IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES Appellee	**BRIEF ON BEHALF OF APPELLANT**
v.	Docket No. ARMY 20240106
Specialist (E-4) **STEVEN A. HOLMES,** United States Army, Appellant	Tried at Fort Riley, Kansas, on 5 July 2023, 30 January 2024, 4-6 March 2024, before a general court-martial appointed by the Commander, 1st Infantry Division and Fort Riley, Colonels Steven Henricks, Scott Oravec, and Gregory R. Bockin, military judges, presiding.

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Assignments of Error[1]

I. WHETHER THE MILITARY JUDGE ERRED IN FAILING TO STRIKE THE ALLEGED VICTIM'S TESTIMONY OR DECLARE A MISTRIAL UNDER R.C.M. 914.

II. WHETHER THE MILITARY JUDGE ERRED IN FINDING APPELLANTS STATEMENT TO CID WAS VOLUNTARY.

Statement of the Case

On 5 March 2024, an enlisted panel sitting as a general court-martial convicted appellant, Specialist (SPC) Steven A. Holmes, contrary to his pleas, of one specification of Article 128b, a simple assault consummated by battery, one

[1] Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant respectfully requests this court consider the information provided in the Appendix.

specification of Article 113, unlawfully carrying a concealed weapon, and one specification of Article 92, failure to obey a lawful order. (R. at 478; Charge Sheet). On 6 March 2024, the judge sentenced appellant to 45 days of confinement to run concurrently with 30 days of hard labor without confinement.[2] The military judge awarded appellant one day of confinement credit against the sentence to confinement. (R. at 509).

On 27 March 2024, the convening authority took no action on the findings but disapproved the portion of the sentence to hard labor without confinement for 30 days and approved the remainder of the sentence. (Convening Authority Action). On 8 April 2024, the military judge entered Judgment. (Modified Judgment of the Court). This court docketed appellant's case on 10 July 2024. (Referral and Designation of Counsel).

Statement of Facts

Appellant and [redacted] were in a brief romantic relationship from October 2021 until approximately 10 April 2022. (R. 203, 213-214). While appellant was at a

[2] The military judge sentenced appellant as follows:

Charge I, Specification 2	45 days
Charge IV, The Specification	45 days
Charge VII, The Specification	30 days with hard labor

The military judge ordered all sentences to confinement to run concurrently. (R. at 509).

training exercise at the National Training Center, [redacted] fell in love with another Soldier, [redacted] R. at 192). On 10 April 2022, after a day of drinking and partying, [redacted] decided that night/early morning, was the perfect time to retrieve her belongings from appellant's residence with her boyfriend (R. at 203). The meeting was contentious and [redacted] alleged appellant committed a variety of acts which formed the basis for the Government's case.

I. WHETHER THE MILITARY JUDGE ERRED IN FAILING TO STRIKE THE ALLEGED VICTIM'S TESTIMONY OR DECLAURE A MISTRIAL IN VIOLATION OF R.C.M. 914.

Facts Relevant to Assignment of Error

A. [redacted] Statement to Military Police

Twelve days after 10 April 2022, [redacted] subsequently married her boyfriend from the night in question, [redacted] (R. at 248, line 12-18.). Four months later, in an interview with Military Police, [redacted] alleged appellant held her against her will in his residence, pointed a gun at her, pointed a gun at appellant's own head, threatened to kill her boyfriend (at the time of the interview her husband), punched her with a closed fist in the face (from which she apparently suffered no injuries), and engaged in a car chase of her and her boyfriend across Fort Riley that night. (Pros. Ex. 1 for Identification). She additionally alleged potential sexual

misconduct which had taken place over the course of their relationship. (Pros. Ex. 1 for Identification, p. 7).

B. [redacted] Statement to Criminal Investigations Division

Approximately a month after her statement to the MPs, [redacted] gave an additional statement to the Criminal Investigations Division (CID), Fort Riley. (R. at 55). This interview, two hours long, was subsequently lost. (R. at 55 and 59). The only evidence of the contents of this interview were recorded in the CID notes, 39 lines of text, of which 26 related to the specific charges in appellants case. (R. at 56-57 and Pros. Ex. 19 for Identification).

What [redacted] is believed to have said in this interview differed from her previous statement to the MPs. In this version of the events of 10 April, [redacted] alleges appellant *slammed her into a wall and punched her in the stomach*. (Pros. Ex. 19 for Identification). The CID agent admitted [redacted] had "vomit of the mouth," and he had to redirect her repeatedly to focus on the alleged sexual assaults. (R. at 67, lines 1-6).

C. Motion and Ruling on R.C.M. 914

Defense Counsel subsequently filed a Motion in Limine and Motion to Compel Production of Evidence. (App. Ex. III). In their motion, Defense Counsel

requested abatement of the proceedings until the interview could be procured. (App. Ex. III). Defense Counsel's principal argument being the full recorded interview was of critical importance to the case and there was no adequate substitute for the recorded interview. (App. Ex. III, p. 6-9.) The Government argued there was no negligence on behalf of the Government and [redacted] previous statement to the MPs was sufficiently detailed to allow the Defense to cross-examine her effectively combined with CIDs notes. (App. Ex. IV, p. 8).

In his ruling, the military judge found the loss of the statement was due to "force major [sic]" and CID had not acted negligently. (App. Ex. XXV, p. 6). The only remedy the Military Judge ordered was to provide the Defense, "substantial leeway" in cross examination of [redacted] (App. Ex. XXV, p. 6).

D. [redacted] Testimony at Trial

In their opening statement, the Government emphasized to the panel this case revolved around [redacted] (R. at 192-194). The Government closes their opening argument with an emphasis on the panel hearing about "what he [appellant] did to B.R." (R. at 194). The Government started their case in chief with [redacted] (R. at 199-211). The only Government witness who spent more time on the stand was the CID agent. (R. at 314-334).

[redacted] testimony at trial is best described as concerning. [redacted] had to refresh her recollection of what exactly happened on 10 April 2022 an astonishing seven times. (R. at 217, 222, 226, 229, 234, 241, 246).[3] During cross-examination [redacted] could not recall telling CID many things, including; whether the appellant punched her in the stomach, how or if she actually tricked the appellant to escape, whether she told CID the appellant wanted to kill her and her boyfriend, and (most surprising) whether she was even there for her interview with CID. (R. at 235, 241, 246, 241 at lines 5-11).

Standard of Review

A military judge's decision on the admissibility of Rules for Courts-Martial [R.C.M.] 914 testimony is reviewed for an abuse of discretion. *United States v. Clark*, 79 M.J. 449, 453 (C.A.A.F. 2020) citing *United States v. Muwwakil*, 74 M.J. 187, 191 (C.A.A.F. 2015). An abuse of discretion occurs when a military judge's findings of facts are clearly erroneous or his conclusions of law are incorrect. *United States v. Clark*, 79 M.J. 449, 453 (C.A.A.F. 2020) citing *United States v. Olson*, 74 M.J. 132, 134 (C.A.A.F 2015).

[3] Of these, four were from the CID agents notes of her interview. (R. at 222, 234, 241, 246).

If the military judge erred in applying R.C.M. 914, the appellate court will determine in de novo review whether there was prejudice to the appellant. *United States v. Sigrah,* 82 M.J. 463, 468 (C.A.A.F. 2022). In this case, the appellant's ability adequately cross-examine his accuser was substantially prejudiced.

Law

A. R.C.M. 914 (2019) Applies.

As the military judge noted, appellant was arraigned on 5 July 2023. (R. at 2-10). On 28 July 2023, Executive Order 14103 amended R.C.M. 914(e) to state a military judge may only exercise one of the enumerated remedies[4] only if the statement is of such central importance to an issue that it is essential to a fair trial, and there is no adequate substitute for the statement.[5] Since the Accused was arraigned prior to the issuance of the executive order, the "old" provisions of R.C.M. 914 therefore apply. (App. Ex. XXV, p.5). This limits the remedy available to the military judge, and this court, to either 1) strike the testimony of the witness

[4] R.C.M. 914(e) (2019)…that the testimony of the witness be disregarded by the trier of fact…or…if it is the Government that elects not to comply, shall declare a mistrial if required in the interest of justice.
[5] Federal Register, page 50560-50561. 88 FR 50560-50561.

or 2) declare a mistrial if it is in the interests of justice. R.C.M. 914(e), *Manual for Courts-Martial, United States (2019 ed.)* [*M.C.M.*].

At trial, the Government conceded R.B.'s recorded interview was a statement within the meaning of R.C.M. 914 and it had been in the Government's possession. (App. Ex. IV, p. 1).[6] However, the Government argued it had not acted negligently when it came to preserving the Victim's statement to CID but had acted in good faith and there was an adequate substitute for the missing interview. (App. Ex. IV).

B. Good Faith & Adequate Substitute

The military judge described the loss of the statement as an example of "force major[sic]."[7] (App. Ex. XXV, p. 6). The military judge ruled CID could not have foreseen or prevented the system crash. (App. Ex. XXV, p. 6). The key element of force majeure clauses is "foreseeability." *TEC Olmos, LLC v.*

[6] "…while the statement made by [redacted] at CID headquarters on 15 September 2022 is no longer in possession of the Government…"
[7] A search of Lexis+ did not reveal any military court every having used this term previously.

Conocophillips Co., 555 S.W.3d 176, 181-182 (Tex. App. 2018).[8] Force majeure events typically are limited to such terms as "fire, flood, storm, act of God, governmental authority, labor disputes, war." *Id*. at 186.

The "good faith," exception for R.C.M. 914 has generally been limited. *United States v. Muwwakkil*, 74 M.J. 187, 193 (C.A.A.F. 2015) citing *United States v. Jarrie*, 5 M.J. 193, 195 (C.M.A. 1978). In *Muwwakkil*, the Government negligently lost a portion of a victim's statement at an Article 32 hearing where she was subject to cross-examination or redirect. *United States v. Muwwakkil*, 74 M.J. at 189-190. In striking the testimony of the alleged victim the trial court ruled:

> (1) the summarized testimony was not substantially verbatim…(3) impeachment of GP was the defenses's "most important strategy," and (4) GP was one of two key witnesses" in the case," (5) the investigating officer found GP's testimony to be "inconsistent with previous statements"; and (6) there was no substitute for the Article 32, UCMJ recording." *Id*. at 190.

The court drew a distinction from *United States v. Marsh* where, while the recording was lost, the summarized transcript was "almost word for word." *Muwwakkil*, 74 M.J. at 194.

[8] In this case, the court found an economic downturn was not such an unforeseeable occurrence that would justify application of the force majeure provision. *Id*. at 184.

In all the cases where the government has relied on "good faith" to avoid striking a witness's testimony, an almost verbatim copy of the testimony in question was available.[9] The *Jencks Act* was designed to ensure government witnesses could be impeached with those statements which could fairly be said to be the witnesses' own rather than the product of the investigators, selections, interpretation and interpolations." *United States v. Patterson*, 10 M.J. 599, 601, citing *United States v. Palermo*, 360 U.S. 343 (1959).

Argument

The military judge erred in his ruling. In this case, the Government was negligent in maintaining critical evidence in the case. Even if the loss was "in good faith," the crux of the issue remains the absence of an adequate substitute for B.R.'s testimony which resulted in prejudice to appellant.

A. The Government Was Negligent

CID conducted an audio-visual interview with [redacted] which was recorded on the proprietary system known as "Casecracker." (R. at 58). Like in *United States v. Clark*, 79 M.J. 449, 454 (C.A.A.F. 2020) this statement was "lost." Here, the

[9] See *United States v. Marsh*, 21 M.J. 445 (C.M.A. 1986); *United States v. Strand*, 21 M.J. 912, 915-916 (N-M.C.M.R. 1986)

military judge found the loss of this statement was "unforeseeable." However, for the government to claim a software crash and subsequent loss of data is unforeseeable defies all knowledge of the history of computers and common sense.[10] Software crashes are foreseeable and occur regularly and data will be lost if the proper measures to back up the data are not in place. Furthermore, CID had believed they had burned a copy of [redacted] interview, but negligently failed to check to ensure the recording was on the CD.

B. There is No Adequate Substitute for [redacted] audio-visual testimony to CID

Good faith is the norm from which "neither adverse nor benefits flows." *United States v. Carrasco*, 537 F.2d 372, 376 (9th Cir. 1976). There is no substitute for the Victim's testimony, regardless of good faith on the part of the government.

Here, there are critical differences between [redacted] initial statements to the MPs and her subsequent statement to CID, just based on the 39 lines of text CID summarized. [redacted] had to have her memory refreshed on multiple occasions. While

[10] On 19 July 2024, a defective software update led to major disruptions in aviation, banking and other industries worldwide. Crowdstrike Software Update At the Root of a Massive Global IT Outage, David Jones, Cybersecurity Dive, July 19, 2024. https://ipps-a.army.mil/Resources/News/Article/3412934/ipps-a-known-issues-and-guidance/.

Defense Counsel was able to highlight some issues, it is frankly impossible to know what [redacted] might have disclosed while having "vomit of the mouth" at the CID office. Ironically, even Government counsel was apparently concerned with [redacted] recollections of the CID interview at trial.[11]

Even more damning, rather than engaging on her domestic violence allegations, CID repeatedly had to steer [redacted] back to her sexual assault allegations. (R. at 67). The CID summary was, not just limited, but the agent's "selections, interpretation and interpolations." *Patterson*, 10 M.J. 599, 601.

Unlike in *Marsh* there is no verbatim transcript upon which the government can hang its hat. Instead, we have a *Muwwakkil* situation: 1) an alleged victim with credibility issues, 2) who makes a statement to the government, and 3) the government loses the statement. Good faith or not, the only appropriate remedy at trial was to abate the proceedings or declare a mistrial.

C. Prejudice

[11] Having created this situation through their negligence the prosecution unironically objected at trial to the use of CID's summary to refresh B.R.'s recollections, saying, "It's not her words or adoptions…" (R. at 232-233 & App. Ex. IV, p. 8).

A criminal trial is a quest for truth rather than an adversarial game. *United States v. Strand*, 21 M.J. 912, 914 (N-M.C.M.R. 1986). Appellant's ability to cross examine his accuser was prejudiced as a result of the military judge's failure to correctly apply the law. Using the framework of *United States v. Sigrah*, the military judge's failure to strike [redacted] testimony prejudiced the Appellant.[12]

Here, the government's case, without [redacted] testimony was non-existent. The only corroboration the Government possessed was the appellant's statement to military police and CID, and those statements bore only a tangential relation to [redacted] allegations. Without [redacted] testimony there was zero corroboration the appellant ever committed an assault of [redacted]

Second, defense counsel relied heavily on the cross examination of [redacted] and without the full and complete interview of [redacted]s interview with CID, where she had "vomit of the mouth," they were handicapped. Had appellant been able to even more thoroughly cross-examine her, it is not a fanciful possibility they would have found appellant not guilty of all the Article 128b charges.

[12] "This court weighs: (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. *United States v. Sigrah*, 82 M.J. 463, 467 (C.A.A.F. 2022)

Third, as stated previously, [redacted] allegations were the foundation of the government's case; without them the appellants' alleged offenses were merely violations of local regulations.

Fourth, the quality of the evidence available to defense was limited. It was thirty nine lines of text written from a CID agents' point of view of a two-hour interview. It is more than a supposition to say appellant was handicapped in his cross examination of his primary accuser. Perhaps [redacted] made further inconsistent statements when she spoke to CID. Perhaps the panel would have perceived her attitude differently than CID and would have concluded she was completely uncredible. Appellant does not know and neither could the panel.

Conclusion

The only appropriate remedy in this case is to vacate and dismiss Specification Two of Charge I with prejudice. No other remedy will suffice since the recording is gone and the government concedes it is not coming back.

II. WHETHER THE MILITARY JUDGE ERRED IN FINDING APPELLANT'S STATEMENT TO CID WAS VOLUNTARY.

CID interviewed appellant on three separate occasions. It was the last occasion, after an allegedly failed polygraph where appellant made inculpatory

statements and which is the subject of this assignment of error. The military judge erred in finding appellant's statement was voluntary. Appellant's statement was procured through artifice and trickery and [redacted] attempting to dissuade appellant from exercising his right to an attorney.

Facts Relevant to the Assignment of Error

Appellant is 23 years old with a high school education. At the time of his first interview with CID he had been in the Army for a little over 4 years. (A.E. IX, p. 1 of 9).

[redacted] initially questioned appellant on 26 September 2022. (App. Ex. 1, p. 2). During this interview appellant denied all of [redacted] allegations. (App. Ex. 1, p. 2). Appellant provided CID with some information verifying his narration of events.[13]

[redacted] then scheduled an interview with appellant to conduct a polygraph. (R. at 22). [redacted] properly advised appellant of his Art. 31 rights prior to beginning the post polygraph interview. (R. at 319). Throughout the interview [redacted] continually emphasized the importance of appellant not

[13] Rather than seeking to corroborate appellants narrative of events, CID ignored his statements. R. at 343.

"closing out your discussion with CID." (Pros. Ex. 3: Time Stamp 11:03:20-11:03-31). Approximately two hours after waiving his right to counsel, appellant makes an inquiry regarding his right to counsel. (R. at 26, 348, Pros. Ex. 3: Time Stamp: 11:12:30). He specifically asks, "Would we have to come back?" (Pros. Ex. 3: Time Stamp: 11:12:35). [redacted] stated, "If you ask for a lawyer, we will have to end this and you'd go talk to them, and they wouldn't come in here." As Appellant hesitated, [redacted] stated, "Those are your options. But I think this is something you can resolve without that [an attorney] since *we're already here*." (Pros. Ex. 3: Time Stamp: 11:12:27 – 11: 13: 29). Appellant, sufficiently convinced an attorney would result in having to return to CID, continued the interview. (Pros. Ex. 3: Time Stamp: 11:13:12; what about Article 39a?).

Defense counsel moved to suppress appellant's interview at trial as involuntary. (App. Ex. I). The military judge denied the motion. (A.E. IX). The military judge found appellant had not unequivocally stated he wanted an attorney after he had waived his Article 31 rights. (A.E. IX, p. 8 of 9).

Standard of Review

"A military judges denial of a motion to suppress a confession is reviewed for an abuse of discretion." *United States v. Chatfield*, 67 M.J. 432, 437 (C.A.A.F.

2009). When analyzing the voluntariness of an accused's statements to investigators, the CCA's review the totality of the circumstances to determine whether the accused's will was overborne and his capacity for self-determination was critically impaired. *Chatfield*, 67 M.J. at 439 (quoting *United States v. Bubonics*, 45 M.J. 93, 95 (C.A.A.F. 1996)). This analysis includes the accused's "age, education, experience, and intelligence as part of the circumstances bearing on the question whether a statement was voluntary." *Id*. at 439-40.

Law

In *Whitehead*, the accused was suspected of murder. *U.S. v. Whitehead*, 26 M.J. 613, 614 (A.C.M.R. 1988). CID interrogated the accused after he had allegedly failed a polygraph. *Whitehead* at 615. The accused made an equivocal statement, "Maybe I should get an attorney." *Id.* at 615. The CID agent said, "If you didn't do anything wrong, Ed, you don't need one, right?" *Id.* The accused subsequently said, "I don't need one," and the interview continued. The CMA found when a properly warned person manifests during the interrogation process indecision in the exercise of his rights, an interviewer may question the suspect only as to whether he does or does not waive counsel. *Whitehead* at 619. Particularly, the court drew attention to the agent using the classic method of

interrogation, where CID concedes the accused has a right to [to remain silent/speak to an attorney] but then points out the incriminating significance of his refusal to talk. *Id*. at 618. Ultimately, the CCA suppressed the Accused's statement in *Whitehead*. *Id*. at 620.

Argument

All parties at trial missed the critical holding in *Whitehead*: law enforcement cannot *dissuade* an appellant from invoking their rights. Like in *Whitehead*, here, appellant requested information regarding his right to counsel. In both cases, the accused paused, and unable to restrain themselves, CID then makes an active effort to *dissuade* the appellant from invoking his right to counsel. In this case "…this is something we can resolved without [a lawyer]," and in *Whitehead*, "…you don't need one [a lawyer] right?" An investigator's use of trickery, artifice, or subterfuge in obtaining a confession is generally admissible but the use of such tactics in discouraging an invocation of rights invalidates any waiver and is improper. *United States v. Campbell*, 76 M.J. 644, 654 (A.F. Ct. Crim. App. 2017) citing *U.S. v. Whitehead*, 26 M.J. 613, 619 (A.C.M.R. 1988).

Conclusion

Appellant was dissuaded from invoking one of the most critical rights a person accused of a crime can have, a zealous attorney. CID deliberately violated this right. Since the Accused's inculpatory statements regarding his concealed weapon and assault of [redacted] were both procured after CID violated appellants' rights, specification two of Charge I and The specification of Charge IV should be vacated and dismissed with prejudice.

For all the foregoing reasons this court should vacate these findings, as well as the sentence as to Charge I and Charge IV.

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically filed with the Army Court and Government Appellate Division on October 24, 2024.

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