IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES	)	APPELLANT'S REPLY
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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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
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Issue Presented

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

Statement of the Case

This Court granted Appellant's petition for grant of review on March 1, 2021 on the issue above and ordered briefing under Rule 25. (JA001). Appellant filed his brief with this Court on March 24, 2021. The government responded on April 23, 2021. This is appellant's reply.

Argument

a. Appellant's assignment of error is squarely within the bounds of Rule for Courts-Martial (R.C.M.) 914, not *Brady v. Maryland*, as the government claimed.

The government claimed appellant is attempting to raise a *Brady* claim before this Court, but appellant's claim is squarely within the bounds of R.C.M. 914. (Appellee Br. 11–12, 19). As the government noted, appellant cannot prove the timeline was exculpatory. (Appellee Br. at 10, 11, 12). In so emphasizing, the government perfectly underscored appellant's argument and highlighted the exact problem with the government's declination to collect the timeline when it was offered. The acts of the government prevented the trial court, the service court, and this Court, from knowing if those acts resulted in the loss of exculpatory evidence. That is, there is a government witness' statement that defense has not seen and does not know the full contents of because the government negligently lost control over it. (JA 122–23).

The purpose of the Jencks Act and R.C.M. 914 is "'to further the fair and just administration of criminal justice' by providing for the disclosure of statements for impeaching government witnesses."[1] *United States v. Muwwakkil*,

[1] Though the government claimed this problem does not exist because defense had access to the witnesses, the calendar, and social media photos, this cannot be true because if the witness' memory, a calendar, and social media clearly captured DS' statement, then there would have been no reason for her to create the timeline in the first place. (Appellee Br. 29). This case is not like *Rosenberg v. United States*,

74 M.J. 187, 190 (C.A.A.F. 2015) (quoting *Goldberg v. United States*, 424 U.S. 94, 107 (1976)).[2] Appellant only cited cases such as *United States v. Stellato* to demonstrate the government's considerable negligence in their failure to preserve DS' timeline, not to confuse the issue at hand and create the "hybrid" argument the government attributes to appellant. 74 M.J. 473 (C.A.A.F. 2015).

b. The government is incorrect that DS' timeline is not a statement.

The government claimed DS' written timeline is not a statement for the purpose of R.C.M. 914, claiming it was no more than notes and that it was not signed by DS. (Appellee Br. at 11, 14–18, 34). This position is untenable, especially in light of this Court's "expansive" definition of the word statement. *United States v. Clark*, 79 M.J. 449, 454 (C.A.AF. 2020). Although the government claimed this "expansive interpretation" only applied to R.C.M. 914(f)(2), the government is wrong because this Court clearly stated it "favored an expansive interpretation of the definition of 'statement' with respect to *the Jencks Act*", not just R.C.M. 914(f)(2). *Id.* (emphasis added) (Appellee Br. 15).

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360 U.S. 367 (1959), as the government contends because in that case, the defense counsel had a copy of the statement in question. (Appellee Br. 29–30). All that was in issue was whether their inability to review the original constituted a Jencks Act violation. *Rosenberg*, 360 U.S. at 370. In this case, the timeline was a completely separate statement from anything in the defense's possession.

[2] This does not limit the prejudice resulting from an R.C.M. 914 violation to the lost impeachment value, which will be discussed further below.

The government first tried to compare DS' timeline to "rough notes or markings."[3] (Appellee Br. at 14). This characterization is contrary to MC's and DS' description of the timeline, which DS prepared after sitting down with her mother and poring through calendars and social media in anticipation of an interview with law enforcement. (JA 120, 122, 267–68). The government's characterization is also distinguishable from *United States v. Augenblick*, the case upon which government relies, in which the witness actually testified that the missing writing was "rough pencil notes." 393 U.S. 348, 354–55 (1969).

The government next claimed that DS did not sign, approve, or otherwise adopt the statement. (Appellee Br. 11, 15). It is puzzling how the government can claim this when DS made the timeline, carried it with her to the interview with law enforcement, and offered it to the interviewing agent. (JA 122–23). The government spent considerable effort citing cases about signing statements law enforcement prepared for witnesses or summaries of interviews that law enforcement wrote, but none of those are applicable in this case because DS prepared the timeline herself, and R.C.M. 914(f)(1) clearly states that signing "*or* otherwise adopt[ing] or approv[ing]" the statement satisfies the rule. (Appellee Br.

[3] The government's claim that the timeline is no more than "rough notes or markings" is presumptuous in light of the fact that they have not even seen it, thus underscoring the prejudice in this case, which will be discussed further below.

at 16); R.C.M. 914(f)(1) (emphasis added). Because the evidence demonstrates DS drafted the statement, she obviously adopted and approved of it.[4]

Next, the government claimed that, because DS was not a government informant, her statement is not covered by R.C.M. 914. (Appellee Br. at 18). This is simply reading a requirement into the rule that is not there based on the government's speculation of Congressional intent. (Appellee Br. at 18). Just because this issue often arises in the context of government informant statements does not change the fact that R.C.M. 914 uses the word "witness" fifteen times, with no qualifiers or limitations such as "government informant witness," as the government would have this Court read into the rule. Moreover, R.C.M. 914 differs from the Jencks Act in that it applies to defense witnesses other than the accused as well as government witnesses; therefore, it simply cannot be true that the rule is limited to government informant witnesses' statements. *Muwwakkil*, 74 M.J. at 190.

[4] The government also claimed a signature is "particularly necessary in this case where DS told SA TM that she could not actually remember most of the dates contained in the timeline—that was a disclaimer, not an adoption." (Appellee Br. at 17). The government's "disclaimer" claim is a mischaracterization of DS description of the timeline. DS stated that she could not remember most of the relevant dates "off the top of her head," just the "timeframe," so she wrote the dates in a timeline to keep them straight, and then offered law enforcement the written timeline. She did not disclaim the accuracy, relevance, or her adoption of the contents as the government claimed. (Def. Ex. A for ID, at 105–06).

c. The government had constructive possession of the timeline, and *United States v. Brooks* provides a workable test for constructive possession for R.C.M. 914 purposes.

The government's position that because law enforcement declined to collect the timeline, this case cannot result in an R.C.M. 914 violation is flawed because it 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; (Appellee Br. at 21). The Army Court's factors in *United States v. Brooks*, as outlined in appellant's brief, are perfectly workable even though there was no other law enforcement agency involved in this case by the time DS offered the timeline.[5] 79 M.J. 501, 508 (Army Ct. Crim. App. 2019). *Brooks* provides three factors for weighing whether there was constructive possession, not a rigid elemental test in which each prong must be met. Therefore, even though the second factor is inapplicable to this case, that does not foreclose this Court from holding the government had possession of the timeline for R.C.M. 914 purposes weighing the *Brooks* factors. *See id.*; (JA 122–23).

[5] The test contains 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."' *Brooks*, 79 M.J. at 508 (citing *United States v. Reyeros*, 537 F.3d 270, 281 (3rd Cir. 2008)).

The government also attempted to support its "lack of possession" defense with the assertion that the government has no duty to "create" statements, but that is not raised by this case. (Appellee Br. at 20, 24–26). In this case, DS created the timeline and brought it to law enforcement. (JA 122–23). All the law enforcement agent had to do was reach out his hand and collect it, not record it himself or engage in any additional investigation. Contrary to the government's assertion, this is not like a drunk driving case where the police declined to do a breathalyzer test because that example would require law enforcement take some affirmative step beyond accepting previously written evidence that a witness sitting in front of them readily offered. (Appellee Br. at 26). Therefore, any discussion about the lack of a government duty to create statements or investigate a certain way is irrelevant to this case.

d. The government conceded two important points regarding whether the timeline related to DS' direct testimony and whether the government acted in good faith.

First, the government did not challenge appellant's position that the timeline related to DS' entire direct testimony. Second, the government conceded that only "sufficient negligence," rather than gross negligence, is required to foreclose the good faith loss doctrine from applying. (Appellee Br. at 22–23). The government's footnote citing the proposed rule change only highlighted the fact

that the current rule is that mere negligence resulting in loss of possession may serve as the basis for an R.C.M. 914 violation. (Appellee Br. at 23, n.5).

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

1. The government's claim that trial judges are not limited to the two remedies articulated in R.C.M. 914 is contrary to the plain language of the rule.

The government claimed "military courts and federal courts have repeatedly recognized that" the two remedies expressly stated in R.C.M. 914(e) are not exclusive in spite of the rule plainly stating the military judge "shall order that the testimony of the witness be disregarded . . . or declare a mistrial" if the government fails to comply with an order to deliver a qualifying statement. (Appellee Br. at 28). To support its position, the government first cited two service court cases decided on the good faith exception rather than remedies (*United States v. Roxas*, 41 M.J. 727, 730 (N-M Ct. Crim. App. 1994) and *United States v. Lewis*, 38 M.J. 501, 508 (A.C.M.R. 1993).) (Appellee Br. at 28). Next, the government cited a 9th Circuit Court of Appeals Case citing no precedent outside the 9th Circuit (*United States v. Riley*, 189 F.3d 802, 806 (9th Cir. 1999).) (Appellee Br. at 27). After that, the government cited *Brooks*, 79 M.J. at 506, 509, which the Army Court decided on the "possession" prong of the rule, and did not explain how the dicta about non-exclusive remedies squared with the plain language of R.C.M. 914. (Appellee Br. at 28). Lastly, the government cited a Navy-Marine Corps Court of

Military Review case (*United States v. Boyd*, 14 M.J. 703, 705 (C.M.A. 1982), which also failed to explain why the rule's remedies are not exclusive beyond their conclusory statement to that effect. (Appellee Br. 23). In short, the government cited no binding or persuasive authority for this Court to hold that the two remedies provided by the rule are not exclusive. More importantly, a plain reading of the rule's use of *"shall"*, demonstrates that a military judge at trial only has two options when there is an R.C.M. 914 violation and the good faith loss doctrine does not apply. *See* R.C.M. 914(e) (emphasis added).

2. Whether the government elected not to produce a missing statement or could not produce the statement does not matter.

The government averred that, because the government in this case merely could not produce the statement, as opposed to making an affirmative election not to produce it, the remedies in R.C.M. 914 do not apply. (Appellee Br. at 32–33). However, this Court specifically rejected the government's reading of R.C.M. 914 in *Muwwakkil*. 74 M.J. at 192–93 (The government's "reading of R.C.M. 914 would effectively render the rule meaningless . . . Further, we note that the Government's strained interpretation of R.C.M. stands in stark contrast to judicial interpretation of the Jencks Act by the Supreme Court, our predecessor Court, and the federal circuit courts, all of which have applied the Jencks Act to destroyed or lost statements.") Therefore, the Court should not give the government's reading any weight.

3. The prejudice in this case is the result of the military judge's failure to grant one of the remedies in R.C.M. 914, not the lost impeachment value as the government suggested.

Ultimately, no matter how robust a cross-examination the defense counsel was able to mount, the lost impeachment value of the witness' missing statement cannot be the limit of this Court's prejudice analysis. Such an unworkable interpretation would require appellant to first speculate about, and then somehow prove the contents of, a statement appellant has never seen because the government negligently suppressed it. Without knowing what exactly was in the statement, neither the parties nor the Court can authoritatively state that the statement did not contain the information defense counsel needed to strike the fatal blow to the government's case. *Rosenberg*, 360 U.S. at 371 ("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.") That is why the reason for the rule, "'to further the fair and just administration of criminal justice' by providing for the disclosure of statements for impeaching government witnesses," is an explanation for the enactment of R.C.M. 914, not a limitation of appellate courts' prejudice analysis. *Muwwakkil*, 74 M.J. at 190 (quoting *Goldberg*, 424 U.S. at 107).

This Court recognized appellant's position just last term in *Clark* when it 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. *Clark*, 79 M.J. at 455. If the remedies prescribed by the rule seem draconian or severe, it is for a good reason. Like the drastic remedy of the exclusionary rule for 4th and 5th Amendment violations, these remedies properly emphasize the importance of a fair trial and motivate compliance by law enforcement and other governmental personnel. Despite the government's claim and further specious speculation of Congressional intent, this does not create some "loophole" for defense to "create a mistrial button." (Appellee Br. 44). Appellant is not even demanding a mistrial, rather just one of the prescribed remedies (mistrial or disregarding DS' testimony). *See* R.C.M. 914(e). In most cases, the witness' entire testimony need not be disregarded for the loss of a statement, rather just the testimony as it relates to the missing statement. *Clark*, 79 M.J. at 455. However, in this case, the timeline relates to DS' entire testimony because it directly correlated to every specification, which alleged wrongdoing over six years and six locations. (JA 015, 022–100).

Therefore, because the military judge erred in his R.C.M. 914 analysis, this foreclosed appellant gaining the benefit of the rule by operation of law, and this clearly prejudiced him in light of the military judge not declaring a mistrial or, in the alternative, the military judge not striking DS' testimony.

Conclusion

Therefore, the military judge's erroneous application of R.C.M. 914 substantially prejudiced a material right of the appellant, 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 May 3, 2021.

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