

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES**

U N I T E D	S T A T E S,) FINAL BRIEF ON BEHALF OF
	Appellee) APPELLEE
)
	v.)
) USCA Dkt. No. 13-0007/AR
)
Specialist (E-4))
WALTER S. COLEMAN) Crim. App. Dkt. No. 20100417
United States Army,)
	Appellant)
)

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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE
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Granted Issue

WHETHER THE MILITARY JUDGE ERRED IN FAILING TO GRANT A DEFENSE MOTION FOR MISTRIAL BASED ON THE TRIAL COUNSEL'S FAILURE TO DISCLOSE THAT APPELLANT'S CO-ACCUSED TESTIFIED AGAINST HIM IN EXCHANGE FOR THE STAFF JUDGE ADVOCATE'S RECOMMENDATION THAT HIS SENTENCE BE REDUCED BY TWELVE MONTHS.

Summary of the Argument

The government concedes that it should have disclosed the oral clemency agreement between PFC Pilago and the Staff Judge Advocate upon defense's discovery request. However, the nondisclosure of the oral agreement was harmless beyond a reasonable doubt. Trial defense counsel could not have used the agreement to impeach PFC Pilago without risking the introduction of PFC Pilago's prior consistent statement. As an exception to the hearsay rule, PFC Pilago's prior consistent statement would have bolstered his own trial testimony, corroborated the victim's testimony, and come in as substantive evidence for the truth of the matter asserted. In light of the other strong evidence of appellant's guilt, there is no reasonable probability that impeaching PFC Pilago on this matter would have led to a different result at trial.

Statement of Statutory Jurisdiction

The United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66, Uniform Code of Military Justice (UCMJ).¹ This Court has jurisdiction under Article 67(a)(3), UCMJ.²

Statement of the Case

An enlisted panel sitting as a general court martial convicted appellant, contrary to his pleas,³ of rape and adultery, in violation of Articles 120 and 134 of the Uniform Code of Military Justice (UCMJ).⁴ The court martial sentenced appellant to reduction to the grade of E-1, forfeiture of all pay and allowances, ten years of confinement, and a dishonorable discharge.⁵ The convening authority reduced appellant's sentence to confinement to five years but otherwise approved the adjudged sentence.⁶

Statement of Facts

a. Sexual Assault of DD

On 26 July 2009, DD attended a "barbeque" at the home of PFC Jarvis Pilago.⁷ PFC Pilago and his wife lived across the

¹ 10 U.S.C. § 866 (2008); JA 7 (*United States v. Coleman*, 2012 WL 2756004 (Army Ct. Crim. App. 9 Jul. 2012)).

² 10 U.S.C. § 867(a) (2008).

³ JA at 299.

⁴ JA at 232-33.

⁵ JA at 234.

⁶ JA at 365.

⁷ JA at 35, 37, and 41.

street from DD and her husband.⁸ Also attending the barbeque was appellant, who at the time lived with PFC Pilago in his house.⁹

Throughout the night, DD consumed a significant amount of alcohol.¹⁰ DD's recollection of the rest of the night is incomplete but includes a number of events. DD recalled feeling drunk, tired, and woozy while at PFC Pilago's house.¹¹ Feeling intoxicated and tired, DD returned to her home later that night.¹²

DD's next memory was of appellant on top of her, feeling him put something in her vagina which caused her pain, and feeling someone pulling her hair.¹³ She also remembered PFC Pilago putting his penis in her mouth.¹⁴ DD told both appellant and PFC Pilago to stop and tried to push appellant off of her.¹⁵ Upon DD's command to "stop," PFC Pilago stopped and said to appellant: "She said 'stop.'"¹⁶ DD heard appellant respond, "That don't mean shit,"¹⁷ whereupon appellant continued to penetrate DD.¹⁸

⁸ JA at 35.

⁹ JA at 35

¹⁰ JA at 41-42, and 57.

¹¹ JA at 57-58.

¹² JA at 58.

¹³ JA at 48-50.

¹⁴ JA at 49.

¹⁵ JA at 49, 51, and 95.

¹⁶ JA at 58.

¹⁷ JA at 58.

¹⁸ JA at 58-59.

The next day, DD reported the rape to a friend, who then transported her to the hospital.¹⁹ Her friend witnessed that DD was in great pain.²⁰ The nurse who examined DD noted areas of redness and a one centimeter laceration inside DD's genitalia.²¹ A semen sample was obtained and DNA analysis was conducted.²² The DNA analysis confirmed that appellant and PFC Pilago were the sources of the semen found in DD's vagina.²³

b. PFC Pilago's Prior Statement to Law Enforcement and Subsequent Court-Martial

Three days after the incident, PFC Pilago waived his rights and provided a written sworn statement to law enforcement.²⁴ In that statement, PFC Pilago implicated himself and appellant in the sexual assault of DD. Specifically, PFC Pilago stated that both he and appellant had sex with DD at his house earlier that night. According to PFC Pilago, the two had sex with DD again but this time at her house. PFC Pilago provided the following narrative of the assault:

"[Appellant] started to have sex with her again and when he tried to put his penis in her vagina she said stop. I stopped because I was about to get oral sex from her again, so I just stopped what I was doing and looked at [appellant] and said dude, and

¹⁹ JA at 166-67.

²⁰ JA at 166-67.

²¹ JA at 193-94.

²² JA at 214.

²³ JA at 214-15.

²⁴ JA at 16-21.

kept telling him dude she said stop and he said keep going. [Appellant] continued to have sex with her²⁵

In the question and answer portion of his statement, PFC Pilago related:

Q: What happened after [DD] told you and [appellant] to stop?

A: I paused, looked at [appellant] and said dude she said stop and said it to him like two or three times and he said just keep going.

Q: What was DD doing when she told you and [appellant] to stop?

A: Laying on her back in her bed in her bedroom.

Q: How long after [DD] told you and [appellant] to stop, did you and [appellant] stop having sexual intercourse with her and getting oral sex from her?

A: About 3 minutes.

Q: Did [DD] at anytime try to push you or [appellant] off of her while you and [appellant] were having sexual intercourse with her or receiving oral sex?

A: Yes, she tried to push him away one time but I don't think she did it anymore.

Q: What did [appellant] do after [DD] tried to push him off of her?

A: Just continued having sex with her.²⁶

²⁵ JA at 16.

²⁶ JA at 18.

On 12 May 2010, PFC Pilago was tried by a general court-martial and found guilty of forcibly sodomizing DD in violation of Article 125, UCMJ.²⁷ The court-martial sentenced PFC Pilago to forfeiture of all pay and allowances, reduction to Private (E-1), confinement for 42 months, and a dishonorable discharge.²⁸ On the last day of his court-martial, PFC Pilago agreed to testify in appellant's court-martial in exchange for the Staff Judge Advocate's (SJA) recommendation to reduce the sentence to confinement by 12 months.²⁹

Prior to appellant's trial, and before the SJA's agreement with PFC Pilago, trial defense counsel filed, *inter alia*, the following discovery request:

Under MRE 301(c) (2), disclosure of any immunity or leniency pertaining to witnesses or to potential witnesses. This includes any anticipated or completed pretrial agreements that may or may not contain an offer of cooperation, and any written or oral statements from those witnesses used to support the pretrial agreement. **Specifically the defense is requesting immediate disclosure of any agreement with SPC Jarvis Pilago to cooperate with the government in any way.**³⁰

²⁷ JA at 366-67. PFC Pilago was also found guilty of adultery in violation of Article 134, UCMJ. *Id.*

²⁸ JA at 366.

²⁹ JA at 250, 272-74.

³⁰ JA at 24-25 (emphasis in original).

The government responded that they would "comply with the defense request if it becomes relevant."³¹

c. Appellant's Court-Martial.

Prior to PFC Pilago's testimony, appellant moved in limine to prevent any mention that PFC Pilago "was convicted and that he received a sentence, and the length of that sentence."³²

Trial defense counsel later clarified, "our motion in limine is limited to what [PFC Pilago] was convicted of, not the overall conviction. A conviction would be appropriate impeachment for the defense, but not necessarily the specific act he was convicted of."³³ The military judge granted defense's motion.³⁴

PFC Pilago testified that he orally sodomized DD while appellant raped her vaginally.³⁵ According to PFC Pilago, DD told them to "stop."³⁶ Hearing DD's words, PFC Pilago stopped and said to appellant: "She said 'stop.'"³⁷ Appellant then told PFC Pilago "just to keep going."³⁸ PFC Pilago also testified that he knew what he was doing was wrong.³⁹

³¹ JA at 28.

³² JA at 125-26.

³³ JA at 125-26.

³⁴ JA at 125-26.

³⁵ JA at 127-28.

³⁶ JA at 128.

³⁷ JA at 128.

³⁸ JA at 128.

³⁹ JA at 128.

After providing this testimony for the prosecution, the defense later called PFC Pilago as a witness for the defense.⁴⁰ Shortly before cross-examining PFC Pilago, trial defense counsel asked the assistant trial counsel if there was "a deal in place" regarding clemency to which the assistant trial counsel responded, "no, there's nothing in writing."⁴¹

Defense counsel did not cross-examine PFC Pilago about his testimony regarding the charged incident. Instead, trial defense counsel elicited testimony that rebutted the government's contention that DD was substantially incapacitated. According to PFC Pilago, DD was happy, smiling, and was not slurring her words.⁴² Trial defense counsel also elicited testimony that both PFC Pilago and appellant had consensual sex with DD earlier that evening.

At the close of evidence, the military judge gave the following instruction on accomplice testimony in regards to PFC Pilago:

Now, a witness is an accomplice if he was criminally involved in an offense with which the accused is charged. The purpose of this advice is to call to your attention to a factor specifically affecting the witness's believability, that is, a motive to testify falsely in whole or in part, because of an obvious self-interest under the circumstances. For example, an accomplice may be motivated to falsely testify—or to falsify testimony in whole or in part because of

⁴⁰ JA at 140-52.

⁴¹ JA at 242, 324.

⁴² JA at 149.

his own self-interest in receiving immunity from prosecution or leniency. In deciding the believability of PFC Jarvis Pilago, you should consider all relevant evidence as you remember it. Whether, PFC Jarvis Pilago, who testified as a witness in this case, was an accomplice is a question for you to decide.⁴³

In closing argument, trial defense counsel spoke extensively about PFC Pilago and his testimony. He repeatedly reminded the panel about PFC Pilago's story that the initial sexual contact between appellant and DD was consensual, an opinion which no witness other than PFC Pilago offered.⁴⁴ Defense counsel also reminded the panel that PFC Pilago contradicted the testimony of DD on several points.⁴⁵ To deflect those portions of PFC Pilago's testimony that harmed appellant's case, the defense counsel reminded the panel that it should discount portions of PFC Pilago's testimony because, in that testimony, PFC Pilago was simply seeking to please the government in an effort to obtain clemency.⁴⁶

He [the military judge] said, in essence, be wary of accomplice testimony because of the benefits that someone may receive from them; the benefits of immunity; and the benefits of potentially receiving some sort of clemency from the Commanding General in his own case. I am not asking the panel to do something unreasonable. So, what I'll tell you is that Jarvis Pilago testified to a lot of different things. I'm asking you to consider the evidence that he gave to the government is the evidence that is

⁴³ R. at 449.

⁴⁴ R. at 460, 466.

⁴⁵ R. at 467-68.

⁴⁶ R. at 467.

going to help him with his clemency. It's the evidence that helped the government⁴⁷

Trial defense counsel repeated: "PFC Pilago wants to make sure his testimony is done official to the government, to get the clemency" ⁴⁸ Appellant's counsel then reiterated the helpful testimony that PFC Pilago provided for the defense.⁴⁹ After that, the defense again argued to the panel: "PFC Pilago told you what he had to tell you to get his clemency."⁵⁰ The panel found appellant not guilty of aggravated sexual assault but convicted him of forcible rape and adultery.⁵¹

d. Post-Trial Article 39(a) Session

After learning about the specific agreement between PFC Pilago and the SJA, trial defense counsel raised the matter in appellant's post-trial submission to the convening authority.⁵² On 5 January 2011, the military judge held a post-trial Article 39(a) session authorized by the Convening Authority.⁵³ The purpose of the Article 39(a) session was to address the prosecution's failure to notify appellant, prior to PFC Pilago testifying, that PFC Pilago had entered into an agreement with

⁴⁷ R. at 467.

⁴⁸ R. at 468.

⁴⁹ R. at 469.

⁵⁰ R. at 470.

⁵¹ JA at 232-33.

⁵² JA at 236-37.

⁵³ JA at 249, 254-343.

the SJA.⁵⁴ Specifically, the convening authority ordered the post-trial hearing to determine:

- a. What agreement existed between the government and PFC Pilago (and or his defense counsel) concerning his testimony as a government witness at *U.S. v. Coleman*;
- b. When did SPC Coleman (and or his defense counsel) become aware of this agreement; and
- c. Any issues deemed relevant by the military judge.⁵⁵

At the conclusion of the hearing, trial defense counsel moved for a mistrial based upon the government's failure to disclose.⁵⁶

In support of his motion, trial defense counsel stated that if he knew about the agreement he would have impeached PFC Pilago by asking him: "Isn't it true that your testimony today is being given in exchange for a recommendation from the [Staff Judge Advocate] for 12 months off of your sentence?"⁵⁷

e. The Military Judge's Findings of Fact and Conclusions of Law.

On 31 January 2011, the military judge issued written findings of fact and conclusions of law.⁵⁸ The military judge found that PFC Pilago had an oral agreement with the SJA to recommend to the convening authority to reduce his sentence to

⁵⁴ JA at 249.

⁵⁵ JA at 249, 256.

⁵⁶ JA at 351-32; 326-27.

⁵⁷ JA at 335-36.

⁵⁸ JA at 240.

confinement by 12 months in exchange for his testimony.⁵⁹

Neither the trial counsel, assistant trial counsel, nor the SJA explicitly disclosed the agreement to the defense before PFC Pilago took the stand.⁶⁰

Specifically, the military judge found trial counsel told trial defense counsel that there was no immunity agreement but that "negotiations had kind of been reached," before PFC Pilago took the stand.⁶¹ The military judge further found that trial counsel told trial defense counsel that the government "was leaning heavily to actually calling [PFC Pilago], and that he was available to testify."⁶²

After the agreement with the SJA was reached, assistant trial counsel saw trial defense counsel interviewing PFC Pilago.⁶³ Once trial defense counsel finished interviewing PFC Pilago, assistant trial counsel proceeded to interview PFC Pilago. Assistant trial counsel was "fairly certain" that trial defense counsel knew about the clemency agreement. However, the military judge found that the defense did not learn about PFC

⁵⁹ JA at 242.

⁶⁰ JA at 242-43. At the post-trial Article 39(a) session, appellant declined to waive the attorney-client privilege or permit his counsel to testify regarding their knowledge of the clemency agreement. JA at 243.

⁶¹ JA at 242.

⁶² JA at 242.

⁶³ JA at 242.

Pilago's specific agreement until the conclusion of appellant's court-martial.⁶⁴

The military judge concluded that the clemency agreement should have been disclosed to appellant,⁶⁵ but that any error was harmless beyond a reasonable doubt.⁶⁶ Among other things, the military judge determined that PFC Pilago "provided substantial value to the defense and enabled the defense as an adopted witness to present evidence that consensual sexual acts took place between Mrs. [DD], PFC Pilago[,] and [appellant]."⁶⁷

The military judge also found that defense counsel could have inquired further once he knew that there had been negotiations between the government and PFC Pilago and that PFC Pilago was in fact going to testify.⁶⁸ The military judge found "defense counsel's failure to inquire further to be evidence of the defense counsel's tactical decision to employ a different strategy than to directly impeach PFC Pilago with his conviction and clemency. Instead, defense counsel chose to get the valuable testimony he could from PFC Pilago, and, after

⁶⁴ JA at 242.

⁶⁵ JA at 243.

⁶⁶ JA at 244. ("The government has sustained its burden to establish beyond a reasonable doubt that the error . . . was harmless beyond a reasonable doubt.").

⁶⁷ JA at 243.

⁶⁸ JA at 244.

instructions on credibility and accomplice testimony, wait for argument to play the clemency card."⁶⁹

The military judge concluded:

Here, the defense counsel was very much aware at the time of his cross examination, the PFC Pilago was a recently convicted co-actor of SPC Coleman with clemency as a substantial motivation for him to testify favorably for the government. Clearly the defense carefully considered the potential damage that could result from exposing PFC Pilago's conviction to the panel based upon their motion in limine to prohibit the government from providing the panel evidence of the conviction while reserving the right to use the conviction as impeachment on cross examination.⁷⁰

The military judge continued:

It's also significant, in assessing the potential harm to the defense resulting from the nondisclosure, that defense counsel chose not to impeach PFC Pilago with his conviction. Rather, as a matter of tactics, defense counsel chose to adopt PFC Pilago as a defense witness and thereby place before the panel testimony about consensual sexual acts that allegedly preceded the events he testified occurred in Mrs. [D.D.'s] bedroom. Moreover, defense counsel also chose not to confront PFC Pilago on testimony he provided that was damaging related to the nonconsensual sexual contact allegations. Instead, he elicited testimony from PFC Pilago that tended to show that Mrs. [D.D.] was not substantially incapacitated at the time she entered her bedroom with PFC Pilago and SPC Coleman. Certainly, the facts of the case reflect the value of employing this tactic in an effort to effectively deal with

⁶⁹ JA at 244.

⁷⁰ JA at 242.

PFC Pilago. Particularly when one considers the prior consistent statement that PFC Pilago provided CID on 29 July 2009, approximately 3 days after the alleged assaults.⁷¹

Because he found that any error was harmless, the military judge held that no mistrial was warranted and, therefore, denied appellant's motion for a mistrial.⁷²

Standard of Review

An appellate court will not reverse a military judge's denial of a motion for mistrial absent clear evidence of an abuse of discretion.⁷³ A military judge abuses his discretion when his "findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law."⁷⁴

Issues relating to nondisclosure of favorable evidence are reviewed de novo.⁷⁵ When the government does not disclose favorable evidence in response to a specific discovery request,

⁷¹ JA at 242.

⁷² JA at 242.

⁷³ *United States v. Behenna*, 70 M.J. 521, 529 (C.A.A.F. 2011) (citing *United States v. Ashby*, 68 M.J. 108, 122 (C.A.A.F. 2009)).

⁷⁴ *United States v. Webb*, 66 M.J. 89, 93 (C.A.A.F. 2008).

⁷⁵ *United States v. Trigueros*, 69 M.J. 604, 609 (Army Ct. Crim. App. 2010) (citing *United States v. Eshalomi*, 23 M.J. 12, 21-22 (C.M.A. 1986)).

the government bears the higher burden of proving that the nondisclosure was harmless beyond a reasonable doubt.⁷⁶

Argument

a. The Government's Duty to Disclose Favorable Evidence.

The Due Process Clause of the Fifth Amendment guarantees that "criminal defendants be afforded a meaningful opportunity to present a complete defense."⁷⁷ In *Brady v. Maryland*, the Supreme Court held that due process requires the prosecution to disclose to the defense "evidence favorable to an accused ... where the evidence is material either to guilt or to punishment."⁷⁸ "Favorable evidence" includes evidence in the government's possession that could be used to impeach prosecution witnesses.⁷⁹

The right of an accused to obtain favorable evidence is codified within Article 46, UCMJ.⁸⁰ Article 46 states that, "defense counsel . . . shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may direct."⁸¹ The President has implemented

⁷⁶ *Id.* (citing *Webb* 66 M.J. at 92; *United States v. Roberts*, 59 M.J. 323, 327 (C.A.A.F. 2004)).

⁷⁷ *United States v. Mahoney*, 58 M.J. 346, 349 (C.A.A.F. 2003) (citing *California v. Trombetta*, 467 U.S. 479, 485 (1984)).

⁷⁸ *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

⁷⁹ *United States v. Bagley*, 473 U.S. 667, 676 (1985); *Giglio v. United States*, 405 U.S. 150, 154 (1972).

⁸⁰ 10 U.S.C. § 846 (2008).

⁸¹ *Id.*

Rule for Courts-Martial [R.C.M.] 701 to regulate discovery practice in military courts-martial.⁸² Upon request from the defense counsel, the government must disclose "Evidence favorable to the defense."⁸³ This includes any evidence which reasonably tends to: "(A) Negate the guilt of the accused of an offense charged; (B) Reduce the degree of guilt of the accused of an offense charged; or (C) Reduce the punishment."⁸⁴

Other portions of the Rules for Court-Martial and the Military Rules of Evidence address the government's requirement to disclose certain matters.⁸⁵ Somewhat related to these facts, when a prosecution witness has been granted leniency in exchange for testimony, the grant must be reduced to writing and served on the accused prior to arraignment or within a reasonable time before the witness testifies.⁸⁶ The Rule does not address promises to recommend clemency that are not reduced to writing. In any case, a promise for clemency must be disclosed when specifically requested by the other party.⁸⁷

To demonstrate a violation of *Brady*, three conditions must exist: (1) the prosecution suppressed evidence; (2) the evidence was favorable to the defense (either because it was exculpatory

⁸² *United States v. Roberts*, 59 M.J. 323, 325 (C.A.A.F. 2004).

⁸³ Rule for Courts-Martial [hereinafter] 701(a)(6).

⁸⁴ R.C.M. 701(a)(6)(A)-(B).

⁸⁵ R.C.M. 701(a)(6) discussion.

⁸⁶ Military Rule of Evidence [hereinafter *Mil. R. Evid*] 301(c)(2).

⁸⁷ *Roberts*, 59 M.J. at 327.

or impeaching); and (3) the evidence was material to guilt or punishment.⁸⁸ Impeachment evidence is "material" to guilt or punishment if there is a reasonable probability that, had the evidence been disclosed the result of the proceeding would have been different.⁸⁹ Given the broad nature of discovery in military courts-martial, when an appellant demonstrates that the government failed to disclose discoverable evidence in response to a specific request, "materiality" is presumed and the appellant will be entitled to relief unless the Government can show that nondisclosure was harmless beyond a reasonable doubt.⁹⁰

b. The nondisclosure of the agreement was harmless beyond a reasonable doubt because utilizing the agreement as impeachment would not have resulted in a reasonable probability of different result.

There is no dispute that the government had an obligation to notify appellant about the SJA's clemency agreement to PFC Pilago. A promise of clemency is potential evidence of bias or motive to misrepresent that must be disclosed by the government upon request by the defense counsel.⁹¹ However, appellant's claim fails because the undisclosed evidence was not "material" in such a way to have reasonably affected the outcome at trial.

⁸⁸ *Banks v. Dretke*, 540 U.S. 668, 691 (2004); *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999); *Brady*, 373 U.S. at 87.

⁸⁹ *Webb*, 66 M.J. at 92 (citing *Bagley*, 473 U.S. at 667); *United States v. Santos*, 59 M.J. 317, 321 (C.A.A.F. 2004).

⁹⁰ *Roberts*, 59 M.J. at 327 (citing *United States v. Hart*, 29 M.J. 407, 410 (C.M.A. 1990)).

⁹¹ Mil. R. Evid 608(c); *Roberts*, 59 M.J. at 327.

Evidence is "material" for purposes of *Brady* when "the favorable evidence could reasonably taken to put the whole case in such a different light as to undermine confidence in the verdict."⁹² In other words, materiality is established "when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different."⁹³ Even if "the government impermissibly withholds exculpatory evidence, a *Brady* violation does not arise unless the undisclosed evidence was material."⁹⁴ As the Supreme Court has stated with respect to the materiality requirement: "there is never a real 'Brady violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict."⁹⁵

"Where substantial evidence of guilt entirely unrelated to the withheld impeachment evidence exists, it will be more difficult to argue that there is a reasonable probability that the withheld evidence, if disclosed, would have resulted in a different verdict."⁹⁶ The Supreme Court has aptly noted that

⁹² *Kyles v. Whitney*, 514 U.S. 419, 435 (1995).

⁹³ *Cone v. Bell*, 556 U.S. 449, 469-70 (2009). See also *Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987); *United States v. Webb*, 66 M.J. 89, 92 (C.A.A.F. 2008).

⁹⁴ *United States v. Watson*, 31 M.J. 49, 54 (C.M.A. 1990).

⁹⁵ *Stickler v. Green*, 527 U.S. 263, 281-82 (1999).

⁹⁶ *United States v. Orena*, 145 F.3d 551, 558 (2d Cir. 1998) (citing *United States v. Zagari*, 111 F.3d 307, 321 (2d Cir. 1997) (concluding that impeachment evidence regarding government witness was immaterial where testimony was corroborated by

"[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense."⁹⁷ "New evidence that is merely impeaching will not ordinarily justify a new trial."⁹⁸ Evidence "which merely discredits a government witness and does not directly contradict the government's case ordinarily does not justify the grant of a new trial."⁹⁹

Here, appellant asserts that the trial counsel's failure to disclose the agreement prevented defense counsel from impeaching PFC Pilago about his motive to fabricate in order to secure a twelve-month reduction in his sentence. Specifically, appellant asserts that the disclosure of the agreement to the panel would have positively influenced the panel's deliberations.¹⁰⁰ In light of the government's burden, appellant has nonetheless failed to demonstrate how impeaching PFC Pilago about the SJA's promise would have affected the outcome at trial.

independent evidence). See also *United States v. Payne*, 63 F.3d 1200, 1210-11 (2d Cir. 1995).

⁹⁷ *United States v. Agurs*, 427 U.S. 97, 109-110 (1976).

⁹⁸ *United States v. Reyes*, 49 F.3d 63, 68 (2d Cir. 1995); *Mesarosh v. United States*, 352 U.S. 1, 9 (1956) ("new evidence which is 'merely cumulative or impeaching' is not, according to the often-repeated statement of the courts, an adequate basis for the grant of a new trial").

⁹⁹ *United States v. Aguilar*, 387 F.2d 625, 625 (2d Cir. 1967).

¹⁰⁰ Appellant's Br. at p. 29.

Highlighting the agreement to the panel through impeachment would have likely influenced the panel's deliberations - but not in a way favorable to appellant. In this case, if the defense counsel raised the spectre that PFC Pilago's testimony was the product of a desire to gain a promise to recommend clemency, the results would have been even more damaging for appellant.

Generally, when a witness is impeached during cross-examination, the proponent of the witness may attempt to rebut, repair, or rehabilitate the charged impeachment. Had the defense counsel impeached PFC Pilago by suggesting that he recently fabricated his account in exchange for the SJA's promise to recommend clemency, the government would have been able to rebut the implied or express charge of recent fabrication with evidence of PFC Pilago's prior consistent statement about the rape of DD. According to Military Rule of Evidence (M.R.E.) 801(d)(1)(B):

A statement is not hearsay if ... [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is ... consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive[.]¹⁰¹

If defense counsel attempted to impeach PFC Pilago about the promise for clemency he would have opened a dangerous door. PFC Pilago's prior consistent statement would have been

¹⁰¹ Mil. R. Evid. 801(d)(1)(B).

admissible to rebut any actual or implied charge of motive to fabricate. A mere three days after the DD's rape, PFC Pilago made statement under oath to law enforcement.¹⁰² Here PFC Pilago stated,

Walter started to try to have sex with her again and when he tried to put his penis in her vagina she said stop. I stopped because I was about to get oral sex from her again, so I stopped what I was doing and looked at Walter and said, dude, and kept telling him dude she said stop and he said keep going.¹⁰³

PFC Pilago's prior consistent statement closely comported with his trial testimony. At trial PFC Pilago testified that DD said "stop" and that he twice told appellant, "Dude, she said stop."¹⁰⁴ According to PFC Pilago, appellant told him to "just keep going."¹⁰⁵

The introduction of PFC Pilago's prior statement would have had several devastating effects. First, it would have served to bolster PFC Pilago's already damaging testimony. PFC Pilago's statement also corroborated DD's testimony.¹⁰⁶ The panel would have also easily seen that the prior consistent statement was not the product of any desire to gain clemency. On the contrary, PFC Pilago's sworn statement was made before he ever

¹⁰² JA at 16-20.

¹⁰³ JA at 16.

¹⁰⁴ JA at 128.

¹⁰⁵ JA at 128.

¹⁰⁶ JA at 58-59.

spoke with anyone from the prosecution. In fact, PFC Pilago had not even been charged at that point.

Furthermore, the government's rehabilitation would have most likely revealed that PFC Pilago was not testifying under an *actual* grant of clemency or leniency. The Staff Judge Advocate did not have the authority to grant actual clemency to PFC Pilago.¹⁰⁷ Rather, the SJA verbally agreed to recommend clemency to the convening authority in exchange for PFC Pilago's truthful testimony. PFC Pilago, having nothing but a verbal assurance, took the SJA at his word. If the convening authority did not concur with the Staff Judge Advocate's recommendation, PFC Pilago would have been sadly out of luck. The government could have argued that PFC Pilago was not guaranteed any kind of leniency in exchange for his testimony. Altogether, this would have made PFC Pilago's testimony more truthful in the eyes of the members because he had no motive to gain clemency when he spoke with law enforcement.

Perhaps the most damaging consequence of opening the door to PFC Pilago's prior statement is the resulting instruction that the military judge would have been required to provide. "When a party seeks to impeach a witness on the ground of recent fabrication, improper influence or motive, and evidence of prior statement consistent with the witness's trial testimony is

¹⁰⁷ JA at 302-03.

offered in rebuttal" the military judge must give the instruction on prior consistent statements.¹⁰⁸ According to the standard instruction, a prior consistent statement may be considered for its tendency to refute the charge of improper motive.¹⁰⁹ Even worse yet for appellant, the prior consistent statement could have been considered as substantive evidence for the truth of the matter asserted.¹¹⁰

In sum, the impeachment of PFC Pilago would not have yielded appellant any better result at trial. Any such impeachment would have in turn led to a square rebuttal to the charge of improper motive. The impeachment of PFC Pilago could have only led to the introduction of his prior consistent statement coming in which would have made the conviction more - not less - likely.

c. Upon impeachment, PFC Pilago's prior consistent statement would have been admissible.

Appellant counters that PFC Pilago's statement would not have been admitted because PFC Pilago had a motive to fabricate when he initially spoke with law enforcement. In particular, appellant asserts that PFC Pilago had motive to make appellant appear more culpable from the beginning therefore, PFC Pilago's

¹⁰⁸ Dep't of Army, Pam. 27-9, Legal Services: Military Judge's Benchbook [hereinafter Benchbook], para. 7-11-2, (1 Jan. 2010).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

prior statement would not have been admitted as substantive evidence. Appellant's argument is based upon a flawed premise.

In order to admit a prior consistent statement only two requirements must be met: first, there must be an explicit or implicit charge of recent fabrication; and second, the prior statement must have been made before the charged motive to fabricate.¹¹¹ When there are multiple motives to fabricate or multiple improper influences, the prior statement need not precede any and all such motives or inferences, but only the one it is offered to rebut.¹¹² As stated by this court:

The focus of Mil.R.Evid. 801(d)(1)(B), however, is not **when** or even **if** a recent fabrication, improper influence, or improper motive occurred. The rule is concerned with rebutting the "express or implied **charge**," i.e., accusation by a party opponent, that some such impropriety occurred. (Emphasis added.) Often, the very fact of improper motive, etc., will be vigorously disputed, much less ascertainable as to precise moment of origination. Thus, the point in time to be ascertained for purposes of rebuttal is the fair implication of the **charge**, not the arguable underlying event.¹¹³

Contrary to appellant's argument, despite PFC Pilago's supposed continuing motive to fabricate, M.R.E. 801(d)(1)(B) would have permitted the government to squarely rebut the

¹¹¹ Mil. R. Evid. 801(d)(1)(B); *United States v. Roach*, 164 F.3d 403, 411 (8th Cir. 1998). See also *Tome v. United States*, 513 U.S. 150, 158 (1995).

¹¹² *United States v. Allison*, 49 M.J. 54, 57 (C.A.A.F. 1998) (citing *United States v. Morgan*, 31 M.J. 43, 46 (C.M.A. 1990)).

¹¹³ *United States v. Faison*, 49 M.J. 59, 61-62 (C.A.A.F. 1998).

distinct charge that PFC Pilago testified falsely in exchange for possible clemency.

Appellant's interpretation of M.R.E. 801(d)(1)(B) effectively swallows the rule in respect to statements made to law enforcement officers. In cases where a suspect makes a statement to law enforcement during apprehension or upon investigation, it will invariably take place before any bargain for clemency, immunity, or leniency is reached. Appellant's would-be rule eviscerates any distinction between such statements.¹¹⁴ Such a result is contrary to both this court's precedence and the general understanding of the rule.

Appellant's dispute with the military judge's findings of fact and conclusions of law cannot overcome the straightforward and common sense application of the Military Rules of Evidence. If trial defense counsel impeached PFC Pilago about the agreement, then the government would have introduced the prior consistent statement in rebuttal. The introduction of the prior consistent statement would only have hurt appellant's case further.

d. Other factors in assessing harmlessness.

Whether the nondisclosure was harmless would also seem to require inquiry into what trial defense counsel knew about the

¹¹⁴ Cf. *United States v. Henderson*, 717 F.2d 135, 138-39 (4th Cir. 1983).

agreement beforehand. The military judge's conclusion that defense counsel fully realized he was one question away from learning about the clemency agreement is not clearly erroneous in light of the totality of the circumstances. 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.

During the post-trial session, trial counsel testified that she could not recall whether she told appellant's attorneys the specifics of the agreement but she did seem to recall telling trial defense counsel that they were in negotiations with PFC Pilago and that the government was heavily considering calling him as a witness for the prosecution.¹¹⁵ Specifically, the trial counsel stated:

I had discussions with [appellant's] defense team. I don't remember if I specifically gave them details of the agreement. I do remember discussing that there were negotiations going on at one point, and we were looking for some sort of agreement. I just don't remember if I ever gave them the specifics.¹¹⁶

In her affidavit, the trial counsel again noted that she at least informed appellant's counsel that "the government was in negotiations with PFC Pilago and his attorney and was most

¹¹⁵ JA at 276.

¹¹⁶ JA at 287.

likely going to agree to recommend some form of clemency as an incentive to have PFC Pilago testify at US v. Coleman."¹¹⁷ She continued:

I also believe that PFC Pilago's defense counsel . . . informed [appellant's trial defense counsel] that PFC Pilago would testify at US v. Coleman in return for a 12 month recommendation on clemency from the Fort Leonard Wood SJA, COL Steven Walburn. I also recall that [appellant's trial defense counsel] had access to PFC Pilago prior to his testimony at US v. Coleman—in fact, prior to the government having access to PFC Pilago.¹¹⁸

After the agreement between PFC Pilago and the Staff Judge Advocate was reached, the assistant trial counsel sought to interview PFC Pilago.¹¹⁹ When the assistant trial counsel arrived, he found PFC Pilago being interviewed by trial defense counsel.¹²⁰ After trial defense counsel finished his interview, assistant trial counsel proceeded to interview PFC Pilago in preparation for appellant's court-martial.¹²¹ The assistant trial counsel was under the impression that trial defense counsel already knew about the oral agreement.¹²² While it is admittedly troubling that assistant trial counsel responded, "No, there's nothing in writing," to trial defense counsel's

¹¹⁷ JA at 250.

¹¹⁸ JA at 250.

¹¹⁹ JA at 242

¹²⁰ JA at 242.

¹²¹ JA at 242.

¹²² JA at 242.

inquiry,¹²³ there is little doubt that trial defense counsel could have asked for a recess and further question PFC Pilago about the status of negotiations.

In light of these facts, trial defense counsel had some knowledge that a clemency agreement between PFC Pilago and the SJA was imminent or afoot. Appellant clearly knew that the prior consistent statement existed¹²⁴ and that the government and PFC Pilago were nearing an agreement.¹²⁵ It is hard to see how the nondisclosure is anything but harmless when appellant's "attorney either knew, or should have known, of the essential facts permitting him to take advantage of that evidence."¹²⁶ Accordingly, trial defense counsel could have exercised reasonable diligence by taking a recess and asking PFC Pilago himself about any clemency agreement.¹²⁷ Under these circumstances, a trial defense counsel cannot sit on his hands when he knows an agreement likely exists and then play "gotcha" litigation with the government. Thus, the failure to inform defense counsel of that which he was already aware is a harmless error beyond a reasonable doubt.

¹²³ JA at 242

¹²⁴ Defense Exhibit F for Identification is a copy of PFC Pilago's prior consistent statement.

¹²⁵ JA at 244.

¹²⁶ *Carter v. Bell*, 218 F.3d 581, 601 (6th Cir. 2000).

¹²⁷ Cf. *United States v. Behenna*, 70 M.J. 521, 528-29 (C.A.A.F. 2011) (noting that defense, when faced with clear indications of favorable evidence, should exercise due diligence).

Furthermore, appellant's choice of tactics permitted him to simultaneously argue that some of PFC Pilago's testimony (i.e., about the consensual sex and DD's capacity to consent) was truthful while other parts (i.e., that DD told appellant to "stop") were false. In walking this fine line, the terms of the clemency agreement would have been of little help. Given defense counsel's clear knowledge of PFC Pilago's prior consistent statement, trial defense counsel wisely made a strategic decision not to overreach on this score. Accordingly, even if they did not know about PFC Pilago's clemency agreement, this would not have strengthened their hand in light of PFC Pilago's prior consistent statement to law enforcement, and appellant's desire for the panel to believe at least some of PFC Pilago's testimony. Most importantly, trial defense counsel's tactic allowed the defense to deftly navigate away from the introduction of PFC Pilago's prior consistent statement and its accompanying instruction.

Finally, PFC Pilago's testimony was not essential to the verdict. There was other substantial evidence of appellant's guilt. DD was the key government witness who gave the panel her firsthand account of appellant raping her. While PFC Pilago confirmed the testimony of DD that she told appellant to stop raping her, the panel was free to find this fact to be true from DD's testimony alone. Also, the evidence of DD's injuries and

pain were entirely unrelated to PFC Pilago's supposed motive to fabricate.¹²⁸ PFC Pilago's testimony, while valuable, was merely icing on the proverbial cake. Had PFC Pilago never testified, it is still likely that the panel would have found appellant guilty of raping DD. In light of the other substantial evidence of appellant's guilt, any failure to provide impeachment evidence regarding such an ancillary witness was harmless.

In light of the foregoing, the government's failure to disclose the clemency agreement was harmless beyond a reasonable doubt. PFC Pilago's testimony was not crucial to the prosecution's case. Trial defense counsel's knowledge of the impending agreement, coupled with his tactical decision not to fully impeach PFC Pilago, actually benefited his client. It kept closed a very dangerous door. Therefore, there is no reasonable probability that impeaching PFC Pilago would have resulted in a different outcome.

¹²⁸ JA at 166-67; 193-94.

Conclusion

Wherefore, the Government respectfully requests this Honorable Court affirm the decision of the Army Court of Criminal Appeals.



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CERTIFICATE OF SERVICE AND FILING

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on January 28, 2013.

A handwritten signature in black ink, appearing to read 'D. Mann', with a long horizontal line extending to the right.

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