IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellee v. Private (E-2) **LEEROY M. SIGRAH** United States Army Appellant	BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 20190556 USCA Dkt. No. 21-0325/AR

David D. Hamstra
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(571) 408-0343
USCAAF Bar No. 37394

Christian E. DeLuke
Major, Judge Advocate
Branch Chief
Defense Appellate Division
USCAAF Bar Number 36414

Dale C. McFeatters
Lieutenant Colonel, Judge Advocate
Deputy Chief
Defense Appellate Division
USCAAF Bar Number 37645

Michael C. Friess
Colonel, Judge Advocate
Chief
Defense Appellate Division
USCAAF Bar Number 33185

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

Granted Issue

WHETHER THE MILITARY JUDGE'S DENIAL OF APPELLANT'S R.C.M. 914 MOTIONS MATERIALLY PREJUDICED APPELLANT'S SUBSTANTIAL RIGHTS

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 [UCMJ], 10 U.S.C. § 866 (2020). This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ.

Statement of the Case

On August 14, 2019, an enlisted panel, sitting as a general court-martial convicted appellant, Private Leeroy M. Sigrah, contrary to his pleas, of a single

specification of sexual assault in violation of Article 120, UCMJ. (JA 020 and JA 174).[1] The next day, the panel sentenced appellant to be reduced to the grade of E-1, forfeit all pay and allowances, confined for twelve years, and dishonorably discharged from the service. (JA 175). On December 3, 2019, the convening authority took no action. (Original Convening Authority Action). On January 16, 2020, the military judge entered judgment. (Original Judgment of the Court).

On May 29, 2020, the Army Court returned appellant's case to the convening authority pursuant to Rule 35 of its Rules of Appellate Procedure for a new convening authority action and judgment. (Memorandum from the Clerk of Court to the Commanding General, Headquarters, Fort Campbell, on the General Court-Martial Record of Trial, United States v. Private E2 Leeroy Sigrah (May 29, 2020)). On June 4, 2020, the convening authority approved the findings and sentence. (Modified Convening Authority Action). On June 8, 2020, the military judge entered judgment. (Modified Judgment of the Court).

On March 23, 2021, the Army Court ordered the Army Government Appellate Division (GAD) to contact the Fort Campbell Office of the Staff Judge Advocate (OSJA) to determine whether the military judge completed a written

[1] The panel excepted the words "abuse, humiliate, harass, and degrade" from the sexual assault specification to which they found appellant guilty. (JA 020 and JA 174). The panel found appellant not guilty of the excepted words. *Id.* The panel also acquitted appellant of one specification of assault consummated by battery in violation of Article 128, UCMJ. *Id.*

ruling on appellant's Rule for Courts-Martial (R.C.M.) 914 motions. *United States v. Sigrah*, ARMY 20190556 (Army Ct. Crim. App. Mar. 23, 2021) (order) (JA 210). The GAD learned of a written ruling the military judge had drafted but failed to attach to the record prior to the case being docketed at the Army Court. On March 26, 2021, the Army Court ordered the record of trial in appellant's case returned to the military judge for action consistent with R.C.M. 1112. *United States v. Sigrah*, ARMY 20190556 (Army Ct. Crim. App. Mar. 26, 2021) (order) (JA 212).

On remand, the military judge denied the trial defense counsel's request for a post-trial hearing in accordance with Article 39(a), UCMJ, to determine what steps, if any, the military judge had taken prior to authentication to ensure the written ruling was included in the record. (App. Ex. XXXIV). Over the trial defense counsel's objection, the military judge attached a copy of her written ruling to the record, along with several other appellate exhibits. (App. Ex. XXVIII–XXXIV). On April 14, 2021, appellant's record of trial was returned to the Army Court and referred back to defense and government appellate counsel. *United States v. Sigrah*, ARMY 20190556 (Army Ct. Crim. App. Apr. 16, 2021) (order) (JA 214).

On June 9, 2021, the Army Court affirmed the findings and sentence. *United States v. Sigrah*, ARMY 20190556, 2021 CCA LEXIS 279 (Army Ct.

Crim. App. Jun. 9, 2021) (mem. op.) (JA 203). This Court granted Appellant's petition for grant of review on February 23, 2022, on the issue above and ordered briefing under Rule 25. (JA 001).

Summary of Argument

The Army Court correctly held that the military judge erred in denying appellant's R.C.M. 914 motions; however, it erred in its prejudice analysis. *Sigrah*, 2021 CCA LEXIS 279, at *17 (JA 008–013). Specifically, the lower court failed to follow this Court's precedent in *United States v. Clark*, 79 M.J. 449 (C.A.A.F. 2020), by refusing to first apply the usual prejudice analysis under *United States v. Kohlbek*, 78 M.J. 326 (C.A.A.F. 2019). Regardless of whether this Court assesses prejudice under *Kohlbek* or *Rosenberg v. United States*, 360 U.S. 367 (1959), the military judge's erroneous denial of appellant's R.C.M. 914 motions materially prejudiced appellant's substantial rights.

This case involves preserved nonconstitutional error. *Sigrah*, 2021 CCA LEXIS 279, at *18–19 (JA 010). In *Clark*, this Court reviewed another preserved R.C.M. 914 error by applying the four *Kohlbek* factors. 79 M.J. at 455. Only *after* reviewing the error under the ordinary prejudice analysis did this Court *then* consider the *Rosenberg* prejudice analysis. *Id*. *Clark* makes clear that the *Rosenberg* analysis does not supplant the usual prejudice analysis—it only supplements it. Applying the *Kohlbek* factors, appellant clearly suffered material

prejudice to his substantial rights, which the Army Court rightly recognized. *Sigrah*, 2021 CCA LEXIS 279, at *22 (JA 012); *Clark*, 79 M.J. at 455. As a result, (contrary to the Army Court's contention), there was no need to apply the *Rosenberg* test, because the requisite prejudice to warrant relief had already been established.

That said, even under the *Rosenberg* test, the military judge's denial of the R.C.M. 914 motions still materially prejudiced appellant's substantial rights. In *Rosenberg*, a failure to produce a Jencks Act statement to the defense was deemed harmless error when appellant had access to the "very same information." *Rosenberg*, 360 U.S. at 371. That did not happen in this case. As the Supreme Court warned, in Jencks Act cases, the harmless error doctrine must be "strictly applied." *Goldberg v. United States*, 425 U.S. 94, 129 n.21 (1976). That is because courts cannot "'speculate whether [Jencks material] could have been utilized effectively' at trial. . ." *Id*. (quoting *Campbell v. United States*, 373 U.S. 487, 497 n.14 (1963)).

Strictly applying the *Rosenberg* test shows that appellant was not given the "very same information" or near to it. 360 U.S. at 371. Therefore, this R.C.M. 914 violation was not harmless error and appellant has suffered material prejudice to his substantial rights.

The uncontroverted evidence in the record (from the key government witnesses at trial: Specialist (SPC) MP, SPC AD, SPC CB and the Army Criminal Investigation Division (CID) agents who interviewed them), shows the short written statements failed to capture all the information contained in the much longer recorded statements, which were destroyed. In this case the Army Court did not, and could not, review the lost recordings. Nonetheless, based on mere speculation, the Army court concluded the written statements offered appellant "substantially the same information" as the missing recorded ones. *Sigrah*, 2021 CCA LEXIS 279, at *23 (JA 012). This is a particularly dubious claim for SPC MP and SPC AD who gave hours-long recorded interviews but provided substantive written statements only six and four pages long. (JA 039–040, JA 053–054, JA 186, and JA 193).

Moreover, appellant's case is dissimilar from earlier cases in which courts either found or suggested there would be harmless error under *Rosenberg*. *Rosenberg*, 360 U.S. at 369–71; *United States v. Marsh*, 21 M.J. 445, 452 (C.M.A. 1986); *Clark*, 79 M.J. at 455. The record in those earlier cases contained facts that allowed appellate courts to compare the evidence appellant had at trial with the information in the undisclosed statements, even if the undisclosed statements themselves were not part of the record. Put differently, the facts in those earlier cases allowed the courts to analyze harmless error based on a review of the

record—not plain conjecture. As explained below, those facts are not present here, nor does the Army Court point to other facts, not found in those earlier cases, that would allow it to make this comparison. In short, the Army Court engaged in the speculative and overly broad harmless error analysis, which the Supreme Court warned against. *Goldberg*, 425 U.S. at 129 n.21.

If this Court analyzes the prejudice from this R.C.M. 914 violation under either the *Kohlbek* or *Rosenberg* standards, the material prejudice to appellant's substantial rights is evident. Thus, the Court should set aside the findings and sentence.

Statement of Facts

In February 2018, SPC MP, a female soldier and the complaining witness in this case, lived in the barracks at Fort Campbell, Kentucky, across the hall from two male Soldiers: SPC AD and then-SPC CB.[2] (JA 289; R. at 290–91). At that point, SPC MP had known the two male soldiers since at least 2016 and often spent time socially in their barracks room. (R. at 296).

On the evening of February 2, 2018, SPC MP went to a going-away party for one of her peers. (R. at 290). At the party, she consumed "around seven shots" of alcohol. (R. at 290). After the party, she texted SPC AD to tell him she was

[2] Prior to appellant's trial, SPC CB was promoted to sergeant. (JA 057). For simplicity's sake, this brief refers to him as SPC CB.

coming to his room. (R. at 297). When she arrived at SPC AD's room, she started playing card games with SPC AD, SPC CB, and appellant, whom she had recently met. (R. at 297–98). She consumed two more beers while she played cards. (R. at 298).

A. The incident

At some point in the evening, SPC MP went into SPC AD's bedroom and went to sleep on his bed.[3] (R. at 298). SPC AD helped her to bed; by this point SPC CB had already retired to his own bedroom. (JA 026). SPC AD then went back to the common area and continued to drink with appellant. (JA 026). The next thing SPC MP says she remembered was waking up in SPC AD's dark room because the bed was moving. (JA 026–027). She noticed the silhouette of a person on top of her and that her legs were spread open and her yoga pants and underwear were partially off. (JA 026–027). Although it was dark in the room, SPC MP was able to identify "a silhouette of somebody who was wider in body shape and the head was shaved." (JA 029). She did not remember the person on top of her penetrating her at any point. (R. at 420).

SPC MP pushed the person off her and put her underwear and pants back on. (JA 029–030). She then left SPC AD's room, went to her own room, and fell

[3] SPC AD and SPC CB's suite had two individual rooms, and a common area with a shared kitchen. (R. at 291).

asleep. (JA 032). When she woke the next morning, SPC MP noticed she was "sore on the vaginal area." (JA 032).

B. The dissenting voice

One week after the alleged incident, on February 9, SPC MP went to a party with other soldiers from her unit. (R. at 434). At this party, SPC MP heard her peers gossiping about her and appellant. (R. at 435). In response, and for the first time, SPC MP told her friends at the party that appellant had sexually assaulted her. (R. at 435). Based on this statement, SPC MP's friends advised her to report the incident to law enforcement. (R. at 435).

SPC AD was the lone dissenting voice. (JA 041). He did not want SPC MP to report the incident. (JA 041). He told SPC MP he was concerned because he did not know what happened on the evening of February 2nd. (JA 041).

C. The investigation

Specialist MP reported her allegation to the Fort Campbell CID office on February 12. (JA 042). Specialist MP was at CID for approximately eight hours, arriving sometime between 0800 and 0900 hours that morning and leaving around 1630 or 1700 that evening. (JA 039–040). Her interview with CID was recorded on video with audio. *Sigrah*, 2021 CCA LEXIS 279, at *13 (JA 008). Following her recorded interview, SPC MP typed a seven-page written statement. (JA 186).

Only six of those pages included substantive material. The last page was for signatures. (JA 039–40 and JA 186).

While at CID, at the request of law enforcement, SPC MP attempted a pretext conversation with appellant. (JA 042). At around 1140, SPC MP contacted appellant via text message asking him what he wanted to "talk about." (JA 184). The two exchanged messages in which appellant denied anything happened between them the night of alleged incident. (JA 184–85). CID later interviewed appellant that same day. (JA 080). During this interview, appellant denied engaging in any sexual acts with SPC MP. (Pros. Ex. 7 for Identification).

Three days later, on February 15, CID agents interviewed SPC AD. (JA 053). Specialist AD was at CID for at least three hours. (JA 054). Despite interviewing SPC MP and appellant three days earlier, CID advised SPC AD of his Article 31, UCMJ, rights, notified him that he was under investigation for sexual assault, and took a DNA sample from him. (JA 081 and JA 055–56). At the conclusion of his interview, SPC AD signed a five-page sworn statement. (JA 193). Finally, on February 27, CID interviewed SPC CB, who provided a four-page sworn statement at the end of his interview. (JA 058 and JA 199). Specialist CB could not remember the length of his CID interview, although he said the interview was not several hours long. (JA 058–59).

D. The R.C.M. 914 motions

At trial, the government only called three non-law enforcement witnesses: SPC MP, SPC AD, and SPC CB. (JA 025, JA 046, and JA 057). Specialist AD gave several conflicting answers as to whether he was ever in bed with SPC MP the night of the incident. (R. at 480–85, 490). Immediately after SPC MP finished testifying on direct examination, appellant's trial defense counsel moved, under R.C.M. 914, for the production of SPC MP's recorded statement to CID from February 12, 2018. (JA 129). In support of its motion, trial defense counsel called three witnesses, including the two CID Special Agents (SA) who conducted the interviews at issue, SA DM and SA RP. (JA 134).

After a brief recess, the military judge ruled, "[t]he defense motion under R.C.M. 914 is denied." (JA 146). This singular statement comprised the military judge's entire analysis and ruling on the matter. (JA 146). Although the military judge promised to supplement her ruling with "written findings of fact and conclusions of law prior to authentication of the record," she failed to do so. (JA 146).

At the conclusion of SPC MP's cross-examination, trial defense counsel again requested relief under R.C.M. 914 for the testimony and statements of SPC MP, as well as for SPC AD, and SPC CB. (JA 149). Although the government had not yet called SPC AD and SPC CB to testify, the military judge allowed the

defense to raise the R.C.M. 914 objections to both witnesses' prospective testimony "so we don't have to then send the panel back out and have another 39(a)." (JA 150–51). The military judge reconsidered her ruling with respect to SPC MP and denied the motion. (JA 150–51). She also denied the motion in regard to SPC AD and SPC CB. (JA 150–51). Once again, the military judge did not state her reasoning on the record. (JA 150–51). After SPC AD finished testifying during the government's case in chief, the defense renewed its R.C.M. 914 objection. (JA 153). Yet again, the military judge denied the motion and failed to offer any reasoning on the record. (JA 153).

E. The Army Court appeal and opinion

On appeal, the Army Court ordered the GAD to determine whether the military judge ever drafted her promised written R.C.M. 914 ruling. *United States v. Sigrah*, ARMY 20190556 (Army Ct. Crim. App. Mar. 23, 2021) (order) (JA 210). After the GAD learned a draft ruling existed, the Army Court returned the record to the military judge, who, relying on R.C.M. 1112 and over defense objection, attached a written ruling to the record. (JA 216; App. Ex. XXXIV).

In the written ruling, the military judge concluded, "there was no violation of R.C.M. 914 or the Jencks Act." (JA 218). In a "finding of fact," the military judge stated there was "no evidence presented that law enforcement acted in bad faith or in a negligent manner . . ." regarding the three witnesses' recorded

statements. (JA 217). In fact, the military judge wrote, law enforcement and the government had acted in good faith. (JA 217). In addition, despite SPC MP's uncontroverted testimony, (JA 039–40), the military judge also found that SPC MP's "entire interview process . . . lasted approximately 2-3 hours from the time she arrived at CID until she signed the sworn statement she typed." (JA 217).

After reviewing the record, the Army Court found the military judge's written ruling was rife with errors. The Army Court held the judge erred in determining there was no violation of R.C.M. 914 or the Jencks Act, 18 U.S.C. § 3500. *Sigrah*, 2021 CCA LEXIS 279, at *13 (JA 008). After discussing how each element of an R.C.M. 914 violation was met, the Army Court noted, "[c]learly, the government violated R.C.M. 914 in this case." *Id*.

The Army Court also found the military judge erred in concluding the government was not negligent and the good faith loss doctrine applied. *Id*. at *14–17 (JA 008–010) (noting the military judge's findings on these points were "clearly unreasonable.") Appellant's record, the Army Court wrote, contained "overwhelming evidence of negligence on the part of CID in electing to make audio and video recordings of these three witnesses and then letting those recordings spoil." *Id*. at *16 (JA 009). The Army Court chastised the "military judge's barebones conclusion that there was no evidence of CID negligence [which] failed to address what the record plainly demonstrates." *Id*. As for the

good faith exception, the lower court succinctly said, "[l]aw enforcement *elected* to create qualifying statements and then *elected* not to preserve the statements." *Id*. This "constitutes sufficient negligence to preclude the application of the good faith loss doctrine." *Id*.

The Army Court's opinion did not discuss whether the military judge abused her discretion in concluding SPC MP's entire interview process—from when she arrived to CID to when she signed her written statement—was two to three hours. This was despite the fact that SPC MP testified she was at CID between seven and nine hours. *Sigrah*, 2021 CCA LEXIS 279 (JA 002–16); (JA 039–40). Appellate defense counsel argued this finding of fact was clearly erroneous both in his briefs and in oral argument to the lower court.

After finding an R.C.M. 914 violation and that the government's negligence precluded the good faith exception's applicability, the Army Court turned to the prejudice analysis and first concluded this was nonconstitutional error. *Sigrah*, 2021 CCA LEXIS 279, at *16–19 (JA 007–10). Yet the Army Court struggled to determine which standard to use in testing for prejudice. The lower court said if it applied the *Kohlbek* preserved nonconstitutional error prejudice analysis, this "would easily result in a finding of prejudice to appellant and compel us to set aside the findings and the sentence. If the testimony of the victim and SPCs D and B was struck at trial based on R.C.M. 914, it would have eviscerated the

government's case. At oral argument, government appellate counsel did not dispute this point, and for good reason." *Id.* at *22 (JA 012).

However, based on its reading of the case law, the Army Court ignored *Kohlbek* and instead concluded that *Rosenberg* offered "the correct analytical framework for addressing prejudice in the context of Jencks Act and R.C.M. 914." *Id*. Applying *Rosenberg*, the lower court divined that the three witnesses' written statements provided appellant "substantially the same information" as the missing recorded statements so defense counsel's cross examinations of those witnesses was not significantly encumbered and therefore the military judge's errors were harmless. *Id*.

Granted Issue

WHETHER THE MILITARY JUDGE'S DENIAL OF APPELLANT'S R.C.M. 914 MOTIONS MATERIALLY PREJUDICED APPELLANT'S SUBSTANTIAL RIGHTS

Standard of Review

This Court reviews for prejudice *de novo*. *Clark*, 79 M.J. at 455.

Law

The Jencks Act and R.C.M. 914 were created "'to further the fair and just administration of criminal justice' by providing for disclosure of statements for impeaching government witnesses." *United States v. Muwwakkil*, 74 M.J. 187, 190 (C.A.A.F. 2015) (quoting *Goldberg*, 425 U.S. at 107.); *United States v. Thompson*,

81 M.J. 391, 395 (C.A.A.F. 2021) (noting the similarities in language and purpose between R.C.M. 914 and the Jencks Act means this Court's Jencks Act case law should inform its R.C.M. 914 analysis). On appeal, a judge's error in denying a Jencks Act or R.C.M. 914 motion is tested for prejudice. *Clark*, 79 M.J. at 454.

A. The Familiar *Kohlbek* Prejudice Standard

Military appellate courts "test for prejudice based on the nature of the right violated." *Id.* (quoting *United States v. Tovarchavez*, 78 M.J. 458, 465 (C.A.A.F. 2019)). "Generally, a Jencks Act violation will not rise to a constitutional level." *Clark*, 79 M.J. at 454 (citing *United States v. Augenblick*, 393 U.S. 348, 356 (1969)). Instead, the nonconstitutional error is tested for prejudice under Article 59(a), UCMJ. *Clark*, 79 M.J. at 455. "For [preserved] nonconstitutional evidentiary errors, the test for prejudice is whether the error had a substantial influence on the findings." *Id.* (quoting *Kohlbek*, 78 M.J. at 333 (citation omitted) (internal quotation marks omitted)). In conducting this prejudice analysis, "this Court weighs: (1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." *Id.* (citations omitted) (internal quotation marks omitted)).

Under the first *Kohlbek* factor, when appellate courts analyze prejudice from an R.C.M. 914 or Jencks Act violation, they do not consider the testimony that the

military judge failed to strike. *Clark*, 79 M.J. at 455. For example, in *Clark*, in assessing the strength of the government's case, neither the Army Court nor this Court considered the CID agents' testimony regarding the lost portions of the accused's recorded statement, which were on Disc 4. *Id*. However, "even without the testimony as to the portions of the interview covered by Disc 4, the government presented an overwhelming case as to appellant's guilt." *United States v. Clark*, ARMY 20170023, 2019 CCA LEXIS 247, at *14–15 (Army. Ct. Crim. App. Jun. 10, 2019) (mem. op.) *aff'd*, 79 M.J. 449 (C.A.A.F. 2020) (JA 209). In other words, under *Kohlbek*, this Court analyzed the prejudice from "the erroneous admission of the agents' testimony"—not the lost impeachment value of the R.C.M. 914 or Jencks Act material. *Clark*, 79 M.J. at 455.

B. The *Rosenberg* Prejudice Standard

In *Rosenberg*, the failure to produce a Jencks Act statement was considered harmless error when appellant had access to the "very same information." *Rosenberg*, 360 U.S. at 371. However, as the Supreme Court cautioned, "[s]ince courts cannot 'speculate whether [Jencks material] could have been utilized effectively' at trial, *Clancy* v. *United States*, 365 U.S. 312, 316 (1961), the harmless-error doctrine must be strictly applied in Jencks Act cases." *Goldberg*, 425 U.S. at 129 n.21; *see also United States v. Beasley*, 576 F.2d 626, 630 (5th Cir. 1978) (noting that "*Goldberg* thus establishes a stricter standard than applies in

constitutional cases regarding prosecutorial non-disclosure."); *United States v. Cleveland*, 507 F.2d 731, 736 (7th Cir. 1974) (vacating a conviction for a Jencks Act violation when it was not perfectly clear the defendant had not been prejudiced).

An appellate court may not "confidently guess what defendant's attorney might have found useful for impeachment purposes in withheld documents to which the defense is entitled." *Rosenberg*, 360 U.S. at 371; *see also Palermo v. United States*, 360 U.S. 343, 346 (1959) ("Once the statements had been shown to contain related material only the defense was adequately equipped to decide whether they had value for impeachment."). After all, a "flat contradiction" between the producible statement and the witness' testimony at trial is not the only inconsistency a skillful defense counsel will exploit. *Clancy*, 365 U.S. at 316 (quoting *Jencks v. United States*, 353 U.S. 657, 667 (1957)). "'The omission from the [producible statement] of facts related at trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony.'" *Id.*

Strictly applying this prejudice analysis, this Court and the Supreme Court have found or suggested there would be harmless error under *Rosenberg* in three scenarios: (1) when the court is able to compare the undisclosed statement, which is preserved in the record, to the evidence appellant had at trial; *Rosenberg*, 360

U.S. at 369–71; (2) when an uncontradicted witness testified that appellant had access to a transcript of a missing recorded statement that was "almost word for word." *Marsh*, 21 M.J. at 452; and (3) when appellant was present for the interrogation or hearing from which the undisclosed statement was made. *Clark*, 79 M.J. at 455.

In all three instances, the courts had evidence in the record that allowed them to compare the information in the undisclosed statement to the evidence an appellant had access to at trial, and to decide whether the defense had the "very same information" or close to it, without resorting to impermissible speculation. *Rosenberg*, 360 U.S. at 371; *Goldberg*, 425 U.S. at 129 n.21.

Argument

A. Under *Kohlbek* the Military Judge's Erroneous Denial of Appellant's R.C.M. 914 Motions Materially Prejudiced Appellant's Substantial Rights

1. The Kohlbek factors are the primary prejudice analysis for a preserved nonconstitutional R.C.M. 914 error, and under this analysis the error in this case materially prejudiced appellant's substantial rights

As the Army Court accurately noted, had it applied the prejudice analysis from *Kohlbek*, this "would easily result in a finding of prejudice to appellant and compel us to set aside the findings and sentence." *Sigrah*, 2021 CCA LEXIS 279, at *22 (JA 012). Even the government conceded that under *Kohlbek* appellant's substantial rights were materially prejudiced. *Id.* (noting "[a]t oral argument, government appellate counsel did not dispute this point, and for good reason.").

As *Clark* shows, the four *Kohlbek* factors provide the initial prejudice analysis for preserved nonconstitutional error. *Clark*, 79 M.J. at 455. *Rosenberg* offers only a secondary prejudice analysis—not the sole analysis. If the *Kohlbek* test shows appellant's substantial rights were materially prejudiced—as the Army Court found here and the government conceded—the analysis ends and the *Rosenberg* analysis does not apply. *Id.* After all, if appellant establishes material prejudice to his substantial rights under *Kohlbek*, why would he need to show that same prejudice exists under another test? In contrast, in *Clark*, this Court found appellant's substantial rights were *not* materially prejudiced under *Kohlbek* so it *then* assessed the error under *Rosenberg*. 79 M.J. at 454–55. *Cf. United States v. Martinez*, 70 M.J. 154, 155 (C.A.A.F. 2011) (noting for judicial disqualification errors this Court first assesses whether there is prejudice under Article 59(a), UCMJ, and if there is no material prejudice under that test then it applies the criteria in *Liljeberg v. Health Services Acquisition Corp.*, 468 U.S. 847 (1988)).

Both *Clark* and appellant's case involve the same type of error: a preserved nonconstitutional R.C.M. 914 violation. *Clark*, 79 M.J. at 455; *Sigrah*, 2021 CCA LEXIS 279, at *19 (JA 010). Thus, just as in *Clark*, this Court should apply the familiar *Kohlbek* factors. If the government believes the usual *Kohlbek* analysis should not apply, or that in order to secure relief appellant must show he is materially prejudiced under both tests—which this Court has never held—then the

government bears the burden of explaining why this Court should deviate from its precedent in *Clark*. *Tovarchavez*, 78 M.J. at 468 (citing *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case . . . [this Court] should follow the case which directly controls. . ."); *United States v. Andrews*, 77 M.J. 393, 399 (C.A.A.F. 2018) (noting the preference and benefits from adhering to precedent).

Applying just the first *Kohlbek* factor to appellant's case—which means not considering SPC MP, SPC AD, and SPC CB's testimony—"would have eviscerated the government's case." *Sigrah*, 2021 CCA LEXIS 279, at *22 (JA 012). "Unlike *Clark*, there was scant independently admissible evidence in this case to prove appellant's guilt." *Id.* In fact, without these three witness' testimony the government could not prove their case beyond a reasonable doubt. *Id*. Thus, under *Kohlbek*, appellant was clearly prejudiced by the military judge's refusal to order an R.C.M. 914 remedy.

2. The history and language of Federal Rule of Criminal Procedure 52(a) and Article 59(a), UCMJ, further supports the conclusion that Rosenberg should not supplant the Kohlbek factors as the main prejudice analysis for a preserved R.C.M. 914 nonconstitutional error

It would be odd for the *Rosenberg* analysis to displace the *Kohlbek* factors as the primary test for assessing prejudice with a nonconstitutional R.C.M. 914 violation. That is because *Rosenberg* implicitly analyzed whether there was

harmless error for a preserved nonconstitutional error under different legal authority with a different standard for showing prejudice—Federal Rule of Criminal Procedure 52(a) and/or what is now codified as 28 U.S.C. § 2111—then the authority that governs courts-martial, Article 59(a), UCMJ.

On March 21, 1946, the Federal Rules of Criminal Procedure went into effect, which included a harmless error provision: Rule 52(a). Roger A. Fairfax Jr., *A Fair Trial, Not a Perfect One: The Early Twentieth-Century Campaign for the Harmless Error Rule* 93 Marq. L. Rev. 433, 454 (2009). Three years later, Congress passed a supplemental harmless error statute, which explicitly (and redundantly) applied the harmless error analysis embedded in the Federal Rules of Criminal Procedure to federal civilian appellate courts. *Id*. at 454 n.130.

Rosenberg was decided in 1959, long after Article III appellate courts were required to apply this harmless error analysis to nonconstitutional errors. 360 U.S at 367. Therefore, although the *Rosenberg* opinion does not mention Rule 52(a) or its statutory analogue, implicitly the Supreme Court must have been analyzing this preserved nonconstitutional error under one or both of those authorities. *Id*. at 371.

On May 31, 1951, the UCMJ took effect. *United States v. Rodriguez-Amy*, 19 M.J. 177, 180 (C.M.A. 1985). Under Article 59(a), UCMJ, appellate courts may only correct a nonconstitutional legal error in a court-martial when the error "materially prejudices . . . substantial rights." In contrast, Fed. R. Crim. P. 52(a),

offers a different standard: a preserved error is prejudicial if it "affect[s] substantial rights." *Tovarchavez*, 78 M.J. at 467 (discussing differences between Article 59(a), UCMJ, and Fed. R. Crim. P. 52).

Given that Congress created a separate harmless error statute for courts-martial with a different standard for establishing prejudice, when assessing prejudice for a preserved nonconstitutional error, this Court should first rely on its own, established Article 59(a), UCMJ, jurisprudence. As this Court did in *Clark*, the *Rosenberg* analysis is best treated as a potential secondary test—not the principal one.

B. Even Under *Rosenberg*, the Military Judge's Erroneous Denial of Appellant's R.C.M. 914 Motions Materially Prejudiced Appellant's Substantial Rights

1. The witnesses' testimony in appellant's case establishes the destroyed recorded statements had important information not captured in the written statements

The evidence in the record shows appellant did not have the "very same information" as was contained in the missing recorded witness interviews. Consequently, under *Rosenberg*, the military judge's denial of the R.C.M. 914 motions was not harmless error. This is clear based on evidence in the record from SPC MP and SPC AD, and the CID agents who conducted the witness interviews.

First, there were relevant substantive discussions in both SPC MP's and SPC AD's recorded statements that were not subsequently captured in their typewritten

statements. SPC MP admitted someone at CID had her message appellant in an attempt to "see what he was going to say." (JA 042). Prosecution Exhibit 2 indicates this exchange occurred at 1140 hours, meaning CID and SPC MP had discussed the case enough by that time to attempt a pretext text message. (JA 184). Nonetheless, it was another five hours before SPC MP signed her statement—a document that contains absolutely no reference to this pretext conversation, nor the discussions that preceded and surrounded it. (JA 186–92).

Second, there is nothing in SPC MP's written statement regarding her consent for CID to search her phone. (JA 186–92; R. at 421). Just as important, there is no record in her statement as to what she told the CID agents who asked for consent to search her phone, and whether she provided CID the opportunity to recover messages between her and SPC AD. (JA 186–92; R. at 421–22).

Third, portions of SPC AD's discussion with CID were likewise left out of his written statement. His written statement does not discuss his rights waiver, or CID's efforts to take DNA from him, nor the questions, statements, or discussions that surrounded those events. (JA 193–97). Given the defense theory that SPC AD was the one who assaulted SPC MP in his own bed, what SPC AD may have said during his rights advisement, as well as when CID asked to take his DNA, could be relevant to appellant's defense. Crucially, SPC AD did not want SPC MP to report the incident, and SPC AD gave multiple conflicting answers at trial about

whether he was ever in bed with SPC MP that night. (JA 041; R. at 480–85, 490). Specialist AD is so central to appellant's case that even his *demeanor* during the interview could have had a serious impact on the defense strategy and the panel's ultimate findings. *See Clancy*, 365 U.S. at 316 (noting "a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony.'") (quoting *Jencks*, 353 U.S. at 667). By negligently allowing this evidence to be destroyed, after they chose to record it, the government robbed appellant of his ability to use this potentially exculpatory evidence.

Furthermore, the CID agents who conducted these interviews also made clear these written statements could not have captured all that was said in the recorded interviews. For example, SA DM admitted SPC MP's written statement did not include all that was said. (JA 079 and JA 104). Special Agent DM also denied that the only thing missing from the recorded interviews in the written statements was rapport building. (JA 104). The CID agent who completed the interview with SPC MP, SA RP, said that it was "safe to say" that he missed some of the details in SPC MP's audio recorded statement. (JA 119).

The Army Court ignored all of this. Relying, in part, on the fact that the written statements were taken the same day as the recordings, and not weeks or months later, the Army Court wrongly held—without ever having seen these

missing statements and despite evidence to the contrary—that appellant had substantially the same information as the destroyed recorded interviews. *Sigrah*, 2021 LEXIS 279, at *23–24 (JA 012–13).

2. Comparing the length of the lost recorded interviews and the written statements further demonstrates that appellant did not have near the "very same information"

Given how long the recorded interviews were and how short the written statements are, the lower court's baseless conclusion that appellant had more or less the same information strains credulity. Specialist MP is the complaining witness in this case. Her written statement is seven-pages long with the last page only including signatures. (JA 186–92). Yet, her entire interview process was between seven and nine hours long. (JA 039–40 and JA 186–92).[4] Even assuming breaks for food, drink, and restroom visits, it is still implausible that a daylong interview could be reduced to only six pages without missing something substantive.

[4] CID Special Agent DM's testimony also corroborates SPC MP's testimony on this point. Special Agent DM testified he used SPC MP's written statement to make his agent investigative report (AIR). (JA 076–77). Special Agent DM said the time he wrote on the AIR for SPC MP's written statement would have been from near the end of SPC MP's interview when she signed and was sworn to her written statement. (JA 068). The time 1620 is noted on SPC MP's written statement along with her initials. (JA 186).

Ignoring evidence to the contrary, the military judge abused her discretion when she concluded, "[t]he entire interview process with the alleged victim, SPC MP, lasted approximately 2-3 hours from the time she arrived at CID until she signed the sworn statement she typed." (JA 217). The evidence in the record directly contradicts this finding. SPC MP's "entire interview process" was not two to three hours long—but rather more than twice that amount of time, between seven and nine hours. (JA 039–40, JA 068, JA 186, and JA 217). Appellant raised this issue before the lower court in briefing and oral argument, however, the Army Court's opinion conspicuously failed to address it. *Sigrah*, 2021 LEXIS 279 (JA 002–16).

This is not some meaningless discrepancy. The judge's obvious abuse of discretion on this key finding matters because it further undercuts the Army Court's conclusion that appellant had "substantially the same information." *Sigrah*, 2021 CCA LEXIS 279, at *23 (JA 012). The six substantive pages of SPC MP's sworn statement could not capture the entirety of her day-long interview. (JA 186–92). Similarly, SPC AD's written statement also did not provide near "substantially the same information" as his recorded interview. Specialist AD was at CID for at least three hours, but his sworn statement is only five pages long, the last of which was reserved for signatures. (JA 054 and JA 193–97). Four pages could not possibly include "the very same information" as a multi-hour interview.

Both the military judge and the Army Court ignored these facts and the logical conclusion that flows from them: the written statements could not possibly capture all, or even substantially all, of the same information as was in the destroyed recorded statements.

3. The record in this case is devoid of facts that would allow an appellate court to conclude appellant had access to the "very same information" or near enough as the undisclosed statements

Appellant's case is distinguishable from the factual scenarios this Court and the Supreme Court have relied on when finding or suggesting there would be harmless error under *Rosenberg*. Furthermore, the Army Court failed to point to other facts that would allow it to conclude appellant had substantially the same information as was in the destroyed statements. Instead, the Army Court committed error when it relied on wholesale conjecture to assume appellant had this information.

This case is clearly distinguishable from other Jencks Act or R.C.M. 914 cases in which the appellant had substantially the same information. In *Rosenberg*, the undisclosed statements were preserved in the record. *Rosenberg*, 360 U.S. at 369–71. This allowed the Supreme Court to compare these statements, side-by-side, with the evidence appellant had at trial and to conclude appellant had the "very same information" and thus the failure to disclose those statements was harmless error. *Id.* at 371; *see also United States v. Dixon*, 8 M.J. 149, 150–51

(C.M.A. 1979) (affirming the service court's order to produce the undisclosed Jencks Act statement, which had not been included in the record. "This action enabled fulfillment of [the service's court's] appellate responsibility to test for prejudice."). Appellant's case is distinguishable from *Rosenberg* because the undisclosed statements are not in the record for the appellate courts to review since the government allowed them to be destroyed. *Sigrah*, 2021 CCA LEXIS 279, at *16 (JA 009).

Unlike *Marsh*, which discussed prejudice in dicta, but was decided under the good faith exception, appellant did not have an "almost word for word" transcript of the missing Article 32, UCMJ, testimony. *Marsh*, 21 M.J. at 452; *Muwwakkil*, 74 M.J. 187, 193 (noting *Marsh* applied the good faith loss doctrine). Finally, unlike *Clark*, appellant was not present for the recording of these missing statements, which would have given him access to the information contained in the destroyed interviews. *Clark*, 79 M.J. at 455.

Appellant's record lacks those facts that allowed previous courts to consider whether appellant had the "very same information" or near that, without resorting to rank speculation about what *might* have been in the missing statement and how appellant *might* have used it. *Rosenberg*, 360 U.S. at 371; *Clancy*, 365 U.S. at 316. The Army Court also failed to point to facts in appellant's case that would allow the lower court to compare the information in the missing statements with the

evidence appellant had at trial, and to find harmless error based on the record rather than mere conjecture.

Based on this record, no appellate court could reasonably conclude the written statements captured the "very same information" as in the recorded statements, without resorting to improper speculation. The facts that allowed other courts to find harmless error are not present here and the facts available make clear that appellant did not have near the "very same information" because chunks of the recorded interviews were not part of the written statements. Additionally, it is extremely unlikely that SPC MP's and SPC AD's four to six-page substantive statements captured all of their hours-long recorded interviews. (JA 039-40, JA 054, JA 068, JA 186–92, and JA 193–97).

This case is analogous to *United States v. Carrasco*, where (because of the government's negligence) the appellate court was unable to determine whether the information provided to defense fully captured the missing Jencks Act statement. 537 F.2d 372, 377–78 (9th Cir. 1976). That case involved another routine but "manifestly unreasonable" law enforcement policy, which allowed the government to destroy a witness's written Jencks Act statement in the government's possession after a government agent "incorporated its substance into his final report." *Id.* at 375–76. Because the original Jencks Act statement was destroyed, the appellate court found it was impossible to determine whether the agent's report substantially

incorporated the lost statement. *Id*. at 377. For that "would require the district court to reconstruct a record no longer in existence using 'the very witness[es] whose testimony the defendant seeks to impeach.'" *Id.* (quoting *United States v. Johnson*, 521 F.2d 1318, 1320 (9th Cir. 1975).

Similarly, in this case, "As [this Court's] ignorance," about what the destroyed recorded statements contain, "and inability to remedy it, are caused totally by the conduct of the government," this Court is "forced to infer" that the written statements "did not fully incorporate" the lost recorded statements. *Carrasco*, 537 F.2d at 377.

Accordingly, because appellant was not provided "the very same information" or close to it, under *Rosenberg*, the military judge's erroneous denial of the R.C.M. 914 motions was not harmless error. For this reason, appellant respectfully asks this Court to set aside the findings and sentence.

Conclusion

WHEREFORE, appellant asks this Court to set aside the findings and sentence.

David D. Hamstra
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(571) 408-9343
USCAAF Bar No. 37394

Christian E. DeLuke
Major, Judge Advocate
Branch Chief
Defense Appellate Division
USCAAF Bar Number 36414

Dale C. McFeatters
Lieutenant Colonel, Judge Advocate
Deputy Chief
Defense Appellate Division
USCAAF Bar Number 37645

Michael C. Friess
Colonel, Judge Advocate
Chief
Defense Appellate Division
USCAAF Bar Number 33185

Certificate of Compliance with Rules 24(c) and 37

1. This Brief on Behalf of Appellant complies with the type-volume limitation of Rule 24(c) because it contains 7,348 words.

2. This Brief on Behalf of Appellant 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.

David D. Hamstra
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(571) 408-9343
USCAAF Bar No. 37394

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Sigrah, Crim App. Dkt. No. 20190556, USCA Dkt. No. 21-0325/AR was electronically filed brief with the Court and Government Appellate Division on March 25, 2022.

MICHELLE L.W. SURRATT
Paralegal Specialist
Defense Appellate Division
(703) 693-0737