IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee

v.

Captain (O-3)
ZACHARY R. BRAUM,
United States AIR FORCE,
Appellant

BRIEF ON BEHALF OF APPELLANT

Crim.App. Dkt. No. ACM 40434

USCA Dkt. No. 25-0046/AF

TO THE HONORABLE, THE JUDGES OF THE
COURT OF APPEALS FOR THE ARMED FORCES

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Issue Presented

Can the government properly refuse to disclose relevant, non-privileged data in its possession, custody, and control on the basis that the witness who provided the data gave limited consent with respect to its use? If not, is relief warranted?

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals ("Air Force Court") had jurisdiction under Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866.[1] This Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

From October 21-28, 2022, Captain (Capt) Zachary R. Braum (Appellant) was tried by officer members at a general court-martial at McConnell Air Force Base, Kansas. Appellant was convicted, contrary to his pleas, of three specifications of rape, three specifications of sexual assault, and one specification of abusive sexual contact in violation of Article 120, UCMJ, 10 U.S.C. § 920; three specifications of domestic violence in violation of Article 128b, UCMJ, 10 U.S.C. § 928b; and one

[1] All references to the Uniform Code of Military Justice (UCMJ), the Rules for Courts-Martial (R.C.M.), and the Military Rules of Evidence (Mil. R. Evid.) are to the Manual for Courts-Martial, United States (2019 ed.) (hereinafter 2019 MCM), unless otherwise noted.

specification of reckless operation of an aircraft in violation of Article 113, UCMJ, 10 U.S.C. § 913. (JA at 26-29).

The military judge sentenced Appellant to nine years confinement, forfeiture of all pay and allowances, a reprimand, and a dismissal. (JA at 30). The convening authority took no action on the findings or the sentence. (JA at 2). The Air Force Court affirmed the findings and sentence. (JA at 22).

Statement of Facts

1. Background Facts

Appellant, an Air Force pilot, and BE met in November of 2019. (JA at 33-34). BE was a single mother with children from two different men. (JA at 34, 88). Over the course of the next several months, their relationship progressed, BE and Appellant got engaged, and – by all external appearances – BE was extremely happy with the relationship. That changed on 12 July 12, 2020 when Appellant broke off their engagement after an argument about BE's phone. (JA at 357-58). Thereafter, BE launched a barrage of accusations against Appellant, alleging he had been abusing her for months.

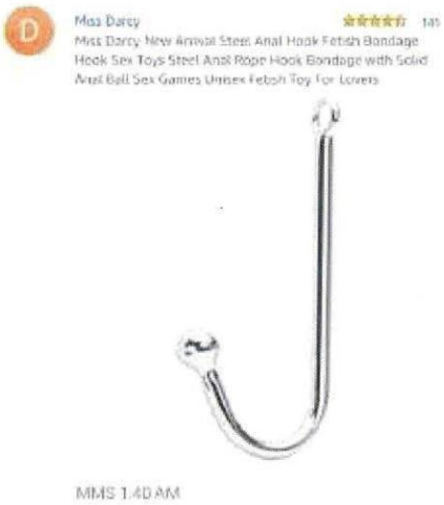
Large portions of BE's accusations focused on Appellant's supposedly unilateral introduction of various forms of "BDSM" sex into the relationship. BE portrayed herself as a passive – often non-consenting – participant in these activities. In pretrial interviews with the prosecution, apparently before she became aware that

the defense had copies of her text messages with Appellant, BE denied requesting or purchasing "BDSM" items or sex toys in her relationship with Appellant. (JA at 323-24). On cross examination, however, the defense presented multiple explicit text messages BE had sent to Appellant, graphically depicting individuals engaged in "BDSM" behavior, and referencing "BDSM," sex toys, and related activities. (JA at 313-15, 375, 378, 438). BE did not provide these text messages to the prosecution, nor inform the prosecution of their existence. (JA at 317). Nor BE did provide these text messages to law enforcement, even when specifically told access to her text messages with Appellant would help the investigation. (JA at 317-19).

The defense also introduced evidence that several "BDSM" themed sex toys had been purchased on BE's Amazon.com account on May 22, 2020. (JA at 466). These items included a "Miss Darcy" brand "steel anal hook," a "stuffed leather gag," a 3-pack of steel "butt plug[s]," and rope. (JA at 466). The timing of these purchases (May 22, 2020) placed them directly after the beginning of supposedly nonconsensual "BDSM" activities. *See generally* (JA at 23-25) (Charge Sheet listing dates of allegations); *see also* (JA at 347) (BE testimony that ball gag purchased on Amazon.com was a few days after Appellant nonconsensually used a different ball gag on her).

Despite these purchases on her Amazon.com account, BE denied that she had ever used an "anal hook" (JA at 323) and, when asked if she was familiar with the

"Miss Darcy anal hook," claimed that this item had only recently been brought to her attention. (JA at 326). When confronted about the Amazon.com purchase of this exact item, BE denied that she had made the purchase or received the item. (JA at 326) ("I do not know because I did not receive it because I did not purchase that."). BE directly stated that she did not realize until recently that these items were on her Amazon.com account. (JA at 330). The Amazon.com records reflect that the purchase was made in the early morning hours of May 22, 2020 (0732 UTC which is 1:32am CST). (JA at 466). Despite BE's claim at trial that she only recently learned of the existence of the item, or the purchases on her Amazon.com account, BE texted Appellant a screenshot of the Amazon.com listing for the anal hook the same morning as the purchase was made:



(JA at 378).

In June of 2020, Appellant and BE traveled to Tuscaloosa, Alabama, where BE had breast augmentation surgery (the operation occurred on June 20, 2020). (JA

at 62, 91). Many of the charged sexual assaults occurred in the immediate aftermath of BE's surgery. (JA at 113-55). BE testified that Appellant had pressured her into the breast augmentation surgery, and that it was exclusively his idea. *See* (JA at 58, 91-92, 94). BE specifically testified that she did not like the idea of the breast augmentation but did it because of pressure from Appellant. (JA at 92, 94); *see also* (JA at 273) ("So, you testified that basically he forced you, or made you feel pressured, to get a breast augmentation? A. Correct."). When asked on cross examination if she had talked about getting a breast augmentation prior to meeting Appellant, BE flatly denied it. (JA at 273). However, the defense called a longtime friend of BE's (Ms. JJ) who testified that BE told JJ she was "very excited" about getting breast augmentation and that "it was something she had wanted for a long time" – seven years in fact. (JA at 364-65).

BE testified at length about her physical limitations after the surgery, when she alleged many of the charged assaults occurred, attributing her inability to resist to her convalescence. *See*, *e.g.*, (JA at 113). She testified that she was "severely limited" during this recovery period and that was why she was unable to fight off Appellant's assaults. (JA at 113, 308). Additionally, due to her recuperation, BE testified she was not going to the gym during this period. (JA at 308). The defense then confronted BE with a text message where she told Appellant she had gone to the gym on June 30, 2020. (JA at 308; 446). BE acknowledged sending the message

but stated she had lied in the message and had not actually gone to the gym. (JA at 308). When confronted with similar messages from July 1 and 2, 2020, BE again stated she had lied in those messages as well. (JA at 308-09). BE testified that the last incidence of nonconsensual sexual activity occurred on July 10, 2020, and involved Appellant taping her breasts together and handling them roughly, resulting in the incision opening up, severe bleeding, and physical trauma. (JA at 147-55). On cross-examination, the defense confronted BE with a text message from the very next day where she referenced lifting a "very heavy :) :)" case. (JA at 309, 464). No medical evidence corroborated BE's alleged injuries.

Large portions of BE's allegations of post-surgery sexual abuse involved Appellant using the pretext of massaging BE's breasts, post-augmentation, to initiate nonconsensual sexual conduct. *See* (JA at 113-55). BE reported that the first nonconsensual incident in this timeframe began when Appellant had forcefully and nonconsensually "massage[d] [her] breasts," resulting in significant pain and trauma and leading up to a particularly violent sexual assault. (JA at 114-26). Thereafter, BE testified there were additional times when Appellant "would come up to me and start massaging my breasts very roughly, and forcefully again" and use the massaging as a pretext for initiating nonconsensual sex. (JA at 126-27). BE testified that she "caught on" that the massaging of the breasts was just an excuse Appellant would use. (JA at 127). In seeming contradiction to this detailed testimony, BE

excitedly texted Appellant on July 2, 2020: "Guess you will need to massage my big titties to help me recover ;)". (JA at 452).

BE's longtime friend testified she had poor character for truthfulness. (JA at 366). The government put on no competing character evidence, apparently unable to find a single person who would testify BE had good character for truthfulness.

2. BE's Cell Phone

In a joint interview with OSI and the Newton Police Department (NPD), BE consented to law enforcement reviewing location-data from her phone and signed a consent form to that effect. (JA at 534). The NPD officer explained that the *entire contents* of her phone would be downloaded but that the search would be limited to the location-related information, in accordance with BE's consent. (JA at 534). Another NPD officer downloaded information from BE's phone and returned the phone to BE. (JA at 534). The downloaded information was placed on a flash drive that NPD kept as evidence. (JA at 534). Subsequently, OSI took possession of the location *and* the full extraction data and, upon learning of the existence of the forensic extraction, the defense moved to compel its discovery (which was in the possession of OSI at that time). *See* (JA at 509, 531, 537, 543); *see also* (JA at 545-76 (Supplement to Defense Motion). The military judge ultimately denied the

motion, finding that the data was not in the possession, custody, or control of military authorities, despite being directly held by OSI. (JA at 543).

Summary of Argument

The data in question, which was literally in the OSI office (and presumably in the OSI "*custody* locker") was within the "possession, custody, and control" of military authorities, triggering the government's R.C.M. 701(a) disclosure obligations. This conclusion is supported by the plain language and the presumption of consistent usage (because the same term is used elsewhere in the UCMJ and does not, in that context, carry the extratextual caveats added by the military judge). The military judge only avoided this clear conclusion, by expressly going beyond the rule's text. None of the exceptions to government disclosure apply. The government has not disproved prejudice beyond a reasonable doubt where, *inter alia,* the absence of the data allowed BE to accuse the defense of manipulating evidence while depriving the defense access to data that would establish the accuracy of the text messages between BE and Appellant, the limited electronic data the defense did have at trial proved highly contradictory to BE's allegations – demonstrating the importance of such evidence to the defense, trial counsel disparaged the defense in front of the panel for seeking access to the data, and the strength of the evidence generally was far from overwhelming.

Argument

Can the government properly refuse to disclose relevant, non-privileged data in its possession, custody, and control on the basis that the witness who provided the data gave limited consent with respect to its use? If not, is relief warranted?

Standard of Review

Questions of statutory interpretation, to include the interpretation of provisions of the R.C.M., are questions of law this Court reviews de novo. *H.V.Z. v. United States*, 85 M.J. 8, 13 (C.A.A.F. 2024) (citation omitted). Issues of prejudice from erroneous evidentiary rulings are reviewed de novo. *United States v. Cano*, 61 M.J. 74, 75 (C.A.A.F. 2005) (citation omitted). Where an Appellant demonstrates that the government failed to disclose discoverable evidence in response to a specific request, the Appellant will be entitled to relief unless the government can show that nondisclosure was harmless beyond a reasonable doubt. *Id.* (citations omitted). "Failing to disclose requested material favorable to the defense is not harmless beyond a reasonable doubt if the undisclosed evidence might have affected the outcome of the trial." *United States v. Coleman*, 72 M.J. 184, 187 (C.A.A.F. 2013).[2]

[2] Of note, this prejudice standard applies equally to scenarios where the government's disclosure obligations are litigated at trial, and the military judge declines to compel government disclosure. For example, in *Cano*, this Court was

Law

R.C.M. 701(a)(2) provides:

> (A) After service of charges, upon request of the defense, the government shall permit the defense to inspect any books, papers, documents, data, photographs, tangible objects, buildings, or places, or copies of portions of these items, if the item is *within the possession, custody, or control of military authorities* and—
>
> (i) *the item is relevant to defense preparation*;

(emphasis added).

R.C.M. 701(f), addresses "Information not subject to disclosure," and provides that: "Nothing in this rule shall be construed to require the disclosure of information protected from disclosure by the Military Rules of Evidence. Nothing in this rule shall require the disclosure or production of notes, memoranda, or similar working papers prepared by counsel and counsel's assistants and representatives."

Two additional overarching principles are also relevant to this issue. First, discovery in the military justice system is broad by design. *See United States v. Stellato*, 74 M.J. 473, 481 (C.A.A.F. 2015) (citations omitted). Second, "Because privileges 'run contrary to a court's truth-seeking function,' they are narrowly construed." *See United States v. Jasper*, 72 M.J. 276, 280 (C.A.A.F. 2013) (quoting *United States v. Custis*, 65 M.J. 366, 369 (C.A.A.F. 2007)).

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evaluating prejudice from "the military judge's erroneous decision to deny [the appellant] the opportunity to review the withheld documents." 61 M.J. at 76.

Argument

1. Under the Plain Meaning of R.C.M. 701(a)'s Text, the Complete Phone Extraction was Within the Government's Possession, Custody, or Control.

Military courts' interpretation of the R.C.M. "must be" rooted in their text and interpreted in accordance with the "plain meaning" thereof. *United States v. Vargas*, 83 M.J. 150, 154 (C.A.A.F. 2023) (interpreting R.C.M. 701 using its plain meaning); *see also United States v. Bergdahl*, 80 M.J. 230, 235 (C.A.A.F. 2020) (interpreting R.C.M. 701: "This Court 'adhere[s] to the plain meaning of any text—statutory, regulatory, or otherwise."). "A fundamental rule of statutory interpretation is that 'courts must presume that a legislature says in a statute what it means and means in a statute what it says there.'" *United States v. James*, 63 M.J. 217, 221 (C.A.A.F. 2006) (quoting *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)). Only in "very limited circumstances," in which the result is "so gross as to shock the general moral or common sense," may courts "refuse to apply the literal text of a statute [as] doing so would produce an absurd result." *United States v. McPherson*, 81 M.J. 372, 380 (C.A.A.F. 2021).

R.C.M. 701(a)(2)(A) applies to data that is disjunctively within the "possession, custody, *or* control of military authorities." (emphasis added). This Court should find the data in question fell within the plain meaning of this broad language. Indeed, the complete extraction of BE's phone was *in the OSI office*. In plain language, data within the government's evidence locker is within its

possession. Similarly, the data was within the custody of military authorities. Indeed, the evidence locker – where the data was presumably kept – is often referred to as a "custody locker."[3] Only one of the three disjunctive triggers is required, and Appellant contends all three were satisfied here. But it is particularly clear that the government had "custody" of the data.

The presumption of consistent usage also supports the conclusion that the term "possession, custody, or control" does not exclude the data in question. For example, Article 108a, UCMJ, 10 U.S.C. § 908a, requires servicemembers report and turn all captured or abandoned property in their "possession, custody, or control." Surely the government would not contend this identical term applied only to data that whose originator consented to full government inspection. Absent action on the part of the drafters to define "possession, custody, or control" more narrowly in the context of R.C.M. 701 than elsewhere, military courts should not read additional words into the exact same term.

Indeed, the military judge acknowledged the data *was* within the "physical possession, custody, or control" of military authorities. (JA at 543). Nevertheless,

[3] When OSI places items within its custody locker, they fill out a "chain of custody" document.

as explored below, the military judge expressly went beyond the plain meaning of the rule to add in a nonexistent additional requirement.[4]

2. The Military Judge Expressly went Beyond Plain Meaning, Adding a Nonexistent Requirement to the Rule.

Despite the obvious conclusion that the data in the OSI office and, presumably, in OSI's "*custody* locker" fell within the plain meaning of R.C.M. 701(a)(2)'s "possession, custody, or control" language, the military judge denied production. (JA at 543-44). To come to this conclusion, the military judge re-wrote the rule, to require "'*legal*' possession, custody, or control":

> The defense's primary argument in this regard is that the full version of the digital copy of BE's cell phone is within the possession, custody, or control of military authorities and is relevant to defense preparation. The issue turns on whether *physical* possession, custody, or control suffices or if "*legal*" possession, custody, or control, though not stated in RCM 701(a)(2)(A), is necessarily implied. I find that it is, that the evidence the defense seeks is not *legally* in the possession, custody, or control of military authorities, and, therefore, that the defense is not entitled to inspect this evidence pursuant to RCM 701.

[4] Of note, Appellant's understanding is that the scope of the controversy on the merits extends only to whether the "possession, custody, or control" language of R.C.M. 701 was triggered because, if it was, it is uncontested that the low bar of R.C.M. 701(a)(2)(A)(i)'s "relevant to defense preparation" requirement was satisfied.

(JA at 543) (emphasis added). The military judge expressly noted that his newly invented "'legal' possession, custody, or control" requirement was "not stated" in the R.C.M. (JA at 543).

The military judge cited no authority for this extratextual standard. To the contrary, the defense is routinely entitled to even illegally seized evidence within the government's possession, custody, or control (though the illegality of the seizure may limit the government's use of the evidence at trial).

Even under the extra-textual "legal" standard, it is hard to understand how the government's custody of the data was anything but perfectly legal. BE was expressly informed, prior to the extraction, that the authorities would download the entire contents of her phone. (JA at 534). In no uncertain terms, the authorities told BE they would be taking custody of the entirety of the phone's data. The military judge did not explain how OSI's custody of the data was illegal under these circumstances, illustrating the problem with adding extra words to the rules without accompanying definitions and explanations.

In sum, military judges are not empowered to add language to the R.C.M. If the President wishes to add the "legal" caveat to the rule, along with appropriate definitions and other safeguards, the President is free to do so.

3. The President has Delineated Exceptions to the Rule, but None are Applicable.

What the President has done is delineate specific, clearly defined exceptions to the general rules on discoverability. R.C.M. 701(f), addresses, "Information not subject to disclosure," and provides that: "Nothing in this rule shall be construed to require the disclosure of information protected from disclosure by the Military Rules of Evidence. Nothing in this rule shall require the disclosure or production of notes, memoranda, or similar working papers prepared by counsel and counsel's assistants and representatives." *Id.* (emphasis added). Relatedly, Section V of the Military Rules of Evidence delineates categories of evidence protected from disclosure or presentation at trial. *See Manual for Courts-Martial, United States* (2019 ed.), pt. III, § V. None of the listed categories apply here. *See Jasper*, 72 M.J. at 280 (quoting *Custis*, 65 M.J. at 369) ("Because privileges 'run contrary to a court's truth-seeking function,' they are narrowly construed.").

While this appears to be an issue of first impression, the simplest answer here is correct: if the government takes custody of data, it cannot simultaneously shelter it from disclosure. Consequently, this Court should find that, under the plain meaning of the rules, and consistent with the dual principles of broad discovery and narrow privileges, the government cannot take relevant non-privileged information into its possession, custody, and control, but nevertheless refuse to disclose it because the witness who provided it gave limited consent with respect to its use. To

hold otherwise would allow the government to re-write its own discovery obligations via ex-parte agreement with witnesses. *See generally Stellato*, 74 M.J. at 487 ("[A] trial counsel cannot avoid discovery obligations by remaining willfully ignorant of evidence that reasonably tends to be exculpatory. . . .").

4. The Government Has Not Disproved Prejudice Beyond a Reasonable Doubt.

"Where an Appellant demonstrates that the government failed to disclose discoverable evidence in response to a specific request the Appellant will be entitled to relief unless the government can show that nondisclosure was harmless beyond a reasonable doubt." *Cano*, 61 M.J. at 75 (citations omitted). Since it is clear the defense made a specific request, if this Court finds error the burden will be on the government to prove harmless beyond a reasonable doubt.

As an initial matter, it is difficult to perform a detailed prejudice analysis without access to the underlying evidence which, of course, is not contained in the record. The reason the evidence is not available to analyze is because access was denied by the government, with the sanction of the military judge. This absence of evidence relevant to the prejudice analysis must be held against the government rather than Appellant – both because the government has the prejudice burden and because it caused the gap in the record through its erroneous withholding of the data. The Air Force Court stated that the presence of other helpful information was "speculative." (JA at 9). The reason it is speculative, however, is because the

information was withheld and therefore is not in the record. It is the *government's burden* to prove harmlessness. To the extent the record is incomplete, it is because the government erroneously withheld the discovery. The government cannot turn around and meet its burden due to the gaps in the record attributable to the very error at issue. If the government can withhold discovery and then meet its prejudice burden by stating prejudice is "speculative," there would never be prejudice. It is almost tantamount to the government presenting no evidence at trial then stating reasonable doubt was speculative. This is not how the beyond a reasonable doubt burden works.

But even without access to the underlying data, there are good reasons to believe defense access thereto might well have affected the outcome of the trial. First, BE's testimony cast doubt on the veracity of the text messages BE sent to Appellant of which the defense *did* have copies. Specifically, BE announced to the panel on cross examination that the messages "choppy and incomplete," that "things are missing," and the messages were "misleading." (JA at 320); *see also* (JA at 339-40) (further allegations by BE that the messages provided by the defense were "incomplete and misleading"). When she was asked about reviewing the messages prior to her testimony, she complained that she "felt like there were a lot of deleted messages throughout the whole stack." (JA at 321). The Air Force Court heavily relied on the assumption that access to the same messages the defense already had

from Appellant's phone would have been cumulative (JA at 9), but this analysis ignores BE's repeated accusations of the defense of altering or modifying the copy of the messages they presented at trial. Having the complete extraction of BE's phone might have demonstrated the text messages presented by the defense were not inaccurate or misleading, supporting the defense case that BE was a much more active participant in the charged activities than she represented in her accusations, and lessoning BE's credibility by undercutting her attempt to explain away her inconsistent actions by accusing Appellant and his defense counsel of manipulating evidence. The government cannot allow its primary witness to accuse the defense of presenting incomplete evidence, then demur that withheld evidence that would have established the truth of the matter would have been merely cumulative on the allegedly incomplete evidence presented at trial.

Second, the limited electronic data the defense did have at trial proved highly contradictory to BE's allegations, demonstrating the importance of such evidence to the defense. Both the text messages the defense did have (BE's accusations about their accuracy not withstanding), and the Amazon.com records, were inconsistent with BE's narrative. Meanwhile, the government possessed much more electronic data of a similar nature. It is reasonable to believe that this data might similarly have undermined BE's credibility. For example, a digital forensic expert could have matched the texts messages and Amazon records to location data and other data

within the phone to prove to the factfinder that BE sent specific messages in context and made the BDSM Amazon purchases—which BE denied. Appellant had a vital interest in having access to information in government files that might undermine the credibility of his accuser. *See United States v. Warda*, 84 M.J. 83, 95 (C.A.A.F. 2023) ("[S]ervicemembers who are accused of domestic violence have a vital interest in ensuring that they have access to information in government files that may significantly undermine the credibility of the complaining witness in the eyes of the trier of fact.") (Ohlson, C.J., concurring).

Third, prejudice is increased by interplay with other aspects of this case. As noted above, BE alleged the text messages provided by Appellant were altered or incomplete. *See* (JA at 320, 77, 339-40). It is doubly prejudicial to allow a witness to accuse the defense of manipulating evidence, but then deny the defense the necessary discovery to confirm or contradict the accuracy of the evidence. Additionally, trial counsel criticized the defense in closing for asking BE to provide her phone data as evidence: "Having her entire public life exposed and then defense want to say, 'Oh we should have -- you should have exposed your life more. You should have given over your phone. You should've let us parading [sic] the entire contents of your phone in this courtroom.[']" (JA at 374). It is triply prejudicial for the government to withhold evidence from the defense, allow a government witness to accuse the defense of manipulating evidence (an accusation could have been

settled by the withheld evidence), and then disparage the defense in front of the panel for seeking access to the withheld evidence.

Finally, regarding the strength of the evidence generally, it was far from overwhelming. The overarching narrative of the prosecution was not particularly compelling, with BE, a mature, professional woman, claiming Appellant violently abused her over a period of months, while she simultaneously continued to pursue a romantic relationship with him for poorly defined reasons. That's not the strongest foundation for a case. And when the specifics are examined, the government's case gets even weaker. BE's testimony was frequently inconsistent or externally contradicted. BE additionally admitted to lying about things that seemingly made little sense to lie about. *See* (JA at 308-09). And BE's friend testified she had a poor character for truthfulness. (JA at 366). On the other hand, the government's affirmative case was limited. Corroboration was minimal and largely collateral; BE's accusations were not well supported by physical, forensic, or eyewitness evidence; and the government presented no character evidence in support of BE. Combined, the government cannot prove nondisclosure was harmless beyond a reasonable doubt in this case.

Conclusion

WHEREFORE, Appellant requests this Court set aside the findings and the sentence.

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Certificate of Filing and Service

I certify that an electronic copy of the foregoing was electronically sent to the Court and served on the Air Force Government Trial and Appellate Operations Division at af.jajg.afloa.filng.workflow@us.af.mil on February 25, 2025.

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Certificate of Compliance with Rule 24(b) and 37

1. This brief complies with the type-volume limitation of Rule 24(b) because it contains 4,785 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in a proportional typeface using Microsoft Word with Times New Roman 14-point typeface.

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