[redacted]

CERTIFIED RECORD OF TRIAL

(and accompanying papers)

of

BECKER	CRAIG	R.	[redacted]	LT/O-3E
(Last Name)	*(First Name)*	*MI*	*(DoD ID No.)*	*(Rank)*

EXPLOSIVE ORDINANCE DISPOSAL MOBILE 12	U.S. NAVY	DETACHMENT NEWPORT
(Unit/Command Name)	*(Branch of Service)*	*(Location)*

By

General Court-Martial (GCM) COURT-MARTIAL

(GCM, SPCM, or SCM)

Convened by COMMANDER

(Title of Convening Authority)

NAVY REGION EURAFCENT

(Unit/Command of Convening Authority)

Tried at

[redacted] On 12 APRIL 2022 TO 30 APRIL 2022

(Place or Places of Trial) *(Date or Dates of Trial)*

Companion and other cases

(Rank, Name, DOD ID No., (if applicable), or enter "None")

[redacted]

CONVENING ORDER

DEPARTMENT OF THE NAVY
COMMANDER
[redacted]

22 Mar 22

GENERAL COURT-MARTIAL AMENDING ORDER CY19-1A

The following members are detailed to the general court-martial convened by order CY19-1, this command, dated 29 January 2019, for the trial of Lieutenant Craig Becker, U.S. Navy, only:

Captain [redacted] U.S. Navy
Captain [redacted] U.S. Navy
Commander [redacted] U.S. Navy
Commander [redacted] U.S. Navy
Commander [redacted] U.S. Navy
Commander [redacted] U.S. Navy
Commander [redacted] U.S. Navy
Commander [redacted] U.S. Navy
Lieutenant Commander [redacted] U.S. Navy
Lieutenant Commander [redacted] U.S. Navy
Lieutenant Commander [redacted] U.S. Navy
Lieutenant Commander [redacted] U.S. Navy
Lieutenant Commander [redacted] U.S. Navy
Lieutenant Commander [redacted] U.S. Navy
Lieutenant Commander [redacted] U.S. Navy
Lieutenant Commander [redacted] U.S. Navy
Lieutenant Commander [redacted] U.S. Navy
Lieutenant Commander [redacted] U.S. Navy

The following members, detailed to the general court-martial convened by order CY19-1, this command, dated 29 January 2019, are hereby relieved for the trial of Lieutenant Craig Becker, U.S. Navy, only:

Captain [redacted] Nurse Corps, U.S. Navy
Captain [redacted] Supply Corps, U.S. Navy
Captain [redacted] U.S. Navy
Commander [redacted] Civil Engineer Corps, U.S. Navy
Commander [redacted] Nurse Corps, U.S. Navy
Commander [redacted] U.S. Navy
Lieutenant Commander [redacted] U.S. Navy
Lieutenant Commander [redacted] U.S. Navy
Lieutenant Commander [redacted] U.S. Navy
Lieutenant Commander [redacted] U.S. Navy

I authorize up to two alternate members if excess members remain upon completion of the voir dire process.

[redacted]
C. S. GRAY
Rear Admiral, U.S. Navy
Commander,
[redacted]

CHARGE SHEET

ORIGINAL

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, MI)	2. SSN	3. RANK/RATE	4. PAY GRADE
BECKER, CRAIG R.	[redacted]	LT	O3-E

5. UNIT OR ORGANIZATION: Ordnance 13 Feb 19
Explosive ~~Ordnances~~ Disposal Mobile Unit 12 Detachment Newport

6. CURRENT SERVICE: a. INITIAL DATE: 25 MAY 1999; b. TERM: Indefinite

7. PAY PER MONTH: a. BASIC: ~~$7,194.60~~ $8,050.80; b. SEA/FOREIGN DUTY: [redacted] $0.00; c. TOTAL: ~~$7,194.60~~ $8,050.80

8. NATURE OF RESTRAINT OF ACCUSED: None

9. DATE(S) IMPOSED: N/A

II. CHARGES AND SPECIFICATIONS

10. **CHARGE I: VIOLATION OF THE UCMJ, ARTICLE 118** [redacted] 13 Feb 19 Ordnance

Specification (Premeditated Murder): In that Lieutenant Craig R. Becker, USN, Explosive ~~Ordnances~~ Disposal Mobile Unit 12 Detachment Newport, on active duty, did at or near [redacted] on or about 8 October 2015, with premeditation, murder his wife [redacted] by means of causing the said [redacted] to fall from the seventh floor of their apartment building.

CHARGE II: VIOLATION OF THE UCMJ, ARTICLE 128 [redacted] 7 Feb 22 Ordnance 13 Feb 19 Criminal

Specification 1 (Assault Consummated by a Battery): In that Lieutenant Craig R. Becker, USN, Explosive ~~Ordnances~~ Disposal Mobile Unit 12 Detachment Newport, on active duty, did at or near [redacted] on or about 9 August 2013, unlawfully strangle his wife [redacted] around the neck with his hands.

Specification 2 (Assault Consummated by a Battery): In that Lieutenant Craig R. Becker, USN, Explosive ~~Ordnances~~ Disposal Mobile Unit 12 Detachment Newport, on active duty, did at or near [redacted] on or about 8 October 2015, unlawfully poison his wife [redacted] with [redacted] 7 Feb 22 [redacted]

See Continuation Page(s)

III. PREFERRAL

11a. NAME OF ACCUSER (Last, First, MI)	b. GRADE	c. ORGANIZATION OF ACCUSER
[redacted]	O-4/O-5	Region Legal Service Office [redacted]

d. SIGNATURE OF ACCUSER: [redacted]

e. DATE: 30 July 2018

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 30 day of July, 2018, 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]
Typed Name of Officer

Region Legal Service Office [redacted]
Organization of Officer

LCDR, USN
Grade and Branch

Judge Advocate
Official Capacity to Administer Oaths
(See R.C.M. 307(b)--must be commissioned officer)

[redacted]
Signature

DD FORM 458 S/N 0102-LF-000-4580

ORIGINAL

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, MI)	2. SSN	3. RANK/RATE	4. PAY GRADE
BECKER, CRAIG R.	[redacted]	LT	O3-E

5. UNIT OR ORGANIZATION	6. CURRENT SERVICE	
	a. INITIAL DATE	b. TERM
Ordnance 13Feb19 Explosive ~~Ordnances~~ Disposal Mobile Unit 12 Detachment Newport	25 MAY 1999	Indefinite

7. PAY PER MONTH			8. NATURE OF RESTRAINT OF ACCUSED	9. DATE(S) IMPOSED
a. BASIC	b. SEA/FOREIGN DUTY	c. TOTAL		
8,050.80 [redacted] ~~$7,194.60~~	20Jun2 $0.00	8,050.80 [redacted] ~~$7,194.60~~	None	N/A

II. CHARGES AND SPECIFICATIONS

10. [redacted] 13Feb19

ADDITIONAL CHARGE I: VIOLATION OF UCMJ, ARTICLE 133

Specification 1 (Conduct Unbecoming an Officer and a Gentleman): In that Lieutenant Craig R. Becker, Explosive ~~Ordnances~~ Ordnance [redacted] 13Feb19 Disposal Mobile Unit 12 Detachment Newport, Rhode Island, on active duty, did at or near [redacted] on divers occasions on about 8 October 2015, wrongfully impersonate [redacted] his spouse, by sending text messages to [redacted] under the pretense that it was [redacted] sending text messages, an act that under the circumstances was conduct unbecoming an officer and a gentleman.

Specification 2 (Conduct Unbecoming an Officer and a Gentleman): In that Lieutenant Craig R. Becker, Explosive ~~Ordnances~~ Ordnance [redacted] 13Feb19 Disposal Mobile Unit 12 Detachment Newport, Rhode Island, on active duty, did at or near [redacted] on divers occasions on about 8 October 2015, wrongfully mislead [redacted] Police investigators by falsely stating that the said Lieutenant Craig Becker did not know the Personal Identification Number (PIN) to open [redacted] cell phone, an act that under the circumstances was conduct unbecoming an officer and a gentleman.

[redacted] USN 13Feb19

And No Others

III. PREFERRAL

11a. NAME OF ACCUSER (Last, First, MI)	b. GRADE	c. ORGANIZATION OF ACCUSER
[redacted]	LNC/E-7	Trial Counsel Assistance Program
[redacted]		d. DATE 23 January 2019

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 23 day of January, 2019, 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.

Paul T. Hochmuth	Trial Counsel Assistance Program
Typed Name of Officer	*Organization of Officer*
LCDR/O4	Judge Advocate
Grade and Service	*Official Capacity to Administer Oaths (See R.C.M. 307(b)--must be commissioned officer)*

[redacted]
Signature

DD FORM 458 S/N 0102-LF-000-4580

12 On 30 July ,2018 , the accused was informed of the charges against him 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.)

Paul T. Hochmuth
Typed Name of Trial Counsel

Trial Counsel Assistance Program
Organization

LCDR/O4
Grade

[redacted]
Signature

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13. The sworn charges were received at 0900 hours, 31 Jul 20 18 at Navy Region
Designation of Command or

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

FOR THE

Rick Williamson
Typed Name of Officer

Commander
Official Capacity of Officer Signing

[redacted]

V. REFERRAL; SERVICE OF CHARGES

14a. [redacted] b. PLACE [redacted] c. DATE
29 JANUARY 2019

Referred for trial to the GENERAL court-martial convened by GENERAL COURT-MARTIAL CONVENING ORDER CY19-1.

Dated 29 January 2019 ,subject to the following instructions:[2] To be tried in conjunction with the charges preferred on 23 January 2019.

By Of
Command or Order

R. L. Williamson
Typed Name of Officer

Commander
Official Capacity of Officer Signing

Rear Admiral, U.S. Navy

[redacted]
Signature

15. On 30 January ,20 19 , I (caused to be) served a copy hereof on (each of) the above named accused

Paul T. Hochmuth
Typed Name of Trial Counsel

LCDR/O-4
Grade or Rank of Trial Counsel

[redacted]
Signature

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

DD Form 458 Reverse

ORIGINAL

Continuation of DD FORM 458 ICO U.S. v. LT CRAIG R. BECKER, USN, [redacted]

CHARGE III: VIOLATION OF THE UCMJ, ARTICLE 133

Specification: In that Lieutenant Craig R. Becker, USN, Explosive Ordinances Disposal Mobile Unit 12 Detachment Newport, on active duty, did at or near [redacted] on divers occasions between about 2 August 2013 and about 8 October 2015, wrongfully and dishonorably, physically and emotionally abuse his wife [redacted] and that under the circumstances the said conduct was unbecoming an officer and a gentleman.

CHARGE IV: VIOLATION OF THE UCMJ, ARTICLE 134

Specification 1 (Obstructing Justice): In that Lieutenant Craig R. Becker, USN, Explosive Ordnance Disposal Mobile Unit 12 Detachment Newport, on active duty, did at or near [redacted] on divers occasions on about 8 October 2015, wrongfully endeavor to impede the investigation into the death of [redacted] by sending text messages to [redacted] under the pretense [redacted] was sending text messages for the purpose of falsely misleading investigating the murder of [redacted] 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.

Specification 2 (Obstructing Justice): In that Lieutenant Craig R. Becker, USN, Explosive Ordnance Disposal Mobile Unit 12 Detachment Newport, on active duty, did at or near [redacted] on divers occasions on about 8 October 2015, wrongfully endeavor to impede the investigation into the death of [redacted] by misleading [redacted] Police investigators falsely stating that the said Lieutenant Craig Becker did not know the Personal Identification Number (PIN) to open [redacted] cell phone, 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.

Specification 3 (Obstructing Justice): In that Lieutenant Craig R. Becker, USN, Explosive Ordnance Disposal Mobile Unit 12 Detachment Newport, on active duty, did at or near [redacted] on divers occasions on about 9 October 2015, wrongfully endeavor to impede the investigation into the death of [redacted] by requesting Department of Defense officials release [redacted] body to Lieutenant Becker for cremation purposes in an effort to destroy evidence 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.

ORIGINAL

12. On 25 January ,2019 , the accused was informed of the charges against him 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.)*

Paul T. Hochmuth
Typed Name of Trial Counsel

Trial Counsel Assistance Program
Organization

LCDR/O4
Grade

[redacted]
Signature

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13. The sworn charges were received at 1456 hours, 29 January 20 19 at Navy Region
Designation of Command or

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

~~FOR THE~~

Rick Williamson
Typed Name of Officer

Commander
Official Capacity of Officer Signing

Rear Admiral/U.S. Navy

[redacted]
Signature

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY	b. PLACE	c. DATE
[redacted]	[redacted]	29 January 2019

Referred for trial to the GENERAL court-martial convened by GENERAL COURT-MARTIAL CONVENING ORDER CY19 – 1

dated 29 January 20 19 ,subject to the following instructions:[2] To be tried in conjunction with the charges preferred on 30 July 2018.

By _____ Of _____
Command or Order

R. L. Williamson
Typed Name of Officer

Commander
Official Capacity of Officer Signing

Rear Admiral, U.S. Navy

[redacted]
Signature

15. On 30 January ,20 19 , I caused to be served a copy hereof on the above named accused.

Paul T. Hochmuth
Typed Name of Trial Counsel

LCDR/O-4
Grade or Rank of Trial Counsel

[redacted]
Signature

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

DD Form 458 Reverse

TRIAL COURT MOTIONS & RESPONSES

NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **CRAIG R. BECKER** **LT/O-3** **U.S. NAVY**	**DEFENSE MOTION TO COMPEL DICOVERY** **19 April 2019**

Issues Presented

The defense asks this Honorable Court to order the government to produce each item of evidence discussed in this motion. The government has been cooperative during the ongoing discovery process.

Facts

First Discovery Request

1. On 30 January 2019, the defense requested, *inter alia*, the following discovery: *See Enclosure.*

a. Para 1(e): Any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the government or agents thereof, including closely aligned civilian authorities or entities, and which are material to the preparation of the defense or are intended for use by trial counsel as evidence in the prosecution case-in-chief at trial; and all of the raw data from any such examination, test or experiment;

Para 1(g): Names, contact information, and a synopsis of expected testimony of witnesses the government intends to call in the prosecution case-in-chief.

Para 1(j): Names, contact information, and a synopsis of expected testimony of witnesses the government intends to call at presentencing proceedings, if any.

Para 1(m): A written list of all statements, oral or written, made by the accused that are relevant to the case and which the government intends to use in the prosecution case-in-chief. This includes statements that are within the control of the government and military law enforcement agents, including closely aligned civilian authorities or entities, witnesses, or consultants.

App. Exh. ___

Page ___ of ___

Para 1(x): All laboratory reports, expert conclusions or statements, chain of custody documents, forensic notes, and other evidence or documents relied on by government experts in the performance of their services. This includes but is not limited to any laboratory tests, field tests, and reports thereof, including but not limited to DNA, fingerprints, blood samples, handwriting exemplars, and chemical analyses, regardless of the results of the tests.

Para 1(aa): Any agency or law enforcement documents and data, from both United States and international law enforcement agencies, made in connection with this case, along with all attachments or enclosures. This request encompasses all forms and documents, including witness reliability forms, data sheets, and other relevant documents. This request includes, but is not limited to, the following relevant documentation:

(1) Interview logs;

(2) Interview records;

(3) Source dossier and forms related to any Confidential Informants;

(4) Informants' notes;

(5) Any document detailing the disbursement of any funds in support of the investigation in this case;

(6) Investigative records checks, including NCIC checks on any person during the investigation of this case;

(7) Any documents related to searches and seizures;

(8) NCIS Case Activity Logs;

(9) Internal communications, emails, or other documents used to brief, respond to, and/or request investigative activities related to this case. This specifically includes any communication between law enforcement and:

(a) a member of the accused's command,

(b) the convening authority,

(c) the command or convening authority's staff judge advocate, legal officer, or any command services attorney providing legal services to the command or the convening authority, or Trial Counsel or Member of the Trial Counsel Assistance Program, or

(d) any officer directing the investigation.

(10) All records reflecting the chain of custody of any evidence seized and/or tested; and

(11) All personal or business notes, memoranda, and other writings prepared by investigators not furnished pursuant to any other provisions of this request. This request is not limited to formatted or typed reports, but also includes any and all "rough" or handwritten notes, memoranda, and documents in the possession of NCIS special agents or any other Government investigation agents.

Para 1(bb): A list and copy of all investigative reports, including the statements of all witnesses or potential witnesses as well as the results of all interviews and conversations with anyone used to develop the case against the accused and any recordings thereof.

Para 1(ee): Any other evidence from unit personnel files or civilian personnel files demonstrating disciplinary actions against a potential government witness.

Para 1(gg): The contents of any prior inconsistent statement or any statement tending to show bias or motive to fabricate made by any potential witness in this case known by the government or agents thereof, including closely aligned civilian authorities or entities.

Para 2(a): Statement of identification for all videos and photographs provided that were not included as part of a report. The statement is to identify the photograph or video by bate stamp number and include a description of the photograph or video, who took the photograph or video, and when the photograph or video was taken.

Para 2(b): Copies of the raw data for all electronic devices searched in connection with this case including but not limited to the devices belonging to LT and Mrs. [redacted] and Mr. [redacted]

Para 2(c): Copies of all written communications between the RLSO and NCIS or other Military Command regarding the decision whether or not to prosecute the alleged 2013 assault.

Para 2(d): Copies of all communications between NCIS and RLSO or TCAP personnel regarding this case.

Para 2(e): Copies of all notes taken by NCIS, RLSO, or TCAP personnel when interviewing witnesses in order to assist in determination whether or not the United States should assert jurisdiction over this case.

Para 2(f): Copies of all communications to or from DOD personnel, including NCIS and Navy Judge Advocates regarding the issue of whether or not to assert jurisdiction in this case.

Para 2(l): Copies of any documents from the Federal Police at [redacted] referencing [redacted]

Para 2(q): All communications, e-mails, memos, records, letters, documents, reports, packages, power point presentations, endorsements, and responses from or to Admiral Michelle Howard regarding the LT Craig Becker matter while she was [redacted] and [redacted]

Para 2(r): All communications, e-mails, memos, records, letters, documents, reports, packages, power point presentations, endorsements, and responses from or to Admiral James Crawford, Judge Advocate General (Retired) regarding the LT Craig Becker matter while he was the Navy Judge Advocate General or Deputy Judge Advocate General.

Para 2(s): A complete copy of all communications, e-mails, records, memos, letters, documents, reports, packages, power point presentations, endorsements, and responses regarding the decision of the United States Navy and the United States Government to initially refuse to assert jurisdiction in the case of LT Craig Becker.

Para 2(j): The government is further requested to obtain and provide all documents from the State of Florida that relate to the 2001/2002 commitment of Mrs. [redacted] This commitment is commonly referred to as "Baker Act" and can last up to five days. The events leading up to this commitment occurred prior to Mrs. [redacted] marriage and as such, the government is requested to utilize Mrs. [redacted] maiden name and other identifying information when obtaining these documents.

First Government Response

2. The government responded to the defense's request on 25 February 2019. See *Enclosure.*

3. The government partially granted the defense's request and is continuing to provide discovery. However, there are some outstanding issues that should be addressed on the record.

Burden of Proof

4. As the moving party, the Defense has the burden of persuasion. R.C.M. 905(c)(2). The burden of proof is by a preponderance of the evidence. R.C.M. 905(c)(1).

Law

5. The Court should compel production of the discovery requests discussed below because each item is necessary and material to provide LT Becker an adequate opportunity to prepare a defense. Discovery practice under R.C.M. 701 promotes full discovery that eliminates 'gamesmanship' from the discovery process and is quite liberal. *United States v. Roberts*, 59 M.J. 323, 325 (C.A.A.F. 2004). Providing broad discovery

contributes to the orderly administration of military justice because it reduces pretrial motions practice, surprise, and delay at trial. Id.

6. A trial counsel cannot avoid discovery obligations by leaving relevant evidence in the hands of another agency. *United States v. Stellato*, 74 M.J. 473, 484-85 (C.A.A.F. 2015). "Article III courts have identified a number of scenarios in which evidence not in the physical possession of the prosecution team is still within its possession, custody, or control. These include instances when: (1) the prosecution has both knowledge of and access to the object; (2) the prosecution has the legal right to obtain the evidence; (3) the evidence resides in another agency but was part of a joint investigation; and (4) the prosecution inherits a case from a local sheriff's office and the object remains in the possession of the local law enforcement." Id (internal citations omitted.).

7. The only restrictions placed upon liberal defense discovery are that the information requested must be relevant and necessary to the subject of the inquiry, and the request must be reasonable. *United States v. Reece*, 25 M.J. 93, 95 (C.M.A. 1987). The Military Rules of Evidence establish "a low threshold of relevance." *Id.* Relevant evidence is "any evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *Id quoting* M.R.E. 401.

8. Evidence is material when there is a reasonable probability that its disclosure could engender a different result, creating reasonable doubt that did not otherwise exist. *United States v. Kinney*, 56 M.J. 156 (C.A.A.F. 2001). In applying the materiality test, military courts "give the benefit of any reasonable doubt to the military accused." *United States v. Green*, 37 M.J. 88, 90 (C.A.A.F. 1993).

Argument

9. The defense and government are working together to resolve discovery issues. The defense has identified the following issues that should be addressed on the record.

Para 1(e): The defense has been consulting with confidential expert consultants. It appears that the defense is missing raw data, hard drives, photos, and reports that will be required for the assigned experts to complete their respective analysis. This would include mirrored copies of all computer hard drives and smart phones, all photographs from autopsy, all testing results and data relating to autopsy, all testing results and measurements from all accident reconstruction, all electronic dates in electronic format including the "electopherograms" regarding the DNA testing,

Para 1(g): The defense requests that names, contact information, and a synopsis of expected testimony of witnesses the government intends to call in the prosecution case-in-chief. This has been on ongoing process and the defense requests an updated list.

Para 1(j): Names, contact information, and a synopsis of expected testimony of witnesses the government intends to call at presentencing proceedings, if any. This has been on ongoing process and the defense requests an updated list.

Para 1(m): The investigation contains many statements made by LT Becker over the years. Many of the statements are not relevant to the case. The defense requests that the government narrow the scope of all the statements that are buried in a vast investigation and provide a written list of all statements, oral or written, made by the accused that are relevant to the case and which the government intends to use in the prosecution case-in-chief. This includes statements that are within the control of the government and military law enforcement agents, including closely aligned civilian authorities or entities, witnesses, or consultants.

Para 1(x): The defense has been consulting with confidential expert consultants. It appears that the defense is missing raw data, hard drives, photos, and reports that will be required for the assigned experts to complete their respective analysis. This would include mirrored copies of all computer hard drives and smart phones, all photographs from autopsy, all testing results and data relating to autopsy, all testing results and measurements from all accident reconstruction, all electronic dates in electronic format including the "electopherograms" regarding the DNA testing,

Para 1(aa): It is apparent that the defense is missing the requested records that pertain to the 2013 assault case. The case was investigated by CID and NCIS and was reviewed by the Regional Legal Service Office before it was rejected for prosecution. The defense is missing case activity reports, agent notes, witnesses' statements, communications, and the complete investigation from CID and NCIS.

Para 1(aa)(6): The defense also requested an investigative records checks, including NCIC checks on any person during the investigation of this case. The records are certainly relevant for any witness that will testify.

Para 1(aa)(9): This request was denied as overbroad. This is a high-profile first-degree murder case that has generated a vast amount of responsive material. A FOI request was filed in this case that generated over 300 pages of responsive documents. A review of the documents reveals that there is a substantial amount of material missing including communications from Admiral Crawford who was involved in the case. There was also a flurry of activity when [redacted] refused to request jurisdiction in this case pursuant to the [redacted] The government has only provided a fraction of the requested documents.

Para 1(aa)(10): The defense is missing complete investigative reports and statements from the eye-witnesses to the event. The defense is also missing all of the reports and statements pertaining to all of the crime scene reenactments. NCIS was present during some of the reenactments and the defense does not have any notes of the events.

Para 1(bb): This has been on ongoing process. The defense believes that we are missing an ROI from 28 March 2019 and also the above referenced material from the 2013 assault incident.

Para 1(ee): Any other evidence from unit personnel files or civilian personnel files demonstrating disciplinary actions against a potential government witness.

Para 1(gg): The contents of any prior inconsistent statement or any statement tending to show bias or motive to fabricate made by any potential witness in this case known by the government or agents thereof, including closely aligned civilian authorities or entities.

Para 2(a): The defense is in possession of many photographs and videos. However, it is proven to be impossible to establish the foundation requirements for all of the photos and relevance.

Para 2(b): Copies of the raw data for all electronic devices searched in connection with this case including but not limited to the devices belonging to LT and Mrs. [redacted] and Mr. [redacted] The requested data has been requested by Mr. [redacted] so he may complete his forensic review and assist the defense.

Para 2(c): Copies of all written communications between the RLSO and NCIS or other Military Command regarding the decision whether or not to prosecute the alleged 2013 assault. The available records reveal that the 2013 incident was thoroughly reviewed by NCIS and the RLSO. However, it appears that the defense is missing the complete case file.

Para 2(d): Copies of all communications between NCIS and RLSO or TCAP personnel regarding this case. This is a high-profile case that generated a substantial amount of communications regarding jurisdiction, pre-trial conferment, and witness availability. The defense is missing a substantial amount of communications including all communications from Admiral Crawford.

Para 2(e): Copies of all notes taken by NCIS, RLSO, or TCAP personnel when interviewing witnesses in order to assist in determination whether or not the United States should assert jurisdiction over this case. When the government first interviewed [redacted] witnesses, they claimed that relevant witnesses would not cooperate. This was the cornerstone for rejecting the case. However, when the defense interviewed key witnesses, they confirmed in writing that they were not contacted about the case. The defense requires all of the notes and communications to support future motions.

Para 2(f): Copies of all communications to or from DOD personnel, including NCIS and Navy Judge Advocates regarding the issue of whether or not to assert jurisdiction in this case. The defense has been in litigation regarding this matter for years. In fact, the issue of jurisdiction was litigated in Federal District Court. The State Department also got involved in the case. The government has not provided a fraction of the paperwork that has been generated in this case.

Para 2(l): Copies of any documents from the Federal Police at [redacted] referencing [redacted]

Para 2(q): All communications, e-mails, memos, records, letters, documents, reports, packages, power point presentations, endorsements, and responses from or to Admiral Michelle Howard regarding the LT Craig Becker matter while she was [redacted] and [redacted] This is a high-profile case that was litigated in the Federal District Court. The government has only provided a fraction of the requested documents.

Para 2(r): All communications, e-mails, memos, records, letters, documents, reports, packages, power point presentations, endorsements, and responses from or to Admiral James Crawford, Judge Advocate General (Retired) regarding the LT Craig Becker matter while he was the Navy Judge Advocate General or Deputy Judge Advocate General. This is a high-profile case that was litigated in the Federal District Court. The government has only provided a fraction of the requested documents.

Para 2(s): A complete copy of all communications, e-mails, records, memos, letters, documents, reports, packages, power point presentations, endorsements, and responses regarding the decision of the United States Navy and the United States Government to initially refuse to assert jurisdiction in the case of LT Craig Becker. This is a high-profile case that was litigated in the Federal District Court. The government has only provided a fraction of the requested documents.

Para 2(j): The government is further requested to obtain and provide all documents from the State of Florida that relate to the 2001/2002 commitment of Mrs. [redacted] This commitment is commonly referred to as "Baker Act" and can last up to five days. It is not disputed that Mrs. [redacted] was involuntarily hospitalized for [redacted]

10. The defense submits that all the above requested information is relevant and material, and under the circumstances, very reasonable. These items will produce admissible evidence for trial, for motions practice, or for impeachment. Finally, as a matter of parity and equality of access to information, the defense submits that this Court should order the production of the above requested evidence. The Government has access to most, if not all, of what has ben requested. The defense merely asks for equal access, as required by law.

Relief Requested

11. The defense respectfully requests this Court compel the government to produce each item discussed in this motion.

Motion Hearing

12. If this motion is opposed by the government, the Defense requests this motion be argued during the motion hearing in this case. We further request the opportunity to establish our facts and support our arguments through the testimony of the witnesses. If

this motion is not opposed by trial counsel, the Defense requests this motion be granted without hearing.

Enclosures

A. First Discovery Request
B. Government's Response to Defense's Discovery Request

For the Defense

[redacted]

JEREMIAH J. SULLIVAN, III
Defense Counsel

CERTIFICATE OF SERVICE

I certify that I caused a copy of this motion to be served on the Military Judge and trial counsel via e-mail on 19 April 2019.

[redacted]

JEREMIAH J. SULLIVAN, III
Defense Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

THE UNITED STATES OF AMERICA V. CRAIG R. BECKER LT USN	GOVERNMENT RESPONSE TO DEFENSE MOTIONS TO COMPEL DISCOVERY AND WITNESS LIST 26 APRIL 10

1. Nature of the Motion.

The Government hereby responds to both the Defense Motion to Compel Government Witness Information and the Defense Motion to Compel Discovery. The Government respectfully requests the Court deny the outstanding discovery requests in the Defense's motion.

2. Burden of Proof.

As the moving party, Defense has the burden of persuasion.[1]

3. Statement of Facts.

The Government concurs with Defense's Summary of Facts. Relevant facts pertaining to the Government's previous responses to listed items are included in the discussion section.

4. Discussion.

a. Statement of Law regarding Discovery.

Defense access to evidence is governed by Article 46 of the Uniform Code of Military Justice (UCMJ) and Rules for Courts-Martial (R.C.M.) 701-703. Article 46 states that trial and defense counsel shall have equal opportunity to obtain evidence. R.C.M. 701 addresses discovery, while R.C.M. 703 addresses production. Pursuant to R.C.M. 701, the Government

[1] R.C.M. 905(c)(2).

must disclose items in its possession which are "relevant to defense preparation."[2] Under R.C.M. 703, the Government must obtain and produce "relevant and necessary" evidence upon Defense request.[3] Any request for production of evidence must "list the items of evidence to be produced" and "include a description of each item sufficient to show its *relevance* and *necessity*."[4] The defense has not done this for a single item requested in their discovery request or their motion.

The Government has an obligation under Article 46 to remove obstacles from Defense's access to information.[5] This obligation however, does not "relieve the defense of its responsibility to specify the scope of its discovery."[6] Defense is in "the best position to know what matters outside of the investigative files," and Article 46 is adequately protected "by requiring the defense to provide a reasonable degree of specificity as to the entities, the types of records, and the types of information that are the subject of the request."[7]

In determining whether evidence is "relevant and necessary," the military judge may refer to M.R.E. 401.[8] A military judge does not abuse his or her discretion by denying Defense's motion to compel where Defense fails to present a theory of relevance adequate to justify production.[9]

b. Analysis of Law of Discovery Materials.

The Government stands by their Discovery response, dated 1 March 2019. Though informed previously, the Defense has not asked for access to any electronic devices in the

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[2] R.C.M. 701(a)(2)(A).
[3] R.C.M. 703(f)(1).
[4] R.C.M. 703(f)(3) (italics added).
[5] *United States v. Williams*, 50 M.J. 436, 442-43 (C.A.A.F. 1999).
[6] *Id. at* 442-43.
[7] *Id.* at 443.
[8] *See United States v. Graner*, 69 M.J. 104, 107-08 (C.A.A.F. 2010).
[9] *Id.* (emphasis added).

possession of the Government. In addition, they have not asked for access for any biological material for further testing.

Paragraph 1(e) (x): If the Defense is missing items regarding photographs, hard drives, etc., then the Defense should let the Government know what they are missing and we will provide it. There were not "mirrored copies" of computers or smart phones taken. Data pulled from [redacted] cell phone is located on a CD previously provided to the Defense as [redacted] Mr. [redacted] physical cell phone was not retained by the Government. The accused's cell phone data pull is [redacted] and [redacted] The cell phone is currently in NCIS possession in [redacted] and can be made available to the Defense if requested. Computer extractions and ipad extractions are located on [redacted] Some of these devices were returned to the accused and others retained by the Government, and similar to the cell phone are located in [redacted] and can be made available to the Defense. The victim's work e-mails obtained at the request of the Defense is [redacted] Autopsy photos are currently contained in the autopsy report [redacted].

The Government will request standalone electronic copies of all photographs, notes and raw data from the autopsy.

The Government will request all notes, raw data from the accident reconstruction.

The Government has already asked for and will follow up regarding the electronic data for all DNA and toxicology reports.

Paragraph 1(g) (j): The Government is under no legal obligation to provide a synopsis of testimony of witnesses and wishes for the court to make a ruling on this matter. The Government has provided contact information for all but one witness (currently seeking) and the

Defense has a Defense Investigator stationed in [redacted] and the Defense Service Offices has a budget to allow this individual to conduct a Defense focused investigation.

In addition, on 22 April 2019, as a professional courtesy and not out of legal obligation, Trial Counsel spoke to Detailed Military Counsel, went over every witness on the Government witness list, and noted that two main witnesses were inadvertently left off. This conversation included what the basis of the witnesses' testimony. The Government has gone well beyond their legal requirements in this case.

Paragraph 1(m): The Government has previously stated that all known statements have been provided in discovery. Once again, as a professional courtesy on the 22 April 2019, during a phone call between Trial Counsel and Detailed Military Counsel, the Government agreed to provide each statement in writing to the Defense by 3 June 2019, eight days before the next motions are due.

Paragraph 1(aa): The Government has received confirmation that NCIS paper files were destroyed in June 2015, as standard protocol after the case was closed out without any further action. Only the electronic files remained which are [redacted] RLSO [redacted] also confirmed that no additional information exists in their files, as well.

The Government has reached out to Army CID and the Army MP's office to determine if any additional documents exist and will provide a response, when one is received.

Paragraph 1(aa)(6): The Government sought all negative information from the [redacted] Federal Police and local [redacted] Police regarding all police/investigators who worked on the case, and as previously disclosed to the Defense no negative material was found. In addition, the Government sought all negative information from all Army CID and NCIS agents who worked on the case and received a negative. Defense specifically requested, "Investigative records

checks, including NCIC checks on any person during the investigation of this case." The Government stands by their response as being overbroad and denying this request.

The Government will conduct the appropriate checks on all witnesses to be called during this Court-Martial.

Paragraph 1(aa)(9): The Government stands by our response that this is overbroad. Defense broadly asked for the following information:
"Internal communications, emails, or other documents used to brief, respond to, and/or request investigative activities related to this case. This specifically includes any communication between law enforcement and:

(a) a member of the accused's command,

(b) the convening authority,

(c) the command or convening authority's staff judge advocate, legal officer, or any command services attorney providing legal services to the command or the convening authority, or Trial Counsel or Member of the Trial Counsel Assistance Program, or

(d) any officer directing the investigation."

Paragraph 1(aa)(10): The Government does not understand the Defense's positon. This paragraph requested chain of custody documents. Not notes and reports. If this was supposed to be Paragraph 1(aa)(11), then NCIS did attend the reenactment as a guest and not in a law enforcement entity. They did not take notes during the reenactments. Multiple reports have been reproduced for the reenactments, but once again the Government does not understand what specifically the Defense is looking for.

The Government has already requested all notes taken by the [redacted] Federal Police and local [redacted] Police.

Paragraph 1(bb): 2013 DV incident is answered in our response to Paragraph 1(aa). The March ROI is [redacted]

Paragraph 1(ee): The Government has responded for all law enforcement personnel involved in this case. We will request for all military and [redacted] Medical/Lab personnel when final witness lists are finalized.

Paragraph 1(gg): We stand by our previous response. If the Defense is seeking something specific, they have not articulated it. We have requested all negative information from law enforcement already and will do as stated in our response to paragraph 1 (ee).

Paragraph 2(a): The Government has answered numerous questions regarding pictures. All pictures are referenced in the discovery, and if there are still questions then Defense just needs to ask.

Paragraph 2(b): Same response as in Paragraph 1(e) (x).

Paragraph 2(c): The Government reached out to NCIS and the Command Services department head for RLSO [redacted] NCIS has provided all documents relating to the 2013 Domestic Violence incident. The Command Services Department Head LCDR [redacted] confirmed today, 26 April 2019, telephonically that no additional documents in the RLSO possession exist regarding this incident and that all files should have been destroyed and that is why they cannot find anything relating, as the case never went forward.

Paragraph 2 (d): The Government stands by our previous response. The request "Copies of all communications between NCIS and RLSO or TCAP personnel regarding this case." is unreasonable, not legally required and is extremely overbroad. In addition, once again the Defense fails to provide their justification as required by R.C.M. 701 as to how is this relevant to the defense preparation.

Paragraph 2(e): Trial Counsel spoke to NCIS regarding this matter on 22 April 2019, and produced the only written document relevant [redacted] on 23 April 2019. This

document contains information of individuals the Government contacted or attempted to contact. In addition, Trial Counsel spoke to CDR Kim Kelley, JAGC, USN and CDR [redacted] telephonically on 22 April 2019. Both stated they did not create notes during the meetings. Their purpose was to provide information about the U.S. Military Court-Martial process, to answer any questions potential witnesses may have had and to determine if the individual would participate as a witness. The findings of the interviews were summarized by RLSO [redacted] and provided to the SJA for [redacted] in January 2017. These documents have previously been provided and the specific relevant pages are [redacted]

Paragraph 2(j): This event took place about 13 – 15 years prior to the homicide of the victim and is not relevant to the defense preparation. However, the Government has sought information about this event from the Victim's father, Mr. [redacted] and her roommate at the time, [redacted]. However, neither individual could provide the hospital/clinic/facility that the victim went to. The Government will seek this information if the Defense can provide us with the name of the facility. The Defense has not done so and the Government is under no obligation under R.C.M. 703 to go on a fishing expedition for the Defense.

Paragraph 2(l): The Government failed to provide the one-page document that we had during our post-32 discovery update and that was rectified on 26 April 2019. The relevant page is [redacted]

Paragraph 2 (f), (q), (r), (s): The Defense has not articulated why this material is relevant to defense preparation. They just continue to state, "This is a high profile case that was litigated in the Federal District Court." Further, they mentioned that they have been seeking this information for "years," yet this Court-Martial was only preferred about 8 months ago. FOIA requests and litigation from civil cases are not the same as discovery under R.C.M 701 or 703.

In addition, if the Defense is seeking these documents for any other purpose other than this Court-Martial, then it is not an appropriate use of these documents. Still, the Government has attempted to obtain as many documents as we could and have sought all documents from [redacted] and Office of the Judge Advocate General for the Navy. The Government has still provided over 265 pages of discovery related to this matter.

Further, the Government cannot see a legally justifiable reason behind this request. Any decision made by any person within the Department of the Navy was overturned by the decision of Secretary Mattis to assert jurisdiction. Further, the Defense specifically requested that the United States Military assert jurisdiction and Secretary Mattis followed their request. Any decision by the Navy not to assert jurisdiction (even though their justification is fully included within the disclosed discovery) is not relevant for this proceeding.

5. Evidence. The Government offers the following documentary evidence in support of this motion:

Government Exhibit 6: E-mail Exchange regarding Admiral Crawford e-mails;

Government Exhibit 7: E-mail Exchange regarding Admiral Howard e-mails;

Government will rely upon Defense Exhibits: A and B.

6. Oral Argument. Unless conceded by the Defense based on the Government's pleading, the Government does desire to make oral argument on this motion.

7. Relief Requested. The Government respectfully requests that this Honorable Court deny the Defense's motion.

[redacted]

Paul T. Hochmuth

CERTIFICATE OF SERVICE

I hereby certify that, on 26 April 2019, I caused to be served a copy of this motion on the defense counsel for the government and the court.

[redacted]

Paul T. Hochmuth

NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **CRAIG R. BECKER** **LT/O-3** **U.S. NAVY**	**DEFENSE MOTION TO DISMISS: MULTIPLICITY/UNREASONABLE MULTIPLICATION OF CHARGES** **19 APR 2019**

1. Nature of Motion[1]

The Government has charged Lieutenant Becker with two specifications of assault consummated by a battery and one specification of murder for conduct that is alleged to have occurred in August 2013 and October 2015. Based on these same acts, the Government has also charged Lieutenant Becker with conduct unbecoming an officer and a gentleman, stating that he did physically and emotionally abuse his wife between August 2013 and October 2015. With respect to the physical abuse, this charging scheme is multiplicious, and either the physical abuse portion of Charge III or Charges I and II must be dismissed. R.C.M. 907(b)(3)(B). Additionally, because the bases for each specification are substantially the same transactions, the Defense moves to dismiss Charge III. R.C.M. 906(b)(12).

2. Summary of Facts

[1] The defense has also filed A Motion to Dismiss for Failure to State and Offense and Due Process Errors related to this same specification. Should the Court grant that motion, the issues raised below would become moot. The Defense is uncertain as to the elements the undefined term "physically abuse" but for the purpose of this motion the Defense assumes that at a minimum they include an offensive touching with unlawful force.

In Charge I, the government alleges that LT Becker violated Article 118, Uniform Code of Military Justice (UCMJ), on 8 October 2015, when he murdered his wife by causing her to fall from their apartment building

In Specification 2 of Charge II, the government alleges that LT Becker violated Article 128, UCMJ, on 8 October 2015, when he poisoned his wife with medications.

In Specification 1 of Charge II, the government alleges that LT Becker violated Article 128, UCMJ, on 9 August 2013, when he strangled his wife.

In the Specification of Charge III, the government alleges that LT Becker violated Article 133, UCMJ, when he:

> . . . did on diverse occasions between about 2 August 2013 and about 8 October 2015, wrongfully and dishonorably, physically and emotionally abuse his wife [redacted] and that under the circumstances the said conduct was unbecoming an officer and a gentleman.

Throughout the entire investigation, the only evidence of any "physical abuse" by LT Becker toward his wife is that conduct described in Charges I and II. (Attachment 14)

3. Discussion of Law

A. Duplicitous Specifications.

Each specification may state only one offense. R.C.M. 307(c)(4). A duplicitous specification is one that alleges two or more separate offenses. R.C.M. 906(b)(6) Discussion.

Here the Government has alleged in Charge III two separate offenses; that LT Becker did on divers occasions physically abuse his wife and that he did on diverse occasions emotionally abuse his wife. The sole remedy for duplicitous specifications is severance. Id. The Defense is not requesting that remedy but instead raising this issue so that for the purpose of this motion, the court may consider the "physically abuse" portion of Charge III on its own.

B. Multiplicity

"The concept of multiplicity is grounded in the Double Jeopardy Clause of the Fifth Amendment, which prohibits multiple punishments 'for the same offen[s]e.'" *United States v. Forrester*, 76 M.J. 389, 395 (C.A.A.F. 2017) (citing U.S. Const. amend. V; Article 44(a), UCMJ, 10 U.S.C. § 844(a) (2012) ("No person may, without his consent, be tried a second time for the same offense."). "The Double Jeopardy Clause prohibits 'multiplicitous prosecutions . . . [i.e.,] when the government charges a defendant twice for what is essentially a single crime.'" *Id.* (quoting *United States v. Chiaradio*, 684 F.3d 265, 272 (1st Cir. 2012)). "Offenses are multiplicious if one is a lesser-included offense of the other." *United States v. Leak*, 61 M.J. 234, 248 (C.A.A.F. 2005) (internal quotation marks omitted).

"When a specific offense alleges criminal conduct that is also charged as conduct unbecoming an officer under Article 133, UCMJ, the specific offense is multiplicious with the Article 133 offense." *United States v. Mathis*, No. 20140473, 2016 CCA LEXIS 229 (A. Ct. Crim. App. Apr. 13, 2016), *rev. denied*, 2016 CAAF LEXIS 520 (C.A.A.F. June 27, 2016) (citing *United States v. Palagar*, 56 M.J 294 (C.A.A.F. 2002); *United States v. Frelix-Vann*, 55 M.J. 329 (C.A.A.F. 2001); *United States v. Cherukuri*, 53 M.J. 68 (C.A.A.F. 2000)). In such situations, dismissal of one of the multiplicious charges is required, and the government is generally allowed to elect which charge to retain. *Palagar*, 56 M.J. at 296-97; *Frelix-Vann*, 55 M.J. at 333, *Cherukuri*, 53 M.J. at 74.

This doctrine includes cases in which an officer is charged with assault consummated by a battery, in violation of Article 128, in addition to conduct unbecoming for the assaultive behavior. *United States v. Alston*, 75 M.J. 875, 887-88 (A. Ct. Crim. App. 2016), *rev. denied*, 2017 CAAF LEXIS 179 (C.A.A.F. Feb. 16, 2017) (dismissing an Article 133 conviction as multiplicious with two assault-consummated-by-a-battery offenses, where every element of the latter was included in the conduct unbecoming offense and the government elected to retain the lesser-included charges).

Here, the Government has charged LT Becker with strangling, poisoning, and murdering his wife, in violation of Articles 118 and 128. The Government has also charged this conduct as "physically abuse" under Article 133. In accordance with *Alston*, *Mathis*, *Palagar*, *Frelix-Vann*,

and *Cherukuri*, the Government must elect which charges it wishes to retain and which it wishes this Court to dismiss.

C. Unreasonable Multiplication of Charges

"What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." R.C.M. 307(c)(4). This prohibition against unreasonable multiplication of charges "has long provided courts-martial and reviewing authorities with a traditional legal standard—reasonableness—to address the consequences of an abuse of prosecutorial discretion in the context of the unique aspects of the military justice system." *United States v. Quiroz*, 55 M.J. 334, 336-39 (C.A.A.F. 2001); *see also United States v. Campbell*, 71 M.J. 19, 23 (C.A.A.F. 2012). Thus even where charges are not multiplicious, "military judges must still exercise sound judgment to ensure that imaginative prosecutors do not needlessly 'pile on' charges against a military accused." *United States v. Foster*, 40 M.J. 140, 144 n.4 (C.M.A 1994), overruled on other grounds.

In *Quiroz*, C.A.A.F. sets out a five-prong test to determine whether an unreadonable multiplication of charges (UMC) exists in a case. This test includes the following prongs: (1) whether the accused objects at trial; (2) whether each of the charges and specifications are aimed at distinctly separate criminal acts; (3) whether the number of charges and specifications misrepresent or exaggerate the accused's criminality; (4) whether the punitive exposure of the accused is unreasonably increased; and (5) whether there is any evidence of prosecutorial abuse in the drafting of the charges. In its analysis, the court must give fair consideration to each prong. See *U.S. v. Pauling*, 60 M.J. 91, 95 (C.A.A.F. 2004). Further, one or more factors may be sufficiently compelling, without more, to warrant relief; it is not required that all five factors be found in favor of an Accused before a court grants relief. See *Campbell*, 71 M.J. at 23.

In the present case, LT Becker is charged with two specifications of assault and one specification of murder that are the same transactions that form the basis for Charge III. An analysis of the five Quiroz factors demonstrates that this prosecutorial charging scheme constitutes UMC.

(1) The accused objects: Through this motion, LT Becker objects to these specifications as an unreasonable multiplication of charges when brought together.

(2) The charges are not aimed at distinctly separate criminal acts: Charge III is based solely on the same criminal acts already charged in Charges I and II. There is no other allegation of "physical abuse" other than the August 9, 2013 assault allegation and the October 8, 2015 assault and murder allegations.

(3) The number of charges and specifications misrepresent and exaggerate the accused's criminality: Charging LT Becker with Charge III in addition to Charges I and II misrepresents and exaggerates his criminality because the conduct at issue for each of these specifications is identical and the alleged victim is identical[2].

(4) The charges unfairly increase the accused's punitive exposure: LT Becker is charged at a General Court-Martial. By adding Charge III, he faces additional confinement, increasing his punitive exposure based on the exact same conduct already charged.

(5) Whether there is evidence of prosecutorial overreaching or abuse in the drafting of these charges: While the Defense is in no way asserting any form of bad faith on the Government, this charging scheme appears to be an attempt by the Government to frame the case as one involving a long standing patter of domestic abuse vice one that involves the two incidents of "physical abuse" for which the Government has any evidence.

4. Relief Requested

The Defense requests that the Military Judge require the Government to elect the dismissal of either the "physically abuse" portion of Charge III or Charges I and II as they are both multiplicious and an unreasonable multiplication of charges.

[2] See *United States v. Lacy*, 53 M.J. 509 (NMCCA 200) holding that in cases involving criminal offenses for which protection of the individual person as victim was the well-established object, such as murder, assault, and robbery, it is not impermissible to charge a separate offense for each different victim.

5. Oral Argument.

Unless the Government concedes the motion or this Court grants the relief on the basis of pleadings alone, the defense requests oral argument on this matter.

[redacted]

J. A. GUARINO
CDR, JAGC, USN
Detailed Defense Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

The United States of America **v.** **CRAIG R. BECKER** **LT/O-3 USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO DISMISS: MULTIPLICITY**

1. **Nature of the Motion.** The Government respectfully requests the Court deny the Defense motion to dismiss the words "physical abuse" of Charge III or Charge I and Charge II, as none of the accused misconduct is covered by more than one specification.

2. **Burden of Proof.** As the moving party, the Defense bears the burden by a preponderance of the evidence.[1]

3. **Statement of Facts.**

a. The Government agrees with the accused's Statement of Facts, with the exception of the last sentence.[2]

b. During the domestic violence incident on 9 August 2013, the accused grabbed the victim by the arm and threw her onto the couch in an aggressive manner.

c. In addition, the accused picked the victim up and carried her into the bedroom, while the victim tried to get away.

d. The accused also climbed on top of the victim and pinned her to the bed, then strangled the victim.

e. She was able to get away, but the accused once again pushed her down onto the bed.

[1] R.C.M. 905(c)(2).
[2] Defense Motion to Dismiss dated 19 April 2018.

f. In November 2014 the accused forced his wife to walk from their apartment located at [redacted] to the local hospital [redacted] to the hospital, even though she was in agonizing pain due to [redacted]

g. [redacted]

4. **Discussion.**

The Government has not charged the same misconduct within two Charges and the Government has not charged the same transaction within separate specifications. For the evening of 9 August 2013, the only physical abuse the Government Charged was when the accused strangled the victim on their hotel room bed. The Government does not consider the additional actions of the accused in the hotel room on the night of 9 August 2013 to be separate acts, but consider his misconduct to be all part of the same offense. The Government is guided by case law that holds that individual blows of an assault should not be parsed out to individual specifications. "This Court has held that Congress intended assault, as prescribed in Article 128, UCMJ, 10 USC § 928 to be a continuous course-of-conduct type offense and that each blow in a single altercation should not be the basis of a separate finding of guilty." United States v. Flynn, 28 M.J. 218 (C.M.A. 1989).

However, in the abundance of caution, the Government puts the Defense on notice that the Government plans on utilizing the full transaction to explain the circumstances leading to and including the strangulation event. Specifically, that the accused grabbed the victim by the arm and threw her onto the couch in an aggressive manner. That the accused picked the victim up and carried her into the bedroom, while the victim tried to get away. The accused then climbed on top of the victim, pinned her to the bed, and strangled her. Once she was able to get away, the accused pushed her down onto the bed ending the transaction. This information will be utilized

under M.R.E. 404b to show that the accused was the aggressor and not acting in self-defense, that his intent was to cause her harm, that he knew what he was doing and that his actions were not a mistake.

Lastly, the "physical harm" within Charge III is specifically referencing when the accused forced his wife to walk from their apartment to located at [redacted] to the local hospital [redacted]. The walk is about 2.1 km in distance and the victim was in agonizing pain due to [redacted]

Further, the Government has charged the accused with the act of murdering his wife by pushing her out of their seventh-floor window. This misconduct is not covered in any other charge or specification. In addition, the accused is charged with poisoning his wife with medications from the home, which is not contained in any other charge or specification. The Government has narrowly constructed these charges to avoid overlap of the accused's actions.

If the Defense is unsure of the misconduct contained in a specification or charge, they are always free to file a bill of particulars. To date, the Defense has not sought a bill of particulars in this case.

Evidence.

Govt Exhibit 4a. The victim's statement of 9 August 2013.

Govt Exhibit 4b. Ms. [redacted] statement of 14 October 2015.

Govt Exhibit 5. Medical Documents.

5. **Oral Argument.** The Government desires oral argument on this motion.

6. **Relief Requested.** The Government respectfully requests the Court deny the accused's motion or reserve ruling until after findings.

[redacted]
Paul T. Hochmuth

CERTIFICATE OF SERVICE

I hereby certify that, on 26 April 2019, I caused a copy of this motion to be served on the Defense counsel and the Court.

[redacted]
Paul T. Hochmuth

NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **CRAIG R. BECKER** **LT/O-3** **U.S. NAVY**	**DEFENSE MOTION TO DISMISS: FAILURE TO STATE AN OFFENSE AND DUE PROCESS NOTICE ERRORS** **19 APR 2019**

1. Nature of Motion

The Government has charged Lieutenant Becker with conduct unbecoming an officer and a gentleman, without identifying any particular conduct or applicable standard to guide a factfinder. The Defense therefore respectfully moves to dismiss Charge III as failing to state an offense under R.C.M. 307(c)(3) and failing to provide the notice demanded by the Due Process Clause of the Fifth Amendment. R.C.M. 907(b)(2)(E), (3)(A).

2. Summary of Facts

In the Specification of Charge III, the Government alleges that LT Becker violated Article 133, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § when he:

> . . . did on diverse occasions between about 2 August 2013 and about 8 October 2015, wrongfully and dishonorably, physically and emotionally abuse his wife [redacted] and that under the circumstances the said conduct was unbecoming an officer and a gentleman.

3. Discussion of Law

A. Failure to State an Offense

"A specification is sufficient if it first, contain[s] the elements of the offense charged and fairly inform[s] a defendant of the charge against which he must defend, and, second, enable[s] him to plead an acquittal or conviction in bar of future prosecutions for the same offense."

United States v. Fosler, 70 M.J. 225, 229 (C.A.A.F. 2011) (citations and internal quotations omitted); *see also United States v. Sutton*, 68 M.J. 455, 457 (C.A.A.F. 2010); *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006). Through this analysis, the Court of Appeals for the Armed Forces gives effect to the President's Rule: "A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication." R.C.M. 307(c)(3).

This sufficiency requirement "ensures that a defendant understands what he must defend against." *Fosler*, 70 M.J. at 229. "Indeed, '[n]o principle of procedural due process is more clearly established than . . . notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge.'" *Id.* (quoting *Cole v. Arkansas*, 333 U.S. 196, 201 (1948)); *see also United States v. Amazaki*, 67 M.J. 666, 669-70 (A. Ct. Crim. App. 2009) (distinguishing between "failure to state an offense" as "concerned with pleading and double jeopardy," and "void for vagueness" as "based upon the Due Process Clause of the Fifth Amendment").

1. <u>The Specification does not allege every element of the charged offense.</u>

The elements of Article 133, UCMJ, are: (1) the accused did or omitted to do certain acts; and (2) under the circumstances, these acts or omissions constituted conduct unbecoming an officer and gentleman. Here, the government fails to allege what acts the LT Becker did or omitted to do. Instead the government uses broad, generalized language to group together a series of undisclosed acts. Instead of alleging the acts required for the first element, the Specification appears to focus on the effect of the unknown acts. As drafted, the Specification invites the factfinder to determine whether Mrs. [redacted] "felt" abused. But the first element of Article 133 does not require a description of what effect may have resulted from certain acts; it requires a description of the certain acts. Those specific factual allegations are not present here.

2. <u>The Specification does not fairly inform LT Becker of the charge against which he must defend.</u>

Moreover, the Specification as drafted does not fairly inform LT Becker of the charge against which he must defend. R.C.M. 307(c)(3) defines a specification as "a plain, concise, and definite statement of the essential facts constituting the offense charged." Section (G) of the discussion to this rule adds, "the specification should be sufficiently specific to inform the accused of the conduct charged, to enable the accused to prepare a defense..." The first step in preparing a criminal defense is knowing what the government is alleging the accused did. The Specification alleges that LT Becker did "wrongfully and dishonorably, physically and emotionally abused his wife" on divers occasions over a two-year period. It provides no details in regards to what physical or emotional acts LT Becker is alleged to have committed. In fact, in regards to the emotional abuse, it fails to even state whether LT Becker committed any acts at all as opposed to committing emotional abuse by omitting to do certain acts. As drafted, the conduct potentially encompassed could be almost anything - nonconsensual sex, shoving, yelling, saying unkind

things, forgetting an anniversary or birthday, repeatedly leaving dishes in the sink. Any of these acts could conceivably be the basis for the Specification as drafted. Given this breadth of conduct and the fact that the covered time period is over two-years of married life, LT Becker is left to simply speculate as to what specific acts or omissions the government contends constitute this offense. And more troubling, the government is left with the impermissible flexibility to simply change what conduct it believes constitutes physical and emotional abuse at any time, including in the middle of trial or even during closings.

While it is true that a Bill of Particulars may be used "to inform the accused of the nature of the charge with sufficient precision to enable the accused to prepare for trial," it cannot be used to repair a specification which is otherwise legally insufficient. RCM 906(b)(6). This specification is legally insufficient as it does not allege the certain acts required in the first element of Article 133 nor does it fairly inform LT Becker of the charge against which he must defend in any meaningful way.

3. <u>The Specification does not protect LT Becker against the potential of future prosecutions for the same conduct.</u>

The Specification as drafted is so sweeping in scope that no plea or outcome could preclude a second prosecution for conduct that LT Becker may have believed was under the penumbra of this Specification. For example, the Specification leaves open the possibility that LT Becker, if acquitted, could face another court-martial where a Specification might allege that he communicated a threat to his wife. This current Specification thus also fails its double jeopardy-protection requirements. *See Fosler*, 70 M.J. at 229.

B. Due Process

"Under the Due Process Clause of the Fifth Amendment, 'no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.'" *United States v. Moore*, 58 M.J. 466, 469 (C.A.A.F. 2003) (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)); *United States v. Warner*, 73 M.J. 1, 4 (C.A.A.F. 2013) ("It is well settled . . . that a servicemember must have fair notice that an act is criminal before being prosecuted.") (citations omitted).

Due Process thus demands both "fair notice that an act is forbidden and subject to criminal sanction," *United States v. Bivins*, 49 M.J. 328, 330 (C.A.A.F. 1998), as well as "fair notice as to the standard applicable to the forbidden conduct." *United States v. Vaughan*, 58 M.J. 29, 31 (C.A.A.F. 2003) (quoting *Parker v. Levy*, 417 U.S. 733, 755 (1974)); *see United States v. Lanier*, 520 U.S. 259, 265 (1997) ("[N]o man shall be held criminally responsible for conduct which he

could not reasonably understand to be proscribed.") (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964) (internal citation and quotation marks omitted)); *see also United States v. Escochea-Sanchez*, No. 20100093, 2011 CCA LEXIS 77, at *11-12 (N-M. Ct. Crim. App. Apr. 19, 2011) ("In general, fair notice has two key facets. First, the accused must have fair notice his conduct is subject to criminal sanction. Second, the accused must have fair notice of the elements against which he must defend.") (citing *United States v. Saunders*, 59 M.J. 1, 6, 9 (C.A.A.F. 2003); *United States v. Pope*, 63 M.J. 68 (C.A.A.F. 2006)).[1] Sources of fair notice that one's conduct may be punishable under the UCMJ include federal law, state law, military case law, military custom and usage, and military regulations. *Vaughan*, 58 M.J. at 31.

As our service court reiterated in *United States v. Peszynski*, "A fundamental feature of due process law is that one's guilt or innocence of a criminal accusation be determined by objective, clearly understood standards of criminality. 40 M.J. 874, 878 (N.M.C.M.R.) (citing *Smith v Goguen*, 415 U.S. 566 (1974)). As such, to satisfy due process, specifications drawn under Article 133, UCMJ, must allege conduct clearly defined and easily recognizable. *Id.* at 879 (string citations omitted). The test is simple: a "reasonable military officer would have no doubt that the activities charged constituted conduct unbecoming an officer." *United States v. Frazier*, 34 M.J. 194, 198 (C.M.A. 1994) (footnote omitted) (citing *Parker v. Levy*, 417 U.S. 733, 757 (1974)).

In addition to the generally applicable standards, the Constitution "demands more clarity of laws, [sic] which threaten to inhibit constitutionally protected conduct, especially conduct protected by the First Amendment." *United States v. Gaudreau*, 860 F.2d 357, 359-60 (10th Cir. 1988)(footnotes omitted). Specifically, the fair notice and clear standard requirements rooted in the Constitution and defined by the courts apply with even greater force and effect when the

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[1] The Due Process concepts of "fair notice and vagueness are related." *Warner*, 73 M.J. at 3 n.2; *see Parker*, 417 M.J. at 752 (vagueness doctrine "incorporates notions of fair notice or warning"). But they remain distinct: fair notice concerns the offense charged; vagueness, the underlying statute. *See United States v. Cochrane*, 60 M.J. 632, 634 (N-M. Ct. Crim. App. 2004) ("void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement") (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)); *Grayned v. Rockford*, 408 U.S. 104, 108-109 (1972) (criminal laws "must provide explicit standards" to avoid potential to "trap the innocent by not providing fair warning"); *United States v. Capital Traction Co.*, 34 App. D.C. 592, 596-598 (1910) ("A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue."). Thus, however tenuous the Government's stretching of Article 133 to cover LT Becker's alleged conduct, this Court need not resolve as-applied questions of *statutory* vagueness when the *specification* itself lacks any source of fair notice as to criminality. *See Warner*, 73 M.J. at 3-4 (setting aside conviction under Article 134 for possession of images depicting minors "as sexual objects or in a sexually suggestive way" on notice grounds and declining to evaluate for vagueness).

government attempts to criminalize otherwise constitutionally protected activity, such as verbal expression. *Peszynski*, 40 M.J. at 879 (N.M.C.M.R. 1994). In *Peszynski*, the Navy-Marine Corp Court of Criminal Appeals stressed that the only speech criminalized under our Uniform Code is "described by a particular label that sets forth a clear and objective standard by which to identify it as criminal and thereby distinguish it from non-criminal expression." *Id.* (listing examples of indecent language, disrespectful language, language that communicates a threat, language that promotes disloyalty to United States, false official statements, and perjury).

1. **Having chosen to depart from and expand upon the plain definitions Congress provided in Article 128, the Government cannot locate any source of notice that "physical and emotional abuse" was subject to criminal sanction.**

There are no federal statutes that the defense could find that criminalize "emotional abuse." Some states on the other hand do have criminal laws that address "emotional abuse." However, these laws typically require that the object of the abuse be a child or a vulnerable adult, usually defined as elderly or a resident of care facility.[2] The Defense could find no state law that prohibited simple "emotional abuse" without a special class of victim. Further, the defense could find no provision in the UCMJ or military regulation that punished or prohibited "emotional abuse." The closest offense that could be argued to provide the requisite notice is Article 93, UCMJ, Cruelty and Maltreatment. However, just as with the state laws governing "emotional abuse," Article 93, UCMJ, also requires a special class of victim, "any person subject to his orders." Without a single source on point, it cannot be said the LT Becker was placed on notice that "emotionally abuse" of his wife, without more, could result in punishment or that a reasonable military officer would have no doubt that doing so constituted conduct unbecoming an officer.

2. **The Specification does not provide the standard applicable to the conduct as required by the Due Process Clause of the 5th Amendment.**

Each aspect of the term "physically and emotionally abuse" is subject to multiple reasonable interpretations and as a result multiple standards of criminality. First the word "abuse" is undefined in the UCMJ.[3] In the context of a marital relationship, particularly a strained one

[2] See Arizona Revised Statue Section 13-3623; Delaware Code Annotated, Title 16 Section 1131; Revised Code of Washington Section 74.34.020 (defining mental abuse).

[3] Article 134, Paragraph 92, Animal Abuse, does define "abuse," however, that definition appears to be exclusively applicable cases involving animals and is of little use to other types of cases.

where there is, naturally, tension, what constitutes "abuse" would be entirely subjective and it would be impossible to properly instruct a factfinder on this language. The factfinder would instead be invited to make their own determination as to what acts or language constituted "abuse." Looking to the common definition of the verb abuse provides no additional clarity. Merriam-Webster provides the following applicable definition: to use or treat so as to injure or damage. This definition proves problematic when applying it to "physically abuse." Unlike Article 128, UCMJ, which specifically defines bodily harm and delineates types of injuries, this Specification, even with the aid to the dictionary definition of abuse leaves the factfinder to their own devices to determine what degree of physical contact is necessary to constitute the injury or damage. Some factfinders might be satisfied that an offensive touching however slight constitutes "physically abuse," while other may require more substantial bodily harm. Put simply, the factfinder is left to come up with their own standard.

Even more than with the other terms used by the government in the Specification, "emotionally abuse" is general enough that an honest dispute could exist as to what conduct constitutes emotional abuse. This point was highlighted during the Article 32 hearing in this case when Special Agent [redacted] was asked if anyone ever witnessed emotional abuse. In response to this question, Special Agent [redacted] asked the defense attorney to define emotional abuse so that she could answer the question. She then went on to state that no one had witnessed "blatant emotional abuse" but that witnesses had seen behavior that might indicate emotional abuse is going on between LT and Mrs. [redacted] (Attachment 14) Again, the factfinder is left with little guidance on what standard to apply. Some factfinders might require the government to show extreme emotional distress, while others might only require sadness or temporary unhappiness. This ad hoc, figure it out approach does not provide the definitive standards demanded by Due Process.

As drafted, this specification invites the factfinder to come up with their own arbitrary and individualized definitions of the critical terms in this novel specification thus leaving the factfinders asking "what does physically and emotionally abuse mean?" It is the essence of lacking an objective, clearly understood standard of criminality when the standard for criminality does not even arise, if ever, until some moment in the deliberation room.

3. <u>The Specification involves Constitutionally protected conduct.</u>

If the government is alleging that the conduct or a portion of it constituting emotional abuse is the verbal expression of LT Becker with or toward his wife, then it becomes even harder to argue that due process has been satisfied in regard to this Specification. Given that it does not allege the communication of a threat, indecent language, or any other of the labeled forms of speech, these communications are protected speech under the First Amendment to the United States Constitution and any attempt to criminalize this protected speech requires an even clearer and stronger form of notice than attempts to criminalize unprotected actions.

4. Relief Requested

The Defense requests that the Military Judge dismiss Charge III and its sole specification as it fails to state an offense and fails to satisfy the due process required by the 5th Amendment.

5. Oral Argument.

Unless the Government concedes the motion or this Court grants the relief on the basis of pleadings alone, the defense requests oral argument on this matter.

[redacted]
J. A. GUARINO
CDR, JAGC, USN
Detailed Defense Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
UNITED STATES NAVY
GENERAL COURTS-MARTIAL

UNITED STATES **v.** **CRAIG BECKER** **LT/O-3 USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO DISMISS: FAILURE TO STATE AN OFFENSE AND FIFTH AMENDMENT DUE PROCESS VIOLATION**

1. **Nature of Motion.**

The Government respectfully request that the Court deny the Defense Motion to Dismiss for failure to state an offense and Due Process notice errors as to Charge III and the sole specification thereunder. Charge III states an offense, provides sufficient notice to the accused under R.C.M. 307 and comports with the Due Process Clause of the Fifth Amendment.

2. **Summary of Facts.**

a. The accused is alleged to have murdered his wife, [redacted], on 8 October 2015 in the city of [redacted] by pushing or tossing her threw the 7th story window of their apartment building. Prior to murdering his wife he was physically and emotionally abusive to her between 2 August 2013 (their arrival in [redacted]) and 8 October 2015 (her death).

b. The accused was stationed at [redacted] and lived in [redacted] with his wife and infant daughter in an apartment.

c. The accused and his wife were married in 2008 and still legally married at the time of her death. Mrs. [redacted] family lived in the United States.

d. While in [redacted] Mrs. [redacted] had a cell phone and the [redacted] had a joint bank account. At one-point Mrs. [redacted]

e. During his time in [redacted] with his wife the accused took specific steps that were physically and emotionally abusive to his wife [redacted] They include the following as illustrative examples:

1. Accessing her personal cell phone to monitor her communications with others,

2. Changed passwords to their joint bank account to deprive her access to money,

3. Confiscated her personal cell phone to prevent her contact with friends and family,

4. Controlled her contacts with friends and family to isolate her from them,

5. Prevented her from speaking with her family,

6. Made her walk to the hospital when she had an [redacted]

7. Confiscated her identification card and credit cards,

8. Prevented her from having her friends as visitors to the home,

9. Controlled what clothes she wore.

3. Discussion.

The Defense alleges that the Charge is deficient in six specific ways and the Government will address each in turn. It is not the Government's intention to prove the accused's guilt at motions or present its entire case-in-chief to support its motion. As the Defense separated its motion into two distinct parts – Failure to State an Offense under R.C.M. 307 and Due Process under the Fifth Amendment – the Government will mirror the Defense's structure

Failure to State an Offense under R.C.M. 307

Issue 1: Does the Specification allege every element of the charged offense

The specification alleges every element of an Article 133, UCMJ offense. The elements of an Article 133, UCMJ offense are: 1) the accused did or omitted to do a certain act; and 2) under the circumstances these acts or omissions constituted conduct unbecoming an officer and gentleman. The specification notes a time for the alleged offenses – 2 August to 8 October 2015 – and a place for the offenses – [redacted]. The acts that accused did are succinctly stated – physically and emotionally abused his wife. It is axiomatic that physically and emotionally abusing a spouse is conduct unbecoming an officer and a gentleman. While there are defenses to physically abusing a person, such as self-defense under R.C.M. 916(e), here is no right to abuse a spouse.

The UCMJ (pre-MJA 16 renumbering) criminalizes assault across a wide spectrum from Article 90, assaulting a commissioned officer, Article 93, cruelty and maltreatment, Article 119a, injury of an unborn child, Article 124 maiming, and Article 128, assault. A physical assault may be charged in a variety of ways under Article 128 such as assault consummated by a battery, aggravated assault with a force or means likely to produce death or grievous bodily harm, or assault in which grievous bodily harm is inflicted. While the Government could have chosen multiple methods of charging it referred charges an Article 133, UCMJ, offense. Article 133, UCMJ offenses may mirror other possible UCMJ offenses. *United States v. Rodriguez*, 18 M.J. 363 (C.M.A. 1984).

"The essence of an Article 133 offense is not whether the accused officer's conduct otherwise amounts to an offense… but simply whether the acts meet the standard of conduct unbecoming an officer. The appropriate standard for assessing criminality under Article 133 is whether the conduct or act charged is dishonorable and compromising … this notwithstanding whether or not the act otherwise amounts to a crime." *United States v. Conliffe*, 67 MJ 127, 132 (C.A.A.F. 2009). The focus of the crime is the accused's actions and not the emotions or feelings of the victim.

The Defense argues that the specification invites the factfinder to determine whether Mrs. [redacted] "felt" abused. This is an attempt to focus the criminality of the accused's behavior on the victim's reactions rather than the acts of the accused. The Government is required to show that the acts occurred for an Article 133 offense to stand and the Government has listed various acts in the facts of the motion. Members determine whether conduct is dishonorable and compromising irrespective how Mrs. [redacted] felt about his actions. The focus is on the accused's behavior and not subjective feelings of another person. The Defense's attempt to paint Mrs. [redacted] feelings as relevant or an element are without legal authority.

Society, Congress and the President expect officers to support spouses vice emotionally and physically abuse them. Courts have upheld emotional abuse as violations of Article 92, UCMJ, dereliction of duty, or a violation of Article 93, UCMJ, cruelty and maltreatment. See, *United States v. Ellis*, 2016 CCA Lexis 24 (A.F.C.C.A. 2016) Congress provides for additional monetary allowances for service members to provide support for their spouses through Basic Allowance for Housing with Dependents and Family Separation Allowance to help defray costs. See, 37 U.S. § 403. The President, in

creating both the Rules for Courts-Martial and Military Rules of Evidence provides that emotional abuse is significant negative behavior that can and should be considered at trial both on the merits and in sentencing. See, R.C.M. 1001(b)(4) allowing evidence in aggravation including but not limited to psychological impact; R.C.M. 1001A allowing evidence of psychological impact on victims; and M.R.E. 404(b) evidence as motive, intent and plan.

The Court should find that the Government has alleged every element of the offense as required under R.C.M. 307. The elements are stated and provide sufficient notice to the accused. The Charge is not dependent upon how Ms. [redacted] "felt" but on how the accused acted. It is the trial of the accused, not the trial of Mrs. [redacted] Officer members, who uphold the very standards that the accused is charged violating, will receive instructions on how to evaluate the presented evidence during the merits. Nothing more definite is required.

Issue 2: Does the Specification fairly inform LT Becker against the charges which he must defend?

The gravamen of the Defense argument is that the specification does not lay out at every time and place the specific act that the accused committed that was dishonorable and wrongful. The Defense list a litany of possible acts, from plausible such as non-consensual sex to farcical, such as leaving dishes in the sink. The Defense argues that this allows the Government to alter the charges during trial or even during closings. (The closing argument is without merit as closing argument, as all statements of counsel, are not evidence.) However, the Defense has extensive discovery that shows the full panoply of acts by the accused, including those listed in the facts section of this motion. The accused had a fully contested Article 32 hearing, where they chose tactically not to request or call any witnesses. The Preliminary Hearing officer, relying upon evidence presented by the Government, noted many of the facts in his Article 32 report. The Defense should be well acquainted with the facts of the case after seeing the Government's Article 32 case, hearing the Government's argument and reading the Article 32 report.

The Defense argument also fails as the UCMJ is a notice pleading jurisdiction wherein the Government is not required to list every act at all times and places. R.C.M. 307(c)(3). The Supreme Court approved of the use of notice pleading almost 100 years

ago by holding "the rigor of old common law criminal pleading has yielded, in modern practice, to general principle that formal defects, not prejudicial, will be disregarded." *Hagner v. United States*, 285 U.S. 427 (1932). The test is balancing notice pleading with fair notice, not whether the specification comports to what the defense desires. *United States v. Tunstall*, 72 M.J. 191 (C.A.A.F. 2012). Relying upon the test first articulated in *Hagnar* service courts have held;

> The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet; and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.

United v. Manning, 78 M.J. 501 (A.C.C.A. 2018).

The specification contains the elements of the offense and appraises the accused of what he must be prepared to meet. The question is not "could" it be more definite and certain but is it required to be more definite and certain? It is not. The specification as written provides notice of the legal theory of criminality under Article 133, UCMJ. It provides notice of two distinct and separate categories of criminal conduct to defend against. It provides a time and place for the conduct which limits the time-frame of the events from the totality of the marriage to the time spent in [redacted] The Defense has received extensive discovery from both the United States and [redacted] authorities. The Government is not required to do more.

The Defense's states that a Bill of Particulars under R.C.M. 906(b)(6) cannot repair a legally insufficient specification. That is a legal truism and means nothing in the current case as there is nothing to repair. However, a Bill of Particulars is a possible remedy in lieu of dismissal and Courts should not start at the drastic remedy of dismissal. Additionally, the Defense never requested a Bill of Particulars in an effort to answer their own questions, as they know the answers would be fatal to their argument.

The Court should deny the Defenses' motion as the specification fairly informs the accused of the charges upon which he must defend. In the alternative, the Government is prepared to provide a Bill of Particulars if ordered to do so.

Issue 3: Does the specification protect LT Becker against the potential of future prosecution for the same act?

The Defense avers that "no plea or outcome could preclude a second prosecution for the same conduct." First, as to a plea, case law is squarely against the Defense on this issue. In *United States v. Ellington*, 2012 CCA LEXIS, 35 (A.C.C.A. 2012) the accused, after a plea on appeal, attacked a specification for failing to provide notice of the charge of child endangerment under Article 134, UCMJ. The Court noted that "the military is a notice pleading jurisdiction" and "charges and specifications first challenged on appeal, even where an appellant pleaded not guilty, are liberally construed." *Id.* The Court went further to hold that appellate courts do not set aside specifications unless "it is obviously defective that by no reasonable construction can it be said to charge the offense for which conviction is held." *Id.* However, this case is not a plea.

The Defense additionally avers that the specification would run afoul of Double Jeopardy grounds as the accused could later possibly be charged with communicating a threat in violation of Article 134, UCMJ. Without providing any legal analysis the Defense makes a sweeping conclusion that the specification must be dismissed. However, the test for Double Jeopardy has not only a "same elements" test but also a "same conduct" test for a second prosecution. *United States v. Dixon*, 509 U.S. 688 (1993). If the Government were to produce evidence of a threat committed by the accused, he would have the opportunity to pled a prior conviction to bar a second trial. Needless to say the test and application of possible Double Jeopardy, on a second prosecution, which is not ripe for consideration, is not the basis to dismiss the specification and the Defense motion should be denied.

Due Process under the Fifth Amendment

Issue 4 & 5 combined: Is there a source of notice that physical and mental abuse was subject to criminal sanction & Does the Specification provide an applicable standard as required by the Due Process Clause of the Fifth Amendment

Article 133, UCMJ, notes that not every action by an officer is punishable under Article 133 but notes "there is a limit of tolerance based upon the customs of the service and military necessity below which the personal standards of an officer cannot fail without

seriously compromising the person's standing as an officer and a gentleman." And one of the noted standards that is unacceptable is cruelty. An officer cannot be cruel to his spouse. While the Defense argues that cruelty or emotional abuse is not otherwise found in the UCMJ that is irrelevant. "An officer may be charged with Article 133 for conduct which may not constitute a violation of other provisions of the Code." *United States v. Taylor*, 23 M.J. 314 (C.M.A. 1987).

The Department of Defense has long noted the importance of home and family life and its relationship to the mission of Armed Forces. As early as 1981 DoD Directive 6400.01, Family Advocacy Program, emphasized the importance of a healthy family life to the military mission. The Secretary of the Navy created a Family Advocacy Instruction under SECNAVINST 1752.3B. This instruction notes that there is a Naval tradition of "taking care of our own." It notes that "domestic abuse are (*sic*) unacceptable and incompatible with these high standards of professional and personal discipline." It states that "abusive behavior by DON personnel destroys families, detracts from military performance, negatively affects the efficient functioning and morale of military units and diminishes the reputation and prestige of the military service in the civilian community." SECNAVINST 1752.3B defines domestic abuse, in part, as "a pattern of behavior in emotional/psychological base, economic control, and/or interference with personal liberty that is directed towards a person of the opposite sex who is: 1) a current or former spouse, 2) a person with whom the abuser shares a child in command and 3) a current of former intimate partner with whom the abuser shares or has shared a common domicile.

The accused was the spouse of Mrs. [redacted] they have a child together and they shared a domicile in [redacted] This definition squarely fits the category of the accused. Courts have long held that abuse undermines a marriage. See, *United States v. Kudlow*, 1997 CCA LEXIS 484 (N.M.C.C.A. 1997) (citing *United States v. O'Brien*, 11 C.M.R. 105 (C.M.A. 1953) involving an officer murdering his wife.)

The Government is not charging a violation of the Family Advocacy Program instruction. It doesn't need to. Article 133, UCMJ, clearly allows the proscription of emotional abuse that the Navy has articulated that is behavior that is incompatible with good order and discipline, destroys families and detracts from military service. *Kudlow*, CCA Lexis at 485. As noted over 50 years ago in *United States v. Giordano*, 15 U.S.C.M.A. 163, 168 (C.M.A. 1964) the appropriate standard for "assessing criminality

under Article 133 is whether the conduct or act charged is dishonorable and compromising ... this notwithstanding whether or not the act amounts to a crime." Thus while the Government is not charging a violation of the SECNAVINST 1752.3B it is evident that emotional abuse of a family is dishonorable, compromises the officer's standing, impacts good order and discipline. The Navy spends an enormous amount of time, effort and money to prevent abuse and reconcile families when abuse occurs. As noted in *Parker v. Levy*, 417 U.S. 733, 750 (1974) "the Uniform Code of Military Justice regulates a far broader range of the conduct of military personnel than a typical state criminal code regulates the conduct of civilians." *Parker* went onto hold that "in the armed forces some restrictions exist for reasons that have no counterpart in the civilian community." *Id* at 759-760. Emotional abuse of a dependent spouse, while overseas, and living in a foreign allied country as their guest needs no statutory definition to be conduct unbecoming an officer and gentleman. Custom of the service is to take care of our own and for officers to treat their wives with dignity and respect. The Navy knows by its history and experience and teaches is sailors that destroying your own family and home is disgraceful and impacts good order, discipline and unit operational readiness. As an officer the accused was on notice that emotional and physical abuse of his wife was subject to criminal sanction under Article 133, UCMJ as behavior incompatible with the service.

The Defense cites *United States v. Vaughn*, 58 M.J. 29 (C.A.A.F. 2003) for the Fifth Amendment Due Process authority that an accused cannot be held criminally liable without fair notice that their conduct may be subject them to criminal liability. *Vaughn* notes one source of notice is military custom and usage. Vaughn dealt with child neglect charged under Article 134, which at the time was not an enumerated Article 134 offense. The Court held "fair notice does not depend on military case law or statue alone." *Id* at 32. It went onto hold "there is an established custom of protecting dependents from harm. Dependents are an integral part of the specialized military community." Id. The Court also discussed the fact that dependents overseas, as *Vaughn* occurred in Germany, were uniquely situated, holding "this is especially true of dependents based overseas whose welfare the United States bears increased responsibility in the absence of normal familial and social ties, as well as the array of public services available within the United States." *Id*.

Vaughn and its holdings provide two important sources of notice for the accused. First is the notice of custom that the military overseas takes care of its own and that

dependents are an integral part of the military. The second notice is that the custom of the service, as also articulated by DoD instructions and SECNAV instructions, have been memorialized in case law. *Vaughn* provides the Defense with two sources of notices that abuse of dependents overseas may result in criminal sanctions. The fact that the Government has chosen to charge the offense as an Article 133, UCMJ offense does not obviate this dual notice of custom and case law. The accused was long on notice that his behavior overseas could subject him to criminal sanctions.

The Defense argument that physical abuse cannot be charged under Article 133, UCMJ, due to a lack of a definition is without merit. Taken to its logical conclusion almost no charge would be available under Article 133, UCMJ, as there are limited statutory definitions under Article 133, UCMJ. An officer may physically be cruel and abuse his subordinates (Article 93, UCMJ), may not strike a superior officer (Article 90), cannot strike an enlisted sailor performing law enforcement duties (Article 128) and cannot strike and abuse an animal (Article 134, UCMJ). The accused's wife was not chattel to strike or do with as he pleased; Ms. [redacted] was a human being, an American, she was a mom, a daughter, and granddaughter.

The crux of the defense's argument is "what does physical and emotional abuse mean?" It means many things to an officer. An officer cannot hit, strike, punch, kick, or offensively touch his wife. He could not hold her down against her will or use his superior strength to force compliance with his will. He cannot economically or socially isolate her from friends and family in an effort to control her, particularly overseas. He cannot verbally belittle or be verbally cruel. He cannot fail to provide her medical care. He cannot tell her what clothes to wear. The list could go on and on.

In a purely military offense such as Article 133, UCMJ, officer members are uniquely qualified to understand what "conduct unbecoming" is as they themselves set the customs and acceptable boundaries of behavior. As for standards to judge behavior by there are standards and they are listed in Military Judge's Benchbook which states: "Conduct unbecoming an officer and gentleman means behavior in an official capacity which, in dishonoring or disgracing the individual as a commissioned officer, seriously detracts from his character as a gentleman or behavior in an unofficial capacity which, in dishonoring or disgracing the individual personally seriously detracts from his standing as a commissioned officer. Unbecoming conduct means misbehavior more serious than slight,

and of a material and pronounced character. It means conduct morally unfitting and unworthy rather than merely inappropriate or unsuitable misbehavior which is more than opposed to good taste and propriety." This provides guidance to members to distinguish between the defense's arguments of dishes left in the sink, minor inoffensive touching, and acceptable disagreements in every marriage. There is no Due Process Clause violation with the specification and the Defense motion should be denied.

Issue 6: Is emotional abuse Constitutionally Protected Speech?

It is difficult to assess the Defense's argument as to Constitutionally Protected Free Speech without their citation to any authority. However, *Parker*, 417 at 758 noted that "while members of the military are not excluded from the protection guaranteed by the First Amendment, the different character of the military community and the military mission requires a different application of those protections." The Government avers that an officer can be cruel to his wife without resorting to threats of violence. As an example, ordering a spouse not to speak with her parents may not be a threat of physical violence but it is cruel and emotional abuse. Telling a spouse to walk to the hospital with an appendicitis is not violent but is cruel and emotional abuse. Ordering a spouse to wear certain clothes is not a threat of violence but is cruel and emotional abuse. None of these acts are protected by the First Amendment's Free Speech clause.

4. Burden of Proof.

Per R.C.M. 905(c) the burden of proof on any factual issue the resolution of which is necessary to decide a motion shall be a preponderance of the evidence. Per R.C.M. 905(c)(2) the burden of persuasion is on the moving party, the Defense.

5. Evidence to be Presented

a. Testimony of NCIS SA [redacted]

b. Government Exhibit 4

6. Relief Requested.

The Government request that the Court deny the Defense motion to dismiss.

6. **Oral Argument.**

The government respectfully requests oral argument on this motion.

/s/
J. L. JONES

****

CERTIFICATE OF SERVICE

I hereby certify that, on 26 April 2019, I caused to be served a copy of this motion on the trial counsel for the government and the court.

/s/
J. L. JONES

NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **CRAIG R. BECKER** **LT/O-3** **U.S. NAVY**	**DEFENSE MOTION IN LIMINE: EXCLUDING STATEMENTS OF MRS. [redacted] AS HEARSAY AND VIOLATIVE OF THE 6TH AMENDMENT** **19 APR 2019**

1. Nature of Motion

Pursuant to R.C.M. 906(b)(13) and M.R.E. 802, the Defense respectfully moves this court for an order *in limine* excluding all statements made by Mrs. [redacted] relating to Charge II, Specification 1[1] as these statements are inadmissible hearsay and further violate the 6th Amendment's right to confront witnesses.

2. Summary of Facts

1) On the night of 8 August 2013, LT Craig Becker and Mrs. [redacted] were staying in Room 128 of the [redacted] (Attachment 6)

2) At approximately 0130 on 9 August 2013, Mrs. [redacted] contacted the front desk and requested they call military law enforcement. (Attachment 7)

3) At approximately 0142, SPC [redacted] of the Army Military Police arrived and located Mrs. [redacted] in the dining room of [redacted] LT Becker was in room 128 at this time. (Attachment 8)

[1] The defense believes it has identified all relevant statements made by Mrs. [redacted] related to Charge II, Specification 1. The intent of this motion is to litigate the admissibility of all such statements at this time. If the Government has related statements it intends to offer at trial, the defense, by this motion, is objecting to those statements as well and respectfully requests that they be litigated with this motion.

4) When SPC [redacted] approached Mrs. [redacted] she made a verbal statement in which she stated LT [redacted] assaulted her. SPC [redacted] asked Mrs. [redacted] if she would make a statement. Mrs. [redacted] said she did not want to do so but then added additional details to her previous statement. (Attachment 8)

5) SPC [redacted] then escorted Mrs. [redacted] to room 236 and left her to conduct further investigatory duties. (Attachment 8)

6) By 0350, LT Becker was removed from [redacted] and provided lodging in the transient barracks. (Attachment 8)

7) Sometime after 0350, SPC [redacted] spoke with Mrs. [redacted] again and told her whenever she felt comfortable she was welcome to make a statement at the Military Police station. (Attachment 8)

8) At 0400, Mrs. [redacted] contacted Military Police stating that her husband physically assaulted her and requesting to come to the police station to make a statement. (Attachments 7 and 8)

9) At 0649, Mrs. [redacted] made written report. (Attachment 9)

10) At 1750, Mrs. [redacted] returned to the Military Police station and at 1902 she provided another statement recanted her previous statements. (Attachments 10 and 11)

11) On 14 November 2013, Mrs. [redacted] was interviewed NCIS Special Agent [redacted] and again recanted her statements from the early morning of 9 August 2013. (Attachment 12)

12) On 27 May 2014, a lawyer for [redacted] informed NCIS that LT Becker's command was taking no judicial or administrative action on this matter. (Attachment 6)

13) On 03 June 2014, NCIS closed their investigation due to the fact that no judicial or administrative action was being pursued. (Attachment 6)

14) Prior to Mrs. [redacted] death, no additional actions or inquiries were made in relation to this matter. However, following her death, at least one of Mrs. [redacted] acquaintances indicated that Mrs. [redacted] had discussed this incident with her at some point. (Attachment 16)

3. Discussion of Law

A. The challenged statements constitute inadmissible hearsay.

M.R.E. 802 provides that absent an applicable exception, hearsay is not admissible at court-martial. M.R.E. 801 defines hearsay as any statement the declarant does not make while testifying at the current trial or hearing and is being offered to prove the truth of the matter asserted in the statement.

With regard to Charge II, Specification 1, the statements made by Mrs. [redacted] are the only proof that the offense occurred and as such will certainly be offered by the Government to prove the truth of the matter asserted in the statements. Obviously Mrs. [redacted] will not be in court testifying to these matters. As such these statements constitute hearsay and the Government should be precluded from offering them at trial.

B. The admission of these statements violates the Sixth Amendment.

The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." In *Crawford* v. *Washington,* 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the Supreme Court held that the Sixth Amendment's Confrontation Clause bars the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." While the Court did not give an exhaustive list as to what constituted testimonial statements, they specifically included "[s]tatements taken by police officers in the course of interrogations," *ibid.;* see also *id.*, at 53, 124 S. Ct. 1354, 158 L. Ed. 2d 177. The court went on to clarify that the term interrogation was not used as a term of art, but instead in its colloquial sense. 541 U.S., at 53, n.

4, 124 S. Ct. 1354, 158 L. Ed. 2d 177. As such, the statements that were made by Mrs. [redacted] to law enforcement in this case constitute testimonial hearsay and Government should be precluded from offering them at trial for that reason as well.

4. Relief Requested

The Defense requests that the Military Judge excluding all statements made by Mrs. [redacted] relating to Charge II, Specification 1 as these statements are inadmissible hearsay and further violate the 6th Amendment's right to confront witnesses.

5. Oral Argument. Unless the government concedes the motion or this Court grants the relief on the basis of pleadings alone, the defense requests oral argument on this matter.

[redacted]

J. A. GUARINO
CDR, JAGC, USN
Detailed Defense Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **CRAIG R. BECKER** **LT/O-3** **U.S. NAVY**	**DEFENSE MOTION TO ECLUDE STATEMENTS OF MRS. [redacted] AS HEARSAY AND VIOLATIVE OF THE 6TH AMENDMENT** **30 APRIL 2019**

1. Nature of Motion

The Defense provides the following Reply to the Government's Response to the above titled motion.

2. Summary of Facts[1]

1) On the night of 8 August 2013, LT Craig Becker and Mrs. [redacted] were staying in Room 128 of the [redacted] (Attachment 6)

2) At approximately 0130 on 9 August 2013, Mrs. [redacted] contacted the front desk and initiated a call to military law enforcement. (Attachment 7)

3) At approximately 0142, SPC [redacted] of the Army Military police arrived and located Mrs. [redacted] in the dining room of [redacted] LT Becker was in room 128 at this time *and was clam and cooperative*. (Attachment 8)

4) When SPC [redacted] approached Mrs. [redacted] she made a verbal statement in which she stated LT Becker assaulted her. SPC [redacted] asked Mrs. [redacted] if she would make a statement. Mrs. [redacted] declined but then added additional details to her previous statement. (Attachment 8)

5) SPC [redacted] then escorted Mrs. [redacted] to room 236 and left her to conduct further investigatory duties. (Attachment 8)

6) By 0350, LT Becker was removed from [redacted] and provided lodging in the transient barracks. (Attachment 8)

[1] Italicized matters are the matters that differ from the original summary of facts.

7) Sometime after 0350, SPC [redacted] spoke with Mrs. [redacted] again and told her whenever she felt comfortable she was welcome to make a statement at the military police station. (Attachment 8)

8) At 0400, Mrs. [redacted] contacted military police stating that her husband physically abused her and requesting to come to the police station to make a statement. (Attachments 7 and 8)

9) At 0649, Mrs. [redacted] made written report. (Attachment 9)

10) At 1750, Mrs. [redacted] returned to the military police station and at 1902 she provided another statement to the military police retracting her previous statements. (Attachments 10 and 11)

11) On 13 August 2013, Mrs. [redacted] reported to her medical provider at [redacted] that the [redacted] that she was taking was causing significant side effects to include [redacted] (Attachment 17)

12) On 14 November 2013, Mrs. [redacted] was interviewed NCIS Special Agent [redacted] again retracting her statements from the early morning of 9 August 2013. (Attachment 12)

13) On 27 May 2014, a lawyer for [redacted] informed NCIS that LT Becker's command was taking no judicial or administrative action on this matter. (Attachment 6)

14) On 03 June 2014, NCIS closed their investigation due to the fact that no judicial or administrative action was being pursued by the command. (Attachment 6)

3. Concessions by the Government.

It appears through their motion that the Government is conceding that all statements made by Mrs. [redacted] related to this event are inadmissible hearsay with the exception of those made to the desk clerk and the oral statements made to Specialist [redacted] immediately upon his arrival on the scene[2]. These inadmissible statements includes those statements made to Ms. [redacted] referenced in summary of fact j. of the Government Response.

4. Discussion of the Law.

The admission of these statements violates the Sixth Amendment.

[2] The Defense is unclear what subparagraph 3. on page 6 of the Government's Response is referencing. It appears to be an inadvertent inclusion of facts relating to the Defense's other motion seeking to exclude hearsay testimony of an unidentified woman who was present around the scene of Mrs. [redacted] fall in October 2015. The Defense is assuming that the Government was intending to reference the oral statements Mrs. [redacted] made to Specialist [redacted] upon his arrival at the base hotel.

The Government incorrectly asserts that the statements made by Mrs. [redacted] to Specialist [redacted] are nontestimonial. In *Davis v. Washington* and *Hammon* v. *Indiana*, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), the Court clarified that statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. Id at 822.

In regard to the first statements Mrs. [redacted] gave to Specialist [redacted] the facts here are almost identical to those in *Hammon* where the Supreme Court found the statements to be testimonial. *Id.* There was no emergency in progress. Despite what the Government asserts in its summary of fact f., LT Becker was already separated from his wife when Specialist [redacted] arrived. She was in the dining room of the lodge and he was in room 128.[3] These locations are separated by significant distance including four family suits, two standard rooms and the front deck.[4] Specialist [redacted] heard no arguments or ongoing dispute, physical or verbal. There was no immediate threat to Mrs. [redacted] or to the public. There was no allegation of the use of a weapon. Furthermore, LT Becker was calm in his room and was not causing on any other type of disturbance. It was clear that there was no danger posed to either Mrs. [redacted] or the public at large. When Specialist [redacted] first spoke with Mrs. [redacted] he was not seeking to determine "what is happening," but rather "what happened." In fact, that is exactly what he asked Mrs. [redacted] Specialist [redacted] states that he asked her if she was comfortable making a statement about what had happened.[5] Furthermore, the way that Specialist [redacted] responded with regard to how he approached LT Becker and the lack of medical or other services provided to Mrs. [redacted] show that objectively viewed, the primary purpose of his interaction with Mrs. [redacted] was to investigate a possible crime and create a substitute for testimony. As such the statements made by Mrs. [redacted] to Specialist [redacted] should be excluded as testimonial.

[redacted]
J.A. GUARINO
CDR, JAGC, USN
Detailed Defense Counsel

[3] Attachment 8.
[4] Attachment 13.
[5] Attachment 8.

NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
UNITED STATES NAVY
GENERAL COURTS-MARTIAL

UNITED STATES **v.** **CRAIG BECKER** **LT/O-3 USN**	**GOVERNMENT' RESPONSE TO THE DEFENDANT'S MOTION TO EXCLUDE STATEMENTS OF THE VICTIM AS HEARSAY AND VIOLATIVE OF THE 6TH AMENDMENT** **26 APRIL 2019**

1. Nature of Motion.

The Defense moved to exclude the statements of the victim Mrs. [redacted] claiming they are hearsay and a violation of the Confrontation Clause of the 6th Amendment. The Government asks the Court to DENY the Defense's motion and find the statements made by the victim to a hotel desk clerk and Army Military Police that the accused had physically assaulted her are admissible, pursuant Military Rules of Evidence MRE 803(2)(Excited utterance).

2. Summary of Facts.

a. The Accused is alleged to assaulted his wife on or about 9 August 2013 at or near [redacted] by strangling her by placing his hands around her neck.

b. The accused and his wife were married in 2008 and around 2 August 2013 the accused transferred to NATO Headquarters in [redacted] When they arrived in [redacted] they initially stayed in the US Army Lodge on base.

c. The US Army Lodge is the equivalent of a Navy Gateway Inn and Suites. It is modern hotel where servicemembers and their families could stay for some time while they seek housing. The US Army Lodge is on [redacted] and US Army military police are the local on-base law enforcement.

d. On 9 August Mrs. [redacted] went to the front desk of the US Army Lodge and requested that the civilian clerk, Mr. [redacted] working at the front desk contact

police as she had been assaulted by her husband in their hotel room a short time beforehand. The clerk, a [redacted] citizen who speaks English, called the base police. Base police were called approximately 0132 in the morning.

e. US Army military police officer Specialist [redacted] arrived at approximately 0142 and met Mrs [redacted] at the hotel. Mrs [redacted] was curled up on the floor of the hotel floor and crying. While talking to Mrs [redacted] she stated that the accused had picked her up and thrown her to the ground multiple times and then attempted to strangle her in their room.

f. US Army police separated the [redacted] with LT Becker initially going to the police station. Between 0200 to 0400 the police separated the [redacted] as Mrs. [redacted] moved into a different hotel room and the accused into the barracks. Around 0400 Mrs. [redacted] requested to be taken to the police station to make a statement.

g. At approximately 0400 Mrs [redacted] was picked up by US Army military police officer Specialist [redacted] She was transported to the police station where she made a written statement. During her ride to the police station she was upset and swore and claimed the accused was manipulating the process. The written statement by Mrs [redacted] was made at approximately 0649 on 9 August 2013.

h. Around 1750 on 9 August 2013 Mrs [redacted] returned to the police station and made statements accusing the police of incompetence claiming they were "useless" and a "piece of shit." She stated she felt coerced into making her 0649 statement. Her statement is not a factual recantation but discusses her extreme displeasure at how she was treated by law enforcement. She also stated that she participated in a "crisis counseling" with her husband at the Behavioral Health Center onboard the base between her initial 0649 statement and her 1750 statement.

i. On 14 November 2013 she made a written factual recantation of the August assault to the Naval Criminal Investigative Service.

j. After the event, at an unknown time but close to Mrs. [redacted] death, she spoke with a friend of hers, Ms. [redacted] Mrs. [redacted] stated that she told the accused "choked her" and was "rough" in 2013 in [redacted]. Mrs. [redacted] also stated that she dropped the charges due to the concern that it would impact her husband's career.

3. **Discussion.**

Does the Victim's statements about being assaulted by the Accused constitute testimonial hearsay?

On 8 Oct 2019, [redacted] (Victim) was murdered after she was pushed from the 7th floor of the apartment she shared with the Accused, in [redacted]. Prior to her death, the Victim stayed at the Army lodge upon arriving in [redacted] with her husband, the Accused. On the evening of 9 August 2013, the Victim and the Accused went out to dinner. Upon their return to their temporary lodging, the Accused assaulted the Victim by throwing her about their hotel room and placing his hands around her throat and pressing down. (The motivation for the assault appears to have been the discovery by the accused of the victim speaking with another man.) The Victim was able to escape the hotel room and asked the desk clerk to call the police. After the police arrived, the Victim gave a statement detailing the abuse she suffered at the hands of the Accused.

The 6th Amendment of the United States Constitution guarantees the right of accused to be confronted by the witnesses against them. *Ohio v. Clark*, 135 S. Ct. 2173, 2179 (2015). The Confrontation Clause thus limits the admissibility of out of court statements where the primary purpose is testimonial. *Crawford v. Washington*, 541 U.S. 36 (2004). However, "[w]here no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause." *Clark*, 135 S. Ct. at 2180. To determine the primary purpose of a statement, the Court of Appeals for the Armed Forces has set for a series of inquiries to determine the testimonial nature of an out of court statement. *United States v. Rankin*, 64 M.J. 348, 352 (CAAF 2007). "First, was the statement at issue elicited by or made in response to law enforcement or prosecutorial inquiry? Second, did the "statement" involve more than a routine and objective cataloging of unambiguous factual matters? Finally, was the primary purpose for making, or eliciting, the statements the production of evidence with an eye toward trial?" *Id.*

Applying the three pronged test set out in *Rankin*, it is clear the Victim's statements to the desk clerk at the Army Lodge and responding law enforcement about the Accused's assault were not testimonial.

1. First, the statement to the desk clerk was not elicited by any responding official. However, clearly the statements to Army Military Police were made to law enforcement.
2. The statement itself does constitute something beyond a "routine and objective cataloging of unambiguous factual matters". The Victim's statements were a clear description of his assault on her that evening.
3. The primary purpose of the statement was not to create evidence for trial. The statement to desk clerk was for the purpose of obtaining help. This is akin to calling 9-1-1 for someone new to a foreign country who has had their ability to seek assistance removed from them by their abuser. Likewise, the Victim's statements to Army MP's was made while the Victim was under the influence of her abuse. This excited utterance reflects a statement not designed to create evidence at trial, but was merely a recitation of how she had been abused.

Viewing the Victim's statement, using a totality evaluation, it is clear prongs one, two and three reflect the non-testimonial nature of the statement. *United States v. Perkins*, 2016 CCA LEXIS 441, 17-18 (N-M.C.C.A. 2016). The unprovoked statement to the hotel desk clerk is not testimonial. Likewise, the statement the Victim made to law enforcement are not testimonial in nature.

Does Victim's statement to the Accused meet a hearsay exception under the Military Rules of Evidence?

Once this Court finds the Victim's statements are not testimonial, it must then determine if the statements meet an exception in the Military Rules of Evidence. The statement of the Victim to the police and desk clerk meets the excited utterance hearsay exception.

Does the Victim's Statement constitute and excited utterance, pursuant to Mil. R. Evid. 803(2)?

An excited utterance is a statement made about a startling event while the declarant

remains under the influence of the startling event. *United States v. Rich*, 2016 CCA LEXIS 493 (A.C.C.A. 2016). Military case law has devised a three-pronged test to determine whether a hearsay statement qualifies as an excited utterance: "(1) the statement must be "spontaneous, excited or impulsive rather than the product of reflection and deliberation"; (2) the event prompting the utterance must be "startling"; and (3) the declarant must be "under the stress of excitement caused by the event." *United States v. Arnold*, 25 M.J. 129, 132 (C.M.A. 1987); *see also United States v. Bowen*, 76 M.J. 83, 88 (CAAF 2017). In *United States v. Feltham*, CAAF held a military judge did not abuse his discretion in admitting the statements a male sailor made to his roommate approximately one hour after appellant forcibly orally sodomized him. *United States v. Feltham*, 58 M.J. 470, 475 (CAAF 2003). The *Feltham* Court found that the victim was still under the stress of a startling event; therefore, the lapse of time was not dispositive. *Id.*

There is ample case law indicating the mere fact a statement is given to law enforcement does not, by itself, removed it for consideration of being an excited utterance. *United States v. Scarpa*, 913 F. 3d 993, 1016 (2nd Cir. 1990); *United States v. Gambardella*, 2012 U.S. Dist. LEXIS 11856, 7 (S.D.N.Y 2012). In *Scarpa*, the Court found the victim's statement to the police, as he lay in his hospital bed following an assault, to be an excited utterance. *Scarpa*, 913 F. 3d. at 1016.

In *Gambardella*, the victim was physically assaulted by the defendant in an effort to extort money. The victim told police, after a 10-minute drive to the police station, that the defendant had approached from behind and placed him in a headlock. *Gambardella* 2012 U.S. Dist. LEXIS at 4. The Court allowed the statement, describing both the assault and the person who had committed the assault, was admissible as an excited utterance because the victim remained under the influence of the startling event. *Id* at 8-9.

In the instant case, the Victim's statement to both the hotel desk clerk and Army MPs meet the tests established in *Arnold* and the other cited legal authority.

1. Her statement to the desk clerk was spontaneous and not the result of questioning. It was a statement made after escaping the assaultive behavior of the Accused. The Clerk described her as being emotional, upset, and seeking a place to hide from the person who had assaulted her. In addition, while her statements to responding officers, where they found her upset and hiding from

the Accused were made while in response to questions about what had happened.

2. The Victim presented, to both the desk clerk and law enforcement as being under the influence of a startling event. Her behavior is consistent with someone who was upset. Clearly having someone, particularly your spouse, physically assault you is a startling event. This is amplified when the assault involves them placing their hands around your neck and strangling you.
3. It is equally, unquestioned that the Victim remained under the stress of the exciting event. Here the statement was made within minutes of the Victim impacting the sidewalk after being pushed from the 7th floor of her apartment building.

Given the facts in this case, the Victim's statements about her assault at the hands of her husband to Mr. [redacted] and Specialist [redacted] is an excited utterance and admissible.

4. Burden of Proof.

Per R.C.M. 905(c) the burden of proof on any factual issue the resolution of which is necessary to decide a motion shall be a preponderance of the evidence. Per R.C.M. 905(c)(2) the burden of persuasion is on the moving party, the Defense. However, as the ultimate proponent of the evidence at trial the Government would be required to lay the proper foundations.

5. Evidence to be Presented

a. Testimony of NCIS SA [redacted]
b. Testimony of SPC [redacted]
b. Documents attached to Government appellate exhibit
c. The Government will also rely upon Defense attachments 6-12, 14

6. Relief Requested.

The Government request that the Court DENY the Defendant's motion to exclude the Victim's statements of domestic abuse.

6. **Oral Argument.**

The government respectfully requests oral argument on this motion.

/s/
J. L. JONES

****

CERTIFICATE OF SERVICE

I hereby certify that, on 26 April 2019, I caused to be served a copy of this motion on the trial counsel for the government and the court.

/s/
J. L. JONES

NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **CRAIG R. BECKER** **LT/O-3** **U.S. NAVY**	**DEFENSE MOTION IN LIMINE: EXCLUDING TESTIMONY THAT A WITNESS STATED THAT "A WOMAN WAS PUSHED" AS HEARSAY** **19 APR 2019**

1. Nature of Motion

Pursuant to R.C.M. 906(b)(13) and M.R.E. 802, the Defense respectfully moves this court for an order *in limine* excluding all statements that an unidentified witness claimed that a woman was pushed from the building as these statements are inadmissible hearsay[1].

2. Summary of Facts

1) On the night of 8 October 2015, Mrs. [redacted] fell from a window in her [redacted] apartment. (Attachment 1)

2) [redacted] and [redacted] found Mrs. [redacted] on the ground below the apartment building. (Attachment 1)

3) Mr. [redacted] called the police. In his phone call with the police he stated twice that a woman was pushed or thrown from a building. (Attachment 2)

4) Shortly thereafter, the police called emergency services and stated that they had a caller claiming that a woman was thrown from a building. (Attachment 3)

5) During the investigation into Mrs. [redacted] death, Ms. [redacted] tells the authorities that when she arrived at the scene, an unidentified woman told her that a man pushed his wife out of a window. (Attachment 4)

[1] The defense believes it has identified all statements that have this hearsay statement as their source. The intent of this motion is to litigate the admissibility of all such statements at this time. If the government has related statements it intends to offer at trial, the defense, by this motion, is objecting to those statements as well and respectfully requests that they be litigated with this motion.

6) This woman was never interviewed or identified.

7) In her statement to law enforcement, Ms. [redacted] is also clear that she does not know if this unidentified woman witnessed the fall or simply speculated as to what had occurred. (Attachment 4)

8) In their statements to law enforcement throughout the investigation, Ms. [redacted] and Mr. [redacted] are clear that they did not see Mrs. [redacted] until after she was on the ground and that they do not see how Mrs. [redacted] fell. (Attachments 4, 5, and 15)

3. Discussion of Law

M.R.E. 802 provides that absent an applicable exception, hearsay is not admissible at court-martial. M.R.E. 801 defines hearsay as any statement the declarant does not make while testifying at the current trial or hearing and is being offered to prove the truth of the matter asserted in the statement.

i. The statements made by Ms. [redacted] regarding what she was told by the unidentified woman constitutes hearsay and the Government should be precluded from offering them at trial.

ii. The statements made by Mr. [redacted] to the police during his phone call on the evening of 8 October 2015 are not based on personal knowledge. When questioned by the officer on the phone, Mr. [redacted] clearly states that he did not see how Mrs. [redacted] fell. Throughout the investigation he remains consistent on this point. As such, his statements to the police officer on the phone call that evening are either speculation or his repeating what he had been told by someone else. As such, these statements constitute hearsay, potentially double hearsay, and the Government should be precluded from offering them at trial.

iii. The statements made by the police when calling emergency services are simply the police officer relaying what he was told by someone else, presumably Mr. [redacted] As such, these statements constitute hearsay, potentially double hearsay or more, and the Government should be precluded from offering them at trial.

4. Relief Requested

The Defense requests that the Military Judge exclude the statements discussed above as these statements are inadmissible hearsay.

5. Oral Argument. Unless the Government concedes the motion or this Court grants the relief on the basis of pleadings alone, the defense requests oral argument on this matter.

[redacted]
J. A. GUARINO
CDR, JAGC, USN
Detailed Defense Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
UNITED STATES NAVY
GENERAL COURTS-MARTIAL

UNITED STATES **v.** **CRAIG R. BECKER** **LT/O-3 USN**	**GOVERNMENT'S RESPONSE TO THE DEFENSE'S MOTION TO EXCLUDE TESTIMONY THAT A WITNESS STATED THAT "A WOMAN WAS PUSHED" AS HEARSAY** **26 APRIL 2019**

1. Nature of Motion.

Pursuant Military Rules of Evidence (MRE) 803(1)(Present Sense Impression), and MRE 803(2)(Excited utterance) the Government moves the Court to deny the Defendant's motion to exclude as hearsay and admit the statement made by the an unidentified bystander witness, to Ms. [redacted] that she observed "a man had pushed a woman out of the window". The Government also asks this Court to admit the statement of [redacted] when he called [redacted] 9-1-1 to seek assistance for the Victim, or at a minimum be allowed to lay the foundation at trial to admit these statements at trial.

2. Summary of Facts.

a. The accused is charged with murdering his wife, [redacted] (Victim), on 8 October 2015 in [redacted] by pushing her threw the seventh story window of their apartment building.

b. The accused was stationed at [redacted] and lived in [redacted] with his wife and infant daughter.

c. The accused and his wife were married in 2008 and still legally married at the time of her death.

d. On 8 October 2015, the accused and the Victim were in their apartment.

e. Mrs. [redacted] bedroom contained a large window which opened inwards to a 45-degree angle. The bedroom was on the top floor, the seventh floor, of their apartment building.

f. The window opened onto a slanted roof and three floors below was a balcony of another apartment.

g. On the evening of 8 October 2015, the accused pushed his wife through the opened window of his apartment. She slid down the slanted roof, screaming for help and fell three stories onto a table on the balcony below. Mrs. [redacted] bounced off the table and over the balcony wall and then plunged to the street below. Mrs. [redacted] screamed on the way down.

h. Ms. [redacted] survived the fall and lay on the sidewalk mortally injured in front of the apartment building. Several French-speaking [redacted] citizens quickly arrived after hearing her scream as she fell and briefly hung onto the roof.

i. Mr. [redacted] and Ms. [redacted] heard the Victim scream and ran towards the sounds of the screams. As they were running towards the screams, they heard a loud thud, which was the Victim hitting the cobblestone paving making up the sidewalk.

j. Mr. [redacted] went towards the Victim, as Ms. [redacted] asked an unidentified bystander what happened. Ms. [redacted] described the woman between 50-60 years old, who Ms. [redacted] did not know and has not seen since that time.

k. Ms. [redacted] asked the woman what happened; Ms. [redacted] described the woman as in shock, after witnessing the events. The woman responded, "A man had pushed his wife out of the window."

l. Ms. [redacted] provided this information to her boyfriend, Mr. [redacted] who relayed this information to emergency personnel on the phone, whom he had called to seek assistance

for the Victim.

3. Discussion.

Mil. R. Evid 805

Mil. R. Evid. 805 states, "[h]earsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception or exclusion to the rule". *See* United States v. Clark, 61 M.J 707, 713-14 (N-M.C.C.A. 2005); United States v. Hutchins, 2018 CCA LEXIS 31, 170 (N-M.C.C.A. 2018). The Government seeks to admit the statement by an unidentified bystander to others in the crowd that she observed the Victim pushed out the window of the seventh-floor apartment she shared with the Accused. Mr. [redacted] who had gathered around the Victim as she lay on the sidewalk, then told emergency responders via [redacted] version of 9-1-1 that the Victim was pushed out the window. Thus, the Government must establish that both the statement of the unidentified woman and the statements to [redacted] 9-1-1 fit an exception to the hearsay rule.

Does the unidentified bystander's statement to the other bystanders constitute testimonial hearsay?

On 8 Oct 2015, Victim was murdered after she was pushed from the 7th floor of the apartment she shared with the Accused, in [redacted] While she lay on the sidewalk, a number of citizens gathered to render aid to the Victim. At this time, an unidentified bystander told [redacted] "a man had pushed a woman out of the window". Ms. [redacted] relayed this information to her boyfriend, Mr. [redacted], who used this information to notify emergency responders as to what had happened to the Victim. This call to emergency responders was recorded and preserved.

The 6th Amendment of the United States Constitution guarantees the right of accused to be confronted by the witnesses against them. Ohio v. Clark, 135 S. Ct. 2173, 2179 (2015).

The Confrontation Clause thus limits the admissibility of out of court statements where the primary purpose is testimonial. Crawford v. Washington, 541 U.S. 36 (2004). However, "[w]here no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause." Clark, 135 S. Ct. at 2180. To determine the primary purpose of a statement, the Court of Appeals for the Armed Forces has set for a series of inquiries to determine the testimonial nature of an out of court statement. United States v. Rankin, 64 M.J. 348, 352 (CAAF 2007). "First, was the statement at issue elicited by or made in response to law enforcement or prosecutorial inquiry? Second, did the "statement" involve more than a routine and objective cataloging of unambiguous factual matters? Finally, was the primary purpose for making, or eliciting, the statements the production of evidence with an eye toward trial?" *Id.*

Applying the three-pronged test set out in Rankin, it is abundantly clear the unidentified bystander's statement to Ms. [redacted] that she observed someone push the Victim out of the seventh-floor window of the apartment building in [redacted] was not testimonial.

1. First, the statement was not elicited by any responding official. The statement was made to anther bystander and not police or emergency medical providers. The statement was made while those at the scene were attempting to determine what had happened to the woman who lay dying at their feet.
2. The statement itself does constitute something beyond a "routine and objective cataloging of unambiguous factual matters". The bystander's statement, "A man had pushed a woman out of the window," clearly indicates the Victim did not throw herself out the window or "fell" out the window, but instead was pushed out the seventh floor of her apartment building.
3. The primary purpose of the statement was not to create evidence for trial. It would

be entirely unbelievable that someone who just heard someone being pushed to her death from the seventh floor of an apartment building, and seeing the person lying on the sidewalk in a pool of her own blood, would have the ability and foresight to formulate the concept that her statement would be used in a court of law.

Also applying the above test, Mr. [redacted] statement to [redacted] 9-1-1 is not testimonial.

1. First, the statement was not elicited by any responding official. The statement was made to other bystanders and not police or emergency medical providers on the scene. The statement was made while those at the scene were attempting to seek aid for the woman who lay dying at their feet. Ms. [redacted] statement to Mr. [redacted] was used by him to tell emergency responders what had happened to the Victim. It was elicited only to assist in whatever could be done to medically treat the Victim.
2. The statement itself does constitute something beyond a "routine and objective cataloging of unambiguous factual matters." The bystander's statement, "A man had pushed a woman out of the window," clearly indicates the Victim did not throw herself or "fall" out the window, but instead was pushed out the seventh floor of her apartment building.
3. The primary purpose of the statement was not to create evidence for trial. It would be entirely unbelievable that someone who just heard someone being pushed to her death from the seventh floor of an apartment building, and seeing the person lying on the sidewalk in a pool of her own blood, would have the ability and foresight to formulate the concept that his statement would be used in a court of law. Likewise, Mr. [redacted] statement to 9-1-1 was clearly to obtain assistance for the Victim based on information he had been given by others at the scene.

Viewing the bystander's statements, using a totality evaluation, it is clear prongs one,

two, and three reflect the non-testimonial nature of the statement. United States v. Perkins, 2016 CCA LEXIS 441, 17-18 (N-M.C.C.A. 2016). The statement to others around her that the woman dying on the sidewalk had just been pushed out of a seventh-floor window is not testimonial. In addition, the call to emergency responders, likewise, was not testimonial.

Does unidentified bystander witness's statement to the other bystanders meet a hearsay exception under the military rules of evidence?

Once this Court finds the bystander's statement is not testimonial, it must then determine if the statement meets an exception in the Military Rules of Evidence. The statement of the unidentified bystander to Ms. [redacted] and Mr. [redacted] statement to 9-1-1 meets the both the excited utterance and present sense impression hearsay exceptions.

Does the unidentified bystander witness's statement and Mr. [redacted] 9-1-1 call constitute an excited utterance, pursuant to Mil. R. Evid. 803(2)?

An excited utterance is a statement made about a startling event while the declarant remains under the influence of the startling event. United States v. Rich, 2016 CCA LEXIS 493 (A.C.C.A. 2016). Military case law has devised a three-pronged test to determine whether a hearsay statement qualifies as an excited utterance: "(1) the statement must be "spontaneous, excited or impulsive rather than the product of reflection and deliberation"; (2) the event prompting the utterance must be "startling"; and (3) the declarant must be "under the stress of excitement caused by the event." United States v. Arnold, 25 M.J. 129, 132 (C.M.A. 1987); see also United States v. Bowen, 76 M.J. 83, 88 (CAAF 2017). In United States v. Feltham, CAAF held that a military judge did not abuse his discretion in admitting the statements a male sailor made to his roommate approximately one hour after appellant forcibly orally sodomized him. United States v. Feltham, 58 M.J. 470, 475 (CAAF 2003). The Feltham Court found that the victim was

still under the stress of a startling event; therefore, the lapse of time was not dispositive. *Id.*

In the instant case, the unidentified bystander's statement to the Ms. [redacted] meets the test established in Arnold.

1. Her statement 9-1-1 was spontaneous and not the result of questioning. It was a statement indicating she had observed a man just shove a woman out a seventh-floor window.
2. It is unquestionable that being pushed from the seventh floor of a building and falling all the way to the sidewalk would constitute a startling event. In fact, Ms. [redacted] described this woman as being in a state of shock.
3. It is equally unquestioned that the unidentified bystander remained under the stress of the exciting event. The statement was made within minutes of the Victim impacting the sidewalk after being pushed from the seventh floor of her apartment building.

Given the uncontroverted facts in this case, the unidentified bystander's statement to Ms. [redacted] that "a man had pushed a woman out of the window" is an excited utterance and admissible, pursuant to MRE 801(2).

In addition, Mr. [redacted] statement to [redacted] 9-1-1 meets the test established in Arnold.

1. His statement was spontaneous and not the result of questioning. It was a statement seeking to obtain assistance for a woman who was just shoved out a seventh-floor window.
2. It is unquestionable that seeing someone pushed from the seventh floor of a building and falling all the way to the sidewalk would constitute a startling event. Mr. [redacted] was faced with observing and seeking assistance for a

woman lying on the sidewalk, in a pool of blood, dying. This would certainly constitute a startling event.

3. It is equally unquestioned that Mr. [redacted] also remained under the stress of the same exciting event.

Based on the facts and case law, Mr. [redacted] entire statement to [redacted] 9-1-1 is admissible as an excited utterance, pursuant to MRE 803(2).

Is the statement of the unidentified bystander witness a statement of a present sense impression, pursuant to Mil. R. Evid. 803(1)?

MRE 803(1), present sense impression allows for the admission of statements "describing or explaining an event or condition, made while or ***immediately*** after the declarant perceived it" (emphasis added). As with the excited utterance exception, the present sense impression exception hinges on absence of time for declarant to reflect on what happened. United States v. Narciso, 446 F. Supp. 252 (E.D. Mich. 1977). The one difference between the rule MRE 803(1) & (2) is excited utterance requires a startling event while the present sense impression exception does not require an exciting event. When discussing the present sense impression Professor Stephen Saltzberg indicated "the contemporaneousness of the statement is crucial to its admission, and should be the proponent's main foundational concern." United States v. Brown, 48 M.J. 578, 582, 1998 CCA LEXIS 160 (A.C.C.A. 1998); Citing STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL 942 (4th ed. 1997).

The present sense impression is a rule which has sparse military case law discussing. *Id.* It is not required for the present sense impression to allow the admission of a statement describing an event to happen while the event is occurring. United States v. Davis, 577 F. 3d 660, 668 (6th Cir, 2009); See also United States v. Green 556 F. 3d 151 (3rd Cir 2009). There is no per se definition of what constitutes immediately after the witness observed an

event. Recently the United States Army Court of Criminal Appeals held "a proper determination will always turn on the facts of each individual case, [] as a general matter, that five minutes will usually be within the present sense impression exception and twenty minutes is at the outer edge of the exception." United States v. Brown, 2018 CCA LEXIS 107, 30 (A.C.C.A. 2018).

It is clear, from the incident reports and statements of Ms. [redacted] that the unidentified bystander witness was giving a present sense impression when she stated "a man had pushed a woman out of the window." All of the witnesses who were present at the time the Vitim was pushed to her death assembled within seconds of the Victim impacting the sidewalk. Ms. [redacted] indicated in her statement, to [redacted] authorities, that she encountered the unidentified bystander witness as she and Mr. [redacted] were headed toward the Victim after hearing her screams coming from the seventh-floor window of her apartment and impacting the ground. This encounter occurred within seconds of the incident and while the unidentified bystander witness was still in a state of shock. Clearly based on the above-referenced case law, the statement fits under the time limitations set out in MRE 803(1) and thus should be admitted as a present sense impression.

The Defense's motion to exclude this statement focuses at least a portion of their argument on the fact that the witness is unknown and thus her statement cannot be deemed credible. MRE 803(1) & (2) do not seek and do not require a determination of the declarant's credibility. The primary focus of each of these rules of evidence focus on how the passage of time prevents a declarant from fabricating a statement. *Miller v. Keating*, 754 F. 2d 507, 510 (3rd Cir. 1985); *see also United States v. Brown*, 254 F. 3d 454, 459 (3rd Cir. 2001); *Parker v. Maryland*, 129 Md. App. 360, 390 (Md. Ct. App. 1999) Here, the all of the witnesses, including the unidentified bystander witness, uttered their statements

within seconds of the Victim being pushed to her death. The fact that we do not know the identity of the unidentified bystander witness is irrelevant.

4. Burden of Proof.

Per R.C.M. 905(c) the burden of proof on any factual issue the resolution of which is necessary to decide a motion shall be a preponderance of the evidence. Per R.C.M. 905(c)(2) the burden of persuasion is on the moving party, the Defense.

5. Evidence Presented.

Govt. Exhibit 1, Ms. [redacted] Interview 7 July 2016;
Govt. Exhibit 2, Mr. [redacted] Interview 7 July 2016;
Govt. Exhibit 3, Mr [redacted] Emergency Phone Call.

6. Relief Requested.

The Government requests that the Court deny the Defense's motion and admit the statement made by the unidentified bystander witness, to Ms. [redacted] and the statement of [redacted] when he called [redacted] 9-1-1 to seek assistance for the Victim, or at a minimum be allowed to lay the foundation at trial to admit these statements at trial.

7. Oral Argument.

The Government respectfully requests oral argument on this motion.

[redacted]
Paul T. Hochmuth

CERTIFICATE OF SERVICE

I hereby certify that, on 26 April 2019, I caused to be served a copy of this motion on the trial counsel for the government and the court.

[redacted]
Paul T. Hochmuth

NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
UNITED STATES NAVY
GENERAL COURTS-MARTIAL

UNITED STATES **v.** **CRAIG BECKER** **LT/O-3 USN**	**GOVERNMENT MOTION TO ADMIT STATEMENTS DUE TO FORFEITURE BY WRONGDOING AND WAIVER BY MISCONDUCT**

1. Nature of Motion.

The Government moves the Court to admit statements made by Mrs. [redacted] the deceased victim, under the theory that the accused, LT Craig Becker, due to his own misconduct has waived and forfeited his Sixth Amendment Confrontation Clause Rights and waived and forfeited any hearsay objections per Military Rule of Evidence 804(b)(6), Statement Offered against a Party that Wrongfully Caused the Declarant's Unavailability. The accused's misconduct of killing his wife as alleged in Charge III prevents her from now testifying as to acts related to Charge I, Specification 1 and Charge III. Prior to her murder [redacted] made numerous statements to third parties that relate to Charge II, Specification 1 and Charge III.

2. Summary of Facts.

a. The Accused is alleged to have murdered his wife, [redacted] on 8 October 2015 in the city of [redacted] by pushing or tossing her throw the 7th story window of their apartment building.

b. The Accused was stationed at [redacted] and lived in [redacted] with his wife and infant daughter.

c. The Accused and his wife were married in 2008 and still legally married at the time of her death.

d. It was known by both the Accused and his wife that 8 October 2015 was the last night that the victim and her daughter were to spend in their apartment as she was moving out the next day. The day of her death she signed a lease on a new apartment.

e. On 8 October 2015 the Accused and the Victim were in their apartment to eat dinner and take care of their daughter. The [redacted] did not live together as husband and wife as they had separate bedrooms and Mrs. [redacted] was sleeping at her friend Mr. [redacted] apartment.

f. Mrs. [redacted] bedroom contained a large window which opened inwards to a 45-degree angle. The bedroom was on the top floor, the 7th floor, of their apartment building.

g. The window opened onto a slanted roof and two floors below was a balcony of another apartment. The apartment also contained a balcony, which was a straight drop to the street below.

h. In the evening of 8 October 2015, the Accused pushed his wife through the opened window of his apartment. She slid down the slanted roof, grasping at tiles, and fell two stories onto a table on the balcony. Mrs. [redacted] bounced off the table, over the balcony wall and then plunged to the street below. Mrs. [redacted] screamed on the way down which was heard by passers-by. She was seen falling by Ms. [redacted] a nurse who was working at a nursing home across the street.

i. Ms. [redacted] survived the fall and lay on the sidewalk mortally injured in front of the apartment building. Several French speaking [redacted] citizens quickly arrived after hearing her scream, including Mr. [redacted] and Ms. [redacted] The accused eventually emerged from the apartment building and spoke to Mrs. [redacted] The accused has given conflicting versions of events as to Mrs. [redacted] last words – alternatively stating that she said "you did this to me" and stating that she told the accused she loved him.

j. [redacted] paramedics and police arrived onto the scene and took Mrs. [redacted] to a local [redacted] hospital. Mrs. [redacted] died as she was being prepped for surgery. She never spoke to law enforcement or medical personnel due to her injuries.

Charge II, Specification 1

l. Prior to her death the accused and Mrs. [redacted] had a contentious marriage which included physical and mental abuse by the accused. Chronologically the first charged event occurred in August 2013 when the accused assaulted Mrs. [redacted] at an Army hotel in [redacted]. The accused and his wife had just PCS'd to [redacted] and were staying at the [redacted] outside [redacted]

m. The accused assaulted this wife by throwing her about their hotel room and placing

his hands around her throat and pressing down. The accused was angry at his wife for an affair she had with Mr. [redacted] while they were in America. Immediately before the assault began he read emails between his wife and [redacted]

n. Mrs. [redacted] was able to escape the hotel room and asked the front desk clerk to call the police. Ms. [redacted] made oral statements to the hotel desk clerk, Mr. [redacted] Mr. [redacted] a [redacted] civilian, called US Army military police.

o. After the military police arrived, Mrs. [redacted] gave an oral statement to US Army military police officer Specialist [redacted] detailing the abuse she suffered at the hands of the Accused.

p. Mrs. [redacted] then went to the US Army MP station and made a detailed written statement about the assault.

q. On or about 1750 on 9 August 2013 Mrs. [redacted] went to the US Army military police station to complain about her treatment by US Army military police. (The United States does not seek to admit this statement, objects to its admission as hearsay, but asks the Court to consider it for this motion only to provide context to the chain-of-events).

r. Between August and November 2013 the accused and Mrs. [redacted] reconciled. In November 2013 Ms. [redacted] made a recantation of the allegations of the assault to NCIS. (The United States does not seek to admit this statements, objects to its admission as hearsay, but asks the Court to consider it for this motion only to provide context to the chain-of-events).

s. Between August and November 2013 the accused was investigated by law enforcement for this domestic violence assault. The accused described the investigation as a "living nightmare" to his wife's friend [redacted] and blamed his wife for instigating the investigation.

t. No charges were preferred, Non-Judicial Punishment, or Board of Inquiry conducted based upon the events alleged in Charge II, Specification 1.

Post-November 2013 statements related to Charge II, Specification 1

u. After her recantation, at a time closer to her death, Mrs. [redacted] spoke with Ms. [redacted] Mrs. [redacted] told Ms. [redacted] that the accused "choked her" and was "rough" in 2013 in [redacted]. Mrs. [redacted] stated that she dropped the charges due to the concern that it would impact her husband's career.

v. After her recantation Mrs. [redacted] spoke with Ms. [redacted] who was another

MWR/Child Youth Center employee who worked with Mrs. [redacted] at the Army base. Mrs. [redacted] told Mrs. [redacted] of an incident where the accused assaulted her over an affair allegation. She stated that the accused placed his hands around her neck, choked her and Mrs. [redacted] thought she was going to die. Mrs. [redacted] also stated that she later recanted the allegation due to concerns it would have on the accused's career.

w. After her recantation Mrs. [redacted] spoke with her friend [redacted] Mrs. [redacted] stated that during an incident at [redacted] is located at [redacted]) "I honestly thought he was going to kill me." Mrs. [redacted] also stated that she retracted her allegation for her husband's career.

x. Mrs. [redacted] also spoke to her childhood friend [redacted] about the physical abuse. She stated that after her husband found out about her affair he became violent and she feared for her life that he hit her and that occurred close to the time she moved to [redacted]

Statements and Actions Related to Charge III

y. After reconciliation the accused and Mrs. [redacted] lived in [redacted] together as husband and wife from autumn 2013 until summer 2015. During this time they lived together in [redacted] while the accused worked onboard [redacted] Mrs. [redacted] at times was a stay-at-home mom and other times worked for the [redacted] During this time the accused continued to emotionally and physically abuse Mrs. [redacted] Such actions include:

1) The accused accessed the victim's personal cell phone to monitor her communications,

2) The accused changed passwords to their joint bank account to deprive the victim access to their her money;

3) The accused confiscated the victim's identification card and credit cards;

4) The accused confiscated the victim's cell phone to prevent her contact with friends and family, to include when she was in the hospital recovering from surgery;

5) The accused prevented the victim from communicating with family members and friends members;

6) The accused controlled the victim's visits with her friends to their apartment in Belgium;

7) The accused forced his wife to walk to the hospital from their apartment when she had [redacted]

8) The accused controlled what clothes the victim wore, to include throwing out clothes which he did not approve of;

9) The accused took down and threw away curtains that the victim handmade;

10) The accused would not allow the victim to get a tattoo;

11) The accused broke cosmetics the victim purchased.

z. As her marriage suffered Mrs. began to talk to her friends and co-workers about her marriage and situation. She confined in girlfriends such as Ms. Ms. and Mrs. She explained that her husband was emotionally controlling and manipulative. Her and her friends maneuvered around her husband such as avoiding visits or not speaking in his presences. Mrs. related incidents in paragraph (y) to her friends in

aa. In summer 2015 Mrs. decided to leave her husband but to remain in Mrs. father is Swedish (though he now lives in America) and she was comfortable living in Europe. She had a job on-base, a set of friends, and was entering a new phase of her life. She had met another and had been staying at his apartment at night to avoid her own.

bb. On the day of her death Mrs. did a significant act in leaving her husband – she put a down payment on the lease of an apartment. Per the landlord Mr. she placed a 500 Euro deposit on a new apartment. She was also having maintenance such a washer and dryer brought over. Mr. did not describe Mrs. as sad, morose or in any way suicidal.

cc. On the day of her death Mrs. also had lunch with a group of co-workers and girlfriends. She had lunch with Mrs. Mrs. Mrs. and Mrs. All four women uniformly described Mrs. as upbeat for the future and looking forward to a new life. They discussed multiple issues including her separation from her husband and an upcoming business trip to Mrs. and the accused were involved in a business venture regarding gloves. She was going to to work on details and was packing that night to leave. None of the women who saw her before her death described her as sad or suicidal. They all describe a woman who was happy to be moving on with life.

dd. As described in detail in other filings, Mrs. went to the apartment on 8 October 2015 to eat dinner with her daughter and husband. Even though she was sleeping at Mr. apartment Mrs. went nightly to the apartment to take care of their daughter and put her to sleep.

ee. The accused told [redacted] police that during dinner Mrs. [redacted] drank wine and attempted to reconcile their marriage. The accused told police he rebuffed her and then she placed some form of powder in her drink. According to the accused this made Mrs. [redacted] drowsy and uncoordinated and when she attempted to bathe their daughter he had to intervene because she was pouring water on the child's head. According to the accused he helped Mrs. [redacted] to her bedroom to lay down and he then left the room.

ff. Phone records show that the accused repeatedly called America that night speaking with who the Government believes was/is his girlfriend. According to the accused while on the phone he heard a scream. While the accused has given multiple statements about the scenario, he stated he went to Mrs. [redacted] bedroom and saw her feet going out the window. He went to the window in an effort to save her but could not. He claims he did not look out the window due to fear and danger, though it opens onto a slanted room and several stories below is a balcony. According to the accused he then went to the elevator and to the ground where his wife was laying on the concrete.

gg. [redacted] police were called by bystanders and arrived quickly. [redacted] police viewed the accused as a suspect and a victim and frankly told him as much. They took photographs of the apartment, noting that Mrs. [redacted] cellphone was found in the living room, not in her bedroom, on her person, clothes or a purse. They noted that during the times the accused was not on the phone with his girlfriend in America that Mrs. [redacted] phone was sending bizarre and semi-suicidal text messages to her friend [redacted], who was listed in Mrs. [redacted] phone under a pseudonym.

hh. [redacted] police quickly released that several days beforehand the accused had come to a [redacted] police station to inform [redacted] police that his wife had a drinking problem. He was not there to report a crime but wanted it noted by the police. The [redacted] police explained that no crime was committed and set him away.

ii. [redacted] police discovered that the accused, after complaining that his wife had a drinking problem, went and purchased wine. He told [redacted] police that his wife was drinking the night of her death. However, [redacted] toxicology reports of Mrs. [redacted] showed that she did not have alcohol in her system. [redacted] toxicology reports showed that Mrs. [redacted] did have the [redacted] in her system. These drugs make a person tired, sleepy or groggy, and compliant.

jj. The accused stated that Mrs. [redacted] went headfirst out the window as he was able to either see or touch her feet as they went out to the window. This was contradicted by the

police's interview of Ms. [redacted] the nurse witness who saw a woman whose feet were facing down with her hands grasping at the window while screaming.

kk. [redacted] police hired their expert Mr. [redacted] to conduct a biomechanical reconstruction of Mrs. [redacted] fall. Mr. [redacted] consistent with the witnesses' description, found that Mrs. [redacted] did not go headfirst out the window but went feet first. Her stomach was against the roof, head up, feet down, as she slid down the slanted roof, falling onto the balcony below and then to the street.

ll. [redacted] police interviews of Mr. [redacted] and Mrs. [redacted] noted that they saw a bald man looking out the window of an apartment above. The accused stated he did not look out the window because of fear. The accused stated he quickly came to his wife's side on the ground. Mr. [redacted] noticed it was "some minutes" before he arrived.

nn. The accused told police he did not know the pin code to his wife's cell phone and guessed it correctly the next day, thus suddenly finding exculpatory and suicidal text messages. However, the code was related to Mrs. [redacted] Swedish identity number (akin to social security number), it was known by her father Mr. [redacted] that she had that used the pin number for years on her phone and Mr. [redacted] had seen the accused open her phone. Additionally a search of the accused's phone located screen shots from Mrs. [redacted] phone taken previously.

oo. During the [redacted] investigation the accused spoke with [redacted] police and made numerous statements. He did not confess to the murder and claimed his wife committed suicide without his knowledge or prompting. [redacted] authorities arrested the accused for the murder of his wife and began [redacted] judicial proceedings. Initially the United States ceded jurisdiction to [redacted] however, Secretary of Defense James Mattis invoked jurisdiction and the accused was returned to America. Once jurisdiction was invoked [redacted] authorities ceased investigation and NCIS assumed the investigation.

3. Discussion.

Military Rule of Evidence 804(b)(6) versus Federal Rule of Evidence 804(b)(6)

There is limited military case law as to forfeiture by wrongdoing under M.R.E. 804(b)(6) or waiver by misconduct. *See*, *United States v. Marchesano*, 67 M.J. 535 (A.C.C.A. 2008). Thus the United States will rely upon Federal Court case law and their interpretation of Federal Rule of Evidence 804(b)(6). In issues of first impression and lack of military controlling case law the Court should look to federal case law when interpreting

similar rules. M.R.E. 101(b)(2) holds that "in the absence of guidance in this Manual or these rules, courts-martial will apply: (1) First, Federal Rules of Evidence and case law interpreting them." See also, *Marchesano*, 67 M.J. at 542.

A comparison between them shows their similarities. There is no reason to deviate from persuasive and controlling federal case law based upon the wording of M.R.E. 804(b)(6) versus F.R.E. 804(b)(6).

Military Rule of Evidence 804(b)(6) – Exceptions to the Rule Against Hearsay – when the declarant is unavailable as a witness – Statement offered against a party that wrongfully caused the Declarant's Unavailability: A statement offered against a party that wrongfully caused or acquiesced in wrongfully cause the declarant's unavailability as a witness, and did so intending the result.

Federal Rule of Evidence 804(b)(6) – Exceptions to the Rule Against Hearsay - when the declarant is unavailable as a witness – Statement offered against a party that wrongfully caused the declarant's unavailability: A statement offered against a party that wrongfully cause – or acquiesced in wrongfully causing – the declarant's unavailability as a witness, and did so intending that result.

The one reported military appellate case on M.R.E. 804(b) (6) is distinguishable from the case at bar. In *Marchesano* the accused and his wife were a unified team and the wife refused to obey a subpoena to testify. The accused was charged with indecent liberties with a child and was tried in [redacted], thus the Government had no power to enforce the subpoena overseas. *Marchesano* discusses M.R.E. 804(b)(6)'s prong as to "acquiescing" in making a declarant unavailable. Mrs. Marchesano was alive but uncooperative and the prosecution, without authority to force her appearance in a court-martial in [redacted], sought to use her prior statements. This is easily distinguished from the case at bar. Mrs. [redacted] is deceased because the accused murdered her and thus the M.R.E. 804(b)(6) prong under consideration is "wrongfully causes," which was not addressed in *Marchesano*. Thus the Court should rely upon Federal case law interpreting F.R.E. 804(b)(6) where the accused wrongfully caused a declarant to be unavailable.

Forfeiture by misconduct under F.R.E. 804(b)(6) versus waiver by misconduct

This Court requested discussion of forfeiture by misconduct versus waiver by misconduct. They are related concepts and address the use of a declarant's prior statement against an accused based upon an accused's action. Courts have held "the recently promulgated Rule 804(b)(6) of the Federal Rules of Evidence represents the codification, in the context of federal hearsay rules, of this long standing doctrine of waiver by misconduct." *United States v. Cherry*, 217 F.3d 811, 815 (10th Cir. 2000). While related, they differ in that forfeiture by misconduct under F.R.E. 804 is a hearsay rule, governing the procedural admission of statements and which acting cannot alone satisfy the accused's Sixth Amendment's Confrontation Clause rights. However, the application of the doctrine of waiver by misconduct does satisfy the accused's Sixth Amendment's Confrontation Clause rights. As noted in *Cherry*, "the Supreme Court has held repeatedly that a defendant's intentional misconduct can constitute waiver of Confrontation Clause rights."(citations omitted). *Id* at 815. It is a common sense and public policy approach that an accused cannot profit from their own criminal acts by ensuring that there is less evidence admissible at court based upon continuing criminal acts. *Cherry* discusses the interrelationship between hearsay and the Confrontation Clause:

> While the Confrontation Clause and hearsay rules are not coextensive, it is beyond doubt that evidentiary rules cannot abrogate constitutional rights. We therefore read the plain language of Rule 804(b)(6) to permit admission of those hearsay statements that would be admissible under the constitutional doctrine of waiver by misconduct and hold that, in the context of criminal proceedings, the Rule permits the admission of hearsay statements by unavailable witness against defendants if those statements are otherwise admissible under the doctrine of waiver by misconduct.
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> *Id* at 816.

The 10th Circuit is not an outlier in its holding. In *United States v. Dhinsa*, 243 F.3d 635, 651 (2nd Cir. 2001) the court held "this Court, as well as a majority of our sister circuits, have applied the waiver-by-misconduct rule in cases where the defendant has wrongfully procured the witnesses' silence through threats, actual violence and murder." Quoting from *United States v. Carlson*, 547 F.2d 1346, 1358-60(8th Cir 1976) the *Dhinsa* court stated "it is hard to imagine a form of misconduct more extreme than the murder of a potential witness." *Id* at 652. "A defendant who wrongfully and intentionally renders a declarant

unavailable as a witness in any proceedings forfeits the right to exclude, on hearsay grounds, the declarant's statement at that proceeding and any subsequent proceeding." *United States v. Gray*, 405 F.3d 227, 242 (4th Cir. 2005). Therefore while the concept of waiver by misconduct in the military justice system may be an issue of first impression, it is widely used and ruled upon in all federal circuits and many state courts. This Court should adopt the holdings of *Cherry* and *Dhinsa* that an accused cannot profit from his own criminal acts and that his murder of a witness may be waiver and forfeiture by misconduct of his Sixth Amendment Confrontation Clause rights and hearsay objections.

While *Cherry* and *Dhinsa* were decided before the evidentiary landmark ruling of *United States v. Crawford*, 541 U.S. 36 (2004), neither *Crawford* nor its progeny require a different application or exclusion of statements when the defendant has waived his Confrontation Clause rights and hearsay objections by his own misconduct.

Post- Crawford, Confrontation and Testimonial Statements made by Mrs. [redacted] to US Army military police

Crawford altered the evidentiary landscape by overturning long-standing precedent regarding the use of out-of-court statements. *Crawford* requires an analysis not only of the rules of evidence governing admission but of the Confrontation Clause implications. The 6th Amendment of the United States Constitution guarantees the right of accused to be confronted by the witnesses against them. *Ohio v. Clark*, 135 S. Ct. 2173, 2179 (2015). The Confrontation Clause thus limits the admissibility of out of court statements where the primary purpose is testimonial. *Crawford v. Washington*, 541 U.S. 36 (2004).

To determine the primary purpose of a statement, the Court of Appeals for the Armed Forces has set for a series of inquiries to determine the testimonial nature of an out of court statement. *United States v. Rankin*, 64 M.J. 348, 352 (CAAF 2007). "First, was the statement at issue elicited by or made in response to law enforcement or prosecutorial inquiry? Second, did the "statement" involve more than a routine and objective cataloging of unambiguous factual matters? Finally, was the primary purpose for making, or eliciting, the statements the production of evidence with an eye toward trial?" *Id.*

The written statement of Mrs. [redacted] to US Army military police are testimonial for *Crawford* and Confrontation Clause purposes. Her written statement to the US Army military police was made in response to law enforcement inquiries. The statement

involved more than a routine and objective cataloging of factual matters. The statement was that of the victim of a crime in which she made criminal accusations against her husband. Finally, statements to law enforcement are often made with an eye towards trial. Nevertheless, the prosecution avers that the accused has forfeited his Sixth Amendment Clause confrontation rights and his evidentiary objections under hearsay.

While *Crawford* was not a forfeiture by misconduct case the Court did address the concept when stating:

> The *Roberts* test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability. It thus replaces the constitutionally prescribed method of assessing reliability with a wholly foreign one. In this respect it is very different from exceptions to the Confrontation Clause that make no claim to be a surrogate means of assessing reliability. For example, the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability.
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> *Crawford*, 541 U.S. at 62.

Post-*Crawford* courts have routinely upheld the waiver of Sixth Amendment Right to Confrontation when the accused's own misconduct makes the declarant unavailable. Courts have also noted that being unavailable alone is not sufficient, say the natural death of a witness, but that the accused must have had the intent to prevent the witnesses from testifying. In *Giles v. California*, 554 U.S. 353 (2008), the Court held that unavailability of a witness alone was insufficient to trigger a waiver of misconduct. Giles was accused of murdering his girlfriend and the trial court admitted prior statements of abuse by his girlfriend rationalizing that his murder of his girlfriend made her unavailable for trial. However, the Supreme Court required that the accused's acts had to have been done with the design or intent to prevent a witness from testifying at trial. This provides additional protections for an accused before their Confrontation Clause right is extinguished. *See*, *Ponce v. Felker*, 606 F.3d. 596 (9th Cir. 2010). Nevertheless, even considering Mrs. [redacted] statement to police as testimonial the Confrontation Clause does not automatically exclude, nor does the unavailability of the witness admit, the evidence.

Dhinsa lays out a two-part test for admissibility and thus waiver of Confrontation Rights, and the United States urges this Court to adopt it:

> Thus, consistent with our pre-Fed. R. Evid. 804(b)(6) precedent, we now hold that, prior to finding that a defendant waived his confrontation rights with respect to an out-of-court statement by an actual or potential witness admitted pursuant to Rule 804(b)(6), the district court must hold an evidentiary hearing outside the presence of the jury in which the government has the burden of proving by a preponderance of the evidence that (1) the defendant (or party against whom the out-of-court statement is offered) was involved in, or responsible for, procuring the unavailability of the declarant "through knowledge, complicity, planning or in any other way," Miller, 116 F.3d at 668; and (2) the defendant (or party against whom the out-of-court statement is offered) acted with the intent of procuring the declarant's unavailability as an actual or potential witness.
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> *Id.* at 653-654.

As to *Dhinsa*'s first prong that the defendant/accused was involved in, or responsible for, procuring the unavailability through knowledge, complicity, planning, or in any other way, the prosecution avers that the accused pushed or tossed his wife out of the seventh story apartment building window they shared in [redacted] in part to prevent her from reviving her previous allegations and to prevent her from describing to authorities the physical and mental abuse she described to friends. There are two possible ways Mrs. [redacted] died – murder or suicide. There is not a scintilla of evidence a third party committed the crime and the only third party present in the apartment was a toddler.

The Government does not need to prove beyond a reasonable doubt that the accused murdered Mrs. [redacted] for the purposes of this motion. For the purposes of this motion the evidence strongly favors the conclusion that the accused murdered his wife, which the Government need only to prove by a preponderance of evidence. After abusing his wife physically and mentally for years Mrs. [redacted] informed the accused that she was leaving him and taking their daughter. By all accounts it was Mrs. [redacted] who sought the divorce. It was Mrs. [redacted] who was moving out, found another place to live and signed a lease on the day she died. Mrs. [redacted] repeatedly told friends in [redacted] that she was happy to be leaving the accused and was looking forward to her new life. Mrs. [redacted] had lunch with co-workers on the day she died and they stated she was excited about moving on with her life. Mrs. [redacted] was beginning a relationship with [redacted] a co-worker, at the time of her death. She had been staying at his apartment every night weeks prior to her death. She told [redacted] that she did not want to stay at the accused's apartment. These are the acts of person

moving on from a relationship, not a suicidal woman trying to reconcile with her spouse.

It is improbable that suddenly, and without a reason, she attempted to reconcile with the accused on 8 October 2015, throwing herself at him over dinner. Then after being rebuffed poisoned herself to muster the fortitude to kill herself by climbing out a window. There is zero motivation for Mrs. [redacted] to kill herself, abandon her child to a man she deems manipulative and violent, and end the life she struggled to create for herself in [redacted] It was the accused, not Mrs. [redacted] who had wanted to continue the marriage. Additionally, if Mrs. [redacted] wanted to kill herself she needed speed and distance, not something that was guaranteed by climbing out a window with a sloped roof that opened to a balcony several floors below. Mrs. [redacted] would have, scientifically, gathered more speed without any impediments if she plunged off the balcony of their apartment, which was a sheer drop to the street. Her actions and mindset are not suicidal in nature. She was murdered.

These actions are in stark contrast to the accused's statements that his wife was abusing alcohol and drugs. Two days before her death the accused reported to [redacted] police that his wife was abusing alcohol, laying groundwork for a future alcohol incident. However, toxicology reports show that her blood alcohol level was negative at the time of her death. The accused lied about his wife's alcohol intake to police on the night of her death to make it appear as if his drunk wife killed herself in an emotionally distraught state. These are the acts of a killer.

Toxicology showed that Mrs. [redacted] body contained [redacted] in her body, which would have caused her to be drowsy. Mrs. [redacted] did not have prescriptions for these medications. The government avers that the accused placed these medications in her food and drink to lower her emotional and physical resistance. Immediately before her death the accused went to an old office he worked in, asked the current occupant, [redacted] to give him pills that were in the desk. Her altered state allowed the accused to eventually position and push her from the window without a physical fight. (As shown in the police photos taken that night the distance from the bed to the window is minimal.) The accused stated that he watched his wife place some medication in her wine at dinner, thought he did nothing to stop her or apparently react to it.

By biomechanical accounts articulated by Mr. [redacted] Mrs. [redacted] feet went out the window first in which she then turned, stomach to the roof, hands up towards the window. This corroborates the [redacted] eye-witness, Mrs. [redacted] and her statements that Mrs. [redacted] was grasping toward the window ledge, with her stomach facing the building. The size and position of the window, which opened inward versus straight up, also is indicative that a person had to manipulate a body to get into the window, it is implausible that a person accidently put themselves into the window in this position. (It is also implausible to go out the top of the window when it is opened inward, to do so would put a person's weight on the window itself, likely resulting in damage to the window, of which there was none.) To dive out the window like a person jumping off a diving board is implausible and does not correlate with Mrs. [redacted] sliding down the roof. It is more plausible that Mrs. [redacted] was placed into this position, pushed and then Mrs. [redacted] attempted to grasp or resist once she understood what was occurring.

In addition to the factual background of their marriage, the history of physical and emotional violence, the biomechanics of how Mrs. [redacted] fell, the lack of suicidal ideation, and the illogical act of abandoning a child to the clutches of man she feared and was divorcing, the accused's own statements show that suicide was not how Mrs. [redacted] died. The preponderance of the evidence is that the accused murdered Mrs. [redacted] by placing her into the window and pushing her.

The accused was not interviewed by NCIS or American law enforcement but by [redacted] law enforcement. The accused immediately lied about the relationship. He stated "I have never used violence against [redacted] That is totally incompatible with my job and character." As [redacted] statements to US Army law enforcement and friends show, the accused had long abused her. This is not the case of an abused person with no hope of a future life committing suicide, it is the culmination of physical abuse and domestic violence resulting in murder.

The accused's statements to [redacted] law enforcement are self-serving. Two days after telling [redacted] police that his wife has a drinking problem he purchased wine for their dinner, laying the foundation for an alcohol related event. He told [redacted] police that he saw his wife put medicine in her wife, but he did nothing about it, or seem fazed by it. He told [redacted] police that his wife jumped out the window when he was on the phone with his friend, a woman he has long had a relationship with. The accused spent

a significant portion of time on the phone with this women, [redacted] other than when the exculpatory/suicidal/self-serving text messages sent to [redacted] are sent. He told [redacted] police that his wife's feet were dangling from the window and that he managed to touch one of her feet in a rescue attempt, which is not supported by witnesses or science. He stated that he did not dare look out the window, though the window slants, it opens onto a roof and a balcony is several stories below and there was no chance of stumbling out the window. However, a bald man was seen in the window by an eye-witness. The accused took the elevator down to the ground floor versus rushing down the stairs. The accused tells conflicting stories of what is said by Mrs. [redacted] while on the ground – one version of "You did this to me" and another of her stating that she loved the accused and she was scared. Mrs. [redacted] did not have her cell phone on her when she died, it was in the apartment. However, it was not in the room she was in versus the main living area, where the accused sent the suicidal/exculpatory texts. The phone was found by [redacted] police and the accused later stated he guessed correctly her pin code after the incident. Mrs. [redacted] told friends he checked her phone and screen shots of her phone were found on his phone. The accused lied constantly about access to the phone of the victim and used his access in an attempt to lay exculpatory evidence for both witnesses and police.

The preponderance of the evidence is clear – the accused murdered his wife by tossing or pushing her out of the seventh story apartment window. Mrs. [redacted] did not commit suicide. Thus per *Dhinsa*, the accused acted with the intent of procuring the declarant's unavailability as an actual or potential witness. It is not that the accused acted with the intent to kill her to prevent her from testifying about the murder. It is that the accused murdered her with the intent to prevent her, <u>in part</u>, from ever testifying about the emotional and physical abuse that she suffered at his hands for years. As discussed below, the motivation to silence a witness need not be the sole reason to make a witness unavailable, it need be only part of a reason. Thus even if the main motivation in the murder was based upon revenge, hatred, control, manipulation, or pecuniary concerns, so long as it was driven <u>in part</u> to silence her about the physical and emotional abuse – and thus save his career – the accused has forfeited and waived his Sixth Amendment Confrontation Clause rights and objections under hearsay.

The underlying issue is not whether the accused committed the charged

offense. The military judge's role is to determine the admissibility of evidence. Thus the judge is focused on the intent of the accused to deprive the members of the testimony of a witness and not the ultimate determination of guilt or innocence. *Lentz*, 524 F.3d at 530. "The intent requirement thus ensures that the judge's inquiry is focused on whether the defendant intended to compromise the integrity of the proceedings, not on whether the defendant committed the underlying offense." *Johnson*, 767 F.3d at 822.

As to *Dhinsa*'s second prong that the defendant acted with the intent of procuring the declarant's unavailability as an actual or potential witness, the accused's acts of domestic violence in this care are squarely what *Giles* warned about. The accused's murder of his spouse is the culmination of his domestic violence towards her. It is premeditated, cold and calculating and achieves multiple goals – no loss of military job, no alimony, no loss of military retirement, no child support, no parenting plan with their child, no impact on their business ventures, the ability to see other women without constraint, satiates his hatred of her leaving him – but it silences her forever for the abuse she has suffered, including the abuse listed in Charge II, Specification 1. As noted in *Dhinsa*, "the Government need not show, however, that the defendant's sole motivation was to procure the declarant's absence; rather, it need only show that the defendant was motivated in part by a desire to silence the witness." (Emphasis in the original.) *Dhinsa*, 243 F.3d at 654.

Giles discusses domestic violence and forfeiture and issued this guidance and warning. It is especially important in cases where the victim has been suffering domestic violence:

> The domestic-violence context is, however, relevant for a separate reason. Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution --rendering her prior statements admissible under the forfeiture doctrine. Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify.

Giles, 554 U.S at 377.

The accused's intent in murdering Mrs. [redacted] in part, was to prevent Mrs. [redacted] from reviving her claims of domestic violence against him and expounding on them. The accused was well aware that domestic violence allegations against him would derail his Navy career completely. It is a reasonable inference that he was aware that his spouse had previously cooperated with investigators and then recanted. It is a reasonable inference that a person who cooperates with law enforcement and later recants due to concerns for their spouse's career may now return to law enforcement when the relationship was over. This was a chance the accused could not take. While he could not stop Mrs. [redacted] in 2013 from initially cooperating with the police due to the fast moving nature of events, he could prevent her from cooperating again in 2015 by murdering her. That it was part of a larger motivation and not the sole or main factor is not controlling. As noted in *Giles*, where an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and stop her from reporting abuse to the authorities or cooperate with a criminal prosecution. Thus accused has forfeited and waived his Sixth Amendment Confrontation Clause rights and objections under hearsay by his murder of Mrs. [redacted] This court must prevent the accused from profiting from his own misconduct, his own attempt to silence the main witness against him, and allow the prosecution to introduce Mrs. [redacted] testimonial statements to the US Army military police, both oral and written.

Once an accused forfeits his Sixth Amendment Confrontation rights due to his own misconduct he also forfeits objections under hearsay. *See, United States v. Emery*, 186 F.3d 921 (8th Cir. 1999). An analysis under the *Dhinsa* test, F.R.E. 804(b)(6), or M.R.E. 804(b)(6) reaches the conclusion that once Confrontation Clause rights are forfeited that hearsay objections are also forfeited. To hold otherwise would provide an accused two attempts to profit from their own misconduct, and courts have quickly dispensed with such arguments. See, *United States v. Johnson*, 495 F.3d 951, 970 (8th Cir 2007) holding that "hearsay objections are similarly forfeited under F.R.E. 804(b)(6)" while stating "We conclude that Emery had forfeited his hearsay and confrontation objections not only with respect to a trial on the underlying crimes about which he feared the victim would testify but also in a trial for murdering her."

Post-Confrontation Clause waiver and hearsay waiver what remains is an M.R.E.

403 balancing test, as discussed below.

Post- Crawford, Confrontation and Non-Testimonial Statements discussing Mrs. [redacted] motivation for recanting her statements to US Army police and statements about the physical abuse charged in Charge II, Specification 1

The 6th Amendment of the United States Constitution guarantees the right of accused to be confronted by the witnesses against them. *Ohio v. Clark*, 135 S. Ct. 2173, 2179 (2015). The Confrontation Clause thus limits the admissibility of out of court statements where the primary purpose is testimonial. *Crawford v. Washington*, 541 U.S. 36 (2004). However, "[w]here no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause." *Clark*, 135 S. Ct. at 2180. To determine the primary purpose of a statement, the Court of Appeals for the Armed Forces has set for a series of inquiries to determine the testimonial nature of an out of court statement. *United States v. Rankin*, 64 M.J. 348, 352 (CAAF 2007). "First, was the statement at issue elicited by or made in response to law enforcement or prosecutorial inquiry? Second, did the "statement" involve more than a routine and objective cataloging of unambiguous factual matters? Finally, was the primary purpose for making, or eliciting, the statements the production of evidence with an eye toward trial?" *Id.*

Mrs. [redacted] statements to her friends are not testimonial in nature, they are made to friends and co-workers during daily life and not with an eye towards trial. They are not made to police and "[w]here no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause." *Clark*, 135 S. Ct. at 2180. When addressing statements made by abused victims the Supreme Court noted "only testimonial statements are excluded by the Confrontation Clause. Statements to friends and neighbors about abuse and intimidation and statements to physicians in course of receiving treatment would be excluded, if at all, only by hearsay rules…" *Giles*, 554 U.S. at 376.

After being assaulted at the Army lodge in 2013 Mrs. [redacted] remained in [redacted] with her husband. During this time she spoke to several friends about the events – Mr. [redacted], Mrs. [redacted], Mrs. [redacted] and Mrs. [redacted]. During these discussion Mrs. [redacted] gave a variation of the account she gave law enforcement – that the accused

physically assaulted her and that she later recanted for the sake of her career. None of these statements are testimonial in nature per *Crawford* and the Sixth Amendment's Confrontation Clause. First, none of the statements were made in response to law enforcement or a prosecutorial inquiry. These are statements from one friend to another about her life, her relationship, and why she acted in contradictory ways or made contradictory statements over time. Second, the statements do not involve more than a routine and objective cataloging, or discussion, of unambiguous factual matters. These are discussions amongst friends about life events that Mrs. [redacted] lived through. Third, the primary purpose of making the statements was never toward the production of evidence with an eye towards trial. It is implausible to imagine that Mrs. [redacted] was sowing the seeds of evidence for hearsay objections with friends in the belief that her husband would one day kill her. (Evidence already existed in the form of statements made to military police and law enforcement.) Mrs. [redacted] was speaking friend-to-friend about her life. None of these statements implicate the Confrontation Clause under *Crawford* and *Rankin* and thus the Court should focus its analysis on issues of hearsay versus Confrontation Clause.

The same analysis under M.R.E. 804(b)(6) for the loss of Confrontation Clause rights under *Dhinsa* also leads to a loss of hearsay objections. M.R.E. 804(b) (6) mirrors F.R.E. 804(b) (6), addresses the same issue and M.R.E. 101(b) (1) states that in the absence of guidance courts may look at the Federal Rules of Evidence when interpreting the M.R.E.'s. As noted in *Dhinsa*, 243 F.3d at 652 "Fed. R. Evid. 804(b)(6), made effective December 1997, codified the waiver-by-misconduct doctrine as an exception to the hearsay rules by permitting the admission of hearsay statements offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness."

Dhinsa holds that misconduct that waives confrontation clause rights can also waive objections to hearsay. "Once the confrontation right is lifted from the scales by operation of the accused's waiver of that right the district court is not required to assess independently the reliability of those statements...." *Id* at 655 (internal citations omitted.) There is no need to make a secondary ruling as to hearsay as "Defendant's misconduct waived not only their confrontation rights but also their hearsay objections, thus rendering a special finding of reliability superfluous." *Id.* Thus Mrs. [redacted] statements to her friends about the abuse she suffered at the hands of her husband that relate Charge II, Specification 1 are admissible

under M.R.E. 804(b)(6) as a hearsay exception, subject to M.R.E. 403 limitations.

Statements relating to Charge III are non-testimonial and admissible under M.R.E. 804(b) (6)

A finding that the accused waived and forfeited his Confrontation Clause rights and hearsay objections as related to Charge II, Specification 1 is equally as applicable to statements made by Mrs. [redacted] as to Charge III. There is no separate or different tests for statements that were not originally made as part of a law enforcement investigation. The statements that relate to Charge III and its abuse were made between Mrs. [redacted] and her friends or family, not to law enforcement. Under *Crawford* and *Rankin* they are non-testimonial. To determine the primary purpose of a statement, the Court of Appeals for the Armed Forces has set for a series of inquiries to determine the testimonial nature of an out of court statement. *United States v. Rankin*, 64 M.J. 348, 352 (CAAF 2007). "First, was the statement at issue elicited by or made in response to law enforcement or prosecutorial inquiry? Second, did the "statement" involve more than a routine and objective cataloging of unambiguous factual matters? Finally, was the primary purpose for making, or eliciting, the statements the production of evidence with an eye toward trial?" *Id.*

None of Mrs. [redacted] statements are made in response to law enforcement inquiries. Her statements about the emotional and physical abuse are routine and a cataloging of the experiences of her life. Lastly, their primary purposes was the conversation between friends and were in no way made with an eye towards trial. This is not a Confrontation Clause issue versus a hearsay issue under M.R.E. 804(b) (6). When addressing statements made by abused victims the Supreme Court noted "only testimonial statements are excluded by the Confrontation Clause. Statements to friends and neighbors about abuse and intimidation and statements to physicians in course of receiving treatment would be excluded, if at all, only by hearsay rules..." *Giles*, 554 U.S. at 376.

As noted above, once the Court has found that the accused has made the declarant unavailable for Confrontation Clause purposes, a separate analysis for hearsay objections becomes superfluous. Thus while for ease of review the prosecution has separated the charges and evidence there is no need for the Court to do so when coming to a resolution. Nevertheless, a review under M.R.E. 804(b) (6) also leads to the same conclusion that Mrs. [redacted] statements are admissible. M.R.E. 804(b)(6) and waiver of Sixth Amendment

Rights to confrontation are so inexorably intertwined using the same test the result must logically and legally be the same. The waiver by misconduct of Sixth Amendment Rights is the genesis of M.R.E. 804(b) (6). Other than exclusion under M.R.E. 403 there is no conceptual way to come to the conclusion that the accused was involved in, or responsible for, the unavailability of Mrs. [redacted] under the Sixth Amendment due to his murdering her while not coming to the same conclusion for M.R.E. 804(b) (6)'s requirement that the "party that wrongfully caused or acquiesced in wrongfully cause the declarant's unavailability as a witness, and did so intending the result." The accused murdered her, in part, to prevent Mrs. [redacted] from reviving her previously stated domestic violence allegations but also making new allegations of emotional and physical abuse. Just as the accused cannot profit from his murder of Mrs. [redacted] to suppress her statements to law enforcements and friends about Charge II, Specification 1, the accused cannot profit from his murder as to Charge III.

Non-Testimonial Statements Related to Charge III

None of Mrs. [redacted] statements to friends and family about the relationship between her and the accused are testimonial per the Sixth Amendment, *Crawford* and *Rankin*. These are statements and conversations between friends or family, none of the statements are made to law enforcement or in official inquiries. These are statements made in the course of daily life, some off-handed, some in deeper conversations, none ever made with an eye towards trial or preserving evidence. The accused's actions of waiver and forfeiture of his Sixth Amendment Confrontation Clause rights aside, the proper evaluation of these statements involve hearsay under M.R.E. 804(b)(6) due to their non-testimonial nature.

After the accused and his wife reconcile, and his being embolden by her recantation, the accused continues to emotionally and physically abuse his wife. During this time he isolates her from friends and family, controls access to money, who may visit the home, throws away clothes, and checks her phone. Any one of these issues, in isolation without a history, could be debated as the inner-workings of a marriage. However, these incidents are not isolated, they continue over time and have an historical anchor in the physical abuse at the Army Lodge where police were called in 2013. The accused was certainly aware that his behavior conduct unbecoming an officer and a gentleman. He attempted to exclude others from his wife's life as he could not control their input and advice on a wide variety of

issues from marriage, child rearing, business venture, and relationships. Once the marriage disintegrated the accused knows that if his wife tells authorities of the physical and emotional abuse his career is over. She once reached out to a third party he could not control – the police – and he weathered that professional storm with her recantation. He could not risk her again contacting authorities, either civil or military, about his actions. His motives to silence her for the physical and mental abuse are as strong for Charge III as they are for Charge II, Specification 1. As noted in *Giles*, supra, the motive to silence the victim of domestic violence with murder is incredibly strong. It is the penultimate act in the long history of the abuse. The accused cannot now profit from his murder to silence Mrs. [redacted] for the history of abuse she suffered up till her final night.

As noted above, M.R.E. 804(b) (6) allows this admission of Mrs. [redacted] statements related to the emotional and physical abuse. *Dhinsa* holds that misconduct that waives confrontation clause rights can also waive objections to hearsay. "Once the confrontation right is lifted from the scales by operation of the accused's waiver of that right the district court is not required to assess independently the reliability of those statements...." *Id* at 655 (internal citations omitted.) There is no need to make a secondary ruling as to hearsay as "Defendant's misconduct waived not only their confrontation rights but also their hearsay objections, thus rendering a special finding of reliability superfluous." *Id.* It is illogical and absurd to hold that the accused waived his Confrontation Clause rights which are codified in F.R.E. 804(b)(6) and M.R.E. 804(b)(6) but find that his actions do not meet the standards set forth in M.R.E. 804(b)(6). The limitations on the admission of Mrs. [redacted] statements related to Charge III are a M.R.E. 403 balancing test, discussed below.

M.R.E. 403 balancing tests

What remains to be determined is an M.R.E. 403 balancing test. "As discussed supra, after the district court finds by a preponderance of the evidence that the hearsay statement is admissible under Fed. R. Evid. 804(b) (6), it must still perform the balancing test required under Fed. R. Evid. 403 "in order to avoid the admission of facially unreliable evidence." *Id.*

For evidence to be admissible it must also be logically and legally relevant under M.R.E. 401 and M.R.E. 402. Under M.R.E. 403 the military judge must balance the probative value of evidence against the danger of unfair prejudice, confusion of the issues or misleading the members, undue delay, waste of time, and needless presentation of cumulative evidence.

Mrs. [redacted] statements, both oral and written to US Army military police are legally and logically relevant as they related directly to Charge II, Specification 1. It is her version of events told within a very short span of the events occurring. There is no confusion of the issues as Mrs. [redacted] asked for the police to be called by the front desk clerk and they appeared shortly thereafter. Such direct evidence of the crime cannot mislead members, is not a waste of time, will not cause any serious delay (it is actually less time to present the evidence than if Mrs. [redacted] were still alive) and is not cumulative. Both her statements to US Army police are made to the same person and both made within a short time-frame. There is no danger of unfair prejudice at all. The fact that the statements are inculpatory do not make them unfairly prejudicial or facially unreliable. Mrs. [redacted] statements to US Army military police should not be excluded under M.R.E. 403. (The issue of Mrs. [redacted] statement to the hotel desk clerk is addressed in other motions.)

Mrs. [redacted] statements to Mr. [redacted], Mrs. [redacted] Mrs. [redacted] and Mrs. [redacted] should not be excluded under M.R.E. 403. After her initial outcry to police Mrs. [redacted] later recants. She explains this recantation and provides a version of events charged in Charge II, Specification 1 to each of them. It is her version of events told after she recanted but then came the realization that her life was spinning out of control and she needed to leave her husband. There is no confusion of the issues as Mrs. [redacted] was talking to friends about the abuse she suffered at the hands of the accused. Such direct evidence of the crime cannot mislead members, is not a waste of time, will not cause any serious delay and is not cumulative to her version of events to police, even if less detailed. There is no doubt that the defense may attempt to present some evidence that Mrs. [redacted] recanted to law enforcement (the prosecution will object to this evidence.) Mrs. [redacted] statements to her friends after the recantation provide direct evidence as to what occurred as to Charge II, Specification 1 and why she made decisions that she later did. This is not evidence that creates a mini-trial or confuses members. It is admissible under M.R.E. 403 and goes directly to the guilt or innocence of the accused as to Charge II, Specification 1.

Mrs. [redacted] statements to friends and family that relate to Charge III are admissible under M.R.E 403. The statements are legally and logically relevant under M.R.E. 401 and M.R.E. 402 as they relate to elements of a charged offense. There is no confusion of the issues as Mrs. [redacted] was talking to friends about the abuse she suffered at the hands of the accused during unguarded and unscripted moments of her life. Such direct evidence

of the crime cannot mislead members, is not a waste of time, will not cause any serious delay and is not cumulative. Mrs. [redacted] has no police interview related to these offenses nor was she ever interviewed by a single person or entity about this topic. Mrs. [redacted] statements to her friends provide the best and at times only direct evidence as to what occurred as to Charge III. They also provide context that she is not suicidal on the day she died, that she had future plans both personally and professionally, that she was spending money to accomplish her goals and that she would not abandon her only child.

In a marriage there are often only two persons present for domestic violence events and this evidence is the most direct evidence of Mrs. [redacted] versions of events and mindset. To exclude the evidence under M.R.E. 403 is to silence Mrs. [redacted] forever and to allow the accused to reach his ultimate goal of preventing her from informing others of the abuse she suffered. Mrs. [redacted] statements are admissible under M.R.E. 403 and go directly to the guilt or innocence of the accused as to Charge III.

Considerations of motivation and timing

The accused does not need to know of a preferred charges or an indictment prior to the applicability of the rules of waiver by misconduct or forfeiture by misconduct. In other words, the accused does not need to know of a court date and attempt to prevent the accused from testifying at a specific date or about specific charges. The act can be done prior to initiation of judicial proceedings, which can itself be an attempt to thwart the initiation of judicial proceedings.

In *United States v Miller*, 116 F.3d 641 (2nd Cir. 1997) the Court held that there was no requirement of an ongoing proceeding which the declarant was required to testify. It held "although a finding that the defendant's purpose was to prevent a declarant from testifying is relevant, such a finding is not required." *Id* at 668. In *Miller* there was testimony that a criminal gang's practice was to murder suspected police informants or gang members whose actions threatened the gang. Two gang members were killed prior to trial and thus unavailable. By holding that there is no requirement that an ongoing case or trial exist, or that the declarant even be a named witness, the Court ensured that the accused cannot profit from his own criminal actions even if done prior to trial in an effort to slay a witness about one possible charge. It is noteworthy that the defendant in Miller was charged with a wide variety of offense outside of murder yet the murder

accomplished the goal of silencing witnesses to other crimes. *See also, United States v. Jackson*, 706 F.3d 264, 269 (4th Cir. 2013) holding "our decision to construe the forfeiture by wrongdoing exception to apply even when a defendant has multiple motivations for harming a witness places us in accord with our sister circuits and several state courts."

In *United States v. Gray*, 405 F.3d 227, 241 (4th Cir. 2005), the Court held "Thus we conclude that Rule 804(b)(6) applies whenever the defendant's wrongdoing was intended to, or did, render the declarant unavailable as a witness against the defendant, without regard to the nature of the charges at the trial in which the declarant's statements are offered." Thus it is irrelevant at this trial that the accused is charged with multiple violent acts upon the victim, so long as the declarant's statements are offered at the trial and they are relevant to at least one charge.

Preponderance of Evidence standard

Prior to admission of statements under M.R.E. 804(b)(6), the Court should hold a preliminary hearing to determine the admissibility of the statements outside the presence of the members. When resolving issues of forfeiture by wrongdoing the burden of proof is preponderance of the evidence. *United States v. Marchesano*, 67 M.J. 535 (A.C.C.A. 2008). *See also, United States v. Johnson*, 767 F.3d 815 (9th Cir. 2014) noting that the vast majority of Federal circuits addressing F.R.E. 804(b)(6) have held to the preponderance of evidence standard; *United States v. Lentz*, 525 F.3d 501, 530 (4th Cir. 2008).

Though in dicta in *Davis v. Washington*, 547 U.S. 813, 833 (2006), a post-*Crawford* case, the Supreme Court stated that "We take no position on the standards necessary to demonstrate such forfeiture, but federal courts using Federal Rule of Evidence 804(b)(6), which codifies the forfeiture doctrine, have generally held the Government to the preponderance of the evidence standard. State courts tend to follow the same practice." (internal citations omitted).

Additionally, per R.C.M. 905(c) the burden of proof on any factual issue the resolution of which is necessary to decide a motion shall be a preponderance of the evidence. The President has not created a different or more onerous (or less demanding) standard for M.R.E. 804(b)(6). Thus unlike much of M.R.E. 804(b)(6)'s impact in

courts-martial a specific R.C.M. does provide guidance on its application to evidentiary hearings.

5. **Evidence to be Presented**

Govt. Exhibit 4a - [redacted] statement dtd 9 Aug 13 to US Army CID;

Govt. Exhibit 9 - [redacted] statement dtd 10 Aug 13 to US Army CID;

Govt. Exhibit 8 - Mr. [redacted] statement dtd 10 Aug 13 to US Army CID;

Govt. Exhibit 10 - Specialist [redacted], USA MP dtd 9 Aug 13 t0 US Army CID;

Govt. Exhibit 11 - [redacted] statement dtd 14 Nov 13 to NCIS;

Govt. Exhibit 12 - [redacted] statement dtd 19 April 18 to NCIS;

Govt. Exhibit 4e - [redacted] statement dtd 12 Apr 16 to Belgian police;

Govt. Exhibit 4b - [redacted] statement dtd 14 Oct 15;

Govt. Exhibit 13 - [redacted] statement dtd 10 Aug 18 to NCIS;

Govt. Exhibit 14 - [redacted] interview by [redacted] Police;

Govt. Exhibit 15 - Statement of [redacted] dtd 17 July 16;

Govt. Exhibit 16 - Statement of [redacted] -Still dtd 2 Feb 17 to [redacted] Police;

Govt. Exhibit 17 - Statement of [redacted]

Govt. Exhibit 18 - Statement of [redacted] dtd 2 Feb 17 to [redacted] Police;

Govt. Exhibit 19 - Statement of [redacted] dtd 12 Oct 15 to [redacted] Police;

Govt. Exhibit 20 - Statement of [redacted] dtd 5 Dec 15 to NCIS

Govt. Exhibit 21 - Statement of [redacted] dtd 29 Oct 15 to [redacted] Police;

Govt. Exhibit 22 - Statement of [redacted] dtd 13 Oct 15 to [redacted] Police;

Govt. Exhibit 23 - [redacted] Police report as to LT Becker as to 6 Oct 15;

Govt. Exhibit 24 - Alcohol purchase records as to LT Becker from [redacted] police;

Govt. Exhibit 25 - Statements of LT Becker to [redacted] police;

Govt. Exhibit 26 - Statements of [redacted] to [redacted] Police and NCIS;

Govt. Exhibit 27 - Statement of [redacted] dtd 9 March 16 to [redacted] Police;

Govt. Exhibit 28 - Statement of [redacted] dtd 09 Feb 16 to NCIS;

Govt. Exhibit 29 - Statement of [redacted] dtd 9 March 16 to [redacted]

Police;

Govt. Exhibit 30 - Statements of [redacted] Police officers [redacted] and [redacted] dtd 20 Oct 15;

Govt. Exhibit 31 - Biomechanical Report by [redacted];

Govt. Exhibit 32 - Toxicology report by [redacted];

Govt. Exhibit 33 - Photographs of Becker's apartment building 8 Oct 15;

Govt. Exhibit 34 - Statements by [redacted] Police officer [redacted];

Govt. Exhibit 37 - Statement of [redacted] 30 Apr 18;

Govt. Exhibit 4c - [redacted] statements of 19 and 27 Oct 15;

Govt. Exhibit 5 - Pages from Victim's Med Record ([redacted].

6. Relief Requested.

The Government request that the Court grant the Government's motion and allow statements by Mrs. [redacted] to be admitted into evidence for the truth of the matter asserted as the accused has waived and forfeited his Sixth Amendment rights and hearsay objections due to his own misconduct.

6. Oral Argument.

The government respectfully requests oral argument on this motion.

[redacted]

J. L. JONES

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CERTIFICATE OF SERVICE

I hereby certify that, on 10 September 2019, I caused to be served a copy of this motion on the trial counsel for the government and the court.

[redacted]

J. L. JONES

NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **CRAIG R. BECKER** **LT/O-3** **U.S. NAVY**	**DEFENSE RESPONSE TO GOVERNMENT MOTION TO ADMIT STATEMENTS DUE TO FORFEITURE BY WRONGDOING** **20 SEP 2019**

1. Nature of Motion

The Defense moves the court to deny the Government's request to apply M.R.E. 804(b)(6) and the Sixth Amendment Confrontation Clause exception of Forfeiture by Wrongdoing.

2. Summary of Facts

The Defense denies many of the facts listed by the Government in its motion. However, for the purpose of this motion the following are disputed or clarified:

t. After a full NCIS investigation and legal review by RLSO [redacted], LT Becker's command determined that no judicial or administrative action would be taken. LT Becker was informed of this decision.

u. Mrs. [redacted] did not tell Ms. [redacted] or otherwise indicate that she intended to attempt to have a criminal investigation into the 2013 incident reopened. Further, Ms. [redacted] did not inform LT Becker that Mrs. [redacted] was discussing the 2013 incident.

v. Mrs. [redacted] did not tell Ms. [redacted] or otherwise indicate that she intended to attempt to have a criminal investigation into the 2013 incident reopened. Further, Ms. [redacted] did not inform LT Becker that Mrs. [redacted] was discussing the 2013 incident.

x. Mrs. [redacted] did not tell Mr. [redacted] or otherwise indicate that she intended to attempt to have a criminal investigation into the 2013 incident reopened. Further, Mr. [redacted] did not inform LT Becker that Mrs. [redacted] was discussing the 2013 incident.

y. The friends and relatives of Mrs. [redacted] who claim she told them about the events listed by the Government in this paragraph have almost no details about how or when these events occurred. Further, the details they can provide do not amount to abuse.

cc. Mrs. [redacted] and LT Becker intended to continue working together on their business venture regarding gloves even after their divorce. The trip Mrs. [redacted] was planning on taking to [redacted] was in furtherance of this business venture.

Additionally, the Defense provides the following facts for this motion:

a. Mrs. [redacted] told several friends in the weeks leading up to her death that her separation from her husband was amicable, that they were going to remain friends, that they were going to continue their business together, and that LT Becker was a good father.

3. Discussion of Law

A. Military Rule of Evidence (M.R.E.) 804(b)(6) versus Federal Rule of Evidence (F.R.E.) 804(b)(6)

The Defense concurs with the Government that it is appropriate to utilize Federal Court case law and their interpretation of F.R.E. 804(b)(6) when analyzing M.R.E. 804(b)(6).

B. Forfeiture by Wrongdoing versus Waiver by Misconduct

The Defense concurs with the Government that forfeiture by wrongdoing and waiver by misconduct are related concepts. The Defense further argues that the analysis for both is the same.

C. Admissibility of the Mrs. [redacted] Hearsay Statements

In Giles v. California, 554 U.S. 353 (2008), the Supreme Court held that the forfeiture by wrongdoing exception only applied when the accused committed an act with the specific intent

of keeping a witness from testifying at trial. "In reaching this conclusion, the Supreme Court clarified the common law principal of "forfeiture by wrongdoing," stating it applied only where the defendant's conduct was "designed" to prevent testimony. The defendant, therefore must have "intended" to prevent testimony before applying the "forfeiture by wrongdoing" principle. . ." United States v. Marchesano 67 M.J. 535, at 542 (A.C.C.A. 2008) (citing Giles, 554 U.S. 353)). This doctrine of forfeiture by wrongdoing addressed in Giles was codified in F.R.E. 804(b)(6) and promulgated in M.R.E. 804(b)(6). *See* Davis v. Washington, 547 U.S. 813 (2006). In applying F.R.E. 804(b)(6) and M.R.E. 804(b)(6), both military and federal courts have upheld the admission of evidence under a theory of forfeiture by wrongdoing only when the Government has shown the wrongdoing was intended to render the declarant unavailable *as a witness*. See Marchesano and United States v. Gurrola, 898 F.3d 524, (5th Cir. 2018). Federal courts have not required actual charges to have been filed at the time of the wrongdoing for this exception to apply. However, the possibility of criminal charges cannot be speculative, with one circuit holding that the forfeiture by wrongdoing exception is only available for statements by a witness who was made unavailable before charges were brought if it was reasonably foreseeable that the investigation would culminate in the bringing of charges. United States v. Burgos-Montes, 786 F.3d 92, 99 (1st Cir. 2015).

In order to avail themselves of M.R.E. 804(b)(6), the Government must show that LT Becker killed his wife and that he did so for the purpose of making her unavailable as a witness against him. First, the Government evidence to demonstrate that LT Becker is responsible for his wife's death is entirely circumstantial and relies heavily on the presumption that there was a longstanding history of "physical and emotional" abuse on the part of LT Becker. This assertion by the Government is based on a few nonspecific statements purportedly made by Mrs. [redacted] to a handful of friends in the brief time period leading up to her separation with LT Becker. When questioned, these witnesses will show that the conduct described does not constitute a pattern of "physical and emotional" abuse.

Even assuming the Government can make a showing by a preponderance of the evidence that LT Becker was responsible for Mrs. [redacted] death, there is absolutely no evidence that LT Becker did so for the purpose silencing her as a witness against him. For the purpose of this motion, the Government appears to rely on a 2013 allegation of domestic violence and LT

Becker's theoretical concern for his career. With regard to the 2013 event, that allegation had already been recanted by Mrs. [redacted] and disposed of by the military authorities without administrative or judicial action. The case was fully investigated by NCIS and Family Advocacy. It was unsubstantiated by family advocacy and, after legal review by RLSO [redacted], LT Becker's command closed the case taking no judicial or administrative action. While the Government suggests that Mrs. [redacted] once again changed her version of events and was telling a friend or two that she only recanted to protect LT Becker's career, they have presented no evidence that Mrs. [redacted] intended to attempt to revive this allegation in any manner. Further, the Government has presented no evidence that LT Becker was concerned or in any way believed Mrs. [redacted] might attempt to revisit the 2013 event with law enforcement. The same is true with Mrs. [redacted] discussion of the alleged "physical and emotional abuse." While the Government may have some evidence to show that during the period surrounding her separation from her husband, Mrs. [redacted] mentioned to a friend or two that LT Becker engaged in conduct she did not appreciate, they have presented no evidence that Mrs. [redacted] intended to attempt to turn these marital complaints into criminal charges. Additionally, the Government has offered nothing to suggest that even if Mrs [redacted] did have this desire that it would be reasonably foreseeable that charges would be filed for conduct such as taking down drapes. And most importantly, the Government has presented no evidence that LT Becker was concerned or in any way believed Mrs. [redacted] might attempt to turn these minor marital complaints into criminal charges. Instead of offering proof that LT Becker was concerned about either of these possibilities, the Government invites this court to infer that LT Becker would have been worried about how this theoretical possibility might impact his career. There are two problems with this invitation. First, even if concern over his career was LT Becker's motivation for the alleged murder, that would be insufficient to satisfy the intent requirement for forfeiture by wrongdoing. The bad actor must intend to make a potential witness unavailable to testify. This rule is "grounded in the ability of courts to protect the integrity of their proceedings." Davis, 547 U.S. 813. It does not apply where a bad actor simply wants to protect their job or reputation. Second, the Government has offered no evidence that LT Becker was in the slightest way concerned the Mrs. [redacted] was going to attempt to harm him legally or professionally. An inference based on no evidence is not an inference, it is speculation.

In addition to the Government's lack of evidence on LT Becker's alleged intent, this court must also take into consideration the Defense's evidence that despite the end of the marital relationship and the natural accompanying friction, LT and Mrs. [redacted] appeared to be going through an amicable separation. The [redacted] voluntarily entered into a separation agreement. Ms. [redacted] a friend of Mrs. [redacted] told NCIS that even as Mrs. [redacted] was preparing to move out of the apartment, Mrs. [redacted] stated that the divorce was amicable. Ms. [redacted] a work colleague of Mrs. [redacted] told NCIS that Mrs. [redacted] told her the separation was amicable. Ms. [redacted] a friend of Mrs. [redacted] told NCIS that even after the separation, Mrs. [redacted] intended to continue working with LT Becker on a joint business venture. This is confirmed by the separation agreement. Ms. [redacted] the [redacted] housekeeper and babysitter, told the [redacted] investigators that LT Becker seemed to take the separation well and that the couple were going to remain friends. Ms. [redacted] a friend of Mrs. [redacted] told [redacted] investigators that Mrs. [redacted] told her she still loved Craig but that she was not in love with him and that she thought he was a good father. It is a reasonable inference that a person who wants to maintain an amicable relationship and a business relationship with their former spouse would not would attempt to bring criminal charges against them.

There were no pending charges against LT Becker at the time of his wife's death; there was no ongoing investigation; there was not even the slightest indication that an investigation might be opened or that Mrs. [redacted] desired for one to be opened. On the contrary, there was evidence that despite their differences, the [redacted] were going through an amicable separation that contemplated regular and positive interactions in the foreseeable future. As such, the Government has failed to demonstrate that LT Becker killed his wife or that he did so for the purpose of silencing her as a witness against him.

4. Relief Requested

The Defense requests that the Military Judge deny the Government's request to apply M.R.E. 804(b)(6) and the Sixth Amendment Confrontation Clause exception of Forfeiture by Wrongdoing.

5. Oral Argument.

Unless the Government concedes the motion or this Court grants the relief on the basis of pleadings alone, the defense requests oral argument on this matter.

[redacted]

JOHN A. GUARINO
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DEFENSE COUNSEL

NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **CRAIG R. BECKER** **LT/O-3** **U.S. NAVY**	**DEFENSE RESPONSE TO GOVERNMENT MOTION IN LIMINE TO ADMIT GOVERNMNET EXHIBITS** **20 SEP 2019**

1. Nature of Motion.

The Defense moves the court to deny, in part, the Government's Motion In Limine to Admit Government Exhibits pursuant to Rule for Courts-Martial 906(b)(13).

2. Summary of Facts.

The Defense denies many of the facts listed by the Government in its motion. Furthermore, it will be necessary for the Government to call witnesses to establish the required foundation before some of the evidence may be preadmitted

3. Discussion of Law.

A party may move for a preliminary ruling on the admissibility of evidence, pursuant to Rule of Court-Martial (RCM) 906(b)(13). It is within the military judge's discretion to rule on evidentiary questions prior to trial. RCM 906(b)(13).

Military Rule of Evidence (MRE)(402) provide that all relevant evidence is admissible, unless another rule or law bars admission. Evidence is relevant if it tends to make any fact of consequence "more of less probable than it would be without the evidence." MRE 401. The Government will still be required to establish the necessary foundation before the evidence can be admitted.

4. Argument.

A. Certified Copy of Death Certificate, Translation and Report of Death from the U.S. State Department.

The Defense does not object to the preadmission.

B. Separation Agreement Between the Alleged Victim and Accused.

The Defense does not object the preadmission as long as the entire document is included.

C. Army Lodge Layout and Pictures of the Army Lodge.

The Defense does not object to the preadmission of the Lodge Layout. However, the Defense objects to the preadmission of the photographs from the Lodge without laying a proper foundation. The Defense believes that some of the photos may not accurately reflect areas of the Lodge as they existed at relevant times.

D. Videos of SA [redacted] Opening Window.

The Defense does not object to the preadmission.

E. Pictures of Accused and Victim's Apartment Inside and Outside.

The Defense objects to the preadmission without laying the proper foundation. The Defense asserts that some, if not all, of the photographs do not accurately represent the apartment at the relevant time period.

F. Faro Scan, "Scene to Go," Fly Through Videos and Still Pictures of Crime Scene and Surrounding Area.

The Defense objects without the Government laying the proper foundation. The Defense asserts that some, if not all, of the photographs do not accurately represent the apartment at the relevant time period.

G. Limited Pictures of Victim and Daughter

The Defense objects to the photographs of the alleged victim and her daughter. The photos are not relevant, and any limited probative value will be far outweighed by the prejudicial impact. The identity of the alleged victim is not in question. The photograph being offered by the Government appears to be a "glamor shot" and does not reflect the accurate appearance of the alleged victim at a time when she had been [redacted]. The photograph of

the alleged victim's daughter is not relevant in light of the Government's claim that it shows the age and size of the daughter. The daughter will not be testifying at trial because she did not witness anything and cannot offer any evidence. There is no need to offer photographs of an irrelevant witness.

5. Relief Requested

The Defense requests that the Military Judge deny the Government's request, in part, and request that the Government establish the necessary foundation as noted in the motion.

6. Oral Argument.

The Defense requests oral argument on this matter.

J.J. SULLIVAN, III

CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion was served electronically on Trial Counsel and the Court on 20 September 2019.

J.J. SULLIVAN, III

[redacted]

NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
UNITED STATES NAVY
GENERAL COURTS-MARTIAL

UNITED STATES **v.** **CRAIG R. BECKER** **LT/O-3 USN**	**GOVERNMENT'S RESPONSE TO THE DEFENSE'S MOTION TO PREADMIT: MRS. [redacted] JOURNAL.** **20 SEPTEMBER 2019**

1. Nature of Motion.

The Government requests that the Court deny the Defense's motion to pre-admit Mrs. [redacted] journal as it is hearsay pursuant to M.R.E. 801 (a) and is barred by M.R.E. 802, as there is not an exception to the prohibition against hearsay that would allow for the admission of the journal.

2. Summary of Facts.

a. LT Becker is charged with murdering his wife, the victim, Mrs. [redacted] ([redacted]), on 8 October 2015 in [redacted] by pushing her through the seventh story window of their apartment building.

b. LT Becker and [redacted] entered into a separation agreement on 18 September 2015.

c. LT Becker physically and emotionally abused his wife during their relationship, to include a 2013 incident at the [redacted]

[redacted]

d. [redacted] wrote the journal sometime after August 2013, but the exact period is unknown.

e. [redacted] told numerous friends and colleagues that she was excited to move on from her husband at the time of their separation.

f. Friends described [redacted] as extremely happy and excited about her future without LT

Becker on the day of her death.

g. [redacted] had already moved onto a new relationship with Mr. [redacted].

3. Discussion.

M.R.E. 802 bars hearsay statements from admission into trial unless there is a specific rule or case that would allow for the admission.

Pursuant to M.R.E. 801(c), hearsay is a statement that (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement. M.R.E. 801(a), describes a statement to mean "a person's oral assertion, ***written assertion***, or nonverbal conduct, if the person intended it as an assertion." (Emphasis added).

M.R.E. 801(d) provides examples of statements that are not hearsay and M.R.E. 803 provides Exception to the Rule against hearsay. The Defense does not provide a single exception under M.R.E. 803 or even make an argument that the journal is not a statement under M.R.E. 801(d).

The Defense's only argument is that the statement is relevant under M.R.E. 402. However, M.R.E. 402 specifically states that "Relevant evidence is admissible unless any of the following provide otherwise: … (3) these rules:…" In this situation, "these rules" means the military Rules of Evidence and, as noted above, the M.R.E. 802 would bar the admission of this piece of evidence.

The Defense never addresses M.R.E. 801(d) or M.R.E. 803, as the statements in the journal are clearly a statement by [redacted]. There are no exceptions within M.R.E. 803 to the M.R.E. 802 rule of exclusion. The Defense's own motion, (Fact 2. d. and h.) clarifies that the Defense plans on introducing these statements for the truth of the matter asserted.

4. Burden of Proof.

Per R.C.M. 905(c)(2) the burden of persuasion is on the moving party, the Defense.

5. Evidence Presented.

Govt. Exhibit 2 for ID - Separation Agreement;
Govt. Exhibit 4a – Victim Statement of 9 August 2013;
Govt. Exhibit 4b – [redacted] Interview;
Govt. Exhibit 4c – [redacted] Interview;
Govt. Exhibit 4e – [redacted] Interview;
Govt. Exhibit 46 – [redacted] full journal;
Govt. Exhibit 47 – [redacted] Statement.

6. Relief Requested.

The Government requests that the Court deny the Defense's motion to pre-admit Mrs. [redacted] journal as it is hearsay pursuant to M.R.E. 801 (a) and is barred by M.R.E. 802 as there is not an exception to the prohibition against hearsay in this situation.

7. Oral Argument.

The Government respectfully requests oral argument on this motion.

[redacted]
Paul T. Hochmuth

CERTIFICATE OF SERVICE

I hereby certify that, on 20 September 2019, I caused to be served a copy of this motion on the trial counsel for the government and the court.

[redacted]
Paul T. Hochmuth

NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES OF AMERICA v. CRAIG BECKER LT USN	Defense Motion In Limine—R.C.M. 914 9 September 2019

1. **Nature of Motion.**

In accordance with R.C.M. 914 and the Jencks Act, the defense requests the Court to preclude the following evidence: 1) Testimony from Mr. [redacted] and (2) Statements from Mrs. [redacted] which relate to Charge II.

2. **Burden of Proof.**

As the moving party, the defense has the burden of proof by a preponderance of the evidence. R.C.M. 905(c).

3. **Summary of Facts.**

a. Charge II, Specification 1 alleges that LT Becker strangled his wife, [redacted] at or near [redacted] on or about 9 August 2013.

b. On 30 July 2018, almost five years after the alleged offense (10 days before the statute of limitations would have tolled), Charge II, Specification 1 was preferred.

c. The charges stem from an argument LT Becker and his wife had in a room at the Army Lodge in the early morning hours. AE V at ZZ.

d. Mrs. [redacted] approached the front desk clerk, Mr. [redacted] who, after a brief discussion, called the base military police ("MPs") and described the situation. SGT [redacted], a military policeman, received the call and dispatched SPC [redacted] AE V at AAA.

e. According to Mr. [redacted], he also made a subsequent call to the MPs, during which Mrs. [redacted] also spoke to the MPs. AE V at BBB.

f. Calls to the MPs are recorded, but those recordings are no longer available.

g. Mr. [redacted] made two initial reports to law enforcement. In one, he made no mention of injuries to Mrs. [redacted] In the other, he specifically denied that he observed injuries to Mrs. [redacted] AE V at BBB; AE V at CCC.

h. A subsequent statement from Mr. [redacted] to NCIS suggests that he observed red marks on Mrs. [redacted] neck. AE V at DDD.

i. In her statement to law enforcement at 0649, Mrs. [redacted] stated that LT Becker "put his hands around my neck and pushed down. He did not squeeze as to leave marks, he only pushed down hard against the bed so that I could not breathe. AE V at EEE.

j. Mrs. [redacted] also reported that LT Becker took her identification and credit cards from her wallet. *Id.*

k. In response to clarifying questions from law enforcement, Mrs. [redacted] stated she had no visible injuries, that she had consumed 4 glasses of wine, and that she was taking medication for [redacted] *Id.*

l. Mrs. [redacted] made a subsequent statement that same day at 1902. AE V at FFF.

m. In that statement Mrs. [redacted] stated that her initial statement was "written under extreme duress" and was factually incorrect in several regards. *Id.*

n. Mrs. [redacted] stated that her accusations that LT Becker had stolen her identification and credit cards was incorrect, and he "in fact had not." Instead, her accusations about her belongings were the result of being "upset and disoriented," and lacking "pertinent information." *Id.*

o. Mrs. [redacted] further stated that she was "coerced" to make a statement by law enforcement because she was told "my husband was in another room and also writing his [statement]." Her statement, therefore, was not a statement that "would accurately reflect my recollection or view of the situation and those involved." *Id.*

p. Mrs. [redacted] also told a Family Advocacy Committee that she misinterpreted the incident, resulting in the Committee closing the case. AE V at GGG.

q. Mrs. [redacted] made a subsequent statement to NCIS on 14 November 2013 "for clarification purposes." AE V at HHH.

r. In that sworn statement, Mrs. [redacted] stated, "My initial assessment of the events that transpired on or around Aug 9 was significantly skewed by being on [redacted] for 8 mos. . . I was severely paranoid, had lost 20 lbs, [and] experienced personality change. At the time I believed that my husband was trying to harm me when in reality he was trying to keep me from harming myself or him and he was trying to deescalate the situation. He DID NOT choke me or hurt me in any way and I made statements indicating that I thought he did due to my altered state of mind (medication induced). *Id.*

s. LT Becker has been interviewed multiple times in connection with this incident and has consistently disclaimed accusations that he choked his wife or was violent in anyway. AE V at ZZ; AE V at GGG.

4. Discussion.

A. THE MILITARY JUDGE SHOULD PRECLUDE THE TESTIMONY OF MR. [redacted] AND THE ADMISSION OF STATEMENTS BY MRS. [redacted] RELATING TO CHARGE II BECAUSE OF THE INEVITABLE FAILURE OF THE GOVERNMENT TO COMPLY WITH R.C.M. 914.

The Jencks Act requires the military judge, upon motion by the accused, to order the government to disclose prior "statement[s]" of its witnesses that are "relate[d]" to the subject matter of their testimony after each witness testifies on direct examination. *See* 18 U.S.C § 3500(b). The Jencks Act is intended "to further the fair and just administration of criminal justice" by providing for disclosure of statements for impeaching government witnesses. *Goldberg v. United States*, 425 U.S. 94, 107 (1976) (quoting *Campbell v. United States*, 365 U.S. 85, 92 (1961)).

In 1984, the President promulgated R.C.M. 914 which "tracks the language of the Jencks Act, but it also includes disclosure of prior statements by defense witnesses other than the accused." *United States v. Pena*, 22 M.J. 281, 282 (C.M.A. 1986). Both R.C.M. 914 and the Jencks Act afford the defense the opportunity to impeach witnesses and enhance the accuracy of trial proceedings through cross examination of witnesses. *United States v. Lewis*, 38 M.J. 501, 508 (A.C.M.R. 1993).

Under R.C.M. 914 (a), "After a witness other than the accused has testified on direct examination, the military judge, on motion of a party who did not call the witness, shall order the party who called the witness to produce, for examination and use by the moving party, any statement of the witness that relates to the subject matter concerning which the witness has testified."

Under subsection (e) of the same rule, "If the other party elects not to comply with an order to deliver a statement to the moving party, the military judge shall order that the testimony

of the witness be disregarded by the trier of fact and that the trial proceed, or, if it is the trial counsel who elects not to comply, shall declare a mistrial if required in the interest of justice." *See United States v. Muwwakkil,* 74 M.J. 187, 193 (C.A.A.F. 2015) (holding one of these sanctions was required when the government negligently failed to preserve a portion of the Article 32 testimony of the complaining witness.).

The only difference between the facts at issue here and the facts in *Muwwakkil*, is that in *Muwwakkil,* a paralegal failed to appropriately "back up" a recording of a complainant's testimony at an Article 32 hearing (where defense counsel was present). Here, the government failed to preserve an audio recording of Mrs. [redacted] interview with law enforcement, notes of those interviews, and recordings of phone calls made by Mrs. [redacted] and Mr. [redacted]. As such, it is helpful to look at the court's analysis in *Muwwakkil* and compare it to the present case.

1. **The recorded interview was a "statement" within the government's possession.**

Under subsection (f)(2) of R.C.M. 914, "a 'statement' of a witness means: a substantially verbatim recital of an oral statement made by the witness that is recorded *contemporaneously* with the making of the oral statement and contained in a stenolineart, mechanical, or electrical or other recording." (emphasis added). In this instance, the audio recordings of the calls from Mr. [redacted] and Mrs. [redacted] to the MPs fall within the plain meaning of the term "statement."

2. **There is no prejudice analysis under R.C.M. 914.**

In *Muwwakkil*, the government asserted that the defense was not prejudiced because it had the summary of the witness's testimony, the investigating officer's notes, and had been personally present during the hearing itself. Although the military judge appears to have conducted some version of a prejudice analysis by finding the paralegal's summary was "not a

substantially verbatim transcript," or that "the investigating officer had found that the complainant had key credibility issues," neither of these findings are required. *Muwwakkil*, 74 M.J. at 193 ("[T]he military judge did not err in declining to apply the good faith loss doctrine because she explicitly found the government had engaged in negligent conduct, and a finding of negligence may serve as the basis for the military judge to conclude the good faith loss doctrine does not apply."). Further, under a plain language reading of R.C.M. 914(e), there is no reference to a finding of prejudice as a predicate to relief. *Id.*

In short, it is no refuge for the government to claim they aren't required to produce a statement under the Jencks Act or R.C.M. 914 because the defense has not averred what is useful about the statement. The defense need only show that the statement pertains to the matter at hand. Audio recorded statements about the charged offense, from the complainant and a percipient witness, made close in time to the alleged offense, certainly satisfy this requirement.

3. The government's negligent failure to preserve the recordings of the initial calls to law enforcement effectively means the government elected not to comply with R.C.M. 914.

In *Muwwakkil*, C.A.A.F. rejected the government's contention that the Trial Counsel could not "elect" to fail to comply with the rule because, at the time of trial, the recording no longer existed. *Id.* at 192-193. C.A.A.F. specifically asserted that such an interpretation of the rule would allow the government to avoid the consequences of R.C.M. 914's clear language by failing to preserve statements. *Id.* C.A.A.F. explained that the Jencks Act and R.C.M. 914 imposed upon the government an implicit asserted that the position of the government stood in "stark contrast to judicial interpretations of the Jencks Act by the Supreme Court, our predecessor court, and the federal circuit courts." The court took pains to remind lower courts that, to the extent that the "good faith" loss of material exists in analyzing the Jencks Act and

R.C.M. 914, such an exception is "generally limited in its application." C.A.A.F. highlights this point by stating it would be an "odd result if the Government ultimately was rewarded for its negligence."

It would be unwise and an ineffective use of judicial resources to proceed to trial, allow Mr. [redacted] to testify (or the admission of Mrs. [redacted] statements), and then attempt to either strike the testimony or statements or grant a mistrial because statements can't be produced in accordance with R.C.M. 914. As such, the court should take immediate action under R.C.M. 914.

5. Relief Requested.

The defense respectfully requests the Court to preclude: 1) testimony from Mr. [redacted] and 2) the admission of any statement from Mrs. [redacted] which relates to Charge II.

6. Enclosures.

All referenced enclosures were submitted as attachments to the Defense Motion to Dismiss Charge II, Specification 1 for Violation of the Accused's Right to Due Process.

7. Oral Argument.

The defense requests oral argument on this motion.

[redacted]
LCDR Bryan M. Davis
Detailed Military Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion was served electronically on Trial Counsel and the Court on 10 September 2019.

[redacted]
LCDR Bryan M. Davis
Detailed Military Defense Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

The United States of America **v.** **CRAIG R. BECKER** **LT/O-3 USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION IN LIMINE PURSUANT TO R.C.M. 914**

1. **Nature of the Motion.** The Government respectfully requests the Court deny the Defense motion to preclude the testimony of Mr. [redacted] and Mrs. [redacted] statement regarding the domestic violence incident on the evening of 9 August 2013 because they have failed to establish any recordings have ever existed.

2. **Burden of Proof.** As the moving party, the Defense bears the burden by a preponderance of the evidence.[1]

3. **Statement of Facts.**

a. During the domestic violence incident on 9 August 2013, LT Becker grabbed Mrs. [redacted] by the arm and threw her onto the couch in an aggressive manner.

b. In addition, LT Becker picked [redacted] up and carried her into the bedroom, while [redacted] tried to get away. He also climbed on top of [redacted] and pinned her to the bed, then strangled [redacted]

c. [redacted] was able to break free momentarily until LT Becker once again pushed her down onto the bed.

d. Eventually, [redacted] was able to escape from the room and run for help at the front desk of the Army Lodge.

[1] R.C.M. 905(c)(2).

e. Mr. [redacted] was the front desk clerk that evening and called security for assistance.

f. On that date, Mr. [redacted] contacted security; it is unlikely incoming calls to security were recorded.

g. Even if a recording was possible, pursuant to base security policy a copy of the recording would not be retained unless requested by the legal section.

h. Even if a recording existed, pursuant to base security policy any recording would be destroyed after a period of one year unless requested as evidence.

i. No entity requested the recording of Mr. [redacted] call to security (if one existed) be secured for evidence within a year of when the recording was created.

j. The government closed out their investigation of this case in May 2014.

k. Based upon [redacted] death on 8 October 2015, the Government once again reviewed the 2013 domestic violence incident and upon speaking to witnesses decided to move forward with the charges.

l. Mr. [redacted] has stated he is willing and able to participate in the upcoming court-martial and is willing to speak to all parties involved.

4. **Discussion.**

Before the Defense can prevail on an argument that R.C.M. 914 and the Jencks Act mandate preclusion of Mr. [redacted] testimony as well as any testimony from [redacted] regarding the domestic assault from 9 August 2013, they must first establish a recording was created. They have failed to do so.

Based on an investigation by MSG [redacted] (see Govt. Exhibit 48), there is no clear evidence that a recording was ever created in the first place. Additionally, nothing in this case

has given the indication the call from Mr. [redacted] to base security was recorded. Nothing from the notes from Army CID, nor Mr. [redacted] statement, nor the statement from [redacted] nor the NCIS investigative reports ever indicate a call to base security was ever recorded. There is no reference to any recording of a call to security anywhere in the report. Perhaps the Defense equated the base security phone system with other emergency lines akin to 9-1-1, which are routinely recorded. The Government is unable to provide, as discovery, a recording that never existed.

Even if a recording did exist it, would have been destroyed after one year without the Government pressing charges and moving forward with a case. The Government closed their case out without taking any judicial action against LT Becker in June 2014. The Government made that decision in good faith at the time based upon the evidence they had at that time. At that time period, if a recording was created, which is doubtful, it would have been destroyed in August of 2014, one year after the incident.

The Defense has failed to establish by any burden of proof that a recording of Mr. [redacted] call to base security has ever existed. Thus, the Defense motion to preclude the testimony of Mr. [redacted] and [redacted] statement regarding the domestic violence incident on the evening of 9 August 2013 must be denied.

Evidence.

Govt. Exhibit 8. Mr. [redacted] Statement of 9 August 2013;

Govt. Exhibit 9. Mrs. [redacted] Statement of 9 August 2013;

Govt. Exhibit 10. SPC [redacted] Statement 9 August 2013;

Govt. Exhibit 41. CID Case Activity;

Govt. Exhibit 42. NCIS ROI 03Jun14;

Govt. Exhibit 48 – E-mail from MSG [redacted] Dated 18 September 2019

5. **Oral Argument.** The Government desires oral argument on this motion.

6. **Relief Requested.** The Government respectfully requests the Court deny the Defense motion to preclude the testimony of Mr. [redacted] and the statements of Mrs. [redacted] regarding the domestic violence incident that happened on 9 August 2013.

[redacted]
Paul T. Hochmuth

CERTIFICATE OF SERVICE

I hereby certify that, on 20 September 2019, I caused a copy of this motion to be served on the Defense counsel and the Court.

[redacted]
Paul T. Hochmuth

NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES OF AMERICA v. CRAIG BECKER LT USN	**Defense Motion For Sentencing Credit** **10 September 2019**

1. **Nature of the Motion.**

The defense moves the court to award LT Becker with credit for both pre-trial confinement and pre-trial restriction. Specifically, due to the unduly harsh circumstances in the [redacted] prison, the defense requests three days of credit for each day served in the [redacted] prison from 18 March 2016 to 14 July 2016 (357 days (119 X 3)). Additionally, the defense requests the court to award day-for-day credit for restriction tantamount to confinement between 15 July 2016 and 9 January 2018 (544 days).

2. **Statement of Facts.**

a. The accused is charged with the October 2015 murder of his wife in [redacted].

b. The accused is also charged with assault and conduct unbecoming an officer for a separate incident in [redacted] in August 2013.

c. On 13 October 2015, the [redacted] Federal Police issued an order requiring LT Becker to remain in [redacted] until the completion of the investigation. AE V at TT.

d. LT Becker was arrested by [redacted] authorities on 18 March 2016 and placed in the [redacted] prison, remaining there until 14 July 2016 (119 days). This arrest and confinement were the result of the [redacted] investigation of the same general charges at issue in LT Becker's court-martial. *Id.*

e. In late April and early May, officials from the Northern Law Center and a [redacted] doctor visited LT Becker at the prison. AE V at UU.

f. At that time, LT Becker reported several concerns about his treatment which constituted violations of his rights under [redacted] and U.S. law. *Id.*; AE V at VV.

g. Many of the problems stemmed from a strike by [redacted] personnel which dramatically reduced staffing and resources. The strike began on 26 April 2016. AE V at WW.

h. During the strike, prison guards refused to work, necessitating intervention by untrained soldiers from the [redacted] Army. *Id.*

i. The strike's impact on staffing and resources resulted in increased prison violence. *Id.*

j. During this timeframe, LT Becker experienced lack of access to legal representation, lack of access to [redacted] lack of hygiene, insufficient food, reductions in the number of visits allowed, reductions in the amount of time spent outdoors or outside of their cells, increased fear for his physical safety, and the inability to attend hearings concerning release from pretrial confinement. AE V at VV; AE V at WW.

k. LT Becker was housed with individuals who had been convicted of violent crimes and religious extremism. LT Becker was the only American, and was the subject of threats from these individuals. AE V at WW.

l. Official visits by U.S. government personnel were denied, causing a gap in official contact from 26 April to 11 May. AE V at UU.

m. On 11 May 2016, staff from the Northern Law Center drafted a report regarding their visit of LT Becker. In addition to reporting the conditions in the prison, the attorney cited to provisions of Department of Defense Directive 5525.1 which establishes that the United States military has a duty "insofar is as is practicable," to ensure that U.S. military personnel in the custody of foreign authorities are fairly treated at all times and are accorded the treatment and are entitled to all the rights, privileges and protections of personnel confined in U.S. military facilities, which "are enunciated in present Military Service directives and regulations, and include, but are not limited to, legal assistance, visitation, medical attention, food, bedding, clothing, and other health and comfort supplies." AE V at UU.

n. On 17 May 2016, the Northern Law Center, Office of the Judge Advocate, contacted [redacted] officials to express concerns that LT Becker's conditions of confinement were not meeting either [redacted] or U.S. military standards. AE V at VV.

o. The specific concerns addressed included: the detention being punitive in nature, the commingling of LT Becker with post-trial prisoners, LT Becker's inability to care for his personal appearance and hygiene, LT Becker's inability to access his account to purchase basic items, LT Becker's inability to have regular contact with the outside world, LT Becker's inability to have daily visits, LT Becker's inability to have daily phone calls, LT Becker's inability to contact or meet with his attorney, LT Becker's inability to access publications and library resources, LT Becker's inability to conduct physical exercise or sporting activities, and LT Becker's inability to receive adequate health care. *Id.*

p. On 1 June 2016, the Northern Law Center, Office of the Judge Advocate, contacted [redacted] officials again, stating "[T]he conditions of detention at [redacted] Prison have remained below the minimum standards. I would therefore ask you either to release Lieutenant Becker or

to transfer him to another penal institution which meets the criteria set by [redacted] law." AE V at XX.

q. An Army Colonel who visited LT Becker in May 2016 observed LT Becker being housed with the general prison population, being limited to showers only 1-2 times per week despite medical orders to the contrary, having rashes and infections from lack of hygiene, experiencing lack of sleep, having limited contact with the outside world, having only one visit per week, being locked in his cell from Friday afternoons until Monday afternoons, and being deprived prescribed medications. AE V at UU; AE V at YY.

r. Upon his release from jail, LT Becker was placed on house arrest with a monitoring device. These restrictive conditions continued 9 January 2018 (544 days). AE V at TT; AE V at WW.

s. During house arrest, LT Becker was not permitted to leave his apartment in [redacted] for any reason. Grocery shopping, collecting mail, and garbage removal were all coordinated through a military designee who stopped by the apartment once a week for approximately 30 minutes. AE V at WW.

t. During this time, LT Becker was, despite formal requests, denied medical treatment. *Id.*

u. Due to the conditions of both his time in [redacted] prison and his time on house arrest, LT Becker continues to suffer symptoms of anxiety, hypervigilance, and fear. *Id.*

v. In the five-month period prior to the imposition of these restraints (prison and house arrest), LT Becker exhibited no signs that he was a flight risk or that he would not appear for legal proceedings. *Id.*

3. Discussion.

A. Statement of the Law

Credit for pre-trial confinement typically falls into three categories. First, "[A]ny part of a day in pretrial confinement must be calculated as a full day for purposes of pretrial confinement credit . . . except where a day of pretrial confinement is also the day the sentence is imposed." 18 USCS §3585; *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984). Courts have further held that this type of *Allen* credit is not limited to time served in military facilities, but also applies to time served in civilian confinement. *United States v. Chaney,* 53 M.J. 621 (N.M. Ct. Crim. App. 2000) (concluding that the appellant was entitled to day for day credit for time served in a civilian facility when the imposition of the civilian confinement was related to the same offenses for which the accused was convicted at court-martial.).

Second, day for day credit can also be awarded for pre-trial restriction which, due to its circumstances, is tantamount to confinement. *United States v. Mason*, 19 M.J. 274 (C.M.A. 1985). "The determination whether the conditions of restriction are tantamount to confinement must be based on the totality of the conditions imposed." *United States v. Smith*, 20 M.J. 528 (A.C.M.R. 1985), *petition denied*, 21 M.J. 169 (C.M.A. 1985). Factors to be considered, however, include: limits of the restricted area; physical restraints; escort requirements (occasional v. constant and armed v. unarmed); sign-in requirements; circumstances of duty; assigned duties; degree of privacy enjoyed; location of sleeping accommodations; access to visitors, telephones, recreational, religious, medical, and educational facilities, entertainment, civilian clothing, and personal property. *United States v. King,* 58 M.J. 110, 113 (CAAF 2003).

Third, additional credit, beyond day for day administrative credit, can be awarded for pre-trial confinement or restriction which constitutes "punishment or penalty" or is "more rigorous

than the circumstances require to insure his presence." Article 13, UCMJ; R.C.M. 305(k); *United States v. Suzuki,* 14 M.J. 491 (C.M.A. 1983).[1] The commingling of pre-trial detainees with post-trial prisoners will typically violate Article 13, UCMJ. *United States v. Adcock,* 65 M.J. 18 (C.A.A.F. 2007) (holding that the commingling was an abuse of discretion); *United States v. Pringle,* 19 U.S.C.M.A. 324, 41 C.M.R. 324, 326 (C.M.A. 1970) (finding a violation of Article 13 even in confinement facilities outside the control of the convening authority).

Foreign confinement facilities, where no United States military confinement or detention facility is available, may be used for pretrial confinement of naval personnel, provided that the confinement precludes "immediate association of U.S. servicemembers with foreign nationals," and that prior to using such a facility, the senior officer present approves the adequacy of the facility's "security features, its ability to ensure safety of prisoners, and adequacy of its living conditions." SECNAVINST 1640.9C at 2101.7a. In each case where a foreign confinement facility is used, a message report will be made in accordance with the requirements of SECNAVINST 1490.9C. *Id.* at 7103.2e.

B. In Accordance with *Allen,* R.C.M. 305, and Article 13, UCMJ, LT Becker Should be Credited with 357 Days of Confinement Credit Because the Period of Time He Spent in [redacted] Prison was More Rigorous Than Necessary, Unusually Harsh, and an Abuse of Discretion.

LT Becker served 119 days in pre-trial confinement in a [redacted] prison. Because that time was served for the same offenses currently before this court, he is entitled to day for day

[1] The defense acknowledges that the Air Force Court of Criminal Appeals has held that Article 12 and Article 13 of the UCMJ does not protect "servicemembers who are confined by a separate sovereign pending criminal prosecution by that sovereign, where such confinement is not at the behest of military authorities." *United States v. Escobar,* 73 M.J. 871, 877 (AFCCA 2014). The defense, however, argues that the Air Force precedent runs contrary to basic statutory interpretation, and the defense has found no other opinions from other service courts or CAAF reaching the same conclusion as the Air Force court. Further, as a result of the United States' primary right to exercise jurisdiction over this matter under the SOFA, the defense argues that the U.S. government's inaction and failure to protect LT Becker is the equivalent of confinement "at the behest of military authorities."

credit. 18 USCS §3585; *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984). The fact that LT Becker was being held by a foreign government in a civilian confinement facility is irrelevant to the determination of *Allen* credit. *United States v. Chaney*, 53 M.J. 621 (N.M. Ct. Crim. App. 2000).

LT Becker is also entitled to an additional two days of credit for each day of pre-trial confinement served because the confinement was more rigorous than necessary to ensure LT Becker's presence at trial, unusually harsh, and an abuse of discretion. Article 13, UCMJ; R.C.M. 305(k). While the worst of the conditions were experienced during the prison guard strike from 26 April until 20 June (56 days), unusually harsh circumstances were present throughout the entire confinement period including showers being limited to twice of week, linens and clothing being exchanged once a week, and confinement alongside foreign nationals who held extremist beliefs and made threats against LT Becker and his family. This exposure to foreign nationals also constitutes an abuse of discretion, directly violating the Secretary's instruction for housing American personnel in foreign confinement facilities. *See* SECNAVINST 1640.9C.

On 26 April, of course, the conditions went from bad to worse. As described by LT Becker in his affidavit, as well as multiple government officials who visited LT Becker during this time period, conditions fell well-below acceptable standards. In the absence of trained guards, and as frustrations grew with the lack of resources, violence among inmates greatly increased. LT Becker's safety was jeopardized, and he still wears the scars today of the fear and anxiety he experienced during that time. AE V at WW.

LT Becker's physical and [redacted] was also jeopardized. His food intake was dramatically decreased, and he was required to remain in his cell for extended periods of time,

sometimes spanning days. As such, he was unable to conduct any exercise, and the unsanitary conditions, including the inability to bathe and to have clean linen clothes, resulted in skin infections. AE V at WW; AE V at YY. Further complicating the issue, the facility ignored medical directions from U.S. officials, denied LT Becker the use of prescriptions that had been delivered to the prison, and didn't afford him the ability to visit the prison dentist, physician, or psychologist. *Id.*

Finally, the strike effectively cut LT Becker off from the outside world, reducing visits from friends and relatives, denying visits by government officials, and terminating access to newspapers and magazines. Especially problematic was LT Becker's inability to communicate with his defense attorneys and to attend hearings during which his continued confinement was litigated and other hearings during which his daughter's status/guardianship was determined. AE V at UU; AE V at VV; AE V at WW.

Clearly, none of these unusually harsh conditions were necessary to ensure LT Becker's presence at any trial. In fact, putting aside the issue of the substandard conditions, subjecting LT Becker to any confinement was wholly unnecessary. From the time of the alleged offense in October 2015 until his incarceration in March 2016, LT Becker committed no misconduct and gave no indication that he was a flight risk. To the contrary, LT Becker sought, and was granted, permission to the return to the United States to attend to a family matter. He, of course, returned to [redacted] at the end of his trip. AE V at WW.

The conditions also represent an abuse of discretion in that they violated both [redacted] law and U.S. regulations. May 2016 Letter; June 2016 Letter; SECNAVINST 1640.9C. Military lawyers from the United States objected on multiple occasions to the conditions of LT Becker's confinement, detailing the ways the confinement did not meet applicable standards.

AE V at VV; AE V at XX. While at least one lawyer at the Northern Law Center was beating the drum to ameliorate the situation, the overall response by the United States government was tepid at best, leaving LT Becker confined in a foreign country, commingled with religious extremists, suffering inhumane conditions without medical care or access to legal counsel. All of this occurred with the full knowledge of the United States government and with an understanding that the United States could have exercised its right to primary jurisdiction at any time. The United States government was, therefore, complicit in exposing LT Becker to these conditions. As such, LT Becker is fully entitled to the protections of Article 13, and the court should grant the very reasonable relief requested.

C. In accordance with *Mason*, R.C.M. 305, and Article 13 UCMJ, LT Becker Should be Credited with 544 Days of Confinement Credit Because the Conditions of LT Becker's House Arrest Were Tantamount to Confinement, More Rigorous Than Necessary, and Unusually Harsh.

LT Becker was finally released from pre-trial confinement on 15 July 2016. The conditions of his release, however, were that he be confined to his apartment in [redacted] and that he wear an electronic monitoring device on his ankle. AE V at WW. These conditions, which were tantamount to confinement, persisted until 9 January 2018 when the United States finally asserted jurisdiction over this matter. *Id.*

Applying the "totality of the circumstances" analysis from *Smith* and the factors enumerated in *King*, LT Becker's house arrest was, indeed, tantamount to confinement. His apartment was a cell, which he was not allowed to leave. He could not shop for his own groceries, he could not leave to visit friends, he could not go outside to exercise, he could not go to work, and he could not even check his own mailbox. AE V at WW. When he complained that he needed to go to base for medical purposes, he was told that he could return to confinement if he did not like it. *Id.* In short, he was on lock down for almost 18 months in a

foreign country away from his family—just not in a prison. It is difficult to imagine a set of circumstances that better defines restriction tantamount to confinement. Day for day credit for this deprivation of liberty is required.

4. **Evidence.**

TT – Report of Investigation, dtd 19 August 2016

UU – Report of Visit, dtd 11 May 2016

VV - Letter from Major [redacted] USA, dtd 17 May 2016

WW – Affidavit of LT Craig Becker, USN

XX – Letter from Major [redacted], USA, dtd 1 June 2016

YY - Email from Colonel [redacted], MC, USA, dtd 20 May 2016

5. **Witnesses and Oral Argument.**

The defense requests oral argument on this motion.

6. **Burden of Proof.**

Pursuant to R.C.M. 905(c), the defense bears the burden of persuasion, by a preponderance of the evidence, on any factual issue necessary for determination of this motion.

7. **Relief Requested.**

The defense respectfully requests the court to award LT Becker 901 days of credit toward any sentence which might ultimately be approved in this case.

[redacted]
B. M. DAVIS
LCDR, JAGC, USN

CERTIFICATION OF SERVICE

A true copy of this motion was served on opposing party on 10 Sep 2019.

[redacted]

B. M. DAVIS
LCDR, JAGC, USN

NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
UNITED STATES NAVY
GENERAL COURTS-MARTIAL

UNITED STATES **v.** **CRAIG BECKER** **LT/O-3 USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION FOR CONFINEMENT CREDIT**

1. Nature of Motion.

The prosecution concurs that the accused is entitled to 119 days confinement credit for pre-trial confinement in [redacted] jail. The prosecution request that the Court deny additional pre-trial confinement credit and credit for restriction tantamount to confinement as the Court lacks the authority to adjudicated additional confinement credit for the acts of a foreign government.

2. Summary of Facts.

For the purposes of this motion the prosecution concurs with the Defense's Statement of Facts as to paragraphs (a)- (e). Paragraph (f) is not solely a statement of fact but also contains a conclusion of law to which the prosecution does not concur. The prosecution concurs with paragraphs (g)-(u). Paragraph (v) is not a statement of facts but a conclusion which the prosecution does not concur.

3. Discussion.

Credit for day-for-day confinement spent in [redacted] pre-trial detention

The prosecution concurs that the accused is entitled to 119 days of confinement credit for his [redacted] jail pre-trial confinement from 18 March to 14 July 2016. The accused was arrested by [redacted] police for the murder of his wife [redacted] which is now charged as Charge I and the sole specification thereunder. As the reason for the accused's [redacted] pre-trial confinement and the accused's current charges mirror each

other, the accused is entitled to day-to-day confinement credit for pre-trial confinement per from *United States v. Pinson*, 54 M.J. 692 (A.F.C.C.A. 2001)(upheld on other ground, *United States v. Pinson*, 56 M.J. 489 (C.A.A.F. 2002) and *United States v. Escobar*, 73 M.J. 871 (A.F.C.C.A. 2014).

Article 13, UCMJ does not authorize additional confinement credit when an accused is held by a foreign government for violations of their own laws

The granting of day-for-day confinement credit for time spent in foreign pre-trial confinement does not automatically equate that additional confinement credit can be granted by a military judge under Article 13, UCMJ. The prosecution avers that Article 13, UMCJ does not apply to a foreign sovereign whose penal actions were not done at the behest of United States military authorities. [redacted] officials enforced their own laws. These actions are not attributable to the United States as there was no military or federal government action. Computing a day-to-day confinement credit, with its historical base in the various Department of Defense instructions for the mathematical computation of days served in jail, is very different than judging the actions of a foreign government as in violation of Article 13, UCMJ, and awarding additional confinement credit. Article 13, U.C.M.J. does not apply to the actions of [redacted] officials irrespective of any impact on the accused. Nor is there any evidence that the [redacted] government intentionally punished the accused prior to trial.

The Defense assumes that once day-for-day credit is authorized per *Pinson* that additional credit may also be authorized as if the accused was held in a US military brig. Neither *Pinson* nor *Allen* addresses Article 13, UCMJ and focus on the day-for-day calendar aspect of pre-trial confinement. However, *Escobar* addresses this issue squarely and found that Article 13, UCMJ, did not apply to foreign officials who confined an accused in a foreign jail:

> In sum, Article 12, UCMJ, and Article 13, UCMJ, apply everywhere to the actions of military authorities who confine those subject to the Code pursuant to a completed or pending court-martial. The provisions do not provide protection to servicemembers who are confined by a separate sovereign pending criminal prosecution by that sovereign, where such confinement is not at the behest of military authorities.

Escobar, 73 M.J. at 877.

There is no evidence that [redacted] authorities held the accused at the behest of

military authorities. Quite the contrary it was [redacted] citizens who called [redacted] police about the accused's crime. [redacted] police investigated the accused's case, [redacted] judicial officials started prosecution for a violation of [redacted] law, and the accused was placed into a [redacted] prison by [redacted] officials. At the time the U.S. military voiced concerns but was well aware that it was [redacted] officials acting to enforce their laws. The accused even sued the United States in federal court attempting to have the United States act and assert jurisdiction. He was well aware that it was a [redacted] initiative to arrest, confine and try him for a [redacted] crime. The accused is not entitled to have the strictures of Article 13, UCMJ, applied to his time in [redacted] confinement by [redacted] officials and thus should be denied the requested additional confinement credit.

Pre-trial confinement by [redacted] officials for violation of a [redacted] crime was not an abuse of discretion reviewable by this Court

This Court should not sit in judgement of [redacted] officials and their decisions as to pre-trial confinement under [redacted] law, be it whether the accused should have been confined, was lawfully confined under [redacted] law, or the conditions of confinement. As articulated by the Supreme Court over 100 years ago, "When an American citizen commits a crime in a foreign country he cannot complain if required to submit to such modes of trial and punishment as the laws of that country may prescribe for its own people." *Neely v. Henkel*, 180 U.S. 109 (1901).

The defense avers that the accused's confinement was more rigorous than necessary to ensure his presence at trial, was unusually harsh and an abuse of discretion thus triggering confinement credit. These are standards applicable to the Rules for Courts-Martial and Article 13, UCMJ, both of which are inapplicable to his [redacted] confinement. [redacted] authorities determined pre-trial confinement was necessary under [redacted] law. This Court should not attempt to second guess whether that was lawful or improper under [redacted] law. It cannot now create a windfall for the accused by granting additional confinement credit for actions of foreign officials.

The accused's conditions were not very unique to him nor an abuse of discretion by [redacted] authorities who were trying to ensure the safety of society by controlling a prison population during a correction officer strike. The accused's affidavit and reports by American officials may focus on him, but the news reports show that [redacted] officials were aimed at the prison population as a whole. None of their acts are personal towards him, are

pre-trial punishment due to his status as an American military officer, nor done with the intent to make his incarceration unusually harsh. No doubt the accused feared for his safety as an American officer and felt that he was not treated well. However, the accused subjective fears and concerns over issues are not unique or particularized to him. Prisoners all over the world are concerned with many of the same issues that the accused's affidavit discusses – concern for family, concerns for his legal future, complaints about treatment, food, medical care and lack of access to facilities. There is nothing unique about the accused's concerns and complaints that show he was singled out for pre-trial confinement that was more rigorous than necessary or different than any other [redacted] prisoner. Complaints of [redacted] prison conditions should have been addressed to [redacted] courts or prison officials. The should not and cannot be remedied by this Court in the form of confinement credit.

Additionally, even according to the Defense's own submissions the US military was attempting to assist the accused. The military repeatedly visited him, attempted even more visits, had a military doctor visit him, and wrote multiple inquiries to [redacted] officials on his behalf. The US military requested he be transferred to another prison and/or released from jail. These are not the actions of an entity attempting to make his confinement more onerous and harsh, they are the opposite. It is evident that [redacted] was not holding the accused at the behest of the US military.

Finally, the decision by [redacted] authorities to bring in the [redacted] Army in an attempt to control a prison population whose corrections officers went on strike has a parallel in American history. In *Engblom v. Carey*, 572 F.Supp 44 (S.D.N.Y. 1983) the state of New York brought in New York state National Guard soldiers to run a New York state prison due to the strike of corrections officers. While the case turns on the Third Amendment's housing of troops in civilian quarters versus prison conditions, it is reasonable for a sovereign to use other one form of public employees for public safety in situations of dire necessity. This Court should not second guess [redacted] security and penal officials on how to operate [redacted] prisons.

R.C.M. 305(k) does not apply to [redacted] criminal cases and [redacted] prison conditions

R.C.M. 305 does not apply to [redacted] criminal cases or [redacted] officials. There is no authority to selectively take a portion of the Rules for Courts-Martial and apply it to the

acts of a foreign government solely for the benefit of the accused. This Court should not attempt to enforce the Uniform Code of Military Justice onto parties and persons, let alone a foreign sovereign, which are not subject to the code. For example, M.R.E. 305(f)(2) holds that Article 31b warnings and the Fifth and Sixth Amendments do not apply to interrogations by foreign police. Courts have ruled that foreign police not acting on behalf of the US military need to read Article 31b warnings, as it does not apply to their activities. There is no rational reason to suddenly and without precedent apply R.C.M. 305k to foreign sovereigns.

The Rules for Court-Martials only apply to properly convened United States military courts-martials. As noted in R.C.M. 101(a) "these rules govern the procedures and punishments in all courts-martial and whenever expressly provided, preliminary, supplementary, and appellate and activities. R.C.M. 102(a) states "these rules are intended to provide for the just determination of every proceeding relating to trial by court-martial." The Defense cites no authority to expand the Rules for Court-Martial to the acts of a foreign government who used their own procedures and law in their criminal case. Quite the opposite, the UCMJ at times states that foreign criminal actions are not binding on courts-martial. See, R.C.M. 1001(b)(3) holding that foreign criminal convictions may not be admitted at trial by court-martial.

R.C.M. 305(k) states that "the remedy for noncompliance with subsection (f)(h)(i) or (j) of this rule shall be an administrative credit against the sentence adjudged for any confinement served as the result of such non-compliance." R.C.M. 305's rules, which have Constitutional underpinnings, never applied to the accused's [redacted] confinement under [redacted] law and thus [redacted] authorities could never have violated it. This Court is in no position to determine whether [redacted] officials acted in conformity with or in violation of [redacted] law. The accused has no authority to selectively apply Rules for Courts-Martial to the acts of foreign officials who acted under the color of foreign law. This Court should deny the request to grant additional confinement credit under R.C.M. 305(k).

The closest analogy would be the US military "assuming" a criminal case which was previously charged or adjudicated by an American state under the state's criminal procedure law. The defense cites no authority that a court-martial should review the actions of an American state's criminal system and then apply R.C.M. 305k to state prison conditions or the acts of state officials. The military has the authority to try

servicemembers for crimes previously adjudicate by a state and does so repeatedly. There is no case law supporting a court-martial review of state criminal procedural acts for additional confinement credit at a court-martial. The accused is given confinement credit for his day-to-day confinement in a state jail if that confinement was not previously credited to another sentence. *United States v. Chaney*, 53 M.J. 621 (N.M.C.C.A. 2000). That is what the prosecution concedes as to foreign pre-trial confinement and nothing more.

No violation of SECNAVINST 1640.9C by the US Military

The Defense's invocation of SECNAVIST 1640.9C is misplaced. This instruction is the Department of the Navy Corrections Manual. The Defense citation, paragraph 2101.7a, applies when the US Navy uses a foreign jail for pre-trial confinement of a sailor for a crime under the UCMJ. The defense's quotation from the manual leaves out the controlling and salient point and distorts the instruction's application. The instruction reads:

6. Foreign Civilian Confinement Facilities

a. Pretrial. Where no military confinement or detention facility is available, foreign civilian confinement facilities may be used for pretrial confinement of naval personnel who are charged with serious offenses against reference (a). Following conditions shall be met:

(1) Senior officer present must approve such facilities based upon adequacy of security features, safety of prisoners, and adequate living conditions.

(2) In each case where a foreign confinement facility is used, a message report will be made per article 7103.2e of this manual.

A key phrase is "for pretrial confinement of naval personnel who are charged with serious offenses against reference (a)." In SECNAVINST 1640.9C reference (a) is the Uniform Code of Military Justice. This instruction envisions that: 1) prior to the US military; 2) placing a US military accused in a foreign jail for the US military benefit of pre-trial confinement; 3) because the US military has no local US military brig: 4) for a crime to be tried under the UCMJ; 5) that the US military takes certain steps to ensure the sailor's safety in jail and isolation from foreign nationals. This ensures that the US military does not place servicemembers in foreign pre-trial confinement facilities without prior review of the facilities. This instruction has no applicability to the operation of foreign jails by foreign penal officials who have confined an American servicemember in their jail for a

violation of local foreign law. Nor does this instruction create a right of the accused, nor should it be used as a basis to award additional confinement credit. There was no violation of SECNAVINST 1640.9C by the US military when [redacted] authorities unilaterally confined the accused for a violation of [redacted] law in a [redacted] jail.

Mason credit is inapplicable to the accused's time in [redacted] at his apartment

The prosecution concurs that the accused was released from [redacted] prison on 15 July 2016 by [redacted] officials. He was required to remain at his apartment in [redacted] until 9 January 2018 when the United States asserted jurisdiction. However, the concept of "restriction tantamount to confinement" is not applicable to conditions imposed by a foreign sovereign enforcing their criminal law in their jurisdiction.

As noted in *Escobar*, the concept of Article 13, UCMJ, which governs pre-trial punishment of an accused, does not apply to situations where an accused is confined in a foreign jail. The Defense does not cite any such authority and assumes restriction tantamount to confinement applies to a foreign case now being prosecuted by the US military. The concept of "restriction tantamount to confinement" is applicable when a servicemember is restricted by military officials, which the accused was not.

In *United States v. King*, 58 M.J. 110, 113 (C.A.A.F. 2003) the Court held "we recognized that the effect which restriction tantamount to confinement has upon an appellate is the practical equivalent of the effect which occurs from a similar period of actual confinement." As Courts have held that the admittedly more onerous situation of actual confinement in a foreign jail is not applicable under Article 13, UCMJ, then its related doctrine, restriction tantamount to confinement, should also not apply to foreign conditions. The closest analogy would be an issue of a court-martial reviewing an American state's pre-trial bail or release conditions. There is no authority to apply a strictly military concept of restriction to another sovereign's actions. The accused's redress for his conditions was with [redacted] authorities. He should not now be credited with confinement credit. Even under the tests of restriction tantamount to confinement the accused would fail to meet the standards because none of them were imposed by his command but by a separate sovereign authority. The Court should deny his request for additional confinement credit for his time spent at his apartment under conditions of pre-trial release imposed by [redacted] authorities.

4. Burden of Proof.

Per R.C.M. 905(c) the burden of proof on any factual issue the resolution of which is necessary to decide a motion shall be a preponderance of the evidence. Per R.C.M. 905(c)(2) the burden of persuasion is on the moving party, the Defense.

5. Evidence to be Presented

The United States relies upon Defense exhibits TT – YY.

6. Relief Requested.

Other than the concession of 119 day-for-day credit for time spent in [redacted] pre-trial jail the prosecution request that the Court deny the Defense's motion.

6. Oral Argument.

The government respectfully requests oral argument on this motion.

/s/
J. L. JONES

****

CERTIFICATE OF SERVICE

I hereby certify that, on 12 Sept 2019, I caused to be served a copy of this motion on the trial counsel for the government and the court.

/s/
J, L. JONES

NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES OF AMERICA **v.** **CRAIG BECKER** **LT USN**	**Defense Motion To Compel Expert Consultant In The Field of Homicide and Suicide Investigations** **10 September 2019**

1. Nature of the Motion

Pursuant to R.C.M. 703(d), 905(b)(4), 906(b)(7), the Due Process Clause, and the Right to Counsel, the Defense respectfully requests this court compel the Government to provide funding for Mr. [redacted] to consult with the defense on areas of expected testimony from a government expert in forensic psychology and to assist with the preparation of a sentencing case by conducting an evaluation of the accused's rehabilitative-potential and likelihood of recidivism.

2. Burden of Proof

As the moving party, the Defense bears the burden of proof by a preponderance of evidence. R.C.M 905(c)(2).

3. Facts

a. The accused is charged with the October 2015 murder of his wife in [redacted]

b. The accused is also charged with assault and conduct unbecoming an officer for a separate incident in [redacted] in August 2013.

c. The case was investigated by local police in [redacted] federal [redacted] police, and NCIS.

d. The government has indicated that it will call no fewer than 10 law enforcement investigators, including several who processed the scene after [redacted] death.

e. On 15 August 2019, the defense requested Mr. [redacted] an expert consultant in the field of homicide and suicide investigations. AE V at III.

f. Mr. [redacted] served 32 years with the Phoenix, AZ police force, including seven years in the homicide division where he investigated hundreds of deaths (homicide, suicide, and accident). *Id.*

g. Mr. [redacted] was later hired by the Maricopa County Public Defender's Office where he served seven years as a defense investigator, including five years as a capital defense investigator. *Id.*

h. Most recently, Mr. [redacted] consulted on a number of complex, high-profile death cases, including four military cases in 2018-2019.

i. On 5 September 2019, the government denied the defense request. AE V at JJJ.

4. Discussion

The Sixth Amendment guarantees each accused the right to effective assistance of counsel, which includes the right to present a defense by means of confrontation, cross-examination, and going forward with development and presentation of its own evidence. The right to present evidence necessarily includes the right to prepare. *United States v. Allen*, 31 M.J. 572, 623 (N.M.C.M.R. 1990). Military due process entitles an accused "to investigative or other expert assistance when necessary for an adequate defense." *United States v. Garries*, 22 M.J. 288, 290 (C.M.A. 1986), cert. denied 479 U.S. 985 (1987).

Article 46 of the U.C.M.J. and R.C.M. 703 require that the Defense and the Government have an "equal opportunity to obtain witnesses and other evidence." This requirement applies to expert consultants as well as expert witnesses. *United States v. Warner*, 62 M.J. 114, 115 (C.A.A.F. 2005). "One important role of expert consultants is to help counsel develop evidence. Even if the defense-requested expert consultant [does not] become an expert witness, he would [assist] the defense in evaluating, identifying, and developing evidence. Another important function of defense experts is to test and challenge the Government's case." *Id.* R.C.M. 703 authorizes experts to assist the defense, at government expense, when the expert's testimony would be "relevant and necessary." The government must provide the expert if the accused establishes a reasonable probability that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial. *Garries*, 32 M.J. at 290-91. Inconvenience, cost, or impediments to witness production do not excuse the government from its responsibility to provide an expert. *See United States v. Willis*, 3 M.J. 94, 96 (C.M.A. 1977).

"Necessity" has been defined by the federal courts as "reasonably necessary." *Allen*, 31 M.J. at 623 (citing *United States v. Durant*, 545 F.2d 823 (2d Cir. 1976)). The standard for evaluating the necessity for the defense to have expert assistance has been more liberally interpreted by the federal courts than has the standard for production of an expert witness. *Id.* The test for demonstrating the necessity of an investigative or expert assistant has three parts. The defense must show: (1) Why the expert assistance is needed; (2) What the expert assistance would accomplish for the accused; and (3) Why the defense is unable to gather and present the evidence that the expert assistant would be able to develop. *Bresnahan*, 62 M.J. at 143, quoting *United States v. Gunkle*, 55 M.J. 26, 31 (C.A.A.F. 2001).

In this case, expert assistance is necessary in order for the Defense to thoroughly examine the evidence, to be competently prepared to cross-examine law enforcement witnesses, and to highlight inadequacies of the government's investigation. The defense also squarely meets the three-pronged *Bresnahan* test as discussed below.

A. The Defense Has Demonstrated the Necessity of the Expert Consultant

The defense must be afforded an opportunity to be assisted by an expert prior to trial upon a demonstration of necessity. *Bresnahan,* 62 M.J. at 143. Consistent with the three-part test noted above, the following information is provided to illustrate why employment of an adequately qualified expert is necessary:

1. Why is expert assistance necessary?

Expert consultation is required to: 1) assess deficiencies in the [redacted] investigation, particularly the investigation and processing of the alleged crime scene; and 2) identify physical and other evidence—or lack thereof—which supports the conclusion that suicide was the cause of death. Deficiencies in the investigation, failures to identify and preserve evidence, and violations of established investigatory protocols are each relevant lines of inquiry which could cause members to have a reasonable doubt as to LT Becker's guilt. This becomes particularly important in this case due to the involvement of multiple levels of foreign law enforcement, as well as NCIS. Further, the defense anticipates that it will ultimately call Mr. [redacted] as a witness to discuss how to conduct a homicide/suicide site assessment, and to testify about the presence of factors on a scene which support the conclusion that a death was caused by suicide. Without the ability to meaningfully consult with Mr. [redacted] and to allow him the opportunity to review the discovery, the defense cannot properly prepare for trial.

2. What would the expert accomplish?

Mr. [redacted] will review the discovery in this case, with a focus on the crime scene investigation and documentation. Mr. [redacted] will then assess these investigative efforts against established protocols for homicide/suicide investigations and his own experiences in this field. Mr. [redacted] can then assist the defense to craft its cross-examination of law enforcement officials and to determine what evidence, if any, supports the defense's theory that suicide was the cause of death.

3. Why is the defense unable to gather and present this evidence?

No member of the defense is an expert in the field of homicide/suicide investigations. The defense does not have training in how to properly conduct such investigations, and, therefore, is not in a position to assess whether the investigation in this case was carried out properly. While defense counsel are experienced in criminal investigations in general, they do not have expertise in the highly specialized area of homicide/suicide investigations. Even if the defense was an expert in homicide/suicide investigations, the defense cannot ultimately testify on issues about accepted standards and practices for these types of investigations, whether this investigation fell below those standards, and, most importantly, how those failings impact the integrity of the investigation. Only an expert can provide such testimony.

5. Relief Requested

The Defense respectfully requests the Court to compel the Convening Authority to fund Mr. [redacted] to consult with the defense for 40 hours at a rate of $150.00/hour.

6. Evidence

The Defense offers the following evidence in support of its motion:

III – Defense Request for Mr. [redacted] dtd 15 August 2019
JJJ – Government's Denial

7. Witnesses

A. Mr. [redacted]

8. Oral Argument

The accused desires to make oral argument on this motion.

[redacted]

B.M. DAVIS
Detailed Military Counsel

CERTIFICATION OF SERVICE

A true copy of this motion was served on the opposing party and the court on 10 September 2019.

[redacted]

B.M. DAVIS
Detailed Military Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **CRAIG R. BECKER** **LT USN**	**GOVERNMENT RESPONSE TO MOTION TO COMPEL EXPERT: MR. [redacted]** **20 September 2019**

1. Nature of the Motion. The United States respectfully requests that the Court deny the Defense Motion to Compel Mr. [redacted] as an expert consultant.

2. Burden of Proof. Pursuant to R.C.M. 905(c)(2) the Defense as the moving party has the burden of persuasion.

3. Statement of Facts.

a. For the purpose of this motion, the Government concurs with Defense's statement of facts a – i.

b. In addition, the Government granted the Defense Dr. [redacted] MD as an expert consultant to help the defense understand suicide on 7 March 2019.

c. The Navy has provided the Defense with nine Defense Litigation Support Specialists (DLSS) i.e. Defense Investigators stationed at each RLSO across the Navy.

d. Several of these investigators are previous attorneys; others have vast experience in criminal investigations.

4. Discussion.

In order to justify expert assistance at any phase of the trial, the defense must show:

(1) Why the expert assistance is needed;
(2) What the expert assistance would accomplish for the accused; and
(3) Why the defense counsel were unable to gather and present the evidence that

the expert assistance would be able to develop. United States v. Garries, 22 M.J. 288 (C.M.A. 1986).

In applying this test, CAAF has since indicated:

> "'[t]o demonstrate necessity, an accused 'must demonstrate something more than a mere possibility of assistance from a requested expert . . . .' An accused 'must show the trial court that there exists a *reasonable probability* both that an expert would be of assistance to the defense and that denial of expert assistance would result in a *fundamentally unfair trial*.'"

United States v. Gunkle, 55 M.J. 26, 21 (C.A.A.F. 2001) (emphasis added). A trial is "fundamentally unfair" only when the government's conduct is "so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." United States v. Anderson, 68 M.J. 378, 383 (C.A.A.F. 2010).

The mere incantation that an area of study requires years of study to gain proficiency or is "complex" does not entitle the defense to expert assistance. Before defaulting to a request for expert assistance, "defense counsel are expected to educate themselves to attain competence in defending an issue presented in a particular case" using a number of "primary and secondary materials." United States v. Kelly, 39 M.J. 235, 237 (C.A.A.F. 1994). So long as the military judge's findings of fact are not "clearly erroneous," and the military judge applies an appropriate view of the law, the military judge's decision will not be disturbed on appeal. *See* United States v. Lloyd, 69 M.J. 95 (C.A.A.F. 2010).

The Accused fails to show how Mr. [redacted] is necessary, as the Defense Service Offices have been provided nine DLSS.

For years, the Navy Defense Bar has stated they were at a disadvantage without their own investigators. Eventually and rightfully, the Navy has provided nine individuals to assist defense counsel prepare its cases. The Defense has at its disposal nine DLSS individuals across

the Defense Service Offices. These individuals are highly qualified and have a vast background to assist LT Becker's team. Mr. [redacted] has already assisted on this case.

The DLSSs can testify at trial, they can review the case material and conduct the same type of preparation and assistance that the Defense is requesting.

The Government has already provided an expert to assist the Defense on suicide. On 7 March 2019. the Convening Authority approved Dr. [redacted] as a Defense Expert Consultant. Between the DLSSs and Dr. [redacted], the Defense can meet their obligation to defense this case, they can rely upon the three-counsel expertise, the nine DLSS and Dr. [redacted] to review the investigation and prepare for cross-examination. Regarding potentially testifying at trial the DLSS can do that.

5. Evidence. The following evidence is offered in support of this Motion:

a. Govt. Exhibit 49 - Appointment of Dr. [redacted]

6. Oral Argument. The Government requests oral argument on this Motion.

7. Relief Requested. The Court should deny the Defense Motion.

[redacted]

PAUL T. HOCHMUTH
LCDR, JAGC, USN
TRIAL COUNSEL

CERTIFICATION OF SERVICE

A true copy of this Motion was served on opposing party on 20 September 2019.

[redacted]

PAUL T. HOCHMUTH
LCDR, JAGC, USN
TRIAL COUNSEL

DEPARTMENT OF THE NAVY
[redacted] JUDICIAL CIRCUIT
NAVY-MARINE CORPS TRIAL JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES	)
	)
v.	)
	) **MOTION TO ALLOW LAW ENFORCEMENT**
Craig R. Becker	) **TO POSSESS FIREARMS IN COURT**
LT USN	)
	)

I. NATURE OF MOTION

Per Rule for Courts-Martial (R.C.M.) 906(b) the Government respectfully requests this Court to allow Naval Criminal Investigative (NCIS) Special Agent (SA) [redacted] and SA [redacted] to carry their official service weapon, while testifying and while SA [redacted] carries out her role as a Government Agent. Their testimony may be on behalf of the Government or Defense during any motion hearings held within a navy courtroom during this court-martial. NCIS SA [redacted] and SA [redacted] pistol would be loaded, safety engaged, holstered under his outer clothing, and not visible to the public, members or attorneys.

II. BURDEN OF PROOF

Rule for Courts-Martial (R.C.M.) 905(c)(2) assigns the burden of persuasion to the moving party, the Government. R.C.M. 905(c)(1) states that the burden of factual proof shall be a preponderance of the evidence. Per the Navy-Marine Corps Trial Judiciary Uniform Rules of Practice, Rule 13.4, the moving party must show good cause.

III. FACTUAL BACKGROUND

a. NCIS SA [redacted] has been employed by the NCIS since 2008 as a Special Agent. NCIS SA [redacted] initially underwent the NCIS Basic Course at the Federal Law Enforcement Training Center in Glynco, GA. During this 10-week course, she qualified in proper usage of firearms to include shooting, cleaning, and the safe handling of firearms. Since graduating in

2008 NCIS SA [redacted] has requalified on a regular occurrence on the pistol she carries on a daily basis. There are no known reports of NCIS disciplining NCIS SA [redacted] for mishandling her weapon in a professional or personal capacity.

b. NCIS SA [redacted] has been employed by the NCIS since 2011XX as a Special Agent. NCIS SA [redacted] initially underwent the NCIS Basic Course at the Federal Law Enforcement Training Center in Glynco, GA. During this 10-week course, she qualified in proper usage of firearms to include shooting, cleaning, and the safe handling of firearms. Since graduating in 2011 NCIS SA [redacted] has requalified on a regular occurrence on the pistol, he carries on a daily basis. There are no known reports of NCIS disciplining NCIS SA [redacted] for mishandling his weapon in a professional or personal capacity.

c. NCIS SA [redacted] is the lead case agent and is a Government Representative. The Government may call NCIS SA [redacted] to the stand to lay the foundation for several items and to discuss investigative steps taken during the case. The Defense has spoken to SA [redacted] on several occasions and may call her as a witness as well.

d. SA [redacted] has conducted the FARO Scanners collecting the data in [redacted] He also took the data to put together the FARO Scans products the Government plans on pre-admitting at trial and using at trial.

e. Prior to arraignment the convening authority, trial and defense counsel, the Region Legal Service Office courtroom security officer and court recommended that this court-martial be a low security case. There is a bailiff and trained unarmed security in the courthouse. There are no planned armed Master-at-Arms or armed base security scheduled to be present in the building. During all pre-trial Article 39(a) hearings the accused behaved in an appropriate military bearing manner.

f. NCIS SA [redacted] would testify and sit at counsel table wearing a suit with her service weapon loaded, safety engaged, holstered and under her clothing. She will enter the courtroom and walk to the witness stand in a manner that would not place him in close proximity to the accused and will be seated at the opposite end of the Government's table from the accused. She would announce that she is carrying a firearm.

g. NCIS SA [redacted] would testify wearing a suit and tie with his service weapon loaded, safety engaged, holstered and under his clothing. He will enter the courtroom and walk to the witness stand in a manner that would not place him in close proximity to the accused. He would announce that he is carrying a firearm.

III. DISCUSSION

a. Statement of Law

Rule 13.4 of the Uniform Rules authorizes a Military Judge to allow an NCIS Agent to testify while armed while preventing other personnel from possessing firearms in-court due to the unique position NCIS occupies within the Navy

Under Rule 13.4 of the Uniform Rules of Practice Before Navy Marine Corps Court Martial there is no blanket prohibition on witnesses testifying while armed. Military judges have the discretion to allow witnesses to testify armed for "good cause shown." Good cause shown may be either for a factual basis or a legal basis if there is a rationale to differentiate between classes of witnesses. For example, there would be virtually no reason to allow a fact witness or an expert witness to possess a firearm in the courtroom. However, there are certainly scenarios where armed service members on duty acting as security could be present in court for courtroom security, to act as quick reaction force if there had been prior disturbances, or provide additional security in addition to unarmed security stationed at the quarterdeck.

The request to allow an NCIS agent to testify while armed, in this case, is not a fact based request. This case has been evaluated as a low-threat court-martial with no additional security measures needed. The Region Legal Service Officer Courtroom Security manager is available for routine security issues, a bailiff is present in the courtroom, and additional unarmed staff trained in summoning additional assistance, including armed assistance, is located outside the courtroom. Nevertheless, the NCIS special agent has good cause to testify armed. Multiple NCIS instructions require special agents to be armed while on duty, NCIS special agents are significantly different than service members in relation to firearms possession, instructions governing NCIS special agents were written knowing that NCIS special agents would testify in court-martials and agents are trusted in higher threat evolutions to retain their firearms. NCIS SA [redacted] can be trusted to act professionally and responsibly as to his firearm.

It is DoD policy to limit and control the carrying of firearms by military and civilian personnel. See, DODI 5210.56 dated 1 November 2001. Military police and security personnel who are armed while on duty do not take service weapons home. The Navy requires military personnel to return weapons to an official armory when not on duty. DODI 5210.56 notes that "firearms shall be returned to a designated control point upon completion of the assignment for storage and accountability." Military police and security personnel are armed for specific jobs or purposes and are not armed at all times while on duty. DODI 5210.26 notes that arming personnel should be on a case-by-case basis only for the duration of specific assignments. SECNAVINST 5500.29 section 4(h) further limits when service members shall carry firearms. DODI 5210.26 notes that "only government-owned and issued weapons are to be carried by DoD personnel while performing official duties." However, it provides that Defense Criminal Investigative Organizations may be given an exception to this rule, which NCIS has and agents may carry approved personally owned firearms as service weapons. See, SECNAVINST 5500.29C, section 4(c).

The limitations placed on military personnel, even security personnel, is in keeping with good order and discipline and limiting access to weapons while providing oversight and strict accounting of firearms. NCIS special agents can be differentiated from military security personnel. Congress and the Secretary of the Navy recognize that NCIS special agents are different than active duty service members regarding firearms and have created specific instructions to govern the possession of weapons by NCIS special agents. The good cause shown to allow an NCIS special agent to testify armed is a legal good cause due to their governing instructions.

Almost all NCIS special agents were state law enforcement officers, federal law enforcement officers, or military security prior to being hired as GS-1811's Federal Investigator. All NCIS special agents regardless of background attend the Federal Law Enforcement Training Center in Glynco, Georgia where they undergo extensive firearms training. NCIS special agents must continually requalify with a variety of weapons based upon their specific job assignment. NCIS agents possess the statutory and instructional authority to possess firearms, to execute warrants and conduct arrest. See, SECNAVINST 5430.107, 10 U.S.C. 1585a and R.C.M. 302. Given the scope and worldwide responsibilities NCIS agents are entrusted to carry weapons on base, in critical areas on bases, on ships, and on aircraft. Possession of a weapon in a courtroom

is not significantly different than possessing a weapon in other areas where a weapon could be used quickly in a deadly manner. For example, if an NCIS special agent was to lose control of a weapon on a plane and it was fired in close quarters it could have devastating effects. Nevertheless, SECNAV has determined that agents should be able to possess weapons on a plane. The same analogy could be made for the close quarters of a ship. Admittedly a courtroom may have persons who are in a highly emotional state or who may desire to use a weapon to escape legal accountability. This is no different than arresting a person who may also be extremely agitated upon arrest or may wish to wrestle a firearm away from an NCIS agent in a bid to escape. SECNAV has again entrusted agents to possess firearms when dealing with persons who may violently confront NCIS agents or try to take weapons away from them in a bid to escape. A courtroom does not present any unique or special fact pattern that SECNAV has considered when determining when NCIS agents should remain armed while on duty.

Service members who are armed for official duties normally open carry, or put another way, may not conceal carry weapons without specific authorization. The Secretary of Navy has created an exception for NCIS agents (and very limited service members performing specific duties) which allow them to carry concealed weapons without further authority or additional documentation. See, SECNAVINST 5500.29c, section 4(j)(1). Any NCIS special agent testifying at court would conceal their weapon from the public and members. In the Mayport courtroom an NCIS special agent could be brought into the courtroom through the door that ensures the agent does not walk beside the accused. An NCIS agent could be brought into the courtroom during an Article 39(a) hearing so the members are not present thus reducing the likelihood that the members would see a weapon while the agent was waking. The military judge could have a colloquy with the special agent wherein the military judge explained to the agent that the bailiff was the first layer of security and that the agent should allow the military judge and bailiff to resolve minor security issues and that absent a fast-moving dangerous situation requiring the use of force the agent was to defer to the judge, bailiff and courtroom security manager.

In the current case, the Government plans to call the lead NCIS case agent to testify in large part to lay the foundation of a statement made by the accused. The case agent has stated that they will not testify unless allowed to testify armed in accordance with instructions governing the use of firearms by NCIS special agents. To prevent an NCIS agent from

testifying, given the multiple instructions cited herein, would amount to a miscarriage of justice by preventing the trier of fact from being able to hear all the facts before rendering their decision on guilt or innocence. NCIS has asserted to the Trial Counsel and Convening Authority that their governing instructions allow and require agents to remained armed while on duty, to include testifying at courts-martial. Rule 13.4 is not a blanket prohibition on preventing NCIS special agents to testify armed. The good cause shown is that NCIS special agents are handled and viewed differently than service members who may be armed at different times for specific tasks. SECNAV has issued instructions that govern their activities, Congress has granted them statutory authority to act as law enforcement and the President has granted them authority under the Rules for Courts-Martial. Wherefore, this Court should recognize the unique status of NCIS special agents and their relationship to firearms, determine that this is good cause, and allow NCIS special agents in this case to testify armed.

IV. RELIEF REQUESTED

The Government respectfully requests this Court to allow NCIS SA [redacted] and SA [redacted] to testify possessing his service weapon while testifying.

V. ORAL ARGUMENT

The Government waives oral argument on this matter to allow the Court to issue an expeditious ruling.

VI. EVIDENCE

A. Testimony of NCIS SA [redacted];

B. Testimony of NCIS SA [redacted];

C. Govt Exhibit 39: NCIS Request to be Armed in the Courtroom.

D. Govt Exhibit 40: Courtroom security form for US v LT Craig R. Becker;

PAUL T. HOCHMUTH
LCDR, JAGC, USN
TRIAL COUNSEL

CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion response was served via email on detailed defense counsel in the above captioned case on 10 September 2019.

PAUL T. HOCHMUTH
LCDR, JAGC, USN
TRIAL COUNSEL

NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **CRAIG R. BECKER** **LT/O-3** **U.S. NAVY**	**DEFENSE MOTION FOR APPROPRIATE RELIEF: GOVERNMENT COMPLIANCE WITH MRE 304 NOTICE REQUIREMENT** **10 SEP 2019**

1. Nature of Motion

Pursuant to R.C.M. 906(a) and M.R.E. 304, the Defense respectfully moves this court to order the Government to comply with the notice requirements of M.R.E. 304. Alternatively, pursuant to R.C.M. 906(b)(13) and M.R.E. 402, the Defense respectfully moves this court for an order *in limine* excluding all statements made by LT Becker contained on the extraction from his cell phone as these statements are irrelevant.

2. Summary of Facts

1) The Government provided M.R.E. 304 notice that contained 43 bate stamp references. (Attachment PP)

2) The last of these bate stamp references was to a hard drive containing the extraction of LT Becker's cell phone. (Attachment PP)

3) This hard drive contains 54 GB of data and hundreds if not thousands of different communications.

3. Discussion of Law

A. M.R.E. 304 requires disclosure of those statements by the accused that the Government intends to offer at trial.

Prior to the 2012, M.R.E. 304(d) required the Government to disclose the statements of the accused that were relevant, known to the trial counsel, and within the control of the armed forces. In the 2012 Supplement to the Manual for Courts-Martial, M.R.E. 304(d) was modified to require the Government to disclose the statements of the accused that were relevant, known to the trial counsel, and within the control of the armed forces, *that the prosecution intends to offer against the accused.* The analysis contained within the Manual states that the reason for this change was to assist the Defense in formulating its challenges. This distinction is important because if the Government were allowed to simply rely on the fact that they have turned over to the Defense all known statements of the accused, without providing separate disclosure under M.R.E. 304(d) of those statements which it intends to offer against the accused, the Defense would be required to analyze each and every statement for potential challenges and ultimately raise those challenges even on statements the Government had no intention of offering at trial. While in some cases, those with only a small number of statements by the accused, this might merely be an inconvenience. However, in cases with a large number of statements, this could present a tremendous impediment to the Defense's ability to prepare for trial. This is particularly true in cases with electronic media containing tens of thousands of statements by the accused.

In the present case, the Government's M.R.E. 304 notice lists 43 different bates stamp references that contain statements allegedly made by LT Becker. The last of these "statements" is a hard drive containing the entire contents of LT Becker's cell phone. The Government narrows the voluminous material contained within it 43rd reference only with the phrase "Additional Info, Chat, All Chat, Chats, WhatsApp, Chat 869." The purpose of M.R.E. 304(d) is to allow the Defense to make appropriate motions or objections to those statements the Government intends on offering at trial. Here, it appears the Government has simply listed out every statement of LT Becker that they could locate in the discovered material with no concern as to whether or not they intend to offer it at trial. While this approach may have been acceptable under older versions of M.R.E. 304(d), it is exactly the kind of gamesmanship that was intended to be prohibited with the addition of the intent language in the current version of this rule.

It is undeniable that a defendant has a constitutional right to present a defense." United States v. Dimberio, 56 M.J. 20, (C.A.A.F. 2001). "Whether rooted directly in the Due Process

Clause... or in the Compulsory Process or Confrontation clauses of the Sixth Amendment... the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." Crane v. Kentucky, 476 U.S. 683 (1986). Whether intentionally or inadvertently, the Government's approach to their obligations under M.R.E. 304(d) results in an interference with this right by requiring the Defense to search for the proverbial needle in a haystack. This is particularly true when one considers the electronic communications which number in the thousands. The impingement on LT Becker's right to prepare and present a defense is even more problematic in light of the Rule of Completeness contained in M.R.E. 304(h). Without advanced notice of which statements and which electronic "chats" the Government intends to offer, the Defense cannot adequately determine whether the offered communication is part of a larger conversation that the Defense would be entitled to have introduced under M.R.E. 304(h). This is due to both the staggering number of communications contained on the hard drive and the fact that often a single conversation may occur over a variety of forums. While the Government may offer a text from the phone, the rest of that conversation may have occurred on WhatsApp or Facebook messenger. The Defense cannot reasonably be expected to memorize thousands of communications over all of the different forums to be able to a degree that the Defense can adequately utilize the Rule of Completeness at trial.

B. The statements of LT Becker contained on his phone are irrelevant and should be excluded.

Absent a more accurate disclosure of which statements the Government intends to offer, the Defense is left in the position of having to look at every statement the Government has listed in their notice as if the Government truly intends to offer it at trial. While this is not as problematic for the first 42 statements identified by the Government, it becomes untenable for the last "statement," the entire content of LT Becker's phone. As such, the Defense moves this court to exclude all of the electronic communications contained on LT Becker's cell phone pursuant to M.R.E. 402 as these thousands of statements are not relevant.

4. Relief Requested.

The Defense requests that the Military Judge require the Government to disclose to the Defense which statements of LT Becker it intends to offer at trial as required by the rule or alternatively to exclude the admission of LT Becker's statements.

5. Oral Argument.

Unless the Government concedes the motion or this Court grants the relief on the basis of pleadings alone, the defense requests oral argument on this matter.

[redacted]
J. A. GUARINO
CDR, JAGC, USN
Detailed Defense Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

The United States of America **v.** **CRAIG R. BECKER** **LT/O-3 USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION FOR APPROPRIATE RELIEF REGARDING MRE 304**

1. **Nature of the Motion.** The Government respectfully requests the Court deny the Defense motion to force the Government to put our MRE 304 notice into quotation mark statements, as it is not required by M.R.E. 304.

2. **Burden of Proof.** As the moving party, the Defense bears the burden by a preponderance of the evidence.[1]

3. **Statement of Facts.**

a. The Government complied with our M.R.E. 304 requirement on 26 June 2019;

b. The Government specifically provided each witness interview that contained a quote or multiple quotes that the Government intends to introduce or elicit during trial.

c. The notification included 25 interviews of others, 8 interviews of LT Becker, the text messages at the center of the Additional Charge, Specification 1, a summary of all of LT Becker's statements, and the specific file path to one text exchange between the victim and the accused mentioning Tramadol, which when printed is only 11 pages.

d. The file path provided limits thousands of pages down to 11.

e. The Government provided an updated M.R.E. 304 notice to the Defense on 20 September 2019. This updated notice provided two additional statements the Government may offer at trial.

[1] R.C.M. 905(c)(2).

4. **Discussion.**

The Defense was provided proper written notice of the statements during discovery and the statements are admissible under Military Rules of Evidence 80l(d)(2).

Military Rules of Evidence (M.R.E.) 304(d) states, "Before arraignment, the prosecution must disclose to the defense the contents of all statements, oral or written, made by the accused that are relevant to the case, known to the trial counsel, and within the control of the Armed Forces, and all evidence derived from such statements, that the prosecution intends to offer against the accused."

M.R.E. 304 (discussion)(d)(1) goes on to state, "the prosecution is required to disclose prior to arraignment all statements by the accused known to the prosecution which are relevant to the case (including matters likely to be relevant in rebuttal and sentencing) and within the military control. Disclosures ***should be made in writing*** in order to prove compliance with the Rule and to prevent misunderstanding." (emphasis added).

The Government has provided over 10,000 pages in discovery and multiple media devices containing thousands of additional pages. The Government provided the vast majority of the discovery in August 2018, to include the extractions of LT Becker's Phone. All of the known statements that the Government intends to elicit from witnesses are disclosed in the discovered material and thus we have satisfied our M.R.E. 304 requirements. However, due to the volume of material, the Government has provided specific bate stamp pages where the material could be found, so the Defense could zero into the specific pages on which the material is contained.

M.R.E. 304 only requires the Government to disclose the statements; it does not specify a specific format. The discussion section for MRE 304 does state that disclosures "should" be

made in writing. Neither the Uniform Rules of Practice for U.S. Navy- Marine Corps Trial Judiciary, the Trial Management Order for this specific case, nor military or federal case law require the disclosure of the statements in a specific format. The intent of MRE 304(d) is to protect the Defense from trial by ambush from ***undiscovered*** material. Those are not the circumstances of this case, as all of the statements currently known by the Government have been turned over to the Defense.

In addition, in the Government should not be solely limited to our M.R.E. 304 notice. Depending on how the evidence comes out at trial, rulings of this Court, etc. the Government should have the flexibility to potentially use additional statements made by the accused and discovered during the discovery process of this case.

5. **Evidence.**

Govt. Exhibit 44 – Govt's MRE 304 Notice.

Govt. Exhibit 57 – Govt's MRE 304 Notice (update dtd 20 September 2019).

6. **Oral Argument.** The Government desires oral argument on this motion.

7. **Relief Requested.** The Government respectfully requests the Court deny the Defense motion to force the Government to put M.R.E. 304 notice into direct quotations.

[redacted]

Paul T. Hochmuth

CERTIFICATE OF SERVICE

I hereby certify that, on 20 September 2019, I caused a copy of this motion to be served on the Defense counsel and the Court.

[redacted]

Paul T. Hochmuth

DEPARTMENT OF THE NAVY
NAVY-MARINE CORPS TRIAL JUDICIARY
GENERAL COURT-MARTIAL
[redacted] JUDICIAL CIRCUIT

U N I T E D S T A T E S

v.

CRAIG R. BECKER
LT USN

10 September 2019

MOTION *IN LIMINE* TO ADMIT GOVERNMENT EXHIBITS

1. **Nature of Motion:**

Pursuant to Rule for Courts-Martial 906(b)(13), the government moves for a preliminary ruling on the admissibility of the following pieces of evidence:

Government Exhibit 1 for ID - Certified copy of death certificate, translation and report of death from U.S. State Department;
Government Exhibit 2 for ID - Separation agreement between victim and accused;
Government Exhibit 3 for ID - Army Lodge layout;
Government Exhibit 4 for ID - Army Lodge pictures;
Government Exhibit 5 for ID - Videos of SA [redacted] opening window the victim went out of;
Government Exhibit 6 for ID - Pictures of accused and victim's apartment (inside);
Government Exhibit 7 for ID - Pictures of accused and victim's apartment (outside);
Government Exhibit 8 for ID – Faro Scan, "Scene to Go" of crime scene and surrounding area;
Government Exhibit 9 for ID – Faro Scan, fly through videos and still pictures of crime scene and surrounding areas;
Government Exhibit 10 for ID – Pictures of victim (alive) and child.

2. **Summary of Facts:**

a. The accused is alleged to have murdered his wife, [redacted] on 8 October 2015 in the city of [redacted] by pushing or tossing her through the 7th story window of their apartment building.

b. On 8 October 2015, the accused and the victim were in their apartment.

c. Mrs. [redacted] bedroom contained a large window which opened inwards to a 45-degree angle. The bedroom was on the top floor, the 7th floor, of their apartment building.

d. The window opened onto a slanted roof and two floors below was a balcony of another apartment.

e. On the evening of 8 October 2015, the accused pushed his wife through the opened window of his apartment. She slid down the slanted roof, grasping at tiles, and fell two stories onto a table on the balcony. Mrs. [redacted] bounced off the table and over the balcony wall and then plunged to the street below. Mrs. [redacted] screamed on the way down.

f. The City of [redacted] issued a certificate of death on 13 October 2015.

g. The United States Embassy in [redacted] issued a Report of Death of a U.S. Citizen or Non-Citizen National Abroad listing the victim's death as occurring on 8 October 2015 at approximately 2100 hours.

h. The accused and the victim brought a separation agreement to Captain [redacted] JAGC, USA on 18 September 2015, where Cpt. [redacted] notarized the separation agreement. She remembers this specific event because of the victim's death shortly thereafter.

i. Mr. [redacted] arrived in [redacted] on 10 October 2015, about 36 hours after the death of his daughter. Mr. [redacted] was in the apartment of the accused and his daughter on the 10th of October 2015 where he had been on a previous occasion.

j. Mr. [redacted] observed the marks on the roof where his daughter slid down the roof.

k. When SA [redacted] took over the case and made her first trip to [redacted] in March of 2016, the marks on the roof were still present.

l. SA [redacted] has been in the apartment on two occasions to include when the apartment was fully furnished by the accused and once the accused vacated the apartment.

m. In February 2018, along with trial counsel, SA [redacted] entered into the victim and accused's vacated apartment. The apartment was in the midst of turn over to new tenants. The property owner allowed the party to enter before the new tenant took possession of the property. During this visit, SA [redacted] was video recorded opening and closing the window that the victim went through the night of her death.

n. On 16 January 2019, SA [redacted] obtained photographs of the Army Lodge aboard [redacted]. Army Lodge personnel allowed NCIS to photograph Room 230, which was a mirror image to Room 128. Room 128 is where the accused assaulted his wife in August of 2013. Army Lodge officials also provided SA [redacted] with a floor plan of the Army Lodge facility.

o. On 15 June 2016, Forensic Consultant [redacted] and SA [redacted] took panoramic photography, and three-dimensional mapping of the inside of the accused's apartment utilizing

the FARO Laser Scanner.

p. On 10 July 2017, SA Cichon and SA [redacted] completed additional 3D scanning of the area outside of the accused's apartment building located at [redacted] SA [redacted] and [redacted] took six scans: two east of the apartment building down an alleyway, three along [redacted] and one at the intersection of [redacted] and [redacted]

q. A measurement was taken using Leica Disto E7500i between the opening of two permanent brick walls within the scene. The hand measurement was 20'0". The point cloud measured the distance as 20.0007'; a difference of approximaltey 1/64".

r. The point cloud data was processed and successfully registered using the FARO Scene software, version 7.0.0.39. The resulting point cloud was successfully registered with the previous scan data collected from June 2016.

s. The Laser scan data was exported as a WebShare Data Project, which may be navigated using the WebShare2Go platform.

t. In addition to 3D Scanning, RA completed five panoramic photographs of the exterior of the apartment building using an NCTech iStar 360 degree rapid imaging panoramic camera, S/N NCT-IS2760. These images were processed using NCTech Immersive Studio Software and an interactive panoramic tour was created.

u. On 15 January 2019, additional 3D laser scan data was collected outside the accused's apartment building. These scans were conducted to depict heights, distances and spatial relationships between relevant locations both inside and outside of the apartment, as well as witness viewpoints.

v. A tripod-mounted FARO focus 3D X330 Laser Scanner was used. The scanner documented laser distance measurements and panoramic photographs of all visible aspects of the scene. Scanning took place from the hospital across the street from the accused's apartment, along [redacted] and several locations on the ground level along [redacted] In total six scans were produced.

w. On 15 – 16 January 2019 and later refined on 19 March 2019, the point cloud data was processed and registered using the FARO Scene software, version 2018.0.0648, using a combination of top-view and cloud to cloud target less registration, as well as manual registration techniques.

x. Using the FARO Zone 3D software, version 2019.1 an orthographic view of the entire point cloud was overlaid on top of Google Earth Satellite image. The orthographic view depicts a two-dimensional view of the three-dimensional point cloud.

y. On 16 May 2019, the SCENE Software was used to export the point cloud data from the scans as a SCENE 2GO project, which can be navigated using the SCENE 2GO project platform. The SCENE 2GO project is a virtual tour of the scan dataset depicting the locations of all scans and containing spherical images with the ability to measure within the point cloud.

z. On 26 April 2019, four 3D Fly-Through videos were rendered from the resultant point cloud data using a combination of the SCENE software and FARO Zone 3D, version 2019.1. Four 3D videos and twelve screen shots were captured using FARO Zone 3D depicting the point cloud with symbols and dimensional lines imported into the 3D model depicting the victim's approximate path down the roof to the sidewalk below, as well as the layout of the apartment.

3. **Table of Authorities:**

RULE FOR COURTS-MARTIAL 906, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2019 ed.)
MILITARY RULE OF EVIDENCE 401, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2019 ed.)
MILITARY RULE OF EVIDENCE 402, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2019 ed.)
MILITARY RULE OF EVIDENCE 403, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2019 ed.)
MILITARY RULE OF EVIDENCE 801, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2019 ed.)
MILITARY RULE OF EVIDENCE 803, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2019 ed.)
MILITARY RULE OF EVIDENCE 901, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2019 ed.)
United States v. Schnable, 65 M.J. 566 (C.A.A.F. 2006).

4. **Argument:**

The government moves for a preliminary ruling on the admissibility of evidence, pursuant to Rule of Court-Martial (RCM) 906(b)(13). It is within the military judge's discretion to rule on evidentiary questions prior to trial. RCM 906(b)(13). The evidentiary issues presented in this motion rely upon facts and circumstances that will not change and have been readily available to both parties since before the Article 32 Hearing.

Military Rule of Evidence (MRE) 402 provides that all relevant evidence is admissible, unless another rule or law bars its admission. Evidence is relevant if it tends to make any fact of consequence "more or less probable than it would be without the evidence." MRE 401.

a. Certified Copy of Death Certificate, transition and report of death from the U.S. State Department.

The [redacted] Death Certificate and the U.S. State Department's Report of Death Report would not be hearsay as they both fall under M.R.E. 803(9) as they are public records of vital statistics reporting of a death. In addition, the government has certified copies of both French and English Copies of the [redacted] Death Certificate (the certified copies will be provided to the court). In addition, Mr. [redacted] received as copy of the Report of Death from the State Department. These documents are relevant to show the death of the victim in this case.

b. Separation agreement between the victim and accused.

The rule against hearsay does not make the accused's statements inadmissible because his statements are not hearsay. Hearsay evidence is inadmissible, unless the rules admit it. MRE 802. A party opponent's own statements, when offered against him, however, are exempt from the definition of hearsay, pursuant to MRE 801(d)(2). The statements fall under the hearsay exemption in Military Rule of Evidence 801(d)(2), which governs admissions of party-opponents and excludes them from the definition of hearsay. The separation agreement was adopted by the accused and is considered non-hearsay. In addition, the victim's signature would fall under these non-hearsay grounds. In addition, the victim's signature could also show her then existing state of mind to separate and divorce from the accused, under M.R.E. 803(3). Lastly, the victim's signature would be admissible because of the accused's actions and the government has filed a motion for Forfeiture by Wrongdoing. Captain [redacted] JAGC, USA, will testify that she remembers the meeting between the accused, victim and herself. She specifically remembers it because of the victim's death and the subsequent arrest of the accused by [redacted] authorities. She will verify that both the accused and victim signed the separation agreement in her office and that she notarized the document. The separation agreement is relevant as it was signed on 18

September 2015, 20 days before the victim was murdered. It goes to combat that the victim committed suicide, as the accused has repeatedly claimed.

c. Army Lodge layout and Pictures of the Army Lodge.

The Army Lodge aboard [redacted] is the location of the domestic violence incident that occurred on or about 9 August 2013 (Specification 1 of Charge II). SA [redacted] will lay the foundation for these exhibits during the motion hearing. In addition, multiple witnesses will testify at trial that these pictures accurately represent what the hotel looked like during August 2013. These pictures are relevant to show the members where the crime took place and the perspective of witnesses from the night of 9 August 2013.

d. Videos of SA [redacted] opening window the victim went out of.

The window the victim went through on the night of her demise and how it opens is relevant to show the operational mechanics of the window and to put in perspective how it opens, how it can be angled and how high up the latch is to open the window. This evidence is relevant to show that the victim did not accidently fall through the window. SA [redacted] the individual in the video, will testify to the authenticity of the videos.

e. Pictures of accused and victim's apartment inside and outside.

As stated in United States v. Schnable, the person who authenticates the pictures does not have to be the person who took the picture. 65 M.J. 566 (C.A.A.F. 2006). The government intends to admit pictures from inside and outside of the accused and victim's apartment. Mr. [redacted] and SA [redacted] will both be able to testify to these pictures and that they accurately represent the scenes from October 2015. Mr. [redacted] arrived to the scene of the crime about 36 hours after the murder and could visibly see the marks on the roof. In addition, he walked inside the apartment and spent a great deal of time in the apartment before and after this incident.

These pictures are relevant to show the members the crime scene of the murder and the marks made by the victim as she fell down the roof.

f. Faro Scan, "Scene to Go," fly through videos and still pictures of crime scene and surrounding area.

SA [redacted] and SA [redacted] will both testify to the process of taking these pictures and the steps taken to collect the information. SA [redacted] will walk through the specific steps he took to create Government Exhibits 8 and 9 for Identification. The two government exhibits are basically thousands of pictures that are taken and put together by computer software to create a 3D image of an area. In addition, laser scans can be utilized to take measurements and angles of objects.

SA [redacted] will explain why images were captured in their locations, how the margin of error is calculated for measurements, how each image is stored in the cloud data, how the data is combined with previous scans to create a project and how the WebShare Data Project, WebShare2Go and SCENE 2GO software encompasses this data to create a 3D image of the crime scene.

This evidence is relevant to show the members the crime scene, vantage points and distances of witnesses. Mr. [redacted] SA [redacted] and SA [redacted] can all testify that the scans accurately represent the apartment and surrounding area. Additionally, witnesses at trial will also be able to attest that the videos and images accurately represent the area and apartment as well.

g. Limited Pictures of victim and daughter.

The government is offering three pictures, a solo picture of the victim, a solo picture of the accused and victim's daughter, who was inside the apartment during the night of the victim's

death, and one picture of the two of them together. These pictures are relevant to allow the members to put faces with names that they will hear about, but never see. It is also important to show the age and size of the victim's daughter who was in the apartment that night and the size and shape of the victim as well. The government has limited the pictures to only 3 and has also chosen pictures that would be least influential.

5. **Evidence:**

Live Testimony:

1. Testimony of Mr. [redacted]
2. Testimony of SA [redacted]
3. Testimony of SA [redacted]
4. Testimony of Cpt [redacted] JAGC, USA;

Appellate Exhibits:

Govt Exhibit 39: NCIS ROIs (Faro Scans)

Exhibits:

Government Exhibit 1 for ID - Certified copy of death certificate, translation and report of death from U.S. State Department;

Government Exhibit 2 for ID - Separation agreement between victim and accused;

Government Exhibit 3 for ID - Army Lodge layout;

Government Exhibit 4 for ID - Army Lodge pictures;

Government Exhibit 5 for ID - Videos of SA [redacted] opening window the victim went out of;

Government Exhibit 6 for ID - Pictures of accused and victim's apartment (inside);

Government Exhibit 7 for ID - Pictures of accused and victim's apartment (outside);

Government Exhibit 8 for ID – Faro Scan, "Scene to Go" of crime scene and surrounding area;

Government Exhibit 9 for ID – Faro Scan, fly through videos and still pictures of crime scene and surrounding areas;

Government Exhibit 10 for ID – Pictures of victim (alive) and child.

6. **Oral Argument:** If opposed, the government respectfully requests oral argument on this motion.

[redacted]

PAUL T. HOCHMUTH
LCDR, JAGC, USN
TRIAL COUNSEL

CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion was served on the Court and on Civilian Defense Counsel on this 10th day of September 2019.

[redacted]

PAUL T. HOCHMUTH
LCDR, JAGC, USN
TRIAL COUNSEL

NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL
CIRCUIT
UNITED STATES NAVY
GENERAL COURTS-MARTIAL

UNITED STATES **v.** **CRAIG BECKER** **LT/O-3 USN**	**GOVERNMENT MOTION TO ADMIT THE STATEMENT OF THE VICTIM AS A DYING DECLARATION UNDER MRE 804(b)(2)**

1. Nature of Motion.

Pursuant to Military Rules of Evidence (MRE) 804(b)(2)(Statement under the belief of imminent death), MRE 803(2)(Excited utterance) and MRE 801(d)(2)(A)(Statement of a party opponent), the Government moves the Court to admit the statement made by the Victim, [redacted] to the Accused, LT Craig Becker, who then related this statement to the victim's father, Mr. [redacted] The multiple statements as a whole are also admissible under MRE 805.

2. Summary of Facts.

a. The accused is alleged to have murdered his wife, [redacted] on 8 October 2015 in the city of [redacted] by pushing or tossing her through the 7th story window of their apartment building.

b. The accused was stationed at [redacted] and lived in [redacted] with his wife and infant daughter.

c. The accused and his wife were married in 2008 and still legally married at the time of her death.

d. It was known by both the accused and his wife that 8 October 2015 was the last night that the victim and her daughter were to spend in their apartment. She was moving out of the apartment and leaving for a business trip to [redacted] The victim had an American

citizen civilian boyfriend, [redacted] and with whom she had worked with previously.

e. On 8 October 2015 the accused and the victim were in their apartment and had dinner together. Though both lived at the apartment they were living in separate bedrooms.

f. Mrs. [redacted] bedroom contained a large window which opened inwards at the top to a 45-degree angle. The bedroom was on the top floor, the 7th floor, of their apartment building.

g. The window opened onto a slanted roof and two floors below was a balcony of another apartment. Such windows are often called Velux windows.

h. In the evening of 8 October 2015 the accused pushed his wife through the opened window of his apartment. She slid down the slanted roof, screaming, grasping at tiles, and fell two stories onto a table and railing on the balcony. Mrs. [redacted] bounced off the table and over the balcony wall and then plunged directly to the street below. Mrs. [redacted] screamed on the way down, which was heard by several [redacted] citizens.

i. Ms. [redacted] survived the fall and lay on the sidewalk mortally injured in front of the apartment building. Several French speaking [redacted] citizens quickly arrived after hearing her scream and land on the ground.

j. The accused left the apartment, waited for the elevator, then exited the building and came to Mrs. [redacted] body. While alive but mortally injured Mrs. [redacted] stated "you did this to me" or "you did this" to the accused in English. None of the other on-scene witnesses spoke English.

k. [redacted] paramedics and police arrived onto the scene and took Mrs. [redacted] to a local [redacted] hospital. Mrs. [redacted] died as she was being prepped for surgery. She did not regain consciousness speak to law enforcement or medical personnel due to her injuries. l.

Mrs. [redacted] father, [redacted] and the father-in-law of the accused, lives in Florida. He is a Swedish immigrant but speaks fluent English. He was informed of Mrs. [redacted] death on or about 9 October by the accused who told the [redacted] family a version of events in which their daughter killed herself by jumping to her death.

n. The accused told Mr. [redacted] that while [redacted] was laying on the ground mortally wounded she stated to the accused "you did this to me" or "you did this."

o. The United States Embassy in [redacted] issued a Report of Death of a U.S. Citizen or Non-Citizen National Abroad listing the victim's death as occurring on 8 October 2015 at approximately 2100 hours.

Exclusion of Additional Related Statements

The accused made additional statements to various witness that while laying on the ground after the fall, but still alive, [redacted] made statements such as "I love you" or "I am scared" or "I'm sorry." The Government is NOT seeking to admit these statements. The Government will object at trial to their admission as they are hearsay under M.R.E. 801(a), there is no applicable exception for admission outside of the accused's possible testimony on the stand under oath, and there is no M.R.E. 805 exception. The Government does not believe that M.R.E. 304 (h), the rule of completeness, allows for their admission as Mr. [redacted] the proponent of the Government's evidence, was not told of such statements by the accused during their phone conversation.

3. Discussion.

Mil. R. Evid 805

Mil. R. Evid. 805 states "[h]earsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception or exclusion to the rule". *See United States v. Clark*, 61 M.J 707, 713-14 (N-M.C.C.A. 2005); *United States v. Hutchins*, 2018 CCA LEXIS 31, 170 (N-M.C.C.A. 2018). The government seeks to admit the statement by the victim to the accused "You did this to me" or "you did this" as she lay on the sidewalk after being thrown from a window in the 7th floor apartment she shared with the accused. The accused then repeated the victim's statement to her father [redacted] Thus the government must establish both statements fit as an exception to the hearsay rule.

Does the Victim's statement to the Accused constitute testimonial hearsay?

On 8 Oct 2019, [redacted] (Victim) was murdered after she was pushed from the 7th floor of the apartment she shared with the Accused, in [redacted] While lying on

the sidewalk, the Victim told the Accused "you did this to me" or "you did this." The 6th Amendment of the United States Constitution guarantees the right of accused to be confronted by the witnesses against them. *Ohio v. Clark*, 135 S. Ct. 2173, 2179 (2015). The Confrontation Clause thus limits the admissibility of out of court statements where the primary purpose is testimonial. *Crawford v. Washington*, 541 U.S. 36 (2004). However, "[w]here no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause." *Clark*, 135 S. Ct. at 2180. To determine the primary purpose of a statement, the Court of Appeals for the Armed Forces has set forth a series of inquiries to determine the testimonial nature of an out of court statement. *United States v. Rankin*, 64 M.J. 348, 352 (CAAF 2007). "First, was the statement at issue elicited by or made in response to law enforcement or prosecutorial inquiry? Second, did the "statement" involve more than a routine and objective cataloging of unambiguous factual matters? Finally, was the primary purpose for making, or eliciting, the statements the production of evidence with an eye toward trial?" *Id.*

Applying the three pronged test set out in *Rankin*, it is abundantly clear the Victim's statement to the Accused, while she lay dying on the sidewalk in [redacted] was not testimonial.

1. First, the statement was not elicited by any responding official. The statement was made to the Accused and not police or emergency medical providers. The Victim, unprompted, made the statement without a question being posed.
2. The statement itself does constitute something beyond a "routine and objective cataloging of unambiguous factual matters". The Victim's statement, "you did this to me," or "you did this" points the blame upon the Accused for pushing her out the 7th floor of their apartment building.
3. The primary purpose of the statement was not to create evidence for trial. It would be an incredulous stretch to believe, after being pushed from the 7th floor of an apartment building, hitting a balcony on the way down, and impacting the sidewalk, the Victim, a non-lawyer, had the ability to formulate the concept her statement would be used in a court of law through multiple hearsay exceptions.

Viewing the Victim's statement, using a totality evaluation, it is clear prongs one, two and three reflect the non-testimonial nature of the statement. *United States v. Perkins*, 2016 CCA LEXIS 441, 17-18 (N-M.C.C.A. 2016). The unprovoked statement to her husband, the man who just pushed her out of a 7th floor window, while dying on the sidewalk is not testimonial.

Does Victim's statement to the Accused meet an hearsay exception under the Military Rules of Evidence?

Once this Court finds the Victim's statement is not testimonial, it must then determine if the statement meets an exception in the Military Rules of Evidence. The statement of the Victim to the Accused meets both the dying declaration and excited utterance hearsay exceptions. (This is in addition to any exception as to forfeiture by wrongdoing under MRE 804(a)(6) or waiver by misconduct. The Court need not reach such rulings for the admissibility of this evidence and such issues are addressed in other filings.)

Does the Victim's statement constitute a Statement under the Belief of Imminent Death, pursuant to Mil. R. Evid. 804(b)(2)?

A statement made under the belief of imminent death is a well-established exception to hearsay rules. *See Mil R. Evid 804(b)(2); Idaho v. Wright*, 497 U.S. 805, 820 (1990); *United States v. Plaut,* 39 C.M.R. 809, 812-13 (NBR 1968); *United States v. McGrath*, 39 M.J. 158, fn 8 (C.M.A. 1994). Mil. R. Evid. 804(b)(2) states "[i]n a prosecution for any offense resulting in the death of the alleged victim, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause of circumstances."

Here, the Victim was lying on the sidewalk moments after being pushed out a 7th floor window. The accused has been charged with premeditated murder for the act of pushing his wife out of the 7th floor window of their apartment. Her statement, "you did this to me" is a clear statement about the Accused's role in the circumstances leading to her impending death. The word "this" can be inferred to mean "the injuries I am suffering

from." Mrs. [redacted] had to have known that she was gravely or mortally injured as she screamed as she fell seven stories to the street. She was pronounced dead within two hours after being pushed from her apartment window and never regained consciousness to speak with medical personnel. The unsolicited statement clearly fits under the dying declaration exception to the hearsay rules.

Does the Victim's Statement constitute and excited utterance, pursuant to Mil. R. Evid. 803(2)?

An excited utterance is a statement made about a startling event while the declarant remains under the influence of the startling event. *United States v. Rich*, 2016 CCA LEXIS 493 (A.C.C.A. 2016). Military case law devised a three-pronged test to determine whether a hearsay statement qualifies as an excited utterance: "(1) the statement must be "spontaneous, excited or impulsive rather than the product of reflection and deliberation"; (2) the event prompting the utterance must be "startling"; and (3) the declarant must be "under the stress of excitement caused by the event." *United States v. Arnold*, 25 M.J. 129, 132 (C.M.A. 1987); *see also United States v. Bowen*, 76 M.J. 83, 88 (CAAF 2017). In *United States v. Feltham,* CAAF held that a military judge did not abuse his discretion in admitting the statements a male sailor made to his roommate approximately one hour after appellant forcibly orally sodomized him. *United States v. Feltham*, 58 M.J. 470, 475 (CAAF 2003). The *Feltham* Court found that the victim was still under the stress of a startling event; therefore, the lapse of time was not dispositive. *Id.*

In the instant case, the Victim's statement to the accused meets the test established in *Arnold*.

1. Her statement was spontaneous and not the result of questioning. It was a statement to the man who had just shoved her out a 7th floor window. (Even taking the defense's viewpoint of suicide she just travelled seven stories to the street.) The Supreme Court in *Bryant* found "severe injuries of the victim would undoubtedly also weigh on the credibility and reliability that the trier of fact would afford to the statements". *Bryant*, 562 U.S. 368 fn 12.
2. It is unquestionable that being pushed (or jumping if viewed from the defense) from the 7th floor of a building and falling all the way to the sidewalk would constitute a startling event.

3. It is equally unquestioned that the Victim remained under the stress of the exciting event. Here the statement was made within minutes of the Victim impacting the sidewalk after being pushed from the 7th floor of her apartment building.

Given the uncontroverted facts in this case, that the victim travelled seven stories to the street, the Victim's statement to her husband that "you did this to me" is an excited utterance and admissible.

Is the Accused's statement to the Victim's father a non-hearsay statement made by a party opponent pursuant to Mil. R. Evid. 801(d)(2)(A)?

Statements made by a party opponent are admissible as not hearsay, pursuant to Mil. R. Evid. 801(d)(2)(A). Thus, unless a specific privilege applies, ". . . any relevant statement by an accused could be admitted into evidence by the Government as a statement of a party opponent." *United States v. Clark*, 62 M.J. 195, 196(CAAF 2005). Courts have allowed the admission of an accused's statements in a variety of situations. *United States v. Cobia*, 53 M.J. 305 (CAAF 2000)(Admission of an accused's admission during a state courts guilty plea); *United States v. Byrd*, 2006 CCA LEXIS 293 (N.M.C.C.A. 2006))(Admission of statement to acquaintance he "hit that" when discussing a sexual assault); *United States v. Miller*, 1995 CCA LEXIS 426, 26 (NM.C.C.A. 1995)(Admission of a statement by the accused overheard by a taxi cab driver). The Accused stated that while the Victim lay dying on the sidewalk she had stated "you did this to me." The logical inference is that the Accused physically "did this" which was pushing her from the window. This constitutes an admission by a party opponent. The Accused was relating that the Victim had accused him of being the individual who had pushed her out a window in their 7th floor apartment. The Accused stated this to his father-in-law and father of Mrs. [redacted] Mr. [redacted]

4. **Burden of Proof.**

Per R.C.M. 905(c) the burden of proof on any factual issue the resolution of which is necessary to decide a motion shall be a preponderance of the

evidence. Per R.C.M. 905(c)(2) the burden of persuasion is on the moving party, the Government.

5. **Evidence to be Presented**

a. Testimony of NCIS SA [redacted];

b. Testimony of Mr. [redacted];

Govt. Exhibit 35 - Photographs of [redacted] apartment building, pictures 1-3;

Govt. Exhibit 1 for ID - Report of Death of a U.S. Citizen or Non-Citizen National Abroad ICO [redacted] issued by US Embassy [redacted] and [redacted] Death Certificate;

Govt Exhibit 36 - Statement of Mr. [redacted] 13 Oct 15.

6. **Relief Requested.**

The Government requests that the Court determine that the Accused's statement to his father-in-law is admissible evidence at trial on the merits as substantive evidence, should the Government seek to introduce it.

7. **Oral Argument.**

The government respectfully requests oral argument on this motion.

[redacted]
J. L. JONES

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CERTIFICATE OF SERVICE

I hereby certify that, on 10 September 2019, I caused to be served a copy of this motion on the trial counsel for the government and the court.

[redacted]

J. L. JONES

NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **CRAIG R. BECKER** **LT/O-3** **U.S. NAVY**	**DEFENSE RESPONSE TO GOVERNMENT MOTIONTO ADMIT THE STATEMENT OF THE VICTIM AS A DYING DECLARATION UNDER MRE 804(B)(2)** **20 SEP 2019**

1. Nature of Motion.

The Defense moves the court to deny the Government's Motion to Admit the Statement of the Victim as a Dying Declaration under MRE 804(b)(2) and MRE 801(d)(2)(A) as a Statement of a Party Opponent.

2. Summary of Facts.

a. The Defense denies many of the facts listed by the Government in its motion.

b. LT Craig Becker is charged with murdering his wife, [redacted] on 8 October 2015 in the city of [redacted].

c. Mrs. [redacted] had a history of [redacted] when she leaped from the 7th story window of her apartment.

d. When Mrs. [redacted] impacted the sidewalk below, she was mortally wounded and incapacitated.

e. There were several [redacted] witnesses that gathered around Mrs. [redacted] before the ambulance arrived.

f. When law enforcement and the ambulance arrived, Mrs. [redacted] was unresponsive.

g. LT Becker never told Mr. [redacted] that his daughter made the statements, "you did this to me" or "you did this."

3. Discussion of Law.

Mil.R. Evid, 805 states "[h]earsay within the hearsay is no excluded by the rule against hearsay if each part of the combined statements confirms with an exception or exclusion to the rule." *See United States v. Clark, 61 M.J. 707, 713-14 (N-M.C.C.A. 2005); United States v. Hutchins, 2018 CCA LEXIS 31, 170 (N-M.C.C.A. 2018).*

A statement made under the belief of imminent death is an exception of the hearsay rules. *See Mil R. Evid 804(b)(2); Idaho v. Wright, 497 U.S. 805, 820 (1990); United States v. Plant, 39 C.M.R. 809,812-13 (NBR 1968); United Stated v. McGrath, 39 M.J. 158, fn 8 (C,M.A. 1994).* Mil R. Evid. 804(b)(2) states "[i]n a prosecution for any offenses resulting in the death of the alleged victim, a statement that the declarant, while believing the declarant's death to be imminent, made about it cause of circumstances."

An excited utterance is a statement made about a startling event while the declarant remains under the influence of the startling event. *United States v. Rich, 2016 CCA LEXIS 493 (A.C.C.A. 2016).*

Statements made by a party opponent are admissible as non hearsay, pursuant to Mil.R. Evid. 801(d)(2)(A). Thus, unless a specific privilege applies, " . . . any relevant statement by an accused could be admitted into evidence by the Government as a statement of a party opponent." *United States v. Clark, 62 M.J. 195, 196 (CAAF 2005).*

4. Argument.

On the evening of 15 October 2015, Mrs. [redacted]. When she leaped from the 7th story window and impacted the sidewalk she was immediately incapacitated. Any movement or alleged verbal uttering were involuntary reactions. The ambulance crew confirmed that Mrs. [redacted] was unresponsive and not excited. Mrs. [redacted] statements were not made under the belief of imminent death because she could not comprehend what was going on and was unresponsive.

5. Relief Requested

The Defense requests that the Military Judge deny the Government's request.

6. Oral Argument.

The Defense requests oral argument on this matter.

J.J. SULLIVAN, III

CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion was served electronically on Trial Counsel and the Court on 20 September 2019.

J.J. SULLIVAN, III

[redacted]

NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted]UDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES OF AMERICA v. CRAIG BECKER LT USN	**Defense Motion To Dismiss for Violation of the Due Process Clause of the United States Constitution** **10 September 2019**

1. **Nature of Motion.**

The defense requests the Court to dismiss Charge II, Specification 1 because the government has engaged in oppressive delay, which has denied the accused the opportunity to present a meaningful defense.

2. **Burden of Proof.**

As the moving party, the defense has the burden of proof by a preponderance of the evidence. R.C.M. 905(c).

3. **Summary of Facts.**

a. Charge II, Specification 1 alleges that LT Becker strangled his wife, [redacted] at or near [redacted] on or about 9 August 2013.

b. On 30 July 2018, almost five years after the alleged offense (10 days before the statute of limitations would have tolled), Charge II, Specification 1 was preferred.

c. The charges stem from an argument LT Becker and his wife had in a room at the Army Lodge in the early morning hours. AE V at ZZ.

d. Mrs. [redacted] approached the front desk clerk, Mr. [redacted] who, after a brief discussion, called the base military police ("MPs") and described the situation. SGT [redacted] a military policeman, received the call and dispatched SPC [redacted] AE V at AAA.

e. According to Mr. [redacted] he also made a subsequent call to the MPs, during which Mrs. [redacted] also spoke to the MPs. AE V at BBB.

f. Calls to the MPs are recorded, but those recordings no longer exist.

g. Mr. [redacted] made two initial reports to law enforcement. In one, he made no mention of injuries to Mrs. [redacted]. In the other, he specifically denied that he observed injuries to Mrs. [redacted] AE V at BBB; AE V at CCC.

h. A subsequent statement from Mr. [redacted] to NCIS suggests that he observed red marks on Mrs. [redacted] neck. AE V at DDD.

i. In her statement to law enforcement at 0649, Mrs. [redacted] stated that LT Becker "put his hands around my neck and pushed down. He did not squeeze as to leave marks, he only pushed down hard against the bed so that I could not breathe." AE V at EEE.

j. Mrs. [redacted] also reported that LT Becker took her identification and credit cards from her wallet. *Id.*

k. In response to clarifying questions from law enforcement, Mrs. [redacted] stated she had no visible injuries, that she had consumed 4 glasses of wine, and that she was taking [redacted] *Id.*

l. Mrs. [redacted] made a subsequent statement that same day at 1902. AE V at FFF.

m. In that statement Mrs. [redacted] stated that her initial statement was "written under extreme duress" and was factually incorrect in several regards. *Id.*

n. Mrs. [redacted] stated that her accusations that LT Becker had stolen her identification and credit cards was incorrect, and he "in fact had not." Instead, her accusations about her belongings were the result of being "upset and disoriented," and lacking "pertinent information." *Id.*

o. Mrs. [redacted] further stated that she was "coerced" to make a statement by law enforcement because she was told "my husband was in another room and also writing his [statement]." Her statement, therefore, was not a statement that "would accurately reflect my recollection or view of the situation and those involved." *Id.*

p. Mrs. [redacted] also told a Family Advocacy Committee that she misinterpreted the incident, resulting in the Committee closing the case. AE V at GGG.

q. Mrs. [redacted] made a subsequent statement to NCIS on 14 November 2013 "for clarification purposes." AE V at HHH.

r. In that sworn statement, Mrs. [redacted] stated, "My initial assessment of the events that transpired on or around Aug 9 was significantly skewed by being on [redacted] for 8 mos. . . I was severely paranoid, had lost 20 lbs, [and] experienced personality change. At the time I believed that my husband was trying to harm me when in reality he was trying to keep me from harming myself or him and he was trying to deescalate the situation. He DID NOT choke me or hurt me in any way and I made statements indicating that I thought he did due to my altered state of mind (medication induced)." *Id.*

s. LT Becker has been interviewed multiple times in connection with this incident and has consistently disclaimed accusations that he choked his wife or was violent in anyway. AE V at ZZ; AE V at GGG.

t. In November 2013, NCIS briefed Colonel [redacted], LT Becker's Commanding Officer, regarding the status of the investigation, and Colonel [redacted] advised that the command did not intend to take any judicial/administrative action. AE V at CCC.

u. No investigative steps were taken after Colonel [redacted] November 2013 advisement, and the case was formally closed by NCIS on 3 June 2014 citing "lack of evidence of a crime" and the "command's decision to take no judicial/administrative action against LT Becker." AE V at ZZ.

v. Mrs. [redacted] an exculpatory witness for Charge II, Specification 1, died on 8 October 2015.

w. In addition to Mrs. [redacted] being deceased, the government has been unable to locate law enforcement notes from the interviews of Mrs. [redacted] and other witnesses from the Army Lodge, its case activity log, and the recordings of the emergency calls and witness interviews. AE V at CCC.

4. Discussion.

A. Due Process Requires that the Court Dismiss Charge II, Specification 1 Because the Government Has Denied the Accused a Meaningful Opportunity to Present a Complete Defense.

The Court should dismiss the proceedings because the Government has offended due process. Due process requires that criminal prosecutions comport with prevailing notions of fundamental fairness. *California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 2532 (1984). The Supreme Court has interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense. *Id.* Oppressive delay by the Government that inhibits a defendant from presenting a complete defense violates Due Process. *United States v. Lovasco*, 431 U.S. 783, 789, 97 S. Ct. 2044, 2048 (1977). Here, the Government

has denied the accused a meaningful opportunity to present a complete defense by engaging in egregious pre-accusation delay. The Accused is permanently prejudiced because the primary, exculpatory witnesses, recordings of calls to law enforcement, and case notes have been lost.

1. The Government has Violated Due Process Through Egregious Pretrial Delay That Fails to Uphold Prevailing Standards of Fundamental Fairness.

The Government has offended due process because it violated prevailing standards of fundamental fairness by waiting nearly 5 years to prefer charges. The Due Process Clause of the 5th Amendment provides speedy trial protection against pre-accusation delay in circumstances where the statute of limitations is insufficient by itself. *United States v. Reed*, 41 M.J. 449, 451 (C.A.A.F. 1995).[1] The right to a speedy trial under the due process clause of the 5th Amendment requires dismissal when the defendant proves: 1) egregious delay or intentional tactical delay; and 2) actual prejudice. *Id* at 452.

The Government engaged in egregious pre-accusation delay by waiting nearly 5 years to prefer charges. The Government engages in egregious delay when delay is incurred in reckless disregard of circumstances, known to the prosecution, suggesting that there existed an appreciable risk that delay would impair the ability to mount an effective defense. *Reed*, 41 M.J. at 452.

The Government's reasons for the delay are unfair by the standard established by the Supreme Court of the United States. *See United States v. Lovasco*, 431 U.S. 783, 97 S. Ct. 2044 (1977). In considering the due process ramifications of pre-accusation delay, the court in *Lovasco* determined that delay is not fundamentally unfair when it is the result of the

[1] The statute of limitations protects individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. *United States v. Reed*, 41 M.J. 449, 451 (C.A.A.F. 1995), quoting *Toussie v. United States*, 397 U.S. 112, 90 S. Ct. 858 (1970).

government developing a case against a defendant. *Id.* at 792-94. In the present case, the Government cannot honestly say that its pre-accusation delay was the result of building a case against the accused. The case was formally closed in June 2014. For all intents and purposes, however, the investigation was closed in November 2013 when Mrs. [redacted] told NCIS what she had previously told the MPs—that she overreacted to the situation, and that her husband had not choked her. At that point, LT Becker's Commanding Officer determined that he would take no administrative or judicial action.

Now, five years later and absent the only witness to the alleged offense, the government asserts that it somehow has the evidence it needs to finally take action on this charge. This court should view the resuscitation of this five year old charge for what it is—a tool to prop up the more serious charged offenses and to avoid obvious problems with such evidence under M.R.E. 404(b). As such, there is no legitimate justification for this delay. The pre-accusation delay is unfair by constitutional standards; therefore, it violates due process.

Prejudice is inherent in this type of delay. The court in *Lovasco* recognized this prejudice, reasoning that prolonged legal processes occasioned by premature accusations "interfere with the defendant's liberty, disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends." *Lovasco*, 431 U.S. 791.

Indeed all of the above apply to LT Becker who has suffered with the stigma of these accusations for almost five years. But, the prejudice in this case, extends well beyond the personal prejudice recognized in *Lovasco*. Here, exculpatory evidence has been lost.

The Constitution guarantees access to evidence as part of providing an accused the right to a meaningful opportunity to present a complete defense. *California v. Trombetta*, 467 U.S.

479, 485, 104 S. Ct. 2528, 2532 (1984). This is loosely referred to as the accused's right of constitutionally guaranteed access to evidence. *Id.* In some cases, the Supreme Court has held this guarantee to include a right of access to exculpatory evidence even when the evidence is beyond the Government's possession. *See Valenzuela-Bernal*, 458 U.S. 858 (1982) (Government deportation of defense witnesses could offend the due process clause because it diminishes the opportunity to put on an effective defense.); *United States v. Lovasco*, 431 U.S. 783, 97 S. Ct. 2044 (1977) (Government delay in indicting the accused could violate due process if the delay diminishes the accused's opportunity to put on an effective defense.). The defense may establish prejudice by showing: (1) the actual loss of a witness, as well as "the substance of their testimony and the efforts made to locate them or (2) the loss of physical evidence." *United States v. Reed*, 41 M.J. 449, 452 (C.A.A.F. 1995). Here, the defense has demonstrated both.

Because the government waited nearly five years to charge LT Becker with this offense, the death of Mrs. [redacted] has caused the defense to lose a percipient, exculpatory witness. As Mrs. [redacted] confirmed in multiple statements to law enforcement and to FAP counselors, the accused did not choke her. Rather, LT Becker "was trying to deescalate the situation. He DID NOT choke me or hurt me in any way and I made statements indicating that I thought he did due to my altered state of mind (medication induced)." AE V at HHH (emphasis and punctuation in the original).

In addition to the loss of Mrs. [redacted] multiple items related to the investigation of this incident have also been lost, including recordings of calls from Mrs. [redacted] and Mr. [redacted] (the front desk clerk) in the immediate aftermath of the incident. Given the inconsistent statements made by both Mrs. [redacted] and Mr. [redacted] these recordings would provide the

defense the ability to impeach Mr. [redacted] and any evidence presented by the government to support the charged offense.

The passage of time has also impacted the memories of the witnesses who are crucial to the defense's ability to challenge the charged offense and to litigate the government's attempt to admit hearsay statements. First, Mr. [redacted] memory has deteriorated and been exposed to influences which now cause him report observations and signs of injuries that he, and other witnesses, including Mrs. [redacted] and the law enforcement responding to the call, specifically disclaimed close in time to the incident. Given that, there is no question that the accused has been prejudiced by the government's delay.

Law enforcement personnel who received reports of this incident, including Mr. [redacted] and Mr. [redacted] now claim no memory of what they were told. Mr. [redacted] was the Desk Sargent who received the initial reports and calls from Mr. [redacted] and Mrs. [redacted] and was in charge of dispatch. He was also present for LT Becker's statement. As he now has no memory of the substance of these conversations, he is unable to impeach any hearsay statements introduced against LT Becker or any testimony by Mr. [redacted] He is also unable to provide any prior consistent statements of LT Becker. Mr. [redacted] was the officer who responded to the Army Lodge and made the initial contact with Mrs. [redacted] He has no independent memory of any of the statements made to him at the Army Lodge by Mrs. [redacted] or Mr. [redacted] As with Mr. [redacted], Mr. [redacted] impaired memory precludes him from impeaching any hearsay statements introduced against Mr. [redacted] or any testimony from Mr. [redacted] but it also impairs the defense's ability to fully litigate the government's attempts to introduce hearsay statements of [redacted].

Finally, the passage of time has resulted in all NCIS case notes and activity logs to be lost or destroyed. The absence of the notes prevent the defense from obtaining potentially impeaching information for any of the witnesses interviewed, including Mr. [redacted] The absence of the case log, prohibits the defense from attacking the quality of the NCIS investigation because there is no objective record of the investigative steps and leads that NCIS pursued (or ignored).

In short, any judicial system which prioritizes fairness and due process cannot endorse practices whereby the government intentionally delays prosecution, evidence is lost, and the government's case is, as a result, strengthened. Because that is what happened here, the court should dismiss Charge II, Specification 1.

B. Should the Court Not Dismiss for Constitutional Due Process Violations, the Court Should Abate the Proceedings in Accordance With R.C.M. 703(b)(3) Due to the Unavailability of Key Defense Witnesses

Article 46 of the UCMJ provides that both counsel and the court, "shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President shall prescribe." 10 U.S.C. § 846. The regulations prescribed by the President are enumerated in R.C.M. 703 which addresses the production of witnesses. In relevant part, R.C.M. 703(b)(3) provides the following:

> *Unavailable witness.* Notwithstanding subsections (b)(1) and (2) of this rule, a party is not entitled to the presence of a **[*133]** witness who is unavailable within the meaning of Mil. R. Evid. 804(a). However, if the testimony of a witness who is unavailable is of such central importance to an issue that it is essential to a fair trial, and if there is no adequate substitute for such testimony, the military judge shall grant a continuance or other relief in order to attempt to secure the witness' presence or shall abate the proceedings, unless the unavailability of the witness is the fault of or could have been prevented by the requesting party.

This rule is derived, in part, from *United States v. Daniels*, 48 C.M.R. 655, 656-57 (1974). The court-martial in *Daniels* was held in [redacted] and, despite reasonable efforts by the government, the U.S. citizen victim could not be compelled to appear through either U.S. or [redacted] process. As such, the Court of Military appeals held that Daniels' right to a fair trial was gravely impaired when the military judge allowed the case to proceed in the absence of the witness, and ultimately held that "the military judge had no constitutional alternative except to abate the proceedings." *Id.*

In that case, the accused was convicted of attempted carnal knowledge of an underage, U.S. military-dependent female in [redacted], where the court-martial was held. Daniels requested the victim be called as a defense witness, but, despite reasonable efforts, the Government was unable to compel the attendance of the victim through the exercise of either U.S. process or that of the [redacted] Government. *Daniels*, 48 C.M.R. at 656-57. The Court of Military Appeals held that Daniels' right to a fair trial was "gravely impaired" when the military judge allowed the trial to continue and stated, "In the absence of specific statutory or regulatory authority to compel . . . the victim's testimony as a defense witness, and so long as her voluntary presence could not be secured, we believe the military judge had no constitutional alternative except to abate the proceedings." *Id.* at 657. In short, the accused was deprived of the right "to have compulsory process for obtaining witnesses in his favor" as guaranteed in the Sixth Amendment." *Id.*

The same result is warranted here. Mrs. [redacted] an alleged victim who has also provided exculpatory statements, is unavailable. It is impossible to imagine a witness that would be of greater "central importance to an issue that is essential to a fair trial" than this witness.

As no straight-faced argument can refute the central importance of these witnesses, the government may argue that an adequate substitute is available. That argument, however, also

fails. In *United States v. Eiland,* the military judge was faced with the unavailability of two witnesses who he found to be of central importance to a fair trial. 39 M.J. 566 (C.M.R. 1993). In that case, the Court of Military Review upheld the military judge's finding that the witnesses' testimony "is not of a nature that would readily adapt itself to written testimony, to stipulations of fact or things of that nature. If I were the fact-finder, I would have grave difficulty in deciding what weight, if any, to give to the testimony of . . . these two witnesses without actually seeing them testify and making some judgments about them and their credibility in the course of that observation." Here, too, even if the defense was permitted to offer Mrs. [redacted] exculpatory statements, the members, not having the opportunity to observe Mrs. [redacted] and her demeanor, would have no sense of what weight to give to such a statement.

"As a general rule, a stipulation may not be accepted into evidence unless the military judge is satisfied that the parties consent to its admission . . . A stipulation, whether of fact or testimony, seems to be among the least acceptable of the possible substitutes for live testimony. Unlike a deposition or former testimony, there is no opportunity for cross-examination or even complete questioning. The substance of a stipulation is often the result of negotiation rather than the actual words of the potential witness and, as a result, often becomes a compromise derived from the strengths or weaknesses in the bargaining positions of the parties." *Id.*; R.C.M. 811(c).

The defense, however, must acknowledge that this rule is not entirely inelastic. Relevant factors have been identified to assist with resolving these issue such as "the issues involved in the case and the importance of the requested witness to those issues; whether the witness is desired on the merits or the sentencing portion of the trial; whether the witness' testimony would be merely cumulative; and the availability of alternatives to the personal

appearance of the witness, such as deposition, interrogatories, or previous testimony." *United States v. Tangpuz*, 5 M.J. 426, 429 (C.M.A. 1978).

All of these factors, however, weigh in favor of abatement. This witness is relevant on the merits, as the basis for a defense theory that Mrs. [redacted] overreacted to an argument under the influence of medication. No evidence is more crucial to the defense's case, and, in fact, no other witness can possibly provide the same or similar information to the court. Additionally, there are no depositions, interrogatories, or previous testimony which can be offered.

Finally, the government may assert that protections of R.C.M. 703(b)(3) should not be afforded to the accused because the unavailability of Mrs. [redacted] is the fault of the accused. The presumption of innocence, however, says otherwise. To find that the accused caused Mrs. [redacted] unavailability would turn this basic principle of justice on its head, particularly in this case where the facts point strongly toward the conclusion that Mrs. [redacted] committed suicide. There are no eye-witnesses to the incident resulting in Mrs. [redacted] death, no physical evidence to suggest a struggle took place, and Mrs. [redacted] had a long struggled with issues related to her [redacted]

5. Relief Requested.

The defense respectfully requests the Court dismiss Charge II, Specification 1. In the alternative, the court should permanently abate the proceedings.

6. Enclosures.

ZZ – Report of Investigation, dtd 3 June 2014
AAA – Statement of Sgt [redacted]
BBB – Statement of [redacted]
CCC – Report of Investigation, dtd 6 February 2014
DDD – TBD
EEE – Statement of [redacted] (first written statement)
FFF – Statement of [redacted] (second written statement)
GGG – Report of Family Advocacy Interview

HHH – Statement of [redacted] (third written statement)

7. Oral Argument.

The defense requests oral argument on this motion.

[redacted]
LCDR Bryan M. Davis
Detailed Military Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion was served electronically on Trial Counsel and the Court on 10 September 2019.

[redacted]
LCDR Bryan M. Davis
Detailed Military Defense Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
UNITED STATES NAVY
GENERAL COURTS-MARTIAL

UNITED STATES **v.** **CRAIG BECKER** **LT/O-3 USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO DISMISS FOR VIOLATION OF THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION** **19 Sept 2019**

1. Nature of Motion.

The United States requests that the Court deny the Defense motion to dismiss Charge II, Specification 1 because the Defense has not met its burden to prove there was egregious delay and there was actual prejudice. Further, the Court should deny the Defense's request to abate the proceedings because the Accused caused the witness's unavailability.

2. Summary of Facts

a. Prior to her death the accused and Mrs. [redacted] had a contentious marriage which included physical and mental abuse by the accused. Chronologically the first charged event occurred in August 2013 when the accused assaulted Mrs. [redacted] at an Army hotel in [redacted] The accused and his wife had PCS'd to [redacted] and were staying at the Army Lodge on [redacted].

b. The accused assaulted this wife by throwing her about their hotel room and placing his hands around her throat and pressing down. The accused was angry at his wife for an [redacted] while they were in America. Immediately before the assault began he read emails between his wife and [redacted]

c. Mrs. [redacted] was able to escape the hotel room and asked the front desk clerk to call the police. Ms. [redacted] made oral statements to the hotel desk clerk, Mr. [redacted]. Mr. [redacted] a [redacted] civilian, called US Army military police.

d. After the military police arrived, Mrs. [redacted] gave an oral statement to US

Army military police officer Specialist [redacted] detailing the abuse she suffered at the hands of the Accused. This was memorialized in police reports.

e. Mrs. [redacted] then went to the US Army MP station and made a detailed written statement about the assault.

f. On or about 1750 on 9 August 2013 Mrs. [redacted] went to the US Army military police station to complain about her treatment by US Army military police. She also made a recantation to Family Advocacy blaming herself for the incident.

g. Between August and November 2013 the accused and Mrs. [redacted] reconciled. In November 2013 Ms. [redacted] made a recantation of the allegations to NCIS. In November 2013 the accused's command declined to take further action.

h. Between August and November 2013 the accused was investigated by law enforcement for this domestic violence assault. The accused described the investigation as a "living nightmare" to his wife's friend [redacted] and blamed his wife for instigating the investigation.

i. After reconciliation the accused and his wife lived in [redacted]. Mrs. [redacted] began to work on the local base. She connected with new friends and stayed in touch with old friends. To both sets she told them about the abuse and assault in the Army lodge while explaining she recanted to protect her husband's career. Her friends included Mrs. [redacted], Mrs. [redacted], Mr. [redacted], Mrs. [redacted] and Mrs. [redacted]. None of these witnesses informed police of Mrs. [redacted] statements. These statements were unknown to law enforcement until an investigation into Mrs. [redacted] murder.

j. On 8 October 2015 the accused murdered his wife by pushing her out of the 7th floor window of their [redacted] apartment. [redacted] police responded immediately and informed the accused that he was "both a victim and a suspect." The accused made numerous statements to [redacted] police including telling them that he and his wife were separated, that she had attempted a reconciliation that night and after being rebuffed she committed suicide by jumping out the window. He denied any previous assaults on his wife.

k. [redacted] police soon arrested the accused for murder and began prosecuting his case in [redacted] courts. [redacted] police were the lead investigative agency with the Naval Criminal Investigative Service only acting in a liaison status. The United States did not invoke jurisdiction under the SOFA treaty.

l. The accused was released from [redacted] jail on 14 July 2014 but remained on house arrest until 9 January 2018. With his [redacted] court case continuing the accused mounted a lawsuit in American federal district court to have the United States invoke jurisdiction and he be returned to the United States. Secretary of Defense James Mattis ordered the invocation of jurisdiction in January 2018.

n. Once the United States invoked jurisdiction the [redacted] authorities ceased their investigation. The Naval Criminal Investigative Service then became the lead investigative agency. Their investigation uncovered additional statements by Mrs. [redacted] to friends and family that discussed the assault in August 2013 and why she recanted. [redacted] authorities had not focused on the accused prior U.S. military investigation.

3. Discussion.

A. The Defense Failed to Meet Their Burden to Show That There was Egregious Pretrial Delay and That They Suffered Actual Prejudice

While the Sixth Amendment provides the right to a speedy trial post-indictment, the Supreme Court has held that the statute of limitations provides "'the primary guarantee against bringing overly stale criminal charges'" pre-indictment. *United States v. Lovasco*, 431 U.S. 783, 789 (1977) (*quoting United States v. Marion*, 404 U.S. 307, 322 (1971). The Court noted that the "Due Process Clause has a limited role to play in protecting against oppressive delay." *Lovasco*, 431 U.S. at 789. Neither party can cite a single case where the Supreme Court found a violation of an accused's speedy trial rights under the Due Process Clause. Further, the Supreme Court held that "[b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation. We, therefore, have defined the category of infractions that violate 'fundamental fairness' very narrowly." *Dowling v. United States*, 493 U.S. 342, 352 (1990).

While the Supreme Court has never explicitly fashioned a remedy for determining when an accused's speedy trial rights under the Due Process Clause are violated, the Courts of Appeals for the Armed Forces established a two-prong test in *United States v. Reed*, 41 M.J. 449 (C.A.A.F. 1995). In *Reed*, the Court followed other federal courts in holding that an accused has the burden of proof when alleging a speedy trial violation. *Id.* at 452. In order to meet the burden the accused must show (1) there was an egregious or intentional delay, and (2) that the accused suffered actual prejudice from the delay. *Id.*

To show actual prejudice, the accused must show "(1) the actual loss of the witness, as well as 'the substance of their testimony and efforts made to locate them,' or (2) the loss of physical evidence." *Id.* (internal citations omitted).

However, even the loss of a witness does not automatically meet the second prong of actual prejudice. In *Lovasco*, the accused was indicted for possessing stolen firearms. *Lovasco*, 431 U.S. at 784. The indictment occurred 18 months after the offense was committed and about 17 months after the investigation had concluded. *Id.* at 784-85. Subsequent to the investigation wrapping up but before the indictment, two witnesses that the accused deemed as material passed away. *Id.* at 785-86. On this basis, the accused claimed that his speedy trial rights under the Due Process Clause were violated. *Id.* at 784. The Supreme Court rejected this claim and held that the prosecution of the accused after an investigative delay, did not deprive him of due process even though he could show that he might have been prejudiced by the lapse of time. Instead the Court noted that "proof of prejudice is generally a necessary but no sufficient element of a due process claim, and that the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused." *Id.* at 790.

1. The Defense Cannot Meet Their Burden to Show That There was an Egregious Delay

In the present case, the Defense claims that there was an egregious delay on the part of the government because the charge was not referred until close to the statute of limitations. The Defense correctly cites to *Reed* in stating that egregious delay "is incurred in reckless disregard of circumstances, known to the prosecution, suggesting their existed an appreciable risk that delay would impair the ability to mount an effective defense." However, the Defense fails to follow up and cannot show how the prosecution acted with reckless disregard of known circumstances. In contrast, the Government, working with a foreign nation, did not egregiously delay a complex murder case. The Defense cite to *Lovasco* to state that delay is not egregious when there is an ongoing investigation and then go into great detail to show that the investigation was closed in this case. But they seem to bring this up to create a strawman to knock down, for the Court has never said that an ongoing investigation is the only thing that avoids the label of egregious delay. They further quote from *Lovasco* to argue that pre-indictment delay results in inherent prejudice,

but they take the quote out of context. *Lovasco* stated that accusations may "interfere with the defendant's liberty, . . . disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends." *Lovasco*, 431 U.S. at 791. However, the Court noted these things as occurring after a "formal accusation" is made and as a reason to delay an indictment rather than charging an accused as soon as probable cause is established. *Id.*

The Defense's main argument in trying to establish that there was egregious delay is that through the passage of time they lost the ability to call Mrs. [redacted] as a witness. However, the loss of a witness alone is not the equivalent of egregious delay. Loss of a witness does not come into consideration until the second part of the *Reed* test. Thus, without the Defense being able to establish egregious delay, they have failed to show that the Accused's right to a speedy trial has been violated.

The Government investigated the accused in 2013 for the assault of his wife. After an initial outcry involving Army police where Mrs. [redacted] made a detailed statement as to what occurred, including most tellingly the rationale for the assault. By all accounts Mrs. [redacted] was unfaithful to the accused with Mr. [redacted] and her initial version of events involved the accused discovering material related to this while in the Army hotel. Mrs. [redacted] stated that he became angry and assaulted her. Human experience across time and space is that infidelity often results in intense emotional and sometimes violent outburst. Mrs. [redacted] initial version of events is quite believable and rooted in human experience.

During the fall of 2013, which the accused referred to as a "living nightmare" the Government investigated her claims. She certainly made contradictory claims both to law enforcement and Family Advocacy. Such actions by a victim of domestic violence are not uncommon. Shortly thereafter the Government decided to not press forward due to the state of the evidence and lack of witness/victim cooperation. This is not egregious activity by the Government. However, Mrs. [redacted] did not forget the abuse and began to tell her friends about the abuse and the rationale for her recantation – to save the accused's career. Mrs. [redacted] did not return to the police or Navy.

Mrs. [redacted] death in October 2015 in [redacted] was initially investigated by [redacted] police and courts. The accused was arrested, held in confinement by [redacted] and his [redacted] court process began. Allowing a sovereign nation to investigate a murder within its borders while complying with treaties is not egregious delay by the Government.

The United States government invoked jurisdiction in January 2018 when SECDEF Mattis personally made the decision to invoke jurisdiction. The accused also initiated a lawsuit in federal court in an effort to force the United States to assert jurisdiction.

Once the United States assumed jurisdiction the Naval Criminal Investigative Service became the lead investigative agency. During its investigation it became evident that Mrs. [redacted] had continued to discuss her marriage and abuse with friends and family. The investigation revealed additional evidence, unknown the Navy in 2013, regarding the events surrounding the assault. This is not egregious delay but investigative police work. The death of Mrs. [redacted] resulted in what [redacted] police told the accused within minutes of showing up at his apartment on 8 October 2015 – he was a victim and a suspect. As a suspect it was natural that police would look into the circumstances surrounding her death and marriage. The accused denied ever abusing his wife which was at odds with some of his wife's prior statements. The accused told [redacted] police that he and his wife were separating and that she had attempted a reconciliation which he rebuffed, resulting in her immediate suicide. It was logical to seek information about the accused's marriage and past to include reviewing prior violent allegations through the lens of additional facts. This is not egregious government delay under the Due Process Clause.

2. The Defense Cannot Meet Their Burden to Show That the Accused Suffered Actual Prejudice

Even assuming arguendo that there was egregious delay, the Defense's motion should still be denied because they cannot prove actual prejudice. The Defense claims that the Accused has suffered actual prejudice because Mrs. [redacted] is deceased. However, the Government cannot be faulted for this as it was not foreseeable that the Accused would murder Mrs. [redacted] thus causing her absence. Further, the Accused cannot benefit from his own misconduct. As stated in the Government's forfeiture by wrongdoing motion, it is common sense and public policy that an accused cannot profit from their own criminal acts. To hold that the Accused's speedy trial right was violated due to Mrs. [redacted] inability to testify would be to provide him with a windfall for his own criminal misconduct.

Witnesses being unavailable or deceased is hardly unique. No victims testify at murder trials. Many victims of domestic violence refuse to participate in the prosecution.

Co-accused in conspiracies cannot force other co-accused to testify. Witnesses may claim a wide variety of privileges from self-incrimination to martial privilege. The issue of a witness being unavailable is predicated on the witness being alive. The death of a witness does not prevent evidence related to that witness from being admitted so long as it is admissible under the Military Rules of Evidence. See, M.R.E. 804(b) (2) Statement under Belief of Imminent Death. See also, *United States v. DeCarlo*, 1 M.J. 90 (C.M.A. 1951).

Next, the Defense claims actual prejudice because of the loss of physical evidence in the way of the 911 calls and NCIS notes.[1] However, the Defense fails to meet the second prong of *Reed*, which requires them to show actual prejudice because they cannot prove that the 911 calls or NCIS notes are exculpatory – the most they can do is speculate that the evidence may be exculpatory, which is clearly insufficient to meet their burden. This is similar to *California v. Trombetta*, 467 U.S. 479 (1984) and *Killian v. United States*, 368 U.S. 231 (1961). In *Trombetta*, the accused was charged with DUI and subsequently filed a motion to suppress the results from his breath test because his breath sample was not preserved for the Defense to test it. *Trombetta*, 467 U.S. at 481. The accused claimed that the failure to preserve the sample was a violation of his due process rights because it was a destruction of *potentially* exculpatory evidence. The Court compared the case to *Killian* where a due process violation was raised because an FBI agent had destroyed his handwritten notes after using them to create a written report. *Id.* at 242. In following *Killian*, the Court noted that there was nothing requiring the Government to maintain the breath sample; the sample was not destroyed in an attempt to hide evidence from the accused; and most importantly the accused had no proof that the breath sample would provide exculpatory evidence – the accused only alleged that it *could* be exculpatory. *Trombetta*, 467 U.S. at 488-89. Therefore, because the accused could not show that the breath sample would lead to exculpatory evidence, the Court held that the accused's due process rights had not been violated.

In the present case, just like in *Trombetta*, the Defense has failed to offer any evidence or explanation for how the 911 tapes or the NCIS notes, if they still existed,

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[1] The Defense argues that the loss of memories of Mr. [redacted] and law enforcement personnel is actual prejudice. However, under *Reed*, actual prejudice only looks at whether there is an "actual loss of a witness" or "loss of physical evidence." Memories are not witnesses or physical evidence and thus are not part of the calculation. Despite this, the Defense still fails to show how the witnesses would provide exculpatory evidence if their memories were perfect. It is expected Mr. [redacted] a [redacted] citizen, will participate at trial and thus be subject to cross-examination.

would be exculpatory. Instead, the Defense claims that the 911 tapes would provide them the opportunity to impeach Mr. [redacted] due to his previous inconsistent statements. This claim though is pure speculation because it is unknown what was said on the 911 tapes. Moreover, the Defense can impeach Mr. [redacted] with his previous statements because he will testify and can be confronted by the Defense. Finally, the loss of NCIS notes does not establish actual prejudice. As the Defense admits in their own motion, "the absence of the notes prevent the defense from obtaining *potentially* impeaching information" (emphasis added). Just as stated above, speculating that lost evidence would be exculpatory does not show prejudice. Therefore, the Defense cannot show actual prejudice and they have not met their burden in proving that the Accused's right to a speedy trial was violated.

Mrs. [redacted] Subsequent Actions and Statements Not Included in Defense Motion

The Defense's characterization of Mrs. [redacted] as repeatedly and adamantly recanting her initial allegations against the accused fails to discuss her further statements to friends and family about the incident. As discussed in greater depths in other motions, after the initial outcry to law enforcement the accused and Mrs. [redacted] continue to live with one another as husband and wife. During this time Mrs. [redacted] developed a social circle of women who lived and worked in the [redacted] area. While the accused may have moved on from his "living nightmare" of being investigated once his wife recanted on his behalf it is evident that Mrs. [redacted] had not forgotten the abuse she had suffered.

After her recantation during conversations with Ms. [redacted] she stated that she recanted to save her husband's career but described the assault. During conversations with Mr. [redacted] her father, and Mr. [redacted] a long-time friend, she stated she recanted her allegations to save her husband's career. She additionally gave versions of events as to the assault. Mrs. [redacted] gave versions of events of the assault to Mrs. [redacted] Mrs. [redacted] and [redacted]. This information was not known to the accused's command/Government and only became known when an in-depth investigation began after Mrs. [redacted] murder.

This is not, as the Defense alleges, attempting to prop up a weak charge with another or buttress a murder charge. It shows the continual course of conduct of the accused from his initial assault to him final murder. As noted in *Giles v. California*, 554 U.S. 353, 377 (2008) "the domestic-violence context is, however, relevant for a separate reason. Acts of

domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution...." What *Giles* warns of is what has occurred, there is abuse, an outcry, recantation through emotions, and later a murder to silence. The fact that the accused fits a recognizable pattern supports the finding that the Government is acting in good faith. The accused's murder of his wife in 2015 put the assault in 2013 into a different perspective with additional information. There is no Due Process violation when the Government reassess previous evidence with the hindsight of time and new information and charges in a timeframe under the statute of limitations. See also, *United States v. Holt*, 33 M.J. 400 (C.A.A.F. 1991); finding five year statute of limitations met by two days.

B. The Court Should Deny the Defense's Request for Abatement Because the Accused Caused Mrs. [redacted] Unavailability

As stated in R.C.M. 703(b) (3) where an unavailable witness is of "such central importance to an issue that it is essential to a fair trial . . . the military judge . . . shall abate the proceedings, unless the unavailability of the witness is the fault of . . . the requesting party." The accused is at fault for Mrs. [redacted] not being available. R.C.M. 703 and the production of witnesses are obviously aimed at people who are alive; it is absurd to request the production of a deceased individual and then claim the lack of production as a reason for abatement. "We have held that a trial may proceed in the absence of a relevant and necessary witness if that witness is not amenable to process." *United States v. Barreto*, 57 M.J. 127, 132 (C.A.A.F. 2002).

The Defense's cited authority is easily distinguishable. In *United States v. Daniels*, 48 C.M.R. 655 (C.M.A. 1974) the victim was alive but a foreign national who could not be compelled to attend an American court-martial held in [redacted]. There is no evidence that the victim in Daniels was deceased or that the accused made her unavailable. *Daniels* is easily distinguished by these facts. The reliance upon *United States v. Eiland*, 39 M.J. 566 (N.M.C.C.A. 1993) is also misplaced and easily distinguishable. Eiland was accused of rape of a Spanish woman in Spain and the court-martial was held in Florida. "Government

efforts to obtain the presence of these witnesses for trial in Florida have been unsuccessful. Before the judge made the foregoing determination, the two witnesses had refused U.S. Government funded travel to the situs of the trial...." *Id* at 667. As in *Daniels*, the witnesses were alive, foreign nationals and not subject to compulsory process and thus they were unavailable. Mrs. [redacted] is dead and dead at the hands of the accused.

The Defense argues that the Accused cannot be held at fault for causing Mrs. [redacted] unavailability because he has the presumption of innocence. However, as argued for in the forfeiture by wrongdoing motion, the Government need only show by a preponderance of evidence that the Accused murdered his wife. The Government has met this burden using the same evidence submitted in the forfeiture by wrongdoing motion. The accused has the presumption of innocence but the Government is not required to prove his guilt beyond a reasonable doubt for the resolution of the production of a witness who is dead. Therefore, the Defense's request for abatement should be denied because Mrs. [redacted] is deceased and not subject to process and Mrs. [redacted] unavailability is solely the fault of the Accused's actions and thus he may not invoke R.C.M. 703(b) as a basis for production.

The Defense's characterization of Mrs. [redacted] as repeatedly and adamantly recanting her initial allegations against the accused fail to discuss her further statements to friends and family about the incident. As discussed in greater depths in other motions, after the initial outcry to law enforcement the accused and Mrs. [redacted] continue to live with one another as husband and wife. During this time Mrs. [redacted] develops a social circle of women who live in and work around the [redacted] area. During conversations with Ms. [redacted] she stated that she recanted to save her husband's career but described the assault. During conversations with Mr. [redacted] her father, and Mr. [redacted] she stated she recanted her allegations to save her husband's career and gave versions of events as to the assault. Mrs. [redacted] additionally gave versions of events of the assault to Mrs. [redacted] Mrs [redacted] and [redacted]. This information was not known to the accused's command and only became known when the Government began to investigate in-depth after her murder.

This is not, as the Defense alleges, attempting to prop up a weak charge or buttress a murder charge. It shows the continual course of conduct of the accused from his initial assault to him final murder. As noted in *Giles v. California*, 554 U.S. 353, 377 (2008) "the

domestic-violence context is, however, relevant for a separate reason. Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution...." What *Giles* warns of is what has occurred, there is initial abuse, an outcry, recantation through emotions, and later a murder. The fact that the accused fits a recognizable pattern supports the finding that the Government is acting in good faith. The accused's murder of his wife in 2015 put the assault in 2013 into a different perspective. There is no Due Process violation when the Government reassess previous evidence with the hindsight of time and new information.

The President and Congress are well aware that the passage of time impacts criminal cases. Memories fade, witnesses move, and time marches on. Congress created a five year statute of limitations for assaults to ensure that society has an appropriate time to investigate allegations of criminal activity, including the possibility that subsequent events would illuminate past events. Five years also ensures that an accused can move forward with their life when the statute of limitations has passed. In the case at bar the Government is under the statute of limitations and there is no Due Process violation.

4. Burden of Proof.

Per R.C.M. 905(c) the burden of proof on any factual issue the resolution of which is necessary to decide a motion shall be a preponderance of the evidence. Per R.C.M. 905(c)(2) the burden of persuasion is on the moving party, the Defense.

5. Relief Requested.

The United States requests that the Court deny the Defense Motion to Dismiss and Abate.

6. **Oral Argument.**

The United States respectfully requests oral argument on this motion.

/s/
J. L. JONES

****

CERTIFICATE OF SERVICE

I hereby certify that, on 19 Sept 2019, I caused to be served a copy of this motion on the defense counsel and the court.

/s/
J. L. JONES

NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **CRAIG R. BECKER** **LT/O-3** **U.S. NAVY**	**DEFENSE MOTION FOR APPROPRIATE RELIEF UNDER R.C.M. 906(b)(7)** **MOTION TO COMPEL DISCOVERY** **10 SEP 2019**

1. Nature of Motion

Pursuant to R.C.M. 906(b)(7) and R.C.M. 701, the Defense respectfully requests the court to compel the Government to produce following evidence: (1) Communications between RLSO/TCAP and Law Enforcement, (2) Communications between Law Enforcement/RLSO/TCAP and all potential witnesses, (3) Written documentation regarding the decision not to prosecute the 2013 assault allegation, (4) Communications between Law Enforcement, (5) Criminal Records of all potential witnesses, and (6)Addresses of witnesses within the possession of the Government[1].

2. Summary of Facts

a. On 30 January 2019, the Defense submitted to the Government a request for discovery. (Attachment S)

b. On 1 March 2019, the Government provided a written response. (Attachment T)

[1] The request for the addresses is made pursuant to R.C.M. 905(f) as a motion to reconsider this court's earlier ruling.

c. On 13 May 2019, the Defense submitted to the Government two supplemental requests for discovery. One titled 1st Supplemental Request and the other inadvertently titled Third Supplemental Request. (Attachments II and JJ)

d. On 23 May 2019, the Government provided a written response to Third Supplemental Request. (Attachment KK)

e. On 7 June 2019, the Government provided a written response to 1st Supplemental Request. (Attachment LL)

f. During the course of this over three year investigation multiple Navy Judge Advocates have accompanied NCIS agents on witness interviews and other case related travel. (Attachments MM)

g. During the course of this investigation on at least two occasions, the government, either through law enforcement only or law enforcement accompanied by a trial counsel, have approached and interviewed a witness by showing up at their home or place of work unannounced.[2]

h. On 29 May 2014, the United States Navy closed the case against LT Becker relating to the 2013 assault allegation and decided that no action either judicial or administrative would be taken against him (Attachment F)

3. Discussion of Law

[2] The Defense is in no way alleging any impropriety on the part of the Government. This is lawful, ethical, and extremely effective way to approach an interview of a potentially reluctant witness.

"Discovery practice under Article 46 and R.C.M. 701 "promotes full discovery . . . eliminates 'gamesmanship' from the discovery process" and is "quite liberal . . . . Providing broad discovery at an early stage reduces pretrial motions practice and surprise and delay at trial." *Manual for Courts-Martial, United States* (2002 ed.), Analysis of Rules for Courts-Martial A21-32. The military rules pertaining to discovery focus on equal access to evidence to aid the preparation of the defense and enhance the orderly administration of military justice. To this end, the discovery practice is not focused solely upon evidence known to be admissible at trial." United States v. Roberts, 59 M.J. 323, (C.A.A.F. 2004). Indeed, it includes materials that would assist the defense in formulating defense strategy. See United States v. Ebb, 66 M.J. 89 (C.A.A.F. 2008). This broad interpretation of military discovery was the state of the law prior to the most recent changes to R.C.M. 701. The current version of R.C.M. 701 now requires even broader discovery obligations on the part of the Government by eliminating the former materiality requirement. *Manual for Courts-Martial, United States* (2019 ed.), Analysis of Rules for Courts-Martial A15-9.

A. Communications

1. Communications between RLSO/TCAP and Law Enforcement: [3]

The Defense requests all e-mails, texts, and all other written communication between RLSO/TCAP personnel and NCIS/CID [redacted] law enforcement personnel[4] related to 1) the

[3] To be clear, the Defense is not requesting Trial Counsel's personal notes or internal Trial Counsel communications, only those writings that were shared with law enforcement.

[4] The Defense is not aware of all of the Government actors who were involved in this matter. However, the Defense believes that at a minimum, this court should order the production of the requested communications to or from the following persons: CDR Kim Kelly, CDR [redacted] CDR [redacted] LCDR Paul Hochmuth, CDR [redacted], SA [redacted] SA [redacted] SSA [redacted], SSA [redacted] SA [redacted], SA [redacted], SA [redacted] and Inspector [redacted]

investigation into the death of Mrs. [redacted] and other related offenses[5], 2) the jurisdictional decision regarding which country would prosecute LT Becker, and 3) all other matters related to current case against LT Becker. E-mails and other communications between NCIS agents and trial counsel or other government lawyers at the RLSO or TCAP are no less discoverable than case activity logs, NCIS agent notes, or other written materials prepared in the course of investigating an alleged crime. These communications are either to or from parties that are not within any recognized protected class that would allow them to fall within either the attorney work product or the attorney-client privileges.

The information contained within these e-mails is relevant for the purpose of R.C.M. 701 as it relates to the charges before this court and could aid the defense in preparing for trial and formulating various strategies. For example, throughout the entire investigation, RLSO and TCAP personnel actively assisted and accompanied NCIS on witness interviews and other investigative matters. Communications relating to these activities, such as summarizing a contact with a witness or describing a witnesses willingness to testify, could be of great assistance to the preparation of the defense and is no less discoverable whether it is memorialized in an e-mail from an agent to a prosecutor than if it is written on a piece of paper in the agent's file. Likewise, e-mails proposing or directing investigative actions could aid in the preparation of the defense and are discoverable regardless of whether or not they originate with the trial counsel or with one NCIS agent who is tasking a fellow agent with a lead. These communications if not officially, in actuality, are part of the investigative file and could inform Defense strategy or lead to the discovery of other information. They are relevant as they relate to the current case and among other uses may (1) identify possible bias in the investigation; (2)

[5] This language is intended to cover all of the charges and specifications that are before this court including 2013 event.

identify an incomplete or insufficient investigation; (3) identify additional investigative leads for the Defense team to pursue; and (4) reveal information related to the timing and reasons behind the decisions regarding to the jurisdiction of this case.

2. **Communications between Law Enforcement/RLSO/TCAP and all potential witnesses identified in the investigation, including but not limited to** [redacted].

The Defense requests the e-mails and other written communications between law enforcement or other government representatives and all potential witnesses identified in this investigation. These materials are clearly relevant. The Defense is entitled to know what kind of case information or updates are being provided to these witnesses. That information could, among other things, present the Defense with materials with which to challenge the impartiality of the investigation or cross-examine the special agents or witnesses. Likewise, the Defense is entitled to know what information these witnesses provided the Government. That information could be used to impeach the witnesses based not only on the substance of any inconsistent statement in the communications, but also by the tone of the communication. Finally, these writings from potential witness could also show investigative leads that were provided to the Government that were not utilized, thus showing an incomplete investigation.

3. **Written documentation regarding the decision not to prosecute the 2013 assault allegation.**

The Defense request all e-mails, texts, and other written communications in the possession of the Government relating to the original decision not to charge LT Becker for the 2013[6]. This information is relevant for the purposes of R.C.M. 701 as it directly relates to one of the charges

[6] The Defense is aware that the Government has made good faith efforts to find any such communications at the RLSO level and has been unsuccessful. While this request is for all communications in the possession of the Government, it should, at a minimum include those communications and documents from the command level, specifically those to or from LCDR [redacted]

currently before this court. These communications could assist the Defense by highlighting weaknesses in the case that lead to the decision not to prosecute. Further, these communications could provide insight on the thought process of the commanders involved that may assist the defense in filing a motion to dismiss the current charges.

4. <u>Communications between Law Enforcement, including but not limited to internal NCIS leads or requests for investigative assistance.</u>

The Defense requests all e-mails, texts, leads, and other written communication between law enforcement personnel[7] related to 1) the investigation into the death of Mrs. [redacted] and other related offenses[8], 2) the jurisdictional decision regarding which country would prosecute LT Becker, and 3) all other matters related to current case against LT Becker. E-mails and other communications between law enforcement personnel is just as discoverable as case activity logs, NCIS agent notes, or other written materials prepared in the course of investigating an alleged crime. The information contained within these e-mails is relevant for the purpose of R.C.M. 701 as it relates to the charges before this court and could aid the defense in preparing for trial and formulating various strategies. They are relevant as they relate to the current case and among other uses may (1) identify possible bias in the investigation; (2) identify an incomplete or insufficient investigation; (3) identify additional investigative leads for the Defense team to pursue; and (4) reveal information related to the timing and reasons behind the decisions regarding to the jurisdiction of this case.

B. Criminal history checks for all witnesses

The Defense requests a criminal background check on all potential witnesses. Past criminal convictions are certainly relevant for the purposes of R.C.M. 701 as they may lead to impeachment material that can be used at trial or may in fact themselves be impeachment material based on the nature or severity of the crime at issue.

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[7] This request covers all NCIS and CID agents who worked on this matter, to include communications they had with [redacted] law enforcement.

[8] This language is intended to cover all of the charges and specifications that are before this court including the 2013 event.

C. Addresses for Witnesses

The Defense respectfully requests this court reconsider its ruling with regard to the production of witness addresses. The Defense reiterates that the only information being requested is that information which is the possession of government. The Defense is not requesting the Government to create or obtain this information. Without this information, the Defense is limited in conducting investigations in to crucial witnesses. Without these addresses, the Defense cannot interview friends, neighbors, and other acquaintances who may live nearby to learn if the witness has made prior inconsistent statements about the case, has biases, is truthful, or has any difficulty with perception. Additionally, Article 46, UCMJ requires a level playing field with regard to access to witnesses. On at least two occasions that the Defense is aware of, the Government has utilized addresses to approach witnesses for interviews. The Defense should be afforded equal opportunity to use this effective and ethical investigative technique. While the government, and potentially this court, for honest and good-faithed privacy reasons, may not want the Defense to have the ability to directly approach witnesses, there is no authority to withhold such information on those grounds. Privacy concerns do not trump R.C.M. 701 and Article 46, UCMJ, especially in a case in which the accused is facing the most serious offenses under our Code.

4. Relief Requested

The Defense requests that the Military Judge order production of the above described items.

5. Oral Argument.

Unless the Government concedes the motion or this Court grants the relief on the basis of

pleadings alone, the defense requests oral argument on this matter.

[redacted]

J. A. GUARINO
CDR, JAGC, USN
Detailed Defense Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

THE UNITED STATES OF AMERICA **V.** **CRAIG R. BECKER** **LT USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTIONS TO COMPEL DISCOVERY AND WITNESS LIST** **20 SEPTEMBER 2019**

1. Nature of the Motion.

The Government hereby responds Defense Motion to Compel Discovery. The Government respectfully requests the Court deny the outstanding discovery requests in the Defense's motion.

2. Burden of Proof.

As the moving party, Defense has the burden of persuasion.[1]

3. Statement of Facts.

a. The Government concurs with Defense's Summary of Facts a – f and h.

b. The Government denies fact g, any meeting at individuals' homes have been prearranged.

c. The only unannounced visits that the Government has made was for MWR personnel aboard military installations and to Ms. [redacted] LT Becker's girlfriend. The Government knew of her employment at the [redacted] because Ms. [redacted] told [redacted] law enforcement during her 1 March 2016 interview. NCIS verified her employment through Google before trying to interview her.

d. All meetings at individual homes were prearranged with the homeowners.

[1] R.C.M. 905(c)(2).

4. Discussion.

a. Statement of Law regarding Discovery.

Defense access to evidence is governed by Article 46 of the Uniform Code of Military Justice (UCMJ) and Rules for Courts-Martial (R.C.M.) 701-703. Article 46 states that trial and defense counsel shall have equal opportunity to obtain evidence. R.C.M. 701 addresses discovery, while R.C.M. 703 addresses production. Pursuant to R.C.M. 701, the Government must disclose items in its possession which are "relevant to defense preparation."[2] Under R.C.M. 703, the Government must obtain and produce "relevant and necessary" evidence upon Defense request.[3] Any request for production of evidence must "list the items of evidence to be produced" and "include a description of each item sufficient to show its *relevance* and *necessity*."[4] The Defense has not done this for a single item requested in their discovery request or their motion.

The Government has an obligation under Article 46 to remove obstacles from Defense's access to information.[5] This obligation however, does not "relieve the defense of its responsibility to specify the scope of its discovery."[6] Defense is in "the best position to know what matters outside of the investigative files," and Article 46 is adequately protected "by requiring the defense to provide a reasonable degree of specificity as to the entities, the types of records, and the types of information that are the subject of the request."[7]

In determining whether evidence is "relevant and necessary," the military judge may refer to M.R.E. 401.[8] A military judge does not abuse his or her discretion by denying Defense's motion

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[2] R.C.M. 701(a)(2)(A).
[3] R.C.M. 703(f)(1).
[4] R.C.M. 703(f)(3) (italics added).
[5] *United States v. Williams*, 50 M.J. 436, 442-43 (C.A.A.F. 1999).
[6] *Id. at* 442-43.
[7] *Id.* at 443.
[8] *See United States v. Graner*, 69 M.J. 104, 107-08 (C.A.A.F. 2010).

to compel where Defense fails to present a theory of relevance adequate to justify production.[9]

b. Analysis of Law of Discovery Materials.

i. Communication between RLSO/TCAP and Law Enforcement.

First, all known emails regarding jurisdiction have been turned over. Admiral Michelle Howard's e-mails have been recovered from June 2017 – November 2017 and January 2018. December 2017 and all emails before June 2017 have not been recover at this time. [redacted] has conveyed that they will not have a fix until sometime in FY 2020 to recover the remaining of Admiral Howard's e-mails. However, the Government believes all relevant e-mails from Admiral Howards were turned over. A search of Admiral Howard's e-mails in the possession (from June 2017 – November 2017 and January 2018) of the Government turned up no new e-mails. All e-mails found during this time have previously been turned over. Admiral Howard's e-mails have been captured by retrieving e-mails from [redacted] JAGs and RLOS [redacted] JAGs.

Second, the Defense request for "all emails, texts and all other written communication between RLSO/TCAP personnel and NCIS/CID/[redacted] Law enforcement personnel related to 1) the investigation into the death of Mrs. [redacted] and other related offenses…3) all other matters related to current case against LT Becker." The Government stands by our response that this is overbroad. In addition, the e-mails of trial counsel and trial team would not assist the Defense in preparing for trial. They have access to the NCIS full investigation and the complete [redacted] investigation file.

As for law enforcement e-mails, right now as it stands the request by the Defense is overbroad.

ii. Communications between Law Enforcement/RLSO/TCAP and potential witnesses identified in the investigation, including but not limited to [redacted]

[9] *Id.* (emphasis added).

Once again, the Defense's request is overbroad. In addition, all updates about the case are related to logistics and will not assist the Defense in preparation of trial. All interviews of witnesses have been provided within ROIs. There is no material that would assist the Defense in preparation of trial that has not already been turned over.

iii. Written documentation regarding the decision not to prosecute the 2013 assault allegation.

As previously discussed at our first motion hearing, and as updated to the Defense pursuant to the Military Judge's ruling, there are no documents that have not been turned over. The Government has turned over NCIS documentation, Army CID investigation and related documents and all FAP records in existence.

Before the last motion hearing, the Government requested command services for RLSO [redacted] to look for any electronic copies or paper copies maintained at the RLSO and none existed. We reached out to the STC LCDR [redacted] JAGC, USN (retired) and LT [redacted] JAGC, USNR.

iv. Communications between Law Enforcement, including but not limited to internal NCIS leads or requests for investigative assistance.

The Defense's request is overbroad. First, as stated previously, all jurisdictional information has been discovered. The Government has handed over all case logs, notes, and upon request the Defense has had access to the investigators in this case. Defense's own request shows that this is a fishing expedition and the Defense does not have a solid basis to ask for this material as they say "They are relevant as they relate to the current case and among other uses **MAY** identify possible bias in the investigation; (2) identify an incomplete or insufficient investigation; (3) identify additional investigative leads for the Defense team to pursue; and (4)

reveal information related to the timing and reasons behind the decisions regarding to the jurisdiction of this case." (Emphasis added).

As noted above, all jurisdictional material has been discovered. All leads have been noted in ROIs or notes and handed over, and regarding bias or an incomplete investigation that can be gathered by talking to the Agents or through the material already discovered.

v. Criminal history checks for all witnesses.

Upon the exchange of witness lists, the Government will seek criminal background checks on all American Citizens. The U.S. Government is unable to run criminal background checks on non-citizens, as we cannot access foreign government databases. If the Defense has specific concerns regarding a witness or witnesses, then they have not articulated why this information is relevant and necessary.

vi. Physical Addresses for Witnesses.

The Government stands by our previous motion response filed with this court. In addition, the Government has not showed up to anyone's individual house without previous permission. For all workplace related unannounced visits, they were either U.S. Government employees or U.S. citizen. The only non-government employee that the Government showed up to was Ms. [redacted]. The Government knew of her employment because she told [redacted] authorities and was verified by Google.

5. Evidence. The Government offers the following documentary evidence in support of this motion:

Government Exhibit 50: RLSO [redacted] Response to 2013 DV Incident regarding existing documents;

Government Exhibit 51: E-mail exchange regarding Admiral Howard's e-mail recovery;

Government Exhibit 52: Government's discovery responses and updates;

Government will rely upon Defense Exhibits: A and B.

6. Oral Argument. Unless conceded by the Defense based on the Government's pleading, the Government does desire to make oral argument on this motion.

7. Relief Requested. The Government respectfully requests that this Honorable Court deny the Defense's motion.

[redacted]
Paul T. Hochmuth

CERTIFICATE OF SERVICE

I hereby certify that, on 20 September 2019, I caused to be served a copy of this motion on the defense counsel for the government and the court.

[redacted]
Paul T. Hochmuth

NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES	)	
	)	MOTION TO COMPEL
v.	)	DISCOVERY
	)	
CRAIG R. BECKER	)	
LT/O-3 USN	)	
	)	11 September 2019

Issues Presented

The defense asks this Honorable Court to order the government to produce each item of evidence discussed in this motion.

Facts

1. Civilian Counsel, Mr. Jeremiah J. Sullivan, III, recently completed litigating the case of *United States v. LT Jacob X. Portier, USN*. Captain Aaron Rugh, JAGC, USN, Military Judge, presided over the case when it was ordered dismissed by the Chief of Naval Operations. During the course of the case, Mr. Sullivan was targeted by Navy prosecutors and the Naval Criminal Investigative Service (NCIS) for alleged acts of misconduct that included violating the Court's protective order.

2. Navy prosecutors made disparaging allegations, in ex-parte sessions, against Mr. Sullivan to the same military judge that is now hearing LT Becker's case. As such, LT Becker has valid concerns about the military judge being fair and impartial and questions whether Mr. Sullivan can remain on the case as a result of Government's own misconduct. Mr. Sullivan never had an opportunity to voire dire the military judge because the *Portier* case was dismissed.

3. Mr. Sullivan is in possession of discovery in the *Portier* case that provides evidence that Navy prosecutors committed misconduct and now that same misconduct has impacted LT Becker's ability to make a free election of counsel because Mr. Sullivan was investigated by the military judge. Mr. Sullivan has been unable to share the evidence with LT Becker because it remains subject to a protective order. LT Becker cannot proceed forward until the issue relating to the military judge and Mr. Sullivan has been litigated.

4. Mr. Sullivan has also been made aware that LCDR Michael Jones, JAGC, USN, from the influential Office of Legislative Affairs has been attempting to influence the media with allegations of misconduct against him. The acts of the JAGC to continue attacking Mr. Sullivan has further impacted LT Becker's ability to elect counsel.

App. Exh. ___

Page ___ of ___

5. The discovery from the *Portier* case remains subject to a protective order. In an abundance of caution, Mr. Sullivan filed a Supplemental Discovery request asking the Government produce relevant records from the *Portier* case so the Defense can litigate a motion regarding violations of the 6th Amendment.

6. The Government has denied the Defense's request to produce the discovery.

7. The Defense will offer evidence from the *Portier* case on this motion after securing a court order to avoid any possibility of violating the protective order.

Burden of Proof

8. As the moving party, the Defense has the burden of persuasion. R.C.M. 905(c)(2). The burden of proof is by a preponderance of the evidence. R.C.M. 905(c)(1).

Law

9. In *Coplan v. United States*, the defendant was convicted of espionage for furnishing secret intelligence reports to a Russian agent, and it was later learned that after her arrest her telephone conversations with her lawyer were monitored. *Coplon v. United States*, 89 U.S. App. D.D. 103, 191 F.2d 749 (1950). The D.C. Court of Appelas held that there was presumed prejudice which required reversal. The Supreme Court said in *Glasser v. United States*, 1942, 315 U.S. 60, 76, 62 S.Ct. "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Graddick v. State*, 408 So.2d 533, 540 (1981 Ala. Crim. App)(citing *Glasser v. United States*). In dicta in *Caldwell v. United States*, the court stated, "intrusion [of the defense team] by means of wiretapping should be differentiated from intrusion by means of secret agents. In neither instance, we think, need actual prejudice be shown in order to entitle defendant to a new trial." *Caldwell v. United States*, 92 U.S. App. D.C. 355, 205 F.2d 879 (1953).

10. The Court of Appeals for the Fourth Circuit, in reversing a conviction, has concluded that "whenever the prosecution knowingly arranges or permits intrusion into the attorney-client relationship the right to counsel is sufficiently endangered to require reversal and a new trial." *Bursey v. Weatherford*, 528 F.2d 483, 486 (4th Cir. 1975).

11. A trial counsel cannot avoid discovery obligations by leaving relevant evidence in the hands of another agency. *United States v. Stellato*, 74 M.J. 473, 484-85 (C.A.A.F. 2015). "Article III courts have identified a number of scenarios in which evidence not in the physical possession of the prosecution team is still within its possession, custody, or control. These include instances when: (1) the prosecution has both knowledge of and access to the object; (2) the prosecution has the legal right to obtain the evidence; (3) the evidence resides in another agency but was part of a joint investigation; and (4) the prosecution inherits a case from a local sheriff's office and the object remains in the possession of the local law enforcement." Id (internal citations omitted.).

12. The only restrictions placed upon liberal defense discovery are that the information requested must be relevant and necessary to the subject of the inquiry, and the request must be reasonable. *United States v. Reece*, 25 M.J. 93, 95 (C.M.A. 1987). The Military Rules of Evidence establish "a low threshold of relevance." *Id.* Relevant evidence is "any evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *Id quoting* M.R.E. 401.

13. Evidence is material when there is a reasonable probability that its disclosure could engender a different result, creating reasonable doubt that did not otherwise exist. *United States v. Kinney*, 56 M.J. 156 (C.A.A.F. 2001). In applying the materiality test, military courts "give the benefit of any reasonable doubt to the military accused." *United States v. Green*, 37 M.J. 88, 90 (C.A.A.F. 1993).

Argument

14. The Court should compel production of the discovery requests discussed above because each item is necessary and material to provide LT Becker an adequate opportunity to prepare a defense and file motions. Discovery practice under R.C.M. 701 promotes full discovery that eliminates 'gamesmanship' from the discovery process and is quite liberal. *United States v. Roberts*, 59 M.J. 323, 325 (C.A.A.F. 2004). Providing broad discovery contributes to the orderly administration of military justice because it reduces pretrial motions practice, surprise, and delay at trial. Id.

15. In this case, discovery of the requested items is important to afford the Defense the ability to prepare motions to dismiss the case.

Relief Requested

16. The Defense respectfully requests this Court compel the government to produce each item discussed in this motion.

Motion Hearing

17. If this motion is opposed by the Government, the Defense requests this motion be argued. We further request the opportunity to establish our facts and support our arguments through the testimony of the witnesses if necessary. Additionally, the Defense will offer portions of the *Portier* discovery after we receive permission from the Court. If this motion is not opposed by trial counsel, the Defense requests this motion be granted without hearing.

For the Defense

//s//

JEREMIAH J. SULLIVAN, III
Defense Counsel

CERTIFICATE OF SERVICE

I certify that I caused a copy of this motion to be served on the Military Judge and trial counsel via e-mail on 11 September 2019.

[redacted]

NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
UNITED STATES NAVY
GENERAL COURTS-MARTIAL

UNITED STATES **v.** **CRAIG BECKER** **LT/O-3 USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO COMPEL**

1. Nature of Motion.

The United States request that the Court deny the Defense motion to compel discovery related to the case of *United States v. Portier*. Any evidence related to the *Portier* case is irrelevant and unnecessary and need not be compelled under R.C.M. 701, R.C.M. 703 or Sixth Amendment Right to Counsel case law. The connection between the two cases are that the same civilian defense counsel represents both accused.

2. Summary of Facts

a. The United States avers that the prosecution team in the case at bar has never sought, attempted to seek, or possess any defense counsel attorney-client materials related in any way to Mr. Sullivan's representation of the accused.[1]

b. The prosecution team does not possess any discovery related to the *Portier* case. The prosecution is aware that evidence related to the *Portier* case is in the possession of the Naval Criminal Investigative Service or Region Legal Service Office Southwest. The prosecution team has neither requested nor reviewed any such evidence in great detail and none related to the Defense discovery request/allegations of electronic monitoring.

c. The prosecution team in the current case has never attempted any electronic monitoring, intercepting, or recording of the accused's defense counsel communications.

d. Neither the prosecution team nor law enforcement has had an *ex parte* hearing or audience with a military judge in the case at bar.

[1] The United States has no discovery related to any of the accused's defense counsel though the Defense request for discovery and subsequent motion focus on Mr. Sullivan.

e. The prosecution team has never spoken with LCDR [redacted] JAGC, USN, at the Office of Legislative Affairs about Mr. Sullivan, the *Portier* case, or this case. The Government is unaware of what allegations the Defense is making about this officer.

f. On or about 13 May 2019 the Defense filed a Third Supplemental Request for Discovery. This discovery request sought materials related to the then referred cases of *United States v. Portier* and *United States v. Gallagher*. No specific discovery as to the facts of *United States v. Becker* were requested.

g. The United States denied the Defense's Third Supplemental Request for Discovery in its entirety. No discovery related to *United States v. Portier* and *United States v. Gallagher* was provided to the Defense. (The prosecution assumes, based upon the Defense's motion, that Mr. Sullivan has a vast amount of discovery related to the *Portier* case. The prosecution is unaware as to what discovery may have been provided in the *Portier* case.)

h. There is no factual connection between the charges of *United States v. Becker* and *United States v. Portier*. They are neither co-accused nor companion cases in any possible sense. Their commonality is their civilian defense counsel.

i. As to the case at bar the prosecution has never sought the assistance of a United States attorney's office, has no contact with the United States Air Force and has not received any notice of any third-party attorneys representing witnesses.

3. Discussion.

The Defense motion makes no request for specific documents nor does it discuss with any specificity under what R.C.M. their motion to compel should be analyzed. As such, it becomes difficult to ascertain exactly what items the defense seeks, for what purpose, and under what legal theory the Government would be compelled to produce material. Thus the Government believes the Defense is moving to compel the material requested in its Third Supplemental Discovery request.

Rule for Court-Martial 701 – Discovery

The Rules for Court-Martial regulates discovery and requests for discovery and/or production fall within several categories. R.C.M. 701(a)(2) regulates discovery of material that is relevant to defense preparation. The Government assumes that this is the theory of

discovery as the Defense motion alludes to a Sixth Amendment Right to Counsel violation based upon an intrusion of the attorney-client privilege.

R.C.M. 701(a)(6) discusses evidence that is favorable to the defense, but none of the requested material fall into the listed categories. As to R.C.M. 701(a)(6)(A) the requested evidence is not relevant or material as it cannot possibly negate the guilt of the accused. LT Becker and LT Portier have no factual connections and their only known intersection is both hired Mr. Sullivan. As to R.C.M. 701(a)(6)(B) none of the requested evidence could reduce the degree of guilt of the accused for any charge. The accused is charged with acts of violence against his wife and LT Portier has no connection with this material. As to R.C.M. 701(a)(6)(C) the requested evidence would not reduce the punishment of the accused in any possible way. As to R.C.M. 701(a)(6)(D) the information has no relevance that would affect the credibility of any prosecution witness or evidence. There are no known witnesses from the *Portier* case that are involved in the accused's case. The vast majority of law enforcement from the case at bar are [redacted] police officers. The Naval Criminal Investigative Service assumed primary jurisdiction when the United States asserted jurisdiction. It was not the lead law enforcement agency at the initial stage of investigation. The lead NCIS case agent was stationed in [redacted] and was not involved in the *Portier* or *Gallagher* case.

None of the requested materials are required to be produced under R.C.M. 701. None of the requested materials are relevant, necessary, legally or logically connected to this case. As evidenced by the Defense request itself none of the materials allege connection with the facts of the accused's case. The only intersection between the cases are the civilian defense counsel. That fact is insufficient to compel discovery of the requested materials.

Rule for Court-Martial 703 Production of witnesses and evidence

R.C.M. 703(e) holds that "each party is entitled to the production of evidence which is relevant and necessary." Relevant evidence is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue. However, there are limitations on discovery and compelling the Government to produce discovery. "Relevance and reasonableness depend, of course, upon the facts of each case." *United States v. Reese*, 25 M.J. 93, 95 (C.M.A. 1987). Here it appears that the Defense is alleging a violation of the accused's Sixth Amendment's

Right to Counsel by the Government interfering with the attorney-client relationship between the accused and Mr. Sullivan. It has not. Irrespective of whatever occurred in *United States v. Portier* the attorney-client relationship is unique and personal to both LT Portier and the accused independently and separately. An attorney-client relationship is personal to the accused, not the attorney. One accused cannot weave causes of actions from another accused that is only connected to him through his attorney.

The fact that the Naval Criminal Investigative Service and other Government attorneys attempted to investigate violations of a protective order in other unrelated cases does not now interfere with the accused's attorney-client relationship with Mr. Sullivan. There is no evidence the Government has any of his attorney-client materials and the prosecution in this case has never attempted any electronic monitoring. The prosecution team of this case has never reviewed any material the Government secured during any *Portier* electronic activity.

Allegations of Sixth Amendment Violation

The Government has not attempted nor actually intruded on the attorney-client privilege of Mr. Sullivan and LT Becker. The Government does not possess any emails, texts, electronic communications, attorney-client communications, work-product or any related type documents related to Mr. Sullivan (and any and all other of the accused's defense attorneys) and the accused. There is no Sixth Amendment violation by the Government as to the attorney-client relationship between the accused and Mr. Sullivan. The Defense cites *Coplan v. United States*, 191 F.2d 749 (1950), in which Defense counsel telephone calls were monitored, for the holding that prejudice is presumed. The case is easily distinguished as the Government has not monitored phone calls or any email communications between Mr. Sullivan and the accused. The Defense cites *Caldwell v. United States*, 205 F.2d 483 (4th Cir. 1975) for the proposition that if the attorney-client relationship is endangered a new trial is required. This case is pre-trial. Before there is a finding of prejudice there must be a finding of an intrusion of the attorney-client relationship. The Defense has no evidence of an interference of the attorney-client relationship between the accused and Mr. Sullivan. Nor does the Defense even discuss how it possibly could be impacted or in what manner.

None of the requested evidence in the Defense's Third Supplemental Request for Discovery dated 13 May 2019 relate to this case. The word "Becker" only appears in the

caption of the request. The document appears to be an almost verbatim copy of a discovery request filed in the *Portier* case as evidence by references to the "the United States Attorney's Office[2]," references to "United States Air Force"[3], references to SOC Gallagher[4], references to Mr. Brian Ferguson[5], and references to disclosures of who will be "part of any clean team to take over litigation in US v. Portier." While this discovery may have been relevant for a motion in *Portier* it is not relevant for this case.

This requested information is irrelevant and not necessary for the accused to make decisions as to counsel and/or continued representation. The Government need not assuage his subjective concerns as to his attorney when there is no evidence that the Government has any attorney-client communications. The fact that Mr. Sullivan's relationship with another client involved separate litigation is not now a Sixth Amendment violation or a reason to compel discovery.

R.C.M. 902

The Defense motion states the accused needs to make "a free election of counsel because Mr. Sullivan was investigated by the military judge." The Government is unaware of how a military judge may "investigate" a civilian defense counsel. The Government respectfully request that the Court again review with the accused's his right to counsel and have his election placed on the record. The Defense motions states "LT Becker cannot proceed forward until the issue relating to the military judge and Mr. Sullivan has been litigated." While at an earlier session of Court both sides were given the opportunity to voir dire and challenge the military judge, either side may voir dire or challenge a judge at any portion of the trial. See, R.C.M. 902 and *United States v. Quintanilla*, 52 M.J. 839 (A.C.C.A. 2000).

4. Burden of Proof.

Per R.C.M. 905(c) the burden of proof on any factual issue the resolution of which is necessary to decide a motion shall be a preponderance of the evidence. Per R.C.M. 905(c)(2) the burden of persuasion is on the moving

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[2] No United States attorney's office has connection to this case.
[3] The prosecution understands that LT Portier's individual military defense counsel was an Air Force officer.
[4] SOC Edward Gallagher is a SEAL whose case was factually related to LT Portier's case as they were in the same SEAL platoon and accused of related criminal activity.
[5] Mr. Ferguson is a civilian attorney who often represents servicemembers. The Government is unaware of any connection he has to this case.

party, the Defense.

5. Evidence to be Presented

- Defense Third Supplemental Request for Discovery dtd 13 May 2019
- Government Response to Defense Third Supplemental Request for Discovery

6. Relief Requested.

The United States request that the Court deny the Defense Motion to Compel.

6. Oral Argument.

The government respectfully requests oral argument on this motion.

/s/
J. L. JONES

****

CERTIFICATE OF SERVICE

I hereby certify that, on 16 Sept 2019, I caused to be served a copy of this motion on the trial counsel for the government and the court.

/s/
J. L. JONES

NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

THE UNITED STATES OF AMERICA **v.** **CRAIG R. BECKER** **LT USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO DISMISS FOR FAILURE TO STATE AN OFFENSE AND DUE PROCESS ERRORS.** **20 SEPTEMBER 2019**

1. Nature of the Motion.

The Government respectfully requests that the Court deny the Defense motion because Charge III and its sole specification properly states an offense and provides sufficient notice to the accused under R.C.M. 307 and comports with the Due Process Clause of the Fifth Amendment. Further, the Bill of Particulars adequately provides the accused with sufficient precision to enable the accused to prepare for trial.

2. Burden of Proof.

Per R.C.M. 905(c)(2) the burden of persuasion is on the moving party, the Defense.

3. Statement of Facts.

a. The Government agrees with the Defense statement of facts for the purpose of this motion.

4. Discussion.

The Government will stand on their 26 April 2019 Response to the Defense Motion to Dismiss: Failure to state an offense and Fifth Amendment due process violations and will only respond to new material brought out in the Defense's supplement motion. In addition, the Government will mirror our paragraphs to the Defense's format.

A. Charge III and its Sole Specification is proper and alleges every required element of the Charged offense.

The specification alleges every element of an Article 133, UCMJ offense. The elements of an Article 133, UCMJ offense are: 1) the accused did or omitted to do a certain act; and 2) under the circumstances these acts or omissions constituted conduct unbecoming an officer and gentleman. The specification notes a time for the alleged offenses – 2 August 2013 to 8 October 2015 – and a place for the offenses – [redacted]. The acts that accused did are succinctly stated – physically and emotionally abused his wife. With that said, the Government stands on their previous motion regarding the Defense's renewed statement that the offense as charged fails to state an offense.

R.C.M. 906(b)(6) permits motions for bills of particulars.

> The purposes of a bill of particulars are to inform the accused of the nature of the charge with sufficient precision to enable the accused to prepare for trial, to avoid or minimize the danger of surprise at the time of the trial and to enable the accused to plead the acquittal or conviction in bar of another prosecution for the same offense when the specification itself is too vague and indefinite for such purposes.

The discussion continues, "A bill of particulars should not be used to conduct discovery of the Government's theory of a case, *to force detailed disclosure of acts underlying a charge, or to restrict the Government's proof at trial*." (Emphasis added).

As both the Rules for Courts-Martial and case law contemplate, the purposes of bills of particulars are two-fold. First, it removes any uncertainty regarding exactly what the accused will be required to defend against—thereby removing potential surprise at trial and allowing an adequate defense. Second, it provides safeguards against double jeopardy by specifying which exact acts have been adjudicated during a certain case. In the instant case, the Government has provided Defense with an adequate bill of particulars to provide sufficient notice to the accused of the course of action that was physically and emotionally abusive during the time alleged. Each of the 11 items listed in the Bill of Particulars comes directly from the discovery.

Throughout this motion practice the Government has provided as enclosures where each of these statements have come from. Further, the Government has provided the Defense with the contact information of the witnesses that the Government will call to prove these facts at trial. The Government has even attempted to set up witness interviews for the Defense, however, the Government cannot force witnesses to talk to the Defense before trial.

B. Charge III and its Sole Specification do not violate the Due Process Clause under the Fifth Amendment.

The Government stands by their Due Process argument in our previous motion. Regarding the Defense Due Process Arguments set forth in paragraphs B. 1. and 2, we will only amplify our position here.

1. a. – k. The Government Bill of Particulars is adequate and provides ample notice to the Defense.

The Government once again relies upon our due process argument from our previous motion. The Defense's argument over these this section (1. a. – k.) cites to no cases or rules. What the Defense does is make an argument that is better saved for a member's panel during closing argument. They are arguing the facts of the case and how they do not meet the elements of the crime i.e. "the conduct described by the Government is at worst a minor deviation from the high standards of conduct expected of an officer." The Government will not engage in this type of argument here. We will save those arguments for closing and rebuttal at the trial where they properly belong.

2. There is no major change and the Charge is not void for vagueness.

The Government has not run afoul of R.C.M. 603. The Charge does not add an offense; the offense is still the same. The Government has provided clarity as to what specifically the accused did to violate that offense. The charged offense does not mislead the accused as to the

offense charge nor does it add a substantial matter not fairly included in the preferred charge. Once again, if the defense does not think, for example, that making your wife walk to the hospital when she has [redacted] is causing physical harm to a person or that monitoring a spouse's cell phone or controlling what clothes a your spouse wears is emotional harm, then they are free to make that argument to the members.

The Supreme Court has stated that laws in the military context need not be as precise as criminal statutes in the civilian sector. *Parker v. Levy*, 417 U.S. 733 (1974). See also, *U.S. v. Vaughan*, 58 M.J. 29 (2003) (accused challenged child neglect statue under Art 134 where there was not physical harm to the child) and *U.S. v. Rogers*, 54 M.J. 244 (2000) (O-5 developed relationship subordinate O-2, held not be vague because Government did not cite to regulation or say custom of the service). The rare exception, when a specification was found have violated the due process clause, is highlighted in *U.S. v. Johanns*. In that situation, an officer was convicted under Art. 133 and 134 for sleeping with a non-subordinate enlisted member because historically in the Air Force that behavior was allowed. 20 M.J. 155 (C.M.A.) The Defense cannot say with a straight face that the accused did not know he couldn't physically and emotionally abuse his spouse. Such a concept as not abusing one's spouse has been around for some time now. In addition, the Navy has issued SECNAVINST 1752.3B, which states "abusive behavior by DON personnel destroys families, detracts from military performance, negatively affects the efficient functioning and morale of military units and diminishes the reputation and prestige of the military service in the civilian community."

3. Physical and Emotional Abuse upon another is not Protected by the First Amendment.

Physical and emotional abuse is not protected by the First Amendment. Once again, the Defense argument that preventing your spouse from getting a tattoo, throwing away your wife's handmade curtains, etc. is not emotional abuse is something that they are free to argue to the members. The Defense cites to *U.S. v. Moore* to argue the "sanctity of the family" and how the First Amendment protects the customs and traditions and "our most cherished values, moral and cultural." 431 U.S. 494. Physical and emotional abuse does not fall under one of those customs and traditions or one of our most cherished values that the court was trying to protect in *Moore*. Moore was about grandparents wanting to take care of two of their grandchildren in their home and having a law prohibiting it. In addition, *Roberts* does not allow for the abuse of one's spouse. In fact, it says that an organization cannot discriminate against women and had to allow them in as members. 468 U.S. 609 (1984). Lastly, *Carey v. Populations Services International* allowed companies to sell contraceptives to minors. 431 U.S. 678 (1977). These cases do not allow for a spouse to control, abuse, and harm his wife. They say the exact opposite; women need to be treated equally to men and we need to protect our morals, not allow an accused to violate them.

4. Procedure.

Upon request of the Military Judge, the Government can provide their suggested definitions for emotional and physical harm and we can offer our suggested jury instruction on this specification to the Court.

5. Evidence.

The Government offers the following documentary evidence in support of this motion:

Govt. Exhibit 56 – Bill of Particulars dtd 25 June 2019.

6. Oral Argument.

The Government does desire to make oral argument on this motion.

7. Relief Requested.

The Court should deny the Defense motion to dismiss.

[redacted]

PAUL T. HOCHMUTH
LCDR, JAGC, USN
TRIAL COUNSEL

CERTIFICATION OF SERVICE

A true copy of this motion was served on opposing party on 20 September 2019.

[redacted]

PAUL T. HOCHMUTH
LCDR, JAGC, USN
TRIAL COUNSEL

NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **CRAIG R. BECKER** **LT/O-3** **U.S. NAVY**	**DEFENSE MOTION IN LIMINE: EXCLUDING STATEMENTS OF MRS. [redacted] AS HEARSAY** **10 SEP 2019**

1. Nature of Motion

Pursuant to R.C.M. 906(b)(13) and M.R.E. 802, the Defense respectfully moves this court for an order *in limine* excluding all statements made by Mrs. [redacted] as these statements are inadmissible hearsay.[1]

2. Summary of Facts

1) LT Becker is charged with the October 2015 murder of his wife in [redacted]

2) LT Becker is also charged with conduct unbecoming an officer based on a series of actions that allegedly occurred over a twenty-six month period. (Attachment NN)

3) During the course of the investigation, [redacted] and American law enforcement personnel interviewed a number of witnesses who knew Mrs. [redacted]

4) Several of these witnesses informed law enforcement that Mrs. [redacted] had made various statements to them concerning her relationship with LT Becker.

3. Discussion of Law - The challenged statements constitute inadmissible hearsay.

[1] The Defense will address the issue of forfeiture by wrongdoing in response to the Government's motion. This motion is intended to object on the assumption that it is not overcome by the court's ruling on forfeiture by wrongdoing.

M.R.E. 802 provides that, absent an applicable exception, hearsay is not admissible is courts-martial. M.R.E. 801 defines hearsay as "(1) any statement the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement."

Throughout the investigation into Mrs. [redacted] death, a number of family, friends, and associates have relayed to Government investigators statements they claim Mrs. [redacted] made concerning acts or behaviors LT Becker.[2]

[redacted]: Ms. [redacted] claims that Mrs. [redacted] told her that (1) LT Becker threw away some drapes that Mrs. [redacted] made; (2) LT Becker made Mrs. [redacted] walk to the hospital prior to have her [redacted] removed; (3) LT Becker took her cell phone away when she was in the hospital; and (4) LT Becker did not want Mrs. [redacted] getting a tattoo.

[redacted] Ms. [redacted] claims that Mrs. [redacted] told her that (1) LT Becker fought with her and brought up past occasions when Mrs. [redacted] had been unfaithful; (2) LT Becker had been violent with her in the past and that she only recanted her previous reporting of this because she was concerned for his career.

[redacted]: Mr. [redacted] claims that Mrs. [redacted] told him that (1) LT Becker tracked her location and looked through her e-mails and phone; (2) LT Becker did not want her traveling to visit family or friends; (3) LT Becker had been violent with her in the past and that she only recanted her previous reporting of this because she was concerned for his career.

[redacted]: Mr. [redacted] claims that Mrs. [redacted] told him that (1) LT Becker tracked her location and looked through her e-mails and phone; and (2) LT Becker had intimidated her.

[redacted]: Mr. [redacted] claims that Mrs. [redacted] told him that (1) LT Becker tracked her location and looked through her e-mails and phone; (2) LT Becker had been violent with her

[2] The Defense has attempted to identify all of the out of court statements made by Mrs. [redacted] that the Government may attempt to introduce. However, this motion serves as an objection to all out of court statements made by Mrs. [redacted] that the Government intends to offer in its case against LT Becker even if not specifically identified in the body of this motion. The Defense respectfully requests that this court require the Government to identify all such statements so that we may fully litigate this issue at one time as opposed to doing so in a piecemeal process.

after learning of her infidelity and she only recanted her previous reporting of this because she was concerned for his career; (3) LT Becker was controlling and hit her; (4) LT Becker did not want her having male friends; and (5) she did not want Mr. [redacted] to call her because she was afraid LT Becker would get upset.

[redacted]: Ms. [redacted] claims that Mrs. [redacted] told her that (1) LT Becker banned her from talking to people; (2) LT Becker had been violent with her after learning of her infidelity and she only recanted her previous reporting of this because she was concerned for his career; (3) LT Becker was controlling and hit her; and (4) LT Becker made her walk to the hospital to have her [redacted] removed and took her phone from her to prevent her from talking with anyone.

[redacted]: Ms. [redacted] claims that Mrs. [redacted] told her that (1) LT Becker was monitoring her and reading communications on her phone; (2) LT Becker had been violent with her after learning of her infidelity and she only recanted her previous reporting of this because she was concerned for his career; and (3) LT Becker controlled the clothes she wore and who could come visit.

[redacted]: Ms. [redacted] claims that Mrs. [redacted] told her that (1) LT Becker was controlling; and (2) LT Becker would not let her get a tattoo.

[redacted]: Mr. [redacted] claims that Mrs. [redacted] told him that (1) She would lock herself in her bedroom because LT Becker was crazy and she did not want to see him; and (2) she was in a better mood when LT Becker was not around; (3) LT Becker was controlling.

[redacted]: Ms. [redacted] claims that Mrs. [redacted] told her that (1) LT Becker had been violent with her in the past and that she only recanted her previous reporting of this because she was concerned for his career.

With regard to Charge III, the statements allegedly made by Mrs. [redacted] are the only proof that the many of the acts described in the bill of particulars occurred and as such will certainly be offered by the Government to prove the truth of the matter asserted in the statements. Obviously Mrs. [redacted] will not be in court testifying to these matters. As such these statements constitute hearsay and the Government should be precluded from offering them at trial.

4. Relief Requested.

The Defense requests that the Military Judge exclude all statements made by Mrs. [redacted] as these statements are inadmissible hearsay absent a showing by the Government that they meet one of the hearsay exceptions.

5. Evidence.

As evidence on this motion, the Defense requests the Government produce the following witnesses (telephonically) so that the Defense may call them to provide testimony on this motion: [redacted]

6. Oral Argument.

Unless the government concedes the motion or this Court grants the relief on the basis of pleadings alone, the defense requests oral argument on this matter.

[redacted]

J. A. GUARINO
CDR, JAGC, USN
Detailed Defense Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
UNITED STATES NAVY
GENERAL COURTS-MARTIAL

UNITED STATES **v.** **CRAIG BECKER** **LT/O-3 USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION IN LIMINE - EXCLUSION OF MRS [redacted] STATEMENTS AS HEARSAY**

1. Nature of Motion.

The Government request that the Court deny the Defense motion as to the exclusion of Mrs. [redacted] statements as hearsay. However, the Government request that the Court deny this Defense motion due to the accused waiving and forfeiting his Sixth Amendment Confrontation Clause Rights and therefore his hearsay objections under the Military Rules of Evidence. This issue is addressed in a separate filing.

2. Summary of Facts.

For the purposes of this motion the prosecution concurs with the Defense's Statement of Facts and as the Defense's characterization of the statements by Mrs. [redacted] to her friends and co-workers. To prove Charge III's elements of emotional abuse the Government would rely on statements made by Mrs. [redacted] to her friends regarding her relationship and interactions with the accused. The Government seeks to introduce the statements for the truth of the matter asserted.

3. Discussion.

M.R.E. 804(b)(6) Controls Mrs. [redacted] statements

The Court need not address this motion independently from the Government's motion as to the introduction of Mrs. [redacted] statements under the theory of waiver and forfeiture by misconduct of the accused's Sixth Amendment rights and hearsay objections. As discussed in greater detail in that filing if the Court determines that that accused has

waived and forfeited his Sixth Amendment Confrontation Clause rights then the accused also similarly forfeits and waives his hearsay objections. The remaining calculus is an analysis under M.R.E. 403 versus a separate hearsay analysis under M.R.E. 801. "Once the confrontation right is lifted from the scales by operation of the accused's waiver of that right the district court is not required to assess independently the reliability of those statements...." *United States v. Dhinsa*, 243 F.3d 635, 655 (2nd Cir. 2001).

Mrs. [redacted] statements to her friends and family listed in the Defense motion are admissible as a hearsay exception under M.R.E. 804(b)(6), Statement Offered Against a Party that Wrongfully Caused the Declarant's Unavailability. As shown in the Government's earlier filing the accused murdered his wife and thus his hearsay objections are waived. The Court need not parse out the individual statements per witness once a blanket hearsay exception applies to Mrs. [redacted] statements. "There is no need to make a secondary ruling as to hearsay as "Defendant's misconduct waived not only their confrontation rights but also their hearsay objections, thus rendering a special finding of reliability superfluous." Id at. 655. The Government is arguing that Mrs. [redacted] statements are admissible under a single theory of admissibility, absent previous filings discussing statements related to Charge II, Specification 1 and Dying Declaration under M.R.E. 804(b)(2).

Objection to the Production of Telephonic Witnesses

The Government objects to the production of the requested witnesses as irrelevant to the determination of the motion. Their individual statements are already known to the Defense and were provided in discovery. Their testimony would not provide any additional facts necessary to the determination of a hearsay objection. Their testimony is not necessary for a determination of the Government's motion under M.R.E. 804(b)(6) as the focus is on the accused's activity which triggers forfeiture of hearsay objections, not on the statements of the victim or future testimony of witness. Finally, the Defense is attempting to use this motion as form of deposition for witnesses who have elected not to submit to pre-trial interviews and their testimony is not necessary for blanket objections to any testimony they would otherwise have.

4. Burden of Proof.

Per R.C.M. 905(c) the burden of proof on any factual issue the resolution of which is necessary to decide a motion shall be a preponderance of the evidence. Per R.C.M. 905(c)(2) the burden of persuasion is on the moving party, the Government.

5. Evidence to be Presented

The United States will rely upon previously submitted statements attached to its motion as to Forfeiture and Waiver by Misconduct.

6. Relief Requested.

The Government request that the Court deny the Defense motion.

6. Oral Argument.

The government respectfully requests oral argument on this motion.

/s/
J. L. JONES

****

CERTIFICATE OF SERVICE

I hereby certify that, on 18 Sept 2019 I caused to be served a copy of this motion on the trial counsel for the government and the court.

/s/
J. L. JONES

NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES v. CRAIG R. BECKER LT, USN	DEFENSE MOTION FOR APPROPRIATE RELIEF (Continuance Request) 12 July 19

1. Nature of Motion. Pursuant to Rule For Courts-Martial 906(b)(l), the Defense moves the court for a first continuance of the subject case.

2. Summary of Facts and Discussion.

a. The case is scheduled for an Article 39(a), UCMJ, session on 12 August 2019 and trial to commence on 16 September 2019.

b. The Defense respectfully requests a continuance of the scheduled trial date because we will not be adequately prepared to litigate the case in September 2019.

c. This is an exceptionally complex first degree murder case that occurred overseas. The case was investigated by both [redacted] and U.S. law enforcement during an investigation that lasted over three years. Many of the witnesses do not speak English. There has been over 7400 pages of discovery including over 25 discs containing various media produced following the Article 32 hearing, over 4000 pages of [redacted] discovery produced, and over 6000 pages of discovery produced prior to the Article 32 hearing.

d. The Government and Defense have been working diligently to secure all outstanding discovery, however, there remain some significant items of discovery that have only recently been turned over and others that will not be available until August.

e. The Defense only recently received digitally imaged copies of an Iphone, Ipad, and two computers on or about 7 July 2019. The Defense expert must still conduct a forensic review and provide the results to the Defense. The Defense will not receive the results of the extracts for at least two or three weeks. The Defense anticipates that the data will voluminous and will contain thousands of text messages and e-mails. The Defense will be unable to review all of the data by the date of the trial.

f. The Defense is waiting for translated versions of the raw data pertaining to the blood tests from the autopsy, the DNA, and other toxicology tests.

g. The Trial Counsels and Defense are also waiting for the Navy to produce e-mails relating to jurisdiction. It is the Defense's understanding that the e-mails are being collected and will be produced but will not be available until the end of August. The e-mails are necessary and will be incorporated into motions that still need to be drafted and litigated.

h. The Defense recently completed a productive trip to [redacted] The Defense was able to meet with 13 different witnesses with the assistance of an interpreter. However, there are still approximately over 30 witnesses that do not speak English that need to be interviewed in [redacted]. As such, the Defense has requested to return to [redacted] to complete our investigation. It should be noted that Trial Counsels have made multiple trips to [redacted] to complete their preparation. The Defense will require the same opportunity in order to competently prepare for trial.

i. The Defense recently spoke with Dr. [redacted] who is our accident reconstruction expert. He is still in the process of reviewing the case file and the forensic reports provided by the Government's own reconstruction expert. The Government's expert spent a substantial amount of time conducting a forensic review of the accident scene and even built a replica of the window for

testing. The Defense has submitted a request for additional funding for Dr. [redacted] to complete his review of the evidence. The Defense will also submit a request for Dr. [redacted] to travel to [redacted] to confirm the accuracy of the raw date relied upon by the Government's expert. Dr. [redacted] confirmed that he will be unable to complete his forensic evaluation of the evidence and travel to [redacted] by the September trial date. Dr. [redacted] will be available to travel with the Defense to [redacted] so he may complete his forensic evaluation.

j. LCDR Bryan Davis was recently added to the Defense team after LT Ryan Mooney was released from the case. LCDR Davis has two complex general courts-martial pending trial in August and September 2019. (U.S. v. Brown, Attempted Murder, 5-9August)(U.S. v. Swarts, Navy SEAL/War Crimes, 19 Aug-5 Sep). Mr. Sullivan also has a War Crimes case scheduled for trial on 3 Sep 2019 with Your Honor (U.S. v. Portier).

k. The Defense cannot be adequately prepared to litigate this complex first degree murder case in September.

l. The Defense understands from discussions with Trial Counsel that the Government will object for the record but recognizes that significant discovery has only recently been provided and that other discovery cannot be completed until August.

m. The Government and Defense have consulted with their respective experts and witnesses and have agreed that everyone will be available for trial in January 2020.

n. This is the Defense's first request for a continuance.

o. The Defense does request oral argument if the Court is inclined to deny motion.

//s//

Jeremiah J. Sullivan, III

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Court Ruling

The above request is approved/disapproved/approved in part.

39a will be held on _____ and/or

Trial will commence on _____ OR

This motion will be litigated at a 39a on _____.

DATE MILITARY JUDGE SIGNATURE

NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
UNITED STATES NAVY
GENERAL COURTS-MARTIAL

UNITED STATES **v.** **CRAIG BECKER** **LT/O-3 USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO CONTINUE**

The Government does not oppose the Defense request for continuance of trial.

The Government conferred with the Defense prior to filing this motion. As such, the Government request the following modification of the Trial Management order:

1) Motions filed by 2 August
2) Motions responses due by 16 August
3) Article 39(a) on 29 - 30 August
4) Trial set to begin on 20 January 2020 in [redacted]

The Government believes that another Article 39(a) will be necessary in Autumn 2019 and will request a date and location closer in time as issues are either raised or resolved.

/s/
J. L. JONES

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CERTIFICATE OF SERVICE

I hereby certify that, on 17 July 2019, I caused to be served a copy of this motion on Defense Counsel and the court.

/s/
J. L. JONES

Appellate Exhibit L
Page 1 of 1

NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES OF AMERICA v. CRAIG BECKER LT USN	Defense Motion To Compel Discovery 17 June 2019

1. **Nature of the Motion.**

Pursuant to Article 46, Uniform Code of Military Justice (UCMJ), and Rules for Courts-Martial (R.C.M.) 701 and 906(b)(7), the defense moves to compel production of discovery.

2. **Statement of Facts.**

a. The accused is charged with the October 2015 murder of his wife in [redacted]

b. The accused is also charged with assault and conduct unbecoming an officer for a separate incident in [redacted] in August 2013.

c. On 18 April 2019, the government provided the defense with a list of anticipated government witnesses. AE V at Enclosure CC.

d. Of the 89 witnesses listed, approximately 35-40 of the individuals reside in [redacted] including percipient witnesses, expert witnesses, law enforcement witnesses, and witnesses with knowledge of the Becker couple. *Id.*

e. For each of the witnesses listed, the government provided an email address or a phone number, and, in some cases, both an email and a phone number. *Id.*

f. The government approved travel for the defense team to [redacted] on 23-27 June 2019 to conduct an investigation, including interviewing many of the government witnesses. AE V at Enclosure DD.

g. The government also approved funding for a translator to assist the defense for 32 hours during its investigation in [redacted] *Id.*

h. The government scheduled its own trip to [redacted] for case preparation for the week immediately preceding the defense investigation, during which it will presumably meet with a number of government witnesses.

i. During a meeting between counsel, following the previous Article 39(a) session, the defense requested government assistance to coordinate defense interviews with [redacted] witnesses. The government indicated it would not provide any assistance.

j. On 12 June 2019, the defense submitted a discovery request for the physical addresses of the witnesses named in the government's 18 April spreadsheet. AE V at Enclosure EE.

k. The government declined to produce the requested information, stating, "The Government has fulfilled our obligations under Art 46 and RCM 701(a)(3) and RCM 703." AE V at Enclosure FF.

l. The defense requested that the government reconsider its response, clarifying that the defense was not asking the government to obtain information, but, instead, to simply provide information that is in the government's possession or in the possession of associated law enforcement entities. AE V at Enclosure GG.

m. The government responded that they would not reconsider their stance. AE V at Enclosure HH.

3. **Discussion.**

A. Statement of the Law

In trials by court-martial, the accused is afforded equal access to witnesses and evidence. Article 46, UCMJ, 10 U.S.C. §846 (2014); *United States v. Lee*, 64 M.J. 213, 214 (C.A.A.F. 2006). "Each party shall have adequate opportunity to prepare its case and equal opportunity to interview witnesses and inspect evidence. No party may unreasonably impede the access of another party to a witness or evidence." R.C.M. 701(e).

R.C.M. 701(a) provides the obligations a trial counsel has to provide discovery to the defense. Discovery practice under Article 46 and R.C.M. 701 promotes full discovery that eliminates 'gamesmanship' from the discovery process and is quite liberal. *United States v. Roberts*, 59 M.J. 323, 325 (C.A.A.F. 2004). Providing broad discovery at an early stage reduces pretrial motions practice, surprise, and delay at trial. *Id.* (citing Manual for Courts-Martial, United States (2002 ed.), Appendix 21 at A21-32); Manual for Courts-Martial, United States (2012 ed.), Appendix 21 at A21-33. "The military rules pertaining to discovery focus on equal access to evidence to aid the preparation of the defense and enhance the orderly administration of military justice. To this end, the discovery practice is not focused solely upon evidence known to be admissible at trial." *Roberts*, 59 M.J. at 325; *United States v. Stone*, 40 M.J. 420, 422 (C.M.A. 1994) (citing *United States v. Lloyd*, 301 U.S. App. D.C. 186, 992 F.2d 348, 351 (D.C.Cir. 1993)). "The parties to a court-martial should evaluate pretrial discovery and disclosure issues in light of this liberal mandate." *Roberts*, 59 M.J. at 325. Military courts also have "interpreted these rules to ensure that discovery and disclosure procedures in the military justice system, which are designed to be broader than in civilian life, provide the accused, at a

minimum, with the disclosure and discovery rights available in federal civilian proceedings." *United States v. Williams*, 50 M.J. 436, 440 (C.A.A.F. 1999).

R.C.M. 701(a)(2)(A)(2019 Edition) provides that trial counsel shall permit the defense to inspect "Any books, papers, documents, data, photographs, tangible objects, buildings, or places, or copies of portions of these items, if the item is within the possession, custody, or control of military authorities, and—(i) the item is relevant to the defense preparation." This standard broadens the previous standard requiring disclosure of items which are "material to the preparation of the defense" R.C.M. 701(a)(2)(A)(2016 Edition).

R.C.M. 701(a)(3) (2019 Edition) states, "trial counsel shall notify the defense of the names and contact information of the witnesses trial counsel intends to call. . ." This language replaces the requirement to notify the defense of "the name and addresses of the witnesses the trial counsel intends to call . . ." R.C.M. 701(a)(3) (2016 Edition). Trial counsel misinterprets this change as eliminating the requirement to provide addresses. To the contrary, the inclusion of the term "contact information" was meant to modernize the practice and expand the definition to include other forms of contact information—not to exclude addresses.[1] This change was a common sense recognition that, in many instances, providing *only* the address was not useful to the defense. To read this change as eliminating, under all circumstances, the disclosure of addresses would contradict R.C.M. 701(a)(2)(A) which requires the provision of information which is "relevant to the preparation of the defense."

[1] This assertion was confirmed by a member of the Joint Service Committee on Military Justice, Military Justice Review Group ("MJRG").

B. The Court Should Order the Government to Produce the Physical Addresses for [redacted] Witnesses Because Disclosure Ensures Equal Access to Witnesses and Because Such Information is Relevant to the Preparation of the Defense.

The defense requests the timely disclosure of physical addresses of [redacted] witnesses so that it can constructively and efficiently conduct an investigation in [redacted] on 23-27 June 2019. As a preliminary matter, it is important to note that the defense is only seeking information which is the possession of government. The defense is not requesting the government to create or obtain this information out of whole cloth. As such, this request fits squarely within R.C.M. 701(a)(2)(A), which requires the government to disclose information so long as it is relevant to the preparation of the defense.

The requested information is relevant for a number of reasons. Addresses, along with other forms of contact information, are a tool to locate and interview witnesses. This proposition alone makes this information relevant. Such information gains even greater relevance when—as here—the government refuses to coordinate or assist the defense to schedule interviews with foreign nationals. Addresses, however, are relevant to more than the defense's ability to locate witnesses. Addresses afford the defense the ability to investigate witnesses by interviewing friends, neighbors, and other acquaintances who may live nearby to learn if the witness has biases, is truthful, or has any difficulty with perception. While the defense may be able to access some of that information through investigatory databases for CONUS witnesses, the defense does not have similar abilities for foreign nationals. Absent this information, an entire chunk of the defense investigation will be rendered meaningless.

Beyond this information's relevance to the preparation of the defense, the requested information further implicates the accused's right to equal access to witnesses. R.C.M. 701(e); Article 46, UCMJ. Simply stated, this case presents anything but a level playing field. The

prosecution has an ongoing, working relationship with [redacted] law enforcement which grants them access to law enforcement witnesses. Further, by acting in concert with local law enforcement, the government benefits from the associated mantle of authority to gain the cooperation of local [redacted] witnesses. Finally, at its most basic level, if the government wishes to conduct in-person contact with a witness, it has the ability to do so because it has the witnesses' addresses. The defense does not.

The government's refusal to provide this information will undoubtedly impede the defense's ability to conduct its investigation in [redacted], and such a refusal is unreasonable. While the government, for strategic reasons, may not want the defense to have the ability to directly approach witnesses, there is no authority to withhold such information. Privacy concerns do not trump R.C.M. 701 and Article 46, UCMJ, especially in a case in which the accused is facing the most serious offenses under our Code. If a privacy interest was truly the government's concern, it would have assisted the defense to schedule interviews—something the government has refused to do.

4. **Evidence.**

Enclosure CC: Email and Witness Spreadsheet, dtd 18 April 2019

Enclosure DD: Approval of Investigatory Travel

Enclosure EE: Defense Request for Physical Addresses, dtd 12 June 2019

Enclosure FF: Government Denial, dtd 12 June 2019

Enclosure GG: Defense Request for Reconsideration, dtd 13 June 2019

Enclosure HH: Government Email Response, dtd 13 June 2019

5. **Witnesses and Oral Argument**

The defense requests neither witnesses nor oral argument.

6. **Burden of Proof.**

Pursuant to R.C.M. 905(c), the defense bears the burden of persuasion, by a preponderance of the evidence, on any factual issue necessary for determination of this motion.

7. **Relief Requested.**

The defense respectfully requests that the court issue an order for the government to produce the requested information prior to the defense's 23 June arrival in [redacted].

[redacted]

B. M. DAVIS
LCDR, JAGC, USN

CERTIFICATION OF SERVICE

A true copy of this motion was served on opposing party on 17 June 2019.

[redacted]

B. M. DAVIS
LCDR, JAGC, USN

NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
UNITED STATES NAVY
GENERAL COURTS-MARTIAL

UNITED STATES **v.** **CRAIG BECKER** **LT/O-3 USN**	**GOVERNMENT RESPONSE TO MOTION TO COMPEL DISCOVERY** **18 June 2019**

1. Nature of Motion.

Pursuant to Article 46, Uniform Code of Military Justice (UCMJ), and Rules for Courts-Martial (R.C.M.) 701 and 906(b)(7), the government respectfully requests that this Court deny the defense's motion to compel discovery. The Government provided the Defense both email and phone number contact information for witnesses.

2. Statement of Facts.

For purposes of this motion, the government concurs with the defense's Statement of Facts.

3. Discussion.

Pursuant to Article 46 of the UCMJ, "the trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." As is applicable here, those regulations are prescribed under R.C.M. 701. The rules are set up to encourage "early and broad disclosure of information to the parties." However, rules of equal access to evidence do not provide the defense with carte blanche to obtain every document and piece of information the government has within its possession. Rather, the defense has the burden to show that they are entitled to the evidence and in order to do so they must show "the item is relevant to defense preparation." R.C.M. 701(a) (2) (A) (i). Further, when it comes to witness information, the government's requirements are limited to "notify[ing] the defense of the names and contact information of the witnesses trial counsel intends to

call." R.C.M. 701(a)(3).

A. The defense has failed to provide evidence that they have tried to contact the witnesses using the information already in their possession.

As a preliminary matter, the defense in their motion does not make any mention of, nor provide evidence of, whether they have made any efforts to contact the witnesses using the phone numbers or email addresses that were previously provided. Nor has the defense shown that the two most common methods of contacting persons – email and phone numbers, are insufficient or that the information provided to the defense is incorrect.

While the defense requested government assistance to coordinate interviews, which the Government refused, there is no evidence that they have taken any action themselves to utilize the information they already have at their disposal. (There is no requirement under Article 46 or R.C.M. 701 or R.C.M. 703 that the Government assist the Defense in securing witness interviews or setting up times and places for witness interviews.) Phone and email addresses are modern and technological methods of contacting witnesses in [redacted]by the defense while they are in America or [redacted]

B. The Court should deny the defense's request because they have failed to meet their burden to show that the information is relevant or that they need it for equal access to the witnesses.

The defense in this case has failed to meet their burden to show that the requested addresses are relevant despite the fact that the government has already provided them with phone numbers and emails addresses for all potential witnesses. Although the defense states that the information is relevant for "a number of reasons," they essentially only point to two:

(1) They need this information to "locate and interview witnesses;" and

(2) They can use this information to interview friends, neighbors, and other acquaintances who may live nearby to learn if the witnesses have biases, are truthful, or have difficulty with perception.

Neither of these reasons show that the addresses are relevant such that they must be provided to the defense. First, the phone numbers and email addresses are provided so that they can interview the witnesses. Assuming arguendo that they have tried to contact them

and been unsuccessful, this is an indication that the witnesses do not want to be interviewed. As such, having the addresses will be of no further help, because it is unlikely that a person who refuses to speak over the phone will cooperate and let the defense into their home to be interviewed, let alone even opening the door to acknowledge the defense team. Second, the defense's stated desire for the addresses so that they can interview friends, neighbors, and acquaintances has its own issues. Mainly, providing the addresses does not provide any information in locating friends and acquaintances. The only thing it will do is allow them to go door-to-door canvassing a witnesses' neighborhood hoping that someone will open the door and speak to them. However, just because the person is a neighbor does not mean that they will know the witness. As such, it is entirely speculative and a complete fishing expedition that they may stumble upon someone who answers the door, is willing to speak with them, knows the witnesses, and have an opinion regarding a witness's biases, truthfulness or ability to perceive. Therefore, the defense has failed to show that such information is relevant to their preparation.

Alternatively, the defense argues that the addresses are an issue of equal access to the witnesses and alleges three things:

(1) Trial counsel have an ongoing working relationship with [redacted] law enforcement which the defense believes provides the trial counsel with access to law enforcement witnesses;

(2) By trial counsel working with law enforcement, the defense believes that trial counsel gains cooperation from local [redacted] witnesses; and

(3) By having witnesses addresses, trial counsel can conduct in-person interviews

However, none of these, even if true, result in unequal access to witnesses within the meaning of Article 46 or R.C.M. 701(e). First, Article 46 is about equal opportunity to *obtain* witnesses. This is not an issue about obtaining witnesses as they are government witnesses. Second, the defense has had the same access to the witnesses as the government. For those witnesses the government will meet with in-person, it is a result of making arrangements with those people by using the phone numbers and emails that have been provided to the defense. None of it was done by using the addresses requested by the defense. The defense does not point to any case law where a witnesses refusal to speak to the defense for a pre-trial interview automatically results in a violation of R.C.M. 701(e).

Further, the government has not taken any action to discourage witnesses from speaking with the defense. As such, the defense has received equal access to the witnesses and their request for the addresses must be denied.

Finally, this is an issue of safety and prevention of possible negative confrontations in a foreign country. Providing phone numbers and emails of witnesses allows the witness to determine the time, place, manner and even whether or not they wish to cooperate with interviews or answering questions. The defense has the right to cross-examine witnesses, it does not have the right to force witnesses into pre-trial interviews. Providing physical addresses allows the defense and defense investigators to confront witnesses at their home or place of business by showing up unannounced and attempting to speak with them, using the tactic of surprise and manipulating an awkward social situation to *de facto* force a witness to speak to them in an effort to have a defense investigator or attorney leave the premises. It is easily conceivable that such a situation could also turn quickly negative, or even violent, as a foreign national, unfamiliar with the roles of persons in the American justice system, either attempt to resist being interviewed or seek local police assistance to remove a person from their home or place of business. Providing phone numbers and email addresses ensures that witnesses have control over whether they are interviewed and, if so, the time, place, manner and with any other person they deem necessary present.

4. Burden of Proof.

Per R.C.M. 905(c) the burden of proof on any factual issue the resolution of which is necessary to decide a motion shall be a preponderance of the evidence. Per R.C.M. 905(c)(2) the burden of persuasion is on the moving party, the defense.

5. Relief Requested.

The government respectfully requests that that the defense's request be denied.

6. **Oral Argument.**

The government does not request oral argument on this motion.

/s/
J. L. JONES

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CERTIFICATE OF SERVICE

I hereby certify that, on 19 June 2019, I caused to be served a copy of this motion on the trial counsel for the government and the court.

/s/
J. L. JONES

NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **CRAIG R. BECKER** **LT/O-3** **U.S. NAVY**	**DEFENSE MOTION TO COMPELL PRODUCTION OF WITNESSES** **22 NOVEMBER 2019**

1. Nature of Motion

This motion is brought pursuant to R.C.M. 906(b)(7) and the 6th Amendment of the United States Constitution. The Defense respectfully requests this court compel the production of the witnesses discussed in the motions below.

2. Summary of Facts

1) The Government alleges that in 2013, LT Becker assaulted his wife by choking her in their on base hotel room.
2) The Government alleges that following this assault LT Becker physically and emotionally abused his wife for over a two year period that ended in her murder on 8 October 2015.
3) The Government's proposed witness list includes family and friends of Mrs. [redacted] who have previously testified or stated to law enforcement that Mrs. [redacted] hated her husband and wanted to leave him as early as January 2015.
4) Based on Government arguments and evidence at prior hearings in this case, it appears that the one of the Government's theories is that LT Becker was angry with his wife over the separation and pending divorce and that this anger lead him to murder his wife.

3. Discussion of Law

Article 46 of the UCMJ and R.C.M. 703(f) grant the Defense equal opportunity to obtain witnesses and evidence. Each party is entitled to the production of any witness whose testimony on a matter in issue on the merits would be relevant and necessary. R.C.M. 703(b)(1). Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence more or less probable. M.R.E. 401. This is a very low threshold. United States v. White, 69 M.J. 236 (C.A.A.F. 2010). Relevant testimony is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way. R.C.M. 703(b)(1), Discussion.

A. Ms. [redacted]

The Government has denied Ms. [redacted] based on cumulativeness without stating who will provide this cumulative testimony. Ms. [redacted] knew both LT and Mrs. [redacted] during the time they lived in [redacted] Ms. [redacted] was friends with the Beckers as a couple. She is the only witness that the Defense is aware of who was not closer friends with one or the other of the Beckers. This objectivity makes her testimony unique. Ms. [redacted] interacted with the Beckers regularly including going over to the Becker's home once a month and having dinners outside of the home 3 to 4 times a month. Ms. [redacted] can describe a loving couple that is in complete contrast to the picture painted by Mrs. [redacted] friends and family who did not socialize with LT Becker. Particularly in the spring of 2015, Ms. [redacted] can describe Mrs. [redacted] feelings about LT Becker including how she was sad when he had to be away from her and their daughter. Given that multiple Government witnesses have already testified at the previous motions hearing that Mrs. [redacted] hated LT Becker and was planning on leaving him as early as January 2015, this testimony is relevant and necessary to combat that narrative as well as circumstantial evidence to combat Charge III and its sole specification that LT Becker physically and emotionally abused his wife during much of the time Ms. [redacted] knew the couple.

The Defense understands that no party is entitled to an unavailable witness. If Ms. [redacted] refuses to come to [redacted] for trial after being made the appropriate offers from the Government, the Defense requests that she be produced by remote means such as VTC.

B. Ms. [redacted]

The Government has denied Ms. [redacted] claiming that Ms. [redacted] is cumulative with the following witnesses: Ms. [redacted] Mr. [redacted] Mr. [redacted] and Mr. [redacted] Ms. [redacted] worked with Mrs. [redacted] and interacted with her on a daily basis from the spring of 2015 until Mrs. [redacted] death. In addition to discussing Mrs. [redacted] behavior on the day of her death, Ms. [redacted] can testify that LT Becker's work took him away a lot and it was hard on Mrs. [redacted] because of this. This point is relevant and necessary because it contradicts other Government witnesses who claim that Mrs. [redacted] hated her husband and that is why she wanted to separate from him. It also contradicts Charge III and its sole specification; if LT Becker was physically and emotionally abusing his wife during that time period, it is reasonable to believe that his absences would be seen as a positive and not the negative Ms. [redacted] describes. Ms. [redacted] will also testify that Mrs. [redacted] said the divorce was going amicably and that she was not even going to get a full divorce so that she could continue to stay in [redacted] These points are relevant and necessary as they are in contrast with a husband who is so angry with his wife that he is planning on murdering her.

None of the other witness listed by the Government will testify to these points or had the same foundation for knowing Mrs. [redacted] Specifically, Ms. [redacted] was Mrs. [redacted] supervisor and did not know her very well or on a personal level. Further, she did not have daily interactions with Mrs. [redacted] like Ms. [redacted] did. While Mr. [redacted] has similar foundational elements as Ms. [redacted] he is not a Defense requested witness. Mr. [redacted] feels strongly that LT Becker was responsible for Mrs. [redacted] death and during interviews with the Defense indicated as such. Requiring the Defense to rely upon such a strongly prosecutorial oriented witness would violate the spirit of Article 46. Mr. [redacted] was Mrs. [redacted] prospective landlord and had limited interactions with her. He is in no way cumulative with Ms. [redacted] Finally, Mr. [redacted] was the man with whom Mrs. [redacted] was having a sexual relationship in September and October. Requiring the Defense to rely upon a witness with such a clear bias against LT Becker would violate the spirit of Article 46.

The Defense understands that no party is entitled to an unavailable witness. If Ms. [redacted] refuses to come to [redacted] for trial after being made the appropriate offers from the

Government, the Defense requests that this court order a deposition of this witness pursuant to R.C.M. 702.

C. LtCol [redacted]

The Government has denied LtCol [redacted] claiming that he is cumulative with the following witnesses: Maj [redacted] LT [redacted], and LtCol [redacted] LtCol [redacted] was LT Becker's direct supervisor and interacted with him on a daily basis. While they were not friends, they discussed personal matters frequently at work. LtCol [redacted] was aware of the pending separation and he observed how LT Becker responded to this. He is relevant and necessary because he can testify that LT Becker did not appear angry when he discussed his wife and their separation and that LT Becker appeared to be handling things well. On the other hand, LtCol [redacted] can also testify that following Mrs. [redacted] death, LT Becker seemed to be taking her loss hard. These points are necessary as they contradict the Government's theory that LT Becker was angry about the separation and that he killed her over it.

None of the witnesses listed by the Government will testify to these points or have the same foundation for knowing LT Becker. Maj [redacted] like his wife, was friends with the [redacted] Testimony from a friend may not carry the same weight as testimony from a supervisor. The fact finders may assume a bias on behalf of the friend. LT [redacted] has some specific interactions with LT Becker in the days leading up to Mrs. [redacted] death, but he did not have the everyday interactions that LtCol [redacted] did. And again, as an equal vice a supervisor, LT [redacted] testimony may not carry the same weight as LtCol [redacted] testimony. LtCol [redacted] had some interactions with LT Becker that were similar to those of LtCol [redacted], but he did not have the daily interactions like LtCol [redacted] did.

The Government claims that they cannot locate LtCol [redacted] and that the Defense has not satisfied the requirements of R.C.M. 703. First, it should be noted, that the Defense contacted LtCol [redacted] using the contact information provided by the Government. And second, LtCol [redacted] is on active duty in the U.S. Army. Certainly the Government has in its possession the capabilities to locate this O5.

D. Ms. [redacted]

The Government has denied Ms. [redacted] as being not relevant or necessary since she did not see Mrs. [redacted] very often. Ms. [redacted] was a close friend of Mrs. [redacted] going back to at least 2007. The two women maintained close contact via electronic means even after Mrs. [redacted] married LT Becker and moved away. Ms. [redacted] can testify about the nature of the Becker's marital relationship going back to its very beginning. This foundational information is vital to the Defense as it is the Defense theory that it was the end of this relationship that contributed significantly to Mrs. [redacted] decisions on the night of her death. The Government also appears to object to Ms. [redacted] because she did not have significant in person contact with the Beckers close in time to Mrs. [redacted] death. It should be noted that Ms. [redacted] contact with Mrs. [redacted] is on par with two witnesses the Government intends to call, Mr. [redacted] and Ms. [redacted]. These two witness were also friends of Mrs. [redacted] who had limited in person contact with her following her marriage to LT Becker. Based on the length of her relationship with Mrs. [redacted] Ms. [redacted] can effectively contradict some of the Government witnesses who only knew Mrs. [redacted] for less than two years. In addition to providing background information about Mrs. [redacted] relationship with her husband, she can testify about communications Mrs. [redacted] shared with her in December of 2014 through the summer of 2015. Most importantly, based on interactions during December 2014 and January 2015, Ms. [redacted] can discuss Mrs. [redacted] attitude toward her marriage as she remained in Florida and when she returned to [redacted]. Ms. [redacted] who is a friend of Mrs. [redacted] and not LT Becker, will provided testimony that directly contradicts the testimony of Mr. [redacted] Mr. [redacted] and others regarding how Mrs. [redacted] felt about LT [redacted]. Further, she communicated with Mrs. [redacted] in the summer of 2015 and can provide testimony as to the state of Mrs. [redacted] feelings at that time. Given that the Government intends to call multiple witnesses with similar interactions and that the charged conduct covers a time period in which this longtime friend personally interacted with Mrs. [redacted], Ms. [redacted] is relevant and necessary.

E. Mr. [redacted]

Mr. [redacted] interviewed Mr. [redacted] shortly after the events that are the basis for Charge II Specification 1, an alleged assault in 2013. Mr. [redacted] was the front desk clerk to whom Mrs. [redacted] first reported being assaulted. When interviewed by the trial counsel and NCIS on 16 January 2019, Mr. [redacted] stated that he observed red marks on the neck area of Mrs. [redacted] Mr. [redacted] went on to describe how it looked like Mrs. [redacted] had been manhandled. However, when interviewed by Mr. [redacted] previously, back in 2013, Mr. [redacted] specifically stated that there were no marks on Mrs. [redacted] that evening and that it simply looked like she had been crying. This was documented in an interview summary prepared and signed by Mr. [redacted]. Given the scant evidence the Government has for this charge, a witness testifying that he observed injuries on the neck of Mrs. [redacted] would be significant to say the least. Mr. [redacted] is relevant and necessary to impeach Mr. [redacted] In their denial, the Government also states that there is no evidence that Mr. [redacted] remembers this interview. This is not a material consideration. Even if Mr. [redacted] had no recollection, he would be relevant and necessary to lay the foundation to refresh his memory with the use of his report or for past recollection recorded.

F. SFC [redacted] and Mrs. [redacted]

The [redacted] are relevant and necessary because they were in the neighboring room during the evening when Mrs. [redacted] claimed to have been assaulted. Both of the [redacted] state that they did not hear anything that sounded like a fight or altercation. SFC [redacted] states that he was not awakened during the night by any noises. Mrs. [redacted] states that she heard furniture moving around for about an hour or so, but heard no screams of anything to indicate an assault. The Government claims that these witnesses provide little assistance to either side because they did not hear anything. It is that very fact that the Defense desires to introduce. The absence of screams or other noises indicating an ongoing assault is relevant to whether or not an assault occurred that evening.

The Government claims that they cannot locate the [redacted] and that the Defense has not satisfied the requirements of R.C.M. 703. There is no indication that SFC [redacted] is no longer on

active duty in the U.S. Army. Certainly the Government has in its possession the capabilities to locate this solider.

4. Relief Requested.

The Defense requests that the Military Judge order the Government to produce the requested witnesses and the requested alternative means of testimony.

5. Oral Argument.

Unless the Government concedes the motion or this Court grants the relief on the basis of pleadings alone, the Defense requests oral argument on this matter.

[redacted]

J. A. GUARINO
CDR, JAGC, USN
Detailed Defense Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

THE UNITED STATES OF AMERICA **v.** **CRAIG R. BECKER** **LT USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO COMPEL PRODUCTION OF WITNESSES** **6 DECEMBER 2019**

1. Nature of the Motion. The Government respectfully requests that the Court deny the Defense's Motion to compel witnesses.

2. Burden of Proof. The Defense has the burden under R.C.M. 703(c)(2)(B)(i) to provide a synopsis of the expected testimony sufficient to show its relevance and necessity. They have not done so.

3. Statement of Facts.

a. For the purpose of this motion, the Government concurs with the Defense's summary of facts.

b. The Government responded to the Defense witness request dtd 6 November 2019 on 19 November 2019, approving 27 witnesses.

c. Mrs. [redacted] was only an acquaintance of [redacted] and never associated with her outside of joint couple events.

d. Ms. [redacted] stated that she loved her daughter and showed no signs of suicide.

e. Mr. [redacted], Ms. [redacted], and Mr. [redacted] all interacted with the victim on the day of her death and all will be produced at trial.

f. LTC [redacted] worked with LT Becker before and after [redacted] death.

g. LTC [redacted] and LT [redacted] both worked in the same building and interacted with LT Becker on an almost daily basis.

h. Ms. [redacted] had very limited interaction with [redacted] after she left [redacted] area in September of 2008. They only had three in person meetings after that and two were random.

i. Ms. [redacted] had only three to four interactions with [redacted] after the [redacted] arrived in [redacted] and two were random meetings, they other electronic communications.

j. Ms. [redacted] did not have [redacted] phone number while [redacted] lived in [redacted].

k. Mr. [redacted] interviewed Mr. [redacted] however, this interview was not recorded and we only have a summary of that interview.

l. Mr. [redacted] has only faint memories of this case.

m. The Defense has provided no contact information for Mr. or Mrs. [redacted] only stating that the contact information was in the possession of the Government.

n. Mr. [redacted] is no longer on active duty. The Government has made numerous attempts to find Mr. and Mrs. [redacted] but have been unable to find them.

o. Mr. [redacted] stated he was a heavy sleeper and did not hear anything.

p. Mrs. [redacted] stated she **may** have been awake during that time, she did hear furniture moving around, but no screams.

4. Authorities cited.

a. Rules for Courts-Martial (R.C.M.) 703, Manual For Courts-Martial (M.C.M.) 2016 Ed.

b. United States v. Hampton, 7 M.J. 284, (C.M.A. 1979).

c. United States v. Williams, 3 M.J. 239, (C.M.A. 1977).

d. R.C.M. 1001, M.C.M. 2016 Ed.

5. Discussion

R.C.M. 703(b) provides that each party is entitled to the production of any witness whose testimony on a matter at issue on the merits would be relevant and necessary. M.R.E. 401

defines "relevant evidence" as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. Relevant testimony is necessary when it is not cumulative and will contribute to a party's presentation of the case in some positive way on a matter in issue. M.R.E. 703(b)(1), Discussion.

The testimony of a witness is material when there exists a reasonable likelihood that his or her testimony will have an effect on the judgment of the fact-finders at trial.[1] If the testimony of a particular witness is material, the live presence of that witness must be furnished or the proceedings abated, unless in the discretion of the trial judge, the testimony of that witness would be merely cumulative to the testimony of other defense witnesses.[2]

After the defense demonstrates that witnesses are material and necessary, however, the witness must be produced in some form. Personal attendance of the witness is determined in light of the following factors:

> [I]ssues involved in the case and importance of requested witness to those issues; whether witness was desired on merits or on sentencing; whether testimony of witness would be merely cumulative; availability of alternatives to personal appearance of witness such as depositions, interrogatories, or previous testimony; unavailability of witness; whether requested witness is in the armed forces or subject to military orders; and whether absence of witness will adversely affect accomplishment of an important military mission or cause manifest injury to the service. Considerations other than materiality have no role in determining whether the Government must produce a requested witness; thus, inconvenience, cost, or distance of the witness from the place of trial are not considerations allowing the Government to escape its responsibility for providing witness.[3]

R.C.M. (c)(2)(B)(i) states that the Defense is required to provide name, telephone

[1] United States v. Hampton, 7 M.J. 284, 285 (C.M.A. 1979).
[2] United States v. Williams, 3 M.J. 239, 243 (C.M.A. 1977).
[3] *Id.*

number, if known, and address or location of the witness such that the witness can be found upon the exercise of due diligence and a synopsis of the expected testimony sufficient to show its relevance and necessity.

a. Mrs. [redacted]

Mrs. [redacted] was no more than acquaintance to [redacted]. They never associated with each other one on one. All of their interactions were because their husbands worked together and associated with each other outside of work. Major [redacted] will testify that the two were not close, as well. During the investigation, none of [redacted] friends or family ever mentioned Mrs. [redacted] either and law enforcement never interviewed her. How a person acts in a public setting with an acquaintance is different from how they talk, act and behave amongst their friends. The Defense has not met their burden that this witness is relevant and necessary, they don't even provide a statement, and produced no evidence in support of their motion regarding Mrs. [redacted]. Lastly, Mrs. [redacted] left [redacted] in May 2015 and had no interaction with the [redacted] after that time period and thus was not there during the divorce process.

b. **Ms.** [redacted]

The Defense seeks Ms. [redacted] because she can discuss the behavior of [redacted] on the day of her death and she worked with her on a daily basis. Mr. [redacted], who will be produced and will be a Government witness, met with [redacted] on the day of her death. Mr. [redacted] a (Defense requested witness) and [redacted] (Government witness) both worked with [redacted] and ate lunch with [redacted] on the day of her death. This will cover the same testimony of Ms. [redacted]. Lastly, Mr. [redacted] also interacted with [redacted] during the morning of her death and will be produced at the trial. In addition, many witnesses can testify that LT Becker's job took him away from the family and that it was hard on the family; that is the same situation as almost all military families. Ms. [redacted] says the same things as all of her friends: they don't think [redacted] was

suicidal, she was happy on the day of her death and showed no signs of committing suicide, that she loved her daughter and wouldn't commit suicide. Further, even the limited amount of testimony she could provide could also be provided by several witnesses already produced by the Government to include [redacted], who testified at the last motion hearing that the divorce seemed to be amicable.

c. LTC [redacted], USA;

LTC [redacted] finally responded to the Government and he has spoken to us. He confirmed that he had daily interactions with LT Becker, but that they were not friends and only interacted during work. LTC [redacted] testimony is cumulative with LT [redacted] and LtCol [redacted] who also worked with LT Becker and will testify to the same items as LTC [redacted]. The Government is willing to produce LTC [redacted] if the Defense agrees not to have LT [redacted] produced as they will both say identical things and are thus are cumulative with each other and LtCol [redacted].

d. Ms. [redacted]

Ms. [redacted] stated that she only communicated with [redacted] every couple of months after they moved to Norfolk in September 2008 until they moved to [redacted] in August 2013. She did meet the [redacted] in Paris for three days in 2013. While in [redacted], she only talked to [redacted] once or twice during the duration, electronically or on the telephone. This is because [redacted] deleted her Facebook page and they lost touch with each other. However, while [redacted] lived in [redacted] they did randomly meet each in the Atlanta Airport in December 2014 as the two sat next to each other on the flight from Atlanta to Jacksonville, FL. Their last interaction was another random meeting at the post office in January 2015. This is not the type of interaction someone has with a close friend. Ms. [redacted] lost most of the contact with [redacted] starting in September 2008 and had very little interaction with her over the next seven years. Lastly, the

Government at this time does not intend to call Mr. [redacted] or Mrs. [redacted] to talk about [redacted] and LT Becker's marriage; both of these witnesses are being called for other matters. The Government agrees that all three had very limited interactions with [redacted] during the end of her life and none provide very relevant material on the marriage.

e. Mr. [redacted]:

During conversations with the Government's paralegal, Mr. [redacted] had almost no memory of the incident. The Defense is trying to impeach Mr. [redacted] with a summary of an interview, drafted and signed by Mr. [redacted]. The Defense has failed to show that they can refresh the memory of Mr. [redacted]. They would likely attempt to impeach Mr. [redacted] on a statement that he cannot remember, about an interview that he cannot remember.

f. Mr. [redacted] and Mrs. [redacted]:

Mr. [redacted] is no longer in the military as of 1 November 2018. The Defense has not provided any current contact information for Mr. [redacted] or Mrs. [redacted] as required by M.R.E. 703(c)(2)(B)(i). In addition, it is our belief that the Defense has never spoken to either witness. The Government has gone to great lengths to contact these witnesses and has come up empty handed. NCIS has used databases to attempt to obtain contact information for the [redacted] and the Government has contacted three separate e-mail addresses and 12 separate phone numbers to no avail. The Government cannot produce a witness that the Defense cannot find. R.C.M. 703 has recently changed to require the Defense to assist the Government in production of their own witnesses. The Defense is now required to produce phone numbers for the witnesses. One would assume the drafters of the new R.C.M. 703(c)(2)(B)(i) meant valid phone numbers to assist the Government and to put some of the responsibility on the Defense.

Even if found, these two witnesses are not relevant or necessary. Mr. [redacted] stated that he is a heavy sleeper and did not hear anything that night. The fact that Mr. [redacted] is a heavy sleeper and he did not hear anything makes him irrelevant, because he cannot add anything to the facts. As for Mrs. [redacted] she mentions that she did hear furniture being moved but did not hear screams. The Defense has not met their burden; they provide no additional information from Mrs. [redacted] and her statement that she provided to law enforcement in 2013 is limited. It lacks specific details and is only a summary of an interview. The Defense has the burden of stating why this witness is relevant and necessary, yet they have failed to do that in their motion and their initial witness request. Without further information, Mrs. [redacted] should be deemed not to be relevant or necessary.

6. Evidence. The Government offers the following documentary evidence in support of this motion: Telephonic testimony of [redacted];

Govt. Exhibit 72 - Defense Witness Request;

Govt. Exhibit 73 - Government Response to Defense Witness Request;

Govt. Exhibit 74 - Ms. [redacted] statement;

Govt. Exhibit 19 – Mr. [redacted] interview;

Govt Exhibit 22 – Mr. [redacted] interview;

Govt. Exhibit 55 – Ms. [redacted] interview;

Defense Exhibit EEEE pages 4 and 5 summary of LTC [redacted] and LTC [redacted] interviews

Govt. Exhibit 75 - CD of Ms. [redacted] interview;

Govt. Exhibit 76 Summary of LT Becker's history of assignments;

Govt. Exhibit 77 - Mr. [redacted] Statement dtd 9 Sep 13;

Govt. Exhibit 78 - E-Mail from LNC [redacted] explaining conversation with [redacted] and Ms. [redacted]

Govt. Exhibit 79 - E-Mail from LNC [redacted] explaining attempts to contact the [redacted]

Govt. Exhibit 80 - [redacted] summary of interview.

7. Oral Argument. The Government does desire to make oral argument on this motion.

8. Relief Requested. The Court should deny the Defense's Motion to compel witnesses.

[redacted]

PAUL T. HOCHMUTH
LCDR, JAGC, USN
TRIAL COUNSEL

CERTIFICATION OF SERVICE

A true copy of this motion was served on the Court and Defense counsel on 6 December 2019.

[redacted]

PAUL T. HOCHMUTH
LCDR, JAGC, USN
TRIAL COUNSEL

NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **CRAIG R. BECKER** **LT/O-3** **U.S. NAVY**	**DEFENSE MOTION FOR APPROPRIATE RELIEF: REQUEST FOR INSTRUCTION DEFINING "PHSYICALLY AND EMOTIONALY ABUSE"** **22 NOVEMBER 2019**

1. Nature of Motion

Pursuant to R.C.M.906(b) and R.C.M. 920(e)(7), the Defense respectfully moves this court to provide the parties with the definition of "physically and emotional abuse" that will be included in the instruction for Charge III.

2. Summary of Facts

The Government has charged LT Becker with physically and emotionally abusing his late wife.

3. Discussion

The Defense cannot prepare for the case without a clear understanding of what the Government must prove beyond a reasonable doubt in order to prove Charge III and its sole specification. This requires a definition of both physical and emotional abuse.

For physical abuse, the Defense requests this court rely on the definitions from battery found within Article 128 with the additional requirement of specific intent.

For emotional abuse, the Defense requests this court rely on the standard definitions related to the tort Intentional Infliction of Emotional Distress (IIED). There is no military or civilian crime similar to "emotionally abuse." At a minimum, any attempt to criminalize this type of behavior should have to at least meet the standard's required for civil liability. While each state

is different in its application of IIED, there are four common elements: 1) extreme or outrageous conduct 2) done with an intent to cause emotional distress 3) resulting in actual emotional distress 4) that emotional distress was in fact caused by the conduct. Extreme or outrageous conduct is conduct that transcends all bounds of decency. The intent required is such that the accused must not only have intended to do the act, but must also have intended that the act cause emotional distress. Emotional distress does not require physical symptoms but it does require that a person has suffered more than a reasonable person could be expected to endure.[1]

4. Relief Requested.

The Defense requests that the Military Judge provide the parties with, at a minimum, an outline of the definitions that will be used for the instructions for Charge III and its sole specification. The Defense further requests that the court rely in part on Article 128 and state law governing IIED.

5. Oral Argument.

Unless the Government concedes the motion or this Court grants the relief on the basis of pleadings alone, the Defense requests oral argument on this matter.

[redacted]

J. A. GUARINO
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Detailed Defense Counsel

[1] 38 A.L.R. 4th 998 provides a large number of cases and references to various state laws on IIED.

NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

THE UNITED STATES OF AMERICA **v.** **CRAIG R. BECKER** **LT/O-3 USN**	**GOVERNMENT RESPONSE TO DEFENSE REQUEST FOR INSTRUCTION DEFINING PHYSICAL AND EMOTIONAL ABUSE.**

1. **Nature of the Motion.** The Government respectfully requests the court provide the below instruction and definitions to the members for Charge III and not utilize the requested definitions proposed by the Defense.

2. **Statement of Facts.**

a. For the purpose of this motion, the Government agrees with the Defense's Statement of Facts.

b. In addition, the Government provided the Defense with a Bill of Particulars on 25 June 2019, pertaining to Charge III and its sole specification.

3. **Discussion.**

The Government has charged the accused with "wrongfully and dishonorably, physically and emotionally abuse his wife…" The "physical harm" within Charge III is specifically referencing when the accused forced his wife to walk from their apartment located at [redacted] to the local hospital [redacted]. The walk is about 2.1 km in distance and the victim was in agonizing pain due to [redacted] The "emotional abuse" is the acts as set forth in the Bill of Particulars a – f and h – k.

There is no federal statute directly on point and there is no punitive article in the U.C.M.J. directly on point for domestic violence. However, SECNAVINST 1752.3B defines domestic abuse, in part, as

"a pattern of behavior in emotional/psychological base, economic control, and/or interference with personal liberty that is directed towards a person of the opposite sex who is: 1) a current or former spouse, 2) a person with whom the abuser shares a child in command and 3) a current of former intimate partner with whom the abuser shares or has shared a common domicile."

R.C.M 920(c) states that either side may make a request for instructions to be given to the members by the Military Judge. R.C.M. 920(e) sets forth the required instructions that must be provided, including the elements of the offense, and R.C.M. 920(e)(7) states, "Such other explanations, descriptions, or directions as may be necessary and which are properly requested by a party or which the military judge determines...."

The Defense requests the instruction for battery to be given for physical abuse and the tort instruction for intentional infliction of emotion distress (IIED). These two instructions are not appropriate in our current situation because they do not appropriately address the charged crime. That is why approximately 38 states place specific domestic violence definitions and penalties within their criminal code. Within these statutes are broad definitions that include physical abuse, stalking, harassment and, in some instances, nonphysical abuse including intimidation and emotional abuse.

In U.S. v. Ashby, the C.A.A.F. analyzes the charging of an enumerated offense as an Article 133 offense. 68 M.J. 108 (C.A.A.F. 2008). In Ashby, the Government charged the accused with an Article 133 offense, but used the language of Article 134 (Obstruction of Justice). The court rightfully concluded that the Military Judge appropriately used the terms from the Obstruction of Justice offense to instruct the members. In our case, the Government has

not charged an enumerated offense from the Code. Instead, the Government charged the accused with Physical and Emotional Abuse of his spouse; in laymen's terms, domestic violence. Thus, the code does not at the time of the offenses have a statute on point to cover the accused's actions and thus the Defense's suggestion of using terms from Article 128 "battery" and the tort offense of IIED is not appropriate. The better option is to look at the states of our Union. Below we will highlight three states, Colorado, Delaware, and New York. However, Maine (Me. Stat. tit. 19-A, § 4002), and New Hampshire (N.H. Stat. § 173-B:1) should not be overlooked.

Colorado Stat. 14 – 101 and Colo. Rev. Ann Section18:

"(2) "Domestic abuse" means any act, attempted act, or threatened act of violence, stalking, harassment, or coercion that is committed by any person against another person to whom the actor is currently or was formerly related, or with whom the actor is living or has lived in the same domicile, or with whom the actor is involved or has been involved in an intimate relationship. For purposes of this subsection (2), "coercion" includes compelling a person by force, threat of force, or intimidation to engage in conduct from which the person has the right or privilege to abstain, or to abstain from conduct in which the person has a right or privilege to engage."

Delaware, Title 10, Section 1041:

"(1) "Abuse" means conduct which constitutes the following:

a. Intentionally or recklessly causing or attempting to cause physical injury or a sexual offense, as defined in § 761 of Title 11 ;

b. Intentionally or recklessly placing or attempting to place another person in reasonable apprehension of physical injury or sexual offense to such person or another;

c. Intentionally or recklessly damaging, destroying or taking the tangible property of another person;

d. Engaging in a course of alarming or distressing conduct in a manner which is likely to cause fear or emotional distress or to provoke a violent or disorderly response;

e. Trespassing on or in property of another person, or on or in property from which the trespasser has been excluded by court order;

f. Child abuse, as defined in Chapter 9 of Title 16;

g. Unlawful imprisonment, kidnapping, interference with custody and coercion, as defined in Title 11; or

h. Any other conduct which a reasonable person under the circumstances would find threatening or harmful.

(2) "Domestic violence" means abuse perpetrated by one member against another member of the following protected classes:

a. Family…;"

New York Consolidated Law Article 6-a - Domestic Violence Prevention Act 459-a.

"Victim of domestic violence" means any person over the age of sixteen, any married person or any parent accompanied by his or her minor child or children in situations in which such person or such person's child is a victim of an act which would constitute a violation of the penal law, including, but not limited to acts constituting disorderly conduct, harassment, aggravated harassment, sexual misconduct, forcible touching, sexual abuse, stalking, criminal mischief, menacing, reckless endangerment, kidnapping, assault, attempted assault, attempted murder, criminal obstruction of breathing or blood circulation, or strangulation; and

(i) such act or acts have resulted in actual physical or emotional injury or have created a substantial risk of physical or emotional harm to such person or such person's child; and (ii) such act or acts are or are alleged to have been committed by a family or household member.

Lastly, there has much discussion during our motion practice in this case regarding the word "dishonorably." The Defense has repeatedly stated that they cannot find a definition for this word. The Benchbook does tell us under the definition and other instruction section for Failing, Dishonorably, to Pay Debt and Failure to Keep Promise to Pay Debt, that:

> A failure to pay a debt is "dishonorable" if the failure is (fraudulent) (deceitful) (a willful evasion) (in bad faith) (based on false promises) (a grossly indifferent attitude toward one's just debts) (_____).
>
> A failure to keep a promise to pay a debt is "dishonorable" if the failure is characterized by (fraud) (deceit) (willful evasion) (demonstrable bad faith) (false promises) (a grossly indifferent attitude toward one's just debts).

Further, several military cases have touched on dishonor in their rulings. See. U.S. v. Meakin, 78 M.J. 396 (C.A.A.F. 2018). Meakin states that a "clear and present danger" standard should be utilized when addressing an officer's free speech, which is protected by the First Amendment of the U.S. Constitution. However, in our case the First Amendment does not protect emotional abuse by the accused. Thus, as in Meakin, the clear and present danger language is not needed and should not be instructed on. Further, Meakin, quoting U.S. v. Lofton, 69 M.J. 386, 388 (C.A.A.F. 2011), states, "The gravman of the offense (Article 133) is that the officer's conduct disgraces him personally or brings dishonor to the military profession such as to affect his fitness to command the obedience of his subordinates so as to successfully complete the military mission." U.S. v. Meakin, at 403.

Based upon SECNAVINST 1752.3B and the relevant state statutes the Government requests the following instructions.

Charge III, Sole Specification

In the specification of Charge III, the accused is charged with the offense of Conduct Unbecoming an Officer and a Gentleman, in violation of Article 133, UCMJ. In order to find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond reasonable doubt:

(1) That at or near [redacted] on divers occasions between about 2 August 2013 and about 8 October 2015, the accused did wrongfully and dishonorably, physically and emotionally abuse his wife [redacted] and

(2) That, under the circumstances, the accused's conduct was unbecoming an officer and a gentleman.

Definitions and Other Instructions:

Conduct unbecoming an officer and a gentleman means behavior in an unofficial or private capacity which, in dishonoring or disgracing the individual personally, seriously detracts from your standing as a commissioned officer. "Unbecoming conduct" means misbehavior more serious than slight and of a material and pronounced character. It means conduct morally unfitting and unworthy rather than merely inappropriate or unsuitable misbehavior, which is more than opposed to good taste or propriety.

Dishonorably means that the accused's conduct disgraces him personally or brings dishonor to the military profession.

Physically and Emotionally Abuse means any act, attempted act, or threatened act of violence, stalking, harassment, coercion, damaging/destroying or taking the tangible property, pattern of psychological control, and economic control, that is committed by the accused against his spouse. For purposes of this subsection, "coercion" includes but is not limited to compelling a person by force, threat of force, or intimidation to engage in conduct from which the person has the right or privilege to abstain, or to abstain from conduct in which the person has a right or privilege to engage. In addition, for the purpose of this subsection "psychological control" includes but is not limited to electronic monitoring, controlling whom a person speaks to and visits with and what the person purchases and does not purchase.

4. **Oral Argument.** The Government desires oral argument on this motion.

5. **Relief Requested.** The Government respectfully requests the Court deny the accused's motion to use the definitions from Article 128 (Battery) and the tort offense of IIED and utilize the instructions and definitions proposed by the Government.

[redacted]

Paul T. Hochmuth

CERTIFICATE OF SERVICE

I hereby certify that, on 4 December 2019, I caused a copy of this motion to be served on the Defense counsel and the Court.

[redacted]

Paul T. Hochmuth

NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **CRAIG R. BECKER** **LT/O-3** **U.S. NAVY**	**DEFENSE MOTION FOR APPROPRIATE RELIEF: EXCLUDING REFERENCE TO CREMATION** **22 NOVEMBER 2019**

1. Nature of Motion

Pursuant to R.C.M. 906(b)(13) and M.R.E. 404, the Defense respectfully moves this court for an order in limine prohibiting the Government from offering evidence that LT Craig Becker had Mrs. [redacted] remains cremated.

2. Summary of Facts

1) On 8 October 2015, Mrs. [redacted] fell from her apartment window and ultimately died.

2) On 9 October 2015, the external portion of Mrs. [redacted] remains were examined by medical personnel and a venipuncture was completed to obtain samples for toxicological testing.

3) On 11 October 2015, the [redacted] authorities conducted an autopsy on Mrs. [redacted] remains which included taking additional samples for toxicological testing.

4) On 16 October 2015, Mrs. [redacted] remains are cremated.

5) On 30 July 2018, the United States preferred an Article 134 charge against LT Becker stating that he wrongfully endeavored to impede the investigation into Mrs. [redacted] death by attempting to cremate Mrs. [redacted] in an effort to destroy evidence.

6) On 25 January 2019, the United States dismissed this charge.

3. Discussion of Law

M.R.E. 404(b) states that evidence of a crime, wrong, or other act may not be used to prove character or to show that a person acted in accordance with the character indicated by the crime, wrong, or other act. Wrongfully attempting to interfere with a criminal investigation by attempting to destroy evidence is certainly a crime, wrong, or other act that is covered by M.R.E. 404(b).

The admissibility of evidence covered by M.R.E. 404(b) is reviewed using he three part test articulated in U.S. v. Reynolds, 29 M.J. 105 (C.M.A. 1989). The test is as follows:

1. Does the evidence reasonably support a finding by the court members that the accused committed the prior crime, wrong, or act?

2. What fact of consequence is made more or less probable by the existence of this evidence?

3. Is the probative value substantially outweighed by the danger of unfair prejudice?

The first prong of Reynolds requires that a preponderance of the evidence reasonably supports a finding that the appellant committed the uncharged act. United States v. Morrison, 52 M.J. 117, 121-22 (C.A.A.F. 1999) (citing Huddleston v. United States, 485 U.S. 681, 690, 108 S. Ct. 1496, 99 L. Ed. 2d 771 (1988)). The Government cannot meet the first prong of the Reynolds test with regard to this alleged act on the part of LT Becker. Throughout the entire investigation there is not any admissible evidence that suggests LT Becker attempted to speed up the process of cremating Mrs. [redacted] remains or that he did so for the purpose of destroying evidence.

The Defense concedes that if the Government could present sufficient admissible evidence to support a finding that LT Becker attempted to speed up the cremation process in order to destroy evidence, then the second prong of the Reynolds test would be met. This evidence could be used as consciousness of guilt. However, based on the actual evidence in this case, all the Government can show is that LT Becker ultimately had his late wife's remains cremated after all investigative steps had been taken. The mere act of choosing cremation over other options of

handling the remains of a family member makes no fact of consequence more or less likely. As such, the Government cannot meet the second prong of the Reynolds test.

Additionally, the Government cannot satisfy the third prong of the Reynolds test. As discussed above, the probative value of choosing to cremate a family member's remains is very low if not nonexistent. On the other hand, the danger of unfair prejudice is extremely high. Simply mentioning that LT Becker had Mrs. [redacted] remains cremated may cause the members to improperly speculate about LT Becker's motives for doing so. And, given that the Government cannot show that LT Becker attempted to speed the process of cremation along or that he had ill intent in making the choice for cremation, this speculation would constitute unfair prejudice.

4. Relief Requested.

The Defense requests that the Military Judge exclude all evidence relating to the cremation of Mrs. [redacted] remains.

5. Oral Argument.

Unless the Government concedes the motion or this Court grants the relief on the basis of pleadings alone, the Defense requests oral argument on this matter.

[redacted]

J. A. GUARINO
CDR, JAGC, USN
Detailed Defense Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

THE UNITED STATES OF AMERICA **v.** **CRAIG R. BECKER** **LT/O-3 USN**	**GOVERNMENT'S RESPONSE TO DEFENSE'S MOTION TO EXCLUDE REFERENCE TO CREMATION**

1. **Nature of the Motion.** The Government has no intent to offer any evidence that LT Craig Becker had [redacted] remains cremated or requested to have her remains cremated. The Government does not intend to even mention cremation or ask any witnesses what happened to [redacted] remains. However, the Government reserves the right in rebuttal to bring this evidence to light if the Defense argues or suggests that additional tests should have been conducted on [redacted] remains.

2. **Burden of Proof.** As the moving party, the Defense bears the burden by a preponderance of the evidence.

3. **Statement of Facts.**

   a. For the purpose of this motion the Government adopts the Defense Summary of Facts.

4. **Oral Argument.** The Government does not desire oral argument on this motion.

[redacted]
Paul T. Hochmuth

CERTIFICATE OF SERVICE

I hereby certify that, on 4 December 2019, I caused a copy of this motion to be served on the Defense counsel and the Court.

[redacted]

Paul T. Hochmuth

NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **CRAIG R. BECKER** **LT/O-3** **U.S. NAVY**	**DEFENSE MOTION FOR APPROPRIATE RELIEF: EXCLUDING REFERENCES INVOCATION OF RIGHTS** **22 NOVEMBER 2019**

1. Nature of Motion

Pursuant to R.C.M. 906(b)(13), M.R.E. 401 and M.R.E. 403, the Defense respectfully moves this court for an order in limine prohibiting the Government from offering evidence that Ms. [redacted] requested to speak with her lawyer prior to speaking with NCIS and that LT Craig Becker did not participate in various portions of the [redacted] investigation or refused to assist the [redacted] in their investigation.

2. Summary of Facts

1) In October 2015, the [redacted] authorities opened an investigation into LT Becker regarding the death of his wife.
2) [redacted] law provides suspects the right to remain silent and the right to consult with an attorney.
3) On 15 June 2016, the [redacted] authorities asked LT Becker to take part in re-enactment of the events of 8 October 2015 and LT Becker declined to participate.
4) On 7 September 2016, LT Becker informed the [redacted] authorities that he was not going to make any statements without his lawyer present.
5) On 7 September 2016, the [redacted] authorities asked LT Becker to take a polygraph and he stated he would have to speak with his attorney first.
6) On 12 April 2017, the [redacted] authorities asked LT Becker to take a personality assessment and through his [redacted] attorney he refused.

7) On 23 March 2016, Ms. [redacted] was interviewed by the [redacted] authorities for 6 hours and 36 minutes.
8) On 19 March 2018, NCIS and the Trial Counsel asked Ms. [redacted] for an additional interview and Ms. [redacted] said that she did not want to answer any questions without an attorney present.

3. Discussion of Law

M.R.E. 401 states that evidence is relevant if it has a tendency to make a fact of consequence more or less probable. M.R.E. 403 states that even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.

It is the well-settled law in military courts that it is improper to bring to the attention of the triers of fact that an accused asserted a constitutional or statutory right. "This principle is founded upon the open-eyed realization that to many, even to those who ought know better, the invocation by a suspect of his constitutional and statutory rights to silence and to counsel equates to a conclusion of guilt -- that a truly innocent accused has nothing to hide behind assertion of these privileges." United States v. Riley, 47 M.J. 276, 279 (C.A.A.F. 1997) (quoting United States v. Moore, 24 C.M.A. 217, 1 M.J. 390, 391, 51 C.M.R. 514 (C.M.A. 1976)); *see also* M.R.E. 403 (excluding relevant evidence where "probative value is substantially outweighed by the danger of unfair prejudice"). In his often-cited concurrence in Grunewald v. United States, Justice Black explains this principal stating that the value of a privilege or right is largely destroyed if persons can be penalized for relying on it. 353 U.S. 391, 425, 77 S. Ct. 963, 1 L. Ed. 2d 931 (1957).

A. LT BECKER'S INTERACTIONS WITH THE [redacted]

The decisions made by LT Becker not to participate in or assist in various portions of the [redacted] criminal investigation against him make no fact of consequence any more or less likely. The fact that he did not assist the [redacted] with every one of their requests does not make it more or less likely that he is in fact guilty. The only possible use for this evidence would be the hope that the triers of fact would make the improper inference that that a truly innocent accused has nothing to hide and would have agreed to any and all requests from law enforcement. While LT

Becker's decisions to decline various requests were not based on U.S. rights or privileges, the same principles regarding the admissibility of referencing these decisions should apply in this case. [redacted] law granted LT Becker the right to refuse to answer questions and the right to consult with an attorney. It is self-evident that contained within the right to remain silent is the right not to take a polygraph test or participate in re-enactments. To allow the Government in any way to reference LT Becker's decisions to rely on these rights during the [redacted] investigation would in essence destroy the rights themselves. The fact that these were not U.S. based rights being asserted in no way changes the relevance analysis nor should it change the M.R.E. 403 analysis.

B. MS. [redacted] REQUEST TO CONSULT WITH COUNSEL

The fact that, after providing a six and a half hour long interview to [redacted] authorities, Ms. [redacted] did not wish to answer any questions without an attorney makes no fact of consequence any more or less likely. The only possible use for this evidence would be the hope that the triers of fact would make the improper inference that that a truly honest witness has nothing to hide and would not have the need to consult with an attorney. This is particularly true given that in addition to an NCIS agent, Ms. [redacted] was being question by an attorney. The fact that it is Ms. [redacted] asserting her right to consult with counsel vice LT Becker asserting his right does not change the relevance analysis. Unless this court were to find that mere fact of desiring to speak with a lawyer was evidence of consciousness of guilt or somehow indicated something other than the desire to understand ones rights, this evidence has no probative value. On the other hand, the danger of unfair prejudice is significant as many people, even toughs who ought to know better, will draw negative inferences from the fact that a witness wanted to speak with a lawyer.

4. Relief Requested.

The Defense requests that the Military Judge exclude all references to LT Becker asserting a right or refusing to assist the [redacted] investigation and all references to Ms. [redacted] request to speak with an attorney.

5. Oral Argument.

Unless the Government concedes the motion or this Court grants the relief on the basis of pleadings alone, the Defense requests oral argument on this matter.

[redacted]

J. A. GUARINO
CDR, JAGC, USN
Detailed Defense Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

The United States of America **v.** **CRAIG R. BECKER** **LT/O-3 USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION FOR APPROPRIATE RELIEF: EXCLUDING REFERENCES INVOCATION OF RIGHTS** **6 December 2019**

1. **Nature of the Motion.** The Government respectfully requests the Court deny the Defense motion to preclude the Government from offering evidence that Ms [redacted] requested to speak with her lawyer prior to speaking with NCIS. The Government agrees that it will not offer evidence that the Accused declined to participate and refused to assist in various portions of the [redacted] investigation.

2. **Summary of Facts.** For purposes of this motion, the Government agrees with the Defense's summary of facts.

3. **Discussion.**

A. THE LAW DOES NOT LIMIT THE GOVERNMENT FROM IMPEACHING A NON-ACCUSED WITNESSES FAILURE TO PROVIDE A STATEMENT OR COOPERATE IN AN INVESTIGATION

It is well established that that the Government cannot bring an Accused invocation of a constitutional or statutory right to the attention of the trier of fact. There is absolutely no case law that prevents the Government from impeaching a non-accused witness using his or her actions in refusing to make a statement or cooperate in an investigation. The prohibition on using an Accused's invocation of a right is not based on a lack of relevancy, but rather that, as the Defense points out, it destroys the right if a person is penalized for invoking it.

Use of Ms. [redacted] refusal to cooperate is not penalizing her for exercising her right because she is not the person on trial. Therefore, the only issue is whether such information is relevant for the trier of fact under M.R.E. 401 and 402. The Government submits that this evidence is relevant because it goes to impeach Ms. [redacted] concerning her bias and credibility. The Government is allowed to impeach Ms. [redacted] under M.R.E. 608(c). Given that Ms. [redacted] was never suspected of committing an offense (she was in the U.S. during the charged offense) and also that she was not subject to the U.C.M.J. she had no need to consult an attorney or have one present while being questioned. It is fair for the members to take this into consideration when weighing her testimony as M.R.E. 608(c) allows. She will be free to provide an explanation as to why she refused to cooperate, but the Government should be able to introduce the evidence and argue that more logically it is because she has a bias towards the Accused and against the Government and therefore the members should doubt the credibility of her testimony.

4. **Oral Argument.** The Government desires oral argument on this motion.

5. **Relief Requested.** The Government respectfully requests the Court deny the Defense motion to preclude the Government from offering evidence that Ms. [redacted] requested to speak with her lawyer prior to speaking with NCIS. The Government agrees that it will not offer evidence that the Accused declined to participate and refused to assist in various portions of the [redacted] investigation.

[redacted]

Paul T. Hochmuth

CERTIFICATE OF SERVICE

I hereby certify that, on 6 December 2019, I caused a copy of this motion to be served on the Defense counsel and the Court.

[redacted]

Paul T. Hochmuth

NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **CRAIG R. BECKER** **LT/O-3** **U.S. NAVY**	**DEFENSE MOTION FOR APPROPRIATE RELIEF: EXCLUDE THE IMPROPER OPINIONS OF WITNESSES** **22 NOVEMBER 2019**

1. Nature of Motion

Pursuant to R.C.M.906(b) and R.C.M. 920(e)(7), the Defense respectfully moves this court to exclude improper opinions and character evidence of witnesses.

2. Summary of Facts

The Defense has interviewed a significant number of witnesses in this case to include law enforcement, friends, co-workers, and experts. The witnesses have provided the Defense the facts they intend to testify at trial. Many witnesses, including [redacted] nationals, have troubling opinions that are not admissible in a court of law.

Some of the witnesses intend to testify that Mrs. [redacted] was murdered, killed, or was a victim. While other witnesses desire to testify as to the type of scream they heard such as, "she screamed like she was being attacked or it was not a scream from someone committing suicide." There are some lay witnesses that will attempt to offer their expert opinions on how the marks were made on the roof or how Mrs. [redacted] was sitting on the window.

There are many lay witnesses that desire to testify about character evidence such as the type of people that Mrs. [redacted] would not hang out with and that she would not have committed suicide. There are also witnesses that will testify that Mrs. [redacted] had too much to live for to commit suicide or that she did not appear to be suicidal.

Finally, there are witnesses who intend to offer derogatory character evidence against LT Becker that his highly prejudicial and not admissible.

3. Discussion

Rule 701 governs the testimony of ordinary or "lay" witnesses. Like its federal counterpart, it is a significant departure from the common law as it permits a lay witness to provide opinion testimony when it is rationally based on the witness's perceptions and will be helpful to the trier of fact in understanding a witness or an important trial issue. Opinion testimony by expert witnesses is covered by Rules 702, 703 and 705.

The distinction between lay witness opinion testimony and expert witness opinion testimony resides largely in the basis for each category. Lay witnesses are permitted to offer an opinion in a very limited number of cases and only based on perceptions the average person would be entitled to draw from events they are familiar with and understand.

The 2013 amendment to Rule 701 eliminates any reference to lay witnesses testifying to "inferences." Like the Federal Rule, this change is based on courts not distinguishing between opinion and inference testimony and viewing opinion as a broader category which includes inference testimony.

The Rule requires that the opinion be rationally based on the witness's perception. It should be emphasized that there are two requirements here. The first is that the witness has perceived that which the witness testifies about. This may mean that the witness has seen something; it may mean that the witness has heard something; or in some cases it may mean that the witness has felt or touched something. All of these would qualify as perceptions of the witness. The second requirement is that the perceptions be rationally based.

When using Rule 701, courts have to be aware of the inherent dangers presented by certain types of lay witnesses. For example, when witnesses are called to identify photographs depicting someone involved in a criminal act, courts may prefer witnesses who are not police or parole officers to avoid suggesting to the factfinder an accused's prior criminal record, which might not be admissible under other provisions, such as Rules 404(b) and 609. See, e.g., *United States v. Farnsworth*, 729 F.2d 1158 (8th Cir. 1984) (no error in permitting parole officer, whose status was not revealed, to identify a defendant in bank surveillance film); and *United States v. Butcher*, 557 F.2d 666 (9th Cir. 1977).

The witness should clearly understand, before they take the stand to testify, that improper opinions are prohibited. This is particularly true for some of the [redacted] witnesses who are accustomed to a court system where hypnotism is used as a tool and there are very little restrictions on testimony. The Defense does not believe that the Government intends on introducing the improper opinions but out of an abundance of caution the witnesses must understand the parameters.

4. Relief Requested.

The Defense requests that the Military Judge exclude improper opinions of witnesses and ensure the witnesses understand the limitations of their testimony.

5. Oral Argument.

Unless the Government concedes the motion or this Court grants the relief on the basis of pleadings alone, the Defense requests oral argument on this matter.

[redacted]

J. J. SULLIVAN
Civilian Defense Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

THE UNITED STATES OF AMERICA **v.** **CRAIG R. BECKER** **LT USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO EXCLUDE THE IMPROPER OPINIONS OF WITNESSES** **4 DECEMBER 2019**

1. Nature of the Motion. The Government respectfully asks the Military Judge to reserve any ruling on the Defense motion until the Military Judge hears the testimony of the witnesses before they offer their observations and opinions.

2. Burden of Proof. Per R.C.M. 905(c)(2) the burden of persuasion is on the Government as the proponent of the Evidence.

3. Discussion. The Defense seeks to put the Government on notice that improper opinion evidence is not permissible. The Government fully understands the requirements of M.R.E. 701, 702, 703 and 704 and will fully comply with the relevant military rules of evidence and case law.

4. Oral Argument. The Government does not desire to make oral argument on this motion.

5. Relief Requested. The Government respectfully asks this Court to reserve any ruling on this motion and until hearing the testimony of the witnesses at trial.

[redacted]
PAUL T. HOCHMUTH
LCDR, JAGC, USN
TRIAL COUNSEL

CERTIFICATION OF SERVICE

A true copy of this motion was served on Defense counsel and the Court on 4 December 2019.

[redacted]

PAUL T. HOCHMUTH
LCDR, JAGC, USN
TRIAL COUNSEL

NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES OF AMERICA **v.** **CRAIG BECKER** **LT USN**	**Defense Motion In Limine—R.C.M. 914** **22 November 2019**

1. **Nature of Motion.**

In accordance with R.C.M. 914 and the Jencks Act, the defense requests the Court to preclude the following evidence: 1) Testimony from Mr. [redacted] and 2) Testimony from Ms. [redacted]

2. **Burden of Proof.**

As the moving party, the defense has the burden of proof by a preponderance of the evidence. R.C.M. 905(c).

3. **Summary of Facts.**

a. On 15 June 2016, Special Agent [redacted] and Special Agent [redacted] of the Naval Criminal Investigative Service ("NCIS") participated in a forensic re-creation at the site of Mrs. [redacted] death in [redacted]. Enclosure BBBB.

b. In support of the re-creation efforts, Special Agent [redacted] and LCDR Kimberly Kelly (Senior Trial Counsel) secured a Command Authorization for Search and Seizure of the apartment which was granted by Commander, Navy Region [redacted] Enclosure BBBB.

c. SA [redacted] application for the search authorization contemplated a potential prosecution of LT Becker by the United States government, and stated a desire to preserve evidence for that purpose. Enclosure BBBB at 8.

d. Attending the re-creation were two percipient witnesses—Mr. [redacted] and Ms. [redacted]. Enclosure CCCC.

e. Mr. [redacted] and Ms. [redacted] were the first witnesses on the scene after Mrs. [redacted] fall. Enclosure CCCC.

f. During the re-creation, Mr. [redacted] and Ms. [redacted] were prompted to individually recreate their movements and actions from the night of the Mrs. [redacted] death. Enclosure BBBB.

g. Mr. [redacted] and Ms. [redacted] also made statements during the re-creation in which they "explained everything that transpired on the night of [Mrs. [redacted] death," and answered clarifying questions from the [redacted] Magistrate. Enclosure BBBB.

h. The statements made at the re-creation by Mr. [redacted] and Ms. [redacted] were audio recorded by the [redacted] Magistrate. Enclosure BBBB.

i. Mr. [redacted] and Ms. [redacted] reported that they heard a scream, and then rushed to the sidewalk outside the Beckers' apartment where they found Mrs. [redacted] badly injured. Enclosure BBBB.

j. They also reported that they looked up from Mrs. [redacted] location and saw a bald man looking down from the window from which Mrs. [redacted] fell. Enclosure BBBB.

k. It is anticipated that the government will elicit testimony from these witnesses to contradict statements from LT Becker in which he stated that he never looked out of the window.

l. U.S. law enforcement, including those in attendance for the taking of the statements, took no steps to preserve these recordings, and the recordings no longer exist in the [redacted] investigative case file.

m. In official correspondence between U.S. law enforcement agencies, the investigation of Mrs. [redacted] death has been labeled as a "Joint Investigation with [redacted], NCIS and USACID with [redacted] as the lead investigative agency and NCIS as the lead Military Criminal Investigation Organization (MCIO). Enclosure DDDD.

n. In the months prior to the recreation, NCIS conducted a number of other investigative steps prior to the June re-creation. Enclosure EEEE; Enclosure FFFF

o. The initial steps of the investigation are described in the 5 December 2015 Report of Investigation and include, but are not limited to: conducting a Cellebrite analysis of Mrs. [redacted] boyfriend's phone; obtaining the lease agreement and [redacted] housing contract for the Becker's apartment; interviewing friends and co-workers of Mrs. [redacted] interviewing co-workers of LT Becker; obtaining investigative reports from CID; and photographing the exterior of the Becker's apartment. Enclosure EEEE.

p. Additional investigative steps are described in the 4 April 2016 Report of Investigation. These steps include, but are not limited to: conducting and recording an interview with friends of Mrs. [redacted] in Florida (Enclosure BB at); conducting and recording an interview with Mrs [redacted] parents (Enclosure BB at); conducting an interview of LT Becker's ex-wife; obtaining information on a life insurance policy for Mrs. [redacted] which had been taken out by her parents (Enclosure BB at); and obtaining LT Becker's service record. Enclosure FFFF.

q. The recordings of the interviews of Mrs. [redacted] parents, as well as interviews of Mrs. [redacted] friends in Florida, were provided to the defense in discovery.

r. On 18 April 2016, NCIS requested copies of LT Becker's and Mrs. [redacted] medical records from Naval Medical Center, Portsmouth, VA. In that request, NCIS indicated it was conducting an investigation "along with the [redacted] Federal Police." The records were obtained in May 2016. Enclosure GGGG.

s. On 26 April 2016, LCDR Kimberly Kelly (Senior Trial Counsel) met with [redacted] investigators and the judicial magistrate, and obtained a copy of the [redacted] investigative case file. LCDR Kelly also discussed jurisdictional issues and explained her position on delaying (not forfeiting) assertion of jurisdiction. Enclosure HHHH.

4. Discussion.

A. THE MILITARY JUDGE SHOULD PRECLUDE THE TESTIMONY OF MR. [redacted] AND MS. [redacted] BECAUSE OF THE INEVITABLE FAILURE OF THE GOVERNMENT TO COMPLY WITH R.C.M. 914.

The Jencks Act requires the military judge, upon motion by the accused, to order the government to disclose prior "statement[s]" of its witnesses that are "relate[d]" to the subject matter of their testimony after each witness testifies on direct examination. *See* 18 U.S.C § 3500(b). The Jencks Act is intended "to further the fair and just administration of criminal justice" by providing for disclosure of statements for impeaching government witnesses. *Goldberg v. United States*, 425 U.S. 94, 107 (1976) (quoting *Campbell v. United States*, 365 U.S. 85, 92 (1961)).

In 1984, the President promulgated R.C.M. 914 which "tracks the language of the Jencks Act, but it also includes disclosure of prior statements by defense witnesses other than the accused." *United States v. Pena*, 22 M.J. 281, 282 (C.M.A. 1986). Both R.C.M. 914 and the

Jencks Act afford the defense the opportunity to impeach witnesses and enhance the accuracy of trial proceedings through cross examination of witnesses. *United States v. Lewis*, 38 M.J. 501, 508 (A.C.M.R. 1993).

Under R.C.M. 914 (a), "After a witness other than the accused has testified on direct examination, the military judge, on motion of a party who did not call the witness, shall order the party who called the witness to produce, for examination and use by the moving party, any statement of the witness that relates to the subject matter concerning which the witness has testified. . ."

Under subsection (e) of the same rule, "If the other party elects not to comply with an order to deliver a statement to the moving party, the military judge shall order that the testimony of the witness be disregarded by the trier of fact and that the trial proceed, or, if it is the trial counsel who elects not to comply, shall declare a mistrial if required in the interest of justice." *See United States v. Muwwakkil*, 74 M.J. 187, 193 (C.A.A.F. 2015) (holding one of these sanctions was required when the government negligently failed to preserve a portion of the Article 32 testimony of the complaining witness).

The only difference between the facts at issue here and the facts in *Muwwakkil*, is that in *Muwwakkil*, a paralegal failed to appropriately "back up" a recording of a complainant's testimony at an Article 32 hearing (where defense counsel was present). Here, NCIS agents failed to preserve an audio recordings of interviews of two key witnesses, despite being present for those interviews. Further, there is no evidence that NCIS ever sought to obtain these recordings at a later date. As such, it is helpful to look at the court's analysis in *Muwwakkil* and compare it to the present case.

1. The Recorded Interview was a "Statement" Within the Government's Possession.

Under subsection (f)(2) of R.C.M. 914, "a 'statement' of a witness means: a substantially verbatim recital of an oral statement made by the witness that is recorded *contemporaneously* with the making of the oral statement and contained in a recording or transcription thereof." (emphasis added). In this instance, the audio recordings of the interviews of Mr. [redacted] and Ms [redacted] fall within the plain meaning of the term "statement."

2. The Government's Negligent Failure to Preserve Witness Recordings Made in its Presence Means the Government Elected Not to Comply with R.C.M. 914.

While the government may argue that the recordings were destroyed or lost, and are not, therefore, in their possession, that argument has been dispelled by C.A.A.F. In *Muwwakkil*, C.A.A.F. rejected the government's contention that the Trial Counsel could not "elect" to fail to comply with the rule because, at the time of trial, the recording no longer existed. *Id.* at 192-193. C.A.A.F. specifically asserted that such an interpretation of the rule would allow the government to avoid the consequences of R.C.M. 914's clear language by failing to preserve statements. *Id.* C.A.A.F. explained that the Jencks Act and R.C.M. 914 imposed upon the government an implied duty to preserve statements, and concluded that the government's position stood in "stark contrast to judicial interpretations of the Jencks Act by the Supreme Court, our predecessor court, and the federal circuit courts." *Id.* In this case, the government was in a position to obtain the recordings to preserve the evidence, and negligently failed to do so.

First, NCIS agents were actually physically present on 16 June when the statements were taken and recorded. In light of the implicit duty to preserve statements under *Jencks*, failing to obtain those statements at that time was negligent. This is particularly so in light of the NCIS agent's 15 June probable cause affidavit which clearly stated a need to preserve evidence for a potential prosecution by the U.S. government. From that affidavit, and their other actions to

preserve evidence during the recreation, it is clear that these agents foresaw court-martial proceedings. As such, their inaction to preserve the recordings was negligent and violative of R.C.M. 914. The negligence is then only magnified by the U.S. government's failure to obtain the recordings at any point since then.

3. Should the Court Hold That the Government Was Not in Actual Possession of the Statements, the Court Should Still Hold that the Disclosure Obligations of R.C.M. 914 Apply to the [redacted] Federal Police Because They Were Conducting a Joint-Investigation With NCIS.

As discussed above, the government has significant disclosure obligations under *Jencks* and R.C.M. 914 when a witness's statement is in the possession of U.S. government. Even when not in actual possession of the statements, the disclosure obligations can be extended to non-Federal entities when the prosecutorial arm of the federal government "is acting in concert with (e.g., jointly)," those non-Federal entities. *United States v. Brooks,* 79 M.J. 501, 507 (A.C.C.A 2019) (citing *United States v. Moeckly*, 769 F.2d 453, 463 (8th Cir. 1985). The assessment of the joint-nature of the relationship is akin to the analysis conducted for the purposes of Article 31, UCMJ. *United States v. Redd,* 67 M.J. 581 (A.C.C.A. 2008).

Determining whether entities are working jointly, or in concert, is a case-by-case, fact specific inquiry. *Brooks,* 79 M.J. at 507. Here, NCIS, by its own words refers to its investigation as being "conducted along with" the [redacted] Federal Police. Enclosure GGGG. Other U.S. law enforcement entities also characterized the relationship in similar ways. In its October 2015 Law Enforcement Status Report, US Army CID noted that the Becker case was a "Joint Investigation with [redacted] NCIS and USACID with [redacted] as the lead investigative agency and NCIS as the lead Military Criminal Investigation Organization." Additionally, in virtually every Report of Investigation, NCIS identifies their role as a "Limited Assistance Investigation," and notes that

all documents obtained since the initiation of the captioned investigation have been provided to the [redacted] Federal Police.

There should be no doubt that NCIS was acting jointly or in concert with the [redacted] Federal Police. The [redacted] have requested investigative assistance from U.S. law enforcement from the very start, and U.S. authorities have delivered, focusing mostly on the American side of the case, and accessing witnesses and evidence that the [redacted] authorities would not necessarily have access to. As such, the requirements of R.C.M. 914 apply. At trial, the government will be unable to produce Mr. [redacted] and Ms. [redacted] statements. To avoid the dangers of a mistrial, the Court should act now and preclude the government from calling these two witnesses.

4. Relief Requested.

The defense respectfully requests the Court to preclude: 1) testimony from Mr. [redacted] and 2) the testimony of Ms. [redacted]

5. Witnesses

Should the government dispute any of the facts asserted in this motion, the defense requests NCIS SA [redacted] to testify regarding the various steps NCIS took in its investigation of LT Becker prior to 17 June 2016, as well as the investigative steps it took on behalf of the [redacted] investigation. SA [redacted] can also testify about NCIS efforts to preserve other recordings made in the course of the investigation. As such, SA [redacted] testimony is relevant and necessary to the resolution of this motion.

6. Enclosures.

Enclosure BBBB – NCIS Report of Investigation dated 21 June 2016

Enclosure CCCC – Translated [redacted] Police Report re: Re-Creation

Enclosure DDDD – Memorandum from Army CID dated 26 Oct 2015

Enclosure EEEE – NCIS Report of Investigation dated 5 December 2015

Enclosure FFFG – NCIS Report of Investigation dated 4 April 2016

Enclosure GGGG – NCIS Requests for Medical Records dated 18 April 2016

Enclosure HHHH – NCIS Report of Investigation dated 29 April 2016

7. Oral Argument.

The defense requests oral argument on this motion.

[redacted]
LCDR Bryan M. Davis
Detailed Military Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion was served electronically on Trial Counsel and the Court on 22 November September 2019.

[redacted]
LCDR Bryan M. Davis
Detailed Military Defense Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

THE UNITED STATES OF AMERICA **v.** **CRAIG R. BECKER** **LT/O-3 USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION IN LIMINE PURSUANT TO R.C.M. 914**

1. **Nature of the Motion.** The Government respectfully requests the Court deny the Defense motion to preclude the testimony of Mr. [redacted] and Ms. [redacted] because the Defense has failed to establish recordings were made and, even if they were made, they cannot show that the Government possessed them.

2. **Burden of Proof.** As the moving party, the Defense bears the burden by a preponderance of the evidence.[1]

3. **Statement of Facts.**

a. On 8 October 2015 at approximately 2100, Mr. [redacted] and Ms. [redacted] were walking away from the Accused's apartment building when they heard a woman scream and call for help.

b. They both turned back towards the apartment building and saw Mrs. [redacted] on the sidewalk in front of the apartment building, badly injured but still alive. Both witnesses also looked up and saw the Accused (who they described as a bald man) in the window from which [redacted] fell.

c. Ms. [redacted] reported that she approached [redacted], caressed her head and tried to talk to her, but [redacted] was speaking English and Ms. [redacted] did not understand what she said. She also saw

[1] R.C.M. 905(c)(2).

the Accused come out of the apartment while he was on the phone. He went over to [redacted] and said "My God" several times.

d. Mr. [redacted] also reported that the Accused came out of the apartment building while on his phone. He went to [redacted] knelt close to her face, and repeated "My God" several times.

e. From the beginning, [redacted] took the lead in investigating the case.

f. [redacted] maintained control of the investigation with limited assistance from NCIS. As part of this, NCIS was not allowed to take part in many investigatory steps, including the autopsy of [redacted]

g. [redacted] was adamant that NCIS had no investigative jurisdiction in [redacted] and would not be granted access to the active [redacted] investigation.

h. NCIS was only allowed to assist [redacted] if they received a specific request from the [redacted] Judge of Evidence. An example of this was a request by [redacted] to run an extraction on [redacted] cell phone.

i. NCIS had to obtain permission from [redacted] just to take photographs of the exterior of the [redacted] residence.

j. [redacted] would not accept any official written reports from NCIS unless the [redacted] Judge of Evidence specifically requested them.

k. Even if NCIS attended a witness interview, they were told to take not actions and just observed.

l. NCIS did share some information with [redacted] upon their requests. However, the interviews referenced in Defense enclosures EEEE and FFFF were completed by NCIS and not provided to the [redacted] until the end f2016 upon a specific request by the [redacted] These

actions were only done because the [redacted] asked for assistance because all of those parties were either American citizens or worked aboard the U.S. military installation.

m. As part of the investigation, [redacted] conducted a forensic reconstruction of the crime scene on 15 June 2016 that involved Mr. [redacted] and Ms. [redacted]. NCIS was given permission to attend this part of the investigation, but they could only observe.

n. During the reconstruction, NCIS received permission from the [redacted] Magistrate in charge of the investigation to conduct scene documentation utilizing FARO.

o. NCIS only secured a search authorization of the Accused's apartment in order to conduct the FARO Scan imaging inside of LT Becker's apartment. The FARO scanning of the inside of the apartment was completely separate from the reconstruction taking place.

p. These FARO scans were completed and provided to the [redacted] upon their request, but were not completed for the [redacted]

q. Investigating Judge Pamela Lonfils conducted the reconstruction with Mr. [redacted] and Ms. [redacted], but they were done separately for the sake of objectivity.

r. Ms. Lonfils did not record the statements that Mr. [redacted] and Ms. [redacted] made during the reconstruction.

s. Due to a statement in an NCIS ROI, it appeared that the statements made by Mr. [redacted] and Ms. [redacted] might have been recorded.

t. Trial Counsel asked the [redacted] to contact Investigating Judge Pamela Lonfils to inquire about the audio recording. In an email dated 9 July 2019, from Mr. [redacted], he informed the Government that no recording was ever taken of witnesses and that Investigating Judge Pamela Lonfils only took her own personal notes.

u. On 10 July 2019, Trial Counsel notified the Defense in an e-mail: "Lastly, the audio notes requested in paragraph 1.d. of your 13 May 2019 discovery request were taken by the Magistrate Pamela LONFILS. She has confirmed that these audio recordings have been deleted once she finalized her report. You have a copy of the report. This satisfied paragraph 1. D. of your 13 May 2019 discovery request."

v. Investigating Judge Pamela Lonfils completed her report on 15 June 2016.

w. The U.S. did not assert jurisdiction in this case until 3 January 2018.

4. **Discussion.**

A. THE MILITARY JUDGE SHOULD DENY THE DEFENSE'S MOTION BECAUSE THEY HAVE FAILED TO ESTABLISH THAT A RECORDING EVER EXISTED.

Before the Defense can prevail on an argument that R.C.M. 914 and the Jencks Act mandate preclusion of Mr. [redacted] and Ms. [redacted] testimony, they must first establish a recording was created. They have failed to do so.

The Government previously inquired as to whether a recording ever existed of the reconstruction, but on 9 July 2019, Mr. [redacted] clarified that Ms. Lonfils did not make a recording. The only evidence that a recording ever existed is due to one sentence in an ROI that states "The Magistrate audio recorded both witnesses' statements as they explained everything that transpired on the night of V[redacted] death as well as her own clarifying questions and the witnesses responses." However, this was an error made by Special Agent [redacted] who saw Investigating Judge Pamela Lonfils place a device next to her mouth during the reconstruction.

The Government takes responsibility for causing the confusion here. Our 10 July 2019 e-mail to the Defense should have been clearer to state the witnesses were not recorded and Investigating Judge Pamela Lonfils only took dictations for herself instead of writing notes.

However, when the Government does not record a statement, there is no violation of R.C.M. 914 and there is no remedy for the Defense. United States v. Weller, 2012 CCA Lexis 154 (N.M.C.C.A) (finding that the Jencks Act did not apply to testimony provided at an Article 32 hearing when the testimony was not recorded).

The Defense has failed to establish by any burden of proof that a recording of the reconstruction ever existed. Thus, the Defense motion to preclude the testimony of Mr. [redacted] and Ms. [redacted] must be denied.

B. IF A RECORDING EVER EXISTED IT WAS NEVER IN THE ACTUAL OR CONSTRUCTIVE POSSESSION OF THE GOVERNMENT

Under R.C.M 914(a)(1), the Government is required to provide the defense with any prior statements by a witness after he or she testifies if the statement is "in the possession of the United States." This tracks closely and is based on 18 U.S.C. 3500(b), which is also known as the Jencks Act. As is relevant in this case, a "statement" is defined as "a substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and contained in a recording or a transcription thereof." R.C.M. 914(f)(2).

If a statement is never recorded, then R.C.M. 914 and the Jencks Act does not apply. Therefore, as stated above, the Defense's motion must fail. However, assuming arguendo that a recording existed at some point, the Defense must prove that it was in the actual or constructive possession of the Government. However, the Defense fails to establish this as well.

Actual possession is straight forward as it concerns whether the United States physically had control over the recording. In this case, even if [redacted] had made a recording, there is no evidence that NCIS or that anyone in the United States received a copy of it. In fact, Investigating Judge Pamela Lonfils stated that she destroyed the dictation notes after writing her report. Therefore, the analysis then turns to whether the United States had constructive possession of the statement.

The Court of Appeals for the Armed Forces and the Navy-Marine Corps Court of Criminal Appeals have never ruled on the meaning of constructive possession as it relates to R.C.M. 914 or the Jencks Act. However, the Army Court of Criminal Appeals and many federal circuits have tackled this area.

In United States v. Brooks, 79 M.J. 501, 508 (A.C.C.A 2019), the court followed the Third Circuit in holding that three factors should be looked at to determine if a statement is constructively possessed:

(1) Whether the party with knowledge of the information is acting on the government's 'behalf' or is under its 'control';
(2) The extent to which state and federal governments are part of a 'team,' are participating in a 'joint investigation' or are sharing resources; and
(3) Whether the entity charged with constructive possession has 'ready access' to the evidence.

Id. (quoting United States v. Reyeros, 537 F.3d 270, 281 (3d Cir. 2008). Additionally, the Brooks court held that in making the assessment, the surrounding facts should be looked at and the court is "not bound by the characterization of the investigation by civilian or military law enforcement agencies." Id. at 507 (internal citation omitted).

All three factors cited in Brooks work against the Defense in this case. First, [redacted] was never acting on the Government's behalf or under our control. From the beginning of the investigation, [redacted] ran things exactly how they wanted to run it and only allowed NCIS to participate with their permission and with strict rules in place. Second, it cannot be said that

[redacted] and NCIS were part of a team or participating in a joint investigation or sharing resources. [redacted] asserted jurisdiction of the case from the beginning. They would occasionally ask NCIS to do something for them. But there was no requirement to coordinate with NCIS and most of the time NCIS could only be a passive participant and they always had to wait to receive information from [redacted] For example, if NCIS attended an interview with the [redacted] they were only allowed to observe. In a "Joint Investigation" both parties act freely or they coordinate with each other to split up the work. In this situation, NCIS only acted upon the request of [redacted]. Finally, NCIS never had "ready access" to the evidence. This is true not only of the recording (assuming it existed), but for almost all the evidence that [redacted] collected. Only after the Secretary of Defense asserted jurisdiction did the [redacted] release the evidence to American authorities.

The Defense argues that constructive possession is established because NCIS stated in the ROI that its investigation was "conducted along with" [redacted] and Army CID labeled it as a "Joint Investigation." However, this is just looking at "the characterization of the investigation" by military law enforcement agencies and fails to address the surrounding facts as required by Brooks. Additionally, NCIS noting that its role was as a "Limited Assistance Investigation" and that it turned over all documents to [redacted] shows that [redacted] had all the control and power in this case.

Therefore, the alleged recording was never in the Government's actual or constructive possession.

5. **Evidence.**

1. The Government relies upon the prior testimony of SA [redacted] NCIS, regarding a joint investigation;

2. Testimony of SA [redacted], NCIS;

Govt. Exhibit 66 - Defense Discovery request dated 13 May 2019;

Govt. Exhibit 67 – [redacted] E-mail (Lonfils) dtd 9 July 2019;

Govt. Exhibit 69 – Hochmuth's Email to Defense dtd 10 July 2019;

Govt. Exhibit 70 – Lonfils Report of Reenactment of [redacted] and [redacted];

Govt. Exhibit 71 – Sec. Def. Decision Memo.

6. **Oral Argument.** The Government desires oral argument on this motion.

7. **Relief Requested.** The Government respectfully requests the Court deny the Defense motion to preclude the testimony of Mr. [redacted] and Ms. [redacted]

[redacted]

Paul T. Hochmuth

CERTIFICATE OF SERVICE

I hereby certify that, on 6 December 2019, I caused a copy of this motion to be served on the Defense counsel and the Court.

[redacted]

Paul T. Hochmuth

NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
UNITED STATES NAVY
GENERAL COURTS-MARTIAL

UNITED STATES **v.** **CRAIG BECKER** **LT/O-3 USN**	**GOVERNMENT MOTION TO EXCLUDE TESTIMONY OF WITNESSES AS TO DEFENSE MOTION AS TO SPEEDY TRIAL**

1. Nature of Motion.

The Government moves the Court to exclude the testimony of Admiral Michelle Howard, USN (retired); Vice Admiral John Hannik, JAGC, USN; Vice Admiral James Crawford, JAGC, USN (retired); Captain Joe Holtz, JAGC, USN; General Joseph Dunford, USMC, (retired) and Commander [redacted] JAGC, USN as irrelevant, unnecessary, and for a failure to comply with R.C.M. 703(c)(2)(B)(i). The Government notified the Defense of its denial of the production of these witnesses on multiple grounds via separate correspondence.

2. Summary of Facts.

The Government will respond substantively to the Defense's Speedy Trial motion via a separate filing. The Government concurs that [redacted] authorities were the sovereign prosecuting the accused for murder of his wife from October 2015 until January 2018 when the Secretary of Defense asserted U.S. jurisdiction. On 8 October 2015 the accused murdered his wife by pushing her out of a window in their apartment in [redacted].

Facts concerning the individuals requested are included below. The Government also incorporates the prior testimony of NCIS SA [redacted] who has testified extensively on the interaction between American and [redacted] law enforcement as well as timelines of the case.

3. **Discussion.**

The Defense motion is predicated upon timelines and a lack of assertion of jurisdiction by the Navy over the accused's multiple offenses. The Defense, while arguing for dismissal of all charges, bifurcates its arguments into viewing the charges in two separate sections: allegations from August 2013 and allegations from October 2015. This is further argued that the Navy had sole jurisdiction for the assault offense from August 2013 while [redacted] and the Navy both had jurisdiction over murder and related offenses from October 2015. While the motion claims that Navy prosecutors failed to assert or secure jurisdiction, however, none of the requested witnesses were billeted Navy prosecutors.

August 2013 – October 2015 offenses – Charge II, Specification 1 & Charge III

The accused is charged with a violation of Article 128, Charge II, Specification 1, from August 2013. The Government avers that the accused physically assaulted his wife at an U.S. Army hotel shortly after moving to [redacted] He is also charged with an offense from August 2013 to October 2015, a violation of Article 133, Charge III. This charge stems from his dishonorable actions of emotional and physical abuse towards his wife during the time they lived together in [redacted] The Navy had sole jurisdictions over these charges due to their location or the type of offenses.

None of the requested witnesses involve these offenses or this timeframes. The requested witnesses are not fact witnesses to the assault or physical/emotional abuse, they did not interview witnesses related to either offenses, and they are not law enforcement. None of the requested witnesses were the special court-martial convening authority of the accused who made initial decisions under R.C.M. 404 to not prosecute the assault charges. Offenses relating to emotional and physical abuse were not known until after Mrs. [redacted] murder in October 2015. The charged offenses are within the statute of limitations under Article 43, UCMJ. Issues of memories fading, witnesses moving on, or passing away were balanced by the President in creating a five year statute of limitations. While this will be addressed in the substantive motions response, it makes the testimony of these witnesses irrelevant, unnecessary and a waste of time and coupled with the failure to comply with R.C.M 703 the Court should rule that the Government need not produce the witnesses telephonically.

October 2015 offenses

On 8 October 2015 the accused murdered his wife by pushing her out of an apartment window in [redacted]. She fell seven stories and died shortly after hitting the ground. Local [redacted] police arrived and began investigating the case. [redacted] police were the primary law enforcement agency exercising jurisdiction. The accused was eventually charged in [redacted] court, though his case was dropped when the United States asserted jurisdiction in January 2018. Charges were preferred on 30 July 2018 against the accused.

During part of this time frame Admiral Howard was the Commander, [redacted]. She declined to assert jurisdiction based on the advice of her legal staff. Vice Admiral John Hannik, JAGC, USMN, was Commander, Naval Legal Service Command and thus in overall control of Region Legal Service Office [redacted]. Vice Admiral James Crawford, JAGC, USN, was the Judge Advocate General of the Navy and provided recommendations on the assertion of jurisdiction to the Secretary of the Navy. Captain Joe Holtz, JAGC, USN, was the Deputy Assistant Staff Judge Advocate International and Operational Law and provided recommendations regarding the assertion of jurisdiction to Admiral Crawford. Commander [redacted] JAGC, USN, was the Assistant Staff Judge Advocate for [redacted] but did not brief Admiral Howard on the issue. General Joseph Dunford, USCM, was the Chairman of the Joint Chiefs of Staff and recommended assertion of U.S. jurisdiction to the Secretary of Defense. On 2 January 2018 Secretary Mattis asserted jurisdiction which resulted in [redacted] dropping their murder charges.

Admiral Michelle Howard, USN (retired)

Admiral Howard was the Commander, [redacted] from June 2016 to October 2017. She declined to assert jurisdiction over the case based upon the advice of her staff judge advocates. As a result the case was forwarded to higher authority with an eventual decision made by the Secretary of Defense Mattis. The Defense motion does not mention her, her billet, or analyze how it is involved in the case. There is no proffer or synopsis of possible testimony. The motion, which focuses heavily on prosecutors from the Judge Advocate General's Corps versus line commanders, does not show how her testimony would be relevant or necessary. The timelines and decisions are known and her testimony would not provide any additional information. Prior to the filing of the defense motion she was not

interviewed by the Defense as they possess no contact information for her. The Court should rule that the Government need not produce her telephonically.

Vice Admiral Hannik

The Defense makes no reference in its motion to actions or opinions by Vice Admiral Hannik, who from 2015-2018 was Commander, Navy Legal Service Command and thus ultimately in charge of Region Legal Service Office [redacted]. Admiral Hannik did not act as a staff judge advocate for any Convening Authority, was not a trial counsel, and was not involved directly in the various decisions made by either Navy or [redacted] authorities. As noted in the Defense motion it was Vice Admiral James Crawford, JAGC, USN who provided advice on behalf of the Navy Judge Advocate General's Corps to the Secretary of the Navy.

In the Defense motion his name does not appear other than in the witness section. There is no discussion as to how he may be related to the various decisions made by the military. There is no proffer as to his relevance or necessity. There is any known statement by Vice Admiral Hannik. The Court should rule that the Government need not produce him telephonically.

Captain Joe Holtz, JAGC, USN

Captain Joe Holtz, JAGC, USN, legal opinion is known as it is written and included as an enclosure to the Defense's motion – LLLL-[redacted] The date of the opinion is 17 November 2017. It discusses pros and cons of waiving and asserting jurisdiction and makes a recommendation; a typical staff judge advocate act. Captain Holtz is not a convening authority but was giving advice as the Deputy Assistant Staff Judge Advocate (International and Operational Law). There is no discussion within the Defense motion as to his decision other than it is a data point on the timeline. He has not provided any statement and prior to the filing of the defense motion he was not interviewed by the Defense. Outside of his known written opinion there is no proffer or synopsis as to how his testimony is relevant or necessary. The Court should rule that the Government need not produce him telephonically.

Vice Admiral James Crawford, JAGC, USN (retired)

Vice Admiral James Crawford, JAGC, USN, legal opinion is known as it written and included as an enclosure to the Defense motion – LLLL – [redacted]. It is dated 9 November 2017. It makes a recommendation to the Secretary of the Navy as whether to assert jurisdiction or not in the accused's case. Vice Admiral Crawford is not a convening authority but was giving advice as the Judge Advocate General to the Secretary of the Navy. (On 12 December 2017 then Secretary of the Navy Richard Spencer prepared a memorandum for the Secretary of Defense discussing the case and its jurisdiction. This is included in the Defense motion – LLLL – [redacted].

After assertion of jurisdiction by Secretary of Defense James Mattis on 2 January 2018 – LLLL – [redacted] – VADM Crawford responded to the Secretary's order with another memorandum – LLLL – [redacted] of 23 January 2018. This memorandum is obviously created by staff and not personally by VADM Crawford. It was delivered to then Secretary of the Navy Spencer. It outlines facts of the case while discussing how foreign criminal jurisdiction issues are handled other countries such as [redacted] Without a synopsis or a proffer of testimony it is impossible to determine how Vice Admiral Crawford's testimony would be relevant or necessary, particularly coupled with his previous opinions. The Court should rule that the Government need not produce him telephonically.

General Joseph Dunford, USMC (retired)

General Joseph Dunford's opinion is known as it is written and included as an enclosure to the Defense motion – LLLL – [redacted] The opinion is dated 19 December 2017. General Dunford did not concur with waiving jurisdiction. This opinion includes a handwritten notation arguing against waiving jurisdiction. There is no discussion within the Defense motion as to his decision other than it is a data point on the timeline. Outside of his known written opinion there is no proffer or synopsis as to how his testimony is relevant or necessary. Prior to the filing of the defense motion he was not interviewed by the Defense nor does the Defense have contact information for him to provide to the Government. The Court should rule that the Government need not produce him telephonically.

Commander [redacted] JAGC, USN

Commander Grant was the Assistant Staff Judge Advocate for [redacted] during Admiral Howard's time as Commander, [redacted] He and his office largely relied upon the International Law attorney at Region Legal Service Office [redacted] to provide analysis of Foreign Criminal Jurisdiction issues. He did not brief Admiral Howard personally. He has not made any statement to law enforcement nor has he ever been interviewed by the Defense. There is no proffer or synopsis as to how his testimony is relevant or necessary, nor can it be deduced from the motion or enclosures. The Court should rule that the Government need not produce him telephonically.

4. **Burden of Proof**.

While the Government is moving the Court, the Defense has the burden under R.C.M. 703(c)(2)(B)(i) to provide a synopsis of the expected testimony sufficient to show its relevance and necessity. They have not done so.

The Defense has not provided a current telephone number/contact information for Admiral Howard (retired) and General Dunford (retired). While the Defense requested such information as discovery post the filing of the motion, the Defense requested witnesses without ever attempting to comply with R.C.M. 703(c)(2)(B)(i).

5. **Relief Requested**.

The Government requests that the Court determine that the above listed witnesses need not be produced for telephonic testimony.

[redacted]
J. L. JONES

****

CERTIFICATE OF SERVICE

I hereby certify that, on 2 December 2019, I caused to be served a copy of this motion on the Defense counsel and the court.

[redacted]
J. L. JONES

NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **CRAIG R. BECKER** **LT/O-3** **U.S. NAVY**	**DEFENSE MOTION FOR APPROPRIATE RELIEF UNDER R.C.M. 906(b)(7)** **MOTION TO COMPEL DISCOVERY** **22 NOV 2019**

1. Nature of Motion

Pursuant to R.C.M. 906(b)(7) and R.C.M. 701, the Defense respectfully requests the court to compel the Government to produce following evidence related to a State Farm Insurance policy taken out by Mr. [redacted]

2. Summary of Facts

a. On 15 November 2019, the Defense submitted to the Government a request for discovery. The discovery request included a request for: All in information relating to the insurance policy on Mrs. [redacted] that has Mr. [redacted] as a beneficiary; including the date the policy was obtained, current status of any claim on such policy, and terms including those which would void the policy.

b. On 22 November 2019, the Government provided the Defense with a two page document that did indicated that [redacted] had such an insurance policy and included the insurance company name and policy number but that did not include the answer to any of the requested matters.

3. Discussion of Law

"Discovery practice under Article 46 and R.C.M. 701 "promotes full discovery . . . eliminates 'gamesmanship' from the discovery process" and is "quite liberal . . . . Providing broad discovery at an early stage reduces pretrial motions practice and surprise and delay at trial." *Manual for Courts-Martial, United States* (2002 ed.), Analysis of Rules for Courts-Martial A21-32. The military rules pertaining to discovery focus on equal access to evidence to aid the preparation of the defense and enhance the orderly administration of military justice. To this end, the discovery practice is not focused solely upon evidence known to be admissible at trial." United States v. Roberts, 59 M.J. 323, (C.A.A.F. 2004). Indeed, it includes materials that would assist the defense in formulating defense strategy. See United States v. Ebb, 66 M.J. 89 (C.A.A.F. 2008). This broad interpretation of military discovery was the state of the law prior to the most recent changes to R.C.M. 701. The current version of R.C.M. 701 now requires even broader discovery obligations on the part of the Government by eliminating the former materiality requirement. *Manual for Courts-Martial, United States* (2019 ed.), Analysis of Rules for Courts-Martial A15-9. R.C.M. 703(f) states that each party is entitled to the production of evidence that is relevant and necessary.

Mr. [redacted] is an important Government witness in this case. He will testify on a number of topics including his daughter's relationship with LT Becker, LT Becker's knowledge of his daughter's cell phone code, and statements made by LT Becker that could amount to a confession ("You did this to me."). Given how important Mr. [redacted] is as a Government witness, it is equally important for the Defense to be able to impeach and challenge his credibility. The

fact that he had an insurance policy on his daughter provides Mr. [redacted] with a motive to fabricate to ensure that Mrs. [redacted] death is not seen as a suicide, a condition which voids most life insurance policies. The details regarding this policy are what provide weight to this attack on his credibility. Knowing the exact terms of the policy, when it was taken out, and if there are remaining funds to be distributed would allow the Defense to effectively challenge this crucial Government witness.

4. Relief Requested

The Defense requests that the Military Judge order production of information related to Mr. [redacted] insurance policy.

5. Oral Argument.

Unless the Government concedes the motion or this Court grants the relief on the basis of pleadings alone, the defense requests oral argument on this matter.

[redacted]
J. A. GUARINO
CDR, JAGC, USN
Detailed Defense Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

THE UNITED STATES OF AMERICA **V.** **CRAIG R. BECKER** **LT USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTIONS TO COMPEL DISCOVERY** **6 DECEMBER 2019**

1. Nature of the Motion.

The Government hereby responds to Defense Motion to Compel Discovery. The Government has attached an e-mail response to the Defense's discovery request in which we believe answers most of the Defense's request. In addition, the Government has subpoena all records from State Farm Insurance Company regarding this policy and will provide to the Defense as soon as we have them.

2. Evidence. Govt Exhibit 68 - E-Mail from Mr. [redacted] dtd 2 December 2019.

3. Oral Argument. The Government does not believe oral argument is necessary.

[redacted]
Paul T. Hochmuth

CERTIFICATE OF SERVICE

I hereby certify that, on 6 December 2019, I caused a copy of this motion to be served upon the Defense Counsel and Court.

[redacted]
Paul T. Hochmuth

Appellate Exhibit LXXVII
Page 1 of 1

NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
UNITED STATES NAVY
GENERAL COURTS-MARTIAL

UNITED STATES **v.** **CRAIG BECKER** **LT/O-3 USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO DISMISS FOR VIOLATION OF SPEEDY TRIAL**

1. Nature of Motion.

The United States requests that the Court deny the Defense motion to dismiss all charges because the Defense has not met its burden to prove there was a violation of Article 10, UCMJ, Rule for Courts-Martial 707, or the Fifth and Sixth Amendments of the Constitution. .

2. Summary of Facts

a. Prior to her death the accused and Mrs. [redacted] had a contentious marriage [redacted] by the accused. Chronologically the first charged event occurred in August 2013 when the accused assaulted Mrs. [redacted] at an Army hotel in [redacted]. The accused and his wife had PCS'd to [redacted] and were staying at the [redacted] outside [redacted]

b. The accused assaulted this wife by throwing her about their hotel room and placing his hands around her throat and pressing down. She initially informed military police but later recanted.

c. Between August and November 2013 the accused was investigated by law enforcement for this domestic violence assault. The accused described the investigation as a "living nightmare." No charges were preferred or administrative action taken.

d. Between August 2013 and October 2015 the accused physically and emotionally abused his wife. While this information was somewhat known to multiple friends and family, it was not brought to the attention of military authorities until after her murder.

e. On 8 October 2015 the accused murdered his wife by pushing her out of the

7th floor window of their [redacted] apartment. [redacted] police responded immediately and informed the accused that he was "both a victim and a suspect." The accused made numerous statements to [redacted] police including telling them that he and his wife were separated, that she had attempted a reconciliation that night and after being rebuffed she committed suicide by jumping out the window. He denied any previous assaults on his wife.

f. [redacted] arrested the accused for murder in March 2016 and began prosecuting his case in [redacted] courts. [redacted] police were the lead investigative agency with the Naval Criminal Investigative Service only acting in a liaison status. The United States did not invoke jurisdiction under the [redacted] treaty at that time. In April 2016 and November 2016 Navy prosecutors travelled to [redacted] to investigate the possibility of a court-martial in a country with no Navy Legal presence and minimal infrastructure support.

g. The accused was released from [redacted] jail on 14 July 2016 at the insistence of the US military but remained on house arrest in [redacted] until 9 January 2018. During this time the time the [redacted] police completed their investigation and discussed with the American military the issue of primary jurisdiction. In the summer of 2017 the American military repeatedly questioned [redacted] as to when the investigation would be closed.

h. In September 2017 [redacted] closed its investigation and prepared to move forward. The Navy evaluated the case which involved recommendations from multiple offices and Navy lawyers. By November 2017 it was recommended to the Secretary of the Navy that the United States cede jurisdiction to the [redacted] In December 2017 the Chairman of the Joint Chiefs of Staff recommended against relinquishing jurisdiction to the [redacted]. Secretary of Defense James Mattis ordered the invocation of jurisdiction in January 2018.

i. Once the United States invoked jurisdiction the [redacted] authorities ceased their prosecution and any further investigation. The Naval Criminal Investigative Service then became the lead investigative agency. Their investigation uncovered additional statements by Mrs. [redacted] to friends and family that discussed the assault in August 2013 and why she recanted. [redacted] authorities had not focused on the accused prior assault during their murder investigation.

j. Original Charges were preferred in July 2018 against the accused to include

murder, assault and conduct unbecoming, encompassing a time frame from 2013 to 2015.

Additional facts included within the Discussion section and are incorporated herein.

3. Discussion.

A. The Defense Failed to Meet Their Burden to Show That There was Egregious Pretrial Delay and That The Accused Suffered Actual Prejudice Under the Fifth or Sixth Amendment

While the Sixth Amendment provides the right to a speedy trial post-indictment, the Supreme Court has held that the statute of limitations provides "'the primary guarantee against bringing overly stale criminal charges'" pre-indictment. *United States v. Lovasco*, 431 U.S. 783, 789 (1977) (*quoting United States v. Marion*, 404 U.S. 307, 322 (1971). The Court noted that the "Due Process Clause has a limited role to play in protecting against oppressive delay." *Lovasco*, 431 U.S. at 789. Neither party can cite a single case where the Supreme Court found a violation of an accused's speedy trial rights under the Due Process Clause. Further, the Supreme Court held that "[b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation. We, therefore, have defined the category of infractions that violate 'fundamental fairness' very narrowly." *Dowling v. United States*, 493 U.S. 342, 352 (1990).

While the Supreme Court has never explicitly fashioned a remedy or test for determining when an accused's speedy trial rights under the Due Process Clause are violated, the Courts of Appeals for the Armed Forces established a two-prong test in *United States v. Reed*, 41 M.J. 449 (C.A.A.F. 1995). In *Reed*, the Court followed other federal courts in holding that an accused has the burden of proof when alleging a speedy trial violation. *Id.* at 452. In order to meet the burden the accused must show (1) there was an egregious or intentional delay, and (2) that the accused suffered actual prejudice from the delay. *Id.* To show actual prejudice, the accused must show "(1) the actual loss of the witness, as well as 'the substance of their testimony and efforts made to locate them,' or (2) the loss of physical evidence." *Id.* (internal citations omitted).

However, even the loss of a witness does not automatically meet the second prong of actual prejudice. In *Lovasco*, the accused was indicted for possessing stolen firearms. *Lovasco*, 431 U.S. at 784. The indictment occurred 18 months after the offense was

committed and about 17 months after the investigation had concluded. *Id.* at 784-85. Subsequent to the investigation wrapping up but before the indictment, two witnesses that the accused deemed as material passed away. *Id.* at 785-86. On this basis, the accused claimed that his speedy trial rights under the Due Process Clause were violated. *Id.* at 784. The Supreme Court rejected this claim and held that the prosecution of the accused after an investigative delay, did not deprive him of due process even though he could show that he might have been prejudiced by the lapse of time. Instead the Court noted that "proof of prejudice is generally a necessary but no sufficient element of a due process claim, and that the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused." *Id.* at 790.

1. The Defense Cannot Meet Their Burden to Show That There was an Egregious Delay

The accused murdered his wife in October 2015 and charges were preferred in July 2018. This case is an overseas murder trial in a location with limited Navy presence, no Navy trial counsel or legal service office, involving over 50 witnesses including experts, foreign law enforcement, interaction with the US Army, medical evidence through foreign doctors, digital evidence and foreign language barriers. It's complex.[1]

The Defense argues that the US Navy intentionally delayed invoking jurisdiction in an egregious delay tactic to strip the accused of his constitutional right to a speedy trial. What is evident is that the Navy did not engage in a pattern of seeking delay in the effort to strip the accused of his constitutional rights. The Navy made a detailed analysis of the pros and cons of trying a complex murder case overseas where it lacks many resources, staff, infrastructure, compulsory process for critical witnesses and even a courtroom. This was balanced against the fact that the crime was one of the most egregious possible crimes – murder – which any sovereign has the right to investigate and prosecute within its borders. The accused lived in [redacted] and his case involved [redacted] police, [redacted] medical, [redacted] civilian witnesses, [redacted] experts and which occurred literally on the public streets of [redacted]. This is distinctly different than a case occurring on base which involves American servicemembers, US military police or law enforcement, US military

[1] Due process issues related to Charge II, Specification 1 which occurred in August 2013 were addressed in a separate motion.

medical and US citizen witnesses.

As shown by the various memos written by numerous legal authorities, this case made its way through the Department of the Navy, through the Chairman of the Joint Chiefs of Staff and all the way to the Secretary of Defense for final decision. This is an intense process, far beyond the power of Navy prosecutors to control, who according to the Defense had a Machiavellian plan to strip the accused of his speedy trial rights by manipulating jurisdiction issues. The Navy repeatedly stated that [redacted] should try this murder; it was never its plan to cause delay for any tactical advantage and then assert jurisdiction at a later date for wildly complex court-martial. Navy prosecutors lack the authority to control such a process and never tried to do so. Delay of such a case hinders prosecution by people moving on in their lives while creating future litigation. This is hardly a recipe for success in the future nor one a prosecutor would choose.

The Navy advised numerous authorities that [redacted] was the proper forum for trial. This delay lasted from October 2015 to January 2018, approximately 28 months. This delay is not egregious as articulated by *Reed*. The accused was arrested in March 2016 and from October 2015 until then the accused was viewed as a suspect and victim. There is no reason to hold this time against the Governnment. See, LLLL – [redacted]. To allow local law enforcement to review a murder on their public streets is hardly an egregious delaying act. This reduces the time to 22 months from [redacted] arresting the accused until the invocation of US jurisdiction in January 2018.

In April 2016 Navy prosecutors flew to [redacted] to discuss with [redacted] prosecutors the case. NCIS noted that this investigation was a [redacted] investigation, not a joint investigation. NCIS ROI of 29 April 2016 noted "This limited assistance investigation was initiated to coordinate with the [redacted] and to provide details and disposition of the events surrounding V/[redacted] death to command. [redacted] maintains primary investigative jurisdiction since the death occurred at V/[redacted] off base residence located at [redacted]" See, LLLL – [redacted] It is evident that the Navy was not orchestrating delay for tactical reasons or in an effort to strip the accused of his rights. In June 2016 NCIS request permission to attend a [redacted] re-enactment of the murder, showing again it was a [redacted] driven investigation. See, LLLL – [redacted]. In November 2016 the Navy request permission to have Navy trial counsel visit [redacted] to assess the possibility of a court-

martial. Again, the Navy was seeking permission to visit so it could assess the possibility of invoking jurisdiction for a successful court-martial. See, LLLL – [redacted]. In July 2017 the US military requested information from [redacted] authorities as to when [redacted] would close its case. See, LLLL – [redacted] It is evident at this stage that the US military was not orchestrating a delay but attempting to cooperate with [redacted] authorities who had the lead investigation to a murder on their street. In August 2017 the Northern Law Center of the US Army notified [redacted] authority that the Department of Defense was considering invoking jurisdiction. See, LLLL – [redacted]. This was not orchestrated by the Navy or Navy trial counsel and it noted that this issue was "working with the highest bodies in the Department of Defense in Washington concerning the jurisdiction priority." On 15 September 2017 the [redacted] authorities notified the Northern Law Center that the investigation was closed and the file was to be submitted to the [redacted] courts. See, LLLL – [redacted].

The Navy routed memorandum discussing the pros and cons of invoking jurisdiction. On 9 November 2017 a memorandum for the Secretary of the Navy discussed the case and whether the [redacted] required the United States to assert jurisdiction over him. [2] See, LLLL – [redacted]. A Navy memorandum from the International and Operational Law Department on 17 November 2017 recommended against invocation of jurisdiction. See, LLLL – [redacted]. On 12 December 2017 the Secretary of the Navy provided a memorandum for the Secretary of Defense. See, LLLL – [redacted]. On 19 December 2017 the Chairman of the Joint Chiefs of Staff recommended invocation of jurisdiction. See, LLLL – [redacted]. This letter notes the long-standing policy of invocation of jurisdiction while also noting the recommendations of multiple Navy leadership levels that [redacted] prosecute the case. On 2 January 2018 Secretary of Defense Mattis invoked U.S. jurisdiction. See, LLLL – [redacted]

What the timeline shows is that an incredibly complex issue involving treaties, host nation relationships and long-standing policy made its way through the Department of the

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[2] Contrary to the assertion of the Defense the accused does not have an individual enforceable treaty right to be tried solely by the United States. The [redacted] Treaty is a contract between parties that confers rights on the states, not the individuals of the states. There is no personal right of the accused to be tried solely or only by the United States. The policy of the United States has been to maximize jurisdiction but the accused has no enforceable personal right in the policy of the United States. Nevertheless the issue is moot as the accused is only being tried by the United States.

Navy and Department of Defense. The discussion of jurisdiction existed between the two nations as [redacted] was the primary investigative lead. The letters between both sides show a lack of coordination at times, confusion as to who is making what decision, and some level of exasperation between them. It shows that Navy legal provided advice showing the pros and cons of invoking jurisdiction as it made its way through the chain of command. What is also clearly shows is no egregious delay, no attempt at a tactical delay and certainly no control by Navy prosecutors. For a complex murder which occurred on the streets of a foreign country the delay in the case is not egregious. The time of the delay is not egregious. The Defense has not met its burden with the first *Reed* prong and its request to dismiss all charges should be denied.

2. The Defense Cannot Meet Their Burden to Show That the Accused Suffered Actual Prejudice

Even assuming *arguendo* that there was egregious delay, the Defense's motion should still be denied because they cannot prove actual prejudice. The Defense claims that the Accused has suffered actual prejudice because Mrs. [redacted] is deceased. However, the Government cannot be faulted for this as it was not foreseeable that the Accused would murder Mrs. [redacted], thus causing her absence. Further, the Accused cannot benefit from his own misconduct. As stated in the Government's forfeiture by wrongdoing motion, it is common sense and public policy that an accused cannot profit from their own criminal acts. To hold that the Accused's speedy trial right was violated due to Mrs. [redacted] inability to testify would be to provide him with a windfall for his own criminal misconduct.

The Defense makes no claim of prejudice that has not already been articulated in its other Due Process motion. There is no discussion of how evidence relates to the murder and surrounding charges as opposed to Charge II, Specification 1, which has already been litigated. The Defense does not articulate what evidence has been lost, what witness other than the one the accused brutally murdered has died, or what witness is missing. All the possible Defense arguments relate to Charge II, Specification 1, which has already been litigated.

Witnesses being unavailable or deceased is hardly unique. No murder victims testify at murder trials. Many victims of domestic violence refuse to participate in the

prosecution. Co-accused in conspiracies cannot force other co-accused to testify. Witnesses may claim a wide variety of privileges from self-incrimination to martial privilege. The issue of a witness being unavailable is predicated on the witness being alive. The death of a witness does not prevent evidence related to that witness from being admitted so long as it is admissible under the Military Rules of Evidence. See, M.R.E. 804(b) (2) Statement under Belief of Imminent Death. See also, *United States v. DeCarlo*, 1 M.J. 90 (C.M.A. 1951). As the Defense does not explain who died, other than Mrs. [redacted], they can show no prejudice as to the murder and surrounding charges.

The Government assumes that the lost evidence is a rehash of its earlier claims of 911 tapes and NCIS notes. The Government assumes the Defense claims actual prejudice because of the loss of physical evidence in the way of the 911 calls and NCIS notes.[3] However, the Defense fails to meet the second prong of *Reed*, which requires them to show actual prejudice because they cannot prove that the 911 calls or NCIS notes are exculpatory – the most they can do is speculate that the evidence may be exculpatory, which is clearly insufficient to meet their burden. This is similar to *California v. Trombetta*, 467 U.S. 479 (1984) and *Killian v. United States*, 368 U.S. 231 (1961). In *Trombetta*, the accused was charged with DUI and subsequently filed a motion to suppress the results from his breath test because his breath sample was not preserved for the Defense to test it. *Trombetta*, 467 U.S. at 481. The accused claimed that the failure to preserve the sample was a violation of his due process rights because it was a destruction of *potentially* exculpatory evidence. The Court compared the case to *Killian* where a due process violation was raised because an FBI agent had destroyed his handwritten notes after using them to create a written report. *Id.* at 242. In following *Killian*, the Court noted that there was nothing requiring the Government to maintain the breath sample; the sample was not destroyed in an attempt to hide evidence from the accused; and most importantly the accused had no proof that the breath sample would provide exculpatory evidence – the accused only alleged that it *could* be exculpatory. *Trombetta*, 467 U.S. at 488-89. Therefore, because the accused could not show that the breath sample would lead to exculpatory evidence, the Court held that the

[3] The Defense argues that the loss of memories of Mr. [redacted] and law enforcement personnel is actual prejudice. However, under *Reed*, actual prejudice only looks at whether there is an "actual loss of a witness" or "loss of physical evidence." Memories are not witnesses or physical evidence and thus are not part of the calculation. Despite this, the Defense still fails to show how the witnesses would provide exculpatory evidence if their memories were perfect. It is expected Mr. [redacted] a [redacted] citizen, will participate at trial and thus be subject to cross-examination.

accused's due process rights had not been violated.

In the present case, just like in *Trombetta*, the Defense has failed to offer any evidence or explanation for how the 911 tapes or the NCIS notes, if they still existed, would be exculpatory. Instead, the Defense claim earlier that the 911 tapes would provide them the opportunity to impeach Mr. [redacted] due to his previous inconsistent statements. This claim though is pure speculation because it is unknown what was said on the 911 tapes. Moreover, the Defense can impeach Mr. [redacted] with his previous statements because he will testify and can be confronted by the Defense. The loss of NCIS notes does not establish actual prejudice. As the Defense has written in prior motions, "the absence of the notes prevent the defense from obtaining *potentially* impeaching information" (emphasis added). Finally, the defense claims that the accused was dropped from Harvard Business School. The Defense makes no linkage as to why the accused was dropped from school to his trial. A student could be dropped for many reasons – grades, attendance, tuition, lack of progress, the list could go on forever. The Defense has not shown how the accused being dropped from school is at all related to his legal issues. Therefore, the Defense cannot show actual prejudice and they have not met their burden in proving that the Accused's right to a speedy trial was violated.

***United States v. Busby* & Sole Jurisdiction**

The Defense cites *United States v. Busby*, 1996 CCA LEXIS 456 (N.M.C.C.A. 1996) for the proposition that the case could or should have been bifurcated between charges within the sole jurisdiction of the Navy and charges within the jurisdiction of the Navy and [redacted] *Busby*, an unpublished case that is an Article 62, UCMJ, appeal, is easily distinguishable.

Busby wrongfully appropriated a truck and was involved in a wreck that killed an [redacted] national. He was charged with, amongst other charges, negligent damage of military property and wrongful appropriation of military property. These two offenses were solely military offenses under the jurisdiction of the Navy. He was also charged with wrongful damage of non-military property and three specifications of assault with means likely to produce death or grievous bodily harm. *Id* at 456. There was a delay of three years while [redacted] and Navy authorities determined who would prosecute the case. When finally charged the Defense moved to dismiss for violation of the Fifth Amendment's Due Process clause. The trial court granted the motion and the Government appealed.

The Defense argues that the case should have been considered a series of offenses versus a unified case; not so. R.C.M. 601's Discussion notes that "Ordinarily all known charges should be referred to a single court-martial." The Government has taken all known charges and referred them to a single court-martial. The 2013 incident was reviewed in 2013 and the Government declined to charges the accused, in part because of the victim's recantation. It is absurd now to argue that the Government should have charged the accused either then or immediately in 2015 when he murdered his wife. Once the accused murdered his wife law enforcement and authorities began to review the accused's actions and his marriage. It placed into greater context the August 2013 incident; taking it from an isolated incident with an uncooperative victim to the first data point in a series of events culminating in her death. Thus Charge II, Specification 1 was reviewed and viewed through a lens containing more overall information that placed it into greater context. As to Charge III, an Article 133 offense, this information was not known until after the accused murdered his wife in 2015. While a military only offense, the charge is well within the statute of limitations and is tied to the accused's interaction and overall behavior towards the victim. Trying the accused on this alone, say in 2016, would have made zero sense when the final and penultimate act that the accused did was slay his wife. It places his actions into context, the repeated emotional and physical abuse that resulted in her death.

Busby is distinguished as it is series of events that occur over a small period of time. The charges were all intertwined with the negligent damage to military property – the truck – and wrongful appropriation – of the truck – were the proximate cause and result of the wreck. Here the accused started abusing his wife at least two years before he killed her and continued a pattern of abuse in the interim.

Busby also discusses evidence that the Military Judge should've included in his trial ruling but failed to do so – just as the defense does not include any information in its motion. The Court stated "We would have preferred that the military judge have made specific findings as to what each of the witnesses would have said, how the evidence would have benefitted the accused, and why the accused would not be able to get that evidence before the trier-of-fact in another way." *Id.* The Defense motion does not discuss what witnesses would have said, in fact it list no witnesses at all. The Defense motion does not list or discuss how the evidence would have benefitted the accused. The argument that Mrs. [redacted] would have been alive and thus a possible witnesses, as has been argued

previously, has to be tempered by the fact that the accused killed her and thus makes her unavailable. The Defense motion does not discuss how the defense would not be able to get evidence before the trier of fact. The Defense list no specific evidence at all or how in way they are prejudiced. The very evidence *Busby*'s opinion lamented is missing is also missing in the Defense motion.

"To prevail on this motion at trial, the accused had a heavy burden of proving two elements of his Due Process claim. First, he had to show that the Government engaged in "egregious or intentional tactical delay." Second, he must show that he suffered "actual prejudice" as a result of this delay." *Id* (internal citations omitted). The Defense makes conclusory statements that the Government engaged in intentional or tactical delay. The evidence is clear that Navy prosecutors had no ability to unilaterally assert jurisdiction and this complicated legal, jurisdictional, treaty based decision that balanced international relations with a [redacted] partner is beyond their control. As shown by the Defense's own evidence the US military was attempting to alleviate his [redacted] confinement conditions – hardly the ploy of a military attempting to delay jurisdiction. Nor do the recommendations of Navy Judge advocates show that the Navy was engaging in intentional tactical delay. The recommendations were to allow [redacted] o take the case entirely, not to delay in the hopes that evidence is lost, memories fade, and witnesses disappear, while plotting to secure jurisdiction later. A basic understanding of prosecuting shows that delaying a case for years actually impedes the prosecution for the very reasons the Defense now claims – evidence is lost or misplaced which may show guilt, memories fade as people move on with their lives (which generally assist the Defense), and witnesses disappear, such as eye witnesses who see a woman murdered. These issues make prosecution harder, not easier, and the Navy did not engage in a series of actions to increase the difficulty of prosecution in a country that has limited Navy connection, no history of court-martials in country, where the investigation is in a foreign language, where witnesses are not subject to compulsory process, where there is no courtroom, where there is no brig, and the cost of trial is astronomical.

Second, the accused must show that he suffered "actual prejudice" as a result of this delay. The defense makes no analysis of actual prejudice. The idea that he is prejudiced in the 2013 assault because Mrs. [redacted] is dead is absurd because the accused murdered her. The accused points to no exculpatory evidence, no lost legal defense, nor any witness lost

other than Mrs. [redacted]. The delay due to international treaty obligations and negotiations reaching the Secretary of Defense level did not result in any prejudice to the accused. The Court should not dismiss any charges under *Busby* and the Fifth Amendment and the Defense motion should be denied.

Article 10, UCMJ

The Defenses alleges a violation of Article 10, UCMJ for speedy trial but does not make any attempt to provide a fact based analysis. Their argument is coupled in an omnibus section of speedy trial violations to include R.C.M. 707 and the 5th and 6th Amendments. "Although Article 10, UCMJ, is generally directed toward the advent of a speedy trial, it is specifically addressed to a particular harm, namely causing an accused to languish in confinement or arrest without knowing the charges against him and without bail." *United States v. Schuber*, 70 M.J. 181, 187 (C.A.A.F. 2011).

There is no Article 10, UCMJ violation in the present case. Article 10, UCMJ, only applies to confinement by military authorities and it does not apply to confinement by another sovereign for charges under their jurisdiction in their jail. The plain language of Article 10(a)(1), UCMJ states that "subject to paragraph (2) any person subject to this chapter who is charged with an offense under this chapter may be ordered into arrest or confinement as the circumstances require." It is evident that [redacted] arrested the accused for a violation of [redacted] law – murder in [redacted] not for a violation of the UCMJ. Letters from Northern Law Center and the US Army show that the [redacted] were acting unilaterally and treating the case as a [redacted] case. The accused was ordered into [redacted] confinement by [redacted] authorities, not United States military authorities. United States Army authorities even requested that he be released from [redacted] prison. On 1 June 2016 Major [redacted] from the Northern Law Center wrote the [redacted] Crown Prosecution Service requesting that the accused be released. It stated "I would ask you either release Lieutenant Becker or transfer him another penal institution which meets the criteria set by [redacted] law." See, LLLL – [redacted]. He was not released until almost 45 days later. It is clear that United States military authorities were not directing his confinement in [redacted] prison nor were the [redacted] holding him at the behest of American military authorities.

The Defense cites no authority for the proposition that actions taken by another sovereign should later be attributed to the US military as to confinement and speedy trial.

The Government cannot find any case law that extends Article 10, UCMJ, retroactively to the actions of another sovereign. The Government cannot find any case law that applied Article 10, UCMJ, to actions by American state authorities for cases later tried by court-martial.

The accused returned to America in January 2018 and has never been restrained or confined. He is currently stationed in Rhode Island. "By its own terms, Article 10, UCMJ applies to arrest or confinement and requires that a person be tried of informed of the offenses for which he or she is confined." *United States v. Cooley*, 75 M.J. 247, 257 (C.A.A.F. 2016). Finding that the accused has never been placed into confinement by military authority nor held at the behest of military authorities in confinement there can be no Article 10, UCMJ violation. The Defense request to dismiss charges for an Article 10, UCMJ violation should be denied.

Rule for Court-Martial 707

For purposes of R.C.M. 707 the accused shall be brought to trial within 120 days after the earlier of: (1) preferral of charges; (2) the imposition of restrain under R.C.M. 304(a)(2)-(4), or (3) entry on active duty under R.C.M. 204. For this case only prongs (1) or (2) should be considered by the Court.

Original charges were preferred on 30 July 2018 and Additional charges were preferred on 23 January. Both sets of charges were referred on 29 January 2019 and the accused was arraigned within 120 days as calculated under R.C.M. 707. If requested, or the Court finds it necessary for resolution, the Government can provide a detailed timeline regarding exclusion and calculation of time. However, the Defense motion focuses on prong (2), imposition of restraint.

Imposition of restraint under R.C.M. 304(a)(2)-(4) refers: to (2) restriction in lieu of arrest, (3) arrest, or (4) confinement. The Defense does not discuss restriction in lieu of arrest or arrest. The Defense states "There was an R.C.M. 707 violation in this case. LT Becker was confined, and the Navy could have easily had released pursuant to the [redacted] as evidence by the fact that the [redacted] immediately released him upon request." While this is factually incorrect, the Government will focus on R.C.M. 304(a) (4) confinement only.

R.C.M. 304(b) (1) holds that "only a commanding officer to whose authority the civilian or officer is subject may order pretrial restraint of that civilian or officer." The

accused's commanding officer did not order him into [redacted] confinement for a violation of the Uniform Code of Military Justice. He was placed into [redacted] confinement by [redacted] authorities using [redacted] law. R.C.M. 304(b) (3) holds that "the authority to order pretrial restraint of civilians and commissioned and warrant officers may not be delegated." There is no evidence any military authority delegated to [redacted] the authority to confine the accused, nor did the US military request the accused be confined on its behalf. The accused was arrested by [redacted] police, not by a joint team of law enforcement. In the accused's affidavit relating to his confinement conditions he stated "On 18 March 2016 I was taken into custody by [redacted] Federal Police and transported to the [redacted] Prison, located in [redacted]" See, Exhibit WW. In his affidavit he makes no claim that he was arrested by a joint team of [redacted] and American law enforcement.

The Northern Law Center, run by the U.S. Army, was reaching out to [redacted] authorities as early as 17 May 2016 regarding the accused's confinement in [redacted] prison. In correspondence from the Norther Law Center Major [redacted] US Army, wrote to "In accordance with its regulations, the USA is required to ensure that US military personnel in foreign custody are treated fairly at all times, and that they receive the same treatments, rights, privileges, and protections as military personnel detained in a US military facility…" See, LLLL – [redacted] By 20 May 2016 Colonel [redacted] US Army, Medical Corps, visited the accused in prison and informed the command of the accused's status and condition in prison. See, Exhibit YY, email of Colonel [redacted] It is blatantly evident that the US military did not place the accused into [redacted] confinement, nor did it use [redacted] authorities as a subterfuge for confinement for speedy trial purposes or R.C.M. 707. [redacted] authorities arrested the accused and initiated legal proceedings.

On 1 June 2016 Major [redacted] from the Northern Law Center wrote the [redacted] Crown Prosecution Service requesting that the accused be released. It stated "Since that letter, the conditions of detention at [redacted] prison have remained below the minimum standards. I would ask you either release Lieutenant Becker or transfer him another penal institution which meets the criteria set by [redacted] law." See, LLLL – [redacted] [redacted] It is evident that the [redacted] were never holding the accused on behalf or at the request of the US military. The accused was not released from [redacted] pre-trial confinement until 14 July 2016, almost 45 days later. Contrary to defense assertions, he was not released promptly when asked by the U.S. military. See, Exhibit WW, affidavit

of the accused. The accused was never held by [redacted] at the request of the US military. Even when released from prison he remained on house arrest in [redacted] until January 2018.

His case was not controlled by the US military and the US military did not confine him. R.C.M. 304(a) (4) and R.C.M. 707 do not apply when a separate sovereign exercising its sovereign authority confines a sailor, even if the case is later prosecuted by the military. The Defense cites no authority for the idea that R.C.M. 707 applies to foreign penal systems or that R.C.M. 707 should apply retroactively to another sovereign. The remedy for an accused being placed in pre-trial confinement in a foreign jail for a case ultimately resolved by court-martial is confinement credit, nothing more. See, *United States v. Pinson*, 54 M.J. 692 (A.F.C.C.A. 2001) (upheld on other ground, *United States v. Pinson*, 56 M.J. 489 (C.A.A.F. 2002) and *United States v. Escobar*, 73 M.J. 871 (A.F.C.C.A. 2014).

R.C.M. 304(a) (4) and R.C.M. 707 only apply when military authority exercises its Rule for Court-Martial authority to confine and prosecute a court-martial. The Defense cites no contrary authority and there is case law directly on point refuting the argument that R.C.M. 707 should be measured by a "substantial information" test. In *United States v. Wilder*, 75 M.J. 135 (C.A.A.F. 2016) the Court rejected the idea that a "substantial information" test was the proper standard for R.C.M. 707. The Court held "The narrow issue for decision in this case is whether, for purposes of a speedy trial violation alleged under R.C.M. 707, the time is calculated by reference to the specific triggers listed in R.C.M. 707(a) or by reference to some other standard such as the "substantial information" rule." *Id* at 138. The Court wasted no time is dismissing the concept of "substantial information" versus a strict reading of R.C.M. 707. The Court held "Based on the plain language of R.C.M. 707, we do not hesitate to conclude that when analyzing a speedy trial violation under R.C.M. 707, it is the earliest of the actions listed in R.C.M. 707(a) with respect to a particular charge that starts the speedy trial clock for that charge." *Id.* In *United States v. Cooley*, 75 M.J. 247, 258 (C.A.A.F. 2016) the Court reaffirmed its denunciation of the "substantial information" rule as archaic law by holding "we therefore overrule the substantial information rule."

In the present case the only R.C.M. 707 trigger is the preferral of charges listed in R.C.M. 707(a) (1). The accused was arraigned within 120 days of preferral of charges and

the defense makes no claim otherwise as to preferral dates. The Court should hold that the accused's time spent in [redacted] prison for a violation of [redacted] law at the behest of [redacted] authorities does not later apply to trial by court-martial under R.C.M. 707. The Defense request for dismissal should be denied.

4. **Burden of Proof.**

Per R.C.M. 905(c) the burden of proof on any factual issue the resolution of which is necessary to decide a motion shall be a preponderance of the evidence. Per R.C.M. 905(c) (2) the burden of persuasion is on the moving party, the Defense.

5. **Evidence**

The Government relies upon defense exhibit LLLL, Exhibit listed in the Discussion section and the prior testimony of NCIS SA [redacted] as to the level and type of cooperation between [redacted] and American law enforcement.

6. **Relief Requested.**

The United States requests that the Court deny the Defense Motion to Dismiss.

7. **Oral Argument.**

The United States respectfully requests oral argument on this motion.

[redacted]

****

CERTIFICATE OF SERVICE

I hereby certify that, on 5 December 2019, I caused to be served a copy of this motion on the defense counsel and the court.

[redacted]

J. L. JONES

NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **CRAIG R. BECKER** **LT/O-3** **U.S. NAVY**	**DEFENSE MOTION TO DISMISS FOR SPEEDY TRIAL VIOLATIONS PURSUANT R.C.M. 707, ARTICLE 10, UCMJ, AND THE 5TH AND 6TH AMENDMENTS:** **22 NOVEMBER 2019**

1. Nature of Motion

Pursuant to R.C.M. 905 and 907 of the Uniform Code of Military Justice (UCMJ), the Defense respectfully moves this Court for an order dismissing all charges because the Government denied LT Craig R. Becker a speedy trial. The unconscionable years of Government delay and inaction based on Navy prosecutor's admitted delay tactics and woeful indecision to assert primary jurisdiction, which was guaranteed under the [redacted] and the failures of the prosecutors to litigate charges that were under the sole jurisdiction of the United States has denied LT Becker a speedy trial pursuant to R.C.M. 707, Article 10, of the UCMJ, and the Fifth and Sixth Amendments.

2. Summary of Facts

a. LT Becker is an Explosive Ordnance Disposal (EOD) Officer and a true war hero who has honorably served our country for over 18 years. During this time, he completed 56 combat missions in support of Operation Enduring Freedom I and commanded EOD forces in support of over 150 Direct Action missions during Operation Enduring Freedom II and was awarded two Bronze Stars including one for "Heroic Achievement."

b. On or about 2 August 2013, LT Becker reported for duty at the [redacted]. He served as an "Aide de Camp" to Vice Admiral Sean Pybus and Lieutenant General Brad Webb. He was also assigned duties as the [redacted] Counter-Weapons of Mass Destruction Advisor.

c. On 8 October 2015, LT Becker's wife, Mrs. [redacted] tragically committed suicide by jumping out the seventh-floor window of her off-post residence. Emergency Medical Services were contacted, and Mrs. [redacted] was transported to a local hospital and she was pronounced dead at 2317.

d. On 12 October 2015, LT Becker was advised of his legal rights by the [redacted] in accordance with [redacted] law and was interviewed. LT Becker was told not to leave [redacted] ([redacted].

e. The circumstances surrounding the suicide was a **"Joint Investigation"** comprised of [redacted] Naval Criminal Investigative Service (NCIS) and the United States Army Criminal Investigative Division (USACID) with [redacted] as the lead investigative agency and NCIS as the lead Military Criminal Investigative Organization (MCIO). NCIS opened a case which was assigned number 12 OCY15-[redacted].

f. Between 13 October 2015 and 23 October 2015, USACID assisted Special Agent [redacted], with investigative activity identified by NCIS and [redacted]. Additionally, SA [redacted] conducted key leadership engagements with [redacted] the Staff Judge Advocate (SJA), and LT Becker's Chain of Command, notifying them **"NCIS has initiated a joint investigation with [redacted] regarding this incident."** ([redacted]).

g. CID continued to provide investigative support to [redacted] and NCIS and completed all directed leads through a CID Request For Assistance file. This ensured the alleged integrity of all the official reporting for this **"joint investigation, which will be completed by NCIS, the responsible Military Criminal Investigative Organization for this incident."** ([redacted]).

h. On March 18, 2016, the [redacted] authorities arrested and immediately incarcerated LT Becker. The alleged offense did not involve any [redacted] citizens or property. The only nexus to [redacted] was the fact that the incident in question took place on [redacted] soil. The act of the [redacted] Government incarcerating LT Becker for criminal charges immediately triggered the protections of the [redacted] The United States was placed on "Very Urgent" notice that LT Becker was placed in jail. ([redacted]).

i. The Department of Defense has historically secured jurisdiction under the [redacted] on behalf of service members. The United States Government ratified the [redacted] in 1951 to protect our service members serving our country abroad. The United States has leveraged this agreement to protect our service members from prosecution in foreign jurisdiction systems that do not recognize our constitutional guarantees.

j. It is the duty of the Department of Defense to protect, to the maximum extent possible, the rights of United States service members who may be subject to criminal trial by foreign courts and imprisonment in foreign prisons.

k. Enclosures 1 to Department of Defense Directive 5525.1, is the "Status of Forces Policy and Information" regarding the [redacted] and it provides the following: "Where a person subject to the military jurisdiction of the United States is to be tried by the authorities of a receiving state, under the treaty the Commanding Officer of the armed forces of the United States in such state shall examine the

laws of such state with particular reference to the procedural safeguards contained in the Constitution of the United States."

l. Department of Defense Directive 5525.1 provides further instruction on securing jurisdiction, "If, in the opinion of such Commanding Officer, under all the circumstances, there is danger that the accused will not be protected because of the absence or denial of constitutional rights the accused would enjoy in the United States, the Commanding Officer **shall** request the authorities of the receiving State waiver jurisdiction in accordance with the provisions of paragraph 3(c) of Article VII (which requires the receiving State to give "sympathetic consideration" to such request) and if such authorities refuse to waive jurisdiction, the commanding officer shall request the Department of State to press such request through diplomatic channels and notification shall be given by the Executive Branch to the Armed Services Committees of the Senate and House of Representatives."

m. In response to LT Becker's arrest and incarceration, the Department of the Army sent formal notice to the Crown Prosecution Service stating that, "[a]s you know, Article 7 paragraph 3(a)(I) of the [redacted] provides that the United States has the right to exercise jurisdiction over LT Craig Becker as a matter of priority. **Consequently, I hereby confirm that the US forces will assert this right.** Nevertheless, the US does not wish to exercise this right in a premature manner and under no circumstances to interfere with the investigation in progress." [redacted].

n. The Department of the Army also confirmed that the United States would continue with the joint investigation since they would be asserting jurisdiction. Major David A. Amamoo, Judge Advocate, states, **"[w]e should nonetheless inform you that the American investigators will have to familiarize themselves with the case, with the evidence, and will most likely**

work together with the [redacted] investigators to make sure that the investigation is complete, so that the case can go to trial." ([redacted].

o. NCIS confirms in a Report of Investigation (ROI) that, **"[t]his joint investigation was initiated to coordinate with the [redacted] and provide details and disposition of the events surrounding v/[redacted] death to command. [redacted] maintains primary investigative jurisdiction since the death occurred as V/[redacted] off-base residence . . ." ([redacted]**

p. NCIS confirms they were investigating a 2013 domestic violence incident that occurred on a military base and, as such, was within the sole jurisdiction of the United States. The United States failed to take any timely actions regarding the domestic violence case while LT Becker remained in custody and was prejudiced. ([redacted].

q. On 29 April 2016, NCIS released a ROI that confirms that the Navy Judge Advocate General's Corps (JAGC) delayed asserting jurisdiction. The report states, "Reporting Agent (RA), and LCDR Kim Kelly, JAGC, USN, Regional Legal Service Office (RLSO), met with Inspector [redacted] COV, and Investigating Magistrate Pamela Longfils, CIV, at [redacted] location as [redacted]. Other [redacted] personal and [redacted] police Detectives working on this investigation were also present. Longfils approved the request for the investigative case file, which will be provided via CID Investigator [redacted] sometime in May 2016. [redacted] stated that they will be travelling to the United States to conduct interviews sometime in September 2016, and the estimated date of completion for their investigation is October or November 20016. **LCDR [redacted] discussed jurisdictional issues and explained her position on "delaying" assertion of jurisdiction at this time**. [redacted]. This was a clear tactic to circumvent speedy trial obligations.

r. While LCDR [redacted] readily admitted to **delaying assertion of jurisdiction**, LT Becker was abandoned and languished in custody. The Department of the Army sent to letter to the [redacted] on 17 May 2016 addressing the poor conditions. ([redacted].

s. On 24 May 2016, the Department of the Army sent another letter to the [redacted] confirming again that the, **"US has priority jurisdiction in their case concerning an American officer and his wife."** The JAG wanted to know the [redacted] interpretation of the Mutual Legal Assistance Treaty (MLAT) between the Kingdom of [redacted] and the United States. ([redacted]). There was never any indication that the [redacted] would not honor the MLAT. In fact, there was never any disputes with the [redacted] who have been exceptionally cooperative throughout the years of strategic delay by Navy lawyers.

t. The JAG confirmed with the [redacted] that, "[t]he court martial will be held most likely in [redacted] not in the United States." ([redacted].

u. The JAG sent another letter on 25 May 2016 to the [redacted] requesting a certified true copy of the investigation file on this case. ([redacted].

v. On 26 May 2016, the JAG sent another letter requesting that SA [redacted] be able to attend the various re-enactments session that were scheduled on 15 June 2016. [redacted].

w. On 1 June 2016, the Army JAG sends another letter noting that LT Becker has remained in prison conditions that were below the minimum standards. [redacted]. While LT Becker continued to suffer in confinement, the Navy JAGC continued to unjustly delay any trial. In fact, the Navy prosecutors failed to take any steps regarding the 2013 domestic violence incident that was within the exclusive control of the United States.

x. The Army JAG requested that Special Agent [redacted] be allowed to, **"take part in the different steps of the re-enactment that was held on 16 June 2016."** [redacted] NCIS

continued to provide support and guidance in the joint investigation that was delayed without just cause.

y. On 15 June 2016, the Investigative Magistrate provided permission for FC [redacted] and RA to, "conduct scene documentation including panoramic photography and three-dimensional mapping of the apartment using a laser scanner." ([redacted].

z. On 17 November 2016, the Army JAG send an "Urgent" letter to the [redacted] stating that the, **"US Navy is considering referring the case to the US Court Martial that will be organized in [redacted]."** The letter requested authority for LCDR Kimberly Kelly, CDR Ryan Stormer, and SA [redacted] to meeting with different witnesses to assess their willingness to cooperate. ([redacted]. The United States received the authority to interview the witnesses on 18 November 2016. [redacted]). It took Navy prosecutors over a year to go to [redacted] to assess the case.

aa. The Navy prosecutors failed address the MLAT with the [redacted] which addresses the production of witnesses.

bb. The [redacted] grew tired of the United States' continued delay in asserting jurisdiction. On 30 June 2017, the Investigating Judge sent a, "Very Urgent" letter requesting that the status of the "American Authorities" with "regard to exercising their jurisdiction privilege." ([redacted]

cc. On 24 January 2017, Ms. [redacted] Head of [redacted] Branch acknowledged that she received the DVD containing the investigation file in the case of LT Becker from Inspector [redacted] However, the case continued to be inexplicitly delayed while LT Becker remained in custody. ([redacted].

dd. The Army JAG waited another 6 months before requesting a status on the LT Becker case from the [redacted] ([redacted]). The case continued to languish, and the Navy prosecutors took no action regarding the 2013 domestic violence case which they had exclusive jurisdiction while LT Becker remained in custody.

ee. NCIS confirmed again that, **"[t]his joint investigation was initiated to coordinate with the [redacted] and to provide details and disposition of the events surrounding v/[redacted] death to command."** During the week on 10 July 2017, the Reporting Agent travelled to [redacted] with Participating Agent [redacted] in order to complete additional documentation outside the [redacted] residence. [redacted].

ff. After further delay, on 27 July 2017, the Investigating Magistrate claimed that she was waiting for the last expert report and would close her file by the end of August. ([redacted]

gg. The NCIS ROI dated 11 August 2017, states that "LT [redacted], JAGC, USNR, Region Legal Services Office, has been briefed regarding this investigation. LT [redacted] indicated the [redacted] Magistrate intends on having the [redacted] case closed by the end of August 2017. Once the [redacted] case is closed, a decision will be made by the Kings Prosecutor on whether or not s/Becker will be charged with murder. S/Becker's civilian attorney, Jeremiah J. Sullivan, III, CIV, has been contacting Congress and the media in order to influence the decision to assert jurisdiction." ([redacted].

hh. Attorney Jeremiah J. Sullivan contacted Congress and ultimately filed a Writ of Mandamus in the United States District Court to lawfully uphold the [redacted] LT Becker remained in custody while the Navy prosecutors continually delayed and failed to even take any action on the 2013 domestic violence case. Instead, they abandoned LT Becker and tactically

avoided taking jurisdiction in a case that the [redacted] were mandated to surrender pursuant the [redacted]

ii. The NCIS ROI dated 28 Sep 2017, confirms that NCIS continued to assist in the joint investigation that had been grossly delayed. "SA [redacted] coordinated with the [redacted] to assist in the 3D scanning and on 10 July 2017, RA captured laser measurement and photograph data of the exterior . . . using a FARO Focus 3D X330 laser scanner, S/N LLs07150772." [redacted]. The measurements could have been completed in 2015 but were delayed as a result of Navy prosecutors.

jj. On 14 August 2017, in an act to cover up the continued unnecessary delay while LT Becker remained in custody, the Army JAG sent another letter to [redacted] authorities claiming that, **"the United States of America is currently working with the highest bodies in the Department of Defense in Washington concerning the jurisdiction priority. The Secretary of Defense should have a decision soon and we will keep you informed."** ([redacted]. The assertions by the Army JAG are not supported by the documentary evidence. The Defense is unaware of any official paperwork from the highest bodies that justifies the repeated delays.

kk. In response to the frivolous letter, the [redacted] authorities responded on 15 September 2017, stating that, "the investigation is now closed and the file has been submitted to my office which is examining at present and will propose rapidly to the Judge's Chambers of the Criminal Court on how to proceed. **This proposal will obviously be conditioned by the positioned adopted by the American authorities in application of international criminal law, and in particular Article of the [redacted] convention between the States party to the [redacted]** [redacted] ([redacted]. The Navy was placed on notice again that the [redacted]

will relinquish jurisdiction pursuant to the [redacted] The Navy prosecutors failed again, and the case was unnecessarily delayed knowing that LT Becker remained in custody.

ll. In an NCIS ROI, dated 11 Oct 2017, the report confirms the Navy failed to take appropriate steps in handling the case in a timely manner. "LCDR [redacted] JAGC, USN, Regional Legal Services Office, has been briefed regarding this investigation. The translated [redacted] case file has been received. The [redacted] investigation is complete and is currently being reviewed by the King's Prosecutor in order to determine whether or not S/Becker will be charged with murder. **The investigation is pending a decision on whether or not the U.S. will assert jurisdiction**." [redacted]. The record is replete from any steps the Navy was taking regarding their extraordinary delays in asserting jurisdiction.

mm. On 8 November 2017, LT Becker's [redacted] lawyer reminded the [redacted] authorities that, **"they are still waiting for the position of the Unite State about the possible competence of [redacted] o hear this case."** ([redacted]).

nn. On 7 November 2017, the Secretary of the Navy recommended that the Secretary of Defense not assert United States primary jurisdiction in this case. On that same day LT Becker filed a civil lawsuit in the Federal District Court of the District of Columbia. ([redacted]

oo. On 9 November 2017, the Judge Advocate General of the Navy provided a Memorandum for the Secretary of the Navy. In his purported legal analysis, he cites, *Marybury v. Madison* (1803) at a failed attempt to avoid the plain reading of the [redacted] [redacted].

pp. On 11 November 2017, CAPT Joe Holtz, Deputy Assistant Judge Advice General, authored a legal opinion that is poor refection of the Navy JAGC. He concludes that, **"A [redacted] criminal proceeding is the only way a full and fair adjudication of the facts**

surrounding the death can occur." It is disturbing is that CAPT Holtz admits in his memorandum that, "[redacted] **has an inquisitorial system and so government lawyers have opined that there is evidence collection procedure would not survive an adversarial system."** ([redacted]. The report also contains assertions that are false that only prolonged the delay.

qq. It was apparent that the [redacted] were frustrated with the inaction and delays of the United States. In a letter dated, 13 November 2017, the King's Prosecutor states, **"Following my numerous letters, amongst them one sent on September 15, 2107, I would like to know the decision of the Secretary of Defense regarding the jurisdiction priority question in this case."** ([redacted]. The United States continued with their inexplicable delays and responded that they have not received any decision. ([redacted]. The Navy prosecutors continued to delay the case while LT Becker remained in custody.

rr. On 12 December 2017, SECNAV issued a memorandum to the SECDEF over two years after Mrs. [redacted]. The memo notes that, "NCIS was ready to assume investigative control once the U.S. asserted jurisdiction." ([redacted]

ss. On 19 December 2017, General Joseph F. Dunford, Jr., Chairman, Joint Chiefs of Staff states that, "I do not support waiving U.S. primary jurisdiction under the [redacted] in this case because of the long-term consequences such an **unprecedented** waiver may have on this important policy." [redacted]. Needless to say, General Dunford did not waste his time examining the legal precedent of *Marbury v. Madison* relied on by the Navy JAGC.

tt. On 2 January 2018, Secretary of Defense James "Mad Dog" Mattis disapproved the Navy's effort to abandon LT Becker in an unprecedented case. ([redacted]. The willful

repeated delays of the Navy denied LT Becker his right to a Speedy Trial while witnesses died, witnesses were lost, evidence was lost or destroyed, and memories faded.

uu. On 5 January 2018, the Army Judge Advocate sent a very simply request to the [redacted] authorities informing them that in accordance of Article VII, paragraph 3(a)(i) of the Convention between the States parties to the [redacted] it was determined that the **US military authorities have the primary right in this matter to exercise jurisdiction on their military personnel and have not renounced jurisdiction. Furthermore, it was finally requested that LT Becker be released from custody.** ([redacted]. It was too late at this juncture because witnesses had died, and evidence was lost and destroyed, and LT Becker could never receive a fair trial.

vv. On 12 January 2018, Route Slips were created by the Navy JAGC that summarized background events. The summary contains information that was relied upon by the legal chain of command and the Convening Authority. One of the most outlandish statements was that, "[difficulties in trying the case are related to unwillingness by the [redacted] government to assist in a U.S. Court-martial." ([redacted]. The statement is absolutely false. The [redacted] authorities could not have been more helpful, even to the Defense, during the litigation of this trial. Furthermore, RLSO [redacted] falsely claimed that, "because [redacted] witness are refusing to testify in a U.S. court-martial, and [redacted] government will not compel participating, RLSO [redacted] assess that the cases would be difficult if not impossible to try." ([redacted].

ww. In another Admiral Crawford disaster, he decides to submit his legal analysis, beyond *Marbury vs. Madison*, noting that he, **"required more time than originally anticipated to confirm the necessary facts and timeline of this case."** ([redacted]. The memo only

highlights the repeated unnecessary delays of the Navy JAGC to process this case in a timely fashion. Mad Dog Mattis had already given the order to assert jurisdiction while the Navy JAGC was drafting memos to cover their tracks.

xx. LT Becker was denied substantial Constitutional rights that are replete in the [redacted] inquisitorial system. LT Becker was not be afforded his Constitutional rights to Speedy Trial, Jury Trial, or Confrontation. Instead, LT Becker was abandoned in a system where the [redacted] "Judge of Evidence" ordered the hypnosis of witnesses to construct evidence. LT Becker, through counsel, had requested that the Department of Defense and the Department of the Navy assert jurisdiction under the [redacted] to; Secretary of Defense on February 23, 2017, Commander, [redacted] on February 28, 2017, Secretary of Navy on July 5, 2017, and again on August 3, 2017. LT Becker has not received any response until Mad Dog Mattis issued his order.

ccc. The [redacted] Government incarcerated LT Becker from March 18, 2016 until January 2018. He has appeared in 18 custody hearings in [redacted] and the Navy failed in their mandated requirements to provide court observers at every hearing.

fff. The Department of the Defense and the Department of the Navy refused to make any timely request to the [redacted] Government to relinquish jurisdiction, which is in violation of the [redacted] Instead, the Navy prosecutors engaged in unlawful international forum shopping. Ostensibly, the Navy determined that it will be easier for the [redacted] to secure a conviction under their system; a system that does not provide the constitutional protections that LT Becker was prepared to die for on the battlefield.

3. Discussion of Law

The inexplicable years of Government willful delay and inaction based on Navy prosecutor's admitted tactics and woeful indecision to assert primary jurisdiction, which was guaranteed under the [redacted] and the failure of the prosecutors to litigate charges that were under the sole jurisdiction of the United States has denied LT Becker a speedy trial pursuant to R.C.M. 707, Article 10, of the UCMJ, and the Fifth and Sixth Amendments. Justice requires that the charges be dismissed.

THE GOVERNMNET FAILED TO ENFORCE THE PLAIN READING OF THE [redacted] TO CIRCUMVENT SPEEDY TRIAL

A fundamental principle of international law is that any "sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction." *Wilson v. Girard*, 354 U.S. 524, 529, 1 L. Ed. 2d 1544, 77 S. Ct. 1409 (1957)(citing *The Schooner Exchange v. M'Faddon*, 11 U.S. 116, 7 Cranch (11 U.S.) 116, 136, 3 L. Ed. 287 (1812)). Balanced against this general principle, "as a matter of policy," commanders should make every effort "to maximize the exercise of court-martial jurisdiction over persons subject to the code to the extent possible under applicable agreements." R.C.M. 201(d)(3), Discussion.

A treaty normally establishes the procedures and standards for determining which State will exercise jurisdiction over an offense. The treaty involved in this case is the Agreement Between the Parties to the [redacted] 19 June 1951, 4 U.S.T. 1792, T.I.A.S. No. 2846, 199 U.N.T.S. 67 [redacted]. Article VII of the [redacted] articulates a balance between the type of offenses foreign servicemembers may commit when stationed in other [redacted] countries.

The Department of Defense has historically secured jurisdiction under the [redacted] on behalf of service members. It is the duty of the Department of Defense to protect, to the

maximum extent possible, the rights of United States service members who may be subject to criminal trial by foreign courts and imprisonment in foreign prisons.

The Department of the Army took appropriate action in this case when they sent formal notice to the Crown Prosecution Service stating that, " . . . I hereby confirm that the US forces will assert this right. Nevertheless, the US does not wish to exercise this right in a premature manner and under no circumstances to interfere with the investigation in progress." The Navy prosecutors then put the unlawful brakes on the case to avoid speedy trial and tactically delayed taking action. Over the course of years of willful delay, evidence was lost and destroyed. In fact, two witnessed died, a witness has been lost, records from the 2013 incident have been destroyed, memories have faded, and LT Becker was dropped from enrollment at the Harvard Business School.

Finally, reasonable minds from the military's most powerful leaders took action in yet another embarrassing moment for the Navy JAGC. On 19 December 2017, General Joseph F. Dunford, Jr., Chairman, Joint Chiefs of Staff concluded that, "I do not support waiving U.S. primary jurisdiction under the [redacted] in this case because of the long-term consequences such an **unprecedented** waiver may have on this important policy." Needless to say, General Dunford did not waste his time examining the legal precedent of *Marbury v. Madison* relied on by the Navy JAGC. Finally, On 2 January 2018, Secretary of Defense James "Mad Dog" Mattis disapproved the Navy's effort to abandon LT Becker in an unprecedented case. Despite the intervention of General Dunford and Secretary Mattis, the Navy's egregious and tactical delays prejudiced LT Becker with the death of witnesses and the loss of evidence.

FAILURE TO PROSECUTE CHARGES UNDER THE SOLE JURISDICTION OF THE UNITED STATES

The problem in the timely processing of Charge II, Specification 1 and Charge III is that apparently no one, except for the trial defense counsel, well over 4 years after the incident, and after LT Becker was incarcerated, considered breaking this case down into two sets of charges: those in which the United States had sole jurisdiction and those in which the United States had primary jurisdiction. The compelling case of *United States v. Busby*, NMCM No. 9601087, 1996 CCA LEXIS 456; 1996 WL 927938, addressed a similar failure of the Navy and dismissed charges in an overseas case for speedy trial violations.

The Navy prosecutors were caught an act of egregious and intentional delay when **LCDR Kelly discussed jurisdictional issues and freely admitted to "delaying" assertion of jurisdiction.** There was no justifiable reason to delay the case when the plain reading of the [redacted] mandates maximizing jurisdiction. This was a clear tactic to circumvent speedy trial obligations. Instead, the Navy prosecutors elected to delay and join all of the offences into one case to be referred to a single court-martial. Had the Navy prosecutors in the military justice process considered treating this matter as a series of "offenses" rather than a unified "case" or "incident" early in the process, the Government could have disposed of those charges for which the U.S. Government has sole jurisdiction years ago before the evidence was lost and destroyed and memories faded. Instead, the Navy violated LT Becker's right to a speedy trial while he languished in custody.

R.C.M. 707, ARTICLE 10, UCMJ, AND THE SIXTH AMENDMENT SPEEDY TRIAL VIOLATIONS

R.C.M. 707, Article 10, UCMJ, and the Sixth Amendment provide a cohesive and sometimes overlapping framework for the protection of an accused's speedy trial rights. *See United States v. Tippit*, 65 M.J. 69, 72–73 (C.A.A.F. 2007).

R.C.M. 707(a) mandates that "[t]he accused shall be brought to trial within 120 days after the earlier of: (1) Preferral of charges; (2) The imposition of restraint under R.C.M. 304(a)(2)–(4); or (3) Entry on active duty under R.C.M. 204." Article 10, UCMJ, requires "reasonable diligence in bringing charges to trial" when an accused is placed "in arrest or confinement" prior to trial. *United States v. Mizgala*, 61 M.J. 122, 127 (C.A.A.F. 2005) (citation omitted) (internal quotation marks omitted). An analysis under the Sixth Amendment focuses on the date of either preferral or the imposition of restraint or confinement, *United States v. Vogan*, 35 M.J. 32, 33 (C.M.A. 1992), and analyzes an alleged violation based on the factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972). *United States v. Danylo*, 73 M.J. 183, 186 (C.A.A.F. 2014).

Arraignment "stops" the speedy trial clock for purposes of R.C.M. 707, *see Leahr*, 73 M.J. at 367, and trial stops the speedy trial clock for Article 10, UCMJ, *see United States v. Cooper*, 58 M.J. 54, 60 (C.A.A.F. 2003), and the Sixth Amendment, *see Danylo*, 73 M.J. at 189. R.C.M. 707(b)(2) provides that "[w]hen charges are preferred at different times, accountability for each charge shall be determined from the appropriate date under subsection (a) of this rule for that charge." If an appellant is arraigned within 120 days after the earlier of, inter alia, the preferral of, or restraint based upon, a particular charge, then R.C.M. 707 is not violated. *See, e.g., Leahr*, 73 M.J. at 367.

These speedy trial protections and inquiries, though overlapping in some respects, are distinct. "The fact that a prosecution meets the 120-day rule of R.C.M. 707 does not directly 'or indirectly' demonstrate that the Government moved to trial

with reasonable diligence as required by Article 10." *Mizgala*, 61 M.J. at 128. Similarly, the government might move with all reasonable diligence for purposes of Article 10, UCMJ, but nonetheless violate the bright-line 120- day rule of R.C.M. 707. *See Kossman*, 38 M.J. at 261.

The narrow issue for decision in this case is whether, for purposes of a speedy trial violation alleged under R.C.M. 707, the time is calculated by reference to the specific triggers listed in R.C.M. 707(a) or by reference to some other standard such as the "substantial information" rule. Based on the plain language of R.C.M. 707, we do not hesitate to conclude that when analyzing a speedy trial violation under R.C.M. 707, it is the earliest of the actions listed in R.C.M. 707(a) with respect to a particular charge that starts the speedy trial clock for that charge. R.C.M. 707, promulgated in 1984, was a new and different layer of protection against speedy trial violations, *see Kossman*, 38 M.J. at 260, and for violations alleged under its rubric, its plain language controls. *See United States v. Ruffin*, 48 M.J. 211, 213 (C.A.A.F. 1998); *United States v. Thompson*, 46 M.J. 472, 475 (C.A.A.F. 1997).

There was a R.C.M. 707 violation in this case. LT Becker was confined, and the Navy could have easily had released pursuant to the [redacted] as evidence by the fact that the [redacted] immediately released him upon request. Instead, Navy prosecutors gamed the system and tactically avoided and delayed asserting jurisdiction to avoid the constitutional protections afforded in the United States. The prosecutors should not be rewarded for their egregious tactics while LT Becker remained in jail and witnesses died and evidence was lost and destroyed.

THE GOVERNMENT VIOLATED LT BECKER'S CONSTITUTIONAL RIGHT TO SPEEDY TRIAL UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

The Constitution does not require the Government "to file charges as soon as probable cause exists." *United States v. Lovasco*, 431 U.S. 783, 791, 52 L. Ed. 2d 752, 97 S. Ct. 2044 (1977). At the same time, while the military statute of limitations, Article 43, UCMJ, 10 U.S.C. § 843, provides primary protection against such delay, "it may not be sufficient by itself" and accused servicemembers may seek relief under "the Due Process Clause of the Fifth Amendment." *United States v. Reed*, 41 M.J. 449, 451, *cert. denied*, 133 L. Ed. 2d 37, 116 S. Ct. 78 (1995). The Government breaches the Due Process Clause only if the delay in moving to trial violates those "fundamental conceptions of justice which lie at the base of our civil and political institutions" and which define the "community's sense of fair play and decency." *Lovasco*, 431 U.S. at 790 (citations omitted).

To prevail on this motion at trial, the accused had a heavy burden of proving two elements of his Due Process claim. First, he had to show that the Government engaged in "egregious or intentional tactical delay." *Reed*, 41 M.J. at 452. Second, he must show that he suffered "actual prejudice" as a result of this delay. *Id.*, *see Lovasco*, 431 U.S. at 790. This Court stated the *Lovasco* requirement in a slightly different way in *United States v. Reeves*, 34 M.J. 1261, 1262 (N.M.C.M.R. 1992): "What is required to substantiate a due process claim is proof of actual prejudice to the accused and a consideration of the reasons for delay." In cases where the accused is not in pretrial confinement or has charges pending against him, actual prejudice is a question of whether the accused is able "to mount an effective defense" as a result of the delay. *Lovasco*, 431 U.S. at 795 n. 17; *see United States v. Vogan*, 35 M.J. 32, 34 (C.M.A. 1992).

In *Busby*, the military judge found that the delay in bringing the case to trial was "inexplicable." In that case the Government intentionally delayed prosecuting the case simply because it misinterpreted the applicable treaty. Moreover, it did so even though it was well aware of the adverse impact delay was having on the accused's life. *Id.* The military judge was upheld in concluding that the Navy always had primary jurisdiction over the military offenses and that "these charges should have and could have been disposed of literally years ago pursuant to the [redacted] *Id.* Therefore, the judge concluded that the Government's failure to get these offenses to trial in a timely manner violated the accused's "constitutional speedy trial rights." *Id.* In so deciding, he must have also decided that the Government's conduct was "egregious." *Id.* The military judge also concluded that this delay resulted in the accused's actual prejudice, the second element of the *Lovasco/Reed* test. Although several of his factual findings, which relate to the administrative consequences of his awaiting court-martial, are not the form of prejudice with which the Supreme Court was concerned in *Marion* and *Lovasco*, several others dealt with "the accused's ability to present a defense without being substantially hampered by a lapse of time." *Reeves*, 34 M.J. at 1263. These include the loss of physical evidence, impairment of memories of witnesses, and loss of some witnesses altogether. *See Marion*, 404 U.S. at 321. The military judge found, based on the evidence he considered, that "witnesses have become unavailable due to insanity, refusal to cooperate, and inability to locate."

In this case, the Government was well aware of the requirements of the [redacted] In fact, the Army JAG correctly placed [redacted] on notice that the U.S. Government will be asserting jurisdiction. Then the Navy prosecutors intervened and admitted that they wanted to delay asserting jurisdiction which was an egregious tactical decision that stripped LT Becker of his Constitutional rights to a speedy trial. Finally, LT Becker has been prejudiced as a result of the

Navy prosecutor's unlawful tactics of delay to avoid speedy trial. Here, two witnesses have died, a witness is now missing, evidence has been lost and destroyed, memories have faded, and LT Becker was dropped from enrollment at the Harvard Business School.

4. Relief Requested.

The Defense requests that the Military Judge dismiss all charges.

5. Oral Argument.

Unless the Government concedes the motion or this Court grants the relief on the basis of pleadings alone, the Defense requests oral argument on this matter.

6. Evidence.

The Defense requests the following witness be produced to testify. The Defense does not object to telephonic testimony for this motion.

1. Admiral Michelle Howard (Retired);
2. Admiral James Crawford, JAGC (Retired);
3. Admiral John Hannink;
4. Special Agent [redacted]
5. CAPT Joe Holtz, JAGC;
6. General Joseph Dunford;
7. CDR [redacted] JAGC.

The Defense requests that Court consider the attached bates stamped pages along with all other exhibits in the record.

Finally, the Defense requests the Court to take judicial notice of all relevant laws and treaties to include the [redacted]

[redacted]

J. J. SULLIVAN
Civilian Defense Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES OF AMERICA **v.** **CRAIG BECKER** **LT USN**	**Defense Motion to Exclude Expert Testimony** **15 November 2021**

1. Nature of the Motion

The defense respectfully requests the court to exclude the testimony of Mr. [redacted] and Ms. [redacted] both alleged experts in Biomechanical Science, because their testimony is unreliable and lacks probative value.

2. Burden of Proof

Upon a showing that the expert's testimony has been "sufficiently called into question," the proponent of the expert's testimony has the burden of persuasion by a preponderance of the evidence.

3. Facts

a. On 8 October 2015, at approximately 2051, Mrs. [redacted] fell to her death from the 7th floor apartment she shared with LT Becker.

b. [redacted] was pronounced dead at 2230 that same night.

c. On 17 December 2015, Mr. [redacted] submitted his Biomechanics Report to Ms. [redacted] Investigating Judge as the [redacted] (Enclosure HHHHH).

d. The case was taken over by Ms. Pamela Lonfils, Investigating Judge, Court of First Instance of [redacted]

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e. On 16 March 2016, Mr. [redacted] submitted a Supplement to his initial Biomechanics Report. (Enclosure IIIII).

f. On 15 June 2016, Judge Lonfils filed an "Official Record of Re-Enactment."

g. On 26 January 2017, the Federal Judicial Police of [redacted] created a Supplemental report with the assistance of the newly discovered eye-witness Ms. [redacted]

h. On 21 June 2017, Mr. [redacted] submitted another Supplement to the Biomechanical Assessment Report. (Enclosure JJJJJ).

4. Discussion

A. The Defense is Entitled to a *Daubert/Houser* Hearing So That the Military Judge Can Properly Serve His Role as Gatekeeper.

The trial judge is called upon to determine the admissibility of the evidence when the "expert testimony's factual basis, data, principles, methods, or their application are *called sufficiently into question*." *Id.* at 155 (citing *United States v. Billings*, 61 M.J. 163, 168 (C.A.A.F. 2005)); *United States v. Clark*, 61 M.J. 707, 710 (N.M.C.C.A. 2005). Here, the purported experts are offering some opinions, based on speculative assumptions, which is not acceptable in the field of biomechanical science.

B. Expert Testimony By Mr. [redacted] and Ms. [redacted] s Inadmissible Within the Frameworks Commonly Utilized by Military Courts

Military Rule of Evidence 702 (2019) states. "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's . . . knowledge will help the trier of fact in understanding the evidence or in determining a fact in issue; (c) the testimony is based on sufficient facts or data; (e) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case."[1]

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The proponent of expert testimony must establish: (1) the qualifications of the expert; (2) the subject matter of the expert testimony; (3) the basis for the expert testimony; (4) the relevance of the testimony; (5) the reliability of the testimony; and (6) the probative value of the testimony. *United States v. Houser*, 36 M.J. 392, 397 (C.M.A. 1993). In other words, "As gatekeeper, the trial court judge is tasked with ensuring that an expert's testimony both rests on a reliable foundation and is relevant." *United States v. Sanchez*, 65 M.J. 145, 149 (C.A.A.F. 2007).

In performing this gatekeeping function, four factors a judge may use to determine the reliability of expert testimony are (1) whether a theory or technique can be or has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error in using a particular scientific technique and the standards controlling the technique's operation; and (4) whether the theory or technique has been generally accepted in the particular scientific field. *Id.* (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593-94, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)).

Importantly, it is not necessary to satisfy every *Daubert* or *Houser* factor as "the inquiry is 'a flexible one,'" and "the factors do not constitute a 'definitive checklist or test.'" *Sanchez*, 65 M.J. at 149 (quoting *Daubert*, 509 U.S. at 593-94). "The focus is on the objective of the gatekeeping requirement, which is to ensure that the expert, 'whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.'" *Id.* (quoting *Kumho Tire Co.*, 526 U.S. at 152).

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In this case, the Defense has interviewed both Mr. [redacted] and Ms. [redacted] with the assistance of Dr. [redacted]. Although they appear to have some experience in the area of Biomechanical Science, some of their opinions call into question whether they are truly qualified experts. The Defense concedes that Biomechanical Science is a proper area in which an expert can assist the trier of fact. However, according to the Defense's Biomechanical Expert, Dr. [redacted], some of the opinions being propounded by Mr. [redacted] and Ms. [redacted] are based on a level of speculation which is not acceptable in the field of Biomechanical Science.

1. **The Government Experts are not Qualified to Testify in the Field of Biomechanical Science**

On 17 December 0215, Mr. [redacted] authored a letter to Ms. [redacted], the former investigating judge stating that, " . . .this case is much more complex than other cases I have been able to analyze." ([redacted]). Mr. [redacted] was assisted by Ms. [redacted] who is a professor. It is the position of the Defense that neither expert had the qualifications to address the underlying Biomechanical Science in this case.

2. **The Government Has Not Established Mr. [redacted] and Ms. [redacted] Have Established the Basis for their Expert's Testimony**

The third Houser prong requires the proponent to establish the basis for the expert's testimony. Again, the court's rule as gatekeeper is to ensure the evidence is "relevant and necessary." The experts have subdivided the fall from the window into seven different stages. It is during their analysis of the first three stages that the experts improperly rely on speculation and not science, which is not acceptable in the field of Biomechanical Science. During the interviews of Mr. [redacted] and Ms. [redacted], Dr. [redacted]

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was able to listen and ascertain the factual basis for their assumptions, Dr. [redacted] concluded that some of the factors considered by the government's experts were not acceptable or supported by Biomechanical Science. It is paramount that the experts articulate their factual basis before they render any ultimate expert opinion.

Determining the acceptable scientific basis is critical in this case given that the government's experts already guessed wrong the first time. It was initially assumed by law enforcement and the experts that [redacted] was unconscious when she was tossed out the window. The case was then turned upside down when an eye-witness came forward and confirmed that [redacted] was conscience and sitting alone in the window. The "experts" then had to go back to the drawing board and speculate again to the facts and basis of their opinions.

3. The Government Has Not Established the Relevance of the Expert's Testimony

The testimony of Mr [redacted] and Ms. [redacted] is not relevant, in part, because their opinions are based on a level of speculation that is not appropriate in Biomechanical Science. When the Defense interviewed the government's experts, with the assistance of Dr. [redacted] it was discovered that some of the expert's opinions were based on psychological factors and not Biomechanical Science.

4. The Government Has Not Established the Reliability of the Expert's Testimony

The testimony of Mr. [redacted] and Ms. [redacted] is unreliable because their opinions are based on speculation, in part, and not on accepted Biomechanical Science. It is apparent that the experts had to strain their definition of Biomechanical Science during some of the

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stages of their analysis. This is particularly true when offering any opinion on third party intervention. Any conclusion of third part intervention is based on speculation and inappropriate conclusion that [redacted] did not commit suicide.

"The *Daubert* requirement that the expert testify to scientific knowledge -- conclusions supported by good grounds for each step in the analysis -- means that *any* step that renders the analysis unreliable under the *Daubert factors renders the expert's testimony inadmissible." McLain v. Metabolife International*, 401 F.3d 1233, 1245 (11th Cir. 2005). Because each step of the analysis is not support by reliable science, the Military Judge should exercise his gatekeeper function and ensure the integrity of the legal process.

5. The Government Has Not Established the Probative Value of the Expert's Testimony

The probative value of any expert opinion based on speculation, and the ultimate conclusion that [redacted] was not suicidal, is nonexistent. Given the low probative value of this information, and the significant likelihood that the findings were unreliable, the Court should exclude this evidence.

5. Relief Requested

The Defense respectfully requests that this court grant the Defense motion and exclude the testimony of Mr. [redacted] and Ms. [redacted].

6. Witnesses

A. The defense requests the following witnesses be produced on motion:

1. Mr. [redacted];

2. Ms. [redacted]

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3. Dr. [redacted]

7. Evidence

-Enclosure HHHHH- Expert Report, dtd 17 Dec 2015;

-Enclosure IIIII-Supplement to Biomechanics Report, dtd 10 March 2016;

-Enclosure JJJJJ-Supplement to the Biomechanical Assessment Report, dtd 21 June 2017

8. Oral Argument

The accused desires to make oral argument on this motion.

[redacted]

JEREMIAH J. SULLIVAN, III
Civilian Defense Counsel

CERTIFICATION OF SERVICE

A true copy of this motion was served on the opposing party and the court on 15 November 2021.

[redacted]

JEREMIAH J. SULLIVAN, III
Civilian Defense Counsel

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NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

THE UNITED STATES OF AMERICA **v.** **CRAIG R. BECKER** **LT USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO EXCLUDE THE TESTIMONY OF PROFESSOR [redacted]** **6 DECEMBER 2019**

1. Nature of the Motion.

The Government respectfully requests that the Court deny the Defense motion. Professor [redacted] is an expert within the meaning of M.R.E. 702. Professor [redacted] testimony would be relevant, highly probative of (1) the position of Ms. [redacted] before exiting the Velux window; (2) how Ms. [redacted] exited the window; (3) Ms. [redacted] body's position falling down the roof, (4) how the marks on the Becker's apartment roof were made by Ms. [redacted] body; and(5) the path Ms. [redacted] body took down the roof and onto the ground. Professor [redacted] her testimony fits within the scope of M.R.E. 703.

2. Burden of Proof.

As the proponent of the evidence, the Government bears the burden of establishing its admissibility.

3. Statement of Facts.

a. On 8 October 2015, the accused and the Victim were in their apartment. Gov't Exhibit 25, page 1.

b. Ms. [redacted] bedroom contained a large window which opened inwards to a 45-degree angle. The bedroom was on the seventh floor (the top floor) of their apartment building. Gov't Exhibit 31.

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c. The window opened onto a slanted roof. Three floors below was a balcony of another apartment. Gov't Exhibit 31.

d. Ms. [redacted] in her system when blood samples were taken during her autopsy. Gov't Exhibit 32.

e. On the evening of 8 October 2015, the accused placed his wife in an opened window of his apartment, then grabbed her feet and flung them out of the window.. Gov't Exhibit 31, page 54.

f. Ms. [redacted] saw Ms. [redacted] in the window with her back towards the outside. She next saw Ms. [redacted] body rotate and her legs exit the window. Ms. [redacted] also observed Ms. [redacted] screaming, trying to hold on, and attempting to get back into the window before she ultimately lost her grip and fell... Gov't Exhibit 26, pages 1-2.

g. Ms. [redacted] slid down the slanted roof, screaming for help, and fell three stories onto a table on the balcony below. Gov't Exhibit 26, page 2.

h. Ms. [redacted] bounced off the table, over the balcony wall, and then plunged to the street below and ultimately to her death. Gov't Exhibit 31, page 55.

i. Mr. [redacted] was requested to conduct a biomechanical report. On 17 December 2015 Mr. [redacted] asked for an extension and the first report was submitted on 25 February 2016. Gov't Exhibit 31.

j. Mr. [redacted] submitted his second and third reports on 10 March 2016 and 9 June 2017. Gov't Exhibit 31.

k. Mr. [redacted] and Professor [redacted] worked on each report together, conducted the reenactments together, and visited the crime scene together. Gov't Exhibit 31.

l. Mr. [redacted] and Professor [redacted] also built a replica of Ms. [redacted] bedroom window and

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conducted experiments of how Ms. [redacted] may have exited the window. Gov't Exhibit 31, pages 88 and 89.

m. Part of their research included the marks left on the roof by Ms. [redacted]

n. Professor [redacted] has a long career in studying the human body's anatomy and its motor sciences. Gov't Exhibit 87.

o. On 12 October 2016 and 29 November 2016, LT Becker told [redacted] authorities that Ms. [redacted] exited the window head first. Gov't Exhibit 25, pages 15 and 32.

4. Discussion.

Military Rule of Evidence 702 lays out, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the fact of the case." United States v. Henning, 75 M.J. 187, 191 (CAAF 2016). United States v. Houser, 36 M.J. 392 (CMA 1993) and Daubert v. Merrell Dow Pharmaceuticals, Inc. 509 U.S. 579 (1993), provide for a fourth and fifth prong: (4) The existence and maintenance of standards controlling the technique's operation; (5) The degree of acceptance within the relevant scientific community; and that a balancing test under M.R E. 403 is conducted. Henning, at 191 quoting United States v. Griffin, 50 M.J. 278, 284 (C.A.A.F. 1999).

Military Rules of Evidence 703 provides "an expert's opinion may be based upon personal knowledge, assumed facts, documents supplied by other experts, or even listening to the testimony at trial." Houser, 36 M.J. at 399 see also United States v. Kaspers 47 M.J. 176 (CAAF

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1997). The simulated conditions of a reconstruction do not need to be identical but do need to be substantially similar to the conductions of the crime. United States v. Kaspers, 47 M.J. 176, 177 (CAAF 1997).

A. Professor [redacted] Testimony will assist the trier of fact in understanding the evidence and is based upon sufficient facts and data.

The Defense has stated their theory is that Ms. [redacted] committed suicide. Professor [redacted] testimony will directly contradict both that theory and LT Becker's statements to law enforcement that his wife went out the window head first. LT Becker on numerous occasions told law enforcement that his wife exited the window head fist and that he only saw her feet still in the bedroom when he rushed in. This evidence would be contradicted by the reenactments that Professor [redacted] conducted. Professor [redacted] and her team visited the crime scene on two occasions. They made a model of the window from which Ms. [redacted] was pushed. They read the eye witness accounts of those who saw and heard Ms. [redacted] They reviewed the autopsy with the injuries listed. They spoke to law enforcement. Their research was not done in a vacuum, but rather after reviewing a significant amount of data.

The Government does not seek to submit the reports themselves, but similar to United States v. Kaspers, we do intend to submit still pictures and videos from their reenactments. As in Kaspers, the Government does not seek to have Professor [redacted] testify as to her ultimate opinion on how Ms. [redacted] exited the window. However, she should and is able to testify as to the results of the reconstruction. This would include the steps her team took to prepare, the material they reviewed, the steps they actually carried out, and the results of the exam.

It would be important for the members to learn that based upon the injuries, marks on the roof, and the abilities of the human body, it is with almos

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[redacted]

t certainty that Ms. [redacted] 1) went out the window feet first; (2) that she slid down the roof on her stomach; (3) that her head was facing up; (4) that the marks on the roof can be determine with a high degree of certainty to be made by certain body parts i.e. fingers or toes; (5) that it would be difficult to explain Ms. [redacted] exit from the window and the marks on the roof unless another person intervened; and (6) how Ms. [redacted] landed on the ground. The intervention of another person directly contradicts the suicide theory by the defense. The reconstruction of showing Ms. [redacted] exiting feet first with her head facing up rather than down, all contradict the numerous statements by the accused that his wife jumped from the window head first.

Professor Feipel can also explain the marks on the roof made by Ms. [redacted] as she slid down the roof. She can explain the position of Ms. [redacted] hands and feet by the marks her fingers and toes made on the roof. Each of these points will directly as assist the trier of fact in coming to their conclusion.

B. Professor [redacted] has the required education and training to testify.

As most experts who testify in criminal cases are college professors, the Government, does not understand the Defense's argument that this is somehow a mark against their ability to testify as experts. Professor [redacted] obtained her first degree in 1990 in physical therapy and has continued to study human anatomy ever since. She has served as the Dean of

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Faculty of Motor Sciences at the University of [redacted] since 2017. She has published on the topic on numerous occasions including 9 books and 132 peer-reviewed articles.. In addition, she wrote a chapter in a book from the Congress of the International Society of Biomechanics in 2011. It is clear by Professor [redacted] CV that she has the education and training to testify.

C. The testimony is the product of reliable principles and methods and Professor [redacted] has applied the principles and methods reliably to the fact of the case.

The math used by Professor [redacted] and Mr. [redacted] is the kind of basic math that is taught in every high school across America. The angles calculated are geometry,and the speed, duration of the fall, rotation speed, launch rate etc. is basic physics. Newton's law for acceleration was even used. The math used by the team has been used for hundreds of years.

Professor [redacted] extensive expertise in physical therapy and dealing with injuries of the human body is a natural fit for this case. Comparing the injuries of Ms. [redacted] hand, feet, torso and especially her breast is key in determining how Ms. [redacted] slid down the roof. The marks on the roof are similar to those of tire tracks or brake marks on a road typical topics on which accident reconstructionists are allowed to testify. See U.S. v. Harris 46 M.J. 221 (CAAF 1997).

D. The existence and maintenance of standards controlling the technique's operation and the degree of acceptance within the relevant scientific community is high.

As in Kaspers, neither the Government nor Professor [redacted] are trying to pass off the reconstructions of either the dummy or Ms. [redacted] using the model window as an absolute re-creation. They are there to assist the fact finder in determining, (1) how Ms. [redacted] was seated in the window before her exit; (2) how Ms. [redacted] exited the window, (3) how she slid down the roof, (4) how the marks on the roof were made, and (5) the path Ms. [redacted] took down the roof. A dummy of similar weight and height was used for the reenactments at the crime scene. For the

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reenactments off site, Professor [redacted] is of a similar build, weight and shape as to Ms. [redacted] The reenactments were recorded with still pictures and videos for review. The Defense is free to critique them and the fact finder is free to give them the weight they deserve.

The experts in our case conducted these reenactments to deduce the answers to (1) how Ms. [redacted] was seated in the window before her exit; (2) how Ms. [redacted] exited the window, (3) how she slid down the roof, (4) how the marks on the roof were made and (5) the path Ms. [redacted] took down the roof. They conducted them to verify or contradict the statements of eye witnesses and the accused, and to match the statements of the witnesses to the injuries. Further, it is worth noting that the case was not "turned on its head" when Ms. [redacted] came forward. Instead, all her statement did was solidify the findings of the experts and other eye witnesses and contradict LT Becker's version of events.

E. The probative value of this evidence is extremely high and the danger of unfair prejudice is low.

The balancing test weighs heavily in the favor of admission. The reenactments were substantially similar to the actual conditions surrounding the event of Ms. [redacted] death. The tests and opinions can be challenged by the Defense or their own expert and they assist the trier of fact with reaching the ultimate decision. There should no concern of "smuggling" inadmissible evidence because the evidence utilized by the experts is admissible and will be presented to the members. Harris at 225. Thus, this evidence is not unfair or confusing, nor does it mislead the members or waste time.

5. Evidence. The Government offers the following documentary evidence in support of this motion:

Govt. Exhibit 25 – LT Becker's Statements

Govt. Exhibit 31 - Biomechanical Report and Supplements

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Govt. Exhibit 32 – Toxicology Report

Govt. Exhibit 26 - [redacted] Statements

Govt. Exhibit 89 - Pictures of Reenactment

Govt. Exhibit 90 – Video of Reenactment

Govt. Exhibit 35 - Pictures of [redacted] Apartment

Govt. Exhibit 88 – Pictures of [redacted] Apartment Roof

Govt. Exhibit 87 – [redacted] CV - English

6. Oral Argument. The Government only desires to make oral argument on this motion if the Defense still opposes it.

7. Relief Requested. The Government respectfully requests that the Court deny the Defense's motion and allows the Government to introduce the Testimony of Professor [redacted] expert opinion regarding (1) the position of Ms. [redacted] before exiting the Velux window; (2) how Ms. [redacted] exited the window; (3) Ms. [redacted] body's position falling down the roof; (4) how the marks on the [redacted] apartment roof were made by Ms. [redacted] body; and (5) the path Ms. [redacted] body took down the roof and onto the ground.

[redacted]

PAUL T. HOCHMUTH
LCDR, JAGC, USN
TRIAL COUNSEL

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CERTIFICATION OF SERVICE

A true copy of this motion was served on the Court and Defense counsel on 15 December 2021.

[redacted]

PAUL T. HOCHMUTH
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TRIAL COUNSEL

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NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES OF AMERICA **v.** **CRAIG BECKER** **LT USN**	**Defense Motion to Exclude Expert Testimony** **15 November 2021**

1. Nature of the Motion

The defense respectfully requests the court to exclude the testimony of Dr. [redacted] ("Dr. [redacted]") because her testimony regarding [redacted] post-mortem blood alcohol concentration is unreliable and lacks probative value.

2. Burden of Proof

Upon a showing that the expert's testimony has been "sufficiently called into question," the proponent of the expert's testimony has the burden of persuasion by a preponderance of the evidence.

3. Facts

a. On 8 October 2015, at approximately 2051, Mrs [redacted] fell to her death from the 7th floor apartment she shared with LT Becker.

b. [redacted] was pronounced dead at 2230 that same night.

c. Prior to her fall, [redacted] and LT Becker shared dinner at their apartment.

d. The dinner began at approximately 1800.

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e. LT Becker allegedly informed [redacted] law enforcement that Mrs. [redacted] consumed wine during the meal, and also appeared to mix some kind of medication into the wine glass. Enclosure CCCCC.

f. Following Mrs. [redacted] death, an autopsy was conducted on 11 October and blood and bile samples were taken. Enclosure DDDDD.

g. One week following the death, on 15 October, the blood and bile samples from the autopsy were transported to the laboratory of Dr. [redacted] Enclosure EEEEE.

h. Dr. [redacted] reported to [redacted] law enforcement that the blood tested "negative" for alcohol. *Id.*

h. Dr. [redacted] was interviewed by the defense on 19 October 2019.

i. Dr. [redacted] reported that it is unknown from which part of body the blood tested was drawn.

j. Dr. [redacted] reported that the alcohol content could have decreased from the time of death until the autopsy.

k. Dr. [redacted] reported that the individuals who took the samples during the autopsy did not use any preservative or anti-coagulant, and that this was unusual.

l. Dr. [redacted] reported that the samples provided to her were provided in unusual containers.

m. Dr. [redacted] conducted her testing on a mixture of blood and bile. Enclosure EEEEE.

n. Dr. [redacted] report does not identify from what part of the body the blood was taken from. Enclosure EEEEE.

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o. Dr. [redacted] did not test blood or tissue from other body parts to verify the blood alcohol concentration. These include areas such as the vitreous humor and urine which can provide more reliable data. *Id.*; Enclosure FFFFF at 5.

p. Because of the delayed testing and error rate, Dr. [redacted] reported that there is little correlation between the amount of alcohol in Mrs. [redacted] system at the time of her death and the amount of alcohol in her blood at the time of testing.

q. Dr. [redacted] reported that she calculated the blood alcohol content based upon an average woman's weight and not [redacted] actual weight.

r. Dr. [redacted] reported that, despite her report indicating the blood was negative for alcohol, that it was possible that Mrs. [redacted] had multiple glasses of wine on the night of her death.

s. Dr. [redacted] reported that she cannot estimate how much alcohol was in [redacted] system at the time of her death.

4. Discussion

A. The Defense is Entitled to a *Daubert/Houser* Hearing So That the Military Judge Can Properly Serve His Role as Gatekeeper.

The trial judge is called upon to determine the admissibility of the evidence when the "expert testimony's factual basis, data, principles, methods, or their application are *called sufficiently into question*." *Id.* at 155 (citing *United States v. Billings*, 61 M.J. 163, 168 (C.A.A.F. 2005)); *United States v. Clark*, 61 M.J. 707, 710 (N.M.C.C.A. 2005). Here, the delay in testing, the failure to use preservatives, questionable storage, and the lack of confirmatory testing from other locations sufficiently calls the findings into question.

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B. Expert Testimony By Dr. [redacted] Is Inadmissible Within the Frameworks Commonly Utilized by Military Courts

Military Rule of Evidence 702 states, "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's . . . knowledge will help the trier of fact in understanding the evidence or in determining a fact in issue; (c) the testimony is based on sufficient facts or data; (e) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case."

The proponent of expert testimony must establish: (1) the qualifications of the expert; (2) the subject matter of the expert testimony; (3) the basis for the expert testimony; (4) the relevance of the testimony; (5) the reliability of the testimony; and (6) the probative value of the testimony. *United States v. Houser*, 36 M.J. 392, 397 (C.M.A. 1993). In other words, "As gatekeeper, the trial court judge is tasked with ensuring that an expert's testimony both rests on a reliable foundation and is relevant." *United States v. Sanchez*, 65 M.J. 145, 149 (C.A.A.F. 2007).

In performing this gatekeeping function, four factors a judge may use to determine the reliability of expert testimony are (1) whether a theory or technique can be or has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error in using a particular scientific technique and the standards controlling the technique's operation; and (4) whether the theory or technique has been generally accepted in the particular scientific field. *Id.* (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593-94, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)).

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Importantly, it is not necessary to satisfy every *Daubert* or *Houser* factor as "the inquiry is 'a flexible one,'" and "the factors do not constitute a 'definitive checklist or test.'" *Sanchez*, 65 M.J. at 149 (quoting *Daubert*, 509 U.S. at 593-94). "The focus is on the objective of the gatekeeping requirement, which is to ensure that the expert, 'whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.'" *Id.* (quoting *Kumho Tire Co.*, 526 U.S. at 152).

Post-Mortem blood testing has been successfully challenged in U.S. courts under *Daubert*. *Battle v. Gold Kist, Inc.*, 2008 U.S. Dist. LEXIS 102316 (Discussing at length "the highly problematic validity of post mortem blood testing" and excluding expert testimony when cardiac blood showed a different level of THC than blood taken from the femoral vein."

State courts have also invalidated blood alcohol testing when blood samples have not been properly treated with preservatives, violating state requirements. *State v. Miles*, 775 So. 2d 950, 954 (Fla. 1992) (holding that a lack of preservative invalidated test results because the absence of preservative could either increase or decrease blood alcohol levels.); *People v. Hall*, 961 N.E.2d 1241 (Ill. App. Ct. 2d Dist. 2011)

In this case, the defense does not take issue with Dr. [redacted] qualifications as an expert in the field of toxicology. The defense further concedes that toxicology is a proper area in which an expert can assist the trier fact. As such, the defense argument is focused on the remaining *Houser* factors, with a specific focus on the reliability and probative value of the evidence.

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1. **The Government Has Not Established the Reliability of the Expert's Testimony**

Dr. [redacted] testimony is unreliable given the delay in obtaining the samples, the failure to use chemical preservatives, the unusual storage of the samples, and the location on the body from which the samples were taken. Here, the samples collected were not obtained at the hospital in the immediate aftermath of [redacted] death. Rather, the samples of blood and bile were not obtained until an autopsy was conducted three days later. Research suggests that samples taken days after death can cause blood alcohol levels to be extraordinarily misleading, both increasing and decreasing levels of ethanol in the blood. Enclosure FFFFF at 5; Enclosure GGGGG at 9 (finding that enzymes remain active within samples after collection causing samples, including ethanol, to degrade and transform). Given this lapse in time, it is impossible to determine whether the blood alcohol content measured by Dr. [redacted] accurately reflects the blood alcohol content at the time of death or is the product of chemical and biological reactions occurring after the death and before the samples were taken three days later. These same processes could also alter the blood alcohol content between the time the samples were taken and the time they were tested. There are simply too many unknown factors to reliably report this result to the members.

In addition to the lapse in time, the methods of preservation and storage also call into question the reliability of the reported results. According to information provided by Dr. [redacted] when she was interviewed by the defense, no preservatives were utilized to maintain the conditions of the samples. Standard practice in this field would dictate the use of a preservative, such as sodium fluoride, and blood anti-coagulant. Enclosure GGGGG at 2, 6 (finding the use of sodium fluoride is a routine practice). Failure to do so can lead to evaporation and chemical break down, altering blood alcohol concentrations.

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Id. at 5 (finding inappropriate preservation and storage can have a deleterious effect on the qualtitative and quantitative accuracy of the testing); Enclosure FFFFF at 4. Dr. [redacted] also noted that the samples were provided to her in unusual glass jar containers. Such storage could lead to further degradation of the sample. Enclosure FFFFF at 4; Enclosure GGGGG at 2.

Finally, the samples used by Dr. [redacted] are problematic. First, there is no specific annotation in the autopsy, identifying from what part of the body the blood was taken. The autopsy simply notes that there was "some intracranial blood" and "some abdominal blood." This is problematic because alcohol concentrations can vary widely depending what part of the body is being utilized. Enclosure GGGGG at 3-4 (finding post-mortem diffusion of alcohol throughout the body can cause blood for some areas to have concentrations ten times higher than that found in other parts). This is especially the case when the body has been subjected to trauma. *Id.* at 8 (finding organ ruptures have a significant impact on quantitative analysis because it cause blood to mix with other bodily fluids. Here, [redacted] liver—the organ responsible for metabolizing alcohol—was described as being fractured, and there is significant evidence of internal bleeding. Finally, Dr. [redacted] report indicates she utilized a mixture of blood and bile. Mixing of different sources should always be avoided. *Id.* at 3.

Alone each of these factors has a high probability of impacting the accuracy of the blood alcohol concentration measurements in this case. When combined, these factors render the results obtained by Dr. [redacted] unreliable, and, therefore, inadmissible. "The *Daubert* requirement that the expert testify to scientific knowledge -- conclusions supported by good grounds for each step in the analysis -- means that *any* step that renders

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the analysis unreliable under the *Daubert factors renders the expert's testimony inadmissible." Mclain v. Metabolife International.* 401 F.3d 1233, 1245 (11th Cir. 2005). Because each step of the anlaysis is not supported by reliable science, the Military Judge should exercise his gatekeeper function and ensure the integrity of the legal process.

2. The Government Has Not Established the Probative Value of the Expert's Testimony

The probative value of the blood alcohol results is minimal, at best. The defense assumes that the Government's purpose in utilizing this information is to establish a discrepancy between LT Becker's report that [redacted] consumed approximately three glasses of wine with evidence that only a minimal amount of alcohol was found in [redacted] blood more than a week after her death. According to Dr. [redacted] report, the results she obtained were consistent with a conclusion that [redacted] consumed 1-2 glasses of wine. During the defense interview, she indicated that an even greater amount could have been consumed depending on a number of factors to include: an above-average elimination rate, a full stomach, and degradation of the alcohol levels due to delay in testing. None of this information is surprising. It is commonly known that an individual can process or eliminate approximately one standard drink per hour. Given the 4.5 hours between the time drinking commenced and the time [redacted] was pronounced dead, it is to be expected that the consumption of three glasses of wine would leave only a small amount of alcohol at the time of death. Notably, research suggests that the body may process alcohol for a period of time after death. As such, minimal blood alcohol findings do not establish that LT Becker fabricated the amount of [redacted] consumption. Rather, the findings are potentially consistent with LT Becker's report, and, to the degree there is a discrepancy, it

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is minimal. According to Dr. [redacted] the bottom line is that she cannot determine how much alcohol was in [redacted] system at the time of her death. Given the low probative value of this information, and the significant likelihood that the findings were unreliable, the Court should exclude this evidence.

5. Relief Requested

The defense respectfully requests that this court grant the defense motion and exclude the testimony of Dr. [redacted] as it pertains to blood alcohol concentration.

6. Witnesses

A. The defense requests Dr. [redacted] to be produced as a witness on this motion.

7. Evidence

-Enclosure CCCCC – Excerpt [redacted] Investigative Report
-Enclosure DDDDD – [redacted] Autopsy Report
-Enclosure EEEEE – Dr. [redacted] Toxicology Report
-Enclosure FFFFF – Article, Pitfalls in Forensic Toxicology
-Enclosure GGGGG – Chapter 13, Clarke's Analytical Forensic Toxicology, 2nd Edition

8. Oral Argument

The accused desires to make oral argument on this motion.

[redacted]
BRYAN M. DAVIS
CDR, JAGC, USN
Defense Counsel

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CERTIFICATION OF SERVICE

A true copy of this motion was served on the opposing party and the court on 15 November 2021.

[redacted]
BRYAN M. DAVIS
CDR, JAGC, USN
Defense Counsel

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NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

THE UNITED STATES OF AMERICA **v.** **CRAIG R. BECKER** **LT USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO EXCLUDE THE TESTIMONY OF Dr. [redacted]** **15 DECEMBER 2019**

1. Nature of the Motion.

The Government respectfully requests that the Court deny the Defense motion. Dr. [redacted] testing, opinions and results of the blood alcohol level are reliable and probative as to the amount of wine Ms. [redacted] drank the evening of her death.

2. Burden of Proof.

As the proponent of the evidence, the Government bears the burden of establishing its admissibility.

3. Statement of Facts.

a. On the evening of 8 October 2015, Ms. [redacted] fell to her death. Govt. Exhibit 54

b. She was then taken by ambulance to [redacted] and died when she was being prepped for surgery. Govt. Exhibit 54

c. On 9 October 2015, Dr. [redacted] was tasked to conduct an autopsy in this case. Govt. Exhibit 94.

d. The autopsy was carried out on 11 October 2015, in the presence of Dr. [redacted] Dr. [redacted] and Investigator [redacted] Exhibit 91 and 94.

e. The autopsy took place at the [redacted]. Exhibit 94.

f. Blood samples were collected from Ms. [redacted] these were described as intracranial and

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during an interview on 9 December 2021 Investigator [redacted] confirmed they were taken from the skull. Govt. Exhibit 94

g. Investigator [redacted] collected the blood and bile samples and stored them in their evidence refrigerator and kept at a temperature of 3 – 4 Celsius. Govt. Exhibit 91.

h. When directed on 15 October 2015, Investigator [redacted] transported the blood from the Forensic Science Laboratory refrigerator, placed it in a cooler and transported the samples to Dr. [redacted] This was about a 30 minute drive.

i. Upon receipt on 15 October 2015, Dr. [redacted] tested the samples that day. Govt. Exhibit 92.

j. At no time were the blood and bile samples ever mixed together. They were mixed inside their own respective containers. Govt. Exhibit 32

k. The containers were plastic containers that were common for Dr. [redacted] to receive from [redacted] autopsies. Govt. Exhibit 95 and 96.

l. It did not appear that any preservative or anti-coagulant was used. Govt. Exhibit 96.

m. This is not unusual, as some of the autopsy doctors do not use preservative or anti-coagulant. Govt. Exhibit 96.

n. A preservative and anti-coagulant is used to preserve a sample long term. Govt. Exhibit 96.

o. In this case, the samples were tested within 7 days of Ms. [redacted] death and 4 days from the date of collection. Govt. Exhibit 32 and 92.

p. The lack of a preservative or anti-coagulant has the ability to cause fermentation, which could lead to a higher blood alcohol level. Govt. Exhibit 96.

q. Dr. [redacted] tested the bile and the blood separately to determine Ms. [redacted]

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alcohol levels. Both tests came back negative for alcohol. Govt. Exhibit 32 and 92.

r. In this case, because there was no alcohol detected in either the blood or bile, and because the sample was tested within a short time (7 days), the lack of a preservative or anti-coagulant had no impact on the blood level tests conducted. Govt. Exhibit 96.

s. A person's blood alcohol level will cease decreasing once a person dies, as the body is no longer processing the alcohol. Govt. Exhibit 96.

t. LT Becker stated that his wife drank a bottle of wine minus one glass. Govt. Exhibit 25 page 20 and 32.

u. Dr. [redacted] stands by her report Ms. [redacted] was not under the influence of alcohol at the time of her death. Govt. Exhibit 32 and 96.

v. Dr. [redacted] states that Ms. [redacted] had at most 2 glasses of wine and that she calculates a glass of wine to be 12ml (4.0oz). Govt. Exhibit 97.

w. When calculating an estimate for Ms. [redacted] blood alcohol level, Ms. [redacted] weight was estimated to be 60Kg. Govt. Exhibit 97.

x. Ms. [redacted] Medical Record from February and July of 2015 has Ms. [redacted] weight at 132 and 135 pounds. Govt. Exhibit 98.

y. 60 Kg is converted to 132 pounds.

z. On 6 October 2015, LT Becker went to the [redacted] Police told them that "his ex-wife has a drinking problem and that in his view, she drinks too much and it affects her emotional state." The police asked him if he wanted them to intervene, but he declined and asked that they not call his wife. Govt. Exhibit 99.

aa. The night of Ms. [redacted] death, LT Becker told responding officers that Ms. [redacted] had a drinking problem and had drank that evening. Govt. Exhibit 34.

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4. Discussion.

Military Rule of Evidence 702 lays out, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the fact of the case." United States v. Henning, 75 M.J. 187, 191 (CAAF 2016). Further, the courts have stressed the importance of reliability of the evidence and its probative value for the factfinder. United States v. Houser, 36 M.J. 392 (CMA 1993) and Daubert v. Merrell Dow Pharmaceuticals, Inc. 509 U.S. 579 (1993),

Military Rules of Evidence 703 provides "an expert's opinion may be based upon personal knowledge, assumed facts, documents supplied by other experts, or even listening to the testimony at trial." Houser, 36 M.J. at 399.

The Defense has narrowed the focus of their argument to the reliability of the testimony and the probative value of this evidence for the members, thus this response will only focus upon those two areas.

A. The toxicology tests for alcohol are reliable and should be admissible.

The Defense argument focuses on several facts that they say we cannot ascertain from the facts of this case. However, that assertion is not accurate. We know that Ms. [redacted] died on the evening of 8 October 2015 and that her body was kept within the morgue of [redacted] That an autopsy was conducted on 11 October 2015 at 1030 and ended at 1150 on the same day. We know that Investigator [redacted] was present for this autopsy and observed and documented

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the autopsy. That he took custody of the blood and bile samples and stored them within his evidence refrigerator at 3 - 4 Celsius. That they remained there until they were transported within a cooler, during a 30 minute drive to Dr. [redacted] That Dr. [redacted] tested the samples the same day she received them on 15 October 2015. Thus, the samples were tested within 7 days of Ms. [redacted] death and within 4 days of being collected during the autopsy. The Government can prove the how, what, when, where, who and why the samples were collected and transported from the time of collection to testing. All of this strengthens the reliability of the test results.

The Defense cite to three cases to strengthen their argument, however when these cases are read, it is clear that they do not apply to our current case and do not support the assertions the Defense makes. First, the Battle v. Gold Kist, Inc. case deals with the testing of THC within the blood. 2008 U.S. Dist. LEXIS 102316. First, there is a lack of research on THC within the blood due to the fact that THC was mostly illegal until the last few years. Second, as noted in this case and the two articles the Defense also cite to, THC is a very unstable drug that is affected by numerous variables, unlike alcohol, that is mostly stable and where there is a significant amount of research on the variable and error margins, depending on the circumstances. Lastly, the samples in that case were tested 14-15 months after collection, not 4 days after collection and 7 days from the death.

The next two cases they cite to also cut against their argument and for the Government. In both People v. Hall and State v. Miles, the Government met defeat because the lack of preservatives and the delay in testing could cause higher levels of alcohol in the blood. 961 N.E.2d 1241 (Ill. App. Ct. 2d Dist. 2011) and 775 So. 2d 950 (FLA 1992). Further, the samples were not tested within a short time period but not until 19 and 14 days after collection

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respectfully. A sample that is going to be stored for 14 days or longer should undergo long term storage precautions, because anything 14 days or longer is considered long term. Chapter 13, Clarke's Analytical Forensic Toxicology, 2nd Edition.

The Defense harp on the need of preservatives and because of the lack of preservatives in this case the samples cannot be reliable. That is not accurate. Preservatives are used for long term storage and the lack of preservative, while it could impact a sample, would be an impact that was nonexistent or extremely minor when the samples were properly stored within a cool environment such as a morgue or refrigerator and were tested in less than 14 days. Keeping the samples in a cool environment is essential because it prevents the growth of bacteria which leads to the potential of fermentation inside the body. When fermentation occurs it almost always increases the blood alcohol in the body, however on occasions under the right conditions a minor decrease could occur. In this case, Ms. [redacted] body was kept within the hospital morgue, and once the samples were collected they were transported within a cooler and refrigerated, thus proper storage was met. Further, Dr. [redacted] will testify that the potential for an increase of the alcohol in this case did not occur, because the toxicology results for both the blood and bile were negative for alcohol. In addition, Dr. [redacted] will also testify that the possibility of the alcohol in the blood decreasing is extremely low.

The Defense makes a point that the blood and bile were mixed together and tested as one unit. That is not correct and is a misreading of the toxicology report. A correct reading of the toxicology report shows that the "samples" (1) blood and (2) bile are "analyzed in duplicate, regulated by controls. Each sample has n-propanol added to them and are subjected to protein precipitation in sulphuric acid by sodium tungstate." It is this mixture that is shaken and then tested. This is the exact recommendation that the Defense's article, Pitfalls in Forensic

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Toxicology, recommends on page 5 of 5. Thus, the Defense's own article highlights that Dr. [redacted] used proper procedures. The raw data provided to the Defense also highlights that the bile and the blood were tested separately and never mixed together.

The Defense articles both stress the importance of not using blood of the cavity of the body or cardiac blood, and that did not occur in this case. Further, the Defense's article, Pitfalls in Forensic Toxicology, under Storage and Stability on page 4 of 5, points out that there are few stability problems when samples are tested soon after collection. Proper storage becomes critical when samples are not tested for several months. Once again, that did not happen in this case. As the same article points out, when collecting blood post mortem, the alcohol levels are usually higher because the non-clotted blood that is collected is serum-rich and therefore has higher level of ethanol. Yet, in this case the results were negative, thus we do not have to worry about a false positive or higher than accurate blood alcohol level.

Lastly, the Defense tries to make an argument that Ms. [redacted] weight was not taken during the autopsy, but was estimated to be about 60kg. The Government concedes that we do not have Ms. [redacted] weight from the day of her death, however a quick review of the medical records show that in February of 2015 Ms. [redacted] weighed about 132 pounds and in July of 2015 she weighed 135 pounds. 132 pounds is about 60 kg. Thus, the estimate of 60 kg is extremely close and a difference of 1 or 2 kg in either direction would only minimally alter the results of the toxicology reports. When the Government asked Dr. [redacted] about a fluctuation of 1-2 kg, she said it would have a minimum impact at most and would not change her opinion that, at most, Ms. [redacted] had two glasses of wine. Further, that at the time of her death, Ms. [redacted] would not have been under the influence of alcohol.

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B. The toxicology tests relating to alcohol are probative of the veracity of LT Becker's version of events and the influence alcohol would have had on Ms. [redacted] on the evening of 8 October 2015.

The Defense has stated their theory is that Ms. [redacted] committed suicide. LT Becker's version of events is that his wife was distraught that evening over their divorce and consumed large amounts of alcohol, which she mixed with narcotics. LT Becker told police that evening that Ms. [redacted] had consumed large amount of alcohol and was distraught. He even went to the [redacted] Police two days before Ms. [redacted] death and informed them that his "ex-wife had a drinking problem and that in his view, she drinks too much and it affects her emotional state." All of these statements are contradicted by the testimony of Dr. [redacted] and the toxicology reports.

Further, the Government has charged LT Becker with premediated murder, and the facts laid out show some of the lengths he went to in order to plan and execute his plot. LT Becker was trying to set the scene on 6 October, on the night of 8 October, and in the following days, that Ms. [redacted] was an unstable drunk. Yet, the toxicology report directly contradicts this narrative. Thus, it is not solely the fact that he lied about her alcohol use that evening. It is that he tried to set the scene, before her murder, the night of, and the days and weeks after, that is important.

The balancing test weighs heavily in the favor of admission. The tests and opinions can be challenged by the Defense or their own expert. But the toxicology report, along with all of the other pieces, assist the trier of fact in reaching the ultimate decision. There should be no concern of "smuggling" inadmissible evidence because the evidence utilized by the experts is admissible and will be presented to the members. Harris at 225. Thus, this evidence is not unfair or confusing, nor does it mislead the members or waste time.

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5. Evidence. The Government offers the following documentary evidence in support of this motion:

Testimony of Dr. [redacted]

Govt. Exhibit 25 – LT Becker's Statement.

Govt. Exhibit 32 – Toxicology Report

Govt. Exhibit 34 – [redacted] Statement

Govt. Exhibit 91 – Statement of Invest. [redacted]

Govt. Exhibit 92 - Initial Toxicology Report

Govt. Exhibit 93 – Transfer of Blood to Dr. [redacted]

Govt. Exhibit 94 – Autopsy Report.

Govt. Exhibit 95 – Sample Pictures of Blood and Bile containers.

Govt. Exhibit 96 – Dr. [redacted] statement.

Govt. Exhibit 97 – Alcohol Metabolism Rate.

Govt. Exhibit 98 – Ms. [redacted] Medical Records.

Govt. Exhibit 99 – Police Blog.

6. Oral Argument. The Government only desires to make oral argument on this motion if the Defense still opposes it.

7. Relief Requested. The Government respectfully requests that the Court deny the Defense's motion and allows the Government to introduce [redacted] the

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Testimony of Dr. [redacted] and the toxicology results relating to the lack of alcohol in Ms. [redacted] blood.

PAUL T. HOCHMUTH
LCDR, JAGC, USN
TRIAL COUNSEL

CERTIFICATION OF SERVICE

A true copy of this motion was served on the Court and Defense counsel on 15 December 2021.

[redacted]

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NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **CRAIG R. BECKER** **LT/O-3** **U.S. NAVY**	**DEFENSE MOTION FOR A UNANIMOUS VERDICT INSTRUCTION** **15 NOV 2021**

1. Nature of Motion

Pursuant to Rule for Courts-Martial (R.C.M) 905(b), the Defense moves that the members panel be instructed that they must reach a unanimous verdict in order to convict LT Craig Becker.

2. Summary

Currently the law allows service members to be convicted at court-martial by a two-thirds or three-fourths vote. However, the Supreme Court has ruled that the Sixth Amendment mandates that *civilian* juries cannot convict except by a *unanimous* verdict. While the Supreme Court has long said that the Sixth Amendment right to trial by jury does not apply to courts-martial, this sweeping declaration—which was dicta when it was pronounced—has never been tested against a request for unanimity. In the alternative and in light of the substantial changes to the scope, form, and impact of courts-martial since the founding era, due process requires unanimity in findings because the factors militating in favor of this right outweigh the balance struck by Congress.

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3. Summary of Facts

1) LT Becker is charged *inter alia* with one specifications of UCMJ Article 118 (premeditated murder). (*See* charge sheet).

2) The facts underlying this case stem from events that occurred in LT Becker's off base residence in [redacted] (Enclosure RRRR)

3) The alleged victim in this case is Mrs [redacted] a civilian. (Enclosure RRRR)

4. Law

The Sixth Amendment Requires a Unanimous Verdict to Convict

The Sixth Amendment guarantees that "the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed" in "all criminal prosecutions." The Fifth Amendment provides, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger."

In *Ramos v. Louisiana*, 140 S.Ct. 1390 (2020), the Supreme Court held that the Sixth Amendment jury trial right carries with it a requirement that verdicts for "serious" offenses be rendered by unanimous vote. The Court reached this conclusion on the basis of the historical practice during the founding era, and found that the Framers would have understood the phrase "impartial jury" as used in the Sixth Amendment to mean one that could only render a conviction upon reaching a unanimous verdict. The Court also pointed out that it has long recognized a distinction between the constitutionally required composition of a jury (e.g. allowing women and

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people of color to sit on juries), and whether or not the constitution required that jury render a unanimous verdict, however constituted. *Id.* At 1402, fn.47.

By contrast, the Supreme Court has long held that the Sixth Amendment right to trial by jury does not apply to courts-martial. *See, e.g., Ex parte Milligan*, 71 U.S. 2, 123 (1866); *Ex parte Quirin*, 317 U.S. 1, 39-40 (1942); *Welchel v. McDonald*, 340 U.S. 122, 127 (1950); *Reid v. Covert*, 354 U.S. 1, 21 (1957); *O'Callahan v. Parker*, 395 U.S. 258, 261-62 (1969). However, the Supreme Court has not elaborated on why precisely this is, nor has the Court specified whether this declaration applies to all facets of the jury trial right, or just some of them.

The decision in *Milligan* concerned the rights of a civilian tried by military commission during the Civil War. The Court based its conclusion about the Sixth Amendment on the Framer's exclusion of "cases arising in the land and naval forces" from the grand jury requirement of the Fifth. 71 U.S. at 122-30. All subsequent cases reiterated this dicta without criticism, though never in the context of unanimity. *Quirin* dealt with the jurisdiction of military commissions to try violations of the laws of war by enemy combatants. 317 U.S. at 39-45. In *Welchel*, the Court upheld the all-officer composition of the members' panel against a Sixth Amendment challenge. 340 U.S. at 126-27. In *Covert*, the Court rejected military jurisdiction over crimes committed by military dependents. 354 U.S. at 20-41. The Court in *O'Callahan* enunciated the "service connection" requirement of court-martial jurisdiction, holding that a service member was entitled to the full panoply of Sixth Amendment protections for crimes wholly unconnected to his military service. 395 U.S. at 272-74 (overruled on that point by *Solorio v. United States*, 483 U.S. 435, 436.)

The Court of Appeals for the Armed Forces has adopted this conclusion without comment or elaboration. *See, e.g., United States v. Witham*, 47 M.J. 297, 300-301 (holding that

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the *Batson* rule applies to peremptory challenges in courts-martial despite the inapplicability of the Sixth Amendment jury trial right). Yet the C.A.A.F., like the U.S. Supreme Court, has never addressed a unanimity requirement.

It is worth noting that the Supreme Court has recently confirmed that courts-martial "decide criminal 'cases' as that term is generally understood . . . in strict accordance with a body of federal law (of course including the Constitution)" and that the "procedural protections afforded to a service member are 'virtually the same' as those given a civilian criminal proceeding, whether state or federal." *Ortiz v. United States*, 138 S.Ct. 2165, 2174 (2018) (citation omitted). The Court went on to note that while court-martial "jurisdiction has waxed and waned over time, courts-martial today can try service members for a vast swath of offenses, including garden-variety crimes unrelated to military service. As a result, the jurisdiction of those tribunals overlaps significantly with the criminal jurisdiction of federal and state courts." *Id.* at 2174-75 (citing *Solorio*, 483 U.S. at 438-41).

Due Process

The Constitution gives Congress the power to "make rules for the government and regulation of the land and naval forces." U.S. CONST, art I, § 8, cl. 14. The Supreme Court has held that the composition, organization, and administration of courts-martial are matters "appropriate for congressional action." *Welchel*, 340 U.S. at 127 (upholding an all-officer panel's conviction of an enlisted man). When Congress is acting pursuant to this power, its decisions are owed great deference. *Solorio*, 483 U.S. at 447-48 (doing away with the service connection requirement for court-martial jurisdiction). The High Court has further found that military tribunals "probably never can be constituted in such a way that they can have the same

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kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts." *Covert*, 354 U.S. at 39. This is owing in large part to the different demands of the military, as against the civilian sector. *Id.* at 35-39 (noting the consolidation of legislative and judicial powers in the executive branch under the military justice system); *see also Curry v. Secretary of Army*, 595 F.2d 873, 880 (1979) (finding that the needs of the military "mandate[] an armed force whose discipline and readiness is not unnecessarily undermined by the often deliberately cumbersome concepts of civilian jurisprudence").

Nevertheless, Congress' power to act in the arena of military justice is not absolute. "Congress, of course, is subject to the requirements of the Due Process Clause when legislating in the area of military affairs, and that Clause provides some measure of protection to defendants in military proceedings." *Weiss v. United States*, 510 U.S. 163, 176 (1994). In arguing that the Due Process Clause mandates a right not provided for by Congress, the standard is "whether the factors militating in favor of" that right "are so extraordinarily weighty as to overcome the balance struck by Congress." *Id.* at 177 (citing *Middendorf v. Henry*, 425 U.S. 25, 44 (1976) [rejecting a Due Process right to counsel at summary courts-martial]). This test is one that must consider the role that military law plays in "maintaining good order and discipline in the armed forces," the promotion of "efficiency and effectiveness in the military establishment," and in "strengthen[ing] the national security of the United States." *Sanford v. United States*, 586 F.3d 28, 36 (D.C. Cir. 2009) (internal quotation marks omitted). However, these considerations are underpinned by the principle that "a fair trial in a fair tribunal is a basic requirement of due process." *Weiss*, 510 U.S. at 178 (internal quotation marks omitted).

In *Weiss*, the Court rejected the accused's argument that military judges needed to serve for fixed terms. 510 U.S. at 181. With respect to the Due Process argument, the Court found

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that "the historical fact that military judges have never had tenure is a factor that must be weighed" in assessing Congress' balance of rights. *Id.* at 179. The Court went on to hold that other provisions of the UCMJ—Article 26, Article 37, Article 98, Article 41, and appellate review by the Court of Military Appeals—all worked to preserve judicial independence and impartiality sufficient to satisfy the Due Process Clause. *Id.* at 179-81.

In *United States v. Mitchell*, the C.A.A.F. rejected the accused's assertion that the roles played by the Judge Advocate General and Assistant Judge Advocate General of the Navy in preparing fitness reports for appellate military judges created a constitutionally impermissible appearance of impropriety and lack of independence by tempting those judges to shape their opinions in an effort to curry favor. 39 M.J. 131, 135-42 (C.M.A. 1994). Relying on *Weiss*, the court held that (a) the accused had not carried his burden to show the invalidity of this practice, and (b) the legal premises of his argument were inadequate. *Id.* at 136-142. To the latter point, the court found that the arguments (1) misapprehended the role and independence of the JAG and AJAG, (2) failed to adduce any evidence that supported a perception that these officials were biased in favor of the government, (3) failed to show that the JAG or AJAG disregarded laws prohibiting them from attempting to influence findings and sentencing decisions through fitness reports, (4) failed to show that the judges in question actually believed their fitness reports evaluated their decisions, and (5) failed to show that the proposed "reasonable man" perception created a constitutionally impermissible risk of unfairness. *Ibid.*

The C.A.A.F. applied this standard again in *United States v. Vazquez*, 72 M.J. 13 (C.A.A.F. 2013). There, the accused challenged procedures under UCMJ Article 29 which, after a member was excused from his trial following the bulk of the government's case in chief, allowed the new members to be read a verbatim transcript of all witness testimony up to that

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point. *Id.* at 15-16. The court held that the accused failed to carry his burden under *Weiss*, noting that Article 29 "represents Congress' view of what 'process is due' in the event a panel falls below quorum," and that the accused failed to show "how the members in his case were either actually unfair or appeared to be unfair." *Id.* at 19-20.

In *Sanford*, the Circuit Court of Appeals rejected a challenge to the panel size of a special court-martial which convicted the accused. The accused argued that *Ballew v. Georgia*, 435 U.S. 223 (1978)—holding that the Sixth Amendment requires a minimum of six people to sit on a jury for trial of non-petty offenses—rendered his four-person special court-martial invalid. *Sanford*, 586 F.23d at 29. The court began by acknowledging that court-martial members are selected "on the basis of who is best qualified for the position." *Id.* at 33-34. The court went on to find that the accused had failed to apply the *Weiss* balancing test to his claim, and therefore failed to show that the "same concerns underlying the *Ballew* decision also undermine 'a fair trial in a fair tribunal,' which is 'a basic requirement of due process,'" and thereby establish the constitutional invalidity of the practice. *Id.* at 35-37. Specifically, the court contended that the accused had not addressed the role military law plays in the maintenance of good order and discipline, military effectiveness, or the rules governing member qualifications and de novo appellate review. *Id.* at 36.

5. Discussion

The Sixth Amendment Unanimity Requirement Extends to Courts-Martial

As an historical matter, the Founders likely never considered that the court-martial system would be so extensively applied as it is today for the simple reason that they did not intend to provide a standing military. Thus it is far more plausible that they expected most

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crimes to be tried through the civilian criminal justice system with all of its attendant protections, while courts-martial would be applied only in times of actual national conflict.

Moreover, the actual scope of court-martial jurisdiction in the Founding Era was limited. Indeed, if a military member was accused of committing a crime "punishable by the known laws of the land," the service member's commander was charged with delivering "such accused person or persons to the civil magistrate" for trial.[1] AMERICAN ARTICLES OF WAR OF 1776, § X, art. 1 (hereinafter AW 1776). Once again, this trial would presumably be conducted with the full spectrum of constitutional rights afforded to an accused.

Today, by contrast, Congress has established a system that is essentially "judicial" in character, and which exercises comprehensive jurisdiction over service members wherever they are and whatever crimes they may have committed. *See Ortiz*, 138 S.Ct. at 2174. As such, the sweeping declaration of *Milligan* is at odds with *Ortiz*'s recognition that many courts-martial today are "criminal prosecutions," and for that reason should now fall under the purview of the Sixth Amendment. Indeed, the Court in *Ramos* recognized that it is improper to subject the guarantee of the Sixth Amendment to a "functionalist assessment." *Ramos* at 1401. In short, because the dicta in *Milligan* lacks a foundation for its application to the modern system with regard to unanimity, this facet of the Sixth Amendment should be incorporated to the court-martial, even if those other facets (e.g. venire) are not.

While it is true that *Ramos* based its conclusion on the common law practice of jury trials, *Ramos*, at 1416 (citing *Thompson v. Utah*, 170 U.S. 343, 348 (1889))—a common law that

[1] The Majority in *Solorio* noted some dispute over the precise reach of courts-martial in practice—citing the "general article" of AW 1776, section XVIII—but ultimately deemed resolution of that question irrelevant to its conclusion that fears of Executive overreach were satisfied by placing the authority to define jurisdiction with Congress. *Solorio*, 483 U.S. at 444-46. But see *Covert*, 354 U.S. at 23-26 & nn.42, 44 (noting that civilian jurisdiction over crimes committed by service members was the rule in peacetime at least through the end of the 19th century).

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excluded courts-martial by parallel historical practice—the modern court-martial system more closely resembles the civilian system in scope and application. It is unlikely that the common law would have countenanced a military justice system that exercised jurisdiction coextensive with the civilian system but lacking in any protections believed to be fundamental to the latter, or the Founders would not have provided for delivery of certain classes of offenders to civilian authorities. *See* AW 1776, § X, art 1. For this reason, the court-martial should be reevaluated as worthy of coming within this historical protection, rather than simply functioning as a label that allows Congress to abrogate whatever rights it thinks expedient.

As a final matter, there is no merit to a slippery slope argument that such a holding would have the effect of requiring grand jury indictments in courts-martial. The Supreme Court long ago recognized that a trial—even for a capital offense—can be conducted in accordance with due process even if done so without an indictment. See *Hurtado v. California*, 110 U.S. 516, 537 (1884). This same logic can be extended to courts-martial without doing violence to the language of the Fifth or Sixth Amendments. *See, e.g., Curry v. Secretary of Army*, 595 F.2d 873, 876-77 (upholding the convening authority's role in the referral of charges as consistent with due process).

Due Process Requires Unanimous Findings

Historical development of court-martial voting

For nearly 150 years, courts-martial reached their findings by majority vote. *See* Hearings before the Senate Committee on Military Affairs, Appendix I to S.Rep. 130, 64th Cong., 1st Sess., 64 (statement of Brig. Gen. Enoch Crowder). Indeed, it was not until 1920 that

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the requisite percentage was raised to two-thirds in non-capital cases. AMERICAN ARTICLES OF WAR OF 1920, § 43. This change was met with some dissent, with one general noting that the old system "makes for justice most of the time," and arguing that because military law has as its "primary object . . . the paramount necessity of safeguarding the whole force," the risk that the guilty go free poses a much greater danger to the military establishment than it does to civilian society, and justifies less emphasis on individual protections and rights. Proceedings and Report of Special War Department Board on Courts-Martial and Their Procedure, July 17, 1919 (OCLC No. 276296627).

In 1946, the War Department directed a study of the military justice system, and an advisory committee received and complied answers to forty-five different questions. It received responses from 81 general officers, 66 active and former judge advocates, and 46 enlisted men. Report of War Department Advisory Committee on Military Justice (hereinafter Vanderbilt Report) (OCLC No. [redacted]). When asked specifically whether unanimous votes should be required to convict, the majority of all three categories of respondent answered in the negative. Each group stated that "hung juries" were not desirable in times of war. *Id.* at pp. 54-55. Among the judge advocates, however, "the suggestion was made that unanimity be required when the charged offense is the equivalent to a felony in civilian jurisprudence." *Id.* at p. 55.

Two-thirds vote was the rule for non-capital cases until 2019, when the Military Justice Act of 2016 became effective. See 10 U.S.C. § 852. That law raises the required number of votes to three-fourths of the members. This change came about after a working group noted the wide variance in actual percentages required for a conviction under the previous system—ranging from 67% to 80% depending on the number of members present. REPORT OF THE MILITARY JUSTICE REVIEW GROUP 2015, pp.458-59. Notably, this report cited to the Oregon and

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Louisiana statutes which were ruled unconstitutional by *Ramos* in its discussion of civilian practice. *Id.* at p.459, n.6. The House and Senate adopted this change without substantive comment. H.Rep. 114-840, 114th Cong., 2d. Sess., p.1521; S.Rep. 114-255, 114th Cong., 2d Sess., p.604.

A unanimous finding is required for proof beyond a reasonable doubt.

The Supreme Court in *Ramos* ultimately concluded that, in order to give content to the phrase "impartial jury," the verdict needed to be unanimous. The Sixth Circuit held almost 70 years ago that "unanimity of a verdict in a criminal case is inextricably interwoven with the required measure of proof. To sustain the validity of a verdict by less than all of the jurors is to destroy this test of proof, for there cannot be a verdict supported by proof beyond a reasonable doubt if one or more jurors remain reasonably in doubt as to guilt. It would be a contradiction in terms." *Hibdon v. United States*, 204 F.2d 834, 838 (6th Cir. 1953). That court went on to hold that unanimity "is of the very essence of our traditional concept of due process in criminal cases." *Id.*; *accord Ramos*, Sotomayor, J., concurring at 1409. And, as the Court held in *Ortiz*, "Each level of military court decides criminal 'cases' as that term is generally understood, and does so in strict accordance with a body of federal law (of course including the Constitution)." *Ortiz*, 138 S.Ct. at 2174.

The UCMJ currently mandates that members be instructed that an accused "must be presumed innocent until his guilt is established beyond a reasonable doubt," and that "if there is a reasonable doubt as to the guilt of the accused, the doubt must be resolved in favor of the accused and he must be acquitted." 10 U.S.C. § 851(c)(1)-(2). The Supreme Court has stated that the reasonable doubt standard "is a prime instrument for reducing the risk of convictions

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resting on factual error," and that it "provides concrete substance for the presumption of innocence." *In re Winship*, 397 U.S. 358, 363 (1970). The Court went on to find that a lower standard would place an accused at "a disadvantage amounting of a lack of fundamental fairness" under the Due Process Clause. *Id.* at 363-64. In support of its conclusion, the Court noted that there is always a margin of error in litigation, and where an accused has an interest at stake which is protected by the Due Process Clause—namely, his liberty—that risk is mitigated by requiring the government to carry its burden beyond a reasonable doubt. *Id.* at 364.

In our system of military justice, members are not selected at random from the service at large. Rather, members are specifically nominated by the convening authority as those "best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." 10 U.S.C. § 825(e)(2); *see also Sanford*, 586 F.23d at 33-34. As such, it is impossible to understand how doubts held by members selected for these qualities could be considered "unreasonable." Yet this is precisely what the current arrangement allows. The government is required to prove its case beyond a reasonable doubt, yet the law implies that the doubts of 25% of members deciding the case are not reasonable doubts and can be disregarded for the purpose of carrying that burden and thereby depriving an accused of a protected interest. This is an inherent conflict that cannot be resolved except through the requirement of unanimity.

To the extent that concerns expressed by the dissenting General on the Special War Department Board—the risk of having criminals go free to rejoin the ranks—is a consideration relevant to the desirability of this facet of the military justice system, it reflects a pre-judgment of an accused that runs directly counter to the presumption of innocence. Moreover, it entirely disregards the concomitant risk that an innocent person gets convicted.

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This is not a case like *Mitchell*, wherein the accused only offered speculation as to how he was harmed by a mere perception of potential unfairness in the preparation of fitness reports for judges. 39 M.J. 136-142. Nor is it like *Vazquez* where the accused failed to show "how the members in his case were either actually unfair or appeared to be unfair" when brought up to speed by transcripts rather than live testimony. 72 M.J. at 19-20. Rather, the risk of unfairness in the present case is tangible and calculable. The government need not carry its burden with respect to 25% of the members to secure a conviction, thus truncating the presumption of innocence and shifting the risk of factual error or insufficiency onto the accused. Due Process requires a "fair trial in a fair tribunal," *Weiss*, 510 U.S. at 178, and by failing to hold the government to its burden, the law allowing for less than unanimous findings creates a constitutionally impermissible risk of unfairness, *see Winship*, 397 U.S. at 363-64.

The attendant effects of a court-martial conviction mandate unanimous findings

Following conviction at a general or special court-martial, a service member then becomes subject to a host of federal laws and regulations. First and foremost, a finding of guilt is counted as a "prior sentence" under the Federal Sentencing Guidelines. U.S.S.G. § 4A1.2(g). It becomes unlawful for that person—if convicted of any crime punishable for more than one year in confinement—to possess a firearm. 18 U.S.C. § 922(g)(1). That person can then be convicted for violating that law, even if their court-martial conviction was for military-specific offenses. *United States v. MacDonald*, 922 F.2d 967 (9th Cir. 1993) (upholding a conviction for felon-in-possession where the defendant had been court-martialed forty years prior for fraudulent enlistment, failure to obey a lawful order, and sale of a liberty pass). The court in *MacDonald* specifically held that courts-martial are "courts" and convictions rendered therein are "crimes"

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for civilian federal law purposes. *Id.* at 970. Additionally LT Becker will—if convicted of the primary offense in this case —be sentenced to a minimum of confinement for life with the possibility of parole. And of course LT Becker will have a criminal record in a federal data base that will then follow him throughout his life, if one exists, after his sentence has been served and his military service has ended.

These laws apply equally to civilians, but a key difference is that, following *Ramos*, every civilian will have the benefit of the requirement of a unanimous jury verdict, while LT Becker will be made to suffer these effects on the basis of a mere two-thirds or three-fourths concurrence of court-martial members. In effect, LT Becker is prone to lose a host of rights more easily by virtue of their military service. This loss is a substantial factor in evaluating the balance struck by Congress in delineating the rights LT Becker is due before a military court, because it increases the impact on his liberty without increasing the scope of protections.

The scope of the modern court-martial favors unanimous findings.

The jurisdiction and scope of the court-martial has expended greatly since the founding era. Aside from the enactment of a comprehensive criminal code, modern precedent has authorized military jurisdiction over service members regardless of where they commit crimes and regardless of whether those crimes are related to military service. *See Solorio*, 483 U.S. at 436 (overruling the "service connection" requirement for court-martial jurisdiction). This certainly was not always the case. In the decades following the founding of the United States, "the right of the military to try soldiers for any offenses in time of peace had only been grudgingly conceded." *Covert*, 354 U.S. at 23. Certainly by 1916, the jurisdiction of courts-martial had been extended to give them "concurrent jurisdiction with the civil courts to try

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noncapital crimes of person subject to military law at all times and wherever committed . . . ." Statement of Brig. Gen. Enoch Crowder, p.32. Even so, there was some dispute as to whether these enactments granted jurisdiction on the basis of "status," or whether there needed to be some connection to military service to bring offenses within the cognizance of military courts. *Compare Solorio*, 483 U.S. at 439, 444-45 (noting the ostensibly broad reach of the "general article") *with id.* at 458-60, Marshall, J., dissenting (arguing that military law traditionally only covered "offenses committed by members of the armed forces that had some connection with their military service"). The majority in *Solorio* declined to resolve this dispute, finding instead that fears about Executive overreach in the use of courts-martial to enforce his will were dealt with by giving Congress the authority to define that jurisdiction. *Id.* at 446.

In any event, it was not at all clear that those practicing military law around the time the UCMJ was first adopted considered it to function as an equivalent to a civilian criminal code. As recorded by the Vanderbilt Report, at least some experienced judge advocates believed unanimity was advisable "when the charged offense is the equivalent to a felony in civilian jurisprudence." Vanderbilt Report at p.55. This indicates that at least some practitioners were of the understanding that courts-martial were not vehicles to enforce civilian laws. When asked whether military and non-military offenses should be treated differently, both generals and enlisted men suggested that it might be best to turn over civilian offenses to civilian authorities, at least during peacetime. *Id.* at pp.17-18. A number of enlisted men also suggested that civilian offenses should be handled "consistent with Federal laws and procedures." *Id.* at p.18. Yet today courts-martial have become all-encompassing bodies for the plenary enforcement of law. Military members may now be prosecuted for any number of crimes which are the equivalent to civilian felonies, whether committed on or off base, on duty or on leave, and whether they

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detract from military efficiency and readiness or not. Given the historical concerns about abuses of military justice, *see Covert*, 354 U.S. at 23-29, Congress cannot expand the reach of military law without also expanding the protections due to those subject to that law.

The present case is illustrative. Neither LT Becker nor his wife was engaged in military operations at the time, the alleged crime was not committed on military property, and the Government has pointed to no impact to the training, efficiency, or operability of any military unit or operation.[2] The only thread that ties this case to the military is LT Becker's active duty status. Of course, following *Solorio* the Government does not have to show anything more than that to justify military jurisdiction. That, however, is precisely the point—military justice is here functioning as a stand-in for the enforcement of state or federal civilian laws without affording LT Becker commensurate process.

No military concerns underpinning the court-martial system justify non-unanimous findings.

There are a number of concerns unique to the military environment that have been advanced to justify a court-martial system that would not stand up to constitutional muster if applied to civilians. None of them, however, favor non-unanimous convictions.

It is true that "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise," and that "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty." *Parker v. Levy*, 417 U.S. 733, 743-44 (1974), citing *United States ex rel Toth v. Quarles*, 350 U.S. 11, 17 (1955) and *Burns v. Wilson*, 346 U.S. 137, 140 (1953) (internal quotation marks omitted). The D.C. Circuit

[2] In fact, it is worth noting that for over two years, the military was content with allowing the [redacted] criminal justice system to dispose of this matter.

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in *Sanford* identified the maintenance of good order and discipline, the promotion of efficiency and effectiveness in the military establishment, and the strengthening of national security as relevant considerations. 586 F.3d at 36 (citing the Preamble to the Manual for Courts-Martial [MCM]).[3] In *Curry*, the court noted that military law "must be equally applicable in time of war and national emergency," and that the "need for national defense mandates an armed force whose discipline and readiness is not unnecessarily undermined by the often deliberately cumbersome concepts of civilian jurisprudence." 595 U.S. at 878, 880. The court also suggested that "the deterrent effect of immediate punishment may be crucial to the maintenance of discipline in crisis situations." *Id.* at 879.

Brigadier General Crowder voiced the position that "The object of militaries is to govern armies composed of strong men so as to be capable of exercising the largest measure of force at the will of the Nation." Statement of Brig. Gen. Crowder, p.34 (internal quotation marks omitted). He goes on to say that "An army is a collection of armed men obliged to obey one man. Every enactment, every change of rule which impairs this principle weakens the army, impairs its value, and defeats the very object of its existence." *Id.* (internal quotation marks omitted.) He cites these principles as support for his position that the military cannot have "the vexatious delays and failures of justice incident to the requirement of a unanimous verdict." *Id.* at p.35.

Levy, however, was a case deciding the scope of substantive rights due to a service member. 417 U.S. at 7454-49 (finding that military law may properly regulate "aspects of the conduct of members of the military which in the civilian sphere are left unregulated"). Nothing in the requirement for unanimous findings impacts the power of the military to curtail those

[3] Conspicuously absent from the court's elucidation is the first stated purpose of military law, which is to "promote justice." MCM 2019 ed., I-1, Preamble.

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rights to the benefit of good order and discipline, or to otherwise govern the conduct of Marines to that end.

Likewise, concerns about the efficiency of the military justice process and the military establishment as a whole are inapposite to a requirement that members render findings unanimously. Findings are the last step in a court-martial, aside from sentencing. The procedures for obtaining and producing witnesses and evidence, for detailing counsel, and all other aspects of the actual preparation for and conduct of the trial are not impacted by this requirement. This satisfies the concern in *Curry*, that the precepts of civilian jurisprudence which are "deliberately cumbersome" not undermine the effectiveness of the military—unanimity is no such burden. *See* 595 U.S. at 880. And to the extent *Curry* found "immediate punishment" to be a major factor in discipline, this position is undermined by failing to consider the parallel role of justice.

The Vanderbilt Report recorded a number of important thoughts on this topic. Among the generals queried, the vast majority indicated the purpose of military justice was a combination of justice and discipline. Specifically, one noted that "an unjust application will result in loss of morale and of combat strength." Another noted that discipline does not hinge on punitive potential, but rather is "maintained by effective, responsible leadership through command, and indoctrination of all intelligent individuals with principles of personal responsibility for self-discipline and conduct." Vanderbilt Report, at p.1. Likewise, the enlisted men argued that "strict discipline results from justice," that discipline "is maintained by administration of justice," remarking that discipline "is not always punishment." Similarly, discipline "must be tempered with justice, if for no other reason than to maintain high morale and esprit de corps." *Id.* at p.2. The upshot is that the maintenance of discipline does not—and

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indeed should not—turn on the relative certitude of punishment. For if Marines are convinced that they will not face a fair trial, their morale will suffer and the whole combat effort will be diminished. To this end, unanimity in fact *promotes* discipline, rather than impedes it.

Any lingering concerns that unanimity will result in delay and "hung juries" are rendered moot by the current framework. As it now stands, if the members cannot reach a quorum for a finding of guilt, the accused is acquitted. 10 U.S.C. § 852; R.C.M. 921(c)(2). In any event, concerns over hung juries and attendant delay in proceedings are not concerns which justify lightening the government's burden and shifting it to the accused.

Lastly, there is the stated need for the military justice system to be equally effective in wartime as in peacetime. Yet, as with the concerns over the efficiency of the military establishment, it is not at all clear what impact a unanimity requirement would have on the overall efficacy in a deployed environment. It would seem there is none. Moreover, it is today sufficiently easy to convene courts-martial in a garrison setting, such that the need for full-blown trials on the front lines is greatly reduced. Finally, in the event that the procedures attendant to traditional courts-martial—to which unanimity would be but a minor modification—are still too cumbersome, the UCMJ preserves the right to try certain offenses which are deleterious to the war effort by military commission rather than court-martial. *See, e.g.*, 10 U.S.C. § 81 (conspiracy); § 103 (spies); § 103b (aiding the enemy). Congress is free to expand this list as the needs of the military evolve, but whether it does or not, unanimity has no impact on the *conduct* of courts-martial.

In short, while all of these identified concerns are legitimate ones for Congress to consider, the factors which favor a unanimous panel outweigh their impact in this regard. As

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such, Due Process demands that an accused be convicted only by the unanimous vote of all members.

RELIEF REQUESTED

The Defense requests that the members be instructed as follows:

"The concurrence of all members present when the vote is taken is required for any finding of guilty. Since we have (8) members, that means all (8) members must concur in any finding of guilty. If one or more members do not agree that the government has proved a charge or specification beyond a reasonable doubt, then you must return a finding of not guilty as to that charge or specification."

ARGUMENT

The Defense does not request oral argument.

EVIDENCE

The Defense requests that this Court consider the charge sheet and the matters presented on this previous motions in deciding this motion.

[redacted]
J/A. GUARINO
CDR, JAGC, USN
Detailed Defense Counsel

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NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES v. CRAIG BECKER LT USN	GOVERNMENT RESPONSE TO MOTION FOR UNANIMOUS VERDICT

The Sixth Amendment right to a trial by jury has long been held inapplicable to courts-martial. Binding precedent dictates that this Court should deny the Defense Motion.

SUMMARY

In *Ramos v. Louisiana*, 140 S.Ct. 1390 (2020), the Supreme Court held that the Sixth Amendment's right to a jury trial was incorporated against the States. This ruling has no bearing on the court-martial process, which has been excepted from the Sixth Amendment's right to a jury trial. The Government respectfully requests that the Court deny the Defense's Motion to instruct the members that unanimity is required to reach a finding of guilty.

FACTS

The accused is charged with an August 2013 assault and October 2015 the murder of his wife [redacted] as well as related Article 133 offenses. On 29 January 2019 the accused's charges were referred to a general court-martial which necessitates a panel of eight officers. For a guilty verdict of any specification three-fourths of the members must concur that the Government proved each element of an offense beyond a reasonable doubt. R.C.M. 921(c)(2).

BURDEN

The burden of proof and persuasion rests on the Defense for this motion. The standard as to any factual issue necessary to resolve this motion is to a preponderance of the evidence. RCM 905(c)(1).

LAW

In order to provide for the common defense, the Constitution gives Congress the power to raise, support and regulate the Armed Forces. U.S. CONST. Art 1, § 8, cl. 14. 11. Under this authority, Congress enacted the UCMJ. 10 U.S.C. §§ 801-946a (Articles 1 – 146a). The UCMJ is the code of military criminal law and procedure applicable to all U.S. military members

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worldwide. In exercising this Constitutional authority to establish a disciplinary system for the military, Congress created court-martial panels under Article 29, UCMJ, and authorized non-unanimous verdicts in Article 52, UCMJ.

The Supreme Court has thus far upheld the court-martial system put in place by Congress holding that the Sixth Amendment right to a trial "by an impartial jury" does not extend to military courts-martial. See, *Ex parte Milligan*, 71 U.S. 2, 123 (1866); *Ex Parte Quirin*, 317 U.S. 1 (1942). ("[T]he framers of the Constitution doubtless meant to limit the right of trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth."); *see also United States v. Dowty*, 60 M.J. 163, 169 (C.A.A.F. 2004) ("Congress has established the court-martial as the institution to provide military justice to service members.").

ARGUMENT

The Sixth Amendment does not apply to court-martials and *Ramos* is Inapplicable

In *Ramos*, the United States Supreme Court held the Sixth Amendment's right to a jury trial, which implicitly requires unanimity, is incorporated against the States by way of the Fourteenth Amendment. *Ramos*, at 1393. This ruling does not alter the longstanding precedent that courts-martial are distinct from civilian jury trials and therefore not bound by the Sixth Amendment's right to a jury trial. *See Ex parte Quirin*, 317 U.S. at 40; *Ex parte Milligan*, 71 U.S. at 123; *Riesbeck*, 77 M.J. at 162; *Leonard*, 63 M.J. at 399. *Ramos* dealt solely with the question of incorporation against the States. *Ramos* was focused on state law which was tested against the Sixth and Fourteenth Amendments. *Ramos* did not discuss statutes or Rules for Courts-Martial that govern how members are instructed or required to vote, let alone Congress' authority to create rules and structures of court-martial.

In *Ex Parte Quirin*, the Supreme Court recognized that the operation of both the Fifth and Sixth Amendment are excepted for cases arising in the land or naval forces. *See Ex Parte Quirin*, 317 U.S. at 40 (citing *Ex Parte Milligan*, 71 U.S. at 2). The Court clarified that the exception's objective was "to authorize the trial by court martial of the members of our Armed Forces" and was "not restricted to those involving offenses against the law of war alone, but extend[ed] to trial of all offenses, including crimes which were of the class traditionally triable by jury at common law." *Id.* at 43. Thus, these constitutional exceptions include courts-martial in addition to a military commission that was trying Quirin, a German civilian saboteur who entered the United States to commit sabotage.

Consistent with the principle that courts-martial are separate and distinct from civilian trials, courts have repeatedly rejected the idea that the Sixth Amendment's right to a trial by jury applies to courts-martial. *See Ex parte Quirin*, 317 U.S. 1, 40 (1942) ("'[C]ases arising in the land or naval forces' . . . are expressly excepted from the Fifth Amendment, and are deemed excepted by implication from the Sixth."); *United States v. Riesbeck*, 77 M.J. 154, 162 (C.A.A.F. 2017) ("Courts-martial are not subject to the jury trial requirements of the Sixth Amendment . . . ."); *United States v. Easton*, 71 M.J. 168, 175 (C.A.A.F. 2012) (surveying different application of constitution to servicemembers and noting "there is no Sixth Amendment right to trial by jury in courts-martial"); *United States v. Brown*, 65 M.J. 356, 359 (C.A.A.F. 2007) ("[M]ilitary criminal practice requires neither unanimous panel members, nor panel agreement on one theory of liability, as long as two-thirds of the panel members agree that the

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government has proven all elements of the offense."); *United States v. Leonard*, 63 M.J. 398, 399 (C.A.A.F. 2006) ("A servicemember does not have a Sixth Amendment right to trial by jury."); *United States v. Wiesen*, 57 M.J. 48, 50 (C.A.A.F. 2002) ("The Sixth Amendment right to trial by jury does not apply to courts-martial"); *United States v. New*, 55 M.J. 95, 103 (C.A.A.F. 2001); *United States v. Kirkland*, 53 M.J. 22, 24 (C.A.A.F. 2000); *United States v. Gray*, 51 M.J. 1, 61 (C.A.A.F. 1999); *see also United States v. Loving*, 41 M.J. 231, 285 (C.A.A.F. 1994) (recognizing that Article 25, UCMJ, contemplates that court-martial panel will not be representative cross-section of military as required under Sixth Amendment); *United States v. Smith*, 27 M.J. 242, 248 (C.M.A. 1988); *United States v. Kemp*, 22 C.M.A. 152, 154 (C.M.A. 1973) ("[T]he Sixth Amendment right to trial by jury with accompanying considerations of constitutional means by which juries may be selected has no application to the appointment of members of courtsmartial."); *United States v. Rollins*, No. 201700039, 2018 CCA LEXIS 372, at *25 (N-M. Ct. Crim. App. July 30, 2018) (rejecting challenge to non-unanimous verdicts in the military).

Ramos did not create a fundamental right in a unanimous verdict in a trial by court-martial. *Ramos* was focused on state courts, not Article I ad hoc tribunals called court-martials. *Ramos* does not address additional concerns in in the military justice system, such as the protection of members from reprisal or unlawful command influence by an additional layer of masking their votes. *Ramos* does not address issues such as the institutional (and accused) benefit of avoiding hung juries, the requirement that the military conduct court-martials across the globe in every place and clime, and that the military's main focus is on winning the nation's wars, not replicating federal criminal trials. Finally, binding precedent has long recognized the validity of non-unanimous verdicts as established by Congress in Article 52, UCMJ. The law established by Congress and case law precedent is not upended by virtue of the Supreme Court's decision in *Ramos*, which specifically addressed state court juries.

Historical Arguments as to the evolving nature of court-martials

After its initial *Ramos* arguments the Defense pivots to historical arguments such as court-martial voting or the scope of modern cases, arguing that the current military and military justice system are so different than those envisioned by the Founding Fathers that the Sixth Amendment must now apply. In *United States v. Ortiz*, 138 S. Ct. 2165 (2018) the Court emphasized that the court-martial system is "older than the Constitution" and that "the Framers 'recogni[zed] and sanction[ed] existing military jurisdiction.'" *Id.* at 2175 (citations omitted). This military jurisdiction meant exempting military cases from the Fifth Amendment's grand jury clause, granting Congress the power to govern and regulate the military, and authorizing Congress to "carry forward courts-martial." *Id.* (citations omitted). Again, the Supreme Court emphasized the separate nature of military courts from their civilian counterparts.

The military justice system is not a mini-version of federal courts nor would the defense truly want a system that included indictments vice Article 32s, all sentencing by a judge, guidelines for offenses, and vast restrictions on the ability of the defense to seek expert assistance. The defense's argument that courts-martials are now "judicial" in character and "criminal prosecutions" belies the structure that courts-martial are ad hoc Article I tribunals called into service for a particular purpose and then disbanded. Military judges are not Article

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III judges, nor are they empowered with authority outside of statutes and regulations under the Manual for Courts-Martial. Trial counsel are not United States Attorneys appointed by the President and confirmed by the Senate. (Outside of previous confirmation if in paygrade O-4 or above). The Founding Fathers may not have envisioned drones and autonomous vessels, but they did envision a future military and the necessity of not tying its court-martial procedures to civilian Constitutional requirements. Time and practice have not altered that. Nothing in the historical practice of courts-martials requires unanimous verdicts.

The fact that Congress and the military have reviewed court-martial practice and procedures over time and made alterations thereto does not now require unanimous verdicts. Congress has the power to require unanimous verdicts under Article 52, UCMJ, and as recently as 2016 in its overhaul of the military justice system it declined to do so. Congress has the best ability to judge the requirements for courts-martial when balancing the national requirement of the armed forces. It declined to craft a unanimous requirement when it shifted from a two-thirds requirement to a three-fourth's requirement for a conviction in the 2016 U.C.M.J. overhaul. This court should grant Congress the deference traditionally allocated to Congress when crafting rules for court-martial that balance military necessity and servicemember rights. *United States v. Middendorf*, 425 U.S. 25 (1976).

Attendant effects of a criminal conviction

The Defense's argument that attendant effect of a court-martial conviction such as inability to possess a firearm or the possibility that it will count as a prior conviction in a future federal sentencing guideline calculation are misplaced. Attendant effects such as this are hard to quantify and subject to future alteration. The inability to possess a firearm under 18 U.S.C. § 922 is a legislative act subject to future alteration or even abolishment. Nor does it require a criminal conviction to be subject to this penalty as a fugitive from justice, a person adjudged mentally defective, or a US citizen who renounces their citizenship cannot also possess a firearm. It is collateral consequence of a conviction irrespective of how the conviction is obtained, be it members' verdict or a plea. Collateral consequences are not imposed by the court or a sentence but by administrative procedures after the fact. See, *United States v. Talkington*, 73 M.J. 212 (C.A.A.F. 2014). There is no requirement for a unanimous jury in relation to depravation of the right of a possession as to a firearm as a collateral consequence.

Federal Sentencing Guidelines are not mandatory and again subject to future alteration or even abolishment. Should the accused ever be faced with a federal sentencing situation the accused has the ability to present arguments to a federal court in relation to sentencing guideline calculations. Not only is the issue speculative and not ripe it in no way requires a unanimous verdict at trial by court-martial.

Proof Beyond a Reasonable Doubt

The burden of proof always remains with the Government to show each element is proven beyond a reasonable doubt. Members are instructed that the Government alone bears this burden and the accused need not prove innocence. The Defense attempts to intertwine the concept of burden of proof with unanimity by focusing on a collective standard – 25% of a panel can vote

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for not guilty – vice the individual vote of each member. The vote of each member is individual though the panel speaks ultimately with one decisions. This is in essence a Fifth Amendment Due Process argument.

In *United States v. Witham*, 47 M.J. 297, 300-301(C.A.A.F. 1997) held that a military accused has Due Process rights under the Fifth Amendment by holding that "[i]t is beyond cavil that there are differences between our military justice system and the various civilian criminal justice systems in our country. However, these differences do not necessarily dictate that constitutional decisions on civilian criminal justice be found per se inapplicable to the military justice system." However, the court immediately noted that "we note that a military accused has no right to a trial by jury under the Sixth Amendment." *Id* at 301. The purpose of this double holding is clear – there are not per se applicable rules from the civilian criminal justice system into the military justice system. Each ruling must be evaluated and compared to the two separate systems with very different purposes. "The military is, by necessity, a specialized society separate from civilian society." *Parker v. Levy*, 417 U.S. 733, 743 (1974)). Just as military society is distinct from the civilian sector, so too the Supreme Court has recognized that military law "is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment." *Id. quoting Burns v. Wilson*, 346 U.S. 137, 140 (1953).

The accused retains the benefit of proof beyond a reasonable doubt and the burden of persuasion resting solely with the Government. Nothing in *Ramos* mandates more nor does the Fifth Amendment require more. Nor does *Ramos* or the Fifth Amendment require unanimous verdicts when taken together as a whole in the court-martial system.

Unanimity of verdict instruction

Nor does the defense motion address the other side of the coin – unanimity of a decision by the panel as a whole. If an accused's panel could not agree on a unanimous verdict, guilty or not guilty, this should result in a hung jury The Government should be able to retry the accused, not be faced with an acquittal by a single vote. The proposed instruction from the defense is thus defective in two ways. First, the unanimity requirement is inapplicable as it does not apply to trial by court-martial. Second, if there was an alteration of voting requirements that alteration should be a unanimous verdict in total, not only for a conviction.

The defense's proposed instruction attempts to have a single vote acquit an accused, *de facto* making a panel of a single member. Thus while refuting the 3/4th voting scheme of R.C.M. 921(c)(2) the defense attempts to replace it with a system where on the Government alone is faced with unanimity, but the defense. Notably, the federal system in Article III courts requires unanimity of a verdict regardless of the type of verdict. *See*, Federal Rule of Procedure 31 stating "The verdict must be unanimous" and *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2016) (holding retrial after hung jury does not violate Double Jeopardy). While the Government request the Court to deny the Defense motion, in the alternative the Government would request an instruction that requires unanimity of a verdict in line with Federal Rule of Procedure 31. Such an instruction, modeled upon the Third Circuit's Modell Jury Instruction may read:

I want to remind you that your verdict, whether it is guilty or not guilty, must be unanimous. To find (name of defendant) guilty of an offense, every one of you must agree that

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the government has overcome the presumption of innocence with evidence that proves each element of that offense beyond a reasonable doubt. To find (name) not guilty, every one of you must agree that the government has failed to convince you beyond a reasonable doubt.

Lack of nexus to [redacted] and [redacted] officials

The Article 39(a) set in January 2023 in [redacted] was intended to provide the defense the opportunity to address issues that had a nexus with [redacted] and/or [redacted] officials. This motion does not address any issue related to [redacted] or [redacted] officials. This motion was more than capable of being addressed in any of the three earlier Article 39(a)'s conducted in California. As such, the Government request that the Court rule on the motion without oral argument and relying upon the pleading, per R.C.M. 905(h). There are no [redacted] witness or [redacted] documents related to this motion from either side.

RELIEF REQUESTED

The Court should deny the Defense's Motion because *Ramos* and the Sixth Amendment's right to a jury trial do not apply to courts-martial. Further, the Court should apply the procedures of R.C.M. 921 and give the Procedural Instructions on Findings found in Section 2-5-14 of the Military Judges' Benchbook (Feb. 29, 2020 ed.).

//s//

JASON L. JONES
CAPT, JAGC, USN

I certify that I have served a true copy via e-mail of the above GOVT RESPONSE on the Court and Defense Counsel on 30 November 2021.

//s//

JASON L. JONES
CAPT, JAGC, USN

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NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **CRAIG R. BECKER** **LT/O-3** **U.S. NAVY**	**DEFENSE MOTION TO DISMISS: UNREASONABLE MULTIPLICATION OF CHARGES** **15 NOV 2021**

1. Nature of Motion

Pursuant to 906(b)(12), the Defense moves this Court to Dismiss Specification 1 of Additional Charge I as it is unreasonably multiplied with the sole specification of Charge I.

2. Summary of Facts

1) At approximately 2050 on 8 October 2015, Mrs. [redacted] fell from her 7th floor bedroom window and died. (Enclosure MMMM and WWWW)
2) Prior to her fall, between 2033 and 2039, several text messages were sent from MRS. [redacted] phone to Mr. [redacted] phone. (Enclosure (XXXX)
3) The Government alleges that LT Becker sent the text messages as part of his plan to murder his wife and make it appear to be a suicide.
4) Based on the facts above, the Government charged LT Becker with both Murder (the sole specification of Charge I) and Conduct Unbecoming an Officer (Specification 1 of the Additional Charge) for sending the text messages.

3. Discussion of Law

Unlike multiplicity, which is grounded in Double Jeopardy and involves statutory interpretation, the prohibition on unreasonable multiplication protects against prosecutorial overreach based on a fundamental fairness.

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"What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." R.C.M. 307(c)(4); *see United States v. Quiroz*, 55 M.J. 334, 336-39 (C.A.A.F. 2001). This prohibition against unreasonable multiplication of charges "has long provided courts-martial and reviewing authorities with a traditional legal standard—reasonableness—to address the consequences of an abuse of prosecutorial discretion in the context of the unique aspects of the military justice system." *Quiroz*, 55 M.J. at 338 (contrasting multiplicity and unreasonable multiplication doctrines); *see also United States v. Campbell*, 71 M.J. 19, 23 (C.A.A.F. 2012) (same).

A military judge must "exercise sound judgment to ensure that imaginative prosecutors do not needlessly 'pile on' charges against a military accused." *United States v. Foster,* 40 M.J. 140, 144 n.4 (C.M.A. 1994), *overruled in part on other grounds*, *United States v. Miller*, 67 M.J. 385 (C.A.A.F. 2009). In service of this obligation, a trial court considers four-factors in testing whether charges are unreasonably multiplied:

- Is each charge and specification aimed at distinctly separate criminal acts?
- Does the number of charges and specifications misrepresent or exaggerate the accused's criminality?
- Does the number of charges and specifications unfairly increase the accused's punitive exposure?
- Is there evidence of prosecutorial overreaching or abuse in the drafting of the charges?

United States v. Anderson, 68 M.J. 378, 386 (C.A.A.F. 2010) (citing *Quiroz*, 55 M.J. at 338) (approving "in general" factors as non-exhaustive "guide" for analysis).

A military judge has wide discretion to remedy unreasonable multiplications of charges, up to and including dismissal.

When charges are unreasonably multiplied, the military judge has wide latitude to craft a remedy, including dismissing offenses, merging them for findings, or merging offenses only for sentencing. *United States v. Thomas*, 74 M.J. 563, 568 (N-M. Ct. Crim. App. 2014) (citing *Campbell*, 71 M.J. at 25) (concluding military judge had discretion to not dismiss or merge

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specifications for findings but to merge them for sentencing).

4. Argument

Because the four trial-level *Quiroz* factors weigh in favor of the Defense, relief from these unreasonably multiplied charges is warranted.

The alleged facts in each specification demonstrate that this charging scheme exceeds the fairness limits imposed by R.C.M. 307 and *Quiroz*.

(1) Each Specification is aimed at a single event, the alleged murder.

Here the Government has charged, under Article 133, an act that would otherwise be charged as an Obstruction of Justice. In essence, the Government is using the fact that LT Becker allegedly created what amounts to a fake suicide note to support both the wrongfulness and the terminal elements of their Article 133 specification. With Obstruction of Justice, the acts alleged to be the obstruction must not be part of the commission of the underlying offense. *See Note 6 of Military Judge's Bench Book.* The same is true here. Normally determining if an act is part of the offense can be difficult, but here it is not. The alleged conduct occurred moments before Mrs. [redacted]death and are being used by the Government to prove that Mrs. [redacted]death was a murder. In short, they are alleging that this fake suicide note was part of the murder. This factor weighs in favor of the Defense.

(2) The exaggeration of any possible criminality does not impact LT Becker's punitive exposure.

The Government's charging scheme—alleging the act as a violation of two different provisions does not impact LT Becker's punitive exposure as Charge I already carries with it the possibility of confinement for life. This factor does not weigh in favor of the Defense.

(3) There is evidence of prosecutorial overreach in the drafting of Specification 1 of the Additional Charge.

The final trial-level *Quiroz* factor tends to encompass all the others, as the unreasonable multiplication test itself is designed to cure prosecutorial overreach. *Quiroz*, 55 M.J. at 337, ("[T]he prohibition against unreasonable multiplication of charges addresses those features of military law that increase the potential for overreaching in the exercise of prosecutorial

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discretion."). Here, even without the Additional Charge, the Government can present evidence supporting its allegation that LT Becker was the one who sent the text messages in question. As discussed above, this act, if true would be part of the murder. The additional specification is not needed to allow the Government to present this evidence. Further, as discussed above, the murder charge already carries with it the maximum non-capital punishment. So, the additional specification provides no benefit to the Government there. Finally, there is no logical scenario in which the members could find that LT Becker created and sent the fake suicide note but did not commit the murder. So the Government gains no contingencies of proof benefit from this additional specification. The only benefit that is gained is creating a larger charge sheet that unfairly exaggerates the allegations against LT Becker before the trial even starts. This is the definition of prosecutorial overreaching.[1] This factor weighs in favor of the Defense.

Dismissal is the appropriate remedy.

This Court may remedy unreasonably multiplied charges at the findings stage by dismissing the lesser offenses or merging all offenses into one. R.C.M. 906(b)(12); *U.S. v. Roderick.*, 62 M.J. at 433. Either remedy works the same effect here, but dismissal is the cleanest approach, both to enforce the unreasonable multiplication doctrine as well as to eliminate the confusion and redundancy at trial caused by unreasonable multiplication.

4. Relief Requested.

The defense requests that the Military Judge dismiss Specification 1 of the Additional Charge.

5. Oral Argument.

Unless the Government concedes the motion or this Court grants the relief on the basis of

[1] The term prosecutorial over reaching is used only in the context of an Unreasonable Multiplication of Charges discussion. The Defense is making no allegations regarding the conduct or ethics of the Trial Counsel as their behavior in this charging decision is well within the lines of ethical norms.

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pleadings alone, the Defense requests oral argument on this matter.

[redacted]

J. A. GUARINO
CDR, JAGC, USN
Detailed Defense Counsel

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GENERAL COURT-MARTIAL
NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
UNITED STATES NAVY

UNITED STATES **v.** **CRAIG BECKER** **LT USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO DISMISS DUE TO UNREASONABLE MULTIPLICATION OF CHARGES**

I. Nature of the Motion.

The Government respectfully requests that the court deny the Defense motion to dismiss Additional Charge, Specification 1 because it is not an unreasonable multiplication of charges as to Charge I under the *Quiroz* analysis. The sending of text messages impersonating the victim is not akin to, nor part of, the accused's murder of Mrs. [redacted] and is properly charged as an Article 133 offense.

II. Summary of the Facts.

The Government avers that on 8 October 2015 in [redacted] the accused murdered his wife by causing her to fall from the window their apartment. Mrs. [redacted] and the accused were going through a separation and were living apart. They were the parents of an infant child who was physically living with the accused in their former marital home/apartment. On 8 October 2015 Mrs. [redacted] went to this apartment to have dinner with her child and the accused. She was scheduled to leave for [redacted] on a business trip the next day.

In October 2015 Mrs. [redacted] had been spending nights at Mr. [redacted] apartment. (Mr. [redacted] was a civilian US Army employee who worked in [redacted]) That Mrs. [redacted] was spending time with and the night at Mr. [redacted] angered the accused. On 26 September 2015 he texted his own girlfriend [redacted] "that piece of shit has the baby over at her boyfriends." (Government Exhibit 58, chat 122.) This was followed shortly thereafter by "I will

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not take care of it. It doesn't matter. It just fucking …. Really pisses me off!) (Ellipses in original) (Government Exhibit 58, chat 122) On 5 October 2015 the accused identified to his girlfriend his wife's new boyfriend by texting '[redacted] boyfriend is the black janitor who works with her." (Government Exhibit 58, chat 122). He continued with "He is the fucking maintenance/janitorial staff at her work. I'm being serious." (Government Exhibit 58, chat 122). When his own girlfriend pushed backed slightly on the accused's vitriol the accused stated "Ha! Well… I'm fucking right! I'm the fucking man! Don't you dare try to justify this cockwitted decision that she made … hahaha! What a goddam idiot! I'd love to be a fly on the wall for her when her parents meet him!" (Government Exhibit 58, Chat 122).

On 8 October 2015, after poisoning Mrs. [redacted] the accused took her phone and impersonated her by text messaging [redacted] was not in Mrs. [redacted] contacts as [redacted] but as [redacted]." Mrs. [redacted] previously told [redacted] that the accused checked her phone. Mrs. [redacted] Iphone had a security code that needed to be punched in to unlock the phone.

Impersonating Mrs. [redacted] the accused sent multiple text messages to Mr. [redacted] The first message was "Miss you. Sad. Really sad. Sorry…had som (sic) wnie (sic) and need you." At 20:35 he texted "Why aren't you answering me…I can't count on you either!!! Fuck this…" (Ellipses in original). Mr. [redacted] responded with "What do you mean? I just got a text about you being sad. What's up?" The accused then texted "Craig is being so damn sweet and it is confusing. I love him and I love you" and "I have the sweetest little baby with him…he was an asshole by nowe (sic) he's changed." (Ellipses in original). This was immediately followed by "And he doesn't want me anymore because he knows I've been with U (sic) and then "I fucking hate my life!". Mr. [redacted] responded with "I am not sure what to say right now" and then "Of course you love him. You have been together for years. Yes your little girl is precious. You are an amazing person." Mr. [redacted] then stated "I will just leave it at that. Have a good evening."

The night of her murder local [redacted] police arrived on the scene. Her body landed on the ground in front of the apartment and local police were called. As part of their investigation [redacted] police took photographs of the apartment that night. Mrs. [redacted] phone was not on her person nor in the bedroom where the window she went through was. Her phone was in the apartment on the couch in the living room near her bag.

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On or about 10 October Mr. [redacted] gave a statement to [redacted] NATO [redacted] police. (This police force investigates crimes and activities regarding [redacted] members and are not "local" [redacted] police.) During this statement Mr. [redacted] expressed concerns over the text messages being inauthentic and out of character for Mrs. [redacted] He also explained that such thoughts and actions were not in keeping with his experiences with Mrs. [redacted] Mr. [redacted] allowed police to digitally search his phone and secure text messages from it. These text messages form the basis of Additional Charge, Specification 1.

III. Discussion.

A. LEGAL STANDARD

The issue in this case with whether the Accused can be charged with both the sole specification of Charge I – murder of Mrs. [redacted] and Additional Charge 1 – Conduct Unbecoming by sending text messages impersonating Mrs. [redacted] R.C.M. 307(c)(4) states that, "[W]hat is substantially once transaction should not be made the basis for unreasonable multiplication of charges [UMC] against one person." The defense is correct in that the standard to be applied when a party alleges unreasonable multiplication of charges against an accused is one of reasonableness. *United States v. Quiroz*, 55 M.J. 334, 338 (CAAF 2001). In this way, the rule against UMC addresses prosecutorial overreaching. In order to decide whether charges are unreasonable, the Court of Appeals for the Armed Forces in *Quiroz* established a non-exclusive, five factor test for finding UMC. *Quiroz*, 55 M.J. at 338-39. Not one of the factors singularly governs the results, as the inquiry must be a balanced one. *United States v. Pauling*, 60 M.J. 91, 95 (CAAF 2004) (finding no UMC for charging forgery for both the signature line and the endorsement lines of checks). The five factors are as follows:

1. Did the Accused object at trial that there was an unreasonable multiplication of charges and/or specifications?
2. Is each charge and specification aimed at distinctly separate criminal acts?
3. Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality?
4. Does the number of charges and specification unfairly increase the appellant's punitive exposures? and,

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5. Is there any evidence of prosecutorial overreaching or abuse in drafting of the charges?

Quiroz, 53 M.J. at 607.

In applying the *Quiroz* factors to the Accused's case, it is readily apparent that the Government was reasonable in referring both a specification of murder and a specification of conduct unbecoming related to impersonating the victim by sending text messages from her phone.

B. UNDER THE FIRST *QUIROZ* FACTOR A TIMELY OBJECTION WAS MADE BY THE ACCUSED.

The first factor is an issue of waiver for appellate review. It is neutral for a trial's court analysis.

C. UNDER THE SECOND *QUIROZ* FACTOR EACH CHARGE IS AIMED AT DISTINCTLY SEPARATE CRIMINAL ACTS.

The second *Quiroz* factor falls squarely in favor of reasonableness. The Defense asserts that that sending the false text messages are part of the murder or related obstruction of justice. The Government has long averred that the accused caused Mrs. [redacted] to fall from the apartment window resulting in her plummeting to the street below. While she survived the initial impact she died shortly thereafter and never spoke to police or rescue personnel about the incident.

After drugging Mrs. [redacted] during dinner she became tired and ended up in a bedroom. During this time her IPhone was present in the living room, where it was later noticed by [redacted] police and appears in crime scene photos. Prior to entering the bedroom to murder Mrs. [redacted] the accused accessed her phone and sent text messages to Mrs. [redacted] civilian boyfriend [redacted] The accused authored text messages to make it appear that Mrs. [redacted] was distraught over a failure to reconcile with the accused, had become drunk, and was depressed. However, this was not in keeping with Mrs. [redacted] life or even that very day. The day of her death she had a girlfriend lunch with multiple women, signed a lease on an apartment, and was leaving the next day on a business trip. Though not divorced she and the accused had signed a separation agreement and she made a decision to remain in [redacted] to live.

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After sending the text messages the accused then murdered Mrs. [redacted]. While the Defense only characterizes the messages as obstruction of justice, they were not sent to any police or military personnel. They were sent to her boyfriend, in part to scare, confuse, and upset him, hoping to give him a sense of guilt and responsibility in her death. Of this he was successful, as [redacted] responses show. He stated "What do you mean? I just got a text about you being sad. What's up?" and then "I am not sure what to say right now" and finally "I will leave it at that. Have a good evening." While they are certainly part of a plan to confuse those around [redacted], they are not part of the murder itself. Impersonating another person digitally is conduct unbecoming irrespective of the reason. The accused could have easily sent the messages and then never murdered Mrs. [redacted]. He could have murdered Mrs. [redacted] without sending the messages. The purpose of sending the messages had multiple reasons – to perhaps throw off any investigation but also to emotionally hurt [redacted], whom the accused despised. This factor weighs in favor of the Government.

D. UNDER THE THIRD *QUIROZ* FACTOR THE NUMBER OF CHARGES AND SPECIFICATIONS DO NOT MISREPRESENT OR EXAGGERATE THE ACCUSED'S CRIMINALITY.

The third *Quiroz* factor also leads to the conclusion of reasonableness. The two charges neither misrepresent these discrete acts, nor do they exaggerate the Accused's criminality. The two each have separate legal bases: murder and conduct unbecoming by impersonation. While the acts are close in time and one is done with multiple motives, perhaps in part to help succeed at the other, they do not misrepresent of exaggerate the accused's criminality. The accused hated [redacted] and this was a way in hurting him and hopefully disrupting his life, a vicious act. It was his way of telling [redacted] "I'm the fucking man!" as he told his own girlfriend days earlier. This factor weighs in favor of the Government.

E. UNDER THE FOURTH *QUIROZ* FACTOR THE NUMBER OF CHARGES AND SPECIFICATIONS DOES NOT UNFAIRLY INCREASE THE APPELLANT'S PUNITIVE EXPOSURE.

The fourth *Quiroz* factor, that the charges unreasonably increase the Accused's punitive exposure, must also be answered in the negative. Given that the charge of murder carries with it a mandatory minimum of life with the possibility of parole the current charging scheme does not

Appellate Exhibit XCVII
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misrepresent of exaggerate the accused's criminality. This factor weighs in favor of the Government.

F. UNDER THE FIFTH *QUIROZ* FACTOR THERE IS NO EVIDENCE OF PROSECUTORIAL OVERREACHING OR ABUSE IN THE DRAFTING OF THE CHARGES.

The final *Quiroz* factor, which probes for evidence of prosecutorial overreaching or abuse, also demands a negative finding of UMC. This factor is, in essence, a distillation of all of the other factors. If the charges were merely a restatement of the same conduct over and over again, and if the charges unreasonably increased the Accused's punitive exposure, and if the charges were not aimed at distinct criminal acts, then it could be argued that the prosecution had overreached in its charging decision. Prosecutorial overreaching is found when a charge "serve[s] no purpose other than to pile on charges against a hapless accused in order to increase the likelihood of a severe sentence." *U.S. v. Sharp*, 2000 CCA Lexis 30 (N-M.C.C.A. Feb. 23, 2000). However the charged conduct derives from discrete and separate actions with multiple purposes. There is no prosecutorial overreaching and this factor must be resolved in the favor of the United States.

Lack of nexus to [redacted] and [redacted] fficials

The Article 39(a) set in January 2023 in [redacted] was intended to provide the defense the opportunity to address issues that had a nexus with [redacted] and/or [redacted] officials. This motion does not address any issue related to [redacted] or [redacted] officials. This motion was more than capable of being addressed in any of the three earlier Article 39(a)'s conducted in California. As such, the Government request that the Court rule on the motion without oral argument and rely upon the pleadings, per R.C.M. 905(h).

IV. Relief Sought.

The five *Quiroz* factors support a finding of reasonableness on the side of the Government. The Government respectfully requests the Court deny Defense's motion to dismiss Additional Charge I, Specification I as an unreasonable multiplication of charges as to Charge I.

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Page 6 of 7

V. Burden of Proof.

a. R.C.M. 905(c)(1) establishes that the burden to prove any factual issue shall be a preponderance of the evidence.

b. R.C.M. 905(c)(2)(A) establishes that the burden of persuasion on any factual issue which is necessary to decide a motion shall be on the moving party, the Defense.

VI. Oral Argument.

The Government respectfully requests that the Court deny oral argument and rule on the pleadings.

VII. Evidence.

The Government will present the following evidence in support of this motion:

a. (If oral argument is granted)Testimony of the following witness:
    a. NCIS Special Agent [redacted]
b. Text messages of [redacted] and [redacted] on 8 October 2015
c. Crime Scene photographs taken by [redacted] police on 8 October
d. Text messages of the accused to [redacted]
e. Statement of Mr. [redacted] to NATO [redacted] police dated 10 October 2015

/s/

Jason Jones
Captain, JAGC, USN
Trial Counsel

****

Certificate of Service

I hereby attest that a copy of the foregoing motion was served on the court and defense counsel via electronic means on 3 December 2021.

Appellate Exhibit XCVII
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NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES OF AMERICA **v.** **CRAIG BECKER** **LT USN**	**Defense Motion to Compel Production of a Witness—Special Agent [redacted]** **15 November 2021**

1. Nature of the Motion

Pursuant to Article 46, Uniform Code of Military Justice (UCMJ), and Rules for Courts-Martial (R.C.M.) 703(b) and 906(b)(7), the defense respectfully requests the court to compel the production of Special Agent [redacted]

2. Burden of Proof

As the moving party, the defense bears the burden by a preponderance of the evidence. R.C.M. 905(c).

3. Facts

a. Charge II, Specification 1 alleges that LT Becker strangled his wife, [redacted] at or near [redacted] on or about 9 August 2013.

b. The charges stem from an argument LT Becker and his wife had in a room at the Army Lodge in the early morning hours.

c. When Military Police responded to the situation, [redacted] reported that LT Becker "attempted to strangle her." Enclosure YYYY.

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d. Mrs. [redacted] made a subsequent statement to NCIS Special Agent [redacted] on 14 November 2013 "for clarification purposes." Enclosure ZZZZ

e. In that sworn statement, Mrs. [redacted] stated, "My initial assessment of the events that transpired on or around Aug 9 was significantly skewed by being on [redacted] for 8 mos. . . I was severely paranoid, had lost 20 lbs, [and] experienced personality change. At the time I believed that my husband was trying to harm me when in reality he was trying to keep me from harming myself or him and he was trying to deescalate the situation. He DID NOT choke me or hurt me in any way and I made statements indicating that I thought he did due to my altered state of mind (medication induced)." *Id.*

f. The defense requested the production of SA [redacted] on 1 November 2021. Enclosure AAAAA.

g. On 9 November 2021, the government denied the production request, stating, "[T]his witness is not relevant or necessary based upon the current evidentiary rulings of the courts. Mrs. [redacted] later statement cannot be used to impeach her excited utterances of 9 August 2013." Enclosure BBBBB.

4. Law

LT Becker is entitled to have relevant and necessary witnesses produced for his court-martial. Article 46, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 846 (2010); *see* Rule for Courts Martial 703(b), Manual for Courts-Martial, United States (2012 ed.); *United States v. Warner*, 62 M.J. 114, 118 (C.A.A.F. 2005). The Due Process Clause of the Fifth Amendment guarantees that "criminal defendants shall be afforded a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1984). Similarly, the Sixth Amendment affords an accused the right to compulsory process. *See Washington v. Texas*, 388

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U.S. 14 (1967). "Each party is entitled to the production of any witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary." R.C.M. 703(b)(1). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Mil. R. Evid. 401. "Relevant testimony is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue." R.C.M. 703 (f)(1) Discussion. The court-martial, as finder of fact and judge of credibility, "has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony." *United States v. Hunter*, 21 M.J. 240, 242 (C.M.A. 1986).

"The accused's right to subpoena witnesses and the motion for appropriate relief give him practically unlimited means for the production of evidence favorable to him." *United States v. Roberts*, 10 M.J. 308, 313 (C.M.A. 1981) (*citing United States v. Franchia*, 13 U.S.C.M.A. 315, 320 (1962)). The right to compel the attendance of witnesses, however, is not absolute; the defense must demonstrate that witnesses are both material and necessary before any order to produce is required. *United States v. Allen*, 31 M.J. 572, 610 (N-M.C.M.R. 1990) *citing United States v. Tangpuz*, 5 M.J. 426 (C.M.A. 1978); *Williams*, 3 M.J. at 239. Materiality has been defined bythe Court of Military Appeals as embracing the "'reasonable likelihood' that the evidence could have affected the judgment of the military judge or court members." *United States v. Allen*, 31 M.J. 572, 610 (N-M.C.M.R. 1990) *quoting United States v. Hampton*, 7 M.J. 284, 285 (C.M.A. 1979). A witness is material when he either negates the government's evidence or supports the defense. *United States v. Roberts*, 10 M.J. 308, 313 (C.M.A. 1981); *United States v. Iturralde-Aponte*, 1 M.J. 196 (C.M.A. 1975); *Jones*, 20 M.J. at 925.

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Once the defense meets that burden of establishing "materiality" of a witness, however, "the witness must be produced unless the averments of the defense are 'inherently incredible on their face, or unless the Government shows, either by introducing evidence or from other matters already of record, that the averments are untrue or that the request is otherwise frivolous.'" *Allen*, 31 M.J. at 610.

The production of a material witness may be denied only if the witness is unavailable or if the witness is "merely cumulative." *Id.*, at 612. "[C]onsiderations other than materiality have no role in determining whether the Government must produce the requested witness." *Id.* (citing *United States v. Carpenter*, 1 M.J. 384 (C.M.A. 1976)).

M.R.E. 806 states, "When a hearsay statement . . . has been admitted into evidence, the declarant's credibility may be attacked . . . by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The military judge may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it."

5. Discussion

Special Agent [redacted] is a relevant and necessary witness, and, as such, should be produced. SA [redacted] will testify that he interviewed [redacted] on 14 November 2013, and that [redacted] stated that LT [redacted] did not choke her 9 August 2013. This statement is inconsistent with a prior statement [redacted] made to SGT [redacted] on 9 August 2013. The Government has indicated that it will offer the statement to SGT [redacted] as an excited utterance. Under M.R.E. 806, the defense is permitted to offer inconsistent statements of a hearsay declarant to attack their credibility. Preventing the defense from offering this information would cast serious doubt on the fairness of

Appellate Exhibit XCIX
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the proceedings. To ensure the accused's rights are protected, the Court should compel the production of this witness.

5. Relief Requested

The defense respectfully requests that this court grant the defense motion and order the Government to produce SA [redacted]

6. Evidence

-Enclosure YYYY: Statement of SGT [redacted] dtd 9 Aug 13
-Enclosure ZZZZ: Sworn Statement of [redacted] dtd 14 Nov 13
-Enclosure AAAAA: Defense Request for Production, dtd 1 Nov 21
-Enclosure BBBBB: Government Response to Defense Request, dtd 9 Nov 21

7. Oral Argument

The accused desires to make oral argument on this motion.

[redacted]
BRYAN M. DAVIS
CDR, JAGC, USN
Defense Counsel

CERTIFICATION OF SERVICE

A true copy of this motion was served on the opposing party and the court on 15 November 2021.

[redacted]
BRYAN M. DAVIS
CDR, JAGC, USN
Defense Counsel

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GENERAL COURT-MARTIAL
NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
UNITED STATES NAVY

UNITED STATES **v.** **CRAIG BECKER** **LT USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION AS TO PRODUCTION OF A WITNESS**

The Government will produce Special Agent [redacted] NCIS. With that concession the Government believes that the motion is moot.

//s//

JASON L. JONES
CAPT, JAGC, USN

I certify that I have served a true copy via e-mail of the above GOVT RESPONSE on the Court and Defense Counsel on 12 December 2021.

//s//

JASON L. JONES
CAPT, JAGC, USN

Appellate Exhibit A
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NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT GENERAL
COURT-MARTIAL

UNITED STATES **v.** **CRAIG R. BECKER** **LT/O-3** **U.S. NAVY**	**DEFENSE MOTION TO COMPEL DICOVERY** **15 November 2021**

Issues Presented

The defense asks this Honorable Court to order the government to produce each item of evidence discussed in this motion. The government has been cooperative during the ongoing discovery process.

Facts

First Discovery Request

1. On 30 January 2019, the defense requested, *inter alia*, the following discovery, in part:

Para 2(d): Copies of all communications between NCIS and RLSO or TCAP personnel regarding this case.

First Government Response

2. The government responded to the defense's request on 25 February 2019.

3. The government partially granted the defense's request and is continuing to provide discovery. However, there are some outstanding issues that should be addressed on therecord.

4. The prior Military Judge previously addressed the request and denied without explanation.

5. The Defense renews its request for any relevant records to date.

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Burden of Proof

6. As the moving party, the Defense has the burden of persuasion. R.C.M. 905(c)(2).The burden of proof is by a preponderance of the evidence. R.C.M. 905(c)(1).

Law

7. The Court should compel production of the discovery requests discussed below because each item is necessary and material to provide LT Becker an adequate opportunity to prepare a defense. Discovery practice under R.C.M. 701 promotes full discovery that eliminates 'gamesmanship' from the discovery process and is quite liberal.*United States v. Roberts*, 59 M.J. 323, 325 (C.A.A.F. 2004). Providing broad discovery contributes to the orderly administration of military justice because it reduces pretrialmotions practice, surprise, and delay at trial. Id.

8. A trial counsel cannot avoid discovery obligations by leaving relevant evidence in the hands of another agency. *United States v. Stellato*, 74 M.J. 473, 484-85 (C.A.A.F. 2015). "Article III courts have identified a number of scenarios in which evidence not in the physical possession of the prosecution team is still within its possession, custody, or control. These include instances when: (1) the prosecution has both knowledge of and access to the object; (2) the prosecution has the legal right to obtain the evidence; (3) theevidence resides in another agency but was part of a joint investigation; and (4) the prosecution inherits a case from a local sheriff's office and the object remains in the possession of the local law enforcement." Id (internal citations omitted.).

9. The only restrictions placed upon liberal defense discovery are that the information requested must be relevant and necessary to the subject of the inquiry, and the request must be reasonable. *United States v. Reece*, 25 M.J. 93, 95 (C.M.A. 1987). The Military Rules of

Evidence establish "a low threshold of relevance." *Id.* Relevant evidence is "anyevidence having any tendency to make the existence of any fact that is of consequence tothe determination of the action more probable or less probable than it would be without the evidence.'" *Id quoting* M.R.E. 401.

10. Evidence is material when there is a reasonable probability that its disclosure could engender a different result, creating reasonable doubt that did not otherwise exist. *United States v. Kinney*, 56 M.J. 156 (C.A.A.F. 2001). In applying the materiality test, military courts "give the benefit of any reasonable doubt to the military accused." *United States v.Green*, 37 M.J. 88, 90 (C.A.A.F. 1993).

Argument

11. The defense and government are working together to resolve discovery issues. The defense has identified the following issues that should be addressed on the record.

Para 2(d): Copies of all communications between NCIS and RLSO or TCAP personnel regarding this case. This is a high-profile case that generated a substantial number of communications regarding jurisdiction, pre-trial conferment, and witness availability. The defense is missing a substantial number of communications including all communications from Admiral Crawford.

10. The defense submits that all the above requested information is relevant and material,and under the circumstances, very reasonable. These items will produce admissible evidence for trial, for motions practice, or for impeachment. Finally, as a matter of parityand equality of access to information, the defense submits that this Court should order theproduction of the

above requested evidence. The Government has access to most, if not all, of what has been requested. The defense merely asks for equal access, as required by law.

Relief Requested

12. The defense respectfully requests this Court compel the government to produce each item discussed in this motion.

Motion Hearing

13. If this motion is opposed by the government, the Defense requests this motion be argued during the motion hearing in this case. We further request the opportunity to establish our facts and support our arguments through the testimony of the witnesses. If this motion is not opposed by trial counsel, the Defense requests this motion be grantedwithout hearing.

Enclosures

A. First Discovery Request

B. Government's Response to Defense's Discovery Request

For the Defense

[redacted]

JEREMIAH J. SULLIVAN, III

Defense Counsel

Appellate Exhibit C1

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CERTIFICATE OF SERVICE

I certify that I caused a copy of this motion to be served on the Military Judge and trial counsel via e-mail on 15 November 2021.

[redacted]

JEREMIAH J. SULLIVAN, III

Defense Counsel

Appellate Exhibit CJ

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NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

THE UNITED STATES OF AMERICA **V.** **CRAIG R. BECKER** **LT USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTIONS TO COMPEL DISCOVERY** **14 DECEMBER 2021**

1. Nature of the Motion.

The Government hereby responds to Defense Motion to Compel Discovery.

a. The Government has disclosed over 1,700 emails between the Government and NCIS. Govt. Exhibit 84.

b. The Government did assert the Attorney work product privilege on 8 emails on 13 November 2019. Govt. Exhibit 85.

c. On 15 November 2019 the Military Judge ruled that all 8 emails were covered by the attorney work production privilege. Govt. Exhibit 86.

d. The Government requested emails from Admiral Crawford regarding this case on 13 March 2019 the Government was notified that no emails exist. This was communicated to the Defense. Govt. Exhibit 87.

2. Evidence.

Govt. Exhibit 84 - E-Mail from TC to MJ and MJ Response dtd 12 November 2019.

Govt. Exhibit 85 – Government's assertion of privilege over 8 e-mails.

Govt. Exhibit 86 - MJ Ruling regard 8 emails.

Govt. Exhibit 6 - OJAG confirmation regarding the lack of Admiral Crawford's emails ico LT Becker.

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3. Oral Argument. The Government does not believe oral argument is necessary.

4. Argument: The Government has disclosed over 1,700 emails between TC and NCIS in this case (Some are duplicates as we requested from all parties). The Trial Counsel did assert privilege over 8 e-mails as those e-mail went to case strategy, with SA [redacted] who has been declared a Government Representative under M.R.E. 615. The Military Judge Ruled that via email that the 8 emails in question did not fall under R.C.M. 701 and did not need to be disclosed. The Government believes we have complied with our requirements under R.C.M. 701.

The Government has sought the emails from Vice Admiral Crawford regarding this case. However, on 13 March 2019 Mr. [redacted] disclosed that no responsive material existed. Trial Counsel does not know what else we can do to produce documents that do not exist.

[redacted]

Paul T. Hochmuth

CERTIFICATE OF SERVICE

I hereby certify that, on 14 December 2021, I caused a copy of this motion to be served upon the Defense Counsel and Court.

[redacted]

Paul T. Hochmuth

Appellate Exhibit C11
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NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **CRAIG R. BECKER** **LT/O-3** **U.S. NAVY**	**BENCH BRIEF:** **EXCLUDING STATEMENTS OF MRS. BECKER TO MR. [redacted] AS HEARSAY** **15 NOV 2021**

1. Nature of Motion

Pursuant to R.C.M. 906(b)(13) and M.R.E. 802, the Defense respectfully moved this court for an order *in limine* excluding all statements made by Mrs. [redacted] relating to Charge II, Specification 1[1] as these statements constitute inadmissible hearsay and further violate the 6th Amendment's right to confront witnesses. The Government responded in part by asserting that all statements by Mrs. [redacted] were admissible under doctrine of forfeiture by wrongdoing. Additionally, the Government argued that certain statements were admissible under various hearsay exceptions. The Military Judge ruled on all the admissibility of all hearsay statements from Mrs. [redacted] with the exception of the statements allegedly made by Mrs. [redacted] to her father, Mr. [redacted] on the 9 August 2013. (AE 79) The Defense respectfully renews the request that this Court to exclude these statements.

2. Summary of Facts

1) On 8 and 9 August 2013, both [redacted] and Jacksonville, Florida were in Daylight Savings Time. (Enclosure OOOO)

2) [redacted] is six hours ahead of Jacksonville, Florida. (Enclosure PPPP)

[1] The defense believed it had identified all relevant statements made by Mrs. [redacted] related to Charge II, Specification 1. The intent of the original motion was to litigate the admissibility of all such statements at that time.

Appellate Exhibit CIII
Page 1 of 6

3) On the night of 8 August 2013, LT Craig Becker and Mrs [redacted] were staying in Room 128 of the [redacted] (Enclosure F)

4) At approximately 0130 on 9 August 2013, Mrs. [redacted] contacted Mr. [redacted] the front desk representative and requested he call military law enforcement. (1930 on 8 August 2013 in Jacksonville, Florida) (Enclosures G and BBB)

5) Mr. [redacted] called military law enforcement. (Enclosure BBB)

6) Immediately after concluding the call, Mr. [redacted] had Mrs. [redacted] wait in the breakfast/dining area. (Enclosure DDD)

7) At approximately 0142, SPC [redacted] of the Army Military Police arrived and located Mrs. [redacted] in the dining room of [redacted] LT Becker was in room 128 at this time. (1942 on 8 August 2013 in Jacksonville, Florida) (Enclosure H)

8) After making an initial statement to SPC [redacted] Mrs. [redacted] determined that she did not need medical attention and that she did not want to make a statement. She then requested assistance in obtaining some personal belongings. (AE 79)

9) At this point in time, Mrs. [redacted] had the opportunity to acclimate to the situation and contemplate the need for personal belongings. All statements she made after this point to SPC [redacted] were part of her efforts to establish past events relevant to a military investigation. (AE 79)

10) SPC [redacted] escorted Mrs. [redacted] to room 236 and left her to conduct further investigatory duties. (Enclosure H)

11) Sometime around 0350, SPC [redacted] spoke with Mrs. [redacted] who responded politely. SPC [redacted] told her whenever she felt comfortable she was welcome to make a statement at the Military Police station. (2150 on 8 August 2013 in Jacksonville, Florida) (Enclosure H)

Appellate Exhibit CIII
Page 2 of 6

12) At approximately 0400, Mrs. [redacted] again approached Mr. [redacted] and asked him to call military law enforcement. (2200 on 8 August 2013 in Jacksonville, Florida) (Enclosures H and BBB)

13) Mr. [redacted] called military law enforcement as requested. (Enclosure BBB)

14) Following this call, Mrs. [redacted] accompanied military law enforcement to their offices and, at 0649, Mrs. [redacted] made written report. (0049 on 9 August 2013 in Jacksonville, Florida) (Enclosures H and I)

15) Mr. [redacted] and his late wife were interviewed by NCIS in February 2016. They both stated that around three in the morning Jacksonville time they received a phone call where Mrs. [redacted] claimed LT Becker was trying to kill her. (0900 on 9 August 2013 in [redacted] (Enclosure MMMM)

16) On 1 October 2019, Mr. [redacted] testified multiple times that he received a phone call from Mrs. [redacted] at 0300 on 9 August 2013. He further testified that this time stands out very clearly to him. (0900 on 9 August 2013 in [redacted] (Enclosure NNNN)

17) Mr. [redacted] testified that during this phone call Mrs. [redacted] claimed that LT Becker strangled her, that she was screaming and running at the same time, and that she was at the reception area waiting for the police to arrive. (Enclosure NNNN)

18) Mr. [redacted] was interviewed by law enforcement on three separate occasions (BBB, DDD, and QQQQ)

3. Discussion of Law

The challenged statement is not an excited utterance

M.R.E. 802 provides that, absent an applicable exception, hearsay is not admissible at court-martial. The Government has argued that the statements made by Mrs. [redacted] during the alleged phone call with her father, Mr. [redacted] fall within the excited utterance exception to the prohibition on hearsay. The excited utterance exception permits the admission of a hearsay statement relating to a "startling event or condition made while the declarant *was under the stress*

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of excitement caused by the event or condition." Mil. R. Evid. 803(2) (emphasis added). The critical element is that the statement is made while still under a continuous excitement caused by the "startling" event or condition. Such statements are considered reliable because they are made before the initial excitement and associated spontaneity passes, thereby reducing the opportunity for reflective thought by the declarant. *See* United States v. Fink, 32 M.J. 987, 990 (A.C.M.R. 1991); *Military Rules* at 943-45; and 3 *Federal Rules* at 1651-54. "The guarantee of trustworthiness of an excited utterance is that the statement was made while the declarant *was still* in a state of nervous excitement caused by the startling event." United States v. Chandler, 39 M.J. 119, 123 (C.M.A. 1994) (emphasis added).

The Government, as the proponent of this evidence, bears the burden of establishing that the statements occurred while Mrs. [redacted] was still under the continuous excitement of the alleged event. Here, this Court has ruled that the continuous excitement ended after Mrs. [redacted] initial interactions with military law enforcement, sometime shortly after [redacted] in Jacksonville. Both Mr. [redacted] and his late wife Mrs. [redacted] have stated that the phone call in question occurred well after this break in the excitement. Both of the [redacted] stated that this call occurred around 0300 Jacksonville time when they were interviewed by NCIS in early 2016. Additionally, Mr. [redacted] testified under oath that he was very clear that the phone call occurred around 0300 in Jacksonville, saying the phone call woke him up at night. Both of these witnesses place the phone call, not only after the initial break in continuous excitement, but also after Mrs. [redacted] had time to go to her new hotel room, change her mind about making a statement to law enforcement, decide to call military law enforcement a second time, travel to the station house, and make a formal written statement. These breaks clearly put her subsequent statements outside of the excited utterance exception. The fact that Mr. [redacted] describes Mrs. [redacted] as upset and crying does not save the Government's excited utterance argument. There is a difference between the stress or excitement caused by the original event and that caused by the trauma of having to retell what happened after initially calming down. Only the former is admissible as an excited utterance. "The basis of the excited utterance exception is that the speaker is under the fresh emotional impact of a startling event, not that the speaker relives her emotions when later telling about the event." United States v. Barrick, 41 M.J. 696, 699 (AF Ct. Crim. App. 1995).

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In addition to the fact that the statements were made after the stress of the continuous excitement, the statements themselves also demonstrate a lack of reliability. First, Mr. [redacted] claims that among other things, Mrs. [redacted] told him she was running toward the front desk and ultimately at the reception area waiting for the police to arrive while she made this phone call. Mrs. [redacted] approached the front desk at 0130 and met with military law enforcement at 0142, 1930 and 1942 Jacksonville time respectively. This time is wholly inconsistent with Mr. [redacted] description of being awakened at three in the morning, even allowing for some honest error concerning the timing on his part. Put simply, if Mr. [redacted] is to be believed, then Mrs. [redacted] statements are lies. Second, this description of running toward the front desk while on the phone is not supported by Mr. [redacted] statement. He does not describe her with a phone of her own in any of his three interviews. Further, he clearly states that after *he* made the call to military law enforcement, he put her in the breakfast/dining area to wait. At no point does he describe her making a call on either her phone or the hotel's. Finally, this description of running and then waiting at the reception area for the police while on the phone with her father is contradicted by Mrs. [redacted] own statement to military law enforcement that night. She makes no mention of calling her parents either in her verbal statements to SPC [redacted] or in her subsequent written statement. Moreover, Mrs. [redacted] describes in detail how she left the room following the alleged assault, how she ran down the hall, how she requested assistance from the man at the front desk, and how she hid in the breakfast area. At no point does she mention calling her parents. Most importantly, in her written statement she specifically states that she did not have her own cell phone, she was unable to get LT Becker's cell phone, and that she had no way to communicate. Mrs. [redacted] written statement makes it clear that her statements as described by Mr. [redacted] could not be true.

Based the Government's failure to prove that this phone call occurred during the relevant period of continuous excitement and the statements clear unreliability, the Government has failed to meet its burden of establishing that the excited utterance exception applies to these statements.

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4. Relief Requested. The Defense requests that the Military Judge excluding the alleged statements made by Mrs. [redacted] to Mr. [redacted] on 9 August 2013 as these statements are inadmissible hearsay.

5. Oral Argument. Unless the Government concedes the motion or this Court grants the relief on the basis of pleadings alone, the Defense requests oral argument on this matter.

[redacted]

J. A. GUARINO
CDR, JAGC, USN
Detailed Defense Counsel

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GENERAL COURT-MARTIAL
NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
UNITED STATES NAVY

UNITED STATES **v.** **CRAIG BECKER** **LT USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION AS TO EXCLUDING STATEMENTS OF MRS [redacted] TO MR [redacted]**

The Government concedes this motion and agrees that the statements to Mr. [redacted] from Mrs. [redacted] on the October 2013 phone call is hearsay. The Government will not seek to elicit this information from Mr. [redacted].

//s//

JASON L. JONES
CAPT, JAGC, USN

I certify that I have served a true copy via e-mail of the above GOVT RESPONSE on the Court and Defense Counsel on 8 December 2021.

//s//

JASON L. JONES
CAPT, JAGC, USN

Appellate Exhibit CIV
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NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES v. CRAIG BECKER LT USN	GOVERNMENT RESPONSE TO MOTION FOR RECONSIDERATION – DISMISSAL FOR SPEEDY TRIAL

The Court should deny the Defense Motion for Reconsideration and/or Dismissal for Speedy Trial. The Defense failed to show why reconsideration is appropriate under Uniform Practice Rule 10.9 and/or R.C.M. 905(f). The defense previously litigated multiple speedy trial motions under the Fifth Amendment, Sixth Amendment, Article 10, UCMJ, and R.C.M. 707, all of which have been denied by this Court. The Court should deny oral argument and re-affirm the prior Court rulings.

FACTS

On 10 September 2019 the Defense filed its original speedy trial motion aimed solely at Charge II, Specification 1, a violation of Article 128, UCMJ. This motion focused on a Fifth Amendment Due Process Clause violation. On 22 November 2019 the Defense filed a second motion to dismiss all charges for Speedy Trial violations of Article 10, UCMJ, Rule for Courts-Martial 707, the Fifth Amendment, and the Sixth Amendment. After response by the Government and oral argument the Court denied both speedy trial motions on 23 September 2020 finding no violation of the accused's speedy trial rights under any theory. *See*, A.E. 86 (Findings of Fact and Conclusions of Law Defense Motions to Dismiss for Speedy Trial Violations).

On 15 November 2021 the Defense filed a motion to reconsider and requested dismissal of all charges for violations of the accused's Fifth Amendment, Sixth Amendment and Article 10, UCMJ, speedy trial rights.

Since the preferral of charges on 30 July 2018 there has been no intervening change in controlling case. There is no new evidence and all evidence could have previously been presented at multiple motions hearings. There is no error in the Court's prior rulings denying speedy trial.

BURDEN

The burden of proof and persuasion rests on the Defense for this motion. The standard as to any factual issue necessary to resolve this motion is to a preponderance of the evidence. RCM 905(c)(1).

LAW

Rule 10.9 of the Navy-Marine Corps Trial Judiciary's Uniform Rule Practice governs motions to reconsider. Under Rule 10.9 "a motion to reconsider must be based upon: (a) an intervening change in controlling law; (b) the availability of new evidence; or (c) the need to correct clear error or prevent manifest injustice." The defense motion fails to discuss these requirement or R.C.M. 905(f). The motion to reconsider should normally be filed within 14 days of the initial ruling being released.

R.C.M. 905(f) states: (f) *Reconsideration.* On request of any party or *sua sponte*, the military judge may, prior to entry of judgment, reconsider any ruling, other than one amounting to a finding of not guilty, made by the military judge.

ARGUMENT

Uniform Practice Rule 10.9

Intervening change in controlling law

The Defense has failed to address, let alone show in its motion to reconsider, whether than as been any intervening change in controlling law as to speedy trial in relation to the Fifth Amendment, Sixth Amendment, Article 10, UCMJ, or R.C.M. 707. The Government is unaware of any intervening change in controlling law that calls into question the Court's prior ruling under any theory.

Availability of new evidence

The Defense has failed to address, let alone show in its motion to reconsider, the availability of new evidence. New evidence is evidence that was not in the possession of a party or known to party at the time of the initial hearing. In the defense motion there are 26 listed facts. Fact 4 occurred after preferral of charges but involves a witness long known by the defense prior to the Article 32 hearing and could have been known prior to the 22 November 2019 Defense Motion as to Speedy Trial. This is not new evidence and is related only to Charge II, Specification 1.

Fact 25 complains of Harvard denying the accused admission and claiming he would have to reapply in 2021. Harvard's actions are not Government action. Nevertheless, his Harvard enrollment problems were known and argued in the November 2019 Defense Motion, where on page 21 the Defense argued as prejudice that "LT Becker was dropped from enrollment at Harvard Business school." It was so unpersuasive that the Court did not even address it in its ruling.

The remaining defense facts occurred either prior to preferral in 2018 or prior to the 2019 motion to dismiss for speedy trial. There are no new facts to present. The defense motion and facts are issues considered and addressed by the court's prior ruling. The Court should refuse to accept the Defense motion when it so clearly fails to articulate any new or previously unavailable facts.

Need to correct clear error or prevent manifest injustice

The Defense has failed to address, let alone show in its motion to reconsider, a clear error or manifest justice that needs to be prevented. Disagreement as to a prior ruling, findings of fact, or conclusions of law is not "clear error" as anticipated by Rule 10.9. A losing litigant will always disagree with a court's ruling. To allow reconsideration without addressing a prior error

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allows endless mini-appeals at the trial court level by the defense. This is not the intent of R.C.M. 905(f) or Uniform Practice Rule 10.9. The Government, public, and Article 6b representative have a right to prepare for trial with an understanding of the finality of rulings.

The defense motion addresses the Fifth Amendment, Sixth Amendment, and Article 10, UCMJ. The Court's prior ruling on speedy trial addresses the Fifth Amendment, Sixth Amendment and Article 10, UCMJ. The defense motion is simply a re-hash of rejected arguments due to the change in military judge. This Court has ruled on all of these arguments.

The Defense motion argues for a violation of Article 10, UCMJ, but this court's prior ruling specifically found "the court concludes that the accused was not placed into pretrial restraint by the government as defined by Article 10, UCMJ, or R.C.M. 707." Nor does the defense attempt to discuss where in the Court's ruling is a "clear error" or "manifest injustice." The Court should not entertain an Article 10, UCMJ, argument as this court has previously ruled on the matter.

The Defense motion argues that a Sixth Amendment violation occurred using the standards set forth in *Barker v. Wingo*, 407 U.S. 514 (1972) which include the length of the delay, the reasons for the delay, assertion of the right to speedy trial, and prejudice. In the Court's prior ruling it articulates its findings using the *Barker* standards of length of the delay, the reasons for the delay, assertion of the right to speedy trial, and prejudice. The defense makes no attempt to discuss "clear error" or manifest injustice in relation to the Court's earlier *Barker* rulings. The Defense motions is simply a re-filing of a prior litigated motion due to their dislike of the ruling. The Court should not entertain any Sixth Amendment argument as this Court has ruled on the matter.

The Defense motion includes a final Fifth Amendment Due Process claim, or "military due process." The Court's ruling addressed the Fifth Amendment and Due Process in two separate sections. The first section dealt solely with Charge II, Specification 1, an incident that occurred in 2013. The very argument that the defense now makes – that it was only upon the death of Mrs. [redacted] was that incident reviewed again after its initial declination of charges – was specifically addressed by the Court in its earlier ruling. The Court held "under these new circumstances, the August 2013 incident was re-contextualized, and the government was reasonable to revive them given the new allegations uncovered in 2015/2016." The Government has long argued the murder of the victim by the accused certainly gave the Government reason to re-contextualize the prior abuse. The remaining arguments pertain to the delay as the United States and [redacted] reviewed and worked out diplomatically which [redacted] partner would assert jurisdiction. This specific issue was addressed at length in the Court's prior ruling where the Court held "the court concludes that the defense has failed to meet their burden to show that the government's delay in asserting U.S. jurisdiction over the offenses amounted to egregious or intentional tactical delay by the government or that the period of delay resulted in actual prejudice in the form of loss of witnesses or physical evidence." The defense makes no attempt to show where the Court's prior ruling contains a "clear error" or manifest injustice. The Court should not entertain any Fifth Amendment argument as the Court has ruled on the matter.

14 Day Requirement of Rule 10.9

The Court's initial ruling occurred on 23 September 2020. Under Rule 10.9 the defense had 14 days to seek reconsideration. During this time frame the Government was seeking an Article 62, UCMJ, appeal of a separate unrelated matter. The Government takes no position as to whether the Defense could have sought reconsideration within the 14 days allotted due to R.C.M. 908(b)(1)'s prohibition of proceeding forth during the pendency of an appeal. A reconsideration

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and granting of the defense motion would have terminated the proceedings, an act prohibited by R.C.M. 908. Nevertheless, the Court need not address this procedural issue when reviewing the substantive requirement of Rule. 10.9

R.C.M. 905(f)

R.C.M. 905(f) grants military judges the ability to reconsider prior rulings. However, R.C.M. 905(f) does not provide any specific factors for reconsideration or procedural timelines. The Government's research on R.C.M. 905(f) did not reveal appellate decisions addressing R.C.M. 905(f), as most likely such issues are not the subject of appellate litigation vice the underlying substantive matter. *See, United States v. Vargas*, 74 M.J. 1 (C.A.A.F. 2014) noting that the Court granted a government motion to reconsider a prior ruling but failing to discuss R.C.M. 905(f).

Case law dealing with motions to reconsider often occurs in relation to the Government seeking an Article 62, UCMJ, appeal. *See, United States v. Hill*, 71 M.J. 678 (A.C.C.A. 2012). With the Government failing to find military appellate case law on R.C.M. 905(f) and reconsideration the Government looks to R.C.M. 108 which holds that: The Judge Advocate General concerned and persons designated by the Judge Advocate General may make rules of court not inconsistent with these rules for the conduct of court-martial proceedings." The factors listed in Rule 10.9 are not inconsistent with R.C.M. 905(f) as they provide both a timeline for reconsideration and factors to be considered by a court. Thus the appropriate standard for reconsideration are the factors listed in Rule 10.9 as they are not forbidden by R.C.M. 905(f).

Substantive Speedy Trial Arguments

The Government incorporates its prior arguments and filings as to the Fifth Amendment, Sixth Amendment and Article 10, UCMJ. The Government relies upon its prior filings, arguments, and the Court's ruling. The Government does not wish to introduce any new documentary evidence or testimony. The Government request that the Court deny the Defense for reconsideration under Rule 10.9, but in the alternative request that the Court rule on the filings prior to the next Article 39(a) in [redacted] in January 2020.

Lack of nexus to [redacted] and [redacted] officials

The Article 39(a) set in January 2023 in [redacted] was intended to provide the defense the opportunity to address issues that had a nexus with [redacted] and/or [redacted] officials. This motion does not address any issue related to [redacted] or [redacted] officials. This motion was addressed two earlier Article 39(a)'s conducted in California. As such, the Government request that the Court rule on the motion without oral argument and relying upon the pleading, per R.C.M. 905(h). There are no [redacted] witness or [redacted] documents related to this motion from either side.

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RELIEF REQUESTED

The Court should refuse to consider and deny the Defense's Motion under Uniform Practice Rule 10.9 and R.C.M. 905(f). In the alternative the Court should affirm its prior speedy trial rulings without a hearing or oral argument.

//s//

JASON L. JONES
CAPT, JAGC, USN

I certify that I have served a true copy via e-mail of the above GOVT RESPONSE on the Court and Defense Counsel on 30 November 2021.

//s//

JASON L. JONES
CAPT, JAGC, USN

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NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES v. CRAIG BECKER LT USN	GOVERNMENT RESPONSE TO MOTION FOR SEVERANCE AND LATE FILING

The Court should refuse to consider the Defense Motion for Severance as filed out of time without justification. If the Court agrees to hear the motion on the merits the Court should deny the motion as severance is not warranted as all charges are properly consolidated for trial under R.C.M. 601(e)(2).

BURDEN

The burden of proof and persuasion rests on the Defense for this motion. The standard as to any factual issue is preponderance of the evidence. RCM 905(c)(1).

FACTS

1. In August 2013 the accused assaulted his wife in the Army Lodge in [redacted] by strangling her. Mrs. [redacted] fled their room and contacted the front desk clerk Mr. [redacted] and requested he call the police.

2. Mrs. [redacted] did not describe her assault in detail to Mr. [redacted] He has given multiple statements as to the appearance of Mrs. [redacted] which include red marks on the neck and face.

3. Arriving Army Military Police Officer Specialist [redacted] stated that Mrs. [redacted] told him that her husband "attempted to strangle her."

4. Mrs. [redacted] was then taken to the Army police station where she gave a detailed version of events to Army MP's, including discussing strangulation. Later, the accused provided an inculpatory version of events where he claimed Mrs. [redacted] attacked him but stated that he forced Mrs. [redacted] onto a bed, climbed on top of her, and stroked her hair.

5. The accused and Mrs. [redacted] later reconciled and she provided a recantation of her allegations to police and Family Advocacy. Her recantation claims that medicine she was taking caused her to misperceive the events. Mrs. [redacted] then spent years telling her friends and family she recanted to save the accused's career.

6. Charges were preferred against the accused on 30 July 2018 and referred on 29 January 2019.

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7. The case has three substantive motions sessions in April, October, and December 2019 where the Defense raised numerous motions as to Charge II, Specification 1, all of which have been denied.

8. In December 2019 the Government took an interlocutory appeal under Article 62, UCMJ of the military judge's decision to exclude evidence of the victim's statements, which in part related to Charge II, Specification 1. In addition to Mrs. [redacted] detailed statement to law enforcement on 9 August such statements included relating the events of 9 August to family and friends. She repeatedly claimed that the events occurred and that she recanted at the pressure of the accused to save his career.

9. The Court of Appeals for the Armed Forces ruled against the Government and in August 2021 the case was returned to the trial court level. In November 2021 the defense filed multiple substantive motions. The Government responded on 8 December conceding a related hearsay motion as to a phone call from Mrs. [redacted] to her father shortly after the events of 9 August 2013.

10. On 23 December 2021 the parties held an R.C.M. 802 conference where the Government stated that it had earlier conceded the hearsay motion on 8 December. On 4 January the Defense filed a motion out of time as to severance on an issue conceded on 8 December. The Government objected to the late filing and the Defense filed a supplemental brief on 10 January 2021.

ARGUMENT

THE DEFENSE MOTION IS AN UNTIMELY FILING THAT THE COURT SHOULD NOT CONSIDER ON ITS MERITS AS NO GOOD CAUSE EXIST FOR ITS LATE FILING

The Article 39a on 20 January is the fourth motions sessions. The defense has long had the opportunity to seek severance of Charge II, Specification 1, which is in essence severing a prior physical assault of the murder victim from the murder charge itself. In April 2019 the defense sought to dismiss Charge II, Specification 1 as an unreasonable multiplication of charges, which was denied. In September 2019 the defense sought to dismiss Charge II, Specification 1 for a Due Process violation related to speedy trial, which was denied. In December 2019 the defense again requested dismissal of Charge II, Specification 1 (as well as all other offenses) for violations of various speedy trial doctrines, which were all denied. In November 2021 the Defense again request that Charge II, Specification 1 be dismissed under a theory of speedy trial. The Defense repeatedly attempted to have the charge dismissed under a variety of theories, none of which have worked, which shows that the Defense long ago analyzed the charge and its procedural strengths and weaknesses. Their motion now comes without good cause.

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While styled as a motion to sever the motion is realistically a motion for pre-trial acquittal based on what they perceive as a lack of evidence. See. R.C.M. 905(a) – "the substance of a motion, not its form or designation, shall control. This motion is an effort to force the Government to lay out its evidence as to Charge II, Specification 1, prior to trial, with the defense arguing that the evidence is insufficient. There is no requirement that the Government introduce such evidence prior to trial.

The crux of the motion is that Mr. [redacted] the front desk clerk of the Army hotel that Mrs. [redacted] spoke to on 9 August 2013 has inconsistent statements. (While ignoring statements to Specialist [redacted] which the Court previously ruled are admissible as excited utterances.) With the Government currently unable to introduce Mrs. [redacted] numerous statements to police, friends, and family of the assault, the evidence of this charge is less (in volume) than the murder. But it is not zero and the defense has known this since at least September 2019 in its Motion to Dismiss for Speedy Trial. In that very motion the defense states in its summary of facts, paragraph 3(h) that "A subsequent statement from Mr. [redacted] to NCIS suggest that he observed red marks on Mrs. [redacted] neck, AE V at DDD." This Court has already ruled that statements and observations of Mr. [redacted] are admissible as excited utterance, as well as statements to Specialist [redacted]. The Defense is able to cross-examine these witnesses on their observations, recollections and statements by Mrs. [redacted]

The Government has additional evidence – statements of the accused – that he picked up his wife, carried her to the bed, placed her down on the bed, and leaned over her. While he couches this as trying to calm her down while he stroked her hair, members can assess whether his version of events is consistent with Mrs. [redacted] physical appearance, her statements, and the observations of others. Members are more than able to view the accused's version of events as self-serving minimization while stating he used force to control her, placing himself on top of Mrs. [redacted] on the bed, while touching her face. The Government may, or may not, introduce this evidence at trial. The Government does not feel bound by the evidence introduced at this motions session as to mirror it at trial.

The Defense motion also is an attempt to avoid their tactical conundrum of whether to attempt to admit Mrs. [redacted] subsequent recantation to law enforcement under M.R.E. 806. Such an act will trigger the Government to seek the admission of evidence of her prior consistent statements both to friends, family, and a detailed written statement to law enforcement. On 9

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August 2013 Mrs. [redacted] went with Army MP's to the police station. She there made a detailed statement to include "he picked me up in some manner and began to carry me toward the bedroom, I remember squirming and trying to get away and preventing him from taking me inside the door frame by putting out my arms and legs. He wrangled me onto the bed where he climbed on top of me and held my arms down so that I could not move at all. He then put his hands around my neck and pushed down." This evidence is currently not admissible but may become so based on cross-examination or tactical decisions that open the door or trigger rebuttal. While this issue is not ripe for adjudication from this motion, this is the crux of what the defense seeks to avoid – opening doors. The Court should not require the Government to lay out its tactical choices for trial on the merits when it has a good faith basis to continue with Charge II, Specification 1.

Finally, the Defense Supplemental Motion does not address why the motion could not have been filed earlier. The motion as to statements made by Mrs. [redacted] to her father are not dispositive of the charge, which is what the Defense claims now triggered the filing. The Government lost a major portion of its evidence – the written statement to law enforcement – with the Court of Appeals for the Armed Forces ruling in August 2021. This motion could have been filed in conjunction with earlier defense motions. The good cause justification motion itself is a repeat of the severance motion with the severance test of *United States v. Southworth*, 50 M.J. 74 (C.A.A.F. 1999). The Court should deny the motion as untimely and without good cause.

THE COURT SHOULD DENY THE SEVERANCE REQUEST

THE CHARGES ARE PROPERLY CONSOLIDATED FOR TRIAL UNDER R.C.M. 601(E)(2).

R.C.M. 601(e)(2) allows joinder of offenses at the discretion of the convening authority, whether the charges are related or not. The non-binding discussion of R.C.M. 601(e)(2) notes that "ordinarily all known charges should be referred to a single court-martial." Normally all charges are tried together as "joinder of charges is favored in trials by court-martial, in part, because of unitary sentencing." *United States v. Evans*, 55 M.J. 732, 744 (N.M.C.C.A. 2001). Unitary sentencing is important for the Accused as it prevents consecutive sentences being adjudged thereby increasing the overall amount of possible confinement or enhanced punishments under R.C.M. 1003(d). "Perhaps more important, unified sentencing by a court-

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martial favors joining all known offenses into a single trial, thus exposing the accused to only one sentence for his criminal misconduct, rather than a series of separate sentences." *United States v. Haye*, 29 M.J. 213, 215 (C.M.A. 1989). In the present case, the convening authority ordered that all charges and specifications be tried together by referring them to the same general court-martial.

THE THREE PRONG TEST OF U.S. V SOUTHWORTH

The Court of Appeals of the Armed Forces articulated a three-part test for the severance of charges with a view towards "manifest injustice" as articulated in R.C.M. 906(b)(10). *See, United States v. Southworth*, 50 M.J. 74, 76 (C.A.A.F. 1999), citing *United States v. Curtis* 44 M.J. 106. This three-part test was affirmed in *United States v. Simpson*, 56 M.J. 462 (C.A.A.F. 2002). The three-part *Southworth* test is:

1) Whether the evidence of one offense would be admissible proof of the other;
2) Whether the military judge has provided a proper limiting instruction; and,
3) Whether the findings reflect an impermissible crossover.[1]

PRONG ONE

Southwark involved the rape of two people with no connection – a Navy enlisted woman and a 13 year old child of another sailor. *Southworth*, 50 M.J. at 74. As to this case the incidents in 2013 and 2015 are linked by the inherent relationship between the accused and the victim – his spouse. There is a natural connection between spouses in a myriad of ways that no member will be concerned or offended about including such routine interaction and access to each other, living together, having a child together, and financial ties. The current case does not present the "predator" scenario that *Southwark* did as the accused and his spouse were involved in two incidents in their own homes. The accused was staying in the Army Lodge upon arrival in [redacted] not on a vacation. The accused later murdered his wife in their apartment. These are natural places for spouses to be and to interact even if the interaction is negative and violent. There is no danger in placing their relationship and interaction out-of-context. Married couples live together, disagree about issues, make-up, move-on, and sometimes divorce. The Court need not go further than to easily distinguish the underlying predicates facts and concerns that easily distinguish this case from *Southwark* and its predator scenario.

[1] Prong three is an appellate concern and not applicable at the trial court level other than the overall rubric of manifest injustice.

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The Defense's attempt to an M.R.E. 404b analysis would make sense in the *Southwark* scenario when an accused has interactions with strangers and the concern is one random event bleeds over to the random other event– the man who seek to gets women alone to rape them. The argument that this is propensity evidence is unfounded. This is clearly not propensity evidence as each assault is its own separate criminal act. He was violent on two occasions towards the same woman, his wife. This is not a trial within a trial - but part the trial itself - that will take multiple witnesses. This is not propensity evidence but the accused's repeated acts towards his wife which are properly consolidated for trial and will be litigated as such.

The Government referred Charge II, Specification 1 and has not attempted to use it as M.R.E. 404b evidence. However, the Defense attempts to use the M.R.E. 404b test as articulated in *United States v. Reynolds*, 29 M.J. 105 (C.M.A. 1989).[2] Neither *Southwark* or its progeny use the M.R.E. 404b test as the test of prong one. See, *United States v. Duncan*, 53 M.J. 494 (C.A.A.F. 2000) and *United States v. Kerr*, 51 M.J. 401 (C.A.A.F. 1999). Nor does any of the case law cited by the Defense such as *United States v. Parker*, 71 M.J. 594 (N.M.C.C.A. 2012) or *United States v. Curtis*, 44 M.J. 106 (C.A.A.F. 1996). The Court is not required to conduct an M.R.E. 404b test analysis on either Charge I or Charge II, Specification 1. Charged offenses are not evaluated as such.

The Government is not seeking to show that because the accused assaulted his wife in 2013 he later murdered her in 2015. These events are roughly two years apart with a fair amount of life in-between including reconciliation, the birth of a child, creating a business, and a falling out where the murder victim left the accused. The 2013 is not premeditation evidence. However, the accused did assault his wife on two occasions, the second resulting in her murder. These are stand-alone offense as the spill-over instruction will articulate. Any possible defense argument that the victim's death in October 2015 is the result of suicide vice murder may cause an evaluation of instructions to the members as to the use of charged evidence and spillover, but the Government is speculating on the what theory the Defense will articulate.

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[2] The test is: 1) does the evidence reasonably support a finding by the factfinder that the accused committed the other crimes, wrongs, acts; 2) does the evidence of the other act make a fact of consequence to the instant offense more less probably; and 3) is the probative value of the evidence of the other act substantially outweighed by the danger of unfair prejudice?

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PRONG TWO

The Defense cites *United States v. Parker*, 71 M.J. 594 (N.M.C.C.A. 2012) for the proposition that "linked" offenses should be severed. *Parker*, like *Southwark*, involves two separate victims. Parker shot and killed two Marines who were not involved with one another. One was killed at random because of his race and the other was killed because it involved an affair with a women. *Parker*'s evidence in one killing was significantly stronger than in the other and the accused argued that "members were faced with an impossible situation in which they could not hold the Government to its full burden of proof as to the LCpl James killing." *Id* at 603. However, Parker's military judge did not issue a spillover warning. "Regrettably, after denying the defense motion to sever the trial judge failed to instruct the members on spillover." *Id* at 604. In this case the Government would request a spillover instruction. Thus the rationale for *Parker* being overturned is quite preventable in the current case.

The Government request that the Military Judge issue the members a spill over instruction from the Military Judge's Benchbook 7-17 "Spillover – Facts of One Charged Offense to Prove Another. "Members are presumed to follow the instructions of the military judge during their closed session deliberations on both findings and sentencing." *United States v. Mahler*, 49 M.J. 558, 565 (N.M.C.C.A. 1998).

Current Case is not Capital

The current case is also not a capital case unlike *Parker*. Defense arguments that Charge I was eligible for a capital referal belays the fact that it is not. The "high stakes" are confinement, not for the accused to be put to death. The reliance on R.C.M. 906(b)(10)(B) is misplaced and disingenuous.[3] This also begs the question as to what U.C.M.J. charges are then not "high stakes" which would not be subject to severance if this were the standard? The point is "death is different" and the rules are crafted as such. See, *Harmelin v. Michigan*, 501 U.S. 957, 995 (1991)

Future Mistrial Argument

The Government believes that evidence at trial will survive an R.C.M. 917 motion. Mr. [redacted] saw red marks on her face or neck and Mrs. [redacted] stated "he tried to strangle me."

[3] Due to the outlandish argument and even the specter of raising the death penalty and the concerns that this raises the Government request that the Court conduct a colloquy with the accused so that knows the maximum punishment available is NOT death.

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This evidence, even without additional information, survives an R.C.M. 917 motion. See, R.C.M. 917 (d) holding that "evidence shall be viewed in the light most favorable to the prosecution without an evaluation of the credibility of the witnesses."

As to concerns that the case has taken years to trial this case has been constantly litigated by both sides up and down the appellate and trial chain. The height of efficiency is to try them together, not to separate them. The defense reliance on *United States v. Giles*, 59 M.J. 374 (C.A.A.F. 2004) is misplaced as *Giles* involved an accused charged with perjury at her first trial and drug offenses related to the perjury. (*Giles* is not a mistrial case but a severance case and does not address issues such as an R.C.M 917 grant midtrial or instructions that should follow it.) This presented "the interlocking evidentiary requirements presented complications not present in normal rehearing on specifications.... In such a typical hearing evidence of an earlier conviction for the same offense would normally be inadmissible when the conviction had been set aside on appeal." *Id* at 376. This is easily distinguishable in that the current case has no prior testimony, there are no perjury and the charges are not uniquely interlocked. Following the accused's argument to its logical conclusion no two charges against the same victim could ever be at the same court-martial with different quantity or quality of evidence. This is simply not the case and R.C.M. 601(e)(2) recognizes this by allowing multiple offenses, regardless of the victim, to be tried by once court-martial.

EVIDENCE

a. Testimony of NCIS Special Agent [redacted]

b. Government objection to late filing dated 7 January 2022

c. NCIS ROI dtd 29 Jan 2019 – App Exhibit DDD (interview of Mr. [redacted]

d. Statement of US Army Military Police Officer Specialist [redacted]

e. NCIS ROI dtd 14 Nov 13 – interview of the accused

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RELIEF REQUESTED

The Court should refuse to consider and deny the Defense's Motion as untimely and without good cause. On the merits as to severance the Court should deny the motion as the charges are properly consolidated under R.C.M. 601(e)(2).

//s//

JASON L. JONES
CAPT, JAGC, USN

I certify that I have served a true copy via e-mail of the above GOVT RESPONSE on the Court and Defense Counsel on 18 January 2022.

//s//

JASON L. JONES
CAPT, JAGC, USN

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NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES OF AMERICA **v.** **CRAIG BECKER** **LT USN**	**Defense Bench Brief Regarding CDR Davis' Representation of LT Becker** **1 February 2022**

1. Summary

The defense asserts that any potential conflict between CDR Davis' representation of LT Becker and his current assignment to Region Legal Service Office Southwest is waivable, and has, in fact, been waived by LT Becker.

2. Facts

a. CDR Davis served as the Officer in Charge for [redacted] from July 2018-July 2020.

b. In early 2019, CDR Davis formed an attorney-client relationship with LT Becker. At the time, LT Becker was already represented by CDR Guarino and Mr. Sullivan.

c. While still attached to [redacted] CDR Davis carried out representation of LT Becker, including: traveling to [redacted] interviewing witnesses, writing motions, and appearing in court on behalf of LT Becker.

d. While CDR Davis was still attached to DSO North, the Government filed an Article 62 appeal, challenging the trial court's ruling regarding hearsay statements by Mrs. [redacted]

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e. While the Article 62 appeal was pending, CDR Davis transferred to Region Legal Service Office Southwest in July 2020, where he assumed duties as the Assistant Senior Trial Counsel, and, ultimately, duties as the Senior Trial Counsel.

f. While CDR Davis has been assigned to Region Legal Service Office Southwest, CAPT Jason Jones, the prosecutor in LT Becker's case, has served as the Director of the Navy's Trial Counsel Assistance Program and as the Navy's Complex Cases Counsel.

g. Because of Captain Jones' assignments to those two billets and CDR Davis' assignment as the Senior Trial Counsel, CDR Davis has had professional interactions with CAPT Jones to include discussions of ongoing prosecutions, policy, and procedures.

h. CDR Davis has never discussed his representation of LT Becker with CAPT Jones.

i. While CDR Davis served as Senior Trial Counsel, CAPT Jones assumed prosecutorial responsibility for two cases in CDR Davis' geographical area of responsibility.

j. CDR Davis and CAPT Jones have had professional discussions regarding the prosecution of those two cases, but CDR Davis has never been assigned to prosecute any cases with CAPT Jones.

k. CDR Davis has never had a supervisor-subordinate relationship with CAPT Jones, and CAPT Jones has never had any input on CDR Davis' fitness reports.

l. CDR Davis reports directly to the Commanding Officer of Region Legal Service Office Southwest, who signs his fitness reports.

m. Prior to the 20 January 2022 Article 39(a) session, LT Becker was formally advised of the potential conflict. DDDDDD.

n. Prior to signing the waiver, LT Becker was advised by CDR Guarino and Mr. Sullivan of his rights to conflict-free representation. LT Becker was also provided the opportunity to speak with conflict-free counsel, and waived that opportunity.

o. LT Becker was also provided a memorandum from the Commanding Officer of Region Legal Service Office Southwest to CDR Davis in which CDR Davis was informed that he would be excused from his duties as the Senior Trial Counsel from 14 February to 30 April 2022 so that he could prepare for, and conduct, LT Becker's trial. Enclosure EEEEEE.

p. The memorandum further stated that the CDR Davis' only responsibilities during that timeframe would be to "zealously defend LT Becker to the best of [his] ability." *Id.*

q. At the 20 January 2022 Article 39(a) session, the Military Judge advised LT Becker of his rights to conflict-free counsel, and LT Becker voluntarily waived the conflict and stated to his desire to be represented by CDR Davis, CDR Guarino, and Mr. Sullivan.

r. The Military Judge requested both Government and Defense Counsel to review the case of *United States v. Lee*, 70 M.J. 535 (N.M.C.C.A. 2011), and to brief the court on the issue of a potential conflict of interest.

4. Law

Each accused is entitled to representation by detailed military counsel. Article 38, UCMJ. Certain individuals, however, are precluded from representation absent an express request from the accused. R.C.M. 502(d)(3). These individuals are the accuser, the investigating or preliminary hearing officer, the military judge, and a member. *Id.* Navy policy dictates:

> A pre-existing personal, professional, or commercial relationship with any other party, witness, judge, or attorney—whether pre-existing the client's proceeding or contemplated during the course of a proceeding—involved in a proceeding creates

> a strong appearance of a potential conflict of interest that must be disclosed to the client to permit the client to make an informed decision regarding the potential conflict of interest.

JAGINST 5803.1E.

Military jurisprudence has for some time declined to consider a command relationship between opposing counsel to be prejudicial *per se*. *United States v. Lee*, 70 M.J. 535, 540 (N.M.C.C.A. 2011)l *United States v. Hubbard*, 20 C.M.A. 482, 43 C.M.R. 322, 325 (C.M.A. 1971); *United States v. Nicholson*, 15 M.J. 436, 439 (C.M.A. 1983)). Upon discovering a conflict, a defense counsel must notify the military judge. *United States v. Lee*, 70 M.J. at 541. If an accused declines to waive the conflict, the military judge may release the counsel or consider other remedies. *Id.*

5. Discussion

The potential conflict at issue in this case bears none of the hallmarks with which appellate courts have previously taken issue. Specifically, the only similarity between this case and *United States v. Lee* is that CDR Davis, like the defense counsel in *Lee*, transferred to a trial department prior to the accused's trial. In *Lee*, the defense counsel had a senior-subordinate relationship with the trial counsel, and the trial counsel had the responsibility of preparing the defense counsel's fitness report. *Id.* at 537. The trial counsel and the defense counsel tried cases together as prosecutors, and the defense counsel provided his client with "an imperfect understanding of the arrangement." *Id.*

Here, CDR Davis has no senior-subordinate relationship with the prosecution, and no prosecutor in this case has any input on CDR Davis's fitness report. CDR Davis has never tried cases with any of the prosecutors, and LT Becker has been fully informed of the nature of the

arrangement—both executing a written waiver and making his elections on the record after being advised by the Military Judge.

The Court in *Lee* further holds:

> [W]hen a defense counsel is assigned duties that place him in the rating chain of the trial counsel, defense counsel must advise the client and any co-counsel of the potential conflicting interests and then arrange for the client to be advised by a disinterested party as to the necessity for a waiver. Defense counsel must notify the military judge of the potential conflict; failing that, trial counsel, as an officer of the court, must do so. Only when the military judge is satisfied that the client understands the right to conflict-free counsel and waives any disability may the trial progress; however, in the interests of justice, the military judge may consider other remedies such as disqualification of the trial counsel from further participation, or alteration of the rating chain of the defense counsel.

Id. at 541. All of these conditions have been satisfied. The client and co-counsel have been advised regarding the potential conflict, the military judge has been notified, the military judge has engaged in a colloquy with the accused, and the accused has waived the conflict both orally and in writing. As such, the trial may progress.

[redacted]

Jeremiah J. Sullivan
Defense Counsel

Certificate of Service

This motion was electronically served on Government counsel and the Court on 1 February 2022.

[redacted]

Jeremiah J. Sullivan, III
Defense Counsel

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NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **CRAIG R. BECKER** **LT/O-3** **U.S. NAVY**	**RECONSIDERATION** **MOTION TO COMPEL DISCOVERY** **1 FEB 2022**

1. Nature of Motion

Pursuant to R.C.M. 906(b)(7) and R.C.M. 701, the Defense respectfully requests the court to compel the Government to produce the communications between trial counsel and SA [redacted] [redacted], the lead NCIS agent in the above captioned case.

2. Summary of Facts

a. In September 2019, the Defense moved this Court to compel the production of communications between trial counsel and NCIS investigators related to the case at bar.

b. When this Court granted the Defense motion, the Government asked the Court to review several communications in camera.

c. In December 2019, this Court orally informed the Defense that these communications would not be turned over as they were work product unrelated to SA [redacted] status as an M.R.E. 615 representative.

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d. This case was put on hold shortly after the December 2019 Article 39a during the pendency of multiple appeals.

e. In the fall of 2021, after the completion of all appeals, the Government provided the Defense with a potential witness list that included SA [redacted]

f. In November 2021, in compliance with this Court's trial management order, the Defense moved this Court to provide more specificity in regards to its ruling on these communications.

g. In January 2022, this Court read its previously sealed ruling which appeared to state that the M.R.E. 615 status of SA [redacted] was a factor in the ruling and that the communications included (1) trial counsel sharing their thoughts on what is important to the prosecution's case, (2) trial counsel directing or requesting additional investigative actions, and (3) SA [redacted] responses to trial counsel.[1]

3. Discussion of Law

R.C.M. 701(f) and M.R.E. 501(a)(5) codify and make applicable in courts-martial the common law work product privilege. As such, "work product" of counsel and counsel's assistants or representatives need not be turned over in the discovery process. As with all privileges, "work product" protections can be waived if the material protected is shared with individuals outside of the sphere of protection. M.R.E.510.

M.R.E. 615 is a rule regarding the exclusion of witnesses from court proceedings. It allows for the trial counsel to prevent the exclusion of an employee of the United States if that person is

[1] The Defense does not have a copy of this ruling and is paraphrasing based on notes taking at the last 39a. The Defense is attempting to be as accurate as possible without being able to review the ruling itself.

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designated a representative of the United States. This rule does not make that employee a representative or assistant of the trial counsel and does not appear to confer any protections on this representative other than preventing their exclusion during trial.[2]

The party claiming protection of a privilege has the burden of showing that the privilege is applicable.[3] "Work Product" protections do not supersede Constitutional requirements of the disclosure of Constitutionally required material. *United States v. Lyson*, 2013 CCA LEXIS 816 (A.F.C.C.A., Sept. 16, 2013)

4. Analysis

A. Good Cause

This Court orally ruled on the protected status of these communications in December 2019. Prior to this ruling the Defense was not aware of the specific protection the Government was claiming with regards to these communications. More importantly, the Defense was not aware of the nature of these communications other than who they were to and from nor was the Defense provided an opportunity to brief or challenge the "work product" classification. The Court's December oral ruling informed the Defense that the communications were being deemed "work product" but did not provide information regarding the nature of the communications. At the first opportunity, the Defense moved to seek clarification from this Court regarding its ruling.

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[2] The Defense could find no case in Military or Federal Courts asserting that 615 designation inferred "work product" or other confidential protections.

[3] The M.R.E.s discuss the burden specifically with each privilege and he burden is on the party asserting the privilege. However, since "work product" is covered under R.C.M. 701, the burden is not discussed. In the federal rules governing "work product" upon which or rules are based, the burden of establishing that a document or communication is privileged lies with the party asserting the privilege. *See, e.g., United States v. BDO Seidman*, 337 F.3d 802, 811 (7th Cir. 2003). "The mere assertion of a privilege is not enough; instead, a party that seeks to invoke the attorney-client privilege has the burden of establishing all of its essential elements." *In re Grand Jury Proceedings (Thullen)*, 220 F.3d 568, 571 (7th Cir. 2000); *see also, e.g., United States v. Evans*, 113 F.3d 1457, 1461 (7th Cir. 1997). The privilege must be asserted and demonstrated on a document-by-document basis. *See, e.g., In re Grand Jury Proceedings (Thullen)*, 220 F.3d at 571.

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Upon hearing the written ruling, the Defense immediately informed this Court that it would be moving to reconsider the ruling that "work product" applied to communications.

B. Work Product

"Work Product" protections applies to matters belonging to counsel and their assistants or representatives. The lead criminal investigator is an independent entity and not trial counsel's assistant or representative. An M.R.E. 615 designation does not change this fact. M.R.E. 615 is a rule exclusively dealing with who can be excluded from a courtroom. By its plain reading, it confers no additional evidentiary rights or protections. It is worth noting that M.R.E. 615 uses both the term "the United States" and "trial counsel" indicating that these terms are not interchangeable within the rule. The rule specifically states in subsection (b) that the employee is a representative of the United States and not a representative of counsel. As such, the lead criminal investigator, even after an M.R.E. 615 designation is not entitled to "work product" protections.

While these communications, as described by this Court, appear to have started as protected "work product," that protection was waived once the trial counsel elected to share those thoughts with the lead criminal investigator. M.R.E. 510(a) states that a voluntary disclosure of any significant part of the protected matter results in a waiver of that protection. Here, the trial counsel chose to send these thoughts and directives to SA [redacted], a person not part of their trial team. This waived any "work product" protections. Further, the Defense was unable to find any "work product" cases in the military that applied the "work product" protection to materials that were shared with persons outside of the prosecution's office.

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Regardless of "work product" classification, exculpatory materials must be disclosed. This includes exculpatory material which could be used for impeachment of government witnesses. *See Giglio v. United States*, 405 U.S. 150, 154, 31 L. Ed. 2d 104, 92 S. Ct. 763 (1972). The communications as described by this Court could be used very effectively to cross-examine SA [redacted].

For example, e-mails proposing or directing investigative actions could be used to show: 1) that SA [redacted] did not comply with the request and conducted an incomplete investigation; or 2) that SA [redacted] only followed up on the leads provided to her by the prosecution and ignored similar leads that would have been helpful to the Accused, thus demonstrating a biased investigation.

E-mails in which the trial counsel relate their plan or theory could be used to challenge statements made by SA [redacted] on the stand. For example, the Defense could ask questions such as, "You just testified to X. You are only saying that because the prosecutors told you how important that fact was to their case?" or "You just testified to X, but prior to receiving that email from the prosecutors telling you how important X was, you had never mentioned it in any of your reports?"

E-mails in which SA [redacted] responds are statements of a witness. Any statement where she is expressing her opinion or otherwise discussing this case could be used as a prior inconsistent statement or to show a personal bias under M.R.E. 608(c). Moreover, even if this material were not provided prior to trial, R.C.M. 914 would require its production once SA [redacted] took the stand.

5. Relief Requested

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The Defense requests that the Military Judge reconsider the Court's prior ruling that the communications in question are protected "work product," that such protection was not waived by voluntary disclosure, and that their disclosure is not is otherwise Constitutionally required.

6. Oral Argument.

Unless the Government concedes the motion or this Court grants the relief on the basis of pleadings alone, the defense requests oral argument on this matter.

[redacted]
J. A. GUARINO
CDR, JAGC, USN
Detailed Defense Counsel

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NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES v. CRAIG BECKER LT USN	GOVERNMENT RESPONSE TO DEFENSE MOTION FOR RECONSIDERATION AS TO DISCOVERY

The Court should deny the Defense Motion for Reconsideration as to Compel Discovery. The Defense failed to show why reconsideration is appropriate under Uniform Practice Rule 10.9 and/or R.C.M. 905(f). The defense previously litigated this issue and the Court denied the motion in December 2019. The Court should now deny oral argument and re-affirm the Court's prior ruling.

FACTS

The Government adopts the Defense recitation of facts.

BURDEN

The burden of proof and persuasion rests on the Defense for this motion. The standard as to any factual issue necessary to resolve this motion is to a preponderance of the evidence. RCM 905(c)(1).

LAW

Rule 10.9 of the Navy-Marine Corps Trial Judiciary's Uniform Rule Practice governs motions to reconsider. Under Rule 10.9 "a motion to reconsider must be based upon: (a) an intervening change in controlling law; (b) the availability of new evidence; or (c) the need to correct clear error or prevent manifest injustice." The defense motion fails to discuss these requirement or R.C.M. 905(f). The motion to reconsider should normally be filed within 14 days of the initial ruling being released.

R.C.M. 905(f) states: (f) *Reconsideration*. On request of any party or *sua sponte*, the military judge may, prior to entry of judgment, reconsider any ruling, other than one amounting to a finding of not guilty, made by the military judge.

ARGUMENT

Uniform Practice Rule 10.9

Intervening change in controlling law

The Defense has failed to address whether than as been any intervening change in controlling law since the original December 2019 ruling. The defense's theories as to work product, exculpatory evidence, R.C.M 914/Jencks, and M.R.E. 615 are is relatively static areas of law. The Government is unaware of any intervening change in controlling law that calls into question the Court's prior ruling under any theory. As the Defense has failed to meet its burden the Court should deny the Defense motion.

Availability of new evidence

The Defense has ample opportunity to interview Special Agent [redacted] and cross-examine her on what steps she did and did not take as an investigator. They can press on issues they think are exculpatory or contradictory. They can even suggest or request that NCIS take steps that may lead to exculpatory evidence. Nothing in the current ruling prevents the defense from cross-examination of SA [redacted] or presenting defense theories.

It is also worth noting that NCIS was not the main investigative agency that investigated the murder allegation. The lead investigative agencies were [redacted] police which included crime scene investigation, witness interviews, forensic testing, and digital testing. NCIS became the lead agency in 2018 when Secretary Mattis ordered the accused's return to the United States. The Court should refuse to accept the Defense motion when it so clearly fails to articulate any new or previously unavailable facts that call into question the prior judge's ruling.

Need to correct clear error or prevent manifest injustice

The Defense failed to address a clear error or manifest injustice that needs to be prevented. Disagreement as to a prior ruling, findings of fact, or conclusions of law is not "clear error" as anticipated by Rule 10.9. A losing litigant will always disagree with a court's ruling. To allow reconsideration without addressing a prior error allows endless mini-appeals at the trial court level by the defense. This is not the intent of R.C.M. 905(f) or Uniform Practice Rule 10.9. The Government, public, and Article 6b representative have a right to prepare for trial with an understanding of the finality of rulings.

The Defense argues that such emails may contain exculpatory materials, led to cross-examination of law enforcement as to investigative leads not taken, or statements of a witness under R.C.M. 914. After reading and reviewing the emails *in camera* the military judge found that the emails were not subject to disclosure. It is reasonable that the original military judge considered all basis upon which the emails were releasable as discovery. Military judges are presumed to know the law and follow it absent clear evidence to the contrary. *United States v. Rapert*, 75 M.J. 164, 170 (C.A.A.F. 2016). The Defense has not shown the need to correct a clear error or prevent manifest injustice and the Court should deny the motion.

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14 Day Requirement of Rule 10.9

The Court's initial ruling occurred in December 2019 and the Defense was aware of the finality of the ruling then. Under Rule 10.9 the defense had 14 days to seek reconsideration, which it did not. The Defense's good cause application is that it was not aware of the specific rationale of the ruling and a determination of work product. Orally reading the ruling in January 2022 to the Defense does not change the nature of the ruling or its finality. The Defense should have sought clarification or reconsideration in December 2019/January 2020. As this motion did not involve the Government's interlocutory appeal the Defense could have moved the Court for relief. *See*, R.C.M. 908(b)(4)(A). As the motion is untimely by over two years the Court should deny the motion.

R.C.M. 905(f)

R.C.M. 905(f) grants military judges the ability to reconsider prior rulings. However, R.C.M. 905(f) does not provide any specific factors for reconsideration or procedural timelines. The Government's research on R.C.M. 905(f) did not reveal appellate decisions addressing R.C.M. 905(f), as most likely such issues are not the subject of appellate litigation vice the underlying substantive matter. *See, United States v. Vargas*, 74 M.J. 1 (C.A.A.F. 2014) noting that the Court granted a government motion to reconsider a prior ruling but failing to discuss R.C.M. 905(f).

Case law dealing with motions to reconsider often occurs in relation to the Government seeking an Article 62, UCMJ, appeal. *See, United States v. Hill*, 71 M.J. 678 (A.C.C.A. 2012). With the Government failing to find military appellate case law on R.C.M. 905(f) and reconsideration the Government looks to R.C.M. 108 which holds that: The Judge Advocate General concerned and persons designated by the Judge Advocate General may make rules of court not inconsistent with these rules for the conduct of court-martial proceedings." The factors listed in Rule 10.9 are not inconsistent with R.C.M. 905(f) as they provide both a timeline for reconsideration and factors to be considered by a court. Thus the appropriate standard for reconsideration are the factors listed in Rule 10.9 as they are not forbidden by R.C.M. 905(f).

RELIEF REQUESTED

The Court should refuse to consider and deny the Defense's Motion to Reconsider its ruling as to compel discovery.

[redacted]

JASON L. JONES
CAPT, JAGC, USN

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I certify that I have served a true copy via e-mail of the above GOVT RESPONSE on the Court and Defense Counsel on 3 February 2022.

[redacted]

JASON L. JONES
CAPT, JAGC, USN

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NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES v. CRAIG BECKER LT USN	GOVERNMENT MOTION AS TO MISTRIAL

On 12 April 2022 during the Government's case-in-chief a law enforcement witness on direct examination referenced evidence that had previously been referred as Charge II, Specification 1 but later withdrawn. This allegation was that the accused strangled his wife during a domestic violence assault in 2013. The witness was previously instructed not to reference any alleged strangulation of Mrs. [redacted] or LT Becker's previous reference to a prior invocation of rights.

BURDEN

The burden of proof and persuasion rests on the Defense as the moving party. The standard as to any factual issue is preponderance of the evidence. RCM 905(c)(1).

FACTS

1. On 30 July 2018 the Government preferred a specification of Article128, Assault consummated by a battery which alleged the accused strangled his wife. The charge was referred to trial on 29 January 2019.

2. In January 2022 the Government withdrew and dismissed the specification.

3. On 7 February 2022 the Government gave M.R.E. 404(b) notice that the Government intended to present evidence that the accused physically assaulted his wife by picking her up and throwing her on the ground.

4. On 17 February the defense filed a motion to suppress M.R.E. 404(b) evidence as to the accused's physically assaulting his wife by picking her up and throwing her on the ground.

5. The Court denied the Defense motion as to M.R.E. 404(b) evidence on 10 March 2022.

6. Prior to trial the Government stated that it would only present evidence of physical injuries of Mrs. [redacted] through Mr. [redacted] the desk clerk that Mrs. [redacted] interacted with in August 2013.

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The Government stated that it would not seek to elicit information from NCIS SA [redacted] as to whether or not Mrs. [redacted] was strangled unless Mr. [redacted] testified that he saw injuries on Mrs. [redacted] (Mr. [redacted] did not testify to any visible injuries.)

7. During additional trial prep the weekend of 9-10 April 2022, Trial Counsel (with the case NCIS SA [redacted] present) notified SA [redacted] that he was not to state that LT Becker invoked his rights to remain silent with US Army military police in August 2013. Additionally he was told not to reference strangulation or any attempted strangulation, or that he asked LT Becker about strangulation. He was reminded that this NCIS ROI of 14 November 2013 stated that LT Becker "stroked" his wife's hair but denied he strangled her. NCIS SA [redacted] was told not mention strangulation even if he thought it was a logical answer to a question, and if so, to wait for any objection or guidance prior to answering. This was the same advice given as to whether he believed an answer called for referencing the invocation of the right to remain silent.

8. During the Government's case-in-chief he was asked if the interview of LT Becker was audio or video taped, which he stated it was not. He was then asked "what was the subject you were talking about" referring to the general topic of the interview – the alleged physical assault on his wife in August 2013. SA [redacted] stated "the strangulation of his wife."

9. While not objected to during SA [redacted] testimony, after his release from the witness stand, the defense moved for a mistrial under R.C.M. 915. SA [redacted] returned to the stand to testify as to what instructions he received from trial counsel as to limitations of his testimony. He stated that he understood that he was not to reference any prior invocation but did not understand that as to any reference regarding strangulation. He did state that he remembered in general preparation with trial counsel.

10. The Court then crafted a curative instruction to the members stating that SA [redacted] answer of "the strangulation of his wife" was inaccurate and erroneous and should not be considered. All members agreed to follow the military judge's instruction.

LAW

CURATIVE INSTRUCTIONS ARE THE PREFERRED REMEDY FOR IMPROPER EVIDENCE PRESENTED TO A PANEL

When face with a situation where inadmissible testimony has been presented to the trier of fact, the granting of a mistrial should be used "only as a last resort in order to truly guarantee the fairness of the trial." *United States v. Zell*, 2007 CCA LEXIS 442, 13 (NMCCA 2007). "It is well-settled that a mistrial is a drastic remedy that should only be granted "when necessary 'to prevent a miscarriage of justice.'" *United States v. Gregus*, 2002 CCA LEXIS 303, 22 (NMCCA 2002); citing *United States v. Taylor*, 53 M.J. 195, 198 (2000). A timely and appropriate curative instruction read to the trier of fact is the preferred method of handling situations where inadmissible evidence come out during trial. *Zell* at 14; see also *United States v. Hutchins*, 2018 CCA LEXIS 31, 185 (NMCCA 2018); *United States v. Bryant*, 2004 CCA LEXIS 113, 14(NMCCA 2004).

The above standards have been applied to a variety of cases where a panel of members have heard evidence which is either improper or has been ordered suppressed prior to trial. In *United States v. Brown*, 2005 CCA Lexis 188 (NMCCA 2005), the Court upheld a conviction

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where a witness provided testimony which had been excluded prior to trial. The accused in *Brown* was charged with engaging in sexual acts with a 13-year-old child. Prior to trial, the trial court excluded evidence that the accused had told a witness he was going away for three years. Despite this ruling, the witness improperly told the panel what the accused had said about going away for three years. The trial Court immediately interrupted the testimony and instructed the panel "to disregard the phrase '3 years.' It's completely irrelevant. Can each of you disregard that? Please indicate that you can positively by raising your hand. All members have affirmatively indicated." *Id.* at 16. The trial court also denied the defense motion for a mistrial which followed the curative instruction. NMCCA found the trial court did not err in denying the motion for mistrial, citing the immediate curative instruction. *Id.* at 18. This reasoning was also applied in a case where a witness improperly mischaracterized the evidence presented at trial. *Bryant*, at 14.

Appellate courts have also found that curative instruction are the appropriate remedy in circumstances where a witness has provided testimony that an accused has asserted his or her right to counsel. In both *Hutchins* and *United States v. Sidwell*, 51 M.J. 262 (CAAF 1999), the defense requested mistrials after members panels were told the accused had invoked their rights under Article 31(b). The Court in *Sidwell*, looked to the nature of the improper evidence, the singular nature of the violation, and the fact the government did not "exploit" this evidence in their case. *Sidwell*, at 10. The Court held that the curative instruction in combination with how the evidence was put before the panel did not create a manifest injustice requiring a mistrial. *Id.* In *Gregus*, an investigating officer testified that they were able to locate a witness during the investigation by virtue of the restraining order which had been issued against the accused. Prior to trial, the trial judge ruled that the request for a restraining order was admissible but the issuance of such an order was not. Following this testimony, a curative instruction was immediately read to the panel. The defense motion for mistrial was denied. The *Gregus* Court found the curative instruction combined with the "mild and ambiguous" evidence supported the denial of the motion for a mistrial. *Gregus* at 23.

Finally, the instant case is easily distinguishable from the holding in *United States v. Diaz*, 59 M.J. 79 (CAAF 2003). In *Diaz*, the accused was charged with the killing one of his daughters and physically abusing another. The evidence in the case was mostly circumstantial and based on the fact the accused was the only on with the child at the time she became unresponsive. During trial, one of the government's expert witnesses testified, contrary to a pre-trial ruling, that the child died of a homicide and the accused was the one who had killed her. Following this testimony, the trial court read a lengthy curative instruction to the panel. On appeal, the accused claimed this testimony could not be cured by any instruction and thus his conviction constituted a manifest injustice. The *Diaz* Court stated "There are situations where the judge can "unring the bell" but we do not believe he did so in this instance". *Id*, at 46. The Court looked specifically at the important nature of the evidence, and the strength of the government's case in holding the trial court erred by not granting the accused's motion for a mistrial. The current case is easily distinguished.

It does not appear that SA [redacted] intentionally defied the Court's ruling with his answer. He gave a non-responsive and inarticulate answer to an open-ended question designed to elicit that he interviewed the accused as to an allegation of domestic abuse from August 2013. The question was designed to reference the allegation as noticed and litigated in the M.R.E. 404(b) motion – the accused physically assaulted his wife by picking her up and throwing her to the ground.

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Nor did the Government attempt to exploit the answer or a lack of an immediate objection. The Government did not attempt to loop questions of strangulation or refer back to strangulation. The Government immediately pivoted a new asking where the accused was staying in August 2013 and why he was there. The Government did not attempt to exploit SA [redacted] gaffe as a method of attempting to smuggle inadmissible evidence during the third witness of an international first degree murder trial in a military justice remote location.

While improper SA [redacted] answer does not require a mistrial. His answer was in response to a general question, not a leading question. His answer did not provide any amplifying information such as whether Mrs. [redacted] was physically injured, lost consciousness, or had to seek medical treatment. All of those questions were answered by Mr. [redacted] and Mr (formerly Specialist) [redacted] who both denied seeing any visible injuries and providing medical care. Mr [redacted] testified that Mrs. [redacted] declined medical care. There is no expert or medical evidence as to whether a person can be strangled but leave no visible marks. In the statements by Mrs. [redacted] to Mr. [redacted] and Mr. [redacted] she does not mention being strangled. Thus SA [redacted] statement is without any additional supporting evidence.

The argument that SA [redacted] statement leads credence to Mrs. [redacted] allegations does not require a mistrial. Nor does a fear that there must be "un-testified to but additional strangulation evidence out there" that the members would speculate upon. The most logical thought of any members would be that if the Government had additional evidence and facts to support the 2013 allegation it would be admitted. SA [redacted] did not state that the accused strangled his wife. (Even the accused's ultimate answer which the Government did not seek was a complete denial.) The Government did not admit any evidence of strangulation and none is before the members.

The Court's curative instruction is sufficient to remedy this issue. It was delivered quickly after the event and prior to the testimony of any other witness. It was delivered once the defense objected, which they did not initially. The curative instruction informed the members not only how to view the evidence but that a Government witness was materially incorrect. This is sufficient to cure any misuse or confusion by the members. The members stated that they understood the military judge's instruction and could follow it. Nor is it a complex instruction to follow – the witness was wrong and his statement is to be disregarded. In this is situation a mistrial is not necessary to prevent a miscarriage of justice. "Members are presumed to follow the law when properly instructed." *United States v. Henley*, 53 M.J. 488 (C.A.A.F. 2000).

RELIEF REQUESTED

The Court deny the defense motion as to mistrial.

//s//

JASON L. JONES
CAPT, JAGC, USN

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I certify that I have served a true copy via e-mail of the above on the Court and Defense Counsel on 12 April 2022.

//s//

JASON L. JONES
CAPT, JAGC, USN

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NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **CRAIG R. BECKER** **LT/O-3** **U.S. NAVY**	**DEFENSE MOTION FOR A MISTRIAL** **12 April 2022**

1. Nature of Brief

Pursuant to R.C.M. 915, the Defense respectfully moves this court for a mistrial.

2. Summary of Facts

1) In 2019, the defense filed a motion in limine seeking to preclude any reference to LT Becker invoking his right.
2) The government conceded this motion agreeing that they would not introduce evidence of LT Becker invoking his rights at anytime.
3) In 2019, the parties litigated a motion in limine regarding hearsay statements relating to a strangling allegation from 2013.
4) These this motion was the subject of multiple appeals to NMCCA and CAAF.
5) Following the ruling that these hearsay statements were inadmissible, in January 2022, the parties litigated a motion to sever the 2013 strangulation charge from the 2015 charges.
6) As a result of this motion, and because the Government had no evidence of strangulation, the government withdrew and dismissed the 2013 strangulation charge.
7) The parties then litigated a M.R.E. 404(b) motion regarding the facts related to the 2013 event.
8) This Court ruled that limited portions of the 2013 event were admissible under M.R.E. 404(b). None of those limited portions included any reference to strangulation.

9) The defense then filed an additional M.R.E. 404(b) motion, seeking among other things, to ensure that the Government would not elicit testimony that the accused invoked his right to counsel or that the accused was, at one time, accused of strangulation. The defense argued, in particular, that any mention of strangulations would undo years of litigation regarding inadmissible hearsay.

10) This motion was litigated on 11 April, and the Government represented to the Court that it would not elicit testimony regarding either the invocation of rights or the previous charge of strangulation.

11) On 12 April 2022, Mr. [redacted] a government witness and a former military police officer, was asked on cross-examination, "Did you talk to LT Becker that evening (or words to that effect). Mr. [redacted] made an unresponsive, and irrelevant remark that LT Becker invoked his right to remain silent. Upon further question, Mr. [redacted] admitted that he did indeed speak with LT Becker about the events of the evening, making clear that his comment on LT Becker's invocation of rights was wholly superfluous and unresponsive.

12) On 12 April 2022, SA [redacted] a current NCIS Agent, testified that when he was interviewing LT Becker, he was doing so as part of an investigation into a strangling allegation.

3. Discussion of Law

A military judge "may, as a matter of discretion, declare a mistrial when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings." Rule for Courts—Martial (R.C.M.) 915(a). When considering whether to declare a mistrial, the military judge "should examine the timing of the incident, the identity of the factfinder, the reasons for a mistrial, and potential alternative remedies. Most importantly, the military judge should consider the desires of and the impact on the defendant." United States v. Thompkins, 58 M.J. 43, 47 (C.A.A.F. 2003) (internal quotation marks and citations omitted). The Discussion to Rule

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915(a) cautions that the power to grant a mistrial should be used with great caution, under urgent circumstances, and for plain and obvious reasons, including times when inadmissible matters so prejudicial that a curative instruction would be inadequate are brought to the attention of the members. United States v. Diaz, 59 M.J. 79 (C.A.A.F. 2003). Inadmissible matters include mention that an accused exercised his or her rights under the Fifth Amendment to the Constitution or Article 31(b), UCMJ, by remaining silent, refusing to answer a question, requesting counsel, or requesting to terminate an interview. The erroneous presentation of such evidence to members implicates constitutional rights; therefore, to be harmless, "'the court must be able to declare a belief that it was harmless beyond a reasonable doubt.'" United States v. Moran, 65 M.J. 178, 187 (C.A.A.F. 2007) (quoting Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)).

4. Discussion

In this case, both the invocation of rights issue and the issue regarding the admissibility of evidence relating to choking or strangulation were heavily litigated. The resulting rulings were clear and limited the evidence relating to 2013 to a few very tightly defined points. This Court was specific on these limitations and even factored the limitations into its ruling on the admissibility of any of the 2013 facts as M.R.E. 404(b) evidence. A mistrial is appropriate in this case because of the clear and voluntary nature of the violations by two government witnesses. The fact that Trial Counsel instructed these witnesses not to discuss these matters makes the violation even more willful. Both of these witnesses are current or former U.S. Department of Defense law enforcement officers who were instructed on the limitations of their testimony. Despite this, both witnesses provided unresponsive answers that exceeded those limitations and violated this Court's orders. Allowing these matters to simply be resolved with curative

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instructions does not serve the ends of justice. If that is the only remedy, hostile government witnesses are free to exclaim any inadmissible fact in front of the members knowing that the only consequence to the case will be an admonishment not to consider the inadmissible statements.

Because of the extraordinary nature of a mistrial, military judges should explore the option of taking other remedial action, such as giving curative instructions." United States v. Ashby, 68 M.J. 108, 122 (C.A.A.F. 2009). Since both of these impermissible comments relate to the M.R.E. 404(b) evidence, there is a potential remedy shy of a mistrial that could potentially resolve this matter. In addition to the curative instruction already given, this Court should refuse to provide the M.R.E. 404(b) instruction to the members before deliberation and prohibit the government from arguing this evidence in closing. This remedy avoids the drastic measure of dismissal, preventing LT Becker from having to suffer any further delays, and protects the fairness of the trial.

5. Relief Requested

The defense requests that the Military Judge either grant a mistrial or prohibit the government from admitting any further M.R.E. 404(b) evidence or from utilizing the M.R.E. 404(b) evidence already admitted.

[redacted]
J. A. GUARINO
CDR, JAGC, USN
Detailed Defense Counsel

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NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES OF AMERICA **v.** **CRAIG BECKER** **LT USN**	**Bench Brief** **Chain of Custody**

1. Law

Typically, the establishment of chain of custody for non-fungible, readily identifiable items can be accomplished by direct evidence from an identifying witness at trial. *See United States v. Fowler,* 9 M.J. 149 (C.M.A. 1980). However, "a substantially more elaborate evidentiary foundation, is required [for fungible evidence], that is, when it does not possess characteristics which are fairly unique "and readily identifiable." *United States v. Parker*, 10 M.J. 415, 416 (quoting *United States v. Nault,* 4 M.J. 318, 319 (C.M.A. 1978)). Generally, fungible evidence becomes admissible and material through a showing of continuous custody which preserves the evidence in an unaltered state. *United States v. Nault*, 4 M.J. 318, 319-320 (C.M.A. 1978).

Where the chain of custody is incomplete, other evidence may be sufficient to "bridge the gap." *See United States v. Nault*, 4 M.J. at 320. The fact of a "missing link does not prevent the admission of real evidence, so long as there is sufficient proof that the evidence is what it purports to be." *United States v. Maxwell,* 38 M.J. 148, 150 (C.A.A.F. 1993) (quoting *United States v. Howard-Arias*, 679 F.2d 363, 366 (4th Cir. 1982). There may be other facts sufficient to

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convince the military judge that the evidence in question is in a reliable condition. *United States v. Fowler*, 9 M.J. at 152.

A. Factual Scenarios in Which Chain of Custody of Fungible Items Has Been Held to Be Insufficient

In *United States v. Nault*, a police officer provided an in-court identification of a pill as being the same as the one he confiscated from the accused. *Nault,* 4 M.J. at 319. The officer further testified that he turned the pill over to the acting evidence custodian. *Id.* The official evidence custodian testified that he received the pill from the acting evidence custodian and subsequently provided it to the lab for testing. *Id.* The acting evidence custodian, who possessed the pill for approximately four days, was not called to testify. *Id.* In light of these facts, the Court held that the Government had failed to account for the four-day period, and held the pill to be inadmissible because the pill did not have any distinctive markings or seals and because there was no evidence in the record to demonstrate the evidence had not been tampered with. *Id.* at 320.

In *United States v. Ortiz,* two German police officers testified that a prosecution exhibit was the same item they confiscated from the accused—a paper packet containing a powdery substance. *Ortiz,* 12 M.J. 136, 137 (C.M.A. 1981). The police officers testified that they turned the evidence over to a police precinct, but did not indicate to whom the evidence had been transferred. *Id.* The chain of custody document described the evidence received as a paper packet containing a white powdery substance, but did not list the two German police officers as the individuals who delivered it. *Id.* The chain of custody document did not note any markings or writings on the packet. *Id.* The evidence was then received by the laboratory three days later. *Id.* The lab receipt noted the source of the evidence as being from the person of the accused, but made no mention of the "police precinct." *Id.* The Court determined the evidence was insufficient to establish a chain of custody. *Id.*

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B. Factual Scenarios in Which Chain of Custody of Fungible Items Has Been Held to Be Sufficient

In *Fowler,* German police seized a camera bag from the accused containing two clear plastic bags containing a tea-like vegetable substance. *United States v. Fowler,* 9 M.J. 149, 151 (C.M.A. 1980). The officers transported the evidence to the police station where it was field tested, and confirmed as marijuana. *Id.* The evidence was then transported to another police office where it was field tested again and confirmed as marijuana. *Id.* The evidence was then turned over to American authorities and tested by the laboratory, and confirmed once again as marijuana. *Id.* At trial, the defense objected that the chain of custody was insufficient because there was no evidence of how the evidence was transferred from the first police station to the second—a four hour period. *Id.*

Distinguishing this case from *Nault,* the Court identified several factors. *Id.* at 152. First, the evidence was not fungible because it was contained in a camera bag with two clear plastic bags, and because the marijuana was described as "manicured," which the officer noted was unusual. *Id.* Second, witnesses from both ends of the missing link were able to identify the evidence as the evidence they observed. *Id.* Finally, the field test of the substance prior to the missing link was confirmed by the field test after the missing link, and then confirmed again by the laboratory. *Id.* Given these distinguishing factors, the Court determined the evidence was admissible. *Id.*

In *Parker,* a knapsack containing marijuana/hash-hish was confiscated from the accused on 7 July, and turned over to an evidence custodian at the police station on 8 July. *United States v. Parker,* 8 M.J. 584, 587 (A.C.M.R. 1979. The evidence was provided to a separate evidence custodian on 10 July, and mailed to the lab the same day. *Id.* The evidence custodian who was

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responsible for the evidence from 8-10 July was not called as a witness. *Id.* The officer who initially confiscated the evidence testified and identified the evidence as being the same as the evidence he seized. *Id.* The evidence custodian who sent the evidence to the lab also testified, stating that he had received a knapsack with hash-hish. *Id.* The Court held that, based upon the testimony alone, the evidence was insufficient to establish the "stringent tracing requirements." *Id.* However, the Court ultimately found that the proper admission of the chain of custody document listing the officer who seized the items, the non-testifying agent who received the items, and the evidence custodian who mailed the evidence sufficiently established the chain of custody. *Id.*

In *Maxwell,* the Court considered the admissibility of blood samples taken from the accused at the hospital where he was being treated as a trauma patient. *United States v. Maxwell,* 38 M.J. 138 (C.A.A.F. 1993). The defense objected because the blood tested was identified as coming from "John Doe", and because there was no evidence of who drew the blood or who transported the blood to the laboratory in the hospital. *Id.* at 151. The Court determined that the chain of custody was sufficient based upon the testimony of multiple witnesses who established that it was common practice to label samples as "John Doe" for trauma patients, that it was standard practice to immediately transport samples to the lab, that the sample was collected in a vaccum sealed tube preventing tampering, and that the accused was the only "John Doe" treated that night. *Id.*

2. Conclusion

The blood samples in LT Becker's case are clearly fungible, requiring a demonstration of a continuous chain custody. Here, because there is no chain of custody documentation, and because the witness testimony reveals gaps in the chain, the Court must assess whether other

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facts are capable of "bridging the gap." In this case, 4 days passed from when the samples were purportedly taken until they were delivered to the lab. There are no identifying marks or labels that were applied, and there is an absence of chain of custody documentation. Further, the samples were either unsealed or the seals were removed, allowing for the potential of tampering, especially when the autopsy reports make no mention of the volume of blood taken. Finally, the evidence received by the lab is inconsistent with the list of items taken at the autopsy, raising further questions. As such, the evidence should be excluded.

[redacted]

CDR Bryan M. Davis
Defense Counsel

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NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **CRAIG BECKER** **LT USN**	**GOVERNMENT MOTION AS TO CHAIN OF CUSTODY AND GOOD CAUSE FOR LATE FILING**

The Government requests that the Court deny the defense motion to suppress evidence as to the autopsy material of Mrs. [redacted] for failure to establish a sufficient chain-of-custody. Due to appellate concerns, the Government request that the Court make a substantive decision on the merits of the chain-of-custody and not a procedural decision alone.

BURDEN

The burden of proof and persuasion rests on the Government as the ultimate proponent of the autopsy evidence as to chain-of-custody. RCM 905(c)(2).

The standard as to any factual issue is preponderance of the evidence. RCM 905(c)(1).

The burden of proof and persuasion rests on the Defense as to show good cause for failure to comport with the Court ordered milestones for filing motions or to show relief from waiver by failing to litigate prior to the entry of pleas. RCM 905(e)(1).

FACTS

Procedural

1. The case was returned to the trial court level in August 2021 from the Court of Appeals for the Armed Forces.

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2. On 1 October 2021 the Court signed a Trial Management Order requiring motions to be filed by 15 November. The defense did not file any as to suppression of evidence as to the autopsy material and chain-of-custody though they filed numerous motions.

3. The Court held an Article 39 on 20 January 2022 to litigate motions.

4. As a result of the Article 39a on 20 January the Court allowed an Article 39a on 3 March 2022 related to an M.R.E. 404b motion that was derivative of the 30 January 2022 Article 39a.

5. On 8 March 2022 the Defense filed an M.R.E. 807 notice which resulted in an additional Article 39a in [redacted] The Defense filed an additional M.R.E. 404(b) motion on 31 March 2022.

6. Sometime in March 2022 the defense interviewed [redacted] Police Officer [redacted], who was involved in the autopsy of [redacted].

7. Trial started on 8 April 2022 and the M.R.E. 404(b) and M.R.E. 807 motions were litigated prior to the merits. Merits began on 12 April 2022.

8. On our abut 20 April the defense filed its bench brief as to chain of custody after the testimony of Officer [redacted]

Chain-of-custody

9. On 11 October 2015 an autopsy of [redacted] was conducted by [redacted] authorities. At the autopsy were Dr. [redacted], Dr. [redacted] and [redacted] Police Officer [redacted]

10. Neither Dr. [redacted] nor Dr. [redacted] testified, but Appellate Exhibit 252 contained a stipulation of expected testimony of Dr. [redacted] which stated that the following items were taken during the autopsy:

a) Two locks of hair
b) Some intracranial blood
c) Some intra-abdominal blood
d) The gall bladder
e) A piece of liver
f) A piece of kidney
g) The stomach contents
h) Three vaginal swabs, anal swabs and oral swabs.
i) A black curly hair was found on the inner surface of the right labia minora.

11. Officer [redacted] did testify as to the autopsy and his taking possession of the autopsy items. Autopsy items were placed in jars. The jars used to hold samples were screw caps and did not contain additional tamper resistant materials such as an additional seal across the lid. It is

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standard operating procedure to label to contents from an autopsy as to the materials taken and from whom they were taken. Officer [redacted] did not specifically remember creating labels seven years ago.

12. Officer [redacted] testified that he took intracranial blood and peripheral blood. His written report stated that the autopsy materials included intracranial and abdominal blood.

13. After the autopsy Officer [redacted] placed the autopsy materials into a Styrofoam box, i.e. cooler, which is standard operating procedure. He then drove to the police station – a five minute drive - and personally placed the autopsy items into the police's refrigerator. It is standard operating procedure to maintain autopsy items in a cold environment to prevent degradation and to prevent loss or tampering. The items remained in the [redacted] Judiciary Police Forensic refrigerator until 15 October. This refrigerator is within the forensic office and Officer [redacted] testified that only his forensic colleagues had access to the evidence refrigerator.

14. Officer [redacted] did not created a chain-of-custody document akin to regularly seen American law enforcement chain-of-custody documents. However, Officer [redacted] did not testify giving the samples to any other law enforcement officer prior to placing them in the police refrigerator. There is no physical or testimonial evidence of tampering while in police custody; to the contrary Officer [redacted] testified that the samples were secured.

15. On 13 October 2015 the [redacted] Police created Prosecution Exhibit 58, noting the contents of [redacted] autopsy.

16. On 15 October 2015 the autopsy remains were transferred to the [redacted] laboratory of Dr. [redacted] by the order of Madame [redacted] a [redacted] magistrate judge. Her order to transfer the autopsy materials was to Officer [redacted]

17. On 15 October 2015 the [redacted] Police courier who transported the autopsy items from the police station to Dr. [redacted] laboratory was Mr. [redacted] Mr. [redacted] did not testify. There is no chain-of-custody document for this transfer from the police to the lab.

18. On 15 October 2015 Dr. [redacted] laboratory received the autopsy materials. The materials were received by Ms. [redacted], an employee of Dr. [redacted] Prosecution Exhibit 58 notes the items are from [redacted] that the items are from the [redacted] police, that the destination is Dr. [redacted] laboratory, and that Ms. [redacted] received them.

19. [redacted] police delivered all items to the [redacted] lab in the same box. The [redacted] police receipt of Prosecution Exhibit 57 does not note any damage to the box or its contents. The box

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contained a label created by [redacted] police noting the contents were from [redacted] Dr. [redacted] lab kept the label with the samples but returned the Styrofoam box to the police. This is normal procedure so the police can reuse the box in the future, as the box itself has no impact on the contents.

20. The contents of the box are, in part, in Prosecution Exhibit 57. This photos shows the gastric contents of the box. On the top of the jars are the labels from Dr. [redacted] lab. On the side of the jars are the police labels. Dr. [redacted] could not specifically remember creating any labels. Upon receipt of the items Dr. [redacted] lab placed the items into refrigeration to prevent degradation.

21. On 16 October Dr. [redacted] laboratory tested the autopsy materials in her lab in [redacted] A second confirmation test was conducted by a second lab in [redacted] This is recommended toxicology procedure in [redacted]. There were no difference in the toxological reports.

22. Dr. [redacted] has been conducting toxicology test for over twenty years. When she conducted the test of the autopsy remains she did not notice any tampering with jars, box, or autopsy samples. She did not notice any spills, broken glass, or any foreign objects in the autopsy materials. She did not note the discrepancy between peripheral and abdominal blood.

23. Ms. [redacted] testified that the autopsy samples contained drugs that were commonly used in life-savings operations by first responding paramedics and hospitals, including drugs known to have been given to Mrs. [redacted] at the [redacted] hospital.

LAW

Failure to comply with Trial Management Order

The Defense states that they did not file a motion to suppress the evidence of autopsy materials prior to trial due to their only discovering this issue after the Trial Management deadlines. However, the defense's own motion stated that they were aware of their own misconstruction of the evidence in March 2022. Trial did not start until April 2022, thus the defense knew of the issue prior to trial and could have sought judicial relief. Before trial on the merits, but in [redacted], the parties litigated both hearsay and M.R.E. 404(b) motions. This certainly provided the Defense an opportunity to either alert the Court or file a motion that could have resulted in resolution prior to trial.

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Additionally, when the issue arose mid-trial the Defense had a written bench brief prepared for the court. This is evidence of knowledge and preparation on this topic as the bench brief had to have been written beforehand. The nomenclature of describing the item as a bench brief does not resolve the matter. R.C.M. 905(a) notes that the substance of a motion, not its form or designation, shall control. This "bench brief" is, as noted by the court, a motion to suppress for failure to adequately provide for and maintain a chain-of-custody.

While the Defense lacks good cause to raise the motion mid-trial, the Government has appellate concerns should the Court rely solely on procedural grounds. Thus, the Government request that the Court deny the motion, in part, for failure to comply with the TMO and for lack of good cause, but also request a determination of the substantive matter as to an adequate chain of custody.

CHAIN OF CUSTODY

Officer [redacted] was present at the autopsy, took control of the items, placed them in a refrigerator inside a secure area of a police station, received an order to deliver them to the [redacted] lab, the items were delivered by police courier, received by the lab, stored by the lab, and tested by Dr. [redacted] The chain-of-custody has been established by testimony, photos, and documents. Discrepancies as to labels, collection methods, and lack of specific memories go to weight, not admissibility. There is reasonable probability that the items have not changed.

"[T]he Government bears the burden of establishing an adequate foundation for admission of evidence against an accused." *United States v. Maxwell*, 38 M.J. 148, 150 (C.M.A. 1993) (citing *United States v. Gonzales*, 37 M.J. 456 (C.M.A. 1993); *United States v. Courts*, 9 M.J. 285, 290 (C.M.A. 1980); *United States v. Nault*, 4 M.J. 318, 319 (C.M.A. 1978)). "[F]or admission of fungible evidence, there must be a 'showing of continuous custody which preserves the evidence in an unaltered state.'" *Id.* (quoting *Nault*, 4 M.J. at 319). "Likewise, the results of tests performed on a fungible substance require a 'chain of custody on which to predicate admission of the laboratory analysis into evidence.'" *Id.* (quoting *Courts*, 9 M.J. at 290).

"Gaps in the chain of custody do not necessarily prevent admission of evidence." *Maxwell*, 38 M.J. at 152 (internal quotation marks and citations omitted). "Where the chain of custody is incomplete, other evidence may be sufficient to 'bridge the gap.'" *Id.* at 150 (quoting *Nault*, 4 M.J. at 320).

"The fact of a missing link does not prevent the admission of real evidence, so long as

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there is sufficient proof that the evidence is what it purports to be" and "[t]he Court need only be satisfied that in *reasonable probability* the article had not been changed in important respects" *Id.* (citations omitted); *see also United States v. Olson*, 846 F.2d 1103, 1116 (7th Cir. 1988) ("If the trial judge is satisfied that in reasonable probability the evidence has not been altered in any material respect, he may permit its introduction."). There may be other facts sufficient to convince the military judge that the evidence in question is in a reliable condition. *Id.* (citing *United States v. Fowler*, 9 M.J. 149, 152 (C.M.A. 1980)).

"The Government may meet its burden of proof with direct or circumstantial evidence." *Maxwell*, 38 M.J. at 151. Also, courts may "presume regularity of systematic handling on the part of neutral chemical analysts," though the same presumption does not apply to "prosecutorial custodians" such as law enforcement. *Nault*, 4 M.J. at 320 n.8. To carry its burden, "[t]he Government is not required to exclude every possibility of tampering." *Maxwell*, 38 M.J. at 150. "Any deficiencies in that chain go to the weight of the evidence rather than its admissibility." *Id.* at 152 (internal quotation marks and citations omitted).

In determining whether a military judge was within his discretion to admit evidence with an incomplete chain of custody, appellate courts consider "the absence of a minimal showing of ill will, bad faith, other evil motivation or some physical evidence of tampering." *Courts*, 9 M.J. at 291–92 (citing *United States v. Daughtry*, 502 F.2d 1019, 1021 (5th Cir. 1974); *accord Nault*, 4 M.J. at 320.

In *Maxwell*, an emergency room treating physician ordered the appellant's blood drawn for a blood-alcohol test. *Maxwell*, 38 M.J. at 151. The physician "had little recollection of the night appellant entered the emergency room," "had no knowledge of who drew appellant's blood or delivered it to the laboratory;" and "did not remember labeling the test tubes or filling out a lab slip for the tests." *Id.* The physician's nursing assistant could not remember these details either. *Id.* Both the physician and the nursing assistant testified to the standard procedure used to order blood-alcohol tests. *Id.* The *Maxwell* court concluded that "[t]he circumstantial evidence" supported the conclusion "that the blood sample at issue was appellant's and that its condition was not substantially changed from the time it was taken to the time it was tested." *Id.* The court relied on the fact that (1) the appellant arrived with serious injuries from a car accident, (2) that a blood-alcohol test was standard trauma procedure, (3) that it was "standard procedure for someone to take the samples from the emergency room immediately to the

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laboratory, (4) the sample was labeled "John Doe" and testimony supported "John Doe was later identified as [the appellant]," and (5) there was no evidence of tampering or a motive to tamper. *Id.*

The court found "all the evidence . . . including the lack of motivation to alter the blood sample and lack of any physical evidence of tampering," was "sufficient for purposes of admissibility to link the results of the blood sample to appellant." *Id.* The court held that the military judge did not abuse his discretion in admitting the blood-alcohol tests. *Id.*

Maxwell is akin to the current case facts. The autopsy was seven years ago and the lack of minute detail – such as creating labels – is offset by the fact that the evidence is that normal procedures is to label samples. This is also logical as to without some form of documentation the contents make no sense. The [redacted] chose labels, Americans a separate document often called a chain-of-custody document. The fact that neither Officer [redacted] nor Dr. [redacted] remember creating labels or writing on them doesn't alter their overall procedures. There is circumstantial evidence that both of them were following standard procedures in [redacted] for collection, storage, and cataloging results. Nothing more is required.

In *Gonzales*, the appellant challenged the admissibility of urinalysis results where the observer never lost sight of the appellant's urine sample, but could not remember "how the urine got from the container into which it was provided to the container from which it was tested." *Gonzales*, 37 M.J. 456–58. The court held that this lack of recollection of how the appellant's urine was transferred from one container to another did not prohibit admission of the evidence but rather went to the weight of it. *Id.*

The Defense in their motion rely heavily on *Nault*, however, as detailed below, the present case is easily distinguishable. In *Nault*, the military judge admitted "a small pill which was pink or purple in color" over the appellant's objection on chain of custody grounds. *Nault*, 4 M.J. at 319. There, law enforcement officer 1 testified that he discovered the pill on the appellant and released it to officer 2. *Id.* Officer 3 testified that officer 2 gave him the pill, however officer 2 never testified at the trial. *See Id.* The United States offered this pill and a laboratory report identifying the pill as a lysergic acid diethylamide to prove a drug possession charge. *Id.* The court held that there was not an "evidentiary showing sufficient to 'bridge the gap'" of officer 2's four-day possession of the pill and, therefore, the pill and the laboratory report were inadmissible. *Id.* at 320. The court noted that it could not "presume regularity of

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systematic handling" by law enforcement, as it could with "neutral chemical analysts." *Id.* at 320 n8.

This case is highly distinguishable from *Nault*. [redacted] Police Officer [redacted] started the chain of custody by observing the autopsy and receiving the samples directly from the medical examiner. From there, Officer [redacted] transferred the samples to the refrigerator used for storing evidence at the [redacted] police station, as was his standard practice. There is no evidence of tampering with by a third party. Conjecture is not evidence. The sample remained in the refrigerator until Officer [redacted] received a court order to transfer to the [redacted] lab for testing. Circumstantial evidence proves that the samples remained in the refrigerator the entire four days because the toxicologist, Dr. [redacted], testified that the samples needed to be kept cold from the time the autopsy was performed until the time she performed her tests. If the samples had not remained continuously in the refrigerator, the samples would have deteriorated to the point she would have been unable to perform any tests.

The evidence also shows that unlike the pill in *Nault*, the samples here contained identifying marks. Specifically, the initials [redacted] were written on the samples and Ms. [redacted] testified that the samples she received and tested had the initials [redacted] circumstantial evidence which made it identifiable as the samples taken from the autopsy. Additionally they possessed a police sticker on the bottles, which Ms. [redacted] recognized from prior work with the [redacted] police. In *Nault* the issue was that a pill was passed from officer 1 to officer 2 to officer 3 without any identifiable marks on the pill or it being placed in any labeled container. Further, in *Nault* there was absolutely no evidence as to what happened with the pill while in officer 2's possession, whereas here the circumstantial evidence shows that the samples must have remained in the police refrigerator from the time Officer [redacted] initially placed it there until he removed it to send to the lab. The autopsy material was then taken to Ms. [redacted] lab by police courier, Mr. [redacted].

There is also a material difference between evidence being in the possession of a person for four days versus evidence being placed in a refrigerator. With the pill in *Nault* being in the hands of officer 2 for four days, there was no way to know what he did with it. In the present case, with Officer [redacted] placing the samples in the refrigerator, the evidence does not lend itself to misplacement or tampering that can occur more easily in the hands of a human rather than a storage facility. Finally, in *Nault* there was no testimony as to whether the handling of

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evidence in the way that it was done was standard practice or deviated from the norms. In the present case, Officer [redacted] testified that he followed his standard practice and stores evidence in the police refrigerator.

More applicable to this situation is *United States v. Gardi*, 6 M.J. 703 (NCMR 1978), which was decided after *Nault*. In *Gardi*, the accused sold marijuana on three separate occasions. *Id.* at 704. After each sale, the marijuana was transferred in a container to an NIS agent (the precursor to NCIS) who marked the container and attached a custody card to it. *Id.* From there, the agent would place the marijuana in an unsecured temporary evidence locker[1] located in the NIS office. *Id.* at 705. Eventually the containers of marijuana were transferred from the temporary unsecured locker to a permanent locker. *Id.* One of the containers of marijuana was in the unsecured locker for over 61 hours. *Id.* The court held that the marijuana was properly admitted based on the totality of the circumstances. *Id.* This included the containers holding the marijuana having been tagged with identifying markings, the agent testifying at trial about the markings, and there being no evidence of tampering. *Id.* at 704. For the time the containers were in the unsecured locker, the circumstantial evidence showed that they had not been tampered with. *Id.* at 705. Specifically, the court relied on the fact that the NIS office was locked after duty hours and only nine agents and a secretary had the key. Plus, during normal working hours, non-NIS employees were escorted by NIS personnel. *Id.*

In the present case, Officer [redacted] took the samples from the medical examiner and placed the initials [redacted] on the container, which identified the samples in the same way the agents did in *Gardi* with the containers of marijuana. From there Officer [redacted] placed the container in the refrigerator at the police station like the agents did in placing the marijuana in the unsecured locker. The refrigerator in this case was located at a police station just as in *Gardi*. While it was determined that the evidence in *Gardi* had not been tampered with due to the few people having after hour access to the building and non-NIS employees needing to be escorted during the day, this case has better evidence that samples were not tampered with because the evidence shows the samples must have remained in the refrigerator the entire time or they would have deteriorated to the point that Ms. [redacted] would have been unable to test them.

Finally, it is clear that the "evidence is what it purports to be" given the fact that when

[1] Evidence at trial did not establish whether the locker was secured and so the court assumed for purposes of its decision that the locker was unsecure during the relevant time frame.

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Ms. [redacted] tested the samples she found unique drugs in the blood and bile that are used by doctors and responding paramedics in a life threatening situation such as this one. This is similar to *United States v. Fowler*, 9 M.J. 149 (C.M.A. 1980), where the marijuana was identifiable in part because the witness testified that the stems had been removed, which he said rarely occurs.

In looking at the totality of the circumstance there is "sufficient proof that the evidence is what it purports to be" and there is a *reasonable probability* the [evidence] ha[s] not been changed in important respects." These circumstances are that Officer [redacted] testified to watching the autopsy and collecting the samples from the medical examiner. This started the chain of custody. Officer [redacted] labeled those samples with the initials [redacted] which is his standard practice when obtaining samples. From there, Officer [redacted] ransferred the samples to a refrigerator for the storage of evidence. The refrigerator was located at the police station. The circumstantial evidence proves that the samples remained in that refrigerator because Dr. [redacted] testified that samples such as blood and bile need to be kept cold or they will deteriorate to the point where they cannot be tested. The samples were placed in a special box that kept them cold while being transported from the police station to the toxicology lab. There is no evidence that the boxes or samples were tampered with such as adding materials or removing materials. Dr. [redacted] testified that she tested the samples the same day they were delivered. She also testified that it did not appear the samples had been tampered or spilled in any way. The samples also contained the label with the initials [redacted] on them. Based on the established facts it is it clear that the Government has met its burden and the evidence and testimony should be admitted. Discrepancies go to weight, not admissibility.

United States v. Cutwright and [redacted] law enforcement chain-of-custody

Though an unpublished opinion, the case of *United States v. Cutwright*, 1997 CCA LEXIS 122 (A.F.C.C.A. 1997) deals with [redacted] law enforcement's chain-of-custody handling of blood samples. Cutwright was convicted of driving drunk and injuring another after he crossed the center line and struck a motorcycle, injuring the driver. [redacted] law enforcement took blood samples from his body and discovered alcohol and cocaine in his body. The accused moved to suppress the results for the [redacted] law enforcement's handling of the samples due to the lack of chain of custody. While *Cutwright* did not object to specific gaps in the [redacted] chain of custody the Court evaluated [redacted] law enforcement's standard practices.

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Cutwright's samples appear to have been taken at the police station and then transported to a lab for testing. Like the current case there was no evidence of tampering, intentional misconduct, or unexplained gaps in possession of the samples. The Court found the [redacted] standard acceptable and admitted the evidence, holding:

> Here, the witnesses tied the sample tested to the appellant. Additionally, there was no evidence of tampering. While the various links in the chain of custody were not described in the same detail as is frequently seen in other cases, there is no reason to infer any error. The laboratory doing the testing was a certified forensic laboratory following established procedures.
>
> *Id* at 123.

In the current case both Dr. [redacted] stipulation of expected testimony, Police Officer [redacted], and Ms. [redacted] testimony tie the evidence to the accused. The police took custody of the samples at the autopsy, transported them to the police station, stored them in the police station, and transported them via police courier, Mr. [redacted] to a designated certified laboratory. Upon receipt from the police courier the laboratory accessed them into their system, tested them, and stored them. (Ms. [redacted] testified that the laboratory still retains the items today).

Ms. [redacted] identified the items in PE 57 as containing both police and laboratory stickers/markings. Additionally, Ms. [redacted] testified that the samples contained drugs that were commonly used in life-savings operations by first responding paramedics and hospitals, including drugs known to have been given to Mrs. [redacted] at the [redacted] hospital. This is strong circumstantial evidence that the items tested were Mrs. [redacted] as it is highly unlikely that a random person would have such unique medical drugs in their system whose sole purpose is life-saving vice getting high. This is also strong evidence of no tampering with the evidence also as these medicinal drugs are directly tied to actions by medical personnel in the short period before her death.

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EVIDENCE

The Government has no additional evidence but relies upon the testimony and evidence adduced at trial. The Government avers that Prosecution Exhibit 57 (pictures of autopsy samples) and Prosecution 58 (police document/receipt of [redacted] lab) and Appellate Exhibit 252 (Stipulation of Expected Testimony of Dr. [redacted]) as well as the testimony of Ms. [redacted] and Police Office [redacted]

RELIEF REQUESTED

The Court deny the defense motion to suppress both for substantive and procedural grounds and allow the evidence and testimony of Mrs. [redacted] to be considered by the panel.

//s//

JASON L. JONES
CAPT, JAGC, USN

****

I certify that I have served a true copy via e-mail of the above on the Court and Defense Counsel on 24 April 2022.

//s//

JASON L. JONES
CAPT, JAGC, USN

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NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **CRAIG R. BECKER** **LT/O-3** **U.S. NAVY**	**DEFENSE MOTION TO RECUSE TRIAL JUDGE AND TRIAL COUNSEL** **DATE 11 August 2022**

1. Nature of Motion

Pursuant to Rule for Courts-Martial 902(b)(3), the defense moves to have the military judge disqualify himself from hearing a post-trial motion to dismiss all charges and specifications in the case of United States v. LT Craig R. Becker, because he will become a witness in the proceeding. In addition, the defense moves to recuse trial counsel from further acting as government counsel in any capacity in this case, as they, too, will be witnesses in the proceeding.

2. Summary

The Uniform Code of Military Justice (hereinafter "UCMJ") requires that, "a complete record of proceedings and testimony shall be prepared in any case of a sentence of death, dismissal, discharge, confinement for more than six months, or forfeiture of pay for more than six months." 10 U.S.C. § 854 (2022). In this case the record of trial is incomplete. The defense has moved that all charges and specifications in this case be dismissed because the incomplete record of trial cannot be reconstructed and LT Becker has been prejudiced by the failure to provide a complete record of trial. As the military judge in this case, Colonel Stephen F. Keane, will be a witness in any evidentiary hearing that will be required to determine a ruling on that

motion, the defense requests that Colonel Keane recuse himself from hearing that motion. Additionally, CAPT Jason L. Jones, USN, and CDR Paul T. Hochmuth, USN, served as trial counsel for the court-martial. They will also be called as witnesses regarding the defense motion to dismiss. Therefore, the defense requests that, in this case, they be constrained from acting as government counsel in any capacity going forward.

3. Summary of Facts

1) Following the death of his wife, who fell out the window of their apartment in 2015, LT Becker was charged on July 30, 2018 with Premeditated Murder in violation of Article 118, 10 U.S.C. § 918, UCMJ; two specifications of Battery in violation of UCMJ Article 128, 10 U.S.C. § 928, UCMJ; Conduct Unbecoming an Officer in violation of Article 133, 10 U.S.C. § 933, UCMJ; and three specifications of Obstructing Justice in violation of Article 134, 10 U.S.C. § 934, UCMJ.

2) On January 23, 2019, two additional specifications of Conduct Unbecoming an Officer were preferred.

3) On January 25, 2019, the three specifications of Obstructing Justice were dismissed without prejudice.

4) After a General Court Martial held in [redacted] LT Becker was convicted of Premeditated Murder, one specification of Battery, and two specifications of Conduct Unbecoming an Officer.

5) On April 30, 2022, he was sentenced to Life Imprisonment with the possibility of parole, forfeiture of pay and allowances, and Dismissal from the Naval Service.

6) In a series of email beginning on June 16, 2022, Colonel Stephen F. Keane, the trial judge, notified defense and government counsel that audio from a December 2019 39(a) session as well as certain documents were missing.

7) On August 9, 2022, the defense filed a motion to dismiss all charges and specifications against LT Becker because he has been prejudiced by the incomplete record of trial.

4. Discussion of Law

The 2019 edition of the Manual for Courts-Martial contains Rules for Courts-Martial. Rule 902, Disqualification of military judge states:

> (a) In general. Except as provided in subsection (e) of this rule, a military judge shall disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably be questioned.
>
> (b) Specific grounds. A military judge shall also disqualify himself or herself in the following circumstances:
>
> (1) Where the military judge has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding.
> (2) Where the military judge has acted as counsel, preliminary hearing officer, investigating officer, legal officer, staff judge advocate, or convening authority as to any offense charged or in the same case generally.
> (3) Where the military judge has been or will be a witness in the same case, is the accuser, has forwarded charges in the case with a personal recommendation as to disposition, or, except in the performance of duties as military judge in a previous trial of the same or a related case, has expressed an opinion concerning the guilt or innocence of the accused.

2019 MCM 2. Chap. 9 Rule 902.

5. Argument

On December 19, 2019, an Article 39(a) session was held in the case of U.S. v. Becker. At that hearing, Naval Criminal Investigative Service Special Agent (SA) [redacted] testified

and was examined by both trial counsel and defense counsel. When the Record of Trial was being assembled, it was discovered that the tape containing SA [redacted] testimony was missing.

The defense has moved that all charges and specifications against LT Becker be dismissed with prejudice because the missing testimony is both quantitatively and qualitatively substantial and LT Becker is prejudiced by its absence. At any motion hearing, the trial judge, Colonel Stephen F. Keane, will be called as a witness by the defense. In accordance with R.C.M. 902, the military judge "shall…disqualify himself…in the following circumstances…Where the military judge has been or will be a witness in the same case…". Here, Judge Keane will be called as a witness in a post-trial hearing in this case and he must disqualify himself.

In addition, the defense intends to call both CAPT Jason L. Jones and CDR Paul T. Hochmuth as witnesses in the hearing that must take place with regard to the defense's motion to dismiss. Inasmuch as they, too, will become participants in this case, the defense respectfully requests that the military judge rule that CAPT Jones and CDR Hochmuth can no longer act as government counsel in any aspect of this case going forward.

6. Relief Requested

Judge Keane cannot rule on a motion when he will be a witness in a hearing on that motion. LT Becker respectfully requests that Judge Keane disqualify himself in accordance with R.C.M. 902(b)(3). CAPT Jones and CDR Hochmuth cannot act as government counsel when they will be witnesses in the case. LT Becker respectfully requests that the military judge rule that they can no longer act as government counsel in this case.

7. Oral Argument

Unless the government concedes to this motion or the Court grants relief on the pleadings, the Defense requests oral argument.

DATE: August 11, 2022

Respectfully submitted,
/s/David P. Sheldon
David P. Sheldon
Civilian Appellate Defense Counsel
Law Offices of David P. Sheldon, PLLC
[redacted]

CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion was served electronically upon the Court and Trial Counsel on August 11, 2022.

/s/David P. Sheldon
David P. Sheldon
Civilian Appellate Defense Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **CRAIG R. BECKER** **LT/O-3** **U.S. NAVY**	**DEFENSE MOTION TO DISMISS ALL CHARGES AND SPECIFICATIONS DUE TO AN INCOMPLETE RECORD OF TRIAL** **11 August 2022**

1. Nature of Motion

Pursuant to Rule for Courts-Martial 1112, the Defense moves that the military judge immediately release LT Becker from confinement and dismiss all charges and specifications with prejudice due to an incomplete record of trial.

2. Summary

The Uniform Code of Military Justice (hereinafter "UCMJ") requires that, "a complete record of proceedings and testimony shall be prepared in any case of a sentence of death, dismissal, discharge, confinement for more than six months, or forfeiture of pay for more than six months." 10 U.S.C. § 854 (2022). Here, the Record of Trial is incomplete, LT Becker has been prejudiced by this, and the military judge should immediately release LT Becker from custody and dismiss all charges and specifications with prejudice.

3. Summary of Facts

1) Following the death of his wife, who fell out the window of their apartment in 2015, LT Becker was charged on July 30, 2018 with Premeditated Murder in violation of Article 118, 10 U.S.C. § 918, UCMJ; two specifications of Battery in violation of UCMJ Article 128, 10

U.S.C. § 928, UCMJ; Conduct Unbecoming an Officer in violation of Article 133, 10 U.S.C. § 933, UCMJ; and three specifications of Obstructing Justice in violation of Article 134, 10 U.S.C. § 934, UCMJ.

2) On January 23, 2019, two additional specifications of Conduct Unbecoming an Officer were preferred.

3) On January 25, 2019, the three specifications of Obstructing Justice were dismissed without prejudice.

4) After a General Court Martial held in [redacted] LT Becker was convicted of Premeditated Murder, one specification of Battery, and two specifications of Conduct Unbecoming an Officer.

5) On April 30, 2022, he was sentenced to Life Imprisonment with the possibility of parole, forfeiture of pay and allowances, and Dismissal from the Naval Service.

6) In a series of email beginning on June 16, 2022, Colonel Stephen F. Keane, the trial judge, notified defense and government counsel that audio from an Article 39(a) session on 19 December 2019, as well as certain documents, were missing.[1]

7) As of the filing of this motion, a substantial portion of the audio containing testimony of a critical witness from the 19 December 2019 Art. 39(a) session—namely, Naval Criminal Investigative Service Special Agent (SA) [redacted] remains missing. It is unclear whether other substantive records from the court-martial are also missing.

4. Discussion of Law

The requirement for a complete record of trial is codified in Public Law and further explained in the Rules for Courts-Martial. As stated in law:

[1] Enclosure 1.

> (a) General and special courts-martial. Each general or special court-martial shall keep a separate record of the proceedings in each case brought before it. The record shall be certified by a court-reporter, except that in the case of death, disability, or absence of a court reporter, the record shall be certified by an official selected as the President may prescribe by regulation.
> (b) Summary courts-martial. Each summary court-martial shall keep a separate record of the proceedings in each case, and the record shall be certified in the manner required by such regulations as the President may prescribe.
> (c) Contents of record.
> (1) Except as provided in paragraph (2), the record shall contain such matters as the President may prescribe by regulation.
> (2) In accordance with regulations prescribed by the President, a complete record of proceedings and testimony shall be prepared in any case of a sentence of death, dismissal, discharge, confinement for more than six months, or forfeiture of pay for more than six months.

10 U.S.C. § 854.

The "regulations prescribed by the President" are contained in the Rules for Courts-Martial (R.C.M.). R.C.M. 1112 lists the required contents of a record of trial. They include:

> (b) Contents of the record of trial. The record of trial contains the court-martial proceedings, and includes any evidence or exhibits considered by the court-martial in determining the findings or sentence. The record of trial in every general and special court-martial shall include:
> (1) A substantially verbatim recording of the court-martial proceedings except sessions closed for deliberations and voting;…
> (6) Exhibits, or, if permitted by the military judge, copies, photographs, or descriptions of any exhibits that were received in evidence and any appellate exhibits;

R.C.M. 1112(b) (2019).

R.C.M. 1112(d) provides direction on what to do if the record of trial is incomplete:

> (d) Loss of record, incomplete record, and correction of record.
> (1) If the certified record of trial is lost or destroyed, a court reporter shall, if practicable, certify another record of trial.
> (2) A record of trial is complete if it complies with the requirements of subsection (b). If the record is incomplete or defective, a court reporter or any party may raise the matter to the military judge for appropriate corrective action. A record of trial found to be incomplete or defective before or after certification may be corrected to make it accurate. A superior competent authority may return a record of trial to the military judge for correction under this rule. The military judge shall give notice of the proposed correction to all parties and permit them to examine and respond to

the proposed correction. All parties shall be given reasonable access to any court reporter notes or recordings of the proceedings.
(3) The military judge may take corrective action by any of the following means—
(A) reconstructing the portion of the record affected;
(B) dismissing affected specifications;
(C) reducing the sentence of the accused; or
(D) if the error was raised by motion or on appeal by the defense, declaring a mistrial as to the affected specifications.

R.C.M. 1112(d) (2019).

"The requirement that a record of trial be complete and substantially verbatim in order to uphold the validity of a verbatim record sentence is one of jurisdictional proportion that cannot be waived." *United States v. Henry*, 53 M.J. 108, 110 (C.A.A.F. 2000).

5. Argument

On December 19, 2019, an Article 39(a)[2] session was held in the case of U.S. v. Becker. At that hearing, SA [redacted] testified and was examined by both trial counsel and defense counsel.[3] When the Record of Trial was being assembled, it was discovered that the tape containing SA [redacted] estimony was missing. According to the court reporter's log, SA [redacted] testified from 9:28 until 10:25.[4] It appears that she testified about actions by the [redacted] Federal Police investigation and about jurisdictional issues.

A. SA [redacted] testimony was both quantitatively and qualitatively substantial.

Substantial omissions render a record of trial incomplete, raising a presumption of prejudice. *United States v. Lashley*, 14 M.J. 7, 8 (C.M.A. 1982). In order to determine the impact of an incomplete record, the court must determine "whether the omitted material was substantial, either qualitatively or quantitatively." *United States v. Henry*, 53 M.J. 108, 110

[2] 10 U.S.C. 839(a)
[3] Upon information and belief, Mr. [redacted] the father of the deceased, also testified at that hearing in December 2019. However, neither former defense counsel nor LT Becker can recall the subject of the testimony. As far as is known, the record of trial and the court reporter's log do not contain any testimony from Mr [redacted] Here, the defense is stymied in its effort to discuss the substantial nature of his testimony and how LT Becker is prejudiced by its absence as Mr. [redacted] testimony is, we believe, completely missing from any record of trial.
[4] Enclosure 2.

(C.A.A.F. 2000). Omissions "are qualitatively substantial if the substance of the omitted material 'related directly to the sufficiency of the Government's case on the merits' and the 'testimony could not ordinarily have been recalled with any degree of fidelity.'" *Id.* "Omissions are quantitatively substantial unless 'the totality of omissions . . . becomes so unimportant and so uninfluential when viewed in the light of the whole record, that it approaches nothingness.'" *Id.* (alteration in original) (quoting *United States v. Nelson*, 3 C.M.A. 482, 13 C.M.R. 38, 43 (C.M.A. 1953)).

Each case is analyzed individually to decide whether an omission is substantial. *United States v. Abrams*, 50 M.J. 361, 363 (C.A.A.F. 1999). "A substantial omission renders a record of trial incomplete and raises a presumption of prejudice that the Government must rebut." *United States v. Henry*, 53 M.J. 108, 111 (C.A.A.F. 2000) (citing *United States v. McCullah*, 11 M.J. 234, 237 (C.M.A. 1981)) (additional citations omitted). "Insubstantial omissions from a record of trial do not raise a presumption of prejudice or affect that record's characterization as a complete one." *Id.* "Therefore, if the record is not "substantially verbatim," the appellant is prejudiced because he or she cannot receive the appellate review he or she is statutorily entitled to receive." *United States v. Underhill*, No. NMCCA 200700144, 2007 WL 2340618, at *3 (N-M. Ct. Crim. App. Aug. 9, 2007)

Here, the omission of SA [redacted] testimony is both qualitatively and quantitatively substantial. Testimony regarding investigative actions by foreign law enforcement officials and delays in asserting jurisdiction by the United States certainly relate directly to the government's case on the merits. As will be discussed later, that testimony will not be able to be recalled or reconstructed with any degree of fidelity. Thus, the missing testimony is qualitatively substantial. SA [redacted] testimony involved extensive questioning by defense counsel related to

the defense motion to dismiss for speedy trial violations.[5] The military judge who denied that motion relied, at least in part, on the testimony of SA [redacted]. Given that a successful defense motion on this issue would have led to dismissal of the charges, it would be impossible to characterize the missing testimony as "so unimportant and so uninfluential when viewed in the light of the whole record, that it approaches nothingness" and must be considered quantitively substantial.

As such, there is a presumption of prejudice against LT Becker. As stated by the Navy-Marine Corps Court of Criminal Appeals:

> We see two primary points in the post-trial process during which prejudice could result from a record of trial that has substantial omissions: (1) the CA's action, and (2) appellate review.
>
> First, an accused could certainly be prejudiced at the CA's action stage by an incomplete record of trial. Although the CA is not required to review the record of trial, R.C.M. 1107(b)(3), the staff judge advocate or the legal officer, as the case may be, is required to use the record of trial in determining how to advise the CA on what action to take on the findings and sentence. R.C.M. 1106(d)(1). If an accused claims that legal error occurred during trial, the staff judge advocate must address that allegation at least with a summary statement of agreement or disagreement. R.C.M. 1106(d)(4). If the record of trial is not "substantially verbatim," the SJAR or legal officer recommendation could be an uninformed recommendation, thereby denying an appellant his or her full opportunity for corrective action or clemency from the CA. *See United States v. Wilson,* 26 C.M.R. 3, 6, 1958 WL 3280 (C.M.A.1958)("It is while the case is at the convening authority level that the accused stands the greatest chance of being relieved from the consequences of a harsh finding or a severe sentence.").
>
> Second, if a court-martial results in a punitive discharge or one year or more of confinement, the accused is entitled to full appellate review of that court-martial. Art. 66(b), UCMJ. This right to automatic appellate review must be read in conjunction with the statutory requirement for verbatim records of trial when the sentence triggers the automatic review. Our superior court has held that Article 19, UCMJ, dealing with special courts-martial, "was intended to have 'provided that if there is a discharge for bad conduct a complete record must be made so that it can be reviewed' and Article 66 to have provided for the review of such cases in a manner similar to general courts-martial." *United States v. Whitney,* 48 C.M.R. 519, 520–21, 1974 WL 13848 (C.M.A.1974) (quoting Hearings on HR 2498 Before a

[5] Enclosure 3.

> Subcomm of the House Comm on Armed Services, 81st Cong, 1st Sess 963 (1949)).
>
> Therefore, if the record is not "substantially verbatim," the appellant is prejudiced because he or she cannot receive the appellate review he or she is statutorily entitled to receive.

United States v. Underhill, 2007 WL 2340618, at *2–3 (N-M. Ct. Crim. App. Aug. 9, 2007).

While the ability of the Convening Authority to affect the verdict or sentence has been removed in cases of this nature, LT Becker remains entitled to full appellate review. Without the missing testimony, a full and fair appellate review is impossible. The omission relates directly to the ability of the United States to even convene the court-martial, and formed a portion of the basis for the prior judge's ruling. An appellate court will not be able to determine the rationale behind that judge's rulings on issues that concern the foreign law enforcement actions or the failure to exercise jurisdiction.[6] Thus, LT Becker has been prejudiced by the lack of the transcript and the record cannot be "substantially verbatim" without that testimony.

B. Prejudice can be overcome if the record could be reconstructed, but reconstruction is not possible in this case.

The Court of Appeals for the Armed Forces has discussed reconstruction of the record:

> A second common remedy for lost recordings is reconstructing the record. A reconstruction occurs when the necessary actors—the military judge, with the assistance of the parties, and relevant witnesses—act promptly and thoroughly to recreate the lost testimony through their collective memories and notes. *See Lashley*, 14 M.J. at 9 (approving the military judge's attempt to reconstruct substantial lost proceedings due to the "unusual combination of factors present" in that case). There are, however, limits to what can be reconstructed. If the reconstruction results in a record that is equivocal such that it leaves uncertainty as to the substance of the lost testimony, it will not suffice. *See Davenport*, 73 M.J. at 378 (holding that without certainty about the substance of lost testimony, the reconstruction fails and the transcript is not verbatim).

[6] Enclosure 4.

United States v. Tate, 2022 WL 1653496, at *4 (C.A.A.F. May 23, 2022). Here, numerous factors militate against the ability to properly reconstruct the missing testimony in such a way that preserves LT Becker's rights.

i. Too much time has passed since the testimony was given.

RCM 1102(d)(1) provides that a military judge may, in the event of an incomplete record of trial, attempt to reconstruct the missing portion. Here, that cannot be done. The events in question took place in December of 2019. Given that more than two and a half years have passed since the testimony was given, it is impossible to build an accurate reconstruction of what was asked, answered, objected to, and ruled upon during the testimony. The duration of the missing hearing, in conjunction with the length of time before reconstruction efforts commenced would make a successful reconstruction "an almost impossible task." *United States v. Boxdale*, 47 C.M.R. 351, 352 (C.M.A. 1973).

In *United States v Seato*, an airman was charged, inter alia, with rape. 2018 CCA LEXIS 518, at *15 (A.F. Ct. Crim. App. Oct. 26, 2018). A motions hearing was held on March 8, 2016. *Id*. After the trial concluded on July 24, 2016, the court reporter discovered that the recording of the March 8, 2016 session was missing. The military judge held an Article 39(a) hearing on November 21, 2016, a little over seven months after the testimony was provided, to attempt to reconstruct the missing portions of the transcript. The U.S. Air Force Court of Criminal Appeals held that the reconstructed transcript was not substantially verbatim, stating that "the length of time before reconstruction efforts commenced" made reconstruction impossible. *Id.*; *see Lashley*, 14 M.J. at 9 (finding that "the prompt and thorough remedial action taken, the assistance of the witness, and the availability of ... [a] skeletal transcript" constituted unique circumstances to render the reconstructed record verbatim).

A similar set of circumstances also happened in another Air Force case. There, testimony from two Air Force Office of Special Investigations agents and motion arguments were lost. Three months after the court-martial adjourned an Article 39(a) session was convened in an effort to reconstruct the missing portion of the trial.

> Using his trial notes, materials provided by both trial defense counsel, the court reporter's notes, and the transcription of the first AFOSI agent's testimony to the point of equipment malfunction, the military judge drafted a reconstruction of the missing witness testimony in a question and answer format. The two AFOSI agents were recalled as witnesses at the post-trial Article 39(a), UCMJ, session. The military judge then went through each question and answer, asking the individual witness and counsel for both parties if the reconstruction comported with what they remembered the testimony to have been during the trial.
>
> Despite his best efforts to reconstruct the record, the hurdles were too great. The appellant was prejudiced by a record that could not become "substantially verbatim" given the importance of the lost testimony and arguments, the lengthy duration of the unrecorded portion of the trial, and the length of time between the trial and reconstruction efforts.

United States v. Snethen, 62 M.J. 579, 580–81 (A.F. Ct. Crim. App. 2005).

ii. The length of the testimony is too long to attempt to reconstruct.

According to the court reporter's log, SA [redacted] testimony began at 9:28 AM and concluded at 10:25 AM. The military judge would need to attempt to reconstruct nearly an hour of testimony. That is far too much testimony to try to reconstruct. As the Air Force Court of Criminal Appeals said in *Seeto*:

> Even the successful reconstruction efforts found in other cases upon which the Government relies consistently involved no more than 15 minutes of transcript. *See United States v. Watts*, 22 M.J. 909 (A.F.C.M.R. 1986) (substantially verbatim transcript where 11 minutes of witness testimony was promptly reconstructed); *United States v. Caudill*, 43 C.M.R. 924 (A.F.C.M.R. 1970) (substantially verbatim transcript where 15 minutes of witness testimony was reconstructed).

Seeto, 2018 CCA LEXIS at *15. Any attempt to reconstruct nearly an hour's worth of testimony two-and-a-half years after the fact is impossible to complete and cannot survive an appeal.

While it is true that military appellate courts have ruled that reconstructions of transcripts and/or exhibits have overcome the presumption of prejudice, none of those cases contained the combination of delay in attempting reconstruction, length of testimony, and effect on the entire trial as this instance does. *See*, for example, *United States v. Stephens*, NMCM 95 00306, 1997 CCA LEXIS 537, at *10 (N-M Ct. Crim. App. Oct. 27, 1997) (finding that presumption of prejudice was overcome, noting that missing exhibits did not relate to guilt or innocence and the defendant pled guilty); *United States v. Woods*, No. NMCCA 200401704, 2005 CCA LEXIS 388, at *6-7 (N-M Ct. Crim. App. Dec. 14, 2005) (where there were two pages of transcript missing and the Court held that the content of those pages could be reasonably determined from the preceding and following pages and from the fact that the defendant pled guilty); *United States v. Fincher*, NMCM 86 0984, 1986 CMR LEXIS 2328, at *2-3 (N-M.C.M.R. July 22, 1986) (stating that, as the summarized portion of the record of trial concerned the defendant's attire, counsel status, advising the defendant of right to counsel, there was no challenge to the trial judge, and the defendant entered pleas, there was no prejudice to the defendant from the missing transcript); *United States v. Harmon*, NMCM 95 00270, 1997 CCA LEXIS 263, at *2-3 (N-M Ct. Crim. App. June 23, 1997) (where sentencing exhibits were missing from the record of trial the Court could review, pursuant to Article 66, the Court was required to take corrective action with regard to sentencing); *United States v. Austin*, No. NMCCA 200500132, 2007 CCA LEXIS 43, at *13-14 (N-M Ct. Crim. App. Feb. 28, 2007) (noting the defendant was not prejudiced by unrecorded 39(a) sessions as no witnesses testified during those sessions and the only missing portion of the record pertained to arguments of counsel); *United States v. McAllister*, No. NMCCA 201100085, 2011 CCA LEXIS 414, at *7-8 (N-M Ct. Crim. App. Dec. 29, 2011) (stating that a record of trial in which (1) the parties, the bailiff, and the court reporter

were not identified on the record; (2) there was an inconsistency between the time announced by the military judge when he closed the court for deliberations on sentence, with the time recorded by the court reporter; and (3) portions of the sentencing argument of both counsel were reported as being inaudible a total of sixteen times, did not amount to a substantial omission). In each of these events, either the missing testimony was brief, the defendant had pled guilty, there was no witness testimony, or the incompleteness related to sentencing only.

In this instance, a witness testified, there was nearly an hour of testimony, and it seems at least some of the testimony related to a delay in the United States asserting jurisdiction and the consequences of that delay: a shoddy investigation by a foreign country – a fundamental issue that impacted and permeated the entire trial. In a similar case:

> [d]uring presentation of its case on the merits, the Government called as a witness, Staff Sergeant (SSgt) [redacted] an investigator for the Criminal Investigative Division (CID) who investigated the allegations against the appellant and who participated in the interrogation of the appellant. However, none of SSgt [redacted] testimony, prior to the submission of questions by the members, is transcribed and contained in the record of trial. Lost and missing from the record is SSgt [redacted] being called to the stand, his swearing in, direct and cross-examination, any objections and exchanges between the parties, any legal rulings by the military judge and the submission of any documentary evidence…In total, it appears that at least 46 minutes of SSgt [redacted] testimony went unrecorded…the Government contacted the military judge, trial counsel, defense counsel, and SSgt [redacted] however, none of them could recall the content of the missing testimony. Thus, the Government was unable to provide either the missing testimony or an authorized substitute. Since the Government cannot reconstruct the missing testimony, it is evident that the witness' testimony is irretrievably lost…Moreover, in the absence of an authorized substitute for the missing testimony, we cannot determine the impact of the testimony on the appellant's court-martial, nor can we determine whether the matter could have materially prejudiced the substantial rights of the appellant at trial. Thus, we conclude that the omission is substantial, and the record of trial is incomplete.

United States v. Kluemper, No. NMCCA 200602366, 2007 CCA LEXIS 348, at *5-9 (N-M Ct. Crim. App. Aug. 30, 2007).

Here, the lack of a transcript is even more prejudicial to LT Becker, and no amount of reconstruction can cure it. As has been mentioned, the testimony took place over two-and-a-half years ago. Additionally, the testimony, at least in part, concerns a delay in exercising jurisdiction by the United States which violated LT Becker's right to a speedy trial, and the actions of foreign authorities which led to chain of custody and other questions concerning the validity of the government's case. The violation of LT Becker's right to a speedy trial and the failure of [redacted] authorities to properly collect and maintain evidentiary materials will be issues on appeal. Testimony on these issues was given before a different trial judge, CAPT Aaron Rugh, JAGC, USN. That judge is the person who ruled on LT Becker's speedy trial motion. For the Court-Martial trial judge to attempt to use a different judge's notes and determine how complete the notes are, while using those notes to try and divine how that judge used the testimony in his deliberative process, is simply several bridges too far. This would be, in effect, hearsay within hearsay. Any reconstruction would not be reliable and would surely be rejected by an appellate court.

6. Relief Requested

The testimony of SA [redacted] is missing and cannot be successfully reconstructed. That missing testimony is substantial, both qualitatively and quantitatively. Without that testimony, LT Becker cannot receive the appellate review to which he is entitled as a matter of law. Given these circumstances, LT Becker respectfully requests that the trial judge immediately release LT Becker from confinement and act in accordance with Rule for Court-Martial 1112(d)(3)(B) by dismissing, with prejudice, all charges and specifications in this case.

7. Oral Argument

Unless the government concedes to this motion or the Court grants relief on the pleadings, the Defense requests oral argument and respectfully requests an evidentiary hearing to identify any further missing exhibits and/or testimony from the record. The defense plans to call the following individuals as witnesses in any evidentiary hearing:

CAPT Jason L. Jones, Trial Counsel

CDR Paul T. Hochmuth, ATC

Mr. John A Guarino, Defense Counsel

Mr. Jeremiah J. Sullivan, Defense Counsel

LN1 [redacted]

Colonel Stephen F. Keane, Military Judge for Court-Martial

CAPT Aaron C. Rugh, Military Judge for 39(a) session

[redacted], Court Reporter for 39(a) session

DATE: 11 August 2022

Respectfully submitted,

/s/ David P. Sheldon
David P. Sheldon
Civilian Appellate Defense Counsel
[redacted]

CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion was served electronically upon the Court and Trial Counsel on August 11, 2022.

/s/David P. Sheldon
David P. Sheldon
Civilian Appellate Defense Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES OF AMERICA **v.** **CRAIG BECKER** **LT USN**	**Defense Motion To Dismiss for Violation of the Due Process Clause of the United States Constitution** **10 September 2019**

1. **Nature of Motion.**

The defense requests the Court to dismiss Charge II, Specification 1 because the government has engaged in oppressive delay, which has denied the accused the opportunity to present a meaningful defense.

2. **Burden of Proof.**

As the moving party, the defense has the burden of proof by a preponderance of the evidence. R.C.M. 905(c).

3. **Summary of Facts.**

a. Charge II, Specification 1 alleges that LT Becker strangled his wife, [redacted], at or near [redacted] on or about 9 August 2013.

b. On 30 July 2018, almost five years after the alleged offense (10 days before the statute of limitations would have tolled), Charge II, Specification 1 was preferred.

c. The charges stem from an argument LT Becker and his wife had in a room at the Army Lodge in the early morning hours. AE V at ZZ.

d. Mrs [redacted] approached the front desk clerk, Mr. [redacted], who, after a brief discussion, called the base military police ("MPs") and described the situation. SGT [redacted], a military policeman, received the call and dispatched SPC [redacted]. AE V at AAA.

e. According to Mr. [redacted], he also made a subsequent call to the MPs, during which Mrs. [redacted] also spoke to the MPs. AE V at BBB.

f. Calls to the MPs are recorded, but those recordings no longer exist.

g. Mr. [redacted] made two initial reports to law enforcement. In one, he made no mention of injuries to Mrs. [redacted]. In the other, he specifically denied that he observed injuries to Mrs. [redacted]. AE V at BBB; AE V at CCC.

h. A subsequent statement from Mr. [redacted] to NCIS suggests that he observed red marks on Mrs. [redacted] neck. AE V at DDD.

i. In her statement to law enforcement at 0649, Mrs. [redacted] stated that LT Becker "put his hands around my neck and pushed down. He did not squeeze as to leave marks, he only pushed down hard against the bed so that I could not breathe." AE V at EEE.

j. Mrs. [redacted] also reported that LT Becker took her identification and credit cards from her wallet. *Id.*

k. In response to clarifying questions from law enforcement, Mrs. [redacted] stated she had no visible injuries, that she had consumed 4 glasses of wine, and that she was taking medication for migraines and anxiety. *Id.*

l. Mrs. [redacted] made a subsequent statement that same day at 1902. AE V at FFF.

m. In that statement Mrs. [redacted] stated that her initial statement was "written under extreme duress" and was factually incorrect in several regards. *Id.*

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n. Mrs. [redacted] stated that her accusations that LT Becker had stolen her identification and credit cards was incorrect, and he "in fact had not." Instead, her accusations about her belongings were the result of being "upset and disoriented," and lacking "pertinent information." *Id.*

o. Mrs. [redacted] further stated that she was "coerced" to make a statement by law enforcement because she was told "my husband was in another room and also writing his [statement]." Her statement, therefore, was not a statement that "would accurately reflect my recollection or view of the situation and those involved." *Id.*

p. Mrs. [redacted] also told a Family Advocacy Committee that she misinterpreted the incident, resulting in the Committee closing the case. AE V at GGG.

q. Mrs. [redacted] made a subsequent statement to NCIS on 14 November 2013 "for clarification purposes." AE V at HHH.

r. In that sworn statement, Mrs. [redacted] stated, "My initial assessment of the events that transpired on or around Aug 9 was significantly skewed by being on [redacted] migraine medication for 8 mos. . . I was severely paranoid, had lost 20 lbs, [and] experienced personality change. At the time I believed that my husband was trying to harm me when in reality he was trying to keep me from harming myself or him and he was trying to deescalate the situation. He DID NOT choke me or hurt me in any way and I made statements indicating that I thought he did due to my altered state of mind (medication induced)." *Id.*

s. LT Becker has been interviewed multiple times in connection with this incident and has consistently disclaimed accusations that he choked his wife or was violent in anyway. AE V at ZZ; AE V at GGG.

t. In November 2013, NCIS briefed Colonel [redacted] LT Becker's Commanding Officer, regarding the status of the investigation, and Colonel [redacted] advised that the command did not intend to take any judicial/administrative action. AE V at CCC.

u. No investigative steps were taken after Colonel [redacted] November 2013 advisement, and the case was formally closed by NCIS on 3 June 2014 citing "lack of evidence of a crime" and the "command's decision to take no judicial/administrative action against LT Becker." AE V at ZZ.

v. Mrs. [redacted], an exculpatory witness for Charge II, Specification 1, died on 8 October 2015.

w. In addition to Mrs. [redacted] being deceased, the government has been unable to locate law enforcement notes from the interviews of Mrs. [redacted] and other witnesses from the Army Lodge, its case activity log, and the recordings of the emergency calls and witness interviews. AE V at CCC.

4. Discussion.

A. Due Process Requires that the Court Dismiss Charge II, Specification 1 Because the Government Has Denied the Accused a Meaningful Opportunity to Present a Complete Defense.

The Court should dismiss the proceedings because the Government has offended due process. Due process requires that criminal prosecutions comport with prevailing notions of fundamental fairness. *California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 2532 (1984). The Supreme Court has interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense. *Id.* Oppressive delay by the Government that inhibits a defendant from presenting a complete defense violates Due Process. *United States v. Lovasco*, 431 U.S. 783, 789, 97 S. Ct. 2044, 2048 (1977). Here, the Government

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has denied the accused a meaningful opportunity to present a complete defense by engaging in egregious pre-accusation delay. The Accused is permanently prejudiced because the primary, exculpatory witnesses, recordings of calls to law enforcement, and case notes have been lost.

1. The Government has Violated Due Process Through Egregious Pretrial Delay That Fails to Uphold Prevailing Standards of Fundamental Fairness.

The Government has offended due process because it violated prevailing standards of fundamental fairness by waiting nearly 5 years to prefer charges. The Due Process Clause of the 5th Amendment provides speedy trial protection against pre-accusation delay in circumstances where the statute of limitations is insufficient by itself. *United States v. Reed*, 41 M.J. 449, 451 (C.A.A.F. 1995).[1] The right to a speedy trial under the due process clause of the 5th Amendment requires dismissal when the defendant proves: 1) egregious delay or intentional tactical delay; and 2) actual prejudice. *Id* at 452.

The Government engaged in egregious pre-accusation delay by waiting nearly 5 years to prefer charges. The Government engages in egregious delay when delay is incurred in reckless disregard of circumstances, known to the prosecution, suggesting that there existed an appreciable risk that delay would impair the ability to mount an effective defense. *Reed*, 41 M.J. at 452.

The Government's reasons for the delay are unfair by the standard established by the Supreme Court of the United States. *See United States v. Lovasco*, 431 U.S. 783, 97 S. Ct. 2044 (1977). In considering the due process ramifications of pre-accusation delay, the court in *Lovasco* determined that delay is not fundamentally unfair when it is the result of the

[1] The statute of limitations protects individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. *United States v. Reed*, 41 M.J. 449, 451 (C.A.A.F. 1995), quoting *Toussie v. United States*, 397 U.S. 112, 90 S. Ct. 858 (1970).

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government developing a case against a defendant. *Id.* at 792-94. In the present case, the Government cannot honestly say that its pre-accusation delay was the result of building a case against the accused. The case was formally closed in June 2014. For all intents and purposes, however, the investigation was closed in November 2013 when Mrs. [redacted] told NCIS what she had previously told the MPs—that she overreacted to the situation, and that her husband had not choked her. At that point, LT Becker's Commanding Officer determined that he would take no administrative or judicial action.

Now, five years later and absent the only witness to the alleged offense, the government asserts that it somehow has the evidence it needs to finally take action on this charge. This court should view the resuscitation of this five year old charge for what it is—a tool to prop up the more serious charged offenses and to avoid obvious problems with such evidence under M.R.E. 404(b). As such, there is no legitimate justification for this delay. The pre-accusation delay is unfair by constitutional standards; therefore, it violates due process.

Prejudice is inherent in this type of delay. The court in *Lovasco* recognized this prejudice, reasoning that prolonged legal processes occasioned by premature accusations "interfere with the defendant's liberty, disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends." *Lovasco*, 431 U.S. 791.

Indeed all of the above apply to LT Becker who has suffered with the stigma of these accusations for almost five years. But, the prejudice in this case, extends well beyond the personal prejudice recognized in *Lovasco*. Here, exculpatory evidence has been lost.

The Constitution guarantees access to evidence as part of providing an accused the right to a meaningful opportunity to present a complete defense. *California v. Trombetta*, 467 U.S.

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479, 485, 104 S. Ct. 2528, 2532 (1984). This is loosely referred to as the accused's right of constitutionally guaranteed access to evidence. *Id.* In some cases, the Supreme Court has held this guarantee to include a right of access to exculpatory evidence even when the evidence is beyond the Government's possession. *See Valenzuela-Bernal*, 458 U.S. 858 (1982) (Government deportation of defense witnesses could offend the due process clause because it diminishes the opportunity to put on an effective defense.); *United States v. Lovasco*, 431 U.S. 783, 97 S. Ct. 2044 (1977) (Government delay in indicting the accused could violate due process if the delay diminishes the accused's opportunity to put on an effective defense.). The defense may establish prejudice by showing: (1) the actual loss of a witness, as well as "the substance of their testimony and the efforts made to locate them or (2) the loss of physical evidence." *United States v. Reed*, 41 M.J. 449, 452 (C.A.A.F. 1995). Here, the defense has demonstrated both.

Because the government waited nearly five years to charge LT Becker with this offense, the death of Mrs. [redacted] has caused the defense to lose a percipient, exculpatory witness. As Mrs. [redacted] confirmed in multiple statements to law enforcement and to FAP counselors, the accused did not choke her. Rather, LT Becker "was trying to deescalate the situation. He DID NOT choke me or hurt me in any way and I made statements indicating that I thought he did due to my altered state of mind (medication induced)." AE V at HHH (emphasis and punctuation in the original).

In addition to the loss of Mrs. [redacted] multiple items related to the investigation of this incident have also been lost, including recordings of calls from Mrs. [redacted] and Mr. [redacted] (the front desk clerk) in the immediate aftermath of the incident. Given the inconsistent statements made by both Mrs. [redacted] and Mr. [redacted] these recordings would provide the

defense the ability to impeach Mr. [redacted] and any evidence presented by the government to support the charged offense.

The passage of time has also impacted the memories of the witnesses who are crucial to the defense's ability to challenge the charged offense and to litigate the government's attempt to admit hearsay statements. First, Mr [redacted] memory has deteriorated and been exposed to influences which now cause him report observations and signs of injuries that he, and other witnesses, including Mrs. [redacted] and the law enforcement responding to the call, specifically disclaimed close in time to the incident. Given that, there is no question that the accused has been prejudiced by the government's delay.

Law enforcement personnel who received reports of this incident, including Mr. [redacted] and Mr. [redacted] now claim no memory of what they were told. Mr. [redacted] was the Desk Sargent who received the initial reports and calls from Mr. [redacted] and Mrs. [redacted] and was in charge of dispatch. He was also present for LT Becker's statement. As he now has no memory of the substance of these conversations, he is unable to impeach any hearsay statements introduced against LT Becker or any testimony by Mr. [redacted] He is also unable to provide any prior consistent statements of LT Becker. Mr. [redacted] was the officer who responded to the Army Lodge and made the initial contact with Mrs. [redacted] He has no independent memory of any of the statements made to him at the Army Lodge by Mrs. [redacted] or Mr. [redacted] As with Mr. [redacted] Mr. [redacted] impaired memory precludes him from impeaching any hearsay statements introduced against Mr. [redacted] or any testimony from Mr. [redacted] but it also impairs the defense's ability to fully litigate the government's attempts to introduce hearsay statements of [redacted]

Finally, the passage of time has resulted in all NCIS case notes and activity logs to be lost or destroyed. The absence of the notes prevent the defense from obtaining potentially impeaching information for any of the witnesses interviewed, including Mr. [redacted]. The absence of the case log, prohibits the defense from attacking the quality of the NCIS investigation because there is no objective record of the investigative steps and leads that NCIS pursued (or ignored).

In short, any judicial system which prioritizes fairness and due process cannot endorse practices whereby the government intentionally delays prosecution, evidence is lost, and the government's case is, as a result, strengthened. Because that is what happened here, the court should dismiss Charge II, Specification 1.

B. Should the Court Not Dismiss for Constitutional Due Process Violations, the Court Should Abate the Proceedings in Accordance With R.C.M. 703(b)(3) Due to the Unavailability of Key Defense Witnesses

Article 46 of the UCMJ provides that both counsel and the court, "shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President shall prescribe." 10 U.S.C. § 846. The regulations prescribed by the President are enumerated in R.C.M. 703 which addresses the production of witnesses. In relevant part, R.C.M. 703(b)(3) provides the following:

> *Unavailable witness.* Notwithstanding subsections (b)(1) and (2) of this rule, a party is not entitled to the presence of a **[*133]** witness who is unavailable within the meaning of Mil. R. Evid. 804(a). However, if the testimony of a witness who is unavailable is of such central importance to an issue that it is essential to a fair trial, and if there is no adequate substitute for such testimony, the military judge shall grant a continuance or other relief in order to attempt to secure the witness' presence or shall abate the proceedings, unless the unavailability of the witness is the fault of or could have been prevented by the requesting party.

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This rule is derived, in part, from *United States v. Daniels*, 48 C.M.R. 655, 656-57 (1974). The court-martial in *Daniels* was held in Belgium, and, despite reasonable efforts by the government, the U.S. citizen victim could not be compelled to appear through either U.S. or [redacted] process. As such, the Court of Military appeals held that Daniels' right to a fair trial was gravely impaired when the military judge allowed the case to proceed in the absence of the witness, and ultimately held that "the military judge had no constitutional alternative except to abate the proceedings." *Id.*

In that case, the accused was convicted of attempted carnal knowledge of an underage, U.S. military-dependent female in [redacted], where the court-martial was held. Daniels requested the victim be called as a defense witness, but, despite reasonable efforts, the Government was unable to compel the attendance of the victim through the exercise of either U.S. process or that of the [redacted] Government. *Daniels*, 48 C.M.R. at 656-57. The Court of Military Appeals held that Daniels' right to a fair trial was "gravely impaired" when the military judge allowed the trial to continue and stated, "In the absence of specific statutory or regulatory authority to compel . . . the victim's testimony as a defense witness, and so long as her voluntary presence could not be secured, we believe the military judge had no constitutional alternative except to abate the proceedings." *Id.* at 657. In short, the accused was deprived of the right "to have compulsory process for obtaining witnesses in his favor" as guaranteed in the Sixth Amendment." *Id.*

The same result is warranted here. Mrs. [redacted] an alleged victim who has also provided exculpatory statements, is unavailable. It is impossible to imagine a witness that would be of greater "central importance to an issue that is essential to a fair trial" than this witness.

As no straight-faced argument can refute the central importance of these witnesses, the government may argue that an adequate substitute is available. That argument, however, also

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fails. In *United States v. Eiland,* the military judge was faced with the unavailability of two witnesses who he found to be of central importance to a fair trial. 39 M.J. 566 (C.M.R. 1993). In that case, the Court of Military Review upheld the military judge's finding that the witnesses' testimony "is not of a nature that would readily adapt itself to written testimony, to stipulations of fact or things of that nature. If I were the fact-finder, I would have grave difficulty in deciding what weight, if any, to give to the testimony of . . . these two witnesses without actually seeing them testify and making some judgments about them and their credibility in the course of that observation." Here, too, even if the defense was permitted to offer Mrs. [redacted] exculpatory statements, the members, not having the opportunity to observe Mrs. [redacted] and her demeanor, would have no sense of what weight to give to such a statement.

"As a general rule, a stipulation may not be accepted into evidence unless the military judge is satisfied that the parties consent to its admission . . . A stipulation, whether of fact or testimony, seems to be among the least acceptable of the possible substitutes for live testimony. Unlike a deposition or former testimony, there is no opportunity for cross-examination or even complete questioning. The substance of a stipulation is often the result of negotiation rather than the actual words of the potential witness and, as a result, often becomes a compromise derived from the strengths or weaknesses in the bargaining positions of the parties." *Id.*; R.C.M. 811(c).

The defense, however, must acknowledge that this rule is not entirely inelastic. Relevant factors have been identified to assist with resolving these issue such as "the issues involved in the case and the importance of the requested witness to those issues; whether the witness is desired on the merits or the sentencing portion of the trial; whether the witness' testimony would be merely cumulative; and the availability of alternatives to the personal

appearance of the witness, such as deposition, interrogatories, or previous testimony." *United States v. Tangpuz*, 5 M.J. 426, 429 (C.M.A. 1978).

All of these factors, however, weigh in favor of abatement. This witness is relevant on the merits, as the basis for a defense theory that Mrs. [redacted] overreacted to an argument under the influence of medication. No evidence is more crucial to the defense's case, and, in fact, no other witness can possibly provide the same or similar information to the court. Additionally, there are no depositions, interrogatories, or previous testimony which can be offered.

Finally, the government may assert that protections of R.C.M. 703(b)(3) should not be afforded to the accused because the unavailability of Mrs. [redacted] is the fault of the accused. The presumption of innocence, however, says otherwise. To find that the accused caused Mrs. [redacted] unavailability would turn this basic principle of justice on its head, particularly in this case where the facts point strongly toward the conclusion that Mrs. [redacted] committed suicide. There are no eye-witnesses to the incident resulting in Mrs. [redacted] death, no physical evidence to suggest a struggle took place, and Mrs. [redacted] had a long struggled with issues related to her [redacted]

5. Relief Requested.

The defense respectfully requests the Court dismiss Charge II, Specification 1. In the alternative, the court should permanently abate the proceedings.

6. Enclosures.

ZZ – Report of Investigation, dtd 3 June 2014
AAA – Statement of Sgt [redacted]
BBB – Statement of [redacted]
CCC – Report of Investigation, dtd 6 February 2014
DDD – TBD
EEE – Statement of [redacted] (first written statement)
FFF – Statement of [redacted] (second written statement)
GGG – Report of Family Advocacy Interview

HHH – Statement of [redacted] (third written statement)

7. Oral Argument.

The defense requests oral argument on this motion.

[redacted]
LCDR Bryan M. Davis
Detailed Military Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion was served electronically on Trial Counsel and the Court on 10 September 2019.

[redacted]
LCDR Bryan M. Davis
Detailed Military Defense Counsel

Appellate Exhibit XXXVII
Page 13 of 13
Appellate Exhibit CCC
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NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
COURT-MARTIAL

UNITED STATES **v.** **CRAIG R. BECKER** **LT/O-3, USN**	**DEFENSE MOTION NON-CONCURRING WITH RECONSTRUCTED TRANSCRIPT** **AUGUST 26, 2022**

1. Nature of Motion

Pursuant to Rule for Courts-Martial 1112(d), the Defense notifies the military judge that it does not concur with the proposed reconstructed transcript and renews its motion that the military judge immediately release LT Becker from confinement and dismiss all charges and specifications with prejudice due to an incomplete record of trial.

2. Summary

The Uniform Code of Military Justice (hereinafter "UCMJ") requires that, "a complete record of proceedings and testimony shall be prepared in any case of a sentence of death, dismissal, discharge, confinement for more than six months, or forfeiture of pay for more than six months." 10 U.S.C. § 854 (2022). Here, the Record of Trial is incomplete. Although the military judge has attempted to reconstruct the record, the reconstruction drafted by him fails to capture the missing testimony. LT Becker has been prejudiced by this, and the military judge should not attempt to certify the record of trial using this flawed reconstruction and he should immediately release LT Becker from custody and dismiss all charges and specifications with prejudice.

3. Summary of Facts

1) Following the death of his wife, who fell out the window of their apartment in 2015, LT Becker was charged on July 30, 2018 with Premeditated Murder in violation of Article 118, 10 U.S.C. § 918, UCMJ; two specifications of Battery in violation of UCMJ Article 128, 10 U.S.C. § 928, UCMJ; Conduct Unbecoming an Officer in violation of Article 133, 10 U.S.C. § 933, UCMJ; and three specifications of Obstructing Justice in violation of Article 134, 10 U.S.C. § 934, UCMJ.

2) On January 23, 2019, two additional specifications of Conduct Unbecoming an Officer were preferred.

3) On January 25, 2019, the three specifications of Obstructing Justice were dismissed without prejudice.

4) After a General Court Martial held in [redacted] LT Becker was convicted of Premeditated Murder, one specification of Battery, and two specifications of Conduct Unbecoming an Officer.

5) On April 30, 2022, he was sentenced to Life Imprisonment with the possibility of parole, forfeiture of pay and allowances, and Dismissal from the Naval Service.

6) In a series of email beginning on June 16, 2022, Colonel Stephen F. Keane, the trial judge, notified defense and government counsel that audio from an Article 39(a) session on 19 December 2019, namely the testimony of Naval Criminal Investigative Service Special Agent (SA) [redacted] as well as certain documents, were missing.

7) On August 15, 2022, Colonel Keane forwarded a draft reconstruction of SA [redacted] testimony to government trial counsel, defense counsel, and appellate defense counsel. Colonel

Keane also included a copy of the court reporter's notes for that session. He asked all counsel for their comments by August 19, 2022.

8) As of the filing of this motion, SA [redacted] recorded testimony from the 11 December 2019[1] Art. 39(a)[2] session remains missing. It is unclear whether other substantive records from the court-martial are also missing.

4. Discussion of Law

The requirement for a complete record of trial is codified in Public Law and further explained in the Rules for Courts-Martial. As stated in law:

> (a) General and special courts-martial. Each general or special court-martial shall keep a separate record of the proceedings in each case brought before it. The record shall be certified by a court-reporter, except that in the case of death, disability, or absence of a court reporter, the record shall be certified by an official selected as the President may prescribe by regulation.
> (b) Summary courts-martial. Each summary court-martial shall keep a separate record of the proceedings in each case, and the record shall be certified in the manner required by such regulations as the President may prescribe.
> (c) Contents of record.
> (1) Except as provided in paragraph (2), the record shall contain such matters as the President may prescribe by regulation.
> (2) In accordance with regulations prescribed by the President, a complete record of proceedings and testimony shall be prepared in any case of a sentence of death, dismissal, discharge, confinement for more than six months, or forfeiture of pay for more than six months.

10 U.S.C. § 854.

The "regulations prescribed by the President" are contained in the Rules for Courts-Martial (R.C.M.). R.C.M. 1112 lists the required contents of a record of trial. They include:

> (b) Contents of the record of trial. The record of trial contains the court-martial proceedings, and includes any evidence or exhibits considered by the court-martial in determining the findings or sentence. The record of trial in every general and special court-martial shall include:

[1] In the defense Motion to Dismiss and Motion to Recuse Trial Participants, submitted to the military judge, trial counsel, and defense counsel via email on August 11, 2022, the date of the 39(a) hearing in question was mistakenly identified as December 19, 2019.
[2] 10 U.S.C. 839(a).

> (1) A substantially verbatim recording of the court-martial proceedings except sessions closed for deliberations and voting;…
> (6) Exhibits, or, if permitted by the military judge, copies, photographs, or descriptions of any exhibits that were received in evidence and any appellate exhibits;

R.C.M. 1112(b) (2019).

> R.C.M. 1112(d) provides direction on what to do if the record of trial is incomplete:
> (d) Loss of record, incomplete record, and correction of record.
> (1) If the certified record of trial is lost or destroyed, a court reporter shall, if practicable, certify another record of trial.
> (2) A record of trial is complete if it complies with the requirements of subsection (b). If the record is incomplete or defective, a court reporter or any party may raise the matter to the military judge for appropriate corrective action. A record of trial found to be incomplete or defective before or after certification may be corrected to make it accurate. A superior competent authority may return a record of trial to the military judge for correction under this rule. The military judge shall give notice of the proposed correction to all parties and permit them to examine and respond to the proposed correction. All parties shall be given reasonable access to any court reporter notes or recordings of the proceedings.
> (3) The military judge may take corrective action by any of the following means—
> (A) reconstructing the portion of the record affected;
> (B) dismissing affected specifications;
> (C) reducing the sentence of the accused; or
> (D) if the error was raised by motion or on appeal by the defense, declaring a mistrial as to the affected specifications.

R.C.M. 1112(d) (2019).

"The requirement that a record of trial be complete and substantially verbatim in order to uphold the validity of a verbatim record sentence is one of jurisdictional proportion that cannot be waived." *United States v. Henry*, 53 M.J. 108, 110 (C.A.A.F. 2000).

5. Argument

On December 11, 2019, an Article 39(a)[3] session was held in the case of U.S. v. Becker. At that hearing, SA [redacted] testified and was examined by both trial counsel and defense counsel. When the Record of Trial was being assembled, it was discovered that the tape

[3] 10 U.S.C. 839(a)

containing SA [redacted] testimony was missing. According to the court reporter's log, SA [redacted] testified from 9:28 until 10:25.

The military judge has attempted to reconstruct the missing portion of the record which included the lengthy testimony of SA [redacted] during which she was questioned by trial counsel and defense counsel on a variety of subjects. The Court of Appeals for the Armed Forces has discussed reconstruction of the record:

> A second common remedy for lost recordings is reconstructing the record. A reconstruction occurs when the necessary actors—the military judge, with the assistance of the parties, and relevant witnesses—act promptly and thoroughly to recreate the lost testimony through their collective memories and notes. *See Lashley*, 14 M.J. at 9 (approving the military judge's attempt to reconstruct substantial lost proceedings due to the "unusual combination of factors present" in that case). There are, however, limits to what can be reconstructed. If the reconstruction results in a record that is equivocal such that it leaves uncertainty as to the substance of the lost testimony, it will not suffice. *See Davenport*, 73 M.J. at 378 (holding that without certainty about the substance of lost testimony, the reconstruction fails and the transcript is not verbatim).

United States v. Tate, 2022 WL 1653496, at *4 (C.A.A.F. May 23, 2022). Here, the attempted reconstruction by a military judge leaves uncertainty as to the substance of the lost testimony.

A. The reconstruction is incomplete.

RCM 1102(d)(1) provides that a military judge may, in the event of an incomplete record of trial, attempt to reconstruct the missing portion. The reconstruction attempted by the military judge is incomplete. The military judge has apparently used the court reporter's log and notes but the result does not match up with them. For example, the first paragraph of the reconstruction, when read aloud in a normal speaking rhythm, takes about 12 seconds. However, the reporter's log shows that the testimony lasted for 42 seconds. Thus, there is at least 30 seconds missing.

B. The reconstruction is deceptive.

The military judge appears to have taken sentence fragments from the log and notes from the court reporter to try to reconstruct the testimony of SA [redacted]. In doing so, the result appears to be a narrative of SA [redacted] answers. That is deceptive. The military judge has inferred words and statements that are not on any document in order to make the sentence fragments and notes readable but the result is not what SA [redacted] said, it is merely the military judge's guess as to what SA [redacted] said. Each separate paragraph takes significantly less time to read aloud than the report's log shows the testimony lasted. Obviously, a great deal is missing from the attempted reconstruction.

C. The military judge was not present for the testimony he is trying to reconstruct.

The current military judge, Colonel Keane, was only assigned to the case after the original military judge Captain Aaron Rugh was removed and given a new assignment. It was CAPT Rugh who presided over the Article 39(a) session on December 19, 2019. Colonel Keane's attempt to reconstruct the testimony is handicapped by the fact that he has no memory of the event upon which he can rely. Instead, he is relying on the court reporter's log and notes. Anything in the reconstruction that is not in the notes or log is, therefore, an invention by Colonel Keane based on nothing but his imagination. For example, the first paragraph of the cross-examination, on draft page 458, reads: "When the [redacted] were investigating the case, I assisted in any way requested. I did not have a role in the case." The court reporter log at 9:38:55 reads: "assisting in any way" and at 9:39:01 reads: "didn't have a role in the case." The notes seems to say "lead agent – initially liaison." Given the dearth of testimony surrounding the phrases, the true testimony could very well have been "I was not assisting in any way. I did not have a role in the case."

D. The reconstruction in no way resembles a substantially verbatim transcript.

The reconstruction strings together sentence fragments from the log and parts of the court reporter's notes. The resultant document is simply a series of supposed statements made by SA [redacted]. There is absolutely no indication as to what those supposed statements are responding to. For example, in the court reporter log, between 9:46:02 and 9:47:01, it reads: "not involved in any of that"; "not aware"; "can't remember"; "not that I recall specifically"; and "speedy trial- do not aware – if I was do not recall". On page 459 of the reconstruction, the second paragraph seems to be applicable to this period of testimony. It reads: "I was not involved in any of that. This was not my investigation at the time." Nowhere does the "substantially verbatim" transcript even mention SA [redacted] unawareness or inability to remember; and, of course, it does not mention what she is unaware of or what she can't remember.

E. Defense counsel from the court-martial do not concur with the reconstruction.

LT Becker was represented by both military and civilian defense counsel. His military counsel was then-CDR John A. Guarino. His civilian defense counsel was Mr. Jeremiah J. Sullivan. Both of them were present at the December 11, 2019 39(a) hearing. Both attorneys heard the questioning of SA [redacted] by trial counsel. Both attorneys asked questions of SA [redacted]. They have reviewed the reconstruction attempt by the military judge. Both attorneys have written affidavits stating that the attempted reconstruction does not result in a complete record of trial. The affidavits are attached to this motion as Enclosure 1 and 2.

F. The reconstruction cannot survive an appeal.

While it is true that military appellate courts have ruled that reconstructions of transcripts and/or exhibits have overcome the presumption of prejudice, none of those cases contained the combination of delay in attempting reconstruction, length of testimony, and effect on the entire

trial as this instance does. *See*, for example, *United States v. Stephens*, NMCM 95 00306, 1997 CCA LEXIS 537, at *10 (N-M Ct. Crim. App. Oct. 27, 1997) (finding that presumption of prejudice was overcome, noting that missing exhibits did not relate to guilt or innocence and the defendant pled guilty); *United States v. Woods*, No. NMCCA 200401704, 2005 CCA LEXIS 388, at *6-7 (N-M Ct. Crim. App. Dec. 14, 2005) (where there were two pages of transcript missing and the Court held that the content of those pages could be reasonably determined from the preceding and following pages and from the fact that the defendant pled guilty); *United States v. Fincher*, NMCM 86 0984, 1986 CMR LEXIS 2328, at *2-3 (N-M.C.M.R. July 22, 1986) (stating that, as the summarized portion of the record of trial concerned the defendant's attire, counsel status, advising the defendant of right to counsel, there was no challenge to the trial judge, and the defendant entered pleas, there was no prejudice to the defendant from the missing transcript); *United States v. Harmon*, NMCM 95 00270, 1997 CCA LEXIS 263, at *2-3 (N-M Ct. Crim. App. June 23, 1997) (where sentencing exhibits were missing from the record of trial the Court could review, pursuant to Article 66, the Court was required to take corrective action with regard to sentencing); *United States v. Austin*, No. NMCCA 200500132, 2007 CCA LEXIS 43, at *13-14 (N-M Ct. Crim. App. Feb. 28, 2007) (noting the defendant was not prejudiced by unrecorded 39(a) sessions as no witnesses testified during those sessions and the only missing portion of the record pertained to arguments of counsel); *United States v. McAllister*, No. NMCCA 201100085, 2011 CCA LEXIS 414, at *7-8 (N-M Ct. Crim. App. Dec. 29, 2011) (stating that a record of trial in which (1) the parties, the bailiff, and the court reporter were not identified on the record; (2) there was an inconsistency between the time announced by the military judge when he closed the court for deliberations on sentence, with the time recorded by the court reporter; and (3) portions of the sentencing argument of both counsel were reported

as being inaudible a total of sixteen times, did not amount to a substantial omission). In each of these events, either the missing testimony was brief, the defendant had pled guilty, there was no witness testimony, or the incompleteness related to sentencing only.

In this instance, a witness testified, there was nearly an hour of testimony, and it seems at least some of the testimony related to a delay in the United States asserting jurisdiction and the consequences of that delay: a shoddy investigation by a foreign country – a fundamental issue that impacted and permeated the entire trial.

6. Relief Requested

The testimony of SA [redacted] s missing and cannot be successfully reconstructed. That missing testimony is substantial, both qualitatively and quantitatively. Without that testimony, LT Becker cannot receive the appellate review to which he is entitled as a matter of law. Given these circumstances, LT Becker respectfully requests that the trial judge immediately release LT Becker from confinement and act in accordance with Rule for Court-Martial 1112(d)(3)(B) by dismissing, with prejudice, all charges and specifications in this case.

DATE: August 26, 2022

Respectfully submitted,

/s/ David P. Sheldon
David P. Sheldon
Civilian Appellate Defense Counsel
[redacted]

CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion was served electronically upon the Court and Trial Counsel on August 26, 2022.

/s/David P. Sheldon
David P. Sheldon
Civilian Appellate Defense Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **CRAIG BECKER** **LT** **USN**	**GOVERNMENT RESPONSE TO DEFENSE POST-TRIAL MOTION TO DISMISS**

The Court should deny the defense post-trial motion to dismiss for lack of verbatim transcript. The transcript is a verbatim record of trial in accordance with *United States v. Tate*, 2022 C.A.A.F. LEXIS 381 (C.A.A.F. 2022) and R.C.M. 1114. The accused's record of trial provides for appellate review under Article 66, U.C.M.J.

FACTS

The Government concurs with defense facts (1) – (5).

The Government avers the following:

1. On 11 December 2019 Naval Criminal Investigative Service Special Agent [redacted] was called to testify at an Article 39a session. The members were absent. Her testimony was not aimed at one single motion.

LAW

A verbatim transcript is required for any general court-martial where the adjudged sentence includes confinement for more than six months or dismissal. R.C.M. 1114(a)(1)(2019 MCM). A transcript need not be actually verbatim but will suffice when it is substantially verbatim. *United States v. Davenport*, 73 M.J. 373 (C.A.A.F. 2014). "To determine whether a transcript is verbatim, the threshold question is whether the omitted material was qualitatively or quantitatively substantial. "Insubstantial omissions from a record of trial . . . do not affect its characterization as a verbatim transcript". An omission is qualitatively substantial when it directly relates to the sufficiency of the government's evidence on the merits and cannot be

recalled with any degree of fidelity. Omissions are quantitatively substantial unless the "totality of the omissions in [the] record becomes so unimportant and so uninfluential when viewed in light of the whole record, that it approaches nothingness." *United States v. Tate*, 2022 CAAF Lexis, 381, 390 (C.A.A.F 2022)(internal citations omitted.)

Once a portion of the record trial is discovered missing the military judge may consider the remedy of reconstruction. Reconstruction is done with notes, collective memories, and input of the parties. Reconstruction is authorized per R.C.M. 1111(d)(3)(A).

RECONSTRUCTION DISCUSSION

The missing portion of the record of trial dates from 2019 but was discovered post-trial in 2022. Thus the remedy of a mistrial during trial or starting anew are both inappropriate and impractical. The lack of a verbatim Article 39a had no impact on the presentation of information and evidence to the panel at trial. All parties knew of and participated in the Article 39a and governed themselves accordingly at trial. The military judge made multiple rulings from the December 2019 Article 39a that can be the subject of appellate review. There was and is no prejudice to the accused as to the presentation of trial on the merits or at sentencing.

The testimony of SA [redacted] regarding the delay in the United States taking jurisdiction from the [redacted] is not an issue that can prejudice the accused now nor did it do so at trial. The accused was always subject to the Uniform Code of Military Justice and the issue of prosecution was one between two sovereigns. The United States did not create jurisdiction in a situation where there previously was none. Additionally, Special Agent [redacted] testified extensively at trial on the history of the investigation by [redacted] authorities and the relationship between the Naval Criminal Investigative Service and [redacted] law enforcement. Prior to trial these defense arguments focused heavily on speedy trial, not personal or subject matter jurisdiction. During trial the defense arguments focused on the quality of the investigation done by foreign law enforcement and called SA [redacted] to the stand.

There is nothing in SA [redacted] Article 39a testimony that would have qualitatively or substantially been directly related to the Government's evidence on the merits. SA [redacted] was never called to testify at trial on the merits by the Government. Her testimony at trial regarding

evidentiary steps taken by the [redacted] coordination between NCIS and the [redacted] and later minor investigative actions taken by NCIS was presented by the defense on their direct.

Additionally, her Article 39a testimony dealt as to investigation and jurisdiction dealt with issues squarely in a military judge's lane such as speedy trial, and jurisdiction, issues that would have not been presented to the members and are the subject of the military judge's ruling. When viewed in light of the whole record a minor portion of her testimony is insubstantial.

The testimony of pills and wine bottles was testified to at trial by percipient witnesses, both in the type of pills, the location of their discovery, and the purchase of the wine bottle. NCIS SA [redacted] had no direct knowledge of these acts and only knew of them via the investigation. The percipient witnesses – [redacted] Police Officer [redacted] about Ms. [redacted] drinking as told by the accused and then the wine receipt from the exchange and LtCol [redacted], USA and [redacted] about the pills – were the vehicles to introduce the evidence at trial. NCIS SA [redacted] could never have introduced any of the pill or wine evidence on the merits. Thus her testimony on these matters at a prior Article 39a were inconsequential and unimportant.

BURDEN

The burden of proof and persuasion rests on the Defense as the moving party. The standard as to any factual issue is preponderance of the evidence. RCM 905(c)(1).

EVIDENCE

The Government relies upon the reconstruction and notes as provided by the military judge on 15 August 2022.

RELIEF REQUESTED

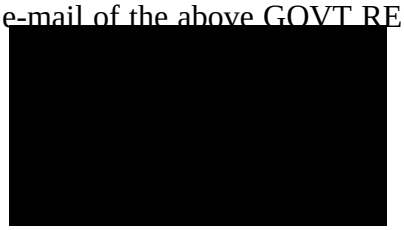
The Court deny the defense's motion to dismiss the charges and specifications for incomplete record of trial.

[redacted]

JASON L. JONES
CAPT, JAGC, USN

****

I certify that I have served a true copy via e-mail of the above GOVT RESPONSE on the Court and Defense Counsel on 30 August 2022.



JASON L. JONES
CAPT, JAGC, USN

REQUESTS

THERE ARE NO REQUESTS

NOTICES

NAVY-MARINE CORPS TRIAL JUDICIARY
SOUTHWEST JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

U N I T E D S T A T E S	
v.	**NOTICE OF APPEARANCE OF**
CRAIG BECKER	**JEREMIAH J. SULLIVAN, III**
LT/O-3 USN	**13 January 2019**

Please take notice that I am entering my General Appearance in the above captioned case. I am certified under 27(b) and have been previously sworn under 42(a) of the Uniform Code of Military Justice. I am licensed to practice law in the state of California. The following contact information is provided:

[redacted]

[redacted]
Jeremiah J. Sullivan, III

Appellate Exhibit II

[redacted] JUDICIAL CIRCUIT
NAVY-MARINE CORPS TRIAL JUDICIARY

UNITED STATES,	)	GENERAL COURT-MARTIAL
	)	
v.	)	GOVERNMENT'S WRITTEN
	)	NOTICE OF APPEAL
	)	UNDER R.C.M. 908
Craig BECKER,	)	
Lieutenant (O-3)	)	
U.S. Navy	)	

1. COMES NOW the United States pursuant to Article 62, UCMJ, and Rule for Courts-Martial 908, and informs this Court that the United States will seek an appeal in the above-captioned case. Director, Code 46, has authorized the appeal.

2. On December 9, 2019, at 0900 hours, this Court handed down a ruling that denied the Government's Motion to Admit Statements Due to Forfeiture by Wrongdoing and Waiver by Conduct, excluding evidence that is substantial proof of a fact material to the proceedings. Specifically, the Court ruled that several of Mrs. [redacted] statements were inadmissible hearsay not subject to an exception.

3. The Charge(s) and Specification(s) affected are:

a. Charge II, Specification 1, a violation of Article 128.

b. Charge III, sole Specification, a violation of Article 133.

4. The United States certifies that this appeal is not taken for the purposes of delay.

5. The evidence excluded by this Court's ruling is substantial proof of a

fact material in the proceeding. Specifically, the ruling prevents the Government from admitting statements by Mrs. [redacted] to law enforcement, friends, and family. These statements detail the Accused's strangulation, the subject of Charge II, and his emotional and physical abuse between August 2013 and October 2015, the subject of Charge III.

6. Under the rules, this Court's ruling is automatically stayed and no session of the court-martial may proceed except as to those charges and specifications not affected by the ruling.

7. As trial counsel, I will promptly forward to the Director, Appellate Government Division, Code 46, the information set forth under R.C.M. 908(b)(6).

8. The accused in this case is not in pretrial confinement.

[redacted]

PAUL T. HOCHMUTH
Lieutenant Commander, JAGC, U.S. Navy
Detailed Trial Counsel
1322 Patterson Ave SE, Suite S330
Washington Navy Yard, DC 20374
[redacted]

Certificate of Filing and Service

I certify that the original and required number of copies of the foregoing were delivered on 12 December 2019 to the Court at 0800 hours (Pacific Time), a time no more than 72 hours from the Military Judge's ruling that is the subject of this appeal. I also certify that a copy of the foregoing was delivered on 12 December 2019 to Commander John A. Guarino, JAGC, U.S. Navy.

[redacted]

PAUL T. HOCHMUTH
Lieutenant Commander, JAGC, U.S. Navy
Detailed Trial Counsel
1322 Patterson Ave SE, Suite S330
Washington Navy Yard, DC 20374
[redacted]

NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT

UNITED STATES

v.

CRAIG R. BECKER
LIEUTENANT USN

NOTICE OF APPEARANCE

Date: 11August 2022

1. Pursuant to Rule 5.1 of the Uniform Rules of Practice, Navy-Marine Corps Trial Judiciary (Uniform Rules) I, David Patrick Sheldon, hereby provide notice of my appearance on behalf of Lieutenant Craig R. Becker, USN. My office address, phone numbers, and e-mail address are: [redacted] I am an active member in good standing licensed to practice in the following jurisdictions: Montana, Maryland and District of Columbia.

2. I am aware of the standards of professional conduct required of counsel practicing in Navy-Marine Corps courts-martial as contained in JAG Instruction 5803.1E. I certify that I am not now, nor have I ever been, de-certified or suspended from practice in Navy-Marine Corps courts-martial by the Judge Advocate General of the Navy.

Respectfully submitted,

/s/

David P. Sheldon, Esq.

Certificate of Service

I hereby attest that a copy of the foregoing notice of appearance was served on the court and opposing counsel electronically on 11 August 2022.

/s/
David P. Sheldon

COURT RULINGS & ORDERS

DEPARTMENT OF THE NAVY
NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES	)	
	)	**CONSOLIDATED RULING ON**
	)	**DEFENSE MOTIONS TO EXCLUDE**
v.	)	**TESTIMONY OF TWO EXPERT**
	)	**WITNESSES: (1) PROFESSOR**
CRAIG R. BECKER	)	**[redacted] AND (2) DR.**
LIEUTENANT	)	**[redacted]**
U.S. NAVY	)	
	)	**22 FEBRUARY 2022**

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1. Nature of the Motion and Procedural Posture.

On 6 December 2021, the Defense filed two (2) separate motions to exclude the testimony of certain expert witnesses: (1) Professor [redacted] (Dr. [redacted], a purported expert in, inter alia, biomechanics, and (2) Dr. [redacted] (Dr. [redacted] a toxicologist. The Government opposed both motions. These motions were litigated at an Article 39(a) session on 19 January 2022 where the Court orally **DENIED** both. This written ruling now supplements the Court's oral ruling.

2. Issues Presented.

a. Did the government establish by a preponderance of the evidence that the testimony of the two witnesses in question is admissible?

3. Findings of Fact.[1]

a. On 8 October 2015, Mrs [redacted] fell to her death from the 7th floor of an apartment she shared with the accused, LT Becker.

b. [redacted] exited a bedroom window from the 7th floor [redacted] apartment on 8 October 2015.

[1] The Court finds the following facts by a preponderance of the evidence based upon the evidence submitted by the parties and adduced at the hearing.

Appellate Exhibit CXV
Page 1 of 11

c. The bedroom window opened to a slanted roof.

d. Witness Ms. [redacted] saw [redacted] exit the window and provided a description of the various body positions of [redacted] before and after the fall.

e. Ms. [redacted] witnessed [redacted] struggle to hold on before falling 3 stories to a balcony then continue her fall to the street below.

f. [redacted] left scratch marks on the side of the building near the window she exited.

g. [redacted] was pronounced dead at 2230 that same night.

h. The Accused was present in the apartment at the time [redacted] fell to her death.

i. The Accused informed [redacted] Law Enforcement that [redacted] consumed alcohol on the night in question.

j. An autopsy of [redacted] was conducted at the [redacted] morgue on 11 October 2011 by a Dr. [redacted] and Dr. [redacted]

k. Intracranial blood samples and bile samples were sent to the laboratory of Dr. [redacted] on 15 October. Long term preservatives and anti-coagulants were not used. Preservatives are typically used for long term storage.

l. Dr. [redacted] testing of the samples occurred 7 days after [redacted] death and were negative for alcohol.

m. [redacted] blood and bile were tested separately, both came back negative for alcohol.

n. [redacted] blood tested positive for [redacted] following her autopsy.

o. A Mr. [redacted] and Professor [redacted] produced a series of biomechanical reports pertaining to [redacted] fall.

p. Mr. [redacted] asserts in multiple documents that he is an expert in human biomechanics. He is a lecturer at the [redacted]

Appellate Exhibit CXV
Page 2 of 11

[redacted] and was retained as an expert by Investigating Judge Ms. Helen Titelion of the Court of First Instance of Hainaut to perform the expert analysis in this case.

q. The government does not intend to call Mr. [redacted] as an expert witness in this case.

r. The government does intend to call Professor [redacted] to testify and obtain expert opinions regarding the circumstances of [redacted] fall and the trajectory of her body when exciting the window and falling.

s. Mr. [redacted] and Professor [redacted] worked together in researching the fall and constructing the various reports and reconstructions pertaining to the fall.

t. As part of their assessment [redacted] and [redacted] reviewed the materials sent to them from the Investigating Judge.

u. [redacted] and [redacted] reviewed the medico-legal report prepared by a Dr. [redacted] and viewed autopsy photos.

v. [redacted] and [redacted] visited the site of the incident on multiple occasions and took a series of measurements and photographs. [redacted] and [redacted] also reviewed additional measurements provided by a Mr. [redacted]

w. [redacted] and [redacted] produced a series of extensive reports that detailed inter alia various stages of the fall and possible explanations for the fall before reaching conclusions.

x. [redacted] noted that the analysis in this case was complex because the fall was broken into at least three stages, sliding down the roof, an aerial stage to the balcony and an aerial stage to impact on the pavement.

y. [redacted] and [redacted] carried out mathematical modeling of different stages of the [redacted] fall.

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z. Professor [redacted] has an impressive and extensive curriculum vitae. Highlights of her CV include a PHD in Physical Therapy, Dean of the Faculty of Motor Sciences, Director of the Laboratory of functional Anatomy and Professor in the Laboratory of Functional Anatomy at [redacted] She is a professor of anatomy and research methodology. She has published over 9 books/book chapters, 132 peer-reviewed articles 150+ conference abstracts and 100+lectures. She is a member of the International Society of Biomechanics and Executive Officer of the International Society of Biomechanics. She has received several awards in the field of biomechanics.

aa. Although this case was unique to her, she has conducted other fall assessments as an expert in other cases.

bb. [redacted] and [redacted] used their background and experience to conduct various assessments and experiments before reaching their conclusions in this case.

cc. [redacted] provided testimony, insufficiently controverted by the defense (if at all), that she used a specific scientific methodology in reaching her conclusions in this case and that the methodology she used is one that is accepted in scientific field of biomechanics. [redacted] further articulated that she applied the methodology in a reliable fashion to the facts in this case.

dd. The Defense did not call as a witness or provide any reports from their biomechanics expert during the "Daubert" hearing.

ee. Dr. [redacted] has an extensive curriculum vitae that details her training and experience as a toxicologist. She worked as a pharmacist in [redacted] and France from 200-2007. She has been a full time pharmacist toxicologist since 2007. She possesses scientific degrees

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in pharmacy and toxicology. She was recognized as a toxicology expert and assigned by Judge Titelion to test the samples provided to her lab following [redacted] autopsy.

ff. Dr. [redacted] provided a detailed report describing the methodology and equipment used during her testing of the samples including the use of gas chromatology and immunochemical analysis. Dr. [redacted] determined through her testing that [redacted] samples were negative for alcohol but positive for [redacted].

gg. Dr. [redacted] noted that it is possible that [redacted] consumed a small amount of wine on the night in question that did not show up in testing.

hh. Dr. [redacted] used the standard testing methodology that is used to test body fluid samples throughout Western Europe. She noted that the samples provided to her were in proper condition.

ii. While use of preservatives is a "best practice", in this case, the absence of preservative in the blood samples tested would provide a low risk for a false negative result particularly in light of the second analysis performed on 2/9/16 which showed slight alcohol production due to fermentation. The slight alcohol fermentation noticed on the subsequent test indicates the reliability of and does not contradict the initial tests Dr. [redacted] performed.

jj. Testing cranial blood is not the best practice but is also not dispositive to create an inaccurate/invalid result.

kk. Neither [redacted] blood nor bile was positive for alcohol.

mm. Dr. [redacted] provided testimony, insufficiently controverted by the defense, that she used a specific scientific methodology in reaching her conclusions in this case and that the

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methodology she used in one that is accepted in scientific field of biomechanics. [redacted] further articulated that she applied the methodology in a reliable fashion to the facts in this case.

mn. The Defense did not call as a witness nor provide any reports from their toxicology expert during the "Daubert" hearing.

4. Statement of the Law.

In accordance with MRE 702, Testimony by Experts Witnesses, a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) The testimony is based on sufficient facts or data;

(c) The testimony is the product of reliable principles and methods; and

(d) The expert has reliably applied the principles and methods to the facts of the case.

The requirements of MRE 702(a) through (d) are stated in the conjunctive, and a party seeking admission of expert testimony must meet all of the rule's requirements. Preliminary questions concerning the availability, qualifications, relevance, propriety, and necessity of expert testimony are matters which must be determined by the military judge. MRE 104(a). In *United States v. Houser*, 36 M.J. 392 (C.A.A.F. 1993), the CAAF set out six factors that a judge should use to determine the admissibility of expert testimony. CAAF continues to apply the *Houser* factors, which are similar to the requirements of MRE 702:

1. Qualified Expert. To give expert testimony, a witness must qualify as an expert by virtue of his or her "knowledge, skill, experience, training, or education." *See* MRE 702.

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2. Proper Subject Matter. Expert testimony is appropriate if it would be "helpful" to the trier of fact. It is essential if the trier of fact could not otherwise be expected to understand the issues and rationally resolve them. *See* MRE 702.

3. Proper Basis. The expert's opinion may be based on admissible evidence "perceived by or made known to the expert at or before the hearing" or inadmissible hearsay if it is "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject. . . ." The expert's opinion must have an adequate factual basis and cannot be simply a bare opinion. *See* MREs 702 and 703.

4. Relevant. Expert testimony must be relevant. *See* MRE 401.

5. Reliable. The expert's methodology and conclusions must be reliable. *See* MRE 702.

6. Probative Value. The probative value of the expert's opinion and the information comprising the basis of the opinion must not be substantially outweighed by any unfair prejudice that could result from the expert's testimony. *See* MRE 403.

An expert's qualifications may be established by a) Degrees attained from educational institutions; b) Specialized training in the field; c) Witness has maintained licensure in a particular field and has done so (if applicable) for a sufficient period of time; d) Teaching experience in the field; e) Witness publications; f) Membership in professional organizations, honors or prizes received, previous expert testimony. *See e.g. United States v. Garries*, 19 M.J. 845 (AFCMR 1985), *United States v. Mustafa,* 22 M.J. 165 (CMA 1986).

In accordance with MRE 703, an expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. If the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the members of a court-martial

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only if the military judge finds that their probative value in helping the members evaluate the opinion substantially outweighs their prejudicial effect.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993):, the Supreme Court held that nothing in the Federal Rules indicates that "general acceptance" is a precondition to admission of scientific evidence. The rules assign the task to the judge to ensure that expert testimony rests on a reliable basis and is relevant. The judge assesses the principles and methodologies of such evidence pursuant to MRE 104(a).

The role of the judge as a "gatekeeper" leads to a determination of whether the evidence is based on a methodology that is "scientific," and therefore reliable. The judgment is made before the evidence is admitted, and entails "a preliminary assessment of whether the reasoning or methodology is scientifically valid." Trial court possesses broad discretion in admitting expert testimony with rulings tested only for abuse of discretion. *General Electric Co. v. Joiner*, 118 S. Ct. 512 (1997); *see also United States v. Kaspers*, 47 M.J. 176 (C.A.A.F. 1997).

In *Daubert*, the Supreme Court discussed a nonexclusive list of factors to consider in admitting scientific evidence, which included the *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), "general acceptance" test as a separate consideration:

(1) Whether the theory or technique can be and has been tested;

(2) Whether the theory or technique has been subjected to peer review and publication;

(3) Whether the known or potential rate of error is acceptable;

(4) Whether the theory/technique enjoys widespread acceptance.

In accordance with MRE 704, an expert opinion is not objectionable simply because it embraces an ultimate issue. However, ultimate-issue opinion testimony is not automatically admissible. Opinion must be relevant and helpful as determined under MRE 401-403 and 702.

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The probative value of the expert's opinion and the information comprising the basis of the opinion must not be substantially outweighed by any unfair prejudice that could result from the expert's testimony. See MRE 403.

5. Analysis and Conclusions of Law.

a. Professor [redacted]

In this case, the Government intends to call Professor [redacted] and have her testify regarding her opinions on the body position of [redacted] when she exited the window, how she exited the window, her body positions during the fall, how she left marks on the roof and the trajectory of her fall.

Professor [redacted] is qualified to testify as an expert on these matters by virtue of her experience, training, education and skill. She is an experienced professor of biomechanics, a member of esteemed biomechanical organizations and has previously conducted scientific analysis of falls. Professor [redacted] along with Mr. [redacted] analyzed the sufficient facts provided to her and visited the scene of the alleged offense to take scientific and mathematical measurements. Professor [redacted] applied the extensive facts provided to her those mathematical measurements, and scientific data to the biomechanical methodology that she is trained on and experienced on. The methodology she used in this case in one that is accepted amongst her biomechanical science peers.

Professor [redacted] testimony will assist the trier of fact in understanding the evidence in this case. The case involves a fall from a 7th story window with an intervening crash of a balcony below before [redacted] final fall to the street. Scientific testimony regarding likely body position while exiting the window and the trajectory of the fall will be helpful to the trier of fact. The Government indicates that Professor [redacted] will not testify regarding her ultimate opinion of

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how [redacted] exited the window, though that would normally be something that an expert such as Professor [redacted] could testify to if the parameters of MRE 403 were met.

While Professor [redacted] passes the "Daubert Test" to testify as an expert. The government must still provide all of their exhibits and visual aids, particularly any reconstruction photos or videos that they intend to use during her testimony so that an MRE 403 balancing test can be completed.

b. Dr. [redacted]

In this case, the Government intends to call Dr. [redacted] and have her testify regarding the results of toxicology tests she performed on [redacted] blood and bile.

Dr. [redacted] is qualified to testify as an expert on these matters by virtue of her experience, training, education and skill. She is an experienced pharmacist and toxicologist, a member of esteemed toxicology organizations and has previously conducted numerous analysis of body fluids such as blood and bile. Dr. [redacted] was provided the samples days after [redacted] autopsy and conducted the testing using a scientific methodology and scientific equipment that is generally accepted in the scientific toxicology community. Dr. [redacted] refuted the Defense's assertions regarding how the nonuse of preservatives and how the use of certain containers used in this case, while perhaps not a best practice, did not impact the results in this case. The Defense is free to challenge Dr. [redacted] with that evidence at trial or call their own expert to challenge her. Dr. [redacted] stood by the testing results and scientific methodology used and convinced this court of the reliability of her testimony.

The results of the toxicology testing will be helpful to the trier of fact in determining the cognitive and [redacted] at the time of the incident. The probative value of her testimony is not substantially outweighed by the danger of unfair prejudice.

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6. Order.

1. The Defense motion to exclude the testimony of Professor [redacted] as an expert consultant in the field of biomechanics is hereby **DENIED**.

2. The Defense motion to exclude the testimony of Dr. [redacted] as an expert in the field of toxicology is hereby **DENIED**.

So **ORDERED** this 22nd day of February, 2022.

[redacted]

S. F. KEANE
Colonel, U.S. Marine Corps
Military Judge

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DEPARTMENT OF THE NAVY
NAVY-MARINE CORPS TRIAL JUDICIARY
[redacted] JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES	)	
	)	**RULING AND SUPPLEMENT TO**
	)	**RECONSTRUCTION OF SA [redacted]**
	)	**TESTIMONY FROM DECEMEBER**
	)	**2019 39A SESSION, DEFENSE**
v.	)	**MOTION TO DISMISS AND**
	)	**DEFENSE MOTION TO RECUSE**
CRAIG R. BECKER	)	
LIEUTENANT	)	
U.S. NAVY	)	
	)	**30 AUGUST 2022**

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1. Nature of Ruling and Findings of Fact[1].

On 11 December 2019 from 09:28:25 until 10:25:30, (58 minutes), Special Agent [redacted] was called to testify during an Art 39a session in this case. The civilian court reporter detailed to the session, Mr. [redacted] failed to properly record and/or maintain the audio recording for this fifty-eight minute portion of the 39a. The civilian reporter, Mr. [redacted] did maintain excellent notes for the session (Enclosure (1)). The Military Judge for the session, CAPT A.C. Rugh, also maintained detailed notes for the session (enclosure (2) - sealed for review by appellate judiciary only).

Defense Counsel and Government Counsel were notified of the missing audio on two occasions 16 June 2022 and 14 July 2022.[2] Counsel were sent the court reporter notes and asked to submit their notes from the session (enclosure (3)). Government Counsel submitted a summary of their notes (enclosure (4)). Defense Counsel did not respond to either the notification of the missing audio in June or the military judge's request for notes in July.

SA [redacted] testified on several other occasions during the trial, including trial on the merits before the trier of fact, and much of her testimony in other sessions regarded the same subject matter covered on 11 December 2019 and described in the detailed notes. The other instances of SA [redacted] sworn testimony include SA [redacted] verbatim transcribed testimony during Art 39a sessions on 2 May 2019, 1 October 2019, 20 January 2022 and during the course of the trial on the merits on 13 April 2022 and again on 26 April 2022 (on the merits). The summarized transcript (457-462) is consistent with the detailed notes of the court reporter, government counsel summary, the notes of CAPT Rugh and CAPT Rugh's findings of fact found in rulings (AE 84, 85, 86). The summarized transcript reconstructed testimony pertaining to SA [redacted]

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[1] The court makes findings of fact by a preponderance of the evidence.
[2] Defense counsel CDR Guarino apparently previously notified the court-reporter of the missing audio on 9 May 2022. (Enclosure 5).

11 December 2019 testimony was created by court-reporter Ms. [redacted] a contracted court-reporter who is a trained and experienced prior-service military court-reporter now employed as a court-reporter in her capacity as a civilian contractor. This summarized transcript of the 11 December 2019 session was emailed to counsel on 15 August 2022 for review and comment. The government concurred with the summarized transcript.(Enclosure 6). Though the Defense elected not to respond to earlier request for input, after seeing the reconstructed transcript, the Defense now requested and was granted an extension to respond. The Defense eventually non-concurred with the transcript without providing significant substantive evidence. The computer disc from the Art 39a session is enclosure (7). Defense post-trial delay request and approval is enclosure (8).

Additional amplifying information regarding SA [redacted] testimony from CAPT Rugh's notes from the 11 December 2019 session are enclosed CAPT Rugh's notes are thoroughly consistent with the summarized transcript, the notes of the court reporter and the submission of government counsel. The complete notes at enclosure 2 are sealed for the appellate judiciary's review.

2. Statement of the Law.

The recent case of U.S. v. Tate, 2022 CAAF LEXIS 381 (C.A.A.F. 2022), outlines in detail the steps that are available and required when a portion of a transcript recording is unavailable. The Tate case involved the loss of a full day of actual trial testimony during the sentencing portion of the trial.

A verbatim transcript must include "all proceedings including sidebar conferences, arguments of counsel, and rulings and instructions by the military judge." R.C.M. 1103(b) Discussion (MCM 2016 ed.). A transcript need not be actually verbatim but will suffice when it is substantially verbatim. U.S. v. Davenport, 73 M.J. 373 (C.A.A.F. 2014) at 376 (citing U. S. v. Henry, 53 M.J. 108, 110 (C.A.A.F. 2000)); U.S. v. Gray, 7 M.J. 296, 297 (C.M.A. 1979). Tate at 8.

"In order to determine whether a transcript is verbatim, the threshold question is whether the omitted material was qualitatively or quantitatively substantial. U.S. v. Lashley, 14 M.J. 7, 9 (C.M.A. 1982) ("Insubstantial omissions from a record of trial . . . do not affect its characterization as a verbatim transcript." (quoting U.S. v. McCullah, 11 M.J. 234, 236-37 (C.M.A. 1981)); *see also* U.S. v. Donati, 14 C.M.A. 235, 34 C.M.R. 15 (1963). An omission is qualitatively substantial when it directly relates to the sufficiency of the government's evidence on the merits and cannot be recalled with any degree of fidelity. Lashley, 14 M.J. at 9. Omissions are quantitatively substantial unless the "totality of the omissions in [the] record becomes so unimportant and so uninfluential when viewed in light of the whole record, that it approaches nothingness." U.S. v. Nelson, 3 C.M.A. 482, 487, 13 C.M.R. 38, 43 (1953)." Tate at 8-9.

In accordance with RCM 112(d)(3)(A), a military judge may use a common remedy for lost recordings by reconstructing the missing portion of the record. Tate at 12.The military judge reconstructs or recreates missing recordings with the assistance of the parties through notes and

memories. Tate at 12. The judge should reconstruct the testimony with reasonable certainty as to its substance. Id.

A military judge's decision not to recuse himself is reviewed for abuse of discretion. An accused has a constitutional right to an impartial judge. There is a strong presumption that a judge is impartial, and a party seeking to demonstrate bias must overcome a high hurdle. Accordingly, a moving party has the burden of establishing a reasonable factual basis for disqualification. More than a mere surmise or conjecture is required. Disqualification of a military judge may occur for either the appearance of bias or actual bias. R.C.M. 902(a) and (b). The appearance standard is designed to enhance public confidence in the integrity of the judicial system. The rule also serves to reassure the parties as to the fairness of the proceedings. United States v. Hoffmann, 2018 CCA LEXIS 326, (N-M.C.C.A. July 9, 2018).

The test under R.C.M. 902(a), for evaluating a military judge's decision not to recuse himself is an objective standard concerning whether there was any conduct that would lead a reasonable person knowing all the circumstances to the conclusion that the judge's impartiality might reasonably be questioned. While performing that test, appellate courts consider the facts and circumstances through an objective lens: not in the mind of the military judge himself, but rather in the mind of a reasonable person who has knowledge of all the facts. Thus, a judge's statements concerning his intentions and the matters upon which he will rely are not irrelevant to the inquiry. Id.

Under RCM 902(b), five non-waivable grounds are listed, directing that a military judge should be disqualified if he or she: (1) has a personal bias or prejudice about a party or personal knowledge of "disputed" facts in the case; (2) has acted as counsel, investigating officer legal officer, SJA, or convening authority for any of the offenses; (3) has been or will be a witness in the case, was the accuser, forwarded charges with recommendations, or expressed opinion about the accused's guilt; (4) is not qualified under RCM 502(c) or not detailed under RCM 503(b); or (5) is personally or has a family member who is a party to the proceeding, has a financial or other interest in the outcome of the proceeding, or likely to be a "material" witness.

The ABA Model Code of Judicial Conduct states "A judge shall hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.11 or other law". Rule 2.7. Responsibility to Decide. In the accompanying comment section to Rule 2.7, the ABA Code states:

> Judges must be available to decide the matters that come before the court. Although there are times when disqualification is necessary to protect the rights of litigants and preserve public confidence in the independence, integrity, and impartiality of the judiciary, judges must be available to decide matters that come before the courts. Unwarranted disqualification may bring public disfavor to the court and to the judge personally. The dignity of the court, the judge's respect for fulfillment of judicial duties, and a proper concern for the burdens that may be imposed upon the judge's colleagues require that a judge not use disqualification to

avoid cases that present difficult, controversial, or unpopular issues"

ABA Model Code of Judicial Conduct Rule 2.7 (Comment Section).

3. Analysis and Conclusions of Law

a. The Reconstructed Transcript of SA [redacted] 58 Minute Dec 2019 Art 39a Testimony

In this case, unlike Tate, the missing portion of the record pertains to a relatively short portion of an Art 39a session on 11 December 2019. Conversely, Tate involved an entire day of actual trial testimony. In this case, the substance of SA [redacted] interlocutory testimony was recorded in detail by the court reporter notes. Those notes were corroborated in detail by the military judge CAPT Rugh's notes. In contrast to Tate, a summarized transcript recreating the missing portion has been created.

The substance to what SA [redacted] testified to on 11 December 2019 were generally not matters that she was a percipient witness to nor factual matters pertaining to the night of Mrs. [redacted] death. Most of what she testified to on 11 December 2019 was not reasonably in dispute by the parties. SA [redacted] testified generally regarding things that other witnesses had told her including: that Ms. [redacted] was the Accused's girlfriend, that the Accused retrieved pills from LtCol [redacted], etc. All these matters were testified to on other occasions, not solely by SA [redacted] hearsay statements but by actual percipient witnesses.

SA [redacted] also testified to matters such as her role as liaison and eventually lead agent. SA [redacted] testified about the [redacted] jurisdiction and ultimately the US taking jurisdiction of the case and when. She has testified to these exact things, consistently, and subject to cross-examination, during other sessions in the court-martial. She also testified to the fact that NCIS did a phone extraction and other forensic activities as explained in the notes and summary though she did not personally do these things. SA [redacted] testified to certain things that [redacted] law enforcement did and what her role as liaison was, again matters covered consistently during her testimony at other times in the case. The matters SA [redacted] testified to on Dec 2019 were covered by her at other sessions and/or covered by witnesses and/or evidence more probative for the issue at hand.[3] The court finds that SA [redacted] testimony focused on things she was aware of other people doing and saying and situations documented elsewhere in the record. In the context of the entire trial and the other instances where SA [redacted] testified, her fifty-eight minutes of testimony on 11 December 2019 were not particularly substantial and were uninfluential under the totality of the circumstances. Because the matters from the fifty-eight minute session on 11 December 2019 were a) either not seriously disputed or were covered during the other sessions where SA [redacted] testified and/or b) were covered by more probative witnesses/ evidence and/or c) were independently corroborated by other testimony/evidence. For

[3] For instance, SA [redacted] was questioned regarding what an "MLAT" is. SA [redacted] is not a practicing international law attorney and is not the best qualified person to discuss the meaning and substance of international legal agreements.

these reasons, applying the tests governing whether the omission is qualitatively substantial, and whether it is quantitatively substantial, the Court is compelled to conclude that the matters discussed during the December 11, 2019 testimony of SA [redacted] were neither qualitatively nor quantitatively substantial. The audio recording of this fifty-eight minutes is unfortunately omitted, but the "totality" of this particular omission in this record truly becomes unimportant and uninfluential when viewed in light of the whole record. U.S. v. Nelson, 3 C.M.A. 482, 487, 13 C.M.R. 38, 43 (1953)." Tate at 9.

Alternatively, the summarized transcript of the fifty-eight minute period of interlocutory testimony accurately depicts the 39a session involving SA [redacted] testimony on 11 December 2019. The summary is derived from detailed court-reporter notes and corroborated by the military judge's notes. The summary is also consistent with the other instances where SA [redacted] testified. Government counsel concurs with the reconstruction. This military judge was not present at the session on 11 December 2019 over which a different military judge presided, but after carefully reviewing all the relevant evidence, the Court finds that the substance of the missing recording has been captured in the summarized transcript. The transcript reconstructed by the court-reporter accurately reflects the notes of the court-reporter.[4] Both the notes of the court-reporter and court-reporter reconstructed transcript are consistent with the detailed notes of the military judge who presided over the Dec 2019 Art. 39a session, CAPT Rugh, the findings of fact that CAPT Rugh made in his rulings, and subsequent testimony of SA [redacted] throughout the remainder of the trial which was subject to cross-examination for any inconsistency. The Defense did not respond to the military judge's June 2022 notice of the missing audio nor the July 2022 request for input. Instead the Defense waited until the transcript was created to non-concur without submitting substantive or compelling evidence. The Defense declined to respond

[4] The Defense asserted in their motion that the reconstruction was the product of the military judge's "imagination". Importantly, the military judge did not draft the reconstruction, the court-reporter Ms. [redacted] independently did so, and thus the defense assertion is inaccurate. The reconstruction was not based on the military judge's "imagination". Court reporters such as Ms. [redacted] are trained to construct summarized transcripts and she did so independently in this case based on the notes of court-reporter Mr. [redacted] The reconstruction is confirmed by the notes of CAPT Rugh and subsequent recorded testimony of the witness. The reconstruction was concurred to by Government counsel. Inaccurate assertions that the reconstructed transcript was the product of the military judge's imagination made after failing to respond to the military judge's requests for notes and input is similar to certain earlier instances in this case where defense counsel made similar expressions when the Defense disagreed with a ruling or when a trial tactical decision did not go the way the Defense hoped. Notably, both Col Keane and CAPT Rugh made several close rulings during the case in favor of the Defense and over the vehement objections of the Government. Nevertheless, counsel's comments regarding rulings are arguably somewhat understandable in an emotionally charged case with serious consequences in an effort the do what one can to assist one's client. Perhaps the use of these types of comments in this case are an attempt to explain the results of tactical decisions that did not go as planned for the benefit of their client's evaluation of their performance. Or perhaps they are considered by the counsel making them to be a bit of harmless hyperbole. In any event, such techniques are probably not representative of the practice of law that Navy-Marine Corps trial practitioners should aspire to. For clarities sake, it is important that counsel attempt to remain detached from the emotional aspects of a case so that focus remains on the law and facts. To be sure, the Defense was thorough, competent and effective in defending their client in a difficult case faced with significant amounts of government evidence before an astute and focused members panel evaluating the evidence. Their trial advocacy was quite impressive. I, the military judge, have presided over many high profile cases with some resulting in convictions and others in acquittal or dismissal of charges. I certainly understand the emotional aspects of a case for participants and how that may contribute to the things they say. I have remained objective, impartial and committed to fairness to all parties. After reviewing the court-reporter reconstruction, the court-reporter notes, and CAPT Rugh's notes, I am objectively convinced of the accuracy and completeness of the reconstructed transcript and ratify it as accurate and substantially complete.

to requests for submission and then objected after the reconstruction was created. Of course, the Defense is not required to submit anything and the Defense does not have any burden at all in this matter. The Defense in this case elected not to offer submissions when that option was initially provided. The court is not persuaded that there is any significant inaccuracy in the reconstructed transcript. The evidence overwhelmingly shows that the reconstructed transcript is indeed both accurate and substantially complete.

b. Motion to Dismiss and Recusal

The Defense moved for recusal of the military judge because they expect him to be a witness in the case. In this case, there is no reasonable expectation that the military judge would ever be a witness in this case. The military judge did not preside over the Art. 39a session in question. The missing testimony from the December 2019 Art 39a session in question is not qualitatively or quantitatively substantial under a totality of the circumstances particularly when viewed in light of the entire record of trial. The bulk of SA [redacted] testimony was hearsay and nevertheless covered by her and other first-hand percipient witnesses throughout the trial in subsequent Art.39a sessions and most importantly during the actual trial on the merits.

Alternatively, the reconstructed transcript has been recreated with reasonable certainty as to the substance of SA [redacted] testimony. The transcript was reconstructed by the court-reporter based on court reporter [redacted] notes from the Art 39a session. The notes and reconstruction are corroborated by CAPT Rugh's notes, the witness's subsequent testimony and the testimony of other witnesses. No reasonable basis for recusal exists under RCM 902 or appellate case law. Instead, since no basis for recusal exists, the military judge has a duty to continue to preside and make rulings.

Since the missing testimony is neither qualitatively not quantitatively substantial, and because the reconstructed transcript has been recreated with substantial certainty, dismissal of the charges is unnecessary and would constitute a miscarriage of justice.

4. Order.

The U.S. v. Becker transcript, which includes a summarized transcript of SA [redacted] relatively brief interlocutory testimony at an Art. 39a session on December 11, 2019, is substantially verbatim as required. Alternatively, the remedy of reconstructing the missing verbatim recording for the fifty-eight minute session of an Art. 39a session is sufficient.

The Defense motion for recusal of the military judge is not granted.
The Defense motion to dismiss is not granted.

So **ORDERED** this 31st day of August 2022 [redacted]

S. F. KEANE
Colonel, U.S. Marine Corps
Military Judge

STATEMENT OF TRIAL RESULTS

STATEMENT OF TRIAL RESULTS

SECTION A - ADMINISTRATIVE

1. NAME OF ACCUSED (last, first, MI)	2. BRANCH	3. PAYGRADE	4. DoD ID NUMBER
BECKER, CRAIG R.	Navy	O-3E	[redacted]

5. CONVENING COMMAND	6. TYPE OF COURT-MARTIAL	7. COMPOSITION	8. DATE SENTENCE ADJUDGED
[redacted]	General	Members	Apr 30, 2022

SECTION B - FINDINGS

SEE FINDINGS PAGE

SECTION C - ADJUDGED SENTENCE

9. DISCHARGE OR DISMISSAL	10. CONFINEMENT	11. FORFEITURES	12. FINES	13. FINE PENALTY
Dismissal	Life w/ parole	N/A	N/A	N/A

14. REDUCTION	15. DEATH	16. REPRIMAND	17. HARD LABOR	18. RESTRICTION	19. HARD LABOR PERIOD
None	Yes ○ No ◉	Yes ○ No ◉	Yes ○ No ◉	Yes ○ No ◉	N/A

20. PERIOD AND LIMITS OF RESTRICTION

N/A

SECTION D - CONFINEMENT CREDIT

21. DAYS OF PRETRIAL CONFINEMENT CREDIT	22. DAYS OF JUDICIALLY ORDERED CREDIT	23. TOTAL DAYS OF CREDIT
831	0	831 days

SECTION E - PLEA AGREEMENT OR PRE-TRIAL AGREEMENT

24. LIMITATIONS ON PUNISHMENT CONTAINED IN THE PLEA AGREEMENT OR PRE-TRIAL AGREEMENT

There was no plea agreement.

SECTION F - SUSPENSION OR CLEMENCY RECOMMENDATION

25. DID THE MILITARY JUDGE RECOMMEND SUSPENSION OF THE SENTENCE OR CLEMENCY?		26. PORTION TO WHICH IT APPLIES	27. RECOMMENDED DURATION
	Yes ○ No ◉		

28. FACTS SUPPORTING THE SUSPENSION OR CLEMENCY RECOMMENDATION

SECTION G - NOTIFICATIONS

29. Is sex offender registration required in accordance with appendix 4 to enclosure 2 of DoDI 1325.07?	Yes ○ No ◉
30. Is DNA collection and submission required in accordance with 10 U.S.C. § 1565 and DoDI 5505.14?	Yes ◉ No ○
31. Did this case involve a crime of domestic violence as defined in enclosure 2 of DoDI 6400.06?	Yes ◉ No ○
32. Does this case trigger a firearm possession prohibition in accordance with 18 U.S.C. § 922?	Yes ◉ No ○

SECTION H - NOTES AND SIGNATURE

33. NAME OF JUDGE (last, first, MI)	34. BRANCH	35. PAYGRADE	36. DATE SIGNED	38. JUDGE'S SIGNATURE
Keane, Stephen F.	Marine Corps	O-6	Apr 30, 2022	KEANE.STEPHEN.FRANCIS.[redacted] Digitally signed by KEANE.STEPHEN.FRANCIS.[redacted] Date: 2022.04.30 07:51:40 -07'00'

37. NOTES

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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 I	118	Specification:	**Not Guilty**	Guilty			118-A-
		Offense description	Premeditated murder				
Charge II	128	Specification 1:	**Not Guilty**	W/D			128-B-
		Offense description	Battery				
		Withdrawn and Dismissed	Withdrawn and dismissed w/o prejudice.				
		Specification 2:	**Not Guilty**	Guilty			128-B-
		Offense description	Battery				
Charge III	133	Specification:	**Not Guilty**	Dismissed			133-D-
		Offense description	Conduct unbecoming generally				
		Withdrawn and Dismissed	Dismissed w/o prejudice.				
Charge IV	134	Specification 1:	**No plea entered**	Dismissed			134-Z-
		Offense description	General article: violation of federal law				
		Withdrawn and Dismissed	Dismissed w/o prejudice.				
		Specification 2:	**No plea entered**	Dismissed			134-Z-
		Offense description	General article: violation of federal law				
		Withdrawn and Dismissed	Dismissed w/o prejudice.				
		Specification 3:	**No plea entered**	Dismissed			134-Z-
		Offense description	General article: violation of federal law				
		Withdrawn and Dismissed	Dismissed w/o prejudice.				
Additional Charge	133	Specification 1:	**Not Guilty**	Guilty			133-D-
		Offense description	Conduct unbecoming generally				
		Specification 2:	**Not Guilty**	Guilty			133-D-
		Offense description	Conduct unbecoming generally				

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CONVENING AUTHORITY'S ACTIONS

POST-TRIAL ACTION

SECTION A - STAFF JUDGE ADVOCATE REVIEW

1. NAME OF ACCUSED (LAST, FIRST, MI)	2. PAYGRADE/RANK	3. DoD ID NUMBER
BECKER, CRAIG, R.	O3	[redacted]

4. UNIT OR ORGANIZATION	5. CURRENT ENLISTMENT	6. TERM
EOD Mobile Unit 12 Detachment Newport, RI	25 MAY 1999	INDEF

7. CONVENING AUTHORITY (UNIT/ORGANIZATION)	8. COURT-MARTIAL TYPE	9. COMPOSITION	10. DATE SENTENCE ADJUDGED
[redacted]	General	Members	30-Apr-2022

Post-Trial Matters to Consider

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

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

Accused submitted a request for clemency to the Convening Authority (CA) on 26 May 2022 and a supplemental request on 29 June 2022. Accused requested that he receive six-for-one sentencing credit for confinement served [redacted] and three-for-one sentencing credit for time spent under house arrest. The accused further requested that the automatic forfeitures be deferred and waived for a period not to exceed months from the date of the Entry of Judgment. Lastly, the accused requested that he be allowed to initially serve his sentence at the Naval Consolidated Brig, Chesapeake, VA, until his appeal has been decided.

Victim Representative was contacted on 25 July 2022 and afforded an opportunity to provide matters for the convening authority's consideration; however, Victim Representative did not provide a response as of 4 August 2022. The 10-day waiting period required by RCM 1106A has lapsed.

24. Convening Authority Name/Title	25. SJA Name
B.J. Collins Rear Admiral, U.S. Navy Commander [redacted]	CDR [redacted] JAGC, USN Staff Judge Advocate Navy Region Europe, Africa, Central

26. SJA signature	27. Date
[redacted]	Aug 4, 2022

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.]

Upon review, I take the following action in the General Court-Martial case of United States v. LT Craig Becker, USN:
- Waiver of all automatic forfeitures for a period of six months, to be paid to the dependent daughter of the accused, Miss [redacted]
- AND NO OTHERS

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:

Waived forfeitures are to be paid directly to the dependent daughter of the accused, Miss [redacted]

30. Convening Authority's signature	31. Date
[redacted]	5AUG2022

32. Date convening authority action was forwarded to PTPD or Review Shop. 8AUG2022

ENTRY OF JUDGMENT

ENTRY OF JUDGMENT

SECTION A - ADMINISTRATIVE

1. NAME OF ACCUSED (LAST, FIRST, MI)	2. PAYGRADE/RANK	3. DoD ID NUMBER
BECKER, CRAIG R.	O3	[redacted]

4. UNIT OR ORGANIZATION	5. CURRENT ENLISTMENT	6. TERM
EOD MOBILE UNIT 12 DETACHMENT NEWPORT, RI	25-May-1999	INDEFINITE

7. CONVENING AUTHORITY (UNIT/ORGANIZATION)	8. COURT-MARTIAL TYPE	9. COMPOSITION	10. DATE COURT-MARTIAL ADJOURNED
[redacted]	General	Members	30-Apr-2022

SECTION B - ENTRY OF JUDGMENT

****MUST be signed by the Military Judge (or Circuit Military Judge) within 20 days of receipt****

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)]

Charge I: Violation of the UCMJ, Article 118
Plea: Not Guilty Finding: Guilty
Specification: Premeditated murder on or about 8 October 2015.
Plea: Not Guilty Finding: Guilty

Charge II: Violation of the UCMJ, Article 128
Plea: Not Guilty Finding: Guilty
Specification 1: Battery on or about 9 August 2013.
Plea: Not Guilty Finding: Withdrawn and dismissed without prejudice.
Specification 2: Battery on or about 8 October 2015.
Plea: Not Guilty Finding: Guilty

Charge III: Violation of the UCMJ, Article 133
Plea: Not Guilty Finding: Dismissed without prejudice.
Specification: Conduct unbecoming generally - physically and emotionally abusing his wife - on divers occasions between on or about 2 August 2013 and on or about 8 October 2015.
Plea: Not Guilty Finding: Dismissed without prejudice.

Charge IV: Violation of the UCMJ, Article 134
Plea: No plea entered Finding: Dismissed without prejudice
Specification 1: Violation of federal law - Obstructing justice on divers occasions on or about 8 August 2015.
Plea: No plea entered Finding: Dismissed without prejudice
Specification 2: Violation of federal law - Obstructing justice on divers occasions on or about 8 August 2015.
Plea: No plea entered Finding: Dismissed without prejudice
Specification 3: Violation of federal law - Obstructing justice on divers occasions on or about 9 August 2015.
Plea: No plea entered Finding: Dismissed without prejudice

Additional Charge: Violation of the UCMJ, Article 133
Plea: Not Guilty Finding: Guilty
Specification 1: Conduct unbecoming generally on divers occasions on or about 8 October 2015, wrongfully impersonating his spouse.
Plea: Not Guilty Finding: Guilty
Specification 2: Conduct unbecoming generally on divers occasions on or about 8 October 2015, wrongfully mislead investigators.
Plea: Not Guilty Finding: Guilty

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.

The Members (unitary sentencing) adjudged the following sentence:
- Dismissal, Confinement for life with the possibility of parole.

Plea Agreement:
- There was no plea agreement

Convening Authority:
Upon review, I take the following action in the General Court-Martial case of United States v. LT Craig Becker, USN:
- Waiver of all automatic forfeitures for a period of six months, to be paid to the dependent daughter of the accused, Miss [redacted]

Pretrial confinement credit: 831 days

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 Convening Authority waived automatic forfeitures for a period of six months, effective on the date the entry of judge is signed, to be paid directly to the daughter of the accused, Miss [redacted]

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

N/A

15. Judge's signature:	16. Date judgment entered:
KEANE.STEPHEN.FRANCIS.[redacted] Digitally signed by KEANE.STEPHEN.FRANCIS[redacted] Date: 2022.08.31 15:47:33 -07'00'	Aug 31, 2022

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.

- On 11 May 22, Defense Counsel requested 20 days delay to submit matters by LT Becker. This request was approved on 13 May 22.
- On 23 May 22, Defense Counsel requested 30 days delay to submit matters by LT Becker. This request was approved on 25 May 22.
- On 19 Aug 22, Defense Counsel requested 7 days delay from the military judge to submit comments on the 11 Dec 19 summarized portion of the transcript. This request was approved and delay excluded on 19 Aug 22.

18. Judge's signature:	19. Date judgment entered:
KEANE.STEPHEN.FRANCIS.[redacted] Digitally signed by KEANE.STEPHEN.FRANCIS[redacted] Date: 2022.08.31 15:48:08 -07'00'	Aug 31, 2022

APPELLATE INFORMATION

IN UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Before Panel No. 3

NMCCA Case No. 202200212

UNITED STATES
Appellee

v.

Craig R. BECKER
Lieutenant (O-3), U.S. Navy

Appellant

APPELLANT'S MOTION FOR FIRST ENLARGEMENT OF TIME

Tried at Region Legal Service Office Mid-Atlantic, Naval Station Norfolk, on May 2, 2019, July 18, 2019, August 20, 2019, September 23, 2019, and October 3-15 2019 before a General Court-Martial convened by Commander, Navy Region [redacted] Colonel St Keane, USMC, presiding

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES NAVY-MARINE CORPS COURTS 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 November 20, 2022. The number of days requested is thirty. The requested due date is December 20, 2022.

Status of the case:

1. The Record of Trial was docketed on September 21, 2022.

2. The Moreno III date is March 21, 2024.

3. Appellant is confined with a life sentence.

4. The record consists of 4055 transcribed pages, 63 prosecution exhibits, 19 defense exhibits, 303 appellate exhibits, and 25 total volumes.

Undersigned counsel respectfully requests this Court grant a first enlargement of time to allow counsel time to review the record, develop a case strategy with Appellant, and draft a brief.

Respectfully submitted.

[redacted]
Joshua P. Keefe
Major, U.S. Marine Corps
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify the foregoing was electronically delivered to the Court, uploaded into the Court's case management system, and electronically delivered to Director, Appellate Government Division on November 15, 2022.

[redacted]

Major, U.S. Marine Corps
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
[redacted]

[redacted]

Subject: RULING - RECEIPT - Filing Panel 3, U.S. v. Becker., NMCCA No 202200212 D First EOT (Keefe)
Date: Monday, November 21, 2022 8:58:54 AM

MOTION GRANTED

NOVEMBER 21 2022
UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

V/R
[redacted]

Panel Secretary
Navy-Marine Corps Court of Criminal Appeals (Code 51)
1254 Charles Morris St SE, Ste 320
Washington Navy Yard, D.C 20374

[redacted]

Subject: RECEIPT - Filing Panel 3, U.S. v. Becker., NMCCA No 202200212 D First EOT (Keefe)

RECEIVED
NOVEMBER 16 2022
United States Navy-Marine Corps
Court of Criminal Appeals

V/R,
[redacted]
Corporal, USMC
Panel Secretary
Navy-Marine Corps Court of Crimminal Appeals
1254 Charles Morris St SE, Ste 320
Washington Navy Yard, D.C 20374

[redacted]

Subject: Filing Panel 3, U.S. v. Becker., NMCCA No 202200212 D First EOT (Keefe)

To this Honorable Court,

Please find attached Appellant's motion for a first enlargement of time in U.S. v. Becker, NMCCA No. 202200212.

Very Respectfully,

Maj Keefe

Josh Keefe
Major, U.S. Marine Corps
Appellate Defense Counsel
Navy-Marine Corps Appellate Defense Division, Code 45
Office of the Judge Advocate General, US Navy
[redacted]

IN UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Before Panel No. 3

UNITED STATES *Appellee* v. **Craig R. BECKER** Lieutenant (O-3), U.S. Navy *Appellant*	**MOTION TO EXAMINE SEALED MATTERS IN THE RECORD OF TRIAL** NMCCA Case No. 202200212 Tried at [redacted] on May 2, 2019, 1 October 2019, 11 December 2019, 20 January 2022, 3 March 2022, 8 April 2022 and 12 April – 30 April 2022 before a General Court-Martial convened by Commander, Navy Region [redacted] Colonel Stephen Keane, USMC, presiding

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

Undersigned counsel on behalf of the Appellant respectfully moves to examine the sealed matters in the Record of Trial pursuant to Rule 6.2(c) of the Navy-Marine Corps Court of Criminal Appeals Rules of Appellate Procedure.

This motion applies to the following exhibits in the following terms:

1. Appellate Exhibit LXXVIII (ruling and documents regarding emails between NCIS and trial counsel)

    a. Were the sealed matters:

i. Presented or reviewed by counsel at trial? Yes. The documents were presented by trial counsel at trial and then reviewed *in camera* by the military judge.

ii. Reviewed in camera and then released to trial or defense counsel? Yes. The documents were presented by trial counsel to the military judge under seal and reviewed *in camera*. They were never released to trial defense counsel.

b. If answer to either part of a. is *Yes*, present a brief, plain statement of the appellant's colorable showing that examination is necessary to a proper fulfillment of counsel's responsibilities:

Appellate defense counsel must review these documents in order to properly evaluate if the trial judge's failure to require discovery of them at trial constituted legal error such to necessitate an assignment of error.

c. If answer to both parts of a. is *No*, present a brief, plain statement of good cause why appellant's counsel should be permitted to examine the matters: N/A.

d. Is the matter the subject of a colorable claim of privilege?

Yes. Following trial defense counsel's timely discovery request, government trial counsel filed with the Court a written assertion of privilege over eight emails between trial counsel and the lead NCIS agent on the case, claiming the documents were protected under attorney-work product doctrine (and R.C.M. 701(f)) because the lead NCIS agent had been certified as a representative of the United States under M.R.E. 615(b). The

military judge reviewed the emails *in camera*, and held that the materials were not subject to disclosure to defense because they represented attorney "working papers" the disclosure of which is not required under R.C.M. 701(f).

e. If so, who may hold such a privilege? Government trial counsel**.**

f. If there is a colorable claim of privilege, why should the court permit examination in light of such a claim?

This matter was litigated at trial and the military judge made a written ruling which appears to also be placed under seal (AE LXXVII), holding that the emails in question were protected attorney work-product not subject to disclosure under R.C.M. 701(f).[1] For the following two reasons, no privilege exists over the email communications and this Court should allow appellate defense to review them.

a. Designating a law enforcement trial witness as a "representative of the United States" under M.R.E. 615(b) does not extend the privilege found in the attorney work-product doctrine to communications disclosed to that third party.

Defendants in the military justice system have broad discovery rights under Article 46, UCMJ,[2] and are generally entitled to documents in the possession of government authorities that are relevant to the defense's preparation.[3] However, the military's liberal discovery policy does not necessarily justify, "unwarranted inquiries into the files and the

[1] *See also* Record at 797-803, where the prior military judge's written ruling was read into the record.
[2] 10 U.S.C.§ 846; *See U.S. v. Vanderwier*, 25 M.J.263,269 (C.M.A. 1987)
[3] R.C.M. 701(a)(2)(A)(ii)

mental impressions of an attorney,"[4] and Rule for Court-Martial 701(f) codifies the common law privilege found in the attorney work-product doctrine, holding that, "the disclosure or production of notes, memoranda, or similar working papers prepared by counsel and counsel's assistants and representatives [is not required under R.C.M. 701]."

Here, the Government trial counsel claimed privilege under R.C.M. 701(f) over eight emails sent between Trial Counsel, Assistant Trial Counsel, Trial Counsel's Legalman, and NCIS Special Agent [redacted] who was the lead Department of Defense criminal investigator on the case and a government witness at trial, and who had previously been identified as a Government Representative pursuant to M.R.E. 615.[5] Although the Government did not expressly state as much at trial, the inference from their pleading is that the status of Special Agent [redacted] as a "Government Representative" under M.R.E. 615 acts to qualify the Agent as a "representative" of trial counsel as contemplated in R.C.M. 701(f)[6] such that the communications between the parties are attorney work-product, protected from discovery. At trial, the military judge denied the Defense motion to compel these emails, ruling instead that the emails were protected attorney work-product not subject to discovery.[7] In concluding that the emails

[4] *Vanderwier* at 269 (quoting *Hickman v. Taylor*, 329 U.S. 495, 510 (1947)(internal quotations omitted)
[5] Appellate Exhibit LXXXVII
[6] R.C.M. 701(f) holds in relevant part that, "Nothing in this rule shall require the disclosure or production of notes, memoranda, or similar working papers prepared by counsel and counsel's assistants *and representatives*." (emphasis added)
[7] Appellate Exhibit LXXVII, see also Record at 797-803

at issue were protected attorney work-product, the military judge, however, failed to cite any authority to support this proposition. Instead of addressing Special Agent [redacted] status, the military trial judge's findings are focused exclusively on the content of the communications and not whether or not Special Agent [redacted] is properly viewed as a *representative* of the trial team such that communications between the trial counsel and the agent are fairly characterized as attorney work-product.[8]

The threshold issue here then is not whether or not the content of the communications are properly viewed as protected attorney work-product, but whether attorney communications *with Special Agent* [redacted] are privileged under the attorney work-product doctrine. Special Agent [redacted] status is significant in this case. Notably, she was the lead DoD criminal investigator in the case, a testifying government witness, and a law enforcement agent who worked for a separate federal agency in a different law enforcement capacity than the trial counsel.

The designation of Special Agent [redacted] as a government representative under M.R.E. 615 only allowed her to not be sequestered from the trial prior to her testimony. The Rule reads in relevant part: "Rule 615: Excluding witnesses: At a party's request, the military judge must order witnesses excluded so that they cannot hear other witnesses'

[8] The trial judge reasoned, for instance, that, "the emails and their attachments exclusively contain internal discussions of preparatory steps for trial, including the location of certain witnesses and evidence, the trial counsel's thoughts on which evidence may be relevant to the various offenses, discussions of potential additional investigative leads, and theories as to motive." Nothing in the military judge's ruling addressed Special Agent [redacted] alleged status as a "representative" of the trial team. R. at 800.

testimony . . . This rule does not authorize excluding: . . . (b) a member of an Armed service or an employee of the United States after being designated as a representative of the United States by trial counsel."[9] Accordingly, the purpose of M.R.E. 615 is to protect certain parties from being excluded from the trial prior to testifying. In addition to the exception in 615(b) for government representatives, the rule also lists exceptions for the accused, crime victims, and others who are essential to a party's case or authorized by statute.[10] There is nothing in the rule or associated case law to suggest that designation as a government representative under the rule protects communications between that representative and trial counsel under the attorney work product-doctrine, and this Court should decline to extend those protections to the communications here.

b. Even if attorney work-product privilege exists over the contents of trial counsel's emails, it was waived when trial counsel knowingly shared those impressions with a Government witness, the lead NCIS agent on the case.

In *United States v. Nobles,* the Supreme Court held that the attorney work-product doctrine extended to protect materials prepared by agents for the attorney as well as those documents prepared by the attorney herself.[11] At issue in *Nobles* was whether the written report of a defense investigator prepared for defense counsel was protected attorney work-product. The *Nobles* Court found that although the defense investigator's written

[9] Military Rule of Evidence 615
[10] Military Rule of Evidence 615
[11] *United States v. Nobles,* 422 U.S. 225, 239 (1975)

report was protected work-product material, the fact that defense counsel called the investigator as a witness to testify about matters covered in the reports waived the privilege with respect to those same matters.[12] Accordingly, "[t]he privilege derived from the work-product doctrine is not absolute. Like other qualified privileges, it may be waived."[13] A privilege holder waives the privilege when they voluntarily disclose any significant part of the privileged matter or communication to a third party under such circumstances that it would be inappropriate to allow the claim of privilege.[14]

Here, any privilege the trial counsel had over attorney work-product contained in the emails was waived when the trial counsel knowingly discussed his mental impressions and case theories with the lead criminal investigator, Special Agent [redacted] Although designated as a "representative" under M.R.E. 615 and thus not subject to witness sequestration at trial, Special Agent [redacted] was no more a representative of the trial team as considered in R.C.M. 701(f) as any other government witness. Her role was to investigate any alleged crimes and report those findings in investigative reports. In that capacity, she acted as a neutral factfinder and not a member of the prosecution team. Significantly, she did not work in the same office as trial counsel, did not have the same supervisory chain of command, and worked for a separate federal agency entirely.

[12] *Id.*
[13] *Nobles* at 239
[14] Military Rule of Evidence 510(a)

Additionally, as Special Agent [redacted] was a Government witness who testified at trial, any statements she made in those emails may have been subject to disclosure to defense counsel after her testimony under the Jencks Act.[15]

This Court should release the eight emails to appellate defense counsel for review. Without a proper review of this material at the appellate level, Appellant will not receive adequate appellate review of his case and it will be impossible to determine if the military judge's ruling should constitute an assignment of error.

g. Are you seeking disclosure of this matter? Yes.

h. If you are seeking disclosure, describe the reasons for the proposed disclosure, and the extent to which the matter should be disclosed:

Appellate defense counsel seek to make copies of the sealed documents to allow the defense team to review. Defense counsel do not seek to disclose or disseminate this material outside of appellate defense counsel, and will promptly destroy all copies at the conclusion of appellate review. Should appellate defense counsel seek to use the documents in briefing this case, counsel will seek leave of the Court prior to doing so.

2. Prosecution Exhibit 18 (Autopsy Photos), Page 3 of AE CCXXVII; pages 13, 20 of AE CCLIII; Pages 10, 22, 28 of AE CCLXXXIII

   a. Were the sealed matters:

      i. Presented or reviewed by counsel at trial? Yes. All counsel reviewed these documents at trial.

      ii. Reviewed in camera and then released to trial or defense counsel? No.

[15] *See* 18 U.S.C. § 3500

b. If answer to either part of a. is *Yes*, present a brief, plain statement of the appellant's colorable showing that examination is necessary to a proper fulfillment of counsel's responsibilities:

The sealed material includes autopsy photos (PE 18), portions of the autopsy report (page 3 of AE CCXXVII and pages 13 and 20 of AE CCLIII), and excerpts of the prosecution's closing argument slides (pages 10, 22, 28 of AE CCLXXXIII). Inspection of these records is necessary to fully and accurately review whether there are any errors related to the trial judge's decision to seal those materials, as well as to afford the appellate defense counsel the chance to review the entire trial record, including all materials viewed and considered by the members.

c. If answer to both parts of a. is *No*, present a brief, plain statement of good cause why appellant's counsel should be permitted to examine the matters: N/A.

d. Is the matter the subject of a colorable claim of privilege?

No. It appears these materials were sealed to prevent the disclosure of sensitive autopsy photographs of the Appellant's deceased wife.

e. If so, who may hold such a privilege? N/A

f. If there is a colorable claim of privilege, why should the court permit examination in light of such a claim? N/A

g. Are you seeking disclosure of this matter?

Yes, the undersigned seeks to make a copy of the sealed material for review in Appellate Military and Civilian Defense counsel's office.

h. If you are seeking disclosure, describe the reasons for the proposed disclosure, and the extent to which the matter should be disclosed:

The undersigned will be able to conduct a more thorough review in his office and will need to refer back to the material frequently if it is the subject of an assignment of error. The undersigned will destroy the material upon completion of appellate review.

WHEREFORE, Appellant respectfully requests that this Court grant this motion to examine sealed matters in the Record of Trial.

[redacted]
Joshua P. Keefe
Major, U.S. Marine Corps
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and three copies of the foregoing were delivered to the Court on 16 December 2022, that a copy was uploaded into the Court's case management system on 16 December 2022, and that a copy of the foregoing was delivered to the Government on 16 December 2022.

[redacted]

Major, U.S. Marine Corps
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
[redacted]

IN UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Before Panel No. 3

	NMCCA Case No. 202200212
UNITED STATES *Appellee* v. **Craig R. BECKER** Lieutenant (O-3), U.S. Navy *Appellant*	**APPELLANT'S MOTION FOR SECOND ENLARGEMENT OF TIME** Tried at [redacted] on May 2, 2019, 1 October 2019, 11 December 2019, 20 January 2022, 3 March 2022, 8 April 2022 and 12 April – 30 April 2022 before a General Court-Martial convened by Commander, Navy Region [redacted] Colonel Stephen Keane, USMC, presiding

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

COMES NOW the undersigned and respectfully moves for a second enlargement of time to file a brief and assignments of error. The current due date is December 20, 2022. The number of days requested is thirty. The requested due date is January 20, 2023.

Status of the case:

1. The Record of Trial was docketed on September 21, 2022.

2. The Moreno III date is March 21, 2024.

3. Appellant is confined with a life sentence.

4. The record consists of 4055 transcribed pages, 63 prosecution exhibits, 19 defense exhibits, 303 appellate exhibits, and 25 total volumes.

Undersigned counsel respectfully requests this Court grant a second enlargement of time to allow counsel time to review the record, develop a case strategy with Appellant, and draft a brief.

Respectfully submitted.

[redacted]
Joshua P. Keefe
Major, U.S. Marine Corps
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify the foregoing was electronically delivered to the Court, uploaded into the Court's case management system, and electronically delivered to Director, Appellate Government Division on December 16, 2022.

[redacted]
Joshua P. Keefe
Major, U.S. Marine Corps
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
[redacted]

[redacted]

Subject: RE: Filing Panel 3, U.S. v. Becker., NMCCA No 202200212 D Second EOT (Keefe)
Date: Monday, December 19, 2022 9:34:44 AM

MOTION GRANTED
DECEMBER 19 2022
UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Very Respectfully,

[redacted]
LT, JAGC, USN
Commissioner
Navy-Marine Corps Court of Criminal Appeals
OJAG | Code 51
1254 Charles Morris St. SE | Bldg. 58, Ste. 320
Washington Navy Yard, DC, 20374-5124

[redacted]

Subject: Filing Panel 3, U.S. v. Becker., NMCCA No 202200212 D Second EOT (Keefe)

To this Honorable Court,

Please find attached Appellant's motion for a second enlargement of time in U.S. v. Becker, NMCCA No. 202200212.

Very Respectfully,

Maj Keefe

Josh Keefe
Major, U.S. Marine Corps
Appellate Defense Counsel
Navy-Marine Corps Appellate Defense Division, Code 45
Office of the Judge Advocate General, US Navy
[redacted]

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

Before Panel No. 3

UNITED STATES, Appellee v. Craig R. BECKER, Lieutenant (O-3E) U.S. Navy Appellant	)	APPELLEE'S PARTIAL OPPOSITION TO APPELLANT'S MOTION TO EXAMINE SEALED MATTERS IN THE RECORD OF TRIAL Case No. 202200212 Tried in [redacted] on May 2, October 1, and December 11, 2019, January 20, March 3, and April 8 and 12–30, 2022, before a general court-martial convened by Commander, Navy Region [redacted] Colonel Stephen Keane, U.S. Marine Corps, presiding

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

Under Rule 6.2 of this Court's Rules of Appellate Procedure and Rule for Courts-Martial 1113, the United States opposes in part Appellant's Motion to Examine Sealed Matters because it fails to show good cause to review Appellate Exhibit LXXVIII. The United States does not oppose his other requests.

A. On appeal, a party must demonstrate good cause to examine sealed materials reviewed by the military judge in camera but that the party was not permitted to review at trial.

"Materials reviewed in camera by a military judge, not released to trial counsel or defense counsel, and sealed may be examined by reviewing or appellate authorities." R.C.M. 1113(b)(3)(B)(ii). "After examination of said materials, the reviewing or appellate authority may permit examination by appellate counsel for good cause." *Id.*; *see also* N-M. Ct. Crim. App. R. 6.2(c)(2).

The 2018 changes to R.C.M. 1113 imposed a higher standard to ensure sealed materials a party was not permitted to review at trial were similarly protected from review on appeal. This contrasts from the pre-2018 Rule, which presumed parties could review all exhibits, regardless of whether the party was permitted or barred from reviewing the materials at the trial level. The new Rule generally follows federal practice in maintaining trial-sealing restrictions as to the parties on appeal.

B. Appellant fails to demonstrate good cause to review Appellate Exhibit LXXVIII. Appellant should not be permitted to review sealed materials that the Military Judge determined were attorney-work product and were not released to the Trial Defense Counsel. This Court is fully qualified to review the materials in camera to determine if Appellant's claims have merit.

Appellant fails to establish good cause because he does not compellingly and explicitly state his need for Appellate Exhibit LXXVIII in light of the fact that Trial Defense Counsel did not review the sealed materials after the Military Judge

held that they constituted attorney-work product, privileged under R.C.M. 701(f). Nor does Appellant identify the specific legal authority authorizing his access. *See* N-M. Ct. Crim. App. R. 6.2(c)(2).

Appellate Defense Counsel wrongly claims the attorney-work product privilege under R.C.M. 701(f) does not apply or that it was somehow waived. (Appellant's Mot. Examine at 3–8, Dec. 16, 2022.) This is contrary to the Military Judge's Ruling, and Appellant fails to identify a specific need for examining the materials. Instead, he alleges the materials are needed in order to "determine if the military judge's ruling should constitute an assignment of error," (Appellant's Mot. Examine at 8), a task this Court is fully qualified to complete. Indeed, the Rules for Courts-Martial require this Court to review any unreleased materials before permitting examination on appeal. *See* R.C.M. 1113(b)(3)(ii).

Appellate Defense Counsel fails to discuss which specific issues could relate to Appellate Exhibit LXXVIII, only that reviewing them may lead Appellate Defense Counsel to argue that the Military Judge's ruling as to those same materials was in error. This does not constitute good cause; instead, this Court can review the materials in camera and make a determination as to whether the Trial Military Judge's Ruling was an error that "materially prejudice[d] the substantial rights of [Appellant]." Art. 59(a), UCMJ, 10 U.S.C. § 859(a) (2016).

Conclusion

The United States respectfully requests this Court deny Appellant's Motion as to Appellate Exhibit LXXVIII and grant Appellant's Motion as to Prosecution Exhibit 18; Page 3 of Appellate Exhibit CCXXVII; Pages 13 and 20 of Appellate Exhibit CCLIII; and Pages 10, 22, and 28 of Appellate Exhibit CCLXXXIII.

Candace G. White
Digitally signed by Candace G. White

CANDACE G. WHITE
Major, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
[redacted]

Certificate of Filing and Service

I certify that this document was emailed to the Court's filing address, uploaded to the Court's case management system, and that a copy of the foregoing was emailed to Appellate Defense Counsel, Major Joshua P. KEEFE, U.S. Marine Corps, on December 20, 2022.

Candace G. White
Digitally signed by Candace G. White

CANDACE G. WHITE
Major, U.S. Marine Corps
Appellate Government Counsel

United States Navy–Marine Corps
Court of Criminal Appeals

UNITED STATES
Appellee

v.

Craig R. BECKER
Lieutenant (O-3)
U.S. Navy
Appellant

NMCCA NO. 202200212

Panel 3

ORDER

Order Granting in Part and Denying in Part Appellant's Motion to Examine Sealed Matters in the Record of Trial

On 16 December 2022, Appellant filed a Motion to Examine Sealed Materials in the Record of Trial. Specifically Appellant is seeking to examine and copy Appellate Exhibit LXXVIII; Prosecution Exhibit 18; page 3 of Appellate Exhibit CCXXVII; pages 13 and 20 of Appellate Exhibit CCLIII; and pages 10, 22, and 28 of Appellate Exhibit CCLXXXIII. On 20 December 2022, the Government filed a Partial Opposition to Appellant's Motion to Examine Sealed Matters in the Record of Trial, requesting this Court deny Appellant's Motion as to Appellate Exhibit LXXVIII; and grant Appellant's Motion as to Prosecution Exhibit 18; page 3 of Appellate Exhibit CCXXVII; pages 13 and 20 of Appellate Exhibit CCLIII; and pages 10, 22, and 28 of Appellate Exhibit CCLXXXIII.

This Court's rules preclude the duplication of sealed materials absent permission from this Court. N-M. Ct. Crim. App. R. 6.2.

Having reviewed the record and sealed materials in question, it is, by the Court, this 29th day of December 2022,

ORDERED:

1. That Appellant's Motion to Examine Sealed Matters in the Record of Trial is **GRANTED in Part** and **DENIED WITHOUT PREJUDICE in Part**.

2. That Appellant's Counsel is permitted to examine and copy Appellate Exhibit LXXVIII.

3. That Appellant's Counsel is permitted to examine Prosecution Exhibit 18; page 3 of Appellate Exhibit CCXXVII; pages 13 and 20 of Appellate Exhibit CCLIII; and pages 10, 22, and 28 of Appellate Exhibit CCLXXXIII**.** However, at this time Appellant's counsel may *not* make digital reproductions or photo-

copies of any images of any autopsy photographs showing a naked person. After viewing the images, if Appellate Defense Counsel (civilian or military) still wish to make copies, Appellate Defense Counsel may file a motion with this Court, and the Court may revisit that portion of this Order.

4. That no hardcopies of sealed materials that have been viewed by counsel may be transmitted to other persons outside of Building 58, Washington Navy Yard, D.C, other than Appellate Exhibit LXXVIII may be transmitted by a secure method to Civilian Appellate Defense Counsel.

5. That in accordance with N-M. Ct. Crim. Appl. R. 6.2(4)(A)–(B), the parties may not make any additional copies or disclose the aforementioned documents to any third party.

FOR THE COURT:

[redacted]

S. TAYLOR JOHNSTON
Acting Clerk of Court

Copy to: NMCCA
45 (Maj Keefe);
46 (Maj White);
02

IN UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Before Panel No. 3

	NMCCA Case No. 202200212
UNITED STATES *Appellee* v. **Craig R. BECKER** Lieutenant (O-3), U.S. Navy *Appellant*	**APPELLANT'S MOTION FOR THIRD ENLARGEMENT OF TIME** Tried at [redacted] on May 2, 2019, 1 October 2019, 11 December 2019, 20 January 2022, 3 March 2022, 8 April 2022 and 12 April – 30 April 2022 before a General Court-Martial convened by Commander, Navy Region [redacted] Colonel Stephen Keane, USMC, presiding

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

COMES NOW the undersigned and respectfully moves for a third enlargement of time to file a brief and assignments of error. The current due date is January 20, 2023. The number of days requested is thirty. The requested due date is February 20, 2023.

Status of the case:

1. The Record of Trial was docketed on September 21, 2022.

2. The Moreno III date is March 21, 2024.

3. Appellant is confined with a life sentence.

4. The record consists of 4055 transcribed pages, 63 prosecution exhibits, 19 defense exhibits, 303 appellate exhibits, and 25 total volumes.
5. Appellant is aware of, and has consented to, this request for a third enlargement of time.
6. Good cause exists here because the significant size of the record, including over 4,000 transcribed pages and over 400 exhibits total, necessitates more time to adequately prepare a defense. Appellate defense counsel is working diligently to finish developing a case strategy, including finalizing identified assignments of error.

Undersigned counsel respectfully requests this Court grant a third enlargement of time to allow counsel time to complete research on possible assignments of error, finalize a case strategy with Appellant, and finish the brief.

Respectfully submitted.

[redacted]
Joshua P. Keefe
Major, U.S. Marine Corps
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify the foregoing was electronically delivered to the Court, uploaded into the Court's case management system, and electronically delivered to Director, Appellate Government Division on January 17, 2022.

[redacted]
Joshua P. Keefe
Major, U.S. Marine Corps
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
[redacted]

[redacted]

Subject: RULING - Filing Panel 3, U.S. v. Becker., NMCCA No 202200212 D Third EOT (Keefe)
Date: Tuesday, January 17, 2023 3:44:47 PM

MOTION GRANTED
JANUARY 17 2023
UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

[redacted]
Corporal, USMC
Panel Secretary
Navy-Marine Corps Court of Criminal Appeals (Code 51)
1254 Charles Morris St SE, Ste 320
Washington Navy Yard, D.C 20374

[redacted]

Subject: Filing Panel 3, U.S. v. Becker., NMCCA No 202200212 D Third EOT (Keefe)

To this Honorable Court,

Please find attached Appellant's motion for a third enlargement of time in U.S. v. Becker, NMCCA No. 202200212.

Very Respectfully,

Maj Keefe

Josh Keefe
Major, U.S. Marine Corps
Appellate Defense Counsel
Navy-Marine Corps Appellate Defense Division, Code 45
Office of the Judge Advocate General, US Navy
[redacted]

United States Navy–Marine Corps
Court of Criminal Appeals

UNITED STATES

Appellee

v.

Craig R. BECKER
Lieutenant (O-3)
U.S. Navy

Appellant

NMCCA No. 202200212

Panel 3

ORDER

Granting Appellant's Motion for Third Enlargement of Time

Appellant's appeal was docketed with this Court on 21 September 2022. The case has a trial transcript of 4,055 pages and a total Record of Trial of approximately 8,507 pages. On 17 November 2022, the Court held a chamber's conference with the parties to discuss the anticipated progress of Appellant's case. The Court has determined that good cause exists to grant the Appellant's motion for his Third Enlargement of Time to file his brief.

The Court grants Appellant's Motion for Third Enlargement of Time. Appellee will submit a brief no later than 20 February 2022. **However, should Appellant seek a further extension, no additional Motions for Enlargements of Time for Appellant's Brief will be granted beyond 20 February 2023, absent extraordinary circumstances as determined solely by this Court.**

Accordingly, it is, on this 18th day of January 2023,

ORDERED:

1. That Appellant's Motion for a Third Enlargement of Time is **GRANTED**. Appellee's Answer is due no later than 20 February 2023.

FOR THE COURT:

[redacted]

MARK K. JAMISON
Clerk of Court

Copy to:
45 (Maj Keefe);
46 (Maj White);
02;
Mr. Sheldon

IN UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Before Panel No. 3

	NMCCA Case No. 202200212
UNITED STATES *Appellee* v. **Craig R. BECKER** Lieutenant (O-3), U.S. Navy *Appellant*	**APPELLANT'S MOTION FOR FOURTH ENLARGEMENT OF TIME** Tried at [redacted] on May 2, 2019, 1 October 2019, 11 December 2019, 20 January 2022, 3 March 2022, 8 April 2022 and 12 April – 30 April 2022 before a General Court-Martial convened by Commander, [redacted] Colonel Stephen Keane, USMC, presiding

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

COMES NOW the undersigned and respectfully moves for a fourth enlargement of time to file a brief and assignments of error. The current due date is February 20, 2023. The number of days requested is thirty. The requested due date is March 20, 2023.

Status of the case:

1. The Record of Trial was docketed on September 21, 2022.

2. The Moreno III date is March 21, 2024.

3. Appellant is confined with a life sentence.

4. The record consists of 4055 transcribed pages, 63 prosecution exhibits, 19 defense exhibits, 303 appellate exhibits, and 25 total volumes.
5. Appellant is fully aware of, and has consented to and fully supports, this request for a fourth enlargement of time.
6. Good cause exists here because the significant size of the record, including over 4,000 transcribed pages and over 400 exhibits total, necessitates more time to adequately prepare a defense. Appellate defense counsel is working diligently to finish developing a case strategy, including finalizing identified assignments of error.
7. Undersigned counsel have reviewed the entire record of trial, consisting of 8301 PDF pages, have identified a significant number of appellate issues that merit briefing before this Court and we are investigating the factual and legal basis of other claims of errors. Counsel is in the process of interviewing expert and fact witnesses not called by the Defense on the merits of this case. These efforts are required for Appellant to receive the effective assistance of counsel on direct review. *Evitts v. Lucey*, 469 U.S. 387 (1985). Counsel will require significant additional time to develop the assignments of errors, the underlying factual basis for each, and properly present them before this Court.
8. Undersigned counsel is fully aware of this Court's previous order dated 18

January 2023, but believes it set an earlier date than the timeline established in the initial chambers conference by a month. Additionally, the Navy initially did not obtain or seek jurisdiction of this case for years much to the detriment of Appellant. Indeed, Appellant was wrongfully confined for months at a time, all without recourse to a United States court, which could have exercised jurisdiction, all at the behest of the Appellee.

9. The task before undersigned counsel is the same as a capital case. This is an extraordinarily complex case. Mindful of the Court's wish for expediency and justice, undersigned counsel respectfully requests this Fourth enlargement of time, fully expecting additional requests will be entertained by the Court.

10. This is Appellant's one and only chance for the effective assistance of counsel as a matter of right. It is up to this Court and his counsel to ensure that right is a reality.

Undersigned counsel respectfully requests this Court grant a fourth enlargement of time to allow counsel time to complete research on possible assignments of error, finalize a case strategy with Appellant, and continue researching assignments of errors and drafting the brief.

Respectfully submitted.

/s/

David P. Sheldon
Law Offices of David P. Sheldon PLLC
[redacted]
Civilian Appellate Defense Counsel

[redacted]
Major, U.S. Marine Corps
Appellate Defense Counsel
NAMARA
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
[redacted]
Military Appellate Defense Counsel

CERTIFICATE OF FILING AND SERVICE

I certify the foregoing was electronically delivered to the Court, uploaded into the Court's case management system, and electronically delivered to Director, Appellate Government Division on February 14, 2023.

[redacted]

Joshua P. Keefe
Major, U.S. Marine Corps
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374

[redacted]

United States Navy–Marine Corps
Court of Criminal Appeals

UNITED STATES

Appellee

v.

Craig R. BECKER
Lieutenant (O-3)
U.S. Navy

Appellant

NMCCA No. 202200212

Panel 3

ORDER

Granting Appellant's Motion for Fourth Enlargement of Time

Appellant's appeal was docketed with this Court on 21 September 2022. The case has a trial transcript of 4,055 pages and a total Record of Trial of approximately 8,507 pages. On 17 November 2022, this Court held a chamber's conference with the parties to discuss the anticipated progress of Appellant's case. On 14 February 2023, Appellant filed a Motion for Fourth Enlargement of Time, the subject of this order, which the Government does not oppose.

Appellant's counsel correctly points out that this extra time was contemplated by the parties and this Court during the chambers conference wherein Appellant's counsel indicated every effort would be made to file Appellant's brief in March 2023. Thus, the Court now determines that good cause exists to grant Appellant's motion for his Fourth Enlargement of Time, and orders that any brief filed by Appellant must be filed with this Court no later than 20 March 2023. The granting of this motion should not be construed as inviting further motions of this nature. Moreover, the granting of this motion does not in any way indicate that this Court will grant any motion to file a brief in excess of the word limit as specified in Rule 17.3 of this Court's rules.

Accordingly, it is, on this 22nd day of February 2023,

ORDERED:

1. That Appellant's Motion for Fourth Enlargement of Time is **GRANTED**.

FOR THE COURT:

[redacted]

MARK K. JAMISON
Clerk of Court

Copy to:
45 (Maj Keefe);
46 (Maj White);
02;
Mr. Sheldon

IN UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Before Panel No. 3

NMCCA Case No. 202200212

UNITED STATES
Appellee

v.

Craig R. BECKER
Lieutenant (O-3), U.S. Navy

Appellant

APPELLANT'S MOTION FOR LEAVE TO FILE MOTION REQUESTING CHAMBERS CONFERENCE AND MOTION REQUESTING CHAMBERS CONFERENCE

Tried at [redacted] on May 2, 2019, 1 October 2019, 11 December 2019, 20 January 2022, 3 March 2022, 8 April 2022 and 12 April – 30 April 2022 before a General Court-Martial convened by Commander, Navy Region [redacted] Colonel Stephen Keane, USMC, presiding

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

COMES NOW the undersigned counsel and respectfully move for leave of this honorable Court to file this motion requesting a chambers conference in the above captioned case, and further move to set a chambers conference to discuss the status of the case.

Status of the case:

1. The Record of Trial was docketed on September 21, 2022.

2. The Moreno III date is March 21, 2024.

3. Appellant is confined with a life sentence.
4. The record consists of 4055 transcribed pages, 63 prosecution exhibits, 19 defense exhibits, 303 appellate exhibits, and 25 total volumes. In total, the record of trial is approximately 8,507 pages.
5. On 14 February 2023, Appellant's counsel filed a timely motion for a Fourth Enlargement of Time pursuant to rule 23.2 of this Court's Rules of Appellate Procedure. On 22 February 2023, this Court granted Appellant's motion for a Fourth Enlargement of Time. In the Court's Order granting Appellant's Fourth Enlargement of Time request, the Court made reference to the prior chambers conference held on 17 November 2022, correctly noting that at that time Appellant's counsel hoped to file a brief and assignments of error by March 2023. This Court's Order also cautioned that, "[the] granting of this motion should not be construed as inviting further motions of this nature."
6. Since the initial chambers conference, Appellant's counsel have become aware of significant additional information that relates to the Appellant's right to a fair trial under the Fifth and Sixth Amendments to the U.S. Constitution. In order to provide the effective assistance of counsel that Appellant is guaranteed on appeal, additional time not previously contemplated by counsel or communicated to the Court is required.

7. Additionally, Appellant's counsel have an ethical duty of competence[1] to their client, which includes a professional responsibility of thoroughness and adequate preparation. JAGINST 5801.1E directs that, in determining competent representation, "[t]he required attention and preparation are determined in part by what is at stake; major litigation and complex transactions require more elaborate treatment than matters of lesser consequence."[2] Here, Appellant was found guilty of premeditated murder and sentenced to life in prison. Consequently, the stakes are extremely high—Appellant faces the complete and total depravation of his liberty for the remainder of his life. Accordingly, Appellant's counsel all have an ethical requirement as covered attorneys to provide an appropriate level of competency, including adequate thoroughness and preparation. Requiring appellate defense counsel to file a brief no later than 20 March 2023 while in the fourth enlargement of time does not provide appellate counsel adequate time to provide competent representation to Appellant on a record of this size in a case of this magnitude. Appellant's counsel are presently

[1] *See* Rule 1.1 ("Competence") of JAGINST 5803.1E ("Professional Conduct of Attorneys Practicing Under the Cognizance and Supervision of the Judge Advocate General"), which requires appropriate thoroughness and preparation for competent representation. This requirement is also found in Rule 1.1 of the District of Columbia Bar Rules of Professional Conduct, which governs the conduct of Appellant's civilian appellate counsel.

[2] Rule 1.1, JAGINST 5803.1E

drafting a motion for a Fifth Enlargement of Time, expecting that additional time beyond that will be required.

Undersigned counsel respectfully requests this Court grant this motion and set a chambers conference to afford appellate defense counsel the opportunity to apprise the Court of a status update on Appellant's brief and its expected submission date.

Respectfully submitted.

/s/

David P. Sheldon
Law Offices of David P. Sheldon PLLC
[redacted]
Civilian Appellate Defense Counsel

/s/

Joshua P. Keefe
Major, U.S. Marine Corps
Appellate Defense Counsel
NAMARA
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
[redacted]
Military Appellate Defense Counsel

CERTIFICATE OF FILING AND SERVICE

I certify the foregoing was electronically delivered to the Court, uploaded into the Court's case management system, and electronically delivered to Director, Appellate Government Division on March 9, 2023.

Joshua P. Keefe
Major, U.S. Marine Corps
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
[redacted]

United States Navy–Marine Corps
Court of Criminal Appeals

NMCCA No. 202200212

Panel 3

UNITED STATES

Appellee

v.

Craig R. BECKER
Lieutenant (O-3)
U.S. Navy

Appellant

ORDER

Granting Appellant's Motion for Leave to File Requesting Chambers Conference and Deferring Ruling on the Request until Appellant's Motion for Fifth Enlargement of Time is Ripe for Decision by this Court

Appellant's appeal was docketed with this Court on 21 September 2022. The case has a trial transcript of 4,055 pages and a total Record of Trial of approximately 8,507 pages. Before this Court is Appellant's Motion for Leave to File a Motion Requesting a Chambers Conference and Motion for a Chambers Conference.

Appellate defense counsel indicate in their motion generally that "Appellant's counsel have become aware of significant additional information that relates to the Appellant's right to a fair trial under the Fifth and Sixth Amendments to the U.S. Constitution." According to Counsel, "additional time not previously contemplated by counsel or communicated to the Court is required." Counsel also assert that they are "drafting a motion for a Fifth Enlargement of Time, expecting that additional time beyond that will be required."

The Court is mindful that the record is lengthy and that Counsel have already had 6 months to prepare an appeal for their client, who remains in confinement. Counsel are directed to explain in detail in their upcoming Motion for a Fifth Enlargement of Time what specific circumstances exist that constitute good cause for this Court to grant such a motion. Conclusory boilerplate statements indicating that the record is long and the issues are complex will not be sufficient. In particular, Counsel shall explain what "significant additional information" they have become aware of now that necessitates further delay in the filing of Appellant's brief. Counsel are also advised to inform the Court as to *when* they anticipate filing Appellant's brief.

To Counsel's credit, they requested a chambers conference for exactly this reason: "to afford appellate defense counsel the opportunity to apprise the Court of a status update on Appellant's brief and its expected submission date." However, the Court prefers that Counsel include this information in their upcoming motion for an additional enlargement of time, and the Court will hold a chambers conference following that submission if it is necessary to resolve that motion.

Accordingly, it is, on this 10th day of March 2023,

ORDERED:

1. That Appellant's Motion for Leave to File Motion Requesting Chambers Conference is **GRANTED**. Ruling on the Motion for Chambers Conference is **DEFERRED**. The Court will decide that motion after reviewing Appellant's Motion for a Fifth Enlargement of Time, and the Government's response thereto.

FOR THE COURT:

[redacted]

MARK K. JAMISON
Clerk of Court

Copy to:
45 (Maj Keefe);
46 (Maj White);
02;
[redacted]

United States Navy-Marine Corps
Court of Criminal Appeals

UNITED STATES

Appellee

v.

Craig R. BECKER
Lieutenant (O-3)
U.S. Navy

Appellant

NMCCA No. 202200212

Panel 3

ORDER

Granting Appellant's Motion for a Chambers Conference

On 9 March 2023, Appellant filed a Motion for Leave to File a Motion Requesting a Chambers Conference and Motion for a Chambers Conference. On 10 March 2023, this Court granted Appellant's Motion for Leave to File a Motion Requesting a Chambers Conference and deferred ruling on the underlying motion until review of Appellant's Motion for a Fifth Enlargement of Time, and the Government's response thereto. On 15 March 2023, Appellant filed a Motion for a Fifth Enlargement of Time. On 20 March 2023, the Government filed a partial opposition to this motion.

Having reviewed the underlying motions and responses, accordingly, it is, on this 21st day of March 2023,

ORDERED:

1. That Appellant's Motion for Chambers Conference is **GRANTED**.

2. That the Chambers Conference will be held on Thursday, 23 March 2023 at 1000, in the NMCCA Conference Room located on the third deck of WNY Building 58. Civilian counsel may appear telephonically if he is outside of the Washington, DC, metro area.

3. Uniform of the Day for counsel is Service Khaki or the Marine Corps equivalent.

FOR THE COURT:

[redacted]

Copy to:
45 (Maj Keefe);
46 (Maj White);
02;
[redacted]

IN UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 3

UNITED STATES

Appellee

v.

Craig R. BECKER
Lieutenant (O-3)
U.S. Navy

Appellant

NMCCA Case No. 202200212

APPELLANT'S MOTION TO COMPEL PRODUCTION OF TRANSCRIBED RECORD OF TRIAL

Tried at [redacted] on May 2, 2019, 1 October 2019, 11 December 2019, 20 January 2022, 3 March 2022, 8 April 2022 and 12 April – 30 April 2022 before a General Court-Martial convened by Commander, Navy Region [redacted] Colonel Stephen F. Keane, USMC, presiding

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

Appellant, through undersigned counsel, pursuant to Rules 6(c), 23.7, and 23.9 of this Court's Rules of Appellate Procedure, moves for production of a complete and accurate copy of the Record of Trial (ROT) in this case, including a substantially verbatim transcript, and further moves this Court to stay these proceedings until such time that one can be produced. The Court and appellate defense counsel require a complete copy of the record, including an accurate

substantially verbatim transcript, to properly review Appellant's case.

"[A] complete record of proceedings and testimony shall be prepared in any case of a sentence of death, dismissal, discharge, confinement for more than six months, or forfeiture of pay for more than six months." Article 54, Uniform Code of Military Justice (hereinafter "UCMJ"), 10 U.S.C. § 854. Further, "[a] copy of the record of the proceedings of each general and special court-martial shall be given to the accused as soon as it is certified." *Id*. "The requirement that a record of trial be complete and substantially verbatim in order to uphold the validity of a verbatim record sentence is one of jurisdictional proportion that cannot be waived." *United States v. Davenport*, 73 M.J. 373, 376 (C.A.A.F. 2014)(quoting *United States v. Henry*, 53 M.J. 108, 110 (C.A.A.F. 2000)). By definition, if there is not a verbatim transcript then there is not a complete record. *Id* at 377.

In reviewing the record, Appellant's counsel have discovered errors in the transcript that call into question the accuracy and completeness of the entire record. The court-martial in this case took place with several witnesses who were [redacted] citizens. Many of these witnesses testified in French with the aid of interpreters provided by the United States Government. Appellate counsel have compared portions of the transcript against the audio files of the court-martial and discovered discrepancies between the interpreters' words and the transcript.

For example, a [redacted] toxicologist, Dr. [redacted], testified

for the Government about her analysis of the blood of the Appellant's deceased wife. On cross-examination, the defense asked her about the use of preservatives in the samples taken and tested. Page 2667 of the transcript reflects the following exchange:

> Q. So you cannot say that preservative was used in the samples in this case?
>
> A. I **can** guarantee you with a certitude, with such certainty, sorry, because it was six years ago.

(R. at 2667.) (emphasis added).

However, a review of the audio file shows that the actual exchange was:

> Q. So you cannot say that preservative was used in the samples in this case?
>
> A. I **cannot** guarantee you with a certitude, with such certainty, sorry, because it was six years ago.

(21 April 2022 Trial audio, audio file titled "BECKER _20220421-0254_01" at 1:21:02.) (emphasis added).

Here, the fact that the witness actually said they *cannot* guarantee with a certitude a material fact—whether or not the blood samples tested had preservative agents required to maintain the integrity of the sample—is a material error within the transcript. In order for appellate defense to competently represent their client, they need to ensure the record accurately reflect statements such as this that have a bearing on the credibility of a witness and the veracity of government witness testimony.

In another example, Ms. [redacted] a [redacted] citizen, claimed to have seen Appellant's wife falling from the window of the apartment. On page 2717 of the transcript, she is asked a question, but the transcript does not contain her answer:

> Q. When you first saw the woman, was the light on or off in the room?
>
> ATC: One moment, Your Honor.
>
> No further questions, Your Honor.

(R. at 2771.)

A review of the audio shows that Ms. [redacted] answered the question, stating: "Oui" and the interpreter said "Yes. Was on." (21 April 2022 Trial audio, audio file titled BECKER _20220421-0558_01 at 31:57.)

This is a critical detail to the defense theory of the case, necessary to prove the defense theory that Appellant was not in fact in the room at the time his wife fell. The fact that Ms. [redacted] testified the light was on supports her later testimony that she did not see anyone. Omitting this response from the record again casts serious doubt on the accuracy of the record as it stands and demonstrates that it is incomplete.

Additionally, page 2734 of the transcript reflects that, under the military judge's questioning of Ms. [redacted], the following question and answer took place:

> Q. Yeah, hang on. Did you see--did you first see Ms. [redacted] on the first scream or the second scream? Or on the scream while she was holding

onto the window, or on the scream while sliding down?

A. I don't--yeah, if I saw her sitting there, meaning that, you know, she was--so before she got down so it means the first cry, the first scream, sorry, it was the one that she was sitting there, yeah.

(R. at 2734.)

A review of the audio file shows that Ms. [redacted] complete answer was as follows:

A. **I cannot recall. It was too long ago.** I don't--yeah, if I saw her sitting there, meaning that, you know, she was--so before she got down so it means the first cry, the first scream, sorry, it was the one that she was sitting there, yeah.

(21 April 2022 Trial audio, audio file titled "BECKER _20220421-0558_01" at 1:03:04.) (emphasis added).

That significant detail is not reflected anywhere in the transcript for that answer. This is a material error as Ms. [redacted] was the *only* percipient witness to observe Appellant's wife fall from the window. The fact that she stated she couldn't remember an important detail about her memory relating to when she first observed Ms. [redacted] is a significant portion of the trial record that should be accurately reflected in the transcript.

The transcript also contains the following errors:

Witness testifying	Transcript	Audio
Mr. [redacted]	R. at 1894: Q: "You said he was a **bad** man?" A: "Oui."	Audio reflects that actual question was: "You said he was a **bald** man?" BECKER_20220413-0919_01d84f178375b0b0 at 11:00.
Ms. [redacted]	R. at 2676: Q: "All right. And now I wanted to talk to you about elimination rates. The elimination rate refers to the amount of alcohol a person's body can process." A: "Yes."	Audio reflects that actual question was: Q: "All right. And now I wanted to talk to you about elimination rates. The elimination rate refers to the amount of alcohol a person's body can process **in an hour.**" A: "Yes." BECKER_20220421-0500_01d8553cc68d7e30.wma at 1:42:03
Ms. [redacted]	R. at 2687: Q: I think I'm not stating the question as it was intended correctly. The pill itself, disregard the person. Does the **pill** of the pill increase or decrease or change in any way over time?"	Audio reflects that actual question was: Q: I think I'm not stating the question as it was intended correctly. The pill itself, disregard the person. Does the **potency** of the pill increase or decrease or change in any way over time?" BECKER_20220421-0500_01d8553cc68d7e30.wma at 22:06.

In addition to these discrepancies between the audio and the transcript, the Record of Trial is missing almost an hour of testimony from the lead NCIS investigator. On December 19, 2019, an Article 39(a), UCMJ, 10 U.S.C. § 839(a), session was held. At that hearing, NCIS Special Agent (SA) [redacted] testified and was examined by both trial counsel and defense counsel. When the Record of Trial was being assembled, it was discovered that the tape containing SA [redacted] testimony was missing. According to the court reporter's log, SA [redacted] testified from 9:28 until 10:25.

Upon discovering the missing testimony, the military judge, Colonel Stephen F. Keane, directed a different court reporter to reconstruct the testimony using the original court reporter's notes and the military judge's notes. As noted, the court reporter doing the reconstruction was not the court reporter who was present during SA [redacted] testimony. The military judge's notes were not compiled by Judge Keene, but were written by the previous military judge, Judge Aaron C. Rugh. Thus, no one with firsthand knowledge of the actual testimony was involved in the attempted reconstruction of nearly one hour of testimony.

Appellant's attorneys filed a motion to dismiss all charges and specifications due to an incomplete record of trial on 11 August 2022. (AE CCC.) On 15 August 2022, Judge Keane forwarded a draft of the reconstructed testimony to trial counsel

and defense counsel. This reconstruction consisted only of reconstructed statements from SA [redacted]. It did not contain any of the questions to which this reconstructed testimony was supposed to be responding. On 26 August 2022, appellant's counsel filed a motion non-concurring with the reconstructed transcript. (AE CCCI.) The motion included declarations made under penalty of perjury from appellant's military and civilian counsel attesting to the fact that the reconstructed testimony did not match their recollection of the testimony at the Article 39(a) hearing regarding information critical to the trial on the merits. (AE CCCI, at 12-18.) On 31 August 2022, the military judge, Judge Keane, denied the motion to dismiss over defense objection, claiming that the reconstructed testimony was not consequential or, in the alternative, that the reconstruction was substantially verbatim. (AE CCCIII.)

Given the above, it is clear that the transcript provided by the Government is not complete. Nearly an hour of a 39(a) session has been reconstructed by a court reporter who was not present for the testimony and a military judge who did not hear the testimony. Substantive trial testimony is missing from the transcript or is misstated. These errors were found after listening to the audio for some of the French-speaking witnesses. That effort took hours of listening and relistening. Given that these significant errors were found in that time, it is patently unreasonable to expect the defense to undertake that same effort for the entirety of

the 63 separate instances of witness testimony in the record to further demonstrate problems with the transcript. It is the Government's responsibility to assure the accuracy of the transcript. It is not the defense's responsibility to do that job for them. Without an accurate and complete transcript, the appellate defense counsel cannot provide effective assistance of counsel to Appellant.

Government appellate counsel argue in their Motion in Partial Opposition to Appellant's Fifth Enlargement request that, "any alleged transcription errors can be addressed in [Appellant's] Brief to the Court[.]" (Appellee's Mot. Partial Opposition, 20 March 2023 at 4.) This assertion, however, fails to appreciate that Appellant is entitled to a complete record including a substantially verbatim transcript as a matter of right in order to facilitate the only guaranteed right of appeal he is afforded. Here, he asserts that right and requests appropriate relief from this Court to ensure the transcript and record he relies on is complete and accurate. The appropriate remedy is to compel the Government to produce an accurate transcript so that Appellant can be provided competent appellate assistance of counsel.

We respectfully request this Court order the Government to produce a complete record of trial, including a record that is substantially verbatim, and stay the proceedings until such time that a complete and accurate transcript is made available.

Respectfully submitted.

/s/

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Law Offices of David P. Sheldon PLLC
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Civilian Appellate Defense Counsel

/s/

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CERTIFICATE OF FILING AND SERVICE

I certify the foregoing was electronically delivered to the Court, uploaded into the Court's case management system, and electronically delivered to Director, Appellate Government Division on March 22, 2023.

/s/

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United States Navy-Marine Corps
Court of Criminal Appeals

UNITED STATES

Appellee

v.

Craig R. BECKER
Lieutenant (O-3)
U.S. Navy

Appellant

NMCCA No. 202200212

Panel 3

ORDER

Denying Appellant's Motion to Compel Production of Transcribed Record of Trial

Before the Court is Appellant's a Motion to Compel Production of Transcribed Record of Trial, filed on 22 March 2023. The Government filed an opposition to this Motion on 27 March 2023, and a corrected opposition on 29 March 2023, noting recent changes in the Rules for Courts-Martial related to verbatim transcripts. On 29 March 2023, Appellant filed a reply to the Government's corrected opposition.

Appellant contends that there are errors in the existing transcript of the court-martial. In particular, Appellant believes there are inaccurate, or missing, responses to some questions and also discrepancies between the interpreter's translation of testimony (given in French) and what is reflected in the existing transcript. The Court is mindful that a substantially verbatim transcript is required to accompany the record of trial. In its Opposition, the Government does not dispute that the errors identified by Appellant in his motion are actually errors. Nonetheless, the Government argues that the transcript here is substantially verbatim, and posits that Appellant can request that specific identified errors be corrected by this Court. The Government notes that any alleged errors can be noted in Appellant's eventual brief, and analyzed for prejudice in the context of an assignment of error.

We believe that ordering a re-transcription of the entire recording (approximately four thousand pages) is unnecessary here. To the extent that any of the alleged transcription errors are material to an assignment of error, Appellant can raise them in the context of his brief and this Court will resolve those issues in conducting our review under Article 66, UCMJ.

Having reviewed the underlying motion, responses, and reply, it is, on this 31st day of March 2023,

ORDERED:

1. That Appellant's Motion to Compel Production of Transcribed Record of Trial is **DENIED**.

2. That Appellant may raise the issue of an error in the transcription in the context of his brief and assignments of error.

3. That the Government will listen to the specific parts of the recording that Appellant contends in his eventual brief and assignments of error are inaccurate in a material way.

4. That the Government will indicate in its eventual Answer whether it concedes or disputes the accuracy of the recording as to the identified alleged transcription errors.

FOR THE COURT:

[redacted]

Copy to:
45 (Maj Keefe);
46 (Maj White, LCDR LaPlante);
02;
[redacted]

IN UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Before Panel No. 3

NMCCA Case No. 202200212

UNITED STATES
Appellee

v.

Craig R. BECKER
Lieutenant (O-3), U.S. Navy

Appellant

APPELLANT'S MOTION FOR FIFTH ENLARGEMENT OF TIME

Tried at [redacted] on May 2, 2019, 1 October 2019, 11 December 2019, 20 January 2022, 3 March 2022, 8 April 2022 and 12 April – 30 April 2022 before a General Court-Martial convened by Commander, Navy Region [redacted] Colonel Stephen Keane, USMC, presiding

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

COMES NOW the undersigned and respectfully moves for a fifth enlargement of time to file a brief and assignments of error. The current due date is March 20, 2023. The number of days requested is thirty. The requested due date is April 20, 2023.

Status of the case:

1. The Record of Trial was docketed on September 21, 2022.

2. The Moreno III date is March 21, 2024.

3. Appellant is confined with a life sentence.

4. The record consists of 4055 transcribed pages, 63 prosecution exhibits, 19

defense exhibits, 303 appellate exhibits, and 26 total volumes.

5. Appellant is fully aware of, and has consented to and fully supports, this request for a fifth enlargement of time.

GOOD CAUSE EXISTS FOR GRANTING THIS FIFTH ENLARGEMENT

Good cause exists for this fifth enlargement for the following reasons:

a. Appellant's counsel have discovered significant errors in the transcription of the trial that require careful review and involve substantial time not previously contemplated.

In reviewing the record, Appellant's counsel have discovered errors in the transcript that call into question the accuracy and completeness of the entire record. Appellant has a statutory right to a complete and accurate record of trial, which includes a substantially verbatim transcript. Article 54, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § 854, R.C.M. 1114, R.C.M. 1116; *see also United States v. Davenport*, 73 M.J. 373, 376 (C.A.A.F. 2014). Here, Appellant's counsel have discovered substantial errors that, if left uncorrected, prejudice Appellant's right to a fair trial including competent appellate review. Appellant's counsel offer the following examples as a non-exhaustive list of errors already identified:

(1) The transcript incorrectly states that a government witness said "I can guarantee you with a certitude, with such certainty." (R. at 2667.) But the audio from trial makes clear the witness said "I cannot guarantee you with a certitude,

with such certainty." (21 Apr 22 audio file "BECKER_20220421-254_01" at 1:21:02.) The transcript reflects the following cross-examination of Government witness Ms [redacted]

> Q: So you cannot say that preservative was used in the samples in this case?
>
> A: I *can* guarantee you with a certitude, with such certainty, sorry because it was six years ago.

(R. at 2667(emphasis added).) In the audio recording of this testimony, however, the translator actually says, "I *cannot* guarantee you with a certitude . . ." (21 Apr 22 audio file "BECKER_20220421-254_01" at 1:21:02 (emphasis added).)

Here, the fact that the witness actually said they *cannot* guarantee with a certitude a material fact—whether or not the blood samples tested had preservative agents required to maintain the integrity of the sample—is a material error within the transcript. In order for appellate defense to competently represent their client, they need to ensure the record accurately reflects statements such as this that have a bearing on the content of the testimony as well as the credibility and veracity of witness testimony, particularly government witnesses.

(2) The transcript completely omits the only eyewitness to the fall saying: "I cannot recall, it was too long ago." The transcript reflects the following examination of Government witness Ms. [redacted] by the military judge:

> Q: Yeah, hang on. Did you see—did you first see Ms. [redacted] on the first scream or the second scream? Or on the scream while she

was holding onto the window, or the scream while sliding down?

A: I don't---yeah, if I saw her sitting there, meaning that, you know, she was—so before she got down so it means the first cry, the first scream, sorry, it was the one that she was sitting there, yeah.

(R. at 2734.) Yet in the audio of this portion of the trial, the translator begins the translation of her answer to the question by stating that the witness said, "I cannot recall, it was too long ago." (21 Apr 22 audio file "BECKER_20220421-0558_01" at 1:03:04.) That *significant detail* is not reflected anywhere in the transcript for that answer. This is a material error: Ms. [redacted] was the *only* percipient witness to observe Appellant's wife fall from the window, and the fact that she stated she couldn't remember an important detail about her memory relating to when she first observed Ms. [redacted] is a significant portion of the trial record that should be accurately reflected in the transcript.

(3) The transcript fails to include Ms. [redacted] the only eyewitness to the fall, testifying that the light was on in the room that Appellant's wife fell from. The transcript reflects the following direct examination of Government witness Ms. [redacted] by trial counsel:

Q: When you first saw the woman, was the light on or off in the room?

ATC: One moment, Your Honor.

No further questions, your honor.

R. 2717. Although the transcript records no response to this question, a review of

the audio shows that Ms. [redacted] answered the question, stating: “Oui” and the interpreter translated her reply as: “Yes. Was on.” (21 April 22 audio file “BECKER_20220421-0558_01d85544e3ef2f70” at 31:57.) Again, the record failed to capture this important detail from the trial. This is critical evidence to the defense’s case, necessary to prove the defense theory that the Appellant was not in fact in the room at the time his wife fell. The fact that Ms. [redacted] testified the light was on supports her later testimony that she did not see anyone in the window by providing evidence there was sufficient illumination to see into the room from the street. Omitting this response from the record again casts serious doubt on the accuracy of the record as it stands.

(4) Some additional errors in the transcript include the following (with error identified in bold):

Witness testifying	Transcript	Audio
Mr. [redacted]	R. at 1894: Q: “You said he was a **bad** man?” A: “Oui.”	Audio reflects that actual question was: “You said he was a **bald** man?” BECKER_20220413-0919_01d84f178375b0b0 at 11:00.

Ms. [redacted]	R. at 2676: Q: "All right. And now I wanted to talk to you about elimination rates. The elimination rate refers to the amount of alcohol a person's body can process." A: "Yes."	Audio reflects that actual question was: Q: "All right. And now I wanted to talk to you about elimination rates. The elimination rate refers to the amount of alcohol a person's body can process **in an hour.**" A: "Yes." BECKER_20220421-0500_01d8553cc68d7e30.wma at 1:42:03
Ms. [redacted]	R. at 2687: Q: I think I'm not stating the question as it was intended correctly. The pill itself, disregard the person. Does the **pill** of the pill increase or decrease or change in any way over time?"	Audio reflects that actual question was: Q: I think I'm not stating the question as it was intended correctly. The pill itself, disregard the person. Does the **potency** of the pill increase or decrease or change in any way over time?" BECKER_20220421-0500_01d8553cc68d7e30.wma at 22:06.

In light of the foregoing errors, there is significant concern that the entire transcript may contain other such errors, and at this time the extent of mistakes in the certified transcript is unclear. Appellant requires additional time to finalize appellate review and complete the brief, as reviewing the audio for errors as compared to the transcript is extremely time consuming and was not contemplated

by counsel at the outset of this appellate review. The Appellant's request for additional time in light of these errors should not be construed as waiver of requesting other appropriate relief here. Counsel expect to file a motion to compel the production of an accurate transcript forthwith.

b. *Appellant's counsel have discovered evidence of ineffective assistance of counsel that requires additional time to develop an assignment of error.*

In reviewing the record of trial, appellate counsel have identified evidence that Appellant received ineffective assistance of counsel by his trial defense team. *See Strickland v. Washington*, 466 U.S. 668 (1984). In order to develop sufficient evidence to meet the requirements of *Strickland*, counsel have conducted extensive interviews with many of the defense witnesses who testified at trial, including all but one of the defense experts. This effort has taken considerable time, and appellate counsel request this enlargement to further develop this assignment of error in accordance with Appellant's wishes.

c. *Appellant is actively involved in this appeal and adequate time is required to provide drafts of the brief and assignments of error for his review and feedback.*

Appellant was convicted of premeditated murder and received a life sentence. He now faces spending the rest of his life incarcerated, away from his three children and family, if he is not successful on appeal. In light of these tremendous stakes, Appellant is very involved in his appeal, requesting to discuss

the case at least weekly and to regularly review documents and drafts relevant to his appeal. Appellate counsel speak to Appellant at least once a week, often more frequently, and regularly send materials for his review. Counsel have already met in person with Appellant once, and plan to visit him a second time to review the final draft of the brief as he has specifically requested. Accommodating Appellant's wishes has required more time than initially was expected, and counsel respectfully request for additional time in this case to ensure that Appellant can continue to be closely involved in his appeal, as is his right.

In light of the foregoing, and in order to provide Appellant the necessary thoroughness and preparation required for competent representation with a case of this magnitude where a life sentence was adjudged, counsel anticipate that 90 additional days are required once a correct record has been produced. That timeline only stands, however, if the government provides a corrected record promptly. Appellate defense counsel cannot accurately anticipate a calendar date until it is clear when the material errors to the transcript will be corrected.

Undersigned counsel respectfully requests this Court grant a fifth enlargement of time to allow counsel time to complete research on possible assignments of error, ensure the record of trial is accurate, and continue drafting the brief.

Respectfully submitted.

/s/

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/s/

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CERTIFICATE OF FILING AND SERVICE

I certify the foregoing was electronically delivered to the Court, uploaded into the Court's case management system, and electronically delivered to Director, Appellate Government Division on March 15, 2023.

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

Before Panel No. 3

UNITED STATES, Appellee v. Craig R. BECKER, Lieutenant (O-3) U.S. Navy Appellant	)	APPELLEE'S PARTIAL OPPOSITION TO APPELLANT'S MOTION FOR FIFTH ENLARGEMENT OF TIME Case No. 202100045 Tried at [redacted] on May 2, October 1, December 11, 2019, January 20, March 3, April 8, and April 12–30, 2022, by a general court-martial convened by Commander, Navy Region [redacted] Colonel S. F. Keane, U.S. Marine Corps, presiding

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

Pursuant to Rule 23.2 of this Court's Rules of Appellate Procedure, the United States opposes a thirty-day enlargement but consents to a fourteen-day enlargement. The United States may not oppose a thirty-day enlargement if Appellant files an amended pleading that complies with the Rules and precedent.

A. This Court's Rules require good cause with particularity when requesting an enlargement of time, which includes a status of the review of the record of trial. Failure to provide good cause implicates an appellant's right to speedy appellate process. Appellant fails to provide good cause as he does not provide his status on Record review.

This Court may grant an enlargement of time only if an appellant shows good cause with particularity. N-M. Ct. Crim. App. R. 23.2(c)(3). A showing of good cause requires certain information, including "status of review of the record of trial." N-M. Ct. Crim. App. R. 23.2(c)(3)(E).

The justification for appellate delay implicates an appellant's right to speedy appellate process. "Ultimately the timely management and disposition of cases docketed at the Courts of Criminal Appeals is a responsibility of the Courts of Criminal Appeals." *See United States v. Moreno*, 63 M.J. 129, 137–38 (C.A.A.F. 2006) (United States must ensure timely representation in face of staffing, overcrowded courts, or other challenges); *see* N-M. Ct. Crim. App. R. 23.2(c)(3)–(4) (protecting constitutional concerns enunciated in *Moreno*).

Here, Appellant fails to provide a status update on his review of the Record of trial to justify additional delay. This Court should require Appellant to abide by this Court's Rules before granting additional delay. *See* N-M. Ct. Crim. App. R. 23.2.

B. Appellant must file appropriate motions for relief to support the good cause he claims for additional time. Moreover, Appellant can address any perceived errors in the transcribed Record in his Brief as he has shown in his Motion for an Enlargement of Time. Any transcribed errors do not justify further delay.

1. An appellant has a right to an accurate record of trial, and the Court's Rules provide a means to address those concerns.

An appellant has a statutory right to a substantially verbatim transcript. 10 U.S.C. § 854; R.C.M. 1114, 1116.

"Any party may move the Court to correct any substantial error in the record of trial, to include correcting a transcription of a court-martial proceeding that is attached to the record of trial." N-M. Ct. Crim. App. R. 6(c). "Any party may move for relief from a post-trial processing error by apprising the Court of an obvious error in the post-trial processing phase and requesting immediate remand to correct it." N-M. Ct. Crim. App. R. 23.5.

Whenever it is clear that the original record of trial is missing an item necessary for the Court's consideration, counsel may move the Court to compel the Government to produce the item. Such a motion should identify with particularity the item that is missing, and how it is relevant to the Court's review. N-M. Ct. Crim. App. R. 23.9.

2. Requesting additional delay will not fix any alleged errors in Appellant's Record, and does not show good cause for additional delay. Appellant can either address any alleged transcription errors in his Brief or can move the Court to amend the Record.

In Appellant's Fifth Enlargement he alleges to have found errors in the Record transcript upon reviewing the trial audio, but previously filed four requests for enlargements without mention of any alleged transcription errors or any filing for appropriate relief. (*See* Appellant's Mot. Fifth Enl. at 2, Mar. 15, 2023; Appellant's Mot. First Enl., Nov. 15, 2022; Appellant's Mot. Second Enl., Dec. 16, 2022; Appellant's Mot. Third Enl., Jan. 17, 2023; Appellant's Mot. Fourth Enl., Feb. 14, 2023.) If Appellant believes the Record does not include a substantially verbatim transcript, then Appellant should file an appropriate motion for relief in order to correct any perceived deficiency and avoid any additional delay in appellate processing—which he has so far failed to do. Moreover, as Appellant shows in his latest Motion he is fully capable of noting differences between the transcript and the audio, any alleged transcription errors can be addressed in his Brief to the Court and do not independently establish good cause for further delay.

Conclusion

The United States respectfully requests that this Court grant a fourteen day enlargement, without prejudice to Appellant filing an amended pleading showing good cause with particularity for a full thirty day enlargement.

Candace G. White Digitally signed by Candace G. White

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Certificate of Filing and Service

I certify I emailed this document to the Court's filing address, uploaded it to the Court's case management system, and emailed it to Appellate Defense Counsel, Major Joshua P. KEEFE, U.S. Marine Corps, and Civilian Appellate Defense Counsel, David P. SHELDON, on March 20, 2023.

Candace G. White Digitally signed by Candace G. White

CANDACE G. WHITE
Major, U.S. Marine Corps
Appellate Government Counsel

United States Navy-Marine Corps
Court of Criminal Appeals

UNITED STATES

Appellee

v.

Craig R. BECKER
Lieutenant (O-3)
U.S. Navy

Appellant

NMCCA No. 202200212

Panel 3

ORDER

Granting Appellant's Motion for a Fifth Enlargement of Time

On 15 March 2023, Appellant filed a Motion for a Fifth Enlargement of Time. On 20 March 2023, the Government filed a partial opposition to this motion, indicating that Appellant has not provided the Court with a status of review of the record of trial. On 22 March 2023, Appellant filed a Motion to Compel Production of Transcribed Record of Trial. On 23 March 2023, this Court held a chambers conference with the parties to discuss the efficient management of this case.

Appellant asserts three bases for his request for more time. First, that a comparison of the audio file with the transcript of the trial reveals some errors in the transcription. Second, that the appellate defense team has identified evidence that Appellant received ineffective assistance of counsel at trial and needs additional time to develop and brief this assignment of error. Third, that Appellant himself remains very involved in the appeal process which is time consuming generally, and delays of a few days result from the fact that Appellant is in confinement and there is a lengthy administrative process for setting up telephone calls.

At the chambers conference, the Government indicated that they had not yet reviewed Appellant's Motion to Compel Production of Transcribed Record of Trial as it was filed after hours yesterday, and appellate government counsel was unable to indicate whether the Government would oppose the Motion. The appellate defense team further stated that they are pressing forward with drafting the brief based on the audio file and the existing transcript, and they expect to file a complete brief and assignment of errors in June 2023.

Having reviewed the underlying motions, accordingly, it is, on this 23rd day of March 2023,

ORDERED:

1. That Appellant's Motion for a Fifth Enlargement of Time is **GRANTED**. Appellant's brief is now due on **20 April 2023.** Further motions for enlargements of time shall describe, with specificity, the status of the review of the record of trial in accordance with Rule 23.2(c)(3)(E) of this Court's rules, and shall indicate whether Appellant plans to request further time beyond that requested in the motion.

2. That the Government will respond to Appellant's Motion to Compel Production of Transcribed Record of Trial by 27 March 2023, and Appellant will be given two days to file a Reply.

3. That the Court will rule on Appellant's Motion to Compel Production of Transcribed Record of Trial, if necessary, after the Court receives the Government's Response and any Reply Appellant subsequently files.

FOR THE COURT:

[redacted]

Acting Clerk of Court

Copy to:
45 (Maj Keefe);
46 (Maj White, LCDR LaPlante);
02;
[redacted]

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

Before Panel No. 3

UNITED STATES, Appellee	)	APPELLEE'S PARTIAL OPPOSITION TO APPELLANT'S MOTION FOR SIXTH ENLARGEMENT OF TIME
v.	)	
Craig R. BECKER, Lieutenant (O-3) U.S. Navy Appellant	)	Case No. 202200212
	)	Tried at [redacted] on May 2, October 1, December 11, 2019, January 20, March 3, April 8, and April 12–30, 2022, by a general court-martial convened by Commander, Navy Region [redacted] Colonel S. F. Keane, U.S. Marine Corps, presiding

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

Pursuant to Rule 23.2 of this Court's Rules of Appellate Procedure, the United States opposes a thirty-day enlargement but consents to a fourteen-day enlargement. The United States may not oppose a thirty-day enlargement if Appellant files an amended pleading that complies with the Rules and precedent.

A. This Court's Rules and *Moreno* require good cause with particularity and more than rote justifications when requesting an enlargement of time. Failure to provide good cause implicates an appellant's right to speedy appellate process.

This Court may grant an enlargement of time only if an appellant shows good cause with particularity. N-M. Ct. Crim. App. R. 23.2(c)(3). A showing of

good cause requires certain information, including "status of review of the record of trial." N-M. Ct. Crim. App. R. 23.2(c)(3)(E).

The justification for appellate delay implicates Appellant's right to speedy appellate process. In *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006), the court held the Court of Criminal Appeals failed to exercise "institutional vigilance" and attributed that failure to the United States where appellate defense counsel stated the same reason for delay in each enlargement request. *Id.* at 137; *see also* N-M. Ct. Crim. App. R. 23.2(c)(3)–(4) (protecting constitutional concerns enunciated in *Moreno*).

There, the court found recurrent, rote justifications for delay suggested there was no evidence demonstrating "the enlargements were directly attributable to [the appellant]," "the need for additional time arose from other factors such as the complexity of [the appellant]'s case," or "the numerous requests for delay filed by appellate defense counsel benefited [the appellant]." *Id.* (rejecting presumption of benefit to the appellant).

B. Appellant provides similar rote justifications similar to his previous five enlargements, and thus fails to provide good cause with particularity for an additional enlargement.

Here, Counsel provides rote justifications of reviewing the Record and researching issues consistent with his previous five enlargements that do not show any tangible benefit to Appellant or justify further delay. (*See* Appellant's Mot.

Sixth Enl. at 2–3, Apr. 14, 2023; Appellant's Mot. First Enl., Nov. 15, 2022; Appellant's Mot. Second Enl., Dec. 16, 2022; Appellant's Mot. Third Enl., Jan. 17, 2023; Appellant's Mot. Fourth Enl., Feb. 14, 2023; Appellant's Mot. Fifth Enl. at 2, Mar. 15, 2023.)

Likewise, Appellant does not provide any estimate when he will complete his Brief and file it with the Court which raises timely post-trial processing concerns. This Court should exercise institutional vigilance and require more detail regarding timelines to justify additional delay. *See Moreno*, 63 M.J. at 137.

This Court should require Appellant to abide by this Court's Rules and precedent before granting additional delay. *See* N-M. Ct. Crim. App. R. 23.2.

Conclusion

The United States respectfully requests that this Court grant a fourteen day enlargement, without prejudice to Appellant filing an amended pleading showing good cause with particularity for a full thirty day enlargement.

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I certify I emailed this document to the Court's filing address, uploaded it to the Court's case management system, and emailed it to Appellate Defense Counsel, Major Joshua P. KEEFE, U.S. Marine Corps, and Civilian Appellate Defense Counsel, David P. SHELDON, on April 19, 2023.

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Appellate Government Counsel

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

Before Panel No. 3

UNITED STATES, Appellee v. Craig R. BECKER, Lieutenant (O-3) U.S. Navy Appellant	)	APPELLEE'S MOTION FOR LEAVE TO FILE PARTIAL OPPOSITION TO APPELLANT'S MOTION FOR SEVENTH ENLARGEMENT OF TIME OUT OF TIME Case No. 202200212 Tried at [redacted] on May 2, October 1, December 11, 2019, January 20, March 3, April 8, and April 12–30, 2022, by a general court-martial convened by Commander, Navy Region [redacted] Colonel S. F. Keane, U.S. Marine Corps, presiding

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

Pursuant to Rule 13.2(e) of this Court's Rules of Appellate Procedure, the United States respectfully moves for this Court to accept the out-of-time filing of Appellee's Partial Opposition to Appellant's Motion for Seventh Enlargement of Time.

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

Before Panel No. 3

UNITED STATES, Appellee	)	APPELLEE'S OUT OF TIME PARTIAL OPPOSITION TO APPELLANT'S MOTION FOR EIGHTH ENLARGEMENT OF TIME
v.	)	
Craig R. BECKER, Lieutenant (O-3) U.S. Navy	)	Case No. 202200212
Appellant	)	Tried at [redacted] on May 2, October 1, December 11, 2019, January 20, March 3, April 8, and April 12–30, 2022, by a general court-martial convened by Commander, Navy Region [redacted] Colonel S. F. Keane, U.S. Marine Corps, presiding

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

Pursuant to Rule 23.2 of this Court's Rules of Appellate Procedure, the United States opposes a thirty-day enlargement but consents to a fourteen-day enlargement. The United States may not oppose a thirty-day enlargement if Appellant files an amended pleading that complies with the Rules and precedent.

A. Appellant must demonstrate the good cause he claims for additional time. Appellant's independent fact-finding does not justify further delay.

1. The record of trial is generally not expanded on appeal, except in limited circumstances. An appellant may move for appellate discovery under *Campbell*, or move to expand the record under precedent listed in *Jessie*, such as *Ginn*.

This Court is limited to the Record and may not consider matters outside the Record in its Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2016), review. *United States v. Willman*, 81 M.J. 355, 358 (C.A.A.F. 2021). "Congress intended a Court of Criminal Appeals to act as factfinder in an appellate-review capacity and not in the first instance as a trial court." *United States v. Ginn*, 47 M.J. 236, 242 (C.A.A.F.1997).

The test in *United States v. Campbell*, 57 M.J. 134, 138 (C.A.A.F. 2002), justifies appellate discovery in narrow circumstances. First, the court must determine whether the "inquiry is warranted." *Id*. Second, if a court determines an inquiry is warranted, "it must determine what method of review should be used." *Id.*; *see also United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997). While the Courts of Criminal Appeals are generally limited to the record established during trial, they may consider matters outside the record of trial "upon a motion to attach or upon its own motion." N-M. Ct. Crim. App. R. 6.1(a).

2. No good cause is provided by Appellant's personal attempt at appellate fact-finding, over two hundred fifty days after docketing. His FOIA requests are subject to times and tests completely unrelated to appellate review before this court. Appellant is free to move to attach items now that satisfy *Jessie*. He may now move to compel appellate discovery if matters satisfy the *Campbell* test. Further delay is inappropriate absent meeting relevant appellate record-expansion tests.

Here, Appellant cites the need for time to complete factual development of his case. (Appellant's Mot. Eighth Enl. at 2, June 15, 2023). But Appellant's trial is complete. The Record is certified. Appellant has not moved for appellate discovery—which might result in an appellate court order with certain results, if he can meet the *Campbell* test—in over two hundred fifty days since docketing at this Court. Instead, Appellant now seeks further delay citing his Freedom of Information Act (FOIA) requests for matters that appear to fall well within the jurisdiction of this Court. (Appellant's Mot. Eighth Enl. at 2, June 15, 2023).

Granting Appellant additional time for his fishing expedition over two hundred fifty days after docketing, and his attempt to seek an end-run around mechanisms this Court has for appellate fact-finding merely causes significant delay for the United States' and the Victim's interests of justice, and impedes the "institutional vigilance" required under *United States v. Moreno*, 63 M.J. 129, 143 (C.A.A.F. 2006).

Therefore, the Court should deny Appellant's request for an enlargement, but allow for Appellant to file a motion to compel the information sought by the FOIA request and re-file the enlargement request.

B. This Court's Rules and *Moreno* require good cause with particularity and more than rote justifications when requesting an enlargement of time. Failure to provide good cause implicates an appellant's right to speedy appellate process.

This Court may grant an enlargement of time only if an appellant shows good cause with particularity. N-M. Ct. Crim. App. R. 23.2(c)(3). A showing of good cause requires certain information, including "status of review of the record of trial" and must include a discussion of the complexity of the case. N-M. Ct. Crim. App. R. 23.2(c)(3)(E)–(F).

The justification for appellate delay implicates Appellant's right to speedy appellate process. In *Moreno*, the court held the Court of Criminal Appeals failed to exercise "institutional vigilance" and attributed that failure to the United States where appellate defense counsel stated the same reason for delay in each enlargement request. 63 M.J. at 137; *see also* N-M. Ct. Crim. App. R. 23.2(c)(3)–(4) (protecting constitutional concerns enunciated in *Moreno*).

There, the court found recurrent, rote justifications for delay suggested there was no evidence demonstrating "the enlargements were directly attributable to [the appellant]," "the need for additional time arose from other factors such as the

complexity of [the appellant]'s case," or "the numerous requests for delay filed by appellate defense counsel benefited [the appellant]." *Id.* (rejecting presumption of benefit to the appellant).

C. Appellant provides rote justifications similar to his previous seven enlargements, and thus fails to provide good cause with particularity for an additional enlargement.

Here, with the exception of the request for time for fact-finding, Counsel provides similar rote justifications of drafting and editing a brief consistent with his previous seven enlargements that do not show any tangible benefit to Appellant or justify further delay. (*See* Appellant's Mot. Eighth Enl. at 2–4, June 15, 2023; Appellant's Mot. Seventh Enl. at 2–3, May 16, 2023; Appellant's Mot. Sixth Enl. at 2–3, Apr. 14, 2023; Appellant's Mot. First Enl., Nov. 15, 2022; Appellant's Mot. Second Enl., Dec. 16, 2022; Appellant's Mot. Third Enl., Jan. 17, 2023; Appellant's Mot. Fourth Enl., Feb. 14, 2023; Appellant's Mot. Fifth Enl. at 2, Mar. 15, 2023.) Counsel indicates the review of the Record is complete and a first draft of the brief is being finished, just as stated in the seventh enlargement.

Likewise, Appellant fails to explain the complexity of the case or the issues he intends to raise, which require additional time. Appellant only states that "additional time [is needed] to edit and complete a draft for filing, including time to meet with the client in person." (Appellant's Mot. Eighth Enl. at 3.)

The United States' interest in speedy post-trial processing continues throughout the appellate process. *Moreno*, 63 M.J. at 137. This Court should require Appellant to abide by this Court's Rules and precedent before granting additional delay. *See* N-M. Ct. Crim. App. R. 23.2.

Conclusion

The United States respectfully requests that this Court grant a fourteen-day enlargement, without prejudice to Appellant filing an amended pleading showing good cause with particularity for a full thirty-day enlargement.

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

Before Panel No. 3

UNITED STATES, Appellee v. Craig R. BECKER, Lieutenant (O-3) U.S. Navy Appellant	)	APPELLEE'S OPPOSITION TO APPELLANT'S MOTION TO COMPEL APPELLATE DISCOVERY Case No. 202200212 Tried at [redacted] on May 2, October 1, December 11, 2019, January 20, March 3, April 8, and April 12–30, 2022, by a general court-martial convened by Commander, Navy Region [redacted] Colonel S. F. Keane, U.S. Marine Corps, presiding.

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

Under Rules 6.1, 23.1, and 23.9 of this Court's Rules of Appellate Procedure, the United States respectfully opposes Appellant's Motion to Compel Appellate Discovery.

A. This Court should not rule on Appellant's Motion to Compel until it resolves Appellee's Motion to Strike.

On August 11, 2023, Appellee filed a Motion to Strike Appellant's Motion to Compel Appellate Discovery, citing Appellant's expansion of the Record of Trial, in violation of this Court's Rules and longstanding appellate precedent including *United States v. Jessie*, 79 M.J. 437, 444 (C.A.A.F. 2020). Appellant must first move to expand the Record under this Court's Rules, and justifying expansion under *Jessie* and other relevant appellate precedent. This Court should first resolve Appellee's Motion to Strike, moot the Motion to Compel, and permit Appellant to re-file a Motion to Compel after properly moving to attach new evidence.

B. Appellate discovery is appropriate in limited circumstances. A movant has the burden to show expanding the record is warranted.

While discovery during trial is governed by rules like R.C.M. 701 and Article 46, UCMJ, appellate discovery takes place after the contents of the record have been determined by litigation in open court, its contents assembled and properly certified, and docketed at appellate court. Expansion of the record on appeal is governed by the precedent discussed in *Jessie*, and "appellate discovery" is governed by the even more restrictive test of *United States v. Campbell*, 57 M.J. 134 (C.A.A.F. 2002).

In *Campbell*, the Court of Appeals for the Armed Forces recognized that appellate discovery may be appropriate in limited circumstances. *Id*. at 138. To justify appellate discovery, an appellant must meet his "threshold burden of demonstrating that some measure of appellate inquiry is warranted." *Id*. Courts should consider:

> (1) whether the appellant has made a colorable showing that the evidence or information exists;
>
> (2) whether the evidence or information sought was previously discoverable with due diligence;
>
> (3) whether the putative information is relevant to appellant's asserted claim or defense; and
>
> (4) whether there is a reasonable probability that the result of the proceeding would have been different with the information.

Id. If by application of the *Campbell* test, the appellate court determines further inquiry is warranted, "it must determine what method of review should be used . . . *e.g.*, affidavits, interrogatories, or a factfinding hearing." *Id*.; *see also United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997).

In *Campbell*, the appellant submitted a congressional complaint alleging prosecutorial misconduct. 57 M.J. at 135. The appellant later filed a motion with the Court of Criminal Appeals requesting that it compel production of an investigative report generated by the complaint. *Id*. at 135. To support the motion to compel, the appellant submitted letters from witnesses in the case describing

how the prosecutor coerced their statements or told them to lie. *Id*. The motion was denied. *Id*. at 136.

Ultimately, the Court of Appeals for the Armed Forces remanded the case to the Court of Criminal Appeals to determine whether the requested report existed. *Id*. at 139. If it existed, the court was required to review it *in camera* and determine whether it was relevant to the appeal and whether additional factual inquiry was needed. *Id*.

C. If this Court grants Appellee's Motion to Strike, it should then deny Appellant's Motion to Compel Appellate Discovery. Without the materials Appellant has attempted to introduce without complying with the tests for expansion of the record, Appellant is unable to make a colorable showing that the requested materials exist.

If Appellee's Motion to Strike is granted, then without the enclosures to that he appended to his Motion for Appellate Discovery, Appellant fails to meet his burden under *Campbell*.

Unlike *Campbell*, where the appellant had evidence of his congressional complaint and letters from witnesses, without his enclosures, Appellant is unable to make a colorable showing that Colonel Keane is employed by the Department of Veterans Affairs, let alone that the requested documents exist. By failing to meet the first prong of *Campbell*, Appellant's Motion must be denied.

D. If this Court considers Appellant's enclosures despite their non-compliance with *Jessie* and this Court's Rules, it should still deny Appellant's Motion for Appellate Discovery. The information sought fails under all four *Campbell* factors.

1. Appellant fails to make a colorable showing that the requested materials exist, except for those related to Colonel Keane's employment by the Department of Veterans Affairs.

Unlike *Campbell*, Appellant failed to request specific documents, from a military entity, that are directly related to his assignment of error. *Id*. at 138.

Further, Appellant fails to make a colorable showing that the requested documents exist. By requesting "all materials relating to any federal job application," Appellant is merely fishing for materials that he hopes exist, to make his case more like precedent where job applications have proven relevant—this fishing is demonstrated by his discovery, as if he were at trial under Rule 701, for "all materials." (Appellant's Mot. to Compel, Aug. 9, 2023.) But that is not how the *Campbell* test for appellate discovery works.

Appellant has merely enclosed extra-Record material in his Motion—without moving to attach or satisfying *Jessie*—suggesting that Colonel Keane may be employed as a Veterans Law Judge. Appellant encloses no extra-Record material suggesting that Colonel Keane applied for other jobs, supporting that other requested materials exist.

2. Appellant could have discovered the information he requested earlier.

Post-service applications or employment of the Military Judge in jobs that bring Appellant's case closer to those types of cases that have raised appearance concerns, is a well-known and recurring topic in military precedent that Trial Defense easily could have inquired about during trial. Appellant could have conducted voir dire of the Military Judge prior to or during trial. Appellant could have requested post-trial discovery, or a post-trial hearing.

Appellant did none of this. Instead, just after the *Bergdahl* case appears in national headlines, Appellant engages in a fishing-expedition for the first time on appeal, despite that the only job the Military Judge *may* have applied for is a independent judicial position at the Department of Veterans Affairs that facially raises no issues.

3. Appellant fails to demonstrate the requested information is relevant.

As Appellant has not yet filed a Brief and Assignments of Error, it is unknown whether these discovery requests are even relevant to his assertions of error and therefore this factor should not weigh in his favor.

Appellant makes generalized assertions, but fails to show how employment in an independent judicial position at the Department of Veterans Affairs would be a conflict and cause for challenge. Nothing in these "enclosed" extra-Record

materials suggests that the Military Judge applied for or took a partial position that raises appearances of impropriety.

Further, Appellant claim that the requested materials are relevant and necessary and required to be produced pursuant to R,.C.M. 703(e) is without merit. Appellant's case is not at trial. Appellant's case is on appeal, and is governed not by trial discovery, but by appellate precedent like *Campbell.* Appellant cites no law that supports that the trial rules continue to apply on appeal. Indeed, no such law exists. Since Appellant can only speculate that the requested materials exist, it is impossible for him to show they are relevant and necessary.

4. Appellant fails to show there is a reasonable probability that the result of the proceedings would have been different with the information.

a. Appellant can only speculate that the requested information may help raising assignments of error.

In *Campbell*, the appellant claimed the results would have been different due to prosecutorial misconduct. *Id*. at 135. Here, unlike *Campbell*, nothing supports that the results of the proceedings would have been different had Appellant had this information.

Appellant baldly states that he needs "discovery"—despite that the time for this was at trial—in order to "review" it and then "determine whether it is relevant, and whether it requires the filing of an additional assignment of error." If *Campbell* did not exist, and R.C.M. 701 applied on appeal, the United States might

agree. However, *Campbell* is clear that speculation is insufficient support for appellate discovery. *Id*. at 138.

Appellant's speculation fails to support a demand for appellate discovery.

b. No probability of a different result exists: the Department of Veterans Affairs was not a party to the case.

Appellant fails to cite anything to support his suggestion that any potential future employment by a sitting judge, with any agency or Department of the Executive branch, raises an appearance of bias issue. (Appellant's Mot to Comp. at 4–5.) Indeed, no law supports that.

In *Al-Nashiri*, the court ruled that "[I]t is beyond question that judges may not adjudicate cases involving their prospective employers." *In re Al-Nashiri*, 921 F. 3d 224, 235 (D.C. Cir. 2019). The military judge presiding over the appellant's case had applied to a job with the Department of Justice and the court concluded that "the Attorney General was a participant in Al-Nashiri's case from start to finish." *Al-Nashiri*, 921 F. 3d at 237. The court found that the Department of Justice was thus party to the case and the military judge's job application "cast an intolerable cloud of partiality." *Id.*

Here, there is no evidence or assertion on behalf of Appellant that the Department of Veterans Affairs is a party to the case. The facts, thus, do not establish that the Secretary of Veterans Affairs is a party to *this* court-martial.

So too, the case law does not establish that the heads of all executive branch departments and agencies are treated, *de jure*, as parties involved in all courts-martial. In fact, in *Al-Nashiri* the court acknowledged that the Department of Justice and Department of Defense are two different organizations. For this reason, further direct connection between the Department of Justice and the Military Commissions was needed in *Al-Nashiri* to establish an appearance of bias in that case. *See* 921 F. 3d at 236.

Here, the Military Judge did not seek civilian employment with the "office that oversees prosecutions in the very circuit" he was presiding over like in *Armendariz*; and, this is not a "unique situation where the military judge might be inclined to appeal to the president's expressed interest in the plaintiff's conviction" as in *Bergdahl*. *See United States v. Armendariz*, 82 M.J. 712, 725 (N-M. Ct. Crim. App. 2022); *Bergdahl v. United States*, 2023 U.S. Dist. LEXIS 127510, *92 (D.C. Cir. 2023).

Appellant fails to meet his burden under *Campbell*. His demand for a second chance at discovery of *new facts*, after trial has ended—and be granted the chance at rare "appellate discovery"—should be denied.

Conclusion

This Court should deny Appellant's Motion for Appellate Discovery.

Candace G. White Digitally signed by Candace G. White

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Major, U.S. Marine Corps
Appellate Government Counsel

United States Navy–Marine Corps
Court of Criminal Appeals

UNITED STATES
Appellee

v.

Craig R. BECKER
Lieutenant (O-3)
U. S. Navy
Appellant

NMCCA NO. 202200212

Special Panel 3

ORDER

Amending Court's 16 August 2023 Order Directing Oral Argument

On 16 August 2023, this Court issued an Order Directing Oral Argument on Pending Motions Before the Court. Upon consideration of new filings by the parties, it is, by the Court, this 23rd day of August 2023,

ORDERED:

1. That the Court will hear consolidated oral argument on the following pending motions, including**:**

I. ***Appellant's Motion to Compel Post-Trial Discovery dtd 9 August 2023, as amended on 21 August (and Appellee's Opposition dtd 14 August 2023).***

II. ***Appellee's Motion to Strike Appellant's Motion to Compel Post-Trial Discovery dtd 11 August 2023.***

III. ***Appellant's Motion for Tenth Enlargement of Time dtd 16 August 2023.***

IV. ***Appellant's Second Motion to Compel Post-Trial Discovery dtd 21 August 2023.***

V. ***Appellant's First Motion to Attach dtd 21 August 2023.***

VI. ***Appellant's Second Motion to Attach dtd 21 August 2023.***

2. Each side will be given 30 minutes to respond to the Court's questions.

3. That the argument will be scheduled for Tuesday, 29 August 2023, at 1400, at the U.S. Navy-Marine Corps Court of Criminal Appeals, 1254 Charles Morris Street SE, Washington Navy Yard, DC 20374-5124.

FOR THE COURT:

[redacted]

MARK K. JAMISON
Clerk of Court

Copy to: 45 (Maj Keefe); 46 (Maj White; LCDR LaPlante); 02; Mr. Sheldon

REMAND

THERE WERE NO REMANDS

NOTICE OF COMPLETION OF APPELLATE REVIEW (NOCAR)