IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	BRIEF ON BEHALF OF APPELLEE
v.	)	
Lieutenant Colonel (O-5) **SEAN M. AHERN,** United States Army, Appellant	)	Crim. App. Dkt. No. 20130822
	)	USCA Dkt. No. 17-0032/AR

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Index of Brief

Issue Presented:

> WHETHER THE LOWER COURT ERRED WHEN IT HELD THAT THE PROHIBITION AGAINST USING AN ADMISSION BY SILENCE PROVIDED BY MIL. R. EVID. 304(a)(2) IS TRIGGERED ONLY "WHEN THE ACCUSED IS AWARE OF" AN INVESTIGATION CONTRARY TO THE PLAIN LANGUAGE OF THE RULE.

Table of Authorities

United States Supreme Court

United States Court of Appeals for the Armed Forces/Court of Military Appeals

United States Courts of Appeals

Constitutional Provisions, Statutes, Rules, and Other Authorities

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

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WHETHER THE LOWER COURT ERRED WHEN IT HELD THAT THE PROHIBITION AGAINST USING AN ADMISSION BY SILENCE PROVIDED BY MIL. R. EVID. 304(a)(2) IS TRIGGERED ONLY "WHEN THE ACCUSED IS AWARE OF" AN INVESTIGATION CONTRARY TO THE PLAIN LANGUAGE OF THE RULE.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2012) [hereinafter UCMJ]. This Honorable Court exercises jurisdiction over this case pursuant to Article 67(a)(3), UCMJ, which permits review in "all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good

cause shown, the Court of Appeals for the Armed Forces has granted a review." In a case reviewed under subsection (a)(3), "action need be taken only with respect to issues specified in the grant of review." UCMJ art. 67(c).

Statement of the Case

A panel of officers sitting as a general court-martial convicted Appellant, contrary to his pleas, of one specification of aggravated sexual assault of a child, one specification of aggravated sexual assault, one specification of assault consummated by battery, three specifications of indecent acts with a child (one being on divers occasions), and one specification of child endangerment, under Articles 120, 128, and 134, UCMJ. (JA 1). The court sentenced appellant to be confined for seventeen years and six months and to be dismissed from the service and the convening authority approved the sentence. (JA 1). The Army Court affirmed. (JA 15). Appellant appeals from the Army Court's decision.

Statement of Facts

Appellant sexually abused his step-daughter, SS, many times over the course of many years. (JA 2). On July 5, 2012, she reported this abuse to police. (JA 37). That day, the police helped her send a pretext text message to Appellant in which she attempted to elicit an incriminating statement from Appellant. (JA 65-67). Appellant did not respond. (JA 67). At trial, the defense admitted evidence of this exchange. (JA 65-67, 148).

Next, police assisted SS's mother, SA, in conducting a recorded pretext phone call with Appellant. (JA 38-39). During the call, SA confronted Appellant about his abuse of SS. (JA 86-87). In response, Appellant did not directly deny the abuse, but did say, "You're making all this stuff up," "This is all part of the divorce," and "This is you and [SS] doing your thing . . . ." (JA 89-90). Before trial, the Government moved in limine to admit the recording of this phone call. (JA 149-52). The defense did not oppose the motion or object to the Government's offer of the recording at trial. (JA 24, 71).

During closing argument, the trial counsel argued that Appellant's failure to respond to SS's text message and his response to SA's phone call constituted evidence of his guilt. (JA 97-98). The defense did not object. (JA 97-98).

On appeal to the Army Court, Appellant argued for the first time that the trial counsel's argument on these subjects was improper, conceding that the court would review only for plain error. (JA 6). The court determined that, to answer the question of whether trial counsel's argument was improper, as a threshold matter, it was required to first answer the question of whether Mil. R. Evid. 304(a)(2) applies to exclude an admission by silence if an accused does not know he is under investigation. (JA 6-7). The court interpreted this rule to apply only if the accused knew or reasonably should have known he was under investigation at the time he made the admission by silence. (JA 11-12). Applying this

interpretation, the court held that the trial counsel's argument was not improper because it was not plain and obvious from the record whether Appellant was aware that he was under investigation. (JA 12). However, alternatively, the court held (1) that the law is not sufficiently clear on this subject for any error to have been plain and obvious; (2) that, even if Mil. R. Evid. 304 bars admissions by silence made when the accused is unaware he was under investigation, it was not plain and obvious that the admissions by silence made in this case occurred after the investigation began; and (3) that, even assuming plain and obvious error, the trial counsel's argument did not materially prejudice Appellant's substantial rights. (JA 7, 12-13).

Summary of Argument

This Court should affirm the Army Court because its alternative holdings make the granted question entirely academic. Even if not, this Court should affirm because Appellant waived this issue at trial. Further, the Army Court's holding was correct: Mil. R. Evid. 304(a)(2) only excludes admissions by silence when the accused knew or reasonably should have known that he was under investigation when he remained silent. Finally, any error on the part of the Army Court was harmless. Because of the Army Court's alternative holdings, its purportedly erroneous interpretation of Mil. R. Evid. 304 was harmless error. Even without

this claimed error, the result of the Army Court's Article 66 review would have been the same: the court would have affirmed the findings and sentence.

Standard of Review

When reviewing a court of criminal appeals' (CCA) Article 66 review, this Court reviews questions of law decided by the lower court de novo. *United States v. Pease*, 75 M.J. 180, 184 (C.A.A.F. 2016) (citing *United States v. Paul*, 73 M.J. 274, 277 (C.A.A.F. 2014)).

Law and Analysis

I. This Court should affirm the Army Court because the granted issue is entirely academic.

Outside of its holding interpreting Mil. R. Evid. 304, the Army Court affirmed on the basis of three independent and alternative holdings. Appellant has not sought review of those alternative holdings in this Court. Accordingly, the alternative holdings are the law of the case. Even if this Court holds that the Army Court erred in its interpretation of Mil. R. Evid. 304, the alternative holdings would be left undisturbed. Accordingly, even a holding favorable to Appellant in this Court will not alter the situation for either Appellant or the Government. This Court should therefore affirm.

"When a party does not appeal a ruling, the ruling of the lower court normally becomes the law of the case." *United States v. Parker*, 62 M.J. 459, 464 (C.A.A.F. 2006) (citing *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002)).

See also United States v. Wilder, 75 M.J. 135, 137 n.5 (C.A.A.F. 2016) (applying the law-of-the-case doctrine against the accused). As an exception, the law-of-the-case doctrine "need not be applied when the lower court's decision is 'clearly erroneous and would work a manifest injustice.'" *Parker*, 62 M.J. at 464-65 (citing *Doss*, 57 M.J. at 185 n*). Here, in addition to its primary holding that Mil. R. Evid. 304 only bars admissions by silence when the accused is aware he is under investigation, the Army Court held (1) that the law is not sufficiently clear on this subject for any error to have been plain and obvious; (2) that, even under the plain language interpretation of Mil. R. Evid. 304 urged by Appellant in this Court, it was not plain and obvious that the admissions by silence made in this case occurred after the investigation began; and (3) that, even assuming plain and obvious error, the trial counsel's argument did not materially prejudice Appellant's substantial rights. (JA 7, 12-13). Appellant has not appealed these holdings or suggested any reason that they are clearly erroneous or working a manifest injustice. Accordingly, they are the law of the case.

The alternative holdings render the granted issue entirely academic. This Court does not answer questions of law when any action it might take "would not materially alter the situation presented with respect to either the accused or the Government." *United States v. Gilley*, 14 U.S.C.M.A. 226, 227, 34 C.M.R. 6, 7 (1963). *See also United States v. McIvor*, 21 U.S.C.M.A. 156, 158, 44 C.M.R.

210, 212 (1972) (citing *United States v. Aletky*, 16 U.S.C.M.A. 546, 37 C.M.R. 156 (1967)) (declining to answer a question rendered "academic."). This situation occurs, for example, when alternative holdings of the lower court make a legal question merely academic. *United States v. Morita*, 74 M.J. 116, 124 n.7 (C.A.A.F. 2016). In *Morita*, the Government sought to show subject-matter jurisdiction by belatedly introducing certain documents, but the CCA declined to consider the documents, and held that the Government failed to meet its burden to show jurisdiction. *Morita*, 74 M.J. at 117 n.1. However, in the alternative, the CCA held that even if it were to consider the documents, the Government would still fail to meet its burden to show jurisdiction. *Id.* at 124 n.7. On these facts, this Court held that "there is no justiciable issue for us to resolve." *Id.* (citing *United States v. Clay*, 10 M.J. 269, 269 (C.M.A. 1981)).

This case is like *Morita*. No matter how this Court would dispose of the granted question, the Army Court's alternative holdings would still stand. The findings and sentence would still be affirmed. Accordingly, as in *Morita*, anything this Court might do "would not materially alter the situation presented with respect to either the accused or the Government." *Gilley*, 14 U.S.C.M.A. at 227, 34 C.M.R. at 7. This Court should therefore affirm the Army Court.

II. This Court should affirm the Army Court because Appellant waived the granted issue at trial.

"'Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for the waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake.'" *United States v. Girouard*, 70 M.J. 5, 10 (C.A.A.F. 2011) (quoting *United States v. Harcrow*, 66 M.J. 154, 156 (C.A.A.F. 2008)). When an accused waives a right, "it is extinguished and may not be raised on appeal." *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009). The President has established that a failure to object to a statement as inadmissible under Mil. R. Evid. 304 constitutes a waiver of that objection:

> Motions to suppress or objections under [Mil. R. Evid. 304] . . . to any statement or derivative evidence that has been disclosed must be made by the defense prior to submission of a plea. In the absence of such motion or objection, the defense may not raise the issue at a later time except as permitted by the military judge for good cause shown. Failure to so move or object constitutes a waiver of the objection.

Mil. R. Evid. 304(f)(1). In this regard, this Court has refused to consider issues related to Mil. R. Evid. 304 when the accused has failed to object before the submission of pleas. *United States v. Maio*, 34 M.J. 215, 219 n.2 (C.M.A. 1992) (refusing to consider whether a confession lacked corroboration where the accused

failed to object, relying on Mil. R. Evid. 304(d)(2)(A), since relocated to Mil. R. Evid. 304(f)(1)).

Here, Appellant waived any issue under Mil. R. Evid. 304 as to his admissions by silence when he failed to object before he submitted pleas. As to Appellant's responses to his wife's phone call, he did not file any motion to suppress the admission. What is more, Appellant declined to oppose the Government's motion to admit the recording of the phone call, filed prior to arraignment. (JA 24, 149-52). Then, Appellant failed to object to the admission of the recording when given the opportunity at trial. (JA 71). Finally, Appellant failed to object when the trial counsel argued that the panel should consider Appellant's responses as evidence of his guilt. (JA 97-98). As to Appellant's silence in the face of SS's text message, it was the defense who admitted this evidence, and there was similarly no objection to the trial counsel's argument. (JA 65-67, 97-98, 148).[1] Appellant's decisions thus constituted waiver under Mil. R.

[1] Two other admissions by silence were admitted at trial but are not at issue in this appeal. Appellant failed to respond to his wife accusing him of the abuse in an email, but that exchange occurred long before any investigation started and so was admissible even under Appellant's interpretation of Mil. R. Evid. 304. (JA 144-47). Appellant also hung up on SS when she attempted to make a pretext phone call to him, but the trial counsel did not argue this was an admission by silence, and so it was not part of the Army Court's review of Appellant's improper-argument claim. (JA 91-102).

Evid. 304(f)(1). Accordingly, the issue "is extinguished and may not be raised on appeal." *Gladue*, 67 M.J. at 313.

To be sure, in the absence of a rule promulgated by the President, this Court normally finds only a forfeiture in a failure to object, not a waiver. *Id.* However, *Girouard* was decided after *Gladue*, and reemphasized that what constitutes a waiver depends on the right at issue.[2] While the *Gladue* definitions are useful to this Court in considering the waiver of rights for which there is no presidential guidance, such as the unreasonable-multiplication-of-charges claim at issue in that case, otherwise, it is the President who is empowered by Congress to establish "[p]retrial, trial, and post-trial procedures . . . ." UCMJ art. 36(a). Here, the rule that provides Appellant the right to exclude admissions by silence also provides the procedure for waiver of that right, the failure to file a motion or object before the submission of pleas. "Failure to so move or object constitutes a waiver of the objection." Mil. R. Evid. 304(f)(1).

Nor is Mil. R. Evid. 304(f)(1) a case of mistaking the term "waiver" for the term "forfeiture." As this Court has noted, military law has not been consistent in its use of these terms. *Gladue*, 67 M.J. at 313. But the President was clear that he meant "waiver" when he said "waiver" in Mil. R. Evid. 304. Where the President

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[2] Both *Girouard* and *Gladue* primarily relied on the same cases, *Harcrow* and *United States v. Olano*, 507 U.S. 725 (1993).

has said "waiver" but meant "forfeiture," he has explicitly provided for plain-error review. *See* Rules for Courts-Martial (R.C.M.) 920(f), 1005(f). By contrast, in Mil. R. Evid. 304, the President not only made no mention of plain-error review, he explicitly provided that "the defense may not raise the issue at a later time except as permitted by the military judge for good cause shown." Mil. R. Evid. 304(f)(1); *accord* R.C.M. 905(e). Accordingly, Appellant waived the granted issue. This Court should therefore affirm the Army Court.

III. Admissions by silence are only prohibited when the accused is aware that he is under investigation.

"Failure to deny an accusation of wrongdoing is not an admission of the truth of the accusation if at the time of the alleged failure the person was under investigation or was in confinement, arrest, or custody for the alleged wrongdoing." Mil. R. Evid. 304(a)(2). "The gist of Mil. R. Evid. 304[(a)(2)] is that silence by an accused who is under investigation will not logically support an inference of guilt." *United States v. Cook*, 48 M.J. 236, 240 (C.A.A.F. 1998). Such silence is therefore not relevant. *Id.*[3] This Court should interpret this

[3] As a matter of constitutional law, civilian federal courts apply a bright line rule against admissions by silence made after arrest or rights warnings under *Miranda v. Arizona*, 384 U.S. 436 (1966). *United States v. Giese*, 597 F.2d 1170, 1196-97 (9th Cir. 1979) (citations omitted). However, in the case of pre-arrest, pre-*Miranda* admissions by silence, lacking any analogue to Mil. R. Evid. 304(a)(2), civilian federal courts apply a multi-part test that includes "'whether the statement was such that under the circumstances an innocent defendant would normally be

subsection to include a requirement that the accused is aware of the investigation to avoid absurd results and maintain the rule's purpose.

Courts interpret statutes according to their plain meaning "'unless to do so would produce absurd results, or bring about a result completely at variance with the statutory purpose.'" *United States v. McGowan*, 41 M.J. 406, 413 n.3 (C.A.A.F. 1995) (quoting *Tibbs v. United States*, 507 A.2d 141, 143-44 (D.C. App. 1986)) (internal quotation omitted); *see United States v. Lewis*, 65 M.J. 85, 88-89 (C.A.A.F. 2007) (interpreting "unless the accused had withdrawn in good faith" in R.C.M. 916(e)(4) to mean "unless the accused had withdrawn in good faith or was unable to . . . ."); *King v. Burwell*, 135 S. Ct. 2480, 2495-96 (2015) (interpreting "an Exchange established by the State" in the Affordable Care Act to mean "an Exchange established by the State or the Secretary of Health and Human Services" to protect the purpose of the statute). This Court has been particularly willing to read additional limitations into a statute in the realm of admissions of the accused. *See United States v. Gibson*, 3 U.S.C.M.A. 746, 752, 14 C.M.R. 164, 170 (1954) (declining to interpret "[n]o person subject to this chapter" in Article 31(b), UCMJ, literally, where such an interpretation would go beyond "the reasonable intendment of the Code at the expense of substantial justice and on grounds that are fanciful or

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induced to respond.'" *Id.* (quoting *United States v. Moore*, 522 F.2d 1068, 1075 (9th Cir. 1975)).

insubstantial."); *United States v. Gilbreath*, 74 M.J. 11, 16 (C.A.A.F. 2014) (noting that the non-literal interpretation of Article 31(b) has been grounded in the absurd-results canon); *United States v. Jones*, 73 M.J. 357, 361 (C.A.A.F. 2014) (interpreting "may interrogate, or request any statement from an accused or person suspected of an offense" in Article 31(b) to mean "may interrogate, or request any statement from a person suspected of an offense when the questioner is acting or could reasonably be considered to be acting in a law enforcement or disciplinary capacity.").

Here, a strictly literal interpretation of Mil. R. Evid. 304(a)(2) would lead to absurd results and expand the rule's reach far beyond its purpose. As the Army Court noted, a literal reading would prevent the admission of evidence "once, somewhere in the world and even if unbeknownst to [the accused], an investigation into his wrongdoing has commenced." (JA 8). That is, if an investigation begins in Ottawa and a victim confronts her attacker in Albuquerque, the admissibility of the accused's silence will turn on which came first. According to *Cook*, the purpose (the "gist") of the rule is to establish that when a person is under investigation, it is not logically relevant that he remained silent; it is entirely neutral, an election equally likely to be taken by guilty and innocent accused alike. *Cook*, 48 M.J. at 240. The logic of *Cook* depends entirely on the fact that the accused *knows* that he is under investigation. If the admissibility of the accused's

silence is dependent on its timing, rather than his knowledge of the investigation, the rule becomes entirely divorced from its purpose and rationale. For this reason, this Court should look beyond the plain meaning of the rule to its purpose.

As the Army Court pointed out, this Court did not take the literal, timing-based approach urged by Appellant in *Cook*. (JA 11). In *Cook*, the appellant raped the victim and the victim reported to the police the next morning. *Cook*, 48 M.J. at 238. Then, the appellant was apprehended and advised of this rights. *Id.* A week later, the appellant's friend confronted him about the rape and he remained silent, evidence of which the trial counsel admitted and argued showed the appellant's guilt. *Id.* This Court stated, "[A]ppellant's silence after being apprehended, advised of his rights, and having obtained counsel was not relevant to the question of his guilt." *Id.* at 240.

If the test is based entirely on the timing of the commencement of the investigation, as urged by Appellant, this Court in *Cook* would not have had any reason to focus on whether the admission by silence came after the appellant was apprehended, advised of his rights, and had obtained counsel. Instead, this Court would have focused on whether the admission by silence came after the investigation began, whether known to the appellant or not. That is, this Court would have looked back further on the timeline, to when the victim reported to the police and an investigation commenced, before the appellant was apprehended.

That this Court focused on the later time, the appellant's apprehension, is reflective of the fact that the appellant certainly knew at that point that he was under investigation. Accordingly, as *Cook* shows, the test is not whether somewhere in the world, unbeknownst to the accused, someone has begun an investigation.

In seeking to effect the purpose of the rule, this Court should adopt the standard of *Jones* and the Army Court. Like in the Article 31(b) context, the overbreadth of the literal scope of the rule is best limited by interpreting it so that it applies only when the accused knows or reasonably should know that he is under investigation at the time he remains silent. The *Jones* standard was adopted in substance decades ago, has been carefully refined since then, and has proven through the test of time to be both workable and effective. Accordingly, Mil. R. Evid. 304(a)(2) is only triggered when the accused knows or reasonably should know that he is under investigation for the offense at issue. For this reason, the Army Court did not err in the course of its Article 66 review of the trial counsel's closing argument.

IV. Even if the Army Court erred, the error was harmless.

"A finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." UCMJ art. 59(a). Here, even if the Army Court's primary holding that Mil. R. Evid. 304(a)(2) does not apply unless the accused is aware of

the investigation was error, the court alternatively held that the law was not plain and obvious, that even if the accused need not know of the investigation it was not plain and obvious whether the admissions by silence were made after the investigation began, and that Appellant was not materially prejudiced by the trial counsel's argument. (JA 7, 12-13). Put another way, even if the Army Court applied the wrong Mil. R. Evid. 304 test in its primary holding, it held that what test should be applied was not plain and obvious, it also applied Appellant's preferred test and found no plain and obvious error, and it found that, in any event, the purported error was harmless. Given these independent and alternative holdings, even if the court's interpretation was erroneous, despite the error, the same result would have occurred following the Army Court's Article 66 review. The court would have affirmed the findings and sentence. Accordingly, the Army Court's purported error did not prejudice Appellant's substantial right to a review under Article 66, UCMJ. This Court should therefore affirm the Army Court.

Appellant invites this Court to address the question of harmless error with reference to what happened at *trial*. (Appellant's Br. 16-18). In that vein, Appellant discusses the strength of the evidence and the focus of the trial counsel's argument. But this Court has not granted review of the trial proceedings. Congress's statutory grant of jurisdiction permits this Court to limit its review to certain issues. UCMJ art. 67(c) ("action need be taken only with respect to issues

specified in the grant of review."). This Court granted review of the *appellate* proceedings, and only one aspect of the appellate proceedings, the Army Court's interpretation of Mil. R. Evid. 304. This Court did not grant review of whether trial counsel's argument was improper, it granted review of whether the Army Court's review of that argument was improper.[4] Given this narrow issue, the question under Article 59(a) is whether the specific error alleged was prejudicial to Appellant *at the CCA*. Because of the Army Court's alternative holdings, any error did not materially prejudice his substantial right to a review under Article 66, UCMJ, as the same result would have obtained absent the purported error.[5] Accordingly, this Court should affirm the Army Court.

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[4] Nor has this Court granted review of whether the Army Court properly *applied* the accused-must-be-aware test. Appellant argues alternatively that, even if the Army Court was correct that admissions by silence are only prohibited when the accused is aware that he is under investigation, the court erred in holding that it was not plain and obvious that Appellant knew he was under investigation. (Appellant's Br. 14-15). But this Court only granted review of whether the Army Court erred in applying that test in the first place. If this Court holds that the Army Court applied the wrong test in a manner that was prejudicial to Appellant, the proper remedy is a remand to the Army Court to conduct a proper Article 66 review with the proper test, without conducting that test in the first instance at this second tier of appellate review.

[5] Even if this Court were to accept Appellant's invitation to direct the harmless-error test at the trial proceedings, under the plain-error test, Appellant failed in his burden of showing the trial counsel's argument materially prejudiced his substantial rights for the reasons listed by the Army Court: the evidence was extremely strong, given that Appellant admitted to the abuse; there was little force to the trial counsel's argument; and the defense used the same evidence to argue that Appellant was not guilty. (JA 13).

Conclusion

Wherefore, the United States respectfully requests that this Honorable Court affirm the Army Court.

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CERTIFICATE OF FILING AND SERVICE

I certify that the original was filed electronically with the Court at efiling@armfor.uscourts.gov on this 17th day of January, 2017 and contemporaneously served electronically and via hard copy on appellate defense counsel.

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