

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES**

UNITED STATES)	APPELLEE'S ANSWER TO APPELLANT'S
Appellee)	PETITION FOR GRANT OF REVIEW
)	
v.)	Crim.App. Misc. Dkt. No. 20140453
)	
Major (O-4))	USCA Misc. Dkt. No. 15-0315/AR
Michael F. STELLATO)	
United States Army)	
Appellant)	
)	
)	

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Issues Presented

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Statement of Statutory Jurisdiction

The United States Army Court of Criminal Appeals (Army court) reviewed this case pursuant to Article 62, Uniform Code of Military Justice (hereinafter UCMJ). The statutory basis for this Honorable Court's jurisdiction is Article 67(a)(3), UCMJ, which permits review in "all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces (C.A.A.F.) has granted review."

Statement of the Case

On April 2, 2014, appellant filed a "Motion to Dismiss" the case against him, with prejudice, based upon "prosecutorial misconduct and violations of MAJ Stellato's due process rights."¹ On May 20, 2014, the military judge granted the motion and

¹ Appellate Exhibit (AE) XLIV.

dismissed, with prejudice, all charges and specifications against appellant.² On May 22, the government filed a "Notice of Appeal Pursuant to R.C.M. [Rule for Courts-Martial] 908."³ On November 17, 2014, the Army court granted the government's appeal under Article 62, UCMJ, and vacated the military judge's ruling.⁴

Statement of Facts

Appellant is charged with one specification of rape of a child, three specifications of aggravated sexual contact with a child, one specification of indecent liberties with a child, and one specification of forcible sodomy with a child, in violation of Articles 120 and 125, UCMJ.⁵ All of the charges stem from the sexual abuse of appellant's minor daughter between October 1, 2007 and April 1, 2009.⁶

This case originated on May 18, 2009, when appellant's wife, Mrs. MS, made a complaint to the Allen County Sherriff's Department in Indiana.⁷ The Allen County Sherriff's Department conducted an investigation; however, there is no evidence of

² AE XLIX, R. 289.

³ AE L.

⁴ Appellant's Supplement (AS), Appendix A.

⁵ Charge Sheet.

⁶ *Id.*

⁷ AE III, Encls. 1, 4. Because appellant's wife and his daughter have the same initials, the government will refer to appellant's wife as "Mrs. MS" and his daughter as "the victim."

prosecution by state or local authorities.⁸ It was at this time the victim was first forensically interviewed and began seeing a series of medical providers and other counselors.⁹

On May 22, 2012, Mrs. MS contacted the Fort Bliss Criminal Investigation Division (CID) and reported, once again, that appellant had sexually abused their daughter.¹⁰ Appellant, a mobilized reservist, was deployed to Afghanistan.¹¹ CID briefed the trial counsel, CPT KJ, sometime in early December 2012.¹² By this time, appellant had redeployed to Fort Bliss.¹³

In February 2013, CPT KJ and the Special Victim Prosecutor, CPT FC, traveled to West Virginia to meet with Mrs. MS and the victim.¹⁴ It was then that the government began discussing evidence and evidence production with Mrs. MS.¹⁵

Charges were preferred on March 13, 2013.¹⁶ Appellant waived the Article 32 hearing, and the case was referred to a general court-martial on June 27, 2013.¹⁷ Appellant was arraigned on September 16, 2013, and additional Article 39(a)

⁸ AE III, Encl. 1. On page 2 of Enclosure 17 to App. Ex. XXXV, it notes that "[t]he Prosecuting Attorney, Tom Shales, has chosen not to prosecute Mr. Stellato due to lack of evidence."

⁹ AE III, Encls. 1, 2, 3, 4, 6, 14.

¹⁰ AE XLIV, Encl. 1. The record is not clear as to what prompted this report.

¹¹ AE XLIV, Encl. 2.

¹² R. 107.

¹³ R. 107.

¹⁴ R. 75, 108.

¹⁵ R. 76, 117-18

¹⁶ Charge Sheet.

¹⁷ Charge Sheet; R. 7.

sessions were held on April 29-30, 2014; May 16, 2014; and May 20, 2014.

On the day of preferral, the government provided a copy of the case file to the local Trial Defense Service (TDS) Office.¹⁸ This initial disclosure consisted of nine CDs/DVDs containing media and one containing documents.¹⁹ The TDS paralegal made a copy of all the CDs/DVDs for the civilian defense counsel (CDC).²⁰ The record does not reflect when these CDs/DVDs were delivered to CDC. On March 26, 2013, CDC emailed CPT KJ to complain about the lack of organization and to alert the government that many of the CDs/DVDs were not working.²¹ In response, CPT KJ made a copy of the CDs/DVDs himself and delivered them to CDC.²²

On March 22, 2013, CDC submitted her only formal discovery request.²³ CPT KJ provided a written response on July 9, 2013.²⁴ At the Article 39(a) hearing on appellant's Motion to Dismiss, CPT KJ testified that after receiving the request, he discussed

¹⁸ R. 135-36, 144; AE XLVI, Encl. 5.

¹⁹ AE XLIV, Encl. 5.

²⁰ R. 136.

²¹ AE XLIV, Encl. 5.

²² R. 136.

²³ AE III, Encl. 7. In email traffic with the trial counsel, CDC wrote, "[o]bviously, a lot of this will be in the second discovery request & will be specific. I'm giving you a heads up now as I know some of it may take a bit of time & you have time now to get it." AE III, Encl. 8. A thorough review of the record does not reveal any subsequent, more specific written discovery requests.

²⁴ AE III, Encl. 10.

it with his supervisors, and they decided to wait until closer to referral to formally respond, at which time the government would have subpoena power. In the meantime, CPT KJ was instructed to continue providing discovery to appellant.²⁵

From March until August 2013, the government provided substantial discovery including medical and mental health records, school records, CID reports, and criminal background checks.²⁶ In addition, the trial counsel and CDC met on a number of occasions to discuss discovery matters.²⁷ CDC's primary complaint about discovery was the government's failure to catalogue or index the discovery.²⁸ The government responded that the original discovery may have seemed disorganized because it was provided to defense in the exact form it was received.²⁹ The trial counsel felt that rather than attempting to pick and choose what documents to send to defense, it was more prudent to send them the complete file.³⁰ This is in keeping with the trial counsel's philosophy to provide all documentation to the defense from the start.³¹ By the time of the Article 39(a) on April 29,

²⁵ R. 110-11, 113.

²⁶ AE XLVIII.

²⁷ See, e.g., AE XLVII; AE XLVIII; R. 30, 115-16, 144, 146.

²⁸ AE III, Encl 8.

²⁹ AE III, Encl 8; R. 139-40.

³⁰ R. 139-40.

³¹ AE III, Encl 8.

2014, the government had provided some 4800 documents to the defense.³²

Trial in this case was originally scheduled for September 17, 2013.³³ On August 19-20, 2013, appellant filed a motion for continuance and a motion to compel discovery.³⁴ The continuance request was based on the following: (1) an expert witness had not been formally appointed, (2) appellant was requesting the court order a forensic interview of a potential child witness (Miss LE), whose parents were refusing access, and (3) to resolve the issues underlying the motion to compel discovery.³⁵ The government responded that the expert was appointed on August 19, 2013, challenged the request for the production of Miss LE on relevancy grounds, and argued that the remaining discovery issues would not necessitate a delay.³⁶ The military judge granted the request for a continuance, re-docketed the case for

³² R. 227.

³³ R. 13. In the Electronic Docketing Notification (EDN), the government indicated it would be ready for trial on August 5, 2013. AE III, at 3. In the government's response to appellant's first motion to continue, the trial counsel noted that the delay from referral to docketing was due to defense counsel failing to timely return the EDN to the government. AE IV, at 1. It is unclear how the initial trial date was chosen, although CDC noted her unavailability from August 9-16, 2013 on the EDN. AE III, at 4.

³⁴ AE III; AE X.

³⁵ AE III.

³⁶ AE IV.

December 10-12, 2013³⁷, ordered that Miss LE be interviewed, and conducted a hearing on September 16, 2013 to resolve the motion to compel discovery.³⁸

Appellant's motion to compel discovery focused on six issues: (1) cataloging and indexing of the discovery provided by the government; (2) evidence of unlawful command influence (UCI); (3) inconsistent statements by the victim; (4) plastic banana seized by Allen County Sheriff's Department; (5) Mrs. MS's medical records; and (6) family court documents.³⁹ The military judge denied the first issue, noting that the government had "generally" "fulfilled its duty to provide discovery," though cautioned that it would be "advantageous for the government to provide" such indexing.⁴⁰ As to the second,

³⁷ Following the first Motion to Continue, the court held a telephonic R.C.M. 802 session on August 26, 2013. At that time, the court continued the trial until a date "TBD." AE XLIV, Encl. 8. On September 9, 2013, the military judge emailed both counsel stating that he was "considering" docketing the case for November 19-21, 2013. CPT FC responded that another military judge had docketed a different trial for those dates, to which the military judge suggested either November 13-15, 2013, or December 3-5, 2013. CDC responded with a conflict for the November dates, but none for the December dates. Military counsel subsequently notified the military judge of training for all Fort Bliss TDS counsel on December 2-6, 2013. In response, the military judge docketed the case for December 10-12, 2013, denying the SVP's request for further delay due to a scheduling conflict with another case. AE XLIV, Encl. 9.

³⁸ R. 13, AE IX.

³⁹ AE X; AE XXV.

⁴⁰ AE XXV. However, the military judge's cautioning conflicts with applicable discovery law. See *United States v. Harry*, 927 F. Supp. 2d 1185, 1212 (D.N.M. 2013) (quoting *United States v.*

because the military judge denied the motion to dismiss for UCI, any related discovery was moot.⁴¹ The military judge granted the remaining discovery issues. In ordering production and disclosure of the family court documents, the military judge noted that they "were requested by defense in discovery;" however, a review of the record establishes that the defense never made a formal, specific request for the family court records.⁴² Finally, the military judge ordered the government to ascertain the status of the plastic banana.⁴³

Appellant filed his second motion for a continuance on November 26, 2013, again arguing that discovery issues necessitated a delay.⁴⁴ The request focused on three issues: (1) family court records; (2) CD/DVD of forensic interview of Miss LE; and (3) additional forensic testing of the plastic banana.

Agurs, 427 U.S. 97, 109-10 (1976)) ("[T]here is no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case."); *United States v. Mahat*, 106 F.3d 89, 94 (5th Cir. 1997) (where government gave defense access to 500,000 pages of documents, no obligation arose under *Brady* to "point the defense to specific documents within a larger mass of material that it has already turned over"); *United States v. Parks*, 100 F.3d 1300, 1307 (7th Cir. 1996) ("*Brady* [does not] require[] the Government to carry the burden of transcribing [65 hours of intercepted conversations]" because the defendants "had been given the same opportunity as the government to discover the identified documents" and "information the defendants seek is available to them through the exercise of reasonable diligence").

⁴¹ AE XXVII.

⁴² AE XXV.

⁴³ *Id.*

⁴⁴ AE XXIX.

The military judge denied the continuance on November 27, 2013.⁴⁵ As to the family court records, the military judge found that "[t]hose records were received by defense soon after the government's written response, so that issue is resolved."⁴⁶ The second was denied because the government expected to have the CD/DVD of the forensic interview by December 3, 2013.⁴⁷ Related to the forensic testing of the banana, the military judge noted that appellant did not make a request for additional DNA testing until November 25, 2013.⁴⁸ The military judge also recognized that upon receiving the request, "the government promptly obtained a DNA sample for the accused and sent it to USACIL."⁴⁹

Appellant renewed his motion for a continuance on December 4, 2013.⁵⁰ This request focused on six separate issues: (1) DNA Evidence Report; (2) subpoena for a defense expert; (3) scheduling issues for two defense witnesses; (4) FBI service of subpoena on defense witness Cathy Bunger; (5) CD of forensic interview of Miss LE; and (6) government denial of defense requested witnesses Ms. Palmer and Dr. Krieg. The military judge denied this continuance request on December 4, 2013.⁵¹ He found that the DNA evidence report and examiner would be

⁴⁵ AE XXXI.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ AE XXXI.

⁵⁰ AE XXXII

⁵¹ AE XXXIV.

available for trial on December 9, 2013.⁵² He found that because Dr. Rodriguez was issued his subpoena that day, was a local witness, and had extensive prior notice of the court date, he was available to testify.⁵³ He noted that the two defense witnesses with scheduling issues could be resolved by defense.⁵⁴ As to Cathy Bunger, the military judge found her to be a defense witness "who is apparently refusing to cooperate with the government."⁵⁵ He noted that the government secured the assistance of the FBI to serve her a subpoena, and that "[t]he government is acting with due diligence to secure her attendance at trial."⁵⁶ The military judge further found that while the CD of the forensic interview was not delivered by the ordered December 3, 2013, date, it would be available on December 5, 2013.⁵⁷ As a remedy for the late disclosure, the military judge allowed the defense to modify its witness list at a later time. Finally, as to Ms. Palmer and Dr. Krieg the military judge found that the motion to compel would be resolved at the Article 39(a) session, and thus a continuance was not necessary.⁵⁸

On the eve of trial, the military judge reconsidered and granted the defense motion for a continuance based on the

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

government's inability to secure Ms. Cathy Bunger and Ms. Palmer.⁵⁹ Due to the difficulty in obtaining these witnesses, he continued the case and re-docketed it for March 18, 2014.⁶⁰

Prior to trial, a number of additional discovery issues were brought to the government's attention. On March 5, 2014 Mrs. MS informed the government that she possessed a napkin which had a potential recantation from the victim on it. The government immediately notified appellant, and then provided a copy of the napkin to appellant on March 7, 2014.⁶¹

On March 14, 2014, Mrs. MS informed the government that she had a number of journals. The government immediately informed appellant, obtained and disclosed those journals on March 16-17, 2014.⁶²

Also on March 14, 2014, the government learned from another witness that Mrs. MS had recently been receiving therapy. The government again immediately informed appellant, and obtained the records on March 17, 2014.⁶³

On March 17, 2014, Mrs. MS provided a number of printed emails between her and appellant, which were immediately

⁵⁹ Appendix 1, at 6-7.

⁶⁰ R. 71; Appendix 1, at 1. In appellant's renewed written motion for continuance, CDC requested a trial date of January 7, 2014. AE XXXII, at 6. Following the R.C.M. 802, the military judge wrote both parties that the trial was "continued until 18 March 2014 at defense request." Appendix 1, at 1.

⁶¹ AE XLVIII.

⁶² AE XLVIII; R. 95.

⁶³ AE XLVIII; R. 98-99, 102.

disclosed to appellant's counsel.⁶⁴ Mrs. MS mistakenly believed that she had already provided those to the government.⁶⁵

Around this time, Mrs. MS also made clear to the government that she had a box or a binder of information related to the case (hereinafter "box").⁶⁶ The government informed appellant, which prompted him to request a fourth continuance on March 17, 2014.⁶⁷ On March 24, 2014, the military judge emailed both parties, inquiring whether appellant would be filing a formal motion to continue or if the court should be expecting something else.⁶⁸ CDC responded that she was planning to file a motion to dismiss.⁶⁹ The military judge indicated that he wanted to re-docket the case, in the event the motion to dismiss was denied.⁷⁰ The military judge suggested April 29-May 1, 2014, and the government did not object.⁷¹ CDC requested additional time to discuss moving the case that was scheduled for those dates (as she was also representing the accused in that case) with her

⁶⁴ AE XLVIII.

⁶⁵ R. 160-62.

⁶⁶ AE XLVIII; R. 96, 100. On March 21, 2014, the government traveled to West Virginia to obtain the complete box/binder of information and provided a complete copy to appellant. AE XLVIII; R. 96, 100.

⁶⁷ AE XLVII, at 8. Although the record is not clear, it appears this request for continuance was done verbally with the military judge following email traffic related to meeting with counsel for an unrelated reason just prior to trial. AE XLIV, Encl. 42.

⁶⁸ AE XLIV, Encl. 42.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

client.⁷² CDC subsequently requested that the court not move the case that was scheduled for those dates and this case was re-docketed for July 8-11, 2014.⁷³

Thereafter, appellant filed his "Motion to Dismiss."⁷⁴ The government filed its response on April 9, 2014.⁷⁵ The military judge heard evidence and argument concerning the motion on April 29-30, and May 16, 2014, and issued his ruling on May 20, 2014.⁷⁶

The military judge concluded generally throughout his findings that the government failed "to fulfill its discovery obligations, either by a failure to produce witnesses or documentary evidence,"⁷⁷ the "discovery violations have been continual and egregious,"⁷⁸ the government "took a recklessly cavalier approach to discovery,"⁷⁹ and the case constituted a "complete abdication of discovery duties."⁸⁰

In particular, the military judge based his decision on the government's alleged discovery violations with regard to the following: (1) the "box" of evidence in the possession of Mrs. MS (which contained a note memorializing the victim's recantation of the allegations and emails from appellant denying

⁷² *Id.*

⁷³ AE XLV.

⁷⁴ AE XLIV.

⁷⁵ AE XLVI.

⁷⁶ AE XLIX.

⁷⁷ R. 279

⁷⁸ R. 282

⁷⁹ R. 283

⁸⁰ R. 285.

the misconduct, two items which were not disclosed during initial discovery); (2) a plastic banana seized by the Allen County Sheriff's Department; and (3) production of Miss LE.⁸¹

The military judge concluded that "based solely on the nature, magnitude, and consistency of the discovery violations in this case, this is the very rare case where dismissal is an appropriate remedy."⁸² Further, due to the "material prejudice and denial of due process already inflicted on the Accused," to include the delayed disclosure of certain pieces of evidence, the loss of a defense witness due to his untimely demise, and the length of time from preferral to the scheduled court-martial⁸³, "the only appropriate remedy left in this case is dismissal with prejudice."⁸⁴

⁸¹ AE XLIX, at 8-9. The military judge subsequently noted the government's failure to "preserve evidence or determine the existence of mental health records, unless ordered to do so by the Court" as examples of how the government failed to respond to "the most basic discovery requests" by appellant. XLIX, at 10. The Army court addressed these two bases, along with the three listed above.

⁸² AE XLIX, at 10.

⁸³ According to the military judge's findings of fact, "[t]he only delay attributable to the Defense is a 35 day delay for the Article 32 hearing, which was ultimately waived. The Government is responsible for the remaining 426 days it has taken to bring this case to trial." AE XLIX, at 7.

⁸⁴ AE XLIX, at 10.

Summary of Argument

In his brief, appellant argues that the Army court engaged in "impermissible fact finding."⁸⁵ Appellant's argument fails for two reasons. First, the Army court did not find additional facts. Second, even if the Army court did, the appellant has not tied them to the basis for the Army court's decision, namely that "the military judge based his ruling upon an erroneous view of the law and, accordingly, abused his discretion."⁸⁶

Furthermore, the Army court did not require a finding of "willful ignorance, willful suppression, or other misconduct" as a condition precedent for dismissal with prejudice for discovery violations. Rather, after the Army court found that the military judge applied an erroneous view of the law with regard to discovery, it determined that "dismissal with prejudice is not amongst the reasonable range of remedies for a military judge in this case."⁸⁷ Without more, i.e., "willful ignorance, willful suppression, or other misconduct," dismissal, a "disfavored sanction" was not reasonable in this case, according to the Army court.⁸⁸

⁸⁵ AS, at 22.

⁸⁶ AS, Appendix A, at 2.

⁸⁷ AS, Appendix A, at 21.

⁸⁸ AS, Appendix A, at 22 (quoting *United States v. Rogers*, 751 F.2d 1074, 1076-77 (9th Cir. 1985)).

Argument

I. WHETHER THE ARMY COURT EXCEEDED ITS STATUTORY AUTHORITY UNDER ARTICLE 62, UCMJ, WHEN IT IMPERMISSIBLY FOUND ADDITIONAL FACTS AND SUBSTITUTED ITS OWN INTERPRETATION OF THOSE FACTS OF THE MILITARY JUDGE'S FINDINGS DESPITE HOLDING THAT THE MILITARY JUDGE'S FINDINGS OF FACT WERE NOT CLEARLY ERRONEOUS

"When reviewing matters under Article 62(b), UCMJ, the lower court may act only with respect to matters of law."⁸⁹

A. The Army court did not find additional facts.

In order to analyze appellant's claim that the Army court found additional facts, it is necessary to put the "facts" listed in Appendix B back in context.

"[D]efense eventually came into possession of all the known information they were seeking."

Appellant ties this "finding" to the thumb drives and to Dr. Krieg and his "notes"⁹⁰.⁹¹ However, the Army court made this finding in the context of those items the military judge found

⁸⁹ *United States v. Baker*, 70 M.J. 283, 287-88 (C.A.A.F. 2011).

⁹⁰ The Army court footnotes the apparent discrepancy between the military judge's findings of fact (which reference "notes") and his analysis (which references "records").

⁹¹ Appellant also ties this statement to the military judge's general statements regarding the conduct of discovery in this case. However, because such statements are conclusory (based on analysis of the specific items at issue in this appeal), the government would disagree that the Army court's similarly conclusory statements (based on its own analysis) constitute impermissible fact-finding. The same argument applies to appellant's final "example" of impermissible fact-finding, namely, "[Military Judge] clearly misjudged the scope and magnitude of discovery issues in this case."

appellant specifically requested during the course of discovery. In that regard, the Army court found no additional facts. The thumb drives contained scanned information from the "box" of evidence in the possession of Mrs. MS. The thumb drives were never evidence; they were simply vehicles to deliver the evidence. Although the first thumb drive was ostensibly missing the requested emails and MS's recantation, the government did turn over those items, albeit late. With regard to Dr. Krieg, to the extent he is a factor, it is part of the prejudice analysis⁹², not part of the determination of whether the government complied with its discovery obligations. To treat Dr. Krieg otherwise would be inappropriate. First, the only "evidence" of additional records/notes is from CDC during rebuttal argument on the motion to dismiss.⁹³ Second, there is no record of appellant filing a specific request for additional

⁹² AS, Appendix A, at 10

⁹³ Appellant first requested production of Dr. Krieg on December 4, 2013. AE XXXV, at 2. In that same motion, appellant appended a copy of Dr. Krieg's lengthy custody evaluation. AE XXXV, Encl. 7 (subject of the first "Joint Motion to Correct Record of Trial"). During the Article 39(a), when the military judge questioned the trial counsel about whether there were additional "reports," the trial counsel's response was somewhat confusing because it appears there is a period missing in the transcript between "defense" and "when." R. 260. During her rebuttal, CDC stated that there was a "file of papers that [Dr. Krieg] had collected." R. 261. CDC argued that the government failed to subpoena the records, although there is no evidence of a subsequent specific discovery request or request to subpoena additional records from Dr. Krieg.

records/notes or requesting that the government subpoena any of Dr. Krieg's records/notes.

"[Military Judge] did not find a suppression of evidence."

Appellant ties this "finding" to the thumb drives, to Dr. Krieg and his "notes", and to the production of Miss LE. Appellant takes this statement out of context. The Army court made this statement when discussing the military judge's findings with regard to the "box" of evidence. It is inapplicable to anything more. And, in that context, the Army court was correct; the military judge faulted the government for failing to take possession of the "box" sooner to ensure complete discovery, however, by March 2014, appellant was in possession of everything contained in the "box."

"All potentially exculpatory evidence [is] now in the possession of the Accused."

Appellant ties this "finding" to the thumb drives and to Dr. Krieg and his "notes." Appellant takes this statement out of context. The Army court made this statement when discussing the government's failure to preserve evidence. The two examples cited by the Army court are the "box" of evidence and the plastic banana. It is inapplicable to anything more. Once again, in that context, the Army court was correct; there is no indication that appellant does not now have everything that is potentially exculpatory from the "box" and from Allen County.

To include Dr. Krieg in this analysis would be inappropriate, because, as noted, he factors into the prejudice analysis; Dr. Krieg and his records were not included with appellant's initial discovery request, so it would be unfair to then fault the government for failing to preserve evidence from a third party of which it was unaware until securing release of the family court records in November 2013⁹⁴.

"The trial counsel disclosed the evidence in the government's possession relating to the box."; "The trial counsel disclosed what he knew."

Appellant ties this "finding" to the "box" of evidence. However, both of these findings were also found by the military judge at trial. For the first finding, the trial counsel testified that he took the first thumb drive containing evidence from Mrs. MS to the G-6 staff section and received a CD with the contents of the thumb drive.⁹⁵ He also testified that he received a second thumb drive from Mrs. MS which he took home and burned to a CD himself.⁹⁶ Both iterations were provided to appellant. For the second finding, the Court should look to the military judge's findings of fact, page 2, paragraph 8 (also footnoted by the Army court): "[CPT KJ] also did not follow up with [Mrs. MS] to ensure she had provided everything to him, but

⁹⁴ AE XXXIV, AE XXXV.

⁹⁵ R. 123.

⁹⁶ R. 123.

stated he was 'under the impression' that he had everything."⁹⁷ (Emphasis added). As is clear from the table in Appendix A, appellant's real issue is not whether the trial counsel disclosed what he knew or what he had, but, rather, whether he violated his discovery obligations with regard to disclosing the existence of the "box" itself and inventorying it to ensure appellant received a copy of everything in the "box." This will be addressed as part of AE II.

B. Even if the Army court did find additional facts, appellant has not tied them to the basis for the Army court's decision.

As noted, the Army court's decision was premised on the military judge's erroneous view of the law, namely, R.C.M. 701(a)(2) and 701(a)(6). For appellant to prevail, he would have to show that the Army court's alleged fact-finding was a dispositive factor in its conclusion that the military judge abused his discretion.⁹⁸ Appellant has not and cannot make this showing, based on the fact-finding he alleges.

This case can be distinguished from *Baker*.⁹⁹ The Army court's impermissible fact finding in that case was dispositive

⁹⁷ AE XLIX; AS, Appendix A, at page 17, FN 9.

⁹⁸ *Baker*, 70 M.J. at 290.

⁹⁹ *Id.*

because it was the basis for its revised weighing of the factors under *Neil v. Biggers*.¹⁰⁰

II. WHETHER THE ARMY COURT APPLIED AN ERRONEOUS VIEW OF THE LAW IN REQUIRING THE MILITARY JUDGE TO FIND "WILLEFUL IGNORANCE, WILLEFUL SUPPRESSION, OR OTHER MISCONDUCT" AS A CONDITION PRECEDENT FOR DISMISSAL WITH PREJUDICE FOR DISCOVERY VIOLATIONS

In general, the question of whether the government has complied with its discovery obligations is a mixed question of law and fact.¹⁰¹ However, the ultimate question as to whether certain evidence is subject to discovery is a question of law, reviewed *de novo*.¹⁰²

Further, where a military judge finds that a discovery violation has occurred and has ordered a particular sanction, such sanctions are reviewed for an abuse of discretion.¹⁰³

A. The Army court correctly found that the military judge applied an erroneous view of the law with regard to discovery.

Appellant claims that the Army court erred because it "analyzed the military judge's ruling only under the rubric of *Brady v. Maryland*¹⁰⁴, rather than the body of applicable law

¹⁰⁰ 409 U.S. 188 (1973). "This erroneous finding is particularly problematic as the Army court relied upon it for support of its determination that the military judge erred in his analysis of this *Biggers* factor." *Baker*, 70 M.J. at 290.

¹⁰¹ *Banks v. Reynolds*, 54 F.3d 1508, 1516 (10th Cir. 1995).

¹⁰² *United States v. Roberts*, 59 M.J. 323, 326 (C.A.A.F. 2004); *United States v. Hughes*, 33 F.3d 1248, 1251 (10th Cir. 1994).

¹⁰³ *United States v. De La Rosa*, 196 F.3d 712, 715 (7th Cir. 1999).

¹⁰⁴ 373 U.S. 83 (1963).

governing discovery rules in both civilian federal courts (Fed. R. Crim. P. 16) and the military (R.C.M. 701)."¹⁰⁵ Although the Army court spent a substantial amount of time analyzing the government's obligations under *Brady*¹⁰⁶ and R.C.M. 701(a)(6), it also touched upon the government's obligations under Article 46 and R.C.M. 701(a)(2).

For example, with regard to the plastic banana, the Army court correctly found that R.C.M. 701(a)(2)(A) controls. Therefore, so long as local authorities maintained control of the plastic banana, the government was not obligated to permit inspection. Once the government had possession, the plastic banana was constructively delivered to appellant for DNA testing. As such, the Army court found that the government complied with R.C.M. 701(a)(2). Similarly, the Army court appeared to apply the standard it noted from R.C.M. 701(a)(2)(B) when it agreed with the military judge that "trial counsel should have inquired further into Mrs. MS's mental health records, including the fact that she was receiving therapy after referral of charges" ¹⁰⁷ Finally, the Army court accurately stated that R.C.M. 703, not R.C.M. 701, governs the production of a witness, therefore, where the government agreed

¹⁰⁵ AS, at 30.

¹⁰⁶ 373 U.S. 83 (1963)

¹⁰⁷ AS, Appendix A, at 13, 19. See also *United States v. Trigueros*, 69 M.J. 604 (A. Ct. Crim. App. 2010).

to produce Miss LE for the second trial date, there could be no violation.¹⁰⁸

As the Army court correctly noted, "[a]lthough we have cited federal cases applying *Brady*, we are cognizant that our statutory and executive guidance is broader than *Brady*."¹⁰⁹ However, even under *Brady* and R.C.M. 701(a)(6), there are still limitations, as noted by this Court in *United States v. Williams*¹¹⁰, cited to by the Army court in its decision.¹¹¹ With this in mind, the Army court examined the government's actions in this case. In doing so, it went even further than the military judge did, within the constraints of Article 62, by assuming that "the trial counsel erred by relying on the Allen

¹⁰⁸ The Army court found that appellant did not request production of Ms. LE until after it received her forensic interview. AS, Appendix A, at 20 FN 12. This is accurate. She is not listed on appellant's first witness list, filed August 20, 2013, even though she was disclosed as part of initial discovery. AE XII, Encl. 1; AE III. On September 9, 2013, the military judge sent an email to the parties explaining that if the forensic interview yielded relevant information, "the defense can request her production." AE IX. Appellant did not add Miss LE to his witness list until January 24, 2014. AE XL, Encl. 4. For the second trial date, the military judge indicated that he would order production of Miss LE, should the defense request her after reviewing the forensic interview. AE XXIV. Although the government had previously denied production, it was prepared to produce her for the third trial date in March. AE XLII. The Army court noted that the military judge did not find the government's initial refusal to produce Miss LE to be "out of bad faith or some other improper purpose." AS, Appendix A, at 19.

¹⁰⁹ AS, Appendix A, at 20.

¹¹⁰ 50 M.J. 436, 441 (C.A.A.F. 1999)

¹¹¹ AS, Appendix A, at 14.

County Sheriff's Department representation" that the plastic banana no longer existed.¹¹² Even so, appellant is now in possession of this exculpatory information for use at trial, and has been so since the second trial date in December 2013.¹¹³

Appellant argues that the military judge made factual findings that the "government exercised *control* over the plastic banana . . . and Mrs. MS's box of evidence."¹¹⁴ (Emphasis in original). These were not findings of fact, but legal conclusions contained in the "Analysis and Conclusions" section. The military judge phrased his legal conclusions in such a way as to specifically to invoke the requirements of R.C.M. 701(a)(2)(A).¹¹⁵ However, this was based on an erroneous view of the law, which goes to the heart of the Army court's opinion. These items were not within military control. Simply because they could be brought under military control does not change the analysis. If this were the standard, then all potentially similar discoverable information in any case would be subject to R.C.M. 701(a)(2), thereby gutting any limitation Congress intended when it included the words "military control." These items were, however, exculpatory or contained exculpatory evidence, i.e., the victim's recantation and appellant's emails

¹¹² AS, Appendix A, at 16.

¹¹³ AE XXXIV.

¹¹⁴ AS, at 33.

¹¹⁵ AS, Appendix A, at 8.

denying the allegations. Hence, the proper framework for analysis is R.C.M. 701(a)(6).

With regard to the "box," this court was clear in *Williams* that the outer parameters of the government's obligation under R.C.M. 701(a)(6) "must be ascertained on a case-by-case basis."¹¹⁶ As the Army court pointed out, testing the non-disclosure for prejudice is complicated in this case because the appellant has yet to go to trial.¹¹⁷ Furthermore, appellant is now in possession of all of the exculpatory information contained within the "box."¹¹⁸ Ultimately, appellant would like this Court to adopt a standard much more expansive than that expressed in *Williams*, namely, that the government is required to search for exculpatory information from cooperating government witnesses. Not only would this be an unworkable standard, it would also be a far departure from the other federal courts that have examined this similar issue.¹¹⁹ As such, the Army court's reliance on *United States v. Graham*¹²⁰ was entirely proper and instructive.

¹¹⁶ 50 M.J. at 441.

¹¹⁷ AS, Appendix A, at 16 FN 8.

¹¹⁸ Cf. *United States v. Coleman*, 72 M.J. 184 (C.A.A.F. 2013) (analyzing the impact of *Brady* information which was not available for use by appellant at trial due to late disclosure).

¹¹⁹ See AS, Appendix A, at 18 FN 10.

¹²⁰ 484 F.3d 413 (6th Cir. 2007).

B. Similar to the military judge and the Army court, this Court should decline to make a finding of prosecutorial misconduct.

In *United States v. Meek*, this court defined prosecutorial misconduct generally as "action or inaction by a prosecutor in violation of some legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon."¹²¹ It occurs when trial counsel "'oversteps the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense.'"¹²² Appellant argues that the trial counsel committed prosecutorial misconduct in this case when he failed to personally examine Mrs. MS's "box" of evidence and provided appellant with only what Mrs. MS provided to him.¹²³ Where this is no violation of R.C.M. 701(a)(2) and R.C.M. 701(a)(6), appellant's argument must fail. Otherwise, in the context of discovery, the standard for prosecutorial misconduct becomes one where it is not enough to abide by the rules for discovery, but one where trial counsel must also engage in a form of "best practices." As the Army court noted, "[n]othing in this opinion limits trial counsel from seeking exculpatory evidence from all sources throughout the preparation

¹²¹ 44 M.J. 1, 5 (C.A.A.F. 1996) (citing *Berger v. United States*, 295 U.S. 78 (1935)).

¹²² *United States v. Fletcher*, 62 M.J. 175, 178 (C.A.A.F. 2005) (quoting *Berger*, 295 U.S. at 84).

¹²³ AS, at 33.

for trial. We encourage such best practices. Nonetheless, we conclude that measuring due diligence in the context of non-governmental third parties is difficult and fraught with concerns."¹²⁴ The government would readily concede, as the Army court recognized, "[t]his case has not been a model of pretrial discovery and production."¹²⁵ However, simply because the government could have done a better job fulfilling its discovery obligations and anticipating issues, does not and should not translate into prosecutorial misconduct.

Further, despite the broad language in *Meek*, this Court's cases demonstrate that something more than incompetence is required to sustain a finding of prosecutorial misconduct. In *Meek*, this Court analyzed the trial counsel's statements to appellant that his civilian defense counsel was "ineffective" and her threats to a potential defense witness that if he testified at appellant's court-martial he would face a court-martial himself.¹²⁶ Likewise, in *United States v. Fletcher*, the trial counsel made a lengthy series of inappropriate comments and statements during her closing statements, including, interjecting her personal beliefs and opinions, improperly vouching for government witnesses and evidence, disparaging comments about the defense counsel, and disparaging comments

¹²⁴ AS, Appendix A, at 20.

¹²⁵ AS, Appendix A, at 21.

¹²⁶ 44 M.J. at 2.

about the accused's credibility.¹²⁷ Finally, in *United States v. Hornback*, this Court found that the trial counsel "repeatedly and persistently elicited improper testimony, despite repeated sustained objections as well as admonition and instruction from the military judge."¹²⁸

Even if this Court were to find that trial counsel committed prosecutorial misconduct for failing to personally examine the "box" and discover its contents to appellant, in order to merit relief, appellant must show that he was prejudiced. "The presence of prosecutorial misconduct does not necessarily mandate dismissal of charges or a rehearing."¹²⁹ In *Hornback*, this Court laid out a three-part test for determining prejudice.¹³⁰ In this case, only the first two prongs are relevant as this case has yet to go to trial.

With regard to the "box" specifically, trial counsel's misconduct was not severe. During the Article 39(a) session on April 29, 2014, CPT KJ testified that he spoke with Mrs. MS about discovery and understood that "she had some stuff she had kept in a box or something like that that she had to go through."¹³¹ CPT KJ testified that he first became aware of this "box" after traveling to West Virginia, although it was not

¹²⁷ 62 M.J. at 180-83.

¹²⁸ 73 M.J. at 155, 160 (C.A.A.F. 2014).

¹²⁹ *Hornback*, 73 M.J. at 159.

¹³⁰ *Id.* at 160.

¹³¹ R. 118.

until litigating the motion to dismiss that he became aware that it was an actual box containing evidence only related to his case.¹³² Furthermore, CPT KJ stated that following these discussions and the receipt of thumb drives containing evidence from Mrs. MS, he was "under the impression that I had everything she had that was relevant" although he later found that he was mistaken.¹³³ CPT FC and Mrs. MS corroborate CPT KJ's testimony. According to CPT FC, she was not aware of a "box" during their initial meeting in West Virginia.¹³⁴ The only thing she remembered was a binder on the kitchen table.¹³⁵ Mrs. MS testified that she "believe[d] that the box was on the table;" however, she didn't direct the government's attention to it.¹³⁶

Further, to the extent there was misconduct, it has been cured by the government's prompt, pre-trial disclosure of the recantation and the emails. As the Army court recognized, any discovery issues involving the "box" "have been resolved" and "[t]he accused is in possession of significantly more potentially exculpatory evidence than when the case was originally docketed."¹³⁷

¹³² R. 119.

¹³³ R. 117-18.

¹³⁴ R. 102.

¹³⁵ R. 213-14.

¹³⁶ R. 175.

¹³⁷ AS, Appendix A, at 21.

Finally, to the extent this Court identifies any additional instances of prosecutorial misconduct, appellant cannot prevail because he cannot show prejudice. He has been granted multiple continuances, is in possession of all the known evidence he sought through discovery, including a significant amount of potentially exculpatory evidence, and CPT KJ, although not forcibly removed from the case, will not prosecute appellant, should the government prevail on this appeal.

C. Without a finding that the government violated its discovery obligations and/or engaged in prosecutorial misconduct as it relates to discovery, the Army court was correct to find that the military judge abused his discretion when he dismissed this case with prejudice.

The government does not agree with appellant or the military judge that a legal error occurred. As such, this case is unlike *United States v. Dooley*¹³⁸ and *United States v. Gore*¹³⁹ where the only issue on appeal was the appropriateness of the remedy. The Army court's conclusion that the military judge abused his discretion was premised on the military judge's erroneous view of the law applicable to discovery.¹⁴⁰ Once the Army court reached this conclusion, it was entirely appropriate for the Army court to determine that without something more, i.e., "willful ignorance, willful suppression, or other

¹³⁸ 61 M.J. 258, 262 (C.A.A.F. 2005).

¹³⁹ 60 M.J. at 189.

¹⁴⁰ AS, Appendix A, at 22.

misconduct," dismissal with prejudice was not "a reasonable remedy in this case."¹⁴¹

Even in cases where discovery violations are discovered post-trial, this Court still tests for prejudice.¹⁴² In this case, there is no prejudice because, with respect to the specific items cited by the military judge, appellant is now in possession of all of that evidence. This is also not a case where appellant was forced to go to trial without the potentially exculpatory information he now possesses. With regard to Dr. Krieg, the delay¹⁴³, and the personal and professional effects of this prosecution upon appellant, the Army court put those items properly into context.¹⁴⁴

¹⁴¹ AS, Appendix A, at 22.

¹⁴² *United States v. Santos*, 59 M.J. 317, 321 (C.A.A.F. 2004) (citing *United States v. Stone*, 40 M.J. 420 (C.M.A. 1994)).

¹⁴³ For reasons which are not clear, appellant never filed a speedy trial motion, a fact documented by the military judge in his ruling on the Motion to Dismiss. AE XLIV, at 10.

¹⁴⁴ AS, Appendix A, at 21.

Conclusion

Wherefore, the Government respectfully requests this Honorable Court deny the petition for review.



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CERTIFICATE OF COMPLIANCE WITH RULE 21(b)

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CERTIFICATE OF FILING AND SERVICE

I certify that the original was filed electronically with the Court at efiling@armfor.uscourts.gov on the 15th day of March, 2015 and contemporaneously served electronically and via hard copy on appellant.



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