IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	BRIEF ON BEHALF OF APPELLEE
v.	)	
Private (E-2) **LEEROY M. SIGRAH,** United States Army, Appellant	)	Crim. App. No. ARMY 20190556
	)	USCA Dkt. No. 21-0325/AR

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

Issue Presented

WHETHER THE MILITARY JUDGE'S DENIAL OF APPELLANT'S R.C.M. 914 MOTIONS MATERIALLY PREJUDICED APPELLANT'S SUBSTANTIAL RIGHTS.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66(b), Uniform Code of Military Justice, 10 U.S.C. §866(b) (2019) [UCMJ]. This Honorable Court has jurisdiction pursuant to Article 67(a)(3), UCMJ.

Statement of the Case

On August 14, 2019, a panel with enlisted representation sitting as a general court-martial convicted Appellant, contrary to his pleas, of one specification of sexual assault, in violation of Article 120, UCMJ. (R. at 595). On August 15, 2019, the panel sentenced Appellant to reduction to the grade of E-1, forfeiture of all pay and allowances, confinement for twelve years, and a dishonorable discharge. (R. at 666). The convening authority took no action on Appellant's sentence on December 3, 2019. (Initial Action). The military judge entered judgment on January 16, 2020. (Judgment). The Army Court returned Appellant's case to the convening authority for his action pursuant to Rule 35 of its Rules of Appellate Procedure on May 29, 2020. The convening authority approved Appellant's adjudged sentence on June 4, 2020. (Final Action). The military judge entered the judgment on June 8, 2020. (Modified Judgment of the Court).

On March 23, 2021, the Army Court ordered the government to inquire with the Fort Campbell Office of the Staff Judge Advocate about whether the military judge's written Rule for Courts-Martial [R.C.M.] 914 ruling existed. *United States v. Sigrah*, ARMY 20190556 (Army. Ct. Crim. App. March 23, 2021) (order). The government confirmed the existence of the military judge's written ruling, and on March 26, 2021, the Army Court returned the record of trial to the military judge "for action consistent with R.C.M. 1112, to resolve the matter of the military

judge's written R.C.M. 914 ruling and correcting the record." *United States v. Sigrah*, ARMY 20190556 (Army. Ct. Crim. App. March 26, 2021) (order). The military judge returned the corrected record of trial, including the her written R.C.M. 914 ruling and several associated appellate exhibits, on April 14, 2021. *United States v. Sigrah*, ARMY 20190556 (Army. Ct. Crim. App. April 16, 2021) (order). On June 9, 2021, the Army Court affirmed the findings and sentence. *United States v. Sigrah*, ARMY 20190556, 2021 CCA LEXIS 279 (Army Ct. Crim. App. Jun. 9, 2021) (mem. op.). This Court granted Appellant's petition for review on February 23, 2022. (JA 001).

Statement of Facts

A. Specialist MP drank nine alcoholic drinks and fell asleep in Specialist AD's bed.

Specialist [SPC] MP, SPC AD, and SPC CB were friends who worked in the same office and lived in the same barracks building. (R. at 291, 296; JA 58). Specialist AD introduced Appellant, who was new to Fort Campbell, to the group. (R. at 296). Appellant and SPC AD were from the same Micronesian island and had known each other for six years, attended church together, and even referred to each other as "cousins." (JA 41, 46).

On 2 February 2018, SPC AD and SPC CB played cards and drank in their common area with Appellant. (R. at 296). Specialist MP was out for dinner and drinks with a different group of friends. (R. at 290). Specialist AD invited SPC

MP to join them upon her return to the barracks. (R. at 463; Pros. Ex. 2 at 10). Appellant repeatedly Facebook-messaged SPC MP, asking whether she was drunk and encouraging her to drink more prior to her arrival. (Pros. Ex. 2 at 10, 13, 14).

Specialist MP consumed seven whiskey shots while she was out and drank two beers upon returning to SPC AD and SPC CB's room. (R. at 298). Specialist AD realized that SPC MP was "a little bit too drunk," so he told her to "crash in [his] room." (R. at 465). Specialist MP knew SPC AD and SPC CB for two years, so she felt safe resting in their barracks room. (R. at 299). She went into SPC AD's bedroom and fell asleep. (R. at 299). Specialist CB followed suit and went to bed in his room, while SPC AD and Appellant continued drinking. (JA 47). Appellant asked SPC AD whether he could have sex with SPC MP. (JA 47). Specialist AD thought that Appellant was joking, as he knew that Appellant was engaged to another woman, so he responded "[y]eah, you can do it." (JA 47–48). Appellant walked into SPC AD's bedroom as SPC AD nodded off to sleep at the kitchen table. (JA 48).

B. Appellant sexually assaulted SPC MP as she slept.

Specialist MP woke when she felt the bed rocking. (JA 27). Despite the darkness of the room, she made out the silhouette of a person with a wide body and shaved head pressed on top of her. (JA 26–27, 29). As the figure "mov[ed] up and down . . . along [her] body," SPC MP realized that her legs were spread open and

that her yoga pants and underwear had been removed from her right leg, exposing her vagina. (JA 27, 44). Specialist MP "realized that something was completely wrong, . . . pushed the person off of [her] and that's when [she] heard him say, 'Okay, I'm sorry. I'm just going to sleep beside you.'" (JA 27). Specialist MP recognized Appellant's voice. (JA 32). Specialist MP struggled against his grasp and eventually left the bedroom. (JA 30).

When SPC MP left the bedroom, she found SPC AD asleep at the kitchen table. (JA 31). After she saw SPC AD asleep on the kitchen table, SPC MP realized it was Appellant—with his wide body and shaved head—who had been on top of her in the bedroom. (JA 31). Specialist MP went to her room and cried herself to sleep. (JA 32). She awoke a few hours later and experienced vaginal soreness, the same pain she felt after previous, unrelated, sexual encounters. (JA 33).

C. Appellant repeatedly apologized and threatened to harm himself after SPC MP refused to speak with him.

Later that day on February 3, 2018, Appellant messaged SPC MP, "I fucked up. U [sic] have all the reasons in this world to hate. I'm very sorry. I really am. u [sic] don't have to reply. I just wanna say how sorry and stupid I am." (JA 177) (emojis omitted). Appellant sent several messages throughout the evening, alternating between apologizing and admitting to "feel[ing] guilty as fuck." (JA 177–78; 179–80). During the early morning hours of 4 February 2019, Appellant

messaged SPC MP, "[l]ast night was the best night of [my] life" and insisted upon speaking with SPC MP in person. (JA 183). At first, SPC MP tried to defuse the situation by telling Appellant that she could not speak with him because she was FaceTiming with her boyfriend. (JA 182). Undeterred, Appellant pleaded with SPC MP to allow him to sleep next to her "for the last time." (JA 181). Specialist MP refused, and Appellant responded with several thinly veiled references to committing suicide. (JA 34, 181; Pros. Ex. 2 at 30, 31, 33, 34). His threats of self-harm led SPC MP to enlist SPC AD's help to calm Appellant. (JA 35).

D. Specialist MP reported the sexual assault.

Specialist MP was in denial about the sexual assault. (JA 36). She did not want to "go through the whole process of it, of reporting it and talking to authorities, to [her] chain of command, and to the lawyers and to do this whole court-martial . . . ." (JA 36). However, approximately one week after the incident, SPC MP confided in a group of her coworkers, and they encouraged her to report the incident. (JA 127). Specialist AD voiced concern about SPC MP's desire to report, which stemmed from the fact that "he didn't want his cousin, or friend, to get in trouble." (JA 41). However, SPC MP realized that she could not simply forget that she was sexually assaulted, so she reported the attack to her battalion's Sexual Assault Response Coordinator. (JA 41).

E. Appellant's Rule for Courts-Martial 914 requests.

At the end of the government's direct examination of SPC MP, Appellant requested an Article 39(a) session to discuss his motion for relief under R.C.M. 914. (JA 127). Appellant called Criminal Investigation Command [CID] Special Agent [SA] DM and SA RP in support of his request. (JA 66, 108).

1. Criminal Investigation Command's video recording procedures and policies.

Special Agent DM, the case's lead investigator, explained that at the time of the interviews, the cameras in Fort Campbell's CID interview rooms used a video recording system that continuously recorded the visual component of a video, regardless of whether there was any activity in the room. (JA 67, 75, 95). The cameras then transmitted the video data to a server maintained at Fort Campbell's CID office. (JA 71). The data remained on the server until it reached its storage capacity, at which point older data was automatically overwritten by newer data. (JA 71–72, 86). Special Agent DM testified that data remained on the server for approximately thirty to forty-five days, depending on the volume of activity within the CID office. (JA 72, 110).

Special Agent DM also explained that CID policy required special agents to download subject/suspect interviews from the server onto a DVD within twenty-four hours of the interview, but there was no such regulatory requirement to download victim or witness interviews. (JA 71, 94). He further testified,

"[individual special agents] do not have the authority to just go in and [download victim interviews] and save [them] to a disc . . . ." (JA 102). In fact, a Special Agent would need authorization from multiple parties, including the Special Agent in Charge, the Special Victims Prosecutor, and the Special Victims Counsel, in order to download, save, and store a victim interview. (JA 102, 105).

2. The Government witnesses' interviews.

Special Agent DM interviewed Appellant, SPC MP, SPC AD, and SPC CB at the Fort Campbell CID office. (JA 67). He confirmed that neither he nor any of the other special agents had downloaded the video data of SPC MP's, SPC CB's, or SPC AD's interviews. (JA 72–74). Special Agent DM testified that he queried the CID server for the videos prior to testifying that day and his search yielded no results. (JA 73).

Specialist MP could not could not recall the exact length of time she spent at the CID office but estimated that she may have arrived at approximately 0900 and left at approximately 1630. (JA 42). Special Agent DM was similarly uncertain about the exact length of SPC MP's interview, but he generally recalled that her interview took "2 or 3 [hours], maybe more." (JA 69, 77). He stated that even though SPC MP was physically present at CID for several hours, there were periods with no communication between SPC MP and a special agent. (JA 101). Special Agent DM specified that there were restroom breaks and periods where

SPC MP sat alone in the interview room, either typing her narrative statement or simply just waiting. (JA 101). When questioned whether he spoke to CID for "several hours," SPC CB replied "No, it wasn't that long." (JA 59). Specialist AD was confident that his entire interaction with CID, from his arrival through his interview, DNA swab, and rights advisement, was at most three hours long. (JA 53–56). Special Agent DM recalled that SPC AD's interview lasted "probably a couple hours." (JA 80).

3. Special Agents created contemporaneous written sworn statements.

Criminal Investigation Command interviews generally consist of several distinct phases: an introductory rapport-building period, a period where the interviewee provides information about the allegation, a chance for the interviewee to memorialize that information in a narrative statement, and a written question and answer period where the special agent asks for further information or clarification. (JA 90–91). Then, the interviewee and special agent review the interviewee's written statement to ensure its accuracy prior to the interviewee swearing to the veracity of his or her "statement." (JA 91–93).

Special Agent DM testified that he used the same protocol when he conducted SPC AD's, SPC CB's, and SPC MP's interviews. (JA 93). Special Agents RP completed just written question-and-answer portion of SPC MP's interview as SA DM left the room to conduct Appellant's interview. (JA 79–80).

Although both special agents admitted that the sworn statements did not capture every word that an interviewee may have uttered, they maintained that the interviewees' sworn statements encompassed "the incident that occurred and allegations, everything that happened." (JA 78, 93, 119, 121–22).

4. The military judge denied Appellant's R.C.M. 914 motion at trial.

Appellant argued that the military judge should order the panel to disregard SPC MP's testimony because of "CID's either intentional or specific[] decision . . . not to download and save [SPC MP]'s recorded video audio interview . . . ." (JA 136). The government conceded that the video-recorded interviews were statements under R.C.M. 914 and that it could not produce the statements, as they no longer existed. (JA 142–43). Nonetheless, the government argued the deletions were not done in bad faith and that the witnesses' written statements were thorough, comprehensive, and detailed. (JA 143). The government maintained that Appellant was not prejudiced because Appellant could cross-examine SPC MP, SPC AD, and SPC CB based upon their written sworn statements. (JA 144). The military judge recessed the court-martial overnight to consider Appellant's R.C.M. 914 motion. (JA 145–46). The following morning, she denied Appellant's R.C.M. 914 motion and said she would supplement her ruling with written findings prior to authentication of the record. (JA 146).

In her written ruling, the military judge found that: CID had not acted negligently nor in bad faith; and the recorded interviews were automatically deleted prior to Appellant's request.[1] (JA 217–18). Further the military judge found that the witnesses' written statements were "comprehensive, thorough[,] and complete, and captured all of the details" of their discussions with CID. (JA 217). The military judge found that the Government had not violated R.C.M. 914, largely because the Government no longer possessed the recordings. (JA 218). Finally, the military judge found that the written statements were adequate substitutes for the recordings, and SA DM and SA RP were present for the interviews and could "testify accordingly." (JA 220).

Summary of Argument

The military judge appropriately denied Appellant's R.C.M. 914 motions. The military judge certainly erred when she found that the government's failure to provide Appellant with the lost government witness interviews did not violate R.C.M. 914. Her subsequent analysis of the lost interviews as an R.C.M. 703 discovery violation was similarly misguided. Nevertheless, Appellant did not suffer material prejudice to his substantial rights because the military judge arrived at the right result—denial of 's R.C.M. 914 motions. Her finding that Appellant

[1] The military judge's written ruling was attached to the record pursuant to the Army Court's Order. (JA 210, 214, 216)

possessed "adequate substitutes"—the government witnesses' sworn statements, which were "complete, thorough, and comprehensive" and rendered contemporaneously with the witness interviews—was correct. (JA 217). Moreover, Appellant used these written statements to effectively cross-examine and impeach the witnesses against him, and thus the loss of the witness interviews did not materially affect Appellant's substantial rights.

The Army Court correctly identified its superior courts' precedent, accurately distilled the rationale underlying each cases' prejudice analysis, and faithfully abided by applicable precedent when it found that Appellant was not prejudiced by the military judge's denial of his R.C.M. 914 motions. There is no conflict, contrived or otherwise, as appellant suggests between the Supreme Court's prejudice analysis in *Rosenberg* and the four-factor *Kohlbek* test. This Court should make explicit what the Army Court implicitly found: that the predicate question to determining prejudice related to an R.C.M. 914 violation is whether an appellant possess an adequate substitute for the lost statement? If so, the error is harmless and the prejudice analysis ends. If not, then the appellate court should turn to the *Kohlbek* test to determine whether the appellant was prejudiced by the erroneous admission of the contested statements. Accordingly, this Court should affirm the Army Court's decision.

WHETHER THE MILITARY JUDGE'S DENIAL OF APPELLANT'S R.C.M. 914 MOTIONS MATERIALLY PREJUDICED APPELLANT'S SUBSTANTIAL RIGHTS.

Standard of Review

"A military judge's decision whether to strike testimony under R.C.M. 914 is reviewed for an abuse of discretion. *United States v. Clark*, 79 M.J. 449, 453 (C.A.A.F. 2020). An abuse of discretion occurs when a military judge's findings of facts are clearly erroneous or his conclusions of law are incorrect. *United States v. Olson*, 74 M.J. 132, 134 (C.A.A.F. 2015). This Court conducts a de novo review when determining whether an appellant was prejudiced by an R.C.M. 914 violation. *Clark*, 79 M.J. at 455.

Law and Argument

A. History and purpose of the Jencks Act and R.C.M. 914.

The Jencks Acts "'further[s] the fair and just administration of criminal justice' by providing for disclosure of statements for impeaching government witnesses." *United States v. Muwwakkil*, 74 M.J. 187, 190 (C.A.A.F. 2015) (quoting *Goldberg v. United States*, 425 U.S. 94, 107, (1976)). The Jencks Act was Congress's reaction to the Supreme Court's opinion in *United States v. Jencks*, which held:

> [A] criminal action must be dismissed when the Government, on the ground of privilege, elects not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant statements or reports in its possession of government witnesses touching the subject matter of their testimony at the trial.

353 U.S. 657, 672 (1957), *superseded by statue*, 18 U.S.C. § 3500; *Palermo v. United States*, 360 U.S. 343, 346 (1959).

The Jencks Act strikes a balance between preventing the inherent injustice of the Government invoking governmental privilege to deny a defendant of the same information that it used to secure his conviction and protecting the Government from evidentiary fishing expeditions. *See Palermo*, 360 U.S. at 349; *United States v. Graves*, 428 F.2d 196, 199 (5th Cir. 1970) ("The Act does not authorize fishing expeditions by the defendant, however, and use of statements under the Act is restricted to impeachment"). Rule for Courts-Martial 914 "tracks the language of the Jencks Act," and "[g]iven the similarities in language and purpose between R.C.M. 914 and the Jencks Act, [this Court] conclude[d] that [its] Jencks Act case law and that of the Supreme Court informs [its] analysis of R.C.M. 914 issues." *Muwwakkil*, 74 M.J. at 190–91.

B. No relief is required for an error without material prejudice.

Rule for Courts-Martial 914 states that "the military judge shall order that the testimony of the witness be disregarded . . . or, . . . declare a mistrial if required

in the interest of justice," if the government elects not to comply with the military judge's order to produce an R.C.M. 914 statement. This Court and the Supreme Court interpret the Government's loss or destruction of an R.C.M. 914 statement as an election not to comply.[2] *Muwwakkil*, 74 M.J. at 192–94 (citing *United States v. Augenblick*, 393 U.S. 348, 355 (1969)).

Nevertheless, specific facts of a case may justify deviation from R.C.M. 914's weighty sanctions. The first such exception recognizes the inequity of penalizing the Government for a loss when it did not act with sufficient culpability, and thus it excuses the "good faith loss" of the R.C.M. 914 statement. *See Killian v. United States*, 368 U.S. 231, 242 (1961); *Clark*, 79 M.J. at 454. Additionally, courts refrain from providing relief when the prejudice stemming from the Government's non-compliance with R.C.M. 914's mandates is inconsequential. *See* Article 59(a), UCMJ; *Rosenberg v. United States*, 360 U.S. 367, 371 (1959); *Killian*, 368 U.S. at 243; *Clark*, 79 M.J. at 455; *United States v. Emor*, 573 F.3d 778, 785 (D.C. Cir. 2009) (finding no prejudice where withheld materials "would have assisted [appellant] only in further impeaching an already impeached witness); *United States v. Riley*, 189 F.3d 802, 805–06 (9th Cir. 1999) (noting "we

[2] For the sake of brevity, references to R.C.M. 914 impliedly encompass its civilian counterpart, the Jencks Act, unless otherwise specified.

have not required that testimony be stricken where a substitute for the missing statement was available").

C. Errant findings do not invalidate an otherwise appropriate ruling.

Appellee does not contend that the military judge made flawless findings of fact or conclusions of law. The Army Court astutely noted that the military judge erred when she found that the Government's failure to provide Appellant with the witnesses' interviews was not an R.C.M. 914 violation. *Sigrah*, 2021 CCA LEXIS 279, at *13. Similarly, the Army Court's finding—that CID's policy against preserving non-subject interviews demonstrated sufficient culpability to preclude the military judge's application of the good faith loss doctrine—was correct. *Sigrah*, 2021 CCA LEXIS 279, at *17. However, this Court should nevertheless affirm appellant's conviction and sentence because the military judge's denial of appellant's R.C.M. 914 motion was ultimately the right result. *United States v. Norwood*, 81 M.J. 12, 18 (C.A.A.F. 2021) ("[W]e affirm a military judge's ruling when 'the military judge reached the correct result, albeit for the wrong reason.'") (quoting *United States v. Bess*, 80 M.J. 1, 12 (C.A.A.F. 2020)).

The military judge's denial of appellant's R.C.M. 914 motion was correct because appellant possessed "substantially the same information"—the witnesses' written statements—as he would have gleaned from their recorded interviews. *United States v. Strand*, 21 M.J. 912, 915 (N.M.C.M.R. 1986). Special Agent DM

affirmed that SPC CB's written statement "captured the incident that occurred and allegations, everything that happened." (JA 79, 103). Special Agent RP testified that "all the information [from SPC MP's recorded interview] basically coincided with what was written on [her] statement." (JA 119). Accordingly and appropriately, the military judge found as fact that SPC MP's sworn statement "was a complete, thorough, and comprehensive statement that captured all of the details of the allegation that she discussed with SA [DM]."[3] (JA 217). Similarly, the military judge found that SPC AD's and SPC CB's sworn statements "captured all of the details [they] discussed with [the] CID agents interviewing [them]." (JA 217). Further, she found that the "written statements constitute[d] an adequate substitute for the deleted video recordings." (JA 218). It is of no moment that the written statements did not capture the witness' every utterance or change in posture, so long as the information is substantially the same. *See Rosenberg*, 360 U.S. at 371; *United States v. Marsh*, 21 M.J. 445, 452 (C.M.A. 1986) (finding no prejudice where appellant possessed a summarized transcript of the lost witness recordings); *Clark*, 79 M.J. at 455 (recognizing that even though appellant did not have the "very same information," his possession of "sufficient information"

[3] The Army Court agreed, finding that the statements were "contemporaneous, detailed, sworn statements, adequately capturing, in [the witnesses'] own words, their discussions with CID on the facts of central importance." *Sigrah*, 2021 CCA LEXIS 279, at *23.

mitigated against a finding of prejudice); *United States v. Anthony*, 565 F.2d 533, 537 (8th Cir. 1977) (finding harmless error where appellant possessed grand jury transcripts which contained "substantially the same evidence" as that contained in an undisclosed letter); *United States v. Derrick*, 507 F.2d 868, 871 (4th Cir. 1974) (finding harmless error where the appellant already had nearly the same information as was contained in an undisclosed statement); *cf Muwwakkil*, 74 M.J. at 193-94 (finding the military judge appropriately granted the appellant's R.C.M. 914 request in part because of the lack of an adequate substitute for the lost witness recording).

The purpose of the Jencks Act and R.C.M. 914 is to provide an appellant with impeachment material, and the record amply demonstrates that Appellant was not left wanting for material. Appellant's effective cross-examination and subsequent impeachment of the Government's witnesses demonstrated that their written statements were more than an "adequate substitute" for the lost recordings. (JA 218). Appellant weaponized SPC MP's written statement to impeach her testimony, thrice forcing her to admit that she had lied to—or at the very least mislead—both CID and Appellant when she claimed to have a boyfriend at the time of the sexual assault. (R. at 429, 432; JA 39).

Appellant's cross-examination of SPC AD, whom appellant alleges was SPC MP's actual attacker, was even more effective. First, appellant exposed to the

panel that SPC AD had the benefit of reviewing his written statement a few days prior to testifying at trial. (JA 50–51). Appellant then used SPC AD's written statement to paint him as both exceedingly forgetful—causing SPC AD to utter the phrase "I can't remember" or words to that effect no fewer than ten times. (JA 51, 52, 54, 56; R. at 483). Appellant was even successful at demonstrating that SPC SD was deceitful, by getting him to admit that he never informed CID that he had lay in bed with SPC MP on the morning of the sexual assault. (R. at 482, 484–85). Appellant's cross-examination was so effective and thorough that the panel posed additional questions to clarify SPC AD's forced equivocation. (R. at 490).

Additionally, Appellant used the written statements to lock the Government witnesses into testimony favorable to Appellant.[4] Specialist MP confirmed that she did not remember "any penetration," thus casting doubt on her allegation that she was sexually assaulted at all or that appellant was her attacker. (R. at 439). Specialist MP and SPC AD both confirmed that their CID interviews lasted several hours. (JA 39–40, 53). Appellant used these admissions to forcefully remind the panel that CID conducted four interviews, yet only saved one—Appellant's. (R. at 554). Appellant then lambasted CID for failing to recover SPC MP's interview and exclaimed, "Wouldn't you have liked to kind of compare [SPC MP's

[4] Appellant described SPC CB as the Government's "most unbiased witness" because his testimony and written statement largely supported appellant's claim that SPC MP exaggerated her level of intoxication. (JA 173).

interview] with the testimony she gave here today? You can't. It was lost, destroyed, overwritten. CID didn't care . . . ." (R. at 554–55).

The military judge erred when she found that the Government did not violate R.C.M. 914, as well as when she applied the good faith loss doctrine; "[h]owever, the military judge's error was harmless, because the military judge reached the correct result, albeit for the wrong reason." *United States v. Robinson*, 58 M.J. 429, 433 (C.A.A.F. 2003). The record is replete with Appellant's effective cross-examination and impeachment of the Government's central witnesses, SPC MP and SPC AD. Consequently, Appellant did not suffer material prejudice to his substantial rights because the loss of the witnesses' recorded interviews did "not significantly encumber[] [] his cross-examination of government witnesses." *Marsh*, 21 M.J. at 452; *see United States v. Missler*, 414 F.2d 1293, 1304 (4th Cir. 1969) (finding that "the effectiveness of defense counsel's cross-examination is highly relevant in determining whether there was prejudice by reason of the Government's nondisclosure . . . " where defense counsel's cross-examination led to a witness's admission that he lied to the FBI multiple times); *Strand*, 21 M.J. at 915 (finding no prejudice because the desired statements would "add little to the means of impeachment already available" in light of defense counsels "lengthy and comprehensive" cross-examination).

D. The Army Court appropriately found that Appellant was not prejudiced by the military judge's denial of Appellant's R.C.M. 914 motion.

As a preliminary matter, this Court should refuse to conflate, as Appellant has, a witness's mere presence at a CID office with an actual interview conducted by a CID special agent. (Appellant's Br. 27). Appellant relies upon SPC MP's testimony that she arrived at CID in the morning and left the office in early evening to bolster his assertion that she was subject to, and therefore CID lost, a "daylong interview." (JA 39–40; Appellant's Br. 26). However, the record does not support appellant's calculations. First, SPC MP never testified that she was continuously interviewed during the entirety of her visit at CID. Additionally, SA DM conducted the interview, and he estimated that the interview itself lasted two to three hours. (JA 69, 77). Special Agent DM, by virtue his experience of conducting "hundreds" of interviews, would likely be able to discern the difference between the conversational back and forth associated with conducting an actual interview— during which a recording of pertinent statements would be made—and the unrecorded ancillary processes associated with receiving a witness at CID, such as restroom visits and breaks for refreshment or tobacco, as well recorded periods where there is no communication between the witness and a special agent for prolonged lengths of time. (JA 101, 217).

Appellant asserts that the Army Court erred because "it failed to follow this Court's precedent in [*Clark*]" and instead "engaged in the speculative and overly

broad harmless error analysis" used by the Supreme Court in *Rosenberg*. (Appellant's Br. 6–7). Appellant's plea for relief is predicated upon the dubious assertion that this Court's decision in *Clark* requires military appellate courts to unfailingly use *Kohlbek* test as the primary, and in some situations the sole, measure for prejudice of non-constitutional R.C.M. 914 violations. 78 M.J. 326 (C.A.A.F. 2019). However, Appellant's approach would require this Court to mandate an obstinately formulaic approach to determine prejudice that ignores case-specific facts and defies both precedent and common sense.

There is no doubt that this Court could find material prejudice if it accepts Appellant's invitation to proceed directly from a finding of error to a *Kohlbek* prejudice analysis. (Appellant's Br. 4). However, this Court should not bypass an obvious but important predicate question—did Appellant have an adequate substitute for the lost interviews? An affirmative answer to this question obviates the need for further analysis under *Kohlbek* because an appellant who has substantially the same impeachment information cannot be materially prejudiced by the loss of other, similar information. In contrast, the *Kohlbek* test is an appropriate measure for prejudice when an appellant is unable to avail himself of an adequate substitute because the absence of such a statement may indeed "significantly encumber" his cross-examination. *Marsh*, 21 M.J. at 452. This Court and Supreme Court have relied upon this bifurcated approach to test R.C.M.

914 prejudice in the past, and Appellant offers no compelling reason to deviate from this practice.

In *Rosenberg*, the Supreme Court found that the appellant was not prejudiced by the absence of a witness's letter informing the prosecution that her memory had "dimmed in the three years that had passed since the fraud had been perpetrated and that to refresh her failing memory she would have to reread the original statement she had given before the first trial to the FBI" because the witness' poor recollection became evident during defense counsel's cross examination. 360 U.S. at 370. It is especially noteworthy that the "very same information" that the Supreme Court found sufficient in *Rosenberg*—that which Appellant alleges is missing in his case—was not a verbatim or even close to verbatim recollection of what the missing letter conveyed. Rather, the witness's testimony, spanning multiple pages of cross-examination, revolved around the same general theme: her memory of the incident was poor and she depended upon her written statements to aid her testimony. *Id.* at 371–73. Here, the Supreme Court did not test for prejudice because "it would deny reason to entertain the belief that defendant could have been prejudiced by not having had opportunity to inspect the letter." *Id.* at 371.

Likewise in *Marsh,* this Court's predecessor employed analogous reasoning by refusing to employ "the drastic remedy of striking the testimony of these

witnesses because of the Government's failure to produce [their] materials." 21 M.J. at 451. There, the Court of Military Appeals found that the appellant's possession of summarized transcripts of witnesses' testimonies mitigated any prejudice the appellant may have suffered from the Government's good faith loss of Article 32, UCMJ recordings. 21 M.J. at 452. Although *Marsh* was decided nearly forty years ago, its reasoning remains sound. In fact, this Court had the opportunity in *Muwwakkil* to repudiate, clarify, or otherwise limit its holding in *Marsh*. However, instead of relegating *Marsh* to the annals of history or simply limiting its applicability to the good faith loss doctrine as appellant asserts, this Court also cited *Marsh* in the context of prejudice. *Muwwakkil*, 74 M.J. at 194. (citing and quoting *Marsh*, 21 M.J. at 452) ("finding no error in military judge's decision declining to strike testimony under the Jencks Act where accused was provided a summarized transcript that was "almost word for word" of Article 32, UCMJ testimony"). Moreover, although this Court found that the military judge was not required to consider prejudice at that juncture, this Court tacitly acknowledged the validity of the military judge's prejudice analysis—including her consideration of whether there was an adequate substitute for the missing recordings. *Id.*

Interestingly, *Muwwakkil* also cited *Rosenberg*, signaling the decision's continuing applicability in determining prejudice at military courts-martials under

R.C.M. 914. *Muwwakkil*, 74 M.J. at 194. "Where the precedent of the Supreme Court has direct application to a case, '[this Court] should follow the case which directly controls.'" *United States v. Tovarchavez*, 78 M.J. 458, 466 (C.A.A.F. 2019) (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)). And, "[a]bsent articulation of a legitimate military necessity or distinction, or a legislative or executive mandate to the contrary, this Court has a duty to follow Supreme Court precedent." *Id.* (quoting *United States v. Cary*, 62 M.J. 277, 280 (C.A.A.F. 2006)). Appellant has failed to articulate any military necessity requiring this Court to analyze R.C.M. 914 prejudice under *Kohlbek*, to the exclusion of *Rosenberg*. Similarly, Appellant cannot point to a legislative or executive mandate for this Court to employ *Kohlbek* as its sole test for prejudice under R.C.M. 914.

Finally, appellant's assertions notwithstanding, this Court's decision in *Clark* clearly stands for the proposition that the particular facts and circumstance of a case dictate the appropriate lens through which to analyze prejudice under R.C.M. 914. *Clark* begins:

> We granted review to determine whether the military judge abused his discretion in failing to strike the testimony of two [witnesses] under [R.C.M. 914], and, if so, *what the correct standard is to assess prejudice*, and whether there was prejudice *in this case*. We conclude that the military judge erred when he denied Appellant's R.C.M. 914 motion, and that assessing for prejudice under the nonconstitutional error standard is appropriate in *this*

> *instance*. The error *in this case* did not have a substantial influence on the findings.

79 M.J. at 451 (emphasis added). This Court's repeated use of "in this case" strongly indicates that this Court employs a much more flexible, fact specific approach to analyzing prejudice under R.C.M. 914 than Appellant suggests. Indeed, when this Court announced that *Clark* involved a procedural, rather than a constitutional, right, it predicated its conclusion by stating, "[u]nder the facts of *this case* . . . ." *Id.* at 455 (emphasis added). Although this Court commended the lower court's *Kohlbek* analysis, this Court chose to conduct its own de novo prejudice review with the *Rosenberg* standard. *Id.* The finding that the appellant possessed "sufficient information to cross-examine" was dispositive to this Court's conclusion that the appellant, under the facts of that case, was not prejudiced by the loss of R.C.M. 914. *Id*.

This Court should continue to employ the more reasoned approach of first asking whether an appellant was able to avail himself of an adequate substitute for the lost R.C.M. 914 statement and then determine whether the *Rosenberg* or *Kohlbek* test is more appropriate given the facts of the case. An affirmative answer ends the prejudice analysis, because any such error is harmless. *Rosenberg*, 360 U.S. at 371. A negative answer leads to an evaluation, under the *Kohlbek* standard, of what effect the erroneous admission of evidence may have had upon appellant's court-martial. This Court should affirm the Army Court's decision because to do

otherwise in the presence of only harmless error "would offend common sense and the fair administration of justice." *Id.*

Conclusion

WHEREFORE, the United States respectfully requests this honorable court affirm the Army Court's ruling.

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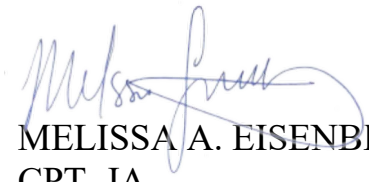

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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on April 25, 2022.

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