



Established in 1775, the Army Judge Advocate General's (JAG) Corps is the oldest law firm in the nation.

The branch insignia was created in 1890 and includes a sword and pen, crossed and wreathed. Today, the insignia worn by all uniformed members of the Corps reflects the many components of the Corps' mission: the pen denotes the recording of testimony; the sword, the military character of the Corps' mission; and the wreath, the traditional symbol of accomplishment.



The United States Army
Court of Criminal Appeals

and



VALPARAISO
UNIVERSITY

LAW

United States v. Coleman

April 10, 2012

3:00 PM

Tabor Auditorium

COUNSEL AND COMMISSIONER BIOGRAPHIES (cont.)

Captain Bradley M. Endicott joined the U.S. Army as a Judge Advocate in January 2006 and currently serves as an appellate attorney for the Government Appellate Division. Before joining the Government Appellate Division, CPT Endicott was assigned to Trial Defense Service-Europe, in Heidelberg, Germany. While stationed in Germany, CPT Endicott also served as a legal assistance attorney, administrative law attorney, and trial counsel. In 2008-2009, CPT Endicott deployed to Operation Iraqi Freedom with the 18th Engineer Brigade as the unit's Brigade Trial Counsel and Operational Law Attorney. He received his bachelor's degree from the University of Tennessee and his J.D. from William Mitchell College of Law. CPT Endicott is admitted to practice before the U.S. Court of Appeals for the Armed Forces, the U.S. Army Court of Criminal Appeals, and the bar of state of Minnesota.

Court Commissioner:

Captain Christopher Simons joined the Judge Advocate General's Corps in 2005 and currently serves as Commissioner for Panel 4, U.S. Army Court of Criminal Appeals. Prior assignments include: Government Appellate Division, Arlington, VA (2010-2011); Battalion Judge Advocate, 2d Battalion, 5th Special Forces Group (Airborne), Iraq and Fort Campbell, KY (2008-2010); Defense Attorney, Trial Defense Service, Iraq and Fort Hood, TX (2006-2008); and Legal Assistance Attorney, Office of the Staff Judge Advocate, U.S. Army Infantry Center and Fort Benning, GA (2005-2006). CPT Simons earned an A.B., With Distinction, from The University of Michigan (1995) and a J.D. from the University of Detroit Mercy School of Law (2002). He previously served as an enlisted Soldier and noncommissioned officer in the U.S. Army Infantry. A member of the Michigan Bar, he is admitted to practice in Michigan, U.S. District Court for the Eastern District of Michigan, the U.S. Court of Appeals for the Sixth Circuit, and the U.S. Court of Federal Claims, as well as the U.S. Army Court of Criminal Appeals, the U.S. Court of Appeals for the Armed Forces, and the Supreme Court of the United States. He and his wife Melissa have three children, with their fourth expected in August.

HISTORY OF THE JAG CORPS

The Judge Advocate General's Corps comprises lawyers, legal administrators, paralegals, and court reporters. The Corps' members are commissioned and warrant officers, enlisted soldiers, and civilians and are members of the Active Component, Army Reserve, and National Guard. They are also members of two honorable professions: the profession of arms and the profession of law.

The Corps' primary mission is to support warfighters through a variety of activities. Judge Advocates assist commanders with Military Justice, Operational Law, and Civil Law. Army lawyers also provide legal services to soldiers and their families, boosting morale and allowing soldiers to stay focused on their mission. Most importantly, The Judge Advocate General's Corps provides the structure and support for maintaining discipline, the foundation of an effective fighting force.

The Judge Advocate General's Corps has a long and proud history of service to the United States Army and to our Nation. On July 29, 1775, The Continental Congress created the position of Judge Advocate of the Army and appointed William Tudor as the first Judge Advocate in order to provide legal advice to General George Washington. As the number of Judge Advocates increased, the Judge Advocate General's Department was created in 1884. After World War II, the Judge Advocate General's Corps was formed. On its 211th birthday, July 29, 1986, the Corps was placed under the U.S. Army Regimental System.

From the Revolutionary War through today's conflicts abroad, Judge Advocates have deployed with the units they serve. They have served with distinction in every major operation and campaign of the United States Army. Today, nearly 400 JAG personnel are deployed to twenty-one countries, including Afghanistan, Kuwait, Kosovo, and Korea. The home of the Corps is the Judge Advocate General's Legal Center and School in Charlottesville, Virginia.

THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

In 1951, The Judge Advocate General of the Army established the Army Court of Criminal Appeals predecessor, the U.S. Army Board of Review, pursuant to Article 66, Uniform Code of Military Justice (UCMJ), enacted by the U.S. Congress in 1950. The UCMJ empowered the Board to "weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses." It also charged each Board with "affirm[ing] only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Finally, the UCMJ made the decisions of the Army Board of Review binding on The Judge Advocate General and, by implication, binding on the Secretary of the Army and the President as well.

The Military Justice Act of 1968 redesignated the various service Boards of Review as Courts of Military Review and provided each court with a chief judge, appointed by The Judge Advocate General, and enabled each court to either sit *en banc* or in panels, empowering the chief judge to designate the senior, or presiding, judge for each panel. The All Writs Act empowers the court to issue extraordinary writs, such as habeas corpus, mandamus, and prohibition, in aid of its jurisdiction. The Military Justice Act of 1983 gave the court additional power to entertain interlocutory appeals by the Government from certain adverse trial rulings by the military judge. Congress also expanded the authority of The Judge Advocate General under Article 69(a), UCMJ, to refer to the court records of trial other than those automatically reviewed by that court under Article 66, UCMJ.

In 1994, the U.S. Army Court of Military Review was renamed the U.S. Army Court of Criminal Appeals. This coincided with the renaming of the U.S. Court of Military Appeals, our superior court, to the U.S. Court of Appeals for the Armed Forces. More recently, The Judge Advocate General, by regulation, granted tenure to Army appellate and trial judges.

Currently, the U.S. Army Court of Criminal Appeals is composed of three judicial panels, each with three appellate judges (one of whom is the senior judge) and a commissioner (staff attorney). It is supplemented by military judges from the U.S. Army Reserve.

COUNSEL AND COMMISSIONER BIOGRAPHIES (cont.)

She became a Judge Advocate in February 2008. Her first assignment as a judge advocate was the 101st Airborne Division, Fort Campbell, Kentucky, 2008-2010. While at the 101st Airborne Division, CPT Poirier served as the Chief of Legal Assistance, Brigade Trial Counsel, Senior Trial Counsel, and Chief of Military Justice. She deployed to Camp Speicher, Iraq in support of Operation Iraqi Freedom in 2008. Captain Poirier has served as an appellate defense attorney since 2010. She received her BS from the United States Military Academy in 2001 and her JD from the Wake Forest University School of Law in 2007. She is admitted to practice before the U.S. Court of Appeals for the Armed Forces and the U.S. Army Court of Criminal Appeals. She and her husband are blessed with two children.

For the Government (Appellee):

Colonel Michael E. Mulligan assumed duty as the Chief, Government Appellate Division, US Army Legal Services Agency, Fort Belvoir, VA in July 2010. This is his third tour in Government Appellate Division having served in positions as both a Captain and a Lieutenant Colonel. His prior assignments include: Executive Officer to the Deputy Commanding General, Multi-National Forces Iraq; Deputy Staff Judge Advocate, US Army Europe; Staff Judge Advocate, 7th Joint Multi-National Training Command (Germany); Staff Judge Advocate, 1st Infantry Division (Germany); Chief, Trial Counsel Assistance Program (Arlington, VA); Assignments Officer, Office of the Judge Advocate General, (Washington, DC); Chief, Criminal Law, III Corps (Fort Hood, TX); Branch Chief, Government Appellate Division, US Army Legal Services Agency, (Arlington VA); Officer in Charge, Wiesbaden Legal Center, V Corps (Germany); Trial Defense Counsel, Darmstadt (Germany), Trial Counsel, V Corps, (Germany). Colonel Mulligan is admitted to practice before the US Supreme Court, the US Court of Appeals for the Armed Forces, the US Army Court of Criminal Appeals, and the Supreme Court of Oklahoma. He is a graduate of the National War College, Army Command and General Staff College, the Judge Advocate General's Officer Graduate Course (L.L.M.), and the Judge Advocate General's Officer Basic Course. His civilian education includes the University of Tulsa, College of Law (JD), and the State University of New York at Oswego (BA).

COUNSEL AND COMMISSIONER BIOGRAPHIES

For the Appellant:

Colonel Patricia Ham currently serves as the Chief, U.S. Army Defense Appellate Division, which represents all individuals convicted in Army courts-martial whose approved sentences include confinement for one year or more or a punitive discharge. Colonel Ham's prior assignments include: Associate Judge, Panel 4, U.S. Army Court of Criminal Appeals, Arlington, Virginia; Chief, Trial Defense Service Southwest, Fort Hood, Texas; Professor and Chair, Criminal Law Department, U.S. Army Judge Advocate General's School, Charlottesville, Virginia; Senior Defense Counsel, Fort Hood, Texas; Branch Chief, Government Appellate Division, Arlington, Virginia; Instructor and Course Coordinator, Defense Institute of International Legal Studies, Newport, Rhode Island; Trial Defense Counsel, Nuremberg and Bamberg, Germany; Trial Counsel, Fort Lewis, Washington; and Legal Assistance Attorney, Fort Bragg, North Carolina and Deployed to Operation Desert Shield/Desert Storm. Colonel Ham is a member of the bar of the Commonwealth of Pennsylvania, and is admitted to practice before the Army Court of Criminal Appeals, the Court of Appeals for the Armed Forces, and the Supreme Court of the United States. She is a graduate of the Judge Advocate Officer Graduate Course (LL.M. 1997, *Honor Graduate*), the Judge Advocate Officer Basic Course (1991), and the Industrial College of the Armed Forces (Master of Science in National Resource Strategy 2011). Her civilian education includes George Washington University School of Law (LL.M. 2003, *With Highest Honors*), Temple University School of Law (JD 1985, *cum laude*), and Syracuse University (BA 1982, *cum laude*). COL Ham has seven Meritorious Service Medals, among other awards, and was promoted to colonel in March 2009. She is married to Wilton Ham, a retired U.S. Army colonel currently working for the Department of the Army. They have four children and two grandchildren.

Captain (CPT) Meghan M. Poirier was commissioned as a Second Lieutenant in the Military Police Corps in June 2001. As a Military Police Officer, CPT Poirier served as Platoon Leader and Assistant S-3 in the 95th Military Police Battalion, Mannheim, Germany, 2001-2003. She then served as the Executive Officer for the U.S. Army Europe Office of the Provost Marshal from 2003-2004.

STATEMENT OF THE CASE

On May 13 and 14, 2010, Specialist Walter S. Coleman (appellant) was tried at Fort Leonard Wood, Missouri by a panel of officer and enlisted Soldiers sitting as a general court-martial. Contrary to his pleas, appellant was convicted of rape and adultery in violation of Articles 120 and 134 of the Uniform Code of Military Justice (UCMJ).

The panel sentenced appellant to ten years of confinement, reduction to the lowest enlisted rank of Private (E-1), forfeiture of all pay and allowances, and a dishonorable discharge.

The convening authority approved only so much of the sentence as provided for five years of confinement, reduction to the grade of Private (E-1), and a dishonorable discharge.

Appellant's defense appellate counsel have raised two assignments of error, only one of which will be orally argued. Appellate counsel from the U.S. Army's Defense Appellate Division and the Government Appellate Division will argue on behalf of appellant and the government, respectively. As the party asserting the error, appellant's counsel will present argument first, with the government responding afterwards. Each side is allotted thirty minutes for argument; the appellant's counsel, if they wish, may reserve time for rebuttal.

FACTUAL BACKGROUND

Appellant and Specialist (SPC) Pilago were accused by D.D., SPC Pilago's neighbor, of sexually assaulting her after she had been drinking with them. When interviewed by investigators, appellant invoked his rights under Article 31 of the UCMJ and declined to provide a statement. SPC Pilago waived his rights and provided a statement to investigators wherein he made certain admissions of wrongdoing and also implicated the appellant. Prior to appellant's court-martial, appellant's counsel filed a discovery request for "immediate disclosure of any agreement with [SPC Pilago] to cooperate with the government in any way." No such disclosure was made by government counsel prior to appellant's court-martial. On May 12, 2010, SPC Pilago was convicted of forcibly orally sodomizing D.D. and was sentenced to 42 months of confinement and a dishonorable discharge. Appellant's court-martial began on the following day. When the government indicated that it planned to call SPC Pilago, appellant's counsel made a motion in limine to prevent him from testifying about his conviction or his sentence. The military judge granted the motion. Thereafter, SPC Pilago testified in appellant's court-martial, appearing as both a witness for the government to corroborate some of D.D.'s testimony and as a witness for the defense to testify that he and appellant had previously engaged in consensual sexual activity with D.D.. After the conclusion of the court-martial, appellant's counsel discovered that SPC Pilago had apparently testified against appellant in exchange for the Staff Judge Advocate's recommendation to the convening authority that SPC Pilago's sentence be reduced by 12 months. After appellant's defense counsel raised the agreement as an issue in appellant's post-trial submissions under the Rules for Courts-Martial 1105 and 1106, the convening authority ordered a post-trial hearing pursuant to Article 39(a) of the UCMJ to look into the matter. On January 5, 2011, the military judge conducted a post-trial hearing which confirmed the existence of an unwritten agreement between the Staff Judge Advocate and SPC Pilago, as well as the non-disclosure of that agreement. At the conclusion of that hearing, appellant's counsel requested a mistrial based upon the "nondisclosure of both material and favorable information to the defense." Although the military judge concluded that the agreement should have been disclosed to appellant's counsel, he found that the error was harmless beyond a reasonable doubt. and denied the motion for a mistrial.

ASSOCIATE JUDGE BIOGRAPHY

Colonel Theresa A. Gallagher assumed her current duties as an Associate Judge with the United States Army Court of Criminal Appeals in August 2010. Additionally, she was appointed by the Secretary of Defense to serve as an Associate Judge with the United States Court of Military Commission Review and was sworn in on 29 September 2010. Her prior assignments include: Command Judge Advocate, Area Support Group- Kuwait; Trial Judge, 1st Judicial Circuit; Chief, Government Appellate Division; Deputy Chief, Government Appellate Division; Branch Chief, Government Appellate Division; Chief, Claims Division, III Corps & Fort Hood; Chief, Criminal Law Division and Special Assistant United States Attorney, III Corps & Fort Hood, Texas; Senior Defense Counsel, Region V (Fort Lewis, WA); Training Attorney, Trial Counsel Assistance Program, Government Appellate Division; Administrative Law Attorney, 1st Armored Division (Baumholder, Germany); Trial Counsel, 1st Armored Division (Baumholder, Germany); Trial Defense Counsel (Kitzingen and Wuerzburg, Germany). Colonel Gallagher is admitted to practice before the US Supreme Court, the US Court of Appeals for the Armed Forces, the US Army Court of Criminal Appeals, and the Supreme Court of California. She is a graduate of the Military Judge's Course, Army Command and General Staff College (non-resident), the Judge Advocate Officer Graduate Course (L.L.M.), the Combined Arms and Services Staff School, the Judge Advocate Officer Basic Course. Her civilian education includes University of the Pacific, McGeorge School of Law (JD-1990), where she was a member of the international moot court and the trial advocacy team, and California State University, Fresno (BA-1987). She also possesses the additional skill identifiers of Master Military Justice Practitioner and Parachutist. Her military awards include: Army Meritorious Service Medal (with a Silver Oak Leaf Cluster); Army Commendation Medal (Oak Leaf Cluster); Army Achievement Medal; National Defense Service Medal (with Service Star), Global War on Terrorism Expeditionary Medal; Global War on Terrorism Service Medal; Army Service Ribbon, and the Overseas Service Ribbon (with 3 device). Colonel Gallagher is married to an Army officer and has three wonderful children.

ASSOCIATE JUDGE BIOGRAPHY

Colonel Thomas D. Cook assumed his current duties as an Associate Judge with the United States Army Court of Criminal Appeals in June 2011. His prior assignments include: Associate Professor, Industrial College of the Armed Forces; Staff Judge Advocate, 3rd Army/US Army Central; Chief Plans Officer, Personnel, Plans, and Training Office; Staff Judge Advocate, 2nd Infantry Division; Deputy Staff Judge Advocate, XVIIIth Airborne Corps; Assistant Executive Officer, US Army Legal Services Agency; Officer in Charge, Wiesbaden Legal Center; Litigation Attorney and Compliance Attorney, Environmental Law Division; Labor Counselor and Administrative Law Attorney, Fort Lee, Virginia; Trial Counsel and Defense Counsel, XVIIIth Airborne Corps.

Colonel Cook is admitted to practice before the United States Supreme Court, the United States Army Court of Criminal Appeals, the Pennsylvania Supreme Court and the New Jersey Supreme Court. He is a graduate of the US Army War College, the US Army Command and General Staff College, the 46th Judge Advocate Officer Graduate Course (LL.M.-1998), the Combined Arms and Services Staff School (1994), Airborne School (1989) and the 118th Judge Advocate Officer Basic Course (1989). His civilian education includes Rutgers (Camden) School of Law (JD-1988) and Dickinson College (BA-1985). Colonel Cook's awards include: Legion of Merit, Meritorious Service Medal (with seven Oak Leaf Clusters), Joint Service Commendation Medal, Army Commendation Medal, Global War on Terrorism Service Medal, Korea Defense Service Medal, Army Service Ribbon, and Overseas Ribbon. He is also authorized to wear the Army Staff Identification Badge, Parachutist Badge and German Parachutist Badge. Colonel Cook is married to Cynthia M. (Watt) Cook. They are the proud parents of David (17) and Melissa (14).

ISSUE PRESENTED

THE MILITARY JUDGE ERRED IN FAILING TO GRANT A DEFENSE MOTION FOR MISTRIAL BASED ON THE GOVERNMENT'S FAILURE TO DISCLOSE THAT APPELLANT'S CO-ACCUSED TESTIFIED AGAINST HIM IN EXCHANGE FOR THE STAFF JUDGE ADVOCATE'S RECOMMENDATION THAT HIS SENTENCE BE REDUCED BY 12 MONTHS.

SUMMARY OF ARGUMENTS

Appellant argues that the government violated appellant's due process rights when it suppressed "material" evidence (consisting of SPC Pilago's agreement) in contravention of the United States Supreme Court's decision in *Brady v. Maryland*, 373 U.S. 83, 87 (1963) and Rule for Courts-Martial 701(a)(6) which implemented that holding within the military. Accordingly, appellant contends the military judge erred in not granting a mistrial at the post-trial hearing. Although appellant agrees with the military judge's findings that there was a discovery violation, appellant disagrees with his findings that the government's nondisclosure was harmless beyond a reasonable doubt. Accordingly, appellant urges the court to find the military judge abused his discretion in not granting a mistrial and requests the court set aside appellant's rape conviction and sentence.

The government appellate counsel responds that the military judge's decision as to the mistrial should not be overturned because his findings of fact are not clearly erroneous, his decision was not influenced by an erroneous view of the law, and his decision is not outside of the range of choices reasonably arising from the applicable facts and law. The government argues there was no *Brady* violation in this case because appellant's defense team had greater or equal access to the relevant evidence based upon the fact that the defense team had access to SPC Pilago and could have discovered the existence of the agreement by questioning him directly. The government further argues the nondisclosure was not "material" under a *Brady* analysis because there is no reasonable probability the outcome of the proceeding would have been different had the agreement been properly disclosed. In the alternative, the government argues that even if the court were to determine the nondisclosure was "material," the court should find that the nondisclosure was harmless beyond a reasonable doubt. If there had been a proper disclosure and the defense had argued thereafter that SPC Pilago was testifying falsely against appellant in return for the Staff Judge Advocate's clemency recommendation, the government could have made use of SPC Pilago's prior consistent statement implicating appellant in order to rebut the defense argument of recent fabrication and the outcome of the trial would have the same.

SENIOR JUDGE BIOGRAPHY

Colonel (COL) Martin L. Sims has served on the US Army Court of Criminal Appeals since August of 2009. In addition to his current duties as a Senior Judge with that court, he also serves as an Associate Judge on the US Court of Military Commission Review (hearing cases arising out of the Military Commissions in Guantanamo Bay, Cuba). Prior to his appointment to the bench, Colonel Sims served as the Staff Judge Advocate for the 25th Infantry Division and the Multi-National Division North in Tikrit, Iraq. His previous assignments include service as a Deputy Chief of the International and Operational Law Division of the Office of The Judge Advocate General; Deputy Staff Judge Advocate for the U.S. Army, Alaska; Brigade Judge Advocate for the 172d Separate Infantry Brigade; Deputy Chief of the U.S. Army Claims Service, Europe; Deputy Legal Advisor to the Commander of the NATO Stabilization Forces in Bosnia-Herzegovina; Military Legal Assistant to the Army Auditor General; Commissioner with the Army Court of Criminal Appeals; Defense Appellate Counsel; Senior Trial Counsel for the 32d Army Air Defense Command; and Trial Counsel/Legal Assistance Attorney for the 41st Field Artillery Brigade. Over the course of his military career, he has deployed to Afghanistan, Albania, Bosnia-Herzegovina, Croatia, the Former Yugoslav Republic of Macedonia, Hungary, Kosovo, Kuwait, and Iraq. His military awards include the Bronze Star Medal, the Army Meritorious Service Medal (with Silver and Bronze Oak Leaf Clusters). Colonel Sims is admitted to practice before the US Supreme Court, the US Court of Appeals for the Armed Forces, the US Army Court of Criminal Appeals, and the Supreme Court of Arkansas. He is a graduate of the Joint Advanced Warfighting Studies Program of the Army Command and General Staff College (2004); the Joint Planners Course (2004); the Judge Advocate Officer Graduate Course (LL.M.-1999); the Combined Arms and Services Staff School (1995); the Judge Advocate Officer Basic Course (1990); the University of Tennessee College of Law (JD-1990)(where he served as the Managing Editor of the Law Review and graduated with honors); and Vanderbilt University (BA-1987)(where he was an R.O.T.C. Distinguished Military Graduate). He has been awarded the Additional Skill Identifiers of Joint Strategist, Joint Planner, Parachutist, and Expert Military Justice Practitioner.