[redacted]

CERTIFIED RECORD OF TRIAL

(and accompanying papers)

of

BENTON	CHERELLE	J.	[redacted]	E-7
(Last Name)	*(First Name)*	*MI*	*(DoD ID No.)*	*(Rank)*

NAVY PERSONNEL COMMAND	U.S. NAVY	
(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 SOUTHEAST

(Unit/Command of Convening Authority)

Tried at

NAVAL STATION MAYPORT, MAYPORT, FLORIDA On 26JAN24, 6MAR24, 19APR24, 25APR24, 29APR24 THRU 3MAY2024

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

Companion and other cases NONE

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

[redacted]

CONVENING ORDER

DEPARTMENT OF THE NAVY
COMMANDER NAVY REGION SOUTHEAST
BOX 102, NAVAL AIR STATION
JACKSONVILLE, FLORIDA 32212-0102

5817
N00J
25 Apr 24

GENERAL COURT-MARTIAL
AMENDING ORDER 1B-24

The following individual is hereby detailed to the general court-martial convened by my General Court-Martial Convening Order 1-24 of 4 January 2024, as amended by my General Court-Martial Amending Order 1A-24 of 8 April 2024, in the case of Chief Aviation Maintenance Administrationman Cherelle J. Benton, U.S. Navy, only.

- Chief Aviation Boatswain's Mate (Aircraft Handling) [redacted] U.S. Navy.

The following individuals are hereby relieved from the general court-martial convened by my General Court-Martial Convening Order 1-24 of 4 January 2024, as amended by my General Court-Martial Amending Order 1A-24 of 8 April 2024, in the case of Chief Aviation Maintenance Administrationman Cherelle J. Benton, U.S. Navy, only.

- Lieutenant Commander [redacted] U.S. Navy; and
- Senior Chief Fire Control Technician [redacted] U.S. Navy.

[redacted]

I. L. JOHNSON
Rear Admiral, U.S. Navy
Commander, Navy Region Southeast

[redacted]

CHARGE SHEET

[redacted], TRIAL COUNSEL 2 MAY 24

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, MI)	2. SSN	3. GRADE OR RANK	4. PAY GRADE
BENTON, Cherelle, J.	[redacted]	AZC	E-7

5. UNIT OR ORGANIZATION	6. CURRENT SERVICE	
	a. INITIAL DATE	b. TERM
Navy Personnel Command	7 JUN 21	6 YEARS

7. PAY PER MONTH			8. NATURE OF RESTRAINT OF ACCUSED	9. DATE(S) IMPOSED
a. BASIC	b. SEA/FOREIGN DUTY	c. TOTAL		
~~$5,532~~ $5,113.50	N/A	~~$5,532~~ $5,113.50	None	N/A

II. CHARGES AND SPECIFICATIONS - ADDITIONAL

10.

CHARGE I: VIOLATION OF THE UCMJ ARTICLE 114

Specification (Firearm Discharge, Endangering Human Life): In that Aviation Maintenance Administrationman Chief Petty Officer Cherelle J. Benton, U.S. Navy, did, at or near Oakland, Tennessee, on or about 5 August 2022, wrongfully and willfully discharge a firearm, to wit: a Kimber 9mm pistol, in a residential neighborhood under circumstances such as to endanger human life.

CHARGE II: VIOLATION OF THE UCMJ ARTICLE 128

Specification (Simple Assault): In that Aviation Maintenance Administrationman Chief Petty Officer Cherelle J. Benton, U.S. Navy, did, at or near Oakland, Tennessee, on or about 5 August 2022, assault PS1 [redacted] U.S. Navy, by pointing a Kimber 9mm pistol in his direction.

CHARGE III: VIOLATION OF THE UCMJ ARTICLE 131b

Specification (Obstructing Justice): In that Aviation Maintenance Administrationman Chief Petty Officer Cherelle J. Benton, U.S. Navy, did, at or near Oakland, Tennessee, on or about 5 August 202, wrongfully do certain acts, to wit: moved a shell casing, placed her discharged firearm in the vehicle of PS1 [redacted] U.S. Navy, and initially denied to law enforcement discharging the firearm with intent to obstruct the due administration of justice in the case of herself against whom the accused had reason to believe that there were or would be criminal proceedings pending.

(AND NO OTHERS)

III. PREFERRAL

a. NAME OF ACCUSER	b. GRADE	c. ORGANIZATION OF ACCUSER
[redacted]	LN2	RLSO SE DET MAYPORT

d. SI [redacted]

e. DATE (YYYYMMDD): 8 NOV 23

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

Kristen Poteet	OSTC
Typed Name of Officer	*Organization of Officer*
O-3	Judge Advocate
Grade	*Official Capacity to Administer Oaths (See R.C.M. 307(b)—must be commissioned officer)*

[redacted]
Signature

12. On 21 November, 20 23 the accused was informed of the charges against him/her and of the name(s) of the accuser(s) known to me. *(See R.C.M. 308(a)). (See R.C.M. 308 if notification cannot be made.)*

[redacted] LCDR JAGC USN
Typed Name of Immediate Commander

Navy Personnel Command
Organization of Immediate Commander

[redacted]
Signature

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13. The sworn charges were received at 1250 hours, 21 November 20 23 at Navy Personnel Command
Designation of Command or Officer Exercising Summary Court-Martial Jurisdiction (See R.C.M. 403)

~~FOR THE~~[1]

[redacted]
Typed Name of Officer

Commander, Navy Personnel Command
Official Capacity of Officer Signing

RDML/O-7

[redacted]

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY	b. PLACE	c. DATE *(YYYYMMDD)*
Commander, Navy Region Southeast	Jacksonville, FL	18 January 2024

Referred for trial to the general court-martial convened by my General Court-Martial Convening Order 1-24 of 4 January 20 24 subject to the following instructions:[2] None

~~By~~ ~~of~~
Command or Order

I. L. JOHNSON
Typed Name of Officer

Commander, Navy Region Southeast
Official Capacity of Officer Signing

Rear Admiral, U.S. Navy

[redacted]
Signature

15. On 22 January 20 24 I (caused to be) served a copy hereof on ~~(each of)~~ the above named accused.

Kristen Poteet
Typed Name of Trial Counsel

LT / O-3
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 (BACK), MAY 2000

TRIAL COURT MOTIONS & RESPONSES

NAVY-MARINE CORPS TRIAL JUDICIARY
SOUTHERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES V. CHERELLE BENTON II AZC/E-7 USN	**DEFENSE MOTION TO DISMISS IMPROPER REFERRAL UNDER R.C.M 905** **22FEB24**

MOTION

Pursuant to RULE FOR COURTS-MARTIAL (RCM) 905(b)(1) and R.C.M. 604(b), The Defense moves this Court to dismiss all charges and specification, as they were improperly withdrawn and dismissed in the previous court martial against AZC Benton.

BURDEN

Upon motion by the Defense, the Government bears the burden of proof by the preponderance of the evidence. R.C.M. 905(c)(1).

Facts

1. Originally, in *Benton I*, AZC Cherelle J. Benton was charged as follows: Charge I Violation of the Uniform Code of Military Justice (UCMJ) Article 80 (Attempt-Aggravated Assault); Charge II Violation of the UCMJ Article 109 (Damaging Non-Military Property); and Charge III Violation of the UCMJ Article 134 (Discharging through Negligence). Enclosure A.
2. These original charges were preferred on 11 May 2023 and were referred to General Court Martial by Commander Naval Region Southeast on 25 July 2023. Enclosure A.
3. AZC Benton's General Court Martial was scheduled for 30 October 2023 through 3

November 2023. Enclosure B.

4. The Defense inquired whether the Government planned to use the entirety of Officer [redacted] body camera or solely the portion after AZC Benton was given her Miranda Rights. Enclosure C.
5. In *Benton I's* Article 39a hearing on 13 October 2023, seemingly for the first time, was made aware of several deficiencies in its case. Critical evidentiary issues were highlighted including, the lack of discovery regarding the amount of damage to the tire and the fact that there had been no ballistics performed on the alleged weapon, both of which were relevant to the then-referred charges. Enclosure B.
6. The Court had not yet issued rulings from the Article 39a before the improper withdrawal and dismissal occurred.

Friday, 20 October 2023

7. On Friday, 20 October 2023, the Defense submitted their Final Pre-Trial matters in accordance with the T.M.O to the Government and to the Court. This included proposed jury instructions and voir dire questions. Enclosure B.
8. The Government did not submit its Final Pre-Trial matters that day, or ever. The Government never submitted member's questionnaires that were due to the Defense and the Court on 20 October 2023.
9. At 0944, that day, the Government notified Special Agent [redacted] NCIS Tennessee, that AZC Benton's trial would not be taking place on 30 October and his travel would be turned off shortly. Enclosure D.
10. At 1037, the Defense and this Court received an email from the Government entitled "ICO AZC Benton Dismissed Charges." Enclosure E.

11. The above-mentioned email contained the following language: "Please see the attached. By direction of the Convening Authority the charges preferred on 11 May 2023 have been dismissed without prejudice. For all parties[']awareness, the Government intends to prefer new charges in this case. Please let us know if the Court has any questions or needs additional information." Enclosure E.
12. The Government also provided the charge sheet itself with lines through each Charge and Specification and written language that this action was based on the "by direction authority" to withdraw and dismiss the charges. Enclosure A.
13. Following this notification from the Government, this Court further inquired: "As the charges are currently withdrawn, I will remove the trial dates from the docket. Do you have a sense of the timeline for referral of new charges?" Enclosure E.
14. The Government's responded: "We expect charges will be preferred next week and the Government will be requesting a new Article 32 hearing." Enclosure E.
15. Although the Government stated they were contemplating further prosecution at the time of the withdrawal, they declined to provide reasons for the withdrawal. Enclosure E.
16. *Benton I* was removed from the docket. Enclosure F.
17. The Government notified AZC Benton's character witnesses that trial was canceled.
18. AZC Benton was notified of the withdrawal and dismissal.

Monday 23 October 2023

19. The following Monday, the Government informed this Court and Defense that the Government did not have the "by direction authority" from the Convening Authority as they originally presented based on a miscommunication. Enclosure E.
20. The Court then requested clarity from the Trial Counsel regarding their position on whether

the charges were withdrawn and dismissed. Enclosure E.

21. The Government further detailed through an attachment from the Region SJA that, "The CA has not taken action on this case beyond the original referral." Enclosure G.
22. The Court requested an R.C.M. 802 conference at the parties' earliest convenience since the case had already been removed from the docket the previous week. Enclosure E.
23. During the R.C.M. 802 conference, the Court indicated that the trial would proceed because the Government did not have by direction authority to withdraw and dismiss the case.
24. During the R.C.M. 802 conference, the Government was granted a pause on the T.M.O., an extension for the submission of their Pre-Trial matters, and an opportunity to draft a motion for a continuance. Enclosure E.
25. During the R.C.M. 802 conference, the Defense posited that the case was already withdrawn and dismissed by the Government, albeit improperly, and that there was no Court-Marital before the judiciary.
26. This Court gave the Defense one day to provide a motion regarding why an improper withdrawal and dismissal such as this should preclude this case from being put back on the docket and tried before members. Enclosure E.
27. On 20 October 2023, the Defense requested a meeting with the Convening Authority's SJA, to inquire into the reasons for any withdrawal and dismissal at this late stage since the Government had not provided any reason. Enclosure H.
28. In the meeting on 24 October 2023, the Region SJA confirmed that Trial Counsel did not have the authority to withdraw and dismiss the charges and that Convening Authority would actually be making a decision later that night that would influence the trial.
29. The Defense was granted an extension for their motion in light of this new information.

Enclosure E.

30. A little over two hours after the Defense's meeting with the Convening Authority's SJA, the charges were again withdrawn and dismissed without prejudice; this time with the concurrence of the Convening Authority. Enclosure E.

31. *Benton I* was not restored to the docket.

United States v. Benton (*Benton II*)

32. On 8 November 2023, the Office of Special Trial Counsel preferred charges against AZC Benton in *Benton II.* Enclosure I.

33. *Benton II's* charge sheet reflected the following charges: Charge I Violation of the Uniform Code of Military Justice (UCMJ) Article 114 (Firearm Discharge, Endangering Human Life); Charge II Violation of the UCMJ Article 128 (Simple Assault); and Charge III Violation of the UCMJ Article 131(b) (Obstructing Justice). Enclosure I.

34. On 8 December 2023 the Defense's request to speak to the Convening Authority regarding the withdrawal and dismissal of charges for *Benton I* was denied. Enclosure J.

35. During the Article 32 hearing on 5 December 2023, the Preliminary Hearing Officer (PHO) as the Government to provide any additional information regarding the original reason for withdrawal and dismissal of *Benton I* and the Government refused. Enclosure K.

36. For the first time, on 7 December 2023 and within its supplemental comments to the PHO, the Government revealed its reason for withdrawal and dismissal of the original charges. The reasoning read: "As the Government continued with pre-trial preparations, it became apparent that those three charges were unsupported by available evidence and did not adequately reflect the nature of the charges." Enclosure L.

37. The PHO did not opine on the improper withdrawal and dismissal indicating it was outside of

his scope. Enclosure K.

38. On 9 February 2024, the Defense received in discovery and email from the Trial Counsel to the Staff Judge Advocate for AZC Benton's command dated 20 November 2023 wherein the Trial Counsel explained, "As we were preparing for trial and reviewing proposed instructions, our office recommended to the GCMCA withdrawing and dismissing charges due to perceiving potential issues at trial with the previous charging scheme and felt withdrawing and dismissing was appropriate in order to properly reflect the criminality of the conduct." Enclosure M.

39. The Government has provided no new substantive discovery following the improper withdrawal and dismissal of the original charges. The perfected charges are not an attempt to accurately capture AZC Benton's criminality but are instead indicative of the Government being unprepared to prosecute the original charges and needing time to prepare charges that would have a higher likelihood of success at trial given the state of the evidence on the eve of trial.

40. The newly perfected charges were referred to a General Court-Martial on 18 January 2024. Enclosure I.

41. AZC Benton was arraigned on Friday, 26 January 2024 in Mayport Florida and *Benton II* is scheduled for 19 -26 April 2024. Enclosure N

42. The Government previously agreed to produce Captain [redacted], USN as a witness for *Benton I.* However, he has indicated he may be unavailable for *Benton II* due to international travel. Additionally, he is now retired and is Mr. [redacted]. The Government is no longer willing to produce him for trial. and Mr. [redacted]

Law

a. R.C.M 604 permits re-referral of charges only if the initial charges were withdrawn and

dismissed for a proper reason by the person direction of the Convening Authority (CA).

R.C.M. 604 (a) states "the convening authority or a superior competent authority may for any reason cause any charges or specifications to be withdrawn from a court martial at any time before findings are announced." R.C.M. 604 (a) "Charges which have been withdrawn may be referred to another court-martial "unless withdrawal was for an improper reason." R.C.M. 604(b)

> The discussion section of R.C.M. 604(b) reads:
> When charges that have been withdrawn from a court-martial are referred to another court-martial, the reasons for the withdrawal and later referral should be included in the record of the later court-martial, if the later referral is more onerous to the accused. Therefore, if further prosecution is contemplated at the time of the withdrawal, the reasons for the withdrawal should be included in or attached to the record of the earlier proceeding.
>
> Improper reasons for withdrawal include an intent to interfere with the free exercise by the accused of constitutional rights or rights provided under the UCMJ, or with the impartiality of a court-martial. A withdrawal is improper if it was not directed personally and independently by the convening authority or by a superior competent authority.
>
> Whether the reason for a withdrawal is proper, for purposes of the propriety of a later referral, depends in part on the stage in the proceedings at which the withdrawal takes place. Before arraignment, there are many reasons for a withdrawal that will not preclude another referral. These include receipt of additional charges, absence of the accused, reconsideration by the convening authority or by a superior competent authority of the seriousness of the offenses, questions concerning the mental capacity of the accused, and routine duty rotation of the personnel constituting the court-martial. Charges withdrawn after arraignment may be referred to another court-martial under some circumstances. For example, it is permissible to refer charges that were withdrawn pursuant to a pretrial agreement if the accused fails to fulfill the terms of the agreement.

The Court has held "neither a delayed appreciation of the seriousness of the offenses nor the discovery of additional evidence of the accused's guilt is a proper reason for withdrawal after arraignment." *United States v. Mann*, 32 M.J. 883, 887 (N-M.C.M.R.

1991). A prosecutor should avoid implying a greater power to influence the disposition of a case than he possesses. *Cooke v. Orser*, 12 M.J. 335, 341.

b. The referral of improperly withdrawn charges prejudices the client and creates an appearance of judicial manipulation.

"The reason for this constriction is to avoid the possibility or the appearance that the convening authority has manipulated the judicial process to obtain some preconceived result." *Mann,* at 888. "Our case law has construed 'proper' in this context as a legitimate command reason which does not "unfairly" prejudice an accused in light of the particular facts of a case." *United States v. Underwood*, 50 M.J. 271, 276. Courts have determined it is not required to limit the question of prejudice to mounting a defense. *Mann*, at 886.

"[T]he remedy in the criminal proceeding is limited to denying the prosecution the fruits of its transgression." *Cooke v. Orser*, 12 M.J. 335, 345.

ARGUMENT

a. *Benton II* charges should be dismissed because *Benton I* charges were improperly withdrawn and dismissed mere days before trial that the Government was unprepared for.

The Defense, Government and this Court were all tracking the start of the *Benton I* trial on 30 October 2023. However, that progression was halted, when the Government sent an email stating they received "by direction authority" to withdraw and dismiss the charges. The Government indicated new charges would be preferred and notified Defense's witnesses that the trial had been canceled. The Court removed the case from the docket and inquired about the new charges the Government intended to prefer, but the Government choose not to provide any reasoning for the withdrawal and dismissal. The Defense and this Court relied on the Government's representation that the Convening Authority had directed the withdrawal and dismissal of these charges on a Friday afternoon. However, it was not until the following

Monday that the Trial Counsel alerted the Defense and this Court that the Convening Authority had not directed the withdrawal and dismissal and that the Trial Counsel acted independently and without authority. The withdrawal in this case was pre se improper because the Government did not withdraw and dismiss the charges in accordance with R.C.M. 604. Not only had Trial Counsel withdrawn and dismissed the charges with the authority of the Convening Authority, they also notified witnesses the trial was canceled, notified them their travel would be turned off, informed the Court and Defense, and had the case removed from the docket. The email from the Convening Authority's Staff Judge Advocate also shows prompting and guiding by the Trial Counsel to affect the Trial Counsel's desired outcome. In light of these facts, the Convening Authority's eventual direction was apparently influenced by the Trial Counsel's unauthorized actions. Convening Authority acquiescence to Trial Counsel actions is not sufficient. R.C.M. 604 requires personal and independent direction of the Convening Authority and an articulation of a proper reason in order for a withdrawal to be proper and a ref-referral authorized.

Despite providing the Defense and this Court with a signed charge sheet containing written language that the withdrawal and dismissal was done with "by direction authority," it was not. This was confirmed though through several R.C.M. 802 email correspondences. The most relevant being, "The CA has not taken action on this case beyond the original referral." R.C.M. 604 and case law both indicate that withdrawal if not directed by the personal and independent action of the CA is improper. The withdrawal and dismissal of the charges on 20 October was not made by the personal and independent direction of the CA, since the CA had not taken any action beyond the original authority. Thus, the Government's action was improper. The action was further made clear through the Defense's communication with the Region SJA. In this communication, the SJA indicated the Convening Authority would be making a decision later

that night "that would influence the progression of the trial" and about two hours later, the SJA sent two additional emails complying with the Trial Counsel's desire to withdraw and dismiss the charges. The timing of these actions imply that the Government, in this case, the Trial Counsel, originally applied greater power to influence the disposition of a case than they actually had as referenced in *Cooke*.

Second, R.C.M. 604 (b) discussion states, "If further prosecution is contemplated at the time of the withdrawal, the reasons for the withdrawal should be included in or attached to the record of proceeding." The Government indicated in both the initial improper withdrawal and the secondary withdrawal that they were contemplating further prosecution of AZC Benton. Yet they failed to include the reasons for the withdrawal in the record of proceeding as discussed in R.C.M. 604 Discussion section. Although AZC Benton knew additional or new charges would be preferred, she was kept in the dark about the reasons the charges had been withdrawn in the first place. To this date, the Convening Authority has never provided his position on why charges were withdrawn and dismissed. The Trial Counsel did not articulate a reason on the record of this proceeding until its supplemental Article 32 filings and only did so upon prompting by the PHO.

Lastly, a thorough assessment of the stage in which this withdrawal and dismissal took place is integral to the ruling of this motion according to the R.C.M. and case law. R.C.M. 604(b)'s Discussion states a determination of whether a withdrawal was proper or improper is directly proportional to the stage in which the proceedings are withdrawn to protect the propriety of a later referral. The Trial Counsel improperly withdrew these charges ten days prior to trial and the Convening Authority acquiesced to that demand a mere six days prior to trial. The Government's reason for such a late-stage withdrawal was simply that in its pre-trial preparation

they realized the evidence was lacking for the charges. At this late stage in the trial proceedings, the Government perceived potential issues with the case and their previous charging scheme. The Government's significantly delayed assessment of their case, lack of evidence, and perceived potential issues at trial caused them to withdraw and dismiss the charges. The late stage with withdrawal cannot be considered proper, just as in *Mann* where neither a delayed appreciation of the seriousness of the offenses nor additional evidence was sufficient for a withdrawal after arraignment.

b. The referral of the improperly withdrawn charges in *Benton I* creates an appearance of judicial manipulation and prejudices AZC Benton.

Case law and the R.C.M.s have determined that the timing of the CA's ability to withdraw and dismiss the charges becomes more limited as a means to protect the integrity of our judicial system. "The reason for this constriction is to avoid the possibility or the appearance that the convening authority has manipulated the judicial process to obtain some preconceived result." *Mann*, at 888. The Government's assertion that the purpose of the withdrawal and dismissal was due to perceived issues at trial. In other words, the Government was afraid of acquittals at trial. This is presumably the messaging that was relayed to the Convening Authority and is a clear indication of the desire to manipulate the judicial process to obtain a preconceived result that favors the Government. The Convening Authority's acquiescence and direction to withdraw and dismiss the charges furthers the appearance that the Convening Authority himself desires AZC Benton be convicted of certain charges at trial. The purpose of this rule is to prohibit even the appearance of this action, but most definitely to prohibit it from actually occurring as it has in this case.

The arbitrary and unfair manner the withdrawal and dismissal was effectuated creates a considerable prejudice against AZC Benton. Because the court in *Mann* indicates it is not

required to limit the question of prejudice to mounting a defense there are several examples of prejudice and judicial manipulation detailed here.

First, is the Government's use of a greater influence of power than they possessed by acting without the authority required by R.C.M. 604. Based on the reasons cited in Enclosures L and M, the exercise of power gives the appearance of judicial manipulation, at minimum. Additionally, there is an appearance that the Convening Authority's ultimate decision was influenced by the prior unauthorized actions. Due to the Government's Correspondence with Special Agent [redacted] the Government had already informed witnesses that they would no longer be needed for 30 October 2023 and that their travel would soon be turned off. This email was sent prior to informing this Court and the Defense that the charges had even been withdrawn. The Government had not likely completed their Final Pre-trial matters since it was in the preparation of proposed instructions when they discovered they lacked evidence. The Government likely did not have members, as the Defense had not received member questionnaires. Travel, T.M.O. deadlines, and informing individuals that they need to be available for trial are arduous tasks which are not turned on and off like a light switch. Therefore, the Government would have needed to communicate to the Convening Authority all of the actions they had taken without authority to ensure the Convening Authority could make a fully informed personal and independent decision the second time around. If this information was communicated to the Convening Authority, it is likely that these unauthorized actions placed the CA in difficult position, likely influencing an acquiescence regarding the ultimate decision in *Benton I*. All of this is also evidence of the Government's lack of preparation at his late stage.

Second, the charges in *Benton II* reflect greater punitive exposure. More specifically, they originally charged AZC Benton with a violation of UCMJ 109 (Destruction of Military

Property), for which they recognized they lacked sufficient evidence to meet their burden at trial. Coincidentally, this charge is no longer before the Court. However, it has been replaced with a UCMJ 131(b) (Obstruction of Justice), which carries exposure of up to five (5) years of confinement rather than the one (1) year of exposure the original charge carried. Additionally, the Defense inquired whether the Government was planning to enter Officer [redacted] full body camera video into evidence which contains comments by AZC Benton to law enforcement prior to receiving her rights. At the time of inquiry, the Government had not yet decided. Now in *Benton II,* the initial comments are charged as misconduct within the "Obstruction of Justice" Charge.

Third, the alleged violations in *Benton I* would permit good character evidence for each of the charges presented, whereas the charges in *Benton II* do not fully permit that evidence. The charges in *Benton I* were withdrawn and dismissed after the Government communicated with the Defense's witnesses and after submission of proposed instructions and voir dire. Based on the Government's 701 disclosures in *Benton I,* these witnesses spoke very highly of AZC Benton. The Government initially denied these witnesses, but ultimately agreed to produce them after the Defense's motion to compel them as they were essential to AZC Benton's fair trial. (Retired) Captain [redacted] now Mr. [redacted] was an available witness for *Benton I*, but may not be available for *Benton II* and the Government is now changing its position on his necessity at trial and declining to produce him. This is not only prejudicial to AZC Benton's presentation of her defense at trial, but also indicative of the perceived judicial manipulation.

Fourth, due to the timing of the withdrawal and dismissal, a ruling was never issued on the Defense's motions. Despite that, the Government received significant information from the 39(a) hearing, which identified issues with their case. The 39a hearing in *Benton I* clearly

pointed out a lack of evidence regarding the Destruction of Property Charge because there had been no discovery regarding the amount of damage inflicted to the tire to justify the amount listed on the charge sheet. This hearing also pointed out the Government had not requested or completed ballistic or other testing on the alleged weapon that would confirm whether the weapon had actually been fired and potentially by whom. The Government realized the insurmountable hurdles just wone week prior to the improper withdrawal and dismissal, highlight the fact that it was unprepared to try the charges as they were drafted. Now, the Government, with its newfound insight seeks to proceed on perfected charges that it has had extra time to prepare for. Not only has the Government been able to redraft their charges, such that good character evidence is limited, but they also are not limited to any rulings from *Benton I* that may have been favorable to the Defense. While the Defense cannot speculate what any of the rulings would have been, there is an appearance of judicial manipulation, which favors the Government as contemplated in *Mann*.

Fifth, we examine the impact to the Court. *Benton I* was removed from the docket on the premises of a personal and independent direction that was later found to be non-existent. The Court relied on the Government's communication of the withdrawal and dismissal because it was communicated as all withdrawals and dismissals are. In order to withdraw and dismiss the charges, the Government marked through and signed the same charging document that reflected every official stage of the judicial process. However, this action was arbitrary because there was no initial authority to do so, and the follow-on authority was improperly influenced by this initial unauthorized action. AZC Benton was arraigned in July of 2023 and the docket contained Benton's trial evolutions until October of 2023. AZC Benton's trial evolutions took up space on the docket, and the Court's time and attention until the case was improperly withdrawn days

before trial. Beginning 26 January, when AZC Benton was arraigned the second time, and new trial evolutions again fill up the docket and require the Court's time and attention until 26 April 2024. Perhaps proceeding the trial in October 2023 was too quick for the Government following an arraignment in July 2023 and they needed additional five months to prepare their case and this course of action was easier than justifying a continuance. The articulated reason was the Government's failure to assess the facts and evidence in its case. However, the delayed appreciation for this case and misuse of resources is arbitrary when the Government had an investigative awareness of this case for close to one year and the charges survived every level of Government scrutiny required of a General Court Martial.

Lastly, the Defense relied on the withdrawal and dismissal of these charges. The timing of this action is unfairly prejudicial to AZC Benton as she had submitted information regarding her forum choice. Defense Counsel was awaiting the Government's Final Pre-trial Matters which were due on the day of the improper withdrawal and dismissal. The Defense never obtained these materials from the Government to include a formal witness list, member questionnaires, proposed jury instructions, or any other relevant information. It has been disclosed through *Benton II's* Discovery, that while reviewing proposed instructions the Government identified potential issues at trial leading to the withdrawal and dismissal, but these issues have yet to be disclosed to the Defense. Additionally, the Defense's hands were tied during the turning on and off again of the case because the Defense was without information, losing days of preparation while the Government continued to perfect its case. While the Court permitted the Government's pause of the Trial Management Order and granted a continuance, the Defense had one day to thoroughly address what seemed to be a novel issue based on the minimal information for the Government. The Defense's attempt to gain additional information from the parties involved, to

include the Convening Authority, were delayed and denied. The Government's actions were arbitrary and created an unfair prejudice to AZC Benton that carries over into *Benton II.*

Based on *Benton I,* the Defense had a desire to investigate Unlawful Command Influence (UCI), which could also taint the case in *Benton II.* However, the Defense still has very little information about the parties involved, the information communicated, and any other relevant information regarding the circumstances of *Benton I.* This limits the Defense's ability to defend AZC Benton such that it is a direct prejudice against her. It also demonstrates an indifference towards the processes outlined in R.C.M. 604, which were drafted in part to protect the Government from the appearance of impropriety in a later referral. The initial withdrawal and dismissal of charges, followed by major changes to the charges, and re-referral of newly perfected charges demonstrate that the Military Justice system is being manipulated in favor of the Government rather than protecting the rights of AZC Benton as it is designed to do.

The initial withdrawal was not with authority and the withdrawal days later was not done for a proper reason. "Our case law has construed "proper" in this context as a legitimate command reason which does not "unfairly" prejudice an accused in light of the particular facts of a case." *Underwood*, 50 M.J. 271, 276. As described above, the improper withdrawal and dismissal in *Benton I* precludes the subsequent referral to *Benton II.*

43. **Requested Relief**. In accordance with R.C.M. 604 (b), the Defense moves this court to dismiss all charges in *Benton II* with prejudice because of the improper, arbitrary and unfair withdrawal and dismissal of the original charges in *Benton I.*

44. **Evidence**. The Defense provides the following evidence in support of this motion:

a. Enclosure A –Withdrawal and Dismissal Charge Sheet

b. Enclosure B – Trial Management Order dtd 21 July 23

c. Enclosure C- Email regarding use of Body Camera Footage

d. Enclosure D- Email Correspondence Regarding Case Activity and Travel

e. Enclosure E- Government Email Correspondence Subj: ICO AZC Benton Dismissed Charges dtd 20-24 October 2023

f. Enclosure F- Court Docket as of 23 October 2023

g. Enclosure G- Email Correspondence Subj: US v. Benton dtd 23 October 23

h. Enclosure H- Email Correspondence Defense Counsel and Region SJA Subj: RE ICO AZC Benton Dismissed Charges dtd 20-24 October 2023

i. Enclosure I - *Benton II*, Charge Sheet

j. Enclosure J- Request to discuss withdrawal of charges ICO US v. Benton

k. Enclosure K- Excerpt of Preliminary hearing Officer Report (Pages 1 and 7)

l. Enclosure L- Supplemental Comments for Article 32

m. Enclosure M- Email Correspondence Subj: Benton Procedural Summary dtd 24 October – 20 November 2023

n. Enclosure N-Trial Management Order dtd 26 Jan 24

20. **Oral Argument**. The Defense requests oral argument.

21. **Requested Witnesses:**

a. RDML Ian Johnson (Convening Authority)

[redacted]

Cierra D. McEachern
LT, JAGC, USN
Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of February 2024, a copy of this Motion was served on Trial

Counsel.

[redacted]

Cierra D. McEachern
LT, JAGC, USN
Defense Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY
SOUTHERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES V. **CHERELLE BENTON II** **AZC/E-7**	**DEFENSE MOTION TO COMPEL PRODUCTION** **(WITNESS AND EVIDENCE)** **22FEB24**

MOTION

Pursuant to 10 U.S.C. §846, Article 46, Uniform Code of Military Justice, and Rule for Courts-Martial 703, as well as the Sixth Amendment to the U.S. Constitution, the defense moves this Court to compel production of CAPT [redacted] as well as the Government's notes from interviews of these and other witnesses.

BURDEN

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

FACTS

1. On 22 Aug 23, the Defense requested that the Government produce Captain [redacted] for *Benton I*. Originally, they denied this request, yet agreed to produce him in an Article 39(a) hearing. Enclosure A.

2. On 12 Feb 24, the Defense requested that the Government produce witnesses for trial in *Benton II*. This included (Retired) CAPT [redacted] now Mr. [redacted] Enclosure B.

3. The Government denied the production of Mr. [redacted] Enclosure C.

4. In its request to Trial Counsel, the Defense included CAPT [redacted] witness' email, physical address and phone number, as well as a summary of his expected testimony. Enclosure A.

5. By its disclosures pursuant to RCM 701 the Government evidently spoke to CAPT [redacted] about his anticipated testimony. Enclosures B.

6. Notwithstanding their agreement to compel this witness during the 39(a) in *Benton I,* the Government denied the production of this witness because "he is unavailable to travel on the docketed trial dates, as he will be overseas." Enclosure E.

7. The Government states it intends to call four witnesses – PS1 [redacted], Officer [redacted] Officer [redacted] and SA [redacted] The only witness that the Government approved that the Government does not intend to call is an Officer [redacted] with the Oakland Police Department. Enclosure E.

8. On 7 Sep 23, the Defense requested "Notes in the possession of the Government taken during the interviews of all witnesses interviewed in this case." Enclosure.

9. On 12 Sep 23, the Government provided several documents drafted by the Trial Counsel titled "GOVERNMENT NOTICE UNDER R.C.M. 701." Enclosures B, C.

10. To date, the Government has not provided the notes from interviews of witnesses in this case.

11. At this General Court Martial, AZC Benton faces a maximum punishment of 14 years confinement, a Dishonorable Discharge and total forfeitures.

LAW

The Sixth Amendment to the U.S Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right [...] to have compulsory process for obtaining witnesses in his favor." U.S. Const. amend. VI, cl. 7. This right is "well established in military law and has been guarded by [our highest Court]." United States v. Hinton, 21 M.J. 267, 269 (C.M.A. 1986) (citing united States v. Carpenter, 1 M.J. 384 (C.M.A. 1976; United States v. Iturralde-Aponte, 1 M.J. 196 (C.M.A. 1975)). Consistent with the constitutional mandate, the prosecution and the defense at a court-martial "shall have equal opportunity to obtain witnesses and evidence, including the benefit of compulsory process," R.C.M. 703(a), and "[e]ach 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) (emphasis added).

Evidence is relevant when it has "any tendency to make the existence of any fact more probable or less probable than it would be without the evidence; and the fact is of consequence to the determination of the action." Mil. R. Evid. 401. Evidence is necessary when it is not cumulative and would contribute to a party's presentation of the case in some positive way on a matter in issue. R.C.M. 703(b)(1), Discussion, Manual for Courts-Martial, United States (2019 ed.); see United States v. Williams, 3 M.J. 239 (C.M.A. 1977).

In determining whether a requested witness' testimony is cumulative of a witness whose appearance at trial is assured, the military judge should consider: whether the requested witness' credibility is greater than that of the attending witness; whether the testimony of the requested witness is relevant to the accused with respect to character traits or other evidence observed during a different time period from the attending witness; and whether there is any benefit to the accused from having an additional witness say the same thing other witnesses have said. United States v. Jones, 20 M.J. 919, 927 (N-M. Ct. Crim. App. 1985) (internal citations omitted). If the court determines that a defense witness is cumulative, the Defense is entitled to choose which of the cumulative witnesses it desires to call. United States v. Harmon, 40 M.J. 107, 108 (C.A.A.F. 1994).

An accused's "right to present his own witnesses to establish a defense" is a "fundamental element of due process of law." United States v. McAllister, 64 M.J. 248, 249 (C.A.A.F. 2007) (quoting Washington v. Texas, 388 U.S. 14, 19 (1967)). Therefore, his "opportunity to obtain witness and other evidence" must be equal to the Government's. United States v. Warner, 62 M.J. 114, 118 (C.A.A.F. 2005) (internal quotation marks omitted).

The court-martial rules which implement these rights require that in order to obtain witnesses for trial, the Defense must first submit a request to trial counsel. R.C.M. 703(c)(2). The

request must include the witness' name, telephone number if known, and address or location of the witness "such that the witness can be found upon the exercise of due diligence." R.C.M. 703(c)(2)(B). It must also include a synopsis of the witness' expected testimony. Id. If the trial counsel contends that production is not required under the rule, the Defense may submit the matter to the military judge. R.C.M. 703(c)(2)(D). If the military judge grants the motion, trial counsel "shall produce the witness or the proceedings shall be abated." Id. These same procedures apply to the production of evidence. R.C.M. 703(f).

ARGUMENT

I. CAPT [redacted] should be produced

AZC Benton's military character was relevant to all three charges in *Benton I*, particularly the alleged violation of Article 134, which would have required the Government to prove beyond a reasonable doubt that AZC Benton's actions were service discrediting. Captain [redacted] was a requested witness that the Government originally denied, then agreed to produce during an Article 39(a). The change in the docketed trial dates for AZC Benton has impacted his availability and the Government is denying the request for the second time. *Benton II's* charges still implicate a showing of good character such that the Government should be required to produce him as they agreed to before. Similarly, AZC Benton's character for truthfulness is relevant to all of the charges.

M.R.E. 404(a)(2) provides that "the accused may offer evidence of the accused's pertinent trait and, if the evidence is admitted, the prosecution may offer evidence to rebut it." M.R.E. 404(a)(2). None of the offenses fit within the exceptions under the same rule, and thus good military character is a permissible defense. See United States v. Schelkle, 47 MJ 110 (CAAF 1997) ("The operation of Mil. R. Evid. 404 and 405, as pertains to this case, is quite

plain. As all parties to the trial agreed, evidence of a pertinent of appellant's character offered by the defense, including good military character and law-abidingness, is admissible."

The Government will likely introduce statements of the Accused which puts her credibility front and center in this case. Should AZC Benton elect to testify, each witness would also be pertinent to the issue of her truthfulness. Notwithstanding the admissibility of this evidence, the Government's agreement to produce him indicates his testimony was relevant to present a Defense.

CAPT [redacted] testimony is not cumulative. Reviewing the Jones factors, these witnesses carry different ranks demonstrating that the "credibility is greater" for several of these witnesses that may value the testimony of a higher ranking witness such as a Captain or a Master Chief. While they all know AZC Benton from her time in Millington, there is benefit to the accused from having "an additional witness say the same thing other witnesses have said" as PS1 [redacted] is a member of the military, and the Government intends to call three members of law enforcement to support his allegations against AZC Benton.

II. The notes within the possession of the Government should be discovered

"R.C.M. 701(a)(1)(A) and (C) require that trial counsel reveal witness statements." United States v. Romano, 46 M.J. 269, 275 (C.A.A.F. 1997). The notes taken of witness interviews are encapsulations of witness statements, and are therefore subject to the disclosure required under R.C.M. 701. The documents drafted by the Trial Counsel do not meet this criteria, and to the extent notes exist that are not the same as what was produced they should be produced.

RELIEF REQUESTED

The Defense moves the Court to order the Government produce (Retired) CAPT [redacted] and to produce all witness notes in the possession of the Government.

EVIDENCE AND HEARING

In support of this motion, the Defense offers the following enclosed exhibits:

A. Defense Witness Request of 22 Aug 23
B. RCM 701 Disclosure CAPT [redacted]
C. RCM 701 Disclosure PS1 [redacted]
D. Government Denial of Witness Request dtd 17 Feb 24
E. Defense Witness Request of 12 Feb 24
F. Government Witness List dtd 8 Sep 23
G. Request for Discovery dtd 7 Sep 23

If this motion is opposed by the Government, and pursuant to R.C.M. 905(h), the Defense requests an Article 39(a) session to present oral argument and evidence.

[redacted]

C. MCEACHERN
LT, JAGC, USN
Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of February 2024, a copy of this Motion was served on Trial Counsel.

[redacted]

Cierra D. McEachern
LT, JAGC, USN
Defense Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY
SOUTHERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES V. CHERELLE BENTON II AZC/E-7	DEFENSE MOTION TO COMPEL PRODUCTION (WITNESS AND EVIDENCE) 22FEB24

MOTION

Pursuant to M.R.E. 311 and the Fourth Amendment to the U.S. Constitution, the defense moves this Court to suppress a firearm that was seized by the Oakland (TN) Police Department without a warrant.

BURDEN

Upon motion by the Defense to suppress evidence under M.R.E. 311, the prosecution has the burden of establishing the admissibility of the evidence. M.R.E. 311 (d)(5). The military judge must find by a preponderance of the evidence that the evidence is admissible before it may be admitted into evidence. M.R.E. 311 (d)(5).

FACTS

1. On 5 Aug 22, AZC Benton was arrested by members of the Oakland Police Department. Enclosure A.

2. Pursuant to the arrest, Officer J. [redacted] found a firearm in the glove box of PS1 [redacted] car. Enclosure A.

3. The firearm was a silver Kimber 9mm Micro 9 that contained a red laser and registered to AZC Benton. Enclosure A.

4. The evidence was placed in the Oakland Police Department Property and Evidence Room. Enclosure A.

5. AZC Benton was charged with Aggravated Assault (Domestic) Tampering with Evidence pursuant to Tennessee state law. Enclosure A.

6. The charges above were dropped by the state of Tennessee on 12 Dec 22. Enclosure B.

7. Beginning in January of 2023, AZC Benton made attempts to retrieve her firearm. AZC Benton states that she made numerous calls between January and March of 2023, and that nobody at the Oakland Police Department returned her call. Enclosure C.

8. In March of 2023, AZC Benton went to the Oakland Police Department (OPD) in person. She was told by a member of the department that "he could not release the weapon" because "the Navy was telling him" he could not release it. Enclosure C.

9. The Navy preferred charges against AZC Benton on 11 May 23. Charge Sheet.

10. Members of the Defense spoke with Ofc [redacted] on 6 Sep 23. During this meeting the issue of AZC Benton's firearm was discussed. Enclosure D.

a. According to Ofc [redacted], the gun was still in OPD possession.

b. Ofc [redacted] was "not sure" why OPD still had possession of the firearm in light of the fact that the state of Tennessee had dropped the case and it was closed by OPD.

c. When asked if AZC Benton would be able to retrieve the weapon, he said "I assume so" and told the Defense to have AZC Benton request it be returned.

11. A few days later, AZC Benton went to the OPD station to retrieve her property. She was denied and told that "a Navy Jag" [evidently Trial Counsel in this case] told OPD they could not release the property back to AZC Benton. Enclosure C.

12. As of the date of this filing, the OPD has seized this property for 567 days. Enclosure A.

13. As of the date of this filing, 438 days have passed since the state of Tennessee dropped the case against AZC Benton. Enclosure B.

14. This timeline has only been extended by the withdrawal and dismissal of charges in *Benton I.*

LAW

The Fourth Amendment to the Constitution protects individuals from unreasonable searches and seizures. United States v. Ruff, 77 M.J. 683, 684-685 Challenges to evidence allegedly obtained from unlawful searches and seizures are litigated in accordance with Military Rule of Evidence 311. Id. In a case involving the actions of an official of a State or any subdivision of a State, a search or seizure is unlawful if it is conducted in violation of the Constitution or relevant principles of law applied in federal criminal court cases. Military Rule of Evidence (M.R.E.) 311(b)(2), Manual for Courts-Martial, United States (2016 ed.). Id. In the absence of a warrant, a government search is presumed unreasonable unless it falls within an exception. Id. when offering evidence from a warrantless search against an accused, the Government bears the burden of establishing that an exception applies. Id.

The Government's authority to seize evidence is not everlasting. United States v. Nelson, 2021 CCA LEXIS 215 (holding that detention of a phone for a day while law enforcement sought a CASS was "reasonable"). How long the Government may seize an item of evidence is a separate inquiry from whether the evidence was properly seized at the crime scene. Id. ("Mil R. Evid. 316(c)(5), Manual Courts-Martial, offers no guidance regarding the meaning of "temporary." But the ultimate touchstone of any Fourth Amendment inquiry is always reasonableness. The Fourth Amendment prohibits only meaningful interference with a person's possessory interests, not government action which is reasonable under the circumstances"). The entity that has seized property must be "authorized" to do so. MRE 316(c)(5)(a).

ARGUMENT

The Oakland Police Department's seizure of AZC Benton's property is unreasonable. The department closed the case against her, and the state of Tennessee no longer had an interest in the case when charges were dropped in December of 2022. While the civilian case was pending, at no point in time did the Oakland Police Department obtain a warrant. Regardless, when the case was dropped it should have been returned to AZC Benton.

Having closed the case, the Oakland Police Department no longer has "authorization" to seize this property from AZC Benton. MRE 316(c)(5)(A). The ongoing seizure of this property is not reasonable under the circumstances, as the personal property being held at the Oakland Police Department has no evidentiary value to the state of Tennessee. It cannot be said that the Oakland Police Department's interference with AZC Benton's personal possessory interest is still "meaningful." Even Ofc [redacted] noted he was "not sure" why his department was still holding this property and encouraged AZC Benton to request the property.

Since the arrest and seizure of evidence, NCIS has declined to obtain a warrant. In fact, NCIS agents did not even bother to obtain this property from the Oakland Police Department. Nonetheless, agents of the Federal government have ordered the Oakland Police Department to continue their ongoing seizure of AZC Benton's property without authority to do so. If the Fourth Amendment's "reasonableness" mandate has any meaning, the Government should not be allowed to seize a citizen's personal property for 567 days without a warrant.

As the Government has violated AZC Benton's right against unreasonable seizure of her property, the evidence should be ruled inadmissible at trial.

RELIEF REQUESTED

The Defense moves the Court to suppress the firearm unlawfully seized by the Oakland Police Department.

EVIDENCE AND HEARING

In support of this motion, the Defense offers the following enclosed exhibits:

A. Excerpt from OPD Arrest Report

B. Record Regarding State of Tennessee Charges ICO Benton

C. AZC Benton Memo dtd 22 Sep 23

D. LN1 Guest Memo dtd 22 Sep 23

If this motion is opposed by the Government, and pursuant to R.C.M. 905(h), the Defense requests an Article 39(a) session to present oral argument and evidence.

[redacted]

C. MCEACHERN

LT, JAGC, USN

Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of February 2024, a copy of this Motion was served on Trial Counsel.

[redacted]

Cierra D. McEachern
LT, JAGC, USN
Defense Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY
SOUTHERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **CHERELLE J. BENTON** **AZC / E-7** **U.S. NAVY**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO SUPPRESS EVIDENCE (Firearm)** **25 Feb 24**

MOTION

The Government respectfully requests that the Court deny the Defense's motion to suppress the firearm seized and retained by Oakland Police Department (OPD), as the firearm was legally seized and OPD's retention of the firearm through duration of the civilian and military criminal justice process is reasonable.

BURDEN

Upon motion by the Defense to suppress evidence as the result of an unlawful search or seizure, the Government has the burden of proof by a preponderance of the evidence. M.R.E. 25 311(d)(5)(A).

FACTS

1. The Accused is charged with Firearm Discharge – Endangering Human Life, Simple Assault, and Obstructing Justice under the Uniform Code of Military Justice. **Charge Sheet.**
2. On 5 August 2022, Oakland Police Department (OPD) received a report of a loud verbal altercation and possible gun shot in the [redacted] **[Encl. (1)].**
3. Upon response to the area, OPD observed the Accused standing outside a silver Mercedes

sedan with the trunk and doors open. **[Encl. (1)].**

4. When questioned whether there was an altercation or a gunshot, the Accused denied both. **[Encl. (1)].**

5. The Accused then contacted PS1 [redacted]. to let him know law enforcement was present on the scene, to which PS1 [redacted] hung up the phone. **[Encl. (1)].**

6. When PS1 [redacted]. arrived on scene and disclosed there was a fight and a gunshot and the Accused discharged the firearm. **[Encl. (1)].**

7. The responding officer then asked the Accused whether she discharged a firearm to which she responded in the affirmative. The Accused further disclosed the firearm was in glovebox compartment of PS1 [redacted] vehicle. **[Encl. (1)].**

8. The responding officer then retrieved the firearm in the glovebox compartment of PS1 [redacted] vehicle. A check of NCIC showed the gun not to be stolen. **[Encl. (1)].**

9. The firearm was placed in the Oakland Police Department Property and Evidence Room. **[Encl. (1)].**

10. On 25 August 2022, Sgt [redacted], OPD, contacted Naval Criminal Investigative Service (NCIS) Memphis, TN regarding the arrest of an active duty service member, AZC Benton, on 5 August 2022. Sgt [redacted] provided a signed NCIS Form 5580 and a copy of the OPD report pertaining to OPD's investigation. OPD served as the lead investigative agency on the case. **[Encl. (2)].**

11. On 29 September 2022, OPD provided copies of the body worn camera video footage pertaining to the investigation. **[Encl. (3)].**

12. On 24 October 2022, Sgt [redacted] advised NCIS Memphis that a preliminary hearing for the Accused was scheduled for 3 November 2023. OPD requested no assistance from NCIS at this time. **[Encl. (4)].**

13. On 8 March 2023, Sgt [redacted] advised NCIS Memphis that the Assistant District Attorney General, Fayette County, TN, declined to prosecute due to a lack of participation by PS1 [redacted] At this time, NCIS Memphis assumed lead investigative role. **[Encl. (5)]**.

DISCUSSION

a. Oakland Police Department lawfully seized the Accused's firearm from PS1 C.N's automobile on 5 August 2022.

The Fourth Amendment by its express terms protects individuals against unreasonable searches and seizures. *United States v. Daniels*, 60 M.J. 69, 70 (C.A.A.F. 2004); U.S. Const. Amend. IV. Under the Military Rules of Evidence, which implement the Fourth Amendment, evidence illegally seized by government agents from a protected place is inadmissible." *Id.* However, evidence is admissible when seized based on a reasonable belief that the property or evidence is contraband or evidence of a crime. M.R.E. 316(c)(1). Probable cause to seize property or evidence exists when there is a reasonable belief that the property or evidence is an unlawful weapon, contraband, evidence of crime, or might be used to resist apprehension or to escape. Mil. R. Evid. 316(c)(1). *United States v. Mons*, 14 M.J. 575 (N.M.C.M.R. 1982). .

Not all searches require warrants or search authorizations and there is no requirement to obtain secondary authorization for a seizure that is otherwise lawful. The Fourth Amendment does not prohibit all warrantless searches, only those that are unreasonable; and whether a search is unreasonable must be evaluated on the facts and circumstances of each situation. *United States v. Irizarry*, 72 M.J. 100, 103 (C.A.A.F. 2015). A search, as considered under the Fourth Amendment, only occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable. *Id.* For example, a search warrant or authorization is not required when there is probable cause but insufficient time to obtain the authorization because the delay to obtain authorization would result in the removal, destruction, or concealment of

evidence and searches of automobiles generally do not require warrants or authorizations. Mil. R. Evid. 315(g); *Carroll v. United States*, 267 U.S. 132, 45 S. Ct. 280 (1925).

To raise a violation of the Fourth Amendment, an accused's own constitutional rights must have been violated and an accused cannot vicariously claim Fourth Amendment violations of the rights of others. *Rakas v. Illinois,* 439 U.S. 128, 134 (1978). Here, the responding OPD officers arrived on scene in direct response to a 911 call that reported concern due to a loud verbal altercation followed by a gunshot. While responding the incident and standing directly next to PS1 [redacted] open-doored vehicle with the Accused and PS1 [redacted] the OPD officers learned there was in fact a verbal altercation, subsequent gun shot, and the firearm in question was placed in the glovebox compartment of PS1 [redacted] vehicle. The firearm was then seized from the glovebox compartment by OPD. Similar to *Rakas* where U.S. Supreme Court held, passengers in an automobile have no reasonable expectation of privacy in the interior area of the car, a warrantless search of the glove compartment and the spaces under the seats, which turned up evidence implicating the passengers, invaded no Fourth Amendment interest of the passenger, the Accused lacks standing to challenge the admissibility of evidence seized. *Id.*

Without conceding the Accused's lack of standing to challenge the search of PS1 [redacted] vehicle and subsequent seizure of her firearm, under a theory of exigent circumstances, police are not required to obtain a search warrant if they reasonably believe that evidence may be destroyed or others may be placed in danger in the time it would take to secure the warrant. Here, the scenario reasonably placed all present parties in harm's way. The Accused admitted to discharging a firearm in a residential neighborhood, placing the lives of multiple other people in the vicinity in danger. This weapon needed to be immediately secured – or others may be placed in danger in the time required to secure the warrant. Further, this evidence was stored within a vehicle that at the time the responding officers would have analyzed the scenario considering the

mobile nature that would allow evidence to be moved quickly. Although it was later learned the vehicle obtained damage resulting in a flat tire, that was unknown to the officers at the time of the search, nor does a flat tire necessarily render a vehicle immovable.

b. Oakland Police Department's retention of the lawfully seized firearm is reasonable.

There is no requirement that law enforcement return lawfully obtained evidence related to an ongoing criminal investigation, while the criminal proceedings related to that investigation remain pending. *United States v. Lee,* No. 1:14-CR-00227-TCB-RGV, 2015 U.S. Dist. LEXIS 102473 (N.D. Ga. July 6, 2015); *United States v. Christie,* 717 F.3d 1156 (10th Cir. 2013); *Cameron v. District of Columbia*, No. 21-cv-2908 (APM), 2022 U.S. Dist. LEXIS 154589 (D.D.C. Aug. 29, 2022). The case at hand is distinguishable from *United States v. Nelson*, where a seizure of a phone, pending a CASS, was executed due to belief the delay necessary to obtain a search warrant or search authorization would result in the removal, destruction, or concealment of the property or evidence sought. *United States v. Nelson,* No. 202000108, 2021 CCA LEXIS 215 (N-M Ct. Crim. App. May 4, 2021). In *Nelson*, reasonableness of the seized phone was reviewed in context with the timeline to obtain search authorization. Here, rather, the firearm maintained by OPD is evidence that was used in a commission of the charged offenses and was lawfully seized from another individual's privately owned vehicle, to which the Accused had no privacy interest in. As such, the firearm is maintained within the custodial chains of the law enforcement agency that seized it, pending court martial charges.

As the responding agency, OPD maintained the primary lead investigative role until March of 2023, when NCIS assumed primary lead. However, since August 2022, the alleged offenses have been subject to investigation, review, and ultimately preferred and referred to a General Court-Martial. Despite the fact that the case was dismissed for prosecution by the State of Tennessee, the investigation remained open by NCIS and subject to criminal proceedings under

the Uniform Code of Military Justice. Based upon the ongoing criminal justice proceedings, OPD continues to maintain a reasonable interest in properly maintaining evidence that was seized during their role as the primary lead investigating agency. There is no question that the responding OPD personnel will be required for the purposes of court-martial, which is further highlighted by the fact Defense Counsel requested production of the two responding officers for the docketed trial dates. The continued seizure of the Accused's lawfully seized firearm by OPD is reasonable given there are criminal charges pending, to which OPD officers will be required to participate in and testify regarding their role as the primary lead investigative agency at the time of the seizure.

EVIDENCE

Enclosure (1) – Oakland Police Department Incident Report of 5 August 2022

Enclosure (2) – NCIS IA of 25 August 2022; Results of Receipt of Notification

Enclosure (3) – NCIS IA of 29 September 2022; Results of Receipt of Body Worn Camera Video

Enclosure (4) – NCIS Executive Summary and Narrative of 24 Oct 2022

Enclosure (5) – NCIS Executive Summary and Narrative of 13 Jun 2023

RELIEF REQUESTED

The Government respectfully request the Court deny Defense's Motion to Suppress the seized firearm.

POTEET.KRISTEN.MICHELLE[redacted] Digitally signed by POTEET.KRISTEN.MICHELLE[redacted] Date: 2024.02.29 16:28:40 -05'00'

K. M. POTEET
LT, JAGC, USN
Trial Counsel

CERTIFICATE OF SERVICE

I certify that I have served a true copy via e-mail of the above on the court and defense counsel on 29 February 2024.

POTEET.KRISTEN.MICHELLE.[redacted] Digitally signed by POTEET.KRISTEN.MICHELLE.[redacted] Date: 2024.02.29 16:28:52 -05'00'

K. M. POTEET
LT, JAGC, USN
Trial Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY
SOUTHERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **CHERELLE J. BENTON** **AZC / E-7** **U.S. NAVY**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO COMPEL WITNESSES AND DISCOVERY** **29 Feb 24**

MOTION

In accordance with Rule for Courts-Martial 701(f), the Government respectfully requests this Court deny defense's Motion to Compel CAPT (Retired) [redacted] and Government interview notes.

BURDEN

As the moving party and proponent of the evidence, the defense bears the burden of persuasion on any factual issue necessary to decide this motion by a preponderance of the evidence.

FACTS

1. The Accused is charged with Firearm Discharge – Endangering Human Life, Simple Assault, and Obstructing Justice under the Uniform Code of Military Justice. **Charge Sheet.**

2. On 5 August 2022, Oakland Police Department (OPD) received a report of a loud verbal altercation. **[Encl. (1)].**

3. Upon response to the area, OPD observed the Accused standing outside a silver Mercedes sedan with the trunk and doors open. When questioned by OPD, the Accused stated she and PS1 [redacted] were in a verbal argument and she discharged a firearm. **[Encl. (1)].**

4. On 12 February 2024, Defense submitted a request for production of witnesses. The Defense requested the Government produce CAPT (Retired) [redacted] CDR [redacted] HMCM [redacted], CECS [redacted], and CSC [redacted] These witnesses were requested for the purposes of character of truthfulness of the Accused and/or general military character. All these witnesses have known the Accused while she has been stationed at Navy Personnel Command. **[Encl. (2)].**

5. In response, the Government granted production of HMCM [redacted] CECS [redacted] CSC [redacted] The Government denied CAPT [redacted] due to his unavailability to travel to Jacksonville, Florida on the docketed trial dates. The Government denied CDR [redacted] as cumulative to that of other witnesses. **[Encl. (3)].**

6. On 18 February 2024, Defense responded to Government's response inquiring whether CDR [redacted] could be produced by the Government in place of one of the granted witnesses, to which Government agreed. **[Encl. (4)].**

7. On 30 August 2023, Government provided defense an R.C.M. 701 disclosure after conducting an interview with PS1 [redacted] **[Encl. (5)].**

8. On 12 September 2023, Government responded to Defense's discovery request and provided defense three R.C.M. 701 disclosures from interviews that were conducted with Defense's requested witnesses. **[Encl. (6) – (8)].**

9. On 15 February 2024, CAPT (Retired) [redacted] shared with the Government he was not available on the docketed trial dates due to going out of the country. On 27 February 2024, CAPT (Retired) [redacted] provided amplifying details that he would be in Mexico and is working through some health concerns. As such, he again reiterated an inability to travel to Jacksonville, Florida. **[Encl. (9)].**

DISCUSSION

a. The right to compel the attendance of witnesses is not absolute.

Article 46 of the Uniform Code of Military Justice (UCMJ) grants an accused "equal opportunity to obtain witnesses . . . in accordance with such regulations as the President may prescribe." 10 U.S.C. § 846. Further, "[a]n accused has a constitutional right to present relevant evidence to defend against [criminal] charges;" *United States v. Browning*, 54 M.J. 1, 9 (C.A.A.F. 2000). This right however, is not absolute. *Id.* (citing *United States v. Woolheater*, 40 M.J. 170, 173 (C.M.A. 1994)).

"Upon a proper showing of relevance and necessity, an accused is entitled to the production of witnesses." *United States v. Lofton*, 48 M.J. 247, 248 (C.A.A.F. 1998); R.C.M. 703(b)(1). First, M.R.E. 401 provides that evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action. Second, as the discussion to R.C.M. 703 states, "evidence is necessary when it is not cumulative and when it would contribute to the party's presentation of the case in some positive way on a matter in issue."

"Each case must be evaluated on an ad hoc basis in which the materiality of the testimony sought is weighed against the equities of the situation." *United States v. Jones*, 20 M.J. 919, 926 (N.M.C.M.R. 1985). To that end, the court should consider specific factors when determining whether witness production is necessary, including but not limited to: "the issues involved in the case and the importance of the requested witness as 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 appearances of the witness[.]" *United States v. Tangpuz*, 5 M.J. 426, 429 (C.M.A. 1978); see also R.C.M. 703(b)(1).

The Government has agreed to produce three of the five witnesses requested by the Defense

for the purpose of testifying to the Accused's character for truthfulness and/or general military character. All five of the requested witnesses have known the Accused while she has been stationed at Navy Personnel Command with their opinions to the requisite character traits all arise from the same timeframe of her career. As such, CAPT (Retired) [redacted] testimony is merely cumulative to the witnesses that are being produced for trial. Defense argues that CAPT (Retired) [redacted] rank when he retired from military service sets him apart from the witnesses that have been granted, however, the Government is standing by to produce CDR [redacted] another senior ranking officer, in place of a witness of the Defense's choosing, per Defense's inquiry. Additionally, CAPT (Retired) [redacted] is unavailable on the docketed trial dates.

b. The Government has and will continue to comply with its disclosure obligations.

Defense has requested that the Government provide its notes drafted contemporaneously while interviewing several witnesses without citing legal authority to support such a request. Additionally, defense has cited no authority to the contrary. Rules for Courts-Martial (R.C.M.) 701(a)(1)(C) requires that the government disclose "any sworn or signed statement relating to an offense charged in the case that is in the possession of trial counsel." Trial counsel or legalman notes taken during a witness interview do not constitute a statement of a witness, let alone a sworn statement.

As acknowledged by defense in its motion, the Government provided defense with summaries of each witness' interview. The disclosures were provided in accordance with the Government's disclosure obligations under R.C.M. 701(a). These disclosures encapsulate the witness interviews and were disclosed in compliance with R.C.M. 701(a), as is the common practice in the Southern Judicial Circuit.

Despite these disclosures, defense continues to request additional disclosure of notes taken by the Government during the interviews. In its motion, defense relies upon *United States*

v. Romano. 46 M.J. 269, (C.A.A.F. 1997). The facts in *Romano* are easily distinguishable from those currently before this court. The court in *Romano* based its reasoning upon case precedent that primarily analyzes situations where the government failed to provide statements for witnesses in violation of the Jenks Act and R.C.M. 914. *See Id., citing Golberg v. United States,* 435 U.S. 94 (1976). In *Romano,* the government failed to disclose the Article 32 testimony of two potential witnesses and on appeal, amongst other grounds, argued the documents were covered by the work-product privilege. *Id.* at 271-72. Instead, here, the Government provided defense with disclosures in accordance with R.C.M. 701. As a result, as required by R.C.M. 701(a), defense has been provided with statements of witnesses that are in the Government's possession.

c. Trial Counsel and Legalman notes are covered by the attorney work-product privilege.

The attorney work product privilege "shelters the mental process of the attorney..." *United States v. Nobles,* 422 U.S. 225, 238 (1975). Trial Counsel and legalman notes taken during an interview encapsulate more than a regurgitation of what a witness states. The notes often include self-reminders to follow up on certain points, attorney thought process, questions to ask that will help develop the government's theory, and suggested questions presented by the legalman. The Government understands its obligation to disclose notes that include quotes from a witness or verbatim notes that amount to a transcript; however, outside of those scenarios, summaries of the interviews satisfies R.C.M. 701. This sentiment and understanding was recognized by the Supreme Court when it listed material that is protected within the work product privilege, which includes "interviews, statements, memoranda...mental impressions, personal beliefs, and countless other tangible and intangible ways." *Id.* at 237. The Court in *Nobles* also recognized that this privilege extends to "material prepared by agents for the attorney as well as those prepared by the attorney himself." *Id.* at 238-39.

The Court's holding and reasoning in *Nobles* has been codified under R.C.M. 701(f). The Rule provides "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." As a result, the notes taken during the witness interviews are protected work product and exceed the government's discovery obligations under R.C.M. 701. The Government has satisfied its disclosure obligations, defense has adequate statements of each witness, which will assist in the preparation of its case and protect the accused's Sixth Amendment Right, and are not entitled to trial counsel or legalman notes.

EVIDENCE

Enclosure (1) – NCIS Executive Summary

Enclosure (2) – Defense's Witness Production Request of 12 February 2024

Enclosure (3) – Government's Response to Defense's Witness Production Request of 17 Feb 24

Enclosure (4) – R.C.M. 701 Disclosure PS1 [redacted] USN

Enclosure (5) – Defense and Government Email of 17 February 2024

Enclosure (6) – R.C.M. 701 Disclosure CAPT [redacted] USN

Enclosure (7) – R.C.M. 701 Disclosure HMCM [redacted], USN

Enclosure (8) – R.C.M. 701 Disclosure CECS [redacted], USN

Enclosure (9) – R.C.M. 701 Disclosure CAPT [redacted], USN

THIS SPACE IS INTENTIONALLY LEFT BLANK

RELIEF REQUESTED

The Government respectfully requests this Court deny defense's Motion to Compel CAPT (Retired) [redacted] and Government interview notes.

POTEET.KRISTEN.MICHELLE.[redacted] Digitally signed by POTEET.KRISTEN.MICHELLE.[redacted] Date: 2024.02.29 16:29:37 -05'00'

K. MPOTEET
LT, JAGC, USN
Trial Counsel

CERTIFICATE OF SERVICE

I certify that I have served a true copy via e-mail of the above on the court and defense counsel on 29 February 2024.

POTEET.KRISTEN.MICHELLE.[redacted] Digitally signed by POTEET.KRISTEN.MICHELLE.[redacted] Date: 2024.02.29 16:29:51 -05'00'

K. M. POTEET
LT, JAGC, USN
Trial Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY
SOUTHERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **V.** **CHERELLE BENTON** **AZC/E-7** **USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO DISMISS FOR IMPROPER REFERRAL UNDER R.C.M. 905** **29 FEB 24**

MOTION

The Government respectfully asks this Court to deny the Defense's motion to dismiss because (1) the charges preferred against AZC Cherelle Benton, USN, on 11 May 2023 were withdrawn and dismissed for a proper reason, and (2) the referral of new charges to the present court-martial is not more onerous to the accused.

FACTS

1. The Government adopts and incorporates by reference, paragraphs 1 – 4 of the Facts evidenced in the Defense's Motion to Dismiss for Improper Referral Under R.C.M. 905. *Appellate Exhibit II.*

2. On 20 October 2023, the Government alerted the Court and Defense counsel that the Convening Authority directed the withdrawal and dismissal of the charges preferred against AZC Benton on 22 May 2023. *Appellate Exhibit III at 29.*

3. In the same email to the Court and Defense, Trial Counsel disclosed the Government's intent to prefer new charges against AZC Benton. *Appellate Exhibit III at 29.*

4. In response, the Court removed the AZC Benton case from the docket. *Appellate Exhibit III at 29.*

5. Believing, in good faith, the charges were properly dismissed, Trial Counsel separately emailed Defense and invited a discussion about the dismissal of charges and preferral of new charges. Enclosure (1).

6. No parties submitted final pretrial matters on 20 October 2023, in accordance with the original Trial Management Order (TMO). Enclosure (2). *See also, Defense email of 24 October 2024, Appellate Exhibit III at 23.*

7. On 23 October 2023, Trial Counsel learned the GCMCA did not give by direction authority to dismiss the charges and immediately informed the court and Defense Counsel of this error. Trial Counsel explained there was an apparent miscommunication between the Senior Trial Counsel and the GCMCA SJA that gave rise to the erroneous dismissal. *Appellate Exhibit III at 28.*

8. Thereafter, the court determined since the charges were not dismissed with proper authority, the charges remained referred and parties would immediately resume the Trial Management Order (TMO). The military judge ordered an RCM 802 conference and resumed the TMO with a new Final Pretrial Matters deadline of 24 October 2024 and the original trial dates.

9. On 24 October 2024, the GCMCA withdrew and dismissed the charges preferred on 11 May 2023 and Trial Counsel again promptly informed the court and Defense Counsel. *Appellate Exhibit III at 22-23.*

10. Given the earlier miscommunication, the GCMCA SJA memorialized the dismissal with a brief email. Enclosure (3).

11. On 8 November 2023, new charges were preferred against ACZ Benton. *See*, Charge Sheet.

12. On 20 November 2023, Trial Counsel emailed the SPCMCA SJA to memorialize the reasoning for dismissal and preferral of new of charges against AZC Benton, "to properly reflect the criminality of the conduct." *Appellate Exhibit III at 58.*

13. On 5 December 2023, Trial Counsel reiterated this same reasoning at AZC Benton's Article 32 proceeding and memorialized this reasoning again after the hearing, in writing on 7 December 2023, in supplemental matters. *Appellate Exhibit III at 53-54.*

14. The original charges exposed AZC Benton to 9 years and 3 months of confinement, a dishonorable discharge, total forfeitures, and reduction to E-1. The new charges expose AZC Benton to 6 years and 3 months of confinement, a dishonorable discharge, total forfeitures, and reduction to E-1. *See*, APPENDIX 12, UCMJ (2019 ed.).

BURDEN

The burden of proof and persuasion rests on the Defense. The standard as to any factual issue necessary to resolve this motion is to a preponderance of the evidence. Rule for Court-Martial 905(c)(1).

LAW

Rule for Court-Martial (R.C.M.) 604(a)(1) provides, "Except as provided in R.C.M. 604(a)(2), the convening authority or a superior competent authority may for any reason cause

any charge or specification to be withdrawn from a court-martial at any time before findings are announced." The Rule goes on to specify,

> Charges that have been withdrawn from a court-martial may be referred to another court-martial unless the withdrawal was for an improper reason. Charges withdrawn after the introduction of evidence on the general issue of guilt may be referred to another court-martial only if the withdrawal was necessitated by urgent and unforeseen military necessity.

R.C.M. 604(b).

Rule for Court-Martial 401 states, "[w]hen a commander dismisses charges further disposition under R.C.M. 306(c) of the offenses is not barred." The CAAF has explained, "[a]bsent a situation where a convening authority's express dismissal is either a subterfuge to vitiate an accused's speedy trial rights, or for some other improper reason, a clear intent to dismiss will be given effect." *United States v. Leahr,* 73 M.J. 364, 369 (C.A.A.F. 2014). A proper reason to withdraw and prefer new charges is a legitimate command reason which does not unfairly prejudice the accused. *Id.* Also, "dismissal and repreferral are fully permissible under the provisions of R.C.M. 707. *Id.* at 368.

ARGUMENT

1. *The Erroneous Dismissal of the Original Charges was Immediately Corrected.*

Trial Counsel promptly alerted the court to the error with the 20 October 2023 dismissal of charges in the original case. The court promptly responded by resuming the original TMO with modified pretrial milestones while maintaining the same original trial dates. The GCMCA then properly dismissed the charges, even before the next amended TMO deadline. The Defense's contention that Trial Counsel applied improper influence over the disposition of the original charges and manipulated the judicial system due to a "lack of preparation" for trial is wholly speculative. Similarly, the Defense's complaints that Trial Counsel began to cancel witness travel in response to the erroneous dismissal are not relevant to the propriety of the ultimate dismissal on 24 October 2023, which the GCMCA legitimately directed. Despite erroneously cancelling witness travel, the Government had ample resources to restore travels plans, arrange new travel, or otherwise ensure witnesses' presence very quickly. The fact that the Government was preparing to cancel witnesses' travel on 20 October 2023 only shows the Government was prepared for trial and that travel logistics were completed prior to that date. Likewise, neither the Government nor Defense submitted final pretrial matters on 20 October 2023 because both parties believed the charges were dismissed. Nevertheless, these were not issues in the original case as final pretrial matters and witness travel were wholly unrelated to the dismissal of charges in this case.

2. *Charges Were Dismissed for a Legitimate Reason in Accordance with R.C.M. 604*

As the Government has consistently maintained, the only purpose for dismissing and preferring new charges against AZC Benton was to ensure she was brought to trial on charges that adequately reflect the nature and seriousness of her offenses. The Government came to believe Aggravated Assault did not adequately reflect the nature and seriousness of AZC Benton's offenses. In fact, it unnecessarily increased the accused's punitive exposure. Likewise, negligent discharge and destruction of property failed to adequately capture the nature of her offenses after she discharged her firearm. R.C.M. 401 has traditionally contemplated amending, or preferring charges anew under these circumstances. Not only has the Government offered an articulable reason for dismissing the original charges and referring new charges, the referral of new charges is not based on retribution for the assertion of any right by the accused, it does not involve harassment of the accused, and the referral is not arbitrary.

Additionally, the R.C.M. 604(b) discussion provides, "When charges that have been withdrawn from a court-martial are referred to another court-martial, the reasons for the withdrawal and later referral *should* be included in the record of the later court-martial, *if the later referral is more onerous to the accused.*" (Emphasis added) The Rule recommends including the reasons for the withdrawal and later referral in any record when the later referral is more onerous to the accused. Here, the new referral is not more onerous to the accused. The new charges are referred to the same forum, at the same location, where the accused will have decreased punitive exposure, and will not face Aggravated Assault, an offense that, alone, carried 8 years of confinement. This is what makes *Mann* factually distinguishable from the present case. In *Mann*, the NMCCA found the Appellant suffered substantial prejudice when the Government withdrew and dismissed his *special* court-martial charges and re-referred the same charges to a *general* court-martial, where he was exposed to greater punishment than his original charges. Here, AZC Benton actually faces a lower punitive exposure under the new charges.

3. *The Dismissal of Charges Does Not Unfairly Prejudice the Accused.*

With the new charges, (1) AZC Benton's punitive exposure has decreased by three years, (2) she is being tried at the same forum to which her original charges were referred, (3) her trial on the new charges will be held less than 6 months after her originally docketed trial, (4) she continues to be represented by the same military Defense Counsel as in her original case, and (5) AZC Benton has not endured any pretrial restraints on her liberty at any point in this process. Although Defense complains that the new charges "do not fully permit" good character evidence for each charge, this is not an unfair prejudice to the accused. The accused will still be allowed to call relevant good character witnesses in her case and the Government is willing to reconsider the production of Mr. [redacted] to ensure AZC Benton is not unfairly prejudiced at trial. The Defense also complains that charges were dismissed before rulings were issued in the original case. This is just more evidence of the fact that the Government did not dismiss charges in response to any unfavorable rulings. Finally, despite Defense's complaints about the timing of the current trial, the accused mutually agreed to the current trial dates. Had the Defense requested speedy trial or demanded a trial date earlier than the current dates, the Government would have made all efforts to support. Ultimately, the Defense has not evidenced a meaningful prejudice claim in the present case.

RELIEF REQUESTED

The Government respectfully asks this Court deny the Defense's motion to dismiss.

EVIDENCE

- Enclosure (1)- Trial Counsel Email to Defense
- Enclosure (2)- Images of Defense Pretrial Submissions
- Enclosure (3)- GCMCA SJA Dismissal Email

Respectfully submitted,

[redacted]

L.K. BRETT
LT, JAGC, USN
SPECIAL TRIAL COUNSEL

I certify that I have served a true copy via electronic filing of the above on CDR Kimberly Kelly, JAGC, USN, and Defense Counsel on 29 February 2024.

[redacted]

L.K. BRETT
LT, JAGC, USN
SPECIAL TRIAL COUNSEL

NAVY-MARINE CORPS TRIAL JUDICIARY
SOUTHERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **Cherelle BENTON** **AZC/E-7** **U.S. NAVY**	**DEFENSE MOTION** **TO COMPEL PRODUCTION** **(Witnesses and Evidence)** **22 Sep 23**

MOTION

Pursuant to 10 U.S.C. §846, Article 46, Uniform Code of Military Justice, and Rule for Courts-Martial 703, as well as the Sixth Amendment to the U.S. Constitution, the defense moves this Court to compel production of CAPT [redacted], HMCM [redacted], CECS [redacted], and CSC [redacted], as well as the Government's notes from interviews of these and other witnesses.

BURDEN

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

FACTS

1. On 22 Aug 23, the Defense requested that the Government produce witnesses for trial (Encl. A). These include CAPT [redacted], HMCM [redacted], CECS [redacted] and CSC [redacted]. Enclosure A.

2. In its request to Trial Counsel, the Defense included each witness' email, physical address and phone number, as well as a summary of his expected testimony. Enclosure A.

[redacted]

3. By its disclosures pursuant to RCM 701 the Government evidently spoke to CAPT [redacted] HMCM [redacted], and CECS [redacted] – all of whom confirmed the proffers from the Defense about their respective anticipated testimony. Enclosures B, C, D.

4. Notwithstanding this, the Government denied the production of these witnesses because "Defense has not provided a sufficient synopsis of [the witness'] expected testimony to establish how it is relevant and necessary." Enclosure E.

5. The Government states it intends to call four witnesses – PS1 [redacted], Officer [redacted] Officer [redacted] and SA [redacted] The only witness that the Government approved that the Government does not intend to call is an Officer [redacted] with the Oakland Police Department. Enclosure F.

6. On 7 Sep 23, the Defense requested "Notes in the possession of the Government taken during the interviews of all witnesses interviewed in this case." Enclosure G.

7. On 12 Sep 23, the Government provided several documents drafted by the Trial Counsel titled "GOVERNMENT NOTICE UNDER R.C.M. 701." Enclosures B, C, D.

8. To date, the Government has not provided the notes from interviews of witnesses in this case.

9. At this General Court Martial, AZC Benton faces a maximum punishment of 9 years and 3 months of confinement, a Dishonorable Discharge and total forfeitures.

LAW

The Sixth Amendment to the U.S Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right [...] to have compulsory process for obtaining witnesses in his favor." U.S. Const. amend. VI, cl. 7. This right is "well established in military law and has been guarded by [our highest Court]." *United States v. Hinton*, 21 M.J. 267, 269 (C.M.A. 1986) (citing *united States v. Carpenter*, 1 M.J. 384 (C.M.A. 1976; *United States v. Iturralde-Aponte*, 1 M.J. 196 (C.M.A. 1975)). Consistent with the constitutional mandate, the prosecution and the defense at a court-martial "shall have equal opportunity to obtain witnesses and evidence, including the benefit of compulsory process," R.C.M. 703(a), and "[e]ach party is entitled to the production of any witness whose testimony on a matter in issue on the merits or on

[redacted]

an interlocutory question would be ***relevant and necessary***." R.C.M. 703(b)(1) (emphasis added).

Evidence is relevant when it has "any tendency to make the existence of any fact more probable or less probable than it would be without the evidence; and the fact is of consequence to the determination of the action." Mil. R. Evid. 401. Evidence is necessary when it is not cumulative and would contribute to a party's presentation of the case in some positive way on a matter in issue. R.C.M. 703(b)(1), Discussion, Manual for Courts-Martial, United States (2019 ed.); *see United States v. Williams*, 3 M.J. 239 (C.M.A. 1977).

In determining whether a requested witness' testimony is cumulative of a witness whose appearance at trial is assured, the military judge should consider: whether the requested witness' credibility is greater than that of the attending witness; whether the testimony of the requested witness is relevant to the accused with respect to character traits or other evidence observed during a different time period from the attending witness; and whether there is any benefit to the accused from having an additional witness say the same thing other witnesses have said. *United States v. Jones*, 20 M.J. 919, 927 (N-M. Ct. Crim. App. 1985) (internal citations omitted). If the court determines that a defense witness is cumulative, the Defense is entitled to choose which of the cumulative witnesses it desires to call. *United States v. Harmon*, 40 M.J. 107, 108 (C.A.A.F. 1994).

An accused's "right to present his own witnesses to establish a defense" is a "fundamental element of due process of law." *United States v. McAllister*, 64 M.J. 248, 249 (C.A.A.F. 2007) (quoting *Washington v. Texas*, 388 U.S. 14, 19 (1967)). Therefore, his "opportunity to obtain witness and other evidence" must be equal to the Government's. *United States v. Warner*, 62 M.J. 114, 118 (C.A.A.F. 2005) (internal quotation marks omitted).

The court-martial rules which implement these rights require that in order to obtain witnesses for trial, the Defense must first submit a request to trial counsel. R.C.M. 703(c)(2). The request must include the witness' name, telephone number if known, and address or location of the witness "such that the witness can be found upon the exercise of due diligence." R.C.M. 703(c)(2)(B). It must also include a synopsis of the witness' expected testimony. *Id.* If the trial counsel contends that production is not required under the rule, the Defense may submit the matter to the military judge. R.C.M. 703(c)(2)(D). If the military judge grants the motion, trial counsel "shall produce the witness or the proceedings shall be abated." *Id.* These same procedures apply to the production of evidence. R.C.M. 703(f).

ARGUMENT

The witnesses should be produced

The witnesses at issue have favorable testimony that is relevant. AZC Benton's military character is relevant to all three charges – particularly the alleged violation of Article 134, which will require the Government to prove beyond a reasonable doubt that AZC Benton's actions were service discrediting. Similarly, AZC Benton's character for truthfulness is relevant to all of the charges.

M.R.E. 404(a)(2) provides that "the accused may offer evidence of the accused's pertinent train and, if the evidence is admitted, the prosecution may offer evidence to rebut it." M.R.E. 404(a)(2). None of the offenses fit within the exceptions under the same rule, and thus good military character is a permissible defense. See *United States v. Schelkle*, 47 MJ 110 (CAAF 1997) ("The operation of Mil. R. Evid. 404 and 405, as pertains to this case, is quite plain. As all parties to the trial agreed, evidence of a pertinent of appellant's character offered by the defense, including good military character and law-abidingness, is admissible."

The Government will likely introduce statements of the Accused which puts her credibility front and center in this case. Should AZC Benton elect to testify, each witness would also be pertinent to the issue of her truthfulness. Notwithstanding the admissibility of this evidence, the Government agreed to produce zero witnesses for AZC Benton to present a Defense. This was improper.

These witnesses are non-cumulative. Reviewing the *Jones* factors, these witnesses carry different ranks demonstrating that the "credibility is greater" for several of these witnesses that may value the testimony of a higher ranking witness such as a Captain or a Master Chief. While they all know AZC Benton from her time in Millington, there is benefit to the accused from having "an additional witness say the same thing other witnesses have said" as PS1 [redacted] is a member of the military, and the Government intends to call three members of law enforcement to support his allegations against AZC Benton.

The notes within the possession of the Government should be discovered

"R.C.M. 701(a)(1)(A) and (C) require that trial counsel reveal witness statements." *United States v. Romano*, 46 M.J. 269, 275 (C.A.A.F. 1997). The notes taken of witness interviews are encapsulations of witness statements, and are therefore subject to the disclosure required under R.C.M. 701. The documents drafted by the Trial Counsel do not meet this criteria, and to the extent notes exist that are not the same as what was produced they should be produced.

[redacted]

RELIEF REQUESTED

The Defense moves the Court to order the Government produce CAPT [redacted], HMCM [redacted], CECS [redacted], and CSC [redacted] for trial, and to produce all witness notes in the possession of the Government.

EVIDENCE AND HEARING

In support of this motion, the Defense offers the following enclosed exhibits:

A. Defense Witness Request of 22 Aug 23

B. RCM 701 Disclosure CAPT [redacted]

C. RCM 701 Disclosure HMCM [redacted]

D. RCM 701 Disclosure CECS [redacted]

E. Government Response to Def. Wit. Req of 7 Sep 23

F. Government Witness List dtd 8 Sep 23

G. Request for Discovery dtd 7 Sep 23

The Defense also intends to call CAPT [redacted], HMCM [redacted], CECS [redacted], and CSC [redacted] as witnesses in support of this motion, and hereby requests the Government produce CAPT [redacted], HMCM [redacted], CECS [redacted], and CSC [redacted] in accordance with R.C.M. 703 at the Article 39(a) session held to receive evidence and hear argument on the motion.

[redacted]

If this motion is opposed by the Government, and pursuant to R.C.M. 905(h), the Defense requests an Article 39(a) session to present oral argument and evidence.

HOWLAND.JAMES.RAYMOND[redacted] Digitally signed by HOWLAND.JAMES.RAYMOND[redacted] Date: 2023.09.22 16:04:59 -04'00'

J. HOWLAND
LCDR, JAGC, USN
Defense Counsel

[redacted]

NAVY-MARINE CORPS TRIAL JUDICIARY
SOUTHERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **Cherelle BENTON** **AZC/E-7** **U.S. NAVY**	**DEFENSE MOTION TO SUPPRESS EVIDENCE (Firearm)** **22 Sep 23**

MOTION

Pursuant to M.R.E. 311 and the Fourth Amendment to the U.S. Constitution, the defense moves this Court to suppress a firearm that was seized by the Oakland (TN) Police Department without a warrant.

BURDEN

Upon motion by the Defense to suppress evidence under M.R.E. 311, the prosecution has the burden of establishing the admissibility of the evidence. M.R.E. 311 (d)(5). The military judge must find by a preponderance of the evidence that the evidence is admissible before it may be admitted into evidence. M.R.E. 311 (d)(5).

FACTS

1. On 5 Aug 22, AZC Benton was arrested by members of the Oakland Police Department. Enclosure A.
2. Pursuant to the arrest, Officer [redacted] found a firearm in the glove box of PS1 [redacted] [redacted] car. Enclosure A.

[redacted]

3. The firearm was a silver Kimber 9mm Micro 9 that contained a red laser and registered to AZC Benton. Enclosure A.
4. The evidence was placed in the Oakland Police Department Property and Evidence Room. Enclosure A.
5. AZC Benton was charged with Aggravated Assault (Domestic) Tampering with Evidence pursuant to Tennessee state law. Enclosure A.
6. The charges above were dropped by the state of Tennessee on 12 Dec 22. Enclosure B.
7. Beginning in January of 2023, AZC Benton made attempts to retrieve her firearm. AZC Benton states that she made numerous calls between January and March of 2023, and that nobody at the Oakland Police Department returned her call. Enclosure C.
8. In March of 2023, AZC Benton went to the Oakland Police Department (OPD) in person. She was told by a member of the department that "he could not release the weapon" because "the Navy was telling him" he could not release it. Enclosure C.
9. The Navy preferred charges against AZC Benton on 11 May 23. Charge Sheet.
10. Members of the Defense spoke with Ofc [redacted] on 6 Sep 23. During this meeting the issue of AZC Benton's firearm was discussed. Enclosure D.
    a. According to Ofc [redacted] the gun was still in OPD possession.
    b. Ofc [redacted] was "not sure" why OPD still had possession of the firearm in light of the fact that the state of Tennessee had dropped the case and it was closed by OPD.
    c. When asked if AZC Benton would be able to retrieve the weapon, he said "I assume so" and told the Defense to have AZC Benton request it be returned.

[redacted]

11. A few days later, AZC Benton went to the OPD station to retrieve her property. She was denied and told that "a Navy Jag" [evidently Trial Counsel in this case] told OPD they could not release the property back to AZC Benton. Enclosure C.
12. As of the date of this filing, the OPD has seized this property for 413 days. Enclosure A.
13. As of the date of this filing, 284 days have passed since the state of Tennessee dropped the case against AZC Benton. Enclosure B.

LAW

The Fourth Amendment to the Constitution protects individuals from unreasonable searches and seizures. *United States v. Ruff*, 77 M.J. 683, 684-685 Challenges to evidence allegedly obtained from unlawful searches and seizures are litigated in accordance with Military Rule of Evidence 311. *Id.* In a case involving the actions of an official of a State or any subdivision of a State, a search or seizure is unlawful if it is conducted in violation of the Constitution or relevant principles of law applied in federal criminal court cases. Military Rule of Evidence (M.R.E.) 311(b)(2), Manual for Courts-Martial, United States (2016 ed.). *Id.* In the absence of a warrant, a government search is presumed unreasonable unless it falls within an exception. *Id.* when offering evidence from a warrantless search against an accused, the Government bears the burden of establishing that an exception applies. *Id.*

The Government's authority to seize evidence is not everlasting. *United States v. Nelson*, 2021 CCA LEXIS 215 (holding that detention of a phone for a day while law enforcement sought a CASS was "reasonable"). How long the Government may seize an item of evidence is a separate inquiry from whether the evidence was properly seized at the crime scene. *Id.* ("Mil R. Evid. 316(c)(5), Manual Courts-Martial, offers no guidance regarding the meaning of "temporary." But the ultimate touchstone of any Fourth Amendment inquiry is always

[redacted]

reasonableness. The Fourth Amendment prohibits only meaningful interference with a person's possessory interests, not government action which is reasonable under the circumstances"). The entity that has seized property must be "authorized" to do so. MRE 316(c)(5)(a).

ARGUMENT

The Oakland Police Department's seizure of AZC Benton's property is unreasonable. The department closed the case against her, and the state of Tennessee no longer had an interest in the case when charges were dropped in December of 2022. While the civilian case was pending, at no point in time did the Oakland Police Department obtain a warrant. Regardless, when the case was dropped it should have been returned to AZC Benton.

Having closed the case, the Oakland Police Department no longer has "authorization" to seize this property from AZC Benton. MRE 316(c)(5)(A). The ongoing seizure of this property is not reasonable under the circumstances, as the personal property being held at the Oakland Police Department has no evidentiary value to the state of Tennessee. It cannot be said that the Oakland Police Department's interference with AZC Benton's personal possessory interest is still "meaningful." Even Ofc [redacted] noted he was "not sure" why his department was still holding this property and encouraged AZC Benton to request the property.

Since the arrest and seizure of evidence, NCIS has declined to obtain a warrant. In fact, NCIS agents did not even bother to obtain this property from the Oakland Police Department. Nonetheless, agents of the Federal government have ordered the Oakland Police Department to continue their ongoing seizure of AZC Benton's property without authority to do so. If the Fourth Amendment's "reasonableness" mandate has any meaning, the Government should not be allowed to seize a citizen's personal property for 413 days without a warrant.

[redacted]

As the Government has violated AZC Benton's right against unreasonable seizure of her property, the evidence should be ruled inadmissible at trial.

RELIEF REQUESTED

The Defense moves the Court to suppress the firearm unlawfully seized by the Oakland Police Department.

EVIDENCE AND HEARING

In support of this motion, the Defense offers the following enclosed exhibits:

A. Exerpt from OPD Arrest Report

B. Record Regarding State of Tennessee Charges ICO Benton

C. AZC Benton Memo dtd 22 Sep 23

D. LN1 Guest Memo dtd 22 Sep 23

If this motion is opposed by the Government, and pursuant to R.C.M. 905(h), the Defense requests an Article 39(a) session to present oral argument and evidence.

HOWLAND.JAMES.RAYMOND.[redacted] Digitally signed by HOWLAND.JAMES.RAYMOND.[redacted] Date: 2023.09.22 17:54:00 -04'00'

J. HOWLAND
LCDR, JAGC, USN
Defense Counsel

[redacted]

NAVY-MARINE CORPS TRIAL JUDICIARY
SOUTHERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **CHERELLE J. BENTON** **AZC / E-7** **U.S. NAVY**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO COMPEL WITNESSES AND DISCOVERY** **5 OCT 2023**

MOTION

In response to Defense's motion to compel CAPT [redacted], HMCM [redacted], CECS [redacted], and CSC [redacted], the Government hereby agrees to produce the requested witnesses for any basis in which they may testify to AZC Benton's character for truthfulness or if the case were to go to sentencing, the basis of AZC Benton's rehabilitative potential. The Government maintains the Defense has not made a showing that good military character is a pertinent character trait to the charged offenses. As such, the Government respectfully requests a preliminary ruling on the admissibility of general military character evidence.

In accordance with Rule for Courts-Martial 701(f), the Government respectfully requests this Court deny defense's Motion to Compel Government interview notes. Contemporaneous notes prepared by trial counsel and legalmen during witness interviews are not subject to disclosure.

BURDEN

As the moving party and proponent of the evidence, the defense bears the burden of persuasion on any factual issue necessary to decide this motion by a preponderance of the

[redacted]

evidence.

SUMMARY

The Accused is charged with violation of Article 80 (Attempt – Aggravated Assault), Article 109 (Damaging Nonmilitary Property), and Article 134 (Firearm – Discharging through Negligence), Uniform Code of Military Justice (UCMJ).

FACTS

1. On 5 August 2022, Oakland Police Department (OPD) received a report of a loud verbal altercation and possible gun shot. [Encl. (1)].

2. Upon response to the area, OPD observed the Accused standing outside a silver Mercedes sedan with the trunk and doors open. When questioned by OPD, the Accused stated she and PS1 [redacted] were in a verbal argument and she discharged a firearm. [Encl. (1)].

3. On 22 August 2023, Defense submitted a witness production request. In their request, defense failed to provide a synopsis articulating which offense each witness was being called to provide character testimony for, and what character traits the Defense believed were pertinent to that offense, and the basis for the witness' knowledge of the applicable character traits. [Encl. (2)].

4. On 7 September 2023, Government denied production of the requested character witnesses based upon a lack of showing what offense(s) the witnesses were being called to provide character testimony for and how those character traits were pertinent to the charged offense(s). [Encl. (3)].

5. On 30 August 2023, Government provided defense an R.C.M. 701 disclosure after conducting an interview with PS1 [redacted] [Encl. (4)].

6. On 7 September 2023, Defense submitted a third discovery request for notes in the possession of the Government taken during the interviews of all witnesses interviewed in the case. [Encl.

[redacted]

(5)].

7. On 12 September 2023, Government responded to Defense's discovery request and provided defense three R.C.M. 701 disclosures from interviews that were conducted with Defense's requested witnesses. [Encl. (5) – (9)].

DISCUSSION

A. Military Rule of Evidence 404(a) limits the use of general military character evidence.

Under M.R.E. 404(a)(2)(A) "the accused may offer evidence of the accused's pertinent trait." However, the accused's ability to offer evidence of the accused's pertinent trait is limited. General military character is not a pertinent trait for the purposes of showing the probability of innocence of the accused for the following offenses under the UCMJ:

(i) Articles 120-123a;

(ii) Articles 125-127;

(iii) Articles 129-132;

(iv) Any other offense in which evidence of general military character of the accused is not relevant to any element of an offense for which the accused has been charged.

M.R.E. 404(a)(2)(A).

Under M.R.E. 404(a), in order to introduce good military character evidence, it must be a pertinent trait of the accused for the offense which he has been charged. Stated another way, good military character evidence is only admissible when the accused has been charged with a military specific crime.

The United States Army Court of Criminal Appeals (ACCA) has held good military character is not a pertinent character trait to aggravated assault. *United States v. Brown,* No. 20160195, 2018 CCA Lexis 107 (A. Ct. Crim. App. Feb. 28, 2018). In coming to their holding,

[redacted]

the ACCA looked not only to the elements of the offense, but also to the specific facts and circumstances surrounding the charged offense. *Id.* at 127. In their analysis, the court reasoned, "while we need not examine every punitive article, an accused's general military character would be most likely relevant when an accused is charged with an offense such as conduct unbecoming an officer…" *Id.* at 120.

Similarly, in *United States v. Cooper*, 11 M.J. 815, 819 (A.F.C.M.R. 1981) the court found that reliance on an offense being charged under UCMJ Article 134, as conduct prejudicial to good order and discipline in the armed forces or of a nature to bring discredit upon the armed forces as a catalyst to introduce evidence of good military character is too broad. Instead, the court reasoned the "trial judge must look to the military nature of the charged misconduct before determining if the accused's good military character is pertinent to the determination of guilt or innocence." *Id.*

Here, the charged offenses and the underlying factual circumstances are such that general military character is not pertinent to the determination of guilt or innocence. The alleged offenses happened off the military installation and in a residential neighborhood. Additionally, the alleged offenses occurred as part of domestic dispute and based upon a personal relationship the Accused had with PS1 [redacted] No element contained within any of the charged offenses correlates to military missions, orders, obligations, or duties. Defense's reliance on the service discrediting element contained within the charged UCMJ, Article 134 offense is too broad and fails to establish how general military character is a pertinent character trait to any of the charged offenses.

B. <u>The Government has and will continue to comply with its disclosure obligations.</u>

Defense has requested that the Government provide its notes drafted contemporaneously

[redacted]

while interviewing several witnesses without citing legal authority to support such a request. Rules for Courts-Martial (R.C.M.) 701(a)(1)(C) requires that the government disclose "any sworn or signed statement relating to an offense charged in the case that is in the possession of trial counsel." Trial counsel or legalman notes taken during a witness interview do not constitute a statement of a witness, let alone a sworn statement. Additionally, defense has cited no authority to the contrary.

As acknowledged by defense in its motion, the Government provided defense with summaries of each witness' interview. The disclosures were provided in accordance with the Government's disclosure obligations under R.C.M. 701(a). These disclosures encapsulate the witness interviews and were disclosed in compliance with R.C.M. 701(a), as is the common practice in the Southern Judicial Circuit.

Despite these disclosures, defense continues to request additional disclosure of notes taken by the Government during the interviews. In its motion, defense relies upon *United States v. Romano*. 46 M.J. 269, (C.A.A.F. 1997). The facts in *Romano* are easily distinguishable from those currently before this court. The court in *Romano* based its reasoning upon case precedent that primarily analyzes situations where the government failed to provide statements for witnesses in violation of the Jenks Act and R.C.M. 914. *See Id., citing Golberg v. United States,* 435 U.S. 94 (1976). In *Romano,* the government failed to disclose the Article 32 testimony of two potential witnesses and on appeal, amongst other grounds, argued the documents were covered by the work-product privilege. *Id.* at 271-72. Instead, here, the Government provided defense with disclosures in accordance with R.C.M. 701. As a result, as required by R.C.M. 701(a), defense has been provided with statements of witnesses that are in the Government's possession.

[redacted]

C. Trial Counsel and Legalman notes are covered by the attorney work-product privilege.

The attorney work product privilege "shelters the mental process of the attorney…" *United States v. Nobles,* 422 U.S. 225, 238 (1975). Trial Counsel and legalman notes taken during an interview encapsulate more than a regurgitation of what a witness states. The notes often include self-reminders to follow up on certain points, attorney thought process, questions to ask that will help develop the government's theory, and suggested questions presented by the legalman. The Government understands its obligation to disclose notes that include quotes from a witness or verbatim notes that amount to a transcript; however, outside of those scenarios, summaries of the interviews satisfies R.C.M. 701. This sentiment and understanding was recognized by the Supreme Court when it listed material that is protected within the work product privilege, which includes "interviews, statements, memoranda…mental impressions, personal beliefs, and countless other tangible and intangible ways." *Id.* at 237. The Court in *Nobles* also recognized that this privilege extends to "material prepared by agents for the attorney as well as those prepared by the attorney himself." *Id.* at 238-39.

The Court's holding and reasoning in *Nobles* has been codified under R.C.M. 701(f). The Rule provides "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." As a result, the notes taken during the witness interviews are protected work product and exceed the government's discovery obligations under R.C.M. 701. The Government has satisfied its disclosure obligations, defense has adequate statements of each witness, which will assist in the preparation of its case and protect the accused's Sixth Amendment Right, and are not entitled to trial counsel or legalman notes.

[redacted]

EVIDENCE

Enclosure (1) – NCIS Executive Summary

Enclosure (2) – Defense's Witness Production Request of 22 August 2023

Enclosure (3) – Government's Response to Defense's Witness Production Request of 7 September 2023

Enclosure (4) – R.C.M. 701 Disclosure PS1 [redacted], USN

Enclosure (5) – Defense's Third Discovery Request of 7 September 2023

Enclosure (6) – Government's Response to Defense's Third Discovery Request of 12 September 2023

Enclosure (7) – R.C.M. 701 Disclosure CAPT [redacted], USN

Enclosure (8) – R.C.M. 701 Disclosure HMCM [redacted], USN

Enclosure (9) – R.C.M. 701 Disclosure CECS [redacted], USN

RELIEF REQUESTED

The Government respectfully requests that this Court issue a preliminary ruling regarding the admissibility of general military character evidence and deny the Defense Motion to Compel trial counsel and paralegal notes

[redacted]
K. M. POTEET
LT, JAGC, US
Trial Counsel

[redacted]

CERTIFICATE OF SERVICE

I certify that I have served a true copy via e-mail of the above on the court and defense counsel on 5 October 2023.

[redacted]
K. M. POTEET
LT, JAGC, USN
Trial Counsel

[redacted]

NAVY-MARINE CORPS TRIAL JUDICIARY
SOUTHERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **CHERELLE J. BENTON** **AZC / E-7** **U.S. NAVY**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO SUPPRESS EVIDENCE (Firearm)** **5 OCT 2023**

MOTION

The Government respectfully requests that the Court deny the Defense's motion to suppress the firearm seized and retained by Oakland Police Department (OPD), as the firearm was legally seized and OPD's retention of the firearm through duration of the civilian and military criminal justice process is reasonable.

BURDEN

Upon motion by the Defense to suppress evidence as the result of an unlawful search or seizure, the Government has the burden of proof by a preponderance of the evidence. M.R.E. 311(d)(5)(A).

SUMMARY

The Accused is charged with violation of Article 80 (Attempt – Aggravated Assault), Article 109 (Damaging Nonmilitary Property), and Article 134 (Firearm – Discharging through Negligence), Uniform Code of Military Justice (UCMJ).

FACTS

1. On 5 August 2022, Oakland Police Department (OPD) received a report of a loud verbal

[redacted]

altercation and possible gun shot in the [redacted] [Encl. (1)].

2. Upon response to the area, OPD observed the Accused standing outside a silver Mercedes sedan with the trunk and doors open. [Encl. (1)].

3. When questioned whether there was an altercation or a gunshot, the Accused denied both. [Encl. (1)].

4. The Accused then contacted PS1 [redacted]. to let him know law enforcement was present on the scene, to which PS1 [redacted]. hung up the phone. [Encl. (1)].

5. When PS1 [redacted] arrived on scene and disclosed there was a fight and a gunshot and the Accused discharged the firearm. [Encl. (1)].

6. The responding officer then asked the Accused whether she discharged a firearm to which she responded in the affirmative. The Accused further disclosed the firearm was in glovebox compartment of PS1 [redacted] vehicle. [Encl. (1)].

7. The responding officer then retrieved the firearm in the glovebox compartment of PS1 [redacted] vehicle. A check of NCIC showed the gun not to be stolen. [Encl. (1)].

8. The firearm was placed in the Oakland Police Department Property and Evidence Room. [Encl. (1)].

9. On 25 August 2022, Sgt [redacted], OPD, contacted Naval Criminal Investigative Service (NCIS) Memphis, TN regarding the arrest of an active duty service member, AZC Benton, on 5 August 2022. Sgt [redacted] provided a signed NCIS Form 5580 and a copy of the OPD report pertaining to OPD's investigation. OPD served as the lead investigative agency on the case. [Encl. (2)].

10. On 29 September 2022, OPD provided copies of the body worn camera video footage pertaining to the investigation. [Encl. (3)].

[redacted]

11. On 24 October 2022, Sgt [redacted] advised NCIS Memphis that a preliminary hearing for the Accused was scheduled for 3 November 2023. OPD requested no assistance from NCIS at this time. [Encl. (4)].

12. On 8 March 2023, Sgt [redacted] advised NCIS Memphis that the Assistant District Attorney General, Fayette County, TN, declined to prosecute due to a lack of participation by PS1 [redacted] At this time, NCIS Memphis assumed lead investigative role. [Encl. (5)].

13. On 11 May 2023, charges were preferred against the Accused. *See* Charge Sheet.

DISCUSSION

A. Oakland Police Department lawfully seized the Accused's firearm from PS1 [redacted] automobile on 5 August 2022.

The Fourth Amendment by its express terms protects individuals against unreasonable searches and seizures. *United States v. Daniels*, 60 M.J. 69, 70 (C.A.A.F. 2004); U.S. Const. amend. IV. Under the Military Rules of Evidence, which implement the Fourth Amendment, evidence illegally seized by government agents from a protected place is inadmissible." *Id.* However, evidence is admissible when seized based on a reasonable belief that the property or evidence is contraband or evidence of a crime. M.R.E. 316(c)(1). Probable cause to seize property or evidence exists when there is a reasonable belief that the property or evidence is an unlawful weapon, contraband, evidence of crime, or might be used to resist apprehension or to escape. Mil. R. Evid. 316(c)(1). *United States v. Mons*, 14 M.J. 575 (N.M.C.M.R. 1982). .

Not all searches require warrants or search authorizations and there is no requirement to obtain secondary authorization for a seizure that is otherwise lawful. The Fourth Amendment does not prohibit all warrantless searches, only those that are unreasonable; and whether a search is unreasonable must be evaluated on the facts and circumstances of each situation. *United States*

[redacted]

v. Irizarry, 72 M.J. 100, 103 (C.A.A.F. 2015). A search, as considered under the Fourth Amendment, only occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable. *Id.* For example, a search warrant or authorization is not required when there is probable cause but insufficient time to obtain the authorization because the delay to obtain authorization would result in the removal, destruction, or concealment of evidence and searches of automobiles generally do not require warrants or authorizations. Mil. R. Evid. 315(g); *Carroll v. United States*, 267 U.S. 132, 45 S. Ct. 280 (1925).

To raise a violation of the Fourth Amendment, an accused's own constitutional rights must have been violated and an accused cannot vicariously claim Fourth Amendment violations of the rights of others. *Rakas v. Illinois,* 439 U.S. 128, 134 (1978).

Here, the responding OPD officers arrived on scene in direct response to a 911 call that reported concern due to a loud verbal altercation followed by a gun shot. While responding the incident and standing directly next to PS1 [redacted] open-doored vehicle with the Accused and PS1 [redacted] the OPD officers learned there was in fact a verbal altercation, subsequent gun shot, and the firearm in question was placed in the glovebox compartment of PS1 [redacted] vehicle. The firearm was then seized from the glovebox compartment by OPD. Similar to *Rakas* where U.S. Supreme Court held, passengers in an automobile have no reasonable expectation of privacy in the interior area of the car, a warrantless search of the glove compartment and the spaces under the seats, which turned up evidence implicating the passengers, invaded no Fourth Amendment interest of the passenger, the Accused lacks standing to challenge the admissibility of evidence seized. *Id.*

Without conceding the Accused's lack of standing to challenge the search of PS1 [redacted] vehicle and subsequent seizure of her firearm, under a theory of exigent circumstances, police

are not required to obtain a search warrant if they reasonably believe that evidence may be destroyed or others may be placed in danger in the time it would take to secure the warrant. Here, the scenario reasonably placed all present parties in harm's way. The Accused admitted to discharging a firearm in a residential neighborhood, placing the lives of multiple other people in the vicinity in danger. This weapon needed to be immediately secured – or others may be placed in danger in the time required to secure the warrant. Further, this evidence was stored within a vehicle that at the time the responding officers would have analyzed the scenario considering the mobile nature that would allow evidence to be moved quickly. Although it was later learned the vehicle obtained damage resulting in a flat tire, that was unknown to the officers at the time of the search, nor does a flat tire necessarily render a vehicle immovable.

B. Oakland Police Department's retention of the lawfully seized firearm is reasonable.

There is no requirement that law enforcement return lawfully obtained evidence related to an ongoing criminal investigation, while the criminal proceedings related to that investigation remain pending. *United States v. Lee,* No. 1:14-CR-00227-TCB-RGV, 2015 U.S. Dist. LEXIS 102473 (N.D. Ga. July 6, 2015); *United States v. Christie,* 717 F.3d 1156 (10th Cir. 2013); *Cameron v. District of Columbia*, No. 21-cv-2908 (APM), 2022 U.S. Dist. LEXIS 154589 (D.D.C. Aug. 29, 2022). The case at hand is distinguishable from *United States v. Nelson*, where a seizure of a phone, pending a CASS, was executed due to belief the delay necessary to obtain a search warrant or search authorization would result in the removal, destruction, or concealment of the property or evidence sought. *United States v. Nelson,* No. 202000108, 2021 CCA LEXIS 215 (N-M Ct. Crim. App. May 4, 2021). In *Nelson*, reasonableness of the seized phone was reviewed in context with the timeline to obtain search authorization. Here, rather, the firearm maintained by OPD is evidence that was used in a commission of the charged offenses and was

[redacted]

lawfully seized from another individual's privately owned vehicle, to which the Accused had no privacy interest in. As such, the firearm is maintained within the custodial chains of the law enforcement agency that seized it, pending court martial charges.

As the responding agency, OPD maintained the primary lead investigative role until March of 2023, when NCIS assumed primary lead. However, since August 2022, the alleged offenses have been subject to investigation, review, and ultimately preferred and referred to a General Court-Martial. Despite the fact that the case was dismissed for prosecution by the State of Tennessee, the investigation remained open by NCIS and subject to criminal proceedings under the Uniform Code of Military Justice. Based upon the ongoing criminal justice proceedings, OPD continues to maintain a reasonable interest in properly maintaining evidence that was seized during their role as the primary lead investigating agency. There is no question that the responding OPD personnel will be required for the purposes of court-martial, which is further highlighted by the fact Defense Counsel requested production of the two responding officers for the docketed trial dates. The continued seizure of the Accused's lawfully seized firearm by OPD is reasonable given there are criminal charges pending, to which OPD officers will be required to participate in and testify regarding their role as the primary lead investigative agency at the time of the seizure.

EVIDENCE

Enclosure (1) – Oakland Police Department Incident Report of 5 August 2022

Enclosure (2) – NCIS IA of 25 August 2022; Results of Receipt of Notification

Enclosure (3) – NCIS IA of 29 September 2022; Results of Receipt of Body Worn Camera Video

Enclosure (4) – NCIS Executive Summary and Narrative of 24 Oct 2022

Enclosure (5) – NCIS Executive Summary and Narrative of 13 Jun 2023

[redacted]

RELIEF REQUESTED

The Government respectfully request the Court deny Defense's Motion to Suppress the seized firearm.

[redacted]

K. M. POTEET
LT, JAGC, USN
Trial Counsel

CERTIFICATE OF SERVICE

I certify that I have served a true copy via e-mail of the above on the court and defense counsel on 5 October 2023.

[redacted]

K. M. POTEET
LT, JAGC, USN
Trial Counsel

[redacted]

DEPARTMENT OF THE NAVY
NAVY-MARINE CORPS TRIAL JUDICIARY
SOUTHERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **V.** **CHERELLE J. BENTON** **AZC / E-7 / USN**	**GOVT MOTION *IN LIMINE* TO PRE-ADMIT EVIDENCE (911 Call)** **10 April 2024**

MOTION

The Government moves under Rule for Court-Martial 906(13) to pre-admit a redacted portion of a recorded 911 call as a regularly conducted business record under Military Rule of Evidence 803(6). Specifically, The Government seeks to pre-admit into evidence a 911 call that was recorded on 5 August 2022 from [redacted], Oakland, Tennessee in which the caller reported hearing a gunshot.

BURDEN

As the party seeking to admit the evidence in question, the Government has the burden of proving its admissibility by a preponderance of the evidence. R.C.M. 905(c).

FACTS

1. The Accused is charged with violation of Uniform Code of Military Justice (UCMJ) Article 114 (Firearm Discharge, Endangering Human Life), Article 128 (Simple Assault), and Article 131b (Obstructing Justice). **Charge Sheet.**

2. On 5 August 2024, a caller reported that while at her residence she heard a gunshot. **Encl. (1) and (2).**

3. Based upon this information, the caller contacted 911 to ensure police assistance was enabled to respond to any ongoing emergencies within the surrounding area. **Encl. (1) and (2).**

4. Ms. [redacted] as the Fayette County 9-1-1 Director, maintains and oversees 9-1-1 recordings as a custodian. She provided the recording and swore to a certificate of authenticity, sufficiently explaining that such recordings are part of the regularly conducted business patriciate of Fayette County Emergency Communications District, Tennessee. **Encl. (3).**

STATEMENT OF LAW

"As a general rule, hearsay, defined as an out of court statement offered into evidence to prove the truth of the matter asserted, is not admissible in courts-martial." *United States v. Smith,* 83 M.J. 350, 355 (C.A.A.F. 2023); Mil. R. Evid. 801; Mil. R. Evid. 802. However, exceptions to the general prohibition on hearsay can render such statements admissible. Mil. R. Evid. 803.

Mil. R. Evid. 803(6) provides that one such exception applies to "records of a regularly conducted activity." The exception applies to records that (a) were "made at or near the time by- or from information transmitted by – someone with knowledge;" (b) were "kept in the course of a regularly conducted activity of a uniformed service...institution...organization, occupation, or calling of any kind;" (c) "making the record was a regular practice of that activity;" and (d) "these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Mil. R. Evid. 902(11). *Id.*

Mil. R. Evid. 902(11) provides that a custodian or qualified person can certify the original or copy of a record that meets the requirements of Mil. R. Evid. 803(6)(A)-(C). *See* Mil. R. Evid. 902(11). If these requirements are met, the burden is on the opponent to "show that the source of information or the method or circumstance of preparation indicate a lack of trustworthiness." Mil. R. Evid. 803(6)(E);

While military courts have not ruled upon the applicability of this hearsay exception to 911 recordings[1], federal courts have held hearsay statements on 911 recordings can be admitted into evidence as a business record. *Bemis v. Edwards*, 45 F.3d 1369, *6 (9th Cir. 1995). However, based upon the rationale that private citizens that contact 911 are under no duty to report, "a recorded statement by a citizen must satisfy a separate hearsay exception." *Id.* (citing to *United States v. Pazsint*, 703 F.2d 420, 424-425 (9th Cir. 1983), a previous ninth circuit case excluding an emergency call). *See also, United States v. Kuo,* 2011 U.S. Dist. LEXIS 4387, *34 (E.D.N.Y. 2011) (holding the 911 recordings were admissible as business records if the statements by the callers themselves were covered by an independent hearsay exception); *United States v. Dorsey,* 2011 U.S. Dist. LEXIS 52523 (S.D. Fla. 2011) (noting "the 911 tape itself can be admitted as a public record or business record"). A statement made by a citizen to a 911 dispatcher may qualify as a present sense impression or an excited utterance. *Id. See also*, *Bemis v. Edwards,* 45 F.3d 1369, *7 (9th Cir. 1995); *United States v. Henry,* 81 M.J. 91, 99-100 (C.A.A.F. 2021).

A present sense impression is a "statement describing or explaining an event or condition, made while or immediately after the declarant perceived it." Mil. R. Evid. 803(1). In addition, the proponent must show the declarant had personal knowledge of the event. *United States v. Henry,* 81 M.J. 91 (C.A.A.F. 2021) (citing *Bemis v. Edwards,* 45 F.3d 1369, 1373 (9th Cir. 1995). "In the case of a hearsay declarant, the personal knowledge does not need to be conclusively established before the testimony is admitted; rather, "it is enough, if the declarant 'so far as appears [has] had an opportunity to observe the fact declared." *Id. See also, United States v. Hickey*, 917 F.2d 901, 904 (6th Cir. 1990) (explaining that "[t]testimony should not be excluded for lack of personal

[1] In *United States v. Leach,* 2022 CCA LEXIS 76 (A.F. Ct. Crim. App. 2022), the court declined to determine whether a jail call was properly authenticated as a business record, holding it was properly authenticated pursuant to Mil. R. Evid. 901(a).

knowledge unless no reasonable juror could believe that the witness had the ability and opportunity to perceive the event that he testifies about").

Even if hearsay is admissible under an exception, its admission may require in person testimony by the declarant. *Crawford v. Washington,* 541 U.S. 36, 53-54 (2004). The Confrontation Clause of the Sixth Amendment bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant has a prior opportunity for cross-examination." *Id.* A statement must be "testimonial" for the Confrontation Clause to apply. *Davis v. Washington,* 547 U.S. 813, 821 (2006). Recordings of 911 calls that are made during an ongoing emergency and for the purpose of obtaining police assistance are considered non-testimonial and admission does not violate the Confrontation Clause. *Id.* In these cases, "the declarant is speaking about events happening and made for the purpose of requiring police assistance as opposed to reporting long past events." *United States v. Dorsey*, 2011 U.S. Dist. LEXIS 52523 (S.D. Fla. 2011). For this reason, "the [Supreme] Court [in Davis v. Washington] introduced a 'primary purpose' test holding that a 911 call was not testimonial because the statements were '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.'" *United States v. Sweeney*, 70 M.J. 296, 308 (C.A.A.F. 2011) (discussing *Davis*, 547 U.S. at 821).

ARGUMENT

I. The 911 recording of 5 August 2022 and enclosed attestation meets the requirements M.R.E. 803(6) and M.R.E. 902(11).

The recording of the 911 call meets all the requirements of M.R.E. 803(6) to be self-authenticating under M.R.E. 902(11), as evidenced by the accompanying attestation. Here, this record has been properly certified by Ms [redacted], Fayette County 911 Director, who serves as a custodian of these records. Her certification affirms the recording was (a) made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters; (b) kept in the ordinary course of a regularly conducted business activity of Fayette County Emergency Communications; and (c) made by Fayette County Emergency Communications as a regular practice. In compliance with 28 U.S.C. §1746, these attestations were made under the penalties of perjury. As such, it is both self-authenticating without live testimony under M.R.E. 902(11) and excepted from the rule against hearsay under M.R.E. 803(6). Therefore, pre-admission is both appropriate and in the interest of judicial economy and the parties' preparation. Such is in accordance with federal case law, allowing 911 recordings themselves to be admitted as business records. *See Bemis v. Edwards*, 45 F.3d 1369, 1372 (9th Cir. 1995); *United States v. Kuo*, 2011 U.S. Dist. LEXIS 4387, *34 (E.D.N.Y. 2011); *United States v. Dorsey*, 2011 U.S. Dist. LEXIS 52523 (S.D. Fla. 2011).

II. The statements made by a private citizen within the 911 recording are admissible as a present sense impression and as an effect on the listener.

Present Sense Impression. The caller contacted the emergency dispatch and described personally hearing a gunshot prior to contacting 911. Specifically, she describes she heard the

gunshot and immediately took steps to ensure safety of her family, such as contacting her husband, checking on her children, and arming their security system. After taking those steps, she contacted 911 to report the gun shot she heard to report her safety concern. Her statements to the dispatcher were made immediately after perceiving the event, with a still ongoing concern for the safety of others, and her statements regarding the gunshot arose from her personal knowledge of what she heard. As such, her statements are admissible as a present sense impression.

Effect on the Listener. Statements that are not offered for the truth of the matter, such as only offered to show the effect on the listener, are not excluded under hearsay rules. The caller contacted 911 in order to report that she heard a gun shot and wanted to request police assistance to respond to any ongoing emergency. This report to the 911 dispatcher in turn led to two Oakland Police Department officers responding to the scene. The caller's report goes directly to the foundation of why law enforcement was dispatched to respond to the area of [redacted] on 5 August 2022. *See United States v. Earth*, 984 F.3d 1289, *7 (8th Cir. 2021) (holding introduction of statements contained within a 911 calls to show their effect on the listener and to introduce the origins of the investigation were not hearsay).

III. The statements contained within the 911 recording are non-testimonial and not subject to the Confrontation Clause.

The statements made by the caller are non-testimonial. Her report is provided so the officers know what had just occurred and for the purpose to allow them to immediately respond to the scene. The caller did not engage in any actions or make any statements that would tend towards her primary purpose of the call being in an effort to establish or prove past events potentially relevant to a later criminal prosecution. Rather, the callers' focus was ensuring police assistance was provided in order to respond to any potential ongoing emergencies associated with the gunshot she personally heard. This is precisely what the Supreme Court explained is non-testimonial: the caller is "describ[ing] current circumstances requiring police assistance" so "officers called to investigate . . . know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim." *Davis*, 547 U.S. at 827-32 (quoting *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 186 (2004)).

RELIEF REQUESTED

The Government requests the Court grant the motion to pre-admit into evidence a 911 call that was recorded on 5 August 2022.

EVIDENCE OFFERED

The Government offers the following evidentiary exhibits in support of its motion:

Encl. (1): Redacted 911 Call of 5 August 2022
Encl. (2): Redacted Transcript of 911 Call of 5 August 2022
Encl. (3): Attestation of Ms. [redacted], Fayette County 911 Director

ORAL ARGUMENT

The Government respectfully requests oral argument prior to any adverse ruling from the Court.

POTEET.KRIST EN.MICHELLE. [redacted] Digitally signed by POTEET.KRISTEN.MICHELLE. [redacted] Date: 2024.04.10 16:58:04 -04'00'

K. M. POTEET
LT, JAGC, USN
Trial Counsel

CERTIFICATE OF SERVICE

I certify that I have served a true copy via electronic means of the above on the Court and Defense Counsel on 10 April 2024.

POTEET.KRIST EN.MICHELLE. [redacted] Digitally signed by POTEET.KRISTEN.MICHELLE. [redacted] Date: 2024.04.10 16:58:15 -04'00'

K. M. POTEET
LT, JAGC, USN
Trial Counsel

DEPARTMENT OF THE NAVY
NAVY-MARINE CORPS TRIAL JUDICIARY
SOUTHERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **V.** **CHERELLE J. BENTON** **AZC / E-7 / USN**	**GOVT MOTION FOR RULING ON ADMISSIBILITY OF BODY WORN CAMERA RECORDINGS** **10 April 2024**

MOTION

The Government moves under Rule for Court-Martial 906(13) for a ruling on the admissibility of a redacted portion of the police body worn camera footage recorded on 5 August 2022.

BURDEN

As the party seeking to admit the evidence in question, the Government has the burden of proving its admissibility by a preponderance of the evidence. R.C.M. 905(c).

FACTS

1. The Accused is charged with violation of Uniform Code of Military Justice (UCMJ) Article 114 (Firearm Discharge, Endangering Human Life), Article 128 (Simple Assault), and Article 131b (Obstructing Justice). **Charge Sheet.**

2. On 5 August 2024, a caller reported that while at her residence she heard a gunshot. **Encl. (1) of AEXXV.**

3. Based upon this information, the caller contacted 911 to ensure police assistance was enabled to respond to any ongoing emergencies within the surrounding area. **Encl. (1) of AEXXV.**

4. Law enforcement was actived to the area of [redacted], Oakland, Tennessee and upon arrival made contact with the Accused, who was standing outside a silver Mercedes sedan with the trunk and doors open. **Encl. (1) – (4).**

5. When questioned whether there was an altercation or a gunshot, the Accused denied both. **Encl. (1) – (4).**

6. The Accused then contacted PS1 [redacted] to let him know law enforcement was present on scene, to which PS1 [redacted] hung up the phone. **Encl. (1) – (4).**

7. When PS1 [redacted] arrived on scene and disclosed there was a fight and a gunshot and the Accused discharged the firearm. **Encl. (1) – (4).**

8. The responding officer then asked the Accused whether she discharged a firearm to which she responded in the affirmative. **Encl. (1) – (4).**

9. The Accused was advised of her Miranda rights and subsequently waived her rights and admitted to discharging a firearm from her front porch. **Encl. (1) – (4).**

STATEMENT OF LAW

Mil. R. Evid. 104(a) allows the military judge to determine preliminary questions concerning admissibility of evidence. Under Mil. R. Evid. 402, "relevant evidence is admissible" unless the Constitution, an applicable federal statute, the Military Rules of Evidence, or Manual for Courts-Martial provide otherwise. Mil. R. Evid. states that evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action. While such evidence may nevertheless be excluded under the rule against hearsay at Mil. R. Evid. 802, statements made by an Accused are not hearsay when offered by the Government. Mil. R. Evid. 801(d)(2). Statements offered for their effect on the listener likewise escape exclusion under hearsay. Mil. R. Evid. 801(c)(2).

Further, exceptions to the general prohibition on hearsay can render hearsay admissible. M.R.E. 803. The excited utterances exception to the hearsay rule applies to "statement[s] describing or explaining an event or condition, made while or immediately after the declarant perceived it." Mil. R. Evid. 803(2). "The implicit premise [of the exception] is that a person who reacts to a startling event or condition while under the stress of excitement caused thereby will speak truthfully because of a lack of opportunity to fabricate." *United States v. Jones*, 30 M.J. 127, 129 (C.M.A. 1990). In determining whether a declarant was under the stress of excitement caused by an event, courts look at, "'[1] lapse of time between the startling event and the statement, [2] whether the statement was made in response to an inquiry, [3] the age of the declarant, [4] the physical and mental condition of the declarant, [5] the characteristics of the event, and [6] the subject matter of the statement.'" *United States v. Donaldson*, 58 M.J. 477, 483 (C.A.A.F. 2003)

"Once the evidence meets the threshold requirements, a military judge must apply the balancing test of M.R.E. 403, under which the evidence may be excluded if its 'probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues,' misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence." *United States v. Berry,* 61 M.J. 91, 95 (C.A.A.F. 2005); M.R.E. 403.

M.R.E. 901(a) states that, to authenticate evidence, "the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." In doing so, the proponent is not required to "rule out all possibilities inconsistent with authenticity, or to prove beyond any doubt that the evidence is what it purports to be." *United States v. Gagliardi,* 506 F.3d

140, 151 (2d Cir. 2007). Rather, a *prima facie* showing is sufficient for admissible. *See United States v. Lubich,* 71 M.J. 170, 174 (C.A.A.F. 2013). Therefore, "[i]f in the court's judgement it seems reasonably probable that the evidence is what it purports to be, the command of Rule 901(a) is satisfied and the evidence's persuasive force is left to the jury." *United States v. Dhinsa,* 243 F.3d 635, 658 (2d Cir. 2001); *see also United States v. Tropeano,* 252 F.3d 653, 661 (2d Cir. 2001) ("Authentication of course merely renders [evidence] admissible, leaving the issue of [its] ultimate reliability to the jury.")

The Military Rules of Evidence do not limit the type of proof a party may present to authenticate evidence. One of the myriad of the methods for authentication includes testimony of a witness with knowledge that an item is what it is claimed to be. Mil. R. Evid. 901(b)(1).

ARGUMENT

The Government's intention to introduce the statements of the Accused against her at trial is proper and not excluded as hearsay. *See* M.R.E. 801(d)(2). The statements made by law enforcement within the recordings are also not excluded as hearsay as those statements are not offered for the truth of the matters asserted, but to provide context to the Accused's statements. Specifically, their statements explain why the Accused stated what she did and how what she said related towards the charged offenses. As such, the statements of law enforcement are admissible as statements offered for their effect on the listener. Further, the officers questioning to both the Accused and PS1 [redacted] while they were standing together is admissible. The inquiries are presented to both parties simultaneously, to which PS1 [redacted] responds in the Accused's presence and the Accused's failure to deny the statements made by PS1 [redacted] is admissible as an admission of the Accused.

PS1 [redacted] question, "Now you trying to set me up too?" is not excluded as hearsay. His comment is not a statement offered for the truth of the matter asserted, but rather a direct question poised to the Accused. However, even if PS1 [redacted] question is considered an assertion it is admissible as an excited utterance. His question was made immediately after learning the Accused placed a firearm that she discharged in the glove box compartment to his vehicle. At the time of the question not only was PS1 [redacted] under the stress from being in the near vicinity when the Accused discharged a firearm, he was under the stress of excitement of learning that very firearm was placed in his vehicle. While PS1 [redacted] statement is short, his voice and demeanor is telling of his emotional state. In fact, when the Accused began responding to him regarding to PS1 [redacted] comment upon learning the firearm was in his vehicle, law enforcement took affirmative steps to separate the parties. PS1 [redacted] statement was not a product of deliberation, but rather a response to a startling event, i.e. being in the near area when the Accused discharged a firearm and subsequently learning the firearm that had been discharged was placed in his vehicle. In addition, if considered an assertion, his question is admissible for an effect on the listener to show the Accused's response.

RELIEF REQUESTED

The Government request the Court rule the redacted portions of the police body worn camera footage is admissible.

EVIDENCE OFFERED

The Government offers the following evidentiary exhibits in support of its motion:

Encl. (1): Redacted body worn camera footage of Officer [redacted]

Encl. (2): Redacted transcript of body worn camera footage of Officer [redacted]

Encl. (3): Redacted body worn camera footage of Officer [redacted]

Encl. (4): Redacted transcript of body worn camera footage of Officer [redacted]

ORAL ARGUMENT

The Government respectfully requests oral argument prior to any adverse ruling from the Court.

POTEET.KRISTEN.MICHELLE.[redacted] Digitally signed by POTEET.KRISTEN.MICHELLE[redacted] Date: 2024.04.10 16:59:22 -04'00'

K. M. POTEET
LT, JAGC, USN
Trial Counsel

CERTIFICATE OF SERVICE

I certify that I have served a true copy via electronic means of the above on the Court and Defense Counsel on 10 April 2024.

POTEET.KRISTEN.MICHELLE.[redacted] Digitally signed by POTEET.KRISTEN.MICHELLE[redacted] Date: 2024.04.10 16:59:34 -04'00'

K. M. POTEET
LT, JAGC, USN
Trial Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY
SOUTHERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **Cherelle BENTON** **AZC/E-7** **U.S. NAVY**	**DEFENSE RESPONSE TO GOVT MOTION IN LIMINE TO PRE-ADMIT EVIDENCE (911 Call)** **17 Apr 2024**

MOTION

Defense hereby responds to the Government Motion In Limine to Pre-Admit Evidence (911 Call). The Government has failed to demonstrate the admissibility of this 911 call as a business record under MRE 803(6), and thus the motion should be denied.

BURDEN

As the party seeking to admit the evidence in question, the Government has the burden of proving its admissibility by a preponderance of the evidence. R.C.M 905(c).

FACTS

Defense does not dispute the facts provided by the Government, but adds the following:

1. On 26 Jan 24, the Defense requested discovery from the Government. In its request, the Defense requested "notice of the government's intent to use any substitute for the physical presence and live in-court testimony of any witness. Exhibit A.
2. In response, the Government stated that it "does not intend to use any substitute for the physical presence and live in-court testimony of any witness." Exhibit A.

3. The Government's motion for ruling on admissibility of evidence, submitted with its final pre-trial matters, was the first time the Defense had seen the "affidavit" signed by Ms. [redacted], which is dated 10 Apr 2024. This affidavit indicates that the Government is relying on a "substitute for the physical presence and live in-court testimony" of a witness.
4. Per the TMO, discovery was due 9 Feb 24.
5. Per the TMO, motions were to be filed on 22 Feb 24,.
6. The Government did not provide a motion for leave to file out of time in accordance with the Navy-Marine Corps Trial Judiciary Rules of practice and the local rules of practice, nor did the Court require that the Government provide such a motion. Rather, the Court set a deadline for the Defense's response of 17 Apr 24.

LAW

M.R.E. 802 provides that hearsay is not admissible in courts-martial unless a federal statute or the Military Rules of Evidence provide otherwise. Hearsay is defined in M.R.E. 801(c) as "a statement that: (1) the declarant does not make while testifying at the current trial . . . ; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." A "statement" in turn is defined as "a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion." M.R.E. 801(a). The declarant is the person who made the statement. M.R.E. 801(b). "Implicit in the definition is that the 'statement' must have been made by a human." United States v. Duncan, 30 M.J. 1284, 1288 (N.M.C.M.R. 1990).

ARGUMENT

I. THE CALL AT ISSUE IS INADMISSIBLE HEARSAY

In this case, the evidence proposed to be introduced is a 911 recording. The Government takes the position that both the recording and the statements captured in the recording are admissible as a business record under M.R.E. 803(6). The Defense disagrees. Nothing in the text or discussion of MRE 803(6) anticipates that the Government can get around the general prohibition of hearsay with the use of a business record from someone with access to a recording of the hearsay statement. Moreover, hearsay statement is from a citizen caller who is not an employee of the Oakland County Sheriff's Office nor under any business duty to report her observations. Accordingly, her observations "can not be given the presumption of reliability and regularity accorded a business record." United States v. Pazsint, 703 F.2d 420, 425 (9th Cir. 1983); see also United States v. Brandon Leach, No. ACM 39805, 2022 CCA LEXIS 76, at *13 (A.F.C.C.A. February 3, 2022).

Military Courts have never ruled that a 911 call may be admissible as a business record. The Government cites Bemis v. Edwards, a Ninth Circuit case which did take the position that a 911 recording itself is a business record. Bemis v. Edwards, 45 F.3d 1369, 1372 (9th Cir. 1995). However, that Court concluded that the citizen caller's statement contained in the recording must meet a separate hearsay exception to be admissible for the very reason cited in Pazsint.

The Government asserts the caller makes a "present sense impression" but a review of the transcript demonstrates that this argues lacks merit. Much of the statements the Government seeks to admit are based on events that took place in the past, and were relayed to her by her husband. See AE XXV, Page 4 of 5, lines 20-21 ("and I called him after I heard the gunshot because I just, obviously, wanted to check on my husband"). The Government's motion

concedes the call to 9-1-1 was made "after" the perceived event, and the caller notes that she was concerned because her husband previously relayed to her that he witnessed two people arguing before the gunshot was heard. The caller is not making a present sense impression.

Next, the Government asserts that the statement comes in for its effect on the listener – who is evidently the dispatcher – which "goes directly to the foundation of why law enforcement was dispatched to respond to the area of [redacted] on 5 August 2022." See AE XXV, Page 4 of 5. This argument also fails. That law enforcement received a third party call about a domestic dispute and responded to the scene is not a fact in dispute in this case, and circumventing the rule against hearsay to prove this fact is improper.

II. THE GOVERNMENT FAILED TO PROVIDE PROPER NOTICE OF THIS CALL

The Government's motion asserts that "pre-admission [of the 911 call] is both appropriate and in the interest of judicial economy and the parties' preparation." AE XXV, Page 3 of 5. The Defense disagrees. The Defense did not have an opportunity to prepare for this evidence to be admitted at trial, as the Government assured the Defense that it "does not intend to use any substitute for the physical presence and live in-court testimony of any witness." Exhibit A. Had the Government provided such notice, the Defense would have litigated this issue at a 39a, and would have had a different strategy with witness production.

The practice of discovering notices on the eve of trial, and waiting until the eve of trial to litigate the admissibility of evidence, should be discouraged. This is particularly so when the issues presented were ripe at a previous 39a session. See rule 10.8 of the NMCTJ Rules of Practice ("unless good cause is shown, motions must be filed in accordance with the TMO");

rule 10.1 of the NMCTJ Rules of Practice ("counsel should advise the military judge in a R.C.M. 802 conference as early as possible of motions that are likely to arise at trial…") and M.R.E. 102 ("these rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay…").

RELIEF REQUESTED

The Defense moves the Court to deny the Government's motion to pre-admit the redacted portion of the recorded 911 call, because it is not business record under Military Rule of Evidence 803(6).

EVIDENCE AND HEARING

In support of this motion, the Defense offers the following enclosed exhibits:

A. Government Response to Discovery Request dtd 29 Jan 24

Additionally, the Defense requests that the Government produce the declarant of this statement, **Ms.** [redacted], telephonically or in person.

This witness is relevant to the statement as she made the call. Her production is necessary for this motion to challenge her personal knowledge of the statements, to challenge the notion that her statements were a present sense impression, to challenge her statement on hearsay grounds, as well as to challenge the evidence under MRE 403 in light of subsequent statements by Ms. [redacted] that contradict what she said in the 911 call.

The Defense requests an Article 39(a) session to present oral argument and evidence.

HOWLANDJAMES.RAYMOND[redacted] Digitally signed by HOWLANDJAMES.RAYMOND.[redacted] Date: 2024.04.17 15:29:43 -04'00'

J. HOWLAND
LCDR, JAGC, USN
Defense Counsel

DEPARTMENT OF THE NAVY
NAVY-MARINE CORPS TRIAL JUDICIARY
SOUTHERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **V.** **CHERELLE J. BENTON** **AZC / E-7 / USN**	**GOVT MOTION FOR APPROPRIATE RELIEF** **(Continuance Request)** **17 April 2024**

MOTION

Pursuant to Rule for Courts-Martial 906(b)(1), the Government moves this Court for a continuance of the subject case to 13-17 May 2024.

BURDEN

At trial, the requesting party shoulders the burden, by a preponderance of the evidence, to show "reasonable cause" for a continuance request. *United States v. Allen*, 31 M.J. 572, 620 (N-M. C.M.R. 1990), aff'd 33 M.J. 209 (C.M.A. 1991).

SUMMARY OF FACTS

1. The Accused is charged with violation of Uniform Code of Military Justice (UCMJ) Article 114 (Firearm Discharge, Endangering Human Life), Article 128 (Simple Assault), and Article 131b (Obstructing Justice). **See Charge Sheet.**

2. PS1 [redacted] was the only eyewitness present at the time of the charged offenses and is the named victim in the specification of simple assault. He is an essential Government witness to all charges in this case. **See Charge Sheet.**

3. PS1 [redacted] is currently deployed onboard the [redacted]) and operating in the Seventh Fleet Area of Operation. His command raised no concerns regarding PS1 [redacted] leaving deployment for the docketed travel dates. **Encl. (1).**

4. On 16 April 2024, [redacted] informed the Government that evolving operational realities foreclosed the possibility of PS1 [redacted] departing the ship in time for the originally docketed trial dates. [redacted] further explained that based upon military operational priorities, PS1 [redacted] is unable to depart he ship and begin travel until after the currently docketed trial dates.

5. In an effort to identify new trial dates for which all witnesses are available, the Government has determined all witnesses are currently available the week of 13-17 May 2024. The only possible

NAVY-MARINE CORPS TRIAL JUDICIARY
SOUTHERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **Cherelle BENTON** **AZC/E-7** **U.S. NAVY**	**DEFENSE RESPONSE TO GOVT MOTION IN LIMINE TO PRE-ADMIT EVIDENCE (BODY CAM FOOTAGE)** **17 Apr 2024**

MOTION

The Defense hereby responds to the Government Motion In Limine to Pre-Admit Evidence (body camera footage). While some of the evidence is admissible as statements of the Accused, much of what the Government seeks to introduce is inadmissible hearsay or in violation of the Military Rules of Evidence.

BURDEN

As the party seeking to admit the evidence in question, the Government has the burden of proving its admissibility by a preponderance of the evidence. R.C.M 905(c).

FACTS

Defense does not dispute the facts provided by the Government. However, the Defense adds the following:

1. The Government has been in the possession of this evidence since 29 Sep 2022.
2. Per the TMO, the motions deadline in this case was 22 Feb 24.
3. At a 39a held on 6 Mar 24, the parties litigated evidentiary matters that were presented by the Defense. The Government did not file any motions, including a motion on the admissibility of this evidence that had been in its possession for over a year.

4. On 10 Apr 24, the Government filed its motion in limine seeking a ruling on the admissibility of this evidence. AE XXVII.
5. The Government did not provide a motion for leave to file out of time in accordance with the NMCTJ Rules of Practice (10.1 and 10.8) and the local rules of practice, nor did the Court require that the Government provide such a motion. Rather, the Court set a deadline for the Defense's response of 17 Apr 24.

ARGUMENT

I. THE DEFENSE HAS OUTLINED ITS OBJECTIONS IN THE ATTACHED EXHIBITS

Rather than address every objection in the body of this response, the Defense has annotated its numerous objections to the Government's proposed exhibits and requests an opportunity to elaborate these objections on the record at the 39a.

II. PS[redacted] STATEMENT "NOW YOU TRYING TO SET ME UP TOO?" IS INADMISSIBLE HEARSAY

In its motion, the Government addressed a particular statement from PS1[redacted] – that being "now you trying to set me up too?". See AE XXXVII, Page 3 of 4. The Government does not provide the relevance of this statement, which is fatal to its admissibility and makes it impossible to elaborate why this statement is inadmissible.

Even assuming the statement was relevant, the Government asserts that this comment "is not a statement offered for the truth of the matter asserted, but rather a direct question poised to the Accused." This argument fails because AZC Benton was not given an opportunity to answer the question – in fact, she tried to answer the question and was silenced by the responding officer. Thus, it cannot be said that this statement is admissible for its effect on AZC Benton.

Despite the assurance that this statement is not coming in for the truth of the matter asserted, the Government alternately requests that the statement be admitted as an excited utterance, which would allow the finder of fact to consider the statement for the truth of the matter asserted. That the Government is conflating these different avenues of admissibility demonstrates the dangers of admitting this evidence and the confusion this will cause the members.

The Government has not laid the foundation for this statement to be admitted as an excited utterance. PS1 [redacted] has never said that discovering the location of AZC Benton's firearm was a startling event, nor has he said that this question was posed while under the stress of that event. The Government has not laid a proper foundation for this evidence, and thus it is inadmissible.

Assuming arguendo, that the statement is ruled admissible as a "direct question posed to the Accused" or an excited utterance, the statement should be excluded under MRE 403 as its probative value is low, and its prejudicial impact is unfairly high. That PS1 [redacted] thinks AZC Benton was responsible for the events that took place on 5 Aug 22 is not in dispute, and thus the question presented has low probative value. Furthermore, that PS1 [redacted] personally thought AZC Benton was "trying to set [him] up" is not a relevant fact. Additionally, AZC Benton attempted to respond to this question by saying "I didn't" and was silenced. See AE XXVIII, Page 60 of 96 ("whoah- oh, oh, oh,. Look, they didn't – neither of you talk)." The prejudicial impact of this statement is high and unfair to AZC Benton because she didn't get a chance to answer the question.

III. EVIDENCE THAT AZC BENTON WAS ARRESTED AND FOOTAGE DEPICTING HER ARREST IS IRRELEVANT AND UNFAIRLY PREJUDICIAL

By its motion, the Government seeks to admit video footage of AZC Benton being arrested and standing in handcuffs at the scene of the arrest. The arrest itself is irrelevant to any of the charges, and the footage of her in handcuffs is unfairly prejudicial.

M.R.E. 402 states that "irrelevant evidence is inadmissible. M.R.E. 401 defines relevant evidence as that evidence which "has any tendency to make a fact more or less probable than it would be without the evidence," and the fact is "of consequence" to the charged misconduct.

Here, the Accused faces charges for alleged misconduct that took place prior to her arrest. AZC Benton's arrest, itself, is nor materially relevant for the members on the issue of guilt or innocence in this case. It does not make any elements of any offenses charged more or less likely, and thus it should not be known to the members that AZC Benton was arrested.

When viewed through the lens of M.R.E. 403, the danger of unfair prejudice substantially outweighs any probative value of this fact and/or evidence – assuming her arrest was somehow relevant. The Government intends to call the arresting officers in this case (Ofc [redacted] and Ofc [redacted]) to testify against AZC Benton. Her arrest speaks volumes to these witness' belief that she committed a crime, and their beliefs are not relevant at this Court Martial. Indeed, the Court has an obligation to instruct the members on a "witness opinion on credibility or guilt" and remind the members that "no witness can testify that the witness believes that a crime occurred." Military Judge's Benchbook, 7-26 (witness opinion on credibility or guilt).

Video footage of the accused in handcuffs should not be admitted at this trial. To the extent some of the statements made by AZC Benton are deemed admissible but made while she is in

handcuffs, this portion of the evidence should be provided to the members via non-video means - be it audio or a certified transcript, or testimony of a witness.

IV. THE COURT SHOULD WITHHOLD ITS RULING ON THIS EVIDENCE UNTIL AFTER OPENING STATEMENTS

With the exception of a statement by PS1 [redacted] the Government has not articulated why the evidence it seeks to admit is relevant and how it would be argued at trial. The Defense is left to make assumptions about much of the content of this evidence. The purpose of pre-trial motions practice is to provide some predictability at trial at the expense of limiting strategic maneuvers by the parties as trial approaches. The Government did not seek a ruling on the admissibility of this evidence at the 39a, and thus it should not get the benefit of a last-minute ruling on the admissibility of evidence. This is especially the case because the Government has not articulated how it intends to use this evidence in a way that would give the Defense an opportunity to meaningfully prepare for trial.

After opening statements, the parties will have previewed the evidence as it will be presented at trial and the Court will be better postured to fairly rule on the relevance of much of this evidence.

RELIEF REQUESTED

The Defense moves the Court to deny the Government's motion to pre-admit the redacted portion of the recorded 911 call, because it is not business record under Military Rule of Evidence 803(6).

EVIDENCE AND HEARING

In support of this motion, the Defense offers the following enclosed exhibits:

A. Defense Objections to Body Cam Footage for Ofc [redacted]

B. Defense Objections to Body Cam Footage for Ocf[redacted]

In support of this motion, the Defense requests that the following witnesses be produced by the Government telephonically or in person:

PS1[redacted] This witness is relevant to the motion and necessary to confront about his statement "now you trying to set me up too?" and challenge the notion that he can lay the foundation for this evidence as an excited utterance. To the extent that the Government objects to the exclusion of other statements he made in the body camera footage the Government seeks to present at trial, the Defense requests an opportunity to challenge him

The Defense requests an Article 39(a) session to present oral argument and evidence.

HOWLAND.JAMES.RAYMOND.[redacted] Digitally signed by HOWLAND.JAMES.RAYMOND.[redacted] Date: 2024.04.17 15:44:16 -04'00'

J. HOWLAND
LCDR, JAGC, USN
Defense Counsel

conflict from any witness is HMCM [redacted] who has a household good move scheduled sometime that week but who is otherwise available to participate in trial. **Encl. (2).**

APPLICABLE LAW

R.C.M. 906(b)(1) states a continuance may only be granted by the military judge. The discussion following articulates several reasons for granting a continuance: "The military judge should, upon a showing of reasonable cause, grant a continuance to any party for as long as often as is just. Whether a request for a continuance should be granted is a matter within the discretion of the military judge. Reasons for a continuance may include: insufficient opportunity to prepare for trial, *unavailability of an essential witness*, the interest of the Government in the order of trial of related cases…" Id. (emphasis added). The Court of Appeals for the Armed Forces has held that "unreasonable and arbitrary insistence upon expeditiousness in the face of justifiable request for delay" is an abuse of discretion. *United States v. Weisbeck*, 50 M.J. 461, 466 (C.A.A.F. 1996) (citing *United States v. Soldevila-Lopez*, 17 F.3d 480, 487 (1st Cir. 1994).

In deciding whether to grant a continuance, the C.A.A.F. has laid out the facts the military judge should consider. *United States v. Miller*, 47 M.J. 352, 358 (C.A.A.F. 1997). Those factors include: "surprise, nature of the evidence involved, timeliness of the request, substitute testimony or evidence, availability of witness or evidence requested, length of continuance, prejudice to opponent, moving party received prior continuances, good faith of moving part, use of reasonable diligence by moving party, possible impact on verdict, and prior notice." *Id.* (internal citations omitted).

Pursuant to R.C.M. 703(g)(1), a military service member's commanding officer is responsible for producing military witnesses. However, "a party is not entitled to the presence of a witness who is unavailable within the meaning of Mil. R. Evid. 804(a)." R.C.M. 703(b)(3). Military necessity is a basis for witness unavailability. Mil. R. Evid. 804(a)(6). In order to "ascertain whether a witness is unavailable due to military necessity or some other aspect of this definition, courts look at such additional factors as whether the witness is subject to the government's subpoena power (particularly as it relates to crossing international boundaries), whether the requested witness is in the armed forces or otherwise subject to military orders, and 'the effect that a military witness's absence will have on his or her unit and whether that absence will adversely affect the accomplishment of an important military mission or cause manifest injury to the service.'" *United States v. Hanabarger*, 2020 CCA LEXIS 252, *52 (N.M. Ct. Crim. App. 2020) (citing *United States v. Jones*, 20 M.J. 919, 926 (N.M. C.M.R. 1985).

DISCUSSION

In this case, an essential witness is unavailable based upon the military operations of his current deployment onboard [redacted] PS1 [redacted] is an essential witness who was present at the time of the alleged offenses and is the named victim within the specification of simple assault. There is no substitute testimony or evidence that can be presented in lieu of PS1 [redacted] a factor weighing in favor of granting the request.

Addressing the other *Miller*, factors, the Government is submitting this request in a timely manner, promptly upon receiving critical new facts with those onboard [redacted] regarding their transport abilities in their current overseas operational environment. Trial Counsel notified the Court and Defense immediately upon learning about the change in transportation operations onboard [redacted] to avoid surprise. The length of the requested continuance is only three weeks and the Government has worked diligently to propose dates for which the docket and all witnesses are available.

The Government exhausted reasonable diligence in assessing alternatives and ascertaining the necessity of this request prior to its submission. Given the operational environment of his ship and lingering uncertainty of PS1 [redacted] expected travel, a mid-trial delay is not appropriate in this scenario. This is further an inappropriate course of action given the Government's only other witnesses are the two responding law enforcement officers in this case, who will be traveling from out of state. Trial Counsel anticipates their respective testimonies will be brief, however, the Government will need these witnesses subject to recall for any possible case in rebuttal. Requiring these witnesses to stay in the local area subject to recall pending the evolving travel arrangements for PS1 [redacted] in his current deployed environment is not a viable alternative to delaying trial for a short amount of time to ensure PS1 [redacted] will, in fact, be able to appear at trial.

Ultimately, this continuance is necessary because the Government would be otherwise unable to arrange for this essential witness to participate in and testify at this upcoming General Court-Martial. The delay arising from the operations of the ships transportation was sudden and unforeseeable. A three week delay is necessary based upon the current operations of the [redacted] is necessary to allow PS1 [redacted] to begin travel to the United States upon arrival to the ship's next anticipated port call.

RELIEF REQUESTED

The Government requests that this Court grant this motion for a continuance and re-docket trial in this case for 13-17 May 2024.

EVIDENCE

The following enclosures are attached to this motion as support for the Government's request for a continuance:

Encl. (1): Original Assurance Regarding PS1 [redacted] Travel
Encl. (2): Affidavit from LN2 [redacted] USN of 17 Apr 24

ORAL ARGUMENT

The Government respectfully requests oral argument prior to any adverse ruling from the Court.

[redacted]
K. M. POTEET
LT, JAGC, USN
Trial Counsel

CERTIFICATE OF SERVICE

I certify that I have served a true copy via electronic means of the above on the Court and Defense Counsel on 17 April 2024.

[redacted]
K. M. POTEET
LT, JAGC, USN
Trial Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY
SOUTHERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **Cherelle BENTON** **AZC/E-7** **U.S. NAVY**	**DEFENSE RESPONSE TO GOVT MOTION FOR CONTINUANCE AND MOTION TO DISMISS** **18 Apr 2024**

MOTION

The Defense hereby responds to the Government's motion for a continuance. Because the Government did not exercise reasonable diligence in producing PS1 [redacted] for trial, a continuance would be unjust and the request should be denied. In the event PS1 [redacted] is not produced for trial as planned, the Defense moves this Court to dismiss the charges with prejudice.

BURDEN

At trial, the requesting party shoulders the burden, by a preponderance of the evidence, to show "reasonable cause" for a continuance request. *United States v. Allen*, 31 M.J. 572, 620 (N-M. C.M.R. 1990), aff'd 33 M.J. 209 (C.M.A. 1991).

FACTS

U.S. v. Benton I

1. The Government originally preferred charges against AZC Benton on 11 May 2023. Charge Sheet (Benton I).

2. On 25 July 23, AZC Benton was arraigned. During arraignment, the Government stated that it was "ready to proceed in the case of United States v. Aviation Maintenance Administrationman Chief Petty Officer Cherelle Benton, U.S. Navy." Record of Trial.
3. The case was set for trial on 30 October 23. TMO.
4. On 22 August 23, the Defense requested that PS1 [redacted] be produced for the original trial. AE V, Exhibit A.
5. On 24 August 23, during discussions regarding PS1 [redacted] production at the first trial, the SJA for [redacted] told the office of the Trial Counsel that "you'll need to keep us in the loop early regarding when you actually need [PS1 [redacted]]" at trial. Exhibit A.
6. As early as 23 September 23, PS1 [redacted] told the Trial Counsel he "did not want to go" to the trial in this case. Exhibit A.
7. On 20 October 2023, the Government notified PS1 [redacted] command that the trial dates "were taken off the docket" and that future charges were likely. Exhibit A.
8. In response, the SJA for PS1 [redacted] command forewarned: "you may be able to have [PS1 [redacted]] as a witness before 1 January [2024], but given our schedule, I think you'll want to pursue a deposition if it is after that." Exhibit A.
9. Shortly thereafter, the Defense and this Court received an email from the Government entitled "ICO AZC Benton Dismissed Charges." AE III, Exhibit E.
10. The above-mentioned email contained the following language: "Please see the attached. By direction of the Convening Authority the charges preferred on 11 May 2023 have been dismissed without prejudice. For all parties[']awareness, the Government intends to prefer

new charges in this case. Please let us know if the Court has any questions or needs additional information." AE III, Exhibit E.

11. The case was dismissed and removed from the docket. AE III, Exhibit A.
12. The following Monday, Trial Counsel informed this Court and Defense that the Government did not have the "by direction authority" from the Convening Authority as originally conveyed as there had a "miscommunication." AE III, Exhibit H.
13. The Court requested an R.C.M. 802 conference at the parties' earliest convenience since the case had already been removed from the docket the previous week. AE III, Exhibit H.
14. During the R.C.M. 802 conference, the Court indicated that the trial would proceed because the Government did not have by direction authority to withdraw and dismiss the case. AE III, Exhibit H.
15. During the R.C.M. 802 conference, the Government asked for and was granted the following: a pause on the T.M.O., an extension for the submission of its final Pre-Trial matters, and an opportunity to draft a motion for a continuance. AE III, Exhibit H.
16. On 24 October 23, the charges in the first Court Martial against AZC Benton were dismissed. AE III, Exhibit A.
17. At no point in time during litigation of the first court martial against AZC Benton did the Defense request any delays with the trial. The Defense was prepared for trial and submitted final pretrial matters in accordance with the Military Judge's direction.

U.S. v. Benton II

18. On 8 November 2023, the Office of Special Trial Counsel preferred new charges against AZC Benton in *Benton II.* Charge Sheet.

19. *Benton II's* charge sheet reflects the following charges: Charge I Violation of the Uniform Code of Military Justice (UCMJ) Article 114 (Firearm Discharge, Endangering Human Life); Charge II Violation of the UCMJ Article 128 (Simple Assault); and Charge III Violation of the UCMJ Article 131(b) (Obstructing Justice). Charge Sheet.

20. AZC Benton was arraigned for the second time on 26 January 24. During arraignment, the Government once again stated that it was "ready to proceed in the case of United States v. Aviation Maintenance Administrationman Chief Petty Officer Cherelle Benton, U.S. Navy." Record of Trial.

21. The TMO was signed on 26 January 24, outlying all the pertinent dates in this case. TMO.

22. PS1 [redacted], the complaining witness, is attached to [redacted] which is operationally deployed overseas and has been throughout this trial. Exhibit A.

23. On 12 February 2024, the Defense requested PS1 [redacted] be produced as a witness. This request was granted. AE V, Exhibit D.

24. On 6 March 24, The parties litigated multiple motions filed by the Defense. The Government submitted no motions. Record of Trial.

25. The U.S. Navy JAG Corps Facebook Page depicts the current SJA of the ship playing rugby during a port visit in [redacted] on 23 Mar 24. Exhibit B.

26. According to LCDR Charles Ball, JAGC, USN, Staff Judge Advocate, [redacted] the Trial Counsel's first notification to the command that PS1 [redacted] needed to be produced for a court-martial was provided to them on 2 April 24. Exhibit C.

27. On 10 April 2024, the Government filed three evidentiary motions. One motion pertained to body cam footage that was in the possession of the Government since September of 2022. Another motion pertained to a 911 call that had also been in the possession of the Government since September of 2022. The final motion pertained to photographs that were never discovered to the Defense depicting the neighborhood where AZC Benton lives. The Government did not supplement any of its motions with motions for good cause to file out of time as required by the Southern Judicial Circuit Local Rules. The Court did not require the Government to file such a motion.

28. On 12 April 24, the [redacted] legal team submitted a request to have PS1 [redacted] flown off the ship. The requested date of departure was 15 April 24 – less than a week before the commencement of trial in this case. Exhibit C.

29. On 16 April 24, the Special Trial Counsel informed the Court that PS1 [redacted] may not be able to get off the ship in time for trial, and that despite there being a potential flight that would get him to Mayport in time, PS1 [redacted] was "not prioritized" for this flight. An email from a Judge Advocate on the ship noted that there was a "line" of sailors awaiting departure due to "maintenance" issues that commenced on 14 April 24. Exhibit D.

30. The email to the Court on 16 April 24 was the first time the Defense was ever made aware that there were potential issues with PS1 [redacted] travel.

31. On 17 April 24, at approximately 1100 EST, the Accused was sitting at the gate of the Memphis International Airport. Her boarding time was less than an hour away. AZC Benton informed the Defense that she had just received a call from Chief [redacted], USN, a witness in this case, that "the case may be moving to June" or words to that effect. Exhibit E.

32. Not wanting to waste any time in providing guidance to AZC Benton on whether she should get on the flight, the Defense requested an RCM 802 to discuss the issue and get some guidance on what was going on with the case. Exhibit E.

33. During the subsequent RCM 802 conference, the Government indicated that it was seeking to have PS1 [redacted] declared operationally unavailable. The Government expressed frustration that the Defense did not reach out to the prosecutors prior to seeking guidance from the Court. During the RCM 802, the Court ordered the Government to submit a continuance request by COB that day – 17 April.

34. Also during the RCM 802 conference, the Court provided guidance to the Government on particular requirements needed to meet the standard for declaring a witness operationally unavailable. Specifically, the Government was instructed to include specifics from the Commanding Officer about why the witness is unavailable.

35. Minutes later, the Court sent the following email to the Defense and Trial Counsel: "As questions arise on either side during litigation, the parties should communicate with one another if possible and consistent with a client's interests before reaching out to the court. This ensures that only matters needing my attention are brought to my attention and that those matters are clearly thought out in advance. Please ensure that this is the practice going forward." Exhibit E.

36. AZC Benton boarded the flight at issue and the Defense is prepared to proceed with trial.

37. On 17 April 24, the Government submitted a request for a continuance. AE XXXVIII.

38. AZC Benton's career has been on hold since 5 Aug 2022 and she is not able to transfer from Naval Personnel Command until this trial is adjudicated.

39. On 18 April 24, the date of this filing, the Government supplemented its motion for a continuance with a letter from PS1 [redacted] Commanding Officer explaining why he was not able to make it to Jacksonville, FL for trial on time and identified the next available timeframe that he would be able to depart the ship as 26 April 2024.

40. On 18 Apr 24, in an email that was only discovered to the Defense in anticipation of this continuance response, it was discovered that PS1 [redacted] has been communicating with his command that "he truly doesn't care if the defendant's case is dismissed or not" and that he "doesn't intend on speaking much if questioned (still truthful, but all along the sentiment that he just wants to put this past him)." Exhibit F.

41. PS1 [redacted] Commanding Officer never declared PS1 [redacted] presence onboard the ship an operational necessity, nor has he declared that PS1 [redacted] was unavailable for trial. He has simply stated that PS1 [redacted] was not able to make it off the ship in time.

42. Assistant Defense Counsel is scheduled to PCS on 7 May 24, and her household goods are currently on the way to [redacted].

43. During an RCM 802 discussion on 18 Apr 24, the Military Judge indicated that it had not heard the issue of whether a continuance would be granted, but told the Assistant Defense Counsel to make plans to stay behind for trial in May in the event that AZC Benton does not release her as counsel. In addition, the Military Judge told the Defense to let the Court know whether its witnesses were available on 13 May 24. The parties also discussed the fact that there will like be a new member panel in the continued trial, and the parties addressed whether it was necessary to proceed with "randomizing" members at the 19 April 2024 39a session as planned.

44. The Defense's motion to dismiss for improper re-referral of charges, which highlights many of the same points made in this motion, has not been ruled upon.

LAW

A military judge has considerable responsibility for the proper administration of military justice and at all appropriate times and in an appropriate manner may promote justice at the trial. *United States v. Vargas*, 74 M.J. 1, 1 (C.A.A.F. 2014). Proper case management during a trial, necessary for the protection of an accused's due process rights and the effective administration of justice, is encompassed within that responsibility. *Id.*

A military judge may, for reasonable cause, grant a continuance to any party so long as the request is "just." *United States v. Crass*, 2000 CCA LEXIS 367 (ACCA 2000); R.C.M. 906(b)(1), Manual Courts-Martial; UCMJ art. 40. Whether a request for a continuance should be granted is a matter within the discretion of the military judge. *Id.* Reasons for a continuance may include an insufficient opportunity to prepare for trial, the unavailability of an essential witness, the interest of the Government in the order of trial of related cases, and an illness of the accused, counsel, the military judge, or a member. *Id.*

In *United States v. Miller*, C.A.A.F. addressed relevant factors for Military Judges to consider when weighing the issue of a continuance. 47 M.J. 352 (C.A.A.F. 1997). Among these are "surprise, nature of any evidence involved, timeliness of the request, substitute testimony or evidence, availability of witness or evidence requested, length of continuance, prejudice to opponent, moving party received prior continuances, good faith of moving party, use of reasonable diligence by moving party, possible impact on verdict, and prior notice." *Id.* In *Miller*, these factors were analyzed through the lens of an Accused seeking a continuance, not the Government.

In *United States v. Vargas*, C.A.A.F. took up the issue of a continuance request from the Government that was denied. 74 M.J. 1, 1 (C.A.A.F. 2014). In *Vargas*, the Court issued six continuances – several of which were for the Defense. *Id.* The pre-trial continuances pertained to discovery that the Defense was requesting, as well as a delay to bring civilian defense counsel onboard. *Id.* Mid-trial, the government sought a continuance to call additional witnesses that had not been previously involved in the case, and the request was denied. *Id.* The Trial Court noted that the accused was "arraigned in March" and that "we're now in October." *Id.* The Court in *Vargas* noted that the case was "very simple" which worked against a delay. *Id.* The Trial Court noted that the witnesses the Government sought to call (justifying the continuance) were not ill. *Id.* Ultimately, the Trial Judge held that "the Government has chosen not to compel the production of their own witnesses and to put those witnesses [sic] schedules ahead of the courts [sic] schedule, which also does not amount to just cause for a delay in this court-martial. Your motion for a continuance is denied." *Id.*

The facts in this case favor the Accused even more than in *Vargas*. Indeed, in *Vargas* seven months had passed from arraignment to trial, and here, AZC Benton was originally arraigned on 25 July 23 – nearly nine months ago. On the eve of the original trial, Government effectuated its own continuance by withdrawing and dismissing the charges prior to obtaining authority from the Convening Authority. The Government then tailored a new charge sheet, with PS1 [redacted] as a named victim on the charge sheet, with no new evidence developed or witnesses identified.

Further, this is a relatively straight-forward case with no expert witnesses and one eye-witness – PS1 [redacted]. PS1 [redacted] has been stationed onboard [redacted] since he left Navy Personnel Command. The TMO was set in January

of 2024, and it is well-known in the Navy judicial system that producing a witness who is deployed involves substantial planning and foresight. Notwithstanding this, the Government waited until 2 April 24 to begin coordinating PS1 [redacted] travel for a court martial that was set for trial just weeks later. Compare this to RCM 703(g)(1) which anticipates that the Government will notify a witness' Commanding Officer of the pertinent time, place, and date with sufficient time to issue "necessary orders" to the witness. There is no evidence that the Commanding Officer was directly reached about this production issue until he was approach about a letter declaring PS1 [redacted] unavailable on 18 Apr 24.

Exacerbating matters, the ship's legal office evidently did not route PS1 [redacted] travel to the air component of the ship until 12 April 24, and even then he was not listed as a "priority" passenger. Predictably, "maintenance" and "weather" issues arose – as they often do on deployments. Those issues could have been mitigated with earlier and more frequent communication with the ship. While the [redacted] dragged its feet in coordinating PS1 [redacted] departure from the ship from 2-16 April 24, the Commanding Officer needed less than a day to turn around a letter for the Government stating that PS1 [redacted] is unavailable for trial. This reflects that notion that PS1 [redacted] production was not a priority, and that the Commanding Officer is evidently capable of making quick witness production decisions when properly notified.

The Government has not shown that PS1 [redacted] is unavailable due to his operational necessity or mission requirements. In fact, the Commanding Officer of [redacted] states he is willing to send PS1 [redacted] off the ship at the next available port visit, which indicates he is not mission essential. The Government is conflating a self-

induced logistics hardship with operational necessity in the Armed Forces. This violates the spirit and purpose of the operational necessity exception under RCM 703.

Not only was this issue foreseeable, it was specifically foreshadowed. On 20 Oct 2023, the former SJA for [redacted] told the Government "you may be able to have [PS1 [redacted] as a witness before 1 January, but given our schedule, I think you'll want to pursue a deposition if it is after that." Months earlier, the ship told the Government that "you'll need to keep us in the loop early regarding when you actually need [PS1 [redacted]]" at trial." Meanwhile, the U.S. Navy JAG Corps Facebook Page depicts the current SJA of the ship playing rugby during a port visit in [redacted] on 23 Mar 24. Presumably, had the Government reached out to the ship prior to that visit, PS1 [redacted] would be available for trial next week.

The text of RCM 703(b)(3) favors dismissal. It states that while a party is not entitled to the presence of a witness who is unavailable within the meaning of MRE 804(a), it also notes that "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 secure the witness' presence... **unless the unavailability of the witness is the fault of or could have been prevented by the requesting party**." (Emphasis mine).

The Government's "surprise" about this witness is unjustified. PS1 [redacted] is central to this General Court Martial in which he is the sole witness for two of the three charges. PS1 [redacted] has been reluctant to participate in this Court Martial process from the start, as is evident by the body cam footage itself where he indicates he does not want to make a statement or press charges. His production, of all witnesses, should have been a priority to the Government.

According to an email that was only discovered to the Defense in anticipation of this continuance response, PS1 [redacted] has been communicating that "he truly doesn't care if the defendant's case is dismissed or not" and that he "doesn't intend on speaking much if questioned (still truthful, but all along the sentiment that he just wants to put this past him)." In another newly-discovered email, on 1 Dec 2023 PS1 [redacted] evidently told the Trial Counsel he "does not wish to attend" a pretrial hearing. The Government has known that this particular witness would need extra attention – both in coordination for trial, and in light of his reluctance to participate.

The accused's right to a fair trial is paramount, and lost in the discussion about re-referral of charges and continuances is the detrimental impact the Government's actions have had on her career and her life. As she sat in the terminal of the Memphis Airport less than an hour from her flight and shortly after she checked a seabag containing items for the brig – where the Government will likely seek to send AZC Benton in the event of a conviction - she received notice from a witness that the trial may be pushed back to June 2024. When the Defense sought to have an RCM 802 discussion about this late-breaking issue to let Chief Benton know whether she should board the plane, the Court effectively reprimanded the Defense in an effort to ensure "that only matters needing my attention are brought to my attention and those matters are clearly thought out in advance." This email from the Court came just minutes after the Court provided guidance to the Trial Counsel about how to satisfy the requirements of declaring a witness unavailable due to military necessity. This creates the appearance that a continuance is a foregone conclusion.

The Government is, yet again, unprepared for trial. The Defense is prepared for trial on Monday and has never sought a continuance in this case or the prior Court-Martial. Given that the Government will not produce a relevant and necessary witness because it failed to exercise

good faith efforts to secure his departure from a deployed ship on time, a continuance or abatement falls short of a remedy and is improper.

The Government easily could have prevented what it is now calling "unavailability" of PS1 [redacted] by communicating with the ship earlier and more frequently to prioritize his departure. PS1 [redacted] Commanding Officer has not articulated any reason that PS1 [redacted] is operationally necessary to remain on station in order for his crew to meet its mission. The Government should not receive the benefit of a continuance to make up for its poor planning to get the most central witness to this General Courts-Martial here for trial. Neither a continuance nor abatement are available or appropriate remedies here. The Government has left the Court with no other option than to dismiss the charges with prejudice to preserve justice in this case.

RELIEF REQUESTED

The Defense moves the Court to deny the Government's motion for a continuance as PS1 [redacted] is not an unavailable witness, he is simply a witness the Government failed to produce. If the Court is satisfied that PS1 [redacted] will not produced for trial next week, the case should be dismissed with prejudice in the interests of justice.

EVIDENCE AND HEARING

Exhibit A: Government Email Comms Regarding PS1 [redacted] production dtd Fall of 2023
Exhibit B: Photo Depicting SJA [redacted] in [redacted] in March of 2024
Exhibit C: Correspondence Between Defense and SJA dtd 18 Apr 24
Exhibit D: Email Comms between [redacted] and Trial Shop dtd 16 Apr 24
Exhibit E: Email from Military Judge dtd 17 April 24
Exhibit F: Email Regarding Discussion between PS1 [redacted] and Command dtd 10 Apr 24

The Defense requests an Article 39(a) session to present oral argument and evidence.

HOWLAND.JAME S.RAYMOND [redacted] Digitally signed by HOWLAND.JAMES.RAYMOND [redacted] Date: 2024.08.15 17:09:38 -04'00'

J. HOWLAND
LCDR, JAGC, USN
Defense Counsel

REQUESTS

THERE ARE NO REQUESTS

NOTICES

NAVY-MARINE CORPS TRIAL JUDICIARY
SOUTHERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **BENTON, CHERELLE** **AZC / E-7** **U.S. NAVY**	**GOVERNMENT NOTICE UNDER R.C.M. 701** **12 SEP 23**

1. On 31 August 2023, LT Kristen Poteet, JAGC, USN and Ms. Tanya Harris conducted a telephonic interview with CAPT [redacted], USN. The following non-verbatim information was relayed by CAPT [redacted]

a. CAPT [redacted] was not AZC Benton's direct supervisor, but rather the Division Director.

b. CAPT [redacted] described he had interactions with AZC Benton on a weekly to bi-weekly basis for administrative matters. He stated he also had interactions with her during an application for the LDO program.

c. CAPT [redacted] described AZC Benton as being in the top of the Chief Petty Officers he observed. He found her to be squared away, professional, and excellent military bearing.

d. CAPT [redacted] had minimal interactions with PS1 [redacted] but observed him to be squared away and he never had issues with him.

e. CAPT [redacted] provided he was not involved with the investigation. While it was ongoing, AZC Benton was sent to another department to separate her from PS1 [redacted]. After PS1 [redacted] PCS'd, CAPT [redacted] had AZC Benton moved back to her original department.

f. CAPT [redacted] is aware of AZC Benton's previous NJP and felt that her owning up to the offense impacted his opinion of her character.

g. CAPT [redacted] was surprised the Navy elected to move forward with the case after it was dropped by civilian authorities.

[redacted]
K. M. POTEET
LT, JAGC, USN
Trial Counsel

[redacted]

NAVY-MARINE CORPS TRIAL JUDICIARY
SOUTHERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **BENTON, CHERELLE** **AZC / E-7** **U.S. NAVY**	**GOVERNMENT NOTICE UNDER R.C.M. 701** **30 AUG 23**

1. On 29 August 2023, LT Kristen Poteet, JAGC, USN and Ms. Tanya Harris conducted a telephonic interview with PS1 [redacted], USN. The following non-verbatim information was relayed by PS1 [redacted]

a. On the night of the charged offenses, PS1 [redacted] remembers being in a verbal altercation with AZC Benton. He stated that he does not remember the specifics of what they were arguing about. He reported that the verbal argument didn't last too long but at some point AZC Benton became physical. PS1 [redacted] reported that he was attempting to leave and anything physical from him towards AZC Benton would have been a result of him trying to leave/protect himself.

b. When PS1 [redacted] left the house, he went to his car and was putting bags in his car and heard the gunshot. He looked up and saw AZC Benton holding her firearm and he asked something along the lines of, "did you just shoot at me". He doesn't recall the firearm being pointed at him at that time and he doesn't remember AZC Benton's response to his question.

c. PS1 [redacted] stated after she discharged the firearm, he went back into AZC Benton's home and they talked about it briefly and then he left to walk around the block. When he was walking around the block is when AZC Benton called him to tell him the police were there.

d. PS1 [redacted] provided that AZC Benton maintained a concealed carry license and he had seen the firearm she owned in her home before. He had seen it kept on her dresser and on her kitchen island. He reported that she never kept her firearm in his vehicle. PS1 [redacted] provided he owns a firearm and it was not in his car that night. .

e. PS1 [redacted] described AZC Benton's neighborhood as still developing but at the time of the charged offenses there were other houses around. He did not notice anyone else outside that night.

f. PS1 [redacted] had to replace his tire and get a new wheel. The cost was approximately $300.

g. PS1 [redacted] called another sailor, Bryon Watson, to pick him up and drive him back to base on the night of the charged offenses.

[redacted]

h. PS1 [redacted] describes he believes this was a bad judgment call on part of AZC Benton and he wants to put it all behind him and move on.

[redacted]

K. M. POTEET
LT, JAGC, USN
Trial Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY
SOUTHERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **BENTON, CHERELLE** **AZC / E-7** **U.S. NAVY**	**GOVERNMENT NOTICE UNDER R.C.M. 701** **12 SEP 23**

1. On 31 August 2023, LT Kristen Poteet, JAGC, USN and Ms. Tanya Harris conducted a telephonic interview with HMCM [redacted], USN. The following non-verbatim information was relayed by HMCM [redacted]

a. HMCM [redacted] was the senior enlisted advisor at the time of the offense. HMCM [redacted] reported that at the time of the offense the command enacted an MPO, however, he had no awareness of the command investigating. His only awareness of involvement was providing documentation to the legal department as it was received. He was unaware the Navy would take the case.

b. HMCM [redacted] described that AZC Benton was moved to PERS 454 and maintained involvement in the Chief's Mess. He described her as an outstanding sailor and chief prior to the alleged offense and after.

c. HMCM [redacted] described PS1 [redacted] as an average sailor. They traveled together on one engagement and he felt PS1 [redacted] was average but he did not find him impressive.

[redacted]
K. M. POTEET
LT, JAGC, USN
Trial Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY
SOUTHERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **BENTON, CHERELLE** **AZC / E-7** **U.S. NAVY**	**GOVERNMENT NOTICE UNDER R.C.M. 701** **12 SEP 23**

1. On 6 September 2023, LT Kristen Poteet, JAGC, USN and Ms. Robbin Swilley conducted a telephonic interview with CECS [redacted], USN. The following non-verbatim information was relayed by CECS [redacted]

a. CECS [redacted] has known AZC Benton for approximately two and a half years and described that they worked together on a weekly basis as their jobs interacted with sailor manning.

b. CECS [redacted] observed AZC Benton to be a squared away sailor and has been CFL with no issues as well as sponsored a Chief through season. CECS [redacted] explained that AZC Benton would have been screened in order to sponsor a Chief.

c. CECS [redacted] has never questions AZC Benton's truthfulness and described great work ethic.

d. CECS [redacted] had no real interactions with PS1 [redacted]

[redacted]
K. M. POTEET
LT, JAGC, USN
Trial Counsel

COURT RULINGS & ORDERS

NAVY-MARINE CORPS TRIAL JUDICIARY
NORTHWEST JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES	)	
	)	**RULING ON DEFENSE MOTION**
v.	)	**TO SUPPRESS (FIREARM)**
	)	
CHERELLE BENTON	)	
AZC/E-7 USN	)	**9 April 2024**
	)	
	)	

---

1. Nature of the Motion

On 22 February 2024, the Defense moved this court pursuant to M.R.E. 311 and the Fourth Amendment to the U.S. Constitution to suppress "a firearm that was seized by the Oakland (TN) Police Department without a warrant." (AE VI and VII). The Government submitted a responsive pleading in opposition to the Defense motion on 25 February 2024. (AE VIII and IX). The court held an Article 39a on 6 March 2024 at which both parties presented argument.

At the Article 39a, the Defense asked that the court consider the arguments made by the parties on the same motion on 13 October 2023 during the prior general court-martial convened to hear charges against this accused. During the 13 October 2023 Article 39a, the Defense clarified that they were not challenging the legality of the search for or initial seizure of the weapon but rather the retention of the firearm by the Oakland Police Department after the dismissal of the charges brought by the state of Tennessee.

2. Findings of Fact

a. On 11 May 2023, the accused was charged with 1 specification of attempted aggravated assault in violation of Article 80 of the Uniform Code of Military Justice (U.C.M.J.), 1 specification of damaging nonmilitary property in violation of Article 109, U.C.M.J., and 1 specification of discharging a firearm through negligence in violation of Article 134, U.C.M.J. The charges were referred to a general court-martial on 13 July 2023. An Article 39a was held on 13 October 2023. On 24 October 2023, the Convening Authority withdrew and dismissed without prejudice all charges and specifications. On 8 November 2023, the accused was charged with 1 specification of firearm discharge, endangering human life in violation of Article 114, U.C.M.J., 1 specification of simple assault in violation of Article 128, U.C.M.J., and 1 specification of obstructing justice in violation of Article 131b, U.C.M.J. These charges were

referred to a general court-martial on 18 January 2024. Both the 11 May 2023 charges and the 8 November 2023 charges were based upon the same events.

b. The charges arose from an argument between the accused and PS1 [redacted], U.S. Navy, in Oakland, Tennessee on 5 August 2022. Officers of the Oakland, Tennessee Police Department (OPD) were dispatched to the scene following an anonymous report of a loud verbal altercation and possible gunshot. When they arrived at the scene of the alleged altercation, they observed a silver Mercedes sedan with the trunk and doors open and "multiple contents of the vehicle in the street as if they had been thrown from it." The accused was standing on the passenger side of the vehicle. The accused initially denied that any altercation or gunshot had occurred before admitting having a fight with her boyfriend. She informed the officers that the car belonged to her boyfriend, who had fled the scene. The accused then called her boyfriend and informed him that the police were present. He arrived shortly thereafter.

c. The accused's boyfriend, PS1 [redacted] confirmed to the officers that he and the accused had a fight, and the accused fired a gun. When asked, the accused admitted that she fired a gun, that the gun belonged to her, and that the gun was located in the glove compartment of her boyfriend's car. PS1 [redacted] then commented, "Oh so you were trying to set me up?" PS1 [redacted] elaborated that the accused fired the gun in his direction from the front porch of her house. He was at the driver's door of his car when he saw a red laser and heard the gunshot. The bullet struck the right, rear tire of his car, and PS1 [redacted] ran away.

d. One of the officers then retrieved the gun from the glove compartment of PS1 [redacted] car. The accused's gun is a silver "Kimber 9mm Micro 9" with a red laser. At the time of its seizure, the gun had 3 rounds of ammunition in the magazine and 1 in the chamber.

e. The officers took the accused into custody, advised her of her Miranda rights, and questioned her further regarding the incident. The accused again admitted firing the gun from the porch area but claimed that she was not aiming the gun at PS1 [redacted]

f. The officers were unable to find any shell casings or damage to nearby houses. They did observe a possible ricochet mark on the curb, and the right rear tire of PS1 [redacted] car was flat.

g. PS1 [redacted] further reported that there was a cut in the driver's seat of his car, and a knife belonging to the accused had been left on the front passenger seat. Additionally, he advised that the accused had struck him in the face with a semi-closed fist during the fight resulting in a cut to his bottom lip.

h. PS1 [redacted] informed the officers that he did not wish to participate in the prosecution or give further statements.

i. Both the firearm and the knife were placed in the OPD Property and Evidence Room. The accused was arrested and charged with aggravated domestic assault and tampering with evidence in violation of Tennessee state law.

j. On 25 August 2022, the OPD contacted the Naval Criminal Investigative Service (NCIS) and informed NCIS of the accused's arrest on 5 August 2022. The accused's command was notified of the incident by PS1 [redacted] and issued a military protective order.

k. On 29 August 2022 and 30 August 2022, NCIS conducted reviews of the accused's and PS1 [redacted] electronic service record books and also conducted database and social media checks pertaining to the accused and PS1 [redacted]

l. On 25 September 2022, NCIS collected the OPD incident report. On 29 September 2023, NCIS also collected copies of body camera video worn by the responding officers.

m. On 24 October 2022, NCIS was notified that a preliminary hearing was scheduled for the accused in Tennessee state court on 3 November 2022.

n. On 12 December 2022, the Fayette County, Tennessee General Sessions Court dismissed the charges against the accused for "lack of prosecution."

o. The Defense asserts in their facts that "[t]he charges above were dropped by the state of Tennessee on 12 Dec 22." This statement is not accurate. Rather, the evidence fairly reflects that the charges were dismissed by a General Sessions Court following a preliminary hearing for lack of prosecution (more likely than not due to PS1 [redacted] continuing refusal to participate). This is not the equivalent of the District Attorney General making a final decision against prosecution. The evidence before this court reflects that the final decision against prosecution was made on 8 March 2023.

p. On 8 March 2023, the Fayette County, Tennessee District Attorney General's Office declined prosecution due to lack of participation by PS1 [redacted]. A Sergeant [redacted] with the OPD informed NCIS of this decision. At that time, "NCISRU Memphis, TN assumed the lead investigative role."

q. On 9 March 2023, Region Legal Service Office Southeast provided to NCIS a copy of "the Fayette County E9-1-1 Emergency Communications District Command Log pertaining to . . . [the] investigation" and asked that NCIS locate and interview the caller. On the same day, NCIS identified [redacted] a civilian, as the caller and contacted her to coordinate an interview. On 21 March, Ms. [redacted] declined to be interviewed.

r. Charges were first preferred against the accused less than two months later.

s. In support of the Defense motion, the accused submitted a statement to the court in which she averred that she began trying to retrieve her gun from the Oakland Police Department in January of 2023. She received no response to her inquiries and, in March 2023, visited the Oakland Police Department in person. According to the accused, the "Chief of Police" informed her that he had been instructed by the Navy not to release the weapon.

t. In September 2023, Defense Counsel spoke with one of the officers who had responded to the scene of the altercation between the accused and PS1 [redacted] on 5 August 2023. When asked whether he was the "lead officer" in the case, the officer replied, "I think I was." The officer informed Defense Counsel that the OPD still had possession of the gun, although he was unsure why they were holding the gun "if the case is dropped." In response to Defense Counsel's inquiry regarding whether the accused could retrieve her gun, the officer responded "I assume so. She can request it."

u. In her statement to the court, the accused related that, following her Defense Counsel's conversation in September 2023 with the responding officer, she returned to the OPD to retrieve her gun. She was unable to speak with anyone at the Police Department but was later called by a "Lieutenant [redacted] who informed her that the detailed Navy trial counsel had told them they could not release the weapon.

3. General Principles of Law

a. Fourth Amendment

The Fourth Amendment of the United States Constitution proscribes unreasonable searches and seizures. "[A] Fourth Amendment '"seizure" of property occurs when there is some meaningful interference with an individual's possessory interest in that property.'" United States v. Visser, 40 M.J. 86, 89-90 (C.M.A. 1994). The constitutional protections of the Fourth Amendment have been implemented in the Armed Forces through Military Rules of Evidence (M.R.E.) 311–317. United States v. Hoffmann, 75 M.J. 120, 123 (C.A.A.F. 2016). M.R.E. 311(a) provides that

> Evidence obtained as a result of an unlawful search or seizure made by a person acting in a governmental capacity is inadmissible against the accused if:
>
> (1) the accused makes a timely motion to suppress or an objection to the evidence under this rule;
>
> (2) the accused had a reasonable expectation of privacy in the person, place, or property searched; the accused had a legitimate interest in the property or evidence seized when challenging a seizure; or the accused would otherwise have ground to object to the search or seizure under the Constitution of the United States as applied to members of the Armed Forces; and

(3) exclusion of the evidence results in appreciable deterrence of future unlawful searches or seizures and the benefits of such deterrence outweigh the costs to the justice system.

Conversely, M.R.E. 315(a) provides that

Evidence obtained from reasonable searches conducted pursuant to a search warrant or search authorization, or under the exigent circumstances described in this rule, is admissible at trial when relevant and not otherwise inadmissible under these rules or the Constitution of the United States as applied to members of the Armed Forces.

M.R.E. 315(g) further explains that evidence obtained from a warrantless search supported by probable cause is admissible "when there is a reasonable belief that the delay necessary to obtain a search warrant . . . would result in the removal, destruction, or concealment of the property or evidence sought."

M.R.E. 316(c)(1) further states that evidence is admissible when seized without a warrant "based on a reasonable belief that the property or evidence is an unlawful weapon, contraband, evidence of crime, or might be used to resist apprehension or escape."

In the circumstance where law enforcement authorities have probable cause to believe that a container, while not itself contraband or evidence of a crime, nonetheless holds contraband or evidence of a crime, but have not secured a warrant, the Supreme Court has held that the Fourth Amendment also permits seizure of the container pending acquisition of a warrant authorizing a search of its contents if there are exigent circumstances or if another exception to the warrant requirement is applicable. United States v. Martin, 157 F.3d 46, 53 (2nd Cir. 1998)(citing United States v. Place, 462 U.S. 696, 701 (1983)). If under these circumstances the warrantless seizure is followed by a delay in securing the warrant to search the contents of the container, that delay may be constitutionally unreasonable, and a court looks "to various factors, including the length of time for which the individual was deprived of her or his property, any diminished interest in the property that the individual may have had, and whether the seizure affected the individual's liberty interests . . . . The court also analyzes the government's interests in seizing the property, and balances the competing interests." United States v. Howe, 545 Fed. Appx. 64, 65-66 (2nd Cir. 2013); see also United States v. Christopher Nelson, No. 202000108, 2021 CCA LEXIS 215, at **11-13 (N.M.C.C.A. May 4, 2021), affirmed by United States v. Nelson, 82 M.J. 251 (C.A.A.F. 2022).

What, after all, is "reasonable" about police seizing an individual's property on the ground that it potentially contains relevant evidence and then simply neglecting for months or years to search that property to determine whether it really does hold relevant evidence needed for trial

or is totally irrelevant to the investigation and should be returned to its rightful owner?

United States v. Christie, 717 F.3d 1156, 1162 (10th Cir. 2013).

This circumstance has been distinguished from the circumstance when law enforcement seize evidence that is itself contraband or evidence of a crime or, stated differently, upon its face supports probable cause to believe the evidence will aid in a particular conviction. Lynch v. Hoskins, No. 06-CV-05076-SW-DGK, 2008 U.S. Dist. LEXIS 146196, at **18-22 (W.D. Mo. October 18, 2006)(distinguishing United States v. Place, 462 U.S. 696, 701 (1983)). The District Court for the Western District of Missouri observed that it could find no authority for the proposition that, having lawfully seized an item that is itself evidence of a crime, the Government must obtain a warrant to hold the seized item. Id. at 19-20. The court concluded that, when "[warrantless] seizure of weapons was lawful because there was probable cause to believe the weapons were evidence of crimes for which [the defendants] were cited, namely hunting turkey and deer over bait . . . [t]here is no constitutional violation for the authorities' failure to [obtain a warrant or] immediately return the weapons because the authorities could lawfully hold the evidence until the charges against [the defendants] were resolved . . . ." Id. at **21-22. In other words, "'[T]he general rule is that' lawfully seized property bearing evidence relevant to trial 'should be returned to its rightful owner once the criminal proceedings have terminated,' not before." Christie, 717 F.3d at 1167.

Finally, the exclusionary "rule's sole purpose . . . is to deter future Fourth Amendment violations." Davis v. United States, 564 U.S. 229, 236–37 (2011). As such, its use is limited "to situations in which this purpose is thought most efficaciously served." Id. at 237. Thus, to trigger the exclusionary rule, "the deterrent effect of suppression must be substantial and outweigh any harm to the justice system." Herring v. United States, 555 U.S. 135, 147 (2009). See also United States v. Wicks, 73 M.J. 93, 104 (C.A.A.F. 2014)(observing that the "exclusionary rule applies only where it results in appreciable deterrence for future Fourth Amendment violations and where the benefits of deterrence outweigh the costs").

4. Analysis and Conclusions of Law

At the 13 October 2023 Article 39a in the prior court-martial, the court inquired whether the Defense was conceding the legality of the search of PS1 [redacted] vehicle and the legality of the initial seizure of the accused's firearm. The court also informed the Defense that the Article 39a was the time they must raise those issues. The Defense denied conceding the issues but also affirmatively declined to raise the issues. At the 6 March 2024 Article 39a in this court-martial, the Defense similarly did not raise any issue other than their assertion that the OPD's retention of the gun after the dismissal of the accused's case by the Fayette County General Sessions Court for lack of prosecution constitutes an unreasonable seizure.

The court first notes that the record is devoid of any evidence that the accused possessed any reasonable expectation of privacy in PS1 [redacted] vehicle. United States v. Flores, 64 M.J. 451, 452 (C.A.A.F. 2007). On the contrary, it is undisputed that the vehicle belonged to PS1 [redacted]. Moreover, the preponderance of the evidence reflects that PS1 [redacted] was driven to abandon the vehicle in the middle of the accused's street under threat of gunfire from the accused. Additionally, at the time of the search, the responding officers had probable cause to believe that the accused had fired a gun at PS1 [redacted] and that the gun used by the accused would be found in the glove compartment of PS1 [redacted]s vehicle. Given the location of the gun in PS1 [redacted] vehicle under the circumstances of this case and the apparent volatility of PS1 [redacted] relationship with the accused, the officers possessed a reasonable belief that the delay necessary to obtain a warrant would result in the removal of the evidence. In short, the responding officers lawfully seized the accused's gun based on a reasonable belief that it was evidence of a crime.

Since the seizure of the gun by the responding officers, the accused has faced prosecution, first, by the State of Tennessee and, second, by the United States Navy relating to her firing of the gun at PS1 [redacted] on 5 August 2022. While additional testing of the gun may have produced additional evidence against the accused, such testing was unnecessary to establish the evidentiary value of the gun itself in either prosecution. Like the court in Lynch v. Hoskins, No. 06-CV-05076-SW-DGK, 2008 U.S. Dist. LEXIS 146196, at **18-22, this court can find no authority for the proposition that, having lawfully seized "evidence of a crime" within the meaning of M.R.E. 316(c)(1), the Government must obtain a warrant to hold the seized items pending trial. Like the court in Lynch v. Hoskins, No. 06-CV-05076-SW-DGK, 2008 U.S. Dist. LEXIS 146196, at **18-22, this court distinguishes cases such as Place, 462 U.S. at 701, and Nelson, No. 202000108, 2021 CCA LEXIS 215, at **11-13. Nor is the Defense's citation to M.R.E. 316(c)(5) persuasive. By its terms, M.R.E. 316(c)(5) does not apply to evidence described in M.R.E. 316(c)(1).

Nonetheless, the Defense argues that once the State of Tennessee declined to prosecute the accused, its retention of the accused's gun in the OPD's evidence locker constituted an unreasonable seizure of the accused's property. Again, the evidence before the court indicates that the State of Tennessee declined prosecution on 8 March 2023. Immediately thereafter the United States Navy took jurisdiction of the case with a view toward court-martial. While NCIS and trial counsel chose to leave the accused's gun in the OPD's evidence locker pending trial, the Defense cites no authority for the proposition that they could not do so, particularly when members of the OPD will be among the primary witnesses for the Government at trial and, based upon the evidence before the court, will authenticate the accused's gun as the gun used in the alleged offenses.

5. Ruling

For all the above reasons, the Defense motion is DENIED.

SO ORDERED this 9th day of April, 2024.

KELLY.KIMBERLY.JOY[redacted] Digitally signed by KELLY.KIMBERLY.JOY[redacted] Date: 2024.04.09 12:42:17 -04'00'

K. J. KELLY
CDR, JAGC, USN
Military Judge

NAVY-MARINE CORPS TRIAL JUDICIARY
NORTHWEST JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES	)	
	)	**RULING ON DEFENSE MOTION**
v.	)	**TO COMPEL PRODUCTION (WITNESS AND**
	)	**EVIDENCE)**
CHERELLE BENTON	)	
AZC/E-7 USN	)	**11 April 2024**
	)	
	)	

---

1. Nature of the Motion

On 22 February 2024, the Defense moved this court pursuant to Article 46, Uniform Code of Military Justice (U.C.M.J.), R.C.M. 703, and the Sixth Amendment to the United States Constitution to compel the in-person production of Captain [redacted], U.S. Navy, as a witness at trial, and to compel the production in discovery of notes taken by Government counsel or their staff during interviews of witnesses in this case. (AE IV and V). The Government submitted a responsive pleading in opposition to the Defense motion on 29 February 2024. (AE X and XI). The court held an Article 39a on 6 March 2024 at which both parties presented argument.

At the Article 39a, the Defense withdrew their motion to compel the in-person production of Captain [redacted], indicating that they would be producing Captain [redacted] as a witness by remote technology. The Defense also asked that the court consider the arguments made by the parties on their motion to compel discovery of Government interview notes on 13 October 2023 during the prior general court-martial convened to hear charges against this accused.

2. Findings of Fact

a. On 11 May 2023, the accused was charged with 1 specification of attempted aggravated assault in violation of Article 80 of the Uniform Code of Military Justice (U.C.M.J.), 1 specification of damaging nonmilitary property in violation of Article 109, U.C.M.J., and 1 specification of discharging a firearm through negligence in violation of Article 134, U.C.M.J. The charges were referred to a general court-martial on 13 July 2023. An Article 39a was held on 13 October 2023. On 24 October 2023, the Convening Authority withdrew and dismissed without prejudice all charges and specifications. On 8 November 2023, the accused was charged with 1 specification of firearm discharge, endangering human life in violation of Article 114, U.C.M.J., 1 specification of simple assault in violation of Article 128, U.C.M.J., and 1

specification of obstructing justice in violation of Article 131b, U.C.M.J. These charges were referred to a general court-martial on 18 January 2024. Both the 11 May 2023 charges and the 8 November 2023 charges were based upon the same events.

b. The charges arose from an argument between the accused and PS1 [redacted], U.S. Navy, in Oakland, Tennessee on 5 August 2022. Officers of the Oakland, Tennessee Police Department (OPD) were dispatched to the scene following an anonymous report of a loud verbal altercation and possible gunshot. When they arrived at the scene of the alleged altercation, they observed a silver Mercedes sedan with the trunk and doors open and "multiple contents of the vehicle in the street as if they had been thrown from it." The accused was standing on the passenger side of the vehicle. The accused initially denied that any altercation or gunshot had occurred before admitting having a fight with her boyfriend. She informed the officers that the car belonged to her boyfriend, who had fled the scene. The accused then called her boyfriend and informed him that the police were present. He arrived shortly thereafter.

c. The accused's boyfriend, PS1 [redacted] confirmed to the officers that he and the accused had a fight, and the accused fired a gun. When asked, the accused admitted that she fired a gun, that the gun belonged to her, and that the gun was located in the glove compartment of her boyfriend's car. PS1 [redacted] then commented, "Oh so you were trying to set me up?" PS1 [redacted] elaborated that the accused fired the gun in his direction from the front porch of her house. He was at the driver's door of his car when he saw a red laser and heard the gunshot. The bullet struck the right, rear tire of his car, and PS1 [redacted] ran away.

d. One of the officers then retrieved the gun from the glove compartment of PS1 [redacted] car. The accused's gun is a silver "Kimber 9mm Micro 9" with a red laser. At the time of its seizure, the gun had 3 rounds of ammunition in the magazine and 1 in the chamber.

e. The officers took the accused into custody, advised her of her Miranda rights, and questioned her further regarding the incident. The accused again admitted firing the gun from the porch area but claimed that she was not aiming the gun at PS1 [redacted]

f. The officers were unable to find any shell casings or damage to nearby houses. They did observe a possible ricochet mark on the curb, and the right rear tire of PS1 [redacted] car was flat.

g. PS1 [redacted] further reported that there was a cut in the driver's seat of his car, and a knife belonging to the accused had been left on the front passenger seat. Additionally, he advised that the accused had struck him in the face with a semi-closed fist during the fight resulting in a cut to his bottom lip.

h. PS1 [redacted] informed the officers that he did not wish to participate in the prosecution or

give further statements.

i. Nevertheless, on 29 August 2023, following the Navy's assumption of jurisdiction, PS1 [redacted] participated in a telephonic interview by detailed Trial Counsel and a trial paralegal. PS1 [redacted] account of events on 5 August 2022 differed in certain respects from his account to the OPD officers:

a. On the night of the charged offenses, PS1 [redacted] remembers being in a verbal altercation with AZC Benton. He stated he does not remember the specifics of what they were arguing about. He reported that the verbal argument didn't last too long but at some point AZC Benton became physical. PS1 [redacted] reported he was attempting to leave and anything physical from him towards AZC Benton would have been a result of him trying to leave/protect himself.
b. When PS1 [redacted] left the house, he went to his car and was putting bags in his car and heard the gunshot. He looked up and saw AZC Benton holding her firearm and he asked something along the lines of, "did you just shoot at me". He doesn't recall the firearm being pointed at him at that time and he doesn't remember AZC Benton's response to his question.
c. . . . [A]fter she discharged the firearm, he went back into AZC Benton's home and they talked about it briefly and then he left to walk around the block. When he was walking around the block is when AZC Benton called him to tell him the police were there.
d. PS1 [redacted] provided that AZC Benton maintained a concealed carry license and he had seen the firearm she owned in her home before. . . . [S]he never kept her firearm in his vehicle. . . .
h. PS1 [redacted] . . . believes this was a bad judgment call on part of AZC Benton and he wants to put it all behind him and move on.

j. The Government also provided to the Defense in discovery R.C.M. 701 notices or summaries of interviews of Captain [redacted] HMCM [redacted], U.S. Navy, and CECS [redacted], U.S. Navy. These witnesses related their professional knowledge of the accused and PS1 [redacted]

k. At the Article 39a on 13 October 2024, Government counsel represented that the R.C.M. 701 disclosures contained everything that was in their notes and also additional matters that were not contained within their notes. They then conceded that they were not asserting that the notes contained any matters covered by the attorney work-product privilege, but rather their refusal to provide their notes was based solely on their command's policy against providing such notes in discovery.

3. General Principles of Law

Article 46 of the Uniform Code of Military Justice provides that the parties "shall have equal opportunity to obtain witnesses and other evidence . . . ." R.C.M. 701(a)(1) places an affirmative duty on the prosecution, "[e]xcept as otherwise provided in R.C.M. 701(f) and (g)(2)" to provide "[a]ny sworn or signed statement relating to an offense charged in the case that is in the possession of trial counsel." R.C.M. 701(a)(2) places an affirmative duty on the prosecution to provide "papers, documents, data" in "the possession, custody, or control of military authorities" that are "relevant to defense preparation." R.C.M. 701(a)(6) provides that the prosecution must disclose evidence know to the trial counsel that is favorable to the Defense. Finally, as relevant to this case, R.C.M. 701(f) clarifies that "[n]othing 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."

R.C.M. 701(f) sets forth the attorney work-product privilege. As the Court of Appeals for the Armed Forces explained in United States v. Romano, 46 M.J. 269, 274-275 (C.A.A.F. 1997),

> The theory behind the work- product rule is that, after an attorney has spent time preparing the case, assembling and sorting the facts, deriving a theory and theme for the case, and planning the strategy to be employed, the opponent, without some overriding interests, may not needlessly interfere with the thought processes used in creating the documents.

Thus, "[a]bsent a disclosure requirement, documents specifically compiled and prepared with a reasonable anticipation of trial will be encompassed within the privilege if they encapsulate the attorney's thought processes." Id. at 275.

In United States v. Vanderwier, 25 M.J. 263, 268 (C.M.A. 1987), the Court of Military Appeals observed that "[i]nterview notes prepared by a lawyer or his representative are not automatically excluded from discovery by the defense on the basis that the notes are work product." The court offered the example that "[w]hen a writing that relates to the subject matter of the testimony of a government witness has been 'signed or otherwise adopted or approved by' the government witness, it is producible under the Jencks Act even though the writing was prepared by the government lawyer who interviewed the witness." Id. As to other notes taken by Government counsel during a witness interview, the court cited the Supreme Court's observation in Hickman v. Taylor, 329 U.S. 495, 512 (1947), a civil case, that

> [u]nder ordinary conditions, forcing an attorney to repeat or write out all that witnesses have told him and to deliver the account to his adversary gives rise to grave dangers of inaccuracy and untrustworthiness. No

> legitimate purpose is served by such production. The practice forces the attorney to testify as to what he remembers or what he saw fit to write down regarding witnesses' remarks. Such testimony could not qualify as evidence; and to use it for impeachment or corroborative purposes would make the attorney much less an officer of the court and much more an ordinary witness. The standards of the profession would thereby suffer.

Id. at 269. That said, the court indicated it would have been within the discretion of the military judge to conduct an *in camera* review of a prosecutor's interview notes prior to any ruling on a request for their discovery. Id. at 19. Indeed, the court affirmed that "[r]equiring material sought for discovery to be submitted to the court for inspection is a sound practice that protects the rights of all concerned and aids in appellate review." Id.; see also Romano, 46 M.J. at 275 (noting the court's expectation that the military judge would examine *in camera* any documents for which the work-product privilege is claimed); United States v. Bowser, 73 M.J. 889, 899-900 (A.F.C.C.A. 2014)(observing that "[e]ven assuming the interview notes contained privileged attorney work-product information, the privilege is not absolute and does not shield the interview notes from *in camera* review.")

4. Analysis and Conclusions of Law

At the Article 39a on 13 October 2024, the Defense asserted that, unless covered by the attorney work-product privilege, a prosecutor's interview notes or those of her paralegal are discoverable under R.C.M. 701(a) if relevant to Defense preparation. The Defense noted in particular that PS1 [redacted] has refused to speak with them, making any notes of the Government's interview of PS1 [redacted] relevant to their preparation.

Echoing the Supreme Court's concerns in Hickman v. Taylor, the Government responded that, while their notes in this case do not contain material covered by the attorney work-product privilege,[1] nonetheless the notes are not verbatim, i.e., are incomplete, and pose a danger of misrepresentation. The R.C.M. 701 disclosures were intended to avoid any misrepresentation or inaccuracy while meeting the Government's discovery obligations.

The court certainly understands the concern of the prosecution command in formulating its policy against disclosure of interview notes. However, the Government has conceded in this case that the notes do not contain attorney work product. Accordingly, R.C.M. 701(f) does not protect the notes from disclosure. The Government does not explain why, absent R.C.M. 701(f), the notes are not discoverable under R.C.M. 701(a). Applying R.C.M.

[1] The Government initially indicated they were relying on R.C.M. 701(f) in refusing to provide their interview notes in discovery. However, again, the Government ultimately conceded that the notes do not contain attorney work product.

701(a), the question is whether the notes are relevant to Defense preparation. While the Government has proffered that the R.C.M. 701 disclosures contain all the information contained in their notes, they effectively concede that the R.C.M. 701 disclosures are not a verbatim copy of the notes. A review of the R.C.M. 701 disclosures themselves indicate they are a re-wording of the witnesses' statements during the interviews in question. To the extent the notes more closely capture the language used by the witness, they are relevant to Defense preparation. To the extent the Government takes the position that the notes are so incomplete as to be irrelevant to Defense preparation, they may submit the notes for this court's *in camera* review. Otherwise, they are ordered to provide the notes to the Defense.

5. Ruling

For all the above reasons, the Defense motion is GRANTED in part. The Government is ordered to provide their interview notes to the Defense or, in the alternative, provide those notes to the court for *in camera* review.

SO ORDERED this 11th day of April, 2024.

KELLY.KIMBERLY.JOY[redacted] Digitally signed by KELLY.KIMBERLY.JOY[redacted] Date: 2024.04.11 11:25:18 -04'00'

K. J. KELLY
CDR, JAGC, USN
Military Judge

NAVY-MARINE CORPS TRIAL JUDICIARY
NORTHWEST JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES	)	
	)	RULING ON DEFENSE MOTION
v.	)	TO DISMISS: IMPROPER REFERRAL
	)	UNDER R.C.M. 905
CHERELLE BENTON	)	
AZC/E-7 USN	)	23 April 2024
	)	
	)	

---

1. **Nature of the Motion**

On 22 February 2024, the Defense moved this court pursuant to Rule for Courts-Martial (R.C.M.) 905(b)(1) and R.C.M. 604(b) to dismiss all charges and specifications due to improper withdrawal and dismissal. (Appellate Exhibits II and III). The Government submitted a responsive pleading in opposition to the Defense motion on 29 February 2024. (AE XII and XIII). The court held an Article 39a on 6 March 2024 at which both parties presented argument. Additionally, to the extent the parties presented additional argument on this motion at an Article 39a on 19 April 2024, the court has included that argument in its consideration. At the 6 March 2024 Article 39a, the Defense requested the testimony of the Convening Authority. The court ordered the testimony of CDR [redacted], JAGC, U.S. Navy, the Staff Judge Advocate for the Convening Authority.

2. **Findings of Fact**

a. On 11 May 2023, the accused was charged with 1 specification of attempted aggravated assault in violation of Article 80 of the Uniform Code of Military Justice (U.C.M.J.), 1 specification of damaging nonmilitary property in violation of Article 109, U.C.M.J., and 1 specification of discharging a firearm through negligence in violation of Article 134, U.C.M.J. The accused waived an Article 32 preliminary hearing. The accused's command, Navy Personnel Command (NPC), forwarded the charges to Commander, Navy Region Southeast (CNRSE) for referral. CNRSE referred the charges to a general court-martial on 13 July 2023. An Article 39a was held on 13 October 2023. Trial was scheduled to begin on 30 October 2023. If found guilty of all charges, the accused was facing a maximum sentence of 9 years and 3 months.

b. The charges arose from an argument between the accused and PS1[redacted], U.S. Navy, in Oakland, Tennessee on 5 August 2022. More specifically, the charges were based on

the following facts:

(1) Officers of the Oakland, Tennessee Police Department (OPD) were dispatched to the scene following an anonymous report of a loud verbal altercation and possible gunshot. When they arrived at the scene of the alleged altercation, they observed a silver Mercedes sedan with the trunk and doors open and "multiple contents of the vehicle in the street as if they had been thrown from it." The accused was standing on the passenger side of the vehicle. The accused initially denied that any altercation or gunshot had occurred before admitting having a fight with her boyfriend. She informed the officers that the car belonged to her boyfriend, who had fled the scene. The accused then called her boyfriend and informed him that the police were present. He arrived shortly thereafter.

(2) The accused's boyfriend, PS1[redacted], U.S. Navy, confirmed to the officers that he and the accused had a fight, and the accused fired a gun. When asked, the accused admitted that she fired a gun, that the gun belonged to her, and that the gun was located in the glove compartment of her boyfriend's car. PS1[redacted] then commented, "Oh so you were trying to set me up?" PS1[redacted] elaborated that the accused fired the gun in his direction from the front porch of her house. He was at the driver's door of his car when he saw a red laser and heard the gunshot. The bullet struck the right, rear tire of his car, and PS1[redacted] ran away.

(3) One of the officers then retrieved the gun from the glove compartment of PS1[redacted] car. The accused's gun is a silver "Kimber 9mm Micro 9" with a red laser. At the time of its seizure, the gun had 3 rounds of ammunition in the magazine and 1 in the chamber.

(4) The officers took the accused into custody, advised her of her Miranda rights, and questioned her further regarding the incident. The accused again admitted firing the gun from the porch area but claimed that she was not aiming the gun at PS1[redacted]

(5) On 29 August 2023, following the Navy's assumption of jurisdiction over this case, PS1[redacted] participated in a telephonic interview with detailed Trial Counsel and a trial paralegal. PS1[redacted] account of events on 5 August 2022 differed in certain respects from his account to the OPD officers. The R.C.M. 701 disclosure summarizes PS1[redacted] statements as follows:

> a. On the night of the charged offenses, PS1[redacted] remembers being in a verbal altercation with AZC Benton. He stated he does not remember the specifics about which they were arguing. He reported that the verbal argument didn't last too long but at some point AZC Benton became physical. PS1[redacted] reported he was attempting to leave and anything physical from him towards AZC Benton would have been a result of him trying to leave/protect himself.

b. When PS1 [redacted] left the house, he went to his car and was putting bags in his car and heard the gunshot. He looked up and saw AZC Benton holding her firearm and he asked something along the lines of, "did you just shoot at me". He doesn't recall the firearm being pointed at him at that time and he doesn't remember AZC Benton's response to his question.

c. . . . [A]fter she discharged the firearm, he went back into AZC Benton's home and they talked about it briefly and then he left to walk around the block. When he was walking around the block is when AZC Benton called him to tell him the police were there.

d. PS1 [redacted] provided that AZC Benton maintained a concealed carry license and he had seen the firearm she owned in her home before. . . . [S]he never kept her firearm in his vehicle. . . .

h. PS1 [redacted]. . . believes this was a bad judgment call on part of AZC Benton and he wants to put it all behind him and move on.

c. On the morning of Friday, 20 October 2023, prior to any ruling by the court on the Defense's motions, detailed Trial Counsel informed the court and the Defense that, "[b]y direction of the Convening Authority the charges preferred on 11 May 2023 have been dismissed without prejudice." Trial Counsel provided a charge sheet with the charges and specifications lined out by the Trial Counsel and the annotation that the withdrawal and dismissal was by direction of the Convening Authority. Trial Counsel further notified the court and Defense that the Government intended to prefer new charges in the case. On the same day, Trial Counsel e-mailed the Defense separately stating, "[W]e are working diligently to prefer new charges and will be happy to discuss any questions."

d. Upon receipt of the purported withdrawn and dismissed charge sheet, the court removed the trial in this case from the docket.

e. On the same morning, Trial Counsel was communicating with one of their witnesses, Special Agent [redacted] Naval Criminal Investigative Service (NCIS), to inform him that the trial would not be taking place as scheduled and that "[o]ur travel coordinator will likely be reaching out shortly to turn off all travel."

f. Final pretrial matters were due on 20 October. Because of the Trial Counsel's notification that charges had been withdrawn and dismissed, neither party filed pretrial matters.

g. On Monday, 23 October 2023, the court received the following communication from detailed Trial Counsel:

> LT Poteet and I just spoke to CDR [redacted] regarding the subject case. We have learned that although . . . [CDR Paul Hochmuth, JAGC, U.S. Navy, Chief, Special Trial Counsel] believed CDR [redacted] gave by direction authority to dismiss the charges in this case last Friday, 20OCT23, CDR [redacted] did NOT give by direction authority for OSTC to dismiss charges. This appears to have resulted from a miscommunication between CDR Hochmuth and CDR [redacted]

Trial Counsel indicated in the same e-mail that they anticipated a decision on withdrawal and dismissal by the Convening Authority the same day.

h. On the same day, the court held an R.C.M. 802 with the parties. During this R.C.M. 802, the court stated that, absent a motion for a continuance, the trial was still scheduled for the following week. During the R.C.M. 802, the court set a deadline of close of business on 24 October 2023 for final matters and motions and responses relating to a continuance and/or the purported withdrawal and dismissal of charges. The court also requested and received confirmation from CDR [redacted] via the Trial Counsel that "[t]he CA has not taken action on this case beyond the original referral."

i. On 23 October 2024, Defense filed final pretrial matters including proposed voir dire, proposed instructions, and a notice of their intent to use courtroom technology.[1]

j. On the same day, CDR [redacted] met with the Defense Counsel to discuss the case and the rationale behind the possible withdrawal and dismissal of charges. During this conversation, CDR [redacted] also indicated that a decision would be forthcoming that evening.

k. On Tuesday, 24 October 2023, the Convening Authority gave by direction authority to Trial Counsel to withdraw and dismiss without prejudice all charges and specifications. The Trial Counsel forwarded to the court the new withdrawn and dismissed charge sheet.

l. On 8 November 2023, based upon the same events that were the subject of the 11 May 2023 charges, the accused was charged with 1 specification of firearm discharge, endangering human life in violation of Article 114, U.C.M.J., 1 specification of simple assault in violation of Article 128, U.C.M.J., and 1 specification of obstructing justice in violation of Article 131b, U.C.M.J.

m. On 28 November 2023, the Defense requested to speak with CNRSE regarding the

[1] The Defense asserts that they filed their Final Pretrial Matters on Friday, 20 October. The court did not receive any Final Pretrial Matters from the Defense until Monday, 23 October, in advance of a new deadline set by the court of 24 October. (Appellate Exhibits XLI and XLII).

rationale for dismissal of charges on 24 October 2023. CDR [redacted] advised CNRSE regarding "the pros and cons" of meeting with Defense Counsel. CDR [redacted] advised CNRSE that it was not necessary to meet with the Defense, and the Convening Authority had acted properly. CNRSE denied the Defense request on 8 December.

n. CNRSE returned the case to NPC. NPC appointed an Article 32 Preliminary Hearing Officer on 30 November 2023. An Article 32 preliminary hearing was conducted on 5 through 8 December 2023. The Defense counsel at that time raised the issue of improper withdrawal and dismissal of the 11 May 2023 charges. On 7 December 2023, the Government provided a memorandum to the Preliminary Hearing Officer explaining that "as the Government continued with pretrial preparations [in the prior general court-martial,] it became apparent those [prior] charges were unsupported by available evidence and did not adequately reflect the nature and seriousness of the offenses at issue." The Government submitted that, therefore, withdrawal and dismissal of the 11 May 2023 charges was consistent with the Discussion to R.C.M. 401(c)(1). The Preliminary Hearing Officer determined that resolution of this issue was outside his purview. He found probable cause to support all the charges and specifications and recommended referral of Charge I and Charge II to a general court-martial. NPC forwarded all three charges to CNRSE for referral.

o. In his Article 34 advice, CDR [redacted] recommended referral of all three charges on the 8 November 2023 charge sheet to a general court-martial. The Convening Authority referred all three charges to this general court-martial on 18 January 2024.

p. The accused was arraigned on the 8 November 2023 charges on 26 January 2024. The Government and Defense submitted a joint, agreed Trial Management Order setting trial dates of 22 through 26 April 2024. Should she be convicted of all three charges, the accused will now face a maximum sentence of 6 years and 3 months. The accused has never been in any form of pretrial restraint and has never requested a speedy trial. In addition to this motion, the Defense has submitted two motions largely identical to those submitted during the prior general court-martial.[2] At the Article 39a on 6 March 2024, the Defense requested and the Government agreed to the court's consideration of the parties' arguments on those two motions at the 13 October 2023 Article 39a in the prior general court-martial. (Appellate Exhibit XV).

q. In an e-mail on 6 March 2024, CDR [redacted] confirmed that he had reviewed Trial Counsel's 7 December 2023 memorandum to the Article 32 Preliminary Hearing Officer and

[2] At the prior court-martial, the Defense submitted a Motion to Suppress Evidence (Firearm) on the same basis as asserted in this court-martial. Additionally, the Defense submitted a Motion to Compel Production (Witnesses and Evidence). As in this court-martial, the Defense sought to compel production of the Government's interview notes. As to the Defense's effort to compel production of witnesses, the Government in both courts-martial agreed to produce the witnesses requested by the Defense with one exception, Captain [redacted], U.S. Navy. However, in both courts-martial, the Defense agreed to the telephonic production of Captain [redacted]

that the memorandum was consistent with CDR [redacted] discussions with the Convening Authority about dismissing the original charges. CDR [redacted] affirmed that "[t]he discussion was based in the fact that the dismissal and new referral more properly showed the culpability of the Accused."

r. CDR [redacted] testified at the Article 39a on 6 March 2024 as follows:

(1) Prior to the withdrawal and dismissal of charges in this case, CDR [redacted] engaged in discussions with the prosecution in the case regarding the adequacy of the evidence. Specifically, he was contacted by CDR Hochmuth when he was on the road in Kingsland, Georgia, traveling to the Naval Submarine Base in Kings Bay, Georgia in connection with nuclear weapons training. He recalled this conversation occurring on a Friday. CDR [redacted] stopped on the side of the road for the conversation. CDR Hochmuth communicated that, after further review and discussion in the prosecution's office, the prosecutors had made the determination that they did not have sufficient evidence to move forward on one or more of the charges in this case. CDR [redacted] specifically recalled the discussion regarding the charge of attempted aggravated assault. CDR [redacted] stated he may have discussed recent case law or the Manual for Courts-Martial, but he did not recall discussion of "legal minutiae" due to the fact he was traveling at the time. At the conclusion of this conversation, CDR [redacted] plan of action was to look at the case with his senior paralegal when he returned to the office and to make a recommendation to the Convening Authority. CDR [redacted] recalled that the main concern was that the accused's alleged actions be properly reflected in the charges.

(2) The purported withdrawal and dismissal of charges on Friday, 20 October 2023 was brought to CDR [redacted] attention by his paralegal. CDR [redacted] recalls that this occurred the Monday after his conversation with CDR Hochmuth or the next work day. His paralegal had learned of the purported withdrawal and dismissal and asked CDR [redacted] if he was aware of Trial Counsel's actions. CDR [redacted] was confused because the Convening Authority had not authorized withdrawal and dismissal of the charges. After discussion, he and his paralegal agreed that the Trial Counsel could not legally withdraw and dismiss charges without the Convening Authority's authorization. They suspected it was a "clerical error" due to someone's misunderstanding of the process. CDR [redacted] recalls instructing his paralegal to reach out to Trial Counsel to find out what had happened.

(3) CDR [redacted] testified that when he spoke with Defense Counsel on Monday, 23 October 2024, he had not yet briefed the Admiral regarding the possible withdrawal and dismissal of charges. He could not recall exactly when he briefed the Convening Authority on this issue. He usually but not exclusively gave legal briefings to CNRSE on Wednesday or Thursday. He did not recall a special meeting with the Admiral to discuss this question.

(4) CDR [redacted] again confirmed that he had reviewed the Trial Counsel's 7 December 2023 memorandum to the Preliminary Hearing Officer and that, with the exception of citations

to case law, it was largely consistent with his discussion with the Convening Authority about withdrawing and dismissing charges. He specifically affirmed his understanding that Trial Counsel's review of the case had ultimately led to the conclusion that the charges were unsupported by available evidence, particularly the charge of attempted aggravated assault. He further explained that "unsupported by available evidence" meant that the evidence did not support probable cause for each element of the offenses. He noted that, based on his experience, the Government may still win the case, but that would be "problematic for military justice and morality."

(5) CDR [redacted] indicated that his explanation of the reason for the Convening Authority's withdrawal and dismissal of the original charges was based upon his discussions with the Convening Authority. He observed that his discussions with the Convening Authority were generally "full and frank."

(6) Regarding his briefing of CNRSE on this issue, CDR [redacted] more specifically recalled sitting at the table with the Admiral. He reminded the Admiral regarding the original package that the Admiral had reviewed in this case. He informed the Admiral of the new developments and that he had "socialized" the issue with the prosecutors and his senior paralegal. He explained that it now appeared that the charges previously referred were not appropriate. He reviewed with the Admiral in particular the elements of attempted aggravated assault and how the evidence failed to support those elements. He offered to the Admiral that attempted aggravated assault was a "significant" crime, and they did not want to charge that offense if it was not supported by the evidence. CDR [redacted] testified that, although he could not recall all of this conversation with the Admiral, based on his experience the Admiral would have inquired regarding "next steps" and the scope of his authority. CDR [redacted] did tell the Admiral that if the charges were withdrawn and dismissed there could be "more to follow," "it could be nothing, it could be a special court-martial, it could be an NJP." CDR [redacted] told the Admiral, "if he had to guess," special-court-martial-level offenses would be forwarded for the Admiral's consideration. CDR [redacted] recalled the meeting was brief, lasting perhaps three or four minutes.

(7) Either at this meeting with the Admiral or subsequently when the decision to refer new charges was made, CDR [redacted] presented to the Admiral the relevant pages of the Manual for Courts-Martial covering withdrawal of charges and re-referral of charges and the implications of the timing of withdrawal. He advised the Admiral that there was no "viable" objection to the process they were pursuing. CDR [redacted] observed that the Admiral likes to look at governing instructions when taking action.

(8) CDR [redacted] did not recall, when advising CNRSE regarding the withdrawal and dismissal of the 11 May 2023 charges, telling the Admiral that Trial Counsel had "already withdrawn and dismissed the charges." He did not think he would have told the Admiral because he did not believe Trial Counsel had the authority to withdraw and dismiss the charges,

so their purported action was not relevant to the Admiral's decision.

(9) CDR [redacted] also could not recall whether or not, at the time of withdrawal and dismissal of the 11 May 2023 charges, he had already gone over members questionnaires with the Admiral for purposes of producing an amending order. He stated he did not track the Trial Management Order and did not know when the amending order and accompanying questionnaires might be due.

(10) The Convening Authority knew at the time of withdrawal and dismissal that trial was "imminent."

(11) CDR [redacted] did not recall whether he discussed with the Admiral or contemplated the possibility of only withdrawing and dismissing the charge of attempted aggravated assault.

(12) The Convening Authority decided to withdraw and dismiss the original charges, and CDR [redacted] communicated this decision to Trial Counsel.

(13) CDR [redacted] did not include reference to the prior court-martial in his Article 34 advice regarding the referral of the 8 November 2023 charges. He explained that he did not believe reference to the prior court-martial was necessary and that he strove to "hew his advice closely to the facts at hand." CDR [redacted] unequivocally asserted that it was impossible that the Convening Authority was unaware of the prior court-martial. He elaborated that he discussed the prior court-martial when presenting his Article 34 advice.

(14) CDR [redacted] concluded that "the Admiral is very concerned about getting to the right answer." Accordingly, their discussion about withdrawal did focus on their expectation that if new charges were referred they would be lesser charges and may be referred to a lesser forum. According to CDR [redacted], the Convening Authority has made it "abundantly clear" that he does not care about who wins or loses at court-martial, "just that the military justice process is followed."

s. On 18 April 2024, the Government submitted a motion for a continuance of the trial dates based upon the unavailability of PS1 [redacted] (Appellate Exhibits XXXVIII and XXXIX). Specifically, PS1 [redacted] is deployed onboard the USS [redacted] in the Pacific, and due to the location of the ship and the mechanical malfunction of carrier-onboard-delivery aircraft could not travel back to the United States before 26 April 2024. The Defense opposed the continuance. (Appellate Exhibits XLIII and XLIV). On 19 April 2024, at an Article 39a, the court granted a continuance for one week until 29 April 2024.

t. On 19 April 2024, at the court's request, the Government clarified as follows the event or events that prompted the Government's reconsideration of the original charges:

> The event that caused the Government to reconsider the appropriateness of the original charges was a case brief during final pre-trial preparations. Questions raised during this case brief made it apparent the original charging scheme did not adequately reflect the nature and seriousness of the offenses at issue, and thus we began to reconsider the charges.

(Appellate Exhibit XLVII).

3. General Principles of Law

a. R.C.M. 601(e)(2) states, "After arraignment of the accused upon charges, no additional charges may be referred to the same trial without consent of the accused." The non-binding Discussion section indicates that "[o]rdinarily all known charges should be referred to a single court-martial."

b. R.C.M. 604(a) states, "[T]he convening authority . . . may for any reason cause any charges or specifications to be withdrawn from a court-martial at any time before findings are announced." The non-binding Discussion section states, "Charges should not be withdrawn from a court-martial arbitrarily or unfairly to the accused."

c. R.C.M. 401(c)(2) provides that "[w]hen a commander dismisses charges further disposition under R.C.M. 306(c) of the offenses is not barred." The non-binding discussion further states that charges should be dismissed if unsupported by available evidence and further that "[i]t is appropriate to dismiss a charge and prefer another charge anew when, for example, the original charge . . . did not adequately reflect the nature or seriousness of the offense."

d. R.C.M. 604(b) states, "Charges that have been withdrawn from a court-martial may be referred to another court-martial unless the withdrawal was for an improper reason." The non-binding Discussion section of R.C.M. 604(b) states:

> Improper reasons for withdrawal include an intent to interfere with the free exercise by the accused of constitutional rights or rights provided by the UCMJ, or with the impartiality of the court-martial. . . .
>
> Whether the reason for a withdrawal is proper, for purposes of the propriety of a later referral, depends in part on the stage in the proceedings at which the withdrawal takes place. Before arraignment, there are many reasons for a withdrawal that will not preclude another referral. These include receipt of additional charges, absence of the accused, reconsideration by the convening authority . . . of the seriousness of the offenses, questions concerning the mental capacity of

> the accused, and routine duty rotation of the personnel constituting the court-martial. Charges withdrawn after arraignment may be referred to another court-martial under some circumstances. . . .

In United States v. Joseph Burnham, No. NMCCA 200700233, 2007 CCA LEXIS 249, at **16-17 (N.M.C.C.A. July 18, 2007), the court rejected the proposition that "the lack of enumeration of reasons justifying re-referral of charges withdrawn after arraignment should be read as to not permit re-referral for any of the reasons listed for charges withdrawn before arraignment." "[G]ood cause in the context of R.C.M. 604(b) is a sliding standard that becomes more difficult as the stages of trial progress." United States v. Koke, 32 M.J. 876, 880 (N.M.C.M.R. 1991), affirmed by United States v. Koke, 34 M.J. 313 (C.M.A. 1992). Nevertheless, even after arraignment, an "intent to ensure that all appropriate charges [are] brought against [an accused] in the appropriate forum . . . is not improper." Burnham, No. NMCCA 200700233, 2007 CCA LEXIS 249, at *16.

e. To determine whether the convening authority has acted properly in withdrawing and then re-referring charges post-arraignment, a court examines whether there was a "legitimate command reason which does not 'unfairly' prejudice an accused in light of the particular facts of a case." United States v. Underwood, 50 M.J. 271, 276 (C.A.A.F. 1999). The Navy-Marine Corps Court of Criminal Appeals has listed six factors to consider:

> (1) Was the withdrawal done for "an articulable reason that genuinely serves a public interest, or the interests of justice or is reactive to an operational exigency"?
>
> 2) Was the withdrawal in response to "some event occurring after arraignment that actually raises a substantial question concerning the appropriateness of the original referral decision"?
>
> 3) Was the withdrawal "based on retribution for the assertion of a right by an accused"?
>
> 4) Does the withdrawal "involve harassment of the accused"?
>
> 5) Is the withdrawal "arbitrary or unfair to an accused, considering all the facts and circumstances of a case and bearing in mind that the mere exposure to potential additional punishment is not controlling"?

Koke, 32 M.J. at 881.

f. In sum, the convening authority's right to withdraw charges and then re-refer them is not unlimited. "Because the decision to withdraw and re-refer is a discretionary act and R.C.M. 604

incorporates fairness, there is implicit balancing of the interests of the accused and the government." Id. at 880.

g. Article 37 of the Uniform Code of Military Justice sets forth the law governing "command influence" of the military justice process. Article 37 provides in pertinent part,

> No person subject to this chapter may attempt to coerce or, by any unauthorized means, attempt to influence the action of a court-martial . . . in reaching the findings or sentence in any case, or the action of any convening . . . authority . . .
> .

Subsection (c) of Article 37 provides, "No finding or sentence of a court-martial may be held incorrect on the ground of a violation of this section unless the violation materially prejudices the substantial rights of the accused."

h. Under the traditional analytical framework, there are two types of unlawful command influence: (1) actual unlawful command influence; and (2) apparent unlawful command influence. Under this framework, apparent unlawful command influence exists when an "'objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding.'" United States v. Boyce, 76 M.J. 242, 249 (C.A.A.F. 2017). Also under the traditional framework, apparent unlawful command influence does not require prejudice to the accused, albeit prejudice to the accused is a "'significant factor in determining whether the unlawful command influence created an intolerable strain on the public's perception of the military justice system . . . .'" United States v. Horne, 82 M.J. 283, 287 (C.A.A.F. 2022)(citation omitted).

i. However, the 2019 amendment to Article 37 requiring material prejudice to a substantial right of the accused has called into question the continued existence of apparent unlawful command influence. See United States v. Cory Garrett, No. 20210298, 2022 CCA LEXIS 638, at *17 (A.C.C.A. October 21, 2022)(observing that, "[b]y premising relief on a demonstration of material prejudice to a substantial right of an accused, Congress has arguably eliminated apparent unlawful command influence as a potential source of relief). In United States v. Proctor, 81 M.J. 250, 255 n.3 (C.A.A.F. 2021), the court declined to take any stance on what changes if any the 2019 amendments require of apparent unlawful command influence jurisprudence. See also Horne, 82 M.J. at 284 n.1.

j. In contrast, "actual unlawful command influence has commonly been recognized as occurring when there is an improper manipulation of the criminal justice process which negatively affects the fair handling and/or disposition of a case." Boyce, 76 M.J. at 247; see also United States v. Barry, 78 M.J. 70, 77 (C.A.A.F. 2018). However, the 2019 amendments to Article 37 have not left even actual unlawful command influence untouched. In Barry, 78 M.J. at 78, the court observed that the plain language of the then existent version of Article 37

"does not require intentional action." However, Congress amended the "plain language" to which the court referred in Barry to include the missing "attempt" language that the court interpreted to require intentional conduct. The language added by Congress would preclude unintentional or inadvertent unlawful command influence. Garrett, No. 20210298, 2022 CCA LEXIS 638, at **15-16.

k. In any event, in order to prevail on a claim of either actual or apparent unlawful command influence,

> [a]t trial, the accused must show facts which, if true, constitute unlawful command influence, and that the alleged unlawful command influence has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings. . . .
>
> Once the issue is raised at the trial level, the burden shifts to the Government, which may either show that there was no unlawful command influence or show that the unlawful command influence will not affect the proceedings. . . .
>
> The Government may carry its burden (1) by disproving the predicate facts on which the allegation of unlawful command influence is based; (2) by persuading the military judge . . . that the facts do not constitute unlawful command influence; [or] (3) . . . by producing evidence proving that the unlawful command influence will not affect the proceedings [or place an intolerable strain upon the public's perception of the military justice system] . . . .

United States v. Biagase, 50 M.J. 143, 150-151 (C.A.A.F. 1999)(citations omitted); see also Boyce, 76 M.J. at 249-250. While a low burden, the Defense's initial showing "must consist of more than 'mere speculation.'" Boyce, 76 M.J. at 249; see also Barry, 78 M.J. at 77. Once the accused has presented "some evidence" of unlawful command influence, the Government must meet its burden beyond a reasonable doubt. United States v. Bergdahl, 80 M.J. 230, 234 (C.A.A.F. 2020).

4. Analysis and Conclusions of Law

The Defense makes the following arguments in support of their motion to dismiss:

1. First, the Convening Authority did not make a personal and independent decision to withdraw and dismiss the 11 May 2023 charges. Rather, "the Convening Authority's eventual direction was apparently influenced by the Trial Counsel's unauthorized actions" in lining out the charges on 20 October 2023 without authorization from the Convening Authority, notifying a witness that the trial would be postponed, canceling witness travel, and causing the case to be removed from the docket.

2. Second, the Government's failure to articulate the reason for withdrawal and dismissal of the 11 May 2023 charges at the time of the Convening Authority's action renders the withdrawal and dismissal and subsequent preferral and referral of new charges improper under R.C.M. 604(b).

3. Finally, because the charges were withdrawn and dismissed approximately 6 days prior to trial, the withdrawal and dismissal were improper and preclude preferral and referral of new charges.

Turning to the first argument, at the Article 39a, when asked by the court, the Defense specifically disclaimed an intent to argue command influence. Yet, their first argument is de facto, at a minimum, a claim of actual command influence, i.e., "an improper manipulation of the criminal justice process which negatively affects the fair handling and/or disposition of a case." Boyce, 76 M.J. at 247. The difficulty for the Defense is that there is no evidence before the court that the Convening Authority was aware of Trial Counsel's actions in precipitously lining out charges, notifying a witness that the trial would be postponed, canceling (or planning to cancel) witness travel, or causing the case to be removed from the docket. CDR [redacted] could not recall informing the Convening Authority of these events and did not believe he would have done so, because the Trial Counsel's unauthorized actions were irrelevant to the decision before the Convening Authority. This is consistent with CDR [redacted] description elsewhere of his general approach to advising the Admiral, namely he strove to "hew his advice closely to the facts at hand." Moreover, the court is satisfied beyond a reasonable doubt that the trial counsel's actions did not influence the Convening Authority's withdrawal and dismissal of charges. CDR [redacted] recalled the focus of his conversation with the Convening Authority on the issue of withdrawal and dismissal to be whether the previously referred charges were supported by the evidence and whether they properly reflected the nature of the accused's conduct. Thus, their discussion about withdrawal focused on their expectation that if new charges were referred they would be lesser charges and might be referred to a lesser forum. CDR [redacted] described the Convening Authority as someone who was concerned about getting to the "right answer" and who made it "abundantly clear" that he did not care about who wins or loses at court-martial, "just that the military justice process is followed." Accordingly, just as there is no evidence of actual command influence, for the same reason, to the extent apparent command influence still exists, an "'objective, disinterested observer, fully informed of all the facts and circumstances, would [not] harbor a significant doubt about the fairness of the proceeding.'" Boyce, 76 M.J. at 249.

The Defense also de facto raises a claim of apparent command influence by the Convening Authority. In this regard, the court disagrees with the Defense's assertion that, "[t]he Convening Authority's acquiescence and direction to withdraw and dismiss the charges furthers the appearance that the Convening Authority himself desires AZC Benton to be convicted of certain charges at trial." On the contrary, R.C.M. 601(d)(1) sets forth the

prerequisite to referral that "there is probable cause to believe that an offense triable by a court-martial has been committed and that the accused committed it." According to CDR [redacted] the trial counsel's admittedly late assessment of the case raised the issue of whether the evidence supported probable cause for each element of the charged offenses, especially the offense of attempted aggravated assault. Even assuming the evidence supported probable cause for the remaining offenses, the attempted aggravated assault offense carried a maximum possible penalty of 8 years confinement, while the remaining offenses (damaging nonmilitary property and negligent discharge of a firearm) carried a combined possible punishment of 1 year and 3 months. Accordingly, the prosecution's reassessment of the case also raised the issue of whether the accused's conduct warranted a lesser forum. In short, the appearance is not that of a Convening Authority seeking conviction of certain charges but a Convening Authority seeking confirmation of probable cause to support any referred charges and ensure adjudication of charges at the appropriate forum.

Turning to the second argument, R.C.M. 604(b) addresses re-referral of charges that have been withdrawn from another court-martial. Thus, the Discussion section of R.C.M. 604(b) does provide,

> When charges that have been withdrawn from a court-martial are referred to another court-martial, the reasons for the withdrawal and later referral should be included in the record of the later court-martial, if the later referral is more onerous to the accused.

See also United States v. Jones, 60 M.J. 917, 920 (N.M.C.C.A. 2005). Looking at the plain language of the rule and the discussion, the court first notes that the charges that were withdrawn from a general court-martial on 24 October 2023 were not re-referred to another court-martial.[3] Rather, the Convening Authority reinitiated "the standard process," returning the case to the accused's command, whose commander convened an Article 32 preliminary hearing and forwarded completely different charges for referral, albeit based upon the same underlying facts. See Jones, 60 M.J. at 921 ("Because these charges were never referred to trial by the original convening authority, [the current convening authority] . . . was free to refer them to court-martial without explanation under R.C.M. 601(b), and R.C.M. 604(b) does not bar that referral"). Also, this referral is not more onerous to the accused as the forum is unchanged and the accused's punitive exposure has been reduced by three years, nor as more amply discussed below does the court agree that the accused has demonstrated any prejudice resulting from the withdrawal and dismissal of charges and preferral followed by referral of new charges to this court-martial.

Leaving aside the fact that the current charges are not the same charges withdrawn from the court-martial on 24 October 2023, the record reflects that the Convening Authority

[3] The Government took the position at the Article 39a that this was a distinction without a difference.

withdrew and dismissed the 11 May 2023 charges because (at a minimum) the attempted aggravated assault charge was unsupported by probable cause and the propriety of a general court-martial was in question. The Government arrived at the realization of insufficient evidence during "a case brief during final pre-trial preparations" and as a result of "[q]uestions raised during this case brief" and so advised the Convening Authority. The court does agree with the Defense that this assessment should have been made by the prosecution much earlier in the process notwithstanding the lack of an Article 32 preliminary hearing prior to the first court-martial. For example, PS1 [redacted] statements during his interview with Trial Counsel on 29 August 2023 undercut any circumstantial evidence of the accused's intent to inflict bodily harm on PS1 [redacted], a required element of the charge of attempted aggravated assault. That said, the standard to determine whether the convening authority has acted properly in withdrawing and then re-referring charges post-arraignment is not an absence of any Government error or oversight but whether there was a "legitimate command reason which does not 'unfairly' prejudice an accused in light of the particular facts of a case." Underwood, 50 M.J. at 276. As a general matter, "[t]here is no basis for the notion that the Government may not correct its errors by starting over." United States v. Grijalva, 83 M.J. 669, 675 (C.G.C.C.A. 2023). Even after arraignment, an "intent to ensure that all appropriate charges [are] brought against [an accused] in the appropriate forum . . . is not improper." Burnham, No. NMCCA 200700233, 2007 CCA LEXIS 249, at *16.

Implicit in the Defense argument is the notion that, having realized that at a minimum the most serious charge on the charge sheet was unsupported by probable cause, the Government was nonetheless required to either go forward on all charges, placing the accused in jeopardy of a conviction on insufficient evidence, go forward at a general court-martial only on any remaining charges notwithstanding their special-court-martial-level penalties, or abandon the prosecution of the accused altogether. On the facts of this case and in light of the Defense's failure to demonstrate any prejudice to the accused, the court disagrees.

The Defense cites United States v. Mann, 32 M.J. 883, 887 (N.M.C.M.R. 1991), for the proposition that "neither a delayed appreciation of the seriousness of the offenses nor the discovery of additional evidence of the accused's guilt is a proper reason for withdrawal after arraignment." However, Mann is distinguishable for the following reasons: (1) as noted above, the proposition in Mann is not the same as the reason for withdrawal in this case; (1) Mann involved the withdrawal and re-referral of identical charges; (2) Mann involved withdrawal of charges from a special court-martial and re-referral of the same charges to the more onerous forum of a general court-martial; (3) the withdrawal in Mann was prompted when the accused sought to enter pleas due to the unexpected decision of a co-conspirator during an Article 39a to waive his privilege against self-incrimination and testify on behalf of the Government; and (4) the court in Mann explicitly declined "to address the situation where the Government withdraws charges after arraignment and rerefers the same charges or the same charges with additional offenses to the same type of court-martial with no authorization to impose any greater punishment." Id. at 884-887. Accordingly, the court in Mann was certainly not

addressing the situation where the Government withdraws charges after arraignment, the accused has never sought to plead guilty to the original charges, different charges are referred to the same court-martial, and lesser punishment is authorized.

Turning to the factors in Koke, 32 M.J. at 881, according to CDR [redacted] the withdrawal was done for the "articulable reason" that in essence the most serious charge on the charge sheet was unsupported by probable cause and the current forum possibly exaggerated the seriousness of the accused's offenses. The withdrawal was in response to "a case brief during [the Government's] final pre-trial preparations" in which "[q]uestions raised during this case brief" raised "a substantial question concerning the appropriateness of the original referral decision." While this realization should have come earlier as it appears rooted in nothing more than a closer review of the case by supervisory counsel, nonetheless the Defense has never contested the accuracy of this belated assessment; on the contrary, the Defense's primary complaint is that had the case gone forward on the original charges, the accused would have been acquitted. The record is devoid of any evidence of "retribution for the assertion of a right by the accused." Nor is there evidence of "harassment of the accused" other than the delay of trial itself, and the court notes that the accused has never requested a speedy trial. Finally, the withdrawal is not "arbitrary or unfair" to the accused, "considering all the facts and circumstances of [the] case."

The Defense asserts that the accused was prejudiced in the following ways: (1) the accused faces greater punitive exposure; (2) full body camera video taken by Officer [redacted] of the Oakland Police Department, "which contains comments by AZC Benton to law enforcement prior to receiving her rights," will now come in as evidence of obstruction of justice whereas at the prior court-martial the Government had not yet decided whether they would introduce the full body camera video; (3) "the alleged violations in Benton I would permit good character evidence for each of the charges presented, whereas the charges in Benton II do not fully permit that evidence"; (4) the Government "received significant information from the 39(a) hearing [in the prior court-martial], which identified issues with their case," and the Defense lost the benefit of any rulings that may have been beneficial to the Defense; (5) the prior court-martial "took up space on the docket, and the Court's time and attention until the case was improperly withdrawn days before trial"; (6) "the Defense relied on the withdrawal and dismissal of these charges;" and (7) the Defense has been unable to investigate unlawful command influence.

Taking each of the claims of prejudice in turn, the court first disagrees, as noted above, that the accused faces greater punitive exposure in this court-martial.

Second, the Defense does not explain why the full body camera video of the responding officer would not have been admissible at the prior court-martial. The Defense did not file any motion in limine at the prior court-martial to exclude any portion of the body camera video nor

any motion to suppress the statements of the accused, and the Defense concedes that the Government was contemplating admitting the full body camera video in the prior court-martial.

Third, at the prior court-martial, the Defense filed a motion to compel the production of character witnesses who would testify regarding the accused's good military character and also her character for truthfulness. The Defense asserted that this character evidence was relevant to all the charges. Specifically as to good military character, the Defense argued that none of the charges were listed in M.R.E. 404(a)(2)(A), and the accused's good military character was relevant to the terminal element of negligent discharge of a firearm in violation of Article 134, namely that the conduct was of a nature to discredit the armed forces. The Government conceded the production of those witnesses, but challenged the relevance of good military character to the charges and asked the court to rule on the relevance of good military character in advance of trial. Before any ruling by the court, the Government withdrew and dismissed the charges.

As in the prior court-martial, none of the current charges are listed explicitly in M.R.E. 404(a)(2)(A) as precluding evidence of good military character. Accordingly, as in the prior court-martial, the Defense is free to argue in this court-martial that good military character is relevant to any element of a charged offense. M.R.E. 404(a)(2)(A)(vi). Nor has the Defense explained why, with the sole exception of the Article 134 charge in the prior court-martial, the court is any more or less likely to admit good military character in this court-martial.

Turning to the Article 134 charge at the prior court-martial, the offense of negligent discharge of a firearm in violation of Article 134 required proof that, under the circumstances, the accused's conduct was of a nature to discredit the armed forces. Just because an Article 134 offense is charged does not make evidence of good military character automatically relevant, United States v. Cooper, 11 M.J. 815, 816 (A.F.C.M.R. 1981), but certainly raises the probability of its admission. See also United States v. Prince Brown, No. ARMY 20160195, 2018 CCA LEXIS 107, at **17-20 (A.C.C.A. February 28, 2018). However, let us assume that the court had admitted good military character in defense of the Article 134 charge at the prior court-martial. Since the accused is not charged with Article 134 now, it is difficult to see how the Defense would be prejudiced by the loss of a defense to a charge that is not before the court. Nor, assuming that the court had admitted good military character in defense *only* of the Article 134 offense, is the Defense entitled to any unlawful "spill over" effect that might have occurred at the prior court-martial.

Fourth, the Defense points to no reason why the court would have ruled differently on any motions before the court in the prior court-martial that were likewise presented in this court-martial. The military judge is the same. Moreover, the court in this court-martial, at the Defense request, considered the arguments of the parties at the Article 39a in the prior court-martial.

Nevertheless, the Defense argues that the Government "received significant information from the 39(a) hearing [in the prior court-martial], which identified issues with their case." The Defense argues that the "39a hearing in Benton I clearly pointed out a lack of evidence regarding the Destruction of Property Charge because there had been no discovery regarding the amount of damage inflicted to the tire to justify the amount listed on the charge sheet." The alleged amount of damage was $150.00. Contrary to the Defense's claim, on 30 August 2023, the Government provided in discovery the R.C.M. 701 disclosure regarding PS1 [redacted] interview by Trial Counsel in which he stated that he "had to replace his tire and get a new wheel. The cost was approximately $300." Moreover, the court has reviewed the recording of the 13 October 2023 Article 39a. That recording does not contain any discussion regarding the destruction of property charge.

The Defense also argues that "[t]he hearing also pointed out the Government had not requested or completed ballistic or other testing on the alleged weapon that would confirm whether the weapon had actually been fired and potentially by whom." However, the Defense conceded at the 6 March 2024 Article 39a that the Government has apparently chosen not to take advantage of any extra time provided by the withdrawal and dismissal of the 11 May 2023 charges as they still have not completed any testing on the weapon at issue. Accordingly, this weakness in the Government's case remains and is as useful to the Defense in this court-martial as in the prior court-martial.

Fifth, the Defense asserts that the prior court-martial "took up space on the docket, and the Court's time and attention until the case was improperly withdrawn days before trial." The Defense simply does not explain how this is prejudicial to the accused.

Sixth, the Defense argues that they "relied" on the withdrawal and dismissal of charges. Since the Defense was notified immediately that the Government intended to prefer new charges, the court is unsure what precisely the Defense means by this argument. If instead they simply mean that the Government's initial, purported withdrawal and dismissal of charges created confusion until the Convening Authority actually withdrew and dismissed the charges, the Defense does not explain how that has prejudiced the accused in these court-martial proceedings other than stating summarily that they filed standard pretrial matters in this case before the withdrawal and dismissal of the 11 May 2023 charges.

Finally, the Defense asserts they have been unable to further investigate unlawful command influence. However, the Defense does not explain in what way they have been prevented from doing so. The Defense has not filed with this court any motion to compel discovery relevant to unlawful command influence. If the Defense's argument is simply a reference to the Convening Authority's refusal to speak directly to the Defense and the court's denial of the Defense motion to compel the testimony of the Convening Authority at the Article 39a, the Defense has spoken with the Convening Authority's Staff Judge Advocate, and CDR [redacted] testified at the Article 39a. The court found CDR [redacted] testimony to be credible.

The record does not reflect that the Convening Authority would say something different from his Staff Judge Advocate. Rather, the record uniformly supports CDR [redacted] explanation for the withdrawal and dismissal of the 11 May 2023 charges.

Viewing the record and balancing the interests of the accused and the interests of the Government, the only possible prejudice to the accused is the delay in being brought to trial. Yet, the accused has not been in any form of pretrial restraint and has never requested a speedy trial. Indeed, the Defense agreed to the trial dates in this court-martial of 22 through 26 April 2024, and the case has now only been continued one week until 29 April.[4] While the Defense asserts that they needed time to submit this motion, examining the substance of the motion and the enclosures and considering the passage of time from the withdrawal and dismissal of the 11 May 2023 charges on 24 October 2023 to the referral of the 8 November 2023 charges on 18 January 2024, the court fails to perceive why the motion could not have been submitted in conjunction with a request for a speedy trial if desired.

5. Ruling

For all the above reasons, the Defense motion is DENIED.

SO ORDERED this 23rd day of April, 2024.

KELLY.KIMBERLY.JOY.[redacted] Digitally signed by KELLY.KIMBERLY.JOY.[redacted] Date: 2024.04.23 10:49:46 -04'00'

K. J. KELLY
CDR, JAGC, USN
Military Judge

[4] The Assistant Defense Counsel was due to PCS on 29 April 2024. However, she affirmed to the court that a change in her PCS date would not distract her from the accused's case or detract from her performance in any way. Moreover, the accused affirmed that she was not concerned about any conflict of interest on the part of the Assistant Defense Counsel.

NAVY-MARINE CORPS TRIAL JUDICIARY
NORTHWEST JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES	)	
	)	**RULING ON GOVERNMENT MOTION**
v.	)	**FOR RULING ON ADMISSIBILITY OF**
	)	**BODY WORN CAMERA RECORDINGS**
CHERELLE BENTON	)	
AZC/E-7 USN	)	**25 April 2024**
	)	
	)	

---

1. Nature of the Motion

On 10 April 2024, the Government moved this court pursuant to R.C.M. 906(13) "for a ruling on the admissibility of a redacted portion of the police body worn camera footage recorded on 5 August 2022." (Appellate Exhibits XXVII and XXVIII). The body cameras were worn by Officer [redacted], Oakland Police Department, and Officer [redacted], Oakland Police Department. The Defense submitted a responsive pleading in partial opposition to the Government motion on 17 April 2024, identifying specific objections to portions of the body camera footage. (Appellate Exhibits XXXVI and XXXVII). The court held an Article 39a on 19 April 2024 at which both parties presented argument. Additionally, the Government presented a new version of a redacted transcript of the body camera footage from Officer [redacted] in which the Government conceded some of the Defense objections. (Appellate Exhibit LIII) The court and parties discussed this version on the record at the Article 39a. Following the hearing, on 22 April 2024, the Government provided a final proposed version of redacted transcripts of both Officer [redacted] and Officer [redacted] body camera footage that they seek to introduce at trial. (Appellate Exhibits LI and LII). The redacted body camera footage itself has been marked as Appellate Exhibits XLIX and L. The Defense's objections currently pertain only to portions of Officer [redacted] body camera footage.

2. Findings of Fact

a. On 8 November 2023, the accused was charged with 1 specification of firearm discharge, endangering human life in violation of Article 114, U.C.M.J., 1 specification of simple assault in violation of Article 128, U.C.M.J., and 1 specification of obstructing justice in violation of Article 131b, U.C.M.J. The charges were referred to this General Court-Martial on 18 January 2024.

b. The charges arose from an argument between the accused and PS1 [redacted]n, U.S. Navy, in Oakland, Tennessee on 5 August 2022. More specifically, the charges were based on

the following facts:

(1) Officers [redacted] and [redacted] of the Oakland, Tennessee Police Department (OPD) were dispatched to the scene following an anonymous report of a loud verbal altercation and possible gunshot. When they arrived at the scene of the alleged altercation, they observed a silver Mercedes sedan with the trunk and doors open and "multiple contents of the vehicle in the street as if they had been thrown from it." The accused was standing on the passenger side of the vehicle. The accused initially denied that any "fight" happened before admitting arguing with her boyfriend, and she denied any gunshot. She informed the officers that the car belonged to her boyfriend. The accused then called her boyfriend and informed him that the police were present. He arrived shortly thereafter.

(2) The accused's boyfriend, PS1 [redacted], U.S. Navy, confirmed to the officers that he and the accused had a fight, and the accused fired a gun. The accused then admitted that she fired a gun, that the gun belonged to her, and that the gun was located in the glove compartment of her boyfriend's car. PS1 [redacted] responded, "Oh so you were trying to set me up?" PS1 [redacted] subsequently elaborated that the accused fired the gun in his direction from the front porch of her house. He was at the driver's door of his car when he saw a red laser and heard the gunshot. The bullet struck the right, rear tire of his car, and PS1 [redacted] ran away.

(3) One of the officers retrieved the gun from the glove compartment of PS1 [redacted] car. The accused's gun is a silver "Kimber 9mm Micro 9" with a red laser. At the time of its seizure, the gun had 3 rounds of ammunition in the magazine and 1 in the chamber.

(4) The officers took the accused into custody, advised her of her Miranda rights, and questioned her further regarding the incident. The accused again admitted firing the gun from the porch area but claimed that she was not aiming the gun at PS1 [redacted]

c. Officers [redacted] and [redacted] were wearing body cameras, which captured footage of their encounter with the accused and PS1 [redacted] at the scene of the alleged shooting.

d. On 29 August 2023, following the Navy's assumption of jurisdiction over this case, PS1 [redacted] participated in a telephonic interview with detailed Trial Counsel and a trial paralegal. PS1 [redacted] account of events on 5 August 2022 differed in certain respects from his account to the OPD officers. The R.C.M. 701 disclosure summarizes PS1 [redacted] statements as follows:

> a. On the night of the charged offenses, PS1 [redacted] remembers being in a verbal altercation with AZC Benton. He stated he does not remember the specifics about which they were arguing. He reported that the verbal argument didn't last too long but at some point AZC Benton became physical. PS1 [redacted] reported he was attempting to leave and anything

physical from him towards AZC Benton would have been a result of him trying to leave/protect himself.

b. When PS1 [redacted] left the house, he went to his car and was putting bags in his car and heard the gunshot. He looked up and saw AZC Benton holding her firearm and he asked something along the lines of, "did you just shoot at me". He doesn't recall the firearm being pointed at him at that time and he doesn't remember AZC Benton's response to his question.

c. . . . [A]fter she discharged the firearm, he went back into AZC Benton's home and they talked about it briefly and then he left to walk around the block. When he was walking around the block is when AZC Benton called him to tell him the police were there.

d. PS1 [redacted] provided that AZC Benton maintained a concealed carry license and he had seen the firearm she owned in her home before. . . . [S]he never kept her firearm in his vehicle. . . .

h. PS1 [redacted] . . . believes this was a bad judgment call on part of AZC Benton and he wants to put it all behind him and move on.

3. General Principles of Law

M.R.E. 802 provides that hearsay is not admissible in courts-martial unless a federal statute or the Military Rules of Evidence provide otherwise. Hearsay is defined in M.R.E. 801(c) as "a statement that: (1) the declarant does not make while testifying at the current trial . . . ; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." M.R.E. 801(a) defines a statement as "a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion." M.R.E. 801(d) clarifies that an opposing party's statement is not hearsay when offered against an opposing party and when either made by the party in an individual or representative capacity or when the party manifested that she adopted the statement or believed it to be true.

Notwithstanding the exclusion of an accused's statements under M.R.E. 801(d)(2) from the definition of hearsay when offered into evidence by the Government and the inclusion of nonverbal conduct in M.R.E. 801(a)'s definition of "statement," M.R.E. 304(a)(2) provides that "[f]ailure to deny an accusation of wrongdoing is not an admission of the truth of the accusation if at the time of the alleged failure the person was under investigation." See also United States v. Cook, 48 M.J. 236, 239-241 (C.A.A.F. 1998)(observing that the gist of the substantially identical predecessor rule to M.R.E. 304(a)(2) "is that silence by an accused who is

under investigation will not logically support an inference of guilt" and is therefore not relevant).

An exception to the general prohibition against hearsay statements is an excited utterance within the meaning of M.R.E. 803(2). That rule defines an excited utterance as "[a] statement relating to a startling event or condition, made while the declarant was under the stress of excitement it caused."

The Court of Appeals for the Armed Forces has broken down the test for admitting an excited utterance into three parts:

> (1) "the statement must be spontaneous, excited or impulsive rather than the product of reflection and deliberation"; (2) "the event [that prompts the utterance] must be startling"; and (3) "the declarant must be under the stress of excitement caused by the event."

United States v. Smith, 83 M.J. 350, 356 (C.A.A.F. 2023). The proponent of the evidence has the burden of demonstrating by a preponderance of the evidence that each part of the test has been satisfied. Id.

As to the first part of the test, "'[t]he implicit premise [of the exception] is that a person who reacts to a startling event or condition while under the stress of excitement caused thereby will speak truthfully because of a lack of opportunity to fabricate.'" Id. at 355. As to the second part of the test, "[t]here is no requirement that the excited utterance directly mention the startling event or condition, or that the startling event or condition must be the underlying offense. Id. at 358. The startling occurrence may be only related to the underlying offense. Id. Finally, as to the third part of the test,

> [i]n determining whether a declarant was under the stress of a startling event at the time of his or her statement, courts have looked to a number of factors. These may include: "the lapse of time between the startling event and the statement, whether the statement was made in response to an inquiry, the age of the declarant, the physical and mental condition of the declarant, the characteristics of the event, and the subject matter of the statement."

United States v. Donaldson, 58 M.J. 477, 483 (C.A.A.F. 2003).

4. Analysis and Conclusions of Law

1. First Defense Objection

OFFICER [redacted]: So, I'll explain to you why we're out here.
OFFICER [redacted] All right. Someone called about ya'll having a little domestic dispute, and whatnot. I appreciate that. Thank you. You mind holding onto that?
OFFICER [redacted] All right, someone said there was a gunshot, okay?
OFFICER [redacted] That's why we're out here doing what we're doing. Was there a gunshot?
[redacted] ~~There was a gunshot.~~
OFFICER [redacted] There was a gunshot. Where's the gun?
[redacted] ~~I don't know.~~
OFFICER [redacted] Who shot the gun?
[redacted] ~~She did.~~

The Defense objects to Officer [redacted] questions and PS1 [redacted] responses as inadmissible hearsay. The Government concedes that PS1 [redacted] responses to Officer [redacted] constitute inadmissible hearsay and have redacted his responses from the body camera footage they seek to introduce. However, the Government asserts that Officer [redacted] *questions* are admissible as they were directed to both PS1 [redacted] and the accused and place the accused's silence in context, rendering her silence an admission. However, because the accused was currently under investigation at the time of the questioning, M.R.E. 304(a)(2) precludes introduction of her silence as an admission. Accordingly, Officer [redacted] questions and the accused's response of silence are **inadmissible**.

2. Second Defense Objection

OFFICER [redacted] Okay, where's the gun? It's in the car?
CHERELLE BENTON: In the glove box.
OFFICER [redacted] In the glove box.
[redacted] Nice. You trying to set me up or something?
CHERELLE BENTON: I didn't---- I didn't try to call
OFFICER [redacted] Look, look. They didn't--neither one of y'all called.

The Government asserts that PS1 [redacted] response, "Nice. You trying to set me up or something?" does not constitute hearsay as it was a question rather than an assertion. The question, however, does not make sense unless PS1 [redacted] was also asserting that the accused placed the gun in the glove compartment of his car. The preface to the question, "Nice", underscores this assertion. Nor can the Government credibly argue that they do not wish to introduce this statement for the truth of the matter asserted, namely that the accused rather than PS1 [redacted] placed the gun in the glove compartment. Nevertheless, the Government also argues the question was an excited utterance as it was a spontaneous response to a startling event spoken while PS1 [redacted] was still under the stress of excitement caused by the event. The court disagrees that the firing of the gun was the startling event that prompted PS1 [redacted] response. Rather, the startling event was the discovery that the gun was in the glove compartment of PS1 [redacted] car. PS1 [redacted] statements were not in response to any

questioning but an immediate reaction to this discovery. However, in the body camera footage offered to the court, PS1 [redacted] tone of voice is not excited, nor is his voice raised. Moreover, because Officer [redacted] has moved to the other side of the car at the time of PS1 [redacted] response, PS1 [redacted] facial expression is not visible nor any other physical reaction. In short, the Government has not as yet met their burden of demonstrating that PS1 [redacted] was under the stress of any excitement, and his statements are **inadmissible**. The Government may renew, outside the presence of the members, their request to admit the statement if they lay additional foundation at trial.

3. Third Defense Objection

CHERELLE BENTON: This sucks.
OFFICER [redacted] It does.

The Defense objects to the introduction of the accused's observation during her encounter with the police that "[t]his sucks" as irrelevant under M.R.E. 402 and unfairly prejudicial under M.R.E. 403. The Defense first asks what fact of consequence is made more or less likely by the accused's observation? The court agrees that, when viewed completely in isolation, the accused's observation has little relevance. However, when viewed in context, her comment followed questions by Officer [redacted] about whether she collected any spent shell casings after she fired her gun and whether he would find any in the vicinity of the shooting and her response that she had not collected any casings and they should still be somewhere in the vicinity. In short, the accused's demeanor when and immediately after responding to questions regarding the charged offenses is highly relevant to the members' duty to assess the credibility of her admissions or statements, and the probative value is not substantially outweighed by any danger of unfair prejudice. Indeed, the court does not believe members will be surprised or have any emotional reaction (other than perhaps agreement) to the accused's observation that her circumstances, regardless of guilt or innocence, "sucked." As to Officer [redacted] comment, the court will be instructing members that the officers' statements or comments are not to be considered for the truth of the matter asserted but only for the purpose of placing the accused's statements in context and understanding the accused's statements. Accordingly, this portion of the body camera footage is **admissible**.

4. Fourth Defense Objection

CHERELLE BENTON: Please don't take me to jail.
. . .
OFFICER [redacted]: . . . You admitted to shooting a gun. . . .
Do you want to give a written statement, your side of the story? Like I said----
CHERELLE BENTON: I just----
OFFICER [redacted] ----you know, having your rights in mind, it's completely up to you. I'm not going to try to talk you into anything.

CHERELLE BENTON: I just don't want to go to jail. I don't want either of us to go to jail.
OFFICER [redacted] I understand.
CHERELLE BENTON: (inaudible) ...fucked up.
OFFICER [redacted] Is he in the Navy?
CHERELLE BENTON: He is. We both are.
OFFICER [redacted] Y'all work in the same section?
CHERELLE BENTON: He's a detailer. I'm in placement, so, again, I get it. Domestic dispute, but I swear to God, I was not trying to----
OFFICER [redacted] Well, it's state law. If there's any evidence of a domestic and a possible primary aggressor, I have to. I have no choice. It's not even me charging you. . . .
CHERELLE BENTON: Please.
OFFICER [redacted] What we're going to do now is we're going to place you in the back of my car. I'm going to talk to Cameron. And then we're going to go from there. Okay?
CHERELLE BENTON: So, I am going to jail?
OFFICER [redacted] As of right now, yeah.
CHERELLE BENTON: You keep saying, "As of right now."
OFFICER [redacted] I still have to continue my investigation, okay?
CHERELLE BENTON: Gotcha.

The Defense objects to this portion of the body camera footage first on the basis that the accused's repeated pleas to avoid jail and Officer [redacted] explanations why he is required to take her to jail are irrelevant under M.R.E. 402 and unfairly prejudicial under M.R.E. 403. Additionally, the Defense asserts that introduction of evidence that the accused did not accept the officer's invitation to provide a written statement violates the accused's rights under the Fifth Amendment of the United States Constitution, and the evidence is in any event irrelevant and unfairly prejudicial. Finally, the Defense argues that the accused's statement, "Domestic dispute, but I swear to God, I was not trying to----" is inadmissible under M.R.E. 403 because she is cut off from completing her sentence by the officer.

The Government argues that the above portion is admissible as evidence of the accused's ongoing efforts to obstruct justice. Namely, she was attempting to manipulate the course of the investigation by resisting going to jail, including trying to minimize the "[d]omestic dispute," and declining to make a written statement.

First, the court notes that the Defense appears to be making a late motion to suppress. Leaving that to one side, declining to make a written statement after waiving one's right to remain silent and agreeing to make an oral statement is not necessarily the same as an invocation of the right to silence. "[O]nce a suspect waives the right to silence, interrogators may continue questioning unless and until the suspect unequivocally invokes the right to silence." United States v. Lincoln, 42 M.J. 315, 320 (C.A.A.F. 1995). "The term 'equivocal' means 'having different significations equally appropriate or plausible; capable of double interpretation; ambiguous.'" United States v. Rittenhouse, 62 M.J. 509, 511 (A.C.C.A. 2005). "In

assessing whether a person provided an unambiguous invocation of Miranda rights, . . . the invocation must be 'sufficiently clear[] that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney' or to remain silent." United States v. Delarosa, 67 M.J. 318, 324 (C.A.A.F. 2009). Thus, this court contrasts this case from, for example, United States v. Shawn Loper, No. NMCM 9601747, 1998 CCA LEXIS 205, at **3-9 (N.M.C.C.A. April 30, 1998), in which, when asked to provide a written statement, the accused requested an attorney. Nonetheless, as explained by the officer to the accused, the accused's right to elect whether to speak or remain silent includes the right to choose how much and in what form to speak. By definition, exercising one's rights during an investigation cannot be evidence of (i.e., relevant to prove) obstruction of justice. Nor is the court convinced that the reluctance to go to jail says anything about whether or not she intended to obstruct justice. A fully cooperative suspect would equally seek to avoid the undoubtedly unpleasant experience of incarceration in a local jail. Accordingly, the above excerpt is **inadmissible** except as provided below.

The only portion of the above excerpt that the court finds admissible is the following:

OFFICER [redacted]: Is he in the Navy?
CHERELLE BENTON: He is. We both are.
OFFICER [redacted] Y'all work in the same section?
CHERELLE BENTON: He's a detailer. I'm in placement, so, again, I get it. Domestic dispute, but I swear to God, I was not trying to----

The Defense argues in essence that this portion of the body camera footage should be excluded under M.R.E. 403 because the accused is interrupted by the officer. However, even if interrupted, the logical interpretation of the accused's statement in context is an exculpatory one, namely an assertion that she was not trying to shoot or harm PS1 [redacted] In short, there is some relevance to the accused's statements and any danger of unfair prejudice is vanishingly small if not non-existent.

5. Ruling

For all the above reasons, the Government motion is GRANTED in part and DENIED in part.

SO ORDERED this 25th day of April, 2024.

KELLY.KIMBERLY.JOY [redacted] Digitally signed by KELLY.KIMBERLY.JOY [redacted] Date: 2024.04.25 09:32:17 -04'00'

K. J. KELLY
CDR, JAGC, USN
Military Judge

NAVY-MARINE CORPS TRIAL JUDICIARY
NORTHWEST JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES	)	
	)	RULING ON GOVERNMENT MOTION
v.	)	IN LIMINE TO PRE-ADMIT EVIDENCE
	)	(911 Call)
CHERELLE BENTON	)	
AZC/E-7 USN	)	26 April 2024
	)	
	)	

---

1. **Nature of the Motion**

On 10 April 2024, the Government moved this court pursuant to R.C.M. 906(13) "to pre-admit a redacted portion of a recorded 911 call as a regularly conducted business record under Military Rule of Evidence 803(6)." (Appellate Exhibits XXV and XXVI). The Defense submitted a responsive pleading in opposition on 17 April 2024. (Appellate Exhibits XXXIV and XXXV). The court held an Article 39a on 19 April 2024 at which both parties presented argument.

2. **Findings of Fact**

a. On 8 November 2023, the accused was charged with 1 specification of firearm discharge, endangering human life in violation of Article 114, U.C.M.J., 1 specification of simple assault in violation of Article 128, U.C.M.J., and 1 specification of obstructing justice in violation of Article 131b, U.C.M.J. The charges were referred to this General Court-Martial on 18 January 2024.

b. The charges arose from an argument between the accused and PS1 [redacted] U.S. Navy, in Oakland, Tennessee on 5 August 2022, which culminated in the accused firing a gun. Police were alerted when the Oakland County Sheriff's Office received a 911 call from a neighbor of the accused who reported hearing a gunshot. She indicated that, before calling, she had called her husband to check on him, checked on her children, and activated her house alarm.

3. **Statement of Law and Discussion**

M.R.E. 802 provides that hearsay is not admissible in courts-martial unless a federal statute or the Military Rules of Evidence provide otherwise. Hearsay is defined in M.R.E. 801(c) as "a statement that: (1) the declarant does not make while testifying at the current trial . . . ; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." A

"statement" in turn is defined as "a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion." M.R.E. 801(a). The declarant is the person who made the statement. M.R.E. 801(b). "Implicit in the definition is that the 'statement' must have been made by a human." United States v. Duncan, 30 M.J. 1284, 1288 (N.M.C.M.R. 1990); see also United States v. Greska, 65 M.J. 835, 844 (A.F.C.C.A. 2007). Thus, not every "business record" "in . . . its literal sense of any record made, possessed, or used by a business" will be hearsay, the most common example being computer-generated records. Duncan, 30 M.J. at 1288. The latter are not hearsay, albeit for introduction at trial they will require authentication.

In this case, the offered evidence is a 911 recording. This evidence is a machine's capture of the 911 call. Accordingly, this court questions whether an audio recording in and of itself, leaving aside for one moment its contents, is hearsay at all because it is machine-generated, i.e., regardless of what the recording captures, it is not itself the statement of a human being. A close analogy would be a photograph such as in Greska or video taken by police of a crime scene.

Citing Bemis v. Edwards, 45 F.3d 1369, 1372 (9th Cir. 1995), the Government nevertheless takes the position that the recording is admissible as a business record under M.R.E. 803(6). For the reason articulated above, the court does not believe the recording itself is a "business record" within the meaning of M.R.E. 803(6). Thus, the appropriate rule of authentication is not M.R.E. 902(11), but instead M.R.E. 902(13), and any certificate provided for self-authentication must satisfy the requirements of that rule. While the requirements of M.R.E. 902(11) and M.R.E. 902(13) overlap, the certificate of authentication provided by the Government in this case does meet all the requirements of M.R.E. 902(13), and their motion to "pre-admit" is denied.

Moreover, as conceded by the Government, the citizen caller was not an employee of the Oakland County Sheriff's Office nor under any business duty to report her observations, and therefore her observations "cannot be given the presumption of reliability and regularity accorded a business record." United States v. Pazsint, 703 F.2d 420, 425 (9th Cir. 1983); see also United States v. Brandon Leach, No. ACM 39805, 2022 CCA LEXIS 76, at *13 (A.F.C.C.A. February 3, 2022).

In this regard, the Government asserts that the caller's statements constitute present sense impressions under M.R.E. 803(1). M.R.E. 803(1) provides the following exception to the general prohibition against hearsay: "A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it." "'The underlying rationale of the present sense impression exception is that substantial contemporaneity of event and statement minimizes unreliability due to defective recollection or conscious fabrication. There is no *per se* rule indicating what time interval is too long under Rule 803(1) . . .'" United States v. Dean, 823 F.3d 422, 427 (8th Cir. 2016); see also United States v. Prince Brown, No. ARMY 20160195, 2018 CCA LEXIS 107, at **29-33 (A.C.C.A. February 28,

2018)(holding "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). If a statement describing an event or condition is not precisely contemporaneous with it, a central question of admissibility will be whether the event occurred "immediately after" within the meaning of M.R.E. 803(1).

The Defense argues that it is not clear how much time had passed from the caller hearing the gunshot to the 911 call. The court notes that the caller indicates that the gunshot occurred between her husband's departure from her house and her call to 911. In the 911 call, she states, "My husband *just* left. There was a gunshot." (Emphasis added). She then indicates that, after hearing the gunshot, she called her husband to check on him, checked on her children, and turned on the house alarm before calling 911. The caller's use of the phrase "just left," however, is ambiguous and could mean either "just left" before the gunshot or "just left" before the 911 call. She stated she was alarmed by the gunshot, from which one might infer that she would not have waited a great deal of time before calling. Although she saw red lights outside while on the phone with the 911 operator, she determined that "there is just a car leaving." In other words, no police had yet arrived at the time of her call. In short, it is certainly possible that the 911 call occurred within minutes of the gunshot. Nevertheless, the court concludes that the Government has thus far failed to lay sufficient foundation regarding the lapse of time between the gunshot and the 911 call to support the admission of the 911 call as a present sense impression.

The Defence also argues that the caller's statements regarding her children should be excluded under M.R.E. 403. However, while certainly prejudicial, it is not clear that the statements are unfairly prejudicial. The Government has alleged a violation of Article 114, willful discharge of a firearm under circumstances such as to endanger human life. In other words, the Government must prove that the discharge occurred under circumstances such as to endanger human life, i.e., there must be a reasonable potentiality for harm to human beings in general. See United States v. Irvin, 80 M.J. 722, 736-737 (N.M.C.C.A. 2020). However, the court does not have sufficient information to assess whether the caller's statements are pertinent to this issue.

Finally, the court agrees with the Defense that the redacted 911 call includes statements by the caller that relate more than her observations of an event or condition in the time period directly preceding the 911 call, such as her name, her address, her phone number, that her neighborhood was new construction, and her observation that they did not normally hear gunshots in their neighborhood. Accordingly, those statements are inadmissible as present sense impressions.

The Government also contends that the 911 call should be introduced for the "effect on the listener," i.e., the police, to explain the arrival of police at the accused's home. The responding officers will be testifying at trial, including presumably explaining their arrival in

front of the accused's home. As noted by the Defense, the reason for their presence is not a fact in contention. In short, while the 911 call may be admissible on other grounds, it adds nothing to the officers' testimony.

The court concludes that the Government has failed to lay sufficient foundation to pre-admit the 911 call. The Defense also claims that the Government misled the Defense by stating in paragraph t. of a discovery response dated 29 January 2024, "At this time the Government does not intend to use any substitute for the physical presence and live in-court testimony of any witness. If that changes, the Government will notify the Defense in a timely manner." The Defense asserts they interpreted this response to include the 911 call, and this late motion by the Government has prevented them from making an earlier request for the caller's production as a witness. The court does not question the Defense's claim regarding how they interpreted this response. That said, a careful examination of the request to which the Government was responding in paragraph t. reveals that the request referenced rules governing *live* remote testimony of a witness, not the introduction of recordings. However, the court agrees that had the Government presented this motion at the Article 39a on 6 March 2024, this confusion could have been resolved at that time rather than on the eve of trial.

The Government asserts that motions to pre-admit are only due on the deadline for final matters. The court perhaps has a different view of what may be appropriately labeled a motion to pre-admit for purposes of final matters, and that view does not include anticipation of significant objections beyond those relating to routine foundational requirements if possible to litigate earlier.

5. Ruling

For all the above reasons, the Government motion to pre-admit is DENIED. Again, if the Government lays additional foundation addressing the court's concerns, they may seek to admit portions of the 911 call at trial.

Given the late date on which this issue is being litigated, the court also orders the production of the 911 caller if (1) the Government chooses to introduce the 911 call, and (2) the Defense requests her production as a witness.

SO ORDERED this 26th day of April, 2024.

KELLY.KIMBERLY.JOY.[redacted] Digitally signed by KELLY.KIMBERLY.JOY[redacted] Date: 2024.04.26 16:13:32 -04'00'

K. J. KELLY
CDR, JAGC, USN
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
Benton, Cherelle J.	Navy	E-7	[redacted]

5. CONVENING COMMAND	6. TYPE OF COURT-MARTIAL	7. COMPOSITION	8. DATE SENTENCE ADJUDGED
Navy Personnel Command	General	Members	May 3, 2024

SECTION B - FINDINGS

SEE FINDINGS PAGE

SECTION C - ADJUDGED SENTENCE

9. DISCHARGE OR DISMISSAL	10. CONFINEMENT	11. FORFEITURES	12. FINES	13. FINE PENALTY
Not adjudged	None	None	None	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
3	0	3 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
KELLY, KIMBERLY	Navy	O-5	May 3, 2024	KELLY.KIMBERLY.JOY.[redacted] Digitally signed by KELLY.KIMBERLY.JOY.[redacted] Date: 2024.05.03 14:49:06 -04'00'

37. NOTES

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	114	Specification:	**Not Guilty**	Guilty			134-N2
		Offense description	Wrongfully and willfully discharge a firearm under circumstances to endanger human life				
Charge II	128	Specification:	**Not Guilty**	Not Guilty			128-A-
		Offense description	Simple assault				
Charge III	131b	Specification:	**Not Guilty**	Guilty by Exception			134-U2
		Offense description	Obstructing justice				
		Exceptions and Substitutions	except for the words "moved a shell casing"				

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
Benton, Cherelle J.	E7	[redacted]

4. UNIT OR ORGANIZATION	5. CURRENT ENLISTMENT	6. TERM
Navy Personnel Command	7 June 2021	6 years

7. CONVENING AUTHORITY (UNIT/ORGANIZATION)	8. COURT-MARTIAL TYPE	9. COMPOSITION	10. DATE SENTENCE ADJUDGED
Commander, Navy Region Southeast	General	Members	3 May 2024

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.

On 9 May 2024, the Defense Counsel submitted a request to disapprove the finding of guilty for Charge I and the sole Specification thereunder (Violation of Article 114, UCMJ).

24. Convening Authority Name/Title	25. SJA Name
J. W. HEWITT, RDML, USN COMMANDER, NAVY REGION SOUTHEAST	[redacted] CDR, JAGC, USN
26. SJA signature [redacted]	27. Date 7/3/24

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.]

Modified Action, replacing my Action of 24 June 2024.

On 9 May 2024, the Defense Counsel submitted a request to disapprove the finding of guilty for Charge I and the sole Specification thereunder (Violation of Article 114, UCMJ). On 16 May 2024, the request was denied.

Prior to taking action on this case I had the opportunity to consult with the Staff Judge Advocate.

The findings are approved.

There was no plea agreement in this case.

Pretrial Confinement Credit - 3 days. Judicially Ordered Credit - 0 days. Total Credit - 3 days.

After completion of the Entry of Judgment, this case will be forwarded to Navy-Marine Corps Appellate Review Activity [redacted]

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:

30. Convening Authority's signature [redacted]

31. Date

23Jul24

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

ENTRY OF JUDGMENT

ENTRY OF JUDGMENT

SECTION A - ADMINISTRATIVE

1. NAME OF ACCUSED (LAST, FIRST, MI)	2. PAYGRADE/RANK	3. DoD ID NUMBER
BENTON, CHERELLE, J	E7	[redacted]

4. UNIT OR ORGANIZATION	5. CURRENT ENLISTMENT	6. TERM
Navy Personnel Command	7 June 2021	6 years

7. CONVENING AUTHORITY (UNIT/ORGANIZATION)	8. COURT-MARTIAL TYPE	9. COMPOSITION	10. DATE COURT-MARTIAL ADJOURNED
CNRSE	General	Members	03-May-2024

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 Article 114(c), Uniform Code of Military Justice, 10 U.S.C. § 914.
Plea: NOT GUILITY Finding: GUILTY

Specification: Wrongfully and willfully discharged a firearm under circumstances such as to endanger human life on or about 5 August 2022 by wrongfully and willfully discharging a Kimber 9mm pistol in a residential neighborhood.
Plea: NOT GUILTY Finding: GUILTY

Charge II: Violation of Article 128(a)(2), Uniform Code of Military Justice, 10 U.S.C. § 928.
Plea: NOT GUILTY Finding: NOT GUILTY

Specification: Assaulted PS1 [redacted], USN, on or about 5 August 2022 by pointing a Kimber 9mm pistol in his direction.
Plea: NOT GUILTY Finding: NOT GUILTY

Charge III: Violation of Article 131b, Uniform Code of Military Justice, 10 U.S.C. § 931b.
Plea: NOT GUILTY Finding: GUILTY BY EXCEPTIONS

Specification: Wrongfully moved a shell casing, placed her discharged firearm in the vehicle of PS1 [redacted], USN, and initially denied to law enforcement discharging the firearm on or about 5 August 2022 with intent to obstruct the due administration of justice.
Plea: NOT GUILTY Finding: GUILTY except the words "moved a shell casing"

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.

Members awarded no additional punishment.

There was no plea agreement in this case.

The Convening Authority approved the findings.

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)

N/A.

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

N/A.

15. Judge's signature:	16. Date judgment entered:
KELLY.KIMBERLY.JOY.[redacted] Digitally signed by KELLY.KIMBERLY.JOY.[redacted] Date: 2024.08.12 17:53:33 -04'00'	Aug 12, 2024

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

18. Judge's signature:	19. Date judgment entered:

APPELLATE INFORMATION

THERE IS NO APPELLATE INFORMATION AT THIS TIME

REMAND

THERE WERE NO REMANDS

NOTICE OF COMPLETION OF APPELLATE REVIEW