IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	BRIEF ON BEHALF OF APPELLEE
v.	)	
Sergeant (E-5) **NORMAN L. CLARK** United States Army, Appellant	)	Crim. App. Dkt. No. 20170023 USCA Dkt. No. 19-0411/AR

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Granted Issues

DID THE MILITARY JUDGE ERR IN APPLYING R.C.M. 914?

IF THE MILITARY JUDGE ERRED, UNDER WHAT STANDARD SHOULD THIS COURT ASSESS PREJUDICE?

WAS THERE PREJUDICE UNDER THE APPLICABLE STANDARD OF REVIEW?

Index of Brief

Table of Authorities

Supreme Court

Court of Appeals for the Armed Forces

Service Courts

Federal Civilian Courts

Statutes

Rules

Other Authorities

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

Introduction

In an audio-video recorded statement, appellant told two special agents ("SAs") from the Criminal Investigation Command ("CID") that he jammed his penis inside of his four-year-old daughter's vagina while she wore a Disney Princess nightgown and that he ejaculated on her. Three individuals – including two judge advocates – watched and listened to appellant's detailed confession in real-time on a monitor in a different office at CID. At some point prior to trial, the disc containing appellant's damning, graphic confession disappeared, and the agents conducting the interview testified over appellant's objection under Rule for Court-Martial ("R.C.M.") 914. To the extent the missing disc contained the spoken words of either SA, those words were questions to appellant, not statements by the agents. Moreover, the only prejudice from the recording's absence hurt the

government, not appellant, inasmuch as it deprived the government of the ability to show the panel the video of appellant's confession. This Court should therefore affirm the judgment of the Army Court of Criminal Appeals ("Army Court").

Granted Issues

I. DID THE MILITARY JUDGE ERR IN APPLYING R.C.M. 914?

II. IF THE MILITARY JUDGE ERRED, UNDER WHAT STANDARD SHOULD THIS COURT ASSESS PREJUDICE?

III. WAS THERE PREJUDICE UNDER THE APPLICABLE STANDARD OF REVIEW?

Statement of Statutory Jurisdiction

The Army Court reviewed this case pursuant to Article 66, Uniform Code of Military Justice ("UCMJ"), 10 U.S.C. § 866. This Court's jurisdiction rests upon Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

A panel with enlisted representation, sitting as a general court-martial, convicted appellant, contrary to his pleas, of one specification of false official statement, one specification of rape of a child, and one specification of assault of a child, in violation of Articles 107 and 120b, UCMJ, 10 U.S.C. §§ 907 and 920(b) (2012). (JA 207). The panel sentenced appellant to a reduction to E-1, total

forfeitures, twelve years of confinement, and a dishonorable discharge. (JA 208). The convening authority approved the adjudged sentence. (Action).

The Army Court affirmed the findings and sentence (JA 2-10), and this Court granted appellant's petition for review. (JA 1).

Statement of Facts

A. Doctors Discover Genital Herpes On Appellant's Four-Year-Old Daughter.

Pediatric Nurse Practitioner LS discovered three vesicles – fluid filled blisters – between the *labia majora* of AC, appellant's four-year-old daughter. (JA 150). Dr. SM-R took a swab of the preschooler's apparently-infected vagina as well as a urine culture. (JA 151). Dr. SM-R diagnosed the child with Herpes Simplex Virus Type-2 ("HSV-2").[1] (JA 156). Following AC's diagnosis of HSV-2, appellant got tested and subsequently learned that he, too, had HSV-2. (JA 54; Supp. JA 22-23; Pros. Ex. 20 at 09:39:32 and 14:05:20).

At trial, Dr. SM-R explained to the panel that HSV-2 is "transmitted by direct contact and direct contact in the form of mucosa of the mouth, of the genital tract, [and] the anus." (JA 152). Further, "because of the nature of the virus, it doesn't survive for any amount of time outside of cells so it is very difficult to transmit it from surface to mucosa." (JA 152). Dr. SM-R opined that "a

[1] According to the World Health Organization, "[i]nfection with HSV-2 is lifelong and incurable." <https://www.who.int/news-room/fact-sheets/detail/herpes-simplex-virus> [accessed 26 November 2019].

preadolescent female, not sexually active female, would obtain or contract genital herpes in that specific area from direct contact in some non-innocent sexual way." (JA 159).

B. Appellant Makes Two Recorded Statements.

On October 21, 2015, appellant waived his rights and participated in an interview with agents EM and SF at the Fort Campbell CID office during which he made several admissions. (JA 54-56). Agents recorded the interview using the Case Cracker system, which burns digital media discs to preserve video recorded interviews. (JA 55-56).

On the first day, appellant denied having sex with AC but indicated that AC slept in his bed numerous times. (JA 210; Pros. Ex. 20). Appellant further told the interviewers that he snuggled closely with AC with an erect penis multiple times, and on at least two of those occasions, his erection protruded through his underwear as he held it against the sleeping child. (JA 210; Pros. Ex. 20). The accused intimated that this caused him to ejaculate. (JA 210; Pros. Ex 20). Dr. SM-R explained that the contact described in appellant's self-serving admission could not have caused the transmission of HSV-2 from appellant to AC. (JA 154).

The following day, appellant returned to CID to participate in a second interview conducted by agents CJ and SF, and appellant's second interview was also recorded using the Case Cracker system. (JA 164). Special Agent CT; the

special victim prosecutor, Lieutenant Colonel ("LTC") JB; and trial counsel, Captain ("CPT") SB watched and listened to agents CJ and SF interview appellant in real-time on a monitor in a different office. (JA 64, 68-69, 73-74). By the time of trial, CPT SB no longer served as trial counsel and LTC JB had become a military judge at Fort Hood. (JA 22-23, 71).

During the October 22 interview, appellant described four distinct sexual incidents with his four-year-old daughter, Ms. AC. (JA 76). In the most egregious of the assaults, appellant described "going fishing" with his penis between the preschooler's legs in search of her vagina, which he called his daughter's "pussy." (JA 75-76). He described penetrating Ms. AC to the depth of his fingernail, but she was too tight for him to enter her further so he thrust his penis between her legs until he ejaculated. (JA 69, 76).

Appellant told the agents that Ms. AC was wearing a Disney Princess nightgown on the night he penetrated her. (JA 70). Observing the interview from his office, SA CT heard appellant's description of the nightgown and went to appellant's home to retrieve it. (JA 70). Special Agent CT collected Ms. AC's Disney Princess nightgown from appellant's home and photographed it. (JA 70; Pros. Ex. 23). Upon his return to CID, SA CT found appellant outside on a smoke break and showed him a picture of the nightgown. (JA 70). Appellant confirmed

it was the nightgown his daughter was wearing the night he penetrated her. (JA 70).

C. The Government Cannot Locate Disc 4, Which Contained The Gravamen of Appellant's Confession.

From time-to-time, the CID office must purge old interviews from the Case Tracker system because the system's "storage capacity is met, . . . if you're in the midst of an interview, it will completely stop recording. That occurred in a few cases prior to [appellant's,] so as a precaution as a standard operating procedure" the office deletes old interviews to make storage space for new interviews. (JA 30). Although appellant's interview, like all interviews, was purged from Case Cracker, there were no discussions about deleting his interview. (JA 31). Prior to that purge, appellant's interview was burned onto five discs. (JA 28, 39). After burning the interview from Case Cracker to the discs, the agents marked the discs with a case number. (JA 39; Supp. JA 4). Three copies of each disc were burned: an original, a copy for the SJA, and a copy for the file. (JA 41).

After burning the interview from Case Cracker onto the discs, CID was "unable to locate" Disc 4, which contained the beginning of the second day of the interviews.[2] (JA 29). Once CID realized that Disc 4 was missing, it conducted a

[2] The disc marked as "Disc 4" was a duplicate of another portion of appellant's interview. (JA 42, 61). However, the disc containing the later portion of the interview on 22 October, labeled as "Disc 5," would not exist had the earlier portion of that day's interview not been burned to a disc. (JA 29).

"complete physical search of the office" to locate it. (JA 31). This started with agents SF and EM looking for the disc and then progressed to every agent in the Fort Campbell CID Office scouring "hundreds and hundreds" of files for the missing disc. (JA 45; Supp. JA 3). Next, a forensic expert unsuccessfully attempted to retrieve the missing portion of the interview from the computer. (JA 31). Finally, they requested that the Crime Records Center at Quantico send the Fort Campbell CID office a copy of all five discs related to appellant's confession, but none of those disks contained the missing portion of the interview. (JA 32, 42).

Lieutenant Colonel JB explained that – from the prosecution's perspective – this was the worst possible disc to lose because "there was nothing exculpatory on it, [and] it was all inculpatory in detailing what [appellant] had done to his daughter." (Supp. JA 8-9). The three agents who participated and/or watched the interview in real-time all agreed with LTC JB: the missing recording contained damaging admissions but nothing exculpatory. (JA 32, 51; Supp. JA 7).

D. Appellant Attempts To Capitalize On The Missing Disc To Abate The Proceeding.

Prior to trial, the defense filed a "Motion for Appropriate Relief: R.C.M. 703(f)(2)" and asked the military judge to abate the proceedings because of the government's failure to preserve all of the discs of appellant's recorded CID interview. (App. Ex. VII). The military judge held an Article 39(a) session on 7

December 2016 in which appellant called four witnesses – including both agents who questioned appellant on the second day of the interview – to establish a record relating to the loss of Disc 4. (JA 27-76). Trial defense counsel confirmed with SA CJ that, in addition to appellant's statements, Disc 4 would also contain the agents' "questions" and that there was no way to recall "with precision the questions that" were asked to appellant. (Supp. JA 1-2). The military judge issued a written ruling – which contained a four-page long section titled "Findings of Fact" – denying the defense motion seeking abatement. (JA 209-214).

E. Appellant Again Attempts To Take Advantage Of The Missing Disc To Preclude Special Agents SF and CJ From Testifying.

On January 10, 2017, at trial, the government called SA SF to testify, and the witness began to lay foundation for admissions made by appellant. (JA 82). The defense counsel objected and asked for the government to produce the discs of appellant's recorded interviews. (JA 86). The defense then asked the military judge to strike the testimony of SA SF pursuant to Rule for Courts-Martial [hereinafter R.C.M.] 914 if the government was unable to produce the recordings. (JA 86). The defense also made clear it would lodge the same objection under R.C.M. 914 if the government elected to call SA CJ as a witness. (JA 117).

During the mid-trial 39(a) session on the defense motion to strike witness testimony, the military judge adopted the findings of fact articulated in his earlier

ruling on the motion for abatement. (JA 114). Notable among the military judge's written findings of fact are the following:

> 6. In the 21 October interview, the accused admitted that AC slept in his bed with him about 10-15 times. . . .The accused admitted that on three to four occasions he woke up, snuggled up next to AC with an erection. The accused admitted that there were 2-3 times when his penis was erect and protruding from the opening in his underwear when he woke up snuggled next to AC with her back toward him. The accused admitted that on one occasion when he woke up with an erection, AC was backing up against him, she rolled over, he took her to her room and noticed a wet spot on the bed. The accused made this statement in the context of the wet spot being his ejaculate.
>
> 7. . . . Using Casecracker, the agents burned 3 discs that captured the entirety of the interview on 21 October 2015. Copies of all three discs still exist and were provided to the defense.
>
> 9. On 22 October 2015, the accused was again interviewed at the Ft. Campbell CID Office. SA [SF] set up the Casecracker system. . .SA [SF] and SA [CJ] were both in the room during the interview. . .
>
> 10. None of the CID agents involved in this case can verify which of them burned the discs to preserve the interview on 22 October 2015. The Casecracker system needed 2 discs to record the entire 22 October 2015 interview. The case agents had two discs they believed contained the entire interview. Sometime later, the CID agents and lead prosecutor discovered that the first of the two discs that compose the 2 October 2015 interview was actually a duplicate of disc 1 from the 21 October 2015 interview. Despite relatively exhaustive efforts to locate the first disc from 22 October 2015, to include searching every file in the office and examining other copies that should have been duplicates of the discs containing the 22

> October 2015 interview, disc 1 of that interview was never recovered.
>
> 11. According to SA [CJ], during the 22 October 2015 interview the accused described approximately four distinct incidents where he contacted AC with his penis. The accused described the most egregious and last of the incidences first. He said he inserted his penis into AC's vagina and ejaculated. The accused's description of this incident would have been on disc 1 and is now lost. Disc 2 contains the accused's statements about additional events when the accused described rubbing his erect penis on AC's buttocks over her clothes. On disc 2, the accused also discussed an event where he moved AC's panties to the side and put his penis between her legs but was unsure of whether he achieved penetration.

(JA 209-211). The court-martial received the three discs described in paragraph 6 of the military judge's findings of fact collectively as Prosecution Exhibit 20, and the court-martial received the disc described in paragraph 11 of the military judge's findings of fact – often referred to as "Disc 5" because it is the second disc from that day and the prior day's interview took up three discs – as Prosecution Exhibit 3. (JA 19).

During a mid-trial Article 39(a) session, the military judge and defense counsel shared the following exchange:

> MJ: How does military law define a statement? Think for example, the definition of a hearsay statement. Is a question considered hearsay?
>
> DC: No, your Honor.

> MJ: So are questions, in the realm of questioning, considered statements?

(JA 95). The military judge framed the issue, "What I am looking for is authority to suggest that when an agent is taking a statement, he is making a statement." (JA 96). The military judge explained that he "spent considerable time looking for a case — a case — wherein the agent taking the statement not making the statement, was considered to be making a statement." (JA 97).

The military judge asked the defense to provide "case law or any other authority" to suggest that "a person who is asking a question, to get a statement from a witness, those comments, those questions, or any statements contained therein are covered by the Jencks Act or R.C.M. 914." (JA 97). The defense cited to R.C.M. 914 but was unable to provide any case law to support the proposition that questions and statements made by law enforcement agents during a suspect interview are statements within the meaning of R.C.M. 914 (or the Jencks Act). (JA 98). The military judge then recessed the court to allow "both parties a full opportunity to research and brief this issue. . . ." (JA 98).

More than an hour later, the military judge called the court back to order to release the panel for the evening and then instructed both parties to continue to research the issue. (JA 100, 102). The court then recessed for the evening until 0832 hours on January 10, 2017. (JA 114).

In the morning, the military judge explained that he had considered whether or not the government had ever been in possession of the lost disc. (JA 114). Based upon the testimony of Mr. Jeffery Cunningham, appellant's digital forensic expert, the military judge found it was "impossible for Disc 2 to have been created had Disc 1 not [been created]" and therefore the government had been in possession of Disc 1, for some amount of time. (JA 115).

The military judge then concluded that the statements of SA SF and SA CJ on the discs containing appellant's interviews were not statements within the meaning of R.C.M. 914 and there is no case law to support the defense's position to the contrary (JA 116). The military judge denied the defense's motion to strike the testimony of Agents SF and SA CJ pursuant to R.C.M. 914. (JA 116).

Summary of Argument

The military judge correctly found that Disc 4 did not contain statements from Agents SF and CJ. The agents asked questions to elicit a statement from appellant. Questions are ordinarily not statements.

Even if all questions are statements, Rule 914 does not require the striking of the agents' testimony because the government did not seek to suppress the tapes. Other federal appellate courts have noted that it is inappropriate for an accused to request production of materials in an effort to preclude a witness from testifying rather than to impeach that witness. Moreover, unless an accused establishes that

the government failed to promulgate methods to preserve evidence and adhere to them, other courts do not require the striking of testimony when the prior statement is lost.

If the Court determines that the military judge erred, the Court should conduct a non-constitutional prejudice analysis. Appellant did not cast his 914 motion in constitutional terms at court-martial or the Army Court; thus he forfeited any such claim. In any event, appellant has not established prejudice under any standard.

GRANTED ISSUES

I. DID THE MILITARY JUDGE ERR IN APPLYING R.C.M. 914?

Standard of Review

This Court "review[s] a military judge's decision to strike testimony under the Jencks Act and R.C.M. 914 using an abuse of discretion standard." *United States v. Muwwakkil*, 74 M.J. 187, 191 (C.A.A.F. 2015); *see also United States v. Young*, 916 F.3d 368, 383 (4th Cir. 2019) ("when the government fails to timely provide . . . Jencks materials, the district court's determination of *whether* to impose a sanction, and *what* sanction to impose, is reviewed for abuse of discretion") (emphasis added). "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *United States v.*

McElhaney, 54 M.J. 120, 130 (C.A.A.F. 2000) (internal quotation marks and citations omitted). Put more simply, an abuse of discretion occurs when "the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *United States v. Stellato*, 74 M.J. 473, 480 (C.A.A.F. 2015). An abuse of discretion can also occur when the military judge's findings of fact are clearly erroneous. *United States v. Dooley*, 61 M.J. 258, 263 (C.A.A.F. 2005).

Law and Analysis

A. Rule 914 Requires Production of "Statements," Not Questions.

After a witness has testified on direct examination, the opposing party can move for production of that witness's statements. R.C.M. 914(a); *see also* 18 U.S.C. § 3500(b) (applying the same rule to federal civilian criminal trials). The moving party bears the burden of establishing that the unproduced material is a "statement" under the rule. *See United States v. Heath*, 580 F.2d 1011, 1019 (10th Cir. 1978). Three types of "statements" fall within the scope of Rule 914:

> (1) A written statement made by the witness that is signed or otherwise adopted or approved by the witness;
> (2) 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 recording or a transcript thereof; or
> (3) A statement, however taken or recorded, or a transcription thereof, made by the witness to a federal grand jury.

R.C.M. 914(f); *see also* 18 U.S.C. § 3500(e). Because each of Rule 914's definitions of statement use the word "statement," this Court also looks to: "(1) the plain meaning of the term [statement]; (2) the manner in which Article III courts have interpreted the term; and (3) guidance, if any, the UCMJ may provide through reference to parallel provisions of law." *United States v. Kuemmerle*, 67 M.J. 141, 143 (C.A.A.F. 2009). Merriam-Webster Dictionary[3] defines a statement as "something stated: such as (a) a single declaration or remark: ASSERTION; or (b) a report of facts or opinions." (available at <https://www.merriam-webster.com/dictionary/statement> [accessed 26 November 2019]). The Military Rules of Evidence define "statement" as "a person's oral assertion, written assertion, or nonverbal conduct if the person intended it as an assertion." Mil. R. Evid. 801(a); *accord.* Fed. R. Evid. 801(a). "While 'assertion' is not defined in the rule, the term has the connotation of a positive declaration." *United States v. Lewis*, 902 F.2d 1176 (5th Cir. 1990); *see also Lubbock Feeds Lot, Inc. v. Iowa Beef Processors, Inc.*, 630 F.2d 250, 262 (5th Cir. 1980) ("it is clear that the central characteristic of a 'statement' or 'assertion' is the assertive intent"); Advisory Comm. Note to Fed. R. Evid 801 ("The effect of the definition of 'statement' is to

[3] "Ordinarily, a word's usage accords with its dictionary definition. *Yates v. United States*, 574 U.S. 528, 135 S.Ct. 1074, 1081-1082 (2015) (pin cites not yet available in official reporter).

exclude from the operation of the hearsay rule all evidence of conduct, *verbal* or nonverbal, not intended as an assertion") (emphasis added).

The military judge's conclusion that law enforcement questioning falls outside of the definition of "statement" aligns squarely with the only Article III court that has decided this question. A verbatim transcript of *questions* asked by a witness do not need to "be turned over to the defendants under the Jencks Act . . . unless the questioning rose to the dignity of a 'statement.'" *United States v. Susskind*, 4 F.3d 1400, 1406 (6th Cir. 1993) (en banc).

In *Susskind*, one of the grand jury prosecutors testified at the trial. *Id.* at 1403-1406. The defendants were provided a transcript of the prosecutor-witness's synopsis to the grand jury, "but they were not given a transcript of the questions that [the prosecutor-witness] posed to the grand jury witnesses." *Id.* at 1403. After the direct examination of the prosecutor-witness, the defense moved the court to compel production of "all 'statements' made by [the prosecutor-witness] before the grand jury in addition to the overview." *Id*. The trial prosecutor "took the position that the requested materials did not come within the Jencks Act, but offered to submit everything to the court *in camera* so that the court could decide." *Id*. The ten-judge majority held that

> [t]here may be rare occasions when a lawyer's question to a witness can constitute a "statement," but ordinarily a statement ends with a period, not a question mark. See, for example, Fed. R. Evid. 801(a), defining a statement as an "assertion." Nothing in the transcript of the questions

> posed by [the prosecutor-witness] suggests to us that there is any reason, in this case, to give the statutory term a broader meaning than it would have in ordinary usage. The questions simply were not "statements" within the meaning of the [Jencks] Act.

Id. at 1406.

Like the prosecutor-witness's questions in *Susskind*, the SAs' questions on Disc 4 were not "statements." The SAs' questioning of appellant falls outside of the definition of statement because the questions "were designed to elicit information and a response rather than assert the defendant's involvement in criminal activity." *United States v. Summers*, 414 F.3d 1287, 1300 (10th Cir. 2005). Indeed, the questions were successful in eliciting a response from appellant. An interview session where law enforcement agents simply hurl accusations at a target would be evidentiarily useless unless the target responds to the questions posed. *See United States v. Olivio*, 80 F.3d 1466, 1471 (10th Cir. 1996) (explaining that questions alone do not constitute evidence); *see also* Mil. R. Evid. 802 (generally prohibiting hearsay); Mil. R. Evid. 801(d)(2) (excluding an accused's statement from the definition of hearsay). When appellant tried to frame his interview as a monologue by the agents, SA CJ denied that characterization but agreed that he asked "pointed questions." (Supp. JA 18). When trial defense counsel asked a series of questions trying to get SA CJ to agree that he made assertions, SA CJ replied "I don't concede to that or submit to that thought process." (Supp. JA 18). Because the questions contained on the missing disc

were merely interrogatories designed to get something of evidentiary value – appellant's statement in response – they are not statements for the purposes of hearsay or Rule 914.

Appellant has yet to point to any purported assertions embedded in the questioning that would transmogrify questions into statements. Having participated in the interviews, appellant is in a position to point to any such assertions. Rather than meet his burden, appellant asks the Court to speculate that the agents intended their questioning to be an assertion. The Court should decline to fill in the gaps for appellant.

This Court's predecessor held that when a law enforcement agent makes a statement in a recorded interview of an accused, the Jencks Act compels disclosure of his recorded interview. *United States v. Walbert*, 14 U.S.C.M.A. 34, 37 (C.M.A. 1963). However, *Walbert* contained minimal analysis on this point: "We perceive no distinction between such a report [signed and adopted by a witness] and the tape recording [of the interview]. Each represents precisely what the agent said in regard to the subject matter as to which he testified in direct examination." *Id*. The only case upon which the *Walbert* Court relied upon for this proposition did not grapple with the issue of whether questioning constitutes a statement. *See De Freese v. United States*, 270 F.2d 737, 740 (5th Cir. 1959). The *Walbert* Court's analysis did not consider whether every oral utterance contains an

assertion. *See United States v. Jackson*, 588 F.2d 1046, 1049 n.4 (5th Cir. 1979) ("The Federal Rules of Evidence exclude from the operation of the hearsay rule any oral statement not intended as an assertion"). Indeed, *Walbert* did not consider the question packed in this issue: What sort of an utterance qualifies as a "statement." Because appellant has not demonstrated that any SA made an utterance with an assertive intent – which, as an active participant in the interview, appellant could have demonstrated – the Court must speculate to find that the questions posed to appellant constitute statements. Accordingly, even assuming that *Walbert* is correct, it does not compel the conclusion that the questioning of appellant constitutes an assertion.

B. Even If Questions Are Statements, Rule 914 Does Not Require The Striking Of Evidence When The Evidence Has Been Inadvertently Lost.

If the judge orders disclosure of the statement and the non-moving party "*elects* not to comply with an order to deliver the statement to the moving party, the military judge shall order that the testimony of the witness be disregarded . . . ." R.C.M. 914(e) (emphasis added); *see also* 18 U.S.C. § 3500(d) (same in civilian prosecution).[4] The Court of Appeals for the District of Columbia Circuit explained that

[4] The Rule also contemplates a mistrial if required by the interest of justice, but appellant did not ask for a mistrial at court-martial, before the Army Court, or before this Court.

> [v]iewed in its proper perspective, the judicial process is a search for truth, not an adversary game, and therefore *the Jencks Act is not a mandate compelling the trial judge to strike (or bar) a witness' testimony when a previously made statement, irrespective of the reason, cannot be produced by the Government*. On the other hand, the Government does not necessarily exonerate itself from the penalty of the statute by pleading so-called "good faith." Instead, the trial judge's effort must be to see that the defendant has access to previous statements of a witness to the fullest extent possible under the terms of the statute, in order to further the interests of justice in the search for truth. *Whether the testimony of a witness is stricken or barred in advance, however, is in the discretion of the trial judge if eliminating the witness' testimony would restrict the search for truth rather than assist it in the instant and future cases. Ordinarily, excluding evidence will assist this search only where the information has been lost or destroyed, negligently or for an unjustified purpose*.

United States v. Perry, 471 F.2d 1057, 1063 (D.C. Cir. 1972) (emphasis added). Where the government loses evidence even though "it has promulgated, enforced and attempted in good faith to follow rigorous and systematic procedures designed to preserve" the Jencks Act material, sanctions are not appropriate. *United States v. Bryant*, 439 F.2d 642, 652 (D.C. Cir. 1971). A year later, the D.C. Circuit clarified this by explaining that where Jencks Act material has "[f]or some undetermined reason . . . been lost[,]" there is "no basis under [the Jencks Act] for the application of the sanctions prescribed therein." *Perry*, 471 F.2d at 1059, 1063-1064.

The Supreme Court has previously adjudicated a Jencks Act appeal when the government lost a recorded interview prior to court-martial. *See United States v. Augenblick*, 393 U.S. 348 (1969). An eyewitness named Hodges gave a tape

recorded statement to the Armed Forces Police. *Id*. at 353. During the course of the recorded interview, Hodges changed his story, and the defense posited that he did so in exchange for the promise of an honorable discharge. *Id*. At court-martial, an agent testified "that there was a tape [of the interview of Hodges] but no one knew where it was or what had happened to it," leading to a challenge under the Jencks Act. *Id.* at 354. The Supreme Court noted the tapes'

> nature and existence were the subject of detailed interrogation at the pretrial hearing convened at the request of the defense. Four government agents testified concerning the interrogation of Hodges, the recording facilities used, the Navy's routine in handling and using such recordings, and the fate of the tape containing Hodges' testimony. The ground was covered once again at the court-martial. The tapes were not produced; the record indeed shows that they were not found; and their ultimate fate remains a mystery.

Id. at 355. The Court concluded that the "record is devoid of credible evidence that [the tapes] were suppressed" and reversed the lower court judgment finding that the conviction occurred in violation of the Jencks Act. *Id.* at 356.

Here, trial counsel did not *elect* to not turn over Disc 4; rather, trial counsel could not do so. Thus – even if the military judge should have ordered the disclosure of the missing disc – the non-production cannot be considered an *election* to not comply. Trial defense counsel knew at the time of the motion for production that trial counsel lacked the ability to comply with any order to produce. Under these circumstances, "it is apparent that the purpose of the production request in this case was never to use the tape for impeachment

purposes, but to prevent the agent who made the recording from being able to testify . . . . The Jencks Act is not an appropriate tool for achieving that end." *United States v. Bobadilla-Lopez*, 954 F.2d 519, 523 (9th Cir. 1992).

Moreover, two grounds support the military judge's denial of appellant's motion to strike: "an absence of bad faith" and appellant's failure to "identif[y] any useful information in the [missing recorded] conversations despite having participated" in the conversation. *United States v. Moore*, 452 F.3d 382, 388 (5th Cir. 2006) (denying defendant's motion to dismiss for an alleged *Brady* violation); *see also id.* at 389-390 (adopting the *Brady* analysis for defendant's Jencks Act claim). Here, the military judge found "no evidence of bad faith on the part of any government actor either before or after the evidence was lost" and that "the agents of the Ft. Campbell CID Office took considerable efforts to find the lost disc . . . ." (App. Ex. XXV at 6). Ample evidence supports the military judge's finding that bad faith did not play into the loss, and no evidence suggests otherwise.

Here, CID had a policy to guard against potential loss of a disc: produce an original to send to Quantico, a copy to stay with the case file, and a copy for the SJA. Criminal Investigation Command adhered to that policy here. However, each of the sets of discs contained the same error: The disc labeled as Disc 4 was actually a duplicate of another disc. Thus, despite adherence to the policy, the disc was lost. Under these circumstances, "eliminating the witness' testimony would

restrict the search for truth rather than assist it in the instant and future cases." *Perry*, 471 F.2d at 1063.

II. IF THE MILITARY JUDGE ERRED, UNDER WHAT STANDARD SHOULD THIS COURT ASSESS PREJUDICE?

Standard of Review

"This Court review questions of law de novo." *United States v. Paul*, 73 M.J. 274, 277 (C.A.A.F. 2014).

Law and Analysis

Even when a lower court errs, this Court must affirm the findings "unless the error materially prejudices the substantial rights of the accused." Article 59(a), UCMJ, 10 U.S.C. § 859(a). In order for error to affect one's substantial rights, "the error *must* have been prejudicial: It *must* have affected the outcome of the" trial. *United States v. Olano*, 507 U.S. 725, 734 (1993) (emphasis added). This Court observed that "[n]ot every Jencks Act error is prejudicial. Consequently, we must consider the circumstances to determine the extent to which the error may have affected the result." *United States v. Albo*, 22 U.S.C.M.A. 30, 34 (C.M.A. 1972) (internal citations omitted).

The Supreme Court of the United States clearly explained that courts should not reverse a conviction due to a Jencks Act violation unless "the court concludes that the Government should have been required to deliver the material, or part of it,

to [appellant], and that the error was not harmless."[5] *Goldberg v. United States*, 425 U.S. 94, 111-112 (1976). When a defendant directly "argue[d] that only he and his counsel could determine the uses that might have been made of the" Jencks Act material and requested a new trial without respect to prejudice, the Supreme Court remanded for an evidentiary hearing to develop a record on prejudice. *Killian v. United States*, 368 U.S. 231, 241, 244 (1961). "While a defendant need not prove prejudice to show a violation of the Jencks Act . . . when there is no prejudice, a witness's testimony need not be stricken." *United States v. Riley*, 189 F. 3d 802, 806 (9th Cir. 1999). "In order to succeed on a claimed violation of the Jencks Act, defendants must demonstrate that they have been prejudiced by the failure to disclose." *United States v. Rosario-Peralta*, 175 F.3d 48, 53 (1st Cir. 1999); *accord. United States v. Kimoto*, 588 F.3d 464, 476 (7th Cir. 2009). Moreover, a "conviction can only be overturned under the Jencks Act if there was bad faith by the government *and* prejudice to the defendant." *United States v. Vieth*, 397 F.3d 615, 619 (8th Cit. 2005).

Both Rule for Court-Martial 914 and the Jencks Act contain mandatory language regarding the striking of testimony for non-compliance. R.C.M. 914(e);

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[5] When federal civilian courts conduct a harmless error review, they disregard any error "that does not *affect* substantial rights." Fed. R. Crim. Proc. 52(a) (emphasis added). By contrast, the military sets the bar higher by requiring the accused to establish "the error *materially prejudices*" – not simply affects – his substantial rights. Article 59(a), UCMJ, 10 U.S.C. § 859(a) (emphasis added).

18 U.S.C. § 3500(d). However, courts interpreting the Jencks Act uniformly test for harmless prejudice. *See, e.g., United States v. Gonzalez-Melendez*, 570 F.3d 1, 5 (1st Cir. 2009); *United States v. Wright*, 506 F.3d 1293, 1301 (10th Cir. 2007); *United States v. Hamaker*, 455 F.3d 1316, 1327 (11th Cir. 2006); *United States v. Elem*, 269 F.3d 877, 882 (7th Cir. 2001); *United States v. Maloof*, 205 F.3d 819, 825 (5th Cir. 2000). Similarly, the Service Courts also apply a prejudice analysis under Rule 914. *See United States v. Lewis*, 38 M.J. 501, 509 (Army C.M.R. 1993); *United States v. Staley*, 36 M.J. 896, 898 (A.F. C.M.R. 1993); *United States v. Derrick*, 21 M.J.903, 906 (N.M. C.M.R. 1986).

Appellant now argues that this Court should look to see if the alleged Rule 914 error was harmless beyond a reasonable doubt. (Appellant's Br. 15-16). For nonconstitutional error, courts look to "whether there is a *reasonable probability* that, but for the error, the outcome of the proceedings *would have been different*. For constitutional errors, . . . courts must be confident that there was *no reasonable possibility* that the error *might have contributed* to the conviction." *United States v. Tovarchavez*, 78 M.J. 458, 462, n.5 (C.A.A.F. 2019) (internal quotation marks and citations omitted, emphasis in original). The only constitutional protections hinted at by appellant are "the right to present a defense" and "the right to be confronted by one's accusers." (Appellant's Br. 15, 19). Appellant did not cast his objection in constitutional terms at court-martial (or

before the Army Court),[6] so he has forfeited this claim. *See United States v. Jones*, 78 M.J. 37, 44 (C.A.A.F. 2018) (finding forfeiture rather than waiver where trial defense counsel objects based on the Military Rules of Evidence but not the Sixth Amendment). Even if the Court considers the forfeited claim of constitutional magnitude, the government satisfied the right to confrontation with the in-court testimony of the agents recorded on Disc 4. *See Meras v. Sisto*, 676 F.3d 1184, 1190 (9th Cir. 2012) (explaining that the right to confrontation is satisfied by in-court testimony of declarant); *United States v. Wipf*, 397 F.3d 677, 682 and n.2 (8th Cir. 2005) (finding the Confrontation Clause inapplicable where the declarant testifies at trial).

In terms of appellant's right to present a defense, he has not articulated what makes this alleged Rule 914 violation different from every other Rule 914 or Jencks Act violation. He claims that because of the missing disc, he "was denied the capacity for meaningful confrontation—and therefore deprived of his right to present a meaningful defense to the alleged confession put forth by the government witnesses." (Appellant's Br. 19). It is difficult to imagine a Rule 914 or Jencks Act error in which that conclusory language would be inapplicable, yet the

[6] Appellant claims that the "court below found that this denial of appellant's right to confrontation to be harmless[.]" (Appellant's Br. 18). However, the Army Court did not consider the military judge's ruling to violate the Confrontation Clause. Rather, it conducted a constitutional prejudice analysis in a footnote as an alternative grounds for affirmance at the end of the opinion. (JA 9-10).

Supreme Court determined that a violation does not necessarily implicate a constitutional right. *See Augenblick*, 393 U.S. at 356. Appellant's newfound constitutional claim notwithstanding, the Army Court noted that trial defense counsel conducted a "robust cross-examination of the SAs concerning their interview techniques" even without the benefit of Disc 4. (JA 9). There is no reasonable possibility the absence of additional cross-examination material from Disc 4 would have contributed to appellant's conviction.

Any error here violates Rule for Courts-Martial 914, not the Constitution. Therefore, the proper standard for prejudice lies in Article 59(a): Whether an error violates appellant's substantial rights.

III. WAS THERE PREJUDICE UNDER THE APPLICABLE STANDARD OF REVIEW?

Additional Facts

There was no prejudice because overwhelming evidence proved appellant's guilt and the panel had evidence. The court-martial received Discs 1, 2, 3, and 5 of appellant's interview, giving the panel the opportunity to see and hear appellant's interactions with the CID agents. (Pros. Exhs. 3 and 20). At the conclusion of Disc 5, when asked if there was anything appellant wanted to tell AC, appellant responded:

> I had a lapse of judgment. I was a monster. And I did her wrong. I did something that will impact her life as long as I -- as long as she can remember. And for that, I'm just -- I'm disgusted with myself. And I

> feel extremely dirty for doing her wrong. That's not who I am. That's not what I want to be. And that I'm just a horrible, horrible individual for doing that.

(Pros. Ex. 3 at 16:57:05). Appellant concluded, "the shit that I've done, it's shit that animals do. It's wrong." (Pros. Ex. 3 at 17:00:10).

In terms of specifics, the panel watched video of appellant admitting that he had four sexual encounters with AC over a fourteen day period. In the first incident – two weeks prior to the fourth incident discussed on the missing Disc 4 – appellant said that AC came into his bed at midnight and he "was pushing up against her." Although appellant's naked penis didn't touch AC on this occasion, this was the first time that he was sexually aroused by cuddling with his four-year-old child. (Pros. Ex. 3 at 16:36:00-16:41:00).

The panel also saw the video of appellant saying that a few days later, AC got back in bed with him and his wife. Appellant started to cuddle his wife, but AC did not like the fact that appellant was not cuddling her too. AC turned her back towards appellant and pressed into his genital region. After a few minutes of this, appellant said he put AC back to bed. (Pros. Ex. 3 at 16:41:50-16:43:00).

The third incident appellant described on video was the first in which there was skin-to-skin contact. (Pros. Ex. 3 at 16:43:10-16:47:40). AC was in front of appellant, and appellant was wearing a loose pair of boxers that did not have a button on the front. Then, "like any normal day, [AC] backed up against

[appellant]." (Pros. Ex. 3 at 16:43:45). AC was in "summer pajamas" that appellant described as "really short" and "extremely short." (Pros. Ex. 3 at 16:44:00). Appellant's semi-erect penis came out of his boxers. When AC backed up into appellant, his penis was "right between her legs." (Pros. Ex. 3 at 16:44:48). At some point, AC went back to her bed, then returned wearing a nightgown. AC again pushed back against appellant. His penis was still semi-erect. Appellant explained he moved AC's underwear to the side to rub up against her, and he demonstrated on camera how he used his thumb to move the panties. Appellant then thrust his penis towards AC's genital region. Appellant's penis "went between [AC]'s legs, right in her [genital] vicinity, so yes, it could have separated her lips." (Pros. Ex. 3 at 16:47:14). Appellant then slightly backtracked to say that his penis "rubbed up against but never separated" the four-year-old's labia. (Pros. Ex. 3 at 16:47:30). Appellant agreed that "theoretically, [it] could be possible" that he subconsciously thought he was having sex with his wife but it was actually AC. (Pros. Ex. 20 at 16:46:10-16:48:00).

The video evidence also reflects appellant talking about a series of incidents in which he cuddled the four-year-old with an erect penis. Appellant explained that on three or four occasions, he woke up with an erection when AC was in his bed. (Pros. Ex. 20 at 16:55:00). He further said that two or three times, his erect penis was outside of his clothing. (Pros. Ex. 20 at 16:56:40). Appellant said that

his penis contacted her buttock region during these incidents. (Pros. Ex. 20 at 17:21:20). When asked whether he thought he had ejaculated during any of these instances with AC in his bed, appellant said that he woke up to wet spots in his bed that he described as "pre-cum." (Pros. Ex. 20 at 16:57:10-16:58:20). Appellant described an incident when AC grinded against his erect penis, and he noticed a wet spot. (Pros. Ex. 20 at 17:06:55). Appellant said AC was wide awake during this incident, and she said "I'm mommy." (Pros. Ex. 20 at 17:13:50). He acknowledged that, at times, he awakened to humping the pre-schooler. (Pros. Ex. 20 at 17:27:40).

At trial, appellant testified at length about these interviews. (R. at 1052-1157). Appellant admitted to the panel that, on the second day of the interview, he confessed to sexually abusing AC four times. (Supp. JA 26). Specifically, appellant testified about describing to the SA's the instance in he went fishing – meaning he was "looking for a hole to put his dick in" – and that he penetrated AC's vagina with his erect penis. (Supp. JA 27-28). Further, he explained that the he made the admissions as the result of "robust--robust questioning." (Supp. JA 29). Appellant told the panel that he thought the agents were trying to elicit a response from him, that SA SF was trying to be the "bad cop," and that he found the questioning degrading, (Supp. JA 24-25). Appellant said that he told CID the things that he did because "it's something that's been burdening," and he agreed

what he said was the truth. (Pros. Ex. 3 at 16:56:20). Appellant said that nobody coerced him into making a statement. (Pros. Ex. 3 at 16:56:50).

Standard of Review

"Article 59(a) is applied through the standards of review and appellate burdens tailored to the issue on appeal." *United States v. Davis*, 64 M.J. 445, 449 (C.A.A.F. 2007); *see also Tovarchavez*, 78 M.J. at 467 (assessing prejudice "based on the nature of the right"). In the context of a Rule 914 motion to strike, prejudice should be assessed for an abuse of discretion. *See Muwwakkil*, 74 M.J. at 191.

Law and Analysis

Under the Jencks Act, a defendant is prejudiced only if "the error is one that might reasonably be thought to have had a substantial and injurious effect or influence in determining the jury verdict." *Susskind*, 4 F.3d at 1406 (internal quotation marks omitted). Where a "witness' admissions while testifying" provide the same information that would be included in a disclosure, "it would deny reason to entertain the belief that defendant could have been prejudiced by not having had opportunity to inspect the" Jencks material. *Rosenberg v. United States*, 360 U.S. 367, 371 (1959). In a Jencks Act appeal regarding a lost tape, the Tenth Circuit held "the defendants were not sufficiently prejudiced by their inability to examine the lost tape recording to justify reversal" because there was "no evidence that the

material in it was exculpatory to the defendants" and the "witness who gave the recorded statement appeared in person and was subject to cross-examination." *United States v. Monaco*, 700 F.2d 577, 580 (10th Cir. 1983).

A. Appellant Benefited From The Absence Of Disc 4.

The absence of Disc 4 hampered the prosecution by depriving it of the ability to have the panel see and hear appellant confessing to the gravamen of the crime. Lieutenant Colonel JB, who observed the interview in real-time, testified that "there's absolutely nothing on [Disc 4] that painted CID in a bad light"; that Disc 4 had "nothing exculpatory on it, it was all inculpatory in what he had done to his daughter"; and that this was the worst DVD to lose from the prosecution's perspective. (Supp. JA 8-9). Further, the loss of Disc 4 gave appellant the ammunition that he used in an extensive effort to undermine the credibility the CID agents who testified against him. (JA 201-204, 206). Both questioning agents from the missing disc appeared and were subject to cross-examination, and whatever additional cross-examination material that appellant claims could have gleaned from Disc 4 would have been far outweighed by the incredibly damaging evidence of the panel having the opportunity to hear the appellant describe violating the child. To the extent that there was prejudice from the Disc 4's absence, it hurt the prosecution, not appellant.

The panel had four discs in which they could evaluate the agents' manner of questioning. Trial defense counsel had the ability to, and did, cross-examine the agents on the that very point. And appellant began making inculpatory admissions – inasmuch as he ejaculated when grinding with the preschooler after which she said, "I'm mommy" – in the first day of the interviews. (Pros. Ex. 20). In short, the panel had sufficient information to evaluate the manner in which the agents conducted this interview.

Three individuals – including two judge advocates – listened in on the interview in real-time and could have potentially testified about appellant's admissions. Because none of these individuals was recorded on the missing Disc 4, they could not have made a statement on the missing disc. Rule 914 therefore could not have served as a basis to preclude their testimony. Accordingly, the court-martial could have received evidence of appellant's confession in exquisite detail[7] from any or all of these witnesses even if the military judge granted

[7] Special Agent CT testified that appellant admitted that – while four-year-old AC wore a Disney Princess nightgown – "he put the tip of his penis in his daughter's vagina" and "he did ejaculate on her." (Supp. JA 5-6). When asked if he recalled appellant's admission, LTC JB gave an uninterrupted response that filled more than two complete pages of the transcript without interruption. (JA 69-70).

LTC JB testified that there were "a few words and phrases that [appellant] used that I'll never forget because they are so abnormal for the situation . . . ." (JA 75). Specifically, when appellant described jamming his penis inside of the four-year-old's vagina as "going fishing" that "just blew [LTC JB's] mind[.]" (JA 75-76). Lieutenant Colonel JB also recalled that appellant described that his penis

appellant's motion to strike the agents' testimony under Rule 914. While their testimony would have been cumulative in the present state of the record, that would not be the case if the military judge struck SA SF and CJ's testimony.

B. The Military Judge's Ruling Did Not Prejudice Appellant's Substantial Rights.

As an initial matter, the Army Court evaluated prejudice based on severing out the testimony of the agents regarding the substance of Disc 4. (JA 9). Appellant claims, without authority, that he is "entitled to have the CID agents' testimony excluded so the matter to be weighed by this court is *not* merely the speculative value of any lost impeachment evidence. The question presented to this court is the importance of the admitted testimony." (Appellant's Br. 16). Federal appellate courts disagree with appellant. *See, e.g. United States v. Miranda*, 526 F.2d 1319, 1328 (2d Cir. 1975) (explaining that where the "loss of the tape recording by the agents was merely inadvertent or negligent" rather than "deliberate or bad faith loss," the question for an appellate court "is whether the defense was so greatly prejudiced by the unavailability of the recording at trial as to require the imposition of sanctions against the government"); *see also United States v. Izzi*, 613 F.3d 1205, 1213 (1st Cir. 1980) ("[w]e have found no case holding that an inadvertent or negligent failure to turn over Jencks Act material is

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[7 (cont'd)] "separated her lips" almost to the depth of the first knuckle but "that she was too tight for him to enter further." (JA 76).

per se grounds for a new trial" and "[o]ur approach has been to determine whether the defendant has been prejudiced by the government's failure to disclose").

However, even if the Court evaluates the effect of the denial of the motion to strike, appellant still has not established prejudice.[8] As the Army Court observed, even without the controverted testimony:

> the following government evidence remains from appellant's fully complete trial: (1) appellant's admissions as to his sexual acts against AC on Discs 1, 2, 3, and 5; (2) appellant's testimony at trial where he admitted he told the SAs during the day two interview that he penetrated AC's vagina with his penis; (3) AC and appellant's HSV-2 genital herpes positive status; and (4) the medical expert testimony as to the sexual activity required to contract HSV-2 genital herpes. Together, even without the testimony as to the portions of the interview covered by Disc 4, the government presented an overwhelming case as to appellant's guilt.

(JA 9). The discs that the Army Court referenced paint a damning picture: appellant admitted to having multiple sexual encounters with his four-year-old daughter, and he admitted – and then backtracked – to separating the child's *labia* with his penis. Portions of Disc 5 reference a conversation which would have been included on the missing disc.[9] In Disc 5, appellant says that everything he said in

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[8] Appellant conceded before the Army Court that the R.C.M. 914 motion "applied only to the comments contained on the lost Disc 4." (JA 9). Therefore, Discs 1, 2, 3, and 5 and the testimony about those portions of appellant's interview are admissible for a prejudice analysis.

[9] Appellant moved to preclude introduction of Disc 5 under the Rule of Completeness. (Supp. JA 20). In denying the motion, the military judge explained that "there are multiple other witnesses who were present for or witnessed that interrogation and defense, unless some other rule of evidence prohibits it, is free to

the interviews was truthful, and appellant testified that he told the agents about penetrating the pre-schooler.

The Army Court also found that "the defense case was weak. Appellant's testimony and his claims as to why he made admissions to CID are simply incredible. The remainder of the defense's case was equally unpersuasive." (JA 9). Appellant posited that the child contracted herpes from non-sexual contact with a surface, a medically unsound theory. (JA 152). Appellant also suggested that someone else might have given the sexually-transmitted disease to the four-year-old, but the panel saw a video of appellant agreeing with SA SF that – based on when AC contracted HSV-2 aligning with when appellant's wife began to work a night shift – appellant would be the logical person to investigate. (Pros. Ex. 20 at 14:08:10). The Army Court correctly found that the defense put forth a weak case.

Furthermore, "[t]he defense was not deprived of any facts otherwise known to the prosecution, and effective cross-examination was not unfairly foreclosed." *United States v. Nelson*, 970 F.2d 439, 442 (8th Cir. 1992). Appellant participated in the entire interview and – although he may not have had verbatim recall of the interview – knew the tone and general content of the agents' questioning. Trial

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[9 (cont'd)] call any of them in an effort to introduce additional evidence regarding the entirety of the statement." (Supp. JA 21). The availability of those same witnesses provided appellant with an avenue to impeach agents CJ and SF notwithstanding the loss of Disc 4.

defense counsel intimated during cross-examination of the agents that the questions were intended to make appellant fearful, that they "can tell anybody pretty much anything in order to get--elicit information from them[,]". (JA 141, 143). The cross-examination of SA SF by asking "you exaggerated and you blew out of proportion the evidence you had and took it out of context . . . to pressure [appellant] into making an admission?" (Supp. JA 17). Trial defense counsel argued that in the missing disc, the agents "are wearing down his will." (JA 201). He further argued that the agents had faulty memory because they could not remember every detail from the missing disc. (JA 202). Appellant's participation in the interview gave him sufficient information to cross-examine the other participants, and under these circumstances, "it would offend common sense and the air administration of justice to order a new trial. There is such a thing as harmless error, and this clearly was such." *Rosenberg*, 360 U.S. at 371.

When other federal appellate courts review similar appeals, they do not find that the trial court abused its discretion in denying motions to strike testimony. For example, in *Miranda*, the defense moved to suppress testimony regarding surveillance because the witness's tape-recorded observations "inexplicably disappeared." 526 F.2d at 1324. As in this case, the "evidence concerning the tape and its loss was before the jury. Defense counsel was in a position to make the most of that evidence in summation, and did so. The jury was entitled to consider

such evidence in reaching its verdict." *Id.*; *see also id.* at 1328 (giving significant weight to the fact that the finder of fact heard all of the facts regarding the absence of the evidence from the trial and the defense's opportunity to use that testimony in summation). The Second Circuit recognized that the trial judge – having observed the witnesses testify about the loss of the tape – was in the best position to determine "that while the loss of the tape 'indicates negligence on the part of the government agents, the court cannot find that the loss was intentional or in bad faith.'" *Id.* at 1327 (quoting the trial court's unpublished opinion). Notwithstanding the un-produced statements, the court affirmed the conviction.

Similarly, appellant put the circumstances regarding the missing disc in front of the panel. Appellant's closing argument addressed the significance of its absence. By highlighting this weakness in the prosecution's case, trial defense counsel made the most of this vulnerability. Appellant did everything he could to capitalize on the government's error. However, Rule 914 does not require the remedy he seeks. Given the overwhelming evidence, appellant cannot establish a *reasonable probability* that, but for the purported error, the results of his court-martial would have been different. *Tovarchavez*, 78 M.J. at 462, n.5

Even if the Court finds that the admission of this testimony affects a non-forfeited constitutional right and tests for harmlessness beyond a reasonable doubt, it should still affirm. Appellant claims that "without knowing how leading the

questions were, or what inducements were offered, or what manipulations were employed, a trier of fact cannot assess the weight a statement deserves." (Appellant's Br. 16-17). However, as the Army Court noted, trial defense counsel still conducted a "robust cross examination of the SAs concerning their interview techniques" even without Disc 4. (JA 9). Moreover, appellant chose to testify in his defense and had a complete opportunity to explain to the panel the manner in which the agents conducted the interview. Thus, there is no reasonable possibility that the absence of the additional impeachment material that appellant claims Disc 4 could provide contributed to appellant's conviction. *Tovarchavez*, 78 M.J. at 462, n.5

Conclusion

Accordingly, the United States respectfully requests that this Honorable Court affirm the findings and sentence as adjudged.

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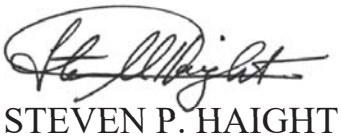

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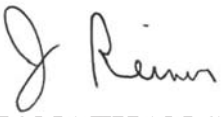

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