IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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

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 and the Case

The Army Court of Criminal Appeals had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 866. This Court exercises jurisdiction over appellant's case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(a). On 25 September 2019, this Court granted appellant's petition for review. *United States v. Carter*, 2019 CAAF LEXIS 710 (C.A.A.F. Sep. 25, 2019).

Statement of Facts

Private First Class (PFC) Gerald Carter was stationed at Fort Drum, New York, from May 2014 until his court-martial in November 2016. (JA 445). Due to

a thirty-day Joint Readiness Training Center (JRTC) rotation, appellant was at or near Fort Polk, Louisiana from 3 June 2015 to 30 June 2015. (JA 67, 223–24). Appellant returned to Fort Drum, New York on 30 June 2015. (JA 69).

During the rotation, appellant called and texted. (JA 224). Indeed, appellant's supervisor said that she called and texted with him during JRTC. (JA 224). Appellant took multiple "selfies" at what appears to be a training environment. (JA 703–12). These pictures show a Meal Ready to Eat (MRE), a tent with cots lined up, and appellant's face, name, and rank. (JA 703–12).

a. Investigation into Appellant's Criminal Acts

While appellant was at JRTC, the Fort Drum Criminal Investigation Command (CID) office received a report that a soldier was sending sexually explicit messages to a fifteen-year-old girl. (JA 64). The telephone number belonged to appellant. (JA 65, JA 460). The pseudonym on the illicit account was "Julio Carter." (JA 64).

Appellant had no "indication that CID was involved" when he returned to Fort Drum. (JA 70). On 8 July 2015, pursuant to a magistrate authorization, CID seized appellant's belongings, recovered an iPhone 6, and conducted a logical extraction. (JA 66, 70, 99). A logical extraction pulls "any text messages, contacts, phone logs, any–a lot of pictures, videos, a lot of different kinds of data that is stored on the phone." (JA 100). Upon review, CID found messages

between appellant and multiple girls, "both above and below the age of 16," mostly on the KiK application. (JA 72).

Special Agent LSP photographed the KiK application when he opened it on appellant's phone, later admitted as Prosecution Exhibit 18. (JA 72–74, 83). The photo displayed "different conversations with other peers" from Julio Carter, maintained on appellant's phone. (JA 73). Notably, dates of these conversations included 28 March 2015, and 10, 16, 21-22, and 24 June 2015. (JA 459). Victims also testified about the specific dates of lewd messages with Julio Carter, including 6, 7, 8, 10, 24, and 29 June 2015. (JA 121, 152, 153, 164).

Julio Carter, the name on the KiK account, engaged in illicit messages with multiple victims. Miss SM told Julio Carter she was fifteen. (JA 159). Regardless, he asked for "naked pictures." (JA 161–62). Julio Carter reciprocated with his own naked "below the waist pictures." (JA 163). Miss SC, who exchanged messages before she entered into the tenth grade, received pictures of his "private areas" or "penis." (JA 144, 148, 150). Julio Carter threatened Miss AS, saying "if [she] didn't keep sending pictures and videos" he would tell her parents. (JA 141). After the threat, she "sent more." (JA 141).

b. Appellant's Evolving Story

On 8 July 2015, CID interviewed appellant. (JA 70, 132). Appellant denied using the name "Julio Carter," but suggested that his brother "previously posed as

him." (JA 133). The agent asked appellant "if anyone had used his cell phone." (JA 132). Appellant told law enforcement "*no one had used [the phone] besides himself*." (JA 132) (emphasis added).

Before his Article 32 hearing, appellant told his defense counsel about a possible alibi. (JA 658). Accordingly, appellant's defense counsel telephonically spoke with an unknown individual who identified himself as "Gerard Carter," appellant's brother. (JA 541–544). During this conversation, Gerard claimed to have sent the lewd messages. (JA 541–544). Gerard said he visited appellant, borrowed his cell phone while appellant was at JRTC, and posed as appellant on social media for the "sake of meeting women." (JA 542, 658). After the Article 32, "Gerard" also telephonically spoke to CID. (JA 546–47). "Gerard" said that he created fake KiK and Facebook accounts using the name of Julio Carter, which contained images of appellant. (JA 546–47).

At the Article 32 hearing on 18 March 2016, "Gerard," without appearing, testified telephonically that he was responsible for the crimes. (JA 29). Specifically, he testified that:

> 1. Appellant lent Gerard his iPhone 6 during his visit. (JA 550 at 20:30, 35:58). Gerard, and not appellant, sent naked pictures of appellant *on that phone*. (JA 550 at 21:25) (emphasis added). The witness never mentioned videos.
>
> 2. Appellant used a "pre-paid" phone at JRTC. (JA 550 at 28:36).

3. Gerard did not have a job while visiting appellant. (JA 550 at 26:15). Gerard stayed at Fort Drum throughout his entire visit until returning to Detroit in September. (JA 550 at 26:32, 32:46).

In October 2016, the government attempted to subpoena Gerard Carter, but he never responded. (JA 54, 556). The witness "only answered his phone one time after the Article 32 hearing" and hung up on the paralegal attempting to arrange his travel. (JA 564). The witness "since disconnected that phone number." (JA 564).

Before trial, on 29 November 2016, the defense expert consultant told defense counsel that the digital forensic evidence contradicted the Article 32 testimony. (JA 648). The evidence placed appellant's iPhone 6 at Fort Polk, LA, not in the hands of some mystery brother in New York. (JA 648). After this conversation, appellant crafted a second "theory of an iPhone, iTunes, iCloud synch and Kik message retrieval." (JA 659).

On 1 August 2018, during his appeal, appellant averred: "I had two iPhones. I loaned one to my brother when he visited me." (JA 652). Most critically, even in this sworn affidavit, appellant still asserted that "my brother was the one who messaged the girls using *the phone that I loaned to him*." (JA 652) (emphasis added).

c. Digital Forensic Evidence

1. KiK software demonstrated no one logged into appellant's account from a second account

On KiK, people communicate through messages, images, and videos. (JA 109). KiK is a "peer to peer messaging service." (JA 109). This means that there must be a cellular or wi-fi signal to operate it. (JA 109).

KiK "can only be logged in on one device at a time." (JA 343). If the user logs into KiK on a different device, (e.g., a cell phone), then all prior messages delete. (JA 111, 145-46, 158). Had "Gerard" logged into the KiK app on another device, it would have removed "the message history . . . on the device." (JA 343).

CID discovered lewd messages dating back to "October of 2014" on appellant's KiK application. (JA 342). The Article 32 preliminary hearing officer noted that Miss AS first messaged Julio Carter in January 2015. (JA 48). Likewise, at trial, Miss SM confirmed that she began communicating with Julio Carter in April 2015. (JA 163).

The military judge summarized this evidence during an Article 39(a): while the defense posited that "it wasn't the accused, it was some other person . . . that means someone else would have to have the accused's phone." (JA 130). However, here, the evidence indicated "that no one has ever logged off or logged into another device using that KiK account. So, therefore, the only way someone

would be using the Julio Carter KiK application is if they were using the accused's phone." (JA 130).

2. Geo-coordinates on Appellant's Phone Indicated Appellant Possessed the iPhone 6 at JRTC

When CID conducted a logical extraction on appellant's iPhone 6—notably titled "Gerald's iPhone"—CID retrieved information that included "call logs, text messages, photographs, location data, [and] contacts . . . ." (JA 101, 329, 330–31). The government admitted the logical extraction data at trial without defense objection. (JA 101).

Special Agent PE testified about this logical extraction as an expert in the field of digital forensic examination. (JA 329). He explained that the metadata on the phone demonstrated that picture files ("selfies") from 5 June 2015 through 20 June 2015 "resolve back to Fort Polk." (JA 337). Photos contain metadata that catalog the geo-coordinate location of the capture site. (JA 332). In this case, Special Agent PE used software and reviewed these "data points" from appellant's iPhone 6. (JA 332). Specifically, the expert reviewed the "selfies" appellant took. (JA 703–12).

Between 3 June 2015 and 29 June 2015, the geo-coordinates attached to these pictures "placed the phone at Fort Polk." (JA 332). The same phone had pictures from March 2015 with geo-coordinates in New York. (JA 344–45). The

expert produced a report with these conclusions, and the government admitted it at trial without defense objection. (JA 335–36).

The expert also explained that the photos containing the geo-coordinate locations were in "the attachments database." (JA 339). Accordingly, the photos were attached to "either a text message, an email, [or] an iMessage," sent directly from appellant's phone. (JA 339). Based on the "capture time," a term specific to Apple, the expert opined that the photos were taken on appellant's iPhone 6. (JA 340). Finally, the expert opined that appellant's iPhone 6 was physically located at Fort Polk, LA, between 3 June 2015 and 29 June 2015. (JA 341–42). In his expert opinion, all relevant KiK messages were sent from appellant's iPhone 6. (JA 343–44).

3. The Content of the Messages Indicated Appellant was the Sender

The logical extraction could not recover geo-coordinates for the contraband photos. (JA 342). However, the KiK messages themselves indicated appellant was the sender. First, Julio Carter told Miss AS that "he lived on Fort Drum." (JA 142). Then, although "Gerard" testified at the Article 32 that he stayed in New York the whole time, Julio Carter messaged Miss HR, "I'm back in New York," indicating his return from an out-of-state sojourn. (JA 40). The messages further highlighted Julio Carter's travels, as trial counsel pointed out in argument, where he said: "[W]hen I come back to New York we can finally fuck," and "I still want

to see you when I get back." (JA 399). The date of these text messages were 29 June 2015—the day before appellant's unit returned from JRTC. (JA 401). Lastly, that appellant attached screenshots of prior KiK conversations, as the trial counsel argued, further demonstrated his possession and ownership of the KiK account. (JA 402).

d. Defense's Theory at Trial

At trial, defense maintained the brother sent the photos. Defense called Miss VG, who testified that she communicated with Julio Carter over KiK. (JA 349). Their messages were sexual in nature but did not contain photos. (JA 349). The male picked her up and apologized for the condition of the jeep, that "it is his brother's." (JA 349). When they got to his house, the male told her "that his brother was going to be home so we had to leave before [four]." (JA 349). On cross examination, the government clarified that Miss VG first began to communicate with Julio Carter on 30 June 2015. (JA 351, 359). A panel member asked: "Can she identify 'Julio Carter' at this time? Is Gerald Carter the one who was driving the jeep that took her to his home?" (JA 360–61). Miss VG testified that appellant was not Julio Carter from KiK. (JA 364).

Additional facts necessary to dispose of the assignments of error are incorporated below.

Summary of Argument

The defense counsel had a firm factual basis to believe the witness's Article 32 testimony was false, and took the necessary steps to ensure he complied with the Rules of Professional Conduct. The military judge took drastic remedial action when he granted a mistrial to one specification and gave the panel a detailed, appropriate curative instruction. Appellant waived any error in the admission of historical cell site location information data, which was properly admitted at his trial under the good faith exception.

Specified Issues

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

Additional Facts

a. Pre-trial Preparation

At the Article 32, "Gerard Carter" telephonically testified that he possessed the iPhone 6 in New York while his brother had a burner phone at JRTC. (JA 658). Thereafter, this individual refused to communicate with the defense. (JA 658). Consequently, defense counsel [CPT MJ] filed a motion to admit prior testimony for his unavailable witnesses. (JA 52, JA 530). Under MRE 804(b)(1), the military judge authorized the defense to introduce their Article 32 testimony at trial. (JA 530).

b. Defense Counsel Discovered the Article 32 Testimony was False

In privileged conversations with his expert consultant, Mr. Jon Berryhill, CPT MJ learned that his client was "being untruthful." (JA 658). Despite appellant's assertions that the phone was with his brother in Fort Drum, the metadata showed otherwise. (JA 658). Specifically, the digital forensic evidence placed the phone in Fort Polk, LA, while appellant was training at Fort Polk, LA. (JA 658). This was a matter of "fact" and not of opinion. (JA 663).

On 29 November 2016, CPT MJ explained to appellant that he would not admit testimony that the phone was in New York because it would be a lie. (JA 658). Captain MJ stated that the Rules of Professional Conduct and his ethical requirements forbade him from admitting untruthful evidence. (JA 658). Then, appellant proposed a second theory based on message retrieval through an iCloud synch. (JA 658–59).

Trial began on 30 November 2016. (JA 567). The military judge instructed the panel members "that opening statements are not evidence in this case. Rather, they are what counsel expect the evidence will show." (JA 56). In his opening statement, CPT MJ promised the panel that they would hear sworn testimony from appellant's brother taking accountability for the crimes. (JA 62).

c. After the Start of Trial, Captain MJ Learns that the Article 32 Testimony was False

When CPT MJ delivered the opening statement, he had yet to receive the government's final expert report or ask his expert about this two-phone synch theory. (JA 659, 663). The government's digital forensic expert "finally analyzed the evidence in the midst of the trial." (JA 663). Mr. Berryhill considered the second theory and stated:

> The analysis of the contraband pictures metadata and other properties revealed that the contraband pictures were not taken on another device because when the image was originally captured, specific information such as the camera type, geography, date and other information that is retained by the original picture, which documented that 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 to the Fort Drum area and the cellular phone in question.[1]

[sic] (JA 663). Captain MJ ultimately did not admit the Article 32 testimony at trial. (JA 659).

d. The Alibi Defense Remained

Defense's theory continued to be that the victims were "communicating with someone else." (JA 62). First, the defense elicited testimony that appellant told CID how his brother had previously posed as him. (JA 133). Defense also forced

[1] Captain MJ's affidavit said "the second theory was probably also untrue." (JA 659). However, in Mr. Berryhill's affidavit, he was unequivocal that the second theory was not possible. (JA 663).

CID to concede that when they attempted to catch "Julio," they set up a sting operation in New York, even though appellant was in Louisiana. (JA 121–23).

CPT MJ highlighted that several witnesses thought they were communicating with someone in New York. (JA 142). Certain messages implied the sender's presence was "by the main gate [of Fort Drum]" and on Constitution and Mifflin Loop near Fort Drum on 6–7 June 2015. (JA 121). Miss SC and Julio Carter had discussed meeting at Mountain Fest, a concert taking place on Fort Drum. (JA 151). CPT MJ emphasized Julio's 24 June 2015 message that he was "not going to come on base" because he does not "like cops, let alone military people." (JA 151–52). The same individual also said they were in Syracuse on 10 June 2015. (JA 153).

Appellant elected not to testify. (JA 714–15). During closing argument, CPT MJ posed reasonable questions like why would "Julio" communicate about meeting up at a Walmart in New York if he were in Louisiana? (JA 391). Defense counsel argued that this case is still about "[s]omeone who's not here." (JA 389). He focused on Miss VG's testimony that "Julio told her it's my brother's Jeep, my brother's house. My brother's returning soon." (JA 393). "[M]y client," he argued, "PFC Gerald Carter is not Julio Carter." (JA 389).

While discussing instructions with the military judge, defense requested an alibi instruction. (JA 368). The military judge agreed there was evidence showing

the accused was at a different location during the time of the Specification 2 of Charge III (possession of child pornography at or near Fort Drum, New York, between on or about 8 June 2015 and on or about 9 June 2015). (JA 20, 370). And so, at the close of evidence, the military judge instructed the panel that "[a]libi is a complete defense to this offense." (JA 378).

Standard of Review

Ineffective assistance of counsel claims are reviewed de novo. *See United States v. Akbar*, 74 M.J. 364, 379 (C.A.A.F. 2015).

Law

The Sixth Amendment of the United States Constitution guarantees, among other things, that an accused shall have the Assistance of Counsel for his defense in all criminal prosecutions. U.S. CONST. amend. VI. In 1984, the Supreme Court of the United States set out a two-part test to determine whether a counsel's performance fell short of this Sixth Amendment guarantee. *See Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* applies to trial by courts-martial. *United States v. Scott*, 24 M.J. 186, 187 (C.M.A. 1987).

To prevail on an ineffective assistance of counsel claim, appellant must show that his counsel's performance was so deficient that he was not "functioning as the 'counsel' guaranteed by the Sixth Amendment," and the deficient performance prejudiced him such that he was deprived of a fair trial—one with an

"unreliable result." *Strickland*, 466 U.S. at 687. Appellant must meet both standards to obtain a reversal of a conviction. *Id*. at 691. Courts can analyze each prong independently. *Id.*

An attorney is deficient when his representation falls "below an objective standard of reasonableness." *Id*. at 688. Appellate courts do not measure deficiency based on the success of a trial defense counsel's strategy, but instead "whether counsel made an objectively reasonable choice in strategy" from the available alternatives. *See United States v. Dewrell*, 55 M.J. 131, 136 (C.A.A.F. 2001). Only when an accused can show his counsel's performance diverged from that of "prevailing professional norms" is he able to overcome this presumption. *Id*. *See also United States v. Anderson*, 55 M.J. 198, 201 (C.A.A.F. 2001). This is a "heavy" burden, as military defense counsel are "presumed to have performed in a competent, professional manner." *United States v. Quick*, 59 M.J. 383, 386 (C.A.A.F. 2004), *see also United States v. Cronic*, 466 U.S. 648, 658 (1984) ("Moreover, because we presume that the lawyer is competent to provide the guiding hand that the defendant needs . . . the burden rests on the accused to demonstrate a constitutional violation.").

Counsel has "wide latitude" in tactical decisions, receiving a high level of deference. *Strickland*, 466 U.S. at 689. Accordingly, the Court of Appeals for the Armed Forces (CAAF) makes "every effort . . . to eliminate the distorting effects

of hindsight" and to evaluate the conduct of counsel given the perspective at that time. *See Akbar*, 74 M.J. at 379. In analyzing ineffective-assistance claims under *Strickland*, this Court asks three questions:

> 1. Are the allegations made by appellant true; and, if they are, is there a reasonable explanation for counsel's actions in the defense of the case?
>
> 2. If they are true, did the level of advocacy fall measurably below the performance ordinarily expected of fallible lawyers?
>
> 3. If ineffective assistance of counsel is found to exist, "is . . . there . . . a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt?"

United States v. McConnell, 55 M.J. 479, 481 (C.A.A.F. 2001) (quoting *United States v. Polk*, 32 M.J. 150, 153 (CMA 1991)). Regarding prejudice, the third question in the *Polk* test comports with the prejudice standard in *Strickland*. *Id*. at 481. The CAAF affirmed this three-part test as recently as 2011. *See United States v. Gooch*, 69 M.J. 353, 361–62 (C.A.A.F 2011).

Argument

Appellant's trial defense team were not ineffective. First, defense counsel reasonably believed the Article 32 testimony was perjured and was ethically bound to refuse to admit it. Second, his advocacy was exactly that which the Supreme Court and CAAF expect of attorneys. Finally, appellant fails to establish prejudice.

1. Appellant's assertions of error are not true and the defense counsel's reasonably refused to introduce false testimony.

Defense counsel did not admit the Article 32 witness testimony because reliable, forensic evidence indicated that it was false. While attorneys must zealously represent their clients, the Rules of Professional Conduct forbid them from offering false evidence. Dep't of Army Pam. 27-26, Legal Services: Rules of Professional Conduct for Lawyers [DA Pam. 27-26], para. 3.3(a)(4) (1 May 1992). Rule 3.3 not only forbids the introduction of evidence "that the lawyer knows to be false," but the lawyer "may" refuse to offer evidence he "reasonably believes is false," requiring candor toward the tribunal. (JA 721).

While an accused has a constitutional right to testify, this does not extend to false testimony. *See Nix v. Whiteside*, 475 U.S. 157, 173 (1986). In *Nix v. Whiteside*, the Supreme Court held that an attorney's refusal to cooperate with a defendant in presenting perjured testimony did not violate his Sixth Amendment right to counsel. *Id*. at 163. Plainly, the duty to zealously advocate the defendant's cause "is limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth." *Id*. at 166.

Forensic digital evidence and cell site location information undeniably impugned "Gerard's" Article 32 testimony. (JA 446, 676–713). Metadata cataloged on appellant's phone plotted its location, using geo-coordinates assigned to his "selfies." (JA 332). The data-points identified that

appellant's iPhone 6 sent lewd photos from Fort Polk, LA. (JA 662). This effectively placed the phone in his client's hand. Therefore, CPT MJ found himself with a "firm factual basis" under Rule 3.3 to refuse to admit the evidence. (JA 721). CPT MJ investigated appellant's revised two-phone synch theory, but Mr. Berryhill said this was also untrue. (JA 659, 663). Mr. Berryhill's conclusions was a matter of "fact and not opinion." (JA 663). Simply put, CPT MJ's refusal to admit the Article 32 testimony was objectively reasonable, if not compelled by his ethical obligations.

Further, additional inconsistencies would make any defense attorney suspect that the Article 32 testimony was false. "Gerard" testified that he never left Fort Drum during the visit. (JA 550 at 26:32, 32:46). This directly contradicts the June 2015 KiK messages, saying "when I come back to New York we can finally fuck." (JA 399). "Gerard" testified he did not have a job. (JA 550 at 26:15). However, June 2015 KiK messages referenced getting "called into work," or "[h]ere at work." (JA 37). "Gerard" claimed to have stayed with appellant until September 2015 when he returned to Detroit. (JA 550 at 26:32, 32:46). However, in July 2015, CID observed appellant's residence was unoccupied. (JA 115–16). "Gerard" also disappeared before trial and no member of the government or defense could contact him. (JA 54, 564). These glaring inconsistencies alone could

lead CPT MJ to "reasonably believe" the testimony was false, validating his refusal to admit it. (JA 721).

2. Captain MJ's advocacy did not fall measurably below the performance ordinarily expected of fallible lawyers.

In *United States v. Barker*, this Court outlined two standards an attorney should adhere to when facing a client who persists in providing false testimony that by extension applies to false evidence. 58 M.J. 380, 384 (C.A.A.F. 2003). First, counsel must possess "a firm factual basis" that the evidence would be false. *Id*. at 385. This standard ensures counsel has conducted adequate inquiry prior to initiating any action under the ethical standards. *Barker*, 58 M.J. at 386 (citing *United States ex rel. Wilcox v. Johnson*, 555 F.2d 115, 122 (3d Cir. 1977)).

Second, should an attorney have a firm factual basis to believe the evidence will be false, the CAAF recognized several appropriate responses. *Id*. at 387. The attorney should have "a discussion with the client that reviews the facts, the basis for the attorney's concern, and the potential consequences for the accused if the client persists in a desire to provide the testimony." *Id*. If the client persists, the advice "should cover consequences in terms of the obligation to tell the truth, pertinent criminal sanctions, tactical considerations at trial, and the effect of testimony in a free narrative form." *Id*; *see also Nix v. Whiteside*, 475 U.S. at 171 ("Accepted professional norms in those situations include attempts to dissuade the

client from committing perjury, and even threatening to withdraw from representation.").

The defense counsel in this case adhered to the two-step *Barker* mandate. At the outset, CPT MJ had a firm factual basis to believe the Article 32 testimony was false. Mr. Berryhill traveled to Fort Drum and reviewed the government's digital evidence against appellant with CPT MJ. (JA 662). Mr. Berryhill's forensic investigation discovered that the proffered theories were impossible. (JA 662–63). Mr. Berryhill concluded appellant "was being untruthful" with the defense team. (JA 662). The metadata and properties of the pictures revealed that appellant had "taken pictures in and around Fort Polk, LA, with the very camera phone that [appellant] had claimed was left with his brother in and around the Fort Drum, NY area." (JA 663). After trial commenced, when appellant offered an alternative theory that his phone "synched with a cloud and then transferred the pictures" Mr. Berryhill explained that was also untrue. (JA 663). This was a matter of "fact and not an opinion," as it was simply black-and-white forensic data. (JA 663).

Therefore, just as the contradictions in *Barker* "rendered [his] story physically impossible," so too did the metadata on appellant's phone. *See United States v. Barker*, 65 M.J. 691, 699 (A.C.C.A. 2007), *aff'd*, 66 M.J. 468 (C.A.A.F. 2008). Likewise, just as the "constantly changing version of the facts" was further

proof of the falsehoods in *Barker*, appellant's inability to get his story straight in this case provided CPT MJ with the firm factual basis to believe the Article 32 testimony is false. *Id*. Ultimately, CPT MJ conducted a diligent investigation and drew an educated, informed conclusion that the Article 32 testimony was false.

Given this firm factual basis, CPT MJ then followed the accepted professional norms outlined in *Nix* and *Barker*. Upon forming his belief that the Article 32 testimony was false, CPT MJ addressed his concerns with his client. (JA 714–15). Captain MJ discussed the facts of concern with appellant and pointed specific and articulable reasons why he believed the Article 32 testimony to be false. (JA 658). Captain MJ discussed appellant's "possible testimony at trial," but explained that he could not present evidence that appellant's cellular phone was in New York when the forensic evidence indicated it was, in fact, in Louisiana. (JA 658). Then, as *Barker* instructs, CPT MJ offered to let his client testify in the narrative form. (JA 658). Appellant elected not to do so. (JA 366).

CPT MJ's investigation into the evidence and subsequent consultation with appellant did not fall measurably below the performance expected of attorneys but instead was exactly what the legal community expects of defense attorneys in these situations. Throughout trial, CPT MJ zealously advocated for appellant. Even though he never did admit the Article 32 testimony, CPT MJ articulated and furthered the defense alibi theory at trial. Thus, CPT MJ's performance most

certainly was not "measurably below" the performance ordinarily expected of fallible lawyers.

3. Assuming arguendo deficient performance, appellant suffered no prejudice.

If it is easier to dispose of an ineffective assistance of counsel claim on the ground of lack of sufficient prejudice, which "we expect will often be so," that course should be followed. *Strickland*, 466 U.S. at 697. Here, appellant was not prejudiced because evidence against him was substantial and overwhelming. Many of the incriminating messages were exchanged during June 2015. (JA 20–23). "Data points" from appellant' iPhone 6 "placed the phone at Fort Polk" between 3 June 2015 and 29 June 2015, and directly in appellant's hands. (JA 332). Further, pictures on the phone were in the "attachments database," proving the pictures were attached to "either a text message, an email, [or] an iMessage" and they were sent directly from appellant's phone. (JA 339). The government expert negated (and the defense expert consultant agreed) all of appellant's evolving explanations for why the forensic evidence pointed to him. (JA 340).

Therefore, notwithstanding defense counsel's objectively reasonable decision-making, this case is easily resolved on appellant's failure to establish sufficient prejudice. Appellant faced a mountain of evidence. Even if there were error, the panel would have certainly found appellant guilty.

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

Additional Facts

a. Miss MR's Testimony

Appellant was charged with wrongfully having sexual intercourse with Miss MR, a woman not his wife, "on or about 17 February 2015," at or near Fort Drum, New York. (JA 20). At trial, the government called Miss MR to the stand. (JA 167). After background questions, trial counsel asked: "[D]o you recognize the accused?" (JA 168). Miss MR testified, "his face shape was different," and that the person she met "was a lot lighter." (JA 168). Apparently, the government had expected her to identify appellant as the person with whom she met and connect him to "Julio Carter." (JA 203).

Trial counsel tried to show Miss MR a picture, but defense objected based on relevance. (JA 169). Trial counsel handed the witness Prosecution Exhibit 7 for identification; however, the witness never confirmed nor denied whether appellant matched the picture. (JA 170). Instead, the witness answered—somewhat nonresponsively—"I don't think I saw any pictures of his face. I saw a picture of his body." (JA 170). Prosecution Exhibit 7 *for identification* was never admitted at trial. (JA 96–97, 115, 170).

After Miss MR failed to testify as expected, the government counsel said: "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." (JA 171). Defense counsel said: "Objection. 39(a)." (JA 171). Throughout Miss MR's entire testimony, there was no mention of KiK or Julio Carter. (JA 167–71).

b. Article 39(a) with Miss MR

The military judge excused the panel members, asked the witness to step out of the courtroom, and held an Article 39(a) session. (JA 172–73). Indeed, Miss MR had told the government that someone contacted her and attempted to manipulate her testimony. (JA 190). The defense team also learned that Miss MR informed the government about the bribe and provided "screen shots of the images with the nickname and the number that had called her" before trial. (JA 568–69).

The following morning, CPT MJ called Miss MR as a witness in his mistrial motion. (JA 187). There, the military judge asked independent questions and learned that appellant's "cousin" contacted her and offered to give her a thousand dollars if she did not "tell on him." (JA 193–94). He confirmed Miss MR was unable to identify appellant and that she did not take the bribe. (JA 194–96).

c. Prosecutorial Misconduct

Prior to trial, the defense made a specific discovery request to the government to disclose, among other things, any "payment or promises of

payment" or any other consideration made to a witness. (JA 200). This request extended to "any stage of the proceeding." (JA 200). The government acknowledged an ongoing obligation but failed to disclose anything. (JA 201–02).

Despite the prosecutor's assertions that this information was not exculpatory, *Brady*, or *Giglio*, the military judge found otherwise. (JA 617). The military judge ruled, in a seven-page opinion: "[T]his questioning was an attempt to smear the accused and the witness with misleading information that had been withheld from the Defense." (JA 616, 621). The military judge deemed government's behavior to be an "intentional discovery violation that was designed to obtain an improper tactical advantage." (JA 621).

d. Defense Counsel's Motion for a Mistrial

The defense counsel filed a motion for a mistrial. (JA 566–571). Defense counsel acknowledged a mistrial was "a drastic remedy and typically a curative instruction would be preferred." (JA 182). Defense counsel argued that the government insinuated the accused was linked to the bribe. (JA 182). Specifically, he believed there was an "inference and application of impropriety to the accused." (JA 182). The defense counsel also argued all of the charges on the sheet were "intertwined," such that the panel members could not separate them. (JA 205).

The military judge disagreed: "Defense counsel, it appears to me that based on that exchange, those statements were not attributed to the accused or anyone acting on behalf of the accused." (JA 184). "No one has accused the accused in court of doing anything improper. There has been a vague allegation that someone has offered money to a witness, but that has not been attributed to the accused. Your argument to me seems to be that the members will believe it was the accused despite any evidence to support that claim." (JA 186).

Regarding whether the specifications were "intertwined," the military judge noted that "aside from similar text messages . . . it appears that the adultery is completely unrelated to all of the other offenses." (JA 205). The witnesses did not know each other, and there was no effort by the accused to contact them all simultaneously. (JA 206). "It seems that there is a separate sexual relationship charged in the adultery that is unrelated to all of the other offenses." (JA 206).

e. Military Judge's Interaction with the Panel

When the government attempted to impeach Miss MR, the court recessed early. (JA 177). The military judge advised the panel members: "We had an issue arise [that] I think will take some time for us to litigate. Rather than have you all stay here in the deliberation room through the night, I'm just going to excuse you until tomorrow." (JA 177). The military judge asked if all members could return at 0900 the following morning, and one panel member even raised his hand. (JA

177). When it drew some confusion, the panel member said, "Isn't that an affirmative, sir?" and the judge confirmed, "raising your hand is an affirmative." (JA 177).

Before departing that afternoon, the military judge instructed the members not to do outside research but to rely only on evidence presented at trial. (JA 178). All members responded affirmatively. (JA 178). The next day, the military judge notified the panel that "we won't be going back on the record until 1030," giving defense counsel additional time to look into the issues and be further heard. (JA 208).

In closing, the government informed the panel that they could "take out 9 June" and substitute it with 8 July 2015. (JA 388). The panel convicted appellant of all charges and specifications, to include by exceptions and substitutions. (JA15–18).

f. Military Judge's Remedy

The military judge understood a mistrial to be an "extraordinary remedy that is only supposed to be issued when it is manifestly necessary in the interest of justice" and a curative instruction is sufficient. (JA 185). The military judge asked the parties to "look at R.C.M. 915(a)" and confer on his interpretation that the rule gave him the authority to grant a mistrial on a single specification. (JA 216–17).

Both parties agreed. (JA 217). The military judge granted a mistrial as to Specification 3 of Charge III. (JA 219).

After the panel members returned, the military judge directed them to physically line through Specification 3 of Charge III. (JA 220). He explained that it no longer requires a finding. (JA 220). Then, the military judge instructed:

> I am instructing you to disregard all of the evidence that you have heard in this case regarding the adultery specification. Disregard has the same meaning that it means in common parlance. You cannot use it in any way. I want you all to imagine that you didn't hear any evidence regarding the adultery specification. You may not use it in any way during the course of this trial. I will further instruct you that yesterday when Ms. [R.] was testifying, there was a somewhat vague allegation made that her testimony may have been influenced by a bribe from an unknown individual. I conducted a hearing regarding that matter outside of your presence. I found that to be an unsubstantiated allegation. In addition to disregarding her testimony in its entirety, I also want you to disregard any inference that anyone attempted to bribe a witness in this case.

(JA 220). All members stated they could follow this instruction. (JA 221). Captain MJ did not object to the content of the instruction, but requested "further relief and admonishment in the presence of the panel directed towards the government by the court." (JA 218).

After deliberation, CPT MJ renewed his mistrial motion. (JA 404). He argued that identity "is so central" to the case; in other words, Miss MR's communication with "Julio" through KiK relates to "all other witnesses in this case." (JA 406, 408). The military judge repeated that his instruction was

sufficient after only "maybe one and a half improper questions" from the trial counsel. (JA 407). He already deemed his remedy to be "pretty strict." (JA 408).

Standard of Review

This Court will not reverse the military judge's decision regarding a mistrial absent clear evidence of abuse of discretion. *United States v. Diaz*, 59 M.J. 79, 90 (C.A.A.F. 2003), *see also United States v. Ashby*, 68 M.J. 108, 122 (C.A.A.F. 2009). The abuse of discretion standard calls for more than a mere difference of opinion. *United States v. Wicks*, 73 M.J. 93, 98 (C.A.A.F. 2014). A military judge abuses his discretion only when the "findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F. 2008).

Law

A military judge has discretion to "declare a mistrial when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings." Rule for Courts-Martial (R.C.M.) 915(a). The power to grant a mistrial should be "used with great caution, under urgent circumstances, and for plain and obvious reasons," including times "when inadmissible matters so

prejudicial that a curative instruction would be inadequate are brought to the attention of the members." R.C.M. 915(a), discussion. Mistrials are an unusual and disfavored remedy, reserved as a "last resort." *United States v. Diaz*, 59 M.J. 79, 90 (C.A.A.F. 2003).

Before granting a mistrial, the military judge must first consider other remedial action. *See United States v. Ashby*, 68 M.J. 108, 122 (C.A.A.F. 2009) ("Because of the extraordinary nature of a mistrial, military judges should explore the option of taking other remedial action, such as giving curative instructions.") (quoting *United States v. Fisiorek*, 43 M.J. 244, 247 (C.A.A.F. 1995); *United States v. Evans*, 27 M.J. 34, 39 (C.M.A. 1988)). Military judges have "considerable latitude" in their rulings. *Diaz*, 59 M.J. at 90 (quoting *United States v. Seward*, 49 M.J. 369, 371 (C.A.A.F. 1998)). The judgment is rooted in a "simple 'tolerable' risk assessment" that the members would be able to put aside the inadmissible evidence. *Diaz*, 59 M.J. at 91.

"A curative instruction is preferred to granting a mistrial." *United States v. McFadden*, 74 M.J. 87, 89 (C.A.A.F. 2015). "We presume, absent contrary indications, that the panel followed the military judge's instructions." *United States v. Sewell*, 76 M.J. 14, 19 (CA.A.F. 2017). Even in situations where egregious discovery violations occur, courts first "must look to see whether

alternative remedies are available." *United States v. Stellato*, 74 M.J. 473, 488 (C.A.A.F. 2015).

In determining whether the military judge abused his discretion, we look to the actual grounds litigated at trial. *United States v. McFadden*, 74 M.J. 87, 90 (C.A.A.F. 2015). Also, during such determination, the CAAF considers "the entire record." *United States v. Ashby*, 68 M.J. 108, 122 (C.A.A.F. 2009). When the error is of constitutional dimension, the CAAF must determine whether the error and the military judge's curative efforts render it harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967).

Argument

For three reasons, the military judge did not abuse his discretion when he granted a mistrial for the adultery specification alone. First, the government's discovery violation only pertained to the adultery specification. Second, the military judge's curative instruction purged any taint from the trial counsel's improper questions. Finally, the weight of the evidence overwhelmingly supports the remaining, unrelated specifications.

a. The government's discovery violation pertained to the adultery specification alone.

The government failed to disclose the attempted bribe despite a discovery request for such information. Still, such information was relevant only to the adultery specification. Likewise—and perhaps most importantly—the adultery

specification was unrelated to the other specifications on the charge sheet, as the witness never mentioned Julio Carter or KiK. Given the silo nature of the violation, the military judge did not abuse his discretion in denying the motion for a complete mistrial.

1. The attempted bribe was relevant only to the adultery specification.

Before ruling on a mistrial motion, or determining what type of remedial relief to give, if any, a military judge must "adequately investigate" the material issues, and "consider important facts." *See United States v. Commisso*, 76 M.J. 315, 321 (C.A.A.F. 2017). Here, the military judge adequately investigated the important facts, as *Commisso* mandated. He instructed the court reporter to replay the exact testimony before making any decision. (JA 184). He asked Miss MR questions beyond what the trial and defense counsel asked. (JA 193). The military judge asked questions about the bribe, learned that Miss MR's testimony had not changed, and that she answered the questions truthfully. (JA 194–95).

Next, he considered important facts: the witnesses did not know each other and there did not seem to be any effort by the accused to contact them all at the same time. (JA 206). Miss MR was listed in one specification only—the adultery specification. A specification distinct from the others both in its nature and when it occurred. (JA 20–23). The record is devoid of any showing that the bribe, which

is what the government should have disclosed, had any bearing on the remaining charges.

2. The adultery specification was also unrelated to the other specifications on the charge sheet.

As far as the fact finder knew, Miss MR was isolated from Julio Carter and KiK entirely. The details before the panel reflected that the adultery specification substantially differed from the rest of the flyer. (JA 20–23). The adultery was alleged to have occurred at a different date, and location. (JA 20–23). Therefore, Miss MR was relevant only to the adultery specification, a crime quite dissimilar from indecent communications with underage girls.

Appellant, in his brief, argues that the government's opening statement created the impression that Miss MR could identify appellant as Julio Carter. (Appellant's Br. 29). Indeed, in opening statement, trial counsel previewed that Miss 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." (JA 58). However, before either counsel delivered an opening statement, the military judge instructed the panel: "I advise you that opening statements are not evidence in this case. Rather, they are what counsel expect the evidence will show." (JA 56). What matters in the analysis is simply the actual grounds litigated at trial. *United States v. McFadden*, 74 M.J. 87, 90 (C.A.A.F. 2015). Therefore,

what the trial counsel said in opening statement is of no consequence because such a statement is not evidence.

Given the facts litigated at trial, the military judge rightly concluded that the adultery specification was distinct from the others. (JA 409–10). Miss MR's testimony accounts for a mere four and a half pages in the record of trial, none of which mentions the name "Julio" or "KiK." (JA 167–71). Instead, the prosecutor simply asked, "Ms. [R], do you recognize the accused?" (JA 168). When Miss MR responded, she explained, "Well when I–the person *I met* was a lot lighter… ." (JA 168) (emphasis added).

Trial counsel tried showing Miss MR "a picture" to refresh her memory. (JA 169–70). Trial counsel retrieved "Prosecution Exhibit 7 for identification," but this exhibit was never admitted. (JA 96–7, 115, 170). Thus, the panel members never saw the form or the content of these messages. Additionally, trial counsel focused her question on whether Miss MR recalled something on "*the day that you met?*" (JA 170) (emphasis added). Therefore, the interaction between trial counsel and Miss MR focused solely on her in-person interaction with her sexual partner. This is vital because it precludes any link from Miss MR to the other victims.

Articulating his thought process, the military judge noted aloud that "aside from similar text messages . . . it appears that the adultery is completely unrelated to all of the other offenses." (JA 205). "It seems that there is a separate sexual

relationship charged in the adultery that is unrelated to all of the other offenses." (JA 206). The record provided ample basis for his decision, which should be afforded the same level of deference that other federal courts provide to the trial judge, given their "superior point of vantage," as opposed to an appellate panel's "review of a cold record." *See United States v. Freeman*, 208 F.3d 332, 339 (1st Cir. 2000). The military judge still provided a drastic remedy: he granted a mistrial as to the impacted specification. A complete mistrial would have been an unnecessary windfall.

b. The military judge's curative instruction purged any taint from the trial counsel's improper questions.

The military judge's chosen remedial steps swiftly and adeptly addressed the trial counsel's questions. Given the drastic nature of a complete mistrial, the military judge's incremental response to the discovery violation and improper questions was most appropriate.

A mistrial is not the required remedy for a discovery violation. *See United States v. Dancy*, 38 M.J. 1 (C.M.A. 1993) (a trial judge did not abuse his discretion in denying a motion for a mistrial, and instead issuing a curative instruction, even when the government committed a discovery violation). In *Dancy*, the government failed to disclose a letter following a specific discovery request and "ambushed" defense at trial. *Id*. at *5–6. In upholding the military judge's denial of the defense's motion for mistrial, the Court of Military Appeals held that the

"circumstances support" the military judge's remedial action of choice. *Id*. at *6. First, the military judge granted defense counsel "an extended weekend continuance" and provided them "sufficient time to investigate the letter and to consider a trial strategy to respond to it." *Id*. Second, the military judge struck appellant's earlier answers on cross-examination, and permitted defense counsel to offer the letter as a defense exhibit. *Id*. The military judge also gave an "extensive instruction" to the members. *Id*.

The military judge's actions in this case are highly similar to those taken in *Dancy*. The military judge recessed early and gave CPT MJ the evening to respond. (JA 177). This gave the defense team sufficient time to investigate the bribery allegation, and thoroughly interview Miss MR. (JA 187). Also, like the judge in *Dancy*, the military judge struck Miss MR's testimony. (JA 220). "I told the members to disregard her testimony entirely." (JA 407). Further, just as the judge in *Dancy* accepted an equitable solution and allowed the defense to offer the exhibit, here the defense counsel could have called Miss MR as a defense witness to testify that she did not recognize appellant. (JA 408, 410). Defense declined. (JA 408, 410). Finally, the military judge here gave an "extensive instruction" to the members, not only providing great detail and context, but also asking them to take out their pens and physically line through the adultery specification, emphasizing the specification's dismissal. (JA 220–21).

Corrective action of this sort was further affirmed in *United States v. Short*, where a military judge issued several curative instructions to which the members responded affirmatively through nonverbal cues such as "nods and raised hands." 77 M.J. 148, 150 (C.A.A.F. 2018). Mirroring the behavior of the military judge in *Short*, this military judge took action early and immediately issued a curative instruction, which the members acknowledged. Additionally, appellant has yet to show that the members were unable to follow the military judge's curative instructions. "We presume, absent contrary indications, that the panel followed the military judge's instructions." *United States v. Sewell*, 76 M.J. 14, 19 (CA.A.F. 2017). Nothing indicates to the contrary in this case.

c. Disclosure Error was Harmless Beyond a Reasonable Doubt

The government's discovery violation was harmless beyond a reasonable doubt because the information withheld would not have changed the defense trial strategy, and the weight of the evidence overwhelmingly supports the additional, unrelated specifications. *United States v. Coleman* is instructive in this case. 72 M.J. 184, 187 (C.A.A.F. 2013). Where defense counsel specifically requests evidence, and the prosecution fails to turn that over, the question becomes whether that was harmless beyond a reasonable doubt. *Id*. The court considers whether there is a "reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Id*. at 186 (citing *Smith v. Cain*, 132

S. Ct. 627, 630 (2012)). Further, in assessing prejudice, *United States v. Fletcher* outlines the CAAF's analysis following prosecutorial misconduct. 62 M.J. 175, 184 (C.A.A.F. 2005). This Court also considers: (1) the severity of the misconduct; (2) the measures adopted to cure the misconduct; and (3) the weight of the evidence supporting the conviction. *Id*.

In *Coleman*, the government failed to comply with a specific defense discovery request and committed a *Brady* violation. *Id*. However, this Court held that the military judge did not abuse his discretion in denying the motion for mistrial because the violation was "harmless beyond a reasonable doubt." *Coleman*, 72 M.J. at 185. It was "unclear how knowing that [information] would have caused the defense counsel to change strategy or tactics, or led to a different result." *Id*. Importantly, the information would not have changed the defense's cross examination or closing argument. *Id*.

As in *Coleman*, it is unclear here how knowledge of the bribe would lead to a different defense theory or different result at trial for the remaining specifications. To start, it is important to examine exactly what the trial counsel *should* have turned over: someone who claimed to be appellant's cousin offered Miss MR $1,000 to testify falsely in this case. (JA 619). Rather than accepting this bribe, Miss MR notified government counsel. (JA 619). Additionally, she assisted law enforcement with a sting operation to catch the offender. (JA 620).

Appellant fails to articulate any way the defense theory to the specifications involving underage girls, or outcome of the trial would have changed, had he known of the bribe. It leaves untouched the defense's calculus regarding the identification of Julio Carter. Miss MR never once mentioned that name. It had no impact on appellant's alibi defense.

The *Fletcher* factors further expose the lack of prejudice to appellant in this case. The severity of the misconduct is less significant in this case when considering the limited nature of trial counsel's conduct. *Compare with Stellato*, 74 M.J. 473, 482–83 (C.A.A.F 2015) (where the military judge found the government's "recklessly cavalier approach to discovery" resulted in the loss of critical witnesses and exculpatory evidence). Also, the discovery that the government failed to disclose was not directly related to the proof of their case; instead, it was related to collateral matters in the days leading up to trial. Given the strong curative instructions and the great weight of the evidence against appellant, this is not a case where the government acted so egregiously that a complete mistrial is warranted.

To conclude, the focus of the omitted discovery was not so central to the government's case-in-chief that a complete mistrial is necessary. It would not have changed the defense theory, and given the weight of evidence against appellant, it also would not have changed the outcome of the trial. The military judge crafted

an appropriate remedy. He dismissed the affected specification and issued an appropriate instruction to the panel regarding the remaining specifications. Accordingly, the military judge did not abuse his discretion in refusing to grant a mistrial.

III. WHETHER THE MILITARY JUDGE COMMITTED PLAIN ERROR BY ADMITTING EVIDENCE OF HISTORICAL CELL-SITE LOCATION INFORMATION.

Additional Facts

On 1 August 2016, defense counsel requested the government subpoena appellant's "cellular phone records, tower records, content, phone logs, text message logs and any and all other information relating to the same." (JA 472, 599). The military judge issued an order to produce records pursuant to 18 USC § 2701 *et seq.*; Article 46, UCMJ; and R.C.M. 701(g)(1). (JA 469). The military ordered appellant's cell phone provider, Sprint Corporation, to provide "this Court a copy of all records pertaining to cell site information" for appellant's phone, "for the time frame of 1 January 2015 to 8 July 2015." (JA 469). The military judge referenced 18 USC § 2703(d), stating "this Court has determined the records and information sought are relevant and material to an ongoing criminal proceeding." (JA 469).

In September 2016, Sprint Corporation provided the government with "Subscription Info (Basic)" for Gerald Carter's account. (JA 447). This information included sixty-four pages of cell site location information (CSLI) for appellant's phone number from 6 March 2015 through 8 July 2015, and the government admitted these records at trial. (JA 255, 453). A Sprint Corporation records custodian explained how this information could be located a map. (JA 244, 272). Defense counsel lodged numerous objections to this evidence under MREs 401, 403, 701, 702, and 803. (JA 256, 258, 259, 272, 274). There was no Fourth Amendment objection, nor was there any objection based on Military Rule of Evidence [Mil. R. Evid.] 311.

Special Agent KS later testified about how she took those latitude and longitude coordinates from the cell towers and compiled them onto a map. (JA 312–14). This agent created a presentation based on the map plots, displaying the "ping marks" in Prosecution Exhibits 19, 20, and 21—all admitted without defense objection. (JA 319).

In closing, the government repeatedly said that appellant's cell phone contained "every bit" of evidence in this case. (JA 380, 381, 385, 387). Referencing "Sprint's cell sites," the government reminded the panel how the records helped them identify where appellant was located based on "what tower is pinging that phone." (JA 382). With these pinpoints, the government argued,

"PFC Carter's phone was at the locations plotted on the map by Special Agent [KS] . . . those maps are going to go back with you; Fort Drum, Fort Polk." (JA 383). The government argued that the panel had several ways to find that the alleged conduct occurred within the date range on the flyer, including "the KiK messages themselves, as well as the Sprint cell site data, and the digital forensic evidence of the pictures that are before you." (JA 384–85).

Law & Argument

a. Consent

Defense counsel consented to the government's acquisition of the CSLI because defense asked the government to subpoena these records. (JA 472, 599). Evidence of a search conducted without probable cause is admissible if conducted with lawful consent. Military Rule of Evidence [Mil. R. Evid.] 314(e)(1). Warrants are required before a search; however, this prohibition does not apply to situations "in which voluntary consent has been obtained." *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990). Here, even more than consent, appellant asked for the government to produce this information. Therefore, appellant should not be allowed to object to evidence he specifically requested.

b. This Issue is Waived by Operation of Law

There is no error before this Court because this issue is waived by operation of law. "We consider the issue of waiver as a question of law under a de novo

standard of review." Mil. R. Evid. 311; *United States v. Haynes*, 79 M.J. 17, 19 (C.A.A.F. 2019).

Whereas forfeiture is the passive abandonment of a right by neglecting to preserve an objection, waiver is the affirmative "intentional relinquishment or abandonment of a known right." *United States v. Olano*, 507 U.S. 725, 733 (1993). Forfeiture results in plain error review, but waiver "leaves no error for us to correct on appeal." *United States v. Campos*, 67 M.J. 330, 332 (C.A.A.F. 2009) (quoting *United States v. Pappas*, 409 F.3d 828, 830 (7th Cir. 2005)).

Generally, when the law changes on appeal, the error is deemed forfeited—not waived. Precedent affords appellant the benefit of the changes to the law between the time of trial and his appeal. *See Griffith v. Kentucky*, 479 U.S. 314, 328 (1987); *United States v. Mullins*, 69 M.J. 113, 116-17 (C.A.A.F. 2010) ("[O]n direct review, we apply the clear law at the time of the appeal, not the time of trial.") *See also United States v. Harcrow*, 66 M.J. 154, 159 (C.A.A.F. 2008). With this benefit in mind, the Supreme Court held that errors are deemed forfeited rather than waived. *Johnson v. United States*, 250 U.S. 461, 467 (1997).

Yet, based on the particular rule at issue, any error is waived by operation of law. Military Rule of Evidence 311, much like M.R.E. 304, contains its own internal provision on waiver. Accordingly, the CAAF jurisprudence regarding the three-hundred series in the rules of evidence should be dispositive here.

In *United States v. Swift*, this court added "rule-based suspenders to the ordinary waiver belt." 76 M.J. 210, 217 (C.A.A.F. 2017). Military Rule of Evidence 304, which broadly governs "[c]onfessions and admissions," has its own internal mandate to raise the issue or waive it. *Id*. "Failure to so move or object [before submission of a plea] constitutes a waiver of the objection." Mil. R. Evid. 304(f)(1). The Court looked at the plain-language of Mil. R. Evid. 304(f)(1) and held that, "by its terms," the Rule applied to the exact type of confession at issue in *Swift*, and therefore appellant's claim was waived. *Id*. at 217–18.

The CAAF reaffirmed this holding in the case of *United States v. Hardy*, 77 M.J. 438, 441–41 (C.A.A.F. 2018). In assessing waiver jurisprudence applied to the express language contained in R.C.M. 905(e), the CAAF confirmed that "*Swift* is the correct approach" for this analysis. *Id*. at 441. Important to this holding was the "text of these rules." *Id*. at 42.

If *Swift* and *Hardy* did not make clear that the text of Mil. R. Evid. 311 requires waiver, *United States v. Smith* certainly did. 78 M.J. 325 (C.A.A.F. 2019). In *Smith*, appellant lodged objections to the evidence; however, he failed to raise the specific objection regarding the use of his computer as a "key" to open his iPhone. *Id*. at 326. As there was no specific objection or motion for suppression, he waived the issue. *Id*. In a *per curium* opinion, this court held the plain language of MRE. 311 that says "waiver," really means "waiver." *Id*. at 326.

"This is not one of those instances . . . where the plain language of a military rule for court-martial or rule for evidence reads 'waiver' but may be interpreted as 'forfeiture.'" *Id*.

While appellant argues that objecting in the face of "long-settled law"[2] would lead to "frivolous or meritless" motions, this is contrary to criminal defense practice, even before the Supreme Court issued *Carpenter*. (Appellant's Br. 38). An example of a pre-*Carpenter* case where the defense moved to suppress CSLI based on the Fourth Amendment is *United States v. Goldstein*, 914 F.3d 200, 201–02 (3rd Cir. 2019). In *Goldstein* the appellant moved to suppress CSLI based on the exact grounds of the Supreme Court's holding in *Carpenter*; the appellant did this in spite of the fact that his trial occurred in 2017. *Id*. at 202, 206. Likewise, the defendants in *Carpenter* and *Zodhiates*[3]—whose trials took place before 2018—all moved to suppress CSLI on Fourth Amendment grounds. *See, e.g.*, *United States v. Pirk*, No. 1:15-CR-00142 EAW, 2018 U.S. Dist. LEXIS 213787, at *58 (W.D.N.Y. Dec. 19, 2018) (discussing these cases in light of *United States v. Carpenter*). Thus, appellant's argument that he needed to be clairvoyant in order to make a Fourth Amendment objection at trial in the face of long-settled law is unpersuasive. (Appellant's Br. 38, 41).

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[2] *United States v. Allen*, 53 M.J. 402 (C.A.A.F. 2000).

[3] *See infra* p. 58, note 4.

Law enforcement gathered this data without a warrant, and therefore appellant's remedy was to file a motion to suppress pursuant to Mil. R. Evid. 311. Despite defense's numerous objections at trial, appellant never objected to the admission of the historical CSLI introduced at his trial as being improperly seized, as Mil. R. Evid. 311 required. Therefore, appellant waived the issue.

c. Even Assuming Forfeiture, Appellant Fails Plain Error Analysis

Whether an error constitutes "plain error" is a question of law that CAAF reviews de novo. *United States v. Tovarchavez*, 78 M.J. 458, 463 (C.A.A.F. 2019). *See also United States v. Bowen*, 76 M.J. 83, 87 (C.A.A.F. 2017). Under a plain error analysis, appellate courts consider whether: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused. *United States v. Davis*, 76 MJ. 224, 230 (C.A.A.F. 2017) (quoting *United States v. Payne*, 73 M.J. 19 (C.A.A.F. 2014)).

Only after appellant meets his burden of persuasion that there was error, and that error was plain and obvious, does the burden shift to the Government to show the error was not prejudicial. *United States v. Powell*, 49 M.J. 460, 464–65 (C.A.A.F. 1998). If the error violates the Constitution, and the error is not waived, the standard of review is higher. *United States v. Jones*, 78 M.J. 37, 43 (C.A.A.F. 2018). Then, the government, who was the "beneficiary of the error," must show it

was harmless beyond a reasonable doubt. *Id*. at 45 (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)).

1. There was no error.

The Stored Communications Act (SCA), 18 U.SC §§ 2701 *et seq*., authorized access to a suspect's CSLI with a showing of "reasonable grounds" to believe the records were relevant and material to an ongoing investigation. 18 U.SC § 2703(d). On 22 June 2018, after the conclusion of appellant's trial, the Supreme Court held that an individual maintains a legitimate expectation of privacy in these records. *See Carpenter v. United States*, 138 S. Ct. 2206, 2209 (2018). Now, before compelling a wireless carrier to turn over a subscriber's CSLI, "the Government's obligation is a familiar one—get a warrant." *Id*. at 2221.

Although the government obtained appellant's CSLI without a warrant, he is not entitled to relief. Even if *Carpenter* applied retroactively, several exceptions would authorize the admission of the CSLI. Indeed, the good faith exception and the government's reasonable reliance on a statute authorize admission.

In *United States v. Leon*, the Supreme Court crafted a good faith exception to the exclusionary rule. 468 U.S. 897, 907 (1984). As the purpose behind the exclusionary rule is to deter unlawful police misconduct, "it cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." *Id*. at 919. Therefore, for the first time, the Supreme Court held

exclusion is inappropriate when government actors hold "objectively reasonable" beliefs in executing their searches. *Id*. at 922.

In *Illinois v. Krull*, the Supreme Court augmented the good faith exception: evidence obtained by the Government, acting in "objectively reasonable reliance *upon a statute*" that is ultimately found to violate the Fourth Amendment, does not require suppression. 480 U.S. 340, 342 (1987) (emphasis added). The Supreme Court held that the approach used in *Leon* is equally applicable to a situation where an officer relied on a statute, because there would be "little deterrent effect on the officer's actions" should the evidence be excluded. *Id*. at 349–50. Unless a statute is clearly unconstitutional, "an officer cannot be expected to question the judgment of the legislature that passed the law." *Id*. After all, penalizing the officer for the legislature's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations. *Id*. at 350.

The Military Rules of Evidence codified the holding in *Illinois v. Krull* in the 2016 Amendment, providing yet another basis for admission of the CSLI. Mil. R. Evid. 311 analysis at A22-21. "Evidence that was obtained as a result of an unlawful search or seizure may be used when the official seeking the evidence acts in objectively reasonable reliance on a statute later held violate of the Fourth Amendment." Mil. R. Evid. 311(c)(4).

Here, the government reasonably relied on the SCA when it obtained appellant's CSLI. The military judge appropriately issued a court order for the CSLI, pursuant to 18 U.SC § 2703(d). (JA 469, 471). As the statute required, he articulated that "this Court has determined the records and information sought are relevant and material to an ongoing criminal proceeding." (JA 469). The dates requested in that order were narrow in scope and specifically limited to the relevant time period on appellant's charge sheet of "1 January 2015 to 8 July 2015." (JA 469). The judge issued this order based on defense counsel's request for production. (JA 472, 599). In response, Sprint Corporation provided sixty-four pages of CSLI to the government. (JA 453).

Until *Carpenter*, this was a perfectly legitimate way of obtaining CSLI. The government and the military judge followed the procedure outlined in 18 U.SC § 2701 *et seq*. and specifically cited the provision in the statute giving them the authority to order the records. (JA 649). While that showing fell short of the probable cause required for a search authorization, it was objectively reasonable at the time the judge signed the order. Therefore, the exclusionary rule should not apply.

Federal courts across the nation agree. Nine of the thirteen federal circuit courts of appeals have held that there was no error in admitting CSLI records.[4] Of note, upon remand in *Carpenter II*, the Sixth Circuit even affirmed Mr. Carpenter's conviction after the Supreme Court announced § 2703(d) was unconstitutional because the good faith exception did not favor exclusion in his case. *United States v. Carpenter*, 926 F.3d 313, 318 (6th Cir. 2019). Simply put, if Carpenter does not get the benefit of *Carpenter*, Carter does not get the benefit of *Carpenter*.

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[4] *See United States v. Zodhiates*, 901 F.3d 137, 143 (2nd Cir. 2018) ("Zodhiates is not entitled to have the records suppressed because, under the 'good faith' exception, when the Government 'acts with an objectively reasonable good faith belief that their conduct is lawful,' the exclusionary rule does not apply.") (quoting *Davis v. United States*, 564 U.S. 229, 238 (2011); *United States v. Goldstein*, 914 F.3d 200, 201–02 (3rd Cir. 2019) (despite a prior panel decision that appellant had no reasonable expectation of privacy in his cell site location information, no relief is warranted because "the government had an objectively reasonable good faith belief that its conduct was legal" when acquiring the records.); *United States v. Chavez*, 894 F.3d 593, 608 (4th Cir. 2018) ("Chavez does not, and cannot, deny that investigators in this case reasonably relied on court orders and the [SCA] in obtaining the cell site records. Without question, then, the good-faith exception to the exclusionary rule applies to investigators' actions here."); *United States v. Beverly*, 2019 U.S. App. LEXIS 33977, *14 (5th Cir. 2019) ("[T]he good-faith exception—specifically, the *Krull* exception—properly applies."); *United States v. Ruffin*, 2019 U.S. App. LEXIS 22709 (6th Cir. 2019) ("[E]vidence collected pre-*Carpenter* in reasonable reliance on the [SCA]'s prescribed procedure need not be excluded."); *United States v. Curtis*, 901 F.3d 846, 848 (7th Cir. 2018) ("[E]vidence obtained in good-faith reliance on a statute later declared unconstitutional need not be excluded."); *United States v. Korte*, 918 F.3d 750, 758 (9th Cir. 2019) ("Because we find the Government reasonably relied on the SCA when it obtained Korte's CSLI, we affirm the district court's application of the Fourth Amendment's good-faith exception."); *United States v. Joyner*, 899 F.3d 1199, 1204 (11th Cir. 2018) (per curiam) ("[T]he Supreme Court's intervening decision does not afford Joyner . . . relief in this appeal.").

2. Assuming there was error, was it clear or obvious?

Assuming there was error, the government acknowledges that appellant gets the benefit of the "clear law at the time of the appeal, not the time of trial." *See Tovarchavez*, 78 M.J. at 462. However, while *Carpenter* "is obviously controlling going forward," it can still have "no effect" on the current cases. *Chavez*, 894 F.3d at 608. Thus, this court does not need to address prong two of plain error because there was no prejudice.

3. Any Error was Harmless Beyond a Reasonable Doubt.

The third prong of the plain-error analysis turns on whether the clear and obvious error materially prejudiced appellant's substantial rights. *Tovarchavez*, 78 M.J. at 462. Where the error is constitutional, *Chapman* directs that the government must show that the error was harmless beyond a reasonable doubt to obviate a finding of prejudice. *Id*. (quoting *Chapman*, 386 U.S. at 24). In weighing the impact of this error, the CAAF asks: "Did it taint the proceedings or otherwise contribute to appellant's conviction or sentence?" *United States v. Williams*, 77 M.J. 459, 464 (C.A.A.F. 2018).

Even where the error is constitutional, there are cases where that error is "so unimportant and insignificant" that they may not require the automatic reversal of the conviction. *Tovarchavez*, 78 M.J. at 466 (quoting *Chapman*, 386 U.S. at 22–23). Where a court is confident that there was no reasonable possibility that the

error might have contributed to the conviction, no prejudice is found. *Chapman*, 386 U.S. at 24. The CAAF has expressed reluctance to find reversible error where the challenged information is simply cumulative of other evidence already admitted at trial. *See United States v. Gunkle*, 55 M.J. 26, 30 (C.A.A.F. 2001) (The disputed rebuttal testimony was cumulative and "added virtually nothing to the factual dispute."). Even when assuming error, this Court has found no prejudice after certain evidence is cumulative of other evidence, and was "admitted without defense objection." *See United States v. Lovett*, 59 M.J. 230, 234 (C.A.A.F. 2004).

Next, despite an error being of constitutional nature, it can be harmless beyond a reasonable doubt due to the strength of the government's case. *United States v. Robinson*, 77 M.J. 294, 299 (C.A.A.F. 2018). In *Robinson*, the military judge should have admitted constitutionally-required evidence pursuant to MRE. 412. *Id*. Still, the CAAF "evaluate[d] the entire record," and found "ample evidence" of appellant's guilt. *Id*. Therefore, the CAAF concluded, even if this evidence would have been admitted, it would not have changed the verdict. *Id*. Accordingly, the error was harmless beyond a reasonable doubt. *Id*.

In this case, even assuming that there was an error, it was harmless beyond a reasonable doubt. As in *Robinson*, appellant faced "ample evidence" at his court-martial and any error in the admission of the CSLI failed to contribute to appellant's conviction because it was cumulative. First, before the Sprint Records

Custodian ever testified, the government had already proven forensically that appellant's iPhone 6 was at with him at JRTC. (JA 221–32). Appellant's noncommissioned officer testified he had occasion to call or text while his unit was on the training rotation at Fort Polk from 3 June 2015 to 30 June 2015. (JA 224). Appellant had this same telephone number linked to the criminal misconduct until "July or August of 2015." (JA 230-31, 237, 240). Further, the forensic metadata attached to photos admitted at trial conclusively "placed the phone at Fort Polk" on the dates the lewd messages were sent. (JA 332–36). The government admitted its expert's report without defense objection. (JA 335–36). The logical conclusion is that appellant sent the lewd messages to the victims.

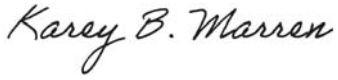
Additionally, just as the appellant in *Robinson* made incriminating statements, so too did appellant when he told CID that no one else had his phone—a statement that the government aptly used to rebut his alibi insinuations at trial. (JA 70, 132). Likewise, just as the details defeated the consent-based defense in *Robinson*, they also defeated appellant's alibi-based defense in this case. When a panel member asked the law enforcement agent whether there was "any evidence the accused's brother was at Fort Drum or Watertown, New York, during this time period," the CID agent answered in the negative. (JA 136).

To conclude, this court can be confident that there was no reasonable possibility the error contributed to the conviction because there was ample

evidence of his guilt on the record. The cell-site information from Sprint was duplicitous of properly admitted evidence. Even without the cell-site information, appellant's verdict would have been the same, and therefore any such error is harmless beyond a reasonable doubt.

Conclusion

Wherefore, the United States respectfully requests that this Honorable Court affirm the judgment of the Army Criminal Court of Appeals.



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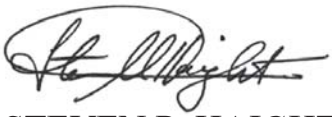

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c) because this brief contains 13,727 words.

2. This brief complies with the typeface and type style requirements of Rule 37. It has been typewritten in 14-point font with proportional, Times New Roman typeface, with one-inch margins.

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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on December 16, 2019.

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