

CERTIFIED RECORD OF TRIAL

(and accompanying papers)

of

Chisolm

(Last Name)

Justin

(First Name)

W.

MI

LCpl/E-3

(DoD ID No.)

(Rank)

HQTRS Co., 5th Mar Regt, 1st MARDIV

(Unit/Command Name)

U.S. Marine Corps

(Branch of Service)

Camp Pendleton, California

(Location)

By

General Court-Martial (GCM)

(GCM, SPCM, or SCM)

COURT-MARTIAL

Convened by

Commanding General

(Title of Convening Authority)

1st Marine Division

(Unit/Command of Convening Authority)

Tried at

Camp Pendleton, California

(Place or Places of Trial)

On

15 Feb 2022; 31 Aug 2022; 1, 2, & 6 September, 19 Jan 2023; 16 Feb 2023

(Date or Dates of Trial)

Companion and other cases

None

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

CONVENING ORDER



UNITED STATES MARINE CORPS
1ST MARINE DIVISION (REIN)
BOX 555380
CAMP PENDLETON CALIFORNIA 92055-5380

IN REPLY REFER TO
5000-82
GCMCO #1-20
SEP 29 2020

A General Court-Martial is hereby convened. It may proceed at Marine Corps Base Camp Pendleton, California, or Marine Air Ground Task Force Training Center Twentynine Palms, California, unless otherwise directed. The Court-Martial will be constituted as follows:

MEMBERS

Major [REDACTED] USMC;
Captain [REDACTED] USMC;
Captain [REDACTED] USMC; and
Captain [REDACTED] USMC.

R. B. TURNER, JR.
Major General
U. S. Marine Corps
Commanding General

CHARGE SHEET

CHARGE SHEET

I. PERSONAL DATA			
1. NAME OF ACCUSED (Last, First, Middle Initial) CHISOLM, Justin W.	2. EDPI [REDACTED]	3. GRADE OR RANK LCpl	4. PAY GRADE E-3
5. UNIT OR ORGANIZATION HQTRS Co., 5th Mar Regt, 1st MARDIV	6. EAS 08 Sep 23	6b. CURRENT SERVICE	
		a. INITIAL DATE 09 Sep 19	b. TERM 4 years
7. PAY PER MONTH		8. NATURE OF RESTRAINT OF ACCUSED Pretrial Confinement	
a. BASIC \$2,236.20 2,296.50	b. SEA/FOREIGN DUTY \$0.00	c. TOTAL 31 AUG 22 \$2,236.20 2,296.50	9. DATE(S) IMPOSED PTC: 05 Oct 21- present

II. CHARGES AND SPECIFICATIONS

31 AUG 22-10.

Charge I: Violation of the UCMJ, Article 90

Specification (Willfully disobeying a superior commissioned officer): In that Lance Corporal Justin W. Chisolm, U.S. Marine Corps, having received a lawful command from Captain [REDACTED] his superior commissioned officer, then known by the said Lance Corporal Chisolm to be his superior commissioned officer, to not drive a motor vehicle on Marine Corps Base Camp Pendleton, California, or words to that effect, did, at or near Marine Corps Base Camp Pendleton, California, on or about 2 October 2021, willfully disobey the same.

Charge II: Violation of the UCMJ, Article 125

Specification (Kidnapping): In that Lance Corporal Justin W. Chisolm, U.S. Marine Corps, did, at or near San Diego, California, between on or about 2 October 2021 and on or about 3 October 2021, wrongfully confine and hold [REDACTED] a minor whose parent or legal guardian the accused was not against his will.

(See Supplemental Page)

III. PREFERRAL			
11a. NAME OF ACCUSER (Last, First, Middle Initial) [REDACTED]	b. GRADE E-8	c. ORGANIZATION OF ACCUSER LSST-CPEN, MCI-West	e. DATE (YYYYMMDD) 20211028
d. SIGNATURE OF ACCUSER [REDACTED]			

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oath in cases of this character, personally appeared the above named accuser this 28th day of October 2021 and signed the foregoing charges and specifications under oath that she is a person subject to the Uniform Code of Military Justice and that she either has personal knowledge of or investigated the matters set forth therein and that the same are true to the best of her knowledge and belief.

Gage M. O'Connell
Typed Name of Officer

LSST-CPEN, MCI-West
Organization of Officer

Captain, U.S. Marine Corps
Grade

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

Charge III: Violation of UCMJ, Article 128

Specification (Battery upon a spouse): In that Lance Corporal Justin W. Chisolm, U.S. Marine Corps, did, at or near San Diego, California, between on or about 2 October 2021 and on or about 3 October 2021, unlawfully grab [REDACTED] of the accused, on the arm with his hand.

Charge IV: Violation of the UCMJ, Article 107

Specification (False official statement): In that Lance Corporal Justin W. Chisolm, U.S. Marine Corps, did, at or near Camp Pendleton, California, on or about 3 October 2021, with intent to deceive, make to Officer [REDACTED] an official statement, to wit: that his children were being cared for by his aunt, which statement was totally false, and was then known by the said Lance Corporal Chisolm to be so false.

Charge V: Violation of the UCMJ Article 119b

Specification 1 (Child endangerment): In that Lance Corporal Justin W. Chisolm, U.S. Marine Corps, at or near San Diego, California, between on or about 2 October 2021 and on or about 3 October 2021, was responsible for the care of [REDACTED] a child under the age of 16 years, and did endanger the welfare of said [REDACTED] by confining the said [REDACTED] in the closed trunk of a car and that such conduct was by design.

Specification 2 (Child endangerment): In that Lance Corporal Justin W. Chisolm, U.S. Marine Corps, at or near San Diego, California, between on or about 2 October 2021 and on or about 3 October 2021, was responsible for the care of [REDACTED] a child under the age of 16 years, and did endanger the welfare of said [REDACTED] by confining the said [REDACTED] in the closed trunk of a car and that such conduct was by design.

Specification 3 (Child endangerment): In that Lance Corporal Justin W. Chisolm, U.S. Marine Corps, at or near San Diego, California, between on or about 2 October 2021 and on or about 3 October 2021, was responsible for the care of [REDACTED] a child under the age of 16 years, and did endanger the welfare of said [REDACTED] by confining the said [REDACTED] in the closed trunk of a car and that such conduct was by design.

ORIGINAL

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, Middle Initial) CHISOLM, Justin W.	2. EDIPI [REDACTED]	3. GRADE OR RANK LCpl	4. PAY GRADE E-3
5. UNIT OR ORGANIZATION HQTRS Co., 5th Mar Regt, 1st MARDIV	6. EAS 08 Sep 23	6b. CURRENT SERVICE	
		a. INITIAL DATE 09 Sep 19	b. TERM 4 years
7. PAY PER MONTH	8. NATURE OF RESTRAINT OF ACCUSED Pretrial Confinement		9. DATE(S) IMPOSED PTC: 05 Oct 21- present
a. BASIC \$2,296.50	b. SEA/FOREIGN DUTY \$0.00	c. TOTAL \$2,296.50	

II. CHARGES AND SPECIFICATIONS

10.

Additional Charge: Violation of the UCMJ, Article 113

Specification (Drunken or reckless operation of a vehicle): In that Lance Corporal Justin W. Chisolm, U.S. Marine Corps, on active duty, did, at or near Camp Pendleton, CA, on or about 4 September 2021, physically control a vehicle, to wit: a passenger car, while drunk.

(See Supplemental Page)

III. PREFERRAL

11a. NAME OF ACCUSER (Last, First, Middle Initial) [REDACTED]	b. GRADE E-6	c. ORGANIZATION OF ACCUSER LSST-CPEN, MCI-West
d. SIGNATURE OF ACCUSER [REDACTED]		e. DATE (YYYYMMDD) 20220426

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oath in cases of this character, personally appeared the above named accuser this 26th day of April 2022 and signed the foregoing charge and specification under oath that she is a person subject to the Uniform Code of Military Justice and that she either has personal knowledge of or investigated the matters set forth therein and that the same are true to the best of her knowledge and belief.

Celidon H. Pitt
Typed Name of Officer

Major, U.S. Marine Corps

Signature

LSST-CPEN, MCI-West
Organization of Officer

Judge Advocate

Official Capacity to Administer Oath
(See R.C.M. 307 (b) must be commissioned officer)

12. On 31 August 2022 the accused was informed of the charges against him and of the name _____ of the accuser known to me (See R.C.M. 308 (a)). (See R.C.M. 308 if notification cannot be made.)

[REDACTED] Typed Name of Immediate Commander

5th Marine Regiment

Organization of Immediate Commander

E-5/SERGEANT, RBE LEGAL OFFICER

Grade

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13. The sworn charges were received at 1200 hours, 26 APR 2022 at 5th Marine Regiment Designation of Command or Officer Exercising Summary Court-Martial Jurisdiction (See R.C.M. 403)

FOR THE TRIAL COUNSEL

PITT, C. H.

Typed Name of Officer

MAJOR / TRIAL COUNSEL

TRIAL COUNSEL

Official Capacity of Officer Signing

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY

b. PLACE

c. DATE

1st Marine Division

Camp Pendleton, CA

26 APRIL 2022

Referred for trial to the General court-martial convened by General Court-Martial Convening Order #1-20

Dated 29 September 20 20 subject to the following instructions:² To be tried in conjunction with the charges preferred on 28 October 2021.

By Command or Order Of

R. B. TURNER, JR.

Typed Name of Officer

COMMANDING GENERAL

Official Capacity of Officer Signing

Major General, U.S. Marine Corps

Signature

15. On 31 AUGUST 2022, I caused to be served a copy hereof on the above named accused.

PITT, C. H.

Major

Captain, U.S. Marine Corps

Grade or Rank of Trial Counsel

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

TRIAL COURT MOTIONS & RESPONSES

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

UNITED STATES) GOVERNMENT MOTION IN LIMINE
) (EXCLUSION OF IRRELEVANT
v.) EVIDENCE RELATED TO VICTIM [REDACTED]
) AND HER CARE OF MINOR VICTIMS)
JUSTIN W. CHISOLM)
LANCE CORPORAL) 15 April 2022
U.S. MARINE CORPS)
)

1. Nature of Motion.

Pursuant to Military Rules of Evidence (M.R.E.) 401 and 403, the Government moves the Court to issue a preliminary ruling precluding any mention of Family Advocacy Program (“FAP”) or Child Welfare Services (“CWS”) regarding [REDACTED] not specifically related to the charged misconduct.

2. Burden of Proof and Standard of Review

As the moving party the Government bears the burden by a preponderance of the evidence.

3. Summary of Facts

- a. The Accused is charged with violations of Article 90 (willfully disobeying a superior commissioned officer), Article 125 (kidnapping), Article 128 (battery upon a spouse), Article 107 (false official statement), and Article 119b (child endangerment).
- b. The Accused and one of the named Victim's in this case, [REDACTED] are married and have three children that live with them. (Enclosure 1).
- c. On 2 October 2021, [REDACTED] went out with friends to Fluxx Night Club in downtown San Diego, California. (Enclosure 2).
- d. Parking lot attendant [REDACTED] spoke with the Accused on the night of 2 October 2021. (Enclosure 3)
- e. Mr. [REDACTED] described the accused as slurring his words and appearing “really drunk.” (*Ibid.*)
- f. Mr. [REDACTED] allowed the accused to park as he thought that it would be the safest thing to do given the Accused's apparent intoxicated state. (*Id.*)

g. Mr. [REDACTED] did not see anyone else in the car with the Accused. (*Id.*).

h. Mr. [REDACTED] provided he did not see anyone else approach the vehicle the Accused drove or inside of the vehicle after the Accused parked it. (*Id.*)

i. At approximately 2349 that same night [REDACTED] received a message from the Accused that he was at Fluxx Nightclub. (Enclosure 2).

j. The Accused then attempted to get [REDACTED] out of the club and pulled on her left arm and she fell to the floor (*Id.*).

k. The Accused and [REDACTED] were driven home by the husband of one of [REDACTED] friends. (*Id.*)

l. When the Accused and [REDACTED] returned to their residence at approximately 0330 on 3 October 2021, she contacted PMO for a welfare check for her three children and the Accused was taken into custody. (*Id.*; Enclosure 1).

m. The Accused told PMO that the children were with his family in Long Beach, California. (Enclosure 1)

n. On 3 October 2021, Lance Corporal [REDACTED] ("LCpl [REDACTED]") was instructed to transport the Accused to pick up the children in the Los Angeles area (Enclosure 4).

o. The pick-up location then changed to Carlsbad, California. (*Id.*).

p. LCpl [REDACTED] drove the Accused to what he thought was Carlsbad, California. (*Id.*).

q. LCpl [REDACTED] drove south until he recognized he was in the "Gaslamp" section of San Diego, California. (*Id.*)

r. Once in the parking garage, LCpl [REDACTED] could smell urine emanating from the Accused's vehicle and could tell the inside of the vehicle was hot due to moisture droplets forming on the inside of the windows. (*Id.*)

s. LCpl [REDACTED] broke the window and the smell of urine was exponentially worse. (*Id.*)

t. The Accused released the latch to the backseat and the [REDACTED] year-old child, [REDACTED] crawled out of the truck and unlocked the vehicle from the inside. (*Id.*)

u. When the doors were unlocked, LCpl [REDACTED] picked up [REDACTED] year old [REDACTED] from the vehicle and the Accused picked up [REDACTED] month old, [REDACTED] from the trunk. (*Id.*).

v. The three children arrived home at approximately 1330 on 3 October 2021. (Enclosure 2).

w. LCpl [REDACTED] then dropped the children off at their home. (*Id.*)

x. All interactions in the parking garage were caught on the security cameras located in the parking garage. (Enclosure 5).

y. Sergeant [REDACTED] ("Sgt [REDACTED]") was at the house when the children were brought home. (Enclosure 6)

z. [REDACTED] told Sgt [REDACTED] that his father put him and his brothers in the trunk of "momma's car." (*Id.*)

aa. On 5 October 2021, [REDACTED] was interviewed by a Child Forensic Interviewer. (Enclosure 7.)

bb. [REDACTED] told the interviewer that the Accused placed him in the trunk. (*Id.*)

cc. The Accused and [REDACTED] had involvement with Family Advocacy Center and CWS on prior occasions for allegations made by [REDACTED] and an incident related to one of the children in March of 2021. (Enclosure 8).

dd. Child Welfare Services determined the incident related to children unfounded. (*Id.*)

ee. On 7 February 2022, Defense requested "A copy of ALL PMO, security, FAP and CPS records and command records, including reports from August-September 2021, relating to the accused's wife leaving the children alone while home and her automobile, while she went to the grocery store and to the neighbor's house and the accused was at work (which incidents(s) were reported to the accused's command). This includes the NCIS reporting of the alleged incidents to FAP and CPS." (Enclosure 9 at para. 121).

4. Statement of Law

Evidence is relevant if "it has a 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. "The military judge may exclude relevant evidence 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. Probative value of evidence is higher when the evidence directly goes "to prove or disprove a fact in issue." *United States v. Reynolds*, 29 M.J. 105, 110 (C.M.A. 1989).

5. Argument.

[REDACTED] Evidence of any involvement of Family Advocacy Program or Child Welfare Services in the care of [REDACTED] children is not relevant per M.R.E. 401 and even if there were any relevance it is inadmissible per M.R.E. 403.

Any reports by FAP or CWS or references to incidents contained within the reports from approximately 7 months earlier are not relevant to the instant case. The Government cannot even conceive a fact of consequence that would be more or less probable due to the admission of this evidence. It is clearly irrelevant and thus inadmissible and thus must be excluded per M.R.E. 401.

Even if this evidence was relevant in some conceivable way, it is not admissible under M.R.E. 403. The probative value of this evidence is minimal. The Government can only speculate, but if the only reason for the Defense to reference any prior incidents with FAP or CWS involving the children would be to paint [REDACTED] as an unfit mother, which while irrelevant, would also be inaccurate per the FAP records. Any probative value, from referencing that FAP had been involved with the children would be substantially outweighed by unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence. This case involves a very specific course of conduct by the Accused that is corroborated by eye witnesses and video evidence. None of the evidence in this case demonstrates any relevance of [REDACTED] care of the children. Just referencing that FAP has investigated an issue with the children is enough to paint [REDACTED] in a negative, inaccurate light, and thus if the members were allowed to hear this testimony it would result in unfair prejudice to the tribunal, confusing the issues, misleading the members, and wasting time. Additionally, if it were allowed in, it would require the Government to put in evidence demonstrating that [REDACTED] is in fact a fit parent, which would further waste time and confuse the issues. To allow any of this evidence would simply be the type of distraction that M.R.E. 403 is designed to prevent against. Thus, this evidence is inadmissible under M.R.E. 401 and 403 and must be excluded at this Court Martial.

6. Relief Requested.

The Government respectfully requests the Court preclude any mention of Family Advocacy Program or Child Welfare Services' involvement with [REDACTED] from any time unrelated to the misconduct at issue.

7. Evidence.

The following evidence is offered in the form of enclosures in support of this motion:

1. Provost Martial Office Incident Report

2. Summary of Interview of [REDACTED]
3. Summary of Interview of [REDACTED]
4. Summary of Interview of LCpl [REDACTED]
5. Initial Review of Security Camera Footage
6. Written Statement of Sgt [REDACTED]
7. Summary of Forensic Interview of [REDACTED]
8. Family Advocacy Program Documents
9. Defense Discovery Request

8. **Oral Argument.**

The Government respectfully requests oral argument.

[REDACTED]

G. M. O'CONNELL
Captain, U.S. Marine Corps
Complex Litigation Counsel

CERTIFICATE OF SERVICE

A true copy of this motion was served on the Court and Defense Counsel electronically on 15 April 2022.

[REDACTED]

G. M. O'CONNELL
Captain, U.S. Marine Corps
Complex Litigation Counsel

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

UNITED STATES

v.

Justin Chisolm
Lance Corporal
U.S. Marine Corps

DEFENSE MOTION FOR APPROPRIATE
RELIEF (COMPEL FUNDING FOR CRIME
SCENE VISIT)

15 April 2022.

I. Nature of the Motion. Pursuant to Rule for Court-Martial 906(b)(7), the defense requests the court order the government to provide funding for the detailed defense counsel and one defense clerk to travel to Georgia to conduct an independent investigation into the facts of the above captioned case.

II. Statement of Facts.

The evidence requested by the Defense is predicated off the following facts:

1. On 4 October 2021, NCIS took possession of LCpl Chisolm's personal vehicle (a Nissan Sentra) and transported it from the Ace Parking Lot located in San Diego to NCISRA Camp Pendleton.

2. On 5 October 2021, LCpl Chisolm was placed in pretrial confinement for alleged acts that took place between 2 and 3 October 2021. These alleged acts include endangering the welfare of minors by confining them in the "closed trunk of a car" by design.

3. On 8 October 2021, military defense counsel were detailed to represent LCpl Chisolm, and the government was notified of such detailing.

4. On 8 October 2021, the same day that defense counsel were detailed, NCIS commenced a forensic examination of the crime scene automobile. Over the course of four days, from 8

1 October to 12 October 2021, NCIS conducted the forensic examination of the automobile. No
2 defense counsel were present.

3 5. On 28 October 2021, charges were preferred against the accused for violations of Article
4 90 (Willfully disobeying a superior commissioned officer), Article 125 (Kidnapping), Article
5 128 (Battery upon a spouse), Article 107 (False official statement), and three specifications of
6 Article 119b (Child endangerment).

7 6. After NCIS completed its examination of the crime scene, the vehicle remained with
8 NCIS for another 17 days.

9 7. On 19 November 2021, Defense Counsel requested to inspection the vehicle on 30
10 November 2021.

12 8. On 19 November 2021, Trial Counsel denied this request.

13 9. On 29 November 2021, Trial Counsel confirmed that the vehicle was released to LCpl
14 Chisolm's wife and no longer in the control of the government.

15 10. On 30 November 2021, Defense Counsel submitted a Request for Government Funded
16 Site Visit to inspect the vehicle. This request was negatively endorsed by the Trial Counsel on 7
17 December 2021.

18 11. On 8 December 2021, Trial Counsel notified Defense Counsel that 5th Marine Regiment
19 Commanding Officer denied Defense's Funding Request.

21 12. On 17 February 2022, Defense Counsel renewed its Request for Government Funded
22 Site Visit to inspect the vehicle.

23 **IV. Law/Discussion**

24 a. *Right to Production of Evidence and Witnesses.*

The right to production of relevant and necessary evidence under R.C.M. 701, the right of equal access to evidence under Article 46 of the UCMJ, and the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution, requires that the defense counsel be sent to inspect the alleged crime scene vehicle to investigate on behalf of the accused.

R.C.M. 701(e) provides that each party shall have an adequate opportunity to prepare its case and equal opportunity to interview witnesses and inspect evidence. R.C.M. 703(e) provides that each party is entitled to the production of evidence which is relevant and necessary. "Just as an accused has a right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." *United States v. McAllister*, 64 M.J. 248, 249 (C.A.A.F. 2007). Relevance means any tendency to make a fact 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 could contribute to a party's presentation of the case in some positive way on a matter in issue." R.C.M. 703(e)(1)

In order to mount a defense against the element of the charge and specifications that allege our client confined the minors in the vehicle's trunk, Defense Counsel must be afforded the right to inspect the structure (to include the placement of car seats and other unique features) of the vehicle. Whether or not the minors had the ability to move about freely in the vehicle is relevant to disprove the government's theory that the minors were kept in darkness, unable to perceive their surroundings or sit upright, and with restricted airflow.

b. *Equal Access.*

1 Under Article 46, Defense Counsel “shall have equal opportunity to obtain witnesses and
2 other evidence in accordance with such regulations as the President may prescribe.” Pursuant to
3 *United States v. Warner*, 62 M.J. 114, 120 (C.A.A.F. 2005), this Article is a “statement of
4 congressional intent to “prevent the government from marshaling its resources to gain an unfair
5 advantage over an accused and thus ensure ‘a more even playing field.’” The government has
6 been afforded the opportunity to investigate and inspect the vehicle related to this case. Trial
7 Counsel had the vehicle in government possession while Defense Counsel were detailed to the
8 case. As such, Defense Counsel could have been afforded access to the vehicle. Instead, Trial
9 Counsel authorized its release and departure out of the local area. This has created an uneven
10 “playing field,” and the Defense has been unable to inspect, document, and investigate the crime
11 scene despite Trial Counsel having complete access.

13 c. *Right to Effective Assistance of Counsel.*

14 LCpl Chisolm has a Constitutional right to reasonably effective counsel. “[A] criminal
15 accused is entitled to more than a competent counsel; his right is to one who *exercises* that
16 competence without omission thought the trial.” *United States v. Rivas*, 3 M.J. 282, 289 (C.M.A.
17 1977); *see also United States v. Gaillard*, 49 C.M.R.471, 475 (A.C.M.R. 1974) (“effective
18 assistance” of counsel encompasses both the competence of counsel and the utilization of such
19 competence by the counsel on the behalf of the accused).

20 To be a reasonably effective counsel, in this case, it is essential the defense counsel visit
21 the alleged crime scene in order to investigative, inspect and gather evidence. The defense
22 counsel has an obligation to independently evaluate and investigate the government’s evidence,
23 which includes independently examining facts and circumstances. To be competent and diligent,
24 a visit to the scene of the alleged crime, the vehicle, is required. Competence and diligence in

1 this case, especially in mounting a defense against the allegation that our client confined the
2 minors to the trunk of the vehicle, cannot be achieved without such steps.

3 d. *Substitutes are Not Adequate.*

4 In uncovering deficiencies in the government's case, the defense must be afforded the
5 right to fully perceive the environment, layout, and characteristics of the case, particularly since
6 the trier of fact will need to make that same evaluation of the evidence. Substitutes for in-person
7 investigation are inadequate. Photographs are be insufficient. Layouts from the government
8 perspective are not adequate. Further, access to another similar make and model vehicle is also
9 insufficient because the specific car seats in the car change the analysis of whether or not the
10 back seat could fold down properly to allow freedom of movement.

11 Inspecting the vehicle in person and having the opportunity to prove that the minors had
12 access to the entire vehicle, and were not confined to the trunk, will be instrumental in the
13 countering the government's assertion that they were suspect to more aggravating circumstances.
14 Just as the government has had the access to investigate the scene of the crime in person, the
15 defense must now be afforded the same opportunities to investigate in order to disprove the
16 government's theory that the minors were locked in the "closed trunk of a car" by design of our
17 client.

18 **V. Evidence**

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- 20 a. Charge Sheet (BS 000001-000003)
- 21 b. NCIS ROI Results of Nissan Sentra Documentation dtd 7 Oct 21 (BS 000151-000153)
- 22 c. Initial Defense Request to Inspect Vehicle Email dtd 19 November 21 and
- 23 Government Response dtd 29 November 21
- 24 d. Defense Request for Funded Site Visit dtd 30 November 2021

1 e. Government Negative Endorsement of Defense Request for Funded Site Visit dtd 7

2 December 2021

3 f. Second Endorsement Denying Defense Request for Funded Site Visit

4 g. Defense Second Request for Funded Site Visit dtd 17 February 2022

5 **VI. Burden and Standard of Proof.**

6 Pursuant to RCM 905(c), the burden is on the Defense to prove by a preponderance of the
7 evidence.

8 **VII. Relief Requested.**

9 Defense requests that the Court compel the government to fund a site visit to Georgia for
10 the Defense to conduct its own inspection of the crime scene in this case.

11 **VIII Argument.**

12 Oral argument is requested.

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15 K. F. DONNELLY
16 Captain, USMC
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4 **CERTIFICATION OF SERVICE**

5 A true copy of this motion was served on opposing counsel via electronic mail on 15 April 2022

6 [REDACTED]

7 K. F. DONELLY

8 Captain, USMC

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

UNITED STATES) MOTION FOR APPROPRIATE RELIEF:
) DISQUALIFICATION OF TRIAL
 vs.) COUNSEL
) JUSTIN CHISOLM) 15 April 2022
 Lance Corporal)
 U.S. Marine Corps)
) _____
)

1. Nature of Motion.

In accordance with Rule for Courts-Martial (R.C.M.) 906, Lance Corporal Justin Chisolm respectfully requests this court disqualify Captain Gage O'Connell, USMC as a trial counsel in this case. Captain O'Connell will be called by the defense as a fact witness in its case-in-chief and therefore is precluded to act as an advocate by JAGINST 5803.1E, Rule 3.7.

2. Statement of Facts.

a. LCpl Chisolm is charged with various violations of the UCMJ. As it relates to this motion, on October 3, 2021, LCpl Chisolm is alleged to have placed his minor [REDACTED] and two minor [REDACTED] in the trunk of his car and then drove from Camp Pendleton to the Gaslamp Quarter in San Diego (approximately 60 miles). When LCpl Chisolm arrived at the Gaslamp Quarter, he parked his car in a private parking lot that was monitored by an on-premises attendant. The government alleges LCpl Chisolm that after parking in the lot, he left the children in the trunk of the car and entered a night club looking for [REDACTED] Ms. [REDACTED] In the night club, LCpl Chisolm is alleged to have assaulted [REDACTED] by grabbing her arm (see Charge

III). LCpl Chisolm then is alleged to have left the children in the trunk of the car in the parking lot and returned to his quarters onboard Camp Pendleton.

- b. On October 4, 2021, NCIS agents searched the vehicle and impounded it. (**Exhibit 1**).
- c. On October 4, 2021, NCIS interviewed Ms. █ (Exhibit 2).
- d. On October 8, 2021, LCpl Chisolm was detailed military counsel and trial counsel was informed that LCpl Chisolm was represented by counsel. (**Exhibit 3**).
- e. On October 8-12, 2021, NCIS conducted a forensic examination of the vehicle. (**Exhibit 4**).
- f. On October 29, 2021, at the direction of Captain O'Connell, NCIS Special Agent █
█ released the vehicle to the command who returned the vehicle to Ms. █ (Exhibit 5).
No NCIS Report of Investigation (ROI) was created to document the release of the vehicle, but the Evidence Custody Receipts indicates the car was released to Ms. █ by the direction of the trial counsel, Captain O'Connell. (**Exhibit 5**).
- g. Ms. █ at some subsequent date, removed the vehicle from the state of California and now resides in the state of Georgia. The defense is unaware if Ms. █ is in possession of the vehicle.

- h. On November 5, 2021, retained counsel provided the government with a representational letter on behalf of LCpl Chisolm. (**Exhibit 6**).
- i. On November 19, 2021, retained counsel requested witness contact information as well as an opportunity to inspect the vehicle in preparation of the UCMJ Art. 32 investigation. (**Exhibit 7**).
- j. On November 19, 2021, Captain O'Connell informed defense counsel that the government "will not be providing contact information or access to the Nissan Sentra." Captain

O'Connell did not inform defense counsel that the Nissan Sentra had been released to Ms. [REDACTED] and that it was no longer in the State of California. (Exhibit 8).

k. On November 30, 2021, retained counsel requested the Convening Authority fund travel for a defense counsel and defense clerk to travel to Georgia to inspect the Nissan Sentra in Ms. [REDACTED] possession (of note, the Nissan Sentra is registered and titled in the names of LCpl Chisolm and Ms. [REDACTED] (Exhibit 9). In an undated memorandum, the Convening Authority denied this request. (Exhibit 10).

l. On December 24, 2021, retained counsel requested the physical presence of Ms. [REDACTED] to appear at the Article 32 hearing for testimony. (Exhibit 11). On December 26, 2021, trial counsel denied this request. (Exhibit 12). At the Article 32, the Preliminary Hearing Officer declined to order Ms. [REDACTED] testimony.

m. On February 18, 2022, defense counsel requested, through Ms. [REDACTED] counsel, the opportunity to interview Ms. [REDACTED] Counsel declined to make Ms. [REDACTED] available for an interview. Counsel also requested Ms. [REDACTED] return the crime scene automobile to the State of California, but she has declined to respond to such request via her counsel. (Exhibit 13).

n. On March 8, 2022, retained counsel requested the Convening Authority order a deposition of Ms. [REDACTED]

The defense desires to examine Ms. [REDACTED] about her knowledge of the alleged offenses that are charged in enclosure (1). Ms. [REDACTED] has been interviewed by NCIS during their investigation, but has refused to submit to a pretrial interview with defense counsel. Ms. [REDACTED] is no longer in California and has left the state with the children and the crime scene vehicle and has refused the defense's effort to have her return with the car to allow access. Given that she refuses to be interviewed, the defense is unable to ask her specific questions about the vehicle. (Exhibit 14).

o. On March 18, 2022, the Convening Authority denied that request (Exhibit 15).

p. Captain O'Connell is a member of the prosecution team and appears to be an integral member of that team. Captain O'Connell has had numerous interactions with NCIS relating to the coordination of this investigation (**Exhibit 16**).

q. At LCpl Chisolm's arraignment, the defense objected to Captain O'Connell's participation in the case and informed the court that it will call Captain O'Connell in its case-in-chief to explain the release of the vehicle. The court did not rule on that objection. To date, Captain O'Connell has acted as trial counsel in all aspects of this case.

r. At the arraignment, over defense objection, the court ordered Ms. █ to be the UCMJ Article 6b(c) representative of the minor children alleged to be the victims of Charges II and V.

s. To date, despite numerous attempts by the defense and requests for assistance to the government, the defense has not interviewed Captain O'Connell.

3. Discussion.

Captain O'Connell is a member of the prosecution in this case. Captain O'Connell has been involved in this case since the inception of the investigation and had numerous interactions with NCIS agents.

Days after the allegations, NCIS searched the Nissan Sentra and conducted a forensic investigation of the car. That investigation was provided to the defense after the Article 32 hearing in this case. The automobile forensic report was partially included in the NCIS Report of Investigation (ROI) dated January 13, 2022, while the remaining portion of the forensic report was not included until the NCIS ROI dated March 15, 2022. However, the defense believes the forensic investigation was incomplete and poorly conducted. The defense filed a motion to compel government funding of a forensic expert to assist LCpl Chisolm's defense. This assistance will come in two ways: a review of NCIS' forensic investigation to assist the defense

in cross examining the NCIS witness and having the defense expert conduct their own forensic analysis of the Nissan Sentra.

The Nissan Sentra is the crime scene for Charges II and V. That crime scene is no longer in the possession of the government due to Captain O'Connell's deliberate relinquishment of the crime scene to an alleged victim of Charge III and the guardian and UCMJ Article 6b(c) representative of the alleged victims of Charges II and V. This is akin to a trial counsel releasing a sexual assault examination kit back to the victim prior to any defense inspection. Moreover, Captain O'Connell knew that defense counsel had been detailed to LCpl Chisolm *prior to* Captain O'Connell's release of the crime scene to an alleged victim. Compounding this fact is that the government forcefully advocated for Ms. [REDACTED] to be the UCMJ Article 6b(c) representative of the minor children. The court ordered Ms. [REDACTED] appointment over defense objection. Therefore, Ms. [REDACTED] possesses evidence in this matter while also being an advocate and representative for the alleged minor victims. The government has compounded the severity of this situation in a manner that makes Ms. [REDACTED] an alleged victim, a representative of three alleged victims, and the evidence custodian of the crime scene (the crime scene she has not returned to the State of California for a defense examination despite the defense's request).

The defense, in its case-in-chief, intends to call Captain O'Connell as a fact witness to explain to the court martial why the defense was unable to forensically inspect the crime scene. Captain O'Connell specifically authorized the NCIS agent to release the Nissan Sentra and knew the car would be removed from the State of California to be used by Ms. [REDACTED] on a daily basis. It is not inconceivable that Ms. [REDACTED] transports the three minor children in the crime scene on regular basis, further tainting the crime scene, making it impossible to determine what actually occurred on October 3, 2021. Captain O'Connell's testimony is necessary to explain why the defense is

unable to counter the government's forensic expert with a defense expert. Preclusion of Captain O'Connell's testimony at trial leaves a large gap that no court instruction could fill.

The Evidence Custody Receipt establishes that Captain O'Connell directed the release of the Nissan Sentra. Captain O'Connell was the designated release authority of the Nissan Sentra. Moreover, SA [REDACTED] will testify that he contacted Captain O'Connell about the matter prior to NCIS releasing the vehicle, as SA [REDACTED] was not authorized to release the crime scene himself. Captain O'Connell is the appropriate witness to this matter and proves collusion, negligent or otherwise, on the part of the government to preclude LCpl Chisolm from receiving a fair trial.

The government may argue that SA [REDACTED] is an acceptable witness to this evidence. The defense intends to call SA [REDACTED] or obtain part of this evidence by way of cross examination. However, the defense is entitled to call the best witnesses for its case – Captain O'Connell.

R.C.M. 703(b), “[e]ach party is entitled to the production of any witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary.” Captain O'Connell is both *relevant* and *necessary*. Furthermore, the government is not allowed to pick the witnesses it thinks are best suited to prove the defense's case. Here, LCpl Chisolm should be allowed to show that Captain O'Connell affirmatively gave the crime scene to an alleged victim *and* the UCMJ Article 6b(c) representative of the alleged victims.

Finally, Captain O'Connell is ethically precluded from being both an advocate and a witness under JAGINST 5803.1E. (Exhibit 17).

RULE 3.7 ATTORNEY AS WITNESS

- a. A covered attorney shall not act as advocate at a trial in which the covered attorney is likely to be a necessary

witness unless:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and quality of legal services rendered in the case; or
- (3) disqualification of the covered attorney would work substantial hardship on the client.

b. A covered attorney may act as advocate in a trial in which another attorney in the covered attorney's office is likely to be called as a witness, unless precluded from doing so by Rule 1.7 or Rule 1.9.

The defense assumes this matter may be considered "uncontested" by the government, that is Captain O'Connell will admit he released the crime scene to an alleged victim and court appointed UCMJ Article 6b(c) representative of minor alleged victims. However, the expected testimony goes beyond the release of the crime scene. In a concurrent motion, the defense requested a deposition of Captain O'Connell as he has refused a defense interview despite numerous requests¹. The defense should be allowed to show the court-martial not only the release of the crime scene but also the reasons why it was released and the prejudice to the defense. Captain O'Connell's testimony shall go well beyond the release of the vehicle.

Rules 1.7 and 1.9 are inapplicable.

4. Evidence.

The Defense will offer the following documentary evidence and testimony in support of its motion:

1. NCIS Results of Nissan Sentra Documentation dated October 7, 2021.
2. NCIS Results of Interview of Ms. [REDACTED] dated October 5, 2021.

¹ The defense has sought his interview through email requests to him, as well as to his Regional Trial Counsel. Their failures to respond to the defense requests for an interview are treated for purpose of this motion as a denial of the defense request.

3. Military Defense Counsel Detailing Letter dated October 8, 2021.
4. NCIS Partial Forensic Review of Nissan Sentra dated December 29, 2021.
5. NCIS Chain of Custody Document.
6. Retained Counsel Representational Letter dated November 5, 2021.
7. Retained Counsel email dated November 19, 2021.
8. Trial Counsel email dated November 19, 2021.
9. Retained Counsel Letter dated November 30, 2021.
10. Convening Authority Memorandum, undated.
11. Retained Counsel Letter dated December 24.2021.
12. Trial Counsel Letter dated December 26, 2021.
13. Retained Counsel email to VLC and Response dated February 18, 2022.
14. Retained Counsel Letter dated March 8, 2022, requesting deposition of Ms. [REDACTED]
15. Convening Authority Letter dated March 18, 2022, denying deposition of Ms. [REDACTED]
16. Various NCIS handwritten notes.
17. JAGINST 5803.1E Rule 3.7.

5. Burden and Standard of Proof.

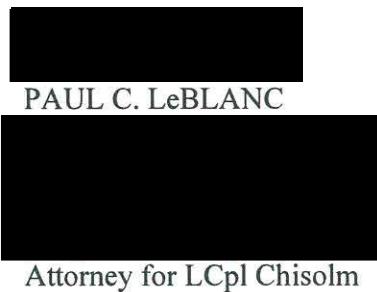
The defense has the burden of proof by a preponderance of evidence, R.C.M. 905 and 906.

6. Relief Requested.

The defense respectfully requests the court order Captain O'Connell be disqualified from acting as trial counsel or in any further manner in this case, including any post trial actions in this case unless ordered to do so by this court or a superior court.

7. Argument.

Oral argument is requested.



CERTIFICATION OF SERVICE

Apr 11 A true copy of this motion was served on the court and opposing counsel via electronic mail on
~~March 15, 2021.~~

[REDACTED] [REDACTED]
PAUL C. LeBLANC

**NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT
GENERAL COURT MARTIAL**

UNITED STATES) MOTION FOR APPROPRIATE RELIEF
vs.) (Judicial Order of Depositions)
JUSTIN CHISOLM)
Lance Corporal) 15 April 2022
U.S. Marine Corps)

1. Nature of Motion.

In accordance with Rule for Courts-Martial (R.C.M.) 702, Lance Corporal Justin Chisolm respectfully requests this court order depositions of the following:

- a. Ms. [REDACTED] civilian;
- b. Mr. [REDACTED] civilian; and
- c. Captain Gage M. O'Connell, USMC

2. Statement of Facts.

a. LCpl Chisolm is charged with various violations of the UCMJ. As it relates to this motion, on October 3, 2021, LCpl Chisolm is alleged to have placed his minor [REDACTED] and two minor [REDACTED] in the trunk of his car and then drove from Camp Pendleton to the Gaslamp Quarter in San Diego. When LCpl Chisolm arrived at the Gaslamp Quarter, he parked his car in a private parking lot that was monitored by an on-premises attendant (Mr. [REDACTED]).

The government alleges he left the children in the trunk of the car and entered a night club looking for [REDACTED] In the night club, LCpl Chisolm is alleged to have assaulted

████████ by grabbing her arm (see Charge III). LCpl Chisolm then is alleged to have left the children in the trunk of the car and returned to his quarters onboard Camp Pendleton.

- b. On October 8-12, 2021, NCIS conducted a forensic examination of the vehicle. (Exhibit 1).
 - c. On October 4, 2021, NCIS interviewed Ms. █████ (Exhibit 2).
 - d. On October 8, 2021, LCpl Chisolm was detailed military counsel and trial counsel were informed that LCpl Chisolm was represented by counsel. (Exhibit 3).
 - e. Mr. █████ was interviewed by NCIS on October 15, 2021 (Exhibit 4).
 - f. On October 29, 2021, at the direction of Captain O'Connell, NCIS Special Agent █████ released the vehicle to the command who returned the vehicle to Ms. █████ (Exhibit 5). No NCIS Investigative Action was created to document the release of the vehicle, but the Evidence Custody Document indicates trial counsel authorized the release.
 - g. Ms. █████ at some subsequent date, removed the vehicle from the state of California and now resides in the state of Georgia. The defense is unaware if Ms. █████ is in possession of the vehicle.
 - h. On November 5, 2021, retained counsel provided the government with a representational letter on behalf of LCpl Chisolm. (Exhibit 6).
 - i. On November 19, 2021, retained counsel requested the government provide witness contact information as well as an opportunity to inspect the vehicle in preparation of the UCMJ Art. 32 investigation. (Exhibit 7).
 - j. On November 19, 2021, Captain O'Connell informed defense counsel that the government "will not be providing contact information or access to the Nissan Sentra." Captain

O'Connell did not inform defense counsel that the Nissan Sentra had been released to Ms. [REDACTED] and that it was no longer in the State of California. (Exhibit 8).

k. On November 30, 2021, retained counsel requested the Convening Authority fund travel for a defense counsel and defense clerk to travel to Georgia to inspect the Nissan Sentra in Ms. [REDACTED] possession (of note, the Nissan Sentra is registered and titled in the names of LCpl Chisolm and Ms. [REDACTED] (Exhibit 9). On an undated memorandum, the Convening Authority denied this request. (Exhibit 10).

l. On December 24, 2021, retained counsel requested the physical presence of Ms. [REDACTED] Mr. [REDACTED] to appear at the Article 32 hearing. (Exhibit 11). On December 26, 2021, trial counsel denied this request. (Exhibit 12).

m. On February 18, 2022, defense counsel requested, through Ms. [REDACTED] counsel, the opportunity to interview Ms. [REDACTED] Counsel declined to make Ms. [REDACTED] available for an interview. (Exhibit 13).

n. On March 8, 2022, retained counsel requested the Convening Authority order a deposition of Ms. [REDACTED]

The defense desires to examine Ms. [REDACTED] about her knowledge of the alleged offenses that are charged in enclosure (1). Ms. [REDACTED] has been interviewed by NCIS during their investigation, but has refused to submit to a pretrial interview with defense counsel. Ms. [REDACTED] is no longer in California and has left the state with the children and the crime scene vehicle and has refused the defense's effort to have her return with the car to allow access. Given that she refuses to be interviewed, the defense is unable to ask her specific questions about the vehicle. (Exhibit 14).

o. On March 18, 2022, the Convening Authority denied that request (Exhibit 15).

p. In response to the defense request for Mr. [REDACTED] contact information, the government initially only indicated Mr. [REDACTED] contact information was his place of work, the

Ace Parking Garage. But defense learned Mr. [REDACTED] no longer worked there. Ultimately, the government finally provided Mr. [REDACTED] cell phone number. Thereafter, the defense team attempted to diligently contact Mr. [REDACTED] without government assistance (**Exhibit 16**). At one time, Mr. [REDACTED] had a scheduled time to be interviewed by the defense on the phone, but he hung up on the defense. Mr. [REDACTED] was the gate attendant at the parking garage where the accused is alleged to have left [REDACTED] children locked in the trunk of the car, and the video evidence reveals that Mr. [REDACTED] and LCpl Chisolm had verbal contact at the gate.

q. At LCpl Chisolm's arraignment, the defense objected to Captain O'Connell's participation in the case. The court did not rule on that objection. To date, Captain O'Connell has acted as trial counsel in all aspects of this case.

r. At LCpl Chisolm's arraignment, at the request of the government and *over defense objection*, the court appointed Ms. [REDACTED] to be the UCMJ Art 6b(c) representative of the alleged victims names in charge II and V.

To date, despite numerous attempts by the defense and requests for assistance from the government, the defense had not interviewed Ms. [REDACTED] Mr. [REDACTED] or Captain O'Connell.¹

3. Discussion.

"In a case referred for trial by court-martial, the trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." UCMJ Art. 46. Here, the government thwarts LCpl Chisolm's equal access to evidence and witnesses. NCIS interviewed Ms. [REDACTED] and Mr. [REDACTED]

Rule 702. Depositions

¹ While the defense has requested an interview with Captain O'Connell, there has been no response from the government in this regard, and thus, for purposes of this motion, the defense treats the non-response as a refusal.

(a) In general.

(1) 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 interest of justice that the testimony of a prospective witness be taken and preserved for use at trial.

(2) "Exceptional circumstances" under this rule includes circumstances under which the deponent is likely to be unavailable to testify at the time of trial.

(3) A victim's declination to testify at a preliminary hearing or a victim's declination to submit to pretrial interviews shall not, by themselves, *be considered "exceptional circumstances" under this rule.*

In the interests of justice, the testimony of a prospective witness may be taken and preserved for trial. R.C.M. 702(a) (1). After referral, the military judge may order a deposition be taken upon request of a party. R.C.M. 702(b). The request to take a deposition should include:

(1) the name and contact information of the potential witness; (2) a statement of the matters on which the person is to be examined; (3) a statement of why their testimony must be preserved; and (4) whether an oral or written deposition is requested. R.C.M. 702(c) (1)-(4).

In this case, exceptional circumstances exist to take the depositions of the individuals for following reasons:

a. Ms. █ is the alleged victim of charge III and the current custodial guardian of the minor children named in charges II and V, is the *de facto* evidence custodian of the crime scene, and refuses to be interviewed. Moreover, Ms. █ is also the UCMJ 6b(c) representative of the minor children and "assume[s] the rights of the victim" creating a *significant conflict* between being the evidence custodian and assuming all rights of the minor children alleged to have been harmed in the vehicle;

b. Mr. [REDACTED] cannot be found, does not respond to messages left at the last known contact phone number, and appears to be avoiding testifying at all;

c. Captain O'Connell is responsible for releasing the crime scene to Ms. [REDACTED] and is the percipient witness to the events that caused the release of the crime scene. Captain O'Connell's testimony is necessary for various motions, including 1) a motion to disqualify Captain O'Connell from the trial team, 2) potentially disqualifying the entire trial team, and 3) a motion to dismiss all charges as Captain O'Connell also swore the accuser.

The absence of a key civilian witness at an Article 32 hearing can "deprive the accused of a substantial pretrial right." *United States v. Chuculate*, 5 M.J. 143, 144-46 (C.M.A. 1978). Military practice provides for somewhat more flexible use of depositions in circumstances unique to the military. As such, depositions can be used for "securing the sworn testimony of a witness prior to trial who was improperly found to be unavailable at an Article 32, UCMJ, investigation." *United States v. Cabrera-Frattini*, 65 M.J. 66 M.J. 950, 953 (N.M.C.C.A. 2008).

A deposition may be ordered to allow the defense an opportunity to cross-examine an essential witness who was not available at the Article 32, UCMJ, investigation." *Id.* See also *United States v. Yazzie*, 2016 CCA LEXIS 332, *11 (N.M.C.C.A. 2016) (military judge erred when he denied defense request to depose daughter after the ex-wife refused to allow his daughter to testify at the Article 32 hearing).

The Rules for Courts-Martial grant an accused an equal opportunity to interview witnesses. R.C.M. 701(e). In this case, the defense is hampered in its ability to investigate the accused's defenses, given the witnesses refusal to be interviewed as well as the unique circumstances as they relate to Captain O'Connell.

The “exceptional circumstances” language was added to RCM 702 by Executive order 13696 on June 17, 2015. However, the change to RCM 702, a presidential rule, cannot vitiate UCMJ Art. 46, a congressional mandate. Any tension between RCM 702 and UCMJ Art. 46 must yield to congressional requirements. As Congress has not changed the equal access requirements of Art 46, any diminution of an accused’s rights to equal access is unconstitutional *per se* and as applied. However, the court need not make this finding as there are exceptional circumstances in this case.

Ms. [REDACTED] Ms. [REDACTED] is the biological mother of the three minor children in question. The children are alleged victims of Charges II and V. Ms. [REDACTED] is also the alleged victim of Charge III. Ms. [REDACTED] has physical custody of the minor children and currently lives in Georgia. As an alleged victim of a crime, the defense has the right under UCMJ Art. 46 and RMC 701(e) to interview Ms. [REDACTED] Moreover, RCM 701 mandates the defense shall have “equal opportunity to interview witnesses” to “prepare its case.” Only the government has interviewed Ms. [REDACTED] and prepared its case. Despite numerous requests, the government provided no assistance nor made Ms. [REDACTED] available for an interview. Ms. [REDACTED] is subject to a subpoena issued by the government to appear before the court-martial. However, this does not satisfy Art. 46. The government interviewed Ms. [REDACTED] and continues to have access to her, otherwise they would not aver her amenability to process. The defense has not had such access.

Moreover, Ms. [REDACTED] is in possession of the crime scene. The defense is not required to embark on a fishing expedition at trial to determine if Ms. [REDACTED] altered the crime scene or her statement to the government. Ms. [REDACTED] drove the crime scene from California to Georgia and continues to use the crime scene on a daily basis. Ms. [REDACTED] is now the *de facto* evidence custodian. If Ms. [REDACTED] was a law enforcement agent, the defense would have a right to interview

her to determine the nature of the crime scene and any alterations to it. Captain O'Connell and SA [REDACTED] gave Ms. [REDACTED] the *imprimatur* of being a government law enforcement agent.

Defense counsel requested funding to travel to Georgia to inspect the crime scene. That request was denied. If Capt. O'Connell did not release the vehicle to Ms. [REDACTED] defense counsel would have local access to the vehicle. Furthermore, if the vehicle was in the possession of NCIS, defense counsel would interview the evidence custodian and determine the state of the evidence. It should not be lost on the court that the government charged LCpl Chisolm with kidnapping and child endangerment alleging he placed the children in the trunk of the car and drove approximately 60 miles to San Diego, then left the children locked in the trunk for a period of approximately 12-hours. There is no more important piece of evidence than the Nissan Sentra. Now, six-months after the alleged crime, there is no way for the defense to inspect the crime scene nor the custodian of that evidence.

Furthermore, Ms. [REDACTED] is the UCMJ Art. 6b(c) representatives of the children the government alleges are victims of LCpl Chisolm's actions. The defense needs to depose Ms. [REDACTED] to determine if she altered the crime scene in anyway and to potentially file additional motions, which may include a motion to dismiss for destruction and spoliation of the crime scene. It cannot be understated the conflict that the government created by vehemently demanding the court appoint Ms. [REDACTED] as the representative – over defense objection. This is akin to the government giving the forensic sexual assault kit to a victim and allowing them to possess it until trial. As the 6b(c) representative, Ms. [REDACTED] is the advocate for alleged victims in this case. The defense has attempted all ethically appropriate methods of contact.

Mr. [REDACTED] Mr. [REDACTED] was the parking lot attendant at the Ace Parking garage that LCpl Chisolm parked at on October 2, 2021. Mr. [REDACTED] was interviewed by NCIS on October

15, 2021. Mr. [REDACTED] interacted with LCpl Chisolm on the evening of October 3, 2021 and Mr. [REDACTED] stated LCpl Chisolm was "really drunk." Furthermore, Mr. [REDACTED] stated he did not see anyone "inside the vehicle." Mr. [REDACTED] statement to NCIS is not sworn, nor did he appear, despite defense's requests, at the Article 32 hearing. Mr. [REDACTED] is a percipient witness to the state of the Nissan Sentra when it parked on October 2, 2021, as he had contact with the accused at the entry of the garage and had discussions with him when he entered. Moreover, Mr. [REDACTED] can describe LCpl Chisolm's alleged state of intoxication which is necessary to explore possible defenses.

Counsel attempted to contact Mr. [REDACTED] to facilitate a voluntary interview. Despite numerous messages left at the contact number provided, Mr. [REDACTED] has not returned any calls. Mr. [REDACTED] is no longer employed by the Ace Parking Company and counsel is unable to find him. It appears he is avoiding counsel's reasonable requests for an interview and potentially will not respond to legal process. Mr. [REDACTED] is the only witness that can testify to LCpl Chisolm driving the Nissan Sentra and parking it in the garage.

Without Mr. [REDACTED] testimony at the Article 32 hearing, defense counsel is unable to verify the veracity of his statements to NCIS.

Captain O'Connell:

Captain O'Connell is a member of the trial team. Captain O'Connell also released the crime scene to Ms. [REDACTED] knowing that Ms. [REDACTED] would remove it from the state of California and continue to use it as her personal vehicle.² Ms. [REDACTED] continues to use the vehicle in the state of Georgia and presumably transports the minor children in the vehicle on a regular basis. The defense needs to depose Captain O'Connell to determine the circumstances surrounding the

² The defense also filed a concurrent motion to disqualify Captain O'Connell as a trial counsel in this case.

release of the vehicle to Ms. [REDACTED] which occurred *after* Captain O'Connell knew LCpl Chisolm was represented by counsel. In addition, Captain O'Connell knew that defense counsel had not yet inspected the crime scene. It cannot be understated how inappropriate it is for a prosecutor to release the crime scene to a victim compounded by the fact it was done before defense counsel was able to inspect it.

Because Captain O'Connell knowingly released the crime scene to civilian, the defense believes it is denied the ability to present expert forensic evidence about the vehicle.³ The defense anticipates calling Captain O'Connell in its case-in-chief to explain to the court-martial why the defense is not able to present forensic evidence to counter the government's evidence. Moreover, the defense must depose Captain O'Connell to ascertain the reasons why he decided it was appropriate to release the crime scene to a victim of a crime and the 6b(c) representative of alleged victims who were placed in the car. A deposition is appropriate in advance of trial as Captain O'Connell may invoke his UCMJ Article 31b rights.⁴

4. Evidence.

The defense seeks to offer the following evidence during the motion:

1. NCIS forensic review of Nissan Sentra.
2. NCIS IA interview of Ms. [REDACTED]
3. Military defense counsel detailing memorandum.
4. NCIS ROI Mr. [REDACTED]
5. NCIS chain of custody and release of Nissan Sentra.
6. Retained counsel notice of representation.

³ The defense also filed a concurrent motion to compel government funding of a forensic expert. The defense does not concede its need for an expert due to Captain O'Connell's actions.

⁴ The defense concedes that Captain O'Connell may have Article 31b rights in a deposition as well.

7. Retained counsel request to inspect Nissan Sentra.
8. Captain O'Connell's refusal to allow inspection of Nissan Sentra.
9. Retained counsel request to CA for travel to Georgia to inspect Nissan Sentra.
10. Convening Authority's denial of retained counsel's request.
11. Defense request for Ms. [REDACTED] to appear at the Article 32 hearing.
12. Trial Counsel's denial of defense request for Ms. [REDACTED] to appear at the Article 32.
13. Retained counsel request to interview Ms. [REDACTED] and VLC's declination of that request.
14. Retained counsel's request to depose Ms. [REDACTED] post referral of charges.
15. Convening Authority's denial of request to depose Ms. [REDACTED]
16. Documentation of defense counsel's attempts to contact Mr. [REDACTED]

5. Burden and Standard of Proof.

The defense has the burden of proof by a preponderance of evidence that it is entitled to a judicial order of depositions, R.C.M. 905 and 906.

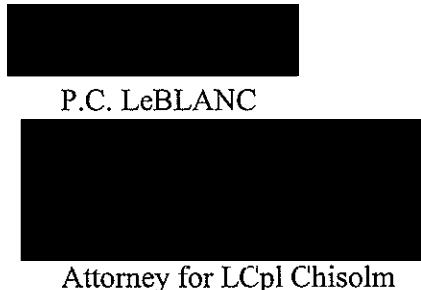
6. Relief Requested.

The defense respectfully requests the court order depositions of the following:

- a. Ms. [REDACTED] civilian;
- b. Mr. [REDACTED] civilian; and
- c. Captain Gage M. O'Connell, USMC

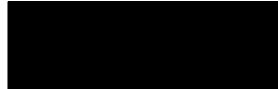
7. Argument.

Oral argument is requested.



CERTIFICATION OF SERVICE

A true copy of this motion was served on the court and opposing counsel via electronic mail on March 15, 2022.



P. C. LeBLANC

1 NAVY-MARINE CORPS TRIAL JUDICIARY
2 WESTERN JUDICIAL CIRCUIT
3 GENERAL COURT MARTIAL

4 UNITED STATES

5 v.

6 Justin Chisolm
7 Lance Corporal
U.S. Marine Corps

DEFENSE MOTION FOR APPROPRIATE
RELIEF (COMPEL DISCOVERY)

Date: 9 April 2022

8 **I. Nature of the Motion.**

9 Pursuant to Rules for Court-Martial (R.C.M.) 701, 703 and 906(b)(7), this motion is
10 submitted to compel discovery.

11 **II. Issue.**

12 The issue presented for the court to decide is whether the court should compel the Government to
13 discover documents, tangible objects, and reports pursuant to R.C.M. 701, and produce evidence
14 pursuant to R.C.M. 703.

15 **III. Statement of Facts.**

16 The evidence requested by the Defense is predicated off the following facts:

17 1. On 5 October 2021, LCPL Chisolm was placed in pretrial confinement (PTC) at the
18 Camp Pendleton Base Brig.

19 2. LCPL Chisolm was accused of various crimes, including child endangerment of [REDACTED]
20 [REDACTED] and two [REDACTED] as the result of an incident that occurred on or about 2-3
21 October 2021.

22 3. On 8 October 2021, defense counsel were detailed to represent LCPL Chisolm, and the
23 government was notified of such detailing.

1 4. On 8 October 2021, the same day that defense counsel were detailed, NCIS commenced a
2 forensic examination of the crime scene automobile.¹ Over the course of four days, from 8
3 October to 12 October 2021, NCIS conducted the forensic examination of the automobile. No
4 defense counsel were present.

5 5. Despite defense counsel being detailed to represent the accused, the government failed to
6 notify defense counsel that NCIS was conducting a forensic examination of the crime scene.
7

8 6. After NCIS completed its examination of the crime scene, the vehicle remained with
9 NCIS for another 17 days.
9

10 7. On 22 October 2021, NCIS Special Agent [REDACTED] contacted the trial counsel to
11 request permission to release the crime scene vehicle to the spouse of the accused.
11

12 8. On 25 October 2021, having received no response to his first attempt with trial counsel
13 S/A [REDACTED] again contacted trial counsel to request permission to release the crime scene
14 vehicle to the spouse of the accused.
14

15 9. NCIS had been advised by the members of the accused's command that the accused's
16 spouse desired to have the car returned to her so she could leave the state with her children.
16

17 10. Prior to contacting the trial counsel about the release of the crime scene, the government
18 still did not inform detailed defense counsel to advise them that the subject vehicle was in the
19 possession of the government, had been searched, or that NCIS was seeking permission to
20 release the vehicle to the spouse. As such, no defense counsel ever viewed the vehicle while it
21 was in NCIS's possession.
22

23 11. On 25 October 2021, detailed trial counsel, Captain O'Connell advised NCIS he could
24 give the automobile back to the accused's spouse.
24

25
1 The accused is alleged to have locked his children in the truck of his and his wife's car.
2

1 12. On 28 October 2021, charges were preferred against the accused.

2 13. On 29 October 2021, NCIS returned the crime scene to the accused's spouse. At some
3 point, she left the state with the car and as far as the defense is aware, she has never returned to
4 California with the car.

5 14. The defense has requested government funding to view the crime scene vehicle in
6 Georgia, but the government has refused.²

7 15. On 5 November 2021, civilian counsel advised the government she had been retained by
8 the accused, and she requested the investigative reports in the case. Trial Counsel advised three
9 days later on 8 November 2021 that there were no NCIS reports in the case.

10 16. On 10 November 2021, an Article 32 was appointed to be held on 17 November 2021.
11 Upon receipt of the appointed order, Defense counsel again requested the investigative reports.
12 Government again claimed there were no reports to give.

13 17. After not receiving any NCIS reports to prepare for the Article 32, defense asked for
14 witness contact information from the government. This witness information would have enabled
15 the defense to investigate its case and prepare a proper witness and evidence request for the
16 Article 32. Trial Counsel (Captain O'Connell) *refused* to provide the witness contact
17 information to the defense.

18 18. The defense also requested access to the crime scene vehicle before the Article 32.
19 Again, Captain O'Connell *refused*, claiming that the defense was not entitled to access to the
20 crime scene before an Article 32 hearing.

25 2 This denial is not the subject of this motion, but will be the subject of a separate motion.

1 20. The original Article 32 hearing was continued a number of times due to various reasons,
2 including defense counsel's schedule, the lateness of the submission of NCIS reports to the
3 defense, as well as a death of a friend of the defense counsel.

4 21. Despite its requests to view the crime scene before the Article 32, the defense was not
5 permitted to view it.

6 22. Defense submitted its witness and evidence request for the Article 32, but the
7 government denied almost everything the defense requested.

8 23. NCIS issued its first ROI on 19 November 2021, which was two days after the originally
9 scheduled date of the Article 32.

10 24. Missing from the first ROI was the report of the forensic examination of the crime scene.
11 In fact, despite the crime scene examination being held on 8-12 October, and the Article 32 held
12 being held 29 December 2021, the defense was not provided the forensic report until the issuance
13 in mid-January of the NCIS report, *after* the Article 32. Defense was forced to examine the
14 agent at the Article 32 without the benefit of having reviewed his report.

15 25. After the charges were referred to general court-martial, on 7 February 2022, defense
16 submitted its first discovery request. Additional discovery requests have been submitted dated
17 16 February, 17 February, 25 February, and 6 April.

18 26. While the government has responded and provided some of the requested discovery,
19 many of the relevant discovery items have NOT been provided, or the government has just failed
20 to respond to indicate its intentions with regard to the requests, and thus the assumption is that
21 the items have been denied.³ It would have been easy and simple for the government to response

22
23
24
25 ³ While the most recent government response to discovery dated 17 March 2022 indicates in various paragraphs that
"NCIS is searching for responsive material," defense counsel has had contact with the agent who claimed he had not
been tasked by the government with a number of the discovery matters requested. Thus, it is unclear which agent

1 to the various items of discovery request, line by line, but the government elects to just say
2 nothing about many of the items requested, forcing the defense to file a motion to compel to get
3 an answer. The following matters are still outstanding:

4 27. Disclosure of the entire investigative file(s), to include *all case notes, case agent*
5 *summaries, interviewer notes and summaries* (including for interviews conducted by
6 government attorneys), interim, final, and supplemental reports, photographs (in color, if the
7 originals are in color), slides, diagrams, sketches, drawings, emails, electronic recordings,
8 computer files, handwritten notes, interview worksheets, interview and interrogation logs,
9 military police/security police/base police desk/gate logs, and any other information in the
10 case file or any other file associated with the instant case and/or any charged or uncharged
11 related offenses/cases. This request includes access to the entire CID, PMO, Security,
Command investigators, NCIS and/or associated law enforcement case files to include the
NCIS Case Activity Report (CAR) and NCIS Investigative Planner (IP). This request also
includes a copy of any and all security and PMO incident reports in this case, as well as
emails from Trial Counsel and NCIS/Law Enforcement to FAP, and from FAP to the
Command.

12 28. Disclosure of any records of any temporary duty, attachment(s), periods of liberty,
13 periods of travel (authorized or otherwise), and leave relating to the accused for the date(s) or
during the time period(s) alleged in the charged sheet(s).

14 29. A copy of all internal forms/documents, including witness reliability forms, internal
15 data sheets, and other relevant forms and documents. The defense further requests to be
informed if any of the previously enumerated requested documents do not exist in the present
16 case. In addition, the defense requests to be informed specifically which documents fall into
this category.

17 30. This request also includes, but is not limited to, disclosure of the following relevant
18 documentation:

- 19 (a) Complaint initiation form (including reverse and continuations
sheets, if any);
- 20 (b) Internal data pages;
- (c) Interview logs;
- (d) Interview records;
- 21 (e) Source dossier and any form(s) related to any Confidential Informant(s);
- (f) Informants' notes;
- (g) Informal source files;
- 22 (h) Any form(s)/documents detailing any disbursement from confidential funds;
- (i) Developmental files;
- 23 (j) Any substantive investigations record check summary;

25 has been tasked to search for responsive material, as the lead agent on the case indicates otherwise, and his case
notes do not reflect any tasking between the months of January 2022 and April 2022.

- (k) Any form(s) related to consent for search and seizure;
- (l) Internal communications, staff summary sheets, and e-Mail and/or electrical medium (message) documents used to brief, respond and/or request investigative activities in the investigation;
- (m) Results of any NCIC, DCII, LAC, Security Police 110, or similar records checks;
- (n) All records reflecting the chain of custody on any evidence seized and/or tested; and
- (o) All agent or investigator notes;
- (p) All investigative reports;
- (q) Internal agency reports;
- (r) Witness reliability forms;
- (s) Any draft statement, printed out by any Naval Criminal Investigative Service (NCIS) Agent and provided to a witness to review that preceded their final sworn statement;
- (t) All other relevant forms and documents.

31. Copies of any investigative reports in which the expected witnesses were subjects or co-subjects.

32. Notice of whether any witness and/or potential witness has asserted or will assert any privilege as to any matters relevant to the instant case and/or any charged or uncharged related offenses, disclosure of the evidence each witness and/or potential witness has asserted or will assert that establishes any privilege(s), and provide any legal authority relied upon to support the claimed privilege(s).

33. Notice whether the government intends to impeach any witness at trial or any hearing with a criminal conviction older than ten years.

34. Disclosure of all guidance possessed and/or followed by any law enforcement agency, regardless of who authored the guidance, regarding:

- a. Investigations of military members accused of the offense(s) the accused has allegedly committed;
- b. Crime scene evidence collection;
- c. Interrogation/questioning of suspects;
- d. Methodology/strategy of questioning/interrogating a subject (this includes, but is not limited to, the Reid and/or Kinesic methodologies);
- e. Questioning of adult witnesses;
- f. Questioning of complainants;
- g. Advising military members of their rights;
- h. Making video and/or audio recordings of witness interviews;
- i. Making video and/or audio recordings of subject interviews/ interrogations;
- j. Advising a subject of his/her rights;
- k. Reinitiating questioning/interrogation of subject after subject has exercised his right to counsel and/or to remain silent and the subject later asks or agrees to answer questions; and subject cleansing statements.

1 1. The requested discovery in this paragraph includes, but is not limited to, diagrams, dolls,
2 and any other tangible objects, pamphlets, instructions, training materials in any form,
2 regulations, policy letters, memos, and emails.

3
4 35. Disclosure of any immunity, leniency, pretrial or post-trial agreements, any offers or
5 agreements, direct or indirect, oral or written, express or implied, choate or inchoate, or any
6 payments or promises of payment or any other consideration from any person or entity in any
7 form whatsoever made to or by any witness or potential witness or any attorney for any
8 witness or potential witness (whether actually communicated to the witness and/or potential
9 witness by the witness' attorney) or any other person at any stage of the instant case or any
10 charged or uncharged case related offenses and which was intended to induce or might have induced or
11 which resulted in any testimony at any stage of the instant case. This request includes, but is not limited to,
12 discovery relating to any past, present, or potential future plea agreements, immunity grants,
13 payments or consideration of any kind and in any form, assistance to or favorable treatment
14 with respect to any pending civil, criminal, or administrative matter between any government
15 and the witness, and any other matters which could arguably create an interest or bias in the
16 witness in favor of the government or against the defense or act as an inducement to color or
17 shape any witness' testimony.

18 36. Disclosure of all mental health, substance abuse treatment program, and medical records
19 (whether military, veteran affairs, and/or civilian), all presentence reports and other contents
20 of federal or state probation office, social security, crime victim compensation commissions,
21 welfare and disaster agencies, and any other government agency records relating to all
22 witnesses, potential witnesses, complainants, and deceased persons who were in any way
23 involved with the instant case and/or any charged or uncharged related offenses and for
24 whom such records exist and which records relate to the character of these persons, these
25 persons' motives for testifying, these persons' tendency to fabricate or exaggerate, evidence
of these persons' mental or emotional stability, these persons' substance abuse, these
persons' low intelligence, instances of these persons' lying to military or civilian authorities
or others, and evidence of these persons' biases against the accused or any defense witnesses.

18 37. Disclosures of all evidence affecting the credibility of all government witnesses,
19 potential witnesses, military, federal, state, or local investigators and law enforcement,
20 medical and mental health providers, including all representatives of FAP/Child Protective
21 Services who reviewed this case or interviewed anyone associated with this case, to include,
22 but not limited to:

23 38. Prior civilian and court-martial convictions, and all arrests or apprehensions of any
24 government witness. The defense specifically requests a check with the National Crime
25 Information Center, National Records Center, and all local military criminal investigatory
organizations.

1 39. Any prior and/or subsequent propensity on the part of any witness, complainant, and/or
2 alleged victim to be an aggressor, to incite aggressive behavior, and or any other pertinent
3 trait of character of any witness and/or alleged victim. The defense specifically asks the
4 government to exercise due diligence in making such a search as to any of these persons who
 were in any way involved with the instant case and/or any charged and/or uncharged related
 offenses and provide disclosure if any of these persons:

5 (1) has ever been subject to a proceeding pursuant to UCMJ Article 15 or equivalent;
6 (2) has ever received any adverse military administrative action;
7 (3) has ever been titled by any military and/or civilian law enforcement and/or
 security agency;
8 (4) has ever been apprehended or arrested by any military, civilian, or foreign law
 enforcement agency;
9 (5) has any military, civilian, or foreign criminal convictions;
10 (6) has any federal, state, or foreign deferrals of charges or pleas which avoided a
 criminal conviction;
11 (7) has any entries at the NCIC;
12 (8) has ever made any allegations at any time which are in any way similar to and/or
 related to the allegations in the instant case;
13 (9) has ever been investigated, or had a complaint made against him/her/them, with
 Child Protective Services, Family Advocacy, or any other similar child abuse/partner abuse
 organization.

14 40. Records of adverse administrative actions (pending and completed) to include discharge
15 prior to expiration of term of service for any reason, punishment under UCMJ Art. 15 or its
 equivalent, relief for cause actions, letters of reprimand or admonition, and negative
 counseling relating to adverse or disciplinary actions concerning any of these persons.

16 41. All investigations of any type or description, pending initiation, ongoing, or recently
17 completed which pertain to alleged misconduct of any type or description committed by a
 government witness.

18 42. All discovery in control of or known to the government concerning the mental status of
19 these persons, the accused, and/or any defense witness. The discovery sought specifically
20 includes any medical records reflecting psychiatric diagnosis and/or treatment or head injury
 of any type and drug and/or alcohol abuse or addiction diagnosis, treatment, or rehabilitation,
 whether court ordered or voluntary, whether privileged or unprivileged. If any requested
 discovery is privileged, then the same or substantially similar discovery from non-privileged
 sources is requested.

1 43. The entire official service personnel file (including the complete DD form(s) 214 and
2 215 or equivalent) for any of these persons who is or was a member of any uniformed service
3 of the United States. This includes, the Unit Training Records, training jackets, counseling
4 files and other unit records kept from all prior and present units of all government witnesses
5 with prior or present military service as well as prior punishments under Article 15, UCMJ,
6 any adverse administrative actions, page 11's or adverse counseling(s), or evidence of other
7 character, conduct, or bias bearing on witness credibility.

8 44. For any of these persons, the results of any polygraph examinations, including the
9 polygraph examination report and related polygraph records, the polygraph consent form, the
10 polygraph examination authorization request, the polygraph examination authorization, the
11 polygraph examination quality control review, any rights certificate executed or signed by
12 the examiner and the subject, and any psychological assessment of the credibility of the
13 person tested.

14 45. Transcripts and/or recordings of prior testimony by any witness, the accused,
15 complainant, or co-accused in any military, federal, civilian, or foreign trial or other hearing
16 46. Any known evidence tending to diminish the credibility of witnesses including, but not
17 limiting to, prior civil or military convictions (*see* M.R.E. 609); prior evidence of allegations
18 made by a witness which were not acted upon or dismissed; and evidence of other character,
19 conduct, or bias bearing on witness credibility including but, not limited to letters of
20 counseling, letters of reprimand, memoranda or other information concerning the existence
21 of oral counseling or reprimands, evidence of prior Article 15 action, complaints with law
22 enforcement or child abuse and domestic abuse protection authorities, and adverse
23 administrative actions in the Government's possession or reasonably obtainable.

24 47. Any evidence that any prospective witness consumed alcohol or drugs prior to
25 witnessing the events that gave rise to his/her testimony. In addition, the defense requests
any evidence, including any medical or psychiatric report or evaluation, tending to show that
any prospective witness's ability to perceive, remember, communicate, or tell the truth was
or is currently impaired and any evidence that a witness has ever used narcotics or other
controlled substance, or has ever been an alcoholic.

48. All medical records, security clearance documents, or other documents referencing
disciplinary action that may indicate a witness's history of alcohol use or abuse.

49. Any sworn or signed statement relating to an offense charged which is in the possession
of the trial counsel.

50. Notice of (a) whether the government intends to call the convening authority as a witness
and, if so, (b) for what purpose.

51. A copy of all civilian search and seizure warrants with affidavits and a copy of all
Command Authorization Search and Seizure (CASS) warrants with affidavits, and a copy of
all Permissive Authorization for Search and Seizure (PASS) signed by the accused, witness,
complainant, or alleged victim.

1
2 52. Notice of whether the accused was directed or ordered by superior authority to speak
and/or cooperate with any law enforcement agency or officer.

3
4 53. Disclosure of whether the accused has been the subject of electronic surveillance,
eavesdropping, search or seizure, or interrogation, and all documents or reports relating
thereto; whether any application has been made to any court or commander for authorization
to intercept or record any conversation by the accused, any conversation related to the
accused, and any communication instrument controlled, owned, or used by the accused; and
whether any other eavesdropping was authorized.

5
6 54. Disclosure of all affidavits/statements supporting requests, which pertain to the instant
case, whether or not granted, for authorization to search, seize, and/or apprehend, and all
granted authorizations, whether used or not.

7
8 55. Disclosure of whether any "handoff" procedure by any law enforcement agency to
another law enforcement agency in the investigation of this case or any related case was
utilized and whether any "handing off" law enforcement agency engaged in any searches or
seizures (e.g., wiretap) related in any way to the instant case.

9
10 56. Disclosure of all financial, business, and/or personal records (e.g., checking and savings
accounts, investments, credit card, online transactions, retirement accounts, etc.) of or about
the accused obtained from the accused or any source other than the accused whether by
subpoena or otherwise along with a copy of all papers associated with the government's
obtaining access to the records.

11
12 57. Disclosure of all financial, business, and/or personal records (e.g., checking and savings
accounts, investments, credit card, online transactions, retirement accounts, etc.) of or about
the complaining witness and other witnesses, obtained from the complaining witness and
other witnesses, or any source other than the complaining witness and other witnesses
whether by subpoena or otherwise along with a copy of all papers associated with the
government's obtaining access to the records.

13
14 58. NCIS, CID, local, command investigator, and State Investigative Files and Agent notes.
Disclosure of the entire file(s), to include all case notes, case agent summaries, interviewer
notes and summaries, interim, final, supplemental reports, photographs (in color, if the
originals are in color, slides, diagrams, sketches, drawings, emails, electronic recordings,
computer files, handwritten notes, interview worksheets, interview and interrogation logs,
military police/security police/base police desk/gate logs, and any other information in the
case file or any other file associated with the instant case and/or any charged or uncharged
related offenses/cases

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1 59. Any statements of understanding (SOU or MOU), transfer orders, agreements or
2 arrangements, or other cooperative memorandums between DOD officials or agencies with
3 state or foreign authorities or courts in this case. This includes disclosure of whether any
4 "handoff" procedure by any law enforcement agency to another law enforcement agency in
the investigation off this case or any related case was utilized and whether any "handing off"
law enforcement agency engaged in any searches or seizures related in any way to the instant
case.

5 60. Copies of all documents related to any reassignment of the accused or revocation of a
6 security clearance as a result of, or contemporaneous with, the investigation of this case.

7 61. Notice of whether the accused, while detained or held in custody, requested to contact a
8 priest, minister, rabbi, imam, any member of the clergy, or any such similar religious person.

9 62. For any Cellebrite and/or XRY, forensic computer analysis, or any other evidence of
10 scientific/forensic testing, the defense demands disclosure of the laboratory case file(s) and
case notes, as well as all laboratory reports including:

- 11 a. A summary of all testing and data interpretation;
- 12 b. What was tested;
- 13 c. Who conducted the testing;
- 14 d. Identification of the protocol used in the testing and any deviation from the protocol;
- 15 e. The data and results produced by the testing or data interpretation;
- 16 f. The examiner's interpretation of the results and conclusions therefrom;
- 17 g. The methods and results of any statistical computations; and
- 18 h. Any additional information that could bear on the validity of the test results,
interpretation, or opinion.

19 63. Disclosure of all evidence of any prior identification of the accused at a traditional line
up, photo lineup, show up, voice identification, or other formal or informal identification
process which the government intends to offer against the accused at trial or any hearing.

20 64. For any testing of DNA or other forensic (including bodily fluids) samples obtained in
21 this case or any related case, disclosure of the laboratory case file(s) and case notes, as well
as all laboratory reports including:

22 65. Notice of any expert consultants or witnesses retained by the government, with their
23 C.V.'s, material they have used and relied upon in coming to their conclusions, opinions, or
24 analysis in the case, and a synopsis of their expected testimony.

1 66. Disclosure of, and the latest curricula vitae with date of preparation for, each person
2 involved in any evaluation and/or testing of any kind in the instant case or any related case
3 and all expert witnesses the government intends to call at trial or at any hearing. The
4 defense requests the government disclose the number of times each expert has been
5 qualified as an expert witness in military, civilian, or foreign courts, the types of court in
6 which each witness has testified (military, federal, state, or foreign), the locations (city and
7 state/territory/province/country) of each court, and the civil and criminal docket number of
8 each case. The defense further requests disclosure of any reports, information, evidence,
9 publications (with citations), unpublished studies, and any other material considered by the
expert prior to testifying.

7 67. Notice of any professional sanction of any kind, formal or informal, imposed upon or
8 given by any governmental regulatory body, professional association, or professional
9 publications to any person involved in any testing or to any expert witness to be called in
the instant case.

10 68. If any expert's testimony will be different from that contained in any laboratory or
11 expert's report or the substance of the testimony is not contained in any laboratory or
12 expert's report, disclosure in writing of the substance of the expert's proposed testimony, the
13 expert's opinion, and the underlying basis/bases for that opinion.

14 69. All contracts entered and other expenditures by prosecution assets connected to this
15 case.

16 70. Copies of the following regarding each investigator involved in this case:

- 17 a. Any "On-the-Job" Training Record
- 18 b. Training test score results;
- 19 c. Evidence of credentials suspended or revoked
- 20 d. Evidence of being a subject or suspect in any internal affairs investigations, whether
21 related to this matter or not; and
- 22 e. Evidence of any adverse administrative or disciplinary actions, whether related to this
23 matter or law enforcement activity or not.

24 71. Disclosure of all evidence known, or with reasonable diligence should be known, to the
25 government, that affects the credibility of any prosecution, defense, or court witness and/or
evidence at trial or any hearing.

26 72. Notice of whether there was any perjured testimony or the government suspects or
27 suspected there was any perjured testimony or there was any fabricated evidence or the
28 government suspected that there was any fabricated evidence offered in any hearing or in
29 the trial in the instant case and/or as to any charged or uncharged related offenses/cases and
30 disclosure of that evidence; and if the government suspects or suspected that there was any
31 perjury or any fabricated evidence offered, whether the government investigated the matter,
32 and if so, disclosure of the result of any such investigation.

1 73. Notice of any *ex parte* communications between any military judge in the instant case or
2 any related case and any government agent, including but not limited to the staff judge
advocate and/or any trial counsel and disclosure of the content of any such communications.

3 74. Disclosure of all statements, oral or written, made by the summary, special, or general
4 court-martial convening authorities in the instant case or as to any charged or uncharged
5 related offenses or by any officer superior to the general court-martial convening authority,
whether written or oral, which:

- 6 a. In any manner, withholds authority from a subordinate commander to dispose of the
accused's case under the UCMJ, to impose nonjudicial punishment upon the accused, to
order the accused's separation or release from active duty or active duty for training, or to
order the accused into pretrial confinement or restriction;
- 7 b. Provides guidance to any subordinate commander concerning appropriate levels of
disposition and punishment of any offense, whether such guidance was given before or after
any offense(s) in issue in the instant case and/or as to any charged or uncharged related
offenses;
- 11 c. In any manner indicates that the relevant officer has anything other than an official
interest in the instant case and/or as to any charged or uncharged related offenses.

13 75. Disclosure of any message traffic of any kind or form within the accused's chain of
14 command in connection with the accused or others allegedly involved with the accused in
15 the charged offenses and/or related charged or uncharged offenses, including but not limited
to any situation reports, emails, or similar message traffic, including Serious Incident
Reports, OP-REP Blue, and other message traffic.

16 76. Disclosure of any and all correspondence (including email and official messages) sent
17 to or by the convening authority or by any superior authority related to military justice
18 matters in the six months previous to the date of the initial preferral until the conclusion of
the instant case.

19 77. Disclosure of the media releases and/or public statements, official or unofficial, by any
20 government and/or military official concerning the accused, the offenses, and/or any related
21 charged or uncharged offenses. This discovery is necessary so that the defense may
properly conduct voir dire and may examine the necessity of raising a motion in the nature
of a change of venue.

1 78. All e-mail communications by members of LCPL Chisholm's unit and parent
2 command related to the accused or the alleged conduct. Such communications include, but
3 are not limited to, emails referencing or forwarding news articles about the accused and the
4 alleged conduct; communications to or from the convening authority regarding the accused
5 and the alleged conduct; situation reports (SITREPs) and any communication indicating a
6 predicted or desired outcome from any potential member. A simple search on the term
7 **"Chisolm"** constrained from the date of the alleged misconduct until present should
8 produce the requested information. Such e-mails are necessary to determine the extent of
9 command influence in order to properly conduct voir dire and file motions.

10 6 79. All written matters (including electronic mail and notes) and information used by the
11 Convening Authority and the various advisory personnel (including the staff judge
12 advocate and subordinate commanders) in nominating prospective court members and in
13 selecting final members detailed to the court-martial for all court-martial orders in this
14 case. This request specifically includes any listing of names (including alpha rosters) sent
15 to the Convening Authority from which the names of court members were selected and
16 materials relating to individuals considered and were not selected for detailing as members.

17 11 80. All written matters (including electronic mail) and information used by the Convening
18 Authority and the various advisory personnel (including the staff judge advocate) for the
19 purpose of amending any convening order, specifying in particular the reason for removing
20 any previously detailed court member.

21 13 81. The e-mail (or other means) taskers sent out to specifically solicit members in this case
22 and all responses to those taskers.

23 15 82. The defense requests that the government promptly disclose all proposed instructions it
24 intends to request the court to give to the court-martial members and the legal authority for
25 each instruction.

26 17 83. Any *subpoena duces tecum* issued by the prosecution to any entity related to this case.

27 18 84. A detailed summary of any legal advice which NCIS Agents, CID, command
28 investigators or any other law enforcement member received from judge advocates which
29 affect the course or scope of the investigation.

30 21 85. All pretrial publicity that is in any way relevant to this case. This includes all
31 summaries prepared by Public Affairs Officers, judge advocates or others that contain any
32 references in the national, local or base media, to include any unit newsletters or similar
33 publications. This discovery is necessary so that the defense may properly conduct voir dire
34 and may examine the necessity of raising motions.

35 24 86. All press releases made to date in this case and the medium in which they were made,
36 including the time. Any media inquiries to any governmental public affairs office
37 regarding the Accused or the alleged conduct, any response provided and all proposed
38 responses to query created related to this case.

1
2 87. A copy of the duty schedule for the months of September – October of the accused's
duties.

3
4 88. A copy of all text messages and emails between the complaining witness and any
government counsel, agent, or other government representative.

5
6 89. A copy of the entire extraction of the accused's cell phone, or attempts to extract,
conducted by NCIS and any other law enforcement entity. (Notably, NCIS claims it failed
to extract the accused's cell phone, yet seized it and made efforts to extract it, but there has
been no investigative report of such attempt).

7
8 90. A copy of ALL PMO, security, FAP and CPS records and command records, including
reports from August-September 2021, relating to the accused's [REDACTED] leaving the children
alone while in home and her automobile, while she went to the grocery store and to the
neighbor's house and the accused was at work (which incidents(s) were reported to the
accused's command). This includes the NCIS reporting of the alleged incidents to FAP
and CPS.

9
10 91. Any email, letter, memorandum, note, summary or report of phone call or text
messages from any NCIS, PMO, DoD Police, or any law enforcement officer to any
member of the prosecution team requesting permission to release the vehicle in question to
Ms. [REDACTED]

11
12 92. Any email, letter, memorandum, note, summary, or report of phone call or text
messages from any NCIS agent, investigator, or employee to NCIS Headquarters
requesting guidance on the release of the vehicle in question to Ms. [REDACTED]

13
14 93. A copy of the NCIS local policy that allows for the release of a piece of evidence prior
to the finalization of all appellate process. A copy of the NCIS Headquarters policy that
allows for the release of a piece of evidence prior to the finalization of all appellate process.

15
16 94. A *Henthorn* and *Giglio* review of their records and discovery of any derogatory
information of the NCIS agent/employee designated as the Evidence Custodian at the Field
Office that released the vehicle in question to Ms. [REDACTED]

17
18 95. The name and contact information of the senior agent (SAC, ASAC, or attorney, to
include Code 00L) who authorized the release of the vehicle. Once identified, the defense
requests copies of all emails, memorandum, text messages, instant messages, or otherwise,
between that named senior official and the agent/custodian who released the vehicle in
question, and to any member of the prosecution

19
20 96. Copies of all emails between any member of the prosecution and Ms. [REDACTED] (and her
VLC) and Ms. [REDACTED] (and her VLC's) response to those emails or correspondence.

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1 97. A copy of the California or Georgia DMV registration for the subject vehicle, name of
2 lienholder, and proof of insurance.

3 98. The name and contact information of any NCIS agent in a different field office that has
4 had, or continues to have contact with Ms. [REDACTED]

5 99. All brig and command visit logs for any command visits with LCPL Chisolm since
6 October 5, 2021.

7 100. LCPL Chisolm's entire brig file to include his DD form 510s, counseling, and
8 discipline records, logs, interviews, and any other records maintained by Marine Corps
9 Base Brig Camp Pendleton for him.

10 101. All records, communications, emails between command, brig, government counsel,
11 and any other person tasked with the matter regarding LCPL Chisolm's request for
12 assistance in preparing and filing his 2021 tax return while in pretrial confinement.

13 102. All records, communications, emails between command, brig, government counsel,
14 and any other person tasked with the matter regarding LCPL Chisolm's request for his
15 running shoes while in pretrial confinement.

16 103. All records, communications, emails between command, brig, government counsel,
17 and any other person tasked with the matter regarding LCPL Chisolm's request for his "no-
18 shave" chit and prescribed ointments and medications for such his skin condition while in
19 confinement.

20 104. All speech therapy records for [REDACTED] from 2020 to the present date.

21 105. All physical therapy and occupational therapy for [REDACTED] and [REDACTED]

22 106. All emails from any government counsel, government agent's, clerk, adjutant, SJA or
23 command representative to and from NCIS, CID, PMO and any other law enforcement
24 agency in this case, as well as any NCIS emails to/from any law enforcement entity or
25 other civilian agencies, including SDPD, Sheriff, FBI, Palomar Health, County Child
Welfare Services, and any other law enforcement or civilian agencies regarding this
case. To be clear, we request ALL of these emails as indicated from the date of the alleged
offenses to the present date, and this is a continuing request.

107. A copy of all records in the possession of Palomar Health pertaining to this case,
including the CV of Ms. [REDACTED] the "intake form," interviewer notes,
photographs and diagrams of the site used for the forensic interview (including interview
room, observation room, waiting room, and offices), consent forms signed by Ms. [REDACTED]
(mother of [REDACTED] which authorized Palomar Health to conduct a forensic interview, all
referrals made by Palomar Health subsequent to the forensic interview, a signed, final copy
of the Forensic Interview Summary, and any and all monthly "case review committee"
reports for the allegation made by [REDACTED]

1
2 108. Copies of any Motiva (and any other therapist or medical provider) records pertaining
3 to [REDACTED] referral from Palomar, including any referrals, treatment records, intake forms,
interviews, evaluations, and any other documents pertaining to [REDACTED] allegations and
Motiva's (and other therapist's) treatment of [REDACTED]

4
5 109. Copies of any and all records from San Diego County Child Welfare Services
6 pertaining to [REDACTED] (named as Victims in this case),
including intake notes, reports, evaluations, child abuse forms 8572, court or agency action,
interviews, recordings, and any other CWS case files pertaining to this case;

7 110. A copy of the resume, biography, or CV of Ms. [REDACTED]

8 111. A copy of any and all early intervention, IEPs, and any school/preschool records of
9 [REDACTED]

10 112. A copy of any and all police reports, 911 calls and any other police blotter/scanner
11 records from San Diego Police Department for any police-reported incidents or about 2-3
October 2021 involving the Ace Parking Lot at [REDACTED] and
Fluxx Nightclub, [REDACTED]

12 **IV. Law/Discussion**

13 a. R.C.M. 701(a)(2) requires the trial counsel to disclose and inspect, after service of charges
14 and upon defense request, any books, papers, documents, photographs, tangible objects,
15 buildings or places, any results or reports of physical or mental examinations and scientific tests
16 or experiments, or copies thereof, which are within the possession, custody, or control of military
17 authorities, the existence of which is known or by the exercise of due diligence may become
18 known to the trial counsel, and **which are relevant to the preparation of the defense** or are
19 intended for use by the trial counsel as evidence in the prosecution's case-in-chief at trial.

20 b. R.C.M. 701(e) states that each party shall have adequate opportunity to prepare its case and
21 equal opportunity to interview witnesses and inspect evidence, subject to the limitations imposed
22 on the accused's request to interview an alleged victim. Otherwise, no party may unreasonably
23 impede the access of another party to a witness or evidence.

1 c. R.C.M. 701(a)(6) states that trial counsel must disclose to defense counsel any evidence
2 that reasonably tends to negate the guilt of the accused of an offense charged, reduce the degree
3 of guilt of an accused, reduce punishment, or adversely affect the credibility of any prosecution
4 witness or evidence.

5 d. The Defense has made numerous discovery requests to the Government since referral of
6 the charges to obtain the relevant, necessary and material evidence. Many of the items are in the
7 government's possession, yet it still refuses to provide them or just has failed to make timely
8 efforts to obtain them, or has just denied access to other evidence than can easily be obtained
9 through law enforcement efforts or government subpoenas. This case has been in existence for
10 over six months, yet the government still insists on impeding the defense's access to evidence.

12 e. In fact, even when the case was in the Article 32 phase, the government impeded access to
13 the defense's ability to access evidence in this case. Trial counsel refused to give the defense
14 witness *contact information* so that it could interview witnesses before the Article 32, in order to
15 prepare and submit a proper witness and evidence production request. At that time, the
16 government claimed the defense was not entitled to have witness contact because the case was
17 merely at the Article 32 stage. The government's position on access to witness contact
18 information strains credulity. In effect, the government's efforts have essentially slow-rolled the
19 evidence to the defense since the case genesis.

20 f. As of the date of this filing, the Government has acknowledged the existence of many of
21 the items still outstanding, but continues to just ignore the defense's request as to many other
22 items leaving the defense to speculate as to the whether the items exist, whether the government
23 knows the items exist or whether the government has any intention of providing the items. The
24 defense's ability to investigate its case on behalf of its client and prepare for trial.

1 g. The defense submits that the information requested is relevant and necessary, and that
2 under the circumstances, very reasonable. The evidence the defense seeks is relevant to dispute
3 the government's allegations and evidence, and in particular will call into question the
4 government's witnesses, the witnesses' credibility, as well as the government's evidence. All the
5 defense is asking is to have access equal to that of the Government and to have the proper tools
6 in which to defend the accused.

7 h. The government's efforts, or lack of efforts, are impairing the defense's efforts to
8 adequately represent LCPL Chisolm. He denies the allegations in whole or in part, and in order
9 to defend him, the defense needs access to the materials sought. Given that motions are due, the
10 defense is in the precarious position of being unable to present matters to the court in the pretrial
11 stage and will be forced to submit a continuance request because the government insists on
12 refusing evidence, improperly delaying the production of evidence, and gamesmanship.

14 V. Evidence

15 a. Pretrial Confinement documents
16 b. Defense counsel detailing memorandum
17 c. Email regarding defense counsel detailing⁴
18 d. NCIS Forensic Examination report (portions)
19 e. NCIS case notes
20 f. Evidence Custody Document
21 g. Article 32 witness and evidence production request documents and responses
22 h. Discovery requests and responses

23

24 ⁴ At the time of the filing of this motion, the original email could not be downloaded by counsel from her case
25 tracking system. Thus, a word version of the email is attached for reference, and the PDF version will be offered
once it can be accessed in the case tracking system.

1 i. Crime scene visit and expert funding requests and denial⁵
2 j. Article 32 appointing order
3 k. Testimony of S/A [REDACTED] will be provided at the Article 39a

4 **VI. Burden and Standard of Proof.**

5 Pursuant to RCM 905(c), the burden is on the Defense to prove by a preponderance of the
6 evidence that the discovery is relevant to the preparation of the Defense.

7 **VII. Relief Requested.**

8 The defense request that the Court should compel the government to disclose and/or
9 produce the items included in this motion.

11 **VIII Argument.**

12 Oral argument is requested.

13 **IX. Conclusion.**

14 The Court should compel the Government to produce the discovery listed in this motion.

15
16 [REDACTED]
17 B. L. PAYTON-O'BRIEN
18 Civilian Defense Counsel
19
20 [REDACTED]

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25 ⁵ While the defense has submitted two site visit requests, as of this writing, the second request of 22 February 2022
has not been acted upon to the defense's knowledge.

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5 **CERTIFICATION OF SERVICE**

6 A true copy of this motion was served on opposing counsel via electronic mail on 9 April 2022

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B. L. PAYTON-O'BRIEN
Civilian Defense Counsel

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GENERAL COURT-MARTIAL
UNITED STATES MARINE CORPS
WESTERN JUDICIAL CIRCUIT

UNITED STATES

v.

Justin W. Chisolm
Lance Corporal
U.S. Marine Corps

DEFENSE MOTION TO
COMPEL EXPERT
CONSULTANT
(Cell Phone Forensic Expert)

9 April 2022

1. Nature of the Motion. The Defense hereby moves the Court to compel expert consultation in the field of cell phone forensic examination.

2. Summary of the Facts.

a. LCPL Chisolm stands accused of various crimes, including child endangerment of his stepson and two biological children as the result of an incident that occurred on or about 2-3 October 2021.

b. On 4 October 2021, NCIS agents attempted to interrogate the accused. At that time of his interrogation, NCIS also requested LCPL Chisolm provide the agents permission (PASS) to seize his cellular telephone. LCPL Chisolm declined to give the agents permission to seize his phone.

c. Thereafter, while LCPL Chisolm was in the custody of NCIS, without any PASS or command authorization for search and seizure (CASS), the NCIS agents seized LCPL Chisolm's cell phone.

d. After seizing the accused's cell phone on 4 October, NCIS records indicate the phone was placed into temporary evidence storage until 7 October 2021.

e. The NCIS Evidence Custody Document does *not* indicate that anyone took the cell phone out of the NCIS evidence locker until 22 March 2022, when it was removed by Mr. [REDACTED] for “Custody/Safekeeping Sealed/Not Inventoried.”

f. On 13 October 2021, NCIS signed an affidavit for a CASS, in order to obtain authorization to search the accused’s cell phone.

g. On 13 October 2021, the Commanding Officer, CLR-17, signed the CASS, but there is no mention or indication in the NCIS Report of Investigation that any CASS was obtained or applied for.¹

f. The NCIS Case Activity Record fails to record any activity from 4 October 2021 to on or about 22 March 2022 related to the accused’s cell phone.

g. NCIS’s Investigative Activity log states that a CASS was signed on 13 October 2021 for the accused’s cell phone but “not able to review” was noted in the NCIS log. There is no date indicated as to NCIS’s alleged attempt to access the accused’s cell phone. Nor is there any indication as to which agent allegedly tried to access the accused’s phone.

h. During the Article 32 proceedings, the defense requested a copy of the extraction of the accused’s cell phone. On 26 December 2021, despite having the cell phone in the possession of NCIS, and a CASS, the government denied the defense request, indicating, *inter alia*, “...not in government possession.” *See* Motion to Compel Discovery, Exhibit G.

i. In discovery after referral, the defense requested a copy of the extraction of the accused’s cell phone. *Id.*, at Exhibit H. On 17 March 2022, government counsel advised the defense that NCIS “has not conducted an extraction of the accused’s phone.” The government also referenced a prior email from 29 December 2021 in which they said the accused’s cell was

¹ Defense counsel only learned of the existence of the CASS when it conducted a case file review at NCIS on 5 March 2022 despite the defense discovery requests asking for search authorizations.

not extracted.

j. Trial counsel has not advised the defense that the NCIS made an attempt to extract the cell phone, but was *incapable of* or had *technical difficulties*, or *could not extract* the accused's cell phone. In fact, there is nothing in the three NCIS ROIs indicating NCIS obtained a CASS to search the cell phone or made any efforts to search the phone.

k. NCIS's affidavit in support of the CASS indicated that it wanted to obtain GPS location data, text messages, phone calls and any applications able to contain GPS, messages, and calls between 1500 on 02Oct21 and 1200 on 03Oct21.

l. On 4 January 2021, the defense submitted a request to the convening authority for the appointment of a defense expert consultant in the area of cellular phone extraction. A month later, the request was denied.

m. After defense counsel learned in March 2021 that NCIS had still not extracted the accused's cell phone, it demanded the return of the accused's cell phone. When defense counsel met with NCIS on 5 April 2022, it was at that time that defense learned that NCIS had claimed it could not get into the phone. NCIS turned over the accused's cell phone to defense counsel on 5 April 2022.

n. After learning to the NCIS's failures in conducting an extraction of the accused's phone, it submitted a second request for an expert consultant in cell phone forensics.

o. The discovery in this case has been extensive. Defense counsel would not be effective in their representation of the accused without the forensic experts to assist them in extracting the accused's cell phone.

p. Defense counsel do not have degrees or training in computer forensics.

q. Defense counsel do not have the forensic tools necessary to extract the data from the

accused's cell phone.

r. Any efforts by defense counsel in searching or reviewing the accused's cell phone could contaminate, alter, or potentially delete the data.

3. Discussion.

Pursuant to R.C.M. 703(d), when an expert is denied by the convening authority, the request may be renewed before the military judge who shall determine whether the expert's testimony is relevant and necessary. The defense is entitled to expert assistance if such expert assistance is relevant and necessary for an adequate defense.² Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. MRE 401. There are three aspects to showing necessity: (1) why the expert assistance is needed, (2) what the expert assistance will accomplish for the defense, and (3) why defense counsel is unable to gather and present the evidence that the expert consultant would be able to develop?³ The defense must show that there is a reasonable probability that the expert would be of assistance to the defense and that denial of the expert would result in a fundamentally unfair trial.⁴

a. Why the expert is needed

Due process requires that the accused be given the 'basic tools' necessary to present a defense." United States v. Short, 50 M.J. 370, 3 73 (C.A.A.F. 1999) (citations omitted). Where the defense requests expert assistance regarding the 'linchpin' of the government's case, the appellate courts are more willing to find error in the denial of expert assistance. *See United*

² See R.C.M. 703(d), United States v. Garries, 22 M.J. 288, 290 (C.M.A. 1986).

³ See United States v. Gonzalez, 39 M.J. 459, 461 (C.M.A. 1994).

⁴ See United States v. Bresnahan, 62 M.J. 137, 143 (C.A.A.F. 2005)

States v. McAllister, 55 M.J. 270,276 (C.A.A.F. 2001) (finding error in denying a DNA expert where DNA was the “linchpin of the prosecution case”); *see also* United States v. Lloyd, 69 M.J. 95, 99 (C.A.A.F. 2010) (distinguishing the case from McAllister in upholding the denial of an expert request where: the expert's assistance would not have gone to the lynchpin of the case).

To receive expert assistance, the defense is required to do more than show the “mere possibility of assistance from a requested expert” but must instead show a “reasonable probability” that the expert would be of assistance. United States v. Lloyd, 69 M.J. 95, 99 (C.A.A.F. 2010) (quoting United States v. Bresnahan, 62 M.J. 137, 143 (C.A.A.F. 2005)). In Lloyd, C.A.A.F. held that a defense request to “explor[e] all possibilities” regarding how blood came to be on the accused's shirt and to “either rule out or present” a theory regarding how the victim's blood came to be on the accused's shirt were inadequate. Lloyd, 62 M.J. at 99. C.A.A.F. stated that “[a]bsent a more precise explanation of the theory they hoped to pursue through the assistance of a blood spatter expert, we cannot find that the military judge abused her discretion when she denied the defense motion for expert assistance.” Id. At 100.

In this case, the government alleges the accused locked his children in the trunk of his car, and then drove around town with them in it, from Camp Pendleton all the way to downtown San Diego, and then left them there. The government wanted to search his phone to obtain his GPS data, cell phone calls, text messages, and other information from the phone. In fact, the government agent was successful in convincing the Commanding Officer that it had probable cause to believe the evidence was located on the accused's phone. The defense also seeks the same data, as the accused disputes the government's theories in this case. The accused's phone will provide the data concerning his locations during the day and evening, including this GPS information, which will be used to show his whereabouts during the day and evening in question.

In fact, the defense witnesses can testify about their contacts with the accused and the children's whereabouts during the day, which will contradict the government's theory.

However, there is no way for the defense to extract the data from the phone, without jeopardizing the evidence. Additionally, it is noted in the NCIS report that government agents sent a preservation letter to Verizon, the accused's cell phone carrier. No such evidence has been provided to the accused to date but one must presume the government intends to ask for it. The government has signaled to the defense that it intends to use cell phone data from the accused's [REDACTED] phone, yet the defense has not been provided the entirety of the [REDACTED] cell phone extraction. And, if she manipulated any data, then the accused's phone would have potentially contradictory information. The defense has a lack of formal training, academic or technical experience in cell phone forensic analysis and the science behind it. The defense team's lack of scientific background inhibits the effective assistance of counsel absent an expert consultant to inform, educate, and back-stop counsel. The defense has no ability to extract the data it seeks, and needs an expert to do so. The government has clearly demonstrated that it lacks the investigative prowess to do its job in this case.

b. What an expert would accomplish.

This case involves offenses where the government intends to use cell phone data and other public records pertaining to the accused's vehicle identified through license plate readers around the county. Yet, despite having the cell phone of the accused in the NCIS evidence locker for 6 months, NCIS proved itself incapable of performing a basic cell phone extraction. Thus, a defense expert will perform what NCIS failed to do to access the evidence for the defense's own case. In addition, an expert can highlight deficiencies in the government's analysis and conclusions about their alleged claim of inability to access the phone data. Mr.

██████████ will be able to review the reports, documents, and the accused's cell phone, and advise Defense Counsel on the proper interpretations and utilizations of this data. He can also review any digital fingerprint left behind by NCIS when it allegedly tried to access the phone, and explain to the defense any deficiencies in their processes. The government claims it tried to search the accused's cell phone, and so Mr. ██████████ will be able to review the metadata from the phone to highlight deficiencies in the government's analysis and conclusions. He will review the forensic data, the reports, other investigative documents, and the forensic data from the accused's own phone, and advise Defense Counsel on the proper interpretations and utilizations of the data and any issues with the extraction and explain to the defense any deficiencies in the procedures utilized by the government. Mr. ██████████ has over 20 years of experience, and has the forensic tools necessary for this case, which cannot be replicated or replaced by the defense counsel. Absent an expert consultant in these fields, the defense will not be able to fully explore possible defenses for the accused.

c. Why defense counsel cannot do this on their own

Although defense counsel has some familiarity with basic cell phone forensics, they do not have a solid background in computer forensics, nor do they have the necessary forensic software to accomplish the extraction. The defense will need assistance from the experts in cell phone forensics to be able to adequately review the accused's phone. They will need assistance to review the expert's conclusions to determine if scientifically valid. Defense counsel will not be able to review cell phone raw data to determine if it has been altered during the alleged NCIS extraction process. Defense counsel simply cannot perform these functions. Even if the defense were able to educate themselves on these issues, the defense would not be able to present this evidence to members at trial without expert assistance.

An independent and confidential expert are needed. The defense needs an independent official who can discuss with the defense team in confidence the digital media analysis the expert will perform in this case. As such, the defense is unable to gather and present the evidence that the expert assistance would be able to develop.

d. Why denial would result in a fundamentally unfair trial

It is a core guarantee of the Sixth Amendment that every criminal accused has the right to counsel when facing incarceration. Gideon v. Wainwright, 372 U.S. 335 at 340-44 (1963) (holding that the right to counsel is “fundamental and essential to a fair trial”). This right is so fundamental to the operation of the criminal justice system that its diminishment erodes the principles of liberty and justice that underpin all of our civil rights in criminal proceedings. Gideon, 372 U.S. at 340-341, 344; Powell v. Alabama, 287 U.S. 45 at 67-69 (1932).

An analysis of Gideon’s progeny informs that constructive denial of counsel may occur when: (1) on a systemic basis, detailed defense counsel face severe structural limitations, such as a lack of resources, high workloads, and understaffing or (2) detailed counsel are unable or are significantly compromised in their ability to provide the traditional markers of representation for their clients, such as timely and confidential consultation, appropriate investigation, and meaningful adversarial testing of the prosecution’s case. Constructive denial may occur even if the detailed counsel is able to fulfill their basic obligations to their clients. The Supreme Court has recognized that, in some circumstances, “although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.” United States v. Cronic, 466 U.S. 648, 659-60 (1984). This may

occur when, for example, the defense attorney is not provided sufficient time to prepare. Powell, 287 U.S. at 53-58.

Claims of systemic constructive denial or counsel are reviewed under the principles enumerated in Gideon and the Sixth Amendment, not the ineffective assistance standard enumerated in Strickland v. Washington, 466 U.S. 668 (1984), which provides only retrospective relief. Hurrell-Harring v. State, 930 N.E.2d 217,224 (N.Y. 2010) (holding that these "allegations state a claim, not for ineffective assistance under Strickland, but for basic denial of the right to counsel under Gideon."); see also Luckey v. Harris, 860 F.2d 1012, 1017 (11th Cir. 1988) (holding that the Sixth Amendment protects rights that do not affect the outcome of a trial, and deficiencies that do not meet the "ineffectiveness" standard may still violate a defendant's rights under the Sixth Amendment). Ancillary services such as experts are traditional markers of the right to counsel as the Supreme Court recognized in Ake v. Oklahoma, 470 U.S. 68, 77 (U.S. 1985). In Ake the Court required the government to provide the defense with a psychiatrist at government expense where the defendant intended to present a defense of insanity:

We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense. Thus, while the Court has not held that a State must purchase for the indigent defendant all the assistance that his wealthier counterpart might buy, see Ross v. Moffitt, 417 U.S. 600 (1974). It has often reaffirmed that fundamental fairness entitles indigent defendants to "an adequate opportunity to present their claims fairly within the adversary system." Id. at 612.

Since the Supreme Court's decision in Ake, courts have applied an Ake analysis and required the granting of experts on a wide variety of issues and expanded its reach beyond the limited sphere of capital litigation. In United States v. McAllister, 64 M.J. 248, 249 (C.A.A.F. 2007), the court found an abuse of discretion where the military judge denied a request for an expert in forensic polymerase chain reaction testing where DNA evidence was the key to the prosecution's case.

The court held, “[J]ust as an accused has the right to confront the prosecution’s witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process or law.” In United States v. Lee, the C.A.A.F. recognized the established principal that an accused’s entitlement to expert assistance is not limited to actual expert testimony at trial. Entitlement to that expertise is available before trial to aid in the preparation of his defense. 64 M.J. 213 (C.A.A.F. 2006).

The government already possesses a significant advantage over the defense by virtue of its ability to call on investigative resources within the Department of the Navy and United States Army and control the purse strings for support of its prosecutorial efforts. While these abilities provide some evidence to the defense through discovery, the government’s focus is directed at proving its case and not investigating the Accused’s innocence. Defense counsel owe a “duty to our client to bear such skill and knowledge as will render the trial a reliable adversarial testing process.”

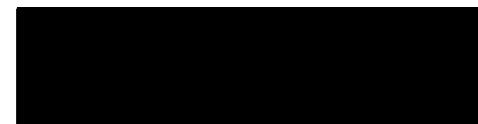
4. Evidence and Burden of Proof

- a. As the moving party, the Defense has the burden of proof by a preponderance of the evidence under R.C.M. 905(c)(1)-(2).
- b. The Defense offers the following documentary evidence in support of its motion:
 1. NCIS Investigative Action of 4 October 2021
 2. NCIS Evidence Custody Documents
 3. NCIS Case Activity Record
 4. NCIS Investigative Log
 5. NCIS Affidavit for CASS
 6. CASS

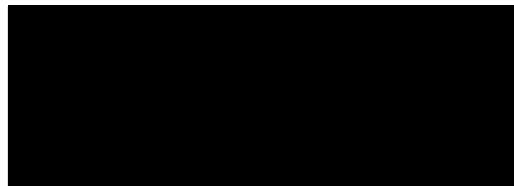
7. Various emails regarding the cell phone
8. Defense requests for cell phone expert consultant, and CA denial of 2 Feb 22
9. CV and fee schedule of cell phone expert

5. **Relief Requested.** The Defense respectfully requests the Court compel the requested expert consultant.

6. **Oral Argument.** The Defense respectfully requests oral argument.



B. L. PAYTON-O'BRIEN
Civilian Defense Counsel



Certificate of Service

I certify that the attached motion was served on the government counsel of record and the court via email on 9 April 2022.



B. L. PAYTON-O'BRIEN

1 NAVY-MARINE CORPS TRIAL JUDICIARY
2 WESTERN JUDICIAL CIRCUIT
3 GENERAL COURT-MARTIAL

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UNITED STATES)	15 April 2022
v.)	DEFENSE MOTION TO DISMISS
)	CHARGES FOR DEFECTIVE
JUSTIN CHISOLM	)	REFERRAL, DEFECTIVE ARTICLE 32,
Lance Corporal)	DEFECTIVE ARTICLE 33
U. S. Marine Corps)	FORWARDING LETTER, AND
)	DEFECTIVE ARTICLE 34 ADVICE

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1. Nature of Motion: The Defense moves to dismiss the charges due to improper referral to a general court-martial, the government's failure to comply with Rule for Court-Martial 405, a defective Article 33 forwarding letter, and defective Article 34, UCMJ, advice.

2. Summary of Facts:

a. The accused is charged with violating Articles 90, 107, 119b, 125, and 128, UCMJ.
b. On 10 November 2021, the Article 32 appointing order was issued in this case.
c. The Article 32 was held on 29 December 2021 after periods of defense requested delay.
d. In accordance with the appointing order, on 24 December 2021, the defense submitted its witness and evidence production request for the hearing.
e. On October 4, 2021, NCIS agents searched the vehicle and impounded it.
f. On October 8-12, 2021, NCIS conducted a forensic examination of the vehicle.
g. On October 29, 2021, at the direction of Captain O'Connell, NCIS Special Agent (S/A) [REDACTED] released the crime scene vehicle to the command who returned the vehicle to Ms. [REDACTED] one of the complaining witnesses in this case and the accused's [REDACTED]

1 h. Ms. █ at some subsequent date, removed the vehicle from the state of California.

2 i. Prior to the Article 32, retained counsel requested witness contact information in the
3 case, as well as an opportunity to inspect the vehicle crime scene in preparation of the Article 32
4 investigation. Notably, when the defense requested this information, NCIS had STILL not
5 issued its investigative report.

6 j. On November 19, 2021, trial counsel informed defense counsel that the government
7 "will not be providing *contact information or access to the Nissan Sentra.*" (Emphasis added.)
8 The government failed to inform defense counsel that the crime scene vehicle had been released
9 to Ms. █ and was no longer in the State of California.

10 k. On November 30, 2021, retained counsel requested the Convening Authority fund
11 travel for a defense counsel and defense clerk to travel to Georgia to inspect the Nissan Sentra in
12 Ms. █ possession, but the Convening Authority denied the defense request.

13 l. As part of their recommendation to the convening authority that a site visit to the
14 automobile should be denied, the government asserted that "photos, videos and measurements"
15 of the car had already been taken by NCIS. Yet, any alleged video was not provided to the
16 defense until after the Article 32 (in March 2022). And, the "video" is not actually a video
17 recording but rather 3D "Faro Scan" of the automobile.

18 m. In the defense's witness and evidence production request for the Article 32, defense
19 requested the physical presence of Ms. █ and Mr. █ among others, to appear at
20 the Article 32 hearing for testimony. On December 26, 2021, trial counsel denied this request
21 for every single witness. For some evidentiary items defense sought, the government claimed
22 that it was "not in possession" of the evidence. In fact, many items requested were in possession
23 of NCIS.

n. At the Article 32, the Preliminary Hearing Officer (PHO) declined to order Ms. [REDACTED] and Mr. [REDACTED] testimony, but failed to properly follow RCM 405 regarding witness production requests.

- o. The PHO was required, under R.C.M. 405 and the Article 32 appointing order to rule on the evidence and witness request. The appointing order required him to rule at least two days prior to the start of the hearing.

p. At the Article 32, the defense again asserted its position for production of evidence and relevant witnesses under RCM 405(g)(1)(B). However, the Preliminary Hearing Officer (PHO) failed to make the proper determination as to the relevancy, necessity, and non-cumulativeness of the requested witnesses. He failed to properly analyze the defense request or state a proper basis for his determination.

q. The PHO recommended referral of some charges to a general court-martial. However, he specifically determined that NO probable cause existed for Charge II (kidnapping) and further that the charge failed to state an offense.

r. On 18 January 2022, the defense submitted its objections after the PHO's report was submitted.

s. The Article 33, UCMJ, forwarding letter dated 2 February 2022 fails to identify or list the defense objections of 18 January 2022.

t. Further, the SPCMCA, Colonel ██████████ failed to execute his responsibilities under R.C.M. 404, which states, "When in receipt of charges, a commander exercising special court-martial jurisdiction may....[f]orward any charges to a superior commander for disposition." In this case, Colonel ██████████ failed to do so. It appears that instead "████████████" (NFI) forwarded

1 the charges, yet this individual is not designated as the commander responsible in this case with
2 special court-martial convening authority jurisdiction.

3 u. In his Article 34, UCMJ, advice letter, the Staff Judge Advocate, improperly advised
4 the Convening Authority the charges and specifications alleged "offenses under the UCMJ" The
5 Article 34 advice letter failed to include the defense objections as an enclosure to the convening
6 authority

7 **3. Discussion**

8 **A. Noncompliance with RCM 405**

9 RCM 405(i) allows the defense to introduce evidence in defense and mitigation, and the
10 same rules which allow the government to introduce evidence without adhering to many of the
11 Military Rules of Evidence (MRE) are equally applicable to the defense. While RCM 405(a)
12 indicates the Article 32 hearing is not intended to serve as a means of discovery, the accused still
13 maintains his rights to cross-examine witnesses on relevant matters and to have relevant,
14 necessary, and non-cumulative witnesses produced. The accused was deprived both rights at the
15 Article 32 in this case. In order to present its case, the defense sought to interview the relevant
16 witnesses in the case, and in order to do so, it requested witness contact information from the
17 government. Misguided, the trial counsel refused to provide contact information, asserting that
18 the defense has no right to have witness "contact" information. R.C.M. 405 does not limit the
19 accused's rights to contact information. Rather, the rule limits "evidence." Names, phone
20 numbers, email addresses are not evidence, but merely the ways an accused's counsel can
21 interview and investigate to determine if any defenses exist, and to provide relevant evidence to
22 the PHO. The government, in violation of RCM 405 and Article 46 impeded the defense's
23 access to witnesses. Likewise, the defense sought to inspect the crime scene, just as it would
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1 want to inspect a murder weapon, if the government alleged that a particular weapon was the tool
2 used to cause a person's death. Yet, the government unlawfully destroyed the crime scene by
3 releasing it back to the complaining witness who promptly left the State of California.

4 To make matters worse, the PHO was derelict in his performance in failing to make the
5 proper determination as to Ms. [REDACTED] and Mr. [REDACTED] In fact, he apparently failed to review
6 anything before the Article 32. He claims he did not know the relevance of the requested
7 witnesses, yet the request of production was quite clear as to the nature of their testimony. The
8 PHO failed to make a proper determination, and merely attempted to parrot the trial counsel
9 when the PHO denied the witnesses. The government introduced evidence in the way of law
10 enforcement reports which included summaries of interviews. The accused was not permitted to
11 conduct his own cross examination or present any evidence due to the improper denial.
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13 These are substantial rights belonging personally to the accused, and in this case the
14 government has denied him such rights. As evidenced by the recording of the Article 32, and the
15 evidence submitted, the accused was deprived of his rights to submit evidence via cross
16 examination of the government's witnesses. One of the issues in this case pertains to the
17 accusation that the accused locked his children in the trunk of his car. Mr. [REDACTED] who was
18 present at the garage when the accused arrive, would have had relevant testimony to present.
19 Allowing the defense an opportunity to present witness testimony would have revealed the
20 location of the children and that Mr. [REDACTED] was made aware the children were in the car, and not
21 locked in the trunk.

22 By denying his relevant witnesses, the accused was deprived a substantial right, thereby
23 preventing him from mounting a defense to the charges. Failure to allow the defense to present
24 testimony of relevant witnesses allowed the government to merely obtain the rubber stamp of the
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1 PHO, without any challenge to the government's evidence. As a result, the PHO was unable to
2 make a fully informed decision as to probable cause and the appropriate disposition of the
3 alleged offenses, and the Defense was unable to fully present its case in defense and mitigation.
4 Ultimately, the Convening Authority was deprived of information that should have been
5 considered during his decision to refer charges.

6 Finally, the PHO's determination that there was no probable cause as to kidnapping and
7 that the offense failed to state an offense was the proper determination. In fact, the referred
8 charge still fails to state an offense, and the convening authority's decision to refer it after advice
9 from his SJA was wrong.

10 **B. Violation of Articles 33 and 34, UCMJ**

11 The PHO is required to forward the defense objections to the convening authority.
12 R.C.M. 405(l)(5). On its face, the PHO's report failed to forward such objections, to the
13 convening authority. Within the Article 33 forwarding letter, the defense's objections are not
14 included. While the government has provided an email between the TSO and Deputy SJA that
15 indicates the Deputy SJA was forwarded the defense's objection, the SJA who authored the
16 Article 34 advise letter failed to include such objections or advise the Convening Authority as to
17 the nature of the defense objections. Based on this, it appears the defense's objections were not
18 considered by the convening authority prior to preferral of charges, which is improper.

19 Article 34, UCMJ, states in pertinent part:

20 "a.1. Before referral of charges and specifications to a general court-martial, the
21 convening authority shall submit the matter to the staff judge advocate for advice
22 which the staff judge advocate shall provide to the convening authority in writing.
23 The convening authority may not refer a specification under a charge to a general
24 court-martial unless the staff judge advocate advises the convening authority in
writing that-

25 (A) The specification alleges an offense under this chapter;

- (B) there is probable cause to believe that the accused committed the offense charged; and
- (C) a court-martial would have jurisdiction over the accused and the offense.”

R.C.M. 406(a), *Pretrial Advice*, similarly states that before referral of any charge to a general court-martial, it must be referred to the staff judge advocate for advice. The SJA must then, "[conclude] with respect to whether there is probable cause to believe the accused committed the offense charged in the specification..." R.C.M. 406(b)(2). The discussion also indicates that the pretrial advice should include when appropriate, "a brief summary of the evidence," and "any recommendations of the Article 32 preliminary hearings officer." Only once the preliminary investigation, in accordance with R.C.M. 405 and Article 32, UCMJ, has been complete, and the SJA has submitted his advice to the GCMCA, in accordance with R.C.M. 406 and Article 34, UCMJ, may the GCMCA consider referral to a GCM. R.C.M. 601(d)(2). The GCMCA may then properly refer the case to a GCM if, and only if, "...there are reasonable grounds to believe that an offense triable by a court-martial has been committed." R.C.M. 601(d)(1). Further, R.C.M. 601(d)(2)(A), requires "substantial compliance with the preliminary hearing requirements of R.C.M. 405."

Here, the Pretrial Advice was defective for the following reasons:

- a. The SJA improperly advised the GCMCA that all charges and specifications allege offenses under the UCMJ (as it pertains to Charge II);
- b. The SJA failed to consider and summarize the defense's substantial objections;
- c. The SJA failed to forward the defense's objections to the GCMCA; and
- d. The SJA improperly advised that probable cause existed for Charge II.

1 The focus of the Article 34 process is ultimately to ensure that the Convening Authority
2 is properly advised regarding the referral decision, including jurisdiction and probable cause.
3 See R.C.M. 406; *United States v. Foti*, 12 U.S.C.M.A. 303, 305 (C.M.A. 1961). Thus, case law
4 has long held that Article 34 advice which is inaccurate, ill-considered, or so incomplete as to be
5 misleading is materially defective and must be remedied. *Id.*; *United States v. Riege*, 5 M.J. 938,
6 943 (N.M.C.M.R. 1978). Where the convening authority refers charges even though the SJA's
7 inaccurate legal conclusions do not support referral, the proper remedy is to dismiss the charges.
8 *United States v. Harrison*, 23 M.J. 907 (N.M.C.M.R. 1987). In this case, the defense's
9 objections, while in the possession of the Deputy SJA, were not summarized or included in the
10 Article 34 advice letter of the SJA. Nothing in the record indicates that the GCMCA was *aware*
11 of the defense's objections or that the objections were forwarded to the GCMCA.¹ Presumably,
12 if they were part of the packet of information presented to the GCMCA prior to referral, they
13 Article 34 advice letter would have noted them.
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15 **C. Dismissal is the Appropriate Remedy**

16 An Article 32 pretrial investigation is an integral part of the general court-martial
17 proceedings. "If an accused is deprived of a substantial pretrial right on timely objection, he is
18 entitled to judicial enforcement of his right, without regard to whether such enforcement will
19 benefit him at the trial. *U.S. v Mickel*, 9 USCMA 324, 325 (CMA 1958). The government's
20 failure to substantially comply with the requirements of Article 32, which failure prejudices the
21 accused, may result in delay in disposition of the case or disapproval of the proceedings.
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¹ It must be noted that the defense has sought in discovery all documents and emails, as well as interviews with the
24 appropriate personnel involved in the referral process, and yet the requests have gone mainly unanswered.
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1 In this case, although the accused's rights under current Rules for Courts-Martial during the
2 Article 32 process have been curtailed, the process does not allow for the government to refuse
3 access to the defense to the crime scene or to witness contact information. The accused is still
4 entitled to the opportunity to *participate* in the process. When the government intentionally and
5 unlawfully shields from the defense government witnesses and crime scene evidence, the
6 prejudice is obvious and substantial. An accused cannot prepare to present his case or cross
7 examine any witnesses, nor can counsel be effective in their representation of their client, when
8 the government is permitted to secret away the witnesses and crime scene.

9 Finally, while the PHO's recommendations are not binding on the GCMCA, the SJA's
10 Article 34 advise is binding in a number of ways, including the conclusion as to whether a
11 specification charged is warranted by the evidence. The SJA's power in this regard, however, is
12 not unlimited, as the focus of the Article 34 process is ultimately to ensure the GCMCA is
13 properly advised regarding the referral decision. *See* RCM 406.

14 **4. Relief Requested:** The Defense requests that all charges and specifications be dismissed
15 with prejudice.

16 **5. Evidence:**

17 The defense submits the following evidence in support of its motion:

18 A: Article 32 appointing letter
19 B: 19 Nov 21 emails between TC and DC
20 C: Defense witness and evidence request for the Article 32 and Government response
21 D. PHO Report
22 E. Defense objections to Article 32 report
23 F. Art 33 and Art 34 letters
24 G. NCIS records (select portions)

25 **6. Burden of Proof:** The burden of proof is on the Defense by a preponderance of the evidence
standard.

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2 7. **Argument:** Oral argument is requested.
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B. L. PAYTON-O'BRIEN
Civilian Defense Counsel
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CERTIFICATION OF SERVICE

A true copy of this motion was served on opposing counsel and the court via electronic mail on
15 April 2021.

B. L. PAYTON-O'BRIEN

1 NAVY-MARINE CORPS TRIAL JUDICIARY
2 WESTERN JUDICIAL CIRCUIT
3 GENERAL COURT MARTIAL

4 UNITED STATES

5 v.

6 Justin Chisolm
7 Lance Corporal
U.S. Marine Corps

DEFENSE MOTION FOR APPROPRIATE
RELIEF (ARTICLE 13 ILLEGAL
PRETRIAL PUNISHMENT)

8 9 July 2022

9 **I. Nature of the Motion.**

10 Pursuant to Article 13 of the Uniform Code of Military Justice (U.C.M.J.) and Rule for
11 Courts-Martial (R.C.M.) 304(f), 305(k) and 906(b)(8), the defense requests the court DISMISS
12 all charges and specifications. In the alternative, the defense requests the Court grant LCpl
13 Chisolm 873 (three-for-one) days of judicially ordered confinement credit in addition to
14 administrative credit the accused accrued during pretrial confinement, *United States v. Suzuki*, 14
15 M.J. 491 (C.M.A. 1983).¹

16 **II. Statement of Facts.**

17 1. On 5 October 2021, LCpl Chisolm was placed in pretrial confinement for alleged acts
18 that took place between 2 and 3 October 2021.

19 2. On 8 October 2021, military defense counsel were detailed to represent LCpl Chisolm,
20 and the government was notified of such detailing.

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24 ¹ As of the filing of this motion, the accused is scheduled to enter guilty pleas pursuant to a pretrial agreement. The
25 defense understands that plea hearing is currently scheduled for June 23, 2022 based on an R.C.M. 802 conference
with the military judge. The number of days from imposition of pretrial confinement to the date of the scheduled
plea agreement is 291 days. If the plea date is modified, the defense reserves the right to modify this motion
consistent with the scheduled plea date.

1 3. On 28 October 2021, charges were preferred against the accused for violations of Article
2 90 (Willfully disobeying a superior commissioned officer), Article 125 (Kidnapping), Article
3 128 (Battery upon a spouse), Article 107 (False official statement), and three specifications of
4 Article 119b (Child endangerment).

5 4. On 21 December 2022, defense counsel requested assistance from the government to
6 facilitate legal assistance and pay matters for LCpl Chisolm as well as locating LCpl Chisolm's
7 truck. (*Enclosure 1*).

8 5. On 2 February 2022, the Convening Authority approved the pretrial agreement in this
9 case. Paragraph 8f permits the accused to reserve an Article 13 pretrial conditions motion.

10 6. On 28 February 2022, civilian defense counsel notified the government that LCpl
11 Chisolm was not receiving consistent command visits and requested that all records between
12 his command and the Camp Pendleton Base Brig be preserved. (*Enclosure 2*)

13 7. On 5 April 2022, civilian defense counsel sent an email requesting all brig and command
14 visit logs from the government (*Enclosure 3*), and followed up on 6 April 2022 in a formal
15 discovery request. (*Enclosure 4*).

16 8. On 21 April 2022, defense counsel requested the whereabouts of LCpl Chisolm's
17 personal vehicle, and his command confirmed that the vehicle had been towed by the San
18 Diego Police Department and had been impounded in a civilian storage facility. LCpl Chisolm
19 first requested an update on the status and location of his vehicles on 8 November 2021, and
20 defense counsel informed the government of the issue via email on 21 December 2021. As of
21 21 April 2022, the impound lot fees were over \$7,000.00. The impound lot agreed to only
22 reduce their fees to approximately \$5,200. Based on information and belief, defense believes
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1 the vehicle has since been auctioned off after LCpl Chisolm and his family were unable to pay
2 the impound fees that had collected since October. (*Enclosure 5 6*).
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4 9. On 22 April 2022, defense counsel received some brig records in discovery and requested
any additional records from the government. (*Enclosures 7 – 8*).
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6 10. Brig records include requests from LCpl Chisolm for status updates regarding matters to
7 include: his personal vehicle, power of attorney, bills and financial matters, clothing, his taxes,
8 and no shave chits. These records also included references to command visits that were either
9 never documented by the command or never took place. (*Enclosure 9*).
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11 11. On 26 April 2022, defense counsel informed the government that LCpl Chisolm needed
assistance with a power of attorney matter. (*Enclosure 10*). This issue was initially brought to
12 the government's attention on 21 December 2021. *See* Enclosure (1).
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14 12. On 20 May 2022, defense counsel again requested brig visitation logs and command
visitation paperwork. (*Enclosure 11*).
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16 13. On 23 May 2022, government counsel indicated the government had “discovered the
requested material to the DSO clerks today.” (*Enclosure 12*).
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18 14. On 1 June 2022, after reviewing the discovered brig records, civilian defense counsel
notified the government of the discrepancies in the records from the brig counselors and the
19 command and requested that the government either provide the command visit records or
20 confirm the records did not exist. (*Enclosure 13*).
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22 15. On 28 June 2022, civilian defense counsel again requested the command visit and brig
records. (*Enclosure 14*).
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24 16. On 29 June 2022, civilian defense counsel notified the government that LCpl Chisolm's
clothing had been lost by the brig and he had no clean clothing. (*Enclosure 15*). LCpl
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1 Chisolm was in the process of doing his laundry when he was confined in segregation. After
2 being placed in segregation, LCpl Chisolm's clothes were lost, misplaced or stolen, and he had
3 been forced to wear the same clothes for over a week without the ability to wash or change
4 them.

5 17. On 8 July 2022, LCpl Chisolm was scheduled to be taken by his command to the tax
6 center to complete his 2021 tax forms. This date was scheduled weeks after the government
7 was made aware again that he needed tax assistance. (*Enclosures 16-17*). LCpl Chisolm had
8 requested assistance with his taxes on 2 March, 11 March, 28 March, 22 April, 29 April, 6
9 May, and 20 May 2022 according to command visit records. See Brig records in Enclosures 6,
10 8, and 9.

12 18. On 7 July 2022, the Court ordered a telephonic 802 conference to discuss setting a guilty
13 plea hearing. After deconflicting schedules, the Court set the hearing for Saturday July 23,
14 2022. Also, in that 802 conference, the defense indicated it would file an Article 13 motion
15 and the Court set 9 July 2022 as the filing date of the motion.

16 19. After the telephone 802 conference between the parties and the military judge on 7 July
17 2022, Captain Gage O'Connell, USMC, trial counsel, had an in-person conversation with
18 Captain Katherine Donnelley, USMC, detailed defense counsel. That conversation occurred in
19 legal offices onboard Camp Pendleton, CA. In that conversation, Captain O'Connell raised his
20 voice and yelled at Captain Donnelly that if the defense filed an Article 13 motion, he would
21 request the Court hold the entire defense team (Ms. Payton-O'Brien, Mr. LeBlanc, and Captain
22 Donnelly) in contempt of court. Captain O'Connell's yelling and contempt comment was
23 witnessed by Major [REDACTED] the assistant trial counsel detailed to this case.
24 (*Enclosure 18*).

1 **IV. Law**

2 Pre-trial punishment is forbidden in accordance with Article 13, U.C.M.J., 10 U.S.C. sec
3 813, which states that:

4 "No person, while being held for trial, may be subjected to punishment or penalty
5 other than arrest or confinement upon the charges pending against him, nor shall
6 the arrest or confinement imposed upon him be any more rigorous than the
7 circumstances required to insure his presence, but he may be subject to minor
8 punishment during that period for infractions of discipline."

9 Article 13 prohibits (1) the imposition of punishment prior to trial; and (2)
10 conditions of arrest or pretrial confinement that are more rigorous than necessary to
11 ensure the accused's presence for trial, *United States v. King*, 61 M.J. 225, 227 (C.A.A.F.
12 2005).

13 Pursuant to R.C.M. 305(k) "the military judge may order additional credit for
14 each day of pretrial confinement that involves an abuse of discretion or unusually harsh
15 circumstances."

16 R.C.M. 304(f) "was based on Article 13" and specifies certain conduct that is expressly
17 prohibited, *United States v. Adcock*, 65 M.J. 18, 22 (C.A.A.F. 2007), which states that, "No
18 person who is restrained pending trial may be subjected to punishment or penalty for the offense
19 which is the basis for that restraint. Prisoners being held for trial shall not be required to...wear
20 special uniforms prescribed only for post-trial prisoners." In the Analysis of R.C.M. 304(f), the
21 drafters explain that "The remedy for a violation of this rule is meaningful sentence relief."

22 In *Adcock*, the court found that Article 13 protected pretrial a confinee's rights in
23 two ways. First, it specified certain conduct that is expressly prohibited, for example via
24 R.C.M. 304(f). *Id.* Second, it also delegated to the service secretaries the authority to
25 enact rules concerning pretrial facilities and the treatment of pretrial confinees. *Id.*
26 Speaking to this second protection, the court explained, "It is well-settled that a

1 government agency must abide by its own rules and regulations where the underlying
2 purpose of such regulations is the protection of personal liberties or interests.” *Id.* at 23,
3 citing *United States v. Dillard*, 8 M.J. 213, 213 (C.M.A. 1980).

4 In *Adcock*, the court went on further to state, “The purposes of the provisions of
5 AFI 31-205² at issue in this case are consistent with treatment of pretrial confinements as
6 innocent individuals and certainly are designed to protect their interests. AFI 31-205
7 reflects a decision by the Air Force to ensure that servicemembers who are housed in
8 civilian jails are treated in a manner that recognizes the presumption of innocence.” *Id.* at
9 24. The court held “under R.C.M. 305(k), a servicemember may identify abuses of
10 discretion by pretrial confinement authorities, including violations of applicable service
11 regulations, and on that basis request additional confinement credit.” *Id.* The court then
12 mandated, “A military judge should consider violations of service regulations as a basis
13 for pretrial confinement credit under R.C.M. 305(k) when those regulations reflect long-
14 standing concern for the prevention of pretrial punishment and the protection of
15 servicemembers’ rights.” *Id.* at 25.

16 In *United States v. McCarthy*, 47 M.J. 162, 165 (C.A.A.F. 1997), the court
17 established a two-prong test to determine a violation of Article 13. One prong asks
18 whether such an imposition of punishment entails an intent to punish the accused before
19 guilt or innocence has been adjudicated. The second prong looks to whether the accused
20 suffered unduly rigorous circumstances during pre-trial detention, “which, in sufficiently
21 egregious circumstances, may give rise to a permissible inference than an accused is
22 being punished, or may be so excessive as to constitute punishment.” *Id.*

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25 ² AFI 31-205 is the Air Force Corrections System manual available at
https://webapp1.dlib.indiana.edu/virtual_disk_library/index.cgi/821003/F1D3696/pubs/af/31/afi31-205/afi31-205.pdf last visited on 9 July 2022.

1 Ultimately, there is a violation of Article 13 where the conditions of a pretrial confinee's
2 confinement are more rigorous than necessary to ensure his presence for trial. This can be
3 shown by one stark violation of Article 13, or by a combination of less blatant factors.

4 **V. Discussion**

5 *a. Article 13*

6 LCpl Chisolm's pretrial confinement is illegal. The record indicates that LCpl
7 Chisolm's command and the government disregarded its requirements to LCpl Chisolm's
8 prejudice. LCpl Chisolm is presumed innocent of all charges and the command is
9 required to assist its Marines despite his pretrial confinement. The choice to confine
10 LCpl Chisolm comes with certain administrative requirements and the command
11 eschewed those responsibilities ultimately treating LCpl Chisolm as a convicted prisoner.

12 During his pretrial confinement, LCpl Chisolm requested assistance with personal
13 matters regarding his personal vehicle, taxes, powers of attorney, housing allowances,
14 clean and serviceable uniforms, and other necessities. LCpl Chisolm's command
15 neglected its responsibilities under Secretary of the Navy Instruction 1640.1 (Corrections
16 Manual) – the command failed to conduct required brig visits despite numerous requests.
17 Moreover, the command failed to assist LCpl Chisolm when he sought to file his federal
18 and state tax returns, secure his personal vehicle, and provide clean uniforms. The
19 command's inactions resulted in unusually harsh conditions and personal and financial
20 detriments rising to the level of illegal pretrial confinement.

21 *b. Command Brig Visits*

22 The Corrections Manual paragraph 7207 requires commands to maintain control
23 and identity of their Marines:

24 Command visits are designed to retain identity with the parent
25 command and to reinforce the identity of the prisoner's chain of
command. Command visits for prisoners who are not returning to

duty may be satisfied by service liaisons or designated counselors. Marine MCF command visits for Marine prisoners assigned to the long-term prisoner units shall be conducted by MCF counselors. *Command visits will be conducted no less than once every 2 weeks (bi-weekly). (Emphasis added)*

The defense team consistently engaged the prosecution to assist with LCpl Chisolm's administrative requirements. While confined, LCpl Chisolm was incapable of completing these basic requirements. As early as December 2021, defense counsel requested assistance from the government to facilitate command interaction with the accused. Counsel requested assistance with the accused's basic allowance for housing (BAH) (the accused is married with three dependent children and is required to maintain support to his dependents.). Enclosure 1 documents the communication between defense counsel and trial counsel requesting assistance in modifying a military protective order to allow the accused to send Christmas presents to his children as well as information on his vehicle (which the government impounded to a civilian towing company secured lot). In addition, the accused sought assistance obtaining legal assistance (powers of attorney). Finally, the accused requested assistance facilitating his BAH to support his dependents (the accused and his family lived on Camp Pendleton – during his pretrial confinement, LCpl Chisolm's wife and children moved to Georgia which made him eligible for BAH which required an allotment to support his family).

The Secretary of the Navy mandates that commands visit their pretrial detainees at least twice a month (Corrections Manual 7207). In addition, MCBCP 1640/7 requires that all “[a]ll visiting Officers (sic) are required to complete an original and (1) copy of this form on each confinement visited.” After numerous requests to trial counsel, the defense was provided with all of LCpl Chisolm’s MCBCP 1640/7s, which reveals 14 visit documents. The evidence indicates the command visited LCpl Chisolm 31 times –

1 resulting in at least 17 visits undocumented. Furthermore, the last documented visit was
2 on 20 May 2022.

3 Furthermore, CAMPENO 5000.2 states that “Commanders shall establish
4 procedures for visiting *at least weekly* each prisoner who will return to their parent
5 command for duty.” (Enclosure 19). LCpl Chisolm is a pretrial detainee and presumed
6 innocent. LCpl Chisolm’s return to the command pending trial is undetermined. The
7 government cannot assume he will be sentenced to any judicially imposed punishment.
8 Even after the pretrial agreement was approved, LCpl Chisolm’s sentence is undecided
9 and a discharge or confinement that triggers a change in commands is not determined.
10 Therefore, under this order, LCpl Chisolm’s command is required to visit him at least
11 once a week. That did not occur. In fact, even after he was initially confined, the brig
12 records indicate that the command failed to visit LCpl Chisolm for three weeks.

13 Civilian defense counsel requested LCpl Chisolm’s Brig records on 5, 22 April,
14 and 1, 20, and 28 June 2022. The enclosures are the only records the trial counsel
15 indicates exists, despite what appear to be references to other records of command visits.
16 To the extent the government has additional documents indicating command visits or
17 interactions beyond 23 May 2022 (except for the 8 July 2022 tax appointment discussed
18 below), the government should be precluded from presenting them to the Court.

19 c. *Taxes*

20 On January 20, 2022, March 2, 11, 17, and 28, 2022, LCpl Chisolm requested
21 assistance with his taxes. On 28 February 2022, 5 April 2022, and 31 May 2022 civilian
22 defense counsel contacted trial counsel requesting assistance with LCpl Chisolm’s taxes.
23 LCpl Chisolm worked through his chain of command as well as his counsel to properly
24 file his taxes including obtaining the social security number of his spouse (the command
25 issued a protective order and LCpl Chisolm was unable to contact her directly). Despite

1 this, and despite an 18 April 2022 federal deadline, the command failed to assist LCpl
2 Chisolm.

3 The command visitation logs reveal the command was certainly aware of LCpl
4 Chisolm's tax assistance requests on 2, 11, 17, 28 March, and 22, 29, April, and 6, 20
5 May 2022. Even after being notified again on 31 May 2022, the command still resisted
6 taking care of the matter, and placed blame at the feet of LCpl Chisolm. On 8 July 2022,
7 the command was scheduled to finally provided the requested assistance in filing LCpl
8 Chisolm's taxes.³ This assistance is more than four months after civilian defense counsel
9 requested assistance and three months after the federally required filing deadline.

10 *D. LCpl Chisolm's Vehicle is Impounded*

11 On 3 October 2021, LCpl Chisolm's personal vehicle (Nissan Pathfinder) was
12 impounded after the alleged incident of child endangerment. While in the custody of the
13 impound lot, LCpl Chisolm incurred daily storage charges for the vehicle that
14 compounded every day he was unable to pay to release the vehicle.

15 On 21 December 2021, civilian defense counsel requested assistance from the
16 command to retrieve the vehicle from impound. The command was well aware of LCpl
17 Chisolm's situation as indicated by the Brig visitation log. The log indicates that on 8
18 November 2021 and 22 April 2022 during the command visit, LCpl Chisolm requested
19 assistance to release his vehicle. This is confirmed by the MCBCP 1640/7 that indicates
20 that LCpl Chisolm discussed his vehicle issue with GySgt [REDACTED]⁴ The resolution of
21 the issues, according to the 1640/7 was to "report request to command." On or about 8
22 November 2022, the command was aware of LCpl Chisolm's situation. It did nothing.

23
24
25 ³ Defense counsel is presently unaware whether this tax appointment occurred.

⁴ Unfortunately, GySgt [REDACTED] had his own legal issues and was relieved of further responsibility to conduct command visits.

1 On 21 April 2022, civilian defense counsel contacted GySgt [REDACTED] at
2 LCpl Chisolm's parent command again requesting information about the vehicle. The
3 command representative indicated, despite the command being informed about the
4 problem seven months prior, that he was unaware of its location. Ultimately, GySgt
5 [REDACTED] located the vehicle at an impound lot located in San Diego, CA.

6 The towing company's fees were \$7000 as of the end of April and the company warned
7 defense counsel that the vehicle would be sold if the fees were not paid. Defense counsel has
8 been unable to verify but believes the towing company ultimately sold the vehicle and used the
9 proceeds to cover the costs of towing and impound. However, LCpl Chisolm has a loan on the
10 vehicle which he is contractually obligated to pay for the vehicle despite not having possession
11 of it due to the loss.

12 *e. Uniforms While Confined*

13 LCpl Chisolm's clothing was lost when he was placed in segregation. He made efforts
14 with the brig staff and his command representative, but after nine days the matter was
15 unresolved. No Marine in confinement should be forced to wear the same dirty clothes for nine
16 days without washing. It is simply unsanitary to require prisoner to remain clothed in the same
17 clothes because the brig lost his laundry.

18 *f. Prosecutorial Misconduct*

19 The government's outrageous conduct warrants dismissal of all charges.

20 Prosecutorial misconduct is generally defined as "action or inaction by a prosecutor in
21 violation of some legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule,
22 or an applicable professional ethics canon." *United States v. Hornback*, 73 M.J. 155, 160
23 (C.A.A.F. 2014) (quoting *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996)). Prosecutorial
24 misconduct occurs when trial counsel "'overstep[s] the bounds of that propriety and fairness
25

1 which should characterize the conduct of such an officer in the prosecution of a criminal
2 offense.” *United States v. Bowser*, 73 M.J. 889, 896 (C.A.A.F. 2014) (quoting *United States v.*
3 *Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005)). An [accused’s] process rights are violated when a
4 prosecutor’s misconduct renders a trial “fundamentally unfair.” *Darden v. Wainwright*, 477 U.S.
5 168, 181 (1986). “Under Darden, the court first determines whether the prosecutor’s remarks or
6 acts were improper; if so, the next consideration is whether the conduct infected the trial with
7 unfairness.” *Bustamante v. Garcia*, 03-CV-276 L(CAB) U.S. Dist. LEXIS 81981 quoting *Tan v.*
8 *Runnels*, 413 F.3d 1101, 1112 (9th Cir. 2005).

9
10 On 7 July 2022 Captain Gage O’Connell, USMC, trial counsel in this matter, in a raised
11 voice threatened Captain Katherine Donnelly, USMC, detailed defense counsel. Captain
12 O’Connell screamed directly at Captain Donnelly stating, words to the effect, that “The Article
13 motion is frivolous and if you file it [in the case of *United States v. Chisolm*] I am asking the
14 Court to hold you, Ms. Payton-O’Brien, and Mr. LeBlanc in contempt of court!”

15 On 7 July 2022, before the conversation between Captain O’Connell and Captain
16 Donnelly, the Court held an 802 conference with all counsel except VLC and Captain Donnelly
17 who was appearing in another matter. The substance of the conference was to set a plea date for
18 the accused. Ultimately, the Court chose either Saturday 16 or 23 July depending upon
19 availability of the command and the VLCs. Subsequent to the 802, trial counsel indicated that 23
20 July 2022 was logically the best date for the hearing. Also discussed in the 802 conference
21 was the defense’s Article 13 motion and a request to the Court for a due date for the motion and
22 the government’s answer. The Court ordered the defense to file the motion by 9 July 2022.
23

24 Later in the day, Captain Donnelly was physically present in the trial counsel’s office
25 discussing the dates of the plea. At that point, Captain O’Connell yelled his threat to Captain

1 Donnelly. Captain O'Connell's tone was loud and aggressive. At some later point in the day,
2 via a text message to Captain Donnelly, Captain O'Connell apologized for yelling at Captain
3 Donnelly. However, Captain O'Connell did not apologize for his threat of contempt, nor did he
4 withdraw or modify his statement. He certainly did not withdraw his threat to ask for contempt
5 charges if she proceeded with filing an Article 13 motion.

6 A motion pursuant to UCMJ Article 13 is not frivolous if it is based on facts and law.
7 Moreover, the pretrial agreement, paragraph 8f states "except as otherwise provided herein, I
8 specifically waive all motions except an Article 13 (Pretrial Confinement Conditions)...."
9 The underlying assertion by Captain O'Connell, as a representative of the United States
10 government, is that he will seek sanctions against defense counsel for filing an Article 13 motion
11 that *he* deems frivolous. Contempt proceedings conducted by the Court trigger potential
12 notification to the Rules Counsel and individual state bars associations. Moreover, such a threat
13 of intimidation precludes the defense team from zealously advocating for LCpl Chisolm as
14 required by JAGINST 5803.1E which states:
15

16 **RULE 3.1 MERITORIOUS CLAIMS AND CONTENTIONS.**

17 A covered attorney shall not bring or defend a proceeding, or assert
18 or controvert an issue therein, unless there is a basis for doing
19 so that is not frivolous, which includes a good faith argument
20 for an extension, modification, or reversal of existing law. A
21 covered attorney representing an accused in a criminal
22 proceeding, or the respondent in an administrative proceeding,
23 that could result in incarceration, discharge from the naval
24 service, or other adverse personnel action, may nevertheless
25 defend the client at the proceeding as to require that every
element of the case is established.

23 Comment 3.2 of the instruction states:

24 The filing of an action or defense or similar action
25 taken for a client is not frivolous merely because the facts
have not first been fully substantiated or because the covered

1 attorney expects to develop vital evidence only by discovery.
2 Such action is not frivolous even though the attorney believes
3 that the client's position ultimately will not prevail. Merely
4 because an issue has never been raised before, or because it may
have been raised under different circumstances and been resolved
under those circumstances, the raising of the issue again is not
necessarily frivolous.

5 Furthermore, JAGINST 5803.1E places an affirmative, "shall report" obligation on any
6 covered attorney to report a violation of the instruction. Such a threat is not to be taken lightly.
7 The defense could forgive Captain O'Connell's language due to his inexperience as a prosecutor.
8 If he apologized and retracted the entire statement, attributing it to over-zealous representation of
9 the government, the issue would be diminished and potentially moot. That, however, did not
10 happen. Captain O'Connell's apology is of no moment here as it only went to the delivery and
11 not the substance. The threat is no less a threat if it is delivered in a calm manner. The
12 bombastic conveyance is not the issue. This is not about hurt feelings, but rather it is about a
13 federal prosecutor invoking federal law to dissuade the defense from zealous representation of
14 their client. It is beyond sharp elbows of litigation; it is inexcusable.

16 Paragraph 1 of the pretrial agreement states that LCpl Chisolm is entering into the
17 agreement freely and voluntarily and that "[n]o one has threatened or coerced me into entering
18 into this agreement." That is no longer the case, Captain O'Connell has threatened the entire
19 defense team though he only delivered that threat in person to Captain Donnelly. Such a threat is
20 a violation of legal norms and standards and goes to the fairness of LCpl Chisolm's trial, see
21 *Smith v. Phillips*, 455 U.S. 209, 219 (1982) ("Past decisions of this Court demonstrate that the
22 touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of
23 the trial, not the culpability of the prosecutor.")

25

1 Surely, Captain O'Connell should not be surprised at the defense's intention to file an
2 Article 13 motion. The motion is preserved in the plea offer agreement; civilian defense counsel
3 regularly requested brig records over the course of months, citing to an Article 13 motion; and
4 counsel discussed the motion with the military judge. Captain O'Connell's threat to report
5 counsel is merely the government's continued efforts to dissuade LCpl Chisolm from asserting
6 his rights to not be illegally punished by the government before he is convicted. Captain
7 O'Connell's efforts are a continuation of the government's impeding defense access to judicial
8 remedies under Article 13.

9

10 **VI. Evidence**

11 A. Testimony: The defense will call the accused for the limited purpose of the motion, as
12 well as Captain O'Connell and Major [REDACTED]

13 B. Exhibits:

14 1. Defense Counsel email dtd 21 December 2021

15 2. Defense Counsel Email requesting brig record preservation dtd 28 February 2022

16 3. Defense Counsel Email requesting brig records dtd 5 April 2022

17 4. Defense 5th Request for Discovery dtd 6 April 2022

18 5. Email between Defense Counsel and GySgt [REDACTED] dtd 21 April 2022

19 6. Command visitation records (BS 2663-2676)

20 7. Defense Counsel Email receipt of brig records; request for additional records dtd 22

21 April 2022

22 8. Brig Records (BS 2597-2639)

23 9. Summary of Brig Command Visits and Brig Counselor Counselings

24 10. Emails regarding POA assistance and brig records dtd 26 April 2022

1 11. Defense Counsel Email regarding brig records dtd 20 May 2022
2 12. Trial Counsel Email regarding discovered brig records dtd 23 May 2022
3 13. Defense Counsel Email Regarding Brig Records Discrepancies dtd 1 June 2022
4 14. Defense Counsel Email Regarding Brig Records dtd 28 June 2022
5 15. Defense Counsel Email Regarding lost clothing dtd 29 June 2022
6 16. Defense Counsel Email regarding taxes dtd 31 May 2022
7 17. Email Regarding Tax Appointment dtd 8 July 2022
8 18. MCIWest-MCB CAMPELO 5000.2 dtd 14 Aug 2013
9 19. LT Donnelly Affidavit⁵

10 **VII. Burden and Standard of Proof.**

11 Pursuant to RCM 905(c), the burden of persuasion is on the Defense to establish his
12 entitlement to additional sentence credit because of a violation of Article 13.

13 **VIII. Relief Requested.**

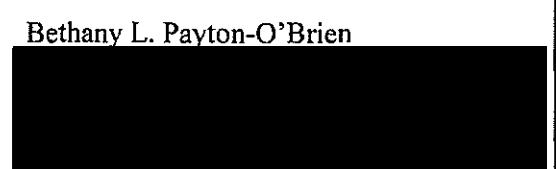
14 Defense requests that the Court dismiss the charges with prejudice. In the alternative, the
15 defense requests the Court award 873 days of credit in addition to administratively accrued time.

16 **IX. Argument.** Oral argument is requested.

17 Paul C. LeBlanc

18 
19 
20 Attorney for LCpl Chisolm

Bethany L. Payton-O'Brien

21 
22 
23 Attorney for LCpl Chisolm

24 ⁵ Please note the affidavit is presently not notarized due to the weekend schedule. A notarized version will be
25 provided to the court during Monday's business hours. The defense is also serving a discovery request upon the
government for all communications concerning this incident as well as the identity of any other potential witnesses
to the incident and may supplement this motion with additional evidence after the government responds.

1

2 **CERTIFICATION OF SERVICE**

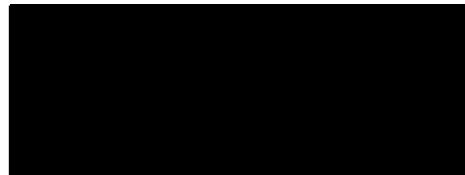
3 A true copy of this motion was served on opposing counsel and the court via electronic mail on

4 9 July 2022

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Bethany L. Pavton-O'Brien

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Attorney for LCpl Chisolm

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UNITED STATES MARINE CORPS
NAVY AND MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES v. JUSTIN W. CHISOLM Lance Corporal U.S. Marine Corps	GOVERNMENT RESPONSE TO DEFENSE MOTION FOR APPROPRIATE RELIEF (ARTICLE 13) 18 JULY 2022
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1. Nature of Motion.

The Government respectfully requests the Court deny the Defense Motion for Appropriate Relief Pursuant to Article 13.

2. Statement of Fact.

- a. As of the filing of Defense Counsel's Article 13 motion, the accused has spent approximately 39 weeks in the brig (5 October 2021 – 9 July 2022).
- b. In the approximate 39 weeks the accused has been in the brig, his command has visited him 31 times. (Defense MFAR, Page 8, Line 24).
- c. On November 30, 2021 Defense Counsel authored a written request for a government funded site visit. This request was submitted to the Commanding Officer, 5th Marine Regiment. Within this request Defense Counsel refers to Trial Counsel by name individually when describing the Government actions of the release of victim's car back to the victim. The letter states, “[t]he government's response regarding our access to the crime scene was misleading and disingenuous, and certainly appears to be obstructive of the defense's ability to investigate the case and defend our client. No other government counsel is named. *Enclosure (1)*.
- d. On December 21, 2021 Defense Counsel send an email to Government Counsel

stating, "our client has requested pay information and location as to his vehicle." Government counsel responded with a request for clarification, "[p]lease specify what information you are requesting about LCpl Chisolm's pay and vehicle." Defense Counsel replies with, "[w]e are trying to figure out where his own car is (was at the house when packed out?)" There are no specific requests for assistance regarding the vehicle in question. Defense Counsel goes on to state that they, "are not responsible for his pay matters." *Enclosure (2)*.

e. On March 7, 2022, in an unrelated case, a Military Judge spoke to Defense Counsel about the quality of a motion which was drafted by detailed military Defense Counsel but edited by the civilian Defense Counsel. *Enclosure (3 & 4)*.

f. On April 21, 2022, Defense Counsel wrote to the Command requesting information regarding the Accused's vehicle location. Five hours later the Command provided the information to Defense Counsel. *Enclosure (5)*.

g. On May 3, 2022, Defense Counsel wrote to the Court regarding a 706 examination of the accused, "[i]n full disclosure, I have not located any recommendation from a provider within the accused's records for a 706 examination, but the provider has not responded to the defense's request for an interview." *Enclosure (6)*.

h. On May 31, 2022, GySgt [REDACTED] responded to Defense Counsel's inquiry regarding the Accused's taxes. GySgt [REDACTED] explains the efforts made by the Command and relays a conversation between himself and the accused in which the accused failed to explain why he did not utilize tax services when they were made available. GySgt [REDACTED] goes on to request that Defense Counsel reach out to him directly should there be any additional assistance needed. *Enclosure (7)*.

i. On June 28, 2022, Government Counsel responds to Defense inquiries regarding

additional command visit or brig records as well as the status of the accused's taxes. Government Counsel explains that the Command has submitted a request to the Tax Center for assistance, due to the fact that the accused did not utilize the service of tax professionals either time they were at the brig. Government Counsel confirms that the records disclosed on May 23, 2022 are in fact all the command visit and brig records that exist. *Enclosure (8).*

j. On June 29, 2022, Defense Counsel emails Government Counsel, Command Representatives, and the Commanding Officer of the Brig stating that the accused has been wearing dirty clothes for nine days due to the fact that his laundry was lost. *Enclosure (9).*

k. That same day, Command Representatives respond stating that they visited the accused two days prior and the accused did not mention the situation. Command stated that the accused, "needs to tell someone that it happened." Command informed Defense Counsel that the accused is on pay status and has access to Post Exchange (PX) calls weekly if needs replacement items.

Enclosure (9).

l. On July 7, 2022, Defense Counsel cites four bases of unavailability: 1) for a guilty dive as a Board of Inquiry set for July 12th, 2) "have travel July 13-15," 3) Defense is unable to determine the accuracy of the 706 board report until they speak to the Provider, and 4) the necessity to file an Article 13 motion. *Enclosure (10).*

m. Regarding the 706 specifically, Defense Counsel states, "[i]t is my understanding that there are some concerns my client's treating provider has with this examination, but she has yet to return my calls." *Enclosure (10).*

n. On July 7, 2022 Government Counsel responds to Defense Counsel's email regarding availability, requesting clarification regarding the 706 issue, "I want to make sure that I understand correctly, you believe the provider has issues but you haven't spoken to her yet?"

Enclosure (10).

o. Defense Counsel responds, stating, “[o]ur client’s provider has NOT returned our calls (remember she is the one who said a 706 board should be done in this case). We don’t have the 706 board doc’s contact info and have requested it so we can talk with him.” *Enclosure (10).*

p. Following an 802 Conference later that day, detailed military Defense Counsel comes into the office where both Government Counsel were working at the time. Detailed military Defense Counsel wants to check in to determine what had occurred at the 802, since the military Defense Counsel was unable to attend due to an unrelated court commitment.

q. At the time the detailed military Defense Counsel entered the office, Trial Counsel was animatedly explaining frustrations to Co-Counsel. Trial Counsel’s voice was raised at the time detailed military Defense Counsel arrived.

r. Following the arrival of military Defense Counsel, Trial Counsel continued to recount frustrations with the situations. It was at this point that Government Co-Counsel mentioned the issue of an Article 13 motion. Trial Counsel made a statement to the effect that military Defense Counsel was already aware because military Defense Counsel was writing the motion.

s. At the time of the meeting, Trial Counsel was aware of a prior instance in which military Defense Counsel wrote a motion which civilian Defense Counsel had edited. Trial Counsel was also aware that the military Defense Counsel had been spoken to on the record about the quality of the motion. *Enclosure (3 & 4).*

t. Trial Counsel stated that if the Article 13 motion was frivolous he would ask for the Military Judge to hold the authors in contempt of court.

u. Detailed military Defense Counsel excuses herself, as she needs to return to the 410 proffer which she is participating in on an unrelated case.

v. On July 7, 2022 Trial Counsel goes to Defense spaces in order to apologize in person, but detailed military Defense Counsel was not present at the time.

w. Trial Counsel sends a text message, apologizing for his demeanor. *Enclosure (11).*

x. On July 11, 2022 Defense Counsel emails regarding Government Counsel's availability to discuss "the Art. 13 motion and the prosecutorial misconduct motion?" *Enclosure (12).*

y. On July 12, 2022 Government Counsel and Defense Counsel spoke regarding the potential withdraw of the Defense Article 13 Motion. The details were summarized by Government Counsel via email sent July 13, 2022. Of note, Government Counsel rejected the notion that a prosecutorial misconduct had been properly filed and that the Government formally rejects the Defense offer. *Enclosure (13).*

z. Throughout the case, Defense Counsel has repeatedly requested that Trial Counsel be removed from the case. Defense Counsel has alleged prosecutorial misconduct on the record on two occasions. Additionally, Defense Counsel corresponded with Trial Counsel's reporting senior, the Regional Trial Counsel (RTC), requesting that the RTC remove Trial Counsel from the case. *Enclosure (14).*

3. Discussion.

a. Burden of Proof and Standard of Proof.

The burden of proof on any factual issue the resolution of which is necessary to decide a motion shall be made by a preponderance of the evidence. R.C.M 905(c)(1). Likewise, the burden of persuasion on any factual issue the resolution of which is necessary to decide a motion shall be on the moving party. R.C. M. (2)(A). As the movant, Defense bears the burden of proving an Article 13 violation has been committed. *United States v. Mosby, 56 M.J. 309, 310*

(C.A.A.F. 2002).

b. Applicable Law: Article 13.

In U.S v. Adcock, the Court stated that "[i]t is well-settled that a government agency must abide by its own rules and regulations where the underlying purpose of such regulations is the protection of personal liberties or interests." United States v. Dillard, 8 M.J. 213, 213 (C.M.A. 1980) (quoting United States v. Russo, 23 C.M.A. 511, 1 M.J. 134, 135, 50 C.M.R. 650 (C.M.A. 1975) (citations omitted)). *United States v. Adcock, 65 M.J. 18, 23 (C.A.A.F. 2007)*

SECNAVINST 1640.9C, the Department of the Navy Corrections Manual, is the operative manual regarding the proper procedures for Navy and Marine Corps correctional facilities (ie Brigs). The Department of the Navy Corrections Manual states:

2. Purpose. Prisoners who will return to their parent command continue to be the responsibility of that command. Command visits are designed to retain identity with the parent command and to reinforce to prisoners that this remains their primary chain of command. SECNAVINST 1640.9C 03 Jan 2006 7-23 Enclosure (1)
3. Procedures. COs shall establish procedures for visiting at least weekly each detainee and each prisoner who will return to the parent command. This visit shall be made by a representative of the parent command (staff non-commissioned officer, first class petty officer or E-6 or higher with the authority to act in the CO's behalf). *Enclosure (15).*

Despite the assertion in *Adcock* above, the case goes on to explain that although,

R.C.M. 304(f) does not grant confinement officials the discretion to disregard service regulations pertaining to pretrial confinees, it does not necessarily follow that pretrial confinees held in conditions that violate these regulations may assert an independent right to sentencing credit on that basis alone. As we have previously held, confinement in violation of service regulations does not create a *per se* right to sentencing credit under the UCMJ. King, 61 M.J. at 228; McCarthy, 47 M.J. at 166 (citing United States v. Moore, 32 M.J. 56, 60 (C.M.A. 1991)). *United States v. Adcock, 65 M.J. 18, 23 (C.A.A.F. 2007)* (Emphasis added).

Article 13, UCMJ, provides, in pertinent part:

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[.]

Article 13 of the UCMJ prohibits two things: (1) the imposition of punishment prior

to trial, and (2) conditions of arrest or pretrial confinement that are more rigorous than necessary to ensure the accused's presence for trial." *United States v. King*, 61 M.J. 225, 227 (C.A.A.F. 2005). In accordance with this, the court may award credit for "unduly harsh circumstances," or for pretrial punishment."

In order to determine whether an action constitutes pretrial punishment under Article 13, the Court must consider: (1) whether the pretrial action was intended to be punishment and (2) whether the pretrial action furthered a legitimate government objective. *United States v. Fischer*, 60 M.J. 650, 651-52 (2004).

If the Court determines that the circumstances meet the two prong test in *Fischer* amounting to pretrial punishment, R.C.M. 305(k) describes the appropriate remedy:

"Remedy. The remedy for noncompliance with subsections (f), (h), (i), or (j) of this rule shall be an administrative credit against the sentence adjudged for any confinement served as the result of such noncompliance. Such credit shall be computed at the rate of 1 day credit for each day of confinement served as a result of such noncompliance. **The military judge may order additional credit for each day of pretrial confinement that involves an abuse of discretion or unusually harsh circumstances.** This credit is to be applied in addition to any other credit the accused may be entitled as a result of pretrial confinement served." (Emphasis added).

Furthermore, although non-binding, the Coast Guard Court of Criminal Appeals declined to give relief to an accused who wasn't visited regularly by his chain of command, despite a Coast Guard regulation requiring regular monthly visits. *United States v. Gomez*, 66 M.J. 663 (C.G. Ct. Crim. App. 2008). In holding that, the court stated "Where the circumstances surrounding a prisoner's complaint are 'unusual or egregious,' we believe it is clear that our Court can consider such matters without requiring the exhaustion of all avenues of administrative appeal." *Id.* at 666. The court also held that "while we do not condone the lack of monthly command contact as required by a Coast Guard instruction, such circumstances do not rise to the level of 'unusual or egregious,' and we decline to provide relief absent Appellant exhausting his administrative remedies,

including the submission of an Article 138, UCMJ, complaint.” *Id.*

c. Specific Basis: Command Brig Visits.

Defense Counsel is dissatisfied with the manner and method in which the Command conducted visits with the accused. There appear to be two overarching complaints regarding the Command Visits, 1) Frequency and 2) Documentation.

The Navy Corrections manual outlines that commands must visit pretrial prisoners at least weekly. MCIWEST-MCB CAMPENO 5000.2 reiterates this requirement.

Enclosure (16). MCB Camp Pendleton Brig, in accordance with the local Officer’s Visitation Report (Form MCMCP 1640/7) provides instructions for command representatives visiting prisoners. *Enclosure (17).* The instructions state that all visiting officers are, “required to complete an original and (1) copy of this form for each confine visited.”

Regarding frequency, the Defense motion for appropriate relief (MFAR) states on page 8, line 24 that, “[t]he evidence indicates the command visited LCpl Chisholm 31 times.” Considering the incarceration date of the accused (October 5th, 2021) and counting out to the week of the Defense filing (July 9, 2022), it appears that the accused has been incarcerated for 39 weeks. The Command has visited the accused 31 times. This leaves roughly eight weeks of missed visits from the Command.

Regarding documentation, there are roughly 17 undocumented visits via the Officer’s Visitation Report. The Government has disclosed all the documentation within its possession.

Eight weeks of missed visits and 17 undocumented visits do not rise to the level of “unduly harsh circumstances” nor do they amount to pretrial punishment in accordance

with the two prong test set forth in *King* as well as the non-binding example provided from *Gomez*.

d. Specific Basis: Taxes

Defense argues that because the accused has not yet filed his taxes, he is entitled to additional credit under Article 13.

Neither the broad guidance provided by MCB CAMPEN-O 5000.2, nor the Department of the Navy Corrections Manual address this type of administrative assistance specifically. The local Officer's Visitation Report (MCBCP 1640/7) does list a section for command representatives to document requests by confinees as well as the action the representative will take on the confinee's request.

The Officer's Visitation Forms and Correctional Facility Continuation Sheets (Counselings) do in fact document multiple instances where the accused mentioned taxes.

To wit:

Form	Date	Request	Command Response	Bates Stamp
MCBCP 1640/7	3/02/2022	█████ had a question in regard to his taxes, when will he be able to do them	Will talk to brig personnel to coordinate a time.	002667
MCBCP 1640/7	3/11/2022	Pulling Marine on Monday to do taxes	BLANK	002666
MCBCP 1640/7	3/17/2022	Need wife social and the kids	BLANK	002665
MCBCP 1640/7	3/28/2022	Schedule appt with tax center	Schedule appt w/ tax center-coordinate w/ █████ tax appt	002664
MCBCP 1640/7	4/22/2022	Car location, notifying tow company and discuss fees, taxes update,	BLANK	002710

		shoes, blue running shoes. Can they be delivered?		
MCBCP 1640/7	4/29/2022	To go ta to the legal office to work on taxes. Can they be taken to supply to pick up shoes/other items? GO TA for a haircut?	BLANK	002708
MCBCP1640/7	5/06/2022	TAXES. Ability to go to supply for personal gear.	BLANK	002707
MCBCP1640/7	5/20/2022	Shoes, Taxes update.	BLANK	002705

The Command did make attempts to assist the accused by pulling him out of the Brig for him to obtain his W2, providing the necessary social security numbers, notifying him of when tax professionals would be available at the brig. The Command also pulled the accused out the brig to attend the tax center when the accused failed to use the tax services available at the Brig. On the occasions when Command escorted the accused to the tax center, the tax center was unable to help the accused. It is unclear at this time as to what reason was given by the tax center on each visit.

Short of finding a specific case on point, relying on the broad guidance of the Navy Corrections Manual, it appears that the Command has not violated any of the internal service regulations by the accused failing to file his taxes prior to the federal deadline. This failure does not rise to the level of "unduly harsh circumstances" and it was not intended as a punishment. Therefore, the granting of Article 13 credit is unwarranted.

e. Specific Basis: Impounded Vehicle

Defense Counsel argues that because the accused's vehicle was impounded that he is entitled to Article 13 credit.

According to the Department of the Navy Corrections Manual and MCB CAMPEN-O 500.2, commands are required to visit confinees who will return to their units (i.e. pre-trial prisoners). As mentioned previously, the Officer's Visitation Report used internally at Camp Pendleton Brig does include sections for documenting requests. However, the Department of the Navy Corrections Manual does not appear to address the extent to which command must provide administrative support to their servicemembers.

On December 21, 2022, Defense Counsel emailed the cognizant SJA and Government Counsel, in pertinent part, "Also, our client has requested pay information and location as to his vehicle." Government Counsel responded, "Please specify what information you are requesting about LCpl Chisolm's pay and vehicle." Defense Counsel responded, "We are trying to figure out where his own car is (was at the house when packed out?)" *Enclosure (2)*. The next request regarding the accused's vehicle occurs on April 21, 2022. *Enclosure (5)*. At 0837 Defense Counsel requests that the Command assist with locating the accused's vehicle and at 1308 the Command provides the information.

The impoundment of the accused's vehicle by a private company is not an action attributable to the Command. Even if it were, it was not an "unduly harsh circumstance" nor was it intended as pre-trial punishment. Therefore, Article 13 credit should not be granted on this basis.

f. Specific Basis: Uniforms

Defense Counsel appears to cite the accused's lost uniforms as a justification for

Article 13 credit.

The Government concedes that confinees rate, and should be provided with, clean and serviceable clothing throughout the duration of their confinement. On June 29, 2022, Defense Counsel contacted Government Counsel, command representatives, and the then-Brig Commanding Officer, explaining that the accused's clothing had either been lost or stolen while they were in the laundry. *Enclosure (9)*. Defense Counsel expressed concerns that the accused had allegedly been in the same clothing for nine days. Command representatives replied, stating the command had visited the accused two days prior and the accused had failed to mention this issue. Command representatives explained to Defense Counsel that the accused needs to communicate the issue to Brig staff and also reminded Defense Counsel that the accused has access to the Post Exchange (PX) on a weekly basis. *Enclosure (9)*.

Lost clothing, in and of itself does not constitute "unduly harsh circumstances," nor was it intended as pre-trial punishment. Thus, the threshold for determining if Article 13 credit should be granted is not met. Therefore, Article 13 credit should not be granted on this basis.

g. Specific Basis: Prosecutorial Misconduct

Defense argues that alleged prosecutorial misconduct by Trial Counsel warrants dismissal of all charges in the above named case.

The Defense motion defines prosecutorial misconduct, clarifies when prosecutorial misconduct occurs, and then describes the pertinent test for determining if prosecutorial misconduct has occurred. The Government concurs with the black letter law presented by defense.

In addition, the Government adds that the presence of prosecutorial misconduct does not in and of itself warrant dismissal of charges. As the Court opined in *Hornback*,

"[t]he presence of prosecutorial misconduct does not necessarily mandate dismissal of charges or a rehearing. It is not the number of legal norms violated but the impact of those violations on the trial which determines the appropriate remedy for prosecutorial misconduct." *United States v. Hornback*, 73 M.J. 155, 160 (C.A.A.F. 2014) (Internal citations omitted).

Applying the relevant case law to the facts at hand, Trial Counsel's actions do not amount to prosecutorial misconduct. Trial Counsel did not violate, "a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon." *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996) (citing Berger, 295 U.S. at 88).

The Government rejects the Defense statement of fact regarding the interaction between Trial Counsel and detailed Military Defense Counsel in two ways.

First, Defense Counsel's motion differs, and is inconsistent, from the unsworn statement provided by detailed Military Defense Counsel (Defense Exhibit 17). While Defense Exhibit 17 recounts Trial Counsel raising his voice, the Defense motion purports that Trial Counsel screamed at detailed Military Counsel—although Defense Counsel was not present for the exchange. Trial Counsel did not scream at detailed Military Defense Counsel. In fact, Trial Counsel in his apology admits that he was frustrated from the 802, and therefore was apologizing for his demeanor. *Enclosure (11)*.

Second, the unsworn affidavit by detailed Military Defense Counsel (Defense Exhibit 18) and the recollection of Government Counsel differ regarding the exchange concerning the Article 13 motion. Specifically, Defense Counsel asserts that Trial Counsel stated that he would ask, "the military judge to hold everyone at defense counsel's table in contempt of court for filing a frivolous motion if defense counsel files an Article 13 motion." Rather, Trial Counsel stated that he would ask the judge to hold

the authors in contempt of court if the Article 13 motion was frivolous.

Defense Counsel specifically reserved the right to file an Article 13 motion as part of the plea trial agreement in this case; a fact well known to Government Counsel as it is not typically a motion reserved. All Government Counsel were aware of this provision and certainly expected Defense Counsel to exercise the rights reserved for the accused as part of the agreement.

It was also known throughout Trial Services, that Defense Counsel and detailed Military Defense had recently been addressed on the record by a Military Judge regarding the quality of a motion. *Enclosures (3 & 4)*.

This exchange between Government Counsel and Defense Counsel didn't occur in a vacuum. Throughout the duration of the case, Defense Counsel has accused Trial Counsel of prosecutorial misconduct on the record and repeatedly asked for his recusal. Not only were these accusations documented in formal court proceedings but were also directly addressed with tenant Commanding Officers and Trial Counsel's Reporting Senior (RS), the Regional Trial Counsel.

In November, Defense Counsel wrote to the Commanding Officer of 5th Marine Regiment, referring to Trial Counsel by name and calling the government's response "misleading and disingenuous." *Enclosure (2)*. On 15 February 2022, at the arraignment, Defense Counsel accused Trial Counsel of prosecutorial misconduct on the record. Defense Counsel stated, "we will be filing a destruction of evidence, spoliation and/or prosecutorial misconduct motion." *Enclosure (18)*. That same day, Defense Counsel emailed Government Counsel requesting that Trial Counsel recuse himself. On 16 February 2022, Defense Counsel emailed trial Counsel's reporting senior, explaining

that Defense Counsel has asked for his recusal on the record and stating that he is now a witness in the case. Throughout email traffic on 16 February and 17 February, Defense Counsel closed out emails with, “again we only include [Trial Counsel] out of necessity and request that he recuse himself.” On 1 March 2022, Defense Counsel again emailed Trial Counsel’s reporting senior requesting that he recuse himself. On 18 March, Defense Counsel, again, emailed Trial Counsel’s reporting senior regarding the matter. Defense Counsel’s persistent and repeated demands to remove Trial Counsel from the case framed the context in which he responded to the most recent 802 conference.

The Government does not condone raising voices at counsel opposite, but maintains that the manner of communication and the frustration expressed regarding yet another defense continuance motion are not prosecutorial misconduct.

We maintain that the actions taken by Trial Counsel do not amount to prosecutorial misconduct. However, even if they did—Trial Counsel’s actions did not impact the case in any meaningful way as set forth in the *Hornback* test.

4. Relief Requested.

The government respectfully requests that the defense motion for appropriate relief pursuant to Article 13, UCMJ, be denied.

5. Evidence. The Government offers the following enclosure in support of its motion:

Exhibit 1: 30 Nov 2021 Letter from Defense Counsel to Commanding Officer, 5th Marines

Exhibit 2: 21 December 2021 Email relating to vehicle of Accused

Exhibit 3: 7 March 2022 Transcript from US v. Sandoval at 1029

Exhibit 4: 7 March 2022 Audio from US v. Sandoval regarding Defense motion

Exhibit 5: 21 April 2022 Email regarding Impounded Vehicle

Exhibit 6: 3 May 2022 Email from Defense Counsel to Court regarding 706 exam

Exhibit 7: 31 May 2022 Email from Command to Defense Counsel regarding taxes

Exhibit 8: 28 June 2022 Email from Government to Defense regarding taxes and records

Exhibit 9: 29 June 2022 Email from Command to Defense regarding clothing

Exhibit 10: 7 July 2022 Email from Defense to Government regarding 706 exam

Exhibit 11: 7 July 2022 Text Message from Government Counsel to Defense Counsel

Exhibit 12: 11 July 2022 Email from Defense to Government regarding Art. 13 motion

Exhibit 13: 13 July 2022 Email from Government to Defense summarizing Art. 13 discussion

Exhibit 14: Consolidated correspondence from Defense Counsel regarding Trial Counsel Recusal

Exhibit 15: SECNAVINST 1640.9C DoN Corrections Manual

Enclosure (16): MCIWEST-MCB CAMPENO 5000.2 Command Visitations

Enclosure 17: MCBCP 1640/7 Officer's Visitation Report

Enclosure 18: 15 February 2022 Audio Clip from US v. Chisolm, Arraignment

6. Oral Argument.

The Government is prepared to give oral argument.

C. A. Buckholtz
Major, U.S. Marine Corps
Trial Counsel

CERTIFICATE OF SERVICE

I certify that I served a copy of this motion on Defense Counsel this 18th day of July 2022.

//S//
C. A. Buckholtz
Major, U.S. Marine Corps

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

UNITED STATES

v.

Justin Chisolm
Lance Corporal
U.S. Marine Corps

DEFENSE MOTION FOR APPROPRIATE
RELIEF (MOTION TO STRIKE)

Date: 27 July 2022

I. Nature of the Motion

Pursuant to Military Rule of Evidence 410, the defense moves to strike portions of the government's pleading.

II. Issue

In its answer to the defense Motion for Appropriate Relief based in violations of UCMJ Article 13, the government averred statements and enclosed documents that violate M.R.E. 410 and those pleadings and enclosures should be removed from the record. In the alternative, the Court should reject the government's pleading entirely.

III. Statement of Facts

1. On 9 July 2022, the defense filed its UCMJ Article 13 motion which included a request for relief based in part, upon Captain O'Connell's threat to the defense team.
2. On 12 July 2022, Mr. Paul C. LeBlanc, civilian counsel, contacted Major Buckholtz via a telephone conversation to address the Article 13 motion, the prosecutorial misconduct aspect of the motion, and to seek a resolution and potential withdrawal and waiver of the defense motion.

Enclosure (12) to the government's response.

1 3. On 13 July 2022, Major Buckholtz contacted Mr. LeBlanc and summarized the discussion
2 in paragraph 2 above and stylized it as a memorandum for the record (MFR). In that email,
3 Major Buckholtz informed the defense that Captain O'Connell was removed from further
4 participation in the case and specifically noted that "This is in no way an admission of guilt
5 regarding the allegations, nor is it an agreement to allow Captain O'Connell to testify as a
6 witness. Major Pitt is being re-detailed to the case." Enclosure (13) to the government's
7 response.

8 4. On 18 July 2022, the government filed its response to the defense's Article 13 motion.

9 5. Paragraph "y" of the government's response and the supporting enclosure 13 are trial
10 counsel's personal summaries of the conversation. Moreover, in enclosure (13), trial counsel
11 rejected the defense offer to resolve the Article 13 motion and did not forward the offer to the
12 Convening Authority.¹ Enclosure (1).

14 **IV. Law/Discussion**

15 M.R.E. 410 precludes introduction of pretrial negotiations into the court-martial. The
16 government, in its pleading and in its enclosures introduces violative information. Such matters
17 are inappropriate.

18 At the request of the Court, made during the R.C.M. 802 conference held on 7 July 2022, Mr.
19 Paul LeBlanc, civilian defense counsel, contacted Major Chelsea Buckholtz, trial counsel, to
20 discuss the motion and a potential resolution. Both sides discussed their positions. In the end, a
21 resolution of the issues was not reached, and the parties cordially ended the conversation.

22 Indeed, the government agrees that this conversation was in the spirit of negotiations, "Of note,

25

¹ Defense counsel submitted to the offer directly to the Convening Authority's staff judge advocate after the defense learned that the offer was not forwarded by trial counsel.

1 Government Counsel rejected the notion that a prosecutorial misconduct had been properly filed
2 and that the Government *formally rejects the Defense offer.*" (Government Response, para. y).

3 Trial counsel did not submit that offer to the Convening Authority. Enclosure (1)

4 **Rule 410. Pleas, plea discussions, and related statements**

5 (a) Prohibited Uses. Evidence of the following is
6 not admissible against the accused who made the
plea or participated in the plea discussions:

7 (1) a guilty plea that was later withdrawn;
8 (2) a nolo contendere plea;
9 (3) any statement made in the course of any judicial inquiry
regarding either of the foregoing pleas;

Or

10 (4) any *statement made during plea discussions*
11 with the convening authority, staff judge advocate,
12 *trial counsel* or other counsel for the government if
the discussions did not result in a guilty plea

13 (Emphasis added)

14 Government's enclosure (13) to the motion is Major Buckholtz's personal MFR. Major
15 Buckholtz summarized, in her words, what the conversation entailed and what it covered.

16 As a preliminary matter, the defense does not accept Major Buckholtz's MRF.² It is
17 inappropriate for a trial counsel to become a witness on a motion. Here, Major Buckholtz is
18 testifying by way of an MFR that she created entirely for this very purpose, to backdoor
19 testimony before the court. Major Buckholtz has potentially made herself a witness before the
20 court-martial.

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24 ² Defense counsel agrees that Major Buckholtz sent Mr. LeBlanc an email that contained the MFR. The government
25 did not request the defense adopt the MFR. Even if that request was made, the defense is under no obligation to
accept or even respond to such a document. An MFR has no place in a court-martial, it is self-serving testimony,
not subjected to cross examination, and potentially makes trial counsel a witness on the motion.

1 Furthermore, the enclosure discusses specific terms during pretrial negotiations which were
2 inappropriately, but none the less, rejected by trial counsel. This is exactly the type of material
3 M.R.E. 410 is designed to prohibit. Now, because of trial counsel's actions, defense counsel will
4 be apprehensive to freely discuss resolving such matters as the government will use that
5 information to the accused's detriment. The application of M.R.E. 410 must be interpreted
6 broadly and not formulaically. *United States v. Anderson*, 55 M.J. 182 (CA.A.F. 2001) (holding
7 the policy of 410 is to "encourage the flow of information during the plea-bargaining process"),
8 *see also, United States v. Vasquez*, 54 M.J. 303 (C.A.A.F. 2001) (holding that lower courts
9 should not have an "excessively formalistic or technical approach to the rule[.]")

10
11 The government violated M.R.E. 410 both in fact and in spirit. Counsel's MFR has no place
12 in a court-martial, even in a motions phase where rules of evidence are not applicable, CAAF has
13 directed that lower courts avoid being overly formalistic in the applicability of M.R.E. 410, the
14 policy behind it is too important.

15 **V. Evidence**

16 a. Enclosure (1) - Email between defense counsel and trial counsel of 26 July 22 (M.R.E.
17 410 portions redacted)

18 **VI. Burden and Standard of Proof**

19 Pursuant to RCM 905(c), the burden is on the defense to prove by a preponderance of the
20 evidence that the government's pleading should be removed.
21

22 **VII. Relief Requested**

23 The defense requests the Court strike paragraph "y" from the government's
24
25

1 pleading as well as enclosure "13." In the alternative, the Court should reject the government's
2 pleading.

3 **VIII. Argument.**

4 Oral argument is not requested.

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7 P.C. LeBLANC
8 Civilian Defense Counsel
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1 *****
2 *****
3 **CERTIFICATION OF SERVICE**

4 A true copy of this motion was served on opposing counsel via electronic mail on 9 April 2022

5
6 [REDACTED]
7 P.C. LeBLANC
8 Civilian Defense Counsel
9 [REDACTED]
10

UNITED STATES MARINE CORPS
NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES)
v.) GOVERNMENT RESPONSE TO
JUSTIN W. CHISOLM) DEFENSE MOTION FOR
Lance Corporal) APPROPRIATE RELIEF
U. S. Marine Corps) (MOTION TO STRIKE)
)
) 2 August 2022

1. **Nature of Response.** The court should deny defense's motion to strike portions of Enclosure (13) to the government's response to defense's motion for appropriate relief under Article 13, UCMJ. The communications in question do not fall within the protections of M.R.E. 410.

2. **Statement of Good Cause.** The original deadline for this response was 29 July 2022. Government counsel requested a continuance until 2 August 2022 to discuss the substance of the response with supervisory counsel. Defense did not oppose the continuance request and the military judge granted it. Government counsel's concern centered on a Critical Information Requirement for any time a member of the Trial Services Organization is contemplating making an allegation of unethical conduct by opposing counsel. After discussion with supervisory counsel, the government is not making any such allegation.

3. **Facts**

a) On 26 April 2022, the accused and the convening authority entered a plea agreement in this case.

b) On 9 July 2022, defense filed a motion for appropriate relief (MFAR) seeking dismissal of charges or, in the alternative, judicially ordered confinement credit for alleged violations of Article 13 of the Uniform Code of Military Justice (UCMJ). The motion also alleged prosecutorial misconduct by Captain Gage O'Connell, one of the trial counsel detailed to this case at the time. The motion did not explain how the alleged prosecutorial misconduct constituted "punishment prohibited before trial." UCMJ art. 13 (2019).

c) Two hours after filing the Article 13 motion via email to the military judge, Ms. Bethany Payton-O'Brien, civilian defense counsel, forwarded that email to Colonel [REDACTED] USMC, the Staff Judge Advocate (SJA) for the convening authority in this case. Ms. Payton-Brien did not address any of defense's substantive Article 13 concerns. Instead, she wrote, "I draw your attention to the last part of the motion which has a prosecutorial misconduct section to it based on trial counsel's threats against defense counsel in this case regarding the filing of this motion." Ms. Payton-O'Brien provided Colonel [REDACTED] with the motion itself but omitted its enclosures, which included an affidavit from detailed defense counsel that downplayed the alleged "threats" from trial counsel. Ms. Payton-O'Brien went on to inform Colonel [REDACTED] that defense was "contemplating another motion as well based on Captain O'Connell's actions, which we believe were witnessed by a [sic] another judge advocate, major [sic] Buchholz [sic]. And we do not believe that she intervened to stop Captain O'Connell." Major Chelsea Buckholtz was (and remains) the other trial counsel detailed to this case; defense has not filed any motions regarding her. At no time did Ms. Payton-O'Brien frame her email as an attempt at plea discussions, which had been completed months before. Colonel [REDACTED] did not reply. *See* Enclosure (1).

d) On 12 July 2022, Mr. Paul Leblanc, the accused's other civilian defense counsel, called Major Buckholtz on the phone. Mr. Leblanc proposed that defense would withdraw its Article 13 motion if the government granted the accused 100 days of confinement credit and removed Captain O'Connell from the case. Major Buckholtz declined that proposal because the matter was already pending before the court and trial counsel cannot grant a judicially ordered remedy. Mr. Leblanc then invoked his years of experience in military appellate law before informing Major Buckholtz that, unless defense withdrew their Article 13 motion, Captain O'Connell would be subject to a Rules of Counsel referral even if the motion itself were denied. No one else was present for the conversation, so Major Buckholtz memorialized its contents in an email to Mr. Leblanc shortly after it concluded. Mr. Leblanc responded, "Received, thanks." At no time during the conversation or in his reply to its summary did Mr. Leblanc frame the proposal to withdraw the defense motion as an offer for an additional or modified plea agreement with the convening authority. Likewise for his reminder that defense effectively controlled whether Captain O'Connell would be exposed to professional sanctions. *See* Enclosure (2).

e) On 18 July 2022, Ms. Payton-O'Brien emailed Colonel [REDACTED] for the second time. Ms. Payton-O'Brien repeated the same "offer" made by Mr. Leblanc on 12 July: 100 days of judicially ordered confinement credit and the removal of Captain O'Connell as trial counsel (already completed on 14 July). This was the first time defense made any reference to its offer to resolve the Article 13 motion as some type of plea negotiation, titling the email "Defense Offer ICO LCPL [sic] Chisolm" and including "proposed language for the PTA provision." Ms. Payton-O'Brien once again omitted any substantive confinement concerns, however, choosing to instead focus on defense's intent "to call a number of witnesses in our motion, and [how] certainly this matter could be resolved without a lengthy hearing and without having to call both

Trial Counsel, military defense counsel, and other TSO personnel" at a motions session. Colonel [REDACTED] did not reply. *See* Enclosure (3).

f) On 26 July 2022, Mr. Leblanc emailed Major Buckholtz, without including any other counsel, to state that his earlier conversation with her was intended as "a pretrial offer" and asking for confirmation that she had forwarded it to the convening authority. Major Buckholtz replied that she did not interpret an offer to withdraw a motion as some type of plea negotiation, especially because the remedy defense sought fell outside the scope of the convening authority's power to grant. Defense included an edited version of this exchange as Enclosure (1) to the defense motion to strike. Defense chose to omit from its filing trial counsel's follow-up email from a couple hours later reminding defense that they themselves had already approached the SJA on 18 July 2022 about this exact subject. *See* Enclosure (4).

4. Burden and Standard of Review

Under R.C.M. 905(c), the burden of persuasion is on the defense by a preponderance of the evidence. The military judge's decision to admit or exclude evidence is reviewed for an abuse of discretion. *See United States v. Pollard*, 38 M.J. 41, 49 (C.M.A. 1993).

5. Law

M.R.E. 410 only applies to "pleas, plea discussions, and related statements." It prohibits the admission into evidence against the accused of, among other items, "any statement made during plea discussions with the convening authority, staff judge advocate, trial counsel, or other counsel for the government if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea." M.R.E. 410(a)(4). Nothing in M.R.E. 410, or any associated case

law, treats statements by defense counsel in the context of a motion pending before the court as somehow subject to protection under the rule.

6. Analysis

Defense seeks to strike portions of an enclosure to a government motion response because the contents “violate[] M.R.E. 410.” Defense motion at 4. This request runs counter to well-settled law and the facts of this case.

(a) M.R.E. 410 does not apply to motions enclosures. The only basis defense provides for striking portions of the enclosure is M.R.E. 410. As defense acknowledges, however, they are seeking to apply a Military Rule of Evidence “in a motions phase where rules of evidence are not applicable.” Defense motion at 4. That alone is enough reason to deny the defense motion to strike. Even so, this response will address the substance of defense’s motion too.

(b) Even if M.R.E. 410 did apply, it would not protect the communication in question. The purpose of M.R.E. 410 is to remove any prejudice against an accused that might be associated with once having pleaded or offered to plead guilty. None of Mr. Leblanc’s statements to Major Buckholtz constituted a plea, plea discussion, or related statement. Mr. Leblanc made those statements almost three months after all parties signed the plea agreement in this case. There is no indication that the accused intends to withdraw from it, and the guilty plea hearing remains scheduled for 31 August 2022.

The two cases cited by defense in their motion do not change this analysis. In *United States v. Anderson*, CAAF held that a military judge erred by admitting, for sentencing, evidence concerning appellant's request for an other than honorable discharge in lieu of trial by court-martial. 55 M.J. 182, 182 (C.A.A.F. 2001). Similarly, in *United States v. Vasquez*, CAAF held that a military judge

erred by admitting, for sentencing, appellant's admission of guilt in an unrelated request for an other than honorable discharge. 54 M.J. 303, 304 (C.A.A.F. 2001). The vague proposition mentioned in those decisions that M.R.E. 410 should be interpreted broadly does not somehow rob the rule of its basic and literal meaning.

Additionally, even if M.R.E. 410 did apply in the motions context, and even if the communication was made during plea discussions, the rule would protect Mr. Leblanc's statements only "*if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea.*" M.R.E. 410(a)(4) (emphasis added). In other words, if the accused withdraws from the plea agreement and decides to contest the charges at court-martial, the government would not be able to introduce as evidence against him his previous offer to plead guilty. That is not analogous to the situation here.

(c) The statements made by Mr. Leblanc demonstrate defense's acknowledgement that their Article 13 and prosecutorial misconduct claims have minimal merit. If the law clearly does not support defense's argument to strike Mr. Leblanc's statements from the record, then why file the motion? In short, because the enclosure undermines defense's arguments by using their own words against them. The same is true for Ms. Payton-O'Brien's emails to the SJA. The following is a reasonable interpretation of how, from 12 to 18 July 2022, defense tried to leverage an extra 100 days of confinement credit from the court even though their arguments are not supported by the facts of this case.

First, Mr. Leblanc called Major Buckholtz to seek an informal resolution to defense's Article 13 motion. When Major Buckholtz informed Mr. Leblanc that the government could not grant what he sought, he invoked his experience with appellate litigation to imply that, unless the government took the deal, Captain O'Connell would face professional repercussions regardless

of the outcome of defense's prosecutorial misconduct claim against him. Second, Ms. Payton-O'Brien emailed the SJA to try to make the same deal for withdrawal of the defense Article 13 motion. Knowing that a prosecutorial misconduct allegation would not affect the convening authority the way it would a trial counsel, she instead chose to emphasize how heavy defense could make the logistical burden of the motions session unless Colonel [REDACTED] took the offer.

Understanding that Article 13 credit is a judicially ordered remedy, neither the trial counsel nor the SJA accepted defense's "offer." Major Buckholtz emailed Mr. Leblanc to confirm that she understood him correctly because she knew that his requested remedy fell outside the scope of what the government could grant and because she was concerned about the tone of the communication in general. Mr. Leblanc expressed no disagreement with Major Buckholtz's summary of the conversation in his reply to her email, nor does defense seem to dispute the substance of the email in their motion to strike it from the record. If anything, Mr. Leblanc seems to confirm the accuracy of the email's contents in his 26 July follow-up to Major Buckholtz, stating that "[b]elow I made a pretrial offer in this matter."

Additionally, defense's decision to omit from its filing three critical emails speaks volumes: the 9 July email from Ms. Payton-O'Brien to the SJA, the 18 July email from Ms. Payton-O'Brien to the SJA, and the 26 July email from trial counsel to Mr. Leblanc reminding him that defense had already been in direct contact with the SJA about defense's proposal. These emails demonstrate that defense's assertion that they only "submitted to [sic] the offer directly to the Convening Authority's staff judge advocate after the defense learned that the offer was not forwarded by trial counsel" is not accurate. Defense MFAR at 2 n. 1. Defense reached out to the SJA at least twice before seeking confirmation from trial counsel that the government had

relayed their “offer.” And, when trial counsel reminded the defense of this sequence, defense chose to omit that reminder from the record.

The fact that none of the conversations or emails touched at all on the actual conditions of the accused’s pretrial confinement indicates that defense knows the Article 13 claims have little merit. Similarly, the fact that defense offered to withdraw a claim of prosecutorial misconduct for a little confinement credit indicates the limited merit of that claim too. Finally, the fact that defense is now trying to bury the emails and conversations indicates that they know the communications are bad for their case.

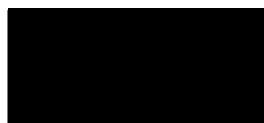
7. **Oral Argument.** The Government is prepared to address this issue during its oral argument on the substantive Article 13 motion.

8. **Evidence Submitted.**

Enclosures:

1. Email from Ms. Payton-O’Brien to Colonel [REDACTED] (9 July 2022).
2. Email from Mr. Leblanc to Major Buckholtz (13 July 2022).
3. Email from Ms. Payton-O’Brien to Colonel [REDACTED] (18 July 2022).
4. Email from Major Pitt to Mr. Leblanc (26 July 2022).

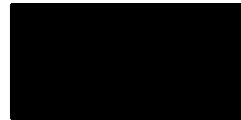
9. **Relief Requested.** The Government respectfully requests that Defense’s motion be denied.



C. H. PIT
Major, U.S. Marine Corps
Trial Counsel

Certificate of Service

A copy of this response was served on the Court and Defense Counsel electronically on 2 August 2022.



C. H. PITT
Major, U.S. Marine Corps
Trial Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT

UNITED STATES) GENERAL COURT-MARTIAL
)
 v.) VICTIMS' LEGAL COUNSEL RESPONSE TO
) THE DEFENSE MOTION FOR
 JUSTIN CHISOLM) APPROPRIATE RELIEF (SITE VISIT)
 LANCE CORPORAL)
 U. S. Marine Corps) 25 April 2022
)

1. **Nature of Response.** Victims' Legal Counsel (VLC), on behalf of the minor children who are named victims in this case, [REDACTED] respectfully requests this Court to deny the Defense Motion.

2. **Summary of Facts.**

a. The vehicle involved in the charged specifications under Article 19b, Uniform Code of Military Justice is a 2018 Nissan Sentra.

b. Following the endorsement of a Request for Personal Safety Move on 14 October 2021, [REDACTED] along with their mother, executed a safety move to Georgia.

c. The aforementioned 2018 Nissan Sentra is the sole vehicle available to the mother of [REDACTED]

d. The above-noted 2018 Nissan Sentra was taken to Georgia for transportation upon execution of the safety move.

3. **Standing.**

VLC has standing based on the language of Article 6b of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 806b (2019) and the Crimes Victim's Rights Act, 18 U.S.C. § 3771 (2018). Specifically, my clients have the "right to be reasonably protected from the accused" and agents of the accused (e.g. his counsel), and the "right to be treated with fairness and with respect for the dignity and privacy of the victim of an offense under this chapter." *Article 6b(a)(1) and (9) Uniform Code of Military Justice (2019 ed.).*

4. Discussion.

I. Access to the vehicle in Ms. [REDACTED] possession is not necessary to the defense's ability to mount a defense.

The defense's contention that it must access the exact vehicle in the possession of Ms. [REDACTED] in order to effectively mount a defense is baseless because it is neither relevant nor necessary because there are other more reasonable options available. R.C.M. 703(e) provides only that parties are entitled to the production of evidence that is relevant and necessary. Similarly, M.R.E. 401 focuses relevancy on whether something makes a fact more probable than it would be without the evidence.

Here, there is no contention by a party that the 2018 Nissan Sentra in question has any special modifications beyond what is standard to all vehicles of its make and model. The only hint of a unique need in the defense's motion centers on being able to see how "the specific car seats in the car change the analysis of whether or not the back seat could fold down properly to allow freedom of movement." Defense MFAR section IV, subsection (d). The 2018 Nissan Sentra in Ms. [REDACTED] possession is not evidence of a kind similar to a firearm where the rifling and unique characteristics of each weapon leave an identifiable fingerprint that is relevant and necessary for the determination of if a round fired could have come from that weapon. Rather, it is all but a carbon copy of all other vehicles of that make and model that were manufactured for that model year. The same analysis on standardization applies to the car seats mentioned by the defense because there is no mention of them being a home-built model or otherwise uniquely modified from their retail state.

Because of the non-unique nature of the vehicle, or items in it, inspection of it for the determinations stated by the defense is neither relevant nor necessary. Because there is no contention of special or unique modifications to the vehicle that could affect the children's position in the vehicle, simple inspection of any vehicle of the same model year, make, and model with car seats also of the same make and model would answer the questions that the defense seeks to have confirmed.

II.

have the right to be reasonably protected from the Accused.

[REDACTED] have the right to be reasonably protected from the Accused. *Article 6b(a)(1), Uniform Code of Military Justice (2019 ed.).* The children were moved, along with their mother, following the allegations to a different state in an effort to ensure they were reasonably protected from the Accused and anyone who may act on his behalf. The mere fact that the Accused, though his defense counsel, would be able to ascertain generally or exactly where [REDACTED]

[REDACTED] currently live would violate Article 6b(a)(1) and run contrary to the policy underlying the safety move process.

Finally, such a request is particularly egregious when the defense is requesting to visit the vehicle, and by implication be present with or near the named victims, without the victims' counsel present. Based on the foregoing, and in light of the Article 6b right to be reasonably protected from the Accused, the defense has failed to provide sufficient justification for a request with such serious implications under Article 6b(a)(1).

5. Evidence. VLC does not submit any additional evidence.

6. Burden of Proof. Pursuant to R.C.M. 905(c), the burden is on the defense by a preponderance of the evidence.

7. Relief Requested. Based upon the foregoing, the defense motion should be denied.

8. Argument. VLC respectfully requests oral argument.

[REDACTED]
S. L. PROCTOR
Captain, U.S. Marine Corps
Victims' Legal Counsel

CERTIFICATE OF SERVICE

An electronic copy of this response was electronically served upon the Court, the Government, and Defense on this date: 25 April 2022.



S. L. PROCTOR
Captain, U.S. Marine Corps
Victims' Legal Counsel

NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT

UNITED STATES	)	GENERAL COURT-MARTIAL
)	
v.	)	VICTIMS' LEGAL COUNSEL RESPONSE TO
	)	THE DEFENSE MOTION FOR
JUSTIN CHISOLM	)	APPROPRIATE RELIEF (JUDICIAL ORDER
LANCE CORPORAL	)	OF DEPOSITIONS)
U. S. Marine Corps)	
	)	22 April 2022

1. **Nature of Response.** Victims' Legal Counsel (VLC), acting on behalf of Ms. [REDACTED] respectfully requests this Court to **deny** the Defense Motion with respect to a judicial order of a deposition of Ms. [REDACTED] in accordance with Rules for Courts-Martial (R.C.M.) 702.

2. **Summary of Facts.**

- a. On 8 October 2021, Captain Joseph Zottola, (hereinafter "VLC") was detailed to represent Ms. [REDACTED] by acting Regional Victims' Legal Counsel-West, Lieutenant Colonel [REDACTED]
- b. On 15 October 2021, a Military Protective Order was issued against Lance Corporal Chisolm for Ms. [REDACTED] and the three minor children.
- c. Later, Ms. [REDACTED] conducted a safety move to Georgia with her three minor children that was signed on 14 October 2021.
- d. On 30 December 2021, an Article 32 hearing was conducted in this case.
- e. At the Article 32 hearing, VLC objected to Defense's request to require Ms. [REDACTED] to testify at the preliminary hearing.
- f. On 14 February 2022, VLC submitted a Notice of Appearance ("NOA") in the case of United States v. LCpl Justin Chisolm, and the NOA was uploaded to the Western Judicial Circuit SharePoint Site.
- g. Within VLC's NOA, paragraph 4 states: "To permit a meaningful exercise of Ms. [REDACTED] rights and privileges, I respectfully request that this Court direct the defense and government

to provide me with informational copies of motions and accompanying papers filed pertaining to issues that fall under Military Rules of Evidence 412, 513, 514, and 615 and in which Ms. ██████ rights and privileges are addressed.”

- h. On February 18, 2022, defense counsel requested, through Ms. ██████ VLC, the opportunity to interview Ms. ██████ in which VLC declined.
- i. On March 8, 2022, Defense Counsel requested the Convening Authority order a deposition of Ms. ██████

The defense desires to examine Ms. ██████ about her knowledge of the alleged offenses that are charged in enclosure (1). Ms. ██████ has been interviewed by NCIS during their investigation, but has refused to submit to a pretrial interview with defense counsel. Ms. ██████ is no longer in California and has left the state with the children and the crime scene vehicle and has refused the defense’s effort to have her return with the car to allow access. Given that she refuses to be interviewed, the defense is unable to ask her specific questions about the vehicle.

- j. On March 18, 2022, the Convening Authority denied that request because there were no “exceptional circumstances.”
- k. The first motions deadline in this case was on 15 April 2022. *See Trial Management Order.*
- l. The Defense submitted their motion on 19 April 2022. *See Western Judicial Sharepoint Site.*

3. Standing.

Ms. ██████ standing is supported by the language of Article 6b of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 806b (2019) and the Crimes Victim’s Rights Act, 18 U.S.C. § 3771 (2018). Specifically, Ms. ██████ has the “right to be reasonably protected from the accused” and agents of the accused, i.e., Defense Counsel, and the “right to be treated with fairness and with respect for the dignity and privacy of the victim of an offense under this chapter.” *Article 6b(a)(1) and (8), Uniform Code of Military Justice (2019 ed.).*

Under R.C.M. 702, within the “Discussion” section, it states, “*See Article 6b(e)(2) concerning a victim’s right to petition a Court of Criminal Appeals to quash an order to submit to a deposition.” Rules for Court-Martial 702, Discussion.* Under Article 6b(e)(2), it states:

If the victim . . . is subject to an order to submit to a deposition, notwithstanding the availability of the victim to testify at the court-martial trying the accused for the offense, the victim may petition the Court of Criminal Appeals for a writ of mandamus to quash such order.

Article 6b(e)(2), Uniform Code of Military Justice (2019 ed.). Thus, if a victim has standing to petition the Navy-Marine Corps Court of Criminal Appeals to quash an order to submit to a deposition, then the victim also has standing to be heard against a Motion to Compel a Deposition at a trial-level court-martial that is subject to the Navy-Marine Corps Court of Criminal Appeals.

Moreover, if Defense deposes Ms. [REDACTED] Defense could ask questions related to Military Rules of Evidence (M.R.E.) 412, 502, 503, 504, 513, 514. In *LRM v. Kastenberg* holding that “[t]here is a long-standing precedent that a holder of a privilege has a right to contest and protect the privilege,” through counsel. 72 M.J. 364, 368. The opinion itself gives examples of federal courts allowing victims to be represented by counsel at pretrial hearings on multiple subjects. Two of the cases deal with Federal Rule of Evidence 412. *Id.* at 379 (citing *United States v. Saunders*, 736 F.Supp. 698, 700 (E.D. Va. 1990) and *United States v. Stamper*, 766 F. Supp. 1396, 1396 (W.D.N.C. 1991). Additionally, M.R.E. 412 specifically provides that before a military judge can admit evidence under M.R.E. 412, the alleged victim “must be afforded a reasonably opportunity to attend and be heard.” Furthermore, “The right to be heard under this rule includes the right to be heard through counsel, including Special Victims’ Counsel under section 1044e of title 10, United States Code.” M.R.E. 412(c)(2). Ms. [REDACTED] is a non-party to this court-martial and has limited standing, however “position as a nonparty to the courts-martial . . . does not preclude standing.” *Id.*

The Defense’s Motion to Compel a deposition of Ms. [REDACTED] raises a multitude of issues related to Ms. [REDACTED] rights, privacy, and privileges under M.R.E.s 412, 502, 503, 504, 513, 514, and Article 6b, UCMJ. Thus, as a named victim in this case, Ms. [REDACTED] has standing to be heard through counsel on issues regarding Defense’s Motion to Compel a judicially ordered deposition of Ms. [REDACTED]

4. Discussion.

I. **Defenses' Motion For Appropriate Relief for a Judically Ordered Deposition of Ms. [REDACTED] violated Western Judicial Circuit Rules 10.8, and should not be considered for the first Article 39(a).**

The Defense Motion to Compel a Judically Ordered Deposition of Ms. [REDACTED] was filed after the "Motion Filed" deadline of 15 April 2022, and should not be considered for the first Article 39(a) scheduled 29 April 2022 because: (1) it violated WJCR 10.8, which states, "Unless good cause is shown, motions must be filed in accordance with the TMO. Good cause is determined by the military judge. . ." and (2) it hinders Ms. [REDACTED] ability to effectively be heard are numerous issues related judically ordered depositions, subpoenas, Article 6(b) rights, and all other applicable rights and privileges. *See Trial Management Order; Western Judicial Circuit Rules, Rule 10.8 (5 Oct 2021 ed.).* In addition, this does not hinder Defense's right to argue their Motion to Compel a Judically Order of a Deposition of Ms. [REDACTED] because the Motion filed by Defense is timely with respect to the next Motions filed deadline of 12 May 2022 and their ability to argue it at the second Article 39(a) on 2 June 2022. *See Trial Management Order.* Moreover, this does not hinder Defense to adequately prepare their case for trial because there is over a month to prepare between the second Article 39(a) on 2 June 2022 and the scheduled trial dates of 7-15 July 2022. *See id.*

Defense has not shown *good cause* on why their Motion to Compel a Deposition of Ms. [REDACTED] was submitted after the first Motions filed deadline. Simply forgetting to submit a motion is not *good cause* and there were no technical issues to submit their Motion to Compel because Defense filed numerous other timely motions, while this one was submitted on 19 April 2022. Defenses' Motion to Compel Deposition was submitted four days after the deadline, and only allowing Ms. [REDACTED] through her VLC, to respond with approximately three days instead of seven days if it was filed timely. *See Trial Management Order; See Western Judicial Sharepoint Site.*

II. Ms. [REDACTED] exercise of her rights at an Article 32 hearing does not constitute “exceptional circumstances” under R.C.M. 702(a)(2).

The gravamen of Defenses' Motion to Compel a Deposition of Ms. [REDACTED] relies on Ms. [REDACTED] exercising her rights related to Article 32 hearings, which does not constitute “exceptional circumstances” under R.C.M. 702(a)(2). *R.C.M. 702(a)(2), MCM (2019 ed.)*. At the Article 32 hearing on 30 December 2021, Defense counsel objected to Ms. [REDACTED] not being available at the Article 32. VLC for Ms. [REDACTED] objected on the record to Defenses' request and cited to the Preliminary Hearing Officer (PHO) the basis of VLC's objection which were Article 32(d)(3) and R.C.M 405(h)(2)(A)(iii).

Article 32(d)(3) states, “A victim *may not be required* to testify at the preliminary hearing. A victim who declines to testify shall be deemed to be not available for purposes of the preliminary hearing . . .” *Article 32(d)(3), MCM (2019 ed.)* (emphasis added). Additionally, under R.C.M. 405(h)(2)(A)(iii), it states, “. . . A victim who is alleged to have suffered a direct physical, emotional, or pecuniary harm as a result of the matters set forth in a charge or specification under consideration and is name in one of the specifications under consideration *shall not be required* to testify at a preliminary hearing.” *R.C.M. 405(h)(2)(A)(iii), MCM (2019 ed.)* (emphasis added).

Thus, Ms. [REDACTED] was not improperly found to be unavailable at the Article 32 by the PHO, as Defense Counsel suggests, but was properly found to be unavailable because Ms. [REDACTED] exercised her rights of “*may not*” and “*shall not* be required to testify at a preliminary hearing.” *See Article 32(d)(3), MCM (2019 ed.); See R.C.M. 405(h)(2)(A)(iii), MCM (2019 ed.)*. Additionally, Ms. [REDACTED] declination to testify at an Article 32, “shall be deemed to be not available for purposes of the preliminary hearing . . .” *Article 32(d)(3), MCM (2019 ed.)*. Ms. [REDACTED] declination and unavailability refers only to the Article 32 hearing, this does not mean Ms. [REDACTED] is unavailable to testify at a court-martial, where Defense can cross-examine. Moreover, and most importantly, “A declination under this paragraph *shall not* serve as the sole basis for ordering a deposition under section 849 of this title (article 49).” *Id.*

III. **Defense has not met their burden of “exceptional circumstances” under R.C.M. 702(a)(2) for a Deposition to be ordered.**

Defense has not met their burden of “exceptional circumstances” for a judicially ordered deposition because Defense relies primarily on: (1) Ms. [REDACTED] not testifying at an Article 32; and (2) Ms. [REDACTED] not submitting to pretrial interviews. In regards to point (1) of Ms. [REDACTED] not testifying at an Article 32, was already addressed above in Section 4, Subsection II of this Motion. *Victims’ Legal Counsel Response to the Defense Motion for Appropriate Relief (Judicial Order of Depositions), Section 4, Subsection II.*

In regards to point (2) of Ms. [REDACTED] not submitting to pretrial interviews, under R.C.M. 702(a)(3), it states, “. . . a victim’s declination to submit to pretrial interviews *shall not*, by themselves be considered “exceptional circumstances” under this rule.” *R.C.M. 702(a)(3), MCM (2019 ed.)* (emphasis added). Ms. [REDACTED] through her VLC, declined Defense’s interview, because Defense requested Ms. [REDACTED] to be made available for in-person interviews at Camp Pendleton or in Georgia, presumably where she resides, to conduct these interviews. Ms. [REDACTED] conducted a safety move to Georgia with her three minor children. To require Ms. [REDACTED] to drive back to California from Georgia (approximately 2,000 miles) with three minor children, whose ages are [REDACTED] years old, in the car is simply absurd. It is absurd because: (1) Ms. [REDACTED] has the “right to be reasonably protected from the accused; (2) Ms. [REDACTED] has the “right to be treated with fairness and with respect for the dignity and privacy of [Ms. [REDACTED]]; and (3) Ms. [REDACTED] conducted a safety to Georgia and to require her to come back to California at MCB Camp Pendleton would contradict, diminish, negate the effect of the safety move, and could be potentially used against her by Defense. *See Article 6b(a)(1) and (8), Uniform Code of Military Justice (2019 ed.).* Arguably, Defense’s request for an in-person interview at MCB Camp Pendleton is being used to harass, overly burden, and intimidate Ms. [REDACTED] which violates Ms. [REDACTED] “right to be reasonably protect from the accused” and “right to be treated with fairness and with respect for the dignity and privacy of [Ms. [REDACTED]].”

See Id.

With respect to Defense's request for a pre-trial interview in Georgia, presumably where Ms. [REDACTED] resides, violates Ms. [REDACTED] Article 6b rights and privileges because: (1) Defense requested to interview Ms. [REDACTED] in Georgia without her VLC (and the three minor children's VLC) or government trial counsel present; (2) Ms. [REDACTED] has the "right to be reasonably protected from the accused;" (3) Ms. [REDACTED] has the "right to be treated with fairness and with respect for the dignity and privacy of [Ms. [REDACTED]];" (4) Ms. [REDACTED] conducted a safety move to Georgia to be protected, and to have Defense Counsel of the accused go to Ms. [REDACTED] would contradict, diminish, negate the effect of the safety move, and could be potentially used against her by Defense. *See Id.*

First, having Defense Counsel go to Georgia, presumably where Ms. [REDACTED] resides without her VLC(s) or government trial counsel present violates R.C.M. 701(e)(1)(B). Under R.C.M. 701(e)(1)(B), it states: "If requested by an alleged victim who is subject to a request for interview under subparagraph (e)(1)(A) of this rule, any interview of the victim by counsel for the accused, . . . shall take place only in the presence of counsel for the Government, counsel for the victim, . . ." *R.C.M. 701(e)(1)(B), MCM (2019 ed.).*

Second, if Defense were to interview Ms. [REDACTED] in Georgia, presumably where she resides, Defense and possibly the accused would then know Ms. [REDACTED] address. This would completely negate the effect of the safety move because Defense and possibly the accused would know Ms. [REDACTED] address.

Lastly, Defense and possibly the accused knowing the address of Ms. [REDACTED] would be in direct contradiction to, and completely deteriorate the meaning and effect of, Ms. [REDACTED] Article 6b rights of "right to be reasonably protected from the accused" and "right to be treated with fairness and with respect for the dignity and privacy of [Ms. [REDACTED]] . ." *See Article 6b(a)(1) and (8), Uniform Code of Military Justice (2019 ed.).*

Furthermore, "exceptional circumstances" does not exist in this case to require a deposition to preserve witness/victim testimony for trial. The intent and purpose of R.C.M. 702, is to preserve testimony to be used at trial if, due to "exceptional circumstances" and "in the interest of justice", the

“deponent is likely to be unavailable to testify at the time of trial.” *R.C.M. 702(a)(1) & (2), MCM (2019 ed.).*

In this case, the deponent for the deposition requested by Defense, Ms. [REDACTED] will likely be available to testify at trial. Ms. [REDACTED] is represented by VLC, who can inform her of the dates, times, location of the trial. Additionally, VLC on behalf of Ms. [REDACTED] can work with the Government and the Command to fund her travel to MCB Camp Pendleton for the scheduled trial. Moreover, Ms. [REDACTED] is a civilian and not in the U.S. Armed Forces, thus she is not pending any ordered deployments that would cause her to be unavailable to testify at trial. Lastly, Ms. [REDACTED] is not terminally ill, thus, she will be alive and available to testify at trial.

5. Evidence. VLC does not submit any additional evidence beyond what the Defense Counsel has submitted in their Motion and any evidence submitted by Government Counsel in their own response to Defense’s Motion.

6. Burden of Proof. Pursuant to R.C.M. 905(c), the burden is on the defense by a preponderance of the evidence.

7. Relief Requested. Based upon the foregoing, the defense motion should be **denied** with respect to a judicial order of a deposition of Ms. [REDACTED]

8. Argument. VLC respectfully requests oral argument.

[REDACTED]
J. D. ZOTTOLA
Captain, U.S. Marine Corps
Victims’ Legal Counsel

CERTIFICATE OF SERVICE

An electronic copy of this response was electronically served upon the Court, the Government, and Defense on this date: 22 April 2022.



J. D. ZOTTOLA
Captain, U.S. Marine Corps
Victims' Legal Counsel

1 NAVY-MARINE CORPS TRIAL JUDICIARY
2 WESTERN JUDICIAL CIRCUIT
3 GENERAL COURT MARTIAL

4 UNITED STATES

5 v.

6 Justin Chisolm
7 Lance Corporal
U.S. Marine Corps

DEFENSE POST-TRIAL MOTION FOR
APPROPRIATE RELIEF

22 December 2022

8 **I. Nature of the Motion.**

9 The defense moves the court for the following relief:

10 1. Pursuant to Rule for Courts-Martial (R.C.M.) 1104(b), the defense requests the court
11 dismiss the charges and specifications based on the convening authority's violation of a material
12 term of the plea agreement.

13 2. The convening authority's action of 13 December 2022 contains errors and is not in
14 compliance with the plea agreement.

15 3. Given that the CA has still not complied with the plea agreement regarding deferment of
16 confinement for the accused's inpatient [REDACTED] in the alternative, the defense requests
17 the Court grant LCpl Chisolm an additional *180 days* of judicially ordered confinement credit
18 due to such noncompliance.

19 **II. Statement of Facts.**

20 1. On 26 April 2022, the Convening Authority approved the plea agreement in this case.

21 **Enclosure (1).**

1 2. Paragraph 9.b of the plea agreement provides that the government agreed to defer
2 confinement upon request of the accused to permit him to attend an appropriate [REDACTED]
3 [REDACTED] *See Enclosure (1).*

4 3. In September 2021, prior to the commencement of his pretrial confinement, the accused
5 had been screened for [REDACTED] and was diagnosed with [REDACTED]
6 As a result of that diagnosis, the accused was previously scheduled to attend [REDACTED]

7 [REDACTED] **Enclosure (2).** However, after his incarceration for his court-martial
8 charges, the command advised [REDACTED] that the accused would not be attending his scheduled
9 treatment in 2021.

10 4. On 30-31 August 2022, the general court-martial commenced wherein the accused
11 pledged guilty in accordance with the plea agreement with the government. The court
12 accepted the plea agreement.

13 5. On 6 September 2022, the sentence was adjudged in this case. **Enclosure (3).**

14 6. On 7 September 2022, the accused, through counsel, in accordance with the plea
15 agreement, requested deferment of confinement in order for him to attend the [REDACTED]
16 **Enclosure (4).**

17 7. On 16 September 2022, the accused, through counsel, submitted his clemency request.
18 **Enclosure (5).**

19 8. On 20 October 2022, after learning that the accused had not been placed in his [REDACTED]
20 [REDACTED] defense counsel sent an email to the government (trial counsel and command)
21 asking for the status of the treatment. **Enclosure (6).**

1 9. On 25 October 2022, defense counsel following up on the 20 Oct 22 email asking the
2 government (staff judge advocate, trial counsel and command) for an update as to the [REDACTED]
3 treatment. *See* Enclosure (6).

4 10. On 26 October 2022, the command finally responded to the inquiries and claimed that
5 LCpl Chisolm refused to go to treatment and had informed his defense counsel, Captain
6 [REDACTED] that he was not going to attend [REDACTED] **Enclosure (7).**

7 11. The very next day, military defense counsel visited LCpl Chisolm to determine the
8 accuracy of the government's claims of 26 Oct 22 that he refused treatment. The defense then
9 informed the government LCpl Chisolm wanted treatment and did not decline it. Notably,
10 LCpl Chisolm referenced the Brig CO questioning why the accused was in confinement if he
11 was supposed to have been in [REDACTED] after trial. *See* Enclosure (7).

13 12. On 16 November 2022, after learning that LCpl Chisolm had not been picked up on 1
14 November 2022 by the command from the brig for a [REDACTED] appointment, defense counsel sent
15 an email to the government inquiring of the same. Military defense counsel followed upon
16 again via emails on 18 Nov 22 and on 22 Nov 22. **Enclosure (8).**

17 13. On 22 Nov 22, civilian defense counsel sent an email to the CA's SJA, requesting
18 compliance with the PTA as it pertained to the [REDACTED] Shortly after this email,
19 command sent an email to military defense counsel notifying him that [REDACTED] was only going to
20 provide LCpl Chisolm [REDACTED] contrary to the terms of the plea
21 agreement. *See* Enclosure (8).

23 14. Also, on 22 Nov 22, the Convening Authority's Action (CAA) was received by the
24 defense. **Enclosure (9).** The CAA was defective. Notably, such action had been taken on
25 28 September 2022 (two months earlier) and not served upon the defense. The defense learned

1 about the CAA having been completed almost two months earlier when it contacted the court
2 clerk on 22 Nov 22 to ask about the status.

3 15. Over the course of more communications with the government, the defense learned that
4 no resolution has been reached with regard to the [REDACTED] See Enclosure (8).

5 16. Notably, despite having been screened for [REDACTED] the command sent the
6 accused for another [REDACTED] screening, which now recommended only [REDACTED]
7 contrary to the earlier recommendation prior to confinement. **Enclosure (10)**. It is unclear
8 why the government sought another evaluation. Despite defense efforts at contacting the
9 evaluator for this new recommendation, no one at [REDACTED] has explained the change in
10 recommendation.

12 17. After reviewing the initial CAA, the defense notified the court it intended to file a post-
13 trial motion due to errors in the CAA. **Enclosure (11)**.

14 18. On 23 November 22, the parties had an 802 conference with the military judge. After the
15 conference, the military judge returned the matter to the CA for new post-trial action.

16 **Enclosure (12)**.

17 19. On 29 November 2022, the defense again inquired of the SJA office as to the status of the
18 [REDACTED] **Enclosure (13)**. The SJA office replied that it was “continuing efforts.”

19 20. On 7 December 2022, the parties had another 802 conference with the court. While the
20 court originally had scheduled an Article 39(a) for 7 December 2022 to take up a defense post-
21 trial motion, since there was no new CAA and per defense request, the court merely held an
22 802 conference.

24 21. One of the matters discussed at the 802 conference was the availability of [REDACTED]
25 [REDACTED] as set forth in the plea agreement. The government represented that despite the latest

1 [REDACTED] recommendation for only outpatient treatment, if LCpl Chisolm wanted [REDACTED]
2 [REDACTED] the government would provide it, and that a bed had been reserved for 3 January
3 2023 for LCpl Chisolm's [REDACTED]

4 22. Email communication following the 7 December 2022 802 conference from the defense
5 to the government confirmed that LCpl Chisolm wanted [REDACTED] **Enclosure (14).**

6 23. On 19 December 2022, at 12:55 pm, the defense was served via email with the new CAA
7 dated 13 December 2022. **Enclosure (15).**

8 24. The CAA contains errors and is not in compliance with the plea agreement. Specifically,
9 the CA purports to defer confinement at a future date, the accused is still in confinement
10 despite deferment, no date has been set for deferment, the CA references clemency with regard
11 to the brig transfer request, and the confinement deferment would likely occur at entry of
12 judgment. If such deferment ends at entry of judgment, LCpl Chisolm would not receive the
13 benefit of his bargain, that is, the [REDACTED] the government claims is available
14 starting on 3 January 2023, because the deferment would end before LCpl Chisolm could
15 complete the [REDACTED]

16 25. On 22 December 2022, the defense contacted [REDACTED] to confirm the availability of
17 [REDACTED] Defense was notified by [REDACTED] that the [REDACTED] is not
18 available for LCpl Chisolm.

19 26. The government has failed to comply with the pretrial agreement. Thus, the accused's
20 pleas are improvident. The accused has complied with the agreement while the government has
21 violated a material term. Specific performance of the agreement is not proper under the
22 circumstances of this case.

1 **IV. Law.**

2 1. To correct an "error in the action of the convening authority," a party may file a post-
3 trial motion within five days of receiving the convening authority's action. *See* R.C.M.
4 1104(b)(1)(F), (b)(2)(B). If the military judge finds "any post-trial action by the convening
5 authority is incomplete, irregular, or contains error," the military judge may return the action to
6 the convening authority for correction. *See* R.C.M. 1104(b)(2)(B)(i). A party may also file a
7 post-trial motion to address "[a]n allegation of error in the post-trial processing of the court-
8 martial." R.C.M. 1104(b)(1)(E).

9
10 2. A pretrial agreement is a contract between the accused and the convening authority.
11 Courts look to the basic principles of contract law when interpreting pretrial agreements. The
12 interpretation of a pretrial agreement is a question of law. Whether the government has
13 complied with a material term of the contract is a mixed question of law and fact. *United*
14 *States v. Smead*, 68 M.J. 44, 57 (C.A.A.F. 2009) (*citing United States v. Lundy*, 63 M.J. 299,
15 301 (C.A.A.F. 2006)). Appellant has the burden to establish both materiality and non-
16 compliance. *Lundy*, 63 M.J. at 302.

17 3. In a typical plea agreement, a military accused foregoes certain constitutional rights in
18 exchange for a reduction in sentence or other benefit. As a result, when interpreting the
19 agreements, contract principles are outweighed by the Constitution's Due Process Clause
20 protections for an accused. In a criminal context, the Government is bound to keep its
21 constitutional promises. *Smead*, 68 M.J. at 45.

22 4. There are several available remedies for non-compliance with an agreement including
23 specific performance, or an opportunity for the accused to withdraw from the plea" as well as
24

1 the option of a post-trial agreement. *United States v. Smead (Smead I)*, 60 M.J. 755,
2 757 (citations omitted).

3 5. When an accused pleads guilty to an offense in reliance on promises made by the
4 Government in a pretrial agreement, the voluntariness of that plea depends on the fulfillment of
5 those promises by the Government. When the government does not perform those promises,
6 the critical issue is whether the misunderstanding or nonperformance relates to a material
7 term of the agreement. The accused bears the burden of establishing that the term is material
8 and that the circumstances establish governmental noncompliance. When determining whether
9 a provision is material, courts look not only to the terms of the agreement but to the accused's
10 understanding of the terms of an agreement as reflected in the record as a whole. *See United*
11 *States v. Deane*, 2016 CCA LEXIS 716 (NMCCA, 5 Dec 2016).

13 6. Pursuant to R.C.M. 1103(a)(1), confinement can be deferred upon request of the
14 accused after sentence is announced. Deferment of a sentence to confinement is postponement
15 of the running of the sentence. *See R.C.M. 1103(a)(2)*.

16 7. When deferment of restraint is granted, the deferment can end in different ways,
17 including but not limited to: (1) when the military judge enters entry of judgement; (2) when
18 the deferred confinement is suspended; (3) when the deferment expires by its own terms; (4)
19 when deferment is rescinded. R.C.M. 1103(f).

20 **V. Discussion.**

21 1. Noncompliance by government with plea agreement.

23 LCpl Chisolm fulfilled his part of the agreement through a provident guilty plea. In fact,
24 he fully complied with the PTA, but the convening authority has not. The government has failed
25 to ensure LCpl Chisolm's [REDACTED] Despite the defense's efforts on

1 behalf of their client, the government has not complied with this material term of the plea
2 agreement and apparently has no intention of doing so, since [REDACTED] has refused the treatment
3 bargained for in this case. The accused pleaded guilty almost four months ago, and yet, despite
4 his requests to be admitted into [REDACTED] the government refuses. While the
5 government may claim that the accused himself declined treatment, the record is not supportive
6 of his claim. In fact, the accused is in jail, subject to the influence and control by brig officials,
7 who have apparently declared he does not need any treatment because he has been able to avoid
8 alcohol consumption while incarcerated. Surely, brig officials, with no formal training in
9 [REDACTED] cannot expect this court to believe that as confinement officials they know
10 better than the [REDACTED] professionals who recommended LCpl Chisolm for [REDACTED]
11 [REDACTED]

12
13 Despite the government's assurances, LCpl Chisolm still has not received the benefit of
14 his bargain. Despite his defense counsel's insistence, the government still has failed in securing
15 LCpl Chisolm's [REDACTED] As of the filing of this motion, [REDACTED] personnel have
16 indicated LCpl Chisolm will not [REDACTED] Regardless of who is at fault—
17 [REDACTED] SJA, CA, Command—the government has failed to abide by a material term of the
18 agreement. As a result, the accused's pleas are improvident. The defense requests the findings
19 and sentence be set aside, and the charges dismissed with prejudice.
20

21 **2. The Convening Authority's Action is Defective and Contains Errors.**

22 The CAA is not in compliance with the pretrial agreement. The CA's attempt to defer
23 confinement is a legal nullity. Referencing the transfer to Miramar as clemency is improper.

24 First, the CA titles the request by the accused to be transferred to Miramar a "clemency"
25 request. Such request to be transferred to Miramar Brig is not a clemency request, but rather a

1 term of the plea agreement. The CA is bound under the terms of the deal to recommend that the
2 accused be transferred to Miramar to serve his confinement. While technically the CA has
3 submitted such recommendation, his action further states, "while not under my clemency
4 authority." This is not a clemency matter. Labeling it as such is improper and has the tendency
5 to indicate to reviewing authority's that as the CA, he was not permitted to grant the accused's
6 request because it was "clemency".
7

8 Next, with regard to the deferment of confinement, the CA has ordered deferment at a
9 future date. This is not proper. RCM 1103 provides for the proper manner in which deferment is
10 requested and approved. Nowhere does it state in the rule that deferment is "prospective" and is
11 dependent on a future event. The accused has requested deferment—in fact, he requested
12 deferment over three months ago—and the CA failed to properly approve or disapprove his
13 request for deferment. And, even after the accused requested deferment on 7 September 2022,
14 the CA failed to act in accordance with law. When a convening authority acts on an accused's
15 request for deferment of all or part of an adjudged sentence, the action must be in writing (with a
16 copy provided to the accused) and must include the reasons upon which the action is based upon.
17 To date, the CA has failed to take proper action.
18

19 The accused has requested deferment. The CA attempts to defer the confinement, at a
20 future date, dependent upon terms that were not agreed to by the accused. The CA's action
21 references "once identified, accepted and provided a starting date, the request is approved." This
22 is not the term of the agreement with the accused. Further, the CA orders deferment to end either
23 at completion of the treatment program or at entry of judgment. Since Entry of Judgment is
24 likely to occur before the accused can even be enrolled in the [REDACTED] program, the CA's action
25 would effectuate the termination of the treatment before it can even start. Thus, the government

1 has failed to comply with the agreement by terminating the treatment before it ends. Further, if
2 in fact, the government believes that the accused has been “accepted” in to [REDACTED] for the 3
3 January 2023 inpatient class, then the CA’s action has already deferred his confinement, and the
4 accused must be released from confinement now, as the CA’s action indicates, “adjudged
5 confinement will be deferred from the date of *acceptance* into such an approved program....”
6

7 Alternatively, if the government cannot and continues to refuse to abide by the terms of
8 the plea agreement it executed with the accused, the accused requests that the court order
9 alternative relief in the form of a judicially ordered credit of 180 days of confinement. The
10 government appears unwilling, unable, or just refuses to comply with the bargain it struck with
11 the accused. He has substantially complied with the agreement, yet the government refuses to
12 uphold its end of the bargain. Thus, a six month judicial credit is appropriate.

13 **VI. Evidence**

14 A. Testimony:

15 The defense expects to call the following witnesses and requests the government produce
16 them for the hearing (and the defense reserves the right to amend this list upon the receipt of the
17 requested discovery concerning the communications between the command, SJA, CA, [REDACTED]
18 and Navy Medicine command):

19 1. Major [REDACTED]

20 2. CWO5 [REDACTED]

21 3. SSgt [REDACTED]

22 4. Mr. [REDACTED]

23 5. Ms. [REDACTED]

24 6. Ms. [REDACTED]

1 7. 1stLt [REDACTED]

2 8. Captain [REDACTED]

3 9. [REDACTED]

4 B. Exhibits attached:

- 5 1. Plea Agreement
- 6 2. Medical Records
- 7 3. Statement of Trial Results
- 8 4. Deferment request
- 9 5. Clemency request (without enclosures)
- 10 6. Emails of 20-25 October 2022
- 11 7. Emails of 26-27 October 2022
- 12 8. Various emails of 16-22 November 2022
- 13 9. CAA of 28 September 2022
- 10 10. [REDACTED] evaluation of 6 December 2022
- 11 11. Email of 22 November 2022 re: CAA and EOJ
- 12 12. Military Judge email of 22 November 2022
- 13 13. Emails of 29-30 November 2022
- 14 14. Emails of 7 December 2022
- 15 15. CAA of 13 December 2022 with transmitting email

14 **VII. Relief Requested.**

15 Defense requests that the Court dismiss the charges with prejudice. The defense requests new CA's
16 Action. If the court does not dismiss the charges, in the alternative, the defense requests the Court
17 award an additional 180 days of confinement credit.

18 **VII. Argument.** Oral argument is requested.

21 [REDACTED]
22 Bethany L. Payton-O'Brien
23 [REDACTED]

24 Attorney for LCpl Chisolm
25

CERTIFICATION OF SERVICE

2 A true copy of this motion was served on opposing counsel and the court via electronic mail on
22 Dec 2022

Bethany L. Payton-O'Brien

Attorney for LCpl Chisolm

**NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT
GENERAL COURT MARTIAL**

UNITED STATES

V.

DEFENSE POST-TRIAL MOTION FOR
APPROPRIATE RELIEF

Justin Chisolm
Lance Corporal
U.S. Marine Corps

22 December 2022

I hereby certified that the required redactions have been made to the attached documents per Article 140a, UCMJ, JAGINST 5800-7F, and Rule 7, WJC-NMCTJ Rules of Court.

Bethany L. Payton-O'Brien

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

UNITED STATES)	
)	
v.	)	GOVERNMENT RESPONSE TO DEFENSE
	)	POST-TRIAL MFAR
JUSTIN W. CHISOLM)	
LANCE CORPORAL	)	11 January 2023
U.S. MARINE CORPS)	
)	

1. Nature of Motion.

The defense motion to dismiss all charges and specifications should be denied because it has no basis in law.

The convening authority is unable to comply with the term of the plea agreement that requires Lance Corporal

Chisolm to attend [REDACTED]. Instead, the government has identified an acceptable

alternative to that program, specifically deferment of confinement so he can attend [REDACTED]

while living in the barracks. This solution meets the intent of the plea agreement and requires minimal

modification to the convening authority's action.

2. Burden of Proof and Standard of Review

As the moving party, defense bears the burden by a preponderance of the evidence.

3. Summary of Relevant Facts

a. For purposes of this motion, the government adopts the following statements of fact from paragraph II of defense's motion: 1., 2., 4., 5., and 6. These statements accurately summarize the sequence of events from signature of the plea agreement (26 April 2022) through defense's request for deferment of confinement (7 September 2022).

b. On 9 September 2022, Staff Sergeant [REDACTED] a command representative, visited Lance Corporal Chisolm in the brig. Among the topics they discussed was [REDACTED]
[REDACTED] with Staff Sergeant [REDACTED] noting that he would "talk to [REDACTED]
about treatment. *Enclosure (1).*

c. On 16 September 2022, Staff Sergeant [REDACTED] visited Lance Corporal Chisolm again. This time Lance Corporal Chisolm communicated to him "no [REDACTED] Staff Sergeant [REDACTED] noted that he would "pass [this] info up to 1stSgt & [REDACTED] *Enclosure (1)*. Staff Sergeant [REDACTED] told Lance Corporal Chisolm that he would wait a couple days to confirm that he truly no longer wanted to attend [REDACTED] *Expected testimony of Staff Sergeant [REDACTED]*

d. On 19 September 2022, Staff Sergeant [REDACTED] visited Lance Corporal Chisolm in the brig and confirmed that he wanted to "opt out of [REDACTED] Staff Sergeant [REDACTED] informed Lance Corporal Chisolm that he would return with a form for him to "sign [for] opting out of [REDACTED] *Enclosure (1)*. Upon consultation with a command representative, however, Staff Sergeant [REDACTED] did not have Lance Corporal Chisolm sign any forms memorializing this decision. *Expected testimony of Staff Sergeant [REDACTED]*

e. Staff Sergeant [REDACTED] continued to visit Lance Corporal Chisolm in the brig, meeting with him on 6 October, 11 October, and 17 October 2022. Lance Corporal Chisolm did not raise the issue of [REDACTED] during any of those visits. *See Enclosure (1)*.

f. On 20 October 2022, defense emailed the command inquiring about the status of Lance Corporal Chisolm's [REDACTED] *See paragraph II.8. of defense motion.*

g. The next time Lance Corporal Chisolm mentioned [REDACTED] to Staff Sergeant [REDACTED] was 27 October 2022, during the next command visit after defense's email. Lance Corporal Chisolm informed Staff Sergeant [REDACTED] that he had changed his mind again and did in fact want to attend treatment. Staff Sergeant [REDACTED] confirmed an appointment scheduled for the following week and noted the command's plan to ensure Lance Corporal Chisolm's attendance there. *See Enclosure (1)*.

h. From 20 October 2022 through 11 January 2023, the command has worked diligently to secure [REDACTED] for Lance Corporal Chisolm. There have been various issues: a change in Lance Corporal Chisolm's diagnosis led to a change in his recommended [REDACTED] initially misunderstood that Lance Corporal Chisolm would not remain in confinement while receiving treatment; and conflicting guidance from different [REDACTED] offices caused confusion over what treatment options were actually available. *Expected testimony of Major [REDACTED] 1st Marine Division Deputy Staff Judge Advocate.*

i. On 19 December 2022, for example, a representative from Naval Medical Center San Diego informed the command that Lance Corporal Chisolm's medical recommendation was for [REDACTED] and not for [REDACTED]. As a result, her facility "cannot accept [Lance Corporal Chisolm] for [REDACTED]. [REDACTED] She recommended that he "complete his incarceration and, upon completion of his time in the brig, he can be re-evaluated for appropriate treatment." *Enclosure (2)*.

j. Mr. [REDACTED] the Senior Attorney for Navy Medicine West, confirmed this dilemma on 10 January 2023 when he informed the government that his command's "recommendations for treatment cannot be based on extra-clinical considerations such as the terms of a pretrial agreement." *Enclosure (3)*.

k. In light of this, the government proposed to defense that the convening authority defer Lance Corporal Chisolm's confinement in order for him to receive [REDACTED] while living in the barracks, with access to all of the resources he would need to effectively participate in the treatment. *See Enclosure (3)*. Defense responded that this option "would not be advisable for our client." *Id.*

4. Statement of Law

Rule for Courts-Martial (RCM) 1104(b)(1)(F) permits post-trial motions to address an "allegation of error in the convening authority's action." This motion must be filed within five days of the party receiving the convening authority's action. *RCM 1104(b)(2)(B)*. If the military judge finds that the post-trial action by the convening authority is "incomplete, irregular, or contains error," he can either return the action to the convening authority for correction or, with the agreement of all parties, correct the action of the convening authority in the entry of judgment. *Id.*

5. Argument

1. Compliance with Plea Agreement. The government has taken substantial steps to comply with the plea agreement by making good-faith attempts to secure [REDACTED] for Lance Corporal Chisolm. The problem now appears to be a matter of legal impossibility: the convening authority cannot send Lance Corporal Chisolm to a program he is no longer eligible to attend due to a change in diagnosis. Clinical diagnoses and conditions for admission to [REDACTED] fall outside the scope of the convening authority's control. This is not a failure to comply with a term of the deal—it is a term of the deal that is impossible to

comply with because of Lance Corporal Chisolm's updated diagnosis. Defense does not cite any law in support of their argument to dismiss all charges and specifications, the most extreme remedy available. They are holding this conviction hostage by insisting on treatment for their client that he no longer wanted, is no longer eligible for, and is impossible to provide.

Instead, the government has offered a more reasonable approach: defer Lance Corporal Chisolm's confinement while he attends the [REDACTED] for which he is actually eligible. The barrier to [REDACTED] in the past has been his lack of reliable access to a computer, the internet, and the time and privacy needed to adequately participate in the course of treatment while he remained in the brig. Setting him up in a barracks room with the necessary equipment for the duration of [REDACTED] addresses each of those problems. This proposal meets the intent of the plea agreement within the constraints of this case.

2. Defects in the Convening Authority's Action. Defense alleges two primary defects: first, referring to the recommendation for transfer to Miramar as "clemency," and second, improper deferment of confinement. Regarding the brig transfer recommendation, defense concedes that "the CA [convening authority] has submitted such recommendation." *Defense motion at 9.* Their objection therefore seems to be to the form of the recommendation rather than to its substance. Either way, defense's argument is based on a misinterpretation of the terms in the convening authority's action. The action does not purport that a brig transfer recommendation falls under the convening authority's clemency authority. In fact, it states just the opposite: the convening authority made the recommendation "not under my clemency authority" but rather as part of the plea agreement. *Enclosure (15) to defense motion.* Defense's argument that the convening authority improperly labelled the brig transfer recommendation is contradicted by a plain reading of the action itself. It is also unclear what remedy defense seeks to this alleged error.

Defense's second argument focuses on improper deferment of confinement. The government agrees that this portion of the action should be modified because, as written, it could potentially lead to the premature end of the deferment of Lance Corporal Chisolm's confinement. For example, if he were to begin a course of treatment but not complete it before the military judge signed the entry of judgment, Lance Corporal Chisolm would be placed back into confinement before finishing his treatment. At this point, it seems unrealistic that Lance Corporal

Chisolm will complete his treatment before the entry of judgment. The military judge should therefore exercise his authority under RCM 1104(b)(2)(B) to modify the convening authority's action. This is the most effective and efficient approach. For example, the following sentence could replace the sentence in question: "The adjudged confinement will be deferred from the starting date of such an approved program until the date of successful completion of such program." The action should also be modified to replace [REDACTED] on line 5 with [REDACTED] to reflect the updated treatment plan. This is a much less drastic remedy than the defense proposal of 180 days of judicially ordered confinement credit, which is not based in any law or analysis.

6. Relief Requested.

The government respectfully requests the Court deny defense's motion for dismissal of all charges and specifications or 180 days of confinement credit. There is a much more reasonable approach to the dilemma posed by this unique set of circumstances.

7. Evidence.

The following evidence is offered in the form of enclosures in support of this motion:

1. Brig Visitation Logs
2. Email from Ms. [REDACTED] Deputy Department Head, [REDACTED] Naval Medical Center San Diego, dtd 15 December 2022
3. Email from Mr. [REDACTED] Senior Attorney for Navy Medicine West, dtd 10 January 2023
4. Email Correspondence Among Trial and Defense Counsel, dtd 10-11 January 2023.

The government also intends to call the following witnesses at a post-trial Article 39(a):

1. Staff Sergeant [REDACTED] USMC
2. Major [REDACTED] USMC.

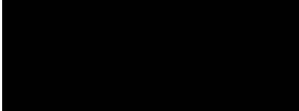
8. Oral Argument.

The Government respectfully requests oral argument if this issue requires a post-trial Article 39(a) session.

C. H. PITT
Major, U.S. Marine Corps
Trial Counsel

CERTIFICATE OF SERVICE

A true copy of this motion was served on the Court and Defense Counsel electronically on 11 January 2023.



C. H. PITTS
Major, U.S. Marine Corps
Trial Counsel

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

UNITED STATES

v.

Justin Chisolm
Lance Corporal
U.S. Marine Corps

DEFENSE MOTION FOR APPROPRIATE
RELIEF (COMPEL DISCOVERY
SUBPOENAS) AND PROPOSED ORDER

26 August 2022

I. Nature of the Motion. Pursuant to Rule for Courts-Martial (R.C.M.) 906, the defense requests the court order LCpl Chisolm's medical providers to submit to interviews by defense counsel.

II. Statement of Facts.

1. On 5 October 2021, LCpl Chisolm was placed in pretrial confinement for alleged acts that took place between 2 and 3 October 2021.
2. On 8 October 2021, military defense counsel were detailed to represent LCpl Chisolm, and the government was notified of such detailing.
3. On 28 October 2021, charges were preferred against the accused for violations of Article 90 (Willfully disobeying a superior commissioned officer), Article 125 (Kidnapping), Article 128 (Battery upon a spouse), Article 107 (False official statement), and three specifications of Article 119b (Child endangerment).
4. The defense has filed an Article 13 motion in this case, alleging among other things that the command's failures in conducting regular visitation with the accused and providing him assistance with his personal, business and tax matters have caused prejudice to him including

1 the loss of his vehicle, unsanitary clothing, the inability to file his tax returns, and financial
2 distress.

3 5. The accused gave consent to his civilian counsel to obtain his Navy Federal Credit Union
4 Records for his towed vehicle, and the towing and storage records from the local tow company.

5 6. Despite forwarding the properly executed releases to NFCU and RoadOne Towing, both
6 entities have not provided all of the requested documentation for use in court.

7 7. RoadOne Towing has not replied at all to defense requests, and NFCU has indicated it is
8 only allowed to provide bank statements to the defense counsel, but all other requested records
9 must be requested via subpoena.

10 8. Defense counsel requested the government issue a subpoena to the two companies and
11 the government has refused.

13 **III. Discussion**

14 In order to provide evidence of the financial prejudice to the accused as part of his
15 Article 13 motion, the defense must have the bank records and tow company records.
16 These matters are in the possession of the two companies, who have refused to provide
17 them to the defense despite a valid release from the accused, and trial counsel has refused
18 to issue the subpoenas. A properly issued subpoena or court order will be sufficient to
19 obtain the records. Proposed orders are attached.

20 **IV. Evidence**

21 1. Accused's releases
22 2. Emails and correspondence with RoadOne Towing
23 3. Emails and correspondence with NFCU
24 4. Emails with trial counsel

1 **VI. Burden and Standard of Proof.**

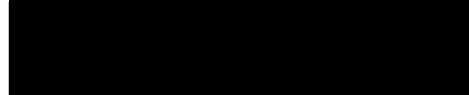
2 Pursuant to RCM 905(c), the burden of persuasion is on the defense to establish its
3 entitlement to this Order.

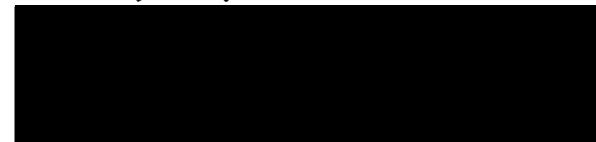
4 **VI. Relief Requested.**

5 The defense requests that the court approve the proposed Order.

6 **VIII Argument.**

7 Oral argument is requested if the government opposes this motion.

10 
11 Bethany L. Payton-O'Brien

12 
13 Attorney for LCpl Chisolm

1

2

3 **CERTIFICATION OF SERVICE**

4

5

6 A true copy of this motion was served on opposing counsel via electronic mail on 26 August
7 2022

8

9

10 [REDACTED]

11 Bethany L. Payton-O'Brien

12 [REDACTED]

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26 Attorney for LCpl Chisolm

1 NAVY-MARINE CORPS TRIAL JUDICIARY
2 WESTERN JUDICIAL CIRCUIT
3 GENERAL COURT MARTIAL

4 UNITED STATES

5 v.

6 DEFENSE MOTION FOR APPROPRIATE
7 RELIEF (COMPEL DISCOVERY
8 SUBPOENAS) AND PROPOSED ORDER

9 Justin Chisolm
10 Lance Corporal
11 U.S. Marine Corps

12 26 August 2022

13 I hereby certify that the required redactions have been made to the attached documents per
14 Article 140a, UCMJ, JAGINST 5800-7F, and Rule 7, WJC-NMCTJ Rules of Court.

1 NAVY-MARINE CORPS TRIAL JUDICIARY
2 WESTERN JUDICIAL CIRCUIT
3 GENERAL COURT MARTIAL

4 UNITED STATES

5 v.

6 Justin Chisolm
7 Lance Corporal
U.S. Marine Corps

4 COURT ORDER TO NAVY FEDERAL
5 CREDIT UNION

6 26 August 2022

7 The Court, having considered the motion to compel a court order filed on 26 August
8 2022, the Court hereby orders Navy Federal Credit Union, Subpoena Compliance, [REDACTED]

9 [REDACTED] to release to Bethany L. Payton-O'Brien,

10 [REDACTED] the

11 following records: All Navy Federal Credit Union records for the period 1 October 2021 to the
12 present, pertaining to Justin Chisolm, [REDACTED]

13 [REDACTED] to include the following:

14

- 15 a. Navy Federal Credit Union records the account activity pertaining to any NFCU
16 automobile loan in which Justin Chisolm is the applicant, principal, guarantor, co-signor;
- 17 b. Any vehicle loan application, terms, contract and monthly automobile loan statements for
18 Justin Chisolm;
- 19 c. Any vehicle lien sale, collection, repossession, charge off, storage fees, and any other
20 records pertaining to the Nissan Pathfinder vehicle loan of Justin Chisolm; and
- 21 d. Balance of any vehicle loan, including any fees, collection, lien sale credit, and other costs.

22 Such records are due on or before Tuesday, 30 August 2022 at 5:00 PM (PST).

23 It is so ORDERED.

24
25 LtCol DEREK A. POTEET
Military Judge

1 NAVY-MARINE CORPS TRIAL JUDICIARY
2 WESTERN JUDICIAL CIRCUIT
3 GENERAL COURT MARTIAL

4 UNITED STATES

5 v.

6 Justin Chisolm
7 Lance Corporal
U.S. Marine Corps

8

9 COURT ORDER TO ROAD ONE
10 TOWING

11 26 August 2022

12 The Court, having considered the motion to compel a court order filed on 26 August
13 2022, the Court hereby orders **Road One Towing, Subpoena Compliance,** [REDACTED]

14 [REDACTED] to
15 release to Attorney Bethany L. Payton-O'Brien, [REDACTED]
16 [REDACTED] the following records, pertaining to a Nissan
17 Pathfinder, California License Plate [REDACTED] for the period 1 October 2021 to the present date:

18

- 19 a. Towing records
- 20 b. Storage records
- 21 c. Fees assessed for towing and storage

22 d. Dates vehicle in tow yard, date released, identity of the company or individual to
23 whom the vehicle was release, and any fees paid by company or individual that assumed
24 possession of the vehicle.

25 Such records are due on or before Tuesday, 30 August 2022 at 5:00 PM (PST).

It is so ORDERED.

LtCol DEREK A. POTEET
Military Judge

REQUESTS

THERE ARE NO REQUESTS

NOTICES

**GENERAL COURT-MARTIAL
NAVY-MARINE CORPS TRIAL JUDICIARY**

UNITED STATES)
)
)
VS.)
)
)
JUSTIN CHISOLM) **NOTICE OF APPEARANCE**
LCPL/E-3)
)
)

Now Comes Bethany L. Payton-O'Brien, CAPT, JAGC, USN (Retired), who enters her appearance on behalf of the Accused, LCPL Justin Chisolm, USMC.

I certify I am admitted to the bar of the State of Illinois, as well as the service Courts of Criminal Appeals and the Court of Appeals for the Armed Forces. I am a member in good standing in all jurisdictions. I have not acted in any disqualifying matter which might tend to disqualify me in this court-martial. I have reviewed the court rules applicable to courts-martial and agree to abide by them. I was previously certified under Articles 27(b) and 42(a), UCMJ, and have never been decertified by the Judge Advocate General of the Navy. I have no disciplinary actions pending. Over the course of my 28-year legal career, I have handled well over 500 court-martial cases, as civilian counsel, military counsel, and trial and appellate judge.

My contact information is as follows:

Name: Bethany L. Payton-O'Brien

B. L. PAYTON-O'BRIEN

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**GENERAL COURT-MARTIAL
NAVY-MARINE CORPS TRIAL JUDICIARY**

UNITED STATES)
)
)
VS.) **NOTICE OF APPEARANCE**
)
)
JUSTIN CHISOLM) **Date: 8 Feb 2021**
LCPL/E 3)

Now Comes Paul C. LeBlanc, CAPT, JAGC, USN (Retired), who enters his appearance on behalf of the Accused, LCPL Justin Chisolm, USMC.

I certify I am admitted to the bar of the State of California, New Hampshire, and the District of Columbia, as well as the service Courts of Criminal Appeals and the Court of Appeals for the Armed Forces. I am a member in good standing in all jurisdictions. I have not acted in any disqualifying matter which might tend to disqualify me in this court-martial. I have reviewed the court rules applicable to courts-martial and agree to abide by them. I was previously certified under Articles 27(b) and 42(a), UCMJ, and have never been decertified by the Judge Advocate General of the Navy. I have no disciplinary actions pending. Over the course of my 31-year legal career, I have handled well over 700 court-martial cases, as civilian counsel, military counsel, and trial military judge, and federal prosecutor.

My contact information is as follows:

Name: Paul C. LeBlanc

[REDACTED]

P. C. LeBLANC

[REDACTED]

NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT

UNITED STATES

v.

Justin Chisolm

Lance Corporal, USMC

)
) VICTIMS' LEGAL COUNSEL
) NOTICE OF APPEARANCE
) ON BEHALF OF
)
) Date: 14 February 2022

1. Pursuant to Rule 36.2 of the Uniform Rules of Practice Before Navy-Marine Corps Courts-Martial (Uniform Rules) I, Captain Seth L. Proctor, USMC, hereby provide notice to the Circuit Military Judge of my appearance on behalf of three minor children involved in the case, [REDACTED]

[REDACTED] My office address, phone number, and e-mail address are:

[REDACTED]

2. I have been detailed as the Victims' Legal Counsel for the above named victim in this case by the Regional Victims' Legal Counsel, Lieutenant Colonel [REDACTED] I am qualified and certified under Article 27(b) and sworn under Article 42(a) of the Uniform Code of Military Justice. I have not acted in any disqualifying manner.

3. I am aware of the standards of professional conduct required of counsel practicing in Navy-Marine Corps courts-martial as contained in JAG Instruction 5803.1E. I certify that I am not now, nor have I ever been, de-certified or suspended from practice in Navy-Marine Corps courts-martial by the Judge Advocate General of the Navy.

4. I have reviewed and am familiar with the Uniform Rules of Practice for the Navy-Marine Corps Trial Judiciary and the Western Judicial Circuit Rules of Practice

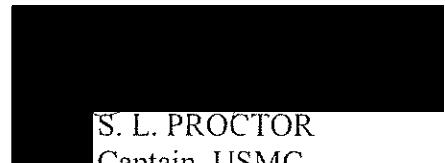
5. My client has limited standing as a named victim in this court-martial, and he reserves the right to exercise those rights through counsel as needed.

Respectfully submitted this 14th day of February 2022.

[REDACTED]
S. L. PROCTOR
Captain, USMC

CERTIFICATE OF SERVICE

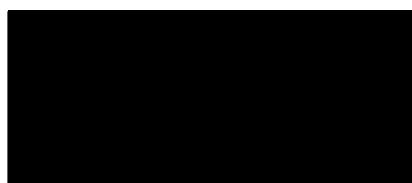
I certify that a copy of this Notice of Appearance was uploaded to the Western Judicial Circuit sharepoint on the 14th day of February 2022.



DEPARTMENT OF THE NAVY
NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT

UNITED STATES)
)
v.	) VICTIMS' LEGAL COUNSEL
JUSTIN CHISOLM	) NOTICE OF APPEARANCE
LANCE CORPORAL	) ON BEHALF OF
U.S. MARINE CORPS	) MS. [REDACTED]

1. I, Captain Joseph D. Zottola, USMC, Victims' Legal Counsel, Marine Corps Base Camp Pendleton, CA, admitted to practice law and currently in good standing in the Commonwealth of Pennsylvania and am certified in accordance with Article 27(b) and sworn in accordance with Article 42(a) of the Uniform Code of Military Justice, hereby enter my appearance in the above captioned court-martial on behalf of Ms. [REDACTED] a named victim in the case.
2. The Regional Victims' Legal Counsel-West, Marine Corps Victims' Legal Counsel Organization, detailed me to represent Ms. [REDACTED] and I have entered into an attorney-client relationship with Ms. [REDACTED] I have not acted in any manner which might disqualify me in the above captioned court-martial.
3. Ms. [REDACTED] reserves the right to be present throughout the court-martial in accordance with Military Rule of Evidence 615, with the exception of closed proceedings that do not involve her.
4. To permit a meaningful exercise of Ms. [REDACTED] rights and privileges, I respectfully request that this Court direct the defense and government to provide me with informational copies of motions and accompanying papers filed pertaining to issues that fall under Military Rules of Evidence 412, 513, 514, and 615 and in which Ms. [REDACTED] rights and privileges are addressed.
5. Ms. [REDACTED] has limited standing in this court-martial, and Ms. [REDACTED] reserves the right to make factual statements and legal arguments herself or through counsel.
6. My current contact information is as follows:



Respectfully submitted this 14th day of February 2022.

[REDACTED]
J. D. ZOTTOLA
Captain, USMC

COURT RULINGS & ORDERS

**THERE ARE NO COURT RULINGS
AND ORDERS**

STATEMENT OF TRIAL RESULTS

STATEMENT OF TRIAL RESULTS

SECTION A - ADMINISTRATIVE

1. NAME OF ACCUSED (last, first, MI)	2. BRANCH	3. PAYGRADE	4. DoD ID NUMBER
CHISOLM, Justin W.	Marine Corps	E-3	
5. CONVENING COMMAND	6. TYPE OF COURT-MARTIAL	7. COMPOSITION	8. DATE SENTENCE ADJUDGED
1st Marine Division	General	Judge Alone - MJA16	Sep 6, 2022

SECTION B - FINDINGS

SEE FINDINGS PAGE

SECTION C - TOTAL ADJUDGED SENTENCE

9. DISCHARGE OR DISMISSAL	10. CONFINEMENT	11. FORFEITURES	12. FINES	13. FINE PENALTY	
Bad conduct discharge	40 months	Total forfeitures	None	N/A	
14. REDUCTION	15. DEATH	16. REPRIMAND	17. HARD LABOR	18. RESTRICTION	19. HARD LABOR PERIOD
E-1	Yes <input type="radio"/> No <input checked="" type="radio"/>	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
336	11 71 20230601	407-347 days 20230601

SECTION E - PLEA AGREEMENT OR PRE-TRIAL AGREEMENT

See Supplemental Ruling
attached

24. LIMITATIONS ON PUNISHMENT CONTAINED IN THE PLEA AGREEMENT OR PRE-TRIAL AGREEMENT

A Bad-Conduct or a Dishonorable Discharge shall be adjudged. Confinement shall be adjudged as follows, for the Spec of Ch I, 4 mos.; for the Spec of Ch III, 3-4 mos.; for each of Specs 1, 2, & 3 of Ch V, 8-11 mos. each; for the Spec of the Add'l Charge, 1 month; all to be served consecutively. Total conf. amount: 32-42 mos. Forfeitures and Reduction may be adjudged. No other punishments shall be adjudged.

SECTION F - SUSPENSION OR CLEMENCY RECOMMENDATION

25. DID THE MILITARY JUDGE RECOMMEND SUSPENSION OF THE SENTENCE OR CLEMENCY?	Yes <input checked="" type="radio"/> No <input type="radio"/>	26. PORTION TO WHICH IT APPLIES	27. RECOMMENDED DURATION
		The adjudged total forfeitures	12 months

28. FACTS SUPPORTING THE SUSPENSION OR CLEMENCY RECOMMENDATION

At para. 11.c.2 of the Plea Agreement, the Accused agreed to provide an allotment for his wife, Ms. [REDACTED] to the Convening Authority. Ms. [REDACTED] is mother of the three young children listed at Charge V in this case. See also AE L (50) victim stmt, and para. 11.c.1 of Plea Agreemt.

SECTION G - NOTIFICATIONS

29. Is sex offender registration required in accordance with appendix 4 to enclosure 2 of DoDI 1325.07?	Yes <input type="radio"/> No <input checked="" type="radio"/>
30. Is DNA collection and submission required in accordance with 10 U.S.C. § 1565 and DoDI 5505.14?	Yes <input checked="" type="radio"/> No <input type="radio"/>
31. Did this case involve a crime of domestic violence as defined in enclosure 2 of DoDI 6400.06?	Yes <input checked="" type="radio"/> No <input type="radio"/>
32. Does this case trigger a firearm possession prohibition in accordance with 18 U.S.C. § 922?	Yes <input checked="" type="radio"/> No <input type="radio"/>

SECTION H - NOTES AND SIGNATURE

33. NAME OF JUDGE (last, first, MI)	34. BRANCH	35. PAYGRADE	36. DATE SIGNED	38. JUDGE'S SIGNATURE
Poteet, Derek A.	Marine Corps	O-5	Sep 6, 2022	POTEET.DER [REDACTED] Digitally signed by POTEET.DEREK.AN EK.ANDREW [REDACTED] Date: 2022.09.06 - 15:24:59 -07'00'
37. NOTES	1 day Suzuki credit + 10 days Art 13 credit ordered. Plea A. addresses: Defermt of conf for [REDACTED] Susp. of adjudged forfs.; Deferment & waiver of auto. forfs.			

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	90	Specification:	Guilty	Guilty	Not drive on base	090-B1	090-B1		
		Offense description	Willfully disobeying a superior commissioned officer o/a 2 Oct 21 after ordered not to drive on base						
Charge II	125	Specification:	Not Guilty	W/D	Kidnapping [REDACTED] a minor, o/a 2-3 Oct 21, by wrongfully confining and holding against his will	134-S1	134-S1		
		Offense description	Withdrawn and Dismissed						
Charge III	128	Specification:	Guilty	Guilty	W/drawn and dismissed w/o prejudice to ripen into prejudice upon completion of appellate review where the findings and sentence have been upheld	Battery on his spouse, [REDACTED] by unlawfully grabbing her arm w/ his hand, btw o/a 2 and 3 Oct 21	128-G1		
		Offense description	Withdrawn and Dismissed						
Charge IV	107	Specification:	Not Guilty	W/D	False official statement to Officer [REDACTED] o/a 3 Oct 21 that the children were being watched by his aunt	W/drawn and dismissed w/o prejudice to ripen into prejudice upon completion of appellate review where the findings and sentence have been upheld	107-B-1		
		Offense description	Withdrawn and Dismissed						
Charge V	119b	Specification 1:	Guilty by E&S	Guilty by E&S	Child endangerment of [REDACTED] child under 16, by design, o/a 2-3 Oct 21 while resp for care of [REDACTED]	Guilty, except the words "by confining the same [REDACTED] in the closed trunk of a car"; substituting therefor the words "by locking the same [REDACTED] in the car, which was parked in a public parking lot overnight"	134-F2		
		Offense description	Exceptions and Substitutions						
		Exceptions and Substitutions	Specification 2:						
		Specification 2:	Guilty by E&S	Guilty by E&S			134-F2		
		Offense description	Exceptions and Substitutions						
		Exceptions and Substitutions	Specification 3:						
		Specification 3:	Guilty by E&S	Guilty by E&S			134-F2		
		Offense description	Exceptions and Substitutions						
		Exceptions and Substitutions	Child endangerment of [REDACTED] child under 16, by design, o/a 2-3 Oct 21 while resp for care of [REDACTED]						
Additional Charge	113	Specification:	Guilty	Guilty	Guilty, except the words "by confining the same [REDACTED] in the closed trunk of a car"; substituting therefor the words "by locking the same [REDACTED] in the car, which was parked in a public parking lot overnight"	Drunk driving o/a 4 Sep 21 by physically controlling a passenger car while drunk	111-A2		
		Offense description	Specification:						

MILITARY JUDGE ALONE SEGMENTED SENTENCE

SECTION J - SENTENCING

CHARGE	SPECIFICATION	CONFINEMENT	CONCURRENT WITH	CONSECUTIVE WITH	FINE
Charge I	Specification: 4 months	N/A		All others.	None..
Charge II	Specification: N/A	N/A		N/A	N/A
Charge III	Specification: 3 months	N/A		All others.	None.
Charge IV	Specification: N/A	N/A		N/A	N/A
Charge V	Specification 1: 10 months	N/A		All others.	None.
	Specification 2: 11 months	N/A		All others.	None.
	Specification 3: 11 months	N/A		All others.	None.
Additional Charge	Specification: 1 month	N/A		All others.	None.

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	
Chisolm, Justin W.	E3		
4. UNIT OR ORGANIZATION	5. CURRENT ENLISTMENT	6. TERM	
Hq Co, 5th Marines, 1st MarDiv	09-Sep-2019	4 years	
7. CONVENING AUTHORITY (UNIT/ORGANIZATION)	8. COURT-MARTIAL TYPE	9. COMPOSITION	10. DATE SENTENCE ADJUDGED
1st Marine Division	General	Judge Alone - MJA16	06-Sep-2022

Post-Trial Matters to Consider

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

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

- SJA consulted with the Convening Authority and explained his clemency authority under Art. 60, UCMJ.
 - The Military Judge recommended that the adjudged total forfeitures be suspended for a period of 12 months, pursuant to the Plea Agreement.
 - On 7 September 2022, Detailed Defense Counsel submitted letter 5800 DSO/rIm of 7 Sep 22, requesting the Convening Authority recommend in writing to the Commanding Officer of the Camp Pendleton Brig, that the accused be transferred to the Naval Consolidated Brig aboard Marine Corps Air Station Miramar. Additionally, the accused requests that confinement be deferred to attend an appropriate [REDACTED] within the Department of the Navy [REDACTED] pursuant to the Plea Agreement.

Summary of Clemency/Deferment Requested by Accused Continued on Page 3.

24. Convening Authority Name/Title	25. SJA Name
Major General B. T. WATSON/ Commanding General	Colonel [REDACTED]
26. SJA signature	27. Date
	DEC 08 2022

SECTION B - CONVENING AUTHORITY ACTION

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

I have considered the Military Judge's recommendation and all matters submitted by the accused. Pursuant to the Plea Agreement, the Military Judge's recommendation and accused's request the adjudged total forfeiture of all pay and allowances is suspended for 12 months from the entry of judgment, at which time, unless the suspension is sooner vacated, the suspended forfeitures will be remitted without further action. Pursuant to the Plea Agreement, the accused's request for confinement to be deferred to attend an appropriate [REDACTED] within the Department of the Navy [REDACTED] once identified, accepted, and provided a starting date, upon that starting date, the request is approved. The adjudged confinement will be deferred from the date of acceptance into such an approved program until the date of successful completion of such program, or until the entry of judgment, whichever is sooner. Pursuant to the Plea Agreement, I, the Convening Authority, defer all of the automatic forfeitures from 14 days from the date the sentence was adjudged until the date the entry of judgment is signed by the Military Judge. All of the automatic forfeitures are waived for a period of 6 months or upon expiration of term of service, whichever is sooner, with the waiver commencing on the date the entry of judgment is signed by the Military Judge. The total pay and allowances is directed to be paid to [REDACTED] spouse of the accused, for the benefit of herself and the accused's dependent children.

The accused's request to be transferred to the Naval Consolidated Brig aboard Marine Corps Air Station Miramar, while not under my clemency authority, was positively endorsed. Specifically, on 28 September 2022, I recommended to the Commanding Officer, Camp Pendleton Base Brig, that the accused be transferred to the confinement facility on board Marine Corps Air Station Miramar. The accused's request that the adjudged reduction to E-1 to be commuted, is denied. The accused's request for the adjudged reduction to E-1 to be suspended for a period of six months, is denied. The accused's request for all additional clemency within my discretion to be granted, is denied. The remainder of the sentence is approved as adjudged.

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:

In reaching my decision, I have considered the nature of the accused's offenses, the sentence adjudged, the effect on good order and discipline, and the accused's character, mental condition, family situation, and service record.

(United States v. Riboni, at 2 (N.M.C.C.A., 20 January 2022)).

30. Convening Authority's signature

31. Date

13 Oct 2022

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

DEC 15 2022

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

- On 16 September 2022, Detailed Defense Counsel submitted letter 5800 DSO/rIm of 16 Sep 22, requesting the Convening Authority commute or suspend (for a period of six months) the adjudged reduction to E-1, so the allotment remains at the pay grade of E-3; Suspend the adjudged forfeitures for a period of 12 months, in accordance with the plea agreement; and grant all additional clemency that is within his discretion.

-The victims did not submit matters in accordance with RCM 1106a.

ENTRY OF JUDGMENT

ENTRY OF JUDGMENT

SECTION A - ADMINISTRATIVE

1. NAME OF ACCUSED (LAST, FIRST, MI)	2. PAYGRADE/RANK	3. DoD ID NUMBER	
CHISOLM, Justin W.	E3	[REDACTED]	
4. UNIT OR ORGANIZATION	5. CURRENT ENLISTMENT	6. TERM	
Hq Co., 5th Marines, 1st MarDiv	09-Sep-2019	4 years	
7. CONVENING AUTHORITY (UNIT/ORGANIZATION)	8. COURT-MARTIAL TYPE	9. COMPOSITION	10. DATE COURT-MARTIAL ADJOURNED
1st Marine Division	General	Judge Alone - MJA16	16-Feb-2023

SECTION B - ENTRY OF JUDGMENT

MUST be signed by the Military Judge (or Circuit Military Judge) within 20 days of receipt

11. Findings of each charge and specification referred to trial. [Summary of each charge and specification (include at a minimum the gravamen of the offense), the plea of the accused, the findings or other disposition accounting for any exceptions and substitutions, any modifications made by the convening authority or any post-trial ruling, order, or other determination by the military judge. R.C.M. 1111(b)(1)]

On 1 September 2022, the Accused entered pleas and the Military Judge entered findings regarding the charged offenses as follows:

Charge I: Violation of the UCMJ, Article 90

Plea: Guilty Finding: Guilty

Specification: Willfully disobeying a superior commissioned officer on or about 2 Oct 21, after having received a lawful command from Capt [REDACTED] to not drive on base.

Plea: Guilty Finding: Guilty

Charge II: Violation of the UCMJ, Article 125

Plea: Not Guilty Finding: Withdrawn and Dismissed*

Specification: Kidnapping [REDACTED] a minor, on or about 2-3 Oct 21, by wrongfully confining and holding [REDACTED] against his will.

Plea: Not Guilty Finding: Withdrawn and Dismissed*

Charge III: Violation of the UCMJ, Article 128

Plea: Guilty Finding: Guilty

Specification: Battery on [REDACTED] Ms. [REDACTED] by unlawfully grabbing her arm with his hand, between on or about 2 and 3 Oct 21.

Plea: Guilty Finding: Guilty

Charge IV: Violation of the UCMJ, Article 107

Plea: Not Guilty Finding: Withdrawn and Dismissed*

Specification: False official statement to Officer [REDACTED] on or about 3 Oct 21 that the children were being cared for by his aunt.

Plea: Not Guilty Finding: Withdrawn and Dismissed*

Charge V: Violation of the UCMJ, Article 119b

Plea: Guilty Finding: Guilty

Specification 1: Child endangerment by design, of [REDACTED] a child under 16, on or about 2-3 Oct 21 while responsible for his care.

Plea: Guilty by E&S** Finding: Guilty by E&S**

Specification 2: Child endangerment by design, of [REDACTED] a child under 16, on or about 2-3 Oct 21 while responsible for his care.

Plea: Guilty by E&S*** Finding: Guilty by E&S***

Specification 3: Child endangerment by design, of [REDACTED] a child under 16, on or about 2-3 Oct 21 while responsible for his care.

Plea: Guilty by E&S**** Finding: Guilty by E&S****

Additional Charge: Violation of the UCMJ, Article 113

Plea: Guilty Finding: Guilty

Specification 1: Drunk driving on or about 4 Sep 21 by physically controlling a passenger car while drunk.

Plea: Guilty Finding: Guilty

[SEE FINDINGS CONTINUATION SHEET on Page 4]

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

On 6 September 2022, the Military Judge (segmented sentencing) adjudged the following sentence:

- Bad conduct discharge; total forfeiture of all pay and allowances; reduction to grade E-1; and confinement for a total of 40 months, as follows:

For the specification of Charge I, confinement for 4 months;
For the specification of Charge III, confinement for 3 months;
For specification 1 of Charge V, confinement for 10 months;
For specification 2 of Charge V, confinement for 11 months;
For specification 3 of Charge V, confinement for 11 months;
For the specification of the Additional Charge, confinement for 1 month.

All sentences to confinement shall run consecutively with all others. Thus, the total amount of confinement adjudged is 40 months.

- The Military Judge recommended suspension of adjudged forfeitures for a period of 12 months, consistent with the plea agreement.
- The Military Judge ruled that the Accused is entitled to pretrial confinement credit and to judicially ordered confinement credit.

(NOTE: The total amount of judicially ordered credit is greater than previously indicated in the Statement of Trial Results; see below.)

Plea Agreement:

- A bad conduct discharge or dishonorable discharge shall be adjudged.
- Confinement shall be adjudged as follows: for the specification of Charge I, 4 months; for the specification of Charge III, 3-4 months; for each of specifications 1, 2, & 3 of Charge V, 8-11 months each; for the specification of the Additional Charge, 1 month. All sentences to confinement are to run consecutively, thus the total amount of confinement will be 32 months to 42 months.
- The convening authority agrees to grant deferment of confinement upon request to allow the Accused to attend an appropriate [REDACTED] at the Dept of the Navy [REDACTED]
- The convening authority will recommend that the Accused serve his confinement at Naval Consolidated Brig Miramar.
- Any adjudged forfeitures will be suspended for the period of time until 12 months after the date of the Entry of Judgment, at which time, unless sooner vacated, the suspended portion will be remitted without further action.
- Automatic forfeitures of any pay and allowances due during the Accused's enlistment will be deferred and waived provided that the Accused establishes and maintains a dependent's allotment in the total amount of the deferred and waived forfeiture amount during the entire period of deferment. The convening authority agreed that the period of waiver will run for 6 months from the date of the Entry of Judgment. The period of deferment will run from the date automatic forfeiture would otherwise become effective under Article 58b(a)(1), UCMJ, until the date of Entry of Judgment on the sentence.
- The maximum reduction in grade that may be imposed is reduction to E-1.
- No fine and no other lawful punishments will be adjudged.

[SEE SENTENCE CONTINUATION SHEET on Page 5]

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

Deferment and Waiver of Automatic Forfeitures:

- The plea agreement at paragraph 11.c.2. states in part, "This agreement constitutes my request for, and the convening authority's approval of, deferment and waiver of automatic forfeitures pursuant to Article 58b(a)(1), UCMJ. . . . The convening authority agrees that the period of waiver will run for 6 months from the date of the Entry of Judgment. The period of deferment will run from the date automatic forfeiture would otherwise become effective under Article 58b(a)(1), UCMJ, until the date the Entry of Judgment on the sentence. The deferred and waived forfeiture shall be paid to [REDACTED] who is my dependent. I must provide proof of this allotment to the convening authority before the Entry of Judgment to defer any adjudged forfeitures under this agreement."
- Per this agreement, on 13 December 2022, the convening authority directed that automatic forfeitures be deferred and waived.

[SEE DEFERMENT AND WAIVER CONTINUATION SHEET on Page 6]

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

- The Military Judge recommended, consistent with the plea agreement, that the adjudged total forfeitures be suspended for a period of 12 months.
- On 13 December 2022, the convening authority implemented the Military Judge's suspension recommendation, consistent with the plea agreement and the request of the accused, and suspended the adjudged forfeitures for the period of time until 12 months after the date of the Entry of Judgment (to wit: 1 June 2024) at which time, unless sooner vacated, the adjudged forfeitures will be remitted without further action.

15. Judge's signature:

POTEET.DEREK.AN
DREW.

Digitally signed by
POTEET.DEREK.ANDREW.

Date: 2023.06.01 08:51:35 -07'00'

16. Date judgment entered:

Jun 1, 2023

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

18. Judge's signature:

19. Date judgment entered:



11. Findings (Continued)

*After announcement of the sentence by the Military Judge, the withdrawn charges and specifications were dismissed without prejudice to ripen into prejudice upon completion of appellate review in which the findings and sentence have been upheld.

**Guilty, except the words "by confining the same [REDACTED] in the closed trunk of a car"; substituting therefore the words "by locking the same [REDACTED] in the car, which was parked in a public parking lot overnight".

***Guilty, except the words "by confining the same [REDACTED] in the closed trunk of a car"; substituting therefore the words "by locking the same [REDACTED] in the car, which was parked in a public parking lot overnight".

****Guilty, except the words "by confining the same [REDACTED] in the closed trunk of a car"; substituting therefore the words "by locking the same [REDACTED] in the car, which was parked in a public parking lot overnight".

12. Sentence (Continued)

Convening Authority's Action:

Initial CA's Action: On 23 November 2022, the Military Judge returned the record of trial to the convening authority for a new CA's Action pursuant to RCM 1104 because the initial CA's Action dated 28 September 2022 contained errors.

Final CA's Action: On 13 December 2022, the convening authority acted on the sentence and on other related aspects of this general court-martial, as follows:

- Consistent with the plea agreement, the Military Judge's recommendation, and the Accused's request, the convening authority SUSPENDED the adjudged total forfeitures for the period of time until 12 months from the entry of judgment, at which time, unless the suspension is sooner vacated, the suspended adjudged forfeitures will be remitted without further action.
- Per the plea agreement and the Accused's request, the convening authority DEFERRED all automatic forfeitures from 14 days from the date the sentence was adjudged until the date of the entry of judgment. And the convening authority directed that, beginning on the date of the entry of judgment, all of the automatic forfeitures are WAIVED for a period of six months or until the Accused's end of active obligated service date, whichever is sooner. The convening authority directed that the total amount of the deferred and waived pay and allowances shall be paid to Ms. [REDACTED] for the benefit of herself and the Accused's dependent children.
- The convening authority positively endorsed the accused's request to be transferred to the Naval Consolidated Brig Miramar, aboard Marine Corps Air Station Miramar, San Diego, California.
- The convening authority stated, "Pursuant to the Plea Agreement, the accused's request for confinement to be deferred to attend an appropriate [REDACTED] within the Department of the Navy [REDACTED] once identified, accepted, and provided a starting date, upon that starting date, the request is approved." (Note: Because the Accused has not obtained admission into a [REDACTED] this deferment of confinement did not take effect. See Supplemental Ruling dated 31 May 2023.)
- The convening authority DENIED the Accused's request to commute the adjudged reduction.
- The convening authority DENIED the Accused's request to suspend the adjudged reduction for a period of 6 months.
- The convening authority DENIED the Accused's request for all additional clemency within the CA's discretion to be granted.
- The convening authority APPROVED the remainder of the sentence as adjudged.

Post-Trial Ruling:

On 19 January 2023 and 16 February 2023, the Military Judge conducted post-trial Article 39(a) sessions regarding the defense post-trial motion filed 22 December 2022. At the conclusion of the 16 February 2023 session, the Military Judge denied the defense motion, ruled that the convening authority's action of 13 December 2022 is valid and does not violate the plea agreement, and held that, considering all of these matters including the previously-cited grounds for judicially ordered confinement credit in this case, the Accused is entitled to a greater amount of judicially-ordered confinement credit than previously awarded.

Confinement Credit:

- The Accused has served 336 days pretrial confinement and is additionally credited with 71 days of judicially ordered confinement credit, in accordance with the Supplemental Ruling dated 31 May 2023. The Accused shall be credited with a total of 407 days of confinement already served, to be deducted from the adjudged sentence to confinement.

13. Deferment and Waiver (Continued)

- Specifically, the convening authority granted deferment of all automatic forfeitures from the date they would have become effective (20 September 2022), which is 14 days from the date the sentence was adjudged, until the date of the entry of judgment (31 May 2023).
- The convening authority also granted waiver of all automatic forfeitures, beginning on the date of the entry of judgment (31 May 2023), lasting for a period of six months (until 30 November 2023) or until the accused's end of active obligated service, whichever is sooner.

Deferment of Confinement:

- The plea agreement at paragraph 9.b. states, "After trial, upon my request for deferment of confinement, the convening authority agrees to grant deferment of confinement for [REDACTED] to attend an appropriate [REDACTED] at the Department of the Navy [REDACTED]. Once admitted into the [REDACTED] if I fail to complete the program, voluntarily withdraw from such program prior to completing it, or commit any misconduct which results in my expulsion from the [REDACTED] the convening authority may withdraw from the previously granted deferment of confinement."
- On 7 September 2022, Detailed Defense Counsel requested deferment of the adjudged confinement to allow the accused to attend an appropriate [REDACTED] within the Department of the Navy [REDACTED] consistent with the plea agreement. The Accused at that time had not yet been admitted to or given a start date for an [REDACTED] of this type.

After speaking with Brig personnel about this issue, the accused subsequently, after 7 September 2022, notified his command representative that the accused no longer wanted to defer his adjudged confinement to attend an [REDACTED] because doing so would delay the date of his eventual release from confinement. The accused affirmatively stated he did not want deferment of his confinement to attend [REDACTED]. Later, after consulting further with counsel, the accused then renewed his request for deferment of confinement to attend an [REDACTED].

- Approximately one year earlier, in 2021, the accused had been evaluated and recommended for a Department of the Navy [REDACTED] that could be colloquially described as [REDACTED]. But the Department of the Navy [REDACTED] has never actually admitted the accused into, nor officially issued the accused a start date to attend, an [REDACTED] which could be colloquially described as [REDACTED]. The accused was subsequently reevaluated for [REDACTED] post-trial, and was no longer recommended for the [REDACTED] that can be colloquially described as [REDACTED].
- In acting on the sentence and on Detailed Defense Counsel's request for deferment of confinement, the convening authority stated, "Pursuant to the Plea Agreement, the accused's request for confinement to be deferred to attend an appropriate [REDACTED] within the Department of the Navy [REDACTED] once identified, accepted, and provided a starting date, upon that starting date, the request is approved."

- Admission into such a Department of the Navy [REDACTED] was a condition precedent to the deferment of confinement provision of the plea agreement. Because the accused has not actually been admitted into, nor been given an official start date for, such a program, there is no obligation on the convening authority to take action under this provision of the plea agreement. The convening authority's action regarding this completely fulfills the convening authority's commitment under the plain language of the plea agreement, even though it does so without any practical effect because the accused has failed to obtain admission into such a program. Under the unambiguous, plain language of the plea agreement, the convening authority did not undertake any promise to ensure the Accused would be admitted into such a program. See the Court's Supplemental Ruling of 31 May 2023, and Transcript at pages 714-715.

- Consistent with the plea agreement, the convening authority's action approving deferment of confinement was contingent on the Accused being admitted into an [REDACTED] as described in the plea agreement. Because the Accused has not obtained admission into such a program, the deferment has not yet taken effect. And now that the entry of judgment has been executed, it appears that the period within which deferment of confinement at request of the Accused could effect has now ended.

CONTINUATION SHEET - ENTRY OF JUDGMENT

14. CA's Action on Suspension (Continued)

This page N/A.

APPELLATE INFORMATION

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

Before Panel No. 1

UNITED STATES

Appellee

v.

Justin W. CHISOLM
Lance Corporal (E-3)
U.S. Marine Corps

Appellant

NMCCA No. 202300144

**APPELLANT'S SECOND MOTION TO
EXAMINE SEALED EXHIBIT IN THE
RECORD OF TRIAL**

Tried at Camp Pendleton, California, on 15 February, 31 August, 1-2 and 6 September 2022, 19 January 2023, and 16 February 2023 before a General Court-Martial convened by Commanding General, 1st Marine Division, LtCol Derek A. Poteet, USMC, Military Judge, presiding

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

COMES NOW the undersigned and respectfully moves, pursuant to Rule 6.2(c) of the Navy-Marine Corps Court of Criminal Appeals Rules of Appellate Procedure to examine a sealed exhibit in the record of trial.

1. Specifically, counsel requests to examine the following:

a. Appellate Exhibit LXI, medical records of Appellant.

2. With regard to sealed exhibit:

a. Appellate Exhibit LXI—

- (1) was released to trial and trial defense counsel.
- (2) was considered by the military judge in ruling on a defense motion.
- (3) is subject to the following colorable claim of privilege: None

b. Access to the sealed exhibit by appellate defense counsel is necessary for the following reasons: complete review of all appellate exhibits considered by the military judge in ruling on defense motions.

3. Absent further order of the Court, undersigned counsel will otherwise ensure continued compliance with any protective orders issued by the military judge in this case.

[REDACTED]

Arthur L. Gaston III
CAPT, JAGC, USN
Appellate Defense Counsel
1254 Charles Morris St SE, Suite 100
Washington Navy Yard, DC 20374-5047
[REDACTED]

CERTIFICATE OF FILING AND SERVICE

I certify that this document was emailed to the Court's filing address, uploaded into the Court's case management system, and emailed to the Director, Appellate Government Division on 22 November 2023.

[REDACTED]

Arthur L. Gaston III
CAPT, JAGC, USN
Appellate Defense Counsel
1254 Charles Morris St SE, Suite 100
Washington Navy Yard, DC 20374-5047
[REDACTED]

Subject: RULING: FILING-Panel 1-US v. Chisolm-NMCCA 202300144-D-Second Mot. to Examine Sealed Exhibits (Gaston)
Date: Monday, November 27, 2023 10:38:09 AM

MOTION GRANTED
NOV 27 2023
UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

CUI

Very Respectfully,

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

Controlled by: Department of the Navy

Controlled
by:
OJAG,
NMCCA,
Code-51

CUI Category: PRVCY, LEGAL PRIVILEGE
Distribution / Dissemination Control: FEDCON
[REDACTED] [REDACTED]

Subject: FILING-Panel 1-US v. Chisolm-NMCCA 202300144-D-Second Mot. to Examine Sealed Exhibits (Gaston)

To this Honorable Court:

Please see the attached for electronic filing in this case. Thank you.

V/r

CAPT Arthur L. Gaston III, JAGC, USN
Director, Navy-Marine Corps Appellate Defense Division
1254 Charles Morris Street SE, Suite 100
Washington Navy Yard, DC 20374-5047
[REDACTED]
[REDACTED]
[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

CUI



Subject: RULING: FILING-Panel 1-US v. Chisolm-NMCCA 202300144-D-Mtn. EOT (Hotard)

MOTION GRANTED

SEP 21 2023

UNITED STATES NAVY-MARINE CORPS

COURT OF CRIMINAL APPEALS

CUI

Very Respectfully,

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

[REDACTED]

[REDACTED]

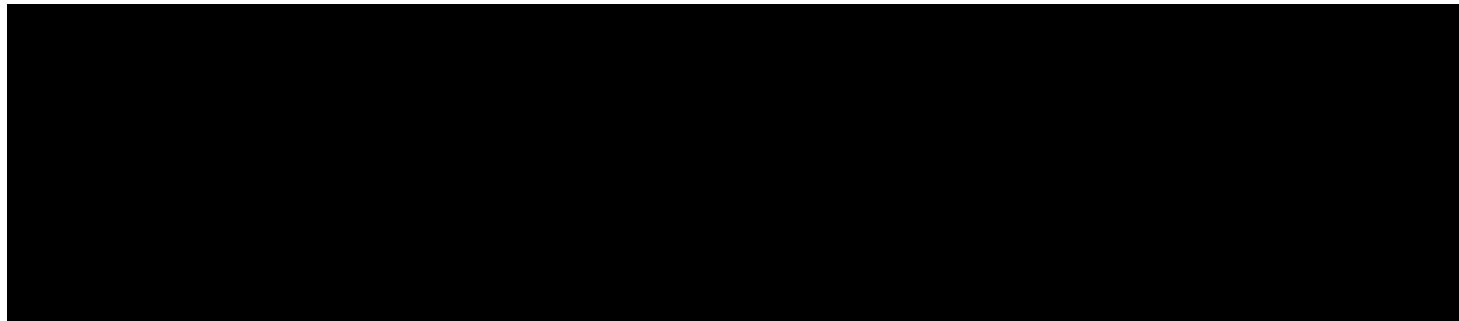
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[REDACTED]

[REDACTED]



[REDACTED]
Subject: FILING-Panel 1-US v. Chisolm-NMCCA 202300144-D-Mtn. EOT (Hotard)

To This Honorable Court:

Please see the attached motion ICO US v Chisolm, NMCCA # 202300144.

Thank you.

Very Respectfully,

Colin W. Hotard
Captain, U.S. Marine Corps
Appellate Defense Counsel, Code 45
1254 Charles Morris St, SE, STE 100
Washington Navy Yard, D.C., 20374
[REDACTED]

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[REDACTED]

CUI

**THERE IS NO APPELLATE
INFORMATION AT THIS TIME**

REMAND

THERE WERE NO REMANDS

**NOTICE OF COMPLETION OF
APPELLATE REVIEW**