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	REPLY BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 20190556 USCA Dkt. No. 21-0325/AR

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 the Case

On 23 February 2022, this court granted appellant's petition for grant of review on the issue above and ordered briefing under Rule 25. (JA 001). On 25 March 2022, appellant filed his brief with this court. The government responded on 25 April 2022. This is appellant's reply.

Argument

1. <u>The government's brief misconstrues appellant's arguments about the two prejudice tests.</u>

Contrary to the government's contention, appellant is not suggesting a conflict exists between the Supreme Court's prejudice analysis in *Rosenberg v. United States*, 360 U.S. 367 (1959), and the factors articulated in *United States v. Kohlbek*, 78 M.J. 326 (C.A.A.F. 2019). (Gov't Br. 12). As appellant explained in his brief, these are just two different prejudice tests.[1] (Appellant's Br. 16–19). The question is how to apply them.

The government dismisses appellant's argument that, when faced with a nonconstitutional Rule for Courts-Martial (R.C.M.) 914 violation, this court should first apply the usual *Kohlbek* analysis. (Gov't Br. 22). According to the government, this is "an obstinately formulaic approach to determine prejudice that ignores case-specific facts and defies precedent and common sense." (Gov't Br. 22). Yet, common sense would suggest following the controlling statute and its attendant precedent.

[1] The government brief proposes a new, third prejudice test. Under this approach, prior to applying the *Rosenberg* or *Kohlbek* analyses courts would first ask whether an appellant had an "adequate substitute for the lost R.C.M. 914 statement." (Gov't Br. 26–27). Given that two other prejudice tests already exist—including one that analyzes whether appellant had the "very same information" as the undisclosed statement—there is no need to create yet another test.

Congress created a separate statute to analyze potential prejudice in a court-martial. Article 59(a), Uniform Code of Military Justice (UCMJ). This court has interpreted that statute and developed a four-factor review for nonconstitutional error. *Kohlbek*, 78 M.J. at 334. This court has also applied that analysis to another nonconstitutional error and R.C.M. 914 violation. *United States v. Clark*, 79 M.J. 449, 454–55 (C.A.A.F. 2020).

If appellant is obstinate, as the government claims, it's merely his stubborn insistence that this court should apply the military-specific prejudice statute that Congress created before turning to *Rosenberg*. After all, *Rosenberg* did not assess prejudice under Article 59(a), UCMJ, but instead applied separate civilian legal authority. (Appellant's Br. 21–23). Because *Rosenberg* is not interpreting the prejudice statute that governs this case, the *Rosenberg* standard does not directly control. (Gov't Br. 25). Moreover, there is a "legislative or executive mandate" to apply a different primary prejudice analysis than the one in *Rosenberg*, namely Article 59(a), UCMJ. (Gov't Br. 25). Thus, as in *Clark*, this court should first apply the *Kohlbek* factors and only consider *Rosenberg* if appellant is not materially prejudiced under the initial test.

In an effort to distinguish *Clark*, the government points to stray language in that opinion about "this case" or "in this case," and suggests the Court should apply a different, more "flexible" prejudice analysis here. (Gov't Br. 25–26). But

the government ignores the language in *Clark* that reiterates that military appellate courts "test for prejudice based on the nature of the right violated." *Clark*, 79 M.J. at 454 (quoting *United States v. Tovarchavez*, 78 M.J. 458, 465 (C.A.A.F. 2019). As this court elaborated, the standard of review and allocation of burdens "depends on whether the defect amounts to a constitutional error or nonconstitutional error." *Clark*, 79 M.J. at 454. The government also ignores the plain language in *Clark* holding that the *Kohlbek* test applies to preserved nonconstitutional evidentiary errors. *Id.* at 455. Together this language suggests the court's prejudice approach in *Clark* was not limited to that case. If the government wants a novel prejudice approach that diverges from this court's precedent, it needs to offer more than empty paeans to "case-specific facts" and "common sense." (Gov't Br. 22). To the extent *Rosenberg* has a place in the R.C.M. 914 prejudice analysis, it should only come after the Article 59(a), UCMJ, analysis.

Finally, even if this court decides to apply *Rosenberg* first and concludes appellant is not prejudiced under that test (a point appellant does not concede), this court should still test for prejudice under Article 59(a), UCMJ, and the *Kohlbek* factors. Congress created this military-specific statute to assess potential prejudice, and this court applied both tests in *Clark* and should also do so here. As the government concedes, under *Kohlbek*, "[t]here is no doubt" appellant was materially prejudiced. (Gov't Br. 22).

2. <u>The U.S. Army Criminal Investigation Division (CID) agents' testimony does not establish that appellant had the "very same information" under *Rosenberg*</u>.

Based on the testimony of the very CID agents who allowed the recorded statements to be destroyed, the government wrongly insists appellant had something like the "very same information" contained in the missing statements. (Gov't Br. 16–17). This is the same argument the Ninth Circuit rejected decades ago in *United States v. Carrasco*, 537 F.2d 372 (9th Cir. 1976). This court should do so as well.

Similar to *Carrasco*, the government here allowed the statements to be destroyed but its agents claimed the substance of these missing statements were incorporated into documents disclosed to the defense.[2] *Id.* at 375–77; (Appellant's Br. 30–31). Due to the government's negligence, however, this court, as in *Carrasco*, cannot determine whether the missing statements were fully incorporated into the evidence disclosed to the defense—in part, because the missing statements no longer exist. As, the Ninth Circuit noted, "[e]ven assuming the honest and full cooperation of [the government agents and prosecution witness

[2] In this case the facts are even less favorable for the government than in *Carrasco*. Here the two CID agents testified that that the written statements *did not* capture all that was said during the interviews, and it was "safe to say" in SPC MP's written statement the agents missed some details in her audio recorded statement apart from rapport building. (JA 079, JA 104, and JA 119).

whose statement was lost], we doubt that they could remember the content of the document with sufficient clarity to enable the court to determine its usefulness as a tool of impeachment." *Carrasco*, 537 F.2d at 377. This inability to recollect is likely even more true here given the witnesses' missing multi-hour interviews.

The government contends this does not matter, and that this court should trust the agents. But, the *Rosenberg* prejudice test requires more than trust: the court needs to verify. (Appellant's Br. 28–30). And here that verification is impossible because the record lacks evidence that would allow this court to determine whether appellant had something like the "very same information" in the missing statements without engaging in impermissible speculation.[3] Thus, under *Rosenberg*, the military judge's error was not harmless.

[3] Although the record does not establish how much of the seven to nine hours SPC MP spent at CID she was being actively interviewed, that does not support the government's argument that appellant was not prejudiced. (Gov't Br. 21). In fact, this uncertainty about the length of SPC MP's interview further demonstrates the difficulty in determining whether appellant had anywhere near the "very same information" as the missing statement, because it is impossible to know how long she was interviewed for—much less all that the missing statement contained.

Conclusion

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

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CERTIFICATE OF COMPLIANCE WITH RULE 24(D)

This reply brief complies with the type-volume limitation of Rule 24(c) because it contains 1,457 words. It also complies with the typeface and type style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of United States v. Sigrah, Crim. App. Dkt. No. 20190556, USCA Dkt. No. 21-0325/AR was electronically filed with the Court and Government Appellate Division on May 5, 2022

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