IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellee v. Private First Class (E-3) **ERICK VARGAS** United States Army Appellant	SUPPLEMENT TO PETITION FOR GRANT OF REVIEW Crim. App. Dkt. No. ARMY MISC 20220168 USCA Dkt. No. _____/AR

Sean Patrick Flynn
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 693-0674
USCAAF Bar No. 37529

Bryan A. Osterhage
Major, Judge Advocate
Branch Chief
Defense Appellate Division
USCAAF Bar Number 36871

Jonathan F. Potter
Senior Capital Appellate Counsel
Defense Appellate Division
USCAAF Bar Number 26450

Dale McFeatters
Lieutenant Colonel, Judge Advocate
Deputy Chief
Defense Appellate Division
USCAAF Bar Number 37645

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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.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 62, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 862 (2018). This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ.

Statement of the Case

On 6 April 2021, the Government charged Appellant, Private First Class Erick Vargas, with two specifications of sexual assault and four specifications of abusive sexual contact, in violation of Article 120, Uniform Code of Military

Justice [UCMJ], 10 U.S.C. § 920. (Charge Sheet). On 7 March 2022, the Government dismissed one specification of sexual assault and one specification of abusive sexual contact with prejudice. (Charge Sheet; R. at 147). On 9 March 2022, the military judge granted the defense motion to dismiss the charge and its remaining specifications with prejudice. (R. at 626). The Government appealed this ruling in accordance with Article 62, UCMJ. (App. Ex. XXXVII). On 16 June 2022, the Army Court issued its opinion and held that the military judge abused her discretion and vacated her order. (Appendix A, at 7).

Reasons to Grant Review

In *United States v. Stellato*, this Court said that courts "must look to see whether other alternative remedies are available" to remedy discovery violations, finding that dismissal is appropriate only where "no lesser sanction will remedy the prejudice." 74 M.J. 473, 488 (C.A.A.F. 2015) (citing *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004)). *Stellato* also stated that the military judge in that case "correctly not[ed] that he was required to 'craft the least drastic remedy' to obtain the desired result." *Id*. at 489. Relying on its reading of *Stellato*, the Army Court granted the Government's appeal in this case because the military judge "failed to impose the least drastic remedy that would have cured the error." (Appendix A, at 5).

This case presents this Court with the opportunity to determine whether the law *requires* military judges to impose the "least drastic remedy." There are two reasons this court should do so. First, requiring the least drastic remedy does not comport with the text of Rule for Courts-Martial [R.C.M.] 701(g)(3), which permits military judges to take "one *or more*" of its listed actions to cure prejudice from discovery violations, and to take an action not otherwise listed, so long as it is just under the circumstances. (emphasis added). The Army Court's reading of *Stellato* thus unnecessarily limits what is "just" to only those actions that are "the least drastic."

Second, federal circuits vary in how they approach violations of Rule 16 Federal Rules of Criminal Procedure 16, the federal analogue to R.C.M. 701(g)(3) and the rule upon which R.C.M. 701(g)(3) is based. *See Manual for Courts-Martial*, *United States*, Analysis of Rules for Courts-Martial app. 21 at A21-33 (2016 ed.). Specifically, some federal courts view the least drastic remedy as but one factor to consider in determining whether an order is "just." *See United States v. Wicker*, 848 F.2d 1059, 1061 (10th Cir. 1988); *see also United States v. Davis,* 244 F.3d 666, 670–71 (8th Cir. 2001). Some circuits have been more explicit, holding that the judge has no obligation to select the least drastic remedy. *See e.g. United States v. Johnson*, 970 F.2d 907, 910 (D.C. Cir. 1992) ("[W]e reject any suggestion that the use of exclusion as a sanction requires some sort of 'least

restrictive alternative' analysis."). And while cases involving dismissal with prejudice as a remedy tend to undergo a stricter analysis than those using exclusion, there is still an apparent desire to deter improper government behavior. *See generally United States v. Chapman*, 524 F.3d 1073 (9th Cir. 2008) *and Virgin Islands v. Fahie*, 419 F.3d 249 (3rd Cir. 2005).

Given this, this Court should grant this petition to determine the validity of the requirement to impose the least drastic remedy to cure a narrow prejudice that was the central tenet of the Army Court's holding in this case. (Appendix A).

Statement of Facts

On 28 July 2021, the Government informed the defense it intended to use uncharged acts to prove Appellant's intent to have sex with HS. (App. Ex. VIII, p. 2; App. Ex. XI, p. 4). According to the Government, while on a porch prior to the alleged sexual assault on 8 November 2020, Appellant moved closer to the purported victim, HS, and told her it had been "forever" since he'd had sex. (App. Ex. XI, p. 4).

On Friday, 4 March 2022, four days before panel selection, while trial counsel was preparing HS to testify, HS told trial counsel that—on the porch prior to the alleged sexual assault—Appellant kissed her on the head three to four times and called her a beauty queen. (R. at 622). A Government paralegal took notes of the witness preparation, which included this new statement by the alleged victim.

(R. at 617–18, 621; App. Ex. XXXVII). The Government did not disclose this new information to the defense on Friday or over the ensuing weekend. (R. at 623).

On Monday, 7 March 2022, the court held an Article 39(a) session regarding an "unruled upon 404(b) matter" and a Military Rule of Evidence 412 hearing. (R. at 153). This hearing addressed the same time frame as the events on the porch. (R. at 623). At or even following this hearing, the Government still failed to disclose the new information regarding Appellant's alleged conduct or statement to HS. (R. at 622).

On Tuesday, 8 March 2022, the panel was selected to hear Appellant's case. (R. at 258). Still, the Government did not disclose to the defense Appellant's alleged statement or conduct. (R. at 622). The next day, Wednesday, 9 March 2022, HS told the Government she had been counseled for being late, and the Government disclosed that information to the defense, (R. at 604), but again failed to disclose the alleged statements from the Friday, 4 March 2022 interview of HS.

The parties presented opening statements later that Wednesday. (R. at 526). The Government's first witness was HS. (R. at 542). The Government questioned HS for over twenty pages of transcript, and the defense then asked for a recess. (R. at 565–66). At no point during the recess, even though HS had already taken the stand and testified, did the Government disclose the new information to the defense. (R. at 566–67, 622). At around 1050, after further Government

examination of HS, the court recessed again. (R. at 588–89). The Government did not disclose the relevant information during this recess either. (R. at 622).

Following the recess, the Government continued its examination of HS. After some questions about her background, the Government asked about her relationship with Appellant (R. at 549–553), and about what happened on the porch of Appellant's brother's house preceding the alleged sexual assault. (R. at 585–96). According to HS, she and Appellant discussed their significant others, each expressing frustrations about the state of their respective relationships. (R. at 590–93). Both were sitting on a bench on the porch, and both had been drinking alcohol. (R. at 588).

Appellant then allegedly told HS that she "deserve[d] the best" and moved closer to her so that their knees were touching. (R. at 594). Trial counsel asked HS, "What did you decide at that point?" She responded, "Well, after he had already been that close and he started grabbing my head and kissing my forehand [sic], telling me I was a beauty queen, and not to let ---" (R. at 596). Defense counsel objected, and asked for an Article 39(a) session. (R. at 596).

After the members were excused, the defense informed the court that "what she's about to testify to" had not been disclosed to the defense. (R. at 597). The Government claimed its "intent wasn't to elicit that particular statement" when questioning HS and asked the military judge to "strike" her answer. (R. at 598).

Defense counsel noted that, no matter whether it wanted to elicit the testimony, the Government knew about it and had failed to disclose it. (R. at 599). Defense counsel emphasized that the Government's response indicated it never intended to disclose the information to the defense. (R. at 599). "They knew, apparently, that there was kissing between the parties before the alleged sexual contact and they didn't tell us about it, and they weren't going to elicit it from - - from their witness." (R. at 599).

The trial counsel admitted to knowing about the kiss on the forehead and the "beauty queen" statement, but claimed he only knew about it "a day or two" before trial, and it was not written down. (R. at 601). Trial counsel also admitted he never disclosed the new statements to the defense. (R. at 601). The military judge pressed the Government on when, exactly, it knew about this information, to which the trial counsel replied, "Two days ago, Your Honor." (R. at 601).

Following a recess, the military judge again pressed the Government about when it had first learned of the statement, to which the other trial counsel again replied "Two days ago, Your Honor." (R. at 602). The Government claimed HS made this disclosure at a meeting on 7 March 2022 at around 1700–1800, in other words, after the hearing on Monday. (R. at 602). The Government justified not disclosing the statement because it "was made in passing," and it had not asked HS any follow-up questions about it. (R. at 603). But the Government admitted it

immediately disclosed information it received that morning about HS being counseled for being late. (R. at 604).

The military judge found "it was a fact" that HS told trial counsel on 7 March 2022 that Appellant called her a "beauty queen" and those statements were not disclosed to the defense. (R. at 605). The Government was asked to again confirm that the meeting with HS occurred after the hearing on Monday, 7 March 2022. (R. at 605). Trial counsel responded, "That is correct, Your Honor." (R. at 605).

In the motion for dismissal with prejudice, defense counsel noted that the Government was quick to disclose the counseling HS received, but had failed to disclose the kiss or the "beauty queen" statement. (R. at 609). Trial defense counsel believed the Government made a strategic decision not to disclose the information. (R. at 610). "[T]he obvious inference is that they did it because they thought . . . disclosing it would be harmful to them in some way or that surprising us at trial would help them in some way." (R. at 610).

After ordering a hearing regarding the appropriate remedy for the discovery violation, the military judge excused trial counsel from further participation in the court-martial and noted the Staff Judge Advocate could assign new counsel to the case. (R. at 615).

At the hearing addressing the appropriate remedy for the discovery violation, the new trial counsel informed the military judge that the information the former trial counsel presented to the court was false. (R. at 617–18). The new trial counsel admitted the interview with HS took place on 4 March 2022, not on 7 March, and that, contrary to the former trial counsel's representation to the court, a paralegal had indeed taken notes. (R. at 617–18).

After concluding the hearing, the military judge made the following, among other, findings of fact and conclusions of law: (1) the Government was aware of the statements at issue on 4 March 2022; (2) the trial counsel did not disclose the statements before or during the evidentiary hearing held on 7 March 2022, even though the hearing regarded the same timeframe as the statements; and (3) that, when questioned about when he learned of the new statements, former trial counsel claimed they only found out about the statements *after* the two hearings on 7 March 2022. (R. at 622–27). The military judge also noted that, although trial counsel failed to disclose the 4 March 2022 statements, trial counsel immediately informed the defense about HS's negative counseling, indicating that trial counsel knew they had a continuing duty to disclose. (R. at 623). The military judge observed she had to fashion a remedy for the Government's discovery violation to the facts of the individual case. (R. at 624). She also noted she did not have to

find willful misconduct to dismiss a case with prejudice, and she stopped short of finding willful misconduct in Appellant's case. (R. at 624).

The military judge found that the Government's discovery violation "hampered" the defense's ability to prepare its case and impacted the defense strategy in a number of ways. (R. at 625). She believed she was required to "craft the least drastic remedy" to cure the discovery violation. (R. at 625). But, after exploring other options, the military judge determined that other options did not adequately cure the violation. (R. at 625–26).

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.

Standard of Review

"In an Article 62, UCMJ, appeal, this Court reviews the military judge's decision directly and reviews the evidence in the light most favorable to the party which prevailed at trial," which in this case is Appellant. *United States v. Pugh*, 77 M.J. 1, 3 (C.A.A.F. 2017) (internal quotation marks omitted) (citation omitted). A military judge's discovery ruling and remedy is reviewed for an abuse of discretion. *Stellato*, 74 M.J. at 480.

Law and Argument

A military judge should not be required to take the least drastic remedy to cure discovery violations. The text of the rule does not require it; federal courts vary in how they handle discovery violations; and it limits a military judge's ability to achieve results broader than curing a specific discovery violation. In this case, even if lesser remedies could have cured any narrow prejudice to Appellant, the military judge did not abuse her discretion in finding dismissal with prejudice was the appropriate remedy.

A. Military judges should not be required to take the least drastic remedy when curing discovery violations.

1. The text of R.C.M. 703 does not require military judges to take the least drastic remedy.

If military judges learn of a discovery violation, they may take one or more of the below actions:

> (A) order the party to permit discovery; (B) grant a continuance; (C) prohibit the party from introducing evidence, calling a witness, or raising a defense not disclosed; and (D) enter such other order as is just under the circumstances. This rule shall not limit the right of the accused to testify in the accused's behalf.

R.C.M. 701(g)(3).

The plain language of the rule does not require military judges to take the least drastic remedy. This court applies the plain text of the law. "If uncertainty does not exist, . . . [t]he regulation then just means what it means—and the court

must give it effect, as the court would any law." *United States v. Bergdahl*, 80 M.J. 230, 235 (C.A.A.F. 2020) (citing *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (alterations in original)). A military judge's remedy is required to be just; it is not required to be the least drastic remedy possible. Additionally, the rule is not without limitations. A military judge, regardless of the defense discovery violation, may not prohibit an accused from testifying. This consideration of a limitation indicates the drafters did consider how military judges' remedies should be limited.

Furthermore, military judges are encouraged, when considering the exclusion of evidence or a witness, to consider various other factors. R.C.M. 701(g)(3) discussion. The discussion also counsels that "the sanction of excluding the testimony of a defense witness should be used only upon finding that the defense counsel's failure to comply" was ill-motivated. R.C.M. 701(g)(3) discussion. Finally, the discussion encourages military judges to only exclude testimony from defense witnesses if alternative sanctions are not available. 701(g)(3) discussion. The idea of a least drastic remedy is only discussed in regards to the exclusion of defense witness testimony. The government's burden is different, and thus military judge's should be able to handle government discovery violations differently.

2. Federal courts vary in how they handle discovery violations.

In *United States v. Johnson*, the defense did not provide notice of alibi witnesses until the eve of a second trial (conducted due to a hung jury at the initial trial). 970 F.2d 907, 910 (D.C. Cir. 1992). Rejecting the defense request for a continuance to remedy the tardiness, the trial judge instead excluded the witnesses. *Id.* The trial judge found that Johnson's attorney had actually acted in good faith, but left open the possibility that Johnson himself had not.[1] The D.C. Circuit "reject[ed] any suggestion that the use of exclusion as a sanction requires some sort of 'least restrictive alternative' analysis." *Id.* at 911. Still, given the apparent conflict between the trial judge's finding of good faith by Johnson's attorney and his decision to exclude, the case was remanded for additional findings. *Id.* at 917. *See also United States v. Gray-Burriss*, 791 F.3d 50, 55–56 (D.C. Cir. 2015) (noting that while exclusion should be rare without bad faith or with least drastic alternatives, "[t]his does not mean that exclusion is always unwarranted in the absence of bad faith or the presence of less drastic alternatives.").

In *United States v. Wicker*, the government failed to produce a lab report until over two weeks after a court ordered deadline. 848 F.2d at 1060. The district court granted a request to exclude the evidence due to the discovery violation. The

[1] This was later confirmed by the trial judge in an affidavit ordered by the D.C. Circuit. *United States v. Johnson*, 815 F. Supp. 492, 494 (D.C. Dist. 1993).

government appealed, and the 10th Circuit laid out the following three factors a court should consider in determining an appropriate sanction:

> (1) the reasons the government delayed producing the requested materials, including whether or not the government acted in bad faith when it failed to comply with the discovery order; (2) the extent of prejudice to the defendant as a result of the government's delay; and (3) the feasibility of curing the prejudice with a continuance.

Id. at 1061. In affirming the district court's judgment, the *Wicker* court even noted that "the district court may need to suppress evidence that did not comply with discovery orders to maintain the integrity and schedule of the court even though the defendant may not be prejudiced." *Id.*

Turning to cases involving dismissal with prejudice, in *United States v. Chapman*, the government failed to turn over substantial discoverable evidence which only became clear in the middle of the lengthy trial. 524 F.3d 1073, 1078–79 (9th Cir. 2008). The district court judge found that the original prosecutor acted "flagrantly, willfully, and in bad faith," but also stated he "refuse[d] to believe . . . the government would intentionally withhold documents." *Id.* at 1080 n.2. The district court judge also confusingly found that the government did not act intentionally but clarified that he did not find it acted unintentionally. *Id.* The district court declared a mistrial and later, following a hearing, dismissed the indictment with prejudice. *Id.* at 1080.

On review, the 9th Circuit, after determining that the district court dismissed the case with prejudice using its supervisory powers—as opposed to on due process grounds—reasoned that the misconduct was sufficiently flagrant to qualify for dismissal with prejudice. *Id.* at 1084–85. It suggested that "flagrancy" may be met by a reckless disregard for a prosecutor's constitutional obligations, even if the documents were not intentionally withheld (but indicated that gross negligence may not be sufficient). *Id.* at 1085. The court noted that an indictment may only be dismissed under a district court's supervisory powers if there is substantial prejudice and no lesser remedy is available. *Id.* 1087. However, the only prejudice the court noted was the government's ability to try its case again and make it stronger the second time, and the mistrial alone could actually benefit the government. *Id.*

Finally, the court highlighted the importance of the government's acknowledgment of a mistake and willingness to "own up to it" in the determination of a proper remedy. *Id. See also Virgin Islands v. Fahie*, 419 F.3d 249, 254–55 (3rd Cir. 2005) ("[W]e conclude that dismissal for a *Brady* violation may be appropriate in cases of deliberate misconduct because those cases call for penalties which are not only corrective but are also highly deterrent. . . . While retrial is normally the most severe sanction available for a *Brady* violation, where a defendant can show both willful misconduct by the government, and prejudice,

dismissal may be proper.") *and United States v. Wellborn*, 849 F.2d 980, 985 (5th Cir. 1988) ("The supervisory authority of the district court includes the power to impose the extreme sanction of dismissal with prejudice only in extraordinary situations and only where the government's misconduct has prejudiced the defendant.").

In other federal courts, the prejudice suffered need not be severe to justify severe remedial measures—and in cases with a remedy short of dismissal with prejudice, there need not be prejudice at all. In *Chapman*, the only prejudice the 9th Circuit focused on was the government's ability to make its case stronger on a retrial. This is at odds with the Army Courts understanding of a requirement that a remedy must be the least drastic to cure a specific error. (Appendix A). According to the Army Court, *Stellato* mandates that the only thing to be considered is how to eliminate prejudice with the least drastic remedy possible. (Appendix A, at 5 ("the military judge failed to impose the least drastic remedy that would have cured the error . . . ."). But the Army Court failed to consider how a lesser remedy could actually harm Appellant, by allowing the Government to be more prepared for a second trial. Military justice, with courts-martial convened by commanders and prosecuted by officers, should lean towards holding the government more accountable for its failures, not less.

3. Allowing military judges to craft remedies untethered to only the least drastic remedy to cure narrow prejudice provides flexibility to achieve results broader than curing any specific discovery violation.

A requirement to use only the least drastic remedy essentially eliminates the possibility of dismissal with prejudice—even with bad faith—unless there is a severe loss to an accused's right to present a defense. But there are cases where the government's conduct is so egregious that harsh remedies are appropriate even in the absence of any prejudice. Some federal courts recognize this general idea, and although expressing preference for less drastic remedies, do not require them in all cases. *See generally Wicker*, 848 F.2d at 1061. This Court should do the same. There can, and perhaps should, be a preference to use less drastic remedial measures. However, always requiring the least drastic remedy binds the hands of military judges.

For a multitude of reasons, a military judge may desire to accomplish more than curing prejudice to any one particular accused. Perhaps a jurisdiction is having discovery issues across multiple cases, or perhaps there is a trial counsel that continues to take a "hard stand on discovery." *Stellato*, 74 M.J. at 478. In those, and other, cases the desired result may be one of showing the importance of processing a case correctly. A reading of *Stellato* supports the idea that a remedy can be broader based than just curing harm to an individual accused. *Id.* at 490 (discussing the goal of obtaining a desired result); *contra id.* at 488 (discussing the

resolution of a specific error). Additionally, a military judge may be unwilling to stigmatize an inexperienced young trial counsel as someone who committed willful misconduct, but still wants him or her to learn a lesson. Dismissing a case with prejudice accomplishes that result. There are circumstances where bad faith is not found and prejudice may be curable that still warrant dismissal with prejudice. This case is but one example, and military judges should have that freedom.

B. When prejudice is only viewed as a factor, or even viewed broadly, dismissal with prejudice is the appropriate result in Appellant's case.

As in *Stellato*, the Government's conduct here constituted at least gross negligence, and likely more, given the numerous false statements to the military judge. 74 M.J. at 489 n.18. After obtaining information that it had an obligation to disclose, despite numerous opportunities, the Government failed to disclose the evidence to defense. These opportunities included: a full weekend, multiple court sessions, voir dire, panel selection, opening statements, and the partial direct examination of its chief witness. Yet the Government remained silent.

The Government was aware of its obligations to continually disclose evidence. It took pains to tell the defense about tardiness by HS. But as the defense noted at trial, this does not mean the Government would disclose evidence actually relevant to the case. (R. at 609). Here, the relevant evidence only came to light because HS said it, unprompted, during direct examination. If the government's failure to immediately disclose can be overlooked, it does not excuse

the failure to disclose the statement at the evidentiary hearing held on 7 March 2022. The hearing was a significant event in Appellant's court-martial, which focused on the same time frame as the alleged statements. It is hard to imagine that no alarm bells went off that the statements should be disclosed. If those alarm bells did go off, they were ignored.

Even if the Government's total failure to disclose can be pardoned, it does not address its repeated false statements that the Government did not learn of the statements until after the evidentiary hearing on 7 March 2022. Again, the hearing was significant, and should have served as a landmark event for when things occurred in Appellant's case. Yet the trial counsel told the military judge multiple times that the statement was after, when it was made days before, and that the statement had not been written down, when it indeed had been.

One of the trial counsel made a significant admission to the military judge. When asked why the information had not been disclosed, the trial counsel justified not doing so because HS "made [the statement] in passing," and trial counsel did not ask HS any follow-up comments about the statement. (R. at 603). In other words, trial counsel turned a blind eye to this new information, just like the government ignored relevant information in *Stellato*. *See* 74 M.J. 487–88. As in *Stellato*, it is not necessary that the Government apparently had no use for this evidence, or intended to ignore it. They still had an obligation to disclose it.

The military judge had serious concerns with the Government's conduct in this case, evidenced by her questions to, and ultimate dismissal of, the original trial counsel. Trial counsel are not dismissed from cases by military judges for honest mistakes or minor mishaps; more likely, trial counsel are dismissed when the military judge no longer believes the trial counsel can be trusted. Nonetheless, the military judge did stop short of finding willful misconduct. This is not, however, as the Army Court erroneously found, an affirmative finding of "not 'willful misconduct.'" (Appendix A, at 6). The military judge's finding leaves open the possibility of perfidy, while the Army Court's affirmation closes that door. And even if this was not willful misconduct, as in *Stellato*, at a minimum this conduct was gross negligence by the Government, which warranted a strong message. Dismissing the case with prejudice provided that message, as well as provided Appellant appropriate relief for the Government's conduct.

Finally, even if this court determines that prejudice should be a prerequisite to a dismissal with prejudice, the military judge's remedy was proper. Given the unique posture of Appellant's case when the military judge dismissed it with prejudice, a lesser remedy only benefits the Government. As in *Chapman*, a mistrial allows the Government, and the alleged victim, a dress rehearsal for Appellant's court-martial. 524 F.3d at 1087. Additionally, as the military judge dismissed the original trial counsel, any delay, which is ongoing now, only allows

the new trial counsel to become more familiar with the case and develop more of a relationship with the alleged victim. Following dismissal of the original trial counsel, appellant arguably would have been better with nothing more than a limiting instruction as opposed to any other remedy short of dismissal with prejudice. (Appellant acknowledges during the hearing his defense counsel did offer dismissal without prejudice as the next desirable remedy, (R. at 619), but strongly cautioned this would not be sufficient citing the benefits to the government.) (R. at 619–22). The 9th Circuit considered the benefits to the government with remedies short of a dismissal with prejudice, and this Court should require the courts of criminal appeals to do so too.

Conclusion

This Court should disabuse military judges, and the criminal courts of appeals, of the notion that remedies for discovery violations must be the least drastic. Rather, the remedies must be just. The military judge provided a just remedy in this case and it should be affirmed.

Sean Patrick Flynn
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 693-0674
USCAAF Bar Number 37529

Bryan A. Osterhage
Major, Judge Advocate
Branch Chief
Defense Appellate Division
USCAAF Bar Number 36871

Jonathan F. Potter, Esq.
Senior Appellate Counsel
Defense Appellate Division
USCAAF Bar Number 26450

Dale McFeatters
Lieutenant Colonel, Judge Advocate
Deputy Chief
Defense Appellate Division
USCAAF Bar Number 37645

APPENDIX A

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
FLEMING, HAYES, and PARKER
Appellate Military Judges

UNITED STATES, Appellant
v.
Private First Class ERICK VARGAS
United States Army, Appellee

ARMY MISC 20220168

Headquarters, Fort Campbell
Jacqueline Tubbs and Sasha N. Rutizer, Military Judges
Lieutenant Colonel Ryan W. Leary, Staff Judge Advocate

For Appellant: Colonel Christopher B. Burgess, JA; Lieutenant Colonel Craig J. Schapira, JA; Major Dustin L. Morgan, JA; Major Karey B. Marren, JA (on brief and reply brief).

For Appellee: Colonel Michael C. Friess, JA; Lieutenant Colonel Dale C. McFeatters, JA; Major Bryan A. Osterhage, JA; Captain Sean Patrick Flynn, JA (on brief).

16 June 2022

MEMORANDUM OPINION AND ACTION ON APPEAL BY THE UNITED STATES FILED PURSUANT TO ARTICLE 62, UNIFORM CODE OF MILITARY JUSTICE

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

FLEMING, Senior Judge:

The government asserts the military judge abused her discretion when she dismissed this case with prejudice because the government failed to disclose to the defense, until at trial, a prior act and statement by appellee. We find the military judge abused her discretion by dismissing the case with prejudice when lesser sufficient remedial remedies were available to cure any harm to the defense caused by the government's disclosure failure.

BACKGROUND

In April 2021, the government charged appellee with two specifications of sexual assault and four specifications of abusive sexual contact, in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920 (2019) (UCMJ).[1] The convening authority referred the case in June 2021; the arraignment occurred in mid-July 2021; and additional Article 39(a), UCMJ sessions occurred in November 2021 and on March 7, 2022. On March 8, 2022, during the named victim's (Specialist (SPC) HS) direct testimony, the military judge granted the defense motion to dismiss the charge and specifications with prejudice. The government now appeals the military judge's ruling pursuant to Article 62, UCMJ.

FACTS

On Friday, March 4, 2022, prior to the start of appellee's contested court-martial, the government re-interviewed SPC HS. During this interview, SPC HS stated appellee called her a "beauty queen" and kissed her on the forehead "3–4 times" prior to the sexual assault. This was new information, and the government failed to disclose it to the defense.

On Monday, March 7, 2022 an Article 39(a), UCMJ hearing was conducted regarding motions filed pursuant to Military Rules of Evidence 404(b) and 412. Specialist HS testified during the hearing regarding the events surrounding the charged offenses but, again, the new information was never revealed. At the contested trial the following day during SPC HS's direct examination, the government counsel asked questions about the events leading up to the charged offenses. Specialist HS testified that appellee "started grabbing my head and kissing my foreh[ead], telling me I was a beauty queen[.]"

Defense counsel immediately objected asserting it was "the first time we have ever heard this testimony." A debate ensued as to when the government first learned about this new information. Initially, the trial counsel asserted the government learned of the new information from SPC HS after the Article 39(a), UCMJ, session on Monday, March 7, 2022, acknowledging the information was not immediately disclosed. The military judge excused the trial counsel from further participation in the trial and the government detailed new counsel. This new trial counsel acknowledged that the government knew about the new information on Friday, March 4, 2022, conceding the government failed to disclose to the defense the new statement by appellee to SPC HS about being a "beauty queen" and his act of kissing

[1] The government dismissed one specification of sexual assault and one specification of abusive sexual assault with prejudice prior to the start of the contested trial on March 8, 2022.

her on the forehead. The military judge concluded the government's nondisclosure of the new information was not "willful misconduct."

The military judge and the parties then explored a range of options to cure the government's nondisclosure. Ultimately, defense counsel asserted "the only proper remedy is dismissal with prejudice. However, if the Court does not believe that that's appropriate, then we would request a mistrial and dismissal without prejudice." The government proffered the following alternative remedies: (1) allowing the defense to impeach SPC HS "on this issue;" (2) granting a continuance for the defense to have "the time that they need to adequately prepare for their case;" and (3) "craft[ing] a limiting instruction to the panel and also an instruction to the government that they will not argue these acts."

After listening to the parties, the military judge made the following oral ruling:

> I do find that a delayed disclosure hampered the ability to prepare a defense. There are a number of things the defense could have done. They could have prepared a different direct examination or cross-examination of her. They could have crafted a new theory. They could have if they felt that that evidence was overwhelming, sought a pretrial agreement to some or all of the offenses, or pled without the benefit of a pretrial agreement to some or all the offenses if that was a consideration for them. The non-disclosure of that information foreclosed them from considering that strategy. Whether the non-disclosure would have allowed the defense to rebut evidence more effectively. Had they had that information earlier, they could have used that information in their opening statement, in their *voir dire*.
>
> This Court is required to craft the least drastic remedy to obtain a desired result. I have considered the number of remedies. I have already dismissed the original trial counsel. I have considered not allowing any additional direct examination of the victim, but, of course, would result in - - that has no -- that is an absurd result. There is no evidence presented. I have considered allowing a delay. I don't think a delay cures the issue. I've considered bringing the alleged victim back in here to allow the defense to fully cross-examine her on that issue, and then putting her back on in front of the panel members. That does not cure the issue. It doesn't cure what I previously

> stated with respect to a strategic option, with what they could have done with that information ahead of time. I've considered a curative instruction, but you cannot unring that bell, not when you consider the government's opening statement. I've considered precluding the government from being able to argue anything about linking a basis of the kiss on the forehead. But that doesn't cure the issue, which is non-disclosure, failure to allow them to prepare, and foreclosing the ability to create a strategic option. So the fact is, there is not another remedy. Defense, I am granting your motion to dismiss with prejudice. I am aware under R.C.M. 915 ---- Court's in recess for 5 minutes.

After a seven-minute recess the court was recalled and the military judge concluded her ruling stating "I considered a mistrial under ... R.C.M. 915 and do not find that that remedy is sufficient given the gravity of the government's discovery violation. So with that said, Defense, I am granting your motion to dismiss with prejudice. In a moment we'll call in the members and I will dismiss them."

The government then asked the military judge to reconsider her oral ruling and requested "a continuance, breaking for the day, to file a written response." The military judge provided the following two-word response "No. Denied."

The panel was recalled and advised the military judge "granted a motion that terminate[d] these proceedings." The trial was then immediately adjourned. The parties at trial never filed any written briefs and the military judge did not issue a written ruling.

LAW AND DISCUSSION

This Court reviews "a military judge's discovery rulings [] for an abuse of discretion." *United States v. Stellato*, 74 M.J. 473, 480 (C.A.A.F. 2015) (citing *United States v. Jones*, 69 M.J. 294, 298 (C.A.A.F. 2011)). Likewise, we also review "a military judge's remedy for discovery violations" using the abuse of discretion standard. *Id.* (citing *United States v. Trimper*, 28 M.J. 460, 461-62 (C.M.A. 1989)). "The abuse of discretion standard calls for more than a mere difference of opinion," but instead 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." *Id.* (citations and internal quotation marks omitted). Absent clear error, we are bound by the military judge's fact-finding. *See id.* at 482. In *Stellato*, the Court of Appeals for the Armed Forces (CAAF) stated while dismissal with prejudice may be an appropriate remedy for a discovery violation, "dismissal is a drastic remedy and courts must look to see

whether alternative remedies are available." 74 M.J. at 488 (quoting *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004)).

Here, the military judge failed to impose the least drastic remedy that would have cured the error; as such, dismissal with prejudice was outside the range of alternative choices reasonably arising from the relevant facts and applicable law.[2] We need go no further in our analysis than to discuss her decision that a mistrial was not a reasonable remedy. Granting a mistrial is, by no means, a lower level remedial measure but, as it is one step removed from the most draconian act of dismissing a case with prejudice, it must be considered before granting a case dispositive ruling.

"The military judge may, as a matter of discretion, declare a mistrial when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings." Rule for Courts-Martial [R.C.M.] 915(a). "The power to grant a mistrial should be used with great caution, under urgent circumstances, and for plain and obvious reasons," including times "when inadmissible matters so prejudicial that a curative instruction would be inadequate are brought to the attention of the members." R.C.M. 915(a), discussion. Mistrials are an unusual and disfavored remedy that are reserved as a "last resort." *United States v. Diaz*, 59 M.J. 79, 90 (C.A.A.F. 2003). "Because of the extraordinary nature of a mistrial, military judges should explore the option of taking other remedial action." *Ashby*, 68 M.J. at 122 (citation omitted).

We now turn to the military judge's decision to deny granting a mistrial as a "last resort" remedy. The military judge provided a bare bone discussion regarding a mistrial after pronouncing "there is not another remedy," granting the motion to dismiss for prejudice, and then taking a seven-minute recess to craft a one sentence analysis that "the gravity of the government's discovery violation" warranted dismissal with prejudice. First, the military judge's analysis as to the "gravity" of the violation appears to contrast with her earlier finding of fact that the government's discovery violation was not "willful misconduct." The timing and brevity of the military judge's limited analysis creates a strong impression that any mistrial remedy was an after-thought and not a seriously considered and weighed option. Further, although not dispositive to our decision, we note the military judge

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[2] As the basis for the dismissal was a discovery violation, typically we would address both the ruling finding a discovery violation and the subsequent remedy. *See Stellato*, 74 M.J. at 481. However, the government concedes the statement at issue should have been disclosed, stating in their brief, "[u]pon learning of this information, trial counsel should have provided timely notice to the accused." Therefore, we focus primarily on the dismissal with prejudice, and discuss the discovery violation only as it relates to the appropriateness of the military judge's remedy.

was unwilling to allow the government an opportunity to present a written brief and a written ruling was not forthcoming to expand upon her reasoning for granting a dismissal without prejudice, a case dispositive ruling, as opposed to granting a less stringent remedial measure of a mistrial. Additionally, the military judge summarily rejected without comment a government request for reconsideration.

In determining whether a mistrial was a reasonable remedy, we now turn to the military judge's ruling as to the potential harms to the defense because of the government's nondisclosure. The military judge held the defense was harmed because they could have "crafted a new theory" of the case or prepared a different voir dire, opening statement, or direct or cross-examination of SPC HS. The military judge also held the defense could have sought a pretrial agreement with the convening authority or, in the alternative, decided to plead guilty without the benefit of a pretrial agreement. All of these alleged harms, however, could have been sufficiently addressed with a mistrial which would have given the defense an opportunity to craft a new theory of the case, prepare a different voir dire, opening statement, or direct or cross-examination of SPC HS, or to explore pretrial negotiations with the convening authority, or to plead guilty.

We find a decision to grant a mistrial was an even more reasonable remedial measure in this case when: (1) the defense counsel agreed to a mistrial, as an alternative form of relief, if a dismissal without prejudice was not granted; and (2) the military judge made a finding of fact, which we now affirm as it is not clearly erroneous, that the government's discovery violation was not "willful misconduct." Under this backdrop, a decision by the military judge to grant a mistrial would have allowed for a "trial by another court-martial" and an opportunity for the defense to cure every harm articulated by the military judge.[3]

In *Stellato*, the CAAF highlighted that the "military judge concluded [his ruling] by noting that '[t]he almost complete abdication of discovery duties' 'call[ed] into serious question whether the Accused [could] ever receive a fair trial' where evidence was lost, unaccounted for, or left in the hands of an interested party." 74 M.J. at 489 (brackets in original). The CAAF determined the military judge did not err in finding prejudice, in part because the discovery violations prevented the defense from calling a "key witness" and the aforementioned lost and unaccounted for evidence. *Id.* at 490.

This case does not involve lost witnesses, lost evidence, or the "complete abdication of discovery duties" but, instead, consists of a singular failure by the

[3] *See* R.C.M. 915(c)(2). By this order, we do not suggest that a mistrial was the only appropriate lesser remedy; a more in-depth inquiry might have established that a continuance and/or a curative instruction, for example, would have satisfactorily addressed the failure to disclose.

government to notify the defense regarding a two-word statement and one act by appellee discovered by the government a few days prior to the contested trial. Although this opinion should in no way be misconstrued to condone the government's disclosure failure, we find the military judge abused her discretion by dismissing the case with prejudice when she failed to exhaust lesser reasonable remedies.

CONCLUSION

The government's appeal under Article 62, UCMJ is GRANTED. The military judge's March 8, 2022 oral ruling dismissing the case with prejudice is VACATED. The record of trial is returned to the military judge for proceedings not inconsistent with this opinion.

Judge HAYES and Judge PARKER concur.

FOR THE COURT:

James W. Herring, Jr.

JAMES W. HERRING, JR.
Clerk of Court

APPENDIX B

United States v. Johnson

United States District Court for the District of Columbia

March 2, 1993, Decided ; March 2, 1993, Filed

Criminal No. 90-459 SSH

Reporter
815 F. Supp. 492 *; 1993 U.S. Dist. LEXIS 3987 **

UNITED STATES OF AMERICA v. MICHAEL EDWARD JOHNSON

Counsel: **[**1]** For Plaintiff: AUSA Robyn C. Ashton, David S. Eisenberg, U.S. Attorney's Office, 555 - 4th Street, N.W., Washington, DC 20001.

For Defendant: Gregory B. English, 1001 Duke Street, Alexandria, VA 22314.

Judges: Harris

Opinion by: STANLEY S. HARRIS

Opinion

[*493] *MEMORANDUM ORDER*

This matter is before the Court on remand from the United States Court of Appeals for the District of Columbia Circuit. *See* *United States v. Johnson, 297 U.S. App. D.C. 278, 970 F.2d 907 (D.C. Cir. 1992)*. The case was remanded for a finding under *Taylor v. Illinois, 484 U.S. 400, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988)*. *See* *Johnson, 970 F.2d at 916*.

Defendant contended on appeal that this Court erred in excluding the testimony of two alibi witnesses. Defendant conceded that he had not complied with *Fed. R. Crim. P. 12.1(a)*. That rule requires a defendant to notify the Government of an alibi defense and to identify any alibi witnesses within ten days of receiving notice of the alleged time, date, and place of the offense. Under *Rule 12.1*, the trial court has discretion to exclude alibi testimony for failure to comply with its terms. *Id.; see* *Johnson, 970 F.2d at 910*.

Defendant **[**2]** did not give the Government notice of the two alibi witnesses until after the first trial in this matter had ended in a hung jury. Defendant's counsel notified the Court and the Government of his intention to call defendant's brother and a friend as witnesses

two weeks before the scheduled retrial on March 6. [1] **[**3]** *(See* Letter dated Feb. 19, 1991.) According to counsel, defendant first informed him of the witnesses' potentially exculpatory testimony on February 19. (Tr. Mar. 6, 1991, p. 8.) On the first day of trial, the Government objected to the proposed testimony for failure to comply with *Rule 12.1(a)*. In the colloquy between the Court and counsel, the Court specifically cited *Taylor v. Illinois.* (Tr. pp. 6-7.) The Court excluded the testimony of the two alibi witnesses but noted as a matter of courtesy to defense counsel its belief that he had acted in good faith. (Tr. at 7, 14). Neither counsel sought any further elucidation from the Court. [2]

The Court of Appeals noted that "the record appears to justify exclusion under *Taylor."* It further stated: "We could normally affirm on this record, but as the judge's only factual finding (good faith of counsel) is slightly counter to the decision to exclude, we remand for the district court to exercise its discretion under *Taylor* expressly." *Johnson, 970 F.2d at 912*.

Under *Taylor*, the Court must consider the defendant's "fundamental" right to offer testimony in his favor. *Taylor, 108 S. Ct. at 656*. The Court also must consider "the integrity of the adversary process, **[**4]** which depends both on the presentation of reliable evidence and the rejection of unreliable evidence, the interest in the fair **[*494]** and efficient administration of justice, and the potential prejudice to the truth-determining function." *Id.*

Defendant's proffered alibi testimony was inherently suspect, in major part because it arose only on the eve of the second trial. *See Taylor, 108 S. Ct. at 655*; *Williams v. Florida, 399 U.S. 78, 90 S. Ct. 1893, 1896, 26 L. Ed. 2d 446 (1970)*. Defendant had no satisfactory explanation for his failure to notify counsel of the potentially favorable testimony and to have requested the witnesses' appearance at the first trial. According to counsel, defendant had "difficulty" locating the witnesses until just before the second trial. The Court found that explanation highly dubious, considering that the witnesses were defendant's brother and a friend. Indeed, it would be difficult to imagine a satisfactory explanation for the

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[1] Defense counsel notified the Court and the Government of the names and addresses of the witnesses he intended to call by a letter dated February 19, 1991. The letter did not indicate that the witnesses would support defendant's alibi defense and did not state "the specific place or places at which the defendant claimed to have been at the time of the alleged offense" as required by *Rule 12.1(a)*.

[2] Although transcripts often reflect why a trial judge ruled as he or she did on an evidentiary question, there is no general requirement that any reason for such a ruling be given. *See, e.g., Fed. R. Evid. 103*. Moreover, it is axiomatic that, unlike administrative law judges, trial judges may be "right" for the "wrong" reason. The giving of "reasons" for the innumerable rulings that are made in the course of a trial is neither feasible nor required.

failure of those witnesses to have come forward with purportedly exculpatory testimony at the first trial. [3]

[5]** Defendant testified before the undersigned both at his pretrial detention hearing and in his first trial. His testimony on those occasions was inconsistent and was not credible. *(See* Pretrial Detention Order, p. 3.) Defendant appeared to adjust his story according to the audience. [4] *(Compare* Tr. Nov. 1, 1990, *with* Tr. Jan. 10, 1991.) The Court concluded that defendant had perjured himself at both prior appearances. Based on that assessment and the overall circumstances, the Court rejected defendant's explanation for the late disclosure of the supposed alibi witnesses. The Court concluded that the proffered testimony would have been perjurious and that defendant was seeking to "sandbag" in an attempt to prevent the Government from challenging the alibi testimony effectively at trial. Balancing those factors against defendant's right to present evidence, the Court concluded that excluding the testimony was appropriate. [5] *See Taylor, 108 S. Ct. at 656*.

[6]** The Court feels obliged to note that the appellate opinion evidences a troubling lack of deference for this Court's implicit assessment of the facts. The Court of Appeals implies that this Court somehow reached its conclusion for improper or inadequate reasons, although the record demonstrates the existence of proper reasons -- including the citation of the controlling Supreme Court case from the bench. The Court also is troubled that the Court of Appeals appears to have been so affected by the trial court's rather bland comments to defense counsel. Those statements were purely and simply a matter of professional courtesy; the undersigned did not want the record to reflect that defense counsel was considered personally responsible for coming up with supposed alibi witnesses just before a second trial. Furthermore, the finding of good faith on the part of counsel implicitly conveyed the Court's belief that it was the defendant who acted in bad faith. The Court saw nothing to be accomplished by stating that belief directly on the first morning of the second trial.

Stanley S. Harris

United States District Judge

Date: MAR 2 1993

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[3] Defendant was aware of the alleged date and location of the offenses almost four months prior to the first trial. Therefore, he easily could have complied with *Rule 12.1(a)*. At a minimum, defendant could have provided notice within sufficient time for the Government to investigate the alibi before the second trial.

[4] Defendant offered a third account at the second trial. *(See* Tr. Mar. 8, 1991.)

[5] The alternatives suggested by defense counsel, continuing the trial or allowing the Government several days to investigate the alibi in the middle of trial, were not feasible given the Court's trial schedule. Furthermore, those alternatives would have been more compelling if discussion of the testimony had arisen before the first trial rather than the retrial.

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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. _____/AR was electronically filed with the Court and the Government Appellate Division on August 12, 2022.

SEAN PATRICK FLYNN
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 693-0674
USCAAF Bar Number 37529