DEPARTMENT OF THE AIR FORCE
UNITED STATES AIR FORCE TRIAL JUDICIARY

UNITED STATES	)	
	)	**RULING: MOTION TO**
	)	**DISMISS (DISCOVERY)**
v.	)	
	)	
	)	
TSGT KEITH A. SNYDER	)	
45th Civil Engineer Squadron (AFSPC)	)	
Patrick AFB, Florida	)	**22 August 2019**
	)	

The Defense filed a motion to dismiss the charges against the accused based on the government's failure to provide timely and adequate discovery. The Government and Special Victims' Counsel (SVC) filed a response in opposition. The Court considered the written filings and the attachments thereto, the entirety of the litigation to date, which included all of the motions and attachments filed in this case, the testimony of witnesses, as well as all of the appellate exhibits, the arguments of counsel, and the relevant law. The Court finds by a preponderance of the evidence, concludes, and rules as follows:

ESSENTIAL FINDINGS OF FACT

By stipulation of the parties, the Court makes the following findings of fact:

The government has evidence that the alleged victims in this case have taken steps to back-up or save information related to this case.

The alleged victims in this case have stated that they have saved materials related to this case on external hard drives, computers and to the cloud.

To date, the government has not been able to verify the contents of all of the various devices, i.e. external hard drives, clouds, etc., where the alleged victims stored matters directly related to this case.

To date, the bulk of the produced evidence has come from the victims. When OSI was able to work with the victims, OSI was limited in what it could review and OSI has never been able to run the types of analyses they would if the devices were handed over for analysis.

The government is aware that there has been evidence or messages that have been deleted or missing that relate to matters relevant to this case, and the government has chosen to not pursue the missing information against the will of the alleged victims.

The government is aware that relevant and necessary information that would be material to the preparation of the defense in this case is likely within the possession of the alleged victims in this case, and that the government has the means of compelling such evidence, but has been directed by the General Court-martial Convening Authority (GCMCA) to not do so.

The government issued subpoenas in this case because the government believed that relevant and necessary information related to this case was in the possession and/or control of the alleged victims in this case and should be provided to the defense.

When all three alleged victims filed motions to quash those subpoenas, the government fought those motions to quash because the government believed they were valid subpoenas and that the information sought was still relevant and necessary.

Other than a minor clarification as to the scope of the subpoena, the court denied the motions to quash and ruled in favor of the government, thereby requiring the alleged victims to comply with the subpoenas issued by trial counsel.

To date, notwithstanding the subpoenas and the court's rulings on the motions to quash, the government still believes that there is relevant, necessary and material information related to this case that is in the possession and control of the alleged victims in this case.

Notwithstanding various court orders and subpoenas, the government has still not been provided full access to all of the discoverable information located in the various social media, phone and other electronic accounts of the alleged victims in this case.

The government does not intend to require the production of any discovery to which the alleged victims do not consent even if that discovery is required by statute, regulation and the United States Constitution.

The government has failed to meet any of the discovery deadlines set by the court.

Notwithstanding this court setting a final deadline for discovery on 20 April 2019, the government neither requested relief from that deadline nor completed the discovery as required by the court order.

The government has now exceeded the court's 20 April 2019 deadline by 4 months and has not provided the court any evidence demonstrating that the remaining discovery issues will be resolved in the near future.

This case was referred in May 2018. It is now over 16 months since this case was referred to trial and there is still outstanding discovery.

The three alleged victims have openly discussed a desire to bring down the accused, have shared messages of their intent to do so and have even talked about celebrating his conviction in this case.

At least two of the victims have taken steps that could result in financial and/or professional benefit, at least in part, from the allegations in this case.

CP has continued to make public postings about this case, make public comments about defense counsel, seek personal interviews with the convening authorities, seek redress from Congress and put pressure on the United States to prosecute this case.

One of the initial prosecutors in this case was removed in large part, due to concerns raised by CP, and counsel outside the base legal office were then assigned to this case.

The government does not believe CP, CN and DF have provided all information required by court order and the trial counsel subpoenas.

The alleged victims indicating that they have provided all they are willing to provide is not the same thing as having fully complied with the court orders and subpoenas.

Notwithstanding the government being aware that there are significant discovery issues in this case and the alleged victims' unwillingness to further assist the government in remedying those discovery problems, the government has not and does not intend to either withdraw the charges or seek warrants of attachment to compel the relevant and necessary information.

SA Fohey had communications with at least some of the alleged victims in this case via text message and those communications were lost in part.

SA Fohey reviewed communications by alleged victims in this case and failed to preserve all of the communications she observed.

Brady material was in the possession of the government for months but was not provided by the government and was never reviewed by the government for purposes of discovery notwithstanding a defense request to do so.

This case cannot go to trial based on the current state of discovery.

The government does not know if, or when, it will be able to fully comply with its discovery obligations.

The government has never asked for reconsideration of any discovery ordered by the court.

Some or all of the alleged victims have deleted apps and other items that contained relevant and necessary information ordered produced.

The government, by choosing its current method of production, has no idea how much evidence still exists, what evidence has been withheld, and what evidence has been lost or destroyed.

Because of the manner in which the government is choosing to conduct discovery, it has no way of verifying whether or not it has met its obligations under the law.

By leaving significant parts of discovery up to the discretion and determination of the interested witnesses in this case, the government is not exercising due diligence to verify it has all of the relevant and necessary information.

Based on the statements of the alleged victims that they have saved relevant information to the cloud, electronic devices, etc., the government has the legal authority IAW RCM 703 to order those items produced for review in the same way the government could order journals and other items produced for review.

The government, and in particular, the GCMCA in this case, has ordered the trial counsel not to use all legal means available to them to meet their discovery obligations.

The accused has been retirement eligible since 2018. However, he has been on administrative hold for this case and therefore unable to retire.

CP was given a request from trial counsel to preserve evidence related to this case in May 2018. The request unequivocally pointed to the importance of not manipulating or altering any electronic data due to its potential for being corrupted, altered and deleted. Notwithstanding being provided these requests, she knowingly deleted applications on her phone that were relevant to this case prior to testifying in December 2018.

On 20 Aug 19, the NAF/SJA had multiple conversations with trial counsel. The NAF/SJA also spoke with the special victim's counsels. CN is unwilling to provide any additional consent. DF is now willing to consent to additional evidence being obtained.

The court also makes the following additional findings of fact based on the record before the court and the court's observations during the hearings:

The alleged victims, either through counsel or on their own, have been allowed, in large part, to make their own independent determinations, as opposed to trial counsel, about what evidence in their possession was relevant and necessary.

By refusing to enforce its subpoenas and compel relevant and necessary information, the United States has abdicated its responsibility, in part, to exercise its rights under the law and produce relevant and necessary evidence.

The CA elected to not take any action on the charges on 20 August 2019, and instead allowed the case to proceed.

The accused has been under preferred charges (equivalent to an indictment) since February 2018.

The accused is not at fault for the delay in this case. The unreasonable delay is directly attributable to the inability and/or refusal of the government to exercise all of its legal authorities to obtain necessary and relevant information and to ensure the judicial process complies with the United States Constitution, statutory and regulatory requirements.

The government did not provide a direct reason as to why the GCMCA would refuse trial counsel the right to exercise all of the government's legal authorities to ensure the accused receives a fair trial and due process of the law afforded by the Constitution of the United States.

The convening authority, when comparing competing options and electing to continue with the trial, weighed the potential concerns of the victims over the constitutional rights of the accused.

The prosecution has failed to meet its discovery obligations under the law and has now done so for almost a year and a half. Additional time will not solve the on-going discovery issues in this case.

Based on the current state of the evidence and the unwillingness of the government to exercise its authority to compel relevant and necessary information, the accused cannot get a fair trial.

The GCMCA's direction to trial counsel on 20 August 2019 has directly impacted the government's ability to fulfill its discovery obligations. The government is not fully committed to obtaining the relevant and necessary evidence and ensuring a fair trial.

Prior witness testimony in the case, to include impeachment of the alleged victims during their testimony, has made access to the relevant and necessary discovery even more critical in this case.

Notwithstanding the legal processes available to the government to meet its discovery obligations, the government has, as a matter of choice, elected to place to a large extent the receipt of relevant and necessary discovery in the possession and control of the alleged victims at the discretion of the very same alleged victims in this case.

The government's decision relating to discovery and the limitation on the trial counsel's ability to seek redress with the court for a failure to comply with subpoenas in this case via a warrant of attachment has injured the accused's right to a fair trial and interfered with the accused's ability to mount a defense. Evidence is incomplete, missing, deleted and inaccessible to the defense because of the decisions the government has and continues to make.

Meanwhile, the accused has been unable to retire from the Air Force, been forced to remain on active duty and has continued to face charges since February of 2018 while his counsel have advocated repeatedly for a fair trial and access to relevant and necessary information.

The government, to include the GCMCA and the NAF/SJA, is aware of the significant discovery failings in this case, but took no remedial action.

Almost all of the relevant and necessary information still outstanding is not privileged material under the Military Rules of Evidence (MRE).

Despite continuances being previously granted, the government has been unable to resolve the discovery issues in this case.

After argument on this motion concluded, CP informed the parties and the court that she is willing to hand over any and all electronic devices, as well as platform consents, to the government. However, as recent as this morning, the government has confirmed that if any or all of the alleged victims revoke their consent at any time, the government will not seek to obtain evidence form the victims without their consent.

The government has consciously chosen to rely solely on the alleged victims' consent to provide the accused the discovery he needs to challenge those same alleged victims and mount his defense against their accusations.

The government's unwillingness to use its full authority to obtain relevant and necessary information in this case has prejudiced the accused and will continue to prejudice the accused.

Evidence is missing, incomplete, and actions have even been taken to delete relevant information notwithstanding preservation orders being sent to witnesses.

The outstanding evidence being sought by the defense is of central importance to mounting the accused's affirmative defense, attacking the credibility of his three accusers, and demonstrating both his innocence and the reasonable doubt in the government's case.

The delay in this case has hampered the defense's strategic options, hampered their ability to prepare a defense, and impacted their ability to rebut evidence more effectively. The delay has also precluded them from obtaining relevant and necessary evidence that would substantially impact their ability to present a defense to the fact-finder.

BURDEN

The burden of persuasion on a motion for appropriate relief is on the moving party. R.C.M. 905(c)(2)(A) and 906(b)(7).

CONCLUSIONS LAW

Article 46 of the Uniform Code of Military Justice (U.C.M.J.), provides the trial counsel, defense counsel, and the court-martial with the equal opportunity to obtain witnesses and other evidence in accordance with the rules prescribed by the President. Discovery in the military justice system, which is broader than in federal civilian criminal proceedings, is designed to eliminate pretrial gamesmanship, reduce the amount of pretrial motions practice, and reduce the potential for surprise and delay at trial. Trial counsel's obligation under Article 46 includes removing obstacles to defense access to information and providing such other assistance as may be needed to ensure that the defense has an equal opportunity to obtain evidence. *See United States v. Stellato*, 74 MJ 473 (C.A.A.F. 2015).

Military Rule of Evidence (M.R.E.) 401 defines relevant evidence as that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Relevant evidence is "necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue." Discussion to Rule for Courts-Martial, (R.C.M.) 703(f)(1).

R.C.M. 701 applies to evidence "within the possession, custody, or control of military authorities, the existence of which is known or by the exercise of due diligence may become known to the trial counsel, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial."

The Rules for Courts-Martial define a trial counsel's obligations under Article 46 of the Uniform Code of Military Justice. First, each party shall have equal opportunity to interview witnesses and inspect evidence. Second, trial counsel shall, as soon as practicable, disclose to the defense the existence of exculpatory evidence known to the trial counsel. Third, the Government must permit the defense to inspect any books, papers, documents, photographs, tangible objects, or copies of portions thereof, which are within the possession, custody, or control of military authorities, and which are material to the preparation of the defense. These discovery rules ensure compliance with the equal-access-to-evidence mandate in Article 46. In doing so, the

rules aid the preparation of the defense and enhance the orderly administration of military justice. The parties to a court-martial should evaluate pretrial discovery and disclosure issues in light of this liberal mandate. *Stellato, supra* at 481.

R.C.M. 701(a)(6), Manual Courts-Martial, implements the U.S. Supreme Court's decision in Brady v. Maryland. Under Brady, the Government violates an accused's right to due process if it withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment. *See Stellato, supra* at 481 (footnote 7)

Under the Rules for Courts-Martial, the Government has a duty to disclose, as soon as practicable, the existence of evidence known to the trial counsel which reasonably tends to be exculpatory. R.C.M. 701(a)(6).

The Due Process clause requires the prosecution to disclose evidence that is material and favorable to the defense. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). This requirement exists whether there is a general request or no request at all. *United States v. Agurs*, 427 U.S. 97, 107 (1976). Under due process discovery and disclosure requirements, the Supreme Court has "'rejected any . . . distinction between impeachment evidence and exculpatory evidence.'" *United States v. Eshalomi*, 23 M.J. 12, 23 (C.M.A. 1986) (quoting *United States v. Bagley*, 473 U.S. 667, 676 (1985)).

However, "[t]he military justice system provides for broader discovery than due process and *Brady* require." *United States v. Trigueros*, 69 M.J. 604, 610 (Army Ct. Crim. App. 2010). In courts-martial, Congress provides both trial and defense counsel with an "equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." UCMJ art. 46. Under the Rules for Courts-Martial [hereinafter R.C.M.], disclosure by the government generally falls into two categories: (1) information the trial counsel must disclose without a request from the defense; and (2) information the trial counsel discloses upon an appropriate defense request. *United States v. Shorts*, 76 M.J. 523, 530 (Army Ct. Crim. App. 2017) (comparing R.C.M. 701(a)(1), (a)(3), (a)(4), (a)(6), with R.C.M 701(a)(2), (a)(5)). "If it falls into the first category, the defense need not request it—they are always entitled to the evidence. In the latter category, the [trial counsel] is responding to a defense request." *Id.* Therefore, "whether the trial counsel exercised reasonable diligence in response to the request will depend on the specificity of the request." *Id.*

When either party fails to meets its discovery obligations, a military judge has broad discretion in crafting an appropriate remedy for the nondisclosure. *See* R.C.M. 701(g)(3); *United States v. Stellato*, *supra at* 488-89 (explaining the broad authority of a military judge to remedy discovery violations); *United States v. Bower*, 74 M.J. 326 (C.A.A.F. 2015) (summ. disp.) ("Because a [military] judge has broad discretion and a range of choices in crafting a remedy to cure discovery violations and ensure a fair trial, [appellate courts] will not reverse so long as his or her decision remains within that range."); *United States v. Pomarleau*, 57 M.J. 351, 364-65 (C.A.A.F. 2002) (reviewing for an abuse of discretion a military judge's decision to exclude evidence that the defense failed to disclose in a timely manner).

Under Brady, the prosecution must reveal information that it had in its possession or knowledge--whether actual or constructive. A prosecutor's lack of knowledge does not render information unknown for Brady purposes, such as where the prosecution has not sought out

information readily available to it. A trial counsel cannot avoid discovery obligations by remaining willfully ignorant of evidence that reasonably tends to be exculpatory, even if that evidence is in the hands of a Government witness instead of the Government. This prohibition against willful ignorance has special force in the military justice system, which mandates that an accused be afforded the "equal opportunity" to inspect evidence. Article 46, UCMJ; Rule for Courts-Martial (R.C.M.) 701(e).

Under R.C.M. 703(f)(1), "each party is entitled to the production of evidence which is relevant and necessary." Trial counsel is given the power to subpoena evidence or witnesses for a court-martial after referral of charges.

R.C.M. 703(f)(2)[1] states that "a party is not entitled to the production of evidence which is destroyed, lost, or otherwise not subject to compulsory process." It further states, "if such evidence is of such central importance to an issue that it is essential to a fair trial, and if there is no adequate substitute for such evidence, the military judge shall grant a continuance or other relief in order to attempt to produce the evidence or shall abate proceedings, unless the unavailability of the evidence is the fault of or could have been prevented by the requesting party."

The military judge has the authority to regulate discovery. See generally R.C.M. 701(g)(1). "Upon sufficient showing the military judge may at any time order that the discovery or inspection be denied, restricted, or deferred, or make other such order as appropriate." R.C.M. 701(g)(2).

It is the practice in military law to provide broad and liberal discovery to an accused. *See* United States v. Eshalomi, 23 M.J. 12, 24 (C.M.A.1986).

In U.S. v. Williams, 50 M.J. 436 (CAAF 1999), the court stated that "the prosecutor's obligation under Article 46 is to remove obstacles to defense access to information and to provide such other assistance as may be needed to ensure that the defense has an equal opportunity to obtain evidence." Id. at 442.

The R.C.M. do not provide any explicit requirement for the Government to preserve evidence upon the defense's request. However, the Rules do require that the defense have equal opportunity to inspect evidence. R.C.M. 701(e), Manual Courts-Martial. Further, the Uniform Code of Military Justice also requires that the defense have equal opportunity to obtain witnesses and other evidence. Article 46, UCMJ. The Government has a duty to use good faith and due diligence to preserve and protect evidence and make it available to an accused.

The duty to preserve includes: (1) evidence that has an apparent exculpatory value and that has no comparable substitute; (2) evidence that is of such central importance to the defense that it is essential to a fair trial, R.C.M. 703(f)(2), Manual Courts-Martial; and (3) statements of witnesses testifying at trial.

[1] The court notes that the Manual for Courts-Martial, 2019 edition, has renumbered this paragraph to R.C.M. 703(e)(2), but the substance of the rule has not changed.

Military courts possess the authority to impose sanctions for noncompliance with discovery requirements. In the military justice system, RCM 701(g)(3), Manual Courts-Martial, governs the sanctioning of Rule 701 discovery violations and provides the military judge with a number of options to remedy such violations. These sanctions are: (A) Order the party to permit discovery; (B) Grant a continuance; (C) Prohibit the party from introducing evidence, calling a witness, or raising a defense not disclosed; and (D) Enter such other order as is just under the circumstances.

"Where a remedy must be fashioned for a violation of a discovery mandate, the facts of each case must be individually evaluated." *United States v. Dancy*, 38 M.J. 1, 6 (C.M.A. 1993).

In *Stellato*, supra at 489, the Court reviewed a military judge's decision to dismiss a case with prejudice for discovery violations. In holding that the military judge did not abuse his discretion, the Court noted that although

> bad faith certainly may be an important and central factor for a military judge to consider in determining whether it is appropriate to dismiss a case with prejudice. However, as the above summary of our case law regarding dismissal with prejudice demonstrates, a finding of willful misconduct is not required in order for a military judge to dismiss a case with prejudice. *(internal citations omitted).*

The *Stellato* court continued,

> In cases involving discovery violations, Article III courts have held that the proper inquiry is whether there was "injury to [an accused's] right to a fair trial." *United States v. Garrett*, 238 F.3d 293, 299 (5th Cir. 2000); *United States v. Valentine*, 984 F.2d 906, 910 (8th Cir. 1993) (noting that discovery sanctions are warranted where violations prejudice the defendant's substantive rights). In making this determination, these courts have examined: (1) whether the delayed disclosure hampered or foreclosed a strategic option, *United States v. Mathur*, 624 F.3d 498, 506 (1st Cir. 2010) (belated Brady disclosure); (2) whether the belated disclosure hampered the ability to prepare a defense, *United States v. Warren*, 454 F.3d 752, 760 (7th Cir. 2006) (noting that belated discovery disclosure did not interfere with ability to prepare a defense), and *Golyansky*, 291 F.3d 1245, 1250 (10th Cir. 2002) ("To support a finding of prejudice, the court must determine that the [discovery disclosure] delay impacted the defendant's ability to prepare or present its case."); (3) whether the delay substantially influenced the fact-finder, *United States v. De La Rosa*, 196 F.3d 712, 716 (7th Cir. 1999); and (4) whether the nondisclosure would have allowed the defense to rebut evidence more effectively. *United States v. Stellato*, supra at 490.

The Stellato court then concluded, "As can be seen then, pursuant to this case law, prejudice can arise from discovery violations when those violations interfere with an accused's

ability to mount a defense. We conclude that these cases are grounded in sound reasoning, and we adopt this approach in the court-martial context." *Id*.

In *United States v. Gore*, 60 MJ 178 (2004), the Court of Appeals for the Armed Forces noted that a "dismissal is a drastic remedy and courts must look to see whether alternative remedies are available. When an error can be rendered harmless, dismissal is not an appropriate remedy. This Court explained in *United States v. Green*, [however], that dismissal of charges is appropriate when an accused would be prejudiced or no useful purpose would be served by continuing the proceedings." *Id*. at 187 (internal citations omitted).

It is undisputed that relevant and necessary evidence which is material to the preparation of the defense has still not been provided by the government. The trial counsel has conceded that this case cannot go to trial with the current state of discovery and that there is no way for the government, let alone the court, to know how long it will ever take to get the information or even if the government will ever get full access to the relevant and necessary information. The delays in this case have not only hampered the defense's strategic options, hampered their ability to prepare a defense, and impacted their ability to rebut evidence more effectively, but they have also made it currently impossible for the defense to fully prepare a defense to present to the fact-finder.

Meanwhile, a military member with a presumption of innocence is forced to sit idly by while senior officers determined that the best course of action is to forego lawful legal options to obtain this evidence because the GCMCA does not want to force an alleged victim to do something involuntarily.

The military justice system has been lauded recently by the United States Supreme Court. *See Ortiz v. United States*, 138 S. Ct 2165 (2018). One of the key components of that praise stems from the efforts over the last sixty-plus years to ensure the military justice system is fair and is perceived to be fair. Within that fairness are located the various rights of the accused, which under the U.C.M.J. generally provide greater protections for a military accused than would be provided to a civilian defendant. That should always be commended. Similarly, the adoption of the Article 6(b) rights and the creation of the Special Victim's Counsel positions were also monumental achievements in ensuring that alleged victims also have their legal interests protected.

Although this court understands and lauds the efforts of the military to ensure that both alleged victims and an accused are afforded dignity and respect, the Constitution of the United States remains the supreme law of the land. Rather than ensuring the accused gets a fair trial, the government has elected instead to give greater weight to both the concerns of the alleged victims and the appearance that would result from issuing a warrant of attachment for the information that the alleged victims have admitted they saved than the individual rights of the accused.

In this case, the accused's defense now rests on the good will of his accusers. This simply is not and cannot be the law. Once the GCMCA directed the trial counsel not to enforce their subpoenas, the government abdicated its obligations to the justice system. Rather than complying with its discovery obligations, even if that decision might not be popular, the government chose instead to subjugate the rights of the accused to the inclinations of interested witnesses.

Furthermore, the issuance of subpoenas to the alleged victims while publicly informing them that the government will not pursue a warrant of attachment if the alleged victims fail to comply is the functional equivalent of placing non-parties and interested witnesses in the position of the trial counsel in determining what will and will not be provided in discovery. In so doing the government abnegated its prosecutorial responsibility to ensure relevant and necessary information is provided to the defense.

The government has no intention of exercising the full authority of the prosecuting sovereign to ensure a fair trial. Instead, the government is willingly permitting the accusers in this case to personally decide whether the accused can enjoy the due process and, indeed, the fair trial to which he is entitled under our laws.

In light of the government's inability and unwillingness to fully exercise its authority to produce relevant and necessary discovery, and the most recent decision by the GCMCA to forbid trial counsel from compelling compliance with its subpoenas, this court is left with few conclusions other than the United States of America is not serious about meeting its legal obligations even when the law demands it. Moreover, the government is willing to prosecute an accused while knowing he does not have all of the evidence he needs for a fair trial, and may not get it.

In considering the excessive delays, incomplete discovery and the government's decisions to rely solely on the alleged victims' consent for information material to the preparation of the defense, this court is convinced that the law demands the United Sates be held accountable for its decisions, actions and inactions.

During argument, trial counsel suggested that an abatement of the proceedings until such time as discovery could be completed would be appropriate. Defense counsel countered that dismissal with prejudice is the only proper remedy when a GCMCA pursues a prosecution while knowing that relevant and necessary evidence is still missing but nonetheless prohibits trial counsel from compelling the evidence necessary to ensure a fair trial.

The court is aware of R.C.M. 703(f)(2), which is now R.C.M. 703(e)(2), and how it has historically addressed unavailable evidence. The court is also aware that the most severe remedy imposed under this rule for unavailable evidence is abatement of the proceedings. However, the court finds this provision of the manual to be inapplicable in this case. Simply put, the relevant and necessary evidence being sought by the defense and acknowledged by the government **is** subject to compulsory process in this case, but the government is just unwilling to use its full authority to compel it. Therefore, the limitations of R.C.M. 703(f)(2), which is now R.C.M. 703(e)(2), are not binding on this court's decision and are inapplicable to these particular facts.

This court also reviewed RCM 701(g)(3) and the various remedies listed therein. Specifically, the court considered ordering discovery again, but that has already been done to no avail. The court considered a continuance, but continuances have already been granted to no avail. The court considered prohibiting the government from calling the three alleged victims to testify, but that would serve no practical purpose as it would be the equivalent of dismissing the case. Therefore, the only option which is practical in this case is the fourth option, which allows a military judge to enter such order as is just under the circumstances.

This court agrees with both counsel that something at least as severe as an abatement is appropriate. In considering an abatement until discovery is provided, the court has also considered how such a decision would continue to impact the rights of the accused to a fair trial and his ability to present a defense. Although this remedy might be appropriate in some circumstances, it is not appropriate in this case. First, the record already demonstrates that evidence has been lost, destroyed, altered or gone missing in this case. Second, the fact that an abatement would be for an indefinite period of time makes the likelihood of further evidence spoilage more likely and would continue to impact the accused's right to a fair trial and ability to present a defense. Lastly, the position taken by the GCMCA on enforcing the subpoenas provides this court with no confidence in the government's willingness to actually obtain the discovery and protect the rights of the accused. Consequently, this court finds that abatement is inappropriate in this case.

Finally, this court has considered the dismissal of the remaining charges and specifications with and without prejudice. As C.A.A.F. noted in *Stellato,* the obligation of this court is to consider the least drastic remedy available to achieve the desired result. See *Stellato, supra* at 490. This court will first address dismissal without prejudice. After abatement, a dismissal without prejudice would, under normal circumstances, be the most appropriate. It would properly sanction the government for its behavior while allowing the accused at least a temporary reprieve from the weight of the charges while simultaneously allowing the government the opportunity to do additional investigation, obtain critical evidence related to both the offenses and the witnesses and then reevaluate the propriety of the charges.

However, there is no indication that the government would conduct an adequate, or legally sufficient, assessment of this prosecution if given the chance. Instead, the evidence before this court indicates that unless the alleged victims in this case voluntarily agree to provide everything that the court has ordered and that the government believes is relevant and necessary, the government will not ever get all of the evidence needed to ensure a fair trial.

Even with knowledge of the government's failures to respond to some of the most basic discovery, and at the risk of having the charges and specifications dismissed with prejudice, the GCMCA has nevertheless elected to press forward with this prosecution while continuing to leave the provision of relevant and necessary discovery to the whims of interested parties. Consequently, this court is left to conclude that the United States of America is neither committed to ensuring the accused gets a fair trial nor taking the steps necessary to provide the accused with the relevant discovery necessary to mount his defense.

The nature, magnitude, and consistency of the discovery violations in this case, when coupled with the government's unwillingness to affirmatively take action to rectify those violations have resulted in this court's lack of confidence in the government's willingness and ability to ensure the accused gets a fair trial, complete its discovery obligations and eliminate interference with the accused's ability to mount a defense. Appellate exhibit LXXX says it best, "The CA has directed that to whatever extent CP, DF, and CN have not provided consent for outstanding discovery, the government is not to pursue a warrant of attachment."

The court has considered the seriousness of the offenses and the impact a dismissal with prejudice would have on society, the military, the alleged victims and the accused. The

government has the absolute right to choose the concerns of the alleged victims over those of the accused, but what the government cannot do is make that decision at the expense of the accused's right to a fair trial. If the government is unwilling to meet its obligations under the law and pursue justice[2] by ensuring the accused's rights to due process, the accused should not be prosecuted. A failure of this court to demand the government meet its obligations under the law and ensure a fair trial for the accused would make the judiciary complicit in the government's decision to subjugate the accused's constitutional rights to other factors outside the law. Continuing the proceedings will serve no useful purpose. The government is aware of the options it had to address the deficiencies in this case prior to any ruling on this motion to dismiss, but instead of taking them, the government has asked the court to sit in judgment of its actions.

Unlike the government, the court, in this case, will not shrink from its obligations to enforce the law and protect the rights of all persons who come before it. The actions and positions taken by the government in this case have convinced this court that anything other than a dismissal with prejudice will continue to prejudice the accused's rights and reward the government for its conscious decision to withhold its authority and meet its obligations under the law.

RULINGS

WHEREFORE, the Defense Motion to Dismiss all charges and specifications with prejudice is ***GRANTED***.

So ordered this 22nd day of August 2019.

W. SHANE COHEN, Colonel, USAF
Military Judge

[2] [T]he prosecutor represents both the United States and the interests of justice. The duty of the prosecutor is to seek justice, not merely to convict. See Air Force Instruction 51-110, Standard 3-1.2 The Function of the Prosecutor.