IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellee	REPLY 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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Statement of the Case

On September 25, 2019, this Court granted appellant's Petition for Grant of Review. On October 24, 2019, appellant filed his brief with the Court. The government responded on December 16, 2019. This is appellant's reply.[1]

Argument

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

1. It is inexplicable how CPT MJ could argue the cloud synch and point the finger at appellant's brother during closing, while simultaneously having a "firm basis" for concluding Gerard's confession was false.

Appellee claims CPT MJ had a "firm factual basis" for believing Gerard's confession to being "Julio" was perjury and the cloud synch theory was false. (Appellant's Br., 20). The government's claim necessarily ignores CPT MJ's closing argument, in which he asserted that "Julio" – the person sending the messages – was appellant's brotherand that the messages were transferred onto appellant's phone through a cloud synch. (JA395). The only way appellant's brother was the culprit is if appellant's brother sent the messages. That was the

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[1] Appellant rests on his pleadings for the third specified issue.

essence of Gerard's testimony. Thus, CPT MJ could not have argued appellant's brother was the culprit, unless he believed (or at least did not firmly *dis*believe) the brother's confession to sending the messages.

Said another way, it defies logic that CPT MJ could argue something to the panel that he had a "firm basis" for disbelieving.[2] It would also defy the very ethical rules he cited as his basis for not introducing Gerard's testimony: Rule 3.3 of the Army's Rules of Professional Conduct for Lawyers prohibits "mislead[ing] the tribunal by false statements of the law or fact or evidence that the lawyer knows to be false." Dep't of the Army Reg. 27-26, Legal Services: Rules of Professional Conduct for Lawyers, [AR 27-26], Comment 1 to R. 3.3 (June 28, 2018). That neither CPT MJ's affidavit nor appellee's brief mention, let alone resolve, this disconnect speaks volumes about whether CPT MJ "firmly believed" by the close of trial that the cloud synch and Gerard's testimony were false.

2. Nothing that occurred mid-trial supplied CPT MJ a "firm basis" for concluding Gerard's testimony about sending the messages was perjured.

Appellee's analysis not only disregards CPT MJ's closing argument, but also the evidence corroborating Gerard's testimony that was adduced *after* CPT MJ decided not to play it. According to his affidavit, CPT MJ made this decision

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[2] CPT MJ is also apparently unable to address this fundamental discrepancy: he similarly did not mention the reason for his closing argument in his affidavit.

during the mid-trial consultation with his digital forensic examiner (DFE) and discussion with appellant, "prior to the defense case-[in]-chief." (JA659, 715). At the latest, this consultation would have occurred during the fifteen-minute recess just prior to the cross-examination of the government's DFE, because that was the last recess prior to the defense case-in-chief. (JA345).

Once the parties returned from the recess, the defense elicited the concession from the government's DFE that he would "not be surprised" to learn that KIK messages could back up remotely through the cloud to other devices (JA346): a concession CPT MJ ultimately used in his closing argument to argue the cloud synch theory. (JA395). Then, VG corroborated Gerard's testimony that Gerard had met up with her after messaging on KIK as Julio. (JA364). Together, this evidence adduced after CPT MJ's mid-trial consultation and decision not to introduce Gerard's testimony undermined any "firm basis" in disbelieving Gerard's confession he might have had. A reasonable attorney at this juncture would have reconsulted with his expert or reconsidered introducing Gerard's testimony; but it appears CPT MJ gave no further thought to the issue.

But this assumes appellee is correct that the defense DFE, Mr. Berryhill, told CPT MJ the cloud synch and Gerard's testimony were false. Mr. Berryhill's affidavit is not clear on this point. Mr. Berryhill stated that when CPT MJ asked during trial about his pre-trial conclusion that the seized iPhone was at Fort Polk,

he responded it was a "fact and not an opinion." (JA663). Later, in paragraph 5.b. of his affidavit, when Mr. Berryhill discussed "the possibility that the phone could have, in the alternative, synced with a cloud then transferred the pictures to the Accused's phone or another device," he simply re-iterated his pre-trial conclusion: that the nude "selfie" photos of appellant were taken on the phone that was with appellant at Fort Polk. (JA663). This conclusion is nothing new. Nor is it inconsistent with the cloud synch theory. Finally, if Mr. Berryhill told the defense the cloud synch was false during the mid-trial consultation, it hardly makes sense that they would lay the groundwork *for that very theory* immediately afterwards during the cross-examination of the government DFE.

Appellee also insinuates that appellant's "constantly changing version of the facts" during trial were further proof the cloud synch was false. (Appellee's Br. 20). Appellee ignores the video from October 2016–filmed over a month before trial and weeks before the pre-trial consultation with Mr. Berryhill–in which appellant and the assistant defense counsel demonstrated interconnectivity between appellant's iPhones. (JA653). The video compellingly contradicts any claim that

appellant was offering his attorneys constantly changing explanations during the middle of trial, and hence, that appellee's theories were demonstrably false.[3]

3. Appellee improperly offers new, post-hoc rationalizations for why CPT MJ might have believed Gerard's testimony was false.

In an effort to shore up CPT MJ's "firm basis," appellee lists "additional inconsistencies" between certain messages "Julio" sent and Gerard's testimony that "could lead CPT MJ to reasonably believe the testimony was false, validating his refusal to admit it." (Appellee's Br., 18-19). Appellee also asserts that Gerard's "disappearance" after the Article 32 would have led CPT MJ to question his veracity. (Appellee's Br., 18).

However, CPT MJ never cited these reasons as a basis for believing Gerard's testimony was false. Nor *could* he have believed it was false for these reasons. CPT MJ was presumably aware of these alleged inconsistencies before giving his opening statement, where he promised to play his testimony. If he had a

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[3] To the extent appellee asserts this issue because the Army Court of Criminal Appeals (Army Court) found as *fact* that appellant was offering constantly changing theories to his defense attorneys, it was error for the Army Court to have done so under the *Ginn* factors. *See United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997). Even if the video did not "compellingly" contradict CPT MJ's assertion (the fourth *Ginn* factor), it was at least directly in conflict with CPT MJ's affidavit on this point. *See id*. Thus, under the sixth *Ginn* factor, the Army Court was required to remand the issue to the trial level for an evidentiary hearing, rather than exercising its Article 66 factfinding power and deciding the legal issue. *Id*.

"firm basis" for believing Gerard's testimony was false for these reasons, the same ethical concerns he cited in his affidavit certainly would have barred him from promising Gerard's testimony during his opening statement. By the same token, if he believed Gerard's testimony was false because Gerard "disappeared" after the Article 32, he never would have moved for the military judge to have Gerard declared "unavailable" under Mil. R. Evid. 804(b)(1) so he could admit his prior testimony. Captain MJ clearly intended to admit this evidence when he gave his opening statement notwithstanding these issues, which is why his affidavit does not contain these reasons. Appellee merely invented them on his behalf.

In the context of ineffective assistance of counsel claims, this Court has long sought to "eliminate the distorting effects of hindsight" and evaluate counsel through his perspective at the time of trial. *See United States v. Akbar*, 74 M.J. 364, 379 (C.A.A.F. 2015) (quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984)). By asking this Court to accept these new, post-hoc rationalizations for CPT MJ's beliefs that actually conflict with his view of the case at the time, appellee invites this Court to depart from this longstanding precedent. This Court should decline the invitation.

4. Appellee's prejudice analysis fails to account for the panel's expectation to hear evidence about Gerard's involvement.

If properly presented, the cloud synch theory would have rendered irrelevant the "mountain of evidence" that the phone CID seized had been with appellant at Fort Polk, not with Gerard at Fort Drum. But no reasonable panel member could infer that a cloud synch was possible without hearing Gerard's testimony that he was in the area sending messages on an iPhone borrowed from appellant.

Appellee's prejudice analysis ignores how the defense left the panel with the mistaken impression that there was no evidence appellant had a brother sending messages during the time period. At the close of the government's rebuttal case, a panel member asked one of the CID agents, "Was there any evidence the accused's brother was at Fort Drum or Watertown, New York, during this time period?" (JA136). The agent responded, "No." (JA136). On cross-examination, the military judge prevented CPT MJ from rebutting this testimony with questions about whether the agent had heard about CID speaking with appellant's brother during the investigation. (JA137). At that point, CPT MJ could have introduced Gerard's testimony to rebut the agent's testimony. His failure to do so left the panel members to deliberate with the unrebutted understanding that there was no evidence of appellant's brother's involvement in the case. To leave the panel with

a flawed understanding of the central issue of the case is unquestionably prejudicial, and appellee's silence on the matter is deafening.

Trial counsel, on the other hand, was anything but silent on the matter. During argument, she emphasized how the defense had broken its promise to put on Gerard's testimony, and argued that the panel could not even conclude appellant had a brother in the first place. (JA400-401). The government's exploitation of the defense's failure to introduce Gerard's testimony only further compounded the prejudice.

If presented, Gerard's testimony would have filled in crucial gaps in the cloud synch theory. First, it would have been direct evidence that appellant actually had a brother. Second, it was the only evidence that Gerard was using a borrowed phone from appellant, which is necessary to permit a reasonable inference that there was some sort of connection between the phones appellant and Gerard were using. Third, it would have corroborated VG's testimony that the person behind the KIK messages was not appellant.[4] Finally, it would have

[4] The panel was explicitly told to disregard the only other corroboration of VG's testimony: MR's testimony.

allayed secondary concerns the panel might have had about the defense theory; for example, why someone would send nude pictures of his brother to people.[5]

Gerard's testimony was necessary to establish the cloud synch, which, as CPT MJ argued, would have rendered irrelevant the "mountain of evidence" [6] about the physical location of the iPhone CID seized. Without it, the panel had no reasonable basis to conclude that the messages Gerard sent could have ended up on appellant's phone, and no choice but to convict.

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

1. Appellee seeks to constrain this Court's ability to consider the entire record in analyzing whether MR played a central or collateral role in the case.

Appellee argues that MR's testimony was unrelated to the other specifications because "[a]s far as the fact finder knew, Miss MR was isolated from Julio Carter and KiK entirely." (Appellee's Br., 33). The only way to reach

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[5] Gerard explained that he sent the photos as a way to attract girls because he believed appellant had a better body than him. (JA29). This is not only plausible, but it corroborates appellant's statement to CID that his brother had "previously posed as him," which otherwise came across as self-serving and unbelievable. (JA 133).

[6] Though not mentioned in appellee's brief, this "mountain of evidence" was built in part on the historical cell site location data the government obtained without a warrant, as required by *Carpenter v. United States*, 138 S. Ct. 2206 (2018).

that conclusion is by ignoring significant points in the record where the trial counsel made the connection between MR, Julio, and KIK explicit in front of the panel. Accordingly, appellee's argument depends on this Court limiting its review to only what was admitted as evidence, rather than the record as a whole and the manner the parties litigated the issue before the members.

Specifically, appellee asks this Court to disregard two key points in the trial where the government connected MR to KIK and "Julio" before the panel members. (Appellee's Br., 33-34). During opening statement, the trial counsel explained that MR "will tell you that she used the Kik username, KayKay when she talked to Cjulio…and it was the accused who showed up at her house to pick her up." (JA58). Then, the government had a special agent identify Prosecution Exhibit 7 for Identification as a message log, and attempted to have MR identify appellant based on that message log. (JA114-115, 170). Thus, the record shows the government clearly made the panel aware of the connection between MR, KIK, and "Julio."

Since opening statements and Prosecution Exhibit 7 for Identification are not "evidence," appellee argues this Court may not consider how they were used in assessing how the panel understood MR's involvement with KIK and Julio. This novel approach runs contrary to this Court's longstanding practice of considering "the entire record" when determining whether the military judge abused his

discretion in not granting a mistrial. *See United States v. Ashby*, 68 M.J. 108, 122 (C.A.A.F. 2009). Appellee offers no caselaw or convincing rationale as to why this Court should disregard the way the government litigated its case in front of the members and focus instead exclusively on what was admitted as evidence.

Review of the entire record clearly shows the government's efforts to inform the panel from the outset that MR's importance was not just to prove up the adultery specification, but also to put a face to "Julio." Since Julio's true identity was the central issue for all specifications, MR's testimony that the person she met did not appear to be the accused touched *all* of the specifications. Thus, the insinuation that appellant (or someone acting on his behalf) bribed MR to testify falsely about the identity of the person she met from KIK did not just infect the single adultery specification, but *all* of the specifications.

2. The remedial measures did not remove the "taint" of the government's misconduct.

Just as MR's testimony touched all of the specifications, so too did the military judge's instruction to disregard her testimony in its entirety. Far from removing the "taint" from the government's misconduct, the military judge's instructions had the perverse effect of compelling the panel members to disregard the only corroboration of VG's testimony that appellant was not Julio. The presumption that panel members follow the military judge's instructions, *see*

United States v. Sewell, 76 M.J. 14, 19 (C.A.A.F. 2017), undermines, rather than strengthens, appellee's argument.

Nonetheless, appellee claims there was no prejudice because defense counsel declined to recall MR during their case-in-chief. (Appellee's Br., 36). In reality, the government's intentional misconduct left the defense with no good choices to minimize the prejudice to their case. To recall MR would potentially re-open the door to the bribery allegation. Even if it did not, the optics of recalling a tainted witness could damage defense counsel's own credibility. Indeed, the military judge noted the defense would be in an "untenable position" by having to dispute bribery claims of a witness mid-trial. (JA622). On the other hand, not recalling MR meant foregoing a defense on a key issue of the case. When the government's intentional misconduct left the defense trapped between two equally bad options, there never was a choice at all.

In that sense, this case is inapposite to *United States v. Dancy*, 38 M.J. 1 (C.M.A. 1993), which appellee analogizes to this case. There, the government similarly violated its discovery obligations and sprung damaging evidence on the defense before the panel. *Id*. at 3. However, in marked contrast to this case, the defense proposed an "equitable solution" to adopt and offer the undisclosed evidence in order to mitigate its effect. *Id*. at 3-4. This Court found that this equitable solution proposed by the defense minimized the prejudice from the

discovery violation because it allowed the defense to "put the best spin on [it]." *Id*. at 6. Here, the defense never proposed an "equitable solution" to mitigate the damage caused by the government, because no solution short of a trial without the cloud of alleged bribery hanging over it could be "equitable."

Finally, appellee claims "the information withheld would not have changed the defense trial strategy." (Appellee's Br., 37). This overlooks the most obvious tactic the defense could have pursued had the government not withheld the evidence: to seek its exclusion under Mil. R. Evid. 403 or 404(b) outside the presence of the members.[7] Had MR's inability to identify appellant been admitted without the taint of alleged bribery, the defense could have argued in closing that the only people who actually met "Julio" testified that it was not appellant. Moreover, these eyewitnesses "bookended" the allegations: MR was among the first individuals to communicate with Julio, and VG was the last, thus establishing that the same person had been behind Julio the entire time. This eyewitness testimony would have been compelling, given the government's reliance on forensic and expert testimony to establish appellant's guilt.

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[7] The objection would have had merit, given how the military judge described the evidence as being of "questionable probative value for the Government." (JA622).

3. A willful and strategic discovery violation is egregious enough to warrant a mistrial on all specifications.

Appellee asks this Court to excuse the government's intentional suppression of this evidence as being insufficiently "egregious[]" as to merit a mistrial on all specifications. (Appellee's Br., 39). Appellee argues the misconduct is not as severe as in *United States v. Stellato*, where the government's "recklessly cavalier approach to discovery" resulted in the loss of exculpatory witnesses and evidence. 74 M.J. 473, 482-83 (C.A.A.F. 2015).

Appellant's position is that the government's *intentional* suppression of requested discovery for the purpose of "obtain[ing] a tactical advantage" and "smear[ing] the accused and the witness," (JA621), can be just as egregious as a "recklessly cavalier approach to discovery." The government here embarked on precisely the sort of gamesmanship the military's robust discovery rules were designed to prevent, and that this Court has repeatedly condemned. *Id*. at 481-482 (citing Dep't of the Army, Reg. 27-26, Legal Services, Rules of Professional Conduct for Lawyers, R. 3.4(a), (d) (May 1, 1992)). Appellant does not receive an "unnecessary windfall" if there is a mistrial on all specifications, as appellee suggests. (Appellee's Br., 35). Rather, the government receives a windfall when it succeeds through its own intentional misconduct in undercutting a viable defense.

Conclusion

For the reasons set forth above, appellant requests this Court grant appropriate relief.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to the Clerk of Court and the Government Appellate Division on 6 January 2020.

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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 January 6, 2020.

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