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

REPLY 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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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?

1. Only One of the Three Triggering Criteria from R.C.M. 701 is Required.

Rule for Court Martial (R.C.M.) 701(a)(2)(A) is triggered when data is disjunctively within the "possession, custody, *or* control of military authorities." (emphasis added). As such, the defense must only establish *one of the three* to trigger operation of the rule, while the Government must "run the table" and establish it had neither possession, custody, nor control of the data in question.

The Government attempts to neutralize this disadvantage by arguing "the three words are synonymous." (Gov. Br. at 23). Immediately thereafter, however, the Government goes on to cite a number of clearly distinguishable definitions for each of the three terms. (Gov. Br. at 23-26). Following this lengthy discourse, the Government concedes it had custody of the data. (Gov. Br. at 26) ("The Government acknowledges that OSI had physical custody of BE's full phone extraction.").[1]

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[1] The Military Judge also acknowledged the data was within the "physical possession, custody, or control" of military authorities. (JA at 543).

2. At Least One of the Three Triggering Criteria is Met.

As this Court need find only one of the three, "custody" seems to be the easiest, particularly given the Government's concession on this point. (Gov. Br. at 26). Indeed, the conclusion that military authorities had custody of the data borders on inescapable given that the data was in the OSI office and, presumably, in OSI's "custody locker."[2]

Of note, one of the definitions the Government itself endorses is that "'custody typically refers to the (often temporary) care and control of a thing or person for inspection, preservation, or security' in which the Government does not have a property interest or right." (Gov. Br. at 24) (quoting *Weems v. United States*, 191 A.3d 296, 301 (D.C. Ct. App. 2018) (internal quotations omitted). This definition seems to fit very neatly with the facts of the present case where law enforcement took the data for inspection, actually inspected it, and thereafter placed it in the custody locker for preservation and security.

3. The Evidence was Relevant to Defense Preparation.

Once possession, custody, or control, is established, R.C.M. 701(a)'s second requirement for disclosure is the low hurdle that the data was "relevant to defense

[2] For that matter, it appears trial counsel personally also had a copy of the full extraction. *See* (JA at 503) ("Trial Counsel physically has an unaccessed digital copy of the full phone extraction.").

preparation." This seems to be obvious from the Government's own actions. Its law enforcement arm clearly thought the phone data was relevant, and asked BE to provide it for their investigation. *See* (JA at 534); *see also* (JA at 339). Surely, the Government cannot contend this same data was relevant to its investigation, but irrelevant to Appellant's preparation. Additionally, as noted by the military judge, BE referenced her phone repeatedly while making her accusations against Appellant. *See* (JA at 534).

Indeed, the Government conceded at trial that, at the very least, the items proffered in the defense motion were relevant to defense preparation:

> Should the Court ultimately disagree and hold the underlying data is within the control of military authorities pursuant to R.C.M. 701(a)(2) regardless of its constitutional obligations to the Victim and limited consent from the Victim, ***then the Government concedes that "relevant to the defense preparation," see R.C.M. 701(a)(2)(A)(i)***, and any such evidence would be reviewed by Trial Counsel and evidence relevant to the defense preparation would be provided in discovery in accordance with Trial Counsel's obligations.

(JA at 503) (emphasis added). These items included: (1) videos of the couple flying; (2) images of her breasts post-augmentation that would have confirmed or contradicted the alleged injuries in the relevant timeframe; (3) the documentation BE was repeatedly referencing on her phone during her law enforcement interviews; (4) the text messages and web history demonstrating BE's involvement in BDSM; (5) "other information pertaining to BDSM on her cellphone extraction;" and (6)

how the amazon.com screenshot got on BE's cellphone. *See* (JA at 484, 548). As the Government has already conceded that at least these categories of the phone data were relevant under R.C.M. 701, it cannot now change its position.

4. The Military Judge and Government Both Add to the Rule's Text.

The Government goes on to make various arguments about why R.C.M. 701 should not be triggered, despite the concession that OSI had custody of the data. Like the military judge, however, the Government premises these arguments on adding to the text of R.C.M. 701. The military judge added a "'*legal'* possession, custody, or control" requirement, despite expressly acknowledging this requirement was "not stated" in the R.C.M. (JA at 543). The Government, meanwhile, argues that "BE's entire cell phone extraction was not subject to disclosure or discovery because it was not in the *complete legal* possession, custody, or control of military authorities." (Gov. Br. at 28) (emphasis added). Just this week, this Court reiterated basic textualists principles to hold that when a statute used one word, but not others, it is inappropriate to read in the absent words. *United States v. Valentin-Andino*, No. 24-0208/AF, __ M.J. __, 2025 WL 996372 (C.A.A.F. Mar. 31, 2025) (where text used the word "appropriate," but not the words "meaningful," or "tangible," it would be inappropriate to read in the absent words). This Court should continue to uphold textualism by declining to read in the absent words inserted by the military judge and Government.

After all, the Government itself writes the rules. As the drafter and proponent of R.C.M. 701, the Government is free to write the language it suggests into the rule at its own sole discretion. But it must actually write it in advance. It cannot just add to the text – or ask judges to add to the text – to make the current language fit its outcome preferences as various scenarios arise.

To the extent the Government urges this Court to add to the text for policy reasons, or to effectuate the supposed purpose of the rule, the Supreme Court has explicitly forbidden this practice. *Baker Botts L.L.P. v. ASARCO LLC*, 576 U.S. 121, 135 (2015) (describing its mandate "to follow the text even if doing so will supposedly undercut a basic objective of the statute.").

5. The Government Does Not Address the Presumption of Consistent Usage.

As argued in appellant's opening brief, the presumption of consistent usage also supports the defense textual interpretation argument, because the term "possession, custody, or control" is also used elsewhere, such as in Article 108a, Uniform Code of Military Justice (UCMJ), and clearly would include the data in question under that article's framework. (Appellant's Br. at 12). The Government does not respond to this argument or challenge its validity. 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, this Court should not read additional words into the exact same term.

6. The UCMJ's General Equal Access/Opportunity Language Cannot Trump the More Specific Provisions of R.C.M. 701(a).

The Government further suggests that because the parties had "equal access" – which presumably is to say "no access" – to the data in question, there was no discovery violation. (Gov. Br. at 20, 29) (citing Article 46a, UCMJ, 10 U.S.C. § 846). However, when there are both general and specific rules about a topic – the specific rules control. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 183-88 (2012 ed.); *see also Valentin-Andino*, 2025 WL 996372 at n.4 (citing *California ex rel. Sacramento Metro. Air Quality Mgmt. Dist. v. United States*, 215 F.3d 1005, 1013 (9th Cir. 2000) (stating that a general statutory rule does not govern unless there is no more specific rule)). Article 46 is a notably general rule, whereas R.C.M. 701(a) is a very specific rule detailing the Government's disclosure requirements. As such, the general language from the former cannot invalidate the much more specific language from the latter.

This is doubly so in that Article 46, UCMJ, specifically dictates that it be applied "in accordance with such regulations as the President may prescribe" – and the relevant regulation the President has prescribed on Government disclosure is R.C.M. 701(a).

7. The Government's Fourth Amendment Arguments Are Not Tailored to The Context of Criminal Discovery.

The Government additionally argues that, even if the data in question fell within the plain language of R.C.M. 701(a), it still could not be disclosed to the defense because such disclosure would violate BE's Fourth Amendment right to privacy.

This argument conflates the lawfulness of a search with the scope of discovery. Criminal discovery often implicates a wide variety of data, including third-party data. R.C.M. 701(f) lists specific reasons for withholding relevant evidence. A witness' general privacy interest, while understandable, is simply not a basis listed in R.C.M. 701(f). Surely the Government would not argue that criminal discovery cannot reach any item in which a third-party may have a reasonable expectation of privacy. The President has already balanced the privacy interests of witnesses against the discovery rights of a defendant and promulgated the rules on that basis.

Complying with the President's discovery rules is not akin to law enforcement rummaging through a person's private data for investigatory purposes; it is a court-supervised disclosure in the context of ongoing litigation. In essence, the Government seeks to use the Fourth Amendment as a sword to block Appellant's

access to evidence. This inversion of the exclusionary rule is inappropriate.[3] The Fourth Amendment exists to protect individuals from Government overreach, not to enable the Government to deprive an accused of evidence. Moreover, BE's consent was limited, but not in the manner the Government suggests. She *consented* to the seizure (copying) of her entire phone contents. *See* (JA at 534-535).

8. Caselaw Recognizes that the President has Balanced Privacy Interests and Discovery Rights.

A similar dynamic was presented by another recent Air Force case, where the military judge ordered discovery of non-privileged medical and mental health records pursuant to R.C.M. 701. *See In re HVZ*, No. MC 2023-03, 2023 WL 4542948 (A.F. Ct. Crim. App. July 14, 2023) (unub. op.), *aff'd in part, rev'd in part and remanded sub nom*. *H.V.Z. v. United States*, 85 M.J. 8 (C.A.A.F. 2024). There, the victim made a similar argument to that which the Government makes here: claiming she had "a constitutional privacy interest" in the underlying discovery. *Id.* at *5. The Air Force Court of Criminal Appeals (Air Force Court) explicitly agreed

[3] Indeed, this goes beyond an inverse of the exclusionary rule, as said rule is only about presentation in evidence, not disclosure in discovery.

a constitutional privacy interest[4] existed, but nonetheless found the discovery rules had to be complied with. *Id.*

Indeed, these principles can be seen within the Government's own argument before the Air Force Court that "Appellant still had an option for obtaining the full extraction . . . through R.C.M. 703." (Answer to Assignments of Error, at 76-77). The Government made no mention of the Fourth Amendment there but now goes so far as to argue that turning over the data under R.C.M. 701 would constitute "a blatant disregard for the Constitution." (Gov. Br. at 22). How, then, would turning it over under R.C.M. 703, be totally fine? By the Government's own terms, the Government, the Court, and Appellant could have obtained the phone data via R.C.M. 703 without violating BE's Fourth Amendment rights, but obtaining the same discovery via R.C.M. 701 would apparently cause a small constitutional crisis.

9. <u>To the Extent Complying with the Discovery Rules was too Onerous to Other Interests, the Government Was Empowered to Choose.</u>

To be clear, the Government was not forced to provide the discovery. To the extent it balanced BE's privacy interest with the rule the Government itself wrote,

[4] Notably, though, the named victim in *In re HVZ* contested release of her records, whereas BE consented to law enforcement officials downloading and keeping the entirety of her phone data. This distinction changes the privacy interest and analysis.

and found the former to be the more compelling interest, it was free to withhold the discovery. However, doing so would have consequences.

A similar dynamic exists in the framework of Mil. R. Evid. 505. Under that framework, when discovery is required under the rules, but the Government decides disclosure would be too invasive, the Government can withhold the evidence, but at the consequence of dismissing the case (or similar remedies). Indeed, this same framework has been applied in situations where, as alleged here, discovery implicated victim privacy interests. *See J.M. v. Payton-O'Brien*, 76 M.J. 782, 790–91 (N-M. Ct. Crim. App. 2017).

10. Other Methods for Safeguarding Privacy Also Exist.

The military judge also had less drastic options to safeguard privacy interests, for example, through an *in camera* review or a protective order. The military judge did not explore any such alternatives because he accepted the Government's absolutist position. Indeed, even extremely sensitive, privileged, and classified data are discoverable subject to such controls. BE's phone data fell into none of these categories and the need for disclosure was driven by the straightforward application of R.C.M. 701.

11. The Caselaw Cited by the Government is Distinguishable or Lacking in Precedential Value.

The Government cites three cases in support of its Fourth Amendment arguments. Neither *Elkins v. United States*, 364 U.S. 206, 209 (1960), nor *Weeks v.*

United States, 232 U.S. 383 (1914), involves the Fourth Amendment rights of third parties. Both cases contain language that the Fourth Amendment applies to "all alike, whether accused of [a] crime or not" – but both cases deal with the Fourth Amendment rights of a criminal defendant. Certainly, neither stand for the proposition that a criminal defendant cannot obtain discovery of anything that a third-party might have a privacy interest in.

The Government further cites a district judge's ruling in the insider trading prosecution against former New York Congressman Christopher Collins, where the trial judge adopted a similar framework to that suggested by the Government to block defense access to certain data seized from third parties. (Gov. Br. at 19-21) (citing *United States v. Collins*, 409 F. Supp. 3d 228 (S.D.N.Y. 2019)). A trial-level ruling applying a different rule in a different system carries no precedential value. Indeed, as far as Appellant can tell this case has never been cited for the proposition the Government cites it for. Additionally, the *Collins* case has important factual distinctions. It seems from context, that the individual(s) whose personal data was at issue were themselves either suspects or co-conspirators, which, of course, implicates a much more traditional Fourth Amendment analysis than in the case of a fact-witness who was not herself under investigation.[5] Additionally, it seems the

[5] While the *Collins* ruling does not explain the background facts in full detail, this is typical for trial-level rulings because they are not written to serve as precedent so

Government had already provided fairly extensive review and discovery of the data in question. While appellate defense counsel are beyond impressed with their counterparts' research abilities, it is perhaps even more telling that government counsel, who are obviously extremely skilled at legal research, cannot find a single *appellate* Court case that supports the Government's unique position here.

12. The Government's Fourth Amendment Arguments are Inapplicable to Important Portions of the Discovery.

At the very least, the Government's arguments about BE's reasonable expectation of privacy are inapplicable to significant portions of the phone data. As repeatedly highlighted by the Government, one particularly important aspect of BE's phone data – naturally enough – was her messages *with* Appellant. Certainty BE did

much as to make a record for appellate review in the specific case at bar. It appears the *Collins* case never reached direct appeal due to the congressman's eventual guilty plea. *See* Vivian Wang, *Ex-Rep. Chris Collins Pleads Guilty to Insider Trading Charges*, N.Y. Times (Oct. 1, 2019); *see also United States v.* Collins, No. 19-3051, 2019 WL 7169099 (2d Cir. Oct. 22, 2019) (withdrawal from appeal). Thus, this trial-level determination holds even less persuasive value as it was never reviewed for error.

not have a reasonable expectation of privacy that Appellant would not have access to messages she sent directly to him.

This is particularly relevant because the Government also explicitly acknowledged at trial this portion of the phone data was relevant to defense preparation. *See* (JA at 503).

As BE had no reasonable expectation in these messages, the Government conceded they were relevant to defense preparation, and their absence was particularly prejudicial in that it allowed BE to accuse the defense of manipulating evidence, this subsection of the data alone is enough for this Court to decide the case in Appellant's favor.

13. It was Incumbent on the Government to Explain to the Witness the Consequences of Creating and Taking Custody of a Full Copy of her Phone Data.

On the facts of this case, the situation was easily avoidable. The Government was not forced to take this data into its own hands despite failing to secure the witness' permission to use it.[6]

To the extent law enforcement could not comply with location-data only extraction, they should have explained the impossibility of limiting the extraction in

[6] As explained to BE, the Government could not obtain the location data without also seizing and searching a copy of her entire phone. (JA at 488). This is probably why the consent form had pre-typed "including any and all digital contents thereon." (JA at 492). Perhaps law enforcement would be better served by not hand-editing their own forms.

that way. It is not mandatory that law enforcement tailor their techniques to the exact preferences of witnesses, and such compliance may not always be possible, as it apparently was not here. (JA at 488).

OSI did not obtain this evidence unlawfully or by mistake; it was a byproduct of BE's consent. In these circumstances, the phone extraction is not contraband or an item that the Government had no right to possess at all—BE voluntarily placed it the hands of law enforcement. Nothing in R.C.M. 701 suggests that the Government can unilaterally deem lawfully obtained evidence "off-limits" to the defense because of a private agreement with a witness about how the Government will use that evidence.

This goes to the heart of the granted issue: This Court should not endorse a rule which allows a witness – particularly the complaining witness who is the driving force behind a prosecution – to voluntarily provide evidence to the Government but simultaneously dictate restrictions on its use.

14. To the Extent the Government Improperly Exceeded the Extent of the Witness' Authorization, It Did Not Trigger the Exclusionary Rule, Much Less a Discovery Exception.

Generally, evidence seized in violation of the Fourth Amendment is subject to suppression under the exclusionary rule. *See United States v. Calandra*, 414 U.S. 338, 347–48 (1974). The overarching purpose of the rule is "to deter future unlawful police conduct." *Id.* at 347. It is black letter law, however, that violation of a third

party's privacy rights does not vicariously trigger the exclusionary rule in a trial against another individual. *Rakas v. Illinois*, 439 U.S. 128 (1978).[7] Stepping back further still, the exclusionary rule is a *rule of evidence*, it does not impact discovery. To the extent the Government unlawfully exceeded the scope of BE's consent, by making a copy of her phone data in its entirety, the exclusionary rule would not apply vicariously to Appellant's trial and certainly would not impact discoverability.

15. Conclusion on Merits.

At bottom, the Government's argument asks this Court to bless a dangerous precedent: that the prosecution can seize and maintain relevant evidence and yet refuse to disclose it by claiming a duty to shield a third party's privacy. Compliance with R.C.M. 701 in this case would not have turned the Government into a constitutional violator;[8] it would have fulfilled the Military Justice system's mandate for truth-seeking and fairness. The Court should reject the invitation to create a

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[7] This is the premise behind the statement in Appellant's Brief that the Government takes issue with: "[T]he defense is routinely entitled to even illegally seized evidence without the [G]overnment's possession, custody, or control (through the illegality of the seizure may limit the [G]overnment's use of the evidence at trial." (Gov. Br. at 22) (citing App. Br. at 14).

[8] There is an argument BE's privacy rights were violated the second the Government exceeded the scope of BE's consent by searching her entire phone for location data, though. However, the remedy is not withholding evidence in the custody of the Government in a criminal trial where that evidence is relevant. The remedy is BE engaging in civil litigation against the state or federal government for violating her rights.

novel Fourth Amendment exception that undermines an accused's right to a fair trial and the plain language of the Government's own rules.

16. Prejudice.

As noted above, the Government itself – through its law enforcement arm – thought this evidence was relevant to the case. It is difficult for the Government to now turn around and say the absence of the evidence it itself wanted has been proved harmless beyond a reasonable doubt.

The Government makes the difficult-to-understand argument that access to BE's copy of the messages between her and Appellant would not have been helpful to the defense because "Appellant would have known if the text messages he introduced at trial were the full collection of text messages between BE and him, or if some messages were missing or deleted." (Gov. Br. at 31). He may have known, but he obviously needed the other copy to prove it. There are many important facts that a defendant may personally know – but it in no way follows that defendants do not need access to the underlying evidence necessary to demonstrate such facts to the factfinder. Additionally, while BE's primary accusation seemed to be that the defense had manipulated the text messages, at times she seemed to deny that the messages presented by the defense were accurate at all. *See, e.g.*, (JA at 261) ("Q: Ma'am, these are your text messages with Captain Braum, correct? A: "Some of these are.").

The Government further complains that Appellant did not explain every possible use of the evidence to the military judge – apparently implying this Court can only consider potential uses that Appellant identified at trial in its prejudice analysis. (Gov. Br. at 33).[9] This, of course, is not the standard. Appellant's low burden under R.C.M. 701 was to establish that the evidence was relevant to his preparation. He did not have to raise every possible potential use for such potential uses to be considered in a latter prejudice analysis.

Regarding BE's accusations that the defense manipulated the text messages, without BE's side of the messages, the defense had no effective way to rebut these serious allegations. Trial counsel capitalized on the issue in closing argument, chastising the defense for seeking BE's phone at all and suggesting the defense wanted to "parade…the entire contents" of BE's private life in court. The Government thus managed to transform the defense's lack of the phone data into an argument against Appellant, increasing prejudice.[10]

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[9] Specifically, the Government highlights the idea that the phone data could have established the truth of the Amazon.com purchase issue. (Gov. Br. at 33). To the contrary, the defense did highlight this dynamic in its motion. *See* (JA at 548). To the extent the Government argues that the defense never requested a digital forensic examiner – presumably this request would have become ripe only after obtaining the digital evidence, which it never received due to the discovery denial.

[10] Regarding trial counsel's argument, the Government states the Air Force Court found this argument was not error. (Gov. Br. at 35, n.3). This is not Appellant's reading of the Air Force Court decision. While the Air Force Court did not specifically address this alleged improper argument, it seemingly presumed, without

Regarding the strength of the evidence generally, BE's testimony was the centerpiece of the prosecution, and her credibility was the central issue for the members. Yet her testimony was rife with inconsistencies and improbabilities. BE even admitted on the stand to lying about certain matters unrelated to the charged offenses, calling into question her general trustworthiness. This was not an overwhelming case where additional impeachment evidence would likely be drowned out by a wave of proof of guilt. In these circumstances, the Government has not met its high prejudice burden.

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deciding, that it constituted clear and obvious error. (JA at 17) ("Appellant points to other comments by trial counsel. We need not address each of those individually. We presume, without deciding, that each of the remaining alleged improper statements were clear and obvious error . . . ."). While this Court did not grant review on the issue of improper argument, that does not mean trial counsel's closing comments cannot be considered within this Court's prejudice analysis of the granted discovery issue.

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 April 3, 2025.

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Certificate of Compliance with Rule 24(b) and 37

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