IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee v. Sergeant (E-5) **NORMAN L. CLARK, SR.**, Appellant	BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 20170023 USCA Dkt. No. 19-0411/AR

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

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Issues Presented

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

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

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

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter under Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2012) [UCMJ]. This Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

On March 8, August 8, and December 7, 2016, and January 9-13, 2017, at Fort Campbell, Kentucky, a general court-martial composed of a panel including enlisted representation convicted the appellant, Sergeant (SGT) Norman L. Clark, Sr., contrary to his pleas, of one specification each of rape of a child, sexual abuse of a child, and making a false official statement, in violation of Articles 120b and 107, UCMJ, 10 U.S.C. §§ 920b and 907. The court sentenced the appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for twelve years, and to be discharged from the service with a dishonorable discharge.

The convening authority approved the findings and sentence.

On June 10, 2019, the Army Court affirmed the findings and sentence. (JA 2-10). Appellant was notified of this decision and, in accordance with Rules 19 and 30 of this Court's Rules of Practice and Procedure, filed a Petition for Grant of Review on August 8, 2019. This Court granted appellant's petition for grant of review on October 2, 2019, and on October 22, 2019, this court granted appellant an extension of time until November 14, 2019, to file his brief and joint appendix.

Statement of Facts

On June 4, 2015, appellant's wife took their four-year-old daughter AC to the hospital at Fort Campbell, where she was found to have vesicles on the inside of her labia majora. (JA 146-50). The nurse suspected the vesicles indicated herpes and consulted a doctor, who obtained a sample by swab. (JA 151). The doctor believed AC had contracted Herpes Simplex Virus (HSV) Type 2, (JA 156), the most common cause of genital herpes, (JA 152). The examination revealed no indication of penetration or trauma. (JA 157-58). Seeing this infection in a young child, however, the hospital contacted law enforcement. (JA 153).

At trial, a physician testifying for the government indicated that indirect transmission of the herpes viruses (Types 1 and 2) is unusual but not impossible: "because [of] the nature of the virus, it doesn't survive for any amount of time outside of cells so it is very difficult to transmit it from surface to mucosa. It's

usually mucosa to mucosa." (JA 152; *but see* JA 155 (the same witness says "contracting HSV requires direct contact")). The government expert also testified that herpes, including Type 2 HSV, could be transmitted to a person's genitals by oral sex. (JA 159-60).

Although appellant supplied CID with the name of at least one other adult male with herpes who had been around AC during the time she contracted the disease, CID never tried to contact that person. (JA 137-41). Nevertheless, CID told appellant that "everything" pointed to him, and that AC could only have contracted HSV-2 "through fluid or sexual contact," knowing that to be false. (JA 142-45).

Appellant was interrogated by three CID agents for more than thirteen hours on October 21, 2015, then he spent the night at the unit Staff Duty desk before more interrogation on October 22, 2015. (JA 209-12).[1] In recorded interrogations on the first day, appellant denied molesting his daughter, but made admissions that AC had been in his bed on many occasions, and on some of those occasions he may have had an erection, and that erection may have protruded from his boxer

[1] Appellate Exhibit XXV was the ruling of the military judge on a motion to abate under R.C.M. 703(f)(2). When the defense later moved for witness testimony to be disregarded under R.C.M. 914(e), the parties agreed that the military judge could consider the evidence adduced for the earlier motion in ruling on the R.C.M. 914 motion, (JA 110), and the judge adopted the finding of facts from App. Ex. XXV in his oral ruling on the motion now addressed by appellant, (JA 114).

shorts.[2] (JA 209). On the second day of interrogation, according to the CID agents, appellant allegedly admitted to molesting AC. (JA 161-63).

The interrogations were recorded by a program called Casecracker, which required the user to put a new disc into the computer when the recording disc was full. (JA 209). The first-day interviews required three discs, while the second-day interrogations required two. (JA 209). Forensic analysis of the computers confirmed that two discs had been created on the second day, but CID lost the first disc, which had recorded the portion of the interview in which appellant allegedly made the most explicit and damning statements. (JA 209).

Before trial, defense moved for abatement under Rule for Courts-Martial (R.C.M.) 703(f)(2). (JA 209). In denying the defense motion to abate, the military judge found that testimony about the interview was an adequate substitute for the recording, but noted how the lost evidence could be material to the defense:

> With subject interrogations in particular, however, the tactics used by agents to procure a statement may impact how the factfinder would view whether the statement was voluntary. Even if the statement is voluntary, the manner in which it is taken may impact the weight it is given.

(JA 209).

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[2] Appellant's admissions on October 21, 2015 were so inadequate as proof of his guilt that trial counsel posed them as a hypothetical to the government's medical expert as a method of transmitting the herpes virus, obtaining the opinion that such a transmission would be "highly improbable." (JA 154).

Later, the defense invoked R.C.M. 914 and the Jencks Act, 18 U.S.C. § 3500 (1957, amended 1970), moving to strike the CID agents' testimony about the matters discussed in their October 22, 2015 interview of appellant. (JA 85-86). The trial counsel initially responded that this new motion merely amounted to a motion to reconsider the military judge's pretrial R.C.M. 703 ruling, adding, "And our position is the same position that it was before, we are producing those portions of the statement through witness testimony." (JA 87). Trial counsel then insisted that the government would only be offering the statements of the accused, as disclosed under Section III. (JA 88-89).

After a recess, government counsel argued that statements of the accused "are not covered under the Jencks Act," apparently citing *United States v. Walbert*, 32 C.M.R. 945 (A.F.B.R. 1963).[3] (JA 106). Trial counsel's argument had acknowledged, however, that the defense motion addressed "the statements of Agent [SF] in the [interview] room." (JA 92-93). Later in his argument, trial counsel offered to solve the problem by "redaction of those statements of the witness." (JA 94).

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[3] In a later proceeding, the Court of Military Appeals found the Jencks Act did apply to statements made by interrogators in the course of obtaining a confession, but also found the appellant was not prejudiced by the error because appellant's own testimony showed his confession had been made voluntarily. 33 C.M.R. 246 (C.M.A. 1963).

The defense countered that the CID agents testifying about the interview were participants whose questions and tactics were relevant to evaluation of appellant's responses: "They are also having conversations with these people." (JA 95). The defense again articulated how the lost recording was a statement of the interviewers, as well as the person interviewed: "We need to know how they got there, for impeachment purposes or biases, or were they threats, things along those lines, Your Honor. We need that for impeachment." (JA 104). Trial counsel responded by standing on the 1963 military decision(s) in *Walbert* that interpreted the Jencks Act. (JA 106-07, 109).

After an overnight recess, the military judge ruled that notwithstanding the defense objections under R.C.M. 914, he would allow CID agents SF and CJ to testify as to the substance of their interview with appellant during the time recorded on the lost disc. (JA 114-15). Relying on the wording of R.C.M. 914 (a)(1) and on "the *purpose* of R.C.M. 914," the military judge found that the "substance" of the lost evidence was only the statement of the accused. (JA 115-16 (emphasis added)). In an oral ruling, the military judge articulated a purported semantic distinction:

> In this case, the Court does not find that the statements of Special Agent—not the statements, that what was said by Special Agent [SF] and Special Agent [CJ], on the discs, are statements within the purposes of R.C.M. 914.

(JA 116).

Appellant's brief to the Army Court asserted, "The military judge erred in failing to adhere to the plain language of Rule for Courts-Martial 914." (JA 11). Government counsel reformulated the assignment of error as "Whether the military judge abused his discretion when he denied a defense motion to strike the direct testimony of two government witnesses." (JA 11). The Army Court ordered briefing on three specified issues: the standard of review, the good faith and harmless error doctrines, and whether there was a test for prejudice. (JA 12).

The Army Court decided the case on the basis that appellant had not shown material prejudice to a substantial right, as required by Article 59(a), UCMJ. (JA 8-10). The Army Court also opined that "[e]ven if [it] had considered this a constitutional error," it would still affirm the findings and sentence because it was "convinced beyond a reasonable doubt that this testimony did not contribute to the findings of guilty." (JA 10).

Summary of Argument

An abuse of discretion occurred if the military judge's ruling was influenced by an erroneous view of the law. In this case, the military judge erroneously held that R.C.M. 914 did not apply to statements made by the CID agents who interrogated appellant. For purposes of R.C.M. 914, however, a "statement" is simply something that someone said. As the defense counsel explained at trial, the statements of the CID interrogators were material to show how appellant had been

persuaded to change his story dramatically over the course of a long interrogation.

Rule for Courts-Martial 914 protects a substantial right of the accused, and its violation may be constitutional error. The rule announced in *Jencks v. United States* was required by "justice." In subsequent cases, the Supreme Court said the violation of this right is not always constitutional error, but may be constitutional error. This court should test for material prejudice to a substantial right, and if the error is constitutional, the error must be harmless beyond a reasonable doubt.

The erroneous admission of the CID agents' testimony had a substantial influence on the findings. Rule for Courts-Martial 914 specified the remedy to which appellant was entitled at trial, and the discretion of a military judge did not extend to failing to strike the agents' testimony. Assessment of prejudice on appeal, therefore, must weigh the harm of the erroneous admission of the agents' testimony, not merely speculate on what impeachment value may have been lost.

Standard of Review

A military judge's decision to strike testimony under R.C.M. 914 is reviewed for an abuse of discretion. *United States v. Muwwakkil,* 74 M.J. 187, 191 (C.A.A.F. 2015). This court described the two standards *within* the abuse of discretion standard in *United States v. Hoffmann*, 75 M.J. 120, 124 (C.A.A.F. 2016): "That means we review the military judge's findings of fact for clear error but her conclusions of law de novo."

"If the military judge commits constitutional error by depriving an accused of his right to present a defense, the test for prejudice on appellate review is whether the appellate court is 'able to declare a belief that it was harmless beyond a reasonable doubt.'" *United States v. Buenaventura*, 45 M.J. 72, 79 (C.A.A.F. 1996), quoting *Chapman v. California*, 386 U.S. 18, 24 (1967).

Law and Argument

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

1. *An abuse of discretion occurred if the military judge's ruling was influenced by an erroneous view of the law.*

The *discretion* aspect of the abuse of discretion standard does not mean "that courts have discretion in deciding pure questions of law. Of course, they do not." *So v. Suchanek*, 670 F.3d 1304, 1310 (D.C. Cir. 2012). The meaning of a term in a Rule for Courts-Martial is a question of law that this court reviews de novo. *United States v. Dean*, 67 M.J. 224, 227 (C.A.A.F. 2009). The military judge erred if he was wrong to conclude that the CID agents' questions and statements were not "statements" within the meaning of R.C.M. 914.

2. *The military judge erroneously held that R.C.M. 914 did not apply to statements made by the CID agents who interrogated appellant.*

The military judge acknowledged "the [lost] disc would have been a substantially verbatim recital of an oral statement made contemporaneously with making of that oral statement" and the disc had been in the possession of the

United States. (JA115). The remaining criteria under R.C.M. 914(a) were that "a witness other than the accused" had testified on direct examination, and that the statement "relate[d] to the subject matter concerning which the witness [had] testified."

The existing interview recordings convey beyond reasonable dispute that—(1) the CID agents spoke for long stretches of time during these interviews, offering theories, assertions of fact, and inducements to appellant to respond to, and (2) during the time period recorded on the lost disc, appellant allegedly became much more forthcoming about his alleged acts of molestation than he had been on the first day. Therefore, what was lost included statements by the CID interrogators engaged in their sausage-making process. These recorded statements were related to the subject matter of the government agents' testimony, and they were material to the defense's ability to challenge or dispute the weight deserved by appellant's statements *as induced by the government agents' statements*.

Every requirement of R.C.M. 914 having been met, the remedies for an R.C.M. 914 violation were dictated by the Rule itself, as the military judge acknowledged. (JA 94).

Relying on the wording of R.C.M. 914 (a)(1) and on "the *purpose* of R.C.M. 914," the military judge found that the "substance" of the lost evidence was only the statement of the accused. (JA 115-16 (emphasis added)). The military judge's

oral ruling tried to capture his rationale for departing from the plain meaning of the words in the rule:

> In this case, the Court does not find that the statements of Special Agent—not the statements, that what was said by Special Agent [SF] and Special Agent [CJ], on the discs, are statements within the purposes of R.C.M. 914.

(JA 116).

3. *For purposes of R.C.M. 914, a "statement" is something someone said.*

Rule for Courts-Martial 914 provides no special definition for the term "statement." When asked by the military judge for legal authority for the proposition that R.C.M. 914 applies to all participants in a conversation, the defense counsel's answer was sufficient if not optimal: "the authority of 914, itself, Your Honor." (JA 98). The military judge's position—not appellant's—rests on the idea that "statement" has some esoteric meaning in R.C.M. 914. Specifically, the military judge found that "the purpose" for which the CID agents "were in an interrogation room with the accused" was "to [e]licit statements of the accused," and therefore the "substance" of the lost recording was "the statements of the accused." (JA 115-16). Appellant recognizes that the *topic* of the recorded conversation was appellant's conduct, but maintains that the recording also contained *the statements of the CID agents* who induced appellant to change his account of his conduct.

Appellant relies on the plain language of the rule, which includes a statement by a government interrogator. Civilian federal cases interpreting the Jencks Act have taken the same position, holding that calling a government interrogator as a witness may implicate the Jencks Act, and the trial court must determine if a record of the interrogation is covered by the Act.

More than forty years ago, the Ninth Circuit noted, "It is now well established that individual 'notes and reports' of agents of the Government who testify for the Government, made in the course of a criminal investigation, are the proper subject of inquiry and may be subject to production under the Jencks Act…." *United States v. Johnson*, 521 F.2d 1318, 1320 (9th Cir. 1975).

In *United States v. Layton*, 564 F.Supp. 1391 (D. Ore. 1983), the court held that the Jencks Act might apply to records from an interview of the accused, even though the Act expressly does not apply to statements of the accused: "The notes must be considered as the possible statement of an interviewee-witness, *the agent*, or the defendant." 564 F.Supp. at 1392 (emphasis added).

Although the decision of the court below was based on its determination that any error was harmless, the court acknowledged that "the military judge's analysis [was] likely erroneous as a matter of law based on the broad definition of 'statement' under R.C.M. 914." (JA 6).

4. ***As the defense explained, the statements of the CID interrogators were material to show how appellant had been persuaded to change his story.***

The court below noted that the admissions ascribed to appellant during the lost portion of the recorded interviews were "the most damning, and thus were clearly material." (JA 9). Indeed, the existing interview recordings convey beyond reasonable dispute that during the time period recorded on the lost disc, appellant allegedly became much more forthcoming about his alleged acts of molestation than he had been on the first day. Therefore, what was lost included statements by the CID interrogators engaged in the process of impelling appellant to change his story. And defense counsel articulated why the lost recording was necessary to a fair trial:

> We need to know how they got there, for impeachment purposes or biases, or were they threats, things along those lines, Your Honor. We need that for impeachment.

(R. at 341).

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

1. ***Rule for Courts-Martial 914 protects a substantial right of the accused, and its violation may be constitutional error.***

The rule at issue in this case originated, broadly speaking, in the right to be confronted by one's accusers. The manner in which this right may be exercised at trial, however, has been established by statute and by Presidential order.

2. ***The rule announced in Jencks v. United States was required by "justice."***

The military judge opined that the purpose of the Jencks Act did not support its applicability to this case. (JA 115-16). Appellant begs to differ, though noting that the Act of Congress served to circumscribe a right, not to create one. The Supreme Court's decision in *Jencks v. United States*, 353 U.S. 657 (1957), provided the means necessary for the criminal accused to exercise the right to be confronted with the witnesses against him, recognizing that "only the defense is adequately equipped to determine" how best to employ prior statements of government witnesses for the purpose of impeachment. 353 U.S. at 668-69.

3. ***In subsequent cases, the Supreme Court said the violation of this right is not categorically constitutional error, but may be constitutional error.***

In *Palermo v. United States*, 360 U.S. 343 (1959), the Supreme Court considered the Jencks Act, which had been enacted to codify (and limit) the *Jencks* decision. The *Palermo* Court noted that "[t]he statute *as interpreted* does not reach any constitutional barrier." *Id*. at 354 n.11 (emphasis added). The Court also reiterated that its authority to prescribe "rules of procedure and evidence for the federal courts" is limited to filling gaps "in the absence of a relevant Act of Congress." *Id*. Thus the *Palermo* Court did not find that the mechanics of the Jencks Act violated any constitutional right protected by the *Jencks* decision.

Similarly, in *United States v. Augenblick*, 393 U.S. 348 (1969), the Court noted that "[its] *Jencks* decision and the Jencks Act were not cast in constitutional

terms." 393 U.S. at 356. The *Jencks* decision had not cited any specific constitutional provision, saying instead simply, "Justice requires no less." 353 U.S. at 669. The *Augenblick* Court, however, noted that violation of the confrontation rights protected by the *Jencks* decision could be constitutional error:

> It may be that in some situations, denial of production of a Jencks Act type of a statement might be a denial of a Sixth Amendment right.

Id.

If a violation of the Jencks Act or R.C.M. 914 deprives the accused of his right to present a defense, that error is of constitutional dimension.

4. *This court should test for material prejudice to a substantial right, which, if the error is constitutional, must be harmless beyond a reasonable doubt.*

Although not every violation of an evidentiary rule is constitutional error, R.C.M. 914 is manifestly a rule of substance and not a *merely* procedural rule directing how charges will be forwarded or how pleadings will be filed. Article 36 conveys on the President the power to promulgate rules, parallel to or in addition to those applicable in federal civilian courts. By enacting R.C.M. 914, the President provided, for trials by court-martial, a mechanism corresponding to the Jencks Act. Therefore, violation of R.C.M. 914 is not categorically constitutional error, but such a violation may rise to that level because the issue addressed by R.C.M. 914 is the right to be confronted by one's accusers.

Whether the error is of constitutional dimension is a legal conclusion particular to each case. If an appellate court determines there was constitutional error, "the test on appellate review is whether [this] Court is satisfied beyond a reasonable doubt that the error was harmless." *United States v. Moolick*, 53 M.J. 174, 177 (C.A.A.F. 2000).

If evidentiary error is nonconstitutional, the appellate question becomes "'whether the error itself had substantial influence' on the findings." *Id*. (quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946). The distinction in the applicable prejudice analysis drawn in *Moolick* was reiterated by this Court in *United States v. Bess*, 75 M.J. 70, 75 (C.A.A.F. 2016).

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

1. *The erroneous admission of the agents' testimony had a substantial influence on the findings.*

Appellant was entitled to have the CID agents' testimony excluded, so the matter to be weighed by this court is *not* merely the speculative value of any lost impeachment evidence. The question presented to this court is the importance of the admitted testimony. That is the meaning of the plain language of the Rule, and that reading is supported by the logic of the rule, *because of* the speculative nature of lost impeachment evidence. Without knowing how leading the questions were,

or what inducements were offered, or what manipulations were employed, a trier of fact cannot assess the weight a statement deserves.

2. *The Rule specified the remedy to which appellant was entitled at trial*.

As the *Muwwakkil* court observed, "The plain text of R.C.M. 914 provides two remedies for the Government's failure to deliver a 'statement' without referencing a predicate finding of prejudice to the accused." 74 M.J. at 194. The court below opined that *Muwwakkil* did "not address the authority of an appellate court under Article 59, UCMJ," and noted that *Muwwakkil* was an interlocutory case under Article 62. (JA 8). Those points are accurate, but potentially obscure the questions of both whether the military judge erred and what impact on the appellant should be weighed for prejudice.

The military judge was obliged to provide a remedy provided by the rule, without engaging in any speculative analysis with regard to prejudice. That remedy was not a curative instruction or some other compensation for lost impeachment. The required remedy was exclusion of the agents' testimony, so the error to be weighed is the admission of the agents' testimony to the effect that appellant confessed to the offenses charged.

3. ***The discretion of a military judge does not extend to failing to strike testimony when R.C.M 914 requires it.***

Generally, trial judges benefit from a deferential standard of discretion with regard to the admission of evidence, but here the protection provided by the R.C.M. specified a narrow range of remedies adequate to the purpose of the rule.

> The actual degree of scrutiny with which any particular discretionary decision is reviewed depends upon the extent to which a trial judge's decisionmaking authority is circumscribed by the Constitution, states, rules, or case precedent.

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The trial judge's discretion in this instance was circumscribed by the Rule's two remedies; the judge provided neither.

4. ***Assessment of prejudice on appeal must weigh the harm of the erroneous admission of the agents' testimony.***

The existing record shows that appellant's account of his conduct changed dramatically during the lost period of the interrogation. Indeed, appellant's alleged admissions on the *first* day of questioning were so inadequate as proof of his guilt that trial counsel posed them as a hypothetical to the government's medical expert as a method of transmitting the herpes virus, obtaining the opinion that such a transmission would be "highly improbable." (JA 154). The Army Court recognized that "[t]he admissions by appellant during this [lost] portion were perhaps the most damning, and thus were clearly material." (JA 9).

The court below found this denial of appellant's right to confrontation to be harmless, citing a passing reference to possible harmlessness in *Goldberg v. United States*, 425 U.S. 94 (1976), a case in which the Court found that attorneys' notes might implicate the Jencks Act and remanded the case to the district court. The *Goldberg* decision provided little guidance on harmlessness, merely citing and quoting (in a footnote) its earlier decision in *Rosenberg v. United States*, 360 U.S. 367 (1959). *Id*. at 111 n.21. The standard articulated in *Rosenberg* makes obvious that this error was not harmless:

> An appellate court should not confidently guess what defendant's attorney might have found useful for impeachment purposes in withheld documents to which the defense is entitled.

Rosenberg, 360 U.S. at 371.

A Jencks Act violation is harmless, the *Rosenberg* decision makes clear, only when the trial defense counsel have the same information "as would have been available were error not committed." *Id*. In the present case, appellant was denied the capacity for meaningful confrontation—and therefore deprived of his right to present a meaningful defense to the alleged confession put forward by the government witnesses. Even by the nonconstitutional standard, appellant suffered material prejudice from the military judge's denial of his substantial right.

Conclusion

Having recorded lengthy CID interviews with appellant, during which the government agents cajoled, hectored, and induced appellant to make statements, the government was bound by R.C.M. 914 to produce the recorded statements made *by its witnesses* who testified about these interviews. Failure to produce these statements necessitated a remedy provided by the plain language of the Rule. The military judge's error materially prejudiced his substantial right to be confronted by the witnesses against him.

WHEREFORE, appellant respectfully requests this Honorable Court set aside the findings and sentence.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Clark, Crim App. Dkt. No. 20170023, USCA Dkt. No. 19-0411/AR was electronically filed brief with the Court and Government Appellate Division on November 14, 2019.

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