IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES	)	BRIEF ON BEHALF OF APPELLANT
Appellee	)	
	)	
v.	)	Crim. App. Dkt. No. 20180519
	)	
Sergeant First Class (E-7)	)	USCA Dkt. No. 21-0111/AR
JESSE M. THOMPSON	)	
United States Army	)	
Appellant	)	

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellee	)	BRIEF ON BEHALF OF APPELLANT
v.	)	Crim. App. Dkt. No. 20180519
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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

Issue Presented

WHETHER APPELLANT IS ENTITLED TO RELIEF UNDER R.C.M. 914.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 866 (2018). This Honorable Court has jurisdiction over this matter under Article 67(a)(3) (2018).

Statement of the Case

On October 3, 2018 at Fort Bragg, North Carolina, a military judge sitting as a general court-martial convicted appellant, Sergeant First Class (SFC) Jesse M. Thompson, pursuant to his plea, of one specification of adultery, in violation of

Article 134, UCMJ (2012). Additionally, the military judge convicted SFC Thompson, contrary to his plea, of one specification of solicitation of production of child pornography, in violation of Article 134, UCMJ, except the words "Fort Bragg, North Carolina" and "to the prejudice of good order and discipline in the armed forces and". (JA 009).[1] The military judge sentenced SFC Thompson to be confined for 24 months and discharged from the service with a bad-conduct discharge. (JA 010). The convening authority approved the sentence as adjudged. (JA 014).

On November 23, 2020, the Army Court issued its opinion. (JA 002). The Army Court affirmed the findings and sentence as adjudged.[2] This Court granted Appellant's petition for grant of review on March 1, 2021 on the issue above and ordered briefing under Rule 25. (JA 001).

Statement of Facts

a. The Relationship

Sergeant First Class Thompson, the appellant, is DS' uncle by marriage. DS and SFC Thompson first met in November 2009 when Mrs. RT (DS' aunt and SFC Thompson's wife) introduced SFC Thompson to her family. (JA 015, 023, 251).

[1] The military judge found SFC Thompson not guilty of one specification of taking indecent liberties with a child, in violation of Article 120, UCMJ (2012).
[2] The Army Court also issued a Notice of Court-Martial Order Correction to ensure appellant's post-trial papers properly captured the findings. (JA 012).

DS and SFC Thompson saw each other at family events a few more times before they began privately communicating via electronic devices. (JA 026, 030, 033, 038–39). In November 2012, the two began messaging on various apps, communicating frequently. (JA 038–39, 050–51). These messages stopped on September 20, 2015 when DS' mother discovered a portion of DS and SFC Thompson's communications. (JA 080, 117).

b. The Investigation

Upon discovering the relationship between DS and SFC Thompson, DS' mother immediately contacted the local Sherriff's Department, who referred her to the Federal Bureau of Investigation (FBI). (JA 266). In one of DS' first interviews with the FBI, she said that she and SFC Thompson first had sex on March 8, 2012. (JA 148–49, 189). Eventually, Army Criminal Investigation Command (commonly known as CID) took over because the FBI could not produce enough evidence to support allegations of child pornography or a sexual relationship while DS was underage. (JA 117–18, 299).

DS' mother took an active role in the investigation by talking to her daughter about what happened, seizing her daughter's electronic devices, and taking photographs of surviving portions of DS' journals, which DS kept throughout the

relationship.[3] (JA 083–84, 264, 266). DS' mother approached investigators on multiple occasions in an attempt to provide them with some of DS' journal entries that she found and a jacket SFC Thompson gave to DS. (JA 270). Additionally, she helped DS assemble a timeline of DS and SFC Thompson's interactions in preparation for an interview with CID. (JA 267).

During that initial interview with CID, DS told the agent about her notes, hereafter referred to as "the timeline," and offered to hand the timeline over to the agent immediately. (JA 122–23). Despite DS having the timeline in her pocket at the time she offered it to the CID agent, the CID agent told her he "didn't need [the timeline]" and took no steps to preserve it. (JA 122–23). This timeline, along with most of the journals DS made, were never turned over to the defense counsel because DS destroyed or lost them. (JA 124–25). Upon completion of the investigation, the government alleged that SFC Thompson committed acts with DS over a broad range of dates and locations. (JA 015).

c. DS' Direct Testimony

At trial, during the government's direct examination, DS testified about all of her and SFC Thompson's in-person and app-based interactions over the course of approximately six years (2009-2015). (JA 015, 022–100). Specifically, DS

[3] DS burned most of her handwritten journals and deleted her digital ones. (JA 125–29).

testified that she and SFC Thompson first had sex on March 8, 2013, not March 8, 2012 as she originally told the FBI. (JA 059). She also testified about her journals, saying she recorded aspects of her and SFC Thompson's relationship on her laptop and in her hand-written journals. (JA 083).

d. The Rule for Courts-Martial (R.C.M.) 914 Motion

After the government finished its direct examination of DS, the defense made a motion under R.C.M. 914 for the government to produce the timeline DS made as part of the investigation and the complete journal entries to which DS referred during direct examination. (JA 102–03). The defense proffered that these were journals and a timeline investigators knew about but did not take affirmative and timely steps to secure. (JA 102–03).

In its initial response to the motion, the government argued that the undisclosed journals and timeline were "never in possession of the United States," but did not immediately contest the journal entries and timeline were statements under the meaning of R.C.M. 914. (JA 104). After hearing from the defense and the government, the military judge decided that he would not strike DS' testimony at that time, he would review the defense's motion, and he would put his complete findings on the record "at some point before" deliberating. (JA 113). Subsequently, the military judge directed that defense counsel could cross-examine DS, and the trial would continue in the normal course. (JA 113–14).

e. The Cross-Examination

The defense counsel's cross-examination can be distilled to the following chapters: (1) establishing DS made a written timeline, (2) establishing what DS did with her journals, (3) impeaching DS' credibility based on what she discussed in the journals, (4) impeaching DS with her law enforcement interviews, and (5) attacking DS' overall character for truthfulness.

1. Defense counsel established that DS made a timeline.

Defense counsel questioned DS about the overall chronology of relevant events and specifically questioned her about each date she and SFC Thompson saw one another, as well as, the written timeline she made for her interview with Army CID. (JA 116, 153–56, 170–78). DS clarified she told Army CID that she "had all the dates where [she] interacted with [SFC Thompson] written down," that she had the timeline in her pocket, and she offered this timeline to the CID agent, but the CID agent said, "he didn't need them." (JA 120, 122–23). The defense never saw this timeline because CID did not collect it when they had the chance, and DS later lost it. (JA 124–25).

2. Defense established what DS did with her journals.

After moving on from DS' written timeline, the defense counsel cross-examined DS on her journals. (JA 125). DS admitted that she burned the physical

journals and got rid of others even after the FBI began investigating and after her mother had taken pictures of a few pages of DS' journals. (JA 125–26, 127–29).

3. Defense impeached DS' credibility with the recovered journal portions.

The defense counsel then turned DS' attention to the few pages of her journal that the government did maintain and turn over to the defense. (JA 130–32, 142–46). When defense counsel asked her about some events chronicled therein, DS could not remember, but defense counsel only had some pages of the journal entries to refresh her recollection. (JA 142–43, 145–46).

4. Defense impeached DS with statements she gave to law enforcement.

Following an impeachment regarding self-harm, the defense counsel questioned DS about her interviews with law enforcement. (JA 148). Defense counsel attempted to elicit the fact DS had made prior statements to her mother, the FBI, and CID that she and SFC Thompson had sexual intercourse on March 8, 2012, which would have been inconsistent with her direct testimony that they had sex in March 2013. (JA 148, 150). However, DS mostly equivocated about those prior inconsistent statements during her cross-examination, with dismissive phrases like, "I don't remember if I said that to him or not," "if that's what was written in my statement," "if I said that yesterday, then it's true." (JA 148–50). Only after she had been asked several times did DS admit that she was not truthful with the FBI. (JA 189). Defense counsel even tried to get DS to admit her mother pointed

out that SFC Thompson and DS would not have been together in March 2012, but, again, DS would only concede, "I don't remember." (JA 152).

5. Defense counsel attacked DS's character for truthfulness.

Ultimately, defense counsel concluded his initial cross-examination by eliciting admissions from DS that she lied to multiple people over the course of her relationship with SFC Thompson including to SFC Thompson himself; to her doctors; to her boyfriend turned husband, BG; to her mother; to her aunt, Mrs. RT; and to her friends. (JA 187, 188–89).

f. The Military Judge's Ruling on R.C.M. 914

Immediately before hearing closing arguments, the military judge put findings on the record regarding whether the timeline and journals were statements, whether they were in possession of the government, whether the unproduced statements relate to the witness' direct testimony, and whether the loss was in good faith. (JA 295–98).

First, regarding whether the timelines and journals were statements, the military judge found they were not statements within the meaning of R.C.M. 914 because there was no evidence they were signed, adopted, or otherwise approved. (JA 295, 297). The military judge articulated he relied on the reasoning in *United States v. Carrasco*, a 9th Circuit Court of Appeals case from 1976. 537 F.2d 372 (9th Cir. 1976); (JA 297). The military judge went on to say that "the journals and

timeline . . . appear to be more like notes to recollection than entries intended to transmit information, which is what a statement is." (JA 297).

Second, the military judge found the journal and timeline "have never been in the physical possession of the government." (JA 295).

Third, the military judge determined that, because the diaries and timeline were not available, there was no evidence the unproduced journals or timeline related to the actual subject matter of the witness' testimony. (JA 298).

Finally, the military judge found that some of the statements in question "were offered during the investigatory stage of this trial," but "[t]here is no general requirement to investigate a certain way, or to gather certain info even if it might have been a good idea." (JA 297–98). He concluded there was "no bad faith or gross negligence in the government's actions here." (JA 298).

Summary of the Argument

The Jencks Act and R.C.M. 914, "require[] the military judge, upon motion by the accused, to order the government to disclose prior statements of its witnesses, *in possession of the United States*, that are related to the subject matter of their testimony after the witness testifies on direct examination." *United States v. Brooks*, 79 M.J 501, 506 (Army Ct. Crim. App. 2019) (emphasis in original). If the government fails to produce all the requested statements, the military judge must order the fact finder to disregard the testimony of that witness as it relates to

that subject matter or declare a mistrial, unless the good faith loss doctrine applies. *United States v. Muwwakkil*, 74 M.J. 187, 193 (C.A.A.F. 2015); R.C.M. 914(e). For the good faith exception to apply, the government's loss of the statement must truly be in good faith and not the result of negligence because negligently losing possession would allow the government "to avoid the consequences of R.C.M. 914's clear language and intent simply by failing to take adequate steps to preserve statements." *Muwwakkil*, 74 M.J. at 192, 193.

In this case, DS made a timeline outlining the complete history of her and appellant's interactions, including the charged misconduct that ranged over a period of approximately six years, offered it to law enforcement when they interviewed her related to this case, and law enforcement inexplicably and consciously declined to collect it. (JA 015, 112–13). Therefore, each prong of the R.C.M. 914 analysis (a witness' statement, in possession of the government, related to the subject matter of the witness' testimony, and lost with bad faith or due to sufficient negligence) trends in favor of appellant based on this Court's precedent.

Just last year, this Court took an "expansive" view on what is a statement for Jencks Act and R.C.M. 914 purposes. *United States v. Clark*, 79 M.J. 449, 454 (C.A.A.F. 2020). Even the federal circuit case upon which the military judge and Army Court relied states that privately recorded thoughts become a statement when

they are offered to another person. *Carrasco*, 537 F.2d at 375; (JA 297). Therefore, DS' timeline, created for the express purpose of assisting law enforcement, and then offered to the interviewing agent as part the investigation, is clearly a statement for the purposes of R.C.M. 914 and the Jencks Act.

Furthermore, the government had possession of the timeline for R.C.M. 914 and Jencks Act purposes considering DS brought it to law enforcement and offered it to them. If the law enforcement agent's plainly negligent declination to collect relevant evidence literally right in front of him and readily offered is not "possession," then the government would be encouraged "to avoid the consequences of R.C.M. 914's clear language and intent simply by failing to take adequate steps to preserve statements." *Muwwakkil*, 74 M.J. at 192, 193. In other words, to find otherwise would be to encourage law enforcement personnel to intentionally avoid collecting relevant evidence for fear it might not fit the government's theory of the case, and they would have to disclose that evidence to the defense. Such a rule would be contrary to, and would frustrate, the truth-seeking function of law enforcement and the military justice system. Therefore, DS' timeline was in the possession of government for R.C.M. 914 purposes and the good faith loss doctrine does not save them.

Finally, appellant was prejudiced by the military judge's ruling that the government did not violate R.C.M. 914 and the Jencks Act because appellant was

denied one of the two prescribed remedies when such a violation occurs, that is, striking DS' testimony or a mistrial. Any debate over whether the prejudice is the lost impeachment value of the missing statement or the failure to grant one of the prescribed remedies was settled last year in *Clark* when this Court stated, "despite the erroneous admission of the agent's testimony, Appellant was not prejudiced," reasoning that even if the testimony related to the subject matter of the Jencks Act statements was omitted, there was enough other evidence to affirm appellant's conviction. 79 M.J. at 455. However, unlike the appellant in *Clark*, without DS' testimony, no reasonable fact finder could convict appellant of solicitation of the production of child pornography. In the absence of any pictures, videos, text messages, or emails in evidence, DS' testimony was nearly the entire case against appellant. Therefore, the military judge's erroneous R.C.M. 914 ruling prejudiced appellant.

Issue

WHETHER APPELLANT IS ENTITLED TO RELIEF UNDER R.C.M. 914.

Standard of Review

This Court reviews a military judge's decision to grant relief under the Jencks Act and R.C.M. 914 for abuse of discretion. *Muwwakkil*, 74 M.J. at 191. A military judge abuses his discretion when his findings of fact are clearly erroneous

or his conclusions of law are incorrect. *United States v. Olson*, 74 M.J. 132, 134 (C.A.A.F. 2015).

Law

The Jencks Act and R.C.M. 914, "require[] the military judge, upon motion by the accused, to order the government to disclose prior statements of its witnesses, *in possession of the United States*, that are related to the subject matter of their testimony after the witness testifies on direct examination." *Brooks*, 79 M.J at 506 (emphasis in original). The purpose of the rule is "to further the fair and just administration of criminal justice" and "afford the defense an opportunity to impeach witnesses and enhance the accuracy of the trial proceedings through cross-examination of witnesses." *Muwwakkil*, 74 M.J. at 190.

According to R.C.M. 914, a "statement" includes a "written statement made by the witness that is signed or otherwise adopted or approved by the witness." R.C.M. 914(f)(1). This definition of a statement is liberal and inclusive. The Army Court, in its Article 66 review of *United States v. Clark*, took the position that R.C.M. 914 offers a "broad definition" of the word "statement." ARMY 20170023, 2019 CCA LEXIS 247, at *7 (Army Ct. Crim. App. 10 June 2019) (mem. op.).[4] This Court has also "favored an expansive interpretation of the definition of 'statement' with respect to the Jencks Act." *Clark*, 79 M.J. at 454.

[4] This unpublished opinion is included in the Joint Appendix at JA 300.

A statement is in possession of the government if "'it is in the possession of a federal prosecutorial agency.'" *Brooks*, 79 M.J. at 507 (citing *United States v. Naranjo*, 634 F.3d 1198, 1211–12 (11th Cir. 2011)). The Army Court, in *Brooks*, also outlined a test for "constructive possession" including the following factors: "'(1) whether the party with knowledge of the information is acting on the government's 'behalf' or is under its 'control'; (2) the extent to which state and federal governments are part of a 'team,' are participating in a 'joint investigation' or are sharing resources; and (3) whether the entity charged with constructive possession has 'ready access' to the evidence.'" *Id.* at 508 (citing *United States v. Reyeros*, 537 F.3d 270, 281 (3rd Cir. 2008)). Losing possession also does not allow the government to escape its duty under R.C.M. 914 because if that were the case, "[t]he 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." *Muwwakkil*, 74 M.J. at 192.[5]

Like the definition of "statement", the term "possession" should be interpreted broadly in analyzing issues under R.C.M. 914. In *United States v. Ali*, the Army Court of Military Review held that a company commander having possession of a statement was enough to determine that the government had

[5] *See also United States v. Stellato*, 74 M.J. 473, 486 (C.A.A.F. 2015) (The government, as a party to a case, has a duty to produce more than "what was in its physical possession, but also what was in its control.")

"possession" for Jencks Act purposes. 12 M.J. 1018, 1020 (C.M.A. 1982) (finding "A company commander, albeit not a prosecutor, has certain investigation responsibilities.")

When a military judge errs in his application of R.C.M. 914 at trial, this Court also does a prejudice analysis per Article 59(a), UCMJ and a good faith loss doctrine analysis. *Clark*, 79 M.J. at 454. In *Muwwakkil*, this Court applied the "good faith loss doctrine" and held that Jencks Act remedies are also applicable in cases of bad faith and negligent suppression of evidence. 74 M.J. at 193 (citing *United States v. Moore*, 452 F.3d 382, 389 (5th Cir. 2006)). The deterrent effect of preventing negligent suppression of evidence by law enforcement is a crucial portion of the rule. If the government could simply ignore or lose documents with impunity, "[t]he 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." *Muwwakkil*, 74 M.J. at 192.

Regarding prejudice, Article 59(a), UCMJ states appellate courts will only hold findings and sentences incorrect when "the error materially prejudices the substantial rights of the accused." Article 59(a), UCMJ, 10 U.S.C. § 859 (2018); *Clark*, 79 M.J. at 454–55. When the military judge's error is non-constitutional, the test is "whether the error had substantial influence on the findings." *Clark*, 79 M.J. at 455. The prejudice is not just the lost impeachment value from the missing

statement, but the failure to grant one of the prescribed remedies in R.C.M. 914. *Clark*, 79 M.J. at 455 ("despite the erroneous admission of the agent's testimony, Appellant was not prejudiced" because even if the testimony related to the subject matter of the Jencks Act statements was omitted, there was enough evidence to affirm appellant's conviction.)

Argument

a. The military judge and the Army Court erred in their R.C.M. 914 analysis.

The military judge and the Army Court erroneously held: (1) the timeline was not a statement; (2) it was not in possession of the government; and (3) there was no evidence the timeline related to the witness' testimony.

1. The unproduced timeline is a statement for the purposes of R.C.M. 914.

DS' written timeline is a statement for the purpose of R.C.M. 914 especially in light of this Court's "expansive" definition of the word statement. *Clark*, 79 M.J. at 454. The timeline was made by the witness, DS, and she testified to its existence. (JA 120). Though DS' mother assisted her in making the timeline, it was "adopted or approved by the witness." *See* R.C.M. 914(f)(1). We know DS adopted and approved it because she made it, brought it with her to the CID office, and personally offered it to the CID agent as her own chronology of all the times she interacted with SFC Thompson. (JA 122–23). That is, she presented the timeline as her recorded chronology of the events CID was investigating.

Though the military judge relied on *Carrasco* to say the timeline was not a statement because the timeline "appear[ed] to be more like notes to recollection than entries intended to transmit information," *Carrasco* actually stands for a different principle. 537 F.2d at 375; (JA 297). *Carrasco* held that privately written thoughts like a diary are not "statements," but can become "statements" once they are offered to another person. 537 F.2d at 375. That is precisely what happened here because, as in *Carrasco*, a witness (DS) made a document, then offered that document to a law enforcement official to assist in an ongoing investigation. *See* 537 F.2d at 375; (JA 120, 122–23). Furthermore, it is important to consider that unlike most diaries and journals considered by the *Carrasco* court, this timeline was made for the specific purpose of assisting law enforcement with an eye toward prosecution.[6] Therefore, assuming arguendo the timeline was like "notes to recollection," the moment DS offered the timeline to law enforcement, it became a statement for Jencks Act purposes according to *Carrasco.* 537 F.2d at 375.

[6] Though *Crawford v. Washington* is not a Jencks Act case, it is notable that in that case, the Supreme Court of the United States discussed that a key factor in determining whether something is a testimonial statement is whether a declarant would reasonably believe the statements would be available for later use at a trial. 541 U.S. 36, 52 (2004). Here, DS would certainly reasonably believe her timeline would be available for later use at a trial when she offered it to CID as part of her official statement. Therefore, it lends credibility to the idea that her timeline is a statement for Jencks Act purposes.

The Army Court further erred in reasoning that law enforcement's declination to incorporate this statement into their report was a key difference between this case and *Carrasco*. (JA 006). In this reasoning, the Army Court completely missed the focus of the analysis on whether something is a statement for purposes of R.C.M. 914(f)(1). R.C.M. 914(f)(1) focuses entirely on whether the witness signed, adopted, or approved the statement, not whether law enforcement incorporated it into a report. Even in *Carrasco*, the 9th Circuit Court of Appeals specifically said the diary became a statement when the witness gave it to law enforcement, not when law enforcement incorporated it into the report. 537 F.2d at 375. Therefore, the military judge and Army Court were simply wrong in their analysis and conclusions, and DS' timeline is a statement for purposes of R.C.M. 914.

2. The timeline was in possession of the government for R.C.M. 914 purposes.

The timeline in this case should be considered in the possession of the government for R.C.M. 914 purposes because an Army CID agent, while acting on behalf of and under the authority of the Army, had ready access to it and consciously avoided collection. *See Brooks*, 79 M.J. at 508; (JA 122–23). DS offered the timeline to the CID agent, and it was in her pocket at the time she offered it. (JA 122–23). Nevertheless, the CID agent inexplicably declined to collect the evidence. (JA 122). This is not a case where law enforcement learns of

the existence of a statement and fails to find and produce it – this is instead a case where they were offered material, relevant, and readily accessible evidence, and they affirmatively chose not to secure, review, or incorporate it into their investigation.

It is true that the government did not collect this timeline and then lose it like the video-recorded statement in *Clark* and the Article 32 testimony in *Muwwakkil*. *Clark*, 79 M.J. at 451–52; *Muwwakkil*, 74 M.J. at 189. However, the CID agent had constructive possession of it under the test outlined in *Brooks* and inexplicably decided not to collect it and preserve it. *See* 79 M.J. at 508; (JA 122–23).

The Army Court not only held that constructive possession did not apply in this specific case but declared that constructive possession in the R.C.M. 914 context generally does not extend to law enforcement's interactions with a victim witness. (JA 007). In so holding, the Army Court endorsed the government blatantly disregarding its duty under R.C.M. 914 in this case and others like it, "avoid[ing] the consequences of R.C.M. 914's clear language and intent simply by failing to take adequate steps to preserve statements." *Muwwakkil*, 74 M.J. at 192. Therefore, the military judge and the Army Court were both incorrect in holding the timeline was not in possession of the government.

3. The military judge erred by concluding the timeline did not relate to the witness' testimony.[7]

The government charged SFC Thompson with three separate specifications that allegedly occurred from as early as the year 2009 to as late as 2015. (JA 015). More significantly, each specification included date ranges of 22 months or more. (JA 015). Given the overall timespan of SFC Thompson's alleged misconduct, the broad date ranges of each specification, and DS' testimony concerning all of her and SFC Thompson's in-person and app-based interactions over six years, the timeline directly correlated to every specification and DS' entire in-court testimony during the government's case-in-chief. (JA 015, 022–100).

The military judge found that there was no way to know if the timeline related to DS' "actual testimony" because the timeline was not available for review. (JA 298). This head-in-the-sand conclusion both fails the common sense test and is not within the spirit of R.C.M. 914. Under the military judge's reasoning, by definition, no missing statement would ever be found to relate to a witness' testimony because it would never be available for review to confirm.

There is no reasonable way to conclude the timeline did not relate to DS' testimony when her testimony covered both the same events that would have appeared on the timeline and the dates of these events, which is an element of each

[7] The Army Court did not address this point in its opinion.

specification. The timeline was specifically created to assist DS in making her allegations to law enforcement, the same allegations that resulted in the charges against appellant, and the same allegations about which she testified at trial. Moreover, allowing the government to avoid R.C.M. 914 by arguing "we don't have . . . all evidence available" would allow the government "to avoid the consequences of R.C.M. 914's clear language and intent," which is "to further the fair and just administration of criminal justice" and "enhance the accuracy of the trial proceedings through cross-examination of witnesses." *Muwwakkil*, 74 M.J. at 190, 192; (JA 298). Therefore, the military judge erred in his R.C.M. 914 analysis.

b. The military judge erred in his good faith loss doctrine analysis.[8]

The military judge came to the wrong factual conclusion and applied the wrong legal standard in determining whether the government acted in bad faith or negligently suppressed evidence. (JA 298); *See Muwwakkil*, 74 M.J. at 193. The correct legal test for the good faith loss doctrine is that Jencks Act remedies are necessary when the government suppresses evidence due to acting in bad faith or negligently. *Muwwakkil*, 74 M.J. at 193 (citing *Moore*, 452 F.3d at 389). It need not be gross negligence, as the military judge supposed, rather a "finding of sufficient negligence may serve as the basis for a military judge's conclusion that the good faith loss doctrine does not apply." (JA 298); *Clark*, 79 M.J. at 449.

[8] The Army Court did not address good faith in its opinion.

Here, DS offered a written timeline that was in her pocket to the CID agent interviewing her, yet the agent inexplicably refused to collect and preserve it as evidence. (JA 122–23). The military judge even admitted it would have been a "good idea" to collect the statement when it was offered; therefore, it logically flows that CID was at least negligent, if not willfully ignorant and grossly negligent, for not collecting it. (JA 297–98).

This is not a case of second-guessing an agent with the benefit of hindsight and perspective. The CID agent's affirmative decision to refuse collecting an alleged victim's written statement, at a minimum, amounts to a negligent suppression of evidence because common sense dictates that it would have been appropriate for the CID agent to collect that evidence when it was offered. (JA 122); *see Muwwakkil*, 74 M.J. at 193. One strains to imagine any rational excuse for a law enforcement agent, dedicated to conducting a thorough and neutral investigation, to decline such evidence. If the Court holds that CID did not act sufficiently negligent here, "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." *Muwwakkil*, 74 M.J. at 192.

Moreover, the military judge was not only wrong about this being negligent suppression of evidence as a matter of fact, but he applied the improper legal standard when he found the government's actions did not amount to "gross

negligence." (JA 298).[9] *Muwwakkil* and *Clark* are clear that the "negligent" suppression of evidence may be sufficient to find the government did not act within the bounds of the good faith loss doctrine, yet the military judge erroneously imposed a higher burden of proof (gross negligence). *Clark*, 79 M.J. 449; *Muwwakkil*, 74 M.J. at 193.

Though the Court of Military Appeals in *United States v. Marsh* used the term "gross negligence" in analyzing a Jencks Act question, the Court did so in an effort to explain why the act did not rise "to an election by the prosecution to suppress these materials," that is, that it did not amount to bad faith. 21 M.J. 445, 452 (C.M.A. 1986).[10] The Court in *Marsh* never analyzed whether negligence, alone, can lead to Jencks Act remedies, whereas *Muwwakkil*, 29 years after *Marsh,*

[9] "Gross negligence" is "very great or excessive negligence, or as the want of, or failure to exercise, even slight or scant care or 'slight diligence.'" whereas "ordinary negligence" is "the failure to exercise such care as the great mass of mankind ordinarily exercises under the same or similar conditions." 57A Am Jur 2d §§ 226, 227; (JA 312–17)

[10] *United States v. Jackson*, to which *Marsh* cited in its reference to gross negligence, also made clear that the degree of negligence is significant to a good faith loss doctrine analysis for determining the appropriate sanction. 450 A.2d 419, 427 (D.C. Cir. 1982). The court in *Jackson* specifically held that when "the loss is a result of bad faith or gross negligence," the witness' testimony must be excluded. *Id.* However, *Jackson* did not confine Jencks Act violations to cases in which the government acted with gross negligence or bad faith. *Id.*

extensively analyzed this subject, specifically using the term "negligence," rather than "gross negligence," four times in its analysis. *Muwwakkil*, 74 M.J. at 193.[11]

This Court, in *Muwwakkil*, also acknowledged the government's contention that the trial judge in that case erred by not using the "gross negligence" standard and rejected that argument, ultimately finding that "negligence may serve as the basis for a military judge to conclude that the good faith loss doctrine does not apply." *Id.* at 190, 193. Therefore, the military judge in this case erred in his good faith loss doctrine analysis.

c. The military judge's erroneous application of R.C.M. 914 materially prejudiced a substantial right of the accused.

Appellant was clearly prejudiced to the point that the judge's error had a substantial influence on the findings. *Clark*, 79 M.J. at 454–55.[12] It was the alleged victim's testimony, the lynchpin of the government's entire case, that

[11] Even if this Court believes *Marsh* and *Muwwakkil* are in conflict, "When confronted with conflicting precedents, [this Court] generally follow[s] the most recent decision," which is *Muwwakkil*. *United States v. Hardy*, 77 M.J. 438, n. 5 (C.A.A.F. 2018).

[12] The military judge's error may have even been a constitutional one, implicating the Confrontation Clause of the Sixth Amendment and Due Process Clause of the Fifth Amendment, but because the facts support that this error had a substantial influence on the findings, the Court need not reach whether this was a constitutional question and whether the error was harmless beyond a reasonable doubt. *See United States v. Tovarchavez*, 78 M.J. 458, 462, n.5 (C.A.A.F. 2019). Failure to produce "a Jencks Act type of statement might be a denial of a Sixth Amendment right." *United States v. Augenblick*, 393 U.S. 348, 356 (1969).

would have been excluded had the military judge correctly ruled.[13] (JA 083). DS's in-court testimony of the charged events and when those events occurred were crucial to the government's case since she had burned, destroyed, or lost almost all of the documentary evidence that once existed. (JA 124–25). The government never introduced any sexually explicit text messages, emails, videos, or lewd images into evidence to support the testimony.

Thus, appellant was directly and irretrievably prejudiced by the military judge's failure to grant one of R.C.M. 914's two prescribed remedies for a violation of the rule, which included either striking DS' testimony or granting a mistrial. *See* R.C.M. 914(e); *Clark*, 79 M.J. at 455. The prejudice cannot be confined to, as the Army Court suggested, the lost impeachment value of the missing statement because that would require the defense to prove the content of a statement the defense has not seen and the government negligently suppressed. (JA 007).

Just last term, this Court analyzed the prejudice of a military judge's failure to strike portions of a witness' testimony, which is one of R.C.M. 914's prescribed remedies, as prejudice. *Clark*, 79 M.J. at 455. This Court's analysis of where the prejudice lies in R.C.M. 914 cases was sound because when the government cannot produce a witness' statement in accordance with the rule, that statement's value to

[13] Alternatively, the military judge could have declared a mistrial for the Jencks Act violation. R.C.M. 914(e).

the defense will nearly always be speculative. That, in and of itself, illustrates why it is prejudicial to allow the alleged victim's testimony when the government failed to produce all of her statements in their possession, why SFC Thompson is entitled to relief under the Jencks Act, and why R.C.M. 914(e) prescribes two substantial remedies for the government's failure to comply with the rule.

Conclusion

Therefore, the military judge's erroneous application of R.C.M. 914 substantially prejudiced a material right of the appellant's, and he requests this Court apply one of the prescribed remedies under R.C.M. 914 and the Jencks Act.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Thompson, Crim. App. Dkt. No. 20180519, USCA Dkt. No. 21-0111/AR, was electronically filed with the Court and Government Appellate Division on March 24, 2021.

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