IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	
Appellee,	)	BRIEF ON BEHALF OF
	)	THE UNITED STATES
v.	)	
	)	Crim. App. Dkt. No. 40225
	)	
Technical Sergeant (E-6)	)	USCA Dkt. No. 23-0206/AF
RYAN M. PALIK	)	
United States Air Force	)	28 September 2023
Appellant.	)	

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Technical Sergeant (E-6) **RYAN M. PALIK** United States Air Force *Appellant.*	)	USC Dkt. No. 23-0206/AF

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

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 RCM 914 MOTION AFTER SM'S TESTIMONY?

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case under Article 66(d), UCMJ. This Court has jurisdiction over this matter under Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE

At a general court-martial convened at Royal Air Force Mildenhall, United Kingdom, Appellant elected trial by officer members and entered a plea of not guilty. (JA at 14, 45, 46.) Appellant was charged with the following offenses: one charge and thirteen specifications of assault consummated by a battery, in violation of Article 128, UCMJ, and one charge and two specifications of domestic violence, in violation of Article 128(b), UCMJ. (JA at 14-16).) The charges against Appellant involved two victims, Airman First Class SM and Staff Sergeant BK. (JA at 14-16.) Contrary to his pleas, the panel of officer members found Appellant guilty of two specifications of assault consummated by a battery[1] and one specification of domestic violence. (Id.) Specifically, Appellant was convicted of pulling SM in the direction of, or through, the front door by her hair, and strangling SM on two separate occasions with his hands.[2] (JA at 15-16.) The military judge sentenced Appellant to a reduction to the grade of E-1, total forfeitures of pay and allowances, 10 months confinement, and a bad conduct discharge. (JA at 16.)

[1] One of Appellant's convictions for assault consummated by a battery stemmed from a finding of guilt to the lesser included offense of Charge II, domestic violence.

[2] One of Appellant's convictions for strangling SM with his hands was determined to qualify as Domestic Violence under the UCMJ.

STATEMENT OF THE FACTS

The OSI Interviews with SM

The named victim for all Appellant's convictions was SM. (JA at 14-16.) Appellant was acquitted of all offenses involving alleged victim, BK. (Id.) On 20 August 2020, SM was interviewed by the Air Force Office of Special Investigations (OSI). (JA at 47-48.) OSI conducted a follow-up interview with SM on 21 August 2020. (JA at 48.) The lead investigator was Special Investigator (SI) HO. (JA at 130.) Special Agent (SA) RA assisted SI HO in the investigation. (JA at 128, 130.) SA RA was assisting SI HO because this was one of her first investigations, and SA RA had more experience than SI HO. (JA at 130.) At the time of trial, SA RA had been a special agent for roughly two and a half years. (JA. at 129.)

A little over two months later, on 26 October 2020, SI HO noticed no recordings of either interview with SM, or Appellant's OSI interview were present in OSI's recording system. (JA at 41.) The missing interviews were annotated in OSI's Internal Data Pages (IDP) by RH on 19 January 2021. (JA at 41.) The IDP notes stated, "SI HO was unaware of the timeframe OSI requires videos to be copied to a disk." (Id.) SI HO testified at trial that the recordings had been deleted from OSI's recording system for an unknown reason. (JA at 53.) SI HO agreed it was OSI practice to video record interviews and to download and copy the

recordings after an interview is completed, but that had not been done in this case. (JA. at 48, 55.)

Trial defense counsel never filed or made an oral motion under R.C.M. 914 at any stage of the trial.

Trial Defense Counsel and R.C.M. 914

On appeal before AFCCA, Appellant raised an ineffective assistance of counsel claim against his trial defense counsel: Maj AN, Capt OH, and Capt RH.[3] On 29 July 2021, assistant trial counsel informed Capt OH that the OSI interviews of SM were "lost," but assistant trial counsel could not confirm whether the interviews had ever been recorded or were lost after being recorded. (JA at 157.) Assistant trial counsel also conveyed neither she nor the OSI agents had ever reviewed a recording of the interviews. (Id.) Capt OH stated that, from her experience with OSI, the interviews (1) were recorded and not removed from the system, and were automatically overwritten after a certain period of time, (2) were never recorded in the first place due to user error with the software system, (3) were never recorded because an agent did not know that best practice was normally to record victim interviews; or (4) were never recorded because the recording system malfunctioned. (JA at 157-158.) Capt OH stated trial defense counsel

[3] Capt RH did not participate in the trial phase. (JA at 159–60.) Because R.C.M. 914 does not ripen until the witness has testified, this brief does not discuss his role.

needed to be able to prove the existence of the video if they were to prevail under R.C.M. 914. (JA at 158.)

Maj AN also stated trial defense counsel had no knowledge as to whether OSI's recording device was fully functional or that it did, in fact, capture the two interviews with SM. (JA at 154.) Maj AN indicated trial defense counsel had no knowledge of OSI, trial counsel, or any legal office personnel having ever viewed the recordings at issue, nor had anyone ever confirmed the existence of the recordings at any point. (JA at 154-155.)

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 the video recordings in question ever existed, and feared they might exist." (JA at 12.) Therefore, AFCCA concluded Appellant had failed to demonstrate that his counsel offered deficient performance. (Id.)

Maj AN and Capt OH's overall trial strategy led to Appellant's acquittal on 12 of 15 specifications, including one of the specifications involving SM. (JA at 14-16.) For Specification 12 of Charge I, Appellant was found not guilty of pulling SM's hair on divers occasions and was convicted only of doing so on one occasion. (Id.) For Specification 1 of Charge II, Appellant was only convicted of the lesser included offense of assault consummated by a battery upon SM, rather than the charged domestic violence. (Id.)

SUMMARY OF THE ARGUMENT

Appellant's assignment of error is without merit, and he is not entitled to relief. Trial defense counsel's performance was not deficient because they had a reasonable explanation for not filing a R.C.M. 914 motion: they reasonably believed such a motion would not be successful. Specifically, they did not believe they would succeed in proving the recordings ever existed or were ever "in the possession of the United States."

Defense counsel correctly determined that they could not meet their burden to establish a recorded statement even existed. As the moving party, an R.C.M. 914 motion would have required trial defense counsel to prove the statement existed. R.C.M. 905(c)(2)(A). At the time of Appellant's trial, trial defense counsel knew that no member of OSI or the prosecution had ever actually viewed video recordings of SM's interviews. As a result, trial defense counsel reasonably believed there were several alternative explanations as to why the interviews with SM were not in the OSI system on 26 October 2020. Since trial defense counsel were never able to confirm whether the videos were in fact captured or that anyone had ever seen them in OSI's recording software or storage system, a successful R.C.M. 914 motion seemed unlikely

Trial defense counsel's level of advocacy did not fall measurably below the performance ordinarily expected of fallible lawyers. Trial defense counsel's

decision-making is supported by the case law applicable at the time, and the more recent Sigrah decision. Understanding the state of the law at the time of trial – and before Sigrah – reasonable attorneys might have chosen not to file an R.C.M. 914 in the same situation because they did not believe they could (1) prove the videos ever existed, (2) prove the good faith loss doctrine did not apply, and (3) prove prejudice.

Finally, Appellant has not established that even if defense counsel had filed an R.C.M. 914 motion, there would have been a different result. There are two reasons why Appellant has failed to meet his burden of demonstrating prejudice. First, there is no evidence in the record the recordings ever existed and, second, even if this Court were to find that they had existed, he has not demonstrated a sufficient level of negligence on the part of the government to preclude the application of the good faith loss doctrine, which is still good law.

Defense counsel's failure to make a motion under R.C.M. 914 was not deficient performance because the facts available to trial defense counsel were not sufficient to succeed on such a motion. This Court should deny Appellant's claims and affirm the decision of the Court of Criminal Appeals.

ARGUMENT

TRIAL DEFENSE COUNSEL WERE NOT INEFFECTIVE BECAUSE APPELLANT CAN PROVE NEITHER DEFICIENCY NOR PREJUDICE.

Standard of Review

Allegations of ineffective assistance are reviewed de novo. United States v. Scott, 81 M.J. 79, 84 (C.A.A.F. 2021).

Law

1. Ineffective Assistance of Counsel

The Sixth Amendment guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; United States v. Strickland, 466 U.S. 668, 686 (1984). "In order to prevail on a claim of ineffective assistance of counsel (IAC), an appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." United States v. Green, 68 M.J. 360, 361 (C.A.A.F. 2010) (citing Strickland, 466 U.S. at 698). "Appellate courts do not lightly vacate a conviction in the absence of a serious incompetency which falls measurably below the performance… of fallible lawyers." United States v. DiCupe, 21 M.J. 440, 442 (C.M.A. 1986) (quotations omitted) (citing United States v. DeCoste, 624 F.2d 196, 208 (D.C. Cir. 1979)). If an appellant has made an "insufficient showing" on even one of the

elements, this Court need not address the other. Strickland, 466 U.S. at 697. "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 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)).

Military courts use a three-part test to determine whether the presumption of competence has been overcome: (1) are appellant's allegations true, and if so, is there a reasonable explanation for counsel's actions; (2) if the allegations are true, did defense counsel's level of advocacy fall measurably below the performance ordinarily expected of fallible lawyers; and (3) if defense counsel was ineffective, whether there is a reasonable probability that, absent the errors, there would have been a different result. United States v. Gooch, 69 M.J. 353, 362 (C.A.A.F. 2011) (citing United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991)) (quotations omitted).

2. Rule for Courts-Martial 914

In 1963, the predecessor to this Court ruled the Jencks Act, applied to courts-martial. *See* United States v. Walbert, 14 C.M.A. 34, 37 (1963); 18 U.S.C. § 3500(b). The Jenks Act entitles a defendant on trial in a federal criminal prosecution "to relevant and competent statements of a government witness in

possession of the [g]overnment touching the events or activities as to which the witness has testified at trial," for impeachment purposes. Campbell v. United States, 365 U.S. 85, 92 (1961). The intent of the statute is to "further the fair and just administration of criminal justice." Id. In 1984, the ruling in Walbert was codified when the President promulgated R.C.M. 914 with language that tracks the Jencks Act. *Compare* R.C.M. 914 (1984 MCM) (JA at 161–62) *with* 18 U.S.C. § 3500.

The relevant portions of R.C.M. 914 state:

> (a) Motion for production. 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 is:
>
> (1) In the case of a witness called by the trial counsel, in the possession of the United States. . . .
>
> (e) Remedy for failure to produce statement. If the other party elects not to comply with an order to deliver a statement to the moving party, the military judge shall order that the testimony of the witness be disregarded by the trier of fact and that the trial proceed, or, if it is the trial counsel who elects not to comply, shall declare a mistrial if required in the interest of justice.

The relevant portion of R.C.M. 914 defines a "statement" as "a substantially verbatim recital of an oral statement made by the witness that is recorded

contemporaneously with the making of the oral statement and contained in a stenographic, mechanical, electrical, or other recording or a transcription thereof."

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* United States. V. Muwwakkil, 74 M.J. 187, 191 (C.A.A.F. 2015).

In Muwwakkil, this Court recognized the existence of a "good faith loss doctrine" in the military's R.C.M. 914 and Jencks Act jurisprudence, which "excuses the Government's failure to produce 'statements' if the loss or destruction of the evidence was in good faith." 74 M.J. at 193. For example, in another case, our superior Court denied relief under the Jencks Act where the government lost Article 32 recordings of witness testimony. United States v. Marsh, 21 M.J. 445, 452 (C.M.A. 1986). The Court reasoned that although "some negligence may have occurred . . . there was no gross negligence amounting to an election by the prosecution to suppress these materials." Id.

In United States v. Sigrah, CAAF addressed a fact pattern in which law enforcement agents failed to preserve the video recording of the victim's interview. 82 M.J. at 465-66. After the victim in the case testified at trial, the defense moved to strike her testimony under R.C.M. 914 because the government failed to preserve and produce the recorded interview. Id. at 466. The military judge

denied the motion because there was "no evidence presented that law enforcement acted in bad faith or in a negligent manner." On appeal, the government conceded that there was an R.C.M. 914 violation and "that the Government showed sufficient culpability to preclude the good faith loss doctrine." Id. at 466, n.2. Based on the government's concession of a R.C.M. 914 violation, CAAF determined that the military judge should have employed one of the only two possible remedies under R.C.M. 914(e): striking the witness' testimony or declaring a mistrial. Id. at 467.

Analysis

1. While it is true that trial defense counsel did not make a motion under R.C.M. 914, there were reasonable explanations for their failure to do so.

Trial defense counsel did not file a motion under R.C.M. 914 for production of SM's recorded statements to OSI. But they had a reasonable explanation for not doing so—they did not believe the motion would prove successful. In order to justify production of a statement under R.C.M. 914, Appellant would have had to prove the following: (1) SM testified, (2) SM made a statement that related to the subject matter concerning which she had testified, (3) said statement was in the possession of the United States. *See* R.C.M. 914 and R.C.M. 905(c)(2)(A). As it pertains to this case, the analysis hinged on whether Appellant adequately proved a statement by SM was ever "in the possession of the United States." Specifically, Appellant would have to prove the two interviews of SM existed in the first place.

See United States v. Benton, 890 F.3d 697, 718 (8th Cir. 2018) (finding defendant did not successfully establish a violation of the Jencks Act where he failed to prove the statement existed); *see also* United States v. Wright, 845 F.Supp. 1041, 1069 (D.N.J. 1994) (finding no Jencks Act violation had occurred under a plain error standard where defendant had not established the statement ever existed).

To establish the existence of the recordings, Appellant relies on SI HO's assertion that she noticed the recordings were "deleted" on 26 October 2020. (App. Br. at 6.) Appellant also relies on the IDP note from 19 January 2021 which states the interview recordings were deleted, and SI HO was not aware of the timeframe OSI requires videos to be copied to a disk. (App. Br. at 7.) While on their face these statements might seem to indicate the recordings did exist at one time, there is one problem with that assertion. The record before this Court is devoid of any evidence indicating the recordings existed prior to any "deletion."

The evidence available to trial defense counsel showed that on 26 October 2020, SI HO discovered there were no recordings of SM's interviews in OSI's system. While SI HO testified that the recordings were "deleted," that assertion was an assumption made to explain the absence of the recordings. When asked how the interviews were deleted off the system, she stated "[t]here's an unknown reason." (JA at 53.) This indicates OSI was unable to confirm the reason the recordings did not exist in their system. SI HO testified it was OSI policy to record

interviews. When she realized the recordings did not exist on the system, she jumped to a conclusion to explain their absence.

But as Capt OH acknowledged in her declaration, other occurrences could have explained the absence of the videos on the OSI recording system. (JA at 156-158). It was possible that the interviews (1) were never recorded in the first place due to user error with the software system or (2) were never recorded because the recording system malfunctioned. (Id.)

At the time of trial, trial defense counsel knew that no witness had ever seen the videos of SM's interviews to be able to confirm that they had been properly recorded. Since the defense could not prove the missing videos had ever existed in a functioning format, and thus been in the possession of the government, the defense reasonably believed a motion under R.C.M. 914 would fail. If the recordings never existed, either due to user error or software malfunction, there would be no R.C.M. 914 concerns. "R.C.M. 914 concerns preservation and disclosure of statements in the government's possession, not the collection of evidence." United States v. Thompson, 81 M.J. 391, 395 (C.A.A.F. 2021). R.C.M. 914 does not impose an obligation onto OSI to create a qualifying statement by recording interviews, it merely creates a duty to preserve them once they are recorded. *See* id.

While failing to follow OSI policy to record an interview may have provided ample grounds for cross-examination, it did not create fertile grounds for a successful R.C.M. 914 motion.

Appellant relies on Muwwakkil and Marsh to support his argument, but those cases do not undermine the trial defense counsel's decision-making in this case. (App. Br. at 27-28.) In Muwwakkil, the evidence showed the missing audio recording at issue did exist at one time, because a paralegal used it to make written summaries of the witness' Article 32 testimony. 74 M.J. at 189. Although the Muwwakkil opinion stated that it would be an absurdity to allow the government to avoid the consequences of R.C.M. 914 by failing to take adequate steps to preserve statements, again, in that case, the defense could show that the statement at issue had existed and was in the possession of the government at one time. 74 M.J. at 192. Muwwakkil did not discuss what analysis would apply if the defense could not prove the statement had ever been in the government's possession. Likewise, Marsh involved physical tape recordings of Article 32 testimony that had existed but had then disappeared from a desk in the legal office. 21 M.J. at 447. The two cases do not establish that the defense can prevail on an R.C.M. 914 motion where no evidence proves the missing recordings ever existed or ever worked properly. It was therefore reasonable for trial defense counsel to note the distinction between

Muwwakkil and Marsh and Appellant's case and to conclude that an R.C.M. 914 motion would fail.

In this case, there is no evidence in the record the recordings ever existed; thus they were never in the possession of the United States.

Even taking the Sigrah decision into account does not change the analysis. In Sigrah, the government conceded that an R.C.M. 914 violation had occurred, so this Court only addressed the issue of prejudice. 82 M.J. at 466, n.2. Nothing in Sigrah stands for the premise that defense counsel can prove an R.C.M. 914 violation occurred when they cannot prove the statements at issue existed in the first place. Since trial defense counsel reasonably believed an R.C.M. 914 motion would fail, they had a reasonable explanation for not making one at Appellant's trial.

2. Trial defense counsel's level of advocacy did not fall measurably below the performance ordinarily expected of fallible lawyers.

Appellant's trial defense counsel performed adequately. As the Supreme Court warned, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from *counsel's perspective at the time.*" Strickland, 446 U.S. at 668 (emphasis added). As discussed above, at the time of Appellant's court-martial, the case law did not

provide any support for the notion that the defense could gain relief under R.C.M. 914 where there was no direct evidence that the statements at issue ever existed.

There are other reasons why a reasonable attorney would have thought, based on the state of the law at the time of trial, that an R.C.M. 914 motion would have been futile. First, under Muwwakkil and Marsh, even where the government conceded the statement's existence and was "in possession of the United States," an R.C.M. 914 motion might still not succeed if the military judge found no bad faith or gross negligence on the part of the government. While the R.C.M. 914 motion in Muwwakkil was granted and that result was ultimately sanctioned by this Court, it is important to consider the procedural posture of that case. Muwwakkil was before this Court as an interlocutory appeal under Article 62, UCMJ, challenging a military judge's decision to grant an R.C.M. 914 motion for abuse of discretion. 74 M.J. at 188. Although this Court found the military judge in question did not abuse her discretion in granting the R.C.M. 914 motion, it did not create a mere negligence standard for the good faith loss doctrine. This Court explained, "a finding of negligence *may* serve as the basis for a military judge to conclude that the good faith loss doctrine does not apply in a specific case." Id. at 193. (emphasis added.) Muwwakkil did not undermine Marsh by saying mere negligence will always preclude application of the good faith loss doctrine. A military judge might also decide, as in Marsh, to apply the doctrine so long as there

was no gross negligence. 21 M.J. at 452. In this case, the defense had no evidence that OSI destroyed the recordings in this case willfully or through gross negligence, if the recordings had ever existed in a working format in the first place. The facts were also unlike the negligence identified in Muwwakkil, where government counsel failed to provide office paralegals any training at all on the handling or preservation of Article 32 testimony. 74 M.J. at 189. In contrast, here, OSI had a policy in place to preserve recordings of victim interviews, and SI HO attempted to follow it by trying to retrieve the recordings off the OSI recording system. In sum, a reasonable attorney could have believed that given the lack of gross negligence or bad faith, an R.C.M. 914 would not succeed, since there was a likelihood the military judge would have applied the good faith loss doctrine.

Sigrah had not been decided at the time of Appellant's trial. Even if Sigrah might now signal that an R.C.M. 914 motion in Appellant's trial would have had a better chance for success, trial defense counsel were only responsible for understanding the law as it existed at the time of trial. *See* Lilly v. Gilmore, 988 F.2d 783, 786 (7th Cir. 1993). And even if Sigrah had been decided at the time of Appellant's trial, it would not guarantee that an R.C.M. 914 motion in Appellant's case would have prevailed. Sigrah did not undermine the good faith loss doctrine. The government in Sigrah conceded not only the R.C.M. 914 violation, but also that the government had showed sufficient culpability to preclude the good faith

loss doctrine. Based on the government's concessions, the opinion in Sigrah only addressed the appropriate remedy for the R.C.M. 914 error. 82 M.J. at 466, .2. *See also* id. at 471-72 (Maggs, J., concurring) (recognizing the military's "judicially created good faith doctrine" and that no party has asked the Court to overrule it). Even after Sigrah, a reasonable lawyer might have believed that the good faith loss doctrine would preclude relief in this case.

Along the same lines, Judge Maggs observed in his concurring opinion in Sigrah that the Army Court of Criminal Appeals below had read prior CAAF and civilian court precedent "to mean that when the government fails to produce a witness's statement, an appellant is only entitled to relief if the defense counsel's cross-examination of the witnesses was significantly encumbered." Id. at 472. (internal citations omitted). Like the Army Court, reasonable attorneys at the time of Appellant's trial might have believed that they would have to make a prejudice showing in order to prevail on an R.C.M. 914 motion. Based on SM's almost immediate report of the assault, photographs of her injuries, and their client's statements to them, trial defense counsel had reason to believe that SM's allegations against Appellant were truthful. (JA at 153-155.) Reasonable attorneys confronted with such evidence could also have concluded that they would be unable to show prejudice from the missing recordings, since there was little

evidence to suggest that SM made meaningfully inconsistent statements about the assaults in her interviews.

Reasonable attorneys also might have thought they could not establish prejudice because agent notes from the SM interviews were available, and the agents and SM were subject to cross-examination about the details of the interviews. *See* United States v. Sigrah, 2021 CCA LEXIS 279 at *23-24 (A. Ct. Crim. App. 9 June 2021). Although this Court's Sigrah decision ultimately dispelled the Army Court's reasoning, it had not been decided at the time of Appellant's trial. Thus, Appellant's claim that "Sigrah did not change R.C.M. 914" is unpersuasive. (App. Br. at 21.) Sigrah did serve to reconcile some "disagreements" surrounding R.C.M. 914 that courts and practitioners were having. *See* 82 M.J. at 470-72 (Maggs, J. concurring) (recognizing "disagreements" in interpreting R.C.M. 914 and forecasting that such disagreements were likely to continue until the rule was rewritten). Given the uncertainty and confusion surrounding R.C.M. 914 at the time of Appellant's trial, failing to file an R.C.M. 914 motion at Appellant's trial did not fall measurably below the performance ordinarily expected of fallible lawyers.

Appellant argues that an R.C.M. 914 motion would have been a "cost-free motion for the defense" and that the viability of the motion should have been apparent since R.C.M. 914 has remained essentially unchanged for more than a

generation." (App. Br. at 22, 21.) However, a futile motion is not cost free. It might cost defense counsel their credibility and takes time away from more fruitful endeavors, such as crafting an effective cross-examination or otherwise preparing for trial. Also, "effective assistance does not demand that every possible motion be filed, but only those having a solid foundation." United States v. Crouthers, 669 F.2d 635, 643 (10th Cir. 1982) (citation and quotation omitted). And "even if many reasonable lawyers at the pertinent time" would have read R.C.M. 914 to provide a likely avenue for relief at Appellant's trial, "no relief can be granted unless it is shown that *no* reasonable lawyer, in the same circumstances" would have thought an R.C.M. 914 motion would be futile. Smith v. Singletary, 170 F.3d 1051, 1055 (11th Cir. 1999). As discussed above, given the state of R.C.M. 914 law at the time of trial, that was not the case here.

Appellant argues trial defense counsel obviously did not understand that an R.C.M. 914 motion was an option, or they did not understand the rule. (App. Br. at 19.) But the analysis conducted by trial defense counsel indicates otherwise. Appellant specifically states Capt OH may have conflated R.C.M. 703(e)(2) and R.C.M. 914 as evidence that there was a fundamental misunderstanding about the law. This is not true. Capt OH correctly stated the existence of the recorded interview would have been information they needed to prove in order to prevail under R.C.M. 914. (JA at 158.) Trial defense counsel were not unaware of

R.C.M. 914 and did not misunderstand the rule; they reasonably believed based on their R.C.M. 703(e)(2) analysis they would have failed under either rule due to their inability to prove the existence of the statement in question.

Appellant also asserts trial defense counsel erroneously believed the defense and not the government, would have to prove the videos existed. (App. Br. at 19.) It is Appellant who misapprehends the law. In support of his assertion, Appellant cites United States v. Augenblick. 393 U.S. 348, 355-56 (1969). But Augenblick does not shift the initial burden of persuasion under R.C.M. 905(c)(2) from the defense to the government. Augenblick instead states that once the existence of the statement has been established, the government bears the burden of producing the statement or explaining why it could not do so. Id. Specifically, in Augenblick the nature and existence of the tapes was "the subject of detailed interrogation at the pretrial hearing convened at the request of the defense." Id. In this case, the government would not have borne burden to produce the statement until it had been established that the recordings existed in the first place.

The Eighth Circuit's 2018 opinion in Benton is instructive on this matter. 890 F.3d at 718. In Benton, there was contradictory evidence about whether government agents had taken any notes during a witness interview. Id. One agent testified "I think I usually take at least some notes. I don't recall an occasion where I didn't take notes. If I wasn't taking notes, somebody else was taking notes,

meaning another agent." Id. Yet the Court found this testimony to be "equivocal" and ruled that "[i]n the absence of any probative evidence that notes were taken . . . no Jencks Act violation was established." Id. Similarly here, the evidence that the videos of SM's interview ever existed was equivocal at best since no one had ever seen the videos, and the defense could not establish an R.C.M. 914 violation under those circumstances. In short, in Appellant's case, trial defense counsel correctly apprehended the burden of persuasion, and their decision-making was properly informed by that understanding.

Appellant next relies on Hinton v. Alabama, 571 U.S. 263 (2014), to assert trial defense counsel's alleged ignorance or misunderstanding of R.C.M. 914 led to a subpar choice to score minor points against law enforcement for losing the video instead of obtaining the remedies under R.C.M. 914. In Hinton, defense counsel was unaware of a change in the law that allowed for greater reimbursement for expert expenses. Id. at 267. This led to the attorney choosing an expert he "knew to be inadequate." Id. at 274. Here, there was no ignorance or misunderstanding of the law as discussed above. Further, trial defense counsel did not make a subpar choice, they made the correct choice in not filing a motion that would have failed due to their inability to prove the existence of the statement. Instead, they scored "minor" points against law enforcement and the alleged victims earning acquittals on 12 of 15 specifications.

Here, a reasonable lawyer could have believed that an R.C.M. 914 motion would fail given the lack of evidence the challenged statements were ever "in the possession of the United States." Further, a reasonable lawyer could have believed that there was little evidence that the government acted with gross negligence or in bad faith, and that given the facts, the motion would fail, even if the court determined the recordings were "in the possession of the United States." Finally, a reasonable lawyer could have believed that they could not prevail on an R.C.M. 914 motion without first showing prejudice.

In sum, trial defense counsel's failure to raise a losing issue did not fall in the realm of "serious incompetency which falls measurably below the performance… of fallible lawyers." DiCupe, 21 M.J. at 442. This is especially true when this Court considers Appellant's trial defense counsel's overall performance. They earned acquittals for Appellant on 12 of 15 specifications. For one of the three remaining specifications, the members only convicted Appellant of a lesser included offense. For another specification, the members only convicted him of one instance of assault consummated by a battery, rather than divers instances. The favorable results of Appellant's trial prove his trial defense counsel's level of advocacy did not fall measurably below the performance ordinarily expected of fallible lawyers. To establish the element of deficiency, the appellant must first overcome "a strong presumption that counsel's conduct falls

within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. And the question here "is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom." Harrington v. Richter, 562 U.S. 86, 105 (2011) (internal citations and quotations omitted). Appellant has not shown that the decision not to make an R.C.M. 914 motion amounted to incompetence and has not overcome the strong presumption that trial defense counsel performed adequately. Thus, he cannot prevail on his claim of ineffective assistance of counsel.

3. There is not a reasonable probability that if trial defense counsel had filed an R.C.M. 914 motion, there would have been a different result.

Even if this Court were to determine trial defense counsel were ineffective in failing to file an R.C.M. 914 motion, Appellant cannot show a reasonable probability that such a motion would have been meritorious. *See* McConnell, 55 M.J. at 482. Appellant argues Sigrah unquestionably establishes that if defense had made a motion under R.C.M. 914 at Appellant's trial, the military judge would have stricken SM's testimony or declared a mistrial. (App. Br. at 26-29.) But Appellant overlooks some notable aspects of the Sigrah opinion that show otherwise. First, the government in Sigrah conceded an R.C.M. 914 violation on appeal. 82 M.J. at 466, n.2. In contrast, there is no indication the government in Appellant's case would have conceded an R.C.M. 914 violation, especially where

trial counsel was unable to confirm whether the recordings had ever existed and had neither trial counsel, legal office personnel, or OSI had ever viewed the recordings to confirm their existence or their functionality. When it was so unclear whether the statements in question were ever "in the possession of the United States," R.C.M. 914 simply does not apply.

Second, the Sigrah opinion does not disturb the judicially created good faith loss doctrine recognized in Muwwakkil and Marsh. *See* Sigrah, 82 M.J. at 472 (Maggs, J., concurring) (overturning the Court's R.C.M. precedent "is not the issue here because neither party has asked us to overrule any precedent.") Since the government in Sigrah conceded that the good faith loss doctrine did not apply, this Court did not address whether the particular facts of that case supported that conclusion. In contrast, in this case the government has never conceded that the good faith loss doctrine does not apply.

Even if the defense had sufficient evidence to show the videos existed, Appellant still cannot show a reasonable probability that he would have prevailed on an R.C.M. 914 motion because he cannot establish that OSI deleted the videos of SM's interviews, intentionally, recklessly, or in bad faith. The IDPs from the investigation suggest that SI HO "was unaware of the timeframe OSI requires videos to be copied to a disk." (JA at 41.) If SI HO incorrectly believed she would have longer access to the videos before they were deleted from OSI's recording

system, that belief does not necessarily rise to the level of negligence, and certainly does not constitute gross negligence. A person using reasonable care might have encountered the same problem. But, in any event, SI HO testified that the reason the videos were "deleted" was "unknown." Thus, the videos could have been deleted because of a system malfunction and not because of a failure to preserve them. Since the record does not confirm how or why the videos were deleted, Appellant would face a steep hurdle of showing bad faith, negligence, or gross negligence on the part of the government.

The culpability of OSI is this case is distinguishable from Sigrah where the government conceded that Army investigators had acted with sufficient culpability to preclude application of the good faith loss doctrine. 82 M.J. 466 at n.2. In Sigrah, although all witness interviews were recorded, Army investigators had a policy to only preserve subject interviews on a physical disc. Id. at 465. In other words, the government knowingly allowed witness statements to be destroyed. A similar policy did not exist in this case. In fact, SI HO demonstrated an intent to preserve any recordings of SM's interviews by searching for them on OSI's recording system. This makes the facts of Appellants case much more similar to Marsh where this Court found the good faith loss doctrine applied. 21 M.J. at 452. Like in Marsh, there was a policy in place to preserve the recording for trial, there

was evidence SI HO tried to follow that policy, and "there was no gross negligence amounting to an election by the prosecution to suppress these materials." Id.

Without a demonstration of bad faith, negligence, or gross negligence, under Muwwakkil and Marsh (which are still good law), Appellant cannot establish a reasonable *probability* that his R.C.M. 914 motion would have prevailed. To succeed on a claim of ineffective assistance of counsel, Appellant must show that his "counsel's errors were so serious as to deprive [him] of a fair trial, a trial whose result is reliable." Richter, 562 M.J. at 104. Since an R.C.M. 914 motion would have had so many obstacles to success, trial defense counsel's failure to file one did not deprive Appellant of a fair trial. In sum, Appellant cannot show that absent his counsel's alleged errors, the result of his trial would have been different.

Appellant did not show either that his counsel performed deficiently or that the deficiency prejudiced him. Since Appellant has not overcome the presumption of competent representation, this Court should deny Appellant's claims and affirm the findings and sentence in this case.

CONCLUSION

For these reasons, the United States respectfully requests that this Honorable Court deny Appellant's claims and affirm the decision of the Court of Criminal Appeals.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was transmitted by electronic means to the Court and the Appellate Defense Division by electronic means on 10 October 2023.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

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Dated: 10 October 2023