IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee

v.

RYAN M. PALIK
Technical Sergeant (E-6)
United States Air Force,
Appellant

USCA Dkt. No. 23-0206/AF

Crim. App. Dkt. No. ACM 40225

BRIEF ON BEHALF OF APPELLANT

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ISSUE PRESENTED

THE GOVERNMENT LOST THE ONLY TWO VIDEO-RECORDED STATEMENTS FROM SM, THE COMPLAINING WITNESS FOR EVERY CONVICTED OFFENSE. DID DEFENSE COUNSEL PROVIDE INEFFECTIVE ASSISTANCE BY FAILING TO FILE AN R.C.M. 914 MOTION AFTER SM'S TESTIMONY?

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66(d), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(d).[1] This Honorable Court has jurisdiction to review this case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

STATEMENT OF THE CASE

On June 8 and August 9-13, 2021, at Royal Air Force Mildenhall, United Kingdom, a panel of officer members tried Appellant, Technical Sergeant (TSgt) Ryan M. Palik. (Joint Appendix (JA) at 14–15, 46.) Contrary to his pleas, the members convicted TSgt Palik of two specifications of assault consummated by a battery and one specification of domestic violence in violation of Articles 128 and 128b, UCMJ, 10

[1] Unless otherwise noted, all references to the UCMJ and the Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (*MCM*) (2019 ed.). The cited punitive articles reference the statute in effect during the charged timeframe.

U.S.C. §§ 928, 928b (2018).[2] (JA at 45, 151.) A military judge sentenced TSgt Palik to 10 months' confinement, reduction to the grade of E-1, forfeiture of all pay and allowances, and a bad-conduct discharge. (JA at 152.) The convening authority took no action on the findings or the sentence. (JA at 19.)

On April 28, 2023, the AFCCA affirmed the findings and sentence. (JA at 13.) This Honorable Court granted review on July 26, 2023. *United States v. Palik*, 2023 CAAF LEXIS 536 (C.A.A.F. July 26, 2023).

STATEMENT OF FACTS

TSgt Palik joined the Air Force in 2009 and deployed four times during his career. (JA at 99–100.) He met Airman First Class SM (SM) in mid-2019; they began a dating relationship that was "very passionate," "very emotional," and full of trust issues. (JA at 60–61, 101–02.)

The First Incident at TSgt Palik's Apartment: Conflicting Testimony

SM stayed at TSgt Palik's apartment over the 2020 Fourth of July weekend. (JA at 88.) TSgt Palik testified they went to a nearby bar for

[2] The members acquitted TSgt Palik of 11 specifications of assault consummated by a battery in violation of Article 128, UCMJ, 10 U.S.C. § 928 (2016 and 2018). (JA at 151.)

drinks around 8:00 PM, returning to the apartment after SM broke a wine glass. (JA at 103–04.) During an argument that followed, SM stood in front of TSgt Palik, calling him names and poking him in the face. (JA at 104.) He told her to back off, but she said "[o]r what?" and pushed his face back. (*Id.*) He then pushed her upper chest to create distance. (JA at 104–05.) At that point, SM smashed a whiskey bottle and proceeded to destroy objects in TSgt Palik's apartment, including his laptop, a chair, going-away gifts, and a PlayStation 4; she left a hole in the wall in the process. (JA at 37–40, 105–09.)

SM, by contrast, claimed that when she got in TSgt Palik's face to yell at him, he responded by putting his hands around her neck and choking her for five seconds. (JA at 63–64.) According to her, this came "out of nowhere." (JA at 89.)

Although the panel did not convict TSgt Palik of the strangulation allegation, it did convict him of the lesser-included offense of assault consummated by a battery for touching her neck. (JA at 151.)

The Second Incident at TSgt Palik's Apartment: More Conflicting Testimony

SM testified that she continued living with TSgt Palik after the alleged strangulation because she "really didn't have any money and

. . . didn't know what to do." (JA at 67.) On August 20, 2020, TSgt Palik and SM went out to the same bar for drinks. (JA at 110–11.) They left when SM threw up and TSgt Palik had to carry her up the stairs. (JA at 110.) While she was asleep, TSgt Palik went through her phone and found a text message between SM and her mother discussing another male. (JA at 113.)

TSgt Palik poured about an inch of water from a water bottle onto her to wake her up. (*Id*.) An argument ensued, with both TSgt Palik and SM throwing each other's phones out a window. (JA at 115–16.) After TSgt Palik broke SM's second cellphone, she struck him in the face with her closed fist. (JA at 116.) TSgt Palik extended his arms to keep her away, making contact with her upper chest. (JA at 117.)

After a brief interlude, the argument resumed, and TSgt Palik began calling SM names. (JA at 119–121.) She then slapped him with the back of her hand. (JA at 121.) She next got up and resumed destroying the apartment, which led TSgt Palik to grab her shirt and push her towards the door. (*Id*.) TSgt Palik admitted that, when he attempted to remove her, he pulled her hair for approximately two seconds, letting go as soon as he felt tension. (JA at 123.) During this

process, SM grabbed the wall to remain in the apartment. (*Id.*) For the next 15-20 minutes, TSgt Palik told SM she needed to leave. (JA at 124.) When she crawled away from the door, TSgt Palik again tried to pull her out of the apartment, grabbing her hair in the process. (JA at 126.)

SM, however, testified that when she returned and threw TSgt Palik's phone out the window, he pinned her on the bed with his whole body and choked her with both hands for five to eight seconds. (JA at 70.) She did not explain how she went from the front door to the bedroom, or how it began. She could not recall whether she told the Air Force Office of Special Investigations (OSI) that it happened near the bed (rather than on the bed), or whether her arms were pinned. (JA at 94–95.)

After this alleged strangulation and hair-pulling, SM sat down on the couch and threw a PlayStation controller at the TV. (JA at 71.) She claimed that TSgt Palik then pinned down her legs and choked her with both hands. (*Id.*) She stated that she punched him twice in the face with a closed fist, causing him to let go. (JA at 072.) She alleged that he dragged her by the hair to the hallway, and then by the hair again when he dragged her out the front door. (*Id.*) She additionally claimed that

she retreated to the bedroom, where he hit her with the door 10 to 15 times. (JA at 73.)

As a result of the incident, TSgt Palik suffered a bloody nose and black eye. (JA at 127.) OSI photographed SM the same day which showed markings on her neck, face, lower back, and legs. (JA at 20–36, 78–84.)

Based on the allegations from August 20, the members convicted TSgt Palik of strangling SM on divers occasions and pulling her by the hair on one occasion, but acquitted him of hitting her with the door. (JA at 151.)

The OSI Interviews and the Court-Martial

SM produced no written statements. However, OSI agents interviewed her on August 20, 2020 (the day she alleged that much of the misconduct occurred) and August 21, 2020. (JA at 47–48.) It recorded both interviews, but the detachment deleted both interviews for "an unknown reason" before they were transferred to a disk. (JA at 48–49, 53.) The lead investigator, Special Investigator (SI) HO, noticed the loss on October 26, 2020. (JA at 57.) She agreed it was customary to record such interviews, and that it was OSI's practice to include the interviews

in a case file. (JA at 55.) She conceded that typically she would have downloaded and copied the recordings but failed to do so in this case. (JA at 58.) In the "internal data pages," which reflect OSI's internal notes about the case, it reads that "SI [HO] was unaware of the timeframe OSI requires videos to be copied to a disk." (JA at 41.) This was one of SI HO's first investigations. (JA at 130.)

Special Agent (SA) RA took notes during the interviews. (JA at 54–55.) During the litigated portion of the court-martial, the Defense called SA RA to testify about SM's interview that he conducted nearly one year earlier. (JA at 128.) When the Circuit Defense Counsel (CDC) asked a general question about SM's allegations, SA RA provided only a brief explanation before having to resort to his notes. (JA at 131–32.) These notes were marked as Appellate Exhibit XXXV; they span two pages of content. (JA at 43–44, 133.) Although SA RA could answer some questions, when the CDC asked him specifics about what SM said in her interview, he replied that he could not *recall* her saying the statement in question, not that she did not say it. (JA at 135–36.) For instance, when asked if SM mentioned having her arms pinned down during the first alleged strangulation on August 20, he responded "I don't recall that."

(JA at 135.) When the CDC asked whether something was not said, or simply not in the notes, SA RA responded, in part:

> [I]t possibly could have been said and I just didn't write it down because I was still trying to figure out what, you know, what I need to say next or receive the information that she's relaying -- and this just goes for any interview but because I didn't write it down I don't -- it's possible that it wasn't said.

(JA at 136.)

During cross-examination, the Government drew out that the primary interviewer, SI HO, was relatively inexperienced, and thus SA RA had to act as both the primary and secondary (notetaking) interviewer. (JA at 138–39.) Normally the primary asks questions while the secondary focuses on note taking. (JA at 141.) The Government repeatedly asked SA RA to confirm that his notes were only bullet points. (JA at 139, 141.) SA RA acknowledged that his lack of recall about SM's statements did not mean she did not say something. (JA at 140–41.)

Declarations and the AFCCA's Opinion

On appeal before the AFCCA, TSgt Palik raised an ineffective assistance of counsel claim against his trial defense counsel: Major (Maj)

AN, Captain (Capt) OH, and Capt RH.[3] In her declaration, Maj AN explained that the Defense filed a discovery request that included all recorded witness statements. (JA at 154.) Over five months later, the assistant trial counsel informed the Defense that OSI lost SM's recorded statements. (*Id.*) Maj AN stated that, from her experience with OSI, the interviews "captured on their recording devices are not indefinitely maintained on the recording device and will be erased after a certain period of time or may be overwritten by subsequent recordings." (*Id.*) She indicated she was aware of the internal data pages, which state that the recorded interviews "were deleted from the Getac system." (*Id.*) She explained that she was not certain whether the videos ever existed, and she did not pursue them in discovery because they might contain adverse information. (JA at 155.)

Maj AN did not state that she considered an R.C.M. 914 motion; in fact, she did not mention R.C.M. 914 at all. (JA at 153–55.) She framed the decision as one about whether to pursue the videos *prior to trial*. (*Id.*)

[3] Capt RH did not participate in the trial phase. (JA at 159–60.) Because R.C.M. 914 comes into play at the court-martial, this brief does not discuss his role.

She did state, "In light of the recent opinion by [this Court] in *United States v. Sigrah*,[4] I may have chosen a different approach as to whether the Defense would have continued to pursue the existence or whereabouts of any OSI video recorded interviews." (JA at 155.)

Similarly, Capt OH stated that she "could not definitively say whether the interviews of [SM] had been recorded then lost or were never recorded in the first place." (JA at 157.) She opined that, "[w]e would've needed that information to prevail on a motion under R.C.M. 914," presumably referring to proving the existence or non-existence of a video. (JA at 157–58.) Capt OH explained that another case of hers, where video interviews lacked audio, influenced her views. (JA at 158.) In that case, she raised a pretrial motion under R.C.M. 703(e)(2), which relates to lost or destroyed evidence. (*Id.*) One problem was that "no one could definitively say whether the audio ever existed," and the military judge ruled against her client. (*Id.*) She wrote that she considered SM's recorded statements "under that experience," concluding that "we would not prevail under R.C.M. 703(e)(2)." (*Id.*) Capt OH, too, acknowledged

[4] 82 M.J. 463 (C.A.A.F. 2022).

that if *Sigrah* was decided before TSgt Palik's trial, she might have handled it differently. (*Id.*)

The AFCCA held that TSgt Palik's trial defense counsel had a "reasonable rationale for not [filing a motion under R.C.M. 914]—they could not confirm that the video recordings in question ever existed, and feared they might exist." (JA at 12.) Consequently, the AFCCA concluded that TSgt Palik failed to demonstrate that his counsel offered deficient performance. (*Id.*)

SUMMARY OF THE ARGUMENT

OSI recorded two interviews with SM, whose testimony led to the only convictions in this case. The lead agent, new to OSI, did not know the timeframe for copying the recordings. Thus, she failed to back them up to a disk before they were deleted. The Defense knew this before trial. But what it appears they did not know about was R.C.M. 914—a powerful tool for defense counsel. As a result, they missed a critical opportunity to move under R.C.M. 914 to force the Government to produce the statements; if this motion was successful, it would have resulted in the striking of SM's testimony or a mistrial.

Defense counsel are entitled to a presumption of competence, and their strategic decisions, made *"after thorough investigation of law and facts*," are virtually unchallengeable. *Strickland v. Washington*, 466 U.S. 668, 690 (1984) (emphasis added). But this case presents an important caveat to that presumption: an attorney's ignorance of a crucial point of law means the presumption cannot hold. *See Bullock v. Carter*, 297 F.3d 1036, 1049–50 & n.7 (10th Cir. 2002) (citing *id.*). Declarations from trial defense counsel make a case for a strategic decision on a *different* question, namely whether to press for the video-recorded statements in discovery. (JA at 153–58.) But R.C.M. 914 only comes into play once the relevant witness testifies. The declarations fail to address a reason for not moving under R.C.M. 914 to produce the statements—nor could they provide a reason. A strategic decision premised on a misunderstanding of the law is not a strategic decision within the meaning of *Strickland*. *See Hinton v. Alabama*, 571 U.S. 263, 274 (2014) (per curiam). Defense counsel were deficient when they failed to move under R.C.M. 914 to produce the statements while unaware of the Rule's power.

The question then becomes whether defense counsel would have had a reasonable probability of success on the motion. They would.

Similar facts in both *Sigrah* and this Court's decision in *Muwwakkil*[5] preclude the good faith loss doctrine from absolving the Government for its failure. Because R.C.M. 914 leaves the military judge with only the option to grant a mistrial or strike witness testimony, the result of the court-martial would certainly have been different.

Defense counsel's failure to move under R.C.M. 914 was deficient performance that prejudiced TSgt Palik. This Honorable Court should set aside the remaining convictions, each of which were affected by the Defense's error.

ARGUMENT

DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY FAILING TO FILE A POTENTIALLY CASE DISPOSITIVE R.C.M. 914 MOTION AFTER SM TESTIFIED.

Standard of Review

This Court reviews whether an appellant received ineffective assistance and was prejudiced thereby de novo. *United States v. Tippit*, 65 M.J. 69, 76 (C.A.A.F. 2007) (citation omitted). "'When a claim of ineffective assistance of counsel is premised on counsel's failure to make a motion . . . , an appellant must show that there is a reasonable

[5] *United States v. Muwwakkil*, 74 M.J. 187 (C.A.A.F. 2015).

probability that such a motion would have been meritorious.'" *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001) (quoting *United States v. Napoleon*, 46 M.J. 279, 284 (C.A.A.F. 1997)).

Law

1. Ineffective Assistance and Exceptions to the Presumption of Competence

"A military accused is entitled under the Constitution and Article 27(b), [UCMJ], to the effective assistance of counsel." *Denedo v. United States*, 66 M.J. 114, 127 (C.A.A.F. 2008) (internal citations omitted), *aff'd and remanded by United States v. Denedo*, 556 U.S. 904 (2009). The Supreme Court outlined a two-part test for reviewing ineffective assistance of counsel claims in *Strickland.* 466 U.S. at 687. The appellant has the burden of demonstrating: (1) a deficiency in counsel's performance that is so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment[6]; and (2) that the deficient performance prejudiced the defense to the degree it deprived the defendant of a fair trial. *See id.*

[6] U.S. CONST. amend VI.

Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable. *Strickland*, 466 U.S. at 690–91. However, the Supreme Court has recognized "[a]n attorney's ignorance of a point of law that is fundamental to the case combined with the failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." *Hinton*, 571 U.S. at 274.

2. *Rule for Courts-Martial 914: An "important rule that furthers the defense's ability to confront witnesses who testify for the government."*[7]

Under the Jencks Act, a court "shall," upon a defendant's motion, order production of a witness statement in the possession of the United States after that witness testifies. 18 U.S.C. § 3500(b). The President promulgated R.C.M. 914 in 1984 with language that tracks the Jencks Act. *Compare* R.C.M. 914 (1984 *MCM*) (JA at 161–62) *with* 18 U.S.C. § 3500. R.C.M. 914 provides:

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

[7] *Sigrah*, 82 M.J. at 469 (Maggs, J., concurring).

> is: (1) In the case of a witness called by the trial counsel, in the possession of the United States . . . .

R.C.M. 914(a). Given the overlap between R.C.M. 914 and the Jencks Act, this Court "conclude[d] that our Jencks Act case law and that of the Supreme Court informs our analysis of R.C.M. 914 issues." *See Muwwakkil*, 74 M.J. at 191.

In accordance with federal practice, this Court held R.C.M. 914(a)(1) applies to lost statements. *Id.* at 192–93 (explaining that the Government's argument that lost statements fell outside R.C.M. 914 stood contrary to precedent from the Supreme Court, this Court, and federal circuit courts). When "statements" within the meaning of the Rule are missing, the "Government [bears] the burden of producing them or explaining why it could not do so." *United States v. Augenblick*, 393 U.S. 348, 355–56 (1969).

If the Government fails to provide a witness statement, the military judge has two options under R.C.M. 914(e): (1) "order that the testimony of the witness be disregarded by the trier of fact" or (2) "declare a mistrial if required in the interest of justice." The Rule "contains no express exceptions." *Sigrah*, 82 M.J. at 471 (Maggs, J., concurring). The Supreme Court (for the Jencks Act) and this Court (for the Jencks Act

and for R.C.M. 914) have recognized that a "good faith loss doctrine" applies. *See Muwwakkil*, 74 M.J. at 193. The "doctrine excuses the Government's failure to produce 'statements' if the loss or destruction of evidence was in good faith." *Id.* at 193 (citations omitted). This Court's predecessor recognized that the exception is "generally limited in its application." *United States v. Jarrie*, 5 M.J. 193, 195 (C.M.A. 1978).

Analysis

TSgt Palik's defense counsel entered trial fully aware that the Government lost SM's interviews. The failure to raise a motion under R.C.M. 914 was deficient performance; counsel cannot benefit from the presumption of competence where they lack understanding of the relevant law. And given the high probability of success, their failure deprived TSgt Palik of a fair trial.

1. Failure to raise an R.C.M. 914 motion was not strategic.

Strickland first asks whether counsel's performance was so deficient as to fall below the threshold for representation within the meaning of the Sixth Amendment. 466 U.S. at 687. When making this assessment, "strategic choices made after thorough investigation of law and facts are virtually unchallengeable." *Id.* at 691. But that is the crux

of the matter. This was not a strategic choice made after thorough investigation of the law and facts. This becomes evident through close examination of defense counsel's declarations, which raise four points.

First, defense counsel almost exclusively discussed their rationale for failing to pursue the lost statements in pretrial discovery. It is not clear they were aware at all that the *separate* R.C.M. 914 option existed. Maj AN, from her personal experience, knew that OSI recorded and then overwrote interviews. (JA at 154.) Maj AN seems to have accepted OSI's practice and did not understand that OSI was routinely committing potential R.C.M. 914 violations.

Maj AN provided several rationales for failing to pursue the lost videos—OSI might find the lost videos, they might contain prior consistent statements, and SM might appear distraught in the video. (JA at 155.) Maj AN also indicated the Defense declined to pursue a remedy under R.C.M. 703(e)(2)—which provides for continuance or abatement in the case of lost evidence—for similar reasons. (*Id.*) And these may well be valid strategic considerations *before* trial. But R.C.M. 914 is triggered only upon a witness's testimony. R.C.M. 914(a) ("After a witness other than the accused has testified on direct examination . . . .") An entirely

different calculation arises at that moment. Defense counsel's declarations do not appreciate this distinction. Indeed, only Capt OH mentions R.C.M. 914, and when she does so it demonstrates misunderstanding of the Rule's application.

This raises the second point. To the degree Maj AN and Capt OH may have even been aware of the Rule at the time of trial, the understanding in the declarations is inaccurate. In her declaration, Capt OH focuses at great length on whether the videos were actually recorded. (JA at 157–58.) Indeed, she conceded that a case involving R.C.M. 703(e)(2)—where proving the existence of audio was a key point for the defense—shaped her view of R.C.M. 914. She may have conflated these rules in believing the Defense, and not the Government, would have to prove the videos existed. But this is wrong on both the facts and the law.

As to the facts, the uncontradicted evidence is that the videos were recorded. (JA at 48–49.) On the law, the Defense incorrectly believed it would have to prove the videos once existed in functional format. This Court in *Muwwakkil* held that lost statements still fall under R.C.M. 914 because a contrary reading "of R.C.M. 914 would effectively render the

rule meaningless. The Government would be able to avoid the consequences of R.C.M. 914's clear language and intent simply by failing to take adequate steps to preserve statements." 74 M.J. at 192. *Muwwakkil* noted that its conclusion mirrored that of courts interpreting the Jencks Act. *Id.* at 192–93. One example was *Augenblick*, 393 U.S. at 355–56, where, despite a "mystery" about what happened to a missing tape, the Government still bore the burden of producing it. Uncertainty about *how* the Government lost the evidence does not undermine the basis for a motion.

The third point is that the declarations, which claim a desire to avoid the videos, run counter to what *actually* happened at trial. (JA at 154–55, 156–57.) Even if the *pre*trial strategy avoided the videos, *during* trial defense counsel repeatedly attacked OSI for deleting the videos. (JA at 47–49, 57–58, 131.) The attack was not a fleeting reference, either. It included a lengthy examination of SA RA—followed by extensive cross, redirect, and recross—on what might have happened in SM's interviews. (JA at 131–50.) The Defense highlighted where the agent notes reflected SM's inconsistent statements. (JA at 132, 134–36, 144, 148–49.) This led the trial counsel to adopt the unusual position of attacking the notes

by highlighting that SA RA was doing more work than a normal notetaker, and that he only made bullet-point notes. (JA at 138–41.) If there was a concern about pressing the Government or OSI to discover the video, this line of attack would serve the same purpose as the R.C.M. 914 motion. Moreover, the R.C.M. 914 motion would only arise after SM's testimony. It would not provide a significant opportunity for OSI to find a "deleted" video it could not find for the previous *year*.

A fourth point demonstrates trial defense counsel's misunderstanding of the law. Both defense counsel claimed that they might have approached the situation differently had *Sigrah* been decided prior to TSgt Palik's trial. (JA at 155, 158.) But *Sigrah* did not change R.C.M. 914: it has remained essentially unchanged for more than a generation. *Compare* R.C.M. 914 *with* R.C.M. 914 (1984 *MCM*). The new law in *Sigrah*, if any, related to the test for *prejudice*. 82 M.J. at 468 (clarifying that *United States v. Kohlbek*, 78 M.J. 326 (C.A.A.F. 2019) provides the appropriate framework for prejudice analysis from a preserved nonconstitutional R.C.M. 914 error). It neither created nor recognized any new standard for an R.C.M. 914 error itself. It would simply have shown, once again, that R.C.M. 914 is a powerful tool for

defense counsel. Further, *Muwwakkil* was decided prior to trial and provided sufficient authority by itself. Trial defense counsel had everything they needed in the Rule and the case law at the time of TSgt Palik's trial to take advantage of the lost interview and secure a favorable result, but they failed to research and recognize it.

Taken together, these points demonstrate that TSgt Palik's defense counsel were unaware of the power of R.C.M. 914 in this situation. It was the perfect solution to their problem; this was a cost-free motion for the defense. At worst, they would have lost in an Article 39(a), UCMJ, 10 U.S.C. § 839, session and the members would be none the wiser. At best, the military judge would have either struck SM's testimony, or declared a mistrial. Either of the latter outcomes would represent a large win for the Defense, especially when SM's allegations yielded the only convictions. Instead, the Defense made small points about the loss of videos through the agents. The two courses of action are incomparable—R.C.M. 914 offers the unequivocally better path for TSgt Palik.

The presumption of competence is overcome here. The key point is that an attorney's failure to recognize and research a crucial issue in a case is deficient performance. *See Hinton*, 571 U.S. at 274. In *Hinton*,

the defense counsel was unaware of a change in the law that allowed for greater reimbursement for expert expenses. *Id.* at 267. As a result, he hired the only "expert" who would work for a limited price, an expert he "knew to be inadequate." *Id.* at 274. The expert testimony was crucial; the *only* link between *Hinton* and the crime was the bullets that the expert would examine for distinctive markings. *Id.* at 265. The Court found deficient performance and remanded for a prejudice analysis. *Id.* at 276. Similarly, in this case defense counsel's ignorance or misunderstanding of R.C.M. 914 led to a subpar choice to score minor points against law enforcement for losing the videos.

Two other Supreme Court cases that *Hinton* cited reinforce this point. In *Kimmelman v. Morrison*, the defense counsel mistakenly believed the state bore an affirmative obligation to turn over all inculpatory evidence without request. 477 U.S. 365, 385 (1986), *superseded by statute on other grounds as recognized in Thomas v. Sullivan*, 2011 U.S. DIST. LEXIS 123371 (C.D. Cal. October 25, 2011) (unpublished). The Court held this was unreasonable and not based on "strategy," but instead counsel's mistaken understanding of the law. *Id.* And in *Williams v. Taylor*, 529 U.S. 362, 395 (2000), the Supreme Court

faulted defense counsel for failure to obtain records of the petitioner's "nightmarish" childhood, "not because of any strategic calculation but because they incorrectly thought that state law barred access to such records."

In both cases, the Supreme Court found the attorneys' ignorance inexcusable, and thus denied defense counsel normal deference for strategic decisions. The same logic applies here. Defense counsel did not grasp the potency of R.C.M. 914, leading to their failure to raise the crucial motion. Where defense counsel have a misunderstanding or ignorance of the law they lose the presumption of competence. *See Bullock* 297 F.3d at 1049–50 & n.7) (stating that an attorney's ignorance of directly relevant law eliminates *Strickland*'s presumption of competence (citing *Williams*, 529 U.S. at 395) (other citations omitted)).

Trial defense counsel were unaware of the powerful effect of an R.C.M. 914 motion, and their failure to raise the motion was not a strategic calculation meriting deference. It was deficient performance.

2. There is a reasonable probability that filing an R.C.M. 914 motion would have led to a different result.

To prevail, TSgt Palik need only demonstrate a reasonable probability that an R.C.M. 914 motion would have been meritorious.[8] *McConnell*, 55 M.J. at 482. This standard is lower than a preponderance: the Supreme Court "do[es] not require a defendant to show 'that counsel's deficient conduct more likely than not altered the outcome' of [the] proceeding, but rather that he establish 'a probability sufficient to undermine confidence in [that] outcome.'" *Porter v. McCullum*, 558 U.S. 30, 44 (2009) (per curiam) (third alteration in original) (quoting *Strickland*, 466 U.S. at 493–94).

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[8] This raises the question of how the meritorious motions requirement interacts with broader prejudice under *Strickland*. In *McConnell*, this Court first applied this ineffective assistance standard with regard to a motion to suppress. 55 M.J. at 482. *McConnell* also applied it to the failure to file a motion *in limine* to exclude certain statements from the complaining witness. *Id.* at 485. For the motion *in limine*, this Court declined to rule on deficient performance despite a "colorable claim" on the motion because the appellant could not show prejudice under *Strickland*. *Id.* Thus, it seems an appellant must meet the motions standard under *McConnell and* the broader prejudice under *Strickland*. Nevertheless, for the purpose of this case, a meritorious motion and *Strickland* prejudice are one and the same: if TSgt Palik prevailed on the motion, the only results were striking SM's testimony or declaring a mistrial. Both are unequivocally a different result within the meaning of *Strickland*.

Had the Defense filed the motion, they would have encountered two issues. First is whether SM's recorded statements fell under R.C.M. 914. This is easily met. R.C.M. 914(f)(2) defines a statement as a "substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and contained in a recording or a transcription thereof"; SM's statements fit cleanly in this definition. *See also Sigrah*, 82 M.J. at 463 n.2 (accepting the Government's concession that lost video-recorded statements of the victim and two witnesses constituted statements within the meaning of R.C.M. 914).

The second issue is whether the good faith loss doctrine would insulate the Government from its nonproduction of the statements. As a starting point, this Court's predecessor clarified that this exception is "generally limited in its application." *Jarrie*, 5 M.J. at 195. In evaluating the doctrine, *Muwwakkil* and *Sigrah* are instructive.

Sigrah involved a similar fact pattern where the Criminal Investigative Division (CID) initially recorded three key interviews but failed to transfer them to disk and preserve them. 82 M.J. at 465–66. It was CID's policy only to preserve subject interviews. *Id.* at 465. While

not the granted issue in *Sigrah,* this Court accepted the Government's concessions that it "showed sufficient culpability to preclude the good faith loss doctrine." *Id.*

Here, SI HO and the OSI detachment recorded the interviews. (JA at 48–49.) While it was customary for OSI to include recorded interviews in the case file (JA at 55), the internal notes show that "SI [HO] was unaware of the timeframe OSI requires videos to be copied to a disk." (JA at 41.) *Sigrah* involved a *policy* of failing to transfer recordings to disk; while there was no such policy here, the commonality between the two is departmental negligence.[9] SI HO was new to OSI and taking part in one of her first investigations. (JA at 130.) As the internal data pages show, she did not know the procedures for when she had to copy the videos to a disk. (JA at 41.) It is negligent for a law enforcement agency to place an untrained, brand-new individual in charge of preserving evidence that, under R.C.M. 914 and the Jencks Act, *must* be preserved.

Muwwakkil offers another close parallel. In that case, the Government made two recordings of a hearing under Article 32, UCMJ,

[9] While there was no "policy" of allowing the videos to be overwritten, both Maj AN and Capt OH stated that, in their experience with OSI, this happens. (JA at 154, 157–58.)

10 U.S.C. § 832. 74 M.J. at 189. One device malfunctioned and captured only part of the complaining witness's direct testimony; the other functioned properly but was lost at some point. *Id.* The paralegal failed to back up the recording, and the trial counsel explained that the paralegals were not instructed on handling or preservation of Article 32 hearing audio. *Id.* Under these circumstances, this Court declined to apply the good faith loss doctrine. *See id.* at 193 (concluding the military judge did not err because her finding of Government negligence supported her conclusion that the good faith loss doctrine did not apply). Likewise, SI HO failed to back up the file appropriately and also seems not to have received any instruction on preservation, as she did not know when the transfer to disk had to occur.

Muwwakkil also distinguished *United States v. Marsh*, where the good faith loss doctrine excused government negligence because "substantial evidence" demonstrated the existence of a policy on preservation and steps taken to comply with the policy. *Id.* (citing 21 M.J. 445, 451–52 (C.M.A. 1986)). Here the facts more approximate *Muwwakkil* than *Marsh*, as the Government has not demonstrated steps to preserve the videos similar to those shown in *Marsh*.

Given the irrefutable argument that the statements fell under R.C.M. 914, and the strong argument that the good faith loss doctrine did not apply under this Court's precedent, TSgt Palik would have a reasonable probability of prevailing on an R.C.M. 914 motion. And as this Court explained in *Sigrah*, the military judge would have little option in the face of an R.C.M. 914 violation: strike SM's testimony or order a mistrial. *See* 82 M.J. at 487 (citing R.C.M. 914(e)). This would have fundamentally changed the trial. Absent SM's testimony, the court-martial evidence would have included primarily TSgt Palik's testimony—where he raised self-defense and defense of property—and images of SM. Under those circumstances, the Government simply could not meet its burden.

3. Conclusion

As their declarations make clear, trial defense counsel did not understand the power of R.C.M. 914. Their failure to understand and use this Rule was not strategic, it was deficient performance. TSgt Palik need only show a reasonable probability of prevailing, and on this Court's precedent he would have. This Honorable Court should find prejudicial error and set aside the convictions. *See Sigrah*, 82 M.J. at 468.

WHEREFORE, TSgt Palik respectfully requests this Honorable Court set aside all convictions related to SM.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

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I certify that an electronic copy of the foregoing was sent via electronic mail to the Court and served on the Government Appellate Division on September 8, 2023.

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