IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*	)	**BRIEF ON BEHALF OF THE UNITED STATES**
v.	)	Crim. App. No. 40434
Captain (O-3) **ZACHARY R. BRAUM** United States Air Force *Appellant.*	)	USC Dkt. No. 25-0046/AF
	)	27 March 2025

BRIEF ON BEHALF OF THE UNITED STATES

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

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 (AFCCA) reviewed this case under Article 66(d), UCMJ. This Court has jurisdiction over this matter under Article 67(a)(3), UCMJ[1].

[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 found in the 2019 edition of the Manual for Courts-Martial, United States, unless otherwise noted.

RELEVANT AUTHORITIES

The Fourth Amendment to the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article 46(a), UCMJ states:

> In a case referred for trial by court-martial, the trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe.

In relevant part, Rule for Courts-Martial 701(a)(2) states:

> (a) Disclosure by trial counsel. Except as otherwise provided in subsection (f) and paragraph (g)(2) of this rule, and unless previously disclosed to the defense in accordance with R.C.M. 404A, trial counsel shall provide the following to the defense:
>
> . . .
>
> (2) Documents, tangible objects, reports. (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;

> (ii) the government intends to use the item in the case-in-chief at trial;
>
> (iii) the government anticipates using the item in rebuttal; or
>
> (iv) the item was obtained from or belongs to the accused.

Then R.C.M. 701(e) states:

> Each party shall have adequate opportunity to prepare its case and equal opportunity to interview witnesses and inspect evidence, subject to the limitations in paragraph (e)(1) of this rule. No party may unreasonably impede the access of another party to a witness or evidence.

STATEMENT OF THE CASE

Contrary to his pleas, a general court-martial found Appellant guilty of one charge and one specification of abusive sexual contact, three specifications of sexual assault, and three specifications of rape (Article 120, UCMJ); one charge and three specifications of domestic violence (Article 128b, UCMJ); and one charge and one specification of reckless operation of an aircraft (Article 113, UCMJ). (JA at 30.) A military judge sentenced Appellant to a dismissal, nine years confinement, forfeiture of all pay and allowances, and a reprimand. (Id.)

At AFCCA, Appellant raised the granted issue. (JA at 3.) The court decided the issue on prejudice and declined to address whether the Government's denial of Appellant's discovery request to access the full extraction of BE's cell phone was error. (JA at 5-9). The court decided that even if the military judge erred in

denying Appellant's trial level motion to dismiss and compel discovery, Appellant did not experience prejudice. (JA at 8-9.) AFCCA decided that "the findings and sentence as entered are correct in law and fact, and no error materially prejudicial to the substantial rights of the Appellant occurred." (JA at 21.)

STATEMENT OF THE FACTS

A. Overview of Appellant's Relationship with BE

Appellant met BE using an online dating application in November 2019, and the two began a romantic relationship. (JA at 46.) At the beginning of their relationship, BE described their sexual relationship as "very romantic, very sensual." (JA at 46.) BE explained that in the first few months of their relationship, they did not use or discuss bondage or other similar types of sexual activity. (R. at 46-47.)

In May 2020, Appellant asked BE if she "would be willing to make our life in the bedroom more fun, a little more perky, but he never did use the actual words BDSM."[2] (JA at 65.) During this conversation, the two exchanged text messages and pictures of BDSM activities because BE was "wanting to know if that's what he was referring to." (JA at 66.) On cross-examination, trial defense counsel asked if BE was trying to arouse Appellant by sending him the pictures, she

[2] BDSM is an acronym meaning bondage, discipline, sadism, and masochism.

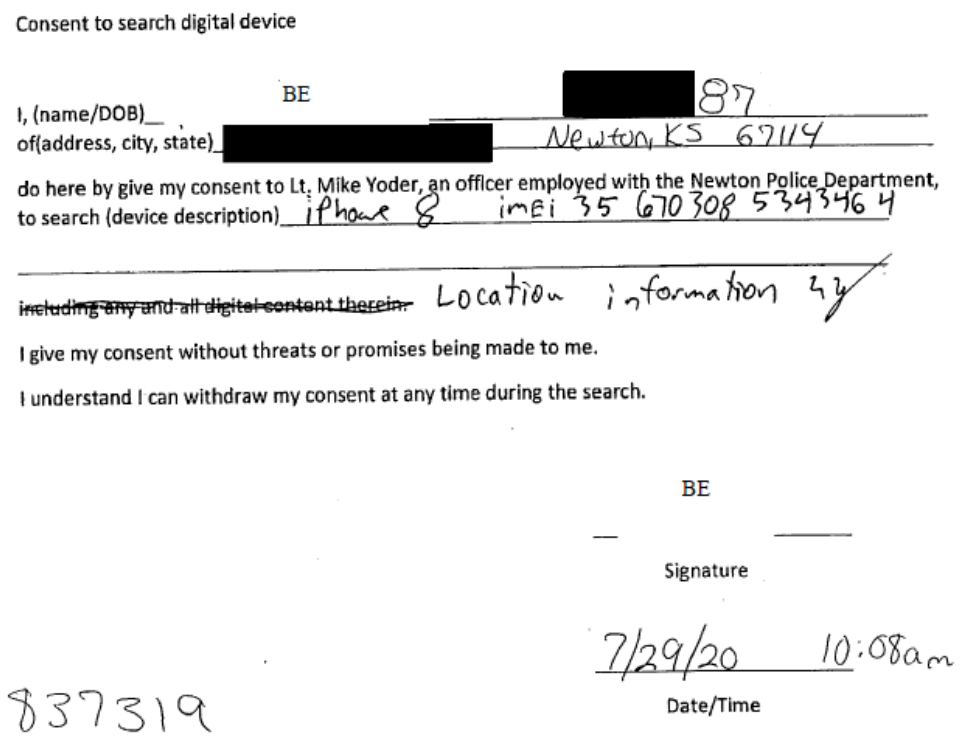
responded, "I wasn't try to [arouse] him. I was trying to understand where he was coming from, and he would send them back to me as well." (R. at 852.)

BE testified that there was never an agreement to use BDSM toys or sex toys, stating, "No, we never made anything like, okay, let's go try it." (JA at 66.) Over the course of the next few months, Appellant proceeded to use a bullwhip to strangle BE during sex causing her to pass out; to insert a gag ball into BE's mouth to hinder her breathing while he penetrated her vulva with his penis; to penetrate her anus with his finger and an enema injector without her consent; and to force his penis into her mouth without her consent. (JA at 32-343.)

After enduring a physically and sexually abusive relationship with Appellant, BE left Appellant in July 2020 after a final physical altercation. (JA at 301.) On 12 July 2020, during an argument, Appellant took BE's phone from her, and when she tried to retrieve it from him, he shoved her and then pushed her from behind – BE's daughter witnessed the incident. (JA at 164, 301-302; Supp. JA at 578.) BE was unable to grab the phone back from Appellant, and Appellant became enraged with BE. (JA at 164.) So, BE and her daughter hid in her daughter's room with the door locked. (JA at 168.) Appellant came to the door, slid BE's phone under the door, and said, "Don't call 911, you'll ruin my career." (JA at 168.) BE's family arrived, and Appellant called a friend to pick him up and then left BE's house. (JA at 170, 175.)

B. Overview of Alleged Discovery Issue

In July 2020, pursuant to BE's consent, civilian law enforcement downloaded a copy of BE's phone after her interview. (JA at 488, 534). But BE only authorized the Government to look at the location data on her phone – nothing else – and she edited and then signed a consent form reflecting her limited consent. (JA at 492.) An image of the relevant portion of the consent form is provided for reference here:



Consent to search digital device

I, (name/DOB) BE [redacted]87
of(address, city, state) [redacted] Newton, KS 67114

do here by give my consent to Lt. Mike Yoder, an officer employed with the Newton Police Department,
to search (device description) iPhone 8 imei 35 670308 534346 4

~~including any and all digital content therein~~ Location information 4y

I give my consent without threats or promises being made to me.

I understand I can withdraw my consent at any time during the search.

BE

Signature

7/29/20 10:08am

Date/Time

837319

(Id.) On 1 June 2022, the government provided the location data to trial defense counsel in discovery. (JA at 537.)

In response, trial defense counsel filed a motion to dismiss the case with prejudice due to discovery violations. (JA at 467-485.) In the alternative, trial

defense counsel requested production of BE's entire cell phone extraction – not just the location data. (JA at 485.) Trial defense counsel alleged that the full extraction of BE's phone was necessary to contradict BE's anticipated testimony that:

> (1) she never requested sex toys, BDSM, or the like; (2) she never purchased BDSM or like items or any sex toys during their relationship; (3) never requested BDSM activities and [Appellant] never brought it up; and (4) the first she knew about BDSM was when [Appellant] strangled her with the bullwhip until she passed out.

(JA at 548.) The Government opposed the motion. (JA 493-505.)

Trial defense counsel already had 91 pages of text messages between BE and Appellant with explicit photos and sexual discussions, and trial defense counsel admitted the messages as Defense Exhibit A. (JA at 375-465.) During her testimony, BE did not deny sending the sexually explicit photos to Appellant. She admitted that she sent them and explained, "I was trying to understand what he meant by 'spicing up' [the sexual relationship] because I didn't know what that all entailed." (JA at 314-315). She did not indicate that Appellant or someone else fabricated the messages. Trial defense counsel asked BE, "You said 'Things are missing, and that's why it's misleading,' right?" And BE responded, "Yes, I felt like there was a lot of deleted messages throughout the whole stack, and I didn't know where from November to May 16th was." (JA at 321).

C. Military Judge's Findings of Fact and Ruling on Trial Defense Counsel's Motion to Dismiss and Alternative Motion to Compel

The military judge made the following findings of fact in his ruling on trial defense counsel's motion to dismiss and alternative motion to compel:

- On 29 July 2020, Newton Police Department (NPD) and Office of Special Investigation (OSI) personnel interviewed BE. (JA at 534.)

- When BE referenced her phone multiple times during the interview, the NPD officer offered to help the OSI Special Agent (SA) request BE's consent to download information from BE's phone. The OSI SA agreed. (Id.)

- BE consented to only location-related information being downloaded from her phone and signed a consent form explaining that. The form crossed out the language "including any and all digital content therein" and the words "location information" was written in. (JA at 534-535.)

- "The NPD officer explained that the entire contents of the phone would be downloaded but that the search would be limited to location-related information in accordance with BE's consent." (JA at 534.)

- NPD placed the downloaded information on a flash drive and stored it as evidence, and NPD returned the phone to BE. (Id.)

- OSI told NPD that "the flash drive was not needed at that point," but OSI would contact NPD if that changed. (JA at 534-535.)

- In the body of the report, NPD discussed interview recordings of BE and "the flash drive containing the information downloaded from her phone." (JA at 535.) The interview recordings and flash drive were also "listed in a separate section discussing evidence" in NPD's custody. (JA at 535.)

- The NPD's report also discussed "the circumstances of gaining consent and downloading the information from the phone" and it included a three-page summary of the extraction report and BE's consent form. (JA at 535.)

- On 1 June 2022, the government informed trial defense counsel that NPD has a cellphone extraction from BE's phone and explained the extraction included more than location data, "but that BE's consent was limited to location data and that the government's review of the extraction was limited to the location data."

- The government provided trial defense counsel "thousands of pages of location data." (Id.)

The military judge denied Appellant's motion to compel the entire extraction of BE's phone. First, the military judge held the "defense has been given equal access to the evidence from BE's phone as the government, that is, only to the location data, in accordance with the limited consent BE provided." (JA at 543.) Next, addressing R.C.M. 701, the military judge found 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." Citing AFCCA's published opinion in United States v. Lutcza, 76 M.J. 698, 703 (A.F. Ct. Crim. App. 2017), the military judge held, "a person's waiver of privacy interests in a cell phone turned over to law enforcement to copy is limited to the terms of the consent given." (JA at 543.) The military judge noted BE "specifically and explicitly limited the consent she gave to location data" and "did not thereby waive any privacy interests or lose legal protections regarding the remaining data in the phone." (Id.) The military judge decided, "As such, the remaining data copied from her phone is not legally in the possession,

custody, or control of military authorities and is not discoverable under RCM 701(a)(2)(A)." (Id.)

The military judge also noted in his ruling that trial defense counsel had access to these messages, "[a]s evinced by the defense's filing, the defense already has evidence of those pictures and messages, presumably from [Appellant's] phone." (JA at 543.)

SUMMARY OF THE ARGUMENT

The Government did not have legal possession, custody, or control of BE's phone, as described in R.C.M. 701 (a)(2)(A) because the Fourth Amendment prevented the Government from violating BE's limited consent. BE allowed law enforcement to copy her phone, but she forbid them to look at the entire contents of the copy and only permitted them to view her location data. Thus, the Government could not legally intrude on BE's constitutional right against unlawful search and seizure by exceeding the scope of BE's consent. U.S. Const. amend. IV; Schneckloth v. Bustamonte, 412 U.S. 218, 242 (1973). And the Government could not legally facilitate a third party's intrusion upon BE's constitutional right against unlawful search and seizure by providing the entire extraction to trial defense counsel. Buonocore v. Harris, 65 F.3d 347, 350 (4th Cir. 1995). Because BE's entire cell phone extraction was not in the complete legal possession,

custody, or control of military authorities, it was not subject to disclosure or discovery.

Even if the nondisclosure was erroneous, the error was harmless beyond a reasonable doubt, and the outcome of Appellant's trial would not have been any different because Appellant already had the text messages and photos that he was hoping to find on BE's phone extraction, and he used them at trial. United States v. Coleman, 72 M.J. 184, 187 (2013). Mining BE's phone for duplicate messages and images would not have changed the outcome – the same information would have been presented to the panel; only the source of the data would have changed. Relief is unwarranted, and this Court should affirm the decision of the Court of Criminal Appeals.

ARGUMENT

THE GOVERNMENT HAD NO LEGAL AUTHORITY TO DISCLOSE THE ENTIRE FORENSIC COPY OF BE'S PHONE TO APPELLANT BECAUSE BE ONLY CONSENTED TO A SEARCH OF HER LOCATION DATA. AND EVEN IF THE NONDISCLOSURE WAS ERROR, THE OUTCOME OF APPELLANT'S COURT-MARTIAL WOULD NOT HAVE BEEN DIFFERENT.

Standard of Review

This Court uses the "ordinary rules of statutory construction" to interpret the Rules for Courts-Martial (R.C.M.). United States v. Tyler, 81 M.J. 108, 113

(C.A.A.F. 2021). This Court reviews questions of statutory interpretation de novo. United States v. Sager, 76 M.J. 158, 161 (C.A.A.F. 2017).

Appellate courts review a military judge's ruling on a discovery request and any remedy for a discovery violation for an abuse of discretion. United States v. Stellato, 74 M.J. 473, 480 (C.A.A.F. 2015). The abuse of discretion standard calls for more than a mere difference of opinion." Id. (citing United States v. Wicks, 73 M.J. 93, 98 (C.A.A.F. 2014). This Court in Stellato reiterated that an abuse of discretion occurs:

> 'when [the military judge's] 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.'

74 M.J. at 480 (citing United States v. Miller, 66 M.J. 306, 307 (C.A.A.F. 2008) (alterations in the original).

Law and Analysis

The Government did not have legal possession, legal custody, or legal control of BE's entire phone extraction. In the military justice system, the Government and trial defense counsel have "equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." 10 U.S.C. § 846. Under R.C.M. 701(a)(2), trial counsel "shall permit the defense to inspect any . . . papers, documents, data . . . or copies of portions of

these items, if the item is within the possession, custody, or control of military authorities," and "the item is relevant to defense preparation."

This Court uses a two-step analysis for alleged discovery violation: (1) this Court "determine[s] whether the information or evidence at issue was subject to disclosure or discovery;" and (2) "if there was nondisclosure of such information, [this Court] test[s] the effect of that nondisclosure on the appellant's trial." Coleman, 72 M.J. at 187 (citing United States v. Roberts, 59 M.J. 323, 325 (C.A.A.F. 2004)).

A. The Government did not have *legal* possession, custody, or control of BE's phone because the Fourth Amendment prevented the Government from violating BE's limited consent.

The Fourth Amendment of the United States Constitution prevented the Government from exceeding BE's explicit, limited consent to only look at the location data on her phone. Law enforcement and prosecutors had no legal authority to dig through BE's phone or facilitate an intrusion by handing over the entire extraction to trial defense counsel. And the military judge did not abuse his discretion when he determined that BE's constitutional privacy right in her phone extraction prevented disclosure to Appellant.

The Government cannot violate "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. The Fourth Amendment does not revolve

around the "ascertainment of the truth" or the fairness of a trial like the Fifth Amendment or Sixth Amendment of the Constitution. Schneckloth, 412 U.S. at 242. Instead, "[t]he guarantees of the Fourth Amendment stand 'as a protection of quite different constitutional values -- values reflecting the concern of our society for the right of each individual ***to be let alone***." Id. (citing Tehan v. United States ex rel. Shott, 382 U.S. 406, 416 (1966)) (emphasis added). Thus, the Government cannot violate ***any*** person's Fourth Amendment right against unlawful search and seizure. And the plain language of the amendment encompasses all people – not just those under investigation for a crime. The protection of the Fourth Amendment "'reaches all alike, ***whether accused of [a] crime or not***, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws.'" Elkins v. United States, 364 U.S. 206, 209 (1960) (quoting Weeks v. United States, 232 U.S. 383 (1914)) (emphasis added). So, the right to privacy under the Fourth Amendment is afforded to an accused, victim, or witness in any case.

1. The Government could not legally intrude on BE's constitutional right against unlawful search and seizure by exceeding the scope of BE's consent.

BE's cell phone data was protected from government intrusion by the Fourth Amendment. The Fourth Amendment's "constitutional protections fully apply to cell phone searches." United States v. Shields, 83 M.J. 226, 231 (C.A.A.F. 2023)

(citing Riley v. California, 573 U.S. 373, 386 (2014)). The Government must have a warrant or search authorization to constitutionally search a person or her effects – unless an exception applies – otherwise the search is unreasonable. Lange v. California, 594 U.S. 295, 301 (2021); Shields, 83 M.J. at 231 (citing United States v. Wicks, 73 M.J. 93, 99 (C.A.A.F. 2014) (A search conducted pursuant to a search authorization is presumptively reasonable); *See also* Katz v. United States, 389 U.S. 347, 357 (1967) (finding the same); United States v. Hoffmann, 75 M.J. 120, 124 (C.A.A.F. 2016) (finding the same).

Voluntary consent to search is one exception to the warrant or search authorization requirement. Schneckloth, 412 U.S. at 219; Fernandez v. California, 571 U.S. 292, 298 (2014); Davis v. United States, 328 U.S. 582, 593-594 (1946) (finding the same). BE referenced her phone multiple times during her interview with law enforcement. (JA at 534.) So, the investigators asked if they could review her phone. (Id.) BE agreed to let them search her phone's data, but she limited their search of that data to a sliver of the information – her location data. (JA at 492.) A search pursuant to voluntary consent "is limited by the terms of its authorization." Walter v. United States, 447 U.S. 649, 656 (1980); *See* Mil. R. Evid. 314(e)(3) (The scope of a consent search or seizure is limited to the authority granted in the consent.).

Investigators explained to BE that they could extract the location data by making a full copy of her cell phone data. (JA at 534.) BE permitted the Government to copy the data on her phone, but because of the extensive data contained in a phone, BE explicitly limited her consent to the location data to protect the privacy interest she held in her other data. (JA at 492.) The Supreme Court has stated that "the immense storage capacity of modern cell phones" implicates "privacy concerns with regard to the extent of information which could be accessed on the phones." Riley, 573 U.S. at 373. To ensure she was clear on the limits of her consent, BE edited the consent form. (Id.) She crossed out the language "including any and all digital content therein" and wrote in the words "location information." (Id.) With this information in the record, the military judge's finding of fact that BE explicitly limited her consent to search to only location data was supported – and not clearly erroneous. (JA at 488, 534.) In addition, the military judge's statement of the law included citations to Lutcza, 76 M.J. 698 that summarized Fourth Amendment cell phone and consent law. (JA at 538.) The excerpt from Lutcza cited to Riley v. California, for the proposition that a person has a substantial privacy interest in her cell phone, and Schneckloth v. Bustamonte, for the proposition that consent is an exception to the Fourth Amendment warrant requirement. (Id.) The military judge stated, "As explained [in] Lutcza, a person's waiver of privacy interests in a cell phone turned over to

law enforcement to copy is limited by the terms of the consent given." (Id.) The military judge did not misstate or misapprehend the Fourth Amendment. Thus, he did not abuse his discretion by stating that BE "did not thereby waive any privacy interests or lose legal protections regarding the remaining data in her phone." (JA at 543.) All BE's data was extracted from her cell phone, but the full copy taken by law enforcement did not eliminate her privacy interest in the other data on the phone. Law enforcement "explained that the entire contents of the phone would be downloaded but that the search would be limited to location-related information in accordance with BE's consent." (JA at 488.) Thus, BE's consent was limited, and she maintained a reasonable expectation of privacy in the remainder of the phone. Only her privacy interest in the location data was eliminated because she voluntarily shared that information with a third party – law enforcement.

2. The Constitution limits the application of Rule for Courts-Martial 701, so the military judge accurately stated that the Government needed to have "legal possession, custody, or control" of discoverable material.

Appellant claims that the military judge added a "nonexistent requirement" to R.C.M. 701 when the military judge stated the extraction of BE's phone was not "within the legal possession, custody, or control of military authorities." (App. Br. at 14). Appellant claims the "legal" requirement is an "extratextual standard" (App. Br. at 14.) While the word "legal" is not articulated in the phrase "within the possession, custody, or control of military authorities" in R.C.M. 701(a)(2), the

procedural rules governing courts-martial are limited by the Constitution and by federal statute. This Court has laid out the hierarchical sources of law:

> The hierarchical sources of rights in the military include the Constitution; Federal statutes, e.g., the Uniform Code of Military Justice; the Executive Orders containing the Military Rules of Evidence and the Rules for Courts-Martial; Department of Defense directives; service directives; and federal common law . . . These sources are set forth in terms of paramountcy.

United States v. Cooper, 1992 CMA LEXIS 1029, *8-9 (C.M.A. 1992). Military procedural rules, and thus discovery obligations, are ranked lower on the hierarchy. Thus, they are limited by superior law such as the Constitution. As a result, Appellant's discovery rights under R.C.M. 701(a) could not eclipse BE's constitutional right to privacy under the Fourth Amendment. This concept is also reflected in R.C.M. 701(f), which says that nothing in Rule 701 "shall be construed to require the disclosure of information protected from disclosure by the Military Rules of Evidence." In turn, Mil. R. Evid. 311(b)(1) makes clear that a search or seizure is "unlawful" if it was "conducted, instigated, or participated in by military personnel or their agents and was in violation of the Constitution of the United States as applied to members of the Armed Forces." Since the Military Rules of Evidence reiterate that a search of BE's phone in violation of the Fourth Amendment would be "unlawful," it follows that R.C.M. 701 cannot require disclosure of evidence that is protected by the Fourth Amendment.

The United States District Court for the Southern District of New York dealt with a similar privacy interest in copied data in United States v. Collins, 409 F. Supp. 3d 228, 244 (S.D.N.Y. 2019). In a criminal case, the Government possessed a copy of an individual's – not the defendant's – iCloud data, and the Government acquired a search warrant for some of the data, but the individual declined to consent to additional searches. Id. The Government had already searched the legally seized data for discoverable material. Id. at 243. Collins asked the court to order the Government to search the entirety of the individual's iCloud data for Brady material or to turn over all the data to the defense over the individual's objection. Id. at 244. The court denied Collins' request, because the individual had a privacy interest in his iCloud data, and "the Government's possession of and ability to review . . . the iCloud data [was] necessarily circumscribed by the Fourth Amendment." Id. at 244. The court further rejected Collins' argument that since the iCloud data was in the Government's "possession, custody, and control," Brady and Due Process required the Government to review the entirety of the data and turn over discoverable material. Id. The court did not believe that "the Government's Brady obligation is superior to and takes precedence over an individual's Fourth Amendment rights." Id.

Like the individual in Collins had a privacy interest in the copy of his iCloud data, BE had a privacy interest in the copy of her cell phone data. In both Collins

and this case, the Government possessed copies of large amounts of data, but the authority to search that data was limited by a search warrant or consent respectively. And the Government had no authority to violate BE's Fourth Amendment rights. Thus, "the Government's possession of and ability to review" data on BE's phone was "necessarily circumscribed by the Fourth Amendment." Id. at 244. Like the court did in Collins, this Court should reject Appellant's argument that because the Government had a copy of BE's cell phone data, Government was required to ignore BE's Fourth Amendment rights and review and/or turn over the entirety of the data.

Like the district court in Collins, the military judge considered BE's privacy interest in the cell phone extraction in deciding on Appellant's trial motion to compel the extraction. The military judge used published AFCCA case law citing to privacy interests in cell phones that quoted the Fourth Amendment, Riley v. California, and Schneckloth v. Bustamonte, in conjunction with the R.C.M. 701. The military judge concluded that the Government did not have legal authority to access BE's entire cell phone extraction because she limited the scope of consent for the copy of her phone. The Government was legally prohibited from accessing anything but location data on BE's phone. Because the Government had limited access, the trial defense could have equal access – but not additional access – to BE's phone extraction. 10 U.S.C. § 846(a). The military judge explained that "a

person's waiver of privacy interests in a cell phone turned over to law enforcement to copy is limited by the terms of the consent given." (JA at 543) (citing Lutcza, 76 M.J. at 703). He did not abuse his discretion in drawing this conclusion because he correctly applied the law, and the decision was within "the range of choices reasonably arising from the applicable facts and the law." Stellato, 74 M.J. at 480.

The Government must operate within the legal limits of the Fourth Amendment to obtain evidence from anyone – including a victim. The only data the Government could legally access pursuant to the robust Fourth Amendment case law was BE's location data contained in the cell phone extraction. Therefore, the rest of BE's data was not in the Government's possession, custody, or control.

3. The government could not facilitate an intrusion by a third party – trial defense counsel – upon BE's constitutional right against unlawful search and seizure.

Had the Government provided trial defense counsel with the full extraction of BE's phone, then the Government would have facilitated an intrusion upon BE's right against unreasonable searches. The Government's involvement would have violated BE's privacy right. The Fourth Amendment is only a limitation on Government action, and not a limit on the actions of individuals in which the Government has no part. Burdeau v. McDowell, 256 U.S. 465, 475 (1921). But the Fourth Amendment prohibits "state agents from allowing a search warrant to

be used to facilitate a private individual's independent search." Buonocore, 65 F.3d at 350. In a case where an appellant steals a victim's phone and downloads information for his defense, there is no Fourth Amendment violation because that appellant was not a state actor. But in a situation, like this one, where the Government could not look at anything other than location data, the Government would have violated BE's rights if it allowed trial defense counsel to look at more than location data. Essentially, the Government cannot collude with a third-party to violate the scope of an owner's consent. The phone extraction is a locked box, and the victim holds the key – not the Government. It is not the Government's scope of consent to broaden.

Appellant argues that "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)." (App. Br. at 14.) Appellant fails to cite any legal authority for the proposition that illegally seized evidence is routinely provided to trial defense counsel in discovery. But this Court should not force the Government to violate any person's constitutional rights at the behest of an appellant because he wants to go on a fishing expedition in a victim's phone. And a state actor under the Constitution is not allowed to infringe on the rights of another or facilitate an infringement by handing over a copy of the victim's entire phone to her

perpetrator. This Court should decline Appellant's invitation to allow such a blatant disregard for the Constitution.

B. 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.

No prosecutor, law enforcement agency, or government entity had full possession, custody, or control of BE's phone extraction; thus, it was not subject to discovery or disclosure. The Rules for Courts-Martial do not define "possession, custody, or control," and the plain meaning of each word complicates the interpretation of the phrase because the three words are synonymous. Possession means "the act of having or taking into control." Possession, MERRIAM WEBSTER'S DICTIONARY (2025 online ed.). Custody means "immediate charge and control (as over a ward or a suspect) exercised by a person or an authority." Custody, MERRIAM WEBSTER'S DICTIONARY (2025 online ed.). And control means "to exercise restraining or directing influence over." Control, MERRIAM WEBSTER'S DICTIONARY (2025 online ed.). Using the canons of statutory construction to interpret the Rules for Courts-Martial, the canon against surplusage requires all portions of a statute to be given meaning. Yates v. United States, 135 S. Ct. 1074, 1085 (2015). Military case law does not explain each word's meaning; so, we look to analogous interpretations to decipher what these words mean.

Federal Rule of Criminal Procedure 16 is the equivalent federal discovery rule to R.C.M. 701. Both Fed. R. Crim. P. 16 and R.C.M. 701 use the phrase "within the [] possession, custody, or control" of the government or military authorities. Although the discovery obligations in the military are broader than the federal civilian sector, Stellato, 74 M.J. at 481, the interpretations of federal circuits are beneficial for understanding what the words "possession, custody, and control" mean. This Court may use federal rules for guidance because Article 36, UCMJ, encourages the President, as much as practicable, to align the military's procedural trial rules with those of the federal district courts. 10 U.S.C. § 836(a).

Generally, courts have been unclear on the difference between possession, custody, and control often using their meanings interchangeably. But the District of Columbia Court of Appeals delineated between the terms possession, custody, and control while grappling with the overlapping nature of the terms. The court explained that possession means "actual possession — direct physical control over a thing" and the Government has an implied property interest in the item. Weems v. United States, 191 A.3d 296, 301 (D.C. Ct. App. 2018) (internal quotations omitted). Then the court explained 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. Id. at 301-302. And "control . . . means the government has the 'legal right' and ability

to obtain the item from the other entity 'upon demand.'" Id. at 302. In other words, the Government has "direct or indirect power to acquire or access the materials at will and by right." Id. 302.

In addition, federal courts have distinguished the words possession, custody, and control based on the government actor or entity that had access to the discoverable materials. The Ninth Circuit interpreted "possession of the government" to mean that the prosecutor "has knowledge of and access to the documents sought by the defendant." United States v. Santiago, 46 F.3d 885, 893 (9th Cir. 1995) (citing United States v. Bryan, 868 F.2d 1032, 1036 (9th Cir. 1989)). The Ninth and Fifth Circuits interpreted "custody of the government" to include situations where federal law enforcement, but not the prosecutor, held the discoverable information. *See* United States v. Bailleaux, 685 F.2d 1105, 1113 (9th Cir. 1982) ("[I]t does not matter that the U.S. Attorney did not 'receive' the tape until the night before appellant's testimony; it is enough for purposes of the custody requirement of Rule 16 that it was in the possession of the FBI."); United States v. Scruggs, 583 F.2d 238, 242 (5th Cir. 1978) (Government's discovery obligation existed even if the documents were in the possession of the FBI prior to trial). The Southern District of Ohio interpreted "control of the government" to mean that a government entity had access to the discoverable information. United States v. Skaggs, 327 F.R.D. 165, 174 (S.D. Ohio 2018). In Skaggs, the federal

prosecutors stated they did not have actual possession of the victim's military medical records, but the district court decided that the records were "sufficiently within the government's 'control' to warrant disclosure." Id. In other words, another federal entity had the documents; thus, they were in the Government's control.

However, in this case, the issue of Government access to the requested information is more important than which government actor or entity physically controlled it. The Government acknowledges that OSI had physical custody of BE's full phone extraction. But BE did not give law enforcement custody of the full extraction for inspection, preservation, or security. She only allowed law enforcement to have the full extraction because doing so would allow law enforcement to capture the location data which she consented to them inspecting. In other words, law enforcement had the entire extraction as an unavoidable byproduct of BE's consent to search the location data. It was not a conscious choice of BE to have law enforcement inspect, preserve, or secure the extraction. Nor was it a conscious desire of law enforcement to inspect, preserve, or secure the entire extraction for BE. Thus, law enforcement's physical possession of the phone did not amount to legal custody. And in any event, the Government also lacked legal access because BE maintained a privacy right in the other parts of her

phone extraction and explicitly limited her consent to search the cell phone extraction. *See* Collins, 409 F. Supp. 3d at 244.

The Ninth Circuit's analysis of "possession" in Bryan turned on "the extent to which the prosecutor has knowledge of ***and access to*** the documents sought by the defendant in each case." *See* 868 F.2d at 1035-36 (emphasis added). This "knowledge of and access to" standard has also been referenced by military courts. *See* Stellato, 74 M.J. at 485; *see also* United States v. Lyson, ACM 38067, 2013 CCA LEXIS 239 (A.F. Ct. Crim. App. 13 March 2013) (unpub. op.). In United States v. Case, law enforcement had physical custody of another defendant's phone, and Case requested access to the contents of the password protected cell phone – the Government did not have the password. 2020 U.S. Dist. LEXIS 131397, *8 (Idaho D.C. 2020) (unpub. op.) (emphasis added). The Idaho District Court decided that the Government had no obligation to disclose "the FBI's possession of the cellphone or produce its contents to the defense. Because the phone was password-protected, the Government ***did not have access*** to the records the Defendant seeks." Id. (emphasis added). In Case, the password on the third party's phone acted as a barrier to access by the Government – the FBI had no way to access the information, so it was not subject to disclosure. Here BE's lack of consent also acted as that legal barrier to the Government's access, and although the Government physically held a copy of her phone – much like the FBI

possessed the phone in Case – the Government could not access the records that Appellant sought. In Skaggs, the Southern District of Ohio analyzed the term "control," and the court determined that control within Fed. R. Crim. P. 16 context required that "the prosecutor has knowledge of ***and access to*** the material while it is in the possession of another federal agency." Skaggs, 327 F.R.D. at 174 (emphasis added). To be discoverable and subject to disclosure, the federal courts require access in addition to physical possession, custody, or control. Without access, no disclosure obligation exists.

Using the federal courts' interpretations in this case, the trial counsel could not have possession, custody, or control of something that they could not fully access themselves. Eventually, trial counsel learned about the cell phone extraction, but they did not have access to BE's entire extracted cell phone due to her limited consent. The trial counsel was prohibited – via the Fourth Amendment – from accessing all her data except for the location data. The cell phone extraction was not fully in the Government's possession.

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. The nondisclosure was not an attempt at the gamesmanship that Article 46 and the military discovery rules are designed to prevent. United States v. Jackson, 59 M.J. 330, 333 (C.A.A.F. 2004). Instead, the Government's

nondisclosure was an effort to give "force and effect" to the Fourth Amendment by respecting the constitutional rights of "all alike, whether accused of [a] crime or not." Elkins, 364 U.S. at 209 (internal quotations omitted). Appellant's "equal opportunity to obtain . . . other evidence" under Article 46, UCMJ was not compromised because neither the Government nor defense had access to any information stored in BE's cell phone extraction beyond the location data. All parties had equal access to the location data that BE provided to law enforcement.

C. Appellant already had the text messages and photos that he was hoping to find on BE's phone extraction, and he used them at trial.

After deciding whether the evidence was discoverable, this Court "test[s] the effect of that nondisclosure on the appellant's trial." Coleman, 72 M.J. at 187 (citing Roberts, 59 M.J. at 325). "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." United States v. Cano, 61 M.J. 74 (C.A.A.F. 2005). This standard is used for nonconstitutional violations of R.C.M. 701 because the military requires broad discovery under Article 46, UCMJ, so "a heavier burden might rest on the United States to sustain a conviction where a specific request had been made for evidence and the Government had not complied therewith." United States v. Hart, 29 M.J. 407, 409-410 (C.M.A. 1990). Under Article 59(a), UCMJ, a "finding or sentence of a court-martial may not be

held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." 10 U.S.C. § 859(a). If the withheld information "might have affected the outcome of the trial" then the nondisclosure is not harmless beyond a reasonable doubt. Coleman, 72 M.J. at 187.

Even if this Court decides that the full extraction of BE's cell phone was discoverable and should have been disclosed to trial defense counsel, this Court should find that any error was harmless beyond a reasonable doubt and that Appellant's trial was not affected by the nondisclosure for two reasons: (1) Appellant had access to 91 pages of text messages and sexually explicit photos that he used to challenge BE's testimony – text messages and photos that were duplicative of what he wanted to find on her phone; (2) all parties had access to the same information at trial; and (3) the Government's case was strong because BE's testimony for many of the specifications was corroborated by other evidence.

First, Appellant's trial was not affected by the nondisclosure of BE's phone extraction because Appellant already had the evidence he was looking for on her phone. At trial Appellant admitted 91 pages of text messages, (JA 375-465), that included sexually explicit photos of people participating in BDSM and pictures of BDSM sex toys. (JA at 375, 378.) Appellant claimed that he wanted to review BE's phone extraction because he believed there would be evidence that she sent

photos of people in sexual positions to Appellant, and that she purchased BDSM sex toys from Amazon. (JA at 484.) But Appellant did not need BE's cell phone extraction because that evidence was acquired by other means, and Appellant used it at trial. Appellant admitted the 91 pages of text messages containing the information he was looking for, and BE's Amazon purchases were also admitted into evidence. (JA at 375-465, 466.)

Appellant complains that BE challenged the veracity of his evidence on the stand when she noted that some of the text messages were missing or deleted, and yet she still refused to allow him access to her entire phone. (App. Br. at 17.) But 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. He did not need BE's phone to know that. Armed with that knowledge, Appellant could have made a more specific and less speculative proffer of why he needed access to BE's entire phone, but he did not.

Appellant also claims that "the limited electronic data the defense did have at trial proved highly contradictory to BE's allegations." (App. Br. at 8.) Yet, it is unlikely that the ***same*** text messages and photos – generated from her phone rather than Appellant's phone – would change the outcome of the trial. In addition, trial defense counsel speculated that any of the messages pulled from Appellant's phone would still be on BE's phone. In the defense's supplemental filing to Appellant's

motion to compel, trial defense counsel wrote, "The images on her phone got there somehow, either through web searches, text messages, or emails, and they were obtained on certain dates." (JA at 548.) Trial defense counsel did not provide any other information. They were speculating about whether the images that she texted to Appellant were still on her phone, how she found them, or even when she looked for them. They assumed such information was still on her phone, but they did not provide any evidence to support their assumption that such information existed in the extraction.

Importantly, BE never denied that she sent the BDSM related messages. Instead, she explained the context behind sending the messages. (JA at 313.) She was trying to understand what Appellant said he was interested in sexually. (JA at 314.) Then on cross examination, trial defense counsel asked BE about the text messages, and she said "Yes, I felt like there was a lot of deleted messages throughout the whole stack, and I didn't know where from November to May 16th was." (JA at 321.) The fairness of Appellant's trial was not called into question by BE's statements because trial defense counsel had the opportunity to challenge BE's response and point out that BE had not shared her entire phone with law enforcement to remedy these missing messages, even though law enforcement asked her to share more information with them. (JA at 313-321.)

Second, all parties had access to the same information at trial. Appellant claims that "the limited electronic data the defense did have at trial proved highly contradictory to BE's allegations . . . Meanwhile, the government possessed much more electronic data of a similar nature." (App. Br. at 18.) But this was not a situation where the Government looked at BE's cell phone extraction and then refused to allow the defense to view it. Neither trial counsel nor defense counsel had access to BE's entire phone. And the portions that BE allowed the Government to access were provided to the defense as well. The nondisclosure was not an attempt at gamesmanship, the nondisclosure was an attempt to protect the victim's constitutional right against unlawful searches. *See* Jackson, 59 M.J. at 333 (Military discovery rules are designed to eliminate gamesmanship).

Neither side presented evidence from a digital forensic analyst. But Appellant argues for the first time on appeal that:

> "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."

(App. Br. at 18-19.) This potential use of the phone extraction was never presented to the military judge, and the trial defense team never requested a digital forensic expert, and no request was made in conjunction with the motion to compel BE's phone extraction. The military judge did not have the opportunity to address this

argument in his ruling because trial defense counsel never made the argument. Thus, the military judge did not abuse his discretion because the issue was never raised by trial defense counsel.

Third, and finally, the Government's case was strong because BE's testimony was corroborated by other evidence. For instance, BE testified that Appellant had a box of sex toys under the bed. (JA at 82). The OSI agent conducting the search of Appellant's house testified that he found Appellant's cardboard box full of sex toys exactly where BE said they would be. (Supp. JA at 579.) The photos were admitted as Prosecution Exhibit 3. (Supp. JA at 592.) BE testified that Appellant maintained a flight log and annotated with a star when sexual activity occurred in the aircraft. (JA at 59.) The OSI agent conducting the search testified that he found Appellant's flight log and photographed it – the photos were admitted as Prosecution Exhibit 1. (Supp. JA at 582-583, 584.) The panel had pictures of BE's injuries – Prosecution Exhibit 5 – caused by Appellant shoving her onto the bed. (Supp. JA at 598.) Additionally, KW – BE's daughter – testified to witnessing the fight between Appellant and BE, and she testified that Appellant shoved BE's shoulder. (Supp. JA at 578.) Finally, BE explained that she made the decision to end the relationship with Appellant. (JA at 138-139.) And messages sent by Appellant's own witness, Ms. JJ, show that Appellant wanted to reunite with BE, but BE had made the decision to end the relationship,

telling Ms. JJ that she was "done" with Appellant. (Supp. JA at 603.) BE's testimony combined with the corroborating evidence to her testimony resulted in a strong case for the Government that outweighed any prejudice caused by BE's brief comments that messages appeared to be missing from Defense Exhibit A.

Appellant also argues that trial counsel "disparaged defense counsel" in closing argument by mentioning trial defense counsel's cross examination of BE. (App. Br. at 20; JA at 374.) Trial counsel argued, "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). Trial counsel articulated a reason – supported by the evidence – why BE did not want the Government or trial defense counsel to have access to her phone. The argument was supported by evidence that defense drew out on cross examination. BE stated that she did not want to provide a full copy of her cell phone because her friends texted her in confidence, and she did not want to expose those conversations. (JA at 321.) In other words, she explained her privacy interest in her phone.[3] Even if the military judge had ordered production of the full phone extraction to trial defense counsel, the defense could have still argued that BE was

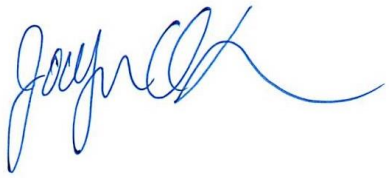
[3] In addition, AFCCA already determined that the argument was not disparaging and did not require a remedy on appeal. And this Court did not grant review of the issue of improper argument. (JA at 12-18,)

reluctant to turn over her entire cell phone, and trial counsel could have still rebutted that assertion in closing argument. Thus, the outcome of the trial would have been no different.

This Court should find that any error caused by nondisclosure of BE's entire phone extraction – if error even occurred – was harmless beyond a reasonable doubt. The Government's case was strong – consisting of BE's testimony and corroborating evidence for many of her statements. And the outcome of Appellant's trial was not affected by the nondisclosure because Appellant had access to 91 pages of text messages and sexually explicit photos that he used to challenge BE's testimony – text messages and photos that were duplicative of what he wanted to find on her phone; and all parties had access to the same information at trial. Access to BE's entire cell phone extraction would not have opened the doors for trial defense counsel to make new arguments that they had not already made. On cross examination, trial defense counsel demonstrated BE's reluctance to provide her cell phone data, and they used the text messages and sexually explicit photos to challenge her stated disinterest in BDSM behavior. Despite these challenges, the panel members determined her detailed testimony about Appellant's violent conduct was sufficiently credible to convict Appellant on 11 of 15 specifications. The outcome of the trial would not have been affected; thus, no relief is warranted.

CONCLUSION

For these reasons, the United States respectfully requests that this Honorable Court deny Appellant's claims and affirm the findings and sentence in this case.



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CERTIFICATE OF FILING AND SERVICE

On 27 March 2025, I certify that a copy of the foregoing was transmitted by electronic means to the Court and transmitted by electronic means with the consent of the counsel being served via email to:

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

This brief complies with the type-volume limitation of Rule 24(c) because: This brief contains 8,789 words. This brief complies with the typeface and type style requirements of Rule 37.

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Dated: 27 March 2025