IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Sergeant (E-5) **NORMAN L. CLARK, SR.**, Appellant	REPLY 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:

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 the Case

On October 2, 2019, this Court granted appellant's petition for review, and on November 14, 2019, appellant filed his brief. The government responded on December 12, 2019. This is appellant's reply.

Argument

1. The lost recording contained hours of statements by the CID agents.

The question addressed by R.C.M. 914 is not how to deal with lost exculpatory evidence. That is addressed by R.C.M. 703(e)(2). The question

addressed by R.C.M. 914 is, how did the government get its inculpatory evidence? And to that end, what happens if the government cannot produce prior statements of its witnesses? These questions implicate the rights to confrontation and compulsory process. Deprivation of the right protected by R.C.M. 914 may be constitutional error (when an accused is completely deprived of a defense), or it may be material prejudice to a substantial right, when it is not harmless.

In this case, the military judge erroneously found that "that the statements of Special Agent—not the statements, that what was said by Special Agent [SF] and Special Agent [CJ], on the discs" were not statements "within the purposes of R.C.M. 914." (JA 116). Government counsel assert that "those words were questions to appellant, not statements by the agents." (Gov't Brief 1).

This Court has prudently ordered transcription of the existing recording, which will make it easier for the Court and the parties to see and quantify what is already manifest: the available record shows a great volume of "assertions" on the part of the interrogating government witnesses.

a. *Susskind* illustrates, by contradistinction, the nature of what was lost.

Government counsel frame the issue strictly as whether questions are statements, then characterize *United States v. Susskind*, 4 F.3d 1400 (6th Cir. 1993) (en banc), as the only Article III court decision to have addressed that issue. (Gov't Brief 16). Comparison of this case with *Susskind* is in fact very helpful.

The trial judge in *Susskind* examined a transcript of questions that a prosecutor had asked during a grand jury proceeding. 4 F.3d at 1403. So the withheld transcript was known by the trial judge to consist strictly of questions asked by an attorney in the formality of a court proceeding. In vivid contrast, the present case involves an interrogation by police agents that somehow impelled appellant to change his story. No reasonable observer could sincerely believe that the lost portion of the interrogation consisted entirely of the agents repeatedly asking questions. That is not what Special Agent CJ said on the stand, (Supp. JA 18), it is not what the existing record shows, and it is not how interrogation works, as we all know from our common sense and knowledge of the ways of the world.

Appellant agrees that "[q]uestions are not ordinarily statements," (Gov't Brief 12), but appellant counters that hours of interrogation ordinarily contain many statements, which is why the Article III courts in *United States v. Johnson*, 521 F.2d 1318 (9th Cir. 1975),[1] and in *United States v. Layton*, 564 F.Supp. 1391 (D. Ore. 1983),[2] found that records of interrogations did implicate the Jencks Act. Appellant cited these cases in his brief, yet the government failed to account for them its analysis of this question.

---

[1] "'[N]otes and reports' of agents … 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." 521 F.2d at 1320.

[2] "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).

Moreover, government counsel attempt to brush aside the military precedent of *United States v. Walbert*, 33 C.M.R. 246 (C.M.A. 1963), on the grounds that it "contained minimal analysis on this point." (Gov't Brief 18). Appellant counters that often a decision will not contain a lengthy justification for giving words their ordinary meaning. This case requires no one to "grapple with" the matter of whether "every oral utterance contains an assertion." (Gov't Brief 18-19). In accordance with precedent, appellant simply maintains that hours of interrogation that impel an accused to change his story will invariably contain statements of the interviewee *and* the agents.

b. The nature of what was lost shows why the rule required exclusion.

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. As part of its effort to convince this Court to set aside the ordinary meaning of the word "statement," government counsel point to the refusal of Special Agent CJ to concede that his interrogation of appellant was largely a monologue by the agent. (Gov't Brief 17). But Special Agent CJ did concede that according to a CID policy manual, an interrogation *should be* largely a monologue *by the agent*, and he characterized his interrogation of appellant as a "dialogue." (Supp. JA 18).

2. The good faith doctrine—which was not the basis of the military judge's R.C.M. 914 ruling—requires more than the absence of bad faith.

The military judge ruled on the basis that what the CID agents said during the interrogation were not "statements," and he did not in any manner invoke the good faith doctrine. (JA 114-16). 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).

a. The military judge did not find good faith loss under R.C.M. 914; he found no bad faith in his earlier R.C.M. 703 abatement ruling.

The Army Court opinion recognized that the military judge's R.C.M. 914 ruling did not rely on the good faith doctrine, ascribing his silence on good faith and harmless error to the fact that the basis of his ruling precluded the need to "expand his ruling to consider" these subjects. (JA 7). The Army Court nevertheless cited findings of fact from the military judge's R.C.M. 703 abatement ruling in deciding whether appellant had suffered prejudice. (JA 7). Appellant and the government agreed at trial that the military judge could consider the evidence about the lost recording, and its loss, from the motion. (JA 110). The change in context from R.C.M. 703 to R.C.M. 914 is telling, however, as the legal standards are not the same—and in fact are more dissimilar than may appear at a glance.

b. The judicially-created good faith exception requires more than the absence of bad faith.

The rule, as promulgated by Congress or by the President, contains no "good faith exception." While courts have seen fit to carve out such an exception, they have not yet presumed to obliterate the rule by establishing—as government counsel would have it—a high bar for government misconduct that an accused must prove. Curiously, government counsel find the Jencks Act analysis in *Walbert* to have been too minimal to merit attention, but take a dubious phrase from *United States v. Vieth*, 397 F.3d 613 (8th Cir. 2005), as authority that a Jencks Act violation may occur only when there was bad faith by the government. (Gov't Brief 24). *Vieth* was decided on the basis that there was "no evidence, just speculation" that a Jencks Act violation had actually occurred. 397 F.3d at 618. The sentence in the *Vieth* decision quoted by government counsel cannot reasonably be supposed to reflect a considered decision to reject the text of the statute and the precedents regarding when a "good faith exception" may apply.

The decisions establishing a good faith exception distinguished between error on the part of a single government agent who failed to follow procedures, versus systemic carelessness of the kind present in this case. In *United States v. Muwwakkil*, 74 M.J. 187, 193 (C.A.A.F. 2015), this Court held that "negligent failure to retain control" of a recording did not entitle the government to invoke the good faith doctrine. The *Muwwakkil* court stressed that "this exception is

‘generally limited in its application.’” *Id*., citing *United States v. Jarrie*, 5 M.J. 193, 195 (C.M.A. 1978). In contrast, this Court found a good faith loss in *United States v. Marsh*, 21 M.J. 445 (C.M.A. 1986), because in that case there was evidence of “(1) an office policy to preserve … recordings and (2) the steps taken to comply with this policy.” 21 M.J. at 451-52.

In the present case, the military judge found “the Ft. Campbell CID Office appears to have inadequate procedures to ensure they know who is conducting the proper preservation of interviews.” (JA 182). Therefore, in this case, unlike in *Marsh*, there was gross negligence in failing to have or follow responsible procedures. “It would be an odd result indeed if the Government ultimately was rewarded for its own negligence.” *Muwwakkil*, 74 M.J. at 193. Between “good faith” loss, when the only indication of negligence is the loss itself, and the “bad faith” of intentional misconduct, is the gross negligence in cases like this and *Muwwakkil*. A judicially created doctrine must be “generally limited in its application” to defeat the plain language of a rule protecting the rights of the accused. *Id*.

3. R.C.M. 914 is a procedural rule in furtherance of the right to confrontation.

“Constitutional error” may be a matter of degree, not a matter of category, as reflected in the common phrase “of constitutional dimension” and the uncountable cases setting out consecutively the two tests for prejudice that may apply as a court

does its prejudice analysis on an evidentiary issue. Government counsel construe appellant's references to the substantive origins of R.C.M. 914 as a new claim not made at trial and therefore "forfeited." (Gov't Brief 25-26).[3]

Appellant has principally argued that R.C.M. 914 protects a substantial right, and therefore material prejudice to that right merits relief under Article 59, (Appellant's Brief 16-19). To support his claim that a violation of R.C.M. 914 may be material prejudice to a substantial right, appellant stressed that the rule protects a right originating in a Supreme Court decision compelled by "justice." (Appellant's Brief 13-15). The court below understood this, and its opinion used the Article 59 standard, but added a footnote that began, "Even if we considered this a constitutional error, we would still affirm the findings of guilty and sentence." (JA 10).

Appellant's brief simply described the nature of the error and prejudice, and it is telling that government counsel heard in that description an assertion of error of constitutional dimension. The court below grudgingly recognized that "the military judge's analysis is likely erroneous as a matter of law based on the broad definition of 'statement' under R.C.M. 914." (JA 6). At trial, appellant's defense

---

[3] Government counsel make this accusation of a new claim by analogy to *United States v. Jones*, 78 M.J. 37 (C.A.A.F. 2018), in which an accused at trial had made an objection on grounds of hearsay but not the Confrontation Clause. *Id*. at 43-45. Hearsay and the Confrontation Clause, however, are separate admissibility issues that do not always overlap. *Crawford v. Washington*, 541 U.S. 36, 51 (2004).

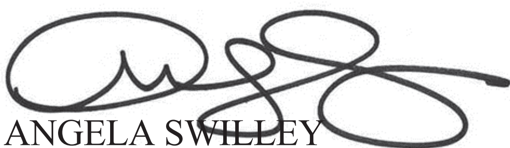
counsel cited “the authority of 914, itself,” and appellant stands by his claim to the right stated in the plain language of that rule. Appellant was entitled to the remedy provided by the text of that rule, and the deprivation of it materially prejudiced his substantial right.

Conclusion

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

CHRISTOPHER DANIEL CARRIER
Lieutenant Colonel, Judge Advocate
Appellate Defense Counsel
9275 Gunston Road
Fort Belvoir, Virginia 22060-5546
(703) 695-9853
USCAAF Bar No. 32172

STEVEN J. DRAY
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
USCAAF Bar No. 36887



ANGELA SWILLEY
Major, Judge Advocate
Branch Chief, Defense Appellate Division
USCAAF Bar No. 34640

TIFFANY D. POND
Lieutenant Colonel, Judge Advocate
Deputy Chief, Defense Appellate Division
USCAAF Bar No. 36427

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Clark*, Crim. App. Dkt. No. 20170023, USCA Dkt. No. 19-0411/AR, was delivered to the Court and Government Appellate Division on December 22, 2019.

CHRISTOPHER D. CARRIER
Lieutenant Colonel, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
US Army Legal Services Agency
9275 Gunston Road, Suite 3200
Fort Belvoir, Virginia 22060
703-695-9853
USCAAF Bar Number 32172