IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellee v. Staff Sergeant (E-6) **ALEX J. SECORD** United States Army Appellant	REPLY BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 20210667 USCA Dkt. No. 24-0217/AR

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

Argument

I. WHERE THE GOVERNMENT SEIZED AND HELD APPELLANT'S PHONE PURSUANT TO A NARROW SEARCH AUTHORIZATION, BUT COULD NOT ACCESS THE DATA WITHOUT APPELLANT'S PASSCODE, WAS THE DATA WITHIN THE POSSESSION, CUSTODY, OR CONTROL OF MILITARY AUTHORITIES FOR PURPOSES OF R.C.M. 701?

The government concedes that appellant's phone was in the possession, custody, or control of military authorities, but argues the information on the phone was not because the government did not have the phone's passcode. (Gov. Br. at 7-9). The government essentially asks this Court to add language to R.C.M. 701, creating an exception where data not readily accessible by the government falls outside its possession, custody, or control.

The government's position on appeal contradicts its position at trial, where trial counsel affirmatively stated the government had "custody of *the information*

on the phone." (JA at 37) (emphasis added). The government at trial further described "*the evidence*" as within "the *control* of the government. . . ." (JA at 36) (emphasis added). This is waiver. *See United States v. Schmidt*, 82 M.J. 68, 80 (C.A.A.F. 2022) (Maggs, J., concurring) ("to tell the military judge one thing . . . and then . . . assert something else on appeal . . . would go against the general prohibition against taking inconsistent litigation positions.") (citation omitted); *see also Lowery v. Stovall*, 92 F.3d 219, 223 (4th Cir. 1996) ("Judicial estoppel precludes a party from adopting a position that is inconsistent with a stance taken in prior litigation. The purpose of the doctrine is to prevent a party from playing fast and loose with the courts, and to protect the essential integrity of the judicial process.") (quotation omitted). This Court should hold the Government to its position at trial, where it conceded the evidence was in its custody and control.

In addition to ignoring its own concessions at trial, the government wholesale ignores multiple defense arguments. The government makes no response to the defense point about *United States v. Strong* defining possession as a subset of seizure. __ M.J. __, 2024 CAAF LEXIS 478 (C.A.A.F. Aug. 22, 2024). (Appellant's Br. at 9-10). Nor does the government respond to the defense argument about the presumption of consistent usage given that the term "possession, custody, or control" is also used in Art. 108a and clearly does not exclude encrypted data in that context. (Appellant's Br. at 11).

In order to prevail on this issue, the government must "run the table" and establish it had neither possession, custody, nor control of the evidence in question. The government makes no specific argument about how it did not have "custody" of the data, and perhaps that is the highest hurdle of the three for the government. While the government analogizes the physical phone to a "container" in which the data was stored, that does not establish that the data was therefore outside of its custody. Using the government's analogy of the phone as a "container," if the government had custody of a locked safe or container, the intuitive conclusion is that it also would have custody of the contents. For example, government custody of a locked briefcase would necessarily imply custody of its contents. At the risk of being repetitive, the government at trial literally stated it had "custody of *the information on* the phone." (JA at 37) (emphasis added).

II. DID THE MILITARY JUDGE ERR BY RULING APPELLANT COULD NOT ACCESS THE DATA WITHOUT SIMULTANEOUSLY PROVIDING THE GOVERNMENT WITH FULL ACCESS TO ALL HIS PERSONAL DATA?

The government attempts to frame the military judge's order as authorizing only government access within the scope of the prior search authorization. (Gov. Br. at 11). But that is not what the military judge stated. The military judge was clear that defense access to the data would trigger *equal* government access. *See, e.g.*, (JA at 39 (Military Judge: "There must be equal access to evidence."); JA at 40 (noting appellant's choice to access the evidence would result in "equal and

simultaneous" government access). There was no stipulation that government access would be limited to the scope of the prior search authorization.

The government cites to *United States v. Rhea*, 33 M.J. 413, 418 (C.M.A. 1991) for the proposition that the defense may, at times, be justified in disclosing information to the government. (Gov Br. at 10-11). In *Rhea*, the government had an authorization for a calendar purporting to document the dates of sexual contact between the accused and his stepdaughter. 33 M.J. at 415. When the defense realized that it possessed the calendar, as part of a "box of materials" the accused had given them, they ultimately were justified in turning it over to the government. *Id.* That does not, however, mean that the government was entitled to the entire "box of materials." By the rationale employed by the military judge in the present case, "equal access" would have required the defense to turn over the entire contents of the "box of materials," untethered to the scope of the government's search authorization. *Rhea* provides no authority for such a ruling.

III. IF THE MILITARY JUDGE ERRED, DID THE ERROR CONSTITUTE PREJUDICIAL ERROR?

If this Court finds error, the government acknowledges it bears the burden of proving harmlessness beyond a reasonable doubt. (Gov. Br. at 14-15). Yet a few sentences later, echoing the error of the lower court, the government thrusts the burden back on appellant to do the impossible: complaining that *Appellant* has not presented "a specific showing" that exculpatory or relevant evidence was

contained on the phone. (Gov. Br. at 15-16). The government's confusion of the burden of persuasion clouds its analysis. The burden is not appellant's to carry. Even if it were, he would need access to the erroneously denied data to present the specific showing the government desires, requiring a post-trial hearing after proper disclosure was made.

As noted in appellant's original brief, but not addressed in the government's answer, the government conceded at trial there was reason to believe the data at issue would yield exculpatory evidence. (JA at 48) ("the contents of the cell phone . . . may be the basis of a good faith basis for containing exculpatory evidence as the defense suggests"). As in Issue I, it is hard to reconcile the government's concessions at trial with its current arguments.

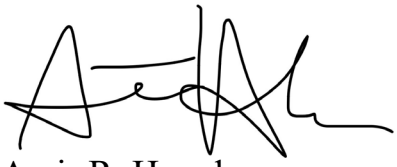
Appellant does agree with the government that there may be differences in the prejudice analysis between the various specifications. As acknowledged in appellant's original brief, prejudice seems highest with regard to Specifications 5-7 of Charge II. (Appellant's Br. at 16). But it is the government's high burden to prove harmlessness with respect to each specification.

In places, the government seems to suggest this Court should skip the specification-by-specification prejudice analysis altogether and jump straight to an analysis of whether "the ultimate sentence imposed" would have been justified, even if some of the specifications might have been eliminated. (Gov. Br. at 16-

17). Appellant is aware of no authority for this sort of sentence-only prejudice analysis. If the government cannot prove harmlessness with respect to each and every specification, the findings must be adjusted accordingly. If any findings are set aside, the proper course of action is remand to the lower court for either sentence reassessment or a rehearing. *See United States v. Smith*, __ M.J. __, 2024 WL 4941954, at n. 5 (C.A.A.F. November 26, 2024) (Ratifying the continuation of "this Court's general practice to remand to the courts of criminal appeals (CCAs) for sentence reassessment or a rehearing on the sentence whenever we set aside at least one finding of guilty.").

Conclusion

WHEREFORE, appellant respectfully requests this Honorable Court set aside the findings and the sentence.



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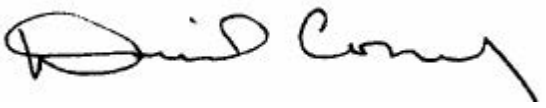

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I certify that an electronic copy of the forgoing was electronically sent to the Court and served on the Government Appellate Division on December 10, 2024.

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