

# UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before  
WALKER, EWING, and PARKER  
Appellate Military Judges

**UNITED STATES, Appellee**  
**v.**  
**Staff Sergeant JONATHAN MARIN**  
**United States Army, Appellant**

ARMY 20210375

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ORDER  
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## WHEREAS:

On 24 June 2021, an officer panel sitting as a general court-martial, convicted appellant, contrary to his pleas, of one specification of rape and one specification of sexual assault, charged in the alternative, in violation of Article 120, Uniform Code of Military Justice [UCMJ]. The military judge sentenced appellant to a dishonorable discharge and confinement twelve years. The convening authority approved the findings and adjudged sentence and the military judge entered judgment. This case is now before us for review under Article 66, UCMJ.

On 4 April 2022, appellant filed a motion for an evidentiary hearing, alleging the prosecutor in appellant's case violated his duty to disclose materials to the defense pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and Rules for Courts-Martial (R.C.M.) 701(a)(2)(A), 701(a)(6), and 914. In support of this motion, appellant filed a motion to attach Defense Appellate Exhibits A, B, C, and D, which was granted on 7 April 2022. Defense Appellate Exhibit A is an affidavit from Major Brian Tracy, a senior Trial Defense Service (TDS) attorney, stating that one of his paralegals, Sergeant (SGT) [REDACTED], possesses knowledge of a potential discovery violation and violation of R.C.M. 914 made by the trial counsel in appellant's case while SGT [REDACTED] served as a government paralegal on appellant's case. Major Tracy's affidavit states SGT [REDACTED] was present during a recorded government interview of a witness where: (1) the trial counsel stopped an audio recording of a witness interview when the witness became critical of the victim, and (2) neither the actual recording nor its existence were disclosed to defense. In response, this Court ordered SGT [REDACTED] to provide an affidavit to address the allegations made against the trial counsel in appellant's case. On 12 May 2022, this Court granted appellee's motion to attach SGT [REDACTED] affidavit (dated 29 April 2022). On 24 May 2022, appellant filed a motion to attach Defense Appellate Exhibits E, F, and G, consisting of affidavits from appellant's trial

defense counsel (Mr. Lance Wood, Captain (CPT) Michelle Nicotera, and MAJ Jordan Miller), which this Court granted on 25 May 2022.

Sergeant [REDACTED] states in his affidavit that the trial counsel, CPT Bernard M. Marshall, conducted an interview of First Lieutenant (1LT) [REDACTED] between on or about August 2020 and on or about October 2020. Sergeant [REDACTED] stated this interview was recorded by a hand held device used to record other administrative proceedings. Sergeant [REDACTED] affidavit alleges that when 1LT [REDACTED] began providing information about the victim's "behavior, conduct and/or demeanor" he was directed to stop the recording with the "universal silent kill it hand gesture." Sergeant [REDACTED] described this gesture as CPT Marshall sliding his hand across his throat. Sergeant [REDACTED] affidavit further alleges that the interview of 1LT [REDACTED] continued for several more minutes after the recording was stopped and that CPT Marshall informed him, "We are not going to record any more interviews." Sergeant [REDACTED] affidavit states he is unable to recall exactly what was said by 1LT [REDACTED] about the victim and "to prevent mischaracterizing the information provided to Captain Marshall and myself during this interview, I do not wish to formally state whether the information provided to us was positive or negative for the government's case." Sergeant [REDACTED] affidavit then states to the best of his knowledge, the recording, which was in possession of the "Brigade Legal Section," was never provided to appellant's defense team. Sergeant [REDACTED] states he contacted CPT Marshall about the recording via email and never received a response. A copy of SGT [REDACTED] email was enclosed with his affidavit and attached to the record when this Court granted appellee's motion to attach.

A comparison between the affidavits of MAJ Brian Tracy and SGT [REDACTED], reflect that SGT [REDACTED] seemed more certain as to the details of the witness' testimony when he first reported it to MAJ Tracy. Sergeant [REDACTED] inability to recall whether the witness gave the prosecution "positive or negative" information is inconsistent with MAJ Tracy's version of SGT [REDACTED] recollection of events.

After identifying these inconsistencies in the affidavit, and applying the factors set forth in *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997), we now order a post-trial hearing pursuant to *United States v. DuBay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967), to resolve material inconsistencies in the post-trial affidavits and develop the facts necessary to resolve appellant's claim that the trial counsel violated his duty to disclose materials to the defense pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and Rules for Courts-Martial (R.C.M.) 701(a)(2)(A), 701(a)(6), and 914 in appellant's court-martial.

NOW THEREFORE, IT IS ORDERED:

1. That the record of trial is returned to The Judge Advocate General for such action as is required to conduct a limited hearing pursuant to *DuBay* by an appropriate convening authority.

2. At a minimum, the *DuBay* military judge will resolve the inconsistencies between the affidavits filed in this case by determining the following issues related to the government's interview of 1LT [REDACTED] and whether the government complied with their duty to disclose pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and R.C.M. 701(a)(2)(A), 701(a)(6):

- a. What, if any, negative information did 1LT [REDACTED] provide during the interview about the victim? Was anyone other than CPT Marshall and SGT [REDACTED] present for the interview with 1LT [REDACTED]? If so, whom?
- b. Was the interview with 1LT [REDACTED] recorded? If so, was the recording stopped during the interview? If so, who made the decision to stop the recording and at what point during the interview was the recording stopped? What are the facts and circumstances surrounding the decision to turn off the recording device? Was anyone other than CPT Marshall and SGT [REDACTED] aware there was a recording of 1LT [REDACTED] interview? If so, whom?
- c. If the interview was recorded, was appellant's defense counsel informed of the existence of the recording? Did the government ever provide a copy of the recording to appellant's defense counsel? If a recording of 1LT [REDACTED] interview was created and not disclosed to defense, obtain the facts and circumstances surrounding CPT Marshall's decision not to disclose its existence or provide a copy to defense counsel.
- d. Did the government provide a memorandum for record (MFR) of its interview of 1LT [REDACTED]? Who drafted the MFR? Whom, if anyone edited the MFR before it was provided to appellant's defense counsel? What information was removed or changed in the initial draft of the MFR? Provide any and all drafts of the MFR and a copy of the MFR provided to appellant's defense counsel.
- e. Did CPT Marshall tell SGT [REDACTED] future interviews would no longer be recorded? If so, what are the facts and circumstances surrounding that decision?
- f. Did defense counsel file a discovery request? If so, provide a copy of the defense discovery request and all of the government responses to

the defense discovery request including documentary, e-mail, and verbal responses to the defense discovery request.

- g. Is a copy of the recording available? If so, attach a copy of the recording to the record. If not, describe the facts and circumstances surrounding its unavailability.
- h. Were there any other trial counsel assisting with 1LT [REDACTED] interview or the prosecution of *United States v. Marin*? If so, were they aware that 1LT [REDACTED] interview was recorded?
- i. Did anyone other than CPT Marshall and SGT [REDACTED] assist in responding to the defense discovery requests? If so, describe the facts and circumstances surrounding their involvement.
- j. What details, if any, was the Chief of Military Justice aware of regarding the government interview of 1LT [REDACTED]?
- k. Did CPT Bernard Marshall, or any other trial counsel working on appellant's case, record any other witness interviews during the course of appellant's case? If so, what are the names of the witnesses whose interviews were recorded? Did those witnesses testify at trial? Was the existence of those recordings disclosed to appellant's trial defense counsel? If not, what are the circumstances for why those recordings were not disclosed?

3. The *DuBay* military judge will permit the presentation of witnesses and evidence, make rulings as appropriate, enter findings of fact, and, as necessary, reach conclusions of law, concerning the questions above. The findings of the *DuBay* military judge will address the matters set forth in this order and resolve inconsistencies in the affidavits and testimony of the witnesses. Specifically, the military judge will address whether the government violated their duty to disclose pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and R.C.M. 701(a)(2)(A), R.C.M. 701(a)(6), and R.C.M. 914.

4. At this hearing those individuals with relevant information, to include but not limited to those who have provided affidavits regarding appellant's claim that the government violated its obligations of disclosure under R.C.M. 701(a)(2)(A), R.C.M. 701(a)(6), R.C.M. 914, and *Brady v. Maryland* shall be required to provide testimony, unless the *DuBay* military judge makes specific findings as to why particular witnesses are deemed to be unavailable. These individuals include: SGT [REDACTED], CPT Bernard Marshall, MAJ Brian Tracy, 1LT [REDACTED], the trial counsel(s) assisting CPT Marshall with appellant's court-martial, Mr. Lance Wood, CPT Michelle Nicotera, MAJ Jordan Miller; and the supervising Chief of Military Justice.

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5. The hearing will be concluded no later than sixty (60) days from the date of this Order.

6. At the conclusion of the proceedings the record, with an authenticated verbatim transcript of the hearing, will be returned promptly to this Court for further review.

DATE: 26 May 2022

FOR THE COURT:



JAMES W. HERRING, JR.  
Clerk of Court

CF: JALS-DA  
JALS-GA  
JALS-TJ  
JALS-CCR  
JALS-CR4