

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,) APPELLANT'S REPLY TO BRIEF
Appellee) ON BEHALF OF APPELLEE
)
v.) Crim. App. Dkt. No. 20100417
)
) USCA Dkt. No. 13-0007/AR
Specialist (E-4))
Walter S. Coleman,)
United States Army)
)
Appellant)

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

Argument

The non-disclosure of the clemency recommendation was NOT harmless beyond a reasonable doubt as the government would have rebutted an attempt to impeach PFC Pilago with the agreement by introducing PFC Pilago's prior consistent statement.'

In its argument that the government's admitted failure to disclose discoverable evidence was harmless beyond a reasonable doubt, the government devotes considerable effort to the notion that the trial counsel was prepared to respond to any attempt to impeach PFC Pilago using the clemency agreement by introducing his prior statement to CID under M.R.E. 801(d)(1)(B). (Gov. Br. at 21-25). The evidence simply does not support the argument.

Neither of the two trial counsel who presented the government's case on the merits ever mentioned being prepared to use the prior statement of PFC Pilago, had the defense impeached him using the clemency agreement. (JA 250-53, 271-300). Nor

did the trial counsel who represented the government at the post-trial Article 39(a), UCMJ, session mention the possibility of using the prior statement during her argument as to why the defense motion for a mistrial should be denied. (JA 328-31).

During that argument, the trial counsel repeatedly referenced strategic choices that defense counsel made in his approach to questioning PFC Pilago, but never argued the possibility of opening the door to admit PFC Pilago's prior statement in her prejudice analysis. (JA 330-31). Not until the government's final written submission to the court on January 12, 2011, seven days after the post-trial Article 39(a), UCMJ, does the government first raise the notion of using the prior statement.¹ For the government to now assert that the prior consistent statement of PFC Pilago is the primary reason why their blatant failure to disclose discoverable evidence is harmless beyond a reasonable doubt is disingenuous.

The government's argument also ignores the statements of the trial counsel moments before PFC Pilago was called to testify. As PFC Pilago was making his way to the witness stand, defense counsel asked the assistant trial counsel if there was a

¹ The government spends considerable time in its January 12, 2011, submissions arguing that defense counsel knew of the agreement and is therefore misleading the court when they assert the contrary. It is only after this argument is raised that the government asserts that the prior consistent statement would be admissible. (JA 346-48).

deal in place with PFC Pilago. (JA 324). The assistant trial counsel's response was "No, there's nothing in writing." (JA 324). The government admits in their brief that this response is troubling. (Gov. Br. at 28). The military judge made a similar observation. (JA 244). If, as the government claims, the government was prepared to rebut defense counsel's impeachment of PFC Pilago using the clemency recommendation, as it claimed after the fact, there was no reason to misrepresent the existence of an agreement with the government's key witness. On the contrary, the government would have relished the opportunity to use the "highly damaging" prior-consistent statement to rebut the defense counsel's cross-examination and inference that PFC Pilago had a motive to fabricate.²

The defense counsel was NOT aware of the existence of the clemency agreement between PFC Pilago and the staff judge advocate.

The government asserts that "other facts not included in the military judge's findings show that defense counsel had a *firm hint* that PFC Pilago and the SJA were coming to an agreement." [emphasis added] (Gov. Br. at 27). This argument

² The government fails to address the question of admissibility of the statement appellant raised in its final brief in light of the United States Supreme Court's decision in *Lilly v. Virginia*, 527 U.S. 116, 119 (1999) (citations omitted). The government's, trial judge's, and Army Court's conclusion that the statement was admissible and highly damaging to defense is entirely unsupported by the record of trial and contrary to case law seriously questioning the reliability of such blame-shifting statements of co-accused.

is also advanced by the assistant trial counsel in both her affidavit and her sworn testimony during the post-trial Article 39(a), UCMJ session. (JA 250-51, 271-87). Assuming, *arguendo*, the government believed the defense thought there may be some sort of agreement with PFC Pilago, the assistant trial counsel's denial of an agreement moments before PFC Pilago testified is all the more egregious. Such a denial can then only be interpreted as a deliberate attempt to misrepresent the existence of material evidence, rather than a mere miscommunication. Defense counsel had to rely on the government's assertion, regardless of what he knew or thought prior to the government's response. Following the assistant trial counsel's denial, defense counsel's strategy had to proceed on the basis of there existing no agreement.

Defense counsel also proffered during the post-trial Article 39(a), UCMJ session that, in accordance with his duty of candor to the tribunal, the government provided no notice of any leniency agreement with PFC Pilago prior to his testimony. (JA 331). For the government to assert otherwise ignores their own admission that the government had an obligation to notify appellant about the clemency agreement. (Gov. Br. at 18). It also ignores that neither the staff judge advocate nor the trial counsels could state under oath that they notified defense counsel of the agreement. On the contrary, the assistant trial

counsel affirmatively represented to the defense counsel that there was no deal as PFC Pilago was walking to the witness stand.

The government's attempt to characterize defense counsel's actions as "gotcha litigation" is entirely unsupported. Such an assertion ignores the uncontradicted evidence that defense counsel asked "Is there a deal in place with PFC Pilago?" moments before PFC Pilago entered the courtroom. (JA 629). The assumption that defense counsel deliberately failed to ask a follow on question, thus denying himself the ability to discover and weigh the use of critical evidence, is an impermissible attempt to shift the government's duty of disclosure to appellant.

The clemency agreement between PFC Pilago and the staff judge advocate was not material evidence because disclosure would have affected the outcome of the trial.

The government's attempt to challenge the materiality of the clemency agreement is contrary to the actions of the trial counsel and the staff judge advocate preceding PFC Pilago's testimony. In the hours prior to appellant's court martial, the trial counsel and the staff judge advocate engaged in direct negotiations with PFC Pilago's defense counsel to secure his testimony against appellant. (JA 605-11, 613-23). The testimony of the staff judge advocate, Colonel Steven Walburn, as well as that of PFC Pilago's defense counsel, Captain Joe

Owens, demonstrates that the government considered PFC Pilago's testimony so vitally material to their case that they were willing to enter into an agreement to recommend a one-year reduction in the sentence to confinement. The agreement was reached after PFC Pilago had pled not guilty and forced the government to meet its burden of proof. If PFC Pilago's testimony was not of materially important to the government, there was no reason to recommend a grant of clemency in any form, let alone a one-year reduction in confinement on the eve of trial.

The government's assertion that PFC Pilago's testimony was not essential to the verdict is also inconsistent with the argument that PFC Pilago's prior statement was highly damaging to appellant. The government argues, on the one hand, that the non-disclosure was harmless beyond a reasonable doubt because the admission of PFC Pilago's prior consistent statement would have devastated the defense as it would have corroborated key points of D.D.'s testimony. (Gov. Br. at 22). On the other hand, the government asserts that the non-disclosure was harmless beyond a reasonable doubt as PFC Pilago's testimony was "merely icing on the proverbial cake." (Gov. Br. at 31). The inconsistencies in the government's arguments coupled with the assistant trial counsel's misrepresentation and the efforts of

the staff judge advocate to obtain PFC Pilago's testimony are clear indications of the materiality of the evidence.

Conclusion

The failure of the government to disclose the existence of a clemency agreement with PFC Pilago denied appellant's counsel the ability to make an informed decision regarding trial tactics moments before a critical government witness testified. There is no evidence that the government was prepared to admit a prior consistent statement in the event that defense counsel impeached PFC Pilago using his clemency agreement. The government has, therefore, failed to prove that the non-disclosure was harmless beyond a reasonable doubt.

WHEREFORE, appellant respectfully requests this Honorable Court grant the requested relief.



ROBERT N. MICHAELS
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road, Suite 3200
Fort Belvoir, Virginia 22060
(703)588-6712
USCAAF No. 35749



RICHARD E. GORINI
Major, Judge Advocate
Branch Chief
Defense Appellate Division
USCAAF No. 35189



PATRICIA HAM
Colonel, Judge Advocate
Chief
Defense Appellate Division
USCAAF No. 31186

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Coleman, Crim. App. Dkt. No. 20100417, Dkt. No. 13-0007/AR, was delivered to the Court and Government Appellate Division on February 5, 2013.


MELINDA J. JOHNSON
Paralegal Specialist
Defense Appellate Division
(703) 693-0736