

INDEX OF ANSWER ON BEHALF OF APPELLEE

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Issues Certified

- 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).

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On December 6, 2013, the government accused Staff Sergeant (SSG) Tahir L. Muwakkil of committing rape, assault consummated by battery and adultery in violation of Articles 120, 128 and 134, UCMJ, 10 U.S.C. §§ 920, 928 and 934 (2012). (JA 93). On May 7, 2014, the complaining witness testified for the government, after which defense requested any statement made by the witness for examination under Rule for Courts-Martial (R.C.M.) 914 and 18 U.S.C. § 3500 (1970) (Jencks Act). (JA 106). After hearing evidence and argument on the motion the military judge ruled to strike Ms. GP's trial testimony. (JA 202).

The government thereafter gave notice of its intent to appeal her decision. (JA 203). On May 9, 2014, the government moved the court to reconsider its trial ruling and to compel defense to produce handwritten notes authored by a paralegal during the earlier Article 32 hearing. Defense timely answered the motion on May 14, 2014. (JA 260-266, 273-279). The military judge denied the motion to reconsider reasoning the government introduced neither new facts nor argument for the court's consideration. (JA 280).

On May 16, 2014, the government filed a notice of appeal pursuant to R.C.M. 908 and the military judge subsequently abated the proceedings. (JA 282-283). In a

published opinion the Army Court of Criminal Appeals (Army Court) unanimously affirmed the military judge's findings and conclusions on August 26, 2014. (JA 1-7). The government then requested the Army Court reconsider its decision *en banc* on September 11, 2014. (JA 75-88). That request failed to specify appropriate grounds required under Rules 17(a) and 19.1(b) of the Army Court's Internal Rules of Practice and Procedure. Instead the motion raised a new argument—Jencks Act violations require the military judge to consider "discovery obligations found in R.C.M. 701." (JA 78). The Army Court declined to reconsider its decision. The appellant now appeals the Army Court's decision.

Statement of Facts

The charges against SSG Muwakkil stem from an incident occurring on July 3, 2013 where he allegedly forced the complaining witness, Ms. GP, to perform oral sex on him and used his hands to choke her.

The Article 32 pretrial investigation for *United States v. Muwakkil* occurred on December 17, 2013. During the investigation, the government relied on two separate audio recording devices to capture witness testimony. (JA 115-116, 120). The primary device resembles a laptop and records audio on separate compact discs. (JA 116). The

government relied on a secondary handheld device, an Olympus Digital Voice Recorder, due to concern about the primary device malfunctioning. (JA 120, 147). The primary recorder did in fact malfunction during the Article 32 investigation. (JA 126-127). The government recorder, Private First Class (PFC) Bernard Tate, made this fact known to the parties during the investigation. (JA 126). The Investigating Officer (IO) asked government counsel if a recess would be appropriate to which government counsel responded in the negative and instructed PFC Tate to continue recording with the secondary device only. (JA 127).

After the IO closed the Article 32 hearing, the Olympus recorder remained in PFC Tate's possession for approximately two days, during which he prepared a summarized transcript of the investigation. (JA 120). Private First Class Tate provided both his copy of the summarized transcript and the Olympus recorder to the incoming military justice non commissioned officer in charge (NCOIC), Sergeant (SGT) Vanessa Marin, for review. (JA 121). Sergeant Marin reviewed the transcript for formatting only and did not compare the summary with the audio recording for substantive accuracy. (JA 139, 142). Sergeant Marin did not brief PFC Tate with instructions on

how to copy the audio recording to a compact disc. (JA 143). She instead "assume[d] that all paralegals do things the same way." (JA 143). Prior to that point, PFC Tate never received explicit instructions on how to copy audio recording to a compact disc, or on where to store recording devices not in use. He knew only that "usually [recording devices are] just kept in the MJ-NCOIC office." (JA 128).

Sergeant Marin returned the Olympus recorder to PFC Tate who in turn may have placed it in the desk drawer that belonged to outgoing military justice NCOIC, Specialist (SPC) Sampson. (JA 121, 131). The desk drawer was not under lock and key; the military justice office did not require an accountability log; and the office did not establish a policy for safeguarding the Olympus recorder. (JA 152, 155).

Private First Class Tate did not attempt to retrieve the audio recording from the Olympus recorder prior to his giving it to SPC Sampson despite as he assumed there to be an office practice backing up audio recordings onto a compact disc. (JA 123, 132). Sometime later, PFC Tate attempted to retrieve the audio recording from the Olympus recorder to no avail. (JA 122). Private First Class Tate then went on emergency leave. (JA 123). Specialist Sampson recalled neither seeing the Olympus recorder in the

desk drawer nor receiving it from another individual during that time. (JA 148). For an unspecified period of time the Olympus recorder remained unaccounted for, and SPC Sampson did not know of the Olympus recorder's whereabouts until the following week. (JA 140, 148).

In preparation for another investigation, SGT Marin searched for the Olympus recording device but could not locate it anywhere in the military justice section. (JA 140). Sometime later, a paralegal recovered the device whereafter SGT Marin discovered it contained no data files. (JA 141). Later still, SGT Marin learned from a Defense email request that the missing audio recording had not been copied to a compact disc. (JA 143). During SGT Marin's inquiry into the missing audio recording, she searched PFC Tate's drawers and desk area although she saw "a lot of CDs [she] couldn't find any of Muwakkil." (JA 143).

The chief of military justice, Captain (CPT) Dana Sherman, claimed she told the paralegals to copy the audio recording to a compact disc. (JA 162-163). However, no paralegal recalled receiving the instruction. (JA 163). Captain Sherman testified she was on leave during the time and did not confirm that PFC Tate copied the audio recording to a compact disc. (JA 164). Captain Sherman testified the trial counsel, CPT Ebony Todd, should have

confirmed the act in her absence. (JA 164). However, CPT Todd later stipulated she "did not give the military justice paralegals any instructions concerning audio in this case." (JA 259). Captain Sherman believed "there was an issue in the recording and transferring of the audio in this case." (JA 164).

The IO recommended the convening authority not refer the charges to court-martial primarily due to Ms. GP's inconsistent testimony at the hearing. (JA 218). The convening authority however referred the charges to a general court-martial on January 15, 2014.

Trial began on May 6, 2014. During its case-in-chief, the government called Ms. GP to testify as the chief witness. After the direct examination, defense requested (1) an audio recording of Ms. GP's earlier statement made during the Article 32 in accordance with R.C.M. 914 and the Jencks Act; and (2) any notes by government agents either penned during the Article 32 hearing or otherwise memorializing any conversations had with Ms. GP. (JA 106; 223-238).

The government responded with a haphazard three-part position: (1) R.C.M. 914 "does not apply to investigations under Article 32;" (2) Ms. GP's sworn testimony during the Article 32 "is not a statement within 914-required to be

produced.;" and (3) there is "not a requirement for the government to provide a verbatim transcript for the Article 32." (JA 107-111). The military judge asked the government, "So do you intend to comply with the request?" (JA 111). Counsel responded the government could not produce the tapes because a paralegal destroyed the audio. (JA 111-112).

Additional facts necessary to answer the appellant's certified issues are contained in the arguments below.

Standard of Review

1. Light Most Favorable to the Prevailing Party.

In an Article 62, UCMJ, petition, this Court reviews the military judge's decision directly and reviews the evidence in the light most favorable to the prevailing party at trial. *United States v. Wicks*, 73 M.J. 93, 98 (C.A.A.F. 2014) (citing *United States v. Baker*, 70 M.J. 283, 287-88 (C.A.A.F. 2011)); *United States v. Cowgill*, 68 M.J. 388, 390 (C.A.A.F. 2010). Staff Sergeant Muwakkil is the prevailing party in this case and therefore the Court must consider the evidence in a light most favorable to him.

2. Matters of Law.

This Court has no authority to find facts in an Article 62 appeal or "substitute its own interpretation of the facts." *United States v. Cossio*, 64 M.J. 254, 256

(C.A.A.F. 2007); *Baker*, 70 M.J. at 290. Rather, in reviewing a military judge's ruling on a motion to suppress under Article 62(b), this Court reviews fact finding under the clearly-erroneous standard and conclusions of law under the de novo standard. *Baker*, 70 M.J. at 287. Therefore, on mixed questions of law and fact, a military judge "abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect." *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995).

The abuse of discretion standard calls "for more than a mere difference of opinion. The challenged action must be arbitrary . . . , clearly unreasonable, or clearly erroneous." *United States v. White*, 69 M.J. 236, 239 (C.A.A.F. 2010) (quoting *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010)) (internal quotation marks omitted). With respect to the Jencks Act, implementation "must be entrusted to the good sense and experience of the trial judge subject to appropriately limited review of appellate courts." *United States v. Boyd*, 14 M.J. 703, 705 (N.M.C.M.R. 1982) (citing *United States v. Augenblick*, 393 U.S. 348, 355 (1969)).

Law and Argument

1. Appellant failed to challenge the trial court's ruling on the basis of evidence spoliation at the Army Court and this Court should treat it as the law of this case.

In its brief to this Court, Appellant for the first time now avers the military judge erred by framing the government's failure at trial to produce Ms. GP's prior recorded testimony as a Jencks Act/R.C.M. 914 violation and not as a pre-trial discovery issue. The root of the problem, in Appellant's view, lies with the military judge who "simply did not ask the right questions" of counsel. (Brief of Appellant at 7).

Yet there is nothing in the record to support an inquiry other than that provided in R.C.M. 914 and the Jencks Act. The defense motioned to produce, for examination and use in cross examination, Ms. GP's prior statements relating to the subject matter of her trial testimony under R.C.M. 914 and the Jencks Act. The government's position at trial was two-fold: (1) the IO and trial counsel's *notes* need not be produced; and (2) the *audio recording* "is not a statement within 914." (JA 109). If it cannot be shown that Ms. GP adopted either the IO or trial counsel's notes then they would fall outside of R.C.M. 914 and the defense must resort to R.C.M. 701. However, it is the audio recording that is the subject of

this appeal and Appellant does not dispute the audio recording of Ms. GP's statement is both a substantially verbatim recording of her oral statement and was recorded contemporaneously with her oral statement.

Appellant nonetheless now asserts "the trial counsel attempted to engage in [an R.C.M. 703] analysis with the military judge, but was denied the opportunity to do so." (Brief for Appellant at 12). In support, Appellant cites to JA 112. There, the trial counsel disclosed the circumstances surrounding the destroyed audio recording. (JA 112). Where is the discussion about a discovery violation?

During argument on the trial motion the government made no mention of R.C.M. 703 focusing rather only on its degree of culpability under the Jencks analysis. (JA 100-104). On appeal to the Army Court the government again made no challenge to the military judge's ruling on the basis of R.C.M. 703 but rather that the military judge's finding of negligence was ambiguous and her decided remedy was unreasonable under the circumstances. Since the correctness of the ruling by the military judge was not challenged at the lower court, this Court should treat it as the law of this case. *United States v. Grooters*, 39 M.J. 269, 273 (C.M.A. 1994); See *United States v. Sales*, 22

M.J. 305, 307 (C.M.A. 1986) (unchallenged ruling by the Court of Military Review "constitutes the law of the case and binds the parties"); See also *Morris v. American National Can Corporation*, 988 F.2d 50, 52 (8th Cir. 1993) (law of the case applies as result of waiver when party fails to raise issue on appeal). This Court should dismiss the government appeal for this reason alone thus preserving the finality of judgment and conserving judicial resources.

As Judge Ryan recognized in *United States v. Blazier*, the better course is "to seek the views of the parties and permit them to advance their arguments, rather than to address these issues *sua sponte*." 68 M.J. 439, 443 (C.A.A.F. 2010) (citing *Greenlaw v. United States*, 554 U.S. 237 (2008)) ("our adversary system is designed around the premise that the parties . . . are responsible for advancing the facts and arguments entitling them to relief") (quoting *Castro v. United States*, 540 U.S. 375, 381-83 (2003) (Scalia, J., concurring in part and concurring in the judgment)).

Appellant's argument moreover is without merit. Appellant argues the remedy-striking Ms. GP's testimony-is extraordinary because the military judge failed to consider the government's otherwise "to the letter" adherence to its

discovery obligations under R.C.M. 701. (Brief of Appellant at 12). Appellant also appears to argue the defense must first help the government "remedy th[e] issue prior to jeopardy attaching"-almost like a condition precedent-before he can raise a motion under R.C.M. 914. (Brief of Appellant at 14). In support, Appellant reads the R.C.M. 914, discussion:

See also R.C.M. 701 (Discovery). Counsel should anticipate legitimate demands for statements under this and similar rules and avoid delays in the proceedings by voluntary disclosure before arraignment

to mean disclosing to defense that the audio tapes are destroyed satisfies the government's discovery obligations. (Brief of Appellant at 12, 17). A rational reading of this provision makes clear that although the government is not required under R.C.M. 914 to produce a witness' statement until after he has testified on direct examination, in the interest of justice and fair play trial counsel should anticipate producing the statement for the opposing party well in advance of trial.¹

¹ See R.C.M. 914 analysis at A21-64 ("Prosecution compliance with R.C.M. 701 should make resort to this rule by the defense unnecessary in most cases. The rule is not intended to discourage voluntary disclosure before trial, even where R.C.M. 701 does not require disclosure, so as to avoid delays at trial.").

Nor is the right to production under R.C.M. 914 subsumed by the government's discovery obligations under R.C.M. 701. Appellant argues R.C.M. 701 requires trial counsel to disclose sworn or signed statements before trial and thus it should control. Rule for Courts-Martial 914 is not a discovery tool and applies only at trial for the purpose of impeaching an opposing witness. *United States v. Ciesielski*, 39 C.M.R. 839, 851 (N.B.R. 1968). The President moreover codified a separate and specific production right under R.C.M. 914. It is a well established canon of statutory construction that "a more specific statute will be given precedence over a more general one. . ." *Corley v. United States*, 556 U.S. 303, 316 (2009) (quoting *Busic v. United States*, 446 U.S. 398, 406 (1980)).

Appellant extends its flawed argument by claiming that, because the government destroyed the audio recording, it is now unavailable and thus defense is not entitled to it. (Brief of Appellant at 13). Evidence does not become unavailable if the responsible party through wrongdoing makes it so. Mil. R. Evid. (804)(b)(6). Appellant's argument, if taken to its logical conclusion, suggests any evidence can be made unavailable as long as government paralegals destroy it.

However, this cannot be so. The government's disclosure obligation under both R.C.M. 914 and the Jencks Act attaches once the government gathers and takes possession of the evidence in question. 18 U.S.C. § 3500 (1970); R.C.M. 914(a)(1). While Appellant is correct the government is not required to record verbatim an Article 32 hearing, that decision to create evidence necessarily includes the duty to preserve it. Contrary to Appellant's assertion, that duty existed long before the military judge ruled in this case. As the D.C. Circuit Court noted, "the duty to produce discoverable evidence entails the antecedent duty to preserve that evidence." *Myers v. United States*, 15 A.3d 688, 690 (DC Cir. 2011) (citing *Allen v. United States*, 649 A.2d 548, 553 (D.C. Cir. 1994)). The court held that before a request for discovery is made, the duty of disclosure is operative as a duty of preservation. *Id.* Military courts have echoed the duty to preserve verbatim notes both before and after *Myers*. See *United States v. Combs*, 28 C.M.R. 866, 870 (A.F.B.R. 1959); *United States v. Scott*, 6 M.J. 547 (A.F.C.M.R. 1978).

2. The government conceded at the Army Court that it violated Rule for Courts-Martial 914 and the Jencks Act. Here, Appellant does not challenge the military judge's findings of fact. In arriving at the decided remedy, the military judge applied the correct law and weighed the relevant factors.

Contrary to Appellant's contention that the military judge and the Army Court were influenced by an erroneous view of the law, it is the Appellant's argument that misses the mark. The triggering event for production under R.C.M. 914, in Appellant's view, is not "after a witness other than the accused has testified on direct examination" but rather only when evidence is lost in bad faith. (Brief of Appellant at 13); R.C.M. 914(a). Appellant's position conflicts with the plain meaning of R.C.M. 914(a) and is wholly unsupported by both statute and case law. Appellant also urges this Court to set aside nearly sixty years of precedent. (Brief of Appellant at 9).

The Jencks Act requires the government, upon request of the defense after a government witness has testified, to produce any prior "statement" of the witness relating to the subject matter about which the witness has testified. 18 U.S.C. § 3500 (1970); *United States v. Lewis*, 38 M.J. 501 (A.C.M.R. 1993) (citing *Palermo v. United States*, 360 U.S. 343 (1959)). Stemming from the United States Supreme Court case that shares its name, a primary purpose of the Jencks Act is to provide the defense with information for use in the impeachment of government witnesses. *Id.*; see also *United States v. Jencks*, 353 U.S. 657 (1957); *United States v. Hamilton*, 27 M.J. 501, 508 (A.C.M.R. 1993), *aff'd*

42 M.J. 1 (C.A.A.F. 1995). It is well established that the Jencks Act applies to trials by court-martial. *United States v. Marsh*, 21 M.J. 445 (C.M.A. 1986) (citing *United States v. Jarrie*, 5 M.J. 193 (C.M.A. 1978)); *United States v. Albo*, 46 C.M.R. 30 (C.M.A. 1972).

Rule for Courts-Martial 914, Production of statements of witnesses, the military counterpart to the Jencks Act mirrors the statutory provisions:

After a witness other than the accused has testified on direct examination, the military judge, on motion of a party who did not call the witness, shall order the party who called the witness to produce, for examination and use by the moving party, any statement of the witness that relates to the subject matter concerning which the witness has testified. R.C.M. 914(a).

R.C.M. 914(a). Rule for Courts-Martial 914(f) defines a statement as a "substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and contained in a stenographic, mechanical, electrical, or other recording or a transcription thereof." R.C.M. 914(f).

This Court first considered the issue of whether the Jencks Act applies to statements made by government witnesses at an Article 32 investigation in the presence of an accused and his counsel in *Marsh*. 21 M.J. 451 (C.M.A.

1986). Finding in the affirmative, *Marsh* noted the "broad language of the statute in its amended form;" the express inclusion in section (e)(3) of statements to a grand jury; and the Jencks Act's failure to expressly except statements made in the presence of the accused and his counsel. *Marsh*, 21 M.J. at 451.

Should the government fail to comply with an order to deliver a statement to the moving party, both R.C.M 914 and the Jencks Act direct the military judge to strike from the record the testimony of the witness. 18 U.S.C. §3500(d); R.C.M. 914(e). This Court however has determined not every Jenck's Act violation mandates striking the testimony of the witness. *United States v. Jarrie*, 5 M.J. 193, 195 (C.M.A. 1978) (citing *Killian v. United States*, 368 U.S. 231 (1961)). Finding that the Jencks Act and R.C.M. 914 are exclusionary rules, *Jarrie* noted the rules are subject to good faith and harmless error exceptions. *Id.* A failure to comply with the production requirement may be excused if the government no longer possesses the statement because it was "lost or destroyed under circumstances in which the government was blameless." *Id.*

Military courts have neither adopted nor fashioned a bright-line test for a Jencks Act violation. Rather, courts have considered, under a totality of the

circumstances, three primary factors: (1) the degree of government negligence or bad faith; and (2) whether an adequate substitute exists; and (3) the importance of the defense's ability to impeach the relevant witness.

a. Degree of government negligence or bad faith

Military courts first addressed the (post-*Jencks*) issue of a government recorder's destruction of verbatim notes transcribed during an Article 32 pretrial investigation in *Combs*. 28 C.M.R. at 870.

There, government counsel caused the sworn testimony of witnesses to be recorded verbatim and in shorthand by a paralegal team. *Id.* The accused and his defense counsel were both present for the investigation. *Id.* Afterward, the defense requested a transcript for several portions of the hearing. A government paralegal however could only locate one book with "part of the testimony" and added she could not "do anything" without asking her supervisor. *Combs*, 28 C.M.R. at 870. The paralegal team then destroyed the shorthand notes transcribed during the Article 32 investigation "as a matter of normal routine and without instruction by anyone." *Id.* at 871.

The court found that after due notice and before the reporters' notes were destroyed, government counsel "made no attempt to safeguard the stenographic notes at a time

when it appeared that [the notes'] presence would be required during the course of trial." *Combs*, 28 C.M.R. at 873. The military judge's refusal to strike the relevant witness' testimony therefore prejudiced *Combs*' substantial rights. *Id.* at 873.

The Air Force Court returned to the issue of lost or destroyed tape recordings in *Scott*. There again, the government created a verbatim recording of an Article 32 pretrial investigation. 6 M.J. at 547. Before trial, defense counsel requested the government produce a verbatim transcript for several of the witnesses who had testified at the investigation. *Id.* at 548. When trial counsel received the request he contacted the reporter and found that the tapes could not be located. *Id.*

During trial, the military judge conducted a fact finding Article 39(a) hearing to determine the circumstances surrounding the loss of the tapes. *Scott*, 6 M.J. at 548. Testimony from the paralegal reporter, the IO and the sergeant paralegal, revealed the paralegal reporter delivered the tapes to the IO for his use in completing the report. The paralegal then remained bedridden and absent from work for several weeks. During the paralegal's absence the IO returned the tapes to the sergeant paralegal who then placed the tapes on the desk of

either the IO or the paralegal, and the tapes disappeared. Finding that the government's administrative practices amounted to simple negligence, the court held that the judicial "good faith" exception to the Jencks Act is limited in its application and shall not be invoked to "permit the government to relieve itself of its duties by negligent administrative practices." *Scott*, 6 M.J. at 549; see also, *United States v. Patterson*, 10 M.J. 599, 601 (A.F.C.M.R. 1980) (the loss, through improper care, of tape recordings of witnesses' testimony at an Article 32 investigation did not excuse the failure to provide the tapes to the defense under the Jencks Act. The court set aside the conviction and ordered a rehearing despite finding no evidence of an intentional destruction of the tapes).

Here, the government made little attempt to safeguard the verbatim notes. PFC Tate did not copy the audio recording to a compact disc in a timely manner to preserve it for eventual discovery. This failure was magnified by his knowing that the primary recording device malfunctioned during the Article 32 investigation without recording the relevant testimony; only the Olympus recorder contained that portion. Private First Class Tate moreover could not say with certainty when he handed the recording device to

SPC Sampson, or exactly where he left it in SPC Sampson's office. (JA 131). Likewise, SPC Sampson did not recall receiving the Olympus from PFC Tate or seeing it in his office. Finally, when PFC Tate discovered the loss of the audio recording he failed not only to remedy the situation, but also to make that fact known to others before going on emergency leave. In light of these facts, the military judge aptly found: "if there had been some importance placed on this surely PFC Tate would have known to report to his supervisors that the audio was missing." (JA 200).

The military judge correctly found that the paralegals did not have a particular unified policy or practice nor did they develop a system of checks and balances to ensure that the previous paralegal had done his/her job. (JA 197). While the chief of military justice testified she considered her office procedures adequate, the military judge correctly found otherwise. Captain Sherman testified she did not personally confirm PFC Tate preserved the audio recording but the trial counsel, CPT Ebony Todd, should have done so in her absence. (JA 163-164). Captain Todd stipulated she too did not confirm if PFC Tate preserved the audio recording. (JA 259). Nothing in the record evidences that an officer or non commissioned officer actually checked PFC Tate's work. As Appellant conceded at

the Army Court, only "the paralegal who is assigned to the hearing [...] generally backs up the audio, one of the other paralegals who used the device after PFC Tate may have deleted the audio mistakenly believing that PFC Tate had already backed it up." (JA 24). No system of review existed in 10th Regional Support Group Military Justice office. By her own admission, CPT Sherman acknowledged errors in her office's handling of the audio recording. (JA 164). Accordingly, the military judge found a want of "positive control over the paralegals in the military justice section to ensure that they understood the importance of the audio." (JA 199).

Conceding negligence at the Army Court, Appellant argued the court should invoke the "good faith exception" in cases less than gross negligence. There, Appellant claimed that *Marsh* declined to strike the government witnesses' testimony because the court did not find the government acted grossly negligent. (JA 19). Appellant misinterpreted *Marsh*. In applying the totality of the circumstances test, *Marsh* recognized first, while some negligence may have occurred, "the government introduced substantial evidence that it lost these tapes despite a good-faith effort on its part to preserve these materials." *Marsh*, 21 M.J. at 452. Second, the government maintained

an office policy to preserve the tapes for trial and introduced testimony from the court reporter and his supervisor as to the particular steps they took in accordance with this policy. *Id.* at 451. Third, the government provided to defense a summarized transcript prepared by a court reporter that was "almost word for word." *Id.* And finally, the near-verbatim transcript enabled the defense to effectively cross-examine the government witnesses during the trial. *Id.*

In Appellant's case, the government's negligence far outweighs that contemplated in *Marsh*. The government offered scant evidence that the chief of justice, trial counsel or either of the non-commissioned officers ever communicated an office policy detailing how to preserve the tapes for trial to the responsible paralegal, PFC Tate. The government paralegals failed to keep positive control over the recording device when in their possession, and neglected to account for the recording device when handing it off to one another.

Appellant also relied on *Lewis* where the Army Court held, in relevant part, that a Jencks Act violation may be excused "if the government no longer possesses the statement because it was lost or destroyed under circumstances in which the government was blameless." 38

M.J. at 508. In *Lewis*, the government demonstrated during trial that the tapes were secured in a unit safe that was inadvertently misplaced through no fault of the custodian. *Id.* at 509. The defense conceded the government acted in good-faith and the military judge declined to strike the witness' testimony. *Id.* at 509. While reviewing for an abuse of discretion, the court also noted the government witness' testimony was not so impeachable but rather, it proved internally consistent and corroborated by other witnesses. *Id.* at 509. Here, the military judge found the government did not act in good-faith. (JA 200). The record evidences, and appellant conceded at the Army Court, a government paralegal intentionally deleted the audio recording from the device without confirming whether a backup copy existed. (JA 21).

b. Whether an adequate substitute exists

The government's good faith alone does not excuse nonproduction under the Jencks Act. *United States v. Cardenas-Mendoza*, 579 F.3d 1024 (9th Cir. 2009) (citing *United States v. Harris*, 543 F.2d 1247, 1253 (9th Cir. 1976)). Prejudice exists when no acceptable substitute or summary of the missing statement is available. *Id.* (citing *United States v. Carrasco*, 537 F.2d 372, 376 (9th Cir. 1976)). In *Patterson*, the court considered whether a

summarized Article 32 transcript constituted an adequate substitute under the Jencks Act. Finding in the negative, the court reasoned the summarized transcript did not substantially incorporate the testimony of the witnesses and the purpose of the Jencks Act "is not served when the investigating officer summarizes a witness' testimony and loses the verbatim transcript." *Patterson*, 10 M.J. at 601.

Similarly, in *United States v. Carrasco*, a DEA agent summarized as many as "10 handwritten, loose-leaf sized pages" from a witness' diary into a summarized report before shredding the diary in accordance with DEA procedures. 537 F.2d at 375. During trial, the agent testified to the contents of the diary and asserted that, "to the best of his recollection, his report did not omit any substantive material which had been included in the original diary." *Id.* *Carrasco* found the DEA agent's report inadequate and ruled the trial court erred in not striking the testimony. 537 F.2d at 378.

After all, "only those statements which could properly be called the witness' own words should be made available to the defense for purposes of impeachment." *Palermo* 360 U.S. at 352. Congress designed the Jencks Act to "eliminate the danger of distortion and misrepresentation inherent in a report which merely selects portions, albeit

accurately, from a lengthy oral recital[;] quoting out of context is one of the most frequent and powerful modes of misquotation." *Id.* at 352.

Appellant relied on *Marsh* and *Strand* at the Army Court asserting the military judge erred in her decided remedy. In *Marsh*, the court noted defense received "a summarized transcript of the witnesses' prior testimony which the court reporter testified without contradiction was almost word for word." *Marsh*, 21 M.J. at 455. Due to the lack of distortion and selectivity in the summarized transcript, *Marsh* affirmed the military judge's decision not to strike the testimony of government witnesses. Similarly, in *United States v. Strand*, the Navy-Marine Court of Military Review considered an "exceptionally thorough summary which essentially paraphrased the tapes" prepared by an IO. 21 M.J. 912, 915 (N.M.C.M.R. 1986). The court compared the verbatim transcript with the summary and found "virtually no difference between summary and transcript." *Strand*, 21 M.J. at 915.

Here however the military judge found that PFC Tate's summarized transcript fell short of a "substantially verbatim recital." (JA 195). In reaching her findings, the military judge compared the surviving portion of Ms. GP's Article 32 testimony with PFC Tate's summarized

transcript. (JA 195). Dissimilar to *Marsh*, the military judge's inquiry noted omissions as early as the opening lines of Ms. GP's testimony. (JA 195). Lacking in substance, the summarized transcript reads one and a half pages whereas Ms. GP testified for over two hours. (JA 188). The military judge also relied on the Article 32 IO's testimony where he indicated Ms. GP's testimony during the Article 32 hearing "has been inconsistent with previous statements." (JA 175, 201). Additionally, PFC Tate testified that he did not attempt to transcribe the testimony verbatim. (JA 128). Finding that the paralegal was selective in what he put in the summarized transcript, the military judge acknowledged "that's what we ask our government paralegals to do. That's what makes it summarized." (JA 196). Her reasoning echoes Justice Frankfurter's concerns penned a half century ago. The military judge also found that the government did not afford Ms. GP an opportunity to adopt the statement or allow either the defense or the IO an opportunity to review the summarized transcript for accuracy. (JA 196).

The military judge also correctly found that SGT Carr's shorthand notes did not qualify as an adequate substitute, reasoning "her notes are subject to the same selectivity that PFC Tate's summarized transcript is. It's

not the defense counsel making that decision; it's someone else." (JA 201-202). Sergeant Carr herself considered the notes less accurate than even a summarized transcript; she didn't compare her notes to the audio recording or the draft summary for accuracy. (JA 170). The military judge moreover accepted the proffer that SGT Carr's notes are no longer available to the defense. (JA 280).

Appellant also argued SSG Muwakkil cannot show prejudice due to his counsel's presence at the Article 32 investigation. In support, appellant relied on *United States v. Thomas* where the Army Court held three defense counsel had the use of a summarized transcript and could overcome "slight differences" in the transcript with their combined observations of the government witnesses during the Article 32 investigation. 7 M.J. 655, 658 (A.C.M.R. 1979). However, the court found that the summarized transcript had been "transcribed with care by the reporter from the tape recordings and [the reporter's] shorthand notes." *Thomas*, 7 M.J. at 658.

Here, PFC Tate summarized only the testimony that he considered relevant at the Article 32 hearing; he did not labor with the intent to copy the tape recordings afterward as the reporter had done in *Thomas*. As discussed above, the military judge compared PFC Tate's summary with the

audio recording and noted inconsistencies of far greater magnitude than the "slight variances" in *Thomas*.

Appellant also argued at the Army Court that SSG Muwwakkil cannot show prejudice due to there being "substantial sources available" to impeach the government witness during cross examination—namely the Article 32 IO, CPT Adam Cumberworth. (JA 29). Appellant contends "while it may not include every possible inconsistent statement" CPT Cumberworth can impeach Ms. GP's testimony based on his memory of her testimony at the Article 32 hearing. (JA 29).

Captain Cumberworth however remarked "obviously there's been a lot of time in - and when I was done with the report [I] kind of put it to the side and haven't thought about it much but I went back and read the [summarized] transcript this morning, read through a few notes that I had in my report and I remember it pretty decently I think." (JA 177). Captain Cumberworth admitted he could not recall any verbatim quotes uttered by the witness and suggested "I think it's more helpful if you have a verbatim quote." (JA 179). Finding CPT Cumberworth is not a substitute, the military judge reasoned:

This happened months ago. The IO's memory can't be relied upon; he doesn't have a verbatim record of everything that Ms. GP said. That's not his

fault. He's not supposed to. But there simply is no substitute for the audio recording of her testimony.

(JA 202). In a similar vein, *Scott* reviewed a military judge's decision to call witnesses whose testimonies had been lost, and asked them to repeat their Article 32 testimony. *Scott*, 6 M.J. at 549. The court held "our review of the results of this procedure serves only to reinforce our belief that it was impossible to reconstruct the Article 32 testimony in any form that would provide the defense with statements suitable for impeachment purposes." *Scott* 6 M.J. at 549.

Finally, appellant argued at the Army Court affording defense "substantial leeway in their cross examination" would satisfy the ends of justice for all parties. (JA 32). In *United States v. Riley*, the Ninth Circuit addressed a nearly identical question.² 189 F.3d 802 (9th Cir. 1999). There, a lower court found that the government violated the Jencks Act, albeit not in bad faith, and offered to allow further cross-examination and to instruct the jury that the notes had been improperly destroyed. *Id.* at 802. During argument, the government contended the

² *Riley* addressed sanctions provided in Federal Rule of Criminal Procedure 26.2 which implements the *Jencks* Act. F.R.C.P Rule 26.2 is nearly identical in language to R.C.M. 914.

sanctions imposed were appropriate "because the case against Riley was strong." *Id.* at 807. Overturning the conviction, *Riley* reasoned that, without the witness' prior statement, there was nothing further to be gained from cross-examination. *Id.* The case turned on whether the factfinder believed the witness' account or the defendant's version. *Id.* Further, because it was the government's doing, "it must live with the consequences." *Id.*

Here, Ms. GP is the complaining witness (and the government's chief witness) in a contested General Court-Martial regarding an offense in violation of Article 120, UCMJ; the case necessarily revolves around her credibility and the defense's ability to impeach her with her own verbatim words. Little would be gained in granting leeway during cross-examination without Ms. GP's prior statement.

c. The importance of the defense's ability to impeach the relevant witness

The Appellant is correct that a remedy for a Jencks Act violation turns on "the potential prejudice to the accused." (Brief of Appellant at 21). Relevant to the totality of the circumstances test is the degree to which the accused would suffer prejudice should the trial court decline to impose sanctions notwithstanding a Jencks Act violation. *Marsh*, 21 M.J. at 452.

The military judge did so here. The military judge found that "Ms. GP is one of two key witnesses in this case" and wherefore the government's case rose and fell on Ms. GP's testimony. (JA 201). Ms. GP's credibility is at "the very heart of [defense's] theory" as well. (JA 189). The military judge continued, "Ms. GP's testimony as indicated by the Article 32 IO has been inconsistent with previous statements." (JA 201). Furthermore, "looking again at the totality of the circumstances, this is clearly a case in which impeaching Ms. GP is the defense's most important strategy." (JA 201). As in *Riley*, this case turns on who's version of the events is more plausible. Central to that determination is the witness' credibility and the accuracy of her account. Yet, a majority of Ms. GP's Article 32 testimony, the portion where CPT Cumberworth noted a majority of her inconsistencies, was destroyed, and therefore, its value as impeachable evidence can never be fully measured, all to appellee's detriment.

Captain Cumberworth did not find Ms. GP credible. (JA 218). In fact, he recommended the convening authority not refer the charges to a court-martial primarily due to Ms. GP's incredulous account. (JA 218-219). In his Article 32 investigation report, CPT Cumberworth writes:

This case has other issues, which may affect a decision on whether to refer the case to trial. There are inconsistencies within Ms. GP's testimony. For example, Ms. GP initially told investigators that she performed oral sex on the accused twice that night. She testified in the Article 32 that she performed oral sex only once. When asked in the Article 32 hearing why she told the investigators she performed oral sex twice, she responded, "I don't remember." This was not the only inconsistency to which she stated "I don't remember." In fact, during the Article 32 hearing any question which was a potential issue to her credibility, she would respond, "I don't remember." This raises issues with her credibility, not just for me as the Investigating Officer but for a possible jury.

(JA 218).

Only the audio recording of Ms. GP's statement may be offered into evidence under Mil. R. Evid. 613, both as evidence of an inconsistent statement *and on the merits*. The paralegal's two-page synopsis of Ms. GP's testimony however cannot-it neither was adopted by Ms. GP nor possesses an adequate foundation to be admitted under Mil. R. Evid. 613(b). The military judge accordingly found that "in order to properly impeach [Ms. GP], the defense needs to have access to those statements. That is the whole point of the Jencks Act." (JA 201).

The military judge correctly noted "it's not 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." (JA

202); *Campbell v. United States*, 365 U.S. 85 (1961); *Scales v. United States*, 367 U.S. 203 (1961), rehearing denied 366 U.S. 978 (1961). As the Court recognized, "it is impossible for a judge to be fully aware of all the possibilities of impeachment inhering in a prior statement of a government witness, because only the defense is adequately equipped to determine its [...] effective use for purpose of discrediting the government's witness and thereby furthering the accused's defense." *United States v. Rosenberg*, 360 U.S. 367, 374-375 (1959) (citing *Jencks*, 353 U.S. at 668-669).

Appellant nonetheless equates the military judge's statement, "It's not my job. . ." to her finding a "presumption of harm." (Brief of Appellant at 19). In support, Appellant cites to *Killian* for the proposition that the cases are factually parallel. (Brief of Appellant at 16). Appellant misinterprets *Killian*. There, the Court determined if a witness' receipts and the reimbursement reports executed thereupon constitute statements under the Jencks Act and, if so, whether the government's good faith excuse the notes' destruction. *Killian*, 368 U.S. at 242. The government asserted the statements did not relate to the witness' testimony and even if they did the government previously provided the defense with the information in

greater detail. *Id.* The record however did not address the issue as *Jencks* was decided after the District Court judgment. The Court thus remanded the case to determine the circumstances surrounding the destruction. *Id.* at 243. Here, appellant conceded to the Army Court the statement relates to Ms. GP's testimony and it negligently destroyed the audio recording. Here too, the military judge did precisely what *Killian* instructs to do: she conducted an Article 39(a) hearing to determine the circumstances surrounding the loss of the evidence. It cannot be said the military judge abused her discretion.

Killian also addressed prejudice: if a Jenck's Act violation occurs but the defense nonetheless receives "the very same information . . . as would have been available were the error not committed[,] " the error would be harmless. *Killian*, 368 U.S. at 244. Here, the military judge aptly found no adequate substitute exists and SSG Muwwakkil would thus be prejudiced.

Contrary to appellant's assertion that appellee cannot show prejudice, the Jencks Act does not require the defendant to show prejudice. *Riley*, 189 F.3d at 806; *United States v. Well*, 572 F.2d 1383 (9th Cir. 1978); *Patterson*, 10 M.J. at 601. Indeed, the Jencks Act itself imposes no requirement on the defendant to show that

prejudice results from the failure to produce. *Jencks*, 353 U.S. at 674-77. Rather, "prejudice exists when no acceptable substitute or summary of the missing statement is available. *United States v. Cardenas-Mendoza*, 579 F.3d 1024, 1032 (9th Cir. 2009) (citing *Carrasco*, 537 F.2d at 378).

In *Well*, the government challenged sanctions imposed under the Jencks Act after its failure to turn tapes over to the defense after the witnesses testified, as required by the Jencks Act. *Well*, 572 F.2d at 1383. The court declared a mistrial on its own motion. *Id.* On appeal to the Ninth Circuit, the government contended that the trial judge erred in imposing sanctions under the Jencks Act where the defendant failed to show that he was materially prejudiced by the government's nondisclosure. The government suggested that the defendant must be able to point to discrepancies between the witnesses' testimony at trial and the witnesses' pretrial statements. *Well*, 572 F.2d at 1384. The Ninth Circuit disagreed. As the Supreme Court noted in its comprehensive discussion of the Jencks Act in *Palermo*, "the statute does not provide that inconsistency between the statement and the witness' testimony is to be a relevant consideration" in determining which statements must be produced. *Id.* at 1384. *Well*

noted that the government was correct in its assertion that the court had consistently applied the harmless error rule in cases in which the court found that the trial judge failed to impose sanctions required by the Jencks Act, citing *Carrasco*. However, the court confirmed that it did review the records in those cases to determine whether the failure to comply with the Jencks Act resulted in prejudice to the defendant. It pointed out in both of those cases that the trial judge's failure to impose sanctions under the Jencks Act was considered to be an error.

Conclusion

The military judge did not abuse her discretion when she found that the government's noncompliance with the Jencks Act did not otherwise merit the good faith exception. Accordingly, her reliance on the statutory remedy to strike the witness' testimony was well reasoned. The military judge's findings are "uniquely one of fact, and usually must and should be left to the judgment of the trial court ..." *Oregon v. Bradshaw*, 462 U.S. 1039, 1051 (1983) (Powell, J. concurring in the judgment). The military judge's ruling was not "arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *White*, 69 M.J. at 239. Therefore, this court should find the military judge did not abuse her discretion.

Wherefore, SSG Muwakkil respectfully requests this Court deny the government's appeal and affirm the military judge's ruling dated 15 May 2014.



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1. This brief complies with the type-volume limitation of Rule 21(b) because this brief contains 7,924 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because this brief has been prepared in a monospaced typeface (12-point, Courier New font) using Microsoft Word, Version 2007.



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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Tahir*, Army Dkt. No. 20140536, USCA Dkt. No. 15-0112/AR, was electronically filed with both the Court and Government Appellate Division on October 30, 2014.



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