IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellant	) BRIEF ON BEHALF OF APPELLANT IN) SUPPORT OF PETITION FOR GRANT OF) REVIEW
v.	) Crim.App. Dkt. No. 20140536
	) **USCA Dkt. No. _____/AR**
Staff Sergeant (E-6) **MUWWAKKIL, TAHIR L.** United States Army, Appellee	)

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

Issues Presented

I. WHETHER THE U.S. ARMY COURT OF CRIMINAL APPEALS ERRED IN ITS APPLICATION OF BOTH THE FEDERAL JENCKS ACT, (18 U.S.C. § 3500) AND RULE FOR COURTS-MARTIAL 914.

II. WHETHER THE U.S. ARMY COURT OF CRIMINAL APPEALS ERRED IN ITS DEFERENCE TO THE MILITARY JUDGE'S FINDINGS AND CONCLUSIONS, AS SHE FAILED TO CONSIDER THE TOTALITY OF THE CASE, AND INSTEAD MADE A PRESUMPTION OF HARM BEFORE ORDERING AN EXTRAORDINARY REMEDY. SEE, e.g., *KILLIAN v. UNITED STATES*, 368 U.S. 231 (1961).

Statement of Statutory Jurisdiction

The United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 62, Uniform Code of Military Justice, 10 U.S.C. §862 [hereinafter UCMJ].[1] The statutory basis for this Honorable Court's jurisdiction is found in Article 67(a)(2), UCMJ, which allows review in "all cases reviewed by a Court of Criminal Appeals which the Judge Advocate

[1] UCMJ, Art. 62, 10 U.S.C. §862.

General orders sent to the Court of Appeals for the Armed Forces (C.A.A.F.) for review."[2]

Statement of the Case

Appellee is charged with rape and assault consummated by a battery, in violation of Articles 120 and 128, UCMJ.[3] The charges result from an incident in July 2013, at which time the appellee allegedly sexually assaulted Ms. GP by forcing her to perform oral sex on him and choking her.

The charges were investigated pursuant to Article, (Art.) 32, UCMJ on December 17, 2013.[4] Ms. GP testified at the hearing, and was subject to lengthy direct and cross-examination. Appellee was represented by counsel. A senior defense counsel and a trial defense paralegal were present for the duration of the hearing, and took copious notes.[5] This testimony was reduced to a summarized transcript and delivered to appellee, without objection.

Prior to referral, appellee filed a discovery request for the audio recordings of the Art. 32 testimony. The government recognized that the recordings had been lost or damaged. The portion including the cross-examination of Ms. GP was mistakenly

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[2] UCMJ, Art. 67(a)(3), 10 U.S.C. §867(a)(2). Certificate of Review, signed by the Judge Advocate General, dtd October 15, 2014.
[3] Charge Sheet.
[4] JA, 284-289.
[5] JA, 192-206 (Art. 39a session).

recorded over and no copies were retained. The charges were referred to general court-martial on January 15, 2014.[6] An enlisted panel convened as a general court-martial on May 6, 2014. Appellee was arraigned, jeopardy attached, and the government presented evidence. Ms. GP testified as the complaining witness and was subject to direct examination. At the conclusion of the direct examination, appellee immediately moved to strike her testimony, alleging violations of the Jencks Act, 18 U.S.C. § 3500, and Rule for Courts-Martial (RCM) 914.[7] On May 7, 2014, the military judge held a 39a session to litigate this motion. Testimony was taken from multiple members of the military justice office, including the paralegal detailed to the Art. 32 hearing. The government conceded negligence in the loss of the audio recordings.

At the hearing, the government attempted to argue that this was a simple pre-trial discovery issue, but the military judge focused the hearing on the operations within the military justice shop, and a failure to maintain equipment accountability. The government also argued the lack of bad faith or gross negligence, and a lack of demonstrable harm suffered by appellee.

The military judge did not make any written findings of fact and conclusions of law. Instead, she made oral findings of

[6] Charge Sheet.
[7] JA 9, 223-298 (App.'s Motion to Strike Testimony).

fact and conclusions of law. She found "RCM 914 has been triggered and the government is required to provide a substantially verbatim recital of an oral statement." She found that the summarized transcript was not a substantially verbatim recitation, after comparing the written document to the remaining audio recording.[8]

In a conclusion of law, the military judge stated that a Jencks case is reviewed under the totality of the circumstances.[9] She found that the loss of the audio was not intentional, nor was there evidence that "the government had some sort of plan to deprive the accused or the defense of this audio."[10] The military judge found negligence, and possibly gross negligence, on the part of the detailed paralegal. Specifically, she found that the Private First Class paralegal demonstrated a lack of concern over the preservation of evidence.[11] She found inconsistencies with Ms. GP's testimony, as indicated by the investigating officer's (IO) report.[12] "In order to impeach her, the defense needs to have access to those statements. That is the whole point of the Jencks Act."[13]

In finding no adequate substitute for the lost recording, the military judge stated, "the case law is clear that it's not

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[8] JA at 195-196.
[9] JA at 196.
[10] JA at 200.
[11] JA at 201.
[12] JA at 201.
[13] JA at 201.

up to the military judge to determine whether or not the statement is particularly useful. It's not my job to look through it and ensure that every single inconsistency is made. My job is to ensure that the defense counsel has the tools he needs for adequate cross-examination in accordance with the law which is the Jencks Act and RCM 914 which codifies that in the military justice system."[14]

The government filed a timely notice of appeal, and appealed this issue to the Army Court of Criminal Appeals on July 7, 2014, pursuant to Article 62, UCMJ.[15] The appeal was denied in an opinion of the court on August 26, 2014.[16] The government filed a motion for reconsideration, with a suggestion to reconsider *en banc* on September 11, 2014. The Army Court declined to adopt the suggestion to reconsider *en banc*, and denied the government's motion for reconsideration on September 12, 2014.[17]

ISSUES PRESENTED

I. WHETHER THE U.S. ARMY COURT OF CRIMINAL APPEALS ERRED IN ITS APPLICATION OF BOTH THE FEDERAL JENCKS ACT, (18 U.S.C. § 3500) AND RULE FOR COURTS-MARTIAL 914.

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[14] JA at 202.
[15] JA at 8-34 (Government appeal to Army Court).
[16] JA at 1.
[17] JA at 1-7. (Army Court's denial of reconsideration).

II. WHETHER THE U.S. ARMY COURT OF CRIMINAL APPEALS ERRED IN ITS DEFERENCE TO THE MILITARY JUDGE'S FINDINGS AND CONCLUSIONS, AS SHE FAILED TO CONSIDER THE TOTALITY OF THE CASE, AND INSTEAD MADE A PRESUMPTION OF HARM BEFORE ORDERING AN EXTRAORDINARY REMEDY. SEE, e.g., *KILLIAN v. UNITED STATES*, 368 U.S. 231 (1961).

Standard of Review

Pursuant to UCMJ Article 62(b), this Court "may act only with respect to matters of law, notwithstanding section 867(c) of this title (Article 67(c))," in a government appeal from a military judge's order excluding evidence that constitutes substantial proof of a material fact at trial.

In mixed questions of law and fact, this honorable Court has added to the abuse of discretion standard, stating that a factual determination would not be overturned "unless it is 'arbitrary, fanciful, clearly unreasonable, or clearly erroneous,' *or influenced by an erroneous view of the law.*"[18]

Conclusions of law are reviewed *de novo*.[19] This issue is two-fold, but it is primarily a question of statutory application; whether or not RCM 914 applies to these facts, and if so, whether the military judge correctly applied RCM 914 to these facts and circumstances. As such, the review is *de novo*.

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[18] *United States v. Thompson*, 63 M.J. 228, 230 (C.A.A.F. 2006)(citing *United States v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004)(emphasis added).
[19] *United States v. Cohen*, 63 M.J. 45, 49 (C.A.A.F. 2006)(citing *Swift*, 53 M.J. at 446).

Law and Analysis

I. WHETHER THE U.S. ARMY COURT OF CRIMINAL APPEALS ERRED IN ITS APPLICATION OF BOTH THE FEDERAL JENCKS ACT, (18 U.S.C. § 3500) AND RULE FOR COURTS-MARTIAL 914.

Beginning with the mid-trial motion to strike testimony, and continuing through the Army court's analysis of this issue, the wrong body of law has been applied. This is a pre-trial discovery issue. The fundamental error is that the military judge simply did not ask the right questions, and this failure resulted in the misapplication of law.

The military judge was faced with a case dispositive motion in the middle of the government's case in chief. The government counsel was granted less than 12 hours to evaluate the appellee's citations to federal law, and respond in kind. Caveated as a motion to strike, and interpreted as a motion to suppress evidence, the government was essentially precluded from presenting the proper argument, which is spoliation of evidence.

1. The history of the Jencks Act defines it as a rule of exclusion, designed to protect the government from overwhelming burdens to disclose information after jeopardy has attached.

The Jencks Act was enacted in 1957. It was drafted by Congress in response to the Supreme Court ruling in *Jencks* v.

United States.[20] *Jencks* required unlimited discovery obligations after a witness had testified at trial. In the federal system, there is a much reduced access to information for a criminal accused. They are often not present and privy to the testimony of witnesses at federal proceedings, such as a grand jury session. The Jencks Act was designed as a protective shield for witnesses, to preclude disclosure of their identities until the last possible moment.[21] It is a rule of procedure that was later incorporated into the federal rules of practice. It is now subsumed in Fed. Rules of Criminal Procedure 26.2.[22] We have likewise subsumed the Jencks Act requirements into RCM 914, a rule of procedure.

A review of the legislative history distinguishes this Court's past application of the Jencks Act to military justice.[23] The Jencks Act is concerned with "limiting and regulating defense access to government papers, and it is

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[20] *Jencks* v. *United States*, 353 U.S. 657 (1957). This opinion guaranteed that a criminal defendant is entitled to inspect the statements related to any witness who testifies against him, and determine for himself whether to use them in his defense.

[21] The legislative history of 18 U.S.C. § 3500 specifically defines this rule as a limitation on *Jencks*. It was intended to ensure the safety of federal witnesses in criminal trials, and allowing limited disclosures until immediately prior to trial. This has no relationship on the pre-trial discovery process, and the federal rules, like the rules for courts-martial, allow a different timeline for disclosure of information. RCM 701 requires disclosures prior to arraignment.

[22] Fed. Rules. Crim. Proc. 26.2.

[23] See, e.g., *United States v. Calley*, 46 C.M.R. 1131 (A.C.M.R.), *aff'd*, 22 U.S.C.M.A. 534, 48 C.M.R. 19(1973). See also, *United States v. Marsh*, 21 M.J. 445 (1986).

designed" as a rule of exclusion.[24] Its ultimate purpose is to protect the fair and just administration of criminal justice, and is equally applied to government and a criminal accused.[25]

The right to disclosure is not unfettered, and the prosecution will at times have other interests. However, an accused has a right to statements that might assist them with witness impeachment. The Jencks Act is a balance of these interests, and provides an accused with notice so that the defense "is assured that witness has made no secret contrary statements in the past."[26]

2. The Jencks Act should have little application in the modern courts-martial system. It is subsumed by RCM 914, and the spirit of Jencks is not satisfied if it is applied erroneously as the military judge did in this case.

There is a long history of the Jencks Act being applied to military justice, but the cases on point are generally at odds with the intent of the statute. For example, *United States v. Combs* discusses the applicability to Art. 32 testimony. This case held that pretrial and trial obligations are different, and Art. 32 testimony is subject to production.[27] However, *Combs* failed to consider the

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[24] *Palermo v. United States*, 360 U.S. 343 (1959).
[25] *Golberg v. United States*, 425 U.S. 94 (1976)
[26] *United States v. Head*, 586 F.2d 508 (1978).
[27] *United States v. Combs*, 28 C.M.R. 866 (A.F.B.R. 1959)

purpose and intent of Jencks, which is to ensure an accused is properly notified of statements for use as impeachment. It also does not discuss the regulatory parameters of a commander's pretrial investigation, which is not a quasi-judicial proceeding. As of now, there is no obligation to retain a verbatim recitation in any regulation, and the accused is given at least a summarized transcript upon completion. At the time of this hearing, there was no regulatory requirement to even make an audio recording at an Art. 32 hearing. It may have been a best practice, but the recording is essentially duplicative to the information presented at the hearing, in the presence of the accused, and otherwise preserved in the summarized transcript. With this military judge's ruling, finding ancillary evidence of such import that it becomes a case dispositive issue, she has essentially created a per se rule for the creation and preservation of information. It de facto abandons the balancing test that is required in all cases adjudicated under the Jencks Act, as well as RCM 914.

United States v. Marsh takes this a step further, analyzing the question as to whether Jencks applies when the accused is present for the taking of testimony at an Art. 32 hearing. This Court held that Jencks does apply, but arguably mis-applied the purpose of Jencks in the dicta.

This Court concluded that Jencks does apply to statements taken in the presence of the accused based upon "the broad language of the statute in its amended form" and "its failure expressly to except statements made in the presence of the accused and his counsel."[28] Considering that Jencks is essentially a rule of exclusion, designed to protect the government from trial by fire, it was arguably inappropriate for the Court to expand the rules beyond the legislative intent, by looking for words of specific exclusion.

3. **The focus of the military judge, as affirmed by the Army court, was misplaced. This is an issue of evidence spoliation, a question that must be answered under RCM 703 before analyzing RCM 914. The proper review starts with the rules of discovery.**

The language of 914 mirrors the plain language of the Jencks Act, but that does not mean that the federal case law regarding Jencks should be controlling here. Our discovery process in the military justice system is vastly more broad than the federal system. Our rules require disclosure of all information that is favorable to a criminal accused, prior to arraignment. In the federal context, that language is limited to *Brady* material, which requires disclosure of exculpatory information.[29]

If the rules for pre-trial discovery have been followed by trial counsel, as they were in this case, it will

[28] *United States v. Marsh*, 21 M.J. 445, 451 (1986).
[29] *Brady v. Maryland*, 373 U.S. 83 (1963).

generally be unnecessary to resort to a remedy under RCM 914.[30] As per RCM 701, trial counsel are required to disclose all witness statements. Military rules for statements of anticipated witnesses require disclosure pre-arraignment.[31] The rules of discovery are continuous and on-going. The government is required to notify an accused of lost or otherwise compromised evidence as well.[32] All rules of procedure were followed at each step of this court-martial.

Per RCM 703, this is an issue of lost evidence. In general, each party is entitled to the production of evidence that is relevant and necessary. [33]

The rules for discovery were followed to the letter, yet the military judge refused to entertain a discussion of the totality of this case.[34] If she had, the result certainly would have been different. The analysis applied would have been that for lost evidence, as defined in RCM 703, the potential remedies would not have resulted in the striking of case dispositive testimony. Per RCM 703(f)(2), the audio recording is deemed unavailable, and not subject to the

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[30] See, RCM 914, discussion. Manual for Courts-Martial (MCM) (2012).
[31] RCM 701.
[32] RCM 701(d).
[33] RCM 703(f)(1). Evidence is not deemed necessary when it is cumulative. In a separate pre-trial motion, appellee stated that this testimony was an almost mirror testimony of Ms. GP's written statement to Army criminal investigators. This written statement was properly disclosed and remains in the appellee's possession.
[34] JA at 112. The trial counsel attempted to engage in this analysis with the military judge, but was denied the opportunity to do so.

compulsory process. "A party is not entitled to the production of evidence which is destroyed, lost, or otherwise not subject to compulsory process."[35]

The government recognizes that Ms. GP, as a complaining victim of sexual assault, is a witness of central importance to the case. The appellee should be armed with all available evidence, in order to properly construct their case. However, the judge made almost no inquiry into whether this appellee was in fact missing necessary information. He was present at the Art. 32 hearing. Appellee was represented by counsel, and a senior defense counsel and trial defense paralegal were noted as present in the IO report. The defense paralegal testified that she took over twenty pages of notes, for the sole purpose of impeaching Ms. GP. And at a later time, the appellee motioned for a brand new Art. 32, since Ms. GP's testimony was "largely ineffective" due to her language barriers and inability to understand the questions posed on cross-examination.

However, lost evidence does not reach an RCM 914 motion without evidence of bad faith. The applicable test for remedy is defined in RCM 703(f)(2). As explained in *United States v. Madigan*, the military judge must make an

[35] RCM 703(f)(2).

affirmative inquiry into whether the evidence was lost due to the bad faith of the government.[36] In this case, the military judge specifically found no bad faith. If so, then the accused might be entitled to remedy, but this is premised on an affirmative showing of prejudice due to the loss.

With no evidence of bad faith, and no evidence that the appellee took any effort to remedy this issue prior to jeopardy attaching, it is inappropriate to reach to RCM 914 for a remedy mid-trial. If this had been properly litigated under the rules of discovery, the government would have had opportunity to remedy the situation. Appellee himself speculated in his Motion for Continuance as to proper remedies to cure the defect. However, the defense specifically opted not to pursue a request for remedy, other than the continuance itself. He tactically waited until jeopardy attached and then raised the issue under Jencks rather than the proper application of the pretrial compulsory process. In an analysis of bad faith and prejudice, appellee is not blameless here. He made a strategic decision to wait to seek a far reaching and improper remedy.

Reviewing the plain language of RCM 914, this rule, and its extraordinary remedy do not apply to these facts.

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[36] *United States v. Madigan*, 63 M.J. 118 (C.A.A.F. 2008).

RCM 914(a) states that "after" a witness has testified in a criminal proceeding, an accused may motion for all statements "in" the possession of the government. As stated above, this evidence was not in the possession of the government, lost well before the referral of charges. Then, RCM 914(e) discusses remedy, "if" the other party "elects not to comply with an order." The plain language implies some discretion being exercised by the trial counsel. That is not the case here. There is no evidence to compel, because it was lost pre-trial. There is no election to deny production, as no party has access to the recording. The plain language of the erroneously applied rule simply does not fit the circumstances of this case. Even if this Court finds that Jencks does apply to this case, it was mis-applied by the military judge. There is no showing of bad faith, there is no showing of prejudice. As a litany of cases state, not all Jencks Act violations require remedy, and it is certainly an abuse of discretion to reach the extraordinary remedy of striking case dispositive testimony without an application of the proper test.

II. WHETHER THE U.S. ARMY COURT OF CRIMINAL APPEALS ERRED IN ITS DEFERENCE TO THE MILTIARY JUDGE'S FINDING AND CONCLUSIONS, AS SHE FAILED TO CONSIDER THE TOTALITY OF THE CASE, AND INSTEAD MADE A PRESUMPTION OF HARM BEFORE ORDERING AN EXTRAORDINARY REMEDY. SEE. e.g., *KILLIAN V. UNITED STATES*, 368 U.S. 231 (1961).

The facts of *United States v. Killian* parallel this case. In *Killian*, the defense made a mid-trial motion requesting any and all documents related to a testifying witness, citing favorable facts and ignoring other issues that happened in the context of the entire trial process. The Solicitor General contended that "on the actual facts, many of which are not incorporated in the record before us, petitioner is not entitled to, and that we should not on this incomplete and imperfect record order raised this as an issue".[37] The Solicitor General was referencing documents that were destroyed during the investigative process, and much of the requested information was destroyed and would not otherwise be subject to compulsion under the Jencks Act. The Supreme Court agreed, remanding this case only for a hearing to determine the truth behind the Solicitor General's assertions that the record was incomplete.[38]

In this case, the issue of the lost recording was placed directly before the trial court, prior to jeopardy attaching. In January of 2014, appellee motioned for a new Art. 32 in this case, stating to the court,

> "By far the most significant portion of the pre-trial investigation in the present case was the examination and cross-examination of the alleged victim. These examinations were rendered largely ineffective due to a significant language barrier. Over and over again [Ms. GP] would say that she did not know or did not remember. Oftentimes [sic], it also seemed that she

[37] *United States v. Killian*, 368 U.S. 231, 263; 82 S.Ct. 302 (1961).
[38] *Killian*, 368 U.S at 242, 82 S. Ct. at 309.

was using these phrases when she did not understand a question or did not have the vocabulary to respond."[39]

None of this is discussed in appellee's motion to strike, and the military judge made no reference to the procedural history in her oral findings of fact or conclusions of law. This was an abuse of discretion, as the prior motions related to the Art. 32 testimony go directly to the question of negligence that caused the loss, and demonstrate that the accused suffered no prejudice due to the lost audio recording.

Both parties stipulated that the government abided by the rules of discovery, and that the loss was disclosed prior to arraignment.[40] The defense made an affirmative motion to the trial court, notifying the military judge of the lost audio recording. They stated that a continuance was warranted in order to determine how to remedy the issue of the lost recording. Appellee speculated that a deposition might be in order, but never returned to the court to request any further remedy. Rather, appellee devised a strategy, and opted to proceed to trial armed with the summarized transcript and the sworn CID statements of Ms. GP.[41]

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[39] JA at 207-219 (Defense Motion for a New Article 32).
[40] JA at 284-289 (Defense Motion for Continuance, dtd February 16, 2014, acknowledging notification of the loss on February 13, 2014).
[41] JA at 105. Notably, appellee was fully prepared to argue this issue, blindsiding the government and the military judge by filing a well researched written motion pertinent only to the federal Jencks Act, and disregarding the companion rules of courts-martial. Although not argued at the trial level, it is arguably an open question whether Congress intended the Jencks Act to

A continuance is, in fact, a remedy articulated in the plain language of RCM 703(f)(2) when an accused is dealing with lost evidence. If an accused has received a proper remedy under the rules, it is untenable that he be allowed to motion for continued relief mid-trial, based on the same underlying alleged government failure.

The issue was litigated to appellee's apparent satisfaction, and he proceeded on the road to trial. At the 39a session, appellee acknowledged that he had the opportunity to review the summarized transcript, the IO report, and did so in the pre-trial phase.[42] Appellee also noted that he was represented by counsel at the Art. 32 hearing, a second defense counsel was present for the entire proceeding, and a defense paralegal took copious notes for the express purpose of impeaching the victim.[43]

All of this is evidence of no prejudice. However, the military judge abdicated her role in this regard, and committed legal error byher refusal to engage in a prejudice analysis.

> "On the evaluation of possible prejudice to the defendant by the absence of this grand jury testimony, the trial court should consider that there is available to the defense here three echelons of the witness' prior testimony: (1) the preliminary statements made to the FBI and other investigators

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apply extraterritorially. See *United States v. Martinelli*, 62 M.J. 52 (C.A.A.F. 2005)(holding that the Child Pornography Prevention Act of 1996 (CPPA), 18 U.S.C. § 2252A (2000) did not apply extraterritorially).

[42] JA at 173.

[43] JA at 173-175.

> before she appeared to the grand jury; (2) her statements to the detective and other government officers after her grand jury testimony as to what she actually testified; and (3) her testimony at a pre-trial hearing. All of this will be available to defense counsel for use for impeachment purposes at the trial."[44]

The facts in *Perry* are almost identical to the totality of this case. The accused retained a copy of the sworn investigative statements, and that accused likewise filed a pre-trial motion that the prior statements were ineffectual. *Perry* can be distinguished, however, once that trial judge reached the prejudice analysis. He focused directly on the import of the witness' testimony and the impact of the loss, making a specific finding that there was no harm. Here, the military judge averred her duty, stating this is "not my job."[45]

Her specific conclusion of law was, "the case law is clear that it's not up to the military judge to determine whether or not the statement is particularly useful."[46] This borrows the language in Jencks first prong, which only limits the discretion of a government counsel to determine what prior statements might be favorable to an accused. It does not extend to a military judge, when she is charged with applying the balancing test articulated in *Marsh*.

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[44] *United States v. Perry*, 1972 U.S. App. LEXIS 7093, 29-30 (D.C. Cir. 1972).
[45] JA at 202.
[46] JA at 202.

Unfortunately the Army court mirrored these failures in its own analysis. They presumed the applicability of Jencks and RCM 914, and focused solely on the question of whether the military judge abused her discretion in the choice of remedy. They reviewed this issue as a suppression of evidence, and did not even touch upon the fact that this is actually a question of spoliation of evidence. The Army court did not articulate any specific findings of fact, yet deferred in total to the decision of the military judge. Likewise, although the military judge made no written findings or conclusions, the Army court did not question how her factual basis supported her conclusions of law. To grant such deference is nearly unheard of in our body of case law.

The military judge, and the Army court, not only made factual errors, they affirmatively failed to consider required information in the determination of both negligence and prejudice. Therefore, this Court should review the entirety of this case *de novo,* granting very little if any deference to the military judge's findings.

"Not every Jencks Act error is prejudicial or requires a remedy."[47] This Court, as well as the federal circuits, have repeatedly found that the appropriate sanctions for Jencks Act violations "should turn on the particular circumstances of the

[47] *Boyd,* 14 M.J. at 705; *United States v. Dixon,* 8 M.J. 149 (C.M.A. 1979); *Rosenberg v. United States,* 360 U.S. 367 (1959).

case at bar and on a balancing of the potential prejudice to the accused and the Government's culpability."[48]

Both the trial judge and the Army Court failed to evaluate this issue under the proper rules of procedure. However, even assuming this is a RCM 914 issue, both the military judge and the Army court, in blind deference, mis-applied the balancing test, willfully refusing to engage in an analysis of harm, and failing to consider the totality of the case before reaching a case dispositive ruling.

[48] *Boyd*, at 705. See also, *United States v. Arra*, 630 F.2d 836 (1st Cir. 1980); *United States v. Miranda*, 526 F.2d 1319(2d Cir. 1975); *United States v. Bryant*, 439 F.2d 642 (D.C. Cir. 1971)

Conclusion

WHEREFORE, the Government respectfully requests that you reverse the decision of the Army Court of Criminal Appeals which affirmed the military judge's decision to strike Ms. GP's testimony, and grant the government's appeal. Government does request oral argument on this issue.

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CERTIFICATE OF SERVICE AND FILING

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on October 24, 2014.

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