**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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| UNITED STATES,<br>*Appellant,*<br><br>v.<br><br><br><br>Senior Airmen (E-4)<br>**SHAWN. M. MURRAY**, USAF,<br>*Appellee,* | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | **UNITED STATES' MOTION FOR ORAL ARGUMENT**<br><br>Before Panel No. 2<br><br>Misc. Dkt. No. 2024-04<br><br>4 June 2024 |

**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:**

Pursuant to Rule 25 of this Court's Rules of Practice and Procedure, the United States requests oral argument on the issue presented in this case. The subject of this appeal requires detailed analysis of a nuanced ruling that involved the exclusion of the testimony of the named victim in seven specifications of sexual assault. Oral argument will assist this Court in understanding the extensive facts related to the non-recorded audio of EM's OSI interview, identifying where the parties disagree, what principles of law the military judge misapplied, and how the military judge abused her discretion. For these reasons, the United States respectfully requests that this Honorable Court grant this motion for oral argument.

Proper application of the codified good faith loss exception under R.C.M. 914, is a question that has yet to be addressed in a published opinion by our service courts or our superior court. Oral argument will permit a robust exploration of an issue with implications for many cases in the Air Force and our sister services.

DENIED
3 JULY 2024

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**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 4 June 2024 via electronic filing.

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**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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| **UNITED STATES**<br>*Appellant*<br><br>v.<br><br>Senior Airman (E-4)<br>**SHAWN M. MURRAY**<br>United States Air Force<br>*Appellee* | **MOTION FOR LEAVE OF COURT TO FILE *AMICUS CURIAE BRIEF IN SUPPORT OF VICTIM, E.M.***<br><br>Before Panel No. 2<br><br>Misc. Dkt. No. 2024-04 |

**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:**

**Issue Presented by Appellant**

**WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION WHEN SHE EXCLUDED THE TESTIMONY OF THE NAMED VICTIM, E.M., UNDER THE PROVISIONS OF R.C.M. 914.**

**Issue Presented by Amicus Curiae**

**WHETHER R.C.M. 914 AS APPLIED TO E.M. CONTRADICTS ARTICLE 6B, UCMJ.**

**Interest of Amicus Curiae**

Amicus curiae, E.M., is the named victim in Appellee's general court-martial. E.M. gave a statement in an interview with law enforcement. As a victim in the military justice system, E.M. is afforded rights under Article 6b, Uniform Code of Military Justice (UCMJ). Based on these rights, E.M. moves for leave to file this brief pursuant to A.F. CT. CRIM. APP. R. 22(a) for this Court's consideration.

GRANTED
21 JUN 2024

## Facts

### *E.M.'s Relationship to Appellee*

E.M. generally agrees with the facts as presented in the Brief of Appellant and the Appellee's Answer. E.M. is the divorced civilian spouse of the Appellee, who is an Active Duty military member. R. at 178-79. E.M. was an American citizen, married to and the dependent of the Appellee. *Id.* One charge and one specification of sexual assault in violation of Article 120 occurred at or near Ramstein Air Base, Germany. R. at 240-42. While E.M. was in Germany, she dated the Appellee. *Id.* at 179. E.M. and Appellee then relocated to Anchorage, Alaska with Appellee to Joint Base Elmendorf-Richardson, Alaska, due to the Appellee's permanent change in station to the same. *Id.* at 188. One charge and six specifications of sexual assault in violation of Article 120 occurred at or near Anchorage, Alaska, with E.M. as the named victim. *Id.* at 240-42.

### *E.M.'s Disclosure to Authorities*

E.M. disclosed to a Family Advocacy Program (FAP) Assistant that she had been sexually abused by Appellee. *Preliminary Hearing Officer Report*, dated 06 July 2023, Record of Trial, Vol. 3. As a mandatory reporter for sexual abuse, the FAP Assistant then provided that information to the Air Force Office of Special Investigations (OSI), Detachment (Det) 631, Joint Base Elmendorf-Richardson. *Id.* Shortly thereafter, on 5 December 2022, E.M. provided information to OSI regarding the sexual abuse. R. at 235. E.M. remained cooperative and responsive with OSI, Appellant, and Appellee. *Id.* at 301-02. In advance of trial, E.M., with

victim counsel present, provided in-person interviews with Appellant and Appellee[1]. *Id.* At those interviews, she answered every question posed by Trial and Defense Counsel. *Id.* at 301-02. At trial, E.M. was placed on the stand and provided testimony under direct examination. *Id.* at 177

### *Appellant's Requested Relief*

Appellant is seeking relief from this Court because the United States argues the Military Judge abused her discretion when she struck E.M.'s testimony due to the Appellant's inability to provide the never recorded audio of E.M.'s interview to OSI. Appellant additionally seeks relief for the Military Judge's abuse of discretion when she ruled that the R.C.M. 914(E) exception did not apply.

### *Summary of Argument*

The language within Article 6b is clear: victims have a "right to be treated with fairness." Article 6b(a)(9), UCMJ. Article 6b(a)(9) incorporates—verbatim—the same right to fair treatment contained in the Crime Victim' Rights Act (CVRA), 18 U.S.C. § 3771. The congressional intent behind the CVRA is well documented and reflects a desire to "make our military the most victim-friendly criminal justice system in the world." 159 CONG. REC. S8148, S8151 (daily ed. Nov. 19, 2013) (statement of Sen. Claire McCaskill). Because congress identified this term as a "right," it must mean more than an ideal.

Congress required the Secretary of Defense and the President implement Article 6b into the Manual for Courts-Martial. Pub. L. 113–66, § 1701(b). The

[1] E.M. asserts her willingness to interview with Appellee should inform any prejudice analysis in this case.

President amended some provisions of the Manual for Courts-Martial by executive order. However, R.C.M. 914 was never amended and did not account for Article 6b's right to fairness statutorily afforded to victims of crime. Accordingly, the Military Judge must consider both R.C.M. 914 and Article 6b when determining whether to strike E.M.'s testimony based on a technological error.

Excluding E.M.'s testimony violates E.M.'s Article 6b right to be treated with fairness. To the extent R.C.M. 914 contradicts Article 6b, a victim's statutory rights outweigh the rule-based process provided in R.C.M. 914. Although a Constitutional right of an Accused may overcome a victim's statutory right, there is no evidence of the Military Judge determining that a constitutional right overcame a victim's statutory right in this case. In fact, the record lacks evidence that the Military Judge considered E.M.'s statutory right to fairness or any provision of Article 6b at all. Accordingly, the Military Judge erred in striking E.M.'s testimony without considering the statutory rights Congress intended and expressly afforded her.

***Argument***

When Congress enacted Article 6b, UCMJ, the statute should have transformed the military justice system. Senator Lisa Murkowski had hoped statutes like Article 6b, UCMJ, and 10 U.S.C. § 1044e would ". . . work to protect the rights of victims; [] to ensure that justice and accountability are achieved in an open and transparent fashion so that victims know there is a system that works for them." 159 CONG. REC. S8148 (daily ed. Nov. 19, 2013) (statement of Sen. Lisa Murkowski). Senator McCaskill believed the provision of victims' counsel would ". .

. make our ***military the most victim-friendly criminal justice system in the world***. In no other criminal justice system anywhere—civilian, military, United States, our allies—does a victim get that kind of support." *Id.* at S8151 (statement of Sen. Claire McCaskill) (emphasis added). In terms of the military justice system, Senator Kelly Ayotte said:

> [t]he issue of ending sexual assaults in our military is an issue for everyone. This is an issue about justice. This is an issue about fairness. This is about making sure that victims of crimes . . . get the justice they deserve, the support they deserve in our military, and that they understand and appreciate that we want them to have a climate in the military where if they are a victim, they can come forward and receive the support they need and that they deserve.

*Id.* (statement of Sen. Kelly Ayotte). That right to fairness Senator Ayotte alluded to is codified in Article 6b(a)(9) and affirmed by the Supreme Court in *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (". . .[]affirm[ing] the view expressed by Justice Cardozo, 'Justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.'") (internal citations omitted).

a. E.M.'s right to be treated with fairness forecloses the Military Judge's ruling to strike her testimony.

Congress passed the Justice for All Act in 2004 codifying the Crime Victims' Rights Act (CVRA). It provided federal crime victims the following rights:

> (1) The right to be reasonably protected from the accused.
> (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
> (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence,

> determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
> (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
> (5) The reasonable right to confer with the attorney for the Government in the case.
> (6) The right to full and timely restitution as provided in law.
> (7) The right to proceedings free from unreasonable delay.
> (8) ***The right to be treated with fairness and with respect for the victim's dignity and privacy***.

18 U.S.C. § 3771.

Although these rights were applicable to federal crime victims, victims of crimes committed by service members and adjudicated in military courts-martial were left without expressly stated comparable rights for another decade. *See* National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66 § 1701(a)(1), 127 Stat. 672, 952 (2013) (hereinafter "2014 NDAA"). At the end of 2013, Congress statutorily granted rights to victims of crimes in the military justice system. The title of that section was "Extension of Crime Victims' Rights to Victims of Offenses Under the Uniform Code of Military Justice," indicating Congress intended to confer rights under the CVRA through Article 6b, UCMJ. With Article 6b(a)(9), E.M. now has "a legally enforceable claim that another will do or will not do a given act; a recognized and protected interest the violation of which is wrong." *Right*, Black's Law Dictionary, at para. 4., 11th Edition (2019). E.M. has a legally enforceable claim to be treated with fairness, with respect to her privacy, and with respect to her dignity.

These new rights for victims in the military justice system mirrored the CVRA, including Article 6b(a)(8)(2014), "The right to be treated with fairness and with respect for the victim's dignity and privacy." *See* Article 6b(a)(9), UCMJ (2014). This identical right allows analysis of and jurisprudence addressing the CVRA to provide persuasive and pointed guidance as to the meaning and applicability of rights afforded in Article 6b, UCMJ.

When defining the statutory right for E.M. to be treated with fairness contained in Article 6b(a)(9), looking to the statutory language of the Crime Victims' Rights Act provides insight and Congressional intent. 18 USC § 3771; *see also In re HK*, No. 2021-07, 2021 CCA LEXIS 535, at *8 (A.F. Ct. Crim. App. Sep. 13, 2021) ("Petitioner's theory is not without basis, in light of both the textual similarities between the CVRA and Article 6b, UCMJ, and the fact the act creating Article 6b, UCMJ, titled that provision as "Extension of Crime Victims' Rights to Victims of Offenses Under the Uniform Code of Military Justice."). To that end, the main drafter and proponent for the CVRA, Senator Jon Kyl, articulated on the Senate floor the intent of Congress for victims to be heard and for their interests to be considered with regards to their right to be treated with fairness. He said:

> The broad rights articulated in this section are meant to be rights themselves and are not intended to just be aspirational. One of these rights is the right to be treated with fairness. Of course, fairness includes the notion of due process. Too often victims of crime experience a secondary victimization at the hands of the criminal justice system. This provision is intended to direct government agencies and employees, whether they are in executive or judicial branches, to treat victims of crime with the respect they deserve and to afford them due process. It is not the intent of this bill that its significance be whittled down or marginalized by the courts or the

> executive branch. This legislation is meant to correct, not continue, the legacy of the poor treatment of crime victims in the criminal process.

150 Cong. Rec. S10910 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl). This stated congressional intent of the CVRA clearly defines the contours of victims' rights and the necessity to consider E.M.'s equities—her stake—in the court-martial proceedings.

b. Because the President has not yet fully implemented Article 6b as statutorily required, the court must look to Article 6b rather than R.C.M. 914.

Article 6b does not exist in a vacuum. The statutory provision of victims' rights in military justice is not a statement of ideals but a clear grant of rights to victims that shall be afforded to them "not whittled down or marginalized." Supra. S10910. In the 2014 National Defense Authorization Act, Congress required implementation of Article 6b into the Manual for Courts-Martial within one year of its issuance and mechanisms for affording those rights. Pub. L. 113–66, § 1701(b). While all mechanisms and implementation could not fully be contemplated, R.C.M. 914 never received changes implementing Article 6b.

The changes to the Manuals for Courts-Martial effectuating the endowment of rights under Article 6b have been limited, and the restrained execution of Article 6b in rules prescribed by the President is not consistent with the Presidential authority in Article 36, UCMJ. The first executive order amending the M.C.M. following the insertion of Article 6b into the UCMJ was only 28 pages long and does not mention a single rule to account for the rights of victims to be treated with

fairness, respect for their dignity, and with respect for their privacy.[2] *See* Exec. Order No. 13669 (Jun. 13, 2014). The second Executive Order after Article 6b in 2015 conservatively implemented more of the statutory provisions. Exec. Order No. 13696 (Jun. 17, 2015). To account for Article 6b the 2015 E.O. amended ***four*** **(4)** R.C.M.s and added R.C.M. 1001A—there were approximately one hundred twenty-six (126) R.C.M.'s at the time.[3] Appendix 21, *Analysis of Rules for Courts-Martial*, 2016 M.C.M. The privacy of crime victims is mentioned once under the amended R.C.M. 405, but there is not a single mention in an amendment aimed at treating victims with fairness or with respect for their dignity. *Id.* The same pattern continues with the 2018 Executive Order amending the M.C.M. and it has continued to this day. *See* Exec. Order No. 13825 (March 1, 2018); *see also* Exec. Order No. 14103 (Jul. 28, 2023). Victims in the military justice system have the Congressionally granted rights to be treated with fairness, with respect for their dignity, and with the respect for their privacy—but there are no rules effectively according those rights. In this case, R.C.M. 914 and the Military Judge's ruling not only fail to acknowledge the rights of E.M. that ***shall*** be accounted for, they stand in direct contravention to E.M.'s right to be treated with fairness.

"Whether a rule promulgated by the President is consistent with his authority under Article 36, UCMJ, is a question of statutory construction, which

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[2] The Executive Order defines victims entitled to receive records or trial and those who could submit a statement on clemency to the convening authority. It also eliminates the admissibility of "good Soldier evidence" in certain offenses. It does not analyze the R.C.M.s or the M.R.E.s to account for the new statutory rights of victims found in the 2014 version of Article 6b(a)(1-8), UCMJ.
[3] The Executive Order amended R.C.M.s 305, 806, 906, and 1001; and it added R.C.M. 1001A.

this Court reviews *de novo*." *United States v. Kohlbek*, 78 M.J. 326, 333 (C.A.A.F. 2019) (citing *United States v. Nerad*, 69 M.J. 138, 141-42 (C.A.A.F. 2010)). As it pertains to statements where R.C.M. 914 requires production after a witness testifies on direct examination, the President exceeded his authority granted under Article 36, UCMJ, because R.C.M. 914 fails to follow Article 6b. Specifically, the rule fails to account for the fairness owed a crime victim since the procedural rule under R.C.M. 914 could require striking a crime victim's testimony—often the only witness to her abuse—without any due consideration for the victim's right to process and decent treatment. Simply stated, because the President has not incorporated Article 6b into R.C.M. 914, the court must look to Article 6b on this matter.

E.M. posits in the case in interest the Military Judge abused her discretion in determining that a statement as defined under R.C.M. 914 actually existed[4] and further abused her discretion in failing to actually follow R.C.M. 914 as written[5]. But, E.M. separately asserts that if this Court finds a statement actually existed, was lost, and the Military Judge followed R.C.M. 914 to strike E.M.'s testimony—that too would be invalid as R.C.M. 914 contravenes Article 6b by not accounting for

[4] See Appellant's Brief at 7. E.M. supports the Appellant's argument that there is no statement subject to disclosure.

[5] Significantly, evaluation of the Military Judge's remedy relies on whether the alleged violation by the Government counsel is constitutional or nonconstitutional. *United States v. Sigrah*, 82 M.J. 463, 467 (C.A.A.F. 2022) ("The prejudice standard that we apply depends on whether the defect amounts to a constitutional error or a nonconstitutional error.") Moreover, CAAF held in *Sigrah* that the witnesses' exposure to cross-examination made the loss of the statements non-constitutional. *Id.* ("given that the victim, SPCs D and B, and the CID agents all testified and were subject to cross-examination, Appellant was not denied his constitutional right to confront the witnesses against him.")

E.M.'s statutory right to be treated with fairness, and the Military Judge further failed to consider that same statutory right. Article 36, UCMJ, requires:

> (a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter [UCMJ] triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which ***may not, [. . .], be contrary to or inconsistent with this chapter [UCMJ]***.

c. The Military Judge's ruling under R.C.M. 914 contradicts Article 6b.

Striking E.M.'s testimony in the case against her abuser simply for a technological failure that does not impact the constitutional rights of the Accused violates E.M.'s right to be treated with fairness and prevents the attachment of all of the rights associated with hearings enumerated in Article 6b. In the concurrence by Chief Judge Ohlson and Judge Maggs in *United States v. Sigrah,* they explicitly state, "this is a ***rule-driven result rather than a constitutionally required result.*** Therefore, although the current language of Rule for Courts-Martial 914 has compelled us to conclude that the Military Judge in this case erred in not striking the testimony of the Government witnesses, nothing in our opinion should be construed as precluding the President from amending this language in the future." *Sigrah,* 82 M.J. 463, 468-9 (C.A.A.F. 2022) (Ohlson, K and Maggs, G concurring). In other words, R.C.M. 914 presents a conflict between the statutory rights of E.M. and the "rule-driven right" of the accused.

Rules for Courts-Martial are promulgated at the behest of Congress and its statutes—R.C.M.s must not contradict the statutes. *See* Article 36, UCMJ. In this

case E.M.'s rights in Article 6b(a)(9) supersede her abuser's rule-driven, procedural right in R.C.M. 914. Since the striking of E.M.'s testimony results from a labored reading of R.C.M. 914, it violates the intent of Congress in promulgating Article 6b, UCMJ. The Military Judge's ruling as applied in this case is not only an abuse of discretion but also erroneous, as R.C.M. 914 is an invalid rule outside Presidential authority contained in Article 36, UCMJ. When a provision of the R.C.M.—the creation of an executive order— conflicts with the UCMJ—the creation of statute—the R.C.M. provision must give way to the statute. *See* Capt Gregory E. Maggs, *Judicial Review of The Manual for Courts-Martial*, 160 Mil. L. Rev. 96, 122 (1999).

No provision of the Constitution demands the pretrial disclosure of witness statements in this case that are not in the prosecutor's possession[6]. "[T]he effect would be to transform the Confrontation Clause into a constitutionally compelled rule of pretrial discovery. Nothing in the case law supports such a view. The opinions of this Court show that ***the right to confrontation is a trial right***, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination." *Pennsylvania v. Ritchie*, 480 U.S. 39, 52 (1987). Moreover, "[g]enerally speaking, the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985). Rather, Congressional intent reflects the need to ***allow victims due process and a stake in the case***.

[6] There are no facts presented that any member of the prosecution team or anyone involved in the case possesses the audio recording of E.M.'s statement.

E.M. asserts there is precedent to invalidate an R.C.M. In *United States v. Davis*, this Court's predecessor Court found R.C.M. 1105 (1983 M.C.M.) invalid because it limited clemency matters of the accused to written materials when the statute, Article 60, contained no such limitations. *United States v. Davis*, 29 M.J. 1004, 1006 (A.F.C.M.R. 1990). The Court states, "[t]he inclusion of the word "written" before "matters" in R.C.M. 1105 is contrary to the wording of Article 60(b), UCMJ, and ***the legislative history of the statutory right*** of an accused to submit matters for a convening authority's consideration." *Id.* C.A.A.F. affirmed the Air Force Court of Military Review, "[t]herefore, we agree with the court below that, insofar as RCM 1105(b) limits the accused to submitting only written materials, it clearly is inconsistent with Article 60 and the legislative history of the article." *United States v. Davis*, 33 M.J. 13, 16 (C.A.A.F. 1991).

In short, insofar the requirements of R.C.M. 914 are inconsistent with Congress' intent to make "our ***military the most victim-friendly criminal justice system in the world***", it is invalid. *Supra*. Statement of Sen. McCaskill. Fair treatment as a statutory right must mean more than an ideal, and a victim must be treated fairly when such treatment does not infringe on the constitutional rights of the Accused. As applied to E.M. in this case, dismissing her testimony based on a technological error for statements that do not exist violates congressional intent and the express fairness language of Article 6b. To the extent a reading of R.C.M. 914—***a rule-driven right of an accused***—requires the

striking of E.M.'s testimony, it is invalid as it contravenes ***E.M.'s statutory right*** to be treated with fairness codified in Article 6b.

## Conclusion

E.M., amicus curiae, respectfully requests this Honorable Court invalidate the Military Judge's ruling and grant the relief Appellant requests.

Respectfully submitted this 7th day of June, 2024


[redacted]

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**CERTIFICATE OF FILING AND SERVICE**

I certify that the foregoing was sent via email to the Court and served on the Air Force Appellate Government Division, Air Force Appellate Defense Division, and all requisite counsel on 7 June 2024.

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**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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| UNITED STATES,<br>*Appellant,*<br><br>v.<br><br><br><br>Senior Airmen (E-4)<br>**SHAWN. M. MURRAY**, USAF,<br>*Appellee,* | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | **REPLY BRIEF FOR THE UNITED STATES UNDER ARTICLE 62, UCMJ**<br><br>Before Panel No. 2<br><br>Misc. Dkt. No. 2024-04<br><br>4 June 2024 |

**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:**

Under Article 62, UCMJ, and Rule 20(c)(1)(C) of this Court's Rules of Practice and Procedure, the United States files this reply to Appellee's Answer to United States' Appeal Under Article 62, UCMJ, filed on 28 May 2024. The United States maintains the arguments submitted in its initial brief, United States' Appeal Under Article 62, UCMJ, filed on 5 May 2024. In response to Appellee's answer, the United States submits the following reply.

## ARGUMENT

**THE MILITARY JUDGE ABUSED HER DISCRETION WHEN SHE MADE THE ERRONEOUS LEGAL CONCLUSION THAT UNRECORDED AUDIO OF A WITNESS INTERVIEW CONSTITUTED A STATEMENT IN THE POSSESSION OF THE GOVERNMENT UNDER R.C.M. 914. SHE ALSO ABUSED HER DISCRETION WHEN SHE DETERMINED THE R.C.M. 914(E) EXCEPTION DID NOT APPLY.**

### *A. The military judge unequivocally found that the audio of EM's interview never existed, and the evidence supports that finding of fact.*

The question of whether the audio of EM's interview existed is the dispositive factor in determining whether an R.C.M. 914 violation occurred. Appellee concedes that if the audio never existed, there was no R.C.M. 914 violation. Specifically, Appellee argues that if the

military judge found a "never-recorded" audio file constituted an R.C.M. 914 statement, this Court would have to "conclude that the military judge truly had no understanding of what R.C.M. 914 statements are." (Ans. Br. at 14.)

Having made this concession, Appellee's entire argument turns on his claim that "[t]he audio of [EM's] victim interview existed at one point in time, and the military judge made such a finding." (Ans. Br. at 12.) Not only is such a finding absent from the military judge's ruling, but Appellee's argument ignores statements in the ruling to the contrary. The military judge's made four different findings throughout her ruling that the audio of EM's interview never existed: (1) "[t]he recording consists of four separate video clips, and none of them have audio; only the video was captured by the recording equipment;" (2) "[a]fter OSI learned there was no audio contained in [EM's] interview;" (3) "when OSI recorded the victim's interview, they were not able to record the audio due to a later discovered technical issue;" (4) "the recorded interview of [EM's] interview qualifies under this expansive interpretation even though audio was not captured." (App. Ex. XXXI, para. 3, 6, 9, 26.) Tellingly, the military judge never said that the audio recording once existed, nor did she find that the audio was recorded and subsequently lost or destroyed like the audio in Muwwakkil, Marsh, or Sigrah, the cases upon which she relied. 74 M.J. 187 (C.A.A.F. 2015); 21 M.J. 445 (C.M.A. 1986); 82 M.J. 463 (C.A.A.F. 2020); (App. Ex. XXXI.)

Despite the military judge's clear findings, Appellee asserts that for the government to prevail on its claim that the military judge found the audio never existed, this Court would have to "ignore the common definition of 'capture.'" (Ans. Br. at 14.) To support this argument, Appellee asserts the appropriate definition of 'capture' is "the act of recording in a *permanent* file." (Ans. Br. at 12.) (emphasis in original). But Appellee's reliance on this definition betrays

his own argument because the definition demonstrates that "capture" and "record" are synonymous. A plain language reading of the definition demonstrates that if something is not "captured" it is also not "recorded." Appellee engages in a game of semantics that results in a distinction without a difference. The military judge said *only* the video was captured during the interview, and the audio was never recorded.

Moreover, Appellee's argument ignores other evidence available to him and to the Court. The United States has moved to attach the military judge's "Summary of Ruling" on the Government's request to file a motion for reconsideration on the R.C.M. 914 ruling. (Capt J[redacted] A. V[redacted] Declaration, dated 16 April 2024, Attach 3 at 3). In that summary of ruling, the military judge denied the government's request "to have the Court clarify the written [R.C.M. 914] Ruling by providing a more definite finding of fact with regard to whether the audio in question ever existed." (Id. at para. 13.) The military judge explained that her previous ruling "provided adequate details from which to support the finding of fact that the audio portion of the recording was ***never captured***, so clarification was not required." (Id. at para. 6.) (emphasis added). The military judge's explanation directly contradicts Appellee's claim that the military judge made a finding of fact that the audio once existed. Although Appellee has argued that this Court should not consider the military judge's "Summary of Ruling" (Ans. Br. at 24.), he has never argued that the "Summary of Ruling" is inauthentic or is not an accurate version of what the military judge issued. In light of the existence of the "Summary of Ruling," Appellee is well aware that the military judge found that the audio never existed, and he should not argue otherwise.

Appellee further suggests the government conceded the audio equipment was recording. (Ans. Br. at 3 fn. 2). This is a mischaracterization of the government's argument and the

evidence. Special Agents (SA) ER and AP testified they followed their normal procedures for initiating the recording equipment. (R. at 243, 259.) During the interview, the audio was being contemporaneously broadcast through the speakers of the recording equipment. (R. at 250.) The agents were listening to the broadcast through speakers, and they assumed that because they could hear the interview, the recording system was working. (R. at 250.) In the moment, they did not realize the system was not recording audio. (Id.) There was no concession that the audio was recording by any witness or the government. These facts establish why OSI did not immediately realize the audio was not recorded.

Appellee also argues "the [g]overnment's assertion that the audio never existed is belied by the fact that OSI took no efforts to ensure the audio was preserved *after* it was recorded." (Ans. Br. at 17.) This is untrue. After EM's interview, OSI took affirmative steps to preserve what was captured by the recording system by burning EM's interview to a disc. (App. Ex. XXVI, R. at 244, 266.) When SA MG reviewed the recording roughly a month later, he discovered the recording system had only captured the video—not the audio. (App. Ex. XXVI, R. at 244.) Investigation by the Getac recording system technician provided a likely explanation for the recording failure: "There was also an issue of losing the microphones when the speakers were plugged into the 3.5 mm aux jack in the back of the DVR." (App. Ex. XXVII.) This meant, that when agents plugged in speakers into the system—as it appears they did here—the audio did not record along with the video. Despite, OSI's efforts to preserve the entirety of EM's interview, OSI could not preserve something that was never recorded to being with. The available evidence showed that the audio of EM's interview never recorded. As a result, the military judge's determinations about the non-existence of the audio were supported by the record and not clearly erroneous.

### *B. The military judge did not apply a presumption of regularity in this case, and its application would have been error anyway.*

Appellee next asserts the military judge applied the presumption of regularity recognized in United States v. Palik, ___ M.J. ____, 2024 CAAF LEXIS 181 (C.A.A.F. 26 March 2024). (Ans. Br. at 16.) Specifically, Appellee alleges the military judge "rightly noted facts about this presumption of regularity in her ruling" and that it "formed the foundation for the finding now in dispute that a statement existed." (Id.) Appellee misreads the military judge's ruling and assigns value to the judge's findings of fact that the military judge did not.

The military judge did make a finding that recording of "these interviews is OSI policy." (App. Ex. XXXI, para. 29(a)(ii)). As noted in the government's initial appeal, that finding was erroneous. (Gov. Br. at 26.) It is standard practice for OSI to record interviews, but OSI regulations do not *require* a victim interview to be recorded. (R. at 272-273.) Regardless, the military judge noted this fact as part of her analysis regarding application of the good faith loss doctrine, not for the proposition that there was a presumption of regularity that indicated the audio had existed. (App. Ex. XXXI, para. 29(a)(ii)). The military judge's ruling is devoid of any reference to the presumption of regularity. Therefore, Appellee's assertion that the military judge applied the presumption of regularity in determining that a "statement" within the ambit of R.C.M. 914 existed is without merit.

Application of the presumption of regularity in this case would have been error. "The presumption of regularity in military law is derived from the one in civilian law which attends to routine administrative acts performed by officials of the government." United States v. Mark, 47 M.J. 99, 101 (C.A.A.F. 1997). Even if the presumption constitutes prima facie evidence that a recording may have existed, that prima facie case can be rebutted by evidence to the contrary.

Murphy v. INS, 54 F.3d 605 (9th Cir. 1995) (explaining prima facie evidence is "evidence which may be contradicted by other evidence). As discussed above, there was clear evidence presented establishing that the audio was never recorded. (App. Ex. XXVI, R. at 244). There was an explanation from the Support Technician providing a reason for the recording failure and for why the audio was not captured. (App. Ex. XXVII). The military judge relied on that evidence in making her determination that the audio of EM's interview was never recorded. (App. Ex. XXXI, para. 3, 6, 9, 26.) Therefore, the available facts rebutted any presumption of regularity, and its application would have been error.

### *C. The military judge applied incorrect legal principles when she concluded never-recorded audio of a victim interview constituted a statement under R.C.M. 914 and that never-recorded audio was at one time "in the possession" of the United States.*

Appellee asserts that the military judge could not have "found a 'never-recorded' audio file to be a R.C.M. 914 statement" because "[a] military judge is presumed to know the law." (Ans. Br. at 14) (citing United States v. Robbins, 52 M.J. 455, 457 (C.A.A.F. 2000). He uses this premise to support his argument that the military judge must have found that the audio of EM's interview existed at one point. Appellee omits a crucial point, "[m]ilitary judges are presumed to know the law and to follow it *absent clear evidence to the contrary*. United States v. Erickson, 65 M.J. 221, 225 (C.A.A.F. 2007) (citing United States v. Mason, 45 M.J. 483, 484 (C.A.A.F. 1997)). Here, the evidence shows that the military judge misunderstood the law and overcomes the ordinary presumption. As discussed above, the evidence shows that the military judge *did* find that the audio had never existed. And examining the plain language of R.C.M. 914(f)(2), never-recorded audio from a witness interview is not "a substantially verbatim recital of an oral statement …that is recorded contemporaneously with the making of the oral statement and contained in a recording." In arriving at her conclusion that never-recorded audio constitutes a

statement, the military judge relied on United States v. Clark, 79 M.J. 449 (C.A.A.F. 2020). While Clark states military appellate courts have "favored an expansive interpretation" of the definition of the term "statement," the interpretation that "the recorded video of [EM]'s statement qualifies" as a statement "even though the audio was not captured" goes too far. (App. Ex. XXXI, para. 26.) The military judge's conclusion of law was not the result of an "expansive interpretation;" she functionally rewrote the definition of a statement. Here, there is clear evidence the military judge did not understand R.C.M. 914, and she should not be entitled to the presumption delineated in Erickson.

In sum, despite Appellee's contention otherwise, the military judge made a factual finding that the audio of EM's interview never existed. In light of that finding, as Appellee himself concedes, this Court must conclude that the military judge had an erroneous understanding of what constituted a statement under R.C.M. 914. (Ans. Br. at 14.) Since the audio of EM's interview never existed, the Government's failure to produce it did not constitute a violation of R.C.M. 914, and the military judge erred by excluding EM's testimony.

### *D. The military judge applied incorrect legal principles when she considered the judicially created good faith loss doctrine.*

Appellee insists the judicially created good faith loss doctrine mirrors the newly codified exception contained in R.C.M. 914(e). (Ans. Br. at 11.) This assertion belies a fundamental misunderstanding of the case law, which this Court should correct. The judicially created good faith loss doctrine was not based on the plain language of the Jencks Act or R.C.M. 914. *See* 18 U.S.C. § 3500; R.C.M. 914 (2019 ed.); Muwwakkil, 74 M.J. at 193. Under the military's judicially created good faith loss exception, a finding of simple negligence alone was sufficient to preclude application of the doctrine. Muwwakkil, 74 M.J. at 193. The judicially created good

faith loss doctrine was also generally limited in its application. United States v. Jarrie, 5 M.J. 193, 195 (C.M.A. 1978).

But the President's changes to R.C.M. 914(e) superseded the judicially created good faith loss doctrine that had no basis in the plain text of R.C.M. 914 or the Jencks Act. *See* Sigrah, 82 M.J. at 471, n.5 (Maggs, J., concurring) (noting that then-proposed amendments to R.C.M. 914(e) would "replace" the judicially created exception). The new exceptions under R.C.M. 914(e) are more generally applicable. Under the new rule, simple negligence will only suffice to warrant an R.C.M. 914 remedy where an accused can demonstrate an actual impact on his Due Process rights: where the evidence is of such central importance to an issue that it is essential to a fair trial, and there is no adequate substitute for such evidence. Using case law issued prior to the R.C.M. 914(e) amendments that interprets the judicially created good-faith doctrine--regardless of whether it interprets the Jencks Act or R.C.M. 914-- poses a danger because of the different negligence standard. The President used his authority to modify the good faith loss doctrine's application to the military, and older precedent must be treated with caution. At a minimum, the mere negligence standard should not be applied when determining whether to grant an R.C.M. 914 remedy. Here, the military judge was wrong to apply the judicially created good faith doctrine before considering the new R.C.M. 914(e) exceptions.

In applying the codified R.C.M. 914 test, the military judge failed to use the appropriate definition of gross negligence. Appellee asserts the government conceded the military judge's use of the United States v. Vaughan, definition of culpable negligence in applying the good faith loss doctrine was not error. 56 M.J. 706, 709 (A.F. Ct. Crim. App. 2001); (Ans. Br. at 21.) This is inaccurate. The government pointed out the military judge's use of the culpable negligence standard and offered the more appropriate definitions of gross negligence the military judge

should have used in arrived at her conclusions, specifically "failing to observe even slight care" or "carelessness or recklessness to a degree that shows utter indifference to the consequences that may result." (Gov. Br. at 28.) Thus, the military judge's use of a definition for a negligence standard that does not apply in the good faith loss doctrine context was erroneous. Had she applied these other definitions, rather than the definition of culpable negligence, she would not have been able to articulate how OSI failed to "observe even slight care" or showed "utter indifference" to the consequences of their actions.

Moreover, the assertion that the government is trying the shift the burden of proof regarding gross negligence is a mischaracterization of the government's argument. (Ans. Br. at 20). The government acknowledges under R.C.M. 914(e) the government bears the burden of persuasion on the issue of gross negligence or bad faith. While the government bears the burden of persuasion on the issue, it is entitled to use all the evidence in the record, not just the evidence the government independently introduced. United States v. Tyler, 81 M.J. 108 (C.A.A.F. 2021) (holding trial counsel is entitled to argue the evidence of the record, as well as all reasonable inferences fairly derived from such evidence in closing argument context). To hold otherwise would require the government to replicate testimony and would strain the efficiency of the judicial process. Here, there was sufficient evidence in the record to preclude a finding of bad faith or gross negligence. During the R.C.M. 914 motion hearing, trial counsel provided the military judge argument to that effect, highlighting evidence that was in the record. (R. at 309-313.) The government's point is that where trial counsel presented argument highlighting evidence demonstrating a lack of bad faith or gross negligence, there was not sufficient evidence in the record to justify a finding to the contrary. Therefore, the military judge abused her discretion in finding OSI had acted with gross negligence.

Appellee argues the military judge properly applied the codified good faith loss exception and that she made a proper finding that the never-recorded audio was of such central importance to an issue that it is essential to a fair trial. (Ans. Br. at 24.) However, Appellee makes the same error the military judge made. Appellee points out that EM is the sole witness for four specifications and that her interview contained "significant details of the alleged misconduct, which SA [ER] admitted was the 'best evidence' against Appellee." (Id.) Appellee misconstrues relevance and materiality with the central importance standard. For evidence to be of such central importance, there must be some showing that the missing evidence is material and favorable to the defense. United States v. Valenzuela-Bernal, 458 U.S. 858, 873 (1982).

Appellee describes why the evidence might have some relevance but provides no indication that the evidence would be material and favorable to the defense. Both Appellee and the military judge made the same error of speculating that the evidence would be beneficial to the defense, without demonstrating how. Appellee alleges there are "inconsistencies" in EM's statements in his brief (Ans. Br. at 25 n.17), but he does not specify what those inconsistencies are. And as highlighted in the United States' initial brief, trial defense counsel pointed to nothing in the agent notes from EM's OSI interview that would suggest she made statements that were inconsistent with her trial testimony or any of her previous statements. (Gov. Br. at 33.) This Court has found that speculation about the "possibility" of evidence is insufficient to meet the standard. United States v. Terry, 66 M.J. 515, 518 (A.F. Ct. Crim. App. 2008). Therefore, the military judge abused her discretion in determining that the never-recorded audio was of such central importance to an issue that it was essential to a fair trial.

### *E. This Court should consider the evidence provided in the government's motion to attach.*

The government provided additional evidence to this Court via a motion to attach on 16 April 2024. (*United States Motion to Attach*, dated 16 April 2024; *United States Motion to Attach*, dated 18 April 2024.) This Court should consider that evidence, despite Appellee's objection. (Ans. Br. at 24.) United States v. Jessie held that CCAs may attach documents "when doing so is necessary for resolving issues raised by materials in the record. 79 M.J. 437, 444 (C.A.A.F. 2020) (quoting 10 U.S.C. §866(c) (2012)). The Court has also concluded that "'extra-record fact determinations' may be 'necessary to resolving appellate questions.'" Id. at 442 (quoting United States v. Parker, 36 M.J. 269, 272 (C.M.A. 1993)).

Here, the attached documents are necessary to resolving issues raised by materials in the record. The documents demonstrate the government's good faith efforts to provide new facts and new case law, not considered by the military judge in arriving at her decision. They provide the full context to what transpired at Appellee's court-martial related to the R.C.M. 914 ruling now being appealed. Given Appellee's repeated assertions in his brief that the military judge found the audio once existed, this Court should, at the very least, consider the military judge's Summary of Ruling. (Capt J[redacted] A. V[redacted] Declaration, dated 16 April 2024, Attach 3 at 3, para. 6.) In her summary, the military judge states "provided adequate details from which to support the finding of fact that the audio portion of the recording was ***never captured***, so clarification was not required." (Id.) As discussed above, this finding of fact directly contradicts Appellee's argument and is necessary for resolving issues raised by materials in the record. The interests of justice do not support that Appellee can deny something in the court-martial happened, just because the military judge did not mark the document as an appellate exhibit. Therefore, this Court should consider the additional documents provided by the government.

## CONCLUSION

The military judge abused her discretion when she repeatedly misapplied legal principles. As a result of her erroneous understanding of the law, she excluded EM's testimony and de facto ordered the dismissal of seven specifications of sexual assault. Despite finding the audio never existed, she acted contrary the law by granting an R.C.M. 914 remedy, where no R.C.M. 914 violation had occurred. Since the military judge abused her discretion, the United States respectfully requests that this Honorable Court reverse the military judge's ruling to exclude the testimony of the named victim, EM and remand this case to the trial court for further proceedings.

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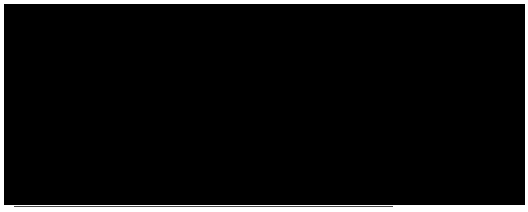

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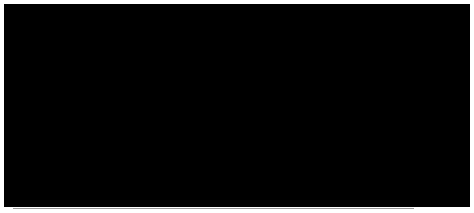
**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 4 June 2024 via electronic filing.



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**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| **UNITED STATES,** *Appellant,* | ) | **APPELLEE'S ANSWER TO UNITED STATES'S APPEAL UNDER ARTICLE 62, UCMJ** |
| v. | ) | Before Panel No. 2 |
| Senior Airman (SrA), **SHAWN M. MURRAY,** United States Air Force, *Appellee.* | ) | Misc. Dkt. No. 2024-04 |
| | ) | 28 May 2024 |

**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:**

## STATEMENT OF THE CASE

Appellee, Senior Airman (SrA) Shawn M. Murray, generally accepts the Government's statement of the case.

## STATEMENT OF FACTS

### *AFOSI's Investigation of SrA Murray*

The Air Force Office of Special Investigations (AFOSI) detachment at Joint Base Elmendorf-Richardson (JBER), Alaska, began investigating SrA Murray on 15 November 2022. Record of Trial (ROT), Vol. 3, *Preliminary Hearing Report*, dated 6 July 2023. As part of that investigation, AFOSI interviewed E.M. Relevant to this appeal, E.M. underwent an interview with Special Agent (SA) E.R.—the lead case agent—and SA A.P. on 5 December 2022. R. at 235, 256-57.

### *Recording Issues at JBER's AFOSI Detachment*

Prior to E.M.'s interview on 5 December 2022, the AFOSI detachment at JBER experienced technological issues with recording and preserving audio from interviews. R. at 248-49, 263-64; App. Ex. XXXI at 1. Specifically, when interviews were conducted simultaneously

in two interview rooms, the audio from one interview room would be recorded over the audio of another. App. Ex. XXVII at 1; App. Ex. XXXI at 1; Appellant's Br. at 6. According to a Getac[1] representative, this was caused by an error in the installation of the recording devices (i.e., both rooms' recording devices were configured on the same channel). App. Ex. XXVII at 1. In addition to this configuration issue, it appears that when speakers were plugged into the recording system, the microphones would not preserve audio due to human error. App. Ex. XXVII at 2 ("There was also an issue of losing the microphones when the speakers were plugged into the . . . jack of the DVR. . . . If you're plugging in speakers always select headphones not headset.").

***E.M.'s Interview***

On 5 December 2022, AFOSI conducted its interview of E.M. R. at 235; App. Ex. XXXI at 1. The interview lasted approximately four hours, R. at 257, where E.M. provided the details that would make up the basis of seven sexual assault specifications and one specification for marijuana use. R. at 240-42. According to SA E.R., the details provided by E.M. during the interview were of "vital importance to OSI's investigation" and were the "best evidence" of the crimes alleged against SrA Murray. R. at 242-43.

Prior to the start of the interview, SA E.R. or SA A.P. turned on the recording technology to record the audio of E.M.'s interview. R. at 244; Gov't Mot. to Attach, dated 16 April 2024, App'x Attachment 1, at Attachment 3 (SA E.R. Affidavit) at 1. During the course of the interview, neither SA E.R. nor SA A.P. believed there were any problems with the audio recording equipment. *Cf*. R. at 250 (discussing the fact that other agents could hear the audio coming through the Getac system), 259 (acknowledging a belief that the audio was recording). In part,

[1] Apparently, Getac is the system which is used by JBER's AFOSI detachment to record the audio and video of interviews. R. at 264.

this is because the detachment superintendent or commander—potentially along with a judge advocate representative—were listening to the interview contemporaneous to it occurring. R. at 250, 266. And, when the Getac equipment is broadcasting audio to other rooms within the AFOSI detachment, the Getac is also recording audio.[2] *See* R. at 250 (explaining that the GETAC recording system was broadcasting audio, which indicated to the agents that there was no problem with the recording of audio). Despite the detachment experiencing audio perseveration issues in the past, the agents made no efforts before or after E.M.'s interview to ensure the audio was preserved. R. at 264. All the evidence suggests that the agents at the JBER detachment believed the audio had been recorded; a belief that lasted until at least 4 January 2023. App. Ex. XXVI; *see also* R. at 266 (showing a standard practice of AFOSI agents burning a disc after the interview, but not reviewing the disc contemporaneous with that burning).

On 4 January 2023, SA M.G. became the first AFOSI agent to review the 5 December 2022 recording, and discovered there was no audio. App. Ex. XXVI; App. Ex. XXXI at 2. According to SA M.G., he did not know whether "this was an equipment issue or other error." App. Ex. XXVI; App. Ex. XXXI at 2. After the discovery of this issue, the JBER detachment took no remedial measures. App. Ex. XXXI at 2. In fact, no evidence presented to the trial judge suggested that AFOSI even reached its own findings as to: (1) whether the audio ever existed; or (2) if it did exist, the cause of the loss.[3] This may explain why SA E.R.—the lead case agent—

[2] The Government concedes that the audio equipment was, in fact, recording the audio because of this. Appellant's Br. at 3 ("During the interview, a supervising agent . . . was able to *hear* the live *audio through* the Getac *recording* system." (emphasis added)).

[3] The affidavit from SA E.R., attached to the Government's written motion to reconsider, speculates the audio was never recorded in the Getac system. SA E.R. Affidavit at 2. However, this information is unsupported by other evidence in the record and was not before the military judge when she made the ruling subject to this appeal.

did not even know which interview of E.M. had lost audio until close in time to the trial. R. at 249 ("I had originally believed it was the first, I have recently been informed it was the second.").

***Trial Defense Counsel's R.C.M. 914 Motion to Exclude E.M.'s Testimony***

A week before trial, trial defense counsel informed the Government that, after E.M. testified, they would be raising an oral motion under Rule for Courts-Martial (R.C.M.) 914. *See, e.g.*, R. at 338. Three days before trial, the senior defense counsel had a conversation with the senior trial counsel, again informing the Government of SrA Murray's intent to raise a R.C.M. 914 motion after E.M.'s testimony. R. at 338. In line with these previous disclosures, after E.M. testified SrA Murray moved for the E.M.'s testimony to be disregarded pursuant to R.C.M. 914 and 18 U.S.C. § 3500 (the Jencks Act). R. at 231, 298.[4]

On 18 March 2024, the military judge conducted a motions hearing where she received evidence on SrA Murray's motion to exclude. SrA Murray presented nine exhibits, called two witnesses to testify, and stipulated as to the expected testimony of another witness who was sick. R. at 231-36 (presenting App. Exs. XXII-XXX), 238 (calling SA E.R.), 255 (calling SA A.P.), 276-77 (stipulating to witness testimony). Despite SrA Murray presenting "a lot of evidence," R. at 316, the Government presented no evidence at this hearing.

***The Military Judge's Ruling***

After receiving evidence and arguments, the military judge recessed the court-martial for the remainder of the day to review the evidence and research the law. R. at 316. The next day, the court-martial reconvened. R. at 317. The military judge provided an oral ruling, granting

[4] The Government mischaracterizes trial defense counsel's motion as being "premised on the [G]overnment's inability to provide the unrecorded audio." Appellant's Br. at 5. Trial defense counsel was clear at trial: their position was that the audio statement did exist and it was in the possession of the Government at some point in time. *See, e.g.*, R. at 286, 288.

SrA Murray's R.C.M. 914 motion, R. at 317-35, which was supplemented by an eight-page written ruling. App. Ex. XXXI.

In her written ruling, the military judge made extensive findings of fact and summaries of applicable law. App. Ex. XXXI. SrA Murray accepts the quoted sections of the trial judge's ruling in Appellant's brief as accurate.[5] Additional facts concerning the military judge's written ruling necessary for the disposition of this matter are provided below in the argument section.

***Government Conduct after Military Judge's Ruling***

Several hours after the judge's ruling, the Government orally moved the military judge to reconsider her decision. R. at 337. The basis for this reconsideration was "new case law *to present* [and] new evidence *to present*." R. at 338 (emphasis added). When asked why the Government failed to present the additional caselaw during the 18 March 2024 hearing, the Government represented it was because "this is not a 914 issue to the Government." R. at 343. When pressed by the military judge about the defense's specific motion under R.C.M. 914, the Government conceded that their failure to timely present the caselaw was because they simply needed more time—even though notice of the forthcoming defense motion was provided a week earlier. R. at 338, 343 (explaining that the Government used extra time after the judge's ruling to conduct additional caselaw research). The Government attempted to respond to the military judge's

[5] Notwithstanding this concurrence regarding what the military judge actually wrote, SrA Murray disagrees with the Government's mischaracterization of the trial judge in both the fact and argument sections of their filing. *See, e.g.*, Appellant's Br. at 10 (stating that the military judge "repeate[dly]" applied "incorrect legal principles"); 18 (characterizing the military judge as "repeatedly" having an "erroneous view of the law"); 22 (arguing that the military judge had a "fundamental misunderstanding of the law"); 24 (contending that this trial judge "misapprehend[ds] . . . the law"); 26 (concluding that the military judge had a "fundamental misunderstanding of the law"); Appellant's 27 (characterizing the military judge's reasoned conclusions of law as evidence that the military judge was confused).

concerns about a lack of diligence by claiming they did not know exactly what SrA Murray's position would be on 18 March 2024. R. at 343-44.

At this point, the trial defense team informed the military judge that the Government's representations were "provable [sic] demonstrably false," because the senior defense counsel had sent emails to the Government informing them of SrA Murray's position and specifically cited to caselaw. R. at 344. While "it's not [the Defense's] job to mentor the trial counsel," the senior defense counsel provided the Government with a professional courtesy of pointing them to the exact caselaw from which the Defense derived their arguments. R. at 345. Ultimately, the military judge found that the Government proffered no new evidence or newly developed caselaw that would justify a motion for reconsideration. R. at 354, 356. As such, the military judge did not permit the Government to move for reconsideration. R. at 356.

The Government appealed the military judge's decision to exclude evidence pursuant to R.C.M. 914 on 21 March 2024. Notice of Article 62 Appeal, dated 21 March 2024. On the same day, trial counsel filed a written motion for reconsideration with the military judge. United States' Motion to Attach Documents, App'x, Attachment 1 at 1. This written filing contains some evidence which the Government failed to provide during the 18 March 2024 motions hearing. Thereafter, the military judge—based on the Government's urging—provided a summary of her earlier ruling, denying the Government's request to move for reconsideration. United States' Motion to Attach Documents, dated 16 April 2024, App'x Attachment 3 at 3. Specifically, that summary stated that the Government's request to move for reconsideration was denied "based on the fact that the evidence and law the Government sought to introduce was not new—rather, the Government failed to do its due diligence in the six days it was on notice of the pending R.C.M. 914 motion." *Id*.

On 16 and 18 April 2024, the Government moved this Court to attach two affidavits containing myriad attachments. This Court granted the Government motions on 2 May 2024, but "defer[ed] consideration of the substance of the attachments." To be sure, the Government's affidavits and attachments were not available to the military judge when she made the ruling subject to this appeal.

## ARGUMENT

### THE MILITARY JUDGE DID NOT ABUSE HER DISCRETION WHEN SHE EXCLUDED THE TESTIMONY OF THE NAMED VICTIM, E.M., UNDER THE PROVISIONS OF R.C.M. 914.

#### *Standard of Review*

"A military judge's decision to exclude evidence is reviewed for an abuse of discretion." *United States v. Becker*, 81 M.J. 483, 488 (C.A.A.F. 2021). The abuse of discretion standard is, similarly, used to review a military judge's decision "to strike testimony under the Jencks Act and R.C.M. 914." *United States v. Muwwakkil*, 74 M.J. 187, 191 (C.A.A.F. 2015). "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be 'arbitrary, fanciful, clearly unreasonable, or clearly erroneous.'" *United States v. White*, 69 M.J. 236, 239 (C.A.A.F. 2010) (internal quotations omitted).

When reviewing matters on interlocutory appeal under Article 62(b), Uniform Code of Military Justice (UCMJ), this Court may act only with respect to matters of law. 10 U.S.C. § 862(b); *United States v. Baker*, 70 M.J. 283, 287-88 (C.A.A.F. 2011). Under such a review, "the question is not whether [this Court] might disagree with the [military judge's] findings, but whether those findings are fairly supported by the record." *Baker*, 70 M.J. at 288 (quotation marks and citation omitted). As such, this Court "reviews the evidence in the light most favorable to [Appellee]." *United States v. Lewis*, 78 M.J. 447, 452 (C.A.A.F. 2019).

Whether certain evidence qualifies as a R.C.M. 914 statement is, likewise, reviewed for an abuse of discretion. *Muwwakkil*, 74 M.J. at 191-92 (reviewing the military judge's determination that certain evidence was a R.C.M. 914 statement for an abuse of discretion); *United States v. Thompson*, ARMY 20180519, 2020 CCA LEXIS 420, at *6-7 (A. Ct. Crim. App. 23 Nov. 2020) (unpub. op.), *aff'd*, 81 M.J. 391, (deciding that the military judge's decision regarding certain evidence as a R.C.M. 914 statement was not an abuse of discretion); *see also United States v. Ramos-Baez*, 86 F.4th 28, 58-59 (1st Cir. 2023) (analyzing evidence of a Jencks Act statement under the abuse of discretion standard). The Government misconstrues *United States v. Clark*, contending that the Court of Appeals for the Armed Forces (C.A.A.F.) has held that courts review a military judge's decision regarding a R.C.M. 914 "statement" de novo. Appellant's Br. at 16 (citing 79 M.J. 449, 454 (2020)). But this is not what the C.A.A.F. reasoned in *Clark*. 79 M.J. at 455 (applying a de novo review *to the prejudice analysis*, not to the military judge's decision to regarding whether evidence was a R.C.M. 914 statement).

***Law***

*A. R.C.M. 914 Statements in the Possession of the Government*

R.C.M. 914(a) provides that "[a]fter a witness . . . has testified on direct examination, the military judge, on motion of a party who did not call the witness, shall order the party who called the witness to produce . . . any statement of the witness that is . . . in the possession of the [Government]." Relevant to this appeal, R.C.M. 914(f) defines a statement as a "substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement." If the Government cannot, or will not, comply with R.C.M. 914, then "the military judge *shall* order that the testimony of the witness be disregarded." R.C.M. 914(e)(1) (emphasis added). A statement is within the possession of the Government when it is

"possessed by the prosecutorial arm of the federal government." *United States v. Thompson*, 81 M.J. 391, 396 (C.A.A.F. 2021).

The C.A.A.F. has held that trial defense counsel commit ineffective assistance of counsel when they fail to raise an applicable R.C.M. 914 motion at trial, absent a reasonable strategic reason to do so. *United States v. Palik*, __ M.J. __, 2024 CAAF LEXIS 181, at *28-29 (C.A.A.F. 2024). In *Palik*, the Government argued that the defense had the burden of demonstrating that certain recordings once existed, and that the defense would have been unable to meet this burden at trial. *Id.* at *22-23. The C.A.A.F. found this argument "unavailing" because there was evidence from the AFOSI agents that there had, at one point in time, been an audio recording.[6] *Id.* at *23. Further, C.A.A.F. went on to reason that there is a presumption of regularity in "[AF]OSI's practice to record interviews such as the ones conducted with the victim in this case." *Id*. This presumption may constitute prima facie evidence that a recording of an interview once existed. *Id*.

The *Palik* Court recognized that "two opinions of [the C.A.A.F.] have applied R.C.M. 914 and are particularly relevant" when reviewing issues raised under that rule. *Id.* at *15-16. The first of those cases is *Muwwakkil*, 74 M.J. 187. In that case, the C.A.A.F. rejected the Government's argument that they did not have a duty to preserve statements within their possession. *Id.* at 192 ("[T]he Government's strained interpretation of R.C.M. 914 stands in stark contrast to judicial interpretations . . . by the Supreme Court, [the Court of Military Appeals], and the federal circuit courts."). The C.A.A.F. concluded that when a recording is "no longer in the Government's possession solely because of the Government's . . . fail[ure] to preserve it," a

[6] The only evidence of this was testimony from one AFOSI agent that the recording was "lost," which was elicited during cross-examination, and a note in the internal data pages. *Palik*, 2024 CAAF LEXIS 181, at *22.

military judge does not abuse her discretion in finding the statement existed in the Government's possession. *Id.* at 194.

The second case referenced by the *Palik* Court was *United States v. Sigrah*. 82 M.J. 463 (C.A.A.F. 2022). In *Sigrah*, the C.A.A.F. clarified its precedent concerning the prejudice analysis for R.C.M. 914 issues. *Id.* at 468. In so doing, the *Sigrah* Court rejected the Government's argument that there was no prejudice to the accused because he had access to the witness's sworn written statements. *Id*.

*B. Good Faith Loss Exception*

R.C.M. 914(e)(2) creates an exception for good faith loss of a statement. The rule states that if the Government "cannot comply with this rule because the statement is lost, and can prove, by a preponderance of evidence, that the loss of the witness statement was not attributable to bad faith or gross negligence," the military judge need not impose sanctions. R.C.M. 914(e)(2). However, the military judge may impose the sanctions authorized under R.C.M. 914(e)(1) if (1) "the statement is of such central importance to an issue that it is essential to a fair trial" and (2) "there is no adequate substitute for the statement." R.C.M. 914(e)(2)(A)-(B)

Gross negligence "has been defined myriad ways." *United States v. Lattin*, ACM No. 39859, 2022 CCA LEXIS 226, at *50 n.22 (A.F. Ct. Crim. App. 20 Apr. 2022) (unpub. op.), *aff'd,* 83 M.J. 192. Black's defines gross negligence as a "lack of slight diligence or care."[7] *Gross Negligence*, BLACK'S LAW DICTIONARY (2d pckt. ed.). "'Gross negligence' is a relative term. It is doubtless to be understood as meaning a greater want of care than is implied by the term 'ordinary negligence.' [B]ut, after all, it means the absence of the care that was necessary under

[7] Black's also defines gross negligence as a "reckless disregard" of a legal duty. *Gross Negligence*, BLACK'S LAW DICTIONARY (2d pckt. ed.)

the circumstances." *Milwaukee & S.P.R. Co. v. Arms*, 91 U.S. 489, 495 (1875); *see also Smith v. Wade*, 461 U.S. 30, 72 (1983) (Rehnquist, J., dissenting) (lamenting that gross negligence is "a relative term").

Prior to the creation of R.C.M. 914's good faith loss exception, there was a judicially created good faith loss doctrine, which essentially mirrors the new exception in R.C.M. 914:[8] "Where the [G]overnment's loss of such statements is due to bad faith or gross negligence, striking the testimony of the witness whose statement is lost is mandated." *United States v. Muwwakkil*, 73 M.J. 859, 862-63 (A. Ct. Crim. App. 2014), *aff'd*, 74 M.J. 187. C.A.A.F.'s predecessor court implied that the good faith loss doctrine was "limited," *United States v. Jarrie*, 5 M.J. 193, 195 (C.M.A. 1978), but the C.A.A.F. "never explicitly ruled that the loss of recordings due to the government's [simple] negligence prohibits the application of the good faith loss doctrine." *Palik*, 2024 CAAF LEXIS 181, at *38 (Sparks, J., dissenting). To be sure, in *Marsh*, 21 M.J. 445, the Court of Military Appeals "concluded that the military judge did not abuse his discretion when he denied a R.C.M. 914 motion despite the fact that the loss of the records in question was due to at least some negligence." *Id*. (citing *Marsh*, 21 M.J. at 451-52). As such, the C.A.A.F.'s precedent on the good faith loss doctrine remains applicable.

***Analysis***

For two reasons, the military judge's decision to exclude E.M.'s testimony was not "arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *White*, 69 M.J. at 239. First, because the evidence demonstrated that E.M.'s AFOSI interview was a statement that existed in

[8] This is not to say that SrA Murray concedes that R.C.M. 914(e) unlawfully abrogates the Jencks Act. *See United States v. Marsh*, 21 M.J. 445, 451 (C.M.A. 1986) (noting the "well-established" applicability of the Jencks Act to courts-martial); *United States v. Romano*, 46 M.J. 269, 274 (C.A.A.F. 1997) (discussing the hierarchy of laws applicable to trials by court-martial and how a subordinate authority may expand but cannot conflict with a right afforded by a superior authority).

the possession of the Government. Second, because the evidence demonstrated that the Government failed to meet the good faith loss exception. Therefore, this Court should affirm the military judge's decision and remand the case to the trial court for further proceedings.

*A. E.M.'s Interview was a Statement in the Possession of the Government*

1. There was a once-existing audio recording of E.M.'s victim interview, and the military judge found as such.

The audio of E.M.'s victim interview existed at one point in time, and the military judge made such a finding. Therefore, the military judge did not abuse her discretion when she concluded that audio from E.M.'s victim interview was a statement within the possession of the Government. App. Ex. XXXI at 5. Despite this, the Government now argues that the military judge abused her discretion because she concluded that a "never-recorded" audio file was in the possession of the Government. Appellant's Br. at 19-22. In doing so, they rely on a single, three-word finding isolated from the surrounding and related text in the military judge's ruling: "was not captured."[9] App. Ex. XXXI at 5.

The Government reads far too much into the phrase "was not captured." To the Government, "was not captured" is synonymous with "never-recorded." Appellant's Br. at 19. But the Government fails to provide any caselaw or dictionary definitions to support this point. In fact, a review of the applicable definition shows that "was not captured" is not at all synonymous with "never-recorded," as the Government suggests. Merriam-Webster defines capture as "the act of recording in a *permanent* file." (emphasis added). *Capture*, MERRIAM-WEBSTER DICTIONARY (online ed.), last visited 20 May 2024. Using this definition for the word

[9] The military judge also noted that "only the video was captured." App. Ex. XXXI at 1. As discussed, *infra*, this simply means that the audio was not recorded "in a permanent file." *See, e.g.*, *Capture*, MERRIAM-WEBSTER DICTIONARY (online ed.), last visited 20 May 2024.

capture, it is clear that the military judge's finding of "was not captured" actually means "was not recorded in a *permanent* file." After all, a recording occurs when audio is processed through a system and collected by it, such as the Getac system which processed audio in this case, R. at 250; capture merely means that the recording is not permanently preserved in some way.

Correspondingly—and as far as undersigned counsel can ascertain—no court in the United States has discussed, at length, the definition of the word "capture" as it applies to audio recordings. Similarly, several dictionaries—including Black's Law Dictionary—provide unhelpful definitions. *See, e.g.*, *Capture*, BLACK'S LAW DICTIONARY (online ed.), last visited 20 May 2024 ("In International Law. The taking or wresting of property from one of two belligerents by another."); *Capture*, CAMBRIDGE DICTIONARY (online ed.), last visited 20 May 2024 (referring to "capture" as either capturing a physical object into one's possession or to "take a picture of something using a camera"); *Capture*, BRITTANICA (online ed.), last visited 20 May 2024 ("[T]o describe or show . . . in a very accurate way by using writing, painting, film, etc."); *Capture*, COLLINS DICTIONARY (online ed.), last visited 20 May 2024 ("If an event is captured in a photograph or on film.").[10] The dictionary definitions above show that only the Merriam-Webster definition is directly on point in this case.

Resulting, the military judge's ruling accurately concluded that the audio of E.M.'s interview "was not recorded in a *permanent* file." After all, by the time of her ruling, the audio of E.M.'s interview was lost from AFOSI's Getac system. App. Ex. XXVI; App. Ex. XXXI at 2.

[10] Some courts seem to adopt, implicitly, the definitions used by Brittanica and Collins. *See, e.g.*, *United States v. Perry*, 92 F.4th 500, 506 (4th Cir. 2024) ("[T]he recording captured [defendants] running the second stop sign."); *United States v. Davis*, 326 F. 3d 361, 366 (2d Cir. 2003) ("[T]he video recording captured only statements and actions that Davis 'knew full well could be used against him.'").

Thus, the evidence shows that the once existing audio recording, discussed at length in Part A.2 *infra*, merely lacked permanence (i.e., was not captured).

Further, in order to believe the Government's argument that the military judge found a "never-recorded" audio file to be a R.C.M. 914 statement, this Court would have to do two things: (1) ignore the common definition of "capture" described above; and (2) conclude that the military judge truly had no understanding of what R.C.M. 914 statements are. This latter proposition stretches credulity. An axiom of the military justice system is that "[a] military judge is presumed to know the law." *United States v. Robbins*, 52 M.J. 455, 457 (C.A.A.F. 2000). A review of the record demonstrates that this military judge understood the law concerning R.C.M. 914 statements. As the military judge articulated on the record, she "would not have gotten into the [R.C.M.] 914, the full analysis, had there been no statement." R. at 343.

Perhaps more importantly, the military judge accurately summarized the law on R.C.M. 914 statements in her oral and written rulings. For example, she correctly quoted R.C.M. 914(f), which defines what a "statement" is for R.C.M. 914 purposes. R. at 322; App. Ex. XXXI at 3. In addition, the military judge cited applicable caselaw. R. at 322-25; App. Ex. XXXI at 5 (summarizing *Clark*, 79 M.J. at 454, as encouraging "an expansive interpretation" of R.C.M. 914 statements).

As the military judge ultimately concluded, an audio "recording would clearly be a substantially verbatim recital of an oral statement that is being recorded contemporaneously with the making of an oral statement and contained in a recording." App. Ex. XXXI at 5. This demonstrates that the military judge knew and understood what a R.C.M. 914 statement was at the time she made her ruling. This fact, coupled with the applicable definition of "capture," demonstrates that the military judge's decision was not clearly erroneous, arbitrary, or fanciful.

Even if this Court "might disagree with the [military judge's characterization]," of the once-existing audio recording, this Court cannot substitute its judgement for hers. *Lewis*, 78 M.J. at 452. Rather, as the C.A.A.F. has instructed, the role of the appellate courts in an Article 62 appeal is merely to assess whether the findings are supported by the record. *Id*. Here, the most relevant finding in dispute is whether there was a statement and, as both the military judge found and the record supports, there was.

2. The record is replete with evidence that the audio of E.M.'s victim interview existed at some point in time.

The Government's entire appeal is based on the contention that the audio of E.M.'s victim interview never existed. Not only is this contrary to the military judge's own findings, discussed in Part A.1. *supra*, it is also inconsistent with the evidence available to the military judge.

First, evidence before the military judge indicated that when the Getac system was broadcasting audio, the audio was being recorded. R. at 250. During E.M.'s interview, the detachment superintendent or commander—along with a potential judge advocate representative—were listening to the interview contemporaneous to it occurring. R. at 250, 266. Specifically, SA E.R. testified that "from what I understand [other OSI agents] heard audio" during the interview.[11] R. at 250. The Government concedes that this is the case, articulating that "during the interview, a supervising agent . . . was able to *hear* the live *audio* through the Getac *recording* system." Appellant's Br. at 3 (emphasis added). The military judge recognized this as well, finding that that this was "supported by testimony of the case agents, who explained a

[11] SA E.R. also indicated in her sworn affidavit that she believed audio was recording because her leadership at the AFOSI detachment could hear audio through the Getac recording equipment. SA E.R. Affidavit at 1.

supervisor was watching the interview in real time and heard E.M.'s interview."[12] App. Ex. XXXI at 5.

Second, SA E.R. testified that she affirmatively turned on the audio recording equipment prior to beginning the interview. R. at 244; SA E.R. Affidavit at 1. Neither SA E.R. nor SA A.P. testified to any occurrence during the interview that led them to believe the audio was not being recorded. In fact, as articulated above, there was evidence that they actively understood the audio was recording. *Cf*. R. at 250.

Third, just this term, the C.A.A.F. has recognized a "presumption of regularity" regarding AFOSI victim interview recordings. *Palik*, 2024 CAAF LEXIS 181, at *23. Specifically, military courts should presume regularity when it comes to "OSI's practice to record interviews such as the ones conducted with the victim in this case." *Id*. This presumption, on its own, may constitute prima facie evidence that a recording of a victim interview would ordinarily be made and, in turn, once existed. *Id*. Despite "not hav[ing] the benefit of the *Palik* opinion," Appellant's Br. at 24 n.5, the military judge rightly noted facts about this presumption of regularity in her ruling. App. Ex. XXXI at 6 (explaining that both agents testified that "[r]ecording of [victim] interviews is [AF]OSI policy."). These facts are predicated in the same presumption and, more importantly, are grounded in the facts before the military judge. This basis in evidence formed the foundation for the finding now in dispute that a statement existed and, consequently, make the Government's argument that much more difficult to show the military judge's decision was arbitrary, fanciful, clearly unreasonable, or clearly erroneous.

[12] The Government references this fact, but ignores the necessary implication which makes it relevant. Appellant's Br. at 19-20.

Even if the military judge had been presented evidence from the AFOSI agents that the audio never existed (as they now attest in their affidavits), the military judge would have rightly dismissed such evidence as speculation. After all, the fact that the recording was missing was not known to AFOSI until one month after the interview. App. Ex. XXVI; App. Ex. XXXI at 2. When the lost audio was discovered, AFOSI did not know whether "this was an equipment issue *or other error*." App. Ex. XXVI (emphasis added); App. Ex. XXXI at 2. In fact, at the time of her ruling, no party provided evidence showing that the audio recording never existed, as the Government now claims.[13] App. Ex. XXXI at 6 ("[A]s late as September 2023, [AF]OSI was still working with a tech company to determine the cause and corrective measures needed.").

Notably, the Government's assertion that the audio never existed is belied by the fact that AFOSI took no efforts to ensure that the audio was preserved *after* it was recorded.[14] R. at 266 ("I don't always review [the burned disc] right after."). As SA A.P. admitted, despite the detachment experiencing audio perseveration issues in the past, they made no efforts before or after E.M.'s interview to ensure the audio was preserved after it was recorded. R. at 264. Any argument that the audio never existed is both speculative and unsupported by the record.

These facts, especially when taken in the light most favorable to SrA Murray, demonstrate that there was likely an audio recording of E.M.'s victim interview. Therefore, the military judge's determination that such a recording existed was not clearly erroneous, fanciful, or arbitrary.

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[13] The affidavit from SA E.R., attached to the Government's written motion to reconsider, speculates the audio was never recorded in the Getac system. However, this information is unsupported by other evidence in the record and was not before the military judge when she made the ruling subject to this appeal. SA E.R. Affidavit at 2. It is interesting that this evidence only surfaced after the military judge made her ruling, a fact which should give this Court pause as to its credibility; this is especially true since the trial defense team was unable to cross-examine SA E.R. on this "fact," or provide contrary evidence.

[14] The C.A.A.F. has rejected Government arguments that they have no obligation to ensure statements are preserved. *Muwwakkil*, 74 M.J. at 192.

3. Because the audio of E.M.'s victim interview existed at one point in time at AFOSI, it was a R.C.M. 914 statement within the possession of the Government.

As demonstrated above, the audio of E.M.'s victim interview existed at some point in time. Therefore, the military judge did not abuse her discretion in ruling that it was a R.C.M. 914 statement in the possession of the Government.

The military judge recognized that an audio recording of an interview qualifies as a statement under R.C.M. 914(f): "[a] substantially verbatim recital of an oral statement . . . that is recorded contemporaneously with the making of the oral statement." App. Ex. XXXI at 3 (quoting R.C.M. 914(f)). Our superior court has been clear that audio recordings of a witness interview qualify as a R.C.M. 914 statement. *See, e.g.*, *Palik*, 2024 CAAF LEXIS 181, at *1-3; *Sigrah*, 82 M.J. at 465, 468. Further, the audio recording in this case was in the possession of a prosecutorial arm of the Government. *Thompson*, 81 M.J. at 396; *cf*. *Palik*, 2024 CAAF LEXIS 181, at *1-3; *Sigrah*, 82 M.J. at 464-65.

As such, the military judge did not abuse her discretion by finding that the once-existing audio recording was a R.C.M. 914 statement and that it was in the possession of the Government.

4. The Government's contention that the military judge "misunderstood" the law is unsupported by the record and applicable precedent.

The Government argues that the "military judge's extensive reliance on cases," such as *Marsh*, *Muwwakkil*, and *Sigrah* "demonstrate[] her fundamental misunderstanding of the law." Appellant's Br. at 22. There are several problems with this argument.

First, the C.A.A.F. recognized in its most recent R.C.M. 914 case that "two opinions of [the C.A.A.F.] have applied R.C.M. 914 and are particularly relevant . . . *Muwwakkil* and *Sigrah*." *Palik*, 2024 CAAF LEXIS 181, at *15-16. Despite not having "the benefit of the *Palik* opinion

at the time of . . . [her] ruling," Appellant's Br. at 24 n.5, the military judge understood the legal landscape of R.C.M. 914, citing these "particularly relevant" C.A.A.F. cases.

Second, the Government frames this "misunderstanding" based on their theory that the audio recording never existed, claiming that the military judge used caselaw to "obviate the need to answer the threshold question of whether a statement existed." Appellant's Br. at 23. This is simply untrue. The military judge made specific findings that the audio recording existed, that it constituted a statement under R.C.M. 914, and was at one time in the possession of the Government. App. Ex. XXXI at 5. These findings answered the threshold questions posed by R.C.M. 914 and the caselaw—in other words, the military judge applied the facts presented to the governing law. And these findings are also supported by the record, discussed above in Parts A.1.-A.3. *supra*. As the Government seems to concede, because the recording existed, the caselaw cited by the military judge is applicable. Appellant's Br. at 23-24; App. Ex. XXXI at 3-5.

While the Government contends that the cases cited "should have been treated with caution" because of the 2023 amendment to R.C.M. 914, Appellant's Br. at 23, it is unclear why this is so. After all, nothing in the 2023 amendment altered the definition of "statement" or what it means to be "in the possession" of the Government. If caution was warranted, it would only be afforded to the good faith loss doctrine. And, as will be discussed below, Part B.2 *infra*, the military judge did accurately summarize this change to the law.

5. The Government constructs a strawman to make their argument more persuasive. This Court should be left unconvinced.

Not only does the Government wrongly claim that the military judge failed to understand the applicable law, it goes on to assert "she believed the law imposes a duty on the government to record witness interviews." Appellant's Br. at 24. This is inaccurate.

First, there is nothing in the military judge's ruling that suggests she thought there was a duty to record interviews. Instead, in the exact paragraph where the Government reads an "impose[d] duty," it is evident that the military judge was merely referencing testimony elicited by the AFOSI agents at trial. App. Ex. XXXI at 6 (finding that the AFOSI agents testified that it is policy to record victim interviews).

Moreover, as discussed above, the C.A.A.F. has recognized a presumption of regularity when it comes to the recording of witness interviews by law enforcement. *Palik*, 2024 CAAF LEXIS 181, at *23. To the extent that any duty arises, it is an administrative one imposed by the Government upon itself. *See id.*

Accordingly, referencing the presumption discussed in *Palik*—or the facts inherent to it—is not error, as the Government suggests. Rather, it is the natural and warranted consequence of AFOSI—and, more broadly, the sovereign prosecuting Appellant—choosing to make the recording of victim interviews its standard practice. When the Government chooses to record statements—as it did here—there is a resulting duty to preserve the statements under R.C.M. 914. *Muwwakkil*, 74 M.J. at 192-93. As such, it was not error for the military judge to reference testimony she received concerning an AFOSI policy to record victim interviews and maintain them.

*B. The Government did not Present Evidence to Satisfy the Good Faith loss Exception*

The military judge did not abuse her discretion when deciding that the Government failed to prove that the good faith loss exception applied.

1. <u>The Government attempts to shift their burden of proving their actions were not grossly negligent.</u>

The Government begins its argument articulating that "there is no evidence in the record that indicates any willful or intentional act by the government agents." Appellant's Br. at 27.

However, at the outset, the Government fails to recognize that it was their burden at trial to present information, by a preponderance of the evidence, that it did not act in bad faith or a grossly negligent fashion. *See* R.C.M. 914(e)(2). Despite having this burden, the Government presented no evidence at trial to demonstrate that they acted in good faith or were not grossly negligent. By contrast, SrA Murray presented "a lot of evidence," R. at 316, to include presenting nine exhibits, App. Exs. XXII-XXX, and two witnesses. R. at 238, 255.

The Government, however, opted to call no witnesses and present no documentary evidence. Even trial counsel's cross-examination of the two witnesses was exceedingly short: little more than one page for SA E.R., R. at 251-52, and two pages for SA A.P., R. at 267-69. And, in those cross-examinations, trial counsel did not elicit any evidence that would tend to show good faith or a lack of gross negligence.

2. The military judge did not abuse her discretion because the Government failed to demonstrate that their actions were not grossly negligent or made in bad faith.

Not only is the Government attempting to shift the burden, it also ignores evidence in the record which demonstrates AFOSI's gross negligence and thereby offered ample foundation for the military judge's determination finding an absence of good faith. App. Ex. XXXI at 5-6.

As this Court has recognized, gross negligence "has been defined myriad ways." *Lattin*, 22 CCA LEXIS 226, at *50 n.22. This is likely because "[g]ross negligence is a relative term." *Arms*, 91 U.S. at 495. The military judge used the definition from this Court's decision in *United States v. Vaughan*: "a negligent act or failure to act, accompanied by a gross, reckless, wanton, or deliberate disregard for the foreseeable consequences to others of that act or omission." App. Ex. XXXI at 6 (citing 56 M.J. 706, 709 (A.F. Ct. Crim. App. 2001)).[15]

[15] The Government seems to concede that the military judge's use of this definition is not an abuse of discretion. Appellant's Br. at 28.

The military judge found specific acts to articulate how the Government's actions were grossly negligent. First, she explained that the AFOSI detachment at JBER had experienced technical issues in the past which caused the audio recording of one interview to be recorded over by another. App. Ex. XXXI at 6. Despite having experienced issues which caused audio recordings to be overwritten, the military judge found that the AFOSI detachment took no remedial steps to ensure that audio recordings were not overwritten. App. Ex. XXXI at 6. This was supported by the testimony of both agents. R. at 249-50, 263-64. Second, the military judge found that after the recording was made, no one from AFOSI reviewed the recording for nearly a month. App. Ex. XXXI at 6. Third, the above referenced negligent acts "were accompanied by . . . a reckless disregard for the foreseeable consequences to others of the acts or omissions." App. Ex. XXXI at 6. After all, AFOSI agents admitted that a victim interview is of vital importance to an investigation for sexual assault, which is why it is AFOSI policy to record such interviews. App. Ex. XXXI at 6.

The Government argues that the cases cited by the military judge "should have been treated with caution, considering they addressed the pre-2023 amendment to R.C.M. 914."[16] Appellant's Br. at 23. This ignores two fundamental facts. First, the military judge recognized this amendment in her conclusions of law and analysis. App. Ex. XXXI at 4-6. Second, the good faith loss exception under R.C.M. 914(e)(2) mirrors the judicially created good faith loss doctrine. *Compare* R.C.M. 914(e)(2) (excepting mandatory remedies other than when there is "bad faith or gross negligence.") *with Muwwakkil*, 73 M.J. at 862-63 ("Where the [G]overnment's loss of such statements is due to bad faith or gross negligence, striking the testimony of the witness whose

[16] Despite making this argument in another section of their filing, the Government concedes that "the military judge appropriately considered the good faith loss exception codified in R.C.M. 914(e)." Appellant's Br. at 31.

statement is lost is mandated.").Therefore, the military judge did not clearly err when she referenced applicable precedent on the good faith loss doctrine.

The Government goes on to argue that there is no duty to create statements, only preserve them. Appellant's Br. at 29. This is correct. However, the Government is wrong to suggest that checking recording equipment prior to its use, or taking steps to ensure that a recording is maintained, is irrelevant. After all, the totality of the circumstances surrounding the loss of a statement may be considered when assessing gross negligence. This is especially true when considering that when the Government loses a statement and presents no evidence of "good faith," they cannot assert they are blameless in that statement's destruction. *Muwwakkil*, 73 M.J. at 863.

The Government further contends that "[AF]OSI could not take proactive steps to prevent a technical issue that they did not know existed." Appellant's Br. at 30. This is not true. While there is no evidence that the audio recording issue that pre-dated E.M.'s interview was the same as the one that caused E.M.'s audio to become lost, AFOSI's failure to take remedial measures to ensure future recordings were not lost is evidence of negligence (and grossly so). The military judge found as such, and that finding was supported by the record.

3. <u>The military judge did not abuse her discretion in declining to apply the R.C.M. 914(e)(2) exception.</u>

R.C.M. 914(e)(2) provides that, even if the Government shows that the loss of the statement was not caused by bad faith or gross negligence, the military judge may exclude the evidence if: "(A) the statement is of such central importance to an issue that it is essential to a fair trial, and (B) there is no adequate substitute for the statement." The Government contends that "R.C.M. 914(e) largely mirrors the language of the test established for obtaining an abatement for lost evidence under R.C.M. 703." But, nothing in the President's executive order suggests that R.C.M. 914(e) is based on the test for lost evidence under R.C.M. 703. Further, there is no caselaw

on this point, and, because of this lack of guidance, the military judge's decision not to rely on R.C.M. 703's lost evidence jurisprudence cannot be an abuse of discretion.

The military judge applied the text of the new R.C.M. 914 exception to findings of fact supported by the record. Specifically, she found that E.M.'s statement to AFOSI were "of central importance." App. Ex. XXXI at 7. After all, E.M. is the sole witness for four specifications against SrA Murray, and the primary witness for an additional three. App. Ex. XXXI at 7. Further, her AFOSI interview contained significant details of the alleged misconduct, which SA E.R. admitted was the "best evidence" against SrA Murray. R. at 242-43. The military judge methodically reviewed all potential alternatives to the recorded audio, including AFOSI agent notes, law enforcement testimony, and E.M.'s pre-trial interview. All of those alternatives, however, would be inadequate to substitute for E.M.'s four-hour long interview with AFOSI.

It should be noted that the Government asks this Court to assess the military judge's ruling with "evidence" not presented to her and that was not part of the record. *See, e.g.*, Appellant's Br. at 30. This would be inappropriate. Military appellate courts are limited to the record of trial on appeal. *United States v. Jessie*, 79 M.J. 437, 442 (C.A.A.F. 2020); *Baker*, 70 M.J. at 288. Moreover, a military judge abuses their discretion only when their "findings of fact are clearly erroneous." *Lewis*, 78 M.J. at 452. It is unclear how a military judge's findings of fact could be clearly erroneous when such findings were made without the benefit of the evidence now purported to exist. This is especially true since the evidence the Government relies upon was not in the record when the military judge made her ruling. Moreover, reliance on this evidence by this Court would be fundamentally unfair to SrA Murray, since he did not have the opportunity to respond to this "new" evidence at trial.

In the end, the Government seeks to escape liability in every situation where it loses a statement, because the trial defense attorneys will not know what is in a recording that no longer exists.[17] Appellant's Br. at 33. This flies in the face of the protections afforded by R.C.M. 914, and applicable precedent. *Muwwakkil*, 74 M.J. at 192 ("It would be an odd result indeed if the government ultimately was rewarded for its own negligence.").

## CONCLUSION

The Government asks this Court to supplant the military judge's judgement with its own. It attempts to shift its burden and cast the trial judge's understanding of the law in a negative light. The military judge did not abuse her discretion because her rulings were not arbitrary or fanciful. She correctly cited the applicable law, found relevant facts, and applied the correct law to those facts. Even if this Court would not make the same decision as this military judge, de novo, a trial judge is afforded incredible latitude in her findings of fact and application of the law on interlocutory appeal. After all, "[a]ny disagreement [this Court] might have with the judge's exercise of discretion under these circumstances is no basis for relief under Article 62." *Muwwakkil*, 73 M.J. at 863.

[17] In this case, there was evidence of inconsistency in E.M.'s statements. *See, e.g.*, App. Ex. XXX; R. at 295-96. This contributes to the military judge's finding that the audio from E.M.'s interview was of central importance and that no other adequate substitutes were available. App. Ex. XXXI at 7-8.

**WHEREFORE**, SrA Murray respectfully requests that this Court affirm the military judge's decision and remand the case to the trial court for further proceedings.

Respectfully submitted,

[redacted]

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**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 28 May 2024.

Respectfully submitted,

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**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | |
|---|---|
| **UNITED STATES**<br>*Appellant*<br><br>v.<br><br>**Shawn M. MURRAY**<br>**Senior Airman (E-4)**<br>**United States Air Force**<br>*Appellee* | **NOTICE OF APPEARANCE OF COUNSEL FOR VICTIM E.M.**<br><br>Misc. Dkt. No. 2024-04 |

**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

To the Clerk of this Court and all parties of record, pursuant to Rule 12.2 the undersigned hereby enter their appearance in *United States v. Murray* as counsel for victim E.M. Ms. Devon Wells and Capt Kellie Jenkins are Victim's Counsel for E.M. Capt Jenkins appears *pro hac vice* for the victim E.M., in the above-captioned case, pursuant to Rule 12.3 of the Rules of Practice and Procedure of the United States Air Force Court of Criminal Appeals.

Capt Jenkins will apply for admission to the Court. Capt Jenkins is registered in Colorado under bar number 55184 and has never been disbarred or suspended from practice before any court, department, bureau, or commission of any state or the United States, nor received any reprimand from any such agency pertaining to his fitness as a member of the bar. She is not under any criminal or any other type of investigation.

Pursuant to Rule 12.2, Ms. Devon Wells also enters her appearance as Victim's Counsel. A Notice of Representation is attached hereto.

Respectfully submitted this 9th day of May,

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I certify that on May 9, 2024, the foregoing was electronically filed with the Court and served on the following addresses:

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**DEPARTMENT OF THE AIR FORCE**
OFFICE OF THE JUDGE ADVOCATE GENERAL
VICTIMS' COUNSEL DIVISION

MEMORANDUM FOR AFCCA

FROM: AF/JAJS (Ms. Devon A. R. Wells, Capt Kellie Jenkins)

SUBJECT: Victims' Counsel (VC) Notice of Representation – Ms. E.M.

1. This notice is to inform you that we represent and have an attorney-client relationship with Ms. E.M., a named victim in the case of *U.S. v. Murray*. We are representing amicus/victim E.M. as her victim's counsel for appellate matters.

2. If you have any questions, please contact Ms. Devon Wells at commercial 240-636-2001 or at the devon.wells@us.af.mil.

[redacted]

Victims' Counsel for E.M.

[redacted]

KELLIE L. JENKINS, Capt, USAF
Victims' Counsel for E.M.

**IN THE UNITED STATES AIR FORCE**
**COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| **UNITED STATES**, Appellant, | ) | **UNITED STATES' APPEAL UNDER ARTICLE 62, UCMJ** |
| v. | ) | |
| | ) | Before Panel No. 2 |
| Senior Airman (E-4) **SHAWN M. MURRAY**, USAF Appellee. | ) | Misc. Dkt. No. 2024-04 |
| | ) | 5 May 2024 |

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**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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| UNITED STATES,<br>*Appellant,* | ) | **UNITED STATES' APPEAL UNDER ARTICLE 62, UCMJ** |
| v. | ) | Before Panel No. 2 |
| | ) | Misc. Dkt. No. 2024-04 |
| Senior Airmen (E-4)<br>**SHAWN. M. MURRAY**, USAF,<br>*Appellee,* | ) | 5 May 2024 |

**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:**

Under Article 62, UCMJ, the United States respectfully requests that this Court reverse the military judge's ruling excluding the testimony of EM[1], the named victim of the seven Specifications of Charge I, for the government's alleged violation of R.C.M. 914.

## INTRODUCTION

The government cannot provide something that never existed. To hold otherwise would impart a duty upon the government to create evidence, which neither federal law nor military law requires. Where the military judge found that the audio of a victim interview was never captured by recording equipment, she erred as a matter of law by finding a R.C.M. 914 violation based on the government's inability to provide audio that never existed. She then compounded that error by determining without sufficient evidence that the investigating agents were grossly negligent in failing to record the audio and that the audio was of such central importance to an issue that it was essential to a fair trial. These two conclusions were clearly unreasonable based on the state

[1] The named victim's initials contained in the specifications of Charge I were EM. By the time of trial, her initials were EP. For purposes of uniformity and clarity, this brief will use the initials contained in Charge I.

of the evidence and were undergirded by a misunderstanding of the law. The military judge erroneously excluded the named victim, EM's, testimony on these bases. Her conclusions were based on incorrect legal principles and a clearly unreasonable application of the facts to the law. The military judge abused her discretion, and therefore this Court should vacate her ruling and remand the case to the trial court for further proceedings.

## ISSUE PRESENTED

**WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION WHEN SHE EXCLUDED THE TESTIMONY OF THE NAMED VICTIM, EM, UNDER THE PROVISIONS OF R.C.M. 914.**

## STATEMENT OF THE CASE

On 7 December 2023, a general court-martial convened for a bifurcated arraignment and motions hearing at Joint Base Elmendorf-Richardson (JBER), Alaska. (R. at 1). The Appellee was arraigned on one charge and seven specifications of sexual assault, in violation of Article 120, UCMJ, and one charge and one specification of wrongful use of marijuana, in violation of Article 112a, UCMJ. (R. at 10). All seven specifications of Charge I involve the same victim, EM. (*Charge Sheet*, dated 11 August 2023, ROT, Vol. 1). Appellee pleaded not guilty to all charges and specifications. (R. at 113). At the conclusion of Appellee's arraignment, the Court recessed until 18 March 2024. (R. at 116).

On 18 March 2024, the general court-martial reconvened for trial on the merits, during which the named victim, EM, testified as part of the government's case-in-chief. (R. at 117, 177-227). At the conclusion of EM's direct examination, the defense made an oral R.C.M. 914 motion. (R. at 231). The parties presented evidence and argument on the issue. (R. at 231-316). On 19 March 2024 at 1111 hours Alaska Daylight Saving Time (AKDT), the military judge

issued her written ruling granting trial defense counsel's R.C.M. 914 motion and excluding the testimony of EM. (App. Ex. XXXI).

On 22 March 2024 at 0717 hours AKDT, the United States timely filed a notice of appeal notifying the military judge that it would be appealing her ruling to exclude evidence. (Gov. Record of Trial Docketing Memorandum, dated 15 April 2024, Attachment 1). Trial counsel forwarded the appeal and record of trial to the Air Force Trial and Government Appellate Operations Division, and it was received on 11 April 2024. The notice of appeal and record of trial were served on this Court and the Air Force Appellate Defense Division on 16 April 2024, in compliance with this Court's Rules for Practice and Procedures 15 and 20(c)(1).

## STATEMENT OF THE FACTS

### *Initial Victim Interviews*

On 15 November 2022, the Air Force Office of Special Investigations (OSI), Detachment (Det) 631, Joint Base Elmendorf-Richardson (JBER), Alaska, began investigating Appellee after receiving information from a Family Advocacy Program (FAP) Assistant that he had sexually maltreated EM. (*Preliminary Hearing Officer Report*, dated 06 July 2023, ROT, Vol. 3).

OSI conducted a victim interview with EM on 5 December 2022. (R. at 235.) This interview was conducted in Interview Room One and lasted for approximately three and a half hours. (R. at 233.) The agents conducting the interview—Special Agents (SA) ER and AP—used the standard OSI recording system and procedures. (R. at 243, 259.) During the interview, a supervising agent watched the interview live from another room and was able to hear the live audio through the Getac recording system. (R. at 250.)

Both SA ER and SA AP took notes contemporaneously with the interview. (R. at 244, 260.) The notes were not a verbatim transcription of the interview but instead were a shorthand

for relevant items that EM disclosed during the interview. (R. at 260). SA ER compiled both agents' notes and produced a written summary of the interview that was included in the Report of Investigation. (R. at 246, 260-61.) When SA ER drafted the summary of EM's second interview, she relied solely on the notes that she and SA AP took. (R. at 246, 254.)

***The Audio of EM's Second Interview Never Recorded***

After EM's second interview, SA MG was assigned to the case due to SA AP's departure from Detachment 631. (R. at 259; App. Ex. XXVI). On 4 January 2023, SA MG reviewed the recording of EM's second interview and discovered the recording device had captured the video but no audio. (App. Ex. XXVI, R. at 244.)

The failure of the recording system to record the audio of EM's interview was not detected during the live interview because the supervising agent watching the interview over the recording system was able to hear the live audio and did not realize the system was not recording. (R. at 250.) The recording software OSI used displays two boxes that indicate the interview is recording. (R. at 271.) Absent a visual check to confirm the boxes are checked and everything is working, the only way to verify the audio was properly captured is to listen to the interview after it is completed. (Id.) After realizing the audio had not been recorded, OSI did not re-interview EM. (R. at 250, 265.)

On 7 September 2023, a Support Technician from Getac Video Solutions Support sent an email to OSI Det 631 at JBER providing a possible explanation for the recording failure. (App. Ex. XXVII.) In the email, the Support Technician indicated "[t]here was also an issue of losing the microphones when the speakers were plugged into the 3.5 mm aux jack in the back of the DVR." (Id.)

During the discovery process, trial counsel provided the recording of EM's second interview to the defense. (App. Ex. XXVIII). Trial counsel informed the defense that "when OSI recorded the victim's interview, they were not able to record the audio due to a later discovered technical issue." (Id.)

***OSI Policy on Recording Victim Interviews***

OSI typically records all important relevant interviews during any investigation. (R. at 247). A recorded interview is useful as it can be used to produce a verbatim transcript, to assess a witness' demeanor and credibility, to ensure that no important statements are missed, and to ensure that OSI agents remain professionally neutral in their approach while conducting said interview. (Id.) However, while it is standard operating procedure, OSI policy does not require victim or witness interviews to be recorded. (R. 272-73).

***Motion to Exclude Witness Testimony Pursuant to R.C.M. 914***

Trial on the merits commenced on 18 March 2024. (R. at 117). EM testified during the government's case-in-chief. (R. at 177-227). Prior to cross examination, trial defense counsel made an oral motion to exclude EM's testimony for an alleged R.C.M. 914 violation, premised on the government's inability to provide the unrecorded audio from EM's second interview. (R. at 231). The government contested the motion. (R. at 298.) Trial defense counsel called SA ER and SA AP to testify regarding the unrecorded audio. (R. at 238-273.) SA ER was unequivocal in her testimony that the recording device used during EM's second interview did not capture any audio. (R. at 244.)

During trial defense counsel's presentation of the evidence, he elicited testimony regarding a previous instance where Det 631's recording equipment malfunctioned. (R. at 248.) Prior to EM's interview on 5 December 2022, the recording of an interview of a named victim in

an unrelated case was corrupted. (R. at 248-249). In that situation, the interview of the witness was conducted in Interview Room Two. (R. at 248.) A recording system malfunction caused by two interviews being recorded at the same time—one in Interview Room One and one in Interview Room Two—resulted in the audio of Interview Room One being recorded over the recording of Interview Room Two. (App. Ex. XXXI, para. 2). Once OSI became aware of this malfunction, the agents notified their leadership. (R. at 249.) EM's interview was conducted in Interview Room One. (R. at 252.)

During argument, trial defense counsel asserted that the unrecorded audio constituted a statement in possession of the United States government, and thus the government's failure to provide a version of EM's interview with the audio included constituted an R.C.M. 914 violation. (R. at 278-298). In support of their motion, trial defense counsel cited to United States v. Muwwakkil, 74 M.J. 187 (C.A.A.F. 2015), and United States v. Marsh, 21 M.J. 445 (C.M.A. 1986), cases that interpreted the old judicially created good faith loss doctrine. (R. at 283.) They also cited to United States v. Sigrah, 82 M.J. 463 (C.A.A.F. 2020), alleging that it was "almost analogous to the facts at issue in this case." (R. at 284-285.) Trial defense counsel then argued that the good faith loss doctrine should not be applied due to the government's alleged gross negligence in conducting EM's interview. (R. at 293-294.) Finally, trial defense counsel argued the unrecorded audio was of such central importance to an issue that it was essential to a fair trial and that there was no adequate substitute for the statement, and therefore the Presidentially codified good faith loss exception to R.C.M. 914 should not be applied. (R. at 294-298.) Based on these assertions, trial defense counsel requested the military judge exclude the testimony of EM as the remedy for the alleged R.C.M. 914 violation. (R. at 282-283.)

In response, trial counsel began her argument by pointing out that the audio to EM's interview never existed:

> *I want to stress the importance that the government was never in possession of the recording, because the recording never existed.* The machine did not record the audio. This is not a case where something became corrupted. It just did not record. That is the testimony of both agents. And so, in that situation, it is not the situation that was described before where there was an overriding, a mistake, an error. Nobody knows why this occurred. It was unique, but it never existed. There was no audio that was corrupted after the fact, when it transferred from one software to another, it's just the software did not record audio.

(R. at 298-299.) (emphasis added). Trial counsel then argued that even if the military judge conducted a good faith loss analysis, the defense had not met their burden to preclude application of the Presidentially codified good faith loss exception. (R. at 299-315).

***The Military Judge's Findings of Fact and Conclusions of Law***

On 19 March 2024, the military judge granted the defense's motion to exclude EM's testimony pursuant to R.C.M. 914. (App. Ex. XXXI). In excluding EM's testimony from Appellee's court-martial, the military judge included the following in her findings of fact:

> Prior to 5 December 2022, OSI Detachment 631, Joint Base Elmendorf-Richardson, Alaska, experienced a technology malfunction. As a result, when two interview rooms were being used simultaneously, only one microphone was used as a source, leaving one interview unrecorded. Despite, this technological malfunction, OSI did not put into place any corrective actions to ensure proper recording for future interviews.

(App. Ex. XXXI at para. 2).

> On 5 December 2022, [EM] was interviewed by agents assigned to OSI Detachment 631. The interview was conducted by SA E[redacted] P[redacted] (now R[redacted]) and SA A[redacted] P[redacted]. SA R[redacted], the lead case agent has worked for OSI for approximately five years, and has been assigned to the Joint Base Elmendorf-Richardson detachment for two years. SA P[redacted], an OSI agent for approximately three years was the support agent, so

> he took notes during EM's interview. What was recorded of that interview is contained on Appellate Exhibit XXIII. The recording consists of four separate video clips, and none of them have audio; only the video was captured by the recording equipment.

(App. Ex. XXXI at para. 3) (footnotes omitted).

> On 9 June 2023, an Assistance Staff Judge Advocate in the 673 ABW Legal Office submitted the OSI interview recordings to Defense Counsel via DoD SAFE. He notified the Defense at that time that "when OSI recorded the victim's interview, they were not able to record the audio due to a later discovered technical issue.

(App. Ex. XXXI at para. 9) (error in original).

The military judge included the following in her analysis section:

> The Court finds that a recording of an alleged victim interview does meet the definition of a statement under R.C.M. 914(f)(2). Such a recording would clearly be a substantially verbatim recital of an oral statement that is being recorded contemporaneously with the making of an oral statement and contained in a recording. Additionally, as CAAF noted in Clark, military appellate courts have "favored an expansive interpretation" of the definition of statement. 79 M.J. at 454. The Court therefore concludes the recorded video of [EM]'s interview qualifies under this expansive interpretation even though the *audio was not captured*. This conclusion is further supported by testimony of the case agents, who explained a supervisor was watching the interview in real time and heard [EM]'s interview.

(App. Ex. XXXI at para. 26) (emphasis added).

> The Court also concludes the statement was in the possession of the United States. A statement is "in possession of the United States" for purposes of R.C.M. 914 if it is or was possessed by a "prosecutorial arm" of the government. Thompson, 81 M.J. at 396. OSI, as the primary law enforcement agency of the Air Force, is a "prosecutorial arm" of the government. It was agents at OSI Detachment 631 who started the recording of [EM]'s interview on their internal recording equipment, and as reflected in the Internal Data Page at Appellate Exhibit XXVI, it remained in the government's possession after the interviews concluded.

(App. Ex. XXXI at para. 27).

> Prior to [EM]'s interview, OSI experienced a technical error, resulting in a failure to record a victim interview. Despite this error, no pre-interview preventative measures were put into place. OSI agents did not test the recording equipment before [EM]'s interview. While a supervisor watched the interview in real time, according to both case agents, the equipment itself was not checked to ensure proper recording. Further, even knowing of the previous incident, agents failed to check the status of the recording immediately after [EM]'s interview. Instead, it appears an entire month passed before any agent reviewed the recording and learned of the lack of sound. Even at that juncture, OSI failed to take corrective action by either reinterviewing [EM] or seeking a sworn written statement from her to capture the details of the seven sexual assault incidents she recounted during her three-plus hour interview with agents. The case agents did report the incident to their supervision, but as late as September 2023 (nine months after [EM]'s interview), OSI was still working with a tech company to determine the cause and corrective measures needed for both errors.

(App. Ex. XXXI at para. 29(a)(i)). The Court then determined the judicially-created good faith loss exception the R.C.M. 914 did not apply in this case:

> The good faith loss exception does not apply in the current case. The good faith loss exception to R.C.M. 914 "excuses the Government's failure to produce 'statements' if the loss or destruction of evidence was in good faith." Muwwakkil at 193 (citing Killian, 368 U.S. at 242). CAAF explained the exception is "generally limited in its application." Muwwakkil at 193 (citing Jarrie, 5 M.J. at 195). As detailed above, OSI was aware of at least one other incident when a victim interview failed to properly record. Despite that, no corrective measures were put into place to ensure no such future technical errors occurred. Even after OSI learned of the technical error, agents failed to take remedial actions, further weakening any claim of good faith. Finally, the current case is distinguishable from Marsh, where the government was able to show there were systems in place to guard against the lost evidence and that appellant was provided summarized transcripts of the lost statements that were almost "word for word" Marsh, 24 M.J. at 452.

(App. Ex. XXXI at para. 30).

The military judge next evaluated the case in light of the Presidentially codified good faith loss exception of R.C.M. 914(e) and found that the government had acted with "reckless disregard

for the foreseeable consequences to others of [its] acts or omissions." (App. Ex. XXXI at para. 29(a)(ii)). The military judge also determined the defense had demonstrated that (1) the "statement" was an issue of central importance to an issue that was essential to a fair trial and (2) there was no adequate substitute for the "statement." (Id. at para. 31(a-b)). In arriving at her conclusion regarding the issue of central importance the military judge reasoned:

> The video recording of a victim interview is often a foundation of Defense cross-examination, providing details of not just the alleged offenses, but also surrounding circumstances and the interview as well. The *lack of audio* in [EM's] recording deprives the Accused of that foundation, and impacts his ability to receive a fair trial.

(App. Ex. XXXI, para. 31(a)).

These are the relevant findings of fact and conclusions of law to the issue at hand. They form the basis of the United States' appeal because they are the result of the military judge's repeated application of incorrect legal principles.

***Government Motion for Reconsideration***

On 19 March 2024, a few hours after the ruling, government trial counsel informed the military judge on the record that the government intended to seek reconsideration of her ruling excluding EM's testimony. (R. at 337). Trial counsel explained that having the benefit of the military judge's rationale, they had new case law and additional evidence to present. (R. at 338, 340). Trial counsel cited United States v. Thompson, 81 M.J. 391 (C.A.A.F. 2021); United States v. Adams, 938 F.2d 96 (8th Cir. 1991); and United States v. Knutson, 9 F. App'x 706 (9th Cir. 2001). (R. at 341-42.)

The military judge pressed trial counsel on why they had not presented the case law the day before. (R. at 342-43). Trial counsel explained that in their view, this was not an R.C.M. 914 issue because "the evidence never existed." The military judge responded "[a]s a practical

matter, I would not have gotten into the 914, the full analysis, had there been no statement. So why was the government not prepared yesterday to provide me case law going to whether or not it existed?" (R. at 343).

Trial counsel responded that because the defense motion was made orally, they "did not know what argument was going to be made except for the lack of sound," and did not know what case law the defense was going to reference or what facts the defense was going to elicit regarding the lack of sound. (R. at 343-44.) Trial defense counsel opposed the motion for reconsideration and countered that the defense had told trial counsel they were going to raise the R.C.M. 914 issue a week before trial and had provided trial counsel with United States v. Sigrah. (R. at 344.) Trial defense counsel stated that he had shown trial counsel a "professional courtesy by at least giving them the keys to the kingdom of understanding R.C.M. 914," because Sigrah was "the most on point, up to date, or most recent case." (R. at 345.) Later in the argument, trial defense counsel again referred to Sigrah as being "the case that is most on point and is the most accurate and up to date." (R. at 347.)

After further discussion the military judge stated:

> I'm not finding it readily but it's my understanding from some of the comments you made yesterday that your position going in was that it did not qualify as a statement, even yesterday… But what concerns me is if the going in proposition for the government was always "there is no statement and that is dispositive and so judge, you don't even get to the rest of the R.C.M. 914 analysis" that was not proffered to the—presented to the court yesterday…But I wouldn't have even gotten to that focus in the ruling had you presented me with case law to support your position that there was no statement because it didn't exist.

(R. at 355-56.) Despite seemingly acknowledging that new case law would have potentially led her to a different result, the military judge said, "again if you had something on point that was dispositive that would have been the time for it." (R. at 356.) The military judge then orally

denied the government's request to file a motion for reconsideration during the same Article 39(a) session, apparently without stopping to read the new cases cited by the government. (Id.)

Later that same day, on 19 March 2024, the military judge held a telephonic R.C.M. 802 conference during which the government sought (1) to go back onto the record to state an intent to file a motion for reconsideration, (2) to be permitted to provide additional testimony in support of a motion for reconsideration, (3) to be permitted to file a motion for reconsideration with new evidence and case law, and (4) for the military judge to make a more definitive finding of fact as to whether the audio in question ever existed. (Gov. Motion to Attach, dated 16 April 2024, Appx., Attachment 3 at 1-2). The military judge "did not rule on the matters during the telephonic R.C.M. 802 conference but reminded Trial Counsel the Court had already ruled on the first three matters and denied the Government's request." (Id. at 2).

The day after the military judge's ruling, on 20 March 2024, to ensure appropriate facts and case law were presented to the military judge and captured on the record, the government trial counsel again requested via email, *inter alia*, permission to move for reconsideration and the opportunity to provide additional testimony in support of the motion for reconsideration. (Gov. Motion to Attach, dated 18 April 2024, Appx.).

Then the next day, on 21 March 2024, trial counsel submitted a written motion for reconsideration via email. (Gov. Motion to Attach, dated 16 April 2024, Appx., Attachment 1). That same day, the military judge emailed the parties, again denying the government's request to file the Motion for Reconsideration and saying the defense did not need to respond to the motion. (Id. at Attach. 2). The military judge provided a Summary of Ruling documenting her denial of the government's request to file a motion for reconsideration and denied the request to present additional evidence in the form of witness testimony. (Id. at Attach. 3). On 22 March 2024 at

0717 hours AKDT, the United States timely filed a notice of appeal notifying the military judge that it would be appealing her ruling to exclude evidence. (Gov. Record of Trial Docketing Memorandum, dated 15 April 2024, Attachment 1).

On 8 April 2024, the government requested the military judge mark the government's written Motion for Reconsideration and judge's Summary of the Ruling on the Motion for Reconsideration as Appellate Exhibits. (Gov. Motion to Attach, dated 16 April 2024, Appx., Attachment 4). On 9 April 2024, the military judge responded indicating it was her belief that the case was in a stay of proceedings and that she lacked authority to take any action, such as marking exhibits, during the stay. (Id.)

***Facts Precluded from Inclusion in the Record by the Military Judge***

Had the military judge allowed the government to file the Motion for Reconsideration, the following relevant facts would have been included in the record:

On 22 November 2022, OSI conducted the first victim interview with EM at OSI Det 631. (Gov. Motion to Attach, dated 16 April 2024, Appx., Attachment 1). The interview was conducted in Interview Room One using standard procedures for the recording equipment. (Id.) During that interview, EM requested Victim's Counsel and the interview was terminated to accommodate her request. (Id.) The video recording of the 22 November 2022 interview contains both audio and video. (Id.)

Upon discovering the lack of audio for EM's second interview, SA MG and SA ER attempted to play the recording on different computers, to no avail. (Gov. Motion to Attach, dated 16 April 2024, Appx., Attachment 1). They then accessed the Getac recording system itself and confirmed that it had only captured the video of EM's interview but had never captured the audio. (Id.)

OSI has used the Getac recording system dating back to at least January 2019. (Id.) Since that time, Detachment 631 has recorded approximately 300 interviews using the Getac system. (Id.) Of those 300 interviews, only one other interview has failed to record. (Id.) The two interviews conducted in Interview Room One immediately before and after EM's 5 December 2022 interview had no audio issues. (Id.) The witness interview in Interview Room Two that had audio issues was related to an investigation out of Tinker AFB. (Id.) That interview was not conducted by the OSI detachment at JBER. (Id.)

AFOSI Manual 71-118, paragraph 3.18.2, provides that victim and witness interviews are not required to be recorded, as opposed to subject and child forensic interviews, which must be. (Id.) OSI agents are still required to take agent notes during unrecorded victim and witness interviews. (Id.)

After the discovery of the first instance at JBER where the audio of an interview was overwritten, OSI took steps to avoid the error occurring again, all recorded interviews were to take place in Interview Room One. (Id.)

## STATEMENT OF STATUTORY JURISDICTION

The military judge's ruling excluded the testimony of the named victim, EM, of all seven specifications of Charge I. (App. Ex. XXXI; *Charge Sheet*, dated 11 August 2023.)
The military judge's ruling excluded "evidence that is substantial proof of a fact material in the proceeding," and the ruling excluded EM's testimony for all seven Specifications of Charge I. 10 U.S.C. §862(a)(1)(B). EM's testimony is essential to proving all seven specifications of Charge I, because she is the sole witness who can testify regarding the lack of consent—an essential element of the seven specifications of Charge I. Without this evidence, the United States will be unable prove an essential element and the military judge's ruling excluding EM's

testimony will function as a *de facto* dismissal of the seven specifications of Sexual Assault of which Appellee is accused. For these reasons, this Court has jurisdiction under Article 62(a)(1)(B), UCMJ.

## ARGUMENT

**THE MILITARY JUDGE ABUSED HER DISCRETION WHEN SHE MADE THE ERRONEOUS LEGAL CONCLUSION THAT UNRECORDED AUDIO OF A WITNESS INTERVIEW CONSTITUTED A STATEMENT IN THE POSSESSION OF THE GOVERNMENT UNDER R.C.M. 914. SHE ALSO ABUSED HER DISCRETION WHEN SHE DETERMINED THE R.C.M. 914(E) EXCEPTION DID NOT APPLY.**

### *Standard of Review*

A military judge's decision to exclude evidence is reviewed for an abuse of discretion. United States v. Bowen, 76 M.J. 83, 87 (C.A.A.F. 2017). "A military judge abuses [her] discretion when (1) the findings of fact upon which [she] predicate[s] [her] ruling are not supported by the evidence of the record, (2) if incorrect legal principles were used, or (3) if [her] application of the correct legal principles to the facts is clearly unreasonable." United States v. Ellis, 68 M.J. 341, 344 (C.A.A.F. 2010). "[A]ny legal ruling based on an erroneous view of the law also constitutes an abuse of discretion." United States v. Harrington, 83 M.J. 408, 416 (C.A.A.F. 2023). An abuse of discretion includes actions that are "arbitrary, fanciful, clearly unreasonable, or clearly erroneous." United States v. McElhaney, 54 M.J. 120, 130 (C.A.A.F. 2000) (internal quotation marks and citations omitted). These standards also apply to interlocutory appeals under Article 62, UCMJ. United States v. Mitchell, 76 M.J. 413, 417 (C.A.A.F. 2017).

"In ruling on an appeal under Article 62, the Court of Criminal Appeals may act only with respect to matters of law." 10 U.S.C. § 862(b). When reviewing the military judge's

findings of fact, this Court is limited to determining whether "the military judge's factual findings are clearly erroneous or unsupported by the record." United States v. Lutcza, 76 M.J. 698, 701 (A.F. Ct. Crim. App. 2017) (citations omitted). This Court "reviews the military judge's decision directly and reviews the evidence in the light most favorable to [Appellee]." United States v. Lewis, 78 M.J. 447, 452 (C.A.A.F. 2019) (quoting United States v. Pugh, 77 M.J. 1, 3 (C.A.A.F. 2017)).

Whether a particular piece of evidence meets the definition of a "statement" under R.C.M. 914 is a question of law reviewed de novo. *See* United States v. Clark, 79 M.J. 449, 454 (C.A.A.F. 2020) (finding that the military judge "erred" rather than "clearly erred" or "abused his discretion" in concluding that agents' comment during an interrogation were not "statements" under R.C.M. 914.) *Cf.* United States v. Morgan, 784 F.3d 1024, 1034 (10th Cir. 2014) (finding that whether a particular crime fits the statutory definition of a "crime of violence" is a question of law).

## ***Law***

*R.C.M. 914 Generally*

In 1984, the President promulgated R.C.M. 914 with language that closely mirrored the Jencks Act. *Compare* R.C.M. 914 (Manual for Courts-Martial, United States, (1984 ed.) (MCM) *with* 18 U.S.C. §3500. Given the overlap between R.C.M. 914 and the Jencks Act, CAAF has concluded that "our Jencks Act case law and that of the Supreme Court informs our analysis of R.C.M. 914 issues." *See* Muwwakkil, 74 M.J. at 191.

R.C.M. 914 states:

> After a witness other than the accused has testified on direct examination, the military judge, on motion of a party who did not call the witness, shall order the party who called the witness to produce, for examination and use by the moving party, any

> statement of the witness that relates to the subject matter concerning which the witness has testified that is…in the possession of the United States.

R.C.M. 914(a)(1). A statement is "in the possession of the United States" for purposes of R.C.M. 914 if it is or was possessed by a "prosecutorial arm of the federal government." Thompson, 81 M.J. at 396.

The relevant portion of R.C.M. 914 defines a "statement" 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 stenographic, mechanical, electrical, or other recording or a transcription thereof."

*R.C.M. 914's Good Faith Exception*

Prior to July 2023, the Jencks Act jurisprudence of our superior courts recognized a judicially-created "good faith loss doctrine." Muwwakkil, 74 M.J. at 191. "This doctrine excuse[d] the government's failure to produce 'statements' if the loss…of evidence was in good faith." Id. (quoting Killian v. United States, 368 U.S. 231, 242 (1961)). However, the United States Court of Military Appeals noted that the good faith loss doctrine was "generally limited in its application." United States v. Jarrie, 5 M.J 193, 195 (C.M.A. 1978)).

In July 2023, the President amended R.C.M. 914 and instituted a new, more generally applicable, good faith loss exception. Under the old rule, a showing of simple negligence could be sufficient to preclude application of the good faith loss doctrine. Muwwakkil, 74 M.J. at 193. Applying the new rule, simple negligence will only be sufficient to warrant an R.C.M. 914 remedy where the lost evidence poses a demonstrated impact to the appellant's Due Process rights. The amended rule states:

> (e) Remedy for failure to produce statement
> ….

> (2) Exception. In the event that the other party cannot comply with this rule because the statement is lost, and can prove, by a preponderance of the evidence, that the loss of the witness statement was not attributable to bad faith or gross negligence, the military judge may exercise the sanctions set forth in paragraph (e)(1) of this rule only if—
>
> (A) the statement is of such central importance to an issue that it is essential to a fair trial, and
>
> (B) there is no adequate substitute for the statement.

Exec. Order No. 14,103, Annex 1, §1(bb), 88 Fed. Reg. 50,535, 50,560-61 (July 28, 2023).

Since Appellee was arraigned after 28 July 2023, the amended version of R.C.M. 914 applies to his court-martial. Id. at 1.

The sanctions available under R.C.M. 914(e)(1) require the military judge to order either (a) that the testimony of the witness be disregarded by the trier of fact, or (b) order a mistrial if required in the interest of justice.

## ***Analysis***

### *A. The military judge abused her discretion when she concluded the government violated R.C.M. 914 by not providing audio of an interview that was never recorded.*

The military judge's decision to exclude EM's testimony constituted an abuse of discretion because she repeatedly based her conclusions on an erroneous view of the law. Application of the remedies available under R.C.M. 914(e)(1), is only appropriate where an R.C.M. 914 violation has occurred. Here, the military judge determined that the audio of EM's interview was never recorded. (App. Ex. XXXI, para. 3, 6, 9, 26). Thus, her legal conclusions that (1) the recorded video of EM's interview qualifies as a statement under R.C.M. 914, despite the fact the audio was never recorded and (2) that the "statement" was in the possession of the United States, resulted from her application of incorrect legal principles.

***1. The military judge applied incorrect legal principles when she concluded never-recorded audio of a victim interview constituted a statement under R.C.M. 914 and that never-recorded audio was at one time "in the possession" of the United States.***

The military judge acknowledged in the analysis section of her ruling that the audio of EM's interview "was not captured."[2] (App. Ex. XXXI, para. 26.) Given this finding, the analysis turns on whether never-recorded audio constitutes a statement "in the possession of" the United States. *See* R.C.M. 914. Before the government can be held accountable for failing to produce a statement under the Jencks Act, "a determination must first be made that a 'statement' *exists*." United States v. McDaniel, 17 M.J. 553, 554 (A.C.M.R. 1983) (emphasis added). *See also* United States v. Benton, 890 F.3d 697, 718 (8th Cir. 2018) (finding defendant did not successfully establish a violation of the Jencks Act where he failed to prove the statement existed); Adams, 938 F.2d at 98 (finding no Jencks Act violation because the Court was "satisfied that another statement simply [did] not exist" and "the government cannot produce what it does not have.")

Looking at the plain language of R.C.M. 914(f)(2), the never-recorded audio from a witness interview was not a "statement" within the meaning of a rule. Never-recorded audio is not "a substantially verbatim recital of an oral statement . . . that is recorded contemporaneously with the making of the oral statement and contained in a recording." There was no recording made contemporaneously with the oral statement, so there was no "statement" under the Rule. And contrary to the military judge's belief, the fact that a supervising agent was able to hear the interview is immaterial. As the military judge herself noted, the supervisor was "watching the

[2] When requesting to file a motion for reconsideration, trial counsel asked the military judge to make more a more definitive finding of fact that the audio had not been recorded. (Gov. Motion to Attach, dated 16 April 2024, Appx., Attachment 3). The military judge declined to do so because she believed she had already made such a finding, and no additional clarification was required. (Id.)

interview *in real time* and heard [EM]'s interview." (App. Ex. XXXI at para. 26) (emphasis added). Given that, unbeknownst to the agents, the audio recording equipment was not working, this amounted to no more than an unrecorded live broadcast, as opposed to a recorded one. Functionally, it would be no different than if the supervising agent was able to hear EM because someone gave her a loudspeaker.

In the end, the logic behind the military judge's interpretation of a "statement" was contradictory. If the video recording with no audio was a statement under the military judge's broad interpretation of the definition, then the government provided that statement to the defense in accordance with R.C.M. 914. If the video recording with no audio was not a statement, then the government had no duty to produce it. Considering the above, the military judge's determination that a statement existed within the meaning of R.C.M. 914 was incorrect as a matter of law. (App. Ex. XXXI at para. 26).

Several military cases also refute the military judge's legal conclusion that never-recorded audio is a statement under R.C.M. 914. In McDaniel, a legal clerk attempted to record audio of an Article 32 proceeding. 17 M.J. at 553. Due to the legal clerk's unfamiliarity with the recording device, the audio was never recorded, and the tapes were left blank. Id. The Army Court determined that no statement within the meaning of the Jencks Act existed "because blank tapes were not statements, and it follows that the *Government could not produce what never existed*." Id. at 554. (emphasis added). The Court effectively endorsed the trial judge's determination that "since the Government had no obligation to record the testimony, the failure to do so, regardless of any negligence by the legal clerk, does not invoke the [Jencks] Act." Id.

Similarly, in United States v. Giusti, 22 M.J. 733, 734 (C.G.C.M.R. 1986), the Coast Guard Court addressed a scenario where an investigating officer had attempted to record a

witness's testimony at an Article 32 hearing, but several of the tapes were blank or garbled. The Court found no Jencks Act[3] violation when the government could not provide the defense with a complete recording of the witness' testimony. Id. at 736. The Court concluded that "the Jencks Act requires only that the Government provide the defense with tape recordings that exist and are in the Government's possession" and "does not impose a duty on the Government to create the recording in the first place." Id. And the Court further recognized that "[a]ny negligence at the hands of the Government in failing to properly record the testimony does not fall within the purview of the Jencks Act." Id.

Here, the unrecorded audio of EM's OSI interview is no different than the blank tapes in McDaniel and the garbled and blank tapes in Giusti. A statement never existed within the meaning of R.C.M. 914, and the government cannot be held accountable for failing to produce what never existed. Even had OSI acted negligently when attempting to record EM's interview, that would not fall within the purview of R.C.M. 914. By treating the never-recorded audio as a statement within the meaning of R.C.M. 914, the military judge betrayed a fundamental misunderstanding of the law, and thereby abused her discretion.

In reaching her conclusion, the military judge cited Clark, 79 M.J. 449, for the proposition that military appellate courts favor an "expansive interpretation" of the term "statement." (App. Ex. XXXI at para. 26.) In Clark, our superior Court held that a videorecorded interview that *included audio* of the agents' questions during the appellant's interrogation constituted a "statement" for purposes of R.C.M. 914, since it was "[a]

[3] Although McDaniel and Giusti interpreted the Jencks Act, rather than R.C.M. 914, the definition of a "statement" being interpreted was functionally the same: "a stenographic, mechanical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement." 17 M.J. at 553; 22 M.J. at 734.

substantially verbatim recital of an oral statement…that is recorded contemporaneously with the making of the oral statement and contained' in a recording." Id. at 453-454. Clark does not, however, stand for the proposition that any videotaped interaction—regardless of whether it contains a "substantially verbatim recital of an oral statement"—constitutes a statement for purposes of R.C.M. 914. The military judge's reliance on Clark was thus misplaced because she failed to recognize this distinction.

Moreover, the military judge's determination that never-recorded audio was in the possession of the United States flies in the face of logic and the law. "Possession" means "the act of having or taking into control.[4] From the plain meaning of the word, something that never existed cannot be possessed by anyone. OSI could not have or take into control something that never existed. *See* United States v. Weller, 2012 CCA LEXIS 154, at *13 (N-M Ct. Crim. App. Apr. 30, 2012) (finding that where no recording of Article 32 investigation was made, the government was never in possession of the witness' statement for purposes of the Jencks Act).

Considering the foregoing, the military judge's determination that the unrecorded audio constituted a statement that was "in the possession of" the United States under R.C.M. 914 was error. (App. Ex. XXXI at para. 27). In other words, the military judge's decision to exclude EM's testimony was based on an erroneous understanding of the law and a logical impossibility and was therefore an abuse of discretion.

***2. The military judge's reliance on Marsh, Muwwakkil, and Sigrah, demonstrated her misunderstanding of the law applicable to R.C.M. 914.***

The military judge's extensive reliance on the cases provided by trial defense counsel during oral argument demonstrated her fundamental misunderstanding of the law. (R. at 281-

[4] Merriam-Webster Dictionary, *Possession*, https://www.merriam-webster.com/dictionary/possession (last visited 3 May 2024).

286; App. Ex. XXXI). First, those cases should have been treated with caution, considering they addressed the pre-2023 amendment to R.C.M. 914 and did not require a finding of gross negligence before sanctioning the government. Moreover, neither Muwwakkil, nor Marsh, nor Sigrah obviate the need to answer the threshold question of whether a statement existed, prior to conducting an R.C.M. 914 analysis, and both are distinguishable from the facts at issue here. For example, in Muwwakkil, the evidence showed that the missing audio recording at issue existed because a government paralegal had used the recordings to draft summaries, prior to the recording being deleted. 74 M.J. at 189. While the Muwwakkil court noted that it would be an absurdity to allow the government to avoid the consequences of R.C.M. 914 by failing to take adequate steps to preserve existing statements, it did not discuss what analysis would apply if the statement had ever existed or been in the government's possession. Id. Likewise, Marsh involved physical tape recordings of Article 32 testimony that had existed but had then disappeared from a desk in the legal office. 21 M.J. at 447. These two cases simply do not address the factual scenario at issue here – where audio of an interview was never recorded in the first place.

The same is true for Sigrah, 82 M.J. 463, the case touted by trial defense counsel as being the most "up to date" and "on point." (R. at 345.) Trial defense counsel was simply incorrect. Sigrah was outdated by the time of Appellee's trial, since it addressed the pre-2023 version of R.C.M. 914. Moreover, in Sigrah, the government conceded that an R.C.M. 914 violation had occurred under the old standard, so the Court only addressed the issue of prejudice. Id. at 466, n.2. Sigrah did not address a scenario where audio or video had never recorded; it involved investigators recording witness interviews but knowingly allowing them to be recorded over without preserving them. Id. at 465. Nothing in the Sigrah decision stands for the proposition

that defense counsel can prove an R.C.M. 914 violation occurred when the statements were not recorded in the first place. Sigrah was neither on point nor up to date, and to the extent the military judge relied on it, she erred.

In contrast, in CAAF's most recent R.C.M. 914 case, United States v. Palik, ___ M.J. ____, 2024 CAAF LEXIS 181 (C.A.A.F. 26 March 2024),[5] all five judges seemed to acknowledge that the one-time existence of a video of a witness interview was necessary to finding an R.C.M. 914 violation. *See* Id. at *22-24 (trial defense counsel ineffective for not filing an R.C.M. 914 motion, in part, because they would have been able to prove that videos of a witness interview once existed); Id. at *33 (Sparks, J,. dissenting) (recognizing that whether "the interviews were recorded" was a necessary predicate to finding that the appellant was prejudiced by this counsel's failure to make an R.C.M. 914 motion); Id. at *40-41 (Maggs, J., dissenting) (trial defense counsel "could have reasonably expected the Government to vigorously oppose [an R.C.M. 914 motion] on the grounds that Appellant could not prove that the investigators had created the recordings" and "could have reasonably believed that the military judge would have accepted the Government's argument").

In the end, the military judge's reliance on inapt case law highlights her misapprehension of the law applicable to R.C.M. 914. Her continuous application of incorrect legal principles constituted an abuse of discretion, and this Court should vacate her ruling.

***3. The military judge's ruling implied that the government had a duty to record EM's statements—a conclusion that is contradicted by existing law.***

The military judge's ruling also seems to suggest she believed the law imposes a duty on the government to record witness interviews. (App. Ex. XXXI, para. 29(a)(ii)) (finding gross

[5] The parties and military judge did not have the benefit of the Palik opinion at the time of the motion and ruling on this matter. Nonetheless, Palik can provide insight to this Court on how to resolve the issue.

negligence, in part, because of what she perceived to be OSI's policy to record victim interviews). The imposition of such a duty would be erroneous because it would impose an obligation on the government that neither military law nor federal law requires. "R.C.M. 914 concerns preservation and disclosure of statements in the government's possession, not the collection of evidence." Thompson, 81 M.J. at 395. R.C.M. 914 does not impose an obligation onto OSI to create a qualifying statement by recording interviews, it merely creates a duty to preserve them once they are recorded. *See* Id. Likewise, in United States v. Bernard, the Ninth Circuit found that the Jencks Act does not compel the creation of statements. 625 F.2d 854, 859 (9th Cir. 1980). The Court reasoned that the purpose of the Jencks Act "was to make any *existing* prior statements made by a government witness equally available to the defense and the prosecution." Id. Given the purpose of the Jencks Act the Court in Bernard declined to read into the Jencks Act a "requirement that the government create such discoverable statements in the first instance." Id. *See also* United States v. Lopez, 112 Fed. App'x 774, 776 (2d Cir. 2004) (Jencks Act clearly contemplates only preservation of notes or recorded statements and does not impose a duty on the government to create them); United States v. Arteaga, 807 F.2d 424, 426 (5th Cir. 1986) (Under the Jencks Act the government has an obligation to preserve recordings once made but no general duty to create recordings); United States v. Cruz, 478 F.2d 408, 411 (5th Cir. 1973) ("no part of the Jencks Act has ever been construed to require the Government to develop potential Jencks Act statements"). Likewise, this Court should decline to impose an obligation on the government to create statements under R.C.M. 914 or the Jencks Act.

OSI regulations do not require a victim interview to be recorded.[6] (R. 272-273). Those regulations comport with the requirements of federal jurisprudence and the demands of the Constitution. "The Supreme Court has never held that the Due Process Clause requires the recording of police interviews, and lower courts have uniformly held that the Constitution does not require government agents to record witness interviews. Ross v. McKee, No. 1:10-cv-288, 2016 U.S. Dist. LEXIS 112012 at *43 (W.D. Mich. Aug 23, 2016). While it may be a preferred practice to record victim interviews, the failure of the audio equipment to capture EM's interview does not constitute an R.C.M. 914 violation. The Jencks Act "applies only to recordings, written statements, and notes that meet certain criteria, not to items that never came into being (whether or not a prudent investigator—cynics might say an unsophisticated investigator—would have arranged things differently)." United States v. Houlihan, 92 F.3d 1271, 1288 (1st Cir. 1996). The government only bears the burden to preserve and disclose statements in its possession. If—as here—a statement was not created, the government bears no burden to preserve or disclose what never existed. While failing to follow OSI preferred practices to record all interviews may have provided ample grounds for cross-examination, it did not create fertile grounds for a successful R.C.M. 914 motion.

Given that the government is not required to create a statement under either military or federal law, the failure of the recording equipment to capture the audio of EM's interview does not constitute a violation of R.C.M. 914 or the Jencks Act. The military judge abused her discretion by repeatedly applying incorrect legal principles. Her fundamental misunderstanding of the law resulted in her erroneously excluding EM's testimony and *de facto* dismissing seven

[6] Even if OSI had failed to follow its own internal policy to record an interview, that would not amount to a violation of R.C.M. 914, per the rule's plain language. That rule only applies when a statement exists and is in the possession of the United States.

specifications of sexual assault. This Court should vacate the military judge's erroneous ruling and remand this case to the trial court for further proceedings.

### *B. The military judge abused her discretion when she held the Presidentially codified good faith loss exception to R.C.M. 914 did not apply.*

This Court need not reach this portion of the analysis, because the law is so clear that never-recorded audio does not qualify as a statement in the possession of the United States. However, if this Court ultimately agrees with the military judge's determination that something that never existed triggers R.C.M. 914, that would not end the R.C.M. 914 analysis. In July 2023, the President amended R.C.M. 914 to codify a good faith loss doctrine. Exec. Order No. 14,103, Annex 1, §1(bb), 88 Fed. Reg. 50,535, 50,560-61 (July 28, 2023). Under the amended R.C.M. 914, if a party is unable to comply with the rule because the statement at issue is lost, but can demonstrate by a preponderance of the evidence that the loss of the statement was not attributable to bad faith or gross negligence, the sanctions under R.C.M. 914(e)(1) may only be levied by the military judge if (1) the statement is of such central importance to an issue that it is essential to a fair trial and (2) there is no adequate substitute for that statement.

It's worth noting that while the military judge did conduct an analysis of the codified good faith loss doctrine, she also conducted an analysis under the now-superseded judicially created good faith loss doctrine. (App. Ex. XXXI, para. 25, 30). The use of the now-defunct judicially created good faith loss doctrine once again demonstrates the military judge's confusion over the state of the law surrounding R.C.M. 914 and is further evidence that her legal conclusions were the result of the continued application of incorrect principles of law.

#### **1.** ***The military judge's finding of gross negligence was clearly unreasonable.***

Here, there is no evidence in the record that indicates any willful or intentional act by the government agents to delete or hide the audio of EM's second interview. Despite this, the

military judge concluded that the government acted with "reckless disregard for the foreseeable consequences." (App. Ex. XXXI at para. 29(a)(ii). This determination was the result of the application of incorrect legal principles and an unreasonable application of the facts to the law and constitutes an abuse of discretion.

**2. *The military judge considered legally irrelevant facts in determining the government had acted with gross negligence.***

The military judge defined "gross negligence" using the definition of "culpable negligence" from United States v. Vaughan, 56 M.J. 706, 709 (A.F. Ct. Crim. App. 2001): "a negligent act or failure to act, accompanied by a gross, reckless, wanton, or deliberate disregard for the foreseeable consequences to others of that act or omission." (App. Ex. XXXI at para. 29(a)). This Court recently noted that gross negligence has been defined myriad ways and cited a law review article that, in turn, offered definitions such as "failing to observe even slight care" and "carelessness or recklessness to a degree that shows utter indifference to the consequences that may result." United States v. Lattin, 2022 CCA LEXIS 226 at *50 n.22 (A.F. Ct. Crim. App. 20 April 2022); Andrew Guthrie Ferguson, Constitutional Culpability: Questioning the New Exclusionary Rules, 66 Fla. L. Rev. 623 (2014). Black's Law Dictionary defines gross negligence as "a lack of even slight diligence or care." Gross Negligence, BLACK'S LAW DICTIONARY (11th ed. 2019).

But regardless of which definition of gross negligence is used, it was clearly unreasonable for the military judge to find the OSI agents' conduct met any such definition.

There were several facts the military judge considered in finding gross negligence that evinced a fundamental misunderstanding of the appropriate test under R.C.M. 914. Specifically, she considered that (1) prior to EM's interview, the equipment was not tested or checked to ensure proper recording, (2) agents failed to check the status of the recording immediately after

EM's interview, and (3) once OSI learned of the lack of audio, they did not reinterview EM or seek out a written sworn statement from her. (App. Ex. XXXI at para. 29(a)(i)).

The purpose of the Jencks Act and R.C.M. 914 is to preserve statements, not create a government obligation to create them in the first instance. Bernard, 625 F.2d at 859; Thompson, 81 M.J. at 395. Whether the recording equipment was tested or checked to ensure proper recording is relevant to whether the government was negligent in their attempts to *create,* not *preserve,* the recorded statement. As discussed above, neither R.C.M. 914 nor the Jencks Act requires the government to create qualifying statements, and whether the government was negligent in recording the interview is irrelevant. McDaniel, 17 M.J. at 554; Giusti, 22 M.J. at 736. Thus, these facts should not have been considered by the military judge when she was determining the government's culpability for the *failure to preserve* the statement.

Also, OSI's failure to reinterview EM or to obtain a written statement from her upon learning of the missing audio was an inappropriate consideration in determining their culpability in preserving the audio portion of EM's interview. A re-interview or a written statement would not have remedied the failure to preserve the audio of the second interview. Failure to create a new qualifying statement where the law does not require it, has no relevance to whether government agents were grossly negligent in failing to preserve a separate and distinct statement.

Finally, there is no evidence that the audio was deleted or was destroyed by virtue of any delay in the agents reviewing the material. The recording of EM's interview captured by the Getac system was burned to a disc and preserved for later review. (App. Ex. XXVI; R. at 244.) While the audio was not part of that recording, there is no evidence that the loss of the audio resulted from a delay in burning the recorded data to the disc or that checking the recording earlier could have preserved the audio.

Finally, the military judge unreasonably considered a previous instance of an interview being lost (App. Ex. XXXI at para. 30), while refusing to consider new facts that would have demonstrated the previous incident was not relevant to EM's interview. While there was a previously identified recording issue resulting in loss of interview audio, that issue was not at play in this case. The previous technical issue was only known to have impacted Interview Room Two. (R. at 248; Gov. Motion to Attach, dated 16 April 2024, Appx., Attachment 1). Due to the setup of the recording equipment, the simultaneous interviews resulted in the audio from Interview Room One recording over the audio of Interview Room Two. (Id.) EM's interview was conducted in Interview Room One, in part, to avoid any potential reoccurrence of the known technical issue. (R. at 252.; Gov. Motion to Attach, dated 16 April 2024, Appx., Attachment 1). In this case, OSI took proactive steps to ensure that a known technical issue with the recording equipment would not reoccur.

Although all the above facts were not considered by the military judge, at the time of her ruling, evidence had been presented that the prior (and different) audio issue had occurred in Room Two, not Room One where EM was interviewed. (R. at 248, 252.) Yet the military judge's findings of fact made no distinction between the audio capabilities in each room. This failure to consider important facts was an abuse of discretion. *See* United States v. Commisso, 76 M.J. 315, 321 (C.A.A.F. 2017) (a military judge can abuse her discretion by failing to consider important facts).

OSI could not take proactive steps to prevent a technical issue that they did not know existed. OSI had conducted EM's first interview in Interview Room One two weeks earlier on 22 November 2022 with no problems. (Gov. Motion to Attach, dated 16 April 2024, Appx., Attachment 1). It was clearly unreasonable for the military judge to find the agents were grossly

negligent under the circumstances. The agents did preserve the existing soundless recordings of EM's interview, and those videos were provided to the defense. The agents informed their leadership when they discovered the audio issues with EM's interview. It cannot be said that the agents failed to observe "even slight" diligence or care or that they showed "utter indifference" to the possibility that the audio might not be recorded. Indeed, even under her own definition of gross negligence, the military judge never articulated why it rose to the level of *recklessness* for the agents not to test the recording equipment before the interview or to check the status of the recording immediately afterward. (App. Ex. XXXI at para. 29(a)(i-ii)). In sum, the military judge's determination that the government acted with gross negligence was based on the application of incorrect legal principles and an unreasonable application of the facts to the law and constituted an abuse of discretion.

**3. *The military judge abused her discretion by declining to apply the R.C.M. 914(e) exception.***

While the military judge appropriately considered the good faith loss exception codified in R.C.M. 914(e), she erroneously determined that the defense had met their burden to preclude application of the exception. (App. Ex. XXXI at paras. 30-31). To preclude the application of the exception, the defense must establish by a preponderance of the evidence (1) the statement is of such central importance to an issue that it is essential to a fair trial and (2) there is no adequate substitute for the statement. *See* R.C.M. 905(c) and R.C.M. 914(e). The judge clearly erred by finding that the "statement" was of such central importance to an issue that it was essential to a fair trial, thereby precluding the application of the codified good faith loss exception. R.C.M. 914(e)(2). Therefore, the military judge's decision to grant the exclusion of EM's testimony was an abuse of discretion.

R.C.M. 914(e) largely mirrors the language of the test established for obtaining an abatement for lost evidence under R.C.M. 703. *Compare* R.C.M. 914(e)(2)(a-b) and R.C.M. 703(e)(2). Given the similarities between the two rules, it follows logically that R.C.M. 703 jurisprudence should inform this Court's analysis of R.C.M. 914(e).

4. ***Speculation on the contents of unrecorded audio cannot establish its central importance to a fair trial.***

To be of "such central importance to an issue that it is essential to a fair trial," the defense must show more than some "conceivable benefit" from the missing evidence. United States v. Valenzuela-Bernal, 458 U.S. 858, 866-67 (1982). There must be some showing that the missing evidence is material and favorable to the defense. Id. at 873. The Supreme Court considers sanctions for the loss of material evidence to be unwarranted unless "there is a reasonable likelihood that the [evidence] could have affected the judgment of the trier of fact." Id. at 873-74. *See also* Manual for Courts-Martial, United States (1984 ed.) (MCM), Drafters' Analysis, A21-32 (citing Valenzuela-Bernal).[7] Lost evidence is of "central importance to impeaching a witness if it is clearly exculpatory." United States v. Warda, 84 M.J. 83, n.15 (C.A.A.F. 2023). Speculation about the "possibility" of evidence is insufficient to meet this standard and conclude that evidence was of central importance and essential to a fair trial. United States. v. Terry, 66 M.J. 515, 518 (A.F. Ct. Crim App. 2008); *see also* United States v. Sales, 247 Fed. Appx. 730, 734 (6th Cir. 2007) (disclosure is not "essential to a fair trial" when the claim is "based on mere conjecture or supposition") (internal quotations omitted).

[7] The portion of the Drafters Analysis that cites Valenzuela-Bernal refers to R.C.M. 703(b) *Right to Witnesses*, which contains the same "of such central importance to an issue that it is essential to a fair trial" language as is now found in R.C.M. 703(e)(e). *See also* Drafters' Analysis, A21-34 (the production of evidence "parallels the procedures for production of witnesses").

In support of their motion to exclude EM's testimony, trial defense counsel argued the unrecorded audio was "of central importance" because if the audio had been recorded it might show EM "*could have* made *some* statements that are completely in contradiction with what she said" during direct examination. (R. at 295) (emphasis added). Trial defense counsel further asserted "*if* anything she said was exculpatory or would seriously call into question her credibility" that would be helpful to Appellee's ability to cross-examine and impeach EM. (R. at 295-296) (emphasis added).

However, trial defense counsel presented *no* evidence of what inconsistencies might have been present in EM's interview. While defense counsel pointed to some alleged inconsistencies within the Family Advocacy Program (FAP) records, they did not point to discrepancies between either the FAP records or EM's trial testimony and the agent notes from the soundless interview that would suggest the audio of the interview would have contained inconsistent statements. Trial defense counsel's own words highlight this point: "*if* anything she said was exculpatory." (R. at 295-296) (emphasis added). In other words, there was no evidence from which the military judge could even reasonably infer that the audio would have contained inconsistencies, or exculpatory or defense-friendly material. *Cf.* People v. Aguilera, 50 Cal. App. 5th 894, 917 (Cal. App. 4th Dist. 2020) (defense could not show an unavailable witness interview with the Drug Enforcement Agency was material and constitutionally required because the existence of any exculpatory or inconsistent statements made during the interview was "entirely speculative"). And even if there had been inconsistencies, nothing suggested those inconsistencies would have been so profound as to materially undermine EM's credibility and affect the judgment of the trier of fact. *See* Id. Tellingly, the military judge made no findings of

fact as to what specific inconsistencies would have been found in the audio of EM's interview or how significant those inconsistencies would have been in the context of the trial.

Where the defense cannot demonstrate whether an exculpatory statement was even made, they have not met their burden to establish more than some "conceivable benefit." *See* Valenzuela-Bernal, 458 U.S. at 866. Appellee certainly did not show a "reasonable likelihood" that this speculative, perhaps nonexistent "evidence" could have affected the judgment of the trier of fact. Id. at 873-74. Under these circumstances, it was clearly unreasonable for the military judge to find that the nonexistent audio was of such "central importance" that it was essential to a fair trial because her conclusion was based on pure conjecture. The speculative nature of the evidence presented by trial defense counsel "ma[de] such a determination near impossible. *See* United States v. Ramirez, No. 2021-05, 2021 CCA Lexis 710, *22 (A.F. Ct. Crim. App. Dec. 30, 2021) (unpub. op.)

In conclusion, the military judge abused her discretion when she determined the unrecorded audio was of such central importance to an issue that it was essential to a fair trial. When the requested remedy is the exclusion of a witness' testimony, the standard must be higher than mere speculation about the value of the missing statement since the remedy undermines the truth-seeking function of a court-martial. *See* United States v. Jasper, 72 M.J. 276, 280 (C.A.A.F. 2013) (internal citations omitted) (recognizing the court-martial's truth-seeking function and that testimonial exclusionary rules contravene the fundamental principle that the public "has a right to every man's evidence"). The military judge unreasonably applied the facts of this case to the law, and therefore abused her discretion.

## CONCLUSION

Thus, the military judge abused her discretion when she repeatedly applied incorrect legal principles. As a result of her erroneous understanding of the law, she excluded EM's testimony and *de facto* ordered the dismissal of seven specifications of sexual assault. It was contrary to logic and the law to conclude that audio that never existed can constitute a statement in the possession of the United States. Moreover, the military judge's finding that speculation as to the value of the missing statement was sufficient to justify a remedy as extreme as exclusion of the testimony of an alleged victim of seven specifications of sexual assault, defeats the truth-seeking function of a Court-martial and granted Appellee an undeserved and unjustified windfall. For these reasons, the United States respectfully requests that this Honorable Court reverse the military judge's decision to exclude the testimony of the named victim, EM.

[redacted]

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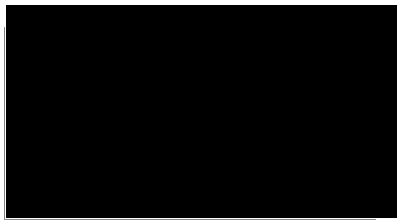

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**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 6 May 2024 via electronic filing.

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# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

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| **UNITED STATES** | ) | **Misc. Dkt. No. 2024-04** |
| ***Appellant*** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | **ORDER** |
| **Shawn M. MURRAY** | ) | |
| **Senior Airman (E-4)** | ) | |
| **U.S. Air Force** | ) | |
| ***Appellee*** | ) | **Panel 2** |

On 16 April 2024, Appellant filed an appeal in the above-styled case pursuant to Article 62, UCMJ, 10 U.S.C. § 862. On this same date, Appellant moved this court to attach a declaration of Captain (Capt) VJ, dated 16 April 2024, with four attachments. On 17 April 2024, the court docketed Appellant's appeal.

On 18 April 2024, Appellant filed a second motion to attach, requesting the court to attach another declaration of Capt VJ, dated 18 April 2024, with one attachment.

According to Appellant's motions, the attached declarations provide relevant information regarding Appellant's Article 62, UCMJ, appeal. The declarations of Capt VJ "demonstrate the [G]overnment's good faith efforts to move for reconsideration of the [trial] military judge's ruling" and "efforts by the [G]overnment to seek clarity regarding the military judge's factual findings" regarding her decision to grant the trial defense counsel's Motion to Exclude Witness Testimony Pursuant to Rule for Courts-Martial (R.C.M.) 914. Appellant further states that this court can consider the attachments under *United States v. Jessie*, 79 M.J. 437 (C.A.A.F. 2020).

On 23 April 2024, Appellee filed opposition to both motions. Appellee claims, *inter alia*, that Appellant is attempting to "back-door" evidence never presented to the trial military judge prior to her R.C.M. 914 ruling despite having ample opportunity and notice to ready this evidence in time for the 18 March 2024 motions hearing. Appellee further asserts that the trial military judge properly denied the trial counsel's motion to reconsider because "lack of due diligence" on the part of the Government cannot form the basis for granting reconsideration.

The court has considered Appellant's motion, Appellee's opposition, and the applicable law. We grant Appellant's motion; however, we specifically defer

consideration of the substance of the attachments pending further review of Appellant's appeal. *See Id.*

Accordingly, it is by the court on this 2d day of May, 2024,

**ORDERED:**

Appellant's Motion to Attach Documents, dated 16 April 2024, and Appellant's Motion to Attach Documents, dated 18 April 2024, are **GRANTED.**

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| **UNITED STATES** | ) | **UNITED STATES' MOTION** |
| *Appellant* | ) | **TO ATTACH DOCUMENTS** |
| | ) | |
| v. | ) | |
| Senior Airman (E-4) | ) | Misc. Dkt. No. 2024-04 |
| **SHAWN M. MURRAY** | ) | |
| United States Air Force | ) | 18 April 2024 |
| *Appellee* | ) | |

**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

Pursuant to Rule 23.3(b) of this Court's Rules of Practice and Procedure, the United States moves the Court to attach the following documents to the record:

- Appendix – Declaration of Capt V[redacted] A. J[redacted], dated 18 April 2024 (4 pages total including one attachment)

The attached declaration provides relevant information regarding the government's Article 62 appeal in the above-titled case. The attachment provides additional context and communications between the military judge and parties that are relevant to the United States' decision to file its notice of appeal. The documents demonstrate the government's good faith efforts to move for reconsideration of the military judge's ruling prior to filing the notice of appeal and to supplement the record with additional facts for the military judge's consideration. The documents also demonstrate efforts by the government to seek clarity regarding the military judge's factual findings that are essential to this Court's assessment of the military judge's decision to grant the defense's motion to exclude witness testimony pursuant to R.C.M. 914. While the military judge denied the governments requests to be permitted to file a motion for reconsideration, to be permitted to provide additional evidence in the form of testimony not previously presented, and to clarify the factual findings, these documents demonstrate the governments good faith efforts to appropriately develop the record in this case.

The attached documents are necessary to provide this Court with the full context of the communications between the military judge and the parties related to the military judge's ruling and this appeal. Without these attachments, neither the Court nor Appellate Defense Counsel will have a complete understanding of this case's entire history.

Our Superior Court has held matters outside the record may be considered "when doing so is necessary for resolving issues raised by materials in the record." United States v. Jessie, 79 M.J. 437, 444 (C.A.A.F. 2020). The Court has also concluded that "based on experience . . . 'extra-record fact determinations' may be 'necessary predicates to resolving appellate questions.'" Id. at 442 (quoting United States v. Parker, 36 M.J. 269, 272 (C.M.A. 1993)). This Court should be privy to the entire case history of Appellee's court-martial, especially as it relates to the ruling that is the subject of this appeal. Accordingly, the attached documents are relevant and necessary to address the United States' Article 62 appeal of the military judge's decision to exclude witness testimony pursuant to R.C.M. 914.

**WHEREFORE**, the United States respectfully requests this Court grant this Motion to Attach.

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**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 18 April 2024.

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**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| **UNITED STATES,** *Appellant,* | ) | **OPPOSITION TO GOVERNMENT'S MOTIONS TO ATTACH DOCUMENTS** |
| v. | ) | Before Panel No. 2 |
| Senior Airman (SrA), **SHAWN M. MURRAY,** United States Air Force, *Appellee.* | ) | Misc. Dkt. No. 2024-04 |
| | ) | 23 April 2024 |

**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:**

Pursuant to Rule 23.3(c) of this Honorable Court's Rules of Practice and Procedure, SrA Shawn M. Murray enters his opposition to Appellant's Motions to Attach Documents, respectively dated 16 and 18 April 2024.

## Relevant Facts

In preparation for trial, SrA Murray's trial defense team discovered that there was no audio for one of the complaining witness's (EM) interviews with the Air Force Office of Special Investigations (AFOSI). Appellate Exhibit XXXI at 2. A week before trial, SrA Murray informed the Government that, after EM testified, they would be raising an oral motion to exclude her testimony pursuant to Rule for Courts-Martial (R.C.M.) 914. *See, e.g.*, R. at 338. Then, three days before trial, the senior defense counsel had a conversation with the senior trial counsel, again informing the Government of SrA Murray's intent to raise a R.C.M. 914 motion after EM's testimony. R. at 338. In line with these previous disclosures, after EM testified SrA Murray moved for the exclusion of her testimony pursuant to R.C.M. 914 and 18 U.S.C. § 3500 (the Jencks Act). R. at 231, 298.

On 18 March 2024, the military judge conducted a motions hearing where she received evidence on SrA Murray's motion to exclude. SrA Murray presented nine exhibits, called two

witnesses to testify, and stipulated as to the expected testimony of another witness who was sick. R. at 231-36 (presenting Appellate Exhibits XXII-XXX), 238 (calling Special Agent (SA) ER), 255 (calling SA AP), 276-77 (stipulating to witness testimony). Despite SrA Murray presenting "a lot of evidence," R. at 316, the Government presented no evidence at this hearing. R. at 276. Both sides presented extensive arguments and caselaw. R. at 276-316.

At 1512, the military judge recessed the court-martial to review the evidence and research the law. R. at 316. The next day, 19 March 2024, the court-martial re-convened. R. at 317. The military judge provided an oral ruling, granting SrA Murray's R.C.M. 914 motion, R. at 317-35, which was supplemented by a written ruling on the same day. AE XXXI. The military judge did advise the parties that she would "consider any requests for reconsideration supported by newly discovered evidence or law if timely raised." R. at 335.

Several hours later, the Government orally moved the military judge to reconsider her ruling. R. at 337. The basis for this reconsideration was "new case law *to present* [and] new evidence *to present*." R. at 338 (emphasis added). When asked why the Government failed to present the additional caselaw during the 18 March 2024 hearing, the Government represented it was because "this is not a 914 issue to the Government." R. at 343. When pressed by the military judge about the defense's specific motion under R.C.M. 914, the Government conceded that their failure to timely present the caselaw was because they simply needed more time. R. at 343 (explaining that the Government used extra time after the judge's ruling to conduct additional caselaw research). The Government attempted to justify their lack of diligence by claiming they did not know exactly what SrA Murray's position would be on 18 March 2024. R. at 343-44.

At this point, the trial defense team informed the military judge that the Government's representations were "provable [sic] demonstrably false," because the senior defense counsel had

sent emails to the Government informing them of SrA Murray's position and specifically citing to caselaw. R. at 344. While "it's not [the Defense's] job to mentor the trial counsel," the senior defense counsel provided the Government with a professional courtesy of pointing them to the exact caselaw from which the Defense derived their arguments. R. at 345. Ultimately, the military judge found that the Government proffered no new evidence or newly developed caselaw that would justify a motion for reconsideration. R. at 354, 356. As such, the military judge did not permit the Government to move for reconsideration. R. at 356.

The Government appealed the military judge's decision to exclude evidence pursuant to R.C.M. 914 on 21 March 2024. Notice of Article 62 Appeal, dated 21 March 2024. On the same day, trial counsel filed a written motion for reconsideration with the military judge. United States' Motion to Attach Documents, App'x, Attachment 1 at 1. This written filing contains some evidence which the Government failed to provide during the 18 March 2024 motions hearing. Thereafter, the military judge—based on the Government's urging—provided a summary of her earlier ruling, denying the Government's request to move for reconsideration. United States' Motion to Attach Documents, dated 16 April 2024, App'x Attachment 3 at 3. Specifically, that summary stated that the Government's request to move for reconsideration was denied "based on the fact that the evidence and law the Government sought to introduce was not new—rather, the Government failed to do its due diligence in the six days it was on notice of the pending R.C.M. 914 motion." *Id*.

On 16 and 18 April 2024, the Government moved this Court to attach two affidavits containing myriad attachments. The 16 April 2024 affidavit contains four attachments: (1) the Government's written motion to reconsider, which the military judge ruled they did not have leave of the court to file (a document, itself, which contains seven additional attachments); (2) email

correspondence concerning the motion for reconsideration; (3) a summary of the military judge's ruling denying the Government's request to file a motion for reconsideration; and (4) email correspondence from the military judge about the trial court's inability to mark certain appellate exhibits during a stay of proceedings. The 18 April 2024 affidavit contains an additional attachment: an email from the Government, again asking the military judge to allow the Government to file their written motion for reconsideration.

**Applicable Law**

The Court of Appeals for the Armed Forces (C.A.A.F.) has held that military appellate courts may not consider matters outside of the record, absent two sets of exceptions. *United States v. Jessie*, 79 M.J. 437, 442 (C.A.A.F. 2020). One of those exceptions is for the purpose of resolving prisoners' claims of cruel and unusual punishment, which is not applicable here. *Id*. at 443. The second exception allows military appellate courts to consider extra-record material in the form of affidavits or evidence received at a *DuBay*[1] hearing, only when such information is helpful in deciding an issue raised by the record. *Id.* at 442. In *Jessie*, the C.A.A.F. declined to attach appellant's new evidence—an affidavit with attachments—because neither the affidavit nor its attachments concerned information already in the record. *Id.* at 444.

"On request of any party . . . the military judge *may* . . . reconsider any ruling." R.C.M. 905(f) (emphasis added). The Uniform Rules of Practice before Department of the Air Force Courts-Martial[2] states that "[r]ulings by a military judge or a previously detailed military judge are final and become the law of the case. If neither the law nor the facts have changed since the

[1] *United States v. DuBay*, 17 C.M.A. 147 (C.M.A. 1967).
[2] R.C.M. 108 permits the Judge Advocate General of the service concerned to make rules for the conduct of trials by courts-martial. This authority, in turn, has been delegated by DAFI 51-201, to the Chief, Air Force Trial Judiciary. Para. 1.8.1

ruling was issued, reconsideration is ordinarily not warranted." Rule 3.6(H). The military judge is "entitled to exclude evidence [offered at reconsideration] if [she] concluded that the prosecution failed negligently to arrange for its presentation at the initial proceeding." *United States v. Harrison* 20 M.J. 55, 60 (C.M.A. 1985) (Everett, C.J., concurring).

**Argument**

Through its motions to attach, Government appellate counsel attempts to compensate for the lack of due diligence exercised by Government trial counsel in the litigation of the underlying R.C.M. 914 motion. But no rule or caselaw affords the Government an avenue to do so. As such, this Court should deny both Government motions to attach.

In this case, the Government has appealed the military judge's 19 March 2024 ruling excluding EM's testimony. Prior to that ruling, the military judge heard voluminous evidence from SrA Murray, and argument from both sides, before deliberating overnight. Only after the military judge ruled against them did the Government endeavor to obtain evidence and "new" law to support its position. The Government then orally moved for reconsideration. However, the military judge concluded that the Government had no new evidence or law to present that would not have been available at the 18 March 2024 motions hearing. *See, e.g.*, United States' Motion to Attach Documents, dated 16 April 2024, App'x Attachment 3 at 3. After all, the Government's "lack of due diligence" was not a reason to grant a motion to reconsider. *Id*. Thereafter, the military judge denied the Government's request to file a motion for reconsideration. *Id*.

In contravention to this ruling, the Government submitted a written motion to reconsider on 21 March 2024. This motion contained seven attachments. This was the same day that the Government filed their Notice of Appeal under Article 62(a), UCMJ. Because the court-martial was stayed pursuant to the Government's appeal, R.C.M. 908(b)(4), the military judge did not mark the

motion for reconsideration, or supplemental correspondence, as appellate exhibits. United States' Motion to Attach Documents, dated 16 April 2024, App'x Attachment 4 at 1.[3]

The present appeal is limited in scope to the military judge's 19 March 2024 ruling to exclude EM's testimony. This appeal does not concern the military judge's denial of the Government's request to file a motion for reconsideration. Military appellate courts are limited to the record of trial on appeal. *Jessie*, 79 M.J. at 442. Only certain, limited exceptions, permit the courts to consider matters extraneous to the record. *Id.* at 442-44. In this case, the full sum of evidence the military judge considered for her 19 March 2024 ruling is available to this Court and the parties in the record. E.g., R. 231-316. The military judge's oral and written rulings—which explain at length the law she used and the facts she relied upon—are also contained in the record. R. at 317-335; AE XXXI.

The Government's motions contain myriad attachments which, themselves, contain even more attachments in the form of purported evidence. The military judge never considered this information at the time she made her ruling.[4] This attempt to back-door evidence not available to the military judge at the time she made the subject ruling is meant to substitute for Government trial counsel's lack of diligence at the time of litigation. No rule or law permits this Court to consider new evidence submitted well-after the military judge's R.C.M. 914 decision and, as such, this Court should decline to consider the attached documents. This Court cannot, and should not, reward the Government's lack of due diligence by permitting a back-door to evidence never considered by the military judge during her R.C.M. 914 deliberation.

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[3] The Government did not ask that the motion for reconsideration be attached to the record as an appellate exhibit until 8 April 2024. United States' Motion to Attach Documents, dated 16 April 2024, App'x Attachment 4 at 2.

[4] Perhaps as importantly, trial defense counsel were not given an opportunity to respond to this motion for reconsideration or the attached purported evidence.

**WHEREFORE**, SrA Murray respectfully requests that this Court deny both of Appellant's Motions to Attach Documents.

Respectfully submitted,

[redacted]

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-2807

**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 23 April 2024.

Respectfully submitted,

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-2807

# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

| | | |
|---|---|---|
| **UNITED STATES** | ) | **Misc. Dkt. No. 2024-04** |
| ***Appellant*** | ) | |
| | ) | |
| | ) | |
| **v.** | ) | |
| | ) | **NOTICE OF DOCKETING** |
| | ) | |
| **Shawn M. MURRAY** | ) | |
| **Senior Airman (E-4)** | ) | |
| **U.S. Air Force** | ) | |
| ***Appellee*** | ) | |

The record of trial and a notice of an intent to appeal pursuant to Article 62, UCMJ, 10 U.S.C. § 862, was filed in the above-styled case with this court on 16 April 2024.

Accordingly, it is by the court on this 17th day of April, 2024,

**ORDERED:**

The case is assigned Misc. Dkt. No. 2024-04 and referred to Panel 2.

FOR THE COURT

[redacted]

FLEMING E. KEEFE, Capt, USAF
Deputy Clerk of the Court

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| **UNITED STATES** | ) | **UNITED STATES' MOTION** |
| *Appellant* | ) | **TO ATTACH DOCUMENTS** |
| | ) | |
| v. | ) | |
| Senior Airman (E-4) | ) | Misc. Dkt. No. _____ |
| **SHAWN M. MURRAY** | ) | |
| United States Air Force | ) | 16 April 2024 |
| *Appellee* | ) | |

**TO THE HONORABLE, THE JUDGES OF**
**THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

Pursuant to Rule 23.3(b) of this Court's Rules of Practice and Procedure, the United States moves the Court to attach the following documents to the record:

- Appendix – Declaration of Capt V[redacted] A. J[redacted], dated 16 April 2024 (32 pages total including 4 attachments)

The attached declaration provides relevant information regarding the government's Article 62 appeal in the above-titled case. The attachment provides context surrounding the military judge's ruling granting the Defense's Motion to Exclude Witness Testimony and provides additional communications between the military judge and parties that are relevant to the United States' decision to file its notice of appeal. The documents demonstrate the government's good faith efforts to move for reconsideration of the military judge's ruling prior to filing the notice of appeal and to supplement the record with additional facts for the military judge's consideration. While the military judge denied the government the ability to even file the Motion for Reconsideration, the motion is highly relevant because it contains material new facts and evidence not contained in the record. On 8 April 2024, the government requested the military judge to mark the Motion for Reconsideration and her Summary of Ruling as appellate exhibits. The military judge did not immediately grant the government's request, apparently because she believed the case had been stayed and that she did not have the authority to take

additional action while the case was stayed. At that point, the record needed to be mailed in order to meet the filing deadlines with this Court. However, the attached documents are necessary to provide this Court with the full context of the communications between the military judge and the parties related to the military judge's ruling and this appeal. Without these attachments, neither the Court nor Appellate Defense Counsel will have a complete understanding of this case's entire history.

Our Superior Court has held matters outside the record may be considered "when doing so is necessary for resolving issues raised by materials in the record." United States v. Jessie, 79 M.J. 437, 444 (C.A.A.F. 2020). The Court has also concluded that "based on experience . . . 'extra-record fact determinations' may be 'necessary predicates to resolving appellate questions.'" Id. at 442 (quoting United States v. Parker, 36 M.J. 269, 272 (C.M.A. 1993)). This Court should be privy to the entire case history of Appellee's court-martial, especially as it relates to the ruling that is the subject of this appeal. Accordingly, the attached documents are relevant and necessary to address the United States' Article 62 appeal of the military judge's decision to exclude witness testimony pursuant to R.C.M. 914.

**WHEREFORE**, the United States respectfully requests this Court grant this Motion to Attach.

TYLER L. WASHBURN, Capt, USAF
Appellate Government Counsel, Government Trial
and Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

MARY ELLEN PAYNE
Associate Chief
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 16 April 2024.

TYLER L. WASHBURN, Capt, USAF
Appellate Government Counsel, Government Trial and Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

DEPARTMENT OF THE AIR FORCE
OFFICE OF THE JUDGE ADVOCATE GENERAL
MILITARY JUSTICE AND DISCIPLINE

15 April 2024

MEMORANDUM FOR AIR FORCE COURT OF CRIMINAL APPEALS

FROM: AF/JAJG

SUBJECT: Record of Trial – Article 62 Appeal – SrA Shawn M. Murray

1. On 11 August 2023, the Commander, Headquarters 11th Air Force, Joint Base Elmendorf-Richardson, Alaska, referred the following charges: one Charge and seven Specifications for Sexual Assault of E.M. in violation of Article 120, UCMJ, and one Charge and one Specification for wrongful use of marijuana in violation of Article 112a, UCMJ. On 18 March 2024, the Defense made an oral motion after the testimony of E.M., to exclude the testimony of E.M. pursuant to R.C.M. 914. (R. at 231.) On that same day, the parties presented evidence and argument on the issue. (R. at 231-316.) On 19 March 2024, the military judge granted the Defense's motion and issued her written ruling at 1111 AKDT. (App. Ex. XXXI.) The military judge excluded the testimony of E.M. pursuant to R.C.M. 914. (Id.) On 21 March 2024, trial counsel moved for reconsideration. (Gov. Motion to Attach, dated 16 April 2024, Appx. A). On that same day, the military judge notified the government she would not consider the government's motion for reconsideration. (Id.) The military judge provided a summary of ruling on the government's request to file a motion for reconsideration. (Id.)

2. On 22 March 2024 at 0717 AKDT, the United States filed a notice of appeal to notify the military judge that it would be appealing her ruling excluding the testimony of E.M. pursuant to R.C.M. 914. (Attached.) The ruling excluded "evidence that is substantial proof of a fact material in the proceeding, and the ruling affected all seven specifications of sexual assault involving E.M. 10 U.S.C. §862(a)(1)(B). Trial counsel forwarded the appeal and record to the Air Force Appellate Operations Division, and it was received on 11 April 2024.

3. Pursuant to Article 62, UCMJ, and Rule 20 of the Air Force Court of Criminal Appeals Rules of Practice and Procedure, the United States files the attached certified original record of trial and the notice of appeal in the above case and notifies this Honorable Court of the United States' intention to appeal the military judge's ruling.

[redacted]

MATTHEW D. TALCOTT, Colonel, USAF
Chief, Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate

United States Air Force
(240) 612-4800

2 Attachments:
1. Notice of Appeal
2. Record of Trial

cc: AF/JAJA

**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 16 April 2024.

TYLER L. WASHBURN, Capt, USAF
Appellate Government Counsel, Government Trial and Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

# ATTACHMENT 1

**DEPARTMENT OF THE AIR FORCE**
**TRIAL JUDICIARY**

| | | |
|---|---|---|
| UNITED STATES | ) | NOTICE OF ARTICLE 62 |
| | ) | APPEAL |
| v. | ) | |
| | ) | |
| SENIOR AIRMEN SHAWN M. MURRAY | ) | |
| 3d Maintenance Group (PACAF) | ) | |
| Joint Base Elmendorf-Richardson, Alaska | ) | 21 March 2024 |

The Government respectfully files the following Notice of Appeal, pursuant to Article 62, Uniform Code of Military Justice and Rule for Courts-Martial 908(b).

1. The Government intends to appeal the military judge's 19 March 2024 ruling granting the Accused's motion to exclude witness testimony pursuant to R.C.M. 914. The military judge stated she excluded the evidence as the appropriate remedy for an alleged R.C.M. 914 violation, in that the government failed to produce audio of the victim's second interview with the Air Force Office of Special Investigations. The ruling affects all seven Specifications of Charge I.

2. The military judge made a ruling that the testimony of the named victim, E.M. was excluded due to the government's alleged R.C.M. 914 violation. The ruling excludes evidence that is substantial proof of a fact material in the proceeding: specifically, the testimony of the named victim in all seven Specifications of Charge I.

3. The Government does not make this appeal for the purposes of delay.

4. Before filing this notice, Trial Counsel consulted with AF/JAJG and the Staff Judge Advocate of the Convening Authority, as required by paragraph 19.14.1. of Department of the Air Force Instruction 51-201, *Administration of Military Justice*, date 24 January 2024. Both the Convening Authority and his Staff Judge Advocate have approved this appeal.

Respectfully submitted,

V[redacted] A. J[redacted], Capt, USAF
Assistant Trial Counsel

**CERTIFICATE OF SERVICE**

I hereby certify that the Military Judge's ruling referenced above was issued on 19 March 2024 at 1511 hours (EST). On 22 March 2024, within 72 hours of the ruling, I caused a copy of this notice of appeal to be served at 1117 hours (EST), on the Military Judge, Lt Col V[redacted] M[redacted], and Defense Counsel, Maj N[redacted] A[redacted] and Capt L[redacted] P[redacted].

[redacted]

V[redacted] A. J[redacted], Capt, USAF
Assistant Trial Counsel

# ATTACHMENT 2

*The Record of Trial was hand delivered to the Air Force Court of Criminal Appeals with this filing.*