[redacted]

CERTIFIED RECORD OF TRIAL

(and accompanying papers)

of

BROWN	MICAH	J	[redacted]	E-3
(Last Name)	*(First Name)*	*MI*	*(DoD ID No.)*	*(Rank)*

NAVAL SUBMARINE SUPPORT COMMAND	U.S. NAVY	GROTON, CT
(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 MID-ATLANTIC

(Unit/Command of Convening Authority)

Tried at

NAVAL SUBMARINE BASE NEW LONDON, GROTON, CT 06349	On	20 MAR 19 ARRAIGN, 11 ARTICLE 39A SESSIONS, 12-16 OCT & 19 OCT 20
(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 MID-ATLANTIC
1510 GILBERT STREET
NORFOLK, VA 23511-2737

16 Sep 20

GENERAL COURT-MARTIAL AMENDING ORDER 1AT-19

The following member is excused from participation in the general court-martial convened by order 1-19, dated 10 January 2019, and amended by order 1F-19, dated 19 July 2019, order 1L-19, dated 18 September 2019, order 1AN-19, dated 6 March 2020, member excusal memo 5811 Ser 00J/164, dated 9 March 2020, order 1AQ-19, dated 22 July 2020, member excusal memo 5811 Ser 00J/477, dated 30 July 2020, and order 1AR-19, dated 31 July 2020, for the trial of Culinary Specialist (Submarines) Seaman Micah J. Brown, U.S. Navy.

Torpedoman's Mate First Class [redacted]

The following new members are hereby detailed:

Lieutenant [redacted];
Information Systems Technician First Class [redacted]
Logistics Specialist Second Class [redacted]; and
Sonar Technician (Submarines) Second Class [redacted]

The following members are detailed to this court-martial:

Lieutenant [redacted]
Lieutenant Junior Grade [redacted]
Senior Chief Electronics Technician Navigation Submarines [redacted]
Machinist's Mate, Nuclear Power First Class [redacted]
Culinary Specialist (Submarines) First Class [redacted]
Information Systems Technician First Class [redacted]
Electronics Technician Navigation (Submarines) First Class [redacted]
Machinist's Mate, Non-Nuclear (Submarine Auxiliary) First Class [redacted]
Electronics Technician (Navigation) First Class [redacted]
Operations Specialist Second Class [redacted]
Master-at-Arms Second Class [redacted]
Logistics Specialist Second Class [redacted]
Sonar Technician (Submarines) Second Class [redacted]
Information Systems Technician Second Class [redacted]
Sonar Technician (Submarines) Second Class [redacted]
Master-at-Arms Third Class [redacted];
Master-at-Arms Third Class [redacted];
Yeoman Third Class [redacted]; and
Electronics Technician Third Class [redacted].

The military judge is authorized to detail alternate members, if available, after voir dire [redacted]

C. W. ROCK
Rear Admiral, U.S. Navy
Commander, Navy Region Mid-Atlantic

CHARGE SHEET

ORIGINAL

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, MI)	2. SSN	3. RANK/RATE	4. PAY GRADE
BROWN, Micah J	[redacted]	CSSSN	E-3

5. UNIT OR ORGANIZATION	6. CURRENT SERVICE	
	a. INITIAL DATE	b. TERM
[redacted] NAVAL SUBMARINE SUPPORT CENTER	11 Feb 2015	4 yrs.

7. PAY PER MONTH			8. NATURE OF RESTRAINT OF ACCUSED	9. DATE(S) IMPOSED
a. BASIC	b. SEA/FOREIGN DUTY	c. TOTAL		
$2,300.80 ~~$2,176.80 SEC~~	$0.00 ~~$120.00 SEC~~	$2,300.80 ~~$2,296.80 SEC~~	PTC	31 July 2018 - Present

II. CHARGES AND SPECIFICATIONS

10.

CHARGE 1: VIOLATION OF UCMJ, ARTICLE 80

Specification 1 (Attempted Premeditated Murder): In that Culinary Specialist (Submarines) Seaman Micah J. Brown, [redacted] on active duty, did, onboard [redacted] on or about 30 July 2018, with premeditation, attempt to murder LSS2 [redacted], by means of stabbing him with a knife.

Specification 2 (Attempted Unpremeditated Murder): In that Culinary Specialist (Submarines) Seaman Micah J. Brown, U.S. Navy, [redacted] on active duty, did, onboard [redacted] on or about 30 July 2018, attempt to kill LSS2 [redacted], by means of stabbing him with a knife.

CHARGE II: VIOLATION OF UCMJ, ARTICLE 128

Specification (Aggravated Assault with Intent to Commit Grievous Bodily Harm): In that Culinary Specialist (Submarines) Seaman Micah J. Brown, U.S. Navy, [redacted] on active duty, did, onboard [redacted] on or about 30 July 2018, commit an assault upon LSS2 [redacted], by cutting his body with a knife, and did thereby intentionally inflict grievous bodily harm upon him, to wit: multiple deep cuts to his body.

III. PREFERRAL

1. [redacted]	b. GRADE	c. ORGANIZATION OF ACCUSER
	LN1 / E-4	Region Legal Service Office, Mid-Atlantic
d. [redacted]		e. DATE: 30 AUG 18

[redacted] authorized by law to administer oaths in cases of this character, personally appeared the [redacted], 2018 and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

SARAH CUMMINGS
Typed Name of Officer

Region Legal Service Office, Mid-Atlantic
Organization of Officer

LT / O-3 / USN
Grade and Service

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

[redacted]

DD FORM 458

S/N 0102-LF-000-4580

ORIGINAL

ORIGINAL

12. On 31 August ,20 18 , 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]
Typed Name

Region Legal Service Office, Southeast
Organization

E-6
Grade

[redacted]

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13. The sworn charges were received at 1045 hours, 05 SEP 20 18 at USS SAN JUAN (SSN 751)
Designation of Command or

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

[redacted]
Typed Name of Officer

~~FOR THE~~

COMMANDING OFFICER
Official Capacity of Officer Signing

COMMANDER, U.S. NAVY

[redacted]
Signature

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY	b. PLACE	c. DATE
Navy Region Mid-Atlantic	Norfolk, VA	MAR 0 1 2019

Referred for trial to the General court-martial convened by General Court-Martial Convening Order 1-19

dated , 10 January 20 19 ,subject to the following instructions:[2] None.

By _____ Of _____
Command or Order

C. W. Rock
Typed Name of Officer

Commander
Official Capacity of Officer Signing

Rear Admiral, U.S. Navy

[redacted]
Signature

15. On 05MAR ,20 19 , I (caused to be) served a copy hereof on (each of) the above named accused.

SARAH E. CUMMINGS
Typed Name of Trial Counsel

LCDR / O-4
Grade or Rank of Trial Counsel

[redacted]

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

DD Form 458 Reverse

ORIGINAL

TRIAL COURT MOTIONS & RESPONSES

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

UNITED STATES OF AMERICA **v.** **MICAH J. BROWN** **CSSSN USN**	**Defense Motion For A Continuance** **11 March 2019**

1. **Nature of Motion**

Pursuant to Rule for Court-Martial 906(b)(1), the defense requests a continuance of the arraignment from 12 March 2019 until 20 March 2019.

2. **Burden of Proof**

As the moving party, the defense bears the burden of proof by a preponderance of the evidence. R.C.M. 905(c)(2).

3. **Statement of Facts**

a. Arraignment in the subject case was scheduled for 12 March 2019.

b. On 11 March 2019, it became apparent for the first time, that the accused was unwilling to waive the presence at arraignment of assistant defense counsel, LCDR Davis.

c. The parties notified the court of this development in an R.C.M. 802 conference on 11 March 2019.

d. Following the R.C.M. 802 conference the parties discussed alternative dates, and agreed to reschedule the arraignment for 20 March 2019.

APPELLATE EXHIBIT I
PAGE 1 OF 3
APPENDED PAGE

e. Assistant defense counsel, LCDR Davis, is stationed in Naples, Italy, and is scheduled to travel to San Diego, CA for a General Court-Martial, arriving in San Diego, CA on 20 March 2019.

f. That trial is scheduled to last approximately three weeks, ending on 12 April 2019.

g. LCDR Davis will reschedule his travel to be present for the arraignment on 20 March.

4. Discussion

"The military judge should, upon a showing of reasonable cause, grant a continuance to any party for such time, and as often, as may appear to be just." Article 40, UCMJ. Reasonable cause exists to grant this short continuance. Assistant defense counsel was unaware that the accused would require his presence at the arraignment until late on 11 March 2019. As counsel is stationed in Naples, Italy, and the arraignment will be held in Groton, CT, an eight-day delay will allow defense counsel to make the necessary travel arrangements to attend the arraignment. Further, scheduling of the arraignment on 20 March 2019, will allow defense counsel to conduct the arraignment in route to another trial, saving the government the expense of funding a separate trip to conduct the arraignment at a later date.

5. Relief Requested

The defense respectfully requests a continuance of the arraignment until 20 March 2019.

6. Oral Argument

The defense does not request oral argument on this motion.

[redacted]
BRYAN M. DAVIS
LCDR, JAGC, USN

APPELLATE EXHIBIT I
PAGE 2 OF 3
APPENDED PAGE

CERTIFICATION OF SERVICE

A true copy of this motion was served on the court and the opposing party via electronic email on 11 March 2019.

[redacted]
LCDR, JAGC, USN

APPELLATE EXHIBIT I
PAGE 3 OF 3

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

UNITED STATES OF AMERICA v. Micah J. Brown CSSSN/E-3 USN	GOVERNMENT RESPONSE TO DEFENSE MOTION FOR CONTINUANCE 11 MAR 19

1. **Nature of Motion**

The Government hereby responds to the Defense motion for continuance in the arraignment of CSSSN Micah J. Brown, USN.

2. **Burden of Proof**

The burden of persuasion rests with the Defense and the burden of proof on any factual issue the resolution of which is necessary to decide a motion shall be by a preponderance of the evidence. R.C. M. 905(c).

3. **Statement of Relevant Facts**

For the purposes of this motion, the Government adopts the Defense statement of facts.

4. **Discussion**

The Government is not opposing the Defense motion for continuance. Government does not have any conflict with the new date of arraignment of 20 March 2019. However, the Government understands the military judge assigned to the case may not be available on that date to conduct the arraignment.

5. **Relief Requested**

The Government respectfully requests that the delay from 12 March 2019 until 20 March 2019, or until the date of the arraignment, be considered excludable delay attributed to the Defense under

APPELLATE EXHIBIT II
PAGE 1 OF 2
APPENDED PAGE

R.C.M. 707(c). Additionally, if the military judge currently assigned to this case is unavailable to conduct the arraignment on 20 March 2019, the Government respectfully requests the arraignment to be docketed with an available military judge.

6. **Evidence**

The Government has no further evidence to offer on this motion.

7. **Oral Argument**

The Government does not request oral argument.

[redacted]

S. E. CUMMINGS
LCDR, JAGC, USN
Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion was served by electronic mail on Defense Counsel on 11 March 2019.

[redacted]

LCDR, JAGC, USN
Trial Counsel

APPELLATE EXHIBIT II
PAGE 2 OF 2
ABBENDED PAGE

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

The United States of America **v.** **MICAH J. BROWN** **CSSSN USN**	**MOTION TO SUPPRESS** **30 May 2019**

1. Nature of the Motion.

Pursuant to Rule for Court-Martial (RCM) 906(b)(13), the defense respectfully moves this Court to suppress evidence offered by the government in violation of Article 31, Uniform Code of Military Justice (UCMJ) and the Fifth Amendment of the United States Constitution.

2. Burden of Proof.

When the defense has made an appropriate motion or objection under RCM 906(b)(13), the prosecution has the burden of establishing the admissibility of the evidence by a preponderance of the evidence. M.R.E. 304(f)(6)-(7).

3. Statement of Facts.

a. On 30 July 2018, ETVC [redacted] heard loud noises coming from the galley onboard the [redacted]. Enclosure A.

b. ETVC [redacted] opened the door and saw LSS2 [redacted] and CSSSN Micah Brown in an altercation. *Id.*

c. ETVC [redacted] saw blood on LSS2 [redacted] face and blood on CSSSN Brown's hands. *Id.*

d. ETVC [redacted] grabbed CSSSN Brown by the arm and escorted him to the chief's quarters. *Id.*

APPELLATE EXHIBIT IV
PAGE 1 OF 11
APPENDED PAGE

e. ETVC [redacted] then woke up the Chief of the Boat (COB). *Id.*

f. COB woke up YNC [redacted], took him to the chief's quarters, and told him to stay with CSSSN Brown. Enclosure B.

g. Shortly after YNC [redacted] entered the chief's quarters, CPC [redacted] and EMDC [redacted] walked in. EMDC [redacted] told YNC [redacted] about the "news of the assault." *Id.*

h. While CSSSN Brown, YNC [redacted], CPO [redacted], and EMDC [redacted] were in the chief's quarters, COB entered and asked CSSSN Brown, "Why'd you do it?" CSSSN Brown allegedly responded with words to the effect of, "I don't know. I just don't know. I told you I needed to get off this boat." COB subsequently stormed away. *Id.*

i. COB later returned and instructed YNC [redacted] to search CSSSN Brown for a knife. *Id.*

j. At some point, COB, ETVC [redacted], and YNC [redacted] individually asked CSSSN Brown what happened. CSSSN Brown allegedly made the following statements:

i. "It's not me, it's [redacted] blood. I've only got a small cut." Enclosure B.

ii. "I punched him, I just kept punching him." Enclosure B.

iii. "I hope he's okay. I don't know why I did that. I just need to go home." Enclosure B.

iv. "[he was tired of taking shit from people and that [I] told the COB and CO that [I] needed to get off the boat and they kept him on." Enclosure C.

v. '[redacted] said that he heard [I] was trying to tap, and the next thing I know, I'm just hitting him." Enclosure C.

k. Prior to making these statements, CSSSN Brown was not advised of his rights under Article 31(b), UCMJ.

APPELLATE EXHIBIT IV
PAGE 2 OF 11
APPENDED PAGE

l. The Commanding Officer (CO) and Executive Officer (XO) were monitoring his mental status, and the decision was made to remove him from the boat at the next possible port visit. Enclosure D.

m. Many sailors on [redacted] described CSSSN Brown's mental state as more reserved and less friendly before the incident, and that he had an "empty" look on his face after the incident, like he was not mentally present.

n. CSSSN Brown has also been described by his co-workers as "acting differently this underway" and "distant." Enclosure E.

o. On this deployment, CSSSN Brown was exhibiting a "deteriorating mental state," and paranoia, and had previously injured his head and burnt his arm on a steam kettle. Enclosure B.

4. Discussion

A. Statement of the Law

Article 31(b), UCMJ prohibits any person subject to the UCMJ from interrogating or requesting "any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make a statement." Art. 31(b), UCMJ; *US v Neiman*, 2016 CCA Lexis 435, (N.M.C.C.A. 2016). "The Article 31(b) warning requirement provides members of the armed forces with statutory assurance that the standard military requirement for a full and complete response to a superior's inquiry does not apply in a situation when the privilege against self-incrimination may be invoked." *United States v. Swift*, 53 M.J. 439, 445 (C.A.A.F. 2000).

Article 31(b) warnings are required if the person conducting the questioning is participating in disciplinary investigation or inquiry, as opposed to having a personal motivation for the inquiry. *United States v Jones*, 73 M.J. 357, 362 (C.A.A.F. 2014). This is determined by:

(1) assessing all the facts and circumstances at the time of the interview to determine whether the military questioner was acting or could reasonably be considered to be acting in a disciplinary capacity and (2) whether a reasonable man in the suspect's position perceived the questioning to be for a law enforcement or disciplinary purpose. *Id.* "When the questioning is done by a military supervisor in the suspect's chain of command, the Government must additionally rebut a strong presumption that such questioning was done for disciplinary purposes." *United States v. Good*, 32 M.J. 32 105, 108 (C.A.A.F. 1991). A statement obtained in violation of Art. 31(b) is involuntary and therefore, inadmissible against the accused. M.R.E. 305(c)(1). If an accused makes a timely motion under M.R.E. 304, an involuntary statement, or any evidence derived therefrom is inadmissible at trial except for limited purposes. M.R.E. 304(a).

The Due Process Clauses of the Fifth and Fourteenth Amendments protect an accused generally against the admission of any involuntary statements, whether made in or out of custody. *Dickerson v United States*, 530 U.S. 428, 433-34 (2000). A statement is involuntary under M.R.E. 304(a) when it is "obtained in violation of the self-incrimination privilege or Due Process Clause of the Fifth Amendment to the Constitution of the United States, Article 31, or through the use of coercion, unlawful influence, or unlawful inducement." M.R.E. 304(a)(1)(A); see also Article 31(d), UCMJ ("No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial."). The government bears the burden of establishing a confession is "the product of an essentially free and unconstrained choice by its maker." *United States v. Chatfield*, 67 M.J. 432, 439 (C.A.A.F. 2009) (citing *United States v. Bubonics*, 45 M.J. 93, 95 (C.A.A.F. 1996) (quotation omitted). The voluntariness of a statement or confession is determined by assessing the totality of the circumstances. *Bubonics*, 45 M.J. at

95. Some factors considered in assessing voluntariness include physical illness or injury and mental condition. *See, e.g., Mincey v. Arizona*, 437 U.S. 385, 398 (1978).

B. CSSSN Brown's Statements Allegedly Made After the Alleged Incident Were Involuntary and Are Therefore Inadmissible Under M.R.E. 304 and 305

The government should be precluded from using CSSSN Brown's statements allegedly made after the alleged incident to servicemembers who each failed to inform him of his Article 31(b) rights. The government cannot meet its burden to demonstrate that ETVC [redacted], COB, and YNC [redacted] did not suspect CSSSN Brown of committing an offense before each individually asked him about the alleged incident in the galley. In fact, the circumstances demonstrate that each person knew CSSSN Brown was a suspect. ETVC [redacted] saw blood on CSSSN Brown's hands and on LSS2 [redacted] face when he opened the door to the gallery. He knew that an altercation had taken place, which is demonstrated by the fact that he sought to immediately separate LSS2 [redacted] and CSSSN Brown.

After escorting CSSSN Brown to the chief's quarters, ETVC [redacted] woke up COB and presumably briefed him on the situation. COB's knowledge of the incident is apparent from the instructions he provided to YNC [redacted] to stay in the room with CSSSN Brown. The circumstances demonstrate that all three servicemembers requesting incriminating information knew, or reasonably should have known, that CSSSN Brown was a suspect. CSSSN Brown should have, therefore, been read his Article 31(b) rights. CSSSN Brown was never informed of the nature of the accusation against him, and he was never told he had a right to remain silent. As such, any statements solicited by the three servicemembers are inadmissible.

For these statements to be admissible against CSSSN Brown, the government must also prove that the servicemembers interrogating or requesting statements were not participating in disciplinary investigation or inquiry. Again, the circumstances show that the individuals

questioning CSSSN Brown were not doing so for any reason other than to get information about an apparent crime. Each person sitting in the room with CSSSN Brown outranked him. Like the military questioners in *United States v. Swift*, 53. M.J. 439, 446 (C.A.A.F. 2000), the questioning was done by military superiors in CSSSN Brown's immediate chain of command. The is a "strong presumption," that the COB and the other servicemembers were questioning CSSSN Brown as part of a disciplinary investigation. *Good*, 322 M.J. at 108. The COB, the senior enlisted on the [redacted], inquired about what happened and why. During his interview with NCIS, YNC[redacted] stated that when COB came back to the chief's quarters later, he asked CSSSN Brown, "Why'd you do it?" The questions asked, coupled with the fact that CSSSN Brown was forced to remain in the chief's quarters with four senior servicemembers, is evidence of disciplinary inquiry.

Finally, CSSSN Brown's responses were involuntary due to the circumstances of the interrogations, his junior status, and his deteriorating mental status. CSSSN Brown is Seaman who is trained to cooperate and respond to his superiors. While on deployment, he suffered physical injuries [redacted] and displayed signs of mental health issues. His command was tracking his physical and mental wellbeing because they were concerned. The concern for CSSSN Brown's physical and mental wellbeing cumulated in the decision to remove him from the submarine as soon as possible. On top of his already fragile mental statement, CSSSN Brown was in a graphic physical altercation when COB and the three chiefs initiated their questioning. CSSSN Brown sat in the chief's quarters expressionless. CSSSN Brown's mental and physical state, rank, and questioning from multiple superiors—some in his direct chain of command—are factors that demonstrate his responses were involuntary. CSSSN Brown's responses to his

superiors' questions were not a product of an essentially free and unconstrained choice by its maker, and are therefore inadmissible.

5. Evidence

The accused offers the following in support of this motion:
Enclosure A: NCIS Results of Interview of ETVC [redacted] dtd 1 Aug 18
Enclosure B: NCIS Results of Interview of YNC [redacted] dtd 13 Sep 18
Enclosure C: Government Notice Pursuant to M.R.E. 404(b) dtd 10 May 19
Enclosure D: NCIS Results of Interview of LCDR [redacted] dtd 21 Sep 18
Enclosure E: NCIS Results of Interview of ETN2 [redacted] dtd 02 Aug 18

6. Oral Argument

The accused does desire to make oral argument on this motion.

7. Witnesses

The defense formally requests the government to produce for testimony the following witnesses who are relevant and necessary to the resolution of this motion. Each of the requested witnesses took or witnessed statements made by the accused during the relevant time period and can describe the facts and circumstances of the interrogations, including, but not limited to, whether the questioning was done for a disciplinary or law enforcement purpose and whether the accused was provided an Article 31(b) rights advisement.

A. ETVC [redacted]
B. YNC [redacted]
C. Chief of the Boat, [redacted], in July 2018 (NFI).

8. Relief Requested

The defense respectfully requests this court to suppress the statements made after the alleged incident in the galley on 30 July 2018 in violation of the 5th Amendment to the United States Constitution and Article 31, Uniform Code of Military Justice.

[redacted]
B. M. DAVIS
LCDR, JAGC, USN
Defense Counsel

CERTIFICATION OF SERVICE

A true copy of this motion was served on the court and trial counsel via e-mail on 21 June 2019.

[redacted]
B. M. DAVIS
LCDR, JAGC, USN
Defense Counsel

APPELLATE EXHIBIT IV
PAGE 8 OF 11
APPENDED PAGE

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

UNITED STATES **v.** **MICAH J. BROWN** **CSSSN/E-3** **USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO SUPPRESS ACCUSED'S STATEMENTS** **28 June 2019**

1. **Nature of Motion**.

Pursuant to Rules for Court-Martial (R.C.M.) 905(b), 905(d), 906(b)(13) and Military Rules of Evidence (M.R.E.) 304(f)(6), the United States objects to the Accused's Motion to Suppress and requests this Court find that the statements made by the Accused to YNC [redacted] and CS1 [redacted], prior to any questioning by the Chief of the Boat, are admissible as they were voluntary, not the product of an interrogation, and in some instances, spontaneous.

2. **Statement of Facts**.

a. On the morning of 30 Jun 2018, YNC [redacted] was asleep in his rack, adjacent to the Chief's Quarters onboard [redacted] (Defense (Def.) Enclosure (Encls.) B at 2, ¶7.)

b. [redacted] was underway at the time. (Gov. Encls. 6 at 2, ¶1b.)

c. YNC [redacted] was awoken by the Chief of the Boat (COB) and guided to the Chief's Quarters. (Def. Encls. B at 2, ¶7.)

d. The COB informed YNC [redacted] "I need you in here," but provided no explanation why. (Def. Encls. B at 2, ¶7.)

APPELLATE EXHIBIT V
PAGE 1 OF 25

e. YNC [redacted] saw the Accused soaked in blood. (Def. Encls. B at 2, ¶7.)

f. The COB exited the Chief's Quarters "without providing any turnover, guidance or explanation, as to what had occurred." (Def. Encls. B at 2, ¶7.)

g. YNC [redacted] had no information about the situation or the assault that had taken place. (Def. Encls. B at 2, ¶7.)

h. YNC [redacted] inquired if the Accused was ok and asked the Accused what happened. (Def. Encls. B at 2, ¶7.)

i. After initial silence, YNC [redacted] made additional inquiries to determine if the Accused was hurt. (Def. Encls. B at 2, ¶7.)

j. The Accused then responded by stating "it's not me. It's [the Victim's] blood. I've only got a small cut." (Def. Encls. B at 2, ¶7.)

k. YNC [redacted] then believed that a mechanical accident had occurred based upon his observations of the Accused and the lack of anybody telling YNC [redacted] otherwise. (Def. Encls. B at 2, ¶7.)

l. The Accused continued by stating words to the effect of "I punched him, I just kept punching him." (Def. Encls. B at 2, ¶7.)

m. Without prompting, the Accused muttered to himself words to the effect of "I hope he's ok. I don't know why I did that I just need to go home." (Def. Encls. B at 2, ¶9.)

n. CPO [redacted] and SCPO [redacted] entered the Chief's Quarters and YNC [redacted] set to work cleaning the Accused with paper towels. (Def. Encls. B at 2, ¶7.)

o. SCPO [redacted] then informed YNC [redacted] of the assault. (Def. Encls. B at 2, ¶7.)

p. Shortly thereafter, the COB returned to the Chief's Quarters and asked the Accused "Why'd you do it?" (Def. Encls. B at 2, ¶7.)

q. The Accused said, "I don't know. I just don't know. I told you I needed to get off this boat." (Def. Encls. B at 2, ¶7.)

r. Though YNC [redacted] could not recall when during the interaction it occurred, at one point the Accused said "[the Victim] came in talking shit about how I was trying to tap, and the next thing I know I'm just hitting him." (Def. Encls. B at 3, ¶11.)

s. At no point did ETVC [redacted] ask the Accused any questions. (Def. Encls. A.)

t. YNC [redacted] is not in the Accused's immediate chain of command.

u. CSI [redacted] saw the Accused in the pantry aboard the [redacted], approximately five minutes before the assault on the Victim. (Gov. Encls. 5 at 1, ¶2.)

v. CSI [redacted] asked the Accused as to his well-being and saw no signs that an assault was imminent. (Gov. Encls. 5 at 1, ¶2.)

w. CSI [redacted] went to his rack and was about to go to sleep when he heard a loud request for medical assistance. (Gov. Encls. 5 at 1, ¶2; Gov. Encls. 6 at 1, ¶1a.)

x. CSI [redacted] heard there had been a fight between the Victim and the Accused and there was a large amount of blood. (Gov. Encls. 1 at 1, ¶2; Gov. Encls. 6 at 1, ¶1a.)

y. CSI [redacted] went to the Chief's Quarters, where he briefly talked with the Accused. (Gov. Encls. 1 at 1, ¶2; Gov. Encls. 6 at 1, ¶1b.)

z. CSI [redacted] asked the Accused what happened and the Accused replied he was "tired of taking shit from people." The Accused also said that he had told people he needed to get off the boat, but that they were not listening, or words to that effect. (Gov. Encls. 1 at 1, ¶2; Gov. Encls. 6 at 1, ¶1b.)

aa. CS1 [redacted] explained to the Accused that efforts were being made to get him off the boat, but that it could not happen immediately as the boat could not just surface and let him off while they were in the middle of the mission. (Gov. Encls. 6 at 2, ¶1b.)

bb. CS1 [redacted] asked why the Victim had been the target and the Accused responded by saying the Victim had asked, "I heard you were trying to tap?" CS1 [redacted] then heard the Accused say, "he just had to be the example." (Gov. Encls. 1 at 1, ¶2; Gov. Encls. 6 at 2, ¶1b.)

cc. CS1 [redacted] had not been ordered by anyone to speak with the Accused and he was not interviewed as part of the internal preliminary investigation. (Gov. Encls. 6 at 2, ¶1b.)

dd. CS1 [redacted]' purpose in speaking to CSSN Brown was not for any law enforcement or disciplinary reason, but simply because he was curious as to what happened in the galley as he was the senior CS onboard at the time. (Gov. Encls. 6 at 2, ¶1b.)

ee. After speaking with the Accused, CS1 [redacted] then left Chief's Mess and went to the Wardroom where HM1 [redacted] was tending to the Victim. (Gov. Encls. 6 at 2, ¶1b.)

3. **Burden.**

The United States has the burden of proof by a preponderance of the evidence. Mil. R. Evid. 304(f)(6).

4. **Discussion.**

A. Article 31(b) warnings are only required if four textual predicates are met.

Article 31(b), UCMJ, states that no person subject to the Code may:

> interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by

court-martial.

United States v. Cox, No. 201700197, 2018 CCA LEXIS 523, at *12 (N-M Ct. Crim. App. Nov. 1, 2018) (quoting Article 31(b), UCMJ). Article 31(b) warnings are required when:

> (1) a person subject to the UCMJ, (2) interrogates or requests any statement, (3) from an accused or person suspected of an offense, and (4) the statements regard the offense of which the person questioned is accused or suspected.

United States v. Jones, 73 M.J. 357, 361 (C.A.A.F. 2014).

B. Article 31(b) warnings are only required if the questioner is "interrogating" or "requesting a statement" from the suspect.

"Mil. R. Evid. 305(b)(2) defines 'interrogation' as 'any formal or informal questioning in which an incriminating response either is sought or is a reasonable consequence of such questioning.'" *United States v. Maza*, 73 M.J. 507, 519 (N-M Ct. Crim. App. 2014). "[I]nterrogation involves more than merely puting questions to an individual." *United States v. Traum*, 60 M.J. 226, 229 (C.A.A.F. 2004). Furthermore, "[CAAF] has repeatedly affirmed that spontaneous statements, although possibly incriminating, are not within the bounds of Article 31, UCMJ." *United States v. Kerns*, 75 M.J. 783, 790 (A.F. Ct. Crim. App. 2016) (citing *United States v. Lichtenhan*, 40 M.J. 466, 470 (C.M.A. 1994); *United States v. Vitale*, 34 M.J. 210, 212 (C.M.A. 1992)).

"Because the mandatory exclusion of statements taken in violation of Article 31(b), UCMJ, is a severe remedy, [CAAF] has interpreted 'the second textual predicates—interrogation and the taking of 'any' statement—in context, and in a manner consistent with Congress' intent that the article protect the constitutional right against self-incrimination." *Id.* (quoting *United States v. Cohen*, 63 M.J. 45, 49 (C.A.A.F. 2006)). "Under Article 31(b)'s second requirement, rights warnings are required if 'the person conducting the questioning is participating in an official law enforcement or disciplinary investigation or inquiry,' . . . as opposed to having a

personal motivation for the inquiry." *Id.* (quoting *United States v. Swift*, 53 M.J. 439, 446 (C.A.A.F. 2000)); *see also United States v. Price*, 44 M.J. 430, 432 (C.A.A.F. 1996). "This 'is determined by assessing all the facts and circumstances at the time of the interview to determine whether the military questioner was acting or could reasonably be considered to be acting in an official law-enforcement or disciplinary capacity.'" *Id.* (quoting *Cohen*, 63 M.J. at 50).

"[W]here the questioner is not acting in a law enforcement or disciplinary capacity, rights warnings are generally not required, because 'military persons not assigned to investigate offenses, do not ordinarily interrogate nor do they request statements from others accused or suspected of crime.'" *Cohen*, 63 M.J. at 49-50 (quoting *United States v. Loukas*, 29 M.J. 385, 388 (C.M.A. 1990)). "In interpreting Article 31(b), [CAAF] has recognized the difference 'between questioning focused solely on the accomplishment of an operational mission and questioning to elicit information for use in disciplinary proceedings.'" *United States v. Ramos*, 76 M.J. 372, 376 (C.A.A.F. 2017) (quoting *Cohen*, 63 M.J. at 50). "Where there is a mixed purpose behind the questioning, the matter must be resolved on a case-by-case basis, looking at the totality of the circumstances, including whether the questioning was 'designed to evade the accused's constitutional or codal rights.'" *Id.*

C. Article 31(b) warnings are only required if the accused is suspected of an offense.

"Whether a person is a suspect is an objective question that is answered by considering all the facts and circumstances at the time of the interview to determine whether the military questioner believed or reasonably should have believed that the servicemember committed an offense." *United States v. Brisbane*, 63 M.J. 106, 113 (C.A.A.F. 2006) (quoting *United States v. Swift*, 53 M.J. 439, 446 (C.A.A.F. 2000)).

Though the ultimate inquiry is objective, "the military judge need not ignore the

[questioner's] subjective beliefs." *United States v. Neiman*, No. NMCCA 201500119, 2016 CCA LEXIS 435, at *18 (N-M Ct. Crim. App. July 26, 2016), *aff'd*, 2017 CAAF LEXIS 101 (C.A.A.F., Feb. 13, 2017). In some cases, "a subjective test may be appropriate." *Muirhead*, 51 M.J. at 96. "[T]hat is, we look at what the investigator, in fact, believed, and we decide if the investigator considered the interrogated person to be a suspect." *Id.*; *see also Lovely*, 73 M.J. at 668 ("We recognize SA[redacted] subjective intent in questioning the appellant is somewhat relevant to the objective question before us, as his subjective intent may help demonstrate what a reasonable person in his situation should believe."); *Rhode Island v. Innis*, 446 U.S. 291, 301-02 n.7 (1980) ("This is not to say that the intent of the police is irrelevant, for it may well have a bearing on whether the police should have known that their words or actions were reasonably likely to evoke an incriminating response.").

The standard of suspicion necessary to invoke the rights advisement requirement involves a "relatively low quantum of evidence," but it must amount to "more than a hunch" that the person committed an offense. *Swift*, 53 M.J. at 446. For example, simply listing someone as a "suspect" in an investigative report does not automatically render that person a suspect for purposes of Article 31(b). *See United States v. Miller*, 48 M.J. 49, 53 (C.A.A.F. 1998)(holding the appellant was not a "suspect" for purposes of Article 31(b) despite the fact that a military policeman listed his name in the "victim/suspect" line of a "stat sheet" after questioning the appellant in a robbery investigation). Further, even if one has a motive to commit an offense, this does not necessarily render one a suspect. *See United States v. Good*, 32 M.J. 105, 108 (C.M.A. 1991) (holding that the appellant-military policeman's supervisory special agent should not reasonably have suspected him of larceny of government funds despite the fact that he was aware of the appellant's serious financial problems).

In *Davis*, the Court held that the appellant was not a suspect when questioned by NIS

agents in a murder investigation. *United States v. Davis*, 36 M.J. 337, 340 (C.A.A.F. 1993). In that case, the appellant was one of several patrons at the Enlisted Club where the victim was found, had "intimate information as to [the victim's] manner of death" in that he apparently had "heard" that the victim had been "hit and jabbed with a pool stick," had a history of disciplinary problems, and had made comments about wanting to "shoot cops." *Id.*

D. All of the Accused's statements made prior to the question from the COB[1] are admissible.

1. Accused was not entitled to Article 31(b) warnings from YNC [redacted] because neither the second, nor third textual predicate is met.

Here, the relevant evidence shows that the Accused was not entitled to Article 31(b) warnings prior to YNC [redacted] inquiries. First, YNC [redacted] did not "interrogate" or otherwise "request a statement" from the Accused. Rather, YNC [redacted] inquired if the Accused was "ok." (Def. Encls. B at 2, ¶7.) After receiving no response and since YNC [redacted] had "no knowledge of what occurred," he further inquired to see if the Accused was "hurt." (Encls. B at 2, ¶7.) It was only at this point that the Accused responded, "it's not me. It's [the Victim's] blood. I've only got a small cut." (Encls. B at 2, ¶7.) YNC [redacted] did not ask any further questions, but assumed "that some sort of mechanical accident must have occurred." (Encls. B at 2, ¶7.) Unprompted, the Accused "then continued by stating words to the effect of 'I punched him, I just kept punching him.'" (Encls. B at 2, ¶7.) Also "in an unsolicited manner" the Accused occasionally muttered "I hope he's ok. I don't know why I did that. I just need to go home." (Encls. B at 2, ¶9.)

The Accused only made one statement in response to an actual question from YNC

[1] The United States does not intend to offer the statement of the Accused—"I don't know. I just don't know. I told you I needed to get off this boat."—made in response to the COB's questioning. However, the United States reserves the right to offer this evidence pursuant to Mil. R. Evid. 304(e).

[redacted], stating that it was the Victim's blood, not his. In essence, the Accused argues that YNC [redacted] questions designed to determine if the Accused was "ok," constitute "interrogation" for purposes of Mil. R. Evid. 305(b)(2). There is no case to support this contention and there is certainly no evidence to suggest that YNC [redacted] question was for a law enforcement or disciplinary purpose. Even if the question "are you ok?" could be considered a "mixed purpose" question under *Cohen*, there is absolutely no evidence to suggest that this question was "designed to evade the Accused's constitutional or codal rights." *Cohen*, 63 M.J. at 50. Regarding the Accused's unprompted statements to YNC [redacted], Article 31(b) is simply not implicated by spontaneous statements[2]. *See Lichtenhan*, 40 M.J. at 469 (holding an accused's unwarned spontaneous statements to his chief were properly admitted even though chief suspected the accused of an offense).

Even if YNC [redacted] questions as to the Accused's welfare could be considered "interrogation" for purposes of Mil. R. Evid. 305(b)(2), a reasonable person in YNC [redacted] position would not have considered the Accused a suspect of an offense at that time.[3] Contrary to the Accused's unsupported speculation to the contrary (Accused's Mot. at 5), YNC [redacted] states that he had "no idea of the situation or the assault," that he had "no knowledge of what had occurred," and that the COB did not provide him "any turnover, guidance or explanation" after telling him to stay with the Accused. (Encls. B at 2, ¶7.) The evidence establishes that YNC

[2] The Accused suggests that ETVC [redacted] also interrogated him. (See Accused's Mot. at 5.) However, there is nothing in the Accused's enclosures to support that ETVC [redacted] asked the Accused any questions about the incident. For this reason, any statement the Accused supposedly made to ETVC [redacted] would likewise not implicate Article 31(b).

[3] The Accused incorrectly argues that in addition to showing that he was not a suspect, "the government must *also* prove that the servicemembers interrogating or requesting statements were not participating in disciplinary investigation or inquiry." (Accused's Mot. at 5.) He is wrong. All four textual predicates must be satisfied in order to implicate Article 31(b). If even one of the textual predicates is not met, the statements are admissible.

[redacted] was pulled out of bed by the COB, taken to the Chief's Quarters, saw a "blood soaked [Accused]," and was told "I need you in here" with "no explanation why." (Encls. B at 2, ¶7.) Viewed objectively, a reasonable person presented with these facts would not have suspected that the Accused had committed an offense. Indeed, YNC [redacted] was primarily concerned with the Accused's physical well-being. Even after the Accused said that he was actually covered in the Victim's blood and not his own, YNC [redacted] assumed that there was some sort of "mechanical accident." And though YNC [redacted] subjective belief that the Accused was not a suspect of a crime is not dispositive, it is certainly a factor this Court can consider when answering the ultimate objective question of whether the Accused should have been considered a suspect by YNC [redacted]. *See Neiman*, 2016 CCA LEXIS 435, at *18; *see also Muirhead*, 51 M.J. at 96; *Lovely*, 73 M.J. at 668; *Innis*, 446 U.S. at 301-02 n.7.

Finally, the Accused's reliance on the "strong presumption" regarding questioning from a superior in the chain of command is misplaced. *See United States v. Swift*, 53 M.J. 439, 446 (C.A.A.F. 2000) ("Questioning by a military superior in the *immediate chain of command* will normally be presumed to be for disciplinary purposes. The presumption is *not conclusive*.") (emphasis added). YNC [redacted] was not in the Accused's chain of command at the time the Accused made his statements, so this presumption is inapposite here. Further, even if YNC [redacted] was in the Accused's immediate chain of command, the nature of his "questioning" and the fact that he had no idea what the Accused had done, adequately rebuts the presumption. YNC [redacted] was not required to give the Accused warnings pursuant to Article 31(b) so there is no basis to suppress statements made to YNC [redacted].

2. The Accused's statements in response to CS1 [redacted][4] are admissible because his questions were made in an "operational context."

As CAAF has recognized, "military persons not assigned to investigate offenses, do not ordinarily interrogate nor do they request statements from others accused or suspected of crime.'" *Cohen*, 63 M.J. at 49-50. There is a difference "between questioning focused solely on the accomplishment of an operational mission and questioning to elicit information for use in disciplinary proceedings." *Id.* If there is "a mixed purpose behind the questioning, the matter must be resolved on a case-by-case basis, looking at the totality of the circumstances, including whether the questioning was 'designed to evade the accused's constitutional or codal rights.'" *Id.* Further, CAAF has "recognized that situations which involve an 'operational context' may relieve law enforcement from giving Article 31(b) rights where immediate operational issues are implicated." *United States v. Ramos*, 76 M.J. 372, 378 (C.A.A.F. 2017).

Here, CS1 [redacted] was not engaged in a disciplinary or law enforcement investigation when asking the Accused what happened. He had not been tasked with investigating this assault by the chain of command. He asked the questions due to his own curiosity and his operational need to ensure the safety and well-being of his Sailors. Even assuming his questions were for a "mixed purpose," there is no evidence to suggest that CS1 [redacted] was asking questions without providing Article 31(b) warnings in an attempt to circumvent the Accused's rights. Indeed, it appears CS1 [redacted] was not aware of Article 31(b) when speaking with the Accused. It is therefore clear that CS1 [redacted] speaking with the Accused was not done in an effort to "evade" his rights.

Further, CS1 [redacted] questions were posed in an "operational context." CS1 [redacted]

[4] The Accused does not object to the use of these statements in his Motion. However, out of an abundance of caution and candor to the Court, the United States addresses these statements as well.

point in asking the questions was to determine what had happened in his Galley and ascertain the condition of his own Sailors. This incident took place while the [redacted] was at sea, so determining what had just happened was important to the mission. To suggest that CS1 [redacted] inquired of the Accused in some attempt to extract information for use at a court-martial or to evade the requirements of Article 31(b) defies common sense. The evidence supports that CS1 [redacted] was not engaging in a disciplinary or law enforcement investigation and therefore the second textual predicate is not met.

3. The Accused's statements are voluntary pursuant to the Fifth Amendment.

As a preliminary matter, "[t]he sole concern of the Fifth Amendment . . . is governmental coercion." *Colorado v. Connelly*, 479 U.S. 157, 170 (1986). Therefore, "coercive police activity is a *necessary predicate* to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause . . ." *Id.* at 167 (emphasis added); *see also Nickel v. Hannigan*, 97 F.3d 403, 411, (10th Cir. 1996) ("As *Connelly* makes clear, [a defendant's] mental condition, in the absence of any evidence of police coercion, does not alone make his statements to the police involuntary."); *United States v. Oldman*, 156 F. Supp. 2d 1252, 1260 (D. Utah 2001) ("As a corollary to that, absent coercion, involuntariness cannot exist.").

When evaluating the voluntariness of a statement, the Court of Appeals for the Armed Forces reviews the totality of the circumstances to determine whether an accused's will was overborne and his capacity for self-determination was critically impaired. *United States v. Akbar*, 74 M.J. 364, 403 n.24 (C.A.A.F. 2015) (quoting *United States v. Bubonics*, 45 M.J. 93, 95 (C.A.A.F. 1996)). Some of the factors taken into account include the youth of the accused, his lack of education, or his low intelligence, the lack of any advice to the accused of his constitutional right, the length of detention, the repeated and prolonged nature of the questioning,

and the use of physical punishment such as the deprivation of food or sleep. *Brisbane*, 63 M.J. at 114 (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)).

The Accused's argument that his statements should be suppressed as "involuntary" pursuant the Fifth Amendment is based almost entirely on his supposed "deteriorating mental state." (Accused's Mot. at 6.) Even assuming the Accused's mental state was in fact "fragile," this falls well short of a showing of involuntariness under the Fifth Amendment. *Miller v. Dugger*, 838 F.2d 1530, 1537 (11th Cir.) ("*Connelly* makes clear that even the interrogators' knowledge that a suspect may have mental problems does not make the suspect's statements involuntary unless '[t]he police exploited this weakness with coercive tactics'") (quoting *Connelly*, 479 U.S. at 165), *cert. denied*, 486 U.S. 1061 (1988). *United States v. Parker*, 116 F. Supp. 3d 159, 176 (W.D.N.Y. 2015) ("Applying *Connelly*, courts have repeatedly rejected arguments that a statement made in response to law enforcement interrogation is involuntary solely due to the confessor's diminished mental state, regardless of whether the mental deficit stems from intoxication or from psychological impairments.").

There is nothing here to suggest that YNC [redacted] engaged in any kind of "coercive" activity, nor does the Accused allege that he did. Without coercion, the Fifth Amendment is simply not implicated. Indeed, *Connelly* is the strongest rebuttal to the Accused's claims here. The defendant in *Connelly* was suffering from "command hallucinations" that instructed him to either confess to a crime or to commit suicide. *Connelly*, 479 U.S. at 161. Complying with the voices that he heard, the defendant approached law enforcement and confessed to a crime. *Id.* at 160. The defendant also told the officer that he had not consumed any alcohol or drugs, but that "he had been a patient in several mental hospitals." *Id.* The Supreme Court rejected the contention that the confession should be suppressed solely because of the defendant's mental

state at the time he made the confession, noting that "[o]nly if we were to establish a brand new constitutional right — the right of a criminal defendant to confess to his crime only when totally rational and properly motivated — could respondent's present claim be sustained." *Id.* at 166.

Even if the Accused could somehow circumvent *Connelly* and its decades of progeny, his argument based on mental fragility would still be unavailing. Courts have repeatedly found statements to be voluntary from criminal defendants with far lower mental capacities than the Accused. *See United States v. Dunn*, 269 F. App'x 567, 572-73 (6th Cir. 2008) (voluntary confession from defendant under the influence of Vicodin and marijuana); *United States v. Macklin*, 900 F.2d 948, 950-53 (6th Cir. 1990) (finding statement voluntary by defendant with IQ of 59; unable to read written instructions; very limited capacity to understand verbal instructions), *cert. denied*, 498 U.S. 840 (1990); *United States v. Chischilly*, 30 F.3d 1144, 1147-48 (9th Cir. 1994) (valid confession by defendant with verbal IQ of 62 and functional level of five or six year old child); *State v. Camacho*, 561 N.W.2d 160 (Minn. 1997) (holding confession of defendant with IQ of 79-82 voluntary, despite police threatening to "blow his head off" during arrest, and preventing him from using the telephone, the bathroom, or eating/drinking during the interrogation). The Accused's argument that his statements to YNC [redacted] should be suppressed as "involuntary" is meritless.

5. **Relief Requested**. The United States respectfully requests this Court deny the Accused's Motion to Suppress.

6. **Evidence**. In addition to relying on Defense enclosures, the United States provides the following enclosures in support of this motion:

Government Enclosure 5 (Results of Interview of CS1 [redacted]).

Government Enclosure 6 (R.C.M. 701 Disclosure regarding interview with CS1 [redacted]).

The United States also intends to offer the testimony of CS1 [redacted] and YNC [redacted].

7. **Oral Argument**. The United States requests oral argument.

BELFORTI.JAM ES.MICHAEL [redacted]

Digitally signed by BELFORTI.JAMES.MICHAEL [redacted] DN: c=US, o=U.S. Government, ou=DoD, ou=PKI, ou=USN, cn=BELFORTI.JAMES.MICHAEL [redacted] Date: 2019.06.28 20:13:01 -04'00'

J. M. BELFORTI
LCDR, JAGC, USN
Trial Counsel

CERTIFICATE OF SERVICE

A copy of this document was electronically served on the Court and Defense Counsel on 28 June 2019.

BELFORTI.JA MES.MICHAEL [redacted]

Digitally signed by BELFORTI.JAMES.MICHAEL [redacted] DN: c=US, o=U.S. Government, ou=DoD, ou=PKI, ou=USN, cn=BELFORTI.JAMES.MICHAEL [redacted] Date: 2019.06.28 20:13:32 -04'00'

J. M. BELFORTI
LCDR, JAGC, USN
Trial Counsel

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

UNITED STATES **v.** **Micah J. Brown** **CSSSN/E-1** **USN**	**DEFENSE MOTION TO DISMISS FOR LACK OF SPEEDY TRIAL PURSUANT TO RCM 707, UCMJ** **21 June 19**

MOTION

1. Pursuant to the Sixth Amendment of the U.S. Constitution and Rule for Court Martial (RCM) 707, the defense moves this court to dismiss all charges and specifications for lack of speedy trial. The Defense does request an Article 39(a), UCMJ, session, if opposed.

FACTS

2. On or about 30 July 2018, onboard [redacted] the accused allegedly stabbed LSS2 [redacted]

3. Immediately afterwards, CSSSN Brown was held in the chief's mess with around- the- clock watch by various senior servicemembers.

4. CSSSN Brown was unable to leave the chief's mess.

5. On 31 July 2018, CSSSN Brown was ordered into pretrial confinement.

6. On 30 August 2018, the Government preferred charges against CSSSN Brown.

7. On 24 September 2018, Convening Authority appointed a Preliminary Hearing Officer and ordered an Article 32 hearing to be held on 4 October 2018.

8. On 27 September 2018, defense submitted a request for delay of the hearing until 29 November 2018.

9. On 1 October 2018, the Convening Authority approved the delay.

10. On 7 November 2018, the defense submitted a request for a RCM 706 examination.

APPELLATE EXHIBIT VIII
PAGE 1 OF 10
APPENDED PAGE ____

11. On 7 December, the Convening Authority forwarded the approved request to Naval Health Clinic New England (NHCNE).
12. On 21 November 2018, defense submitted a second request for delay for a period of 36 days until 4 January 2019.

13. On 11 December 2018, defense was notified that the 706 examination could not occur until 10 January 2019 and a report not generated until 19 January 2019.

14. On 11 December 2018, LT Lee submitted a request for delay, to be attributed to the government due to their delay in convening the 706 board, until the results of said 706 board were completed.

15. On 10-11 January 2019, the 706 board commenced.

16. On 19 January 2019, the results of the 706 board were sent to the defense.

17. On 23 January 2019, the Article 32 hearing was held.

18. On 1 March 2019, the case was referred to this court.

19. The government requested, and the court ordered, an arraignment for 12 March 2019.

20. Defense requested delay until 20 March 2019, which was approved by the court.

21. The arraignment was held on 20 March 2019.

STATEMENT OF LAW

22. R.C.M. 707 states, in relevant part, that "the accused shall be brought to trial within 120 days after....the imposition of restraint under R.C.M. 304(a)(2)-(4)" with priority "given to persons in arrest or confinement."[1] Furthermore, "the right to a speedy trial is expressly guaranteed by R.C.M. 707 and the Sixth Amendment.

23. R.C.M. 304 identifies authorized methods of pretrial restraint, from restrictions on liberty to pretrial confinement. Restrictions only on liberty do not trigger the speedy trial rights under R.C.M. 707. Therefore, when reviewing a motion under R.C.M. 707, a court must determine whether an action by a command is a restriction on liberty, restriction in lieu of arrest, or more severe.

24. Additionally, the Uniform Code of Military Justice (U.C.M.J.) art. 9(a), 10 U.S.C.S. § 809(a), defines arrest as "the restraint of a person by an order, not imposed as a punishment for an offense, directing him to remain within certain specified limits."[2] In making a determination on when restraint is significant enough to trigger the requirements of R.C.M. 707, the Court

[1] 2012 MCM Rule 707
[2] 10 U.S.C.S. § 809(a)

should look to the totality of the circumstances.[3] Cases addressing this issue indicate that the key consideration is whether the purported restriction places any realistic, significant restraint on the liberty of the service member concerned.[4] "Most cases dealing with the characterization of pretrial restraint illustrate the difficult factual nature of determining when a form of pretrial restraint is a restriction or merely a condition on liberty."[5] Courts have held the following to be restriction in lieu of arrest sufficient to start the speedy trial clock: Requirement to remain on installation, to depart the base only with an authorized escort, to periodically check in while off-duty, and random non-duty check-ins by a unit.[6]

25. In addition to a Sailor's right to speedy trial under R.C.M. 707, there remains a constitutional right to speedy trial. Alleged violations of such rights under the Sixth Amendment are analyzed under the four-factor structure of *Barker v. Wingo*: (1) the length of the delay; (2) the reasons for the delay; (3) whether Appellant made a demand for speedy trial; and (4) prejudice to Appellant.[7] This analysis is applied where an accuser can point to some delay which is presumptively prejudicial.[8] A presumptive violation of R.C.M. 707 is sufficient to trigger the *Barker* analysis and weighs in favor of the defense.[9]

26. "[W]here the accused has been deprived of his or her constitutional right to speedy trial... [t]he charges must be dismissed with prejudice." R.C.M. 707(d)(1). Here, the majority of the *Barker* factors favor the Defense, warranting dismissal of all the charges and specifications.

ARGUMENT

The government took 174 days to bring CSSSN Brown to arraignment.

27. The speedy trial clock began to run on 30 July 18 when CSSSN Brown was held in the chief's mess without the ability to leave and under the direct continuous supervision of senior servicemembers – this amounted to pretrial restraint. CSSSN Brown's arraignment occurred on 20 March 2019 day 174.

The reasons for the 54 days of delay involve a failure on the part of the Government, not CSSSN Brown, to diligently move this case toward trial – including, but not limited to, the Government's delay in preferring charges, the Government's delay in ordering an Article 32 hearing and the Government's delay in processing the RCM 706 examination request.

28. The defense acknowledges and accepts that delay was attributed to the defense for the following time periods:

1. 4 October 18 to 19 November 18, a period of 46 days

---

[3] United States v. Russell, 30 M.J. 977, 979, 1990 CMR LEXIS 417, *5
[4] United States v. Fujiwara, 64 M.J 695, 701 (A.F Ct. Crim. App. 2007)
[5] United States v. Muniz, No. ARMY 20000668, 2004 CCA LEXIS 384, at *19 (A. Ct. Crim. App. Mar. 25, 2004)
[6] Andrews v. Heupel, 29 M.J. 743, 745, 1989 CMR LEXIS 929, *2
[7] Barker, 407 U.S. at 530.
[8] *Id*; United States v. Patterson, 2017 CCA LEXIS 437, *10.
[9] United States v. Danylo, 73 M.J 183, 185 (C.A.A.F. 2014)

2. 18 January 19 to 23 January 19, a period of 5 days
3. 12 March 19 to 20 March 19, a period of 8 days.

This amounts to a total 59 days of delay attributed to the defense.

29. Despite having witness statements (including the complaining witness' statement) and medical documentation, the Government waited 26 days to prefer charges in this case. Even after preferral, the government waited an additional 33 days of delay before scheduling the Article 32.

30. Although the defense submitted requests for delay which encompass 20 November 18 through 4 January 19 (45 days of delay), this period of time should not be excludable nor attributed to the defense. The Convening Authority sat on a request for a 706 examination for CSSSN Brown while he sat in pretrial confinement in a civilian facility for 11 days before the first action was taken. Then the Convening Authority waited another 31 days before forwarding the request to NHCNE. NHCNE responded swiftly stating they would not be able conduct the evaluation for 30 days.

31. There are numerous facilities in which the Convening Authority could have sent CSSSN Brown to ensure his case was not delayed any further such as Maryland, Jacksonville, Great Lakes, California but they did not. CSSSN Brown just sat in pretrial confinement in a civilian facility awaiting his day in court because the Government made conscious decisions to drag its feet.

32. Furthermore, the 706 board was ineffective as the board members told CSSSN Brown that the information he provided would not be held confidential. The purpose of the 706 examination is to determine whether (1) he suffered from any mental disease or defect that would preclude him from appreciating the nature and quality of wrongfulness of his actions and (2) whether he is presently suffering from a mental disease or defect that would hinder his ability to understand the nature of the proceeding and assist in his defense. Since CSSSN Brown was told that his communications would not be confidential, he was unable to provide all the necessary information needed and therefore the results of the 706 board are to some extent, useless.

33. After the Article 32 report was received, despite being on notice about potential speedy trial issues, the government still waited another 24 days to refer charges. The Government took its time at every stage in the court martial process and as a result, CSSSN Brown was denied a Constitutional right.

The fact that CSSSN Brown did not demand speedy trial does not signify that his right to one was not violated

34. Although CSSSN Brown did not demand speedy trial, the government still maintains an obligation to ensure swift administration justice. *Barker* emphasizes that while a defendant's assertion of, or failure to assert, his right to a speedy trial is one of the factors to be considered in an inquiry into the deprivation of such a right, the primary burden remains on the courts and the

prosecutors to assure that cases are speedily brought to trial.[10] Additionally, the right to a speedy trial is guaranteed through R.C.M. 707 and the Sixth Amendment. Each factor is related to the other and must be considered together with such other circumstances as may be relevant.[11]

CSSSN Brown has suffered personal and professional prejudice

35. The Supreme Court has established that following the test for prejudice in the speedy trial context:

> Prejudice, of course, should be assessed in the light of the interests of defendants, which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.

Mizgala, 61 M.J. 122,129 (C.A.A.F. 2005) (quoting *United States v. Barker*, 407 U.S. at 532 (footnote omitted)).

36. The prejudice CSSSN Brown suffered is self-evident – he has been confined for 326 days. Despite the fact that he is facing charges of attempted murder, in pretrial confinement in a civilian facility, in solitary confinement at this facility, the government did not act with any sense of urgency to get this case to trial in a reasonable manner.

37. CSSSN Brown was placed into pretrial confinement on 16 November 18 due to an alleged incident with another inmate. CSSSN Brown was supposed to be in solitary confinement for 20 days (ending on 6 Dec 18) but due to the other inmate threatening CSSSN Brown, he was told he had to remain in solitary confinement. CSSSN Brown filed requests and complaints to his Commanding Officer to be moved to a military facility so that he did not have to unnecessarily endure solitary confinement but all efforts were met with repeated denials.

38. Despite having the ability to move CSSSN Brown to a location where he could be safe and not subjected to [redacted] for an indefinite period time, the Convening Authority did nothing. The Convening Authority did nothing to move his case forward and did nothing to ensure his mental and emotional health were not compromised during this time which jeopardizes his case. CSSSN Brown remained in solitary confinement until 1 May 2019 166 days.

39. There are significant periods of time where the government just did not do anything. The government failed CSSSN Brown and as such he suffered personal and professional prejudice. This case impacted every aspect of his life, caused him embarrassment and shame in his personal relationships, caused him to miss significant moments within the life of his family, deprived him

[10] Barker, 407 U.S. at 515.
[11] Id.

of the ability to [redacted], damaged his ability to advance as a Sailor in the U.S. Navy, and most importantly, deprived him of his freedom.

40. The majority of the factors weigh heavily in favor of the defense. CSSSN Brown has spent 326 days in jail as of the filing of this motion. Of the 326 days, the government dragged its feet and did nothing to expedite this process for 155 days. That is almost half the amount of time CSSSN Brown was confined – that is not reasonable diligence. "The remedy for an Article 10 violation must remain dismissal with prejudice of the affected charges [...] where the circumstances of delay are not excusable [...] it is no remedy to compound the delay by starting all over." *Kossman* at 262.

RELIEF REQUESTED

41. The Defense respectfully requests this Court dismiss all charges and specifications against CSSSN Brown due to lack of speedy trial pursuant to the Sixth Amendment and RCM 707.

[redacted]

Respectfully submitted,
S. Y. WILLIAMS
LT, JAGC, USN

Attachments:
Enclosure P: Charge Sheet preferred on 30 Aug 18
Enclosure Q: Statement of ETVC [redacted] dtd 30 Jul 18
Enclosure R: Statement of ETVSA [redacted] dtd 30 Jul 18
Enclosure S: Statement of EMN2 [redacted] dtd 30 Jul 18
Enclosure T: Statement of CS3 [redacted] dtd 30 Jul 18
Enclosure U: Statement of EMN2 [redacted] dtd 30 Jul 18
Enclosure V: Statement of MMN1 [redacted] dtd 30 Jul 18
Enclosure W: Statement of ETN2 [redacted] dtd 30 Jul 18
Enclosure X: Statement of ETV3 [redacted] dtd 30 Jul 18
Enclosure Y: Statement of MMW1 [redacted] dtd 30 Jul 18
Enclosure Z: Results of Interview with CS3 [redacted] dtd 31 Jul 18
Enclosure A: Results of Interview with ETVC [redacted] dtd 1 Aug 18[12]
Enclosure AA: Results of Interview with EMN2 [redacted] dtd 2 Aug 18[13]
Enclosure AB: Results of Interview with EMN2 [redacted] dtd 31 Jul 18
Enclosure AC: Results of Interview with MMN1 [redacted] dtd 2 Aug 18[14]
Enclosure E: Results of Interview with ETN2 [redacted] dtd 2 Aug 18[15]
Enclosure AD: Results of Interview with ETV3 [redacted] dtd 31 Jul 18
Enclosure AE: Results of Interview with LSS2 [redacted] dtd 1 Aug 18 (w/enclosures)
Enclosure AF: Memorandum of Initial Review Officer dtd 3 August 18

[12] Although dated 1 August 18, the interview was conducted on 31 July 18
[13] Although dated 2 August 18, the interview was conducted on 31 July 18
[14] Although dated 2 August 18, the interview was conducted on 31 July 18.
[15] Although dated 2 August 18, the interview was conducted on 31 July 18.

Enclosure AG: Request for Counsel dtd 7 Sep 18
Enclosure AH: Appointment of Preliminary Hearing Officer dtd 24 Sep 18
Enclosure AI: Defense Request for Delay of Article 32 dtd 27 Sep 18
Enclosure AJ: Approval of Delay Request dtd 1 Oct 18
Enclosure AK: Request for RCM 706 inquiry dtd 7 Nov 18
Enclosure AL: Order for RCM 706 inquiry dtd 20 Nov 18
Enclosure AM: Email thread subject title '706 Status ICO Brown'
Enclosure AN: Email thread subject title 'Request for RCM 706 Inquiry Signed'
Enclosure AO: Request for delay of Article 32 hearing dtd 21 Nov 18
Enclosure AP: Email thread subject title 'RCM 706 Order for Competency and Mental Responsibility'
Enclosure AQ: Request for delay of Article 32 dtd 11 Dec 18
Enclosure AR: TC Endorsement of 3rd Continuance ICO Brown dtd 12 Dec 18
Enclosure AS: Email thread subject title 'Art. 32 Extension Request- US v. Brown'
Enclosure AT: Preliminary Hearing Officer's Report dtd 4 Feb 19
Enclosure AU: Complaints of Wrong Under Article 138 dtd 31 Jan 19 (w/encls)

I certify that I have served a true copy via e-mail of the above on the court and trial counsel on 21 June 19.

[redacted]
S. Y. WILLIAMS
LT, JAGC, USN

APPELLATE EXHIBIT VIII
PAGE 7 OF 10
APPENDED PAGE ____

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

UNITED STATES **v.** **MICAH J. BROWN** **CSSSN/E-3** **USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO DISMISS FOR LACK OF SPPEDY TRIAL PURSUANT RCM 707, UCMJ** **28 June 2019**

1. **Nature of Motion**.

This is the United States' response to the Accused's motion to dismiss all charges with prejudice for violation of speedy trial rights under Rules of Courts-Martial (R.C.M.) 707. The United States respectfully request this Court deny the Accused's Motion because there has been no violation of R.C.M. 707.

2. **Statement of Facts.**

a. On or about 30 July 2018, the Accused was placed under supervision in the chief's mess on the [redacted] following his attack on the Victim. (Defense (Def.) Enclosure (Encls.) B at 2.)

b. On 31 July 2018, [redacted] pulled into port in Cape Canaveral, FL for approximately 1.5 hours. (Def. Encls. AT at 16.)

c. On 31 July 2018, the Accused entered pretrial confinement and NCIS conducted interviews with multiple witnesses on the [redacted]. (Def. Encls. AF at 1.)

APPELLATE EXHIBIT IX
PAGE 1 OF 17
APPENDED PAGE

d. On 30 August 2018, the United States preferred charges against the Accused. (Def. Encls. P at 1.) On 24 September 2018, a preliminary hearing officer was appointed for an Article 32 hearing scheduled for 4 October 2018. (Def. Encls. AH at 1.)

e. On 27 September 2018, LT Sahar Jooshani, Detailed Defense Counsel, submitted the first request for a continuance to last from 4 October 2018 until 29 November 2018 given the "serious" and "complex" "nature of the offenses." Defense Counsel stated in the request that any delay would be attributable to the Defense.(Def. Encls. AI. at 1.)

f. On 27 September 2018, the United States endorsed Defense's first motion for continuance. (Government (Gov.) Encls. 11 at 1.)

g. On 1 October 2018, the Convening Authority approved Defense's delay request of the Article 32 to last from 4 October 2018 to 29 November 2018 and attributed the delay to the Defense. (Def. Encls. AJ. at 1.)

h. On 4 October 2018, the previously requested period of excludable delay began. (Def. Encls. AJ. at 1.)

i. On 7 November 2018, the Defense requested an R.C.M. 706 board for the Accused. (Def. Encls. AK. At 1.)

j. On 13 November 2018, the Convening Authority received both the Defense R.C.M. 706 request and the Trial Counsel's endorsement of said request.(Def. Encls. AT at 16.)

k. On 20 November 2018, the Convening Authority issued the order for an R.C.M. 706 examination. (Def. Encls. AL at 1.)

l. On 21 November 2018, Trial Counsel was informed that the previously detailed Defense Counsel was being replaced by two new counsel. (Def. Encls. AT at 16.)

m. On 21 November 2018, LT Robin Lee, one of the new Detailed Defense Counsel, submitted a second request for a continuance of the Article 32 hearing until 4 January 2019, again due to the "serious and complex nature of the allegations." Defense Counsel stated in the request that any delay would be attributable to the Defense. (Def. Encls. AO at 1.)

n. On 26 November 2018, the Trial Counsel endorsed the Defense's second request for a continuance. (Gov. Encls. 12 at 1.)

o. On 27 November 2018, the Trial Counsel informed new Defense Counsels of the pending R.C.M. 706 request. (Def. Encls. AN. at 1.)

p. On 27 November 2018, the Convening Authority approved the Defense's second continuance request of the Article 32 to last from 29 November 2018 to 4 January 2019 and attributed the delay to the Defense.(Gov. Encls. 13 at 1.)

q. On 7 December 2018, the Convening Authority forwarded the approved request for an R.C.M. 706 board to the legal department of Naval Health Clinic New England (NHCNE). (Def. Encls. AT at 16.)

r. On 10 December 2018, the NHCNE legal department informed the Convening Authority that the two doctors qualified to convene the board could not do so until 10-11 January 2019. (Def. Encls. AP at 1.)

s. On 11 December 2018, LT Robin Lee, Defense Counsel, submitted a third request for a continuance, asking that the Article 32 hearing be delayed until the R.C.M. 706 board was completed. This time, the Defense asked that the delay be attributable to the United States. (Def. Encls. AQ at 2.)

t. On 12 December 2018, the Trial Counsel endorsed the Defense's third request for a continuance, but specifically requested that the delay be attributed to the Defense. (Def. Encls. AR at 1.)

u. On 28 December 2018, the Convening Authority approved the Defense's request for a third continuance to last from 4 January 2019 until 28 January 2019 and attributed the delay to the Defense. (Gov. Encls. 13 at 2.)

v. On 10 January 2019, the R.C.M. 706 board convened and lasted two days. (Def. Encls. AX at 1.)

w. On 18 January 2019, the results of the R.C.M. 706 board were sent to the Defense.(Def. Encls. AX at 1.)

x. On 23 January 2019, the Article 32 hearing was held, thereby ending the period of excludable delay that began on 4 October 2018. (Def. Encls. AS at 1.)

y. On 7 February 2019, the Preliminary Hearing Officer issued his report. (Def. Encls. AT at 1.)

z. On 11 March 2019, LCDR Davis, Defense Counsel, submitted a fourth request for a continuance, this time to this Court, seeking a delay of the arraignment from 12 March 2019 until 20 March 2019. (Gov. Encls. 14 at 1.)

aa. On 12 March 2019, this Court granted the continuance and ordered the delay be attributable to the Defense. (Gov. Encls. 14 at 1.)

bb. On 20 March 2019, the Accused was arraigned. (Gov. Encls. 15 at 1.)

cc. In total, 233 days passed from the Accused's initial confinement ad his arraignment. (Gov. Encls. 15 at 2.)

dd. A total of 120 days of excludable delay was granted by the Convening Authority and this Court. (Gov. Encls. 15 at 1.)

ee. Therefore, the R.C.M. 707 clock was stopped on day 113. (Gov. Encls. 15 at 2.)

3. **Burden**. The United States has the burden of persuasion on motions alleging a denial of the right to speedy trial under R.C.M 707. R.C.M. 905(c)(2)(B).

4. **Discussion**.

A. R.C.M. 707 is not violated if an accused is arraigned under 120 days.

R.C.M. 707 states that, a military "accused shall be brought to trial within 120 days after the earlier of: (1) preferral of charges; (2) the imposition of restraint under R.C.M. 304(a)(2)-(4); or (3) entry on active duty under R.C.M. 204." *United States v. Wilder*, 75 M.J. 135, 138 (C.A.A.F. 2016) (quoting R.C.M. 707(a)). "A failure to comply with this rule will result in dismissal of the affected charges." *United States v. Patterson*, No. 201600189, 2017 CCA LEXIS 437, at *5 (N-M Ct. Crim. App. June 26, 2017) (quoting R.C.M. 707(d)).

R.C.M. 707(c) addresses excludable delay:

> All periods of time during which appellate courts have issued stays in the proceedings, or the accused is absent without authority, or the accused is hospitalized due to incompetence, or is otherwise in the custody of the Attorney General, shall be excluded when determining whether the period in subsection (a) of this rule has run. *All other pretrial delays approved by a military judge or the convening authority shall be similarly excluded.*

R.C.M. 707(c) (emphasis added).

"The threshold requirement for excluding any period of time from speedy trial accountability under R.C.M. 707(c) is whether a delay was in fact granted by a person authorized to grant such a delay." *United States v. Arab*, 55 M.J. 508, 512 (A. Ct. Crim. App. 2001). "Prior to referral, a convening authority may grant a requested delay. R.C.M. 707(c)(1). After referral, a

military judge may grant a requested delay." *Id.*; *see also United States v. Lazauskas*, 62 M.J. 39, 41-42 (C.A.A.F. 2005).

The discussion following R.C.M. 707(c) indicates that "[t]he decision to grant or deny a reasonable delay is a matter within the *sole* discretion of the convening authority or a military judge, and should be based on the facts and circumstances then existing." *United States v. Kirklen*, No. 95 00488, 1995 CCA LEXIS 476, *4 (N-M Ct. Crim. App. Oct. 31, 1995) (emphasis added). The discussion section of R.C.M. 707(c) also gives several examples of "reasons to grant a delay":

> time to enable counsel to prepare for trial in complex cases; time to allow examination into the mental capacity of the accused; time to process a member of the reserve component to active duty for disciplinary action; time to complete other proceedings related to the case; time requested by the defense; time to secure the availability of the accused, substantial witnesses, or other evidence; time to obtain appropriate security clearances . . .; or additional time for other good causes.

United States v. Melvin, No. ACM 37081, 2009 CCA LEXIS 82, *19-21 (A.F. Ct. Crim. App. Mar. 4, 2009) (quoting R.C.M. 707(c)).

B. The United States did not violate R.C.M. 707.

1. Excludable delay was granted by persons authorized to grant such delays.

As a preliminary matter, the Accused omits a large chunk of excludable delay—that he agreed to—from his calculation. (Accused's Mot. at 3-4, ¶28.) The Accused "acknowledges ad accepts" delay from 4 October 2018 to 19 November 2018, a period of 46 days. (Id.) First of all, his initial continuance request encompassed the period from 4 October 2018 to 29 November 2018, which is a period of 56 days. Secondly, the Accused also submitted a second continuance in which he consented to excludable delay from 29 November 2018 to 4 January 2019, a period of 36 days. So from the outset, the Accused has omitted an additional 46 days of excludable delay from his calculation. To justify this, the Accused argues that the "Government made

conscious decisions to drag its feet." (Accused's Mot. at 4, ¶31.) But there is no authority for the argument that this Court can "un-grant" delay that has already been excluded by the Convening Authority, particularly when the Accused himself *asked for and consented to the delay*. There is no basis in fact or law for the Accused's argument, and this Court should not adopt this calculation. When one subtracts the additional 46 days of excludable delay that the Accused omitted from the overall time period between confinement and arraignment, the number drops from the Accused's proposed 174 to 128.

Even if the Accused had not consented to these additional 46 days of excludable delay, it would not matter, because the Convening Authority declared them as such. Based on the plain text of R.C.M. 707(c), if a convening authority or military judge approves a "pretrial delay," then it "shall be similarly excluded." R.C.M. 707(c). There is no mechanism in the Rule to challenge either a convening authority or military judge's determination that a delay is excludable. To conclude otherwise would require ignoring the plain text of the Rule, something CAAF has declined to do in similar contexts. *See Wilder*, 75 M.J. at 138 (applying the plain text of R.C.M. 707 in overruling previous case that contradicted that Rule).

For this reason, the Accused's argument regarding the period from 4 January 2019 to 23 January 2019 is also unavailing. It does not matter if the Accused did not consent to the delay. It only matters if a party with authority deemed the delay excludable. *See Lazauskas*, 62 M.J. at 41 ("It does not matter which party is responsible [for the delay]."). Per R.C.M. 707(c), "[p]rior to referral, a convening authority may grant a requested delay." *Arab*, 55 M.J. at 512.

Since 30 July 2018, the Accused submitted three continuance requests to the Convening Authority, on 27 September 2018, 21 November 2018, and 11 December 2018. Trial Counsel endorsed these requests. The Convening Authority granted these requests attributed the periods

as excludable delay. Taken together, the period of excludable delay granted by the Convening Authority spanned from 4 October 2018 to 23 January 2019: 111 days.

The Accused also requested excludable delay from this Court. "After referral, a military judge may grant a requested delay." *Arab*, 55 M.J. at 512. On 11 March 2019, the Accused submitted a motion for a continuance of arraignment to last until 20 March 2019. This Court approved this continuance on 12 March 2019, and thus granted a total of 9 days excludable delay.

The Accused has not alleged that the Convening Authority or this Court were not authorized to issue excludable delays or continuances. As such, for the 233 days from 30 June 2018 to 20 March 2019, 120 days are excludable. There has been no violation of R.C.M. 707.

2. The Convening Authority did not abuse his discretion in ordering excludable delay.

Even if there were a mechanism to challenge a convening authority's grant of excludable delay in R.C.M. 707, here, there was no abuse of discretion.

"Under R.C.M. 707(c), all pretrial delays approved by the convening authority are excludable so long as approving them was not an abuse of the convening authority's discretion. It does not matter which party is responsible." *Lazauskas*, 62 M.J. at 41 (C.A.A.F. 2005); *see also Arab*, 55 M.J. at 512 ("The second issue is whether granting the delays constituted an abuse of discretion."). An abuse of discretion calls for "more than a mere difference of opinion." *United States v. Wicks*, 73 M.J. 93, 98 (C.A.A.F. 2014); *see also Rolen v. Hansen Bev. Co.*, 193 F. App'x 468, 472 (6th Cir. 2006) ("The abuse of discretion standard is highly deferential."). A convening authority's decision to grant excludable delay is not an abuse of discretion so long as it "was not arbitrary or clearly unreasonable under the circumstances." *United States v. Lane*, ACM S29537, 1999 CCA Lexis 5, *2 (A.F. Ct. Crim. App. Jan. 14, 1999). "[I]n the absence of

an abuse of discretion by the officer granting the delay, there is no violation of R.C.M. 707." *Lazauskas*, 62 M.J. at 41.

Far from engaging in an "arbitrary or clearly unreasonable" decision under the circumstances, the Convening Authority adhered to guidance in R.C.M. 707(c) by declaring periods of excludable delay for circumstances specifically mentioned in the Discussion section, such as allowing Defense Counsel "to prepare for trial in [a] complex case," allowing "examination into the mental capacity of the Accused," and "time requested by the defense." *See Melvin*, 2009 CCA LEXIS 82, at *19-21.

The Accused asserts that the Convening Authority's supposed lack of promptness in ordering a R.C.M. 706[1] hearing is grounds for un-granting the period of excludable delay. This argument is unavailing. *See United States v. Worlds*, No. 20150134, 2017 CAA LEXIS 621, at *7 (A. Ct. Crim. App. Sept. 22, 2017) (military judge did not err when deeming a period of 65 days excludable for the completion of an R.C.M. 706 board even though "more than two months was not optimum."); *see also United States v. Thompson*, 46 M.J. 472, 475 (C.A.A.F. 1997) (noting "no reason to grant the defense a windfall from a claimed violation of R.C.M. 707 that the defense itself occasioned").

The Accused's R.C.M. 707 motion fails given 1) he cannot prove that the excludable delay was issued by someone not authorized under R.C.M. 707(c), and 2) he has not alleged and fails to prove that the Convening Authority abused his discretion in granting the various periods of excludable delay. There was no violation of R.C.M. 707.

[1] The Accused also asserts that the R.C.M. 706 board was "to some extent, useless." (Accused's Mot. at 4, ¶32.) But despite receiving these results in January, the Accused has not requested an additional R.C.M. 706 board, nor does he challenge the results of the R.C.M. 706 board.

5. **Relief Requested**. The United States respectfully requests this Court deny the Accused's motion to dismiss all charges and specifications against CSSSN Brown due to lack of speedy trial under RCM 707.

6. **Evidence**. In addition to relying on defense enclosures, the United States provides the following enclosures in support of this motion:

Enclosure 11 (First Endorsement on Defense Request for Continuance of Article 32 Investigation ICO U.S. v. CSSSN Micah J. Brown dtd 27 Sep 18)

Enclosure 12 (First Endorsement on Defense Request for Continuance of Article 32 Investigation ICO U.S. v. CSSSN Micah J. Brown dtd 21 Nov 18)

Enclosure 13 (Request for Delay of Article 32 Preliminary Hearing ICO United States v. CSSSN Micah J. Brown, USN dtd 27 Nov 18 and dtd 28 Dec 18)

Enclosure 14 (Email thread subject title 'United States v. Brown – Motion for a Continuance

Enclosure 15 (Timeline)

7. **Oral Argument**. The United States requests oral argument.

BELFORTIJAMES.MICHAEL.[redacted]
Digitally signed by BELFORTI.JAMES.MICHAEL.[redacted]
DN: c=US, o=U.S. Government, ou=DoD, ou=PKI, ou=USN, cn=BELFORTI.JAMES.MICHAEL.[redacted]
Date: 2019.06.28 20:23:15 -04'00'

J. M. BELFORTI
LCDR, JAGC, USN
Trial Counsel

APPELLATE EXHIBIT IX
PAGE 10 OF 17
APPENDED PAGE

CERTIFICATE OF SERVICE

A copy of this document was electronically served on the Court and Defense Counsel on 28 June 2019.

BELFORTI.JAMES.MICHAEL.[redacted]

Digitally signed by BELFORTI.JAMES.MICHAEL.[redacted]
DN: c=US, o=U.S. Government, ou=DoD, ou=PKI, ou=USN, cn=BELFORTI.JAMES.MICHAEL.[redacted]
Date: 2019.06.28 20:23:38 -04'00'

J. M. BELFORTI
LCDR, JAGC, USN
Trial Counsel

APPELLATE EXHIBIT IX
PAGE 17 OF 17
APPENDED PAGE

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

UNITED STATES v. Micah J. Brown CSSSN/E-1 USN	DEFENSE MOTION TO DISMISS FOR LACK OF SPEEDY TRIAL PURSUANT TO ARTICLE 10, UCMJ 21 June 19

MOTION

Pursuant to Article 10, Uniform Code of Military Justice (UCMJ), the defense moves this court to dismiss all charges and specifications for lack of speedy trial. The Defense does request an Article 39(a), UCMJ, session, if opposed.

FACTS

1. On 30 July 18, the alleged incident occurred.

2. Immediately following the alleged incident, CSSSN Brown was placed in pretrial restraint and NCIS was notified.

3. On the same day, a Preliminary Inquiry Officer (PIO) was appointed to inquire into the facts and circumstances surrounding the alleged assault.

4. On 30 July 18, the PIO interviewed 9 witnesses.

5. On 31 July 18, CSSSN Brown was ordered into pretrial confinement and NCIS took over the investigation.

6. Between 31 July 18 and 2 August 18, NCIS re-interviewed six of the previously interviewed witnesses.

7. On 1 August 18, NCIS interviewed the complaining witness and received medical documentation from the complaining witness documenting the injuries sustained.

8. On 3 August 18, an initial review hearing was conducted with a determination made that continued confinement was appropriate.[1]

[1] CSSSN Brown waived his presence at this hearing.

APPELLATE EXHIBIT X
PAGE 1 OF 11
APPENDED PAGE

9. A military attorney represented CSSSN Brown for the limited purpose of the hearing.

10. At the initial review hearing, the Initial Review Officer (IRO) reviewed various witness statements to make the aforementioned determination.

11. On 30 August 18, charges for violation of Article 80 (attempted premeditated and attempted unpremeditated murder) and Article 128 (aggravated assault with intent to commit grievous bodily harm) were preferred.

12. On 7 September 18, Region Legal Service Office Mid-Atlantic sent a request for counsel to Defense Service Office North.

13. In the request for counsel, the Convening Authority scheduled the Article 32 hearing for no later than 28 September 18.

14. On 17 September 18, defense counsel was detailed to represent CSSSN Brown.

15. On 24 September 18, LCDR [redacted] was appointed as the Preliminary Hearing Officer (PHO). Although the request for counsel stated the hearing would occur on 28 September 18, the appointing order stated the Article 32 was to commence on 4 October 18.

16. On 27 September 18, defense counsel submitted a request for delay of the Article 32 until 29 November 18. This request was granted by the Convening Authority.

17. On 7 November 18, defense counsel submitted a request for a R.C.M. 706 examination.

18. On 8 November 18, trial counsel positively endorsed the request for a R.C.M. 706 examination.

19. On 20 November, the Convening Authority signed a request for Commanding Officer Naval Health Clinic New England (NHCNE) to convene a board, yet this request was not forwarded to NCHNE until 7 December 18.

20. On 20 November 18, CSSSN Brown's defense counsel was relieved and replaced by new counsel.

21. On 21 November 18, CSSSN Brown's new defense counsel submitted a request for delay of the Article 32 until 4 January 19.

22. On 11 December 18, defense counsel was notified that the 706 board could not convene until 11 January 19 and the full report would not be completed until 18 January 19.

23. Based on the aforementioned information, defense counsel submitted another request for delay of the Article 32 until the completion of the 706 examination and full report due to the government's inaction.

24. Trial counsel favorably endorsed the request for delay with a projected date of 21 January 19 for the Article 32 hearing although they disagreed that the delay was government induced.

APPELLATE EXHIBIT Y
PAGE 2 OF 11
APPENDED PAGE ____

25. The PHO stated he was unavailable until 23 January 19.

26. The Convening Authority set the Article 32 hearing for 28 January 19.

27. The 706 evaluation was conducted [redacted]

28. [redacted]

29. The Article 32 hearing was held on 23 January 19 despite the 28 January 19 date set by the Convening Authority.

30. The Article 32 report was completed and received on 4 February 19 by all parties.

31. The case was referred on 1 March 19.

32. The charges were served on CSSSN Brown on 5 March 19.

33. The arraignment was scheduled for 12 March 19.

34. On 11 March 19 the defense filed a motion for a continuance of the arraignment until 20 March.

35. The court granted the motion for a continuance.

36. The arraignment was held on 20 March 19.

37. Trial is currently scheduled for the week of 4 August 19.

38. As of the filing of this motion, CSSSN Brown remains in pretrial confinement.

BURDEN

39. The burden of proof rests on the Government for this motion. *United States v. Laminman*, 41 M.J. 518, 521 (C.G. Ct.Crim.App 1994). The standard as to any factual issue necessary to resolve this motion is to a preponderance of the evidence.

LAW

40. For servicemembers, it has been long understood that Article 10, UCMJ, 10 USC §810, imposes a more stringent speedy-trial standard than that of the Sixth Amendment. *United States v. Kossman*, 38 M.J. 258, 259 (C.A.A.F. 1993) *citing United States v. Burton*, 21 USCMA 112, 117, 44 CMR 166, 171 (1971).

41. Article 10, UCMJ, provides that when a person subject to this chapter is ordered into arrest or confinement before trial, immediate steps shall be taken (a) to inform the person of the

specific offense of which the person is accused; and (b) to try the person or to dismiss the charges and release the person. 10 USC §810.

42. The court in *Kossman* viewed the issue through the prism of "reasonable diligence." *Id.* at 262; *see also United States v. Mizgala*, 61 M.J. 122, 127 (C.A.A.F. 2005) (In reviewing Article 10, UCMJ, claims, courts do not require "constant motion, but reasonable diligence in bringing the charges to trial").

43. Courts then look at four factors in examining the circumstances surrounding an alleged Article 10, UCMJ, violation: "(1) the length of the delay; (2) the reasons for the delay; (3) the appellant's demand for speedy trial; and (4) prejudice to the appellant." *Id.* at 129.

ARGUMENT

The length of the delay (155 days) is facially unreasonable

44. From 4 August 18 (the day after the IRO hearing) to 30 August 18 (preferral of charges) there were 26 days of delay.

45. From 31 August 18 to 7 September 18 (request for counsel sent) there were 7 days of delay. The government knew of the allegations since 30 July 18, yet failed to request defense counsel to represent CSSSN Brown. This action did not occur until CSSSN Brown had spent 39 days in pretrial confinement.

46. From 8 September 18 to 4 October 18 (initial date of Article 32) there were 26 days of delay. The only known action during this period of time was on 24 September when the PHO was appointed; after CSSSN Brown had spent 56 days in pretrial confinement.

47. From 9 November 18 (the day after the government positively endorsed the 706 request) to 20 November 18 (the day the CA acted on the 706 request) were 11 days of delay.

48. From 21 November 18 to 11 January 19 (the date the 706 board convened) were 51 days of delay. The only known action during this period of time is on 7 December 18 when the CA forwarded the 706 request to NHCNE.

49. From 5 February 19 (the day after the Article 32 report was received by all parties) to 1 March 19 (when the case was referred) were 24 days of delay.

50. From 2 March 19 to 12 March 19 (the originally scheduled arraignment date) were 10 days of delay.

The reasons for delay involve a failure on the part of the Government, not CSSSN Brown, to diligently move this case toward trial

51. The delays by the government in the case do not involve the type of deliberate, tactical delay by the government that has been cited in some cases clearly favoring the accused under the

second *Barker* factor. *See, e.g., Barker*, 407 U.S. at 533. However, even in cases without such egregious tactical delay, the length of pretrial delay can be attributable to the government – or at least not against the accused.

52. Here, the vast majority of interviews and investigative work between the PIO and NCIS occurred from 30 July to 2 August. "The delay that can be tolerated for an ordinary a street crime is considerably less than [that] for a serious, complex conspiracy charge." *Barker*, 407 U.S. at 531. This is not a complex case. The government had over 12 signed and sworn witness statements, including that of the complaining witness, to know and understand the nature of the charges going forward. CSSSN Brown was apprehended immediately, identity was not an issue, and witnesses were not an issue. The government does not have to perfect its case to prefer charges. Therefore, the government had more than enough information to prefer the case to a court martial yet failed to do so for 26 days.

53. Despite knowing that (1) CSSSN Brown was ordered into pretrial confinement and (2) they were going to charge him with attempted murder, the government did not send a request for counsel until CSSSN Brown had been in confinement for 39 days.

54. Prior to any request by the defense for a delay of the Article 32 hearing, the government did not schedule the Article 32 until 26 days after preferral. The government is the only party who knows (1) what cases are before them, (2) what forum will be required and (3) the date any pretrial referral proceeding will take place. From the very advent of the allegation, the government should have been identifying a hearing officer and a date for the Article 32 without consideration of a potential request for a delay from the defense. Instead, the government again took its time while CSSSN Brown sat in jail with an unknown fate awaiting him.

55. Trial counsel positively endorsed the defense's request for a 706 examination one day after receiving it. The Special Court Martial Convening Authority (SPCMCA) took 11 days to order the 706 and then took another 16 days to forward the request to NHCNE. Because the SPCMCA dragged its feet for 27 days, it took an additional 33 days for the 706 board to convene. During this period of time, the government was on notice that CSSSN Brown was sitting in a civilian detention facility in solitary confinement.

56. Furthermore, the 706 board was ineffective as the board members told CSSSN Brown that the information he provided would not be held confidential. The purpose of the 706 examination is to determine whether (1) he suffered from any mental disease or defect that would preclude him from appreciating the nature and quality of wrongfulness of his actions and (2) whether he is presently suffering from a mental disease or defect that would hinder his ability to understand the nature of the proceeding and assist in his defense. Since CSSSN Brown was told that his communications would not be confidential, he was unable to provide all the necessary information needed and therefore the results of the 706 board are useless to some extent. Therefore the time wasted on 706 board was not diligent.

57. Despite the PHO putting the government on notice at the Article 32 hearing and in his Article 32 report of the significant Article 10 issues in this case, the GCMCA still took its time referring this case to trial. The GCMCA took 24 days – that is triple the amount of time prescribed by

Article 33, UCMJ. During this period of time, CSSSN Brown remained in a civilian confinement facility in solitary confinement.

58. Even after referral, the government waited 5 days to serve the charges on CSSSN Brown and 10 days to arraign him.

The fact that CSSSN Brown did not demand speedy trial does not signify that his right to one was not violated

59. Although CSSSN Brown did not demand speedy trial, the government still maintains an obligation to ensure swift administration justice.

CSSSN Brown has suffered personal and professional prejudice

60. The Supreme Court has established that following the test for prejudice in the speedy trial context:

> Prejudice, of course, should be assessed in the light of the interests of defendants, which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.

Mizgala, 61 M.J. 122,129 (C.A.A.F. 2005) (quoting *United States v. Barker*, 407 U.S. at 532 (footnote omitted)).

61. The prejudice CSSSN Brown suffered is self-evident – he has been confined for 326 days. Despite the fact that he is facing charges of attempted murder, in pretrial confinement in a civilian facility, in solitary confinement at this facility, the government did not act with any sense of urgency to get this case to trial in a reasonable manner.

62. CSSSN Brown was placed into pretrial confinement on 16 November 18 due to an alleged incident with another inmate. CSSSN Brown was supposed to be in solitary confinement for 20 days (ending on 6 Dec 18) but due to the other inmate threatening CSSSN Brown, he was told he had to remain in solitary confinement. CSSSN Brown filed requests and complaints to his Commanding Officer to be moved to a military facility so that he did not have to unnecessarily endure solitary confinement but all efforts were met with repeated denials.

63. Despite having the ability to move CSSSN Brown to a location where he could be safe and not subjected to [redacted] for an indefinite period time, the Convening Authority did nothing. The Convening Authority did nothing to move his case forward and did nothing to ensure his mental and emotional health were not compromised during this time which jeopardizes his case. CSSSN Brown remained in solitary confinement until 1 May 2019 - 166 days.

64. There are significant periods of time where the government just did not do anything. The government failed CSSSN Brown and as such he suffered personal and professional prejudice. This case impacted every aspect of his life, caused him embarrassment and shame in his personal relationships, caused him to miss significant moments within the life of his family, deprived him of the ability to be [redacted], damaged his ability to advance as a Sailor in the U.S. Navy, and most importantly deprived him of his freedom.

65. The majority of the factors weigh heavily in favor of the defense. CSSSN Brown has spent 326 days in jail as of the filing of this motion. Of the 326 days, the government dragged its feet and did nothing to expedite this process for 155 days. That is almost half the amount of time that is not reasonable diligence. There must be "a particularized showing of why the circumstances require the [delay]." See *United States v. Seltzer*, 595 F.3d at 1178. If not, "[t]he remedy for an Article 10 violation must remain dismissal with prejudice of the affected charges [...] where the circumstances of delay are not excusable [...] it is no remedy to compound the delay by starting all over." *Kossman* at 262.

RELIEF REQUESTED

66. The Defense respectfully requests this Court dismiss all charges and specifications against CSSSN Brown due to lack of speedy trial pursuant to Article 10, UCMJ. .

[redacted]

Respectfully submitted,
S. Y. WILLIAMS
LT, JAGC, USN

Attachments:
Enclosure P: Charge Sheet preferred on 30 Aug 18
Enclosure Q: Statement of ETVC [redacted] dtd 30 Jul 18
Enclosure R: Statement of ETVSA [redacted] dtd 30 Jul 18
Enclosure S: Statement of EMN2 [redacted] dtd 30 Jul 18
Enclosure T: Statement of CS3 [redacted] dtd 30 Jul 18
Enclosure U: Statement of EMN2 [redacted] dtd 30 Jul 18
Enclosure V: Statement of MMN1 [redacted] dtd 30 Jul 18
Enclosure W: Statement of ETN2 [redacted] dtd 30 Jul 18
Enclosure X: Statement of ETV3 [redacted] dtd 30 Jul 18
Enclosure Y: Statement of MMW1 [redacted] dtd 30 Jul 18
Enclosure Z: Results of Interview with CS3 [redacted] dtd 31 Jul 18
Enclosure A: Results of Interview with ETVC [redacted] dtd 1 Aug 18[2]

[2] Although dated 1 August 18, the interview was conducted on 31 July 18.

Enclosure AA: Results of Interview with EMN2 [redacted] dtd 2 Aug 18[3]
Enclosure AB: Results of Interview with EMN2 [redacted] dtd 31 Jul 18
Enclosure AC: Results of Interview with MMN1 [redacted] dtd 2 Aug 18[4]
Enclosure E: Results of Interview with ETN2 [redacted] dtd 2 Aug 18[5]
Enclosure AD: Results of Interview with ETV3 [redacted] dtd 31 Jul 18
Enclosure AE: Results of Interview with LSS2 [redacted] dtd 1 Aug 18 (w/enclosures)
Enclosure AF: Memorandum of Initial Review Officer dtd 3 August 18
Enclosure AG: Request for Counsel dtd 7 Sep 18
Enclosure AH: Appointment of Preliminary Hearing Officer dtd 24 Sep 18
Enclosure AI: Defense Request for Delay of Article 32 dtd 27 Sep 18
Enclosure AJ: Approval of Delay Request dtd 1 Oct 18
Enclosure AK: Request for RCM 706 inquiry dtd 7 Nov 18
Enclosure AL: Order for RCM 706 inquiry dtd 20 Nov 18
Enclosure AM: Email thread subject title '706 Status ICO Brown'
Enclosure AN: Email thread subject title 'Request for RCM 706 Inquiry Signed'
Enclosure AO: Request for delay of Article 32 hearing dtd 21 Nov 18
Enclosure AP: Email thread subject title 'RCM 706 Order for Competency and Mental Responsibility'
Enclosure AQ: Request for delay of Article 32 dtd 11 Dec 18
Enclosure AR: TC Endorsement of 3rd Continuance ICO Brown dtd 12 Dec 18
Enclosure AS: Email thread subject title 'Art. 32 Extension Request- US v. Brown'
Enclosure AT: Preliminary Hearing Officer's Report dtd 4 Feb 19
Enclosure AU: Complaints of Wrong Under Article 138 dtd 31 Jan 19 (w/encls)

I certify that I have served a true copy via e-mail of the above on the court and trial counsel on 21 June 19.

[redacted]
S. Y. WILLIAMS
LT, JAGC, USN

[3] Although dated 2 August 18, the interview was conducted on 31 July 18
[4] Although dated 2 August 18, the interview was conducted on 31 July 18
[5] Although dated 2 August 18, the interview was conducted on 31 July 18

APPELLATE EXHIBIT ✓
PAGE 8 OF 11
APPENDED PAGE

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

UNITED STATES **v.** **MICAH J. BROWN** **CSSSN/E-3** **USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO DISMISS FOR LACK OF SPEEDY TRIAL ARTICLE 10, UCMJ** **28 June 2019**

1. **Nature of Motion**. Defense has moved to dismiss all charges with prejudice arguing a violation of the Accused's speedy trial rights under Article 10, UCMJ. The Government respectfully requests the court to deny Defense's motion as the Government has complied with Article 10, UCMJ.

2. **Statement of Facts.**

a. On or about 30 July 2018, the Accused placed under supervision in the Chief's mess on the [redacted] following his attack on the Victim, USN. (Defense (Def.) Enclosure (Encls.) B at 2.)

b. On 30 July 2018, Commanding Officer, [redacted] appointed MMNCS(SS) [redacted] to serve as Preliminary Inquiry Officer (PIO) to look into the facts and circumstances surrounding the attack on LSS2 [redacted]. (Government (Gov.) Encls. 16 at 1.)

c. On 30 July 2018, the PIO interviewed the following members: ETVC [redacted]; ETVSA [redacted] EMN2 [redacted] EMN2 [redacted]; MMN1

APPELLATE EXHIBIT XI
PAGE 1 OF 30
APPENDED PAGE

[redacted] ETN2 [redacted]; ETV3 [redacted]; CS3 [redacted]; and MMW1 [redacted] (Gov. Encls. 16 at 2 - 13.)

d. On 31 July 2018, [redacted] pulled into port in Cape Canaveral, FL for approximately 1.5 hours before getting underway again. (Def. Encls. AT at 16.)

e. On 31 July 2018, the Accused was apprehended and placed into pre-trial confinement in the brig at NAS Jacksonville, FL. (Gov. Encls. 7 at 1.)

f. On 31 July 2018, NCIS re-interviewed CS3 [redacted], ETVC [redacted] EMN2 [redacted], EMN2 [redacted], MMN1 [redacted], ETN2 [redacted] ETV3 [redacted] from [redacted], conducted a crime scene examination and seized multiple pieces of evidence including knives and clothing. (Def. Encls. E at 1, H at 1-3, Z at 1, AA at 1, AB at 1, AC at 1, AD at 1, and Gov. Encls. 17.)

g. On 1 August 2018, NCIS interviewed LSS2 [redacted] and captured photographic documentation of his wounds. (Def. Encls. AE at 1.)

h. On 3 August 2018, LCDR [redacted], conducted an initial review hearing where she determined that continued confinement of the Accused was appropriate. (Def. Encls. AF at 1.)

i. On 3 August 2018, LT Davey G. Rowe, USN, represented the Accused for the limited purpose of the hearing and the Accused waived his presence at that hearing. (Def. Encls. AF at 1 and Gov. Encls. 18 at 7.)

j. On 9 August 2018, NCIS obtained a CASS for evidentiary items seized on 31 July 2018 from Commanding Officer of Naval Air Station Jacksonville, FL, to include items turned over by the [redacted] but were not previously opened or inventoried. (Gov. Encls. 19 at 1.)

k. On 9 August 2018, NCIS collected additional photographic documentation of LSS2 [redacted] injuries. (Gov. Encls. 20 at 1 - 7.)

l. On 30 August 2018, government preferred charges against the Accused. (Def. Encls. P at 1.)

m. On 31 August 2018, NCIS interviewed PO2 [redacted]; PO2 [redacted]; ETN2 [redacted] CS3 [redacted] (Gov. Encls. 21 at 1, 17, 34, and 38)

n. On 5 September 2018, NCIS interviewed PO2 [redacted] EMN2 [redacted] and MMW1 [redacted] (Gov. Encls. 21 at 19, 25, and 42.)

o. On 5 September 2018, NCIS contacted and received incident reports involving the accused from Baltimore County Police Department. (Gov. Encls. 21 at 65 – 84)

p. On 6 September 2018, NCIS submitted a request for Family Advocacy Program (FAP) records. (Gov. Encls. 21 at 87.)

q. On 7 September 2018, NCIS interviewed FT3 [redacted] YN3 [redacted] TM2 [redacted] and TS2 [redacted] (Gov. Encls. 21 at 23, 28, 30, and 32.)

r. On 7 September 2018, the Government reached out to several members of Naval Justice School Newport (NJS) to inquire into their availability to serve as a Preliminary Hearing Officer (PHO). (Gov. Encls. 22 at 1.)

s. On 10 September 2018, the Government reached out to points of contact at NJS, DILS, and the Reserve PHO unit in an attempt to identify a PHO. (Gov. Encls. 22 at 2.)

t. On 11 September 2018, the Government reached out to RLSO NDW to ask for assistance in finding a PHO and was referred back to the Reserve PHO unit. (Gov. Encls. 22 at 9.)

u. On 11 September 2018, NCIS interviewed CS1 [redacted] and CSC [redacted] (Gov. Encls. 21 at 6 and 8.)

v. On 12 September 2018, NCIS made telephonic contact with [redacted]. (Gov. Encls. 21 at 85.)

w. On 13 September 2018, NCIS interviewed HM1 [redacted] and YNC [redacted]. (Gov. Encls. 21 at 11 and 14.)

x. On 14 September 2018, NCIS interviewed TM2 [redacted] and CS3 [redacted] (Gov. Encls. 21 at 21 and 36.)

y. On 17 September 2018, the Government reached back out to NJS to ask for PHO support again and received a positive response and received a phone call from the PHO identified on 21 September 2018. (Gov. Encls. 22 at 11.)

z. On 18 September 2018, NCIS made telephonic contact with [redacted]. (Gov. Encls. 21 at 86.)

aa. On 19 September 2018, subsequent to an official request made by NCIS to HM1 [redacted] NCIS received a series of medical records detailing treatments provided by HM1 [redacted], to the Accused. (Gov. Encls. 21 at 45.)

bb. On 20 September 2018, NCIS interviewed the Chief of the Boat (COB) MCPO [redacted] and the Executive Officer of [redacted] LCDR [redacted] (Gov. Encls. 21 at 60 and 63.)

cc. On 24 September 2018, the Convening Authority appointed LCDR [redacted], [redacted], as a Preliminary Hearing Officer (PHO) for the Article 32 hearing scheduled for 4 October 2018. (Def. Encls. AH at 1.)

dd. On 27 September 2018, LT Sahar Jooshani, JAGC, USN, detailed Defense Counsel, submitted the first request for a delay, attributable to defense, to last from 4 October 2018

until 29 November 2018 given the "serious and nature of the offenses are complex." (Def. Encls. AI. at 1.)

ee. On 27 September 2018, the Government endorsed Defense's first motion for continuance. (Gov. Encls. 11 at 1.)

ff. On 1 October 2018, Convening Authority approved Defense's request to delay the Article 32 until 29 November 2018 and attributed the entire length of the delay to Defense. (Def. Encls. AJ. at 1.)

gg. On 7 November 2018, Defense requested the Convening Authority convene an R.C.M. 706 inquiry for the Accused. (Def. Encls. AK. At 1.)

hh. On 13 November 2018, the Government positively endorsed the Defense's request for an R.C.M. 706 inquiry and forwarded it to the Convening Authority. (Def. Encls. AT at 16.)

ii. On 15 November 2018, the Staff Judge Advocate (SJA) for the Convening Authority reached out [redacted] for Behavioral Health at Naval Branch Health Clinic Groton to coordinate getting the R.C.M. 706 evaluation scheduled; and on the same day, the SJA received a response directing her to send the request through Naval Health Clinic New England (NHCNE) legal officer. (Gov. Encls. 23 at 2.)

jj. On 20 November 2018, Convening Authority ordered the R.C.M. 706 board, but this order was not forwarded off the [redacted] until 26 November 2018 due to the LAN being down onboard. (Def. Encls. AL at 1.)

kk. On 21 November 2018, the Government was informed that the Defense Counsels previously assigned to case were replaced by two new counsel. (Def. Encls. AT at 16.)

ll. On 21 November 2018, LT Robin Lee, JAGC, USN, Defense Counsel, submitted a second request to delay the Article 32 hearing to a date no later than 4 January 2019, due to the "serious and complex nature of the allegations." (Def. Encls. AO at 1.)

mm. On 26 November 2018, the Government endorsed Defense's second request for a delay. (Gov. Encls. 12 at 1.)

nn. On 27 November 2018, the Government informed the new Defense Counsels of pending R.C.M. 706 request and no response was received. (Def. Encls. AN at 1.)

oo. On 27 November 2018, the Convening Authority approved Defense's second delay request of the Article 32 and attributed the delay from 29 November 2018 to 4 January 2019 to the Defense. (Gov. Encls. 12 at 1.)

pp. On 7 December 2018, the Convening Authority forwarded the order to convening authority the R.C.M. 706 evaluation to legal department of NHCNE. (Def. Encls. AT at 16.)

qq. On 10 December 2018, NHCNE legal department informed command that the two doctors qualified to convene the beard could not do so until 10-11 January 2019. (Def. Encls. AP at 1.)

rr. On 11 December 2018, Defense Counsel, submitted a third request to delay the Article 32 until completion of R.C.M. 706 board and requested delay be attributed to the Government due to the delay in scheduling the R.C.M. 706 board. (Def. Encls. AQ at 2.)

ss. On 12 December 2018, the Government endorsed Defense's third request for a delay and specifically requested that the delay be attributed to the Defense. (Def. Encls. AR at 1.)

tt. On 28 December 2018, Convening Authority approved Defense's request for a third continuance to last from 4 January 2019 until 28 January 2019 and attributed the delay to Defense. (Gov. Encls. 13 at 2.)

uu. On 10 January – 11 January 2019, R.C.M. 706 board convened. (Def. Encls. AX at 1.)

vv. On 19 January 2019, R.C.M. 706 finding long form sent to Defense Counsel and short form sent to Government. (Def. Encls. AX at 1.)

ww. On 23 January 2019 the Article 32 hearing was held, thereby ending series of continuous delays that began on 4 October 2018. (Def. Encls. AS at 1.)

xx. On 7 February 2019, all parties received the PHO report. (Def. Encls. AT at 1.)

a. On 20 February 2019, the Government proposed TMO dates to the Defense including proposed trial dates for 10-14 June 2019 with no response received. (Gov. Encls. 14 at 1.)

yy. On 1 March 2019, the Government again proposed TMO dates to the Defense including proposed trial dates for 10-14 June 2019. (Gov. Encls. 24 at 1.)

zz. On 4 March 2019, Defense Counsel proposed trial dates of 5-9 August 2019. (Gov. Encls. 24 at 9.)

aaa. On 11 March 2019, Defense Counsel submitted a motion to continue the arraignment from 12 March 2019 until 20 March 2019. (Gov. Encls. 14 at 1.)

bbb. On 12 March 2019, the Government responded to Defense's motion to continue and military judge granted continuance from 12 March 2019 to 20 March 2019, deeming the delay excludable. (Gov. Encls. 14 at 1.)

ccc. On 20 March 2019, the Accused was arraigned. (Gov. Encls. 15 at 2.)

ddd. On 22 March 2019, the Government and Defense sent proposed TMO to the court which included a 14 June 2019 39(a) session. (Gov. Encls. 24 at 12.)

eee. On 26 March 2019, the court approved the TMO with the 39(a) scheduled for 30 May 2019 due to the court being unavailable on the original proposed date of 14 June 2019. (Gov. Encls. 24 at 18.)

fff. On 26 April 2019, Defense submitted a motion to continue the 30 May 2019 Article 39(a) session until 18 June 2019. (Gov. Encls. 24 at 26.)

ggg. The 39(a) session was ultimately scheduled for 11 July 2019 due to conflicts with the court and Defense schedules. (Gov. Encls. 24 at 24.)

hhh. On 26 June 2019, Defense submitted a request to Government to facilitate their expert forensic psychologist consultant to meet with the Accused on 15 July 2019. (Gov. Encls. 25 at 1.)

iii. 15 July 2019 falls after the TMO deadline to disclose affirmative defenses such as lack of mental responsibility. (Gov. Encls. 25 at 1.)

3. **Burden**.

The Accused has the burden of proof by a preponderance of the evidence. R.C.M. 905(c)(1). *See also United States v. McKee*, No. 201700136, 2017 CCA LEXIS 648, at *9 (N-M Ct. Crim. App. Oct. 12, 2017) (when commenting on Article 10 challenge "failure to assert the right will make it difficult *for a defendant to prove* that he was denied a speedy trial.") (emphasis added).

4. **Discussion**.

A. Article 10 is satisfied if the United States exercises "reasonable diligence" in bringing an accused to trial.

The UCMJ codifies an accused's right to a speedy trial, "[w]hen any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges

and release him.." *United States v. Cooley*, 75 M.J. 247, 257 (C.A.A.F. 2016) (quoting Article 10, UCMJ). "These provisions are intended to insure that the accused knows the reason for the restraint of his liberty, and to protect him, while under restraint, from unreasonable or oppressive delay in disposing of a charge of alleged wrongdoing, either by trial or by dismissal." *United States v. Tibbs,* 35 C.M.R. 322, 325 (C.M.A. 1965). The Court of Appeals for the Armed Forces has interpreted the terms arrest or confinement to depend upon contextual analysis, which includes factors such as, "geographic limits of constraint, extent of sign-in requirements, whether restriction is performed with or without escort, and whether regular military duties are performed." *United States v. Schuber*, 70 M.J. 181, 187 (C.A.A.F. 2011).

Although overlapping with R.C.M. 707 speedy trial protections, speedy trial protections under Article 10 are distinct and require separate analysis. *See United States v. Reed*, 41 M.J. 449, 451 (C.A.A.F. 1995) (listing sources for the right to a speedy trial in the military); *United States v. Vogan*, 35 M.J. 32, 33 (C.M.A. 1992) (same). The standard under Article 10 contains "no provision as to hours or days" like R.C.M. 707, because "there are perfectly reasonable exigencies that arise in individual cases which just do not fit under a set time limit." *United States v. Kossman*, 38 M.J. 258, 259 (C.A.A.F. 1993) (quoting testimony of [redacted], Assistant General Counsel, O.S.D., during drafting of Article 10.).

The standard set for Article 10 by CAAF is "reasonable diligence in bringing charges to trial." *United States v. Wilson*, 72 M.J. 347, 351 (C.A.A.F. 2013) (quoting *United States v. Mizgala*, 61 M.J. 122, 127 (C.A.A.F. 2005)). "Brief periods of inactivity in an otherwise active prosecution are not unreasonable or oppressive." *Kossman*, 38 M.J. at 262 (quoting Tibbs, 37 C.M.R. at 326).

In *United States v. Birge*, CAAF applied the four-part balancing test in *Barker v. Wingo* for Article 10 violation analysis. *See United States v. Birge*, 52 M.J. 209, 212 (C.A.A.F. 1999) (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). The *Barker* four-part balancing test for assessing whether pretrial delay amounts to a Sixth Amendment speedy trial violation is: (1) the length of the delay; (2) the reasons for the delay; (3) whether the appellant demanded a speedy trial; and (4) any prejudice to the appellant from the delay. *See Cooley*, 75 M.J. at 259. None of the four *Barker* factors alone are a "necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process." *Barker*, 407 U.S. at 533.

In balancing these four factors, military courts look to the proceeding as a whole, the "essential element" being "orderly expedition and not mere speed." *Mizgala*, 61 M.J. at 129. Military courts take into account "the logistical challenges of a world-wide system that is constantly expanding" as well as "ordinary judicial impediments, such as crowded dockets, unavailability of judges, and attorney caseloads..." *Kossman*, 38 M.J. at 261-262. "Short periods of inactivity are not fatal to an otherwise active prosecution." *Mizgala*, 61 M.J. at 129.

The United States addresses each of the *Barker* factors below.

B. The length of delay was reasonable.

The first factor, length of the delay, is "a triggering mechanism" and can be dispositive in favor of the United States. *Cooley*, 75 M.J. at 260. Determining reasonability of delay requires consideration of circumstances because "the delay that can be tolerated for an ordinary street crime is considerably less than [that] for a serious, complex conspiracy charge." *Id.* (quoting

Barker, 407 U.S. at 531). Circumstances that are appropriate to consider include: (1) the seriousness of the offense; (2) the complexity of the case; (3) the availability of proof; (4) whether the accused was informed of the accusations against him; (5) whether the government complied with the pre-trial confinement procedures; and (6) whether the government was responsive to requests for reconsideration of pretrial confinement. *Schuber*, 70 M.J. at 188 (citing *Barker*, 407 U.S. at 530-31).

Whereas arraignment "stops" the speedy trial clock for purposes of R.C.M. 707, trial itself stops the speedy trial clock for Article 10, UCMJ, "because in our [CAAF's] view, the plain meaning of Article 10 strongly suggest its protections extend beyond arraignment." *United States v. Cooper*, 58 M.J. 54, 59 (C.A.A.F. 2003); *see also United States v. Leahr*, 73 M.J. 364, 367 (C.A.A.F. 2014). In *United States v. Farrell*, NMCCA accepted the government's timeline that calculated the length of pre-trial confinement from the date the appellant was apprehended and placed in pre-trial confinement to the date the appellant signed the stipulation of fact and pled guilty. No. 201700011, 2018 CCA LEXIS 293, at *13 (N-M Ct. Crim. App. Jun. 14, 2018). As of the filing of this response, the Accused has been in confinement since 30 July 2018 and therefore confinement for the purposes of Article 10 is 333 days.

The United States acknowledges that at first glance, 333 days seems to suggest facial unreasonableness. However, it should be noted that what "may appear at first glance facially unreasonable" in fact "requires consideration of the case's circumstances." *Id.* at *15.

Many of the circumstances to be considered weigh in the United States' favor. This case is not an "ordinary street crime" but rather an attempted murder, which requires a specific intent to kill. *Cooley*, 75 M.J. at 260 (quoting *Barker*, 407 U.S. at 531); *see also United States v. Roa*, 12 M.J. 210, 212 (C.M.A. 1982) ("Our cases, however, have made it perfectly clear that

attempted murder requires a specific intent to kill."). Proving the specific intent to kill in this case necessitated the locating and interviewing of a number of witnesses on an underway submarine who could provide relevant evidence. This required coordination between NCIS offices in New London, CT, and Jacksonville, FL, [redacted] Naval Submarine Support Command (NSSC), Trial Department of Region Legal Service Office MIDLANT detachment Groton. Many of the interviews conducted by NCIS with members of [redacted] occurred during the first and second week of September 2018 due to the boat's mission requirements.

The Accused's timeline lists NCIS's interview of the Victim on 1 August 2018, as though it were the last of NCIS's activities in this investigation, and that twelve (12) signed and sworn statements by 2 August 2018 was adequate enough to charge the Accused. Such an assertion disregards that the "[g]overnment has the right (if not the obligation) to thoroughly investigate a case before proceeding to trial." *Cossio*, 64 M.J. at 258. The United States preferred charges against the Accused on 30 August 2018, twenty-six (26) days from the IRO hearing. This length of time is not inherently lengthy as CAAF has accepted longer periods between confinement and preferral of charges as not inconsistent with reasonable diligence on behalf of the United States. *United States v. Wilson*, 72 M.J. 347, 350 (C.A.A.F. 2013) (holding that a thirty-six day delay between confinement and preferral did not show lack of reasonable diligence in drug distribution case).

The Accused asserts for the first time that "[t]his is not a complex case." This assertion contradicts the Accused's earlier statements when he repeatedly requested continuances. The Accused previously invoked the "serious" and "complex" nature of the offenses to justify a continuance.

Furthermore, the final three circumstances identified per the first *Barker* factor relating exclusively to the pre-trial confinement procedures weigh heavily in favor of the United States. The Accused was placed on notice of the general charges he was facing upon being placed in pretrial confinement through an initial charge sheet. The Accused was charged with Article 80, attempted murder and Article 128, Assault. Under the "presumption of regularity," the United States fully complied with the pretrial confinement procedures. *Schuber*, 70 M.J. at 188 (noting "[m]oreover, absent any complaint by Appellant, and under the presumption of regularity, we presume the Government complied with pretrial confinement procedures, including a twenty-four-hour report to the commander, a forty-eight-hour probable cause determination, the commander's seventy-two-hour memorandum, and a seven-day review."). Finally, the Accused never challenged the validity of his pretrial confinement, either from the outset, or in any later request for reconsideration. Notably, the Accused waived his presence at the IRO hearing at the very beginning of the pretrial confinement.

C. The reasons for delay weigh against the Accused.

"Under this factor we look at the Government's responsibility for any delay, as well as any legitimate reasons for the delay, including those attributable to an appellant." *United States v. Moreno*, 63 M.J. 129, 136 (C.A.A.F. 2006). While 333 days have passed between the Accused's entry into confinement and the filing of this response, the United States is only responsible for 113 days given excludable delays issued by the Convening Authority and this Court. The time attributed to the United States encompasses reasonable actions to process the Accused's case towards trial.

The *Barker* court established "reason for the delay" as the second prong, acknowledging that, "different weights should be assigned to different reasons." *Barker*, 407 U.S. at 531. A

deliberate effort by the government to delay the trial in order to hamper the defense weighs heavily against the government. *Id.* "[M]ore neutral reason[s] such as negligence or overcrowded courts" also weigh against the government, though "less heavily." *Id.* Defense concedes that delays in this case do not involve the type of deliberate, tactical delay that would weigh heavily against the United States. *See Birge*, 52 M.J. at 212 (concluding "[t]here is no evidence of willful or malicious conduct on the part of the Government to create the delay" before finding *Birge*'s appellate Article 10, UCMJ, claim "readily resolved [unfavorably] under the *Barker v. Wingo* factors.").

The reasons for delay such as the complexities of the case and delays in the process of preferring charges are reviewed above under *Barker* first prong analysis. Beyond these reasons, the main reason the accused has been in pretrial confinement for 333 days is due to continuances requested by the Defense. The Accused requested continuances delaying the Article 32 hearing from 4 October 2018 to 23 January 2019, which accounts for 111 days. Holding the United States accountable for delays requested by the Accused would constitute a windfall for the Accused. *See United States v. Thompson*, 46 M.J. 472, 475 (C.A.A.F. 1997) (noting "no reason to grant the defense a windfall from a claimed violation of R.C.M. 707 that the defense itself occasioned").

Additionally, when scheduling the Accused's arraignment, defense requested an additional eight day continuance to last from 12 March to 20 March 2019. Furthermore, the Accused did not concur with the United States' proposed trial date of 10 June 2019 when Trial Counsel submitted the pretrial information report on 1 March 2019. Instead, the Accused requested dates for August, four months after his arraignment. The Accused is not allowed to use the shielding concept of speedy trial as a sword against the United States. *See United States*

v. Farrell, No. 201700011, 2018 CCA LEXIS 293, at *20-21 (N-M. Ct. Crim. App. June 14, 2018) ("Here, the appellant appears to have used his speedy trial request as a sword. It is significant that: (1) the appellant did not demand speedy trial until 6 June 2016, more than 11 months after he was placed in pretrial confinement; (2) he never filed an Article 10, UCMJ speedy trial motion; and (3) when arraigned a month after his speedy trial request, the appellant agreed to a trial date that was still *two months* away.") (emphasis added).

D. Accused made no demand for a speedy trial prior to arraignment.

Demand for a speedy trial is "one of the factors to be considered in an inquiry into the deprivation of the right." *Barker*, 407 U.S. at 528. As the Supreme Court has pointed out with regard to the relation between the deprivation of an accused's speedy trial right and his request for a speedy trial, "[t]he more serious the deprivation, the more likely a defendant is to complain." *Id.* at 531. CAAF has also held that failure to demand a speedy trial until an appellant had been in pre-trial confinement for over 140 days indicates an absence of complaint about confinement and delay. *See Thompson*, 68 M.J. 308, 313 (C.A.A.F. 2010).

"[NMCCA] too, [has] long held that 'the right to a speedy trial is a shield, not a sword,' and that 'failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.'" *United States v. McKee*, No. 201700136, 2017 CCA LEXIS 648, at *9 (N-M Ct. Crim. App. Oct. 12, 2017) (quoting *United States v. Miller*, 66 M.J. 571, 575 (N-M. Ct. Crim. App. 2008)).

The Accused concedes that he did not demand a speedy trial. Compared to *Cooley*, where the "[a]ppellant demanded a speedy trial no fewer than five occasions" during 289 days of pre-trial confinement, the Accused made no such requests during a shorter period of pre-trial confinement in this case. Indeed, even to this very day, the Accused has not demanded a speedy

trial. *See United States v. Foster*, No. NMCCA 201200235, 2013 CCA LEXIS 92, at *7-8 (N-M Ct. Crim. App. Feb. 7, 2013) (Finding no Article 10 violation where "[t]he appellant made no demand for speedy trial. Although the appellant did move to dismiss the charges for lack of a speedy trial 49 days after arraignment and 172 days after being ordered into pretrial confinement, that motion included no demand for a speedy trial and acknowledged the appellant's agreement to the trial schedule."). The Accused's failure to raise his right to speedy trial strongly favors the United States.

E. The Accused has not established prejudice: he has not been subject to oppressive pretrial incarceration; he can only point to normal anxiety and concern as a result of pretrial confinement; and he has presented no evidence that his defense is hindered by delay.

Pre-trial confinement alone does not establish prejudice. *Cooper*, 58 M.J. at 56-57. When assessing whether an accused has been prejudiced as a result of pre-trial incarceration, courts look to the interests that Article 10, UCMJ, was designed to protect. *Mizgala*, 61 M.J. at 129. These are to: (1) prevent oppressive pretrial incarceration; (2) minimize anxiety and concern of the accused; and (3) limit the possibility that the defense will be impaired. *Id.* (citing *Barker*, 407 U.S. at 532).

As the United States has argued in detail in its Response to the Accused's Motion for sentencing credit, the Accused has not been subject to oppressive pretrial incarceration as contemplated by courts applying *Barker*. *See, e.g., United States v. Christiana*, No. 36229, 2007 CCA LEXIS 27, at *15-18 (A.F. Ct. Crim. App. Jan. 25, 2007) (finding no prejudice despite appellant being commingled with convicted prisoners, deprived of his military uniform, and forced to sleep on a cement floor with blood and feces on the appellant's walls); *United States v. Wilson*, 72 M.J. 347, 354 (C.A.A.F. 2013) (finding no oppressive confinement where appellant subject to racial bigotry and racist remarks from other prisoners).

The Accused has not been subject to "some degree of particularized anxiety and concern greater than the normal anxiety and concern associated with pretrial confinement." *Wilson*, 72 M.J. at 354 (citing *Cossio*, 64 M.J. at 257 (accepting military judge's finding that there was "'no evidence' that the defendant's 'anxiety and concern' has exceeded the norm'")); *United States v. Larson*, 627 F.3d 1198, 1210 (10th Cir. 2010) (holding that defendant's "[g]eneralized and conclusory references to the anxiety and distress that purportedly are intrinsic to incarceration are not sufficient to demonstrate particularized prejudice."). The Accused asserts that "this case impacted every aspect of his life, caused him embarrassment and shame in his personal relationships, caused him to miss significant moments within the life of his family, deprived him of the ability to be [redacted], and damaged his ability to advance as a sailor in the U.S. Navy, and most importantly, deprived him of his freedom," but these concerns and anxiety are all part and parcel of being in pre-trial confinement. As noted in *Mizgala* pretrial confinement "necessarily involves some anxiety and stress." *Mizgala*, 61 M.J. at 129.

The Accused has not identified how his preparation for trial, defense evidence, trial strategy, or ability to present witnesses were compromised by the processing time in this case. *Id.* Of all parts of the prejudice analysis, impairing the possibility of defense is "the most serious." *Barker*, 407 U.S. at 532. An absence of this showing weighs heavily in favor of the United States.

F. <u>When balancing the *Barker* factors, there has been no Article 10 violation here.</u>

The processing of the Accused's case represented reasonable diligence on the part of the United States. 120 days of pre-arraignment delay was based upon the Accused's own requests, not due to the actions of the United States. Further, the United States took reasonable measures to process the Accused's case as expeditiously as possible under the circumstances. While there

may have been minor delays during the processing of this case, those delays did not deny the Accused a speedy trial under Article 10, UCMJ. *See Mizgala*, 61 M.J. at 127. Further, the Accused has completely failed to establish that the delay in his trial prejudiced him in any manner. Based on the foregoing, the Accused has failed to establish a violation of Article 10, UCMJ.

5. **Relief Requested**. The United States respectfully requests this Court deny the Accused's Motion to dismiss all charges and specifications against him due to lack of speedy trial under Article 10, UCMJ.

6. **Evidence**. In addition to relying on defense enclosures, the United States provides the following enclosures in support of this motion:

Government Enclosure 16 (PIO Appointment and Statements)

Government Enclosure 17 (31 Jul 2018 ROI statements)

Government Enclosure 18 (IRO waiver e-mail/rights form)

Government Enclosure 19 (CASS)

Government Enclosure 20 (9 Aug 2018 Victim photographs)

Government Enclosure 21 (NCIS Interviews and Records Request)

Government Enclosure 22 (PHO e-mails)

Government Enclosure 23 (R.C.M. 706 e-mails)

Government Enclosure 24 (TMO e-mails)

Government Enclosure 25 (Def. Request for Accommodation of Expert meeting with Accused dtd 26 Jun 2019).

7. **Oral Argument**. The United States requests oral argument.

BELFORTI.JAMES.MICHAEL.[redacted]
Digitally signed by BELFORTI.JAMES.MICHAEL.[redacted]
DN: c=US, o=U.S. Government, ou=DoD, ou=PKI, ou=USN, cn=BELFORTI.JAMES.MICHAEL.[redacted]
Date: 2019.06.28 20:59:01 -04'00'

J. M. BELFORTI
LCDR, JAGC, USN
Trial Counsel

CERTIFICATE OF SERVICE

A copy of this document was electronically served on the Court and Defense Counsel on 28 June 2019.

BELFORTI.JAMES.MICHAEL.[redacted]
Digitally signed by BELFORTI.JAMES.MICHAEL.[redacted]
DN: c=US, o=U.S. Government, ou=DoD, ou=PKI, ou=USN, cn=BELFORTI.JAMES.MICHAEL.[redacted]
Date: 2019.06.28 20:59:27 -04'00'

J. M. BELFORTI
LCDR, JAGC, USN
Trial Counsel

APPELLATE EXHIBIT XI
PAGE 19 OF 30
APPENDED PAGE

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

UNITED STATES v. Micah J. Brown CSSSN/E-1 USN	DEFENSE MOTION TO COMPEL DISCOVERY 21 June 19

MOTION

Pursuant to Rule for Court-Martial (RCM) 906(b)(7), 701 and 703 the Defense respectfully moves this Court to compel discovery. The Defense does request an Article 39(a), UCMJ, session, if opposed.

FACTS

1. CSSSN Brown is charged with two specifications of violation of Article 80, UCMJ, attempted premeditated murder and attempted unpremeditated murder, and one specification of violation of Article 128, UCMJ, aggravated assault with intent to commit grievous bodily harm.

2. On 15 Mar 19, the defense sent the government an initial discovery request.

3. On 5 Apr 19, the government responded to the defense's discovery request.

4. On 15 Jun 19, the defense sent the government a supplemental discovery request.

5. On 19 Jun 19, the government responded to the defense's supplemental discovery request.

BURDEN

6. The burden of proof and persuasion rests on the Defense for this motion. The standard as to any factual issue necessary to resolve this motion is to a preponderance of the evidence.[1]

LAW

8. The military rules pertaining to discovery focus on equal access to evidence to aid the preparation of the defense and enhance the orderly administration of military justice. To this end, the discovery practice is not focused solely upon evidence known to be admissible at trial.[2]

[1] RCM 905(c)(1).
[2] *See* United States v. Stone, 40 M.J. 420, 422 (C.M.A. 1994) [**8] (citing United States v. Lloyd, 301 U.S. App. D.C. 186, 992 F.2d 348, 351 (D.C. Cir. 1993)).

APPELLATE EXHIBIT XII
PAGE 1 OF 6
APPENDED PAGE ____

9. Military case law enthusiastically indicates that the R.C.M.s require significantly broader and more comprehensive discovery than the Constitutional requirements. In United States v. Williams, the CAAF held that "the prosecution 'must exercise due diligence' in reviewing the files of other government entities to determine whether such files contain discoverable information."[3] Williams reiterated and adopted the Supreme Court's holding in Kyles v. Whitley, 514 U.S. 419 (1995), that the prosecutor must review "the files of law enforcement authorities that have participated in the investigation of the subject matter of the charged offenses."[4] Most importantly, however, Williams held that RCM 701 requires broader discovery than Brady v. Maryland, 373 U.S. 83 (1963), requires and the Constitution alone.[5]

10. Under R.C.M. 701(a)(2), The government is required to produce all evidence that is "relevant to the defense's preparation."[6]

11. Military courts have also long recognized that the military system, by design, requires a "more direct and generally broader means of discovery by an accused than is normally available to him in civilian courts."[7] Discovery in the military justice system is also broader than that required in federal civilian criminal proceedings under the federal rules of criminal procedure.[8] The broad open discovery requirement is designed to eliminate pretrial gamesmanship, reduce the amount of pretrial motions practice, and reduce the potential for surprise and delay at trial.[9]

ARGUMENT

12. Statements of TM2 [redacted] and all other witnesses interviewed during pretrial preparation to include the complaining witness. Based on the government's reason for denial of TM2 [redacted] as a witness, presumably they spoke to TM2 [redacted] and he provided a different version of events than he provided to NCIS. If so, the defense entitled to this information as it is an inconsistent statement.

13. All case activity reports from all agencies who participated in the investigation of CSSSN Brown. This information is part of the complete case file, or at least should be, as it relates to CSSSN Brown. It is relevant to the defense's preparation as it is a tool that can be used to impeach law enforcement on lack of investigative steps taken, information not included in the final written report, etc.

14. Internal communications between law enforcement and a member of the Accused's command, convening authority, the staff judge advocate, or any officer directing investigation. This information is not privileged. Multiple NCIS agents/offices were involved in the

---

[3] 50 M.J. 436 (C.A.A.F. 1999).
[4] Id.
[5] *See* Id. at 440-41.
[6] As of 1 January 2019, the standard changed from "material" to "relevant".
[7] United States v. Reece, 25 M.J. 93, 94 (C.M.A. 1987) (quoting United States v. Mougenel, 6 M.J. 589, 591 (A.F.C.M.R. 1978).
[8] United States v. Jackson, 59 M.J. 330, 333 (C.A.A.F. 2004).
[9] Id

investigation of this case. All communications, including emails, should be part of the case file. This information is relevant to know and understand what investigative steps have taken place or why certain steps were not taken. Furthermore, a decision was made to put CSSSN Brown in pre-trial confinement. As noted in the Article 32 report as well as Defense's Article 13 motion, the Convening Authority's report regarding the facts of the case were not factual. If this information was relayed via email to the Convening Authority, it will has the potential to affect the Defense's motion as well as file additional motions. It is reasonable to conclude that communication took place via email as the [redacted] was underway during the alleged events.

15. R.C.M. 914 materials. In its response to Defense's discover request, the government states it will provide statements under R.C.M. 914 three days before trial. Although the rule technically provides for a party to move under R.C.M. 914 after a witness testifies on direct, the discussion section urges counsel to disclose this information prior to arraignment to avoid delays in the proceedings. Based on the government's response, they already have this information in their possession in therefore we ask the Court to require its production immediately.

16. Relevant to the defense's preparation is a broad enough standard that the government will rarely have a legitimate ability to deny the defense's discovery request. The government will never know the defense's strategy, investigative needs or case theory therefore they are not in a position to decide that certain evidence would not be relevant to the defense's preparation.

RELIEF REQUESTED

17. The Defense respectfully requests this Court compel the aforementioned discovery.

[redacted]

Respectfully submitted,
S. Y. WILLIAMS
LT, JAGC, USN

Attachment:
Enclosure I: Defense Initial Request for Discovery dtd 15 Mar 19
Enclosure J: Government Response to Defense Initial Discovery Request dtd 5 Apr 19
Enclosure K: Defense Supplemental Discovery Request dtd 15 Jun 19
Enclosure L: Government Response to Defense Supplement Discovery Request dtd 19 Jun 19
Enclosure N: Government Response to Defense Request for the Production of Witnesses dtd 20 May 19

I certify that I have served a true copy via e-mail of the above on the court and trial counsel on 21 June 19.

[redacted]
S. Y. WILLIAMS
LT, JAGC, USN

APPELLATE EXHIBIT XII
PAGE 4 OF 6
APPENDED PAGE ____

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

UNITED STATES **v.** **MICAH J. BROWN** **CSSSN/E-3** **USN**	**GOVERNMENT RESPONSE TO MOTION TO COMPEL DISCOVERY** **28 June 2019**

1. **Nature of Motion**.

Defense has moved to compel discovery of the following: A) Statements of TM2 [redacted] and other witnesses; B) All case activity reports; C) Internal communications between law enforcement and members of the Accused's command, convening authority, SJA, or any officer directing the investigation of the Accused; and D) R.C.M. 914 materials. The Government respectfully requests the court deny the Defense motion in part and the Government contends it will provide certain items, mooting the remaining issues. Specifically, the Government takes the following position with regard to the requested materials:

a. Government has provided proper R.C.M. 701 notice following an interview of TM2 [redacted] and will continue to provide such notices for other witnesses, but should not be compelled to create any additional documents.

b. Government has provided all relevant information and without an adequate proffer of what Defense believes is missing, the Defense request should be denied.

APPELLATE EXHIBIT [redacted]
PAGE 1 OF 8
APPENDED PAGE

c. Government has provided all relevant communications and without an adequate proffer of how additional communications would be material to the defense, the Defense request should be denied.

d. Government has provided all relevant materials and will continue to comply with R.C.M. 914 and the TMO.

2. **Summary of Relevant Facts.**

a. The Accused is charged with two specifications of violation of Article 80, UCMJ, attempted premeditated and attempted unpremeditated murder, and one specification of violation of Article 128, UCMJ, aggravated assault with intent to commit grievous bodily harm. (Def. Encl. P)

b. On 5 April 2019, Government responded to Defense initial discovery request dtd 15 March 2019. (Def. Encls. I and J)

c. On 19 June 2019, Government responded to Defense supplemental discovery request dtd 15 June 2019. (Def. Encls. K and L)

3. **Discussion.**

Under R.C.M. 701, the Defense is entitled to the discovery of "books, papers, documents, photographs…" or "…results of reports of physical or mental examinations…scientific tests of experiments…" which are in the control of military authorities. Under R.C.M. 703, the Defense is entitled to the production of evidence that is relevant and necessary to the defense when they have "list[ed] the items of evidence to be produced and … [have] include[d] a description of each item sufficient to show its relevance and necessity" R.C.M. 703(f)(3). These discovery and

production rules allow the Defense to request that the Government turnover items of evidence, but not to compel the Government to ask questions of witnesses and disclose the responses to the Defense. Aside from the Government's affirmative obligations to disclose exculpatory information, the Government is not required by any rule to create documents or answers to provide to the Defense.

Although "[d]iscovery in the military justice system … is broader than in federal civilian criminal proceedings," an accused's right to discovery is not unlimited. *United States v. Stellato*, 74 M.J. 473, 481 (C.A.A.F. 2015) (*citing United States v.* Jackson, 59 M.J. 330, 333 (C.A.A.F. 2004). For example, a court is not required to sanction a "fishing expedition" for materials that would not likely lead to "potentially relevant evidence," or when the Defense could elicit the same facts during cross-examination. *United States v. Briggs*, 48 M.J. 143, 144 (C.A.A.F. 1998). The Government will address the requested discovery in turn.

A: Statements of TM2 [redacted] and all other witnesses interviewed during pretrial preparation to include the complaining witness.

The Government provided R.C.M. 701 notice of an interview with TM2 [redacted] that took place on 20 May 2019 along with similar notices for other witnesses. (Enclosures 1 and 6). The Government will continue to comply with this discovery obligation as required. However, the Government should not be compelled to create any document pertaining to witness statements other than the appropriate disclosure notifications.

B: All case activity reports from all agencies who participated in the investigation of CSSSN Brown.

The Government moves this court to deny this request due to lack of specificity. The

Government has turned over all notes, case files from all NCIS agents who had any investigative role in this case. On the date of this filing, the Government received the NCIS Case Activity Record and is now disclosing that to Defense. (Enclosure 2). The Defense has not explained what case activity reports from what agency they believe have not been provided or how that information, if it exists, would be material to the defense.

C: Internal communications between law enforcement and members of the Accused's command, convening authority, the staff judge advocate, or any officer directing the investigation.

The Government has provided all emails known to be in existence between the Accused's command, NCIS, and others that may be material to the preparation of this case. (Enclosures 3 and 4). The Defense has not articulated what information they believe is not factual in the Convening Authority's report regarding the facts of this case. The Defense is on a "fishing expedition" and simply hopes to find evidence of missed investigative steps without providing any proffer as to the existence of any such relevant materials.

D: R.C.M. 914 Materials.

Although the Government will comply and provide relevant information pursuant to R.C.M. 914 prior to trial, all known responsive materials up to the date of this motion have been provided to the Defense. The Government will continue to comply with its disclosure obligations under R.C.M. 701. Again, the Defense has not made a sufficient proffer to show any such additional relevant materials exist.

4. **Relief Requested**. The Government respectfully requests the court deny the Defense's motion to compel discovery with regard to the following items: additional discovery outside R.C.M. 701 disclosures requested in item A and the entirety of items B and C.

5. **Evidence**. The Government provides the following enclosures in support of this motion:

A. Enclosure 1: R.C.M. 701 Disclosure ICO TM2[redacted] (Bates Stamps 001440-001441).

B. Enclosure 2: NCIS Case Activity Record (Bates Stamps 001500-001507).

C. Enclosure 3: Emails from Accused's Command (Bates Stamps 001031-001048).

D. Enclosure 4: Emails between Law Enforcement and the Accused's Command.

E. Enclosure 6: R.C.M. 701 Disclosure ICO CS1[redacted] (Bates Stamps 001495-001498).

6. **Oral Argument**. The government requests oral argument.

CUMMINGS.SARAH.ELIZABETH.[redacted]
Digitally signed by CUMMINGS.SARAH.ELIZABETH.[redacted]
Date: 2019.06.28 20:43:19 -04'00'

S. E. CUMMINGS
LCDR, JAGC, USN
Trial Counsel

APPELLATE EXHIBIT XIII
PAGE 5 OF 8
APPENDED PAGE

CERTIFICATE OF SERVICE

A copy of this document was electronically served on the Court and Defense Counsel on 28 June 2019.

CUMMINGS.SARAH.ELIZABETH.[redacted] Digitally signed by CUMMINGS.SARAH.ELIZABETH.[redacted] Date: 2019.06.28 20:43:42 -04'00'

S. E. CUMMINGS
LCDR, JAGC, USN
Trial Counsel

APPELLATE EXHIBIT XII
PAGE 60 OF 68
APPENDED PAGE ___

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

The United States of America **v.** **Micah J. Brown** **CSSSN/E-3 USN**	**DEFENSE MOTION TO COMPEL WITNESS** **21 JUNE 19**

1. Nature of Motion

Pursuant to Rule for Courts-Martial 906(b)(7), the Defense moves this Court to order the Government to produce the necessary and material witness, TM2 [redacted], for testimony during the merits phase of the court-martial for charges referred against CSSSN Micah J. Brown, U. S. Navy as provided for by R.C.M. 703(c)(2)(d) and the 6th Amendment of the Constitution of the United States of America.

2. Burden of Proof

The Defense has the burden to prove by a preponderance of the evidence that a witness is both material and necessary. *United States v. Tangpuz*, 5 M.J. 426 (C.M.A. 1978).

3. Summary of Facts

a. CSSSN Brown is accused of two specifications of violation of Article 80, UCMJ, attempted premeditated murder and attempted unpremeditated murder, and one specification of a violation of Article 128, UCMJ, aggravated assault with the intent to commit grievous bodily harm.[1]

b. The alleged misconduct occurred on the [redacted]. TM2 [redacted], the requested witness, has served on board the [redacted] since April 2015 and was onboard the [redacted] during the alleged misconduct.

c. On 26 April 2019, Defense Counsel filed a Request for Production of Witnesses in this case. TM2 [redacted] was part of this request.[2]

d. On 20 May 2019, Trial Counsel responded to Defense Counsel's Request for Production of Witnesses and denied the production of TM2 [redacted]

[1] Charge Sheet
[2] Defense Counsel's Request for Production of Witnesses dtd 26 April 2019
[3] Government Counsel's Response dtd 20 May 2019

APPELLATE EXHIBIT XIV
PAGE 1 OF 60
APPENDED PAGE

14

4. Discussion

a. Statement of the Law

The Accused is entitled to have material witnesses provided for his court-martial.[4] In order to compel the production of witnesses, the defense must establish by a preponderance of the evidence that the requested witness is both material and necessary.[5]

The Court of Military Appeals defined materiality as embracing the "'reasonable likelihood' that the evidence could have affected the judgment of the military judge or court members."[6] Materiality of a witness turns on whether the witness's testimony "either negates the Government's evidence or supports the defense."[7] If so, then the witness is material. A witness is "necessary" when the testimony "would contribute to a party's presentation of the case in some positive way on a matter in issue."[8]

The factors relevant to whether the personal appearance of a witness should be compelled were stated in *United States v. Allen*, 31 M.J. 572 (N.M.C.M.R. 1991), aff'd, 33 M.J. 209 (C.M.A. 1991), *cert. denied*, 112 S.Ct 1473 (1992). The factors are:

(1) The issues involved in the case and importance of requested witness to those issues;

(2) Whether the witness was desired on the merits or sentencing;

(3) The availability of the witness or alternatives to live testimony;

(4) The military status of the witness;

(5) Whether compelling the witness's appearance would interfere with mission accomplishment; and

(6) Whether the witness's testimony would be cumulative.

b. Analysis of the Law

TM2 [redacted], is material and necessary because he can speak to CSSSN Brown's behavior and conduct before the alleged misconduct on the [redacted] and compare it to the timeframe of the alleged misconduct. TM2 [redacted]

[4] *See* Article 46, U.C.M.J.; *see also United States v. Manos*, 17 U.S.C.M.A. 10 (C.M.A. 1967) (applying *Washington v. Texas*, 388 U.S. 14 (1967)); *see also* R.C.M. 703 (the accused 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).
[5] *United States v. Tangpuz*, 5 M.J. 426 (C.M.A. 1978).
[6] *United States v. Hampton*, 7 M.J. 284, 285 (C.M.A. 1979).
[7] *U.S. v. Allen*, 31 M.J. 572, 610 (N.M.C.R. 1990).
[8] *United States v. Breeding*, 44 M.J. 345, 350 (1996) (outlining the standard for reviewing witness production requests).

APPELLATE EXHIBIT XIV
PAGE 2 OF 6
APPENDED PAGE

has been stationed aboard the [redacted] since April 2015, and has served aboard the boat with CSSSN Brown. As a result, TM2 [redacted] is familiar with CSSSN Brown's behavior and conduct, and has the ability to compare CSSSN Brown's behavior during the prior deployment to his behavior leading up to the alleged misconduct.

TM2 [redacted] testimony about the CSSSN Brown's deteriorating mental condition is of particular importance to the defense's case as CSSSN Brown's mental responsibility will indeed come into play during the trial, and, if convicted, will be offered as mitigation in any presentencing case. TM2 [redacted] is a military witness, therefore, the government has control over his production. The government has not proffered TM2 [redacted] is unavailable due to military mission. CSSSN Brown is facing life in prison and, therefore, this testimony, directly related to his defense, is both material and necessary, but also critical to CSSSN Brown receiving a fair trial.

5. Evidence

The Defense requests TM2 [redacted] be produced to support this motion. The Defense also offers the following documentary evidence:

a. Enclosure M: Defense Request for Witnesses dtd 26 April 2019.

b. Enclosure N: Government Response dtd 20 May 2019.

c. Enclosure O: NCIS Results of Interview with TM2 [redacted] dtd 07 September 2019

6. Oral Argument

The Defense respectfully requests oral argument if the government opposes this motion.

7. Relief Requested

The Defense respectfully requests the Court order the Government to produce TM2 [redacted].

[redacted]

S. Y. WILLIAMS
LT, JAGC, USN
Detailed Defense Counsel

APPELLATE EXHIBIT XIV
PAGE 3 OF 6
APPENDED PAGE

CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion was served on the Government trial counsel in the above captioned case on 21 June 2019.

[redacted]

S. Y. WILLIAMS
LT, JAGC, USN
Detailed Defense Counsel

APPELLATE EXHIBIT XIV
PAGE 4 OF 60
APPENDED PAGE

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

UNITED STATES **v.** **MICAH J. BROWN** **CSSSN/E-3** **USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO COMPEL WITNESS** **28 June 2019**

1. **Nature of the Motion.**

The Government respectfully requests this Court deny the Defense motion to compel production of TM2 [redacted]. The witness' anticipated testimony is not relevant and necessary under Rule for Courts-Martial (R.C.M.) 703(b) as he cannot meet the foundational requirements necessary to provide what amounts to expert scientific opinion testimony on the question of the mental responsibility of the Accused. Strictly lay witness testimony in this significantly scientific and complex area ought to be excluded under Military Rule of Evidence (M.R.E.) 403 as its probative value (if any) is substantially outweighed by the danger that it will confuse the issues and mislead the fact finder. At the least, the Court should rule the issue is not ripe until and unless the Defense provides notice that it intends to put forth a complete or partial defense of lack of mental responsibility. After a hearing to determine the admissibility of such scientific evidence, the relevance and necessity of such factual testimony can then be determined.

2. **Summary of Facts.**

a. On 7 September 2018, NCIS interviewed TM2 [redacted], a Sailor onboard the [redacted] as a witness in the subject case. The summary of the interview states in relevant part, "TM2 [redacted] stated definitively that S/BROWN's mental status had been eroding during the most recent deployment and underway surge of the [redacted]." The summary noted the Accused had been speaking and socializing less. It also noted that TM2 [redacted] was "unaware of any specific mental health issues afflicting S/BROWN." (Defense Encl. O)

b. The summary of interview went on to note the witness had observed the Accused engaged in what could be described as "paranoid" behavior. (Defense Encl. O p. 2)

c. On 26 April 2019, Defense requested the Government produce TM2 [redacted]. (Defense Encl. M, p. 3)

d. Defense stated, "TM2 [redacted] was underway with the [redacted] during the alleged incident. He also previously deployed with CSSN Brown and therefore he is expected to testify to the differences that he personally observed in CSSN Brown's *mental state* between the two periods of time." (Defense Encl. M p. 3, emphasis added)

e. On 20 May 2019, the Government responded denying the Defense request deeming TM2 [redacted] testimony unnecessary and irrelevant as the witness "…has never had any personal relationship with the accused…and had limited interactions with him during working hours. The accused never confided in the witness….and the witness has no personal knowledge of the accused's mental state at the time of the stabbing or before." (Defense Encl. N)

f. On 25 June 2019, the Government provided notice to the Defense under R.C.M. 701 of the following information: that TM2 [redacted] deployed with the Accused previously onboard the [redacted]

[redacted] That during that deployment, the Accused "seemed less stressed" compared to the underway when the alleged crimes occurred. The Accused "kept to himself" during the relevant time period. TM2 [redacted] did not consider the Accused a friend and the two were in different departments onboard the boat, engaging each other only infrequently. TM2 [redacted] asked the Accused about and injury to his arm and the Accused told him he "did not want to talk about it." (Government Encl. 1)

3. **Law and Argument**

Both prosecution and defense are "entitled to the production of any witness whose testimony on a matter in issue on the merits or an interlocutory question would be relevant and necessary." R.C.M. 703(b)(1). Witness testimony is relevant when it has any tendency to make any fact that is "of consequence in determining the action" more or less probable than it would have been without the evidence. M.R.E. 401. Relevant testimony is only necessary "when it is not cumulative and when it would contribute to a party's presentation in some positive way on a matter in issue." Manual for Courts-Martial, Discussion to R.C.M. 703(b)(1). Notably, it is the "*testimony*, not the actual presence of the witness, that is the key" to determining whether a witness should be produced. *United States v.* Allen, 31, M.J. 572, 612 (N.M.C.M.R. 1990) (emphasis added). That testimony is the "verbal evidence, subject to the criteria of credibility, and tested by the same rules and manner as any other evidence." *Id. (quoting United States v. Scott*, 5 M.J. 431, 432 (C.M.A. 1978). Thus, production of a witness should not be granted if their testimony would be inadmissible in court.

The only logical reason for Defense to offer this evidence is to present the fact finder with evidence related to the Accused's mental state and thus raise the issue of a complete or partial defense of mental responsibility - otherwise, TM2 [redacted] observations have no relevance.

Change in behavior do not make it more or less probable that on the morning of the assault the Accused was any more of less able to appreciate the wrongfulness of his conduct or form the specific intent alleged in the charged offense. In addition, TM2 [redacted], even if he had talked to the Accused about his mental state, would not be able to offer the Accused's statements under hearsay rules.

Almost every rule governing the admission of psychological evidence related to a defense of mental responsibility includes reference to "expert testimony." (*See* R.C.M. 701(b)(2), R.C.M. 916(k)(1) and the discussion section, and M.R.E. 302(b)(2)). But TM2 [redacted] (as far as the Government is aware) is not a forensic psychiatrist or other medical doctor. He has not medically evaluated the Accused, reviewed the scientific literature and conducted research that's been peer reviewed, or testified on this topic as an expert in the past. Thus the Government would be left to cross examine a lay witness on an expert topic. Any testimony from him about the "mental state" of the accused is outside of his personal knowledge to testify about and should not be allowed.

If the Court disagrees with the Government and determines that the witness could nevertheless offer his own lay observations about the Accused's behavior and thus allow the Defense implicitly or explicitly to put forth such a defense, the Court should proceed to an evaluation of the testimony's admissibility under M.R.E. 403. The probative value of TM2 [redacted] observations that the Accused was "different" or quieter is extremely low as it relates to whether the Accused had the mental capacity to appreciate the wrongfulness or nature of his actions or could have formed the specific intent to kill the victim. Someone acting differently does not automatically equate to the presence of a severe mental disease or defect which impacts an Accused's mental responsibility. The danger that the fact finder will confuse the issue and be

misled to believe that the Accused cannot be held criminally liable for the charged offenses is high without the expertise of medical experts.

At the very least, the Court should rule the issue is not ripe until and unless the Defense provides notice of its intent to introduce a complete or partial defense of lack of mental responsibility and until a hearing can be held to determine the admissibility of such evidence under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

4. **Evidence and Burden of Proof.**

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

The Government relies on Enclosures in other Court filings, as noted above, and offers no additional evidence on this motion.

5. **Relief Requested.**

The Government respectfully requests that the Military Judge deny the Defense motion, finding that the Defense has not met its burden by a preponderance of the evidence requested to show the evidence is relevant and necessary or in the alternative rules the issue not ripe and declines to rule at this time.

6. **Oral Argument.**

The Government respectfully requests oral argument on this subject.

[redacted]
C. E. Lewis
CDR, JAGC, USN
Assistant Trial Counsel

APPELLATE EXHIBIT XV
PAGE 5 OF 12
APPENDED PAGE

CERTIFICATE OF SERVICE

A copy of this document was electronically served on the Court and Defense Counsel on 28 June 2019.

[redacted]
C. E. Lewis
CDR, JAGC, USN
Assistant Trial Counsel

APPELLATE EXHIBIT XV
PAGE 6 OF 12
APPENDED PAGE

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

UNITED STATES OF AMERICA v. MICAH J. BROWN CSSSN/E-3 USN	**Defense Motion In Limine: Admissibility of Knives Collected from [redacted]** 21 June 2019

1. Nature of the Motion

Pursuant to Military Rules of Evidence 401, 402, and 403, the defense moves in limine to challenge the admissibility of knives collected from [redacted]

2. Burden of Proof

As this motion seeks a preliminary ruling on admissibility of evidence, the burden is on the proponent of the evidence to demonstrate admissibility. *See United States v. Brewer*, 61 M.J. 425, 440 (C.A.A.F. 2005).

3. Facts

a. CSSSN Micah Brown has been accused of attempting to murder LSS2 [redacted] on or about 30 July 2018 by means of stabbing him with a knife.

b. Personnel onboard [redacted] collected items from the galley which were ultimately turned over to NCIS. Enclosure H.

c. Included in the items collected were three knives. *Id.*

d. The three knives were collected because they matched a general description of the knife allegedly used by CSSSN Brown. *Id.*

e. No witness can state that any of the three knives which were collected was the knife that was used in the alleged assault.

APPELLATE EXHIBIT XVI
PAGE 1 OF 5
APPENDED PAGE

f. No forensic evidence connects CSSSN Brown to any of the three knives that were collected.

4. Discussion

a. Statement of the Law

"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." M.R.E. 401. Relevant evidence is admissible presuming that the probative value of the evidence is not "substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence." M.R.E. 402; M.R.E. 403.

b. Analysis of the Law

In accordance with M.R.E. 401, 402, and 403, the military judge should preclude the government from admitting, as substantive evidence against the accused, the three knives that were collected from [redacted] These objects lack the foundation to be relevant and admissible. Absent witness testimony or forensic evidence connecting these knives to the alleged assault, these knives are general knives found onboard a ship. As such, they make no fact of consequence more or less probable than it would be without the evidence.

Additionally, if the court finds any minimal relevance, the evidence should still be excluded under M.R.E. 403 because the inconsequential probative value is substantially outweighed by the danger of unfair prejudice, misleading the members, and the needless presentation of cumulative evidence. Witnesses to the incident, including the alleged victim, will testify and describe a knife that the accused had in his hand during the altercation. The

presentation of other knives, unconnected to the altercation, add nothing more than a dramatic courtroom trick, which will unfairly influence the members.

5. Relief Requested

The defense respectfully requests that this court exclude the evidence proposed by the government under M.R.E. 401, 402, and 403.

6. Evidence

H. NCIS Report of Investigation, dated 31 August 2018.

7. Witnesses

A. The defense does not request the production of any witnesses on this motion.

8. Oral Argument

The accused desires to make oral argument on this motion.

[redacted]
LCDR, JAGC, USN
Defense Counsel

CERTIFICATION OF SERVICE

A true copy of this motion was served on the opposing party and the court on 21 June 2019.

[redacted]
LCDR, JAGC, USN
Defense Counsel

APPELLATE EXHIBIT XVI
PAGE 3 OF 5
APPENDED PAGE

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

UNITED STATES v. MICAH J. BROWN CSSSN/E-3 USN	GOVERNMENT MOTION IN LIMINE FOR PRETRIAL ADMISSIBILITY RULING 21 June 2019

1. Nature of Motion.

Pursuant to Rules for Court-Martial (R.C.M.) 905(b), 905(d), 906(b)(13) and Military Rules of Evidence (M.R.E.) 104(a), the Government requests that the Military Judge rule on the admissibility of prosecution exhibit *in limine*:

a. Prosecution Exhibit #1 for Identification: One black handled Wusthof brand knife with an approximate six-inch blade.

2. Summary of Relevant Facts.

a. The Accused is charged with violating UCMJ Article 80 for the attempted premeditated murder of LSS2 [redacted], and in the alternative, violating UCMJ Article 128 for the aggravated assault of the same victim. (Enclosure 1)

b. The Accused allegedly stabbed LSS2 [redacted], multiple times with a knife in the galley while underway on the [redacted] on 30 July 2018. (Enclosure 2)

c. When interviewed by NCIS on 01 August 2018, LSS2 [redacted] described the weapon used in the attack as a black handled knife with approximately a six-inch blade. (Enclosure 2)

d. When interviewed by NCIS on 05 September 2018, EMN2 [redacted] described seeing a black handled kitchen knife with a six-inch blade on the galley deck

immediately after both the Accused and LSS2 [redacted] exited the galley after the stabbing. (Enclosure 3)

e. EMN2 [redacted] recalled the brand of the knife was Wusthof, which he recognized because he worked in the galley where this brand of knife is used and because he owns the same brand knife at home. (Enclosure 3)

f. Before collecting the knife used in the attack, the crew onboard [redacted] commenced cleanup efforts in the galley and EMN2 [redacted] saw a knife in the sink resembling the one he saw on the galley deck. (Enclosure 3)

g. Three identical black handled knives, each with an approximate six-inch blade, were collected from the galley (after EMN2 [redacted] r chose them from a group of 10-12 knives), placed in a locker, and turned over to NCIS once [redacted] pulled into port. (Enclosure 3)

h. NCIS took photos of the three knives collected and took possession of the knives collected. (Enclosure 4)

i. The knives were not analyzed at a crime laboratory because they had been washed and handled prior to seizure.

3. **Burden**.

The burden of persuasion rests with the Government by a preponderance of the evidence.

4. **Discussion**.

Demonstrative evidence is admissible under M.R.E. 403 when it is "relevant, highly probative of critical issues, and not unfairly prejudicial." *United States v. White*, 23 M.J. 84, 88 (C.M.A.1986). It is within the discretion of the military judge to permit the use of demonstrative evidence. *United States v. Heatherly*, 21 M.J. 113, 115 n. 2 (C.M.A.1985). Relevant evidence

may be excluded if its probative value is "substantially outweighed by a danger of ... unfair prejudice, confusing the issues, [or] misleading the members." M.R.E. 403. Admissibility of a replica weapon is dependent upon the balancing test of probative value against prejudice to the Accused. *United States v. Parks*, 364 F.3d 902, 907 (8th Cir.2004) (citing *United States v. McIntosh*, 23 F.3d 1454, 1456 (8th Cir.), *cert. denied*, 513 U.S. 935, 115 S.Ct. 333, 130 L.Ed.2d 291 (1994)). The probative value is exemplified by reliable evidence that the Accused "possessed and used in the crime a weapon of the same type as the replica." *See United States v. Wynde*, 579 F.2d 1088, 1094 (8th Cir.), *cert. denied*, 439 U.S. 871, 99 S.Ct. 204, 58 L.Ed.2d 184 (1978). The potential prejudice of admitting a replica weapon is that it may mislead the members to believe it was the actual weapon used in the offense. *See parks*, 364 F.3d at 907. "Prejudice can be ameliorated...where the government makes clear in its use of the replica that it is *not* the actual weapon used or carried by the defendant, the court gives a proper limiting instruction, and the replica is not left on display in the courtroom or given to the jury during deliberations." *See United States v. Johnson*, 354 F. Supp. 2d 939, 976-78 (N.D. Iowa 2005), aff'd in part, 495 F.3d 951 (8th Cir. 2007). Therefore, as long as the demonstrative evidence the Government seeks to admit is relevant to a central issue and is more probative than prejudicial, the Military Judge should deem it admissible.

a. **Prosecution Exhibit 1 for Identification, one black-handled knife with an approximate six-inch blade recovered from the [redacted] is admissible under M.R.E. 403 as the probative value outweighs any potential unfair prejudice to the Accused.**

Exhibit 1, for identification, is a black handled knife with an approximate six in blade. The knife described by LSS2 [redacted], the victim in this case, was very similar, if not identical, to the three knives recovered from the galley after the attack. EMN2 [redacted] description of the

knife he saw on the galley floor and later in the galley sink matched LSS2 [redacted] description of the knife used in the attack and the knives collected after the attack. Because the Government cannot say for certain which exact knife was used by the Accused in the attack, the Government is seeking to admit one of the three knives collected as demonstrative evidence to augment both LSS2 [redacted] and EMN2 [redacted] testimony. Specifically, each witness will testify to seeing a knife identical to the one proposed for admission and the manner in which it was utilized by the Accused. Their testimony coupled with showing the members a replica will assist the fact finder in evaluating the charge of attempted murder and the Accused's intent to kill at the time of the assault. In addition, it will assist with evaluation of the weapon's ability or likelihood of causing death or grievous bodily injury to the victim, giving the demonstrative evidence high probative value that outweighs any potential unfair prejudice, especially because the members will not be led to believe it was the actual weapon.

5. **Relief Requested**. The Government asks the Court to find Prosecution Exhibit 1, for identification, admissible and admit the exhibit into evidence.

6. **Evidence**. The Government provides the following enclosures in support of this motion:

(1) Charge sheet

(2) Results of Interview of LSS2 [redacted]

(3) Results of Interview of EMN2 [redacted]

(4) 2 NCIS pictures of the knives collected

7. **Oral Argument**. The government requests oral argument.

CUMMINGS.SARA H.ELIZABETH [redacted]

S. E. CUMMINGS
LCDR, JAGC, USN
Trial Counsel

CERTIFICATE OF SERVICE

A copy of this document was electronically served on the Court and Defense Counsel on 21 June 2019.

CUMMINGS.SA[redacted]
RAH.ELIZABET
H.[redacted]

S. E. CUMMINGS
LCDR, JAGC, USN
Trial Counsel

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

UNITED STATES **v.** **Micah J. Brown** **CSSSN/E-1** **USN**	**DEFENSE MOTION FOR SENTENCING CREDIT UNDER ARTICLE 13, RCM 304(f), AND RCM 305(k)** **21 June 19**

MOTION

1. The Defense respectfully moves this Court order an additional 996 days of credit pursuant to Article 13, UCMJ and RCM 305(k).The Defense does request an Article 39(a), UCMJ, session, if opposed.

FACTS

2. On or about 30 July 2018, onboard [redacted] the accused allegedly stabbed LSS2 [redacted].

3. On 31 July 2018, CSSSN Brown was ordered into pretrial confinement.

4. On 16 November 2018, after an alleged altercation with another inmate, CSSSN Brown was placed in solitary confinement at Donald Wyatt Detention Facility (Wyatt).

5. Wyatt found CSSSN Brown "guilty" as it related to the altercation and sentenced him to 30 days segregation with 10 days suspended.

6. CSSSN Brown was set to return to general population on 6 December 18.

7. At some point thereafter, the inmate involved in the alleged incident allegedly threatened CSSSN Brown. Based on that threat, Wyatt refused to return CSSSN Brown to general population.

8. On 3 January 19, Defense submitted a Request for Redress, requesting the Commanding Officer, [redacted] authorize a transfer of CSSSN Brown to the nearest military facility due to Wyatt keeping CSSSN Brown in solitary confinement.

9. On 15 January 19, CSSSN Brown's Request for Redress was denied.

10. On 31 January 19, CSSSN Brown, through counsel, filed an Article 138 complaint seeking relief.

11. All responses contained a denial.

12. On 1 May 19, Wyatt transferred CSSSN Brown back to general population for the daytime hours but he still sleeps in segregation at night.

13. CSSSN Brown spent 166 days in solitary confinement.

STATEMENT OF LAW

14. "No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances required to ensure his presence, but he may be subjected to minor punishment during that period for infractions of discipline." Article 13, UCMJ.

15. Article 13, UCMJ prohibits two types of activities involving the treatment of an accused prior to trial. *United States v. McCarthy*, 47 M.J. 162,165 (C.A.A.F. 1997). The activities are: (1) the intentional imposition of punishment on an accused before his or her guilt is established at trial (illegal pretrial punishment) and (2) arrest or pretrial confinement conditions that are more rigorous than necessary to ensure the accused's presence at trial (illegal pretrial confinement). *United States v. King*, 61 M.J. 225, 227 (C.A.A.F. 2005).

16. Purpose or intent to punish is determined by examining the intent of detention officials or the purposes served by the restriction or condition, determining whether such purposes are reasonably related to a legitimate governmental objective. Restrictions or conditions not reasonably related to a legitimate goal (such as an arbitrary or purposeless confinement) permit a court to reasonably infer that the purpose of the action is punishment. *United States v. James*, 28 M.J. 214, 216 (C.M.A. 1989), see also *Howell v. United States*, 75 M.J. 386 (C.A.A.F. 2016).

17. The second prohibition of Article 13, UCMJ, prevents imposing unduly rigorous conditions during pretrial confinement. Conditions that are sufficiently egregious may give rise to a permissive inference that an accused is being punished, or the conditions may be so excessive as to constitute punishment. *King*, 61 M.J. at 227-28.

18. The military judge may order credit for each day of pretrial confinement that involves an abuse of discretion or unusually harsh circumstances. RCM 305(k).

19. The Secretary concerned may issue instructions establishing requirements applicable to facilities and treatment of prisoners to prevent pretrial restraint amounting to punishment. Generally, confinement in violation of Secretary regulations does not create a per se right to sentencing credit. *United States v. Williams*, 68 M.J. 252, 256 (C.A.A.F. 2010); *United States v. Adcock*, 65 M.J. 18, 23 (C.A.A.F. 2007). However, credit may be appropriate "where the

underlying purpose of such regulations is the protection of personal liberties or interests." *Williams*, 68 M.J. at 256; *Adcock*, 65 M.J. at 23.

20. RCM 305(k) provides an independent basis for the aware of additional confinement credit, "where there has been a violation of service regulations 'when those violations reflect long-standing concern for the prevention of pretrial punishment and the protection of the servicemember's rights." *Williams*, 68 M.J. 256 (citing *Adcock*, 65 M.J. at 25).

21. The Secretary of the Navy issued the Department of the Navy Corrections Manual, SECNAVINST 1640.9C, dtd 3 Janaury 2006, to provide "standardize policies and procedures for the operation of Navy and Marine Corps confinement facilities."

22. A command's disregard for service regulations may lead us to infer an improper purpose, such as to punish, even where an accused's status as a flight risk or a threat of continuing misconduct justifies the decision to confine him. *United States v. West*, No. NMCCA 201200189, 2013 CCA LEXIS 230, at *13 (N-M Ct. Crim. App. Mar. 21, 2013).

23. Pretrial confinement in a civilian confinement facility is subject to the same scrutiny as confinement in a military detention facility. *United States v. Whalen*, 2014 CCA Lexis 788, at *7 (N-M Ct. Crim. App. 2014)(quoting *United States v. James*, 28 M.J. 214, 215 (C.M.A. 1989)).

24. The C.A.A.F. has held that unnecessary segregation during period of pretrial confinement is illegal. *See, e.g. King*, 61 M.J. 225 (C.A.A.F. 2005)(service member awarded 3-for-1 credit for the two weeks he spent in PTC because he was isolated from other prisoners during the period and the government offered no explanation as to whether it explored alternatives to solitary confinement and no sound reason why the member was singled out and segregated); *see also United States v. Catano*, 2018 CCA Lexis 1, at *2 (A.F. Ct. Crim. App. 2018) (affirming the military judge's award of PTC credit when the appellant was arbitrarily held in maximum custody and in unnecessary segregation during periods of his PTC).

ARGUMENT

[redacted]

26. CO [redacted] was on notice of these conditions and maintained the ability to rectify the matter but chose not to do so without a legitimate goal/reason. The only reasonable inference is that the purpose of not transferring CSSSN Brown is punishment.

27. Transferring CSSSN Brown to the nearest military facility would have been an easy solution as requested by the defense. Although not maybe ideal for the command because it would take some level of coordination and expense, these are not legitimate reasons.

28. Now, everyone in the entire chain of command has thrown their hands up and essentially said "well it is not my problem because that was Wyatt's decision." This is wholly improper. Wyatt is

not the Commanding Officer of CSSSN Brown. Wyatt does not have the ability to keep CSSSN Brown in confinement. The Convening Authority did not relinquish authority and control over CSSSN Brown completely once he was placed into pretrial confinement. If the Convening Authority wanted CSSSN Brown transferred to another location, they would not have to ask Wyatt for permission – the same way they do not ask Wyatt for permission when transporting CSSSN Brown to base for court appearances.

27. The Convening Authority knew by way of the 706 short form that CSSSN Brown suffered from [redacted] and therefore [redacted] was impacting him mentally, physically, and psychologically. The Convening Authority did not even care enough to ensure CSSSN Brown was receiving treatment for his diagnosed conditions.

28. The Convening Authority had a total disregard for its own service regulations. Per SECNAVINST 1640.9C, had CSSSN Brown been housed in a military confinement facility and the same alleged altercation with another inmate occurred, the maximum disciplinary action that could occur would have been the following: a reprimand, forfeiture of 60 days of recreation privileges, disciplinary segregation **not to exceed 30 days**, 14 days of extra duty not to exceed 2 hours per day, forfeiture of 90 days good credit abatement, and forfeiture of H&Cs not to exceed 25 percent of monthly allotment.

29. Of the 326 days of pretrial confinement, CSSSN Brown served 166 days in solitary confinement due to the blatant disregard for service regulations and inaction by the Convening Authority. These are clearly more rigorous conditions than necessary to ensure CSSSN Brown's presence at trial.

30. Given the egregious nature of the Convening Authority's actions (or inactions), which violated CSSSN Brown's rights, the Defense seeks 6 for 1 credit for the 166 days of illegal pretrial punishment suffered.

RELIEF REQUESTED

31. The Defense respectfully requests this Court order an additional 996 days of credit pursuant to Article 13, UCMJ and RCM 305(k).

[redacted]

Respectfully submitted,
S. Y. WILLIAMS
LT, JAGC, USN

Attachments:
Enclosure AU: Complaints of Wrong Under Article 138 dtd 31 Jan 19 (w/encls)
Enclosure AV: Email thread subject line 'Dt. Micah Brown'
Enclosure AW: SECNAVINST 1640.9C (excerpt)
Enclosure AX: 706 Short Form dtd 18 Jan 19

I certify that I have served a true copy via e-mail of the above on the court and trial counsel on 21 June 19.

[redacted]

S. Y. WILLIAMS
LT, JAGC, USN

APPELLATE EXHIBIT XVIII
PAGE 5 OF 8
APPENDED PAGE ____

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

UNITED STATES **v.** **MICAH J. BROWN** **CSSSN/E-3** **USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION FOR SENTENCING CREDIT** **28 June 2019**

1. **Nature of Motion**.

Pursuant to Rules for Court-Martial (R.C.M.) 304(f), 305(k), 905(c)(1), 906(b)(1) and Article 13, UCMJ, the United States objects to the Accused's Motion for Sentencing Credit because he does not and cannot demonstrate a violation of either R.C.M. 304(f) or Article 13, UCMJ.

2. **Statement of Facts**.

a. On 31 July 2018, the Accused was ordered into pretrial confinement at the Jacksonville Brig. (Government (Gov.) Enclosure (Encls.) 7 at 1.)

b. On 6 September 2018, the Accused was moved into pretrial confinement at Donald Wyatt Detention Facility (Wyatt). (Gov. Encls. 8 at 1.)

c. On 16 November 2018, the Accused heated up a liquid mixture of oatmeal and Vaseline in the K-pod communal microwave for approximately 8 minutes. (Gov. Encls. [redacted]; Gov. Encls. 8 at 1.)

[1] These references or to the time stamps on the video file submitted to the Court and Defense.

APPELLATE EXHIBIT XIX
PAGE 1 OF 22
APPENDED PAGE ____

d. After testing the temperature, the Accused further heated the mixture for another 2 minutes. (Gov. Encls. 9 at [redacted].)

e. The Accused threw the hot oatmeal mixture onto the face of another detainee and struck the detainee's face with his fist. (Def. Encls. AU at 17; Gov. Encls. 9 at [redacted]).

f. On 16 November 2018, the Accused was placed in administrative detention pending investigation for violation of facility rules and regulations. (Def. Encls. AU at 17.)

g. On 28 November 2018, Wyatt officials conducted a Disciplinary Report Hearing where a Hearing Officer found the Accused guilty of "Assault with Fluids" by "a preponderance of the evidence." (Def. Encls. AU at 18.)

h. The Accused was adjudged sanctions including disciplinary segregation for a period of [redacted]. (Def. Encls. AU at 18.)

i. On December 5, 2018, Wyatt officials determined it was necessary to keep the Accused in preventative segregated confinement for his own safety. (Def. Encls. AU at 34.)

j. The Accused's preventative segregated confinement was reevaluated every week beginning on December 6 to determine its appropriateness. At no point during the segregated confinement did the Accused voice any concerns or problems with his conditions of confinement despite 12 opportunities to do so. (Def. Encls. AU at 19-34.)

k. On 2 January 2019, the Accused affirmatively stated during the weekly restrictive housing review that he had no issues with housing. (Def. Encls. AU at 29.)

l. On 3 January 2019, the Defense submitted a Request for Redress requesting that the Commanding Officer, [redacted], authorize a transfer of the Accused to the nearest military facility. (Def. Encls. AU at 11, ¶1)

m. On 9 January 2019, the Accused affirmatively stated during the weekly restrictive housing review that he had no issues with housing. (Def. Encls. AU at 27.)

n. On 15 January 2019, the Request for Redress was denied stating a "legitimate penological interest to control, preserve order, and prevent injury" (Def. Encls. AU at 13, ¶2.)

o. On 16 January 2019, the Accused affirmatively stated during the weekly restrictive housing review that he had no issues with housing. (Def. Encls. AU at 25.)

p. On 23 January 2019, the Accused affirmatively stated during the weekly restrictive housing review that he had no issues with housing. (Def. Encls. AU at 23.)

q. On 30 January 2019, the Accused refused to complete the requisite packet and refused to begin the segregated confinement step down procedure that would return him to general population. (Def. Encls. AU at 20; Gov. Encls. 10.)

r. On 30 January 2019, the Accused affirmatively stated during the weekly restrictive housing review that he had no issues with housing. (Def. Encls. AU at 21.)

s. On 31 January 2019, the very next day after refusing to complete the release packet, the Accused filed an Article 138 complaint seeking relief from segregated confinement. (Def. Encls. AU at 10, ¶3; Gov. Encls. 10.)

t. On 6 February 2019, the Accused refused to complete the release packet and refused to begin the segregated confinement step down procedure that would return him to general population. (Def. Encls. AU at 18; Gov. Encls. 10.)

u. On 6 February 2019, the Accused affirmatively stated during the weekly restrictive housing review that he had no issues with housing. (Def. Encls. AU at 19.)

v. On 25 March 2019, the Article 138 Request for Relief was denied stating "a failure by the Accused to comply with reintegration procedures and a failure to provide evidence

demonstrating that he is being deprived of benefits available by similarly-situated service members serving pre-trial confinement in a military facility." (Def. Encls. AU at 42, ¶2)

w. On 1 May, 2019, after the Accused finally completed the release packet, he was transferred back to general population but slept at night in a private room for his own protection. (Def. Encls. AV)

x. Per SECNAVINST 1640.9c §5103 ¶4(a)(3), Assault Consummated by Battery is a Category IV Offense.

y. Per SECNAVINST 1640.9c §5104 ¶5, Assault Consummated by Battery is defined as "intentionally and without consent striking, touching, or applying force to the person of another, either directly or indirectly, resulting in either bodily harm or an offensive touching of any form.

z. Per SECNAVINST 1640.9c §5103 ¶4(b)(4), a Category IV Offense carries a possible disciplinary action of "Disciplinary Segregation: indefinite, normally not to exceed 60 days in any one period."

aa. Per SECNAVINST 1640.9C § 5105, ¶3e(1) "disciplinary segregation" is a status that requires "[p]risoners shall remain in their cells at all times except as specified below or when specifically authorized by competent authority." Subparagraphs 4 and 5 go on to state "[m]eals shall be served in the cells" and "[a] 1-hour exercise period and a 5 to 10 minute shower privilege shall be granted daily when the prisoner's behavior is satisfactory. At a minimum, prisoners shall be allowed to shower every other day."

bb. Per SECNAVINST 1640.9C § 5103, ¶4c(3)-(4), in cases of Category IV offenses, brig officials may reduce the inmate's "custody level to Max custody" or to make "other recommendations considering extenuating circumstances and the violation."

cc. Per SECNAVINST 1640.9C § 4202, ¶2a, "Max custody" is defined as "[p]risoners requiring special custodial supervision because of the high probability of escape, are potentially dangerous or violent, and whose escape would cause concern of a threat to life, property, or national security. Ordinarily, only a small percentage of prisoners shall be classified as MAX."

dd. Per SECNAVINST 1640.9C § 4202, ¶2a(1)-(5), "Max custody" status includes being assigned to "the most secure quarters," wearing restraints "at all times when outside the maximum-security area and be escorted by at least two escorts," and being subject "immediate and continuous" supervision. This status is more restrictive than either disciplinary or preventative segregation at Wyatt.

3. **Burden**.

The Accused has the burden of proof by a preponderance of the evidence. R.C.M. 905(c)(1).

4. **Discussion**.

A. Article 13 only prevents illegal pretrial punishment or conditions more rigorous than necessary to ensure the accused's presence at trial.

Article 13, UCMJ, provides that "[n]o person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances required to insure his presence, but he may be subjected to minor punishment during that period for infractions of discipline." Article 13, UCMJ. The Court of Appeals for the Armed Forces has interpreted the statute to prohibit two types of government action: "(1) the intentional imposition of punishment on an accused prior to trial, i.e., illegal pretrial punishment; and (2) pretrial confinement conditions that are more rigorous than necessary to ensure the

accused's presence at trial, i.e., illegal pretrial confinement." *United States v. Fischer*, 61 M.J. 415, 418 (C.A.A.F. 2005) (citing *United States v. Inong*, 58 M.J. 460, 463 (C.A.A.F. 2003)); *McCarthy*, 47 M.J. at 165).

In determining whether Governmental action rises to the level of "illegal pretrial punishment" under the first prong of Article 13, UCMJ, this Court examines whether the Government action was motivated by a "purpose or intent to punish an accused before guilt or innocence has been adjudicated," *Fischer*, 61 M.J. at 418, which "is determined by examining the purposes served by the restriction or condition, and whether such purposes are 'reasonably related to a legitimate governmental objective.'" *United States v. Palmiter*, 20 M.J. 90, 95 (C.M.A. 1985) (quoting *Bell v. Wolfish*, 441 U.S. 520, 539 (1979)). In the absence of a showing of punitive intent, the Government action "does not, without more, amount to 'punishment.'" *United States* v. *James*, 28 M.J. 214, 216 (C.M.A. 1989) (quoting *Wolfish*, 441 U.S. at 539); *see Palmiter*, 20 M.J. at 95 ("[I]n the absence of a showing of intent to punish, a court must look to see if a particular restriction or condition, which may on its face appear to be punishment, is instead but an incident of a legitimate nonpunitive governmental objective.") (quoting *Wolfish*, 441 U.S. at 539 n.20). "Conversely, if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment." *James*, 28 M.J. at 216 (quoting *Wolfish*, 441 U.S. at 539).

The second prong of Article 13, UCMJ—"illegal pretrial confinement"—involves "the infliction of unduly rigorous circumstances during pretrial detention which, in sufficiently egregious circumstances, may give rise to a permissible inference that an accused is being punished, or may be so excessive as to constitute punishment." *McCarthy*, 47 M.J. at 165 (citing

James, 28 M.J. at 214). In determining whether confinement conditions rise to the level of "illegal pretrial confinement," this Court again focuses on the question of "punitive intent" by examining whether the conditions were reasonably related to legitimate governmental objectives, including "ensuring safety and [the accused's] presence at trial." *McCarthy*, 47 M.J. at 167. Although certain confinement conditions may be so "'excessive' as to rise to the level of punishment," *James*, 28 M.J. at 216 (quoting *Wolfish*, 441 U.S. at 538), "a prisoner is not permitted to dictate the terms and conditions of his confinement . . . [as] [s]uch terms are within the discretion of the confining authorities." *McCarthy*, 47 M.J. at 168 (citing *Palmiter*, 20 M.J. at 90); *see United States v. Corteguera*, 56 M.J. 330, 334 (C.A.A.F. 2002) (noting that a pretrial detainee "may be subjected to 'discomforting' administrative measures reasonably related to the effective management of the confinement facility [and that] '*de minimus*' impositions on a pretrial detainee . . . even if these impositions are not reasonable . . . are not cognizable under Article 13").

B. R.C.M. 304(f) dictates that pretrial restraint shall not be used as punishment, but this does not prevent discipline for infractions of the rules of the confinement facility.

R.C.M. 304(f) prohibits punitive pretrial restraint such as "punitive duty hours or training, . . . punitive labor, or . . . special uniforms prescribed only for post-trial prisoners." *United States v. Hutchins*, No. 200800393, 2018 CCA LEXIS 31, at *142 (N-M Ct. Crim. App. Jan. 29, 2018), *aff'd*, No. 18-0234, 2019 CAAF LEXIS 377, at *1 (C.A.A.F. May 29, 2019). The Rule "requires prisoners to be 'afforded facilities and treatment under regulations of the Secretary concerned.'" *United States v. Whalen*, No. NMCCA 201400020, 2014 CCA LEXIS 788, at *8-9 (N-M Ct. Crim. App. Oct. 21, 2014); *see also United States v. Adcock*, 65 M.J. 18,

23 (C.A.A.F. 2007) (holding Government violation of regulations consistent with treatment of pretrial prisoners as innocent amounted to an abuse of discretion under R.C.M. 305(k)).

However, "[c]onfinement in violation of service regulations does not create a per se right to sentencing credit under the UCMJ." *Whalen*, 2014 CCA LEXIS 788, at *8-9 (citing *United States v. Williams*, 68 M.J. 252, 253 (C.A.A.F. 2010)). Under R.C.M. 304(f) "a service member may identify violations of applicable service regulations by pretrial confinement authorities, and on that basis request confinement credit. [The Rule] allows for credit for pretrial confinement that involves an abuse of discretion or unusually harsh circumstances." *Id.*

Notably, "[t]his rule does not prohibit minor punishment during pretrial confinement for infractions of the rules of the place of confinement." R.C.M. 304(f). Regarding the internal management of prison facilities, courts—both military and civilian—show "great deference" to the judgment and expertise of prison administrators. *See United States v. Coder*, 39 M.J. 1006, 1008-09 (A. Ct. Crim. App. 1994) (stating that both CAAF and multiple civilian courts have recognized that prison officials must be able to "further correctional goals . . . the most basic of which is the internal security of the prisons themselves."); *United States v. Vaughan*, 11 C.M.R. 121, 124 (C.M.A. 1953) ("There can be no denying the general proposition that those entrusted with the management of a penal institution must necessarily possess power to impose disciplinary sanctions of a wholly administrative character."); *see also Cutter v. Wilkinson*, 544 U.S. 709, 723, (2005) (giving "due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources"); *Washington v. Harper*, 494 U.S. 210, 223-24 (1990) ("prison authorities are best equipped to make difficult decisions regarding prison administration"); *Goff v. Graves*, 362 F.3d 543, 549

(8th Cir. 2004) ("We accord great deference to the judgment and expertise of prison officials, particularly with respect to decisions that implicate institutional security.").

C. The Accused fails to meet his burden to prove he is entitled to either Article 13 or R.C.M. 304(f) relief.

1. The Accused fails under R.C.M. 304(f), because he does not point to a violation of the text of the Rule and he cannot show that Wyatt did not comply with the relevant SECNAVINST.

The Accused's R.C.M. 304(f) argument is not based on an allegation that his conditions while in restrictive housing were a violation of the text of the Rule. Rather, the Accused submits that his conditions while in restrictive housing were not in accord with SECNAVINST 1640.9C. (Accused's Mot. at 3-4, ¶¶25, 28.) For a variety of reasons, his argument fails.

First, the Accused submits that his "segregation consisted [redacted]." (Accused's Mot. at 3, ¶25.) But the Accused offers no evidence to prove this fact. Indeed, the only reference to a period [redacted]" or any of his other conditions of confinement in the Accused's 225 pages of enclosures appears in an Article 138 complaint and a request for redress submitted by Defense counsel. (Def. Encls. AU at 1, 3.) This is insufficient to meet the Accused's burden.

Second, even if one assumes the Accused's allegations regarding his conditions while on restrictive housing to be true, there is nothing to support the Accused's assertion that these "are not in accordance with SECNAVINST 1640.9C." (Accused's Mot. at 3, ¶25.) Notably, the Accused does not point to any particular provision of the Instruction when making this claim.

SECNAVINST 1640.9C § 5105, ¶3e(1)—which describes disciplinary segregation—states, *inter alia* "[p]risoners shall remain in their cells at all times except as specified below or when specifically authorized by competent authority." Subparagraphs 4 and 5 go on to state

"[m]eals shall be served in the cells" and "[a] 1-hour exercise period and a 5 to 10 minute shower privilege shall be granted daily when the prisoner's behavior is satisfactory. At a minimum, prisoners shall be allowed to shower every other day." Disciplinary segregation in naval brigs therefore allows for inmates to be "locked down" in their cells for 22 hours and 55 minutes, assuming the inmate has behaved well enough to get a shower. To the extent the Accused is arguing that he has suffered unlawful pretrial punishment because he may have had to wait to shower over the weekend instead of "every other day," this is *de minimis* and certainly cannot constitute "an abuse of discretion or unusually harsh circumstances" justifying additional confinement credit pursuant to R.C.M. 305(k). *See Whalen*, 2014 CCA LEXIS 788, at *8-9.

The Accused's argument that the Instruction was violated because his time in restrictive housing exceeded 30 days is also quickly rebutted by the text of the Instruction. SECNAVINST 1640.9C § 5103, ¶4a lists "Category IV offenses," among them, "assault consummated by a battery." This is defined as "[t]o intentionally and without consent, strike, touch, or apply force to the person of another, either directly or indirectly, resulting in either bodily harm or an offensive touching of any form." SECNAVINST 1640.9C § 5104, ¶ 5. Category IV offenses carry with them punishments including, *inter alia*, disciplinary segregation for an "indefinite" period, "normally [not to exceed] 60 days in any one period." SECNAVINST 1640.9C § 5103, ¶4b(4).

Further, in cases of Category IV offenses, the Instruction allows the brig to reduce the inmate's "custody level to Max custody" or to make "other recommendations considering extenuating circumstances and the violation." SECNAVINST 1640.9C § 5103, ¶4c(3)-(4). "Max custody" is defined as "[p]risoners requiring special custodial supervision because of the high probability of escape, are potentially dangerous or violent, and whose escape would cause

concern of a threat to life, property, or national security. Ordinarily, only a small percentage of prisoners shall be classified as MAX." SECNAVINST 1640.9C § 4202, ¶2a. This status is far more restrictive than anything the Accused has experienced in Wyatt, to include being assigned to "the most secure quarters," wearing restraints "at all times when outside the maximum-security area and be escorted by at least two escorts," and being subject "immediate and continuous" supervision. SECNAVINST 1640.9C § 4202, ¶2a(1)-(5).

Here, the Accused was placed in disciplinary segregation after scalding a fellow detainee with oatmeal and then punching him in the face. This would constitute a Category IV assault. The Accused was kept in preventative segregation because of the violent nature of his assault, due to the fact that his victim was also housed in the unit he would have ordinarily returned to, and his own choice not to complete the "step down" administrative process. Under these factual circumstances, the Instruction would have allowed naval brig personnel to place him in disciplinary segregation for an "indefinite period of time." These were also not "normal circumstances" warranting the typical 60 day period. Given the violence of the Accused, a longer period of disciplinary segregation certainly would have been justified and well within the broad latitude routinely extended to prison officials by the courts. Likewise, a naval brig official would have been well within her discretion to place the Accused on a Max custody status, far exceeding the restrictions he faced in Wyatt.

2. The Accused also fails his burden to prove he is entitled to Article 13 relief, as he has not shown an intent to punish before trial or that the conditions of pretrial confinement were more rigorous than necessary.

The Accused does not submit any evidence to suggest that the Convening Authority actually had any intent to punish him. Instead, he relies on the second portion of the test,

asserting that his time in "solitary confinement" was "clearly more rigorous conditions than necessary to ensure [his] presence at trial." (Accused's Mot. at 4, ¶29.)

The ultimate question before this Court is whether the Accused's time in restrictive housing was reasonably related to legitimate governmental objectives, including "ensuring safety and [the accused's] presence at trial." *McCarthy*, 47 M.J. at 167. Again, the Accused was placed in restrictive housing because of his own extraordinarily violent attack of a fellow detainee. He remained in preventative segregation status based in large part to his own refusal to complete the packet attached to this Motion. This packet focuses mostly on anger management and emotional coping exercises. (Gov. Encls. 10.) Requiring a detainee who violently assaulted another detainee by burning him with heated Vaseline to complete basic anger management exercises before releasing him into general population is certainly reasonably related to maintaining institutional security. Safety and institutional security are not only legitimate governmental objectives when managing prisons. Security is the primary governmental objective. *Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119, 135 n.11 (1977) ("the primary objective of the correctional system [is] to maintain order and security. . ."); *see also Palmigiano v. Travisono*, 317 F. Supp. 776, 788 (D.R.I. 1970) ("I fully recognize that maintaining security at the Adult Correctional Institution is so obvious and fundamental a legitimate objective as to obviate the need for any further comment.").

The Accused ironically made his Article 138 complaint the very day after he 1. refused to begin the segregated confinement step down procedure that would have returned him to general population and 2. stated that he had no issues with his housing. (Def. Encls. AU at 20-21.) In essence, the Accused argues that he should have been allowed out of restrictive housing despite his own refusal to comply with the directives of the confinement facility. But prisoners like the

Accused "are not permitted to dictate the terms and conditions of [their] confinement . . . " *McCarthy*, 47 M.J. at 168. The Accused cannot create a situation through his own actions, refuse to cooperate, demand transfer to another facility, and now ask for multiple *years* of additional confinement credit. Such tactics are akin to invited error. *See United States v. Eggen*, 51 M.J. 159, 162 (C.A.A.F. 1999) (A party "cannot create error and then take advantage of a situation of his own making.").

Simply put, the Accused's actions were the cause of his own conditions of confinement, not the Convening Authority. To award him with a windfall of 996 days of additional confinement credit under these circumstances would be unprecedented and unjust.

5. **Relief Requested**. The United States respectfully requests this Court deny the Accused's Motion for Sentencing Credit.

6. **Evidence**. In addition to relying on Defense enclosures, the United States provides the following enclosures in support of this motion:

Government Enclosure 7 (Confinement Order dtd 31 JUL 2018)

Government Enclosure 8 (Wyatt Significant Incident Summary and Use of Force Report dtd 16 Nov 2018)

Government Enclosure 9 [redacted]

Government Enclosure 10 (Wyatt Packet)

The United States also reserves the right to present testimony from a relevant official from Wyatt Detention Facility via telephone should such evidence be necessary.

7. **Oral Argument**. The United States requests oral argument.

BELFORTI.JAME S.MICHAEL. [redacted]

J. M. BELFORTI
LCDR, JAGC, USN

APPELLATE EXHIBIT XIX
PAGE 13 OF 22
APPENDED PAGE

Trial Counsel

CERTIFICATE OF SERVICE

A copy of this document was electronically served on the Court and Defense Counsel on 28 June 2019.

BELFORTI.JAMES.MICHAEL.[redacted]

Digitally signed by BELFORTI.JAMES.MICHAEL.[redacted]
DN: c=US, o=U.S. Government, ou=DoD, ou=PKI, ou=USN, cn=BELFORTI.JAMES.MICHAEL.[redacted]
Date: 2019.06.28 20:07:38 -04'00'

J. M. BELFORTI
LCDR, JAGC, USN
Trial Counsel

APPELLATE EXHIBIT XIX
PAGE 14 OF 22
APPENDED PAGE

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

UNITED STATES OF AMERICA v. MICAH J. BROWN CSSSN USN	Defense Motion for a Continuance 24 April 2019

1. **Nature of the Motion**

Pursuant to Rule for Court-Martial 906(b)(1), the defense respectfully requests to continue the 30 May 2019 session of court until 18 June 2019.

2. **Burden of Proof**

As the moving party, the Defense bears the burden of persuasion by a preponderance of evidence. R.C.M 905(c)(2).

3. **Statement of Facts**

a. The court signed the Trial Management Order on 26 March 2019.

b. The Trial Management Order scheduled an Article 39(a) session to be held on 30 May 2019 for the purpose of litigating pre-trial motions.

c. The defense recently learned that the Deputy Judge Advocate General of the Navy ("DJAG") will be conducting a site visit in Naples, Italy from 30 May – 1 June 2019.

d. Assistant Defense Counsel, LCDR Davis, is the Officer in Charge of Defense Service Office North, Detachment Naples, Italy.

ENCL (24)

APPELLATE EXHIBIT XXI
PAGE 344 OF
APPENDED PAGE
00033

e. Defense counsel discussed this request for a continuance with trial counsel who noted no objection.

f. Trial is scheduled for 5-9 August 2019.

4. Discussion

"The military judge should, upon a showing of reasonable cause, grant a continuance to any party for such a time, and as often, as may appear to be just." Article 40, UCMJ. Because this request does not impact the August trial dates, reasonable cause exists to grant this continuance. Should LCDR Davis miss the DJAG's site visit to Naples, he will be missing out on an important professional development opportunity. More importantly, however, the absence of the Officer In Charge during such a visit would impose a significant burden on the other members of the Naples office.

5. Relief Requested

The defense respectfully requests that this Court to grant a continuance of the Article 39(a) hearing until 18 June 2019.

6. Oral Argument

The defense does not request oral argument on this motion.

[redacted]
LCDR, JAGC, USN
Detailed Military Counsel

APPELLATE EXHIBIT XXI
PAGE 345 OF ___
APPENDED PAGE ___

ENCL (24)

CERTIFICATION OF SERVICE

A true copy of this motion was served on the opposing party and the court on 24 April 2019.

[redacted]
B.M. DAVIS
LCDR, JAGC, USN
Detailed Military Counsel

ENCL (24)

APPELLATE EXHIBIT XXI
PAGE 346 OF ____
APPENDED PAGE ____

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

UNITED STATES OF AMERICA v. Micah J. Brown CSSSN/E-3 USN	GOVERNMENT RESPONSE TO DEFENSE MOTION FOR CONTINUANCE 26 April 2019

1. **Nature of Motion**

The Government hereby responds to the Defense motion for continuance of the 30 May 2019 Article 39(a) session.

2. **Burden of Proof**

The burden of persuasion by a preponderance of the evidence rests with the Defense as the moving party. R.C. M. 905(c).

3. **Statement of Relevant Facts**

For the purposes of this motion, the Government adopts the Defense statement of facts.

4. **Discussion**

The Government does not oppose the Defense motion for continuance and does not have any conflict with the proposed date of 18 June 2019. The Government is standing by to complete this Article 39(a) session at the earliest date available to the Court and Defense.

5. **Relief Requested**

The Government requests that the Court grant Defense's motion for continuance of the Article 39(a).

ENCL (24)

APPELLATE EXHIBIT XXI
PAGE 347 OF
APPENDED PAGE
00036

6. **Evidence**

The Government has no further evidence to offer on this motion.

7. **Oral Argument**

The Government does not request oral argument.

[redacted]
S. E. CUMMINGS
LCDR, JAGC, USN
Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion was served by electronic mail on Defense Counsel on 26 April 2019.

[redacted]
LCDR, JAGC, USN
Trial Counsel

ENCL (24)

APPELLATE EXHIBIT XXI
PAGE 348 OF ____
APPENDED PAGE ____

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

UNITED STATES OF AMERICA v. MICAH J. BROWN CSSSN/E-3 USN	Defense Motion For a Continuance 24 July 2019

1. Nature of the Motion

Pursuant to Rule for Court-Martial 906(b)(1), the defense requests a continuance of the trial currently scheduled to begin on 5 August 2019.

2. Burden of Proof

As the moving party, the defense bears the burden of proof by a preponderance of the evidence.

3. Facts

a. CSSSN Micah Brown has been accused of attempting to murder LSS2 [redacted] on or about 30 July 2018 by means of stabbing him with a knife.

b. Trial is scheduled for 5-9 August 2019.

c. This is the first defense request for a continuance of the trial date.

d. The Trial Management Order established a due date of 26 April for defense expert consultant requests and a government response date of 10 May 2019.

e. The defense submitted its expert consultant requests nine days prior to the due date established by the Trial Management Order.

f. The government provided its response on 23 May 2019, approving [redacted] as an expert consultant.

APPELLATE EXHIBIT I
PAGE 1 OF 3
APPENDED PAGE

g. Because of delays in the approval process, [redacted] was not able to evaluate CSSSN Brown until 18 July 2019.

h. [redacted] assessment of CSSSN Brown revealed [redacted]

i. This factor was also addressed in the R.C.M. 706 report.

j. [redacted] also observed irregular levels of [redacted]. These factors, when combined with evidence [redacted] and the sudden onset of [redacted], call into question CSSN Brown's executive and cognitive functioning and establish the need for further neurological testing.

k [redacted] such as lesions, that compromise the functioning of the brain and are frequently linked to random, violent outbursts such as that at issue in this case.

l. In order to complete her assessment of CSSSN Brown's mental responsibility for the charged offenses, [redacted] has indicated that neurological assessment is necessary. This assessment would include an [redacted].

m. The defense is in the process of identifying a neurologist in the Providence, RI region who can conduct this type of assessment.

n. Defense counsel, who is permanently stationed in Naples, Italy, is scheduled to conduct a three-week trial in San Diego, CA from 19 August -5 September.

o. The defense has discussed this motion with trial counsel, and trial counsel indicated that the government does not object to the continuance.

4. Discussion

"The military judge should, upon a showing of reasonable cause, grant a continuance to any party for such time, and as often, as may appear just." Article 40, UCMJ. Reasonable cause exists to grant this continuance. Due to delays in the approval of the defense expert, the defense was unable to schedule the expert's evaluation of CSSSN Brown until approximately three weeks before trial. This fact alone placed the defense at a disadvantage with respect to conducting its pre-trial preparation. Now, based upon [redacted] initial assessment, and the resulting need to conduct a neurological assessment, the situation has now grown increasingly

untenable. The defense, through no fault of its own, is still assessing a crucial, case-determinative aspect of its case—the defense of lack of mental responsibility—and must be afforded additional time to develop the defense. As such, reasonable cause for a continuance has been established.

5. Relief Requested

The defense respectfully requests a continuance of the trial.[1]

6. Witnesses

The defense does not request the production of any witnesses on this motion.

7. Oral Argument

The accused does not desire oral argument on this motion.

[redacted]
LCDR, JAGC, USN
Defense Counsel

CERTIFICATION OF SERVICE

A true copy of this motion was served on the opposing party and the court on 24 July 2019.

[redacted]
Defense Counsel

[1] During an 802 conference held on 24 July between defense counsel, trial counsel, and the military judge, the parties tentatively discussed re-scheduling the trial for 30 September 2019.

APPELLATE EXHIBIT XXIII
PAGE 3 OF 3
APPENDED PAGE

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

UNITED STATES **v.** **MICAH J. BROWN** **CSSSN/E-3** **USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION FOR CONTINUANCE** **25 July 2019**

1. **Nature of Motion**.

Pursuant to Rules for Court-Martial (R.C.M.) 906(b)(1), the United States does not object to the Accused's Motion for Continuance .

2. **Statement of Facts.**

a. The Accused was evaluated by a previously approved Defense expert consultant in the field of forensic psychology—[redacted]—on 18 July 2019.

b. The Defense has represented that [redacted] is indicating that the Accused requires further neurological testing in order for her to complete her assessment of the Accused.

3. **Burden**.

The Accused has the burden of proof by a preponderance of the evidence. R.C.M. 905(c)(1).

4. **Discussion**.

"Article 40, UCMJ, gives a military judge the discretion to grant a continuance to any party for such time as the military judge deems just." *United States v. Smith*, No. 200600156, 2007 CCA LEXIS 434, at *16-17 (N-M Ct. Crim. App. Oct. 16, 2007) (citing *United States v.*

APPELLATE EXHIBIT _____
PAGE _____ OF _____
APPENDED PAGE _____

Allen, 31 M.J. 572, 620 (N-M. Ct. Mil. Rev. 1990)). "A military judge should liberally grant motions for a continuance, as long as it is clear that a good cause showing has been made." *Id.* (citing *United States v. Dunks*, 1 M.J. 254, 255 n.3 (C.M.A. 1976)). "To sustain its burden, the moving party must show by a preponderance of the evidence that prejudice to a substantial right of the accused would occur if the continuance were not granted." *Id.*

Based on the representations of the Defense, the Government does not oppose Defense's motion for a reasonable continuance in these circumstances[1].

5. **Oral Argument**. The Government does not request oral argument.

BELFORTI.JAM
ES.MICHAEL

J. M. BELFORTI
LCDR, JAGC, USN
Trial Counsel

CERTIFICATE OF SERVICE

A copy of this document was electronically served on the Court and Defense Counsel on 25 July 2019.

BELFORTI.JAM
ES.MICHAEL

J. M. BELFORTI
LCDR, JAGC, USN
Trial Counsel

---

[1] As the filing of this pleading, the Government cannot propose an alternative date for trial, because it has not yet received a finalized request from Defense. However, both parties are working diligently towards determining the logistics and timing of the Defense's proposed additional testing of the Accused. The Government would, however, object to rescheduling the trial to the week of 30 September 2019 as neither the undersigned, nor Assistant Trial Counsel, nor previously detailed Trial Counsel are available during that timeframe.

APPELLATE EXHIBIT XXV
PAGE 2 OF 2
APPENDED PAGE

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

The United States of America **v.** **MICAH J. BROWN** **CSSSN USN**	**DEFENSE SECOND MOTION FOR A CONTINUANCE** **10 Sep 2019**

1. Nature of Motion

Pursuant to Rule for Court-Martial 906(b)(1), the defense requests a continuance of the trial currently scheduled to begin on 23 September 2019.

2. Burden of Proof

As the moving party, the defense bears the burden of proof by a preponderance of the evidence.

3. Statement of Facts

a. CSSSN Micah Brown has been accused of attempting to murder LSS2 [redacted] on or about 30 July 2018 by means of stabbing him with a knife.
b. Trial was originally scheduled for 5-9 August 2019.
c. On 24 July 2019, the defense moved for a continuance of the trial dates due to issues related to the approval of expert witnesses.
d. On 25 July 2019, trial counsel responded and did not object to the defense's request for a continuance.
e. On 25 July 2019, defense submitted a request for an expert consultant in the field of neurology and neuropsychology.
f. On 29 July 2019, the court granted the defense's continuance request.
g. The new trial date was set for 23-27 September 2019.
h. On 31 July 2019, trial counsel positively endorsed the aforementioned request.
i. On 31 July 2019, Commander Navy Region Mid-Atlantic approved the defense request for the employment of Commander [redacted] as an expert in the field of neurology but the approval but was not forward to the defense until 2 August 2019.
j. On 2 August 2019, a series of emails were exchanged between CDR [redacted], the defense and trial counsel discussing his role and the procedures going forth.
k. On 7 August 2019, CDR [redacted] scheduled an appointment to meet with CSSSN Brown on 9 August 2019.
l. On 8 August 2019, the defense emailed trial counsel to discuss concerns regarding CDR [redacted] unwillingness to act as a confidential consultant.

m. On the same day, trial counsel responded that CDR [redacted] is a confidential consultant for the defense and that this information was communicated directly to CDR [redacted] on 7 August 2019.
n. On 9 August 2019, [redacted] was appointed as an expert consultant in the field of neuropsychology for the defense but the approval was not forward to the defense until 14 August 2019.
o. Following the 9 August 2019 appointment, CSSSN Brown was scheduled for another appointment for 19 August 2019.
p. On 26 August 2019, the defense began reaching out to CDR [redacted] to receive the results of all the testing conducted on CSSSN Brown.
q. On 28 August 2019, CDR [redacted] responded stating that he was working on obtaining all the results.
r. On 30 August 2019, CDR [redacted] sent a follow up email stating that [redacted].
s. On 4 September 2019, the defense learned that [redacted], the defense's expert forensic psychologist, would no longer be available the week of 23 September 2019 due to medical issues.
t. On 4 September 2019, defense contacted trial counsel via phone to relay the issues with CDR [redacted].
u. On 4 September 2019 via email, trial counsel relayed that [redacted].
v. On 5 September 2019, the defense sent an email to [redacted] at Wyatt Detention Facility containing [redacted].
w. On 6 September 2019, the defense was able to speak with CSSSN Brown confirming that [redacted]
x. On 6 September 2019, the defense followed up with an email to [redacted] regarding [redacted].
y. On 9 September 2019, having not heard from Wyatt Detention Facility, the defense followed up with another email to [redacted].
z. As of the filing of this motion, the defense has not received a response from Wyatt Detention Facility, therefore [redacted]
aa. [redacted] is available for trial the week of 11 November 2019.
bb. Defense's expert pathologist, [redacted], is available the week of 11 November 2019 for trial.

4. Discussion.

"The military judge should, upon a showing of reasonable cause, grant a continuance to any party for such time, and as often, as may appear just." Article 40, UCMJ. Reasonable cause exists to grant this continuance. Although CDR [redacted] was appointed as a defense expert consultant, he has taken the position that his treatment of CSSSN Brown was strictly under the

guise of a regular medical provider and therefore refuses to disclose the results of his testing to the defense without a signed authorization for release of medical records from CSSSN Brown.

Despite numerous attempts from the defense, Wyatt Detention Facility has been unresponsive and therefore has cause additional delay in getting the form to CDR [redacted]. These various delays, at no fault of the defense, has hindered the defense's other experts from being able to complete their respective assessments. The defense is still assessing a crucial, case determinative aspect of its case the defense of lack of mental responsibility and therefore it is imperative the defense is afforded additional time to develop its defense.

Furthermore, [redacted] is unavailable due to medical issues that require treatment during the week of 23 September 2019. [redacted] is a crucial witness for the defense. The defense anticipates [redacted] testifying to the defense of lack of mental responsibility and CSSSN Brown's inability to form the requisite intent for the charged offenses. Therefore, without [redacted] presence, CSSSN Brown would not be able to present a complete defense nor will he receive a fair trial.

5. Relief Requested.

The defense respectfully requests a continuance of the trial dates as well as the pretrial matters submissions.[1]

6. Evidence.

a. Appellate Exhibit XX
    a. Defense Motion for Continuance dtd 24 July 2019
    b. Government Response to Defense Motion for Continuance dtd 25 July 2019
    c. Defense Request for Expert in the Field of Neurology and Neuropsychology dtd 25 July 2019
    d. Email from Military Judge granting continuance dtd 29 July 2019
    e. First Endorsement on Defense Request for Expert in the Field of Neurology and Neuropsychology dtd 31 July 2019
    f. Approval from Convening Authority for Defense expert request for expert in the field of Neurology dtd 31 July 2019
    g. Email from Trial Counsel containing expert approval of expert in the field of neurology dtd 2 August 2019
    h. 1-7 August 2019 email thread
    i. 7-8 August 2019 email thread
    j. Second Endorsement on Defense Request for Expert in the Field of Neurology and Neuropsychology dtd 9 August 2019
    k. Approval from Convening Authority for Defense expert request for expert in the field of Neuropsychology dtd 9 August 2019

[1] During an 802 conference held on 5 September 2019 between defense counsel, trial counsel, and the military judge, the parties tentatively discussed re-scheduling the trial for the week of 11 November 2019.

l. Email from Convening Authority containing expert approval in the field of neuropsychology dtd 14 August 2019
m. Email thread between defense counsel and CDR [redacted] dtd 26-30 August 2019
n. Email between trial counsel and defense counsel dtd 4 September 2019
o. Emails between defense counsel and [redacted] dtd 5-9 September 2019
p. Email between defense counsel and [redacted] dtd 9 September 2019

7. Oral Argument.

The defense does not desire oral argument on this motion.

[redacted]

S. Y. WILLIAMS
LCDR, JAGC, USN
Defense Counsel

CERTIFICATION OF SERVICE

A true copy of this motion was served on the opposing party and the court on 10 September 2019.

[redacted]

S. Y. WILLIAMS
LCDR, JAGC, USN
Defense Counsel

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

UNITED STATES **v.** **MICAH J. BROWN** **CSSSN/E-3** **USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION FOR CONTINUANCE** **11 September 2019**

1. **Nature of Motion.**

Pursuant to Rules for Court-Martial (R.C.M.) 906(b)(1), the United States objects to the Accused's Motion for Continuance of the scheduled Article 39(a) session on Friday, 13 September, as Defense has not made an adequate showing that one defense counsel is unable to be physically present in Groton, CT.

2. **Statement of Facts.**

a. On Tuesday, 10 September, at 1619 the Military Judge ordered an Article 39(a) session to convene on Friday, 13 September at 1300 to discuss the second continuance request filed by the Defense in this case that same day for trial which was docketed for 23-27 September.

b. The Government immediately took steps to notify Wyatt Detention Facility and Navy personnel needed to transport the accused and provide security to the Court for the 13 September session to ensure the accused's presence and prepare for the logistics of the hearing.

d. At 2146 on 10 September, Defense counsel located in San Diego emailed the Court stating that she was unavailable due to a "hearing" on 12 September. Defense counsel provided

no further information regarding the nature of the hearing, its scheduled start time, or any efforts undertaken to move such hearing.

e. At 0859 on 11 September, the Military Judge responded to Defense counsel stating that the motion was still on and that if they were seeking a continuance they would need to file one in writing.

f. At 0900 on 11 September, the Government started working on a technological solution to conducting a videoteleconference (VTC) with the Military Judge in D.C. and continued working throughout the entire day; culminating in a successful working VTC connection for the hearing. The Government planned a test with personnel in D.C. and Naples at 0800 (EST) Thursday morning.

g. At 0930 on 11 September, Defense counsel in Naples, Italy wrote the Military Judge stating that if the other defense counsel (stationed in San Diego) could personally appear with the accused, while he appeared via VTC, that the Defense would be available for the motion session on Friday at 1300. Defense counsel then followed up with another email at 1132 stating that his client would not waive his presence.

h. At 1349, Defense filed a motion for a continuance of the Article 39(a) session providing facts related to defense counsel in Naples unavailability. The motion does not contain any information regarding defense counsel in San Diego's ability to appear in person.

i. There are no scheduled court proceedings on the Southwest Judicial Circuit's webpage where the relevant defense counsel are noted as counsel of record.

j. The Government is aware of an Article 32 hearing in San Diego that this defense counsel is counsel of record on. That hearing is set to begin at 0900 (PST) on Thursday, 12 September. It is the Government's understanding that the accused in that case is not in pretrial confinement, that a civilian defense counsel will also be appearing in the case, and that the Government in that case will present only documentary evidence and will not be calling witnesses for testimony.

k. A search of the Defense travel system reveals several late morning and early afternoon flights (some 3-4 hours after the start of the relevant Article 32 hearing) which would allow counsel in San Diego to arrive in Groton, Connecticut with enough time to rest and appear in Court in the afternoon on Friday.

l. The Government is amenable to starting later in the afternoon on Friday, if the Court has availability, to allow Defense counsel sufficient rest before the start time.

3. **Burden**.

The Accused has the burden of proof by a preponderance of the evidence. R.C.M. 905(c)(1).

4. **Discussion**.

"Article 40, UCMJ, gives a military judge the discretion to grant a continuance to any party for such time as the military judge deems just." *United States v. Smith*, No. 200600156, 2007 CCA LEXIS 434, at *16-17 (N-M Ct. Crim. App. Oct. 16, 2007) (citing *United States v. Allen*, 31 M.J. 572, 620 (N-M. Ct. Mil. Rev. 1990)). "A military judge should liberally grant motions for a continuance, as long as it is clear that a good cause showing has been made." *Id.* (citing *United States v. Dunks*, 1 M.J. 254, 255 n.3 (C.M.A. 1976)). "To sustain its burden, the moving party must show by a preponderance of the evidence that prejudice to a substantial right of the accused would occur if the continuance were not granted." *Id.*

Although military judges can and should liberally grant motions for continuance, a showing of good cause still must be made. Given the very serious nature of this case and the confinement status of the accused, there is even more reason to hold the Defense to the standard. "Good cause" is not met when Defense provides no factual information.

If the Government's understanding is correct, the hearing alluded to in emails by Defense on

12 September is scheduled to start at 0900 (PST). Given the experience of all counsel involved in this case, it is fair to assume that an Article 32 hearing with no witnesses should last no longer than two hours (three at most). Defense counsel has not shown why she cannot fly from San Diego in the afternoon and be present in Court the next day at 1300. In addition, counsel has not provided any facts as to what efforts she undertook to request a continuance in the Article 32 hearing in San Diego. While each case is important, a pending attempted murder case in which the accused is in pretrial confinement should take precedence over an Article 32 hearing where the accused is not in pretrial confinement.

Defense counsel seems to propose that because the accused will not waive the appearance of one defense counsel, that the hearing has to be continued. However, they cite to no rule or case law for such a proposition. Article 39(b) of the UCMJ states, "...If authorized by regulations of the Secretary concerned, and if at least one defense counsel if physically in the presence of the accused, the presence required by this subsection may otherwise be established by audiovisual technology (such as videoteleconferencing technology)." There is no service Secretary instruction on the matter, but the Manual of the Judge Advocate General, section 0135, further allows for VTC appearance as allowed under Article 39 when it states in relevant part,

> "Use of such audiovisual technology will satisfy the "presence" requirement of the accused only when the accused has a defense counsel physically present at his or her location. Such technology may include two or more remote sites as long as all parties can see and hear each other and the Article 39(a) session can be properly recorded."

The Government has spent significant time completing all logistical requirements to date to ensure the statutes and regulations are complied with in the scheduled Article 39(a) session. Because Defense has not met their burden by a preponderance of the evidence that good cause exists to continue this hearing, the Court should deny the motion and hold the hearing.

5. **Oral Argument**. The Government does not request oral argument.

[redacted]
CDR, JAGC, USN
Trial Counsel

CERTIFICATE OF SERVICE

A copy of this document was electronically served on the Court and Defense Counsel on 11 September 2019.

[redacted]
CDR, JAGC, USN
Trial Counsel

APPELLATE EXHIBIT XXIX
PAGE 5 OF 5
APPENDED PAGE

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

The United States of America **v.** **MICAH J. BROWN** **CSSSN USN**	**DEFENSE SUPPLEMENTAL FILING TO SECOND MOTION FOR A CONTINUANCE** **12 Sep 2019**

1. Nature of Motion

This is a supplemental filing to defense original motion filed on 10 September 2019.

2. Statement of Facts

a. On 2 August 19, LCDR Williams was detailed to a case in San Diego, CA.
b. Civilian counsel is detailed to the case.
c. This Article 32 hearing was originally scheduled for 13 August 2019.
d. On 8 August 2019, the defense requested a delay of the hearing until 12 September 2019.
e. The requested delay was subsequently approved.
f. The Article 32 hearing is set to commence at 0900PST on 12 September 2019 in San Diego, California.

3. Discussion.

LCDR Williams has searched Defense Travel System (DTS) to review potential flights for the evening of 12 September 2019. The available flights that would realistically work given the short timeframe departs San Diego at or around 1930. This flight is not a direct flight. Defense would arrive in Chicago, Illinois at or around 0500 on 13 September 2019 then eventually arrive to Rhode Island at or around 0930. After retrieving luggage and getting a rental car, defense would still have to drive the remaining approximately 1 hour to Groton, CT.

These conditions are unrealistic and will make it so that the defense is exhausted and unable to zealously represent CSSSN Brown. Over the past few years, the Navy JAG Corps has made it abundantly clear that traveling under these conditions are not safe and not authorized. Furthermore, 1300EST is 1900 in Naples, Italy. Even if the court ordered LCDR Davis to appear via VTC, over the CSSSN Brown's objection, the time difference again presents a disadvantage for the defense.

Finally, DTS is down for maintenance until 1600EST on 12 September 2019. Defense has shown that its request for a continuance of 5 days (to include the weekend) is not unreasonable.

APPELLATE EXHIBIT XXXI
PAGE 1 OF 2
APPENDED PAGE

31

4. Relief Requested.

The defense respectfully requests a continuance of the trial dates as well as the pretrial matters submissions.[1]

5. Evidence.

The defense does not have any additional evidence to offer.

6. Oral Argument.

The defense does not desire oral argument on this motion.

[redacted]

S. Y. WILLIAMS
LCDR, JAGC, USN
Defense Counsel

CERTIFICATION OF SERVICE

A true copy of this motion was served on the opposing party and the court on 12 September 2019.

[redacted]

S. Y. WILLIAMS
LCDR, JAGC, USN
Defense Counsel

[1] During an 802 conference held on 5 September 2019 between defense counsel, trial counsel, and the military judge, the parties tentatively discussed re-scheduling the trial for the week of 11 November 2019.

APPELLATE EXHIBIT XXXI
PAGE 2 OF 2
APPENDED PAGE

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

UNITED STATES **v.** **MICAH J. BROWN** **CSSSN/E-3** **USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION FOR CONTINUANCE** **17 September 2019**

1. **Nature of Motion**.

Pursuant to Rule for Court-Martial (R.C.M.) 906(b)(1), the Government does not object to the Accused's Motion for Continuance dated 10 September 2019. However, the Government files this pleading in an effort to clarify the record and to request trial dates of 6-10 January 2019, assuming the Defense's timely compliance with the Government's discovery request.

2. **Statement of Facts**.

a. CSSSN Micah Brown, USN (hereinafter "the Accused") is charged with, *inter alia*, the attempted premeditated murder of his shipmate, LSS2 [redacted], on 30 July 2018, while both were serving onboard the underway [redacted].

b. On 24 July 2019, Defense sought and was granted a continuance of the 5-9 August 2019 trial dates. (Appellate Exhibit (AE) XXIII.) The trial was rescheduled to 23-27 September 2019. (AE XXVI.)

c. On 25 July 2019, Defense filed a request to the Convening Authority seeking expert consultants in the fields of neurology and neuropsychology. The Defense did not identify any specific experts or period of hours for any expert services. Rather, the Defense

APPELLATE EXHIBIT XXXII
PAGE 1 OF 36
APPENDED PAGE

specifically requested Government assistance in identifying "qualified experts" in the requested fields. (Defense (Def.) Enclosures[1] at 7.)

d. Over the next week, the Government attempted to locate suitable experts for the Defense in both requested fields by contacting the Naval Branch Health Clinic New England, Walter Reed, BUMED, and the psychiatrists who performed the R.C.M. 706 board of the Accused. (Government (Gov.) Enclosure (Encls.) 1 at 1-2.)

e. On 29 July 2019, the Government identified CDR [redacted], a board-certified neurologist serving as the [redacted] of the Warfighter Performance Department at the Naval Submarine Medical Research Laboratory located at Naval Submarine Base New London. (Gov. Encls. 2 at 1.)

f. On 1 August 2019, the Government was informed that funding for any requested testing of the Accused, such as an [redacted], would typically not be covered by TRICARE if done solely for trial purposes. (Def. Encls. at 18.)

g. On 2 August 2019, the Government made the Defense aware of this fact and

[redacted]

[1] Defense attached a 35 page pdf entitled "Defense Enclosures – 2nd Motion to Continue" to its Motion dated 10 September 2019 (AE XXVIII). The Defense did not individually label or otherwise mark the enclosures, so for purposes of this Pleading, the Government citations to Defense Enclosures is based on the page number within that pdf.

[redacted]

h. On 2 August 2019, CDR [redacted] stated that [redacted] he was [redacted] (Def. Encls. at 16.)

i. From 25 July 2019 to 6 August 2019, the Government attempted to identify suitable neuropsychologists to potentially serve as a Defense expert. The Government reached out to several civilian neuropsychologists in an effort to locate a suitable expert consultant for the Defense. (Gov. Encls. 3 at 1-2.)

j. On 2 August 2019, CDR [redacted] was approved and appointed as a confidential expert for the Defense in the field of neurology. (Def. Encls. at 12-13.)

k. On 6 August 2019, the Government spoke directly with [redacted], a clinical neuropsychologist licensed in both Massachusetts and Rhode Island. [redacted] is currently [redacted] in Pawtucket, RI and also serves as a [redacted] at the Warren Alpert Medical School at Brown University. (Gov. Encls. 4 at 1-2; Def. Encls. at 23-24.)

l. During this initial conversation. [redacted] informed the Government that she had availability to conduct the requested testing of the Accused at the Wyatt Detention Facility on 24 August 2019. (Gov. Encls. 4 at 1.)

m. On 7 August 2019, the Government forwarded [redacted] curriculum vitae (CV) to the Defense. (Gov. Encls. 4 at 1.)

n. On 7 August 2019, the Government assisted Defense in arranging an appointment for the Accused with CDR [redacted]s scheduled for 9 August 2019 onboard Naval Submarine Base New London. (Def. Encls. at 20-22.)

[redacted]

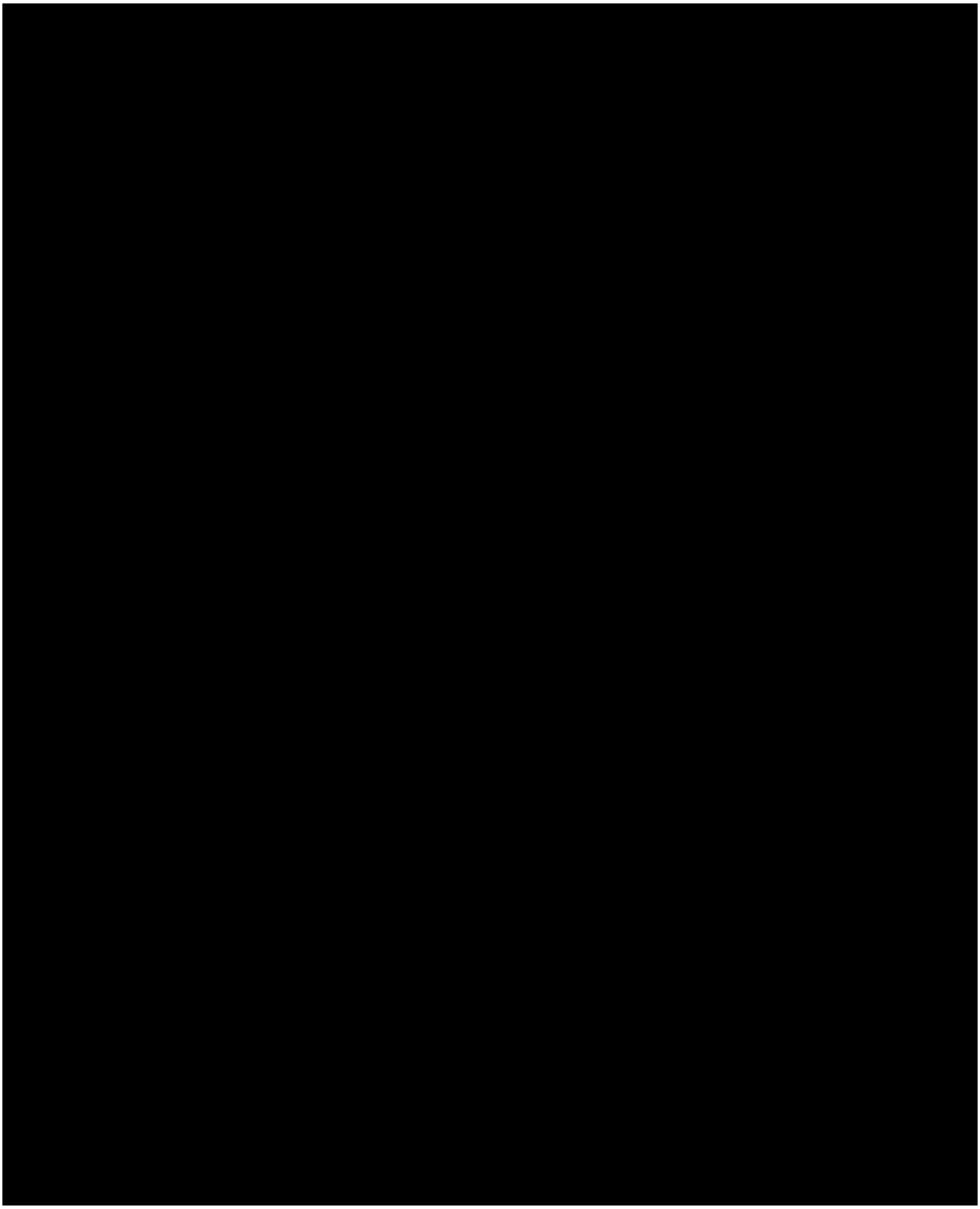
[redacted]

r. On 8 August 2019, the Defense spoke with [redacted] and informed the Government that they were "happy with her qualifications and experience." The Defense also informed the Government that they would require 20 hours of consultation with [redacted]. (Def. Encls. at 20.)

s. On 14 August 2019, [redacted] was approved and appointed as a confidential expert for the Defense in the field of neuropsychology. (Def. Encls. at 25-27.)

t. On 26 August 2019, the Government contacted the Defense seeking confirmation that the testing of the Accused had been completed and that the trial remained on schedule for 23-27 September 2019[redacted]

[redacted]



x. On 3 September 2019, this Court ordered an R.C.M. 802 conference and instructed the parties to confer and schedule a time with the Court. (Gov. Encls. 6 at 3-4.)

y. On 4 September 2019, the Government was able to contact the Defense via telephone. The Defense informed the Government that they were unable to access the results of the Accused's [redacted] from CDR [redacted] because CDR [redacted] was requesting a medical release from the Accused. (Def. Encls. at 28, 30.)

z. On 4 September 2019, the Government reached out to CDR [redacted] to determine what kind of release he required from the Accused in order to provide the test results to the Defense. CDR [redacted] informed the Government that the form could be accessed at [redacted]

aa. On 4 September 2019, the Government contacted the [redacted] at the Naval Branch Health Clinic in Groton, CT. He informed the Government that the clinic would accept a DD form 2870 and provided specific instructions on how to best complete the form. (Def. Encls. at 30.)

bb. On 4 September 2019, the Government forwarded this form to the Defense, as well as including the aforementioned instructions and the contact information for the clinic's administrative point of contact. (Def. Encls. at 30.)

cc. On 5 September 2019 during a telephonic R.C.M. 802 conference, the Defense stated that they had contacted personnel at the Wyatt Detention Facility in an effort to get the DD Form 2870 signed by the Accused, but that no one from Wyatt had gotten back to them.

dd. On 5 September 2019, the Government contacted the Wyatt Detention Facility in order to assist the Defense in getting the DD Form 2870 to the Accused. The Government was informed by [redacted] at the Wyatt Detention Facility that the Form had been provided to the Accused, but that he had refused to sign it. She also informed the

Government that she had scheduled a call between the Accused and the Defense for 6 September 2019. (Gov. Encls. 7 at 1.)

ee. On 10 September 2019, the Defense sought another continuance of the trial dates from 23-27 September 2019 until the week of 11 November 2019. In their Motion, Defense asserts that they are "still assessing a crucial, case determinative aspect of its case—the defense of lack of mental responsibility. . ." (AE XXVIII at 3.)

ff. In the same Motion, the Defense asserts that [redacted] will testify "to the defense of lack of mental responsibility and [the Accused's] inability to form the requisite intent for the charged offenses." (AE XXVIII at 3.)

gg. The Defense has never sought production of [redacted] as an expert witness.

hh. On 10 September 2019—and based on the Defense's representations in its Motion that it intends on offering evidence of the Accused's mental condition at trial—the Government submitted a discovery request to the Defense seeking, *inter alia*, all medical and mental health records reviewed by [redacted] in forming her opinion on the Accused's mental state at the time of the offense, as well as the names, locations, and dates of all mental health providers, fleet and family support centers, or any other location or entity where the Accused may have received psychological evaluation, counseling, or treatment. (Gov. Encls. 8.)

ii. As of the drafting of this pleading, the Defense has not responded to this discovery request.

jj. The relevant and necessary witnesses stationed onboard the [redacted] are unavailable to testify until January of 2020 due to operational commitments.

3. **Burden**.

The Accused has the burden of proof by a preponderance of the evidence. R.C.M. 905(c)(1).

4. **Discussion**.

"Article 40, UCMJ, gives a military judge the discretion to grant a continuance to any party for such time as the military judge deems just." *United States v. Smith*, No. 200600156, 2007 CCA LEXIS 434, at *16-17 (N-M Ct. Crim. App. Oct. 16, 2007) (citing *United States v. Allen*, 31 M.J. 572, 620 (N-M. Ct. Mil. Rev. 1990)). "A military judge should liberally grant motions for a continuance, as long as it is clear that a good cause showing has been made." *Id.* (citing *United States v. Dunks*, 1 M.J. 254, 255 n.3 (C.M.A. 1976)). "To sustain its burden, the moving party must show by a preponderance of the evidence that prejudice to a substantial right of the accused would occur if the continuance were not granted." *Id.*

Based on the representations of the Defense, the Government does not oppose Defense's motion for a continuance in these circumstances. However, the Government opposes the Defense's proposed dates of the week of 11 November 2019 due to the unavailability of many of the percipient witnesses because of their operational commitments. The Government instead proposes 6-10 January 2019 as trial dates. These proposed dates are contingent on the Defense's cooperation and timely compliance with the Government's 10 September 2019 discovery request. The Government respectfully requests leave of this Court to request alternative trial dates should the Defense fail to comply with this discovery request in a timely enough fashion to allow Government experts to review the Accused's mental health records and assist the Government in presenting its case.

5. **Oral Argument**. The Government does not request oral argument.

BELFORTIJAMES.MICHAEL[redacted] Digitally signed by BELFORTIJAMES.MICHAEL[redacted] Date: 2019.09.17 17:09:58 -04'00'

J. M. BELFORTI
LCDR, JAGC, USN
Trial Counsel

CERTIFICATE OF SERVICE

A copy of this document was electronically served on the Court and Defense Counsel on 17 September 2019.

BELFORTIJAMES.MICHAEL[redacted] Digitally signed by BELFORTIJAMES.MICHAEL[redacted] Date: 2019.09.17 17:10:26 -04'00'

J. M. BELFORTI
LCDR, JAGC, USN
Trial Counsel

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

The United States of America **v.** **Micah J. Brown** **CSSSN/E-3 USN**	**DEFENSE MOTION FOR RELEASE FROM PRETRIAL CONFINEMENT AND FOR ADDITIONAL CREDIT** **20 SEP 19**

1. Nature of Motion

Pursuant to Rule for Courts-Martial (R.C.M.) 305(j) and R.C.M. 906(b)(8) the defense moves the court to release CSSSN Micah Brown, the accused, from pretrial confinement. The defense moves for CSSSN Brown's immediate release from confinement because continued confinement is unnecessary given the evidence currently available to the court. In addition, the defense moves for illegal pretrial confinement credit of three days for every one day of illegal confinement served due to the IRO's abuse of discretion.

2. Burden of Proof

Although the defense is the moving party, this motion concerns the basis for continued pretrial confinement and so the burden rests on the government by a preponderance of the evidence to demonstrate why continued confinement is necessary. *See United States v. Heard*, 3 M.J. 14 (C.M.A. 1977). The defense bears the burden by a preponderance of the evidence with respect to the preliminary question of whether the IRO abused her discretion under R.C.M. 305(j)(1)(A) and consequently whether CSSSN Brown should receive credit for illegal pretrial confinement. *See* R.C.M. 905(c).

3. Summary of Facts

a. CSSSN Brown is accused of two specifications of violation of Article 80, UCMJ, attempted premeditated murder and attempted unpremeditated murder, and one specification of a violation of Article 128, UCMJ, aggravated assault with the intent to commit grievous bodily harm.[1]

b. On 31 July 2018, CSSSN Brown was ordered into pretrial confinement

c. On 1 August 2018, the Commanding Officer submitted the 48/72 hour as required by R.C.M. 305.

[1] Charge Sheet

d. On 3 August 2018, the IRO determined that continued pretrial confinement was necessary in this case.

e. CSSSN Brown has been in pretrial confinement since 31 July 2018.

f. Trial is now scheduled for 6-10 January 2020.

4. Discussion

a. Statement of the Law

It is long established in American law than an individual accused of a crime is cloaked in a presumption of innocence. Related to this presumption is the principle that punishment without the benefit of trial violates the constitutional right to due process of law. *Courtney v. Williams*, 1 M.J. 267 (C.M.A. 1976), *citing In Re Winship*, 397 U.S. 358 (1970). These principles apply in the military as well. *See* Article 10, U.C.M.J. According to *United States v. Heard*, 3 M.J. 14, 16-17 (C.M.A. 1977), "unless confinement prior to trial is compelled by a legitimate and pressing social need sufficient to overwhelm the individual's right to freedom… restrictions unnecessary to meet that need are in the nature of intolerable, unlawful punishment. Thus, the Government must make a strong showing that its reason for incarcerating an accused prior to his trial on the charged offense reaches such a level, for otherwise the right to be free must be paramount." R.C.M. 305(h)(2)(B) synthesizes these principles into a detailed test balancing the right to be free with the importance of securing presence at trial and the prevention of further serious misconduct. The commander placing a service member into pretrial confinement and an IRO must consider the prongs of this test in making the determination to confine a service member without the benefit of trial. *See* R.C.M. 305(h)(2)(A) and R.C.M. 305(i)(2). After an initial determination is made that an offense triable by court-martial has been committed and that the service member in question committed it, the next consideration is whether confinement is necessary. The two factors for consideration in making this determination are (a) whether it is foreseeable that the prisoner will not appear in court or (b) whether the prisoner will engage in serious criminal misconduct. R.C.M. 305(h)(2)(B)(iii)(a) and (b).

Pursuant to R.C.M. 305(j), the military judge shall release an accused who has been subjected to pretrial confinement if the IRO's decision was an abuse of discretion and if there is not sufficient information presented to the military judge to justify continuation of pretrial confinement. R.C.M. 305(j)(1). Additionally, the military judge shall release the accused from pretrial confinement if additional information not presented to the IRO establishes that the

accused should not be held under the standards of R.C.M. 305(h)(2)(B). R.C.M. 305(j)(B). The military judge should review whether the IRO's decision was an abuse of discretion by looking only at the evidence available to the IRO at the time of his decision. However, the military judge should review the separate question of whether the accused should remain in pretrial confinement *pendente lite* under a de novo standard, taking into account all of the evidence currently available. *United States v. Gaither*, 45 M.J. 349, 351 (C.A.A.F. 1996).

When reviewing an IRO's decision for abuse of discretion, the military judge may show some deference, but must also determine whether the IRO made an individual judgment supportable in law and fact. "The exercise of discretion implies conscientious judgment, not arbitrary action. It takes account of the law and the particular circumstances of the case and is directed by reason and conscience to a just result." *United States v. Fisher*, 37 M.J. 812, 816 (N.M.C.M.R. 1993), *citing Burns v. United States*, 287 U.S. 216, 223 (1932). "The test for 'abuse of discretion' is the failure to exercise discretion or its exercise on grounds that are untenable." *Fisher*, 37 M.J. at 816. Abuse of discretion "can be a failure to apply principles of law applicable to the situation at hand." *Id.* at 817, *citing United States v. Hawks*, 19 M.J. 736, 738 (A.F.C.M.R. 1984). Importantly, in order to find that the IRO did not abuse his discretion, the court must find that the IRO's decision was independently made and not just a rubber-stamp approval of the confining commander's initial order. "The process by which probable cause for pretrial confinement is determined may be transformed into an empty ritual, and commanding officers and IROs may not abdicate their decision-making authority through the "mere ratification of the bare bones conclusions of others." *Fisher*, 37 M.J. at 818. "If the information upon which their decision is based is insufficient, their decision is untenable and constitutes an abuse of discretion." *Id.* at 819.

THE COURT SHOULD ORDER THAT CSSSN BROWN BE RELEASED FROM PRETRIAL CONFINEMENT BASED ON THE INFORMATION CURRENTLY AVAILABLE

It is clear from all of the available evidence that CSSSN Brown should not be confined pending trial under the standards of R.C.M. 305(h)(2)(B) and that he should be released, now, by the military judge. Specifically, the government has not demonstrated that CSSSN Brown 1) will not appear at trial or 2) will engage in further misconduct and 3) that lesser forms of restraint are

inadequate. There is no evidence to suggest that CSSSN Brown is a flight risk or that he will engage in serious criminal misconduct if released from pretrial confinement. LSS2 [redacted] is no longer stationed in Groton, CT. He has since transferred [redacted], therefore there is zero chance of CSSSN Brown and LSS2 [redacted] encountering one another on base. The government has not issued a Military Protective Order (MPO) against CSSSN Brown for any witness in the case, let alone LSS2 [redacted], therefore there is no concern by the government regarding witness tampering/obstruction of justice. If the military judge ordered the release of CSSSN Brown, the Convening Authority has the ability to restrict him to the base/barracks.

These forms of restraint have not been attempted or, from the record, even contemplated by the Convening Authority. *Heard* does not require that a "stepped process of lesser forms of restriction must be tried first," but *Heard* is taken to require the exercise of reasonable judgment in determination of pretrial confinement issues, bearing in mind society's need to protect itself, the need for an accused's presence at trial, and the complete undesirability and unlawfulness of unnecessary pretrial confinement." *United States v. Burke*, 4 M.J. 530, 534-535 (N.C.M.R. 1977). In this case, reasonable judgment counsels in favor of these lesser restraints that would be more than adequate to serve the government's interest in preventing other misconduct or the flight of CSSSN Brown.

Should the Government assert that the allegations in this case are so serious that the referred charges alone present risk of further misconduct, flight, or that lesser forms of restraint are inadequate, the court should reject such an argument. Though the nature and circumstances of the offenses charges can be considered, the "[s]eriousness of the offense alone is not sufficient justification for pretrial confinement." *United States v. Rios*, 24 M.J. 809, 811 (A.F.C.M.R. 1987), citing *Fletcher v. Commanding Officer*, 2 M.J. 234 (C.M.A. 1977); *Heard*, 3 M.J. 14.

THE DECISION TO APPROVE CSSSN BROWN'S CONTINUED PRETRIAL CONFINEMENT CONSTITUTES AN ABUSE OF DISCRETION

LCDR [redacted] was the IRO in this case. According to Memorandum of Initial Review Officer (a pre-printed form letter), LCDR [redacted] considered the following 1) written memo of detainee's commander (48/72-hour letter), 2) confinement order, and 3) witness statements. She also found that continued confinement was proved by a preponderance of the

evidence and that the evidence showed: 1) an offense triable by a court-martial has been committed; 2) the prisoner committed it; and 3) confinement is necessary because it is foreseeable that there are reasonable grounds to believe that the accused will engage in serious misconduct and less severe forms of restraint are inadequate.

The IRO "rubber stamped" this process. She had zero evidence before her to make a determination that continued confinement is necessary because it was foreseeable that there are reasonable grounds to believe that the accused will engage in serious misconduct and less severe forms of restraint are inadequate. Since CSSSN Brown waived his presence at the IRO, the government did not hold a formal hearing and therefore the hearing officer made her determination based on the information presented to her via email. There was zero evidence presented on the two aforementioned findings by the IRO.

In fact, she considered the inaccurate and over exaggerated evidence of the commander's 48/72 hour letter. In the 48/72 hour letter, the commander misstated the facts and exaggerated the severity of the injuries sustained by LSS2 [redacted]. Paragraph 1.c.(2) states the "lacerations were too deep for the IDC (independent duty corpsman) to solely treat." The majority of the injuries to LSS2 [redacted] were superficial, so much so that the IDC onboard the submarine was able to treat LSS2 [redacted]. There were approximately [redacted]. LSS2 [redacted] was treated at a hospital for [redacted] but was released from the hospital on the same day. Although defense is unable to say if this gross misstatement of the facts was intentional, good-faith based errors are still a violation of CSSSN Brown's rights.

Furthermore, paragraph 1.c.(7) of the commander's 48 72 hour letter states:

[redacted]

This "determination" by the commander is wholly improper. First, CSSSN Brown enjoys the constitutional right of being innocent until proven guilty. In essence, the commander found CSSSN Brown guilty solely based on the allegation. Further, the commander's determination that "lesser forms of restraint are inadequate for the nature these offenses" suggests that regardless of the facts and circumstances, for "these offenses" lesser

forms of restraint are inadequate. That is not the standard. That is not the law. The commander's decision to order CSSSN Brown into pretrial confinement was and remains improper.

Paragraph 4 of the commander's 48/72 hour letter is even more troublesome. The commander's findings are based on pure speculation as opposed to evidence that probable cause is supposed to be based on. He states there is [redacted], yet there is zero evidence presented to support this [redacted] This paragraph is riddled with conclusory statements and speculation without evidence. His decision to keep CSSSN Brown was not based on the law but rather on emotion.

Furthermore, the IRO did not consider the statement of CSSSN Brown, through counsel. Although CSSSN Brown waived his right to be physically present at the IRO, this did not eliminate the requirement for the IRO to abide by R.C.M. 305. LT Davey G. Rowe, JAGC, USN was appointed as CSSSN Brown's defense counsel for the limited purpose of the IRO hearing. LT Rowe submitted an argument, via email, to the IRO stating that the government is unable to present any evidence that CSSSN Brown will continue to commit further misconduct, that he is a flight risk, or that lesser forms of restraint are inadequate. LT Rowe specifically pointed out to the IRO that the government has not even attempted lesser forms of restraints and in fact CSSSN Brown had been compliant and continues to be compliant. LT Rowe further pointed out that CSSSN Brown's record was impeccable and showed no indication that lesser forms of restraint would be ineffective. Based on the IRO Memorandum, the hearing officer did not consider any of this information when deciding to approve continued confinement of CSSSN Brown.

The IRO ratified an improper decision by the commander based on zero evidence. LSS2 [redacted] was informed on 2 August 2018 that CSSSN Brown would remain in pretrial confinement because he waived his right to be present at the hearing. Despite CSSSN Brown not wanting to be present, the functionality of the hearing was still required to take place, yet a day before the IRO filled in the pre-printed form letter, LSS2 [redacted] was told that CSSSN Brown would not be getting out of pretrial confinement. This is proof that the hearing officer abused her discretion and merely ratified the decision of the commander, a decision that was exaggerated and misstated the facts and was therefore improper.

Since the pretrial confinement of CSSSN Brown was an abuse of discretion, CSSSN Brown is entitled to additional administrative credit under R.C.M. 305(k). While CSSSN Brown will already receive credit for his pretrial confinement if there is a conviction with adjudged

confinement in his case, he is also entitled to "additional credit for each day of pretrial confinement that involves an abuse of discretion" as is the case here. Based on the deficiencies and abuse of discretion on the part of the IRO noted above, the court should award CSSSN Brown three-for-one credit for each day of illegal pretrial confinement he has served since 31 July 2018.

5. Evidence

a. 48/72 hour Letter dtd 1 Aug 18

b. Pre-trial Confinement Acknowledgement dtd 2 Aug 18

c. Memorandum of Initial Review Officer dtd 3 August 18

d. Email from LT Rowe dtd 3 August 18

e. Electronic Training Jacket page ICO LSS2 [redacted]

6. Oral Argument

The defense does not request oral argument.

7. Relief Requested

The defense respectfully request the court issue an order releasing CSSSN Brown from pretrial confinement due to the IRO's abuse of discretion. The defense further requests the court award CSSSN Brown additional credit for illegal pretrial confinement at a ratio of three days of credit for each day of illegal pretrial confinement served since 31 July 2018.

[redacted]

S. Y. WILLIAMS
LCDR, JAGC, USN
Detailed Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion was served on the Government trial counsel in the above captioned case on 20 Sep 2019.

[redacted]

S. Y. WILLIAMS
LCDR, JAGC, USN
Detailed Defense Counsel

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

UNITED STATES **v.** **MICAH J. BROWN** **CSSSN/E-3** **USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION FOR RELEASE FROM PRETRIAL CONFINEMENT AND FOR ADDITIONAL SENTENCING CREDIT** **27 September 2019**

1. **Nature of Motion**.

Pursuant to Rules for Court-Martial (R.C.M.) 305(j), 305(k), 905(c)(1), and 905(c)(2), the Government objects to the Accused's Motion for Release from Pretrial Confinement and for Additional Sentencing Credit because he does not and cannot demonstrate the existence of any of the conditions articulated in R.C.M. 305(j)(1).

2. **Statement of Facts**.

a. On 31 July 2018, the Accused was ordered into pretrial confinement at the Jacksonville Brig. (Defense (Def.) Enclosures[1] (Encls.) at 1.)

b. On 1 August 2018, the Commander of Submarine Squadron 12 completed the 48 probable cause review pursuant to R.C.M. 305(i)(1) and completed a written memorandum that stated the reasons for his conclusion that the requirements of R.C.M. 305(h)(2)(B) had been met. This memo (hereinafter "48/72 hour letter") also satisfied the requirements of

[1] Defense attached an 11 page pdf entitled "Def Encls to Motion to Release from PTC" to its Motion. The Defense did not individually label or otherwise mark the enclosures, so for purposes of this Pleading, the Government citations to Defense Enclosures is based on the page number within that pdf.

APPELLATE EXHIBIT L
PAGE 1 OF 10
APPENDED PAGE 50

R.C.M. 305(h)(2)(A)-(C). His memo was also forwarded to the Initial Review Officer (IRO). (Def. Encls. at 1-2, 4.)

c. On 2 August 2018, the Accused was informed via written memo of his rights pursuant to R.C.M. 305 and discussed these rights with his counsel. He elected to waive his appearance at the initial review of his pretrial confinement. (Def. Encls. at 3.)

d. On 3 August 2018, the IRO reviewed the 48/72 hour letter, the confinement order, and the witness statements. (Def. Encls. at 4.)

e. On the same day, the IRO approved the continued confinement of the Accused because she concluded that there were reasonable grounds to believe that [redacted]' (Def. Encls. at 5.)

f. The IRO provided a detailed explanation for her decision: [redacted]

[redacted]

(Def. Encls. at 6; Gov. Encls. 16[2] at 2, 5-6.)

g. On 6 September 2018, the Accused was moved into pretrial confinement at Donald Wyatt Detention Facility (Wyatt). (Gov. Encls. 8[3] at 1.)

[2] This enclosure was attached to the Government Response (Appellate Exhibit (AE) XI) to Defense Motion to Dismiss for Lack of Speedy Trial Pursuant to Article 10 (AE X). It is located in AE XXI.
[3] This enclosure was attached to the Government Response (AE XIX) to Defense Motion for Sentencing Credit (AE XVIII). It is located in AE XXI.

h. On 16 November 2018, the Accused heated up a liquid mixture of oatmeal in the K-pod communal microwave for approximately 8 minutes. (Gov. Encls.[4] ([redacted][5]; Gov. Encls. 8 at 1.)

i. After testing the temperature, the Accused further heated the mixture for another 2 minutes. (Gov. Encls. 9 at [redacted].)

j. The Accused threw the hot oatmeal onto the face of another detainee and struck the detainee's face with his fist. (Def. Encls. AU[6] at 17; Gov. Encls. 9 at [redacted]).

k. On 16 November 2018, the Accused was placed in administrative detention pending investigation for violation of facility rules and regulations. (Def. Encls. AU at 17.)

l. On 28 November 2018, Wyatt officials conducted a Disciplinary Report Hearing where a Hearing Officer found the Accused guilty of "Assault with Fluids" by "a preponderance of the evidence." (Def. Encls. AU at 18.)

3. **Burden**.

The Accused has the burden of proof by a preponderance of the evidence. R.C.M. 905(c)(1).

4. **Discussion**.

A. An accused can only be released from confinement if the IRO abused her discretion and there is insufficient evidence presented to justify continued confinement.

"An accused may be placed in pretrial confinement if: the commander believes upon probable cause, that is, reasonable grounds, that: (i) An offense triable by a court-martial has

[4] This enclosure was attached to the Government Response (Appellate Exhibit (AE) XIX) to Defense Motion for Sentencing Credit (AE XVIII). It is located in AE XXI.
[5] These references are to the time stamps on the video file submitted to the Court and Defense.
[6] This enclosure was attached to the Defense Motion for Sentencing Credit (AE XVIII). It is located in AE XX.

been committed; (ii) The prisoner committed it; and (iii) Confinement is necessary because it is foreseeable that: (a) The prisoner will not appear at trial, pretrial hearing, or investigation, or (b) The prisoner will engage in serious criminal misconduct; and (iv) Less severe forms of restraint are inadequate." *United States v. Edginton*, No. NMCCA 201300328, 2014 CCA LEXIS 274, at *5 (N-M Ct. Crim. App. Apr. 30, 2014) (quoting R.C.M. 305(h)(2)(B)). "Serious criminal misconduct includes intimidation of witnesses or other obstruction of justice, serious injury of others, or other offenses which pose a threat to the safety of the community. . ." R.C.M. 305(h)(2)(B).

"Within 7 days of ordering an accused into pretrial confinement, the commander's decision must be reviewed by a neutral and detached IRO or magistrate." *Edginton*, 2014 CCA LEXIS 274, at *5 (citing R.C.M. 305(i)(2)). "The IRO must find by a preponderance of the evidence that probable cause exists to continue confinement." *Id.* (citing R.C.M. 305(i)(2)(A)(3)).

"A military judge reviews an IRO's conclusion to continue pretrial confinement for an abuse of discretion." *Id.* (citing R.C.M. 305(j)(1)(A)). "In making his determination, the military judge examines only the evidence that was before the IRO at the time he made the decision to continue pretrial confinement." *Id.* (citing *United States v. Gaither*, 45 M.J. 349, 351 (C.A.A.F. 1996)); *see also United States v. Wardle*, 58 M.J. 156, 157 (C.A.A.F. 2003). "An abuse of discretion occurs if a finding of fact is clearly erroneous (i.e., unsupported by the record) or, if a decision is based on an erroneous view of the law." *United States v. Vancourt*, No. NMCCA 200900397, 2010 CCA LEXIS 620, at *9 (N-M Ct. Crim. App. Apr. 30, 2010) (citing *United States v. Taylor*, 47 M.J. 322, 325 (C.A.A.F. 1997); *United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995)). The mere "possibility that a factual finding could be wrong is

insufficient to find it clearly erroneous. Where the record contains some support for a factual finding it is not clearly erroneous." *United States v. Haridat*, No. 201100275, 2012 CCA LEXIS 4, at *4-5 (N-M. Ct. Crim. App. Jan. 10, 2012) (citing *United States v Leedy*, 65 M.J. 208, 213 (C.A.A.F. 2007)). "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be 'arbitrary, fanciful, clearly unreasonable,' or 'clearly erroneous.'" *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010) (quotation omitted).

"A military judge orders release of an accused *only* if the IRO abused his discretion *and* there is insufficient evidence presented to justify continued confinement." *Id.* (citing *Gaither*, 45 M.J. at 351; R.C.M. 305(j)(1)(A)) (emphasis added). "When a military judge is asked to determine whether confinement should be continued *pendente lite*, a different question is presented." *Gaither*, 45 M.J. at 351. "An accused's contention that conditions have changed since he was placed in confinement or that new information has been developed which shows that confinement need not be continued requires a *de novo* review." *Id.*

B. The information currently before this Court justifies the Accused's continued confinement.

The Accused argues that "it is clear from all of the available evidence" that he should be released from confinement. (Def. Mot. at 3.) In essence, he argues that "conditions have changed" and therefore his continued confinement is unnecessary to prevent him from committing serious misconduct or fleeing. To adopt this argument, this Court would have to ignore—as the Accused has in his Motion—a crucial point: there is now additional evidence that the Accused will commit further serious criminal misconduct because he already has *while still in confinement*.

The Accused violently attacked another detainee by scalding him with hot oatmeal and then punching him in the face. (Gov. Encls. 9 at [redacted]- Gov. Encls. 9 at [redacted]; Gov. Encls. 8 at 1.) The Accused makes no mention of this fact in his Motion. Instead, he suggests that because the Victim is no longer stationed in Connecticut, there is "no concern by the government regarding witness tampering/obstruction of justice." (Def. Mot. at 4.) Even taking this unsupported assertion at face value, "serious criminal misconduct" also includes "serious injury of others," just like the injury the Accused inflicted on his fellow detainee by burning his face.

Consideration of the Accused's violent attack while confined is crucial for this Court's ultimate determination for two reasons. First, it demonstrates the high likelihood that the Accused will continue to attack people if unleashed on the community. Second, it demonstrates that lesser forms of confinement are insufficient to keep the Accused from attacking people. Indeed, despite being housed in a federal detention facility, the Accused still perpetrated a violent assault on an otherwise unsuspecting detainee. Lesser forms of restraint need not be "attempted and proven inadequate before confinement can be legally imposed." *United States v. Jenkins*, No. NMCCA 201000663, 2011 CCA LEXIS 473, at *6 (N-M Ct. Crim. App. Aug. 9, 2011). In other words, a commander does not have to wait for an accused to commit even more violence while on restriction in order to have him confined. Neither is this Court required to ignore evidence and abandon common sense, despite the Accused's apparent entreaties to do so.

What the Court is left with is evidence that the Accused repeatedly stabbed his shipmate with a kitchen knife and that he attacked another detainee after purposefully heating a bowl of oatmeal, throwing it in his victim's face, and then punching him. The Accused argues that "reasonable judgment counsels in favor of these lesser restraints . . ." (Def. Mot. at 4.) On the

contrary, to release someone with such a demonstrated track record of violent criminal misconduct would be decidedly unreasonable. This Court should reject the Accused's argument.

C. The Accused cannot demonstrate that the IRO abused her discretion because they cannot point to a clearly erroneous finding of fact or a misapplication of the law.

The Accused argues that the IRO abused her discretion. He does not, however, point to an alleged misapplication of the law. (Def. Mot. at 5.) Instead, the Accused seems to argue that the IRO made clearly erroneous findings of fact, citing her reliance on the supposedly "inaccurate and over exaggerated evidence of the commander's 48/72 hour letter." (Def. Mot. at 6.) This contention is problematic for multiple reasons.

First, the mere fact that the IRO read the 48/72 hour letter cannot demonstrate an abuse of discretion. Indeed, the IRO was *required* to read the 48/72 hour letter by the Rules. *See* R.C.M. 305(i)(2) ("Within 7 days of the imposition of confinement, a neutral and detached officer appointed in accordance with regulations prescribed by the Secretary concerned *shall review the probable cause determination* and necessity for continued pretrial confinement.") (emphasis added). Furthermore, though the IRO read the 48/72 hour letter as required by the Rules, her more detailed explanation specifically mentioned the witness statements, not the supposedly "over exaggerated" 48/72 hour letter. To the extent the Accused is arguing that reading the 48/72 hour letter was an abuse of discretion, he is wrong on the law. To the extent the Accused is arguing that the IRO overly relied on the 48/72 hour letter, he is wrong on the facts. The mere fact that the IRO read the 48/72 hour letter does not show she abused her discretion and the Accused notably does not point to any authority to suggest otherwise.

Second, the Accused does not and cannot demonstrate that anything in the 48/72 hour letter is clearly erroneous or that the IRO should not have considered any facts therein. The

Accused does not provide this Court with any evidence demonstrating that the 48/72 hour letter is inaccurate, let alone that there is no support in the record for what is contained in the letter. *See Haridat*, 2012 CCA LEXIS 4, at *4-5. Indeed, the Victim did sustain multiple injuries at the hands of the Accused (see Gov. Encls. 20[7]), he was medically evacuated off of the [redacted] and he did receive treatment for his injuries at a hospital. (Gov. Encls. 3[8] at 5-6, 10-11.)

The Accused also argues that consideration of the letter was improper because it included the following verbiage: "Based on the above facts, I found it is appropriate to order pretrial confinement, and intend to maintain pre-trial custody, based on [the Accused's] violent and criminal misconduct which are serious court-martial offenses and lesser forms of restraint are inadequate for the nature these offenses." (Def. Encls. at 2.) The Accused ignores the fact that a commander is *required* to make a determination as to whether pretrial confinement will continue and state it in writing. *See* R.C.M. 305(h)(2)(a) ("the commander shall decide whether pretrial confinement will continue."); R.C.M. 305(h)(2)(C) ("the commander shall prepare a written memorandum that states the reasons for the conclusion that the requirements for confinement in subsection (h)(2)(B) of this rule have been met."); R.C.M. 305(i)(1)("Review of the adequacy of probable cause to continue pretrial confinement shall be made by a neutral and detached officer within 48 hours of imposition of confinement under military control.").

The 48/72 hour letter merely states the Commander's conclusion that continued pretrial confinement of the Accused is warranted. The Commander also elaborates why [redacted] (Def. Encls. at 2.) The

[7] This enclosure was attached to the Government Response (AE XIII) to Defense Motion to Compel Discovery (AE XII). It is located in AE XXI.
[8] This enclosure was attached to the Government Response (AE XI) to Defense Motion to Dismiss for Lack of Speedy Trial Pursuant to Article 10 (AE X). It is located in AE XXI.

Commander was permitted to consider the nature of the Accused's offenses and the fact that he is facing significant confinement if convicted. It should be noted that the Commander's assessments proved to be correct. The Accused did commit another violent assault despite being confined. In any case, the Commander acted appropriately by following the Rules and documenting his decision. The Accused's contention that the IRO abused her discretion by following the Rules and reading the 48/72 hour letter—a letter the Commander was required to write—is completely unsupported by any legal authority or the facts in this case.

Finally, the Accused argues that the IRO abused her discretion by failing to consider "the statements of [the Accused] through counsel." (Def. Mot. at 6.) This is equally unavailing. The Accused cites to no authority suggesting that failure of an IRO to consider a "statement of the accused" would constitute an abuse of discretion, but even if he had, that is not what happened in this case. The e-mail from LT Rowe to the IRO is not a "statement of [the Accused]." LT Rowe does not state that in the e-mail and it is clear from the actual text of the e-mail that it is merely the argument of LT Rowe. (Def. Encls at 7.) This reveals the folly of this assertion by the Accused. Ultimately, the IRO did not ignore a statement of the Accused. She was simply not persuaded by the argument of counsel. This cannot constitute an abuse of discretion. *See United States v. Stellato*, 74 M.J. 473, 480 (C.A.A.F. 2015) ("The abuse of discretion standard calls for more than a mere difference of opinion. Instead, an abuse of discretion occurs when the military judge's findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law."). The IRO's action was well within her range of choices. The Accused's does to meet his burden. He is therefore not entitled to be released or to receive any confinement credit.

5. **Relief Requested**. The Government respectfully requests this Court deny the Accused's Motion.

6. **Evidence**. In addition to relying on Defense enclosures, the Government directs the Court's attention to Government Enclosures that are already part of the Record and can be located at Appellate Exhibit XXI, as discussed *supra* at page 3, n. 2-6 and page 8, n.7-8.

7. **Oral Argument**. The Government does not request oral argument.

BELFORTI.JAMES.MICHAEL [redacted]
Digitally signed by BELFORTI.JAMES.MICHAEL [redacted]
Date: 2019.09.27 14:38:34 -04'00'

J. M. BELFORTI
LCDR, JAGC, USN
Trial Counsel

CERTIFICATE OF SERVICE

A copy of this document was electronically served on the Court and Defense Counsel on 27 September 2019.

BELFORTIJA MES.MICHAEL [redacted]
Digitally signed by BELFORTIJAMES.MICHAEL [redacted]
Date: 2019.09.27 14:39:00 -04'00'

J. M. BELFORTI
LCDR, JAGC, USN
Trial Counsel

APPELLATE EXHIBIT L
PAGE 10 OF 10
APPENDED PAGE

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

UNITED STATES OF AMERICA **v.** **MICAH J. BROWN** **CSSSN/E-3 USN**	**Defense Motion For Reconsideration of the Court's 24 October Order** **29 October 2019**

1. Nature of the Motion

In accordance with R.C.M. 905(f), the defense moves the court to reconsider its order compelling disclosure, for in camera review, of records protected under M.R.E. 513.

2. Burden of Proof

As the moving party, the defense bears the burden of proof by a preponderance of the evidence.

3. Facts

a. The parties litigated the Government's Motion to Compel Mental Health records at an Article 39(a) session on 23 October 2019.

b. In support of its motion, the only evidence offered by the government was an invoice submitted by the defense's forensic psychology expert consultant [redacted] for services completed.

c. The government presented no testimony or evidence relating to three categories of records at issue in this motion—mental health records held by [redacted]

APPELLATE EXHIBIT LIII
PAGE 1 OF 7
APPENDED PAGE

[redacted]

d. There is no evidence before the court establishing the existence of the records or establishing what the records contain.

e. The only evidence submitted by the defense on the motion was an email from [redacted] stating that she had not reviewed any of the above-mentioned records.

f. The R.C.M. 706 evaluation did not review either the [redacted] Enclosure A.

g. During oral argument, the court indicated that, based upon [redacted] evidence currently available, the court found the government's motion to compel to be premature.

h. Within hours of the conclusion of the Article 39(a) session, the court ordered disclosure for in camera review of testing conducted by [redacted]. The court further ordered disclosure for an in camera review of records "believed" to be held by the [redacted]

[redacted]

i. The court's order made no reference to any of the requirements for in camera review contained in M.R.E. 513(e)(3)(A-D).

j. On 24 October, the defense emailed the court requesting clarification of the court's order. Specifically, the defense requested clarification of the court's findings with respect to M.R.E. 513(e)(3)(A) and M.R.E. 513(e)(3)(B), noting the court's statement on the record that it lacked sufficient evidence at this juncture to compel production of the records.

k. Having not received a response from the court, the defense emailed the court on 28 October, requesting a stay of the court's order to allow the defense the opportunity to submit a motion for reconsideration.

l. The court responded on 28 October, indicating that it had received the defense's request for clarification on 24 October, but had not had sufficient time to review and consider the defense request for clarification.

m. The court granted the request for a stay of the order, and provided the defense with 26 hours to file a motion to reconsider. The court granted the government 48 hours to respond.

4. Discussion

A. The Court Should Rescind Its Order for In Camera Review Because the Court Did Not Make the Required Findings Under M.R.E. 513(e) and Because the Government Has Provided No Evidence Upon Which the Court Could Conclude That the Government Has Met Its Burden Under M.R.E. 513(e)(3)(A-D)

In accordance with M.R.E. 513(e)(3), "the military judge must find by a preponderance of the evidence that the moving party has met" each of the four prongs enumerated in M.R.E. 513(e)(3)(A-D). *J.M. v. Payton-O'Brien*, 76 M.J. 782, 786 (N.M.C.C.A. 2017). The four prongs are as follows:

(A) A specific factual basis demonstrating a reasonable likelihood that the records or communications would yield evidence admissible under an exception to the privilege;

(B) That the requested information meets one of the enumerated exceptions under subsection (d) of this rule;

(C) That the information sought is not merely cumulative of other information available, and;

(D) That the party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources.

M.R.E. 513(e)(3)(A-D).

The court is required to make specific findings prior to ordering in camera review of M.R.E. 513. *United States v. Singletary*, 2016 CCA LEXIS 390 at *7 (A.C.C.A. 2016) (distinguishing M.R.E. 513(e) from other rulings which do not require specific findings). In fact, the required findings represent a significant shift from prior iterations of the rule which allowed in camera review "if such an examination is necessary to rule on the motion." M.R.E. 513 (Manual for Courts-Martial 2012). As the court's order made none of the predicate findings required by the rule, the order violates M.R.E. 513 and should be rescinded.

Further, the court could not—and cannot—make such findings because, as the court noted during the Article 39(a) session, there was no evidence in the record upon which to make such findings. To date, the court has been presented with only the government's assertions that it thinks the records could assist them in cross-examining [redacted]. The government provides no specifics with respect to what information they expect to find in the records or how the records would assist them to cross-examine a defense expert who has not reviewed the records at issue.[1]

When no evidence is presented, the court cannot order in camera review. *DB v. Lippert*, 2016 CCA LEXIS 63 at *23 (A.C.C.A. 2016) (holding in camera review was improper when there was no evidence before the court of any kind, and further holding that inclusion of admissible evidence in one portion of a record does not logically support the proposition that

[1] This requirement under M.R.E. 513(e)(3)(A) plays two key roles. First, it ensures that only disclosures based upon evidence are considered, eliminating from consideration those fishing expeditions—like this one--that are unsupported by any evidence. Second, by requiring the moving party to clearly outline the factual basis and theory of admissibility, the court can fulfill its function to "narrowly tailor" what information it may ultimately release. *DB v. Lippert*, 2016 CCA LEXIS 63 at *17 (A.C.C.A. 2016). Given the limited nature of the government's motion to compel, which relied only on general assertions that it is entitled as a matter of law to this material, the court could not fulfill this second function because the court would not even know what is looking for in the records.

admissible evidence will be found in another portion.); *United States v. Morales*, 2017 CCA LEXIS 612 at *27-28 (A.F.C.C.A. 2017) (holding that military judge correctly denied a request for in camera review when the moving party could only "speculate" as to the contents of the records sought); *United States v. Arnold*, 2018 CCA LEXIS 322 at *34 (A.F.C.C.A. 2018) (holding that a military judge correctly denied in camera review for an insufficient factual basis, and affirming the trial judge's conclusion that attending counseling shortly after an assault is not an indication that the assault was discussed in counseling).

Simply put, more is required to pierce the privilege. As the court correctly pointed out during the Article 39(a) session, M.R.E. 513(d)(7) states that the court "may" order disclosure, but is not required to. Further, the government must demonstrate that such disclosure is "necessary in the interests of justice." *Id.* Ordering disclosure under this exception with no evidence to support it would turn the rule upon its head and render this clear language meaningless. The only conclusion that can be drawn from the court's order is that the court sought to utilize in camera review to determine whether information exists that could support a finding that an exception to M.R.E. 513 had been met. In doing so, however, the court skips the important step of ensuring that that the requirements of M.R.E. 513(e)(3) have been met first.

5. Relief Requested

The defense respectfully requests the court to rescind its 24 October 2019 order.

6. Evidence

The defense requests that the email correspondence between the military judge and the parties be appended to the record.

7. Witnesses

The defense does not request the production of any witnesses on this motion.

8. Oral Argument

The accused DOES NOT desire oral argument on this motion. The evidentiary hearing has already taken place, and the court can, and should, decide this motion based upon the parties' moving papers.

[redacted]
BRYAN M. DAVIS
LCDR, JAGC, USN
Defense Counsel

CERTIFICATION OF SERVICE

A true copy of this motion was served on the opposing party and the court on 29 October 2019.

[redacted]
BRYAN M. DAVIS
LCDR, JAGC, USN
Defense Counsel

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

UNITED STATES **v.** **MICAH J. BROWN** **CSSSN/E-3** **USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION FOR RECONSIDERATION** **03 November 2019**

1. **Nature of Motion**.

Pursuant to Rules for Court-Martial (R.C.M.) 905 and M.R.E. 513, the government respectfully requests the Court DENY the defense's motion for reconsideration. Additionally, the government requests the Court order the production of the medical and mental health records of the accused including those from any medical treatment facility and pre-trial confinement facilities and opinions, reports, and testing result generated by any expert working for the defense.

2. **Statement of Facts**.

In addition to the facts listed in the government's motion to compel dated 15 October 2019, the government provides the following:

a. The government's motion to compel mental health records was litigated at an Article 39(a) session on 23 October 2019.

APPELLATE EXHIBIT LV
PAGE 1 OF 10
APPENDED PAGE

b. The government supported its motion with an invoice from the defense's expert in forensic psychology showing completion of testing and scoring of the accused and the R.C.M. 706 long report.

c. The R.C.M. 706 long report references medical and mental health records of the accused held by the following: [redacted]

d. Following the 29 October 2019 39(a) session the Court ordered production of the requested records for an in camera review.

e. Following a Defense request for clarification on the Court's findings, the Court stayed its order and allowed the defense to file a motion for reconsideration and both parties to supplement their filings.

f. On 1 November 2019, the government received an affidavit from its forensic psychology expert, LTC [redacted], detailing items in the accused's medical and mental health records that he needs to review in order to assist the government in combating a defense of partial mental responsibility.

g. While in pre-trial confinement, the accused and Wyatt Detention Facility officials discussed the accused's mental health treatment at [redacted].

h. When command members visited the accused at Wyatt Detention Facility, it was noted on a visit questionnaire that the accused wanted to be [redacted]

3. **Burden**.

The Government bears the burden of preponderance of the evidence for production of the requested evidence.

4. **Discussion**.

The Government has met its burden under M.R.E. 513(e) allowing for an in camera review of the accused's records. The records sought clearly fall under the M.R.E. 512(d)(7) exception as discussed in the government's original motion to compel and the government has met its burden of the threshold showing required before the Court may conduct an in camera review. *United States v. Klemick*, 65 M.J. 576, 580 (N-M.Ct.Crim.App. 2006)[1]. Under its current iteration, M.R.E. 513(e)(3) provides a four-pronged test for an in camera review, which the moving party must establish by a preponderance of the evidence:

(A) a specific factual basis demonstrating a reasonable likelihood that the records or communications would yield evidence admissible under an exception to the privilege;

(B) that the requested information meets one of the enumerated exceptions under subsection (d) of this rule;

(C) that the information sought is not merely cumulative of other information available; and

(D) that the party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources.

[1] Holding the "moving party must show that it had conducted a 'reasonable investigation' into the background and counseling of the holder of the privilege through 'other means' before the records would be made available" moving party to this test is critical given."

In order to meet the first prong of this test, the government must demonstrate a reasonable probability that the records contain information otherwise unavailable and that such records would yield admissible evidence under an exception to this privilege. The government has the burden of proving the element of intent of the charged offenses. The defense has put the government on notice that it intends to assert a defense of partial mental responsibility under R.C.M. 916(k). A partial mental responsibility defense is not an affirmative defense and the burden remains with the government to prove the defense did not exist. To help meet this burden, the government has employed [redacted], an expert in forensic psychiatry. [redacted] has indicated that in order to challenge the partial mental responsibility defense, he would need to review all of the records requested. Since the defense has put the accused's mental health at issue and the psychotherapist-patient privilege does not exist pursuant to M.R.E. 513(d)(7), the government is entitled to review the accused's mental health and medical history not only to challenge the defense expert, but to also meet its burden to prove a partial mental responsibility defense does not exist.[2] The disclosure of these records is necessary in the interest of justice because failure to do so would allow the defense to raise a partial mental responsibility defense and tie the government's hands in combatting that defense.

The R.C.M. 706 long report referenced an email containing "detention behavioral observations" dated noted the accused's medical record showed six (6) encounters with a psychologist while being held at the brig in FL that resulted in diagnoses, noted the accused sought outpatient treatment for symptoms of [redacted]. On one of the command wellness checks, the accused

[2] *See United States v. Bond*, ACM 38934, 2017 CCA LEXIS 392, at *17-22 (A.F. Ct. Crim. App. June 7, 2017) (holding that because the defense offered evidence of the accused's mental state in an effort to rebut the intent element of the charged offense, the M.R.E. 513(d)(7) exception applied to the review and disclosure of the accused's mental health records.)

noted [redacted] Additionally, [redacted] initiated by the accused also confirms he was being seen for mental health while in pre-trial confinement at Wyatt Detention Facility. As of the date of this filing, the defense has yet to disclose exactly what mental condition it plans to raise as a defense. Regardless, the information contained within the requested records would be admissible pursuant to R.C.M. 513(d)(7) and necessary for the government to meet its burden at trial. If the defense had not raised the accused's mental condition as an issue, the accused's records would remain privileged and unavailable for the Court or the government to review. However, since the defense has been raised and the government has met the threshold showing that the accused's records would yield evidence admissible under an exception, the Court should not rescind its order to produce these records for an in camera review.

The second prong of this test is met pursuant to M.R.E. 513(d)(7) as discussed above.

In regards to the third and fourth prongs, none of the information requested is cumulative to any other information currently possessed by the government. Aside from the documents discussed that mention these records exist, the government is not in possession of any of the underlying information found in the records requested.

Therefore, the government has met its threshold requirement under M.R.E. 513(e)(A-D) and the Court should not rescind its order to produce these records for an in camera review.

5. **Relief Requested**.

The government respectfully requests the Court DENY the defense's motion for reconsideration and order the production of the requested records for an in camera review.

6. **Evidence**.

In addition to relying on the long form R.C.M. 706 report provided to the Court in support of the government's motion to compel, the government now provides the following:

- Affidavit from government forensic psychiatry expert LTC [redacted]

- [redacted]

- Command visit questionnaire dtd 12 September 2019

7. **Oral Argument**.

The Government does not request oral argument.

[redacted]
S. E. CUMMINGS
LCDR, JAGC, USN
Trial Counsel

CERTIFICATE OF SERVICE

A copy of this document was electronically served on the Court and Defense Counsel on 3 November 2019.

[redacted]
S. E. CUMMINGS
LCDR, JAGC, USN
Trial Counsel

APPELLATE EXHIBIT LV
PAGE 60 OF 70
APPENDED PAGE

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

UNITED STATES OF AMERICA v. MICAH J. BROWN CSSSN/E-3 USN	**Defense Supplement To Its Motion For Reconsideration** **5 November 2019**

1. Nature of the Motion

The defense respectfully requests the court to deny the government's motion to compel records which are not in the defense's possession and have not been relied upon by [redacted] in forming any opinions she may offer as an expert witness.

2. Burden of Proof

As the moving party, the government bears the burden of persuasion by a preponderance of the evidence.

3. Facts

a. CSSSN Micah Brown has been accused of attempting to murder LSS2 [redacted] on or about 30 July 2018 by means of stabbing him with a knife.

b. An R.C.M. 706 examination was conducted on 10-11 January 2019. The evaluators

[redacted]

APPELLATE EXHIBIT LVII
PAGE 1 OF 60
APPENDED PAGE 5

c. In accordance with M.R.E. 410, the defense provided the long form of that report to the government on 22 July 2019.

d. The defense was granted the expert assistance of [redacted] (forensic psychology), [redacted] (neuropsychology), and CDR [redacted] (neurology).

e. [redacted] assessed SN Brown on 18 July 2019.

f. To date, [redacted] has reviewed no psychological or medical records other than the long form from the R.C.M. 706 evaluation.

g. To date, [redacted] has not drafted any reports related to SN Brown.

h. Any opinion offered by [redacted] was developed independently from the R.C.M. 706 evaluation, and does not rely upon the R.C.M. 706 evaluation in any way.

i. CDR [redacted] met with SN Brown, ordered an [redacted], and reviewed the results of the [redacted]. Six pages of medical records were generated, and were disclosed to the government on 1 November 2019.

j. On 28 October 2019, the court granted the defense request for a stay of the court's 23 October order to produce records for *in camera* review.

k. In accordance with the court's direction, the defense submitted a motion to reconsider the court's order on 29 October 2019.

l. The government submitted its response to the Defense Motion for Reconsideration on 3 November 2019.

m. The government's response contained an affidavit from LTC [redacted] The affidavit provided no discussion of the contents of the records sought, what the expert would look for in the records, or what type of testimony the expert would provide that would utilize the records in an admissible fashion.

n. The government's response contained a document from a command visit, which references the fact that the accused has been [redacted] There is no indication in the document that this note relates to the accused's mental health.

4. Discussion

The government's response fails to establish any of the requirements for *in camera* review under M.R.E. 513(e)(3). The government must first establish by a preponderance of the evidence the existence of a "specific, credible factual basis" demonstrating that access to the records would likely yield evidence admissible under the rule. While the government's response broadly concludes that "information contained within the requested records would be admissible," it does not articulate what information that is or how such information would be used to meet the government's burden at trial. Such conclusory statements fall well short of what the law requires to pierce the privilege. *LK v. Acosta*, 76 M.J. 611, 620 (A.C.C.A 2017) ("Our rules require a motion seeking the production, disclosure, or admission of mental health records to specifically describ[e] the evidence [and]. . . The moving party's factual and legal theory to breach the privilege must be stated in the motion."). Indeed, the government has established that there is some amount of information contained in records to demonstrate that the accused, who has been in confinement for the past 15 months, suffers from [redacted] and may even be receiving [redacted] for that condition. How the government would use information of that type to establish the accused's specific intent to commit crimes which predate most of the records remains a mystery.

The rule requires specifics of what the government expects to find and a clearly articulated theory of admissibility—not generalities and speculation. *United States v. Marquez*,

2019 CCA LEXIS 409 at *13-14 (N.M.C.C.A. 2019) (holding a party must do more than speculate about the admissibility of records to pierce the privilege, and finding that evidence that an individual discussed the charged offense with a psychotherapist did not establish a *specific factual basis* demonstrating a reasonable likelihood that access would yield admissible evidence); *see also United States v. Morales*, 2017 CCA LEXIS 612 at *22-28 (A.F.C.C.A. 2017); *United States v. Blackburn*, 2019 CCA LEXIS 336 at *23-26 (A.F.C.C.A. 2019). With the facts and arguments presented to date, proceeding forth with *in camera* review would represent both a violation of M.R.E. 513 and a clear abuse of discretion.

With respect to M.R.E. 513(e)(3)(B), the government also fails to meet its burden. As previously briefed, the government offers no authority to support the broad power it attributes to M.R.E. 513(d)(7). To meet this requirement, the court must find that the records aren't simply relevant or admissible—the court must find that the records are "necessary in the interests of justice." Here, no such conclusion can be reached. The defense expert relied on her own observations to form her opinions in this case, and did not review or rely upon any of the requested records. *United States v. Clark*, 62 M.J. 195 (C.A.A.F. 2005). Similarly, the R.C.M. 706 board who is tasked with the weighty responsibility of evaluating the accused's mental responsibility, did not review the requested records. The government is in possession of the long form of the R.C.M. 706 report, and is aware of the accused's [redacted]. Given these circumstances, the government's request falls far short of demonstrating necessity.

The government's response also fails to meet its burden with respect to M.R.E. 513(e)(3)(C), providing no discussion of what information is contained in the records that is different than what the government already has. The government has, or will soon have, the raw

data [redacted] The government has not—and cannot—state what additional information would be contained in further review of the accused's private records.

Finally, as argued previously, the government's response places the court in an untenable position with regard to M.R.E. 513(e)(4). Because the government has not narrowed the scope of what it is looking for, specified its theory of admissibility, or described how it would utilize information from the records, any *in camera* review would violate the court's responsibility to "narrowly tailor" the information it might ultimately disclose. Absent this important information, the court can only guess what should be disclosed, resulting in an over-disclosure of information.

5. Relief Requested

The defense respectfully requests that this court deny the government motion to compel discovery.

6. Witnesses

A. The defense does not request the production of any witnesses on this motion.

7. Oral Argument

The accused desires to make oral argument on this motion.

[redacted]
BRYAN M. DAVIS
LCDR, JAGC, USN
Defense Counsel

APPELLATE EXHIBIT LVII
PAGE 5 OF 6
APPENDED PAGE

CERTIFICATION OF SERVICE

A true copy of this motion was served on the opposing party and the court on 5 November 2019.

[redacted]
BRYAN M. DAVIS
LCDR, JAGC, USN
Defense Counsel

APPELLATE EXHIBIT LVII
PAGE 6 OF 6
/ PRENDED PAGE

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

UNITED STATES **v.** **MICAH J. BROWN** **CSSSN/E-3** **USN**	**GOVERNMENT MOTION FOR APPROPRIATE RELIEF: CONTINUANCE** **20 November 2019**

1. Nature of Motion

Pursuant to Rule for Courts-Martial (R.C.M.) 906(b)(1), the Government hereby moves this Court to continue the trial in the above-captioned case to begin on 17 February 2019 due to the unavailability of ten (10) essential Government witnesses as they are mission critical to underway certifications of the [redacted]

2. Statement of Relevant Facts

a. On 24 July 2019, Defense sought and was granted a continuance of the 5-9 August 2019 trial dates. (Appellate Exhibit (AE) XXIII). The trial was rescheduled to 23-27 September 2019. (AE XXVI).

b. On 10 September 2019, the Defense sought another continuance of the trial dates from 23-27 September 2019 until the week of 11 November 2019. (AE XXVIII at 3).

c. On 17 September 2019, the Government responded to the Defense's motion for continuance wherein the Defenses' continuance request was not opposed, but the Government proposed trial dates of 6-10 January 2019 due to the unavailability of many witnesses due to operational commitments. (AE XXXII).

5

d. On 27 September 2019, the Court signed a Supplemental Trial Management Order (TMO) scheduling trial dates for 6 -17 January 2019. (AE XXXV)

e. At the time the Supplemental TMO was issued, the [redacted] was able to support the January trial dates. (Enclosure A)

f. On 14 November 2019, the Executive Officer of [redacted] informed Trial Counsel that the [redacted] will be underway on the January trial dates. (Enclosure A).

g. On 19 November 2019, the Operations Officer for Submarine Squadron 12 explained that the [redacted] is entering a pre-deployment certification period, to include sea trials. (Enclosure B).

h. Ten (10) of the Government's witnesses are mission critical for the [redacted] underway operations and certifications and are therefore unavailable for the current trial dates. These witnesses include: ETVC [redacted], HM1 [redacted], ETV3 [redacted], and EDMC [redacted] ETRCM [redacted], ETN2 [redacted], MMN1 [redacted], CSS1 [redacted], EMN2 [redacted], and CSS3 [redacted] (Enclosure A).

i. The above witnesses are essential Government witnesses as all were onboard [redacted] at the time of the charged offenses and are expected to testify as to their observations of both the accused and the victim before, during, and after the attack. (Enclosure C).

j. The Defense has provided notice of its intent to call four of these witnesses at trial including ETVC [redacted], HM1 [redacted], ETV3 [redacted], and EDMC [redacted] (AE XLV).

k. The next available dates the [redacted] can make these witnesses available for trial is between 11 February 2019 and 24 February 2019 and between 23 March 2019 and 21 April 2019. (Enclosures A and B).

l. During the time period between the two available blocks of time in paragraph g, the [redacted] will be conducting TYCOM certifications and the 10 Government witnesses are critical to that mission. (Enclosure B).

m. Defense Counsels are currently assigned to contested cases scheduled for 23 January 2019 – 13 February 2019 and 10 February 2019 – 14 February 2019.

n. This is the first request for a continuance of trial dates by the Government and is necessitated by the operational needs of the United States Navy and not due to a lack of preparation by the Government.

3. Burden of Proof

As the moving party, the Government bears the burden of persuasion by a preponderance of the evidence. R.C.M. 905(c)(2).

4. Discussion

"Article 40, UCMJ, gives a military judge the discretion to grant a continuance to any party for such time as the military judge deems just." *United States v. Smith*, No. 200600156, 2007 CCA LEXIS 434, at *16-17 (N-M Ct. Crim. App. Oct. 16, 2007) (citing *United States v. Allen*, 31 M.J. 572, 620 (N-M. Ct. Mil. Rev. 1990)). "A military judge should liberally grant motions for a continuance, as long as it is clear that a good cause showing has been made." *Id.* (citing *United States v. Dunks*, 1 M.J. 254, 255 n.3 (C.M.A. 1976)). The military judge is empowered to grant continuances under R.C.M. 906(b)(1). Under the discussion section to R.C.M. 906(b)(1), the military judge should grant a continuance to any party "for as long and as often as is just[,]" when that party makes "a showing of reasonable cause[.]"[1] Whether to grant a

[1] Rule 906(b)(1) Discussion.

continuance is within the sound discretion of the military judge.[2] Specifically included in the list of reasons for a continuance is the "unavailability of *an* essential witness."[3] Courts routinely grant continuances for the unavailability of essential witnesses, including law enforcement witnesses and expert witnesses who are essential to the presentation of the Government's case and the Defense's Case.[3]

In this case, not just one, but ten essential witnesses are unavailable due to operational needs of the United States Navy. Four of these witnesses, including ETVC [redacted], HM1 [redacted], ETV3 [redacted], and EDMC [redacted] were identified by the Defense as witnesses the Defense intends to call at trial.

Enclosure C provides statements made by the unavailable witnesses to include the following: MMNCS [redacted] who was tasked with the initial Preliminary Inquiry and secured three knives, one of which was suspected to be used in the stabbing. ETRCM [redacted], the Chief of the Boat, can speak to the events leading up to the attack, the steps taken by the command following the attack, and the impact the attack had on the [redacted] mission. ETVC [redacted] heard the altercation through the galley door, opened the door to see the accused standing over a bloodied LSS2 [redacted], and escorted the accused to the Chief's mess. ETN2 [redacted] who was an eyewitness to the altercation, heard the accused yelling at LSS2 [redacted], and could tell that the accused was angry due to the look on his face and the tone of his voice. MMN1 [redacted] who heard the attack, saw the accused standing over LSS2

---

[2] *Id.*

[3] *Id.*

[3] *See, e.g., United States v. Hale*, 685 F.3d 522 (5th Cir. 2012) (finding that the unavailability of an FBI witness was sufficient to satisfy a continuance under federal law as required by the ends of justice); *United States v. LamelaCardenas*, No. 11-0122-KD-C, 2011 U.S. Dist. LEXIS 92179 (S.D. Ala. Aug. 17, 2011) (finding that an unavailable special agent justified a continuance).

[redacted], and escorted LSS2 [redacted] the shower. HM1 [redacted] treated LSS2 [redacted] injuries after the stabbing and also treated the accused for [redacted] both before and after the charged offense. CSS1 [redacted] recalled the accused making incriminating statements to him immediately after the attack. ETV2 [redacted] was in crew's mess and heard the attack as it was happening. EMN2 [redacted] who, while carrying out his Food Service Attendant duties in the galley and crew's mess, heard the attack, saw a knife on the galley deck after the accused and LSS2 [redacted] exited, and helped to clean the galley afterwards. CSS3 [redacted] can speak to the types of knives used in the galley and to his observations of LSS2 [redacted] when he entered the lower level head as CSS3 [redacted] was exiting the shower.

These witnesses were onboard the [redacted] at the time of the charged offense and will provide key testimony as to their observations of the accused and the victim before, during, and after the attack. A continuance in this case is essential due to the unavailability of multiple critical Government witnesses that can provide eyewitness testimony. While the Government considered requesting the ordering of depositions, deposing this number of highly relevant fact witnesses and depriving the Government of the ability to present these witnesses in person to a fact finder would unnecessarily prejudice the Government's case. All of these witnesses are essential to this court-martial and the rules specifically allow for a continuance until such time as they are able to attend the trial.

As of the date of this filing, the next two periods these witnesses will be available for trial is between 11 February 2019 and 24 February 2019 and between 23 March 2019 and 21 April

2019. During the time period between the two available blocks of time, the [redacted] will be conducting TYCOM certifications and the 10 Government witnesses are critical to that mission. The certification periods certify that crew onboard is qualified to operate the systems onboard and therefore, these witnesses are required and mission critical to the underway operations.

The Government is requesting to begin trial on 17 February 2019. This will allow the identified witnesses to testify at trial before becoming unavailable again due to operational necessity. Beginning on 17 February 2019 also allows both Defense Counsel to complete contested trials currently scheduled for 23 January 2019 - 13 February 2019 and 10 February 2019 – 14 February 2019. A delay of six weeks (especially given the serious nature of the charges in this case) is reasonable given the operational requirements that make the witnesses unavailable and the impact to the Government's case if required to proceed without them. As the Government has made a showing of reasonable cause, specifically a reason specifically contemplated by the discussion section to RCM 906(b)(1), the Court should grant a continuance in this case.

5. Relief Requested

The Government respectfully requests this Court to grant the Government's motion for a continuance until 17 February 2019.

6. Evidence

The Government submits the following documentary evidence in support of this motion for appropriate relief:

1. Enclosure A: Email from XO, [redacted]
2. Enclosure B: Affidavit from Operations Officer Submarine Squadron 12
3. Enclosure C: Statements from witnesses identified as unavailable for the trial dates as currently docketed.

7. **Oral Argument**

The Government respectfully requests oral argument on this motion if it is opposed by Defense.

[redacted]
S. E. CUMMINGS
LCDR, JAGC, USN
Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion was served by electronic mail on Defense Counsel on 20 November 2019.

[redacted]
S. E. CUMMINGS
LCDR, JAGC, USN
Trial Counsel

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

UNITED STATES **v.** **MICAH J. BROWN** **CSSSN/E3 USN**	**GOVERNMENT MOTION TO EXCLUDE TESTIMONY OF DEFENSE EXPERT** **20 NOVEMBER 2019**

1. **Nature of Motion**. The Government respectfully requests this Court evaluate the proposed testimony of Defense expert, [redacted], on the topic of the accused's ability to premeditate the stabbing of the victim in this case and his ability to form the intent to kill based on his alleged [redacted] The Government respectfully requests that you exclude this testimony as it fails the requirements under M.R.E. 702 and legal tests contained in controlling case law.

2. **Burden of Proof**. As the proponents of the testimony, the Defense has the burden of proof by a preponderance of the evidence.

3. **Statement of Facts**.

a. On 13 November 2019, the Government interviewed the Defense's expert witness, [redacted]

b. Based on that interview, [redacted] is expected to testify at trial as follows:

i. [redacted] intends to educate the members regarding [redacted] and its effects on people's cognition.

ii. She will not give a specific opinion on CSSSN Brown's specific diagnoses or whether or not he had the ability to premeditate the attack on LSSN [redacted] or form the specific intent to kill.

iii. That medical research supports her opinion that when people are in a [redacted] their executive functioning is limited such that it impacts their ability to make organized plans, regulate impulses, or control their actions and emotions.

iv. That those in [redacted] or potentially suffering from [redacted] (at the time of the interview on 13 November, [redacted] had not decided if this diagnosis was relevant) can be inhibited in their ability to plan goal-directed violence.

v. [redacted] stated that those in such states are able to engage in violence and figure out how to hurt someone, but they will not have an intended target or goal, and their actions are more reactive in nature.

vi. [redacted] does not intend to cite to any scientific studies to the fact finder and did not name any when asked by the Government to do so.

vii. [redacted] offered an opinion (although it wasn't clear that she intended to testify as such) that given the proximity in time to when CSSSN Brown [redacted] to the attack on LSSN [redacted], it appears the [redacted] inhibited his ability to plan the attack.

viii. [redacted] conducted psychological testing on the accused for approximately six hours, to include (but not limited to) [redacted].

viv. [redacted] learned that the accused had significant exposure [redacted] and determined he has high risk factors that indicate a concern for recidivism and warrant treatment.

x. She has communicated with [redacted] but did not review any testing completed by her or [redacted].

xi. She has not testified in this specific manner before (i.e. that [redacted] could impact the accused's ability to form the specific intent to kill or to premeditate an attack).

xii. [redacted] did not say if she planned to testify in a potential sentencing hearing.

c. LTC [redacted], the Government's expert psychologist, is expected to rebut [redacted] testimony in the following ways:

i. After listening in on the interview conducted on 13 November 2019, [redacted] conducted research of medical journals as he had not encountered [redacted] opinion before.

ii. [redacted] will state that there is little to no studies that support [redacted] proposition that a person having [redacted] cannot develop goal-oriented plans such as a stabbing or to form an intent to kill.

iii. [redacted] identified just two studies that showed mild decreasing in executive functioning and nothing that would cause someone to be unable to form the specific intent to kill.

iv. That those with [redacted] by the very nature of that mental state often develop elaborate and organized plans for violence (albeit upon themselves.)

v. That, in his opinion, in order for someone to truly not be able to form the intent to kill or premeditate an attack they would have to be in an [redacted] state such that other symptoms would manifest. There would likely be a marked inability to perform daily tasks and functions and he'd expect the person to be in a state requiring hospitalization.

vi. That CSSSN Brown's pattern of escalating [redacted] and others shows an ability to plan.

vii. That CSSSN Brown's [redacted] and while in Wyatt detention facility are relevant factors to consider when evaluating the accused's ability to form a specific intent.

viii. That he needs to evaluate [redacted] testing data (and other treatment records of the accused) to form an opinion and be able to advise the Government on possible areas of cross-examination.

viv. That he is not aware of [redacted] scientific opinion or proposition being peer reviewed, accepted by the psychological or medical community, or been previously admitted in Court.

4. **Discussion**

The Government acknowledges that the Defense has the right to introduce evidence on the issue of a specific intent that is an element of a crime for which the accused is charged. *United States v. Ellis*, 26 M.J. 90 (C.M.A. 1988). However, when presenting scientific evidence, including testimony from a psychological expert, the evidence must meet certain threshold legal requirements before it is admitted.

In *United States v. Patrick*, the Navy Marine Corps Court of Criminal Appeals clearly outlined the analysis that should occur before proposed scientific evidence is admitted. The Court stated the following:

> "MILITARY RULE OF EVIDENCE (MIL. R. EVID.) 702, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2016 ed.), allows a witness to testify as an expert on a particular subject matter if the witness is qualified to do so based on his or her knowledge, skill, experience, training, or education regarding that subject. The testimony provided by the expert must: (1) be helpful to the trier of fact in understanding the evidence or in determining a fact in issue; (2) be based on sufficient facts or data; (3) be the product of reliable principles and methods; and (4) in providing his testimony, the expert must reliably apply those principles and methods to the facts of the case. MIL. R. EVID. 702. If the expert testifies in the form of an opinion, that opinion may be based "on facts or data in the case that the expert has been made aware of or personally observed." MIL. R. EVID. 703.
>
> The proponent of expert testimony must establish: (1) the qualifications of the expert; (2) the subject matter of the expert testimony; (3) the basis for the expert testimony; (4) the relevance of the testimony; (5) the reliability of the testimony;

and (6) the probative value of the testimony. *United States v. Houser*, 36 M.J. 392, 397 (C.M.A. 1993).

"As gatekeeper, the trial court judge is tasked with ensuring that an expert's testimony both rests on a reliable foundation and is relevant." *United States v. Sanchez*, 65 M.J. 145, 149 (C.A.A.F. 2007). In performing this gatekeeping function, four factors a judge may use to determine the reliability of expert testimony are:
(1) whether a theory or technique can be or has been tested;(2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error in using a particular scientific technique and the standards controlling the technique's operation; and (4) whether the theory or technique has been generally accepted in the particular scientific field.
Id. (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593-94, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)).

It is not necessary to satisfy every *Daubert* or *Houser* factor as "the inquiry is 'a flexible one,'" and "the factors do not constitute a 'definitive checklist or test.'" *Sanchez*, 65 M.J. at 149 (quoting *Daubert*, 509 U.S. at 593-94). Although a *Daubert* hearing is not required every time an expert witness is called to testify, the military judge is obligated to take an active "gatekeeper" approach when the proffered evidence is "called sufficiently into question." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)."

United States v. Patrick, 78 M.J. 687, 699 (N.M.C.C.A. 2018). The Government respectfully requests this Court exercise its important gatekeeping function in carefully analyzing the proposed expert testimony.

a. [redacted] proposed testimony should not be admitted because it fails the third and fifth prong of the *Houser* test.

[redacted] is expected to testify as a teaching expert and does not intend to give a specific opinion on whether or not CSSSN Brown was capable of premeditating his actions of stabbing the victim or was able to form the intent to kill at the time of the offense. Automatically, her testimony is of less relevance because it is not specifically an opinion on the ability of this accused. She intends to testify that the science is well established that people who are having [redacted] have diminished executive

functioning. Yet, she presents no scientific studies to support her proposition. To the contrary, the Government's expert is expected to testify that the scientific literature is sparse on the subject and actually states that there is only a slight degradation in a person's executive functioning (not nearly the extent that [redacted] is expected to attest to). The reliability of her proposed testimony is low, thus causing it to fail both the third and fifth prong of the *Houser* factors. Based on all of this, her testimony will not be especially helpful to the fact finder and there is a very real danger that it will confuse the members.

b. The proposed testimony should not be admitted as it cannot meet the first, second, and fourth prongs under *Daubert*.

First, [redacted] "theory or technique" has not been tested. In addition, this is seemingly novel expert testimony being offered. [redacted] admits that she has not testified to an opinion that a person who was [redacted] could not form the intent to kill or premeditate an attack in any other case. [redacted] will confirm that he has not testified as such nor heard of the type of testimony [redacted] intends to provide. [redacted] theory is not supported by the literature and her opinion has not been peer reviewed. To the contrary, the literature states the opposite of what she proposes to tell a jury. Lastly, [redacted] will testify that [redacted] theory has not been generally accepted in the field. For the Court to accept such a novel scientific opinion it should be rigorously tested and the proponent should be required to offer some level of scientific reliability in the form of studies, opinions, or other data.

c. If the Court allows [redacted] to testify as proposed, the Government should be allowed to cross examine the witness on other actions of the accused which refute her opinion.

[redacted] opinion should be tested against specific facts relevant to this accused, to rebut the reliability of her opinion. By holding herself out as a "teaching" expert, [redacted] seeks to avoid any opinion on CSSSN Brown himself. But, the Government should be able to test this expert by cross examining her on the actions of CSSSN Brown which support a finding that the accused was able to form the specific intent to kill and was capable of premeditation. Specifically, the Government will seek to cross examine, and potentially offer evidence in rebuttal, on the following matters: 1.) the fact that CSSSN Brown burned his arm while on the ship in what appears to be an attempt to be taken off the boat, 2.) an incident where he slammed another Sailor's arm in a door shortly before the attack on Petty Officer [redacted], 3.) [redacted] 4.) the accused's criminal history which contains documentation of [redacted] and 5.) the video of the accused from November 2018 at the Wyatt detention facility deliberately heating up oatmeal in the microwave, walking up to another detainee and throwing it in his face, punching him, and then walking away (an event just a few months after the attempted murder of LSS2 [redacted], in which he appears to have a very high level of executive functioning).

The Defense and their expert should not be allowed to offer broad, vague assertions about mental conditions without tying the opinion to an evaluation of this specific accused and applying it to the totality of the circumstances, and especially without a basis of reliability and acceptance in the scientific community. If the Defense is allowed to introduce such evidence, the Government should be allowed to counter such assertions with factual information rebutting the same regarding the accused's other acts of violence.

5. **Evidence**. The Government intends to call the following witnesses:

a [redacted]
b. LTC [redacted]

6. **Oral Argument**. The Government requests oral argument.

[redacted]
C. E. LEWIS
CDR, JAGC, USN
Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion was served by electronic mail on Defense Counsel on 20 November 2019.

[redacted]
C. E. LEWIS
CDR, JAGC, USN
Trial Counsel

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

The United States of America **v.** **MICAH J. BROWN** **CSSSN USN**	**DEFENSE RESPONSE TO GOVERNMENT MOTION TO CONTINUE** **27 Nov 2019**

1. Nature of Motion

Pursuant to Rule for Court-Martial 906(b)(1), the defense requests the court deny the government's motion for continuance of trial dates.

2. Burden of Proof

As the moving party, the government bears the burden of proof by a preponderance of the evidence.

3. Statement of Facts

a. CSSSN Micah Brown has been accused of attempting to murder LSS2 [redacted] on or about 30 July 2018 by means of stabbing him with a knife.
b. Trial was originally scheduled for 5-9 August 2019.
c. On 24 July 2019, the defense moved for a continuance of the trial dates due to issues related to the approval of expert witnesses.
d. On 25 July 2019, trial counsel responded and did not object to the defense's request for a continuance.
e. On 29 July 2019, the court granted the defense's continuance request.
f. The new trial date was set for 23-27 September 2019.
g. On 10 September, the defense moved for a continuance of the trial dates due the unavailability of defense's expert, [redacted].
h. The defense requested trial to be continued to the week of 11 November 2019.
i. The government did not opposed the continuance but requested 6-10 January 2020 as trial dates, representing to the court that all the witnesses onboard the [redacted] would be available during that time period.
j. On 20 November 2019, the government moved for a continuance of the trial dates due to the witnesses onboard the [redacted] being unavailable.
k. The government requested the week of 17 February 2020 for trial.

4. Discussion.

"The military judge should, upon a showing of reasonable cause, grant a continuance to any party for such time, and as often, as may appear just." Article 40, UCMJ. In September 2019, when the defense requested a continuance of the trial dates until November 2019, the government represented to the court that the [redacted] witnesses were not available in November 2019 and would not be available until January 2020. That is an 8-week difference in time requested by the defense. The defense initially opposed the January 2020 dates but then agreed to these dates. Now the government is requesting an additional 6 weeks.

The defense is not available 17 February 2020, as these dates conflict with the defense's current professional schedule. LCDR Bryan Davis is in [redacted] trial in Belgium scheduled from 23 January 2020 to 13 February 2020. It is unrealistic for him to get from Belgium to Groton, CT and immediately start another potentially two week trial. LCDR Williams is also in trial the week of 10 February 2020. This would not allow more than 1 day of pretrial preparation for both defense counsel and CSSSN Brown. CSSSN Brown is facing serious charges with grave consequences such as the potential for life in confinement. CSSSN Brown would not be subject to a fair trial should defense be required to begin a trial under such circumstances. Furthermore, the defense's forensic psychologist is unavailable the week of 17 February 2020.

If the court grants the government's motion for a continuance of the trial dates, the defense is not available until 23 Mar 2020, an additional 11 weeks from the currently scheduled trial dates. CSSSN Brown has remained in pretrial confinement since 31 July 2018. He remains at the mercy of the court and the government. To date, the defense has been unsuccessful with convincing the court to release him from pretrial confinement. It would be unjust if the trial is continued and CSSSN Brown is required to remain in pretrial confinement.

The defense opposes the idea of depositions in this case. RCM 702 allows a military judge to order depositions upon the request of a party. Neither the government nor the defense has requested depositions. Furthermore, it would be unfair to the defense to be required to be prepared to essentially go to trial a month in advance of the scheduled trial dates with such short notice. To effectively cross examine 10 government witnesses requires preparation that cannot be accomplished under such short notice.

5. Relief Requested.

The defense respectfully requests the court deny the government's motion for continuance.

6. Evidence.

a. Enclosure (1)- TMO ICO United States v. LT [redacted]
b. Enclosure (2)- TMO ICO United States v. LS2 [redacted]
c. Enclosure (3)- Email from [redacted] dtd 21 Nov 19

7. Oral Argument.

The defense does desire oral argument on this motion.

[redacted]
S. Y. WILLIAMS
LCDR, JAGC, USN
Defense Counsel

CERTIFICATION OF SERVICE

A true copy of this motion was served on the opposing party and the court on 27 November 2019.

[redacted]
S. Y. WILLIAMS
LCDR, JAGC, USN
Defense Counsel

APPELLATE EXHIBIT LXI
PAGE 3 OF 11
APPENDED PAGE

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

UNITED STATES OF AMERICA **v.** **MICAH J. BROWN** **CSSSN/E-3 USN**	**Defense Response to the Government's Motion to Exclude Expert Testimony** **27 November 2019**

1. Nature of the Motion

In accordance with M.R.E. 702, the defense respectfully requests the court to deny the government's motion to preclude [redacted] expert testimony. Excluding evidence which directly refutes elements of the charged offenses would deprive CSSSN Brown of his constitutional right to present a complete defense. *Nevada v. Jackson,* 569 U.S. 505 (2013).

2. Burden of Proof

1. Upon a showing that the expert's testimony has been "sufficiently called into question," the proponent of the expert's testimony has the burden of persuasion by a preponderance of the evidence.

2. To the extent the government's motion separately seeks a preliminary ruling on the admissibility of evidence of other wrongs committed by the accused, the government would have the burden as the proponent of that evidence.

3. Facts

a. CSSSN Micah Brown has been accused of attempting to murder LSS2 [redacted] on or about 30 July 2018 by means of stabbing him with a knife.

Exhibit misnumbered after page 119

APPELLATE EXHIBIT LXII
PAGE 1 OF 190
APPENDED PAGE 62

[redacted]

f. The crew of [redacted] had noticed a steady deterioration in CSSSN Brown's mental health prior to the incident with LSS2 [redacted], and had planned to have CSSSN Brown moved off of the boat. Enclosure C.

d. The defense intends to call members of the 706 board to testify about their diagnoses of CSSSN Brown, including [redacted]

e. The defense further intends to call [redacted] to testify about how [redacted] affect the executive functioning of the brain, and the ability of individuals to engage in goal-oriented behavior.

f. Executive Functioning ("EF") allows individuals to "control and direct our behavior." Further, "Inhibition, Working Memory, and Cognitive Flexibility are considered to be the cores of EF, and from their interaction, a higher-order set of EF such as reasoning, problem solving, and planning emerges." Enclosure E at 26.

g. The prefrontal cortex is crucial for EF such as inhibition, attention, working memory, set-shifting and planning. A deficit in these functions may result in anti-social, impulsive, or even aggressive behavior. Enclosure E at 137.

h. Executive Function deficits in planning specifically predisposes individuals to impulsive or violent offending. Enclosure E at 143.

i. When compared to individuals with only [redacted], individuals with [redacted] have significantly lower performances in EF tests, which suggests dysfunctions in decision making related to the frontal lobe. Enclosure E.

j. Violence directed toward others is associated with executive dysfunction. Enclosure E at 93.

k. Research suggests that [redacted] subjects may have poor inhibitory control. Enclosure E at 45.

l. Exposure to stress, like that experienced by those suffering from [redacted], markedly impairs the executive functions of the pre-frontal cortex while simultaneously strengthening primitive responses. Enclosure E at 105.

m. [redacted] was interviewed by the trial counsel on 13 November 2019, in the presence of defense counsel and [redacted] (government's expert).

n. [redacted] explained that her testimony would focus on educating the members about how [redacted] impact the executive functioning of the brain, and negatively impact an individual's ability to plan or engage in goal-directed behavior.

o. [redacted] stated that this negative impact was supported by research, and offered to provide references to specific articles and studies to the trial counsel. The trial counsel responded to this offer by stating that would not be necessary.

p. [redacted] stated that, in her experience, citing to specific studies is not helpful to jury members and their understanding of the subject matter of her testimony, but that she could certainly provide information from specific studies if the members indicated they would find that helpful.

q. [redacted] has extensive experience assessing violent offenders, including working with the California Department of Corrections for the past 12 years as a psychological evaluator in their Forensic Assessment Division. In that capacity, [redacted] has conducted hundreds of risk assessments on inmates with indeterminate life sentences, which are provided to the Board of Parole Hearings in order to assist them in parole suitability decisions. Enclosure D.

r. [redacted] is regularly called upon to testify in State court regarding her assessment of violent offenders. This testimony regularly includes a discussion of risk factors, including whether an individual's executive functioning is compromised by conditions such as [redacted]. Such testimony has never been challenged or excluded.

s. [redacted] provided 12 scholarly articles from reputable journals discussing how mental disorders such as [redacted] negatively impact executive functioning of the brain. Enclosure E.

t. At the conclusion of the government's interview, the defense asked [redacted] if he had any significant disagreements with what [redacted] had explained, and he indicated that he did not have any disagreements.

u. The government's motion contained no evidence to support its assertion that a *Daubert* hearing was necessary.

v. On page 7 of the government's motion, the government indicates its desire to present evidence at trial that the accused: 1) burned his arm while underway on the submarine prior to the alleged offenses; 2) an incident in which CSSSN Brown "slammed" another sailor's arm in a door; 3) [redacted] 4) the accused's criminal history, including [redacted]; and 5) CSSSN Brown's assault on another inmate at the Wyatt Detention Facility.

w. The defense previously filed a motion, under M.R.E. 404(b) to exclude evidence that the accused "slammed" another sailor's arm in a door. The government did not respond to that motion, indicating that it did not intend to offer that evidence.

x. In the defense motion to exclude the information related to the door, the defense submitted evidence that the matter had been investigated and was determined to be an accident with no malicious intent.

y. The government motion includes no evidence of the accused's criminal history of [redacted].

[redacted]

[redacted]

bb. The government has preferred charges against the accused for the alleged assault at the Wyatt Detention Facility.

cc. An Article 32 was held on 23 October 2019, and the preliminary hearing officer recommended that the charges be disposed of at a special court-martial. As far as the defense is aware, no further action has been taken.

4. Discussion

A. The Government Has Not Established That it is Entitled to a Hearing of This Nature.

A *Daubert*-type hearing is not required every time a party intends to call an expert witness. *United States v. Sanchez,* 65 M.J. 145, 149 (C.A.A.F. 2007). Rather, the trial judge is only called upon to determine the admissibility of the evidence when the "expert testimony's factual basis, data, principles, methods, or their application are *called sufficiently into question.*" *Id.* at 155 (citing *United States v. Billings,* 61 M.J. 163, 168 (C.A.A.F. 2005)); *United States v. Clark,* 61 M.J. 707, 710 (N.M.C.C.A. 2005). Here, the government has offered no evidence in support of its motion, and, therefore, has not "sufficiently called into question" the quality of the defense's evidence.

As such, while the defense acknowledges its burden as the proponent of the evidence, the government should be required to demonstrate something more than the proffers of counsel before a hearing is ordered. To do otherwise, establishes a dangerous precedent that *Daubert*-type hearings will become the default for every case in which an expert is expected to testify. Such a scenario would be tremendously inefficient—requiring experts to testify twice—and also

subject to abuse by counsel who simply want a preview of the opposing party's evidence or to "lock in" the expert's testimony. Understandably, the need may be greater in some cases in which the government is unable to interview the defense expert. But that is not the case presented here. The government has had full access to [redacted], yet still offers no evidence warranting a hearing.

B. [redacted] Testimony Is Clearly Admissible Within the Frameworks Commonly Utilized by Military Courts

Military Rule of Evidence 702 (2019) states, "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's . . . knowledge will help the trier of fact in understanding the evidence or in determining a fact in issue; (c) the testimony is based on sufficient facts or data; (e) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case."[1]

The proponent of expert testimony must establish: (1) the qualifications of the expert; (2) the subject matter of the expert testimony; (3) the basis for the expert testimony; (4) the relevance of the testimony; (5) the reliability of the testimony; and (6) the probative value of the testimony. *United States v. Houser*, 36 M.J. 392, 397 (C.M.A. 1993). In other words, "As gatekeeper, the trial court judge is tasked with ensuring that an expert's testimony both rests on a reliable foundation and is relevant." *United States v. Sanchez*, 65 M.J. 145, 149 (C.A.A.F. 2007).

In performing this gatekeeping function, four factors a judge may use to determine the reliability of expert testimony are (1) whether a theory or technique can be or has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error in using a particular scientific technique and the standards

[1] Mislettering is consistent with the original text of the Rule.

controlling the technique's operation; and (4) whether the theory or technique has been generally accepted in the particular scientific field. *Id.* (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593-94, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)).

Importantly, it is not necessary to satisfy every *Daubert* or *Houser* factor as "the inquiry is 'a flexible one,'" and "the factors do not constitute a 'definitive checklist or test.'" *Sanchez*, 65 M.J. at 149 (quoting *Daubert*, 509 U.S. at 593-94). "The focus is on the objective of the gatekeeping requirement, which is to ensure that the expert, 'whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.'" *Id.* (quoting *Kumho Tire Co.*, 526 U.S. at 152).

1. The Defense Expert is Uniquely Qualified to Educate the Members on This Topic Area

As indicated in Enclosure D, [redacted] is a licensed psychologist in the State of California. She has been qualified as an expert in the field of forensic psychology in both military and civilian courts, and has appeared as an expert witness or consultant in dozens of courts-martial. More importantly, however, is her extensive experience in treating and assessing violent offenders. As an evaluator for the California Department of Corrections for the past 12 years, she has conducted hundreds of risk assessments for violent offenders and offered her opinions about those offenders to both parole boards and in State Court. This experience uniquely qualifies her to testify about how—and more importantly why—mental illnesses like those observed in this case result in violent bebavior.

2. The Defense Has Established the Subject Matter of [redacted] Testimony

The second *Houser* prong requires the defense to establish the subject matter of

the expert's testimony. [redacted] will testify that mental illnesses, including those observed in CSSSN Brown [redacted] diminish the executive functioning of the brain. [redacted] will explain that executive function controls the brain's ability to rationally plan, to engage in goal-directed behavior, to appropriately assess danger, and to engage in impulse control. It then follows that individuals who suffer from these conditions, and who engage in violent behavior are far less likely to plan and think through the behavior, than those who are not suffering from these conditions.

In discussing this factor, the Court in *Houser* noted that "M.R.E. 702 is a very liberal standard. *Houser,* 36 M.J. at 398. "The test is not whether the jury could reach some conclusion in the absence of the expert evidence, but whether the jury is qualified without such testimony 'to determine intelligently and to the best possible degree the particular issue without enlightenment from those having specialized understanding of the subject." *Id.* (quoting *State v. Chapple,* 660 P.2d 1208, 1219-20 (1983)). Certainly, if it is permissible, as our courts have regularly held, to present expert testimony about how victims of sexual assault and abuse are likely to act, it logically follows that evidence regarding how those suffering from mental illness may make decisions should also be permissible. This information is outside the common understanding of members and requires an expert to illuminate the subject.

3. The Defense Has Established the Basis for [redacted] Testimony

The third *Houser prong* requires the defense to establish the basis for the expert's testimony. This factor is arguably inapplicable, where, as here, the defense anticipates calling a witness as a teaching expert. As such, the witness is not offering an opinion on the specific facts of this case under M.R.E. 703, but, rather, is serving an educational role with respect to a relevant topic. Nothing in the rules requires an expert to offer an opinion. To the contrary, the

rules contemplate expert testimony that does not amount to an opinion. M.R.E. 702 (the expert "may testify in the form of an opinion *or otherwise.")*. Again, the court's rule as gatekeeper is to ensure the evidence is "relevant and reliable." *United States v. Sanchez,* 65 M.J. 145, 149 (C.A.A.F. 2007). The basis for [redacted] testimony, therefore, is her vast experience in the subject matter and the studies upon which her testimony relies.

4. The Defense Has Established the Relevance of [redacted] Testimony

The fourth *Houser* factor requires the defense to demonstrate the relevance of the expert's testimony. It will be established through testimony in this case that the accused was evaluated by medical professionals and diagnosed with [redacted] In this case, the government has charged CSSSN Brown with attempted premeditated murder and assault with the intent to inflict grievous bodily harm, and the defense has provided notice that it intends to raise the defense of partial mental responsibility. According to the Military Judge's Benchbook, premeditation requires a premeditated "design to kill," which means the formation of a specific intent to kill, and consideration of the act intended to bring about the death. The members are further instructed, that, with respect to partial mental responsibility, that they should "consider . . . evidence tending to show that the accused may have been suffering from an (impairment) (condition) (deficiency) of such consequence and degree as to deprive him of the ability to entertain (the specific design to kill) (specific intent)," required for the charged offenses.

The question for the members, therefore, is whether CSSSN Brown considered the act and formed a specific design to kill or whether he simply, in a fit of impulsivity and emotional vulnerability, lashed out at LSS2 [redacted]. [redacted] testimony will establish that individuals

with [redacted] often have impaired cognitive functioning which then interferes with their ability to consider their actions, to control impulsivity, and to plan. As there is significant evidence that CSSSN Brown was [redacted], the likelihood that his actions were planned, considered, and pre-meditated are, therefore, far less than if he did not suffer from those conditions. Relevance simply requires that that the evidence has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or probable or less probable than it would be without the evidence." M.R.E. 401. This information establishes that it is less likely that CSSSN Brown planned, considered, and pre-meditated the assault of LSS2 [redacted], which is the central issue to the determination of this action. The same theory of relevance, of course, applies equally to whether CSSSN Brown could form the specific intent to inflict grievous bodily harm.

5. The Defense Has Established the Reliability of [redacted] Testimony

The fifth *Houser* factor requires the defense to establish the reliability of the expert's testimony. As the numerous studies provided by the defense demonstrate, the information [redacted] will present has been studied at length, resulting in consistent findings that individuals with [redacted] have higher rates of cognitive or executive function impairment. The research also establishes that executive function impairment results in reduced inhibition, and compromised abilities to plan and make decisions.[2] This is not a new technique or theory.

[2] The government's motion asserts that [redacted] testimony "presents no studies to support her proposition." In addition to being inaccurate, this assertion is a massive mischaracterization of [redacted] comments during her interview with trial counsel. [redacted] never indicated that her testimony was unsupported by research. Instead, she indicated that members do not typically find citations to studies helpful to their understanding of the subject matter. [redacted] further indicated that she could provide both trial counsel and the members (if requested) with citations to research, and trial counsel declined that invitation.

Disagreements between experts are to be expected. Experts engage in the proverbial "battle of the experts" in trials throughout our system. This disagreement, however, is not fatal to the defense's presentation of this evidence. "When attempting to determine if there is 'too great an analytical gap between the data and the opinion proffered,' or whether the proffered testimony falls 'outside the range where experts might reasonably differ,' the goal is to ensure that the expert testimony or evidence admitted is relevant and reliable, as well as to shield the panel from junk science." *United States v. Sanchez*, 65 M.J. 145, 150 (C.A.A.F 2007) (quoting *U.S. v. Joiner,* 522 U.S. at 146 and *Kumho Tire Co.,* 526 U.S. at 153).

The government seems to be arguing that [redacted] must produce a study or research that specifically states that mental health diagnoses of the type noted here prohibit an individual from premeditating murder or forming the specific intent required for the charged offenses. That, however, is not the standard. First of all, such research does not lend itself to a laboratory setting. But, more importantly, "Trained experts commonly extrapolate from existing data." *Sanchez, 65 M.J. at 150 (quoting GE v. Joiner*, 522 U.S. 136, 146 (2007)). [redacted] testimony will simply apply general concepts of executive functioning impairment to the forensic environment.

6. The Defense Has Demonstrated that [redacted] Testimony is Probative

In short, the touchstone question is, as stated above, whether members can, without the assistance of the expert, intelligently analyze the impact of certain mental conditions on the executive functioning of the brain and one's ability to plan and consider violent acts. *Houser,* 36 M.J. at 399. From the studies provided, it is clear that it took experts in the field years of experiments to gain an understanding of this complex intersection of human behavior. As such,

it is apparent that even highly-educated military members would not have the knowledge and understanding to correctly apply these scientific principles in the absence of expert testimony. This evidence is eminently probative because it goes directly towards the defense's ability to raise a partial mental responsibility defense, and to demonstrate whether CSSSN Brown had an "impairment" or "condition" that made him "incapable of entertaining the premeditated design to kill" or the "specific intent to kill or inflict grievous bodily harm." Military Judges Benchbook, Evidence Negating Mens Rea 5-17.

The defense has demonstrated the reliability of this evidence, negating any danger of unfair prejudice. Further, the government will have the ability to cross-examine the defense expert, and to present evidence in rebuttal. And, finally, the military judge will instruct the members regarding how they are to consider expert testimony. All of these measures will ensure members are not confused or misled.

C. The Proffered Testimony of [redacted] in no way Opens the Door to the Propensity Evidence the Government Seeks to Offer

The defense has intentionally limited the scope of [redacted] testimony to eliminate opinions that specifically refer to CSSSN Brown. As such, any cross-examination of [redacted] on specific acts of the accused would not test the basis of her opinion or testimony. Rather, such cross-examination would only serve to impermissibly place before the members evidence of bad acts of the accused.

Further, introduction of evidence related to: 1) slamming another sailor's arm in a door; 2) [redacted]; and 3) the altercation with another inmate at Wyatt Detention Facility would be misleading, distracting, and would require the adjudication of several mini-trials within this trial with several additional witnesses. M.R.E. 403. The defense has already addressed the door slamming allegation in a motion *in limine* in which the defense

presented evidence that this incident was, in all likelihood, an accident or a misunderstanding. As such, there is no probative value of this evidence.

[redacted] Finally, introduction of the evidence related to the altercation at the detention facility relates to a matter which is the subject of separate court-martial proceedings. The government elected to try those charges in separate proceedings, and should not be afforded the opportunity to punish CSSSN Brown twice for the same incident.

5. Relief Requested

The defense respectfully requests that this court deny the government motion to preclude [redacted] testimony. The government has raised questions about the reliability of [redacted] testimony, and the defense has provided the court with ample evidence of reliability. This is relevant information that goes directly to elements of pre-meditation and specific intent. To deny the defense the ability to present this information to the members would deny CSSSN Brown of his constitutional rights to due process and to present a complete defense.

6. Witnesses

A. Should the court find that the government has sufficiently called into question the relevance and reliability of [redacted] proposed testimony, the defense intends to call [redacted] as a witness

7. Enclosures

A. Photograph of CSSSN Brown's [redacted]
B. Excerpt from CSSSN Brown's Medical Record
C. Summary of Interview of Master Chief [redacted]
D. CV of [redacted]

E. Scholarly Articles Related to Impaired Executive Functioning
F. Discovery Related to Alleged Criminal Involvement

8. Oral Argument

The accused desires to make oral argument on this motion.

[redacted]
LCDR, JAGC, USN
Defense Counsel

CERTIFICATION OF SERVICE

A true copy of this motion was served on the opposing party and the court on 27 November 2019.

[redacted]
LCDR, JAGC, USN
Defense Counsel

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

The United States of America **v.** **Micah J. Brown** **CSSSN/E-3 USN**	**DEFENSE SECOND MOTION FOR RELEASE FROM PRETRIAL CONFINEMENT AND FOR ADDITIONAL CREDIT** **25 NOV 19**

1. Nature of Motion

Pursuant to Rule for Courts-Martial (R.C.M.) 305(j) and R.C.M. 906(b)(8) the defense moves the court to release CSSSN Micah Brown, the accused, from pretrial confinement. In addition, the defense moves for the court to issue credit of two days for every one day of pretrial confinement served due the unusually harsh circumstances endured by CSSSN Brown.

2. Burden of Proof

Although the defense is the moving party, this motion concerns the basis for continued pretrial confinement and so the burden rests on the government by a preponderance of the evidence to demonstrate why continued confinement is necessary. *See United States v. Heard*, 3 M.J. 14 (C.M.A. 1977).

3. Summary of Facts

a. CSSSN Brown is accused of two specifications of violation of Article 80, UCMJ, attempted premeditated murder and attempted unpremeditated murder, and one specification of a violation of Article 128, UCMJ, aggravated assault with the intent to commit grievous bodily harm.[1]

b. On 31 July 2018, CSSSN Brown was ordered into pretrial confinement

c. On 1 August 2018, the Commanding Officer submitted the 48/72 hour as required by R.C.M. 305.

d. On 3 August 2018, the IRO determined that continued pretrial confinement was necessary in this case.

e. CSSSN Brown has been in pretrial confinement since 31 July 2018.

f. Trial is currently scheduled for 6-10 January 2020.

g. The government filed a continuance request on 20 November 2019.

[1] Charge Sheet

4. Discussion

a. Statement of the Law

It is long established in American law than an individual accused of a crime is cloaked in a presumption of innocence. Related to this presumption is the principle that punishment without the benefit of trial violates the constitutional right to due process of law. *Courtney v. Williams*, 1 M.J. 267 (C.M.A. 1976), *citing In Re Winship*, 397 U.S. 358 (1970). These principles apply in the military as well. *See* Article 10, U.C.M.J. According to *United States v. Heard*, 3 M.J. 14, 16-17 (C.M.A. 1977), "unless confinement prior to trial is compelled by a legitimate and pressing social need sufficient to overwhelm the individual's right to freedom... restrictions unnecessary to meet that need are in the nature of intolerable, unlawful punishment. Thus, the Government must make a strong showing that its reason for incarcerating an accused prior to his trial on the charged offense reaches such a level, for otherwise the right to be free must be paramount." R.C.M. 305(h)(2)(B) synthesizes these principles into a detailed test balancing the right to be free with the importance of securing presence at trial and the prevention of further serious misconduct. The commander placing a service member into pretrial confinement and an IRO must consider the prongs of this test in making the determination to confine a service member without the benefit of trial. *See* R.C.M. 305(h)(2)(A) and R.C.M. 305(i)(2). After an initial determination is made that an offense triable by court-martial has been committed and that the service member in question committed it, the next consideration is whether confinement is necessary. The two factors for consideration in making this determination are (a) whether it is foreseeable that the prisoner will not appear in court or (b) whether the prisoner will engage in serious criminal misconduct. R.C.M. 305(h)(2)(B)(iii)(a) and (b).

Once charges are referred to trial, the military judge can authorized release of an accused from pretrial confinement. The military judge shall release the accused from pretrial confinement if additional information not presented to the IRO establishes that the accused should not be held under the standards of R.C.M. 305(h)(2)(B). R.C.M. 305(j)(B).

THE COURT SHOULD ORDER THAT CSSSN BROWN BE RELEASED FROM PRETRIAL CONFINEMENT BASED ON INFORMATION NOT PRESENTED TO THE 7-DAY HEARING OFFICER

At the time that the IRO made the decision to continue confinement for CSSSN Brown, there were many facets to continued pretrial confinement that she was not and could not become aware. CSSSN Brown has been subjected to pretrial confinement at Wyatt Detention Facility (Wyatt) since 6 September 2018. Wyatt is not a Naval Consolidated Brig. Wyatt houses violent felons and do not operate like military brigs. CSSSN Brown has been subjected to threats, acts of intimidation and [redacted] while being housed at Wyatt. Despite being diagnosed with [redacted] Wyatt has not provided any treatment for CSSSN Brown.

In the court's previously ruling on CSSSN Brown's release from pretrial confinement motion, the court presented concerns regarding the assault allegation that took place at Wyatt. As detailed in the letter from [redacted] and CSSSN Brown, you can see the situation CSSSN Brown was put in. From being constantly bullied, threatened, assaulted, and intimidated for weeks by [redacted] and other inmates, CSSSN Brown was put in an impossible position where he was forced to defend himself. [redacted] is a violent offender and made it a habit of intimidating CSSSN Brown. The letters provided from the other inmates show that CSSSN Brown was not a trouble maker, he was not an instigator. Quite the opposite, CSSSN Brown was a quiet guy, kept to himself, and liked to read books. He would not have been put into this position if he was not in pretrial confinement. He would not have been put into this position if he was in a military facility.

In July 2019, CSSSN Brown reported that he had been [redacted] while at Wyatt yet, the command took no action to remove him from the facility. The command took no action to ensure CSSSN Brown was safe and free from harm. CSSSN Brown was diagnosed with [redacted] yet the command took no action to ensure he was receiving treatment or medication. If he was released from pretrial confinement he could seek treatment on his own.

Furthermore, CSSSN Brown's continued confinement at Wyatt violates his 6th Amendment right to counsel. CSSSN Brown's counsel are located in San Diego, California and Naples, Italy therefore they do not have the ability to just drive over to Wyatt for a client meeting. Defense counsel are required to call or email Wyatt to schedule an appointment time

but Wyatt is not always responsive. Even when Wyatt is responsive, it takes days for the scheduled call to occur and greatly decreases the level of productivity and efficiency on CSSSN Brown's case. Although the command has been generally good about showing up for weekly wellness visits, CSSSN Brown has expressed to them on more than one occasion that he wants to speak with his defense counsel yet, no one from the command reached out to the defense counsel to inform them of CSSSN Brown's request. There have been times, as the court is aware, where the defense needed documents signed by CSSSN Brown but it took over a week to coordinate with Wyatt. Although there is a defense office located 1 hour from Wyatt, those counsel are all conflicted from the case therefore the next nearest defense counsel that could possibly assist with certain tasks are located in Washington, DC. It is unreasonable to think that the convening authority is going to pay for counsel not assigned to the case to fly to Providence, Rhode Island to execute a task.

These are not circumstances that would occur if CSSSN Brown was in a military facility or out of pretrial confinement. CSSSN Brown is facing potential life in confinement. It is imperative for him to have access to his counsel and vice versa. It is imperative that CSSSN Brown be free from intimidation, threats, [redacted] as he tries to help his counsel with his defense. At the time of the IRO CSSSN Brown was being housed at Navy Consolidated Brig, Jacksonville. The IRO could not have known these are some of the issues CSSSN Brown would encounter when making the decision for continued confinement. These conditions amount to unusually harsh circumstances. There are many lesser forms of restraint that can be put into place such as restriction to the base. Based on the aforementioned circumstances, CSSSN Brown should be released from pretrial confinement.

Due to the unusually harsh circumstances CSSSN Brown has encountered, the defense requests the court order additional credit pursuant to RCM 305(k).

5. Evidence

a. Letter from CSSSN Micah Brown

b. Letter from [redacted]

c. Comprehensive Report ICO [redacted]

d. Confinement Questionnaires

e. Wyatt Grievances ICO Micah Brown

f. [redacted] ICO Micah Brown

g. Email dtd 16 Jul 19

h. Witness Statements ICO Micah Brown

6. Oral Argument

The defense does request oral argument.

7. Relief Requested

The defense respectfully request the court issue an order releasing CSSSN Brown from pretrial confinement. The defense further requests the court award CSSSN Brown additional credit for the unusually harsh circumstances while in pretrial confinement at Wyatt at a rate of two days for every one day.

[redacted]

S. Y. WILLIAMS
LCDR, JAGC, USN
Detailed Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion was served on the Government trial counsel in the above captioned case on 25 Nov 2019.

[redacted]
S. Y. WILLIAMS
LCDR, JAGC, USN
Detailed Defense Counsel

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

UNITED STATES v. MICAH J. BROWN CSSSN/E-3 USN	GOVERNMENT RESPONSE TO SECOND DEFENSE MOTION FOR RELEASE FROM PRETRIAL CONFINEMENT AND FOR ADDITIONAL SENTENCING CREDIT 02 December 2019

1. **Nature of Motion.**

Pursuant to Rules for Court-Martial (R.C.M.) 305(j), 305(k), 905(c)(1), and 905(c)(2), the Government objects to the Defense's Second Motion for Release from Pretrial Confinement and for Additional Sentencing Credit because the Defense does not and cannot demonstrate the existence of any of the conditions articulated in R.C.M. 305(j)(1).

2. **Statement of Facts.**

In addition to the facts listed in the Government's response to the first Defense motion dated 27 September 2019, the Government provides the following:

a. On 20 September 2019, the Defense filed a Motion for Release from Pretrial Confinement and for Additional Sentencing Credit wherein they alleged the IRO abused her discretion in approving continued pretrial confinement and that the information before the Court was not sufficient to justify continued confinement.

b. On 27 September 2019, the Government responded to the Defense's motion arguing that a military judge can *only* release an accused from pretrial confinement if the IRO abused their discretion *and* there is insufficient evidence presented to justify confinement.

c. On 23 October 2019, the parties argued their motions before the Court at an Article 39(a) session and this Court orally denied the Defense's motion.

d. The Court reconsidered its oral ruling at the request of the Defense, but the Defense presented no new evidence for the Court to consider.

e. On 31 October 2019, this Court provided a written ruling denying the Defense's motion stating that the IRO did not abuse her discretion and that there is sufficient evidence before the Court to justify continued confinement.

f. The defense has presented no new evidence under R.C.M. 305(j) or R.C.M. 305(h)(2)(B) that justify the accused's release from pretrial confinement.

3. **Burden**.

The Defense has the burden of proof by a preponderance of the evidence with respect to the preliminary showing of whether information not presented to the IRO establishes that the accused should be released from pretrial confinement under R.C.M. 305(j). R.C.M. 905(c)(1).

4. **Discussion**.

R.C.M. 305(j) requires the military judge to release from pretrial confinement *only* if: (A) The The 7-day reviewing officer's decision was an abuse of discretion, and there is not sufficient information presented to the military judge justifying continuation of pretrial confinement under subparagraph (h)(2)(B) of this rule; (B) Information not presented to the 7-day reviewing officer establishes that the confinec should be released under subparagraph (h)(2)(B) of this rule; or (C) The provisions of paragraph (i)(1) or (2) of this rule have not been

complied with and information presented to the military judge does not establish sufficient grounds for continued confinement.

Regarding the first condition, this Court has previously ruled that the IRO's decision was not an abuse of discretion and that there is sufficient information presented to the military judge justifying continuation of pretrial confinement under R.C.M. 305(h)(2)(B). The Defense has not raised any argument under the third condition as R.C.M. 305(i)(1) and (2) have been complied with. The Defense's argument now lies in the second condition as they are asserting that at the time of the IRO's decision "...there were many facets to continued pretrial confinement that she was not and could not be aware." (Def. Mot. at 3.)

A. The Defense has not shown that information not presented to the IRO establishes CSSSN Brown should be released under R.C.M. 305(h)(2)(B).

An accused should be released from pretrial confinement unless there is probable cause to believe, upon reasonable grounds, that " (i) An offense triable by a court-martial has been committed; (ii) The prisoner committed it; and (iii) Confinement is necessary because it is foreseeable that: (a) The prisoner will not appear at trial, pretrial hearing, or investigation, or (b) The prisoner will engage in serious criminal misconduct; and (iv) Less severe forms of restraint are inadequate." *United States v. Edginton*, No. NMCCA 201300328, 2014 CCA LEXIS 274, at *5 (N-M Ct. Crim. App. Apr. 30, 2014) (quoting R.C.M. 305(h)(2)(B)). Serious criminal misconduct includes "...serious injury of others, or other offenses which pose a serious threat to the safety of the community or to the effectiveness, morale, discipline, readiness, or safety of the command..." R.C.M. 305(h)(2)B).

After considering all the information before the Court on 31 October 2019, this Court found that the accused's "...likely infliction of serious injury on other poses a serious threat to

the safety of the community or serious threat to effectiveness, morale, discipline, readiness, or safety of his command or U.S. national security" and therefore, continued pretrial confinement is justified. This Court went on to conclude that lesser forms of restraint are inadequate based on the charged misconduct and the continued violent misconduct the accused has engaged in while in pretrial confinement.

The Defense now argues that because the IRO was not aware of the possibility that CSSSN Brown could (and subsequently was) moved to a civilian pre-trial confinement facility should now result in his release from pretrial confinement altogether. The Defense lists potentially mitigating reasons for the accused's continued misconduct while in pretrial confinement and argues the accused's right to counsel has been violated due to such, but fails to articulate how any of this information directs the accused's release under R.C.M. 305(h)(2)(b). However, the evidence before this Court has not changed and the accused should remain in pretrial confinement pursuant to R.C.M. 305.

The Defense argues that the accused's location violates his 6th amendment right to counsel. Although this concern is not a consideration under R.C.M. 305, the Defense would likely have a similar claim regardless of where the accused is physically housed due to the location of the Defense counsels in San Diego, California and Naples, Italy. Given the physical separation of counsel and client, and taking Defense's assertion as accurate, the logistics of setting up meeting times are not unreasonable. There is no evidence in the record that Defense has had unreasonable lags in contacting the accused or vice versa. Even if there were defense counsels closer to the accused, it is not likely they would form an attorney-client relationship for the reasons asserted by the Defense that would make a military facility more conducive to client

meetings.[1] The Defense is free to utilize the command members who make weekly wellness visits in the event they need a simple signature on a form. Regardless, continued pretrial confinement is clearly warranted under R.C.M. 305.

The accused claims that he has not had a physical or verbal altercation with anyone for the previous three years while living in Groton, CT and that his attack on a fellow detainee was the inevitable result of intimidation and provocation by the victim. (Def. Mot. at 3).[2] There were available and non-violent ways of dealing with any alleged intimidation the accused was suffering including filing a grievance with the facility.[3] However, there is no evidence before this Court to show the accused tried to handle that situation with anything less than a planned and violent attack against the victim. There is also no evidence before this Court to justify the accused intentionally stabbing LSS2 [redacted] multiple times while underway on a submarine. This demonstrated track record of violent criminal misconduct clearly justifies the continued confinement of the accused and to release him back to the command would be putting all those around him in harm's way should the accused feel threatened or intimidated in any way.

B. Sentencing credit under R.C.M. 305(k) or Article 13 is not warranted.

R.C.M. 305(f) and Article 13, UCMJ, makes it clear that pretrial confinement shall not be

---

[1] As noted in this Courts Ruling on Defense Motion for Credit Under Article 13, UCMJ, RCM 305, and RCM 304 dated 01 November 2019, neither the Convening Authority, nor the government, is obligated to transfer the accused to a different location and there are legitimate government interests in housing the accused in Rhode Island which is the closest location to the trial location.

[2] The Government invites the Court to reexamine Appellate Exhibit XXI Enclosure 21 which is an arrest history of the accused showing [redacted]

[3] The Defense's motion contains multiple grievance forms and [redacted] requests submitted by the accused for things such as commissary reimbursement and requests to move pods, but the Court should note none of these grievances include any complaints about being bullied or intimidated as the accused now claims.

used as punishment.[4] Article 13, UCMJ, prohibits two types of activities involving the treatment of an accused prior to trial: (1) the intentional imposition of punishment on an accused before his or her guilt is established at trial (illegal pretrial punishment), and (2) arrest or pretrial confinement conditions that are more rigorous than necessary to ensure the accused's presence at trial (illegal pretrial confinement). [5] The Defense seems to argue that the conditions at the civilian detention facility are so unusually harsh and more rigorous than necessary as to warrant sentencing credit under R.C.M. 305(k) which implicates Article 13, UCMJ, although no such argument is explicitly made by the Defense in its motion.[6]

The Defense presents no new evidence for the Courts review to show there has been a change in the conditions of the accused's pretrial confinement from their previous motion which was denied by this Court. The accused claims that his placement in pretrial confinement, particularly in a civilian facility, has forced him to commit further misconduct to protect himself. As noted above, the accused has exercised none of the options available to him such as [redacted] complaints or formal grievances to remedy these complaints. (Def. Mot. at 40-48). The assertion that the accused would not have committed further misconduct if placed in a military facility is without merit as there is no guarantee that the accused would not have felt threatened, bullied, or intimidated by others at a Navy brig which may have caused him to react in the same way he has while at a civilian facility. The Defense's assertion that the accused should be released from pre-trial confinement so that he can seek mental health treatment on his own is also not a

---

[4] "No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances required to insure his presence, but he may be subjected to minor punishment during that period for infractions of discipline."

[5] *United States v. Zarbatany*, 70 M.J. 169, 169 (C.A.A.F. 2010).

[6] This Court previously ruled that the IRO did not abuse her discretion and that there is sufficient evidence before the Court to justify a continuation of confinement. This Court also denied the defense's first request for administrative credit under RCM 305(k) and Article 13 as there was no evidence that the government placed the accused in pretrial confinement to punish him and such confinement is not more rigorous than necessary.

consideration under R.C.M. 305 that would warrant release. The 47 pages of [redacted] released by this Court after an in camera review clearly show the accused is being continuously cared for while at Wyatt which is in direct conflict with the Defense's assertion that Wyatt has provided no treatment for the accused .[7] [Encl. 1]

On 13 July 2019, the accused made a complaint to Wyatt Detention Facility that his cellmate [redacted] over the clothing, multiple times in September 2018. The accused only had one roommate from 7 September 2018 – 13 September 2018, a civilian detainee. The accused made no reports and did not tell anyone of the alleged [redacted] at the time they were occurring. When the Rhode Island State Police interviewed the accused regarding the allegations, he stated he did not trust the facility and did not want to deal with the state police. The command did reach out to Defense Counsel to inquire as to how they wanted the Victim Witness Assistance Program notification handled. (Def. Mot. at 49) The 10 month delay in reporting and the accused's unwillingness to participate in an investigation has left these claims unsubstantiated. There is no allegation or evidence that the accused has been subjected to any other physical or [redacted] while at Wyatt. As noted in this Court's Ruling on Defense Motion for Credit Under Article 13, UCMJ, RCM 305, and RCM 304 dated 01 November 2019, the Convening Authority is not obligated to transport an accused to a different military facility regardless of whether or not the CA is aware of the accused's mental, physical, and psychological condition.

The Defense has made no showing that the conditions of the accused's pretrial confinement conditions are so unusually harsh and more rigorous than necessary as to warrant sentencing credit under R.C.M. 305(k) or Article 13, UCMJ.

[7] Also see Def. Mot. at 39, 48.

5. **Relief Requested**.

The Government respectfully requests this Court deny the Defense's Motion.

6. **Evidence**.

In addition to relying on the Defense's enclosures, the Government now provides the following:

- Enclosure A: [redacted] of CSSSN Brown while at Wyatt Detention Facility
- Enclosure B: Emails regarding CSSSN Brown's [redacted] allegation dated 30 July 2019.

7. **Oral Argument**.

The Government does not request oral argument.

[redacted]

S. E. CUMMINGS
LCDR, JAGC, USN
Trial Counsel

CERTIFICATE OF SERVICE

A copy of this document was electronically served on the Court and Defense Counsel on 2 December 2019.

[redacted]

S. E. CUMMINGS
LCDR, JAGC, USN
Trial Counsel

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

UNITED STATES **v.** **MICAH J. BROWN** **CSSSN/E-3** **USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO DISMISS: UNLAWFUL COMMAND INFLUENCE** **10 January 2020**

1. **Nature of Motion**.

The Government opposes the accused's motion to dismiss all charges based on actual and/or apparent unlawful command influence (UCI). The accused has not and will not be able to establish a prima facie case that any actual or apparent UCI exists in this case and therefore, the burden should not shift to the Government.

2. **Statement of Facts.**

a. On 25 September 2018, [redacted], made a statement to NCIS regarding her interactions with the accused at her place of work. (Encl. 1)

b. On 13 September 2018, HM1 [redacted], made a statement to NCIS during the investigation into the attempted murder of LSS2 [redacted]. (Encl. 2)

c. On 03 January 2020, the Court received a hand-written motion from the accused, who is proceeding pro se, alleging UCI and requesting dismissal of all charges due to the statements referenced above and due to the lack of charges pending against CSS3 [redacted].

APPELLATE EXHIBIT LXXXII
PAGE 1 OF 12
APPENDED PAGE

3. **Burden**.

The accused has the burden to present sufficient facts, which if true, would constitute actual UCI and to show that the UCI has a logical connection to the case at hand and would cause unfairness in the proceedings. *United States v. Biagase*, 50 M.J. 143, 150-151 (C.A.A.F. 1999). If that requisite showing is met, the burden shifts to the Government to prove, beyond a reasonable doubt: 1) that the facts as alleged do not exist, 2) persuade the military judge that the facts alleged do not constitute UCI, or 3) that if the facts are true and do rise to the level of UCI, that they will not prejudice the trial.

4. **Discussion**.

UCMJ Article 37(a) provides that, "No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence…the action of any convening, approving, or reviewing authority with respect to his judicial acts."[1] In his motion, the accused does not specify whether he is arguing that actual or apparent UCI exists in this case. Even so, the Court should consider both actual and apparent UCI. Actual UCI has been commonly 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.[2] Apparent UCI exists when "an objective, disinterested observer fully informed of the facts would entertain a significant doubt that justice was being done and would perceive an appearance of command influence." [3]

While the threshold is low to shift the burden to the Government, the accused must first show some facts which if true, constitute UCI.[4] After production of sufficient evidence of UCI,

[1] 10 USC §837. *See also* Rule for Court-Martial (R.C.M.) 104.
[2] *United States v. Boyce*, 76 M.J. 242, 247 (C.A.A.F. 2016).
[3] *Id.* (quoting *United States v. Mitchell*, 39 M.J. 131 (C.M.A. 1994)).
[4] *United States v. Bigase*, 50 M.J. 143, 150 (C.A.A.F. 1999).

the accused must then show that the alleged UCI has a logical connection to the case at hand in terms of its potential to cause unfairness in the proceedings.[5] The accused is required to present "some evidence" of UCI that is more than mere allegation or speculation.[6] Only once the accused has made this requisite showing does the burden shift to the Government to: 1) disprove the facts on which the allegation of UCI is based; 2) persuade the military judge that the facts do not constitute UCI; or 3) prove at trial that the UCI will not affect the proceedings.[7] The Government is free to choose one of the three, but the quantum of proof is beyond a reasonable doubt.[8]

a. The accused has not made a prima facie showing that facts exist, which if true, would constitute UCI.

In his motion, the accused argues UCI exists for three reasons: 1) A witness, [redacted] allegedly fabricated a story in order to slander and defame the accused's character and came forward upon request of the Chief of the Boat (COB) on [redacted] 2) HM1 [redacted] who treated the stab wounds on LSS2 [redacted] allegedly fabricated the severity of his injuries; and 3) another Sailor, CSS3 [redacted], has not been charged with any crimes related to his alleged misconduct that occurred after the accused stabbed LSS2 [redacted] multiple times with a knife.

Put simply, none of these three allegations concern any person subject to the UCMJ attempting to coerce or influence any action of a witness or convening, approving or reviewing authority with respect to any judicial act and therefore do not constitute "some evidence" of either actual or apparent UCI. With respect to [redacted] her statement was made to NCIS

[5] *Id.* at 150.
[6] *Id.* (quoting *United States v. Ayala*, 43 M.J. 296, 300 (C.A.A.F. 1995)).
[7] *Id.* at 151.
[8] *Id.*

during the course of the investigation. (Encl. 1) [redacted] did mention her interactions with the accused to the COB after learning that the accused stabbed a shipmate onboard the [redacted] but at no time did [redacted] attempt to influence anyone with authority over this case. Even if she had attempted to influence this case, [redacted], is not subject to the UCMJ and therefore, no UCI can exist pertaining to her statements. With respect to the second allegation of UCI, there is no evidence to suggest HM1 [redacted] attempted to influence any convening, approving, or reviewing authority with respect to any judicial act. HM1 [redacted] simply made a statement when questioned by NCIS regarding his role in treating both the accused and the victim. (Encl. 2) The accused is free to challenge the accuracy of this statement at trial, but this statement alone does not meet the showing of "some evidence" of UCI. With respect to the third allegation of UCI, whether or not another Sailor has been charged with any crime has no bearing on this case and is not "some evidence" of UCI.

None of these three allegations constitute actual UCI as there is no evidence of an improper manipulation of the criminal justice process which will negatively affect the fair handling and/or disposition of this case. Additionally, there is no evidence of apparent UCI because there has been no showing that "an objective, disinterested observer fully informed of the facts would entertain a significant doubt that justice was being done and would perceive an appearance of command influence," nor would an intolerable strain be placed on the public's perception of the military justice system.[9] A disinterested observer would have no doubt about the fairness of the proceedings. There is no evidence that any witness or member of the chain of command or convening authority has been influenced in any way by the facts alleged by the

[9] *Boyce*, 76 M.J. at 247 (C.A.A.F. 2016).

accused. These facts, if true, do not amount to UCI, actual or apparent, and the Court should find no prejudice.

b. Even if there was "some evidence" of UCI, there is no logical connection between those facts and the case at hand in terms of potential unfairness.

"Prejudice is not presumed. The issue of unlawful command influence must be alleged with particularity and substantiation."[10] Although the accused seemingly raises three allegations of UCI, there is no particularity or substantiation to show that any type of UCI exists in this case. If any one of the three allegations of UCI raised by the accused amounted to more than mere speculation and rose to the level of "some evidence" of UCI, there is no logical connection between those facts and the case at hand in terms of any potential to cause unfairness in the proceedings. The accused has not been charged with any interactions he may have had with [redacted] nor does the Government intend to use those interactions in any way at trial. Therefore, there is no potential for [redacted] statement to cause unfairness in the proceedings. The accused will have a chance to question HM1 [redacted] at trial, so any statement made by HM1 [redacted] to NCIS will not affect the accused's ability to receive a fair trial. The charges, or lack thereof, of CSS3 [redacted] for alleged misconduct occurring after the accused stabbed LSS2 [redacted], also has no bearing on the fairness of these proceedings. If he wishes to do so, the accused may question this witness on his actions at trial, thereby negating any potential for unfairness on these proceedings. Because there is no logical connection between any alleged UCI and the potential for those facts to cause unfairness in these proceedings, no UCI exists and the burden should not shift to the Government.

[10] *United States v. Reynolds*, 40 M.J. 198, 202 (C.A.A.F. 1994).

c. If prejudice is found, dismissal of charges is not the appropriate remedy.

Dismissal of charges, as the accused requests, is a drastic remedy if the Court finds UCI does exist and is prejudicial to the fairness of this case. Charges should be dismissed *only* if "there is no way to prevent it [UCI] from adversely affecting the finding or sentence beyond a reasonable doubt..."[11] If this Court finds UCI and prejudice, then another appropriate remedy outside dismissal should be awarded to cure any minor prejudice.[12]

5. **Relief Requested**.

The Government respectfully requests the Court deny the accused's motion to dismiss charges as the Government has proven beyond a reasonable doubt that no UCI exists in this case.

6. **Evidence**.

Enclosure 1: Statement of [redacted] to NCIS
Enclosure 2: Statement of HM1 [redacted] to NCIS

7. **Oral Argument**. The Government requests oral argument.

[redacted]

S. E. CUMMINGS
LCDR, JAGC, USN
Trial Counsel

[11] *United States v. Jones*, 30 M.J. 849, 854 (N.M.C.M.R. 1990)
[12] Other Courts have fashioned remedies for UCI that include expanded voir dire, extra preemptory challenges, issuing curative instructions, limiting Government's evidence on merits and in sentencing, etc.

CERTIFICATE OF SERVICE

A copy of this document was electronically served on the Court and physically given to Wyatt Detention Facility for service on the accused on 10 January 2020.

[redacted]
S. E. CUMMINGS
LCDR, JAGC, USN
Trial Counsel

APPELLATE EXHIBIT LXXXI
PAGE 7 OF 12
APPENDED PAGE

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

UNITED STATES **v.** **MICAH J. BROWN** **CSSSN/E-3** **USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO DISMISS: UNLAWFUL COMMAND INFLUENCE** **10 January 2020**

1. **Nature of Motion**.

The Government responds to the accused's Motion to Compel Witnesses and moves this Court to deny the motion as the production of witnesses President Donald Trump and Senator Bernie Sanders is neither relevant or necessary under Rule for Courts-Martial ("R.C.M.") 703(b) or R.C.M. 1001(e).

2. **Statement of Facts.**

a. On 30 August 2018, the accused was charged with attempted murder of LSS2 [redacted] after he allegedly stabbed LSS2 [redacted] multiple times with a knife.

b. The accused has not requested production of President Trump or Senator Sanders outside of the motion filed with the Court on 03 January 2020.

3. **Burden**.

The burden of proof is on the defense as mover by a preponderance of evidence. R.C.M. 905(c).

APPELLATE EXHIBIT LXXXIII
PAGE 1 OF 4
APPENDED PAGE 83

4. **Discussion**.

Both prosecution and defense are "entitled to the production of any witness whose testimony on a matter in issue on the merits or an interlocutory question would be relevant and necessary." R.C.M. 703(b)(1). Witness testimony is relevant when it has any tendency to make any fact that is "of consequence in determining the action" more or less probable than it would have been without the evidence. M.R.E. 401. Relevant testimony is only necessary "when it is not cumulative and when it would contribute to a party's presentation in some positive way on a matter in issue." Manual for Courts-Martial, Discussion to R.C.M. 703(b)(1). During presentencing proceedings, a witness may be produced to testify through a subpoena *only if* "the testimony expected to be offered by the witness is necessary for consideration of a matter of substantial significance to a determination of an appropriate sentence, including evidence necessary to resolve an alleged inaccuracy or dispute as to a material fact." R.C.M. 1001(e)(2)(A) Notably, it is the "testimony, not the actual presence of the witness, that is the key" to determining whether a witness should be produced. *United States v. Allen*, 31 M.J. 572, 612 (N.M.C.M.R. 1990) (emphasis added). Witness testimony is the "verbal evidence, subject to the criteria of credibility, and tested by the same rules and manner as any other evidence." *Id.* (quoting *United States v. Scott*, 5 M.J. 431, 432 (C.M.A. 1978). Therefore, the production of a witness should not be granted if the testimony would be inadmissible in court.

The accused's rationale for requesting the sitting President of the United States of America and a sitting Senator from Vermont is so that they can each discuss their opinion about the city of Baltimore, MD, assuming the quotes provided in the accused's motion are accurate. The accused argues because he is from Baltimore, the opinion these two witnesses have about the city are necessary for the accused to describe his upbringing.

The accused's hometown is not at issue on the merits, therefore any testimony from the requested witnesses is unnecessary and irrelevant under R.C.M. 703(b). Assuming this case moves into the presentencing phase, such testimony should not be admitted under R.C.M. 1001(e) as it is unnecessary to determine an appropriate sentence or to resolve an alleged inaccuracy or dispute of a material fact. Even if the accused's living conditions in Baltimore were to be at issue in presentencing, testimony of these witnesses who merely (presumably) have opinions of the city as a whole would not be relevant. It is unlikely, and there is no evidence of such, that either witness is familiar with the accused or his living conditions or upbringing within Baltimore. The accused would be able to call other witnesses who could speak to their personal knowledge of the accused's upbringing. Since neither requested witness has firsthand knowledge of the alleged misconduct of the accused or personal information of the accused's upbringing, the opinion testimony of lay witnesses about a city is not relevant and is inadmissible.

5. **Relief Requested**.

The Government respectfully requests the Court deny the accused's motion, finding that the accused has not met the burden of showing how the requested witnesses' testimony is relevant or necessary to either the merits or presentencing phases.

6. **Oral Argument**. The Government does not request oral argument.

[redacted]
S. E. CUMMINGS
LCDR, JAGC, USN
Trial Counsel

CERTIFICATE OF SERVICE

A copy of this document was electronically served on the Court and physically given to Wyatt Detention Facility for service on the accused on 10 January 2020.

[redacted]
S. E. CUMMINGS
LCDR, JAGC, USN
Trial Counsel

APPELLATE EXHIBIT LXXXIII
PAGE 4 OF 4
APPENDED PAGE

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

UNITED STATES **v.** **MICAH J. BROWN** **CSSSN/E-3** **USN**	**GOVERNMENT RESPONSE TO ACCUSED'S MOTION TO DISMISS DUE TO LACK OF JURISDICTION** **10 January 2020**

1. **Nature of Motion**.

Pursuant to Rule for Courts-Martial (R.C.M.) 907(b), the Government opposes the accused's motion, as the Government had jurisdiction over the accused at the time of the offense as he was on active duty and continues to have jurisdiction over the accused for trial purposes pursuant to Article 2 of the Uniform Code of Military Justice.

2. **Statement of Facts.**

There is no evidence that at the time if the Accused's enlistment in 2015, he did not have the mental capacity to enter into a contract.

The Accused has been evaluated by multiple psychologists in this case, all of whom have found him competent to stand trial.

On 3 December 2019, after a thorough examination and discussion with the Accused on the record, the Court found the Accused competent to represent himself at this court-martial.

APPELLATE EXHIBIT LXXXV
PAGE 1 OF 3
APPENDED PAGE

There is no evidence in the record, or proposed by the Accused, that having [redacted] in and of itself makes one unable to appreciate the nature of his or her actions or to comprehend enlisting in the Armed Forces.

3. **Burden**.

The Government has the burden to prove jurisdiction over the Accused.

4. **Discussion**.

The Accused's argument that the Government lacks jurisdiction over him because of his misdiagnosed [redacted] in 2015 is unsupported by any evidence or legal authority. The Government will produce CSSSN Brown's enlistment contract at the next session of Court, 13 January 2020, showing his current enlistment.

A fraudulent enlistment under the Military Personnel Manual is a basis for administratively separating a service member that deceives the Government in order to enlist. It is a civil cancelling of a contract. However, once that servicemember is on active duty and is getting paid by the federal Government, he or she is subject to the uniform code of military justice as they are on active duty under Article 2. The only basis to conclude that person would not be able to stand trial for offenses under the UCMJ based on a mental health diagnosis would be if there was a finding of lack of mental responsibility or a finding of lack of competence to stand trial – neither of which is present in this case.

5. **Relief Requested**. The Government respectfully requests the Court deny the motion.

6. **Evidence**.

1. CSSSN Brown's enlistment contract.

7. **Oral Argument**. The Government does not request oral argument.

[redacted]
C. E. LEWIS
CDR, JAGC, USN
Assistant Trial Counsel

CERTIFICATE OF SERVICE

A copy of this document was electronically served on the Court and was forwarded to the Wyatt detention facility for service on CSSSN Brown.

[redacted]
C. E. LEWIS
CDR, JAGC, USN
Assistant Trial Counsel

APPELLATE EXHIBIT LXXXIV
PAGE 3 OF 3
APPENDED PAGE

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

UNITED STATES **v.** **MICAH J. BROWN** **CSSSN/E-3** **USN**	**GOVERNMENT RESPONSE TO ACCUSED'S MOTION TO DISMISS ATTEMPTED PREMEDITATED MURDER AND ATTEMPTED MURDER CHARGES DUE TO LACK OF EVIDENCE** **10 January 2020**

1. **Nature of Motion**.

Pursuant to Rule for Courts-Martial (R.C.M.) 917, the Government opposes the accused's motion, as it is not ripe.

2. **Statement of Facts.**

As this is a matter of law and not fact, the Government does not submit any statement of facts.

3. **Burden**.

The Defense has the burden as the moving party to make an initial showing of why the charges should be dismissed.

4. **Discussion**.

The Accused's argument that the Government's evidence is insufficient to sustain the burden of proof on the element of intent for both murder charges would be more appropriately argued under R.C.M. 917 at the close of the Government's case or the close of the Accused's case, but prior to entry of judgement. At that time, if the Accused raises the motion again, the Court would then evaluate the evidence, looking at it in the light most favorable to the

APPELLATE EXHIBIT LXXXV
PAGE 1 OF 2 85
APPENDED PAGE

prosecution, without evaluating the credibility of witnesses, and determine if there is some evidence which could reasonably tend to establish the element of intent. If so, the charges should be given to the fact finder for a verdict. If not, then the Court would enter a verdict of not guilty.

5. **Relief Requested**. The Government respectfully requests the Court deny the motion.

6. **Evidence**. None.

7. **Oral Argument**. The Government does not request oral argument.

[redacted]
C. E. LEWIS
CDR, JAGC, USN
Assistant Trial Counsel

CERTIFICATE OF SERVICE

A copy of this document was electronically served on the Court and was forwarded to the Wyatt detention facility for service on CSSSN Brown.

[redacted]
C. E. LEWIS
CDR, JAGC, USN
Assistant Trial Counsel

APPELLATE EXHIBIT LXXXV
PAGE 2 OF 2
APPENDED PAGE

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

UNITED STATES **v.** **MICAH J. BROWN** **CSSSN/E-3** **USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION FOR TIME EXTENSION** **10 January 2020**

1. **Nature of Motion**.

The Government opposes the accused's motion seeking additional time to file a motion for a new Article 32 Preliminary Hearing.

2. **Statement of Facts.**

a. On 23 January 2019, an Article 32 preliminary hearing was held in this case and the accused was present with detailed defense counsel. (Encl. 1)

b. Detailed defense counsels for the accused did not call any witnesses at the preliminary hearing, nor were any witnesses requested beforehand. (Encl. 1)

c. At an Article 39(a) session on 3 December 2019, the Court accepted a request from the accused to proceed in this case pro se.

d. As of 9 December 2019, Government provided the accused the military judge's benchbook, 2016 and 2019 versions of the Manual for Courts-Martial, and all paper and disc discovery in this case with the exception of five minutes of audio from one session

APPELLATE EXHIBIT LXXXVI
PAGE 1 OF 34
APPENDED PAGE 86

as it was in a format CSSSN Brown did not have access to, however the court reporter's notes from that five minutes were provided to CSSSN Brown. (Encl. 2)

e. A supplemental trial management order (TMO) was issued on 27 December 2019 listing a motions due date of 6 January 2020 and trial dates of 23 March – 10 April 2020. (Encl. 3)

f. The accused was provided a copy of the supplemental TMO on 30 December 2019. (Encl. 4)

g. On 31 December 2019, the accused called trial counsel and confirmed that he is in possession of the supplemental TMO and all discovery with the exception of the audio of the Article 32 preliminary hearing. (Encl. 4)

3. **Burden**.

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

4. **Discussion**.

Pretrial motions, including inadequate Article 32 preliminary hearing, must be raised before a plea is entered. R.C.M. 905(b)(1). The scope and purpose of the preliminary hearing is limited to witnesses necessary to: 1) determine whether probable cause exists for the offenses and whether the accused committed them, 2) determine whether a court-marital would have jurisdiction of the accused and the offenses, 3) consider whether the form of the charges is proper, and 4) make recommendation as to the disposition of the charges. Prior to the preliminary hearing, defense counsel is required to provide to government counsel names of proposed military witnesses that the accused requests be produced at the hearing. R.C.M. 405(g)(1)(A). The preliminary hearing officer has the ability to determine whether a witness is

relevant, not cumulative, and necessary based on the limited scope and purpose of the hearing if the government objects to the proposed defense witnesses. R.C.M. 405(g)(1)(B)"A victim of an offense under consideration at the preliminary hearing is not required to testify at the preliminary hearing." R.C.M. 405(i)(2)(B). "Any objection alleging failure to comply with this rule shall be made to the convening authority via the preliminary hearing officer." R.C.M. 405(i)(7).

a. The accused has had ample time to file a motion alleging an inadequate preliminary hearing.

This preliminary hearing took place on 23 January 2019, almost one year prior to the date of this filing. (Encl. 1) The accused is now requesting more time to file a motion for a new preliminary hearing based on the fact that the victim and other witnesses did not testify. This is not new information. The accused claims he needs more time to file this motion because he has not received a copy of the audio from that hearing. The accused has been provided all documents relating to the preliminary hearing. The accused was also present at that hearing, was represented by counsel, and has known since January 2019 that no witnesses were called at that hearing. (Encl. 1) Although the government believes the accused has been provided a copy of the hearing audio, even without such the accused is in possession of all the information he needed to file a motion if desired. (Encl. 3) As no witnesses were called, the audio provides no amplifying information.

The accused chose to represent himself in this case on 3 December 2019 and was provided a copy of the supplement TMO on 30 December 2019 that required motions be filed with the Court by 6 January 2020. (Encls. 3, 4) As of 9 December 2019, the accused was in possession of the military judge's benchbook, 2016 and 2019 versions of the Manual for Courts-Martial, and all paper and disc discovery in this case with the exception of five minutes of audio

from one session as it was in a format CSSSN Brown did not have access to (however the court reporter's notes from that five minutes were provided to CSSSN Brown). (Encl. 4) Before 9 December 2019, the accused's detailed defense counsels were in possession of all discovery items and presumably the accused should have had access to discovery through counsel. Therefore, the accused should have met the TMO deadline of 6 January 2020 if he felt there was a need to request a new preliminary hearing.

b. No grounds exist to order a new preliminary hearing.

There are very clear procedural rules under R.C.M. 405 regarding witnesses at the preliminary hearing. The defense had the opportunity to request witnesses to be produced for the hearing, yet chose not to do so, and none were called. If the accused wanted witnesses to be called, he had the opportunity to request such through the preliminary hearing officer (PHO), yet did not. Additionally, an objection should have been made to the convening authority if there was reason to believe R.C.M. 405 had not been complied with, yet there was no objection. It should also be noted that the victim, LSS2 [redacted] is not required to testify at the preliminary hearing under R.C.M. 405(i)(2)(B).

This case is set for trial from 23 March – 10 April 2020. (Encl. 3) The accused deciding to represent himself at this point in these proceedings should not allow him to essentially start the case over entirely beginning with a new preliminary hearing. The accused should not now be allowed to decide he wanted witnesses to testify a year ago at a hearing that is limited in both scope and purpose.

5. **Relief Requested**.

The Government respectfully requests the Court deny the accused's motion for more time to file a motion for a new Article 32 preliminary hearing

6. **Evidence**.

Enclosure 1: DD Form 457 dtd 4 Feb 2019
Enclosure 2: Email from CDR [redacted] dtd 9 Dec 2019
Enclosure 3: Supplemental TMO dtd 27 Dec 2019
Enclosure 4: Memo dtd 31 Dec 2019

7. **Oral Argument**. The Government does not request oral argument.

[redacted]
S. E. CUMMINGS
LCDR, JAGC, USN
Trial Counsel

APPELLATE EXHIBIT LXXXVI
PAGE 5 OF 34
APPENDED PAGE

CERTIFICATE OF SERVICE

A copy of this document was electronically served on the Court and physically given to Wyatt Detention Facility for service on the accused on 10 January 2020.

[redacted]
S. E. CUMMINGS
LCDR, JAGC, USN
Trial Counsel

APPELLATE EXHIBIT LXXXVI
PAGE 60 OF 34
APPENDED PAGE

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

UNITED STATES **v.** **MICAH J. BROWN** **CSSSN/E-3** **USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO PRE-ADMIT EVIDENCE** **10 January 2020**

1. **Nature of Motion**.

Pursuant to Rule for Courts-Martial (R.C.M.) 906(b)(13), the Government opposes the accused's motion seeking pre-admission of the victim's video recorded NCIS interview.

2. **Statement of Facts.**

a. The accused is charged in the alternative with attempted premeditated murder, attempted unpremeditated murder, and aggravated assault with the intent to commit grievous bodily harm.

b. The victim was interviewed by NCIS on 01 August 2018 and that interview was video recorded.

3. **Burden**.

The burden of persuasion rests with the accused, as the moving party, by a preponderance of the evidence.

APPELLATE EXHIBIT LXXXVII
PAGE 1 OF 4
APPENDED PAGE 87

4. **Discussion**.

Military Rules of Evidence (M.R.E.) 401 and 402 defines evidence as 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." Relevant evidence can be excluded by the military judge if its probative value is "substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence." M.R.E. 403. The rule against hearsay prohibits the introduction of any out of court statement that is offered to prove the truth of the matter asserted. M.R.E. 801(c). A statement under M.R.E. 801 includes "...a person's oral assertion...or nonverbal conduct, if the person intended it as an assertion." M.R.E. 801(a)

The accused seeks to admit into evidence the video recorded interview NCIS conducted of LSS2 [redacted], the victim in this case. The accused argues admission of this video is necessary as it will show body movements, injury dressings, body language, etc. of the victim, all of which the accused argues goes to the element of intent to cause grievous bodily harm.

Essentially, the accused is arguing that the victim's nonverbal conduct in the video will help the factfinder understand whether or not the accused intended to kill or commit grievous bodily harm. This video recording is hearsay under M.R.E. 801(a)-(c) and is inadmissible since the victim will be subject to cross examination at trial. Even if the Court determined the video is not hearsay, the video would be cumulative to other evidence that could be produced at trial that is not hearsay, such as pictures of the victim's wounds and bandages. Showing the video to members may also mislead them or confuse the issue as intent is not proven by actual harm the victim suffered, but rather by the actual intentions of the accused at the time of the misconduct.

The minimal probative value of the video is outweighed by the danger of misleading the members, confusing the issue, and presenting cumulative evidence and should therefore be excluded from evidence under M.R.E. 403.

5. **Relief Requested**.

The Government respectfully requests the Court deny the accused motion to pre-admit the victim's video recorded interview. If the Court is inclined to grant the accused's motion, the Government asks that only a selected portion of the video be played without audio so as to minimize the risks discussed above.

6. **Evidence**. None.

7. **Oral Argument**. The Government does not request oral argument.

[redacted]

S. E. CUMMINGS
LCDR, JAGC, USN
Trial Counsel

APPELLATE EXHIBIT LXXXVII
PAGE 3 OF 4
APPENDED PAGE

CERTIFICATE OF SERVICE

A copy of this document was electronically served on the Court and forwarded to Wyatt Detention Facility for service on the accused.

[redacted]

S. E. CUMMINGS
LCDR, JAGC, USN
Trial Counsel

APPELLATE EXHIBIT LXXXVII
PAGE 4 OF 4
APPENDED PAGE

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

UNITED STATES **v.** **MICAH J. BROWN** **CSSSN/E-3** **USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION FOR DUBAY HEARING** **10 January 2020**

1. **Nature of Motion**.

The Government opposes the accused's motion seeking a DuBay hearing.

2. **Burden**.

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

3. **Discussion**.

A *DuBay* hearing is a limited evidentiary hearing that arises when an appellate court remands the case for such in order to answer findings of fact and conclusions of law questions.[1] The accused has requested a DuBay hearing, pre-trial, for the Court to consider alleged unlawful command influence (UCI) and alleged preliminary inquiry issues as well as alleged misstatements of a witness. Currently pending for the Court's consideration at the Article 39(a) session scheduled for 13 January 2020, is the accused's separate motion to dismiss charges due

[1] *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967)

APPELLATE EXHIBIT LXXXVIII
PAGE 1 OF 3
APPENDED PAGE
87

to alleged UCI. The other issues raised by the accused in this motion are to be considered by the fact finder at trial as they are not interlocutory issues. The accused will have the ability to question the witnesses on the stand about their actions and observations and this is not suited for a DuBay hearing.

4. **Relief Requested**.

The Government respectfully requests the Court deny the accused's motion for a DuBay hearing.

5. **Oral Argument**. The Government does not request oral argument.

[redacted]

S. E. CUMMINGS
LCDR, JAGC, USN
Trial Counsel

APPELLATE EXHIBIT LXXXVIII
PAGE 2 OF 3
APPENDED PAGE

CERTIFICATE OF SERVICE

A copy of this document was electronically served on the Court and physically given to Wyatt Detention Facility for service on the accused on 10 January 2020.

[redacted]
S. E. CUMMINGS
LCDR, JAGC, USN
Trial Counsel

APPELLATE EXHIBIT LXXXVIII
PAGE 3 OF 3
APPENDED PAGE

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

UNITED STATES **v.** **MICAH J. BROWN** **CSSSN/E-3** **USN**	**SUPPLEMENTAL GOVERNMENT RESPONSE TO SECOND AND THIRD DEFENSE MOTION FOR RELEASE FROM PRETRIAL CONFINEMENT AND FOR ADDITIONAL SENTENCING CREDIT** **17 January 2020**

1. **Nature of Motion**.

Pursuant to Rules for Court-Martial (R.C.M.) 305(k) and Article 13, UCMJ, the Government objects to the Defense's Second Motion for Release from Pretrial Confinement and for Additional Sentencing Credit and to the Accused's Motion for Appropriate Relief from Pre-Trial Confinement and Confinement Credit because the accused does not and cannot demonstrate the existence of any illegal pretrial punishment or confinement.

2. **Statement of Facts**.

In addition to the facts listed in the Government's response to the first Defense motion dated 27 September 2019 and the Government's response to the second Defense motion dated 02 December 2019, the Government provides the following:

a. On 20 December 2019, the accused filed a pro se motion for release from pretrial confinement and confinement credit alleging the existence of pretrial punishment.

b. On 13 January 2020, the parties argued the release from pretrial confinement and confinement credit motions before the Court. The Court afforded all parties the opportunity to supplement their motions by 17 January 2020.

c. On 9 January 2019, the Commanding Officer of RLSO MIDLANT designated the accused's preliminary hearing as a high risk proceeding and therefore the accused would remain restrained throughout for safety purposes. (Encl. 2)

d. On 13 August 2019, the accused submitted a grievance to Wyatt Detention Facility complaining of being placed in solitary confinement without a ticket and about a commissary sheet. (Encl. 8)

e. The remedy outlined on grievance # [redacted] relates to the lost commissary sheet, not the accused being placed in segregation. (Encl. 9)

f. On 13 August 2019, the accused was placed into restrictive housing due to a pending investigation into the accused strongarming other detainees in the dorm he was allowed to rec in during the day. (Encl. 10)

g. On 14 September 2019, the accused was released from restrictive housing, with the exception of sleeping there due to facility housing needs. (Encl. 11)

3. **Burden**.

The accused has the burden of proof by a preponderance of the evidence. R.C.M. 905(c)(1).

4. **Discussion**.

Article 13, UCMJ prohibits the imposition of punishment upon the accused before a finding of guilty and pretrial confinement that is "more rigorous than the circumstances require to insure

his presence, but he may be subjected to minor punishment during that period for infractions of discipline." When assessing illegal pretrial punishment, an intent to punish is determined by looking at the purpose of the restriction or conditions and whether they are reasonably related to a legitimate government objective.[1] There must be evidence of "an intent to punish on the part of the government" for a violation under Article 13, UCMJ to occur.[2] If punitive intent is not shown, the government action "does not, without more, amount to 'punishment.'"[3] For illegal pretrial confinement, conditions must be "sufficiently egregious to give rise to a permissive inference that the accused is being punished, or the conditions may be so excessive as to constitute punishment."[4]

a. <u>There is no showing of illegal pretrial punishment or confinement.</u>

a. <u>Maximum custody and restraints at a preliminary hearing are not pretrial punishment.</u>

Neither a maximum custody designation nor restraints on the accused at a preliminary hearing amount to illegal pretrial punishment. The accused argues that his designation as "maximum security" while housed in the NAS Jacksonville, FL brig, shows an intent to punish on the part of the government. Merely classifying a pretrial inmate as "maximum" is not a per se violation of Article 13, UCMJ.[5] Classification codes at a military confinement facility are assigned based on a number of factors outlined in SECNAVINST 1640.9C section 4202 (Encl. 1). This designation is made to ensure the safe and orderly administration of the facility and

---

[1] *United States v. Zarbatany*, 70 M.J. 169, 169 (C.A.A.F. 2010).
[2] *United States v. Howell*, 75 M.J. 386, 394 (C.A.A.F. 2016).
[3] *United States v. James*, 28 M.J. 214, 216 (C.M.A. 1989) (quoting *Wolfish*, 441 U.S. at 539).
[4] *United Staes v. McCarthy*, 47 M.J. 162, 165 (C.A.A.F. 1997); *United States v. James*, 28 M.J. 214, 216 (C.M.A. 1989) (conditions that are "arbitrary or purposeless" can be considered to raise an inference of punishment).
[5] *Zarbatany* at 174. (citing *United States v. King*, 61 M.J. 225, 228 (C.A.A.F. 2005).

courts should be reluctant to second-guess the officials making those security determinations.[6] A continued classification of "maximum" custody is "not so egregious as to give rise to any inference of intent to punish" and the conditions of that classification are likewise not so excessive to amount to punishment.[7]

The accused argues that his wearing of restraints at his preliminary hearing amounts to pretrial punishment. The ability to be free from physical restraint at trial is not absolute.[8] There are situations where the judge may order an accused be physically restrained even at trial before members.[9] In this case, the accused was appearing at a preliminary hearing in a Region Legal Service Office (RLSO) space, prior to arraignment, assignment of a military judge, and empanelment of members. The risk assessment form signed by the RLSO commanding officer prior to the preliminary hearing recommended that the accused remain in restraints as it "is in the best interest of safety and security." (Encl. 2) There was no danger of signaling dangerousness to members as this hearing was pretrial and the accused has not alleged any harm suffered by remaining restrained at the preliminary hearing. This was a safety measure put in place for the safety of all parties and there is no indication it was done with the intent to punish.

b. Pretrial confinement at a civilian facility is authorized and the conditions therein are not illegal pretrial punishment or confinement.

The accused also argues that being housed in a civilian confinement facility amounts to pretrial punishment because he is not able to wear a military uniform, is allegedly comingled with senteneed prisoners, and was placed in solitary confinement without reason for fifteen days.

---

[6] *McCarthy*, 47 M.J. at 167-168.
[7] *King*, 61 M.J. at 228.
[8] *United States v. Briggs*, 42 M.J. 367, 370 (C.A.A.F. 1995).
[9] Handcuffs and shackles on the accused due to dangerousness escape attempts,

SECNAVINST 1640.9C authorizes use of a civilian confinement facility if a military facility is not reasonably available. (Encl. 3) The same instruction defines the accused's status as a "detainee" and requires a "differentiation in programs, primarily in work areas, for sentenced and un-sentenced prisoners." (Encl. 4) Comingling a detainee with post-trial inmates is not a per se violation of Article 13, UCMJ.[10] "Although preferred, there is no requirement that prisoners of different legal status (detained or sentenced) be berthed separately…In many confinement facilities, practicality dictates commingling of prisoners in the same quarters…"[11] (Encl. 5)

In this case, there is no military confinement facility reasonably available making the confinement of the accused in a civilian facility warranted. Wyatt Detention Facility, where the accused is housed, houses primarily pretrial detainees, but also holds post-trial detainees awaiting sentencing or temporarily after sentencing as they await transfer to the facility where they will carry out their sentence. (Encl. 6) However, the accused is housed alone in his own cell. [12] (Encl. 6) The extent of any commingling with sentenced prisoners does not rise to the level of an intent to punish on behalf of the government, nor does it make conditions more rigorous than necessary, as the accused is able to retreat to his very own cell at night.

The accused wears the same "uniform" as every other detainee at the facility. [redacted] testified at the motions hearing on 13 January 2020 that the accused wears the same uniform, khaki pants and khaki shirt, which is the same as what the rest of the detainees at the facility wear. The wearing of this uniform is in compliance with the contract in place with the facility wherein the Navy mandates the facility provide the detainee with uniform items including uniform shirt and pants. (Encl. 7) As the wearing of this uniform is not due to a government

[10] *Zarbatany*, 70 M.J. at 174.
[11] SECNAVINST 1640.9C § 4206.
[12] The accused may rec with post trial detainees during the day and the number of such detainees varies.

intent to punish and is not a condition more rigorous than necessary, there is no violation of Article 13, UCMJ.

The accused claims that he was sent to solitary confinement for fifteen days for no reason which establishes a basis for pretrial punishment. In support of his claim, the accused includes a grievance numbered [redacted] wherein he complains of both the solitary confinement and a commissary slip. (Encl. 8) The response to that grievance read "This incident was reviewed and staff will be spoken to about the incident accordingly" but that response was in response to a commissary slip that was not handled properly and not in response to the solitary confinement. (Encl. 9) [redacted] testified at the motions session held on 13 January 2020 that the solitary confinement the accused complained about in that grievance occurred after another detainee complained about the accused "strongarming" him. This is supported by the facility's restrictive housing review form that clearly indicated the accused was housed (slept) in restrictive housing for the non-punitive reason of facility/housing needs, but that he would no longer be allowed to rec in A-Dorm (but could rec in G-pod) due to a pending investigation into the accused strong-arming others in A-dorm. (Encl. 10) The accused had a chance to comment at that time and cited "no issues @ this time." (Encl. 10) [redacted] further explained at the motions session that the facility responds to such an allegation by placing the detainee in protective custody while an investigation ensues and that a "ticket" is only given to a detainee if an investigation substantiates the allegation, therefore the accused's grievance stating there was no ticket issued was premature. This procedure is in place for the safety of the detainees and the facility and is not indicative of an intent to punish on behalf of the government, nor does it rise to the level of more rigorous than necessary.

b. Sentencing credit under R.C.M. 305(k) or Article 13 is not warranted.

The accused seems to argue that the conditions at the civilian detention facility are so unusually harsh and more rigorous than necessary as to warrant sentencing credit under R.C.M. 305(k), although no exact amount of credit was requested. Such credit is appropriate where "...confinement officials have knowingly and deliberately violated provisions of service regulations designed to protect the rights of presumptively innocent servicemembers." [13]

As the conditions faced by the accused in the civilian confinement facility are not more rigorous than necessary and the accused has not shown an intent to punish on behalf of the government, the accused is not entitled to any confinement credit under R.C.M. 305(k) or Article 13, UCMJ.

5. **Relief Requested**.

The Government respectfully requests this Court deny the accused's Motion.

6. **Evidence**.

In addition to relying on the Defense and Government enclosures provided in the motions still pending before the Court, the Government now provides:

- Enclosure 1: SEVNAVINST 1640.9C pages 4-7 through 4-12
- Enclosure 2: Risk Assessment Form
- Enclosure 3: SECNAVINST 1640.9C pages 7-13 through 7-14
- Enclosure 4: SECNAVINST 1640.9C pages 7-3 through 7-4
- Enclosure 5: SECNAVINST 1640.9C pages 4-16 through 4-17
- Enclosure 6: Email regarding comingling
- Enclosure 7: Contract, Bates Stamp number 1417
- Enclosure 8: Grievance [redacted]
- Enclosure 9: Email regarding grievance
- Enclosure 10: Restrictive housing review form dtd 8/14/19
- Enclosure 11: Restrictive housing review form dtd 9/4/19

[13] *United States v. Adcock*, 65 M.J. 18, 25 (C.A.A.F. 2007)

7. **Oral Argument**.

The Government does not request oral argument.

[redacted]
S. E. CUMMINGS
LCDR, JAGC, USN
Trial Counsel

CERTIFICATE OF SERVICE

A copy of this document was electronically served on the Court and forwarded to Wyatt for service on the accused on 17 January 2020.

[redacted]
S. E. CUMMINGS
LCDR, JAGC, USN
Trial Counsel

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

UNITED STATES **v.** **MICAH J. BROWN** **CSSSN/E-3** **USN**	**GOVERNMENT REQUEST FOR AN ORDER** **29 January 2020**

1. **Nature of Motion**.

Pursuant to Rules for Court-Martial (R.C.M.) 801 and 906, the Government respectfully requests the Military Judge issue an order on the record setting parameters for trial relating to any change in the pro se status of the accused.

2. **Statement of Facts.**

a. At an Article 39(a) session on 3 December 2019, the Court accepted a request from the accused to proceed in this case pro se.

b. On 27 December 2019, this Court issued a supplemental trial management order (TMO) shifting trial dates from 6-10 January 2020 to 23 March – 10 April 2020.

c. At an Article 39(a) session on 13 January 2020, this Court set the deadlines for disclosure of expert witnesses, notice and declaration of defenses including mental responsibility to be 11 February 2020.

3. **Burden**. The Government bears the burden of persuasion as the moving party. R.C.M. 905(c).

4. **Discussion**.

Pursuant to R.C.M. 801, the military judge should ensure "court-martial proceedings are conducted in a fair and orderly manner, without unnecessary delay or waste of time or resources."[1] Both the Government and Defense are entitled to an expeditious trial process free from unreasonable delay. To that end, the Government respectfully requests that the Court issue an order, on the record, to set parameters for trial proceedings in the event there is any change to the accused pro se status.

Specifically, the Government requests that the Court notifies CSSSN Brown clearly, on the record, that he is bound by his elections as to witness and evidence production, as well as notice of defenses per the trial management order. If CSSSN Brown elects to be represented by standby counsel close to trial or after trial begins in March, the Court should not be inclined to grant a continuance for purposes of witness availability or counsel preparation.[2] LCDR Sharlena Williams and LCDR Bryan Davis, standby counsel, were originally assigned as detailed defense counsel in November 2018 and February 2019 respectively, have attended every motions hearing after the accused elected to proceed pro se, and have been copied on all filings. Additionally, on 03 December 2019, standby counsel (then detailed counsel) were prepared to proceed to trial on 06 January 2020 when the accused elected to represent himself. Given their experience level and prior trial preparation, if CSSSN Brown elects to be represented by them at trial in March, they

[1] See R.C.M. 801 discussion. This rule also calls for the military judge to avoid interference with the parties' presentations.

[2] See R.C.M. 906(b)(1) discussion. Insufficient opportunity to prepare and unavailability of witnesses normally constitute reasonable cause for continuance, however, they are insufficient for the reasons set forth in this motion.

should be more than ready to try this case with the evidence and witnesses that CSSSN Brown has elected to present.

The Defense has received two prior continuances in this trial; the Government, one. Any further continuance request, especially mid-trial should be viewed critically and only granted in the most extreme circumstances. If the accused should elect to be represented by counsel mid-trial, the Government understands and, if necessary, would not object to a short break in trial (i.e. a few days) for counsel to meet with CSSSN Brown and conduct any last minute interviews or trial preparation. As the trial is scheduled for three weeks, there should be ample time to complete the proceeding while ensuring CSSSN Brown is more than adequately represented.

5. **Relief Requested**.

The Government respectfully requests the Court issue a written or oral order at the next session of Court as outlined above.

6. **Oral Argument**. The Government requests oral argument.

[redacted]
S. E. CUMMINGS
LCDR, JAGC, USN
Trial Counsel

CERTIFICATE OF SERVICE

A copy of this document was electronically served on the Court and forwarded to Wyatt Detention Facility for service on the accused on 29 January 2020.

[redacted]
S. E. CUMMINGS
LCDR, JAGC, USN
Trial Counsel

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

UNITED STATES **v.** **MICAH J. BROWN** **CSSSN/E-3** **USN**	**GOVERNMENT MOTION TO REQUEST FIREARM IN THE COURTROOM** **29 January 2020**

1. **Nature of Motion**. The Government respectfully requests this Court make a ruling regarding whether Navy Criminal Investigative Service (NCIS) Special Agents [redacted] may be permitted to carry a firearm into the courtroom while testifying in or observing court proceedings in this case.

2. **Statement of Facts.**

   a. JAG/COMNAVLEGSVCCOMINST 5530.2D CH-3 permits the Military Judge presiding over a military justice proceeding in a Navy Legal Services Command (NLSC) facility to make the determination whether a firearm may be carried in the courtroom. (Encl. 1)

   b. The Military Judge may, in coordination with the responsible Commanding Officer, submit a request for an exception to AJAG 06, via the Director, Code 67. (Encl. 1)

   c. The request shall include the reasons for the request, an explanation as to why other threat mitigation measures are insufficient, and any amplifying information. (Encl. 1)

3. **Discussion**. The Government respectfully asks this Court to consider the request by NCIS Special Agents [redacted] to carry a firearm in the courtroom during court proceedings in this matter. NCIS Special Agents [redacted] have provided Enclosures 2 – 4 for the court's consideration.

4. **Evidence**. The Government provides the following in support of this motion:

    1. NCIS FORM 5580/151 (8-2019) [redacted]
    2. NCIS FORM 5580/151 (8-2019) [redacted]
    3. NCIS FORM 5580/151 (8-2019) [redacted]

5. **Argument**. The Government does not request oral argument.

[redacted]
S. E. CUMMINGS
LCDR, JAGC, USN
Trial Counsel

CERTIFICATE OF SERVICE

A copy of this document was electronically served on the Court and sent to Wyatt Detention Facility for service on the accused on 29 January 2020.

[redacted]
S. E. CUMMINGS
LCDR, JAGC, USN
Trial Counsel

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

UNITED STATES **v.** **MICAH J. BROWN** **CSSSN/E-3** **USN**	**GOVERNMENT RESPONSE TO MOTION TO BE TRANSPORTED TO SUBMARINE BASE TO USE A SECURE PHONE AND INTERNET LINE** **05 February 2020**

1. **Nature of Motion**.

The Government opposes accused's motion to be transported from the pretrial confinement facility to the base two to three times a week for two to three to use a secure phone line and to have internet access in preparation for the accused's defense.

2. **Statement of Facts.**

a. On 31 July 2018, the accused was ordered into pretrial confinement at the Jacksonville Brig. (Defense (Def.) Enclosures (Encls.) at 1.)

b. On 3 August 2018, the IRO reviewed the 48/72 hour letter, the confinement order, and the witness statements. (Def. Encls. at 4.)

c. On the same day, the IRO approved the continued confinement of the accused because she concluded that there were reasonable grounds to believe that [redacted] (Def. Encls. at 5.)

APPELLATE EXHIBIT CIX
PAGE 1 OF 14
APPENDED PAGE 109

d. On 6 September 2018, the accused was moved into pretrial confinement at Donald Wyatt Detention Facility (Wyatt). (Gov. Encls. 8 at 1.)

e. At an Article 39(a) session on 3 December 2019, the Court accepted a request from the accused to proceed in this case pro se.

[redacted]

APPELLATE EXHIBIT CIX
PAGE 2 OF 14
APPENDED PAGE

[redacted]

i. On 15 January 2020, the accused submitted a similar request to the Government for transportation from his pretrial confinement facility to the base along with internet access and a secure phone line. (Encl. 4)

j. The Government denied this request on 23 January 2020. (Encl. 5)

3. **Burden**. As the moving party, the accused has the burden of persuasion by a preponderance of evidence. R.C.M. 905(c).

4. **Discussion**.

The accused has been in pre-trial confinement since 31 July 2018. On 3 December 2019, the accused chose to represent himself in this case. On the same day, this Court issued a point of clarification to inform that accused that this Court is not ordering the Government to give the accused an exact amount of time each day to work on his case or specific materials or gear recognizing that the accused is still in pre-trial confinement status and the restrictions that come with that status. Encl.1. On the same day, the accused requested this Court to order the Government to provide a time (six to eight hours) and space (office on base) to include access to internet and secure phone line arguing he needed such in order to defend himself properly. Encl.

2. On 5 December 2019, this Court again informed the accused that he must prepare within the conditions of his pre-trial confinement. Encl. 3. Again, the Court declined to order any specifics regarding space, materials, or gear.

The accused choose to represent himself in this case while in pre-trial confinement status. This Court has acknowledged that certain restrictions come with being in that status and made sure that the accused understood he must work within those restrictions. The conditions that accompany being in pre-trial confinement status were known to the accused when he elected to proceed without representation of counsel who would have access to the accommodations now being requested.

The accused should not now be granted time out of pretrial confinement, access to the internet, and a secured phone line simply because he chose to release his counsel from his case. The decision to represent himself within the restrictions that pretrial confinement necessarily places on the accused was made despite warnings from the Court that doing such might not be in his best interest. Therefore, this request should be denied.

5. **Relief Requested**. The Government respectfully requests the Court deny the accused's motion.

6. **Evidence**.

Enclosure 1: CDR Stormer email to CSSSN Brown dtd 3 Dec 2019

Enclosure 2: CSSSN Brown letter to CDR Stormer dtd 3 Dec 2019

Enclosure 3: CDR Stormer email to CSSSN Brown dtd 5 Dec 2019

Enclosure 4: Accused's request to Trial Counsel dtd 15 Jan 2020

Enclosure 5: Government's response to accused's request dtd 23 Jan 2020

7. **Oral Argument**. The Government does not request oral argument.

[redacted]
S. E. CUMMINGS
LCDR, JAGC, USN
Trial Counsel

CERTIFICATE OF SERVICE

A copy of this document was electronically served on the Court and forwarded to Wyatt Detention Facility for service on the accused on 5 February 2020.

[redacted]
S. E. CUMMINGS
LCDR, JAGC, USN
Trial Counsel

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

UNITED STATES **v.** **MICAH J. BROWN** **CSSSN/E-3** **USN**	**GOVERNMENT RESPONSE TO ACCUSED'S MOTION FOR RELEASE FROM PRETRIAL CONFINEMENT** **1 May 2020**

MOTION

The Government requests the Court deny the accused's motion for release from pretrial confinement.

SUMMARY

The accused was placed in pretrial confinement after he violently stabbed a shipmate multiple times with a knife in the head and neck while they were underway on a submarine. The accused has not made an allegation that the Initial Review Officer (IRO) abused her discretion. The accused has not presented any new evidence that was not presented to the IRO that would establish his release. The accused has not presented any evidence to support his contention that his particular conditions at Wyatt Detention Facility warrant release due to the pandemic related to coronavirus. Therefore, pursuant to R.C.M. 305 (j)(1), the accused should not be released from pretrial confinement.

FACTS

a. The accused has not presented any evidence of an elevated risk of exposure to COVID-19 at Wyatt Detention Facility compared to his risk of exposure if he were to be released.

b. The accused has not provided any facts relating to confirmed cases of COVID-19 at Wyatt or any other facts that would warrant consideration of his release.

BURDEN

Pursuant to R.C.M. 905(c), the accused bears the burden of persuasion by a preponderance of the evidence.

APPELLATE EXHIBIT CXXIV
PAGE 1 OF 5
APPENDED PAGE 124

LAW

Article 10, UCMJ, allows any servicemember charged with an offense to be placed into pretrial confinement "as the circumstances require."[1] The Rules for Court-Martial authorize pretrial confinement when the commander believes there to be probable cause that

> (i) An offense triable by a court-martial has been committed; (ii) The confinee committed it; (iii) Confinement is necessary because it is foreseeable that: (a) The confinee will not appear at trial …, or (b) The confinee will engage in serious criminal misconduct; and (iv) Less severe forms of restraint are inadequate.[2]

"*Serious criminal misconduct* includes … obstruction of justice, serious injury of others, or other offenses which pose a serious threat … to the effectiveness morale, discipline, readiness, or safety of the command."[3] The "seriousness of the offense" is not an independent justification for pretrial confinement.[4]

Once the accused is placed in pretrial confinement, an IRO must conduct a review using the R.C.M. 305(h)(2)(B) requirements and will either continue the confinement or order immediate release.[5] The IRO will consider the totality of the circumstances using a probable cause standard.[6]

Upon request for review, the military judge should order the accused's release only if the IRO abused their discretion and the evidence does not support continued confinement or if there is new evidence that was not presented to the IRO that establishes the accused should be released.[7]

ARGUMENT

The accused has not presented any new information that establishes his release should be ordered.

The Court may order the accused released if it receives new information that was not previously provided to the IRO provided that this new evidence establishes that the accused should be released.[8] However, the accused has presented no new evidence to the Court. The accused motion simply states that he is concerned with the current world health pandemic and argues that he should be released from pretrial confinement because if he contracts the disease it

---

[1] Art 10
[2] R.C.M. 305(h)(2)(b)
[3] *Id.* (emphasis added).
[4] United States v. Heard, 3 M.J. 14, 16-17 (C.M.A. 1977).
[5] R.C.M. 205(i)(2)(C)
[6] United States v. Fisher, 37 M.J. 812, 818-819 (N.M.C.C.M.R. 1993) (describing the probable cause standard to be a practical, flexible, nontechnical, and common-sense standard and requires the IRO to "make a practical, common-sense decision, given all the circumstances set before them.")
[7] R.C.M. 305(j)(A)-(B)
[8] Id.

would be detrimental to his health. The accused has not presented any evidence that his health is in actually in danger at the confinement facility. The accused does not address any specific circumstances at his confinement facility that would show an increased risk of contracting a virus there as opposed to his chances of contracting a virus outside the facility. If released, the accused would travel back to his command in Groton, Connecticut. Connecticut is experiencing wide spread community transmission of COVID-19 and releasing him into the state may actually increase his risk of exposure.

RELIEF REQUESTED

The Government respectfully requests the Court DENY the defense's motion for release from pretrial confinement. The Government does not request oral argument and believes the Court has the ability to decide this issue through written filings from the parties. Should the Court determine oral argument is necessary, the Government requests that the Article 39(a), UCMJ, session be conducted using visual teleconferencing (VTC) to present evidence and oral argument. Wyatt Detention Facility has VTC capabilities that would allow the accused to participate from there and would alleviate the need to have three brig chasers and the accused to travel across state lines. Connecticut is experiencing widespread community transmission according to the Center for Disease Control and all travelers could be subject to a 14 day ROM upon their departure. VTC would also allow for better social distancing for all parties.

[redacted]
S. E. CUMMINGS
LCDR, JAGC, USN
Trial Counsel

CERTIFICATE OF SERVICE

A copy of this document was electronically served on the Court and forwarded to Wyatt Detention Facility for service on the accused on 1 May 2020.

[redacted]
S. E. CUMMINGS
LCDR, JAGC, USN
Trial Counsel

APPELLATE EXHIBIT CXXIV
PAGE 3 OF 5
APPENDED PAGE

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

UNITED STATES OF AMERICA **v.** **MICAH J. BROWN** **CSSSN/E-3 USN**	**Defense Supplemental Motion to Defense Motion to be Released from PTC dtd 6 Apr 20** **14 May 2020**

1. Supplemental Motion.

Studies have shown that more [redacted] are affected and have died as a result of Covid-19. The Accused chances of infection are greatly increased because he is 1) [redacted] 2) in a confinement, 3) suffers from [redacted], and 4) has [redacted].

Covid-19 is spread from person to person through respiratory droplets produced when an infected person coughs or sneezes and then inhaled through the lungs. Spreading occurs when people are within about 6 feet of each other.[1] The Center for Disease Control (CDC) recommends each person maintains good social distance, wash their hands, and routinely clean and disinfect frequently touched surfaces.

As of 12 May 20, there are 1,342,594 cases in the United States. There are 11,450 in Rhode Island and 33,765 in Connecticut. These numbers increase daily. The CDC collected data on 492,871 cases and determined that 27.5% of all confirmed positive cases were [redacted].[2]

Jails and Prisons are breeding grounds for infectious diseases. The rate at which people enter and leave these facilities to include inmates and staff is high, which increases the chance of infection. These facilities tend to provide very limited healthcare to the individuals incarcerated and the individuals incarcerated are generally from a section of society unable to maintain healthcare services.[3]

[1] https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html
[2] https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html
[3] https://www.forbes.com/sites/lipiroy/2020/03/11/infections-and-incarceration-why-jails-and-prisons-need-to-prepare-for-covid-19-stat/#1154741949f3

APPELLATE EXHIBIT CXXV
PAGE 1 OF 13
APPENDED PAGE 125

[redacted] which results in reduced oxygen flow to the organs and tissues. Once [redacted] has progressed to this stage, it could result in the need for blood transfusions. The breakdown of the red bloods cells can be triggered by infections and drugs such as antimalarial drugs, aspirins, nonsteroidal anti-inflammatory medications, all of which have been experimented with recently to cure Covid-19.

People with serious underlying medical conditions might be at higher risk for severe illness from Covid-10 such as people with moderate to severe asthma.[5] Covid-19 can affect the respiratory tract (nose, throat, and lungs), cause an asthma attack and possibly lead to pneumonia and acute respiratory disease.[6]

The government's response stating that the Accused would be in greater harm if released from pretrial confinement because Connecticut has a high rate of Covid-19 infected patients is without merit. If the Accused is released from pretrial confinement he is able to have control over his exposure. The accused will be able to live in a barracks by himself and maintain its cleanliness. The Accused would be able to choose how many people he is exposed to, how often, and under what circumstances. At Wyatt Detention Center, the correction officers come and go each day, thereby increasing every inmates' exposure greatly. The Accused does not have any control over who the correction officers interact with outside or within the facility. Covid-19 was spread in Wyatt from the correction officers or newly placed inmates. If released, the Accused has the ability to limit access to his personal space as well as his dwelling. If Accused feels sick he can seek proper medical care at Navy medicine and he could isolate him accordingly.

Wyatt has provided gloves and masks to the inmates on 3 occasions since the first case was discovered on 21 April 20. Therefore, inmates are using the same gloves and masks for at least 1 week. Gloves become contaminated the second after a person touches anything, therefore using the same gloves for week further spreads germs and diseases. He is also in a jail cell therefore the ability to maintain the cleanliness of a mask is almost non-existent. If released, the Accused could change his gloves and mask as often as needed to prevent the spread of the virus. He could wash his clothes on a daily basis therefore further preventing the spread of covid-19.

The Accused wants the ability to make it to trial but the longer he is confined at Wyatt Detention Center under these conditions in this current environment, his chances of reaching his trial date greatly decrease. As such, the Accused urges this Court to order his immediate release from pretrial confinement.

[4] https://www.healthline.com/health/[redacted]
[5] https://www.cdc.gov/coronavirus/2019-ncov/faq.html#Coronavirus-Disease-2019-Basics
[6] https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions[redacted].html

2. Enclosures.

A. Affidavit from CSSSN Micah Brown dtd 14 May 20
B. Memorandum for the Record from LNC [redacted] dtd 4 May 20
C. Memorandum for the Record from LNC [redacted] dtd 6 May 20
D. Memorandum for the Record from LNC [redacted] dtd 12 May 20

[redacted]
CSSSN Brown

APPELLATE EXHIBIT CXXV
PAGE 3 OF 13
APPENDED PAGE

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

UNITED STATES **v.** **MICAH J. BROWN** **CSSSN/E-3** **USN**	**SUPPLEMENTAL GOVERNMENT RESPONSE TO ACCUSED'S MOTION FOR RELEASE FROM PRETRIAL CONFINEMENT** **21 May 2020**

MOTION

The Government requests the Court deny the accused's motion for release from pretrial confinement.

SUMMARY

The accused was placed in pretrial confinement after he violently stabbed a shipmate multiple times with a knife in the head and neck while they were underway on a submarine. The accused has not alleged that the Initial Review Officer (IRO) abused her discretion. The accused, even through his supplemental filing, has not presented any new evidence that was not presented to the IRO that would establish his release. The accused has not presented any evidence that his particular conditions at Wyatt Detention Facility warrant release due to the pandemic related to COVID-19. Therefore, pursuant to R.C.M. 305 (j)(1), the accused should not be released from pretrial confinement.

FACTS

a. On 23 April 2020, the government received and forwarded to the Court a pro se motion for release from pretrial confinement from the accused that cited the ongoing COVID-19 pandemic.

b. On 1 May 2020, the government filed a response to the accused's motion.

c. On 14 May 2020, the accused supplemented his motion, but still did not present any evidence that was not presented to the IRO that would warrant his release from pretrial confinement.

BURDEN

Pursuant to R.C.M. 905(c), the accused bears the burden of persuasion by a preponderance of the evidence.

LAW

Article 10, UCMJ, allows any servicemember charged with an offense to be placed into pretrial confinement "as the circumstances require."[1] The Rules for Court-Martial authorize pretrial confinement when the commander believes there to be probable cause that

> (i) An offense triable by a court-martial has been committed; (ii) The confinee committed it; (iii) Confinement is necessary because it is foreseeable that: (a) The confinee will not appear at trial …, or (b) The confinee will engage in serious criminal misconduct; and (iv) Less severe forms of restraint are inadequate.[2]

"*Serious criminal misconduct* includes … obstruction of justice, serious injury of others, or other offenses which pose a serious threat … to the effectiveness morale, discipline, readiness, or safety of the command."[3] The "seriousness of the offense" is not an independent justification for pretrial confinement.[4]

Once the accused is placed in pretrial confinement, an IRO must conduct a review using the R.C.M. 305(h)(2)(B) requirements and will either continue the confinement or order immediate release.[5] The IRO will consider the totality of the circumstances using a probable cause standard.[6]

Upon request for review, the military judge should order the accused's release only if the IRO abused their discretion and the evidence does not support continued confinement or if there is new evidence that was not presented to the IRO that establishes the accused should be released.[7]

ARGUMENT

The accused has not presented any new information that establishes his release should be ordered.

The Court may order the accused released from pretrial confinement if it receives new information that was not previously provided to the IRO, provided that this new evidence establishes that the accused should be released.[8] The accused asserts that his chances of contracting COVID-19 are greatly increased because he 1) is [redacted], 2) is in pretrial confinement, and 3) allegedly suffers from [redacted] and

---

[1] Art 10
[2] R.C.M 305(h)(2)(b)
[3] *Id.* (emphasis added).
[4] United States v. Heard, 3 M.J. 14, 16-17 (C.M.A. 1977).
[5] R.C.M. 205(i)(2)(C)
[6] United States v. Fisher, 37 M.J. 812, 818-819 (N.M.C.C.M.R. 1993) (describing the probable cause standard to be a practical, flexible, nontechnical, and common-sense standard and requires the IRO to "make a practical, common-sense decision, given all the circumstances set before them.")
[7] R.C.M. 305(j)(A)-(B)
[8] *Id.*

[redacted]. However, these assertions are not new pieces of information that warrant his release, pursuant to R.C.M. 305(h)(2)(B).

The accused argues that because he is [redacted] he has an increased risk of contracting COVID-19. However, even the Center for Disease Control (CDC) research that the accused relies on does not support that assertion. Of the 1,164,011 positive COVID-19 cases the CDC examined, only 557,752 of those people reported their race and 27% of that subsection were [redacted].[9] Additionally, the CDC's research does not show an increased risk of contracting COVID-19 due to race alone, but did find a correlation to socio-economic factors such as access to care, living situation, and work requirements. [10] The accused is housed in his own cell, has been provided soap and personal protective items, and has access to medical care, all of which lessens the likelihood of increased risk of exposure.

The accused also argues that his risk of exposure to COVID-19 is increased due to his pretrial confinement status at Wyatt Detention Facility (Wyatt). While that argument may have had merit in the beginning stages of the pandemic, Wyatt has taken appropriate measures to mitigate that risk. Wyatt is following CDC guidelines for COVID-19 mitigation, has 24/7 on-site medical staff, has instituted increased medical screening and a 16-day quarantine of all new detainees, and has outfitted an entire unit to be negatively pressured to allow for proper quarantine space. .[11] Wyatt's medical director is board certified in infectious diseases and has 40 years of medical experience in the correctional setting and the health services administrator and certified correctional health professional (CCHP) has over 25 years of healthcare experience in the correctional environment.[12] Wyatt has implemented a robust COVID-19 testing protocol and has conducted 326 tests on a population of 547 detainees,[13] which is 59% of its population. In contrast, as of 5 May 2020, the state of Connecticut has only performed 177,679 tests on a population of 3.656 million people which equates to testing of only 4% of the population.[14] While some larger urban areas with overcrowded facilities have released prisoners in an effort to mitigate COVID-19 exposure, Wyatt is only at 71% capacity and has dedicated space within the facility to adequately quarantine any positive cases.[15] Wyatt has also reassigned detainees to spaced out cells, directs social distancing among the detainees, increased mental health rounds, increased cleaning and disinfecting of high touch areas both day and night, provided hand sanitizer dispensers, and increased the masks and soap distribution to detainees.[16] The accused also is housed alone in his own cell and has access to his own sink and soap. Wyatt is in close communication with Rhode Island's Department of Health and Congregate Settings Support Team (CSST) to ensure the facility is well prepared to control COVID-19 through testing and mitigation strategies. Overall, the accused has better access to testing and immediate medical care in Wyatt than he would have on an active naval installation.

---

[9] https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html

[redacted]

[11] Wyatt Detention Facility Status Report dtd 14 May 2020
[12] *Id.*
[13] *Id.*
[14] https://portal.ct.gov/Coronavirus
[15] Wyatt Detention Facility Status Report dtd 14 May 2020
[16] *Id.*

While the accused asserts that he has underlying health conditions that put him at a higher risk of contracting COVID-19, this is not a compelling reason to release him from pretrial confinement. The accused claims to have been diagnosed with [redacted] at a young age, yet he reported that he had never been diagnosed with [redacted] or experienced any other [redacted] related problems on his report of medical history that he submitted for entrance into service.[17] The government has not examined the accused's medical records to confirm any [redacted] diagnosis, but even assuming the accused does have such a condition, the prevention and mitigation measures in place at Wyatt are sufficient to minimize his exposure and provide adequate testing and care if needed.[18] Federal courts have recently rejected motions for release of defendants charged with violent crimes, despite underlying medical conditions and the ongoing COVID-19 pandemic.[19] In this case, the accused is charged with violently stabbing another Sailor with a knife multiple times and continued to commit violent misconduct after he was placed in pretrial confinement. The concerns for public safety, the need to ensure the accused appears at trial, and the other factors considered by the IRO outweigh the accused's arguments that have no bearing on the R.C.M. 305 analysis.

Despite the arguments of the accused, there is no new evidence before the Court that would warrant the release of the accused from pretrial confinement.

EVIDENCE

Enclosure (1): Wyatt Detention Facility Status Report dtd 14 May 2020

Enclosure (2): SN Brown's DD Form 2807-1 dtd 6 January 2015

RELIEF REQUESTED

The Government respectfully requests the Court DENY the defense's motion for release from pretrial confinement.

[redacted]
S. E. CUMMINGS
LCDR, JAGC, USN
Trial Counsel

---

[17] SN Brown's DD Form 2807-1 dtd 6 January 2015

[18] *United States v. Whyte*, 2020 U.S. Dist. LEXIS 71438 (denying a defense motion for release from pretrial confinement at Wyatt Detention Facility where the accused was diagnosed with [redacted] based on the need to reasonably assure the accused's presence a trial and for the safety of the community.)

[redacted]

Untied States v. Hamilton, 2020 U.S. Dist. LEXIS 49095, 2020 WL 1323036, at *2 (denying defendant temporary release for COVID-19 risk on the basis of the risk posed by the defendant to the community)

CERTIFICATE OF SERVICE

A copy of this document was electronically served on the Court and forwarded to Wyatt Detention Facility for service on the accused on 21 May 2020.

[redacted]
S. E. CUMMINGS
LCDR, JAGC, USN
Trial Counsel

AE CXXVI
Page 5 of 26

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

UNITED STATES **v.** **MICAH BROWN** **CSSSN USN**	**DEFENSE MOTION TO ABATE OR CONTINUE CURRENT TRIAL DATES** **11 JUNE 2020**

1. Nature of Motion

CSSSN Brown was provided with a draft of this motion on 11 June 2020, and discussed its content with standby counsel on 11 June 2020. CSSSN Brown does not object to the requested relief.

Pursuant to Rule for Courts-Martial (R.C.M.) 703 and CSSSN Brown's rights to due process under the United States Constitution, the Defense respectfully requests the Court to abate proceedings until Commander, Navy Region Mid-Atlantic rescinds its 30 April 2020 memorandum as it pertains to expert witnesses. Should the court deny that requested relief, the defense requests the court to continue the start of trial from 31 July 2020 until 14 September 2020 to allow standby counsel to complete their respective travel, ROM requirements, and trial obligations.

2. Burden of Proof

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

APPELLATE EXHIBIT CXXIX
PAGE 1 OF 54
APPENDED PAGE

3. **Summary of Facts**

a. On 2 June 2020, standby counsel contacted the court, requesting an 802 conference to discuss scheduling contingencies in light of evolving travel guidance from Department of Defense and U.S. Navy authorities. Enclosure A.

b. The 802 conference was held on 5 June 2020, during which the military judge and the parties discussed logistical trial difficulties presented by social-distancing requirements.

c. Standby counsel also raised concerns about the viability of the 31 July trial date in light of the Convening Authority's stance regarding ROM requirements for expert witnesses, and projected ROM requirements for counsel who are executing PCS orders and have other trial commitments.

d. The military judge maintained his expectation that trial would begin on 31 July, encouraging counsel "to work with their chains of command" to arrange travel to accomplish the current trial dates.

e. Given the court's posture, the defense indicated it would likely seek a continuance of the 31 July trial date, and the court set a filing deadline of 12 June.

f. In the absence of ROM requirements, both standby counsel would be available to begin trial, as scheduled, on 31 July.

Applicable COVID-Regulations

g. On 25 March 2020, the Secretary of Defense issued a memorandum halting all travel for Department of Defense personnel and their sponsored overseas dependents for a period of 60 days. Enclosure B.

a. On 20 April 2020, the Secretary of Defense extended its stop movement order until 30 June 2020. Enclosure C.

b. On 22 May 2020, the Secretary of Defense cancelled the 20 April 2020 order, modifying the stop movement order to a "conditions-based" approach under which travel to and from certain locations would be permitted. Enclosure D.

c. On 8 June 2020, 39 states and 5 host nations were designated by the Under Secretary of Defense for Personnel and Readiness as locations for which unrestricted travel was permitted. Enclosure E.

d. The states of California and Virginia, and the country of Italy, were not on the list and, therefore, remain subject to the stop movement order. *Id.*

e. One trial counsel is located in Virginia, one standby counsel is stationed in San Diego, CA, one standby counsel is stationed in Naples, Italy, and the military judge is executing PCS orders to San Diego, CA.

f. Each of the stop movement orders have allowed for exemptions and exceptions to the policy. Exception to policy waivers can be granted for travel which is determined to be 1) mission essential; 2) necessary for humanitarian reasons; or 3) required to avoid extreme personal hardship. Waivers are approved by the first flag level officer in the traveler's chain of command. Enclosure B; Enclosure C; Enclosure D.

g. Guidance on restriction of movement ("ROM") was issued by the Chief of Naval Operations on 17 April 2020. Enclosure F.

h. In accordance with NAVADMIN 113/20, a 14-day ROM period is required for all traveler's arriving from either 1) A foreign country which has been designated by the

CDC as Level 2 or Level 3 country; or 2) a domestic location defined by the CDC to have widespread community transmission of COVID-19. *Id.*

i. As of today's date, Italy remains designated by the CDC as a Level 3 country, and each of Connecticut, California, and Virginia have greater than 40,000 cases of COVID-19. Enclosure G; Enclosure H.

Expert Witness Availability

j. The Convening Authority has previously approved the production of a defense expert in the field of forensic pathology—[redacted].

k. It is expected the [redacted] will observe witness testimony, including the testimony of the government's expert in the field of forensic pathology—[redacted]

l. [redacted] intends to consult with SN Brown during trial, and, if necessary, will testify regarding his assessment of LS1 [redacted] injuries, whether those injuries meet definitions of grievous bodily harm, and whether the injuries demonstrate a specific intent to murder LS1 [redacted].

m. On 30 April 2020, Commander, Navy Region Mid-Atlantic issued a memorandum in which he established procedures for conducting courts-martial in Groton, CT, during COVID-19 pandemic. Enclosure I.

n. One provision of that memorandum states that expert witnesses, upon arrival in the area of trial, will be subjected to a 14-day restriction on movement ("ROM"). The memo further states that experts in a ROM status will not receive pay for time spent in ROM, and experts who do not agree to the 14-day ROM will not be funded to travel. *Id.*

o. [redacted], who resides in Georgia, does not consent to a 14-day ROM period during which he cannot appear in other cases, and during which he will not be paid for his time. Enclosure J.

Counsel Availability – LCDR Davis

p. On approximately 20 February 2020, standby counsel, LCDR Bryan Davis was issued Permanent Change of Station ("PCS") orders to transfer from Naples, Italy to San Diego, CA. The orders stated that LCDR Davis should detach from Naples, Italy in July 2020 and report to his new duty station no later than August 2020. Enclosure K.

q. Due to COVID-19's impact on the availability of counsel, health concerns about holding a trial during a pandemic, and the unavailability of a key defense expert witness, the court continued the 23 March 2020 trial date.

r. While the court initially re-docketed the case to commence on 3 August 2020, the court's email to the parties on 21 April 2020 established that voir dire would commence on 31 July 2020.

s. Since the continuance of the previous trial date, the Department of Defense, the U.S. Navy, and local military leaders have issued guidance and measures aimed at curbing the spread of COVID-19.

t. As a result of those measures, LCDR Davis was informed on 1 May 2020, that his PCS would likely be delayed until August or September. Enclosure L.

u. LCDR Davis's inability to PCS prior to the 31 July trial, would require, under current guidelines, at least three ROM periods: 1) 14-day ROM in Groton, CT prior to trial; 2) 14-day ROM upon return from trial to Naples, Italy, and 3) 14-day ROM upon his PCS to San Diego.

v. To avoid that scenario, to address non-COVID-related family health issues, and to allow his child to start school in San Diego on time, LCDR Davis requested, and was granted, permission to maintain his July detach date. Enclosure L.

w. Rotator flights from the Naples, Italy to the United States typically depart twice per month—once at the beginning of the month and then two weeks later in the middle of each month. Enclosure M.

x. The 3 July 2020 rotator flight is currently full. For all persons who were unable to obtain a waiver of the DoD stop movement order to complete March, April, May, and June PCS or other official travel, this flight was the first opportunity to resume travel. *Id.*

y. LCDR Davis and LCDR Williams are currently docketed to appear at an Article 39(a) session in a separate matter in Groton, CT on 8 July 2020. Enclosure N.

z. LCDR Davis, [redacted] are confirmed as passengers on a rotator flight out of Naples, Italy, departing on 17 July. Enclosure M.

aa. [redacted] flights are at a premium because only a nominal fee is charged. *Id.*

bb. During the month of June, C-17 flights were scheduled in place of rotator flights. If C-17 flights continue to be used in lieu of rotator flights during July, there would be space for LCDR Davis, [redacted]. That flight would be scheduled to depart on approximately 5 July 2020. *Id.*

cc. The determination of whether there will be a 5 July 2020 C-17 flight will be made in the next couple of weeks. *Id.*

dd. Commercial flights between Naples, Italy and the United States have been largely unavailable since March 2020. *Id.*

ee. Limited commercial flights between Naples, Italy and the United States began in June 2020. *Id.*

ff. These limited flights have experienced widespread last-minute cancellations, and require an overnight stay at an intermediate stop in Europe. *Id.*

[redacted]

hh. NAVPTO provided LCDR Davis with the name of a commercial [redacted] company (Relocat.IT).

ii. While this company's website indicates that they are not currently [redacted] due to COVID-19 concerns, LCDR Davis was able to obtain a quote of $4,175. Enclosure O.

jj. During his PCS from San Diego to Italy in 2018, LCDR Davis paid approximately $4000 to transport [redacted] because space on the rotator was unavailable at that time. This expense is not reimbursable. Enclosure P.

kk. One portion of LCDR Davis's household goods pack-out is scheduled for 22-23 June. The second is scheduled for 30 June. Enclosure Q.

ll. LCDR Davis's lease on his residence terminates on 1 July 2020. Enclosure R.

mm. LCDR Davis and [redacted] will reside in temporary housing in Italy until PCS travel begins.

nn. LCDR Davis requested detailer assistance to have his PCS orders include an intermediate stop in Groton, CT to accommodate currently-scheduled trial dates.

oo. It was determined that combining TDY travel for trial and PCS travel was not feasible.[1]

pp. In accordance with NAVADMIN 113/20, LCDR Davis would currently be required to serve a 14-day ROM period upon his arrival at his new duty station in San Diego, and a subsequent 14-day ROM period upon his arrival in Groton, CT. Enclosure F.

Counsel Availability – LCDR Williams

qq. LCDR Williams is detailed defense counsel in the case of United States v. MAC [redacted]s. That trial is docketed for trial in San Diego, CA from 13-17 July. Enclosure S.

rr. MAC[redacted]' trial was originally docketed for 27 January 2020, and has been continued multiple times. Enclosure T.

ss. MAC[redacted] is also represented by civilian counsel. Enclosure S.

tt. Departure from San Diego, CA to Groton, CT on 18 July would not allow LCDR Williams to complete a 14-day ROM period prior to the commencement of voir dire on 31 July 2020.

uu. As of 8 June 2020, DoD's stop movement order remains in effect for California, prohibiting TDY travel to, or from, California, unless a waiver is granted. Waivers are granted for: 1) mission-essential travel; 2) humanitarian necessity; and 3) extreme personal hardship. Enclosure D; Enclosure E.

[1] The Senior Detailer indicated her willingness to discuss this matter with the court if desired in an 802 conference.

4. Law and Discussion

A. The Court Must Abate the Proceedings Until the Convening Authority Rescinds Its 30 April Memorandum As It Pertains to Expert Witnesses

CSSSN Brown's right to expert assistance has long been guaranteed by the Due Process clause, federal civilian case law, and military case law. *Ake v. Oklahoma*, 470 U.S. 68 (1985); *United States v. Garries*, 22. M.J. 288 (1986). This is especially the case in situations where the government intends to rely on an expert of its own at trial. *United States v. Lee*, 64 M.J. 213 (C.A.A.F. 2006).

At trial, the government has stated its intent to call an expert witness—[redacted]—to testify about the severity of the injuries sustained by the alleged victim in this case. Such information is central to the members' determination of whether the government satisfies its burden to establish that grievous bodily harm was inflicted, that CSSSN Brown's actions caused [redacted], or that CSSSN Brown had the specific intent to murder the alleged victim. It is imperative, therefore, that CSSSN Brown, who is proceeding *pro se*, has the ability to consult with and prepare his own expert [redacted]. [redacted] and [redacted] are the key witnesses in this trial. There is little disagreement that CSSSN Brown wielded a knife and injured LS1 [redacted]. There is, however, significant disagreement on the severity of the injuries suffered and whether the injuries provide any evidence of CSSSN Brown's specific intent to kill. These issues will be resolved through the testimony of these two expert witnesses.

The 30 April 2020 memorandum from the Convening Authority requires civilian expert witnesses to complete a 14-day ROM period prior to trial, and further indicates that the government will not pay expert fees during the ROM period, and will not pay travel fees for experts who will not serve a ROM period. Enclosure I. [redacted] has rightfully objected to the conditions imposed by the memorandum. Enclosure J. First, [redacted] notes that his recovery from [redacted] precludes him from traveling to Groton, CT two weeks prior to trial. *Id.* Second, [redacted] objects to limits imposed on his ability to make a living. *Id.* As an expert witness, he supports himself by consulting on, and testifying in, cases throughout the country. A 14-day ROM prohibits him from meaningfully participating in any other cases

during that time period. It also differs from the terms of the contract he entered into with the Convening Authority, doubling the amount of time required for the same amount of pay. While this memorandum may have been issued with noble intentions, it undoubtedly interferes with CSSSN Brown's ability to defend himself and violates his due process rights because it precludes CSSSN Brown from obtaining the expert assistance and testimony that has been the foundation of defense case for the past year.

Either abatement or the grant of a continuance would be an appropriate remedy in this situation. Abatement of the proceedings would be consistent with the court's powers under R.C.M. 703(d)(2)(B) which states that "the proceedings shall be abated if the Government fails to comply," with a court order to employ an expert. While this provision applies to the government's failure to comply with a court order to grant an expert, there should be no argument that the same remedy would also apply to the government's refusal to honor its contract with an expert it has already approved. To the extent the government seeks to raise this distinction, the defense requests the court to order production of [redacted], and then to abate if the government refuses.

Additional authority to abate or continue can be found in R.C.M. 703(e)(2) because the Convening Authority's memorandum has effectively made [redacted] unavailable, and because [redacted] assistance and testimony, as described above, is of central importance to an issue that is essential to a fair trial. There is, in fact, no issue more central to the resolution of this case. In such instances, the military judge, "shall grant a continuance or other relief in order to attempt to produce the evidence or shall abate the proceedings . . ." R.C.M. 703(e)(2).

In email and telephone correspondence between the parties, trial counsel has suggested that the Convening Authority may be willing to fly in an expert witness for 1-2 days to testify, and would otherwise limit the witness's access to the base. This concession is wholly insufficient in a typical case, but even moreso for a *pro se* client who is in pre-trial confinement. CSSSN Brown has been granted [redacted] assistance for the trial -not select portions of it. CSSSN Brown requires access to [redacted] throughout the trial to consult, to prepare to cross-examine witnesses, and to prepare to call [redacted] in the defense case in-chief. CSSSN Brown cannot meet with [redacted] prior to trial, and he cannot leave

base to meet up with [redacted] during trial. This proposal is a recipe for failure, and will certainly prevent CSSSN Brown from effectively representing himself at trial.

B. As Current ROM Requirements Preclude the Availability of Standby Counsel, the Court Should Continue the Trial Until Standby Counsel are Available.

"The military judge . . . may, for reasonable cause, grant a continuance to any party for such time, and as often, as may appear to be just." Article 40, UCMJ; *See also* R.C.M. 906(b)(1) Discussion. In its most recent continuance order, the military judge found that "the availability of standby counsel, witnesses (including a defense expert witness), COVID-19 outbreaks, the subsequent internationally-mandated travel restrictions, and DoD/DoN directives and guidelines, provide good cause to continue the trial." As the concerns previously noted by the court persist, so too does reasonable cause to grant a continuance. As described above, the defense expert has been made unavailable by the Convening Authority's COVID-policy. In addition, standby counsel are unable to be present due to ROM requirements. DoD travel restrictions remain in place for the home locations of both defense counsel, one trial counsel, and the military judge, and parties must still grapple with issues of how to socially distance members, whether court participants and members must remain masked, and what, if any, precautions are being taken to minimize the risk of transmission created by the CSSSN Brown returning to a civilian confinement facility each night of trial.

As for the availability of standby counsel, LCDR Williams is counsel of record in a contested court-martial being held on Navy Base San Diego, CA from 13-17 July. Enclosure S. That trial was originally docketed for January 2020, but has been continued multiple times. Enclosure T. The current trial dates were set prior to this court's scheduling of the 31 July trial date. Enclosure U. As civilian counsel is also involved in that case, any change to the current dates may result in a significant delay of the trial. *Id.*

Even if LCDR Williams departed San Diego for Groton on 17 July, the ROM restrictions currently in place would not allow her to appear in court until 1 August. Realistically, LCDR Williams' departure date would be 18 July, prohibiting her first appearance in court until 2 August. LCDR Williams would still not, however, have the opportunity to assist CSSSN Brown in the days leading up to the beginning of trial. Additionally, based upon information released this week, the State of California remains subject to DoD's stop movement order. As such, a flag-level determination would need to be requested and approved before LCDR Williams would be permitted to travel. Enclosure D; Enclosure E.

CSSSN Brown's other standby counsel, LCDR Davis, is also, under current ROM requirements, unavailable to begin trial on the dates set by the court. LCDR Davis has PCS orders to detach from DSO North in Naples, Italy in July and report to RLSO SW no later than 31 August. Enclosure K. To effect that PCS, LCDR Davis, [redacted], have been booked on a military rotator flight which is scheduled to depart on 17 July 2020, arriving in Norfolk, VA late at night on the same day.[2] Enclosure M. LCDR Davis would then need to drive to his new duty station in San Diego, CA, check-in with his new command, and complete a 14-day ROM period before transiting back to Groton, CT where an additional 14-day ROM period would be required. Enclosure F. Assuming 4 days of driving time, LCDR Davis could complete ROM and depart San Diego, CA on approximately 5 August. LCDR Davis and his chain of command have investigated the possibility of traveling directly to Groton from Norfolk, VA on or about 17 July following his PCS, but have been advised by JAGC detailing authorities that is not possible. LCDR Davis inquired about the availability of a rotator flight earlier in July. While a 3 July rotator is scheduled, it cannot accommodate LCDR Davis's pet. Enclosure M.

[2] In the event rotator service is not restored in July, military flights via a C-17 would be substituted, departing on approximately 19 July. C-17 flights in June, however, have departed well after the expected date of departure.

Notably, this flight would also have conflicted with a LCDR Davis's ability to appear in a separate matter on 8 July. Enclosure N.

If a C-17 flight is scheduled in lieu of the rotator flight (as occurred throughout June), LCDR Davis was told that there would be space for [redacted] on that flight, and that the flight would depart on approximately 5 July. Enclosure M. The determination of whether a C-17 will be substituted for the rotator flight will not be made, however, for a couple of weeks. Enclosure M. Assuming the 5 July C-17 is scheduled, and LCDR Davis is able to be booked on that flight with [redacted], that timeline could allow LCDR Davis to PCS with [redacted], complete ROM requirements in San Diego and Groton, and be available to begin trial one week late on 7 August.[3]

On the issue of the availability of commercial flights, a limited number of commercial flights are available in the early-July timeframe. Enclosure M. Utilization of a commercial flight, vice a military flight, requires the approval of the traveler's gaining command. Preliminary conversations with RLSO SW indicate that approval would be likely. Commercial flights, however, present a number of concerns.

First, due to COVID-19 circumstances, commercial flights are currently subject to last-minute cancellations. Enclosure M. The unpredictability of the schedule makes it difficult to project exact dates of arrival, and could potentially result in travelers being stranded at intermediate stops. Second, commercial flights require transiting multiple international airports, and require at least one overnight stop. Enclosure M. Virtually all of Europe remains an area of significant COVID-19 transmission. Civilian health agencies, the U.S. State Department, and military authorities continue to warn against commercial travel in these countries. Enclosure E.

[3] This estimated date presumes an on-time arrival in Norfolk, VA on 5 July, a 4-day drive to San Diego, CA, a ROM period from 10-24 July, travel to Groton, CT on 25 July, and a 14-day ROM in Groton, CT.

There is no question that commercial travel through Europe, including hotel stays, presents a heightened risk of COVID-19 infection compared to the use of a military flight.

Third, commercial flights cannot accommodate large animals. Enclosure M. In such scenarios, the traveler is personally responsible for contracting with a private company to arrange and fund transportation [redacted]. The recommended [redacted] company quoted LCDR Davis a fee of $4,175 to transport [redacted] from Naples, Italy to San Diego, CA. Enclosure O. As noted above, LCDR Davis was subject to a similar cost during his PCS to Naples, Italy. Enclosure P.

Finally, departing in early-July would also gap the DSO North, Officer In Charge billet in Naples, Italy, for an additional two weeks—one month total. LCDR Davis' relief (LCDR Myer) is not scheduled to arrive until early-August. Enclosure W. The Officer in Charge oversees all defense services in Europe, Africa, and Southwest Asia, including offices in Naples, Rota, and Bahrain, and is directly responsible for one civilian employee, 4 enlisted servicemembers, and 6 attorneys. In short, the operational impact of the gapped billet, the health risks for the servicemember and [redacted], and the personal cost to this servicemember establish good cause to continue existing trial dates. Notably, if current ROM requirements, persist, even a commercial departure on 1 July would not afford LCDR Davis the opportunity to appear in court on 31 July. [4]

It may be proposed that LCDR Davis should travel commercially in early July, and [redacted] should remain in temporary housing for 16 days without LCDR Davis and travel, as scheduled, on the 17 July rotator to avoid the cost of pet transport. As a preliminary matter,

[4] A 1 July departure on a commercial flight would require an overnight stay somewhere in Europe, arriving on 2 July in San Diego. A 14-day ROM period in San Diego would take place from 3-16 July with travel to Groton occurring on 17 July. A 14-day ROM period in Groton would cover 18-31 July. As noted in Enclosure R, LCDR Davis is required to appear at a lease termination appointment on 1 July, making travel impractical on that day.

this course of action does not address the heightened risk of infection to the servicemember. Second, it fails to recognize the tremendous burden it would place upon the [redacted] to complete an overseas-PCS without the sponsor. This transfer involves multiple days of travel with a [redacted] departure from an overseas military base, stops at additional military bases, possible overnight stays at overseas military bases, arrival at an American military base, an overnight stay in Norfolk, VA, a transfer to a civilian international airport, and, finally, management of arrival, transportation, and housing in San Diego, CA. Indeed, military [redacted] make many sacrifices in support of the military mission, but these sacrifices should be minimized where, as here, they can be avoided.

5. Evidence

-Enclosure A: Email from standby counsel dated 2 June 2002

-Enclosure B: 25 March Memorandum from the Secretary of Defense

-Enclosure C: 20 April Memorandum from the Secretary of Defense

-Enclosure D: 22 May Memorandum from the Secretary of Defense

-Enclosure E: 8 June Publication by the Under Secretary of Def. for Pers. and Readiness

-Enclosure F: NAVADMIN 113/20

-Enclosure G: CDC COVID-Ratings for Italy

-Enclosure H: CDC Reports of COVID cases by state

-Enclosure I: Memorandum from Commander, Navy Region Mid-Lant dated 30 April

-Enclosure J: Emails from [redacted]

-Enclosure K: LCDR Davis PCS Orders

-Enclosure L: Email correspondence with detailer dated 1 May

-Enclosure M: Email from NAVPTO dated 9 June

-Enclosure N: Trial Management Order

-Enclosure O: [redacted] Transport Quote

-Enclosure P: [redacted] Transport Fees from 2018

-Enclosure Q: Email Correspondence regarding pack-out dates

-Enclosure R: Lease Termination Letter

-Enclosure S: U.S. v [redacted] Trial Calendar

-Enclosure T: U.S. v. [redacted] Initial Trial Management Order

-Enclosure U: Email From Military Judge in U.S. v. [redacted] dated X

-Enclosure V: Travel Warnings

-Enclosure W: DSO North Gains and Losses

-Enclosure X: TMO ICO U.S. LS2 Cervil

6. Relief Requested

The Defense respectfully requests the court to abate or continue the proceedings until the Convening Authority rescinds its 30 April order. If denied, the defense requests the court to continue the proceedings until both standby counsel can appear, taking into consideration whatever ROM requirements may be in place at the time. In light of LCDR Williams' involvement in a trial from 31 August-4 September (Enclosure X), the defense requests a trial date of 14 September 2020. The court could also reserve ruling to see if the stop movement order is lifted for California, Virginia, and Italy, whether the C-17 flight option on 5 July is scheduled, and whether ROM requirements are minimized. Changes to the stop movement order and minimization of ROM requirements could allow the trial to proceed as scheduled.

[redacted]

7. Oral Argument

The Defense does not request oral argument.

[redacted]

B. M. DAVIS
LCDR, JAGC, USN
Standby Counsel

**********CERTIFICATE OF SERVICE**********

I hereby certify that a true copy of this motion was served electronically on trial counsel and the court on 12 June 2020.

[redacted]

B. M. DAVIS
LCDR, JAGC, USN
Standby Counsel

APPELLATE EXHIBIT CXXX
PAGE 15 OF 84
APPENDED PAGE

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

UNITED STATES **v.** **MICAH J. BROWN** **CSSSN/E-3** **USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO ABATE OR CONTINUE CURRENT TRIAL DATES** **19 JUNE 2020**

MOTION

Pursuant to Rule for Courts-Martial (R.C.M.) 906(b)(1), the Government requests the Court to deny the Defense's motion to abate the proceedings or continue the trial dates in the above captioned case.

SUMMARY

The Defense requested the Court abate the proceedings until Commander, Navy Region Mid-Atlantic (CNRMA) rescinds a memorandum subjecting expert witnesses to a 14-day restriction of movement (ROM) period prior to participating in a Courts-Martial. Alternately, the Defense requests a continuance of the trial dates from 31 July 2020 until 14 September 2020 to allow standby counsel to complete ROM requirements. The Defense has recently indicated an intention to modify its continuance request to begin trial on 21 September 2020. As of the date of this filing, the Defense's motion is not yet ripe, as no waivers of ROM requirements have been sought for either counsel or witnesses.

FACTS

1. On 12 June 2020, standby counsel for CSSSN Brown submitted a motion to abate the proceedings or continue the start of trial from 31 July 2020 until 14 September 2020.

2. On 12 June 2020, NAVADMIN 168/20 was issued which updated information on the stop movement order and implemented guidance for a phased, conditions-based approach to travel. (Enclosure 1)

3. Under the new conditions-based approach, travel waivers will not be necessary if the origin and destination state and installations are both deemed "green" and that status can be found by visiting [redacted] (Enclosure 1)

Appellate Exhibit CXXX
Page 1 of 9

4. If the origin and destination states and/or installations are not in a "green" status, a travel waiver will be required. (Enclosure 1)

5. On 19 June 2020, standby counsel indicated in email that they plan to amend the Defense's requested start date of trial to 21 September 2020 vice 14 September 2020.

6. Naval Submarine Base New London has initiated the process of requesting a shift in the HPCON status of the base from C to B, which, if approved, would place the installation in a "green" status. (Enclosure 2)

7. No counsel has sought a waiver for travel from Commander, Naval Legal Service Command (CNLSC).

BURDEN

The Defense bears the burden of proof by a preponderance of the evidence pursuant to R.C.M. 905(c).

LAW

Abatement of proceedings is a remedy available to the Court under R.C.M. 703(d)(2)(B) if the Government fails to comply with a court order to employ an expert. R.C.M. 906(b)(1) allows the military judge to grant a continuance upon a showing of reasonable cause. "Article 40, UCMJ, gives a military judge the discretion to grant a continuance to any party for such time as the military judge deems just."[1] "A military judge should liberally grant motions for a continuance, as long as it is clear that a good cause showing has been made."[2] "To sustain its burden, the moving party must show by a preponderance of the evidence that prejudice to a substantial right of the accused would occur if the continuance were not granted."[3]

ARGUMENT

As of the date of the filing of this response, the Defense's arguments to either abate the proceedings or continue the dates of trial until 21 September 2020 are not yet ripe.

CNRMA, the convening authority, issued a memorandum on 30 April 2020 requiring civilian experts to conduct a 14-day ROM upon arrival in Groton, CT. (Defense Enclosure I) That guidance was issued in an effort to mitigate health and safety risks during the widespread global pandemic of COVID-19 and mirrored the ROM requirements for servicemembers. Since 30 April 2020, the Navy guidance has shifted from a travel ban to a regional based travel restrictions based upon trends of COVID cases and symptoms within each state and individual

[1] *United States v. Smith*, No. 200600156, 2007 CCA LEXIS 434, at *16-17 (N-M Ct. Crim. App. Oct. 16, 2007) (citing *United States v. Allen*, 31 M.J. 572, 620 (N-M. Ct. Mil. Rev. 1990)).
[2] ." *Id.* (citing *United States v. Dunks*, 1 M.J. 254, 255 n.3 (C.M.A. 1976)).
[3] *Id.*

installations. (Enclosure 1) Although CNRMA has not rescinded the 30 April 2020 guidance, the travel restrictions are fluid and changing rapidly. The Government has asked CNRMA for clarification of this memorandum as it relates to [redacted] travel for this trial. From the Government's understanding, if both the states and nearest installations to the travel from and travel to locations are considered "green" then there will be no travel restrictions for either civilians or servicemembers. [redacted] is travelling from Georgia to Connecticut and both of those states are considered "green" for travel as of today. Naval Submarine Base New London has requested through Commander, Navy Installations Command (CNIC) to shift from an HPCON C status to a HPCON B status, which will put the installation in a "green" status if approved. (Enclosure 2) It is possible that [redacted] will be allowed to travel without a ROM period if Connecticut, Georgia, and the installations in those states are considered "green" at the time of travel. Abatement is not warranted at this time as this issue is not ripe until and unless convening authority makes the determination that [redacted] will not be allowed to travel unless he consents to a ROM period in alignment with current Navy travel restrictions.

The Defense has alternatively asked for a continuance of the start of trial from 31 July 2020 until 21 September 2020 to allow standby counsel, LCDR Bryan Davis and LCDR Sharlena Williams, to complete their respective ROM requirements as both counsel are travelling from "red" locations. This request is not yet ripe either as counsel have not sought waivers through CNLSC. The earliest LCDR Sharlena Williams will be able to begin travel from California to Connecticut is 18 July 2020 due to her role in another trial that ends on 17 July 2020. If LCDR Williams arrived in Groton, CT on 18 July 2020 and began her ROM on 19 July 2020, the ROM would be complete on 2 July 2020. LCDR Davis is scheduled to fly from Italy to Norfolk on 17 July 2020. LCDR Davis states he must then drive from Norfolk, VA to San Diego, CA to complete a 14-day ROM and check into his new command before he could travel to Groton, CT on 5 August 2020 where he would have to complete another 14-day ROM and would not be available for trial until 20 Aug 2020. Neither LCDR Davis nor LCDR Williams have requested waivers of the travel restrictions from CNLSC which may allow them to travel without ROMs. If LCDR Davis was granted a waiver for the ROM period in California and was able to travel to Groton, CT after checking in to his new command, he could be available for trial as early as 5 August 2020 even if he were to have to complete a ROM upon arrival in CT. Until waivers are sought and counsel know for sure the ROMs will be enforced, the Defense request for continuance is not ripe for consideration by the Court.

The Government is amenable to shifting the start date of trial from 31 July 2020 until 10 August 2020. This would allow all counsel to complete ROMs, if required, upon arrival at the site of the trial. The Government is still working to determine the availability of its witnesses during the months of August and September. As of 19 June 2020, the witnesses from the [redacted] will be available well into August 2020 to support a shift in the start date to 10 August 2020.

EVIDENCE

Enclosure 1: Conditions-Based Movement Fact Sheet
Enclosure 2: LT [redacted] SJA, email dtd 16 June 2020

ORAL ARGUMENT

The Government does not request oral argument.

RELIEF REQUESTED

The Government respectfully requests the Court DENY the Defense's motion to abate the proceedings or to continue the trial dates until 21 September 2020.

[redacted]
S. E. CUMMINGS
LCDR, JAGC, USN
Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion was served electronically on standby counsel and forwarded to Wyatt Detention Facility for service on the accused on 19 June 2020.

[redacted]
S. E. CUMMINGS
LCDR, JAGC, USN
Trial Counsel

[ ]Y-MARINE CORPS TRIAL JUDICI[ ]
NORTHERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **MICAH J. BROWN** **CSSSN/E-3 USN**	**GOVERNMENT MOTION FOR REMOTE TESTIMONY** **15 JULY 2020**

MOTION

1. The Government moves this Honorable Court to approve remote testimony under Rule for Courts-Martial (R.C.M.) 703 and Military Rules of Evidence (M.R.E.) 804 based on the unavailability of Defense witnesses due to the current health pandemic. If the Court denies the Government's request for remote testimony, the Government respectfully moves this Court to continue the case until early 2021, with a scheduling conference to be held in December to ascertain witness availability and review the status of the health and travel situation in the United States.

BURDEN

2. If opposed, the Accused, as the proponent of the testimony of the requested witnesses, has the burden of proof. R.C.M. 905(c). That burden is by a preponderance of the evidence.

FACTS

3. CSSSN Brown is charged with one specification of attempted premeditated murder, one specification of attempted unpremeditated murder, and one specification of aggravated assault with intent to inflict grievous bodily hard for stabbing LSS2 [redacted] approximately a dozen times in the torso, neck, face, head and arms while underway onboard the [redacted] on 31 July 2018. The maximum punishment he could face is up to life imprisonment if convicted of one of the specifications of attempted murder, or 5 years if convicted of the aggravated assault. CSSSN Brown has been in pretrial confinement since the offense.

4. CSSSN Brown requested the following witnesses for trial: NCIS Special Agent [redacted] NCIS Special Agent [redacted] and the Government approved the witnesses (prior to the pandemic). (Encl. 1)

5. The trial has been continued five times since the originally scheduled trial date in summer 2019 for various reasons, to include: the accused's request for psychological evaluations, the accused's expert witness availability, the accused's election to represent himself in late 2019, and changes in the operational schedule of witnesses from the accused's command.

6. In mid-March 2020, the global health pandemic due to the novel coronavirus caused much of the United States to shut down. The trial in this case was scheduled to begin on 23 March 2020 and was continued by the military judge to 3 August 2020, because of concerns about the health and safety of witness and counsel travel, to include the concerns and availability of the Defense's

APPELLATE EXHIBIT CXXXIII
PAGE 1 OF 60
APPENDED PAGE

expert, [redacted]. (Encl. 2)

7. [redacted] is a forensic pathologist who resides in Georgia. He is on the Defense witness list and will testify that the wounds inflicted on the victim were superficial. He will suggest that it is possible the accused was holding the knife in his hand sideways while punching the victim.

8. [redacted] is presently [redacted] which causes him to be in a significant amount of pain when moving around, making travel and sitting for a long time in a courtroom burdensome. He is scheduled to have [redacted] in late September or early October. In addition, he has expressed concerns about the current spread of COVID 19 in the United States as it relates to his health should he travel and contract coronavirus. (Encl. 3)

9. [redacted] is a trauma surgeon currently working as [redacted] in Jacksonville, Florida. She is expected to testify that she treated the victim, LSS2 [redacted], the day after his injuries. She examined LSS2 [redacted], [redacted], and ordered a [redacted] to ensure no internal injuries were present. She will further testify that, although a trauma alert was ordered, she did not consider his injuries to be life threatening. On Friday, 10 July 2020, the Government received a letter from [redacted] employer describing the challenges associated with [redacted] traveling for the trial given her status as an essential health care worker both due to time away from patients during trial and a mandatory restriction of movement period (14 days) upon her return before she would be allowed back to work. (Encl. 4)

10. Special Agent [redacted] is presently assigned in Brazil, a country with a high rate of coronavirus cases. Agent [redacted] interviewed several witnesses, to include the victim, during the investigation. All relevant witnesses that he interviewed will be physically present at trial. The interview of the victim was videotaped. In addition, all of the witnesses that Agent [redacted] interviewed had previously provided written statements to a command investigator while still onboard the boat, shortly after witnessing the assault. The Staff Judge Advocate for NCIS emailed trial counsel notifying them of the significant challenges that NCIS, and Agent [redacted] personally, would experience if the agent were ordered to travel to Groton, Connecticut. Agent [redacted] is available for remote testimony. (Encl. 5)

11. NCIS Special Agent [redacted] is currently stationed in Florida in the North Florida counterintelligence task force. He has operational commitments until 28 August, however could be available for remote testimony. Agent [redacted] only involvement in this case was interviewing Chief [redacted], an eyewitness to the alleged offenses who will be physically present at trial. He took no other action in the case. (Encl. 6)

12. CSSSN Brown has been informed of the issues with these four witnesses. He expressed his desire, both through his stand-by counsel and directly to trial counsel on a phone conference on 5 July 2020, to ***both*** go to trial on 3 August ***and*** have all of his witnesses physically present for testimony. (Encl. 7)

13. The trial counsel and defense counsel, (and presumably the military judge) have all been

approved for travel to Groton by the Deputy Judge Advocate General of the Navy, RADM Darse E. Crandall, JAGC, USN.

14. The Government requested three "first flag" level waivers for out of area military witness travel and are currently awaiting answers on two of them.

15. All witnesses stationed onboard the [redacted] are available to testify during the month of August. They are also available during the month of October, but their schedule is consistently in flux and is uncertain past October.

16. The state of Connecticut is encouraging a 14-day restriction of movement for travelers to the state from 22 states with a 10% or higher positivity rate.[1]

17. The state of Connecticut order contains exceptions which the Government interprets as applying to civilian witnesses traveling on invitational travel orders or subpoenas for a courts-martial. The leadership at Naval Submarine Base New London has expressed a desire for out of state civilians to comply with the state order but ultimately deferred to the convening authority with regard to approval of travel and requirement to comply with the state order. (Encl. 8)

18. Several states are experiencing increases in COVID 19 (the disease caused by the novel coronavirus) cases. [2] Many states have paused plans to reopen and are seeing additional strains on medical facilities, to include Florida and Georgia. Recently, Florida hit an all-time high of over 15,000 positive COVID 19 cases in one day.[3] In addition, Brazil is second in the world (behind the United States) for number of deaths from the coronavirus.[4]

19. In this unprecedented time, State and Federal entities are grappling with how to safely conduct jury trials during the pandemic and comply with the constitutional and statutory rights of the accused. The United States District Courts recently issued a guide, which briefly notes the importance of conducting trials during this time (especially when accused are in a pretrial confinement status) and recommends that Courts consider using live video streaming testimony of witnesses when in compliance with rules and the Constitution. (Encl. 9).

LAW

20. Parties are entitled to the production of witnesses when the testimony would be relevant and necessary. R.C.M. 703(b)(1). Along with Article 46 of the Uniform Code of Military Justice (U.C.M.J.), these rules implement the accused's 6th amendment right to compulsory process.

---

[1] https://portal.ct.gov/Coronavirus/Covid-19-Knowledge-Base/Travel-In-or-Out-of-CT, Accessed July 15, 2020. And https://www.npr.org/sections/health-shots/2020/03/16/816707182/map-tracking-the-spread-of-the-coronavirus-in-the-u-s, Accessed July 15, 2020.

[2] https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/index.html, Accessed July 15, 2020.

[3] Zaragovia, Veronica, "Florida Shatters U.S. Record In Largest Single-Day Increase In COVID-19 Cases", July 12, 2020, https://www.npr.org/2020/07/12/890253787/florida-shatters-u-s-record-in-largest-single-day-increase-in-covid-19-cases, Accessed July 15, 2020.

[4] https://coronavirus.jhu.edu/map.html, Accessed July 15, 2020.

However, parties are not entitled to witnesses who are unavailable within the meaning of M.R.E. 804. R.C.M. 703(b)(3). M.R.E. 804(a)(4) recognizes witness unavailability in multiple situations to include, "then-existing infirmity, physical illness, or mental illness…"

21. When such circumstances arise, the Court must evaluate whether the testimony each witness would provide is "of such central importance to an issue that is essential to a fair trial" and whether or not adequate substitutes for in-person testimony will suffice. If no adequate substitute for the testimony exists, the military judge shall grant a continuance, or other relief in order to attempt to secure the witness' presence or shall abate the proceedings, unless the availability of the witness is the fault or of could have been prevented by the requesting party. R.C.M. 703(b)(3).

22. The 6th amendment right to in-person confrontation does not apply to the accused's own witnesses. However, the 6th amendment right to compulsory process is applicable here with regard to the evaluation of essentiality of these witnesses.

23. The military judge has the discretion to approve alternatives to live in-person testimony and is best suited to assess the particular facts and circumstances of any given case. R.C.M. 703(b)(3).

24. Two military cases discuss (non-exhaustive) factors that judges should consider when evaluating alternatives to testimony of essential witnesses. They include: 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 appearance of the witness, such as deposition, interrogatories or previous testimony. U.S. v. Tangpuz, 5 M.J. 426, 429 (1978). And also: the importance of the testimony, the amount of delay necessary to obtain the in-court testimony, the trustworthiness of the alternative to live testimony, the nature and extent of earlier cross-examination, the prompt administration of justice, and any special circumstances militating for or against delay. U.S. v Boswell, 36 M.J. 807, 810 (1993).

ARGUMENT

A. Special Agents [redacted] anticipated testimony is minimally relevant (if at all) and is not essential to a fair trial in this case.

25. The Defense's proffer of Agent [redacted] and Agent [redacted] testimony in their request for witnesses is vague and does not establish the necessity for these witnesses' production. The Government would have been justified in denying their approval based on the standard of relevance and necessity under R.C.M. 703. However, at the time of the request, both agents were available and the global health situation was not what it is today and could not have been predicted.

26. Agent [redacted] interviewed just one witness. The defense requests generically states that he will [redacted]

[redacted] Yet, they point to no specific investigative action at issue. The analysis for this witness should stop there. However, if the Court disagrees, it should analyze whether or not Agent [redacted] potential testimony is of such central importance to an issue that is essential to a fair trial. Testimony that is conditioned on the uncertainty of a witness testifying differently than a previously uttered statement is not of such central importance to an issue that is essential to a fair trial. The witness interviewed by Agent [redacted] (Chief [redacted]) provided a statement to a command investigator even before the interview by NCIS. Chief [redacted] will testify in person and the accused will be able to cross-examine him utilizing his prior statement to the command investigator, the summary of interview written by Agent [redacted], and/or the agent's notes. Any testimony provided by Agent [redacted] would likely be no more than five minutes and would be minimally probative on the issue of the credibility of the witness. Agent [redacted] is currently assigned to a unit in Florida, arguably the new epi-center of the coronavirus outbreak in the United States. Ordering this agent to travel to Connecticut in this environment and potentially expose others to a deadly virus, or expose himself through air travel, is not worth the risk given the lack of materiality of his anticipated (and quite frankly, unlikely) testimony.

27. Agent [redacted] should be considered unavailable under R.C.M. 804(4) due to the health situation around the globe. While he does not presently have a health condition that precludes his travel, the risk to himself and others as well as the risk to the NCIS mission were he to travel from Brazil to Connecticut for trial is serious. This is a reasonable interpretation of unavailability under the rules. While Agent [redacted] interviewed several witnesses, all the relevant and necessary percipient witnesses will be present in Court. Like in the case of Chief [redacted], all witnesses provided previous statements to a command investigator before speaking to NCIS. Such uncertain, conditional testimony is not of such central importance to an issue that is essential to a fair trial in this case.

28. As the Court is well aware, this is not a case where there is a question of who committed the crime, or motives to fabricate on the part of the victim or certain witnesses. The central issue in this case is whether or not CSSSN Brown intended to kill LSS2 [redacted] when he stabbed him multiple times in the galley onboard the boat, and whether or not when he did so he intended to inflict grievous bodily harm. Agent [redacted] anticipated testimony has no bearing on these central issues. Even if the Court were to find his testimony essential, a substitute (remote VTC testimony) is available and is an adequate alternative when balancing the other competing factors of proceeding with trial in a timely manner in a global health pandemic, especially given the accused's status in pretrial confinement. Today, particularly because most of the world has operated in a remote environment for the past five months, there is little to no chance that jury members (especially upon proper instruction by the military judge) would give any less weight to the proposed remote testimony.

B. [redacted] testimony is essential to a fair trial for CSSSN Brown. However, remote testimony is an adequate substitute for their in-person testimony.

29. [redacted] treated the victim a day after the attack and will describe her medical assessment of the wounds suffered by LSS2 [redacted] The medical records themselves will be offered into

evidence by the Government with a business record affidavit. The accused seeks to call [redacted] for one purpose – to explain the use of the term "trauma alert" in multiple locations in the records. In pretrial interviews, [redacted] described the language in the report about life threatening injuries to be standard language required in reports for billing purposes. She will state that she did not necessarily consider LSS2 [redacted] injuries to be life threatening at the time she treated him. [redacted] anticipated testimony will be used to support the accused's contention that the injuries do not rise to the level of "intent to commit grievous bodily harm", an element the Government is required to prove and a factual issue in dispute. She should be deemed unavailable under M.R.E. 804(4) based on the physical illnesses that are impacting her patients and her essentiality as a first responder in this pandemic.

30. While the Government agrees that this is essential testimony for the accused to present, an adequate substitute is available for [redacted] in-person testimony pursuant to R.C.M. 703(b)(3). [redacted] has offered to appear via VTC to present such testimony. The military judge could provide the members with an instruction that they should not view [redacted] testimony any differently than in-person witnesses and that her absence is due solely to her necessity to continue to provide essential health surfaces as a trauma surgeon in this time of unprecedented medical needs in a global health pandemic in one of the nation's hot spots of the outbreak. Even absent a jury instruction, surely members will understand this need in light of the global events of the last five months. VTC is a trustworthy alternative to live testimony, especially for a professional witness such as a trauma surgeon. The jurors will be able to clearly see and hear [redacted] to evaluate her credibility. VTC is not a novel technology. All jurors will be familiar with this type of communication, especially in light of its increased necessity and usage during the pandemic. The likelihood that this will impact their assessment of this witness' credibility or testimony in general, thus prejudicing the accused, is extremely low.

31. [redacted] is a forensic pathologist who has been consulting with the Defense team for the last year. He is expected to provide his opinion on the severity of the wounds inflicted by CSSSN Brown on LSS2 [redacted]. The Government readily concedes that his opinion is essential to a fair trial for CSSSN Brown. [redacted] has a significant medical condition that precludes him from traveling and participating in person at the hearing. His condition places him squarely in the situation contemplated by M.R.E. 804(a)(4). The same factors should be applied as discussed above with [redacted]. Even though his testimony will be on the merits in the accused's case and is important to his theory, VTC is a reliable method for providing [redacted] testimony to the jury. The courtroom is equipped with technology whereby [redacted] can also properly conduct his work as an expert consultant during other parts of the case. He can listen in on the testimony of the Government's expert forensic pathologist via phone and he can similarly consult with the accused and counsel via phone during breaks.

32. Because CSSSN Brown has been in pretrial confinement for two years, has expressed a desire to go to trial in August and opposes a continuance, and in light of the familiarity all jurors are likely to have with VTC, the likelihood remote testimony will result in unfairness to the accused is extremely low. Courts have long recognized depositions as suitable alternatives to in person testimony when witnesses are unavailable. R.C.M. 702. Live, remote testimony in many ways is more effective and impactful to jurors as they get to see and hear the witness in real time

and ask their own questions.

33. In occasional situations, justice requires flexibility -as long as the Constitutional and statutory rights of the parties can be complied with. This is just such a case. These are unprecedented times with very real, very serious, risks to the health and safety of all participants- some more than others. As courts have previously emphasized, the totality of the circumstances and the unique factors of a given case must be analyzed by the military judge. When applying the factors in *Tagpuz* and *Boswell,* the unique procedural situation in this case clearly weighs in favor of allowing remote testimony.

C. CSSSN Brown's request to proceed to trial on 3 August is an important factor to be weighed in evaluating approval for remote testimony.

34. CSSSN Brown was informed of the unavailability of the four witnesses described above. It has been explained to him that it is unlikely we can proceed on 3 August with trial, if the witnesses cannot travel to Connecticut. Yet, he continues to state his desire to go to trial on 3 August 2020 ***and*** have all of his witnesses in person. His requests are incongruent, leaving the Court to weigh which requested right of the accused is more important. CSSSN Brown may argue to the Court that abatement is the only option here. However, abatement should be a last resort considered by this Court.

35. CSSSN Brown has been in pretrial confinement since 1 July 2018. If the Court were to continue this case, it is unclear as of now when the unavailable witnesses will next be available as their status is tied to the global health pandemic. This factor should weigh heavily in the Court's evaluation of the case. Although no speedy trial demand has been formally made by the accused, his request places at the forefront the need for prompt administration of justice in this case. Rate of infection across the United States is increasing and there is no guarantee that it will decrease this fall. In addition, though experts are working toward vaccines, there is also no date certain for such to arrive for the general public. It is very possible that if the Court does not allow for remote testimony in this instance, there will be a significant delay to obtain the witnesses' in-person testimony. In light of the uncertainty of the global situation, the availability of all other necessary witnesses, the accused's pretrial confinement status, and the length of time this case has been pending, the Court should permit remote testimony and provide proper instructions to the jury.

RELIEF REQUESTED

36. The Government respectfully requests that this Honorable Court approve its motion and allow for remote testimony of the aforementioned witnesses.

37. In the alternative, if the Court decides remote testimony is not an adequate substitute for the essential witness testimony, the Government respectfully requests the Court continue the case to no earlier than January 2021 to allow for significant improvements to be made to the health and safety situation in this country.

38. The Government offers the following documentary evidence in support of its motion:

Enclosure 1: Defense witness request and Government Response
Enclosure 2: Military Judge's email wrt continuance dtd 13 March 2020
Enclosure 3: [redacted] email wrt trial dates dtd 8 Jul 20
Enclosure 4: Email from [redacted] employer with subpoena and letter dtd 10 Jul 20
Enclosure 5: NCIS SJA email wrt Agent [redacted] dtd 7 Jul 20
Enclosure 6: Agent [redacted] email dtd 8 Jul 20
Enclosure 7: Email from Defense with CSSSN Brown's position on a continuance dtd 9 Jul 20
Enclosure 8: Email from Naval Submarine Base New London XO dtd 9 Jul 20
Enclosure 9: United States Courts report on jury trials during COVID

39. The Government does not request oral argument on this motion. However, if no response is filed by the accused, the Government requests an R.C.M. 802 conference on the matter and requests the Court specifically ask CSSSN Brown for his verbal response.

[redacted]
Courtney E. Lewis
CDR, JAGC, USN
Assistant Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion was served electronically on stand-by defense counsel, forwarded to Wyatt Detention Facility for service on the accused, and the Court on 15 July 2020.

[redacted]
Courtney E. Lewis
CDR, JAGC, USN
Assistant Trial Counsel

APPELLATE EXHIBIT CXXXIII
PAGE 8 OF 60
APPENDED PAGE

VY-MARINE CORPS TRIAL JUDICIARY
NORTHERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **MICAH J. BROWN** **CSSSN/E-3 USN**	**SUPPLEMENT TO GOVERNMENT MOTION FOR REMOTE TESTIMONY** **18 JULY 2020**

MOTION

1. This supplements the Government's motion for remote testimony filed on 15 July 2020 based on recently received information regarding a subsequent NCIS agent who is unavailable for trial.

BURDEN

2. The Accused, as the proponent of the testimony of the requested witnesses, has the burden of proof. R.C.M. 905(c). That burden is by a preponderance of the evidence.

FACTS

3. Special Agent [redacted], was requested by the Defense and approved by the Government prior to the global health pandemic.

4. Agent [redacted] only action in this case was to interview two witnesses, both of whom will be physically present to testify in the Government's case. She would only provide potential impeachment testimony.

5. On 17 July, 2020, the Government received an email from Agent [redacted] supervisor stating that due to her duties in August as well as her location (Florida) NCIS considers her unavailable for testimony and is not willing to approve her travel given the current COVID situation.

ARGUMENT

6. The Government relies on the law and argument section in the motion filed on 15 July, and adds the following:

7. Agent [redacted] does not meet the requirements for witness production under R.C.M. 703. If the Court deems her relevant and necessary, her circumstances warrant of finding of unavailability under M.R.E. 804(4). Any potential impeachment testimony is not of such central importance to the case that would make her an essential witness in this case and remote testimony (if any) should be allowed.

RELIEF REQUESTED

8. The Government respectfully requests the Court considered the additional factual information provided when considering its motion for remote testimony.

APPELLATE EXHIBIT CXXXIV
PAGE 1 OF 3
APPENDED PAGE

9. The Government offers the following documentary evidence in support of its motion:

Enclosure 1: NCIS email wrt Agent [redacted] 17 Jul 20

10. The Government does not request oral argument with regard to the originally filed motion or this supplement.

[redacted]
Courtney E. Lewis
CDR, JAGC, USN
Assistant Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion was served electronically on defense counsel, the accused, and the Court on 18 July 2020.

[redacted]
Courtney E. Lewis
CDR, JAGC, USN
Assistant Trial Counsel

APPELLATE EXHIBIT CXXXIV
PAGE 2 OF 3
APPENDED PAGE

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

UNITED STATES OF AMERICA **v.** **MICAH BROWN** **CSSSN USN**	**Defense Response To The Government's Motion for Remote Testimony** **27 July 2020**

1. Nature of Motion.

Pursuant to Article 46, Uniform Code of Military Justice (UCMJ), and Rule for Courts-Martial (R.C.M.) 703(b)(1), the accused opposes the government motion for remote testimony.

2. Burden of Proof.

As the moving party, the government has the burden of proof by a preponderance of the evidence.

3. Discussion

Rule for Court-Martial 703(b)(1) states, "Each party is entitled to the production of any witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary." The military judge may authorize remote testimony "[w]ith the consent of both the accused and the Government . . ." *Id.* The accused, however, does not consent to remote testimony and desires to have all relevant and necessary witnesses physically produced for trial, beginning on 3 August 2020. As such, the government's motion should be denied.

APPELLATE EXHIBIT CXXXVI
PAGE 1 OF 2
APPENDED PAGE

[redacted]
MICAH BROWN
CSSSN USN

CERTIFICATION OF SERVICE

A true copy of this motion was served on opposing party via electronic email on 27 July 2020.

[redacted]
MICAH BROWN
CSSSN USN

APPELLATE EXHIBIT CXXXVI
PAGE 2 OF 2
APPENDED PAGE

[ARMY]-MARINE CORPS TRIAL JUDICIARY
NORTHERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **MICAH J. BROWN** **CSSSN/E-3 USN**	**GOVERNMENT RESPONSE TO MOTION TO QUASH SUBPOENA FOR DR. [redacted]** **31 JULY 2020**

MOTION

1. The Government hereby provides its position to this Honorable Court regarding the pending motion to modify or quash the subpoena for [redacted] The Government concurs with the rationale contained in the 31 July 2020 filing by Inpatient Services and its employee, [redacted] and believes the subpoena should be modified.

BURDEN

2. The burden is on the petitioner by preponderance of the evidence.

FACTS

3. The Government offers no additional facts and concurs with those cited in the petitioner's motion.

LAW

4. RCM 703(g)(3)(G) states:

If a person subpoenaed requests relief on grounds that compliance is unreasonable, oppressive, or prohibited by law, the military judge ...shall review the request and shall –

(i) Order that the subpoena be modified or quashed, as appropriate; or
(ii) Order the person to comply with the subpoena.

ARGUMENT

5. The Government invites the Court's attention to its argument for remote testimony in its 15 July filing and respectfully requests this Court grant the petitioner's motion in part by modifying the subpoena to allow for remote testimony. Requiring [redacted] to travel to Connecticut given the state of the health pandemic in this country (particularly in Florida where [redacted] practices medicine) would be unreasonable and have detrimental effects on the patients in the health care system in which she operates.

APPELLATE EXHIBIT CXXXVIII
PAGE 1 OF 2
APPENDED PAGE

RELIEF REQUESTED

6. The Government respectfully requests that this Honorable Court modify the subpoena to [redacted] to allow for remote testimony. In the alternative, if the Court does not believe remote testimony is sufficient, the Government requests this Court quash the subpoena and grant a continuance.

[redacted]
Courtney E. Lewis
CDR, JAGC, USN
Assistant Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion was served electronically on stand-by defense counsel, forwarded to Wyatt Detention Facility for service on the accused, and the Court on 31 July 2020.

[redacted]
Courtney E. Lewis
CDR, JAGC, USN
Assistant Trial Counsel

APPELLATE EXHIBIT CXXXVII
PAGE 2 OF 2
APPENDED PAGE

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

UNITED STATES OF AMERICA **v.** **MICAH BROWN** **CSSSN USN**	**Defense Motion to Abate and Response to [redacted] Motion to Quash** **31 July 2020**

1. Nature of Motion.

Pursuant to Article 46, Uniform Code of Military Justice (UCMJ), and Rule for Courts-Martial (R.C.M.) 703(b)(3), the accused requests abatement of the proceedings until [redacted] and [redacted]—witnesses of central importance—can be produced.

2. Burden of Proof.

As the moving party, the defense has the burden of proof by a preponderance of the evidence.

3. Facts

a. The government has previously agreed to produce at trial [redacted], an expert in forensic pathology, and [redacted], the emergency room doctor who treated LSS2 [redacted].

b. In its 15 July filing for remote testimony, the government conceded that both witnesses are, not only relevant and necessary, but "essential for a fair trial for CSSSN Brown."

APPELLATE EXHIBIT CXXXIX
PAGE 1 OF 5
APPENDED PAGE

c. If called as a witness, [redacted] would testify that the injuries sustained by LSS2 [redacted] do not suggest that CSSSN Brown had pre-meditated the attack, or was attempting to kill or inflict grievous bodily harm on LSS2 [redacted]. Rather, the injuries are consistent with a disorganized, flailing attack in which CSSSN Brown was likely punching LSS2 [redacted] with a knife in his hand rather than actively trying to stab LSS2 [redacted]

d. If called as a witness, [redacted] would testify that LSS2 [redacted] injuries were not life threatening, and that he generally appeared to be in good health.

e. The parties and the court received documentation from [redacted] physician describing significant health concerns that preclude [redacted] from traveling for trial, including conditions which make him susceptible to COVID-19, and [redacted] which inhibits his ability to walk and requires the use of [redacted].

f. Today, [redacted] through counsel, filed a motion to quash her subpoena. As of this filing, no ruling on this motion has been made. [1]

g. No writs for attachment have been requested or issued for either [redacted]

h. The government has indicated that it will call [redacted] a forensic pathologist, as an in-person witness at trial to testify about the severity of the injuries sustained by LSS2 [redacted]

i. The government has also indicated that it intends to introduce medical records associated with [redacted] treatment of LSS2 [redacted]

[1] CSSSN Brown maintains his position that all witnesses, and particularly those who are of central importance to his trial, should be physically produced. Failure to do so violates his constitutional rights to due process.

4. Discussion

A. Due to the Unavailability of Witnesses Who Are of Central Importance to Issues Essential to a Fair Trial, the Court Should Abate the Proceedings Until the Witnesses Can be Physically Produced

Rule for Court-Martial 703(b)(1) states, "Each party is entitled to the production of any witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary." In cases of unavailability, however, "if the testimony of a witness who is unavailable is of such central importance to an issue that it is essential to a fair trial, and if there is no adequate substitute for such testimony, the military judge shall grant a continuance or other relief in order to attempt to secure the witness' presence or shall abate the proceedings, unless the unavailability of the witness is the fault of or could have been prevented by the requesting party." R.C.M. 703(b)(3). Also instructive is R.C.M. 703(c)(2)(D) which states, "If the military judge grants a motion for a witness, trial counsel shall produce the witness or the proceedings shall be abated."

Here, the government will not, and cannot, produce either [redacted]—two witnesses the government has conceded are "essential to a fair trial." Given their unavailability, the court must fashion an appropriate remedy to ensure that CSSSN Brown rights to a fair trial are protected. Abatement is appropriate in this instance where, due to COVID-19 considerations, no future trial date can be ascertained and where two witnesses who are of central importance to issues essential to a fair trial cannot be produced. *United States v. Eiland,* 1993 CMR LEXIS 666 (holding abatement was proper when two central witnesses could not be produced for trial); *United States v. Davis,* 29 M.J. 357, 360 (1990) (holding where a witness of central importance is unavailable, the accused should "elect" either a continuance or an abatement.).

B. The Court Should Deny [redacted] Motion to Quash

As stated previously, CSSSN Brown asserts his Constitutional rights to Due Process to present a complete defense and to have relevant and necessary witnesses physically produced for trial. While the defense recognizes the challenges and difficulties presented by COVID-19, those challenges cannot become a basis to violate the accused's Constitutional rights or to violate the Rules for Courts-Martial. [redacted] has not sought exceptions to the quarantine requirements she cites in her motion. As such, it is premature, and potentially incorrect, to assert that her presence at trial necessarily violates any rule or policy.

Remote testimony is also unfeasible. Rule for Court-Martial 703(b)(1) states, "Each party is entitled to the production of any witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary." The military judge may authorize remote testimony "[w]ith the consent of both the accused and the Government . . ." *Id.* As the accused does not consent, there is no authority which permits the court to authorize remote testimony for this witness.

5. Oral Argument

If the court denies this motion, the accused requests to be heard on the record.

[redacted]

MICAH BROWN
CSSSN USN

APPELLATE EXHIBIT CXXXIX
PAGE 4 OF
APPENDED PAGE

CERTIFICATION OF SERVICE

A true copy of this motion was served on opposing party and the court via electronic email on 31 July 2020.

[redacted]
MICAH BROWN
CSSSN USN

APPELLATE EXHIBIT CXXXIX
PAGE 5 OF 5
APPENDED PAGE

ARMY-MARINE CORPS TRIAL JUDICIARY
NORTHERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **MICAH J. BROWN** **CSSSN/E-3 USN**	**GOVERNMENT RESPONSE TO MOTION FOR ABATEMENT** **3 AUGUST 2020**

MOTION

1. The Government respectfully moves this Honorable Court to deny the Defense's motion for an abatement. If the Court does not approve remote testimony as an adequate substitute for [redacted] testimony, then the Government respectfully requests the Court consider a continuance to 5 October. If a continuance is granted until October, the Government also moves the Court to order a deposition of [redacted] as it is foreseeable that she will not be available for trial in October. The Government will appoint a new expert forensic pathologist for the Accused to consult and be available for potential testimony in October as well. If none of these courses of action satisfies the military judge, then the Government requests a continuance until at least 1 February to allow for both [redacted] convalescence and the availability of a vaccine against the coronavirus. With this plan, the Government requests the ordering of depositions of 8 military witnesses that will not be available after October until possibly summer of 2021.

BURDEN

2. The burden is on the Defense by preponderance of the evidence to show why abatement is the appropriate remedy for the unavailability of two of its own witnesses.

FACTS

3. The Government invites the Court to consider its fact section in its 15 July motion for remote testimony when considering the pending motion to abate.

4. The Government concurs with the facts cited in Defense's 31 July motion for abatement and offers the following additional facts.

5. The latest reporting on a coronavirus vaccine is optimistic and targets late 2020 for completion, and early 2021 for distribution to essential health workers and at risk populations (categories both [redacted] fit).[1]

6. Courts across the country have delayed all jury trials, including criminal trials until conditions

[1] Schwartz, Matthew, "Fauci Says He's 'Optimistic' Americans Will Get Coronavirus Vaccine Next Year", July 31, 2020, https://www.npr.org/sections/coronavirus-live-updates/2020/07/31/897728431/fauci-optimistic-americans-will-get-coronavirus-vaccine-next-year

APPELLATE EXHIBIT CXL
PAGE 1 OF 8
APPENDED PAGE 14

are safer. In Chesapeake, Virginia, the Courts are tentatively scheduled to open for jury trials in October 2020, and will be working through a potentially year-long backlog to complete cases. In Connecticut (the state in which this trial is pending) jury trials are suspended and several categories of appearances have been moved to remote platforms. [2] (Encl. 1)

7. To date, Defense has not demanded speedy trial. But rather has requested and been granted three continuances, whereas the Government has requested and received one based on availability of operational witnesses.

8. [redacted] has been on [redacted] and he asserts it does not affect his ability to testify competently. He has completed testified at several remote depositions since March.

LAW

9. The Government respectfully invites the Court to consider law cited in its motion for remote testimony filed on 15 July 2020.

ARGUMENT

10. The Accused will receive a fair trial if [redacted] testifies remotely. Given the importance of her job to the health and welfare of people in [redacted], Florida, enforcement of a subpoena against her would be unreasonable and oppressive. As previously argued in other pleadings, it is highly unlikely that members would view her testimony as any less credible given the current environment.

11. The Accused is entitled to adequate expert assistance during trial from his forensic pathologist, however the currently appointed expert is unavailable to testify in person pursuant to M.R.E. 804(a)(4)[redacted] physician raised questions in her letter regarding [redacted] cognitive ability to consult and testify competently based on [redacted]. Witnesses can and have testified while on [redacted] in court proceedings, provided they are deemed competent. The military judge can and should make a legal determination as to [redacted] competence to assist as well as testify for the Defense. Accommodations could be made regarding the time of day [redacted] testifies to maximize his mental cognition and reduce impact of his [redacted]. As previously argued in other filings, it is highly unlikely that the members will view remote testimony in this current environment differently than in person. As such, the Accused will not be prejudiced by his expert providing testimony via video teleconferencing.

[2] Fox, Andy "Chesapeake prepares to resume trials, possibly in October", July 14, 2020 https://no-click.mil/?https://www.wavy.com/news/local-news/chesapeake/chesapeake-prepares-to-resume-jury-trials-possibly-in-october. And: https://jud.ct.gov/LawLib/covid19-faqs.htm#7, accessed August 2, 2020.

12. If the Court agrees that the witnesses are unavailable for in person testimony and finds that remote testimony for one or both of these witnesses does not adequately protect the Accused's right to a fair trial, the answer is not automatically abatement. The Defense reliance on *Eiland* supporting that remedy is misplaced. 39 M.J. 566 (1993). In *Eiland,* the proposed adequate substitute was a stipulation of fact and the Court did not discuss any other available alternative to in-person testimony. Here the Court has the option to analyze remote testimony under the particularly rare circumstances of a pandemic as well as exploring a continuance.

13. The Accused has requested and been granted three continuances and he has not demanded speedy trial. These requested continuances have significantly contributed to the overall length of time this case has been pending. In this unprecedented time, Courts all across the country are experiencing continuances for criminal jury trials. Here, if the case must be continued to October or even to late winter/early spring 2021, it will be no different than what is occurring with criminal defendants all across the country; many of them presumably pending serious criminal charges.

14. The serious crimes the Accused faces carries a maximum punishment of life in prison. A case involving much less serious crime such as unauthorized abuse, drug abuse, or larceny may not be evaluated in the same manner. But, in this case the Accused executed a brutal attack on LSS2 [redacted] while on a submarine that was underway, under water. A two or 6 month continuance based on the unavailability of the witnesses and the Accused's refusal to accept remote testimony is not unreasonably long for an attempted murder case, especially in the midst of a pandemic. While all of the Accused's Constitutional rights must be complied with to the greatest extent possible, they are not absolute and do not operate in a vacuum. The rules allow for alternatives to the standard in person testimony to account for real life. Defense's argument that the trial should be abated without analysis of any other option ignores the practical realities and, most importantly, the reality that the Accused's wishes cannot always be granted to the extent he would like them to be. Any granted alternative does not equate to an unfair trial.

15. An abatement is typically reserved for situations in which there is a stalemate between parties and a judge's order and would be an abuse of discretion in this instance when there are other options. Remedies such as remote testimony or the ordering of a deposition for [redacted] and securing another expert consultant should be explored before abatement. These measures provide a realistic plan for the completion of this case.

RELIEF REQUESTED

16. The Government offers the following documentary and testimonial evidence in support of its motion:

Enclosure 1 – Connecticut update on remote capabilities
Testimony from [redacted]

17. The Government respectfully requests that this Honorable Court exhaust all reasonable alternatives to in-person testimony for Defense witnesses and if necessary to order a continuance

and deny the Defense's motion for abatement.

[redacted]
Courtney E. Lewis
CDR, JAGC, USN
Assistant Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion was served electronically on stand-by defense counsel, forwarded to Wyatt Detention Facility for service on the accused, and the Court on 3 August 2020.

[redacted]
Courtney E. Lewis
CDR, JAGC, USN
Assistant Trial Counsel

MILITARY JUSTICE PROCEEDING

United States of America,	MCI Case No. 31JUL18-SEKB-0147-7GNA/T
v.	
CSSSN Micah J. Brown, USN,	
Subject of Investigation/Accused	JULY 31, 2020

MOTION TO QUASH SUBPOENA OR, ALTERNATIVELY, MOTION TO MODIFY SUBPOENA TO ALLOW REMOTE TESTIMONY

On behalf of non-party Inpatient Services of Florida, P.A. ("Inpatient Services") and its employee, [redacted] the undersigned hereby moves this Court-Martial, pursuant to Manual for Courts-Martial R.C.M. ("RCM") 703(g)(3)(G)(i), to quash or alternatively to modify the revised subpoena issued by the United States (the "Government") in the above-captioned matter for [redacted] in-person testimony on August 10, 2020, such that [redacted] testimony may be heard remotely.

A. Factual and Procedural Background

[redacted], employed by Inpatient Services in Florida at [redacted] required by Florida statute under Chapter 395.402(2) of Title XXIX, attached hereto as Exhibit A. On July 10, 2020, Inpatient Services received a subpoena from Counsel for the Government, calling for [redacted] to personally appear at trial in the above-captioned matter. Inpatient Services discussed and agreed with Counsel for the Government that it would be acceptable for [redacted] testimony to be heard remotely. Thereafter, Counsel for the Government confirmed that she attended a conference with this Court-Martial on July 27, 2020 and that this Courts-Martial reserved decision on whether [redacted]

APPELLATE EXHIBIT CXLI
PAGE 1 OF 29
APPENDED PAGE

[redacted] testimony could be heard remotely pending a motion. Thereafter, on July 28, 2020, Counsel for the Government delivered to Inpatient Services a revised subpoena for [redacted] testimony. *See* Revised Subpoena, attached hereto as Exhibit B. This Motion, requesting permission for [redacted] to provide testimony remotely and/or in person at a local Florida military base follows.

B. <u>COVID-19 Pandemic-Related Travel Restrictions and Considerations</u>

The President of the United States declared a national emergency due to the spread of COVID-19.

Governor Lamont declared a public health emergency for the State of Connecticut (the site of these proceedings) and ordered restrictions on travel into the state. *See* Connecticut Travel Advisory, dated July 23, 2020, attached hereto as Exhibit C. Under the Connecticut Order, individuals traveling from Florida must quarantine for fourteen days and must complete a mandatory travel health form upon arrival to Connecticut. Exhibit C. Failure to self-quarantine for fourteen days or submit the form is subject to civil penalties. *Id.*

Florida Governor DeSantis issued an Executive Order directing all individuals entering Florida from Connecticut to isolate or quarantine for fourteen days upon entry into Florida. *See* EO Nos. 20-82 and 20-139, attached hereto as Exhibit D. Failure to quarantine per the Florida Order is subject to criminal and civil penalties. *Id.*

Federal courts in Connecticut currently require parties to arrange for remote appearance by videoconference or telephone due to public health risks related to COVID-19 presented by in-court appearances. *See* General Order of the United Stated District Court for the District of Connecticut, dated June 12, 2020, attached hereto as Exhibit E.

Additionally, the medical facility where [redacted] works requires a fourteen-day

quarantine following travel outside of the state – irrespective of State requirements. *See* 7/10/20 letter from [redacted] for the Government, detailing the medical need underlying Inpatient Services' request, attached hereto as Exhibit F. Further, [redacted] physical presence in Florida in her role as [redacted] is legally required by statute. *See* Exhibit A. Her in-person presence in Florida is also medically and practically necessary, as she is a trauma surgeon directly treating COVID-19 and trauma patients in the midst of a worldwide health pandemic with a shortage of qualified healthcare providers. *See* Exhibit F for additional detail regarding [redacted] essential role as [redacted]

C. Applicable Law

Under RCM 703(g)(3)(G), "a person subpoenaed" may "request[] relief on grounds that compliance is unreasonable, oppressive, or prohibited by law." In considering the request, "the military judge . . . shall review the request and shall – (i) Order that the subpoena be modified or quashed, as appropriate; or (ii) Order the person to comply with the subpoena. RCM 703(g)(3)(G).

D. The Revised Subpoena Should be Quashed or, Alternatively, Modified to Allow for [redacted] Remote Testimony.

Inpatient Services respectfully submits that [redacted] travel from Florida to Connecticut to testify in-person pursuant to the revised subpoena should not be required because: (1) the personal risk of travel amidst a global pandemic continues to be high and discouraged by federal and state governments; (2) if [redacted] traveled to Connecticut, she would be required by Connecticut's and Florida's EOs to quarantine for fourteen days upon arriving to Connecticut and returning to Florida, resulting in an extended absence from her patient care and other medical responsibilities; and (3) [redacted] responsibilities, including for direct patient care as a

trauma surgeon treating COVID-19 and trauma patients and as required by Florida statute in her role as [redacted], make even a brief absence – even one day, let alone the 14-day quarantine that would be required if she traveled out of Florida at this time --- from her work unreasonable, oppressive, and/or contrary to the public interest and law. *See* Exhibit F.

Accordingly, the undersigned requests that [redacted] be granted relief from the revised subpoena, as "unreasonable" and "oppressive," and it should be quashed or, alternatively, be modified to allow for her testimony to be heard remotely and/or in person at a local Florida military base the presence at which would not subject her to any state or facility quarantine requirements.

Respectfully submitted,

JACKSON LEWIS P.C.

By: [redacted]

Holly L. Cini [redacted]
Jackson Lewis P.C.
[redacted]

Matthew Nieman [redacted]

FOR INPATIENT SERVICES OF FLORIDA, P.A. and [redacted]

CERTIFICATION OF SERVICE

This is to certify that a copy of the foregoing was sent via e-mail to the following Trial Counsel for the Government/Issuing Authority:

Ryan Stormer
Military Judge
[redacted]

Sarah E. Cummings
USN RLSO MIDLANT DET GTN (USA)
[redacted]

Courtney E. Lewis
USN NAVY JAG WASH DC (USA)
[redacted]

Bryan Michael
Standby Counsel for CSSSN Micah J. Brown, USN
[redacted]

Sharlena Y. Williams
Standby Counsel for CSSSN Micah J. Brown, USN
[redacted]

This 31st day of July, 2020.

[redacted]
Counsel for Inpatient Services of Florida, P.A. and
[redacted]

APPELLATE EXHIBIT CLXI
PAGE 5 OF 29
APPENDED PAGE

[ ]Y-MARINE CORPS TRIAL JUDICI[ ]
NORTHERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **MICAH J. BROWN** **CSSSN/E-3 USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION FOR COMPASSIONATE RELEASE FROM PRETRIAL CONFINEMENT** **20 AUGUST 2020**

MOTION

The Government request the Court deny the accused's motion for compassionate release from pretrial confinement.

SUMMARY

The accused was placed in pretrial confinement after he violently stabbed a shipmate multiple times with a knife in the head and neck while they were underway on a submarine. The accused is now requesting a compassionate release from his pretrial confinement status. The Government opposes this request as the accused has presented no new evidence that warrants his release.

FACTS

1. The Government invites the Court to review the facts section presented in its Supplemental Response to the Accused's Motion for Release from Pretrial Confinement dated 21 May 2020.

BURDEN

Pursuant to R.C.M. 905(c), the accused bears the burden of persuasion by a preponderance of the evidence.

LAW AND ARGUMENT

The Government invites the Court to review the law and argument presented in its Supplemental Response to the Accused's Motion for Release from Pretrial Confinement dated 21 May 2020.

Additionally, the accused has not presented any new evidence that would warrant his release from pretrial confinement. In part, thee accused argues he should be released because he suffers from medical conditions that place his life at risk should he contract COVID-19. The medical documentation the accused provided to the Court does indeed show that he reported a history of [redacted] but there is no such recorded diagnosis of that or [redacted] provided by the accused.

Federal courts have recently rejected motions for release of defendants charged with violent crimes, despite underlying medical conditions and the ongoing COVID-19 pandemic.[1] In

[1] *United States v. Whyte*, 2020 U.S. Dist. LEXIS 71438 (denying a defense motion for release from pretrial

APPELLATE EXHIBIT CXLV
PAGE 1 OF 2
APPENDED PAGE

this case, the accused is charged with violently stabbing another Sailor with a knife multiple times and continued to commit violent misconduct after he was placed in pretrial confinement. The concerns for public safety and the need to ensure the accused appears at trial outweigh the accused's arguments for a compassionate release from his pretrial confinement status.

EVIDENCE

The Government invites the Court to review the evidence presented in its Supplemental Response to the Accused's Motion for Release from Pretrial Confinement dated 21 May 2020.

ORAL ARGUMENT

The Government does not request oral argument.

RELIEF REQUESTED

The Government respectfully requests the Court deny the accused's motion for release from pretrial confinement.

[redacted]
S. E. Cummings
LCDR, JAGC, USN
Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion was served electronically on the Court, standby defense counsel, and forwarded to the accused's command for service on the accused on 20 August 2020.

[redacted]
LCDR, JAGC, USN
Trial Counsel

---

confinement at Wyatt Detention Facility where the accused was diagnosed with [redacted] based on the need to reasonably assure the accused's presence a trial and for the safety of the community.), citing *United States v. Martin*, No. CR PWG-19-140-13, 2020 U.S. Dist. LEXIS 46046, 2020 WL1274857, at *3 (D. Md. Mar. 17, 2020) [redacted]

United States v. Clark, No. 19-40068-01-HLT, 2020 U.S. Dist. LEXIS 51390, 2020 WL 1446895, at *4 (D. Kan. Mar. 25, 2020) [redacted]; *Untied States v. Hamilton*, 2020 U.S. Dist. LEXIS 49095, 2020 WL 1323036, at *2 (denying defendant temporary release for COVID-19 risk on the basis of the risk posed by the defendant to the community)

[N]Y-MARINE CORPS TRIAL JUDICI[ ]
NORTHERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **MICAH J. BROWN** **CSSSN/E-3 USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO RECONSIDER ABATEMENT** **20 AUGUST 2020**

MOTION

The Government requests the Court to deny the Defense's motion to reconsider abatement in the above captioned case.

SUMMARY

The Defense requested the Court to reconsider its motion to abate the proceedings alleging the government has failed to produce a witness as ordered to do so by the Court and because the Court granted a continuance that was not formally requested by the Government. The continuance was granted by the Court after the Defense's expert witness was declared unavailable pursuant to M.R.E. 804 and pursuant to the Government's Motion for Remote Testimony. The Government was not ordered to produce [redacted] as he is unavailable and the Government has complied with the Court's order to identify an adequate substitute expert for the Defense. Abatement is not an available remedy to the Defense under these facts.

FACTS

1. The Government invites the Court to consider its facts section in its 15 July 2020 Motion for Remote Testimony and in its 3 August 2020 Response to Motion for Abatement when considering this motion.

2. On 12 June 2020, standby counsel for CSSSN Brown submitted a motion to abate the proceedings or continue the start of trial from 31 July 2020 until 14 September 2020.

3. On 4 August 2020, the Court declared [redacted] unavailable. The Court continued the start of trial to allow [redacted] time to recover and the Government to find another adequate substitute expert witness.

4. On 10 August 2020, the Government found and submitted to the Court and the Defense, [redacted], a potential adequate substitute expert witness. (Enclosure 1)

5. On 18 August 2020, the Government submitted a request to the Convening Authority that [redacted] be approved as an expert and funded for consultation with the Defense. This was done in compliance with the Court's order to facilitate the approval and funding of [redacted] and in an effort to expedite the approval process since the Defense had not submitted such a request. (Enclosure 2)

APPELLATE EXHIBIT CXLVII
PAGE 1 OF 15
APPENDED PAGE

5. On 19 August 2020, the Government received a request from CSSSN Brown addressed to the Convening Authority to approve 500 hours of consultation time with [redacted]. This request was forwarded to the Convening Authority and the Government recommended 10 hours of consultation time. (Enclosure 2)

6. On 20 August 2020, the Convening Authority approved 10 hours of consultation time with [redacted] for the Defense. That approval was forwarded to [redacted] and to standby counsel to ensure the accused was informed.

BURDEN

The burden is on the Defense by a preponderance of the evidence to show why abatement is the appropriate relief for the unavailability of its own witness. R.C.M. 905(c).

LAW

Parties are entitled to the production of witnesses when the testimony would be relevant and necessary. R.C.M. 703(b)(1). Along with Article 46 of the Uniform Code of Military Justice (U.C.M.J.), these rules implement the accused's 6th amendment right to compulsory process.

However, parties are not entitled to witnesses who are unavailable within the meaning of M.R.E. 804. R.C.M. 703(b)(3). M.R.E. 804(a)(4) recognizes witness unavailability in multiple situations to include, "then-existing infirmity, physical illness, or mental illness…"

Proceedings shall be abated if the Government fails to produce a witness that the judge has ordered to be produced. R.C.M.703(c)(2)(D)

If the Government fails to comply with a court order to provide an adequate substitute for an expert defense witness, the proceedings shall be abated. R.C.M.703(d)(2)(B)

ARGUMENT

As a preliminary matter, the Defense argues that trial counsel did not formally file a motion for a continuance and therefore the continuance ordered by the Court on 4 August 2020 violated the accused's right to a speedy trial. However, the Court did in fact grant a continuance based on the formal pleadings filed by the Government in its Motion for Remote Testimony dated 23 July 2020 and only did so after the Court ruled that [redacted], the Defense's expert forensic pathologist, was unavailable due to circumstances outside the control of the Government. In light of the unavailability of [redacted], a continuance in this case was warranted to allow the Government time to identify an adequate substitute expert witness for the

Defense and to allow the Defense time to consult and prepare with that expert.[1] The Court continued the trial from 3 August 2020 until 12 October 2020 and such a continuance prejudiced the accused in no way as its purpose was to allow for another Defense expert to be employed in order prepare and potentially testify at trial.

The Defense also argues that because [redacted] cannot be produced, the proceedings should be abated. After the Court found [redacted] unavailable under M.R.E. 804, the Court ordered the Government to identify an adequate substitute expert witnesses. The Government has complied with that order by contacting over nine forensic pathologists located across New England and identifying [redacted] as a potential substitute who is available for consultation and also available for the currently scheduled trial dates. (Enclosure 4) The Government also assisted in requesting funding for consultation with [redacted] from the Convening Authority and that request was approved on 20 August 2020. (Enclosure 5) R.C.M.703(c)(2)(D) requires abatement only if the Government fails to comply with a Court order to produce a witness. The Government has not been ordered to produce [redacted] as the Court has deemed that he is unavailable under M.R.E. 804. R.C.M.703(d)(2)(B) requires abatement if the Government fails to comply with a Court order to provide an adequate substitute expert. The Government has done its due diligence to comply with the Court's order and has not neglected to provide what it believes to be an adequate substitute. It is now up to the Defense to consult with [redacted] and move the Court if they determine she is not an adequate substitute.

RELIEF REQUESTED

The Government respectfully requests the Court DENY the Defense's motion to abate the proceedings.

EVIDENCE

Enclosure 1: Email – Government submitting [redacted] to the Defense for consideration
Enclosure 2: Emails regarding the request of and approval of [redacted] as a Defense expert

[1] R.C.M. 906(b)(1) allows the military judge to grant a continuance upon a showing of reasonable cause. "Article 40, UCMJ, gives a military judge the discretion to grant a continuance to any party for such time as the military judge deems just."[1] "A military judge should liberally grant motions for a continuance, as long as it is clear that a good cause showing has been made."[1] "To sustain its burden, the moving party must show by a preponderance of the evidence that prejudice to a substantial right of the accused would occur if the continuance were not granted."

ORAL ARGUMENT

The Government only requests oral argument in response to any Defense oral argument on this motion.

[redacted]
Sarah E. Cummings
LCDR, JAGC, USN
Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion was served electronically on the Court, standby defense counsel, forwarded to the Accused's command for service on the Accused on 20 August 2020.

[redacted]
Sarah E. Cummings
LCDR, JAGC, USN
Trial Counsel

Y-MARINE CORPS TRIAL JUDICI
NORTHERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **MICAH J. BROWN** **CSSSN/E-3 USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO DISMISS CHARGES PURSUANT TO R.C.M. 703(b)(3)** **24 AUGUST 2020**

MOTION

The Government request the Court deny the accused's motion to dismiss the charges pursuant to R.C.M. 703(b)(3).

BURDEN

Pursuant to R.C.M. 905(c), the accused as the moving party bears the burden of proof by a preponderance of the evidence.

FACTS

1. The Government invites the Court to consider the Facts section in its Response to Defense Motion to Reconsider Abatement dated 20 August 2020 in support of this motion.

LAW

Parties are entitled to the production of witnesses when the testimony would be relevant and necessary. R.C.M. 703(b)(1). Along with Article 46 of the Uniform Code of Military Justice (U.C.M.J.), these rules implement the accused's 6th amendment right to compulsory process.

However, parties are not entitled to witnesses who are unavailable within the meaning of M.R.E. 804. R.C.M. 703(b)(3). M.R.E. 804(a)(4) recognizes witness unavailability in multiple situations to include, "then-existing infirmity, physical illness, or mental illness…"

However, if the testimony of a witness who is unavailable is of such central importance to an issue that is essential to a fair trial, and if there is no adequate substitute for such testimony, the military judge shall grant a continuance or other relief in order to attempt to secure the witness' presence or shall abate the proceedings, unless the unavailability of the witness is the fault of or could have been prevented by the requesting party. R.C.M. 703(b)(3)

Proceedings shall be abated if the Government fails to produce a witness that the judge has ordered to be produced. R.C.M.703(c)(2)(D)

If the Government fails to comply with a court order to provide an adequate substitute for an expert defense witness, the proceedings shall be abated. R.C.M.703(d)(2)(B)

APPELLATE EXHIBIT CXLIX
PAGE 1 OF 2
APPENDED PAGE

ARGUMENT

Dismissal of the charges is not a proper remedy pursuant to R.C.M. 703(b)(3)

The defense argues that the Court should dismiss all charges, or alternatively just the attempted murder charges, due to the unavailability of the defense expert forensic pathologist, [redacted]. R.C.M. 703(b)(3) allows the military judge to grant a continuance or other relief *in order to secure a witness' presence* at trial. Dismissal of any of the charges would not accomplish the goal of securing [redacted] presence at trial which is what the "or other relief" language in the rule intends to accomplish.

Additionally, the Government responded separately to the defense's Motion for Abatement also predicated on [redacted] unavailability. [redacted] has been declared unavailable by the Court pursuant to M.R.E. 804 and the Government has provided what it believes to be an adequate substitute for the defense to consult with and potentially utilize at trial pursuant to R.C.M. 703(d)(2)(B). That step was taken due to the uncertain nature of when [redacted] will become available again for trial.

ORAL ARGUMENT

The Government does request oral argument unless in response to any defense oral argument on this matter.

RELIEF REQUESTED

The Government respectfully requests the Court deny the accused's motion to dismiss the charges pursuant to R.C.M. 703(b)(3).

[redacted]
S. E. Cummings
LCDR, JAGC, USN
Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion was served electronically on the Court, standby defense counsel, and forwarded to the accused's command for service on the accused on 24 August 2020.

[redacted]
S. E. Cummings
LCDR, JAGC, USN
Trial Counsel

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

The United States of America **v.** **Micah J. Brown** **CSSSN/E-3 USN**	**DEFENSE SECOND MOTION TO COMPEL WITNESSES** **14 August 2020**

MOTION

On 7 August 2020, the Government provided defense with notice that they will not produce the following witnesses: NCIS Special Agent [redacted], NCIS Special Agent [redacted], NCIS Special Agent [redacted], and NCIS Special Agent [redacted]. The defense respectfully requests the court order production of these witnesses pursuant to Rule for Courts-Martial 703, Article 46, Uniform Code of Military Justice and the Sixth Amendment to the United States Constitution.

FACTS

1. The defense submitted a request for production of witnesses on 26 April 2019. Enclosure (A).
2. The government responded on 20 May 2019. Enclosure (B).
3. In its response, the government stated that they were having issues contacting four witnesses, SA [redacted], SA [redacted], ETV3 [redacted] and EDMC [redacted]. Id.
4. On 25 July 2019 the government filed its pretrial matters, to include its combined witness list. Enclosure (C).
5. In its combined witness list, government included the following witnesses, NCIS Special Agent [redacted], NCIS Special Agent [redacted], NCIS Special Agent [redacted], and NCIS Special Agent [redacted]. Id.
6. On 25 July 2019 the defense submitted its combined witnesses list. Enclosure (D).
7. In its combined witness list, the defense included the following witnesses, NCIS Special Agent [redacted], NCIS Special Agent [redacted], NCIS Special Agent [redacted], and NCIS Special Agent [redacted] Id.
8. The first time the government alleged any issues with any witnesses being produced was on 2 July 2020.
9. Those witnesses were NCIS SA [redacted] and NCIS SA [redacted]
10. Despite being asked by the defense to provide notice in writing, the government failed to do so until 7 August 2020. Enclosure (E).

APPELLATE EXHIBIT CL I
PAGE 1 OF 37
APPENDED PAGE

11. It was not until 7 August 2020 that the government informed the defense that they were not willing to produce NCIS SA [redacted] or NCIS SA [redacted]. Id.
12. Trial was scheduled to commence on 3 August 2020.
13. A continuance was not ordered until 31 July 2020.

LAW

R.CM. 703 states "the prosecution and the defense shall have equal opportunity to obtain witnesses [...]". R.C.M. 703; *See* Article 46, UCMJ. For witnesses requested to testify on the merits, the Defense is required to show that such witness is relevant and necessary. Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence and the fact is of consequence in determining the action. M.R.E. 401. Relevant testimony is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue. R.C.M. 701.

ARGUMENT

The government agreed to produce NCIS Special Agent [redacted], NCIS Special Agent [redacted], NCIS Special Agent [redacted], and NCIS Special Agent [redacted].

SA [redacted]

On 2 July 2020 during a phone conference, trial counsel mentioned potential issues with SA [redacted] and SA [redacted]. This was the first mention of any witness issues with these two individuals. Trial counsel specifically asked CSSSN Brown would he agree to video teleconference (VTC) in which CSSSN Brown responded "I want all witnesses physically present. I will object to it." The government never provided any formal/official notice regarding their unwillingness to produce these witnesses until their 7 August 2020 notice.

It is confouding for the government to now allege that they "never agreed to produce SA [redacted]" when this witness has been listed on the government's combined witness list for over one year. Enclosure (C). If the government wants to split hairs, then maybe there was not a written notice to the defense, but clearly the government agreed through their actions—actions which CSSSN Brown detrimentally relied upon. The fact that the government had the 2 July 2020 conversation with the defense concerning SA [redacted] is further proof that they agreed to produce him otherwise there would not be a need for any conversation. The government should not now be allowed to allege that this witness is not relevant and necessary simply because it has now become inconvenient.

SA [redacted] interviewed CS3 [redacted], EMN2 [redacted], and ETV3 [redacted]. CS3 [redacted] is one the individuals that was physically present in galley prior to the altercation. CS3 [redacted] was interviewed by SA [redacted] on 31 July 2018, one day after the altercation. There were many questions SA [redacted] did not ask during his interview with CS3 [redacted]. The defense is left with wondering why didn't SA [redacted] ask CS3 [redacted] about CSSS Brown's demeanor when he initially saw CSSSN Brown in the pantry that morning. CS3 [redacted] said it

was weird that CSSSN Brown was in the pantry therefore follow up questions as to what CSSSN Brown was specifically doing in the pantry matters. NCIS received the initial Preliminary Inquiry Officer's Report and knew that multiple witnesses exclaimed how CSSSN Brown appeared "dazed" or "out of it" yet SA [redacted] failed to follow up on these matters with the very first person CSSSN Brown encountered that day.

The government has charged this case as both attempted premediated and attempted unpremeditated, therefore CSSSN Brown's actions before the assault are clearly relevant. If SA [redacted] had done a thorough investigation, these questions could have been answered and would potentially make a difference when the finder of fact has to make a decision regarding intent. CS3 [redacted] stated that he spoke with LSS2 [redacted] after the altercation. In his notes, SA [redacted] does not provide a detailed account of the conversation between CS3 [redacted] and the complaining witness, it merely states "V [redacted] was unable to explain why the attack occurred, saying that he and S/BROWN "dapped and said what's up" and everything seemed fine." Enclosure F. Every statement that a complaining witness makes about the charged offense is relevant and necessary and essential to a fair trial. There are no details provided, no questions specifically asked of CS3 [redacted], therefore the defense can use this information to develop a line of cross examination to show that the investigation was rushed, incomplete, and biased. If SA [redacted] had not rushed to judgment, there would potentially be more information to show why these events occurred. A finder of fact could very well determine that the investigation is incomplete and therefore they are unable to find beyond a reasonable doubt that CSSSN Brown possessed the requisite intent required for all of the charged offenses.

SA [redacted] also interviewed EMN2 [redacted]. EMN2 [redacted] told SA [redacted] that he heard someone say "don't fuck with me" yet SA [redacted] did not follow up on whose voice EMN2 [redacted] heard. Although EMN2 [redacted] did not know CSSSN Brown or LSS2 [redacted] very well, EMN2 [redacted] was able to hear LSS2 [redacted] immediately afterwards saying "are you serious?" but SA [redacted] never asked EMN2 [redacted] about his ability to compare the two voices. This could have presented an affirmative defense such as self-defense had these questions been asked. EMN2 [redacted] told SA [redacted] that CSSSN Brown seemed "quieter than normal" yet there was no follow up again despite the abovementioned witnesses stating CSSSN Brown seemed "dazed" and "out of it" after the altercation. All of this information can and will be used to impeach the bias nature of this investigation therefore presenting doubt to the finder of fact.

SA [redacted]

SA [redacted] was the lead agent in this case. SA [redacted] interviewed the complaining witness in this case two days after the altercation. SA [redacted] took pictures of LSS2 [redacted] and collected LSS2 [redacted] medical records. LSS2 [redacted] has already demonstrated inconsistent statement potential based on his interview where he tells SA [redacted] he only wants CSSSN Brown to get help and now he is pushing for CSSSN Brown to be confined for a significant period of time.

SA [redacted] interviewed CS3 [redacted] on 31 August 2018, and also did not follow up on any of the above matters. At this point, SA [redacted] had information that EMN2 [redacted]r (who he personally interviewed) stated CS3 [redacted] kicked the knife away that was allegedly used in this altercation. SA [redacted] did not read CS3 [redacted] his rights. Based on the limited information the defense has, SA [redacted] asked if CS3 [redacted] kicked the knife away, CS3 [redacted] denied doing so and the interview continued from there. This further shows that NCIS was biased this entire investigation. If it safe to presume the knife in an attempted murder stabbing incident has significant importance. If NCIS had been intent on doing a thorough and complete investigation, this case could have played out in a different manner. Therefore it is important for the members to know all of these details to assess the credibility of all witnesses, including NCIS SA [redacted] and NCIS SA [redacted]

SA [redacted] interviewed HM1 [redacted], who is one of the most important witnesses as it relates to injuries sustained by LSS2 [redacted]. HM1 [redacted] treated LSS2 [redacted] immediately after the altercation. He also provided information as it related to CSSSN Brown before and after the altercation to include two [redacted] injuries. Despite all of this information provided to SA [redacted], he did not seek to get the full extent of CSSSN Brown's mental state and any additional information that would help to understand why this altercation occurred. NCIS is supposed to be a neutral fact finder. SA [redacted] essentially gathered what little information he felt he needed to prove CSSSN Brown was guilty of the offense and that is all. Furthermore, eleven months after the altercation, HM1 [redacted] was interviewed by trial counsel and disclosed 'additional' information. Enclosure M. This suggests that impeachment may also be necessary for HM1 [redacted].

SA [redacted] interviewed YNC [redacted]. The defense filed a motion to suppress statements made by CSSSN Brown but the military judge ruled these statements are admissible and will come in at trial. YNC [redacted] is the holder of that evidence. Furthermore, YNC [redacted] mentioned the deterioration of CSSSN Brown's mental health and how it was his impression that CSSSN Brown "just snapped" but SA [redacted] failed to follow up on that lead or get clarifying details.

NCIS Special Agent [redacted]

SA [redacted] interviewed ETVC [redacted] who was the first individual to respond to the altercation. SA [redacted] did not ask [redacted] what, if anything, he heard coming from inside the galley. All he elicits is that loud noises were heard. Based on other interviews, we know that multiple witnesses heard someone say "stop fucking with me" or words to the effect but there is not enough information to determine who stated those words. SA [redacted] did not ask for any background on CSSSN Brown from Chief [redacted]. Chief Click provided SA [redacted] information on another altercation with CSSSN Brown but he never followed up on that. This is all information that could help the finder of fact determine the investigation conducted by NCIS was subpar and therefore not enough information to determine CSSSN Brown's intent.

NCIS Special Agent [redacted]

SA [redacted] interviewed MMN1 [redacted] who reported a "difference in S/BROWN's personality as of late" yet no further information was sought. SA [redacted] did not care as to why the altercation occurred as evidenced by her lack of questioning, only that it occurred and CSSSN Brown was the suspect—a clear rush to judgment and biased investigation.

SA [redacted] interviewed ETN2 [redacted] who reported having "a lot of interaction" with CSSSN Brown in the past 1.5 years, but SA [redacted] did not seek further information. SA [redacted] did not seek more information on what ETN2 [redacted] meant by CSSSN Brown "acting differently this underway." CSSSN Brown's mental health plays a significant role in these proceedings as it clearly evident from multiple witnesses mentioning it, but SA [redacted] (along with the other agents) did not do a good job at following up. Also, since ETN2 [redacted] is the only person in the entire investigation to report interacting a lot with CSSSN Brown, SA [redacted] should have used that as an opportunity to find out more about CSSSN Brown and LSS2 [redacted] relationship and potentially finding out what lead to this altercation. The government has to prove specific intent. If there was more to the story, the defense will never know because SA [redacted] did notconduct a complete investigation.

Impeachment

Trial counsel believes it is "unlikely" that any of the witnesses interviewed by the above mentioned agents would make an inconsistent statement. Trial counsel cannot guarantee what any of these witness' statements in trial will be. Trial counsel can prepare witnesses but until the witness gets on the stand and testifies, no one know what will come out. Contrary to what trial counsel claims, the defense cannot impeach the above-mentioned witnesses with NCIS notes. The written statements provided by these witnesses are scant. The bulk (although not complete) of their respective statements come from the NCIS ROIs. If we ask these witnesses "didn't you tell NCIS SA X, that you did not see CSSSN Brown holding the knife" and the response is "no" then CSSSN Brown is left in an untenable position of potentially requesting a lengthy continuance to produce these witnesses—some of whom are out of the country. CSSSN Brown has been in pretrial confinement for over two years. This case has been continued numerous times. CSSSN Brown does not want any more continuances. It would be unfair to put CSSSN Brown in that position unnecessarily when these witnesses can be produced now.

Unavailability

The government has not presented any evidence to show that these witnesses are unavailable within the meaning of M.R.E. 804(a). An email from NCIS [redacted] is not sufficient for the court to find her unavailable. Furthermore, there is plenty of time for her to find adequate [redacted] and make necessary arrangements for [redacted]. She is a NCIS agent and therefore by job required to travel to testify at courts-martial, this case is no different. Despite COVID-19, she would have had [redacted] which she would have needed to resolve for the purpose of doing her job.

Other forms of testimony

CSSSN Brown cannot be forced to call relevant witnesses on the merits via remote means. R.C.M. 703(b)(1). Generally testimony taken over an accused's objection will not be admissible as evidence on the question that bears on the ultimate issue of guilt. R.C.M. 703(b)(1), Discussion. Furthermore, "an accused cannot be forced to present the testimony of a material witness on his behalf by way of stipulation or deposition. On the contrary, he is entitled to have the witness testify directly from the witness stand in the courtroom." United States v. Sweeney, 34 C.M.R. at 383 (quoting Thornton, 24 C.M.R. at 259).

The situation before the court is similar to United States v. Hanabarger, NMCCA No. 201900031. Although the court in Hanabarger did not resolve the case under the third assignment of error, whether the military judge erred in denying the Defense motion to compel production of the lead NCIS agent who investigated the case, Senior Judge Gaston in his dissent provides a compelling analysis showing that the denial of the motion was an abuse of discretion and resulted in prejudicial error.

In Hanabarger, the defense wanted to call the lead NCIS agent to testify about the "incompetent" and "perfunctory" nature of its investigation. The defense also wanted to call NCIS to potentially impeach a witness who claimed NCIS told her she could delete text messages from her phone. The military judge in that case found that the NCIS agent's testimony was cumulative and therefore necessary. Jude Gaston noted that the NCIS agent's testimony went to the core of accused defense that the NCIS investigation was incompetent and biased. This is exactly what CSSSN Brown seeks to do in the case before the court. NCIS did not take numerous investigative steps during its investigation. There was either a rush to judgment and therefore an incomplete investigation or incompetent NCIS agents investigating the case. Either way, this evidence is important for CSSSN Brown to present a complete defense.

The government is trying to minimize these witness' involvement with the case now because it requires more work on behalf of the government but that should not be taken into consideration. CSSSN Brown is charged with attempted murder. He faces up to life in confinement. CSSSN Brown's constitutional right to confront witnesses and present a complete defense should not yield to the convenience of the government.

The same way the military judge, both standby counsel, and trial counsel have to travel to Groton, CT despite COVID-19, these witnesses should not be exempt from doing the same. If the government does not want witnesses to travel during a pandemic, they should withdraw and dismiss the charges.

EVIDENCE

A. Defense Request for Production of Witnesses 26 Apr 19
B. Government Response to Defense Request for Production of Witnesses 20 May 19
C. Government Combined Witness list 25 Jul 19
D. Defense Witness List 25 Jul 19
E. Government Notice to CSSSN Brown Regarding Witness Production dtd 7 Aug 20
F. Results of Interview with CS3 [redacted] dtd 31 Jul 18
G. Results of Interview with EMN2 [redacted] dtd 31 Jul 18

H. Results of Interview with HM1 [redacted] dtd 13 Sep 18
I. Results of Interview with MMN1 [redacted] dtd 2 Aug 18
J. Results of Interview with YNC [redacted] dtd 13 Sep 18
K. Results of Interview with ETN2 [redacted] dtd 2 Aug 18
L. Results of Interview with ETVC [redacted] dtd 1 Aug 18
M. Government RCM 701 Disclosure dtd 10 July 19

RELIEF REQUESTED

The defense respectfully requests the court order production of NCIS Special Agent [redacted], NCIS Special Agent [redacted], NCIS Special Agent [redacted] and NCIS Special Agent [redacted] pursuant to Rules for Courts-Martial 703, Article 46, Uniform Code of Military Justice and the Sixth Amendment to the United States Constitution.

[redacted]
MICAH BROWN
CSSSN USN

CERTIFICATE OF SERVICE

A true copy of this motion was served on trial counsel and the military judge on 17 August 2020.

[redacted]
MICAH BROWN
CSSSN USN

APPELLATE EXHIBIT CL
PAGE 7 OF 37
APPENDED PAGE

Y-MARINE CORPS TRIAL JUDICI /
NORTHERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **MICAH J. BROWN** **CSSSN/E-3 USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO COMPEL WITNESSES** **24 AUGUST 2020**

MOTION

The Government request the Court deny the accused's motion to compel four Naval Criminal Investigative Service (NCIS) Special Agents (SA) for in-person testimony.

BURDEN

Pursuant to R.C.M. 905(c), the accused as the moving party bears the burden of proof by a preponderance of the evidence.

FACTS

1. The accused is charged with one specification of attempted premeditated murder, one specification of attempted unpremeditated murder, and one specification of aggravated assault with intent to inflict grievous bodily hard for stabbing LSS2 [redacted] approximately a dozen times in the torso, neck, face, head and arms while underway onboard the [redacted] on 31 July 2018. The maximum punishment he could face is up to life imprisonment if convicted if one of the specifications of attempted murder, or 5 years if convicted of the aggravated assault. The accused has been in pretrial confinement since the offense.

2. On multiple R.C.M. 802 conferences, the Government raised the issue of unavailability of NCIS agents located in Florida and Brazil due to travel restrictions and COVID-19.

3. As early as 2 July 2020, the accused expressed his desire, both through his stand-by counsel and directly to trial counsel on a phone conference, that he wanted to ***both*** go to trial on 3 August ***and*** have all of his witnesses physically present for testimony. (Gov. Motion for Remote Testimony, Encl. 7)

4. On 15 July 2020, the Government moved the Court to allow for remote testimony for these NCIS agents, but that issue has not been ruled on to date. (AE _)

5. On 7 August 2020, pursuant to the Court's instruction, the Government provided written notice to the accused outlining its rationale regarding the production of witnesses it would not produce at trial. (AE _)

APPELLATE EXHIBIT CLI
PAGE 1 OF 46
APPENDED PAGE

6. On 20 August 2020, the accused filed a motion to compel the following NCIS Agents as witnesses for trial: SA [redacted], SA [redacted], SA [redacted], and SA [redacted]

7. SA [redacted] interviewed three witnesses during the course of the investigation: CSS3 [redacted] ETV3 [redacted], and EMN2 [redacted]. All three witnesses were also previously interviewed during a Preliminary Investigation and later by other NCIS agents. All of their statements were substantially similar. SA [redacted] took no further actions in this case. (Def. Encls. F and G) (Encl. 1)

8. SA [redacted] is presently assigned in Brazil, a country with a high rate of coronavirus cases. SA [redacted] interviewed several witnesses, to include the victim, during the investigation. All relevant witnesses that he interviewed will be physically present at trial. The interview of the victim was videotaped. In addition, all of the witnesses that SA [redacted] interviewed had previously provided written statements to a command investigator while still onboard the boat, shortly after witnessing the assault. The Staff Judge Advocate for NCIS emailed trial counsel notifying them of the significant challenges that NCIS, and Agent [redacted] personally, would experience if the agent were ordered to travel to Groton, Connecticut. Agent [redacted] is available for remote testimony. (Gov. Motion for Remote Testimony, Encl. 5)

9. SA [redacted] only involvement in this case was interviewing Chief [redacted] an eyewitness to the alleged offenses who will be physically present at trial. He took no other action in the case. (Gov. Motion for Remote Testimony, Encl. 6)

10. SA [redacted] interviewed only two witnesses in this case, MMN1 [redacted] and ETN2 [redacted]. Both will be present at trial and both provided sworn statement to the preliminary investigating officer, MMNCS [redacted] who will also be present at trial. ETN2 [redacted] provided an additional statement to SA [redacted], NCIS on 31 Aug 2018. (Encl. 1)

LAW

Parties are entitled to the production of witnesses when the testimony would be relevant and necessary. R.C.M. 703(b)(1). Along with Article 46 of the Uniform Code of Military Justice (U.C.M.J.), these rules implement the accused's 6th amendment right to compulsory process.

A witness' testimony is relevant if it has a tendency to make a fact of consequence more or less probably than it would be without the testimony. M.R.E. 401

A witness' testimony is necessary only if it is not cumulative and when it would contribute to a party's presentation of its case in some positive way on a matter in issue. R.C.M. 703(b)(1).

However, parties are not entitled to witnesses who are unavailable within the meaning of M.R.E. 804. R.C.M. 703(b)(3). M.R.E. 804(a)(4) recognizes witness unavailability in multiple situations to include, "then-existing infirmity, physical illness, or mental illness…"

When such circumstances arise, the Court must evaluate whether the testimony each witness would provide is "of such central importance to an issue that is essential to a fair trial" and whether or not adequate substitutes for in-person testimony will suffice. If no adequate substitute for the testimony exists, the military judge shall grant a continuance, or other relief in order to attempt to secure the witness' presence or shall abate the proceedings, unless the availability of the witness is the fault or of could have been prevented by the requesting party. R.C.M. 703(b)(3).

ARGUMENT

SA [redacted] testimony is not relevant or necessary and he should not be produced for trial.

The defense argues that SA [redacted] testimony is relevant and necessary so that he can question the Agent on why he did not ask certain questions of the witnesses he interviewed. Specifically, the defense alleges that SA [redacted] did not ask CSS3 [redacted] about the accused's demeanor the morning of the stabbing or why the accused was in the pantry before the stabbing and that SA [redacted] failed to provide a detailed account of a conversation between CSS3 [redacted] and LSS2 [redacted] (the victim in this case) after the stabbing regarding LSS2 [redacted] inability to explain why CSSSN Brown stabbed him multiple times with a knife after they "dapped and said what's up." The defense also argues that SA [redacted] should have questioned EMN2 [redacted] about whose voice he heard yelling inside the galley and how the accused seemed quieter than normal since he described the accused as "dazed" or "out of it."

CSS3 [redacted] was interviewed by both during the preliminary investigation before SA [redacted] interviewed him and then later by SA [redacted] regarding his recollection of events. (Encl. 1) Additionally, the defense would be precluded from asking any agent what was said during a conversation between the person they interviewed and someone else as that is hearsay. EMN2 [redacted] was also questioned a second time by NCIS and it is within the second interview that he elaborated in saying that the though the accused looked "dazed" or "out of it." (Encl. 1) SA [redacted] had no knowledge that the witness would make such a statement in the future at the time of his interview. SA [redacted] written summary of the interview of either witness does not tend to show a bias in the investigation in any way. Rather the summaries record the facts as the witnesses relayed to the agent. The defense is attempting to impugn the NCIS investigation by putting SA [redacted] on the stand and asking why he did not ask certain questions, but that does not make his testimony relevant or necessary. This is especially true because SA [redacted] interviews of CSS3 [redacted] and EMN2 [redacted] does not capture the entirety of NCIS' questioning of either Sailor and the Government would not be able to ask SA [redacted] about additional investigative steps that occurred after the case was transferred from Florida to Connecticut since SA [redacted] had no further involvement in this case. CSS3 [redacted], EMN2 [redacted], and LSS2 [redacted] will all be present at trial and they can be questioned regarding all of the items the defense contends should have been asked of them making any

questioning of the agent cumulative. Therefore, the defense has not met its burden in showing that SA [redacted] is relevant and necessary for production at trial.

Even if SA [redacted] is deemed to be relevant and necessary, he should be declared unavailable for trial pursuant to M.R.E. 804 and should be allowed to testify remotely.

The defense argues that SA [redacted] is relevant and necessary to impeach the victim on his desires on how he wishes the accused to be held accountable, to show that he conducted a biased investigation because he did not read CSS3 [redacted] his rights after other witnesses said they saw him kick the knife in the galley, for potential impeachment purposes for HM1 [redacted], and because he failed to follow up on YNC [redacted] knowledge of the accused's mental health after he said he believed the accused "just snapped."

LSS2 [redacted] interview with SA [redacted] was captured on video and the transcription has also been provided to the accused. Any questioning regarding what the victim desires to see as an outcome in this case is improper and the defense has pointed to no inconsistencies in the victim's statements that SA [redacted] may be needed to impeach on. The defense argues SA [redacted] should have read CSS3 [redacted] his rights before questioning him and that failing to do so shows there was a biased investigation. The defense does acknowledge that SA [redacted] did ask CSS3 [redacted] about the knife and whether he kicked it and that answer was recorded in the agent's report. This is not a case where NCIS was in search of who stabbed LSS2 [redacted] The victim identified the accused as the assailant. Multiple other witnesses, besides CSS3 [redacted], identify the accused as the one they saw standing over the victim inside the galley "looking angry" or "punching down" when the door to the galley opened. SA [redacted] had no reason to believe CSS3 [redacted] was the one who attacked LSS2 [redacted] with a knife and therefore did not read him his rights. CSS3 [redacted] will be present at trial and can be cross-examined on his recollection of the knife on the floor. The defense points to no potential inconsistencies that would require SA [redacted] to impeach HM1 [redacted] on and has not explained why impeachment could not be accomplished via written statements of HM1 [redacted] or SA [redacted] notes. The defense also claims that SA [redacted] did not follow up on YNC [redacted] knowledge of the accused's mental state around the time of the alleged incident. However, SA [redacted] summary of the interview with YNC [redacted] is riddled with examples of YNC [redacted] impressions on the accused's mental health showing that SA [redacted] did, in fact, follow up on that front. (Def. Encl. J) All of the witnesses SA [redacted] interviewed will be present at trial and subject to direct and cross examination. Aside from the witness interviews, the defense has not cited any reason that SA [redacted] should be produced for in person testimony at trial. The defense has not met its burden to show how SA [redacted] testimony is relevant and necessary.

However, should the Court find that SA [redacted] is relevant and necessary and that his presence at trial is required, the next step is determining whether or not SA [redacted] is available under M.R.E. 804. M.R.E. 804(a)(4) recognizes witness unavailability in multiple situations to include, "then-existing infirmity, physical illness, or mental illness…" SA [redacted] should be considered unavailable due to COVID 19 and the global health pandemic the virus has created. SA [redacted] is the sole NCIS Agent in Brazil. While SA [redacted] does not presently have a health condition that precludes his travel, the risk to himself and others as well as the risk to the NCIS

mission in Brazil were he to travel from Brazil to Connecticut for trial is serious. This is a reasonable interpretation of unavailability under the rules. While SA [redacted] interviewed several witnesses, all the relevant and necessary percipient witnesses will be present in Court. Like in the case of Chief [redacted], all witnesses provided previous statements to a command investigator before speaking to NCIS. Such uncertain, conditional impeachment testimony that SA may possibly be called on to provide is not of such central importance to an issue that is essential to a fair trial in this case. As the Court is well aware, this is not a case where there is a question of who committed the crime, or motives to fabricate on the part of the victim or certain witnesses. The central issue in this case is whether or not CSSSN Brown intended to kill LSS2 [redacted] when he stabbed him multiple times in the galley onboard the boat, and whether or not when he did so he intended to inflict grievous bodily harm. SA [redacted] anticipated testimony has no bearing on these central issues. Remote VTC testimony is available and is an adequate alternative when balancing the other competing factors of proceeding with trial in a timely manner in a global health pandemic, especially given the accused's status in pretrial confinement. Today, particularly because most of the world has operated in a remote environment for the past five months, there is little to no chance that jury members (especially upon proper instruction by the military judge) would give any less weight to the proposed remote testimony. The Government again asserts that SA [redacted] should be allowed to testify remotely from Brazil in the event he is called by the accused at trial.

SA [redacted] testimony is not relevant or necessary and he should not be produced for trial.

The defense again argues the SA [redacted] testimony is relevant and necessary to show that the NCIS investigation was subpar because SA [redacted] did not ask Chief [redacted] about what he heard coming from the galley at the time of the stabbing, he did not ask Chief [redacted] about the accused's background, and because he did not ask Chief [redacted] for additional information about a separate and unrelated altercation the accused had with a different Sailor.

Chief [redacted] provided a statement to during the preliminary investigation regarding what he heard coming from the galley prior to being interviewed by SA [redacted], subsequently testified before this Court about his observations at this time, and will be present at trial and subject to cross-examination. There is no indication that Chief [redacted] has knowledge about the background of the accused and the defense has pointed to no relevant information they believe SA [redacted] should have elicited from Chief [redacted] or how that information would be relevant to his production at trial. Taking the last point, Chief [redacted] indicated that he was aware of another altercation the accused was involved in and provided the name of the other Sailor to SA [redacted] (Def. Encl. L) That Sailor was later interviewed twice by other NCIS agents. (Encl. 2) The Government would be precluded from asking SA [redacted] about those follow-up interviews because he had no further involvement in this case past his interview of Chief [redacted]. As such, the defense has not met its burden to show that SA [redacted] is relevant or necessary to be produced at trial.

SA [redacted] testimony is not relevant or necessary and she should not be produced for trial.

The defense argues that SA [redacted] testimony is relevant and necessary because she did not ask MMN1 [redacted] why the accused stabbed LSS2 [redacted] since MMN1 [redacted] reported a difference in the accused's personality "as of late" and because she did not ask ETN2 [redacted] what the accused's relationship with the victim was or how he thought the accused had been acting differently during the timeframe of the stabbing.

SA [redacted] summary of MMN1 [redacted] interview did in fact provide amplifying information as to why MMN1 [redacted] believed the accused was acting differently and that was in direct response to SA [redacted] question about whether he noted a difference in the accused personality. (Def. Encl I) That is in stark contrast to the defense's position that "SA [redacted] did not care as to why the altercation occurred as evidenced by her lack of questioning…and biased investigation." The interview the defense provided was from the second NCIS interview conducted by SA [redacted] conducted 31 Aug 2018. (Def. Encl. K) However, in both interviews, ETN2 [redacted] described in detail how he believed the accused had been acting differently in his mind including instances where the accused was in altercations with both himself and other Sailors. Additionally, ETN2 [redacted] did in fact explain his knowledge of the accused's relationship with the victim and described them as "good friends prior to the altercation" and said he was unaware of any "beef" between them (Def. Encl. K) The defense's arguments that the questions they identified show a subpar NCIS investigation fall flat because those questions were indeed asked and the answers were reported throughout the investigation. MMN1 [redacted] will also be present at trial. SA [redacted] cannot speak to follow on investigative actions in the case because her involvement ended after she conducted these two interviews. The defense has not met its burden to show how SA [redacted] testimony is relevant or necessary to her production at trial.

EVIDENCE

Enclosure 1: Preliminary Investigation and NCIS Statements of Relevant Witnesses
Enclosure 2: [redacted] Interview

WITNESSES

The Government anticipates one telephonic witness in support of its motion as it relates to the unavailability of SA [redacted].

ORAL ARGUMENT

The Government does request oral argument.

RELIEF REQUESTED

The Government respectfully requests the Court deny the accused's motion for production of the above referenced NCIS agents at trial. In the event SA [redacted] is found relevant and necessary, the Government respectfully requests the he be declared unavailable and allowed to testify remotely.

[redacted]
S. E. Cummings
LCDR, JAGC, USN
Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion was served electronically on the Court, standby defense counsel, and forwarded to the accused's command for service on the accused on 24 August 2020.

[redacted]
S. E. Cummings
LCDR, JAGC, USN
Trial Counsel

APPELLATE EXHIBIT CLI
PAGE 7 OF 46
APPENDED PAGE

'Y-MARINE CORPS TRIAL JUDICI
NORTHERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **MICAH J. BROWN** **CSSSN/E-3 USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO DISMISS CHARGES PURSUANT TO SIXTH AMENDMENT, ARTICLE 10 AND R.C.M. 707** **24 AUGUST 2020**

MOTION

The Government request the Court deny the accused's motions to dismiss the charges pursuant to the Sixth Amendment, Article 10, UCMJ, and Rule for Court-Martial (R.C.M.) 707.

BURDEN

Pursuant to R.C.M. 905(c), the accused as the moving party bears the burden of proof by a preponderance of the evidence.

FACTS

1. The Government relies on the Court's Findings of Fact in its 28 August 2019 Ruling on Defense Motion to Dismiss for Lack of Speedy Trial Pursuant to Sixth Amendment, Article 10, UCMJ, and R.C.M. 707. Additionally, the Government provides the following:

2. On 28 August 2019, this Court issued a ruling denying defense motions to dismiss the charges pursuant to the Sixth Amendment and Article 10, UCMJ and also denied the defense's claim under R.C.M. 707. (AE XXII)

3. On 10 September 2019, the Defense sought another continuance from 23-27 September 2019 until the week of 11 November 2019 citing their exploration of a defense of lack of mental responsibility with their expert [redacted]. (AE XXVIII at 3).

4. On 10 September 2019—and based on the Defense's representations in its Motion that it intended on offering evidence of the accused's mental condition at trial—the Government submitted a discovery request to the Defense seeking, *inter alia*, all medical and mental health records reviewed by [redacted] in forming her opinion on the Accused's mental state at the time of the offense, as well as the names, locations, and dates of all mental health providers, fleet and family support centers, or any other location or entity where the Accused may have received psychological evaluation, counseling, or treatment.

5. On 17 September 2019, the Government filed a motion in response to the defense's continuance request wherein that request was not opposed, but the Government requested trial dates of 6-10 January 2020 due to operational unavailability of a number of witnesses of the [redacted] (AE XXXII)

APPELLATE EXHIBIT CLIV
PAGE 1 OF 63
APPENDED PAGE

6. On 27 September 2019, this Court issued a Supplemental Trial Management Order (TMO) docketing trial for 6-17 January 2020. (AE XXXV)

7. At the time the supplemental TMO was issued, the [redacted] was able to support the January trial dates. On 14 November 2019, the Executive Officer of the [redacted] informed trial counsel that the boat would be underway on the January trial dates and on 19 November 2020 the Operations Officer for Submarine Squadron 12 explained that this underway period was crew certifications and sea trials and that 10 of the Government's witnesses were mission critical and could not be left behind for trial. The next availability these witnesses would have for trial was between 11 February 2019 and 24 February 2019 or between 23 March 2019 and 21 April 2019. (AE LIX Encl A)

8. Four of the mission critical witnesses were also on the defense's witness list. (AE XLV)

9. On 20 November 2019, the Government made its first request to the Court to continue the case until 17 February 2020 in light of the information in the preceding paragraphs a. (AE LIX)

10. On 27 November 2019, the defense opposed the Government's motion for continuance citing unavailability of standby counsel to conduct trial in this case beginning 17 February 2020 due to both counsel's involvement in separate trials the week before as well as the defense's forensic psychologist, [redacted], being unavailable the week of 17 February 2020. The first availability the standby counsel had for trial in this case was 23 March 2020. (AE LXI)

11. On 27 December 2019, the Court issued a supplemental TMO docketing trial for 23 March-10 April 2020. (AE LXVII)

12. In January and February 2020, the accused filed and the Government responded to approximately 15 various motions and an Article 39(a) session was held on 11 February 2020.

13. On 6 March 2020, the Government submitted pre-trial matters to include proposed voir dire, combined witness list, cleansed charge sheet, proposed instructions, request for judicial notice, and notice of intent to use electronic media and demonstrative aids. (AE CXV – CXXI)

14. On 10 March 2020, LCDR Davis (standby counsel) emailed to alert the Court that the Prime Minister of Italy (where he was stationed) declared the entire country a "red zone" for COVID-19 containment purposes and that the 14 day quarantine requirement for travel to the US was in effect. On the same day, standby counsel again emailed the Court on behalf of the accused and relayed that the accused understood that having LCDR Davis present at trial would necessitate a continuance, but that he still desired LCDR Davis to be present a trial. (Encl. 1)

15. On 11 March 2020, the Government opposed the Defense's continuance request via email and requested empanelment of the members on 20 March 2020. (Encl. 1)

16. On 13 March 2020, standby counsel again emailed the Court requesting a continuance of the 23 March 2020 trial date on behalf of SN Brown. Standby counsel indicated that the accused

desired to delay the trial to allow for the presence of LCDR Davis whose absence would result in a "fundamentally unfair trial which would not comport with his due process rights" and because the defense expert, [redacted] was also unavailable for trial. (Encl. 1)

17. On 13 March 2020, the Court granted the defense's motion for continuance via email and requested all parties to propose trial dates by 23 March 2020. (Encl. 1)

18. On 23 March 2020, the Government proposed trial dates to the Court of 27 July – 14 Aug and alerted the Court standby counsel had not provided their availability or the availability of [redacted], the defense's expert forensic pathologist. (Encl. 2)

19. On 24 March 2020, the Government updated the Court after speaking with standby counsel that 3-21 August 2020 seemed feasible for trial dates, but that the accused had not yet agreed to those dates and it was still unclear as to whether or not [redacted] was available then. (Encl. 2)

20. On 25 March 2020, the Government again updated the Court that the accused would not agree to the proposed dates of 3-21 August 2020 because the witnesses attached to [redacted] would only be available for the first two weeks of that timeframe. The Government was also working to see if those witnesses may be allowed to stay behind for the third week if they were not mission critical. (Encl. 2)

21. On 26 March 2020, the Government submitted a motion for docketing the trial on 3 – 21 August 2020. (Encl. 2)

22. On 27 March, the Court initially docketed the trial from 3 – 16 August 2020 and implemented 0800 start times and extended hours to include weekends if needed. The Court indicated its availability to conduct voir dire on 31 July 2020 if necessary. (Encl. 2)

23. On 7 April 2020, the Court issued a written order for the trial to begin on 31 July 2020 finding that the availability of standby counsel and defense expert witness along with COVID-19 outbreak and subsequent travel restrictions provide good cause to continue the trial. The Court also acknowledged that the accused requested this continuance and that there is no evidence (and none was alleged) of prejudice to the accused by this continuance. (AE CXXII)

24. On 12 May 2020, the Court asked the Government to identify alternate locations to hold the trial that would allow for proper COVID 19 mitigation measures to include social distancing. The Government sought out various locations and updated the Court accordingly. (Encl. 3)

25. On 11 June 2020, standby counsel filed a motion to abate the proceedings or continue the trial dates to allow for both the defense expert and LCDR Davis to be available for trial. The requested continuances was from 31 July 2020 until 14 September 2020 and the accused did not object to the motion at the time of the filing. Shortly thereafter, the defense indicated its intention to modify its request for the trial to begin on 21 September 2020. (AE ____)

26. On 19 June 2020, the Government opposed the defense's motion for abatement or continuance as counsel had not sought waivers to the restriction of movement (ROM) requirements and if waivers were granted then trial dates could remain intact. (AE ____)

27. On 29 June 2020, the Court ordered the accused to provide an affidavit stating his position with respect to the defense's continuance request and his preference on the start date of trial. (Encl. 4)

28. On 5 July 2020, the Government alerted the Court that the accused indicated to trial counsel and standby counsel that he did not desire a continuance and wanted to proceed to trial in Aug, despite his expert and multiple NCIS agents not being available. On that same date, the Court ordered the defense for a second time to clarify its position on the defense's continuance request. The requested clarity was due to the court on 9 July 2020. (Encl. 5)

29. On 15 July 2020, the Government filed a motion for remote testimony in an effort to keep trial on track and to allow the accused to have his witnesses testify despite their unavailability. (AE ____)

30. On 30 July 2020, the Court ordered an R.C.M. 802 conference for the following day to discuss [redacted] availability after the Government forwarded a letter from [redacted] physician who declared him unavailable to travel and [redacted] filed a motion to quash her subpoena for trial. (Encl. 6)

31. On 31 July 2020, the Court delayed the start of the trial set for 3 August 2020. Instead, the Court ordered an Article 39(a) session on 4 August 2020 to address the unavailability of [redacted] and other witnesses. (Encl. 6)

32. At the Article 39(a) session on 4 August 2020, the Court found [redacted] unavailable and continued the start of trial until a date to be determined. The Court also ordered the Government to continue looking for alternate experts to [redacted] for the accused.

33. On 13 August 2020, the Court ordered another Article 39(a) session for 14 August 2020 on request of the Government and standby counsel to take up issues surrounding availability of witnesses including experts. (Encl. 7)

34. At the 14 August 2020 Article 39(a) session, most of the motions were tabled because the accused said he was unaware the motions session was taking place and he was not prepared to argue his motions. The Court set trial dates for 12-30 October and ordered SN Brown to consult with [redacted] who was identified by the Government as a possible adequate substitute for [redacted]. Following the hearing, the accused submitted four motions to the Government including a demand for speedy trial and Government forwarded the motions to the Court. (AE ____)

35. SN Brown was afforded an opportunity to remain on base following the Article 39(a) session on 14 August 2020 in order to do an initial consultation with [redacted] and to draft

and submit a request to the convening authority for approval for further consultation in order to comply with the Court's order. SN Brown refused the opportunity to do either and said that he would set it up himself at a later time. (AE _____)

36. On 17 August 2020, the defense filed a motion to compel witnesses and on 24 July 2020 the Government responded. (AE ____)

37. On 19 August 2020, the Government received three additional motions in the mail from the accused and forwarded them to the Court. Two of these motions were allegations of speedy trial violations to which the Government is hereby responding. (AE _____ - _____)

LAW

The Sixth Amendment of the U.S. Constitution provides that "the accused shall enjoy the right to a speedy and public trial…" U.S. CONST. amend VI. Under the Sixth Amendment, the accused's constitutional right to a speedy trial is triggered upon preferral of charges or the imposition of pretrial restraint.[1] This speedy trial guarantee cannot be established by any inflexible rule, but it can only be determined on an ad hoc balancing by the military judge.[2] The Sixth Amendment right to a speedy trial requires the application of a balancing test between: 1) the length of the delay; 2) the reason for the delay; 3) the assertion of the speedy trial right; and 4) prejudice to the accused.[3] "None of the four factors are either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant."[4]

Article 10, UCMJ, requires that the government must exercise reasonable diligence to bring to trial an accused in pretrial confinement. (*United States v. Kossman,* 38 M.J. 258 (C.M.A. 1993). Article 10, UCMJ, also provides "whenever any person subject this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him."

R.C.M. 707 requires that an accused be brought to trial within 120 days after the earlier of either: 1) preferral of charges or 2) the imposition of restraint under R.C.M 304(a)(2)-(4).

R.C.M. 707(b)(1) defines "brought to trial" as the day of the arraignment.

---

[1] *United States v. Danylo*, 73 M.J. 183 (C.A.A.F. 2013).
[2] *Barker v. Wingo*, 407 U.S. 514 (1972).
[3] *Id*
[4] *Id.*

ARGUMENT

R.C.M. 707

The defense argues that the Government has failed to bring the accused to trial within the 120 days proscribed by R.C.M. 707. This Court previously considered a similar defense motion, the Government response, and argument by counsel. On 28 August 2019, this Court ruled that the R.C.M. 707 120-day clock stopped on day 113 and that the Convening Authority did not abuse its discretion in excluding 121 days from that clock.

Sixth Amendment

The defense argues the accused's Sixth Amendment right to a speedy trial has been violated because he has been prejudiced by the length of his pretrial confinement and because he believes the Government has not taken adequate measures to bring this case to trial. In applying the four factors listed above in the *Barker* analysis, the accused has not been deprived of his right to speedy trial.

a. *Length of Delay:*

The Court has previously ruled that the Government did not violate the R.C.M. 707 120 day clock to bring the accused to trial. Since that ruling, the defense has sought to continue the start of trial from 23 September 2019 until 11 November 2019, from 17 February 2020 until 23 March 2020, from 23 March 2020 until at least 3 August 2020, and from 31 July 2020 until 21 September 2020 although the last request was later retracted by the accused. The Government expressed concerns for witness availability and requested that if the Court did grant a continuance of the 23 September 2019 trial dates that the new dates be set for 6 January 2020 vice 11 November 2019. The Government only initiated one continuance request from 6 January 2020 until 17 February 2020. This factor weighs strongly in favor of the Government.

b. *Reason for Delay:*

The Government has been proactive in requesting the earliest available trial dates for this case and opposing defense continuance requests. The defense requests for continuances were for reasons including availability of standby counsel, availability of two separate defense expert witnesses, and exploration of defenses. The Government's requests to continue the case related to availability of the majority of the Government's witnesses not being available due to operational necessities. Some of these continuances were also considered in light of the COVID-19 global health pandemic that is still currently affecting travel across the globe. There is no evidence that the Government has intentionally delayed this case at any point and this factor weighs in favor of the Government.

c. *Accused's Assertion of his Speedy Trial right:*

Barker emphasized that the accused's failure to assert the right to a speedy trial will make it difficult for the accused to prove that he was denied that right.[5]The accused first demanded a speedy trial on 14 August 2020 following the Article 39(a) that took place on that day. The timing of this demand does not weigh in the defense's favor as it was made only after numerous defense requests for continuances spanning the course of two years. This demand for a speedy trial was made only five days before the accused filed multiple motions alleging that he has been deprived of his right to a speedy trial. This factor still weighs in favor of the Government.

d. *Prejudice to the Accused:*

In analyzing this factor, three interests are involved: (1) to prevent oppressive pretrial incarceration, (2) to minimize anxiety and concern of the accused, and (3), most importantly, to limit the possibility that the defense will be impaired.[6] The nature of the prejudices allegedly suffered by the accused do not rise to the level of diminishing his constitutional rights. The accused has not alleged any additional prejudices that the Court did not consider in its first ruling on alleged sixth amendment violations. The prejudices the accused has allegedly suffered are minimal at most, not designed by the Government to prejudice his defense, and are the natural result of his own actions and his status in pretrial confinement for those actions. This factor also weighs in favor of the Government.

Article 10, UCMJ

Under Article 10, UCMJ, once an appellant is placed in pretrial confinement the Government is required to exercise "reasonable diligence" in bringing the accused to trial.[7] "The touch stone…is not constant motion, but reasonable diligence in bringing the charges to trial. Brief periods of inactivity in an otherwise active prosecution are not unreasonable or oppressive."[8] Although the *Barker v. Wingo* factors are considered in assessing a speedy trial violation under Article 10, Article 10 is more exacting than the Sixth Amendment standard.

While there may have been brief periods of seemingly inactivity, given the complex nature and the seriousness of the charges against the accused, the current COVID-19 global health pandemic, the unavailability of standby counsel and defense experts, and the delays requested by the defense, the Government has demonstrated reasonable diligence in bringing this case to trial. The Government has continued to take steps to solidify trial dates and minimize delays, even despite the accused not demanding a speedy trial until late. For the same reasons that the *Barker* factors weigh in favor of the Government, the Government has acted with diligence in the processing of this case.

---

[5] *Id.* at 532.
[6] *Id.*
[7] *United States v. Kossman*, 38 M.J. 258, 262 (C.M.A. 1993).
[8] *Id.*

EVIDENCE

In support of its motion, the Government offers the following:

Enclosure 1: Email chains regarding the defense's continuance request in March 2020
Enclosure 2: Email chains including Government proposed trial dates and docketing
Enclosure 3: Email chains regarding alternate court locations
Enclosure 4: Email from Court ordering and affidavit from the accused
Enclosure 5: Email from Court: second order for defense position on their continuance request
Enclosure 6: Emails delaying 3 August 2020 trial start
Enclosure 7: Email chain regarding Art. 39(a) set for 14 August 2020

ORAL ARGUMENT

The Government does not request oral argument unless in response to any defense oral argument on this matter.

RELIEF REQUESTED

The Government respectfully requests the Court deny the accused's motion to dismiss the charges pursuant to the Sixth Amendment, Article 10, UCMJ, and Rule for Court-Martial (R.C.M.) 707.

[redacted]
S. E. CUMMINGS
LCDR, JAGC, USN
Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion was served electronically on the Court, standby defense counsel, and forwarded to the accused's command for service on the accused on 24 August 2020.

[redacted]
S. E. CUMMINGS
LCDR, JAGC, USN
Trial Counsel

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

UNITED STATES OF AMERICA **v.** **MICAH BROWN** **CSSSN USN**	**Defense Motion for Appropriate Relief (Adequate Substitute)** **24 August 2020**

1. Nature of Motion.

Pursuant to Rule for Court-Martial 703, the accused's rights to compulsory process, the accused's right to present a defense, the 5th and 6th Amendment of the Constitution, the accused's rights to due process, and Article 46, UCMJ, the defense moves the court to find that the government has not provided an adequate substitute.

2. Burden of Proof.

As the moving party, the defense has the burden by a preponderance of the evidence.

3. Facts

a. [redacted] is an expert in the field of forensic pathology.

b. [redacted] was the [redacted] for the State of Georgia from [redacted]

c. [redacted] was granted by the Convening Authority to assist the defense as both an expert consultant and an expert witness.

APPELLATE EXHIBIT CLIX
PAGE 1 OF 16
APPENDED PAGE

159

d. Since its approval, the Convening Authority has not rescinded either of those approvals.

e. [redacted] has been involved in CSSSN Brown's defense for over one year.

f. [redacted] submitted to an interview by government counsel on 19 November 2019.

g. During that interview, [redacted] discussed some of his conclusions regarding the facts presented in this case. Those conclusions included:

1. The wounds exhibited by LSS2[redacted] do not indicate that CSSSN Brown had premeditated or planned a murderous act upon LSS2[redacted]. Rather, the wounds are more consistent with an individual who is engaging in a disorganized assault, and is simply flailing around. Enclosure A.

2. The wounds exhibited by LSS2[redacted] do not indicate that CSSSN Brown had the specific intent to inflict grievous bodily harm. Rather, the wounds are more consistent with an individual who is engaging in a disorganized assault, flailing around, inflicting blows with minimal force, and failing to strike any major arteries or organs. *Id.*

3. The wounds are consistent with CSSSN Brown's statements subsequent to the assault in which he described his actions as "punching" LSS2[redacted]. In other words, it stands to reason that the cuts to LSS2[redacted] were the by-product of CSSSN Brown punching LSS2[redacted] while holding a knife. *Id.*

4. All of the wounds sustained by LSS2[redacted] are superficial, and none of the injuries placed LSS2[redacted] in danger of death. To the contrary, the injuries appear to have been controlled by compression and closed easily with sutures. *Id.*

5. None of the wounds suggest a downward stabbing motion. *Id.*

h. On 14 August 2020, at the government's request, the military judge ruled [redacted] unavailable for October 2020 trial dates, and ordered the defense to consult with a new expert consultant in forensic pathology [redacted]).

i. The court further ordered CSSSN Brown to file a motion by 24 August 2020 if CSSSN Brown determined that [redacted] was not an adequate substitute for [redacted]

j. In accordance with the military judge's order, on 16 August, CSSSN Brown submitted a request for expert consultation with [redacted]. Consistent with the detention facility's change in policy, this request was mailed (vice emailed) to trial counsel, arriving on 19 August. Enclosure B.

k. Standby counsel advised trial counsel on 18 August that a request had been submitted. Enclosure B.

l. Following that communication, trial counsel opted to submit a request directly to CNRMA to have [redacted] appointed to the defense team for five hours of consultation. Enclosure C.

m. On 19 August, in anticipation of CNRMA's approval of the request, standby counsel provided [redacted] with relevant discovery to review.

n. [redacted] then informed standby counsel that current professional obligations preclude her from developing expert conclusions about CSSSN Brown's case for approximately 3-4 weeks. Enclosure D.

o. Standby counsel immediately notified both trial counsel and the court regarding this development, further informing the court and trial counsel that standby counsel would be

discussing these matters at 0800 PST on 21 August if the court wanted to pass any information or guidance. Enclosure E.

p. On 20 August, CNRMA approved [redacted] to conduct 10 hours of consultation with CSSSN Brown. Enclosure F.

q. The court did not provide a response prior to the standby counsel's meeting with CSSSN Brown.

r. During the 21 August meeting, CSSSN Brown asked standby counsel to inform the court that he did not believe an adequate substitute had been provided because [redacted] was unavailable to conduct the consultation within the timeframe provided by the court. Enclosure E.

s. Standby counsel relayed that information to the court, and the court responded that it would accept pleadings on the issue, giving CSSSN Brown until 26 August to submit motions. Enclosure E.

t. According to [redacted] he will be able to travel during the first or second week of November. Enclosure G.

u. On 21 August, standby counsel requested the detention facility make CSSSN Brown available on 24 August to discuss these matters. The detention facility indicated that it could not. Enclosure H.

4. Law and Discussion

At a court-martial, the parties and the court "shall have equal opportunity to obtain witnesses and other evidence." Article 46, UCMJ. It is undeniable that a defendant has a constitutional right to present a defense. Compulsory due process includes both the right to compel the attendance of defense witnesses and the right to introduce their testimony into

evidence. *United States v. Dimberio*, 56 M.J. 20, 24, 2001 CAAF LEXIS 1200 (citing *Washington v. Texas*, 388 U.S. 14, 18 (1967)).

When the testimony of an expert is both relevant and necessary to an accused's defense, the government is required to provide either the expert requested, or an "adequate substitute." Rule for Courts-Martial [R.C.M.] 703(d)(2)(i); *United States v. Pomarleau*, 57 M.J. 351, 359 (C.A.A.F. 2002). The production of an adequate substitute for an expert witness was discussed at length in *United States v. Axe*, 2020 CCA LEXIS 243, *10-11. "When an accused requests a particular expert witness . . . were the government-offered substitute unwilling to testify to the same conclusions as the defense-requested expert, the argument could be made that the accused is deprived of his Sixth Amendment right to compulsory process for witnesses 'in his favor.'" *Id.* (quoting *Robinson*, 24 M.J. at 652. As such, for a substitute expert witness to be "adequate" under R.C.M. 703(d), they must "possess similar professional qualifications" and be willing to testify to the same "conclusions and opinions" as the defense-requested expert witness. *Id.* (citing *Robinson*, 24 M.J. at 652).

Despite representations during the previous Article 39(a) session that [redacted] would be available to consult with the defense within the timeframe prescribed by the court, [redacted] was not available to consult with the defense last week, and indicated that she would require 3-4 weeks to review the discovery, formulate conclusions, and consult with CSSSN Brown. At this juncture, the government has not, therefore, provided CSSSN Brown with a substitute. As such, CSSSN Brown persists in his request to have [redacted] testify on his behalf.

[redacted]
MICAH BROWN
CSSSN USN

CERTIFICATION OF SERVICE

A true copy of this motion was served on opposing party via electronic email on 26 August 2020.

[redacted]
MICAH BROWN
CSSSN USN

APPELLATE EXHIBIT CLIX
PAGE 60 OF 116
APPENDED PAGE

MILITARY JUSTICE PROCEEDING

United States of America,	:	MCI Case No. 31JUL18-SEKB-0147-7GNA/T
v.	:	
CSSSN Micah J. Brown, USN,	:	
Subject of Investigation/Accused.	:	AUGUST 25, 2020

SUPPLEMENTAL MOTION TO QUASH SUBPOENA OR, ALTERNATIVELY, MOTION TO MODIFY SUBPOENA TO ALLOW REMOTE TESTIMONY

On behalf of non-party Inpatient Services of Florida, P.A. ("Inpatient Services") and its employee, [redacted] the undersigned hereby submits this supplement to its July 31, 2020 motion to quash or alternatively to modify the revised subpoena issued by the United States for [redacted] in-person testimony, such as that [redacted] testimony may be heard remotely ("Motion to Quash or Modify").

Inpatient Services and [redacted] understand that the assigned Court-Martial has scheduled trial in the above-captioned matter for October 12, 2020; and [redacted] testimony may still be required for the purpose of that trial. Based on current conditions and outlook related to COVID-19, Inpatient Services does not expect that the impact of COVID-19 on its patient population and related medical staffing needs at its Florida medical center will have changed significantly. *See* Letter from [redacted], attached hereto as Exhibit A. Inpatient Services expects that Florida will likely continue to have increases in COVID-19 cases; [redacted] will still be overcrowded and have physician shortages; state law requirements for [redacted] will remain in place; and [redacted]

APPELLATE EXHIBIT CLX
PAGE 1 OF 5
APPENDED PAGE

absence in October 2020 (and beyond) would unduly burden the Medical Center, its patients, and its staff, including [redacted] *See* Exhibit A.

For these reasons, those set forth more fully in the original Motion to Quash or Modify and as discussed in the enclosed Exhibit A, the undersigned requests that [redacted] be granted relief from the revised subpoena, as "unreasonable" and "oppressive," and it should be quashed or, alternatively, be modified to allow for her testimony to be heard remotely and/or in person at a local Florida military base the presence at which would not subject her to any state or facility quarantine requirements.

Respectfully submitted,

JACKSON LEWIS P.C.

By: [redacted]
Holly L. Cini (ct [redacted])
Jackson Lewis P.C.
[redacted]

[redacted]
Matthew Nieman (Virginia Bar No. [redacted])
[redacted]

FOR INPATIENT SERVICES OF FLORIDA, P.A. and [redacted]

APPELLATE EXHIBIT CLX
PAGE 2 OF 5
APPENDED PAGE

CERTIFICATION OF SERVICE

This is to certify that a copy of the foregoing was sent via e-mail to the following individuals:

Ryan Stormer
Military Judge
[redacted]

Sarah E. Cummings
USN RLSO MIDLANT DET GTN (USA)
[redacted]

Bryan Michael
Standby Counsel for CSSSN Micah J. Brown, USN
[redacted]

Sharlena Y. Williams
Standby Counsel for CSSSN Micah J. Brown, USN
[redacted]

This 25th day of August 2020.

[redacted]
Counsel for Inpatient Services of Florida, P.A. and
[redacted]

APPELLATE EXHIBIT CLX
PAGE 3 OF 5
APPENDED PAGE

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

UNITED STATES **v.** **MICAH J. BROWN** **CSSSN/E-3** **USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO DISMISS: MULTIPLICITY** **29 September 2020**

MOTION

Pursuant to R.C.M 307(c)(4) and applicable case law, the Government respectfully requests that the court deny the Defense motion to dismiss charges in the above captioned case. Although the Defense motion pertains to multiplicity, the Defense motion invites a Government response relating to unreasonable multiplication of charges. The proper remedy for unreasonable multiplication of charges in this case is a conditional dismissal of certain specifications until completion of appellate review and such remedy is applicable only after findings of guilt and before sentencing.

BURDEN

As the moving party, the Defense bears the burden of proof by a preponderance of the evidence. R.C.M. 905(c)(1)-(2).

FACTS

1. The accused allegedly stabbed LSS2 [redacted] multiple times with a knife in the galley of [redacted] while underway on 30 July 2018.

2. The accused has been charged in the alternative with attempted murder pursuant to Article 80, UCMJ including one specification of attempted premeditated murder and one specification of unpremeditated murder as well as one specification of aggravated assault with the intent to commit grievous bodily harm pursuant to Article 128, UCMJ.

3. For a finding of guilt on attempted premeditated murder, the prosecution must prove the following elements:

i) That the accused committed a certain act;

ii) That such act was done with the specific intent to kill LSS2 [redacted] (without justification or excuse);

APPELLATE EXHIBIT CLXIX
PAGE 1 OF 4
APPENDED PAGE

iii) That such act amounted to more than mere preparation;

iv) That such act apparently tended to bring about the commission of the offense of premeditated murder; and

v) At the time of the offense the accused had a premeditated design to kill.

4. Attempted unpremeditated murder is a lesser included offense of attempted premeditated murder.

5. For a finding of guilt on attempted unpremeditated murder, the prosecution must prove the following elements:

i) That the accused committed a certain act;

ii) That such act was done with the specific intent to kill LSS2[redacted] (without justification or excuse);

iii) That such act amounted to more than mere preparation;

iv) That such act apparently tended to bring about the commission of the offense of unpremeditated murder; and

v) At the time of the offense the accused had the intent to kill or inflict great bodily harm upon a person.

6. For a finding of guilt on aggravated assault with the intent to commit grievous bodily harm, the Government must prove the following elements:

i) That the accused assaulted LSS2[redacted],

ii) That grievous bodily harm was inflicted upon LSS2[redacted],

iii) That the grievous bodily harm was done with unlawful force or violence; and

iv) That the accused, at the time, had the specific intent to commit grievous bodily harm.

7. Aggravated assault with the intent to commit grievous bodily harm is a lesser included offense of attempted murder.

LAW

R.C.M. 307(c)(4) states, "What is substantially one transaction should not be made the basis for unreasonable multiplication of charges (UMC) against one person." CAAF established a non-exclusive, five-factor test for evaluating a UMC objection raised by the Defense.[1] None of the factors singularly governs the results, as the inquiry must be a balanced one.[2] The five factors are as follows:

1. Did the Accused object at trial that there was an unreasonable multiplication of charges and/or specifications?
2. Is each charge and specification aimed at distinctly separate criminal acts?[3]

---

[1] Id.

[2] *United States v. Pauling*, 60 M.J. 91, 95 (CAAF 2004) (finding no UMC for charging forgery for both the signature line and the endorsement lines of checks).

[3] *United States v. Blockburger*, 284 U.S. 299, 304 (SCOTUS 1932) established that when "the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."

3. Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality?
4. Does the number of charges and specifications unfairly increase the appellant's punitive exposures? and,
5. Is there any evidence of prosecutorial overreaching or abuse in drafting of the charges?

The standard of assessing UMC is one of reasonableness.[4] When assessing reasonableness, deference is given to the prosecution's charging decisions.[5]

ARGUMENT

Conditional dismissal after findings is appropriate.

The Government concedes that the charged offenses are charged in the alternative in order to deal with contingencies of proof and alternate theories of guilt for the same act.[6] To prove attempted premeditated murder, the Government must prove the accused had a premeditated design to kill. To prove attempted unpremeditated murder, the Government must prove the accused had the intent to kill or inflict great bodily harm, but does not need to prove a premeditated design to kill. To prove aggravated assault, the Government must prove the accused had the specific intent to commit grievous bodily harm, but does not need to prove any intent to kill. A factfinder in this case will likely only find that the Government has met its burden to prove one of the specifications. Dismissal of any charge or specification before findings would be premature. Only after the members return findings of guilt, and only if the accused is found guilty of multiple charges or specifications, should the Court apply a remedy.[7] In the event that a panel returns findings of guilty for multiple specifications when those specifications were charged as exigencies of proof, "it [is] incumbent [upon the military judge] either to consolidate or dismiss [the contingent] specification(s)."[8] As stated in the discussion to R.C.M. 906(b)(12), "A ruling on this motion ordinarily should be deferred until after findings are entered." By waiting until after findings, a conditional dismissal "protect[s] the interests of the Government in the event that the remaining [specification] is dismissed during appellate review."[9]

RELIEF REQUESTED

---

[4] *United States v. Quiroz*, 55 M.J. 334, 338 (CAAF 2001)

[5] See, *United States v. Morton*, 69 M.M. 12, 16 (CAAF 2010), "It is the Government's responsibility to determine what offense to bring against an accused. Aware of the evidence in its possession, the Government is presumably cognizant of which offenses are supported by the evidence and which are not. In some instances there may be a genuine question as to whether one offense as opposed to another is sustainable. In such a case, the prosecution may properly charge both offenses for exigencies of proof, a long accepted practice in military law"; and See, *United States v. Elespuru*, 73 M.J. 326, 329 (CAAF 2014), "The Government's appellate counsel acknowledged this strategy, explaining, 'the existence of remaining exigencies of proof necessarily required multiple specifications.' This was a reasonable decision on the Government's part." (internal citations omitted)

[6] *Id.*

[7] *United States v. Thomas*, 74 M.J. 563, 569 (NMCCA 2014) "When consolidation is impracticable, such as when the guilty findings involve violations of different UCMJ articles, military judges should consider a conditional dismissal of one or more findings."

[8] *Thomas*, 74 M.J. at 568 (quoting *Elespuru*, 73 M.J.at 329-30) (additional citation omitted)

[9] *Id.*

The Government respectfully requests this Honorable Court deny the Defense motion to dismiss the charges and/or specifications before findings.

EVIDENCE

None.

ORAL ARGUMENT

The Government does not request oral argument.

[redacted]
S. E. CUMMINGS
LCDR, JAGC, USN
Trial Counsel

CERTIFICATE OF SERVICE

A copy of this document was electronically served on the Court and standby counsel and was forwarded to Wyatt Detention Facility for service on the accused on 29 September 2020.

[redacted]
S. E. CUMMINGS
LCDR, JAGC, USN
Trial Counsel

APPELLATE EXHIBIT CLXIX
PAGE 4 OF 4
APPENDED PAGE

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

UNITED STATES **v.** **MICAH J. BROWN** **CSSSN/E-3** **USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION FOR ADEQUATE SUBSTITUTE** **29 September 2020**

MOTION

Pursuant to R.C.M 703(d)(2)(B) and applicable case law, the Government respectfully requests that the court deny the Defense motion for an adequate substitue forensic pathologist to testisfy as an expert witness at trial as the issue is now moot. The accused has made it clear at the Article 39(a) on 24 September 2020 that he desires to proceed to trial on 12 October without either [redacted], his original forensic pathologist who is unavailable, or [redacted] who the Government offered as an adequate substitute. Therefore, the Defense motion is moot.

BURDEN

As the moving party, the Defense bears the burden of proof by a preponderance of the evidence. R.C.M. 905(c)(1)-(2).

FACTS

1. On 12 June 2020, standby counsel for CSSSN Brown submitted a motion to abate the proceedings or continue the start of trial from 31 July 2020 until 14 September 2020.

2. On 4 August 2020, the Court declared [redacted] unavailable. The Court continued the start of trial to allow [redacted] time to recover and the Government to find another adequate substitute expert witness.

3. On 10 August 2020, the Government found and submitted to the Court and the Defense, [redacted], a potential adequate substitute expert witness. (Enclosure 1)

4. On 18 August 2020, the Government submitted a request to the Convening Authority that [redacted] be approved as an expert and funded for consultation with the Defense. This was done in compliance with the Court's order to facilitate the approval and funding of [redacted] and in

APPELLATE EXHIBIT CLXX
PAGE 1 OF 8
APPENDED PAGE

an effort to expedite the approval process since the Defense had not submitted such a request. (Enclosure 2)

5. On 19 August 2020, the Government received a request from CSSSN Brown addressed to the Convening Authority to approve 500 hours of consultation time with [redacted]. This request was forwarded to the Convening Authority and the Government recommended 10 hours of consultation time. (Enclosure 2)

6. On 20 August 2020, the Convening Authority approved 10 hours of consultation time with [redacted] for the Defense. That approval was forwarded to [redacted] and to standby counsel to ensure the accused was informed.

7. An Article 39(a) session was held on 24 September 2020 in Jacksonville, FL. The accused, CDR Davis (standby counsel), and LCDR Cummings (trial counsel) were present in person and CDR Stormer (military judge), LCDR Williams (standby counsel), and LCDR Belforti (trial counsel) were present via VTC.

8. At that Article 39(a) session, the accused argued his motion as to why he believed [redacted] is not an adequate substitute for [redacted] and provided the Court an affidavit signed by [redacted]. The accused informed the Court that he had not had a conversation with [redacted] as of the date of the 39(a), but that his standby counsel had. The Court called [redacted] telephonically and questioned the witness regarding her affidavit and opinions of the case.

9. The Court also called [redacted], the accused's original expert witness, to inquire into his availability for trial. [redacted] indicated that he would not be available to travel for trial due to medical conditions until December 2020. [redacted] also indicated that he was in possession of a computer, a webcam, and a telephone and could be available to testify remotely during the trial dates in October 2020 if needed. Trial counsel indicated the Government would not object to [redacted] testifying via remote means.

10. When the Court asked the accused if the accused desired to continue the trial dates until [redacted] was physically available for trial or if the accused desired to call [redacted] to testify via telephone or VTC, the accused was very clear that he desired to keep the trial dates of 12-30 October 2020 even though [redacted] could not be there in person for trial in Groton, CT. The accused was also very clear that he did not desire to call [redacted] as an expert witness via remote means and that he desired to proceed to trial without any expert.

11. As of the date of this filing, the accused has not indicated that he would like to call [redacted], or any other expert forensic pathologist that he may deem to be an adequate substitute. The accused has not provided any alternative substitutes for [redacted] and has indicated that he would not consider any other expert forensic pathologist to be an adequate substitute.

Law

R.C.M. 703(d)(2)(B) states:

"If a military judge grants a motion for employment of an expert or finds that the Government is required to provide a substitute, the proceedings shall be abated if the Government fails to comply with the ruling…"

ARGUMENT

The Government has complied with its obligation.

The Government approved and agreed to pay [redacted] as an expert consultant and then later as an expert witness. After the Court found [redacted] unavailable for trial, the Government also approved and agreed to pay [redacted] as an expert consultant. After standby defense counsel consulted with [redacted], the accused argued she is not an adequate substitute, but has not proposed any other forensic pathologist that he would consider to be an adequate substitute. This is not a case where the Government has declined to fund the expert of choice for the accused or provide an adequate substitute of that witness instead.[1] Not only did the Government fund the expert of choice [redacted], the Government funded a second expert for consultation after [redacted] became unavailable. The Government second funded forensic pathologist would meet the requirements as an adequate substitute in terms of qualifications, but the accused argues that her opinion and testimony will not be an adequate substitute for [redacted][2] Rather than finding and proposing an expert to take the place of [redacted], the accused has repeatedly attempted to abate the proceedings arguing that the Government has not provided him adequate expert assistance. The Government also provided to the accused and standby counsel a list of other potential experts that they were free to reach out to and request consultation with if they desired.

At the 24 September 2020 Article 39(a) session, the accused was clear that he wanted to proceed to trial on 12 October, that he understood [redacted] was not physically available then, and that he did not desire to call [redacted] via remote means. The accused made it clear that he does not desire to utilize either [redacted] or [redacted] as expert consultants or witnesses at trial. Since the accused does not desire to call a forensic pathologist as an expert witness at trial, his motion arguing [redacted] is not an adequate substitute is moot.

---

[1] *United States v. Axe*, No. 201900009, 2020 CCA LEXIS 243, at *1 (N-M Ct. Crim. App. July 27, 2020) "When the testimony of an expert is both relevant and necessary to an accused's defense, the government is required to provide either the expert requested, or an 'adequate substitute.'"

[2] *Id.* at 11 "Accordingly, in order for a substitute expert witness to be "adequate" under R.C.M. 703(d), they must "possess similar professional qualifications" and be willing to testify to the same "conclusions and opinions" as the defense-requested expert witness. *Robinson*, 24 M.J. at 652 (citing *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985)).

RELIEF REQUESTED

The Government respectfully requests this Honorable Court deny the Defense motion as the issue is moot.

EVIDENCE

The Government invites the Court's attention to the enclosures submitted in its 20 Aug 2020 Response to Defense Motion to Reconsider Abatement in addition to the following:

Enclosure 1: Approval chain of [redacted]

ORAL ARGUMENT

The Government does not request oral argument.

[redacted]

S. E. CUMMINGS
LCDR, JAGC, USN
Trial Counsel

CERTIFICATE OF SERVICE

A copy of this document was electronically served on the Court and standby counsel and was forwarded to Wyatt Detention Facility for service on the accused on 29 September 2020.

[redacted]

S. E. CUMMINGS
LCDR, JAGC, USN
Trial Counsel

APPELLATE EXHIBIT CLXX
PAGE 4 OF 8
APPENDED PAGE

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

UNITED STATES **v.** **MICAH J. BROWN** **CSSSN/E-3/USN**	**MOTION TO PREADMIT EVIDENCE: MEDICAL RECORDS** **1 October 2020**

MOTION

Pursuant to Rule for Courts-Martial (R.C.M.) 906 (b)(7), the Government requests that this Court rule on the admissibility of the medical records from [redacted] showing the treatment the victim, LSS2 [redacted] received there on 31 July 2018.

SUMMARY

The accused is charged in the alternative with attempted premeditated murder, attempted unpremeditated murder, and aggravated assault after he attacked LSS2 [redacted] with a knife on 30 July 2018. Following that attack, the victim was treated at [redacted] and medical records pertaining to that treatment were created. These medical should be ruled admissible because they are relevant, not unduly prejudicial, and authentic.

FACTS

1. The accused has been charged in the alternative with attempted murder pursuant to Article 80, UCMJ including one specification of attempted premeditated murder and one specification of unpremeditated murder as well as one specification of aggravated assault with the intent to commit grievous bodily harm pursuant to Article 128, UCMJ after he attacked LSS2 [redacted] in this case with a knife onboard [redacted] on 30 July 2018.

2. On 31 July 2018, LSS2 [redacted] was admitted at [redacted] where some of his injuries were treated.

3. Medical records documenting LSS2 [redacted] presentation and injuries at the time and the treatment of his injuries were created during his stay at the hospital by hospital staff.

4. On 15 November 2019, the medical records contained in Enclosure 1 were certified by the [redacted] records custodian and an affidavit was affixed to those records.

BURDEN

The burden of proof and persuasion rests on the Government for this motion. The standard as to any factual issue necessary to resolve this motion is to a preponderance of the evidence. *See* R.C.M. 905(c).

LAW

The Rules of Court-Martial (R.C.M.) allow and promote, in the interest of judicial economy, pretrial rulings on the admissibility of evidence. R.C.M. 905(b), dealing with pretrial motions, states, "[a]ny…request which is capable of determination without the general issue of guilt may be raised before trial." R.C.M. 905(d) states that rulings should be issued "before pleas are entered." R.C.M. 906(b)(13) specifically permits the request for rulings on admissibility of evidence. Military Rule of Evidence (M.R.E.) 104(a) also states that "[p]reliminary questions concerning . . . the admissibility of evidence . . . shall be determined by the military judge." A military judge's determinations on evidence admissibility are reviewed for abuse of discretion only. *United States v. Kelley*, 45 M.J. 275, 279-80 (C.A.A.F. 1996).

In order to show evidence is admissible it must meet certain requirements. First, it must be relevant evidence. This is a low threshold that requires it make some fact at issue more or less probable. M.R.E. 401. Second, relevant evidence is admissible unless prohibited by the U.S. Constitution, federal statute, the M.R.E., or the Manual for Courts-Martial. M.R.E. 402 (2016). Third, the probative value of this evidence must not be substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence. M.R.E. 403 (2016).

In addition, evidence must meet the authentication or identification requirement of M.R.E. 901. The requirements of M.R.E. 901 are satisfied when the proponent of the evidence makes a *prima facie* showing the evidence is what it purports to be. *United States v. Lubich*, 72 M.J. 170, 174 (C.A.A.F. 2013). Once this *prima facie* showing is made, "the trial court should admit the item, assuming it meets the other prerequisites to admissibility, such as relevance and compliance with the rule against hearsay, in spite of any issues the opponent has raised about flaws in the authentication." *Id.* at 174 (quoting 5-901 Weinstein's Federal Evidence § 901.02[3], at 901-13 to 901-13 (Joseph M. McLaughlin ed., 2d ed. 2003)).

Under M.R.E. 902(11), the original copy of a domestic record that meet the requirements of M.R.E. 803(6)(A)-(C), as shown by a certification of the custodian, is admissible. M.R.E. 803(6)(A)-(C) requires that the record meet the following requirements: (1) that it be made at or near the time by someone with knowledge; (2) the

record was kept in the course of regularly conducted business; and (3) the records were prepared by the personnel of the business in the ordinary course of business.

A ruling on the admissibility of evidence is specifically listed among the non-exclusive list of motions for relief to permit effective preparation for trial. R.C.M. 906. Since admissibility is the province of the military judge, resolving any issues as to admissibility prior to trial allows for a smooth presentation of evidence and reduces the number of times the members must be excused for Article 39(a) sessions. *See* M.R.E. 104(a).

ARGUMENT

[redacted] Records of LSS2 [redacted] are Admissible

As evidenced by the affidavit signed by the records custodian of [redacted], the requirements of M.R.E. 902(11) and M.R.E. 803(6)(A)-(C) are met. This evidence is self-authenticating because it qualifies as a certified domestic record of a regularly conducted activity. The business record affidavit meets the requirements of M.R.E. 803(6)(A)-(C) because: (1) the record was created at or near the time of the occurrence of the matters set forth by a person with knowledge on those matters; (2) the records were kept in the course of the regularly conducted activity [redacted]; and (3) making these records was a regular practice of [redacted] Furthermore, this evidence is admissible under M.R.E. 803(6) without the testimony of the custodian or another qualified witness because the certification complies with M.R.E. 902(11) and there are no indications of a lack of trustworthiness.

The medical records of LSS2 [redacted] from [redacted] are relevant to this case because they show the injuries that were documented and treated on LSS2 [redacted] just one day after the accused attacked him with a knife.

RELIEF REQUESTED

The Government offers the following evidence in support of its motion:

Enclosure (1): [redacted] records of LSS2 [redacted]

ORAL ARGUMENT

The Government does not request oral argument.

[redacted]
S.E. CUMMINGS
LCDR, JAGC, USN
Trial Counsel

CERTIFICATE OF SERVICE

A copy of this document was electronically served on the Court and standby counsel and was forwarded to Wyatt Detention Facility for service on the accused on 1 October 2020.

[redacted]
S.E. CUMMINGS
LCDR, JAGC, USN
Trial Counsel

REQUESTS

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

The United States of America **v.** **Micah J. Brown** **CSSSN/E-3 USN**	**REQUEST FOR PRODUCTION OF WITNESSES** **26 Apr 19**

1. Pursuant to R.C.M. 703, the Defense provides this witness production request for the following witnesses to be produced for testimony during the merits phase of the court-martial for charges referred against CSSSN Micah J. Brown, U.S. Navy.

a. NCIS Special Agent [redacted] - contact information is in the possession of the Government. Special Agent [redacted] was one of the participating agents in this case. He interviewed multiple witnesses and collected/received evidence in this case that the Government intends to introduce. He is expected to testify about his investigative actions. He will also be needed to impeach witnesses on their prior statements, if necessary.

b. NCIS Special Agent [redacted] - contact information is in the possession of the Government. Special Agent [redacted] was one of the participating agents in this case. He interviewed the first responding witness ETVC [redacted] in this case. He will be needed to impeach ETVC [redacted] on his prior statements, if necessary. He is also expected to testify about investigative actions he took in this case.

c. NCIS Special Agent [redacted] - contact information is in the possession of the Government. Special Agent [redacted] was one of the participating agents in this case. She

Enclosure M

interviewed multiple witnesses in this case. She is expected to testify about her investigative actions. She will also be needed to impeach witnesses on their prior statements, if necessary.

d. NCIS Special Agent [redacted] - contact information is in the possession of the Government. Special Agent [redacted] was one of the participating agents in this case. He interviewed multiple (approximately 18) witnesses and collected/received evidence in this case that the Government intends to introduce. He is expected to testify about his investigative actions. He will also be needed to impeach witnesses on their prior statements, if necessary.

e. NCIS Special Agent [redacted] - contact information is in the possession of the Government. Special Agent [redacted] was one of the participating agents in this case. He interviewed multiple witnesses. He is expected to testify about his investigative actions. He will also be needed to impeach witnesses on their prior statements, if necessary.

f. ETVC [redacted] - contact information is in the possession of the Government. ETVC [redacted] was one of the first witnesses to respond to the alleged events in the galley on the day in question. He will testify to the events he witnessed and his interactions and observations of CSSSN Brown immediately preceding the alleged stabbing.

g. HM1 [redacted] - contact information is in the possession of the Government. HM1 [redacted] was the Independent Duty Corpsman (IDC) onboard the [redacted] during the alleged incident. As the IDC, HM1 [redacted] treated LSS2 [redacted] injuries sustained onboard the [redacted]. HM1 [redacted] is expected to testify to the treatment he provided to LSS2 [redacted]

h. YNC [redacted] - contact information is in the possession of the Government. According to YNC [redacted], of the all the Chief Petty Officers onboard the [redacted], "he may know CSSSN Brown the best". He will be able to testify

about his interactions and observations of CSSSN Brown leading up to the alleged incident, as well as his interactions and observations of CSSSN Brown immediately thereafter.

i. TM2 [redacted] - contact information is in the possession of the Government. TM2 [redacted] was underway with the [redacted] during the alleged incident. He also previously deployed with CSSSN Brown and therefore he is expected to testify to the differences that he personally observed in CSSSN Brown's mental state between the two periods of time.

j. ETV3 [redacted] contact information is in the possession of the Government. ETV3 [redacted] as present in/near the galley at the time of the alleged incident. ETV3 [redacted] is expected to testify to his observations of the alleged incident as well as his observations of CSSSN Brown immediately thereafter.

k. EDMC [redacted] - contact information is in the possession of the Government. EDMC [redacted] was the Preliminary Inquiry Officer (PIO) following the alleged incident. He interviewed numerous witnesses during the course of his investigation. He will be needed to impeach witnesses on their prior statements to him, if necessary.

2. The Defense reserves the right to add additional witnesses and will provide supplemental requests in a timely manner. Additionally, the Defense reserves the right to call witnesses that appear on the government witness list.

[redacted]
S. Y. WILLIAMS
LT, JAGC, USN
Defense Counsel

****

Certificate of Service

I hereby attest that a copy of the foregoing request was served on trial counsel by e-mail on 26 April 2019.

[redacted]
S. Y. WILLIAMS
LT, JAGC, USN
Defense Counsel

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

UNITED STATES **v.** **MICAH J. BROWN** **CSSSN/E-3** **USN**	**GOVERNMENT REQUEST FOR DOCKETING** **27 March 2020**

1. The Government respectfully requests the titled case be docketed for trial on 3-21 August 2020. All witnesses, including experts for both sides and all NCIS agents, will be available during this time period, with the exception of nine witnesses who will be available the entire first two weeks, but as of the date of this filing will be unavailable for the third week due to operational requirements.

2. The Government previously proposed 27 July – 14 August 2020 for trial dates as the operational schedule fort these nine witnesses, which include both Government and Defense witnesses, allowed for their continual presence during that three week period. However, LCDR Bryan Davis is scheduled to execute a permanent change of station that month and informed the Government he would not be available at all. LCDR Sharlena Williams stated that she was "out of the country" at the end of July and informed the Government that she too was not available until the first week of August.

3. On Tuesday, March 24th, the Government held a conference call with CSSSN Brown and LCDR Williams. The Government explained to the accused and LCDR Williams that the operational schedule of the nine witnesses made them unavailable starting the middle of August until an unknown date in the fall. The Government also explained that based on the availability of standby defense counsel and the schedules of the other dozen witnesses, 3-21 August 2020 seemed to be the best time frame to docket the case. The accused indicated that he will object to the proposed trial dates if the nine witnesses are not available for all three weeks. Government counsel signed off the conference call and allowed the accused to consul with LCDR Williams further and was informed the next day that the accused will not agree to the 3-21 August dates as proposed.

4. Government counsel has consulted with the staff judge advocate for Naval Submarine Support Center and the Operations Officer of COMSUBRON 12, LCDR [redacted], in an effort to

APPELLATE EXHIBIT CXXII
PAGE 23 OF 113
APPENDED PAGE

provide the Court with information regarding whether these nine military members may be relieved of their duties during the entire three week period by appointing other Sailors from other units to support the mission. [redacted] initially led counsel to a Master Chief who could be a direct point of contact on this issue, however Government counsel learned this morning (27 March) that this Master Chief is currently in quarantine with symptoms of COVID-19. Government counsel consulted again with LCDR [redacted] who indicated that it is likely the nine witnesses will be able to stay behind, but stated that the organization needs more time to fully assess and put that plan into action. The Government also intends to elevate this issue to the staff judge advocate for the TYCOM for assistance.

5. Even if some or all of the witnesses may not be available during the third week of trial, it is the Government's position that this does not prejudice the accused in any way. In several instances in other cases witnesses have been deposed prior to trial due to operational necessity, medical situations, or other circumstances that render them unavailable during docketed courts. Those depositions are a recognized form of admissible evidence and are played for members at trial without counsel being able to ask additional question or subjecting the witness to recall. In this case, the witnesses will be available for live, in-person testimony and the accused's only objection to the proposed dates is that the witnesses would be unavailable for recall during a third week of trial. The Government believes it is likely that all witness testimony, including testimony of these nine witnesses, will be complete within the first two weeks of trial. The Government fails to see how witness unavailability for recall during a third week of trial will prejudice the accused. If the trial is not able to be docketed during these proposed dates, it is unclear when these nine witnesses will be available again for a two (let-alone three) week period due to operational commitments.

6. The Government is making every effort to obtain approval from the operational chain of command of the relevant Sailors to make them available all three weeks and will continue to update the Court if the Court approves this request.

[redacted]

S. E. CUMMINGS
LCDR, JAGC, USN
Trial Counsel

CERTIFICATE OF SERVICE

A copy of this document was electronically served on the Court, stand-by counsel, and forwarded to Wyatt Detention Facility for service on the accused on 27 March 2020.

[redacted]

S. E. CUMMINGS
LCDR, JAGC, USN
Trial Counsel

/Y-MARINE CORPS TRIAL JUDIC Y
NORTHERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **MICAH J. BROWN** **CSSSN/E-3 USN**	**GOVERNMENT REQUEST FOR RULING** **24 JULY 2020**

MOTION

1. The Government respectfully requests this Honorable Court issue a ruling on its motion to allow remote testimony or grant a continuance filed on 15 July 2020 by Wednesday July 29th.

FACTS

2. On 15 July 2020, the Government filed a motion requesting remote testimony for several Defense witnesses that it argued were unavailable under the rules due to the ongoing health pandemic.

3. The same date, the Court replied and gave the accused and stand-by counsel until 22 July to file a response.

4. On 18 July, the Government filed a supplement with additional information about a new witness with travel concerns related to coronavirus.

5. Neither the accused nor standby defense counsel filed a response with the Court at the 22 July deadline and neither asked for an extension.

6. On the evening of 22 July, the military judge sent another email indicating that since the accused had not submitted a filing by the deadline previously set, that the parties should plan on appearing in Court on 3 August. The Court did not issue a ruling on the Government's motion for remote testimony. The Court directed the parties to file any other matters by 23 July (the next day) by 1700.

7. On 23 July at 1807, LCDR Sharlena Williams (one of the two stand-by defense counsel for CSSSN Brown) emailed the Court alleging that the accused never received the Government's filing from 15 July and that she was just able to speak to him that day given difficulties in communications with the detention facility. LCDR Williams stated that the accused would file a response the next day opposing the Government's motion.

8. Neither stand-by counsel contacted the Government between 15 July and 23 July to alert them to any difficulties in communicating with the accused.

9. The military judge in response to LCDR Williams' email directed the parties to appear telephonically at an R.C.M. 802 conference on Monday, July 27th at 1100 (EST) and to also plan to appear in Court on 3 August. The Court did not provide a ruling on the motion filed on 15

APPELLATE EXHIBIT CXXXV
PAGE 1 OF 23
APPENDED PAGE 135

July.

10. On 24 July, Government counsel contacted personnel at the Wyatt detention facility to gather facts surrounding the alleged communication difficulties and to facilitate filing of any responses as per LCDR Williams' email the previous day.

11. [redacted], from the Wyatt detention facility sent an email to the Government counsel on 24 July stating that CSSSN Brown was asked if he had any paperwork that the staff could send to the Government for purposes of filing a response with the Court. CSSSN Brown's response was, "not at the moment, possibly Monday."

12. In addition, [redacted] provided the Government with several pages of communications between Wyatt staff and standby defense counsel setting up phone conversations and facilitating providing paperwork to CSSSN Brown over the last several months. These communications reveal standby counsel spoke to CSSN Brown on 16 July (the day after the Government filing for remote testimony) and 23 July.

13. The standby counsel did not alert the Government or the staff at Wyatt that CSSSN Brown allegedly was not in receipt of the Government's motion until 23 July.

14. CSSN Brown has known of the issues surrounding availability of witnesses since at least 5 July 2020.

15. Most of the counsel and the military judge will be traveling to Connecticut the weekend of 1 August 2020 from Virginia and California; states with high rates of spread of coronavirus. The victim, LSS2[redacted], is set to travel to Connecticut on 30 July 2020 from the state of Georgia, another state with a high rate of spread of coronavirus. Six other Government witnesses coming from the states of Washington, California, and Florida are scheduled to fly commercial airlines on 1 August to arrive in Connecticut for trial. All of these states have high rates of coronavirus spread.[1]

ARGUMENT

A. Given the current state of the spread of coronavirus in the United States, the Court should rule on the Government's motion for remote testimony by 29 July 2020.

16. Given the nature of the spread of coronavirus currently in the United States, travel between states (especially via commercial airline) increases the risk of infection. If the Court were to wait to rule on the Government's motion until an in-person session of court on 3 August, 2020 and then were to continue this case, 11 people (counsel and witnesses) would have conducted interstate travel with many of them coming across the country on commercial flights. This would expose all of these people to potential infection without the completion of the court-martial. In addition, the Government would expend significant resources logistically and

[1] https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/index.html, Accessed July 24, 2020.

monetarily, perhaps in vain.

B. The accused has been afforded ample time to respond to the motion for remote testimony.

17. As noted in previous filings and enclosures to the Court, the accused has been aware of the travel challenges of his witnesses for several weeks now. His counsel spoke to him the day after the Government filed its motion to allow remote testimony. Neither he nor his counsel alerted the Government that he was not in receipt of the filing until a day after his response was due. He has been given two extensions for filing a response and has failed to meet either deadline without showing good case. CSSSN Brown will have time on 27 July to verbally state his position to the Court which the Court can make part of the record in a summarized email after the fact. R.C.M. 905(h) allows the Court to dispose of the matter without a 39(a) session.

18. Allowing the accused to further extend this important issue until 3 August, after a lack of diligence and proper communication previously ordered by the Court, would be unfair to the Government. It also would unneeessarily put 11 people in harm's way by increasing their risk of exposure to coronavirus; not least of which is LSS2 [redacted]. The victim in this case has endured several delays. Now, after two years, he is on the precipice of attaining closure and justice for the brutal crime committed upon him. It is an unfair burden for him to have to travel in this dangerous environment only for the case to potentially be continued yet again. In addition, all but one traveler is on active duty or employed by NCIS. If they contract coronavirus or spread it to other military members it could have a detrimental effect on various units' mission readiness. These risks can be avoided if the Court issues a ruling prior to travel.

RELIEF REQUESTED

19. The Government respectfully requests that this Honorable Court rule on its motion for remote testimony by 29 June to enable the Government to cancel travel arrangements if necessary and to adequate protect the health of all parties, the victim, and the witnesses.

20. The Government will provide documentary evidence to support this motion within the next 24 hours.

[redacted]
Courtney E. Lewis
CDR, JAGC, USN
Assistant Trial Counsel

APPELLATE EXHIBIT [illegible]
PAGE 1 OF 13
APPENDED PAGE [illegible]

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion was served electronically on stand-by defense counsel, forwarded to Wyatt Detention Facility for service on the accused, and the Court on 24 July 2020.

[redacted]

Courtney E. Lewis
CDR, JAGC, USN
Assistant Trial Counsel

APPELLATE EXHIBIT CXXXV
PAGE 4 OF 23
APPENDED PAGE

NOTICES

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

UNITED STATES **v.** **MICAH J. BROWN** **CSSSN/E-3** **USN**	**GOVERNMENT NOTICE OF EXPERT WITNESSES** **07 October 2019**

Pursuant to RULE FOR COURT-MARTIAL 703(D), MANUAL FOR COURTS-MARTIAL (2019 ed.), the government hereby gives notice of intent to employ the use of the following expert witnesses for the above captioned case:

a. LCDR [redacted], in the area of mental health.

b. [redacted], in the area of mental health.

c. [redacted], in the area of forensic pathology.

d. LTC [redacted], in the area of forensic psychiatry.

CUMMINGS.SAR
AH.ELIZABETH.[redacted]

Sarah E. Cummings
LCDR, JAGC, USN
Trial Counsel

APPELLATE EXHIBIT XXXVII
PAGE 1 OF 2
APPENDED PAGE

CERTIFICATE OF SERVICE

I hereby certify that a copy of this notice of expert witness was served on Defense Counsel in the above-captioned case on 07 October 2019.

CUMMINGS.SARAH.ELIZABETH.[redacted]

Sarah E. Cummings
LCDR, JAGC, USN
Trial Counsel

APPELLATE EXHIBIT XXXVII
PAGE 2 OF 2
APPENDED PAGE

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

UNITED STATES **v.** **MICAH J. BROWN** **CSSSN/E-3** **USN**	**GOVERNMENT NOTICES PURSUANT TO R.C.M. 701, R.C.M. 703 AND R.C.M. 902** **12 FEB 2020**

On 07 October 2019, the Government provided notice in the above captioned case pursuant to Rule For Court Martial 703(D), Manual for Courts-Martial (2019 ed.). The Government still intends to employ [redacted] in the field of forensic pathology and may employ CDR [redacted] and [redacted] in the field of mental health as well as LTC [redacted] in the field of forensic psychiatry dependent on notice of any defense that includes mental responsibility.

Out of an abundance of caution and pursuant to M.R.E. 902, the Government also provides notice of its intent to offer into evidence the records and certification located at Bates Stamp numbers 1533-1574 and 1626-1633.

Pursuant to R.C.M. 701, the following disclosure is provided. On 11 February 2020, Trial Counsel spoke with LSS2 [redacted], in the presence of LN1 [redacted] who stated the following: LSS2 [redacted] routinely visited the galley when the Accused and CSS3 [redacted] were on duty. LSS2 [redacted] would help them set up for the next meal and in exchange he would be allowed to eat before the rest of the crew. LSS2 [redacted] recalled the knife used in the attack may have had small grooves along the flat edge of the blade. LSS2 [redacted] also participates in physical therapy for his ankles as they were injured during the attack.

Although not required and not all-inclusive, the Government is providing notice to the Accused of its intent to offer into evidence the following: pictures of LSSS2 [redacted] injuries, pictures of the suspected weapon used by the Accused in the attack, pictures of the clothing and shoes worn by both the Accused and LSS2 [redacted] during the attack, diagrams and pictures of the galley and surrounding areas where the attack took place.

The Government is also hereby providing a courtesy list of the witnesses it currently intends to call in its case in chief. Should the Government intend to call additional witnesses, notice will be provided in accordance with the trial management order. Although not meant to be all inclusive, the Government has also listed corresponding bates stamp pages to each witness. The Government also suggests reviewing the R.C.M. 701 notices provided for the witnesses below.

APPELLATE EXHIBIT CXII
PAGE 1 OF 2
APPENDED PAGE

Witness Name	Bates stamp#
Chief [redacted]	002, 021, 033-034, pg. 065-076 (07/11/19, 39a Transcript)
ENS [redacted]	012-013, 024-025, 339-341
ETN2 [redacted]	008, 028, 039-042, 331-332
ETRCM [redacted]	357-359, 468-470, pg. 045-064 (07/11/19, 39a Transcript)
Chief [redacted]	311-313, pg. 106-127 (07/11/19, 39a Transcript)
CSS3 [redacted]	010-011, 019-020, 031-032, 298-302
EMN2 [redacted]	004, 026, 036, 322-324
CSS1 [redacted]	303-304, pg. 091-106 (07/11/19, 39a Transcript)
HMC [redacted]	308-310
MMN1 [redacted]	007, 027, 037-038
CSS3 [redacted]	333-334
SA [redacted]	138-153, 160-174, 214-291
SA [redacted] (and/or SA [redacted])	052-087, 177-185, 303-304
[redacted]	Notice of expert employment previously provided
LTC [redacted]	Notice of expert employment previously provided
CDR [redacted]	R.C.M. 706 Report (Short and Long Forms)
[redacted]	R.C.M. 706 Report (Short and Long Forms)
LSS2 [redacted]	049-051 (plus video recorded interview)

*Testimony of these witnesses may expected should there be notice given of any defense that includes mental responsibility.

[redacted]
S. E. CUMMINGS
LCDR, JAGC, USN
Trial Counsel

CERTIFICATE OF SERVICE

A copy of this document was physically served on the Accused by Trial Counsel on 12 February 2020. Bates Stamps 1626-1633 were also physical provided to the Accused by Trial Counsel on 12 February 2020.

[redacted]
S. E. CUMMINGS
LCDR, JAGC, USN
Trial Counsel

APPELLATE EXHIBIT CXII
PAGE 2 OF 2
APPENDED PAGE

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

UNITED STATES **v.** **MICAH J. BROWN** **CSSSN/E-3/USN**	**GOVERNMENT NOTICE OF INTENT TO USE ELECTRONIC MEDIA AND DEMONSTRATIVE AIDS** **6 March 2020**

The Government hereby provides notice of its intent to use electronic media and demonstrative aids during the trial.

[redacted]
S. E. CUMMINGS
LCDR, JAGC, USN
Trial Counsel

APPELLATE EXHIBIT CXV
PAGE 1 OF 1
APPENDED PAGE

N Y-MARINE CORPS TRIAL JUDICIA
NORTHERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **MICAH J. BROWN** **CSSSN/E-3 USN**	**NOTICE TO CSSSN BROWN REGARDING WITNESS PRODUCTION** **7 AUGUST 2020**

The Military Judge ordered the Government to provide its "rationale" regarding the witnesses it would not produce for trial in this case. The Government previously provided the CSSSN Brown notice via email and in phone conference in early July that it would not produce these witnesses. CSSSN Brown has not filed a motion to compel. Please see below:

a. NCIS Special Agent [redacted]: Agent [redacted] interviewed just one witness. The defense requests generically states that he will "be needed to impeach ETVC [redacted] on his prior statements, if necessary. He is also expected to testify about investigative actions he took in this case." Chief [redacted] is the witness that Agent [redacted] interviewed. He was an eye witness to the alleged crimes in this case. He will be physically present to testify at trial. He was interviewed by the preliminary inquiry officer, MMNCS [redacted] while still onboard the [redacted] on 30 July 2018 and then was interviewed by Special Agent [redacted] on 31 July 2018. Chief [redacted] also testified at an Article 39(a) session in the summer of 2019. All three statements are consistent in material ways. It is unlikely that Chief [redacted] will make an inconsistent statement. Even if he did, he can be impeached with any of the three written statements. Agent [redacted] would only be able to refer back to those statements as he recalls nothing outside of the provided statements. He is not a relevant and necessary witness.

b. NCIS Special Agent [redacted]: Agent [redacted], presently assigned in Brazil, interviewed the victim, LSS2 [redacted]. The interview was videotaped and a transcript is available for impeachment purposes. He also interviewed five other witnesses that will be testifying in person at trial: HM1 [redacted], YNSC [redacted], EMNS [redacted], CS3 [redacted], and ENS [redacted] These witnesses were interviewed by the PIO as well and all their statements are materially similar. All witnesses will be present in person for trial. Agent [redacted] was the lead NCIS agent when the case was transferred to Groton, Connecticut. He also collected the victim's medical records. Neither the accused nor standby counsel have interviewed Agent [redacted]. Agent [redacted] does not remember any statements made by any witnesses noted above outside of what is in his NCIS summary. As previously noted, NCIS leadership has sought approval of remote testimony for Agent [redacted] due to this location and the health and mission risks to his international travel. While, the Government concedes that he could be a relevant witness (although Defense has not filed a motion to compel articulating the specific reason why they believe he is relevant and necessary), the Government will not produce him in person unless ordered by the military judge. He is unavailable due to his location and the limitations on travel due to coronavirus.

c. NCIS Special Agent [redacted]: Agent [redacted] interviewed just two witnesses; MMN1 [redacted] and ETN2 [redacted]. Both were eye witnesses to the assault and will be physically

present in person to testify at trial. Both provided sworn statements to the preliminary inquiry officer, MMNCS [redacted]. And both provided substantially similar statements to Agent [redacted] Neither the accused nor standby counsel have interviewed Agent [redacted]. Agent [redacted]n does not remember any statements made by either MMN[redacted] outside of what is in her NCIS summary. Defense has provided no other rationale for her necessity other than a vague statement that she may be needed for impeachment purposes and to discuss investigative steps. Agent [redacted] took no other investigation action on this case. Even if the Court were to deem her relevant and necessary, the Government believes she is unavailable due to childcare responsibilities which make in-person appearance burdensome (see Enclosed email).

d. NCIS Special Agent [redacted]: Agent [redacted] was requested by the Defense. The Government did not approve the witness but rather stated it would need to consult with the agent to determine his availability. The Government did not respond further and Defense never filed a motion to compel. Agent [redacted] interviewed CS3 [redacted], EMN2 [redacted]r, and ETV3 [redacted]. All witnesses were previously interviewed by the PIO and provided substantially similar statements to the agent. No one on the defense team has interviewed this agent and he will provide nothing of substance outside of what is already in written form, which the Accused can use to cross-examine the witnesses.

e. This is not a case where there is a question of who committed the crime, or where the Defense involves motives to fabricate on the part of the victim or witnesses. The credibility of the above listed eye witnesses is not in doubt. The central issue in this case is whether or not CSSSN Brown intended to kill LSS2 [redacted] when he stabbed him multiple times in the galley onboard the boat, and whether or not when he did so he intended to inflict grievous bodily harm. Any anticipated testimony these agents could provide has no bearing on these central issues. They are not relevant and necessary for the Defense to present its case.

[redacted]
Courtney E. Lewis
CDR, JAGC, USN
Assistant Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of this notice was served electronically on stand-by defense counsel, and forwarded to Wyatt Detention Facility for service on the accused on 7 August 2020.

[redacted]
Courtney E. Lewis
CDR, JAGC, USN
Assistant Trial Counsel

APPELLATE EXHIBIT CL
PAGE 20 OF 37
APPENDED PAGE

COURT RULINGS & ORDERS

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

UNITED STATES **v.** **MICAH J. BROWN** **CSSSN USN**	)	**RULING ON DEFENSE MOTION TO SUPPRESS ACCUSED'S STATEMENTS** **19 JULY 2019**

1. **Nature of Motion.**

CSSN Brown (hereinafter "the accused") is charged with Articles 80 and 128 of the Uniform Code of Military Justice (UCMJ). On 21 June 2019, pursuant to R.C.M. 905(b)(3), M.R.E. 304(a), and Article 31(b), the Defense moved this Court to suppress the following statements made by the accused on 30 July 2018 onboard the [redacted] after the alleged incident in the galley. The Government filed its response on 28 June 2019, moving the Court to deny the Defense's motion. The Court held an Article 39(a) hearing on 11 July 2019, during which the parties presented arguments and additional evidence. The court-martial is scheduled to begin on 5 August 2019.

2. **Issue.**

a. Should all of the accused's statements made after the alleged incident with LSS2 [redacted] onboard the [redacted] be suppressed?

3. **Findings of Fact.**

In reaching its findings and conclusions, the court considered all legal and competent evidence presented by the parties and the reasonable inferences to be drawn therefrom. The Court makes the following findings of fact:

a. On 30 July 2018, the [redacted] was underway and underwater when the accused and LSS2 [redacted] had a physical altercation.

b. The altercation occurred sometime around 0200 on 30 July 2018.

c. ETVC [redacted] was the first person to respond to the altercation after he heard a loud noise in the galley. He opened the door and saw the accused swinging his fist down upon LSS2 [redacted] ETVC grabbed the accused by the arm and led him away from LSS2 [redacted]

d. ETVC [redacted] escorted the accused to the chief's quarters onboard the [redacted]

e. Master Chief [redacted] was the Chief of the Boat (COB) of the [redacted] at the time of the incident.

f. The COB was woken up shortly after the altercation between the accused and LSS2 [redacted].

g. Initially, the COB was only told there was a fight in the galley. He went to the galley after getting dressed and in the galley he observed blood on the floor. His main concern was to make sure everyone was safe onboard the submarine.

h. COB ordered the accused and LSS2 [redacted] to be separated and ordered the accused to stay in the chief's quarters.

i. The COB woke up YNC [redacted] and told YNC [redacted] he needed YNC [redacted] to report to the chief's quarters to watch the accused.

j. From the time the COB woke up YNC [redacted] until the time in which the accused spoke to YNC [redacted], YNC [redacted] did not know what had happened.

k. After the COB left the chief's quarters area, he went to "checkup" on LSS2 [redacted] who was located in a different area of the submarine. The COB stated his main intent at this point was to make sure everyone on the underway, underwater submarine remained safe. This included the accused. The COB described the scene as hectic and things were moving very fast.

l. ETVC [redacted] described the scene after he broke up the altercation as "chaos."

m. When he arrived in the chief's quarters, YNC [redacted] observed blood on the accused and thought that the accused was hurt. YNC [redacted] also thought it might have been an injury due to a work related issue on the submarine. Because of this, YNC [redacted] asked the accused if he was "ok."

n. The accused responded to YNC [redacted] "it's not me. It's [LSS2 [redacted]] blood. I've only got a small cut."

o. The accused also stated to YNC [redacted], "I punched him, I just kept punching him."

p. When YNC [redacted] asked this question, the only two people in the chief's quarters were YNC [redacted]o and the accused.

q. YNC [redacted] also heard the accused make two statements that were spontaneous and not in response to any question from anyone. The statements were:

1. "[LSS2 [redacted]] came in talking shit about how I was trying to tap, and the next thing I know I'm just hitting him"
2. "I hope he's ok. I don't know why I did that I just need to go home."

r. The second statement on paragraph q was made after the COB had come back into the chief's quarters for a second time after he had checked up on LSS2 [redacted].

s. Sometime within the next 5-15 minutes after YNC [redacted] asked the accused if he was ok, the COB came back into the chief's quarters.

t. After he returned to the chief's quarters, the COB asked the accused, "Why did you do it?" The accused responded to this question.

u. The COB left the chief's quarters again after this. The COB had members of the [redacted] set up a watch bill to watch the accused. Two people at a time were in charge of watching the accused.

v. The COB issued an order that the accused could not leave the room in the chief's quarters. Two Sailors were ordered to stay with the accused at all times. He was authorized to shower, but he was not allowed to leave without an escort.

w. Shortly after going off watch, CS1 [redacted] heard there was as fight between the accused and LSS2 [redacted] and that there was a large amount of blood.

x. CS1 [redacted] was stationed onboard the [redacted] on 30 July 2018 and was in charge of the galley. He was the supervisor of the Culinary Specialists (CS) who worked in the galley and was in charge of the galley spaces. CS1 [redacted] had been the accused's supervisor for about a year on 30 July 2018.

y. After hearing about the fight, CS1 [redacted] went to the galley. When he arrived at the galley, he saw blood on the floor and did not know exactly what had happened.

z. CS1 [redacted] described the scene as hectic and chaotic – that no one had a clear picture of what had happened.

aa. After he went to the galley, CS1 [redacted] saw LSS2 [redacted] in a shower. LSS2 [redacted] was in a "state of shock."

bb. Around 5 minutes after he learned about the fight, CS1 [redacted] went to the chief's quarters to see the accused. When he arrived, the accused was with YNC [redacted].

cc. CS1 [redacted] asked the accused, "What happened?" CS1 [redacted] stated he asked the accused what happened because he "was responsible for the galley and CSs," and he was worried about the safety and well-being of the Sailors on the submarine.

dd. The accused responded to CS1 [redacted] and made several statements to the effect that "he was tired of taking shit from people," that he needed to get "off the boat," and that [redacted] "had to be the example."

ee. CS [redacted] was not tasked with investigating the incident at the time of this question and was never tasked with investigating this incident.

ff. CS1 [redacted] did not share any of the accused's responses with anyone until he spoke to Naval Criminal Investigative Service in September 2018.

4. <u>Principles of Law</u>.

Pursuant to M.R.E. 304(f)(6), when the defense has made an appropriate motion or objection under the rule, the prosecution has the burden of establishing the admissibility of the evidence. Pursuant to M.R.E. 304(f)(7), the military judge must find by a preponderance of the evidence that a statement by the accused was made voluntarily before it may be received into evidence. Thus, the issue having been raised by the Defense, the Government bears the burden of establishing the voluntariness of the accused's statements by a preponderance of the evidence. M.R.E. 304(f)(6); *United States v. Twomey*, 404 U.S. 477, 489 (1972).

The Fifth Amendment provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const., Amdt. 5. In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court adopted a set of prophylactic measures to protect a suspect's Fifth Amendment right from the "inherently compelling pressures" of custodial interrogation. *Id.* at 467.

Miranda warnings provide protections against self-incrimination, whereas the Due Process Clauses of the Fifth and Fourteenth Amendments protect the accused against any involuntary statements regardless of whether the statements were made while custody. An accused's pretrial statement is involuntary if it was obtained through the use of coercion, unlawful influence or unlawful inducement. M.R.E. 304(c)(3). Voluntariness is determined by assessing the totality of circumstances surrounding the making of the statement. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). The essence of the inquiry is whether the statement is the product of an essentially free and unconstrained choice by its maker. *United States v. Bubonics*, 45 M.J. 93, 95 (C.A.A.F. 1996). Once voluntariness is raised, the Government must prove the statement was voluntary by a preponderance of the evidence. M.R.E. 304(e).

Turning to military legal requirements, Article 31(a), UCMJ states that no person subject to this chapter may compel any person to incriminate himself or to answer any questions the answer to which may tend to incriminate him. 10 U.S.C. § 831(a). Article 31(b), UCMJ precludes any questioning of a person suspected of committing an offense under the Code unless that person has been properly advised of his/her rights. Article 31(b) provides:

> No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense *without first informing him of the nature of the accusation* and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial. (*Emphasis added*).

No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial. 10 U.S.C. § 831(d). A statement obtained from the accused in violation of the accused's rights under Article 31 is *involuntary* and therefore inadmissible against the accused except as provided in subdivision (d). M.R.E. 305(c)(1). Involuntary statements may only be

used to impeach by contradiction the in-court testimony of the accused or in a later prosecution against the accused for perjury, false swearing, or the making of a false official statement. M.R.E. 305(e); *United States v. Swift*, 53 M.J. 439, 451 (C.A.A.F. 2000).

Article 31(b), UCMJ warnings are required when: "(1) a person subject to the UCMJ, (2) interrogates or requests any statement, (3) from an accused or person suspected of an offense, and (4) the statements regard the offense of which the person questioned is accused or suspected." *United States v. Jones*, 73 M.J. 357, 361 (C.A.A.F. 2014). The Court of Appeals of the Armed Forces (CAAF) continued, "[u]nder Article 31(b)'s second requirement, rights warnings are required if 'the person conducting the questioning is participating in an official law enforcement or disciplinary investigation or inquiry' as opposed to having a personal motivation for the inquiry." *Id.* (quoting *Swift*, 53 M.J. at 446). This is an objective test. "This 'is determined by assessing all the facts and circumstances at the time of the interview to determine whether the military questioner was acting or could reasonably be considered to be acting in an official law enforcement or disciplinary capacity.'" *Id.* (quoting *United States v. Cohen*, 63 M.J. 45, 50 (C.A.A.F. 2006), quoting *Swift*, 53 M.J. at 446.)

"Interrogation" means any formal or informal questioning in which an incriminating response either is sought or is a reasonable consequence of such questioning. M.R.E. 305(b)(2). In *Swift*, CAAF noted, "Where the questioner is performing a law enforcement or disciplinary investigation, for example, and the person questioned is suspected of an offense, then Article 31 warnings are required."[1] After receiving applicable warnings under this rule, a person may waive the rights described therein and … and make a statement. The waiver must be made freely, knowingly, and intelligently. A written waiver is not required. The accused or suspect must

[1] *Swift*, 53 M.J. at 446-47.

affirmatively acknowledge that he or she understands the rights involved, affirmatively decline the right to counsel, and affirmatively consent to making a statement. M.R.E. 305(e)(1).

Despite the clear language of Article 31, UCMJ, courts have recognized that situations exist wherein statements taken in violation of Article 31(b) may still be admissible. *Cohen*, 63 M.J. at 49-50; *United States v. Gibson*, 14 C.M.R. 164, 170 (U.S.C.M.A. 1954). "Judicial discretion indicates a necessity for denying Article 31(b)'s application to a situation not considered by its framers, and wholly unrelated to the reasons for its creation." *Gibson*, 14 C.M.R. at 170. In *Jones*, CAAF cited *Gibson*, noting, "because the mandatory exclusion of statements taken in violation of Article 31(b), UCMJ, is a severe remedy, this Court has interpreted the second textual predicates -- interrogation and the taking of 'any' statement -- in context, and in a manner consistent with Congress' intent that the article protects the constitutional right against self-incrimination." *Jones*, 73 M.J. at 361, FN5 (citing *Gibson*, 14 C.M.R. at 170).

5. <u>Conclusions of Law</u>.

A. CS1 [redacted] was not a person participating in an official law enforcement or disciplinary investigation or inquiry.

The resolution of this issue hinges on whether or not CS1 [redacted] was interrogating/requesting information from the accused and was a person "participating in an official law enforcement or disciplinary investigation or inquiry." *Jones*, 73 M.J. at 361. Article 31(b) warnings are required when: "(1) a person subject to the UCMJ, (2) interrogates or requests any statement, (3) from an accused or person suspected of an offense, and (4) the statements regard the offense of which the person questioned is accused or suspected." *Jones*, 73 M.J. at 361. The Court finds that while CS1 [redacted] was requesting information from the accused, he was not participating in an official law enforcement/disciplinary

investigation/inquiry and was not required to provide Article 31(b) warnings to the accused prior to requesting information from him.

(1) Person Subject to the UCMJ. The facts in this case satisfy the first *Jones* predicate. CS1 [redacted] was a First Class Petty Officer in the U.S. Navy on active duty and subject to the UCMJ on 30 July 2018.

(2) Interrogates or Requests a Statement. The Court finds that the evidence does not establish the second *Jones* predicate. In *Jones*, CAAF articulated that Article 31(b) rights warnings are required when "the person conducting the questioning is participating in an official law enforcement or disciplinary investigation or inquiry." *Id.* This is an objective test. The Court finds CS1 [redacted] was acting in his official capacity as a first class petty officer on 30 July 2018; however, the Court finds that his questions to the accused on 30 July 2018 in the chief's quarters were not a result of CS1 [redacted] "participating in an official law enforcement or disciplinary investigation or inquiry." *Id.*

This case does involve a mixed purpose behind CS1 [redacted] questions to the accused. In *Cohen*, CAAF recognized the need to evaluate the "difference between questioning focused solely on the accomplishment of an operational mission and questioning to elicit information for use during disciplinary proceedings." 63 M.J. at 50 (citing *United States v. Bradley*, 51 M.J. 437, 441 (C.A.A.F. 1991)). When such a mixed purpose exists, "the matter must be resolved on a case-by-case basis, looking at the totality of the circumstances, including whether the questioning was 'designed to evade the accused's constitutional or codal rights.'" *Cohen*, 63 M.J. at 50 (quoting *Bradley*, 51 M.J. at 441). CAAF noted that warnings were not required in *Bradley* because the questioner in *Bradley* "*was not* conducting a criminal investigation." *Cohen*, 63 M.J. at 50 (citing *Bradley*, 51 M.J. at 441) (*Emphasis added*). The same can be said in this case.

The Court's rationale for its finding on this second *Jones* predicate relies heavily on the context and the environment in which this questioning took place on 30 July 2018. On this morning, at approximately 0200, at the time of the incident and subsequent questioning, the [redacted] was underway and underwater. The [redacted] was on a mission and the operational tempo was high, with the safety and the security of those onboard being a high priority on the submarine. The scene following incident between the accused and LSS2 [redacted] was describe by multiple witnesses as being chaotic and confusing. The accused had blood on him, LSS2 [redacted] had blood on him and had multiple injuries, and blood was located all over the galley. It is clear this was an extremely stressful and alarming event for all those onboard the [redacted] on the morning of 30 July 2018 while it was underway and underwater.

One of those Sailors was CS1 [redacted]. CS1 [redacted] was a first class petty officer onboard the [redacted] He was in charge of the galley and in his words was "responsible for all the CSs and the galley." As a leader onboard the submarine, it was his duty to ensure the Sailors who worked for him were safe and the spaces he was in charge of were safe and secure on the underway submarine. This included the accused and LSS2 [redacted]. As such, the Court finds CS1 [redacted] questions to the accused in this environment fall under the narrow exception of Article 31(b) because they were asked in an "operational context." *United States v. Ramos*, 76 M.J. 372, 377 (C.A.A.F. 2017). The Court also finds the totality of the circumstances on 30 July 2018 overcome the "strong presumption" the questioning was done for a disciplinary purpose. *United States v. Good*, 32 M.J. 105, 108 (C.A.A.F. 1991). CS1 [redacted] actions and questions were similar to the crew chief in *United States v. Louskas*, 29 M.J. 385, (U.S.C.M.A. 1990). Like the crew chief in *Louskas*, CS1 [redacted] was a supervisor who had a responsibility to

ensure his Sailors and spaces remained safe in what was a precarious operational environment immediately following the incident between the accused and LSS2 [redacted].[2] In *Louskas*, it was an aircraft in the air and in this case it was a submarine underwater. CS1 [redacted]' questions to the accused occurred shortly after the incident (occurring approximately 5-15 minutes after the incident) and after he saw blood on the accused, on LSS2 [redacted] (including his injuries), and om the floor of the galley. His question were simple and direct, he wanted to know "what happened" and "why he did it." He testified he did this because he was concerned for the safety and well-being of his Sailors. These questions were reasonable under the circumstances given CS1 [redacted]' position on the [redacted] As a leader, he was proactively trying to figure out what, if any, danger remained to any of his Sailors, including the accused and LSS2 [redacted]. In addition, CS1 [redacted] was not involved in any investigation of the incident. No one tasked him to find out what happened and until he was interviewed by Naval Criminal Investigative Services on 11 September 2018, he did not share any of the information with his superiors. There is no evidence CS1 [redacted] was attempting to circumvent the accused's rights or trick the accused in any way.[3] Thus, CS1 [redacted] conversation with the accused fails the second *Jones* predicate.

The Court also finds the accused was not subjected to a custodial interrogation on 30 July 2018, as CS1 [redacted] who was not a law enforcement official, did not interrogate him. Consequently, the accused was not entitled to *Miranda* warnings. However, even if *Miranda*

[2] The Defense has argued that since the Chiefs had taken charge of the situation that CS1 did not have an obligation or was not responsible for ensuring safety onboard the submarine. The Court disagrees and recognizes that a first class petty officer in the U.S. Navy on an underway underwater submarine such as the one in this case is considered a leader within the command and is expected to take care of the Sailors and crew space under his leadership.
[3] In fact, when questioned by the counsel at the Article 39(a) session, CS1 [redacted] admitted on the stand he did not know what Article 31(b) rights were. The Court found his testimony to be very forthright and sincere and concludes there was no nefarious intent behind his questions to the accused on 30 July 2018.

warnings were required, the Court finds the "public safety exception" would apply.[4] *New York v. Quarles*, 467 U.S. 649, 655-56, 104 S.Ct. 2626, 2631-2632, 81 L.Ed. 2d 550 (1984).

Lastly, the Court does not find that the accused's statements made to CS1 [redacted] were involuntary. There is no evidence CS1 [redacted] coerced, threatened, or attempted to trick the accused into giving him a statement. The accused was not permitted to leave the chief's quarter area, but there is no evidence he was constrained in any way in that room.[5] There is no evidence the accused has a low IQ or was unable to understand the CS1 [redacted]' questions. Moreover, while the accused may have been under stress and anxiety from the incident with LSS2 [redacted], there is no evidence before the Court that this in any way affected his mental capabilities to answer the simple questions from CS1 [redacted] of "what happened" and "why did you do it." Given the totality of the circumstances in this case, the Court finds that the Government has met its burden to show by a preponderance of the evidence that the accused's statement to CS1 [redacted] were voluntary.

B. YNC [redacted] was not a person participating in an official law enforcement or disciplinary investigation or inquiry and did not suspect the accused of committing an offense.

The Court finds that while YNC [redacted] was requesting information from the accused, he was not participating in an official law enforcement/disciplinary investigation/inquiry and was not required to provide Article 31(b) warnings to the accused prior to requesting information

[4] In support of the conclusion that *Miranda* warnings were not required before CS1 [redacted] asked the accused questions and whether the the public safety exception would apply if the warnings were required, the Court relies on its same rationale it used to come to the conclusion that CS1 [redacted] was not participating in an official law enforcement or disciplinary investigation or inquiry and did not "interrogate" the accused.

[5] The Court finds it reasonable that the leadership of the [redacted] made the decision to restrict the accused's movement around the submarine given the facts surrounding his altercation with LSS2 [redacted] and that the submarine was underway and underwater at the time.

from him. The Court also finds that YNC did not suspect and did not have a reason to suspect the accused had committed any offense when he asked him a question.

(1) Person Subject to the UCMJ. The facts in this case satisfy the first *Jones* predicate. YNC [redacted] was a Chief Petty Officer in the U.S. Navy on active duty and subject to the UCMJ on 30 July 2018.

(2) Interrogates or Requests a Statement. The Court finds that the evidence does not establish the second *Jones* predicate. While YNC [redacted] was acting in his official capacity as a Chief Class Petty Officer on 30 July 2018, his question to the accused on 30 July 2018 in the chief's quarters was not result of him "participating in an official law enforcement or disciplinary investigation or inquiry." *Jones*, 73 M.J. at 361. YNC [redacted] question to the accused was very close in time to the accused's altercation with LSS2 [redacted]. At the time, YNC had no knowledge of what had happened on the [redacted] All he knew was that the COB had told him to watch the accused in the chief's quarters, and that he saw the accused had blood on his body when YNC [redacted] entered the chief's quarters. YNC [redacted] testified he did not know what had happened and that he thought the accused had been in an accident onboard the submarine. He did not get any turnover as to why he was watching the accused in the chief's mess. YNC [redacted] asked the accused if he was "ok" because he was concerned the accused was injured. There is no evidence that YNC [redacted] was participating in a law enforcement or disciplinary investigation. Instead, the Court finds YNC [redacted] was doing exactly what one would expect a chief petty officer onboard an underway, underwater submarine to do when he discovered one of his Sailors covered in blood – ask him if he was "ok."

(3) An Accused or Person Suspected of an Offense. The Court finds that the evidence does not establish the third *Jones* predicate. After evaluating all of the facts and circumstances at

the time of the interview, the Court finds YNC did not suspect and should not have reasonably suspected the accused of an offense. As described above, YNC [redacted] did not have any facts of what had occurred when he questioned the accused. All he knew was that he had a Sailor covered in blood and was unsure as to whose blood it was and how it had gotten there. It was completely reasonable for him to ask the accused if he was "ok" and is what a reasonable person would have done in YNC [redacted] situation.

Lastly, the Court does not find that the accused's statements made to YNC [redacted] were involuntary. There is no evidence YNC [redacted] coerced, threatened, or attempted to trick the accused into giving him a statement. There is no evidence the accused has a low IQ or was unable to understand YNC [redacted] question. In addition, while the accused may have been under stress and anxiety from the incident with LSS2 [redacted], there is no evidence before the Court that this in any way affected his mental capabilities to answer the simple question from YNC [redacted] on if he was "ok." Given the totality of the circumstances in this case, the Court finds that the Government has met its burden to show by a preponderance of the evidence that the accused's statement to YNC [redacted] was voluntary.

C. The accused statements in response to the COB are not admissible at trial.

The Government has conceded the COB should have read the accused his Article 31(b) rights and are not attempting to admit these statements into evidence. As such, the Court finds the accused's statements made in response to the COB's questions are not admissible at trial.

D. The accused statements made spontaneously were made voluntary and without coercion.

Lastly, the Court finds that the accused did make several spontaneous statements that no one solicited.[6] The Court also finds that these statements were made voluntary. There is no evidence that any member of the [redacted] coerced, threatened, or attempted to trick the accused into giving these statements. There is no evidence the accused was being pressured or bombarded with inappropriate questions. As stated above, while the accused was not permitted to leave the chief's quarters area, there is no evidence he was constrained in any way in that room. The accused was secured in the chief's quarters for safety reasons – for his and crew's. There is no evidence this was done to coerce statements out of the accused or to violate his rights. There is no evidence that the accused has a low IQ or was unable to understand what was going on in the chief's quarters. The accused may have been under stress and anxiety from the incident with LSS2 [redacted]; however, there is no evidence before the Court that his mental capabilities were so severely diminished that he did not know what he was doing when he decided to make spontaneous statements in the chief's quarters. Simply put, even considering that some of his statements came after the questions from the COB (discussed above), there is no evidence of coercion from anyone following COB's questions that would rise to the level of the accused's due process being violated to the point of his spontaneous statements being considered involuntary. *Colorado v. Connelly*, 479 U.S. 157 (1986). Given the totality of the circumstances in this case, the Court finds that the Government has met its burden to show by a preponderance of the evidence that the accused's statements were unsolicited, spontaneous, voluntary, and without coercion.

[6] Statements referenced in the findings of fact paragraph q.

6. Ruling

The Defense's motion to suppress (1) oral statements the accused made to CS1 [redacted]; (2) oral statements made to YNC [redacted]; and (3) the spontaneous oral statements he made in the chief's quarters on 30 July 2018 is **DENIED.**[7] The Defense's motion to suppress the accused's statements made to the COB is **GRANTED.**

So **ORDERED**, this 19th day of July 2019.

[redacted]
CDR, JAGC, USN
Circuit Military Judge

[7] This includes the statements in finding of fact paragraphs n, o, q, and dd.

APPELLATE EXHIBIT XXII
PAGE 16 OF 169
APPENDED PAGE

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

UNITED STATES **v.** **MICAH J. BROWN** **CCCSN/E-3** **U.S. NAVY**	**RULING ON DEFENSE MOTION TO DISMISS FOR LACK OF SPEEDY TRIAL PURSUANT TO SIXTH AMENDMENT, ARTICLE 10, UCMJ, AND R.C.M. 707** **28 AUGUST 2019**

1. **Nature of Ruling.**

The defense moves the Court, pursuant to Sixth Amendment, Article 10, UCMJ and Rules for Court-Martial (R.C.M.) 707 to dismiss specifications 1 and 2 under charge I and the sole specification under charge II thereunder due to alleged violations of the accused's right to a speedy trial. The government opposed the defense's motions. Upon consideration of the defense's motions, the government's responses, and the evidence and arguments presented by counsel, the Court makes the following findings of fact and conclusions of law.

2. **Findings of Fact.**

a. The accused is charged with two specifications under Article 80, U.C.M.J. (attempted premeditated murder, attempted unpremeditated murder) and a sole specification under Article 128, U.C.M.J. (aggravated assault with intent to commit grievous bodily harm) for allegedly stabbing LSS2 [redacted]. with a knife.

b. On 30 July 2018, the accused allegedly stabbed LSS2 [redacted] with a knife during an altercation onboard [redacted]

APPELLATE EXHIBIT XXVII
PAGE 1 OF 27
APPENDED PAGE

c. On 30 July 2018, the Commanding Officer of [redacted] appointed MMNCS(SS) [redacted], to serve as Preliminary Inquiry Officer (PIO) to look into the facts and circumstances surrounding the attack on LSS2 [redacted]

d. On 30 July 2018, the PIO interviewed the following the members: ETVC [redacted], [redacted] ETVSA [redacted] EMN2 [redacted]; EMN2 [redacted]; MMN1 [redacted]; ETN2 [redacted] ETV3 [redacted]; CS3 [redacted]; and MMW1 [redacted]

e. On 31 July 2018, [redacted] pulled into Cape Canaveral, FL for approximately 1.5 hours. The Commanding Officer of the submarine ordered the accused into pretrial confinement in the brig at NAS Jacksonville, FL.

f. On 31 July 2018, NCIS re-interviewed CS3 [redacted], ETVC [redacted] EMN2 [redacted] EMN2 [redacted], MMN1 [redacted], ETN2 [redacted] ETV3 [redacted] from [redacted] conducted a crime scene examination, took photographand seized multiple pieces of evidence. This evidence included knives and clothing.

g. On 1 August 2018, NCIS interviewed LSS2 [redacted] and captured photographic documentation of his wounds.

h. On 3 August 2018, LCDR [redacted], conducted an initial review hearing and determined that continued confinement of the accused was appropriate. The accused waived his presence at the hearing.

i. On 3 August 2018, LT Davey G. Rowe, USN, represented the accused for the limited purpose of the hearing. The accused waived his presence at the hearing.

j. On 9 August 2018, NCIS obtained search authorization for evidentiary items seized on 31 July 2018 from the Commanding Officer of Naval Air Station Jacksonville, FL, to include items turned over by the [redacted] but were not previously opened or inventoried.

k. On 9 August 2018, NCIS collected additional photographic documentation of LSS2 [redacted] injuries.

l. On 30 August 2018, the government preferred charges against the accused for violation of Article 80 (attempted premeditated murder and attempted unpremeditated murder) and Article 128 (aggravated assault with intent to commit grievous bodily harm).

m. On 31 August 2018, NCIS interviewed PO2 [redacted]; PO2 [redacted] ETN2 [redacted]; CS3 [redacted]

n. On 5 September 2018, NCIS contacted and received incident reports involving the accused from Baltimore County Police Department.

o. On 6 September 2018, NCIS submitted a request for Family Advocacy Program (FAP) records.

p. On 7 September 2018, the government reached out to several members of Naval Justice School Newport (NJS) to inquire about their availability to serve as a Preliminary Hearing Officer (PHO).

q. On 10 September 2018, the government reached out to points of contact at NJS, DILS, and the Reserve PHO unit in an attempt to identify a PHO.

r. On 11 September 2018, the government reached out to RLSO NDW to ask for assistance in finding a PHO and was referred back to the Reserve PHO unit.

s. On 11 September 2018, NCIS interviewed CS1 [redacted] and CSC [redacted]

t. On 12 September 2018, NCIS made telephonic contact with [redacted].

u. On 13 September 2018, NCIS interviewed HM1 [redacted] and YNC [redacted].

v. On 14 September 2018, NCIS interviewed TM2 [redacted] and CS3 [redacted]

w. On 17 September 2018, the government reached back out to NJS to ask for PHO support again and received a positive response and received a phone call from the PHO identified on 21 September 2018.

x. On 18 September 2018, NCIS made telephonic contact with [redacted]

y. On 19 September 2018, subsequent to an official request made by NCIS to HM1 [redacted] NCIS received a series of medical records detailing the treatments provided by HM1 [redacted], to the accused.

z. On 20 September 2018, NCIS interviewed the Chief of the Boat (COB) MCPO [redacted] and the Executive Officer of [redacted] LCDR [redacted]

aa. On 24 September 2018, the Convening Authority appointed LCDR [redacted] as a Preliminary Hearing Officer (PHO) for the Article 32 hearing to be held on 4 October 2018.

bb. On 27 September 2018, LT Sahar Jooshani, the detailed defense counsel, submitted a request for delay of the hearing until 29 November 2018 due to the "serious and

APPELLATE EXHIBIT XXVII
PAGE 4 OF 27
APPENDED PAGE

complex nature of the offense." Defense stated in request that such delay would be attributable to the defense. The government endorsed the defense's first motion for continuance.

cc. On 1 October 2018, the Convening Authority approved the defense's request to delay the Article 32 hearing until 29 November 2018, and attributed the entire length of the delay to the defense.

dd. On 4 October 2018, the period of excludable delay began.

ee. On 7 November 2018, the defense submitted a request for a R.C.M. 706 examination board for the accused.

ff. On 13 November 2018, the Convening Authority received both the defense's R.C.M. 706 request and the government's endorsement of such request.

gg. On 15 November 2018, the Staff Judge Advocate (SJA) for the Convening Authority, LT [redacted], contacted [redacted] for the Behavioral Health at the Naval Branch Health Clinic Groton to coordinate a R.C.M. 706 examination board scheduled for the accused. On the same day, the SJA received a response directing her to send the request to the Naval Health Clinic New England (NHCNE) legal department.

hh. On 16 November 2018, the accused was placed into solitary confinement after an alleged incident with in which the accused threw hot oatmeal and Vaseline at the face of another inmate. The accused also allegedly tried to punch the inmate in the face. The accused was scheduled to leave restrictive housing on 6 December 2018; however, he remained there until 1 May 2019.

ii. On 20 November 2018, the Convening Authority ordered and signed the request for NHCNE to convene a R.C.M. 706 board. This order sent off the [redacted] until 26 November 2018 due to the LAN being down onboard the [redacted]

[redacted] The LAN is the system that allows the personnel on the [redacted] to send email and document to people not on the submarine.

jj. On 21 November 2018, LT [redacted] emailed the trial counsel and defense counsel stating she and the command had been working with NHCNE to get the R.C.M. 706 examination board completed. This email responded to trial counsel's email on 20 November 2018 asking the status of the request.

kk. On 21 November 2018, the previously appointed defense counsel was replaced by two new defense counsel. LT Robin Lee, one of the newly appointed defense counsels, submitted a second request for a continuance of the Article 32 hearing, until 4 January 2019, due to the "serious and complex nature of the allegations." Defense stated in the request that such delay would be attributable to the defense.

ll. On 26 November 2018, the government endorsed the defense's second request for continuance.

mm. On 26 November, LT [redacted] emailed trial counsel to determine if the new defense counsel had any follow up to the original R.C.M. 706 examination board request.

nn. On 27 November 2018, the trial counsel informed the new defense counsels of the pending R.C.M. 706 examination board request and also informed the defense that the SJA for the Convening Authority had been in contract with the NHCNE regarding the request.

oo. On 27 November 2018, the Convening Authority approved the defense's second continuance request of the Article 32 to last from 29 November 2018 to 4 January 2019.

pp. On 7 December 2018, the Convening Authority forwarded R.C.M. 706 order to convene a board for the purpose of ascertaining the competency and mental responsibility of the accused to the NHCNE.

qq. On 10 December, the NHCNE informed the Convening Authority that the two doctors qualified to convene the R.C.M. 706 board could not do so until 10-11 January 2019.

rr. On 11 December 2018, the defense was notified that the R.C.M. 706 board could not convene until 11 January 2019 and that the full report would not be completed until 18 January 2018.

ss. On 11 December 2019, the defense submitted a third request for delay, asking that that the Article 32 hearing be delayed until the results of the R.C.M. 706 board were completed. However, the defense asked that this delay be attributable to the government.

tt. On 12 December 2018, the government endorsed the defense's third request for a continuance but requested that such delay be attributed to the defense.

uu. On 28 December 2018, the Convening Authority approved the defense's request for a third delay that would last until the Article 32 hearing convened and attributed the delay to the defense.

vv. On 10 and 11 January 2019, the R.C.M. 706 examination board was conducted and lasted two days.

ww. On 19 January 2019, the results of the R.C.M. 706 examination board were sent to the defense and government. The long form was sent to the defense, and the short form was sent to the government.

xx. On 23 January 2019, the Article 32 hearing was held.

yy. On 7 February 2019, the Preliminary Hearing Officer issued his report, which was received by all parties.

zz. On 20 February 2019, the government proposed Trial Management Order (TMO) dates to the defense including proposed trial dates for 10-14 June 2019. There is no evidence the defense responded to these requested trial dates until 4 March 2019.

aaa. On 1 March 2019, the government again proposed TMO dates to the defense, including proposed trial dates for 10-14 June 2019.

bbb. On 1 March 2019, the case was referred to this Court.

ccc. On 4 March 2019, the defense proposed trial dates of 5-9 August 2019.

ddd. On 5 March 2019, charges were served on the accused.

eee. On 11 March 2019, the accused, though his defense counsel LCDR Bryan Davis, submitted a fourth request for delay. The continuance request was to this Court and sought a delay of the arraignment from 12 March 2019 until 20 March 2019. This Court granted the continuance, excluded the delay, and ordered the delay to be attributable to the defense.

fff. On 12 March 2019, the government requested and the Court ordered an arraignment for 20 March 2019.

ggg. On 20 March 2019, the arraignment was held.

hhh. On 22 March 2019, the government and defense sent a proposed TMO to the court which included a 14 June 2019 39(a) session.

iii. On 26 March 2019, the court approved the TMO with the 39(a) scheduled for 30 May 2019 due to the court being unavailable on the original proposed date of 14 June 2019.

jjj. On 26 April 2019, the defense submitted a motion to continue the 30 May Article 39(a) session until 18 June 2019 due to command related activities. The command related activities for LCDR Davis were that RADML Crandall was visiting his office from 29 May to 1 June and he wanted to be present. The Court was initially able to do the Article 39(a) session on

18; however, because of docketing issues related to another case, the Court informed the parties on 2 May it was unable to support that date.

kkk. On 6 May 2019, the defense asked for any dates prior to the date of the currently scheduled Article 39(a) because after 18 June 2019 they did not have any availability until 8 July 2019. On 6 May 2019, the Court responded to the defense noting the Court was available on the following dates for an Article 39(a) session: 13-14 May, 16-17 May, 23-24 May, 27 through 31 May (including the original date from the TMO), 3-4 June, and 24 through 28 June.

lll. On 9 May 2019, the Court emailed the parties as no parties had responded to the Court's email.

mmm. On 10 May 2019, the defense requested 10-11 July 2019 as it was the "best option" and for travel purposes. On 10 May 2019, the Court ordered the Article 39(a) session for 11 July 2019. The Article 39(a) took place on 11 July 2019.

nnn. On 26 June 2019, the defense submitted a request to the government to facilitate their expert forensic psychologist consultant to meet with the accused on 15 July 2019.

ooo. On 24 July 2019, the defense submitted a motion for a continuance of the trial that was to begin on 5 August 2019. In its motion, the defense noted the defense counsel was not available from 19 August to 5 September 2019.

ppp. On 26 July 2019, the Court received an affidavit from the defense from the accused. This affidavit has been included as an attachment to this ruling and the facts contained within the affidavit are determined to be findings of facts as to what the accused understands and believes about the continuance. He does not oppose a continuance.

qqq. The government did not oppose the continuance.

rrr. The Court granted the motion for a continuance. Based on an agreement from both parties, the Court has set a trial date of 23 September 2019.

sss. On 6 September 2018, the accused was moved into pretrial confinement at Donald Wyatt Detention Facility (Wyatt).

ttt. On 16 November 2018, the accused heated up a liquid mixture of oatmeal and Vaseline, which he re-heated multiple times, and then threw said hot oatmeal mixture onto the face of another detainee and struck the detainee's face with his fist.

uuu. On 16 November 2018, because of the incident, the accused was placed in administrative detention pending investigation because of the hot oatmeal and Vaseline incident.

vvv. On 28 November 2018, Wyatt officials conducted a Disciplinary Report Hearing, where the Hearing Officer found the accused guilty of "assault with fluids" by "a preponderance of the evidence." The accused was adjudged sanctions, including disciplinary segregation for a period of 20 days, with 10 days suspended.

www. On 2 January 2019, the accused stated during the weekly restrictive housing review that he had no issues with his housing situation of segregated confinement.

xxx. On 3 January 2019, the defense submitted a request for redress, requesting the Commanding Officer, [redacted] authorize the transfer of the accused to the nearest military facility from Wyatt.

yyy. On 9 January 2019, the accused stated during the weekly restrictive housing review that he had no issues with his housing situation of segregated confinement.

zzz. On 15 January 2019, the accused's request for redress was denied, stating there was a "legitimate penological interest to control, preserve order, and prevent injury."

aaaa. On both 16 and 23 January 2019, the accused stated during the weekly restrictive housing review that he had no issue being confined in restrictive housing.

bbbb. On 30 January 2019, the accused failed to complete the requisite packet, and did not begin the segregated confinement step down procedure that would get him out of segregated confinement.

cccc. On 6 February 2019, the Accused refused to complete the release packet and refused to begin the segregated confinement step down procedure that would return him to general population.

dddd. On 25 March 2019, the Article 138 Request for Relief was denied stating "a failure by the Accused to comply with reintegration procedures and a failure to provide evidence demonstrating that he is being deprived of benefits available by similarly-situated service members serving pre-trial confinement in a military facility."

eeee. On 1 May 2019, after the Accused completed the release packet, he was transferred back to general population. The accused continues to sleep at night in a private cell in the restrictive housing section of Wyatt. He is entitled to go out into the general population area during recreational time, which is typically 0900 to 2000 every day.

3. **Discussion and Conclusions of Law.**

There are three primary sources of law relevant to this motion. First, the Sixth Amendment of the U.S. Constitution provides that "the accused shall enjoy the right to a speedy and public trial..." U.S. CONST. amend VI. Second, Article 10, UCMJ, requires that the government must exercise reasonable diligence to bring to trial an accused in pretrial confinement.[1] Article 10, UCMJ, also provides "whenever any person subject this chapter is placed in arrest or

[1] *United States v. Kossman*, 38 M.J. 258 (C.M.A. 1993).

confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him." Third, R.C.M. 707 requires that an accused be brought to trial within 120 days after the earlier of either: 1) preferral of charges or 2) the imposition of restraint under R.C.M 304(a)(2)-(4).

A. Sixth Amendment.

Under the Sixth Amendment, the accused's constitutional right to a speedy trial is triggered upon preferral of charges or the imposition of pretrial restraint.[2] This speedy trial guarantee cannot be established by any inflexible rule, but it can only be determined on an ad hoc balancing by the military judge.[3] The Sixth Amendment right to a speedy trial requires the application of a balancing test between: 1) the length of the delay; 2) the reason for the delay; 3) the assertion of the speedy trial right; and 4) prejudice to the accused.[4] "None of the four factors are either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant."[5]

1. *Length of Delay*:

The first factor under the *Barker* analysis is to some extent a triggering mechanism.[6] "[U]nless there is a period of delay that appears, on its face, to be unreasonable under the circumstances, 'there is no necessity for inquiry into the other factors that go into the balance.'"[7] The length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar

---

[2] *United States v. Danylo*, 73 M.J. 183 (C.A.A.F. 2013).
[3] *Barker v. Wingo*, 407 U.S. 514 (1972).
[4] *Id.*
[5] *Id.*
[6] *United States v. Cossio*, 64 M.J. 254, 257 (C.A.A.F. 2007) (quoting *United States v. Smith*, 94 F.3d 204, 208-09 (6th Cir. 1996).
[7] *United States v. Merritt*, 72 M.J. 483, 489 (C.A.A.F. 2013).

circumstances of the case, and the delay that can be tolerated for an ordinary street crime is considerably less than for a serious complex conspiracy charge.[8]

In this case, the accused's R.C.M. 707 120 day clock began on 31 July 2018 – the day after he was put on restriction tantamount to confinement onboard the [redacted] The accused was arraigned on 20 March 2019. The time between those two dates is 233 days, as calculated under R.C.M. 707 120-day clock. However, the defense requested three different delays leading up to the Article 32 hearing, and another delay following the Article 32 hearing, which the Convening Authority and this Court properly calculated as time of excludable delay attributable to the defense. The amount of time of excludable delay equaled 120 days total. Therefore, in subtracting 121 days from the total 233 days, the total amount of time attributed to the government is 113 days. Such time is acceptable. The government is within the time proscribed under R.C.M. 707 in this case.[9]

In their argument to the Court, the defense argued that the government "made conscious decisions to drag its feet." The Court finds the government has provided sufficient evidence to show otherwise. Evidence shows the government was active in conducting interviews, collecting evidence, submitting requests for medical records, requesting a PHO, preferring charges, and in scheduling the R.C.M. 706 examination board with the Convening Authority and the legal department of NHCNE. Particularly, logistics in scheduling a R.C.M. 706 examination board with the requisite medical professionals can be challenging and time consuming, but in this case, the government exhibited reasonable diligence in getting the R.C.M. 706 examination board done.

[8] *Barker*, 407 U.S. at 531.
[9] See Court's ruling in regard to R.C.M. 707 below.

Additionally, the length of delay was never shortened by the defense's press to get to trial. The defense never asserted their right to a speedy trial. On the contrary, continuous defense requests for delay have extended this case for things such as defense preparation, travel, and a command event. This factor weighs strongly in favor of the government.

2. *Reason for Delay:*

The main factors to consider under this prong are the seriousness of the case and the delay attributable to the defense.

Given the seriousness of the offense, the complexity of the investigative tasks associated with premeditated and unpremeditated attempted murder cases onboard an underway underwater submarine, along with the logistical challenges of scheduling a R.C.M. 706 examination board, the Court concludes the reason for the delay was reasonable. Here, the government followed the necessary steps in pushing the case forward and scheduling a R.C.M. 706 examination board with the required medicals professionals at NHCNE. There is no evidence the government intentionally delayed the case at any point. This factor weighs in favor of the government.

Regarding the delay attributable to the defense, the government initially proposed the scheduling of the Article 32 hearing for 4 October 2018. The original detailed defense counsel, LT Sahar Jooshani, requested the first delay in the Article 32 hearing on 27 September 2018, until 29 November 2018, due to the "serious and complex nature of the offense." The defense stated in the request that such delay would be attributable to the defense and the request was approved by the Convening Authority on 3 October 2018. The period of excludable delay began on 4 October 2018. On 7 November 2018, the defense submitted a request for a R.C.M. 706 examination board for the accused. On 21 November 2018, previously appointed defense counsel were replaced by two new defense counsel. On the same day and before the first delay had

expired, newly appointed defense counsel submitted a second request for delay of the Article 32 hearing, this time until 4 January 2019, again due to the "serious and complex nature of the offense." The defense again stated in the request that such delay would be attributable to the defense.

On 11 December 2018, the defense submitted a third request for delay, in asking that the Article 32 hearing be delayed until after the results of the R.C.M. 706 examination board were completed. The defense requested the delay be attributable to the government, but the Convening Authority disagreed and attributed such delay to the defense. On 11 March 2019, the defense was again replaced by new counsel and submitted a fourth request for delay seeking a delay in the arraignment, from 12 March 2019 until 20 March 2019. The Court granted this request and excluded the time, with the delay attributable to the defense. On 26 April 2019, the defense requested a fifth request for delay to continue the 30 May Article 39(a) session until 11 July 2018. The Court granted this request and attributed the delay to the defense.

On July 24, the defense filed another motion for a continuance. On 26 July 2019, the accused, through an affidavit, stated he desired the continuance and believed that it was in his best interest. The defense agreed to reschedule the trial start date to 23 September 2019. The almost seven week in delay for the start of the accused's trial is attributed to the defense's request for a continuance – also based in part on the availability of the defense counsels' schedule.

The reasons for delay in this case were due in large part to the defense's numerous requests for delay throughout the entire life of this case. The government's delay in not scheduling the R.C.M. 706 board until 11 January 2019 and not having the results ready until 18 January 2019 were less than ideal; however, the government's actions as whole in regard to the

R.C.M. 706 examination board were reasonable. The government's (trial counsel, SJA, and Convening Authority) active communications with legal department of NHCNE in scheduling the R.C.M. 706 board, which the defense requested, demonstrated they acted with reasonable diligence. This is even more reasonable given LAN was down on the [redacted] during some of this time while they were underway. The Court finds the defense holds the majority of the responsibility for delay in this case. This factor weighs in favor of the government.

3. *Assertion of the right to a speedy trial*:

In this case, the accused never demanded a speedy trial. According to *Barker*, the accused's failure to assert a speedy trial is indeed one of the factors to be considered into this balancing test, but also noted that the more serious the deprivation, the more likely a defendant is to complain.[10] The accused's assertion of his speedy trial right is strong evidentiary weight in determining whether the accused is being deprived of the right.[11] *Barker* emphasized that the accused's failure to assert the right to a speedy trial will make it difficult for the accused to prove that he was denied a speedy trial. [12]

In this case, the accused never demanded a speedy trial. Such failure to assert this right is strong evidentiary weight that the accused was not deprived of his right under the Sixth Amendment. In fact, the opposite is true in this case. Instead of asserting their speedy trial rights, the defense has requested numerous delays both pre and post arraignment. This factor weighs strongly in favor of the government.

4. *Prejudice to the accused*:

[10] *Id.*
[11] *Id.* at 531-532.
[12] *Id.* at 532.

In analyzing this factor, three interests are involved: (1) to prevent oppressive pretrial incarceration, (2) to minimize anxiety and concern of the accused, and (3), most importantly, to limit the possibility that the defense will be impaired. Although the accused undoubtedly experienced some level of anxiety and concern after being held in restrictive housing for a total of 166 days, such anxiety or conditions do not rise to the level of implicating the constitutional rights of the accused. The accused was placed in restrictive housing on 16 November 2018 after he intentionally threw hot oatmeal and Vaseline in the face of another inmate. After he served his 20 days in restrictive housing for this incident, he remained in restrictive housing until 1 May 2019 because he did not complete steps he needed to get out and the inmate he had assaulted had threatened him (also putting him in a protective housing status). The accused's personal and professional prejudice, [redacted], and concern from his duration of time in restrictive housing was due in large part to his own actions. While restrictive housing for 166 days was clearly challenging for the accused, the conditions of pretrial incarceration were by not oppressive within the meaning of the Sixth Amendment and *Barker*. The accused being deprived of significant time with his family, his ability to advance as a sailor, and his freedom are all a result of pre-trial confinement status and his actions while in pre-trial confinement, not because the government has not exercise reasonable diligence in this case or in any way deprived him of a speedy trial. In fact, for the most recent request for a continuance, the accused has stated he believes it is in his interest for there to be delay in this case.

Lastly, and most importantly, there is no evidence that the accused's defense has been materially impaired by his 166 days in restrictive housing. There has been no evidence presented that the accused had his pretrial preparations for his trial impaired by being in restrictive housing or that he had any issues communicating with his defense counsels during this time. He has had

lexis nexis access the entire time he has been in pre-trial confinement. While the defense cites to the 166 days the accused spent in restrictive housing as evidence that the accused's Sixth Amendment rights were violated, such prejudice is minimal at most. This factor also weighs heavily in favor of the government.

The defense motion to dismiss pursuant to the Sixth Amendment is **DENIED**.

B. Article 10, UCMJ.

Under Article 10, UCMJ, once an appellant is placed in pretrial confinement the Government is required to exercise "reasonable diligence" in bringing the accused to trial.[13] "The touch stone…is not constant motion, but reasonable diligence in bringing the charges to trial. Brief periods of inactivity in an otherwise active prosecution are not unreasonable or oppressive."[14] Although the *Barker v. Wingo* factors are considered in assessing a speedy trial violation under Article 10, Article 10 is more exacting than the Sixth Amendment standard. Under Article 10, UCMJ, Military courts have noted that "the touchstone for measurement of compliance [with Article 10]…is not constant motion, but reasonable diligence in bringing the charges to trial."[15] Moreover, "brief periods of inactivity in an otherwise active prosecution are not unreasonable or oppressive."[16]

Despite the more exacting standard applicable to Article 10, the Court, in applying the same analysis and rationale used under its Sixth Amendment decision above, reaches the conclusion that the government exercised reasonable diligence in bringing the charges to trial.[17] Despite there being brief periods of isolated inactivity, in its totality, given the complex nature of the

---

[13] *United States v. Kossman*, 38 M.J. 258, 262 (C.M.A. 1993).
[14] *Id.*
[15] *United States v. Tibbs*, 35 C.M.A. 322, 325 (C.M.A. 1965) (citations omitted).
[16] *Id.*
[17] See the Court's rationale under the Sixth Amendment analysis of this ruling in addition to the rationale provided under this section as to why the Court finds the government exercised reasonable diligence in bringing the accused's case to trial in compliance with Article 10, UCMJ.

investigation and evidence, the seriousness of charges, the delays requested by the defense, and the logistical issues that surround a R.CM. 706 examination board, the Court finds that the government's investigation and prosecution of the case demonstrated reasonable diligence. There was some minor delay in the R.C.M. 706 examination board process; however, put simply, that process does take time. In this case, the time that it took for the trial counsel, defense counsel, SJAs, Convening Authority, and NHCNE to request, coordinate, and complete the steps associated with the R.C.M. 706 examination board was not unreasonable. All parties were well aware of the accused pre-trial confinement status and the need to conduct associated tasks expeditiously. They did so in this case. The Court also notes, again, there were numerous requests for delay by the defense in this case, including the last request which the accused believe was in his interest. In this case, the defense requests for delay have occurred at all stages of the trial. Despite these requests, the government continued to expeditiously process the accused's case at all stages of the case.

The defense claim made under Article 10, UCMJ is **DENIED**.

C. R.C.M. 707

R.C.M. 707(a) provides for a 120-day speedy trial rule requiring the government to bring the accused to trial within 120 days. The inception of the 120-day period is on the earlier date of preferral of charges or imposition of restraint under R.C.M. 304(a)(2)-(4). R.C.M. 707(b)(1) defines "brought to trial" as the day of the arraignment. Thus, the duty imposed on the government by R.C.M. 707 is to arraign an accused within 120 days of preferral of charges or imposition of restraint under R.C.M. 304(a)(2)-(4) or face dismissal of the charges. Per R.C.M. 707(b)(1), the date on which pretrial restraint is imposed under R.C.M. 304(a)(2)-(4) does not count for the purposes of the 120-day clock.

The rule allows authorized personnel to approve delays, and therefore "exclude" time from the 120-day clock.[18] Prior to referral, any request for pretrial delay must be submitted to either the convening authority, the Article 32 officer (if the convening authority has properly delegated delay authority), or "if authorized under regulations prescribed by the Secretary concerned, to the military judge for resolution.[19] After referral, only a military judge can approve any pretrial delay.[20] All pretrial delays approved by the convening authority are excludable so long as approving them was not an abuse of the convening authority's discretion. It does not matter which party is responsible.[21] The decision to approve or disapprove a delay is reviewed for an abuse of discretion.[22] There must be "good cause" for the delay and the length of the time requested must be "reasonable" based on the facts and circumstances of each case.[23] "[I]n the absence of an abuse of discretion by the officer granting the delay, there is no violation of R.C.M. 707."[24]

In this case, the R.C.M. 707 question before the Court is whether or not the Convening Authority abused its discretion by approving the delay requested by the defense, and whether or not "good cause" existed for such delay, and if the length of delay was "reasonable" under the circumstances. The Court finds that the accused's 120-day R.C.M. clock began on 31 July 2018, when the accused entered into pretrial confinement. The date in which the accused was restricted from leaving the chief's mess and placed on around the clock watch by various senior servicemembers qualifies as restriction tantamount to confinement, but does not count towards

---

[18] R.C.M. 707(c)
[19] R.C.M. 707(c)(1); *United States v. Lazauskas*, 62 M.J. 39, 41-42 (C.A.A.F. 2005).
[20] R.C.M. 707(c)(1)
[21] *United States v. Dies*, 45 M.J. 376, 377-78 (C.A.A.F. 1996).
[22] *Lazauskas*, 62 M.J. at 41.
[23] *United States v. Thompson*, 46 M.J. 472, 475 (C.A.A.F. 1997).
[24] *Lazauskas*, 62 M.J. at 41.

the 120-day clock.[25] However, the day of the accused's arraignment on 20 March 2019 does count towards the 120-day clock.[26] Therefore, the time from 31 July 2018 to the accused's arraignment on 20 March 2019 spans a total of 233 days. However, of the total 233 days, 120 of those days are excludable from the R.C.M. 120-day clock period.[27] Therefore, in subtracting the 121 days excludable from the R.C.M. 120-day clock, that leaves a total span of 113 days between when the accused's R.C.M. clock started on 31 July 2018 confinement and when the accused was arraigned on 20 March 2019. Such time is acceptable under the R.C.M. 120-day rule, and therefore the Court finds no R.C.M. 707(a) violation.

The Court also finds that such 121 days were properly excluded from the R.C.M. 120-day clock because the Convening Authority did not abuse its discretion in approving such excludable delay under R.C.M. 707(c), that "good cause" existed for the such delay, and that the length of the delay was in fact "reasonable" based on the circumstances of the case. The defense requested the initial delay to begin on 4 October 2018 due to the "serious and complex nature of the offense, which was approved by the Convening Authority." During that delay, on 7 November 2018, the defense requested a R.C.M. 706 examination board to evaluate the mental health of the accused. The defense argues that the government then 'dragged its feet' by not officially scheduling the R.C.M. 706 examination board with the legal department of the NHCNE until 7 December 2018. On 10 December 2018, the NHCNE legal department informed the Convening Authority that the two doctors qualified to conduct the R.C.M. 706 board could not do so until 10-11 January 2019, and that their report would not be ready to be sent in until 18 January 2019. Subsequently, this prompted the defense to request a third delay so that the Article

[25] *United States v. Schuber*, 70 M.J. 181, 187 (C.A.A.F. 2011); R.C.M. 707(b)(1).
[26] R.C.M. 707(b)(1).
[27] R.C.M. 707(c).

32 hearing could be delayed until after the completion of the R.C.M. 706 examination board. Unlike the two previous requests for delay, the defense asked that such delay be attributed to the government because of the government's delay in scheduling the R.C.M. 706 board evaluation from when it was originally requested on 7 November 2018. Despite the delay from 7 November 2018 until 7 December 2018, the government has provided evidence that shows good cause for such delay that was reasonable in scheduling the R.C.M. 706 board. On 13 November 2018, the government endorsed the defense's request for a R.C.M. 706 board and forwarded it to the Convening Authority. On 15 November 2018, the SJA for the Convening Authority contacted [redacted] for Behavioral Health at the Naval Branch Health Clinic Groton about acquiring a R.C.M. 706 evaluation for the accused. On the same day, the SJA received a response directing her to send the R.C.M. 706 request through the legal department of the NHCNE. Five days later, on 20 November 2018, the Convening Authority ordered the requested the R.C.M. 706 board; however, this order was not forwarded off the [redacted] until 26 November 2018 due LAN being down onboard. On 27 November 2018, the government informed the newly appointed defense counsel of the R.C.M. 706 evaluation requested by previous defense counsel. They also informed defense that the SJA of the Convening Authority has already been in contact with the NHCNE regarding the scheduling of the R.C.M. 706 board. On 7 December 2018, the Convening Authority forwarded the order of the official R.C.M. 706 request to the legal department of NHCNE.

The evidence of the continuous communication between the government, the defense counsel, the Convening Authority, and the Convening Authority's SJA with the NHCNE in scheduling the R.C.M. 706 board, especially given the logistics associated with a R.C.M. 706 examination board, indicates good cause for the delay and that the government did not "drag its

feet." Other evidence such as the LAN being temporarily down onboard the [redacted] and the defense switching counsels during the case also constitute good cause for the delay from 7 November 2018 to 7 December 2018. It was reasonable for the trial counsel and the SJA to notify the new defense counsel and to see if they had any follow up about the R.C.M. 706 request on 27 November 2018 before forwarding the actual request to NHCNE. The delay was reasonable under the circumstances for all of the aforementioned reasons.

Good cause existed for the delay in scheduling the R.C.M. 706 examination board by the government under the circumstances in this case. The Court finds the Convening Authority did not abuse its discretion in excluding all 121 days from the R.C.M. 120-day clock. As a result, R.C.M. 707 is satisfied in this case because the accused's R.C.M. 120-day clock stopped on day 113.

The defense claim made under R.C.M. 707 is **DENIED**.

4. Ruling:

The defense's motions to dismiss under (1) the Sixth Amendment; (2) Article 10, UCMJ; and (3) R.C.M. 707 are **DENIED.**

So **ORDERED**, this 28th day of August2019.

[redacted]
CDR, JAGC, USN
Circuit Military Judge

APPELLATE EXHIBIT XXVII
PAGE 23 OF 27
APPENDED PAGE

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

UNITED STATES **v.** **MICAH J. BROWN** **CCCSN** **U.S. NAVY**	**RULING ON DEFENSE MOTION FOR APPROPRIATE RELIEF: RELIEF FROM PRETRIAL CONFINEMENT AND CONFINEMENT CREDIT** **31 OCTOBER 2019**

I. Nature of Ruling.

The defense moves for relief from pretrial confinement pursuant to Rules for Court-Martial (R.C.M.) 305(j), arguing that the Initial Review Officer (IRO) abused her discretion in approving continued pretrial confinement and that information currently before the Court does not justify pretrial confinement. They are seeking the accused's release from pretrial confinement. The defense also moves the court for administrative confinement credit under R.C.M. 305(k) for the government unlawfully imposing restraint in violation of R.C.M. 305. The government opposes the motion.

The Court considered the defense and government briefs and attachments thereto, as well as the oral argument of counsel in arriving at the following findings of fact and conclusions of law.

2. Findings of Fact.

a. The Court adopts its findings of fact from its ruling on the defense's motion to suppress to the accused's statements. This includes finding of facts a. through ff.

b. As a result of the accused's alleged actions, LSS2 [redacted] sustained multiple lacerations to his body. He was transported to the [redacted] in

APPELLATE EXHIBIT LIV
PAGE 1 OF 11
APPENDED PAGE

Melbourne, FL after the submarine returned to the pier in Florida. He received some treatment there.

c. On 31 July 2018, the accused was ordered into pretrial confinement at the brig at Naval Air Station (NAS) Jacksonville located in Jacksonville, Florida.

n. On 1 August 2018, the Commander, Submarine Squadron 12, issued a memorandum memorializing his justifications for placing the accused in pretrial confinement. The memorandum briefly noted the accusations they believed the accused would be charge with – Violation of UCMJ, Article 80 (attempted murder) and Violation of UCMJ, Article 128 (assault with a knife). The Commander found that probable cause existed that the accused had committed offenses triable by a court-martial, that confinement was necessary because it is foreseeable that the accused will engage in further serious criminal misconduct if not confined, that the accused is a potential flight risk, and that lesser forms of restraint were inadequate.

o. On 2 August 2018, the accused was advised of the nature of the offenses against him, that he had the right to remain silent, that he could retain civilian counsel at no expense to the United States, and that his confinement could be reviewed by an Initial Review Officer (IRO). On this date he also spoke to LT Gary Rowe, a defense counsel assigned to Defense Service Office Southeast (DSO). After getting all this information and speaking to LT Rowe, the accused waived his right to have an appearance at his initial review of his pretrial confinement.

p. On 3 August 2018, an initial review of the accused's pretrial confinement was conducted by LCDR [redacted], the IRO. The accused was absent given his waiver of appearance. On 3 August 2018, LT Rowe emailed LCDR [redacted] and made an argument on behalf of the accused.[1] LT Rowe's signature block stated his name was LT Davey G. Rowe.

[1] See the email from LT Rowe to LCDR [redacted]. The Court finds the substance of this email was sent to LCDR [redacted] on this date and were from the accused's defense counsel assigned to his case at the time. The Court also

APPELLATE EXHIBIT LIV
PAGE 2 OF 11
APPENDED PAGE

q. IRO approved continued pretrial confinement on 1 August 2018. On the form, she noted the accused's counsel as LT Davey G. Rowe. She memorialized her decision in a three-page document titled "Memorandum of Initial Review Officer." She indicated on this form her determination by a preponderance of the evidence that, after considering the written memo of the detainee's commander, the confinement order, and witness statements, that she approved continued confinement of the accused. She found by a preponderance of the evidence that an offense triable by court-martial had been committed by the accused. She also found confinement was necessary because it was foreseeable there are reasonable grounds to believe the accused would engage in serious misconduct. She also found less severe forms of restraint were inadequate. She determined the accused was not a flight risk.

r. In support of her conclusions, she also included handwritten remarks noting her decision was "based on various witness statements, particularly EMN2 [redacted] and ETVC [redacted], the individuals who responded to the loud noise stemming from the altercation between Brown and [redacted]." She also noted the accused use of a "knife to stab LSS2 [redacted] multiple times" was also a reason for her decision of continued confinement. Lastly, she noted that the offenses committed by the accused are court-martial offenses.

r. On 6 September 2018, the accused was moved into pretrial confinement at Donald Wyatt Detention Facility (Wyatt Facility).

s. On 16 November 2018, the accused heated up a liquid mixture of hot oatmeal and Vaseline (which on video appears to show him re-heating the mixture multiple times), and then threw that liquid mixture onto the face of another detainee. He also appears to have attempted to strike the same detainee's face with his fist.

---

finds LCDR [redacted] received and reviewed this email based on the fact that she noted the accused's counsel was LT Davey G. Rowe, which is the same name used in LT Rowe's signature block on his email.

t. On 16 November 2018, as a result of the incident, the accused was placed in administrative detention pending investigation as a result of the hot oatmeal and Vaseline incident.

u. On 28 November 2018, Wyatt Facility officials conducted a Disciplinary Report Hearing, where the Hearing Officer found the accused guilty of "assault with fluids" by "a preponderance of the evidence." The accused was adjudged sanctions, including restrictive housing for a period of 20 days, with 10 days suspended. The accused served the 20 days in restrictive housing.

3. Discussion and Conclusions of Law.

a. Release from Pre-Trial Confinement

Service members pending criminal charges may be ordered into pretrial confinement as the circumstances may require.[2] An accused shall be released from pretrial confinement unless reasonable grounds exist to believe that an offense triable by court-martial has been committed, the accused committed it, confinement is necessary either because the accused is a flight risk or will engage in serious criminal misconduct, and less severe forms of restraint are inadequate.[3] Serious criminal misconduct includes intimidation of witnesses or other obstruction of justice, serious injury of others, or other offenses that pose a serious threat to the safety of the community or to the effectiveness, morale, discipline, readiness, or safety of the command.[4] On motion from the defense, the military judge shall order an accused released from pretrial confinement only if: (A) The 7-day review officer's decision was an abuse of discretion, and there is not sufficient information presented to the military judge justifying continued pre-trial

[2] Article 10, U.C.M.J.
[3] R.C.M. 305(h)(2)(B).
[4] *Id.*

confinement; (B) Information not presented to the 7-day review officer establishes that the prisoner should be released; or (C) The requirements of R.C.M. 305(i)(1) and R.C.M. 305(i)(2) were not complied with, and information presented to the military judge does not establish grounds for continued confinement.[5]

An IRO should utilize a "totality-of-the-circumstances" test in determining whether pretrial confinement is warranted.[6] As the case law holds:

> The exercise of discretion implies conscientious judgment, not arbitrary action. It takes account of the law and the particular circumstances of the case and is directed by reason and conscience to a just result. The test for an abuse of discretion is the failure to exercise discretion or its exercise on grounds that are untenable. It does not imply a bad motive or willful disregard of an accused's rights, but can be the failure to apply the principles of law applicable to the situation at hand.[7]

The required exercise of common sense, factual analysis, and independent judgment is designed ultimately to guard against the "mere ratification of the bare bones conclusions of others."[8] In order to find an abuse of such discretion, the court must find "more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous."[9] Furthermore, an abuse of discretion standard is similar to the clearly erroneous standard; requiring not that the decision was wrong, but rather was clearly wrong and that the decision was more than just "maybe wrong" or "probably wrong;" the decision "must strike a chord of wrong with the force of a five-week-old, unrefrigerated dead fish."[10]

b. R.C.M. 305(k) and Article 13

---

[5] R.C.M. 305(j).
[6] *United States v. Fisher*, 37 M.J. 812 (N.M.C.M.R. 1993).
[7] *Id.* at 816-17.
[8] *Id.* at 818.
[9] *United States v. Baker*, 70 M.J. 283, 287 (C.A.A.F. 2011) (internal quotation marks and citations omitted).
[10] *United States v. French*, 38 M.J. 420, 425 (C.M.A. 1994) (quoting *Parts & Electric Motors Inc. v. Sterling Electric, Inc., 866 F.2d 228, 233 (7th Cir. 1988)).*

R.C.M. 305(k) states that remedy for any noncompliance of R.C.M. 305 (f), (h), (i), or (j) of the rule "shall be administrative credit against the sentence adjudged for confinement served as a result of such noncompliance."[11]

"No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances required to insure his presence, but he may be subjected to minor punishment during that period for infractions of discipline."[12] By its terms and clear implications, Article 13 prohibits two types of activities involving the treatment of an accused prior to trial.[13] The two activities are (1) the intentional imposition of punishment on an accused before his or her guilt is established at trial (illegal pretrial punishment), and (2) arrest or pretrial confinement conditions that are more rigorous than necessary to ensure the accused's presence at trial (illegal pretrial confinement).[14] The first prohibition of Article 13 involves a purpose or intent to punish, determined by examining the purposes served by the restriction or condition, and whether such purposes are reasonably related to a legitimate governmental objective.[15] In looking at the intent of the command, "[a] court must decide whether the disability is imposed for…punishment or whether it is but an incident of some other legitimate governmental purpose."[16] Furthermore, for an Article 13 violation to occur, the record "must disclose an intent to punish on the part of the Government."[17]

4. <u>Conclusions of Law.</u>

---

[11] R.C.M. 305(k).
[12] Article 13, U.C.M.J.
[13] *United States v. McCarthy*, 47 M.J. 162, 165 (C.A.A.F. 1997).
[14] *United States v. Zarbatany*, 70 M.J. 169 (C.A.A.F. 2010).
[15] *Id.*
[16] *United States v. James*, 28 M.J. 214, 215 (C.M.A. 1989) (citing *Bell v. Wolfish*, 441 U.S. at 538, 99 S.Ct. at 1873, citing *Fleming v. Nestor*, 363 U.S. 603, 613-17, 80 S.Ct. 1367, 1373-76, 4 L.Ed.2d 1435 (1960)).
[17] *United States v. Howell*, 2016 Lexis CAAF 592 (C.A.A.F. 2016).

a. Release from Pre-Trial Confinement

i. IRO's Decision

Here, the defense argues that the IRO's decision was an abuse of discretion and that there is not sufficient information presented to the military judge justifying continued pretrial confinement in lieu of some lesser form of restraint. The Court disagrees. In analyzing the IRO's decision under R.C.M. 305(j)(1)(A), the Court first considers whether the IRO abused her discretion in ordering continued pretrial confinement for the accused. In doing so, the Court only considers matters before the IRO at the time she made his decision. Based on the evidence she considered, the Court concurs with the IRO's assessment on continued pretrial confinement, and the Court concludes that the IRO did not abuse her discretion.[18]

The Court finds the IRO understood and properly applied the correct preponderance standard at the pretrial confinement review she conducted held on 3 August 2018. Within the IRO's Findings and Order form she filed out, under the heading "CONCLUSION," the IRO made her findings by checking facts and decisions that applied in this case. These check marks and facts were listed under a paragraph the IRO had also checked that stated, "The matters I have considered convince me that the requirements for continued pretrial confinement have been proved by preponderance of the evidence." On the last page of the form, the IRO hand wrote what she considered and provided further justification as to why she decided to continue pretrial confinement. She hand wrote what she considered in addition to the blocks she checked in the number 2 paragraph on page one of the document. These facts indicate to the Court that the IRO understood and applied the correct standard of proof during her pretrial confinement review.

[18] See *United States v. Gaither*, 45 M.J. 349, 351 (C.A.A.F. 1996).

The Court also finds that the IRO considered the totality of the circumstances of the accused's situation on 3 August 2018 during her pretrial confinement review. The Court finds she weighed the appropriate facts highlighted in R.C.M. 305(h)(2)(B)'s Discussion. The weight accorded to those factors was squarely within her determination. The IRO also considered witness statements – which she noted EMN2 [redacted] and ETVC [redacted] were particularly relevant as they were the first responders to the altercation. On the basis of what she considered, she then determined that the requirements under R.C.M. 305(h)(2)(B) were met and that continued pretrial confinement was warranted. Her findings that the accused will engage in further serious criminal misconduct and that less severe forms of restraint were not adequate were more persuasive than those factors favoring the accused's release was her judgment call and was reasonable in light of the facts before her. In addition, the "Memorandum of Initial Review Officer" show the accused was afforded all of his rights under R.C.M. 305.

In their motion, the defense never alleged that the accused was not afforded all his rights, but instead they focused their argument on the fact the IRO simply "ratified an improper decision by the commander based on zero evidence." Defense has also argued the IRO did not consider the statement of the accused. The Court disagrees with the defense on both points. First, the IRO was not a rubber stamp when she made her decision. In fact, she specifically disagreed with the accused's commander when she found the accused was not a flight risk. In addition, in her handwritten notes, she specifically mentions the witness statements she reviewed and how they influenced her decision to approve continued pretrial confinement in this case. The Court believes the IRO followed the proper procedures set out in R.C.M. 305 and did an actual analysis of the standards set out in R.C.M. 305. Second, the accused waive his appearance to appear in front of the IRO. In turn, his attorney, LT Rowe, submitted an email to the IRO. The Court

agrees with the government that this email was essentially the defense counsel's argument and was not an actual statement from the accused. Furthermore, as noted above, the Court finds the IRO did review the email based on the evidence presented to this Court. The IRO noted on her "Memorandum of Initial Review Officer" that the accused's counsel was LT Davey G. Rowe, the same name that appeared in the signature block of LT Rowe's email to her. Neither the accused nor his counsel appeared before her. There is no evidence to suggest that the IRO would have learned of the defense counsel's name any other way than the email he sent to her. The Court will also note that R.C.M. 305(i)(2)(A) states that "additional written matters *may* be considered, including any submitted by the prisoner." Based on this, the Court does not find that the IRO is required to review every single piece of the investigation or matters submitted by the prisoner. There was no abuse of discretion by the IRO in this case.

ii. Sufficient Evidence Presented to Military Judge Justifying Pretrial Confinement

Even though it is not necessary because the Court finds the IRO's decision was not an abuse of discretion, the Court will note it does find, based on all the evidence presented in the parties' motions, there is sufficient information to justify continued pretrial confinement in this case. While it is settled that an accused cannot be placed into pretrial confinement simply for being a "pain in the neck,"[19] "the accused whose behavior is not merely an irritant to the commander, but is rather an infection in the unit may be so confined."[20] Here, the evidence supports the notion that the accused's impact on his unit rises far above the level of being a mere pain in the neck to his commander and that the likely infliction of serious injury on others poses a serious threat to the safety of the community or serious threat to effectiveness, morale,

[19] *United States v. Heard*, 3 M.J. 14, 19 (C.M.A. 1977).
[20] *United States v. Rosato*, 29 M.J. 1052, 1054 (A.F.C.M.R. 1990), *rev'd on other grounds*, 32 M.J. 93 (C.M.A. 1991).

discipline, readiness, or safety of his command or U.S. national security. The allegations of the accused stabbing a shipmate with a kitchen knife on an underway and underwater submarine evince the sort of infection in the unit which the court in *Rosato* found to justify pretrial confinement. The accused's alleged actions created a danger not just to LSSS2 [redacted], but also to the entire crew of the [redacted] given when, where, how, and why it occurred. In addition, since being placed in pretrial confinement, the accused is also alleged to have attacked another person in pretrial confinement with a hot bowl of Vaseline and oatmeal (for which a video shows he repeatedly heated up in a microwave) by throwing it in his face and striking him in the face with his fists. All this alleged misconduct point to justifications for keeping the accused in pretrial confinement, and the Court agrees with the IRO's determination made under R.C.M. 305.

Finally, based the totality of the circumstances in this case, including his demonstrated repeated behavior that has led him to be accused of multiple crimes involving violence, the Court has considered less severe forms of restraint and concludes that they are inadequate.

b. <u>R.C.M. 305(k) and Article 13</u>

The crux of the defense's argument in relation to credit under R.C.M. 305(k) and Article 13 is that the government was not justified in placing the accused in pre-trial confinement. For the reason set forth above, the Court disagrees with defense's argument. First, as noted, the Court has found that IRO did not abuse her discretion and that there is sufficient evidence before the Court to justify a continuation of confinement. Second, there is no evidence before the Court that the government placed the accused in pretrial confinement to punish him. In this case, the accused's pretrial confinement is not an intentional imposition of punishment before his guilt is established at trial or more rigorous than necessary. There is no evidence on the record that

"disclose an intent to punish on the part of the government."[21] The defense request for administrative credit under R.C.M. 305(k) and Article 13 is denied.

4. **Ruling.**

Accordingly, the defense's motion for the accused to be released from pretrial confinement and to receive confinement credit under Article 13, UCMJ and R.C.M. 305 is **DENIED**.[22]

So **ORDERED** this 31st day of October, 2019.

[redacted]
R.J. STORMER
CDR, JAGC, USN
Military Judge

[21] *United States v. Howell*, 2016 Lexis 592 (C.A.A.F. 2016).

[22] The Court orally denied this motion on 23 October 2019 based on the rationale in this written order. During the Article 39(a) session, the defense requested the Court reconsider its ruling. The Court did and denied that motion as well for the same reasons noted above. During their request for reconsideration and the following oral motion, the defense presented no new evidence for the Court to consider.

APPELLATE EXHIBIT LIV
PAGE 11 OF 11
APPENDED PAGE

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

UNITED STATES **v.** **MICAH J. BROWN** **CCCSN** **U.S. NAVY**	**RULING ON DEFENSE MOTION FOR CREDIT UNDER ARTICLE 13, UCMJ. R.C.M. 305 AND R.C.M. 304** **1 NOVEMBER 2019**

1. **Nature of Ruling.**

The defense moves the Court for administrative credit for unlawful punishment under Article 13, U.C.M.J., R.C.M. 305, and R.C.M. 304. The government opposed the defense's motion. Upon consideration of that motion, the government's response, and the evidence and arguments presented by counsel, the Court makes the following findings of fact and conclusions of law.

2. **Findings of Fact.**

a. On 30 July 2018, onboard [redacted] an underway and underwater submarine, the accused allegedly stabbed LSS2 [redacted] with a knife.

b. On 31 July 2018, the accused was ordered into pretrial confinement at the brig at NAS Jacksonville, FL.

c. On 6 September 2018, the accused was moved into pretrial confinement at Donald Wyatt Detention Facility (Wyatt Facility).

d. On 16 November 2018, the accused allegedly heated up a liquid mixture of hot oatmeal and Vaseline, which a video shows him apparently re-heating multiple times, and then threw that liquid mixture onto the face of another detainee. He then appeared to strike the

APPELLATE EXHIBIT LVI
PAGE 1 OF 10
APPENDED PAGE

detainee's face with his fist. There is a video of this altercation that has been submitted as a government exhibit. The Court finds this video to be authentic and a visual account of the altercation that took place.

e. On 16 November 2018, because of the incident, the accused was placed in administrative detention pending an investigation.

f. On 28 November 2018, Wyatt Facility officials conducted a Disciplinary Report Hearing, where the Hearing Officer found the accused guilty of "assault with fluids" by "a preponderance of the evidence." The accused was adjudged sanctions, including restrictive housing for a period of 20 days, with 10 days suspended. The accused served the 20 days in restrictive housing for his "assault with fluids."

g. On 5 December 2018, Wyatt Facility officials determined it was necessary to keep the accused in restrictive housing for his own safety due to the inmate the accused allegedly attacked on 16 November 2018 threatened the accused. The Wyatt Facility contains no other housing unit, and the only way the accused could be prevented from having contact with the inmate was by placing the accused in restrictive housing.

h. While being held in restrictive housing at the Wyatt Facility, the accused was restricted to [redacted]. The accused was able to request and receive items such as socks, sweatshirts, and boxers. The accused was also offered services like haircuts, the opportunity to meet with a pastor, and access to LexisNexis for legal research.

i. Beginning on 6 December 2018, the accused's status of restrictive housing was re-evaluated every week to determine its appropriateness. The accused had 12 different

opportunities to voice any concerns or problems with his housing conditions to the Wyatt Facility officials.

j. On 2 January 2019, the accused stated during the weekly restrictive housing review that he had no issues with his housing situation at the Wyatt Facility.

k. On 3 January 2019, the defense submitted a Request for Redress, requesting the Commanding Officer, [redacted] to authorize transfer of the accused to the nearest military facility due to Wyatt Facility keeping the accused in restrictive housing.

l. On 9 January 2019, the accused stated during the weekly restrictive housing review that he had no issues with his housing situation at the Wyatt Facility.

m. On 15 January 2019, the Commanding Officer, [redacted] the denied the accused's Request for Redress, stating there was a "legitimate penological interest to control, preserve order, and prevent injury to CSSSN Brown."

n. On both 16 and 23 January 2019, the accused stated during the weekly restrictive housing review that he had no issue with his housing situation at the Wyatt Facility.

o. On 30 January 2019, the accused failed to complete the requisite reintegration program to start the process of getting out of restrictive housing. The program consisted of filling out a Federal Bureau of Prisons package that focused on "living with others." This package/program focused on communication skills, emotions – to include anger, unhealthy behaviors, peers, relationship issues, learning how to handle social pressure, working effectively with authority figures, and benefits of a healthy relationship. The package states its goal is to "focus on skills that will help you adjust to incarceration. Making the most of your time here depends on learning to communicate effectively, managing your anger and building healthy relationships." These are all issues directly connected to the allegation of assault against the

accused for attacking another inmate with fluids and his fists while he was in pretrial confinement. Because he refused to complete this program, he failed to begin the restrictive housing step down procedure that would return him to general population.

p. On 30 January 2019, the accused stated during weekly restrictive housing review that he had no issues with the housing situation at the Wyatt Facility. On this date, he again refused to start the step-down program. The Chief of Security also noted he [redacted]

q. On 31 January 2019, the accused, through counsel, filed an Article 138 complaint seeking relief from restrictive housing.

r. On 6 February 2019, the accused stated during weekly restrictive housing review that he had no issues with the housing situation at the Wyatt Facility. On this date, he again refused to start the step-down program.

s. The accused also filed an Article 138 complaint against the Commanding Officer, [redacted] On 25 March 2019, Commander, Submarine Squadron 12, provided a second endorsement on the complaint. The second endorsement stated [redacted]

t. On 1 May 2019, the accused completed the requisite reintegration program and packet and was then transferred back to general population that same day. He continued to sleep at night in a private room for his own protection.

APPELLATE EXHIBIT LVI
PAGE 4 OF 10
APPENDED PAGE

u. On 10 June 2019, Commander, Submarine Force Atlantic, stated the accused's complaint was "not proper."

v. The accused spent a total of 166 days in restrictive housing.

3. Discussion and Conclusions of Law.

"No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances required to insure his presence, but he may be subjected to minor punishment during that period for infractions of discipline."[1] By its terms and clear implications, Article 13, UCMJ, prohibits two types of activities involving the treatment of an accused prior to trial.[2] The two activities are (1) the intentional imposition of punishment on an accused before his or her guilt is established at trial (illegal pretrial punishment), and (2) arrest or pretrial confinement conditions that are more rigorous than necessary to ensure the accused's presence at trial (illegal pretrial confinement).[3]

The first prohibition of Article 13 involves a purpose or intent to punish, determined by examining the purposes served by the restriction or condition, and whether such purposes are reasonably related to a legitimate government objective.[4] For an Article 13 violation to occur, the record "must disclose an intent to punish on the part of the government."[5] In looking at the intent of the command, "[a] court must decide whether the disability imposed for punishment or whether it is but an incident of some other legitimate governmental purpose."[6] In the absence of

---

[1] Article 13, U.C.M.J.
[2] *United States v. McCarthy*, 47 M.J. 162, 165 (C.A.A.F. 1997).
[3] *United States v. Zarbatany*, 70 M.J. 169, 169 (C.A.A.F. 2010).
[4] *Id.*
[5] *United States v. Howell*, 75 M.J. 386, 394 (C.A.A.F. 2016).
[6] *United States v. Palmiter*, 20 M.J. 90, 95 (C.M.A. 1985) (citing *Bell v. Wolfish*, 441 U.S. 520, 539, 99 S.Ct. at 1874, citing *Fleming v. Nestor*, 363 U.S. 603, 617, 80 S.Ct. 1367, 1376, 4 L.Ed.2d 1435 (1960)).

a showing of punitive intent, the government action "does not, without more, amount to 'punishment.'"[7]

a. Illegal Pretrial Punishment.

In this case, contrary to the defense's argument, the Court finds under the first prong of Article 13 that the Convening Authority did not intend to punish the accused by placing him in restrictive housing. Rather, the accused's placement in restrictive housing was reasonably related to the legitimate government objective of ensuring the safety of the Wyatt Facility and its inmates following the accused's intentional aggressive actions towards another inmate. Based on a review of the video of the incident, the Court finds the Wyatt Facility Hearing Officer was justified in finding the accused guilty of "assault with fluids" by a preponderance of the evidence. On the video, the accused intentionally threw a liquid mixture of hot oatmeal and Vaseline at another inmate and attempted to the strike the inmate's face with his fists. The Court also finds the Wyatt Facility officials were justified in adjudging sanctions against the accused, including restrictive housing for a period of 20 days, with 10 days suspended. Per SECNAVINST 1640.9c §5103, an assault consummated by a battery is a Category IV offense. As such, it carries a possible disciplinary action of "Disciplinary Segregation: indefinite, normally not to exceed sixty days in any one period." The accused's actions would qualify as a Category IV offense.

The defense argues the Convening Authority violated SECNAVINST 1640.9c by keeping the accused in restrictive housing for 166 days. The Court disagrees. The time period the accused spent in restrictive housing was extended by his own actions. The Court finds the accused himself is the one most responsible for that extended time period in restrictive housing.

[7] *United States v. James*, 28 M.J. 214, 216 (C.M.A. 1989) (quoting *Wolfish*, 441 U.S. at 539).

The accused's intentional actions of throwing a hot liquid mixture at another inmate, and then striking that inmate, is what initially placed the accused in restrictive housing. That inmate's threats towards accused in response to the accused's actions provided reasonable justification for keeping the accused in restrictive housing on 5 December 2018. The Wyatt Facility has no other housing unit, and so in order to avoid a future altercation and ensure the safety of the Wyatt Facility and its inmates, it was a legitimate government objective for the accused to be kept in restrictive housing.

In addition to throwing hot liquid at the face of another inmate and receiving threats in response, the accused failed to complete the requisite reintegration steps he needed to complete in order to begin the restrictive housing step-down procedure. The Court recognizes SECNAVINST 1640.9c states [redacted] is "indefinite, normally NTE 60 days in any one period," but the Court puts greater emphasis on the procedures in place at the actual confinement facilities for inmates like the accused to be released from restrictive housing and to be reintegrated and returned to the general population. The accused had numerous opportunities on numerous occasions to complete the required reintegration process to be moved from restrictive housing back to general population; however, he made a conscious decision each time to not complete the steps needed to be returned to general population. Lastly, based on a review of the reintegration process, the Court finds the reintegration process and the packets involved also serve a legitimate penological and government purpose. The Wyatt Facility has an interest in inmates who are involved in altercations receiving training and resources that allow them to integration better into the general population by looking at their communication skills, relationship, and emotions (among other things). The packet from the Bureau of the Prison does exactly that.

Later, when the accused did complete the required reintegration process and packet on 1 May 2019, he was returned to the general population, with the exception of his sleeping conditions.[8] Additionally, beginning on 6 December 2018 and continuing to 6 February 2019, the accused continually stated during 12 different restrictive housing reviews that he had no issues with his housing conditions at the Wyatt Facility. Similar to the required packets, these interviews represented an opportunity for the accused, which he did not pursue, to take steps towards returning to general population. In this case, keeping the accused in restrictive housing beyond 60 days was justified.

Furthermore, the defense also argues the Convening Authority had the option to transfer the accused to a different location. The Court rejects this defense argument because neither the Convening Authority, nor the government, is obligated to make such transfers. The accused is being held in pretrial confinement at the Wyatt Facility (located in [redacted]) in anticipation of his case going to trial in Groton, Connecticut. Due to this incident occurring on the [redacted] a submarine homeported in Groton, Connecticut, the majority of the evidence and witnesses are located in Groton. There is a legitimate government interest in the Convening Authority's decision to hold the trial in Groton, Connecticut, and to leave the accused in pretrial confinement in a detention facility that is geographically close to the site of the court-martial and courthouse. Whether or not the Convening Authority was aware of the accused's mental, physical, and psychological condition is not persuasive because the Convening Authority is still not obligated transport an accused to a different military facility.

While keeping the accused in restrictive housing beyond 60 days is more than is *normally* expected under SECNAVINST 1640.9c, the Court holds it does not rise to the level of a

[8] The accused was transferred back to general population, but slept at night in a private cell for his own protection. The inmate from the 15 November 2018 incident had left the Wyatt Facility at that point.

violation under Article 13, UCMJ because the 166 days the accused spent in restrictive housing were due to his own actions (and inactions) inside the Wyatt Facility and were reasonably related to a legitimate government objective of ensuring safety at the Wyatt Facility. The accused's situation is one the Court finds falls outside of the *normal* parameters discussed in SECNAVINST 1640.9c. There is no evidence the government kept him in restrictive housing to punish him for the allegations pending against him at this general court-martial. The accused's actions against another inmate, the threats made against the accused in response to those actions, and accused's refusal to start the reintegration, step-down process to return him to general population were all major factors explaining the 166 days the accused spent in restrictive housing.

b. **Arrest/Pretrial Confinement Conditions More Rigorous Than Necessary.**

Under the second prong of Article 13, the Court again finds no intent to punish by the government regarding the accused being subjected to conditions of confinement more rigorous than necessary at the Wyatt Facility. As previously discussed, the accused's time in restrictive housing was largely a result of the accused's own actions.

Per SECNAVINST 1640.9c §5105 ¶3e(1), "Disciplinary Segregation" is a status that requires "[p]risoners shall remain in their cells at all times except as specified below or when specifically authorized by competent authority." Under subparagraphs 4 and 5, "[m]eals shall be served in cells" and "[a] 1-hour exercise period, and a 5 to 10 minute shower privilege shall be granted daily when the prisoner's behavior is satisfactory. At a minimum, prisoners shall be allowed to shower every other day."

In this case, the Court finds the accused was properly placed in "Disciplinary Segregation" after his Category IV offense of throwing a liquid mixture of hot oatmeal, mixed

with Vaseline, at the face of another inmate. The accused's restrictive housing consisted of [redacted] Email correspondence between the accused and Wyatt Facility personnel show the accused was provided with socks, sweatshirts, and boxers while in restrictive housing. Additionally, the accused was provided with services like haircuts, the opportunity to meet with a pastor, and access to a military law library through LexisNexis. The accused not being allowed to shower over the weekend is not a substantial violation of SECNAVINST 1640.9c §5105 that shows an intent to punish by the government.

Despite 166 days in restrictive housing being beyond the 60 days noted by SECNAVINST 1640.9c, the accused's conditions during the days after the initial 60 days were still reasonably related to the legitimate government objective of ensuring the safety of the Wyatt Facility. And, as previously discussed, the accused was placed into restrictive housing as a direct result of his own actions and his inactions of completing the necessary steps to get out of restrictive housing kept him in that status. Therefore, because the Court finds no similar violation under the second prong of Article 13, UCMJ, the accused is not entitled to any confinement credit under Article 13, UCMJ.

4. **Ruling.**

Accordingly, the defense's motion for confinement credit under Article 13, UCMJ, R.C.M. 305 and R.C.M. 304 is **DENIED**.

So **ORDERED** this 1st day of November, 2019.

[redacted]
R.J. STORMER
Military Judge

APPELLATE EXHIBIT LVI
PAGE 10 OF 10
APPENDED PAGE

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

UNITED STATES **v.** **MICAH J. BROWN** **CSSN** **U.S. NAVY**	**RULING ON DEFENSE MOTION FOR RECONSIDERATION OF COURT'S 24 OCTOBER ORDER** **12 NOVEMBER 2019**

1. **Nature of Ruling and Procedural History.**

The defense moved the Court to reconsider its order compelling disclosure for in camera review of records protected under M.R.E. 513.

On 16 October 2019, the government filed a motion to produce the accused's medical records and mental health records under M.R.E. 513. The defense filed a response opposing the motion on 21 October 2019. On 23 October 2019, the parties litigated the issue at an Article 39(a)[1] held in Groton, Connecticut.[2] Following this Article 39(a) session, the Court signed an order to produce the accused's mental health records and medical records from [redacted]. On 24 October 2019, the defense asked the Court to provide facts for its order. On 28 October 2019, the defense requested a reconsideration of the Court's order. The Court granted this request for reconsideration and stayed its original order. Pursuant to the Court's direction, the parties submitted supplemental motions and evidence on this issue.

2. **Findings of Fact.**

[1] UCMJ Article 39(a), 10 U.S.C. §839.
[2] As noted in the record, the Court participated via VTC from the Washington Navy Yard in Washington D.C.

1. In July, August, and September 2019, forensic psychologist [redacted]; forensic neuropsychologist [redacted]; and neurologist Commander [redacted] all evaluated the accused, conducted medical testing, and consulted with defense counsel on their findings. All three were designated as expert consultants by the Convening Authority.

2. The Court adopts the government's findings of fact (a through h) in the government motion to compel production of medical and mental health records, dated 15 October 2019.

3. On 30 September 2019, [redacted] submitted an invoiced bill to the government. Included within this invoice were: 12 hours discovery review, eight hours of evaluation [redacted]), and three hours of consultation for a total of $8,050.

4. On 4 October 2019, the defense provided notice to the government of its intent to offer evidence of a mental condition not amounting to lack of mental responsibility to prove CSSSN Brown lacked the specific intent that is required of the offenses at this court-martial. The defense also notified the government that they would be calling [redacted] Sahni as an expert witness to present this evidence.

5. On 7 October 2019, the defense sent a request to Commander, Navy Region MIDLANT. The request noted that Commander, Navy Region MIDLANT had authorized the employment of [redacted] as an expert consultant in the field of forensic psychology. It noted he had authorized 15 hours of pretrial consultation and document review and eight hours of forensic interviewing and report writing. It also noted [redacted] had used all of the allotted $8,050.00 for this purpose. Lastly, the request asked for an additional $1,400.00 in funding to assist the defense in preparation for trial.

6. On 8 October 2019, the government emailed the defense and asked to speak to [redacted]

7. On 9 October 2019, the defense sent an email to the government. The email stated the following: [redacted] did not conduct any testing or generate any reports; [redacted] is not available to speak to the government until she is granted more funding; the defense would be providing CDR [redacted] report to the government; and [redacted] would not be available unless more funding was granted.

8. On 23 October 2019, [redacted] provided an email to the defense stating she had reviewed the accused's R.C.M. 706 evaluation, but it was not relied upon to form the opinions she may have as an expert witness. [redacted] The defense proffered [redacted] did not rely upon this testing to form her expert opinion on the accused's ability to form intent even though she conducted it under the contract she had with Commander, Navy Region MIDLANT.

9. On 23 October 2019, the parties litigated the government's Motion to Compel Mental Health records at an Article 39(a) session. The three categories at issue are the [redacted]

10. At the Article 39(a) session, the parties agreed [redacted] is designated and is being produced by the government as an expert witness for the defense and is no longer just an expert consultant. The parties also agreed that CDR [redacted] and [redacted] were still expert consultants.

11. Following the Article 39(a) session, the Court ordered disclosure for an in camera review of testing conducted by [redacted]. The Court further ordered disclosure for an in camera review of records held by the [redacted]. The Court denied the government's request to interview CDR [redacted] and [redacted]. The Court denied the government's request to get access to any information (oral or in writing) CDR [redacted] or [redacted] may have provided to [redacted]. The Court's rationale for this part of the ruling rested in the Court's position that CDR [redacted] and [redacted] were still expert consultants and thus their communications with [redacted] were still privileged and not discoverable to the government.

12. On 28 October 2019, the defense emailed the Court requesting a stay of the Court's order to allow the defense the opportunity to submit a motion for reconsideration.

13. On 28 October 2019, the Court granted a request for stay of the 23 October 2019 Order, pending this ruling. The Court also allowed each party to submit additional motions and evidence on this issue. Neither party desired an Article 39(a) hearing on this matter. The Court did not receive any document or records per its 23 October ruling. As of this ruling, the Court has not received any records or document from either party.

14. On 1 November 2019, LTC [redacted] who has been retained by the government as an expert witness, provided an affidavit that was submitted to the Court. The Court accepts the contents of this affidavit as a statement of facts as to what LTC [redacted] believes he needs to assist the government in preparing in their case.

15. On 10 January 2019 and 11 January 2019, the accused met with LCDR [redacted] – staff psychiatrist at Naval Branch Health Clinic New England and [redacted]

[redacted] – a clinical psychologist at the same place. The evaluation was an inquiry into the mental condition of the accused in accordance with R.C.M. 706. [redacted]

[redacted]

16. On 15 March 2019, defense counsel submitted a discover request that included the request for "any results or reports of physical or mental examinations and of scientific tests…" to trial counsel. The request mirrored the language of R.C.M. 701(a)(2)(B).

17. On 30 September 2019, the accused, during a command visit, let LS1 [redacted] know he is being [redacted] from Wyatt Detention Facility. He told her [redacted]

[redacted]

18. In April 2019, the accused asked the Wyatt Detention Facility multiple times to speak to a [redacted].

3. **Discussion and Conclusions of Law.**

Pursuant to Article 46(a), UCMJ, parties to a court-martial "shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." R.C.M. 703(e)(1) provides that each party is entitled to the production of evidence which is relevant and necessary. A party is not entitled to the production of evidence that is destroyed, lost, or otherwise not subject to compulsory process.[3] Evidence or information that is privileged is not subject to compulsory process, except as may be provided by the law pertaining to privileges.[4]

R.C.M. 706 and M.R.E. 513 protect the confidentiality of mental health records of an accused both before and during an evaluation for mental competency.[5] M.R.E. 513 protects privileged communications between a psychotherapist and his or her patient. M.R.E. 513(a) states:

> A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in a case arising under the Uniform Code of Military Justice, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

Privileges run contrary to a court's truth seeking function, and therefore, they must be narrowly construed.[6] By its plain language, M.R.E. 513 only protects "confidential communications"

---

[3] R.C.M. 703(e)(2).
[4] *See* M.R.E. 501.
[5] R.C.M. 706; M.R.E. 513
[6] *United States v. Jasper*, 72 M.J. 276, 280 (CAAF 2013), *Trammel v. United States*, 445 U.S. 40, 50-51 (1980).

between a psychotherapist and his or her patient, and only those communications made "for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition."

The Court recognizes this strict construction of the privilege is not universally held. For example, one military case interpreting the scope M.R.E. 513 beyond communications is *H.V. v. Kitchen*, 75 M.J. 717 (CGCCA 2016), wherein the Coast Guard Court of Criminal Appeals (CGCCA) held that a psychotherapist's diagnosis of a patient and the nature of treatment, to include medications prescribed, were covered by the privilege found in M.R.E. 513. In *Kitchen*, the Coast Guard Court held that diagnoses and medications prescribed "necessarily reflect, in part, the patient's confidential communications made to the psychotherapist."[7] The Coast Guard court relied, in large measure, on a federal district court opinion that held the same with regard to the federal psychotherapist-patient privilege.[8] However, the Coast Guard Court's interpretation runs contrary to a plain reading of the rule and admittedly adopts one federal court interpretation over other contrary views.[9] Recently, the United States Army Court of Criminal Appeals (ACCA) disagreed with the Coast Guard's rational in *Kitchen*. ACCA stated:

> As the words "diagnosis" and "treatment" appear in the rule, we cannot conclude that the President merely overlooked the issue of whether the diagnosis or treatment constitutes a "confidential communication." Instead, we concur with the lone dissenting Judge Bruce that Mil. R. Evid. 513 privilege extends to statements and records that reveal the substance of conversations that may have been for the "purpose of facilitating diagnosis or treatment," but not to the diagnosis or treatment itself.[10]

[7] 75 M.J. 717, 719 (CGCCA 2016).
[8] *Id.* citing to *Stark v. Hartt Transportation Systems, Inc.*, 937 F. Supp. 2d 88, 92, (D. Me. 2013).
[9] *Id.* noting the contrary view found in an unpublished opinion in *Silvestri v. Smith*, 26 U.S. Dist. LEXIS 23764 (D. Mass. 2016).
[10] *United States v. Rodriguez*, 2019 CCA LEXIS 387 *8 (A.C.CA. 2019).

ACCA further stated "a prescription, by its very nature, is intended to be disclosed to non-psychotherapist third party – the pharmacist who fills it."[11] The Coast Guard Court did agreed with several other federal courts when it also held that the identity of the treatment provider and the dates of treatment are not privileged.[12]

It is important to note that the psychotherapist-patient privilege is not impenetrable. In certain circumstances, the privilege must give way to other considerations. In order to determine whether or not the privilege applies, or may be pierced based upon these other considerations, the party seeking production must file a written motion, and the patient must be afforded an opportunity to be heard at a closed hearing.[13] If examination of the disputed records is necessary for a judge to rule on the production or admissibility of the disputed records, the judge may examine the records in camera.[14] M.R.E. 513 (d)(7) provides one of the exceptions to this privilege.[15] Such rules states that "when an accused offers statements or other evidence concerning his mental condition in defense, extenuation, or mitigation, under circumstances not covered by R.C.M. 706 or M.R.E. 302. In such situations, the military judge may, upon motion, order disclosure of any statement made by the accused to a psychotherapist as may be necessary in the interests of justice."[16]

---

[11] *Id.*

[12] *Id.* See also *United States v. Lowe*, 948 F. Supp. 97, 101 (D. Mass.1996) [redacted] counseling records with dates of contact, length of contact, nature of contact [i.e., telephonic or in person], and name of [redacted] crisis counsellor not privileged communication); *In re Subpoena Served Upon Zuniga*, 714 F.2d 632, 640 (6th Cir.), cert. denied, 464 U.S. 983 (1983)("as a general rule, the identity of a patient or the fact and time of his treatment does not fall within the scope of the psychotherapist-patient privilege"); *Santelli v. Electro–Motive*, 188 F.R.D. 306, 310 (N.D. Ill.1999) (psychotherapist privilege does not prevent disclosure of date of treatment or identity of psychotherapists); *Vanderbilt v. Chilmark*, 174 F.R.D. 225, 230 (D. Mass.1997) ("Facts regarding the very occurrence of psychotherapy, such as the dates of treatment, are not privileged").

[13] M.R.E. 513(e)(1) and M.R.E. 513(e)(2).

[14] M.R.E. 513(e)(3).

[15] M.R.E. 513(d)(7)

[16] *Id.*

However, M.R.E. 513(e) outlines the procedures for determining the admissibility of an accused's patient records or communications.[17] Under M.R.E. 513(e)(3), "the military judge may examine the evidence or a proffer thereof in camera, if such examination is necessary to rule on the production or admissibility of protected records or communications."[18] Before conducting that in-camera review, the military judge must find by a preponderance of the evidence that the moving party has shown each of the following four requirements:[19]

> (A) A specific, credible factual basis for demonstrating a reasonable likelihood that the records or communications would yield evidence admissible under an exception to the privilege;
>
> (B) That the requested information meets one of the enumerated exceptions under M.R.E. 513(d);
>
> (C) That the information sought is not merely cumulative of other information available, and;
>
> (D) The party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources.[20]

Thus, M.R.E. 513(e)(3)(B) contemplates that the requested information must first fall under an exception provided under M.R.E. 513(d), but still must satisfy the other three requirements of M.R.E. 513(e)(3).[21] As a result, the military judge must find by a preponderance of the evidence that the moving party has met each of the above listed prongs under M.R.E. 513(e)(3)(A-D) *prior to ordering in camera review.*[22] (emphasis added).

i. Tests Performed by [redacted]

[17] M.R.E. 513(e)
[18] M.R.E. 513(e)(3)(A-D)
[19] *Id.*; *J.M. v. Payton-O'Brien*, 76 M.J. 782, 786 (N.M.C.C.A. 2017).
[20] M.R.E. 513(e)(3)(A-D).
[21] *Id.*
[22] *J.M. v. Payton-O'Brien*, 76 M.J. 782, 786 (N.M.C.C.A. 2017).

As noted by her invoice and as argued by the government at the Article 39(a) hearing, the court notes that [redacted]. The defense has argued that since [redacted] has not created a report and may not have considered this testing in forming her opinions and conclusions, her psychological testing and scoring are not discoverable. The Court disagrees. Under R.C.M. 701(b)(4), the defense "shall permit trial counsel to inspect the results or reports of any physical or mental examinations…made in connection with a particular case…and (B) the item was prepared by a witness who defense intends to call at trial and the results or reports relate to the that witness' testimony." In this case, the defense has triggered R.C.M. 701(b)(4) by submitting their discovery request to the trial counsel and then stating their intention of calling [redacted] as an expert witness at trial to offer evidence of a mental condition not amounting to lack of mental responsibility to prove the accused lacked the specific intent that is required by the charged offenses. The Court finds that any psychological testing and scoring [redacted] did in her evaluation of the accused are likely related to her testimony – even if she ultimately did not use this data to form her ultimate opinion. Simply put, if [redacted] evaluation and testing were not at least a precursor to her testimony she intends to offer at trial, then why did she conduct an evaluation and testing and then charge the government for this particular work? The Court finds the evaluation and testing prepared by [redacted] are likely related to her testimony and are likely discoverable under R.C.M. 701(b)(4). The only way to determine if they are in fact discoverable to the government is to review the results in camera.

In addition, the Court finds the evaluation and testing results from [redacted] do meet the exception under M.R.E. 513(d)(7). The defense has provided notice they will be presenting

evidence concerning the accused's mental condition as a partial defense to the intent element. The Court further finds it is in the interest justice to review the evidence because [redacted] is an expert witness who will be testifying on behalf of the accused and that the evidence is likely discoverable under R.C.M. 701(b)(4). The Court also finds by preponderance of the evidence under M.R.E. 513 (e)(3) that the government (moving party) showed:

(A) That any testing results [redacted] produced would lead to the discovery of evidence admissible under the exception noted above. These tests results were conducted on the accused in the context of preparing for his defense for this court-martial. The Court again finds this is relevant. For the reasons noted above, the Court also finds the government has provided a specific, credible factual basis demonstrating a reasonable likelihood that requested records of the accused's mental health records (testing results or reports generated by [redacted]) would contain or lead to the discovery of evidence admissible under a M.R.E. 513(d)(7) exception.

(B) The information sought meets the except M.R.E 513(d)(7) for the reasons noted above.

(C) The information sought is not cumulative – it does not appear in any other evidence that has been or will be provided to the government; and

(D) The government has made reasonable efforts to obtain the information through other ways.

Therefore, because of the reasons discussed above, the Court is ordering the defense to produce all evaluation and testing results conducted by [redacted] to the Court for an in-camera review.[23]

ii. Production of Non-Privileged Information For an In-Camera Review

[23] The Court previously ordered this information on 23 October 2019 to be produced by the defense to the Court for an in camera review on 12 November 2019. This order stands and has not be rescinded in any way.

The fact that accused was seen by a mental health provider is not privileged. The identity of any treating psychotherapist, the dates treatment occurred, and the location of treatment are also not privileged. Although cognizant of the CGCCA's opinion in *H.V. v. Kitchen,* and sympathetic to the policy goals articulated therein, the Court declines to extend M.R.E. 513 beyond the plain language provided by the President and follows ACCA's rationale in *United States v. Rodriguez*, 2019 CCA LEXIS 387 (A.C.CA. 2019). Specifically, the Court determines that a list of prescription records are not confidential communications protected by the rule. Any other interpretation runs contrary to the plain reading of the rule and the requirement that privileges be narrowly construed. Prescription records disclose nothing about what was said between the psychotherapist and their patient. Indeed, many medications serve multiple purposes, and the reason they may be prescribed is not inherently revealed by the mere fact of their prescription. Also, a "prescription, by its very nature, is intended to be disclosed to a non-psychotherapist third part – the pharmacist who fills it."[24]

Whether or not a diagnosis or treatment is protected by M.R.E. 513 is a much closer and fact specific call.[25] For instance, if a provider told a patient during a clinical or counseling session "I think you have bipolar disorder" that substantive communication, in context, might implicate the rule. Nevertheless, outside of substantive communications that are for the purpose of facilitating a diagnosis or treatment of a mental health condition, the treatment or diagnosis itself is not privileged. The Court discerns no difference between having bipolar disorder and having a broken wrist in relation to M.R.E. 513. In essence, a diagnosis simply reflects the fact that a medical condition exists, which does not necessarily reveal any communications between patient and provider that lead to that diagnosis. Imaginably, in some instances, a diagnosis might not

[24] *United States v. Rodriguez*, 2019 CCA LEXIS 387 *8 (A.C.CA. 2019).
[25] This would also include any list of medical or mental health problems.

even be revealed to a patient. While it is probable that a diagnosis will also be communicated to a patient by a treating psychotherapist in order to "facilitate...treatment of the patient's mental or emotional condition," it is these communications between a psycho-therapist and patient that are protected, and not the mere existence of a medical condition. Considering this, this court determines that a mental health diagnosis and treatments are not protected by M.R.E. 513, but any records reflecting the psychotherapist's conversations with a patient regarding this diagnosis, as well as any treatment plans developed and communicated to the patient are protected by the Rule.

The Court also finds the accused's medical records (those which contain no mental health information) are not covered by any privilege. Specifically, because of the defense's assertions of its intent to offer evidence of a mental condition not amounting to lack of mental responsibility to prove CSSSN Brown lacked the specific intent that is required of the offenses at this court-martial, CSSSN Brown's diagnoses, treatments, and the list of prescriptions he was prescribed are relevant. LTC [redacted] assertions in his affidavit are evidence as to why this information (from 11 February 2015 to present) is relevant for him as an expert who is assisting the government in preparing their case. As such, the government has demonstrated why this non-privileged information is relevant and necessary in this case.

The Court recognizes non-privileged information discussed above is likely contained in both medical and mental health records. To ensure only information that is relevant and necessary (and not privileged) to this particular case is produced to the parties, the Court orders the accused's medical records from 11 February 2015 to present be produced to the Court for an in camera review. In addition, for the accused's mental health records from [redacted], the Court orders these records to be produced to the Court as well; however, all

information from the mental health records that is privilege shall be redacted. This shall include any communications from the accused to his mental health providers.[26]

iii. Production of Mental Health Records For an In-Camera Review

The government has not made a sufficient showing that leads the Court to conclude it ought to conduct an in camera review of all of the accused's mental health records from [redacted] While the Court recognizes the government's right to present its case, that right is not without limits and here the government must do more than assert the records might be helpful. They must demonstrate a reasonable probability that the records contain information otherwise unavailable to the government and is not cumulative with other evidence they already have.

The government has not shown that the production of the records ordered by this court today will be insufficient to prepare for their case. The government will have ample evidence for their expert, LTC Perry, to consider, review, and use to prepare their case. Namely that evidence is that from [redacted]: (1) any mental health or medical diagnosis of the accused; (2) any treatment the accused has received during that time period; (3) any prescriptions the accused has been prescribed; (4) psychological testing from [redacted]; and (5) specific details of the accused's childhood/family history, education/behavioral history, employment history, military career history, marital/relationships history, medical conditions, past psychiatric conditions and history, family psychiatric history, alcohol/substance abuse history, legal history, history of symptoms, current mental status as of [redacted], adjudicative competency, and mental state at the time of the alleged offenses, and the accused's own words about his mindset at the time of the alleged offense – all contained in the R.C.M. 706 long form provided to the

[26] See the Court's order for specific information that will not be redacted from these records.

government.[27] Given all the information and evidence the government will have to prepare for its case based on this Court's ruling and information the defense has already provided to the government, the government has failed to convince the Court why all the accused's mental records from [redacted] should be produced for an in camera ruling. The information the government will have will contain almost all the information LTC [redacted] described he needed in his affidavit – with the lone exceptions being the [redacted]' Nevertheless, the government has failed to show by a preponderance of the evidence what else would be in these records and why they would not be cumulative with the evidence they will have in this case. Specifically, the government has failed to show why the information contained in the long form R.C.M. 706 report is not enough and why it would not be cumulative with what is in the accused's mental health records.

4. **Ruling.**

Accordingly, the Court orders a production of the accused's medical and mental health records consistent with the two Court orders that accompany this ruling.

So **ORDERED** this 12th[th] day of November 2010.

[redacted]

R. J. STORMER
CDR, JAGC, USN
Military Judge

[27] The Court also notes the defense provided this form to the government unredacted, to include statements made by the accused for the purposes of the R.C.M. 706 examination.

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

UNITED STATES **v.** **MICAH J. BROWN** **CSSSN/E-3** **USN**	**12 November 2019** **ORDER – In Camera Review**

On 15 October 2019, the government moved this Court to order the production of any psychotherapist/patient records and medical records of CSSSN Micah Brown, [redacted]. On 21 October 2019, the defense opposed the motion. On 23 October 2019, the Court considered the pleadings and arguments by both parties. On 28 October 2019, the Court granted a stay of its original 23 October 2019 order and on 12 November 2019, it issued this new order.

The Court hereby ORDERS the government to produce any and all of the accused's medical records in its possession from 11 February 2015 to the date of this order. The medical records are believed to be held at the following locations:

[redacted]

The medical records are to be turned over to the government counsel SEALED who in turn will turn over the SEALED records to the Court for an in camera review. All records should be delivered to the Court no later than 18 November 2019. This order does NOT include Mental Health Records.

SO ORDERED this 12th day of November 2019.

[redacted]

R. J. Stormer
CDR, JAGC, USN
Military Judge

APPELLATE EXHIBIT LVIII
PAGE 16 OF 17
APPENDED PAGE ___

NORTHERN JUDICIAL CIRCUIT
UNITED STATES NAVY-MARINE CORPS TRIAL JUDICIARY
GENERAL COURT-MARTIAL

U N I T E D S T A T E S	**ORDER**
v.	
CSSSN MICAH J. BROWN, USN	**2/20/2020**

In light of the government's motion requesting an order from the Court regarding any further requested defense continuances, the Court issues the below order.

Findings of Fact

1. On 3 December 2019, the accused elected to go *pro se*. After discussing this thoroughly with the Court, the Court allowed the accused to waive representation by counsel under R.C.M. 506(d). The accused specifically requested that LCDR Williams and LCDR Davis, his detailed defense counsel, continue to assist him at his court-martial. He also specifically requested they both remain at counsel table. The Court granted this request. The Court re-iterated multiple times to the accused that he had the ability to consult with LCDR Williams and LCDR Davis even though he had chosen to represent himself at this court-martial. Specifically, the Court told the accused to consult with the two of them regarding the availability and the employment of the defense's previously appointed expert, [redacted]

2. Since 3 December 2019, both LCDR Williams and LCDR Davis have been present at counsel table to assist the accused at all UCMJ Article 39(a) sessions in this matter. The Court has included both counsel on all correspondences between the Court and the accused.

3. On 27 December 2019, LCDR Davis emailed the Court seeking to clarify expectations of the Court in regarding his and LCDR Williams's representation of the accused. The Court interpreted this email to mean LCDR Williams and LCDR Davis had concern with the Court continuing to refer to them as "detailed defense counsel" in email correspondence and on the record.

4. On 13 January 2020, to ensure that the record was clear that the Court did not consider LCDR Williams or LCDR Davis to be in the same status as detailed defense counsel whose client had not elected *pro se* representation, the Court stated on the record once again that the accused elected to waive counsel representation under R.C.M. 506(d). The Court also again noted, after personally observing the accused in Court, that this waiver was voluntary and that the accused was mentally competent to represent himself. The Court stated that LCDR Williams and LCDR Davis would continue to remain at counsel table to assist the accused in his *pro se* representation.

APPELLATE EXHIBIT CXIII
PAGE 1 OF 3
APPENDED PAGE

5. On 11 February 2020, the Court advised the parties it would be referring to LCDR Davis and LCDR Williams as standby counsel to avoid any confusion regarding their status now or before a potential members panel in the future. This clarification was also intended to delineate that the roles of standby counsel were different than that of detailed defense counsel as referred to in R.C.M 506(d).

6. While the accused did waive representation under R.C.M. 506(d), LCDR Williams and LCDR Davis were never excused under R.C.M. 505. In fact, the Court has ordered them to be standby counsel and sit at counsel table with the accused – all of which were requested by the accused.

Court Order

The Court has determined it is necessary to further define the roles of standby counsel in this court-martial.

1. **Order.** This Court orders the following:

The Court recognizes the right of the accused to waive the representation by counsel and conduct his defense under R.C.M. 506(d), which he has done. The Court has appointed LCDR Williams and LCDR Davis as standby counsel. The Court, in its broad supervisory powers, has equally broad discretion to guide what, if any, assistance standby counsel may provide to an accused conducting his own defense.[1]

The Court sets out the following guidelines as to the function of standby counsel in this case:

1. To assist and consult with the accused before, during, and after court proceedings and during court recesses regarding case strategy and case preparation. This includes but is not limited to voir dire, opening/closing statement/argument, witness examination, case law research, case investigations, motions, sentencing, and any other needed advice for his court-martial;

2. To sit with the accused at counsel table and provide "elbow advice" directly to the accused during court proceedings;

3. To facilitate receipt of filings and other communications delivered to counsel;

4. To serve as an intermediary between trial counsel and the accused – this includes any pre-trial agreements negotiations or communications; and

5. To actively provide attorney's best advice on the accused's case while permitting the accused to make the final decisions on all matters, including strategic and tactical matters relating to the conduct of the case.[2]

[1] *United States v. Lawrence*, 161 F.3d 250, 254 (4th Circuit 1998).
[2] See American Bar Association (ABA) Standard 4-5.3 Obligations of Stand-By Counsel.

Furthermore, while the standby counsel should be assisting the *pro se* accused in this case, the Court, as the trial military judge, will ensure that the accused is permitted to make the final decisions on all matters, including strategic and tactical matters relating to the conduct of the case.[3]

As the accused has already been advised, CSSSN Brown will be expected to follow the technical rules of the rules for courts-martial (R.C.M.) and the military rules of evidence (M.R.E.). He will receive no special considerations because of his lack of legal ability and legal training. The standby counsel are to assist the accused as he represents himself at his court-martial, to include helping him conform to these rules; however, the accused will be responsible for representing himself during sessions of the court-martial.[4] This will ensure court proceedings will remain organized, coherent, and orderly and the accused can speak with one voice.[5]

Should the accused ultimately desire to have the standby counsel perform any other function – to include having standby counsel represent him during the court-martial, the accused shall inform the Court of his desires before standby counsel performs any functions during his court-martial. If the accused does raise this issue to the Court, the Court will then determine whether to authorize the requested function or representation. This Court, not the counsels' commands, will grant or deny any request from the accused to have standby counsel represent him at this court-martial.

So **ORDERED,** this 20th day of February, 2020.

[redacted]
CDR, JAGC, USN
Military Judge

[3] See American Bar Association (ABA) Standard 6-3.7 Obligations of Stand-By Counsel.
[4] This includes all communications with the Court while on the record and the presentation of his case during the trial, including but not limited to: motions, voir dire, opening statement, objections, cross-examinations, direct examinations, presentation of physical evidence and closing argument.
[5] See M.R.E. 611 and *United States v. Root,* 225 F.Supp.3d 394, 403 (2016 U.S. Dist. LEXIS 188467).

NORTHERN JUDICIAL CIRCUIT
UNITED STATES NAVY-MARINE CORPS TRIAL JUDICIARY
GENERAL COURT-MARTIAL

U N I T E D S T A T E S **v.** **CSSSN MICAH J. BROWN, USN**	**CONTINUANCE ORDER** **4/7/2020**

1. Statement of the Case.

The accused requested the Court to continue his case in light of the COVID-19 and the travel restrictions that have accompanied this worldwide pandemic. In addition, the accused also asked for a continuance because one of his expert witnesses was not available for the docketed trial start date of 23 March 2020.

2. Issue

Should the Court grant the defense's request for a continuance in light of the COVID-19 pandemic and the availability of their expert witness?

Findings of Fact

In reaching its findings and conclusions, the Court considered the record of proceedings in this case to date, the attached enclosures, and the most recent information available from the Centers for Disease Control and Prevention (CDC).[1] The Court makes the following findings of fact:

1. On 3 December 2019, the accused elected to go *pro se*. After discussing this thoroughly with the Court, the Court allowed the accused to waive representation by counsel under R.C.M. 506(d). The accused specifically requested that LCDR Williams and LCDR Davis, his detailed defense counsel, continue to assist him at his court-martial. He also specifically requested they both remain at counsel table. The Court granted this request. The Court reiterated multiple times to the accused that he had the ability to consult with LCDR Williams and LCDR Davis even though he had chosen to represent himself at this court-martial. Specifically, the Court told the accused to consult with the two of them regarding the availability and the employment of the defense's previously appointed expert, [redacted].

2. Since 3 December 2019, both LCDR Williams and LCDR Davis have been present at counsel table to assist the accused at all UCMJ Article 39(a) sessions in this matter. The Court has included both counsel on all correspondences between the Court and the accused.

[1] https://www.coronavirus.gov/

APPELLATE EXHIBIT CXXII
PAGE 1 OF 113
APPENDED PAGE

3. On 11 February 2020, the Court advised the parties it would be referring to LCDR Davis and LCDR Williams as standby counsel to avoid any confusion regarding their status now or before a potential members panel in the future. While the accused did waive representation under R.C.M. 506(d), LCDR Williams and LCDR Davis were never excused under R.C.M. 505. In fact, the Court has ordered them to be standby counsel and sit at counsel table with the accused – all of which were requested by the accused. The Court issued an order further detailing the standby counsels' roles on 20 February 2020.

4. A novel form of the coronavirus, and the disease it causes (COVID-19), began sweeping the globe in January 2020.[2] COVID-19 is a respiratory disease that exhibits flu-like symptoms. While experts are still learning more about the disease, initial estimates are that it causes serious illness in approximately 16 percent of those infected. Dr. Anthony Fauci, director of the National Institute of Allergy and Infectious Diseases, testified on 11 March 2020 that COVID-19 has a death rate roughly 10 times that of the seasonal flu.[3]

5. On 20 February 2020, Italy identified an outbreak of COVID-19, which spread rapidly.[4]

6. On 6 March 2020, the Court became aware of a FRAGO issued from NORTHCOM that required any servicemember traveling to the United States from certain overseas locations would be required to self-quarantine themselves for 14 days upon the arrival in the United States due to COVID-19.[5] This included Italy, which is where LCDR Davis, standby counsel, is currently stationed.

7. On 9 March 2020, Italian Prime Minister Giuseppe Conte ordered a nationwide lockdown in Italy, effectively shutting most Italians inside their homes. DoD leaders in Italy have directed that U.S. personnel must comply with most portions of the lockdown order.[6] On 11 March 2020, the World Health Organization (WHO) declared COVID-19 to be a global pandemic.[7]

8. On 13 March 2020, the Deputy Secretary of Defense issued a stop movement order effective 16 March 2020 to 11 May 2020.[8] This order prevents travel for all Department of Defense (DoD) military personnel, unless their "travel is: (1) determined to be mission-essential; (2) necessary for humanitarian reasons; or (3) warranted due to extreme hardship." The approval authority for exceptions to the stop movement order can be delegated down to the first Flag or General Officer in the traveler's chain of command. Any travel under an approved

---

[2] *See generally* Coronavirus Disease 2019 (COVID-19), NATIONAL INSTITUTES OF HEALTH (2020), https://www.nih.gov/health-information/coronavirus (last visited Mar 17, 2020).
[3] Joseph Guzman, CORONAVIRUS 10 TIMES MORE LETHAL THAN SEASONAL FLU, TOP HEALTH OFFICIAL SAYS, THE HILL (2020), https://thehill.com/changing-america/well-being/prevention-cures/487086-coronavirus-10-times-more-lethalthan-seasonal.
[4] Mélissa Godin, ITALY REPORTS 17 COVID-19 CASES, CLUSTER QUADRUPLES IN 1 DAY TIME (2020), https://time.com/5788661/italy-coronavirus-cases/ (last visited Mar 16, 2020).
[5] See attached FRAGO.
[6] *Commander Naval Forces Europe, Fragmentary Order 004 Directing Response to Outbreak of COVID-19 Within the CNE-CNA/C6F AOR*, Mar 14, 2020).
[7] Coronavirus disease 2019 (COVID-19) Situation Report - 51, WORLD HEALTH ORGANIZATION (Mar 11, 2020). *Included as enclosure (11).*
[8] See attached Stop Movement Order.

exception must still comply with the DoD's Guidance for Personnel Traveling During the Novel Coronavirus Outbreak.[9]

9. On 19 March 2020, U.S. Fleet Forces directed all Navy Installations to set HPCON C MINUS.[10] The message directed the cancellation of unit and installation sponsored events; instructed personnel to avoid large public gatherings and practice social distancing; and maximized the use of telework. Installation leadership was directed to be prepared to consider declaring a public health emergency and limit access to the installation for non-essential personnel.

10. On 13 March 2020, through standby counsel (via e-mail to the Court), the accused requested a continuance of the trial. Trial was scheduled to begin on 23 March 2020. The accused acknowledged this could result in a several month continuance.[11] The accused's reasons behind his request for a continuance included: one of his standby counsel (LCDR Davis) cannot be physically present for the trial, as scheduled, due to the COVID-19 travel restrictions placed upon servicemembers in Italy; that the absence of LCDR Davis would result in a fundamentally unfair trial which would not comport with his due process rights; and a defense expert, [redacted], is unavailable for trial. The accused further stated [redacted] is a forensic pathologist and is expected to provide testimony which will counter testimony by the Government's expert, [redacted] on the elements of specific intent and grievous bodily harm. The accused's defense relies heavily on the expert opinions of [redacted]. As such, any trial for which [redacted] is not produced would violate SN Brown's constitutional rights to due process under the Constitution

11. The government opposed this continuance, acknowledging COVID-19, LCDR Davis' inability to travel to be physically present for the trial, and that [redacted] would not be available. [redacted] had unknowingly scheduled himself for another trial during the timeframe of the accused's trial. [redacted] had been approved as a defense expert witness by the convening authority. Neither the trial counsel, the accused, nor the standby counsel had been in contact with [redacted] for several months. The government also informed the Court that at least seven witnesses would only be available for the first few days of trial and would then be unavailable due to an unforeseen deployment onboard the [redacted].

12. On 13 March 2020, the Court, via email, granted the accused's request for a continuance.[12]

13. On 24 March 2020, the government informed the Court they had had spoken to the defense team and that they were available either the 3-21 August or 10-28 August 2020. The government informed the Court they were also available the last week of July.[13]

[9] See attached order.
[10] See attached order.
[11] See attached emails.
[12] See attached email.
[13] See attached emails.

14. On 25 March 2020, the government informed the Court the defense did not agree to the first two weeks of trial if witnesses would not be available the third week of August.[14]

15. On 27 March 2020, the Court received a docketing request from the government. The Court adopts the number 2 and 3 paragraph of this request as findings of fact.

16. On 27 March 2020, the Court docketed the trial from 3-16 August 2020. The Court also stated it would consider starting the voir dire process on 31 July 2020.[15]

Summary of the Law

Article 40 of the UCMJ and Rule of Courts-Martial (RCM) 906 vest the military judge with the power to grant continuances. The rule's discussion explains that "[t]he military judge should, upon a showing of reasonable cause, grant a continuance for as long and as often as is just." *Id.* The Court of Appeals for the Armed Forces (C.A.A.F.) laid out the factors military judges should consider in deciding whether or not to grant continuances.[16] Those factors include "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 any prior continuances, good faith of moving party, use of reasonable diligence by moving party, possible impact on verdict, and prior notice."[17] While RCM 804 allows for some remote hearings, it generally requires that a defense counsel be present with his or her client during the proceedings. Further, RCM 703 and the Confrontation Clause require the production of in-person witnesses for trial. The military judge may also order witnesses to appear in-person for motions hearings.[18]

Conclusions of Law

The Court finds that the availability of standby counsel, witnesses (including a defense expert witness), COVID-19 outbreaks, the subsequent internationally-mandated travel restrictions, and DoD/DoN directives and guidelines, provide good cause to continue the trial. Specifically, COVID-19 has proven to be a rapidly spreading disease. COVID-19 itself, the correlating travel restrictions, and the DoD/DoN guidelines and mandates, significantly impact the ability of the Court to conduct an adequate hearing. Also, the standby counsels' (located in San Diego, CA and Naples, Italy) ability to travel to assist the accused in his *pro se* representation or vise-versa, and other social distancing requirements has the potential to significantly impact due process and interfere with the accused's ability to adequately represent himself. Furthermore, forcing staff, members, and witnesses to complete a hearing before the expiration of the DoD travel restrictions and other DoD and DoN mandates also risks exposing the individuals at issue and their close contacts to a disease believed to have 10 times the lethality of the seasonal flu. Finally, moving forward with the case during the existing public health crisis would create a nearly insurmountable logistical and coordination burden for the government. There is no evidence, nor has any been alleged, that the accused will be prejudiced by this continuance. In fact, the continuance was requested by the accused. In balancing all of the factors above, the Court finds that granting a continuance of all trial dates and milestones is not only just, but prudent. Accordingly, the defense's motion to continue all hearings and remaining trial milestones in this the case is

[14] See attached emails.
[15] See attached email.
[16] *United States v. Miller*, 47 M.J. 352, 358 (C.A.A.F. 1997).
[17] *Id.*
[18] See RCM 703, RCM 804.

GRANTED. The Court is docketing this case to begin on 31 July 2020, to continue until the trial is complete. The Court's intent is conduct pleas, forum selection, any additional motions, and voir dire on the 31st. Opening statements and the presentation of evidence will begin promptly on Monday, 3 August 2020.

So **ORDERED,** this 7th day of April, 2020.

[redacted]

R. J. STORMER
CDR, JAGC, USN
Military Judge

APPELLATE EXHIBIT CXXII
PAGE 5 OF 113
APPENDED PAGE

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

UNITED STATES **v.** **MICAH J. BROWN** **CSSSN, U.S. NAVY**	**RULING ON DEFENSE MOTIONS FOR APPROPRIATE RELIEF: RELIEF FROM PRETRIAL CONFINEMENT**

1. Nature of Ruling.

The defense has again moved multiple times for relief from pretrial confinement pursuant to Rules for Court-Martial (R.C.M.) 305. The defense has filed multiple motions on this subject. The first motion that is subject to this ruling was filed on 25 November 2019 by the accused's then defense counsel.[1] The second defense motion that is the subject of this ruling was filed on 20 December by the accused.[2] The government opposed both motions.[3] Supplemental documents for the defense's motion were filed in this case.[4] The third defense motion was filed on 6 April 2020 by the accused.[5] The fourth defense motion was filed on 14 May 2020 and was a defense supplemental motion to support the defense motion filed on 6 April 2020.[6] The government opposed all motions. The Court allowed the accused an extended amount of time to file an exhibit to support his last two motions. The Court granted this extension of time during several 802 conferences in May, June, and July of 2020. The defense filed this exhibit, a page

[1] A.E. 63
[2] As noted in the record, between the motion filed on 25 November and 20 December the accused elected to go *pro se*. This motion from the accused is A.E. 73
[3] A.E. 64
[4] A.E. 91
[5] A.E. 123
[6] A.E. 125

APPELLATE EXHIBIT CLVI
PAGE 1 OF 16
APPENDED PAGE

from the accused's medical record, on 13 August 2020. The Court orally denied the motions filed on 25 November and 20 December; however, this ruling supplements the Court's previous ruling on those two motions and addresses all defense motions mentioned above. This ruling applies to all defense motions listed above in this ruling.

The Court considered the defense and government briefs and attachments thereto and witness testimony, as well as the oral argument of trial counsel and the accused in arriving at the following findings of fact and conclusions of law.

2. **Findings of Fact.**

a. The Court adopts its findings of fact from its ruling on the defense's motion to suppress to the accused's statements. This includes finding of facts a. through ff.

b. The Court adopts its findings of facts from its ruling on the defense's motion to dismiss for lack of speedy trial pursuant to Sixth Amendment, Article 10, and R.C.M. 707. This includes findings of fact a through eeee.

c. The Court adopts its findings of facts from its Continuance Order issued on 7 April 2020. As of the date of this ruling, COVID-19 continues to be a worldwide global pandemic. COVID-19 continues to be a public health crisis in the United States.

d. Per NAVADMIN 168/20, the U.S. Navy implemented Navy mitigation measures in response to the coronavirus outbreak. Part of the mitigation measures is to assign Naval installation and DoD installations with either a red or green designation. A green designation indicates travel is authorized to and from a particular installation. A red designation indicates travel to or from the installation is not authorized without a waiver. The same designation applies to states within the United States. As of this ruling, Connecticut, Rhode Island, and Naval Sub Base New London all have a green designations. Rhode Island is the location of the

Donald Wyatt Detention Facility (Wyatt Facility). Connecticut and New London are the location of the trial.

e. As a result of the accused's alleged actions, LSS2 [redacted] sustained multiple lacerations to his body. He was transported to the [redacted] in Melbourne, FL after the submarine returned to the pier in Florida.

f. On 31 July 2018, the accused was ordered into pretrial confinement at the brig at Naval Air Station (NAS) Jacksonville located in Jacksonville, Florida.

n. On 1 August 2018, the Commander, Submarine Squadron 12, issued a memorandum memorializing his justifications for placing the accused in pretrial confinement. The memorandum briefly noted the accusations they believed the accused would be charge with – Violation of UCMJ, Article 80 (attempted murder) and Violation of UCMJ, Article 128 (assault with a knife). The Commander found that probable cause existed that the accused had committed offenses triable by a court-martial, that confinement was necessary because it is foreseeable that the accused will engage in further serious criminal misconduct if not confined, that the accused is a potential flight risk, and that lesser forms of restraint were inadequate.

o. On 2 August 2018, the accused was advised of the nature of the offenses against him, that he had the right to remain silent, that he could retain civilian counsel at no expense to the United States, and that his confinement could be reviewed by an Initial Review Officer (IRO). On this date he also spoke to LT Gary Rowe, a defense counsel assigned to Defense Service Office Southeast. After getting all this information and speaking to LT Rowe, the accused waived his right to have an appearance at his initial review of his pretrial confinement.

p. On 3 August 2018, an initial review of the accused's pretrial confinement was conducted by LCDR [redacted] the IRO. The accused was absent given his waiver of

appearance. On 3 August 2018, LT Rowe emailed LCDR [redacted] and made an argument on behalf of the accused.[7] LT Rowe's signature block stated his name was LT Davey G. Rowe.

q. IRO approved continued pretrial confinement on 1 August 2018. On the form, she noted the accused's counsel as LT Davey G. Rowe. She memorialized her decision in a three-page document titled "Memorandum of Initial Review Officer." She indicated on this form

[redacted]

r. On 6 September 2018, the accused was moved into pretrial confinement at Donald Wyatt Detention Facility (Wyatt Facility).

[7] See the email from LT Rowe to LCDR [redacted]. The Court finds the substance of this email was sent to LCDR [redacted] on this date and were from the accused's defense counsel assigned to his case at the time. The Court also finds LCDR [redacted] received and reviewed this email based on the fact that she noted the accused's counsel was LT Davey G. Rowe, which is the same name used in LT Rowe's signature block on his email.

s. On 16 November 2018, the accused heated up a liquid mixture of hot oatmeal and Vaseline (which on video appears to show him re-heating the mixture multiple times), and then threw that liquid mixture onto the face of another detainee. He also appears to have attempted to strike the same detainee's face with his fist.

t. On 16 November 2018, as a result of the incident, the accused was placed in administrative detention pending investigation as a result of the hot oatmeal and Vaseline incident.

u. On 28 November 2018, Wyatt Facility officials conducted a Disciplinary Report Hearing, where the Hearing Officer found the accused guilty of "assault with fluids" by "a preponderance of the evidence." The accused was adjudged sanctions, including restrictive housing for a period of 20 days, with 10 days suspended. The accused served the 20 days in restrictive housing.

v. On 24 May 2020, the accused was accused of fighting with another detainee at Wyatt Facility. The officials at Wyatt facility reviewed the cameras and observed the accused assaulting another detainee with a sock that contained two bars of soap and a three triple A batteries. The accused also threw human feces on the detainee's body and face. The feces was located in a peanut butter jar that was found on the floor where the assault took place.

w. As of 4 May 2020, there have been 16 positive cases of COVID-19 at Wyatt Detention Facility (13 detainees and 3 staff). None of these detainees were located in the same "pod" as the accused. The "pod" is the living area at Wyatt Detention where detainees are group. As of 5 May 2020, Wyatt Facility was at 71% capacity and has a designated space within the facility to quarantine positive cases of COVID-19.

x. During the COVID-19 pandemic, Wyatt Facility has re-assigned detainees to spaced out cells, directs social distancing among detainees, increased mental health rounds, increased cleaning and disinfecting of high touch areas, and have provide detainees with masks and soap. The Wyatt Facility coordinates with the Rhode Island Department of Health (RIDH) and the RIDH have allowed their Coordination with Rhode Island Congregation Settings Support Team to assist the Wyatt Facility.[8] The accused is housed alone in his own cell. He has access to his own soap, water, and sink.

y. The accused is reported to have the [redacted] in his medical records. His medical records do not contain any diagnosis of [redacted].

3. Discussion and Conclusions of Law.

a. Release from Pretrial Confinement

Service members pending criminal charges may be ordered into pretrial confinement as the circumstances may require.[9] An accused shall be released from pretrial confinement unless reasonable grounds exist to believe that an offense triable by court-martial has been committed, the accused committed it, confinement is necessary either because the accused is a flight risk or will engage in serious criminal misconduct, and less severe forms of restraint are inadequate.[10] Serious criminal misconduct includes intimidation of witnesses or other obstruction of justice, serious injury of others, or other offenses that pose a serious threat to the safety of the community or to the effectiveness, morale, discipline, readiness, or safety of the command.[11] On

[8] See the attachments to the government's motion (United States District Court for the District of Rhode Island). The Court finds that the Wyatt Facility's mitigation efforts and plan as attached are currently in effect and apply to the accused's pretrial confinement at that facility.
[9] Article 10, U.C.M.J.
[10] R.C.M. 305(h)(2)(B).
[11] *Id.*

motion from the defense, the military judge shall order an accused released from pretrial confinement only if: (A) The 7-day review officer's decision was an abuse of discretion, and there is not sufficient information presented to the military judge justifying continued pretrial confinement; (B) Information not presented to the 7-day review officer establishes that the prisoner should be released; or (C) The requirements of R.C.M. 305(i)(1) and R.C.M. 305(i)(2) were not complied with, and information presented to the military judge does not establish grounds for continued confinement.[12]

An IRO should utilize a "totality-of-the-circumstances" test in determining whether pretrial confinement is warranted.[13] As the case law holds:

> The exercise of discretion implies conscientious judgment, not arbitrary action. It takes account of the law and the particular circumstances of the case and is directed by reason and conscience to a just result. The test for an abuse of discretion is the failure to exercise discretion or its exercise on grounds that are untenable. It does not imply a bad motive or willful disregard of an accused's rights, but can be the failure to apply the principles of law applicable to the situation at hand.[14]

The required exercise of common sense, factual analysis, and independent judgment is designed ultimately to guard against the "mere ratification of the bare bones conclusions of others."[15] In order to find an abuse of such discretion, the court must find "more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous."[16] Furthermore, an abuse of discretion standard is similar to the clearly erroneous standard; requiring not that the decision was wrong, but rather was clearly wrong and that the

---

[12] R.C.M. 305(j).
[13] *United States v. Fisher*, 37 M.J. 812 (N.M.C.M.R. 1993).
[14] *Id.* at 816-17.
[15] *Id.* at 818.
[16] *United States v. Baker*, 70 M.J. 283, 287 (C.A.A.F. 2011) (internal quotation marks and citations omitted).

decision was more than just "maybe wrong" or "probably wrong;" the decision "must strike a chord of wrong with the force of a five-week-old, unrefrigerated dead fish."[17]

4. Conclusions of Law.

a. Release from Pretrial Confinement

i. IRO's Decision (Defense Motion from 20 December 2019)

In motions filed by the accused on 20 December 2019, he argues that the IRO's decision was an abuse of discretion and that the IRO "violated his rights to being innocent until proven guilty." The Court disagrees. In analyzing the IRO's decision under R.C.M. 305(j)(1)(A), the Court first considers whether the IRO abused her discretion in ordering continued pretrial confinement for the accused. In doing so, the Court only considers matters before the IRO at the time she made his decision. Based on the evidence she considered, the Court concurs with the IRO's assessment on continued pretrial confinement, and the Court concludes that the IRO did not abuse her discretion.[18]

The Court finds the IRO understood and properly applied the correct preponderance standard at the pretrial confinement review she conducted held on 3 August 2018. Within the IRO's Findings and Order form she filed out, under the heading "CONCLUSION," the IRO made her findings by checking facts and decisions that applied in this case. These check marks and facts were listed under a paragraph the IRO had also checked that stated, "The matters I have considered convince me that the requirements for continued pretrial confinement have been proved by preponderance of the evidence." On the last page of the form, the IRO hand wrote what she considered and provided further justification as to why she decided to continue pretrial

[17] *United States v. French*, 38 M.J. 420, 425 (C.M.A. 1994) (quoting *Parts & Electric Motors Inc. v. Sterling Electric, Inc., 866 F.2d 228, 233 (7th Cir. 1988)).*
[18] See *United States v. Gaither*, 45 M.J. 349, 351 (C.A.A.F. 1996).

confinement. She hand wrote what she considered in addition to the blocks she checked in the number 2 paragraph on page one of the document. These facts indicate to the Court that the IRO understood and applied the correct standard of proof during her pretrial confinement review.

In his motion, the accused further asserts she violated his due process by not using the word "allegedly" and used "tainted facts." Despite these assertions, the Court does not believe the accused's right to due process was violated and her failure to use the word "allegedly" was clearly not an abuse of discretion. Under R.C.M. 305 (i)(2)(A)(iii), the IRO is required to make a determination if the requirements for confinement are met by using a "preponderance of the evidence" standard. There is no requirement under R.C.M. 305 that an IRO has to use the word "allegedly." The Court also finds that the IRO considered the totality of the circumstances of the accused's situation on 3 August 2018 during her pretrial confinement review. The Court finds she weighed the appropriate facts highlighted in R.C.M. 305(h)(2)(B)'s Discussion. The weight accorded to those factors was squarely within her determination. The IRO also considered evidence and witness statements – she noted EMN2 [redacted] and ETVC [redacted] were particularly relevant as they were the first responders to the altercation. The rules permit her to do this. On the basis of what she considered, she then determined that the requirements under R.C.M. 305(h)(2)(B) were met and that continued pretrial confinement was warranted. Her findings that the accused will engage in further serious criminal misconduct and that less severe forms of restraint were not adequate were more persuasive than those factors favoring the accused's release was her judgment call and was reasonable in light of the facts before her. In addition, the "Memorandum of Initial Review Officer" show the accused was afforded all of his rights under R.C.M. 305. The Court also finds that the IRO was not required to use the word

"alleged." Failure to use this word is not evidence of any bias on the part of the IRO and in no way violated the accused's due process rights or his rights under R.C.M. 305.

Even though it is not necessary because the Court finds the IRO's decision was not an abuse of discretion, the Court will note it does find, based on all the evidence presented in the parties' motions, there is sufficient information to justify continued pretrial confinement in this case. While it is settled that an accused cannot be placed into pretrial confinement simply for being a "pain in the neck,"[19] "the accused whose behavior is not merely an irritant to the commander, but is rather an infection in the unit may be so confined."[20] Here, the evidence supports the notion that the accused's impact on his unit rises far above the level of being a mere pain in the neck to his commander and that the likely infliction of serious injury on others poses a serious threat to the safety of the community or serious threat to effectiveness, morale, discipline, readiness, or safety of his command or U.S. national security. The allegation of the accused stabbing a shipmate with a kitchen knife on an underway and underwater submarine evince the sort of infection on a unit which the court in *Rosato* found to justify pretrial confinement. The accused's alleged actions created a danger not just to LSSS2 [redacted], but also to the entire crew of the [redacted] given when and where the alleged assault occurred. In addition, since being placed in pretrial confinement, the accused is also alleged to have violently attacked two other people while in pretrial confinement. On one occasion, he is alleged to have thrown a hot bowl of Vaseline and oatmeal (for which a video shows he repeatedly heated up in a microwave) in another detainee's face. He is alleged to have then struck the same detainee's face with his fists. On another occasion, the accused is alleged to

[19] *United States v. Heard*, 3 M.J. 14, 19 (C.M.A. 1977).
[20] *United States v. Rosato*, 29 M.J. 1052, 1054 (A.F.C.M.R. 1990), *rev'd on other grounds*, 32 M.J. 93 (C.M.A. 1991).

have assaulted a different detainee with a sock full of soap and batteries. He is also alleged to have assaulted this second detainee with human feces. These two instances of alleged misconduct are justifications for keeping the accused in pretrial confinement, and the Court agrees with the IRO's determination made under R.C.M. 305. Based the totality of the circumstances in this case, including the accused's alleged violent behavior that has led him to be accused of multiple violent crimes, the Court has considered less severe forms of restraint and concludes that they are inadequate.

ii. Information Not Presented to 7-day Hearing Officer (Defense Motion From 25 November 2019,)

The defense has argued that letters from other inmates show the accused was not an instigator in regard to the accused's alleged assault of another inmate with steaming hot Vaseline and oatmeal. Regardless of whether or not the accused was the "instigator," the video evidence before the Court clearly shows the accused heated up the Vaseline and oatmeal mixture, then walked the length of a room with the heated Vaseline, and then threw the heated Vaseline/oatmeal into the face of another inmate. There is no evidence currently before the Court that the detainee the accused allegedly assaulted was in anyway threatening the accused at the time of the alleged assault. There is limited evidence before the Court that the accused reported any threats or any incidents to the Wyatt Facility personnel before this incident or about the detainee he attacked. Therefore, because the accused chose to engage in a violent act to resolve an issue he was having in the Wyatt Facility, the Court does not believe the new information submitted by the defense warrants releasing the accused from pretrial confinement under R.C.M. 305. In addition, since the Court's oral denial of this motion, the accused has been accused of assaulting another inmate at the Wyatt Facility with a sock that contained batteries and soap and then assaulted the same detainee with human feces. This incident, along with the

allegation of attacking a detainee with a heated oatmeal/Vaseline mixture is not new information that warrant the release of the accused from PTC. In fact, they establish a sufficient grounds to continue pretrial confinement under R.C.M. 305.

The defense has also asserted to the Court that the accused's pretrial confinement is an infringement upon the accused's Sixth Amendment right to counsel.[21] The thrust of their argument is that the defense counsel were unable to adequately communicate with the accused because of his location and the restrictions at the Wyatt Facility, located in Rhode Island. Despite these assertions, the Court finds zero merit in this argument and denies the defense's request to release the accused under this rationale. First, as has been noted in several other rulings in this case, the accused has had multiple defense counsel assigned as detailed defense counsel to him before he elected to go *pro se*. At the time the accused elected to represent himself, he had two Lieutenant Commanders (LCDR) as his detailed defense counsel, LCDR Davis and LCDR Williams. The decision to detail these two defense counsel rested solely with the Commanding Officer, Defense Service Office North. It was his decision to detail LCDR Davis and LCDR Williams, located in Naples, Italy and Great Lakes, IL at the time of their detailing, knowing the accused was located in pretrial confinement in Rhode Island and that the closest Defense Service Office North office was located in Groton, CT.[22] In addition, despite the defense's assertion within their motion, there is zero evidence before the Court that the defense team has not been able to communicate, visit, or meet. There is no evidence the government has impeded the standby counsels' ability assist the accused first as detailed counsel and then later as

[21] The Court recognizes this issue is essentially no longer before the Court as the accused has elected to go *pro se* in this case; however, because this Sixth Amendment issue was raised before his decision to represent himself, the Court is addressing this claim by the defense.

[22] The Court does not question this decision by Commanding Officer, Defense Service Office North to detail these two defense counsel. The Court only raises this issue within its ruling because the defense asserted this fact as a reason for why the accused's Sixth Amendment rights were being violated. The Court recognizes this decision was well within Commanding Officer, Defense Service Office North's discretion to detail these defense counsel.

standby counsel. There is no evidence before the Court that the government has refused to fund counsel travel or impeded their travel in any way. Whether or not the counsel, as either detailed defense counsel or as standby counsel, decide to visit (or not visit) or call the accused is not a product of the government's decision to put the accused in pretrial confinement. It is not a product of any government interference. The government is not in any way responsible for the detailing decisions of the counsels' commands in this case. The government is not responsible for the counsels' decision on when to visit the accused (first as detailed counsel and then second as standby counsel). The Court finds no Sixth Amendment violation in this case based on the location of the counsel or the accused and denies the defense's motion to release the accused on this ground.

Lastly, within this particular defense motion, the defense has claimed the accused reported he was [redacted] and that he has not received any mental health treatment. First, there is no evidence before the Court that the accused was actually [redacted] in July 2019. There is only evidence that he reported a [redacted]. Wyatt Facility never filed any charges against anyone regarding this issue. The Court finds no merit in this argument by the defense and denies the accused released based on this. Second, there is no evidence before the Court the accused has not been able to get the mental health treatment he has requested. There is also currently no evidence before the Court the accused's command has not assisted him in his request. Because of the lack of evidence on these claims, the Court denies the defense's motion to release the accused on these grounds.

iii. Information Not Presented to 7-day Hearing Officer (Defense Motion From 6 Apr 20 and 14 May 20)

The accused has asserted in his motion from 6 April 2020 and 14 May 2020 that he should be released from pretrial confinement because of COVID-19 and his existing medical conditions. While the accused has presented some evidence he has the [redacted], there has been no direct evidence presented to the Court connecting this [redacted] with a higher health risk regarding COVID-19 by the Center for Disease Control and Prevention. Nevertheless, despite this lack of direct evidence or any witness testimony, the Court did conduct its analysis as if the accused has an underlying medical condition that puts him at a higher risk should he contract the virus.[23]

The defense's argument regarding this issue is tied to their assumption that the accused is at a much greater risk of contracting COVID-19 because of his confinement at Wyatt Facility and that this risk outweighs other factors to be considered under R.C.M. 305. The defense has essentially argued that this assumption is information not presented to the IRO that would warrant release under R.C.M. 305(h)(2)(B).

The Court recognizes the seriousness of the COVID-19 and the significant health risks to those who contract the virus, especially to those who have underlying medical issues that put them at a higher risk – to possibly include the accused. It is clear to the Court that Wyatt Facility has taken stringent measure to ensure the risk to inmates and staff of contracting COVID-19 is minimized. The Court finds their COVID-19 mitigation measures and their consistent communication with the Rhode Island Department of Health to be a reasonable and proactive response to COVID-19. Nevertheless, even with the most stringent measures taken by confinement facilities, the Court also recognizes there is still a risk inmates and staff can contract

[23] The accused has asserted he has [redacted]; however, the Court has not been provided any medical documents to support this claim. The Court refers to CSSSN Brown's DD Form 28087-1 from January 2015 where [redacted] was not listed as a condition. At this time, the Court does not find the accused has [redacted].

the virus. This is to be contrasted with the risk the accused would have to contracting the virus if he were to live in a residence either on or off base outside of Wyatt Facility.

Given the stringent measures that Wyatt Facility is taking in regard to COVID-19, the Court is not convinced that the accused is at a significant, greater risk of contracting COVID-19 at Wyatt Facility as opposed to if he were be living on base or in an off base residence, where the exposures and mitigation measures employed in all those places is unknown. While the accused is in the close confines of Wyatt Facility and does have a limited ability to distance himself from other inmates and the staff, Wyatt Facility has adopted a rigorous regime of cleaning, has hand sanitizer available to inmates and staff, and the accused has a cell to himself. Wyatt Facility has adopted aggressive testing measures and consults daily with RIDH. The Court finds Wyatt Facility has adopted appropriate and acceptable mitigation measures in response to COVID-19. Furthermore, there is no evidence before the Court that the accused's pod in the Wyatt Facility has had anyone infected with COVID-19. This would suggest to the Court that Wyatt Facility's mitigation measures are working.

The accused's living environment at Wyatt Facility during COVID-19 is also just one additional piece of information the Court is considering under R.C.M. 305(h)(2)(B) factors. Another new additional piece of information not considered by the IRO is the fact the accused is alleged to have assaulted a second inmate in the Wyatt Facility with a sock full of batteries and soap and then human feces. This is the second violent assault the accused is alleged to have committed while he has been in pretrial confinement. This, along with the first alleged assault, is direct evidence that the accused will engage in further serious criminal misconduct.

Considering all the evidence before it, the Court finds there is likelihood the accused can and will commit further serious misconduct if released from pretrial confinement. Therefore,

after balanced all the facts listed above in regard to COVID-19 and the new alleged assaults under R.C.M. 305(h)(2)(B), the Court denies the defense motion to release the accused from pretrial confinement.

4. Ruling.

Accordingly, the defense's motions for the accused to be released from pretrial confinement are **DENIED**.

So **ORDERED** this 24th day of August, 2020.

[redacted]
CDR, JAGC, USN
Military Judge

APPELLATE EXHIBIT CLVI
PAGE 16 OF 16
APPENDED PAGE

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

UNITED STATES **v.** **MICAH J. BROWN** **CSSSN/E-3** **USN**	**JUDICIAL ORDER FOR DEPOSITION** **28 August 2020**

1. In accordance with R.C.M. 702, the Court finds that the government has demonstrated there are exceptional circumstances, and it is in the interest of justice to grant the government's request to depose [redacted]. After holding an Article 39(a) UCMJ session with all the parties on 26 August 2020 and considering the additional submission of the parties, the Court finds the following exceptional circumstances require a deposition to be ordered in this case:

a. [redacted] is an employee at the [redacted] located near Jacksonville, Florida. [redacted] works and lives in Florida.
b. [redacted] is a Level 2 trauma center in the state of Florida.
c. [redacted] is a medical doctor and a [redacted], which is a role required under Florida state law. [redacted] role is essential to the continued function of [redacted] for the local community in which the [redacted] is located.
d. Any absence of [redacted] would render the [redacted] center ineligible to continue to function as a trauma center in Florida.
e. COVID-19 has been declared a national emergency by the President of the United States. As of this order, COVID-19 continues to be a global and national pandemic that has affect the United States and the state of Florida.
f. COVID-19 continues to be a health emergency for the state of Florida. Because of COVID-19, the [redacted] has a shortage of qualified trauma surgeons for their medical facility.
g. The trial of United States v. Brown is currently docketed to begin on 12 October 2020 in Groton, Connecticut.
h. As a relevant and necessary witness in this case, [redacted] will have to travel from Florida to Connecticut. This travel will require her to quarantine herself upon her return to Florida for at least 14 days. This travel will increase her exposure to COVID-19. [redacted] absence from [redacted] could affect the facilities ability to assist and treat trauma patients.

APPELLATE EXHIBIT CLXII
PAGE 1 OF 2
APPENDED PAGE

i. [redacted] was the treating physician of LSS2 [redacted] on 31 July 2018. She is expected to testify about her treatment of him after the accused allegedly struck him. She will also testify about LSS2 [redacted] medical records.

2. **Law and Discussion**: Under R.C.M. 702, "a deposition may be ordered at the request of any party if the requesting party demonstrates that, due to exceptional circumstances, it is in the interests of justice that the testimony of the prospective witness be taken and preserved for trial."

In this case, the government has requested the Court order the deposition of [redacted] because of COVID-19 and the possibility that because of COVID-19 [redacted] will be unable to travel to Connecticut to testify personally in this case. The government also has stated a deposition will preserve her testimony should she not be available for trial and that this deposition would prevent any further delay of this case. The Court agrees. While the Court is not making any ruling at this time on whether [redacted] will or will not be deemed available for trial, the Court does recognize there are "exceptional circumstances" here because of [redacted] current position as a [redacted] and trauma surgeon and because of the national pandemic that is COVID-19. See R.C.M. 702. There is no guarantee at this moment that the COVID-19 pandemic will improve in the United States or the state of Florida before the trial start date of 12 October 2020. It is also a possibility that the COVID-19 pandemic will get worse in the United States, Connecticut, or Florida by 12 October 2020. If COVID-19 continues to be a national and state of Florida health issue, because of her job as a [redacted] and trauma surgeon, it is likely [redacted] will need to remain in Florida to ensure patients are able to be treated at the [redacted]. There is also no guarantee that [redacted] a medical doctor who works in a hospital where her exposure to COVID-19 is a possibility, will not get COVID-19 herself and be unable to travel to testify. Therefore, based on all these factors, the Court believes a deposition should be ordered in the "interest of justice." See R.C.M. 702.

3. The Convening Authority is hereby ordered to appoint a deposition officer and arrange for a video deposition of [redacted] no later than 25 September 2020. The deposition officer is ordered to follow his or her duties set out in R.C.M. 702(e). The accused shall have all rights afforded of him under R.C.M. 702(f). The deposition officer is ordered to certify the record and the video recording of the deposition and forward the deposition to this Court no later than 30 September 2020. The Convening Authority is also ordered to transcribe deposition and provide a transcript to the parties and the Court no later than 5 October 2020.

4. The trial counsel in this case is LCDR Sarah Cummings. She may be contacted at [redacted] The standby counsel in this case are LCDR Bryan Davis and LCDR Sharlena Williams. They may be contacted at [redacted] and [redacted]

SO ORDERED this 28th day of August 2020.

[redacted]
R.J. STORMER
CDR, JAGC, USN
Military Judge

APPELLATE EXHIBIT CLXVI
PAGE 2 OF 2
APPENDED PAGE

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

UNITED STATES **v.** **MICAH J. BROWN** **CSSSN, U.S. NAVY**	**RULING ON MOTION TO COMPEL QUASH** **5 October 2020**

1. **Nature of Ruling.** On 31 July 2020 the government issued a subpoena to [redacted] to appear in Groton, Connecticut on 10 August 2020 as a witness in the case of United States v. Brown. On 31 July 2020, [redacted], through her employer Inpatient Services of Florida (Inpatient Services), filed a motion to quash the government's subpoena. On 25 August 2020, the Court received a supplemental motion to quash from [redacted] through Inpatient Services.[1] The Court allowed both the government and the defense to respond to this motion to quash and to argue. The defense opposed the motion to quash. In resolving this motion, the Court has considered all motions and evidence submitted by [redacted] (Inpatient Services), the government, and the defense, and the arguments presented by the government and the accused. The Court makes the following findings of fact and conclusions of law.

2. **Findings of Fact**:

a. The accused is charged with two specifications under Article 80, U.C.M.J. (attempted premeditated murder, attempted unpremeditated murder) and a sole specification under Article

[1] The Court granted a continuance for this case from 10 August to 12 October 2020. Despite this change in trial dates, the Court concludes the validity and enforceability of the subpoena is not an issue before the Court. The Court is addressing the issues raised in the [redacted] motions from 31 July and 25 August as they relate to her motion to quash the subpoena for the trial starting on 12 October 2020 in Groton, Connecticut.

128, U.C.M.J. (aggravated assault with intent to commit grievous bodily harm) for allegedly stabbing LSS2 [redacted] with a knife.

b. On 31 July 2020, the government served a subpoena on [redacted] to appear as a witness in the case of United States v. Brown. Neither [redacted] nor Inpatient Services have questioned the validity and the enforcement of this subpoena.

c. On 31 July 2020, [redacted], through her employer Inpatient Services, filed a motion with this Court to quash the government's motion. Their motion has argued the government's subpoena was "unreasonable" and "oppressive" under R.C.M. 703(g)(3)(G).

d. [redacted] is a medical doctor. She is a trauma surgeon. She is currently the [redacted], which is a part of Inpatient Services. [redacted] is a level 2 trauma center in the state of Florida and is essential to the health care of the surrounding community for the services it provides. It has been designated as a trauma facility by the Florida Department of Health.

e. As the [redacted], [redacted] position is required by Florida state statutes. Her presence is necessary for the continued functioning of the trauma center for the local community surrounding [redacted] Her presence is also required by Florida statutes. Any extended absence by her as the [redacted] would render the facility unable to function as a trauma center in Florida because the hospital would not have the proper oversight as required by Florida statutes.

f. The President of the United States has declared a nation emergency due to the spread of COVID-19. As of the date of this ruling, COVID-19 continues to be a worldwide global pandemic. COVID-19 continues to be a public health crisis in the United States. The Court also adopts its findings of facts from its Continuance Order issued on 7 April 2020 for this motion

and the facts related to COVID-19. The Court also adopts finding of fact d. from its Ruling on Defense Motions for Appropriate Relief: Relief from Pretrial Confinement, dated 24 August 2020.

g. The State of Connecticut continues to have a public health emergency and has orders for the travel into the state. This includes a 14 day quarantine for travelers from certain states. As of 29 September, this included Florida.[2] [redacted], regardless of Florida state laws and rules, also has a 14 day quarantine period for any healthcare worker who travels outside of the state.

h. COVID-19 has continued to increase in the state of Florida as of 25 August 2020. COVID-19 continues to be present in the state of Florida as of the date of this ruling.

i. [redacted] has a shortage of qualified trauma surgeons.

j. As a [redacted], [redacted] physical presence at the [redacted] is crucial for [redacted] to continue to not only treat trauma patients, but patients with COVID-19.

k. [redacted] remains on a diversion for transfers of patients due to over-crowding and capacity issues related to COVID-19 patients. Staffing at [redacted] remains a significant challenge for this health provider facility due health care providers having to leave call rotations related to COVID-19 illness or quarantine issues. This has created a decrease in the number of available health care providers for [redacted], even with [redacted] in the rotation of health care providers and medical trauma doctors/surgeons. Taking [redacted] out the rotation would significantly hurt [redacted] health care mission and put an incredible strain on the other staff members at [redacted].

l. All COVID-19 quarantine precautions for [redacted] are still in effect as of this motion.

3. **Summary of Law.**

[2] See https://portal.ct.gov/coronavirus/travel

"A person subpoenaed" may "request[s] relief on grounds that compliance is unreasonable, oppressive, or prohibited by law."[3] In considering the request, "the military judge…shall review the request and shall – (i) order that the subpoena be modified or quashed, as appropriate; or (ii) order the person to comply with the subpoena."[4]

"If the person subpoenaed neglects or refuses to appear…the military judge may issue a warrant of attachment to compel the attendance of a witness or the production of evidence, as appropriate."[5]

The federal district courts provide some insight into what may constitute an unreasonable or oppressive subpoena, indicating these two factors require a case-by-case judgment because they "cannot sensibly be converted into a mechanical rule."[6] While conversion into a "mechanical rule" may be impossible, the courts do consider circumstances such as "the risk of imminent physical harm to others, magnitude of the case, scarcity of evidence…along with the potential harm from enforcing the subpoena."[7]

4. **Conclusion of Law**.

The Court concludes that the government's subpoena issued on 31 July 2020 is both unreasonable and oppressive. The COVID-19 pandemic in the United States and around the world is both unprecedented and unpredictable. There is has been no evidence presented to this Court that the pandemic and its effect will be ending any time soon in the world and the United States. This includes the state of Florida, where [redacted] and its surrounding community are located. Health care providers, such as [redacted], and their skills have never been in more

[3] R.C.M. 703(g)(3)(G).
[4] *Id.*
[5] R.C.M. 703(g)(3)(H).
[6] See *United States v. Bergeson*, 425 F.3d 1221, 1225 (9th Cir. 2005).
[7] *Id.* at 1227.

APPELLATE EXHIBIT CLXXIII
PAGE 4 OF 10
APPENDED PAGE

demand than they currently are in this COVID-19 pandemic environment. The Court finds that [redacted] is crucial to [redacted] ability to meet its mission, especially during the COVID-19 pandemic. Specifically, [redacted] is a necessary health care worker whose presence is required to ensure [redacted] can treat both its trauma and COVID-19 patients in the community it serves. As such, the Court finds the government's subpoena to have [redacted] travel to Connecticut from Florida for this trial set to begin on 12 October 2020 to be unreasonable and oppressive. First, it is likely [redacted] would be required to conduct as least one (if not two) 14 day quarantine period(s) if she were to conduct a round trip from Florida to Connecticut. This would result in her being absent from her duties at the [redacted] for at least 14-28 days. Any extended absence that would take [redacted] away from her duties as [redacted] and out of the normal physician rotation would be detrimental to [redacted]'s ability to treat both trauma and non-trauma patients, included COVID-19 patients. Her absence would create a strain on the other medical health care providers at [redacted]. There is currently a shortage of qualified trauma surgeons at [redacted] and taking [redacted], a trauma surgeon and [redacted], away from her duties would severely hamper [redacted]s ability to meet its mission of treating patients. Lastly, any extended absence by [redacted] as the [redacted] may prevent [redacted] from being able to legally treat any trauma patients under Florida law. It is very likely any extended absence by [redacted] from her duties at the [redacted] would result in the imminent physical harm to [redacted]'s patients and [redacted]'s staff members. Second, any travel outside of the state of Florida increases [redacted] risk of contracting COVID-19. While many participants in this case will be traveling from out state for this trial, [redacted] duties as a frontline health care provider in the battle against COVID-19 cannot be ignored. Simply put, [redacted] skills are needed now more than ever at [redacted] to treat their patients. Patients' lives and

well-being are in her and other medical health professionals' hands. Requiring her to travel out of state during the COVID-19 pandemic puts her and her patients at a greater risk of imminent physical harm. For these reasons, the Court finds the government's subpoena to be oppressive and unreasonable.

5. **Ruling.**

Accordingly, the motion filed on behalf of [redacted] to quash the government's subpoena is **GRANTED**.

So **ORDERED** this 5th day of October, 2020.

[redacted]
R. J. STORMER
CDR, JAGC, USN
Military Judge

APPELLATE EXHIBIT CLXXIII
PAGE 10 OF 10
APPENDED PAGE

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

UNITED STATES **v.** **MICAH J. BROWN** **CSSSN, U.S. NAVY**	**RULING ON DEFENSE MOTION TO COMPEL WITNESSES** **2 October 2020**

1. **Nature of Ruling.** The defense moved the Court to compel the production of certain witnesses whose testimony the defense believes to be relevant and necessary. The government opposed the defense's motion. The motion was litigated at an Article 39(a) session on 26 August 2020. The Court orally granted the defense's motion in part and denied the motion in part. Upon consideration of the defense motion, the government response, and the evidence and arguments presented by counsel and the accused, the court makes the following findings of fact and conclusions of law.

2. **Findings of Fact.**

a. The accused is charged with two specifications under Article 80, U.C.M.J. (attempted premeditated murder, attempted unpremeditated murder) and a sole specification under Article 128, U.C.M.J. (aggravated assault with intent to commit grievous bodily harm) for allegedly stabbing LSS2 [redacted]. with a knife.

b. The Court adopts the findings of fact 1 through 7 contained with the defense's motion to compel witnesses.

c. The court adopts the findings of fact 6 through 10 contained with the government's response to the defense's motion to compel witnesses.

APPELLATE EXHIBIT CLXXXIV
PAGE 1 OF 7
APPENDED PAGE

d. Special Agent (SA) [redacted] is currently assigned as a Naval Criminal Investigative Service (NCIS) SA in Brazil.

e. SA [redacted] is the SA in charge for the NCIS Southeast office. He is the supervisor of the SA who is stationed in Brazil.

f. SA [redacted] testified he was unaware of any new NCIS policies related to SAs traveling during the COVID-19 pandemic. He testified that SA [redacted] would be able to travel to the United States for emergency leave if required and approved.

g. SA [redacted] testified that SAs testifying in courts-martial are mission essential; however, given the COVID-19 pandemic, he did not believe testifying at courts-martial was mission essential if it required the SA to travel to testify in person during the COVID-19 pandemic. He stated he was "uncomfortable" with his SAs traveling during the COVID-19 pandemic. Specifically, he was "uncomfortable" with any SAs traveling to Brazil to cover SA [redacted] mission requirements should he have to leave Brazil to testify in Connecticut for the United States v. Brown case – a case in which he was the lead SA.

h. SA [redacted] testified he was unaware of any United States State Department policies for travel for government officials to and from Brazil. He did not know of any requirements related to COVID-19 for SAs traveling to and from Brazil.

3. **Discussion and Conclusions of Law**.

An accused has a right to the production of witnesses whose testimony is relevant and necessary. R.C.M. 703(b)(1). The discussion to R.C.M. 703 states that "Relevant testimony is necessary, when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue." The defense must demonstrate the witnesses are material and necessary before any order to produce is required. *See* United States v. *Allen*, 31

M.J. 572, 610 (N.M.C.M.R. 1990). Materiality is defined as a "reasonable likelihood that the evidence could have affected the judgment of the military judge or the court members." *Id.* at 610. "A witness is material when he either negates the government's evidence or supports the defense." *Id.* Character evidence can be material. *See United States v. Sweeny*, 34 C.M.R. 379 (C.M.A. 1964); *United States v. Williams*, 3 M.J. 239 (C.M.A. 1977).

When ruling upon a motion to compel witnesses, the trial court should balance at least seven factors:

> 1. The issues involved in the case and the importance of the requested witness to those issues;
>
> 2. Whether the witness was desired on the merits or on sentencing;
>
> 3. Whether the witness' testimony would be "merely cumulative;"
>
> 4. The availability of alternatives to the personal appearance of the witness such as depositions, interrogatories, or previous testimony;
>
> 5. The unavailability of the witness, such as that occasioned by no amenability to the court's process;
>
> 6. Whether or not the requested witness is in the armed forces and/or subject to military orders;
>
> 7. The effect that a military witness' 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.

Allen, 31 M.J. at 610-11 (citing *United States v. Tangpuz*, 5 M.J. 426, 429 (C.M.A. 1978)).

a. SA [redacted]: The motion with respect to SA [redacted] is **GRANTED**. The defense has proven his testimony is relevant and necessary. SA [redacted] was the lead investigator in this case. In addition to being in charge of the investigation, SA [redacted] interviewed the alleged victim and other witnesses, took photographs of the alleged victim and his injuries, and collected the alleged victim's medical records. The Court agrees with the

defense that they should be able to question this witness about the investigation and the steps he did or did not take in this case. The defense should be able put forth their theory that the investigation was biased against the accused. This theory is directly tied to the defense's assertion that the accused did not have the requisite intent during his altercation with LSS2 [redacted] as alleged by the government. As such, the SA [redacted] is ordered to be produced in person as a witness at the trial.[1]

b. SA [redacted]: The defense motion to compel SA [redacted] is **DENIED**. The defense has failed to articulate why his testimony is *necessary*. SA [redacted] interviewed three witnesses in this case, ETV3 [redacted], CSS3 [redacted], and EMN2 [redacted]. All three witness will be physically present to testify at trial. All evidence related to SA [redacted] interview of these three witnesses has been turned over to the defense in discovery. In addition, these witnesses also gave additional statements to a preliminary investigator and another NCIS SA. All this information has been provided to the defense in discovery. The defense has essentially argued that SA [redacted] is relevant and necessary because he will be used as an impeachment witness for these witnesses; however, the defense has presented no evidence to this Court as to what they expect these witnesses to testify to and what part of their testimony they expect to impeach. The defense has presented no evidence that they themselves have interviewed these witnesses or that these witnesses have refused to be interviewed by them. The defense has also failed to show why they need SA [redacted] to impeach these witnesses and why the evidence they currently have in their possession is not adequate enough to impeach these witnesses should it become necessary. The defense has failed demonstrate why his testimony is required and would

[1] The government has asked this Court to deem SA [redacted] as unavailable as defined by MRE 804(a)(4) because of COVID-19 and his current duty station of Brazil. The Court denied this request as there is no evidence before the Court that SA [redacted] himself has contracted COVID-19 or has a "then-existing infirmity, physical illness." MRE 804(a)(4).

not be cumulative. As such, there is not enough evidence before this Court to conclude SA [redacted] is a necessary witness. Lastly, there is no evidence that SA [redacted] was involved in the investigation in this case beyond interviewing these witnesses. Therefore, the Court also finds his testimony is not necessary on this issue and that any information he would provide on this topic would be cumulative with that of SA Colwell.

c. SA [redacted]: The defense motion to compel SA [redacted] is **DENIED**. The defense has failed to articulate why his testimony is *necessary*. SA [redacted] interviewed one witness in this case, ETVC [redacted]. This witness will be physically present to testify at trial. All evidence related to SA [redacted] interview of this witness has been turned over to the defense in discovery. In addition, this witness gave an additional statement to a preliminary investigator. All this information has been provided to the defense. The defense has essentially argued that SA [redacted] is relevant and necessary because he will be used as an impeachment witness for this one witness (ETVC [redacted]); however, the defense has presented no evidence to this Court as to what statements they expect to impeach at trial. The defense has presented no evidence that they themselves have interviewed this one witness or that this one witness has refused to be interviewed by them. The defense has also failed to show why they need SA [redacted] to impeach this witness and why the evidence they currently have in their possession is not adequate enough to use for impeachment purposes should it become necessary. As such, there is not enough evidence before this Court to conclude SA [redacted] is a necessary witness. The have also failed to show why this witness would not be cumulative. Lastly, there is no evidence that SA [redacted] was involved in the investigation in this case beyond interviewing this one witness. Therefore, the Court also finds his testimony is not necessary on this issue and that any information he would provide would be cumulative with that of SA [redacted]

d. SA [redacted]: The defense motion to compel SA [redacted] is **DENIED**. The defense has failed to articulate why her testimony is *necessary*. SA [redacted] interviewed two witnesses in this case, MMN1 [redacted] and ETN2 [redacted]. Both witnesses will be physically present to testify at trial. All evidence related to SA [redacted] interview of these two witnesses has been turned over to the defense in discovery. In addition, this witness gave an additional statement to a preliminary investigator. All this information has been provided to the defense. The defense has essentially argued that SA [redacted] is relevant and necessary because she will be used as an impeachment witness for this witness; however, the defense has presented no evidence to this Court as to the witnesses' expected testimony and how any of the witnesses' previous statements would be used to impeach them. The defense has presented no evidence that they themselves have interviewed these witnesses or that these witnesses have refused to be interviewed by them. The defense has also failed to show why they need SA [redacted] to impeach these witnesses and why the evidence they currently have in their possession is not adequate enough to impeach these witnesses should it become necessary. As such, there is not enough evidence before this Court to conclude SA [redacted] is a necessary witness and that any testimony by her would not be cumulative. Lastly, there is no evidence that SA [redacted] was involved in the investigation in this case beyond interviewing these two witnesses. Therefore, the Court also finds her testimony is not necessary on this issue and that any information she would provide would be cumulative with that of SA [redacted]

4. **Ruling.**

Accordingly, the defense's motion is **GRANTED in part** and **DENIED in part.**

So **ORDERED** this 2nd day of October, 2020.

[redacted]
CDR, JAGC, USN
Military Judge

APPELLATE EXHIBIT CLXXIV
PAGE 7 OF 7
APPENDED PAGE

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

UNITED STATES **v.** **MICAH J. BROWN** **CSSSN, U.S. NAVY**	**RULING ON DEFENSE MOTION FOR APPROPRIATE RELIEF: RELIEF FROM PRETRIAL CONFINEMENT (dated 13 August 2020)**

1. **Nature of Ruling.**

The defense has moved multiple times for relief from pretrial confinement pursuant to Rules for Court-Martial (R.C.M.) 305. On 24 August 2020, the Court issued a ruling which provided the Court's rationale for denying all previous defense motions to release the accused from pretrial confinement.[1] This ruling addresses the defense's most recently filed motion from 13 August 2020 to have the accused released from pretrial confinement.[2]

The Court considered the defense and government briefs and attachments, as well as the oral argument of trial counsel and the accused in arriving at the following findings of fact and conclusions of law.

2. **Findings of Fact.**

a. The Court adopts its findings of facts from its Continuance Order issued on 7 April 2020. As of the date of this ruling, COVID-19 continues to be a worldwide global pandemic. COVID-19 continues to be a public health crisis in the United States.

[1] See A.E. 156; court ruling dated 24 August 2020.
[2] See A.E. 144, defense motion "compassionate release from PTC," dated 13 August 2020.

APPELLATE EXHIBIT CLXXV
PAGE 1 OF 2
APPENDED PAGE 17

b. The Court adopts its findings of fact from its 31 October 2019 and 24 August 2020 rulings denying the defense's motions to release the accused from pretrial confinement (PTC).

3. Principles of Law and Conclusion of Law.

In his new motion to have himself released from PTC, the accused has failed to raise any new issues or facts to the Court that have not already been raised in previous defense motions to release the accused from PTC. Therefore, based on the fact that no new issues or facts have been raised to this Court, the Court adopts its previously articulated principles of law and conclusions of law from its previous rulings denying the defense's motions to release the accused from PTC.[3] Relying on the principles of law, conclusions of law, and the rational spelled out in its 31 October 2019 and 24 August 2020 rulings, the Court denies the defense's motion to release the accused from PTC. There is no new information presented to the Court that establishes the accused should be released from pretrial confinement.

4. Ruling.

Accordingly, the defense's motions for the accused to be released from pretrial confinement is **DENIED**.

So **ORDERED** this 13th day of September, 2020.

[redacted]
R. J. STORMER
CDR, JAGC, USN
Military Judge

[3] See A.E. 55 and A.E. 156.

APPELLATE EXHIBIT CLXXV
PAGE 2 OF 2
APPENDED PAGE

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

UNITED STATES **v.** **MICAH J. BROWN** **CSSSN, U.S. NAVY**	**RULING ON DEFENSE MOTION FOR CREDIT UNDER ARTICLE 13, UCMJ, ARTICLE 12, UCMJ, R.C.M. 305, SIXTH AMENDMENT, AND EIGHTH AMENDMENT** **7 October 2020**

1. **Nature of Ruling.**

The defense moves the Court for administrative credit for unlawful punishment under Article 13, R.C.M. 305, Article 12, the Sixth Amendment, and the Eighth Amendment.[1] The government opposed all of the defense's motions. Upon consideration of all the defense's motions, the government's responses, and the evidence and arguments presented by counsel and the accused, the Court makes the following findings of fact and conclusions of law.

2. **Findings of Fact:**

a. On 30 July 2018, onboard [redacted] an underway and underwater submarine, the accused allegedly stabbed LSS2 [redacted]. with a knife.

b. On 31 July 2018, the accused was ordered into pretrial confinement at the brig at NAS Jacksonville, FL.

c. The accused was in restrictive housing while he was a detainee at the Naval brig in Jacksonville, FL.

d. On 6 September 2018, the accused was moved into pretrial confinement at Donald Wyatt Detention Facility (Wyatt). Wyatt is a civilian confinement facility located in the

[1] This ruling addresses following defense motions that either directly or through other legal arguments ask for confinement credit. These motions include: AE 73, AE 91, AE 114, AE 125, AE 144, and AE 165.

state of Rhode Island. The U.S. Navy has a contract with this facility on requirement and the treatment of military detainees.

e. On 16 November 2018, the accused allegedly heated up a liquid mixture of hot oatmeal and Vaseline, which a video shows him apparently re-heating multiple times, and then threw that liquid mixture onto the face of another detainee. He then appeared to strike the detainee's face with his fist. There is a video of this altercation that has been submitted as a government exhibit. The Court finds this video to be authentic and a visual account of the altercation that took place.

f. On 16 November 2018, because of the incident, the accused was placed in administrative detention pending an investigation.

g. On 28 November 2018, Wyatt Facility officials conducted a Disciplinary Report Hearing, where the Hearing Officer found the accused guilty of "assault with fluids" by "a preponderance of the evidence." The accused was adjudged sanctions, including restrictive housing for a period of 20 days, with 10 days suspended. The accused served the 20 days in restrictive housing for his "assault with fluids."

h. On 5 December 2018, Wyatt Facility officials determined it was necessary to keep the accused in restrictive housing for his own safety due to the inmate the accused allegedly attacked on 16 November 2018 threatened the accused. The Wyatt Facility contains no other housing unit, and the only way the accused could be prevented from having contact with the inmate was by placing the accused in restrictive housing.

i. While being held in restrictive housing at the Wyatt Facility, the accused was restricted to a [redacted] The accused was

able to request and receive items such as socks, sweatshirts, and boxers. The accused was also offered services like haircuts, the opportunity to meet with a pastor, and access to LexisNexis for legal research.

j. Beginning on 6 December 2018, the accused's status of restrictive housing was re-evaluated every week to determine its appropriateness. The accused had 12 different opportunities to voice any concerns or problems with his housing conditions to the Wyatt Facility officials.

k. On 2 January 2019, the accused stated during the weekly restrictive housing review that he had no issues with his housing situation at the Wyatt Facility.

l. On 3 January 2019, the defense submitted a Request for Redress, requesting the Commanding Officer, [redacted] to authorize transfer of the accused to the nearest military facility due to Wyatt Facility keeping the accused in restrictive housing.

m. On 9 January 2019, the accused stated during the weekly restrictive housing review that he had no issues with his housing situation at the Wyatt Facility.

n. On 15 January 2019, the Commanding Officer, [redacted] the denied the accused's Request for Redress, stating there was a "legitimate penological interest to control, preserve order, and prevent injury to CSSSN Brown."

o. On both 16 and 23 January 2019, the accused stated during the weekly restrictive housing review that he had no issue with his housing situation at the Wyatt Facility.

p. On 30 January 2019, the accused failed to complete the requisite reintegration program to start the process of getting out of restrictive housing. The program consisted of filling out a Federal Bureau of Prisons package that focused on "living with others." This package/program focused on communication skills, emotions – to include anger, unhealthy

behaviors, peers, relationship issues, learning how to handle social pressure, working effectively with authority figures, and benefits of a healthy relationship. The package states its goal is to "focus on skills that will help you adjust to incarceration. Making the most of your time here depends on learning to communicate effectively, managing your anger and building healthy relationships." These are all issues directly connected to the allegation of assault against the accused for attacking another inmate with fluids and his fists while he was in pretrial confinement. Because he refused to complete this program, he failed to begin the restrictive housing step down procedure that would return him to general population.

q. On 30 January 2019, the accused stated during weekly restrictive housing review that he had no issues with the housing situation at the Wyatt Facility. On this date, he again refused to start the step-down program. The Chief of Security also noted he "needs to complete the PS program for step-down."

r. On 31 January 2019, the accused, through counsel, filed an Article 138 complaint seeking relief from restrictive housing.

s. On 6 February 2019, the accused stated during weekly restrictive housing review that he had no issues with the housing situation at the Wyatt Facility. On this date, he again refused to start the step-down program.

t. The accused also filed an Article 138 complaint against the Commanding Officer, [redacted] On 25 March 2019, Commander, Submarine Squadron 12, provided a second endorsement on the complaint. The second endorsement stated "I have determined CSSSN Micah J. Brown has refuse to comply with reintegration procedures established by Wyatt and has provided no evidence that demonstrates he is being deprived of beneficial programs and

benefits available by similarly-situated service members serving pre-trial confinement in a military facility."

u. On 1 May 2019, the accused completed the requisite reintegration program and packet and was then transferred back to general population that same day. He continued to sleep at night in a private cell for his own protection.

v. On 10 June 2019, Commander, Submarine Force Atlantic, stated the accused's complaint was "not proper."

w. The accused spent a total of 166 days in restrictive housing with limitations on recreation. Since 1 May 2019 the accused has continued to reside in a cell in restrictive housing "pod." However, except for a few enumerated times, the accused has been permitted normal recreation in normal general population dormitory. This typically includes at least two hours of recreation, with a minimum of one hour outside recreation time. He is allowed to walk outside. He is allowed to recreate with the general population. He is allowed to watch TV. He has access to LexisNexis for case preparation. He is also allowed to shower at least five days a week.

x. On 13 August 2019, Wyatt received a complaint that the accused was "strong-arming," bullying, and threatening another inmate at Wyatt. This complaint was investigated. During this investigation, the accused was not allowed normal recreation with the general population at Wyatt. After a short investigation, the allegations were not substantiated. The accused was permitted to return to his normal recreation with the general population at Wyatt.

y. During his time at Wyatt, the accused has worn the same uniform as every other inmate. This uniform consists of khaki pants and khaki shirt.

z. In August 2019, the accused met with one of his expert consultants, [redacted]. The accused only met with her for a short time, and then cancelled the meeting with her because

he was "stressed out." From August 2019 until the date of this ruling, neither the accused nor any other member of the defense team has attempted to re-schedule this meeting with [redacted].

aa. On 4 September 2019, the accused was moved to a different pod, F-pod. He made several complaints related to his ability to access a microwave, cleaning supplies, law library, and hot water. Officials at Wyatt received these complaints and documented them on 5 September 2019. These issues were not raised again by the accused. Since this date, the accused has filed numerous motions with this Court that were handwritten and contained case law citations.

bb. On 5 September 2019 and 24 September 2019, the accused filed a complaint his sliding door in F-pod did not work. Officials at Wyatt received these complaints and documented them on 12 September 2019 and 25 September 2019.

cc. On 4 October 2019, Wyatt fixed the accused door he had previously filed a complaint about. To fix his door, the accused was placed in another cell with another inmate, Detainee [redacted]. The accused was placed in a cell with this Detainee for approximately 25 to 30 minutes. Detainee [redacted] is not a U.S. service member and his status as a detainee is unknown. Wyatt has acknowledged in their response to the accused on 24 October 2019 that they should not have done this and have stated it "was not done with intention or malice."

dd. On 24 May 2020, the accused was accused of fighting with another detainee at Wyatt. The officials at Wyatt reviewed the cameras and observed the accused assaulting another detainee with a sock that contained two bars of soap and three triple A batteries. The accused also threw human feces on the detainees' body and face after he struck him with the sock. The feces was located in a peanut butter jar that was found on the floor where the assault took place.

ee. The contract between the Navy and Wyatt states "the contractor shall provide separate inmate housing for pre-trial and post-trial (sentenced) personnel. It also states "double occupancy is only permitted if both occupants of cell are military members and they are not being detained for the same or related case.[2]

ff. On 13 February 2020, the government issued a subpoena to Wyatt for records related to a list of detainees the accused who the accused had been housed with. The subpoena also asked for a list of detainees and their pre or post trial status. This subpoena was issued in response to the Court ordering the government to retrieve this information for discovery purposes.

gg. From 7 September 2018 to 13 September 2018, the accused had a cellmate. The cellmate name was [redacted] Detainee [redacted] was not a member of the military. This information was provided to the government and the defense on 19 February 2020.

hh. From 13 September 2018 to 14 September, the accused had a cellmate. The cellmate name was [redacted] Detainee [redacted] was not a member of the military. This information was provided to the government and the defense on 19 February 2020.

ii. From August 2019 to 19 February 2020, the accused has been assigned to F-pod and H-pod. During this time he has not had a cellmate. This information was provided to the government and the defense on 19 February 2020.

jj. The accused has stated he was co-mingled with nine individuals who are not in the military.[3] These individuals include: [redacted]

[2] See AE 103.
[3] See AE 161.

kk. [redacted], on 6 March 2020, affirmed that the Wyatt Detention Facility only maintains records of detainees currently housed in each unit. The Facility does not maintain a record of past detainees housed in particular units. She also stated Wyatt does not differentiate pretrial and post-trial detainees when housing detainees in housing units.

3. **Principles of Law.**

"No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances required to insure his presence, but he may be subjected to minor punishment during that period for infractions of discipline."[4] By its terms and clear implications, Article 13, UCMJ, prohibits two types of activities involving the treatment of an accused prior to trial.[5] The two activities are (1) the intentional imposition of punishment on an accused before his or her guilt is established at trial (illegal pretrial punishment), and (2) arrest or pretrial confinement conditions that are more rigorous than necessary to ensure the accused's presence at trial (illegal pretrial confinement).[6]

The first prohibition of Article 13 involves a purpose or intent to punish, determined by examining the purposes served by the restriction or condition, and whether such purposes are reasonably related to a legitimate government objective.[7] For an Article 13 violation to occur, the record "must disclose an intent to punish on the part of the government."[8] In looking at the intent of the command, "[a] court must decide whether the disability imposed for punishment or

[4] Article 13, U.C.M.J.
[5] *United States v. McCarthy*, 47 M.J. 162, 165 (C.A.A.F. 1997).
[6] *United States v. Zarbatany*, 70 M.J. 169, 169 (C.A.A.F. 2010).
[7] *Id.*
[8] *United States v. Howell*, 75 M.J. 386, 394 (C.A.A.F. 2016).

whether it is but an incident of some other legitimate governmental purpose."[9] In the absence of a showing of punitive intent, the government action "does not, without more, amount to 'punishment.'"[10]

The military justice system recognizes "three types of credit on sentence for pretrial confinement: (1) *Allen* credit, (2) R.C.M. 305(k) credit, and (3) other credits for illegal pretrial confinement."[11] "The credits are usually cumulative."[12] "Credit against the maximum term … should be given to a defendant for all time spent in custody as a result of the criminal charge for which the … sentence is imposed … specifically includ[ing] credit for time spent in custody prior to trial."[13] An accused is entitled to one day of credit for every day in pretrial confinement.[14] "The military judge shall order administrative credit under [R.C.M. 305(k)] for any pretrial confinement served as a result of an abuse of discretion or failure to comply with the provisions of [R.C.M. 305](f), (h), or (i)."[15] "The exercise of discretion implies conscientious judgment, not arbitrary action … and is directed by reason and conscience to a just result."[16] An abuse of discretion "does not imply a bad motive … but can be the failure to apply the principles of law applicable to the situation at hand."[17]

4. **Conclusions of Law**.

a. **Article 13 Credit**

[9] *United States v. Palmiter*, 20 M.J. 90, 95 (C.M.A. 1985) (citing *Bell v. Wolfish*, 441 U.S. 520, 539, 99 S.Ct. at 1874, citing *Fleming v. Nestor*, 363 U.S. 603, 617, 80 S.Ct. 1367, 1376, 4 L.Ed.2d 1435 (1960)).
[10] *United States v. James*, 28 M.J. 214, 216 (C.M.A. 1989) (quoting *Wolfish*, 441 U.S. at 539).
[11] *United States v. Fisher*, 37 M.J. 812, 816 (C.M.R. 1993).
[12] *Id.*
[13] *United States v. Allen*, 17 M.J. 126, 128 (C.M.A. 1984).
[14] *Fisher*, 37 M.J. at 816.
[15] R.C.M. 305(j)(2). *See Fisher*, 37 M.J. at 816.
[16] *Fisher*, 37 M.J. at 816; (citing *Burns v. United States*, 287 U.S. 216, 223 (1932)).
[17] *Fisher*, 37 M.J. 816-817; (quoting *United States v. Hawks*, 19 M.J. 736, 738 (A.F.C.M.R. 1984)).

In their various motions, the defense has asserted the government has punished the accused during his pretrial confinement by placing him in restrictive housing at the Naval Bring in Jacksonville, FL. The defense has also asserted the accused has been punished at Wyatt because of his living conditions, specifically stating they punished him at Wyatt by: co-mingling him with post-trial detainees and non-military detainees, making him wear the Wyatt uniform instead of his Navy uniform, and his overall living conditions at Wyatt – to include having him be permanently housed in restrictive housing. The Court disagrees and concludes the defense has presented no evidence of a punitive intent and therefore has failed to meet its burden of establishing a violation of Article 13.[18] In addition, the facts, as presented to this Court, do not show that the conditions of the accused's pretrial confinement are sufficiently egregious to give rise to a permissive inference that he was being punished or that the conditions at Wyatt or the Jacksonville Brig were more rigorous than necessary.[19]

The Court finds government did not intend to punish the accused when they placed him in restrictive housing when he first entered pretrial confinement at the Naval Brig in Jacksonville, Florida. Per SECNAVINST 1640.9D, dated 15 May 2019, reference SECNAV M-1640.1, 4205, "newly confined prisoners generally will be housed in an orientation quarters, that may be located in the [restrictive housing unit], and administered separately from post-orientation prisoners."[20] Based on this guidance and the evidence currently pending before the Court, the Court finds the government acted reasonable in initially placing the accused in a

[18] *United States v. Palmiter*, 20 M.J. 90, 95 (C.M.A. 1985) (*quoting Bell v. Wolfish*, 441 U.S. 520, 539, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979)). *See United States v. Guardado*, 79 M.J. 301, 303 (C.A.A.F. 2020) and *Howell v. United States*, 75 M.J. 386, 393 (C.A.A.F. 2016).
[19] *United States v. King*, 61 M.J. 225, 227-228 (C.A.A.F. 2005).
[20] The court recognizes this version of the SECNAV instruction was not in effect at the time the accused was placed into pre-trial confinement in 2018; however, the previous version, SECNAVINST 1640.9, has substantially the same guidelines.

restrictive housing while he underwent his orientation to his pretrial confinement facility. The Court further finds no intent to punish the accused or that his conditions at the Jacksonville Brig were more rigorous than necessary.

The Court finds the government has not intended to punish the accused at the Wyatt facility during his pre-trial confinement.

First, the Court does not find the government is punishing the accused by making him wear the khaki shirt and pants proscribed by the Wyatt facility. SECNAVINST 1640.1, 8210 states "all pretrial and post-trial prisoners…regardless of service…will wear the standardized prisoners uniform for the Service MCF they are confined in." In the accused case, he is properly confined in civilian confinement facility. He has been afforded and wears the standard uniform of this facility. There is no evidence before the Court he has been forced to wear anything else.[21] The Court finds this to be in compliance with SECNAVINST 1640.9D and SECNAVINST 1640.1, 8210. This is also in compliance with the contract between Wyatt and the U.S. Navy.[22] The Court also finds that any time the accused spent in restrictive housing (without being able to go to normal recreation with the general population), segregation, or had his recreation and privileges removed to be justified. The accused is alleged to have assaulted two different individuals in Wyatt in a violet manner with a weapon. For both allegations, Wyatt appropriately investigated the cases and followed their normal procedures. This also includes the other allegation against the accused of "strong-arming" people in his pod. All guidelines were

[21] The Court notes that for all sessions of court the accused has been attired in his proper U.S. Navy uniform, to include all ribbons and rank insignia.
[22] See attachment to government's motion, contract states "the contractor shall provide initial issue of uniform to include…uniform pants and uniform shirt."

followed. As such, the Court finds no intent to punish the accused during his pretrial confinement time at Wyatt.

Second, the Court does not find the accused's conditions at Wyatt to be more rigorous than necessary and do not show an intent by the government to punish the accused. There is also no evidence before the Court the government has ever intended to punish the accused during his pretrial confinement. The evidence clearly shows the accused, while at Wyatt, has been living in berthing located in restrictive house. The evidence also shows that the majority of the time the accused has not had a cell mate and that he has only been restricted to this berthing located in restrictive housing during non-recreational hours at Wyatt. During recreational hours, unless the accused has been under investigation for an infraction, the accused has been permitted normal recreation with the general population at Wyatt. He has been permitted to go outside for at least an hour. He has been permitted access to the law library.[23] The accused has been able to communicate with standby counsel. The accused has been permitted to have his case files in his cell. There is no evidence he has not received appropriate clothing, hygiene products, and masks for COVID-19. And, while the accused has filed several complaints throughout his time in pretrial confinement, there is simply no evidence before this Court that any issues related to his conditions at Wyatt have not been addressed or attempted to be addressed by the officials at Wyatt. Lastly, the accused has been co-mingled with civilian detainees and possibly post-trial detainees; however, there is no evidence this was done to punish the accused. This co-mingling appears to be an administrative oversight by Wyatt. Based on reasons above, the Court finds no intent to punish the accused at Wyatt or that his conditions at Wyatt were more rigorous than

[23] As evidence of this, the Court notes the accused has filed numerous hand-written motions with relevant case law citations. It is clear to the Court the accused has been able to access LexisNexis and other legal resources during this case.

necessary. The Court finds the accused is not entitled to any confinement credit under Article 13, UCMJ.

b. **R.C.M. 305(k) Credit**

While the Court has found that co-mingling of the accused with civilian detainee and possibly post-trial detainees at Wyatt to not be a violation of Article 13, UCMJ, the Court does find that the co-mingling violated the contract between the U.S. Navy and Wyatt. The Court also finds that the co-mingling does not follow the guidelines of SECNAVINST 1640.9D (SECNAV M-1640.1). SECNAV M-1640.1 states "although preferred, there is no requirement that prisoners of different legal status (pre-trial or post-trial) be berthed separately.[24] It also states "every effort will be made to maintain separate berthing where possible and when staffing allows."[25] SECNAVINST M-1640.1, 8101 further states records should be "maintained to provide accurate, current, and readily available information on individual prisoners."

Based on the evidence presented, it is clear to the Court the accused was housed in a cell with two separate non-military detainees at Wyatt for a total of at least eight days. No evidence was presented that this co-mingling was necessary based on space availability at Wyatt. No evidence was presented to show every effort was made to ensure this did not happen. This co-mingling of the accused with non-military detainees is a direct violation of the contract between the U.S. Navy and Wyatt, which states "the contractor shall provide single occupancy cells for military personnel for the entire time of confinement..." Therefore, based on Wyatt not following the contract nor clearly complying with SECNAVINST M-1640.1, the Court orders a total of **60 days** confinement credit for these two co-mingling instances. This credit reflects 30

[24] SECNAVINST 1640.9D, dated 15 May 2019, reference SECNAV M-1640.1, 4205.
[25] *Id.*

days for each person the accused was wrongfully forced to occupy his cell with during his time at Wyatt.

In addition, there is evidence the accused was co-mingled with nine other detainees at Wyatt. While based on the evidence it does not appear these nine individuals were ever housed with the accused in his cell, the Court does find the accused was co-mingled with these individuals within his pod and the Wyatt facility.[26] This co-mingling likely occurred during recreation time and during work details. No evidence was presented that this co-mingling was necessary based on space availability at Wyatt. No evidence was presented to show every effort was made to ensure this did not happen. It is unclear to the Court if these detainees were pretrial detainees or post-trial detainees. It is also unclear if these individuals are foreign nationals, as alleged in defense's Article 12 motion before this Court.[27] No evidence regarding the status of these nine individuals was presented to the Court. The only evidence before the Court is that the Court ordered discovery, and that Wyatt does not keep records of past detainees. This assertion by Wyatt also appears to be a violation of SECNAVINST M-1640.1 8101, which states that states records should be "maintained to provide accurate, current, and readily available information on individual prisoners." If Wyatt had maintained records in accordance with SECNAVINST M-1640.1, 8101, it likely the Court would have the answers as to the status of these detainees. In addition, even if it is not Wyatt's common practice to keep such records, the government still had an obligation to ensure the applicable SECNAVINST instructions were being followed. The government made a decision to put the accused in pretrial confinement in

[26] This co-mingling does not include Detainee [redacted]. The Court finds Wyatt had a legit government interest in co-mingling the accused on this occasion – namely fixing the door to the accused's cell he had previously filed a complaint about to Wyatt.

[27] See also AE 103 – contract between U.S. Navy and Wyatt stating "No member of the armed forces may be placed in confinement in immediate associate with enemy prisoners or other foreign nationals not members of the armed forces."

Wyatt and not a military brig; therefore, the accused should not be held responsible for failing to put forth evidence to this Court when the government's confinement facility of choice does not keep records in accordance with SECNAVINST M-1640.1. Because the government has failed to meet its burden to show it has complied with its own instructions, the Court orders a total **90 days** confinement credit for this co-mingling and lack of record keeping. This credit reflects 60 days for the co-mingling of the accused with the nine detainees and another 30 days for the government's failure to follow SECNAVINST 1640.1 in regards to record keeping.[28]

c. **Pre-Trial Confinement**

Based on the findings of fact, conclusions of law, and reasoning it its three rulings denying the defense's motion to release the accused from pre-trial confinement, the Court denies the defense's motions for credit based on the accused being wrongfully held in pre-trial confinement.

d. **Sixth Amendment**

Based on the Court's rationale above and in its previous rulings in the case denying the defense's motions based on Sixth Amendment violations, the Court denies the defense's motion to receive pre-trial credit based on Sixth Amendment violations in this case. Specifically, the defense's failure to re-schedule any appointments or meetings with any of their experts is not a product of the accused being in pretrial confinement or government interference.

e. **Eighth Amendment**

Under the Eighth Amendment, the Constitution prohibits the infliction of "cruel and unusual punishment."[29] Article 55, UCMJ, states that various specified punishments, as well as

[28] Credit, in part, is ordered based on the issues raised in AE 114; however, the Court does not find there to be a violation of Article 12, UCMJ as there is no evidence to support an Article 12, UCMJ violation. This is due in part to the lack of record keeping by the government, which is a reason the Court has ordered credit in this case.

[29] *United States v. Brennan*, 58 M.J. 351, 353 (C.A.A.F. 2003).

"any other cruel or unusual punishment, may not be adjudged by a court-martial or inflicted upon any person subject to [the UCMJ]."[30] The Supreme Court's interpretation of the Eighth Amendment applies to a claim under Article 55.[31] The Eighth Amendment does not mandate comfortable prisons, but neither does it permit inhumane ones. To support a claim that such conditions of confinement violate the Eighth Amendment, the military prisoner must show (1) an objectively, sufficiently serious act or omission resulting in the denial of necessities, (2) culpable state of mind on the part of the prison officials amounting to deliberate indifference to the prisoner's health and safety, ands exhausted the prisoner-grievance system and has petitioned for relief under Article 138, UCMJ.[32]

The Court agrees with the government's assertions that the Eighth Amendment is currently inapplicable to the accused's case as a punishment has not been adjudged in this case. In addition, based on the rationale above, the Court has found there has been no pretrial punishment in this case. Nevertheless, even if the Eight Amendment did apply, the Court would have found that there has been no violation of the Eight Amendment or Article 55, UCMJ. The facts in this case do not rise to the level of cruel and unusual punishment. While there have been some instances of the government not following its own instructions, the Court finds there have been no sufficiently serious act resulting in the denial of necessities, no culpable state of mind of indifference towards a prisoner's health and safety, and that the accused's condition in pretrial confinement is justified. The defense's request for credit based on Eight Amendment violation is denied.

4. **Ruling.**

The defense motions for pre-trial credit are **GRANTED IN PART** and **DENIED IN**

---

[30] *Id.*
[31] *Id.* (citing *United States v. White*, 54 M.J. 469, 473 (C.A.A.F. 2001).
[32] *United States v. Lovett*, 63 M.J. 211, 215 (C.A.A.F. 2006).

PART. The accused will be credited with **150 days** of confinement credit as detailed above

So **ORDERED** this 7th day of October 2020.

[redacted]
R.J. STORMER
CDR, JAGC, USN
Military Judge

APPELLATE EXHIBIT CLXXVI
PAGE 17 OF 17
APPENDED PAGE

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

UNITED STATES **v.** **MICAH J. BROWN** **CSSSN, U.S. NAVY**	**RULING ON DEFENSE MOTION FOR AN ABATEMENT AND WITNESS AVAILABILITY** **9 October 2020**

1. **Nature of Ruling.** The defense has filed a several motions in this case to abate the proceedings in this case due to the unavailability of [redacted] and [redacted].[1] The government opposed the defense's motions and have stated they will not object to the defense using alternate means of testimony for both [redacted] and [redacted] This ruling covers all defense motions regarding abatement, dismissal of charges under R.C.M. 703, and unavailability.

2. **Findings of Fact.**

a. The accused is charged with two specifications under Article 80, U.C.M.J. (attempted premeditated murder, attempted unpremeditated murder) and a sole specification under Article 128, U.C.M.J. (aggravated assault with intent to commit grievous bodily harm) for allegedly stabbing LSS2[redacted]. with a knife.

b. On 31 July 2020, the government served a subpoena on [redacted] to appear as a witness in the case of United States v. Brown. Neither [redacted] nor Inpatient Services have questioned the validity and the enforcement of this subpoena.

[1] See AE 129, AE 139, and AE 146.
[2] See AE 140, AE 147, and AE 149.

c. On 31 July 2020, [redacted], through her employer Inpatient Services, filed a motion with this Court to quash the government's motion. Their motion has argued the government's subpoena was "unreasonable" and "oppressive" under R.C.M. 703(g)(3)(G).

d. [redacted] is a medical doctor. She is a trauma surgeon. She is currently the [redacted], which is a part of Inpatient Services. [redacted] is a level 2 trauma center in the state of Florida and is essential to the health care of the surrounding community for the services it provides. It has been designated as a trauma facility by the Florida Department of Health.

e. As the [redacted], [redacted] position is required by Florida state statutes. Her presence is necessary for the continued functioning of the trauma center for the local community surrounding [redacted]. Her presence is also required by Florida statutes. Any extended absence by her as [redacted] would render the facility unable to function as a trauma center in Florida because the hospital would not have the proper oversight as required by Florida statutes.

f. The President of the United States has declared a nation emergency due to the spread of COVID-19. As of the date of this ruling, COVID-19 continues to be a worldwide global pandemic. COVID-19 continues to be a public health crisis in the United States. The Court also adopts its findings of facts from its Continuance Order issued on 7 April 2020 for this motion and the facts related to COVID-19. The Court also adopts finding of fact d. from its Ruling on Defense Motions for Appropriate Relief: Relief from Pretrial Confinement, dated 24 August 2020.

g. The State of Connecticut continues to have a public health emergency and has orders for the travel into the state. This includes a 14 day quarantine for travelers from certain states.

As of 29 September, this included Florida.[3] [redacted], regardless of Florida state laws and rules, also has a 14 day quarantine period for any healthcare worker who travels outside of the state.

h. COVID-19 has continued to increase in the state of Florida as of 25 August 2020. COVID-19 continues to be present in the state of Florida as of the date of this ruling.

i. OPMC has a shortage of qualified trauma surgeons.

j. As a [redacted], [redacted] physical presence at the [redacted] is crucial for [redacted] to continue to not only treat trauma patients, but patients with COVID-19.

k. [redacted] remains on a diversion for transfers of patients due to over-crowding and capacity issues related to COVID-19 patients. Staffing at [redacted] remains a significant challenge for this health provider facility due health care providers having to leave call rotations related to COVID-19 illness or quarantine issues. This has created a decrease in the number of available health care providers for [redacted], even with [redacted] in the rotation of health care providers and medical trauma doctors/surgeons. Taking [redacted] out the rotation would significantly hurt [redacted] health care mission and put an incredible strain on the other staff members at [redacted]

l. All COVID-19 quarantine precautions for [redacted] are still in effect as of this motion.

m. On 5 October 2020, the Court granted [redacted] motion to quash the government's subpoena.[4]

n. On 11 June 2020, the defense filed a motion to abate the proceeds until the Convening Authority rescinded its restriction of movement (ROM) requirements for witnesses. The accused, through standby counsel, asked that should the Court deny the abatement, they be granted a continuance until 14 September 2020 from the trial start date of 31 July 2020.[5] The

[3] See https://portal.ct.gov/coronavirus/travel.
[4] See Court's ruling on Motion to Quash, dated 5 October 2020.
[5] See AE 129.

government opposed the motion. On this date, neither standby counsel had sought a ROM waiver from their chain of command.[6]

o. On 29 June 2020, the Court ordered the accused to provide an affidavit on his position in regard to a continuance request. The accused refused to provide an affidavit to the Court asking for a continuance. On 5 July 2020, the accused notified the Court he did not desire a continuance and wanted to proceed to trial in August with both [redacted] and [redacted] present. The continuance motion submitted by the defense on 11 June 2020 was withdrawn by the accused.

p. On 8 July 2020, [redacted], the defense's expert consultant and witness, forwarded an email to standby counsel. In this email, [redacted] noted the COVID-19 pandemic and indicated he would not want to travel because of COVID-19 and because he was in a "high risk" category in regards to COVID-19. He also stated he had sustained a [redacted] and has been in constant pain since the [redacted]. He noted he had [redacted] scheduled for an [redacted] scheduled for 29 September 2020 to address [redacted]

q. On 29 July 2020, [redacted] doctor at [redacted] wrote a letter that was received by the Court. It noted that she strongly advised him to not travel during COVID-19. She deemed him a "high risk" because he is an [redacted]. She stated he has a high risk of death or severe complications if he contracted COVID-19 and that his risk for being exposed to the virus was exponentially increased by any travel. She also stated he could only walk around 25 feet without needing a break because of [redacted]. She stated he is also on [redacted] to

[6] The government subsequently noted to the Court and the defense that the Convening Authority and all other government officials would respect and accept ROM waivers from the standby counsels' and the military judge's chains of command.

relieve his pain and it can cause [redacted]. She stated he would need six weeks of [redacted] on 29 September 2020.

r. On 31 July 2020, the Court delayed the start of the trial to address the unavailability of [redacted] and [redacted].

s. At an Article 39(a) session on 4 August 2020, the Court found [redacted] unavailable under M.R.E. 804(a)(4). The Court also found there was no adequate substitute for his testimony and that his testimony was essential to the accused getting a fair trial. The defense requested an abatement. The Court denied this request, but instead granted a continuance until 12 October 2020. The Court also ordered the government to assist the defense in looking for an "adequate substitute" for [redacted] testimony as an expert witness.

t. On 10 August 2020, the government provided the defense with a list of nine different forensic pathologists who could potentially be deemed adequate substitutes for [redacted] expert witness testimony. CDR Lewis, trial counsel, emailed the information to both standby counsel. They provided the names and contact information for all nine people. The government either spoke to or attempted to contact all nine people. The government also provided a resource website, [redacted] Lastly, on this date, CDR Lewis confirmed she had spoken with one of the experts, [redacted]. CDR Lewis provided [redacted] personal cell phone to standby counsel. From 4 August 2020 until the date of this ruling, there is no evidence any member of the defense team ever reached out to any of the nine people or attempted to contact anyone else except [redacted].

u. On 11 August 2020, the Court emailed the government to get an update on the search for a new expert witness for the accused. The government responded on 12 August 2020. The government confirmed [redacted] would be available for an October trial date and that the

government was standing by to process the administrative paperwork to make her an expert consultant.

v. On 14 August 2020, the Court held another Article 39(a) session. At this session, the Court ordered [redacted] as an expert consultant for the defense. On this date, the defense team had still not spoken to [redacted]. The Court set trial dates, with the trial to begin on 12 October 2020. Following the hearing, the defense submitted a demand for speedy trial.

w. On 14 August 2020, the accused was afforded an opportunity to do an initial consultation with [redacted] in the DSO North spaces on base in Groton, CT. He was also afforded time to request the convening authority further approve more funds to consult with [redacted]. The accused refused the opportunity to do both. There is no evidence before the Court that any member of the defense team spoke to [redacted], despite her being available on this day.

x. On 16 August 2020, defense submitted a request to have [redacted] appointed as an expert consultant. On 18 August 2020, the trial counsel endorsed this request. On 19 August 2020, the convening authority approved [redacted] as an expert consultant for the defense. There has been no evidence presented to the Court that the amount of time approved by the convening authority was not an adequate amount of time for the defense to consultant with [redacted]

y. On 26 August 2020, an Article 39(a) session was held. At this session, the defense stated they had still not spoken with [redacted]. The Court clarifiedto the parties that it considered both [redacted] and [redacted] to be expert consultants for the defense. The Court extended the deadline for the defense to file an objection to [redacted] not being an adequate substitute for [redacted] as an expert witness under R.C.M. 703.

z. On 24 September 2020, an Article 39(a) session was held. Before this session, the defense filed another motion stating [redacted] was not an adequate substitute. The Court took testimony from [redacted] and ruled she was not an adequate substitute for [redacted] as an expert witness. The Court ruled [redacted] was still unavailable and would be deemed unavailable for the 12 October trial dates because of the same medical conditions discussed above. [redacted] testified at this Article 39(a) session that he would be available the first week of December 2020 to testify as an expert witness. This is the earliest he could travel given the time he needs to recover from his [redacted].

aa. At this 24 September 2020 Article 39(a) session, the Court asked the defense their position on the trial starting as scheduled, to begin on 12 October 2020. The defense stated they did not want a continuance and wanted to start trial on 12 October. The Court then set a deadline of 1 October for any further motions to be filed in this case, to include any continuance request. The Court stated at the Article 39(a) session that any continuance request from the defense related to [redacted] would likely be looked upon favorably and that the government should be prepared to go to trial on the earliest dates [redacted] would be available if the defense requested a continuance.

bb. As of the date of this ruling the defense has not requested any further continuances in this case.

cc. The Court held an 802 on 9 October 2020. At this 802, the defense stated they had no other issues to raise with the Court before the trial start date of 12 October 2020.

3. **Principles of Law.**

An accused has a right to the production of witnesses whose testimony is relevant and necessary. R.C.M. 703(b)(1). The discussion to R.C.M. 703 states that "Relevant testimony is

necessary, when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue." The defense must demonstrate the witnesses are material and necessary before any order to produce is required. *See* United States v. *Allen*, 31 M.J. 572, 610 (N.M.C.M.R. 1990). Materiality is defined as a "reasonable likelihood that the evidence could have affected the judgment of the military judge or the court members." *Id.* at 610. "A witness is material when he either negates the government's evidence or supports the defense." *Id.* Character evidence can be material. *See United States v. Sweeny*, 34 C.M.R. 379 (C.M.A. 1964); *United States v. Williams*, 3 M.J. 239 (C.M.A. 1977).

"A party is not entitled to the presence of a witness who is unavailable within the meaning of [M.R.E. 804(a)]."[7] "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 are no adequate substitutes for such testimony, the military judge shall grant a continuance or other relief in order to attempt to secure the witness' presence or shall abate the proceedings."[8]

A military judge's ruling to abate the proceedings can be tantamount to a termination of the proceedings.[9] The military judge's abatement order is often a situation where intractability has set in because the government had definitively decided it would not produce the responsive correspondence.[10] M.R.E. 804(a) provides a list of reasons in which a declarant is deemed to be declared unavailable as witness.

4. <u>Conclusions of Law</u>.

---

[7] R.C.M. 703.

[8] *Id.*

[9] See *United States v. True*, 28 M.J. 1, 2 (C.M.A. 1989) (holding the military judge's abatement was the "functional equivalent" of terminating the proceedings).

[10] *United States v. Harding*, 63 M.J. 65, 67 (C.A.A.F. 2006) (holding that the military judge's abatement did not terminate the proceedings where the Government was willing to comply with the military judge's order but was unable to persuade the United States Marshals to timely enforce a warrant).

a. [redacted]

[redacted] is an expert consultant for the defense. The defense has also declared him to be an expert witness, and the government has agreed that he is an expert witness whose testimony is "relevant and necessary" to the defense.[11] However, based on his medical infirmities and his current existing medical conditions, the Court finds that [redacted] is unavailable under M.R.E. 804(a)(4). The Court relies on its previously articulated reasons it orally put on the record as to why [redacted] medical conditions made him unavailable in August and why they make him unavailable now. It is clear to the Court, based on evidence from [redacted] doctor and [redacted] testimony, that he has a current medical condition that makes him unavailable to be physically present at the trial as it is currently scheduled.[12] The Court has ruled that [redacted] is not an adequate substitute to [redacted] as an expert witness. There is currently not an adequate substitute for [redacted] testimony.

In a case such as this, R.C.M. 703 states the military judge "shall grant a continuance…in order to attempt to obtain the presence of the witness." The defense has asked this Court to abate the court proceeds because of [redacted] unavailability and have stated that this is the only proper remedy under R.C.M. 703. The Court disagrees. The remedies listed in R.C.M. 703(b)(3) are intended to secure the physical presence of a witness at a court-martial whose testimony is of central importance to an issue that is essential to a fair trial. An abatement is not an appropriate remedy in this case at this time. The Court does not find that intractability has set in. First, the government has never opposed the production of [redacted]. It is evident to the Court that the government has done everything they can to ensure the defense receives a fair trial

[11] R.C.M. 703.

[redacted]

in regards to this expert testimony. There have been no issues regarding [redacted] funding or travel payment. The only reason [redacted] is unavailable and not able to attend the trial is because of his physical infirmities. The government also jumped through several hoops to secure another expert consultant for the defense and tried to get the defense an adequate substitute for [redacted] testimony. The Court notes how quickly the government found several possible experts and then approved one once they received the necessary paperwork. The Court also notes that there is no evidence before it that the defense did anything to secure any other experts other than relying on all the government's work in setting up [redacted] as an expert consultant for them. The defense could have been proactive and tried to find a substitute; however, they chose not to look for another expert. Second, this is not a situation in which [redacted] will never be available. [redacted] has testified he will be available the entire month of December to participate in this trial. Third, the defense has the ability to request a continuance in this case until December 2020 to secure [redacted]. The Court notes here and has noted before that it would have very likely granted any continuance request by the defense.[13] While the Court understands the defense in this case has also demanded a speedy trial and filed another speedy trial motion, the Court notes again that a continuance is an option under R.C.M. 703(b)(3) that would secure the unavailable witness. The defense has chosen not to request the continuance. This decision to not request a continuance does not mean an abatement should be automatically granted. Rather, because the Court finds that a continuance would in fact secure the physical presence [redacted] at trial, an abatement is not an appropriate remedy at this time.

The Court denies the defense's motion to dismiss charges under R.C.M. 703 and their motions for an abatement due to [redacted] availability. The trial will begin on 12 October

[13] This includes beginning trial on the first date [redacted] is available in December 2020.

2020. Should the defense request to have [redacted] testify telephonically or via VTC, the Court will allow them to call him as a witness via those means. The Court will also allow the defense to introduce a stipulation of expected testimony should they desire to present his testimony in that fashion. The government has also articulated to the defense and the Court that they would not object to [redacted] testifying remotely.

b. [redacted]

[redacted] is a witness for the defense. The government has agreed that her testimony is "relevant and necessary" to the defense.[14] However, based on her not being amendable to process and for other reasonable causes, the Court finds [redacted] is unavailable under M.R.E. 804(a)(4). The Court granted [redacted] motion to quash. The Court relies on the findings of fact and the rationale in its ruling on [redacted] motion to quash as to why she is not amendable to the process. The Court also relies on the findings of fact and rationale in this ruling as to why [redacted] has a reasonable cause to be unavailable. Because of these reasons, and the fact that there is a deposition of [redacted], the Court finds [redacted] unavailable under M.R.E. 804(a)(6).

The Court also finds there is an adequate substitute for [redacted] testimony. The government requested, and the Court ordered (over defense's objection for its own witness) a deposition of [redacted]. This deposition took place on 24 September 2020 in Jacksonville, Florida. The accused was physically present with standby counsel to ask [redacted] questions. She was sworn in as a witness. It was video recorded. A transcript was made of the deposition. After reviewing the transcript and video of the deposition, the Court finds the accused was able to ask his questions to [redacted]. The government was able to cross-examine [redacted]. For these reasons, the Court deems this deposition an adequate substitute for her testimony.

[14] R.C.M. 703.

Because of the rationale above, the Court denies the defense's motion to dismiss charges under R.C.M. 703 and their motions for an abatement due to [redacted] availability. The trial will begin on 12 October 2020. The Court will allow the defense to introduce her deposition as an adequate substitute should they decided to offer it as evidence.

4. **Ruling.**

Accordingly, the defense's motions are **DENIED**.

So **ORDERED** this 9th day of October, 2020.

[redacted]
R.J. STORMER
CDR, JAGC, USN
Military Judge

APPELLATE EXHIBIT CLXXXI
PAGE 12 OF 12
APPENDED PAGE

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

UNITED STATES **v.** **MICAH J. BROWN** **CSSSN, U.S. NAVY**	**RULING ON DEFENSE MOTION FOR VIOLATIONS OF ACCUSED'S RIGHT TO SPEEDY TRIAL** **9 October 2020**

1. **Nature of Ruling.** The defense moves the Court, pursuant to Sixth Amendment, Article 10, UCMJ and Rules for Court-Martial (R.C.M.) 707 to dismiss all charges and specifications due to alleged violations of the accused's right to a speedy trial.[1] The government opposed the defense's motions.[2] Upon consideration of the defense's motions, the government's responses, and the evidence and arguments presented by counsel and the accused, the Court makes the following findings of fact and conclusions of law.

2. **Findings of Fact.**

a. The accused is charged with two specifications under Article 80, U.C.M.J. (attempted premeditated murder, attempted unpremeditated murder) and a sole specification under Article 128, U.C.M.J. (aggravated assault with intent to commit grievous bodily harm) for allegedly stabbing LSS2 [redacted] with a knife.

b. The Court adopts its findings of fact included in its 28 August 2019 ruling denying the defense's motion to dismiss charges due to violations of the accused's right to a speedy trial.

[1] See AE 152, AE 153, and AE 157.
[2] See AE 154.

c. On 10 September 2019, the defense filed a continuance from its scheduled start date of 23 September 2019. The defense requested a new trial start date of 11 November 2019. The defense stated in their continuance request that one of their expert witness, [redacted], was no longer available the week of 23 September due to medical reasons. The defense also stated they had logistical issues obtaining the accused medical records. This was due in part to the defense team's inability to get the accused to sign the appropriate required waivers.

d. On 17 September 2019, the government filed a motion in response stating they did not oppose the continuance, but they requested the Court to docket the case to begin the week of 6 January 2020 due to the unavailability of several of the witnesses because of operational military necessity. The witnesses were crew members of the [redacted]. The defense, armed with this knowledge, still requested their continuance.

e. On 27 September 2019, the Court granted the defense's motion for a continuance, but docketed the case to begin on 6 January 2020 due to witnesses not being available due to operational military necessity associated with their sea duties onboard the [redacted] in November 2019. [redacted] is an operational submarine in the U.S. Navy.

f. In November 2019, the government requested the Court continue the case from 6 January 2020 to begin on 11 February due to the same essential witnesses now being unavailable due to military necessities in January 2020. The defense objected to the continuance request. The defense also stated the counsel and defense experts were unavailable until 23 March 2020. Based on the essential witnesses being operationally necessary to their command, the [redacted], and the fact they were going to be unavailable due to military necessity, the Court granted the government's continuance request. Four of the witnesses were also on the defense's witness list. The Court set the trial to begin on 23 March 2020.

g. In December 2019, the accused elected to go *pro se*. The Court adopts it findings of fact included in its 20 February 2020 order regarding standby counsel.

h. The Court adopts its findings of fact included in its 7 April 2020 order granting the defense's request for a continuance until 31 July 2020.

i. The Court granted the government's request for a continuance on 3 August 2020; however, the Court set a trial date of 12 October 2020. The Court granted this continuance request to give the parties time to find an adequate substitute for [redacted] testimony, who the Court has deemed unavailable.

j. On 31 July 2020, the government served a subpoena on [redacted] to appear as a witness in the case of United States v. Brown. Neither [redacted] nor Inpatient Services have questioned the validity and the enforcement of this subpoena.

k. On 31 July 2020, [redacted], through her employer Inpatient Services, filed a motion with this Court to quash the government's motion. Their motion has argued the government's subpoena was "unreasonable" and "oppressive" under R.C.M. 703(g)(3)(G).

l. [redacted] is a medical doctor. She is a trauma surgeon. She is currently the [redacted] which is a part of Inpatient Services. [redacted] is a level 2 trauma center in the state of Florida and is essential to the health care of the surrounding community for the services it provides. It has been designated as a trauma facility by the Florida Department of Health.

m. As the [redacted] at OPMC, [redacted] position is required by Florida state statutes. Her presence is necessary for the continued functioning of the trauma center for the local community surrounding [redacted] Her presence is also required by Florida statutes. Any extended absence by her as [redacted] would render the facility unable to

function as a trauma center in Florida because the hospital would not have the proper oversight as required by Florida statutes.

n. The President of the United States has declared a nation emergency due to the spread of COVID-19. As of the date of this ruling, COVID-19 continues to be a worldwide global pandemic. COVID-19 continues to be a public health crisis in the United States. The Court also adopts finding of fact d. from its Ruling on Defense Motions for Appropriate Relief: Relief from Pretrial Confinement, dated 24 August 2020.

o. The State of Connecticut continues to have a public health emergency and has orders for the travel into the state. This includes a 14 day quarantine for travelers from certain states. As of 29 September, this included Florida.[3] [redacted], regardless of Florida state laws and rules, also has a 14 day quarantine period for any healthcare worker who travels outside of the state.

p. COVID-19 has continued to increase in the state of Florida as of 25 August 2020. COVID-19 continues to be present in the state of Florida as of the date of this ruling.

q. [redacted] has a shortage of qualified trauma surgeons.

r. As a [redacted] at OPMC, [redacted] physical presence at the [redacted] is crucial for [redacted] to continue to not only treat trauma patients, but patients with COVID-19.

s. [redacted] remains on a diversion for transfers of patients due to over-crowding and capacity issues related to COVID-19 patients. Staffing at [redacted] remains a significant challenge for this health provider facility due health care providers having to leave call rotations related to COVID-19 illness or quarantine issues. This has created a decrease in the number of available health care providers for [redacted], even with [redacted] in the rotation of health care providers and

[3] See https://portal.ct.gov/coronavirus/travel

medical trauma doctors/surgeons. Taking [redacted] out the rotation would significantly hurt [redacted] health care mission and put an incredible strain on the other staff members at [redacted].

t. All COVID-19 quarantine precautions for [redacted] are still in effect as of this motion.

u. On 5 October 2020, the Court granted [redacted] motion to quash the government's subpoena.[4]

v. On 11 June 2020, the defense filed a motion to abate the proceeds until the Covening Authority rescinded its restriction of movement (ROM) requirements for witnesses. The accused, through standby counsel, asked that should the Court deny the abatement, they be granted a continuance until 14 September 2020 from the trial start date of 31 July 2020.[5] The government opposed the motion. On this date, neither standby counsel had sought a ROM waiver from their chain of command.[6]

w. On 29 June 2020, the Court ordered the accused to provide an affidavit on his position in regard to a continuance request. On 5 July 2020, the accused notified the Court he did not desire a continuance and wanted to proceed to trial in August with both [redacted] and [redacted] present.

x. The Court adopts its findings of fact from its ruling, dated 9 October 2020 denying the defense's motion for an abatement and the dismissal of charges under R.C.M. 703.

3. <u>Discussion and Conclusions of Law</u>.

There are three primary sources of law relevant to this motion. First, the Sixth Amendment of the U.S. Constitution provides that "the accused shall enjoy the right to a speedy

[4] See Court's ruling on Motion to Quash, dated 5 October 2020.
[5] See AE 129.
[6] The government subsequently noted the Court and the defense that the Convening Authority and all other government officials would respect and accept ROM waivers for standby counsels' and the military judges' chain of command.

and public trial…" U.S. CONST. amend VI. Second, Article 10, UCMJ, requires that the government must exercise reasonable diligence to bring to trial an accused in pretrial confinement.[7] Article 10, UCMJ, also provides "whenever any person subject this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him." Third, R.C.M. 707 requires that an accused be brought to trial within 120 days after the earlier of either: 1) preferral of charges or 2) the imposition of restraint under R.C.M 304(a)(2)-(4).

The Court finds the defense has presented no new evidence regarding their actions or the government's actions (or lack of action) prior to the Court previous ruling on 28 August 2019 denying the defense's speedy trial motions. The Court relies on its previous ruling in confirming the accused's speedy trial rights were not violated before or after 28 August 2019.

A. Sixth Amendment.

Under the Sixth Amendment, the accused's constitutional right to a speedy trial is triggered upon preferral of charges or the imposition of pretrial restraint.[8] This speedy trial guarantee cannot be established by any inflexible rule, but it can only be determined on an ad hoc balancing by the military judge.[9] The Sixth Amendment right to a speedy trial requires the application of a balancing test between: 1) the length of the delay; 2) the reason for the delay; 3) the assertion of the speedy trial right; and 4) prejudice to the accused.[10] "None of the four factors are either a necessary or sufficient condition to the finding of a deprivation of the right of speedy

[7] *United States v. Kossman*, 38 M.J. 258 (C.M.A. 1993).
[8] *United States v. Danylo*, 73 M.J. 183 (C.A.A.F. 2013).
[9] *Barker v. Wingo*, 407 U.S. 514 (1972).
[10] *Id.*

trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant."[11]

1. *Length of Delay*:

The first factor under the *Barker* analysis is to some extent a triggering mechanism.[12] "[U]nless there is a period of delay that appears, on its face, to be unreasonable under the circumstances, 'there is no necessity for inquiry into the other factors that go into the balance.'"[13] The length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case, and the delay that can be tolerated for an ordinary street crime is considerably less than for a serious complex conspiracy charge.[14]

In this ruling, the Court finds the defense has presented no new evidence regarding the government's action prior to the Court's ruling on 28 August 2019. All government actions before and after 28 August 2019 were reasonable under the circumstances of this case. The government has acted diligently and reasonable in their efforts to get the accused's case to trial as soon as possible. The length of delay was never shortened by the defense's press to get to trial until the accused's recent demand for a speedy trial in August 2020. On the contrary, continuous defense requests for delay for the accused's trial have extended this case for things such as defense preparation, defense travel, a defense command event, standby counsel availability, and defense witnesses' availability. This trial was set to begin in March 2020, when the accused requested another continuance in this case because of his standby counsel's and expert witness' availability to be physically present at the trial. When making this continuance request, the

[11] *Id.*
[12] *United States v. Cossio*, 64 M.J. 254, 257 (C.A.A.F. 2007) (quoting *United States v. Smith*, 94 F.3d 204, 208-09 (6th Cir. 1996).
[13] *United States v. Merritt*, 72 M.J. 483, 489 (C.A.A.F. 2013).
[14] *Barker*, 407 U.S. at 531.

accused, as a *pro se* litigant, acknowledged the continuance request could result in long delay in this case getting to trial. He still filed the continuance request. The Court granted this continuance. The case was docketed to begin on 31 July 2020. The Court then moved the start time of this trial to begin on 3 August, mainly due to the accused's standby counsels' availability. The Court did grant a government continuance in August 2020 until 12 October 2020; however, this continuance was granted for the benefit of the accused in an attempt to get the accused a new expert witness so this trial would not be delayed any longer than it needed to be.[15] This factor weighs strongly in favor of the government.

2. *Reason for Delay:*

The main factors to consider under this prong are the seriousness of the case, the delay attributable to the defense, and the COVID-19 pandemic.

Given the seriousness of the offense, the complexity of the investigative tasks associated with premeditated and unpremeditated attempted murder cases onboard an underway underwater submarine, along with the logistical challenges of scheduling a R.C.M. 706 examination board, counsel availability, expert witness availability, military witness unavailability due to military necessity, and the COVID-19 pandemic, the Court concludes the reason for the delay was reasonable. Here, the government has acted reasonable and diligent at all stages. There is no evidence has ever dragged its feet. There is no evidence the government intentionally delayed the case at any point. In fact, as noted above the majority of delay in this case is attributed to the defense. This factor weighs in favor of the government.

[15] The Court finds the government was diligent and reasonable in their efforts to obtain the accused's a different expert witness as adequate substitute for [redacted] testimony. The Court also finds the defense did the bare minimum in following the Court's orders to attempt to secure a new expert witness as a substitute for [redacted] testimony. There is no evidence the defense ever sought out or looked for witnesses on their own, even after the government secured nine different experts to contact.

Regarding the delay attributable to the defense, the government initially proposed the scheduling of the Article 32 hearing for 4 October 2018. The original detailed defense counsel, LT Sahar Jooshani, requested the first delay in the Article 32 hearing on 27 September 2018, until 29 November 2018, due to the "serious and complex nature of the offense." The defense stated in the request that such delay would be attributable to the defense and the request was approved by the convening authority on 3 October 2018. The period of excludable delay began on 4 October 2018. On 7 November 2018, the defense submitted a request for a R.C.M. 706 examination board for the accused. On 21 November 2018, previously appointed defense counsel were replaced by two new defense counsel. On the same day and before the first delay had expired, newly appointed defense counsel submitted a second request for delay of the Article 32 hearing, this time until 4 January 2019, again due to the "serious and complex nature of the offense." The defense again stated in the request that such delay would be attributable to the defense.

On 11 December 2018, the defense submitted a third request for delay, in asking that the Article 32 hearing be delayed until after the results of the R.C.M. 706 examination board were completed. The defense requested the delay be attributable to the government, but the convening authority disagreed and attributed such delay to the defense. On 11 March 2019, the defense was again replaced by new counsel and submitted a fourth request for delay seeking a delay in the arraignment, from 12 March 2019 until 20 March 2019. The Court granted this request and excluded the time, with the delay attributable to the defense. On 26 April 2019, the defense requested a fifth request for delay to continue the 30 May Article 39(a) session until 11 July 2018. The Court granted this request and attributed the delay to the defense.

On July 24 2019, the defense filed another motion for a continuance. On 26 July 2019, the accused, through an affidavit, stated he desired the continuance and believed that it was in his best interest. The defense agreed to reschedule the trial start date to 23 September 2019. The almost seven week in delay for the start of the accused's trial is attributed to the defense's request for a continuance – also based in part on the availability of the defense counsels' schedule.

In March 2020, now as a *pro se* litigant, the accused filed another motion for a continuance. This continuance was due in part to the COVID-19 pandemic, [redacted] availability, and CDR Davis' availability. Knowing his case could be delayed for months, the accused requested another continuance. The Court granted this continuance request and the case was docketed for 31 July 2020.

In August 2020, the Court granted a government continuance for two months until 12 October 2020; however this continuance was for the benefit of the accused because it was granted in an attempt to secure an adequate substitute for [redacted] testimony.

The reasons for delay in this case were due in large part to the defense's numerous requests for delay throughout the entire life of this case. This factor weighs in favor of the government.

3. *Assertion of the right to a speedy trial*:

In this case, the accused did not demand a speedy trial until August 2020, well after he had made numerous continuous requests, all of which were granted by this Court. This factor weighs in favor of the government.

4. *Prejudice to the accused*:

In analyzing this factor, three interests are involved: (1) to prevent oppressive pretrial

incarceration, (2) to minimize anxiety and concern of the accused, and (3), most importantly, to limit the possibility that the defense will be impaired. First, the Court does not find there has been oppressive pretrial confinement. While the Court recognizes the accused has been in pretrial confinement for well over two years, the majority of this time is due to his own continuance requests. Second, although the accused undoubtedly experienced some level of anxiety and concern after being held in pretrial confinement for the amount of time he has been in pretrial confinement, such anxiety or conditions do not rise to the level of implicating the constitutional rights of the accused. There is no evidence the accused has been unfairly punished during this time or treated in a harsh manner. The only time the accused has received any punitive measures in pretrial confinement have been after he allegedly attacked two separate inmates in a violent manner. Lastly, and most importantly, there is no evidence that the accused's defense has been materially impaired by the delay in this case or his time in pretrial confinement. There has been no evidence presented that the accused had his pretrial preparations for his trial impaired by being in pretrial confinement or that he had any issues communicating with his standby counsels during this time. He has had LexisNexis access the entire time he has been in pretrial confinement. He has had his case files with him. He has been able to file motions with the Court. The Court does recognize that two of the defense's witness have been deemed unavailable for trial. However, the unavailability of these witnesses can be directly tied to the accused's multiple request for continuances in this case. This factor also weighs heavily in favor of the government.

The defense motion to dismiss pursuant to the Sixth Amendment is **DENIED**.

B. Article 10, UCMJ.

Under Article 10, UCMJ, once an appellant is placed in pretrial confinement the Government is required to exercise "reasonable diligence" in bringing the accused to trial.[16] "The touch stone…is not constant motion, but reasonable diligence in bringing the charges to trial. Brief periods of inactivity in an otherwise active prosecution are not unreasonable or oppressive."[17] Although the *Barker v. Wingo* factors are considered in assessing a speedy trial violation under Article 10, Article 10 is more exacting than the Sixth Amendment standard. Under Article 10, UCMJ, Military courts have noted that "the touchstone for measurement of compliance [with Article 10]…is not constant motion, but reasonable diligence in bringing the charges to trial."[18] Moreover, "brief periods of inactivity in an otherwise active prosecution are not unreasonable or oppressive."[19]

Despite the more exacting standard applicable to Article 10, the Court, in applying the same analysis and rationale used under its Sixth Amendment decision above, reaches the conclusion that the government exercised reasonable diligence in bringing the charges to trial.[20] Despite there being periods of isolated inactivity, specifically over the last eight months because of the COVID-19 pandemic, in its totality, given the complex nature of the investigation and evidence, the seriousness of charges, the multiple delays requested by the defense, the COVID-19 pandemic, and the logistical issues that surrounding standby counsel and witness availability, the Court finds that the government's investigation and prosecution of the case demonstrated reasonable diligence. All parties have been well aware of the accused pretrial confinement status and the need to conduct associated tasks expeditiously. They did so in this case. This is clearly

[16] *United States v. Kossman*, 38 M.J. 258, 262 (C.M.A. 1993).
[17] *Id.*
[18] *United States v. Tibbs*, 35 C.M.A. 322, 325 (C.M.A. 1965) (citations omitted).
[19] *Id.*
[20] See the Court's rationale under the Sixth Amendment analysis of this ruling in addition to the rationale provided under this section as to why the Court finds the government exercised reasonable diligence in bringing the accused's case to trial in compliance with Article 10, UCMJ.

evident in the convening authority's and trial counsels' actions in securing the defense a new expert consultant and attempting to secure a new expert witness in August and September of 2020. The government has also proactively ensured a deposition was taken of a witness that they thought might be deemed unavailable. The convening authority flew a trial counsel, the accused, and standby counsel to Jacksonville, Florida to ensure a deposition of [redacted] could be taken, despite [redacted] being a defense witness. Part of their request to the Court when asking the Court to order this deposition was to ensure this trial could remain on schedule. The Court also notes, again, there were numerous requests for delay by the defense in this case, including the last request in March 2020, which the accused believe was in his interest. In this case, the defense requests for delay have occurred at all stages of the trial. Despite these requests, the government has continued to expeditiously process the accused's case at all stages of the case.

The defense claim made under Article 10, UCMJ is **DENIED**.

C. R.C.M. 707

R.C.M. 707(a) provides for a 120-day speedy trial rule requiring the government to bring the accused to trial within 120 days. The inception of the 120-day period is on the earlier date of preferral of charges or imposition of restraint under R.C.M. 304(a)(2)-(4). R.C.M. 707(b)(1) defines "brought to trial" as the day of the arraignment. Thus, the duty imposed on the government by R.C.M. 707 is to arraign an accused within 120 days of preferral of charges or imposition of restraint under R.C.M. 304(a)(2)-(4) or face dismissal of the charges. Per R.C.M. 707(b)(1), the date on which pretrial restraint is imposed under R.C.M. 304(a)(2)-(4) does not count for the purposes of the 120-day clock.

The rule allows authorized personnel to approve delays, and therefore "exclude" time from the 120-day clock.[21] Prior to referral, any request for pretrial delay must be submitted to either the convening authority, the Article 32 officer (if the convening authority has properly delegated delay authority), or "if authorized under regulations prescribed by the Secretary concerned, to the military judge for resolution.[22] After referral, only a military judge can approve any pretrial delay.[23] All pretrial delays approved by the convening authority are excludable so long as approving them was not an abuse of the convening authority's discretion. It does not matter which party is responsible.[24] The decision to approve or disapprove a delay is reviewed for an abuse of discretion.[25] There must be "good cause" for the delay and the length of the time requested must be "reasonable" based on the facts and circumstances of each case.[26] "[I]n the absence of an abuse of discretion by the officer granting the delay, there is no violation of R.C.M. 707."[27]

The defense has presented no new evidence since the Court denied their first claim that the accused's speedy trial rights under R.C.M. 707 had be violated. Therefore, the Court relies on its previous ruling and its rationale from 28 August 2020. The Court still finds the accused's rights under R.C.M. 707 were not violated by the government.

The defense claim made under R.C.M. 707 is **DENIED**.

4. Ruling.

All defense speedy trial motions to dismiss under (1) the Sixth Amendment; (2) Article 10, UCMJ; and (3) R.C.M. 707 are **DENIED.**

---

[21] R.C.M. 707(c).
[22] R.C.M. 707(c)(1); *United States v. Lazauskas*, 62 M.J. 39, 41-42 (C.A.A.F. 2005).
[23] R.C.M. 707(c)(1).
[24] *United States v. Dies*, 45 M.J. 376, 377-78 (C.A.A.F. 1996).
[25] *Lazauskas*, 62 M.J. at 41.
[26] *United States v. Thompson*, 46 M.J. 472, 475 (C.A.A.F. 1997).
[27] *Lazauskas*, 62 M.J. at 41.

ORDERED this 9th day of October, 2020.

[redacted]

R. J. STORMER
CDR, JAGC, USN
Military Judge

APPELLATE EXHIBIT CLXXXVI
PAGE 15 OF 15
APPENDED PAGE

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

UNITED STATES **v.** **MICAH J. BROWN** **CSSSN, U.S. NAVY**	**COURT ORDER REGARDING COVID-19 MITIGATION MEASURES FOR A CONTESTED MEMBER'S TRIAL**

1. **Nature of Order**. The subject case is currently docketed for a contested member's trial in the Courtroom, building 84, located on Naval Submarine Base New London, for the dates 3 August to 14 August 2020. In order to mitigate COVID-19 health risks to all trial personnel and any members of the general public who may desire to attend the proceedings, the Court orders the following mitigation measures implemented during the trial of the subject case. These mitigation measures address only those measures that will be taken within the Courtroom, the judicial chambers, and members deliberation room. In addition to these measures, any other measures imposed by the Commander, Navy Region Mid-Atlantic or the Commanding Officer, Naval Submarine Base New London will also be observed. However, should there be any conflict between the measures imposed by this Court and any other official direction, the measures ordered by the Court shall be enforced.

2. **The following mitigation measures are hereby ordered by the Court to be observed within the Courtroom of Building 84, the judicial chambers, and members' deliberations room during the proceedings conducted in the General Court-Martial of United States v. CSSSN Micah J. Brown, U.S. Navy.**

3. Measures related to courtroom spaces.

a. Absent good cause, sessions of court will be held from 0800-1630 each day.

b. Prior to the commencement of any session of court, all tables, podiums, chairs, and surfaces within the courtroom, the judicial chambers, and members deliberation rooms will be cleaned with appropriate cleaning agents. The cleaning of these spaces and items will occur before the start of each day's proceedings, during the mid-day recess, and at the conclusion of each day's proceedings.

c. To reduce "mask fatigue" and to allow for the "airing out" of the courtroom, the Court will observe frequent recesses throughout the proceedings. Typically, the session will be recessed every 45 minutes for a period of 15 minutes. During these recesses, the courtroom doors should be opened and fans should be used to the greatest extent possible to maximize fresh air flow within the courtroom.

d. Because the members deliberation room and witness waiting areas adjacent to the Courtroom in Building 84 are insufficient to maintain appropriate social distancing and lack adequate airflow for use over extended periods of time, alternate locations for these spaces will be utilized whenever these spaces are used for more than 15 minutes at a time. The Court will conduct an inspection, in the presence of the parties, of the alternate members deliberation room prior to its use in deliberations.

e. In order to maximize social distancing, the Court is limiting the number of spectators allowed in the courtroom to 8 individuals. [1] Trial counsel is directed to designate seating in the spectators' box to ensure minimum social distancing occurs consistent with this order. Nothing in this order is intended to interfere with the requirements of an open trial pursuant to RULE FOR COURTS-MARTIAL 806.

4. Measures related to counsel. All counsel will wear face masks at all times while within the Courtroom of Building 84 unless granted specific permission by the Court to remove their mask. Should the Court grant counsel permission to remove their mask, counsel will maintain six (6) feet distance from any other participant at all times while unmasked.

5. Measures related to the accused. The accused may, but is not required to, wear a face mask while court is in session. Should the accused choose not to wear a mask while court is in session, defense counsel will arrange seating at counsel table in order to observe appropriate social distancing from the accused. When consulting with counsel in the courtroom, the accused will wear a face mask. During all periods of recess, the accused will wear a face mask while within the courtroom.

6. Measures related to members.

a. As currently convened, the court panel venire is comprised of 16 members. To mitigate the increased chance of exposure that may occur with a large venire, the Court directs that all questions intended for the panel in general *voir dire* instead be submitted to the panel in written form. The questions will constitute a supplemental questionnaire as permitted by RULE FOR COURTS-MARTIAL 912 and will include the court's preliminary instructions to members as required by RULE FOR COURTS-MARTIAL 801.

b. Subsequently, all members will be questioned in individual *voir dire*. They will be directed to report to Building 84 at 30 minute increments scheduled between 1000-1200 and 1300-1600 on 3 August 2020 and between 0800-1200 on 4 August 2020. The court will liberally permit follow on questions during individual *voir dire* to ensure the parties have had adequate opportunity to develop potential challenges. During individual *voir dire*, members will not wear masks in order to allow the military judge and counsel to have an unobstructed view.

[1] Spectators are any member of the general public and any individual not specifically detailed to this court-martial, including, but not limited to, the accused's or victim's family members and supporters, members of the press, trial team support staff, and supervisory counsel.

c. At all other times, members are required to wear a face mask while within the Courtroom of Building 84.

d. During deliberations, members may, but are not require to, remain unmasked. While in the deliberation room, members should maintain social distancing at all times.

7. Measures related to other participants and spectators.

a. The court reporter is required to wear a face mask at all times within the Courtroom of Building 84.

b. The Court directs the appointment of a bailiff and an assistant bailiff. The assistant bailiff will assist the bailiff in monitoring and assisting the members in complying with the Court's mitigation measures during recesses and back-and-forth to the alternate deliberation room. Both bailiff and assistant bailiff are required to wear a face mask at all times within the Courtroom of Building 84.

c. Witnesses are required to wear a face mask when entering and exiting the Courtroom of Building 84. Prior to swearing in, the trial counsel will direct witnesses to remove their face mask which will not be worn during testimony. During examination, counsel will remain at least six (6) feet away from the witness at all times. Should counsel need to pass any exhibit to a witness on the witness stand, that exhibit will be passed to the witness via the bailiff. Once a witness is excused from the stand and prior to the next witness taking the stand, the witness chair and all surfaces in the witness box will be cleaned with appropriate cleaning agents.

d. All spectators will wear a mask while within the Courtroom of Building 84. Any spectator who fails to wear a mask will not be permitted to enter the courtroom.

So **ORDERED**, this 28th Day of July 2020.

[redacted]

CDR, JAGC, USN
Military Judge

APPELLATE EXHIBIT CLXXV
PAGE 20 OF 45
APPENDED PAGE

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

UNITED STATES **v.** **MICAH J. BROWN** **CSSSN/E-3** **U.S. NAVY**	**RULING ON DEFENSE MOTION TO DISMISS FOR LACK OF JURISDICTION** **1 OCTOBER 2020**

1. **Nature of Ruling.**

The defense moves the Court to dismiss all charges and specifications because the government lacks jurisdiction over the accused. The government opposed the defense's motions. Upon consideration of the defense's motions, the government's responses, and the evidence and arguments presented by counsel and the accused, the Court makes the following findings of fact and conclusions of law.

2. **Findings of Fact.**

a. The accused is charged with two specifications under Article 80, U.C.M.J. (attempted premeditated murder, attempted unpremeditated murder) and a sole specification under Article 128, U.C.M.J. (aggravated assault with intent to commit grievous bodily harm) for allegedly stabbing LSS2 [redacted] with a knife.

b. On 30 July 2018, the accused allegedly stabbed LSS2 [redacted] with a knife during an altercation onboard [redacted]

c. In December 2019, the accused was found to be competent to stand trial.

d. The accused enlisted in the U.S. Navy on 11 February 2015. This contract was for four years and was then extended for an additional 12 months.

235

APPELLATE EXHIBIT CCXXXV
PAGE 1 OF 3
APPENDED PAGE

e. This enlistment was for the accused to serve on active duty in the U.S. Navy. The enlistment contract was signed in Baltimore, MD.[1]

f. The accused has been on active duty since this date. There is no evidence the accused was suffering from any mental conditions on that day or had any conditions that would have prevented him from serving in the US Navy.

g. Since his enlistment contract began, the accused has graduated from boot camp and his "A" school. He has qualified to serve on submarines and has earned his warfare device.[2]

h. The accused has been receiving military pay since his enlistment contract began.

3. **Discussion and Conclusions of Law.**

"Members of the regular component of the armed forces" are subject to UCMJ and the government has jurisdiction over active duty sailors to prosecute them under the UCMJ.[3] In this case, there is zero evidence before the court that the accused's enlistment was in any way fraudulent or not valid. In fact, the evidence shows the opposite.

The evidence presented to the Court clearly shows the accused executed an enlistment contract in Baltimore, MD on 11 February 2015. The accused has received his military pay since that date and continues to get his military pay. There has been no evidence presented to the Court that the accused has ever had his military pay stopped. In addition, while there is some evidence before the Court the accused has been diagnosed with some mental health issues, there is no evidence these issues were present on the day he signed his enlistment contract. There is no evidence that the accused was confused about the consequences of signing his enlistment contract or that he was tricked into signing his enlistment contract. All evidence points to the

[1] See A.E. 89.
[2] See the record of trial regarding the accused's decision to represent himself.
[3] Article 2, UCMJ.

accused knowingly and voluntarily agreeing to enlist in the U.S. Navy in February 2015 and that he has received his military pay since that date. The Court finds zero evidence that there is any fraud regarding his enlistment. Lastly, there is evidence the accused was able to serve successfully in the U.S. Navy before his alleged actions that form the charges and specifications in this case.

As noted by the government, the accused, in his motion, appears to rely on an administrative regulation in his claim of his fraudulent enlistment. While this could be a basis to address the validity of his enlistment contract administratively, this does not apply to the government's jurisdiction over him at this court-martial. As such, the Court finds zero merit in this defense argument.

4. Ruling:

The defense's motions to dismiss for lack of jurisdiction is **DENIED**.

So ORDERED, this 1st day of October 2020.

[redacted]
R.J. STORMER
CDR, JAGC, USN
Circuit Military Judge

APPELLATE EXHIBIT CCXXXV
PAGE 3 OF 3
APPENDED PAGE ____

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

UNITED STATES **v.** **MICAH J. BROWN** **CSSSN/E-3** **U.S. NAVY**	**SUPPLEMENTAL TO COURT'S RULING ON ABATEMENT, WITNESS AVAILABILITY, AND R.C.M. 703 (AE CLXXI)**

1. **Consideration.**

The Court will note for the record that in coming to its ruling contained within appellate exhibit CLXXI, ruling on defense motions for abatement, witness availability, and dismissal under R.C.M. 703, the Court considered the defense's motion and argument, the government's motions and argument, and all evidence in the record that has been presented by counsel and the accused. The Court also used all evidence in the record to make its findings of fact and conclusions of law.

[redacted]
R. J. STORMER
CDR, JAGC, USN
Circuit Military Judge

230

APPELLATE EXHIBIT CCXXXVI
PAGE 1 OF 1
APPENDED PAGE

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

UNITED STATES **v.** **MICAH J. BROWN** **CSSSN/E-3** **U.S. NAVY**	**RULING ON DEFENSE MOTION UNLAWFUL COMMAND INFLUENCE** **13 OCTOBER 2020**

1. **Nature of Ruling.**

The Defense seeks the following due to alleged unlawful command influence (UCI): dismiss all charges and specifications. The government opposes this motion. The Court previously denied this defense motion orally. Upon consideration of the defense motion, the government response, and the evidence presented by counsel and the accused, the Court makes the following findings of fact and conclusions of law.

2. **Findings of Fact.**

a. The accused is charged with two specifications under Article 80, U.C.M.J. (attempted premeditated murder, attempted unpremeditated murder) and a sole specification under Article 128, U.C.M.J. (aggravated assault with intent to commit grievous bodily harm) for allegedly stabbing LSS2 [redacted] with a knife.

b. On 30 July 2018, the accused allegedly stabbed LSS2 [redacted] with a knife during an altercation onboard [redacted]

c. The Court adopts the findings of fact contained within all of its other rulings in this case.

237

APPELLATE EXHIBIT CCXXXVII
PAGE 1 OF 6
APPENDED PAGE

d. On 25 September 2018, the reporting NCIS Special Agent (SA) interviewed [redacted]

e. [redacted] worked at a [redacted] located on Naval Submarine Base New London, located in Connecticut.

f. [redacted] stated she knew the accused from her employment at the [redacted]. During one interaction, the accused began yelling at her and was removed from the pub in which she worked.

g. [redacted] stated the accused attempted to get her fired from her job.

h. [redacted] stated several "patrons" of the [redacted] told her about the allegations against the accused. [redacted] also told the SA she mentioned to the Chief of the Boat (COB) of the accused's submarine that she knew the accused personally.

i. [redacted] is not a government witness. [redacted] is not a defense witness. [redacted] had no personal or direct knowledge regarding the allegations or the accused's relationship with LSS2 [redacted].

3. <u>Discussion and Conclusions of Law</u>.

Case law primarily focuses on three possible populations that could be affected by unlawful command influence: subordinate commanders, potential panel members, and potential witnesses. Here the defense does not specifically address how they believe unlawful command influence will taint the proceedings. Instead, the defense has just generally asserted the charges and specifications need to be dismissed because of UCI.

<u>Unlawful Command Influence (UCI) Generally</u>

Unlawful command influence (UCI) has often been referred to as "the mortal enemy of military justice."[1] UCMJ Article 37(a) provides that, "No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence … the action of any convening, approving, or reviewing authority with respect to his judicial acts." 10 USC § 837. *See also* Rule for Court-Martial (R.C.M.) 104. "Two types of unlawful command influence can arise in the military justice system: *actual* unlawful command influence and *the appearance of* unlawful command influence. From the outset, 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."[2] In contrast, apparent unlawful command influence exists when "*an objective, disinterested observer fully informed of the facts would entertain a significant doubt that justice was being done and would perceive an appearance of command influence.*"[3]

The seminal cases addressing unlawful command influence are *United States v. Biagase*, 50 M.J. 143 (1999) and *United States v. Stombaugh*, 40 M.J. 208 (C.M.A. 1994).[4] First, the defense must "show facts which, if true, constitute unlawful command influence."[5] This prong is commonly known as "some evidence" of unlawful command influence.[6] "The threshold for raising the issue at trial is low, but *more than mere allegation or speculation*."[7] Second, the defense must show "that the alleged unlawful command influence has a logical connection to the

---

[1] *United States v. Gore*, 60 M.J. 178, 178 (C.A.A.F. 2004) (quoting *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986)).
[2] *United States v. Boyce*, 76 M.J. 242, 247 (C.A.A.F. 2016).
[3] *Id.* quoting *United States v. Mitchell*, 39 M.J. 131 (C.M.A. 1994).
[4] See also *United States* v. *Davis*, 31 C.M.R. 162, 166 (1961), *United States* v. *Danzine*, 30 C.M.R. 350 (1961), *United States v. Morrison*, 66 M.J. 508, 511 (N.M.C.C.A. 2008), and *United States v. Gore*, 60 M.J. 178, (C.A.A.F. 2004).
[5] *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999).
[6] *Id.* (quoting *United States v. Ayala*, 43 M.J. 296, 300 (C.A.A.F. 1995)).
[7] *Id.* (emphasis added).

court-martial, in terms of its potential to cause unfairness in the proceedings."[8] Third, if the defense has made the requisite showing under the first two steps, the burden shifts to the government to: (1) disprove "the predicate facts on which the allegation of unlawful command influence is based"; (2) persuade the military judge "that the facts do not constitute unlawful command influence"; or (3) prove at trial "that the unlawful command influence will not affect the proceedings."[9] "Whichever tactic the Government chooses, the quantum of proof is beyond a reasonable doubt."[10] This standard is set high because unlawful command influence is viewed as "the mortal enemy of military justice" and "tends to deprive service members of their constitutional rights."[11]

Apparent UCI

When considering the issue of unlawful command influence, the trial judge must consider both actual and apparent unlawful command influence.

> [M]ilitary judges and appellate courts must consider apparent as well as actual unlawful command influence. As we observed in *Stoneman:* This court has long recognized that, once unlawful command influence is raised,...it [is] incumbent on the military judge to act in the spirit of the Code by avoiding even the appearance of evil in [the] courtroom and by establishing the confidence of the general public in the fairness of the court-martial proceedings .... Accordingly, disposition of an issue of unlawful command influence falls short if it fails to take into consideration the concern of Congress and this Court in eliminating even the

---

[8] *Id.*
[9] *Id.* at 151.
[10] *United States v. Stoneman*, 57 M.J. 35, 41 (C.A.A.F. 2002)(citing *Biagase*, 50 M.J. at 151).
[11] *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986), *United States v Lewis*, 63 M.J. 405, 413 (C.A.A.F. 2006), and *United States v. Gore*, 60 M.J. 178, 178 (C.A.A.F. 2004)(quoting *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986)).

> appearance of unlawful command influence at courts-martial.... The appearance of unlawful command influence is as devastating to the military justice system as the actual manipulation of any given trial....*Id.* at 374.[12]

Therefore, "beyond actual UCI, the Court must also be convinced beyond a reasonable doubt that a reasonable person with knowledge of the relevant facts would not perceive that the deck is unfairly stacked against" the accused.[13]

Here, the defense has provided zero evidence that actual or apparent UCI exists. There has been no evidence presented to the Court that would lead to the conclusion that actual UCI exists in this case. In their motion, the defense appears to raise an apparent unlawful command influence (UCI) because a person interviewed by a NCIS SA mentioned she knew the accused to the accused's COB. While there is a low threshold to shift the burden to the government, the defense must show facts that constitute unlawful command influence if true, amount to more than mere speculation or "command influence in the air", and that the alleged influence has a logical connection to the accused's court-martial in terms of its potential to cause unfairness in the proceedings.[14]

The Court does not find any merit in the defense's assertion of any kind of UCI in this case. The evidence only shows a person interviewed by NCIS mentioned she knew the accused and that "patrons" had told her about the allegations against the accused. Beyond that, this person, [redacted] has no connection to the accused or his command. [redacted] is not a witness for either side in this case. [redacted] has no personal knowledge of the case or the accused's

---

[12] See also *United States v. Stoneman*, 57 M.J. 42 (C.A.A.F. 2002) and *United States v. Morrison*, 66 M.J. 508, 510-511 (N.M.C.C.A. 2008).
[13] *Morrison* at 510-511, citing *United States v. Hedges*, 29 C.M.R. 458 (C.M.A. 1960). See also, *United States v Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006).
[14] *United States v. Biagase*, 50 M.J. at 150, *United States v. Harvey*, 64 M.J. 13, 14 (C.A.A.F. 2006).

relationship with LSS2 [redacted]. The only nexus she has to this case is that she had a previous interaction with the accused in which she claims he yelled at her at her place of employment, the accused tried to get her fired, and that she mentioned to the COB she knew the accused. That is the extent of the evidence in this case. The Court finds this evidence is not "some evidence" of UCI. In fact, the Court finds there is zero evidence in this case of UCI. Any defense claim of UCI is nothing more than mere speculation. The defense has failed to meet its burden.

4. Ruling:

The defense's motions to dismiss based on UCI is **DENIED**.

So ORDERED, this 13th day of October 2020.

[redacted]
R. J. STORMER
CDR, JAGC, USN
Circuit Military Judge

APPELLATE EXHIBIT CCXXXVII
PAGE 6 OF 6
APPENDED PAGE _____

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
BROWN, MICAH J.	Navy	E-3	[redacted]

5. CONVENING COMMAND	6. TYPE OF COURT-MARTIAL	7. COMPOSITION	8. DATE SENTENCE ADJUDGED
COMMAND NAVY REGION MID-ATLANTIC	General	Enlisted Members	Oct 19, 2020

SECTION B - FINDINGS

SEE FINDINGS PAGE

SECTION C - ADJUDGED SENTENCE

9. DISCHARGE OR DISMISSAL	10. CONFINEMENT	11. FORFEITURES	12. FINES	13. FINE PENALTY
Dishonorable discharge	3 YEARS	N/A	N/A	N/A

14. REDUCTION	15. DEATH	16. REPRIMAND	17. HARD LABOR	18. RESTRICTION	19. HARD LABOR PERIOD
E-1	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
812	150	962 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
Stormer, Ryan J	Navy	O-5	Oct 19, 2020	[redacted]

37. NOTES

ENCLOSURE (1)
1 of 1

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	80	Specification	Not Guilty	Not Guilty			90Z
		Offense description	Attempts - murder (premeditated and unpremeditated)				
Charge II	128	Specification	Not Guilty	Guilty to LIO			128-H1
		Offense description	Aggravated assault with the infliction of grievous bodily harm				
		LIO description	Aggravated assault with a dangerous weapon				

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
Brown, Micah J.	E3	[redacted]

4. UNIT OR ORGANIZATION	5. CURRENT ENLISTMENT	6. TERM
Naval Submarine Support Center New London	11 Feb 2015	4 Years

7. CONVENING AUTHORITY (UNIT/ORGANIZATION)	8. COURT-MARTIAL TYPE	9. COMPOSITION	10. DATE SENTENCE ADJUDGED
Commander, Navy Region Mid-Atlantic	General	Enlisted Members	19-Oct-2020

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 21 October 2020, a copy of the Statement of Trial Results was sent to the victim electronically. An electronic receipt confirmed the victim's receipt of the Statement of Trial Results. The victim's deadline to submit matters for your consideration was 30 October 2020. The victim has not submitted any matters for your consideration.
- On 22 October 2020, a copy of the Statement of Trial Results was sent to CSSSN Brown via the Donald W. Wyatt Detention Facility. He signed for receipt of the Statement of Trial Results on 22 October 2020. CSSSN Brown's deadline to submit matters in clemency was 31 October 2020; he has not submitted any matters in clemency for your consideration. CSSSN Brown represented himself at court-martial.
- You may not set aside, disapprove, or take any other action with regard to the findings in this case. Nor may you disapprove, commute, or suspend, in whole or in part, the sentence to confinement or discharge. You do have the authority to disapprove, commute, or suspend, in whole or in part, the reduction to the pay grade of E-1.

24. Convening Authority Name/Title	25. SJA Name
RADM C. W. ROCK, Commander, Navy Region Mid-Atlantic	[redacted], CDR, JAGC, USN

26. SJA signature	27. Date
[redacted]	5 Nov 20

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.]

1. Sentence Adjudged. On 19 October 2020, CSSSN Micah J. Brown, USN, was sentenced to three (3) years' confinement, reduction to the pay grade of E-1, and a Dishonorable Discharge.
2. Action. In the case of United States v. CSSSN Micah J. Brown, USN, the sentence is approved.
3. Pretrial Confinement Credit. The military judge awarded 812 days of pretrial confinement credit and 150 days of judicially ordered credit for a total of 962 days of confinement credit.
4. Initial Place of Confinement. The Donald W. Wyatt detention facility, Central Falls, Rhode Island.
5. Companion Cases. There were no companion cases.
6. Statutory Reporting Requirements. DNA collection and submission are required in accordance with 10 U.S.C. 1565 and DoDI 5505.14. Sex Offender registration is not required in accordance with appendix 4 to enclosure 2 of DoDI 1325.07. The Gun Control Act, 18 U.S.C. 922 does apply in this case.
7. Requests for deferral or waiver. CSSSN Brown has not requested deferral or waiver, but I deferred his adjudged reduction to the pay grade of E-1 and his automatic forfeiture of all pay and allowances until the date of this action via separate correspondence.
8. Matters considered. In taking this action, I have considered the Statement of Trial Results. The deadlines for both the accused and the victim to submit matters for my consideration have passed, and neither the accused nor the victim has submitted any matters for my consideration.

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	31. Date
[redacted]	6 Nov 2020

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

ENTRY OF JUDGMENT

SECTION C - ENTRY OF JUDGMENT

****MUST be signed by the Military Judge (or Circuit Military Judge) within 20 days of receipt****

33. **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 UCMJ, Article 80 (Attempted Premeditated Murder):
Plea: Not Guilty
Finding: Not Guilty

Specification: Violation of UCMJ, Article 80 (Attempted Premeditated Murder): In that Culinary Specialist (Submarines) Seaman Micah J. Brown, U.S. Navy, [redacted] on active duty, did, on board [redacted] on or about 30 July 2018, with premeditation, attempt to murder LSS2 [redacted], by means of stabbing him with a knife:
Plea: Not Guilty
Finding: Not Guilty

CHARGE II: Violation of UCMJ, Article 128 (Aggravated Assault with Intent to Commit Grievous Bodily Harm):
Plea: Not Guilty
Finding: Guilty

Specification: Violation of UCMJ, Article 128 (Aggravated Assault with Intent to Commit Grievous Bodily Harm): In that Culinary Specialist (Submarines) Seaman Micah J. Brown, U.S. Navy, [redacted] on active duty, did, on board [redacted], on or about 30 Jul 2018, commit an assault upon LSS2 [redacted], by cutting his body with a knife, and did thereby intentionally inflict grievous bodily harm upon him, to wit: multiple deep cuts to his body.

Plea: Not Guilty
Finding: Guilty to the Lessor Included Offense of Aggravated Assault with a Dangerous Weapon.

34. **Sentence to be Entered.** Accor or any modifications made by reason o y 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 adjudged the following sentence:
- to be discharged with a Dishonorable Discharge,
- to be confined for a period of three years, and
- to be reduced to the pay grade E-1.

Confinement Credit:
- Days of Pretrial Confinement Credit: 812 days
- Days of Judicially Ordered Credit: 150 days
Total Days Credit: 962 days

35. **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)

CSSSN Brown did not request a deferral or waiver but the Convening Authority deferred his adjudged reduction to the pay grade of E-1 and his automatic forfeiture of all pay and allowances effective 1 Nov 20 until 6 Nov 20.

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

N/A

37. Judge's signature:	38. Date judgment entered:
STORMER.RYAN.[redacted] Digitally signed by [redacted] Date: 2021.01.29 11:45:36 -08'00'	Jan 29, 2021

39. 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.

40. Judge's signature:	41. Date judgment entered:

42. Return completed copy of the judgment to the Post-Trial Department/Review Shop for distribution to the defense counsel and/or accused as well as the victim and/or victims' legal counsel.

APPELLATE INFORMATION

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

Before Panel No. 3

UNITED STATES

Appellee

v.

Micah J. Brown
Culinary Specialist (Submarines)
Seaman (E-3)
U.S. Navy

Appellant

Notice of No Authority to Represent Appellant

NMCCA Case No. 202100042

Tried at Region Legal Service Office Mid-Atlantic, Naval Base Groton, Connecticut, on 20 March 2019, 11 July 2019, 18 September 2019, 23 October 2019, 2-3 December 2019, 13 January 2020, 11 February 2020, 4 August 2020, 14 August 2020, 26 August 2020, 24 September 2020, and 12-19 October 2020 before a General Court-Martial convened by the Commanding Officer, Commander, Navy Region Mid-Atlantic, Lieutenant Commander R.L. Stormer, JAGC, USN presiding (trial)

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

On March 1, 2021, undersigned counsel was detailed to represent Appellant before this Court. Counsel has since undertaken every reasonable effort to locate Appellant. These efforts have been unsuccessful. Counsel has therefore been unable to form an attorney-client relationship. The record of trial does not contain a special power of attorney authorizing counsel to represent Appellant. Appellant dismissed his detailed trial defense counsel, and represented himself at his court-

martial. Appellant also refused to sign his Appellate Rights Statement or provide contact information to the government post-trial. Therefore, counsel is unable to represent Appellant before this Court. Counsel does not intend to file any substantive pleading before this Court.

Respectfully submitted.

[redacted]
Jasper W. Casey
Captain, U.S. Marine Corps
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street SE
Building 58, Suite 100
Washington Navy Yard, D.C. 20374
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copy of the foregoing was delivered to the Court on 2 April 2021 that a copy was uploaded into the Court's case management system on 2 April 2021, and that a copy of the foregoing was delivered to Director, Appellate Government Division on 2 April 2021.

[redacted]
Jasper W. Casey
Captain, U.S. Marine Corps
Appellate Defense Counsel

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

Before Panel No. 3

UNITED STATES

Appellee

v.

Micah J. Brown
Culinary Specialist (Submarines)
Seaman (E-3)
U.S. Navy

Appellant

APPELLANT'S MOTION FOR A FIRST ENLARGEMENT OF TIME

NMCCA Case No. 202100042

Tried at Region Legal Service Office Mid-Atlantic, Naval Base Groton, Connecticut, on 20 March 2019, 11 July 2019, 18 September 2019, 23 October 2019, 2-3 December 2019, 13 January 2020, 11 February 2020, 4 August 2020, 14 August 2020, 26 August 2020, 24 September 2020, and 12-19 October 2020 before a General Court-Martial convened by the Commanding Officer, Commander, Navy Region Mid-Atlantic, Lieutenant Commander R.L. Stormer, JAGC, USN presiding (trial)

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

COMES NOW undersigned, pursuant to Rule 23.2(c)(3) of this Court's Rules, and respectfully moves for a first enlargement of time to locate Appellant. The current due date is April 18, 2021. The number of days requested is thirty. The requested due date is May 17, 2021.

The current status of the case:

1. The Record of Trial was docketed on 17 February 2021.

2. The Moreno III date is 17 August 2022.

3. CSSN Brown is not confined.

4. The record consists of 1,965 transcribed pages.

5. Counsel has not completed initial review of the record of trial.

Appellant has not been consulted regarding this enlargement request.

Good cause exists for this enlargement. Undersigned counsel has not formed an attorney client relationship with Appellant. Counsel provided Notice of No Authority to Represent Appellant on April 2, 2021. This court directed the government to assist in locating Appellant on 12 April 2021. Appellant has not yet been located.

WHEREFORE, Appellant respectfully requests this Court grant this motion.

[redacted]
Jasper W. Casey
Captain, U.S. Marine Corps
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street SE
Building 58, Suite 100
Washington Navy Yard, D.C. 20374
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copy of the foregoing was delivered to the Court on 19 April 2021 that a copy was uploaded into the Court's case management system on 19 April 2021, and that a copy of the foregoing was delivered to Director, Appellate Government Division on 19 April 2021.

[redacted]
Jasper W. Casey
Captain, U.S. Marine Corps
Appellate Defense Counsel

[redacted]

Subject: RULING - FILING - Panel 3 - U.S. v. Brown - NMCCA No. 202100042 - EOT (Capt Casey)
Date: Monday, April 19, 2021 10:29:14 AM

MOTION GRANTED
April 19 2021
United States Navy-Marine Corps
Court of Criminal Appeals

[redacted]

Subject: FILING - Panel 3 - U.S. v. Brown - NMCCA No. 202100042 - EOT (Capt Casey)

Good morning,

Attached is a request for a First Enlargement in the Panel 3 case, U.S. v. Brown, 202100042.

I have not formed an attorney client relationship with CSSN Brown. On 12 April 2021, the court directed the government to assist in locating CSSN Brown. Those efforts are still ongoing.

Very respectfully,

Jasper Casey
Captain, U.S. Marine Corps

Appellate Defense Counsel (Code 45)
1254 Charles Morris Street SE, Bldg. 58
Washington Navy Yard, DC 20374
[redacted]

[redacted]

United States Navy–Marine Corps
Court of Criminal Appeals

UNITED STATES

Appellee

v.

Micah J. BROWN
Culinary Specialist (Submarines)
Seaman (E-3)
U. S. Navy

Appellant

NMCCA No. 202100042

Panel 3

ORDER

To Locate Appellant

In its filing titled "Notice of No Authority to Represent Appellant," Appellate Defense Counsel asserts an inability to communicate with Appellant, who remains under military authority, subject to orders, and subject to the Uniform Code of Military Justice.

Appellant is on involuntary appellate leave. This is an active duty leave status generally required of those accused whose sentence includes a punitive discharge and who are awaiting the completion of appellate review.[1] Members on involuntary appellate leave are transferred to the administrative control of the Navy and Marine Corps Appellate Leave Activity [NAMALA] on involuntary appellate leave orders.[2] Those orders require members on appellate leave to provide NAMALA with a current leave address, to advise the Commanding Officer, NAMALA, of any changes of address within 10 days of such change, and reminds members that they are still subject to military orders.[3] Members on appellate leave also sign an Appellant Leave Statement

---

[1] Article 76a, UCMJ; 10 U.S.C. § 876a (Members may be placed on voluntary appellate leave pending convening authority action at the discretion of their commanding officer. Members whose punitive discharge has been approved, and are awaiting the completion of appellate review, are placed on mandatory appellate leave).

[2] *See* Dep't of the Navy, *Navy Military Personnel Manual*, art. 1050-340, Mandatory Appellate Leave, para. 2.10 (Oct. 2, 2018); Marine Corps Order 1050.16A, *Appellate Leave Awaiting Punitive Separation*, para. 10 (June 19, 1998).

[3] *Id.*

of Understanding.[4] This statement includes the following statements, each of which the member must initial:

> I understand that I must advise my command officer of any change of my leave address, permanent home address, and the address for which official correspondence may be sent.
>
> . . . .
>
> I understand that while on appellate leave, I am still on active duty and subject to orders of competent naval authority.[5]

Therefore, it is on this 12th day of April, 2021,

ORDERED:

1. That the Government shall order Appellant to contact Appellate Defense Counsel and take the necessary legal steps to effectuate contact and inform the Court if contact was effectuated by 12 May 2020.

2. If the Government is unable to effectuate that contact before 12 May 2020, the Government shall inform the Court of the steps taken to effectuate the contact.

FOR THE COURT:

[redacted]

RODGER A. DREW, JR.
Clerk of Court

Copy to:
NMCCA (51.3)
45 (Capt Casey)
46 (Capt Rimal)
02

---

[4] Dep't of the Navy, NAVPERS 1050/3, Appellate Leave Statement of Understanding (Dec. 2015).

[5] *Id.*

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

Before Panel No. 3

UNITED STATES

Appellee

v.

Micah J. Brown
Culinary Specialist (Submarines)
Seaman (E-3)
U.S. Navy

Appellant

APPELLANT'S MOTION FOR A SECOND ENLARGEMENT OF TIME

NMCCA Case No. 202100042

Tried at Region Legal Service Office Mid-Atlantic, Naval Base Groton, Connecticut, on 20 March 2019, 11 July 2019, 18 September 2019, 23 October 2019, 2-3 December 2019, 13 January 2020, 11 February 2020, 4 August 2020, 14 August 2020, 26 August 2020, 24 September 2020, and 12-19 October 2020 before a General Court-Martial convened by the Commanding Officer, Commander, Navy Region Mid-Atlantic, Lieutenant Commander R.L. Stormer, JAGC, USN presiding (trial)

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

COMES NOW undersigned, pursuant to Rule 23.2(c)(3) of this Court's Rules, and respectfully moves for a first enlargement of time to file a brief and assignments of error. The current due date is May 17, 2021. The number of days requested is thirty. The requested due date is June 16, 2021.

The current status of the case:

1. The Record of Trial was docketed on 17 February 2021.

2. The Moreno III date is 17 August 2022.

3. CSSN Brown is not confined.

4. The record consists of 1,965 transcribed pages.

5. Counsel has not completed initial review of the record of trial.

Appellant has not been consulted regarding this enlargement request.

Good cause exists for this enlargement. Undersigned counsel has not formed an attorney-client relationship with Appellant. Counsel provided Notice of No Authority to Represent Appellant on April 2, 2021. This court directed the government to assist in locating Appellant on 12 April 2021. Appellant has not yet been located.

WHEREFORE, Appellant respectfully requests this Court grant this motion.

[redacted]
Jasper W. Casey
Captain, U.S. Marine Corps
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street SE
Building 58, Suite 100
Washington Navy Yard, D.C. 20374
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copy of the foregoing was delivered to the Court on 12 May 2021 that a copy was uploaded into the Court's case management system on 12 May 2021, and that a copy of the foregoing was delivered to Director, Appellate Government Division on 12 May 2021.

[redacted]
Jasper W. Casey
Captain, U.S. Marine Corps
Appellate Defense Counsel

[redacted]

Subject: RULING: RE: RECEIPT: RE: FILING - Panel 3 - U.S. v. Brown - NMCCA No. 202100042 - EOT (Capt Casey)

Signed By: [redacted]

MOTION GRANTED
May 12 2021
United States Navy-Marine Corps
Court of Criminal Appeals

[redacted]
Panel Paralegal
Navy-Marine Corps Court of Criminal Appeals
1254 Charles Morris St SE, Ste 320
Washington Navy Yard, DC 20374
[redacted]

[redacted]

[redacted]

Subject: RECEIPT: RE: FILING - Panel 3 - U.S. v. Brown - NMCCA No. 202100042 - EOT (Capt Casey)

RECEIVED
May 12 2021
United States Navy-Marine Corps
Court of Criminal Appeals

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

Before Panel No. 3

UNITED STATES, Appellee v. Micah J. BROWN, Culinary Specialist (Submarines) Seaman (E-3) U.S. Navy Appellant	)	APPELLEE'S ORDER RESPONSE Case No. 202100042 Tried at Naval Submarine Base New London, Groton, Connecticut, on March 20, July 11, September 18, October 23, and December 2–3, 2019, January 13, February 11, August 4, 14, and 26, and September 24, 2020, before a general court-martial convened by Commander, Navy Region Mid-Atlantic, Lieutenant Colonel R. Mattioli, U.S. Marine Corps (arraignment), Commander R.J. Stormer, JAGC, U.S. Navy (trial), presiding.

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

In response to this Court's Order of April 12, 2021, the United States respectfully provides an affidavit from the Executive Officer, Navy and Marine Corps Appellate Leave Activity, outlining the steps taken to attempt to effectuate contact with Appellant, marked as Appendix A. Though the United States has been unable to effectuate contact with Appellant since the date of this Court's

Order, Appellant did provide an address to Navy and Marine Corps Appellate Leave Activity on April 4, 2021, and this address was provided to Appellate Defense Counsel. Navy and Marine Corps Appellate Leave Activity will continue to attempt to effectuate contact with Appellant in accordance with its standard operating procedures.

Digitally
Nicole A. Rimal signed by
Nicole A. Rimal

NICOLE A. RIMAL
Captain, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
[redacted]

Appendix

A. Affidavit of Captain [redacted] U.S. Marine Corps

Certificate of Filing and Service

I certify that this document was emailed to the Court's filing address, that a copy was uploaded into the Court's case management system, and that a copy of the foregoing was emailed to Appellate Defense Counsel, Captain Jasper W. CASEY, U.S. Marine Corps, on May 12, 2021.

Digitally
Nicole A. Rimal signed by
Nicole A. Rimal

NICOLE A. RIMAL
Captain, U.S. Marine Corps
Appellate Government Counsel

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

Before Panel No. 3

UNITED STATES, Appellee	)	AFFIDAVIT
	)	Case No. 202100042
v.	)	
Micah J. BROWN, Culinary Specialist (Submarines) Seaman (E-3) U.S. Navy Appellant	)	

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

I, Captain [redacted] Executive Officer, Navy and Marine Corps Appellate Leave Unity (NAMALA) do swear, the following is true to the best of my knowledge:

Seaman Recruit (SR) Micah Brown was joined to NAMALA on 20 November 2020. In November 2020, Chief [redacted] USN, called the parents of SR Micah Brown and spoke with them telephonically in an attempt to ascertain the whereabouts of the Service Member, SR Micah Brown. However, they were unable to provide any information. Since that time, NAMALA has conducted a monthly audit 5 times: December 17, 2020, January 21, 2021, February 18, 2021, March 18, 2021, and Apr 15, 2021. On these dates an audit was conducted, which included a telephonic attempt to contact each Appellant Service Member attached to NAMALA (to include SR Micah Brown). Upon gaining Micah Brown in November, I, myself, have reached out additionally and attempted to establish phone contact every month. I called and texted Micah Brown initially on 24 November 2021. On one occasion a text message response from Micah Brown's phone number was received from Captain [redacted] approximately 5 months later, on April 4, 2021, which Captain [redacted] relayed in an email to SR Micah Brown's defense counsel and the NAMALA Commanding Officer. On April 4, 2021, Captain [redacted] received two texts from Micah Brown's phone number stating "[redacted] [redacted]" and "You can mail my things to that address plz and thank you".

Since the NMCCA's order of April 12, 2021 and until today, I, Captain [redacted] called the phone number of Micah Brown a total of 10 times from which I received a text message, and sent him 4 follow up text messages with no reply, and left 2 voicemail. The last contact received by Micah Brown was on April 4, 2021 (via text message sent to Captain [redacted] from his phone number). SR Brown never attempted to contact NAMALA Commanding Officer or Staff with an updated change of address or phone number. SR Micah Brown refused to sign the Appellant Statement of Understanding per LT [redacted] USN's, NSSC New London Staff Judge Advocate, memorandum for the record on 5 November 2020.

As of today, May, 12, 2021, no positive contact has been established with SR Micah Brown.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed on XX.

[redacted]

Captain [redacted] United States Marine Corps
Executive Officer, Navy and Marine Corps Appellate Leave Activity

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

Before Panel No. 3

UNITED STATES

v.

BROWN, Micah J.
Culinary Specialist (Submarines)
Seaman (E-3)
U.S. Navy

MOTION TO WITHDRAW APPELLATE DEFENSE COUNSEL AND MOTION FOR RECONSIDERATION OF NMCCA PANEL 3 ORDER TO REPRESENT APPELLANT AND SUGGESTION FOR *EN BANC* CONSIDERATION

NMCCA Case No. 202100042

Tried at Region Legal Service Office Mid-Atlantic, Naval Base Groton, Connecticut, on March 20; July 11; September 18; October 23; December 2-3, 2019; and January 13; February 11; August 4, 14, 26; September 24; October 12-19, 2020, before a General Court-Martial convened by the Commanding Officer, Navy Region Mid-Atlantic, LCDR R.L. Stormer, JAGC, U.S. Navy, presiding

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

Pursuant to Rules 12, 27 and 31, Appellate Defense Counsel moves to withdraw and moves for reconsideration of Panel No. 3's Order To Represent Appellant on June 10, 2021. Appellate Defense Counsel suggests *en banc* consideration. The Order was delivered to Appellate Defense Counsel on the same

date and neither the United States Court of Appeals for the Armed Forces nor any other court has acquired jurisdiction over this case.

Per this Court's Rule 12.2, counsel requests withdraw because: 1) he has not and cannot form an attorney-client relationship with Seaman Brown because Seaman Brown cannot be found; 2) Seaman Brown has not requested appellate representation or signed a special power of attorney; 3) no replacement counsel is identified and turnover of the Record has not been completed; 4) Counsel cannot confirm Seaman Brown has been informed of this withdraw or concurs since the Government has not successfully found him.

Per this Court's Rule 31.1, the compelling bases of good cause to reconsider the Panel's Order are:

I. **United States v. Harper'***s holding is inapplicable in this case for two reasons: First, Seaman Brown's actions at trial (representing himself, stating he would handle post-trial actions himself, and refusing to sign the Appellate Rights Advisement) constituted an affirmative waiver of appellate representation. Second, even if it did not constitute an affirmative waiver, the Military Judge did not "specifically advise" Seaman Brown that unless he waived his appeal, his case would receive automatic appellate review and he would be represented by appellate defense counsel.*

II. **United States v. Harper** ***was erroneously decided and should be overturned. Under Articles 66 and 70, UCMJ and the Appellate Rights form, appellate representation is not a right and must be requested even in a mandatory appeal. The Panel's Order, and Harper's holding, are inconsistent with the current statutory and regulatory appellate framework.***

III. The Panel's Order commands Appellate Defense Counsel to violate his State Business and Professions Code §6104, the advice of the State Bar Ethics Hotline, and JAG Instruction 5803.1E, Rule 1.2. The Panel neither addressed, nor cited, Appellate Defense Counsel's State Bar Ethics Rules.

Under Rule 27(a), the Court should reconsider Panel 3's Order *en banc* because (1) we ask the Court to overrule *United States v. Harper*, 80 M.J. 540 (N.M. Ct. Crim. App. 2020); and (2) the proceeding involves a question of exceptional importance—directing a counsel to represent an accused with no request for representation and no attorney-client relationship.

Relevant Facts

A. Seaman Brown represented himself *pro se* through his entire court-martial. The Military Judge, multiple times, found him competent to continue *pro se*.

After several Article 39(a) sessions and an *ex parte* discussion with the Military Judge, Seaman Brown elected to represent himself at his court-martial. (R. 436-41.) The Military Judge had a long colloquy with Seaman Brown, (R. 441-84),

and Seaman Brown spoke with a supervisory defense counsel and an experienced conflict-free defense counsel. (R. 446-50, 487.) The Military Judge made factual findings, concluded Seaman Brown's decision was voluntary, and approved his election to represent himself. (R. 486-92.)

B. The Military Judge continued to find Seaman Brown competent to represent himself throughout his contested, members court-martial.

The Military Judge made additional factual findings after Seaman Brown submitted multiple Motions, found Seaman Brown met all deadlines, was articulate in his arguments, and continued to be competent to represent himself. (R. 599.) After Seaman Brown filed additional Motions, the Military Judge again found him competent to represent himself. (R. 934.) Seaman Brown represented himself through his entire Court-Martial. (R. 1364-1964.)

C. Seaman Brown elected to "be responsible for [his] own post-trial actions in this case." The Military Judge did not specifically advise Seaman Brown of his rights to appellate counsel on the Record.

After the Members began deliberations on a sentence, the Military Judge asked Seaman Brown, "are you aware of your post-trial and appellate rights?" (R. 1690.) Seaman Brown answered yes. (*Id*.) Seaman Brown then asked for his "appellate rights form" and his "records" to come directly to him. (*Id*.)

Seaman Brown stated he understand his post-trial and appellate rights and had no questions. (R. 1961.)

The Military Judge ended the discussion with the following question:

"MJ: And you will be responsible for your own post-trial actions in this case. Is that correct?

[Appellant]: Yes, Your Honor." (R. 1961.)

The Military Judge did not go over the appellate rights in detail with Seaman Brown. (R. 1960-61.) He did not advise Seaman Brown when his case would have an automatic appellate review or that he was guaranteed detailed appellate defense counsel to represent him. (R. 1960-61.)

D. Seaman Brown did not sign an Appellate Rights form and nothing in the Record indicates he was even provided a form.

After the Court-Martial adjourned, the Court Reporter emailed Seaman Brown's former trial defense counsel,[1] asking if they had his "appellate rights form." (Appellate Ex. CCXXXI at 2.) One of the standby counsel responded, "SN Brown was asked about this on the record. He did not sign the form but the Judge went over it with him and [he] desired all his materials to be forwarded to him." (*Id.* at 1.)

[1] When Seaman Brown elected to proceed pro se, the Military Judge ordered his former trial defense counsel to attend all court sessions as "standby counsel." (R. 450, 601.)

E. Appellate Defense Counsel was detailed to Seaman Brown's case on automatic appeal. He filed two Motions for Enlargement and then a "Notice of No Authority to Represent" Seaman Brown.

Appellate Defense Counsel was detailed to Seaman Brown's case and took every reasonable effort to locate Seaman Brown. (Notice of no ACR, Apr. 2, 2021.) He could not locate him. (*Id*.) This Court ordered the Government to find Seaman Brown. (Order to Locate, Apr. 12, 2021.) Prior to the Court Order, the Government had contacted Seaman Brown's parents via telephone, who "were unable to provide any information." (Gov. Response to Order to Locate, App. A, May 12, 2021.) The Government attempted to call Seaman Brown multiple times, without success. (*Id*.) The Government did receive a text message from Seaman Brown's phone number, which provided an updated address and to "mail my things to that address plz and thank you." (*Id*.)

After the Court Order, the Government called Seaman Brown ten times, left two voicemails, and sent four text messages—with no response or answer. (*Id*.) They took no other actions to contact Seaman Brown, such as check the address provided by Seaman Brown, contact his parents again, or assign any law enforcement or military personnel to find Seaman Brown. (*Id*.) The Government did not send any correspondence to Seaman Brown to his confirmed address via certified mail requesting his preferences for appellate representation. (*Id*.)

Argument

I.

United States v. Harper's holding is inapplicable in this case for two reasons. First, Seaman Brown waived appellate representation by representing himself at trial, stating he would be responsible for all post-trial actions himself, and not signing any Appellate Rights form. Second, even absent waiver, there is no evidence in the Record that he was specifically advised he would be guaranteed appellate counsel on appeal like in Harper. The Military Judge did not provide his appellate rights in detail and his "standby counsel" indicated the extent of his rights advisement was on the Record by the Judge.

A. The standard of review is *de novo*.

When all the evidence relating to appellate representation is in the record, the issue before the court "necessarily reduces to a question of law" and is reviewed *de novo*. *United States v. Moss*, 73 M.J. 64, 67 (C.A.A.F. 2014) (quoting *United States v. Lundy*, 63 M.J. 299, 301 (C.A.A.F. 2006)).

B. *Harper's* holding required the Appellate Rights form to be signed and acknowledged by both trial defense counsel and the accused before the Court would order appellate representation.

In *Harper*, the Appellate Rights statement was provided to the appellant "in writing and discussed with him by the military judge." *Harper*, 80 M.J. at 541. The appellant "was advised of the automatic appellate review . . . of cases involving the type of sentence he received" and "his right to 'waive appellate review' or to 'withdraw [his] case from appellate review at a later time.'" *Id*. (quoting the signed Appellate Rights statement). Both "he and defense counsel signed the Appellate

Rights statement advising him of these rights." *Id*. (citing the signed Appellate Rights statement).

The *Harper* Court held that "the above-described Appellate Rights advice to Appellant that he would be represented by military counsel in the event of an automatic appeal, coupled with the absence of any affirmative waiver of such appeal or such representation, is tantamount to Appellant's uninterrupted and unaltered request for such counsel."[2] *Id*. The *Harper* Court later confirmed, in its legal analysis, that appellate defense counsel shall "represent him where, as here, Appellant stated his understanding that he would be assigned such counsel in the event of such an automatic appeal; was informed of his right to affirmatively waive such appeal and has not done so . . ." *Id*. at 542.

C. *Harper's* holding is inapplicable in this case. First, Seaman Brown expressly waived appellate representation. Second, in the alternative, the Military Judge did not detail his appellate rights or advise him he was guaranteed appellate counsel and had to waive that representation.

1. Seaman Brown affirmatively waived appellate representation by stating he would personally handle his "post-trial actions" and never signed an Appellate Rights form.

"Waiver is the intentional relinquishment or abandonment of a known right."

[2] This holding is wrong in both fact and law. *See infra* Part II. Mere receipt and acknowledgement of the appellate rights form does not constitute a "request" under Article 70, UCMJ under any definition of "request" and holding otherwise conflicts with *United States v. Moss*, 73 M.J. 64, 68 (C.A.A.F. 2014) (appellate rights form informative only).

United States v. Gladue, 67 M.J. 311, 313 (C.A.A.F. 2009) (internal citation omitted). This Court looks to "the particular facts and circumstances of a case to determine whether a party has intentionally relinquished a known right." *United States v. Mitchell*, 77 M.J. 725, 731 (N-M. Ct. Crim. App. 2018).

In *United States v. Matthews*, the Air Force Court of Criminal Appeals held an unauthorized voluntary absence "constitutes a waiver of the right to be represented by appellate defense counsel before" the Court of Criminal Appeals. 19 M.J. 707, 708 (A.F.C.M.R. 1984). Matthews did not make an election or sign an appellate rights form that had an option to request appellate defense counsel. *Id*.

More recently, the Air Force Court held that when an appellant "elected not to request appellate defense counsel" and then could not be found while on appeal, "the proper course of action is to conduct a review of the record under Article 66, UCMJ . . . without the benefit of a brief from the appellant. *United States v. Hernandez*, No. S32118, 2013 CCA LEXIS 1094, at *2 (A.F. Ct. Crim. App. Dec. 5, 2013); *see also United States v. Walsh*, No. S32250, 2015 CCA LEXIS 147, at *3 (A.F. Ct. Crim. App. Apr. 16, 2015) (conducting Article 66 review without appellate defense counsel when appellant waived appellate representation).

Seaman Brown knew his appellate rights—as he told the Military Judge he understood his "post-trial and appellate rights," (R. 1960), took a recess to discuss these rights with his standby counsel, and then told the Military Judge again he

understood them and had no questions. (R. 1961.)

Immediately thereafter, Seaman Brown unequivocally answered the Military Judge's question—he wanted to be responsible for all post-trial actions in his case. (R. 1961.) That statement indicates Seaman Brown wanted to represent himself on appeal and is akin to *Hernandez's* affirmative election not to request appellate counsel. That statement was not made in a vacuum—Seaman Brown represented himself throughout his entire contested trial after releasing his former trial defense counsel. (R. 492-1964.) He did not want his detailed trial defense counsel, or any other counsel, to represent him at trial and did not want any other counsel to handle his post-trial actions or appeal. (R. 436-92; 1960-61.)

In addition, Seaman Brown did not sign any Appellate Rights form at trial, making his preference to continue to represent himself on appeal even clearer. (App. Ex. CCXXXI at 2.) His decision not to sign the form, along with his affirmative statement to be responsible for the post-trial actions, is exactly the "affirmative action" that was absent from the *Harper* case. *See Harper*, 80 M.J. at 542 (lack of affirmative action to waive representation key to holding).

These two actions constitute an affirmative waiver of appellate representation and *Harper's* holding is inapplicable in this case.

However, since this waiver occurred prior to the convening authority's action, the case must be remanded to the Navy Judge Advocate General to

determine whether Seaman Brown still waives his right to appellate counsel. *See United States v. Smith*, 34 M.J. 247, 249 (C.M.A. 1992) (finding waiver of appellate counsel prior to CA's action premature); *see also United States v. Ramos*, 2021 CCA LEXIS 253, at *4-6 (A.F. Ct. Crim. App. May 21, 2021) (remanding case to Air Force JAG for determination if appellant desires appellate representation when waiver prior to CA's action).

2. Even if the Panel finds no express waiver, none was required since Seaman Brown's appellate rights were never provided. Unlike *Harper*, nothing in the Record supports that Seaman Brown was advised he was guaranteed military counsel on appeal. Neither the Military Judge nor his standby counsel advised him he was guaranteed appellate counsel and he did not sign an Appellate Rights form.

The *Harper* Court concluded that the "Appellate Rights advice . . . coupled with the absence of any affirmative waiver . . . [is] tantamount to [an] uninterrupted and unaltered request for such counsel." *Harper*, 80 M.J. at 541.

Those facts are not present here. First, Seaman Brown did not sign any Appellate Rights advice or form. (App. Ex. CCXXXI.) Second, the Military Judge did not specifically go through his appellate rights—neither addressing when his case would have a mandatory appeal nor that he was guaranteed military appellate counsel. (R. 1960-61.) Third, his standby counsel indicated she did not advise Seaman Brown his appellate rights—instead stating Seaman Brown "was asked about this on the record." *See* JAGINST 5800.7G, Section 0148.b(3) (trial defense

counsel is normally required to "advise the accused in detail" appellate rights); (App. Ex. CCXXXI). Finally, Seaman Brown represented himself at trial, despite numerous recommendations from the Military Judge that this was against his best interest. (R. 436-92.)

Unlike in *Harper*, the Government can point to nowhere in the Record that shows Seaman Brown knew and acknowledged he was guaranteed appellate representation during a mandatory appeal. The Judge did not advise him, the standby counsel did not advise him, and there is no evidence he ever read, reviewed, or understood the standard Appellate Rights advisement. This Panel Order, without recognizing these significant factual distinctions, cited *Harper* without explanation. It is not applicable to this case and this Court is without authority to order appellate representation.

3. Seaman Brown repeatedly expressed his desire to represent himself, at trial and for all post-trial actions. The Panel's Order forces Appellate Defense Counsel to prevent him from doing that by this Court's Rules and federal precedent.

This Court's Rules permit "*Pro Se Submissions*" for a litigant "who is representing him or herself." JRAP 18(c) (Jan. 1, 2021). But "an accused who is represented by counsel who has made an appearance in a matter before the Court *may not file pro se submissions*." JRAP 18(c)(2).

That Rule is consistent with federal precedent prohibiting *pro se* briefs or submissions when the appellant is represented by counsel. *See McMeans v.*

Brigano, 228 F.3d. 674, 684 (6th Cir. 2000) (a criminal appellant does not have "a constitutional entitlement to submit a *pro se* appellate brief on direct appeal in addition to the brief submitted by appointed counsel"); *United States v. Ogbonna*, 184 F.3d 447, 449 (5th Cir. 1999); *United States v. Gwiazdzinski*, 141 F.3d 784, 787 (7th Cir. 1998) (declining to accept the defendant's *pro se* brief on appeal from his federal conviction because a "defendant does not have an affirmative right to submit a *pro se* brief when represented by counsel").

The Panel's Order improperly forces Appellate Defense Counsel to make an appearance in this matter that would prevent Seaman Brown from representing himself—a desire he consistently expressed at trial.

D. <u>The Panel should remand the case to the JAG to find Seaman Brown and determine if he continues to waive his right to appellate counsel. If the Government fails again, the Court must review the case without appellate defense representation</u>.

Pursuant to *Smith* and consistent with *Ramos*, the case must be remanded to the Navy Judge Advocate General to determine whether Seaman Brown still waives his right to appellate counsel. *See Smith*, 34 M.J. at 249; *see Ramos*, 2021 CCA LEXIS 253, at *4-6. And the Government must make sufficient effort to find Seaman Brown. *See United States v. Bell*, 11 C.M.A. 306, 309 (C.M.A. 1960) (holding an accused can forfeit the right to any assistance of counsel on appeal after sufficient effort by military authorities). The Government has his address—it should send certified mail letters requesting he elect whether to request

representation as recommended in *Bell* and that "he must either represent himself or obtain civilian counsel" if he does not elect representation. *Id*.

If the Government still cannot find Seaman Brown, the Court must conduct its Article 66 review without appellate defense representation consistent with Air Force Court of Criminal Appeals precedent. *See Ramos*, 2021 CCA LEXIS 253; *Walsh*, 2015 CCA LEXIS 147.

II.

United States v. Harper was erroneously decided and should be overturned. Under Articles 66 and 70, UCMJ and the Appellate Rights form, appellate representation is not a right and must be requested even in a mandatory appeal. The Panel's Order, and Harper's holding, are inconsistent with the current statutory and regulatory appellate framework.

A. The standard of review is *de novo*.

Questions of statutory interpretation are reviewed *de novo*. *United States v. Schloff*, 74 M.J. 312, 313 (C.A.A.F. 2015).

B. Statutory interpretation cannot be done in a vacuum—it must be done in the context of the overall statutory scheme.

Statutory construction begins with a look at plain language. *United States v. Ron Pair Enterprises, Inc*., 489 U.S. 235, 241-42 (1989). "When the statute's language is plain, the sole function of the courts—at least where the disposition required by the test is not absurd—is to enforce it according to its terms."

Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A., 530 U.S. 1, 6 (2000).

A court's "duty in interpreting a statute is to implement the will of Congress, so far as the meaning of the words fairly permit." *United States v. Chin*, 75 M.J. 220, 224 (C.A.A.F. 2016) (internal citations and quotations omitted). "Statutory language cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Id*. (internal citations and quotations omitted).

C. Articles 66(b) and 70, UCMJ require an accused to "request" representation from a detailed appellate defense counsel in all cases.

1. Under Article 70(c), UCMJ, an accused only receives representation from appellate defense counsel in three situations—not in every case—regardless if the appeal is mandatory.

Article 70(c), UCMJ states:

> Appellate defense counsel shall represent the accused before the Court of Criminal Appeals, the Court of Appeals for the Armed Forces, or the Supreme Court—
>
> (1) when requested by the accused;
> (2) when the United Sates is represented by counsel; or
> (3) when the Judge Advocate General has sent the case to the Court of Appeals for the Armed Forces.

10 U.S.C. §870(c) (2019). Those three situations control when an accused is entitled to representation on appeal. *Id*.; *see also* R.C.M. 1202(b)(2)(A) (appellate

representation only when requested); JAG Instruction 5800.7G, Manual of the Judge Advocate General, Section 0148.b(1) (Jan. 15, 2021) (military accused entitled to representation when requested).

2. Article 66, UCMJ, does not require appellate defense counsel representation, despite establishing mandatory review and voluntary requests for review by an accused in certain scenarios.

This Court automatically reviews courts-martial with a sentence of a certain severity. Article 66(b)(3), UCMJ; 10 U.S.C. §866(b)(3) (2019). Article 66(b)(3) does not require appellate defense counsel to represent an accused in a mandatory appeal. *Id*. Article 66(b)(1) further allows "the accused" the file a "timely appeal" in cases not subject to "automatic review." Article 66(b)(1), UCMJ. Article 66(b)(1) also does not require appellate defense counsel representation for an accused to "timely appeal." *Id*.

3. The Navy-Marine Corps Trial Judiciary updated the standard Appellate Rights form to inform an accused they will not receive appellate representation without a request.[3]

The Navy-Marine Corps Trial Judiciary changed the Appellate Rights form after the Military Justice Act of 2016 to inform an accused they will not receive

---

[3] It is unclear whether Seaman Brown received the old Appellate Rights form (as in *Harper*), the updated Appellate Rights form (post MJA 16), or no form at all. (*See* App. Ex. CCXXXI.) Regardless, Seaman Brown never signed any form and the updated form is an intervening event showing the reasoning in *Harper* was flawed and should be overturned.

appellate representation without a request. Appellate and Post-Trial Rights and Post-Trial Administrative Processing at 4-5; available at http://jag.navy.mil/trial_judiciary.htm (labeled as Appellate Rights Post MJA 16) (last visited on July 2, 2021). The updated Appellate Rights form advises an accused of "the right to request a military appellate defense counsel be detailed to represent you." *Id*. An accused can "Sign a Special Power of Attorney" or "Request Representation at a Later Date." *Id*. If an accused does not sign the power of attorney, the form states, "you do not waive the right to request a military defense counsel at a later date." *Id*. If he makes no request, the form states a military appellate defense counsel will make reasonable efforts to contact the accused. *Id*. But if military defense counsel are unable to contact an accused, the form warns that "the NMCCA will conduct the automatic review of your case without input from you." *Id*. at 5.

D. *Harper's* holding is inconsistent with the statutory and regulatory framework requiring a request for representation. It should be overturned.

When asked to overrule precedent, this Court should analyze the issue "under the doctrine of stare decisis." *United States v. Dinger*, 77 M.J. 447, 452 (C.A.A.F. 2018) (citation omitted). Prior decisions should be overruled "where the necessity and propriety of doing so has been established." *Id*. (citations omitted) (internal quotation marks omitted). Considerations should include: "whether the

prior decision is unworkable or poorly reasoned; any intervening events; the reasonable expectations of servicemembers; and the risk of undermining public confidence in the law." *Id*. (citation omitted).

Harper should be overturned for three reasons. First, *Harper* is poorly reasoned. *Harper* held the acknowledgement of Appellate Rights advice, without an affirmative waiver, "is tantamount to Appellant's uninterrupted and unaltered request for [] counsel." *Harper*, 80 M.J. at 541. That statement is both not a finding of fact, and more importantly, an incorrect conclusion of law.[4]

A request requires an affirmative action by any standard definition of the word—not the receipt of advice and the absence of action. A request is "the act or an instance of asking for something" or "to ask as a favor or privilege." Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/request (last visited July 2, 2021) (as noun and verb, respectively). And those definitions requiring an "act" are consistent with CAAF precedent. In *Moss*, the Court held that the appellate rights advice is "informative only." *Moss*, 73 M.J. at 68. The appellate advice "simply informed Moss . . . she had the discretion to appeal to [CAAF] . . . and if she chose to do so she had *the same right to counsel before [CAAF] as she did before the ACCA*." *Id*. (emphasis added). Put simply, acknowledging you have a right to request appellate counsel is not the same as

[4] The *Harper* court improperly placed this holding in its Findings of Fact.

requesting counsel. A request requires some type of additional, affirmative action—*Harper's* reasoning is wrong.

This is consistent with Army and Air Force standard practice—prompting an accused to select they "DO" or "DO NOT" request appellate representation in their standard appellate rights form or having a specific request for appellate counsel form. *See Moss*, 73 M.J. at 66 (Moss "circled the word 'do' in rights advisement to request appellate representation); *United States v. Snyder*, 2020 CCA LEXIS 117, at *69 (A.F. Ct. Crim. App. Apr. 15, 2020).

Second, the updated Appellate Rights advice is a sufficient intervening event to justify overruling *Harper*. The Navy-Marine Corps Trial Judiciary now has standardized appellate advice warning accused that they must request appellate representation—with a power of attorney or a later request—or they will not receive appellate representation. Appellate Rights Post MJA 16. This new advice is consistent with 35 years of Air Force CCA precedent, *see Matthews*, 19 M.J. at 708; *Hernandez*, 2013 CCA LEXIS 1094, at *2; *Walsh*, 2015 CCA LEXIS 147, at *3, and consistent with the plain language of Articles 66(b) and 70, UCMJ. This Court should bring its precedent in line as well.

Finally, *Harper's* holding creates a contradiction with the reasonable expectations of servicemembers convicted at courts-martial. An accused may decide to decline to request appellate representation based on the current appellate

advice—only to have this Court order appellate representation per *Harper* like in this case where no advice was provided at all. This Court must bring its precedent in line with the statutory and regulatory framework and its own trial judiciary's standardized appellate advice.

This Court must overturn *Harper* and remand this case to the Navy JAG to find Seaman Brown. If he cannot be found—the Court should conduct its review without appellate defense counsel representation. *Supra* Part I.D.

III.

The Panel's Order commands Appellate Defense Counsel to violate his State Business and Professions Code §6104, the advice of the State Bar Ethics Hotline, and JAG Instruction 5803.1E, Rule 1.2. The Panel neither addressed, nor cited, Appellate Defense Counsel's State Bar Ethics Rules.

An attorney "shall not represent a client . . . if the representation will result in violation of" ethical rules. JAGINST 5803.1E, Rule 1.16(a). A licensed attorney may be subject to disciplinary action if representing a client contrary to ethical rules. JAGINST 5803.1E, Rule 8.4. These rules are in accord with the Model Rules of Professional Conduct. *See* MODEL RULES OF PROF'L CONDUCT r. 1.16, 8.4 (AM. BAR ASS'N, 2016).

A client is the "ultimate authority to determine the purpose to be served by legal representation." MODEL RULES OF PROF'L CONDUCT r. 1.2 cmt. (AM. BAR ASS'N, 2016). The duty of communication requires both informing clients of the

circumstances of their case and consulting with the client about the "means to be used to accomplish the client's objectives." MODEL RULES OF PROF'L CONDUCT r. 1.4 cmt (AM. BAR ASS'N, 2016). Moreover, any decision that lies with the client must be made with "informed consent." *Id.* None of this is possible without a relationship with the convicted servicemember. In short, the ethical rules do not allow such representation.

Appellate Defense Counsel identified in the Panel's Order is subject to California's State Bar Act, also known as the California Business & Professions Code for Attorneys. (Cal. Bus. & Prof. Code § 6000 et seq. (2021 ed.).) The California Code §6104 states, "corruptly or wilfully and without authority appearing as attorney for a party to an action or proceeding constitutes a cause for disbarment or suspension." (Cal. Bus. & Prof. Code §6104 (2021 ed.).)

In *United States v. Iverson*, the CAAF held "that the attorney-client relationship must exist for anyone to function as 'counsel for the accused.'" *Iverson*, 5 M.J. at 441 (in the context of post-trial actions). The *Iverson* court continued, "it is the *accused's* interests which are at stake in the review, and it is the *accused's* welfare which will be affected by an appellate conclusion that 'counsel for the accused' effectively waived a complaint . . . ." *Id*. at 441-42.

The California State Bar Ethics Hotline counselor communicated "concern" to Appellate Defense Counsel that §6104 could be an issue because he has not

formed an attorney-client relationship with Brown. (App. Def. Counsel Affidavit.) Appellate Defense Counsel shares this concern.

The Panel's Order does not cite California State Bar Rules or address the specific ethical concerns for Appellate Defense Counsel. The Panel did not cite any ethical rules at all. Instead, the Panel relied on *Harper*, which had a single footnote referencing state ethical rules that did not include the State of California. This Court should vacate the Panel's Order considering Appellate Defense Counsel's ethics advice and issue an Order consistent with *supra* Part I.D.

[redacted]
Jasper W. Casey
Captain, U.S. Marine Corps
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and three copies of the foregoing were electronically delivered to the Court on July 8, 2021, that a copy was uploaded into the Court's case management system on July 8, 2021 and that a copy of the foregoing was electronically delivered to the Appellate Government Division on July 8, 2021.

[redacted]
Jasper W. Casey
Captain, U.S. Marine Corps
Appellate Defense Counsel

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

Before Panel No. 3

UNITED STATES	**MOTION TO ATTACH**
	NMCCA Case No. 202100042
v.	Tried at Region Legal Service Office Mid-Atlantic, Naval Base Groton, Connecticut, on March 20; July 11; September 18; October 23; December 2-3, 2019; and January 13; February 11; August 4, 14, 26; September 24; October 12-19, 2020, before a General Court-Martial convened by the Commanding Officer, Navy Region Mid-Atlantic, LCDR R.L. Stormer, JAGC, U.S. Navy, presiding
Micah J. Brown Culinary Specialist (Submarines) Seaman (E-3) U.S. Navy	

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

Pursuant to this Court's Rule 23.4, undersigned counsel requests to attach the affidavit of the advice received from California Bar Ethics Hotline. This affidavit it relevant to undersigned counsel's Motion to Withdraw and Motion for Reconsideration to represent Seaman Brown on July 8, 2021.

Jasper W. Casey
Captain, U.S. Marine Corps
Appellate Defense Counsel

Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
[redacted]

APPENDIX

A. Affidavit from Captain Jasper Casey, U.S. Marine Corps, dated July 8, 2021.

CERTIFICATE OF FILING AND SERVICE

I certify that the original and three copies of the foregoing were electronically delivered to the Court on July 8, 2021, that a copy was uploaded into the Court's case management system on July 8, 2021 and that a copy of the foregoing was electronically delivered to the Appellate Government Division on July 8, 2021.

[redacted]
Jasper W. Casey
Captain, U.S. Marine Corps
Appellate Defense Counsel

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

Before Panel No. 3

UNITED STATES *Appellee* v. **Micah J. Brown** Culinary Specialist (Submarines) Seaman (E-3) U.S. Navy *Appellant*	**AFFIDAVIT OF CAPTAIN J.W. CASEY** NMCCA Case No. 202100042

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

I, Captain Jasper W. Casey, Appellate Defense Counsel, do swear that the following is true to the best of my knowledge.

I am a member of good standing with the State Bar of California.

On April 2, 2021, after repeated failed attempts to contact CSSN Brown, Micah, I provided a "Notice of No Attorney-Client Relationship" to this Court and the Appellate Government Division. As of this writing I have not had any contact with CSSN Brown, nor have I formed an attorney-client relationship.

On June 10, 2021, this court issued and "ORDER To Represent Appellant."

On June 14, 2021 I contacted the State Bar of California Ethics Hotline to inquire about any potential violations of the California Business and Professions Code that could result from my compliance with this Court's order.

The Ethics Counselor directed me to California Business and Professions Code § 6104, which states "[c]orruptly or willfully and without authority appearing as

attorney for a party to an action or proceeding constitutes a cause for disbarment or suspension." My concern is that any action I take on behalf of CSSN Brown would be "without authority" because I have not formed an attorney-client relationship or had any contact with CSSN Brown that would constitute authority to represent him. The ethics counselor concurred with my concern.

However, California Business and Professions Code § 6103 states that "[a] willful disobedience or violation of an order of the court requiring him to do . . . an act connected with or in the course of his profession, which he out in good faith to do…, and any violation of the oath taken buy him, or of his duties as such attorney, constitute causes for disbarment or suspension." The ethics counselor opined that an order from a court that specifically acknowledges that the order is directing counsel to violate California Business and Professions Code § 6104 may provide "shelter" against any disciplinary action by the State Bar of California.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed on July 8, 2021.

[redacted]

Jasper W. Casey
Captain, U.S. Marine Corps
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street SE
Building 58, Suite 100
Washington Navy Yard, D.C. 20374
[redacted]

United States Navy-Marine Corps
Court of Criminal Appeals

UNITED STATES ***Appellee*** **v.** **Micah J. BROWN** **Culinary Specialist (Submarines)** **Seaman (E-3)** **U. S. Navy** ***Appellant***	**NMCCA No. 202100042** **Panel 3** **ORDER** ***To Represent Appellant***

It is, by the Court, this 10th day of June 2021,

ORDERED:

That Appellate Defense Counsel shall represent Appellant, *see United States v. Harper*, 80 MJ 540 (N-M Ct. Crim. App. 2020) (order), and file a brief specifying any assignments of error by no later than 12 July 2021.

FOR THE COURT:

[redacted]

RODGER A. DREW, JR.
Clerk of Court

Copy to:
NMCCA (51.3)
45 (Capt Casey)
46 (Capt Rimal)
02

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

Before Panel No. 3

UNITED STATES	**MOTION FOR LEAVE TO FILE OUT-OF-TIME FOR A THIRD ENLARGEMENT OF TIME**
v.	NMCCA Case No. 202100042
Micah J. Brown Culinary Specialist (Submarines) Seaman (E-3) U.S. Navy	Tried at Region Legal Service Office Mid-Atlantic, Naval Base Groton, Connecticut, on March 20; July 11; September 18; October 23; December 2-3, 2019; and January 13; February 11; August 4, 14, 26; September 24; October 12-19, 2020, before a General Court-Martial convened by the Commanding Officer, Navy Region Mid-Atlantic, LCDR R.L. Stormer, JAGC, U.S. Navy, presiding

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

Pursuant to this Court's Rules of Appellate Procedure 23(a), 23.1, and 23.2, and 23.11, undersigned counsel respectfully moves for leave to file out-of-time for a third enlargement of time. The current due date per Panel 3's Order is July 12, 2021. The number of days requested is thirty. The requested due date is August 11, 2021.

Status of the case:

1. The Record of Trial was docketed on February 17, 2021.
2. The Moreno III date is August 17, 2022.
3. Seaman Brown is not confined.
4. The record consists of 1,965 transcribed pages and 5,416 total pages.
5. Counsel has not reviewed the Record.

Counsel has been unable to communicate with Seaman Brown after reasonable due diligence. The Government failed to find Seaman Brown after this Court's Order to locate him. Thus, Seaman Brown has not been consulted for this enlargement and no attorney-client relationship has been formed between counsel and Seaman Brown.

There is good cause for this enlargement, out-of-time, due to the pending Motions regarding undersigned counsel's inability to represent Seaman Brown based on a lack of attorney-client relationship and a lack of request for appellate representation. Counsel filed a Motion to Withdraw from the case and a Motion for Reconsideration of the Panel's Order to represent Seaman Brown. The Court has not yet acted on those Motions.

This enlargement request is an attempt to comply with the Panel's Order on June 10, 2021. However, it is not a concession that undersigned counsel can represent Seaman Brown. No attorney-client representation has been formed and

Seaman Brown made no request for appellate representation.

[redacted]
Jasper W. Casey
Captain, U.S. Marine Corps
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and three copies of the foregoing were electronically delivered to the Court on July 12, 2021, that a copy was uploaded into the Court's case management system on July 12, 2021 and that a copy of the foregoing was electronically delivered to the Appellate Government Division on July 12, 2021.

[redacted]
Jasper W. Casey
Captain, U.S. Marine Corps
Appellate Defense Counsel

[redacted]

Subject: RULING - FILING - Panel 3 - U.S. v. Brown - NMCCA No. 202100042 - Request for 3rd EOT (Capt Casey)

Signed By: [redacted]

MOTION GRANTED
July 12 2021
United States Navy-Marine Corps
Court of Criminal Appeals

[redacted]
Panel Paralegal
Navy-Marine Corps Court of Criminal Appeals
1254 Charles Morris St SE, Ste 320
Washington Navy Yard, DC 20374
[redacted]

[redacted]

Subject: FILING - Panel 3 - U.S. v. Brown - NMCCA No. 202100042 - Request for 3rd EOT (Capt Casey)

Good morning,

Attached is a Motion for Leave to File Out of Time and a request for a 3rd EOT in the Panel 3 case, U.S. v. Brown, 202100042.

Very respectfully,

Jasper Casey
Captain, U.S. Marine Corps

Appellate Defense Counsel (Code 45)
1254 Charles Morris Street SE, Bldg. 58
Washington Navy Yard, DC 20374
[redacted]

[redacted]

United States Navy-Marine Corps
Court of Criminal Appeals

UNITED STATES ***Appellee*** **v.** **Micah J. BROWN** **Culinary Specialist (Submarines)** **Seaman (E-3)** **U. S. Navy** ***Appellant***	**NMCCA No. 202100042** **Panel 3** **ORDER** ***Denying Appellate Defense Counsel's Motion to Withdraw as Appellate Defense Counsel and Motion for Reconsideration***

On 12 April 2021, this Court issued an Order directing the Government to locate Appellant for the purpose of ordering him to contact Appellate Defense Counsel. The Government responded on 12 May 2021 that the Navy and Marine Corps Appellate Leave Activity [NAMALA] had attempted to contact Appellant via phone call on 10 separate occasions. These attempts resulted in a responsive text message on 4 April 2021, presumably from Appellant, providing an address to "mail [Appellant's] things," which this Court construes to include matters related to the appellate review of his case. In response to the text message, NAMALA sent four text messages and two voice mails, to which Appellant did not respond.

On 10 June 2021, this Court ordered Appellate Defense Counsel to represent Appellant and to file a brief specifying any assignments of error no later than 12 July 2021. On 8 July 2021, Appellate Defense Counsel filed a Motion to Withdraw Appellate Defense Counsel and Motion for Reconsideration of NMCCA Panel 3 Order to Represent Appellant and Suggestion for En Banc Consideration.

Appellate Defense Counsel argues for withdrawal on various grounds, but in light of previous decisions by this Court,[1] it is unnecessary to respond to each asserted ground individually. What is clear is that Appellant has taken no action either to affirmatively waive or withdraw his case from automatic

---

[1] *United States v. Harper*, 80 M.J. 540 (N-M Ct. Crim. App. 2020).

appellate review by this Court, or to affirmatively waive his right to representation by military counsel.

This Court finds that Appellate Defense Counsel was properly detailed as military counsel to represent Appellant before this Court. By statute, such counsel "*shall* represent the accused before th[is] Court of Criminal Appeals . . . when the United States is represented by counsel."[2] The United States is represented by appellate government counsel on pending matters in this case; therefore, Appellate Defense Counsel shall represent Appellant before this Court unless and until Appellant affirmatively waives his right to such representation. In the future, should Appellant waive his right to appellate review, the need for representation by Appellate Defense Counsel would be obviated. This Court finds that in the absence of either a signed appellate rights waiver or an affirmative waiver of Appellant's right to detailed appellate counsel, Appellant is entitled to review by this Court and to representation by Appellate Defense Counsel.

Accordingly, it is, by the Court, this 27th day of July 2021,

ORDERED:

That Appellate Defense Counsel's request to withdraw as counsel for Appellant is **DENIED**;

That Appellate Defense Counsel's motion for reconsideration and suggestion for this Court's En Banc review of the Order to Represent Appellant of 10 June 2021 is **DENIED**;

That the Government provide to Appellate Defense Counsel all contact information for Appellant, including but not limited to the address he provided to NAMALA;

That Appellate Defense Counsel attempt to contact Appellant via all means available, to include sending a letter via certified mail to the address provided by NAMALA, explaining—at a minimum—the matters set out in Appendix A to this Order; and

That Appellate Defense Counsel provide representation to Appellant in accordance with his state bar rules, this Court Order, and the rules of this Court, and file a brief specifying any assignments of error no later than 25 August 2021.

---

[2] Article 70(c)(1)–(2), Uniform Code of Military Justice, 10 U.S.C. § 870(c)(2) (emphasis added). *See also* Rule for Courts-Martial 1202; Manual of the Judge Advocate General, Judge Advocate General Instruction 5800.7F CH 1 § 0148 (Jan. 1, 2019).

FOR THE COURT:

[redacted]

Clerk of Court

Copy to:
NMCCA (51.3)
45 (Capt Casey)
46 (Capt Rimal)
02

United States Navy-Marine Corps
Court of Criminal Appeals

UNITED STATES ***Appellee*** **v.** **Micah J. BROWN** **Culinary Specialist (Submarines)** **Seaman (E-3)** **U. S. Navy** ***Appellant***	**NMCCA No. 202100042** **Panel 3** **ORDER** ***Denying Appellate Defense Counsel's Motion to Withdraw as Appellate Defense Counsel and Motion for Reconsideration***

On 12 April 2021, this Court issued an Order directing the Government to locate Appellant for the purpose of ordering him to contact Appellate Defense Counsel. The Government responded on 12 May 2021 that the Navy and Marine Corps Appellate Leave Activity [NAMALA] had attempted to contact Appellant via phone call on 10 separate occasions. These attempts resulted in a responsive text message on 4 April 2021, presumably from Appellant, providing an address to "mail [Appellant's] things," which this Court construes to include matters related to the appellate review of his case. In response to the text message, NAMALA sent four text messages and two voice mails, to which Appellant did not respond.

On 10 June 2021, this Court ordered Appellate Defense Counsel to represent Appellant and to file a brief specifying any assignments of error no later than 12 July 2021. On 8 July 2021, Appellate Defense Counsel filed a Motion to Withdraw Appellate Defense Counsel and Motion for Reconsideration of NMCCA Panel 3 Order to Represent Appellant and Suggestion for En Banc Consideration.

Appellate Defense Counsel argues for withdrawal on various grounds, but in light of previous decisions by this Court,[1] it is unnecessary to respond to each asserted ground individually. What is clear is that Appellant has taken no action either to affirmatively waive or withdraw his case from automatic

---

[1] *United States v. Harper*, 80 M.J. 540 (N-M Ct. Crim. App. 2020).

appellate review by this Court, or to affirmatively waive his right to representation by military counsel.

This Court finds that Appellate Defense Counsel was properly detailed as military counsel to represent Appellant before this Court. By statute, such counsel "*shall* represent the accused before th[is] Court of Criminal Appeals . . . when the United States is represented by counsel."[2] The United States is represented by appellate government counsel on pending matters in this case; therefore, Appellate Defense Counsel shall represent Appellant before this Court unless and until Appellant affirmatively waives his right to such representation. In the future, should Appellant waive his right to appellate review, the need for representation by Appellate Defense Counsel would be obviated. This Court finds that in the absence of either a signed appellate rights waiver or an affirmative waiver of Appellant's right to detailed appellate counsel, Appellant is entitled to review by this Court and to representation by Appellate Defense Counsel.

Accordingly, it is, by the Court, this 27th day of July 2021,

ORDERED:

That Appellate Defense Counsel's request to withdraw as counsel for Appellant is **DENIED**;

That Appellate Defense Counsel's motion for reconsideration and suggestion for this Court's En Banc review of the Order to Represent Appellant of 10 June 2021 is **DENIED**;

That the Government provide to Appellate Defense Counsel all contact information for Appellant, including but not limited to the address he provided to NAMALA;

That Appellate Defense Counsel attempt to contact Appellant via all means available, to include sending a letter via certified mail to the address provided by NAMALA, explaining—at a minimum—the matters set out in Appendix A to this Order; and

That Appellate Defense Counsel provide representation to Appellant in accordance with his state bar rules, this Court Order, and the rules of this Court, and file a brief specifying any assignments of error no later than 25 August 2021.

---

[2] Article 70(c)(1)–(2), Uniform Code of Military Justice, 10 U.S.C. § 870(c)(2) (emphasis added). *See also* Rule for Courts-Martial 1202; Manual of the Judge Advocate General, Judge Advocate General Instruction 5800.7F CH 1 § 0148 (Jan. 1, 2019).

[redacted]
Clerk of Court

Copy to:
NMCCA (51.3)
45 (Capt Casey)
46 (Capt Rimal)
02

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

Before Panel No. 3

UNITED STATES, Appellee v. Micah J. BROWN, Culinary Specialist Seaman (E-3) U.S. Navy Appellant	)	APPELLEE'S OPPOSITION TO APPELLANT'S MOTION TO WITHDRAW Case No. 202100042 Tried at Naval Submarine Base New London, Groton, Connecticut, on March 20, July 11, September 18, October 23, and December 2–3, 2019, January 13, February 11, August 4, 14, and 26, and September 24, 2020, before a general court-martial convened by Commander, Navy Region Mid-Atlantic, Lieutenant Colonel R. Mattioli, U.S. Marine Corps (arraignment), Commander R.J. Stormer, JAGC, U.S. Navy (trial), presiding.

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

The United States opposes Appellant's Motion to withdraw because it fails to identify the successor appellate defense counsel, as required by Rule 12 of this Court's Rules of Appellate Procedure.

A. This Court's Rules require counsel requesting withdrawal from a case to, inter alia, "identify by name the successor appellate defense counsel."

"The filing of any pleading relative to a case which contains the signature of counsel . . . constitutes notice of appearance of such counsel." N-M. Ct. Crim. App. R. 12(a). To later withdraw, an appellate defense counsel "must request leave to withdraw by motion to the Court." N-M. Ct. Crim. App. R. 12.2. Such motion must, inter alia, "identify by name the successor appellate defense counsel," and "affirm that a thorough turnover of the record between counsel has been completed." *Id.*

This Court is directly responsible for exercising "institutional vigilance" over all cases before it which are pending Article 66 review. *Diaz v. JAG of the Navy*, 59 M.J. 34, 40 (C.A.A.F. 2003). An appellant must comply with this Court's Rules, which enable the Court to maintain "institutional vigilance" over cases before it. *Id.*

B. Contrary to Rule 12.2, Appellate Defense Counsel's Motion fails to identify the successor appellate defense counsel. This Court should require Appellate Defense Counsel to comply with its Rules.

Appellate Defense Counsel has filed multiple pleadings that already constitute notice of appearance as Appellant's counsel under the Rules. (*See* Appellant's Notice of No Attorney Client Relationship at 2, April 4, 2021; Appellant's Mot First Enl. at 3, April 19, 2021; Appellant's Mot Second Enl. at 3,

May 12, 2021; Appellant's Mot to Withdraw and Mot for Recon. and Suggestion for *En Banc* Consideration at 22, July 8, 2021; Appellant's Mot to Attach at 1, July 8, 2021; Appellant's Mot Third Enl. at 3, July 12, 2021.)

As counsel of record, Appellate Defense Counsel must first comply with Rule 12.2 before withdrawing from representation. Despite acknowledging this requirement, Appellate Defense Counsel's Motion fails to identify replacement counsel and therefore has not acted to ensure continued representation of Appellant. (*See* App. Mot to Withdraw at 2, July 8, 2021.) Appellate Defense Counsel may accomplish this by contacting the appellate detailing authority in Code 45 and identifying the successor appellate defense counsel.

Unless Counsel amends his Motion to comply with Rule 12.2, this Court should deny his request for withdrawal.

Conclusion

The United States respectfully requests this Court deny Appellate Defense Counsel's Motion for Withdrawal. When Appellate Defense Counsel submits an amended Motion that complies with this Court's Rules, the United States will reconsider its position.

Megan E. Martino
Digitally signed by Megan E. Martino

MEGAN E. MARTINO
Lieutenant, JAGC, U.S. Navy
Appellate Government Counsel

Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
[redacted]

Certificate of Filing and Service

I certify that this document was emailed to the Court's filing address, uploaded to the Court's case management system, and emailed to Appellate Defense Counsel, Captain Jasper W. CASEY, U.S. Marine Corps, on July 16, 2021.

Megan E. Martino
Digitally signed by Megan E. Martino

MEGAN E. MARTINO
Lieutenant, JAGC, U.S. Navy
Appellate Government Counsel

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

Before Panel No. 3

UNITED STATES, Appellee v. Micah J. BROWN, Culinary Specialist Seaman (E-3) U.S. Navy Appellant	)	APPELLEE'S CONDITIONAL CONSENT TO APPELLANT'S MOTION FOR FOURTH ENLARGEMENT OF TIME Case No. 202100042 Tried at Naval Submarine Base New London, Groton, Connecticut, on March 20, July 11, September 18, October 23, and December 2–3, 2019, January 13, February 11, August 4, 14, and 26, and September 24, 2020, before a general court-martial convened by Commander, Navy Region Mid-Atlantic, Lieutenant Colonel R. Mattioli, U.S. Marine Corps (arraignment), Commander R. J. Stormer, JAGC, U.S. Navy (trial), presiding.

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

Pursuant to Rule 23(c) of this Court's Rules of Appellate Procedure, while the United States opposes a full thirty-day enlargement, it consents to a fourteen-

day enlargement. If Appellant files a supplemental pleading consistent with the Rules and precedent, the United States will then consent to the full enlargement.

A. This Court's Rules require a status of the review of the record of trial, a discussion of case complexity, and a detailed explanation of good cause.

This Court may grant an enlargement of time only if an appellant shows good cause with particularity. N-M. Ct. Crim. App. R. 23.2(c)(3). This includes requiring counsel to provide the status of the review of the record of trial and to "articulate specific reasons why the enlargement of time should be granted by the Court," which includes the complexity of the case. N-M. Ct. Crim. App. R. 23.2(c)(3).

This Court is directly responsible for exercising "institutional vigilance" over this and all cases pending Article 66 review. *Diaz v. JAG of the Navy*, 59 M.J. 34, 40 (C.A.A.F. 2003). Appellant must comply with this Court's Rules, which enable the Court to maintain "institutional vigilance" over his case. *Id.*

The justification for appellate delay implicates Appellant's right to speedy appellate process. In *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006), the court held that the Court of Criminal Appeals failed to exercise "institutional vigilance" and attributed that failure to the United States where appellate defense counsel stated the same reason for delay in each enlargement request. *Id.* at 137. The court found recurrent, rote justifications for delay suggested there was no

evidence demonstrating either "that the enlargements were directly attributable to [the appellant]," "that the need for additional time arose from other factors such as the complexity of [the appellant]'s case," or that "the numerous requests for delay filed by appellate defense counsel benefited [the appellant]." *Id.*

B. The Motion does not comply with the Rules. It fails to describe a current status of the review of the Record, a statement of the complexity of the case, or a statement of good cause.

1. Appellate Defense Counsel's repeated statement that review of the Record is incomplete fails to convey to the Court, or the United States, the current status of review.

Despite two orders from this Court requiring Appellate Defense Counsel to file a brief specifying any assignments of error, Counsel shows no progress toward that end. (*See* Order to Represent Appellant, June 10, 2021; Order Denying Appellate Defense Counsel's Mot. To Withdraw as Appellate Defense Counsel and Mot. For Recon. at 2, July 27, 2021.)

Appellant's fourth Motion asserts that Appellate Defense Counsel has not completed review of the Record. (*See* Appellant's Mot Fourth Enl. at 2, Aug. 24, 2021.) This case was docketed over six months ago and the status of review in the Fourth Enlargement Motion is identical to that in the First, which was filed four months ago. (*See* Appellant's Mot First Enl. at 2, Apr. 19, 2021.) This rote claim that Counsel has not completed review of the Record fails to update the Court—so that the Court can exercise "institutional vigilance"—and fails to convey to the

United States information to permit a fully informed response to the Motion. *Diaz*, 59 M.J. at 40.

2. The Motion does not describe the case's complexity.

As with each of the previous three requests, the current Motion again fails to discuss the case's complexity. (*Compare* Appellant's Mot. Fourth Enl., Aug. 24, 2021, *with* Appellant's Mot. Third Enl. July 12, 2021, Appellant's Mot. Second Enl., May 12, 2020, *and* Appellant's Mot. First Enl., Apr. 19, 2021.)

Rule 23.2(c)(3)(F) demands otherwise.

3. Appellant fails to articulate good cause.

Finally, the Motion's sole enunciation of "good cause" is Appellate Defense Counsel's difficulty in communicating with Appellant. (Appellant's Mot. Fourth Enl. at 2–3, Aug. 24, 2021.) Appellate Defense Counsel provides no explanation of how that prevents review of the Record and drafting a brief.

Appellate Defense Counsel neither documents how these delays benefitted Appellant, nor provides assurances that Appellate Defense Counsel will make progress in the requested enlargement period or that he will prioritize this case over his other cases. (*See* Appellant's Mot. Fourth Enl., Aug. 24, 2021.) This Court's Rules and *Moreno* require more. "Ultimately the timely management and disposition of cases docketed at the Courts of Criminal Appeals is a responsibility of the Courts of Criminal Appeals." *Moreno*, 63 M.J. at 137.

This Court should partially deny the present thirty-day enlargement request and grant only fourteen days. If Appellant complies with this Court's Rules, only then should this Court consider granting Appellant's full requested thirty-day enlargement.

Conclusion

The United States consents to a fourteen-day enlargement. The United States will consent to the full thirty-days requested if Appellate Defense Counsel promptly files an amended motion that complies with this Court's Rules.

Megan E. Martino
Digitally signed by Megan E. Martino

MEGAN E. MARTINO
Lieutenant, JAGC, U.S. Navy
Appellate Government Counsel
Navy-Marine Corps Appellate Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
[redacted]

Certificate of Filing and Service

I certify that this document was emailed to the Court's filing address, uploaded to the Court's case management system, and emailed to Appellate Defense Counsel, Captain Jasper W. CASEY, U.S. Marine Corps, on August 25, 2021.

Megan E. Martino

Digitally signed by Megan E. Martino

MEGAN E. MARTINO
Lieutenant, JAGC, U.S. Navy
Appellate Government Counsel

[redacted]

Subject: RULING - FILING - Panel 3 - U.S. v. Brown - NMCCA No. 202100042 - SUPPLEMENT to Request for 4th EOT (Capt Casey)

Signed By: [redacted]

MOTION GRANTED
Aug 25 2021
United States Navy-Marine Corps
Court of Criminal Appeals

[redacted]

Subject: FILING - Panel 3 - U.S. v. Brown - NMCCA No. 202100042 - SUPPLEMENT to Request for 4th EOT (Capt Casey)

To this Honorable Court,

Per this Court's direction, attached is a Supplement to Appellant's Request for a 4th EOT in the Panel 3 case, U.S. v. Brown, 202100042.

Very respectfully,

Jasper Casey
Captain, U.S. Marine Corps

Appellate Defense Counsel (Code 45)
1254 Charles Morris Street SE, Bldg. 58
Washington Navy Yard, DC 20374
[redacted]

[redacted]

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

Before Panel No. 3

UNITED STATES

Appellee

v.

Micah J. Brown
Culinary Specialist (Submarines)
Seaman (E-3)
U.S. Navy

Appellant

APPELLANT'S OUT-OF-TIME MOTION FOR A FOURTH ENLARGEMENT OF TIME

NMCCA Case No. 202100042

Tried at Region Legal Service Office Mid-Atlantic, Naval Base Groton, Connecticut, on 20 March 2019, 11 July 2019, 18 September 2019, 23 October 2019, 2-3 December 2019, 13 January 2020, 11 February 2020, 4 August 2020, 14 August 2020, 26 August 2020, 24 September 2020, and 12-19 October 2020 before a General Court-Martial convened by the Commanding Officer, Commander, Navy Region Mid-Atlantic, Lieutenant Commander R.L. Stormer, JAGC, USN presiding (trial)

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

COMES NOW undersigned, pursuant to Rule 23.2(c)(3) of this Court's Rules, and respectfully moves out-of-time for a fourth enlargement of time to resolve a pending writ of mandamus and prohibition at C.A.A.F., titled *In Re Jasper Casey*. The current due date is August 25, 2021. The number of days

requested is thirty. The requested due date is September 24, 2021.

The current status of the case:

1. The Record of Trial was docketed on 17 February 2021.

2. The Moreno III date is 17 August 2022.

3. CSSN Brown is not confined.

4. The record consists of 1,965 transcribed pages, and 5,416 total pages.

5. Counsel has not completed initial review of the record of trial.

Seaman Brown has not been consulted regarding this enlargement request.

Good cause exists for this enlargement. Undersigned counsel has not formed an attorney-client relationship with Seaman Brown. Counsel provided Notice of No Authority to Represent Seaman Brown on April 2, 2021. After the government was unable to locate Seaman Brown, this Court ordered undersigned counsel to represent Seaman Brown on June 10, 2021. This court later denied undersigned counsel's motionsto withdraw and reconsider and ordered the current filing deadline on July 27, 2021.

On August 16, 2021 a Petition for Extraordinary Relief in the Nature of a Writ of Mandamus and Prohibition titled *In Re Jasper Casey*, and a Motion for Emergency Stay were filed with the Court of Appeals for the Armed Forces (C.A.A.F.). Those filings are pending decision from C.A.A.F.. Undersigned

counsel requests additional time to resolve this pending litigation.

Undersigned counsel also requests additional time to continue to make efforts to make contact with Seaman Brown to ascertain his desires for representation and appellate review.

Due to administrative oversight, undersigned counsel failed to file this request for a fourth enlargement as intended on August 20, 2021. This enlargement request is an attempt to comply with the Panel's Order of July 27, 2021. However, it is not a concession that undersigned counsel can represent Seaman Brown. No attorney-client representation has been formed and Seaman Brown made no request for appellate representation.

WHEREFORE, Appellant respectfully requests this Court grant this motion.

[redacted]

Jasper W. Casey
Captain, U.S. Marine Corps
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street SE
Building 58, Suite 100
Washington Navy Yard, D.C. 20374

[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copy of the foregoing was delivered to the Court on 24 August 2021 that a copy was uploaded into the Court's case management system on 24 August 2021, and that a copy of the foregoing was delivered to Director, Appellate Government Division on 24 August 2021.

[redacted]
Jasper W. Casey
Captain, U.S. Marine Corps
Appellate Defense Counsel

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

Before Panel No. 3

UNITED STATES, Appellee v. Micah J. BROWN, Culinary Specialist Seaman (E-3) U.S. Navy Appellant	)	APPELLEE'S ORDER RESPONSE Case No. 202100042 Tried at Naval Submarine Base New London, Groton, Connecticut, on March 20, July 11, September 18, October 23, and December 2–3, 2019, January 13, February 11, August 4, 14, and 26, and September 24, 2020, before a general court-martial convened by Commander, Navy Region Mid-Atlantic, Lieutenant Colonel R. Mattioli, U.S. Marine Corps (arraignment), Commander R. J. Stormer, JAGC, U.S. Navy (trial), presiding.

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

In response to this Court's Order of July 27, 2021, the United States respectfully affirms that undersigned Counsel has provided Appellate Defense Counsel by email all known contact information for Appellant, including (1) the address he provided to the Navy and Marine Corps Appellate Leave Activity

("NAMALA"), (2) the phone number from which Appellant sent NAMALA his address, and (3) Appellant's mother's phone number.

Conclusion

The United States has complied with this Court's Order.

Megan E. Martino
Digitally signed by Megan E. Martino

MEGAN E. MARTINO
Lieutenant, JAGC, U.S. Navy
Appellate Government Counsel
Navy-Marine Corps Appellate Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
[redacted]

Certificate of Filing and Service

I certify that this document was emailed to the Court's filing address, uploaded to the Court's case management system, and emailed to Appellate Defense Counsel, Captain Jasper W. CASEY, U.S. Marine Corps, on August 5, 2021.

Megan E. Martino
Digitally signed by Megan E. Martino

MEGAN E. MARTINO
Lieutenant, JAGC, U.S. Navy
Appellate Government Counsel

United States Navy–Marine Corps
Court of Criminal Appeals

UNITED STATES

Appellee

v.

Micah J. BROWN
Culinary Specialist (Submarines)
Seaman (E-3)
U. S. Navy

Appellant

NMCCA NO. 202100042

Panel 3

ORDER

Denying Access to Sealed Materials

On 13 September 2021, Appellant, through counsel, filed an amended Motion to Examine Sealed Materials in the Record of Trial. Specifically, Appellant's counsel seeks to review Appellate Exhibit LXVIII, Appellant's Medical and Mental Health Records, and Appellate Exhibit LXX, Appellant's Medical and Mental Health Records.

In the motion, counsel assert that the exhibits were reviewed by trial defense counsel (prior to being excused by Appellant, who subsequently represented himself at trial) but not released to trial counsel.[1] The military judge reviewed the exhibits in camera. Appellant's counsel indicates that "counsel does not believe that said Appellate Exhibits are subject to any colorable claims of privilege." Appellant's Mot. to Examine (Sept. 13, 2021), para. 2.a.(3). Appellant's counsel asserts that "access to the sealed exhibits is necessary to complete counsel's review of the entire appellate record, in order to coordinate an appropriate appellate strategy." *Id.*, para. 2.a.(4).

> Sealed exhibits not released to trial counsel or trial defense counsel may be examined by or disclosed to appellate counsel only upon a showing of good cause. The motion must concisely identify the counsel's need for the sealed portion of the record to

---

[1] The military judge's sealing order for Appellate Exhibit LXVII states that the sealed records were "[r]eviewed in camera by the military judge, but not reviewed by, or released to counsel." App. Ex. LXVII. By contrast, the military judge's sealing order for Appellate Exhibit LXX states that the sealed records were "[r]eviewed in camera by the military judge, but not reviewed by, or released to *trial* counsel." App. Ex. LXX (emphasis added).

perform his or her official duties as well as the specific legal authority authorizing his or her access to that portion of the record.

N-M. Ct. Crim. App. R. 6.2(c)(2).

A motion seeking to examine sealed exhibits not released to trial counsel or trial defense counsel that are colorably privileged under the Military Rules of Evidence (e.g. matters sealed under Mil. R. Evid. 513 and 514), must further include either a certification in subsection (A) or an explanation in subsection (B) below:

(A) A certification that:

(i) The privilege holder, or the guardian or authorized representative of the privilege holder, has been provided notice and a copy of the motion to examine the sealed privileged materials. In such an instance, the response, if any, received by counsel within seven days of providing the notice.

or

(ii) That counsel has taken reasonable steps to provide notice to the privilege holder, or the guardian or authorized representative of the privilege holder but has been unable to locate or provide notice to such person. In such an instance, counsel shall detail the efforts undertaken to contact the privilege holder.

(B) An explanation, with supporting affidavits or references to the record as may be necessary, as to why the privilege:

(i) Has been waived;

(ii) Does not exist; or

(iii) Does not apply because of a recognized exception to the privilege.

N-M. Ct. Crim. App. R. 6.2(c)(3).

(a) *Except as provided in (b) below*, a motion to examine sealed materials, if granted, will constitute approval for both parties to review the sealed materials. When the Court has granted one party's motion to review sealed matter, a motion seeking to review the same matter filed by the other party is redundant and unnecessary.

(b) A party may seek to review sealed matter without presumptively providing access to the other party. (E.g., such a motion may be appropriate when a privilege applies to one party but not the other). A motion under this exception shall *clearly*

and specifically state that it is filed under this exception and will include the basis for seeking ex parte examination.

N-M. Ct. Crim. App. R. 6.4.

The Court finds that the exhibits sought to be reviewed by Appellant's Counsel are colorably privileged under Mil. R. Evid. 513.

Accordingly, it is, by the Court, this 7th day of October, 2021,

ORDERED:

1. That Appellant's Motion to Review Sealed Materials is **DENIED**.

2. That a motion for reconsideration shall comply with N-M. Ct. Crim. App. R. 6.2(c)(3) and shall affirmatively state whether counsel seeks to review sealed matter without presumptively providing access to Appellee in accordance with N-M. Ct. Crim. App. R. 6.4.

FOR THE COURT:

[redacted]

Clerk of Court

Copy to:
45 (Capt Casey)
46
02

United States Navy–Marine Corps Court of Criminal Appeals

Before
GASTON, HOUTZ, and MYERS
Appellate Military Judges

UNITED STATES
Appellee

v.

Micah J. BROWN
Culinary Specialist (Submarines) Seaman (E-3), U.S. Navy
Appellant

No. 202100042

Decided: 4 January 2022

Appeal from the United States Navy-Marine Corps Trial Judiciary

Military Judge:
Roger E. Mattioli (arraignment)
Ryan J. Stormer (motions and trial)

Sentence adjudged 19 October 2020 by a general court-martial convened at Naval Submarine Base New London, Connecticut, consisting of officer and enlisted members. Sentence in the Entry of Judgment: reduction to E-1, confinement for 3 years, and a dishonorable discharge.

For Appellant:
Captain Jasper W. Casey, USMC

This opinion does not serve as binding precedent under NMCCA Rule of Appellate Procedure 30.2(a).

PER CURIAM:

After careful consideration of the record, submitted without assignment of error, we have determined that the findings and sentence are correct in law and fact and that no error materially prejudicial to Appellant's substantial rights occurred.[1]

The findings and sentence are **AFFIRMED**.

FOR THE COURT:

[redacted]

Clerk of Court

[1] Articles 59 & 66, Uniform Code of Military Justice, 10 U.S.C. §§ 859, 866.

REMAND

THERE WERE NO REMANDS

NOTICE OF COMPLETION OF APPELLATE REVIEW