IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	BRIEF ON BEHALF OF APPELLEE
v.	)	Crim.App. Dkt. No. 201300129
Allyssa K. SIMMERMACHER, Hospital Corpsman Third Class (E-4) U.S. Navy Appellant	)	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

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2012), because Appellant's approved sentence included a dishonorable discharge and more than one year of confinement. This Court has jurisdiction over this case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

A panel of members with enlisted representation sitting as a general court-martial convicted Appellant, contrary to her pleas, of one specification of wrongful use of cocaine and one specification of false official statement, in violation of Articles 107 and 112(a), UCMJ, 10 U.S.C. §§ 907 and 912(a) (2012). The Members sentenced Appellant to reduction to pay grade E-3 and a bad conduct discharge. The Convening Authority

approved the sentence as adjudged, and except for the punitive discharge, ordered the sentence executed.

The Record of Trial was docketed with the lower court on April 5, 2013. On May 29, 2014, the lower court affirmed the findings and sentence as approved.

Statement of Facts

A. Investigation into allegations that Appellant committed child abuse began in 2009.

In 2009, the Montgomery County Police Department, Maryland, began investigating Appellant for allegations of child abuse of her infant son. (J.A. 162.) In 2010, the Montgomery County Police Department suspended its investigation and the Naval Criminal Investigative Service (NCIS) took over. (J.A. 256.) The child abuse investigation continued as NCIS waited on medical reports from various specialists regarding the extent of a presumed brain injury suffered by Appellant's son. (J.A. 259.)

B. While the child abuse investigation continued, Appellant used cocaine during her pregnancy in 2011. A drug test was confirmed as positive on March 15, 2011.

On March 7, 2011, while seven months pregnant with her second child, Appellant tested positive for 151 nanograms of cocaine metabolite based on two immunoassay tests. (J.A. 32, 122-61.) The Naval Drug Screening Laboratory Jacksonville, Florida (NDSL JAX) confirmed the positive tests by conducting a

gas chromatograph/mass spectrometry (GC/MS) on March 15, 2011. (J.A. 122-61.)

NCIS interviewed Appellant regarding the allegations of child abuse and her cocaine use. (J.A. 164-66.) Appellant denied abusing her son and using cocaine. (J.A. 164-66.)

C. The urine sample was destroyed on March 16, 2012, consistent with Department of Defense policy.

On or about March 16, 2012, in accordance with Department of Defense policy, NDSL JAX destroyed Appellant's urine sample. (J.A. 122.) The Department of Defense policy allowed for destruction of a positive urine sample after twelve months unless an extension is requested. (J.A. 122.)

D. The child abuse investigation completed shortly thereafter, and charges for both child abuse and cocaine use were preferred on March 28, 2012.

Because Appellant tested positive for cocaine use during an active child abuse investigation, charges were preferred at one time, approximately twelve months after Appellant's positive urinalysis. (J.A. 6.) On March 28, 2012, charges were preferred against Appellant. (J.A. 6.) After preferral, counsel learned that Appellant's urine sample was destroyed after the regulatory twelve month preservation period and was not available for re-test. (J.A. 235.)

The Military Judge later severed the drug use charges from the child abuse charges. (J.A. 240.) At trial, the Members

were not allowed to hear that Appellant was seven months pregnant at the time of her positive urinalysis. (J.A. 240-41.)

E. The Military Judge found the United States had followed proper procedures, had not tactically delayed the investigation to avoid retention of the drug sample, and that no discrepancies existed in the drug testing process.

During an Article 39(a) session on Appellant's motion to dismiss based on the destroyed urine sample, Appellant presented testimony from Major Matthew Moser, a forensic toxicologist. (J.A. 29.) He testified that even if an instrument experienced a calibration error, it would only change the test sample by one or possibly two nanograms. (J.A. 46.) He stated that he had reviewed Appellant's entire results package and did not identify any discrepancies with the testing process used to analyze Appellant's urine sample. (J.A. 42.) This was also confirmed by Dr. Bateh, an expert witness for the United States. (J.A. 83, 99-100.)

The Military Judge denied the Defense Motion to Suppress and held that "failure to preserve potentially useful evidence does not violate due process, unless an accused can show bad faith on the part of the government." (J.A. 120.) He specifically addressed "constitutional" due process and "military standards of due process" under R.C.M. 703(f)(1) and (2). (J.A. 213-15.) He found that: (1) there was no evidence of any breakdown in the handling of Appellant's urine sample at

the unit level; (2) the United States did not act in bad faith in not preserving the urine sample; (3) the Defense failed to show that retesting the original sample held any exculpatory value; and (4) the bar code discrepancy on Appellant test label actually required a higher level of scrutiny from the lab. (J.A. 213-15.) Additionally, the Military Judge stated that the sample was destroyed "consistent with regulations." (J.A. 57.)

F. The Military Judge instructed the Members that because the sample was destroyed, they could infer the evidence would have been adverse to the prosecution.

The Military Judge, to address the destroyed urine sample, instructed the Members that they

> [M]ay infer from the positive urinalysis test, for the presence of cocaine, that the accused knew she used cocaine. However, drawing of any inference is not required. Because the sample was destroyed after 1 year, you may infer that the missing evidence would have been adverse to the prosecution. However, you are not required to draw this inference.

(J.A. 114-15.)

Argument

APPELLANT FAILS TO DEMONSTRATE CONSTITUTIONAL ERROR BY PROVING (1) THE DESTROYED SAMPLE WAS EXCULPATORY AND (2) THAT THERE WAS NO ALTERNATE MEANS OF DEMONSTRATING INNOCENCE. SIMILARLY, APPELLANT DEMONSTRATES NO R.C.M. 703(f)(2) ERROR AS SHE TO PROVE (1) THE EVIDENCE WAS OF CENTRAL IMPORTANCE AND (2) THERE WAS NO ADEQUATE SUBSTITUTE. FINALLY, APPELLANT FAILS TO DEMONSTRATE "BAD FAITH" AS THE EVIDENCE WAS NOT EVIDENCE ESSENTIAL TO A "FAIR TRIAL," AND SHE FAILS TO DEMONSTRATE SPECIFIC PREJUDICE.

A. Standard of review.

The denial of an evidentiary suppression motion is reviewed for abuse of discretion. *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004). Review of a judge's choice of a remedy for lost or destroyed evidence is also reviewed for abuse of discretion. *United States v. Kern*, 22 M.J. 39, 51 (C.M.A. 1986) ("Determination of an appropriate remedy is left to the sound discretion of the trial judge.").

A military judge abuses his discretion if his "findings of fact are clearly erroneous or his conclusions of law are incorrect." *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995).

B. There is no deprivation of constitutional due process where no bad faith caused the destruction of Appellant's urine sample, and Appellant fails to show the evidence was exculpatory and that she was unable to obtain comparable evidence.

The "duty the Constitution imposes . . . must be limited to evidence that might be expected to play a significant role in the suspect's defense." *Kern*, 22 M.J. at 51. Absent bad faith, the "burden is upon an accused to show" that the evidence (1) "possess[ed] an exculpatory value that was apparent before the evidence was destroyed," and (2) "[was] of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Kern*, 22 M.J. at 51-52; *California v. Trombetta*, 467 U.S. 479, 488-90 (1984); *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988); *see Illinois v. Fisher*, 540 U.S. 544 (2004).

1. The Military Judge acted within his discretion in finding no bad faith on the part of the United States.

The issue of "good or bad faith of the Government" is central to the constitutional analysis where there is "a claim . . . based on loss of evidence attributable to the Government." *Youngblood*, 488 U.S. at 57. "[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Id*. at 58; *see Fisher*, 540 U.S. at 548 (applying the *Youngblood* bad-faith requirement).

Here, a Department of Defense Instruction directs the destruction of positive urine samples after twelve months, unless an extension has been requested. (J.A. 122.) Appellant's command was notified of the positive urine sample on March 14, 2011, and received the report on April 11, 2011. (J.A. 122.) The sample was destroyed, consistent with Department of Defense regulations, over twelve months after notification. (J.A. 122, 213.)

After finding that the urine sample was destroyed consistent with regulations, the Military Judge properly found the United States' inaction to preserve the sample did not amount to "bad faith" because the "investigative focus" of the Government had been "on [Appellant's] child abuse charges". (J.A. 215); *see United States v. Simmermacher*, No 201300129, 2014 CCA LEXIS 334, *9 (N-M. Ct. Crim. App. May 29, 2014) (noting Military Judge's finding of no bad faith).

2. The Military Judge did not abuse his discretion in finding that Appellant failed to demonstrate the evidence was exculpatory. Three separate tests confirmed the presence of drugs in the sample.

The burden, under a constitutional analysis, is likewise on an appellant to show that the destroyed evidence was exculpatory. *Kern*, 22 M.J. at 51. The *Fisher* Court distinguished between "material exculpatory" evidence and "potentially useful" evidence, the latter of which does not

implicate constitutional due process. *Fisher*, 540 U.S. at 549. When dealing with "potentially useful" evidence, no automatic duty to preserve the evidence exists. *Id*; *Youngblood*, 488 U.S. at 58.

The *Trombetta* decision, in addressing the destruction of breath samples, noted that based on the testing procedures, one could only "conclude that the chances are extremely low that preserved samples would have been exculpatory." *Trombetta*, 467 U.S. at 489. Those "samples were much more likely to provide inculpatory than exculpatory evidence." *Id*; s*ee Fisher*, 540 U.S. at 548 (finding that "[a]t most, [appellant] could hope that, had the evidence been preserved, a fifth test on the substance would have exonerated [her].").

Similarly here, the testing procedures on Appellant's urine sample were much more likely to provide inculpatory evidence as three tests had all confirmed the inculpatory nature of the urine sample. (J.A. 122-61.) This conclusion was confirmed by the Defense expert, Major Moser, when he stated that retesting Appellant's urine sample would result in a decrease of one or two nanograms at most. (J.A. 46.) He further testified that he reviewed the entire litigation package and found no error that would adversely affect the accuracy of the testing process. (J.A. 42.) Dr. Bateh later verified this opinion at trial. (J.A. 99-100.)

Moreover, by failing, as she must, to point to any exculpatory value, Appellant implicitly concedes that destruction of the urine sample violated neither the Constitution nor Article 46, UCMJ. (Appellant's Br. at 6.)

As the Military Judge found, Appellant failed to demonstrate that the urine sample was materially exculpatory. (J.A. 213-15.) He further stated that "[b]ased on the evidence it is unlikely the defense would have met the burden for even a retest at the government's expense" because the production of the urine sample was neither relevant nor necessary to a fair trial as it held no exculpatory value. (J.A. 215.) There was no compulsory right to evidence because that is limited to relevant and necessary evidence under R.C.M. 703(f)(1).

As the lower court properly found, "the destroyed sample, at best, met the definition of 'potentially useful evidence,' which includes evidence 'of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated [Appellant].'" *United States v. Simmermacher*, No 201300129, 2014 CCA LEXIS 334, *8 (N-M. Ct. Crim. App. May 29, 2014) (quoting *Fisher*, 540 U.S. at 547-48 (internal quotation and citation omitted)).

Appellant fails to meet this burden, thus has no right to relief.

3. Appellant fails to prove an inability to use alternate means of demonstrating her innocence.

In *Trombetta*, the United States failed to preserve breath samples, but the test results were nonetheless properly admissible as evidence that the appellants drove while intoxicated. 467 U.S. at 481. In finding the appellants had "alternative means of demonstrating their innocence", the Court found that an appellant is always free to attack the credibility of a case, including testing mechanisms, without the actual sample. *Id*. at 489.

Where chemical test results are at issue, an appellant may, *inter alia*, introduce evidence of "faulty calibration, extraneous interference with machine measurements, and operator error." *Id*. Further, an appellant "retains the right to cross-examine the [witness] who administered the . . . test, and to attempt to raise doubts in the mind of the factfinder whether the test was properly administered." *Id*.

As in *Trombetta*, Appellant here had alternate means of proving her innocence. She had equal access to all information in the litigation package and every prosecution witness prior to trial. At trial, Appellant engaged in a rigorous cross-examination of the United States' witnesses and attacked the credibility of (1) those responsible for the chain of custody of

the urine sample, (2) the NDSL JAX testing procedures, and (3) Mr. Davis' "consciousness of guilt" testimony. (J.A. 243-55.)

As Appellant was able to use alternate means to demonstrate her innocence, she is entitled to no relief.

C. The requirements of R.C.M. 703(f)(2) were likewise met. Appellant fails to demonstrate: (1) the evidence was "of such central importance . . . that it [was] essential to a fair trial"; and (2) there was "no adequate substitute" for the evidence.

Article 46, UCMJ, provides that the 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." Under this delegation, the President promulgated R.C.M. 703(f)(2), which addresses lost or destroyed evidence.

Under R.C.M. 703(f)(2), the defense is not entitled to production of lost or destroyed evidence. However:

> [(1)] if such evidence is of such central importance to an issue that is essential to a fair trial, and [(2)] if there is no adequate substitute for such evidence, [then (3)] the military judge shall grant a continuance or other relief in order to attempt to produce the evidence or shall abate the proceedings, [(4)] unless the unavailability of the evidence is the fault of or could have been prevented by the requesting party.

R.C.M. 703(f)(2).

1. Appellant's urine sample was not of central importance to an issue that was essential to a fair trial" under the sparse extant precedent.

Only a handful of cases have addressed what R.C.M. 703(f)(2) means when it discusses evidence of "central importance to an issue that is essential to a fair trial." Foremost among them is *United States v. Manuel,* 43 M.J. 282 (C.M.A. 1995).

In *Manuel*, the Court found that the "gross negligence" of the Government in destroying the urine sample prior to its own regulations "was particularly significant here, as there was a genuine controversy as to nanogram level in the specimen." *Manuel*, 43 M.J. at 288. The appellant also testified on the merits and denied using cocaine. *Id*. The *Manuel* court, under "the narrow facts of [that] case," found that the appellant "raised a viable issue as to the accuracy of the urinalysis results." *Id*. at 289. The Court further reasoned that based on the "complete lack of accountability for the urine sample" and as "the urinalysis was the only evidence of the accused's wrongful use of cocaine, the urine sample was of central importance to the defense." *Id*. at 288.

Unlike the facts in *Manuel*, there was no evidence here that contradicted the urinalysis results, Appellant did not testify on the merits, and there was no genuine controversy as to the nanogram level. In fact, Appellant's own expert witness

testified that he found no error that would adversely affect the accuracy of the testing process and that a retest would result in simply a one or two nanogram reduction at most. (J.A. 46.) Moreover, as noted *supra*, a retest of the urine sample here was much more likely to provide inculpatory evidence as three tests had all confirmed the inculpatory nature of the urine sample. (J.A. 213-15.)

With no genuine controversy over the accuracy of the urinalysis results and no evidence introduced by Appellant to contradict those results or raise genuine doubt, the urine sample was not of central importance to an issue that was essential to a fair trial.

2. In addition, in situations like this one, this Court should interpret "essential to a fair trial" to incorporate constitutional due process standards for a "fair trial" into this Rule, requiring bad faith where evidence is destroyed pursuant to regulations, but an accused has no chance to object.

In *United States v. Madigan,* 63 M.J. 117, 121 (C.A.A.F. 2006), the Court noted that: "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." However, the *Madigan* court noted that "different considerations" might apply when: (1) a party seeks access or retention within a

regulatory retention period; (2) a party demonstrates the regulatory retention period was "so short" that it "did not permit a reasonable opportunity to request access"; and, (3) a party demonstrates that "the period between notice . . . and destruction . . . did not provide the party a reasonable time within which to request access." *Id.* at 121-22.

Until today, this Court has not revisited this dicta from *Madigan*. Arguably, this case presents a fourth scenario: although Appellant here was notified of the evidence a year *prior* to destruction, Appellant was not assigned counsel and charged until *after* the destruction of evidence. Arguably, Appellant would not have thought to request retention until after charges were preferred.

But the Rule's words "fair trial" must mean something. *See United States v. Janssen,* 73 M.J. 221, 224 (C.A.A.F. 2014) ("Words have meaning..."). "Fair trial" is language similar to that already defined in the constitutional due process analysis of lost and destroyed evidence: *Trombetta* says that "fundamental fairness" means the "meaningful opportunity to present a complete defense"; and *Trombetta* further finds no deprivation of fundamental fairness when evidence is destroyed in "good faith and in accord with their normal practices." 467 U.S. at 485, 487-88. In this fourth scenario, this Court should decline to

find the evidence either essential to a fair trial, or to require abatement.

Thus to the extent this case presents a fourth scenario under the dicta in *Madigan,* this Court should hold: under R.C.M. 703(f)(2), when evidence is destroyed or lost prior to charging an accused and consistent with regulations, and the regulatory scheme is not challenged, absent bad faith in the destruction or loss, (a) the lost or destroyed evidence is not "essential to a fair trial," and (b) there is no abuse of discretion in a judge declining to abate the proceedings or exclude evidence.

3. The litigation packet, which included, *inter alia,* the non-testimonial results of the three positive tests, was an adequate substitute for the destroyed evidence.

Little caselaw squarely resolves what an "adequate substitute" is for purposes of R.C.M. 703(f)(2). *See Madigan,* 63 M.J. at 121 (holding the circumstances of the case eliminated the need to determine whether an "adequate substitute" existed); *United States v. Ellis,* 57 M.J. 375, 382 (C.A.A.F. 2002) (finding existence of a voluntary confession rendered harmless beyond a reasonable doubt, and unnecessary to decide, any R.C.M. 703(f)(2) error from loss of the brain of the deceased child).

In other contexts, this Court has defined "adequate substitute" as reasonably similar and left to the discretion of the military judge. *See United States v. Warner,* 62 M.J. 114

(C.A.A.F. 2005) (finding that "adequate substitute" under R.C.M. 703(d) for defense-requested expert "is a fact-intensive determination that is committed to the military judge's sound discretion" to determine if reasonably similar qualifications).

But this Court should hold that whether evidence is an "adequate substitute" is as fact-specific as what is "central" and "essential to a fair trial" and within the discretion of the military judge.

Here, not only was the evidence not "central," as it was in *Manuel*——but also, unlike *Manuel,* the evidence here had an adequate substitute. The *Manuel* court found that "the accused raised a viable issue as to the accuracy of the urinalysis results" given that (a) the accused testified on the merits, denying use of cocaine, and (b) the "sample presented a relatively low level of metabolite... close to the . . . cutoff." 43 M.J. at 284, 288-89. Each of these facts "raised a viable issue as to the accuracy of the urinalysis results." *Id.* at 289.

In contrast, here Appellant raises no more than post-trial speculation as to what "might have been." First, Appellant did not, as was her right, testify on the merits to call into question the test results. Second, the tests were verified three times. Third, unlike *Manuel*, there was no "gross negligence" that could suggest other mishandling of evidence.

Instead, and significantly, non-testimonial laboratory evidence of drug use *of the sort routinely used to convict accuseds* was admitted into evidence in the form of a litigation package, and attacked by Appellant. *See, e.g., United States v. Tearman,* 72 M.J. 54 (C.A.A.F. 2013). The litigation package included: computer generated results of three positive tests performed by NDSL JAX; the details surrounding the tests; and the resulting nanogram level in Appellant's urine. (J.A. 123-61.) Appellant and her expert witness had access to the litigation package prior to and during trial. (J.A. 29.) Under these circumstances, such laboratory results should be held to be an "adequate substitute" for the purposes of R.C.M. 703(f)(2).

In addition to being provided adequate substitute evidence, Appellant was free to attack the evidence and credibility of the case without the actual urine sample. Appellant engaged in a rigorous cross-examination of witnesses to raise doubts in the mind of the Members. She cross-examined those responsible for the chain of custody of the urine sample. (J.A. 243-55.) She attacked the NDSL JAX testing procedures. (J.A. 243-55.) She was also provided her own expert that testified during her case-in-chief. (J.A. 29.)

The litigation package and other evidence provided an adequate substitute for the urine sample, thus the Military

Judge did not abuse his discretion in denying further remedy under R.C.M. 703(f)(2).

D. Even assuming a violation of R.C.M. 703(f)(2), the Military Judge did not abuse his discretion in fashioning a remedy. He properly gave the Members a permissive adverse instruction to remedy the destruction of the positive urine sample.

R.C.M. 703(f)(2) "gives the court *discretion* to fashion an *appropriate* remedy if lost evidence is of such central importance to an issue that it is essential to a fair trial." *Manuel,* 43 M.J. at 288 (internal quotation omitted); *see Madigan*, 63 M.J. at 121. "Determination of an appropriate remedy is left to the sound discretion of the trial judge." *Kern*, 22 M.J. at 52.

Precedent interprets R.C.M. 703(f)(2) for the proposition that abatement is not the only remedy available to remedy destroyed evidence. *See* R.C.M. 703(f)(2) ("a military judge shall grant a continuance or other relief in order to attempt to produce the evidence or shall abate the proceedings".). *See also Ellis*, 57 M.J. at 380 (finding that "adverse inference instruction is an appropriate curative measure for improper destruction of evidence.").

In *Youngblood*, the Government negligently destroyed semen samples prior to trial. *Youngblood*, 488 U.S. at 58. As a remedy, the trial court "instructed the jury that if they found the State had destroyed or lost evidence, they might infer that

the true fact is against the State's interest." *Id*. at 54 (internal quotation and citation omitted). In his concurring opinion, Justice Stevens noted that as a result of the instruction, "the uncertainty as to what the evidence might have proved was turned to the defendant's advantage." *Id*. at 60 (Stevens, J.P., concurring).

Similarly here, after finding that the United States was negligent in destroying Appellant's positive urine sample, the Military Judge instructed the Members in an identical manner. (J.A. 114-15.) He instructed:

> Because the sample was destroyed after 1 year, you may infer that the missing evidence would have been adverse to the prosecution. However, you are not required to draw this inference.

(J.A. 115.)

As in *Youngblood*, and as the lower court found here, this remedial instruction was "arguably more helpful to [Appellant]'s case." *United States v. Simmermacher*, No 201300129, 2014 CCA LEXIS 334, *9-10 (N-M. Ct. Crim. App. May 29, 2014).

Having properly analyzed the facts and made conclusions of law under the controlling test, the Military Judge did not abuse his discretion and the denial of the Motion to Suppress should not be disturbed.

E. This Court should require a showing of bad faith before mandating abatement under R.C.M. 703(f)(2) for destroyed evidence that is merely "potentially useful".

The *Kern* court opined that the United States' requirement to preserve evidence which is not apparently exculpatory is not "stricter" in the military "than is required of the states under the Fourteenth Amendment to the Constitution. *United States v. Kern*, 22 M.J. 49, 51 (C.M.A. 1986). Further, the constitutional rule announced in "[*California v.*] *Trombetta* satisfies both constitutional and military standards of due process and should therefore be applicable to courts-martial." *Id*.

In *Manuel*, the United States' violation of its own prescribed one-year retention period allowed this Court to not require bad faith under these circumstances. 43 M.J. at 288-89. In dicta this Court noted that the scope of the rule may exceed the constitutional rule, but did not explicitly overrule the *Kern* holding that the protections were co-extensive. *Id*. at 289; *Kern*, 22 M.J. at 51.

The Navy-Marine Corps Court of Criminal Appeals in this case, after finding the United States negligent in destroying the sample, properly limited *Manuel* to its facts. *United States v. Simmermacher*, No 201300129, 2014 CCA LEXIS 334, *9 (N-M. Ct. Crim. App. May 29, 2014). The court reasoned that as the destroyed urine sample was only "potentially useful evidence"

and since the United States did not act in "bad faith", there was no violation of R.C.M. 703(f)(2). *Id*. at *6, 9.

Unlike *Manuel*, here the United States followed regulations governing the destruction of evidence. This Court should hold that where evidence is destroyed consistent with regulations and the regulatory scheme is not challenged, the constitutional rule of *Trombetta* satisfies both constitutional and military standards of due process and should therefore be applicable to courts-martial which requires a showing of bad faith before mandating abatement. Otherwise, the remedy should remain squarely within the discretion of the trial judge, which in this case declined to abate the proceedings or exclude evidence.

As there was no bad faith here, there was no violation of Appellant's due process rights, and the Military Judge had discretion to provide the instruction to the Members to remedy the destroyed sample.

F. <u>In any case, this Court should require a specific and non-speculative demonstration of Article 59(a) prejudice before overturning a judge's broad discretion in the choice of remedies and mandating abatement under R.C.M. 703(f)(2) for destroyed evidence</u>.

The *Manuel* court further noted that a prejudice analysis may be required in other circumstances. It noted: "We will not require an accused to make a further demonstration of specific prejudice before we sustain the remedial relief fashioned by a

lower court in the exercise of its discretion." *Manuel*, 43 M.J. at 287. The Manuel court went to great lengths to limit its holding to the facts of that case, stating, "we hold only that the Court of Military Review did not abuse its discretion by following that course of remedial action here."

The *Manuel* court added that the "linchpin" of the issue was standard of review for assessing the adequacy of the judge's remedy. *Id.* The court noted: "we hold only that the Court of Military Review did not abuse its discretion by following that course of remedial action here," given that the Government had committed "a significant violation of regulations intended to insure reliability of testing procedures," but instead was "grossly negligent" in prematurely destroying the sample. *Id*. at 289 (footnote and citations omitted).

As Appellant fails to present any evidence contradicting the laboratory tests indicating the presence of cocaine in her urine, or present any specific and non-speculative demonstration of Article 59(a) prejudice, any error in this case should be held harmless.

Conclusion

Wherefore, the Government respectfully requests that this Court affirm the decision of the lower court.

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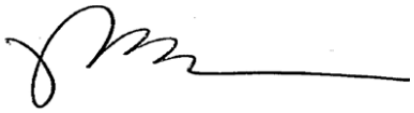

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