UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
ALDYKIEWICZ, BURTON, and WALKER
Appellate Military Judges

UNITED STATES, Appellee
v.
Private E2 LEEROY M. SIGRAH
United States Army, Appellant

ARMY 20190556

Headquarters, Fort Campbell
Matthew A. Calarco and Jacqueline Tubbs, Military Judges
Colonel Laura J. Calese, Staff Judge Advocate

For Appellant: Captain David D. Hamstra, JA (argued); Colonel Michael C. Friess, JA; Lieutenant Colonel Angela D. Swilley, JA; Major Christian E. DeLuke, JA; Captain Paul T. Shirk, JA (on brief); Colonel Michael C. Friess, JA; Lieutenant Colonel Angela D. Swilley, JA; Major Christian E. DeLuke, JA; Captain David D. Hamstra, JA (on reply brief); Colonel Michael C. Friess, JA; Lieutenant Colonel Angela D. Swilley, JA; Captain Thomas J. Travers, JA; Captain David D. Hamstra, JA (on supplemental brief); Colonel Michael C. Friess, JA; Lieutenant Colonel Angela D. Swilley, JA; Captain Julia M. Farinas, JA; Captain David D. Hamstra, JA (on supplemental reply brief).

For Appellee: Captain R. Tristan C. DeVega, JA (argued); Colonel Steven P. Haight, JA; Lieutenant Colonel Wayne H. Williams, JA; Major Brett A. Cramer, JA; Captain R. Tristan C. DeVega, JA (on brief); Major Brett A. Cramer, JA; Captain R. Tristan C. DeVega, JA (on surreply brief); Colonel Steven P. Haight, JA; Lieutenant Colonel Wayne H. Williams, JA; Major Brett A. Cramer, JA; Captain R. Tristan C. DeVega, JA (on supplemental brief).

9 June 2021

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

WALKER, Judge:

On appeal before this court pursuant to Article 66, UCMJ, appellant raises five assignments of error, two of which merit discussion but no relief.[1] Specifically, appellant claims the military judge abused her discretion in denying defense counsel's motions to strike testimony of government witnesses under Rule for Courts-Martial (R.C.M.) 914. Appellant further argues the government violated its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), by withholding favorable and material evidence. We agree with appellant that the military judge erred in her application of R.C.M. 914, but conclude appellant suffered no prejudice. Further, we find appellant affirmatively waived his *Brady* claim. Therefore, we affirm the findings and sentence.[2]

I. BACKGROUND

A. Events Leading to the Charges

In February 2018, the victim, a female Specialist (SPC) in the U.S. Army, spent the evening socializing and consuming alcohol with friends. Following a farewell party, she went to a male friend's, SPC D's, barracks room. Once at SPC D's barracks room, she continued socializing and consuming alcohol with SPC D and two other male soldiers, appellant and SPC B, both of whom she knew. After consuming around seven shots of alcohol at the farewell party and another two beers at SPC D's barracks room, the victim felt very intoxicated and went to sleep alone in SPC D's bed, fully clothed. Her next memory was waking up with her legs spread, her pants and underwear partially removed, and with a person on top of her. She testified the person on top of her was appellant, based in part on seeing his silhouette and hearing his voice. After pushing appellant off of her, she left SPC

[1] A panel of officers with enlisted representation sitting as a general court-martial convicted appellant, contrary to his plea, of one specification of sexual assault, in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920 [UCMJ]. The panel sentenced appellant to a dishonorable discharge, confinement for twelve years, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority approved the adjudged sentence.

[2] We gave full and fair consideration of the remaining three assignments of error concerning the military judge's correction of the record under R.C.M. 1112(d) as ordered by this court, the factual sufficiency of appellant's conviction, and dilatory post-trial processing, and have likewise fully and fairly considered the matter appellant personally submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). None of these issues warrant discussion or relief.

D's room and returned to her own room. Once back in her room, the victim cried herself to sleep. The next morning, she woke up with pain in her vaginal area, consistent with sexual intercourse.

Later that day, appellant began sending messages to the victim. In his opening message, he wrote, "I fucked up. U have all the reasons in this world to hate. I'm very sorry. I really am. u don't have to reply. I just wanna say how sorry and stupid I am." (emojis omitted). In another message, appellant wrote, "I feel guilty as fuck." Despite the sheer volume of messages sent to the victim, nowhere did appellant admit to the victim the specifics of what happened in SPC D's bedroom. The victim did not recall being penetrated. Specialist D, however, testified at trial that appellant stated to him that he pulled down the victim's pants and had sex with her.

B. The Investigation and Charges

Initially, the victim did not want to report the incident, but chose to do so approximately a week later after talking with friends and upon realizing it was not something she could simply let go. Following the report, Army Criminal Investigation Command (CID) began an investigation. As part of the investigation, CID Special Agent (SA) M, with the assistance of SA P, interviewed the victim, appellant, SPC D, and SPC B. All of the interviews were video recorded and temporarily stored on a CID server. At the relevant time in February 2018, the Fort Campbell CID interview rooms were configured in a manner such that the video-recording feature automatically began whenever someone entered an interview room. In order to record the audio of an interview, however, the interviewing CID agent had to affirmatively press a button to engage the audio recording feature. As SA M testified, "[T]he only button that we have to click is an audio button. So we have the option to turn the audio on and off in the interview rooms, but the video is always recording."

Video recordings of interviews—and the audio recordings of interviews, if the button was pressed—were automatically stored on a CID server with limited storage space. Unless a CID agent accessed the server and affirmatively preserved a specific recording, the recordings were automatically overwritten when the server's storage capacity was reached. According to SA M, it was CID policy at the time to preserve only subject interviews on a physical disc.[3] Depending on the storage capacity of the CID server, non-subject witness interviews would be overwritten approximately thirty to forty-five days after the interview.

[3] The only evidence of the CID policy was provided by the testimony of SAs M and P. No written policy was entered into evidence.

In this case, only appellant's CID interview—video and audio—was preserved on a physical disc. The interviews of the victim and SPCs D and B were not affirmatively preserved by CID and, as such, were eventually automatically overwritten. These three recordings contained both audio and video because the audio button was engaged prior to entering the interview rooms. Indeed, SA M testified, "My practice is I always turn the audio on . . .". The victim and SPCs D and B did, however, provide written sworn statements to CID during their interviews, all of which were preserved and disclosed to the defense. The victim wrote a seven-page sworn statement; SPC D wrote a five-page sworn statement; and SPC B wrote a four-page sworn statement. In addition to appellant, SPC D was advised of his Article 31(b), UCMJ, rights prior to his interview and waived his rights. Notwithstanding the rights advisement, SPC D's interview was not affirmatively preserved. According to SA M, SPC D was issued a rights advisement based on guidance SA M received from his supervisors. At the time, however, CID believed appellant was the "suspect subject." Special Agent M testified that the issuance of Article 31(b), UCMJ, rights was not the "threshold that determines if a recording is going to be burned to a disc or not."

In addition to conducting recorded interviews, in February 2018, CID executed a magistrate-issued search authorization to collect appellant's DNA. Law enforcement also collected the victim's and SPC D's DNA with their consent, as well as the linens from SPC D's bed. All of these materials were sent off for laboratory testing and analysis. The DNA report was completed on 12 June 2018.

The government preferred the court-martial charge against appellant on 1 October 2018. The Article 32, UCMJ, preliminary hearing was conducted on 7 December 2018 and on 27 December 2018, the preliminary hearing officer issued her report recommending trial by general court-martial. The Charge and its Specification were referred to trial by general court-martial on 27 March 2019. On 7 May 2019, defense counsel filed a discovery request. In the request, defense counsel requested, among other things, "[a] complete copy of any law-enforcement investigation that relates to this matter." The government responded to defense's discovery request on 12 May 2019. In the government's response, it stated, among other things, "[a] complete copy of [appellant's CID case file] is available for inspection by Defense at CID Fort Campbell, Kentucky. The point of contact for inspecting said files is SA [P] . . . . The Government provided Defense a hard copy of that investigation on 01 October 2018, followed by delivery of digital media on 02 October 2018." The record reveals no pretrial motions to compel discovery by the defense.

C. Litigation of R.C.M. 914

Following the victim's direct examination, defense counsel moved to strike her testimony under R.C.M. 914 because the government failed to preserve her

recorded interview. In support of the motion, defense counsel called SAs M and P, whose testimony is summarized above. The government offered no evidence, relying solely on argument. Trial counsel acknowledged the victim's recorded interview contained statements and that the government could not produce those statements due to the recording being automatically overwritten. Trial counsel argued that despite the loss of the statements, there was no showing of bad faith on the part of CID and that the defense had access to the victim's sworn statement. During the same Article 39(a), UCMJ, hearing, the defense indicated it would be making the same motion, supported with the same evidence, with respect to the testimony of SPCs D and B. The government maintained its argument concerning the absence of bad faith and the availability of sworn statements as to SPCs D and B. The military judge orally denied defense counsel's R.C.M. 914 motions for all three witnesses and stated she would supplement the record with written findings of fact and conclusions of law.

Following a correction of the record ordered pursuant to R.C.M. 1112(d), the court received the military judge's written R.C.M. 914 ruling. In her ruling, the military judge found that the recorded interviews of the victim and SPCs D and B were "technically . . . recorded statement[s]" that were "deleted/overwritten prior to preferral of charges." However, she concluded there was "no violation of R.C.M. 914 or the Jencks Act." She also found there "was no evidence presented that law enforcement acted in bad faith or in a negligent manner." The military judge further concluded that all three witnesses provided "comprehensive, thorough and detailed" sworn statements and that the statements "constitute[d] an adequate substitute for the deleted video recordings."

D. The DNA Report

Following the announcement of appellant's sentence and immediately prior to final adjournment, defense counsel informed the military judge that the defense had recently received a DNA report dated 12 June 2018. The DNA report was purportedly produced by the Defense Forensic Science Center as part of CID's investigation of appellant. Defense counsel informed the military judge that the defense was aware the report existed the day before trial, but did not receive a copy of it until the members were deliberating on a sentence. Defense counsel stated nothing was being alleged at the time and that additional time would be needed to review the report, possibly with expert assistance, to determine if it contained favorable and material information. Defense counsel concluded, stating:

> If the defense believes that we are entitled to relief under *Brady* for a *Brady* violation, the defense will make a request for a post-trial Article 39(a) session with the Court for a potential *Brady* violation and a potential mistrial. We do not request a decision today. The defense needs

> more time to find out if this evidence is, in fact, material, Your Honor.

Trial counsel did not respond to defense counsel's comments and the military judge adjourned the court-martial on 15 August 2019. Ultimately, defense counsel noted the DNA report issue in appellant's 15 September 2019 post-trial submissions to the convening authority. Defense counsel never requested a post-trial hearing or the appointment of expert assistance.

II. LAW AND DISCUSSION

A. The Military Judge's R.C.M. 914 Ruling

Appellant claims the military judge abused her discretion when she denied defense counsel's motions to strike the testimony of the victim and SPCs B and D based on the government's failure to produce their recorded CID interviews. We review a military judge's ruling on a R.C.M. 914 motion for an abuse of discretion. *United States v. Clark*, 79 M.J. 449, 453 (C.A.A.F. 2020) (citing *United States v. Muwwakkil*, 74 M.J. 187, 191 (C.A.A.F. 2015)). A military judge abuses her discretion when: (1) "h[er] findings of fact are clearly erroneous," (2) "the military judge's "decision is influenced by an erroneous view of the law," or (3) when "the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F. 2008) (citations omitted). To find an abuse of discretion under the last of these tests, our superior court requires "more than a mere difference of opinion"; rather, the military judge's ruling "must be arbitrary, fanciful, clearly unreasonable or clearly erroneous." *United States v. Collier*, 67 M.J. 347, 353 (C.A.A.F. 2009) (internal quotation marks omitted) (citations omitted).

Rule for Courts-Martial 914(a) states "[a]fter a witness other than the accused has testified on direct examination, the military judge" upon motion of the opposing party shall order the production of "any statement of the witness that relates to the subject matter concerning which the witness has testified." A "statement" is defined, in part, as "[a] substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and contained in a[n] . . . electrical, or other recording." R.C.M. 914(f)(2). If the government, as the opposing party, fails to produce a qualifying statement, R.C.M. 914(e) provides the military judge with two remedies for the government's failure to deliver the qualifying statement: (1) "order that the testimony of the witness be disregarded by the trier of fact" or (2) "declare a mistrial if required in the interest of justice."

Not every failure to produce a qualifying statement triggers a R.C.M. 914 remedy. Both the Supreme Court and the Court of Appeals for the Armed Forces

[CAAF] "have indicated 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 (citing *Muwwakkil*, 74 M.J. at 193; *United States v. Augenblick*, 393 U.S. 348, 355–56 (1969)). "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.* (citing *Muwwakkil*, 74 M.J. at 193). If a military judge is convinced the good faith loss doctrine applies to excuse the government's loss of a qualifying statement, then a R.C.M. 914 remedy is not required, even though the government violated the rule by its plain text. The good faith loss doctrine, however, is "generally limited in its application." *Muwwakkil*, 74 M.J. at 193 (quoting *United States v. Jarrie*, 5 M.J. 193, 195 (C.M.A. 1978)).

1. The Military Judge Erred by Concluding R.C.M. 914 was not Violated

We first address the military judge's determination that "there was no violation of R.C.M. 914 or the Jencks Act." We easily conclude that the recorded interviews of the victim and SPCs D and B constitute "statements" for purposes of R.C.M. 914. Trial counsel acknowledged as much during the Article 39(a), UCMJ, hearing, government appellate counsel conceded the point, and the testimony makes clear that the CID interviews of these three witnesses—both video and audio—were automatically recorded and subsequently overwritten. As the CAAF recently stated, military jurisprudence "has favored an expansive interpretation of the definition of 'statement' with respect to the Jencks Act." 79 M.J. at 454. In *Clark*, the CAAF concluded that even a law enforcement officer's comments during a video-recorded interview constituted statements for purposes of R.C.M. 914.

Here, because qualifying statements were created, demanded, and not produced, the government violated R.C.M. 914. It appears the military judge conflated the threshold determination of whether a R.C.M. 914 violation occurred with the follow-on determination of whether the good faith loss doctrine applied to excuse the government's loss of the statements. This was error. Clearly, the government violated R.C.M. 914 in this case.

2. The Military Judge Erred by Concluding the Good Faith Loss Doctrine Applied

Having found a R.C.M. 914 violation, we next address whether the military judge abused her discretion in finding that the government's failure to produce the qualifying statements in this case did not constitute a violation of R.C.M. 914 because the loss was excusable under the good faith loss doctrine. The military judge, in a "finding of fact," concluded there "was no evidence presented that law enforcement acted in bad faith or in a negligent manner in recording" the victim's and SPCs D and B's statements. We agree with the military judge's determination that there was no evidence of bad faith but find her conclusion as to negligence is clearly erroneous in light of the record.

As to bad faith, the record contains no evidence of intentional or deliberate suppression of exculpatory statements, nor is this a case where the loss of a statement was unexplained. *Cf. United States v. Bryant*, 439 F.2d 642, 645–67 (D.C. Cir. 1971) (discussing the "intentional non-preservation by investigative officials of highly relevant evidence," a video recording of the appellant's controlled drug transaction in a motel room, "colored by clear reluctance even to admit that the evidence ever existed at all"). Given the record, we do not disturb the military judge's determination on this point.

What the record does contain, however, is overwhelming evidence of negligence on the part of CID in electing to make audio and video recordings of these three witnesses and then letting those recordings spoil. On its face, the CID policy violated neither R.C.M. 914 or the Jencks Act because there was no obligation for CID to *create* qualifying statements during their interviews of the witnesses in this case. *See United States v. Bernard*, 625 F.2d 854, 859–60 (9th Cir. 1980) (rejecting a claim that the government is required to create Jencks Act material by recording everything a potential witness says). Despite the lack of an obligation to create qualifying statements, the CID agents in this case *elected* to create such statements by affirmatively engaging the audio recording feature in the interview rooms. In so doing, CID created qualifying statements and assumed a responsibility to preserve them. *See United States v. Scott*, 6 M.J. 547, 549 (A.F.C.M.R. 1978) (footnotes omitted) ("It is clear that there is no obligation on the part of the Article 32 investigating officer to cause statements to be recorded verbatim. When they are recorded, however, they must be retained."). Once the CID agents elected to create qualifying statements, the existence of a CID policy not to preserve said statements cannot absolve the government of its requirements under R.C.M. 914. Simply put, a routine CID policy does not excuse violating R.C.M. 914. *See United States v. Carrasco*, 537 F.2d 372, 376 (9th Cir. 1976) (declining to apply the good faith loss doctrine because the law enforcement agent's destruction of a statement—while consistent with the agency's routine practice—was "manifestly unreasonable").

Here, the military judge's barebones conclusion that there was no evidence of CID negligence failed to address what the record plainly demonstrates. Law enforcement *elected* to create qualifying statements and then *elected* not to preserve the statements. The fact that the recordings were automatically overwritten without any affirmative actions by CID agents does not inure to the government's benefit. It is not disputed that CID had both the technological means and between thirty and forty-five days to access the server and preserve the statements on a physical disc, just as the agents did in this case with respect to appellant's recorded interview. This constitutes sufficient negligence to preclude the application of the good faith loss doctrine. Indeed, in *Clark*, the CAAF assumed without deciding that the good faith loss doctrine did not apply to the loss of a portion of the appellant's video-recorded interview because a plausible reading of the record indicated "the military

judge made a negligence finding when he found that 'the Ft. Campbell CID Office appears to have inadequate procedures to ensure they know who is conducting the proper preservation of interviews recorded on Casecracker, at least in this case.'" 79 M.J. at 454. Though insufficiently explained or analyzed by the military judge, the CID deficiency is even more patent in this case. This is not a case about inadequate preservation procedures; rather, this case concerns a CID policy *not to preserve* qualifying statements. Under the circumstances, the military judge's finding of no negligence and application of the good faith loss doctrine were clearly unreasonable.

B. Prejudice

Having found the military judge erred in denying defense counsel's R.C.M. 914 motions, we must determine whether the error prejudiced appellant. *Clark*, 79 M.J. at 454 (citing UCMJ art. 59(a)). We "test for prejudice based on the nature of the right violated." *Id.* (quoting *United States v. Tovarchavez*, 78 M.J. 458, 465 (C.A.A.F. 2019)). "Generally, a Jencks Act violation will not rise to a constitutional level." *Id.* (citing *Augenblick*, 393 U.S. at 356). As the Supreme Court stated in *Augenblick*, a case where the government lost a video recording of an interview with a key prosecution witness (the other participant in the indecent act), "apart from trials conducted in violation of express constitutional mandates, a constitutionally unfair trial takes place only where the barriers and safeguards are so relaxed or forgotten . . . that the proceeding is more a spectacle . . . or trial by ordeal . . . than a disciplined contest." 393 U.S. at 356 (citations omitted). In *Clark*, the CAAF declined to test the error for constitutional prejudice, but noted there may be circumstances in which the failure to produce statements infringes upon the constitutional right of confrontation. 79 M.J. at 454–55. It did not apply the constitutional prejudice standard in part because the CID agents in that case were subject to cross-examination concerning the missing portion of appellant's video-recorded interview. *Id.* at 455.

Given that the victim, SPCs D and B, and the CID agents in this case all testified and were subject to cross-examination, we conclude appellant was not denied his constitutional right to confront the witnesses against him. Additionally, we do not view the proceedings as constitutionally unfair as the Supreme Court described that term in *Augenblick*. Consequently, we test for prejudice under the nonconstitutional standard, where the question is "whether the error had a substantial influence on the findings." *Clark*, 79 M.J. at 455 (quoting *United States v. Kohlbek*, 78 M.J. 326, 333 (C.A.A.F. 2019)). Our review for prejudice is de novo. *Id.*

The parties disagree over the applicable framework for addressing prejudice. Appellant contends the familiar standard reiterated by the CAAF in *United States v. Kohlbek* controls and that we should weigh: (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. 78 M.J. 326, 333 (C.A.A.F. 2019). The government argues we should apply the standard articulated by the Supreme Court in *Rosenberg v. United States*, where the Court stated a Jencks Act violation may be held harmless if the defense otherwise had access to the same information. 360 U.S. 367, 371 (1959). Looking at the precedent of our superior court, there is good cause for the parties' disagreement on this issue.

In *United States v. Marsh*, 21 M.J. 445 (C.M.A. 1986), the government lost a recording of the Article 32, UCMJ, preliminary hearing. In place of the Article 32, UCMJ, recording, the government provided the defense with a summarized transcript of the proceedings. *Id.* at 452. Notwithstanding the loss of the recording, our superior court determined that the defense counsel "was not significantly encumbered in his cross-examination of government witnesses" and was still able to conduct "effective" cross-examination based on the summarized transcript. *Id.* Although the *Marsh* opinion did not cite *Rosenberg*, it appeared to apply a similar standard, concluding the summarized transcript of the lost recording was sufficient for the defense to conduct effective cross-examination of government witnesses because the summarized transcript contained essentially the same information as the lost recording. The *Marsh* opinion did not analyze the relative strengths of the cases and the materiality and quality of the evidence in question, although that framework for addressing prejudice was first adopted the previous year in *United States v. Weeks*, 20 M.J. 22, 25 (C.M.A. 1985). Our predecessor court and our sister courts have likewise applied *Marsh*'s reasoning in this context. *See United States v. Guthrie*, 25 M.J. 808, 811 (A.C.M.R. 1988); *United States v. Cook*, 2001 CCA LEXIS 19, *18 (A.F. Ct. Crim. App. 29 Jan. 2001) (unpublished) (citing *United States v. Barber*, 20 M.J. 678, 681 (A.F.C.M.R. 1985)); *United States v. Strand*, 21 M.J. 912, 915 (N.M.C.M.R. 1986). The *Marsh* framework—an assessment of whether a defense counsel's representation was materially encumbered by the government's failure to produce qualifying statements—permeates Article III case law. *See, e.g.*, *United States v. Hill*, 976 F.2d 132, 140–42 (3d Cir. 1992) (citing *Rosenberg*, 360 U.S. at 371).

More recently in *Clark*, the CAAF explicitly applied both analytical frameworks when addressing prejudice. 79 M.J. at 455. Applying the *Kohlbek*/*Weeks* standard, the CAAF determined the appellant suffered no prejudice because even assuming the testimony in question should have been stricken based on the government's loss of a portion of the appellant's recorded CID interview, the record otherwise contained sufficient evidence of appellant's guilt. *Id.* The CAAF continued its prejudice analysis, however, noting that in the context of R.C.M. 914 and the Jencks Act, "a failure to produce may be held harmless if the defense otherwise had access to the same information." 79 M.J. at 455 (citing *Rosenberg*, 360 U.S. at 371). In applying the *Rosenberg* standard, the CAAF concluded that even though the appellant did not have the "very same information" that would have

been available had the government not lost a portion of the appellant's recorded CID interview, he nevertheless suffered no prejudice because the defense counsel still possessed "sufficient information to cross-examine" the CID agent based on appellant's participation in the interview and because appellant explained in his own testimony the manner in which CID conducted the interrogation. *Id.* The judgment in *Clark* did not turn on the analytical framework employed for assessing prejudice because, under either standard, the appellant suffered no prejudice. *Id.* Such is not the case here.

An exclusive application of the *Kohlbek*/*Weeks* standard would easily result in a finding of prejudice to appellant and compel us to set aside the findings and the sentence. If the testimony of the victim and SPCs D and B was struck at trial based on R.C.M. 914, it would have eviscerated the government's case. At oral argument, government appellate counsel did not dispute this point, and for good reason. Unlike *Clark*, there was scant independently admissible evidence in this case to prove appellant's guilt.

Under the *Rosenberg* standard, however, we reach a different result. Given the longstanding precedent on this issue—both from our superior court, our own court, our sister courts, and, of course, the Supreme Court—we conclude this is the correct analytical framework for addressing prejudice in the context of the Jencks Act and R.C.M. 914. As the CAAF stated in *Muwwakkil*, "our Jencks Act case law and that of the Supreme Court informs our analysis of R.C.M. 914 issues." 74 M.J. at 191. In *Clark*, the CAAF both cited and applied Supreme Court case law in the specific context of Jencks Act prejudice. We believe we are bound to do the same, while recognizing the judgment in this case would be different if we strictly applied the *Kohlbek*/*Weeks* prejudice framework. Our *Rosenberg* analysis follows.

Here, as in *Clark* and *Marsh*, defense counsel did not possess the "very same information" that would have been available had the recordings not been lost. *Clark*, 79 M.J. at 455. Nevertheless, we conclude the defense counsel's cross-examination of these witnesses "was not significantly encumbered" because all of the witnesses provided contemporaneous, detailed, sworn statements, adequately capturing, in their own words, their discussions with CID on the facts of central importance. *Marsh*, 21 M.J. at 452. This case does not present "the kind of uncertainties that necessitated corrective action in [*Jarrie*], where summarization of an informant's statement was untimely and of dubious accuracy." *Strand*, 21 M.J. at 915. Like our sister court concluded in *Strand*, "[w]e are confident that . . . appellant had substantially the same information." *Id.*; *see United States v. Boyd*, 14 M.J. 703, 705–06 (N.M.C.M.R. 1982). Furthermore, all of the witnesses, including the CID agents who interviewed them, were subject to cross-examination about the details of the interviews. *See Clark*, 79 M.J. at 455. Finally, we reiterate the lack of malicious intent on the part of CID and no evidence of any intent to destroy or

conceal possibly exculpatory evidence. In conclusion, we find that the military judge's errors in this case did not substantially influence the findings.[4]

C. The Brady Allegation

Appellant asserts the government violated its obligations under *Brady* when it failed to disclose the DNA report, dated 12 June 2018, prior to trial. On brief, appellant presents his arguments as if this issue was fully preserved and litigated. It was not. As such, we must confront at the outset the appropriate standard of review given the limited record on this issue.

According to defense counsel's statements to the military judge immediately prior to final adjournment, he was first made aware of the DNA report the day before trial during an interview with CID SA M. Defense counsel did not raise any concern about the DNA report at that time, or request a continuance, because SA M allegedly conveyed to defense counsel that the DNA report contained only inculpatory information. Defense counsel further averred that the defense did not receive a copy of the DNA report until the panel was deliberating on a sentence. Defense counsel made clear that he was "not specifically alleging anything at this time," and that if, after studying the report, he believed appellant was "entitled to relief under *Brady* . . . the defense will make a request for a post-trial Article 39(a) session with the Court." In his concluding sentence, defense counsel reiterated, "We do not request a decision today." A month later, on 15 September 2019, defense counsel submitted post-trial matters to the convening authority discussing the issue but requesting no specific relief. He never requested a post-trial hearing.

The record before this court merely contains a copy of the DNA report in question marked as an appellate exhibit, but we have no testimony, much less expert testimony, as to its meaning. We have no litigation or rulings concerning if and when the report was disclosed or made available to the defense. We have no litigation or rulings as to whether the DNA report contains information within the ambit of *Brady*. And we have no claims of ineffective assistance of counsel raised

[4] We recognize that overruling by implication is disfavored and it is for our superior court to overrule its own precedent. *United States v. Davis*, 76 M.J. 224, 228 n.2 (C.A.A.F. 2017). We believe our prejudice analysis in this case faithfully applies the precedent of our superior court, in this context, and that of the Supreme Court. If we misapplied precedent from our superior court or the Supreme Court, we urge the CAAF to reconsider or clarify its precedent in this area. *Id.* (stating a lower court's recourse is to "urge . . . reconsideration" of superior court precedent).

on appeal and a legal presumption that counsel are competent. *United States v. Carpenter*, 55 M.J. 198, 201 (C.A.A.F. 2001).[5]

1. Waiver

While rooted in constitutional due process, *Brady* claims, like many other constitutional rights, are subject to waiver. *See United States v. Keltner*, 147 F.3d 662, 673 (8th Cir. 1998) (citing *United States v. Wagoner*, 713 F.2d 1371, 1374 (8th Cir. 1983) (finding the defendant's *Brady* issue was not preserved for appellate review because he did not raise the issue in his motions for a new trial and thus failed to obtain a ruling on the issue from the district court judge); *United States v. Payne*, 102 F.3d 289, 292–93 (7th Cir. 1996) (holding the defendant waived his *Brady* argument with respect to a law enforcement agent's debriefing notes by failing to give the district court the opportunity to review the notes before taking an appeal, despite defendant's request that the matter be preserved for appeal).

Waiver is "the 'intentional relinquishment or abandonment of a known right.'" *United States v. Haynes*, 79 M.J. 17, 19 (C.A.A.F. 2019) (quoting *United States v. Jones*, 78 M.J. 37, 44 (C.A.A.F. 2018)). "The purpose of the so-called raise-or-waive rule is to promote the efficiency of the entire justice system by requiring the parties to advance their claims at trial, where the underlying facts can best be determined." *United States v. King*, 58 M.J. 110, 114 (C.A.A.F. 2003). Whether an issue has been waived is a question of law reviewed de novo. *Haynes*, 79 M.J. at 19.

It is clear to us that defense counsel had full knowledge and awareness of this "potential *Brady*" issue and understood there was a process to litigate the issue at the trial level, either by requesting a continuance upon the alleged initial discovery of the report before trial, or through the mechanism of post-trial proceedings following adjournment. Despite this, defense counsel chose to abandon the opportunity for substantive resolution of the issue at the trial level where the facts could be appropriately developed. In so doing, he affirmatively waived this claim, leaving no error for this court to correct on appeal.[6]

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[5] During oral argument, appellate defense counsel affirmatively disclaimed any allegations of ineffective assistance of counsel.

[6] During oral argument, appellate defense counsel contended the CAAF's opinion in *United States v. Garlick*, 61 M.J. 346 (C.A.A.F. 2005) precluded this court from finding waiver. We disagree. Having carefully reviewed *Garlick*, not only is it factually distinguishable from appellant's case, but nowhere does it state, expressly or impliedly, that *Brady* claims are not subject to waiver. To the contrary, in the

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2. Assuming the Issue was not Waived, Appellant's Claim Still Fails

"The government violates *Brady* when [it] withhold[s] favorable and material information from the defense." *United States v. Ellis*, 77 M.J. 671, 675 (Army Ct. Crim. App. 2018) (citing *United States v. Behenna*, 71 M.J. 228, 237–38 (C.A.A.F. 2012)). "Evidence is favorable if, among other things, it impeaches the government's case." *Id.* (citing *Behenna*, 71 M.J. at 238). "Evidence is material when 'there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.'" *Id.* (quoting *Behenna*, 71 M.J. at 238).

> The purpose of *Brady* is to assure that the accused will not be denied access to exculpatory evidence known to the government but unknown to him. Irrespective of whether the statement here was exculpatory evidence under *Brady*, a question we do not reach, there is no *Brady* violation when the accused or his counsel knows before trial about the allegedly exculpatory information and makes no effort to obtain its production.

Id. (quoting *United States v. Lucas*, 5 M.J. 167, 171 (C.M.A. 1987)). "The State has no obligation to point the defense toward potentially exculpatory evidence when that evidence is either in the possession of the defendant or can be discovered by exercising due diligence." *Id.* (quoting *Rector v. Johnson*, 120 F.3d 551, 558–59 (5th Cir. 1997)).

Here, appellant's *Brady* claim never gets off the ground because he fails as a threshold matter to demonstrate that the government suppressed or withheld the DNA report, irrespective of its favorability or materiality.[7] For several reasons, the defense could have, but inexplicably chose not to, obtain the DNA report or exercise

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view of the concurring judge, the majority opinion denied relief precisely because it determined that the appellant waived his *Brady* claim. *Id.* at 351 (Baker, J., concurring).

[7] Because there is no evidence in the record discussing the meaning of the DNA report, we are unable to discern whether it was favorable or material evidence. As discussed above, the absence of a record is due to defense counsel's decision not to litigate the issue at trial. While we could order a post-trial fact-finding hearing pursuant to *United States v. Dubay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967), we decline to do so because it is unnecessary to resolve the issue.

due diligence in determining what, if any, DNA testing was conducted during the investigation. Appellant himself submitted a DNA sample to CID on 12 February 2018 pursuant to magistrate-issued search authorization. This was documented in the CID case file with a notation that the sample was "submitted to [United States Army Criminal Investigation Laboratory]" on 27 February 2018. Additionally, Defense Exhibit B for Identification—clearly a document in the defense's possession before trial—lists the linens that were collected from SPC D's bedroom on 12 February 2018 and indicates those materials were "submitted to [United States Army Criminal Investigation Laboratory]" on 27 February 2018. This document, combined with appellant's own knowledge that his DNA was collected, should have put the defense on notice that DNA testing was being conducted in his case. Further, in the government's discovery response, dated 12 May 2019, trial counsel informed defense counsel that the entire physical CID case file was available for inspection and provided a CID point of contact. The discovery response also indicated a complete copy of the investigation was provided to the defense on 1 October 2018. As evidenced by Defense Exhibit E for Identification, defense counsel understood how to contact CID to gain access to the case file.

For these reasons, we determine the government did not suppress or withhold the DNA report in this case. The CID case file was accessible to the defense and was littered with notations concerning DNA testing. This is hardly a case where the government denied access to exculpatory evidence known to the government but unknown to the defense. Through the exercise of due diligence, all of the evidence could have been reviewed and inspected. As such, even if appellant did not waive his *Brady* claim, he is still entitled to no relief.

III. CONCLUSION

The findings of guilty and the sentence are AFFIRMED.

Senior Judges ALDYKIEWICZ and BURTON concur.

FOR THE COURT:

[redacted]

SHELLEY GOODWIN-MATHERS
Acting Clerk of Court