**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ARMED FORCES**

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| UNITED STATES<br>Appellee<br><br>v.<br><br>Private First Class (E-3)<br>**ERICK VARGAS**<br>United States Army<br>Appellant | APPELLANT'S REPLY TO<br>APPELLEE'S RESPONSE<br><br><br><br>Crim. App. Dkt. No. ARMY MISC 20220168<br><br>USCA Dkt. No. 22-0259/AR |

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

## Issue Presented

**WHETHER THE ARMY COURT ERRED IN ITS ABUSE OF DISCRETION ANALYSIS BY REQUIRING THE MILITARY JUDGE TO CRAFT THE LEAST DRASTIC REMEDY TO CURE THE DISCOVERY VIOLATION.**

### A. *Stellato's* dicta is not a sufficient vehicle to deal with all Government discovery violations.

In *United States v. Stellato*, this Court dealt with a trial counsel whose "hard stand" on discovery led to so many continuances that a key defense witness died. 74 M.J. 473, 478–80 (C.A.A.F. 2015). The significant prejudice that Stellato experienced, because of the government's discovery violations, eliminated any need for this Court to look beyond prejudice. But the actual holding in *Stellato* was narrow. *Id.* at 476 ("We . . . now hold that the military judge did not abuse his discretion."). While this Court noted the military judge was correct in attempting

to draft the least drastic remedy and that prejudice is an important factor to be considered, it also noted that "bad faith certainly may be an important and central factor for a military judge to consider." *Id.* at 488–89. Just because the need to look beyond prejudice did not exist in *Stellato* does not mean it can never exist; indeed, it exists here. The Government's string cite of cases purporting to demonstrate settled precedent do not deal with discovery violations *at trial*, or are from lower courts of criminal appeals that rely on *Stellato*. (Appellee's Br. at 13); *United States v. Gore*, 60 M.J. 178 (C.A.A.F 2004) (unlawful command influence); *United States v. Cooper*, 35 M.J. 417 (C.M.A. 1992) (entrapment); *United States v. Pinson*, 56 M.J. 489 (C.A.A.F. 2002) (lawyer-client privilege violation); *United States v. Morrison*, 449 U.S. 361 (1981) (Sixth Amendment violation).

In Appellant's case, officer-lawyers committed the discovery violations. They can, and must, be held to a higher standard. *Stellato* was decided based on the facts before it, but the facts in this case, and other cases, require military judges to have more flexibility to deal with discovery violations.

**B. The Government's interpretation of Rule for Courts-Martial [R.C.M.] 701 and federal circuit opinions is inconsistent.**

The Government embraces, without caveat, the notion that only the least drastic remedy may be imposed—no matter the severity of the Government's misconduct. (Appellee's Br. 12, 15–16). In its reading of R.C.M. 701, any remedy in excess of the least drastic would be unjust. (Appellee's Br. at 16). The

Government cites some of the same federal cases Appellant cited to support its claim, but encourages this Court to ignore other federal circuit court cases that reject this premise. (Appellee's Br. 17–18). The Government cannot have it both ways. Under the government's basic argument, if a remedy must be the least drastic, that applies to all remedies. But that is simply not the law in some of the federal circuits. *See United States v. Johnson*, 970 F.2d 907 (D.C. Cir. 1992) (excluding a defense witness); *United States v. Wicker*, 848 F.2d 1059 (10th Cir. 1988) (excluding a lab report). The proper standard is one that ensures justice. The Government pays lip service to a military judge's discretion. However, if all remedies are truly required to always be the lease drastic then any discretion evaporates.

**C. The Government, like the Army Court, misconstrues what happened at trial.**

The Government makes the same error the Army Court did by stating that the military judge found the discovery violation was *not willful misconduct*. (Appellee's Br. 14–15). That is not what she found. She stated, "I do not find willful misconduct in this case." (R. at 624). The military judge not finding willful misconduct does not mean she vindicated the trial counsel—just like all individuals who are not found guilty are not necessarily innocent. The military judge's actions speak louder than her words. By excusing the trial counsel from the case, the military judged demonstrated distrust. If these were just innocent

mistakes, as the Government states, (Appellee's Br. 15), there would have been no need or basis for excusal.

The Government believes it to be speculative that that it will be more prepared for trial a second time around. (Appellee's Br. 14). The Government also believes Appellant will be more prepared because he is now in possession of a prior inconsistent statement by the alleged victim. (Appellee's Br. 14). This does not make sense. At the time of the dismissal, both the Government and Appellant had conducted voir dire and presented opening statements. However, only the Government presented evidence. The stress of testifying at a court-martial is immense, especially for a purported victim facing her alleged assaulter, and in this case the alleged victim got a full dress rehearsal. Appellant gained nothing. The Government cannot use the position Appellant was in during the discovery violation as the default, and then state that, since it has finally honored its discovery obligations, Appellant is now better off. Appellant should have been in that position in the first place. The Government is the true beneficiary of its failure.

Even more concerning is the Government's unwillingness to acknowledge that egregious conduct alone can serve as the basis for dismissal with prejudice. Appellant acknowledges that a dismissal is a significant remedy, but the military judge was there. She was best positioned to determine if that remedy was

appropriate. Limiting military judges hinders their ability to properly encourage trial counsel to do what is right. By permitting military judges to rely on their judgment and experience to impose remedies that are just, this Court can give military judges the ability to hold the government accountable and ensure the system works justly.

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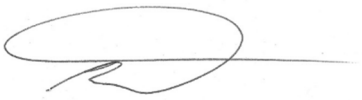

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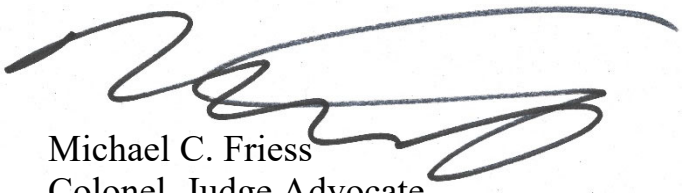

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**Certificate of Filing and Service**

I certify that a copy of the foregoing in the case of United States v. Vargas, Crim. App. Dkt. No. ARMY MISC 20220168, USCA Dkt. No. 22-0259/AR was electronically filed with the Court and the Government Appellate Division on August 25, 2022.

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