IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellant,*	)	**UNITED STATES' MOTION TO CITE SUPPLEMENTAL AUTHORITY**
v.	)	Before Special Panel
Master Sergeant (E-7) **Desiree M. Holmes** United States Air Force *Appellee.*	)	Misc. Dkt. No. 2024-1 28 May 2024

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

Pursuant to Rule 23.3(d) and 25.2(e) of this Court's Rules of Practice and Procedure, the United States respectfully moves to submit a supplemental citation of authority that undersigned counsel "wishes to raise for the Court's consideration in oral argument." This relevant new law was discovered by counsel during preparation for oral argument. The below cited case is relevant for this Court to consider whether the military judge abused his discretion with his erroneous view of the law when he dismissed with prejudice Charge II, Specifications 1-2, and suppressed evidence for prosecutorial misconduct without making a finding of prejudice to Appellee. Oral argument in this case is scheduled on 31 May 2024.

In United States v. Rodriguez, our Superior Court found that the appellant did not suffer any prejudice even though trial counsel made a disparaging racial comment during closing argument. 60 M.J. 87, 88 (C.A.A.F. 2004). CAAF reiterated the concept that "where, in fact, there is no prejudice to an accused, we should not forsake society's other interests in the timely and efficient administration of justice, the interests of victims, and in the military context, the ...al impact on national security deployment." Id. at 89-90. This citation to a supplemental ... provides an additional explanation from our Superior Court explaining why courts

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should not grant remedies and abandon society's interest in the administration of justice when the prosecutorial misconduct did not result in prejudice to an accused. United States v. Rodriguez will assist this Court in determining whether the military judge abused his discretion.

Wherefore, the United States respectfully requests that this Court grant its motion to submit a supplemental citation of authority.

[redacted]
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Associate Chief
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing motion was delivered to the Court and the Air Force Appellate Defense Division on 28 May 2024 via electronic mail.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellant* v. Master Sergeant (E-7) **DESIREE M. HOLMES** United States Air Force *Appellee*	**NOTICE OF APPEARANCE** Before Special Panel Misc. Dkt. No. 2024-01 28 May 2024

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 12 of this Court's Rules of Practice and Procedure, Megan P. Marinos files this written notice of appearance. Ms. Marinos will sit second chair at Appellee's table at oral argument as supervisory counsel.

Respectfully submitted,

[redacted]

MEGAN P. MARINOS
Senior Counsel
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(240) 612-4770
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Division on 28 May 2024.

[redacted]

MEGAN P. MARINOS
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellant*,	)	**UNITED STATES' MOTION TO ATTACH AUDIO RECORDING**
v.	)	Before Special Panel
Master Sergeant (E-7) **Desiree M. Holmes** United States Air Force *Appellee*.	)	Misc. Dkt. No. 2024-1
	)	19 April 2024

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

Pursuant to Rule 23.3(b) of this Court's Rules of Practice and Procedure, the United States respectfully requests to attach the following appendices to this motion:

A. **Appendix A – United States v. Holmes audio recording, dated 2 October 2023 and 16-20 October 2023 (1 disc)**

B. **Appendix B – Government Request for Release of Audio Recording in United States v. Holmes, various dates (6 pages)**

On 29 February 2024, the United States filed an appeal under Article 62, UCMJ. On 20 March 2024, Appellee filed her answer brief. The United States filed its reply brief on 27 March 2024. Given the extensive facts discussed in the briefs related to the prosecutorial misconduct, the audio recording of Appellee's court-martial is relevant and necessary because it provides context to the facts and law the military judge relied on in his rulings. Thus, the audio recording will assist this Court in determining whether the military judge abused his discretion.

More importantly, the audio recording is part of the record of trial under Rules for Courts-Martial (R.C.M.) 1112(b)(1). Moreover, in Article 62, UCMJ, appeals, a record of lings shall be prepared, verbatim, and complete to the extent necessary to resolve the ealed. R.C.M. 908(b)(5). But in this case, the audio was not included in the record of

GRANTED
29 Apr 2024

trial served on this Court and the Air Force Appellate Defense Division on 9 February 2024 because the military judge initially released the audio recording only to trial counsel and trial defense counsel.[1] Appendix B is mainly email traffic between the district trial counsel and the military judge discussing the government's request to release the audio recording. Appendix B is relevant to this motion to attach because it provides background explaining why the audio recording of Appellee's court-martial was not originally included in the record of trial. On 26 October 2023, the military judge released the audio to trial counsel and trial defense counsel only. (Appendix B at 4.) As a result, the audio was not included in the record of trial because the military judge only authorized limited release. Trial counsel reengaged with the military judge and requested that the audio be released to government appellate counsel in preparation for oral arguments. On 7 April 2024, the military judge released the audio to both appellate government counsel and appellate defense counsel. (Appendix B at 3.) The military judge also stated that "[i]n the event AFCCA believes a release is needed from the military judge for them to review the audio, this email will serve that purpose as well." (Id.) On 8 April 2024, appellate government counsel received the audio recording and provided it to appellate defense counsel. (Appendix B at 1.) Now, the United States seeks to provide this Court with a copy of the audio recording.

The audio recording is a required part of the record of trial, but this Court's Rules contemplate that the record might not be complete at the time the appeal is filed and can be

[1] Rule 3.9 of The Uniform Rules of Practice Before Department of The Air Force Courts-Marial provides the following guidance on release of audio recording and transcribed records:

> Before signing of the Statement of Trial Results, neither audio recordings nor transcribed records of any proceeding will be released to any party to the trial, or to any other entity, without the prior approval of the military judge. Before approving such a release, the military judge may issue an appropriate protective order.

supplemented later. *See* Rule 20.1(c)(1)(F) and (c)(2). The inclusion of the audio recording ensures a complete record of trial in accordance with the Rules for Courts-Martial. For these reasons, the United States respectfully requests this Court grant this motion to attach the appendices.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing motion and Appendix B was delivered to the Court and the Air Force Appellate Defense Division on 19 April 2024 via electronic mail. Undersigned counsel hand delivered Appendix A to the Court and the Air Force Appellate Defense Division.

VANESSA BAIROS, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**Misc. Dkt. No. 2024-01**
Appellant	)	
	)	
v.	)	
	)	**ORDER**
Desiree M. HOLMES	)	
Master Sergeant (E-7)	)	
U.S. Air Force	)	
Appellee	)	**Special Panel**

On 3 April 2024, the court ordered oral argument in the above-captioned case on the following issue:

> **WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DISMISSED WITH PREJUDICE SPECIFICATIONS 1 AND 2 OF CHARGE II, AND SUPPRESSED ALL EVIDENCE FROM THE GUAM DEPARTMENT OF EDUCATION WHEN HE DID NOT FIND THAT THE PROSECUTORIAL MISCONDUCT IMPACTED APPELLEE'S SUBSTANTIAL RIGHTS.**

Accordingly, it is by the court on this 5th day of April, 2024,

ORDERED:

Oral argument on this issue will be heard at **1000 hours on Friday, the 31st of May 2024**, in the courtroom of the United States Air Force Court of Criminal Appeals, located at 1500 West Perimeter Road, Suite 1900, Joint Base Andrews – Naval Air Facility Washington, Maryland 20762.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**Misc. Dkt. No. 2024-01**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Desiree M. HOLMES	)	**PANEL CHANGE**
Master Sergeant (E-7)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 5th day of April, 2024,

ORDERED:

The record of trial in the above styled matter is withdrawn from Panel 3 and referred to a Special Panel for appellate review.

The Special Panel in this matter shall be constituted as follows:

JOHNSON, JOHN C., Colonel, Chief Appellate Military Judge
MASON, BRIAN C., Lieutenant Colonel, Appellate Military Judge
KEARLEY. CYNTHIA T., Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**Misc. Dkt. No. 2024-01**
Appellant	)	
	)	
v.	)	
	)	**ORDER**
Desiree M. HOLMES	)	
Master Sergeant (E-7)	)	
U.S. Air Force	)	
Appellee	)	**Panel 3**

On 27 March 2024, Appellant requested oral argument in the above-styled case. Appellee does not oppose the motion.

Oral argument is hereby ordered on the following issue:

> **WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DISMISSED WITH PREJUDICE SPECIFICATIONS 1 AND 2 OF CHARGE II, AND SUPPRESSED ALL EVIDENCE FROM THE GUAM DEPARTMENT OF EDUCATION WHEN HE DID NOT FIND THAT THE PROSECUTORIAL MISCONDUCT IMPACTED APPELLEE'S SUBSTANTIAL RIGHTS.**

Accordingly, it is by the court on this 3d day of April, 2024,

ORDERED:

Appellant's Motion for Oral Argument is **GRANTED** as specified above.

Oral argument on this issue will be heard in the courtroom of the United States Air Force Court of Criminal Appeals, located at 1500 West Perimeter Road, Suite 1900, Joint Base Andrews – Naval Air Facility Washington, Maryland 20762, at a time and date to be set by future order of the court.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellant,*	)	**UNITED STATES' MOTION FOR ORAL ARGUMENT**
v.	)	Before Panel No. 3
Master Sergeant (E-7) **Desiree M. Holmes** United States Air Force *Appellee.*	)	Misc. Dkt. No. 2024-1
	)	27 March 2024

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

Pursuant to Rule 25 of this Court's Rules of Practice and Procedure, the United States requests oral argument on the issue presented in this case. Oral argument will assist this Court in understanding the extensive facts related to the prosecutorial misconduct, identifying where the parties disagree, what principles of law the military judge misapplied, and whether the military judge abused his discretion. For these reasons, the United States respectfully requests that this Honorable Court grant this motion for oral argument.

[redacted]

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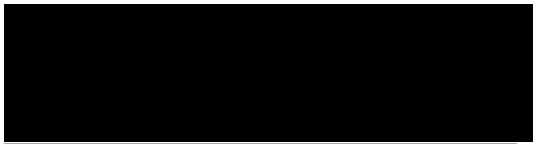
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 27 March 2024.



VANESSA BAIROS, Maj, USAF
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellant*	)	**APPELLEE'S RESPONSE TO APPELLANT'S MOTION FOR ORAL ARGUMENT**
v.	)	Before Panel No. 3
Master Sergeant (E-7) **DESIREE M. HOLMES** United States Air Force *Appellee*	)	Misc. Dkt. No. 2024-1 29 March 2024

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.2 of this Honorable Court's Rules of Practice and Procedure, Appellee hereby responds to Appellant's Motion for Oral Argument under Rule 25, filed on 27 March 2024. Appellee does not oppose Appellant's motion.

WHEREFORE, Appellee requests this Honorable Court grant Appellant's motion.

Respectfully Submitted,

[redacted]

HEATHER M. BRUHA, Maj, USAF
Air Force Appellate Defense Division
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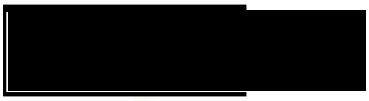
[redacted]

Counsel for Appellee

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 29 March 2024.

Respectfully Submitted,



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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellant,*	)	**REPLY BRIEF FOR THE UNITED STATES UNDER ARTICLE 62, UCMJ**
v.	)	Before Panel No. 3
Master Sergeant (E-7) **Desiree M. Holmes** United States Air Force *Appellee.*	)	Misc. Dkt. No. 2024-1
	)	27 March 2024

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

Under Article 62, UCMJ, and Rule 20(c)(1)(C) of this Court's Rules of Practice and Procedure, the United States files this reply to Appellee's Answer to Appellant's Appeal Under Article 62, UCMJ, filed on 20 March 2024. The United States maintains the arguments submitted in its initial brief, Appeal by the United States Under Article 62, UCMJ, filed on 29 February 2024. In response to Appellee's answer, the United States submits the following reply.

ARGUMENT

THE MILITARY JUDGE ABUSED HIS DISCRETION BECAUSE THE PROSECUTORIAL MISCONDUCT DID NOT RESULT IN ANY PREJUDICE TO APPELLEE. THEREFORE, DISMISSING WITH PREJUDICE CHARGE II, SPECIFICATIONS 1-2, AND SUPPRESSING THE GUAM DEPARTMENT OF EDUCATION RECORDS WERE NOT APPROPRIATE REMEDIES.

The military judge abused his discretion when he dismissed with prejudice Charge II, Specifications 1-2, and suppressed evidence from the Guam Department of Education (GDOE). His rulings were influenced by an erroneous interpretation of the law. Although the military judge found that the severity of the prosecutorial misconduct was high, he failed to determine whether the prosecutorial misconduct impacted the fairness of Appellee's trial. Prosecutorial

misconduct did occur, but the trial team took curative measures to authenticate the GDOE documents. Thus, Appellee suffered no prejudice because of the prosecutorial misconduct. Tellingly, in Appellee's 35-page answer brief, she never articulates what material prejudice to a substantial right she actually suffered. Given the lack of prejudice, Appellee was not entitled to relief. Thus, this Court should reverse the military judge's rulings.

A. Weighing the severity of the prosecutorial misconduct was not the test to determine prejudice.

Appellee argues that the military judge found prejudice in that "the severity of the misconduct was high." (Ans. Br. at 27; App. Ex. LII at para. 48.) But weighing the severity of the prosecutorial misconduct was not the test to determine whether the prosecutorial misconduct prejudiced Appellee. "[I]t is not the number of legal norms violated but the *impact* of those violations on the trial which determine the appropriate remedy for prosecutorial misconduct." United States v. Meek, 44 M.J. 1, 6 (C.A.A.F. 1996) (emphasis added). Moreover, the Supreme Court has recognized that "the aim of due process 'is not punishment of society for the misdeeds of the prosecutor but avoidance of an unfair trial to the accused.'" Smith v. Phillips, 455 U.S. 209, 219 (1982) (internal citation omitted). Appellee spends much time articulating the fraudulent notary and how the trial team, along with the base legal office, perpetuated fraud on the court. (Ans. Br. at 28-32.) But our superior Court specifically explained that looking at the fairness of the trial, not the culpability of the prosecutor, is imperative:

> In a due process analysis of prosecutorial misconduct this court looks at the fairness of the trial and not the culpability of the prosecutor. *See* Smith v. Phillips, 455 U.S. 209, 219, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982). Even where we find misconduct on the part of the prosecutor, this court will go on to look at the "overall effect of counsel's conduct on the trial, and not counsel's personal blameworthiness. United States v. Thompkins, 58 M.J. 43, 47 (C.A.A.F. 2003).

United States v. Edmond, 63 M.J. 343, 345 (C.A.A.F. 2006).

Military courts have implemented these principles in practice. For example, in United States v. Hornback, the court of criminal appeals (CCA), relying on Edmond and Thompkins, found no material prejudice to the appellant's substantial right to a fair trial despite prosecutorial misconduct. 2013 CCA LEXIS 114, *4-5 (N.M. Ct. Crim. App. 21 February 2013) (unpub. op.). Trial counsel repeatedly tried to introduce improper character evidence, solicit improper hearsay, and made improper closing arguments. Id. at *5, 7. Because the military judge either sustained an objection from trial defense counsel or interrupted trial counsel to issue a curative instruction to the panel members, the CCA found that the military judge cured any misconduct, and the panel members convicted the appellant based on the evidence properly admitted. Id. at *8. CAAF later affirmed and held that significant prosecutorial misconduct occurred, but that the error did not prejudice the appellant. United States v. Hornback, 73 M.J. 155, 156 (C.A.A.F. 2014), *cert. denied*, 574 U.S. 825 (2014). CAAF noted that trial counsel sought to elicit improper testimony from nearly every witness called during the government's case-in-chief and made improper closing argument. Id. at 160. CAAF further stated that trial counsel was unable to either understand or abide by the military judge's rulings and instructions. Id. Still our superior Court found that the appellant did not suffer any prejudice because the military judge gave repeated curative instructions to the panel members and issued a comprehensive instruction during trial counsel's closing argument. Id. at 161. CAAF held that the appellant was not prejudiced by trial counsel's misconduct despite characterizing it as "severe." Id. Thus, even severe prosecutorial misconduct does not always result in prejudice to an accused warranting a remedy. *See* id. The same is true for Appellee's case. Even if this Court determines the

prosecutorial misconduct to be severe, that finding alone did not allow the military judge to grant Appellee the relief at issue here, or even any relief at all.

United States v. Meek reinforces that trial courts can cure prosecutorial misconduct and that therefore dismissal, or other remedies, are not warranted when the accused suffered no prejudice. *See* 44 M.J. at 2. In Meek, trial counsel intimidated a witness. Id. at 3. During trial, the military judge, sitting alone, took extensive testimony on the issue of witness intimidation. Id. at 4. By the time of trial, the witnesses then understood that they could testify freely without fear of trial counsel. Id. CAAF held that although prosecutorial misconduct occurred, the military judge cured trial counsel's actions and; therefore, the appellant suffered no prejudice. Id. Like Meek where the prosecutorial misconduct was cured at the trial level, here, the prosecutorial misconduct was also cured at the trial level, albeit by the prosecution instead of a military judge. *See*; Meek, 44 M.J. at 7; *see also* Hornback, 73 M.J. at 161

It is well-established law that "[r]elief will only be granted if the trial counsel's misconduct 'actually impacted on a substantial right of an accused…'" United States v. Frey, 73 M.J. 245, 249 (C.A.A.F. 2014). A finding of prejudice was required in this case: not just assessing the severity of the misconduct without determining whether it had any effect on the fairness of the trial. *See* Thompkins, 58 M.J. at 47. Thus, the military judge abused his discretion when he misapplied well-established law and granted Appellee remedies without first finding that the prosecutorial misconduct infringed upon her substantial rights.

1. The severity of the prosecutorial misconduct did not result in prejudice because the prosecution took curative measures.

The military judge here should have considered whether the legal norm violated by the government impacted a substantial right of Appellee. The specific right at issue was whether Appellee had the right to legal and competent evidence introduced against her at trial. *See*

United States v. Kaiser, 58 M.J. 146, (C.A.A.F. 2003) (explaining that "the presumption of innocence is directly related to the requirement that guilt be established by legal and competent evidence beyond a reasonable doubt"). But the military judge never articulated whether the prosecutorial misconduct impacted Appellee's substantial rights, and disregarded that the trial team cured the prosecutorial misconduct. Although Ms. A[redacted], the records custodian, did not sign the original business records certification in the notary's presence, there was no dispute that Ms. A[redacted] did, in fact, sign the document. (T2 at 198-99.) The trial team took curative measures to ensure that the GDOE documents were properly authenticated by recalling Ms. A[redacted] to testify to lay the proper foundation and execute another business records certification. (T2 at 164; App. Ex. XXXVII.) Appellee has not disputed that these measures rendered the GDOE documents admissible, negating any harm that might have been caused by the false notary originally used as a part of the initial attempt to authenticate the documents.

Not only does Appellee ignore these curative measures, she also states that Ms. A[redacted] did not review the documents until 13 October 2023, five days before her in-court testimony, implying that the records custodian released the documents without ever reviewing them. (Ans. Br. at 6.) Yet a closer reading of the transcript revealed that Ms. A[redacted] did look at the files before 13 October 2023. After Ms. A[redacted] received a tasker to make copies of Mr. Holmes' files for this case, she had her administrative assistant make copies before her department transmitted the files to her legal team. (T2 at 167.) On cross-examination, when asked when she "see[s] the file *again* for the first time since [her assistant] made a copy of it," Ms. A[redacted] stated it was Friday, 13 October 2023. (T2 at 170.) On this date she "reviewed [the files] *again* just to make sure it's the *same file that was [previously] transmitted*, which it was and in case there were any questions on it." (T2 at 170.) That Ms. A[redacted] "reviewed the file to make sure it's exactly the same" suggested

that Ms. A[redacted] had, in fact, reviewed the same set of files prior to 13 October 2023. (Id.) Despite the chain of events of when Ms. A[redacted] reviewed the documents, her sworn testimony specified that she reviewed the 224 pages of GDOE records. (T2 at 189-95.) And she confirmed that the excerpts in Prosecution Exhibits 16-21 for identification were excepts from the 224 pages of Mr. Holmes GDOE records she previously reviewed. (Id.) Thus, there was no question that the GDOE documents themselves were actual copies of Mr. Holmes' employment records, as authenticated by Ms. A[redacted]. The only falsity was that Ms. A[redacted] signed the original business records certification in the presence of the notary. The prosecutorial misconduct did not infringe on Appellee's right to competent evidence introduced against her at trial because the trial team obtained a new, proper business records certification *and* had Ms. A[redacted] testified to properly authenticate the GDOE records. Thus, Appellee suffered no prejudice. The trial team cured any potential negative impact of the prosecutorial misconduct before any records from the GDOE were published to the finder of fact.

Other than mentioning the severity of the prosecutorial misconduct, the military judge and Appellee never articulated a substantial right that was infringed upon at trial. Appellee has still failed to do so in her Answer brief. Without a nexus between prosecutorial misconduct and prejudice to an accused, the misconduct must be characterized as harmless error and beyond the scope of dismissal or reversal. United States v. Osorio, 929 F.23d 753, 763 (1st Cir. 1991). In the absence of any prejudice to Appellee, no relief could be granted.

B. The military judge needed to find prejudice before granting relief.

Appellee asserts that the Government's reliance on United States v. Morrison, 449 U.S 361 (1981) and United States v. Meek, 44 M.J. 1 (C.A.A.F. 1996) for the premise that the military judge needed to find prejudice prior to granting relief "is misplaced as both were reviewed after conviction when a prejudice analysis is definitely required." (Ans. Br. at 26 n.6.) This does not comport with the body of law on this issue. For example, in Smith v. Phillips, the prosecution failed to disclose that, during trial, a juror applied for employment with the District Attorney's office. 455 U.S. at 212-13. The trial judge found that the juror's "conduct did not impair his ability to render an impartial verdict" – in other words, the trial judge conducted a prejudicial analysis, but found no prejudice resulted from the prosecutorial misconduct. Id. at 220. The Supreme Court later held that the district court and court of appeals erred when they held, on federal *habeas* review, that the prosecutor's failure to disclose the juror's job application, without more, violated the accused right to due process and required a new trial. Id. at 214, 220. The Supreme Court highlighted the trial court's finding of no prejudice. Id. at 220. Given that there was a finding of no prejudice at trial, the Supreme Court said that the district court and court of appeals could not reverse based on prosecutorial misconduct alone. Id. The Supreme Court recognized that "the misconduct's effect on the trial, not the blameworthiness of the prosecutor, is the crucial inquiry for due process purposes." Id. at 220, n.10. Thus, it follows that to provide a remedy in the first place, a trial judge must also first find prejudice.

In additional to Smith v. Phillips, virtually every federal circuit court of appeals recognizes that a dismissal of an accused indictments at the trial level without a finding of prejudice contradicts well-established Supreme Court law. United States v. Derrick, 163 F.3d 799, 804, 807 (4th Cir. 1998). Requiring a finding of prejudice just at the appellate level is

illogical,[1] implying that the law applicable at the appellate courts does not apply to the trial courts. There is no practical reason why a trial judge should be able to punish the government for prosecutorial misconduct absent any prejudice to an accused, when an appellate court cannot.

Appellee also states that this Court in United States v. Bowser, 73 M.J. 889 (AF. Ct. Crim. App 2014) did not "say the military judge…found the prosecutorial misconduct prejudice the appellant." (Ans. Br. at 23.) But Appellee makes the same mistake as the military judge. The military judge here wrongfully asserted that "Bowser makes clear, this Court is not required to do a prejudice analysis when this Court finds prosecutorial misconduct at the trial level." (App Ex. LII at para. 36.) But in Bowser, the military judge found prejudice – "the simple fact is the government has been seeking a delay, and that delay will work to the detriment of the accused." Id. at 895. The military judge then explained that dismissal with prejudice was appropriate because "the government was still perfecting its case, that the failure to perfect [its] case in the previous 10 months was without good cause." Id. This is an unmistakable finding of prejudice to the accused.

Lastly, in footnote 7, Appellee states that this Court in Bowser did not actually hold that "prosecutorial misconduct does not automatically require [relief]; instead relief is granted only if trial counsel's misconduct actually impacted on a substantial right of an accused (i.e. result in prejudice)." (Ans. Br. at 26 n.7.) Appellee asserts instead that the Court was "discussing basic legal principles not holding anything regarding misconduct specially in this case." (Id.) While it

[1] The test outlined in United States v. Fletcher, 62 M.J 175 (C.A.A.F. 2005) is only applicable at the appellate level because it requires a conviction. Cases cited by the United States requiring prejudice before dismissing charges, did not require a conviction. Thus, our reading of Morrison and Meek were not misplaced. As mentioned in our initial filing, the military judge should have never conducted an analysis under Fletcher. (App. Br. at 28.) The government's mention of the Fletcher factors in the motion to reconsider was a typographical error. (Id.)

may be true that this Court's recitation of law was not a "holding," it still indicates that this Court endorsed and applied that legal principle. It would be illogical for this Court to have cited our superior Court for a proposition of law – requiring a finding of prejudice before granting relief – and then to have ignored it. This proposition of law coupled with the discussion of the military judge's finding that seeking a delay would prejudice the accused demonstrated that this Court believed that the military judge found prejudice. Thus, Bowser did not suggest that trial judges need not find prejudice before dismissing charges. The military judge abused his discretion when he affirmatively stated that he need not conduct a prejudice analysis at the trial level.

C. This Court is not bound by government's concession that dismissal was an appropriate remedy.

Appellee asserts that "how could a military judge abuse his discretion when his decision falls within the confines of the law, and the Government agreed to the remedy?" (Ans. Br. at 33.) But it was not the government's position going into oral argument to concede that dismissal was appropriate. Before making the concession, trial counsel said that dismissing Charge II, Specifications 1-2 "would be grave." (T2 at 483-84.) It was only after the military judge's repeated questions that trial counsel caved in and agreed that dismissal of Charge II, Specifications 1-2 to "being a potential remedy." (T2 at 483-85.)

Appellee also asserts the following:

> The Government wants this Court to only consider the argument of the new trial team and appellate government, but as the military judge found, that logic is flawed. As the military judge aptly noted, "By that logic the government could cho[o]se to replace government counsel anytime a military judge ruled against them with new detailed counsel who present a different argument than the previously detailed government argument."

(Ans. Br. at 33.) This notion relied on by the military judge was flawed. First, the government revoked its concession immediately in its motion for reconsideration: this could have happened with the current or prior trial team. (App. Ex. XLVI.) Second, the government would not choose to replace a trial team after every adverse ruling. This would be costly and unreasonable. Third, the government did not revoke a concession after the trial court relied on it and then the trial proceeded on the merits based on that concession – for instance trial counsel stipulating to facts or anticipated testimony directly relating to the merits of a case. Here, the concession related to a matter of law – whether specifications should have been dismissed – during a motions hearing.

After oral arguments on the motion to dismiss for prosecutorial misconduct, the trial remains in recess. As a result, trial counsel's concession had no bearing on the merits of the case. (T2 at 489.) Then the military judge granted Appellee relief in-part. (App. Ex. XLIII.) In turn, the government filed a motion for reconsideration with arguably new facts in that the government was no longer conceding to dismissing the false official statement specifications. (App. Ex. XLVI at 1, 7.) The motion to reconsider articulated the government's position that dismissal without a finding of prejudice strayed from well-established precedent. (App. Ex. XLVI.)

But further, this Court is not bound by government concessions. *See* United States v. Taylor, 47 M.J. 322, 328 (C.A.A.F. 1997) (acknowledging that the government conceded error, but mentioned that the court is not bound by government concessions) (Crawford, J. dissenting). An appellate court "is not bound by a litigant's concession on an issue of law." NASA v. Nelson, 562 U.S. 134, 163 n.* (2011) (citing Grove City College v. Bell, 465 U.S. 555, 562 n.10 (1984)). In a recent decision, United States v. Flores, ___ M.J. ____, No. 23-0198 /AF (C.A.A.F

14 March 2024), our superior Court recognized that concessions on questions of law, such as statutory interpretations, were not binding on the court and therefore did not foreclose review. CAAF relied on Supreme Court precedent for this proposition. Id. (citing Grove City College, 465 U.S. at 562 n.10). Here, whether dismissal of charges with prejudice was an appropriate remedy is a question of law raised on this appeal. So, the government's prior concession over an appropriate remedy is not binding on this Court. *See* id. In any event, a concession from the government did not excuse the military judge from applying correct principles of law. The military judge was still required to find prejudice before dismissing Charge II, Specifications 1-2. Thus, the military judge abused his discretion with his erroneous interpretations of the law.

D. Suppressing GDOE records was not an appropriate remedy where the military judge found no prejudice.

Appellee asserts that "the military judge chose remedies 'to identify the taint in the [accused's trial] and 'neutralize' it by 'tailoring relief appropriate in the circumstances' to assure the accused's due process rights of law 'and a fair trial.'" (Ans. Br. at 35.) When the military judge issued his rulings there was no taint. The trial team cured the faulty notary before trial defense counsel moved to dismiss for prosecutorial misconduct. The prosecution neutralized the taint when they provided a new business records certification and had Ms. A[redacted] testify under oath – either of which was completely sufficient to properly authenticate the GDOE records.

Appellee also asserts that this case is distinguishable from United States v. Vargas, 83 M.J. 150 (C.A.A.F. 2023) because the military judge here "did consider other available remedies and choose the remedies based upon this Court's discretion to impose adequate remedies." (Ans. Br. at 35.) While this may be the case, in Vargas the military judge did, in fact, find prejudice to the accused, and CAAF noted this finding in its opinion. *See* id. at 155. But the military judge's analysis in Vargas was erroneous in that the analysis was "limited to whether each remedy would

cure the prejudice to the accused and failed to articulate why dismissal was just under the circumstances." Id. at 157. Because the military judge failed to articulate why dismissal was just under the circumstances, CAAF still found that the military judge abused her discretion when dismissing charges because of an erroneous view of the law. Id. at 153. Even though the military judge here considered other remedies, that did not allow him to escape the requirement to find prejudice to Appellee. For the reasons articulated above, Appellee suffered no prejudice, and the military judge found none. Thus, excluding GDOE evidence was also improper and an abuse of discretion.

CONCLUSION

The United States acknowledges that prosecutorial misconduct occurred and does not condone the behavior of those members of the government involved. That said, Appellee was not entitled to a windfall simply because the severity of the prosecutorial misconduct may have been high. The United States charged Appellee with significant fraudulent crimes, and society has an interest in holding her accountable. Society should not be punished for the misdeeds of the government when Appellee suffered no prejudice. *See* Smith 455 U.S. at 219. Justice here did not equate to granting relief when the military judge merely found that the severity of the misconduct was high. The military judge did not identify, and could not identify, any actual prejudice because no prejudice was established on the record. Well-established law mandates that relief, such as dismissal of charges and suppression of evidence, is appropriate only when the prosecutorial misconduct infringes on a substantial right of an accused. *See* Morrison, 448 U.S. 361 at 365; Frey, 73 M.J. at 249; Meek, 44 M.J. at 5. Accordingly, when the military judge granted relief without making a prejudice finding, he abused his discretion based on erroneous interpretations of the law.

In sum, the United States respectfully requests that this Honorable Court reverse the military judge's decision to dismiss with prejudice Charge II, Specification 1-2, and suppress the evidence from the GDOE. Further, the United States asks this Court to determine that the GDOE records, Prosecution Exhibits 16-21 for identification and Prosecution Exhibit 31 are admissible and remand the case to the trial court for further proceedings.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 27 March 2024.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES
Appellant

v.

DESIREE M. HOLMES
Master Sergeant (E-7)
United States Air Force
Appellee

Misc. Dkt. No. 2024-1

APPELLEE'S ANSWER TO APPELLANT'S APPEAL UNDER ARTICLE 62, UCMJ

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellant*	)	**APPELLEE'S ANSWER TO APPELLANT'S APPEAL UNDER ARTICLE 62, UCMJ**
v.	)	Before Panel No. 3
Master Sergeant (E-7) **DESIREE M. HOLMES** United States Air Force *Appellee*	)	Misc. Dkt. No. 2024-1 Filed on: 20 March 2024

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Statement of the Case

The Government inaccurately represented the issue as the Government merely failing to "properly execute the notary attached to [a] business records certification." Gov. Br. at 3. Despite this characterization, the Government committed fraud upon the court. App. Ex. XXXIX. Aside from this overall contention, the Appellee generally accepts the Government's statement of the case as it discusses the procedural background.

Statement of Facts

1. <u>All Three Charges Brought Against the Appellee Related to the Same Alleged Conduct.</u>

The Appellee was charged with dereliction of duty in violation of Article 92, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 892, for negligently failing to report that her dependent husband had moved to Guam. Charge Sheet. She was also charged with two specifications of false official statement in violation of 107, UCMJ, 10 U.S.C. § 907, for statements made on Air Force Form 594 related to her husband's location. *Id.* Finally, the Appellee was charged with larceny related to the misrepresentation of her husband's whereabouts in violation of Article 121, UCMJ, 10 U.S.C. § 921. *Id.* On 2 October 2023, the Appellee was arraigned on all three charges.

T1 at 4, 8, 10.

2. Capt P.H. Directed the Paralegal to Sign a Notary on a Business Records Certification Falsely Attesting that the Affiant Physically Appeared Before Her When the Affiant Did Not.

The trial team attempted to get the Guam Department of Education (GDOE) records regarding the Appellee's husband. The GDOE filed a motion to quash a subpoena for the records. App. Ex. I. The military judge ordered the records be produced for an *in-camera* review. App. Ex. III. The military judge then released all 224 pages of documents to the parties subject to a protective order. App. Ex. VI. Capt P.H., assistant trial counsel, recognized the Government needed a business records certification to get the records into evidence at trial. T2 at 257. However, the paralegal was having difficulty getting ahold of the records custodian, so Capt P.H. decided the two of them would go to the GDOE in person on Wednesday, 27 September. T2 at 257-58. Motions were due the next day, Thursday, 28 September. *Id.*

Capt P.H. felt pressed for time—there was a looming motions deadline, he had to manage the other cases in the office, and he had to drive to the GDOE, which was about 30 minutes away. T2 at 260. Capt P.H. and the paralegal brought the business records certification, a notary stamp, a notary logbook, and everything else needed to effectuate a notary at the GDOE. *Id.* When they arrived, they were taken to the legal office at the GDOE. T2 at 261. The Human Resources (HR) representative indicated they could not sign the business records certification until it was vetted by their legal representative who was in court for the next few hours. *Id.* Understanding the motions deadline was the following evening, Capt P.H. decided to leave the documents for legal to review. *Id.*

The next day, Capt P.H. told the paralegal, "[T]his is our top priority. This is the thing that has to happen right now or else we bust the motion deadline; we would not be able to admit it . . .

." T2 at 263. That day, Capt P.H. and the paralegal again went to the GDOE. When he arrived, he explained, "I'm here to retrieve this business affidavit and make sure it's properly filled out and signed." *Id.* Capt P.H. told the legal office at the GDOE that he could not accept page one of the document "because it's already been signed." T2 at 264. The lawyer for the GDOE then asked if there was any other way they could verify Ms. K.A.'s signature. T2 at 265. Instead of insisting that the document be re-executed in their presence, Capt P.H. asked if Ms. K.A. had a signature stamp. *Id.* He tested the stamp on post-it notes, and the signature matched what was on the business records certification. *Id.* At that point it was around 1400-1430, and he was told Ms. K.A. was not coming in. *Id.*

The language on the second page attested that the affiant personally appeared in front of the person notarizing. App. Ex. XXI. Because of that language, the paralegal asked Capt P.H. if she should still notarize. T2 at 232. Capt P.H. said verifying the stamp was "good enough" and directed her to notarize the document. T2 at 232, 266. He also had the paralegal "line through the 27th and put the 28th and put her initials to indicate the proper date that the form was signed to [his] knowledge." T2 at 266. This false business records certification was offered as the basis of foundation and authentication for Prosecution Exhibits 16 through 21, 30 and 31.

3. <u>Capt P.H. Knowingly Offered the Falsified Business Records Certification Into Evidence.</u>

At the motions hearing, the Government argued preadmission was appropriate in the interest of judicial economy because "this is a BAH fraud case which has hundreds and hundreds of documentary evidence." T1 at 48. The Government also expressed its intent in referencing the exhibits during opening statements. *Id.* The Defense objected to the preadmission on several grounds, including authentication and foundation. T1 at 54. The Defense noted on the record later that Appellate Exhibit XXI was originally dated 27 September, but someone scratched out the "28"

above it and initialed the change. T1 at 89. Nothing further was discussed on the record regarding the date change at that time. The military judge withheld ruling on the motion to preadmit Prosecution Exhibits 16 through 21. T1 at 98.

The Government offered Prosecution Exhibits 16 through 21 into evidence a second time. T2 at 3. When discussing Mil. R. Evid. 803(6), Capt P.H. offered the falsified business records certification again. T2 at 6. He explained that on page one of the falsified document, Ms. K.A., records custodian for the GDOE, "signed and attested" that the documents making up Prosecution Exhibits 16 through 21 were "true and correct, that they were pulled properly, that they are true and correct copies of the original records in their possession." *Id.* Capt P.H. stated the business records certification was "signed and sworn on page 2."[1] T2 at 7. When asked what that meant, Capt P.H. proffered that under Mil. R. Evid. 902(11), it was the "certification of a custodian or other qualified person that complies with federal statutes or rules." *Id.* He purported:

> The records have a high degree of reliability, Your Honor, because one, they were produced pursuant to [the military judge's] written order; two, the documents, themselves, throughout have various statements guaranteeing their authenticity such as, you know, lying or not telling the truth on these records would go to their falseness. Or it would lead to someone being rejected from employment. As such, the government believes and intends that these records should be allowed under 902(11) and 803(6).

T2 at 7. The Defense expressed concerns again about the falsified business records certification and stated that they had one copy of the affidavit that appeared to be signed by Ms. K.A. "without any corrections, additions, or changes to it." T2 at 10. The Defense went on to state they had another copy of it that has a change to the date with initials that look like "CEV." *Id.* The Defense further noted that the initials seemed to be the paralegal's not the affiant. *Id.* The Defense asked for the affiant to testify in court about the records. *Id.* The military judge inquired of Capt P.H.

[1] Page 1 had Ms. K.A.'s signature, while page 2 had the false notary on it. App. Ex. XXI.

whether Ms. K.A. was in the building. T2 at 13-14. Capt P.H. said as the Government indicated in the R.C.M. 802 hearing, Ms. K.A. was not physically present, but on telephonic standby. T2 at 14. The military judge responded, "I don't remember you telling me that. When was that?" *Id.* Capt P.H. responded, "Apologies, Your Honor, I believe I confused what I stated this morning." *Id.*

The military judge gave the Government a minute to figure out if Ms. K.A. could come to the building and referenced the issue with the date change. *Id.* Capt P.H. stated, "Yes, Your Honor, and I'll point you to page 2, because in page 2 in that notary, it does indicate that the date that the document was signed and notarized was 28 September, which matches the date on the first page." *Id.* The military judge pushed back stating, "I understand that completely. What I have, though, is I have a document that is signed by an affiant that then someone else than the affiant changed the date at the top. Do you agree with that?" *Id.* Capt P.H. affirmed and asked for a moment. *Id.* Capt P.H. proffered that the paralegal would testify that the document was dropped off with the GDOE on 27 September 2023, the next day it was signed by the affiant, and then the paralegal changed the date and notarized it. T2 at 14-15.

Capt P.H. followed-up that Ms. K.A. was not available until 1400. T2 at 15. The military judge stated he assumed the Defense would not accept Capt P.H.'s proffer. *Id.* The military judge told Capt P.H. the court needed evidence and asked if he had any. *Id.* Capt P.H. responded that he could call the paralegal to the stand to which the military judge stated he would not tell the Government how to try its case. *Id.* Capt P.H. asked for a moment to confer with co-counsel and then asked the military judge to postpone his ruling until after Ms. K.A. testified at 1400. *Id.* The military judge waited to rule.

4. Ms. K.A. Did Not Have the GDOE Records Before Her When She Signed the Falsified Business Records Certification.

At 1523 on 18 October 2023, the parties went back on the record for Ms. K.A. to testify. T2 at 160. At this point, the Government offered a new "record certification signed by Ms. [K.A.] from GDOE to cover Prosecution Exhibits 16 through 21 for identification under 902(11)." *Id.* It was offered to replace Appellate Exhibit XXI—the falsified business records certification. *Id.* The new affidavit was dated the same day—18 October 2023. App. Ex. XXXVII. The Defense objected to the affidavit arguing it was unclear if Ms. K.A. was the proper records custodian and whether she reviewed the documents before handing them over to the Government. T2 at 162.

Despite signing the affidavit on 27 September (or 28 September), Ms. K.A. testified that she did not review any records associated with Appellee or Appellee's husband until 13 October 2023 (5 days prior to her in-court testimony). T2 at 174.

The military judge indicated this discrepancy to the Government. The Government responded by marking the 224 pages of GDOE records as Appellate Exhibit XXXVIII. T2 at 187. Then, the Government recalled Ms. K.A. T2 at 185-86.

During her testimony, the Government asked if she recognized Appellate Exhibit XXXVIII as the records she reviewed earlier that day. T2 at 188. She said they were. *Id.* The Government then presented Prosecution Exhibits 16 through 21 for identification to Ms. K.A. in an attempt to confirm the same pages also made-up Appellate Exhibit XXXVIII.[2] T2 at 188-95.

To be sure, Ms. K.A. never met with the base paralegal. T2 at 196. Ms. K.A. signed Appellate Exhibit XXI in her office and provided it to her legal department at some point after. T2 at 197. She did not meet with anyone from the Air Force the day she signed the document. T2

[2] Of note, the Appellee's copy of the record does not contain a clear version of what Prosecution Exhibits 16, 17, 18, 19, 20, or 21 are.

at 197-98. She never "personally appear[ed]" before the paralegal when she "signed and executed the foregoing instrument." T2 at 199. The Government nevertheless "move[d] Prosecution Exhibits 16 through 21 for identification into evidence as Prosecution Exhibits 16 through 21." T2 at 201.

5. Capt P.H. Attempted to Minimize His Mistake Instead of Notifying the Court and the Defense.

On 19 October 2023, the Defense filed a motion to dismiss the charges and specifications. T2 at 206[3]; App. Ex. XXXIX. The motion was based on prosecutorial misconduct. T2 at 208. The Government asked the court's permission for Capt P.H.'s presence to be excused due to the motion—the military judge granted the request. *Id.* For purposes of this appeal, the Government agreed with the facts as articulated by the Defense in that motion. T2 at 210.

A. An Experienced Paralegal Signed that Ms. K.A. Had "Personally Appeared" in Front of Her When Signing the Business Records Certification—Ms. K.A. Had Not.

The paralegal testified that she changed the date on page one from 27 to 28 September and notarized the certification at the GDOE prior to making a copy for the motion. T2 at 234. The Defense confronted the paralegal with Appellate Exhibit XL, which was another copy of the business records certification that had the notary section executed but did not have a date change. T2 at 234-35. The paralegal could not explain that copy. *Id.*

The paralegal admitted to talking to Capt P.H. before her testimony. T2 at 233. She admitted this conversation happened after the Defense filed their motion to dismiss. T2 at 236. According to the case paralegal, Capt P.H. talked about what he remembered happening on 27-28

[3] In the interim, the Appellee submitted a Pretrial Agreement to the convening authority's office directed to the Staff Judge Advocate (SJA) of the General Court-Martial Convening Authority (GCMCA). T2 at 206.

September. T2 at 237-38. The paralegal admitted she was the one who sought out Capt P.H. after the Defense filed their motion to dismiss, and that she did so to figure out what the basis of the prosecutorial misconduct was.

The military judge then questioned the paralegal. T2 at 243. The paralegal had been a paralegal for about two and half years and done about a hundred notaries by that point. T2 at 245. She explained the correct process of notarizing a document—verifying that the signatory is physically present, checking the identification of the signatory, and witnessing the signing of the document. T2 at 245-46. Despite understanding these requirements, the first time the paralegal ever saw Ms. K.A. was when she testified in the motions hearing. T2 at 247. The paralegal notarized the document because Capt P.H. told her to. *Id.*

The paralegal admitted she sought out Capt P.H. after receiving the defense motion to dismiss for prosecutorial misconduct. T2 at 249. While the paralegal first told the military judge that she asked generally about the trial and not the motion, she later admitted that she was trying to find out what was going on with the Defense's motion to dismiss. T2 at 249-50. When confronted about her change in testimony, the paralegal stated she was "a little bit confused" and did not know if the military judge meant "the affidavit or if a motion was included in that." T2 at 250. The military judge reminded the paralegal that if she is confused, it is her "duty to say, 'I'm confused.'" *Id.*

When the paralegal talked to Capt P.H. about the motion that morning, Capt P.H. said he was sorry he made her do the notary. T2 at 250-51. He seemed stressed and upset when he said it. T2 at 251. Before having the paralegal step down, the military judge instructed her not to speak with her leadership or Capt P.H. about her testimony—she confirmed that she could follow that order. T2 at 252. The military judge then ordered everyone in the gallery not to speak with Capt

P.H. and for counsel to ask permission to interview Capt P.H. prior to any contact. *Id.*

B. Capt P.H., an Experienced Attorney and Former Paralegal, Testified that He Believed the Business Records Certification was Properly Notarized.

Capt P.H. directed the paralegal notarize the document despite knowing that the paralegal had not witnessed the requisite information. T2 at 266. Capt P.H. also directed the paralegal to "line through the 27th and put the 28th and put her initials to indicate the proper date that the form was signed to [his] knowledge." *Id.* Despite notarizing hundreds of documents and understanding the requirements for proper notarization, Capt P.H. nevertheless testified that the document was properly notarized. T2 at 267, 275. He said he had properly verified the authenticity of the signature, or he would not have submitted it to the court otherwise. *Id.*

Capt P.H. had nine and a half years of legal experience, with significant experience as a notary—performing around 50 to 200 notaries and serving as the case paralegal in 40-42 courts-martial. T2 at 268, 275, 303. During those notaries, he used his notary log to have the person signing the document also sign his notary log. *Id.* When asked why it was important to have the person sign his notary log, Capt P.H. said, "I guess legally speaking, because you're trying to prove that the legal realm is always on guard for forgeries, or falsehoods, or things that don't make sense." *Id.* He understood that these safeguards were intended to ensure that a "document [is] signed by this person on this date." *Id.* When asked if the paralegal completed her notary logbook while at the GDOE on 27-28 September, Capt P.H.. said, "I'll be honest, that day the notary logbook was not the thing I was thinking about." *Id.*

Regarding feeling rushed, Capt P.H. admitted he was on the case when the civilian defense counsel requested more time for a deadline due to being in a complex sentencing case. T2 at 279. Capt P.H. changed his opinion during cross-examination regarding whether the GDOE records are the most probative evidence on the issue of the Appellee's husband living in Guam—a position he

had earlier when trying to get the documents into evidence. T2 at 280-82. Capt P.H. testified he did not believe it was wrong for the paralegal to notarize the business record certification when she did not see the affiant sign. T2 at 283. He stated he did read the language on the notary affidavit "likely before [they] provided it the first time and definitely yesterday through this trial." *Id.*

Capt P.H. admitted he recognized there might be an issue with the business records certification prior to Ms. K.A. testifying the day prior Wednesday, 18 October 2023. T2 at 284. Capt P.H. said he then went to his leadership to include his Deputy Staff Judge Advocate (DSJA), Staff Judge Advocate (SJA), and the law office superintendent (LOS). T2 at 285. Capt P.H. told them he recognized there was a problem with the notary affidavit. T2 at 286. The military judge then stopped the testimony to point out the superintendent was in the gallery. *Id.* The Defense did not have an issue with her attendance. *Id.* When asked to walk through the conversation with his leadership, Capt P.H. said the conversation happened in the last 24 hours, which had "honestly, been a bit of a blur." *Id.*

Capt P.H. explained that after he recognized there might be a problem, the legal office and trial team tried to get Ms. K.A. to the building "because [they] expected [the Defense] to object, and so [they] were trying to get her [there] to testify anyway. [They] recognized it was a problem. [They] began to think of ways to resolve if there was an issue with the notary affidavit." T2 at 287. When asked what the issue with the notary affidavit was, Capt P.H. said, "the issue that was recognized yesterday was that Ms. [K.A.] had not personally appeared before [the paralegal] and myself." *Id.*

He explained that the result his discussion with leadership was to have Ms. K.A. re-sign a new affidavit. T2 at 287-88. Specifically, Capt P.H.'s leadership's answer was to "have her try

to re-sign a new affidavit, brand new, completely cut the old one or have her testify and lay the foundation that way." T2 at 289. Capt P.H. was asked several times if he told his leadership that the falsified business records certification had already been filed with the court. T2 at 290-91. His leadership's response to Capt P.H. directing the paralegal to notarize the document when Ms. K.A. did not sign in front of her was to suggest they do "remedial notary training" for the office. T2 at 291.

Capt P.H. then discussed the issue with the rest of the trial team: "Now we have to get the – either the new affidavit – or her sitting here in court. We were really focused on trying to admit Prosecution Exhibits 16 through 21." *Id.* There was no discussion on what to do with the Appellate Exhibit that was previously offered to the court. T2 at 292. When asked whether having Ms. K.A. testify in court made everything that happened with the business records certification "okay," Capt P.H. responded, "I don't believe so sitting here now, sir, in this witness box." *Id.*

The Defense then asked Capt P.H. about that morning when he found out about the motion to dismiss based on prosecutorial misconduct. T2 at 293. Capt P.H. indicated he is not sure he read the full motion, but that he was reading it over his co-counsel's shoulder. *Id.* Shortly after reading the motion, Capt P.H. informed the trial team that he knew he would probably have to testify as a witness because of the motion. T2 at 295. Despite this, the district trial counsel instructed Capt P.H. to continue working on the case and, specifically, conduct research on prosecutorial misconduct to aid in the Government's response. *Id.*

Capt P.H. admitted to also speaking with the paralegal after reading the motion, despite knowing they would both be testifying as witnesses. *Id.* Capt P.H. testified that he told the case paralegal that the whole situation was his fault as the officer, and that he understood his ethics rules and she should not be penalized for what he did. T2 at 295-96. When asked if that was all

they discussed, Capt P.H. responded that he believed so. T2 at 296. When asked if he wanted a minute to make sure, the district trial counsel then stood up and told the court it was an appropriate time for a break. T2 at 297. The military judge denied this request. *Id.* Capt P.H. went on to say, "[H]onestly, my memory of that conversation is predominately focused on making sure that [the paralegal was] okay. I cannot recall here, truthfully whether or not she and I may or may not have discussed [27-28 September] I – if it was – it was very brief." *Id.* The Defense responded, "I know you were struggling with some stuff in 2016 remembering that. I'm talking about like four hours ago. You don't remember having a conversation about it? Nothing?" *Id.* Capt P.H. responded, "I – if mentioned – it was brief and it was in the context of, 'Is she okay?'" *Id.*

The military judge then questioned Capt P.H.:

> Q. [Capt P.H.], I anticipate mine will be short. Let me just ask you, would you agree that whenever you directed [the paralegal] to sign that document, that that was fraud?
>
> A. I did not believe it at the time, sir, but yes.
>
> Q. Why didn't you believe it at the time?
>
> A. I thought I had enough assurances from [legal], the other two women there, the stamp to verify the authenticity of the signature.
>
> Q. Had you ever done a notary in that manner?
>
> A. I had, years and years ago, but I will admit that the person was present.
>
> . . .
>
> Q. Okay. And then you realized – let me ask you this – did you – in your mind – did you ever realize that that is fraud?
>
> A. I don't think it really sunk in, Your Honor, until last night when Ms. [K.A.] said she never read those documents. I don't think the truth really set in.
>
> Q. Okay. But you felt it enough that you went and talked to your leadership before then, right?

A. Yes, sir.

Q. So, if it hadn't sunk in at that point that you talked to – or that you heard Ms. [K.A.] say what she said on the stand – why did you talk to your leadership?

A. I think there was, you know, at that point, I recognized there was a problem with the document. I should clarify, Your Honor, I didn't believe it to be fraud. I believe it to be improperly notarized and, in my mind, at the time it was how do we solve the problem of getting these documents into evidence, not what have I done?

Q. And I'm definitely not trying to put words in your mouth but, I mean, you would agree that whenever I get an affidavit from someone, whenever the court gets an affidavit from someone, that's saying the document is what it purports to be, right?

A. Yes, Your Honor.

Q. So, that document is not true, would you agree that that is fraud?

A. I'd have to look at the legal definition, Your Honor, but I believe so, yes.

Q. Okay. And I understand what you're saying but when you went and talked to your leadership, you told them, "Hey, she never signed the affidavit in our presence," correct?

A. Yes, Your Honor.

Q. Did anyone tell you; you need to tell the defense counsel?

A. No, Your Honor.

Q. Now, turning to conversations that you've had with your co-counsels, did either of them tell you that you needed to tell the court?

A. No, Your Honor.

Q. Did either of the tell you that you needed to tell the defense counsel?

A. No, Your Honor.

T2 at 310-12.

The next morning, at 0840 on 20 October 2023, the military judge recalled Capt P.H. to once again confirm he spoke with his leadership Wednesday around noon about the business records certification, that he spoke with his two co-counsel about it as well, and that no one told

him he needed to inform the court or defense counsel; Capt P.H. informed the court that that was correct. T2 at 317-20.

6. The Staff Judge Advocate and Deputy Staff Judge Advocate also Knew about the Falsified Document and the Court's Reliance on it.

The Government elected not to call any witnesses for the motion. T2 at 322. The Defense called the SJA, Colonel Z.A., to testify. T2 at 322. The military judge previously denied the Government's request to interview Colonel Z.A. prior to his testimony. T2 at 382.

A. The Staff Judge Advocate Initially Did Not Believe that Capt P.H. Directing the Paralegal to Sign the Notary While Not in the Presence of the Affiant was a "Material Fact."

Colonel Z.A. first became aware of a possible issue with one of the documents submitted to the court when he was in the courtroom and the Defense expressed a concern about a pen-and-ink change to a date. T2 at 337. He did not understand the context until Capt P.H. came to his office during the lunch hour. *Id.* The Defense asked Colonel Z.A. to walk through the meeting and what Capt P.H. said.

Capt P.H. told Colonel Z.A. about the issues related to the business records certification. Colonel Z.A. received an update end of day Wednesday, 18 October 2023, and was informed the GDOE records were not admitted and there were issues with the testimony of the records custodian indicating she had not reviewed the records as indicated by the affidavit. T2 at 341. Ms. T.A. testified the notary was not done in her presence. *Id.* Colonel Z.A.'s response was asking what the next step was and what they were going to do now. T2 at 342. He said he thought everyone in the room agreed the records should not be admitted. *Id.*

Colonel Z.A. became aware of the motion to dismiss for prosecutorial misconduct the next morning at which time he discussed what the appropriate way to respond was with the district trial counsel, Capt C.W. T2 at 344. The meeting was in person and Colonel Z.A. learned what the

motion to dismiss was about. T2 at 345. He admitted that he did know the Government attempted to introduce the false business records certification and that the Defense had a copy of it. T2 at 346. Colonel Z.A. did not have a conversation with Capt P.H. about whether he needed to let the court know about the false document, but he did start researching the issue Wednesday afternoon. T2 at 347. Colonel Z.A. determined through his research of Rule 3.3. that candor to the court meant one had an affirmative duty to correct a material false statement of fact that was previously made to the tribunal. T2 at 348. However, he did not initially believe the false business records certification rose to the level of a material statement of fact given the Government did not need the affidavit at all. T2 at 348-49.

Colonel Z.A. admitted that, after Ms. K.A. testified, "it became clear that it was revealed to the court, [his] internal debate regarding obligation to disclose to the court became overcome by events." T2 at 349. Colonel Z.A. admitted he did not ask for the affidavit that the Government attempted to admit until Thursday, 19 September. T2 at 352. Colonel Z.A. determined that once it came out in testimony that Ms. K.A. had not signed the affidavit in the presence of the paralegal that the fraud was disclosed to the court and counsel, and no further steps were needed. T2 at 356. Colonel Z.A. stated leadership agreed after Ms. K.A.'s testimony that the Government should not continue trying to offer the business records certification. T2 at 357. He did ultimately agree that offering a false notary affidavit is in violation of a legal norm and in violation of a statute, because it is a false statement. T2 at 359.

Colonel Z.A. agreed that the Defense would have had an opportunity to object to parts of the opening statement had they known the business records certification was falsified. T2 at 363. Colonel Z.A. did not believe Capt P.H. had any intent to defraud anyone or fabricate evidence. T2 at 371. Instead, he believed Capt P.H. was attempting to "do the process properly" as evidenced

by his pen-and-ink changing of the date to show the date the paralegal "actually notarized it." *Id.*

Colonel Z.A. had a closed-door meeting on Wednesday at noon with the DSJA, LOS, and Capt P.H. and there was not an open-door discussion with anyone else. T2 at 372. When asked if he knew Appellate Exhibit XXI was already filed with the court, he testified, "I understood that the defense had objected to it, but I don't know, you know, whether that was based on something being filed with the court, I guess, is – I don't know. I was not tracking that it had been filed with the court, but I was tracking that the defense had an objection to it. So, that may have, you know, one may necessitate the other." T2 at 373. Colonel Z.A. acknowledged that he was familiar with the ethics rules for lawyers in the Judge Advocate General's Corps (JAGC)—they must be certified as read every year. T2 at 377. He agreed the term prosecutor includes not just the trial counsel, but also the office of the SJA. *Id.* He also agreed that "in hindsight" it was appropriate for the tribunal to receive the information that Capt P.H. directed the paralegal to sign the notary. T2 at 378.

B. The Deputy Staff Judge Advocate Knew Capt P.H. Directed the Paralegal to Notarize the Business Records Certification when Ms. K.A. did not Personally Appear in Front of her to Sign. But he did not Direct the Trial Team to Notify the Court or the Defense.

The DSJA, Maj G.B., assumed he was called to testify in relation to the Defense's motion to dismiss for prosecutorial misconduct, but he had not read the motion line-by-line. T2 at 384. He explained that, on Monday, 16 October 2023, he received an update from the trial team that there was an exhibit left out because of a "date issue." *Id.* Then on Tuesday, he was put on notice that the trial team would potentially need someone from the GDOE to testify to lay the foundation for the exhibit. T2 at 385. On Wednesday morning, Maj G.B. called the GDOE to line up that witness's presence. *Id.* When the trial broke for lunch on Wednesday, 18 October 2023, Capt P.H. reported to Colonel Z.A.'s office to discuss the status of the trial and next steps. *Id.*

On Wednesday at lunch, Capt P.H. had come to Colonel Z.A.'s office looking very shaken and apologized and said he'd "let the trial team down." T2 at 392-93. Capt P.H. explained there was an issue with the notary to the affidavit on the GDOE exhibit. T2 at 393. Capt P.H. relayed the struggles they had with getting ahold of the GDOE and getting the affidavit signed. *Id.* He explained that the second day they went to the GDOE, they received the affidavit already signed. *Id.* They asked where Ms. K.A. was but was told she was in a meeting and could not meet them. *Id.* They then asked to confirm her signature and were told it was hers and looked at her signature stamp to make sure it looked the same. *Id.* Capt P.H. then told the paralegal to notarize the affidavit. *Id.* Maj G.B. testified that they thanked Capt P.H. and excused him to get back to court then he met with the SJA on his own. T2 at 394.

Maj G.B. explained what leadership considered after Capt P.H. left. T2 at 399-400. They considered whether there had been a material error or an irreversible harm that required corrective action. T2 at 399. For instance, was there anything that would disrupt the judicial fairness of the Appellee's due process rights. *Id.* Leadership understood that the exhibit had not been admitted, no evidence had been presented to members at that point, and the testimony had occurred outside the presence of the members. T2 at 400. Most importantly, Ms. K.A. was going to be testifying in person to lay the proper foundation and authentication of the exhibit. *Id.* Maj G.B.'s main concern was whether Ms. K.A. signed the document not whether the notary was appropriate or done the right way. T2 at 401. Maj G.B. "literally" ran over to the courtroom to catch the trial team before they went back on the record, so they had some information from leadership. T2 at 402. He relayed to the trial team that "if [Ms. K.A.] didn't sign it or she's saying she's never seen these before, then that's a discussion we need to have with the court and the judge." T2 at 401.

The Defense asked Maj G.B. if at any point he thought there was a need to disclose the

affidavit issue to the court or to the Defense. T2 at 409. The Defense followed the question up, "I'm talking about when one of your subordinate attorneys came in and said that they falsified a document that got submitted to the court." T2 at 410. Maj G.B. said Capt P.H. never said he falsified a document and instead "his demeanor was one of shock, and concern, and fear and it's not – well, not to me, the demeanor of someone who said, 'I falsified a record.'" *Id.* The Defense directed Maj G.B. to Appellate Exhibit XXI and asked if he understood it contained false information. T2 at 411. The military judge continued questioning Maj G.B.:

> A. So, what do you mean by "false information"? And I'm not trying to play cute here, really, I'm not, but I want to make sure that we're specific with legal elements. If we're going to throw around "false information," what I'd recommend is that we refer to the elements that are discussed in the Professional Rules and Responsibilities. What do mean by falsifying evidence? So, there's three elements to that.
>
> MJ: Major Bush --
>
> WIT: Yes, sir?
>
> MJ: -- defense counsel gets to ask questions.
>
> WIT: Fair enough, sir.
>
> MJ: Okay.
>
> WIT: Fair enough, sir.
>
> MJ: All right.
>
> WIT: Yes, sir.
>
> MJ: All right.
>
> CIVDC: May I have XLI?
>
> [The civilian defense counsel retrieved Appellate Exhibit XLI.]
>
> WIT: So, in the interest of time, I'm happy to also -- I know -- I think I know exactly what you're going to say what part of this page is false. I'm happy to go directly to that if that saves time, sir.

MJ: Just listen to the question.

WIT: Fair enough, sir.

MJ: And just answer that question. Defense Counsel, re-ask your question.

CIVDC: Yes, sir.

[The civilian defense counsel resumed questioning the witness.]

Q. On page 2 where it says, "With the United States Air Force, Guam, at the 36th Wing Office of the Staff Judge Advocate, Andersen Air Force Base, Guam. I, [C.E.V.], the undersigned and do hereby certify that on this 28th day of September 2023, before me, personally appeared [K.A.], who signed and executed the foregoing instrument." That's false, correct?

A. Again, you need to be very clear about what you mean by "false," sir, and, again, I'm not trying to play cute. The reason why is there is a power of attorney and when someone represents another person, if they speak on their behalf, there is an ability for that person to speak to the veracity of the document. So, the purpose of a notary is to attest that what is begin signed is actually represented by the person. So, when it says she signed and executed the foregoing instrument, according to what I've heard, they had three witnesses including the attorney tell them that she did, in fact, sign that document. So, again, I'm not trying to be cute, but I believe that portion of the 1 document is accurate. She did sign and certify the affidavit. To your point, did she personally appear before them? I don't believe so, it doesn't sound like it based on what I've heard. But when it comes to notary procedures, I can also see the mistake could be wrong, but I can see an attorney, in their negligence, jumping to that conclusion that this was proper. So, when you use the word "false," again, I'm not trying to split hairs here, but I think there's -- you're impugning it to [Capt P.H.]. And so, I think what you need ask -- the important difference is -- is it accurate? I agree, this is not a hundred percent accurate document. But I don't know that it meets the elements of what we mean when we say, "falsifying evidence." And I believe that's what you're really trying to say. So, again, that's why I think there's an important distinction here between "false" and "inaccurate."

Q. You think he intentionally told [the paralegal] to sign the document?

A. Yes, sir. I think he intentionally told her to sign the document based on his understanding that it probably met the intent of a notary requirement, which is to attest to the veracity of the document.

Q. Is that what it's for? To test the veracity --

A. Yeah, there's --

Q. -- of the document?

A. – there's several. You want the person to be there. You only use it as an authentication shield to make sure that the document was signed by the person who said they're signing it. So, you want to be – it's an extra layer. But it's also – I'll leave it at that, sir.

Q. You sound like you've done research on notary responsibilities recently.

A. Yes, sir, that's part of my job, absolutely, to determine whether there's a professional responsibilities violation.

T2 at 411-13. The military judge's questioning Maj G.B. began with:

Q. Major [G.B.], I have some questions.

A. Yes, sir.

Q. I think I understand that you don't think there was a problem with page 1 of Appellate Exhibit XXI. So, Appellate Exhibit XXI is what you just had?

A. Yes, sir.

Q. All right. It's safe to say you don't think there was any problem with Appellate Exhibit XXI, the first page?

A. Yes, sir, that's correct.

Q. Okay. Do you agree that Ms. [K.A.] did not personally appear before [the paralegal] to sign page 1 of Appellate Exhibit XXI?

A. Yes, sir, I agree with that.

Q. Okay. Do you agree that page 2 of Appellate Exhibit XXI, [the paralegal] says that Ms. [K.A.] appeared personally before and signed that document?

A. Yes, sir, I agree with that.

Q. Okay. Now, however you want to classify that, you would agree that it's not true that Ms. [KA.] personally appeared in front of [the paralegal] and signed that document? And I know you want to answer a different question. I need you to answer my question.

A. Yes, sir, I think to the extent that the attorney didn't make any representation that he was speaking on her behalf, I think there can be a distinction there if the attorney makes a representation of the person that they are their power in fact -- power of attorney in fact. But I agree that I don't believe that happened in this case. I don't have any reason to believe that happened in the case, so, yes, in answer to your question, yes.

Q. Yeah, it was a false statement. I understand that there's caveats to it.

T2 at 418-19. The military judge continued to ask questions regarding candor to the court and what leadership believed was required and what they relayed to the trial team. T2 at 418-439. At no point did Maj G.B. admit that the trial team had a duty to report the falsity of the notary to the court or the Defense. Over the course of the two-day motions hearing (Thursday, 19 October 2023, and Friday, 20 October 2023), on the Defense's motion to dismiss due to prosecutorial misconduct, the district trial counsel, Capt C.W., objected numerous times on the grounds of "cumulative" and "wasting the court's time" to which the military judge denied. T2 at 286, 337, 344-45, 385.

7. The Defense Moved for a Dismissal of Charges.

In argument on the motion to dismiss, the Defense asked for a dismissal of all charges and specifications but did not ask specifically for it to be done with prejudice. T2 at 444; *see also* App. Ex. XXXIX. The Defense agreed there were other options the military judge could choose from and that he had "significant discretion" in his decision on remedies, but that it does not go unfettered. T2 at 444-45.

The Government conceded there was prosecutorial misconduct. T2 at 471. The district trial counsel admitted that both he and the trial counsel knew what Capt P.H. did prior to the motion to dismiss being filed by the Defense. T2 at 472. He also agreed that the legal office knew prior to the filing of the motion based on the testimony that came out. *Id.* However, the Government did not agree initially that the military judge should dismiss the charges and specifications, because the misconduct was not severe enough to warrant it. T2 at 473. The Government stated that the remedial measures necessary were to get a new affidavit or put Ms. K.A. on the stand to testify and they did both—not notifying the tribunal. T2 at 475. The military judge went back and forth with the Government on what information could be impugned to the remainder of the trial team and whether they all had a duty of candor to the tribunal. T2 at 475-77. Ultimately, the

Government stated, "Due to the irony of the fact that we're dealing with a false document and the two specifications in Charge II, are also dealing with similar matters, the government would concede to that being a potential remedy." T2 at 485.

8. The Military Judge's Ruling on the Motion for Reconsideration Found He Did Not Have to Find Prejudice. However, Should an Appellate Court Disagree, He Did Find Prejudice to a Substantial Right of the Appellee.

On 24 October 2023, the military judge's original ruling granted the Defense's motion to dismiss in part—dismissing with prejudice only Charge II and its Specifications. App. Ex. XLIII. On 26 October 2023, the newly detailed trial team filed a motion to reconsider requesting a hearing an argument on the motion. App. Ex. XLVI. The Defense filed a response to the Government's motion to reconsider. App. Ex. XLVII. On 9 January 2024, the Government filed an amended motion to reconsider no longer requesting a hearing or argument on the motion. App. Ex. XLVIII-XLIX. On 19 January 2024, the military judge emailed the parties stating, "Strictly for planning purposes, the motion for reconsideration is denied. I plan to issue a written ruling later." App. Ex. L. On 20 January 2024, the Government filed a notice of appeal with the court. App. LI. On 30 January 2024, pursuant to the email notice, the military judge issued his written ruling on the motion to reconsider. App. Ex. LII.

The military judge's ruling on the Government's motion to reconsider[4] discussed three issues: (1) should the military judge reconsider its 24 October 2023 ruling on the Defense's motion to dismiss for prosecutorial misconduct; (2) if the military judge does reconsider his prior ruling, does he have to conduct a prejudice analysis; and (3) if he should " conduct a prejudice analysis, was the Appellee prejudiced by the Government's prosecutorial misconduct. App. Ex. LII at 6. The military judge found the first question in the affirmative and the second question in the

[4] The military judge adopted all findings of fact from his original ruling. App. Ex. LII at 1.

negative. *Id.* Regardless, the military judge also answered the third issue in the affirmative. *Id.*

He noted the Government once again conceded the prosecutorial misconduct. App. Ex. LII at 7. As to whether he was required to find prejudice, the military judge relied on *United States v. Bowser*, 73 M.J. 889 (A.F. Ct. Crim. App. 2014), *aff'd*, 74 M.J. 326 (C.A.A.F. 2015). *Id.* There the Air Force Court held the military judge did not abuse his discretion when he dismissed the charges and specifications due to prosecutorial misconduct. *Id.* (citing 73 M.J. at 903). This Court in *Bowser* did not say the military judge there found the prosecutorial misconduct prejudiced the appellant. *Id.* Further, Court of Appeals for the Armed Forces then affirmed the Air Force Court's decision. *Id*. (citing *United States v. Bowser*, 74 M.J. 326 (C.A.A.F. 2015)).

The military judge here believed that utilizing the *Fletcher* factors at the trial level is inappropriate given the language of the case states that prosecutorial misconduct requires reversal when the comments were so damaging that the appellate court "cannot be confident that the members **convicted** the appellant on the basis of the evidence alone." App. Ex. LII at 8 (quoting *United States v. Fletcher*, 62 M.J. 175, 184 (C.A.A.F. 2005) (emphasis added in App. Ex. LII)). The military judge then conducted a prejudice analysis and concluded the Appellee was prejudiced:

> 41. First, the severity of the misconduct was high. The government attempts to say the business record affidavit was not forged and that somehow makes it less culpable. GMR at para. 16. While true the business record affidavit was not forged, the affidavit that the Court relied on to admit the business record was forged. Even more egregious, an officer of the Court told a paralegal to forge a document, presented that document to the Court, and then the Court relied on that document to admit government evidence.
>
> 42. Likewise, the Staff Judge Advocate, Deputy Staff Judge Advocate, and the entire trial team knew about the forgery and chose not to tell the defense or the Court until the following morning when the Court had a hearing regarding the defense's motion to dismiss.
>
> 43. Next, the government argues that disqualifying the trial team and excluding Prosecution Exhibit 30 (the accused's husband's driver's license) are sufficient "measures adopted to cure the misconduct." *Fletcher*, at 184, GMR at para. 17. *Fletcher* does not say what the

measures need to be, only if the measures were sufficient. This Court chose measures sufficient "to overcome the severity of the trial counsel's misconduct." *Fletcher*, at 185. Specifically, this Court chose measures to remedy the misconduct by the government to introduce evidence with a falsified affidavit and prosecute the accused for alleged offenses, of which the government arguably could be viewed to have committed.

44. In addition, this Court notes the accused's case is not like *Vargas*. Unlike the military judge in *Vargas*, this Court did consider other available remedies and chose the remedies based upon this Court's discretion to impose adequate remedies.
. . .

47. The final *Fletcher* factor is the weight of the evidence. That is impossible for this Court to determine, considering the government has not fully presented its case and the defense has not started to present evidence.

48. Of the two *Fletcher* factors this Court may consider, both factors weigh in favor of the defense. Those factors are how appellate courts have accessed prejudice. *See Fletcher*. The severity of the government's misconduct is high. Therefore, under the *Fletcher* prejudice analysis, this Court finds the accused has suffered prejudice based upon the government's prosecutorial misconduct. *Id.* at 184.
. . .

App. Ex. LII at 8-10.

ARGUMENT

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION IN DISMISSING WITH PREJUDICE CHARGE II, SPECIFICATIONS 1-2, AND SUPPRESSING THE GUAM DEPARTMENT OF EDUCATION RECORDS DUE TO PROSECUTORIAL MISCONDUCT.

Standard of Review

A military judge's decision to exclude evidence is reviewed for an abuse of discretion. *United States v. Lewis*, 78 M.J. 447, 452 (C.A.A.F. 2019) (citation omitted). A military judge abuses his discretion when the military judge's findings of fact are clearly erroneous, the military judge's decision is influenced by an erroneous view of the law, or the military judge's decision is outside the range of choices reasonably arising from the applicable facts and law. *United States v. Vargas*, 83 M.J. 150, 153 (C.A.A.F. 2023) (citations and quotations omitted). "The abuse of discretion standard of review recognizes that a judge has a range of choices and will not be reversed

so long as the decision remains within that range." *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004). In an Article 62, UCMJ, appeal, appellate courts review the military judge's decision and the evidence in the light most favorable to the party that prevailed at trial. *United States v. Pyron*, 83 M.J. 59, 62 (C.A.A.F. 2023) (citations omitted). When an issue is raised through a government appeal, this Court cannot make findings of fact, and can only act with respect to matters of law. *United States. v. Lincoln*, 42 M.J. 315, 320 (C.A.A.F. 1995).

Law and Analysis

The military judge was correct in finding that he had the authority to determine that exclusion of the evidence and dismissal with prejudice were appropriate remedies; at the very least, he did not abuse his discretion because that conclusion is well within the range of reasonableness. *See Gore*, 60 M.J. at 187. Further, the miliary judge found prejudice despite his belief that such a finding was unnecessary under the circumstances of this case.

Rule for Courts-Martial (R.C.M.) 908(b) directs the procedure for appeals by the United States. "Upon written notice to the military judge under paragraph (b)(3) of this rule, the ruling or order that is the subject of the appeal is automatically stayed and no session of the court-martial may proceed pending disposition by the Court of Criminal Appeals of the appeal . . . ." R.C.M. 908(b)(4). "Strictly for planning purposes," the military judge provided an email notice to the parties of his intent to deny the motion for reconsideration. App. Ex. L. The email notice stated that the military judge would issue a written ruling. *Id.* Understanding the Government provided notice of appeal the day after the email, the military judge's written ruling is part of the "ruling or order that is the subject of the appeal," and may be considered by this Court as part of the record. R.C.M. 908(b)(4).

Here, the remedies were chosen to "deny [] the prosecution the fruits of its transgression."

App. Ex. LII at 9 (quoting *United States v. Morrison*, 449 U.S. 361, 366 (1981)). The Government engaged in undisputed prosecutorial misconduct when members of the prosecution submitted falsified documents to the trial court. The trial team, and subsequently the legal office, then failed to take any actions to correct the fraud upon the court. The prosecutorial misconduct in this case, therefore, is multifaceted: (1) the initial misconduct of directing a paralegal to falsify a notary; (2) the offering of that document several times for the court to rely on; and (3) the failure to correct the false statement submitted to the court.

1. The Appellee Was Prejudiced by the Prosecutorial Misconduct and the Military Judge Found as Such.

The military judge did not believe he needed to find prejudice prior to granting relief, pursuant to *Bowser*,[5] but on the chance the appellate courts disagreed with his assessment, he did find prejudice in the Appellee's case.[6] App. Ex. LII at 6-10.

The military judge here relied on the Air Force Court's analysis in *Bowser* where this Court did not discuss a requirement that a military judge find prejudice prior to selecting a remedy. App. Ex. LII at 7. While this Court in *Bowser* cited the correct law regarding a requirement that there be an error and then prejudice to get relief,[7] so did the military judge in both his initial ruling on the motion to dismiss and his ruling on the motion for reconsideration. Ultimately, in *Bowser*, the military judge dismissed all charges and their specifications with prejudice because the

[5] 73 M.J. 889 (A.F. Ct. Crim. App. 2014).
[6] The Government's reliance on *United States v. Morrison*, 449 U.S. 361 (C.A.A.F. 1981), and *United States v. Meek*, 44 M.J. 1 (C.A.A.F. 1996), is misplaced as both were reviewed after conviction when a prejudice analysis is definitely required.
[7] *See* Gov. Br. at 24 (Asserting, "In fact, the Court actually held that "[p]rosecutorial misconduct does not automatically require [relief]; instead, relief is granted only if trial counsel's misconduct actually impacted on a substantial right of an accused (i.e. resulted in prejudice)."). However, this Court was discussing basic legal principles not holding anything regarding misconduct specially in the case.

Government refused to turn over the witness interview notes even after it was revealed that discoverable information was not disclosed to the Defense. 73 M.J. at 894-95. Here, not only did a commissioned officer—who is a licensed lawyer and former paralegal with nine and a half years of legal experience—direct a paralegal to falsify a record, he submitted that record to the court multiple times as a method of admitting hearsay. T2 at 275.

Contrary to the Government's assertions, the military judge did find prejudice in this case. The military judge went through the *Fletcher* factors even though, as the military judge noted, they are specifically for when an appellant is *convicted*. App. Ex. LII at 8. The military judge found the severity of the misconduct was high. *Id.* The Government asserts the business records certification itself was not forged. *Id.* While the first page of the document was not forged, the notary on the second page was nevertheless false. Further, the court relied on the document in admitting other prosecution exhibits. *Id.* The military judge also gave credence to the fact that an officer of the court directed a paralegal to falsify a document, which was ultimately presented to the tribunal multiple times. *Id.* Further, the entire trial team and legal office knew about the falsified notarization and chose to hide it from the court and the Defense. *Id.* The military judge chose measures sufficient to overcome the breadth and severity of the Government's misconduct and chose measures to remedy the misconduct. *Id.*

The military judge did not dismiss with prejudice all the charges and specifications as requested by the Defense (a remedy upheld by the CAAF in *Bowser*). *United States v. Bowser*, 74 M.J. 326 (C.A.A.F. 2015). Instead, he chose a specifically tailored remedy to which the trial team agreed was appropriate. T2 at 485. Both *Fletcher* factors discernable at this stage of the court-martial weigh in favor of the Appellee and as such, the military judge found the Appellee suffered prejudice based upon the prosecutorial misconduct. App. Ex. LII at 9.

A. The Fraud Perpetuated to the Court Was Knowing and Extensive.

As the military judge found, the severity of the misconduct was high. App. Ex. LII at 8. The fraudulent notarization was merely the start of the prosecutorial misconduct. And any weak attempt to remedy the harm, failed. While the "improper notarization," as characterized by the Government, *could* have been the beginning and end of the prosecutorial misconduct, the Government failed disclose its error. Gov. Br. at 2. Instead, Capt P.H., the trial team, and legal office leadership engaged in active measures to get the underlying evidence in without being candid with the court about the fraudulent business records certification already relied upon—perpetuating the misconduct.

In fact, had it not been for the Defense's diligence in this case, this fraud would have gone unnoticed, and a conviction may have been secured based on a falsified business records certification used as the foundation and authentication of eight prosecution exhibits. After all, the only reason the fraud upon the court was discovered in this case was because the Defense noticed a difference in the initials on the pen-and-ink change. App. Ex. XXI at 1. Had the Defense not initially stated during an Article 39(a) that it appeared the initials next to the date change were not those of the affiant, the fraud upon the court would have been undiscovered, despite the entire legal office knowing about it. Capt P.H., the other two more senior trial counsel detailed to the case, and the legal office leadership would have failed "to correct a false statement of material fact or law previously made to the tribunal by the lawyer." Air Force Instruction 51-110, Professional Responsibility Program, dated 11 December 2018, attachment 2, Air Force Rules of Professional Conduct, Rule 3.3. This is clear based on the testimony of Capt P.H., Colonel Z.A., and Maj G.B.; the objections made by Capt C.W. during the hearing on the Defense's motion to dismiss; and the lack of candor to the court by Capt P.H., Capt C.W., and Capt K.T.

Not only did Capt P.H. direct the paralegal to make a false official statement, he submitted the false statement to the court as purported grounds for authenticating eight prosecution exhibits. Knowing that the document was falsified, Capt P.H. nevertheless sought admission multiple times. After the Defense pointed out the issue with the initials on the pen-and-ink date change, Capt P.H. went to his leadership and admitted that he directed the paralegal to sign the notary when Ms. K.A. had not "personally appeared" before her. The entire trial team was there for this discussion. At no point before or after Ms. K.A.'s testimony did anyone on the trial team or the legal office—including the leadership—believe the court or the Defense should be notified. Instead, it appears their goal was to convict the Appellee regardless of the means used to effectuate that conviction. The fraud on the court was egregious, continual, and condoned by every member of the Government.

i. Capt P.H. Knew He Directed the Notarization of the Business Records Certification and that it was Wrong.

Capt P.H. as assistant trial counsel[8] committed a fraud upon the court several times. He knew the notary on the GDOE business records certification had not been done properly because he directed an enlisted member to execute it as such. He knew Ms. K.A. did not personally appear before the paralegal when Ms. K.A. signed and executed the business records certification. Nevertheless, Capt P.H. believed he was under a tight deadline because he mistakenly believed that if they did not obtain the business records certification before the motions' deadline, the

[8] While the Government tries to make excuses for Capt P.H. because he was the junior counsel, it should be noted that Capt P.H. has worked in the JAG Corps for over nine years as a paralegal, intern, and attorney. At the time of the fraud, he was, and continues to be, the Chief of Military Justice at Andersen AFB. Capt P.H. clearly had more experience than most senior litigators in the Air Force. To be sure, the fraud concerned a notary, which Capt P.H.—as a paralegal—had executed hundreds.

Government would not be able to admit the documents.[9]

When Capt P.H. and the paralegal went to GDOE, Capt P.H. saw the business records certification was already signed. He understood that this was a problem, telling the GDOE staff that they could not accept page one of the document "because it's already been signed." T2 at 264. Capt P.H. believed a notary was required and as such, a new signature would need to be accomplished in their presence. T2 at 265. Both Capt P.H. and the paralegal asked to speak to Ms. K.A. to confirm she had signed the document.

Ultimately, Capt P.H. knew there was an issue with the notary when he asked for Ms. K.A. to re-sign in front of the paralegal. T2 at 310. Yet, when offering Prosecution Exhibits 16-21 for identification into evidence, Capt P.H. claimed Ms. K.A. "signed and attested" that those documents were "true and correct, that they were pulled properly, that they are true and correct copies of the original records in their possession."[10] T2 at 6. Then after the Defense raised the issue with the pen-and-ink change of dates and the military judge asked if Ms. K.A. could come to the building to testify, Capt P.H. pushed back. He said, "Yes, Your Honor, and I'll point you to page 2, because in page 2 in that notary, it does indicate that the date that the document was signed and notarized was 28 September, which matches the date on the first page." T2 at 14. Capt P.H. dug in further and offered the paralegal up as tribute, proffering that she would testify

[9] It is unclear why Capt P.H. believed this to be true, although any more senior member of the trial team or his leadership should have been able to tell Capt P.H. this was not the case. Whatever the reason, however, it is evident that Capt P.H. felt so much pressure that he chose to direct the falsification of a notary rather than miss a deadline.

[10] Specifically, he told the court that, "the records have a high degree of reliability" and that "because one, they were produced pursuant to [the military judge's] written order; two, the documents, themselves, throughout have various statements guaranteeing their authenticity such as, you know, lying or not telling the truth on these records would go to their falseness. Or it would lead to someone being rejected from employment. As such, the government believes and intends that these records should be allowed under 902(11) and 803(6)." T2 at 7.

about the date signed. T2 at 14-15.

Just like other members of the prosecution, Capt P.H. minimized his culpability when he testified, saying he did not believe it was fraud and that he would need to "look at the legal definition" to conclude his actions were wrong. T2 at 310-11. When pressed by the military judge, Capt P.H. admitted to knowing that directing the paralegal to notarize the document was wrong because the whole point of a notary is to protect against "forgeries, or falsehoods, or things that don't make sense." T2 at 275. According to Capt P.H., the notary process ensures "fidelity," "honesty and truth." T2 at 276. Ultimately, Capt P.H. admitted his focus was not on the notary process; rather, his concern was on meeting the motions deadline and, later, minimizing his fraud upon the court.

ii. <u>The Legal Office Not Only Condoned the Prosecutorial Misconduct, But Also Perpetuated it.</u>

When Capt P.H. disclosed to the SJA and DSJA that he had directed the paralegal to make a false statement, the leadership did not direct Capt P.H. to notify the court or the Defense. Instead, they were focused on how to get the evidence in and work around the falsified business record certification. In fact, Maj G.B. "literally" ran over to the courtroom to give the trial team options for fixing the issue but took no such action to guide the trial team in remedying the fraud. T2 at 402.

The SJA ultimately did agree that offering a false notary affidavit is in violation of a legal norm and in violation of a statute, because it is a false statement. T2 at 359. The DSJA, however, could not bring himself to be as forthright. Maj G.B. somehow believed that, because Capt P.H. never admitted to intentionally falsifying a document, then there was no fraud. In fact, Maj G.B. was more concerned about Capt P.H.'s demeanor of "of shock, and concern, and fear and it's not

– well, not to me, the demeanor of someone who said, 'I falsified a record.'".[11] T2 at 410. Maj G.B.'s testimony was combative and uncooperative. He routinely refused to answer questions from the Defense and the military judge, instead deflecting and hiding behind supposed legal standards. At one point he said, "So, in the interest of time, I'm happy to also -- I know -- I think I know exactly what you're going to say what part of this page is false. I'm happy to go directly to that if that saves time, sir." The military judge interrupted Maj G.B., instructing him to answer the questions asked. Even when questioned by the military judge under oath, Maj G.B. defended his position and at no point did Maj G.B. admit that the trial team had a duty to report the falsity of the notary to the court or the Defense.

B. The Military Judge Determined the Appropriate Remedies, which were within His Array of Options and Did Not Amount to Clear Error in Judgment.

Military judges, under the abuse of discretion standard, have broad discretion in determining an appropriate remedy to correct a wrong. *United States v. Douglas*, 68 M.J. 349, 354 (C.A.A.F. 2010). The military judge in this case utilized that discretion in determining the remedy of dismissing with prejudice the false official statement charge was appropriate given the Government committed prosecutorial misconduct in the form of offering a falsified document to the court. Further, the military judge determined suppressing the GDOE records was appropriate as well, because the falsified document—which was known by the Government to be false—was offered by the Government several times as authentication of the GDOE records.

i. Dismissing the Charge and Specifications of False Official Statements was an Appropriate Remedy that the Government Conceded.

It is well established that military judges have a range of choices for possible remedies and

[11] This could also be evidence of consciousness of guilt after receiving a motion to dismiss for one's prosecutorial misconduct.

a decision will not be reversed under the abuse of discretion standard when it falls within that range. *Gore*, 58 M.J. at 187. While dismissing charges with prejudice may be a "drastic remedy," such a decision will be upheld so long as it was "within the range of remedies available and not otherwise a clear error of judgment." *Id.* at 187, 189. Dismissal of the false official statements in this case was an appropriate remedy.

The military judge tailored the remedies to the case. Even the district trial counsel agreed that such a remedy of dismissing with prejudice the false official statement specifications was appropriate. T2 at 485. It does not matter that now, after trial counsel were disqualified and replaced with a new trial team, the Government walked back that assertion. After all, how could a military judge abuse his discretion when his decision falls within the confines of the law, and the Government agreed to the remedy? The Government wants this Court to only consider the argument of the new trial team and appellate government, but as the military judge found, that logic is flawed. As the military judge aptly noted, "By that logic the government could cho[o]se to replace government counsel anytime a military judge ruled against them with new detailed counsel who present a different argument than the previously detailed government argument." App. Ex. LII at 9.

The CAAF upheld the military judge's decision to dismiss with prejudice all the charges and specification in *Bowser*. 74 M.J. 326 (C.A.A.F. 2015). There the CAAF quoted *United States v. Vargas* in finding the military judge did not abuse his discretion, because "[p]roper case management during a trial, necessary for the protection of an accused's due process rights and the effective administration of justice, is encompassed within that responsibility." 74 M.J. at 326 (quoting *United States v. Vargas*, 74 M.J. 1, 8 (C.A.A.F. 2014)). It took two days of testimony and consistent pressure from the military judge and Defense to draw out the truth about the falsified

business records certification. No member of the prosecution—to include the legal office leadership—ever intended to notify the court or the Defense regarding the false statements made. The leadership avoided addressing the fraud upon the court by offering fixes that did not include correcting the false statement to the court or informing the court of the false document.

The military judge found the Government's misconduct was high—the SJA, DSJA, and the entire trial team knew about the forgery and chose not to tell the court or the Defense until the morning of the hearing on the Defense's motion to dismiss. App. Ex. LII at 8. The military judge "had the option of granting the defense's original request to dismiss all Charges and Specifications and decided the prosecutorial misconduct did not rise to the level necessitating that option." App. Ex. LII at 9. Dismissing with prejudice the charge and specifications regarding a false official statement was an appropriate remedy and well within the military judge's discretion.

ii. Suppressing the GDOE Records was an Appropriate Remedy and Within the Range of Choices by the Military Judge.

Capt P.H. acknowledged the importance of the Appellee receiving a fair and honest trial, impartially viewed by the members in the panel, the military judge, and "by whomever" would review the record. T2 at 303. He testified his job "is to be honest, to tell the truth, to do [his] best, and to own when [he] fail[s]." *Id.* He told the military judge that "here, I failed, and I apologize deeply to the entire tribunal." *Id.*

Leadership attempted to split hairs about whether the falsified business records certification was a "material fact." The DSJA himself became extremely combative during his defense of the legal office's actions and advice. A false statement in the notary presented to the court as the foundation and authentication for eight prosecution exhibits was "material." It was well within the military judge's discretion to suppress that evidence.

The first several times Capt P.H. attempted to offer the GDOE documents into evidence he

was using a business records certification signed by a custodian, Ms. K.A., who had not even reviewed the GDOE documents prior to signing. Even the DSJA admitted that if Ms. K.A. testified she had not reviewed the documents, then that would be a reason to alert the court and the Defense. T2 at 401. The Government instead had Ms. K.A. sign a new business records certification, because the GDOE documents were material for its case. As the military judge expressed in his ruling, this case is distinguishable from *Vargas*, 74 M.J. 1 (C.A.A.F. 2014), because the military judge in this case "did consider other available remedies and chose the remedies based upon this Court's discretion to impose adequate remedies." App. Ex. LII at 8. Here, the military judge chose remedies "'to identify' the taint in the [accused's trial] and 'neutralize' it 'by tailoring relief appropriate in the circumstances" to assure the accused's due process of law 'and a fair trial.'" App. Ex. LII at 9 (quoting *United States v. Morrison*, 449 U.S. 361, 365 (1981)). Suppressing the GDOE documents neutralized that taint to ensure the Appellee's due process of law and a fair trial.

Conclusion

A military judge abuses her discretion when the military judge's findings of fact are clearly erroneous, the military judge's decision is influenced by an erroneous view of the law, or the military judge's decision is outside the range of choices reasonably arising from the applicable facts and law. *Vargas*, 83 M.J. at 153. As such, this Honorable Court should deny the Government's Article 62 appeal and find the military judge did not abuse his discretion when he dismissed with prejudice Charge II, Specifications 1-2, and suppressed the GDOE records.

Respectfully Submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 20 March 2024.

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IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES, Appellant, v. Master Sergeant (E-7) **Desiree M. Holmes**, USAF Appellee.	))))))))))	**APPEAL BY THE UNITED STATES UNDER ARTICLE 62, UCMJ** Before Panel No. 3 Misc. Dkt. 2024-1 29 February 2024

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**APPEAL BY THE UNITED STATES**
Appellant	)	**UNDER ARTICLE 62, UCMJ**
	)	
v.	)	Before Panel No. 3
	)	
Master Sergeant (E-7)	)	Misc. Dkt. No. 2024-1
Desiree M. Holmes	)	
United States Air Force	)	29 February 2024
Appellee	)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

Under Article 62, UCMJ, the United States respectfully requests that this Court reverse the military judge's ruling dismissing with prejudice, Charge II, Specifications 1-2, for making false official statements, and suppressing all evidence from the Guam Department of Education (GDOE), including Prosecution Exhibits 16-21 for identification and Prosecution Exhibit 31.

INTRODUCTION

Upon arrival to Guam, Appellee claimed her husband, Mr. Dana Holmes, resided in New York. He did not. Her husband worked at the Guam Department of Education (GDOE) as the men's basketball coach for the University of Guam. As a result, Appellee received both overseas housing allowance and BAH. That is stealing. In support of this case, the prosecution obtained the husband's employment records from the GDOE. Accompanying these records was a business records certification[1] and a notary. Ms. K[redacted] M.P. A[redacted], the records custodian for GDOE signed the certification attesting to the foundation of Prosecution Exhibits 16-21 for identification and Prosecution Exhibits 30-31. A paralegal notarized the document asserting that

[1] "Certification" and "affidavit" were used interchangeably throughout the record. Appellate Exhibit XXI was titled "Certification of Domestic Records of a Regularly Conducted Activity."

Ms. A[redacted] had signed the certification in the presence of the paralegal. Unfortunately, Ms. A[redacted] had not actually signed in the paralegal's presence. Ms. A[redacted] had signed the certification before the paralegal arrived to pick up the documents. This improper notarization was the beginning and the end of the prosecutorial misconduct. Fortunately, the misconduct was quickly remedied.

Thereafter, Ms. A[redacted] was called as a witness and testified in person to the proper foundation for GDOE records. With the live, in-person testimony, trial counsel properly authenticated and laid the foundation for all prosecution exhibits originating from the GDOE. No member of the panel ever saw or will ever see the improperly prepared certification. No dispute remains regarding the authenticity, foundation, or relevance of Prosecution Exhibits 16-21 for identification and Prosecution Exhibits 30-31.

Nevertheless, the military judge granted relief for prosecutorial misconduct. Without finding that Appellee suffered any harm, he dismissed one charge and its specifications, suppressed all GDOE records, and disqualified the entire legal office, except one paralegal, from further participation in the case. Dismissing specifications or granting any relief for that matter--without finding prejudice--strays from well-established precedent. *See* United States v. Morrison, 449 U.S. 361 (1981); United States v. Frey, 73 M.J. 245, 249 (C.A.A.F. 2014). For these reasons, the military judge's dismissal with prejudice of Charge II, Specifications 1-2, and suppression of all the evidence from the GDOE was an abuse of discretion given that he relied on incorrect legal principles. *See* United States v. Freeman, 65 M.J. 451, 453 (C.A.A.F 2008) (defining abuse of discretion.) Now, the United States files this Article 62, UCMJ appeal. And this Court should reverse the military judge's ruling and expeditiously remand the case to the trial court for further proceedings.

ISSUE PRESENTED

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DISMISSED WITH PREJUDICE CHARGE II, SPECIFICATIONS 1-2, AND SUPPRESSED ALL EVIDENCE FROM THE GUAM DEPARTMENT OF EDUCATION WHEN HE DID NOT FIND THAT THE PROSECUTORIAL MISCONDUCT IMPACTED APPELLEE'S SUBSTANTIAL RIGHTS.

STATEMENT OF THE CASE

On 2 October 2023, a general court-martial convened at Andersen AFB, and Appellee was arraigned on one charge and specification of dereliction of duty in violation of Article 92, UCMJ; one charge and two specifications for making a false official statement, in violation of Article 107, UCMJ; and one charge and one specification of larceny, in violation of Article 121, UCMJ. (T1 at 7-11.)[2] Before entering pleas, the military judge held various Article 39(a), UCMJ, sessions over the prosecution's motion to preadmit evidence. (T1 at 47-64, 73-112.) Appellee pleaded not guilty to all charges and specifications. (T1 at 113.)

During the prosecution's case-in-chief, trial defense counsel moved to dismiss the case for prosecutorial misconduct because the government did not properly execute the notary attached to the business records certification accompanying Mr. Holmes' employment records from the GDOE. (App. Ex. XXXIX.) The trial court conducted an Article 39(a), UCMJ, session on 19-20 October 2023 on the motion to dismiss. The military judge granted the motion in-part on 24 October 2023. (App. Ex. XLIII.) The military judge dismissed with prejudice Charge II, Specifications 1-2, suppressed the evidence from the GDOE, and disqualified all previously detailed trial counsel, as well as all members of the Andersen AFB legal office, except for one

[2] The Record of Trial contains two transcripts – the first transcript (T1), dated 2, 16-17 October 2023, and the second transcript (T2), dated 18-20 October 2023.

paralegal. (App. Ex. XLIII at para. 59-61.) Trial counsel timely filed a motion to reconsider. (App. Ex. XLVI.) On 9 January 2024, trial counsel filed an amended motion to reconsider. The military judge notified all counsel that he denied the motion for reconsideration on 19 January 2023 via email. (App. Ex. L.) The next day, the United States filed a notice of intent to appeal the military judge's rulings on the motion to dismiss and motion to reconsider. (App Ex. LI.) On 30 January 2024, the military judge issued his written ruling denying the motion to reconsider. (App. Ex. LII.) Trial proceedings remain in recess pending this appeal.

STATEMENT OF THE FACTS

Trial Counsel Obtained a Business Records Certification for GDOE Records

Initially trial counsel intended to lay the foundation for Prosecution Exhibits 16-21 with a business records certification from the GDOE. (T1 at 44.) This certificate became Appellate Exhibit XXI. (Id.) SrA C[redacted] E. V[redacted] understood that she needed to get the business records certifications signed by a records custodian at the GDOE. (T2 at 211.) Contacting personnel to obtain this certificate was difficult. (Id.) As a result, Capt P[redacted] H. H[redacted], assistant trial counsel, made the decision to visit the GDOE in person to get the certification signed. (T2 at 257.) On 27 September 2023, along with SrA V[redacted], Capt H[redacted] visited the GDOE. (Id.) Capt H[redacted] told human resources employees that they needed a business records certification signed. (T2 at 259.) The employees told Capt H[redacted] that they needed to speak to the legal department. (Id.) Capt H[redacted] then met with a GDOE paralegal who said that no representative could sign the document that day without an attorney vetting the documents. (T2 at 261.) Capt H[redacted] left the documents with the paralegal telling them that they need these documents signed by the next day. (Id.) Because the motions deadline was the next day, Capt H[redacted] explained the

sense of urgency to get the business records certification signed as soon as possible. (T2 at 260, 262.)

Ms. A[redacted] Signed the Business Records Certification

The next day, around 1300, Capt H[redacted] and SrA V[redacted] received a phone call from the human resources department stating that an "individual that's going to be signing the document is ready right now." (T2 at 263.) Because the motions deadline was just hours away, Capt H[redacted] made getting this certification signed his top priority, and he and SrA V[redacted] returned to the GDOE. (Id.) Two human resources representatives took Capt H[redacted] and SrA V[redacted] into a back office and provided the business records certification. (Id.) Ms. A[redacted] had already signed the certification. (T2 at 263-64.) Capt H[redacted] told the representatives that he needs "the actual person to be here in order to verify this is their signature." (T2 at 264.) Mr. N[redacted], GDOE general counsel, came into the room and asked, "what is the problem here?" (Id.) Capt H[redacted] explained that he needed to verify Ms. A[redacted]'s signature. (T2 at 265.)

Trial Counsel Confirmed Ms. A[redacted]'s Signature

Mr. N[redacted] told Capt H[redacted] that Ms. A[redacted] signed the document the morning of 28 September 2023. (T2 at 266.) Capt H[redacted] wanted further proof. (T2 at 265.) He asked if there was "a stamp, a signature, [was] there something that [he] [could] use to verify this is the actual person."[3] (Id.) Someone brought out a stamp that had "K[redacted] M.P. A[redacted]" on it. (Id.) Ms. A[redacted]'s signature stamp matched the signature on the business records certification. (Id.) At this point that Capt H[redacted] told SrA V[redacted] to notarize the document. (T2 at 265-66.) SrA V[redacted] executed the notary in front of Mr. N[redacted] and the human resources employees. (T2 at

[3] Capt H[redacted], as a former paralegal, executed 50-200 notaries. (T2 at 274-75.) Capt H[redacted] was in military justice for most of his paralegal career, and the last time he regularly executed notaries was in 2015-2016. (Id.)

266-67.) Capt H[redacted] told "SrA V[redacted] to line through the 27th and put 28th and her initials to indicate the proper date that the form was signed to [his] knowledge." (T2 at 266.) Until 18 October 2023, Capt H[redacted] believed that the document was properly notarized, and that the certification was properly signed for because he had "verified the authenticity of that signature." (T2 at 267.) The military judge found Capt H[redacted]'s testimony credible. (Ap. Ex. XLIII at para. 17.)

First Motions Hearings Regarding GDOE Records

On 2 October 2023, a general court-martial convened, and Appellee was arraigned. (T1 at 10-11.) The prosecution filed three motions to preadmit evidence. (App. Exs. X, XII, XIII; T1 at 18-21.) Relevant to this appeal are Prosecution Exhibits 16-21 for identification[4] (various employment records for Mr. Holmes from the GDOE), Prosecution Exhibits 30 (Mr. Holmes' driver's license maintained in GDOE files), Prosecution Exhibit 31 (Mr. Holmes' payment record also maintained in GDOE files), and Appellate Exhibit XXI (the original business records certification, certifying 224 pages of GDOE records). (T1 at 44.)

The GDOE filed a non-party motion to quash subpoena or, in the alternative, requested an *in camera* review for records sought. (App. Ex. I.) The prosecution filed an opposition. (App. Ex. II.) The military judge denied the motion to quash, but granted the alternative request for an *in camera* review of Mr. H[redacted]' employment records. (App. Ex. III.) The military judge then released the 224 pages of GDOE records to the parties. (T1 at 15.)

At the 2 October 2023 session, the military judge conducted a hearing on the admissibility of Prosecution Exhibits 1-21 for identification. (T1 at 24-31; 47-64.) Prosecution

[4] The military judge did not admit Prosecution Exhibits 16-21 for identification, and they are in the Record of Trial, Volume 14 in prosecution exhibits offered, not admitted.

Exhibits 16-21 for identification were excerpts from the 224 pages of records from GDOE ultimately put onto the record in a later session as Appellate Exhibit XXXVIII. (T2 at 187-89.) During the 2 October 2023 hearing, the prosecution put Appellate Exhibit XXI, a business records certification signed on 28 September 2023 by Ms. K[redacted] M.P. A[redacted] onto the record. (App. Ex. XXI at 1.) On the record, trial counsel stated that Appellate Exhibit XXI pertained to Prosecution Exhibits 16 through 21 for identification. (T1. at 44.) At the 2 October 2023 hearing, the military judge did not make a ruling on the prosecution's motions to admit evidence. The court recessed until 16 October 2023. (T1 at 71.)

Second Motions Hearings Regarding GDOE Records

Proceedings resumed on 16 October 2023. Before members were present, the military judge had another Article 39(a), UCMJ, session to discuss again the government's motion to admit Prosecution Exhibits 16-21 for identification. (T1 at 73-99.) Trial defense counsel objected to the admissibility of Prosecution Exhibits for identification 16-21 based on testimonial hearsay. (T1 at 92-93.)

On the record, assistant trial counsel stated that both Prosecution Exhibits 30 and 31 for identification were tied to Appellate Exhibit XXI, Ms. A[redacted]'s business record certification. (T1 at 107.) Trial defense counsel did not object to Prosecution Exhibit 31 for identification, the GDOE pay records for Mr. H[redacted]. (T1 at 109; App. Ex. XXVII at para. 5.) Trial defense counsel did object to Prosecution Exhibit 30 for identification, Mr. H[redacted] driver's license, on the grounds of lack of proper authentication. (Id.)

The following day, on 17 October 2023, the military judge issued a ruling granting the prosecution's motion to admit Prosecution Exhibits for identification 6-13, 15, 30, and 32. (App. Ex. XXVII; T1 at 115.) The military judge deferred ruling on the admissibility of Prosecution

Exhibits 16-21 for identification. (App. Ex. XXVII at para. 29.) The military judge admitted Prosecution Exhibit 30 for identification as Prosecution Exhibit 30, relying on Appellate Exhibit XXI, the business records certification, signed by Ms. A[redacted] to lay the foundation under Mil. R. Evid. 902(11) and 803(6). (App. Ex. XXVII at para. 33.) The copy of the driver's license in Prosecution Exhibit 30 came from the 224 pages of GDOE records. (App. Ex. XXXVII at 73.) On the record on 17 October 2023, the military judge formally admitted Prosecution Exhibits 30 and 31 into evidence. (T1 at 123.)

Trial On the Merits Commenced

Before opening statements, the military judge instructed the members that "opening statements are not evidence, rather, they are what counsel expect the evidence will show in this case." (T1 at 125.) Trial counsel in her opening statement mentioned that Mr. H[redacted] obtained a Guam driver's license. (T1 at 125.) Trial counsel's slide show presentation also noted that in 2018 Mr. H[redacted] received a Guam driver's license. (App. Ex. XXIX.) The prosecution never published Prosecution Exhibit 30 to the members.

Trial Counsel Reoffered Prosecution Exhibits 16-21 for Identification

During its case-in-chief, on 18 October 2023, the prosecution moved to offer Prosecution Exhibits 16-21 for identification into evidence. (T2 at 3.) These exhibits were employment applications and Department of Homeland Security employment eligibility verification forms for Mr. H[redacted] regarding his employment with GDOE. (Pros. Exs. 16-21 for ID, ROT. Vol. 14.) During an Article 39(a), UCMJ, session, assistant trial counsel argued that these documents were "non-testimonial in nature." (T2 at 2.) Assistant trial counsel then stated that these exhibits were admissible under Mil. R. Evid. 902(11), as a self-authenticating certified domestic records of a regularly conducted activity and Mil. R. Evid. 803(6), records of a regularly conducted activity.

(T2 at 4.) Assistant trial counsel explained that the exhibits were authenticated by the business records certification signed by Ms. A[redacted]. (T2 at 6-7.)

Appellate Exhibit XXI was a two-page document. The first page consisted of the business records certification. Although the first page did not state that the declarant had "signed under penalty of perjury," the military judge noted that it otherwise met all other requirements for a business records certification. (App. Exs. XLIII at para. 8, LII at para. 4 n.1.) Appellate Exhibit XXI, page 1, had a date change from "27" to "28" with the initials C.E.V. under the correction. (T1 at 10.)

CERTIFICATION OF DOMESTIC
RECORDS OF A REGULARLY
CONDUCTED ACTIVITY

28
~~27~~ September 2023
28 Sep 23 CEV

The second page was a notary in which SrA V[redacted], the case paralegal, signed asserting that Ms. A[redacted] personally appeared before her on 28 September 2023. (App. Ex. XXI at 2.)

With the United States Armed Forces, Guam at the 36th Wing Office of the Staff Judge Advocate, Andersen Air Force Base, Guam, I C[redacted] E. V[redacted], the undersigned, do hereby certify that on this 28 day of September 2023, before me personally appeared K[redacted] M.P. A[redacted], who signed and executed the foregoing instrument. I do further certify that I am at the date of this certificate a person in the service of the United States Armed Forces authorized the general powers of a notary public under Title 10 U.S.C. 1044a of the grade SrA, United States Air Force, and 36th Wing Office of the Staff Judge Advocate stated below and that this certificate is executed in my capacity as a person authorized notary under Title 10 U.S.C. 1044a.

[redacted]
(Signature of person authorized to administer oaths)

C[redacted] E. V[redacted], SrA, USAF
(Name, Grade, and Branch of Service)

When assistant trial counsel attempted to offer Prosecution Exhibits 16-21 for identification, trial defense counsel noted that the initials on the date correction on the business records certification, C.E.V., were not the declarant's initials. (T2 at 10.)

The Error is Detected and Remedied

During a lunch recess, on 18 October 2023, Capt H[redacted] discussed the discrepancy with the notary with his leadership. (T2 at 287-88) Capt H[redacted] explained that although they had verified that Ms. A[redacted]'s signature was authentic, the notary form incorrectly stated that Ms. A[redacted] had "personally appeared before" SrA V[redacted]. (T2 at 288.) And upon realizing the error Capt H[redacted] notified his Staff Judge Advocate, Deputy Staff Judge Advocate, and the Law Officer Superintendent and then took steps to correct the error. (Id.)

Ms. A[redacted] Signed a New Business Records Certification – Appellate Exhibit XXXVII

Later that same day, the prosecution obtained a new business records certification, also signed by Ms. A[redacted] and marked as Appellate Exhibit XXXVII, to replace Appellate Exhibit XXI. (App. Ex. XXXVII; T2 at 160.) Appellate Exhibit XXXVII referred to the same 224 pages that Appellate Exhibit XXI referred to. When trial counsel attempted to reoffer Prosecution Exhibits 16-21 for identification, trial defense counsel change tact, they now objected that Ms. A[redacted] was not a proper records custodian. (T2 at 162.)

Ms. A[redacted] Testified to the Authenticity and Foundation for the GDOE Records

Thereafter, trial counsel called Ms. A[redacted] to testify. (T2 at 163.) Ms. A[redacted] was the personnel services administrator, a records custodian, and maintained records for employment for the GDOE. (T2 at 163-64.) During her testimony, she confirmed that she reviewed and released 224 pages of Mr. H[redacted] employment. (T2 at 164, 166, 187.) Ms. A[redacted] explained that these documents were readily kept and maintained in the course of regularly conducted business

activities at the GDOE. (T2 at 164.) And it is a regularly practice for the GDOE to record this type of information. (Id.) In her role as a business records custodian, it would be proper for her to maintain the 224 pages of Mr. H[redacted]' employment records. (Id.) Ms. A[redacted] also confirmed that she signed a business records certification, Appellate Exhibit XXXVII, on 18 October 2023. (T2 166.)

Later that same day, the prosecution recalled Ms. A[redacted] and put the 224 pages of Mr. H[redacted]' GDOE records on the record as Appellate Exhibit XXXVIII. (T2 at 187.) Ms. A[redacted] confirmed that Prosecution Exhibits 16-21 for identification were copies of the same records in Appellate Exhibit XXXVIII. (T2 at 189-95.)

As for Appellate Exhibit XXI, the initial business records certification, Ms. A[redacted] stated that she signed it on 28 September 2023 in her office. (T2 at 198.) Ms. A[redacted] confirmed that although she had, in fact, signed page one of Appellate Exhibit XXI, she had not done so in front of SrA V[redacted], the notary. (T2 at 199.) Once Ms. A[redacted] signed the business records certification on 28 September 2023, she gave it to her legal department. (T2 at 197.)

Motion to Dismiss for Prosecutorial Misconduct

On 19 October 2023, trial defense counsel moved to dismiss for prosecutorial misconduct. (App. Ex. XXXIX; T2 at 208.) Trial defense counsel argued that the government falsely notarized page two of Appellate Exhibit XXI and that dismissing the entire case was an appropriate remedy. (App. Ex. XXXIX at 4.) The prosecution contested the motion to dismiss for prosecutorial misconduct. (T2 at 209.) Next the parties called witnesses to testify regarding the contested notary.

Motion to Dismiss for Prosecutorial Misconduct Oral Arguments

During arguments, trial defense counsel said dismissing the entire case was an appropriate remedy. (T2 at 444.) Trial defense counsel conceded that neither party published any documents from the GDOE to the members, including Prosecution Exhibit 30. (T2 at 448.) Trial defense further conceded that the only time either party referenced evidence from the GDOE was during opening statements. (Id.) Nevertheless, trial defense counsel argued for dismissal directing the judge to consider the similarity between Appellee's alleged misconduct and trial counsel's misconduct: "when you have allegations of false statements against an accused and the trial counsel has done something that amounts to false statements… I think it's not just prejudice, it's also the integrity of the system and the inherent fairness to the system." (T2 at 450-51.)

Initially, trial counsel argued that the prosecutorial misconduct did not justify dismissal of charges. (T2 at 473.) The military judge repeatedly pressed trial counsel suggesting that dismissal would be appropriate given the irony of the situation. (T2 at 483-85.) Eventually, trial counsel caved to the judge's repeated questions: "[d]ue to the irony of the fact that we're dealing with a false document and the two specifications in Charge II, are also dealing with similar matters, the government would concede to that [dismissing Charge II] being a potential remedy." (T2 at 483-85.)

Military Judge's Ruling – Motion to Dismiss

On 24 October 2023, the military judge issued his ruling granting the motion to dismiss in-part. (App. Ex. XLIII.) The military judge dismissed with prejudice Charge II, Specifications 1-2. (App. Ex. XLIII at para. 60.) The military judge also suppressed all evidence from the GDOE, including Prosecution Exhibits 30-31 (Mr. H[redacted] driver's license and employment pay

records, respectively), as well as Prosecution Exhibits 16-21 for identification (Mr. H[redacted] employment records). (App. Ex. XLIII at para. 59.) Lastly, the military judge disqualified the current prosecution team and the entire Andersen AFB legal office, except for one paralegal. (App. Ex. XLIII at para. 61.)[5]

In dismissing with prejudice Charge II, Specifications 1-2, the military judge did not articulate whether the prosecutorial misconduct impacted a substantial right of Appellee. The military judge did not find prejudice before dismissing the charge and its specifications. The military judge found that prosecutorial misconduct had occurred when Capt H[redacted] unknowingly allowed the court to rely on the improperly notarized document:

> There is no question that prosecutorial misconduct occurred in this Court-Martial. The government conceded during oral argument that what Capt H[redacted] did meets the definition of prosecutorial misconduct, as defined by Voorhees and all prior cases. Likewise, the Court could not agree more that prosecutorial misconduct occurred. The Court relied on a false document (App. Ex. XXI) to overrule a defense objection to PE 30. Capt H[redacted], while it does not appear it was knowingly at that time, allowed this Court to rely on the false document (App. Ex. XXI). But for the defense counsel's question regarding signing the document in front of someone from the Air Force, this issue would never have seen the light of day. The only issue in this case is what remedy is appropriate for the misconduct that occurred.

(App. Ex. XLIII at para. 55.)

For this misconduct alone, the military judge appeared to believe he had within his discretion the authority to dismiss all charges and specifications, he realized that would have been inappropriate:

[5] The United States is not appealing the military judge's decision to disqualify the former prosecution team and legal office. That ruling does not terminate charges against Appellee, nor does it exclude evidence. Thus, it does not appear that the decision is appealable under Article 62, UCMJ.

> The defense counsel requests this Court dismiss all Charges and Specifications with prejudice. While that option was found to be a valid exercise of judicial discretion in Bowser, the Court does not find it appropriate under the facts of this case.

(App Ex. XLIII at para. 56.)

The military judge recited the legal requirement that prejudice is a precondition for relief for prosecutorial misconduct:

> As stated by the Court of Appeals for the Armed Forces (CAAF) in Frey, "[r]elief will be granted only if the trial counsel's misconduct 'actually impacted on a substantial right of an accused (i.e., resulted in prejudice).'" *Id.* at 249 (quoting Fletcher at 178).

(App. Ex. XLIII at para. 57.) He then rejected trial defense counsel argument that the appellee was prejudiced:

> During oral argument when asked about the prejudice, the defense counsel mentioned the accused's husband's driver's license being mentioned in opening statements. However, as conceded by the defense, opening statements are not evidence. The Court instructed the members prior to the government's opening statement, "[n]ext, you will hear opening statements. I advise you that opening statements are not evidence; rather, they are what counsel expect the evidence will show in the case."

(App. Ex. XLIII at para. 57.) Further supporting his conclusion, the military judge highlighted the fact that none of the evidence had yet been published or provided to the members:

> It is important to note that the members have received zero evidence from the GDOE records. The only time anything from the GDOE records has been mentioned in front of the members is during the ATC's opening statement.

(App. Ex. XLIII at para. 58.)

Notwithstanding the judge's recitation of the correct legal standard "[r]elief will be granted only if the trial counsel's misconduct 'actually impacted on a substantial right of an accused (i.e.,

resulted in prejudice).'" and his rejection of trial defense counsel's argument in support of prejudice, he determined relief was still warranted:

> That said, the Court agrees relief is warranted, just not the exact relief the defense requests. Instead, the Court orders the following: No evidence obtained from the Guam Department of Education will be permitted to be introduced into evidence. Prosecution Exhibits 30 and 31, which were previously admitted into evidence, will not be introduced to the members and there will not be any reference to either exhibit.

(App. Ex. XLIII at para. 59.)

> The defense requested, if the Court disagrees with dismissal with prejudice as the best option in the accused's case, the Court consider dismissing the false official statement Charge and Specifications, as well as the larceny Charge and Specification. The Court disagrees that both Charges and Specifications should be dismissed. However, the Court concurs that Charge II and both Specifications of false official statement, will be dismissed with prejudice. The trial counsel conceded this would be appropriate remedy based upon the false document being presented to the Court, in a case where an accused is facing accusations of false official statements.

(App. Ex. XLIII at para. 60.)

Trial Counsel's Motion to Reconsider

On 26 October 2023, trial counsel moved for reconsideration. (App. Ex. XLVI.)[6] Trial counsel made clear that dismissal of any specification was improper. (App. Ex. XLVIII at para. 28.) In the motion to reconsider, trial counsel acknowledged that excluding Prosecution Exhibit 30[7] and disqualifying the trial team was an appropriate remedy. (App. Ex. XLVIII at para. 25.)

[6] Trial counsel filed an amended motion for reconsideration on 9 January 2024, the only difference being withdrawing a request for an Article 39(a), UCMJ, session. (App. Ex. XLVIII.)

[7] For the reasons discussed below, the prosecutorial misconduct did not result in prejudice. Therefore, the military judge should not have suppressed Prosecution Exhibit 30. The United States is not appealing the exclusion of Prosecution Exhibit 30 because the prosecution has other independent means to admit Mr. H[redacted]' driver's license at trial.

The motion to reconsider requested the military judge reverse his decision to dismiss the specifications and to reverse his decision to suppress Prosecution Exhibits 16-21 for identification and Prosecution Exhibit 31:

> THEREFORE, the United States respectfully requests this Honorable Court: (a) reconsider its ruling ordering Charge II and its respective Specifications be dismissed with prejudice for prosecutorial misconduct. Further, the United States requests this Court reconsider its ruling ordering that "no evidence from the Guam Department of Education will be permitted to be introduced into evidence." This Court should find disqualification of trial counsel and exclusion of Prosecution Exhibit 30 were sufficient remedies to cure the misconduct in question.

(App. Ex. XLVIII at para. 28.) Trial defense counsel opposed the motion to reconsider. (App. Ex. XLVII.)

Military Judge's Ruling – Motion to Reconsider

The military judge denied the motion for reconsideration. (App. Ex. LII.) The military judge's ruling on the motion to reconsider identified three issues. (App. Ex. LII at para. 28.) First, should the military judge reconsider the ruling. (Id.) He concluded he should. (Id.) Second, whether a trial judge was required to making any finding of prejudice prior to granting a remedy at the trial level. (Id.) Third, whether Appellee suffered any prejudice. (Id.) With regard to whether he was required to consider whether any substantial right of the Appellee was prejudiced, he concluded "No." (Id.) In support of this conclusion, he noted that the AFCCA had previously held that trial judges are not required to conduct any prejudice analysis. (App. Ex. LII at para. 35.) Indeed, the trial judge reiterated his personal view that no prejudice analysis of any kind was required, and that a trial judge is permitted to dismiss all charges and specification with prejudice even if they are aware of other potential remedies:

> As Bowser makes clear, this Court is not required to do a prejudice analysis when this Court finds prosecutorial misconduct at the trial

> level. In addition, so it is clear, the Court understands there were other remedies that it could have chosen in its discretion. After weighing all options, the Court chose dismissal with prejudice for Charge II and its specifications and prohibiting any evidence from being introduced that came from the GDOE records.

(App. Ex. LII at para. 36.) The judge then returned to his observation that at an earlier motion hearing a trial counsel had conceded dismissal and suppression would be appropriate remedies.

> It is not lost on this Court that the measures chosen by this Court are the same measures the government has already conceded were appropriate: no longer using the GDOE records and dismissing with prejudice the false official statement Charge and Specifications. While the government wants to argue the original trial team is no longer the government and somehow this Court should only consider the new trial team as the government, the Court finds that logic flawed and chooses not to find the new trial team are the only ones who can claim to be the government. GMR at para. 24. By that logic the government could chose to replace government counsel anytime a military judge ruled against them with new detailed counsel who present a different argument than the previously detailed government argument.

(App. Ex. LII para. 45.)

STATEMENT OF STATUTORY JURISDICTION

The military judge's ruling dismissing with prejudice Charge II, Specifications 1-2, terminated the proceedings as to a charge and a specification. Also, the ruling excluded all evidence from the GDOE, which was a substantial proof of a fact material in the court-martial against Appellee. Mr. H[redacted] employment applications and pay records were highly probative showing that he lived in Guam. Proving that Mr. H[redacted] lived in Guam was a fact of consequence relevant to all charges and its specifications in the case against Appellee. Mr. H[redacted] lived in Guam and this proved that Appellee mispresented facts on her Application and Authorization to Start, Stop, or Change Basic Allowance for Housing form in that her husband no longer lived in New York, but instead lived in Guam. THE GDOE was further proof that she

received BAH in addition to OHA when she was not entitled to receive BAH in addition to OHA because her husband no longer lived in New York. Lastly, Appellee was derelict in her duties because she failed to inform authorities that her husband no longer lived in New York as it was her duty to do so. For these reasons, this Court has jurisdiction under Article 62(a)(1)(A)-(B), UCMJ.

ARGUMENT

THE MILITARY JUDGE ABUSED HIS DISCRETION BECAUSE THE PROSECUTORIAL MISCONDUCT DID NOT RESULT IN ANY PREJUDICE TO APPELLEE. THEREFORE, DISMISSING WITH PREJUDICE CHARGE II, SPECIFICATIONS 1-2, AND SUPPRESSING THE GUAM DEPARTMENT OF EDUCATION RECORDS WERE NOT APPROPRIATE REMEDIES.

Standard of Review

Appellate court's review dismissal of charges and specifications for an abuse of discretion. United States v. Bowser, 73 M.J. 889, 898 (AF. Ct. Crim. App. 2014.) (citing United States v. Douglas, 68 M.J. 349, 354 (C.A.A.F. 2010); United States v. Gore, 50 M.J. 178, 187 (C.A.A.F. 2004)). When a military judge suppresses evidence, this Court also reviews for an abuse of discretion. United States v. Catano, 75 M.J. 513, 516 (AF. Ct. Crim App. 2015). An abuse of discretion occurs when the military judge's decision is influenced by an erroneous view of the law or when findings of fact are clearly erroneous. Freeman, 65 M.J. at 453. A military judge "enjoys 'broad discretion' under the abuse of discretion standard in selecting an appropriate remedy to correct a wrong." Douglas, 68 M.J. 354. But dismissal is not an appropriate remedy when the error was harmless. United States v. Mechanik, 475 U.S. 66, 89 (1986).

Law and Analysis

The military judge abused his discretion in dismissing with prejudice Charge II, Specifications 1-2, and suppressing evidence from the GDOE because the prosecutorial misconduct did not impact Appellee's substantial rights and therefore did not result in prejudice. Although the United States acknowledges that prosecutorial misconduct occurred in this case, that does not end the analysis. The improper execution of the notary – notarizing the document outside the presence of Ms. A[redacted] – whether intentionally or unintentionally, was a violation of a legal norm and therefore prosecutorial misconduct. *See* United States v. Meek, 44 M.J. 1, 5 (C.A.A.F. 1996) ("Prosecutorial misconduct can be generally defined as action or inaction by a prosecutor in violation of some legal norm or standard, e.g., a connotational provision, a statute, a Manual Rule, or an applicable professional ethics canon."). Notwithstanding the prosecutorial misconduct, trial judges must still follow the law and cannot dismiss specifications or suppress evidence absent an injury to a substantial right of an accused.

Prosecutorial misconduct does not mandate dismissal of charges in every case. *See* Greer v. Miller, 483 U.S. 756, 765 (1987) (recognizing that to constitute a due process violation the prosecutorial misconduct must deny the defendant a fair trial). Here, the military judge did not articulate how the prosecutorial misconduct resulted in any prejudice to Appellee. The military judge claimed that he did not have to find prejudice before dismissing charges and specifications. (App. Ex. LII at para. 36.) But this assertion contradicts Supreme Court precedent. *See* Morrison, 449 U.S. at 364. Lastly, if the military judge were to conduct a prejudice analysis, nothing in the record supports that Appellee suffered any prejudice because of the prosecutorial misconduct. For these reasons, the military judge abused his discretion, and this Court should grant the United States relief.

A. The military judge erred by failing to recognize that he must first find prejudice to a substantial right before dismissing charges with prejudice for prosecutorial misconduct.

1. Supreme Court precedent requires a judge to find prejudice before dismissing charges with prejudice.

Supreme Court precedent requires a finding of prejudice before dismissing charges with prejudice. Most closely on point is Morrison, 449 U.S. 361. The respondent in Morrison invoked her Sixth Amendment right to counsel. Id. at 362. After invoking her right to counsel, agents attempted to question the respondent without her counsel present. The respondent then appealed, claiming that the agents violated her right to counsel. The Supreme Court explained that "absent demonstratable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate." Id. at 365. The Supreme Court then went on to explain that the respondent did not show prejudice of any kind to the ability of her counsel to provide adequate representation in the criminal proceedings and therefore there was no Sixth Amendment violation. Id. at 366-67. The Supreme Court noted that although the agent's actions were egregious, questioning the respondent without her attorney present, did not rise to the level of prejudice and therefore dismissal of charges was not an appropriate remedy. Id. at 367.

2. Federal circuit courts, since Morrison, require a judge to find prejudice before dismissing charges for prosecutorial misconduct.

Although Morrison did not address prosecutorial misconduct directly, other federal courts have relied on the Morrison test when addressing prosecutorial misconduct. And those federal courts have concluded that it is imperative that trial judge's find prejudice before dismissing charges based on prosecutorial misconduct. In United States v. Derrick, 163 F.3d 799, 804 (4th Cir. 1998, the Fourth Circuit acknowledged that "virtually every other circuit…has also held that

an indictment may not be dismissed on prosecutorial misconduct, absent a showing of prejudice to the defendant." It further observed that "the district court's dismissal of defendant's indictments without a finding of prejudice is directly contrary not only to the precedent of this court, but also to clear and well-established Supreme Court precedent." Id. at 806. Moreover, "a district court exceeds its powers in dismissing an indictment for prosecutorial misconduct not prejudicial to the defendant." Id. at 807 (quoting Bank of Nova Scotia v. United States, 487 U.S. 250, 255 (1988)). Derrick also cited Morrison for the proposition that a "court's supervisory power cannot be exercised to dismiss indictments for government misconduct absent a showing of prejudice to defendants. Id. 807.

Over the past several decades, other federal circuit courts have required that a district court judge find prejudice before dismissing an indictment with or without prejudice. *See* United States v. Wright, 913 F.3d 364, 371 (3d Cir. 2019), *cert. denied*, 140 S. Ct. 627 (2019); *see also* United States v. Orozco, 916 F.3d 919, 925 (10th Cir. 2019) (finding that the district court's dismissal of the indictment with prejudice "failed to balance the competing interest that Morrison requires and failed to consider more narrowly tailored remedies"); United States v. Van Engel, 15 F.3d 623, 631 (7th Cir. 1993) ("A federal judge is not authorized to punish the misconduct of a prosecutor by letting the defendant walk, unless the misconduct not only violated the defendant's right but also prejudice his defense…") United States v. Jacobs, 855 F.2d 652, 655 (9th Cir. 1988) ("In short, absent flagrant and prejudicial prosecutorial misconduct, this court will find that the district court's dismissal of an indictment is an abuse of discretion.").

3. In line with Supreme Court precedent, CAAF also requires a judge to find prejudice before dismissing charges for prosecutorial misconduct.

Our superior court requires a finding of prejudice before dismissing charges. Prosecutorial misconduct "does not itself mandate dismissal of charges against an accused or ordering a rehearing in every case where it has occurred." Meek, 44 M.J. at 5 (citing Greer, 483 U.S. at 765). In Meek, trial counsel "contacted a defense-requested witness [] and, in interviewing him, threatened and intimidated him by telling him he should be afraid to come to the trial site and talk with uniformed personnel because he would face a court-martial." Id. at 3. CAAF rejected the appellant's argument for a per se reversal rule for prosecutorial misconduct and held that the prosecutorial misconduct towards the defense's witness must be evaluated for prejudice to the accused's right to compel witnesses for his court-martial. Id. at 6. "Instead an appellate court usually considers the legal norm violated by the prosecutor and determines if its violation actually impacted on a substantial right of an accused (i.e., resulted in prejudice)." Id. at 5. The court found no prejudice because the defense witness stated that he told the truth at this court-martial regardless of trial counsel's intimidations. Id. at 7-8. Thus, the court upheld the appellant's conviction. In recognizing that the prosecutorial misconduct must violate an accused's substantial right, CAAF relied on Supreme Court precedent. The Supreme Court in United States v. Hasting, 461 U.S. 499 (1983) and Morrison, 449 U.S. 361, "strongly suggested that prosecutorial misconduct is not per se reversible error but rather is error whose impact may vary in individual cases." Id. at 6. Hasting addressed the harmless error rule when reviewing prosecutorial misconduct and held that the lower court erred when failing to consider harmless error in light of the prosecution's overreaching comments in closing statements when commenting on respondent's right to remain silent. 461 U.S. 499. The Supreme Court reversed the lower court's decision and held that the prosecutorial misconduct was harmless error. Id. at

512. CAAF has explained that the harmless-error rule is appropriate even where a prosecutor knowingly used perjured testimony, or where a defense witness was influenced by a commander and his staff on the basis of their quasi-prosecutorial status. Meek, 44 M.J. at 6.

If a court finds prosecutorial misconduct occurred, relief is only warranted if the misconduct, "actually impacted on a substantial right of an accused (i.e., resulted in prejudice)." United States v. Pabelona, 76 M.J. 9, 12 (C.A.A.F. 2017) (citing Fletcher, 62 M.J. at 178.) And over the years, CAAF has insisted on looking at the fairness of the trial and actual prejudice rather than focusing on the prosecutor's misconduct. CAAF specifically explained looking at the fairness of the trial is imperative and not the culpability of the prosecutor:

> In a due process analysis of prosecutorial misconduct this court looks at the fairness of the trial and not the culpability of the prosecutor. *See* Smith v. Phillips, 455 U.S. 209, 219, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982). Even where we find misconduct on the part of the prosecutor, this court will go on to look at the "overall effect of counsel's conduct on the trial, and not counsel's personal blameworthiness. United States v. Thompkins, 58 M.J. 43, 47 (C.A.A.F. 2003).

United States v. Edmond, 63 M.J. 343, 345 (C.A.A.F. 2006). Furthermore, CAAF in United States v. Andrews, reiterated the importance of finding prejudice before determining an appropriate remedy:

> It is not the number of legal norms violated but the impact of those violations on the trial which determines the appropriate remedy for prosecutorial misconduct.' Meek, 44 M.J. at 6. 'In assessing prejudice, we look at the cumulative impact of any prosecutorial misconduct on the accused's substantial rights and the fairness and integrity of his trial.' Fletcher, 62 M.J. at 184 (citation omitted).

77 M.J. 393, 402 (C.A.A.F. 2018).

Even the military judge here noted the requirement to find prejudice when he cited Frey, which held that "relief will be granted only if the trial counsel's conduct actually impacted on a

substantial right of an accused (i.e., resulted in prejudice)." 73 M.J. at 249 (quoting Fletcher, 62 M.J. at 178). Still the military judge did not believe he had to find prejudice before dismissing with prejudice Charge II, Specifications 1-2. (App. Ex. LII at para. 35, 36.) Based on the above-cited cases, the military judge had an erroneous view of the law, and therefore abused his discretion.

4. The military judge's reliance on Bowser for the proposition that he need not find prejudice before dismissing Charge II, Specifications 1-2, was erroneous.

The only opinion cited by the military judge in support of his conclusion that no prejudice finding was required was Bowser,73 M.J. 889. (App. Ex. LII at para 35.) Accordingly, the military judge's misreading of the Court's opinion in Bowser is dispositive. (App. Ex. LII at para 36.) The military judge explained that "[n]owhere in AFCCA's opinion does it say the military judge found the government's prosecutorial misconduct prejudiced [Appellee]." (App. Ex. LII. at para 35.) His assertion was simply wrong. In fact, the Court actually held that "[p]rosecutorial misconduct does not automatically require [relief]; instead, relief is granted only if trial counsel's misconduct actually impacted on a substantial right of an accused (i.e. resulted in prejudice)." Id. at 897 (citing Frey, 73 M.J. at 249) (internal quotations omitted). This clear and fatal misreading of Bowser dooms the military judge's ruling.

The prejudice to the accused's rights in Bowser was obvious and ongoing. 73 M.J. at 894. In Bowser, after the military judge found that trial counsel had committed a discovery violation, the military ordered an *in camera* review of trial counsel's notes to remedy this ongoing violation of the accused's rights. 73 M.J. at 894. Trial counsel refused to turn over their interview notes. Id. This additional misconduct on trial counsel's part, prevented the military judge from remedying the ongoing prejudice to the accused substantial right to discovery. Id. The military judge had already identified a discovery violation, not turning over witness

interview notes. Id. And trial counsel's ongoing and continuous misconduct was preventing the trial judge from remedying that prejudice. Id. This could not be more different from the facts of this case. Here, trial counsel took affirmative steps themselves to remedy the error. They prepared a new business records certification and called Ms. A[redacted] to testify to lay the proper foundation. (App. Ex. XXXVII; T2 at 164.) Trial counsel fully cooperated with every request from the military judge. The efforts of trial counsel successfully corrected the faulty notary and prevented the members from ever encountering improperly authenticated evidence. Unlike in Bowser where trial counsel's intentional misconduct worsened and continued to prejudice the accused, here trial counsel's actions ensured Appellee suffered no prejudice. *See* id. at 894-95.

The military judge in Bowser found an additional prejudice before dismissing the case. The judge expressed concerns that trial counsel's refusal to comply with his order and their subsequent request for a continuance were attempts to buy more time to "perfect [their] case." Id. 894-95. Concerned that trial counsel had not diligently prepared for trial, he noted that trial counsel's "failure to perfect [its] case in the previous 10 months was without good cause, and that any delay would inure to its benefit." Id. at 895. The military judge highlighted that "the simple fact is the government has been seeking a delay, and that delay *will work to the detriment* of the accused." Id. (emphasis added.) Before determining that dismissal was the appropriate remedy the trial judge considered abatement. Id. He found that abatement of the case was insufficient because it would "reward the party with unclean hands with that which it desperately needs." Id. In sum, the military judge in Bowser found that as a result of the trial counsel's ongoing misconduct the accused would suffer not only from the uncured discovery violation, but also from the additional delay. Id. Conversely, the government would benefit from their continuing misconduct by obtaining "that which [they] desperately need[]." Id. at 895. Only

after finding these prejudices to the accused and the inappropriateness of other remedies, did the military judge dismiss the charges with prejudice. Id. A careful review of Bowser reveals the trial judge unmistakably found prejudice to the accused before the he dismissed the charges with prejudice. Id. Contrary to the trial judge's misapprehension of the law, Bowser does not stand for the proposition that trial judges are not required to find prejudice before dismissing charges. *See* id. The military judge abused his discretion with his erroneous interpretations of the law when he adamantly concluded that he did not need to find prejudice to Appellee before dismissing with prejudice Charge II, Specifications 1-2. (App. Ex. LII para. 35-36.)

B. The military judge further erred by failing to find prejudice to a substantial right before excluding evidence on the basis of prosecutorial misconduct.

The military judge also abused his discretion by suppressing evidence from the GDOE without first finding prejudice to Appellee. Again, providing such a remedy absent any prejudice is contrary to existing law. "While prosecutorial misconduct does not automatically require a new trial or the dismissal of the charges against the accused, relief will be granted if the trial counsel's misconduct 'actually impacted on a substantial right of an accused (*i.e.*, resulted in prejudice).'" Fletcher, 62 M.J at 178 (quoting Meek, 44 M.J. at 5.)

In the context of prosecutorial misconduct, other jurisdictions have held that suppressing evidence as a remedy is only warranted when the prosecutorial misconduct results in prejudice. In Commonwealth v. Taitano, the prosecutor advised the victim that it was in her best interest not to speak with defense counsel prior to trial. 2017 MP 19 ¶ 1,4, 2017 N. Mar. I. LEXIS 19**. Based on the prosecutorial misconduct the trial judge excluded the victim's testimony. 2017 MP 19 ¶ 11. The court found that the trial judge did not find actual or tangible prejudice when deciding to exclude the victim from testifying. 2017 MP 19 ¶ 57. The court echoed that exclusion of evidence, a key witness, was not appropriate absent a showing of actual or tangible

prejudice. 2017 MP 19 ¶ 55. Because the exclusion of evidence was based on an erroneous view of the law, the court found that the judge abused his discretion. Id. Taitano mentioned that various authorities who addressed similar issues regarding prosecutorial misconduct have required a finding of prejudice before granting a defendant relief. Id. The court found State v. Harper, 266 P.3d 25 (N.M. 2011) instructive. 2017 MP 19 ¶ 52.

In State v. Harper, the district court imposed a deadline to complete interviews of the alleged victim and the doctor who examined her. 266 P.3d at 27. The prosecution failed to comply with this order and the court prohibited the prosecution from calling the victim and doctor as witnesses. Id. The Supreme Court of New Mexico reversed the district judge's order precluding the victim and doctor from testifying. Id. at 28. The court's opinion hinged on the importance of finding prejudice before providing relief. Id. at 30-31. "[W]hen a party has acted with a high degree of culpability, the severe sanctions of dismissal or exclusion of key witnesses are only proper where the opposing party suffered tangible prejudice." Id. at 31. The court then went on to explain that the district judge "made only a cursory finding of prejudice, merely enumerating 'the subcategories of lack of discovery, lack of ability to prepare, lack of confrontation [and] incarceration of the defendant during all of this delay…." Id. at 33. The court then found that the district judge made a "speculative prejudice" finding. Id. The district judge failed to articulate how the defendant was prejudiced by the delay – prosecution not interviewing the witnesses prior to the judge's deadline. The exclusion of testimony was an extreme sanction given the lack of prejudice and the court found that the exclusion of the testimony was an abuse of discretion. Id.

Additionally, federal circuit courts have also held that excluding evidence is an unwarranted remedy absent prejudice. In United States v. Maples, the court noted that

"suppression of evidence must be viewed as an undesirable remedy reserved for cases of incurable prejudice or bad faith conduct demanding punishment by the court." 60 F.3d 244, 247 (6th Cir. 1995). In United States v. Johnson, the opinion reiterated that "a district court must substantiate a defendant's claim of prejudice before adopting the most severe discovery sanction available – wholesale exclusion of evidence." 228 F.3d 920, 926 (8th Cir. 2000)

Throughout various jurisdictions, including ours, it is well-settled law that prosecutorial misconduct warrants *any* relief only if the error impacted a substantial right of an accused. *See* Meek, 44 M.J. at 5. For reasons discussed below, Appellee did not suffer any prejudice. Here, there was no violation of a substantial right that would have impacted the merits of this case, warranting the suppression of evidence from the GDOE. Thus, the military judge abused his discretion with his erroneous view of the law when suppressing evidence absent a finding of prejudice.

C. Appellee did not suffer any prejudice because of the prosecutorial misconduct.

Contrary to well-established law, the military judge here dismissed a charge and its specifications without weighing whether the prosecutorial misconduct prejudiced the Appellee. In the military judge's ruling for reconsideration, he explicitly stated that he need not conduct a prejudice analysis, showing that the military judge abused his discretion in applying erroneous legal principles. (App. Ex. LII at para. 28, 36.) Nonetheless, the military judge conducted a prejudice analysis applying the Fletcher factors. (App. Ex. LII para. 39-43.) The Fletcher test is an inappropriate prejudice test for trial judges to use. The United States did ask the military judge to conduct an analysis under the Fletcher factors in the motion to reconsider. (App. Ex. XLVI at 1.) But this was a typographical error that should have been removed, as evidenced by the fact that the rest of the motion to reconsider did not cite or argue the Fletcher factors. Even

though the military judge used the wrong test at the trial level, he still did not identify any prejudice. Essentially, the military judge punished the misconduct of the prosecutor by letting Appellee off the hook with respect to half of the specifications on the charge sheet without finding any violations to her substantial rights or her defense.

In the end, the military judge identified no prejudice to Appellee in either of his rulings. He focused on the government falsifying a document and the irony in the government's conduct because Appellee was charged with making two false official statements. (App. Ex. XLIII at para. 20; T2 at 483.) The military judge also relied on trial counsel's concessions during oral argument that an appropriate remedy could be dismissal of Charge II, Specifications 1-2. (App. Ex. LII at para. 36, 45.) But irony is not prejudice.

The military judge's ruling referred to trial counsel's concession during oral argument that dismissal of Charge II, Specifications 1-2, could be an appropriate remedy. (App. Ex. LII para. 45.) But this Court is not bound by the government's concessions. In United States v. Emmons, the court held that the government's concession was not determinative of the appeal. 31 M.J. 108, 110 (C.M.A. 1990) (overruled on other grounds). Here, the government backed off on that concession in its motion for reconsideration. (App. Ex. XLVIII at para. 28.) Trial counsel conceded the remedy after being pressed multiple times by the military judge to change its position. Importantly, trial counsel never conceded that Appellee had suffered any prejudice. For these reasons, the United States, now on appeal, does not concede that the dismissal was an appropriate remedy.

The military judge noted that if this Court should disagree with him and find that he must conduct a prejudice analysis, he would find that the prosecutorial misconduct prejudiced the Appellee. (App. Ex. LII at para. 28.) The military judge mentioned that "the severity of the

government's misconduct [was] high. Therefore, under the Fletcher prejudice analysis, this Court finds the accused has suffered prejudice based on the government's prosecutorial misconduct." (App. Ex. LII para. 48.) But weighing the severity of prosecutorial misconduct is not the test. "[I]t is not the number of legal norms violated but the impact of those violations on the trial which determine the appropriate remedy for prosecutorial misconduct." Meek, 44 M.J. at 6. The military judge should have considered "the legal norm violated by the prosecutor and determine[d] if its violation actually impacted on a substantial right of an accused (i.e. resulted in prejudice)." *See* Meek, 44 M.J. at 5 (citing Morrison, 449 U.S. 361). Still the military judge did not develop what substantial right was in question, because at the end of the day there was no prejudice to Appellee. The prosecutorial misconduct did not impact Appellee's substantial rights.

Appellee had the right to have legal and competent evidence introduced against her at trial. *See* United States v. Kaiser, 58 M.J. 146, (C.A.A.F. 2003) (explaining that "the presumption of innocence is directly related to the requirement that guilt be established by legal and competent evidence beyond a reasonable doubt"). This right has been ensured because the Prosecution Exhibits 16-21 for identification and Prosecution Exhibits 30-31, evidence obtained from the GDOE, have now been properly authenticated and are admissible. For the following reasons, the trial team cured the prosecutorial misconduct.

Even though the notary falsely stated on Appellate Exhibit XXI that Ms. A[redacted] signed in the notary's presence; there is no dispute that Ms. A[redacted] did, in fact, sign the original business records certification, certifying the authenticity of Prosecution Exhibits 16-21 for identification and Prosecution Exhibits 30-31. (T2 198-99.) Ms. A[redacted] did not make a false statement about the authenticity of the documents.

Furthermore, the false notarization did not mean that the GDOE documents were not true and accurate copies. The only falsity was that Ms. A[redacted] had signed in the presence of the notary. Everything else about the Appellate Exhibit XXI proved accurate.

In any event, the prosecution remedied the faulty notary. The prosecution obtained a new business records certification." (App. Ex. XXXVII.) Further, Ms. A[redacted] testified and laid the proper foundation for admission of Prosecution Exhibits 16-21 for identification and Prosecution Exhibits 30-31. Ms. A[redacted] explained that the GDOE records are readily kept and maintained in the course of regularly conducted business activities at the GDOE. (T2 at 164.) She also testified that it is a regular practice for the GDOE to record this type of information. (Id.) In her role as business records custodian, it would be proper to maintain the records in Appellate Exhibit XXXVIII. (Id.) Trial defense counsel also had the chance to confront Ms. A[redacted] who confirmed that she reviewed the 224 pages of GDOE records. (T2 at 166.) When recalled, Ms. A[redacted] explained that Prosecution Exhibits 16-21 for identification were in fact records from the GDOE that she reviewed. (T2 at 189-95.) Between Ms. A[redacted]'s testimony and the new business records certification, the prosecution met the requirements for foundation and authentication under Mil. R. Evid. 803(6) and 902(11).

More so, the military judge acknowledged that the original business records certification (App. Ex. XXI at 1.) met all the requirements of certification but for the declarant not signing "under penalty of perjury." (App. Exs. XLIII at para. 8, LII at para. 4 n.1.) The new business records certification contains the language "under penalty of perjury," and it is therefore valid. (App. Ex. XXXVII.) Given these remedial measures, the GDOE records should be admissible at trial. *See* United States v. Foerster, 65 M.J. 120, 125 (C.A.A.F. 2007) (acknowledging that federal courts have held that business records exception to hearsay should be "construed

generously in favor of admissibility"). The trial team cured the prosecutorial misconduct by correctly authenticating the prosecution exhibits – through both in-court testimony and a new business records certification – without the use of the improperly notarized Appellate Exhibit XXI. Moreover, the prosecution demonstrated its ability to properly authenticate the exhibits *before* the military made its ruling dismissing the charges and excluding the evidence in this case.

Equally important, the prosecution demonstrated it could properly authenticate Prosecution Exhibits 16-21 for identification and Prosecution Exhibits 30-31 before trial counsel published those exhibits to the members. Indeed, Prosecution Exhibits 16-21 for identification have not even been admitted into evidence yet. No improperly authenticated evidence was presented to the members, and the prosecution exhibits have now been properly authenticated.

Although trial counsel mentioned the driver's license in the opening statement, this did not result in prejudice. The military judge before opening statements instructed the members that "opening statements are not evidence, rather, they are what counsel expect the evidence will show in this case." (T1 at 125.) Any mentioning of Prosecution Exhibit 30, the driver's license, in opening statements, was cured by the military judge's instruction. Even trial defense counsel admitted that opening statements are not evidence. (T2 at 469.) Members were aware that opening statements are not evidence and are presumed to follow the judge's instructions. *See* United states v. Taylor, 53 M.J. 195, 198 (C.A.A.F. 2000) ("Absent evidence to the contrary, this Court may presume that members follow the military judge's instructions."). Nonetheless, the driver's license now has been properly authenticated, even if the government may attempt to re-introduce it through other means. Thus, mentioning the driver's license was not prejudicial. The

government has ensured that only legal and competent evidence will be used against Appellee at trial. Appellee has therefore suffered no prejudice

The prosecution's behavior in this case was improper and against legal norms. *See* Meek, 44 M.J. at 5. But in light of their being no prejudice, excluding all the evidence from the GDOE and dismissing charges was an undeserved windfall for Appellee. The contested documents have been properly authenticated, and Appellee's right to have only legal and competent evidence introduced against her has been ensured. Society has an interest in seeing wrongdoers punished, and missteps by the prosecution with no effect on Appellee's rights should not preclude prosecution of Appellee or the introduction of legal and competent evidence against her. In determining relief for prosecutorial misconduct this Court should look "to the fairness of the trial and not the culpability of the prosecutor." Edmond, 63 M.J. at 345. Even in cases with prosecutorial misconduct, it is imperative to look at the "overall effect of counsel's conduct on the trial, and not counsel's blameworthiness." Thompkins, 58 M.J. at 43.

CONCLUSION

Without finding that the prosecutorial misconduct impacted Appellee's substantial rights, the military judge dismissed with prejudice Charge II, Specifications 1-2, and suppressed evidence from the GDOE. The remedies the military judge imposed for the prosecutorial misconduct were not supported by law. The military judge's rulings were influenced by an erroneous view of the law in that he believed he did not have to find prejudice before granting Appellee relief. As discussed at length above, this assertion was contrary to well-established law and the military judge needed to articulate prejudice before granting any relief in this case. *See* Morrison, 449 U.S. 361; Frey, 73 M.J. 245. The military judge could not identify prejudice

because no prejudice was established on the record. Given that the military judge abused his discretion in applying the wrong law, his rulings should be reversed.

In conclusion, the United States respectfully requests that this Honorable Court reverse the military judge's decision to dismiss with prejudice Charge II, Specifications 1-2, and suppress the evidence from the GDOE. Further, the United States asks this Court to determine that the GDOE records, Prosecution Exhibits 16-21 for identification and Prosecution Exhibit 31 are admissible and remand the case to the trial court for further proceedings.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 29 February 2024.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**NOTICE OF APPEARANCE**
Appellee	)	
	)	
v.	)	Before Panel No. 3
	)	
Master Sergeant (E-7)	)	Misc. Dkt. No. 2024-1
DESIREE M. HOLMES	)	
United States Air Force	)	20 February 2024
Appellant	)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 12(a) of this Honorable Court's Rules of Practice and Procedure, the undersigned counsel respectfully provides written notice of her appearance in the above captioned matter.

Respectfully submitted,

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 20 February 2024.

Respectfully submitted,

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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**Misc. Dkt. No. 2024-1**
Appellant	)	
	)	
	)	
v.	)	
	)	**NOTICE OF DOCKETING**
	)	
Desiree M. HOLMES	)	
Master Sergeant (E-7)	)	
U.S. Air Force	)	
Appellee	)	

The record of trial and a notice of an intent to appeal pursuant to Article 62, UCMJ, 10 U.S.C. § 862, was filed in the above-styled case with this court on 9 February 2024.

Accordingly, it is by the court on this 9th day of February, 2024,

ORDERED:

The case is assigned Misc. Dkt. No. 2024-1 and referred to Panel 3.

FOR THE COURT

[redacted]

FLEMING E. KEEFE, Capt, USAF
Deputy Clerk of the Court

DEPARTMENT OF THE AIR FORCE
OFFICE OF THE JUDGE ADVOCATE GENERAL
MILITARY JUSTICE AND DISCIPLINE

9 February 2024

MEMORANDUM FOR AIR FORCE COURT OF CRIMINAL APPEALS

FROM: AF/JAJG

SUBJECT: Record of Trial – Article 62 Appeal – MSgt Desiree N. Holmes

1. On 29 May 2023, the Commander, Headquarters 11th Air Force, Joint Base Elmendorf-Richardson, Alaska, referred the following charges: one Charge and one Specification for dereliction of duty in violation of Article 92, UCMJ; one Charge and two Specifications for making a false official statement in violation of Article 107, UCMJ; and one Charge and one Specification for larceny in violation of Article 121, UCMJ. On 19 October 2023, the Defense filed a motion to dismiss the case for prosecutorial misconduct. (App. Ex. XXXIX.) On 19-20 October 2023, the parties presented evidence and argument on the issue. On 24 October 2023, the military judge granted the Defense's motion in-part. (App. Ex. XLIII.) The military judge dismissed Charge II and its two Specifications for making a false official statement with prejudice, suppressed the admission of evidence of Prosecution Exhibits 16-21, 30, and 31, and disqualified all previously detailed trial counsel and all members of the Andersen AFB, except for one paralegal. (Id.) On 26 October 2023, trial counsel moved for reconsideration. (App. Ex. XLVI.) Trial counsel filed an amended motion for reconsideration on 9 January 2024. (App. Ex. XLVIII.) The military judge on 19 January 2024, Japan Standard Time, notified trial and defense counsel, via e-mail, that he denied the motion for reconsideration. (App. Ex. L.)[1] On 30 January 2024, the military judge issued his written ruling. (App Ex. LII.)

2. On 20 January 2024 at 2010 CST, the United States filed a notice of appeal to notify the military judge that it would be appealing his ruling dismissing Charge II and its specifications and suppressing evidence. (Attached.) Trial counsel forwarded the appeal and record to the Air Force Appellate Operations Division, and it was received on 8 February 2024.

3. Pursuant to Article 62, UCMJ, and Rule 20 of the Air Force Court of Criminal Appeals Rules of Practice and Procedure, the United States files the attached certified original record of trial and the notice of appeal in the above case and notifies this Honorable Court of the United States' intention to appeal the military judge's ruling.

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[1] The military judge is stationed at Kadena Air Base, Japan. Given the time zone difference, trial counsel received the military judge's e-mail on 18 January 2024 at 2030 CST.

MATTHEW D. TALCOTT, Colonel, USAF
Chief, Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

2 Attachments:
1. Record of Trial
2. Notice of Appeal

cc: AF/JAJA

DEPARTMENT OF THE AIR FORCE
TRIAL JUDICIARY

UNITED STATES v. Master Sergeant Desiree N. Holmes 36th Medical Group (PACAF) Andersen AFB, Guam	NOTICE OF APPEAL 20 January 2024

The Government respectfully files the following Notice of Appeal, pursuant to Article 62(a)(1), Uniform Code of Military Justice and Rule for Courts-Martial 908(b).

1. The Government intends to appeal the military judge's 24 October 2023 ruling and his 18 January 2024 ruling denying the Government's motion for reconsideration of the 24 October 2023 ruling. These rulings resulted in the military judge dismissing, with prejudice, Charge II and its Specifications, suppressing the admission of Prosecution Exhibits 16-21 (which had previously been marked for identification but not yet admitted into evidence), 30 and 31 (which had previously been admitted into evidence), suppressing all "evidence obtained from the Guam Department of Education," disqualifying all previously detailed Trial Counsel and all members of the Andersen AFB legal office from participation in the case (save one paralegal, SSgt Emily Tiedt).

2. The military judge's ruling terminated the proceedings as to Charge II and its Specifications. Furthermore, the military judge's ruling suppressing Prosecution Exhibits 16-21, 30, and 31 excluded evidence that is a substantial proof of facts material to all of the Charges and Specifications in this case (including those dismissed, with prejudice, by the military judge).

3. The Government does not make this appeal for the purposes of delay.

4. Before filing this notice, Trial Counsel has consulted with AF/JAJG and the Staff Judge Advocate of the Convening Authority, as required by paragraph 19.17.1 of Department of the Air Force Instruction 51-201, *Administration of Military Justice*, dated 14 April 2022, as amended by AFGM 2023-01, dated 28 September 2023. Both the Convening Authority and his Staff Judge Advocate have approved this appeal.

Respectfully submitted,

[redacted]
J[redacted]J. Z[redacted], Capt, USAF
Trial Counsel

Appellate Exhibit ____

CERTIFICATE OF SERVICE

I hereby certify that the Military Judge's ruling referenced above was issued on 24 October 2023. Within 72 hours of the ruling, I filed a motion requesting reconsideration. The military judge's denial of that motion for reconsideration was denied on 18 January 2024 at 2030 hours (CST). I caused a copy of this notice of appeal to be served at 2010 hours (CST) on 20 January 2024, on the Military Judge, Lt Col Cl[redacted] D. J[redacted], and Defense Counsel, Mr. P[redacted] S[redacted] and Maj J[redacted] B[redacted].

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J[redacted] J. Z[redacted], Capt, USAF
Trial Counsel