IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Chief Warrant Officer Two (CW2) **RANDY E. JONES** United States Army, Appellant	FINAL BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 20150370 USCA Dkt. No. 17-0608/AR

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

Issues Presented

I.

WHETHER ADMISSION OF AN ALLEGED CO-CONSPIRATOR'S CONFESSION TO LAW ENFORCEMENT VIOLATED M.R.E. 801(d)(2)(E).

II.

WHETHER ADMISSION OF THE SAME CONFESSION VIOLATED APPELLANT'S SIXTH AMENDMENT RIGHT TO CONFRONTATION.

III.

WHETHER USE OF THE CONFESSION TO CORROBORATE OTHERWISE UNSUPPORTED ESSENTIAL ELEMENTS IN APPELLANT'S OWN CONFESSION VIOLATED M.R.E. 304(g) AND UNITED STATES v. ADAMS, 74 M.J. 137 (C.A.A.F. 2015).

STATEMENT OF STATUTORY JURISDICTION

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2012) [hereinafter UCMJ]. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867 (a)(3) (2012).

STATEMENT OF THE CASE

On May 28, 2015, a military judge sitting as a general court-martial convicted Chief Warrant Officer Two (CW2) Randy E. Jones, contrary to his pleas, of one specification of larceny of military property of a value of more than $500 and one specification of larceny of military property of a value of $500 or less, in violation of Article 121, UCMJ. The military judge acquitted CW2 Jones of one specification of conspiracy to commit the charged larceny offenses under Article 81, UCMJ. (JA 229). The military judge sentenced CW2 Jones to be reprimanded, confined for seventeen days, and dismissed from the service. (JA 233). With one exception, the convening authority approved the findings and sentence as adjudged. (JA 4). For the greater Article 121 offense, the convening authority stated, "only so much of the finding . . . as finds a larceny of military property of a value of $500 or less is approved." (JA 4).

On August 3, 2017, the Army Court summarily affirmed the findings of guilty and the sentence as approved by the convening authority. (JA 1). Chief

Warrant Officer Two Jones was notified of the Army Court's decision and, in accordance with Rule 19 of this Court's Rules of Practice and Procedure, appellate defense counsel filed a Petition for Grant of Review on September 27, 2017. This Honorable Court granted appellate defense counsel's motion to extend time to file the supplement on September 29, 2017, and counsel filed the Supplement to the Petition for Grant of review on October 17, 2017. On November 15, 2017, this Honorable Court granted CW2 Jones's petition for review.

STATEMENT OF FACTS

Chief Warrant Officer Two (CW2) Randy Jones, a 45-year-old woodshop instructor, father, and Army reservist, deployed to Kandahar, Afghanistan in October 2013. (JA 203). At that time, CW2 Jones had been in the Army for a total of four years, having enlisted in 1986 but taking a break in service of over 20 years to work as a teacher. (JA 13). During this deployment, he served as the Officer in Charge (OIC) of the unit's woodshop. (JA 193). Under CW2 Jones's guidance, the woodshop became highly praised, incredibly popular, and created numerous gifts for World War II veterans, gold-star families, foreign dignitaries, and even President Barack Obama. (JA 196–97). It was so successful the unit's leadership contemplated recreating the woodshop in garrison when the unit redeployed home. (JA 60, 198).

In running the woodshop, CW2 Jones and his Soldiers used tools left by previous units and whatever else they could salvage from the Retro-Sort Yard (RSY), a repository of random materials and tools, many of which were otherwise set to be destroyed in preparation for retrograde efforts. (JA 50, 60, 63, 202). In addition to salvaging tools for additional duties, numerous Soldiers mailed them home through the local U.S. Postal Service. (JA 179–80). In fact, such mailings occurred "all the time" and "every day" the post office was open. (JA 179–80).

This was in part due to the fact that CW2 Jones and his fellow reservists did not have their own connex for shipping, and that shipping tools in Regular Army connexes had proved problematic in the past. (JA 200–01). As a result, the reservists used commercial mail to send items to and from Afghanistan. (JA 201). The overall number of Soldiers mailing tools was "a lot" and "[post office employees] complained to the supervisors because it was so many people mailing tools," which were heavy and sometimes had to be repacked. (JA 183).

Chief Warrant Officer Two Jones and his then First Sergeant, Master Sergeant (MSG) Kenneth Addington, were among those who mailed tools home through the postal service. Both Soldiers were subsequently charged with larceny of military property under Article 121, UCMJ, and conspiracy to commit larceny under Article 81, UCMJ. (JA 2).

Master Sergeant Addington confessed to Criminal Investigative Command (CID) Special Agent (SA) Haider Khaleel on April 21, 2014. (JA 272–75). In doing so, SA Khaleel also elicited from MSG Addington numerous facts also incriminating CW2 Jones. (JA 272–75). CID agents also attempted to interview CW2 Jones that same day but he "elect[ed] to cease questioning." (JA 41). The next day, CW2 Jones returned to CID and provided a similar confession. (JA 41, 283–85).

At CW2 Jones's trial, the government attempted to move MSG Addington's confession into evidence as a co-conspirator statement through SA Khaleel. (JA 19–20). The military judge did not make a finding that a conspiracy actually existed, nor could he have done so, as SA Khaleel was the government's first witness and did not provide any context for the relationship between CW2 Jones and MSG Addington.[1] (JA 21).

The defense objected to the entirety of the statement and argued that MSG Addington's confession was not in furtherance of a conspiracy. (JA 19–20). Acknowledging Military Rule of Evidence (hereinafter M.R.E.) 801(d)(2)(E), the defense counsel explained "a particular statement has to advance the objectives of the conspiracy. There's nothing in that statement of [MSG] Addington that does

[1] There was no evidence that the military judge intended to admit the statement conditionally, under M.R.E. 104(b), nor did the government make such a request.

that." (JA 19–20). After asking to see the confession, the military judge simply stated the defense's objection was overruled. (JA 21). At trial, MSG Addington did not testify, nor was he declared unavailable pursuant to M.R.E. 804(a).

After the military judge admitted MSG Addington's confession, the prosecution moved to introduce CW2 Jones's statements through SA Mark Heyung. (JA 42). The defense again objected to the entirety of the statement, arguing that CW2 Jones's confession was uncorroborated and therefore inadmissible under M.R.E. 304(c). Specifically, the defense cited *United States v. Adams*, 74 M.J. 137 (C.A.A.F. 2015), decided just prior to the trial. (JA 42–44).

The government conceded the majority of the statement was uncorroborated, but argued MSG Addington's sworn statement corroborated two facts: (1) that CW2 Jones had mailed items home, and (2) that MSG Addington and CW2 Jones had gone to the RSY together. (JA 46–47). The military judge agreed with the government and permitted it to move forward with the remainder of its case before attempting to re-introduce more of CW2 Jones's statement. (JA 47–48). The prosecution subsequently recalled SA Heyung as its final witness, at which time defense renewed its objection under M.R.E. 304(c) on multiple occasions. (JA 150-53). The military judge ultimately redacted portions of CW2 Jones's confession, leaving only those portions he believed were corroborated. (JA 169,

280–85).[2] The military judge left intact *inter alia* CW2 Jones's admissions that: "[He] intended [the tools] to be used by the Soldiers at the unit or by the students at the school[;]" and he got the tools from the woodshop. (JA 283–85). These two essential facts were corroborated *only* by MSG Addington's statement. After the military judge provided counsel with the redacted version of the statement, neither counsel objected further. (JA 169).

The defense then began its case-in-chief by renewing its objection to MSG Addington's confession, this time arguing that it should also be subject to M.R.E. 304(c)'s corroboration requirement. (JA 170). The military judge stated, "[O]ut of an abundance of caution," he would only consider "three essential elements" from MSG Addington's statement: (1) that MSG Addington himself had taken tools from the RSY and mailed them home; (2) that MSG Addington witnessed CW2 Jones mail tools home on one occasion; and (3) that MSG Addington and CW2 Jones went to the RSY together about three times. (JA 173–74). The military judge, however, made no further redactions to either confession after he made this ruling.

The military judge ultimately found CW2 Jones guilty of both specifications of larceny and not guilty of conspiracy. (JA 233).

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[2] An unredacted copy of Prosecution Exhibit 4, CW2 Jones's statement, although not admitted at trial, has been included at JA 239–41.

SUMMARY OF ARGUMENT

In line with the issues presented, the military judge erred for three reasons.

First, the introduction of MSG Addington's confession violated M.R.E. 801(d)(2)(e). Master Sergeant Addington's confession to law enforcement was neither during nor in furtherance of any purported conspiracy. Moreover, the military judge failed to make the threshold determination that a conspiracy existed before admitting the confession. The military judge therefore abused his discretion in admitting this statement pursuant to M.R.E. 801(d)(2)(E).

Second, the admission of MSG Addington's confession through SA Khaleel violated CW2 Jones's Sixth Amendment right to confrontation. Master Sergeant Addington never testified at trial, nor was he declared unavailable. (JA 18–21).

Both of these errors directly resulted in the corroboration of essential facts admitted by CW2 Jones, which were not corroborated by any other evidence. Furthermore, these otherwise uncorroborated facts were vital to the government's case, as the government could not have met its burden of proof without them.

Finally, should this Honorable Court finds no error in the first two issues presented, a third issue exists. To the extent the military judge ultimately stated that he would only consider limited facts from MSG Addington's confession, he considered otherwise uncorroborated essential facts from CW2 Jones's admission in violation of *Adams*. (JA 46–47, 170–74).

I.

WHETHER ADMISSION OF AN ALLEGED CO-CONSPIRATOR'S CONFESSION TO LAW ENFORCEMENT VIOLATED M.R.E. 801(d)(2)(E).

a. Statement of facts.

For this issue, CW2 Jones primarily relies on the facts previously presented. Any additional facts are contained in the relevant subsections below.

b. Standard of review.

This Court "reviews a military judge's decision to admit or exclude evidence under an abuse of discretion standard." *United States v. Barnett*, 63 M.J. 388, 394 (C.A.A.F. 2006). When reviewing a mixed question of law and fact, this Court applies a clearly-erroneous standard when reviewing findings of fact and a de novo standard when reviewing conclusions of law. *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995). Furthermore, as this Court stated in *United States v. Flesher*:

> When the standard of review is abuse of discretion, and we do not have the benefit of the military judge's analysis of the facts before him, we cannot grant the great deference we generally accord to a trial judge's factual findings because we have no factual findings to review. Nor do we have the benefit of the military judge's legal reasoning in determining whether he abused his discretion . . . .

73 M.J. 303, 312 (C.A.A.F. 2014) (quoting *United States v. Benton*, 54 M.J. 717, 725 (A. Ct. Crim. App. 2001) (citations omitted)).

c. Law.

Military Rule of Evidence 801(d)(2)(E) exempts from M.R.E. 802's general prohibition on hearsay, "a statement by a co-conspirator of a party *during the course of and in furtherance* of the conspiracy[,]" is not hearsay. M.R.E. 801(d)(2)(E) (emphasis added). "Before admitting a co-conspirator's statement over an objection . . . there must be evidence that there was a conspiracy involving the declarant and the nonoffering party, and that the statement was made during the course and in furtherance of the conspiracy." *United States v. Bourjaily*, 483 U.S. 171, 175 (1987) (quotations omitted).

Although a co-conspirator's statement may be "admissible against the others where it is in furtherance of the criminal undertaking . . . all such responsibility is at an end when the conspiracy ends." *Wong Sun v. United States*, 371 U.S. 471, 490 (1963) (quoting *Fiswick v. United States*, 329 U.S. 211, 217 (1946)). The Supreme Court has "consistently refused to broaden that very narrow exception to the traditional hearsay rule which admits statements of a codefendant made in furtherance of a conspiracy or joint undertaking." *Wong Sun*, 371 U.S. at 490; *see also Krulewitch v. United States*, 336 U.S. 440, 443–45 (1949) (declining to "expand this narrow exception to the hearsay rule to hold admissible a declaration, not made in furtherance of the alleged criminal transportation conspiracy charged,

but made in furtherance of an alleged implied but uncharged conspiracy aimed at preventing detection and punishment.")

In rare instances, courts have been willing to entertain the prospect that post-arrest statements to law enforcement may qualify as hearsay exceptions, but only where it is done in furtherance of an incomplete objective. *See United States v. Howard*, 770 F.2d 57, 61 (6th Cir. 1985) (conspiracy to commit insurance fraud by arson not complete until defendants received reimbursement).

Additionally, a co-conspirator statement must not only take place during the conspiracy, it must also be in furtherance of it. M.R.E. 801(d)(2)(E). There is significant legal authority for the proposition that a post-arrest statement is not made in furtherance of a conspiracy. *Fiswick*, 329 U.S. at 217; *United States v. Lombard*, 72 F.3d 170, 189 (1st Cir. 1995); *United States v. Alonzo*, 991 F.2d 1422, 1425 (8th Cir. 1993)).

Simply put, the proposition that a confession is not in furtherance of a conspiracy is sound. *See* Christopher B. Mueller & Laird C. Kirpatrick, Federal Evidence § 8:61(2008) ("When a conspirator knowingly speaks to law enforcement agents, what he says almost always fails the furtherance requirement"); *see also Krulewitch*, 336 U.S. at 443 (a statement is not in furtherance of a conspiracy's objectives if it is made "after those objectives either had failed or been achieved").

d. Argument.

i. The military judge failed to find that a conspiracy existed.

The military judge erred by admitting evidence under M.R.E. 801(d)(2)(E) without first finding that a conspiracy actually existed. (JA 19–21). *See e.g. United States v. Perez*, 989 F.2d 1574, 1582 (10th Cir. 1993) (holding the trial court's failure to make a finding that a conspiracy actually existed was an abuse of discretion). However, even assuming the military judge implicitly made such a determination in this case, he did not provide his analysis or legal reasoning. As such, his ruling should be accorded minimal deference from this Court. *Flesher*, 73 M.J. at 312.

In fact, not only did the military judge fail to find that a conspiracy existed on the record, he could not have made such a determination at that point in the trial. (JA 19–21). The government attempted to introduce the co-conspirator statement through its very first witness, SA Khaleel, and did so without asking a single question about the relationship between CW2 Jones and MSG Addington. (JA 19). As such, there was no evidence of a conspiracy before the court at the time the statement was offered and erroneously admitted.

Notably, several witnesses later, the military judge even told the trial counsel, "I need to hear evidence that would lead me to believe there was such a conspiracy." (JA 73). From this statement alone, it appears the military judge

himself belatedly realized the government had not presented any evidence of a conspiracy.[3]

ii. Master Sergeant Addington's confession was made after the conspiracy ended and was not in furtherance of it.

The military judge further erred when he admitted the confession over defense's objection that MSG Addington's statements were not admissible under M.R.E. 801(d)(2)(E). Again, because the military judge did not provide his findings or legal analysis on the record, his ruling should receive minimal, if any, deference from this Court. *Flesher*, 73 M.J. at 312.

For this point, the arguments of both parties remain illuminating. In response to defense's objection that the MSG Addington's entire statement did not satisfy the requirements of the rule, the trial counsel confusingly argued that any part of a confession to an offense is somehow automatically part of a conspiracy to commit that same offense. (JA at 20). It is difficult to understand (and is in fact irreconcilable) how any portion of this confession advanced the objective of the charged conspiracy.

[3] For this same reason, the additional hearsay statement from MSG Addington was also erroneously admitted. (JA 100). In this statement, MSG Addington told SGT Zajac that he and CW2 Jones were going to the RSY together. (JA 100). The military judge overruled defense's hearsay objection and admitted this statement despite receiving no new evidence of a conspiracy since admonishing the trial counsel that he needed such evidence. (JA 73, 100).

While courts have on rare occasions found that post-arrest statements to law enforcement may potentially qualify under M.R.E. 801(d)(2)(E), it has only where the statement is given in furtherance of an incomplete objective. In this case, MSG Addington's statement was a *confession*, and no such incomplete objective exists. Furthermore, as outlined above, there is significant legal authority for the broader, and more intuitive, proposition that a post-arrest statement generally not made in furtherance of a conspiracy. *Fiswick*, 329 U.S. at 217; *Lombard*, 72 F.3d at 189; *Alonzo*, 991 F.2d at 1425.

Plain and simple, MSG Addington's confession was not made "during the course of and in furtherance of the conspiracy," as required by M.R.E. 801(d)(2)(E). As in *Wong Sun*, at the time MSG Addington made his confession to law enforcement, he was well aware that he and CW2 Jones had been caught mailing the tools home. (JA 272). Master Sergeant Addington's confession ended whatever conspiracy there may have been, and in doing so, the confession was surely not in furtherance of it. *See also Williamson v. United States*, 512 U.S. 594, 610, n. 3 (1994) (Ginsburg, J., concurring) (clarifying that the post-arrest statement of a codefendant was not in furtherance of the conspiracy and therefore inadmissible under F.R.E. 801(d)(2)(E)).

iii. The error was prejudicial.[4]

The erroneously admitted evidence was highly prejudicial. Here, the government's case consisted almost entirely of the confessions of MSG Addington and CW2 Jones. To this extent, MSG Addington's erroneously admitted statements were the sole corroboration for two essential facts admitted by CW2 Jones, without which the government failed to meet its burden of proof. Ultimately, without MSG Addington's confession (and therefore without key portions of CW2 Jones's statement based on the defense's *Adams* objections), the government's case consisted solely of the fact that CW2 Jones mailed commercially available tools from Afghanistan to his home in North Carolina.

Specifically, the military judge admitted MSG Addington's statements that CW2 Jones said "he's going to use [the tools] at the school he works at," (JA 274), and that "to my knowledge" CW2 Jones got the tools he mailed home from "the

[4] While CW2 Jones has demonstrated prejudice under any standard, this Court should assess whether this error was harmless beyond a reasonable doubt. The practical effect of this error was to deprive CW2 Jones of his constitutional right to confront MSG Addington at trial. *See Chapman v. California*, 386 U.S. 18, 23–24 (1967). Indeed, multiple federal circuit courts have applied the harmless beyond a reasonable doubt test to improperly admitted co-conspirator statements. *See United States v. Cross*, 928 F.2d 1030, 1052 (11th Cir. 1991); *United States v. Turner*, 871 F.2d 1574, 1582 (11th Cir. 1989); *United States v. Vowiell*, 869 F.2d 1264, 1270 (9th Cir. 1989); *United States v. Mahar*, 801 F.2d 1477, 1504 (6th Cir. 1986); *but see Perez*, 989 F.2d at 1580 (applying the nonconstitutional harmless error test).

woodshop." (JA 275). Accordingly, the military judge left unredacted from CW2 Jones's statement the admissions that: (1) he intended to use them for his students or his Soldiers, and (2) that he had taken the tools from the woodshop. (JA 284).

Most inculpatory, and most prejudicial, was the use of MSG Addington's statement to corroborate CW2 Jones's confession as to his motive and intent to mail the tools home for use by his students. The government wholly relied on this fact to prove that CW2 Jones intended to deprive the government permanently of the tools during its R.C.M. 917 motion argument and again in closing argument. (JA 164, 218).

Master Sergeant Addington's corroboration of CW2 Jones's statement was uniquely crucial in light of evidence introduced by defense that CW2 Jones had been asked to establish a similar woodshop in garrison, and that reservists, who did not have their own connex, mailed tools through the postal service to ensure they didn't get lost amongst Regular Army materials being shipped home. (JA 59-60, 198, 200, 201, 206). From these facts, the defense argued that CW2 Jones's motive and intent was to ensure the tools—tools he believed would otherwise be destroyed in Afghanistan—made it back for use at the nascent woodshop in garrison. (JA 223). Master Sergeant Addington's corroboration of CW2 Jones's admission that he potentially intended to use the tools for his students was therefore dispositive to proving intent and motive.

MSG Addington's confession also corroborated CW2 Jones's admission with respect to place, access, and opportunity, specifically that he actually obtained the tools from the woodshop. (JA 274, 284). The government failed to present any evidence of property documents linking even one tool found in CW2 Jones's home to his unit, anyone else's, the military, or even the government. Instead, the government's case focused primarily on the fact that the tools came from the RSY and therefore must have been military property.[5] With respect to the RSY, however, there was no evidence that CW2 Jones actually obtained the tools found in his home from, or that he even had access to, the RSY absent MSG Addington's statements. (JA 274).[6]

The government's focus on the RSY was therefore misplaced. In fact, when CID agents asked MSG Addington what items CW2 Jones obtained from the RSY,

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[5] The prosecution relied on SA Khaleel and SGM Garo to testify that property in the RSY was "government property." (JA 30, 144). The rationale, however, rested entirely on the presumption that property in that area would likely be government property. Neither of these witnesses, nor any other, testified as to whether any specific tool found in CW2 Jones's garage was "government," let alone "military property."

[6] The government's only evidence to tie CW2 Jones to the RSY was SGT Zajac's recollection of MSG Addington's stating he and CW2 Jones were going to the RSY one morning. (JA 100). This statement, however, was also impermissibly admitted over defense's objection under M.R.E. 801(d)(2)(E), as the military judge allowed it in again without making the initial finding that a conspiracy in fact existed. In fact, the record suggests the military judge did not believe a conspiracy existed, yet somehow ruled these statements were admissible. (JA 73).

he told them "paint." (JA 274). The only evidence the tools came from the woodshop (and not the RSY) was CW2 Jones's admission and MSG Addington's corroboration. (JA 274).

During its case, the defense admitted copious evidence of poor property accountability, including an assortment of tools with no clear owner. (JA 53, 61–63). In light of the presence of civilian contractors, (JA 127, 184), and the fact that CW2 Jones and other reservists had even brought their personal tools into theater (JA 39, 206), the government's argument the tools must be "government property" because they came from somewhere in Afghanistan simply does not vitiate prejudice. It took MSG Addington's corroboration of CW2 Jones's admission that he got the tools from the woodshop for the government to prove its case.

In conclusion, the government simply could not have met every element of its case beyond a reasonable doubt without CW2 Jones's uncorroborated admissions that he intended to use the tools for his students and that he got the tools found in his home from the woodshop. Without these admissions, the government failed to meet its burden. For this reason, CW2 Jones was prejudiced no matter which test this Honorable Court chooses to apply.

II.

WHETHER ADMISSION OF THE SAME CONFESSION VIOLATED APPELLANT'S SIXTH AMENDMENT RIGHT TO CONFRONTATION.

a. Statement of facts.

For this issue, CW2 Jones primarily relies on the facts previously presented. Any additional facts are contained in the relevant subsections below.

b. Standard of review.[7]

This Court reviews forfeiture of the right to confrontation under a plain error analysis. *United States v. Sweeney*, 70 M.J. 296, 304 (C.A.A.F. 2011); *United States v. Harcrow*, 66 M.J. 154, 158 (C.A.A.F. 2008). In order to prevail under plain error, an appellant "must demonstrate that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right." *Harcrow*, 66 M.J. 158.

[7] Appellant respectfully submits that, given the intertwined nature of his objection under M.R.E. 801(d)(2)(E) and the right to confrontation, his objection to the former preserves the latter. This is supported by the fact the military judge's ruling—in finding that MSG Addington's confession was during and in furtherance of the conspiracy—foreclosed any colorable objection by defense counsel under confrontation grounds. (JA 21). However, in an abundance of caution, appellant is arguing under the higher plain error analysis laid out by this Court in *United States v. Rankin*, 64 M.J. 348, 351 (C.A.A.F. 2007) and *United States v. Harcrow*, 66 M.J. 154, 158 (C.A.A.F. 2008).

"Whether evidence is testimonial hearsay," and thus inadmissible under *Crawford*, "is a question of law reviewed de novo." *United States v. Katso*, 74 M.J. 273, 279 (C.A.A.F. 2015); *United States v. Rankin*, 64 M.J. 348, 351 (C.A.A.F. 2007); *Harcrow*, 66 M.J. at 158. Where, as here, the alleged error is constitutional, the prejudice prong is fulfilled where the Government cannot show that the error was harmless beyond a reasonable doubt." *Sweeney*, 70 M.J. at 304 (citations omitted).

Furthermore, "an error of constitutional significance may be 'noticed more freely than less serious errors.'" *Perez*, 989 F.2d at 1583 (citing 3A C. Wright, Federal Practice & Procedure 856 at 336, 342 (1982 & 1990 Supp.)) Closer scrutiny may also be appropriate when the failure to preserve the precise grounds for error is mitigated by an objection on related grounds. *United States v. Brown*, 555 F.2d 407, 420 (5th Cir. 1977). Accordingly, based on the constitutional nature of the error and the intertwined defense objection under M.R.E. 801(d)(2)(E), this error should be reviewed less rigidly and with closer scrutiny.

c. Law.

The Confrontation Clause bars admission of the testimonial statements of a witness who did not appear at trial unless the witness was unavailable to testify and the defendant had a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 53–54 (2004). In addressing the Confrontation Clause

under the post-*Crawford* rubric, this Court has explained, "[T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused. The Confrontation Clause thus protects defendants by excluding the introduction of 'hearsay' that is 'testimonial.'" *Katso*, 74 M.J. at 279.

"A statement is testimonial if 'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" *Id*. (quoting *Sweeney*, 70 M.J. at 301). To determine as much, this Court considers "whether it would be reasonably foreseeable to an objective person that the purpose of any individual statement is evidentiary considering the formality of the statement as well as the knowledge of the declarant." *Id*. at 279 (citations and internal quotations omitted).

In dealing with police questioning, the Supreme Court has held, "Statements taken by police officers in the course of interrogations are . . . testimonial under even a narrow standard." *Crawford*, 541 M.J. at 52. The Supreme Court expanded on *Crawford* in *Davis v. Washington*, where it articulated the "primary purpose doctrine." 547 U.S. 813 (2006). "Statements are testimonial when the circumstances objectively indicate…that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis*, 547 U.S. at 822.

d. Argument.

i. The error was clear and obvious.

Although co-conspirator *statements* properly admitted under M.R.E. 801(d)(2)(E) are rarely testimonial and therefore not subject to confrontation, such is not the case here. This case involves a co-conspirator *confession*, made neither during nor in furtherance of the conspiracy, and under circumstances wherein it was obvious to MSG Addington that his confession was being elicited by law enforcement for the purpose of criminal prosecution.

Applying the standards articulated above, there is no question that MSG Addington's confession was testimonial. Statements such as MSG Addington's confession are precisely the "principal evil" that *Crawford* construed the Confrontation Clause as protecting against. *Crawford*, 541 U.S. at 50.

In this case, MSG Addington made his statement to a CID agent under circumstances that objectively left no doubt that he was giving his statement for the purpose of subsequent criminal prosecution. (JA 24, 272–75). Even more telling, after discussing MSG Addington's role, SA Khaleel meticulously walked MSG Addington through CW2 Jones's conduct, attempting to address the elements of both conspiracy and larceny. (JA 272–75).

In sum, the Confrontation Clause "protects defendants by excluding the introduction of *hearsay* that is *testimonial*." *Katso*, 74 M.J. at 279 (emphasis

added). In this case, MSG Addington's confession was plainly both. Absent a declaration that MSG Addington was unavailable and a prior opportunity to cross-examine him, the military judge's admission of MSG Addington's statement represents plain and obvious error. *Crawford*, 541 U.S. at 59.

ii. The Error Was Not Harmless Beyond a Reasonable Doubt.

"The third prong of [plain error analysis] asks whether the error materially prejudiced Appellee's substantial rights. In the context of a constitutional error, the burden is on the Government to establish that the [statements] were harmless beyond a reasonable doubt." *United States v. Carter*, 61 M.J. 30, 35 (C.A.A.F. 2015) (citing *United States v. Powell*, 49 M.J. 460, 465 (C.A.A.F. 1998)). Accordingly, in order to establish material prejudice to a constitutional right, this Court imports the harmless beyond a reasonable doubt standard. *Id*.

In this case, the admission of MSG Addington's confession was harmful by any standard, much less harmless beyond a reasonable doubt. As outlined in the first issue presented, MSG Addington's confession was the only evidence offered to support crucial aspects of CW2 Jones's admissions that were otherwise uncorroborated and therefore inadmissible.

III.

WHETHER USE OF THE CONFESSION TO CORROBORATE OTHERWISE UNSUPPORTED ESSENTIAL ELEMENTS IN APPELLANT'S OWN CONFESSION VIOLATED M.R.E. 304(g)[8] AND *UNITED STATES v. ADAMS*, 74 M.J. 137 (C.A.A.F. 2015). [9]

a. Statement of facts.

At trial, defense objected to the introduction of otherwise uncorroborated facts pursuant to this Court's interpretation of M.R.E. 304(c) in *Adams*. (JA 42, 150-53). Defense did so at the prosecution's first attempt to enter CW2 Jones's confession into evidence through SA Heyung. (JA 42). It renewed the objection when SA Heyung took the stand after the court had heard additional evidence, (JA 150), and again on multiple additional occasions during SA Heyung's testimony. (JA 151–53).

The following morning, the military judge created a redacted version of CW2 Jones's statement. (JA 169, 283-85). In doing so, the military judge said, "As I stated on the record yesterday, I would excise those portions out, except for

[8] Appellant's Supplement to the Petition for Review mistakenly referenced M.R.E. 304(g) as the basis for the military judge's ruling. At the time of Appellant's trial, however, M.R.E. 304(g) had been reintroduced, identical in form, as M.R.E. 304(c).

[9] Appellant notes this issue is moot if this Court finds that MSG Addington's confession was inadmissible under either of the first two issues presented.

the ones which I found had been corroborated by independent evidence[.]" (JA 169). After providing counsel with copies of the statement, the military judge asked counsel whether "either party [has] any question [sic] or concern regarding the court's redactions?" (JA 169). Neither party objected. (JA 169). At that time, the entirety of MSG Addington's statement had already been reviewed and admitted into evidence by the military judge over defense objection. (JA 21).

Prior to beginning its case-in-chief, defense counsel objected again to MSG Addington's statement, this time arguing that M.R.E. 304(c) and *Adams* applied not only to CW2 Jones's statement but also to MSG Addington's. (JA 170). The military judge was unconvinced, but stated that "out of an abundance of caution" he would only consider three facts from MSG Addington's confession. (JA 173–74). In doing so, he left material portions of CW2 Jones's statement thereby uncorroborated. The defense did not renew its objection under M.R.E. 304(c) to the remaining, unredacted portions of CW2 Jones's statement. Again, at this time, MSG Addington's statement had already been admitted into evidence over defense objection. (JA 21).

b. Pursuant to the defense's Adams objections to appellant's statement, this issue is not waived.

Overall, the defense's numerous previous objections to the admission of CW2 Jones's admissions preserved this error for review. "Whether an accused has

waived an issue is a question of law we review de novo." *United States v. Ahern*, 76 M.J. 194, 197 (C.A.A.F. 2017); *see also United States v. Swift*, 76 M.J. 210 (C.A.A.F. 2017). As this Court stated in *Ahern*, M.R.E. 304(f)(1) "plainly states" that objections under M.R.E. 304 must be made by the submission of plea and that "[*f]ailure to move or object constitutes a waiver of the objection*." *Ahern*, 76 M.J. at 197 (citing M.R.E. 304(f)(1)) (emphasis in original).

M.R.E. 103(b), however, is equally clear. "Once the military judge rules definitively on the record admitting or excluding evidence . . . a party need not renew an objection or offer of proof to preserve a claim of error for appeal." M.R.E. 103(b). The plain-language reading of this rule makes apparent that the defense's numerous objections to the admission of CW2 Jones's statement to CID preserved this issue on appeal. (JA 42, 150–53).

This Court recently dealt with potential waiver of an objection under M.R.E. 304(c) in *United States v. Swift*, 76 M.J. 210 (C.A.A.F. 2017). In *Swift*, this Court reasoned that the appellant had waived his right to object because he both failed to object and affirmatively agreed to its use in deliberations. *Id*. at 217. This case is distinguishable for several reasons.

First, unlike in *Swift*, CW2 Jones's defense counsel objected to a lack of corroboration on at least five occasions. (JA 42, 150–53). Under M.R.E. 103(b), the objection was clearly preserved. Second, to the extent that defense counsel

failed to object further after the original redactions were done, at that time he had no colorable objection to make, as MSG Addington's statement had previously been admitted over defense objection. (JA 21, 169). As such, the portions of CW2 Jones's statements relating to his intent for the tools and where he obtained them *were* corroborated, albeit only by MSG Addington's statement. It was only after the military judge had redacted CW2 Jones's statements and asked counsel if they objected that he stated he would limit his consideration of MSG Addington's statement to limited facts. Finally, unlike in *Swift*, wherein the defense made a tactical decision to admit the statements and argue them, 76 M.J. at 214, there is no such evidence here. Not once did defense reference MSG Addington's confession as a basis for CW2 Jones's innocence.

Accordingly, while defense counsel could and probably should have renewed his objection, M.R.E. 103(b) makes clear that it was not required to in order to preserve the objection for appellate review.

c. Law and Standard of Review.

This Court "review[s] a military judge's admission of evidence for an abuse of discretion." *Adams*, 74 M.J. at 140.

In *Adams*, this Court recognized the then-applicable language of M.R.E. 304(c) required corroboration of each "essential fact" contained within a defendant's admission or confession. 74 M.J. at 140. "What constitutes an

essential fact of an admission or confession necessarily varies by case. Essential facts [this Court] has previously considered include the time, place, persons involved, access, opportunity, and motive of the crime." *Id.* (citations omitted). When sufficient corroborating evidence is not provided, the essential fact is inadmissible and "the military judge must excise it from the record." *Id*.

In *Adams*, this Court found multiple essential facts were uncorroborated and impermissibly relied up by the trial court judge. Specifically, this Court found that motive, intent, opportunity, and access were uncorroborated. *Id*. at 141. Despite the fact that investigators found a handgun at the defendant's home matching the one he described in his admission, this Court still found the military judge abused his discretion in admitting the other uncorroborated facts. *Id*. at 141. This Court explained "the confession was the government's key piece of evidence; the admission of the uncorroborated essential facts was prejudicial to Adams." *Id*.

d. Argument.

As in *Adams*, CW2 Jones's confession was "the government's key piece of evidence" and "the admission of the uncorroborated essential facts was prejudicial." *Id*. While some of these facts were initially corroborated through the erroneous admission of MSG Addington's statement, they became uncorroborated once the military judge stated he would only consider limited facts from MSG Addington's confession.

Specifically, the military judge eventually stated he was permitting MSG Addington's confession for a limited number of purposes, which did not include the portions regarding where CW2 Jones obtained the tools or his motive in taking the tools. (JA 174). *Adams* itself recognized motive and ownership of stolen property as essential facts, but neither of these facts were otherwise corroborated in this case. 74 M.J. at 140.

i. Motive and intent to deprive permanently went wholly uncorroborated.

Chief Warrant Officer Two Jones's admission included that he "intended [the tools] to be used by the Soldiers at the unit *or the students at school*." (JA 284) (emphasis added). This essential fact was the only evidence of CW2 Jones's intent to deprive permanently,[10] but was only corroborated by portions of MSG Addington's confession that the military judge later stated he would not consider.

Overall, without this information, the larceny charges would have likely been dismissed pursuant to R.C.M. 917. More specifically, while the government failed to put on *any* direct evidence of intent, the defense introduced multiple reasons why CW2 Jones mistakenly believed he was salvaging tools for a garrison woodshop and, in the absence of a dedicated connex for the reservists, the safest

[10] The government exclusively relied on appellant's admission to satisfy this element of intent. (JA 164, 218).

way to send them back was through the postal service. (JA 59-60, 198, 200, 201, 206).

ii. Place, access, and opportunity went wholly uncorroborated.

The military judge also left intact CW2 Jones's admission that he got the tools "from the woodshop," which was only corroborated by portions of MSG Addington's confession that the military judge later stated he would not consider. (JA 173–74, 284). While the government introduced some evidence that *some* property in the woodshop and the RSY was government property, it failed to introduce a single piece of evidence tying the property found in CW2 Jones's home to either of these locations. Therefore, CW2 Jones's admission that he got the tools from the woodshop remained vital to closing the loop that the property found at his home belonged to the government, much less the military.

Apart from CW2 Jones's admission, the government's effort to meet the "military property" element consisted of evidence from SA Khaleel and SGM Garo. (JA 30, 144). While both witnesses testified that property from the RSY and woodshop would be government property, both parties relied on a generalized assumption that property found in these areas would likely belong to the government.[11] More importantly, neither party testified as to whether the actual

[11] Although the trial counsel, in closing, stated that SA Khaleel and SGM Garo testified the property was military property, their actual testimony was that

tools mailed home by CW2 Jones came from either the RSY or the woodshop. Notably, two of the government's own witnesses admitted they could not determine whether the tools belonged to the government, military, or CW2 Jones. (JA 97, 120, 125).

In sum, apart from CW2 Jones's uncorroborated confession (based on the military judge's limitation of MSG Addington's statement), the government failed to prove the elements of the offense related to ownership and intent. This issue was therefore prejudicial and the larceny charges requiring these elements should therefore be dismissed.

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property from the RSY was "government property" and neither witness could speak meaningfully to the specific property found at appellant's home. (JA 30, 144).

CONCLUSION

WHEREFORE, CW2 Jones respectfully requests this Honorable Court set aside and dismiss the relevant specifications.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c) because this brief contains 6,915 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.

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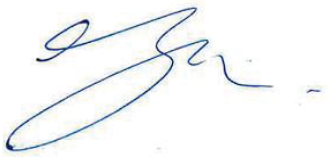
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Jones,* Army Dkt. No. 20150370, USCA Dkt. No. 17-0608/AR, was electronically filed brief with the Court and Government Appellate Division on December 27, 2017. The Joint Appendix will be delivered via courier service.



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