IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	BRIEF ON BEHALF OF APPELLANT
v.	Crim. App. Dkt. No. 20200644
Sergeant (E-5) **ASHRAF S. WARDA**, United States Army, Appellant	USCA Dkt. No. 22-0282/AR

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

WILLIAM E. CASSARA, Esq.
Appellate Defense Counsel
PO Box 2688
Evans, GA 30809
(706) 860-5769
USCAAF Bar No. 26503

TUMENTUGS D. ARMSTRONG
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 693-0692
USCAAF Bar No. 37591

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ISSUES PRESENTED[1]

I.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN DENYING THE MOTION TO DISMISS OR ABATE THE PROCEEDINGS WHERE THE UNAVAILABLE EVIDENCE WAS OF SUCH CENTRAL IMPORTANCE THAT IT WAS ESSENTIAL TO A FAIR TRIAL, THERE WAS NO ADEQUATE SUBSTITUTE FOR THE UNAVAILALBE EVIDENCE, THE UNAVAILABLE EVIDENCE WAS NOT APPELLANT'S FAULT, AND THE MILITARY JUDGE VARIED FROM THE PRESCRIBED REMEDY UNDER R.C.M. 703(f)(2).

II.

WHETHER APPELLANT WAS DEPRIVED OF HIS RIGHT TO A UNANIMOUS VERDICT AS GUARANTEED BY THE SIXTH AMENDMENT, THE FIFTH AMENDMENT'S DUE PROCESS CLAUSE, AND THE FIFTH AMENDEMENT'S RIGHT TO EQUAL PROTECTION.

STATEMENT OF STATUTORY JURISDICTION

The Army Court of Criminal Appeals [CCA] had jurisdiction over this matter pursuant to Article 66(d), Uniform Code of Military Justice [UCMJ]; 10 U.S.C. § 866(d). This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

[1] This Court ordered briefs to be filed on Issue I only. (JA 1).

STATEMENT OF THE CASE

On November 26, 2018, June 19, 2019, January 7, 2020, July 16, 2020, and September 30-October 2, 2020, appellant was tried at Fort Drum, New York, before a general court-martial composed of officer and enlisted members. Contrary to his plea, appellant was convicted of rape, in violation of Article 120 of the Uniform Code of Military Justice [UCMJ]; 10 U.S.C. § 920 (2016).[2] (JA 11). The panel sentenced appellant to reduction to the grade of E-1, forfeiture of all pay and allowances, confinement for seven years, and a dishonorable discharge. (JA 12). The convening authority approved the adjudged sentence and credited appellant with one day of confinement. (JA 12, 20).

Of the five errors appellant assigned to the CCA,[3] the CCA addressed Issue I herein, "pause[d] to address" another in a footnote and affirmed the findings and sentence. *United States v. Warda*, ARMY 20200644, 2022 CCA LEXIS 438 (Army Ct. Crim. App. July 21, 2022) (summ. disp.) (unpub. op.) (JA 3-6).

STATEMENT OF THE FACTS

Appellant, a native of Egypt, and MAB, born in the United Arab Emirates and raised in Jordan, met via Facebook in 2012. (JA 32, 34, 276). They only spoke Arabic with each other. (JA 35). In December 2015, they got married in

[2] The panel acquitted appellant of sexual assault and of wrongfully communicating a threat. (JA 11).
[3] Appellant personally submitted issues for the CCA's consideration pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Jordan and signed a marriage contract which included the terms of the $13,000-$15,000 dowry from appellant to MAB. (JA 91-94, 161, 280).

The First Talaq

In late March or early April 2017, appellant orally divorced MAB via "talaq," an Islamic word for "divorce." (JA 95-96, 130, 282). While the first and second announcements of talaq can be retracted and the couple will remain engaged or married, the third renunciation constitutes the final divorce. (JA 95, 101, 277-78). MAB and her mother called AF, appellant's brother, and asked him to intervene. (JA 283).

MAB's Green Card

In May 2017, MAB traveled to New York to obtain a conditional Permanent Resident Card, commonly known as a "green card." (JA 128, 280-81). The green card was valid for two years from the date of issuance. (JA 102, 128). The conditions could be removed only with appellant's participation. (JA 103, 123). In the event of a divorce, the immigrant could not remove the conditions on the green card on her own, but if the immigrant claimed that she was a victim of abuse, she could document the abuse and apply for a green card without the citizen's participation. (JA 123-24). Appellant did not assist MAB when she later sought the removal of the conditions on her green card. (JA 180).

The Second Talaq

In August 2017, appellant uttered the second oral divorce. (JA 129-30, 284-87). MAB's brother called AF and begged him to have appellant revoke a second oral divorce. (JA 284).

The Third Talaq

On September 23, 2017, appellant announced the third and final talaq. (JA 130, 287). MAB's mother texted AF to intervene again. (JA 290-91). The next day, MAB told AF that she wanted citizenship and her $13,000-$15,000 dowry because she had not received it. (JA 177, 295). He replied, "I can't give you either." (JA 295). She told AF, "You will see what I am going to do and you will regret it." (JA 290).

MAB told a different story. She testified that AF and appellant informed her that she had to give up her dowry if she wanted to remain in the United States or she could return to Jordan for six months and then return to the United States. (JA 138-40). She replied, "It's my right to choose whether I want to stay here or go back, and you don't have to tell me what to do." (JA 140). MAB testified that she did not remember telling AF, "You will see what I am going to do and you will regret it." (JA 140).

MAB's mother and brother contacted AF to complain about appellant's decision to divorce MAB. (JA 292). In all their requests for intervention, MAB's family never accused appellant of raping or sexually assaulting MAB. (JA 291).

Protection Order

In October 2017, MAB applied for a temporary protection order. (JA 86). She averred that the court document shows she would be killed by her family if she returned to Jordan. (JA 89). At trial, she denied writing this, blamed the translator for that language, and claimed that she later corrected that language. (JA 90-91, 155-56).

As the basis for the order, MAB alleged that on August 10, 2017, she and appellant saw a nurse practitioner at the Woman to Woman Clinic for advice on how to have more comfortable sexual intercourse because she had no sexual experience and had felt pain during sex. (JA 41, 67-72, 77, 186-87). At home, MAB and appellant engaged in rear entry vaginal intercourse. (JA 41-42, 72). MAB testified that appellant did not follow the nurse practitioner's advice and that intercourse was painful. (JA 42, 72-73). MAB alleged that she told appellant to stop but that he continued to penetrate her vagina. (JA 42-43). She testified that she passed out during the alleged incident and woke up in an ambulance. (JA 43, 73). MAB admitted that the Clinic record shows that her appointment was on

August 13, 2017, and that there are no records of an August 10, 2017, appointment. (JA 70).

In February 2018, MAB obtained a long-term protection order. (JA 127-29, 163).

Family Advocacy and Financial Support

In November 2017, SJ, a family advocacy specialist, served as MAB's victim advocate. (JA 264-54). MAB told SJ that appellant had cut her off financially. (JA 154). Appellant's commander testified that he received reports "from legal" that appellant had failed to financially support MAB. (JA 272-73). The commander personally investigated those reports and concluded that they were unfounded. (JA 274).

Appellant filed for divorce, and it was finalized in April 2018. (JA 162, 179). During the divorce negotiations, MAB asked for her dowry. (JA 177-79). In March 2020, she started working as an administrative assistant for a nonprofit organization that provides resources to immigrants, including free legal and immigration services. (JA 105-106, 183-84).

Pretrial Discovery Requests and Motions

On May 17, 2019, the defense submitted a supplemental discovery request to the government for documentation of MAB's immigration status in the United States, including any requests, petitions, affidavits, applications, or other

paperwork pending or submitted by her, or on her behalf by a third party, to the US Customs and Immigration Service [USCIS], National Visa Center [NVC], Consular Electronic Application Center [CEAC], US State Department, or other government entity, for a visa (non-immigrant or immigrant), permanent resident card [green card], or other class of authorization to enter or remain in the United States. (JA 351-55, 386-87).

On May 21, 2019, the defense submitted another supplemental discovery request to the government regarding whether MAB had ever requested an I-918 Supplement B certification. (JA 351-35).

On June 10, 2019, the defense moved to compel discovery and production of, *inter alia*, MAB's immigration records and related documents. (JA 351-55). Two days later, the trial counsel [TC] sent a letter and a subpoena for the aforementioned items to the US Department of Homeland Security Office of the General Counsel. (JA 411-14).

On June 11, 2019, the defense moved to compel production of an immigration law attorney as an expert consultant and potential expert witness in immigration law and policy. (JA 356-58). The defense averred that its appointed Arabic language expert consultant had notified the defense counsel that she had found references to immigrations issues, including the right to keep a green card in the event of divorce, in the materials she translated for the defense. (JA 356-58).

At the June 19, 2019, hearing on the motion, the military judge stated that it was "highly irregular" to request an attorney as an expert and that it was "unclear" how appellant's attorneys were incapable of researching the relevant law because they were graduates of accredited law schools and certified as appropriate defense attorneys. (JA 190-91). The military judge denied the motion. (JA 359-60).

On August 16, 2019, an attorney from the USCIS Office of the Chief Counsel replied via letter that the agency would not comply with the subpoena, nor would it confirm the existence or non-existence of the requested records. (JA 395-97). The attorney acknowledged that the records, should they exist, would be maintained in the system of records known as the DHS Alien File [A-File][4] and

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[4] In *Dent v. Holder*, the Ninth Circuit explained:

> The A-File documents the history of immigrants' and others' interactions with components of the Department of Homeland Security and predecessor agencies. The United States Customs and Immigration Service (USCIS) uses the information in an A-File to enforce U.S. immigration laws. The A-file "contains all the individual's official record material such as naturalization certificates; various forms (and attachments, e.g., photographs), applications and petitions for benefits under the immigration and nationality laws, reports of investigations; statements; reports; correspondence; and memoranda on each individual for whom INS has created a record under the Immigration and Nationality Act."

627 F.3d. 365, 372 (9th Cir. 2010) (citations omitted).

The Ninth Circuit further explained:

Central Index System [CIS], pursuant to 82 FR 43556. (JA 395-97). He stated that this system of records is protected from "indiscriminate disclosures pursuant to the Privacy Act of 1974, as amended, 5 U.S.C. §552a," and that the Privacy Act "prevents the release of this information without the subject's consent unless USCIS is authorized by one of the Privacy Act's exceptions." (JA 395-97). The attorney also stated that

> even where the Privacy Act does not apply, or a Privacy Act exception exists that would allow disclosure of information from an A-file system or records, there may be additional legal restrictions or prohibitions that would preclude USCIS from disclosing certain information (see, e.g., 8 U.S.C. §§ 1160(b)(5), and 8 U.S.C. §§ 1255A(c)(4), (5) regarding SAW/legalization; 8 U.S.C. § 1202(f) for records pertaining to issuance or refusal of immigration visas; 8 U.S.C. § 1254A(c)(6) and 8 C.F.R. § 244.16 regarding Temporary Protected Status; 8 U.S.C. § 1304(b) regarding alien registration; 8 U.S.C. § 1367 regarding victims of abuse, trafficking and crimes; 8 C.F.R. § 208.6 regarding asylum and withholding of removal applicants; 8 C.F.R. § 236.6 for information regarding pre-order detainees; 8 C.F.R. § 241.5 for information regarding post-order detainees; and 8 C.F.R.

> The government uses the A-file routinely in almost every case to determine whether an alien should be removed and whether an alien should be naturalized, and maintains an automated system to make access easy for its staff. All the official records, correspondence, photographs, applications, petitions, statements, reports and memoranda relating to immigration contacts between the alien and the government are there. . . .

Id. at 373 (citation omitted).

> § 1003.46 for information subject to a protective order issued by an immigration judge.

(JA 395-97).

Regarding the request for any documentation related to any I-918 Supplement B certification, the USCIS attorney asserted that, even assuming such records existed, 8 U.S.C. § 1367(a)(2) prohibited USCIS from disclosing the records of an alien who has "sought immigration benefits based on trafficking, certain qualifying criminal activity, and battery or extreme cruelty by a U.S. citizen or lawful permanent resident spouse." (JA 395-97).

The USCIS attorney asserted that the limited exceptions in 8 U.S.C. § 1367(b) did not apply in this case:

> Though 8 U.S.C. § 1367(b) permits disclosure of information to law enforcement officials to be used solely for a legitimate law enforcement purpose, it only permits such disclosure "in a manner that protects the confidentiality of such information." To the extent that the defendant in the above-title court-martial would be made aware of such information, there is no manner of disclosure which could protect the confidentiality of this information. Federal courts have emphasized that a central purpose of these confidentiality provisions is to prevent abusers from obtaining sensitive information about their victims. *See, e.g, Demaj v. Sakaj*, 2012 WL 476168 (D. Conn.) (Feb. 14, 2012) (holding that the disclosure of information from a U petition to impeach a witness would be contrary to the goal of 8 U.S.C. § 1367, "the purpose of which is to protect the confidentiality of the applications by preventing disclosure of these documents to alleged criminals"). A disclosure which would provide the information to the alleged abuser, the

> person from whom it is most vital to keep the information confidential, is not permissible under this or any other exception.

(JA 395-97).

The USCIS attorney maintained that USCIS "recognizes the constitutional obligations of prosecutors to disclose information, including exculpatory evidence and impeachment material, to defendants," but that "DHS/USCIS respectfully observes that it has no role in this prosecution and therefore no constitutional duty of disclosure." (JA 395-97). Finally, the attorney asserted that USCIS is statutorily precluded from providing the requested records under the Privacy Act and/or 8 U.S.C. § 1367. (JA 395-97).

On August 28, 2019, the TC inquired of the USCIS attorney whether the agency's position would change if the military judge issued a non-disclosure order prohibiting the release of MAB's immigration records to appellant personally. (JA 398-99). The attorney replied that the agency was unable to comply with the subpoena even with a military judge's order because USCIS did not believe that a limiting order "can adequately protect [the records'] confidentiality." (JA 398). The attorney advised that MAB could request records pursuant to the Freedom of Information Act [FOIA]. (JA 469-71).

On April 27, 2020, the defense filed another supplemental request for discovery. (JA 389-90). The defense noted that 8 U.S.C. § 1367 provides a basis

for disclosure if MAB, as the applicant, waived the requirements to prevent disclosure and requested that the government seek a waiver from MAB. (JA 389-90). On May 13, 2020, the government notified the defense that MAB refused to waive the requirements to prevent the disclosure of her records. (JA 394). The government added, "without [MAB's] waiver, and in consideration of the [USCIS's] refusal to provide the requested documentation, the information to the extent any exists, cannot be disclosed." (JA 394).

On June 2, 2020, the defense moved to dismiss the charges and specifications with prejudice or, in the alternative, to either abate the proceedings until MAB agreed to allow the USCIS to produce the requested records or prohibit the government from calling MAB as a witness at trial and from offering any hearsay statements from her under Mil. R. Evid. 801(d)(2)(C), (D), or (E). (JA 362-74). The defense proffered that "[t]hrough conversations with the Government Counsel, the Defense has learned that the Government does not intend to take any further action in an attempt to acquire the immigration records of [MAB]. The Defense has clarified that it still desires the records that were previously requested." (JA 365-66).

The government responded to the motion on June 5, 2020. (JA 403-409). The response conceded the relevance of the records. (JA 408). The government suggested that 8 USC § 1367(b)(3) and (4) provided two avenues for resolving the

issue. (JA 408). The government offered that the military judge could order the release and review of the records under subsection (3) and that the military judge could craft a limiting order preventing disclosure of confidential information to appellant. (JA 408). The government acknowledged that subsection (4) permitted MAB to waive confidentiality but surmised that she would not do so. (JA 408). The government requested that the military judge order USCIS to release the documents pertaining to MAB, review the records, and issue a limiting order which prevented the defense from providing the records or the information in those records to appellant. (JA 408-409).

The Military Judge's Order

The military judge issued the order to USCIS on June 19, 2020. (JA 349-50). The order required USCIS, NVC, CEAC, or the US State Department to produce all the requested records and decreed that, upon receipt of the documents, they would be provided to the military judge for in camera review and that following in camera review, the court would release the relevant and necessary documents to the defense. (JA 349-50). The order prevented Appellant from physical or constructive possession of the protected information and averred that the court would redact MAB's address and phone number. (JA 349-50). The order restricted the distribution and reproduction of all documents produced from the order and restricted the copying and distribution of any portion of the produced

documents to one copy each to the trial counsel [TC], defense counsel [DC], and defense appellate counsel later assigned to the case. (JA 349-50).

On June 25, 2020, the USCIS attorney wrote the military judge that if the requested records existed, and he did not concede that they did, the USCIS was statutorily precluded from providing them under 8 U.S.C. § 1367, a provision of the Violence Against Women Act [VAWA]. (JA 448-50).

On July 15, 2020, the government filed a supplemental response to the defense motion to dismiss or abate the proceedings. (JA 443-47).

Litigation of the Motion

At a July 16, 2020, pretrial hearing, Appellant testified that MAB immigrated to the United States as a result of their marriage and that he did not file a joint petition to remove the conditions on her green card. (JA 192).

After appellant testified, the defense asked the military judge to take judicial notice of 8 C.F.R. § 216.1 (definition of a conditional permanent resident); 8 C.F.R. § 216.4 (joint petition to remove conditional basis of lawful permanent resident status for alien spouse); and 8 C.F.R. § 216.5 (waiver of requirement to file joint petition to remove conditions by alien spouse. (JA 194-95, 198-201, 425-39). The defense also requested that the military judge take judicial notice of an email from MAB's Special Victims Counsel [SVC] that MAB declined to participate in the production of immigration documents. (JA 195). The

government did not object. (JA 195). The military judge did not affirmatively take judicial notice, nor did he decline to take judicial notice. (JA 195).

The military judge asked whether MAB's SVC had "been made aware of the potential consequences of not producing this information?" (JA 227). The TC stated that the SVC had informed the prosecutors of a letter he drafted to MAB to explain the defense motion, the military judge's order, and the potential consequences of a decision not to produce the requested records. (JA 227-28). MAB maintained that she would not waive her privacy rights to the requested information. (JA 228).

The SVC noted that the agency refused to comply with the military judge's order and wondered why the defense sought dismissal rather than enforcement of the order. (JA 244-45). The SVC insisted that if the court-martial were to compel MAB to act, "her compliance would literally be a FOIA request to the office that has the records." (JA 246). The military judge expressed confusion at this first mention that MAB could submit a FOIA request. (JA 248). The SVC responded that, for reasons he could not disclose, MAB would not submit a FOIA request. (JA 249).

The Military Judge's Ruling

The military judge denied the motion to dismiss on September 26, 2020. (JA 469-71). The military judge cited, *inter alia*, Article 46, UCMJ, Rule for

Courts-Martial [R.C.M.] 701, case law precluding a TC from intentionally remaining ignorant in complying with discovery requests, and the R.C.M. 701(g)(3) remedies when a party has failed to comply with the rules for discovery. (JA 470-71). Specifically, the military judge stated that remedies for a discovery violation include ordering a party to permit discovery; granting a continuance; prohibiting the party from introducing evidence, calling a witness, or raising a defense not disclosed; and entering such other order as is just under the circumstances. (JA 471) (citing R.C.M. 701(g)(3); *United States v. Stellato*, 74 M.J. 473, 481 (C.A.A.F. 2015)).

The military judge concluded that the defense had not established by a preponderance of the evidence that the requested records exist because the USCIS did not confirm the existence of any responsive records. (JA 471). Even if the records exist, "they are not in the control of military authorities. Further, the government went to considerable efforts to attempt to obtain these records for the defense that are not in its own control." (JA 471).

Request for Reconsideration

On September 29, 2020, the defense requested reconsideration of the military judge's ruling because MAB informed the government that morning that she refused to consent to the disclosure of her immigration records to the defense because she did not want appellant to have access to her personal information. (JA

252-53). The DC argued that the issue was not whether the government possessed the evidence, but rather, under R.C.M. 703(f)(2) the evidence was unavailable. (JA 253-54). The DC continued:

> [T]he unavailability of the evidence could not have been avoided by Sergeant Warda, I don't believe that's been contested by the government by any point. This evidence is the issue of central importance in this trial. [MAB] is the witness in which the government's case is going to rest and fall on, her motives to fabricate, and present that evidence in front of the fact finder is critical for Sergeant Warda to be able to present his defense. There is no adequate substitute for this evidence that we're requesting because [MAB] is now free to come up with whatever excuse she wants to be it factual or not, and the panel will decide whether she's being truthful or not where we could prove that she's not being truthful. Your Honor, we need to be able to demonstrate for Sergeant Warda's defense the motives to fabricate, the actions she's taken or not taken, because if she hasn't filed status, if she is not on a current green card, if her green card is expired and she's hasn't adjusted status that creates a continuing on-going motive to fabricate. They key here is at no point has the government ever contested our entitlement to these records, the government has conceded their relevance and necessity.

(JA 254-55).

The DC requested that the military judge dismiss the charges or preclude MAB from testifying under R.C.M. 701 or grant a continuance or abate the proceedings under R.C.M. 703 or declare a mistrial under R.C.M. 915 because the interests of justice required it. (JA 256-57). The military judge asked, "The

defense doesn't know what is in these records, correct?" (JA 258). The DC answered:

> The defense knows there is immigration records that exist with respect to [MAB]. Defense knows that [MAB's] conditional green card expired in January of 2019. So, there is only two options essentially that exist right now, she's either an over stay and doesn't have a valid legal status in the country or she has applied for some sort of adjustment. She has informed the government that she is here on a green card, which would mean she would had to have taken some action in order to get that green card, so we know there are records that exist at USCIS. We cannot tell the Court exactly what those records say, I can't because I don't have access to those records.

(JA 258).

The military judge advised the defense that he would give "great latitude in the scope of cross-examination [of MAB], to include the fact there was a court order that indicated that information would be redacted." (JA 261). The DC explained that MAB could simply testify that her SVC did not tell her about that part of the court order precluding the disclosure of her personal information to appellant. (JA 261). The military judge answered, "Well we'll take that up as we get to it, I guess." (JA 261).

The military judge denied the request for reconsideration and announced that the court would grant the defense "substantial leeway on cross-examination of [MAB], the alleged victim." (JA 262).

MAB's Testimony

At the conclusion of MAB's direct examination, the defense moved for any statements in the possession of the United States under R.C.M. 914, the Jencks Act,[5] and R.C.M.s 701 and 703 regarding MAB's testimony that she would not have immigrated to the United States but for her marriage to appellant. (JA 56, 58-59). The military judge denied the motion. (JA 60-61). He explained, "There has been no meaningful testimony regarding her immigration status that would require these records be turned over. As I've indicated previously I will give the defense substantial room to cross-examine on these issues." (JA 61).

On cross-examination, the defense probed MAB's testimony that she moved to the United States because she married appellant and that she received a conditional green card based on her marriage. (JA 102). She acknowledged that her green card was valid for two years and that she had to apply to remove the conditions on her green card. (JA 102-103). When asked whether she needed appellant's participation to apply for the removal of those conditions, MAB answered, "I don't know what I have to do with [appellant]." (JA 103). She denied that she had to remain married to appellant to apply for the removal of those conditions. (JA 103). MAB denied that she could remain in the country without appellant's participation if she claimed to be an alleged victim of battery, domestic

[5] 18 U.S.C. §3500

violence, or cruelty. (JA 103). She later denied knowing that an alleged abuse victim could apply for a green card extension without the abusive spouse's participation. (R. at 606-607). She admitted that she knew that she could not remove the conditions on her green card on her own if she was divorced. (JA 123-24).

MAB acknowledged that she worked for a nonprofit organization but did not want to provide the name of her employer because she did not want appellant to know where she worked or lived. (JA 103-104).

In an Article 39(a), UCMJ, session, the DC proffered that the website for the Arab American Association of New York listed MAB's name and that her employment information was necessary to impeach her testimony that she did not understand or know that she could remove the conditions on her green card without appellant's participation.[6] (JA 105-106). The DC also proffered a flyer from the nonprofit that advertised its assistance with legal and immigration services. (JA 106).

After the court-martial was called to order, the DC questioned MAB about her immigration records, the defense request for those records, and the

[6] After the DC made a proffer about MAB's employment, the military judge asked, "How did you get this information about where the witness is working?" (JA 105). The DC answered, "The Internet, Your Honor." (JA 105). The military judge responded, "Her name is listed?" and the DC confirmed that her name was listed in the human resources section of the website. (JA 105-106).

government's concession that the records were relevant and necessary. (JA 111). MAB admitted that she knew that the government sought her records and that the military judge ordered their production. (JA 111-12). She denied knowing that the order provided for the redaction of her personal information. (JA 112-13). She acknowledged that her SVC informed her of the order and its provision that the military judge would review the records before providing them to the parties. JA 113, 115-16). Nonetheless, MAB testified, "I don't know, I didn't know but I know the judge can see everything. But I didn't want [appellant] to see. . . . I have heard that if he looked at my file he will see everything." (JA 113).

The DC gave MAB a copy of the protection order marked Def. Ex. Q for Identification. (JA 115). MAB denied ever seeing or reading the order. (JA 116-17). She claimed not to know about the order's prohibition against appellant ever possessing the immigration records or that the military judge would redact her personal information. (JA 117-18, 120-21). When asked about her multiple refusals to consent to the release of her records, MAB testified, "For the government and the judge, I don't mind. But, I was – I didn't want [appellant] to have it." (JA 118). She confirmed that she agreed to release the records to the prosecutors and the military judge. (JA 119). She told her SVC, "I don't want [appellant] to know my information." (JA 120).

When asked whether her SVC did not explain what "redacting out" means, MAB answered, "No, he did tell me that he doesn't have access. . . . But, I asked also some people from immigration if my ex-husband gets a copy of my information. They told me that he will know everything and he will [have] the file forever, even if I update where I have changed my address, he will know the new address." (JA 121). MAB admitted that she understood that the military judge could punish appellant or anyone who violated the order. (R. at 605). Finally, MAB denied seeking the long-term protection order for use in her application to renew her green card without appellant's participation. (JA 122).

The parties agreed to introduce the military judge's June 19, 2020, order into evidence. (JA 300-301, 349).

Proposed Instructions

The defense requested that the military judge instruct the members that they may draw an adverse inference against MAB for her refusal to consent to the disclosure of her immigration records. (JA 303-304). The government opposed the proposed instruction. (JA 306-307).

In response, the DC argued:

> [MAB] has taken action to mislead the panel in this case, specifically, stating that the only reason she wouldn't consent to the records was that she didn't want Sergeant Warda to get her personal information or for him to have possession of those records. That material was specifically covered in the court order. It seems crazy to

> me right now that the government can sit here and say that we shouldn't be able to give this instruction where the SVC was there in the 39(a), the military judge spoke with the SVC and talked about privilege and all these other things that came up during the 39(a) session and the only that that was holding us back from getting those records was [MAB's] consent which was specifically articulated in the court order that her SVC had, was on the email for.
>
> Your Honor, the government now is sitting here basically using as a sword and shield to say well, you know, we tried our best to get them so you don't get to prepare for it and now also we're going to just be able to go with [MAB's] statements here in court, which are completely contradictory to the court order that we had, to mislead the panel as to why she didn't provide consent for those records. We got the disclosure on her reasoning on the eve of trial at that point where she was saying that the only reasons for her failure to consent was Sergeant Warda not giving his personal information. The government should have taken steps to try and obtain her consent again at that point to remove barriers to our obstacles to get the information.

(JA 307-308).

The military judge denied the proposed instruction because "the defense did not establish by preponderance of the evidence that the requested records exist," that "USCIS did not confirm there were any responsive records and they are not in control of the military authorities[,] and that the government did in fact go to considerable efforts to attempt to attain these records for defense that are not in its control." (JA 310). The military judge reiterated that he had granted the defense substantial leeway on MAB's cross-examination "about the records which we

don't even know if they actually exist and if they do exist that they are even favorable in any way shape or form to the accused. In fact, an argument can be made that they are not helpful to the accused just as easily." (JA 310).

The DC proposed a stipulation of fact with the government that MAB's consent was necessary to produce the records. (JA 311). The TC did not agree to a stipulation because "still unsure of [how] the process works with getting the FOIA request. . . ." (JA 311). The military judge stated, "My recollection of the hearing on this issue was that if [MAB] consented to the release of the records, the records would have been received." (JA 313). After a brief recess for the parties to determine whether they would agree to a stipulation, the parties informed the military judge that they did not enter into a stipulation. (JA 313-14).

The military judge denied the government request to take judicial notice of the order. (JA 315-17).

After the findings were announced, the DC moved, pursuant to R.C.M. 905, for reconsideration of all motions, including the motion to dismiss or abate the proceedings under R.C.M. 701 and 703 or, in the alternative, a mistrial because a continuance or abatement was insufficient at that point in time. (JA 347). The military judge ruled on the request for reconsideration of other motions made by the defense but did not rule on the motion to dismiss or abate the proceedings. (JA 348).

The CCA Decision

The CCA summarized the chronological history of the discovery requests and motion but did not discuss either appellant's or MAB's testimony relevant to this issue. (JA 4). The CCA cited the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(2); R.C.M. 701(a)(2)(A); and R.C.M. 703(0(1) [sic] and (2). (JA 4-5). The CCA acknowledged that "the government dutifully conceded at the outset that [MAB's] immigration records were relevant and necessary. . . ." (JA 5).

The CCA "commend[ed] the trial judge for adhering to the procedures of R.C.M. 703(0(2) [sic] and endorse[d] his approach to this difficult scenario." (JA 5).

The CCA stated that

> the military judge, in a three-page written ruling, correctly made the required and sequential findings. First, he found that appellant had not met his burden to show that the records sought, records of a claim of abuse, existed. While it is reasonable to infer their existence, the preponderance of evidence does not support this. The only evidence of their existence is the continued presence of [MAB] in the country and her concern about the release to appellant of any records that may exist. However, her continued presence could be the result of an undetermined number of other immigration provisions, the proof of which she would likely be similarly reluctant to provide to appellant.

(JA 5).

The CCA determined that the military judge correctly found that the records, if they existed, were not in control of military authorities and that "they were not subject to compulsory process, as both a subpoena and court order had failed to secure them due to the statutory privilege," leaving the only recourse to appellant that "if the judge were to find the records were of such central importance to a fair trial, and there was no adequate substitute for the evidence, the judge would be required to grant a continuance or some other relief designed to produce the evidence, or abate the proceedings." (JA 5).

The CCA agreed with the military judge that the records were not of such central importance to a fair trial because

> even if the records existed and were produced they were arguably just as helpful to the government, as they would potentially serve as a prior consistent statement once the defense attempted to impeach [MAB]. The insufficient proof of the evidence's existence and its arguable materiality both support the judge's finding. Nonetheless, the judge provided the defense the opportunity to explore the motive to fabricate by allowing substantial leeway in the cross-examination of [MAB], which the defense explored to great benefit. Their position was made stronger by their ability to highlight that [MAB] held the keys to the documents' production and was refusing to waive the privilege, despite the judge's assurance that any personal information would not be disclosed. The judge admitted his court order into evidence to corroborate the defense theory.

(JA 5-6).

Summary of Argument

The military judge abused his discretion in denying the motion to dismiss or abate the proceedings under R.C.M. 703(f)(2). First, the military judge's findings of fact were clearly erroneous. Next, his decision was influenced by an erroneous view of the law where he incorrectly applied R.C.M. 701 analysis instead of R.C.M. 703(f)(2).

Appellant prevails under R.C.M. 703(f)(2) because (a) the defense proved by a preponderance of the evidence that MAB's immigration records existed; (b) the records were unavailable because they were not subject to compulsory process and because MAB refused to request them through the FOIA; (c) they were of such central importance to appellant's defense that MAB had a motive to fabricate the allegations that they were essential to a fair trial; (d) there was no adequate substitute for the records and the military judge's "substantial leeway on cross-examination" of MAB's immigration status and the admission of the military judge's June 19, 2020, order were not adequate substitutes; (e) the unavailability of the records was not appellant's fault and could not have been prevented by the defense; and (f) the military judge improperly varied from the prescribed remedy in R.C.M. 703(f)(2).

Argument

I.

THE MILITARY JUDGE ABUSED HIS DISCRETION IN DENYING THE MOTION TO DISMISS OR ABATE THE PROCEEDINGS WHERE THE UNAVAILABLE EVIDENCE WAS OF SUCH CENTRAL IMPORTANCE THAT IT WAS ESSENTIAL TO A FAIR TRIAL, THERE WAS NO ADEQUATE SUBSTITUTE FOR THE UNAVAILABLE EVIDENCE, THE UNAVAILABLE EVIDENCE WAS NOT APPELLANT'S FAULT, AND THE MILITARY JUDGE VARIED FROM THE PRESCRIBED REMEDY UNDER R.C.M. 703(f)(2).

Standard of Review

A military judge's decision not to abate proceedings is reviewed for an abuse of discretion. *United States v. Simmermacher*, 74 M.J. 196, 199 (C.A.A.F. 2015) (citing *United States v. Ivey*, 55 M.J. 251, 256 (C.A.A.F. 2001)). An abuse of discretion occurs when a court's findings of fact are clearly erroneous or the decision is influenced by an erroneous view of the law. *Id*. (citing *United States v. Lubich*, 72 M.J. 170, 173 (C.A.A.F. 2013)).

Law

Article 46, UCMJ

Article 46, UCMJ, provides the parties and the court-martial with the "equal opportunity to obtain witnesses and other evidence in accordance with" the rules prescribed by the President. Article 46, UCMJ, 10 U.S.C. § 846 (2016).

8 U.S.C. § 1229b(b)(2)

The Immigration and Nationality Act allows a permanent resident alien married to a United States citizen to apply for a change in status without spousal consent if the alien demonstrates that s/he is a battered spouse of a citizen; otherwise, an extension of the green card requires spousal consent. 8 U.S.C. § 1229b(b)(2). This information is generally protected from disclosure by 8 U.S.C. § 1367, but there are exceptions to this general rule. *See* 8 U.S.C. § 1367(b)(3), (4).[7]

8 U.S.C. § 1367

Under 8 U.S.C. § 1367, no official in the Department of Homeland Security, the Department of State, or any agency of those departments may permit use by or disclosure to anyone of any information which relates to an alien who is the beneficiary of an application for relief under the Immigration and Nationality Act. 8 U.S.C. § 1367(a)(2). This prohibition, however, shall not be construed as preventing disclosure of information in connection with judicial review of a determination in a manner that protects the confidentiality of the information. *Id*. at (b)(3). Furthermore, the prohibition shall not apply if the battered individual waived the restrictions on the disclosure of the information. *Id*. at (b)(4).

[7] The CCA failed to note the exceptions in 8 U.S.C. § 1367(b)(3), (4). (JA 4).

8 U.S.C. § 1154

Under 8 U.S.C. § 1154(a)(1)(A)(iii) of the Violence Against Women Act [VAWA], an alien spouse may file a petition for immigrant visa status with the Attorney General for classification that the marriage or the intent to marry a citizen was entered into good faith by the alien and that during the marriage, the alien has been battered or has been the subject of extreme cruelty perpetrated by the alien's spouse.

8 CFR § 216

Under 8 CFR § 216.1, a conditional permanent resident is an alien who has been lawfully admitted for permanent residence and is subject to the conditions and responsibilities of the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act of 1986.

A joint petition to remove the conditional basis of lawful permanent resident status for alien spouse, under 8 CFR § 216.4, requires the alien and the alien's spouse to file a Petition to Remove the Conditions on Residence (Form I-751) within the ninety-day period immediately preceding the second anniversary of the date on which the alien obtained permanent residence. A joint petition must be properly signed by the alien and the alien's spouse. 8 CFR § 216.4(a)(1). If the joint petition cannot be filed because of the termination of the marriage through, inter alia, divorce, or if the petitioning spouse refuses to join in the filing of the

petition, the conditional permanent resident may apply for a waiver of the requirement to file the joint petition. *Id*. Upon receipt of a properly filed Form I-751, the alien's conditional permanent resident status is automatically extended until the petition has been adjudicated. *Id*. Failure to file the Form I-751 within the ninety-day period immediately preceding the second anniversary of the date on which the alien obtained lawful permanent residence on a conditional basis shall result in the automatic termination of the permanent residence status and the initiation of proceedings to remove the alien from the United States. *Id*. at (a)(6).

Under 8 CFR § 216.5, a conditional resident alien who is unable to meet the requirements for a joint petition to remove the conditional basis of her permanent resident status may request a waiver if she can establish that deportation or removal from the United States would result in extreme hardship; the marriage was entered into in good faith but was terminated other than by death and the conditional resident was not at fault in failing to file a timely a petition; or the marriage was entered into in good faith but during the marriage the alien spouse was battered by or subjected to extreme cruelty by the citizen or permanent resident spouse. 8 CFR § 216.5(a)(1). A conditional resident who entered into the marriage in good faith and who was battered or who was the subject of extreme cruelty may request a waiver of the joint filing requirement. *Id*. at (a)(3). The phrase "was battered by or was the subject of extreme cruelty" includes, but is not

limited to, being the victim of any act or threatened act of violence, psychological abuse, and sexual abuse, including rape. *Id*. at (a)(3)(i).

R.C.M. 703

R.C.M. 703(f)(1) provides that "Each party is entitled to the production of evidence which is relevant and necessary." R.C.M. 703(f)(2) governs unavailable evidence and states:

> Notwithstanding subsection (f)(1) of this rule, a party is not entitled to the production of evidence which is destroyed, lost, or otherwise not subject to compulsory process. However, if such evidence is of such central importance to an issue that it is essential to a fair trial, and if there is no adequate substitute for such evidence, the military judge shall grant a continuance or other relief in order to attempt to produce the evidence or shall abate the proceedings, unless the unavailability of the evidence is the fault of or could have been prevented by the requesting party.

R.C.M. 703(f)(2) requires relief when: (1) the lost or destroyed evidence is of such central importance to an issue that it is essential to a fair trial, (2) there is no adequate substitute for such evidence, and (3) the unavailability of the evidence could not have been prevented by the requesting party. *Simmermacher*, 74 M.J. at 201-202).

In *Simmermacher*, this Court examined its R.C.M. 703(f)(2) precedents in *United States v. Manuel*[8] and *United States v. Madigan*[9] and noted several

[8] 43 M.J. 282 (C.A.A.F. 1995)

inconsistencies in its prior holdings which required clarification. 74 M.J. at 201. First, "constitutional due process standards are not part of a R.C.M. 703(f)(2) analysis." *Id*. (accord *Manuel*, 43 M.J. at 288). Next, "R.C.M. 703(f)(2) is an additional protection the President granted to servicemembers whose lost or destroyed evidence [or evidence otherwise not subject to compulsory process] fall within the rule's criteria." *Id*. Finally,

> [t]he "other relief" language in R.C.M. 703(f)(2) is clearly applicable only to the military judge's attempt to produce the missing evidence and does not grant the military judge broad discretion to fashion a remedy for violation of the rule. If a continuance or other relief cannot produce the missing evidence, the remaining remedy for a violation of R.C.M. 703(f)(2) is abatement of the proceedings.

Id.

Regarding abatement of the proceedings as the only remaining remedy for a violation of R.C.M. 703(f)(2), this Court noted that abatement is the remedy only if all three criteria of the rule have been satisfied. *Id*. at n.5.

Analysis

The military judge abused his discretion in denying the defense motion to dismiss because his findings of fact were clearly erroneous and his decision was influenced by an erroneous view of the law.

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[9] 63 M.J. 118 (C.A.A.F. 2006)

1. The findings of fact were clearly erroneous.

In the September 26, 2020, ruling on the defense Motion to Dismiss, the military judge made nine findings of fact. (JA 469-70). While Appellant concurs with the accuracy of these findings, the military judge erred because he failed to make additional findings of fact (1) upon the September 29, 2020, request for reconsideration under R.C.M. 905(f), which followed MAB's notification to the government that she would not consent to the disclosure of her immigration records to the defense because she did not want appellant to have access to her personal information and (2) upon the October 1, 2020, request for a mistrial and reconsideration of all motions, including the motion to dismiss or abate the proceedings, which followed MAB's testimony on the merits in which she discussed her "file," her "information," and her willingness to release her records to the military judge and the prosecutors but not to the defense. The military judge did not consider the additional relevant evidence and did not make additional findings of fact when ruling on the requests for reconsideration. R.C.M. 905(c)(2)(B) ("Where factual issues are involved in determining a motion, the military judge shall state the essential findings on the record."). This omission was clearly erroneous.

2. The decision was influenced by an erroneous view of the law.

At the outset, the military judge incorrectly applied R.C.M. 701 instead of R.C.M. 703(f)(2). (JA 470-71). As the DC argued in the September 26, 2020, request for reconsideration, the issue is not a discovery violation or whether the government possessed the evidence under R.C.M. 701; rather, the issue is that the evidence – MAB's immigration records – was unavailable under R.C.M. 703(f)(2) because it was not subject to compulsory process.[10] Because this is not a discovery violation issue, the R.C.M. 701(g)(3) remedies cited by the military judge in his September 26, 2020, ruling were inapplicable to the issue.

Contrary to the CCA's decision, the military judge did not conduct an R.C.M. 703(f)(2) analysis. (JA 5-6). Because the military judge did not conduct an R.C.M. 703(f)(2) analysis, the CCA's conclusion – that the military judge found that the records were not of such central importance to a fair trial that, absent an adequate substitute for the evidence, a continuance or abatement was necessary – is incorrect. (JA 5).

Next, the CCA stated that the military judge "noted that even if the records existed and were produced they were arguably just as helpful to the government, as they would potentially serve as a prior consistent statement once the defense

[10] The CCA stated that the military judge "found that [the records] were not subject to compulsory process, as both a subpoena and a court order had failed to secure them due to the statutory privilege." (JA 5). The military judge made no such finding. (JA 469-71).

attempted to impeach [MAB]." (JA 5). This statement is apparently a reference to the military judge's musing that "an argument can be made that they are not helpful to the accused just as easily." (JA 310). While the military judge offered such an opinion, his statement occurred in the context of the defense request for an adverse inference instruction and not on the motion to dismiss or abate the proceedings or on either of the requests for reconsideration. Therefore, the CCA's reliance on this statement when discussing the central importance of the evidence is misplaced.

3. Appellant prevails under R.C.M. 703(f)(2).

Because MAB's immigration records were not subject to compulsory process, R.C.M. 703(f)(2) requires the military judge to either grant a continuance or other relief in order to attempt to produce the evidence or to abate the proceedings if appellant satisfies proves by a preponderance of the evidence that the unavailable evidence is of such central importance to an issue that it is essential to trial; there is no adequate substitute for the evidence, and the unavailability of the evidence could not have been prevented by appellant. The military judge abused his discretion in denying the defense motion to dismiss or abate the proceedings because (a) the defense established by a preponderance of the evidence that the requested records exist; (b) the records were unavailable; (c) the unavailable evidence was of such central importance to appellant's defense that it

was essential to a fair trial; (d) there was no adequate substitute for the unavailable evidence; (e) the unavailability of the evidence was not the fault of nor could have it been prevented by the defense; and (f) the military judge's remedy of "substantial leeway" and "great latitude" on cross-examination was insufficient.

a. The defense established by a preponderance of the evidence that MAB's immigration records existed.

In the September 26, 2020, ruling, the military judge concluded that the defense had not established by a preponderance of the evidence that MAB's immigration records exist. (JA 471). The military judge made this determination because the USCIS refused to confirm the existence or non-existence of MAB's immigration records. (JA 470). It is important to note that the defense request was not limited to any records involving claims of abuse; rather, the defense had requested "any requests, petitions, affidavits, applications, or other paperwork pending or submitted by her, or on her behalf by a third party" to the USCIS, NVC, CEAC, US State Department, or other government entity, "for a visa (non-immigrant or immigrant), permanent resident card [green card], or other class of authorization to enter or remain in the United States." (JA 352). At a minimum, had the military judge merely taken judicial notice of the various 8 C.F.R. § 216 provisions, as requested by the defense, then the military judge would have concluded that the records contained in MAB's A-File existed. Accordingly, the

defense proved by a preponderance of the evidence that the records existed, contrary to the military judge's finding.

The USCIS refused to produce the records, assuming that they existed, and, advised that MAB could file a FOIA request. (JA 470). The military judge found that MAB's SVC "represented that the complainant would not submit a FOIA request and will not provide the records." (JA 470). Thus, at the time of the military judge's September 26, 2020, ruling, the SVC had de facto acknowledged that the records existed, but that MAB would not request them. Accordingly, the military judge erred in concluding that appellant had failed to prove by a preponderance of the evidence that the records existed.

During the government's case-in-chief, MAB discussed her "file," her "information," and her decision to release her records to the military judge and the prosecutors but not to the defense. This testimony amounted to confirmation that the records existed because MAB was willing to disclose them to the court and to the prosecutors. The USCIS may not have confirmed the existence of MAB's records, but MAB did. The CCA acknowledged that it was "reasonable to infer" the records' existence, but nonetheless determined that "the preponderance of the evidence does not support this." (JA 5). Both the military judge and the CCA failed to recognize that the SVC de facto acknowledged their existence and that MAB explicitly acknowledged their existence. Thus, the defense proved the

existence of MAB's immigration records by a preponderance of the evidence by the combination of MAB's status as an alien, which necessitated the existence of an A-File, with the SVC's de facto acknowledgment of MAB's records and MAB's explicit acknowledgment of them. Accordingly, the military judge abused his discretion in concluding otherwise.

b. MAB's immigration records were unavailable because they were not subject to compulsory process and because of MAB's refusal to request them through the FOIA.

The military judge and the CCA correctly concluded that the immigration records were unavailable because they were not subject to compulsory process and MAB refused to request them through the FOIA. (JA 5, 470).

c. MAB's unavailable immigration records were of such central importance to appellant's defense that they were essential to a fair trial.

MAB's testimony was the linchpin of the government's case that appellant raped, sexually abused, and threatened her. Evidence of her motive to fabricate the allegations was essential to appellant's defense. Indeed, the CCA accurately summarized appellant's defense:

> The defense theory relevant to the motive to fabricate was that [MAB] alleged she was a victim of violence by appellant to secure continued immigration benefits. An extension of her two-year conditional permanent resident authorization required a joint petition; however, a spouse who is the victim of a violent crime may petition for an adjustment in status without spouse consent. Because [MAB] remained in the United States beyond the

> expiration of her initial authorization, and did so without the consent of appellant, appellant argues the allegations were made to allow her to remain in the United States. Appellant sought [MAB]'s records to bolster this theory.

(JA 5).

The military judge hypothesized that the records could have been used by the government as a prior consistent statement, albeit in the context of the defense request for an adverse inference. (JA 310). The CCA endorsed this theory and called the materiality of the records "arguable." (JA 5-6). The same piece of evidence can be material to both sides but that does not negate the materiality of the evidence. Notably, the government conceded the relevance and necessity of MAB's records, so much so that the government issued a subpoena for them and the military judge ordered their production. It is evident that the records' materiality is significantly more than just "arguable."

After the third talaq, MAB demanded that AF give her citizenship and her unpaid dowry. Since AF could not furnish the money nor could he assist her with becoming a citizen, she warned AF, and by extension, appellant, "You'll see what I'm going to do and you'll regret it." Ultimately, MAB made good on her threat: shortly after this conversation she reported her allegations to the local police and subsequently petitioned a New York court for protection orders based on allegations of sexual, physical, and verbal abuse.

MAB testified that she did not remember making this threat to AF; instead, she testified that she did not remember making this statement. She insisted that she told AF, "It's my right to choose whether I want to stay here or go back, and you don't have to tell me what to do." Assuming *arguendo* that she told AF that it was her "right to choose" whether she wanted to remain in the United States or to return to Jordan, she did not have a viable path to staying in the United States without appellant's participation in the petition to remove the conditions on her green card. Given that MAB sought a temporary protection order against appellant soon after making this alleged statement to AF, it is reasonable to assume that MAB chose to remain in the United States by claiming that she was a victim of abuse by appellant in order to apply for a green card without appellant's participation.

MAB remained in the United States even though appellant did not join her petition to remove the conditional basis of her permanent resident status. The CCA opined that MAB's "continued presence [in the United States] could be the result of an undetermined number of other immigration provisions, the proof of which she would likely be similarly reluctant to provide to appellant." (JA 5). Such speculation is disingenuous. As stated above, MAB secured temporary and long-term protections orders based on allegations that appellant sexually, physically, and verbally abused her.

If MAB claimed that she was battered or subject to extreme cruelty on her Form I-360 as a VAWA self-petitioner, as the defense suspected, then she used her immigration records as a sword and a shield. She never outright denied threatening AF and appellant that they would regret their inability and/or unwillingness to assist her in remaining in the United States. Therefore, it is reasonable to assume that she claimed abuse in order to remain in the United States as a self-petitioner under VAWA and then refused to permit disclosure of those records to prevent the defense from pursuing her motive to fabricate the allegations against appellant. Had the defense been in possession of MAB's immigration records, then the defense could have impeached her with them to prove her motive to fabricate. Instead, the situation unfolded exactly as the DC predicted in the defense's September 29, 2020, request for reconsideration: the DC asked MAB about the specific provisions of the military judge's order and MAB claimed that she did not read the order and did not know about those provisions despite having an SVC. The defense was stuck with MAB's answers and could not use her immigration records to probe her motive to fabricate. The military judge's "substantial leeway" and "great latitude" on cross-examination was an insufficient remedy to attack MAB's motive to fabricate the allegations.

d. There was no adequate substitute for the unavailable records.

There was no substitute, adequate or not, for MAB's immigration records. These records, which would either contradict MAB's testimony that she did not fear returning to Jordan or reveal that she fabricated the allegations in order to remain in the United States due to being battered or subject to extreme cruelty by appellant, were in DHS's possession. There were no other immigration records, such that there was no substitute whatsoever. The CCA did not address this issue. (JA 5-6).

In *Simmermacher*, this Court noted, "in determining whether an adequate substitute for lost or destroyed evidence is available, a military judge has broad discretion. It is when no adequate substitute is available . . . that military judges do not have discretion to vary from the prescribed remedy." 74 M.J. at 202.

Here, the military judge's "substantial leeway on cross-examination" of MAB's immigration status and the admission of the June 19, 2020, order prohibiting the release of information to appellant were not adequate substitutes of the immigration records for purposes of establishing that MAB had a motive to fabricate sexual assault allegations. As discussed above, there was no substitute for the immigration records – there were no other documents, whether at the state or federal level, that substituted for MAB's A-File, nor where there any witnesses who could testify about MAB's immigration status. Without the actual records to

impeach the witness' repeated denials regarding her knowledge of the victim-based application process for the removal of conditions on her green card, the cross-examination was meaningless. "When reviewing confidential records in future cases, trial courts should be particularly aware of the possibility that impeachment evidence of a key prosecution witness could well constitute the sort whose unavailability to the defendant would undermine confidence in the outcome of the trial." *Pennsylvania v. Richie*, 480 U.S. 39, 65 (1987) (Blackmun, J., concurring). When the essential defense at trial was MAB's motive to fabricate, the military judge clearly erred in concluding that mere examination of the witness – whose credibility was in question – was an adequate substitute for the unavailable records.

e. The unavailability of MAB's immigration records was not appellant's fault and could not have been prevented by the defense.

Appellant exhausted every remedy available to him. Appellant sought the records in a discovery request, collaborated with the government to draft the military judge's order, and subsequently requested that MAB submit a FOIA request, but she refused. Neither the military judge nor the CCA addressed this issue. (JA 5-6, 469-71). There is no doubt that the unavailability of MAB's immigration records was not appellant's fault, nor could their unavailability be prevented by appellant.

f. The military judge improperly varied from the prescribed remedy where there was no adequate substitute for MAB's immigration records.

Because appellant satisfied the requirements of R.C.M. 703(f)(2), the military judge had two options in order to attempt to compel MAB to consent to the release of her records: (1) grant a continuance or other relief in order to attempt to produce the evidence or (2) abate the proceedings.

In *Simmermacher*, this Court made clear that "military judges do not have discretion to vary from the prescribed remedy." 74 M.J. at 201. In that case, there was no adequate substitute for the destroyed urine sample. *Id*. The military judge's remedy consisted of an adverse inference instruction to the panel. *Id*. Because a continuance or other relief could not have produced the destroyed sample, abatement was the only remedy, and the military judge abused his discretion when he failed to abate the proceedings. *Id*.

Here, the military judge abused his discretion because he varied from the prescribed remedy when there was no adequate substitute for MAB's immigration records. The military judge declined to continue or abate the proceedings. Instead, he gave the defense "substantial leeway" and "great latitude" on cross-examination. However, without the documents to impeach MAB, the great latitude was meaningless. The defense's cross-examination of MAB regarding which exception she claimed in order to remain in the United States without appellant's

participation in a joint petition or as a self-petitioner under VAWA unfolded exactly as the DC predicted. MAB claimed or feigned ignorance of the exceptions to requiring appellant's participation in a joint petition to remove the conditions on her green card, any provision of the relevant immigration laws that permitted her to claim that she was battered by or subject to extreme cruelty by appellant, and the specifics of the military judge's June 19, 2020, order. Just as the DC anticipated, MAB maintained that her SVC did not tell her everything about the military judge's order. The military judge admitted the order into evidence, but it did not contain any information about MAB's immigration records. The order was relevant to proving that the military judge carefully crafted limitations on the release of MAB's personal information to appellant, to impeaching MAB's credibility, and to her knowledge of the order, but it was irrelevant to appellant's defense that MAB had a motive to fabricate the allegations.

Without the immigration records, the defense was hamstrung in its ability to impeach MAB. The military judge's "other relief" was not a remedy designed to "attempt to produce the evidence." To the contrary, it denied the defense the opportunity to fully and adequately defend appellant by probing MAB's motive to fabricate. Accordingly, the military judge's remedy was erroneous.

While the defense motion was styled as a motion to dismiss or abate the proceedings, the defense also proposed alternative remedies for the military judge,

none of which the military judge granted, even when it seemed for a time that MAB was not absolute in her refusal to file a FOIA request. Her SVC indicated that if the court wants to compel MAB to act, then "her 'compliance' would literally be a FOIA request." The military judge had inquired whether SVC and MAB were "aware of the potential consequences of not producing this information," presumably a continuance or a ruling that precluded the government from calling MAB as a witness. A continuance would prolong MAB's ability to have her day in court until she submitted a FOIA request or consented to the release of her records and it would presumably have an end date, whereas an abatement would suspend the court-martial indefinitely. A ruling precluding the government from calling MAB as a witness would decimate the government's case against appellant because there were no witnesses to the charged acts. Such a ruling would deprive MAB of her day in court. These options would serve as inducements to MAB to consent to the release of her records. In failing to exercise these options, the military judge permitted MAB and the government to use her immigration status as a sword to accuse appellant of the charged acts and a shield to deny appellant the opportunity to fully present its defense.

PRAYER FOR RELIEF

WHEREFORE, appellant respectfully requests that this Honorable Court reverse the CCA and set aside and dismiss the finding of guilty and set aside the sentence.

William E. Cassara
WILLIAM E. CASSARA, Esq.
Appellate Defense Counsel
PO Box 2688
Evans, GA 30809
706-860-5769
bill@courtmartial.com
USCAAF Bar No. 26503

TUMENTUGS D. ARMSTRONG
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 693-0692
tumentugs.d.armstrong.mil@army.mil
USCAAF Bar No. 37591

CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c) because it contains 11,017 words.

2. This brief complies with the typeface and type style requirements of Rule 37.

William E. Cassara

WILLIAM E. CASSARA, Esq.
Appellate Defense Counsel
PO Box 2688
Evans, GA 30809
706-860-5769
bill@courtmartial.com

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Warda, Crim App. Dkt. No. 20200644, USCA Dkt. No. 22-0282/AR was electronically filed with the Court and Government Appellate Division. Copies of the brief and the Joint Appendix were also delivered via courier service to the Court on December 2, 2022.

MICHELLE L.W. SURRATT
Paralegal Specialist
Defense Appellate Division
(703) 693-0737