were adequate substitutes for the destroyed evidence.[50] The defense experts were able to examine the x-rays, CAT scans, and medical records to form an opinion as to the timing and cause of death.[51] The defense also submitted substantial evidence that there was in fact a pre-existing injury to the child's brain and that re-bleeding of that injury caused his death.[52]

This case is fundamentally different from *Ellis*. In *Ellis*, there was ample additional evidence the defense could use to support its alternative theory of the case. Most importantly, the defense had access to the same medical information the Government used in formulating its theory, and those materials were open to interpretation by the defense expert. Access to the destroyed evidence would, at best, have allowed the defense to

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[49] *Id*. at 379.
[50] *Ellis*, 57 M.J. at 379.
[51] *Id*.
[52] *Id*.

bolster its theory. In this case, there was no such additional evidence. The lab report was the only evidence provided to the defense, and ultimately to the members. The report was conclusory and not subject to interpretation or inspection.

Unlike in *Ellis*, defense counsel here could not seek an interpretation of the data produced on the NDSL JAX lab report. This is because the relevant question was how that data came to exist on the lab report, not the data displayed on the report. In essence, defense counsel was denied the ability to challenge the foundation of the report, which was the sole evidence in the case. In order to properly defend the case, access to the sample was required. Without access to the actual sample, the defense had no ability whatsoever to challenge the Government's conclusions. Under these circumstances, HM3 Simmermacher's fate was sealed as soon as the lab report was admitted.

C. The destruction of the urine sample could not have been prevented by the defense.

In *United States v. Madigan*, this Court again addressed a challenge to a drug-use conviction that rested on the results of a laboratory screening.[53] In that case, a sample of appellant's blood tested positive for diazepam.[54] The sample was inadvertently destroyed less than two months later, in violation of service regulations requiring retention of positive samples

[53] 63 M.J. 118, 118-19 (C.A.A.F. 2006).
[54] *Id*. at 119.

for two years.[55] Over the next two years, appellant was the subject of multiple investigative and disciplinary proceedings relating to the positive test.[56] Appellant was represented by counsel throughout these proceedings.[57] However, appellant never requested a retest or access to the sample until after the mandatory two-year retention period had expired.[58]

This Court rejected appellant's assertion that the military judge should have dismissed the charge for drug use under R.C.M. 703(f)(2):[59]

> In the context of the destruction of evidence under a regulatory schedule that is not under challenge, the Government is not responsible for ensuring the availability of the evidence after the authorized destruction date in the absence of a timely request for access or retention. Without such a request, *the responsibility for the unavailability of the evidence rests with the party that failed to make the request that could have prevented the destruction*.[60]

Although the sample was destroyed prematurely, the defense was not impeded because it failed to make a timely request for preservation.[61] This Court limited its ruling to the specific circumstances of that case, however, and emphasized that:

> Different considerations might apply in other circumstances, such as when . . . a party demonstrates that, in a particular case, the period between notice

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[55] *Id*.
[56] *Madigan*, 63 M.J. at 121.
[57] *Id*.
[58] *Id*. at 119.
[59] *Id*. at 121-22.
[60] *Id*. at 121 (emphasis added).
[61] *Id*.

> to the party of the test result and destruction of the evidence did not provide the party with reasonable time within which to request access to the evidence.[62]

Here, the responsibility for the unavailability of the evidence rests only with the Government. By the time HM3 Simmermacher was notified of charges against her, the Government had already destroyed the evidence. She was never informed prior to the assignment of defense counsel that retesting or access to the sample was even a possibility. The Government, on the other hand, was on notice a year in advance that the sample would be destroyed, and could easily have prevented the destruction of the sample with a simple written request. Both the military judge and the lower court found the Government to be negligent in failing to make such a request.[63] Under R.C.M. 703(f)(2), the Government must be held accountable for its failure to preserve this essential evidence.

D. Abatement of the proceedings or suppression of the lab report was the only appropriate remedy.

In *Manuel*, this Court expressly reserved judgment as to whether suppression was required as a matter of law, going only so far as to hold that the Air Force Court of Military Review did not abuse its discretion in ruling that the incriminating lab report should have been suppressed.[64] But the lower court's

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[62] *Madigan*, 63 M.J. at 121-22.
[63] JA at 3, 215.
[64] 43 M.J. at 289.

remedy in *Manuel* was the only remedy that accords with the plain meaning of R.C.M. 703(f)(2).

Under the pertinent part of this rule, when the unavailable evidence "is of such central importance to an issue that it is essential to a fair trial, . . . the military judge [1] shall grant a continuance or other relief *in order to attempt to produce the evidence* or [2] shall abate the proceedings."[65] When, as in both *Manuel* and this case, the unavailable evidence is destroyed and cannot be produced, abatement is the only relief available to the military judge.

In this case, the military judge abused his discretion when he failed to properly apply this court's precedent from *Manuel.*[66] He applied only the Article 46, UCMJ, analysis and did not reach the question of whether HM3 Simmermacher had a right to the destroyed sample under R.C.M. 703(f)(2).[67] He nonetheless instructed the members they could infer the destroyed evidence would have been adverse to the prosecution.[68]

On appeal, the lower court also failed to properly apply *Manuel* when it held that R.C.M. 703(f)(2) is analyzed no differently than the constitutional due process standards.[69] It further held that the military judge's instruction to the

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[65] JA at 226 (emphasis added).
[66] JA at 213-15.
[67] *Id*.
[68] JA at 216-17.
[69] JA at 3.

members was an appropriate remedy for any error and was "arguably more helpful to the appellant's case" than access to the sample would have been.[70]

The proposition that any remedy other than abatement of proceedings could be appropriate when evidence that is *essential to a fair trial* is destroyed is fundamentally flawed. However, if other alternative remedies could be appropriate under certain circumstances, the military judge's instruction was in no way adequate in this case. The Government's entire case rested on the validity of the lab report admitted at trial; and the members' belief in the validity of that report is tantamount to a finding of guilt for HM3 Simmermacher. Simply telling the members that they *may* find that the lost evidence would have been adverse to the Government is essentially telling them that they *may* disregard the lab report entirely.

Without any comparable forensic evidence from the defense regarding the destroyed urine sample, no reasonable juror could draw such an inference. The lower court's statement that the military judge's instruction was "arguably more beneficial" is telling in this regard, as this already assumes the lab report was accurate and unimpeachable. The members clearly made the same assumption after they heard a mountain of testimony from

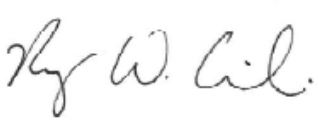
[70] JA at 3.

the Government's expert about their impeccable and precise procedures.[71] It is precisely the assumption of the lab report's infallibility that the defense was prohibited from exploring. It could not do so because the Government negligently destroyed the urine sample.

[71] JA at 83-103.

Conclusion

Under the circumstances of this case, no remedy other than suppression of the lab report or abatement of the proceedings could cure the fundamental unfairness of this trial caused by the Government's destruction of essential evidence. The lower court's opinion means the Government can destroy urine samples with impunity and force an accused to trade a defense for a military judge's instruction. Therefore, this Court should set aside HM3 Simmermacher's conviction for the specification under Charge I and remand for reassessment of the sentence.



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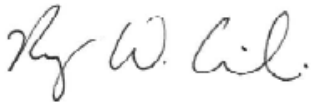

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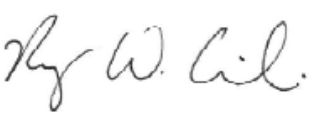

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