

CERTIFIED RECORD OF TRIAL

(and accompanying papers)

of

Bautista Benjamin J. [REDACTED] LCpl/E-3
(Last Name) (First Name) MI (DoD ID No.) (Rank)

[REDACTED] USMC [REDACTED]
(Unit/Command Name) (Branch of Service) (Location)

By

Special Court-Martial (SPCM)
(GCM, SPCM, or SCM)

COURT-MARTIAL

Convened by Lieutenant General J. W. Bierman, Commanding General
(Title of Convening Authority)

[REDACTED]
(Unit/Command of Convening Authority)

Tried at

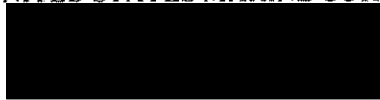
[REDACTED] On 14 July 2023
(Place or Places of Trial) (Date or Dates of Trial)

Companion and other cases None
(Rank, Name, DOD ID No., (if applicable), or enter "None")

CONVENING ORDER



UNITED STATES MARINE CORPS



IN REPLY REFER TO:

5810

SJA

FEB 09 2022

SPECIAL COURT-MARTIAL CONVENING ORDER, SERIAL NUMBER 1-22

Pursuant to the authority contained in UCMJ Article 23(b)(1), R.C.M. 504(b)(2), and JAGMAN section 0120(a), a Special Court-Martial is hereby convened to hear all those cases properly referred to it, with the following members:

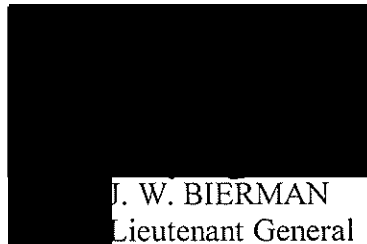
MEMBERS

Lieutenant Colonel [REDACTED] USMC, President;

Major [REDACTED] USMC;

Major [REDACTED] USMC; and

Captain [REDACTED] USMC.



J. W. BIERMAN
Lieutenant General
U.S. Marine Corps
Commanding

CHARGE SHEET

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (<i>Last, First, Middle Initial</i>) Bautista, Benjamin J.			2. SSN [REDACTED]	3. GRADE OR RANK LCpl	4. PAY GRADE E-3
5. UNIT OR ORGANIZATION [REDACTED]				6. CURRENT SERVICE	
				7. INITIAL DATE 20181126	8. TERM 4 years and 13 months
7. PAY PER MONTH			8. NATURE OF RESTRAINT OF ACCUSED RE-TRIAL CONFINEMENT N/A	9. DATE(S) IMPOSED 10 MARCH 23 — 17 MARCH 23 R.C. 13 JULY 25	
a. BASIC \$2,547.60	b. SEA/FOREIGN DUTY N/A	c. TOTAL \$2,547.60			

II. CHARGES AND SPECIFICATIONS

10. CHARGE	VIOLATION OF THE UCMJ, ARTICLE 92	
CHARGE: VIOLATION OF THE UCMJ, ARTICLE 92	92	
SPECIFICATION Violation or failure to obey lawful General Order or regulation.		
In that Lance Corporal Benjamin J. Bautista, did, at or near [REDACTED] on or about 29 September 2022, Violate a Lawful General Order, which was his duty to obey, to wit: Marine Corps Order 5354.1F, Chapter 1, Paragraph 5.a, dated 20 April, 2021, by wrongfully using racial slur, "nigger", toward another Marine.		

III. PREFERRAL

11a. NAME OF ACCUSER (<i>Last, First, Middle Initial</i>) [REDACTED]	b. GRADE O-4	c. ORGANIZATION OF ACCUSER [REDACTED]
d. SIGNATURE OF ACCUSER [REDACTED]		e. DATE (YYYYMMDD) 2022-12-09

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oath in cases of this character, personally appeared the above named accuser this 9th day of December, 2022, and signed the foregoing

charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

[REDACTED]		[REDACTED]	
Typed Name of Officer		Organization of Officer	
O-1		Legal Officer	
Grade		Official Capacity to Administer Oath (See R.C.M. 307(b), must be Grade commissioned officer)	
[REDACTED]			

12.		
On <u>9 December</u> , <u>2022</u> , the accused was informed of the charges against him/her and of the name(s) of the accuser(s) known to me (See R.C.M. 308(a)). (See R.C.M. 308 if notification cannot be made.)		
Cap		
Typed Name of Immediate Commander		Organization of Immediate Commander
O-3		
IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY		
13.		
The sworn charges were received at _____ hours, _____ at _____		
Designation of Command or Officer Exercising Summary Court-Martial Jurisdiction (See R.C.M. 403) _____, for the _____		
Typed Name of Officer		Official Capacity of Officer Signing
Grade		
Signature		
V. REFERRAL; SERVICE OF CHARGES		
14a. DESIGNATION OF COMMAND OR CONVENING AUTHORITY	b. PLACE	c. DATE (YYYYMMDD)
		<u>MAY 18 2023</u>
Referred for trial to the <u>Special</u> court-martial convened by <u>Special Court-martial Convening Order 1-22</u> dtd 9 February 2022		
_____, subject to the following instructions:		
To be tried in conjunction with charges preferred on 9 August 2022, 7 November 2022, and 16 March 2023.		
By _____ Of _____		
Command or Order		
<u>J. W. BIERMAN</u>		<u>COMMANDING GENERAL</u>
Typed Name of Officer		Official Capacity of Officer Signing
<u>Lieutenant General/O-9</u>		
15.		
On <u>7 July 23</u> , _____ I (caused to be) served a copy hereof on (each of) the above named accused.		
<u>JAN D. DENTSEY</u>		<u>03</u>
Typed Name of Trial Counsel		Grade or Rank of Trial Counsel
FOOTNOTES: 1 - When an appropriate commander signs personally, inapplicable words are stricken. 2 - See R.C.M. 601(e) concerning instructions.		

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First Middle Initial) Bautista, Benjamin J.		2. EDIPT: [REDACTED]	3. GRADE OR RANK [Cpl]	4. PAY GRADE E-3
5. UNIT OR ORGANIZATION [REDACTED]			6. CURRENT SERVICE	
			a. INITIAL DATE 20181126	b. TERM 5 years 1 month
7. PAY PER MONTH		8. NATURE OF RESTRAINT OF ACCUSED		9. DATE(S) IMPOSED
a. BASIC \$2,547.60	b. SEA/FOREIGN DUTY N/A	c. TOTAL \$2,547.60	Pre-Trial Confinement	10 March 2023- 17 March 2023

II. CHARGES AND SPECIFICATIONS

ADDITIONAL CHARGE I: VIOLATION OF THE UCMJ, ARTICLE 92

LANCE CORPORAL [REDACTED] JUDGE ADVOCATE
7 JULY 2023

Specification (Failure to Obey Other Lawful Written Order): In that Corporal Benjamin J. Bautista, U.S. Marine Corps, on active duty, having knowledge of a lawful order issued by Lieutenant Colonel [REDACTED] to wit: Military Protective Order, dated 21 October 2021, an order which it was his duty to obey, did, at or near [REDACTED] on divers occasions between 21 October 2021 and 9 March 2023, fail to obey the same by wrongfully communicating with Lance Corporal [REDACTED] U.S. Marine Corps.

III. PREFERRAL

11a. NAME OF ACCUSER (Last, First, Middle Initial) [REDACTED]	b. GRADE E-3	c. ORGANIZATION OF ACCUSER [REDACTED]
d. SIGNATURE OF ACCUSER [REDACTED]	e. DATE (YYYYMMDD) 20230316	

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 16th day of March, 2023, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

Jan D. Dempsey

Typed Name of Officer

O-3

Grade

[REDACTED]

Organization of Officer

Judge Advocate

Official Capacity to Administer Oaths
(See P.C.M. 367(h) - must be commissioned officer)

12. On _____, 20____ 2023, the accused was informed of the charges against him/her and of the name(s) of the accuser(s) known to me. (See R.C.M. 308(a)). (See R.C.M. 308 if notification cannot be made.)

Typed Name of Immediate Commander

LEGAL OFFICER

Organization of Immediate Commander

O-1

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13. The sworn charges were received at _____ hours, _____, 20____ at _____

Designation of
Commander

Officer Exercising Summary Court-Martial Jurisdiction (See R.C.M. 403)

FOR THE ¹ COMMANDING OFFICER

LEGAL OFFICER

Official Capacity of Officer Signing

Typed Name of Officer

Grade

Signature

V. REFERRAL: SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OR CONVENING AUTHORITY

b. PLACE

c. DATE
MAY 18 2023

Referred for trial
to the Special court-martial convened by Special Court-Martial Convening Order 1-22
dtd 9 February 2022

_____, 20____, subject to the following instructions: ² To be tried in
conjunction with charges preferred on 9 August 2022, 9 December 2022, and 7 November 2022.

By _____ of _____
Command or Order

J.W. BIERMAN

Typed Name of Officer

COMMANDING GENERAL

Official Capacity of Officer Signing

eral/O-9

15. On 07 July, 2023, I (caused to be) served a copy hereof on (each of) the above named accused.

IAN D. DEMPSEY

Typed Name of Trial Counsel

03

Grade or Rank of Trial Counsel

FOOTNOTES

1 -- When an appropriate commander signs personally, inapplicable words are stricken
2 -- See R.C.M. 601(c) concerning instructions. If none, so state

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (<i>Last, First Middle Initial</i>) Bautista, Benjamin J.		2. EDIPT: [REDACTED]	3. GRADE OR RANK LCpl	4. PAY GRADE E-3
5. UNIT OR ORGANIZATION [REDACTED]			6. CURRENT SERVICE	
			a. INITIAL DATE 20181126	b. TERM 4 years 13 MONTHS
7. PAY PER MONTH		8. NATURE OF RESTRAINT OF ACCUSED Pre-Trial Confinement		9. DATE(S) IMPOSED 10 March 23-17 March 23
a. BASIC \$2,547.60	b. SEA/FOREIGN DUTY N/A	c. TOTAL \$2,547.60		

10. CHARGES AND SPECIFICATIONS

ADDITIONAL CHARGE II: VIOLATION OF THE UCMJ, ARTICLE 128b

Specification 1: Assault by Strangulation

In that Lance Corporal Benjamin J. Bautista, U.S. Marine Corps, on active duty, did, at or near [REDACTED], on or about April 2020, commit an assault against Lance Corporal [REDACTED] U.S. Marine Corps, the intimate partner of the accused, by unlawfully strangling her.

Specification 2: Violent Offense

In that Lance Corporal Benjamin J. Bautista, U.S. Marine Corps, on active duty, did, at or near [REDACTED] on or about 12 August 2020, commit a violent offense against Lance Corporal [REDACTED] U.S. Marine Corps, the intimate partner of the accused, to wit: unlawfully kicking Lance Corporal [REDACTED]

- (a) in the groin;
- (b) on the back;
- (c) on the buttocks; and
- (d) on the leg;

with the accused's foot.

(See Supplemental Page)

III. PREFERRAL

11a. NAME OF ACCUSED (<i>Last, First Middle Initial</i>) [REDACTED]	b. GRADE E-4	c. ORGANIZATION OF ACCUSED [REDACTED]
d. [REDACTED]	e. DATE (YTTA/MD/YY) 20220809	

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 9 day of August, 2022, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

William E. Grau

Typed Name of Officer

O-3/Captain

Grade

Signature

[REDACTED]

Organization of Officer

Judge Advocate

*Official Capacity to Administer Oaths
(See, RCM 30710--must be commissioned officer)*

12. On <u>20</u> , the accused was informed of the charges against him/her and of the name(s) of the accuser(s) known to him. (See R.C.M. 308(c)(1). (See R.C.M. 309 if notification cannot be made.) <div style="display: flex; justify-content: space-between; margin-top: 10px;"> <div style="width: 45%;"> <u>[Redacted]</u> <small>Typed Name of Immediate Commander</small> </div> <div style="width: 45%;"> <u>[Redacted]</u> <small>Organization of Immediate Commander</small> </div> </div>	
<u>O-1</u> <u>O-2</u>	
<u>[Redacted]</u> <u>[Redacted]</u>	
IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY	
13. The sworn charges were received at _____ hours, _____, 20____ At _____ <small>Designation of Command or</small>	
<small>Officer Exercising Summary Court-Martial Jurisdiction (See R.C.M. 403)</small> <div style="display: flex; justify-content: space-between; margin-top: 20px;"> <div style="width: 45%;"> <u>[Redacted]</u> <small>Typed Name of Officer</small> </div> <div style="width: 45%;"> FOR THIS ¹ <u>Commanding Officer</u> <u>Legal Officer</u> <small>Official Capacity of Officer Signing</small> </div> </div>	
<u>O-2</u> <u>[Redacted]</u>	
V. REFERRAL: SERVICE OF CHARGES	
14a. DESIGNATION OF COMMAND OR CONVENING AUTHORITY <u>[Redacted]</u>	b. PLACE <u>[Redacted]</u>
c. DATE MAY 18 2023	
Referred for trial to the <u>Special</u> court-martial convened by <u>Special Court-Martial Convening Order 1-22</u> dated 09 February 2022	
_____, 20____, subject to the following instructions: ² <u>To be tried in conjunction with charges preferred on 7 November 2022, 9 December 2022, and 16 March 2023</u>	
By _____ Of _____ <small>Command or Order</small>	
<u>J. W. BIERMAN</u> <small>Typed Name of Officer</small>	<u>COMMANDING GENERAL</u> <small>Official Capacity of Officer Signing</small>
<u>Lieutenant General / O-9</u> <u>[Redacted]</u>	
15. On <u>7 JUL</u> , <u>2023</u> , I (caused to be) served a copy hereof on (each of) the above named accused. <div style="display: flex; justify-content: space-between; margin-top: 10px;"> <div style="width: 45%;"> <u>William E. Grau</u> <u>[Redacted]</u> </div> <div style="width: 45%;"> <u>O-3</u> <small>Grade or Rank of Trial Counsel</small> </div> </div>	
<small>FOOTNOTES</small> 1 -- When an appropriate commander signs personally, applicable words are stricken. 2 -- See R.C.M. 601 for convening orders. If none, in date.	

Accused: Benjamin J. Bautista

EDIPI: [REDACTED]

Specification 3: Assault by Strangulation

In that Lance Corporal Benjamin J. Bautista, U.S. Marine Corps, on active duty, did, at or near [REDACTED] on or about 6 March 2021, commit an assault against Lance Corporal [REDACTED] U.S. Marine Corps, the spouse of the accused, by unlawfully strangling her.

Specification 4: Violent Offense

In that Lance Corporal Benjamin J. Bautista, U.S. Marine Corps, on active duty, did, at or near [REDACTED] on or about 6 March 2021, commit a violent offense against Lance Corporal [REDACTED] U.S. Marine Corps, the spouse of the accused, to wit: unlawfully:

- (a) striking Lance Corporal [REDACTED] in the face with his hand;
- (b) pulling Lance Corporal [REDACTED] by the foot with his hand; and
- (c) striking Lance Corporal [REDACTED] on the leg with his foot.

Specification 5: Assault by Suffocation

In that Lance Corporal Benjamin J. Bautista, U.S. Marine Corps, on active duty, did, at or near [REDACTED] on or about 2 October 2021, commit an assault against Lance Corporal [REDACTED] U.S. Marine Corps, the spouse of the accused, by unlawfully suffocating her with a beanbag chair.

Specification 6: Violent Offense

In that Lance Corporal Benjamin J. Bautista, U.S. Marine Corps, on active duty, did, at or near [REDACTED] on or about 2 October 2021, commit a violent offense against Lance Corporal [REDACTED] U.S. Marine Corps, the spouse of the accused, to wit: unlawfully:

- (a) throwing a cellphone into the leg of Lance Corporal [REDACTED]
- (b) pushing the head of Lance Corporal [REDACTED] into a wall; and
- (c) forcing a beanbag chair into the face of Lance Corporal [REDACTED]

Specification 7: Violent Offense

In that Lance Corporal Benjamin J. Bautista, U.S. Marine Corps, on active duty, did, at or near [REDACTED] between on or about 1 January 2021 and 4 October 2021, commit a violent offense against Lance Corporal [REDACTED] the spouse of the accused, to wit: unlawfully biting Lance Corporal [REDACTED] U.S. Marine Corps, on the chest with his teeth.

Specification 8: Assault by Strangulation

In that Lance Corporal Benjamin J. Bautista, U.S. Marine Corps, on active duty, did, at or near [REDACTED] on or about 12 October 2021, unlawfully assault Lance Corporal [REDACTED] U.S. Marine Corps, the spouse of the accused, by strangling her.

Accused: Benjamin J. Bautista

EDIP: [REDACTED]

Specification 9: Assault by Suffocation

In that Lance Corporal Benjamin J. Bautista, U.S. Marine Corps, on active duty, did, at or near [REDACTED] on or about 13 October 2021, unlawfully assault Lance Corporal [REDACTED] U.S. Marine Corps, the spouse of the accused, by suffocating her.

Specification 10: Assault by Strangulation

In that Lance Corporal Benjamin J. Bautista, U.S. Marine Corps, on active duty, did, at or near [REDACTED] on or about 13 October 2021, unlawfully assault Lance Corporal [REDACTED] U.S. Marine Corps, the spouse of the accused, by strangling her.

Specification 11: Violent Offense

In that Lance Corporal Benjamin J. Bautista, U.S. Marine Corps, on active duty, did, at or near [REDACTED] on or about 13 October 2021, commit a violent offense against Lance Corporal [REDACTED] U.S. Marine Corps, the spouse of the accused, to wit: unlawfully:

- (a) pushing Lance Corporal [REDACTED] on the body with his hand;
- (b) touching Lance Corporal [REDACTED] on the mouth with his hand;
- (c) touching Lance Corporal [REDACTED] on the neck with his hand; and
- (d) touching Lance Corporal [REDACTED] on the torso with his torso.

ADDITIONAL CHARGE III: VIOLATION OF THE UCMJ, ARTICLE 129

Specification: Wrongful Entry

In that Lance Corporal Benjamin J. Bautista, U.S. Marine Corps, on active duty, did, at or near [REDACTED] on or about 13 October 2021, unlawfully enter the room of Lance Corporal [REDACTED] U.S. Marine Corps, to wit: Bachelor Enlisted [REDACTED]

ADDITIONAL CHARGE IV: VIOLATION OF THE UCMJ, ARTICLE 92

Specification 1: Failure to Obey Other Lawful Written Order

In that Lance Corporal Benjamin J. Bautista, U.S. Marine Corps, on active duty, having knowledge of a lawful order issued by Lieutenant Colonel [REDACTED] to wit: paragraph 1, No Contact Order, dated 24 September 2021, an order which it was his duty to obey, did, at or near [REDACTED] on 13 October 2021, fail to obey the same by wrongfully contacting Lance Corporal [REDACTED] U.S. Marine Corps.

Accused: Benjamin J. Bautista

EDIPI: [REDACTED]

Specification 2: Failure to Obey Other Lawful Written Order

In that Lance Corporal Benjamin J. Bautista, U.S. Marine Corps, on active duty, having knowledge of a lawful order issued by Major [REDACTED] to wit: paragraph 1, No Contact Order, dated 14 October 2021, an order which it was his duty to obey, did, at or near [REDACTED] between 14 October 2021 and 21 October 2021, fail to obey the same by wrongfully contacting Lance Corporal [REDACTED] U.S. Marine Corps.

ADDITIONAL CHARGE V: VIOLATION OF THE UCMJ, ARTICLE 134

Specification (Disorderly Conduct): In that Lance Corporal Benjamin J. Bautista, U.S. Marine Corps, on active duty, was, at or near [REDACTED] on divers occasions between on or about 12 August 2020 and 13 October 2021, disorderly and that said conduct was to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces.

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First Middle Initial) Bautista, Benjamin J.		2. EDIPI: [REDACTED]	3. GRADE OR RANK LCpl	4. PAY GRADE E-3
5. UNIT OR ORGANIZATION [REDACTED]		6. CURRENT SERVICE		
		a. INITIAL DATE 20181126	b. TERM 4 years 13 MONTHS	
7. PAY PER MONTH		8. NATURE OF RESTRAINT OF ACCUSED Pre-Trial Confinement		9. DATE(S) IMPOSED 10 March 23-17 March 23
a. BASIC \$2,547.60	b. SEA/FOREIGN DUTY N/A	c. TOTAL \$2,547.60		

10. CHARGES AND SPECIFICATIONS

ADDITIONAL CHARGE VI: VIOLATION OF THE UCMJ, ARTICLE 134

Specification: Animal Abuse

In that Lance Corporal Benjamin J. Bautista, U.S. Marine Corps, on active duty, did, at or near [REDACTED] between on or about 13 October 2021 and 16 February 2022, wrongfully neglect a certain animal, and that said conduct was of a nature to bring discredit upon the armed forces.

III. PREFERRAL

11a. NAME OF ACCUSER (Last, First Middle Initial) [REDACTED]	b. GRADE E-4	c. ORGANIZATION OF ACCUSER [REDACTED]
d. SIGNATURE OF ACC [REDACTED]		e. DATE (YYYYMMDD) 20221107

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 7 day of November, 2022, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

William E. Grau

Typed Name of Officer

O-3

Organization of Officer

Judge Advocate

Official Capacity to Administer Oaths
(See RCM 307(h)--must be commissioned officer)

Organization of Immediate Commander

○ 1000

-152-

RELIAL CONVENING AUTHORITY

13. The sworn charges were received at _____ hours, _____, 20____ 22____ At _____

Designation of
Commander

Officer Exercising Summary Court-Martial Jurisdiction (See R.C.M. 403)

FOR THE : Commanding Officer

Legal Officer

Official Capacity of Officer Signing

Typed Name of Officer

Q-2.

Grade

Signature

V. REFERRAL; SERVICE OF CHARGES

14. DESIGNATION OF COMMAND OF CONVENING AUTHORITY

b. PLACE

c. DATE

MAY 18 2023

Referred for trial
to Jite

Special

court-martial convened by

Special Court-Martial Convening Order 1-22

dated 09 February 2022

20

subject to the following instructions: ²

To be tried in

conjunction with charges preferred on 9 August 2022, 9 December, and 16 March 2023

By

Command or Order

or

J. W. BIERMAN

Typed Name of Officer

Commanding General

Official Cause(s) of Officer Sienkiewicz

Lieutenant General / O-9

15. On 7 JUL, 2023, I (caused to be) served a copy hereof on (each of) the above named accused.

William E. Grau

0-3

Grade or Rank of Trial Counsel

FOOTNOTES

1. When an appropriate commander signs personally, inapplicable words are stricken.

2. See R.C.M. 601(f) concerning instructions. If none, so state.

TRIAL COURT MOTIONS & RESPONSES

NAVY-MARINE CORPS TRIAL JUDICIARY
[REDACTED] JUDICIAL CIRCUIT
SPECIAL COURT-MARTIAL

UNITED STATES

v.

BENJAMIN J. BAUTISTA
LANCE CORPORAL
U.S. MARINE CORPS

DEFENSE OPPOSITION TO
GOVERNMENT APPLICATION FOR
SEARCH AND SEIZURE WARRANT

11 MAY 23

1. **Nature of Motion.** Pursuant to the Fourth Amendment to the Constitution, 10 U.S.C. § 846 (Article 46, Uniform Code of Military Justice), and Rule for Courts-Martial 703A, the Defense respectfully requests that this Court deny the Government’s application for a search and seizure warrant. The Government seeks a warrant to search and seize emails allegedly sent from Lance Corporal Benjamin J. Bautista, U.S. Marine Corps (LCpl Bautista), to his wife, Lance Corporal [REDACTED] U.S. Marine Corps, in violation of a Military Protective Order (MPO) dated 21 October 2021. The Government’s application lacks particularity and the affidavit lacks facts supporting a conclusion that the civilian emails actually belong to LCpl [REDACTED]

2. **Facts.**

a. LCpl Bautista is accused of violating Article 92, UCMJ.¹

b. On 3 May 2023, the Court notified the parties in United States v. LCpl Bautista that it had received an *ex parte* request from the Government.²

c. On 3 May 2023, the Government responded and supplied to all parties an application for a search warrant for emails related to an alleged Military Protection Order (MPO) violation by LCpl Bautista.³

3. **Burden.** As the proponent of the search warrant, the Government bears the burden of establishing probable cause.

4. **Law.**

The Fourth Amendment to the Constitution of the United States guarantees the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” To this end, it states that “no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

¹ Charge Sheet.

² Enclosure (1).

³ *Id.*

The Court of Military Appeals has explicitly stated that “the Bill of Rights applies with full force to men and women in the military service unless any given protection is, expressly or by necessary implication, inapplicable” and thus, “the Fourth Amendment does shield the American service person.”⁴

Article 46(d)(3), UCMJ, authorizes a detailed military judge to “issue warrants or court orders for the contents of, and records concerning, wire or electronic communications in the same manner as such warrants and orders may be issued by a district court of the United States under chapter 121 of title 18, subject to such limitations as the President may prescribe by regulation.”

Under 18 U.S.C. § 2703, the government “may require the disclosure by a provider of electronic communication service of the contents of a wire or electronic communication” by obtaining a search warrant “issued using the procedures described ... in the case of a court-martial or other proceeding under chapter 47 of title 10 (of the Uniform Code of Military Justice), issued under section 846 of that title, in accordance with regulations prescribed by the President[.]”

R.C.M. 703A generally regulates the issuance of search warrants and orders for wire or electronic communications. R.C.M. 703A(b) dictates the procedures for obtaining a warrant. It requires a military judge to issue a warrant based on an affidavit or testimony subject to examination by the military judge that establishes probable cause.⁵ The warrant itself must “identify the property to be searched, identify any property or other information to be seized, and designate the military judge to whom the warrant must be returned.”⁶

“Probable cause to search exists when there is a reasonable belief that ... property or evidence sought is located in the place or on the person to be searched.”⁷ This determination is made based on the “totality of the circumstances.”⁸ Probable cause is “a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before” the military judge, “there is a fair probability that contraband or evidence of a crime will be found in a particular place.”⁹

Probable cause is “not a technical standard, but rather is based on the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. Probable cause requires more than bare suspicion, but something less than a preponderance of the evidence. ... The duty of the reviewing court is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit ... there is a fair

⁴ *United States v. Stuckey*, 10 M.J. 347, 349 (C.M.A. 1981); quoting *United States v. Middleton*, 10 M.J. 123, 126 (C.M.A. 1981).

⁵ R.C.M. 703A(b)(1).

⁶ R.C.M. 703A(b)(3).

⁷ Mil. R. Evid. 315(f)(2); *United States v. Macomber*, 67 M.J. 214, 218 (C.A.A.F. 2009).

⁸ *Macomber*, 67 M.J. at 218, citing *United States v. Gates*, 462 U.S. 213, 238 (1983); *United States v. Carter*, 54 M.J. 414, 418 (C.A.A.F. 2001); *United States v. Monroe*, 52 M.J. 326, 331 (C.A.A.F. 2000); *United States v. Bethea*, 61 M.J. 184, 187 (C.A.A.F. 2005).

⁹ *Macomber*, 67 M.J. at 219, quoting *Gates*, 462 U.S. at 238.

probability that contraband or evidence of a crime will be found in a particular place.”¹⁰

The Fourth Amendment also requires that a warrant state with particularity “the place to be searched, and the persons or things to be seized.” This applies not only to the *application* for a warrant, but also to the warrant itself.¹¹ The search warrant “serves a high function” that is “not necessarily vindicated when some other document, somewhere, says something about the objects of the search, but the contents of that document are neither known to the person whose home is being searched nor available for her inspection.”¹²

“An overly broad warrant can result in a general search prohibited by the Fourth Amendment[.]”¹³

5. Argument.

- a. The warrant application lacks particularity over what or where the Government intends on searching.

A warrant—not merely its application—must state with particularity “the place to be searched, and the persons or things to be seized.”¹⁴ Although the Fourth Amendment does not prohibit a warrant from cross-referencing other documents, a warrant that fails in its particularity requirement is unconstitutional.¹⁵ Here, the search warrant provided by the Government in its application states: “Information associated with the Google email account [REDACTED] that is stored at premises owned, maintained, controlled, or operated by Google LLC, a company headquartered at [REDACTED] [REDACTED] The information includes, but is not limited to: account information and content as provided in Attachment A and B of the affidavit sworn to by NCIS Special Agent [REDACTED] on 28 April 2023 for Case No. [REDACTED]”

This brief statement, seeking “information” from the email account attributed to LCpl Bautista, is insufficient. It does not state what, exactly, is being sought, nor where. While cross-referencing documents on a warrant is not prohibited, it relies entirely on the application to state the warrant’s purpose. It does not even reference LCpl [REDACTED] civilian email accounts as a necessary condition for the emails or “information” being sought. More, it provides no date range over when emails are sought. In sum, the warrant on its face gives the Government a broad mandate to search the entirety of the requested email account with no limiting factors.

¹⁰ *Macomber*, 67 M.J. at 219, quoting *United States v. Leedy*, 65 M.J. 208, 213 (C.A.A.F. 2007).

¹¹ *Groh v. Ramirez*, 540 U.S. 551, 557 (2004) (“The Fourth Amendment requires particularity in the warrant, not in the supporting documents”); see *Massachusetts v. Sheppard*, 468 U.S. 981, 988 n. 5 (“A warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional”).

¹² *Groh*, 540 U.S. at 557, quoting *McDonald v. United States*, 335 U.S. 451, 455 (1948) (stating that the Fourth Amendment does not prohibit a warrant from cross-referencing other documents).

¹³ *United States v. Lattin*, 2022 CCA LEXIS 226, *35 (A.F.C.C.A. 2022), aff’d by *United States v. Lattin*, No. 22-0211, Crim. App. No. 39859 (C.A.A.F. 2023).

¹⁴ U.S. Const. amend. IV; *Groh*, 540 U.S. at 557.

¹⁵ *Sheppard*, 468 U.S. at 988 n. 5; *McDonald*, 335 U.S. at 455.

¹⁶ Enclosure (2).

b. The date range of search is overbroad, given the facts provided in the affidavit.

“An overly broad warrant can result in a general search prohibited by the Fourth Amendment.”¹⁷ Here, there is no date range on the warrant itself, thus granting the Government a general warrant with no limitations on what the Government may examine or where it may search. Such a warrant itself is reprehensible to the spirit and letter of the Fourth Amendment.

More, however, the date range described in the affidavit is overbroad. The affidavit seeks to search all emails from [REDACTED] to various civilian email accounts attributed to LCpl [REDACTED] from 21 October 2021 “through the effective date of the warrant.”¹⁸ The justification for a beginning date of 21 October 2021 is that it “is the identified effective date of the MPO issued to SUBJECT to prevent communication between SUBJECT and VICTIM.”¹⁹ Despite this, the affidavit identifies no emails that were sent from [REDACTED] those emails in 2021. At best, the affidavit states that “[a] review of a sample of the emails provided the emails were sent on various dates in 2022, with the most recent email being sent ... on February 4, 2023.”²⁰ The affidavit offers no particular facts to support a conclusion that any emails were sent in 2021, nor any as recently as May, when the search warrant will be signed. The dates requested by the Government are unsupported by what few facts are given, and therefore the search warrant is overbroad.

c. There is nothing in the affidavit to support a conclusion that the civilian emails ascribed to LCpl [REDACTED] actually are LCpl [REDACTED] civilian email addresses.

“Probable cause to search exists when there is a reasonable belief that ... property or evidence sought is located in the place or on the person to be searched.”²¹ This determination is made based on the “totality of the circumstances.”²² Probable cause is “a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before” the military judge, “there is a fair probability that contraband or evidence of a crime will be found in a particular place.”²³

Here, the affidavit lays out the three civilian accounts ascribed to LCpl [REDACTED] from which or to LCpl Bautista sent emails in violation of the MPO. The affidavit then conclusively states that “various emails were observed to have originated from the email address [REDACTED] and sent to VICTIM’S U.S. Government email, and VICTIM’S

¹⁷ *Lattin*, 2022 CCA LEXIS 226, *35.

¹⁸ Enclosure (3), pg. 6.

¹⁹ *Id.*

²⁰ Enclosure (3), pg. 3. It is additionally curious why an NCIS Special Agent is the individual attesting to the search warrant. NCIS’s investigation pertains to allegations of domestic violence currently pending in a separate general court-martial, and the affiant makes clear that the genesis of this application was a “Prohibited Activities and Conduct (PAC) investigation involving SUBJECT, conducted by the Instillation [sic] Trial Office” (emphasis added) that caused the Regional Trial Investigator—not NCIS—to retrieve emails from Lance Corporal [REDACTED] government email account.

²¹ Mil. R. Evid. 315(f)(2); *United States v. Macomber*, 67 M.J. 214, 218 (C.A.A.F. 2009).

²² *Macomber*, 67 M.J. at 218, citing *United States v. Gates*, 462 U.S. 213, 238 (1983); *United States v. Carter*, 54 M.J. 414, 418 (C.A.A.F. 2001); *United States v. Monroe*, 52 M.J. 326, 331 (C.A.A.F. 2000); *United States v. Bethea*, 61 M.J. 184, 187 (C.A.A.F. 2005).

²³ *Macomber*, 67 M.J. at 219, quoting *Gates*, 462 U.S. at 238.

personal email.”²⁴ Nowhere, however, does the affidavit provide facts that those emails actually belong to LCpl [REDACTED]. That two of the three emails bear the same initials is insufficient; anyone can sign up for a Gmail account and create any username.

Critically, the Government does not identify who the “various witnesses” are alleging that LCpl Bautista was attempting to contact his wife in violation of the MPO. The Government ostensibly has the ability to speak with the “VICTIM” of this crime, yet no facts are provided that LCpl [REDACTED] corroborated that the emails listed belong to her. Even by the low standard of probable cause, the Government has failed to carry its burden.

6. **Conclusion**. The Government’s application is overbroad in its scope and fails the Fourth Amendment’s requirement for particularity by providing a date range unrelated to any of the facts in the affidavit. More, the Government has failed to provide facts to support a conclusion that the emails ascribed to LCpl [REDACTED] actually belong to [REDACTED].

7. **Evidence and Enclosures**.

Enclosure (1): Emails dated 3 May 2023.

Enclosure (2): Draft DD Form 3056 dated 1 May 2023.

Enclosure (3): Affidavit in Support of Search Warrant.

8. **Relief Requested**. The Defense respectfully requests that the Military Judge deny the Government’s application for a search warrant.

LAMB.IAN.MICH
AEL [REDACTED]
I. M. LAMB
Captain, USMC
Defense Counsel

Digitally signed by
LAMB.IAN.MICHAE [REDACTED]
Date: 2023.05.11 19:30:53 +09'00'

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of May, a copy of this motion was served on Trial Counsel.

LAMB.IAN.MICHA
EL [REDACTED]
I. M. LAMB
Captain, USMC
Defense Counsel

Digitally signed by
LAMB.IAN.MICHAEL [REDACTED]
Date: 2023.05.11 19:31:13 +09'00'

²⁴ Enclosure (3), pg. 8.

NAVY-MARINE CORPS TRIAL JUDICIARY
██████████ JUDICIAL CIRCUIT
SPECIAL COURT-MARTIAL

UNITED STATES v. BENJAMIN J. BAUTISTA E-3/LANCE CORPORAL, USMC	DEFENSE MOTION TO DISMISS (Speedy Trial) 9 MAY 23
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1. **Nature of the Motion.** Pursuant to Rule for Courts-Martial (R.C.M.) 907(b)(2)(A) and the Sixth Amendment to the Constitution of the United States, the Defense respectfully requests that this Court dismiss the sole specification of the Charge with prejudice. One hundred-eleven days elapsed between when the Charge was preferred and when Lance Corporal Benjamin J. Bautista, U.S. Marine Corps (LCpl Bautista), was arraigned. Under a *Barker v. Wingo* analysis, LCpl Bautista's right to speedy trial was violated, and therefore the Defense respectfully requests that this Court dismiss the sole specification of the Charge.

2. **Facts.**

- a. Lance Corporal Bautista is accused of violating Article 92, UCMJ.¹
- b. Lance Corporal Bautista is currently pending allegations of domestic violence, orders violations, and animal abuse at a separate General Court-Martial.²
- c. The sole specification of the Charge in this case was preferred on 9 December 2022.³
- d. Lance Corporal Bautista was offered nonjudicial punishment on 21 November 2022.⁴
- e. The sole specification of the Charge alleges that the Accused used a racial slur towards another Marine on or about 22 September 2023.⁵
- f. Major ██████████, U.S. Marine Corps is the accuser on the charge sheet.⁶

¹ Charge Sheet.

² Charge Sheet in the General Court-Martial case of United States v. Lance Corporal Benjamin J. Bautista, U.S. Marine Corps.

³ Charge Sheet.

⁴ See pg. 23, Encl (2) of the Defense Motion to Compel Discovery.

⁵ Charge Sheet.

⁶ Charge Sheet.

g. The sole specification of the Charge was initially referred to Special Court-Martial on 9 March 2023.⁷

h. At the Government's request, the Court originally docketed the arraignment for this case on 15 March 2023.⁸

i. As of 15 March 2023, 97 days had elapsed since preferral, including 15 March 2023.

j. Lance Corporal Bautista was placed in pretrial confinement on 10 March 2023.⁹

k. On 11 March 2023, the Government contacted the Court and requested a delay in arraigning LCpl Bautista.¹⁰

l. A 39(a) in the pending General Court-Martial for U.S. v. LCpl Bautista was held on 15 March 2023.¹¹

m. The Government preferred the sole specification of the Additional Charge on 16 March 2023.¹²

n. Defense Counsel was TAD the Intermediate Trial Advocacy Course (ITAC) at The Judge Advocate General's Legal Center and School (TJAGLCS) in Charlottesville, Virginia, from 20 March 2023 to 30 March 2023, returning to [REDACTED] on 4 April 2023.¹³

o. Defense Counsel had an "Out of Office" email message stating that he would return on 4 April 2023 that automatically responded to emails that he received.

p. On 22 March 2023, the Government emailed the Court requesting an arraignment for this case to be held on 27 March 2023.¹⁴

q. After consultation with the parties, this Court docketed the arraignment for 4 April 2023, and excluded delay from 27 March 2023 until 4 April 2023.¹⁵

r. As of 26 March 2023, 108 days had elapsed since preferral of the Charge, including 26 March 2023.

⁷ Enclosure (1), pg. 2.

⁸ Enclosure (2), pg. 3.

⁹ Enclosure (3), pg. 1.

¹⁰ Enclosure (2), pg. 1.

¹¹ Enclosure (2), pg. 1.

¹² Additional Charge Sheet.

¹³ Enclosure (4), pg. 2.

¹⁴ Enclosure (5), pg. 7.

¹⁵ Enclosure (5), pg. 5.

s. On 4 April 2023, Defense Counsel requested the Court postpone the arraignment until either 6 or 7 April due to travel issues.¹⁶

t. On 4 April 2023, the Court ordered the arraignment for 6 April 2023 and excluded the period of delay from 27 March 2023 until 6 April 2023 in accordance with R.C.M. 707(c).¹⁷

u. On 6 April 2023, the Government attempted to arraign LCpl Bautista but was unsuccessful because Maj [REDACTED] acted as both the accuser and the convening authority in the special court-martial in violation of R.C.M. 504(c)(1). As a result, LCpl Bautista was not arraigned.¹⁸

v. The Command re-referred the Charge and the Additional Charge to special court-martial on 10 April 2023. That same day, the Government requested the arraignment take place the next day, on 11 April 2023.¹⁹

w. On 13 April 2023, the Court docketed the arraignment for 17 April 2023. Additionally, the Court granted excludable delay from the period of 10 April 2023 until 17 April 2023 pursuant to *United States v. Lazauskas* after LCpl Bautista did not waive the three-day statutory waiting period.²⁰

x. LCpl Bautista was arraigned on 17 April 2023.

y. Excluding 27 March – 6 April 2023 and 10 – 17 April 2023, 111 days elapsed since the preferral on 9 March 2023.

3. **Burden.** The Defense bears the burden of proof and persuasion by a preponderance of the evidence.²¹

4. **Law.**

a. **Sixth Amendment.**

The Sixth Amendment to the Constitution guarantees, among other things, the right to a trial without unreasonable delay. “Pretrial delay is often both inevitable and wholly justifiable.”²² “However, the right to a speedy trial ‘is as fundamental as any of the rights secured by the Sixth Amendment.’”²³

¹⁶ Enclosure (5), pp. 2-3.

¹⁷ Enclosure (5), pg. 1.

¹⁸ 6 April 2023 arraignment; see also original charge sheet.

¹⁹ Charge Sheet; Encl (6), pg. 8.

²⁰ Enclosure (6), pg. 7.

²¹ R.C.M. 905(c)

²² *Doggett v. United States*, 505 U.S. 647, 656 (1992).

²³ *United States v. Guyton*, 82 M.J. 146, 154 (C.A.A.F. 2022), *Klopfert v. North Carolina*, 386 U.S. 213, 223 (1967).

Four factors derived from *Barker v. Wingo*²⁴ are used to determine whether an accused's Sixth Amendment right to speedy trial has been violated: (1) the length of the delay; (2) the reason(s) for the delay; (3) the accused's demand for a speedy trial; and (4) the prejudice to the accused.²⁵

Under the first factor, the “quantum of delay is ‘a triggering mechanism’ for identifying ‘presumptively prejudicial’ delay.”²⁶ “In general, accountability for speedy-trial tracking begins at the time of pretrial restraint or preferral of charges, whichever comes first.”²⁷ “Unless the delay is facially unreasonable, the full due process analysis will not be triggered.”²⁸ “Where the Government withdraws charges in good faith, the speedy trial provision of the Sixth Amendment is inapplicable to the period between the withdrawal of the charges and a subsequent repreferral [sic] of those charges.”²⁹

The second *Barker* factor looks at the reason(s) for delay. “A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than the defendant.”³⁰

The third *Barker* factor weighs whether the accused made a speedy trial demand. An accused has some responsibility to assert his right to speedy trial.³¹ However, failure to demand it does not constitute waiver; rather, the accused's “assertion of or failure to assert his right to a speedy trial is one of the factors to be considered in an inquiry into the deprivation of the right.”³²

The fourth *Barker* factor—prejudice to the accused—is “‘assessed in the light of’ the three interests of the accused ‘which the speedy trial right was designed to protect: (1) preventing oppressive pretrial incarceration; (2) minimizing anxiety and concern of the accused; and (3) limiting the possibility that the defense will be impaired.’”³³ “Of these forms of prejudice, ‘the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.’”³⁴

²⁴ 407 U.S. 514 (1972).

²⁵ *Guyton*, 82 M.J. at 154, citing *United States v. Harrington*, 81 M.J. 184, 189 (C.A.A.F. 2021).

²⁶ *United States v. Grom*, 21 M.J. 53, 56 (C.M.A. 1985), citing *Barker*, 407 U.S. at 530.

²⁷ *Grom*, 21 M.J. at 55.

²⁸ *United States v. Danylo*, 73 M.J. 183, 186 (C.A.A.F. 2014), citing *United States v. Merritt*, 72 M.J. 483, 489 (C.A.A.F. 2013); citing *United States v. Cossio*, 64 M.J. 254, 257 (C.A.A.F. 2007) (finding 117 days of continuous pretrial confinement as sufficient to trigger the full *Barker* inquiry); but see *United States v. Ewell*, 383 U.S. 116 (1966) (noting that prosecution procedures “are designed to move at a deliberate pace,” and finding no Sixth Amendment speedy trial violation in a nineteen-month pretrial delay).

²⁹ *United States v. Amerine*, 17 M.J. 947, 950 (A.F.C.M.R. 1984).

³⁰ *Barker*, 407 U.S. at 531.

³¹ *Barker*, 407 U.S. at 529.

³² *Barker*, 407 U.S. at 528.

³³ *Guyton*, 82 M.J. at 154, quoting *United States v. Cooley*, 75 M.J. 247, 262 (C.A.A.F. 2016) (internal alterations omitted).

³⁴ *Id.*, citing *Doggett*, 505 U.S. at 654.

b. Article 10.

Article 10, UCMJ. “By its own terms, Article 10, UCMJ, applies to arrest or confinement and requires that a person be tried or informed of the offenses for which he or she is confined.”³⁵ “For Article 10, UCMJ, to apply, confinement must be related to specific charges.”³⁶

a. R.C.M. 707.

An accused must “be brought to trial within 120 days after ... [p]referral of charges.”³⁷ For purposes of R.C.M. 707, an “accused is brought to trial ... at the time of arraignment.”³⁸ “If charges are merely withdrawn and not subsequently dismissed ... the R.C.M. 707 ‘speedy-trial clock continues to run.’”³⁹

The Discussion to R.C.M. 707 states that “[t]he decision to grant or deny a reasonable delay is a matter within the sole discretion of ... a military judge ... based on the facts and circumstances then and there existing.”⁴⁰ “However, [the Court of Appeals for the Armed Forces] requires ‘good cause’ for the delay and also requires that the length of time requested be ‘reasonable’ based on the facts and circumstances of each case.”⁴¹

5. Argument.

The Government’s failure to bring the sole specification of the Charge to trial within a reasonable time violated LCpl Bautista’s Sixth Amendment rights. Given the relative simplicity of the charged offense, taking over 100 days to bring the case to trial is facially unreasonable, and triggers analysis under *Barker v. Wingo*.

a. Over 100 days’ delay to bring to trial a case based on a command investigation completed in September triggers the *Barker* analysis.

“In general, accountability for speedy-trial tracking begins at the time of pretrial restraint or preferral of charges, whichever comes first.”⁴² “Unless the delay is facially unreasonable, the full due process analysis will not be triggered.”⁴³ Here, not including delay that was excluded by the

³⁵ *United States v. Cooley*, 75 M.J. 247, 257 (C.A.A.F. 2016), referencing *United States v. Schubert*, 70 M.J. 181, 187 (C.A.A.F. 2011); *United States v. Cooper*, 58 M.J. 54, 60 (C.A.A.F. 2003).

³⁶ *Id.*, citing *United States v. Mladjen*, 19 U.S.C.M.A. 159, 161 (C.M.A. 1969).

³⁷ R.C.M. 707(a)(1).

³⁸ R.C.M. 707(b)(1).

³⁹ *United States v. Leahr*, 73 M.J. 364, 367 (C.A.A.F. 2014), quoting *United States v. Britton*, 26 M.J. 24, 26 (C.M.A. 1988).

⁴⁰ R.C.M. 707(c)(1) Discussion.

⁴¹ *United States v. Guyton*, 82 M.J. 146, 151 (C.A.A.F. 2022), citing *United States v. Thompson*, 46 M.J. 472, 475 (C.A.A.F. 1997).

⁴² *Grom*, 21 M.J. at 55.

⁴³ *United States v. Danylo*, 73 M.J. 183, 186 (C.A.A.F. 2014), citing *United States v. Merritt*, 72 M.J. 483, 489 (C.A.A.F. 2013); citing *United States v. Cossio*, 64 M.J. 254, 257 (C.A.A.F. 2007) (finding 117 days of continuous pretrial confinement as sufficient to trigger the full *Barker* inquiry); but see *United States v. Ewell*, 383 U.S. 116 (1966) (noting that prosecution procedures “are designed to move at a deliberate pace,” and finding no Sixth Amendment speedy trial violation in a nineteen-month pretrial delay).

Military Judge, it took the Government 111 days to arraign LCpl Bautista. This case is reasonably straightforward; it is an alleged orders violation based on a command investigation completed in December 2022. No scientific testing or complex evidentiary analysis was required for the Government to be prepared to prosecute the case. Therefore, over 100 days to arraign LCpl Bautista was facially unreasonable, and the *Barker* analysis is triggered.

- b. There is no immediately compelling reason for why the Government took so long to bring this case to trial.

“A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than the defendant.”⁴⁴ Preferred in December 2022, this case was not initially referred—albeit improperly—until March 2023. Although the Government edited the wording of the specification first in January and then again in March, it is unclear why the case was not initially referred until March.

It is clear, however, that LCpl Bautista’s brief incarceration caused further delay. LCpl Bautista was ordered into pretrial confinement on 10 March 2023 and ordered released by the Initial Review Officer on 17 March 2023. One day prior to LCpl Bautista’s release, the Government preferred the sole specification of the Additional Charge. Nonetheless, the charges were not referred until 22 March 2023.

Although a portion of the delay was due to Defense Counsel’s ITAC attendance, this is not dispositive. Defense Counsel’s ITAC selection was a well-known and routinely discussed absence in this and other cases. The Government could have taken immediate steps following the preferral of the Additional Charge to refer all charges and specifications to court-martial in a timely fashion. More, the additional delay was due to an improper referral. Ultimately, the second prong of the *Barker* analysis weighs in favor of the Defense.

- c. Although LCpl Bautista did not demand speedy trial, this does not prevent finding that his Sixth Amendment rights were violated.

An accused has some responsibility to assert his right to speedy trial.⁴⁵ However, failure to demand it does not constitute waiver; rather, the accused’s “assertion of or failure to assert his right to a speedy trial is one of the factors to be considered in an inquiry into the deprivation of the right.”⁴⁶ Here, no demand was made. Although this does not weigh in Defense’s favor, nor does it constitute a waiver of LCpl Bautista’s right to speedy trial.

⁴⁴ *Barker*, 407 U.S. at 531.

⁴⁵ *Barker*, 407 U.S. at 529.

⁴⁶ *Barker*, 407 U.S. at 528.

- d. In addition to the anxiety of a pending second court-martial, the further away from the alleged offense the trial runs, the more likely it will impact the state of the evidence.

The fourth *Barker* factor—prejudice to the accused—is “‘assessed in the light of’ the three interests of the accused ‘which the speedy trial right was designed to protect: (1) preventing oppressive pretrial incarceration; (2) minimizing anxiety and concern of the accused; and (3) limiting the possibility that the defense will be impaired.’”⁴⁷ “Of these forms of prejudice, ‘the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.’”⁴⁸ Here, LCpl Bautista was forced to contend with both a pending general court-martial and the uncertainty of when—or even if—the pending special court-martial case would be referred to trial.

Additionally, as time elapses, the state of the evidence will likely be affected. The trial is currently docketed for the end of July in [REDACTED]. The trial will therefore take place ten months after the alleged offense. More, summer in the Marine Corps is a time of turnover, as commands turn over, Marines execute Permanent Change of Station (PCS) orders, and Marines reach their end of active service. The Government’s delay will likely impact the state of the evidence in this case, necessarily prejudicing the court-martial process.

6. **Conclusion.** The Government’s 111-day delay to bring to trial the sole specification of the Charge in this case unduly prejudiced LCpl Bautista under *Barker v. Wingo*. Therefore, the Defense respectfully requests that this Court dismiss the sole specification of the Charge.

7. **Enclosures.** In support of its motion, the Defense respectfully submits the following enclosures:

- Enclosure (1): Charge Sheet Referred on 9 March 2023.
- Enclosure (2): Arraignment Emails dtd 9 March 2023.
- Enclosure (3): 72-Hour Memo.
- Enclosure (4): Arraignment Emails dtd 24 March 2023.
- Enclosure (5): Arraignment Emails dtd 4 April 23.
- Enclosure (6): Arraignment Emails 13 April 2023.

⁴⁷ *Guyton*, 82 M.J. at 154, quoting *United States v. Cooley*, 75 M.J. 247, 262 (C.A.A.F. 2016) (internal alterations omitted).

⁴⁸ *Id.*, citing *Doggett*, 505 U.S. at 654.

8. **Relief Requested.** The Defense respectfully requests that this Court grant this motion and dismiss the Specification of the Charge. Additionally, the Defense respectfully requests that the Government produce a chronology detailing the processing of the case.

LAMB.IAN.MICH
AEL. [REDACTED] Digitally signed by
LAMB.IAN.MICHAEL [REDACTED]
Date: 2023.05.09 23:19:04 +09'00'

I. M. LAMB
Captain, U.S. Marine Corps
Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that on 4 April 2023, a copy of this motion was served on Trial Counsel.

LAMB.IAN.MICH
AEL. [REDACTED] Digitally signed by
LAMB.IAN.MICHAEL [REDACTED]
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I. M. LAMB
Captain, U.S. Marine Corps
Defense Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY
[REDACTED] JUDICIAL CIRCUIT
SPECIAL COURT-MARTIAL

UNITED STATES

v.

BENJAMIN J. BAUTISTA
LANCE CORPORAL
U.S. MARINE CORPS

**GOVERNMENT RESPONSE TO
DEFENSE MOTION TO DISMISS
(Speedy Trial)**

16 MAY 23

1. **Nature of Motion.** Pursuant to Rules for Courts-Martial (R.C.M.) 707, the Government respectfully requests that this Court deny the Defense Motion to Dismiss. As conceded by the Defense, one hundred-eleven (111) days elapses between when the initial charge was preferred and when the Accused was ultimately arraigned. Under R.C.M. 707, the Government has one hundred-twenty (120) days to bring the Accused to trial, which it succeeded in doing in this case.

2. **Facts**

- a. The Accused is presently accused of violating Uniform Code of Military Justice (UCMJ) Article 92, including two charges each with a sole specification.¹
- b. The first of the two charges (hereinafter “original charge”) was preferred on 09 December 2022.²
- c. The second of the two charges (hereinafter “additional charge”) was preferred on 16 March 2023.³
- d. Both charges were initially referred under Special Court Martial Convening Order 1-23, signed by Major [REDACTED] in his authority a [REDACTED]
- e. The original charge relates to the Accused’s use of racial slurs towards another Marine during September of 2022.⁵ Major [REDACTED] is listed and signed as the Accuser for the original charge, and the charge was referred by LtCol [REDACTED], Commanding Officer, [REDACTED]
- f. The additional charge relates to the Accused violating a Military Protective Order (MPO)

¹ Enclosure 1; Enclosure 2

² Enclosure 1

³ Enclosure 2

⁴ Enclosure 1; Enclosure 2; Enclosure 3

⁵ Enclosure 1

⁶ *Id.*

by wrongfully communicating with LCpl [REDACTED] between October 2021 and March 2023.⁷ LCpl [REDACTED] LSSS, [REDACTED] is listed and signed as the Accuser for the additional charge, and the charge was referred by LtCol [REDACTED], CO, [REDACTED]

- g. The Accused was placed in pretrial confinement on 10 March 23, for violating an MPO, which served as the basis for the additional charge.⁸ On 17 March 23, the Accused was released from pretrial confinement.⁹
- h. Major [REDACTED] served as both the convening authority and accuser for the original charge.¹⁰
- i. The Government filed a docketing application for the original and additional charges on 22 March 2023.¹¹
- j. This Court received the docketing application on 23 March 23, and proposed the arraignment take place on 27 March 23, acknowledging detailed defense counsel's TAD status. Detailed defense counsel confirmed his unavailability and proposed 4 April 23 or 6 April 23.¹² This Court responded by docketing the Accused's arraignment for 4 April 2023, and granted excludable delay between 27 March 23 and 4 April 23.¹³
- k. In the early hours of 4 April 23, detailed defense counsel notified this Court that he would not be able to attend the 4 April 23 arraignment due to travel issues and requested that the arraignment be continued to 6 or 7 April.¹⁴
- l. This Court granted the continuance request, additionally granting excludable delay from 4 April 23 through 6 April 23.¹⁵
- m. Immediately prior to the 6 April 23 arraignment, this Court identified that Major [REDACTED] served as both the accuser and the convening authority in the original charge.¹⁶ The defense did not waive this error, and the Accused was not arraigned.¹⁷
- n. On 07 April 23, LtCol [REDACTED] pursuant to R.C.M. 604, directed that the Government withdraw the original and additional charges from Special Court Martial Convening Order 1-23, after which the charges were withdrawn.¹⁸

⁷ Enclosure 2

⁸ *Id.*

⁹ *Id.*

¹⁰ Enclosure 1; Enclosure 3.

¹¹ Enclosure 5; pg 7 of 16.

¹² *Id.* pg 7 of 16.

¹³ *Id.* pg 5 of 16.

¹⁴ *Id.* pg 2-3 of 16.

¹⁵ *Id.* pg 1-2 of 16.

¹⁶ 6 April arraignment.

¹⁷ 6 April arraignment.

¹⁸ Enclosure 6

- o. On 07 April 23, LtCol [REDACTED] signed Special Court Martial Convening Order 2-23.¹⁹
- p. On 07 April 23, LtCol [REDACTED] referred the original charge and the additional charge under Special Court Martial Convening Order 2-23.²⁰
- q. On 10 April 23, the Government filed a second docketing application for the original and additional charge sheets.²¹ The Government requested that the arraignment take place on 11 April 23, acknowledging the 3-day waiting period.²²
- r. On 10 April 23, detailed defense counsel indicated that the Accused would not waiving the 3-day statutory waiting period.²³
- s. Ultimately, this Court docketed the arraignment for 17 April 23, and granted excludable delay beginning on 10 April 23 until the date of the arraignment.²⁴
- t. The Accused was arraigned before this Court on 17 April 23, for the original charge and the additional charge, both of which were referred under SPCMO 2-23, signed by LtCol [REDACTED].²⁵
- u. Including the periods of excludable delay from 27 March 23 through 6 April 23 and 10 April 23 through 17 April 23, 111 days passed from the initial preferral of charges on 9 December 22 and when the Accused was arraigned on 17 April 23.

3. **Burden.** As the moving party, the Defense bears the burden of proof by a preponderance of evidence; however, given the nature of the motion the Government bears the burden of persuasion.²⁶

4. **Law**

The Sixth Amendment of the United States Constitution affords individuals the right to a speedy trial.²⁷ The Military Justice system specifically defines what “speedy trial” means for service members in Rules for Courts-Martial (R.C.M.) 707; specifically, that “the accused shall be brought to trial within 120 days after the ... preferral of charges.”²⁸ Additionally, “the date of preferral of charges ... shall not count for purpose of computing time under subsection (a) of this rule.”²⁹ Furthermore, “the accused is brought to trial within the meaning of this rule at the time

¹⁹ Enclosure 4

²⁰ Enclosure 1; Enclosure 2

²¹ Enclosure 5: pg 16 of 16.

²² *Id.*

²³ *Id.* pg 15 of 16.

²⁴ *Id.* pg 10 of 16.

²⁵ 17 April Arraignment.

²⁶ R.C.M. 905(c)(2)(B).

²⁷ U.S. Const. amend. VI.

²⁸ R.C.M. 707(a)(1).

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of arraignment.”³⁰

R.C.M. 707 contemplates various forms of pre-trial delay, delay that has been referred to as both “inevitable and wholly justifiable.”³¹ Delay from the time of an offense to preferral of charges or the imposition of pretrial restraint is not considered for speedy trial purposes.³² However, in some circumstances such delay may prejudice the accused and may result in dismissal of the charges or other relief.³³ R.C.M. 707(c) defines excludable delay and conveys that all pretrial delays approved by a military judge shall be excluded from determining whether 120-day speedy trial period has run.³⁴

When an accused is not brought to trial within the 120-day speedy trial period contemplated by R.C.M. 707, it may trigger a *Barker* analysis.³⁵ Under *Barker*, the court weighs four factors to determine if there is a Sixth Amendment speedy trial violation: (1) the length of the delay; (2) the reasons for the delay; (3) the accused’s demand for a speedy trial; and (4) the prejudice to the accused.³⁶

In *United States v. Guyton*, it took 192 days arraign the appellant and 273 days to bring him to trial.³⁷ Both the parties and the court acknowledged that this length of delay was sufficient to trigger a *Barker* analysis. In applying the *Barker* analysis, the court determined that “despite the fact that 192 days elapsed in this case from the time of preferral ... to the time of arraignment ... we conclude that the Government did not violate R.C.M. 707’s speedy trial provision.”³⁸

In *Guyton*, the court underwent a *Barker* analysis and ultimately determined that the Government did not violate the appellant’s Sixth Amendment right to a speedy trial.³⁹ In its holding, the court was persuaded by the ordinarily tolerable amount of pre-trial delay in a military context, the bilateral government and defense reason for delay, the appellant’s delayed request for a speedy trial, and the lack of prejudice to the appellant.⁴⁰

5. Argument

I. The Government Timely Brought the Accused to Trial Pursuant to R.C.M. 707

The Government timely brought the Accused to trial pursuant to R.C.M. 707 when it arraigned the Accused on day 111 of the 120-day speedy trial clock. The initial charge was preferred against the Accused on 09 December 2023, which started the R.C.M. 707 clock on 10 December 2022. The Government then began a comprehensive pre-trial preparation in its case

³⁰ *Id.*

³¹ *United States v. Guyton*, 82 M.J. 146, 154 (C.A.A.F. 2022).

³² R.C.M. 707(a)(1) *Discussion*.

³³ *Id.*

³⁴ R.C.M. 707(c)

³⁵ 407 U.S. 514 (1972).

³⁶ *Guyton*, 82 M.J. at 154.

³⁷ *Id.* at 148.

³⁸ *Id.* at 152.

³⁹ *Id.* at 155.

⁴⁰ *Id.*

against the Accused, which included contacting a considerable number of witnesses given the breadth of the Accused's alleged misconduct. No scientific testing or complex evidentiary analysis was required by the Government, but conversations with nearly every witness garnered credible leads to the Accused's further misconduct, ultimately leading to an additional charge referred in March of 2023; when witness interviews indicated that the Accused was regularly violating his Military Protective Order (MPO). The Government acknowledges that there are only two charges in this case, but its pre-trial preparation was not facially unreasonable, only ordinarily comprehensive.

II. The Defense's assertion that there were over 100 days' delay is facially inaccurate and does not trigger *Barker*.

The Defense's assertion that there were over 100 days' delay is facially inaccurate and does not trigger *Barker* because there was only 18 days of delay in this case. The Defense characterizes the 111 days that it took the Government to arraign him as delay even though he was arraigned within the R.C.M. 120-day speedy trial clock. Regardless of the complexity of this case, the only "delay" considered by this Court should be the excludable delay that this Court granted from 27 March 23 to 6 April 23 and 10 April 23 to 17 April 23, amounting to 18 days in total. All other time elapsed in between preferral and arraignment was simply the Government compiling a case against the Accused. Thus, the Defense's assertion that there were over 100 days' delay is facially inaccurate and does not trigger *Barker*.

6. Evidence and Enclosures

The Government will notify the Court and Defense prior to the Article 39(a) session what witnesses it intends to produce. Additionally, the Government offers the following evidentiary enclosures in support of the above response motion:

- a. Enclosure 1: Charge Sheet Preferred 09 December 2022
- b. Enclosure 2: Additional Charge Sheet Preferred 16 March 2023
- c. Enclosure 3: Special Court Martial Convening Order 1-23
- d. Enclosure 4: Special Court Martial Convening Order 2-23
- e. Enclosure 5: Pre-Arraignment Communications
- f. Enclosure 6: Notice of Withdrawal dated 18 April 2023.

7. Relief Requested. Pursuant to Rules for Courts-Martial (R.C.M.) 707, the Government respectfully requests that this Court deny the Defense Motion to Dismiss.

DEMPSEY.IAN.DONALD
LD.

Digitally signed by
DEMPSEY.IAN.DONALD

Date: 2023.05.16 20:13:40 +09'00'

I.D. DEMPSEY
Captain, USMC
Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of May 2023, a copy of this motion was served on Defense Counsel.

**DEMPSEY.IAN.DON
ALD** [REDACTED]

Digitally signed by
DEMPSEY.IAN.DONALD [REDACTED]
Date: 2023.05.16 20:14:04 +09'00'

I.D. DEMPSEY
Captain, USMC
Trial Counsel

**JUDICIAL CIRCUIT
NAVY-MARINE CORPS TRIAL JUDICIARY
SPECIAL COURT-MARTIAL**

UNITED STATES

V.

**BENJAMIN J. BAUTISTA
LANCE CORPORAL
U.S. MARINE CORPS**

**DEFENSE MOTION TO
COMPEL DISCOVERY**

9 MAY 23

MOTION

Pursuant to Rules for Courts-Martial (R.C.M.) 701 and 906(b)(7), and Article 46, Uniform Code of Military Justice (UCMJ), the Defense requests that the Court Compel the government to provide discovery.

FACTS

1. Lance Corporal Benjamin Bautista (LCpl Bautista) is charged with multiple violations of Article 92 of the U.C.M.J.¹
2. The Government responded to the Defense's initial discovery request on 28 April 2023.²
3. The Government's response denied portions of the Defense's discovery request.³
4. The Executive Officer of LCpl Bautista's unit, Maj. [REDACTED] served as Accuser in the case.⁴
5. Lance Corporal Bautista is accused of violating a Military Protective Order by contacting his spouse, LCpl [REDACTED]
6. Lance Corporal Bautista was accused of violating the PAC order by directing a racial slur towards another Marine.⁵
7. Lance Corporal Bautista was also the subject of a Command Investigation regarding an

¹ Charge Sheet

² Enclosure (1)

³ Id.

⁴ Charge Sheet

⁵ Id.

⁶ Id.

alleged PAC order violation.⁷

8. The Investigating Officer for the Command Investigation was Capt [REDACTED]
9. The individuals interviewed during the Command Investigation were largely members of LCpl Bautista's unit.⁹
10. Master Sergeant [REDACTED] was also involved in the Command Investigation.¹⁰

BURDEN

The Defense, as the moving party, bears the burden of persuasion and the burden of proof on any factual issue the resolution necessary to decide the motion by a preponderance of the evidence. R.C.M. 905(c).

LAW

The Trial Counsel must provide the Defense with any documents within military control that are relevant to defense preparation. R.C.M. 701(a)(2). Discovery in the Military Justice system "is broader than in federal civilian criminal proceedings, [and] is designed to eliminate pretrial gamesmanship, reduce the amount of pretrial motions practice, and reduce the potential for surprise and delay at trial." *United States v. Jackson*, 59 M.J. 330, 333 (C.A.A.F. 2004). It is in this spirit that U.C.M.J. Art. 46(a) mandates that the Defense and Trial Counsel are entitled to equal opportunity to obtain evidence.

The Trial Counsel's obligations under Art. 46 are defined by the Rules for Courts-Martial. *United States v. Stellato*, 74 M.J. 473, 481 (C.A.A.F. 2015). R.C.M. 701 states that "each party shall have . . . equal opportunity to interview witnesses and inspect evidence." R.C.M. 701(e). Moreover, "[n]o party may unreasonably impede the access of another party to a witness or evidence." R.C.M. 701 further requires that, after the service of charges, the Trial Counsel shall permit the Defense to inspect evidence "within the possession, custody, or control of military authorities" if: 1) the evidence is relevant to defense *preparation*; 2) the government intends to use the evidence in its case-in-chief at trial; 3) the government anticipates using the evidence in rebuttal; or the evidence was obtained from or belonged to the accused. R.C.M. 701(a)(2). The Trial Counsel must also exercise due diligence in reviewing the files of other government entities for "discoverable information." *United States v. Williams*, 50 M.J. 436, 441 (C.A.A.F. 1999).

If the Government withholds evidence favorable to the defense and material to the defendant's guilt or punishment, then the government has violated defendant's right to due process "irrespective of the good faith or bad faith of the prosecution." *United States v. Claxton*, 76 M.J. 356, 359 (C.A.A.F. 2017) (citing *Brady v. Maryland*, 373 U.S. 83, 87 (1963)).

⁷ Enclosure (2)

⁸ Id. pg 4.

⁹ Id. pg 4.

¹⁰ Id. pg 25.

ARGUMENT

The Government has denied the Defense access to evidence that is both within military control and relevant to defense preparation. In doing so, the Government applied a constrained standard of relevance that runs counter both to the broad language within R.C.M. 701(a)(2) and the broad nature of discovery within the Military Justice System. Each item the Defense seeks to compel will be addressed in turn. The bolded text denotes the denied request, while the text that follows speaks to relevance to defense preparation.

1. **[T]he written advice, pretrial advice, or guidance (to include messages, letters, or memoranda sent or received by the command or convening authority relating to the case) given by any judge advocate, military attorney, or general counsel to the convening authority or any intermediate commander during either the preferral or the referral process.**

This evidence is relevant to defense preparation because of the insight it would provide into potential unlawful command influence. This is a case with several complicating factors. One such complication is noted on the charge sheet: the Executive Officer is also the Accuser. This unusual step suggests that the behind-the-scenes process has not been executed in the typical fashion. It suggests that this course of action was taken without going through the normal processes which, in turn, begs the questions of what else did not go through the normal processes and why. Any legal counsel provided, whether adhered to or disregarded, would assist the defense in determining whether this or any of the other unusual circumstances surrounding this case was born out of reasoned advice or something else.

2. **A copy of all documents, emails and messages relating to any and all non-judicial punishment (NJP) of the Accused or of any government witness.**

This speaks directly to the credibility of government witnesses. If a witness has been subjected to NJP, especially for conduct that implicates the character trait for truthfulness, then this constitutes exculpatory impeachment evidence that the government is obliged to produce. The Accused was initially offered NJP on 21 Nov 2022. Encl (2).

3. **Any information of any prior and/or subsequent propensity on the part of any witness and/or alleged victim to lie or state falsehoods, and/or any other pertinent trait of character of any witness and/or alleged victim.**

Impeachment materials are relevant to defense preparation. Further, such evidence would be considered exculpatory evidence favorable to the defense. Failure to provide such evidence despite this request may constitute a violation of the Accused's right to due process. *See United States v. Claxton*, 76 M.J. 356, 359 (C.A.A.F. 2017) (citing *Brady v. Maryland*, 373 U.S. 83, 87 (1963)).

4. **The defense specifically asks the government to exercise due diligence in making such a search as to any of these persons who were in any way involved with the**

instant case and/or any charged and/or uncharged related offenses. Affirm or deny if any of these persons:

- i. has ever been subject to a proceeding pursuant to UCMJ Art 15; has ever received any adverse military administrative action;**
- ii. has ever been titled by any military and/or civilian law enforcement and/or agency;**
- iii. has ever been arrested by any military, civilian, or foreign law enforcement agency;**
- iv. has any military, civilian, or foreign criminal convictions;**
- v. has any federal, state, or foreign deferrals of charges or pleas which avoided a criminal conviction;**
- vi. has any entries at the NCIC; and**
- vii. has ever made any allegations at any time which are in any way similar to and/or related to the allegations in the instant case.**

The requested information is both specific and relevant to defense preparation given the potential impeachment material at play. Further, such evidence should be within the possession of either military authorities or other government entities whose files are reviewable with due diligence. This is all information the government has readily access to given the resources they have at their disposal. Yet, the government responded as follows: "Approved in part, denied in part. The Government will conduct a review of the personnel records of all testifying witnesses and provide the results of that review prior to trial. Denied to the remainder as overbroad, not relevant or necessary. Upon a specific showing as to what material the defense is seeking that is both relevant and necessary from non-military entities, the Government will respond to the request anew." Though not entirely certain of which requests were specifically granted and which denied, defense asks that the government affirm or deny the above. For those affirmed, the defense reiterates its request as outlined in subpart b.14.e.(i-iv) of enclosure (1).

5. Notice of any possible rebuttal evidence on the merits and/or sentencing known to the government prior to the government resting its case-in-chief at trial.

The government's anticipated rebuttal evidence is relevant to defense preparation so that, if necessary, the defense has the opportunity for surrebuttal. It further mitigates the risk of gamesmanship and trial by surprise.

6. Email communications between Lieutenant Colonel [REDACTED] Major [REDACTED] [REDACTED] and/or First Lieutenant [REDACTED] regarding the drafting, review, and preferral of the Specification of the Charges in this case.

This evidence is relevant to defense preparation because it speaks to the circumstances surrounding the preferral of charges with Maj [REDACTED] as both the Accuser and Executive Officers. This is an unusual situation where an Executive Officer, with the assistance of his Adjutant, preferred charges against a Lance Corporal within his own Command. The defense has a duty to ensure that the entirety of the Accused's Court-Martial process is enacted properly, which includes proper referral. Access to these communications are necessary to do so.

7. **Email communications between Lieutenant Colonel [REDACTED] Major [REDACTED], and Captain [REDACTED] regarding Captain [REDACTED] appointment as Investigating Officer for Command Investigation into the Facts and Circumstances Surrounding the Alleged Claim of Violation(s) of the Marine Corps Equal Opportunity Program dated 20 October 2022.**

This is relevant to defense preparation because it provides insight into why Capt [REDACTED] was selected to serve as the Investigating Officer, as well as what Capt [REDACTED] knew about the Accused prior to conducting the Command Investigation. Such evidence could result in impeachment material.

8. **Email communications between any member of the [REDACTED] Office of the Staff Judge Advocate and Captain [REDACTED] regarding Captain [REDACTED] appointment as Investigating Officer for Command Investigation into the Facts and Circumstances Surrounding the Alleged Claim of Violation(s) of the Marine Corps Equal Opportunity Program dated 20 October 2022.**

This is similarly relevant to defense preparation: it provides insight into why Capt [REDACTED] was selected to serve as the Investigating Officer, as well as what Capt [REDACTED] knew about the Accused prior to conducting the Command Investigation. Such evidence could result in impeachment material.

9. **Email communications between any member of the [REDACTED] Office of the Staff Judge Advocate and Master Sergeant [REDACTED] regarding the Command Investigation into the Facts and Circumstances Surrounding the Alleged Claim of Violation(s) of the Marine Corps Equal Opportunity Program dated 20 October 2022.**

This evidence is necessary to defense preparation. Master Sergeant [REDACTED] contributed to the analysis of the Command Investigation into the Accused. Encl. (2). This evidence would provide insights into MSgt [REDACTED] role in the investigation as well as any influence he may have had over the investigation itself, over the findings, and over the Command's ultimate decision to offer NJP and ultimately take the case to Court-Martial.

10. **Email communications between Captain [REDACTED] and Master Sergeant [REDACTED] regarding the Command Investigation into the Facts and Circumstances Surrounding the Alleged Violation(s) of the Marine Corps Equal Opportunity Program dated 20 October 2022.**

This evidence is necessary to defense preparation. As noted above, MSgt [REDACTED] contributed to the analysis of the Command Investigation into the Accused. Encl. (2). This evidence would provide insights into MSgt [REDACTED] role in the investigation as well as any influence he may have had over the investigation itself, over the findings, and over the Command's ultimate decision to offer NJP and ultimately take the case to Court-Martial.

RELIEF REQUESTED

The Defense moves this Court order the Government to provide the requested evidence.

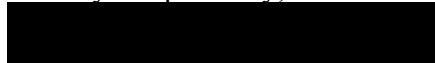
EVIDENCE

In addition to the charge sheet, the Defense requests that the Court consider the following materials in deciding this motion:

Encl (1): 20230428 Bautista SPCM (Initial Discovery Request Response)

Encl (2): Command Investigation of Lance Corporal Benjamin J. Bautista

Very Respectfully,

A solid black rectangular box used to redact the signature of the attorney.

N. R. BLOOM

First Lieutenant, U.S. Marine Corps

Detailed Defense Counsel

I hereby certify that on the 9th day of May 2023, a copy of this motion was served on the Trial Counsel.

N. R. BLOOM
First Lieutenant, U.S. Marine Corps
Detailed Defense Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY
JUDICIAL CIRCUIT
SPECIAL COURT-MARTIAL

UNITED STATES

v.

BENJAMIN J. BAUTISTA
LANCE CORPORAL
U.S. MARINE CORPS

**GOVERNMENT RESPONSE TO
DEFENSE MOTION TO DISMISS
(Speedy Trial)**

16 MAY 23

1. **Nature of Motion.** Pursuant to Rules for Courts-Martial (R.C.M.) 707, the Government respectfully requests that this Court deny the Defense Motion to Dismiss. As conceded by the Defense, one hundred-eleven (111) days elapses between when the initial charge was preferred and when the Accused was ultimately arraigned. Under R.C.M. 707, the Government has one hundred-twenty (120) days to bring the Accused to trial, which it succeeded in doing in this case.

2. **Facts**

- a. The Accused is presently accused of violating Uniform Code of Military Justice (UCMJ) Article 92, including two charges each with a sole specification.¹
- b. The first of the two charges (hereinafter “original charge”) was preferred on 09 December 2022.²
- c. The second of the two charges (hereinafter “additional charge”) was preferred on 16 March 2023.³
- d. Both charges were initially referred under Special Court Martial Convening Order 1-23, signed by Major [REDACTED] in his authority as acting Commanding Officer of [REDACTED]
- e. The original charge relates to the Accused’s use of racial slurs towards another Marine during September of 2022.⁵ Major [REDACTED] is listed and signed as the Accuser for the original charge, and the charge was referred by LtCol [REDACTED] Commanding Officer, [REDACTED]
- f. The additional charge relates to the Accused violating a Military Protective Order (MPO)

¹ Enclosure 1; Enclosure 2

² Enclosure 1

³ Enclosure 2

⁴ Enclosure 1; Enclosure 2; Enclosure 3

⁵ Enclosure 1

⁶ *Id.*

by wrongfully communicating with LCpl [REDACTED] between October 2021 and March 2023.⁷ LCpl [REDACTED] LSSS, [REDACTED] is listed and signed as the Accuser for the additional charge, and the charge was referred by LtCol [REDACTED] CO, [REDACTED]

- g. The Accused was placed in pretrial confinement on 10 March 23, for violating an MPO, which served as the basis for the additional charge.⁸ On 17 March 23, the Accused was released from pretrial confinement.⁹
- h. Major [REDACTED] served as both the convening authority and accuser for the original charge.¹⁰
- i. The Government filed a docketing application for the original and additional charges on 22 March 2023.¹¹
- j. This Court received the docketing application on 23 March 23, and proposed the arraignment take place on 27 March 23, acknowledging detailed defense counsel's TAD status. Detailed defense counsel confirmed his unavailability and proposed 4 April 23 or 6 April 23.¹² This Court responded by docketing the Accused's arraignment for 4 April 2023, and granted excludable delay between 27 March 23 and 4 April 23.¹³
- k. In the early hours of 4 April 23, detailed defense counsel notified this Court that he would not be able to attend the 4 April 23 arraignment due to travel issues and requested that the arraignment be continued to 6 or 7 April.¹⁴
- l. This Court granted the continuance request, additionally granting excludable delay from 4 April 23 through 6 April 23.¹⁵
- m. Immediately prior to the 6 April 23 arraignment, this Court identified that Major [REDACTED] served as both the accuser and the convening authority in the original charge.¹⁶ The defense did not waive this error, and the Accused was not arraigned.¹⁷
- n. On 07 April 23, LtCol [REDACTED] pursuant to R.C.M. 604, directed that the Government withdraw the original and additional charges from Special Court Martial Convening Order 1-23, after which the charges were withdrawn.¹⁸

⁷ Enclosure 2

⁸ *Id.*

⁹ *Id.*

¹⁰ Enclosure 1; Enclosure 3.

¹¹ Enclosure 5: pg 7 of 16.

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- o. On 07 April 23, LtCol [REDACTED] signed Special Court Martial Convening Order 2-23.¹⁹
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- r. On 10 April 23, detailed defense counsel indicated that the Accused would not waiving the 3-day statutory waiting period.²³
- s. Ultimately, this Court docketed the arraignment for 17 April 23, and granted excludable delay beginning on 10 April 23 until the date of the arraignment.²⁴
- t. The Accused was arraigned before this Court on 17 April 23, for the original charge and the additional charge, both of which were referred under SPCMO 2-23, signed by LtCol [REDACTED]²⁵
- u. Including the periods of excludable delay from 27 March 23 through 6 April 23 and 10 April 23 through 17 April 23, 111 days passed from the initial preferral of charges on 9 December 22 and when the Accused was arraigned on 17 April 23.

3. **Burden.** As the moving party, the Defense bears the burden of proof by a preponderance of evidence; however, given the nature of the motion the Government bears the burden of persuasion.²⁶

4. **Law**

The Sixth Amendment of the United States Constitution affords individuals the right to a speedy trial.²⁷ The Military Justice system specifically defines what “speedy trial” means for service members in Rules for Courts-Martial (R.C.M.) 707; specifically, that “the accused shall be brought to trial within 120 days after the ... preferral of charges.”²⁸ Additionally, “the date of preferral of charges ... shall not count for purpose of computing time under subsection (a) of this rule.”²⁹ Furthermore, “the accused is brought to trial within the meaning of this rule at the time

¹⁹ Enclosure 4

²⁰ Enclosure 1; Enclosure 2

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²³ *Id.* pg 15 of 16.

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²⁶ R.C.M. 905(c)(2)(B).

²⁷ U.S. Const. amend. VI.

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R.C.M. 707 contemplates various forms of pre-trial delay, delay that has been referred to as both “inevitable and wholly justifiable.”³¹ Delay from the time of an offense to preferral of charges or the imposition of pretrial restraint is not considered for speedy trial purposes.³² However, in some circumstances such delay may prejudice the accused and may result in dismissal of the charges or other relief.³³ R.C.M. 707(c) defines excludable delay and conveys that all pretrial delays approved by a military judge shall be excluded from determining whether 120-day speedy trial period has run.³⁴

When an accused is not brought to trial within the 120-day speedy trial period contemplated by R.C.M. 707, it may trigger a *Barker* analysis.³⁵ Under *Barker*, the court weighs four factors to determine if there is a Sixth Amendment speedy trial violation: (1) the length of the delay; (2) the reasons for the delay; (3) the accused’s demand for a speedy trial; and (4) the prejudice to the accused.³⁶

In *United States v. Guyton*, it took 192 days arraign the appellant and 273 days to bring him to trial.³⁷ Both the parties and the court acknowledged that this length of delay was sufficient to trigger a *Barker* analysis. In applying the *Barker* analysis, the court determined that “despite the fact that 192 days elapsed in this case from the time of preferral ... to the time of arraignment ... we conclude that the Government did not violate R.C.M. 707’s speedy trial provision.”³⁸

In *Guyton*, the court underwent a *Barker* analysis and ultimately determined that the Government did not violate the appellant’s Sixth Amendment right to a speedy trial.³⁹ In its holding, the court was persuaded by the ordinarily tolerable amount of pre-trial delay in a military context, the bilateral government and defense reason for delay, the appellant’s delayed request for a speedy trial, and the lack of prejudice to the appellant.⁴⁰

5. Argument

I. The Government Timely Brought the Accused to Trial Pursuant to R.C.M. 707

The Government timely brought the Accused to trial pursuant to R.C.M. 707 when it arraigned the Accused on day 111 of the 120-day speedy trial clock. The initial charge was preferred against the Accused on 09 December 2023, which started the R.C.M. 707 clock on 10 December 2022. The Government then began a comprehensive pre-trial preparation in its case

³⁰ *Id.*

³¹ *United States v. Guyton*, 82 M.J. 146, 154 (C.A.A.F. 2022).

³² R.C.M. 707(a)(1) *Discussion*.

³³ *Id.*

³⁴ R.C.M. 707(c)

³⁵ 407 U.S. 514 (1972).

³⁶ *Guyton*, 82 M.J. at 154.

³⁷ *Id.* at 148.

³⁸ *Id.* at 152.

³⁹ *Id.* at 155.

⁴⁰ *Id.*

against the Accused, which included contacting a considerable number of witnesses given the breadth of the Accused's alleged misconduct. No scientific testing or complex evidentiary analysis was required by the Government, but conversations with nearly every witness garnered credible leads to the Accused's further misconduct, ultimately leading to an additional charge referred in March of 2023; when witness interviews indicated that the Accused was regularly violating his Military Protective Order (MPO). The Government acknowledges that there are only two charges in this case, but its pre-trial preparation was not facially unreasonable, only ordinarily comprehensive.

II. The Defense's assertion that there were over 100 days' delay is facially inaccurate and does not trigger *Barker*.

The Defense's assertion that there were over 100 days' delay is facially inaccurate and does not trigger *Barker* because there was only 18 days of delay in this case. The Defense characterizes the 111 days that it took the Government to arraign him as delay even though he was arraigned within the R.C.M. 120-day speedy trial clock. Regardless of the complexity of this case, the only "delay" considered by this Court should be the excludable delay that this Court granted from 27 March 23 to 6 April 23 and 10 April 23 to 17 April 23, amounting to 18 days in total. All other time elapsed in between preferral and arraignment was simply the Government compiling a case against the Accused. Thus, the Defense's assertion that there were over 100 days' delay is facially inaccurate and does not trigger *Barker*.

6. Evidence and Enclosures

The Government will notify the Court and Defense prior to the Article 39(a) session what witnesses it intends to produce. Additionally, the Government offers the following evidentiary enclosures in support of the above response motion:

- a. Enclosure 1: Charge Sheet Preferred 09 December 2022
- b. Enclosure 2: Additional Charge Sheet Preferred 16 March 2023
- c. Enclosure 3: Special Court Martial Convening Order 1-23
- d. Enclosure 4: Special Court Martial Convening Order 2-23
- e. Enclosure 5: Pre-Arraignment Communications
- f. Enclosure 6: Notice of Withdrawal dated 18 April 2023.

7. Relief Requested. Pursuant to Rules for Courts-Martial (R.C.M.) 707, the Government respectfully requests that this Court deny the Defense Motion to Dismiss.

DEMPSEY.IAN.DONALD
LD [REDACTED]

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Date: 2023.05.16 20:13:40 +09'00'

I.D. DEMPSEY
Captain, USMC
Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of May 2023, a copy of this motion was served on Defense Counsel.

**DEMPSEY.IAN.DON
ALD.** [REDACTED]

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Date: 2023.05.16 20:14:04 +09'00'

I.D. DEMPSEY
Captain, USMC
Trial Counsel

**UNITED STATES MARINE CORPS
NAVY-MARINE CORPS TRIAL JUDICIARY
[REDACTED] JUDICIAL CIRCUIT
SPECIAL COURT-MARTIAL**

UNITED STATES)	
)	
v.)	BENCH BRIEF
)	(ADMISSIBILITY OF EVIDENCE IN
BENJAMIN J. BAUTISTA)	AGGRAVATION)
LANCE CORPORAL)	
U.S. MARINE CORPS)	11 JUL 23
)	

1. Nature of Brief:

The Accused subjected his spouse, LCpl [REDACTED], to domestic violence throughout the duration of their relationship spanning from January 2020 to August 2021. This violence grew more frequent and intense following 24 September 2021 after LCpl [REDACTED] told the Accused that she intended to file for divorce. The Accused has agreed to plead guilty to suffocating LCpl [REDACTED] on 13 October 2021, just 19 days after LCpl [REDACTED] disclosed that she wanted a divorce.

The additional assaults and threats the Accused committed in the 19 days between 24 September 2021 and 13 October 2021, which was either uncharged or to which the Accused will plead not guilty, are directly and substantially related to the offenses for which he will be sentenced and provide essential context regarding the circumstances of the Accused, of the victim, and of the criminal acts. Specifically, the Government moves the Court to consider the following evidence of the Accused's abuse of LCpl [REDACTED] as evidence in aggravation pursuant to R.C.M. 1001(b)(4): the Accused striking LCpl [REDACTED] in the eye on 24 September 2021; the Accused throwing a cellphone at LCpl [REDACTED] pushing the LCpl [REDACTED] head into a wall, and suffocating LCpl [REDACTED] with a beanbag chair on 2 October 2021; the Accused stalking LCpl [REDACTED] after she moved out of the family's house and into the barracks following the 2 October 2021 physical assault; the Accused strangling LCpl [REDACTED] while driving on 12 October 2021, and; the Accused shoving LCpl [REDACTED] into a secretary and the Accused shoving his hand into LCpl [REDACTED] mouth on 13 October. Without considering the Accused's physical abuse of LCpl [REDACTED] and other threatening behavior in the immediate lead up and aftermath of the domestic violence specification to which the Accused has agreed to plead guilty, this Court cannot effectively apply a sentence that achieves the aims set out in Rule for Courts-Martial 1002 and cannot bring justice both to the Accused and the victim.

The Government also moves the Court to consider evidence that the Accused neglected his and LCpl ██████ dogs after his actions resulted in a military protective order (MPO) and forced LCpl ██████ to transfer from Camp ██████ to Camp ██████. Without this evidence, the Court cannot effectively apply a sentence that brings justice to the dogs, who suffered medical impact due to the Accused and are therefore entities who constitute victim's under R.C.M. 1001(b)(4).

2. Statement of Facts.

a. In mid-September, LCpl ██████ approached Sgt ██████ and Ms. ██████ about divorcing the Accused, in part because of the Accused's continued domestic abuse.¹ During this conversation, LCpl ██████ stated she was afraid to go to legal to initiate the divorce because the Accused tracked her location on his phone.² Ms. ██████ advised LCpl ██████ to place her phone on airplane mode when she went to the legal meeting.³ On 21 September 2021, LCpl ██████ attended a legal meeting to facilitate a divorce between LCpl ██████ and the Accused.⁴ On 23 September 2021, the Accused returned home from the field and LCpl ██████ told him that she wanted to file for divorce.⁵ That evening Cpl ██████ received a telephone call from LCpl ██████ where she informed him that she was upset because of an argument she had just had with the Accused.⁶ However, given LCpl ██████ emotional state and her level of intoxication, Cpl ██████ was unable to understand what the argument was about and much of what LCpl ██████ was saying.⁷ Cpl ██████ then texted LCpl ██████ to see if she was ok, but she did not respond. Shortly after speaking with LCpl ██████ Cpl ██████ was contacted by the Accused and the Accused told Cpl ██████ that LCpl ██████ had injured her eye while moving furniture and would be going to the hospital. LCpl ██████ later went to the emergency room with an injured eye that developed into a severe black eye.⁸ LCpl ██████ doesn't remember exactly how she ended up with the black eye due to her level of intoxication that night, but knows the Accused caused the injury.⁹

¹ Gov MFAR 404(b) Resp. Enclosure 7 – pg 1; 6th bullet point from top (LCpl ██████ stated domestic violence as a contributing factor for her decision for a divorce to Sgt ██████ but not Ms. ██████ [see Enclosure 10; pg 1; 7th bullet point from top.])

² Gov MFAR 404(b) Resp. Enclosure 10 - pg 1; 10th bullet point from top.

³ *Id.* at 11th bullet point from top.

⁴ Gov MFAR 404(b) Resp. Enclosure 9; *See also* Enclosure 7 – pg 2 of 3; 7th bullet point from top. (Sgt ██████ remembered LCpl ██████ reporting to legal to initiate a divorce on 23 September; however, the facebook messages are consistent with Ms. ██████ memory: that the meeting occurred on 21 September.)

⁵ Gov MFAR 404(b) Resp. Enclosure 7 – pg 2; 12th bullet point from top.

⁶ Gov MFAR 803 – Enclosure 20; pg 1; paragraph 4.

⁷ *Id.*

⁸ Gov MFAR 404(b) Resp. Enclosure 8; *See also*, Gov MFAR 404(b) Resp. Enclosure 7 – pg 2; 12th bullet point from top.

⁹ Gov MFAR 803 Enclosure 23 – pg 2; 7th bullet point from top; *see also* Enclosure 1; bullet points 3 & 4; Gov MFAR 803 Enclosure 28 – pg 3, 7th bullet point from top. Note: In initial interviews with the ITO, LCpl ██████ stated, consistent with what said during the preliminary inquiry, that she had received the black eye carrying the TV on the stairs. However, after the ITO interviewed numerous witnesses who disclosed that LCpl ██████ had admitted to them that the TV story was a cover for the Accused, the ITO reapproached LCpl ██████ about the subject on 12 Jul

b. On approximately 2 October 2021¹⁰ the Accused and LCpl █████ engaged in a verbal altercation after LCpl █████ discovered that the Accused had an “OnlyFans” account.¹¹ During that argument, the Accused threw a cellphone at LCpl █████, striking her leg and causing an injury.¹² The Accused proceeded to grab LCpl █████ under the arms and shove her into the wall.¹³ He then shoved her head into the wall.¹⁴ The Accused then held a beanbag chair over LCpl █████ face, which inhibited her ability to breath.¹⁵ As LCpl █████ was suffocating, she remembers thinking, “This is torture.”¹⁶

c. After LCpl █████ moved back to the barracks following the 2 October 2021 incident, multiple witnesses observed the Accused stalking LCpl █████ by Accused parking outside of her barracks.¹⁷ Cpl █████ would observe the Accused follow LCpl █████ in his vehicle during this time.¹⁸ The Accused contacted LCpl █████ on 9 October 2021 and asked her where she was and why she was not at the barracks.¹⁹ During this timeframe, the Accused also followed Cpl █████ in his vehicle to see if LCpl █████ was with him.²⁰

d. On 12 October 2021, the Accused drove LCpl █████ to the Chili’s aboard █████ Air Force Base in order to celebrate the Accused’s birthday.²¹ While driving to Chili’s, the Accused and LCpl █████ became involved in a verbal argument because the Accused suspected that LCpl █████ was texting Cpl █████.²² During the verbal argument, the Accused reached over and grabbed LCpl █████ by the neck for approximately five to six seconds, during which time she could not breath.²³ LCpl █████ felt her body go warm and numb and she felt her body began to convulse.²⁴ LCpl █████ originally attempted to break free of the Accused’s chokehold by kicking

22. During that interview, LCpl █████ stated that she did not remember how she received the black eye due to her level of intoxication at the time she received it.

¹⁰ The NCIS ROI erroneously labeled this event as taking place on 16 October 2021, after LCpl █████ had already disclosed this event in her 15 October 2021 CID recorded interview (See Enclosure 1a – Gov MFAR 803). In her NCIS interview, LCpl █████ never provided an exact date, only that it happened a few Saturdays ago.

¹¹ Gov MFAR 803 Enclosure 2 – pg 2; paragraph 9.

¹² *Id.*

¹³ Gov MFAR 803 Enclosure 33 – pg 2, 7th bullet point from bottom.

¹⁴ *Id.*

¹⁵ Gov MFAR 803 Enclosure 2 – pg 2; paragraph 9.

¹⁶ Gov MFAR 803 Enclosure 33 – pg 2; 6th bullet point from bottom.

¹⁷ Gov MFAR 803 – Enclosure 23, pg 2, final bullet point; *see also* Gov MFAR 803 – Enclosure 24 - pg 2, paragraph 8; Enclosure 1 – 3rd bullet point from bottom; *Id* at Enclosure 28 – pg 3, 5th bullet point from top; Enclosure 23 -pg 2; bottom bullet point and 3rd bullet point from bottom.

¹⁸ Gov MFAR 803 Enclosure 24, pg 2, paragraph 8; Gov MFAR 803 – Enclosure 19, pg 1; 10th bullet point from top.

¹⁹ Gov MFAR 803 – Enclosure 19; pg 2; 3rd bullet point from top.

²⁰ *Id* at pg 2; top bullet point.

²¹ *Id* at paragraph 7

²² *Id* at paragraph 7.

²³ *Id.*

²⁴ *Id.*

the dashboard but this failed to dislodge the Accused's hold.²⁵ The Accused only allowed LCpl [REDACTED] to breath after she grabbed the steering wheel, which caused the car to swerve and almost strike another vehicle.²⁶

e. After the Accused suffocated LCpl [REDACTED] with a beanbag chair on or about 2 October 2021, LCpl [REDACTED] moved to the barracks because she feared for her safety.²⁷ On 13 October 2021, the Cpl [REDACTED] came to LCpl [REDACTED] room to talk. Just minutes after Cpl [REDACTED] left LCpl [REDACTED] room, the Accused entered her room, located at Camp [REDACTED] Bldg [REDACTED] Room [REDACTED]²⁸, letting himself in through the unsecured door to the room.²⁹ Once inside the room, the Accused and LCpl [REDACTED] became engaged in a verbal altercation.³⁰ In the middle of the verbal altercation LCpl [REDACTED] attempted to leave her room, which prompted the Accused to shove her against the secretary desk in her room, causing a bleeding abrasion on her right elbow.³¹ LCpl [REDACTED] screamed for help, which prompted the Accused to cover her mouth with one hand and choke her by squeezing her neck with his other hand.³² In addition, the Accused hooked his fingers in LCpl [REDACTED] mouth to keep her from screaming, causing bruising and bleeding abrasions on her lips and gums.³³ After being confronted by Cpl [REDACTED] and Cpl [REDACTED] the Accused fled the room with LCpl [REDACTED] phone.³⁴

f. Immediately after the 13 October 2021 incident, the Accused called Cpl [REDACTED] and told him, "You're a piece of shit, stay away from my wife, she's bleeding from the mouth because of you."³⁵ After the Accused fled the scene of the crime on 13 October 2021, Marines observed him crying in the parking lot.³⁶

g. After moving off-base, the Accused and LCpl [REDACTED] purchased three dogs; originally, two (2) French Mastiffs named Kuma and Oso, and later one (1) Chocolate Lab named Chip.³⁷

h. The Accused and LCpl [REDACTED] lived with the three (3) dogs at their off-base residence located in [REDACTED]³⁸

²⁵ Gov MFAR 803 – Enclosure 33; pg 2, top bullet point.

²⁶ *Id.*

²⁷ Gov MFAR 404(b) Resp. Enclosure 2.

²⁸ *See* Gov MFAR 404(b) Resp. Enclosure 14

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* *See also* Gov MFAR 404(b) Resp. Enclosure 11.

³² *Id.*

³³ *Id.*

³⁴ Gov MFAR 803 – Enclosure 12 ; pg 1, 2nd bullet point from bottom; *See also* Enclosure 17

³⁵ Gov MFAR 803 - Enclosure 19; pg 1; 6th bullet point from top.

³⁶ Gov MFAR 404(b) Resp. Enclosure 16 – pg 2, 2nd bullet point from top. Gov MFAR 803 – Enclosure 12 ; pg 2, 6th bullet point from bottom.

³⁷ Gov MFAR 404(b) Enclosure 2 – page 1 of 19.

³⁸ Gov MFAR 803 Enclosure 1 – page 2 of 4; paragraph 1; Gov MFAR 404(b) Resp. Enclosure 2; page 1 of 19.

- i. While LCpl [REDACTED] lived at the off-base residence, neighbors and friends observed that the dogs appeared healthy and happy. When Mrs. [REDACTED] would walk on the beach, she would often see LCpl [REDACTED] and the Accused walking their dogs on the beach and the dogs appeared healthy.³⁹
- j. After LCpl [REDACTED] moved into the barracks with Cpl [REDACTED] the three (3) dogs were left behind at the off-base residence with the Accused.⁴⁰
- k. [REDACTED], [REDACTED], and [REDACTED] were neighbors with LCpl [REDACTED] and the Accused. These neighbors often observed LCpl [REDACTED] and the Accused walking the dogs. However, after an altercation between LCpl [REDACTED] and the Accused, the neighbors no longer observed LCpl [REDACTED] at home, nor was her car observed. After the LCpl [REDACTED] left, the neighbors observed the dogs being left outside for more extended periods of time. They noticed the dogs becoming skinnier and skinnier and an offensive odor akin to trash, dog urine and dog feces was observed emanating from the Accused's home. The neighbors noticed the Accused would not be present at the home for long periods of time, during which the dogs would remain outside. The neighbors "felt sorry for the dogs," and they were "hoping for the dogs to be rescued by the Americans."⁴¹

Discussion.

I. The Accused's additional assaults and threatening behavior against LCpl [REDACTED] were committed close in time, against the same victim and using similar acts of violence. They are directly related to the conduct to which the Accused is pleading guilty and should be considered by this Court in deciding an appropriate sentence.

R.C.M. 1001(b)(4) provides that: "[t]he trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty." When uncharged misconduct is part of a continuous course of conduct involving similar crimes and the same victims, it is encompassed within the language "directly relating to or resulting from the offenses of which the accused has been found guilty" under R.C.M. 1001(b)(4). *United States v. Bullard*, 2016 CCA LEXIS 558 at *3-4 (N-M. Ct. Crim. App. No. 201600122, 22 Sep. 2016) (citing *United States v. Nourse*, 55 M.J. 229, 232, (C.A.A.F. 2001))(internal editorial markings omitted).

Military appellate courts have routinely held that evidence of a continuing course of assault including uncharged misconduct is appropriate for consideration in determining a sentence. In *Bullard*, the Navy-Marine Corps Court of Criminal Appeals (N.M.C.C.A.) held that

³⁹ Gov MFAR 803 - Enclosure 9

⁴⁰ Enclosure 9

⁴¹ See Gov MFAR 404(b) Enclosure 1

the appellant's uncharged act of throwing his nephew across a room was directly related to the charged acts of grabbing his nephew's arm and disciplining him with a belt, events which occurred on different days. 2016 CCA LEXIS 558 at *4-5. The Court noted that the uncharged throwing incident "involved the same victim, occurred the same week, and was similar to the physically abusive conduct in the two pled battery offenses." *Id.*

Similarly, in *United States v. Thomas*, the N.M.C.C.A. held that evidence of a shoulder rub that occurred prior to the charged offenses was admissible evidence in aggravation for the other, charged instances of assault consummated by a battery. 2017 CCA LEXIS 671 at *1-6 (N-M. Ct. Crim. App. No. 201600438, 31 Oct. 2017) *rev. den'd* 77 M.J. 266 (C.A.A.F. 2018). The Court explained that the evidence of this prior unwanted touching was similar to the charged offenses, involved one of the victims of the charged misconduct, and would put the offense regarding that victim in context. *Id.* at *4-5.

Moreover, in *United States v. Nourse*, 55 M.J. 229 (C.A.A.F. 2001), the CAAF held that it was permissible to admit evidence of other uncharged larcenies of property from the same victim by the accused because such evidence "directly related to the charged offenses as part of a continuing scheme..." The Court reasoned that this evidence showed the "full impact of appellant's crimes" upon the victim.⁴²

Additionally, in *United States v. Mullens*, the Court of Military Appeals determined that in a prosecution for sodomy committed against the appellant's minor son, evidence of "uncharged identical acts with the same children" was properly considered in aggravation. 29 M.J. 398, 399 (C.M.A. 1990).

Finally, in *United States v. Terlep*, 57 M.J. 344 (2002), the Court noted that neither the pretrial agreement nor the stipulation of fact limited the evidence the Government could present on sentencing. The Court reasoned that "absent an express provision in the pretrial agreement or some applicable rule of evidence or procedure barring such evidence, [] important victim impact evidence was properly admitted because R.C.M. 1001(b)(4) provides for 'accuracy in the sentencing process by permitting the judge to fully appreciate the true plight of the victim in each case.'"

Here, the accused suffocated LCpl [REDACTED] a second time and shoved her into her secretary on the same day and location as the offense to which he has agreed to plead guilty. Moreover, the Accused's previous physical assaults and threats between 24 September and 12 October 2022 occurred in the same general location – at or near Camp [REDACTED] – occurred close in time and were similar in kind to the misconduct to which the Accused will plead guilty. The Accused's

⁴² See also *United States v. Shupe*, 36 M.J. 431 (C.M.A. 1993); *United States v. Mullens*, 29 M.J. 398 (C.M.A. 1990).

motivation, to control and subjugate LCpl [REDACTED] are also identical in both these instances and the offense to which the Accused is pleading guilty. These acts are so closely connected to the subject of the Accused's guilty pleas that they are directly related within the meaning of Rule for Courts-Martial 1001.

II. Considering evidence of the additional assaults will allow this Court to place the abuse LCpl [REDACTED] experienced in context and evaluate its effect on her and the rest of her family.

As the *Mullens* Court explained, the evidence of uncharged misconduct in that case demonstrated a continuous course of conduct and established the "true impact of the charged offenses on the members of [the appellant's] family." 29 M.J. 398 at 400. The *Thomas* Court similarly emphasized the value of other acts occurring in a continuing course of conduct to contextualize charged acts. 2017 CCA LEXIS 671 at *4-5.

The Accused will plead guilty to suffocating LCpl [REDACTED] on 13 October 2021. LCpl [REDACTED] has discussed the impact that the Accused's action have had on her social, psychological and physical health. This Court cannot properly evaluate the effect of the offenses to which the Accused will plead guilty had on LCpl [REDACTED] without also considering the Accused's similar abuse of LCpl [REDACTED] in the same timeframe and same location. *See* Rule for Courts-Martial 1002(f).

III. The Accused's dogs are entities who suffered medical impact directly resulting from the conduct to which the Accused is pleading guilty.

The Accused's dogs are entities who suffered medical impact directly resulting from the conduct to which the Accused is pleading guilty. The Accused's abuse of LCpl [REDACTED] in the fall of 2021 first caused LCpl [REDACTED] to leave the family's home following the 2 October 2021 incident. The Accused's violence towards LCpl [REDACTED] on 13 October 2021, to include the offense to which the Accused is pleading guilty, resulted in an MPO that prevented LCpl [REDACTED] to come home and care for the dogs. The Accused's actions on 13 October 2021 also resulted in LCpl [REDACTED] being transferred from Camp [REDACTED] to Camp [REDACTED] away from the family's home where the dogs were located. As the Accused's neighbors note, it was after LCpl [REDACTED] left the family's home that the dogs became increasingly thin and sickly. Accordingly, the neglect of the dogs is directly related to and resulting from the conduct to which the Accused is pleading guilty. Accordingly, the Court should consider the neglect of these dogs as evidence in aggravation.

4. **Relief Requested.** The Government requests that this Court consider the other offenses committed by the Accused that are directly related to the offenses to which he will plead guilty.
5. **Burden of Proof.** As the proponent of the evidence, the Government ultimately bears the burden of proof by a preponderance of the evidence.
6. **Argument.** The Government does not request oral argument.
7. **Enclosures.** None. This brief references the supporting enclosures from previous filings.

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W.E. GRAU
Captain, U.S. Marine Corps
Trial Counsel

Certificate of Service

I hereby attest that a copy of the foregoing brief was served on the Court and opposing counsel via electronic mail on 11 July 2023.

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W.E. GRAU
Captain, U.S. Marine Corps
Trial Counsel

REQUESTS

THERE ARE NO REQUESTS

NOTICES

NAVY-MARINE CORPS TRIAL JUDICIARY
JUDICIAL CIRCUIT
SPECIAL COURT-MARTIAL

UNITED STATES

v.

BENJAMIN J. BAUTISTA
E-3/LANCE CORPORAL, USMC

NOTICE OF WITHDRAWAL

18 APRIL 23

1. On 07 April 2023, Lieutenant Colonel [REDACTED] Commander [REDACTED] the Convening Authority, pursuant to R.C.M. 604, directed Trial Counsel to withdraw the charges in the subject case that were preferred on 09 December 2022 and 16 March 2023.
2. The Government respectfully requests the Court remove this case from the docket.

DEMPSEY.IAN.DO
NALD.

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DEMPSEY.IAN.DONALD [REDACTED]

Date: 2023.04.18 09:23:05 +09'00'

I.D. DEMPSEY
CAPT, USMC

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Application for Arraignment was served electronically on Defense Counsel and Victim's Legal Counsel on 18 April 2023.

DEMPSEY.IAN.DO
NALD

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DEMPSEY.IAN.DONALD [REDACTED]

Date: 2023.04.18 09:23:35 +09'00'

I.D. DEMPSEY
CAPT, USMC

**DEPARTMENT OF THE NAVY
UNITED STATES MARINE CORPS
NAVY-MARINE CORPS TRIAL JUDICIARY
[REDACTED] JUDICIAL CIRCUIT**

UNITED STATES

v.

BENJAMIN J. BAUTISTA
E-3/LANCE CORPORAL, USMC

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VICTIMS' LEGAL COUNSEL
COURT-MARTIAL NOTICE OF
APPEARANCE ON BEHALF OF
LANCE CORPORAL [REDACTED]

1. I, Major Timothy M. Keane, USMC, Victims' Legal Counsel Organization, [REDACTED] admitted to practice law and currently in good standing with the Texas State Bar, although not appearing as a defense counsel or trial counsel, certified in accordance with Article 27(b), and sworn under Article 42(a), hereby enter my appearance in the above captioned court-martial on behalf of LCpl [REDACTED] a named victim in the subject case.

2. On 22 August 2022, I detailed myself, as the Regional Victims' Counsel, to represent LCpl [REDACTED] I have entered into an attorney-client relationship with LCpl [REDACTED] I have not acted in any manner which might disqualify me in the above captioned court-martial.

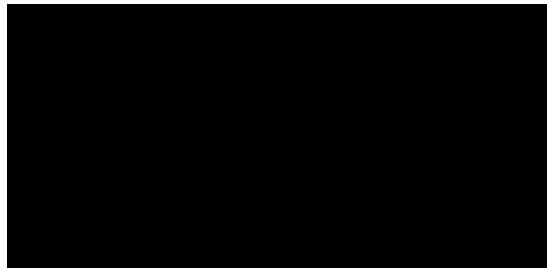
3. I have reviewed the Navy-Marine Corps Trial Judiciary Uniform Rules of Practice and the [REDACTED] Judicial Circuit Rules of Court.

4. LCpl [REDACTED] reserves the right to be present throughout the court-martial in accordance with Military Rule of Evidence 615, with the exception of closed proceedings that do not involve the victims.

5. To permit a meaningful exercise of my client's rights and privileges, I respectfully request that this Court direct the defense and government to provide me with informational copies of motions and accompanying papers filed pertaining to issues that fall under Military Rules of Evidence 412, 513, 514, and 615 and in which LCpl [REDACTED] statutory rights and privileges as a victim are addressed.

6. LCpl [REDACTED] has limited standing in this court-martial, and reserves the right to make factual statements and legal arguments herself or through counsel.

7. My current contact information is as follows:



8. Respectfully submitted this 1st day of December 2022.

KEANE.TIMOTHY.MI
CHAEL [REDACTED] Digitally signed by
KEANE.TIMOTHY.MICHAEL [REDACTED]
2022.12.01 17:02:10 +09'00'

T. M. KEANE

CERTIFICATE OF SERVICE

I certify that a copy of this Notice of Appearance was served on the 1st day of December 2022 via electronic submission.

KEANE.TIMOTHY.MI Digitally signed by
MICHAEL [REDACTED] KEANE.TIMOTHY.MICHAEL [REDACTED]
[REDACTED] Date: 2 22.12.01 17:03:30
+09'00'

T. M. KEANE

COURT RULINGS & ORDERS

**THERE ARE NO COURT RULINGS
AND ORDERS**

STATEMENT OF TRIAL RESULTS

STATEMENT OF TRIAL RESULTS				
SECTION A - ADMINISTRATIVE				
1. NAME OF ACCUSED (last, first, MI) Bautista, Benjamin J.		2. BRANCH Marine Corps	3. PAYGRADE E-3	4. DoD ID NUMBER [REDACTED]
5. CONVENING COMMAND [REDACTED]		6. TYPE OF COURT-MARTIAL Special	7. COMPOSITION Judge Alone - MJA16	8. DATE SENTENCE ADJUDGED Jul 14, 2023
SECTION B - FINDINGS				
SEE FINDINGS PAGE				
SECTION C - TOTAL ADJUDGED SENTENCE				
9. DISCHARGE OR DISMISSAL Bad conduct discharge	10. CONFINEMENT 90 Days	11. FORFEITURES N/A	12. FINES N/A	13. FINE PENALTY N/A
14. REDUCTION E-1	15. DEATH Yes <input type="radio"/> No <input checked="" type="radio"/>	16. REPRIMAND Yes <input type="radio"/> No <input checked="" type="radio"/>	17. HARD LABOR Yes <input type="radio"/> No <input checked="" type="radio"/>	18. RESTRICTION Yes <input type="radio"/> No <input checked="" type="radio"/>
				19. HARD LABOR PERIOD N/A
20. PERIOD AND LIMITS OF RESTRICTION N/A				
SECTION D - CONFINEMENT CREDIT				
21. DAYS OF PRETRIAL CONFINEMENT CREDIT 8		22. DAYS OF JUDICIALLY ORDERED CREDIT 0		23. TOTAL DAYS OF CREDIT 8 days
SECTION E - PLEA AGREEMENT OR PRE-TRIAL AGREEMENT				
24. LIMITATIONS ON PUNISHMENT CONTAINED IN THE PLEA AGREEMENT OR PRE-TRIAL AGREEMENT a. Punitive Discharge: A Bad Conduct Discharge will be adjudged. b. Confinement: Minimum of 0 months, maximum of 3 months. c. Forfeiture: No forfeitures shall be adjudged. d. Fine: No fine shall be adjudged. e. Reduction: Reduction may be adjudged.				
SECTION F - SUSPENSION OR CLEMENCY RECOMMENDATION				
25. DID THE MILITARY JUDGE RECOMMEND SUSPENSION OF THE SENTENCE OR CLEMENCY? Yes <input type="radio"/> No <input checked="" type="radio"/>		26. PORTION TO WHICH IT APPLIES [REDACTED]		27. RECOMMENDED DURATION [REDACTED]
28. FACTS SUPPORTING THE SUSPENSION OR CLEMENCY RECOMMENDATION [REDACTED]				
SECTION G - NOTIFICATIONS				
29. Is sex offender registration required in accordance with appendix 4 to enclosure 2 of DoDI 1325.07?				Yes <input type="radio"/> No <input checked="" type="radio"/>
30. Is DNA collection and submission required in accordance with 10 U.S.C. § 1565 and DoDI 5505.14?				Yes <input checked="" type="radio"/> No <input type="radio"/>
31. Did this case involve a crime of domestic violence as defined in enclosure 2 of DoDI 6400.06?				Yes <input checked="" type="radio"/> No <input type="radio"/>
32. Does this case trigger a firearm possession prohibition in accordance with 18 U.S.C. § 922?				Yes <input checked="" type="radio"/> No <input type="radio"/>
SECTION H - NOTES AND SIGNATURE				
33. NAME OF JUDGE (last, first, MI) King, Adam M.		34. BRANCH Marine Corps	35. PAYGRADE O-5	36. DATE SIGNED Jul 14, 2023
37. NOTES [REDACTED]		38. JUDGE'S SIGNATURE [REDACTED] Digitally signed by LtCol Adam M. King Date: 2023.07.14 17:18:13 +09'00'		

STATEMENT OF TRIAL RESULTS - FINDINGS

SECTION I - LIST OF FINDINGS

CHARGE	ARTICLE	SPECIFICATION	PLEA	FINDING	ORDER OR REGULATION VIOLATED	LIO OR INCHOATE OFFENSE ARTICLE	DIBRS
Charge	92	Specification:	<input type="text" value="Not Guilty"/>	<input type="text" value="W/D"/>			092-A0
		Offense description	<input type="text" value="Violation of a lawful general order"/>				
		Withdrawn and Dismissed	<input type="text" value="W/o prejudice upon pronouncement of the sentence, to ripen into prejudice upon the completion of appellate rev and affirmation of findings and sentence."/>				
Additional Charge I	92	Specification:	<input type="text" value="Guilty"/>	<input type="text" value="Guilty"/>			092-B-
		Offense description	<input type="text" value="Failure to obey other lawful written order"/>				
Additional Charge II	128b	Specification 1:	<input type="text" value="Not Guilty"/>	<input type="text" value="W/D"/>			128B1E
		Offense description	<input type="text" value="Domestic Violence - Assault by strangulation or suffocation"/>				
		Withdrawn and Dismissed	<input type="text" value="W/o prejudice upon pronouncement of the sentence, to ripen into prejudice upon the completion of appellate rev and affirmation of findings and sentence."/>				
		Specification 2:	<input type="text" value="Not Guilty"/>	<input type="text" value="W/D"/>			128B1A
		Offense description	<input type="text" value="Domestic Violence - commission of violent offense"/>				
		Withdrawn and Dismissed	<input type="text" value="W/o prejudice upon pronouncement of the sentence, to ripen into prejudice upon the completion of appellate rev and affirmation of findings and sentence."/>				
		Specification 3:	<input type="text" value="Not Guilty"/>	<input type="text" value="W/D"/>			128B1E
		Offense description	<input type="text" value="Domestic Violence - Assault by strangulation or suffocation"/>				
		Withdrawn and Dismissed	<input type="text" value="W/o prejudice upon pronouncement of the sentence, to ripen into prejudice upon the completion of appellate rev and affirmation of findings and sentence."/>				
		Specification 4:	<input type="text" value="Not Guilty"/>	<input type="text" value="W/D"/>			128B1A
		Offense description	<input type="text" value="Domestic Violence - commission of violent offense"/>				
		Withdrawn and Dismissed	<input type="text" value="W/o prejudice upon pronouncement of the sentence, to ripen into prejudice upon the completion of appellate rev and affirmation of findings and sentence."/>				
		Specification 5:	<input type="text" value="Not Guilty"/>	<input type="text" value="W/D"/>			128B1E
		Offense description	<input type="text" value="Domestic Violence - Assault by strangulation or suffocation"/>				
		Withdrawn and Dismissed	<input type="text" value="W/o prejudice upon pronouncement of the sentence, to ripen into prejudice upon the completion of appellate rev and affirmation of findings and sentence."/>				
		Specification 6:	<input type="text" value="Not Guilty"/>	<input type="text" value="W/D"/>			128B1A
		Offense description	<input type="text" value="Domestic Violence - commission of violent offense"/>				
		Withdrawn and Dismissed	<input type="text" value="W/o prejudice upon pronouncement of the sentence, to ripen into prejudice upon the completion of appellate rev and affirmation of findings and sentence."/>				
		Specification 7:	<input type="text" value="Not Guilty"/>	<input type="text" value="W/D"/>			128B1A
		Offense description	<input type="text" value="Domestic Violence - commission of violent offense"/>				
		Withdrawn and Dismissed	<input type="text" value="W/o prejudice upon pronouncement of the sentence, to ripen into prejudice upon the completion of appellate rev and affirmation of findings and sentence."/>				

STATEMENT OF TRIAL RESULTS - FINDINGS

SECTION I - LIST OF FINDINGS

CHARGE	ARTICLE	SPECIFICATION	PLEA	FINDING	ORDER OR REGULATION VIOLATED	LIO OR INCHOATE OFFENSE ARTICLE	DIBRS
Specification 8:	Not Guilty	W/D			128B1E		
Offense description	Domestic Violence - Assault by strangulation or suffocation						
Withdrawn and Dismissed	W/o prejudice upon pronouncement of the sentence, to ripen into prejudice upon the completion of appellate rev and affirmation of findings and sentence.						
Specification 9:	Guilty	Guilty			128B1E		
Offense description	Domestic Violence - Assault by suffocation						
Specification 10:	Not Guilty	W/D			128B1E		
Offense description	Domestic Violence - Assault by strangulation or suffocation						
Withdrawn and Dismissed	W/o prejudice upon pronouncement of the sentence, to ripen into prejudice upon the completion of appellate rev and affirmation of findings and sentence.						
Specification 11:	Not Guilty	W/D			128B1A		
Offense description	Domestic Violence - commission of violent offense						
Withdrawn and Dismissed	W/o prejudice upon pronouncement of the sentence, to ripen into prejudice upon the completion of appellate rev and affirmation of findings and sentence.						
129	Specification:	Not Guilty	W/D				134-C8
Additional Charge III	Offense description	Unlawful entry					
	Withdrawn and Dismissed	W/o prejudice upon pronouncement of the sentence, to ripen into prejudice upon the completion of appellate rev and affirmation of findings and sentence.					
92	Specification 1:	Not Guilty	W/D				092-B-
Additional Charge IV	Offense description	Failure to obey other lawful written order					
	Withdrawn and Dismissed	W/o prejudice upon pronouncement of the sentence, to ripen into prejudice upon the completion of appellate rev and affirmation of findings and sentence.					
	Specification 2:	Not Guilty	W/D				092-B-
	Offense description	Failure to obey other lawful written order					
	Withdrawn and Dismissed	W/o prejudice upon pronouncement of the sentence, to ripen into prejudice upon the completion of appellate rev and affirmation of findings and sentence.					
134	Specification:	Not Guilty	W/D				134-J8
Additional Charge V	Offense description	Disorderly conduct: prejudicial to good order & discipline and discredit upon the armed forces					
	Withdrawn and Dismissed	W/o prejudice upon pronouncement of the sentence, to ripen into prejudice upon the completion of appellate rev and affirmation of findings and sentence.					
134	Specification:	Not Guilty	W/D				134-A1
Additional Charge VI	Offense description	Animal abuse					
	Withdrawn and Dismissed	W/o prejudice upon pronouncement of the sentence, to ripen into prejudice upon the completion of appellate rev and affirmation of findings and sentence.					

MILITARY JUDGE ALONE SEGMENTED SENTENCE					
SECTION J - SENTENCING					
CHARGE	SPECIFICATION	CONFINEMENT	CONCURRENT WITH	CONSECUTIVE WITH	FINE
Charge	Specification:	N/A	N/A	N/A	N/A
Additional Charge I	Specification:	90 days	Additional Charge II, Spec. 9	N/A	N/A
Additional Charge II	Specification 1:	N/A	N/A	N/A	N/A
	Specification 2:	N/A	N/A	N/A	N/A
	Specification 3:	N/A	N/A	N/A	N/A
	Specification 4:	N/A	N/A	N/A	N/A
	Specification 5:	N/A	N/A	N/A	N/A
	Specification 6:	N/A	N/A	N/A	N/A
	Specification 7:	N/A	N/A	N/A	N/A
	Specification 8:	N/A	N/A	N/A	N/A
	Specification 9:	90 days	Additional Charge I, Sole Specification	N/A	N/A
	Specification 10:	N/A	N/A	N/A	N/A
	Specification 11:	N/A	N/A	N/A	N/A
Additional Charge III	Specification:	N/A	N/A	N/A	N/A

SECTION J - SENTENCING					
Additional Charge IV	Specification 1:	N/A	N/A	N/A	N/A
	Specification 2:	N/A	N/A	N/A	N/A
Additional Charge V	Specification:	N/A	N/A	N/A	N/A
Additional Charge VI	Specification:	N/A	N/A	N/A	N/A

CONVENING AUTHORITY'S ACTIONS

POST-TRIAL ACTION

SECTION A - STAFF JUDGE ADVOCATE REVIEW

1. NAME OF ACCUSED (LAST, FIRST, MI) Bautista, Benjamin, J.		2. PAYGRADE/RANK E3	3. DoD ID NUMBER [REDACTED]
4. UNIT OR ORGANIZATION [REDACTED]		5. CURRENT ENLISTMENT 26 Nov 2018	6. TERM 4 years and 13 months
7. CONVENING AUTHORITY (UNIT/ORGANIZATION) [REDACTED]	8. COURT-MARTIAL TYPE Special	9. COMPOSITION Judge Alone - MJA16	10. DATE SENTENCE ADJUDGED 14-Jul-2023

Post-Trial Matters to Consider

11. Has the accused made a request for deferment of reduction in grade?	<input type="radio"/> Yes	<input checked="" type="radio"/> No
12. Has the accused made a request for deferment of confinement?	<input type="radio"/> Yes	<input checked="" type="radio"/> No
13. Has the accused made a request for deferment of adjudged forfeitures?	<input type="radio"/> Yes	<input checked="" type="radio"/> No
14. Has the accused made a request for deferment of automatic forfeitures?	<input type="radio"/> Yes	<input checked="" type="radio"/> No
15. Has the accused made a request for waiver of automatic forfeitures?	<input type="radio"/> Yes	<input checked="" type="radio"/> No
16. Has the accused submitted necessary information for transferring forfeitures for benefit of dependents?	<input type="radio"/> Yes	<input checked="" type="radio"/> No
17. Has the accused submitted matters for convening authority's review?	<input checked="" type="radio"/> Yes	<input type="radio"/> No
18. Has the victim(s) submitted matters for convening authority's review?	<input type="radio"/> Yes	<input checked="" type="radio"/> No
19. Has the accused submitted any rebuttal matters?	<input type="radio"/> Yes	<input checked="" type="radio"/> No
20. Has the military judge made a suspension or clemency recommendation?	<input type="radio"/> Yes	<input checked="" type="radio"/> No
21. Has the trial counsel made a recommendation to suspend any part of the sentence?	<input type="radio"/> Yes	<input checked="" type="radio"/> No
22. Did the court-martial sentence the accused to a reprimand issued by the convening authority?	<input type="radio"/> Yes	<input checked="" type="radio"/> No

23. Summary of Clemency/Deferment Requested by Accused and/or Crime Victim, if applicable.

The Accused, through counsel, submitted a clemency request for you to suspend the reduction in rank to E-1.

24. Convening Authority Name/Title Lieutenant General James W. Bierman Commanding General, [REDACTED]	25. SJA Name Colonel [REDACTED] Staff Judge Advocate [REDACTED]
26. SJA signature [REDACTED]	27. Date Jul 27, 2023

SECTION B - CONVENING AUTHORITY ACTION

28. Having reviewed all matters submitted by the accused and the victim(s) pursuant to R.C.M. 1106/1106A, and after being advised by the staff judge advocate or legal officer, I take the following action in this case: [If deferring or waiving any punishment, indicate the date the deferment/waiver will end. Attach signed reprimand if applicable. Indicate what action, if any, taken on suspension recommendation(s) or clemency recommendations from the judge.]

I take no action on the findings or sentence in this case.

I have reviewed all matters submitted by the accused, the statement of trial results, and the plea agreement, and have been advised by the staff judge advocate. I deny the accused's request to suspend the adjudged reduction in rank to E-1.

29. Convening authority's written explanation of the reasons for taking action on offenses with mandatory minimum punishments or offenses for which the maximum sentence to confinement that may be adjudged exceeds two years, or offenses where the adjudged sentence includes a punitive discharge (Dismissal, DD, BCD) or confinement for more than six months, or a violation of Art. 120(a) or 120(b) or 120b:

N/A

30. Convening Authority's signature

USMC [REDACTED].LTGEN
BIERMAN.G [REDACTED]

Digitally signed by USMC [REDACTED]
LTGEN BIERMAN.G [REDACTED]
Date: 2023.08.04 17:46:14 +09'00'

31. Date

32. Date convening authority action was forwarded to PTPD or Review Shop.

Aug 7, 2023

ENTRY OF JUDGMENT

ENTRY OF JUDGMENT			
SECTION A - ADMINISTRATIVE			
1. NAME OF ACCUSED (LAST, FIRST, MI) Bautista, Benjamin J.	2. PAYGRADE/RANK E3	3. DoD ID NUMBER [REDACTED]	
4. UNIT OR ORGANIZATION [REDACTED]	5. CURRENT ENLISTMENT 26 Nov 18	6. TERM 4 yrs 13 mos	
7. CONVENING AUTHORITY (UNIT/ORGANIZATION) [REDACTED]	8. COURT-MARTIAL TYPE Special	9. COMPOSITION Judge Alone - MJA16	10. DATE COURT-MARTIAL ADJOURNED 14-Jul-2023
SECTION B - ENTRY OF JUDGMENT			
MUST be signed by the Military Judge (or Circuit Military Judge) within 20 days of receipt			
<p>11. Findings of each charge and specification referred to trial. [Summary of each charge and specification (include at a minimum the gravamen of the offense), the plea of the accused, the findings or other disposition accounting for any exceptions and substitutions, any modifications made by the convening authority or any post-trial ruling, order, or other determination by the military judge. R.C.M. 1111(b)(1)]</p> <p>The following are the Accused's pleas and the Court's findings to all offenses the convening authority referred to trial:</p> <p>Charge: Violation of Article 92, Uniform Code of Military Justice, 10 U.S.C. § 892. Plea: Not Guilty Findings: Withdrawn and Dismissed</p> <p>Specification: Violation or Failure to Obey Lawful General Order or Regulation on divers occasions between on or about 1 September 2022 and 29 September 2022. Plea: Not Guilty Findings: Withdrawn and Dismissed</p> <p>Additional Charge I: Violation of Article 92, Uniform Code of Military Justice, 10 U.S.C. § 892. Plea: Guilty Findings: Guilty</p> <p>Specification: Failure to Obey Other Lawful Written Order on divers occasions between 21 October 2021 and 9 March 2023. Plea: Guilty Findings: Guilty</p> <p>Additional Charge II: Violation of Article 128b, Uniform Code of Military Justice, 10 U.S.C. § 928. Plea: Guilty Findings: Guilty</p> <p>Specification 1: Assault by Strangulation on or about April 2020. Plea: Not Guilty Findings: Withdrawn and Dismissed</p> <p>Specification 2: Violent Offense on or about 12 August 2020. Plea: Not Guilty Findings: Withdrawn and Dismissed</p> <p>Specification 3: Assault by Strangulation on or about 6 March 2021. Plea: Not Guilty Findings: Withdrawn and Dismissed</p> <p style="text-align: center;">[See Supplemental Page]</p>			

12. Sentence to be Entered. Account for any modifications made by reason of any post-trial action by the convening authority (including any action taken based on a suspension recommendation), confinement credit, or any post-trial rule, order, or other determination by the military judge. R.C.M. 1111(b)(2). If the sentence was determined by a military judge, ensure confinement and fines are segmented as well as if a sentence shall run concurrently or consecutively.

On 14 Jul 2023, a military judge sentenced the Accused to the following:

Reduction to E-1.

For the Specification of Additional Charge I: 90 days.

For Specification 9 of Additional Charge II: 90 days.

The terms of confinement will run concurrently.

Confinement for a total of 90 days.

A bad conduct discharge.

The accused has served 8 days of pretrial confinement and shall be credited with 8 days of confinement already served, to be deducted from the adjudged sentence to confinement.

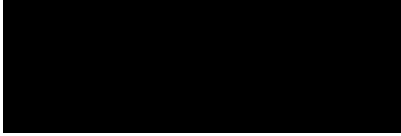
13. Deferment and Waiver. Include the nature of the request, the CA's Action, the effective date of the deferment, and date the deferment ended. For waivers, include the effective date and the length of the waiver. RCM 1111(b)(3)

The Accused, through Counsel, submitted a clemency request to suspend the reduction in rank to E-1. The Convening Authority denied the Accused's request after after being advised by the Staff Judge Advocate and reviewing all matters submitted by the Accused, the statement of trial results, and the plea agreement.

14. Action convening authority took on any suspension recommendation from the military judge:

N/A.

15. Judge's signature:



Digitally signed by LtCol Adam M.
King
Date: 2023.11.07 14:07:51 +09'00'

16. Date judgment entered:

Nov 7, 2023

17. In accordance with RCM 1111(c)(1), the military judge who entered a judgment may modify the judgment to correct computational or clerical errors within 14 days after the judgment was initially entered. Include any modifications here and resign the Entry of Judgment.

18. Judge's signature:

19. Date judgment entered:

CONTINUATION SHEET - ENTRY OF JUDGMENT

11. Findings (Continued)

Specification 4: Violent Offense on or about 6 March 2021.

Plea: Not Guilty

Findings: Withdrawn and Dismissed

Specification 5: Assault by Suffocation on or about 2 October 2021.

Plea: Not Guilty

Findings: Withdrawn and Dismissed

Specification 6: Violent Offense on or about 2 October 2021.

Plea: Not Guilty

Findings: Withdrawn and Dismissed

Specification 7: Violent Offense on or about 1 January 2021.

Plea: Not Guilty

Findings: Withdrawn and Dismissed

Specification 8: Assault by Strangulation on or about 12 October 2021.

Plea: Not Guilty

Findings: Withdrawn and Dismissed

Specification 9: Assault by Suffocation on or about 13 October 2021.

Plea: Guilty

Findings: Guilty

Specification 10: Assault by Strangulation on or about 13 October 2021.

Plea: Not Guilty

Findings: Withdrawn and Dismissed

Specification 11: Violent Offense on or about 13 October 2021.

Plea: Not Guilty

Findings: Withdrawn and Dismissed

Additional Charge III: Violation of Article 129, Uniform Code of Military Justice, 10 U.S.C. § 929.

Plea: Not Guilty

Findings: Withdrawn and Dismissed

Specification: Wrongful Entry on or about 13 October 2021.

Plea: Not Guilty

Findings: Withdrawn and Dismissed

Additional Charge IV: Violation of Article 92, Uniform Code of Military Justice, 10 U.S.C. § 892.

Plea: Not Guilty

Findings: Withdrawn and Dismissed

Specification 1: Failure to Obey Other Lawful Written Order on 13 October 2021.

Plea: Not Guilty

Findings: Withdrawn and Dismissed

Specification 2: Failure to Obey Other Lawful Written between 14 October 2021 and 21 October 2021.

Plea: Not Guilty

Findings: Withdrawn and Dismissed

[See Supplemental Page]

CONTINUATION SHEET - ENTRY OF JUDGMENT

12. Sentence (Continued)

Additional Charge V: Violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934.

Plea: Not Guilty

Findings: Withdrawn and Dismissed

Specification: Disorderly Conduct on divers occasions between on or about 12 August 2020 and 13 October 2021.

Plea: Not Guilty

Findings: Withdrawn and Dismissed

Additional Charge VI: Violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934.

Plea: Not Guilty

Findings: Withdrawn and Dismissed

Specification: Animal Abuse between on or about 13 October 2021 and 16 February 2022.

Plea: Not Guilty

Findings: Withdrawn and Dismissed

APPELLATE INFORMATION

**IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS**

Before Panel No. 3

UNITED STATES

Appellee

v.

Benjamin J. Bautista

Lance Corporal
U.S. Marine Corps

Appellant

NMCCA No. 202400011

**APPELLANT'S MOTION
FOR A FIRST
ENLARGEMENT OF TIME**

Tried at Marine Corps Base [REDACTED]
[REDACTED] on 14
July 2023 before a Special Court-
Martial convened by
Commanding Officer, [REDACTED]
[REDACTED] military
judge Lieutenant Colonel Adam M.
King, presiding

**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS**

COMES NOW the undersigned and respectfully moves for a first
enlargement of time to file a brief and assignments of error. The current due date is
March 25, 2024. The number of days requested is 30. The requested due date is
April 24, 2024.

The current status of the case:

1. The Record was docketed on January 25, 2024.
2. The Moreno III date is July 25, 2025 .
3. Appellant is not confined.

4. The Record consists of 155 transcribed pages and 1428 total pages.

5. Counsel has not completed reviewing the record.

Good cause exists for granting the requested enlargement to allow counsel for the Appellant time to complete his review of the record. This was a special Court Martial in which the Appellant plead guilty to one specification of failure to obey by a lawful written order and one specification of domestic violence.

Respectfully submitted.

NORTON.CO
LIN.PATRICK.
Digitally signed by
NORTON.COLIN.PAT
RICK.
Date: 2024.03.20
21:52:42 -04'00'

Colin P. Norton
Captain, USMC
Appellate Defense Counsel
1254 Charles Morris St SE, Suite 100
Washington Navy Yard, DC 20374-5047

CERTIFICATE OF FILING AND SERVICE

I certify that the original and three copies of the foregoing were emailed to the Court on March 20, 2024, that a copy was uploaded into the Court's case management system on March 20, 2024, *and* that a copy of the foregoing was emailed to Appellate Government Division [REDACTED] on March 20, 2024.

NORTON.CO
LIN.PATRICK.
[REDACTED] Digitally signed by
NORTON.COLIN.PA
TRICK. [REDACTED]
Date: 2024.03.20
21:53:11 -04'00'

Colin P. Norton
Captain, USMC
Appellate Defense Counsel
1254 Charles Morris St SE, Suite 100
Washington Navy Yard, DC 20374-5047
[REDACTED]

Subject: RULING: FILING - Panel 3 - US v Bautista- NMCCA No. 202300011 - 1EOT (Norton)
Date: Thursday, March 21, 2024 8:38:41 AM

MOTION GRANTED
MAR 21 2024
UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

CUI

Very Respectfully,

Ms. [REDACTED]
Panel Secretary
Navy-Marine Corps Court of Criminal Appeals (NMCCA)
Code-51
1254 Charles Morris St. SE, Bldg. 58
Navy Yard, Washington DC 20374-5124
[REDACTED]

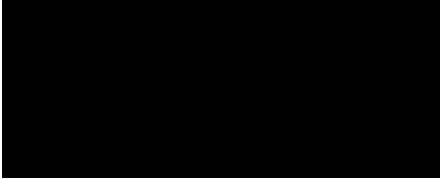
Colin Patrick Norton

Captain, USMC

Appellate Counsel

Navy-Marine Corps Appellate Defense Division, Code 45

Office of the Judge Advocate General, US Navy



REMAND

THERE WERE NO REMANDS

**NOTICE OF COMPLETION OF
APPELLATE REVIEW**