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	REPLY BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 20150370 USCA Dkt. No. 17-0608/AR

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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).

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

Issues Granted

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STATEMENT OF THE CASE

On November 15, 2017, this Court granted appellant's petition for review. On December 27, 2017, appellant filed his final brief with this Court. The government responded on January 26, 2018. This is appellant's reply.

ARGUMENT

For the first and second issues presented, the government concedes the errors and acknowledges the proper standard of review. (Gov't. Br. 7). Therefore, the only issue remaining before this Honorable Court is whether the erroneous admission of MSG Addington's confession was harmless beyond a reasonable doubt.[1] Critically, the government bears this burden, which it cannot meet. *See United States v. Harcrow*, 66 M.J. 154, 160 (C.A.A.F. 2008) (citing *United States v. Brewer*, 61 M.J. 425, 432 (C.A.A.F. 2005)).

In attempting to meet its burden, the government understates the importance of MSG Addington's confession, overstates the strength of the remaining evidence, and fails to account for its charging decision in this case. Ultimately, for these reasons, the government simply cannot prove this error was harmless beyond a reasonable doubt.

[1] As referenced in appellant's initial brief, the third issue presented is mooted in light of the government's concession. (*See* Appellant Br. 24). As the parties agree that MSG Addington's statements to law enforcement were inadmissible, the prejudice analysis for the first two issues subsumes any analysis of the third issue.

a. The government understates the overall importance and function of MSG Addington's statement.

In its brief, the government asserts MSG Addington's statement was "utterly inconsequential," "entirely cumulative," "unimportant," "unnecessary," and even "irrelevant." (Gov't. Br. 12, 15–17). This is incorrect. Instead, as appellant outlined in his brief, MSG Addington's statement was the *only evidence* to sufficiently corroborate two essential facts from appellant's confession: (1) that he intended to use the tools for his students, and (2) that he had taken the tools from the woodshop. (*See* Appellant Br. 15–18, 23, 29–31).

Notably, in seeking to minimize the importance of MSG Addington's confession, the government actually relies on the essential facts at issue. For example, the government cites appellant's intent to use the tools for his students as evidence that MSG Addington's confession was harmless beyond a reasonable doubt. (Gov't. Br. 11, 16). This misses the point. If the military judge had properly excluded MSG Addington's confession, this essential fact from appellant's own confession would have been inadmissible.

The government also contends that MSG Addington's confession was unimportant because it was "unmentioned by the government in their summation of the evidence supporting both larcenies." (Gov't. Br. 12–13, 16). This also misses the point. The government did not need to highlight MSG Addington's confession because it had appellant's own admission, which the trial counsel relied

heavily on to prove appellant's intent to permanently deprive. (JA 12, 164, 218).[2] The government's own argument at trial reflects the fact that the military judge used MSG Addington's confession to corroborate appellant's intent. (JA 164).

Overall, the government repeatedly points to evidence corroborating the *elements* of larceny, but not the *essential facts* from appellant's confession. (Gov't. Br. 20–21, 23-24). This is a key distinction.[3] While evidence that supports the elements of an offense is relevant to a broader analysis of prejudice, it is not relevant to whether the essential facts of a confession were otherwise corroborated.

The weakness of the government's argument is best shown by its purported proof. Rather than providing additional corroboration for these two essential facts, the government instead seeks to substitute evidence related to the broader elements. (Gov't. Br. 19). For example, in arguing the "essential fact" of "appellant's intent to permanently deprive the military of the stolen property" was independently corroborated, the government cites to evidence of "secret" mailings,

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[2] Furthermore, the government fails to acknowledge the trial counsel could not have argued MSG Addington's confession for this purpose, as the military judge eventually limited the facts he would consider from MSG Addington's confession. (JA 173–74). Appellant's point remains that the military judge's eventual limitation of MSG Addington's confession does not vitiate the prejudice caused by its initial use to corroborate essential facts from appellant's own confession.

[3] For example, if an accused told his co-conspirator he intended to sell stolen tools online for profit, this would support the element of intent to permanently deprive. However, such a statement would not corroborate an essential fact from a separate confession that an accused intended to keep the tools for personal use.

the supposed lack of an approved plan for a garrison woodshop, appellant's conversation with Sergeant Major (SGM) Garo, the alleged visit to the Retro-Sort Yard (RSY) with MSG Addington, and some of the items themselves. (Gov't. Br. 20–21). None of this evidence corroborates the *actual* essential fact that appellant is challenging from his confession, which is that he intended to use the tools for his students.[4]

Similarly, the government points to evidence that tools in the woodshop or the RSY were military property, but this does not corroborate the essential fact that appellant obtained the tools from the woodshop. (Gov't Br. 23–24). This leaves the government to argue that the mere fact appellant was the Officer-in-Charge of the woodshop sufficiently corroborates his admission that he took the tools from it. It does not. An individual's admission that he stole property from his work is not adequately corroborated merely by introducing evidence that he did indeed work there. While corroborating evidence may indeed be slight, it still must "be sufficient in quality and quantity to meet the plain language" of Mil. R. Evid. 304(c). *United States v. Adams*, 74 M.J. 137, 140 (C.A.A.F. 2015).

[4] Appellant acknowledges this type of evidence could arguably demonstrate harmlessness in a broader context. Therefore, these points are addressed in the remaining subsections. The bottom line remains that without the essential facts solely corroborated by MSG Addington's confession, the government's additional evidence was not strong enough to meet its burden.

As such, the erroneous admission of MSG Addington's confession was highly prejudicial in the context of corroborating essential facts from appellant's confession that were otherwise uncorroborated. While the government could have corroborated these two facts by granting MSG Addington qualified immunity and having him testify, the prosecution instead elected to utilize a constitutionally impermissible shortcut.

b. The government overstates the strength of its remaining evidence related to the elements primarily proven by the essential facts at issue.

Based on the limited evidence in this case, the government cannot meet its burden to prove the admission of either essential fact was harmless beyond a reasonable doubt, much less both.

i. Appellant's intent to use the tools "for the students at school."

While the government claims a variety of circumstantial evidence demonstrates appellant's intent, none of this evidence shows the admission that he intended to use the tools "for the students at school" was harmless beyond a reasonable doubt.

First, the government characterizes appellant's actions in mailing the tools as being "secretive"—or some derivation thereof—nine separate times. (Gov't. Br. 12, 16, 17, 20, 21). This is completely unsupported by the record. Appellant certainly did not keep the practice secret from the postal service workers who inspected each box for prohibited items. (JA 178). In fact, a postal worker

testified he was "just a really nice guy." (JA 187). Nor was appellant secretive in how he paid to mail these items, as he used his Eagle Cash card, which left an electronic record of his transactions. (JA 234–71). Additionally, a postal worker testified she saw people mailing tools "all the time" and "every day." (JA 179–80). She even testified, "It was so many people who mailed tools that [the postal workers] actually complained to the supervisors because it was so many people mailing tools." (JA 183).

Second, the government cites to Sergeant (SGT) Christopher Zajac's testimony that MSG Addington came to the Tactical Operations Center on a Sunday morning. (Gov't. Br. 20). Sergeant Zajac testified MSG Addington said he was going to use the unit vehicle to go with appellant to "either the [RSY] *or DRMO*."[5] (JA 100–01) (emphasis added). Sergeant Zajac described the timing as "peculiar" because everyone else was off work. (JA 100–01). Again, such testimony hardly demonstrates "secretive" behavior, especially since MSG Addington openly acknowledged where he was going and who was with him.

Third, the government asserts appellant's intent to permanently deprive was proven by his continuing to ship military equipment through the post office after

[5] Moreover, the military judge erroneously overruled defense counsel's objection pursuant to Mil. R. Evid. 801(d)(2)(E). (*See* Appellant's Br. 17, n. 6). This introduces a third essential fact – that CW2 Jones went to the RSY with MSG Addington – as being uncorroborated but for MSG Addington's statement.

being advised on the proper procedures. (Gov't Br. 5, 12, 17). This assertion is rooted in SGM Garo's testimony that he "believed" that "on or about January or February timeframe," he advised appellant of how to ship military equipment. (JA 145). However, SGM Garo admitted on cross-examination that appellant told him he was under investigation at the time of this conversation. (JA 146).

This is a key admission, as it demonstrates SGM Garo misremembered the timeline of the conversation. Critically, the investigation did not even *start* until March 31, 2014, and Special Agent (SA) Heyungs did not interview appellant until April 21–22, 2014. (JA 34, 41). The military judge himself noticed this contradiction in SGM Garo's testimony, as he sustained defense counsel's multiple Mil. R. Evid. 304(c) objections when the government asked SA Khaleel whether appellant thought his actions were wrong and whether he admitted to mailing tools after his conversation with SGM Garo. (JA 150–52).[6]

Fourth, the government references testimony from First Lieutenant (1LT) Green that unit leadership decided against creating the garrison woodshop. (Gov't Br. 12, 20). This testimony is undercut by its lack of context. The government

[6] Sergeant Major Garo also testified about the Standard Operating Procedures for taking property from the RSY, but he only testified that personnel who were "authorized" to use the RSY would have knowledge of these procedures. (JA 142–43). The government did not introduce any evidence that appellant met this criteria and thus received this information. (JA 142–44). This lack of evidence mitigates any argument related to appellant purportedly ignoring guidance over the proper procedures. Someone cannot ignore information they are never given.

introduced no evidence as to when this decision occurred, whether it was before or after appellant mailed the tools home, or even whether appellant was informed of the decision. When defense counsel explicitly asked when this occurred, 1LT Green could not remember. (JA 59). However, 1LT Green did remember that prior to the decision, he and others had conversations *encouraging* appellant to start a woodshop in garrison. (JA 60, 198). Properly contextualized, this evidence proves nothing.

In sum, the government's argument that it could otherwise prove appellant's intent to permanently deprive is tenuously rooted in weak circumstantial evidence. The record demonstrates that "many people" were mailing tools "all the time" and even "every day." (JA 179–80, 183). When coupled with evidence that Army Reserve Soldiers did not have their own connex, had trouble shipping property through their parent unit, and that the unit leadership actively encouraged appellant to start a garrison woodshop, appellant's admission that he intended to use the tools for his students was crucial to the prosecution's case. (JA 200–01).

ii. Appellant's admission that he obtained the tools from "the woodshop."

The government's arguments related to appellant's admission of obtaining tools from "the woodshop" similarly do not demonstrate the error was harmless beyond a reasonable doubt. Instead, as outlined in appellant's brief, this admission

was dispositive given the government's failure to tie any of the items found in appellant's garage to any unit or government entity. (*See* Appellant Br. 17, 30).

First, the government cites to evidence that tools in the woodshop or the RSY were military property, but these facts do not corroborate that appellant obtained the tools from the woodshop. (Gov't. Br. 23–24). This issue was especially pertinent because the unit's property accountability system appeared non-existent. The company executive officer testified he was "not aware of documentation" related to "the tools that came out of Afghanistan." (JA 53). When asked whether there were any "property book records from the deployment," the executive officer stated, "I do not know." (JA 53). Nor was the 760th EC alone in its accountability woes. Contrary to SGM Garo's testimony of rigorous accountability controls at the RSY—controls for which he, as the sustainment operations sergeant major, was responsible (JA 140)—SA Khaleel testified the RSY "did not do the paperwork properly" or even "require the paperwork." (JA 35–36). In short, no one could demonstrate which equipment was brought to theater, acquired there, or what they lost.[7]

Second, the government fails to address that the only two witnesses who reviewed the property in appellant's garage could not identify this property as

[7] The government also did not introduce any evidence demonstrating when each individual box was shipped to appellant's home.

belonging to the government. (JA 97, 125). While the government posits the rifle sight and body armor have a "uniquely military nature," this overlooks its own witness's testimony. (Gov't. Br. 23). During the government's direct examination of Major Laurijean Wright, she testified the rifle sight was "a commercial item, so it's found in the commercial market place." (JA 120). The government did not present any evidence that the body armor, ground tester, or rifle sight were anything other than "commercial items."

Appellant acknowledges that SGM Garo testified "the government" owns the property in the RSY, and SA Khaleel similarly stated property from the RSY and woodshop would belong to the government. (JA 30, 144). However, beyond the presumptive nature of their testimony, this only demonstrates the nature of property in the RSY and woodshop, *not* the actual property found in appellant's garage. This deficiency only underscores the importance of appellant's admission that he got the tools from the woodshop.

In sum, apart from the admission solely corroborated by MSG Addington's statement, the government's only arguable evidence was that property from the RSY and the woodshop was government property, not that the property found in appellant's garage came from these locations.

c. The government fails to account for its charging decision in this case.

Based on its charging decisions, the government faces an additional hurdle in meeting its burden regarding prejudice. Notably, rather than listing some—or any—specific tools in either specification, the government merely charged appellant with stealing "tools and other equipment." (JA 2).[8]

The government seems to urge this Honorable Court to find this error was harmless beyond a reasonable doubt based on the boxes at appellant's house containing body armor, a rifle sight, and a ground resistance tester. (Gov't. Br. at 17, 21, 23). Such an argument ignores the effect of the government's charging decisions. This Court has no way of knowing *which* items actually resulted in appellant's conviction for either specification. As the charge sheet did not list any specific items for either specification, it is mere guesswork and speculation as to how the military judge reached his findings.

It is entirely possible the military judge did not find the government proved its case for *any* of these three items, particularly based on: (1) the lack of proof of where these items came from; (2) the government's failure to demonstrate these

[8] While these two specifications involved different language related to value at trial ("of a value in excess of $500" and "of a value of $500 or less"), the convening authority did not approve the language related to the higher valuation. (JA 2–4). The convening authority only approved "so much of the finding of Specification 1 of Charge II as finds a larceny of a value of $500 or less." (JA 4). As such, the two specifications were identical at the time of appellate review.

items were not commercially available; (3) the fact these items were markedly different from the vast majority of the other items; and (4) the fact these items were not part of appellant's confession.

Notably, appellant's confession explicitly listed a series of mailed items as being worth over $2,000. (JA 283). By themselves, the listed tools could have formed the basis of the military judge's finding for Specification 1 of Charge II. Additionally, based on the "essential facts" from appellant's confession that were solely admitted based on MSG Addington's confession, the military judge could have found the other tools not listed in appellant's confession were also "from the woodshop" and that he intended to use them "for the students at school." Such items could have formed the basis for Specification 2 of Charge II.

Overall, based on the government's charging decisions, there are numerous permutations and possibilities of how the military judge could have reached his findings. The net result is the government cannot prove which items appellant was convicted of stealing in support of each specification, which increases its difficulty in proving the error in this case was harmless beyond a reasonable doubt. There is simply no way of knowing whether the convictions were supported by the otherwise uncorroborated essential facts from appellant's confession.

CONCLUSION

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

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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 with the Court and Government Appellate Division on February 5, 2018.

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