IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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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, 10 U.S.C. § 866. This Court has jurisdiction over this matter under Article 67(a)(3) Uniform Code of Military Justice, 10 U.S.C. § 867(a)(3).

Statement of the Case

On October 3, 2018 at Fort Bragg, North Carolina, a military judge sitting as a general court-martial convicted appellant, pursuant to his plea, of one specification of adultery, in violation of Article 134, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 934 (2012). (JA 009). The military judge also

convicted appellant, contrary to his plea, of one specification of solicitation of production of child pornography, in violation of Article 134, UCMJ. (JA 009). The military judge found appellant not guilty of one specification of taking indecent liberties with a child, in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2007). (JA 009). The military judge sentenced appellant to 24 months of confinement and a bad-conduct discharge. (JA 010). The convening authority approved the sentence as adjudged. (JA 010). The Army Court issued its opinion on November 23, 2020, and affirmed the findings and sentence. (JA 002). This Court granted appellant's petition for grant of review on March 1, 2021 on the issue stated above. (JA 001).

Statement of Facts

A. Appellant's Crimes.

DS was born in November 1996 and was 13 or 14 years old when she first met appellant. (JA 022). Appellant joined DS's family when he married DS's maternal aunt in 2011. (JA 023, 030). When DS first met appellant, she did not know how old he was but "knew that he was older, like late 20s, early 30s." (R. at 024). Around DS's sixteenth birthday, appellant sent her a private Facebook message and told her how much she'd grown, how special and beautiful she was, and not to let anybody destroy that. (JA 039). In December 2012, appellant visited DS's house during a family Christmas visit. (JA 039). Appellant made

physical sexual advances on sixteen-year-old DS during that visit by touching her inner thigh while they were in the car, and he rubbed her vagina while he sat next to her on the sofa. (JA 041, 043). Appellant again sent DS a private Facebook message in early January 2013 and told her he had touched her because he could not help himself, he thought she was really pretty, and he wanted to caress her body. (JA 050). DS did not know how to respond and nobody had ever talked to her like that before. (JA 050).

Appellant continued to send DS messages every few days, and he soon escalated to sending messages on a daily basis. (JA 051). Appellant then told DS he wanted to FaceTime and Skype. (JA 051). During their FaceTime and Skype sessions, appellant solicited DS to undress for him, to show her bra or underwear, and then pressured her to show her breasts or vagina unclothed. (JA 051). DS was initially shy, but appellant would ask her, "please, or well just let me see a little bit." (JA 052). Appellant progressed to soliciting DS to touch herself and masturbate on camera for him during their video calls. (JA 052). Appellant masturbated himself during these video calls. (JA 052). Appellant gave DS specific instructions on where to touch herself and to "put your hands on your vagina and do this or that." (JA 052). DS complied with appellant's requests during these video sessions. (JA 052). Appellant conducted these sexual Skype calls with DS on nearly a daily basis. (JA 053). By February 2013, most of their

video communication was on Skype, though they also texted each other. (JA 053). Appellant told DS he was worried about getting caught. (JA 053). Accordingly, he showed her how to delete messages and calls on Facebook and Skype and would ask her to delete the conversations almost immediately after they concluded. (JA 054). She always deleted the conversations as appellant instructed her to, and did so for the remainder of their relationship. (JA 054).

In March 2013, DS and her mother, MC, visited appellant and his wife at DS's grandmother's house in Georgia. (JA 055). Appellant had sex with DS for the first time during this visit. (JA 055). DS thought that appellant really cared about her because they spoke to each other every day. (JA 055). After they had sex, appellant told DS that she could not tell anyone because he would be in big trouble and it would tear the family apart. (JA 058). Later in March 2013, after the visit, appellant moved to Korea for two years, and DS did not see him in person during that time. (JA 055).

While appellant was in Korea, he communicated with DS through a Korean application called Kakoa. (JA 059). Every time appellant called DS using this application, a different number appeared on DS's phone. (JA 059). During this time, appellant also used the email address and account black72chevy@gmail.com. (JA 059, 061). Appellant's email address displayed on DS's phone when she received text messages from appellant. (JA 077). DS's husband (her boyfriend in

2014) testified that sometime prior to September 2014, he remembered seeing a "blackchevy76" e-mail pop up on DS's phone asking her what she was wearing. (JA 289). In September 2014, DS's husband found pictures of DS in the deleted photo section of DS's phone in which she was naked and touching her breasts and "private areas." (JA 289). DS had intended to delete these images after taking them for and sending them to appellant. (R. at 548). Google business records and a search of the email account revealed that appellant had registered the black72chevy email address with Google in October of 2012, and he used it to register and create a Kakoa account in November 2013. (Pros. Ex. 10; JA 250).

Appellant continued to ask DS to send him nude images of herself on a daily basis throughout the two years he was in Korea. (JA 060). Appellant made specific requests for DS to pose in certain ways, for pictures of specific body parts, and for pictures of her touching herself. (JA 061). In each text conversation, he would ask DS for new pictures, usually about three or four per conversation. (JA 063). After DS texted appellant the photos, appellant and DS would typically have a video call on FaceTime or Skype in which DS was naked and masturbating, as well as appellant masturbating himself. (JA 063). Because of the time difference between Korea and Indiana, DS would often stay up late or wake up early to communicate with appellant. (JA 060). MC observed that during this time period,

DS's academic and social life worsened, and DS also would often stay up late and sleep in late. (JA 272–74).

DS turned 18 years old in November 2014. The next time DS saw appellant in person was in March or April of 2015 during a family visit in Tennessee, after he had returned from Korea. (JA 080). DS then saw appellant in May of 2015 at her grandmother's house in Georgia, where they had sex again. (JA 080).

In September 2015, MC discovered the relationship when she saw a photograph appear on DS's iPad showing appellant exposing his penis and masturbating. (JA 080, 260). When MC scrolled through the messages, she saw further images of DS naked. (JA 260). In an effort to get DS to talk to her and admit everything, MC lied to DS and told her that appellant's wife had found out about the relationship and DS should admit to everything. (JA 260). MC lied as a way to get DS to talk to her and admit everything. (JA 260). DS and her mother discussed dates together and tried to figure out when the various trips and holidays had occurred where DS and appellant had been in the same place. (JA 267). MC made a report to law enforcement after discovering appellant's jacket and DS's hand-written diary discussing appellant. (JA 267).

Up until the point her mother discovered the relationship, DS had always tried to delete her conversations with appellant in order to conceal the relationship, and had never intentionally saved any images. (R. at 316). DS testified she tried

to conceal the relationship to protect appellant and avoid family friction. (JA 206). A law enforcement examination of DS's iPad revealed "sexting" messages between appellant and DS. (JA 230). The photographs discovered in the iPad had been taken recently, during 2015, while DS was 18. (JA 231). A forensic expert conducted a search of DS's computer and found two photos of DS exposing her breasts. (JA 243).

B. The R.C.M. 914 Motion and Ruling.

After discovering evidence of the relationship between her daughter DS and appellant in September 2015, MC worked with DS to create a timeline of when appellant and DS had been in the same place together. (JA 267). MC testified at trial as follows:

> [DS] could not remember the timeline very well. We looked through Facebook and said, "Oh, there was the visit"--we didn't remember what year family Christmas of 2012 was, so we did go back and look at, this was 2012 when this happened. "Oh, yeah, the wedding was 2011. Oh, yeah, the first time we met was 2010." . . . [Putting a timeline together with DS] was to help both her and myself, because we could not remember. We knew that there were times that we had gotten together for family--different family functions and different family things, but we could not remember what happened when. And I know that she couldn't remember when the first time that they had sex was, and things like that, so we went through Facebook to try to put together when things happened.

(JA 267–68). DS testified MC helped her put the timeline together and they referred to Facebook and MC's writing in MC's calendar to construct the timeline.

(JA 120–22). The defense showed DS her mom's calendar (Def. Ex. B for identification) and cross-examined her about it. (JA 121, 150).

DS brought the timeline with her to her interview with Army Criminal Investigation Command [CID] on April 13, 2017. (JA 120). She had the timeline in her pocket during her interview and told Special Agent [SA] TM that he could see the timeline if he wanted. (JA 123). Special Agent TM did not ask her for the timeline and she never took it out of her pocket. (JA 122).

At the end of his interview, he asked DS about the timeline DS had mentioned earlier and whether they had already covered the information it contained, to which DS answered:

> **DS**: Um, yeah [. . .] But I mean, I have specific dates [. . . that] I couldn't remember off the top of my head, but if you want them.
> **SA TM**: It's okay.
> **DS**: But we covered pretty much the . . .
> **SA** TM: [interjecting] [. . .] the only one that you're really confident of is the . . .
> **DS**: March 8th.

(Def. Ex. A for Identification, p.105). Special Agent TM continued by asking if the photos DS referred to were available somewhere and DS answered that they were on Facebook and were probably still available there. (Def. Ex. A for Identification, p.106). Special Agent TM indicated he may get the photos from DS

"at a later time." (Def. Ex. A for Identification, p.106). DS eventually lost the timeline. (JA 125, 295).

At trial, after direct examination of DS, the defense moved to strike her testimony under Rule for Courts-Martial [R.C.M.] 914, arguing that the government had violated the rule when it failed to provide a copy of the timeline created by DS and MC to the defense. (JA 101–114). The facts considered by the military judge were undisputed. (JA 109). After each party argued, the military judge stated that he would consider the motion and put his findings on the record prior to deliberating on the merits, and that the trial would continue in the meantime. (JA 113–14).

Later in the trial, prior to retiring for deliberation on the merits, the military judge gave his ruling on the defense's R.C.M. 914 motion. (JA 295). The military judge made the following factual findings: the timeline and journals at issue in the motion have never been in the physical possession of government investigators or counsel; during her April 2017 CID interview, DS told SA TM that she had written down all of her interactions with the accused; SA TM did not obtain the notes from DS during the April 2017 interview; SA FD asked DS in October 2017 if she still had any diaries, and DS said she had gotten rid of it all; DS later added she could "maybe see" if she still had anything pertaining to the case, but the government did not follow up with that offer; on 5 September 2018, the defense requested the

timeline that was referred to in an interview with DS; and that the government has been unable to produce the timeline because DS lost or destroyed it.[1] (R. at 295–96).

In light of his factual findings, the military judge concluded that the timeline was not a statement within the meaning of R.C.M. 914 because it was not signed, adopted, or otherwise approved. (JA 297). Further, the military judge concluded that the timeline was never in the possession of the government to include law enforcement. (JA 297). The military judge concluded that there was "no bad faith or gross negligence" on the part of the government or investigators, that *Brady* requirements were not violated, and that there was no evidence that the timeline was exculpatory. (JA 298).

Standard of Review

A military judge's decision whether to strike testimony under Rule for Courts-Martial 914 is reviewed for an abuse of discretion. *United States v. Muwwakkil*, 74 M.J. 187, 191 (C.A.A.F. 2015). An abuse of discretion occurs when a military judge's 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).

[1] This non-exhaustive restatement of the military judge's findings of fact only includes those pertinent to the issue presented.

Summary of Argument

The timeline was not a statement because it was no more than informal notes co-authored by DS and her mother, and was not signed, adopted, or approved by DS. The government never possessed the timeline. Therefore, the military judge did not abuse his discretion when he denied appellant's requested relief under R.C.M. 914.

Even if the military judge erred in his analysis, he correctly determined that the government did not act in bad faith and therefore the good faith doctrine would have applied and appellant would still have been entitled to no relief under R.C.M. 914. Finally, any error was harmless because striking DS's testimony or declaring a mistrial would not have been appropriate remedies in this case, and the timeline was not material to appellant's ability to cross-examine and impeach DS.

Law and Argument

Appellant attempts to smuggle a meritless, atmospheric *Brady* claim before this Court by cloaking it in the garb of Rule 914.[2] At trial, the defense attempted a "hybrid argument" that combined a *Brady* complaint with its facially deficient Rule 914 argument.[3] (R. at 337). Now, appellant attempts to present this "hybrid"

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[2] *Brady v. Maryland*, 373 U.S. 83 (1963) (holding that prosecution must turn over all evidence tending to exonerate the defendant).

[3] Any claim under *Brady* lacks merit because nothing indicates that DS's lost timeline notes were exculpatory. Further, nothing in the record reflects an effort to conceal the timeline's existence: it was clearly referenced in DS's recorded

argument as a pure Rule 914 argument, and in so doing asks this Court to create new law by stretching the definition and application of "constructive possession" analysis to the point of meaninglessness. (Appellant's Br. 19).

I. The military judge did not abuse his discretion.

Statements fall within the ambit of Rule for Courts-Martial 914 if they are statements made by a witness that testifies at trial, relate to the subject matter concerning which the witness testified, and are in the possession of the government. R.C.M. 914(a). Rule 914 defines "statement" as "a written statement made by the witness that is signed or otherwise adopted or approved by the witness." R.C.M. 914(f)(1). A statement may also fall within Rule 914's definition if it is a substantially verbatim transcript or recording of an oral statement, or statements made to a federal grand jury. R.C.M. 914(f)(2) & (3).

Rule of Courts-Martial 914 "tracks the language of the Jencks Act" (18 U.S.C. § 3500(b)), and therefore federal courts' interpretation of the Jencks Act "should inform" military courts' analysis of Rule 914. *Muwwakkil*, 74 M.J. at 190.

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statement taken by CID. (Def. Exs. A and E for Identification). Criminal Investigation Command subsequently tried to collect the timeline at the request of the trial counsel. (JA 296). Finally, the calendar on which DS and her mother based the timeline—i.e., the source material for the timeline—was preserved. (Def. Ex. B for Identification; JA 121). *See United States v. Stellato*, 74 M.J. 473, 488 (C.A.A.F. 2015) (military judge did not abuse discretion in finding trial counsel violated discovery obligations in failing to preserve and disclose the existence of *exculpatory* emails and notes of a complaining witness's recantation).

The purpose of Jencks Act is to make any existing prior statements of a government witness equally available to defense and prosecution, but there is no requirement that the government *create* such statements. *United States v. Bernard*, 625 F.2d 854, 859 (9th Cir. 1980). *See also Palermo v. United States*, 360 U.S. 343, 345 (1959) ("One of the most important motive forces behind the enactment of [the Jencks Act] was the fear that an expansive reading of *Jencks* [*v. United States*, 353 U.S. 657 (1957)] would compel the undiscriminating production of agent's summaries of interviews regardless of their character or completeness.").

If the government "elects" not to produce a qualifying statement, the military judge "shall order the testimony of the witness be disregarded by the trier of fact [. . . or] declare a mistrial *if* required in the interest of justice." R.C.M. 914(e) (emphasis added). However, "[t]he 'strike' or 'mistrial' remedy is not absolute. A trial court has the discretion not to impose sanctions for noncompliance with the dictates of the *Jencks Act*." *United States v. Brooks*, 79 M.J. 501, 506 (Army Ct. Crim. App. 2019) (quoting *United States v. Sterling*, 742 F.2d 521, 524 (9th Cir. 1984)) (marks omitted); *see also United States v. Lewis*, 38 M.J. 501, 508 (A.C.M.R. 1993) ("Not every situation in which a party fails to produce a pretrial statement of a testifying witness mandates striking the testimony of the witness").

A. The military judge did not abuse his discretion in ruling that the timeline was not a "statement" under R.C.M. 914.[4]

The military judge acted within his discretion in finding that notes in the form of a timeline co-authored by MC and her daughter DS, based on Facebook photographs and MC's calendar, was not a statement of DS within the meaning of Rule 914. To satisfy Rule 914, a written statement that is not a verbatim transcript or other formal testimony must be "made by the witness" and "signed or otherwise adopted or approved by the witness." R.C.M. 914(f)(1).

The facts do not support a finding that the timeline was more than rough notes or markings that were insufficient in themselves to constitute a Rule 914 statement. *See United States v. Augenblick*, 393 U.S. 348, 355 (1969) (trial judge is entrusted to administer the Jencks Act; no abuse of discretion where "rough notes" found not to be Jencks Act material); *see also United States v. Ramirez*, 954 F.2d 1035, 1038 (5th Cir. 1992) (finding that "scattered notes" taken by an informant-witness over the course of the investigation, including "odd pieces of paper on which [the witness] jotted down names, addresses, and license plate numbers" that were destroyed before the witness testified, "do not fit within the [Jencks] Act's purview"). Appellant never created a record (for instance, during

[4] Appellant's brief only explicitly raises the government's non-collection of the timeline as the basis of its R.C.M. 914 motion. To the extent appellant's argument applies to the unrecovered journal entries as well, it fails for the same reasons.

its cross-examination of DS and MC, or by asking to call them as witnesses in support of its motion) to demonstrate that the timeline at issue consisted of anything more than rough notes outside of the purview of Rule 914. *See United States v. Heath*, 580 F.2d 1011, 1019 (10th Cir. 1978) (defendant has burden of showing that statement is Jencks Act statement).

Further, DS never signed, approved or otherwise adopted the timeline. While in *United States v. Clark*, when considering a lost recording containing a CID interrogation, this Court noted that its jurisprudence has "favored an expansive interpretation of the definition of "statement" with respect to the Jencks Act" and R.C.M. 914, the statements at issue in *Clark* fell under the alternate definition at R.C.M. 914(f)(2). 79 M.J. 449, 454 (C.A.A.F. 2020); *compare* R.C.M. 914(f)(1) (written statement that is adopted or approved by witness) *with* R.C.M. 914(f)(2) (recording of an oral statement). Therefore, this Court did not have cause to address the section of the definition at issue in this case, a definition that purposely narrows what can qualify as a *written* statement. Because Rule 914(f)(1) deals with written statements, it requires a further, fact-driven analysis by a military judge in determining whether a witness *adopted* a writing for R.C.M. 914 purposes.

A writing is not a statement for purposes of the Jencks Act unless it reflects the witness's own words fully and without distortion. *Goldberg v. United States*,

425 U.S. 94, 113 (1976) (Stevens, J., concurring). "The statutory definition of the term "statement" was intended by Congress to describe material that could be fairly used to impeach the testimony of a witness." *Id.* "If notes are producible on a showing of less than *knowing adoption* as a *formal statement*, honest and reliable witnesses will be postured wrongly before the jury as having made inconsistent statements." *Id*. at 128 (Powell, J., concurring) (emphasis added). *See also Campbell v. United States*, 365 U.S. 85, 105–106 (1961) ("As to the statements that the witness had himself set down on paper, Congress desired that his signature or some other form of approval be shown to assure authenticity. The required approval would also quiet any doubts that the witness had an adequate opportunity to scrutinize for verification the document which he had prepared. These are appropriate safeguards for the use of these documents as a basis for impeaching the witness' testimony on the stand."); *United States v. Jarrie*, 5 M.J. 193 (C.M.A. 1978) ("[T]he agent and the informant both admitted that the informant had verified the written notes as a correct and authentic account of his original statement. [. . .] [T]his act of verification by the informant transformed the agent's written notes into the informant's own statement for purposes of the Jencks Act."); *United States v. Allen*, 798 F.2d 985, 994 (7th Cir. 1986) (government notes taken during informant interview may become a Jencks statement after the "interviewer read back to the witness what he wrote" and "the witness affirmatively stated his

approval"). Even if SA TM had collected the timeline from DS, for Rule 914 purposes some further verification (e.g. signing, or an affirmation that it represents her own memory or belief) would have been necessary in order for it to be incorporated into her sworn statement to him, or as a standalone statement. This would have been 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. (Def. Ex. A for Identification, p.105).

Here, the military judge relied in part on *United States v. Carrasco*, a case in which the Ninth Circuit reasoned that a diary created by a government informant was adopted by the informant and became a Jencks statement when the informant turned it over to the federal agent. 537 F.2d 372, 375 (9th Cir. 1976). The agent subsequently destroyed the writing after summarizing it in his report. *Id.* The Ninth Circuit pointed to the fact that each page of the informant's diary in *Carrasco* had been signed or initialed by the informant. *Id*. "By giving her diary to [the agent], [the informant] transformed what had been a diary not covered by the Jencks Act into a statement which was." *Id*. In a subsequent case, the Ninth Circuit further explained that the diary in *Carrasco* became a statement "only when the author turned the pages over to the DEA agent for use as evidence." *United States v. Bobadilla-Lopez*, 954 F.2d 519, 522 (9th Cir. 1992). In this case, the military judge properly applied the *Carrasco* analysis to the Rule 914 motion.

Because the timeline was never given to the agent, it was not transformed into a statement. Further, unlike the diary in *Carrasco*, the record contains no evidence that DS signed, initialed, or adopted the timeline.

While federal courts have at times found notes or journals made by non-federal agents to have become statements for Jencks Act purposes, such cases overwhelmingly concern the notes of government informants, not the notes of victims or other non-informant witnesses. *See, e.g.*, *Carrasco*, 537 F.2d at 375; *United States v. Rivera Pedin*, 861 F.2d 1522 (11th Cir. 1988) (informant's diary held to be a Jencks Act statement after used to refresh his recollection at trial). Indeed, no court appears to have held that notes co-authored by a victim and her mother has fallen under the purview of the Jencks Act.

DS was not a federal agent or an informant when she and her mother created the timeline – she was a then-nineteen-year-old victim trying to remember the dates of her victimization outside the setting of a government interview. The co-authored timeline was not the sort of writing that was "intended by Congress to describe material that could be fairly used to impeach the testimony of a witness" without further adoption or approval. *Goldberg*, 425 U.S. at 112 (Stevens, J., concurring). It appears to be exceedingly rare, if not entirely novel, that a non-informant witness's writing may turn into Jencks material. *See, e.g., Rosenberg v. United States*, 360 U.S. 367, 370 (1959) (in finding victim's letters were Jencks

statements, the Court relied on the fact that victim had signed letters to the Federal Bureau of Investigation [FBI], indicating formal adoption). Appellant provides no authority where a similar writing produced under similar circumstances to the timeline at issue here has ever been held to be an R.C.M. 914 or Jencks statement.

The military judge properly assessed the facts of this case in the light of applicable case law. He prudently exercised his discretion in determining that notes—in the form of a timeline coauthored by DS and MC in a private setting and never adopted as part of a statement to CID—did not constitute a Rule 914 statement. "The abuse of discretion standard calls for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *United States v. Baker*, 70 M.J. 283, 287 (C.A.A.F. 2011). Therefore, the military judge acted within his discretion when he found that the timeline was not a statement for purposes of the Rule 914.

B. The military judge did not abuse his discretion in ruling that the government never possessed the timeline.

DS never took the timeline out of her pocket and never gave it to SA TM. (JA 123, 296). Consequently, the government never possessed the timeline. The defense counsel conceded the government possession prong of the analysis and attempted to substitute a "hybrid" *Brady* analysis to satisfy the possession requirement. (JA 111). A military judge surely does not abuse his discretion

where a party concedes that their argument lacks a required factor, and where the judge therefore does nothing more than decline to create new law.

Appellant cites no applicable authority to support his assertion that SA TM's decision not to collect DS's timeline violated the Jencks act or R.C.M. 914. Rule 914 and the case law requires that the government preserve and produce certain statements in its possession. *See* R.C.M. 914; *Muwwakkil*, 74 M.J. at 193. It does not require law enforcement to collect personal notes made by government witnesses, nor to create new statements out of such notes: Rule 914 and the Jencks Act are about preservation and disclosure of statements in the government's possession, not evidence collection or creation. There is no requirement that the government *create* such statements. *Bernard*, 625 F.2d at 859. *See, e.g.*, *United States v. Murphy*, 768 F.2d 1518, 1533 (7th Cir. 1985). *Cf. United States v. Rodriguez*, 496 F.3d 221 (2d Cir. 2007) ("the Jencks Act does not require government agents to record witness interviews or take notes during such interviews"); *United States v. Giusti*, 22 M.J. 733, 736 (C.G.C.M.R. 1986) ("[T]he Jencks Act requires only that the Government provide the defense with tape recordings that exist and are in the Government's possession. It does not impose a duty on the Government to create the recording in the first place. Any negligence at the hands of the Government in failing to properly record the testimony does not fall with the purview of the Jencks Act.") (citation omitted).

Appellant relies on the Army Court opinion in *United States v. Brooks* to argue the government had "constructive possession" of the timeline because DS brought it with her to her CID interview. (Appellant's Br. 18–19). However, *Brooks* stands for the very different proposition that CID *may* be found to have "constructive possession" if the statement is in the possession of another law enforcement agency conducting a joint investigation. 79 M.J. 501, 508 (Army Ct. Crim. App. 2019). Possession by another government entity is categorically different than possession by a private, individual complainant. *Brooks* does not stand for the proposition that any evidence CID possibly could have collected from whatever source was in its "constructive possession," nor would such an approach be workable under R.C.M. 914.

Further, no authority requires a military judge or this Court to conduct a "constructive possession" analysis for Jencks Act or R.C.M. 914 purposes. *See Brooks*, 79 M.J. at 508 (noting that the analysis is an import from *Brady* analysis found in federal case law).

The military judge followed the facts and the law when he found that the government did not have possession of the timeline. Therefore, his ruling is entitled to this Court's deference.

C. The military judge did not err when he used the term "gross negligence."

Because the military judge determined that the timeline was not a statement and was not in the government's possession, he did not conduct a lengthy analysis under R.C.M. 914 to determine whether its absence or non-collection was in good faith or negligent; nor was he required to conduct such an analysis given his ruling. *See Muwwakkil*, 74 M.J. at 194 ("Absent any reference to prejudice or harmless error, at [the trial] stage of the proceedings we conclude that the military judge was not required to engage in a prejudice analysis.").

Appellant's assertion that the military judge erred when he referenced gross negligence misstates the law. As a preliminary matter, the military judge was referring to the defense's "hybrid argument between *Muwwakkil* and *Stellato*" when he used the term. (R. at 337). Gross negligence and bad faith are proper considerations when analyzing *both* discovery violations *and* R.C.M. 914 violations. *See, e.g.*, *Stellato*, 74 M.J. at 489, 489 n.18 (considering gross negligence and bad faith in discussing the government's disclosure obligations); *United States v. Marsh*, 21 M.J. 445, 452 (C.M.A. 1986) (Jencks Act statement lost through gross negligence may amount to an election to suppress it).

Simple negligence is not an automatic bar to the application of a good faith analysis by the military judge, but rather "sufficient negligence *may* serve as the basis for a military judge's conclusion that the good faith loss doctrine does not

apply." *Clark*, 79 M.J. at 454 (citing *Muwwakkil*, 74 M.J. at 193) (emphasis added); *see also*, *Muwwakkil*, 74 M.J. at 19 ("a finding of negligence *may* serve as the basis for a military judge to conclude that the good faith loss doctrine does not apply in a specific case") (emphasis added); *Marsh*, 21 M.J. at 452 (Jencks Act statement lost through gross negligence may amount to an election to suppress it). Therefore, the military judge's use of the term "gross negligence" was in step both with this Court's *Brady* case law and R.C.M. 914 case law.[5] Regardless, the timeline was not lost through investigator negligence, gross or otherwise but rather by a victim-witness.

Therefore, the military judge did not abuse his discretion when he ruled that appellant was not entitled to relief under R.C.M. 914.

II. Even if the military judge erred, the good faith doctrine applied, appellant was not prejudiced, and this Court should affirm.

"Not every Jencks Act error is prejudicial or requires a remedy." *United States v. Boyd*, 14 M.J. 703, 705 (C.M.A. 1982) (citing *Rosenberg*, 360 U.S. 367; *United States v. Dixon,* 8 M.J. 149 (C.M.A. 1979)).

[5] The proposed-2020 changes to Rule 914(e) incorporate this judicially-created "gross negligence" standard. *See* 85 Fed. Reg. 7737 (available at www.federalregister.gov/documents/2020/02/11/2020-02685/manual-for-courts-martial-proposed-amendments).

A. The good faith doctrine should apply to any R.C.M. 914 error in this case because the military judge correctly determined that there was no bad faith or gross negligence by the government.

If this Court determines that the government "constructively possessed" the timeline, and that the timeline was a Rule 914 statement, appellant is still not entitled to relief because the good faith doctrine would apply to this case. The military judge determined that there was no bad faith or gross negligence on the part of the government, and that determination is supported by the record. (JA 298).

"The *Jencks Act* jurisprudence of the Supreme Court and our Court . . . has recognized a judicially created good faith loss doctrine." *Muwwakkil*, 74 M.J. at 193 (citing *Marsh*, 21 M.J. at 451). This Court has stated that "good faith loss or destruction of Jencks Act material and R.C.M. 914 material may excuse the government's failure to produce statements." *Clark*, 79 M.J. at 454 (citations and marks omitted). However, 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." *Id.* (citation omitted).

In this case, any failure by SA TM to collect the timeline was in good faith. Law enforcement is not required to collect any and all potential evidence. *Cf. Arizona v. Youngblood*, 488 U.S. 51, 58 (1988) (Due Process Clause does not

impose an undifferentiated and absolute duty to retain all material that might be of conceivable evidentiary significance in a particular prosecution.) (citation omitted).

Even if SA TM should have collected the timeline, his decision not to was neither inexplicable nor in bad faith. Special Agent TM was taking a sworn statement from DS when she told him she had made a timeline of the dates she had met appellant based off of pictures on Facebook and that she had the statement with her. (Def. Ex. A for Identification, pp.5, 105). However, DS also said that she was unable to remember the dates herself "off the top of [her] head." (Def. Ex. A for Identification. p.105). In other words, SA TM could have honestly and in good faith concluded that the value of the timeline was negligible because it was merely a restatement of dates found on Facebook photographs, while the witness offering to show him the timeline simultaneously disclaimed her personal memory of the dates it contained. (Def. Ex. A for Identification. p.105). Further, the exact dates when appellant, DS and other family members visited each other were straightforwardly verifiable facts given the infrequency of their occasional holiday visits, the number of people involved, records of travel, and the like. Special Agent TM could have honestly concluded that the timeline was of no evidentiary value or that any value it contained was merely derivative.

There is no indication that SA TM had malicious intent, nor did he ever view the timeline himself, meaning the government never gained an advantage

over appellant due to the non-collection of the timeline. *Cf. Youngblood*, 488 U.S. at 58–59 ("None of this information was concealed from respondent at trial [. . .] The situation here is no different than a prosecution for drunken driving that rests on police observation alone; the defendant is free to argue to the finder of fact that a breathalyzer test might have been exculpatory, but the police do not have a constitutional duty to perform any particular tests.").

DS and SA TM's conversation was recorded as part of a formal interview that was subsequently provided to the defense as part of routine discovery, demonstrating he was not trying to hide information. Further, when the defense requested production of the timeline before trial, the government denied the request only because by that time it had already been lost or destroyed by DS.[6] (JA 105, 296). The government's good faith is judged by considering the totality of the circumstances—not merely the actions of one out of its many agents that acted in the case. *See United States v. Muwwakkil*, 73 M.J. 859, 862–63 (Army Ct. Crim. App. 2014) (military judges should "consider and balance the totality of relevant circumstances and resolve whether and what fashion of remedy is appropriate") (citing, *inter alia*, *Marsh*, 21 M.J. at 451–52; *United States v. Jackson,* 450 A.2d

[6] In October 2017, the government had already asked DS if she had any diaries from the time of appellant's offenses, and DS stated she would see if she had any writings regarding the case. (JA 296). The government recovered a typewritten journal authored by DS when it searched her computer. (Pros. Ex. 15, Def. Ex. F for Identification).

419 (D.C.1982)); *see also Boyd*, 14 M.J. at 705 ("The imposition of sanctions for violations of the Jencks Act should turn on the particular circumstances of the case at bar and on a balancing of the potential prejudice to the accused and the Government's culpability.") (citation omitted).

Therefore, even if SA TM's inaction during the interview was not ideal, it was not in bad faith, and under the totality of the circumstances the government acted in good faith. This Court should conclude that, even if the military judge erred in his R.C.M. 914 analysis, appellant was not entitled to relief because of the good faith exception.

B. Even if the military judge had found a R.C.M. 914 violation, the proper remedy would not have been to strike DS's testimony or declare a mistrial, and therefore any error was harmless.

"While a defendant need not prove prejudice to show a violation of the Jencks Act[,] when there is no prejudice, a witness's testimony need not be stricken." *United States v. Riley*, 189 F.3d 802, 806 (9th Cir. 1999) (citations omitted). Error under R.C.M. 914 is subject to harmless error analysis: "A finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." Article 59, UCMJ; *see also Clark*, 79 M.J., at 455 (citations omitted). Because the military judge should not have stricken DS's testimony in this case, even if there was error, any error was harmless.

Military and federal courts have repeatedly recognized that, depending on the nature of the statement at issue, trial judges are not limited to the two drastic remedies articulated in R.C.M. 914(e) (mistrial or striking testimony). "Not every failure to comply with the Jencks Act is necessarily prejudicial. The court must weigh all the circumstances of the case to determine the appropriate course and determine if there is possible prejudice to the defendant." *United States v. Roxas*, 41 M.J. 727, 730 (N-M Ct. Crim. App. 1994), pet. denied, 43 M.J. 174 (C.A.A.F. 1995). *See also, e.g.*, *Brooks*, 79 M.J. at 506 (quoting *Sterling*, 742 F.2d at 524) ("A trial court has the discretion not to impose sanctions for noncompliance with the dictates of the Jencks Act.") (marks omitted); *see also Lewis*, 38 M.J. at 508 ("Not every situation in which a party fails to produce a pretrial statement of a testifying witness mandates striking the testimony of the witness").

Both the FBI and CID interviewed DS, and she was subject to vigorous cross examination about her previous statements, and about the creation of the timeline, as was its co-author MC. The defense almost certainly benefitted more from casting the entire investigation in a bad light due to the timeline's non-collection than any benefit it might have derived from a restatement of when a few visits between DS and appellant's families occurred. (R. at 578–79). At trial, the creation of the timeline was used by the defense to suggest that she was manufacturing evidence with her mother. (R. at 352–53, 378–80, 503). *See also*

United States v. Thompson, ARMY 20180519, 2020 CCA LEXIS 420, at *9, n.6 (Army Ct. Crim. App. 23 Nov. 2020) ("Defense counsel crossexamined witnesses regarding the timeline and argued its creation established MC improperly influenced DS. Specifically, defense counsel argued the timeline was

In this case, even had the military judge found a R.C.M. 914 violation, the most appropriate remedies were already on tap: the cross-examination of DS and MC, the timeline's authors, production of DS's statement to SA TM and her interview with the FBI, and access to MC's calendar, a primary source the two used when they created the timeline and that the defense used during its cross-examination of DS. (Def. Ex. B for Identification; JA 117, 121–22, 150–51; FBI Form 302 Interview Notes, Oct. 13, 2015). *See, e.g.*, *Sterling*, 742 F.2d at 524 (no abuse of discretion to decline imposition of sanction where other available materials enabled a vigorous cross-examination).

There were four sources of information on which the timeline was based: DS's memory, MC's memory, MC's calendar, and Facebook photographs of family visits with appellant. (Def. Ex. A for Identification, p. 105; JA 121–22, 267). Three out of those four (the two witnesses and MC's calendar) were available to, and used by, the defense at trial. (Def. Ex. B for Identification; JA 121–22, 150–51). The defense apparently did not pursue the Facebook photographs, the fourth source, presumably because they would not contain any

new material facts.[7] *See Rosenberg*, 360 U.S. at 367 (when documents to which the defense are entitled are withheld in the Jencks context, but the same information is possessed by the defense in another form, the error is harmless).

If the defense had truly been interested in the *contents* of the timeline rather than merely using its absence as an albatross to hang around the government's neck, it might have requested, or if necessary moved to compel, production of DS or MC's Facebook account. But the defense knew prior to trial that the timeline could not be produced by the government, and would have known from reviewing DS's interview with SA TM that the content of the timeline was merely a restatement of when DS's family visits occurred. (JA 296; Def. Ex. A for Identification). *See Bobadilla-Lopez*, 954 F.2d at 523 ("[I]t is apparent that the purpose of the production request in this case was never to use the tape for impeachment purposes, but to prevent the agent who made the recording from being able to testify . . . . The Jencks Act is not an appropriate tool for achieving that end." (9th Cir. 1992). *Cf. United States v. Simmermacher*, 74 M.J. 196, 199 (C.A.A.F. 2015) (appellant failed to "obtain comparable evidence by other reasonably available means.").

[7] The defense asked DS about using Facebook as a source for the timeline's dates, and later objected to a line of questioning by the government about the Facebook photographs. (JA 122, 267).

A court's discretion to craft less drastic remedies is not only recognized in the case law, but the necessity for such discretion is found in Rule 914 itself. Although the rule is silent as to lost or destroyed statements, courts have held that R.C.M. 914 applies to lost or destroyed statements and not only to statements that are currently in the possession of the government at the time of trial. *See Muwwakkil*, 79 M.J. at 193. *But Cf. Campbell*, 365 U.S. at 102 ("Petitioners' contention that the [Jencks Act's] words 'in the possession of' must be interpreted as meaning 'possession at any prior or present time' must be rejected. Congress surely did not intend to initiate a game of chance whereby the admission of a witness' testimony is made to depend upon a file clerk's accuracy or care.").

However, it does not follow that the specific remedies of R.C.M. 914(e) must always apply in cases of lost or destroyed statements, because the rule's silence requires that courts exercise discretion when they consider whether to apply its remedies in the situation of such statements.[8] As an initial matter, regarding the declaration of a mistrial, R.C.M. 914(e) states such remedy should be applied "*if* required in the interest of justice." R.C.M. 914(e) (emphasis added). Declaring a mistrial is inherently discretionary, a step that a military judge should take only if

[8] Hence the "judicially created good faith loss doctrine." *Muwwakkil*, 74 M.J. at 193 (emphasis added).

"manifestly necessary" and with "great caution." R.C.M. 915; R.C.M. 915 Discussion.

Both specified remedies in R.C.M. 914(e) can apply to situations where the government "elects not to comply with an order" to produce a statement. Under its plain meaning, "elects" would mean chooses not to comply with the order during the trial process. In this case the government did not "elect" or choose not to produce the timeline at the time of trial; rather it was unable to do so because it had never been collected in the first place.[9] This key fact means that even if the

[9] The rule's use of the word "elects" stems from a recognition that a party, in exceptional circumstances, may seek to protect information (from, e.g., informant-witnesses, grand jury testimony, or statements taken by attorneys containing claimed attorney work product) and ultimately determine that the costs of disclosure outweigh the benefit of a preserving a witness's testimony. This understanding is consistently reflected in the federal case law. *See, e.g.*, *Palermo*, 360 U.S. at 350 (1959) (Congress "strongly feared that disclosure of memoranda containing the investigative agent's interpretations and impressions might reveal the inner workings of the investigative process and thereby injure the national interest."); *United States v. Pope*, 574 F.2d 320, 325 (6th Cir. 1978) (Congress's "use of the term ["elects"] refers to a conscious choice given the government to disclose the statement it possesses or to suffer the mandatory alternatives of either having the entire testimony of the witness stricken or in the court's discretion, a new trial ordered."); *Fields v. United States*, 368 A.2d 537, 541 (D.C. 1977) ("The government's need to make this election in some cases may be dictated by considerations of national security or the safety of covert law enforcement operatives."); *United States v. Calley*, 46 C.M.R. 1131, 1192 (A.C.M.R. 1973) ("Compliance [with an order to produce under the Jencks Act] would be the norm; non-compliance exceptional."). For instance, the government may not know exactly which parts of a statement it will have to disclose until after the witness has testified. *See* R.C.M. 914(c) (allowing for in camera review by the military judge if a party wishes to excise portions of a statement). *See also, e.g.*, *Reed v. United States*, 379 A.2d 1181, 1183 (D.C. 1977) ("This balance is for the government to

military judge had found an R.C.M. 914 violation, the military judge also could have, and should have, found that the drastic remedies of R.C.M. 914(e) did not apply to this case.

Certainly, military judges have discretion to consider negligently lost or destroyed statements as the functional equivalent of an election not to produce. For instance, in *Muwwakkil*, after analyzing the facts surrounding a lost statement, this Court found "the Government's negligent failure to retain control of the recorded Article 32, UCMJ, testimony, which once had been in its exclusive possession, effectively means that the trial counsel . . . elect[ed] not to comply with the requirement under R.C.M. 914(e) to provide a copy of GP's statement to the defense." 74 M.J. at 193 (marks omitted).

However, both the facts and appellate posture of *Muwwakkil* stand in stark contrast to this case. In *Muwwakkil*, the government was in "exclusive possession" of recorded Article 32 testimony. *Id.* Here, even if appellant's novel theory of constructive possession of DS's statement is adopted, such possession was certainly not exclusive, and it was not the government that lost or destroyed the

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strike, for the government stands to lose the testimony should it not elect to produce a relevant statement.") (citing, *inter alia*, *United States v. Perry,* 471 F.2d 1057, 1063-64 (D.C. Cir. 1972)). Therefore, while negligent loss at times "effectively mean[s]" an election not to disclose, *see, e.g.*, *Muwwakkil*, 79 M.J. at 193, such a determination should be fact-sensitive and at the discretion of the court, or else the word "elects" is rendered meaningless.

timeline; DS lost or destroyed the timeline sometime after SA TM declined to collect it. (JA 296). Further, Article 32 testimony is planned-for, formal sworn testimony recorded on government equipment of which the government "retain[s] control." *Id.* DS's co-authored timeline created at home with her mother and brought to an interview in her pocket could not be more distinct from the audio-recorded Article 32 testimony this Court considered in *Muwwakkil*.

In *Muwwakkil*, the government lost the recording of sworn Article 32 testimony by the complaining witness, including the *entire cross-examination and redirect portions* of her testimony. *Id.* at 189. By contrast, DS lost or destroyed a homemade, unsworn, coauthored timeline based on other sources to which appellant had access. The materiality of the evidence in each case is drastically different. Because the military judge in this case should properly have declined to implement one of the drastic remedies of R.C.M. 914(e), this Court should analyze prejudice by analyzing "whether the defense was so greatly prejudiced by the unavailability of the recording at trial as to require the imposition of sanctions against the government." *United States v. Miranda*, 526 F.2d 1319, 1328 (2d Cir. 1975).

Finally, *Muwwakkil* was an Article 62 appeal in which this Court upheld that the military judge in that case acted within her *discretion* in declaring one of the specified remedies. *Id.* ("[W]e find that the military judge did not err in declining

to apply the good faith loss doctrine because she explicitly found that the Government had engaged in negligent conduct, and a finding of negligence *may* serve as the basis for a military judge to conclude that the good faith loss doctrine does not apply in a specific case.") (emphasis added) (citation omitted). A trial judge's discretionary finding of bad faith (or lack of good faith) and the resulting remedy in one case does not bind different trial judges in other cases to the same remedy. *See, e.g.*, *Marsh*, 21 M.J. at 452 ("While some negligence may have occurred in the execution of this policy, there was no gross negligence amounting to an election by the prosecution to suppress these materials.") (citing *Jackson,* 450 A.2d at 427; *Johnson v. United States,* 298 A.2d 516, 520 (D.C.1972)). Here the military judge determined that there was no bad faith by the government. (JA 298).

C. If there was error, prejudice should be weighed by considering whether the absence of the timeline materially harmed appellant's opportunity to cross-examine DS.

The purpose of R.C.M. 914 is, in part, to "afford the defense an opportunity to impeach witnesses and enhance the accuracy of trial proceedings through cross-examination of witnesses." *Muwwakkil*, 74 M.J. at 191. Rule 914 is not a super-rule that enables an accused push a mistrial button any time law enforcement does

not collect *any* potential statements from key government witnesses, although that is exactly the result that would flow from appellant's proposed approach.[10]

The correct lens through which to analyze any prejudice in this case is the consideration of whether appellant's opportunity to meaningfully cross-examine and impeach DS's testimony was harmed by the loss of the timeline; it is not to simply assume that the military judge should or would have stricken DS's testimony or declared a mistrial. *See Miranda*, 526 F.2d at 1328 (explaining that where the "loss of the tape recording by the agents was merely inadvertent or negligent" rather than "deliberate or bad faith loss," the question for an appellate court "is whether the defense was so greatly prejudiced by the unavailability of the recording at trial as to require the imposition of sanctions against the government"); (Appellant's Br. 25).

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[10] Under appellant's reading, R.C.M. 914 automatically mandates striking testimony or declaring a mistrial no matter the nature of a missing statement, even though the rule itself is silent as to lost or destroyed evidence. By contrast, in the discovery context in a rule explicitly dealing with missing evidence, in order to grant the specified relief of abatement of proceedings under R.C.M. 703(f)(2), a military judge must find that the missing evidence was of such central importance that it was essential to a fair trial and that there was no adequate substitute evidence. R.C.M. 703(f)(2); *Simmermacher*, 74 M.J. at 199.

Appellant's proposed approach would lead to the absurd result that in any case a victim-witness loses (for example) his or her own notes, diary, emails or text messages, after offering to show them to law enforcement, a trial would be impossible because the victim's testimony would either need to be stricken, or a mistrial would immediately follow the victim's testimony. This would be the outcome regardless of the evidentiary value of the missing notes.

While this Court has recently assessed prejudice in the Rule 914 context by assuming that the military judge would have stricken the testimony of the witnesses subject to the Rule 914 objection, such an approach is discretionary and not appropriate in this case. In *Clark*, this Court assumed—as a mode of analysis and without deciding—that the appropriate Rule 914 remedy in that case would have been stricken testimony because of the absence of a good faith determination by the military judge. 79 M.J. at 454 ("[W]e may assume without deciding that the Government was sufficiently negligent and further assume that the good faith loss doctrine does not apply.").

But here, particularly where the military judge made a finding that there was no bad faith or gross negligence, this Court can and should assess prejudice by considering the likelihood that the collection and production of DS's timeline would have made any difference to appellant's defense. (JA 298). *See, e.g.*, *United States v. Monaco*, 700 F.2d 577, 580 (10th Cir. 1983) (in a Jencks Act appeal regarding a lost audio-recorded statement, the Tenth Circuit held "the defendants were not sufficiently prejudiced by their inability to examine the lost tape recording to justify reversal" because there was "no evidence that the material in it was exculpatory to the defendants" and the "witness who gave the recorded statement appeared in person and was subject to cross-examination").

D. Any error was harmless because it did not materially prejudice the substantial rights of appellant.

Appellant was not prejudiced by the government's inability to produce the timeline. Appellate courts "evaluate prejudice from an erroneous evidentiary ruling by weighing (1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." *Clark*, 79 M.J., at 455 (citations omitted). Even if this Court finds that a military judge abused his discretion in determining no R.C.M. 914 violation existed, this Court should still affirm the findings because any error was harmless. The rights potentially at issue here were the right of confrontation[11] and the ability to impeach DS with her prior statements. *See Muwwakkil*, 74 M.J. at 191. The record shows that appellant suffered no meaningful limitation to these rights.

1. The Government Had a Strong Case.

There was no prejudice because the government's case was strong, and there was no convincing, evidence-based reason to doubt DS's credibility. The record unambiguously demonstrates that from January of 2013 through DS's eighteenth birthday in late 2014, appellant solicited child pornography from DS on an almost daily basis. (JA 053). The finding of guilty for Specification 1 of Charge II did

[11] Any error here was non-constitutional because the defense counsel ably and extensively cross-examined DS, negating any Sixth Amendment claim.

not hinge on subtle evidentiary questions of dates that would have been meaningfully affected by the collection and preservation of the timeline.

The evidence proved beyond a reasonable doubt that appellant solicited child pornography from DS for 22 continuous months. In addition to the direct evidence from DS—sufficient by itself to convict appellant—*all* of the circumstantial evidence in this case supported her testimony and supported a finding of guilt. The absence of nude images (or messages from appellant soliciting such images) depicting DS prior to her eighteenth birthday is consistent both with DS's testimony and with the forensic evidence. DS testified that throughout their relationship, she and appellant would delete all of their images and conversations after each ended because appellant was worried about the trouble he could be in as well as the effects their relationship could have on the family. (JA 054, 058). DS never intentionally saved any images and always tried to erase them. (JA 082). An expert witness examined DS's iPad and testified that the text message type appellant and DS used to communicate would not show up on a phone bill. (JA 286).

DS testified that she and appellant also communicated via a Korean app called Kakoa in which each call to DS from appellant displayed as coming from a different number. (JA 059). DS testified that appellant also used the email address black72chevy@gmail.com to communicate with her. (JA 059). Special Agent

AW conducted a logical examination of DS's iPad and uncovered nude images sent between DS and the email address black72chevy@gmail.com. (JA 230). Appellant registered the black72chevy email address with Google in October of 2012 and used it to create a Kakoa account in November 2013. (Pros. Ex. 10; JA 250). DS's husband (then-boyfriend) testified that sometime prior to September 2014, when she DS was only seventeen years old, a "blackchevy" email popped up on DS's phone asking her what she was wearing. (JA 289). In September of 2014, DS's husband found pictures of DS (then seventeen) in the deleted photo section of her phone in which she was naked and touching her breasts and "private areas." (JA 289).

There was also no convincing reason to doubt DS's credibility. The defense attempted to gain traction throughout the trial from DS's apparent error during the investigation when she told law enforcement she first had sex with appellant in March 2012 (when she was 15). Such a mistake is entirely unremarkable in the context of a witness trying to remember which year a given family gathering or holiday had occurred several years prior.[12] This is quite different from an

[12] At trial, the defense counsel himself misstated the same date, demonstrating to the factfinder in this case how easily such a mistake could be made; however, defense counsel—unlike DS—had the benefit of substantial discovery and a theory of the case before making the error. (JA 148). Additionally, DS and her mother also understandably struggled to do date-related math while testifying, and the trial counsel confused a reference to a "freshman year" with a specific year. (JA 116, 263).

intentional lie that would damage the credibility of the witness in the eyes of a factfinder. An inaccuracy about a date by exactly one year is much more naturally attributable to a faulty memory after the passage of several years than a deliberate lie, because a deliberate lie such as that would be easily discovered. DS did not know the age of consent when she made her report to law enforcement, negating any supposed motive to lie to inculpate appellant for their early sexual encounters. (R. at 437). And in any case, that avenue of impeachment was available to appellant because of DS's statement to the FBI—the collection of the timeline would have made no difference to this line of defense attack one way or the other.

2. The Defense Had a Weak Case.

The defense case was weak, and relied mostly on attacking DS's credibility. The only witness the defense called in its case-in-chief for a brief direct examination was DS herself. (R. at 547).

3. The Timeline was not Material Evidence.

The defense counsel argued in closing, "dates are really important. There is a huge difference between 16 and 15. It changes everything. It changes the whole character of the case." (R. at 578). But the question of whether DS was fifteen or sixteen during this trial only mattered for Charge I, indecent liberties with a child, of which appellant was acquitted. (Result of Trial).

For Specification 1 of Charge II, solicitation of child pornography, *eighteen*—not fifteen or sixteen—was the material age. Article 134, UCMJ (Solicitation). Appellant was convicted of soliciting child pornography during a *nearly two-year time period*; his conviction of this offense did not hinge on a close parsing of dates with which the lost timeline would have made any difference. (Charge Sheet; JA 15). DS testified that appellant solicited and exchanged explicit images on an almost daily basis during that period; therefore the timeline was immaterial to this charge.[13] The fact that DS and MC copied family meeting dates from MC's calendar and Facebook photographs onto a timeline has no bearing on the solicitation charge because appellant's solicitation took place remotely via telephonic and internet communications, not when the two were physically together for the infrequent family gatherings reflected on the timeline.

4. The quality of the evidence was low.

The quality of the timeline was low because it was only a restatement of dates taken from other sources, and DS stated she could not actually attest to them from her own memory. (Def. Ex. A for Identification, p. 105; JA 267). Therefore, the impeachment value of the timeline was minimal at best, if not entirely lacking.

[13] While the timeline was likely material to Charge I, even as to that charge any information it contained would have been merely cumulative in relation to the witnesses' testimony and MC's calendars and thus its materiality would have been minimal.

Further, neither party ever viewed the timeline so that—even if it were of greater quality—the defense was at no disadvantage compared to the government.

III. Conclusion

Appellant asks this Court to strain the definition of a statement under R.C.M. 914, adopt a novel and impossibly broad definition of "possession," and promulgate a strict-liability remedy standard. This Court should decline all three of appellant's invitations.

Rule for Courts-Martial 914 grants an accused access to qualifying statements of a witness. The military justice system is one that rarely relies on informant testimony, and does not use secret grand jury proceedings; therefore, the application of R.C.M. 914 to military trials is less common than the Jencks Act is to civilian federal practice. The robust discovery protections in military justice practice should make exceedingly rare the instances where defense counsel need to make a Rule 914 motion to gain access to a government witness's statements—the government should almost always have already provided any such statements in pre-trial discovery in the vast majority of cases. *See, e.g.*, *Stellato*, 74 M.J. at 481 (describing the discovery requirements of the military justice system as "broader than in federal civilian criminal proceedings") (citation omitted).

Rule 914's is not intended to serve as a mid-trial ambush device for otherwise meritless (and tardy) discovery claims; such an approach is not

consistent with Rule 914's purpose, its language, or the case law. *See United States v. Bobadilla-Lopez*, 954 F.2d at 523 (Jencks Act is about the production of witness statements to enable impeachment; it is not a tool to prevent witness testimony).

Yet despite this context and applicability of R.C.M. 914, appellant advocates an obtuse reading of the rule and case law that would create a loophole through which an accused—even lacking a meritorious discovery claim—can nevertheless *automatically* avail themselves of R.C.M. 914's drastic remedies for lost statements, or statements never collected by the government in the first place. Congress did not intend to create a mistrial button when it enacted the Jencks Act, nor did the President in promulgating R.C.M. 914. This Court should reject appellant's unsupported and unworkable interpretation.

Therefore, this Court should find that appellant was not entitled to relief under R.C.M. 914.

Conclusion

Wherefore, the United States respectfully requests that this Honorable Court affirm the decision of the service court and deny appellant's requested relief.

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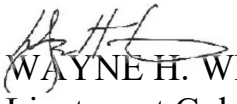

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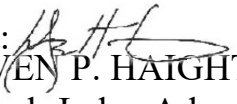

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CERTIFICATE OF COMPLIANCE WITH RULE 24(c)

1. This brief complies with the type-volume limitation of Rule 24(c) because this brief contains 11,044 words.

2. This brief complies with the typeface and type style requirements of Rule 37. It has been typewritten in 14-point font with proportional, Times New Roman typeface, with one-inch margins.

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April 20, 2021

CERTIFICATE OF SERVICE AND FILING

I hereby certify that the original was electronically filed to efiling@armfor.uscourts.gov on 23 April 2021 and electronically filed to Defense Appellate on April 23, 2021.

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