IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellee	)	BRIEF ON BEHALF OF APPELLANT
v.	)	
Private First Class (E-3) **GERALD R. CARTER, JR.** United States Army Appellant	)	Crim. App. Dkt. No. 20160770 USCA Dkt. No. 19-0382/AR

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

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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
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Issues Presented

I. WHETHER TRIAL DEFENSE COUNSEL WERE INEFFECTIVE FOR FAILING TO INTRODUCE EXCULPATORY EVIDENCE IN THEIR POSSESSION.

II. WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY FAILING TO ORDER A MISTRIAL FOR THE CHARGES AND SPECIFICATIONS.

III. WHETHER THE MILITARY JUDGE COMMITTED PLAIN ERROR BY ADMITTING EVIDENCE OF HISTORICAL CELL-SITE LOCATION INFORMATION. SEE *CARPENTER V. UNITED STATES*, 138 S. Ct. 2206 (2018).

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice [hereinafter

UCMJ]; 10 U.S.C. § 866. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

On September 9, November 29-30, and December 1-2, 2016, at Fort Drum, New York, a panel with enlisted representation sitting as a general court-martial convicted the appellant, contrary to his pleas, of five specifications of sexual abuse of a child, one specification of extortion, and two specifications of possessing child pornography, in violation of Articles 120b, 127, and 134, UCMJ, 10 U.S.C. §§ 920b, 927, and 934, respectively. (JA015-019). Prior to findings, the military judge granted a defense motion for a mistrial for one specification of adultery, in violation of Article 134, UCMJ. (JA217). The members sentenced appellant to be confined for eight years and to be discharged from the service with a dishonorable discharge. (JA019). On June 6, 2017, the convening authority approved the sentence as adjudged. (JA019).

On March 28, 2019, the Army Court affirmed the adjudged findings and sentence. (JA003-012). Appellate defense counsel filed a motion for reconsideration on April 29, 2019, and on May 17, 2019, the Army Court denied the motion. (JA013-014).

Appellant was notified of the Army Court's decision, and in accordance with Rules 19 and 20 of this Court's Rules of Practice and Procedure, appellate defense

counsel filed a Petition for Grant of Review on July 16, 2019 and the Supplement to the Petition on August 5, 2019. This Court granted Appellant's petition for grant of review on September 25, 2019 and ordered briefing under Rule 25. (JA001).

Summary of the Argument

Where the defense's theory at trial is that the accused's brother committed the charged offenses, defense counsel's failure to introduce the brother's sworn prior testimony where he confessed to the crimes falls below the standard of reasonably competent representation. Defense counsel had no strategic or tactical reason for omitting this exculpatory testimony after promising during opening statements to play the recording to the panel members, and reemphasizing the brother's guilt during closing arguments. The omission was prejudicial because it asked the panel to do the impossible: find reasonable doubt as to appellant's guilt without evidence appellant's brother even existed, let alone that he had confessed to the crimes.

In addition to the ineffective assistance of defense counsel, appellant's case was marred by prosecutorial misconduct and the quintessential "trial by ambush" that Article 46, UCMJ, and the rules for court-martial were designed to prevent. The military judge found the prosecution flouted those rules by intentionally withholding evidence responsive to a discovery request in order to obtain a tactical

advantage at trial. That evidence—an unsubstantiated allegation that appellant attempted to bribe a government witness into misidentifying him—was extremely prejudicial consciousness of guilt evidence offered solely to "smear the accused." Additionally, the alleged bribe went to the central issue of the case: whether appellant was the person sending the lewd messages that formed the basis for all charges. No instruction can cure such a prejudicial "smear," but even if it could, the military judge's instructions in this case exacerbated the error and gave a windfall to the government, by ordering the panel members to disregard the witness's exculpatory testimony that bolstered the defense's theory of the case. Any remedy short of declaring a mistrial for all charges under these circumstances was a clear abuse of discretion.

Finally, after appellant's trial concluded, the Supreme Court announced a new rule in *Carpenter v. United States*, 138 S. Ct. 2206 (2018), that a person has a Fourth Amendment reasonable expectation of privacy in his historical cell site data, even though it is maintained by a third party. At the time of trial, however, military law was the opposite; accordingly, and no warrant was required to obtain information under the Stored Communications Act. *See United States v. Allen*, 53 M.J. 402 (C.A.A.F. 2000). Operating under *Allen*, the military judge issued a court order, rather than a warrant, for appellant's historical cell site location data, which the government then introduced as a key component of its case. When there is a

seismic change in the law after trial that gives right to a new, colorable claim of a constitutional right after trial, this Court should find the issue forfeited, rather than waived under Military Rule of Evidence [Mil. R. Evid.] 311. To find waiver would penalize defense counsel for their failure to file a suppression motion that would have been frivolous at the time.

Statement of Facts

The central issue in this case was the true identity of "Julio Carter": an individual who used the "KIK" messaging application to engage in lewd conversations with multiple females in the Fort Drum, New York, area during the summer of 2015. Three of the recipients–AS, SC, and SM – never actually met "Julio" in person, so they could not identify appellant as the one sending the messages. (JA141, 148-149). The two recipients who met "Julio" in person after chatting with him on KIK—MR and VG—testified that appellant was not "Julio." (JA169, 364).

The government's case against appellant was based on Army Criminal Investigation Command (CID) agents' July 8, 2015 search of appellant's iPhone 6, where the KIK message logs were found. (JA070-071, 090). The post-trial affidavits ordered by the Army Court, however, revealed the defense knew of an alternate explanation for how the KIK messages ended up on appellant's phone: that messages appellant's brother, Gerard Carter, sent on a phone he had borrowed

from appellant automatically "cloud synched" onto the iPhone appellant was using, and which CID later seized. (JA653-654, 658).

In simple terms, two iPhones connected to a common "cloud" storage system can transfer videos, photos, and applications to each other during an automatic "synch." (JA655). Thus, KIK messages Gerard sent could "synch" (i.e. be copied) automatically to appellant's phone through appellant's iCloud storage system to which both phones were connected. (JA658). Gerard's messages would then appear on appellant's phone, making it appear as if appellant had been sending the messages all along.

The defense possessed evidence that appellant had two phones that were interconnected. First, the iPhone CID seized was named "Gerald's iPhone (2)." (JA731) (emphasis added). Second, in an experiment recorded on video[1] approximately one month before trial, appellant and his assistant defense counsel demonstrated how appellant's two iPhones were connected in a unique fashion, where calling one phone would result in both phones ringing. (JA653).

1. The pre-trial litigation.

At the Article 32, UCMJ, Preliminary Hearing, Gerard testified telephonically that he – not appellant – sent the KIK messages under the pseudonym "Julio Carter." (JA029). Gerard explained that he stayed at

[1] The videos are attached to the record as Defense Appellate Exhibit B.

appellant's house at Fort Drum between May and September 2015, during which time appellant lent him a phone. (JA029). Gerard discovered nude photographs of appellant on the loaner phone, and sent them to various underage females on KIK in exchange for nude photos or videos of themselves. (JA029-030).

After the preliminary hearing, Gerard ceased communicating with the parties. (JA658). As a result, the day before trial, the defense requested the military judge find Gerard to be unavailable under Mil. R. Evid. 804(a), in order to introduce his Article 32 sworn prior testimony during trial. (JA055). The military judge granted the motion and ruled the evidence admissible. (JA055).

2. The trial.

During opening statements, Captain (CPT) MJ, the lead defense counsel, promised the members they would hear Gerard's Article 32 testimony because Gerard—not appellant—was the culprit:

> This case is about someone else, who is not here today. Who, you will hear accepted responsibility for these actions. You will hear testimony that at the preliminary hearing the accused's brother stated under oath, subject to a penalty of perjury, fully aware that he could be prosecuted in federal court for his crimes and said that his brother is completely innocent of these charges, that he assumed the identity of his brother to meet women. While enjoying the hospitality of his brother who let him stay with him throughout the summer of 2015. That is what this case is about.

(JA061-062). Despite this promise, the defense never introduced Gerard's Article 32 testimony during trial.

The government's digital forensic examiner (DFE) testified that the iPhone CID seized from appellant on July 8, 2015, contained metadata demonstrating that the phone was physically located at Fort Polk during June 2015. (JA332). Since appellant was at Fort Polk for training during that month, the DFE concluded that the iPhone CID seized had been with appellant, not Gerard. (JA346). Importantly, however, he admitted that KIK messages could be retrieved from an "iCloud backup" and "be found on any PC or any iPhone." (JA346).

3. The mistrial.

Midway through trial, the trial counsel called MR, a woman with whom appellant was charged with committing adultery. (JA023, 287). However, MR testified she did not recognize appellant as the person with whom she had sex. (JA168). To refresh her recollection that appellant was the person she had met, the trial counsel handed her Prosecution Exhibit 7 for Identification. (JA170). The members were previously told that this exhibit consisted of a printout of one of the KIK message logs CID found on appellant's phone. (JA114-115).

Despite reviewing the message log, MR maintained she still did not recognize appellant as the person she met. (JA170). This led to the following exchange:

> Trial Counsel: [MR], you and I have spoke [sic] before, right?
> MR: Mm-hmm.
> Trial Counsel: Do you remember the other day you and I talked, you told me that you were offered a thousand dollars to come in here and misidentify him?
> MR: Mm-hmm.
> Trial Counsel: You were offered a thousand dollars to come in here---
> Defense Counsel: Objection, Your Honor.
> Trial Counsel: -- and say that wasn't him, right?
> Defense Counsel: Objection. 39(a).

(JA171).

In the ensuing Article 39(a), UCMJ, session, the defense requested a mistrial because the government had never disclosed the alleged attempted bribe. (JA180, 566). The military judge found that the government had violated its *Brady* and *Giglio*[2] obligations, and had not complied with the defense's discovery request for evidence of "payments or consideration of any kind and in any form…and any other matters which could arguably create an interest or bias in the witness in favor of the Government or against the Defense *or act as an inducement to color and shape testimony*." (JA617-618, 623) (emphasis added). The military judge further found that the discovery violation was "intentional" and "designed to obtain an improper tactical advantage." (JA621). Specifically, he concluded that the

[2] *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972).

"questioning was an attempt to smear the accused" rather than impeach the witness. (JA620-621).

As a remedy, the military judge declared a mistrial for the adultery specification involving MR. However, he denied the defense request for a mistrial on the remaining specifications because "[MR] and the evidence of an attempted bribe only impact the adultery specification." (JA622-623). The military judge instructed the panel that the alleged attempted bribe was "unsubstantiated" and that they must disregard MR's testimony "in its entirety." (JA220-221).

4. The defense case-in-chief and closing arguments.

The defense called one witness during its case-in-chief: VG. She testified that she had been chatting on KIK with "Julio" like MR and the other alleged victims. Like MR, but unlike the other victims, she eventually met up with the person sending the messages. (JA348-349). In testimony strikingly similar to MR's testimony, VG testified that appellant was not that person. (JA364). The defense closed its case without introducing Gerard's Article 32, UCMJ, testimony that he had been the one sending the KIK messages on a borrowed phone, or that he had met up with a woman with the same name as VG. (JA030).

However, in closing argument, the defense again asserted that Gerard was the one sending the KIK messages. Referring to the "cloud synch," CPT MJ argued:

> Special agent, an expert whose CV is in evidence, extremely qualified, teaches at a college where my wife went to school, *tells us that KIK can be restored and retrieved from iCloud and iTunes*. Yeah, by an expert. My client returns on 30th of June. Who else is at Fort Drum area 30 June? Julio Carter. *Brother*. *I brought backups, iTunes, syncing.* That's what we're talking about here.

(JA395) (emphasis added).

In rebuttal, the trial counsel emphasized that there had been no evidence about appellant's brother:

> Defense counsel argued that it is PFC Carter's brother that did it. Where is that evidence? Where is that evidence? . . . There is no evidence before you, none. Despite being promised in opening that you were going to hear from the guy who took full responsibility for that. Did you hear it? No evidence of that because that emptied chair is empty because that person doesn't exist. Doesn't exist."

(JA400-401). The members returned with findings of guilty on all contested charges and specifications. (JA015-018).

5. The post-trial litigation.

The Army Court ordered CPT MJ to explain why he did not introduce Gerard's testimony. Captain MJ claimed he understood Gerard's testimony to be that while appellant was at Fort Polk, Gerard possessed and sent the messages on the iPhone 6 that CID ultimately seized. (JA658). The defense DFE, Mr. Jon Berryhill, told CPT MJ that he analyzed the metadata of photos taken on the iPhone 6 during the time appellant was in Fort Polk. (JA663). The metadata

showed that the iPhone 6 was at Fort Polk with appellant, not at Fort Drum with Gerard. (JA663). In other words, Gerard could not have been using that particular iPhone to send the KIK messages. (JA663) Accordingly, CPT MJ claimed he told appellant the day before trial began he could not ethically present Gerard's testimony, because he now believed it to be false. (JA658).

Captain MJ alleged that sometime after this conversation with appellant, appellant proposed the "cloud synch" theory *for the very first time*. (JA658-659). Appellant, on the other hand, averred in his affidavit that he told CPT MJ and the assistant defense counsel about the cloud synch long before trial began. (JA652). Indeed, appellant and the assistant defense counsel recorded a video in October 2016[3] – over a month prior to trial – demonstrating that appellant's two iPhones were interconnected. (JA653).

Captain MJ further averred that just prior to the defense case-in-chief, he consulted with Mr. Berryhill about the possibility of a "cloud synch." (JA659). Captain MJ wrote, "Mr. Berryhill considered the second theory and, as stated in paragraph 5, subparagraph (b) of Mr. Berryhill's Affidavit, the second theory was probably untrue." (JA659). That paragraph of Mr. Berryhill's affidavit merely reiterated his conclusion that Gerard could not have been using the particular iPhone seized by CID:

[3] The date of the recording is visible when playing Def. App. Ex. B

> I explained that the analysis of the contraband pictures[4] metadata and other properties revealed that the contraband pictures were not taken on another device…the pictures were captured by the cellular phone belonging to the Accused at a period of time which predated the arrival of the Accused's brother's [sic] to the Fort Drum area and the cellular phone in question.

(JA663). CPT MJ claimed that based on this mid-trial consultation with Mr. Berryhill, he believed the "cloud synch" was false and he could not ethically present it and Gerard's testimony to the panel. (JA659). Notably absent from his affidavit was any explanation for why during closing arguments he argued the cloud synch theory and blamed appellant's brother for sending the messages.

I. WHETHER TRIAL DEFENSE COUNSEL WERE INEFFECTIVE FOR FAILING TO INTRODUCE EXCULPATORY EVIDENCE IN THEIR POSSESSION.

Standard of Review

Claims of ineffective assistance of counsel are reviewed de novo. *United States v. Mazza*, 67 M.J. 470, 474 (C.A.A.F. 2009); *Strickland v. Washington*, 466 U.S. 668, 690 (1984).

[4] In the pleadings below, appellee clarified that the "contraband pictures" referred to selfie-style nude photos of appellant, not the alleged child pornography.

Law

The Sixth Amendment guarantees the right to effective assistance of counsel at trial. *United States v. Cronic*, 466 U.S. 648, 653-56 (1984). To prevail on a claim of ineffective assistance of counsel, appellant must show both deficient performance and prejudice. *United States v. Datavs*, 71 M.J. 420, 424 (C.A.A.F. 2012) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Mazza*, 67 M.J. at 474.

Under the "deficient performance" prong, the appellant must "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *United States v. Rose*, 71 M.J. 138, 143 (C.A.A.F. 2012) (quoting *Michael v. Louisiana*, 350 U.S. 91, 101 (1955)). This requires appellant to show "specific defects in counsel's performance that were unreasonable under prevailing professional norms." *United States v. Perez*, 64 M.J. 239, 243 (C.A.A.F. 2009) (internal citations omitted). "Acts or omissions that fall within a broad range of reasonable approaches do not constitute a deficiency." *United States v. Dewrell*, 55 M.J. 131, 133 (C.A.A.F. 2001). Further, the strategic, tactical, or other deliberate decisions of counsel must be objectively reasonable from counsel's perspective at the time of the conduct in question. *Id*.

Under the prejudice prong, appellant must demonstrate "a reasonable probability that, but for counsel's deficient performance the result of the proceeding would have been different." *Datavs*, 71 M.J. at 420 (quoting *Strickland*, 466 U.S. at 694). Appellant need not "make an 'outcome-determinative' showing that 'counsel's deficient conduct more likely than not altered the outcome in the case.'" *United States v. Howard*, 47 M.J. 104, 106 n.1 (C.A.A.F. 1997) (quoting *Strickland*, 466 U.S. at 693). Rather, "the result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Strickland*, 466 U.S. at 694.

Argument

1. Defense counsel's failure to introduce Gerard's testimony constituted deficient performance.

a. Gerard's testimony was wholly exculpatory and consistent with the defense's theory of the case.

The defense theory of the case was that Gerard had sent the KIK messages from a phone appellant had lent him. In support of this theory, the defense sought a pre-trial ruling from the military judge that Gerard was unavailable, in order to play Gerard's Article 32, UCMJ, testimony to the panel. (JA052). After obtaining this ruling, the defense promised the panel during opening statements that they would hear Gerard's Article 32, UCMJ, testimony. (JA061-062). During cross-

examination of the government's DFE, the defense elicited admissions that KIK messages could synch between phones through the "cloud." (JA346). In closing arguments, defense counsel emphasized this concession and placed the blame squarely at Gerard's feet: "Who else is at Fort Drum area 30 June? Julio Carter. *Brother. I brought backups, iTunes, synching.* That's what we're talking about here." (JA395).

Despite defense counsel's efforts to point the finger at appellant's brother from opening statements through closing arguments, defense counsel failed to introduce the most important evidence available to bolster this strategy: Gerard's Article 32 testimony, where he *confessed under oath and subject to cross-examination* that he sent the lewd messages from a phone he had borrowed from appellant. (JA029-030).

Not only was Gerard's testimony wholly exculpatory on its face; it was necessary to lay the groundwork for the defense's cloud synch theory of the case. Simply put, the cloud synch theory is that messages Gerard sent on phone borrowed from appellant could "synch" onto appellant's phone if, as the government's expert conceded, KIK messages could be "retrieved from iTunes or iCloud backup" and "be found on any PC or any iPhone," (JA346). In order to make this connection, however, the defense needed to present evidence that appellant actually had a brother, and that the brother was sending the messages on

a borrowed phone. Gerard's testimony would have accomplished both. Without it, the panel would be left in the dark as to how or why someone else's messages would end up on appellant's phone.

Additionally, Gerard's testimony would have corroborated VG's testimony that she met "Julio" and it was not appellant. (JA364). VG's testimony ordinarily would have been powerful exculpatory evidence. However, it was tainted because it was strikingly similar to MR's testimony, and the government had previously assailed MR's credibility by introducing evidence that someone had attempted to bribe her into misidentifying appellant. (JA171). Gerard's testimony that he had met up with a female with the same name as VG would have bolstered VG's credibility and possibly mitigated some of the taint from the prosecution's "smear" of appellant. (JA030). Under these circumstances, the objectively reasonable course of action would have been to introduce Gerard's testimony after VG testified that appellant was not "Julio Carter."

Failure to introduce clearly exculpatory evidence that is admissible and in the defense's possession generally falls below the standard for reasonably professional assistance, unless there is a tactical reason for not admitting it. *See United States v. McIntosh*, 74 M.J. 294, 295-96 (C.A.A.F. 2015) ("While defense counsel would normally be expected to introduce potentially exculpatory evidence, their performance is not deficient when a tactical reason cautions against

admission."); *see also Griffin v. Warden, Md. Corr. Adjustment Ctr.*, 970 F.2d 1355, 1358 (4th Cir. 1992) ("An attorney's failure to present available exculpatory evidence is ordinarily deficient, unless some cogent tactical or other consideration justified it."); *Washington v. Murray*, 952 F.2d 113 (8th Cir. 1993) (same).

In *McIntosh*, the appellant argued that his counsel was ineffective for failing to present medical reports showing the alleged rape victim had an intact hymen before and after the alleged rape. *Id*. at 295. This Court determined defense counsel's performance was not deficient because one tactical reason for the defense not to introduce the report was its trial strategy to argue the government had offered "absolutely no medical evidence to support the testimony of the complainant." *Id*. at 296.

Similarly, in *Mazza*, this Court determined it was not deficient for defense counsel to fail to object to a videotaped interview of alleged victim introduced as a prior consistent statement. 67 M.J. at 475. This Court reasoned that the defense's strategy, as demonstrated through its closing argument, was to show that the alleged victim's recorded statements were inconsistent with her trial testimony and simply "did not make sense." *Id*.

In this case, no such tactical or strategic reason existed. Unlike *McIntosh* and *Mazza*, Gerard's testimony was not only exculpatory, it was foundational for the defense's strategy of pointing the finger at Gerard. Without it, the defense

failed to prove appellant even had a brother in the first place, let alone that Gerard sent the KIK messages. In other words, the defense's failure to introduce Gerard's testimony undermined its own theory of the case. Under these circumstances, there can be no strategic or tactical reason for failing to introduce Gerard's testimony.

b. The record belies defense counsel's explanation for why the defense failed to introduce Gerard's testimony.

Captain OR, the assistant defense counsel, candidly admitted that she would have introduced Gerard's testimony because it laid the necessary groundwork for the cloud synch theory. (JA653). Thus, the only question for this Court is what strategic or tactical reason CPT MJ had at the time of trial for overruling CPT OR's judgment and not introducing Gerard's testimony.

In his post-trial affidavit, CPT MJ claimed he did not present Gerard's testimony because he believed it to be false based on two conversations he had with the defense DFE, Mr. Berryhill. (JA659-660). Captain MJ stated the first conversation occurred the day before trial, and the second conversation occurred sometime prior to the defense case-in-chief after trial had begun. (JA659-660).

The timing of these alleged conversations in relation to CPT MJ's representations to the panel casts serious doubt on his assertion that he actually believed Gerard's testimony to be false. Captain MJ claimed that the second conversation with Mr. Berryhill, which occurred shortly before the defense case-

in-chief, convinced him the cloud synch theory was false. (JA658-659). If that were true, the same ethical rule CPT MJ cited for prohibiting him from introducing testimony he believed to be false would have also prohibited him from arguing the cloud synch theory, which he supposedly believed to be false, in his closing arguments. Put differently, if CPT MJ actually disbelieved Gerard as he claimed, he had no good faith basis for arguing to the panel that appellant's "brother" was the culprit through a cloud synch.

Moreover, Mr. Berryhill did not actually state in his affidavit that he told CPT MJ the cloud synch was false. In his recollection of the conversation, Mr. Berryhill merely repeated his conclusion that the metadata showed the iPhone CID seized was with appellant at Fort Polk. (JA663). However, the physical location of the iPhone is irrelevant to the cloud synch theory: even CPT MJ conceded as much in his affidavit. (JA659) ("This theory diminished the importance of the geographic location of the telephone…."). Thus, Mr. Berryhill's affidavit simply does not invalidate the cloud synch theory. Captain MJ's misunderstanding of Mr. Berryhill's conclusion may be foreseeable because he waited until the middle of trial to consult on such a technical matter. It is precisely for this reason, however, that waiting until mid-trial to conduct a reasonable investigation is objectively unreasonable, particularly when it involves the centerpiece of the defense's case. *See United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987) ("Because

investigation is an essential component of the adversary process…that testing process generally will not function unless defense counsel has done some investigation.")

Captain MJ never provided a strategic or tactical reason for omitting Gerard's prior sworn testimony; for example, that it might open the door to some new damaging government evidence on rebuttal. Instead, he claimed he did not introduce it because he believed it was false. (JA658-659). Captain MJ's closing argument in particular, however, demonstrates that he did not actually believe Gerard's testimony was false at the time of trial. Accordingly, his failure to introduce the testimony that would have supported the defense's theory at trial lacked a strategic or tactical justification and constituted deficient performance.

2. The failure to present Gerard's exculpatory testimony was prejudicial.

Considering the evidence as a whole, there is a "reasonable probability…that the factfinder would have had a reasonable doubt respecting guilt" if the defense had admitted Gerard's Article 32 testimony at trial. *United States v. Polk*, 32 M.J. 150, 153 (C.A.A.F. 1991).

First, the government's case had significant gaps in the link between appellant and "Julio." None of the underage females that chatted with "Julio" could identify appellant as the one sending the messages, because they had never actually met "Julio" in person. (JA141, 148-149). On the other hand, VG, the

woman who met "Julio" in person after chatting with him on KIK, testified that appellant was *not* the one who showed up. (JA364).[5]

Lacking an eyewitness who could link appellant to "Julio," the government was forced to rely on their DFE's highly technical testimony about metadata and the historical cell site location data to connect appellant to the KIK account. Yet even the government's DFE conceded that KIK messages could be retrieved from iCloud backups and "can be found on any iPhone." (JA346). Further, the record demonstrates appellant owned two connected iPhones at the time CID seized one of the phones, because the phone CID seized was named "Gerald's iPhone (2)." (JA731) (emphasis added). Thus, even though the messages were found on appellant's phone, the government's own evidence showed that a cloud synch of messages was possible.

Nevertheless, the government was able to gloss over these shortcomings because the defense's failure to put on Gerard's testimony opened the door for the trial counsel to launch a powerful broadside attack against the defense's case during rebuttal arguments. The government not only reminded the panel of the defense's broken promise to play Gerard's testimony, but also asserted that there

[5] Like VG, MR also testified that she met "Julio" in person, and that it was not appellant. (JA168). However, as discussed below in Assignment of Error II, the military judge (erroneously) instructed the panel to disregard MR's exculpatory testimony because of the *prosecution*'s intentional discovery violation.

was no evidence that a brother even existed, let alone that the brother was the one sending the messages. (JA401). If the defense had simply played Gerard's testimony as promised, they would have completely foreclosed this devastating attack. The trial counsel's explicit exploitation of defense counsel's deficient performance only exacerbated the prejudice.

If there is any question whether the panel was hungry for evidence about the existence of appellant's brother and his involvement in the case, one need look no further than one of the panel members' questions to CID Special Agent (SA) Luke St. Pierre during the government's rebuttal case. Not long after hearing VG's testimony that the "Julio" she met was not appellant, and after being promised to hear Gerard's confession that he was "Julio," a panel member asked, "Was there any evidence the accused's brother was at Fort Drum or Watertown, New York, during this time period?" (JA136). Special Agent St. Pierre responded, "No, there was not at the time, sir." (JA136). The defense had that evidence in the form of Gerard's testimony. The failure to rebut SA St. Pierre's testimony with it at this juncture left the panel with the mistaken impression that Gerard's brother was a non-factor.

Fundamentally, defense counsel's failure to introduce Gerard's testimony left the panel to deliberate without any answers to a simple, yet burning question: how and why would Gerard's messages end up on appellant's phone? No

reasonable person would suspect that the messages could jump from one person's phone onto appellant's phone, unless they had evidence that (1) this other person existed and (2) the other person was using a phone that could be linked to the same "cloud" storage account. Gerard's testimony would have established that evidence and, more importantly, provided a rational basis for the panel to infer the messages found on appellant's phone came from someone else. Without it, the panel was left with broken promises from defense counsel and a surfeit of evidence linking appellant's brother to the crimes. This is the very definition of prejudice.

II. WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY FAILING TO ORDER A MISTRIAL FOR THE CHARGES AND SPECIFICATIONS.

Standard of Review

A military judge's findings of fact are binding on this Court unless they are clearly erroneous. *United States v. Stellato*, 74 M.J. 473, 482-83 (C.A.A.F. 2015). His conclusion that there was a discovery violation is reviewed for an abuse of a discretion. *Id*. A military judge's decision regarding a mistrial motion is reviewed for a clear abuse of discretion. *United States v. Barron*, 52 M.J. 1, 4 (C.A.A.F. 1999).

Law

Article 46, UCMJ, provides the trial counsel, defense counsel, and the court-martial with "equal opportunity" to obtain evidence in accordance with the rules prescribed by the President. "Discovery in the military justice system, which is broader than in federal civilian criminal proceedings, is designed to eliminate pretrial gamesmanship, reduce the amount of pretrial motions practice, and reduce the potential for surprise and delay at trial." *United States v. Stellato*, 74 M.J. 473, 481 (C.A.A.F. 2015) (quoting *United States v. Jackson*, 59 M.J. 330, 333 (C.A.A.F. 2004)).

Where the prosecution fails to disclose discoverable evidence in response to a specific request or as a result of prosecutorial misconduct, the appellant is entitled to relief unless the government can show the nondisclosure was harmless beyond a reasonable doubt. *United States v. Roberts*, 59 M.J. 323, 327 (C.A.A.F. 2004) (citing *United States v. Hart*, 29 M.J. 407, 410 (C.M.A. 1990)).

Among the remedies for prosecutorial misconduct is a mistrial. *See United States v. Thompkins*, 58 M.J. 43 (C.A.A.F. 2003); *United States v. Dancy*, 38 M.J. 1 (C.M.A. 1993). Although a mistrial is a drastic remedy, it is appropriate when "manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings." R.C.M. 915(a); *United States v. Dancy*, 38 M.J. 1, 6 (C.M.A. 1993).

Factors to consider when ruling on a mistrial include the timing of the incident, the identity of the factfinder, the reasons for the mistrial, and potential alternative remedies. *United States v. Harris*, 51 M.J. 191, 196 (C.A.A.F. 1999). Evidence the prosecution acted in bad faith may also be considered in selecting the remedy for a discovery violation, but it is not required. *See Stellato*, 74 M.J. at 489.

"Giving a curative instruction, rather than declaring a mistrial, is the preferred remedy for curing error…as long as the curative instruction avoids prejudice to the accused." *United States v. Rushatz*, 31 M.J. 450, 456 (C.M.A. 1990) (omission in original). However, as the Supreme Court recognized long ago, "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Burton v. United States*, 391 U.S. 123, 135 (1968).

Argument

1. The trial counsel committed prosecutorial misconduct by intentionally violating her discovery obligations in order to obtain a tactical advantage over the defense.

The prosecution violated its discovery obligations by failing to disclose the alleged attempted bribe to defense counsel. As part of the pre-trial discovery process, the defense requested:

> Any offers or agreements . . . *or any payments or promises of payment* or any other consideration *from any person or*

> *entity in any form whatsoever* made to or by any witness …at any stage of the instant case.... The request includes…payments or consideration of any kind and in any form…and any other matters which could arguably create an interest or bias in the witness in favor of the Government or against the Defense *or act as an inducement to color and shape testimony*.

(JA583) (emphasis added). The military judge correctly concluded that this discovery request obligated the government to disclose the alleged attempted bribe of MR.[6] (JA622).

The military judge did not abuse his discretion in finding that the failure to disclose was intentional and for the purpose of smearing appellant, rather than impeaching MR. First, the trial counsel never argued that the failure to disclose was an unintentional oversight or mistake. Instead, the trial counsel argued that the defense had only requested discovery of payments or promises *by the government* to a witness. (JA622). The military judge correctly called that for what it was: an "absurdly-limited" reading of the defense request. (JA622). Indeed, this artificially limited reading smacks precisely of the sort of "gamesmanship" that Article 46, UCMJ, was designed to avoid.

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[6] Although not discussed by the military judge in his ruling, a disclosure that MR had provided screenshots of the attempted bribe to the victim-witness liaison and an Investigator Brown, (JA188, 192), would also have been required pursuant to the defense's request for "All reports…notes, memoranda, and writings prepared by law enforcement investigators in this case. . . . This request includes . . . all documentation relating to the collection of any physical evidence in this case." (JA577).

Second, the military judge aptly noted that the actual impeachment value of the bribe was limited. There was no evidence MR accepted the bribe; on the contrary, she had immediately reported it to the prosecutors and even participated in a "sting" investigation with law enforcement to track down the culprit. (JA620-621).

Finally, the military judge determined the trial counsel's strategic decision to surprise the defense with this "momentous" accusation before the members, rather than requesting an Article 39(a) session outside of their presence, was further proof of the trial counsel's intent to "smear the accused and the witness with misleading information that had been withheld from the defense." (JA620-621).

In sum, the military judge's finding that the discovery violation was the result of prosecutorial misconduct was not an abuse of discretion, and is therefore binding on this Court.

2. The military judge failed to consider the full impact of the prosecutorial misconduct when crafting his remedy.

a. The military judge either ignored or fundamentally misunderstood MR's role in linking appellant to "Julio."

From the outset of trial, the government sought to use MR to identify appellant as the one sending the KIK messages. During opening statements, the trial counsel told the panel that MR met the individual sending the KIK messages in person, and that it was appellant. (JA058-059). During MR's direct

examination, the trial counsel used her KIK messages found on appellant's phone (Prosecution Exhibit 7 for Identification) to "refresh" her recollection that appellant was both the person sending the messages and the person who showed up to have sex with her. (JA170). Earlier in the trial, Special Agent (SA) Luke St. Pierre had testified that Prosecution Exhibit 7 for Identification consisted of messages he had photographed from appellant's phone. (JA114-115).

In other words, the government created the impression that MR could prove appellant was the person who owned the KIK account and sent the messages, because she had actually met the sender in person. In a case where none of the other alleged victims ever met "Julio" in person, the government otherwise had to rely on often confusing technical testimony from its experts to prove appellant had been sending the messages. The importance of MR's face-to-face identification cannot be overstated.

The military judge, however, found that "[MR is] only relevant for the adultery specification. Her offense is unrelated to any other offense for which the accused has been found guilty." (JA409-410). The military judge explained the basis for his reasoning as follows:

> [T]hese witnesses didn't know each other, there didn't seem to be some kind of effort by the accused to contact them all at the same time. It seems that there is a separate sexual relationship charged in the adultery that is unrelated to all of the other offenses.

(JA205-206). In other words, because the alleged victims and crimes were different, the military judge determined the panel could parse out MR's testimony from the evidence relating to all the other offenses. His reasoning demonstrates a fundamental misunderstanding of how MR was inextricably connected to all of the remaining alleged victims: they all communicated via KIK with "Julio," and the KIK message logs were all found on appellant's phone.

The military judge properly granted a mistrial on the adultery specification involving MR because "[i]f the Government had been allowed to continue its prosecution of the adultery specification, the Defense would be in the untenable position of disputing bribery claims of a witness, claims that were not disclosed until the middle of trial." (JA622). But by not granting a mistrial for the remaining specifications, the military judge locked the defense into an even more "untenable position": trying to show appellant was not "Julio" after he had been accused of bribing a witness into saying he was not "Julio."

b. The "curative" instruction did not remove the poison infecting the remaining charges and specifications.

Although the panel is presumed to follow a military judge's instructions, "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Burton v. United States*, 391 U.S. 123, 135 (1968). This case is that context. No

curative instruction can "unring the bell" of an allegation as "momentous" as this: that appellant (or someone acting on his behalf) had attempted to bribe one of the witnesses who met "Julio" into misidentifying him during trial. To believe a reasonable person could set aside and ignore such plain and powerful evidence of consciousness of guilt on the central issue of the case transforms a legal fiction into a legal fairy tale.

Additionally, the allegation prejudiced the defense's ability to present its defense that someone other than appellant had been sending the messages. The key defense witness was VG. Like MR, she testified she chatted with and arranged an in-person meeting with "Julio." (JA348-349). Also like MR, she testified that appellant was not the "Julio" she met. (JA364). Ordinarily, this would be powerful testimony that appellant was not the owner of the KIK account. In light of the government's improper accusation MR had been bribed to misidentify appellant, however, VG's nearly identical testimony was tainted. Simply put, there is significant likelihood the panel members would conclude that if appellant or his ally was willing to pay one witness (MR) to misidentify him, he would also pay a second (VG) to misidentify him in the same manner. The government's "smear" extended beyond MR to VG, and necessarily, the defense's central strategy in showing appellant was not "Julio."

Even if instructions could cure the prejudice, the particular instructions the military judge gave did not. Importantly, the military judge was the first person to use the loaded term "bribe" when characterizing the allegation. (JA220-221). This label only highlighted the inadmissible evidence the government unfairly introduced, necessarily (though perhaps inadvertently) reinforcing the prosecution's effort to "improperly suggest that someone was helping the accused by influencing witnesses." (JA621) (emphasis added).

Moreover, the instruction was to disregard M.R.'s testimony "in its entirety." (JA221). In other words, the panel was instructed to disregard her exculpatory testimony that appellant was not the person associated with the KIK account. Thus, when the dust finally settled, the panel members not only heard "momentous" consciousness of guilt evidence, but were instructed to disregard key evidence that appellant was not "Julio." Far from "curing" the intentional discovery violation, the military judge ultimately allowed the government to profit from its own misconduct by instructing the panel to disregard the portion of MR's testimony that was helpful—if not crucial—to the defense. It is therefore hardly surprising that the panel returned a guilty verdict for all contested charges. *See United States v. Balagna*, 33 M.J. 54, 57 (C.A.A.F. 1991) (appellate courts may consider the panel's verdict in assessing whether the members could follow a curative instruction).

III. WHETHER THE MILITARY JUDGE COMMITTED PLAIN ERROR BY ADMITTING EVIDENCE OF HISTORICAL CELL-SITE LOCATION INFORMATION. SEE *CARPENTER V. UNITED STATES*, 138 S. Ct. 2206 (2018).

Additional Facts

On August 1, 2016, the defense submitted an initial discovery request for "call records, tower records, content, phone logs, text message logs, and any and all other information relating to the same" from the accused's cell phone provider. (JA588). The trial counsel responded that based on a prior conversation with defense counsel, she had already issued a subpoena to Sprint for those records. Sprint provided basic subscriber information, but not the "historic/stored cell site records." (JA478). Sprint stated that under 18 U.S.C. § 2703(d) of the Stored Communications Act, a court order or warrant was required for the "historical/stored cell site records." (JA478).

On August 28, 2016, the government requested the military judge issue a court order for the records. (JA471). The military judge issued the court order for "all records pertaining to cell site information" for appellant's phone number the following day. (JA469). Sprint complied with the court order and provided the accused's cell site records from January 1, 2015 through July 8, 2015. (JA446-453).

At trial, a Sprint records custodian introduced the historical cell site records for appellant's phone between March 2015 and July 2015, over various defense objections to hearsay, relevance, and improper expert testimony. (JA256-260). The defense did not move to suppress the records under the Fourth Amendment.

Special Agent Kristen Stewart explained how looking at these voluminous cell phone records allowed them to pinpoint the nearest cell tower that picked up appellant's signal when texting or calling, and thereby pinpoint the latitude and longitude of the phone. (JA313). She then plugged in the latitude and longitude to plot on a map where appellant's phone had been during that period of time: Fort Drum, New York, and Fort Polk, Louisiana. (JA318-319). This data corresponded with appellant's participation in field exercise at Fort Polk from June 3 – 30, 2015. (JA224).

Standard of Review

Where an issue is waived, there is no error to correct on appeal. *United States v. Robinson*, 77 M.J. 303, 307 (C.A.A.F. 2018). However, when an error is forfeited because of a failure to object, this Court analyzes for plain error. *United States v. McMurrin*, 70 M.J. 15, 18 (C.A.A.F. 2011). Under plain error review, the appellant must demonstrate (1) there was error, (2) the error was clear and obvious, and (3) the error materially prejudiced a substantial right of the accused. *United*

States v. Harcrow, 66 M.J. 154, 158 (C.A.A.F. 2008). Whether there is plain error is a question of law reviewed de novo. *McMurrin*, 70 M.J. at 18.

Law

Prior to *Carpenter*, military law was clear: 18 U.S.C. § 2703(d) of the Stored Communications Act allowed the government to obtain an accused's electronic records from an electronic communications service provider without obtaining a warrant because there was no Fourth Amendment reasonable expectation of privacy in the records. *See United States v. Allen*, 53 M.J. 402 (C.A.A.F. 2000).

In *Allen*, a child pornography case, law enforcement obtained from an internet service provider a listing of online services appellant accessed through the provider that identified the date, time, user, and internet sites accessed over several months. *Id*. at 409. The agent who obtained the records did not get a warrant for the records; rather, he simply requested them telephonically from the service provider. *Id*. at 404-05. This Court determined that this evidence was "electronic data" stored by the service provider, and that obtaining it required compliance with the Stored Communications Act. *Id*. at 408-409. However, this Court rejected the appellant's claim that the records were protected by the Fourth Amendment and held that "the release of such records does not require a warrant. They may also be released upon a court order issued on the 'reasonable grounds to believe' standard under 2703(d)." Id. at 409.

In *Carpenter v. United States*, 138 S. Ct. 2206, 2216 (2018), the Supreme Court confronted the issue of applying the Fourth Amendment to a "new phenomenon": the ability to chronicle a person's past movement through the record of his cell phone signals. In *Carpenter*, the government obtained a court order – but not a warrant – from Carpenter's wireless provider for "cell/site sector [information] for [Carpenter's] telephone [] at call origination and at call termination for incoming and outgoing calls" for a four month period. *Id*. at 2212.

The Court recognized that cell phones had become essential to most Americans; indeed, they had become "almost a feature of human anatomy." *Id*. at 2218. The phones continuously submit signals picked up by cell towers, which are then documented and maintained by the wireless companies for business purposes. *Id.* As the technology improved and number of cell towers increased, the ability to pinpoint the phone – and its user – became increasingly precise. *Id*. For obvious reasons, these records were a boon to law enforcement.

The Supreme Court recognized that these records revealed virtually all of the comings and goings of the person carrying the phone for extended periods of time. *Id*. at 2217-2218. Concerned that such data created "even greater privacy concerns" than GPS monitoring of a car, the Supreme Court determined that an individual has a reasonable expectation of privacy in the records, notwithstanding the fact that the records are maintained by a third party. *Id*. at 2218.

Thus, the Fourth Amendment required law enforcement obtain a warrant to obtain these historical cell-site records from the cell phone company, unless an exception to the warrant requirement existed. *Id*. at 2221. It was insufficient to obtain the records via court order issued under 18 U.S.C. § 2703(d), because the basis for obtaining a warrant (a showing of "reasonable grounds" that the records were "relevant and material to an ongoing investigation") fell "well short" of the probable cause required for a warrant. *Id*.

The *Carpenter* majority was careful to note that it was a "narrow" decision that applied only to historical cell-site location data. *Id*. at 2220. Thus, to the extent *Allen* applies to records *other than* historical cell-site location data that could be obtained under 18 U.S.C. § 2703(d), it appears to remain good law.

Argument

1. This Court should find the error forfeited, not waived.

In *United States v. Smith*, 78 M.J. 325, 326 (C.A.A.F. 2019), this Court held that under Mil. R. Evid. 311(d)(2)(A), a failure to move to suppress evidence at trial is waiver, not forfeiture. In an ordinary case, where the parties litigate how the facts apply to the law, applying waiver makes sense because it encourages the parties to raise objections, litigate the issues, and fully develop the record for appellate review. *See United States v. Stringer*, 37 M.J. 120, 132 (C.M.A. 1983) (Wiss, J., concurring in the result) (finding waiver "makes good sense" under Mil.

R. Evid. 311(d) when defense counsel's failure to object may have precluded the prosecution from submitting evidence to clarify the matter) (cited with approval in *Robinson*, 77 M.J. at n. 6).

However, that calculus is very different in cases where long-settled law binding on the facts of the case at the time of trial changes by the time of appeal – as C*arpenter* did to *Allen* on the facts of this case. Specifically, requiring the defense to move to suppress evidence, when the law at the time of suppression clearly provides no basis for suppression, creates a perverse incentive for defense counsel to file frivolous or meritless suppression motions at the trial level. Alternatively, it requires counsel to foretell that a future appellate court might one day overrule binding precedent. Where, as here, there is a fundamental post-trial change in the analytical framework of a particular issue that opens the door to a colorable assertion of a constitutional right not previously available, forfeiture—not waiver—ensures an accused receives a fair trial free of error. *See Harcrow*, 66 M.J. at 154.

2. The admission of appellant's historical cell-site records was error.

In light of *Carpenter*, the military judge erred in admitting appellant's cell-site records that had been obtained via a court order, rather than a warrant based on probable cause. The records in this case disclosed the precise location of appellant's iPhone 6 over the course of several months. This allowed SA Stewart

to plot the location of the iPhone CID had seized onto a map for the panel. As in *Carpenter*, appellant had a reasonable expectation of privacy in those records, notwithstanding the fact that they were held and maintained by Sprint, a third party.

Carpenter mandated that the government obtain a warrant supported by probable cause to obtain the records, rather than simply a "court order" showing "reasonable grounds" to believe the records were "relevant and material to an ongoing investigation" under 18 U.S.C. § 2703(d). In this case, however, the government sought (and obtained) the latter after Sprint refused to comply with the subpoena. (JA 469, 471). Thus, the military judge's admission of the records obtained without a warrant was erroneous.

This Court should not hold against appellant the fact that the defense requested the records in its discovery request on August 1, 2016. One of the foibles of the military discovery and production process is that defense counsel must request the trial counsel issue a subpoena for information not under the control of the government. R.C.M. 703(e)(2), (f)(4). This is different from practice in civilian federal court, where defense counsel can obtain a blank subpoena from a clerk of court and serve it without involvement from the court or prosecution. *See* Federal Rule of Criminal Procedure 17. Thus, unlike their

civilian counterparts, military defense counsel are required under the rules to "tip their hand" to obtain certain records as part of their pre-trial investigation.

This is problematic in cases where the defense may not know whether the records contain helpful or harmful information for the accused. Put simply, there is a risk to a military accused that when the trial counsel receives the records responsive to the subpoena, the trial counsel could turn around and use those records against the accused during trial. That is precisely what happened in this case. It would be fundamentally unfair for this Court to find the defense was at fault for requesting the records, when the military rules for discovery and production mandated the defense do precisely that as part of their pre-trial investigation. The unfairness to appellant is compounded because this issue is unlikely to arise in civilian court. *See United States v. Breeding*, 44 M.J. 345, 355 (C.A.A.F. 1996) (Sullivan, J., concurring in the result) (an accused can demonstrate a denial of due process under the Fifth Amendment by showing factors militating in favor of a civilian procedure "are so extraordinarily weighty as to overcome the balance struck by Congress" in Article 46 and RCM 703).

Furthermore, the defense was operating at the time under the pre-*Carpenter* understanding of the law that appellant had no reasonable expectation of privacy in his historical cell site records held by a third party. Thus, the request should not be construed as voluntary "consent" for the government to obtain the records because

it was made without knowledge that appellant had a protected Fourth Amendment reasonable expectation of privacy in the records. *See United States v. Mendenhall*, 446 U.S. 544, 558-59 (1980) ("knowledge [is] highly relevant to the determination that there [was] consent [to search].").

3. The error was clear and obvious.

Where the law at the time of trial was settled and clearly contrary to the law at the time of appeal, it is enough that an error be "plain" at the time of appellate consideration. *Harcrow*, 66 M.J. at 159 (quoting *Johnson v. United States*, 520 U.S. 461, 468 (1997)).

Under *Allen*, the law at the time of appellant's court-martial was clear: no warrant was required to obtain records under 18 U.S.C. § 2703(d) because the Fourth Amendment did not apply. 53 M.J. at 409. That holding is clearly contrary to the holding of *Carpenter*, at least with respect to the "narrow" field of historical cell site location data held by electronic service providers. Thus, *Harcrow* mandates this Court look to whether the error is clear at the time of appeal, i.e., under *Carpenter*. 66 M.J. at 159. *Carpenter*'s holding that historical cell site data must be obtained via a warrant, rather than a court order, is clearly applicable to appellant's case. Thus, the error was also plain and obvious.

4. The error was not harmless beyond a reasonable doubt.

Where a forfeited constitutional error is clear or obvious, "material prejudice" is assessed using the "harmless beyond a reasonable doubt" standard set. *United States v. Tovarchavez*, 78 M.J. 458, 460 (C.A.A.F. 2019). This standard is met when the Court is confident that there was "no reasonable possibility that the error might have contributed to the conviction." *Id*. (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)).

The government cannot show harmlessness beyond a reasonable doubt. Since the only witness who had met "Julio" testified that it was *not* appellant, the government was forced to rely on highly technical metadata from its DFE to link appellant to the phone where the messages were found. The most compelling evidence in support of the government's case was the cell site data, because it showed the seized iPhone's location on a map and clearly demonstrated it was within appellant's—not Gerard's—physical possession. (JA313). Emphasizing how even a "non-engineer Sprint custodian of records" could understand, interpret, and testify about the data, the trial counsel repeatedly pointed to the evidence during closing arguments to assert the case was far simpler than it appeared. (JA382, 400). Considering the government's emphasis on this evidence during its case-in-chief and arguments, the government cannot show its admission was harmless beyond a reasonable doubt.

Conclusion

Appellant was denied a fair trial due to significant improprieties by all parties. The defense failed to introduce wholly exculpatory, sworn prior testimony that was essential to their theory of the case. The prosecution intentionally ambushed the defense in front of the members to "smear" the accused: a tactic the military judge's instructions ultimately exacerbated, rather than cured. The military judge admitted evidence seized in violation of appellant's Fourth Amendment rights. Whether this Court grants relief for ineffective assistance of counsel, prosecutorial misconduct, or the erroneous admission of evidence, there is only one just result: setting aside the charges and specifications. WHEREFORE, appellant respectfully requests that this Honorable Court grant the relief requested.

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Certificate of Compliance with Rules 24(c) and 37

1. This Brief on Behalf of Appellant complies with the type-volume limitation of Rule 24(c) because it contains 10,480 words.

2. This Brief on Behalf of Appellant complies with the typeface and type style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Carter, Crim. App. Dkt. No. 20160770, USCA Dkt. No. 19-0382/AR, was electronically filed with the Court and Government Appellate Division on October 24, 2019.

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