IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellee v. Specialist (E-4) **MICHAEL P. WHITEEYES** United States Army Appellant	REPLY BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 20190221 USCA Dkt. No. 21-0120/AR

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

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

WHETHER THE MILITARY JUDGE COMMITTED PREJUDICIAL ERROR BY ADMITTING APPELLANT'S STATEMENTS TO LAW ENFORCEMENT IN VIOLATION OF MILITARY RULE OF EVIDENCE 304(c).

Argument

A. Appellee's Recitation of the Facts Regarding the August 18, 2018 Interview Is Incorrect and Misleading.

Appellant's statements to law enforcement on August 18, 2018 must be viewed in context of the entire interview and the surrounding circumstances. In its brief, Appellee highlights quotes which may look alarming but are dramatically tempered when understood in context. (Appellee's Br. 5, 23). There are two major considerations that have to be made while reviewing the interview. First,

appellant *never* said he had any sexual feelings or urges towards EM; those concerns belonged to his wife. Mrs. Moore found incest-themed pornography on appellant's computer which is likely the reason she was concerned that appellant could pose a risk to her daughter. (JA 085). All the initial comments by appellant were reflections of this state of affairs. His text to Sergeant KS stated that his wife believed he was a risk to her daughter but that he would never hurt her. (JA 055). His statement to Special Agent (SA) TT on August 18, 2018 was the same. (Pros Ex. 1 at 13:00) ("My wife said…that I might end up having an urge for her daughter."). Appellant steadfastly denied ever having urges[1] or sexual feelings toward EM and reiterated that any concerns belonged to his wife. (Pros Ex. 1 at 13:30-14:45, 19:30-19:45, 24:20-25:05).

The second important thing to keep in mind is the precise context of the conversation. Appellant was reflecting on a traumatic experience he had as a child, that his mother's boyfriend raped his sister. (Pros. Ex. 1 at 22:49). Appellant continuously stated the only reason EM might be in any danger is that something similar happened to his sister. (Pros. Ex. 1 at 22:49). That while it was generally possible someone would pose a risk to a young girl, as his mother's boyfriend did,

[1] As appellee points out, at one-point during the interview appellant makes the comment: "yeah, I'm going to have urges, but I just think that I need to stop it." (Appellee's Br. 5; Pros. Ex. 1, 13:30). He immediately clarifies that he was not talking about EM when he made that comment and expressed shock at CID's suggestion that he would think of his daughter in that way. (Pros. Ex. 1, 13:30).

he, personally, had never done or thought anything that would make him a risk to EM. (Pros. Ex. 1 at 25:10- 26:30).

Despite appellant's constant denial throughout the entirety of the interview, Appellee still audaciously argues, "[a]ppellant told SA TT he had sexual urges towards EM," which is simply not true. (Appellee's Br. 23). Appellee relies upon that false assertion in an attempt to create a scintilla of nexus between appellant's statements in that interview and the *only* piece of evidence the military judge found corroborated its admission: appellant's immature comments about milk and carrots.[2] (JA 168-69). Throughout the interview, appellant wholly, repeatedly, and consistently denied having any sexual thoughts about EM, having any sexual urges towards her, or being any sort of sexual risk. (Pros Ex. 1 at 13:30-14:45, 19:30-19:45, 24:20-25:05). As a result, there was no corroborative nexus between

[2] In his ruling, the military judge said the interview was being offered pursuant to Mil. R. Evid. 404(b); however, as appellee acknowledges, this does not eliminate the corroboration requirement. *See Smith v. United States*, 348 U.S. 147, 154 (1954); Appellee's Br. 23 n.19. Holding otherwise would render the entirety of Mil. R. Evid. 304(c) moot as any confession, admission, or other incriminating statement of the accused could *always* be used as evidence of consciousness of guilt. The military judge was apparently referencing Mil. R. Evid. 304(c)(3) ("Corroboration is not required . . . for statements offered under a rule of evidence other than that pertaining to the admissibility of admissions or confessions."). That rule is better understood as an analog of Mil. R. Evid. 304(e) allowing involuntary statements to be used for impeachment or other non-substantive purposes but not as a means to bypass Mil. R. Evid. 304(c) in its entirety. *See United States v. Latour*, 75 M.J. 723, 727-730 (N-M Ct. Crim. App. 2016) (analyzing the similar interplay between Mil. R. Evid. 304 and Mil. R. Evid. 801(d)).

the immature comments, which were only relevant to appellant's alleged state of mind and appellant's statements on August 18th, wherein he expressly denied having that state of mind. Just because the military judge found the immature comments about EM were relevant to the *crime*, it does not mean they were corroborative evidence of an unrelated *admission*. (Appellant's Br. 39). For this reason, as well as the other reasons listed in appellant's brief, the military judge abused his discretion in finding the statement to SA TT on August 18th was sufficiently corroborated; the statement should have been excluded.

B. Appellee Oversimplifies and Misunderstands the Law of *Corpus Delicti.*

Appellee argues that appellant is attempting to resurrect the "outdated and rejected *corpus delicti* doctrine." (Appellee's Br. 11). They are incorrect and their argument takes too simplified a view of this admittedly complex area of law. To appellee's credit, this is something that has not been handled with a high degree of clarity across the federal circuit courts. The trouble stems, in part, from a lack of uniformity in the use of the term "*corpus delicti.*" Throughout American jurisprudence, the term has been given a variety of meanings and has been defined in a variety of ways, causing a great deal of uncertainty. *See Manning v. United States*, 215 F.2d 945, 946 (10th Cir. 1954) ("'[T]he phrase '*corpus delicti*' has been the subject of much loose judicial comment, and an apparent sanction has often been given to an unjustifiably broad meaning.'") (citing 7 Wigmore on

Evidence (3d ed. 1940) Sec. 2072, page 401). As the Tenth Circuit once described:

> The use of Latin words, e.g. '*corpus delicti*', '*res gestae*' and the like, in the law of evidence, do not tend to throw much light upon the subject. Not infrequently one feels justified in suspecting that when a judge says evidence is admissible because it is part of the '*res gestae*', or says a confession is not admissible because the '*corpus delicti*' has not been proved, the judge has a hunch it should be admissible or inadmissible, as the case may be, and resorts to a foreign language he doesn't understand for a reason.

Manning, 215 F.2d at 946.

Black's Law Dictionary defines *corpus delicti* as both "the fact of the transgression" (a synonym of *actus reus*) as well as "loosely the material substance on which a crime has been committed; the physical evidence of a crime, such as the corpse of a murdered person." BLACK'S LAW DICTIONARY 369 (8th ed. 2004). Separately, Black's defines the "*corpus delicti* rule" as "the doctrine that prohibits a prosecutor from proving the *corpus delicti* based solely on a defendant's extrajudicial statements." *Id.* Throughout the years, there have been varying *corpus delicti* tests and competing interpretations. *See Smith*, 348 U.S. at 156 (comparing various doctrines related to *corpus delicti*). Because the term is used so haphazardly across American jurisprudence, it is more important to focus on the substance of the law actually applied in a given case than any sweeping statement

by a court claiming "the *corpus deliciti* need not be proven." As described below, the state of the law is far more nuanced.

In its traditional form, the *corpus delicti* standard was composed of three elements:

> First, the fact of an injury or a loss, as, in homicide, a dead person; in arson, a house burned; in larceny, property missing.
>
> Secondly, the fact of somebody's criminality (in contrast, e.g. to accident) as the cause of the injury or loss. The proof of these two elements involves the proof of the commission of a crime by somebody.
>
> Thirdly, the fact of the connection of the accused with the crime -- his identity as the criminal, or the guilty agent through whom the wrong has occurred.

Manning, 215 F.2d at 947 (citing 7 Wigmore on Evidence (3d ed. 1940) Sec. 2072, page 401).

Prior to *Opper*[3] and *Smith*,[4] Circuit courts struggled to identify how many, and to what extent, these three elements needed to be proven to satisfy the corroboration requirement. *See e.g., Manning*, 215 F.2d at 947*; Forte v. United States*, 94 F.2d 236 (D.C. Cir. 1937); *Smyly v. United States*, 287 F.2d 760 (5th Cir. 1961). In *Forte*, the D.C. Circuit noted a common view that, at most, only the first two *corpus deliciti* elements should be required, and that the third was not

[3] 348 U.S. 84 (1954).
[4] 348 U.S. 147 (1954).

properly included or the term *corpus delicti* would become "synonymous with the whole of the charge." 94 F.2d at 244 (citing 4 Wigmore on Evidence (2d Ed. 1923) § 2072(3)). The court in *Forte,* adopted this "two-element" approach; requiring proof of the "injury or loss" and proof of criminality but not requiring a connection with the accused. *Id.* Nonetheless, the *Forte* court made an important observation; there are some circumstances where the government's obligation to prove a scienter element of a charged offense would, in effect, make it necessary that the Government have to satisfy all three parts of the traditional *corpus deliciti* standard. *Id.* In such a circumstance, the government had to bear that burden. *Id.* ("this cannot operate to diminish the duty of the Government to present evidence of both elements of the *corpus delicti* independent of the confession."). In essence: if one of the elements of the crime required proving the accused acted with a criminal *mens rea*, the government would still have to satisfy element one of the traditional *corpus deliciti* standards*,* and in doing so, would likely end up satisfying element three as well.

That problem underscores one of the complexities within the first part of the traditional test; namely, what is necessary to prove "the fact of an injury or loss?" Did it require, as some state courts do, "every element of the underlying offense?" *People v. Miranda*, 161 Cal. App. 4th 98, 102 (2008). The Tenth Circuit explained the problem in *United States v. Manning*. 215 F.2d 945. There the court noted:

> You cannot prove the knowledge of the defendant while transporting the car across the state line without also proving his connection with the crime, and his identity as the criminal. Evidence of both, of necessity, is commingled. And by the great weight of authority evidence of his identity as the criminal and his connection with the crime is not a part of the '*corpus delicti*'. On the other hand, also by the great weight of authority, the act causing the wrong or loss must be a criminal act, and under the Dyer Act it is not a criminal act unless the interstate transportation was with knowledge that the car had been stolen. So, it would seem, whichever view we take, we must run counter to the majority view as to the content of the term '*corpus delicti*'.

Manning, 215 F.2d at 947.

After analyzing the holding in *Forte*, the Tenth Circuit refused to adopt the same interpretation of the law. *Id.* at 948-49. They resolved the dilemma by holding that "the government need not prove … that the defendant had knowledge that the car was stolen. It is enough if the government proves that someone who transported it knew it was stolen." *Id.* at 947-48. That interpretation hardly brings any lucidity.

Clearly there was confusion prior to 1954, which was one of the issues that confronted the Supreme Court. It had to address the traditional *corpus delicti* doctrine, its elements, and how it should be applied moving forward. Due to confusion surrounding the term "*corpus delicti"* it is important to start by identifying what the Supreme Court meant when it used the term. In *Opper* and *Smith*, the Court used "*corpus delicti"* to mean the entirety of a charged offense

including each of its component elements. *Opper,* 348 U.S. at 93-94; *see also United States v. Lopez-Alvarez*, 970 F.2d 583, 591 (9th Cir. 1992) ("[The Supreme Court] held that the prosecution need not introduce independent evidence of every element of the crime."). In *Opper*, petitioner was convicted of paying a government employee for services rendered in an official capacity. 348 U.S. at 85. The elements required the government prove (1) payment of a government employee; (2) for rendering services in relation to any . . . matter in which the United States is a party. *Id.* at 85 n.1. The Court found there was independent evidence petitioner paid a government employee but that this was not enough to "establish a *corpus deliciti* of the offense charged." *Id.* at 94. The government still "had to prove the other element of the *corpus delicti* – rendering of services by the government employee." *Id.* at 94. Clearly, the Court considered the term *corpus delicti* to mean evidence touching on each element of the offense.[5] This was consistent with the Circuit Courts in *Manning* and *Forte* which also required independent evidence for each element of the charged offense in order to satisfy the traditional rule. *Manning*, 215 F.2d at 947*;* 94 F.2d at 244. That being the case, when the Court then held, "the corroborative evidence need not be sufficient, independent of the statements, to establish the *corpus delicti*," it meant that the independent evidence

[5] This use of the term contrasts with a definition referencing the full three-element traditional standard. *See Manning, 215 F.2d at 947 (citing 7 Wigmore on Evidence (3d ed. 1940) Sec. 2072, page 401).*

need not touch on *every element* of the charged offense. *Opper*, 348 U.S. at 93. It does not mean, as appellee argues here, that there is no longer a requirement to show that a crime actually occurred. (Appellee's Br. 15-17).

This is made clear from the holding in *Smith*. 348 U.S. 147. There the Court directly addressed the elements of the traditional *corpus delicti* rule. *Id*. at 153-54. Specifically, the Court returned to the *Forte-Manning* debate surrounding the third element of the traditional rule, which required "implicat[ng] the accused in order to show that a crime has been committed." *Id.* at 154. Despite previous rejections of the third element by the *Manning* and *Forte* courts, the Supreme Court ultimately decided to require it, and "its broader guarantee," in cases where there is no "tangible *corpus delicti*." *Id.* Rather than doing away with the traditional rule, the Supreme Court *expanded* it. It is then no surprise when, nine years later, the Court reiterated its take on the *corpus delicti* test in *Wong Sun*:

> Where the crime involves physical damage to person or property, the prosecution must generally show that the injury for which the accused confesses responsibility did in fact occur, and that some person was criminally culpable. A notable example is the principle that an admission of homicide must be corroborated by tangible evidence of the death of the supposed victim. See 7 Wigmore, Evidence (3d ed. 1940), § 2072, n. 5. There need in such a case be no link, outside the confession, between the injury and the accused who admits having inflicted it. But where the crime involves no tangible *corpus delicti*, we have said that "the corroborative evidence must implicate the accused in order to show that a crime has been committed."

371 U.S. 471, 489 n.15 (1963) (citing *Smith,* 348 U.S. at 156).

The Supreme Court's case law is clear that crimes with a tangible *corpus delicti* require only the first two elements of the traditional test (injury and criminality), whereas cases without a tangible *corpus delicti* require all three (injury, criminality, and association). *Id.*; *Smith,* 348 U.S. at 156.

The one area that the Supreme Court does not resolve is the interplay between the *Smith-Wong Sun* traditional element test and the *Opper* trustworthiness test. Therein lies all the confusion. Since *Wong Sun*, nearly every Circuit Court has continued to apply the traditional *corpus delicti* rule in deciding issues of corroboration.[6] Additionally, as appellee points out, many courts have quoted or paraphrased language from the *Opper* decision that "evidence need not be sufficient…to establish the *corpus delicti*."[7] (Appellee's Br. 17 n.8). While

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[6] *See e.g. United States v. Tanco-Baez,* 942 F.3d 7, 19 (1st Cir. 2019)*; United States v. Braverman*, 376 F.2d 249, 253 (2d Cir. 1967); *United States v. Whittaker,* 67 Fed. Appx. 697, 699-700 (3d Cir. 2003); *United States v. Sterling*, 555 F.3d 452, 456 (5th Cir. 2009); *United States v. Daniels*, 528 F.2d 705, 707-08 (6th Cir. 1976); *United States v. Baltrunas*, 957 F.2d 491, 496 (7th Cir. 1992); *United States v. Opdahl*, 610 F.2d 490, 492-93 (8th Cir. 1979); *United States v. Lopez Alvarez*, 970 F.2d 583 (9th Cir. 1992); *United States v. Treas-Wilson*, 3 F.3d 1406, 1409 (10th Cir. 1993).

[7] Some of the cases cited by appellee also cite to the following language from *Smith*: corroboration "is sufficient which merely fortifies the truth of the confession, without *independently* establishing the crime charged." 348 U.S. at 156 (emphasis added). This accords with the holding in *Opper*; there is no need for the corroborating evidence to establish every element of the crime, *independently*. This does not stand for the proposition that there need not be any independent evidence a crime was *actually committed*. That much is made clear

there are decisions citing to the trustworthiness test and decisions citing to the *Smith-Wong Sun* traditional test, there is a dearth of cases which attempt to bridge the gap between them or explain when either would apply. One case that does assess the interplay is the Ninth Circuit's decision in *Lopez-Alvarez,* which is why this Court should assign it more deferential consideration. 970 F.2d 583. As a result of the current state of federal practice, this Court has the opportunity to be one of the few Courts to lucidly interpret this area and provide refuge from the uncertainty which exists in many federal circuits. *See Smyly*, 287 F.2d at 766-72 (Judge Brown, dissenting) (explaining the confusion surrounding the interplay of the various Supreme Court holdings).

As a result of this confusion over terminology, when Appellee talismanically invokes quotes such as: "proof of the *corpus delicti* is not required," it is not particularly helpful in deciding the proper scope or substance of the current corroboration doctrine. As a perfect example, appellee cites to *Government of the Virgin Islands v. Harris,* 938 F.2d 401, 409-10 (3d Cir. 1991), for the statement, "*corpus delicti* is not required." (Appellee's Br. 17 n.8). On first read, it appears the Third Circuit seems to agree with appellee's position, but upon closer inspection this is no more than the same confusion that permeates this area of law.

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by the *Wong Sun* Court attaching footnote 15 to this exact sentence. 371 U.S. at 489.

The *Harris* court's reference to *corpus delicti* is a reference to a doctrine "more concerned with the elements of the offense," than "trustworthiness." *Id*. This simply means the Third Circuit, like the Supreme Court, correctly rejected a *corpus delicti* rule requiring independent proof of all the elements of the offense. It does not mean that they rejected the basic requirement that the government establish a crime has been committed. In fact, the Third Circuit said as much in *United States v. Whittaker*, citing directly to their holding in *Harris*: "In order to establish *corpus delicti*, the Government need prove only that a crime has been committed; identifying the defendant as the perpetrator of crime is not required." 67 Fed. Appx. 697, 699-700 (3d Cir. 2003) (citing *Harris,* 938 F.2d at 408).[8]

Upon closer analysis, the same can be said for many of the cases cited in appellee's brief. Appellee cites to *United States v. Ybarra,* 70 F.3d 362 (5th Cir. 1995) as evidence that the Fifth Circuit does not require proof a crime has been committed. (Appellee Br. 17 n.10). However, when one steps back from the quoted language and looks at the way the law was applied, it is clear the Fifth Circuit also followed the two-prong assessment of corroboration by requiring independent evidence that a crime was *actually committed* in addition to determining trustworthiness. In *United States v. Sterling*, the Fifth Circuit explained, "[t]he *corpus delicti* requirement was intended to bar confessions to

[8] This is a parallel of *Wong Sun*. 371 U.S. at 489 n. 15.

fictitious crimes." 555 F.3d 452, 456 (5th Cir. 2009). Based on this rationale, the court held, "if Sterling had told the police that he had purchased a gun [] but no gun was found, lack of corroboration would almost certainly prevent his conviction. . . . Possession of the firearms establishes that Sterling's account of acquiring the weapons is not *wholly* a fabrication." *Id*. (citing *Bremerton v. Corbett*, 723 P.2d 1135, 1139 (Wash. 1986)) (emphasis in original); see also *Vogt v. United States*, 156 F.2d 308, 311 (5th Cir. 1946) ("The[] confessions by the Defendants were admissible provided there was also in evidence such extrinsic corroborating facts and circumstances as would justify a jury in finding that *the alleged crime had been committed by someone*.") (emphasis added); *Caster v. United States*, 319 F.2d 850, 852 (5th Cir. 1963) ("To prove the *corpus delicti* of an offense, by evidence independent of the confession, the [g]overnment need only prove *that the offense in question likely has been committed*.") (emphasis added).

Ultimately, when reviewing the current state of federal jurisprudence on this issue, there may be confusion as to what the term "*corpus delicti*" means in a given decision, but there is widespread agreement that there must be evidence a crime was *actually committed* in order to corroborate an accused's admission or confession. The "*corpus delicti* rule" that was cast aside by the Supreme Court was solely the requirement that independent evidence establish *every element* of the crime. The rest of the traditional rule lives on. *Opper,* 348 U.S. at 93-94;

Smith, 348 U.S. at 156; *Wong Sun*, 371 U.S. at 489 n.15; *see also Lopez-Alvarez*, 970 F.2d at 591.

C. Appellee Fails to Acknowledge this Court's Predecessor's Application of *Corpus Delicti* in *United States v. Yates.*

Aside from the interpretations in the federal circuits, this Court's predecessor properly interpreted the Supreme Court's precedent and applied the two-prong analysis in *United States v. Yates,* 24 M.J. 114 (C.M.A. 1987). Appellee does not mention *Yates* at all in their brief. In *Yates*, the Court of Military Appeals joined the Ninth Circuit in requiring the two-prong assessments laid forth by *Opper*, *Smith*, and *Wong Sun.* The *Yates* court correctly identified the questions at play during a corroboration analysis. 24 M.J. 114. First, whether "the injury for which the accused confesses responsibility did-in-fact occur, and that some person was criminally culpable;" and second, "whether the corroborating evidence is sufficient to 'raise an inference of the truth of the essential facts admitted.'" *Id.* at 116-17. That analysis is precisely what appellant asks this Court to apply.

Finally, to the extent this Court finds there is a circuit split which necessitates choosing a side, it should consider the long-standing military justice principle of providing more protection to military accused than offered to similarly situated civilians. When *Opper* and *Smith* were first announced, the Court of

Military Appeals resisted adopting the more-government friendly standard. *United States v. Villasenor*, 6 U.S.C.M.A. 3, 6 (C.M.A. 1955) (professing an inability to follow the holding in *Opper* and adopt "Federal law on the subject.") This was aimed at increasing the protections of military defendants. *United States v. Smith*, 13 U.S.C.M.A. 105, 120 (C.M.A. 1962) (explaining how the conditions of military life open military accused to greater pressures than civilians). This is a common theme in our system. *See United States v. Coleman*, 72 M.J. 184, 187 (C.A.A.F. 2013) ("Article 46 and its implementing rules provide greater statutory discovery rights to an accused than does his constitutional right to due process."); *see also* Mil. R. Evid. 301(a) ("An individual may claim the most favorable privilege provided by the Fifth Amendment to the United States Constitution, Article 31, or these rules."). If this Court believes it must choose between two interpretations of the Supreme Court's precedent, the spirit of the military justice system is on the appellant's side.

Conclusion

Based on the foregoing, the appellant respectfully requests that this Court set aside appellant's findings and sentence.

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Certificate of Compliance with Rules 24(c) and 37

1. This Brief on Behalf of Appellee complies with the type-volume limitation of Rule 24(c) because it contains 4,842 words.

2. This Brief on Behalf of Appellee 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 forgoing in the case of United States v. Whiteeyes, Crim App. Dkt. No. 20190221, USCA Dkt. No. 21-0120/AR was electronically filed brief with the Court and Government Appellate Division on May 13, 2021.

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