[redacted]

CERTIFIED RECORD OF TRIAL

(and accompanying papers)

of

DEDOLPH	TONY	E	[redacted]	E-7
(Last Name)	*(First Name)*	*MI*	*(DoD ID No.)*	*(Rank)*

[redacted]	U.S. NAVY	VIRGINIA BEACH, VIRGINIA
(Unit/Command Name)	*(Branch of Service)*	*(Location)*

By

General Court-Martial (GCM) COURT-MARTIAL

(GCM, SPCM, or SCM)

Convened by COMMANDER

(Title of Convening Authority)

NAVY REGION MID ATLANTIC

(Unit/Command of Convening Authority)

Tried at

NORFOLK, VIRGINIA	On	1, 30 JAN, 7 JUL, 31 AUG 2020, 14, 15, 19 - 23 JAN 2021
(Place or Places of Trial)		*(Date or Dates of Trial)*

Companion and other cases [redacted]

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

[redacted]

CONVENING ORDER

DEPARTMENT OF THE NAVY
COMMANDER
NAVY REGION MID-ATLANTIC
1510 GILBERT STREET
NORFOLK, VA 23511-2737

12 Jan 21

GENERAL COURT-MARTIAL AMENDING ORDER 1AY-19

The following member is excused from participation in the general court-martial convened by order 1-19, dated 10 January 2019 and amended by order 1AL-19, dated 4 March 2020, order 1AW-19, dated 2 December 2020, order 1AX-19, dated 11 December 2020, Staff Judge Advocate, Navy Region Mid-Atlantic, memo 5811 Ser 00J/001 dated 5 January 2021, and Staff Judge Advocate, Navy Region Mid-Atlantic, memo 5811 Ser 00J/018 dated 11 January 2021, for the trial of [redacted] Tony E. DeDolph, U.S. Navy.

Commander Scott R. Savery, U.S. Navy;

The following new members are hereby detailed:

Lieutenant Commander [redacted] U.S. Navy;
Master Chief Electronics Technician [redacted] U.S. Navy;
Senior Chief Aircrew Survival Equipmentman [redacted] U.S. Navy; and
Chief Information Systems Technician [redacted] U.S. Navy.

The following members are detailed:

Commander [redacted] US. Navy;
Lieutenant Commander [redacted] U.S. Navy;
Lieutenant [redacted] U.S. Navy;
~~Ensign~~ [redacted] U.S. Navy;
Chief Warrant Officer Five [redacted] U.S. Navy;
Master Chief Electronics Technician [redacted] U.S. Navy;
Master Chief Naval Aircrewman [redacted] U.S. Navy;
Senior Chief Religious Program Specialist [redacted] U.S. Navy;
Senior Chief Information Systems Technician [redacted] U.S. Navy;
Senior Chief Machinist's Mate (Auxiliary) [redacted] U.S. Navy;
Senior Chief Aircrew Survival Equipmentman [redacted] U.S. Navy;
Chief Fire Controlman [redacted] U.S. Navy;
Chief Cryptologic Technician (Networks) [redacted] U.S. Navy;
Chief Information Systems Technician [redacted] U.S. Navy.
Chief Aviation Structural Mechanic [redacted] U.S. Navy;
Chief Culinary Specialist (Submarine) [redacted] U.S. Navy; and
Chief Information Systems Technician [redacted] U.S. Navy.

[redacted]

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

[redacted]

DEPARTMENT OF THE NAVY
COMMANDER
NAVY REGION MID-ATLANTIC
1510 GILBERT STREET
NORFOLK, VA 23511-2737

DEC 11 2020

GENERAL COURT-MARTIAL AMENDING ORDER 1AX-19

The following members are excused from participation in the general court-martial convened by order 1-19, dated 10 January 2019 and amended by order 1AL-19, dated 4 March 2020, and order 1AW-19, dated 2 December 2020, for the trial of [redacted] Tony E. Dedolph, U.S. Navy.

Commander [redacted] U.S. Navy;
Commander [redacted] U.S. Navy;
Lieutenant Commander [redacted] U.S. Navy;
Lieutenant Commander [redacted] U.S. Navy;
Lieutenant [redacted] U.S. Navy;
Master Chief Machinist's Mate (Nuclear) [redacted] U.S. Navy;
Senior Chief Firecontrolman [redacted] U.S. Navy;
Senior Chief Aviation Electrician's Mate [redacted] U.S. Navy; and
Chief Cryptologic Technician (Collection) [redacted] U.S. Navy.

The following new members are hereby detailed:

Commander [redacted] U.S. Navy;
Commander [redacted] U.S. Navy;
Commander [redacted] US. Navy;
Lieutenant Commander [redacted] U.S. Navy;
Lieutenant [redacted] U.S. Navy;
Master Chief Electronics Technician (Nuclear) [redacted] U.S. Navy;
Master Chief Naval Aircrewman (Operator) [redacted] U.S. Navy;
Master Chief Electrician's Mate (Nuclear) [redacted] U.S. Navy;
Senior Chief Machinist's Mate (Auxiliary) [redacted] U.S. Navy; and
Senior Chief Aviation Boatswain's Mate (Launching and Recovery Equipment) [redacted] U.S. Navy.

The following members are detailed:

Commander [redacted] U.S. Navy;
Commander [redacted] U.S. Navy;
Commander [redacted] US. Navy;
Lieutenant Commander [redacted] U.S. Navy;
Lieutenant [redacted] U.S. Navy;
Ensign [redacted] U.S. Navy;
Chief Warrant Officer Five [redacted] U.S. Navy;
Master Chief Electronics Technician (Nuclear) [redacted] U.S. Navy;
Master Chief Naval Aircrewman (Operator) [redacted] U.S. Navy;
Master Chief Electrician's Mate (Nuclear) [redacted] U.S. Navy;
Senior Chief Religious Program Specialist [redacted] U.S. Navy;

Senior Chief Information Systems Technician [redacted] U.S. Navy;
Senior Chief Machinist's Mate (Auxiliary) [redacted] U.S. Navy;
Senior Chief Aviation Boatswain's Mate (Launching and Recovery Equipment) [redacted] U.S. Navy;
Senior Chief Aviation Electronics Technician [redacted] U.S. Navy;
Senior Chief Logistics Specialist [redacted] U.S. Navy;
Chief Fire Controlman [redacted] U.S. Navy;
Chief Cryptologic Technician (Networks) [redacted] U.S. Navy;
Chief Aviation Structural Mechanic [redacted] U.S. Navy;
Chief Culinary Specialist (Submarine) [redacted] U.S. Navy; and
Chief Information Systems Technician [redacted] U.S. Navy.

The military judge is authorized to detail alternate members, if available, after voir dire.

[redacted]

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

DEPARTMENT OF THE NAVY
COMMANDER
NAVY REGION MID-ATLANTIC
1510 GILBERT STREET
NORFOLK, VA 23511-2737

GENERAL COURT-MARTIAL AMENDING ORDER 1AW-19 DEC 0 2 2020

The following members are excused from participation in the general court-martial convened by order 1-19, dated 10 January 2019 and amended by order 1 AL-19, dated 4 March 2020, for the trial of [redacted] Tony E. Dedolph, U.S. Navy.

Lieutenant Commander [redacted] U.S. Navy;
Lieutenant Commander [redacted] U.S. Navy;
Lieutenant Commander [redacted] U.S. Navy;
Lieutenant Commander [redacted] U.S. Navy;
Lieutenant [redacted] U.S. Navy;
Lieutenant [redacted] U.S. Navy;
Lieutenant Junior Grade [redacted] U.S. Navy;
Chief Warrant Officer Three [redacted] U.S. Navy;
Master Chief Hull Technician [redacted] U.S. Navy;
Master Chief Master-at-Arms [redacted] U.S. Navy;
Chief Mineman [redacted] U.S. Navy;
Chief Aviation Ordnanceman [redacted] U.S. Navy; and
Chief Firecontrolman [redacted] U.S. Navy.

The following new members are hereby detailed:

Commander [redacted] U.S. Navy;
Commander [redacted] U.S. Navy;
Lieutenant Commander [redacted] U.S. Navy;
Lieutenant Commander [redacted] U.S. Navy;
Chief Warrant Officer Five [redacted] U.S. Navy;
Master Chief Machinist's Mate (Nuclear) [redacted] U.S. Navy;
Senior Chief Aviation Electronics Technician [redacted] U.S. Navy;
Senior Chief Logistics Specialist [redacted] U.S. Navy;
Senior Chief Aviation Electrician's [redacted] U.S. Navy;
Chief Cryptologic Technician (Collection [redacted] U.S. Navy; and
Chief Culinary Specialist (Submarine) [redacted] U.S. Navy.

The following members are detailed:

Commander [redacted] U.S. Navy;
Commander [redacted] U.S. Navy;
Lieutenant Commander [redacted] U.S. Navy;
Lieutenant Commander [redacted] U.S. Navy;
Lieutenant [redacted] U.S. Navy;
Ensign [redacted] U.S. Navy;
Chief Warrant Officer Five [redacted] U.S. Navy;
Master Chief Machinist's Mate (Nuclear) [redacted] U.S. Navy;

Senior Chief Religious Program [redacted] U.S. Navy;
Senior Chief Information Systems Technician [redacted] U.S. Navy;
Senior Chief Firecontrolman [redacted] U.S. Navy;
Senior Chief Aviation Electronics Technician [redacted], U.S. Navy;
Senior Chief Logistics Specialist [redacted] U.S. Navy;
Senior Chief Aviation Electrician's Mate [redacted] U.S. Navy;
Chief Cryptologic Technician (Collection) [redacted] U.S. Navy;
Chief Firecontrolman [redacted] U.S. Navy;
Chief Cryptologic Technician (Networks) [redacted] U.S. Navy;
Chief Aviation Structural Mechanic [redacted] U.S. Navy;
Chief Culinary Specialist (Submarine) [redacted] U.S. Navy; and
Chief Information Systems Technician [redacted] U.S. Navy.

The military judge is authorized to detail alternate members, if available, after voir dire.

[redacted]

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

DEPARTMENT OF THE NAVY
COMMANDER
NAVY REGION MID-ATLANTIC
1510 GILBERT ST.
NORFOLK, VA 23511-2737

IN REPLY REFER TO:

MAR 0 4 2020

GENERAL COURT-MARTIAL CONVENING ORDER 1AL-19

The following members are excused from participation in the general court-martial convened by order 1-19, dated 10 January 2019, for the trial of [redacted] Tony E. Dedolph, U.S. Navy.

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

The following members are hereby detailed:

Lieutenant Commander [redacted] U.S. Navy;
Lieutenant Commander [redacted] U.S. Navy;
Lieutenant Commander [redacted] U.S. Navy;
Lieutenant Commander [redacted] U.S. Navy;
Lieutenant [redacted] U.S. Navy;
Lieutenant [redacted] U.S. Navy;
Lieutenant [redacted] U.S. Navy;
Lieutenant Junior Grade [redacted] U.S. Navy;
Ensign [redacted] U.S. Navy;
Chief Warrant Officer Three [redacted] U.S. Navy;
Master Chief Hull Technician [redacted] U.S. Navy;
Master Chief Master-at-Arms [redacted] U.S. Navy;
Senior Chief Religious Program Specialist [redacted] U.S. Navy;
Senior Chief Information Systems Technician [redacted] U.S. Navy;
Senior Chief Fire Control Technician [redacted] U.S. Navy;
Chief Fire Control Technician [redacted] U.S. Navy;
Chief Mineman [redacted] U.S. Navy;
Chief Cryptologic Technician (Networks) [redacted] U.S. Navy;
Chief Aviation Ordnanceman [redacted] U.S. Navy;
Chief Aviation Structural Mechanic [redacted] U.S. Navy;
Chief Fire Control Technician [redacted] and

[redacted]

Chief Information Systems Technician [redacted] U.S. Navy.

The military judge is authorized to detail alternate members, if available, after voir dire.

[redacted]

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

[redacted]

DEPARTMENT OF THE NAVY
COMMANDER
NAVY REGION MID-ATLANTIC
1510 GILBERT ST.
NORFOLK, VA 23511-2737

IN REPLY REFER TO:

JAN 10 2019

GENERAL COURT-MARTIAL CONVENING ORDER 1-19

Pursuant to authority contained in paragraph 0120(a) of JAGINST 5800.7F, CH-1 dated 1 January 2019, a general court-martial is convened with the following members:

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

The military judge is authorized to impanel an unspecified number of alternate members only if, after the exercise of all challenges, excess members remain.

[redacted]

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

[redacted]

CHARGE SHEET

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, MI)	2. DOD ID	3. RANK/RATE	4. PAY GRADE
DEDOLPH, Tony E.	[redacted]	SOC	E-7

5. UNIT OR ORGANIZATION	6. CURRENT SERVICE	
	a. INITIAL DATE	b. TERM
[redacted]	4 Jan 17	4 years

7. PAY PER MONTH			8. NATURE OF RESTRAINT OF ACCUSED	9. DATE(S) IMPOSED
a. BASIC	b. SEA/FOREIGN DUTY	c. TOTAL		
~~$4,752.60~~ ~~$4,368.90~~	N/A	~~$4,752.60~~ ~~$4,368.90~~ $4895.13	None	N/A

II. CHARGES AND SPECIFICATIONS

10. **CHARGE** **VIOLATION OF THE UCMJ, ARTICLE 81**

Specification 1 (*Conspiracy, Assault*): In that [redacted] Tony Dedolph, U.S. Navy, on active duty, did, on or about 4 June 2017, at or near [redacted] conspire with [redacted] U.S. Navy, Gunnery Sergeant [redacted] U.S. Marine Corps, and Staff Sergeant [redacted], U.S. Marine Corps to commit an offense under the Uniform Code of Military Justice, to wit: an Assault consummated by a Battery of Staff Sergeant [redacted] U.S. Army, and in order to effect the object of the conspiracy, the said members of the conspiracy did the following:

a. drove to the Marine quarters to obtain duct tape;
b. drove to the shared Army and Navy quarters;
c. entered the bedroom of SSG [redacted] by breaking through his locked door;
d. physically restrained SSG [redacted] and bound him with duct tape; and
e. strangled SSG [redacted] by placing him in a chokehold.

See continuation pages

[redacted]

PREFERRAL

DE	c. ORGANIZATION OF ACCUSER
E-7	Region Legal Service Office Mid-Atlantic
	e. DATE 14 November 2018

to administer oaths in cases of this character, personally appeared the ✓, 20 18, and signed the foregoing charges and specifications e of Military Justice and that he/she either has personal knowledge of or he are true to the best of his/her knowledge and belief.

B. B. GARCIA
Typed Name of Officer

Region Legal Service Office Mid-Atlantic
Organization of Officer

LCDR/O-4

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

[redacted]

S/N 0102-LF-000-4580

12. On 15 November ,20 18 , the accused was informed of the charges against him/her and of the name(s) of the accuser(s) known to me. *(See R.C.M. 308(a)). (See R.C.M. 308 if notification cannot be made.)*

B. B. GARCIA
Typed Name of ~~Immediate Commander~~

RLSO MID-ATLANTIC
Organization

Trial Counsel

[redacted]

IARY COURT-MARTIAL CONVENING AUTHORITY

13. The sworn charges were received at _____ hours, 14 November 20 18 at Commander, Navy
Designation of Command or

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

FOR THE _____

C. W. ROCK
Typed Name of Officer

Official Capacity of Officer Signing

Rear Admiral

[redacted]
Signature

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY	b. PLACE	c. DATE
Navy Region Mid-Atlantic	Norfolk, VA	SEP 1 9 2019

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

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

_____ By _____ Of _____
Command or Order

C. W. Rock
Typed Name of Officer

Commander
Official Capacity of Officer Signing

Rear Admiral, U. S. Navy

[redacted]
Signature

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

B. B. GARCIA
Counsel

LCDR, JAGC, USN
Grade or Rank of Trial Counsel

[redacted]

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

DD Form 458 Reverse

Continuation of DD FORM 458 ICO U.S. v. [redacted] Tony DEDOLPH, USN, [redacted]

Specification 2 (*Conspiracy, Obstruction of Justice*): In that [redacted] Tony Dedolph, U.S. Navy, on active duty, did, between on or about 4 June 2017 to on or about 5 December 2017, at or near [redacted] and Camp Lejeune, North Carolina, conspire with [redacted], U.S. Navy, Gunnery Sergeant [redacted] U.S. Marine Corps, and Staff Sergeant [redacted], U.S. Marine Corps to commit an offense under the Uniform Code of Military Justice, to wit: Obstruction of Justice, to impede the investigation of the assault and death of Staff Sergeant [redacted] U.S. Army, and in order to effect the object of the conspiracy, the said members of the conspiracy did the following:
a. provided a false timeline of events to the Navy chain of command;
b. shared information with each other about what had been communicated to the Navy chain of Command;
c. made statements purposefully omitting mention of the use of duct tape during the assault;
d. made statements purposefully omitting mention of the Marines being present in the room during the assault;
e. disposed of the alcohol kept in the shared Army and Navy quarters; and
f. made false statements to CID and NCIS investigators.

CHARGE II: VIOLATION OF THE UCMJ, ARTICLE 129

Specification (*Burglary*): In that [redacted] Tony Dedolph, U.S. Navy, on active duty, did, on or about 4 June 2017, at or near [redacted] in the nighttime, unlawfully break and enter the private bedroom of Staff Sergeant [redacted] U.S. Army, with the intent to commit assault consummated by a battery therein.

CHARGE III VIOLATION OF THE UCMJ, ARTICLE 118

Specification 1 *(Felony Murder)*: In that [redacted] Tony Dedolph, U.S. Navy, on active duty, did, on or about 4 June 2017, at or near [redacted] while perpetrating a burglary, murder Staff Sergeant [redacted] U.S. Army, by means of strangling him with a chokehold.

Specification 2 *(Murder, Inherently Dangerous Act)*: In that [redacted] Tony Dedolph, U.S. Navy, on active duty, did, on or about 4 June 2017, at or near [redacted] ~~murder Staff Sergeant~~ [redacted] U.S. Army, by means of ~~strangling him, an act that was inherently dangerous to another and evinced a wanton disregard for human life.~~ Withdrawn & Dismissed 19 Sept 2019 [redacted]

CHARGE IV: VIOLATION OF THE UCMJ, ARTICLE 119

Specification (*Involuntary Manslaughter*): In that [redacted] Tony Dedolph, U.S. Navy, on active duty, on or about 4 June 2017, at or near [redacted] by culpable negligence and while perpetrating an offense directly affecting the person of Staff Sergeant [redacted] U.S. Army, to wit: Assault consummated by a Battery, did unlawfully kill the said SSG [redacted] by strangling him with a chokehold.

CHARGE V: VIOLATION OF THE UCMJ, ARTICLE 92

Specification *(Hazing, SECNAVINST)*: In that [redacted] Tony Dedolph, U.S. Navy, on active duty, did, on or about 4 June 2017, at or near [redacted] violate a lawful general order, to wit: SECNAVINST 1610.2A, para. 7b, dated 15 July 2005, by hazing Staff Sergeant [redacted] U.S. Army, by breaking into his private bedroom while he was sleeping, and participating in an assault where the said SSG [redacted] was restrained with duct tape, assaulted and strangled with a chokehold.

Continuation of DD FORM 458 for U.S. v. SOC Tony DEDOLPH, USN, [redacted]

CHARGE VI: VIOLATION OF THE UCMJ, ARTICLE 134

Specification (*Obstruction of Justice*): In that [redacted] Tony Dedolph, U.S. Navy, on active duty, did, on or about 4 June 2017, at or near [redacted], wrongfully endeavor to impede an investigation into the assault and death of SSG [redacted], U.S. Army, when he purposefully did:

~~a. conduct a cricothyrotomy upon SSG Melgar's body to hide evidence of the injuries inflicted to SSG Melgar's trachea;~~ withdrawn & dismissed without prejudice 19 Sep 2019

a ~~b.~~ advise GySgt [redacted] and [redacted] of information he would be omitting when reporting the circumstances of the death of SSG [redacted]

b ~~c.~~ make false statements to ARSO [redacted] RSO [redacted] CPT [redacted] and his command regarding the nature and circumstances of SSG [redacted] assault and death;

c ~~d.~~ purposefully omit material information regarding the assault and death of SSG [redacted] including the use of duct tape to restrain SSG [redacted] during his assault, and the participation of GySgt [redacted] and SSgt [redacted]

which conduct was to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

AND NO OTHERS

TRIAL COURT MOTIONS & RESPONSES

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

U N I T E D S T A T E S **v.** **TONY DEDOLPH** **[redacted]/E-7 USN**	**Defense Motion to Compel Discovery** **27 December 2019**

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1. **Nature of Motion**. Pursuant to Rule for Courts-Martial 701, the Defense moves the Court to compel the Government to discover the following documents that are in the possession, custody, and control of military authorities and that are relevant to defense preparation:

   a. All records pertaining to the use, possession, and ownership of the building in which the alleged offenses took place, including any leases, memoranda of understanding, or other agreements between or among the State Department, U.S. Navy, and U.S. Army.

   b. SSG [redacted] complete medical record.

   c. All NCIS and U.S. Army CID Notes, Case Activity Records, Investigative Plans, and other similar documents pertaining to the investigation of this case and related cases.

   d. The request submitted by Trial Counsel to the Convening Authority for the employment of a forensic pathologist as an expert consultant.

   e. All documents relating to the employment of [redacted] by the U.S. Navy in [redacted]

   f. All communications to or from the legal team of GySgt [redacted] relating to any offer of leniency, any offered pretrial agreement, or other pretrial negotiations.

   g. SSG [redacted] complete service record.

2. **Statement of Facts**. Enclosures (1) – (6) set forth the following facts relevant to the resolution of this motion:

On 4 June 2017, SSG [redacted] died at a house in [redacted]. That house was being used by U.S. forces stationed in [redacted] DeDolph was in control of the house and was responsible for its maintenance, security and upkeep. For example, he was responsible for changing the keys to the locks and paying for that work order.

U.S. Army Criminal Investigations Division (CID) initially investigated SSG [redacted] death but subsequently transferred the investigation to NCIS. In May 2019, CID opened another investigation into alleged false statements made by a soldier during the investigations into SSG [redacted] death.

During the pretrial litigation in this case, the Government has given notice to the Defense of its employment of a forensic pathologist as an expert consultant in this case. In addition, the Government has notified the Defense that it intends to call Mr. [redacted] as witnesses at trial. Mr. [redacted] who were employed as [redacted] by the U.S. Navy at the time of the alleged offenses.

In preparation for trial, the Defense has requested the production of GySgt [redacted] as a witness at trial. GySgt [redacted] is currently charged with similar offenses to [redacted] DeDolph for his alleged involvement in the death of SSG [redacted] Two additional servicemembers – [redacted] and SSgt [redacted] – have reached pretrial agreements with the Government and have pled guilty to related offenses. Based on statements by Trial Counsel, some offer of a pretrial agreement has also been made to GySgt [redacted]

3. **Discussion**. As discussed below, each of the sets of documents the Defense moves the Court to compel the discovery of are relevant to Defense preparation under R.C.M. 701.

a. Records relating to the use, possession, and ownership of the house at which SSG [redacted] died are relevant to the issue of whether the location was a "dwelling house" and whether [redacted] DeDolph unlawfully entered that "dwelling house," an element of the offenses of Burglary and Felony Murder based on the alleged Burglary. Whether one room inside that house constituted a "dwelling house" is a factual issue based on all the circumstances of the house. Moreover, whether [redacted] DeDolph's alleged entry into the room was unlawful depends on the status of that room and the house as a whole, including who had a possessory interest in the house and who had the right of entry into the room. The requested documents are relevant to these circumstances and to the Defense's preparation to address this element of the offenses at trial.

b. The Government has charged [redacted] DeDolph with causing SSG [redacted] death by "strangling him with a chokehold." This allegation appears to be based on an autopsy report concluding that asphyxiation was the cause of SSG [redacted] death. In order to prepare to litigate the issue of cause of death, the Defense needs access to SSG [redacted] full medical record. Only by analyzing the autopsy findings in light of SSG [redacted] medical history, medications, and other medical information can the Defense – and an expert consultant pathologist – prepare to confront witnesses expected to testify at trial as to the cause of SSG [redacted] death.

c. Between the two agencies, NCIS and CID have conducted at least 3 investigations directly related to the charges that have been brought against [redacted] DeDolph. Each investigation produced not only an official report, but numerous supporting documents including agent notes, Case Activity Records, Investigative Plans, Interview Logs, and similar documents with different official titles due to service differences. Each of these documents provides additional

information not contained in the official published reports. This additional information describes, inter alia, steps taken by agents, more nuanced witness statements, and timelines of investigative steps. The documents with this information are relevant to Defense preparation to cross-examine the numerous agent witnesses on the Government's witness list and also to confront other witnesses whom the agents have interviewed as part of their investigation.

d. In this case, the Government has requested the employment, at Government expense, of a forensic pathologist as an expert consultant. Based on normal practice in this Navy Region, such a request would have been submitted in writing to Commander, Navy Region Mid-Atlantic (CNRMA). That request would have set out both the amount of funding requested and the specific issues that the consultation was expected to address. The Defense submitted a similar request for the employment of its own forensic pathologist. Notably, however, the Defense was required by R.C.M. 703 to submit its request to CNRMA via the trial counsel. The Government is not required to follow any similar procedure. Thus, the Government has access to, and an opportunity to comment on, the specific reasons for the Defense seeking the employment of an expert consultant, but the Defense has no such reciprocal information. This asymmetrical access to evidence violates the equal access to evidence principle of Article 46 of the UCMJ and creates further unfairness in a system that already makes the Defense dependent on the Government to obtain evidence and witnesses. Not only the general precepts of Article 46 but also the specific mandate of R.C.M. 701 mandate that the request be discovered to the Defense. Under that rule, the request, which is a document in the possession of military authorities, must be discovered if it is relevant to defense preparation. A specific statement of the reasons the Government is seeking expert assistance are directly relevant as they show the matters expected to be at issue at trial and will help guide the Defense in preparing to confront medical testimony at trial.

e. Mr. [redacted] who were employed by the U.S. Navy as security guards for the house at which SSG [redacted] died at the time of his death and who continue to be employed – in some capacity – by the U.S. government. Both of them appear on the Government's initial witness list. Their employment by the U.S. Government, ongoing dependency on the U.S. Government for their livelihoods, and relationships with U.S. Government officials are relevant to their biases and potential motives to fabricate their testimony at trial. The requested documents will show the nature and extent of these relationships and the magnitude of the financial dependence they have on the continued goodwill of U.S. Government officials toward them.

f. The Government originally charged four servicemembers with murder and related offenses arising from the death of SSG [redacted] Two of those members – [redacted] and SSgt [redacted] – reached pretrial agreements with the convening authority and have pled guilty. GySgt [redacted] is still facing charges and is pending trial in the spring of 2019. Based on communications from trial counsel, the Defense has reason to believe that the Government has made at least one offer of a pretrial agreement to GySgt [redacted] which was presumably refused. The terms of that offer and any other offers or negotiations are relevant to the Defense preparation with respect to the testimony of GySgt [redacted] who the Defense has requested be produced as a witness. The offers made to him are evidence of potential bias as well as providing a possible motive to fabricate. This is especially true given that the Government is certain to cross-examine GySgt [redacted] based on the fact that he is currently pending charges similar to those [redacted] DeDolph is facing. Documents relating to offers to and negotiations with GySgt [redacted] are relevant to Defense preparation for the presentation of his testimony.

g. If presentencing proceedings become necessary in this case, the Defense expects that the Government will call one or more individuals to testify about the nature of SSG [redacted] military service. SSG [redacted] service record is relevant to the Defense's ability to prepare to confront these witnesses and to understand their testimony within the full context of SSG [redacted] military service.

4. **Evidence.** The Defense respectfully requests the Court consider the following documentary evidence in ruling on this motion:

a. Enclosure (1) – Receipt for Key Change dated 21 March 2017

b. Enclosure (2) – NCIS Executive Summary dated 23 October 2017

c. Enclosure (3) – CID Case Activity Summary dated 31 May 2019

d. Enclosure (4) – LCDR [redacted] letter dated 31 October 2019 (paragraph 2(y))

e. Enclosure (5) – Government Initial Witness List dated 16 December 2019

f. Enclosure (6) – Defense Witness Production Request dated 16 December 2019

5. **Relief Requested**. The Defense respectfully moves the Court to order the Government to discover the above-described documents.

[redacted]
N. J. INNS

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

U N I T E D S T A T E S **v.** **TONY DEDOLPH** **E-7[redacted] USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO COMPEL DISCOVERY** **7 JAN 20**

MOTION

The Government requests the Court deny the Defense's motion to compel discovery in part.

SUMMARY

The Defense filing requests relief in the form of dismissal of the Specification of Charge III (Felony Murder), specifically because it is "Unconstitutional" and a violation of the "merger doctrine". The Defense also requests dismissal of the Specification of Charge II (Burglary) for failing to state an offense.

BURDEN

Pursuant to R.C.M. 905(c), the Defense bears the burden of persuasion by a preponderance of the evidence.

FACTS

a. Trial counsel has inquired with the relevant command, and they are attempting to identify if any paper record regarding the housing in [redacted] exists. However, they have initially indicated they have no such records, and do not believe any military authority has any such records. They are uncertain any other agency would have responsive records.

b. The Government is requesting the full medical record from the responsible U.S. Army agency.

c. The Government believes all responsive CID documents have been discovered. The relevant NCIS case files are available for inspection and copying.

d. The Government provided notice of the expert request to Defense, as per R.C.M. 703, but has not provided a copy of the request itself to Defense counsel.

e. The relevant command has indicated that they have no records of employment for Mr. [redacted] They are attempting to confirm if they were employed through another agency (such as the State Department). Any responsive records found will be discovered to Defense.

f. The Government has denied the request to produce GySgt [redacted] as a witness, as he has indicated he would invoke the 5th Amendment if called to testify. The Government has not disclosed correspondence between his Defense counsel and Trial counsel to the DeDolph defense team. Enclosure 1.

g. The Government has discovered SSG [redacted] service record to the Defense.

LAW

Per Rule for Courts-Martial 701(a)(2)(A), the Government shall permit the Defense to inspect any documents within the possession, custody or control of military authorities if the item is relevant to defense preparation.

Rule for Courts-Martial 703(d)(1) requires the Government to provide notice to the Defense if it submits a request to the Convening Authority for authorization of an expert.

ARGUMENT

a. At present, the Government does not believe responsive records exist. Regardless, the Government is willing to stipulate that [redacted] DeDolph was the team lead for the building in question, serving as the senior military authority present for the facility and that [redacted] DeDolph was an authorizing agent for various expenses associated with the building.

b. The Government agrees the medical record is potentially relevant to the Defense, and is seeking its discovery.

c. The Government believes it has completed discovery for the CID case file. The current NCIS case file is open and active, but available for inspection. The Government has copied the notes and all ROIs for the [redacted] investigation and the main [redacted] death case and discovered them to Defense.

d. The Government request for expert assistance is not "evidence" in any sense of the word, and is not material or relevant to the Defense case. While Defense may understandably desire to read Trial counsel comments, thoughts or opinions regarding this court-martial, none of those items are material or relevant unless they point to further evidence in the case. As the Defense has all of the evidence that Trial counsel has, the request will not provide any further evidence. Further, as it is not evidence, 10 U.S.C. § 846 is not implicated, as the Defense is not being denied access to any evidence in the case.

e. The responsive records do not appear to exist.

f. The Government agrees that when GySgt [redacted] becomes a cooperating witness, communications regarding any pretrial agreement, proffer of testimony and related communications would be relevant to the Defense; at such a time, the Government would discover such documents to the Defense. However, he is not presently a witness for either side in this court-martial, and he does not currently have a pretrial agreement with the Government. As such, any communications are not relevant or material at this point.

g. This request is moot.

EVIDENCE

Enclosure (1): Government response to Defense Witness request, dtd 27 Dec 19

RELIEF REQUESTED

The Government requests the Defense request to compel discovery be denied with respect to the items request in (d) and (f).

The Government does not request oral argument.

Respectfully submitted,

[redacted]

B. B. GARCIA
LCDR, JAGC, USN
Trial Counsel

Certificate of Service

I hereby certify that a copy of this motion response was served on the Court and defense counsel on this 7th day of January 2020.

[redacted]

B. B. GARCIA
LCDR, JAGC, USN
Trial Counsel

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

U N I T E D S T A T E S **v.** **TONY DEDOLPH** **E-7/[redacted] USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION FOR APPROPRIATE RELIEF: PRODUCTION OF WITNESSES FOR MOTION TO DISMISS CHARGE II AND CHARGE III** **2 JAN 20**

MOTION

The Government requests the Court deny the Defense's motion to produce [redacted] and SSG [redacted] for testimony at the 10 January 2020 Article 39(a).

SUMMARY

The Defense filing requests relief in the form of dismissal of the Specification of Charge III (Felony Murder), specifically because it is "Unconstitutional" and a violation of the "merger doctrine". The Defense also requests dismissal of the Specification of Charge II (Burglary) for failing to state an offense.

BURDEN

Pursuant to R.C.M. 905(c), the Defense bears the burden of persuasion by a preponderance of the evidence.

FACTS

Defense Counsel has requested the production of [redacted] and SSgt [redacted] The proffer of testimony is "in order to demonstrate several matters for the court's consideration inside the court-room." Although the request notes both were percipient witnesses to the charged offenses, no other synopsis of testimony is provided.

Both [redacted] and SSgt [redacted] are not currently local, and are in confinement in separate military brigs.

Neither [redacted] nor SSgt [redacted] were SSG [redacted] roommate, and neither resided at the [redacted] did visit it for a day or two before SSG [redacted] death).

LAW

Per Rule for Courts-Martial 703(b)(1), each party is entitled to the production of a witness whose testimony on an interlocutory question would be relevant and necessary. Over a party's objection, the military judge may authorize any witness to testify on an interlocutory question via remote means if the practical difficulties of production outweigh the significance of the witness' personal appearance.

As noted in the discussion to Rule for Courts-Martial 703(b)(1), "[r]elevant testimony is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue. A matter is not in issue when it is stipulated as a fact."

Per Rule for Courts-Martial 703(c)(2)(B)(i), a defense request for a witness must include a synopsis of the expected testimony sufficient to show its relevance and necessity.

ARGUMENT

1. <u>The Witnesses are irrelevant to the Defense motions</u>

As an initial matter, the Defense has failed to meet the requirements of R.C.M. 703(c)(2)(B) by failing to meaningfully proffer any testimony, let alone that which sufficiently demonstrates the relevance and necessity of [redacted] and SSgt [redacted] testimony.

Further, the Defense motion is fundamentally a legal motion, attacking the charging decision and language of the Government. No evidence is needed to resolve any of the legal issues which are dispositive for the motion.

Although the Defense writes at length about why it believes the Government cannot prove or meet the elements of Burglary, or why it believes the Government is mischaracterizing the evidence, those are factual questions to be resolved at trial—they may be ripe for a R.C.M. 917 motion, but are not amenable to pre-trial litigation (at least insofar as the current Defense filing is concerned).

As such, the only matters that need to be handled at the 10 January 2020 motions hearing are questions of law, not fact (e.g., does a "merger doctrine" exist under the U.C.M.J., does Charge II allege an offense), which do not require any further evidence to resolve.

2. <u>Witness Testimony is Unnecessary to the Defense motion</u>

Even if the Defense needed to establish some point regarding the events in question, the testimony of [redacted] and SSgt [redacted] is not necessary. Attached as enclosures to this motion (and the pending Government response to the Defense motion) are transcripts of [redacted] and SSgt [redacted] testimony at the Article 32 hearing, as well as SSgt [redacted] proffer of testimony. Further, the Defense has full transcripts of the testimony of SSgt [redacted]

and [redacted] at both their respective guilty pleas and their related stipulations of fact. Finally, Defense has transcripts of [redacted] proffer interviews of 29 Nov 18 and 1 July 2019 and SSgt [redacted] oral interview of 6 June 2019.

As a result, any further testimony of [redacted] and SSgt [redacted] would be cumulative, and therefore unnecessary on any point that might be relevant.

3. <u>The Defense summary of facts is in conflict with any likely testimony</u>

The Defense contends in its facts that the charged events were in fact a light-hearted frivolity, "simply just to tease [redacted] and "playful roughhousing".

As the attached enclosures show, both the witnesses would testify that the Accused, with his co-conspirators, planned to and did the following:

1) break into SSG [redacted] room with a sledgehammer, thereby breaking the doorframe and lock,
2) charged his bed, breaking his parts of his bedding and mosquito netting, and then all four trained special operators worked together to grab and restrain him,
2) as the Accused applied a rear naked chokehold to SSG [redacted] while on top of him and pressing SSG [redacted] face into his bed as he strangled him,
3) while restraining his hands and armed, preventing him from effectively resisting or "tapping out" and,
4) preparing to have a local [redacted] guard join in molesting (or appearing to molest) SSG [redacted] after he was restrained, by removing the guard's shirt, placing a leash about him, telling him he would "cuddle" with SSG [redacted] and having him wear a mask,

These events and the attack were so disturbing that Mr. [redacted] a [redacted] that was watching, felt sick and fled the scene.

As [redacted] testified at the Article 32 hearing: [redacted]

Or as SSgt [redacted] testified [redacted]

As a result, even if the Defense were to proffer the witnesses would testify in support of the various facts they suggest in their motion, the prior testimony and interviews are in sharp

contrast to the Defense facts, suggesting their testimony would not contribute to the Defense's presentation in a positive way, and is therefore not relevant or necessary.,

EVIDENCE

Enclosure (1): Article 32 testimony of [redacted] USN (transcript)
Enclosure (2): Article 32 testimony of SSgt [redacted] USMC (transcript)
Enclosure (3): Mil. R. Evid. 410 proffer of SSgt [redacted] USMC

RELIEF REQUESTED

The Government requests the Defense request for production be denied.

The Government does not request oral argument.

Respectfully submitted,

[redacted]
B. B. GARCIA
LCDR, JAGC, USN
Trial Counsel

Certificate of Service

I hereby certify that a copy of this motion response was served on the Court and defense counsel on this 2nd day of January 2020.

[redacted]
B. B. GARCIA
LCDR, JAGC, USN
Trial Counsel

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

U N I T E D S T A T E S **v.** **TONY DEDOLPH** **E-7/[redacted] USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO DISMISS CHARGE II AND CHARGE III** **7 JAN 20**

MOTION

The Government requests the Court deny Defense's motion to dismiss.

SUMMARY

1. The Defense filing requests to dismiss the Specification of Charge III (Felony Murder), because it is "Unconstitutional" and a violation of the "merger doctrine". The merger doctrine is not constitutionally required, does not exist under the U.C.M.J., and where applied, would not bar the Specification of Charge III.

2. The Defense filing appears to request to dismiss the Specification of Charge II (Burglary) for "failure to state an offense". The Defense position also appears to argue that on the merits, the evidence will be insufficient. The Specification of Charge II properly alleges an offense, and any other issues of factual sufficiency are not amenable to pretrial litigation and must be resolved at trial.

FACTS

1. On the evening of 3 June 2017, in [redacted] DeDolph created a plan to embarrass SSG [redacted] and shared it with, among others, GySgt [redacted] SSgt [redacted] and [redacted] Enclosure 3, para. (a)-(b).

2. [redacted] testified the "plan" discussed at [redacted] was to overcome and restrain SSG [redacted] with duct tape, and then embarrass him by having the [redacted] guards enter and threaten him with a sexual act. Enclosure 1 at 142-44.

3. SSgt [redacted] testified the "plan" discussed at [redacted] was to overcome and restrain SSG [redacted] and then to video record someone sexually molesting SSG [redacted] Enclosure 2 at 114-115.

4. [redacted] DeDolph, [redacted] SSgt [redacted] and GySgt [redacted] drove to the Marine residence to get supplies for the plan, and then drove to the Army/Navy residence. Enclosure 3, para (f)-(h).

5. At the Army/Navy residence, [redacted] DeDolph, [redacted] SSgt [redacted] and GySgt [redacted] discussed the plan, and enlisted the two gate guards at the Army/Navy house in the plan, including [redacted] Enclosure 3, para. (h).

6. The four military members put a belt around [redacted] neck, and a night mask on his face. Enclosure 3, para. (h). They also had [redacted] take his shirt off for his role. Enclosure 1 at 143.

7. The four stood in tactical file behind SSG [redacted] door, and GySgt [redacted] broke open SSG [redacted] door with a sledgehammer. SSgt [redacted] turned on the lights and grabbed the mosquito netting. SSG [redacted] stood up and appeared frightened or startle. [redacted] DeDolph placed SSG [redacted] in a chokehold and [redacted] grabbed his legs. They also proceeded to bind him with cords and duct tape. Enclosure 2 at 67-69.

8. SSG [redacted] regained consciousness as the four were continuing to bind him, so [redacted] DeDolph placed him in another chokehold until became unconscious again. Enclosure 2 at 69.

9. [redacted] DeDolph was applying a chokehold from behind SSG [redacted] while on top of him, pressing his face down into his bed. Enclosure 1 at 182-83.

10. The four realized the SSG [redacted] wasn't breathing, and then began to unbind him and attempt resuscitation efforts. Enclosure 2 at 69-70.

11. SSgt [redacted] does not remember SSG [redacted] saying "Come on fuckers" or words to that effect. Enclosure 2 at 88.

12. [redacted] has not testified to SSG [redacted] saying "Come on fuckers" or words to that effect. Enclosure 1 at 145.

13. [redacted] has testified [redacted]

14. SSgt [redacted] has testified [redacted]

15. SSgt [redacted] further testified [redacted]

BURDEN

Pursuant to R.C.M. 905(c), the Defense bears the burden of persuasion by a preponderance of the evidence.

TABLE OF AUTHORITIES

Enmund v. Florida, 458 U.S. 782 (1982)
People v. Chun, 45 Cal. 4th 1172 (2009)
People v. Farley, 46 Cal. 4th 1053 (2009)
Barnett v. Bear, 2015 U.S. Dist. LEXIS 129061 (Okla. E. Dist. Ct.)
Clark v. Patton, 2014 U.S. Dist. LEXIS 66273 (Okla. W. Dist. Ct.)
State v. Huynh, 278 Kan. 99 (2004)
State v. Sanchez, 144 P.3d 718 (Kan. 2006)
State v. Foy, 224 Kan. 558 (1978)
State v. Fisher, 120 Kan. 226 (1926)
People v. Moran, 246 N.Y. 100 (1927)
People v. Miller, 32 N.Y.2d 157 (1973)
State v. Tremblay, 479 P.2d 507 (Ore. Ct. App. 1971)
State v. Reams, 616 P.2d 498, (Ore. Ct. App. 1980)
Harris v. United States, 377 A.2d 34 (1977, Dist. Col. App.)
Blango v. United States, 373 A.2d 885 (1977, Dist. Col. App.)
State v. Miller, 110 Ariz. 489 (1974)
State v. Lopez, 174 Ariz. 131, 142 (1992)
State v. Hankins, 141 Ariz. 217 (1984)
Commonwealth v. Bell, 460 Mass. 294, 301
Commonwealth v. Kilburn, 438 Mass. 356 (2003)
Commonwealth v. Morin, 478 Mass. 415 (2017)
Saenz v. State, 976 S.W.2d 314 (1998, Tex. 13th Ct. of App.)
Rodriguez v. State, 953 S.W.2d 342 (1997, 3rd Ct. of App.)
Barnett v. State, 2011 OK CR 28 (Okla. Ct. Crim. App. 2011)
Baker v. State, 236 Ga. 754 (1976)
Huntley v. State, 271 Ga. 227 (1999)
United States v. Schember, 50 M.J. 670 (N.M.C.C.A. 1999)
People v. O'Keefe, 222 Cal. App. 3d 517 (Cal. 4th Dist. Ct. App. 1990).
State v. Cochran, 191 Conn. 180 (1983)
13 Am. Jur. 2d. Burglary § 3, Purpose of burglary laws

LAW AND ARGUMENT

A. <u>The "Merger Doctrine", explained and applied</u>.

The "merger doctrine" referenced by the Defense has never been recognized in military courts. Rather, it applies in some jurisdictions with common law felony murder, or where courts

analyze subjective definitions for felony murder (e.g., where a death occurs during the commission of any "inherently dangerous" felony).

In most jurisdictions that apply it, the merger doctrine means that the act of the murder itself (i.e., the stabbing or shooting), cannot be used as the underlying felony element in order to evade the otherwise necessary intent elements for a murder (this a general definition, as jurisdiction vary greatly). This general doctrine would not apply to the murder charge in this case, because the aggravated assault (the strangling of SSG [redacted]) is not the underlying felony for the murder. Instead, burglary is.

The Defense asks this Court to adopt the underlying *intended* crime of the burglary (intended, as completion is not an element for burglary) as the underlying felony for the murder charge, and then adopt and apply a merger doctrine analysis to the intended assault, rather than the burglary.

In most states that apply the merger doctrine, a burglary with intent to assault is an acceptable predicate for felony murder (even where not independent of the homicide). Where there is a statutory list of triggering felonies, each jurisdiction reviewed defers to the plain language of the statute, rather than overriding the prerogative of the legislature.

1. The "Merger Doctrine" does not exist under the U.C.M.J.

The Defense cites no military or federal case law establishing the merger doctrine exists under the U.C.M.J. or under federal criminal law, except for *Enmund v. Florida*, which the Defense misstates.[1] Instead, the Defense cites some state case law—for example applying the "Ireland merger doctrine" to various common-law felony murder charges.[2] The merger doctrine is not consistent among the states (in other states, "merger doctrine" refers to other legal concepts, such as multiplicity), and some states (such as Oklahoma) have decided to abandon the merger doctrine with regards to felony murder.

The Defense argues that a violation of the merger doctrine is "unconstitutional", but cites no case law nor provides any analysis supporting this proposition. As noted below in more detail, the merger doctrine varies significantly among jurisdictions and is often superseded by statute. When reviewed in request for habeas relief, U.S. District Courts have repeatedly found the doctrine was a matter of state law and not cognizable for federal habeas corpus relief.[3] In

[1] Defense counsel cites *Enmund v. Florida*, 458 U.S. 782 (1982), claiming it, *and its progeny*, stand for the proposition that assault cannot be the basis for felony murder. Defense mot. at 7. However, *Enmund* is an 8th Amendment case, holding that imposition of the death penalty was inappropriate for a "mere participant" who was vicariously liable for a death under felony murder. Nowhere in the holding, concurrence or dissent is the Defense proposition discussed, either directly or in *dicta*.

[2] Specifically, under California law, second degree felony murder is a common law crime, but first degree is statutory; in *People v. Chun,* California is applying the "Ireland merger doctrine" to second degree felony murder. 45 Cal. 4th 1172 (2009).

[3] *See Barnett v. Bear,* 2015 U.S. Dist. LEXIS 129061 (Okla. E. Dist. Ct.) (habeas relief denied where Oklahoma had overruled the "merger doctrine" finding it was "a matter of state law that is not cognizable in federal habeas corpus"); *see also Clark v. Patton*, 2014 U.S. Dist. LEXIS 66273 (Okla. W. Dist. Ct.) (denying habeas relief where Oklahoma had abandoned the "merger doctrine" and retroactively applied the same to appellant's case)

brief, the Government has found no court that has held the Constitution requires the merger doctrine as it applies to felony murder. As the military has a statutory criminal code and there is no ambiguity about the application of 10 U.S.C. § 918(4), there has been no basis to create or apply the merger doctrine under the U.C.M.J.

As such, the Defense is requesting this Court, without any controlling law or supporting military precedent, to create a new legal rule for military law and overrule the plain language of the U.C.M.J.

2. The Court should defer to the plain language of 10 U.S.C. § 918(4)

Article 118(4) of the U.C.M.J. is not ambiguous. It includes burglary as one of the predicate offenses for felony murder. It does not provide any exception for particular kinds of burglary, such as burglary with intent to assault.

Moreover, the Discussion to Article 118 in the Manual for Courts-Martial provides some explanation for the intent behind 118(4): "The commission or attempted commission of any of the offenses listed in Article 118(4) is likely to result in homicide, and when an unlawful killing occurs as a consequence of the perpetration or attempted perpetration of one of those offenses, the killing is murder."[4]

Unlawfully breaking into a dwelling to commit an assault and battery upon a person, to bind, tape and haze them, in the nighttime, is a proper basis for a burglary. It can be charged as a burglary because the law recognizes the need to provide special protection to a dwelling—a private space where a person may be sleeping and vulnerable. Further, the law recognizes the increased likelihood of violence and harm during a burglary.[5]

As there is no ambiguity to resolve, the analysis ends at a plain language reading of Article 118(4), which properly authorizes a charge when the Accused kills the victim during a burglary.

3. The "Merger Doctrine", even if imported into the military system, based on comparable state examples, would permit the use of Burglary with Intent to Assault for Felony Murder

The Defense cites three cases for three state jurisdictions applying the merger doctrine for felony murder: California, Kansas and New York.[6] The Defense neglects to inform this Court that in *each* of the cited jurisdictions, Burglary with Intent to Assault is not excluded by the merger doctrine for felony murder.

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[4] Manual for Courts-Martial, Part IV, Para. 43.c.(5)(a) (2016 ed.)

[5] See *Miller*, *infra.*

[6] Citing *Chun, supra, State v. Huynh*, 278 Kan. 99 (2004) and *People v. Moran*, 246 N.Y. 100 (1927). *Huynh* is actually a case *declining* to apply the merger doctrine, but Kansas did recognize it in *State v. Fisher*, 120 Kan. 226 (1926).

Decided shortly after *Chun*, the Supreme Court of California ruled in *People v. Farley* that the merger doctrine only applied to second degree felony murder (a common law creation) and not first degree felony murder, and that burglary with an intent to assault is an acceptable predicate for first degree felony murder, even if the assault is not independent of the murder.[7]

In Kansas, the Supreme Court of Kansas considered a felony murder charge where the underlying felony was a burglary predicated upon aggravated assault in *State v. Foy*.[8] "Should the merger doctrine for assault cases be extended to limit the felony-murder instruction in burglary cases in which the burglary is based up on an assault? *We think not.*"[9]

And likewise in New York, in *People v. Miller* the Court of Appeals (the highest court in New York), declined to extend the merger doctrine and held that burglary with intent to assault was an acceptable predicate crime for felony murder. [10]

> "It should be apparent that the Legislature, in including burglary as one of the enumerated felonies as a basis for felony murder, recognized that persons within domiciles are in greater peril from those entering the domicile with criminal intent, than persons on the street who are being subjected to the same criminal intent…When the assault takes place within the domicile, the victim may be more likely to resist the assault; the victim is also less likely to be able to avoid the consequences of the assault, since his paths of retreat and escape may be barred or severely restricted by furniture, walls and other obstructions…the Legislature, in enacting the burglary and felony-murder statutes, did not exclude from the definition of burglary, a burglary based upon the intent to assault…"[11]

Other jurisdictions which exercise the merger doctrine, outside of those referenced by the Defense, have also declined to extend it to Burglary with Intent to Assault, including Oregon,[12] the District of Columbia,[13] and Arizona.[14] It does appears Massachusetts, based on its statutory and common law scheme, would still analyze a common law felony murder involving an assault

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[7] 46 Cal. 4th 1053, 1119-21 (2009).
[8] 224 Kan. 558 (1978) (emphasis added).
[9] *Id.* at 566. *See also State v. Sanchez*, 144 P.3d 718 (Kan. 2006) (child abuse is an appropriate predicate for felony murder where authorized by statute, even if not distinct from murder).
[10] 32 N.Y.2d 157, 159 (1973).
[11] *Id.* at 160-61.
[12] *State v. Tremblay*, 479 P.2d 507, 517-519 (Ore. Ct. App. 1971) (merger doctrine did not apply to burglary with intent to assault, as legislature intended to give added protections to persons within a dwelling) Also see *State v. Reams*, 616 P.2d 498, 504-5 (Ore. Ct. App. 1980) (continuing to hold merger doctrine did not apply to burglary with intent to assault).
[13] *Harris v. United States*, (1977, Dist. Col. App.) 377 A.2d 34 (even though burglary charge was based upon intent to commit assault with deadly weapon, burglary did not merge with resulting homicide and therefore felony-murder doctrine was applicable). "[S]ocietal interest served by the burglary statute…is separate and distinct from that of the murder statute". *Id*. at 38. *See also Blango v. United States*, 373 A.2d 885, 888 (1977, Dist. Col. App.) (merger doctrine was unwarranted for felony murder where burglary was based upon the assault, as felony murder statute did not exclude burglaries with intent to assault).
[14] *State v. Miller*, 110 Ariz. 489 (1974) (burglary with intent to assault with a deadly weapon is a predicate for felony murder). See also *State v. Lopez*, 174 Ariz. 131, 142 (1992) ("merger" didn't apply for felony murder in case of child abuse resulting in death) "Even those states that follow the merger doctrine recognize that, if the legislature explicitly states that a particular felony is a predicate felony for felony-murder, no 'merger' occurs." *Id.*

in a dwelling under the merger doctrine.[15] But other jurisdictions have dramatically limited the scope of the merger doctrine, abandoned it, or have never adopted it, such as Texas,[16] Oklahoma[17] and Georgia,[18] respectively.

In short, even if this Court were to import the merger doctrine into the military system and apply it in this case, it should not be applied to bar Burglary with Intent to Assault as an underlying crime for felony murder, given the statutory framework for charging.

4. The intent of the underlying assault is sufficiently distinct that the "merger doctrine" would not apply.

The merger doctrine, as described *supra* and as presented by the Defense, even if applied to the Specification, would not mandate merger, because another collateral purposes existed aside from the aggravated assault which killed SSG [redacted] which Defense appears to concede, by noting that the Accused meant to "play a practical joke" upon the victim. Specifically, the Accused strangled SSG [redacted] in order to gain control and then effect his larger plan for hazing and humiliation, which involved a variety of batteries, from taping the victim to removing his pants and the potential assault of having a guard threaten to molest him.

Of note, the Specification of Charge II (Burglary) cites assault and battery as the underlying crime, not the aggravated assault which killed SSG [redacted]

[15] *See Commonwealth v. Bell*, 460 Mass. 294, 301 (no merger between homicide and predicate felony of armed assault in dwelling where defendant assaulted multiple occupants in addition to victim); *see also Commonwealth v. Kilburn*, 438 Mass. 356 (2003) (no merger where predicate felony of armed assault in dwelling included a separate assault upon the victim, separate from that which killed him).

[16] *Saenz v. State,* 976 S.W.2d 314 (1998, Tex. 13th Ct. of App.) (merger doctrine doesn't apply to any crime except manslaughter, due to plain language of statute), citing *Rodriguez v. State*, "If [the legislature] had intended to exempt other felony offenses or lesser included felony offenses to embrace the merger doctrine as a limitation on felony murder, it could easily have done so. The maxim *expresio unius est exclusio alterius* is often employed in the construction of statutes. In general, it means that a statute's inclusion of a specific limitation excludes all other limitations of that type." 953 S.W.2d 342, 354 (1997, 3rd Ct. of App.)

[17] *Barnett v. State*, 2011 OK CR 28 (Okla. Ct. Crim. App. 2011) (OCCA abandons the "merger doctrine" for 2nd degree felony murder). "The felony crimes of assault and battery, child neglect, caretaker abuse and neglect, operation of a motor vehicle while intoxicated…. and a host of other felonies, can have deadly consequences. The Legislature is well within reason to define killings during the commission of these dangerous felonies as murder, even when the felony is not "independent" of the act or acts resulting in death. Indeed, it is when such felonies destroy life that they are most deserving of the infamy and punishment of murder. Continued adherence to the merger doctrine, and the remedy as established in *Quillen*, would, in many instances, nullify the proper exercise of the Legislature's power to define and punish murder. We will not follow that course." *Id.* at 32-33.

[18] *Baker v. State*, 236 Ga. 754 (1976) (Georgia rejects the merger doctrine, based on presumed intent of legislature to make all felonies qualify as predicates for felony murder), *see also King v. State*, 260 Ga. 740, 741 (1991) (upholding felony murder conviction where predicate felony was aggravated assault of victim), and *Huntley v. State*, 271 Ga. 227 (1999) (Georgia continues to decline to adopt merger rule to preclude aggravated assault from serving as predicate for felony murder).

The one jurisdiction noted above which would analyze the burglary charge for merger, Massachusetts, notes that the merger doctrine does not apply where the predicate felony has an intent distinct from the act causing physical injury or death.[19]

In this case, the planned assault underlying the felony murder intended a variety of acts and crimes outside of the aggravated assault which killed SSG [redacted] Because the sole intent of the burglary was not to commit the strangling of SSG [redacted] even if the merger doctrine was applied to the underlying crime within the burglary, it still should not merge with the murder.

5. Congressional Intent has not been "usurped"

Defense counsel suggests that the charging scheme has "usurped" the intent of Congress with respect to Articles 118 and 129, claiming "it was not congress' intent to allow certain crimes to satisfy Burglary and then to be fast-tracked to felony murder without careful analysis." Defense mot. at 9.

In broad summary, the Defense attempts to argue the burglary in this case wasn't serious because it was in good playful fun (which the Government disputes), and that Congress didn't intend for this kind of burglary to qualify for felony-murder (either because it isn't "serious" or due to the merger doctrine).

However, the Defense cites no authority supporting these propositions, and the underlying assertion (that certain burglaries should not be eligible for felony murder) is refuted by the plain text of Article 118. If Congress had desired to impose further limits on felony murder aside from enumerating particular felonies, it certainly could have done so. Similar to *Rodriguez,*[20] the maxim *expresio unius est exclusio alterius* applies, where the inclusion of a limitation in the law (enumerating particular felonies, rather than providing a subjective test), implies the exclusion of other limitations of a similar sort.

Moreover, the attempt to focus on the underlying crime within the burglary misapprehends the general purpose of burglary statutes. In this case, a burglary is committed whether the underlying crime was an intended indecent exposure, a wrongful appropriation, or an assault and battery to embarrass, humiliate and haze a fellow servicemember.

> [I]t has also been stated that burglary laws are based primarily upon a recognition of the dangers to personal safety created by the usual burglary situation—the danger that the intruder will harm the occupants in attempting to perpetrate the intended crime or to escape, and the danger that the occupants will in anger or panic react violently to the invasion, thereby inviting more violence. Thus, burglary laws are also designed primarily to protect against the creation of a situation dangerous to personal safety caused by unauthorized entry.

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[19] *Commonwealth v. Morin*, 478 Mass. 415 (2017). *See also Commonwealth v. Kilburn*, 438 Mass. 356, 359 (2003) (holding that where the victim was assaulted by the brandishing of a firearm, before being shot by the accused, the first assault was sufficiently independent to avoid merger and support a felony murder charge).

[20] 953 S.W.2d at 354.

> The deterrence of the trespass and the crime intended to be committed within is of secondary importance, as the laws are primarily designed not to deter the trespass and the intended crime, which are prohibited by other laws, so much as to forestall the germination of a situation dangerous to personal safety.[21]

As noted above, the plain language of Article 118 and 129 do not include any requirement to examine the underlying intended crime of the burglary. But moreover, doing so would be contrary to the general purpose of burglary laws.

B. <u>The Specification of Charge II properly alleges an offense.</u>

> Charge II: Violation of the UMCJ, Article 129
>
> Specification (Burglary): In that [redacted]Tony Dedolph, U.S. Navy, on active duty, did, on or about 4 June 2017, at or near [redacted] in the nighttime, unlawfully break and enter the private bedroom of Staff Sergeant [redacted] U.S. Army, with the intent to commit assault consummated by a battery therein.
>
> Burglary has three elements;
>
> (1) That the accused unlawfully broke and entered the dwelling house of another;
>
> (2) That both the breaking and entering were done in the nighttime; and
>
> (3) That the breaking and entering were done with the intent to commit an offense punishable under Article 118 through 128, except Article 123a[22]

The Specification alleges that the Accused did "unlawfully break and enter" the "private bedroom" of "Staff Sergeant [redacted]. In doing, it alleged the first element, where the private bedroom is alleged to be the dwelling of "another" (namely, the victim).

The Specification alleges the breaking and entering occurred in the nighttime.

The Specification alleges the breaking and entering were done with the intent to commit and assault consummated by a battery, which is an offense punishable under Article 128.

As such, the Specification properly alleges all of the elements of a violation of Article 129, and properly states the offense of Burglary.

C. <u>The Specification of Charge II is not otherwise defective</u>

The further Defense attacks regarding the deficiencies of the Burglary charge appear to be arguing that the Government won't be able to prove the necessary elements. Or put differently, that the evidence will be insufficient to find the Accused guilty at trial. None of

[21] 13 Am. Jur. 2d. Burglary § 3, Purpose of burglary laws
[22] Manual for Courts-Martial, Part IV, Para. 55.b. (2016 Ed.)

these are any kind of basis for a motion to dismiss at this point in the litigation. At best, they could be a basis for a motion under Rule for Courts-Martial 917.

However, the Government will briefly survey the factual matters raised by Defense.

1. "To merely play a practical joke"

The Defense suggests that [redacted] DeDolph never intended any crime, and therefore the Burglary charge is defective. This is a matter to be resolved at trial, as it is a question of proof of the necessary element of specific intent.[23]

2. "Superior tenancy"

The Defense argues that the Accused was the "Owner" of the building, that he had a superior possessory interest, and that he could not commit burglary within the Army/Navy residence as a result. The Government will have to prove that SSG [redacted] bedroom was the dwelling *of another* (distinct from [redacted] DeDolph), and that it was his private habitation.[24] However, that is evidence and proof to be resolved at trial.

3. "Shared common spaces"

The Defense attempts to argue that SSG [redacted] openly shared his private bedroom, and that he that he thereby surrendered any right to exclusive use which would make his bedroom his dwelling.[25] As above, if the Government cannot show that SSG [redacted] bedroom was his dwelling, then it will fail to prove a necessary element of the Specification—but this is a matter to be resolved at trial.

D. Conclusion

In summary, the merger doctrine is not a constitutional requirement, does not exist in the military, and does not apply to the Article 118 charge. Article 118 has an unambiguous

[23] However, enclosures 1-3 clearly evidence that [redacted] DeDolph did intend specific crimes, and planned to break and enter SSG [redacted] bedrooms to effect those crimes.

[24] Possessory interest or military authority is also likely insufficient as a defense theory, as military case law supports the notion that the purpose of the entry affects the *lawfulness* of the entry. In *United States v. Schember*, the Accused planned to assault the victim in a trailer that the victim resided in with two others. 50 M.J. 670 (N.M.C.C.A. 1999). The Accused received consent from both the other residents before entering the trailer and assaulting the victim, one of whom assisted by informing the Accused of the layout and a faulty lock. "There is a constructive breaking when the entry is gained … through collusion with a confederate, an occupant of the house." *Id. at 672.*

[25] This ignores the typical realities of living in shared spaces, such as a dormitory or separate bedrooms within a house where residents share facilities. In such instances, friendly residents may freely mingle or share their spaces during the day—no one would reasonably presume that meant they had consented to anyone breaking through their locked door with a sledgehammer at night while they slept. *See also People v. O'Keefe*, holding each room within a dormitory was a separate dwelling, even as they shared facilities, and each unauthorized entry presented a new and separate danger constituting another burglary. 222 Cal. App. 3d 517, 521 (Cal. 4th Dist. Ct. App. 1990). *See also State v. Cochran*, holding that entry into a locked bedroom, even though the appellant was invited into the home, could be entry into a separate "building" and therefore burglary. 191 Conn. 180, 187 (1983).

enumerated list of applicable crimes, and no further analysis is needed. Even if the merger doctrine were to be imported, it should not be applied to a burglary with intent to assault as the underlying crime for felony murder. Even if it were applied, the separate intents present in this crime would still weigh against merging the burglary with the felony murder.

The burglary charge properly states an offense, and the remaining evidentiary matters raised by the Defense should be resolved at trial.

The Defense has failed to show the Convening Authority has violated any controlling principles or congressional intent in the charging scheme. Rather than demonstrating a violation of Congress' intent, the Defense is simply asking to substitute its own judgment for what should be charged, over that of the Convening Authority. Not unlike the *State v. Hankins*[26] case, where the Defense likewise criticized the prosecution for their choice of underlying crime in a felony-murder case, the Supreme Court of Arizona noted:

> Appellant…claims that for the prosecution to charge…burglary in this case instead of aggravated assault constitutes prosecutorial misconduct, overreaching and misuse of the charging power. He cites no authority for this novel claim. It is clearly within the sound discretion of the prosecutor to determine whether to file charges and which charges to file.[27]

It is within the same sound discretion of the Convening Authority to refer the present charges for trial. The Defense motion should be dismissed in its entirety.

EVIDENCE

The Government adopts the following enclosures from the Government Response to Production of witnesses for the 10 Jan 20 Article 39(a):

Enclosure (1): Article 32 testimony of [redacted] USN (transcript)
Enclosure (2): Article 32 testimony of SSgt [redacted] SMC (transcript)
Enclosure (3): Mil. R. Evid 410 proffer of SSgt [redacted] USMC

RELIEF REQUESTED

The Government requests that the Defense motion be denied.

The Government respectfully requests oral argument.

[26] 141 Ariz. 217 (1984): (burglary with intent to commit aggravated assault was proper predicate for felony murder even where not independent of the homicide, and did not fall within "merger doctrine").
[27] *Id.* at 221.

Respectfully submitted,

[redacted]

LCDR, JAGC, USN
Trial Counsel

Certificate of Service

I hereby certify that a copy of this motion response was served on the Court and defense counsel on this 7th day of January 2020.

[redacted]

B. B. GARCIA
LCDR, JAGC, USN
Trial Counsel

UNITED STATES **v.** **TONY DEDOLPH** **[redacted] E-7 USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO COMPEL EXPERT CONSULTANT (DR. [redacted])** **7 JANUARY 2020**

1. **Nature of Response.** This is the Government's response to the Defense motion to compel an expert consultant to potentially ripen into an expert witness. The Government opposes the appointment of any expert consultant to the Defense who is not available for the scheduled trial dates of 23 March - 3 April 2020.

2. **Summary of Facts.**

   a. The Accused has been charged with a Violations of Article 81, 92, 118, 119, 129, and 134, UCMJ, stemming from the murder of Army Staff Sergeant (SSG) [redacted] during a hazing incident.

   b. This Court has set trial dates of 23 March 2020 through 3 April 2020.

   c. On 19 November 2019, the Defense requested Dr. [redacted] be provided as an expert consultant in the field of Forensic Pathology. The Defense also stated that "[T]he defense is all but certain that we will be calling Doctor [redacted] as an expert witness in the case…" (Def. Mot. Encl. 2). Additionally, the Defense requested that Dr. [redacted] "be [paid]…travel time and expenses as required." (Def. Mot. Encl. 2). The Defense failed to state in its request that Dr. [redacted] would be available for trial. (Def. Mot. Encl. 2).

   d. On 19 November 2019, Trial Counsel reached out to the Defense to clarify deficiencies in its expert consultant requests relating to 1) the amount of the authorization, 2) clarification that the experts understand that they cannot be paid

for travel per the Joint Travel Regulations, and 3) that the experts have confirmed that they are available for the scheduled trial dates. (Encl. 1). The Defense did not respond to this inquiry.

e. On 26 November 2019, Trial Counsel again reached out to the Defense to request confirmation that the experts understood that they could not be paid for travel per the Joint Travel Regulations, and that the experts are available for the scheduled trial dates. (Encl. 2). Again, the Defense did not respond to this inquiry.

f. On 12 December 2019, the Convening Authority denied the Defense request for Dr. [redacted] "pending confirmation of his availability during the scheduled trial dates," and advised the Defense that the "[Convening Authority] will not pay any rate for professional services on days devoted solely to travel without a showing of necessity."[1] (Def. Mot. Encl. 3).

g. On 17 December 2019, Trial Counsel informed the Defense that the denial of Dr. [redacted] was "conditioned on the fact that you have not confirmed availability of [him] and that [he] cannot be paid for travel days." (Encl. 3). Defense Counsel responded to Trial Counsel without confirming Dr. [redacted] availability for trial or that he understood that he could not be paid for travel. (Encl. 4). In response, Trial Counsel invited Defense Counsel to resubmit a request for Dr. [redacted] to the Convening Authority stating that the Defense would not request Dr. [redacted] for trial. (Encl. 5). Defense Counsel did not submit an amended request or otherwise respond.

3. <u>Burden of Proof.</u> The burden of persuasion rests with the Defense and the burden proof on

[1] The Joint Travel Regulations do not permit payment for travel fees. The command is not legally authorized to pay the expert her requested fee. (Encl. 6)

any factual issue the resolution of which is necessary to decide a motion shall by a preponderance of the evidence. R.C.M. 905(c).

4. Discussion of Law and Analysis.

A. Expert Assistance is *For* Trial

An expert who is unavailable for an accused's trial is not necessary to that accused's defense at trial and should not be paid for by the government.[2] Because the Defense has not confirmed that Dr. [redacted] is available for trial, it is not entitled to his assistance at taxpayer expense.

The accused is not entitled to government funded expert assistance pre-trial if the expert assistance is not necessary to the accused's defense.[3] An accused makes a showing of necessity according to a two prong test: 1) demonstrating that the expert would be of assistance to the defense, and 2) by establishing that the denial of the expert would result in an unfair trial.[4] Here, the Defense has not met its burden as to the second prong.[5]

Because the Defense has not confirmed the availability of Dr. [redacted] for the trial, it is unknown whether he could provide assistance to the accused at *this* trial. If he cannot be present at the accused's trial, his assistance will not ensure that the accused has a fair trial. In fulfilling its obligation to provide the accused a fair trial[6], the Government made repeated efforts to ascertain Dr. [redacted] availability, yet the Defense chose to remain silent. Even after the Defense was explicitly told that the expert denial was conditioned on

[2] The Defense has *not* argued that Dr. [redacted] is the *only* forensic pathologist expert who could provide necessary assistance to the accused in his trial.
[3] "Servicemembers are entitled to government-provided expert assistance if such assistance is necessary to their defense." *United States v. Anderson*, 68 M.J. 378, 383 (CAAF 2010)
[4] "Instead, the accused must establish a reasonable probability 'that (1) an expert would be of assistance to the defense and (2) that denial of expert assistance would result in a fundamentally unfair trial.' *" United States v. Hendrix*, 76 M.J. 283, 288 (CAAF 2017)
[5] The Government agrees that a forensic expert would be of assistance to the defense in the preparation of its case.
[6] See generally, *Kyles v. Whitley*, 514 U.S. 419, 438 (1995).

the lack of confirmation of availability for trial, the Defense refused to confirm Dr. [redacted] availability. Because the Defense has not shown how Dr. [redacted] will help the accused in his presently scheduled trial, it has not met its burden to show he is necessary for *this* trial.

B. Granting Dr. [redacted] is Likely to Delay Trial

The accused's interest in moving towards trial without delay will be prejudiced by granting Dr. [redacted] as an expert. Given that experts frequently book out for trials months in advance, it can be expected that Dr. [redacted] might now have conflicts with scheduled trial dates. The Government has made every effort to expedite the approval of his request to aid in the accused's trial. To this end, the Government has made it clear that if Dr. [redacted] availability for trial is confirmed, he will be granted and can begin work on the case. However, the Defense has not and will not confirm his availability for trial despite signaling three times in its initial request[7] that it intends to call him as a witness at trial. Although the Defense responded, "I don't really get this – they were requested as expert consultants. How does their ability for trial affect their ability for being a consultant to our team as requested?" they stated in their expert request that, "There is every reason to believe [Dr. [redacted] will be requested as an expert witness." The Defense also states in its motion that, "The defense requests the government be compelled to retain Dr. [redacted] as an expert witness *or that the proceedings be abated*." (Def. Mot. Pg. 4, Para. 11-12.) (emphasis added) Such a response suggests a tactical move to use Dr. [redacted] future

[7] (Def. Mot. Encl. 2).
1. "The defense requests the appointment of Ms. [redacted] as an expert consultant (**with later a possibility of being an expert witness**) and paid for by the government in accordance with Rules for Court-martial 701(d), Article 46, UCMJ, and applicable case law." (emphasis added)
2. "Additionally, the defense would have no way of presenting this evidence to the members without having Dr. [redacted] testify from the witness stand."
3. "There is every reason to believe [Dr. [redacted] will be requested as an expert witness."

unavailability at trial as grounds for a continuance or otherwise. This kind of tactic is frowned upon within the Navy-Marine Corps Criminal Courts.[8]

C. Government Is Looking For Adequate Substitute

The Defense is not entitled to Dr. [redacted] expert assistance. If the Court determines that expert assistance is required, an adequate substitute may replace the requested expert.[9] The Government is actively seeking a substitute for the Defense to consult with who will be available for trial if necessary.

D. CNRMA Does Not Fund Expert Witness Travel Without a Showing of Necessity

Navy Region Mid-Atlantic generally does not pay expert witnesses a fee for travel time.[10] (Encl. 6) A deviation from that policy requires a showing of necessity. The Defense has not submitted a revised request to CNRMA showing the necessity of payment for travel fees.

5. Relief Requested. The Government respectfully requests this Court to deny the Defense's motion.

6. Evidence.

a. Enclosure 1 – Email from Trial Counsel to Defense dtd 19 Nov 19

b. Enclosure 2 – Email from Trial Counsel to Defense dtd 26 Nov 19

c. Enclosure 3 – Email from Trial Counsel to Defense dtd 17 Dec 19

d. Enclosure 4 – Email from Defense Counsel to Trial dtd 17 Dec 19

e. Enclosure 5 – Email from Trial Counsel to Defense dtd 17 Dec 19

[8] See generally, *United States v. Cherok*, 19 M.J. 559, 574 (NM-CMR 1984).
[9] "When the defense requests a nonmilitary expert, the defense must provide an estimated cost of employment and illustrate why a military expert would be an inadequate substitute. While the military judge is not required to provide the particular expert requested, if the defense shows that expert assistance is necessary an adequate substitute must be provided." *United States v. Anderson*, 68 M.J. 378, 383 (CAAF 2010)
[10] Governing regulation is 32 CFR 719.138 (Encl. 7)

f. Enclosure 6 – Memorandum from CNRMA dtd 7 Jan 20

g. Enclosure 7 – 32 C.F.R. 719.138

7. <u>Oral Argument.</u> If requested by the Defense or this Court, the Government is amenable to oral argument.

[redacted]
Capt, USMC
Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion was served electronically on defense counsel on 7 January 2020.

[redacted]
Jason D. Samuel
Capt, USMC
Trial Counsel

Phillip Stackhouse, Esq.
MILITARYDEFENDER
[redacted]

Attorneys for [redacted] Tony Dedolph

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

UNITED STATES OF AMERICA,

Government

vs.

[redacted] TONY DEDOLPH, [redacted]
[redacted] U.S. Navy

Accused.

NOTICE OF MOTION AND MOTION TO COMPEL PRODUCTION OF DEFENSE EXPERT WITNESS; AND MEMORANDUM OF POINTS & AUTHORITIES; (DNA Analysis)

[R.C.M. § 701(d)]

Date: TBD
Time: TBD
Judge: Captain Michael J. Luken
Dept.: Bldg [redacted]
Norfolk, Virginia 23511
Action Filed: November 14, 2018
Trial Date: March 23, 2020
Date: December 27, 2019

TO THE GOVERNMENT AND ITS ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that on December 27, 2019, in the above-mentioned Court, located at building [redacted] Norfolk, Virginia 23511, before Captain Michael J. Luken presiding, Accused moves the Court to Compel the prosecution to retain Accused's Expert Consultant and possibly later Expert Witnesses as previously requested and denied.

This motion will be based upon this Notice, this Memorandum of Points and Authorities, as well as the pleadings, records and files of this Court, and upon such other evidence and arguments that may be presented before the time of the court's ruling on the motion.

I.
RELIEF SOUGHT

The defense in the above case moves this court to compel the Government to retain the services of Ms. [redacted] as a defense expert consultant and possibly later expert witness in the field of forensic deoxyribonucleic acid ("DNA") analysis.

II.
BURDEN OF PERSUASION AND BURDEN OF PROOF

The burden of persuasion is on the defense and is by a showing of a preponderance of the evidence.

III.
BACKGROUND FACTS

In the instant case, the accused, [redacted] Dedolph, is alleged to have murdered his colleague, SSG [redacted] who had been injured while wrestling/horseplay and to whom the accused and others were providing combat lifesaving treatment e.g. cardiopulmonary resuscitation and a cricothyrotomy, but were unable to revive their injured colleague. Consequently, DNA was allegedly recovered at the scene of the incident and allegedly within a vehicle used to transport SSG [redacted] to medical care at a local hospital in [redacted]

IV.
WITNESSES AND EVIDENCE

a. Charge Sheet [not enclosed]

b. CV/Fee Schedule [Enclosure (1)]

c. Defense request [Enclosure (2)]

d. Government Denial [Enclosure (3)]

e. Ms. [redacted] will testify telephonically for the motion if necessary.

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///

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V.
LEGAL AUTHORITY AND ARGUMENT

The defense is requesting that Ms. [redacted], be paid for by the Government as an expert consultant and possibly later expert witness in the field of forensic deoxyribonucleic acid ("DNA") analysis in accordance with Rules for Court-martial 703(d), Article 46, UCMJ, and applicable case law.

In accordance with Article 46, UCMJ, "[t]he 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." This ensures that "[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 of law.' " *United States v. McAllister*, 64 M.J. 248, 249 (C.A.A.F.2007) (quoting Washington v. Texas, 388 U.S. 14, 19 (1967)).

An expert consultant is provided to the defense as a matter of [military and constitutional] due process, in order to prepare properly for trial and otherwise assist with the defense of a case. *United States v. Langston,* 32 M.J. 894, 896 (A.F.C.M.R.1991).

The Court of Appeals for the Armed Forces has determined that in order to require production of an expert consultant and possibly later expert witness, the moving party must establish: (1) the qualifications of the expert; (2) the subject matter of the expert testimony; (3) the basis for the expert testimony; (4) the legal relevance of the evidence; (5) the reliability of the evidence; and (6) whether the probative value of the testimony outweighs other considerations. United States v. Boston, No. NMCCA 200900157, 2010 CCA LEXIS 59, at *6-7 (N-M Ct. Crim. App. May 11, 2010), *United States v. Ruth*, 46 M.J. 1, 3 (C.A.A.F. 1997) (quoting *United States v. Houser*, 36 M.J. 392, 397 (C.A.A.F. 1993)).

A. The qualification of the expert.

Ms. [redacted] CV is attached at Enclosure (1) and is hereby incorporated as evidence of her qualifications as an expert in the field of forensic deoxyribonucleic acid ("DNA").

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B. <u>The subject matter of the counsel and expert testimony.</u>

The subject matter – including DNA collected at the scene – necessitates expert analysis from the highly specific and technical field of a forensic deoxyribonucleic acid ("DNA").

C. <u>The basis for the expert counsel and testimony.</u>

The government proffers to have recovered DNA from tape that was allegedly found at the scene and allegedly used during the event that lead to SSG [redacted] death. Important in the case will be objective evidence as to the cause of death and who was involved in what capacity. The government seized several items and had them analyzed for DNA evidence. The government has provided brief reports on the DNA analysis conducted that indicate the government will attempt to offer evidence suggesting the accused's guilt. The defense requires the assistance of a qualified expert consultant to review these reports and evaluate both the reports and the testing of the evidence in order to prepare for the yet to be named government expert in the same field.

The expert would review DNA-related reports and evidence that has been provided to the defense thus far. She would consult with members of the defense team to explain the DNA results, testing procedure, and possible flaws or inconsistencies in the testing or results. Among other things, the expert would also assist us in crafting appropriate cross-examination questions for the government expert. Finally, if relevant, Ms. [redacted] may testify for the defense.

D. <u>The legal relevance of the evidence.</u>

Ms. [redacted] consultation will provide the defense with the expertise to understand the intricacies of forensic DNA Analysis, assist the defense in developing its trial strategy given the complexity of forensic DNA Analysis, and assist the defense in preparing to cross examine government experts in the relevant fields. Further, if relevant to the defense after reviewing the evidence in the case, Ms. [redacted] testimony will provide direct evidence for the jurors to consider when deciding whether or not they should make any inference pertaining to the DNA.

E. <u>The reliability of the evidence.</u>

Ms. [redacted] has been qualified as an expert of DNA on numerous occasions and forensic DNA is a recognized scientific field.

F. <u>The probative value of the counsel and testimony outweighs other considerations.</u>

The probative value of Ms. [redacted] counsel and possible testimony cannot be overstated. She will provide expert consultant and possibly later expert testimony that will go toward elements of the allege offense that creates a defense for the accused. Again, Ms. [redacted] CV is attached, as is her fee schedule. The defense respectfully requests that Ms. [redacted] be initially authorized 30 hours for preparation time, plus travel time and expenses as required at the fee quoted.

VI.
ORAL ARGUMENT

The defense respectfully requests or argument.

V.
CONCLUSION

The defense requests the government be compelled to retain Ms. [redacted] as an expert witness or that the proceedings be abated. The ability to present matters to the court, and establish a defense, is imperative.

DATED: December 27, 2019

MILITARYDEFENDER

[redacted]

Attorney for Accused
[redacted] Tony Dedolph

UNITED STATES **v.** **TONY DEDOLPH** **[redacted]/E-7 USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO COMPEL EXPERT CONSULTANT (MS. [redacted])** **7 JANUARY 2020**

1. **Nature of Response.** This is the Government's response to the Defense motion to compel an expert consultant to potentially ripen into an expert witness. The Government opposes the appointment of any expert consultant to the Defense who is not available for the scheduled trial dates of 23 March - 3 April 2020.

2. **Summary of Facts.**

   a. The Accused has been charged with a Violations of Article 81, 92, 118, 119, 129, and 134, UCMJ, stemming from the murder of Army Staff Sergeant (SSG) [redacted] during a hazing incident.

   b. This Court has set trial dates of 23 March 2020 through 3 April 2020.

   c. The Accused's deoxyribonucleic acid (DNA) was found on the duct tape used to restrain SSG [redacted] during the hazing incident. (Encl. 1)

   d. On 19 November 2019, the Defense requested Ms. [redacted] be provided as an expert consultant in the field of DNA. The Defense also stated that "There is every reason to believe she will be requested as an expert witness." (Def. Mot. Encl. 2). Additionally, the Defense requested that Ms. [redacted] "be [paid]…travel time and expenses as required." (Def. Mot. Encl. 2). The Defense failed to state in its request that Ms [redacted] would be available for trial. (Def. Mot. Encl. 2).

   e. On 19 November 2019, Trial Counsel reached out to the Defense to clarify deficiencies in its expert consultant requests relating to 1) the amount of the

authorization, 2) clarification that the experts understand that they cannot be paid for travel per the Joint Travel Regulations, and 3) that the experts have confirmed that they are available for the scheduled trial dates. (Encl. 2). The Defense did not respond to this inquiry.

f. On 26 November 2019, Trial Counsel again reached out to the Defense to request confirmation that the experts understood that they could not be paid for travel per the Joint Travel Regulations, and that the experts are available for the scheduled trial dates. (Encl. 3). Again, the Defense did not respond to this inquiry.

g. On 12 December 2019, the Convening Authority denied the Defense request for Ms. [redacted] "pending confirmation of her availability during the scheduled trial dates," and advised the Defense that the "[Convening Authority] will not pay any rate for professional services on days devoted solely to travel without a showing of necessity."[1] (Def. Mot. Encl. 3).

h. On 17 December 2019, Trial Counsel informed the Defense that the denial of Ms. [redacted] was "conditioned on the fact that you have not confirmed availability of [her] and that [she] cannot be paid for travel days." (Encl. 4). Defense Counsel responded to Trial Counsel without confirming Ms. [redacted] availability for trial or that she understood that she could not be paid for travel. (Encl. 5). In response, Trial Counsel invited Defense Counsel to resubmit a request for Ms. [redacted] to the Convening Authority stating that the Defense would not request Ms. [redacted] for trial. (Encl. 6). Defense Counsel did not submit an amended request or otherwise respond.

[1] The Joint Travel Regulations do not permit payment for travel fees. The command is not legally authorized to pay the expert her requested fee. (Encl. 7)

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

4. **Discussion of Law and Analysis.**

A. Expert Assistance is *For* Trial

An expert who is unavailable for an accused's trial is not necessary to that accused's defense at trial and should not be paid for by the government.[2] Because the Defense has not confirmed that Ms. [redacted] is available for trial, it is not entitled to her assistance at taxpayer expense.

The accused is not entitled to government funded expert assistance pre-trial if the expert assistance is not necessary to the accused's defense.[3] An accused makes a showing of necessity according to a two prong test: 1) demonstrating that the expert would be of assistance to the defense, and 2) by establishing that the denial of the expert would result in an unfair trial.[4] Here, the Defense has not met its burden as to the second prong.[5]

Because the Defense has not confirmed the availability of Ms. [redacted] for the trial, it is unknown whether she could provide assistance to the accused at *this* trial. If she cannot be present at the accused's trial, her assistance will not ensure that the accused has a fair trial. In fulfilling its obligation to provide the accused a fair trial[6], the Government made repeated efforts to ascertain Ms. [redacted] availability, yet the Defense chose to remain

[2] The Defense has *not* argued that Ms. [redacted] is the *only* DNA expert who could provide necessary assistance to the accused in his trial.
[3] "Servicemembers are entitled to government-provided expert assistance if such assistance is necessary to their defense." *United States v. Anderson*, 68 M.J. 378, 383 (CAAF 2010)
[4] "Instead, the accused must establish a reasonable probability 'that (1) an expert would be of assistance to the defense and (2) that denial of expert assistance would result in a fundamentally unfair trial.'" *United States v. Hendrix*, 76 M.J. 283, 288 (CAAF 2017)
[5] The Government agrees that a DNA expert would be of assistance to the defense in the preparation of its case.
[6] See generally, *Kyles v. Whitley*, 514 U.S. 419, 438 (1995).

silent. Even after the Defense was explicitly told that the expert denial was conditioned on the lack of confirmation of availability for trial, the Defense refused to confirm Ms. [redacted] availability. Because the Defense has not shown how Ms. [redacted] will help the accused in his presently scheduled trial, it has not met its burden to show she is necessary for *this* trial.

B. Granting Ms. [redacted] is Likely to Delay Trial

The accused's interest in moving towards trial without delay will be prejudiced by granting Ms. [redacted] as an expert. Given that experts frequently book out for trials months in advance, it can be expected that Ms. [redacted] might now have conflicts with scheduled trial dates. The Government has made every effort to expedite the approval of her request to aid in the accused's trial. To this end, the Government has made it clear that if Ms. [redacted] availability for trial is confirmed, she will be granted and can begin work on the case. However, the Defense has not and will not confirm her availability for trial despite signaling three times in its initial request[7] that it intends to call her as a witness at trial. Although the Defense responded, "I don't really get this – they were requested as expert consultants. How does their ability for trial affect their ability for being a consultant to our team as requested?" they stated in their expert request that, "There is every reason to believe [Ms. [redacted] will be requested as an expert witness." The Defense also states in its motion that, "The defense requests the government be compelled to retain Ms. [redacted] as an expert witness *or that the proceedings be abated*." (Def. Mot. Pg. 4, Para. 11-

[7] (Def. Mot. Encl. 2).
1. "The defense requests the appointment of Ms. [redacted] as an expert consultant (**with later a possibility of being an expert witness**) and paid for by the government in accordance with Rules for Court-martial 701(d), Article 46, UCMJ, and applicable case law." (emphasis added)
2. "Additionally, the defense would have no way of presenting this evidence to the members without having Ms. [redacted] testify from the witness stand."
3. "There is every reason to believe [Ms. [redacted] will be requested as an expert witness."

12.) (emphasis added) Such a response suggests a tactical move to use Ms. [redacted] future unavailability at trial as grounds for a continuance or otherwise. This kind of tactic is frowned upon within the Navy-Marine Corps Criminal Courts.[8]

C. Government Is Looking For Adequate Substitute

The Defense is not entitled to Ms. [redacted] expert assistance. If the Court determines that expert assistance is required, an adequate substitute may replace the requested expert.[9] The Government is actively seeking a substitute for the Defense to consult with who will be available for trial if necessary.

D. CNRMA Does Not Fund Expert Witness Travel Without a Showing of Necessity

Navy Region Mid-Atlantic generally does not pay expert witnesses a fee for travel time.[10] (Encl. 7) A deviation from that policy requires a showing of necessity. The Defense has not submitted a revised request to CNRMA showing the necessity of payment for travel fees.

5. Relief Requested. The Government respectfully requests this Court to deny the Defense's motion.

6. Evidence.

a. Enclosure 1 – NCIS DNA Report

b. Enclosure 2 – Email from Trial Counsel to Defense dtd 19 Nov 19

c. Enclosure 3 – Email from Trial Counsel to Defense dtd 26 Nov 19

d. Enclosure 4 – Email from Trial Counsel to Defense dtd 17 Dec 19

[8] See generally, *United States v. Cherok*, 19 M.J. 559, 574 (NM-CMR 1984).
[9] "When the defense requests a nonmilitary expert, the defense must provide an estimated cost of employment and illustrate why a military expert would be an inadequate substitute. While the military judge is not required to provide the particular expert requested, if the defense shows that expert assistance is necessary an adequate substitute must be provided." *United States v. Anderson*, 68 M.J. 378, 383 (CAAF 2010)
[10] Governing regulation is 32 CFR 719.138 (Encl. 8)

e. Enclosure 5 – Email from Defense Counsel to Trial dtd 17 Dec 19

f. Enclosure 6 – Email from Trial Counsel to Defense dtd 17 Dec 19

g. Enclosure 7 – Memorandum from CNRMA dtd 7 Jan 20

h. Enclosure 8 – 32 C.F.R. 719.138

7. <u>Oral Argument.</u> If requested by the Defense or this Court, the Government is amenable to oral argument.

[redacted]
Jason D. Samuel
Capt, USMC
Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion was served electronically on defense counsel on 7 January 2020.

[redacted]
Jason D. Samuel
Capt, USMC
Trial Counsel

UNITED STATES **v.** **TONY DEDOLPH** **[redacted]/E-7 USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO COMPEL EXPERT CONSULTANT (DR. [redacted])** **7 JANUARY 2020**

1. **Nature of Response.** This is the Government's response to the Defense motion to compel an expert consultant to potentially ripen into an expert witness. The Government opposes the appointment of any expert consultant to the Defense in the area of forensic trauma medicine.

2. **Summary of Facts.**

   a. The Accused has been charged with a Violations of Article 81, 92, 118, 119, 129, and 134, UCMJ, stemming from the murder of Army Staff Sergeant (SSG) [redacted] during a hazing incident.

   b. This Court has set trial dates of 23 March 2020 through 3 April 2020.

   c. After the Accused assaulted SSG [redacted] he and the other co-conspirators discovered SSG [redacted] was unconscious, and they attempted several medical procedures to resuscitate him including cardiopulmonary resuscitation and a cricothyrotomy. SSG [redacted] perished despite their efforts.

   d. On 19 November 2019, the Defense requested Dr. [redacted] be provided as an expert consultant in the field of trauma medicine. The Defense's stated basis for her consultation was, "[To analyze] whether the treatment methods performed were reasonable under the circumstances, were conducted in a reasonable manner, and if different life saving actions would have resulted in a different outcome." (Def. Mot. Encl. 2) The Defense then stated that her answers would go towards

"issues on the merits and matters in mitigation." (Def. Mot. Encl. 2) The Defense did not proffer any particular issues on the merits or matters in mitigation that her testimony would be relevant to.

e. The Defense stated in its request that it "is all but certain that we will be calling Doctor [redacted] as an expert witness in the case…" (Def. Mot. Encl. 2)

f. On 12 December 2019, the Convening Authority denied the Defense request for Dr. [redacted] (Def. Mot. Encl. 3).

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

4. Discussion of Law and Analysis.

The Accused is entitled to expert assistance before trial after he first demonstrates the necessity of the expert assistance.[1] The possibility of gaining helpful information from an expert does not establish necessity.[2] The accused must establish necessity through presenting evidence which shows *how* the expert will assist in his defense, and that without the expert's testimony the accused would have a fundamentally unfair trial.[3] The Defense has not established the necessity of this area of expert testimony.

A. No Legal Or Factual Necessity for Expert Consultation

The Defense did not present or proffer any evidence that testimony from Dr. [redacted] is factually relevant to the charged offenses. The Defense has not proffered any

[1] "An accused is entitled to an expert's assistance before trial to aid in the preparation of his defense upon a demonstration of necessity." *United States v. Bresnahan*, 62 M.J. 137, 143 (C.A.A.F. 2005).
[2] "To establish necessity, an accused must demonstrate something more than a mere possibility of assistance from a requested expert*." United States v. Hendrix*, 76 M.J. 283, 288 (CAAF 2017)
[3] "Instead, the accused must establish a reasonable probability 'that (1) an expert would be of assistance to the defense and (2) that denial of expert assistance would result in a fundamentally unfair trial.' *" United States v. Hendrix*, 76 M.J. 283, 288 (CAAF 2017)

testimony which could go to the elements of any charged offense that could create a defense for the accused. The subject matter to which the Defense wants Dr. [redacted] to opine, "emergency life-saving medical procedures performed," is irrelevant to the charged offenses and is not necessary for trial because the Government does not intend to offer any testimony or evidence for the purpose of proving that the accused or his co-conspirators did not attempt life-saving measures.

The other offered bases for Dr. [redacted] testimony are also unnecessary for trial. The employment of emergency life-saving medical procedures is not a legally cognizable defense to hazing, conspiracy, obstruction of justice, burglary, murder, or manslaughter charges. Reviewing evidence "to determine inconsistencies or implausibility in the statements made by the complaining witnesses" relating to emergency life-saving procedures is not necessary for this case. Consultation with other experts and the accused "to determine whether the defense theory is reasonable" is not necessary when the Defense has not proffered its potential theory it requests Dr. [redacted] be hired to explore, and no theory would be a defense. The crafting of cross-examination questions for the government expert on an uncontested issue is not necessary for this trial. The law requires that the Defense MUST demonstrate something more than a mere possibility that speaking with Dr. [redacted] might yield a benefit to the accused before an expert consultant can be judicially ordered. The Defense has not done so and thus it fails to establish the necessity of Dr. [redacted]

B. <u>No Necessity for Potential Expert Testimony In Sentencing</u>

The testimony of an expert witness in forensic trauma medicine is not necessary for pre-sentencing proceedings. Because intent and motive are not generally relevant to the felony murder or manslaughter on the merits, Dr. [redacted] testimony could only be relevant at pre-sentencing. However, the Government does not intend to introduce any testimony or evidence

that would contradict the evidence that the accused and his co-conspirators attempted life-saving steps after SSG [redacted] death. Therefore, Dr. [redacted] testimony at pre-sentencing on any inference the members should draw is not necessary on this issue. This is not a tort law case where assigning various amounts of liability to a particular individual is material. Rather, in this criminal case, the Defense has the ability to elicit R.C.M. 1001(d) evidence of life-saving measures through other fact witnesses and/or the accused himself without paying a $750.00 per hour fee to Dr [redacted] No expert is needed to explain those facts to the members. Thus, expert testimony in this area is not necessary for sentencing.

C. Government Will Find Adequate Substitute If Necessary

However, should the Court disagree with the Government and order an expert consultant, the Government maintains that the Defense is not entitled to Dr. [redacted] expert assistance based on its proffer. An adequate government substitute may replace the requested expert.[4] The Defense has not proffered any reason why Dr. [redacted] is the only expert that could provide testimony in this case. The Government is actively seeking available personnel for the Defense to consult should it become necessary.

5. **Relief Requested.** The Government respectfully requests this Court to deny the Defense's motion.
6. **Evidence.** None.

[4] "When the defense requests a nonmilitary expert, the defense must provide an estimated cost of employment and illustrate why a military expert would be an inadequate substitute. While the military judge is not required to provide the particular expert requested, if the defense shows that expert assistance is necessary an adequate substitute must be provided." *United States v. Anderson*, 68 M.J. 378, 383 (CAAF 2010)

7. **Oral Argument.** If requested by the Defense or this Court, the Government is amenable to oral argument.

[redacted]

Capt, USMC
Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion was served electronically on defense counsel on 7 January 2020.

[redacted]

Capt, USMC
Trial Counsel

UNITED STATES **v.** **TONY DEDOLPH** **[redacted]/E-7 USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO COMPEL EXPERT CONSULTANT (MR. [redacted])** **7 JANUARY 2020**

1. **Nature of Response.** This is the Government's response to the Defense motion to compel an expert consultant to potentially ripen into an expert witness. The Government opposes the appointment of any expert consultant to the Defense in the area of forensic criminology.

2. **Summary of Facts.**

   a. The Accused has been charged with a Violations of Article 81, 92, 118, 119, 129, and 134, UCMJ, stemming from the murder of Army Staff Sergeant (SSG) [redacted] during a hazing incident.

   b. This Court has set trial dates of 23 March 2020 through 3 April 2020.

   c. On 19 November 2019, the Defense requested Mr. [redacted] be provided as an expert consultant in the field forensic criminology. The Defense's stated basis for his consultation was "to assess whether the crime scene was properly preserved, and whether the processes in obtaining and preserving such evidence were adhered to." (Def. Mot. Encl. 2) The Defense then stated that he "give his independent opinion based on the evidence and to refute any opinions the government offers that are not consistent with his expert analysis." (Def. Mot. Encl. 2)

   d. On 12 December 2019, the Convening Authority denied the Defense request for Mr. [redacted] (Def. Mot. Encl. 3).

3. **Burden of Proof.** The burden of persuasion rests with the Defense and the burden proof on

any factual issue the resolution of which is necessary to decide a motion shall by a preponderance of the evidence. R.C.M. 905(c).

4. <u>Discussion of Law and Analysis.</u>

An expert witness may testify if it will be helpful to the members.[1] If an untrained jury member is qualified to determine an issue intelligently apart from an expert's testimony the expert may not be necessary.[2] There must be a demonstration of necessity to receive expert assistance.[3] The small possibility of gaining helpful information from an expert does not establish necessity.[4] The accused must establish necessity through presenting evidence which shows *how* the expert will assist in his defense, and that without the expert's testimony the accused would have a fundamentally unfair trial.[5] The defense needs to demonstrate through evidence what exactly it expects the expert to find, and why the defense counsel cannot do what it will ask the expert to do.[6] The Defense has not demonstrated why a layperson would not understand the crime scene based on the testimony from witnesses who were at the scene on the night in question, nor why the defense needs an expert witness to elucidate and cross-examine witnesses on issues with chain of custody or evidence handling. The Defense has failed to establish the necessity of this expertise for this trial.

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[1] "Thus, an 'expert' witness may testify if he or she is qualified and testimony in his or her area of knowledge would be helpful." *United States v. Billings*, 61 M.J. 163, 166 (CAAF 2005)

[2] "A suggested 'test' for deciding 'when experts may be used' is 'whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject.'" *United States v. Flesher*, 73 M.J. 303, 313 (CAAF 2014)

[3] "An accused is entitled to an expert's assistance before trial to aid in the preparation of his defense upon a demonstration of necessity." *United States v. Bresnahan*, 62 M.J. 137, 143 (C.A.A.F. 2005).

[4] "To establish necessity, an accused must demonstrate something more than a mere possibility of assistance from a requested expert." *United States v. Hendrix*, 76 M.J. 283, 288 (CAAF 2017)

[5] "Instead, the accused must establish a reasonable probability 'that (1) an expert would be of assistance to the defense and (2) that denial of expert assistance would result in a fundamentally unfair trial.'" *United States v. Hendrix*, 76 M.J. 283, 288 (CAAF 2017)

[6] "In particular, the defense must show what it expects to find…[and]…how and why the defense counsel and staff cannot do it." *United States v. Allen*, 31 M.J. 572, 623 (NM-CMR 1990)

A. Testimony of Fact Witnesses Obviates Need for Expert Opinion

The primary source witnesses who were present for SSG [redacted] murder will testify about what occurred that night. No retrospective testimony from an expert is needed to explain or contradict the accounts given by the witnesses who were there and committed the crimes. If this were a case where there were no eye-witnesses and the members had to rely on solely on after-the-fact investigators to piece together what happened, having an independent expert review the findings of the government investigators could be probative. However, in this case, there will be multiple fact witnesses who were present for the murder of SSG [redacted] who can describe the crime scene and criminal actions for the members. The members would have the benefit of having "highly specialized knowledge" from those witnesses, allowing them to intelligently determine the facts to the best possible degree from the witnesses who took part in the crime. An expert witness would not have more specialized knowledge than those witnesses, nor would the expert be the person to explain the scene to the best possible degree to the members. Further, the Defense has not proffered, nor included any evidence, in its motion that any review of "images, charts, and graphs" would be inconsistent with what the primary source witnesses will testify to. Therefore, the Defense has not shown the necessity of an expert in this area, nor demonstrated how an expert would aid the Defense in its preparation for trial.

B. Defense Capable of Highlighting Errors in Evidence Handling and Scene Preservation

An expert is not needed to highlight investigative errors to the members. The defense attorneys are not inexperienced and are capable of handling any issues with scene preservation or evidence handling at trial. The lead counsel is a very experienced retired Marine Corps judge advocate who has tried over 100 cases to verdict, including many high

profile cases.[7] If for some reason he were unable to successfully investigate and cross-examine witnesses based on defects in the crime scene, one of the detailed military counsel is a Navy JAG Corps Military Justice Specialist 1 who is certified by the Navy to be able to handle these tasks. The Defense has or will receive the benefit of a site visit to the crime scene, access to testimony of the primary source witnesses, access to same documentary and electronic evidence as the Government. Moreover, if that were not enough, the Defense has access to its client to uncover enough evidence to proffer to the court on why the defense team is unable to handle these issues at trial. However, the Defense has not proffered any evidence to the court. It has not highlighted any specific areas where the expert will be helpful. It has not proffered any way in which Mr. [redacted] testimony might "go toward elements of the allege (sic) offense that creates a defense for the accused." (Def. Mot. Pg. 4. Para. 3-4.) Therefore, this expert testimony is not necessary for this trial.

5. **Relief Requested.** The Government respectfully requests this Court to deny the Defense's motion.
6. **Evidence.** None.
7. **Oral Argument.** If requested by the Defense or this Court, the Government is amenable to oral argument.

[redacted]
Jason D. Samuel
Capt, USMC
Trial Counsel

[7] "Mr. Stackhouse has tried well over 100 jury trials to verdict as both a defense attorney and prosecutor, represented hundreds of clients in resolving their case through plea agreements, and supervised the defense and prosecution of several hundred more." https://www.militarydefender.com/About/Phillip-E-Stackhouse.shtml. 3 Jan 2020.

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion was served electronically on defense counsel on 7 January 2020.

[redacted]

Jason D. Samuel
Capt, USMC
Trial Counsel

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

U N I T E D S T A T E S **v.** **TONY DEDOLPH** **E-7/[redacted] USN**	**GOVERNMENT MOTION TO PROTECT M.R.E. 505 AND 506 PRIVILEGED INFORMATION** **17 JAN 20**

MOTION

First, the prosecution requests that this Court issue an order to protect against the unauthorized disclosure of government information in this case. The prosecution requests that the protective order prohibit disclosure by any means, either verbal or in print.

Second, the prosecution requests a hearing under M.R.E. 505 in order to consider the alternatives to full disclosure for the Defense evidence, and any necessary plans to safeguard classified information.

BACKGROUND SUMMARY

On the evening of 3June 2017, the Accused, GySgt [redacted], [redacted] and SSgt [redacted] met at a bar in [redacted] (the "[redacted] along with other friends (military members and other expatriates). During the course of the evening, the four named members began to form a plan to haze SSG [redacted] who had ditched some of the group for a different event that night.

Late in the evening and early morning hours, the group proceeded to another club ("[redacted] where they continued to plan and joke about breaking into SSG [redacted] room to strangle (with a chokehold) and restrain him with duct tape, so as to then have [redacted] ational commit a sexual act upon him. Also present for these plans were [redacted] and [redacted] The plan came to be known as "Operation Tossed Salad".

Closer to 0400, the group left [redacted] and after getting food, proceeded back to the Marine residence in [redacted] to secure supplies for the hazing event. [redacted] did not go with the group, but th [redacted] ed, [redacted] did. After getting supplies at the Marine residence, they proceeded to the shared Army/Navy house (where the Accused and SSG [redacted] resided).

The group arrived around 0500, and convinced the local [redacted] to assist in their plan. They removed the shirt of one [redacted] put a leash around his neck, and placed a night

mask on him. They used a sledgehammer to break into SSG [redacted] room at ~0530. The Accused, [redacted] rushed in, while [redacted] ran from the scene. While the other members helped retrain and tape SSG [redacted] the Accused placed him in a rear naked chokehold, pressing his face into the bedding and strangling him into unconsciousness. At some point [redacted] realized that SSG [redacted] was unconsciousness and not recovering, and acted to get the Accused off of SSG [redacted] Once the group realized he was not breathing, they attempted resuscitation efforts, which were unsuccessful.

Before SSG [redacted] was taken to a nearby clinic, the Accused began coordinating a statements between [redacted] and himself, expressing concern that the event might be seen as hazing. The members agreed to keep the Marines "out of the room." Later, at the clinic, [redacted] stated that the story would just have the Accused and [redacted] involved in the "wrestling".

The Accused later generated falsified timelines and narratives to share with [redacted] in order to coordinate their stories. Duct tape was not to be mentioned, and the event was to be characterized as mutual and consensual wrestling for fun, where a tragic and unexpected accident occurred.

The morning of 4 June 2017, [redacted] texted [redacted] asking how "the Operation" went, and learned of SSG [redacted] death.

Later that same morning [redacted] was present at the Army/Navy house when the Accused explained to other members ([redacted]) how "duct tape" was not to be mentioned, because that would look like hazing. However, the details of what had happened in the morning were not explained to [redacted]

Army Criminal Investigations Division (CID) arrived a bit over a day later, after the Accused and MATTHEWS had left country. When investigating, they were told that it was mutual wrestling and an accident, and CID did not investigate it as or consider it a homicide.

[redacted] knowing of the investigation, took affirmative steps to contact Army CID, and forwarded information regarding the planning of "Operation Tossed Salad" prior to the death of SSG [redacted]

When SSG [redacted] death was classified as a homicide in September 2017, investigative jurisdiction transferred to the Naval Criminal Investigative Service (NCIS). Special Agent (SA) [redacted] was assigned as the case agent.

SA [redacted] interviewed [redacted] who described the planning and possible intent of [redacted] and the Accused, based on their interactions at the [redacted] was still in contact and friendly with the parties, SA [redacted] sought their assistance as a Confidential Informant (CI) to seek further information.

[redacted] attempted to get information from [redacted] both in person and over text. However, neither was forthcoming, and no further material information was developed.

In November 2017, SA [redacted] began an intimate personal relationship with [redacted] which he did not disclose to NCIS or the Region Legal Service Office (RLSO). SA [redacted] continued to act as the lead case agent and maintain the relationship until late October 2018, when NCIS learned of the relationship. SA [redacted] was then immediately removed from the investigation.

FACTS

1. [redacted] is an expected witness for the court-martial.

2. SA [redacted] s an expected (and approved) witness for the court-martial.

3. Defense counsel provided the Government notice of potential M.R.E. 505 evidence, including details of [redacted] employment and actions in [redacted]

4. Further material facts can be found in Enclosure (1).

BURDEN

Burdens vary under M.R.E. 505, but either party may move for a hearing to seek a ruling regarding the disclosure or protection of classified information, and alternatives to disclosure.

TABLE OF AUTHORITY

United States v. Grunden, 2 M.J. 116 (C.M.A. 1977)

ARGUMENT

Fundamentally, the Government is seeking two things—a protective order to secure information privileged under M.R.E. 506 (the basis for which is explained in Enclosure (1)), and a hearing to consider the alternatives to full disclosure of the information Defense desires to admit. Because this is not currently a dispute over discovery or disclosure to the Defense, but over the handling and protection of privileged information, the Government is not seeking any *ex parte* discussions or submissions at this time.

1. Alternatives to full disclosure

The Government does not have sufficient clarity on the details of what the Defense seeks to admit to provide a particularized list of solutions, however, the Defense seeks to introduce evidence at least four things: of the Accused's prior service, the Accused's mission and actions in [redacted] employment, and information about another witness.

For information relating to [redacted] and the Accused's prior service and missions, the Government desires appropriate substitutions or stipulations in the classified information, such that the Defense is able to admit the material information they seek, while avoiding classified details. For example, some of the Accused's prior achievements are not classified when taken out of a particular context, with units redacted and potentially locations changed.

By similar note, the particular details of [redacted] are not necessary for Defense to admit the material evidence in question—the gross error in judgment and dereliction represented by SA [redacted] intimate relationship with a primary witness and CI in an investigation. [redacted] further work as a CI is not material, because no one was willing to share further details with them.

Should there be any information where a substitution, pseudonym, or other measure is inadequate for relevant, necessary information, the Government would seek limited, closed sessions of court for the presentation of the classified evidence to members with proper clearances. As noted in *United States v. Grunden*, the military judge may direct that the public be excluded from a trial to prevent the disclosure of classified information, but such authority should be exercised with caution, weighing the right of an accused to an open trial against the public policy considering justifying exclusion. 2 M.J. 116, 121 (C.M.A. 1977). The Court further recognized partial exclusion on such a basis can be justified, where the exclusion is narrowly and carefully drawn, but a blanket exclusion from a trial would demand a compelling showing that it was necessary to prevent the disclosure of classified information. *Id.*

2. Protective Order for M.R.E. 506 information

The prosecution requests that the Court issue an order to protect against the disclosure of government Information in this case because privileged unclassified government information has been and will be disclosed to the Accused in connection with these proceedings. "Upon motion of the trial counsel, the military judge must issue an order to protect against the disclosure of any government information that has been disclosed by the United States to any accused in any court-martial proceeding or that has otherwise been provided to, or obtained by, any such accused in any such court-martial proceeding". M.R.E. 506(g). The prosecution has already disclosed privileged government information to the defense in connection with this court-martial. Indeed, some of the probative evidence in this court-martial is privileged government information and is the subject of discovery in these proceedings.

The prosecution has engaged in coordination with other agencies in order to declassify evidence for discovery and use in these proceedings. These efforts culminated in the discovery of requested activities forms and employment decisions to the Defense, and the likely production of a material witness. In order to protect against the disclosure of the government information surveyed in the below enclosure this Court must issue the requested protective order.

This Court should consider the agency's assertion of its government information privilege when reaching its determination on whether to issue the requested protective order. The agency's declaration of privilege covers both the classified and unclassified details surrounding the relevant witness(es).

The requested protective order will also guard against any compilation of unclassified information already in the public domain. Compilation can become problematic in this case and can affect the unclassified nature of matters around the witness. Should compilation become an issue affecting the classification level of court proceedings, the prosecution will need to seek additional protective measures from this Court pertaining to classified information.

The Government requests that this Court issue the enclosed proposed Protective Order for Government Information. See Enclosure (2). Acceptable provisions of a protective order issued in accordance with M.R.E. 506(g) include the following:

"(1) prohibiting the disclosure of the information except as authorized by the military judge;

(2) requiring storage of material in a manner appropriate for the level of classification assigned to the documents to be disclosed;

(3) requiring controlled access to the material during normal business hours and at other times upon reasonable notice;

(4) requiring the maintenance of logs regarding access by all persons authorized by the military judge to have access to the classified information in connection with the preparation of the defense;

(6) regulating the making and handling of notes taken from material containing government information; or

(7) requesting the convening authority to authorize the assignment of government security personnel and the provision of government storage facilities." M.R.E. 5056(g)(1) - (6).

The terms of the enclosed proposed protective order are reasonably tailored to protect against any unauthorized disclosure of government information in the course of these proceedings.

Prior to disclosing government information in connection with these proceedings, the prosecution requires a protective order to ensure that reasonable measures are in place to help protect against the unauthorized disclosure of any government information disclosed in the course of these proceedings. The issuance of a protective order by the Court at the earliest opportunity will ensure that the trial counsel is able to commence with disclosure of government information in an expeditious manner. See M.R.E. 506(f)(3)(B) (stating that the Military Judge "may also consider any matters that relate to classified information or that may promote a fair and expeditious trial" during the pretrial conference.)

EVIDENCE

The Government includes the following evidence:

Enclosure (1):	S//NF – Classified Disclosure
Enclosure (2):	Proposed Protective Order for Privilege Government Information
Enclosure (3):	Defense M.R.E. 505 Notice

The Government also adopts the three enclosures of Appellate Exhibit 5(a).

RELIEF REQUESTED

The Government requests that the enclosed protective order be issued by the court.

The Government respectfully requests oral argument.

Respectfully submitted,

[redacted]

B. B. GARCIA
LCDR, JAGC, USN
Trial Counsel

Certificate of Service

I hereby certify that a copy of this motion response was served on the Court and defense counsel on this 17th day of January 2020.

[redacted]

B. B. GARCIA
LCDR, JAGC, USN
Trial Counsel

Phillip Stackhouse
[redacted]

NAVY-MARINE CORPS TRIAL JUDICIARY, CENTRAL JUDICIAL CIRCUIT

GENERAL COURT-MARTIAL

UNITED STATES, vs. Tony DeDolph E-7/[redacted] USN ACCUSED	Defense answer to government motion to protect them Re: 505 and 506 privileged information

RELIEF SOUGHT

Based upon the below, the military judge should limit the government's proposed protective order and should compel the government to produce all requested information and allow the defense to present the information disclosed in its MRE 505 notice.

BACKGROUND

1. For the purposes of this motion, the following is relevant.

2. In June 2017 Staff Sergeant [redacted] U.S. Army, died in by [redacted]

3. An investigation ensued and ultimately focused on the accused, Gunnery Sergeant [redacted] USMC; Staff Sergeant [redacted] USMC; and, Special Operations Chief [redacted] USN.

4. A percipient witness to significant events during the evening of Staff Sergeant [redacted] death was identified as [redacted] is an employee of a governmental agency.

5. During the conduct of the investigation, [redacted] knowing of the investigation, took affirmative steps to contact investigators and provide some, but not all, information that [redacted] knew.[1]

6. In around September 2017, Staff Sergeant [redacted] death was classified as a homicide and NCIS Special Agent [redacted] was assigned to the case as the Case Agent.

7. Eventually, Special Agent [redacted] interviewed [redacted] who provided additional details that were not previously disclosed and [redacted] offered assistance as working undercover as a Confidential Informant. This Confidential Informant work was with the apparent knowledge and consent of [redacted] employer.

8. Additionally, Special Agent [redacted] would ask [redacted] advice regarding potential interviews in the case.

9. In the process of offering [redacted] services, [redacted] contacted her governmental agency supervisor and was apparently approved to participate as a Confidential Informant.

10. Significant credibility, deference, expectation, and reliance was put upon [redacted] because of her employer, her status with the employer, training that she had received from her employer, and the fact that Special Agent [redacted] began a secret romantic relationship with [redacted]

[1] [redacted] claimed [redacted] was surprised when no one from Army CID reached out to [redacted] in the weeks that followed Staff Sergeant [redacted]. After [redacted] leadership, at [redacted] request, made contact apparently with CID Headquarters, a lead was sent and [redacted] was interviewed. However, [redacted] felt the CID interviewer didn't seem to understand the details of the case, and was not confident in their follow up. Later, [redacted] was asked to write a summary, and [redacted] took more than a week to write an email describing the events to the CID agent.

11. At some point, Special Agent [redacted] became compromised when the [redacted] of Special Agent [redacted] threatened to disclose the relationship if he did not concede to her child custody demands.

12. It is the defense position that [redacted] nd Special Agent [redacted] individually and together contaminated the investigation in such a way that it violated the due process rights of the accused.

a. A significant piece of the contamination is the secret relationship between [redacted] and Special Agent [redacted] who both wanted to keep the relationship secret because of who each worked for and the job each maintained in their perspective organization.

b. Just one key example is the failure of Special Agent [redacted] to do a forensic pull of [redacted] cell phone when it was determined that real time evidence was collected on the phone because evidence of their affair would have been collected and discovered as well.

c. Further, Special Agent [redacted] was being [redacted] because of the relationship.

13. Additionally, the defense believes the court should look at the service record of the accused pertaining to his prior service and purpose for being in [redacted] as well. This evidence is relevant and necessary to show the intent of the accused during the investigation and also provides potential evidence in mitigation if sentencing is necessary.

14. [redacted] has been requested as a witness in the court-martial. Special Agent [redacted] has been approved as a witness for the court-martial.

Discussion

15. In reviewing the government's combined motion, it is somewhat unclear what the government is asking the court to do, so the defense will address

the motion first by discussing the protective order requested under MRE 506 and then address what the defense believes the government is requesting under MRE 505.

MRE 506(g) Protective Order

16. The government appears to be moving the court to issue a protective order under MRE 506(g) of which the court has no discretion except in terms and limits.

17. Aside from the overbroad nature of the proposed protective order, the defense understands that the court must issue said protective order.

18. In the proposed protective order, in paragraph 2, the motion mentions "in the interest of national security" which is normally an issue addressed in MRE 505 protective orders.

    a. The government appears to include several definitions that are included in a MRE 505 protective order; however, the undersigned has not yet had access to enclosure 1 of the prosecution motion.

19. Significantly, the government wants to prohibit the defense from discussing alleged privileged information with potential witnesses who are not specifically identified in the protective order without first going through the trial counsel or the military judge following notice two and an opportunity be heard by a representative of the United States.

20. This puts the government in a position to gain insight into the defense strategy.

21. A separate taint team should be constituted to address governmental concerns to any ex parte request for exception made by the defense to the court vice allowing the government to have access to the defense deliberative process.

22. **MRE 505 Matters**

23. The defense is unclear what the prosecution's position is with respect to MRE 505.

24. The defense provided MRE 505 notice to the government in accordance with trial milestones. The notice was in an unclassified filing (at the time of the filing) and, additionally, the defense has made specific requests for discovery pertaining to [redacted]

25. Up to this point, except what may be included in government enclosure 1, the government has not filed a motion for hearing under MRE 505(f) or (j) or requested an In Camera Hearing. All of this is to say that:

a. The defense has been provided relevant classified materials,

b. The defense is aware of other relevant classified evidence outlined in the MRE 505 notice, and

c. The defense has requested other relevant classified materials that have not been denied based upon classification issues or privilege.

26. If government enclosure 1 includes a claim of privilege under MRE 505(g)(1)(A) it is unclear by the motion that they filed, i.e. it does not state anywhere that the government is invoking a claim of privilege because discovery or access to evidence requested would damage national security.

27. The defense does not believe the government has provided the military judge any classified information in order to make a relevancy determination as required under MRE 505(h)(1)(B).

28. Normally, the defense requests classified information and the OCA conducts a classification review.

29. Normally this is followed by the trial counsel requesting a hearing under MRE 505(f)(3) and requesting a protective order in accordance with

MRE 505(g), followed them by a government claim of privilege under MRE 505(h)(1)(A).

30. However, at this point, aside from the discovery request being submitted and the MRE 505 disclosures being provided – none of the above is been completed or requested.

31. In the motion the government intimates that do not have sufficient clarity on the details of what the defense seeks to admit to provide a "particularized list of solutions" (presumably talking about alternatives) - and there is still evidence the defense is waiting to be provided; however, the defense has set out its intent with sufficient specificity to put the government on notice.

32. To address the few issues in the government's motion in this regard:

a. Aside from the prior achievements of the accused possibly being classified, it does not appear that the government is invoking privilege under MRE 505 and it's unclear whether the trial counsel has sought declassification of that evidence;

b. When looking at the relevancy of [redacted] was not just a primary witness, but was also a confidential informant in the investigation;

c. The employer of [redacted] was informed by [redacted] of what [redacted] witnessed and therefore possesses a prior statement of [redacted]

d. The employer of [redacted] contacted CID and, presumably NCIS, with emphasis to initiate a lead by the investigatory agency;

e. [redacted] utilized relationships, training, and experience to work as a confidential informant for Special Agent [redacted]

f. [redacted] provided more information to Special Agent [redacted] during their intimate relationship than is reflected in the investigative report;

g. [redacted] was romantically interested and engaged in intimate contact with one of the codefendants;

h. [redacted] used training and experience to size up Special Agent [redacted] and,

i. [redacted] has a stated bias against the accused because [redacted] was disrupted in rotation of tours and utilize training and experience to hide things from the employer of [redacted]

33. Again it does not appear that the government is invoking privilege on any of these matters, but is only asking that some alternatives be provided or that the court be closed for the presentation of classified evidence which appears proper under the circumstances.

Exhibits:

Enclosure A: Email from Trial Counsel dtd 1/27/2020

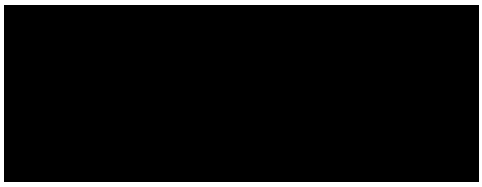
Conclusion:

34. Pertaining to any protective order, the order should be as narrow as possible to allow the flexibility for the defense to properly interview witnesses about relevant matters, allow the defense to properly present its case, and ensure the rights of the accused are protected.

35. Pertaining to any classified material, the prosecution should seek declassification; provide the discovery or invoke privilege; prepare for the use of classified material at the trial or invoke privilege.

36. Again, absent these matters being contained in enclosure 1, which the

37. undersigned has not had the opportunity to review at the time of this filing, the defense should be allowed to present its case as it has disclosed under MRE 505.



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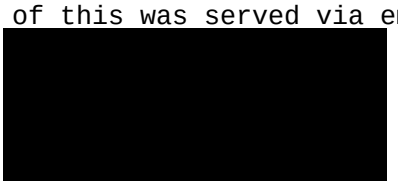
Phillip Stackhouse

A true copy of this was served via email on January 27, 2020.



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Phillip Stackhouse

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

U N I T E D S T A T E S v. TONY DEDOLPH SOC/E-7 USN	**Defense Motion to Compel Discovery** **15 January 2020**

1. **Nature of Motion**. Pursuant to Rule for Courts-Martial 701, the Defense moves the Court to compel the Government to discover the below documents that are in the possession, custody, and control of military authorities and that are relevant to defense preparation. If the requested items are not in the possession of military authorities, the Defense respectfully requests that the Court compel the Government use appropriate voluntary or compulsory process to obtain the documents from their custodian.

a. All documents relating to [redacted] involvement in this case, including but not limited to:

i. All email communications between or among any representative of NCIS, RLSO MIDLANT, and [redacted] employer, including the employer's legal office.

ii. All text communications between SA [redacted] concerning her participation in this case and, specifically, her staged interaction with SOC [redacted] USN.

iii. Logs of all telephonic contact between SA [redacted] during the time she was involved in this case.

iv. Records of all communications pertaining to [redacted] departure from [redacted]

v. All communications between [redacted] and her employer, including any membership of her leadership or any member of her employer's legal office concerning her participation in the investigation of this case.

2. **Filing Procedure.** Due to the nature of some of the issues contained in this motion, additional facts and discussion will be included under separate cover and filed in hard copy.

3. **Statement of Facts**. Enclosures (1) – (4) set forth the following facts relevant to the resolution of this motion:

On 25 September 2017 NCIS Special [redacted] was assigned as the lead agent on the investigation into SSG[redacted]'s death in [redacted]. In the course of conducting that investigation, he engaged a confidential source, [redacted]. This source was a key witness to the event, having been present prior to SSG[redacted] death. However, [redacted] was not merely a witness to some specific events – she was also very familiar with many of the individuals involved in the case.

[redacted] was present in [redacted] on behalf of her employer. On the morning SSG[redacted] died, [redacted] informed her management of the incident, who requested she remain at the US Embassy until she was flown to Washington, D.C. that same evening. Upon arriving in Washington, [redacted] spoke to her employer's lawyers as well as her own management about the events in [redacted].

Army CID initially conducted the investigation into SSG[redacted] death. When weeks went by without hearing anything from Army CID, [redacted] approached her employer's lawyers, requesting they proactively reach out to Army CID to make sure they knew she existed as a witness in the case. [redacted] provided a written statement to Army CID. Shortly thereafter, Army CID handed the case over to NCIS for further investigation.

On 27 September 2017 SA [redacted] met with [redacted] regarding her written statement to Army CID. It was during that discussion that [redacted] realized she had the opportunity to "be used more proactively" in the case. She began proposing ideas of how she could be used, given the background and training as a result of her employment. Her proposals involved operations to elicit information from individuals who would not otherwise be willing to talk, something she described as "something that just comes naturally to [her]" because of her employment.

At that meeting, SA [redacted] gave [redacted] paperwork to sign in order to establish her as a confidential informant, thus protecting her identity and her employer. [redacted] took the paperwork back to her managers and her employer's lawyers, who ultimately "signed off" on her participation in investigating the case. Over the course of the next several months [redacted] actively discussed and helped to plan ways to reach out to individuals involved in the case. She offered her expertise as a professional to plan operations and opportunities for contact with people with whom she had established personal relationships while in [redacted] ultimately conducted two "operations" – one via digital messaging platforms with one of the accused parties, and another that culminated in a face to face meeting in Virginia Beach, Virginia on 15 December 2017.

The 15 December "operation" involved [redacted] meeting SOC [redacted] USN, at a restaurant in Virginia Beach. Prior to the meeting itself, [redacted] traveled from Washington, D.C., to Virginia to do area familiarization and assist NCIS in selecting a venue for the meet. [redacted] was responsible for, and actually did choose the location because of her superior skills and experience with conducting similar types of meetings. Preparation for the meet took several weeks, as NCIS and [redacted] coordinated logistics between her schedule

and the schedules of the security, surveillance, and "rescue" elements. Before actually conducing the meet with SOC [redacted] met with her employers regarding the operation, got permission to participate, and filed an "Outside Activities" form.

SA [redacted] and [redacted] first began communicating on 26 September 2017, and have had nearly daily contact ever since. Initial contact was purely professional, but soon became personal. In late November, [redacted] visited SA [redacted] in his hotel room in Arlington, Virginia, where they became physically intimate. By December, SA [redacted] had switched to only using his personal phone to contact [redacted] The two commenced their serious romantic relationship at the end of 2017, taking multiple trips together over the next several months (while the investigation was ongoing) and continuing their daily communication. At the time of this filing, that romantic relationship continues to exist.

SA [redacted] and [redacted] kept their personal relationship a secret, failing to disclose it to either of their employers. Eventually, a complaint was filed with NCIS alleging that SA [redacted] was having an affair, and an Inspector General investigation was launched [redacted] employer was also informed about the affair, an event which caused what [redacted] describes as professional turmoil.

On 10 December 2019, defense filed a supplemental discovery request for information regarding [redacted] involvement in the case. On 13 December 2019, trial counsel provided their response, denying some requests as overbroad and irrelevant while remaining silent on the issue of production of other requests.

4. **Discussion**. As discussed below, each of the sets of documents the Defense moves the Court to compel the discovery of are relevant to Defense preparation under R.C.M. 701 and 703

a. Email communications between or among any representative of NCIS, RLSO MIDLANT, and [redacted] employer, including the employer's legal office, are relevant for multiple reasons. First, [redacted] makes several references in her interview with the NCIS Inspector General (enclosure (3)), to the professional issues she has been facing as a result of her involvement in the incident itself and the disclosure of her relationship with SA [redacted] to her managers. According to [redacted] that disclosure was made by RLSO MIDLANT personnel. [redacted] professional concerns are relevant as to her bias as a witness in the case. Further discussion will be included under separate cover.

b. The defense originally requested all of the text, email, or other written communications between SA [redacted] and [redacted] concerning her participation in this case and, specifically, her staged interaction with SOC [redacted] USN. Through trial counsel, NCIS has reported that no emails regarding the case were shared between [redacted] and SA [redacted] and that there are no additional texts to discover. SA [redacted] apparently lost his government phone sometime in July 2018. However, defense counsel has a good faith basis to believe that additional text messages between SA [redacted] and [redacted] exist, but may not be in NCIS possession. During his interview with the NCIS IG (enclosure (4)), SA [redacted] explains that he stopped using his government phone to contact [redacted] in December 2017, because his conversations with her were only personal in nature. However, he later admits to the interviewer that he discussed certain elements of the case with [redacted] that did not exist until January. Specifically, he gave her updates on certain lab analysis results and results of interviews with the suspects in the case. [redacted] only used what she describes as her personal phone in all communications regarding the case. The defense is requesting production of [redacted] text message history with SA [redacted] regarding her involvement in the

investigation, with particular emphasis on the "operations" with the two suspects in October and December. The defense also is requesting production of the messages from SA [redacted] personal phone between [redacted] and SA [redacted] regarding the investigation. These texts are relevant to the issue of her participation in the investigation, the truthfulness of SA [redacted] interview with the IG, and bias in SA [redacted] investigation of the facts and circumstances surrounding SSG [redacted] death. Further discussion is included under separate cover.

c. Based on statements made by both SA [redacted] and [redacted] at least some of the communication regarding this case was done via phone call, rather than by text. Logs of all telephonic contact between SA [redacted] and [redacted] during the time she was involved in this case, in particular, the records of calls made from [redacted] phone to SA [redacted] work number (at the time) are relevant as to the issue of both her involvement in the investigation and the truthfulness of SA [redacted] statements to the IG.

d. The records of communications pertaining to [redacted] departure from [redacted] are relevant to [redacted] bias. During her interview with the IG, [redacted] mentions professional problems on seven separate occasions. In particular, she references the incident with SSG [redacted] and the "career upheaval" that resulted. The circumstances and manner in which [redacted] was removed from [redacted] are relevant to the career ramifications her involvement with this case has caused. The professional impact of the case goes directly to her bias.

e. The communications between [redacted] and her employer, including any membership of her leadership or any member of her employer's legal office concerning her participation in the investigation of this case are relevant both as to her truthfulness and her bias. Further discussion is included under separate cover.

5. **Evidence.** The Defense respectfully requests the Court consider the following evidence in ruling on this motion:

a. Enclosure (1) – Defense Supplementary Discovery Request of 10 December 2019

b. Enclosure (2) – Government Response to Defense Supplementary Discovery Request

c. Enclosure (3) – Recording of interview between Inspector General and [redacted]

d. Enclosure (4) – Recording of interview between Inspector General and SA [redacted]

6. **Relief Requested.** The Defense respectfully moves the Court to order the Government to produce and discover the above-described documents.

PORTZER.JO [redacted]
ELLE.C [redacted]

J. C. PORTZER

UNITED STATES **v.** **TONY DEDOLPH** **[redacted]/E-7 USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO COMPEL DISCOVERY** **23 JANUARY 2020**

1. Nature of Response. This is the Government's response to the Defense motion to compel discovery of 15 January 2020 and its supplemental filing. The Government will use the words "Employee" and "Employer" in reference to the Defense supplemental filing.

2. Summary of Facts.

a. The Accused has been charged with a Violations of Article 81, 92, 118, 119, 129, and 134, UCMJ, stemming from the murder of Army Staff Sergeant (SSG) [redacted] in [redacted] during a hazing incident.

b. Initially, the investigation into this case was led by Army CID. After a tip was received from the "Employee," Army CID began investigating the case more thoroughly, and eventually transferred the case to NCIS.

c. The NCIS Agent on the case, SA [redacted] and the "Employee", [redacted] on investigating the case. [redacted] during the latter portion of the investigation into this case.

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

4. Discussion of Law and Analysis.

Per Rule for Courts-Martial 701(a)(2)(A), the "Government shall permit the Defense to inspect any documents within the possession, custody or control of military authorities if the item is relevant to defense preparation." The Government will respond to the Defense motion

in two parts. The first part addressing the main filing, and the second part, the supplemental enclosure.

Main Filing

The Government responds to the Defense paragraphs in order.

i. The Government believes that this request is overbroad and not narrowly tailored enough to be informative on what the Defense wants the Government to produce. It is not necessary or relevant to the preparation of the defense.

ii. The Defense is in possession of all communications that the Government possesses.

iii. The Government has inquired and does not believe that any logs exist.

iv. The "Employer" is currently doing a search and the Government will comply with its discovery obligations.

v. These items are not within military control and the "Employer" asserts privilege over these items. These items are not necessary or relevant to the preparation of the defense.

Supplemental Enclosure

The Government responds to the Defense bullets in order.

a. The Government denied this request because it is not necessary or relevant. The Government has requested the Outside Activities Form and will discover that to the Defense upon receipt. It is the Government's understanding that the "Employer" had no involvement in the direction of the investigation in this case and merely allowed its "Employee" to assist NCIS because of the "Employee's" personal involvement in the case.

b. The Government denied this request because it is not necessary or relevant. The Government has confirmed with NCIS that it does not have any phone logs. The Defense has everything in the possession of military authorities.

c. The Government denied this request because it is not necessary or relevant. The Government has requested the Outside Activities Form and will discover that to the Defense upon receipt. It is the Government's understanding that the "Employer" had no involvement in the direction of the investigation in this case and merely allowed its "Employee" to assist NCIS because of the "Employee's" personal involvement in the case.

Conclusion

The Government does not intend to introduce any evidence from the "Employee" that was developed after the "Employee" became a cooperating witness with NCIS. All evidence or information that the Government intends to introduce or elicit from the "Employee" in this case pre-dates any interaction with SA [redacted] and as such, any bias on the "Employee's" part or with SA [redacted] is not relevant. Thus the requests for communications between the "Employer" and the "Employee" or Trial Counsel are not necessary or relevant.

5. Relief Requested. The Government respectfully requests this Court to deny the Defense's motion.

6. Evidence. None.

7. Oral Argument. If requested by the Defense or this Court, the Government is amenable to oral argument.

[redacted]
Jason D. Samuel
Capt, USMC
Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that this Response was served electronically on defense counsel on 23 January 2020.



Jason D. Samuel
Capt, USMC
Trial Counsel

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

U N I T E D S T A T E S **v.** **TONY DEDOLPH** **[redacted]/E-7 USN**	**Defense Motion to Continue Trial** **5 February 2020**

1. **Nature of Motion**. Pursuant to Rule for Courts-Martial 906(b)(1), the Defense moves the Court to continue the trial in the above-captioned case. Because of delays in the delivery of discovery materials and approval of Defense requests, the Defense has had insufficient opportunity to prepare for trial.

2. **Background.** On 14 November 2018, the Government preferred charges against [redacted] DeDolph. On 28 February 2019 and 25 April 2019, the Government requested – and the Convening Authority approved – excludable delay so that NCIS could conduct additional investigative steps in this case. The Article 32 Preliminary Hearing was ultimately held on 5 August 2019, and the case was referred to the present General Court-Martial on 19 September 2019. On 23 October 2019, the Defense requested funding from the Convening Authority to travel to [redacted] to conduct its own investigation in this case. That request was not approved until 7 January 2020, and that travel is not scheduled to occur until 9-14 February 2020. Per the Trial Management Order, trial in this case is set to begin on 23 March 2020.

3. **Discussion**.

Under R.C.M. 906(b)(1), only the Military Judge may grant a continuance. "The Military Judge should, upon a showing of reasonable cause, grant a continuance to any party for as long and as often as is just." R.C.M. 906(b)(1) discussion. One reason justifying a continuance may include insufficient opportunity to prepare for trial. Id. In evaluating the propriety of a

continuance, the Court should consider "surprise, nature of any evidence involved, timeliness of the request, substitute testimony or evidence, availability of witness or evidence requested, length of continuance, prejudice to opponent, moving party received prior continuances, good faith of the moving party, use of reasonable diligence by moving party, possible impact on verdict, and prior notice." United States v. Montalvo, 2015 CCA LEXIS 218, *14 (N.M.C.C.A. 2015) (quoting United States v. Miller, 47 M.J. 352, 358 (C.A.A.F. 1997)). Applying these factors to the issues inhibiting the Defense from preparing a trial, the Court should grant this motion.

a. **Outstanding discovery is preventing the Defense from meaningfully preparing for trial**.

To date, the Government has agreed to produce numerous documents that have not yet been delivered to the Defense. As a result, the Defense has been unable to meaningfully prepare to litigate this case at trial. These documents fall into three broad categories: (1) classified documents from [redacted] DeDolph's service record, (2) documents relating to [redacted] and (3) classified investigative documents.

First, due to the nature of his work, a number of documents from [redacted] DeDolph's service records are classified. These include award citations, shooter statements, and other records of his acts of valor and heroism. To date, the Defense has been provided the opportunity to inspect some, but not all, of these awards. The Government has not yet been able to locate other of the awards, which may be stored in a separate system of classified records. Without these documents, the Defense is unable to prepare a case in extenuation and mitigation both due to the lack of potential documentary evidence and the inability to speak to witnesses who are knowledgeable about the events described in those awards.

Second, the Government agreed at the Article 39(a) session held on 30 January 2020 to discover to the Defense certain classified documents pertaining to [redacted] a Government informant in this case, and to subpoena NCIS SA [redacted] phone records related t [redacted] In addition, a Defense motion to compel additional records pertaining to [redacted] remains outstanding before the Court. Pending receipt of the documents pertaining to [redacted] and the Court's ruling on the Defense motion, the Defense is severely limited in its ability to fully understand the scope of her involvement in the investigation of this case, to file motions related to the propriety of her involvement in the case, or to prepare to confront [redacted] at trial. Given the normal amount of time needed for the discovery of classified documents such as those at issue here, the Defense does not anticipate sufficient time to receive, review, and prepare for motions practice and/or trial in advance of a 23 March trial date.

Lastly, and most importantly, significant investigative documents in this case remain classified. Specifically, virtually all of the investigative steps taken by U.S. Army CID in the days immediately following the death of SSG [redacted] despite not being classified themselves, still exist only in a classified document. These investigative steps include but are not limited to documentation of the alleged crime scene, initial witness interviews, and the collection of forensic evidence subsequently submitted for lab analysis. The continued classification of these documents has severely frustrated the ability of the Defense to prepare for trial. Because they are classified and cannot be transmitted electronically or stored remotely, [redacted] DeDolph's civilian defense counsel can only review the thousands of pages of documents when he is in Norfolk. In addition, the Defense has not yet been able to share these documents with the expert criminologist the Court ordered the Government to authorize.

At the Article 39(a) session held on 30 January 2020, the Government stated to the Court and Defense that the process of declassifying these materials had been transferred from the previous owner of the documents to a new declassification authority. However, the Government did not provide an expected completion time for the declassification. Until the Defense is able to fully receive and distribute these investigative documents, it cannot even meaningfully begin an entire avenue of preparation for trial. As a result, given the complexities in the investigative steps taken here, the amount of forensic testing at issue, and the need for expert consultation, there is no conceivable way the Defense can be prepared for trial on 23 March.

b. **Delay in approval of Defense pre-trial investigative travel has frustrated the ability of the Defense to be ready for trial as scheduled.**

In an effort to prepare for trial, the Defense requested, in October 2019, funding from the Convening Authority to travel to [redacted] to interview witnesses, examine the alleged crime scene, and take other steps in conducting its own investigation into the allegations against [redacted] DeDolph. The Convening Authority took no action on this request until January 2020, when he approved the request. That travel was then combined with anticipated travel to conduct depositions of certain witnesses and has not yet occurred. The Defense anticipates traveling to [redacted] 9-14 February 2020.

As the Defense has not yet been able to travel to [redacted] it is impossible to say what additional investigation and preparation will be necessary following the trip. The Defense has had minimal contact with two [redacted] percipient witnesses due to language barriers and the lack of reliable telecommunications in [redacted] In addition, the Defense has not been able to inspect the alleged crime scene to determine what evidence may be available with respect to the nighttime elements of the burglary and felony murder charges. Depending what evidence the Defense

develops during its visit, it is foreseeable that additional witness requests, expert requests, and/or motions may become necessary. At a minimum, the Defense anticipates needing to litigate motions regarding the admissibility of depositions taken in [redacted] and the need to litigate pre-trial Motions in Limine once the Defense has a full picture of the evidentiary landscape of the case.

c. **A continuance is necessary in the interests of Justice**

Due to the insufficient preparation the Defense has been able to conduct as of the filing of this motion, the Court should grant this request for a continuance. The factors set out by the N.M.C.C.A. in Montalvo also favor granting this continuance. 2015 CCA LEXIS 218, *14 (N.M.C.C.A. 2015). The Defense is filing this motion seven weeks before the scheduled trial date; this is a timely request that should come as no surprise to the Government or Court. Throughout the pendency of this case, the Defense has acted with all possible diligence to seek out the materials it has needed to prepare its case, but those efforts have not yet been fully successful. Unlike the Government, which sought multiple investigative continuances prior to referral, the Defense has not requested any delays except those necessary to accommodate counsel's schedules for Preliminary Hearing and Court dates. Moreover, the aspects of the case that the Defense has not yet been able to prepare go directly to essential elements of the most significant charges pending against [redacted] DeDolph, including the charge of Felony Murder and its mandatory minimum sentence of confinement for life. Only by granting this continuance can the Court ensure that [redacted] DeDolph receives a fair trial.

4. Relief Requested. The Defense respectfully requests that the Court continue the trial in the above captioned case to a future date that is mutually agreeable to the Court and parties.

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

a. Enclosure (1): LCDR Garcia ltr of 28 Feb 19
b. Enclosure (2): Commander, Navy Region Mid-Atlantic ltr of 1 Mar 19
c. Enclosure (3): LCDR Garcia ltr of 25 Apr 19
d. Enclosure (4): Commander, Navy Region Mid-Atlantic ltr of 27 Jun 19
e. Enclosure (5): LCDR Inns ltr of 23 Oct 19
f. Enclosure (6): Commander, Navy Region Mid-Atlantic ltr of 7 Jan 20

6. Oral Argument. The Defense does not request oral argument on this motion.

[redacted]

N. J. INNS
LCDR, JAGC, USN
Detailed Defense Counsel

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

U N I T E D S T A T E S **v.** **TONY DEDOLPH** **[redacted]/E-7 USN**	**DEFENSE MOTION FOR APPROPRIATE RELIEF: UNLAWFUL INFLUENCE** **28 Jun 20**

1. **Nature of Motion.** Pursuant to R.C.M. 906 and Article 37, UCMJ, the Defense moves the Court to rule that then-Acting Secretary of the Navy [redacted]; RADM [redacted] USN; BG Donald Boluc, USA; and other unidentified individuals subject to the UCMJ have, by unauthorized means, influenced the action of the court-martial in this case by tainting the pool from which the members will be selected and grant the Defense five additional peremptory challenges to remedy this taint.

2. **Summary of Facts.**

Since immediately after the death of SSG [redacted] on 4 June 2017, the topic of the cause of his death has been one of widespread commentary by civilian news outlets and military members alike. On 12 November 2017, the Daily Beast published an article alleging that [redacted] DeDolph and other unnamed individuals intentionally murdered SSG [redacted] Citing unnamed sources referred to as "former [redacted] official[s]" and "special operations sources," the article claimed that [redacted] DeDolph was stealing money from operational funds and killed SSG [redacted] to prevent him from reporting this embezzlement. These allegations are absolutely false and have not been supported by any of the thousands of pages of investigative documents produced by the more than three years of investigations into SSG [redacted] death.

In addition to reporting on a claimed – but false – motive for SSG [redacted] death, the Daily Beast article also reported – again based on anonymous [redacted] sources – that the then-[redacted] ([redacted], BG Bolduc, was skeptical of initial reports from the outset. On 13 November 2017, the day after the article was published, BG Bolduc positively replied to a Tweet referring to SSG [redacted] as a [redacted] That same day, he was quoted in an article by NBC News discussing the access that [redacted] would have to operational funds, strongly implying his support of the embezzlement theory. Then, on 18 November 2017, less than a week later, BG Bolduc tweeted a photograph of SSG [redacted] with the caption "Perfect valor is to behave without witnesses as one would act were all the world watching." Following his retirement, BG Bolduc became even more vocal against [redacted] DeDolph. Quoted in an article in January 2020 regarding the Navy's decision to promote [redacted] DeDolph – a man presumed innocent under the law – now-retired BG Bolduc described that decision as "another failure of leadership" and "utter bullshit."

In addition to these actions on the part of BG Bolduc and unidentified military members that are influencing [redacted] DeDolph's court-martial, recent statements by then-Acting Secretary of the Navy Thomas Modly and RADM Collin Green, Commander of [redacted] are similarly problematic. On 20 August 2019, RADM Green issued a memorandum to all commands in the [redacted] community. In that memorandum, he stated that certain members of the community are "ethically misaligned" with the special warfare culture and that the "Force has drifted from Navy core values of Honor, Courage, and Commitment." Although the memorandum does not specifically address [redacted] DeDolph or this case, press reporting on the memorandum and RADM Green's other public statements about Naval Special

Warfare misconduct almost universally identify the death of SSG [redacted] as one of the events precipitating RADM Green's actions to "clean up" the special warfare community.

Continuing on this theme, in December 2019, Secretary Modly gave a speech to the U.S. Naval Institute on the discipline problems in the special warfare community. Citing nearly two decades of war, he opined that the strain caused by that was causing "cultural challenges" in the community that were reflected in special warfare misconduct. Like RADM Green, Secretary Modly did not specifically name [redacted] DeDolph, but alluded to the case, which connection the press reports of his speech then made explicit.

3. Discussion.

Unlawful influence is "the mortal enemy of military justice." United States v. Thomas, 22 M. J. 388, 393 (C.M.A. 1986). Under Article 37 of the UCMJ, as it existed at the time of the actions by the unnamed [redacted] officials, BG Bolduc, RADM Green, and Secretary Modly, "No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case…." 10 U.S.C. § 837 (pre-20 December 2019). The Court of Appeals for the Armed Forces has interpreted the second portion of this prohibition "by any unauthorized means, influence" to be distinct from "attempt to coerce" and to require no intent on the part of the individual influencing the court-martial. United States v. Barry, 78 M.J. 70, 78 (C.A.A.F. 2018).

Although commonly referred to as "unlawful command influence," this provision "prohibits unlawful influence by *all persons subject to the UCMJ*." Barry, 78 M.J. at 76 (emphasis in original) (citing United States v. Gore, 60 M.J. 178, 178 (C.A.A.F. 2004)). No mantle of command authority is required for a finding of unlawful influence. Id. In addition, the

Court of Appeals for the Armed Forces has accepted the Government's concession in past litigation that, although not explicitly covered by the statutory language, the principle of unlawful influence also encompasses civilian service secretaries. United States v. Boyce ,76 M.J. 242, 246 n.3 (C.A.A.F. 2017).

At trial, the Defense bears the burden of presenting "some evidence" of unlawful influence. United States v. Biagase, 50 M.J. 143, 150 (C.A.A.F. 1999). Once the Defense has shown some evidence, the burden shifts to the Government to show beyond a reasonable doubt that either there was no unlawful influence or that the unlawful influence will not affect the proceedings. Id. at 150-51. Improperly influencing the criminal justice process "even if effectuated unintentionally, will not be countenanced by" the judicial system. Barry, 78 M.J. at 78. This improper influence can be both actual – having a concrete effect on judicial process – or apparent. In the latter analysis, the Court assesses "the perception of fairness in the military justice system as viewed through the eyes of a reasonable member of the public. Thus, the appearance of unlawful command influence will exist where an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding." United States v. Thompson, 2017 CCA LEXIS 398, *26 (N.M.C.C.A. 2017) (quoting United States v. Lewis, 63 M.J. 405, 415 (C.A.A.F. 2006).

Here, each of the categories of public statements set out above, and addressed in more depth below, create the appearance of unlawful influence on this court-martial. Without members identified, the Defense cannot make and is not now making any claim of actual unlawful influence. However, given the danger that these repeated public statements by high ranking individuals create that [redacted] DeDolph's trial will be perceived as being unfair by the public, the Court should award the Defense five (5) additional peremptory challenges to assist in

eradicating any concern about the fairness of these proceedings. See id. (positively discussing the military judge's decision to award expanded voir dire and additional peremptory challenges as a remedy for apparent unlawful influence and pretrial publicity).

a. The statements that unnamed Special Forces and [redacted] officials made alleging to the press a completely unsubstantiated motive for the death of SSG [redacted] as echoed and endorsed by BG Bolduc, create the grave risk that [redacted] DeDolph's court-martial will be tainted before the beginning of trial.

The first category of unlawful influence on [redacted] DeDolph's court-martial comprises the statements made by multiple "former [redacted] official[s]" and "special operations sources" to the Daily Beast claiming that [redacted] DeDolph intentionally murdered SSG [redacted] to cover up the supposed embezzlement of operational funds. BG Bolduc – the Commander of [redacted] at the time of SSG [redacted] death – insinuated his support for these unsubstantiated theories by discussing [redacted] access to operational funds on the record with NBC News and supporting Tweets that claimed SSG [redacted] was a "whistleblower." As a result of these initial – and utterly false – allegations, the entire course of this case in the public perception has been characterized by the erroneous belief that SSG [redacted] was intentionally murdered due to this motive. The danger that this taint persists in the members pool is overwhelming. The statements causing this taint constitute a violation of Article 37 that must be remedied.

First, there is "some evidence" to believe that all the statements fall under the ambit of Article 37 despite the anonymous nature of many of the Daily Beast's sources. Although the sources are not identified, the descriptions of them as "former [redacted] official[s]" and "special operations sources" strongly implies that they are active duty servicemembers. This conclusion is reinforced by the fact that their positions were such that a reporter accepted their claims to have knowledge of the investigation into SSG [redacted] death. Likewise, although BG Bolduc's statements about this case appear to straddle his retirement from the Army in the fall of

2017, under Article 2(a)(4) of the U.C.M.J., he remained "subject to this chapter" even after his retirement from the Army.

Second, these statements and the media stories they spurred have had a lasting effect on public perceptions of this case and, in light of the completely unsubstantiated nature of the claims, on the public perception that [redacted] DeDolph will receive a fair trial in the face of this media environment. Although the false story originated with anonymous sources, its endorsement by BG Bolduc is of greatest concern. Given his senior rank and command position at the time of SSG [redacted] death, members who are likely to sit on [redacted] DeDolph's court-martial would reasonably conclude that he had access to information that supported these allegations though, in fact, no such information has ever existed. This taint on the members pool is precisely the type of perception of unfairness that is implicated by the doctrine of apparent unlawful influence and demand a remedy from the Court.

b. Statements by RADM Green and Secretary Modly regarding the desire to "crack down" on Naval Special Warfare disciplinary problems improperly influence the independence and objectivity of the members who will sit on this court-martial.

The second category of statements that undermine the public perception in this court-martial comprises statements and policies by RADM Green, [redacted] Thomas Modly. These statements create – at a minimum – the appearance that senior Navy leaders are exerting pressure on other members of the Naval Service to take a strict and harsh approach to allegations of wrongdoing by members of the Naval Special Warfare community, including [redacted] DeDolph. Although neither RADM Green nor Secretary Modly explicitly identified [redacted] DeDolph, the statements were made during a time period in which his case was often in the media, and news stories describing their statements regularly referenced

[redacted] DeDolph's case. An objective member of the public would be reasonably concerned that the members of [redacted] DeDolph's court-martial would be influenced by these demands from the senior leaders of [redacted] DeDolph's community for strict accountability. This perception of a taint on the members pool caused by the violation of Article 37 warrants a judicial remedy to restore the public perception of the fairness of [redacted] DeDolph's trial.

c. The ordinary voir dire process – even with the liberal grant mandate – cannot fully remedy the taint from the unlawful influence on the members pool.

Confronted with the likelihood that at least some members of [redacted] DeDolph's panel will have been exposed to and – consciously or subconsciously – influenced by all of the above unlawful influence over this case, voir dire and the challenge for cause process are not sufficient to cure the public perception of the unfairness of this trial. Two primary factors illustrate why.

First, the manner in which voir dire is conducted handcuffs the Defense in its ability to identify what taint these public statements have created without creating additional taint through the questions posed to the members. For example, with respect to the issue of alleged embezzlement, the Defense can attempt to elicit members' knowledge of this claim through broad questions about press coverage. However, without specifically targeting those questions, the Defense can never be satisfied that members have not heard those claims and have either (a) forgotten them for the time being, with the danger that they will resurface during the lengthy trial on the merits; or (b) that they choose not to volunteer that information in response to general, vague questions. But if the Defense does specifically question members on the embezzlement claims, it runs the risk of introducing highly prejudicial and completely unsubstantiated ideas into the minds of members who might otherwise have not known of that false claim.

Second, specifically with respect to RADM Green and Secretary Modly's statements, the Defense fully expects members – who will all be senior enlisted Sailors or officers – to have

sufficient experience to know to assure the Court and the parties that those statements have had no effect on their approach to the case. Such answers are entirely predictable among senior military members in response to leading "rehabilitation" questions from the Government and the Military Judge. However, even though those rehabilitating answers may remove the basis for a challenge for cause, they still leave the lingering concern that the senior leaders' statements exist in the minds of the member and might influence their consideration of this case.

For each of these circumstances, additional peremptory challenges will enable the Defense to cure taint in the members panel by striking individuals whose answers about these topics are unsatisfactory to the Defense but may not necessarily give rise to a challenge for cause. The fact that the Defense will be able to exert this additional control over the members panel will resolve any concern that a reasonable member of the public might have about the fairness of the court-martial in this case. Additional peremptory challenges are an accepted and – as explained above – appropriate remedy to cure the apparent unlawful influence in this case.

4. Evidence.

The Defense respectfully requests that the Court consider the following documentary evidence in support of its motion:

Enclosure (1) – "Green Beret Discovered SEALs' Illicit Cash. Then He Was Killed," The Daily Beast, 12 Nov 17
Enclosure (2) – "Witness: Navy SEAL Said He 'Choked' Green Beret Who Died," NBCNews.com, 13 Nov 17
Enclosure (3) – BG Don Bolduc, USA (Ret.) Tweets dtd 13 Nov 17 and 18 Nov 17
Enclosure (4) – "Navy SEAL Promoted After Choking Green Beret to Death," The Daily Beast, 28 Jan 20
Enclosure (5) – [redacted] ltr 5800 Ser 00/423 of 20 Aug 19
Enclosure (6) – "Navy's top SEAL orders adoption of grooming and uniform standards, blames leadership for 'ethically misaligned' troops," Stars and Stripes, 23 Aug 19
Enclosure (7) – "Navy chief says he would follow Trump's instructions on Navy SEAL," Washington Post, 23 Nov 19

Enclosure (8) – "Decades of Combat Led to SEAL Team Discipline Issues, Acting Navy Secretary Says," Military.com, 6 Dec 19

5. Oral Argument. The Defense requests oral argument on this motion.

[redacted]

LCDR, JAGC, USN
Detailed Defense Counsel

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

UNITED STATES **v.** **TONY DEDLOPH** **[redacted] /E-7 USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION FOR RELIEF: UNLAWFUL INFLUENCE** **5 July 2020**

1. Nature of Response. The Government requests the Court deny Defense's motion for (5) additional peremptory challenges based on apparent unlawful command influence (UCI).

2. Burden of Proof. Under the apparent UCI framework, Defense has the burden to present sufficient evidence, which if true: 1) constitutes UCI and, 2) that the UCI would place an intolerable strain on the public's perception of military justice such that an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding. *United States v. Boyce*, 76 M.J. 242, 248-250 (C.A.A.F. 2017). In this analysis there is no requirement to prove prejudice to the accused. If Defense is successful, the burden then shifts to the Government to prove, beyond a reasonable doubt, that: 1) the facts are not true, or 2) if the facts are true, that no such strain would be put on the military justice system.

Although Defense's initial burden is a low one, some evidence must exist. There must be more than just an allegation that "command influence [is] in the air.' *US v. Johnston*, 39 M.J. 242 (C.M.A. 1994) citing *United States v. Allen*, 33 MJ 209, 212 (CMA 1991).

3. Statement of Facts.

1. At the time of SSG [redacted] death, on 4 June 2017, BG Donald Bolduc was [redacted] Enclosure 1.

2. On 29 June 2017, BG Bolduc was relieved as [redacted] by Major General Marcus Hicks. Enclosure 1.
3. On 1 October 2017, BG Bolduc retired from active duty. Enclosure 1.
4. On 12 November 2017, The Daily Beast published an article about [redacted] DeDolph's alleged involvement in the death of SSG [redacted]
5. The article suggested a possible motive and cited anonymous sources such as "former [redacted] official[s] and "special operations sources."
6. Ret. BG Bolduc was not cited in the 12 November 2017 article. Opinions attributed to him regarding the investigation came solely from anonymous sources.
7. On 13 November 2017, Ret. BG Bolduc replied to a Tweet by saying, "[t]hank you for the note. SSG [redacted] and his family have earned and deserve our complete support. God bless him, his family, and his team."
8. On 13 November 2017, an NBC News article cited the Army's preliminary investigative report and raised several possible motives for the alleged crime. The article noted that the motives listed in the investigative report differed from the motive previously reported in the Daily Beast by anonymous sources.
9. In the 13 November 2017 NBC News article, a spokesperson for the Pentagon, Col. [redacted] "cautioned against speculating about [the] incident before the full investigation is complete."
10. In the 13 November 2017 NBC News article, Ret. BG Bolduc confirmed that "special operators do have access to cash on the ground in places like [redacted] Ret. BG Bolduc did not comment or speculate about the guilt or innocence of the accused or the veracity of any potential motive.

11. On 18 November 2017, Ret. BG Bolduc shared an image on Twitter of SSG [redacted] and offered thoughts and prayers to the family of SSG [redacted]
12. On 20 August 2019, Rear Admiral Collins Green issued [redacted]



13. In December 2019, Acting Secretary of the Navy Thomas Modly spoke at a U.S. Naval Institute Defense forum where he explained that 20 years of war has had an effect on our forces. The Acting Secretary did not make comments about the accused or specific incidents of misconduct.
14. In January 2020, Ret. BG Bolduc commented negatively on the Navy's decision to promote the accused despite being under investigation for the death of SSG [redacted]

4. **Discussion:**

Article 37(a) of the UCMJ provides, "No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of any court-martial . . . or any member thereof, in reaching the findings or sentence in any case. . . ." 10 USC § 837. The Court of Appeals for the Armed Forces has interpreted "attempt to coerce" and "by any unauthorized means, influence" as distinct means of unlawful command influence with only the former requiring intent. *United States v. Barry*, 78 M.J. 70, 78 (C.A.A.F. 2018). While actual UCI requires a real impact on the fairness of the judicial process, apparent UCI exists where "an objective, disinterested observer, fully informed of all the facts, would harbor a significant doubt

about the fairness of the proceeding. *United States v. Boyce*, 76 M.J. 242, 248-250 (C.A.A.F. 2017).

1) There Is No Apparent Unlawful Command Influence from Statements Made By Anonymous Sources or From Retired BG Bolduc.

a. <u>There is no evidence statements from anonymous sources or Ret. BG Bolduc amount to UCI</u>

Defense has not met its initial burden of showing some evidence of UCI. First, Defense alleges unlawful command influence from statements made by anonymous sources to the Daily Beast. As these sources were anonymous, there is no evidence they were made by persons subject to the UCMJ. In its motion, Defense argues the statements are highly likely to have been made by active duty personnel because they were attributed to former [redacted] officials and accepted as credible by a Daily Beast reporter. Def. Mot. 5. This argument is without merit. [redacted] is a command made up of personnel who are military, federal civilians, and contactors, any of whom may have spoken to the Daily Beast. Enclosure 2. The determination that a source was credible, in the opinion of a reporter, is not evidence the source is a person subject to the UCMJ.

Moreover, even if the statements could be attributed to a person subject to the UCMJ, they do not amount to UCI. There is no evidence the statements were an attempt to coerce the proceedings or an unauthorized act with the potential to cause unfairness in the proceedings. The unattributed statements, published in 2017, amount to little more than rumors about a potential motive at the early stages of the investigation. In subsequent articles, the Daily Beast contradicted the initial motive and quoted a Pentagon official cautioning against speculating prior to the completion of the investigation. As such, the potential for any influence deriving from these anonymous sources amounts to little more than a belief that "influence [is] in the air."

US v. Johnston, 39 M.J. 242 (C.M.A. 1994) citing *United States v. Allen*, 33 MJ 209, 212 (CMA 1991). As a result, Defense has not met its burden of showing some evidence of UCI.

While Ret. BG Bolduc, a retiree, is a person subject to the UCMJ, none of his actions amount to UCI. First, the opinion attributed to Ret. BG Bolduc, published in the Daily Beast article of 12 November 2017, regarding skepticism of the initial investigation, came solely from an unnamed source. There is no evidence Ret. BG Bolduc acted in any unauthorized manner by expressing skepticism of the initial investigation. The mere fact his alleged skepticism leaked to the media and was published by a reporter does not convert his opinion into UCI. Similarly, there was nothing unauthorized about Ret. BG Bolduc confirming that special operators have access to cash in places like [redacted] While the Daily Beast may have tried draw an inference from this fact, no such inference was drawn by Ret. BG Bolduc, the person subject to the UCMJ. Additionally, there was nothing unauthorized about Ret. BG Bolduc expressing disappointment in the Navy for promoting the accused while he was the subject of a criminal investigation. Once again, the statements made by Ret. BG Bolduc amount to mere allegations of "influence in the air," and not UCI.

Next, Defense offers a Tweet by Ret. BG Bolduc as another source of potential UCI. Defense argues by responding to a poster who called SSG [redacted] a whistleblower, Ret. BG Bolduc was endorsing that statement as true. Def. Mot. 6. This argument is without merit. Ret. BG Bolduc responded to the poster by thanking her for her comment and stating that SSG [redacted] family had earned our support. At the time of this Tweet, Ret. BG Bolduc was retired from active duty and acting in his personal capacity. Ret. BG Bolduc did not mention the accused or offer any kind of insider information related to a potential motive in SSG [redacted] death. There was

nothing unauthorized or unlawful about Ret. BG Bolduc responding to a poster expressing her own opinion of SSG [redacted]

Furthermore, there is no evidence this Tweet has the potential to have any influence on the court-martial of the accused. The Tweet about SSG [redacted] was written over 3 years ago. As evidenced by the search bar in Defense's Exhibit 3, it is only discoverable using specific Boolean search terms. The obscurity and remoteness of this Tweet about SSG [redacted] further diminishes the potential for it to have any influence on the accused's court martial.

b. <u>There Has Been No Showing That Any Statements Amounting To UCI Would Put an Intolerable Strain on The Perception of Fairness of The Proceedings.</u>

Assuming any of the alleged statements by anonymous sources or Ret. BG Bolduc amount to UCI, Defense cannot meet its burden in showing they would put an intolerable strain on the perception of fairness by a disinterested observer. A fully informed observer would recognize that a handful of comments made over three years ago, speculating on a possible motive at the earliest stage of the investigation, are unlikely to have any influence on the accused's ability to receive a fair trial. Likewise, Tweets offering praise for SSG [redacted] and his family, over three years ago, by a retiree acting in his personal capacity, would not cause a fully informed observer to question the fairness of the proceedings.

Moreover, a fully informed observer would know the ordinary voir dire process, with the liberal grant mandate, is exactly the process to address Defense's concerns about any bias related to media coverage. Individual voir dire allows Defense to fully vet potential members by asking open-ended questions designed to illicit bias without suggesting information. While Defense speculates senior members on the panel may not reveal their true biases or fail to follow the military judge's instructions, this kind of skepticism would not be shared by an objective, disinterested, fully informed observer. Such an observer would expect any member who has

consumed media related to this case to be appropriately questioned in individual voir dire, to answer truthfully, and be challenged for cause, if warranted. The voir dire process, along with standard instructions from the Military Judge, ensure there would be no concerns about the perception of fairness in the accused's case.

2. There is no apparent UCI from the statements made by Admiral Green or Acting Secretary Modly

a. The statements from Admiral Green and Acting Secretary do not amount to UCI

There is no evidence of unlawful command influence by Admiral Green or then Acting Secretary Modly. To the contrary, both Admiral Green and Acting Secretary Modly were exercising lawful influence by commenting on issues that were apparent in the communities over which they are responsible. First, Admiral Green was acting within his authority as Commander, Special Warfare Command when he issued the memorandum to his subordinate commanders addressing the culture in the special warfare community. The memorandum did not identify the accused or any specific incident of misconduct, nor did it comment on the court-martial process. While Admiral Green called attention to a cultural problem within the community, his call to action can be fairly characterized as getting "back to the basics" to prevent future misconduct in the special warfare community. His actions were not only lawful, failure to provide guidance to his subordinate commanders in the wake of issues in the community would have been a dereliction of his duty. Admiral Green did not make any statements addressing the accused's case or suggesting a desired outcome in his court martial process. Further, the memorandum, published in August 2019, is over two years removed from the allegations against the accused. This temporal remoteness undercuts any perception that the guidance was tied directly to the allegations against the accused. While Defense cites media coverage during this time as tying Admiral Green's memorandum to the accused's case, media coverage does not convert Admiral

Green's authorized actions to UCI. As his comments were neither unauthorized, nor likely to influence the accused's court martial, Defense has not met its burden in showing some evidence of UCI.

Similarly, the general statements made by the Acting Secretary of the Navy regarding the effect of 20 years of war on our forces do not amount to UCI. The Secretary of the Navy has the statutory responsibility to oversee all affairs of the Department of the Navy, including recruiting, training, and administering the forces. His statements regarding the welfare and culture of the forces after decades of war are well within his authority. In his statements, he did not identify the accused, discuss any desired outcome in his court marital process, or in any other way influence the accused's ability to receive a fair trial. As his comments were neither unauthorized, nor likely to influence the accused's court marital, Defense has not met its burden in showing some evidence of UCI.

b. <u>There Has Been No Showing Any Statements Amounting to UCI Would Put an Intolerable Strain on The Perception of Fairness of The Proceedings.</u>

If the Court finds any of the statements by Admiral Green or Acting Secretary Modly amounted to UCI, there is no evidence these statements would put an intolerable strain on the perception of fairness of the accused's court-martial. A fully informed observer would understand the voir dire process, with the liberal grant mandate, is the appropriate remedy to ensure that no member has any actual or implied bias that would prevent them from being an impartial member. Such a fully informed observer would know that Defense will fully vet potential members during voir dire to determine if any potential member has actual or implied biases regarding the culture in the special warfare community. A fully informed observer would know that if a potential member is shown to have actual or implied bias relating to the culture in the special warfare community, that member may be challenged for cause.

5. Evidence.

Enclosure 1: Special Forces commander & Laconia native Bolduc retires after 32 years in Army

Enclosure 2: [redacted], About the Command

6. Relief Requested. The government respectfully requests the court deny Defense's motion for (5) additional peremptory challenges.

7. Oral Argument. The Government requests oral argument.

L.M. FONTENOT
LT, JAGC, USN
Trial Counsel

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Certificate of Service

I hereby certify that a copy of this motion response was served on the Court and defense counsel on this 5th day of July 2020.

L.M. FONTENOT
LT, JAGC, USN
Trial Counsel

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

U N I T E D S T A T E S **v.** **TONY DEDOLPH** **[redacted]/E-7 USN**	**DEFENSE MOTION TO COMPEL TESTIMONIAL IMMUNITY** **28 Jun 20**

1. Nature of Motion. Pursuant to Rule for Courts-Martial 704, the Defense moves the Court to direct an appropriate convening authority to grant testimonial immunity to GySgt [redacted] USMC, GySgt [redacted] USMC, and SFC [redacted], USA, or abate the proceedings in the above captioned case.

2. Summary of Facts.

The Government alleges that in the morning of 4 June 2017, [redacted] DeDolph, [redacted] GySgt [redacted] SSgt [redacted] and three civilians unlawfully entered the bedroom of SSG [redacted] with the intent of assaulting and hazing him, and that these actions unintentionally led to SSG [redacted] death. [redacted] and SSgt [redacted] have pled guilty to certain offenses related to this incident, and the Government has provided both of them with testimonial immunity to testify against [redacted] DeDolph. GySgt [redacted] is currently pending trial on charges including felony murder based on a theory that SSG [redacted] died during an alleged burglary. Like [redacted] DeDolph, GySgt [redacted] contests the Government's allegation that he unlawfully broke and entered SSG [redacted] room or that any such unlawful entry took place during nighttime, a necessary element of burglary.

In addition to the above individuals, two other servicemembers were involved in the actions taken in the morning of 4 June 2017. First, GySgt [redacted] was present on the night of 3 June

2017 when the Government first alleges that [redacted] DeDolph conspired with other servicemembers. In fact, SSgt [redacted] describes GySgt [redacted] as the only one to express anger toward SSG [redacted] and depicts him as the driving force behind the actions the group took later that night. GySgt [redacted] has invoked his right to remain silent and declined to provide any testimony regarding his participation that night. However, the Defense is not aware of any legal proceedings pending against GySgt [redacted]

Second, SFC [redacted] was SSG [redacted] superior and team leader in [redacted] Both SSgt [redacted] and [redacted] have claimed that, shortly before entering SSG [redacted] room, [redacted] DeDolph woke SFC [redacted] in his room down the hall, told him about a plan to enter SSG [redacted] room, and received approval from SFC [redacted] for this plan. SFC [redacted] has invoked his right to remain silent and declined to provide any testimony regarding his actions that night. Army CID began an investigation into SFC [redacted] participation in mid-2019. Although the CID agents conducting that investigation viewed it as a straight forward False Official Statement investigation, they were pushed to continue investigating further due to the Army Trial Counsel's desire to be able to charge SFC [redacted] with murder under an unspecified theory of liability. Nevertheless, the Defense has not been notified of any charges being brought against SFC [redacted]

The Defense requested that the Convening Authority grant testimonial immunity to GySgt [redacted] GySgt [redacted] and SFC [redacted] so that the Defense can present its case on the same footing as the Government, whose witnesses have been granted testimonial immunity. The Convening Authority denied this request, depriving the Defense of three essential witnesses.

3. Discussion.

Under R.C.M. 704(e), the decision to grant immunity is one "within the sole discretion" of the general court-martial convening authority. "However, if a defense request to immunize a witness has been denied, the military judge may, upon motion by the defense, grant appropriate relief directing that either an appropriate convening authority grant testimonial immunity to a defense witness or, as to the affected charges and specifications, the proceedings against the accused be abated." R.C.M. 704(e). An order directing the grant of immunity is appropriate when (1) the witness intends to invoke his right to remain silent; (2) either the Government has engaged in the discriminatory use of immunity to obtain a tactical advantage or the Government has forced the witness to invoke his right to silence through its own overreach; and (3) the witness's testimony is material, clearly exculpatory, not cumulative, not obtainable from any other source and does more than merely affect the credibility of other witnesses. Id.

When the Defense makes a proffer of "clearly exculpatory testimony of a witness who will invoke his privilege against self-incrimination if called to testify, [the military judge] cannot sit idly by. When such a proffer is made and the Government does not make a particular and substantive contention that testimonial immunity will jeopardize a contemplated future prosecution of the witness, consideration of the accused's due-process and fair trial rights requires the military judge to fashion an appropriate remedy. Simply denying an accused the use of such testimony under these circumstances is fundamental error." United States v. Zayas, 24 M.J. 132, 135-36 (C.M.A. 1987) *vacated due to finding of no prejudice by* 26 M.J. 203 (C.M.A. 1988). Here, each of the three prongs under R.C.M. 704(e) are met with respect to GySgt [redacted] SFC [redacted] and GySgt [redacted] All three have indicated that they will invoke

their privilege against self-incrimination if called to testify, satisfying the first prong. Particularized discussion of the remaining two prongs for each witness follows below.

First, the convening authority's refusal to grant GySgt [redacted] testimonial immunity is precisely the type of discriminatory use of immunity contemplated by R.C.M. 704(e)(2). The Government alleges that there were 7 individuals in SSG [redacted] room during the events that led to his death. Of those 7 people, 4 were servicemembers. All four were charged with substantially similar offenses including felony murder. Two of those servicemembers – SSgt [redacted] and [redacted] – reached pretrial agreements with the Government where they admitted culpability and have been granted testimonial immunity. As a result, of the individuals in the room to whom the convening authority has the power to grant immunity, he has granted it **only** to the two people who agree with the Government's theory of the case. GySgt [redacted] – the one individual (other than [redacted] DeDolph) who disputes the Government's account of what took place – has been denied testimonial immunity, ensuring that the finder of fact will hear only the evidence the Government wants them to hear.

Moreover, the Government can make no "contention that testimonial immunity will jeopardize a contemplated future prosecution of" GySgt [redacted] Zayas, 24 M.J. at 135. Charges were preferred against GySgt [redacted] in 2018. His trial has been scheduled for September of 2020. Whatever evidence the Government has against GySgt [redacted] that supports the charges against him already exists and will not in any way be affected by granting him testimonial immunity in this case.

The third prong is also met here. There is clearly a factual dispute about essential elements of the charges the Government has brought against [redacted] DeDolph. Key among these are the intent of the individuals upon entering SSG [redacted] room and the time of day that the

entry took place. These elements are critical to the felony murder charge, which carries a mandatory sentence of confinement for life. GySgt [redacted] expected testimony that the entry took place in the morning and not during nighttime as that term is defined in the Manual for Courts-Martial is directly exculpatory with respect to both the burglary and felony murder charges pending against [redacted] DeDolph. In addition, GySgt [redacted] expected testimony that the entire incident was undertaken as a joke is exculpatory with respect to the conspiracy charge, which requires proof of a specific intent to assault SSG [redacted] No other individual – especially none who has already agreed to support the Government's theory of events by pleading guilty – can offer any testimony similar in nature or perspective to GySgt [redacted] Thus, all prongs of R.C.M. 704(e) are met and the Court must direct that the convening authority grant testimonial immunity to GySgt [redacted]

Second, with respect to SFC [redacted] government overreach has forced him to invoke his right to remain silent. The death of SSG [redacted] has been under near constant investigation for more than 3 years: first by Army CID, then by NCIS, and again by Army CID. This second CID investigation began nearly a year ago and specifically targeted SFC [redacted] Nevertheless, no charges have been brought against SFC [redacted] seemingly because the Army Trial Counsel assigned to the case is attempting to find a novel legal theory by which to charge SFC [redacted] with murder, despite the fact that he was asleep in his separate room at the time of SSG [redacted] death. Even the assigned CID agents appear confused by this overreach, as it goes well beyond their view that the case is one of False Official Statements and not murder. In its attempt to invent a shockingly flimsy murder case against him, the government's overreach has forced SFC [redacted] to invoke his right to remain silent. Had the government made the more reasonable decision to approach SFC [redacted] case as one about false statements rather than murder, that

case likely would have been resolved by now – removing any need for testimonial immunity. Only because of Government overreach is [redacted] DeDolph being deprived of vital exculpatory testimony.

SFC [redacted] expected testimony – based on the claimed interaction between him and [redacted] DeDolph as described by [redacted] and SSgt [redacted] – is directly exculpatory as to two of the most serious charges pending against [redacted] DeDolph: Burglary and Felony Murder based on that alleged Burglary. In order for the Government to prove that [redacted] DeDolph committed Burglary, they must show that he had no legal right to enter SSG [redacted] room. However, SFC [redacted] was the leader of the Army contingent using the house at the time. The house itself was a Navy asset in which [redacted] DeDolph permitted the Army – through SFC [redacted] – to use extra space. SFC [redacted] expected testimony that he gave [redacted] DeDolph permission to enter SSG [redacted] room is clearly exculpatory as to the alleged unlawfulness of that entry.

No other witness can offer similar testimony. Although [redacted] and SSgt [redacted] are aware of the interaction between [redacted] DeDolph and SFC [redacted] neither of them was a party to it and neither can describe it comprehensively. In addition, the Defense expects that the Government will object to any attempt to elicit third-hand testimony about this conversation on the grounds of hearsay. Thus, without testimonial immunity for SFC [redacted] the Defense will have no means of introducing this essential exculpatory testimony.

Third, GySgt [redacted] has likewise been forced to invoke his right to remain silent due to Government overreach. It is undisputed that GySgt [redacted] was present on the night of 3 June at various restaurants when a group of individuals were joking about taping SSG [redacted] Based on the testimony of SSgt [redacted] GySgt [redacted] anger at SSG [redacted] was the prime motivation for that joking. However, it is also undisputed that GySgt [redacted] became extremely intoxicated,

separated from the group, and did not participate at all in the actions leading up to SSG [redacted] death because he was asleep or passed out at the time. Despite having this information for nearly 3 years, and having SSgt [redacted] description of GySgt [redacted] anger for more than a year, the Government has not charged GySgt [redacted] with anything. It is not even clear with what they could charge him based on the testimony of the Government's own cooperating witnesses. Nevertheless, the Government continues to threaten GySgt [redacted] with charges, forcing him to invoke his right to remain silent. Even if the Government were to someday decide to charge GySgt [redacted] granting him testimonial immunity would not jeopardize that potential prosecution as the evidentiary record from three years of investigation could be used for any proceedings.

Like the other two witnesses, GySgt [redacted] expected testimony would be exculpatory. [redacted] DeDolph is charged with conspiring with others to assault SSG [redacted] and also with hazing SSG [redacted] Government witnesses are expected to testify that [redacted] DeDolph was the main proponent of this alleged conspiracy and the most invested in the alleged desire to haze SSG [redacted] GySgt [redacted] expected testimony that he was the only individual angry at SSG [redacted] due to an interaction on the road earlier exculpates [redacted] DeDolph with respect to these two charges. Other witnesses cannot substitute for this testimony as they cannot describe the interaction that led to GySgt [redacted] anger, the ways he expressed that anger to all parties involved, and how that anger translated into a desire to play a practical joke on SSG [redacted] But for the government overreach described above, the Defense would be able to offer this vital, exculpatory testimony from GySgt [redacted]

For each of the three witnesses above, the Government has used discriminatory denials of testimonial immunity plus the threat of unfounded charges to tactically shape the evidentiary picture in its favor. Without grants of testimonial immunity to GySgt [redacted] SFC

[redacted] and GySgt [redacted] the finder of fact will hear only evidence that fits with the Government's theory of the case and none that challenges that theory. This is precisely the type of violation of the Due Process right to a fair trial for which R.C.M. 704(e) accounts and seeks to prevent. Nor can the Government point to any prejudice it will suffer as a result of granting this testimonial immunity that would potentially counterbalance depriving [redacted] DeDolph of a fair trial. As such, the Court should direct the convening authority to grant testimonial immunity to GySgt [redacted] SFC [redacted] and GySgt [redacted] or, if the convening authority refuses to do so, abate the proceedings.

4. **Evidence.**

The Defense presents the following documentary evidence in support of its motion:

Enclosure (1) – SFC [redacted] email dtd 31 Jul 19
Enclosure (2) – CPT [redacted] email dtd 2 Aug 19
Enclosure (3) – SSgt [redacted] interview of 7 Jun 10 (excerpt)
Enclosure (4) – [redacted] Guilty Plea Transcript dtd 16 May 19 (excerpt)
Enclosure (5) – Army CID Case Activity Summary (excerpt)
Enclosure (6) – SSgt [redacted] Article 32 Testimony of 5 Aug 19 (excerpt)
Enclosure (7) – [redacted] and SSgt [redacted] Grants of Immunity
Enclosure (8) – Defense Request for Immunity, Government Endorsement, and Denial

5. Oral Argument. The Defense requests oral argument on this motion.

[redacted]

LCDR, JAGC, USN
Detailed Defense Counsel

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

UNITED STATES **v.** **TONY DEDOLPH** **[redacted]/E-7 USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO COMPEL TESTIMONIAL IMMUNITY** **5 JULY 2020**

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1. Nature of Response. This is the Government's response to the Defense motion to require a grant of testimonial immunity to Sergeant First Class [redacted], (SFC [redacted] USA, Gunnery Sergeant [redacted], (Mr. [redacted] USMC, (ret.), and Gunnery Sergeant [redacted] (GySgt [redacted] USMC. The Government opposes the grant of testimonial immunity to all three witnesses.

2. Summary of Facts.

a. The Accused has been charged with a Violations of Article 81, 92, 118, 119, 129, and 134, UCMJ, stemming from the murder of Army Staff Sergeant (SSG) [redacted] in [redacted], during a hazing incident.

b. SFC [redacted] is under investigation by the Army for his false statements and involvement in the murder and cover-up of SSG [redacted] death. His statement to NCIS denies any involvement or knowledge of the murder of SSG [redacted] or the subsequent cover-up by [redacted] DeDolph and others. (Encl. 1)

c. Mr. [redacted] has retired from the Marine Corps and is no longer easily subject to military jurisdiction. His statement to NCIS denies any involvement or knowledge of the murder of SSG [redacted] or the subsequent cover-up by [redacted] DeDolph and others. (Encl. 2)

d. GySgt [redacted] is a co-conspirator facing a separate trial, and both defense teams have been working together during this trial process.[1] GySgt [redacted] faces similar charges to [redacted] DeDolph, with an additional charge of False Official Statement for lying to Army CID about his lack of involvement in the murder of SSG [redacted] His sworn statement to Army CID disclaims any involvement in causing SSG [redacted] death. (Encl. 3) His trial is currently slated for 1 September 2020.

3. Burden of Proof. The burden of proof and persuasion rests with the Defense by a preponderance of the evidence. R.C.M. 905(c).

4. Discussion of Law and Analysis.

"[Military jurisprudence] recognizes the view of a majority of the federal courts that there is no right to grants of immunity under the Fifth or Sixth Amendments."[2] R.C.M. 704 governs the granting of immunity within military courts-martial. First, it delineates the types of immunity that may be granted.[3] Second, it establishes that only a general court-martial convening authority may grant immunity to any witness.[4] Third, it creates a three prong test the Defense must meet to justify a military judge ordering an abatement where the convening authority declines to immunize a witness.[5] The three prongs are: 1) the witness has invoked her/his right to silence; 2) the government has engaged in discriminatory grants of immunity or

[1] The government believes both the [redacted] and DeDolph teams are working together based off of a classified spillage originating from a witness request which should have only infected the government and the [redacted] defense team, but also ensnared members of the DeDolph defense team who had already submitted their own witness request.
[2] *United States v. Richter*, 51 M.J. 213, 223 (CAAF 1999).
[3] Testimonial and transactional immunity. R.C.M. 704(a).
[4] "A general court-martial convening authority, or designee, may grant immunity, and may do so only in accordance with this rule." R.C.M. 704(c).
[5] R.C.M. 704(e). Of note, "The military judge is not empowered to immunize a witness. If the military judge finds that a grant of immunity is essential to a fair trial, the military judge may abate the proceedings until immunity is granted by an appropriate convening authority. The military judge must consider the Government's interest in not granting immunity to the defense witness." *United States v. Gallagher*, 65 M.J. 601, 603 (NMCCA 2007) (internal citations omitted).

committed prosecutorial overreach; and 3) the witness' testimony is clearly exculpatory and doesn't just impact credibility of another witness.[6]

"Because the three prongs are stated in the conjunctive, all three must be met."[7] The first prong of R.C.M. 704(e)'s test is evident on its face.[8] As to the second prong, "when the witness is a prosecution target and awaiting trial, the second prong is not met, and there can be no claim of discrimination or overreaching."[9] For the third prong, clearly exculpatory testimony must be "capable of being characterized as evidence which clearly negates guilt."[10] It must exonerate the accused completely if it is believed.[11] "Statements that the witness will testify to a legal conclusion…are insufficient. The proffer of expected testimony must set forth the specifics of the witness' testimony."[12]

Argument

There is no Fifth or Sixth Amendment right to immunity[13] and the Convening Authority acted appropriately in denying immunity to [redacted] DeDolph's requested witnesses: GySgt

[6] R.C.M. 704(e)(1)-(3): (1) The witness intends to invoke the right against self-incrimination to the extent permitted by law if called to testify; and (2) The Government has engaged in discriminatory use of immunity to obtain a tactical advantage, or the Government, through its own overreaching, has forced the witness to invoke the privilege against self-incrimination, and (3) The witness' testimony is material, clearly exculpatory, not cumulative, not obtainable from any other source and does more than merely affect the credibility of other witnesses."
[7] "Because the three prongs are stated in the conjunctive, all three must be met." *United States v. Richter*, 51 M.J. 213, 223 (CAAF 1999).
[8] See *United States v. Ivey*, 53 M.J. 685, 693 (ACCA 2000), *aff'd* by CAAF in *United States v. Ivey*, 55 M.J. 251, 257 (CAAF 2001): "The defense request for immunity cleared the first hurdle, as all of the witnesses indicated personally or through counsel, that if called, they would invoke their privilege against self-incrimination."
[9] *United States v. Richter*, 51 M.J. 213, 223 (CAAF 1999) (The government granted immunity to five government witnesses and denied the lone defense witness – no discrimination).
[10] *United States v. Gallagher*, 65 M.J. 601, 604 (NMCCA 2007). See also, *United States v. James*, 22 M.J. 929, 932-933 (CMR 1986). "This requirement enunciates a far higher standard of probativeness than, for example, the mere 'any tendency' standard for the determination of relevance. To be considered 'clearly exculpatory,' the prospective testimony must be capable of being characterized as 'evidence which clearly negates . . . guilt.'"
[11] *United States v. Gallagher*, 65 M.J. 601, 604 (NMCCA 2007).
[12] See *United States v. Ivey*, 53 M.J. 685, 694 (ACCA 2000), *aff'd* by CAAF in *United States v. Ivey*, 55 M.J. 251, 257 (CAAF 2001): "Statements that the witness will testify to a legal conclusion--that the appellant was not a party to a particular conspiracy--are insufficient. The proffer of expected testimony must set forth the specifics of the witness' testimony."
[13] *United States v. Richter*, 51 M.J. 213, 223 (CAAF 1999).

[redacted] SFC [redacted] and Mr. [redacted] This Court should not interfere in the prosecution of this case by ordering the convening authority to immunize the requested witnesses.[14] A grant of immunity will increase the likelihood of "cooperative perjury" and [redacted] DeDolph "should not be empowered to give his confederates an immunity bath."[15] The Defense did not produce evidence to satisfy prongs two and three, and thus cannot meet its burden for this motion.[16] Therefore, the motion should be denied.

Prong Two

For GySgt [redacted] the law is quite clear that when "the witness is a prosecution target and awaiting trial, the second prong is not met, and there can be no claim of discrimination or overreaching."[17] As conceded by the Defense in its motion[18], GySgt [redacted] is currently pending trial. By itself, the failure of this prong ends discussion. But even if GySgt [redacted] was no longer facing a trial, he should still not be immunized. In the case of a conviction, he should be denied immunity while his case is being appealed[19], or in the event of an acquittal, he has no need for testimonial immunity. As for SFC [redacted] he is targeted for prosecution by the U.S. Army[20], and "the refusal to grant immunity to a defense witness targeted for or pending prosecution, without something more, does not constitute [a discriminatory use of

[14] "The military judge must consider the Government's interest in not granting immunity to the defense witness." *United States v. Gallagher*, 65 M.J. 601, 603 (NMCCA 2007).
[15] See also, *Blissett v. Lefevre*, 924 F.2d 434, 441-442, (2nd Cir. 1991): "Absent exceptional circumstances, the Due Process Clause imposes no requirement that defense witness immunity be ordered whenever it seems fair to grant it. Indeed, a trial court should order the prosecutor to grant a defense witness immunity only in extraordinary circumstances. In addition to ensuring that prosecutorial decisions concerning whom to prosecute and what evidence to present at a criminal trial will not be lightly interfered with by the judiciary, it reduces the possibility of cooperative perjury between the defendant and his witness. A person suspected of crime should not be empowered to give his confederates an immunity bath." (internal citations and quotations omitted).
[16] It is clear that the defense has met the first prong of this test. The government will not discuss this prong any further.
[17] *United States v. Richter*, 51 M.J. 213, 223 (CAAF 1999).
[18] Def. Mot. at 1.
[19] "The Government had legitimate reasons to refuse to grant use immunity to B given that his recent conviction was being appealed." *United States v. Monroe*, 42 M.J. 398, 403 (CAAF 1995).
[20] Def. Mot. at 5.

immunity]."[21] For Mr. [redacted] because he is no longer active duty, the Convening Authority cannot grant him immunity.[22] In other words, the Convening Authority lacks the legal authority to discriminate against Mr. [redacted] The Defense has not introduced any evidence showing they intend to ask the U.S. Attorney General for immunity for Mr. [redacted].[23]

For all of the proposed witnesses, the Defense has not provided any evidence of discriminatory intent, overreach, or bad faith on the part of the government to support its allegations. The Defense has merely used the word "overreach" as a magic talisman, without researching the established legal meaning of the word, or finding any other legal support[24] for their position that the Convening Authority has acted in a discriminatory fashion. Clearly, prong two has not been established.

As laid out above, the Government has a valid prosecutorial purpose in refusing immunity for GySgt [redacted] given his ongoing trial, so the Defense cannot establish discriminatory intent in the refusal. Among other potential harms, were GySgt [redacted] to testify in [redacted] DeDolph's trial under a grant of immunity, the Government would then have the

[21] *United States v. Ivey*, 53 M.J. 685, 694 (ACCA 2000), *aff'd* by CAAF in *United States v. Ivey*, 55 M.J. 251, 257 (CAAF 2001): "While discriminatory use of immunity is not defined in the rule, we are confident that the refusal to grant immunity to a defense witness targeted for or pending prosecution, without something more, does not constitute it."

[22] Because Mr. [redacted] is still subject to the UCMJ, yet not on active duty, any attempt to immunize him must first be done in coordination with the U.S. Attorney's office and the Secretary of the Navy so as not to interfere with civilian jurisdiction. See 18 USCS § 3261, JAGMAN 0123, *United States v. Begani*, 79 M.J. 767, 775 (NMCCA 2020), R.C.M. 704(c)(2), and *United States v. Ivey*, 55 M.J. 251, 257 (CAAF 2001) .

[23] See *United States v. Ivey*, 55 M.J. 251, 257 (CAAF 2001) (Defense may submit immunity request directly to the Attorney General. The Convening Authority is not obligated to forward request he wishes to deny.)

[24] The *only* case cited by the Defense in its motion, *United States v. Zayas*, is based on an outdated version of R.C.M. 704(e), which was superseded by statute. See *United States v. Ivey*, 53 M.J. 685, 693 (ACCA 2000) Footnote 11. "The version of R.C.M. 704 in effect at the time of the appellant's trial was adopted in 1993, replacing a version that had reflected the minority view in the federal courts. In *Monroe*, the Court of Appeals for the Armed Forces discussed the various approaches to defense immunity that have been applied in the military courts. We comment on the changed standard only because many military cases treating the subject of defense immunity requests were decided based on the earlier R.C.M. 704, which required the testimony to be 'of central importance to the defense case such that it is essential to a fair trial.' See, e.g., *United States v. Zayas*, 24 M.J. 132 (C.M.A. 1987), *vacated in part*, 26 M.J. 203 (C.M.A. 1988). The 1984 version of R.C.M. 704(e) clearly imposed a lighter burden on the defense than does the current version."

affirmative duty to demonstrate it was not "using" the immunized testimony in the case against him. In one example, were GySgt [redacted] to testify at his own trial or re-trial, the Government would have extraordinary difficulty in demonstrating its cross-examination was not affected by GySgt [redacted] immunized testimony, especially if the Defense proffer is correct and he will provide wholly new information. Moreover, Defense's proffer concedes that GySgt [redacted] has lied to law enforcement regarding the facts of this case. Defense's proffer is substantially in line with the statements and testimony of Pvt [redacted] and SO2 [redacted] as well as the physical evidence (which found GySgt [redacted] DNA on restraints alleged to be used on the victim). GySgt [redacted] stated that he saw the victim come out of his bedroom and initiate wrestling with [redacted] DeDolph, that his view was then obstructed by a closed door, and that he remained outside and uninvolved until the suspects reported he was unresponsive. Unlike Pvt [redacted] and SO2 [redacted] he has not provided any updated or corrected statements that could give the Convening Authority any confidence regarding what he would testify too if immunized and called. As a result, the Convening Authority has a separate, justifiable basis for denying immunity.

For SFC [redacted] the Defense argues that "[G]overnment overreach has forced him to invoke his right to remain silent." This assertion is supported solely by Defense's reference to August 2019 notes from CID investigators indicating they want to follow up with CPT [redacted] to understand the intent of a requested re-interview of SFC [redacted].[25] While these notes fail on their own to demonstrate "overreach", they occur *after* SFC [redacted] had already invoked his Article 31(b) rights when asked to testify at the Article 32 hearing.[26] As a result, the only evidence Defense offers entirely fails to demonstrate government overreach in SFC

[25] Def. Mot. Encl (5)
[26] Def. Mot. Encl (1)

[redacted] case. Moreover, the Defense position refutes itself—the Defense proffer indicates the Defense believes SFC [redacted] also lied to investigators, demonstrating a motive other than Government overreach for his refusal to testify.

Likewise, the Defense claims GySgt [redacted] was "forced to invoke his right to remain silent due to Government overreach."[27] The Defense suggests the Government "continues to threaten GySgt [redacted] with charges" to force him to invoke, without providing a scintilla of evidence supporting the same. And again, the Defense position is self-refuting, as the Defense proffer alleges GySgt [redacted] lied to law enforcement regarding the events, and is actually partly responsible for encouraging the hazing and eventual death of the victim, which demonstrates a motive for refusing to testify other than Government overreach.

Prong Three

The testimony of the witnesses is not clearly exculpatory and is totally unreliable. All three witnesses have told very different stories to law enforcement than the Defense posits in its motion. First, the Defense claims that GySgt [redacted] testimony is clearly exculpatory on two charges.[28] This is legally incorrect. The Defense claims that the intent element of conspiracy is nullified because GySgt [redacted] would testify that the "entire incident was undertaken as a joke."[29] But the fact that GySgt [redacted] or [redacted] DeDolph found the events humorous would not negate the specific intent requirements of Article 81.[30] Further still, breaking into SSG [redacted] room to conduct a "taping"[31] on him as a joke is not a legally

[27] Def. Mot. at 6.
[28] Def. Mot. at 5.
[29] Def. Mot. at 5.
[30] Article 81, UCMJ (2016 MCM): "(a) That the accused entered into an agreement with one or more persons to commit an offense under the UCMJ; and (b) That, while the agreement continued to exist, and while the accused remained a party to the agreement, the accused or at least one of the coconspirators performed an overt act for the purpose of bringing about the object of the conspiracy."
[31] Def. Mot. at 6.

recognized defense to assault and battery or burglary.[32] As to the burglary charge, if GySgt [redacted] testified that the burglary took place during the day, his testimony would be countered by five witnesses[33] (Mr. [redacted] Mr. [redacted] Mr. [redacted] Pvt [redacted] and SO2 [redacted] who will say that the burglary occurred at night. GySgt [redacted] testimony would at most impeach the credibility of the other five witnesses, but by itself would not exonerate the [redacted] DeDolph completely[34], especially given that this new testimony would only have arisen from GySgt [redacted] *after* he learned of the legal significance of the time, and would be contradicting of the timeline he offered to CID (indicating they arrived at the house at 5 AM, and the wrestling commenced around 5:10 AM).[35] The standard for exculpatory testimony is higher than mere relevance.[36] Further, there is no evidence before this Court that GySgt [redacted] would testify in line with the Defense proffer. In addition to saying that he arrived at the house when it was "late and dark outside" and that he did not go into the house, GySgt [redacted] prior statement also omits any reference to a "taping" or the conspirators playing a joke on SSG [redacted] that night. The Defense fails to introduce any evidence from GySgt [redacted] of what GySgt [redacted] would say. The Defense proffers only that GySgt [redacted] would offer legal opinions and conclusory statements,[37] but statements "that the witness will testify to a legal conclusion…are insufficient. The proffer of expected testimony must set forth the specifics of the witness' testimony."[38] The Defense has failed this prong for GySgt [redacted]

[32] The Defense appears to be pursuing a jury nullification defense, instead of a legal defense.
[33] Three of those witnesses do not have immunity from convening authority.
[34] See *United States v. Gallagher*, 65 M.J. 601, 604 (NMCCA 2007).
[35] Encl. 3.
[36] See *United States v. James*, 22 M.J. 929, 932-933 (CMR 1986). "This requirement enunciates a far higher standard of probativeness than, for example, the mere 'any tendency' standard for the determination of relevance. To be considered 'clearly exculpatory,' the prospective testimony must be capable of being characterized as 'evidence which clearly negates . . . guilt.'"
[37] "The third prong also was not met because the proffered testimony was not 'clearly exculpatory.' The vague proffers of testimony amounted to no more than legal conclusions that appellant was not guilty." *United States v. Ivey*, 55 M.J. 251, 257 (CAAF 2001).
[38] *United States v. Ivey*, 53 M.J. 685, 694 (ACCA 2000).

SFC [redacted] testimony would not be exculpatory either. Although the Defense claims that the prosecution has overreached by targeting SFC [redacted] in its next breath, the Defense claims that SFC [redacted] would testify that he gave [redacted] DeDolph and the other co-conspirators permission to enter SSG [redacted] room to commit an assault and battery, as if that legally excuses either the assault and battery on SSG [redacted] or the burglary in entering his room. SFC [redacted] has no legal authority to authorize the breaking and entering of SSG [redacted] room to commit crimes. Even the Defense believes that SFC [redacted] committed a crime that night, which is precisely why he is still a target of the Army prosecutors. Similar to GySgt [redacted] SFC [redacted] also made a statement to law enforcement that contradicts what the Defense proffers he will say under oath. In his statement, SFC [redacted] does not say that anyone asked his permission to perform a "taping" on SSG [redacted].[39] The Defense does not provide a specific proffer of testimony from SFC [redacted] and there is no clearly exculpatory evidence in his statement. Any *new* exculpatory evidence would be unreliable because it is not consistent with his past statement.

For Mr. [redacted] there is no indication he will testify reliably in accordance with the Defense proffer. Any animosity between him and SSG [redacted] is noticeably absent from his statement to NCIS.[40] Even if it were present, it would not excuse the burglary committed against SSG [redacted] as it is irrelevant to any elements of the charged crimes. It is hard to see how another party encouraging [redacted] DeDolph to haze and molest SSG [redacted] is exculpatory at all, let alone "clearly exculpatory" testimony. As with the other witnesses, without a proffer directly from Mr. [redacted] the Court "would be hard-pressed to determine the reliability" of

[39] Encl. 1.
[40] Encl. 2.

what Mr. [redacted] would really say under a grant of immunity.[41] R.C.M. 704 requires that the testimony of the witnesses do more than "merely affect the credibility of the other witnesses." The Defense proffers of testimony barely suffice to do that. It is far more likely that providing immunity to these three witnesses would only serve to drown the factfinder in convenient inventions and outright falsehoods. The Constitution, nor R.C.M. 704, requires "such an absurd result."[42]

Conclusion

A grant of immunity, without a reliable proffer of truly exculpatory testimony, particularly with these witnesses who have already demonstrably lied to investigators, introduces grave uncertainty into the trial process. SFC [redacted] even with a grant of immunity, still has a strong incentive to lie to protect his career and reputation from adverse administrative and personal consequences. Mr. [redacted] who has retired from active duty, cannot be easily ordered to cooperate truthfully in any way prior to his testimony, increasing the chance of a SO1 [redacted] style "surprise" at trial. GySgt [redacted] is a charged co-conspirator, who has every incentive to use this opportunity to testify to undermine his own prosecution and to protect [redacted] DeDolph. In this case, the Defense has not met its burden on prongs two and three. Therefore, the military judge must deny this motion.

5. <u>Relief Requested.</u> The Government respectfully requests this Court to deny the Defense's motion.

6. <u>Evidence.</u>

a. Enclosure 1: NCIS Statement of SFC [redacted], USA

[41] *United States v. Ivey*, 53 M.J. 685, 695 (ACCA 2000).
[42] "The appellant's position would require the Government to forego the possible prosecution of Villalon, the person identified by the appellant's own testimony as the source of a large quantity of child pornography. Neither R.C.M. 704(e) nor the Constitution requires such an absurd result." *United States v. Gallagher*, 65 M.J. 601, 604 (NMCCA 2007).

b. Enclosure 2: NCIS Statement of GySgt [redacted] USMC (ret.)

c. Enclosure 3: Sworn CID Statement of GySgt [redacted], USMC

7. **Oral Argument.** If requested by the Defense or this Court, the Government is amenable to oral argument.

[redacted]
Jason D. Samuel
Capt, USMC
Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion was served electronically on defense counsel on 5 July 2020.

[redacted]
Jason D. Samuel
Capt, USMC
Trial Counsel

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

U N I T E D S T A T E S **v .** **TONY DEDOLPH** **[redacted]/E-7 USN**	**DEFENSE MOTION TO COMPEL DISCOVERY** **28 Jun 20**

1. **Nature of Motion**. Pursuant to R.C.M. 701 and M.R.E. 505, the Defense moves the Court to compel the Government to provide to the Defense an unclassified copy of all Army CID reports pertaining to that agency's investigation into the death of SSG [redacted] to allow the Defense to prepare for trial in this case.

2. **Summary of Facts**.

Immediately after the death of SSG [redacted] on 4 June 2017, Army CID was the law enforcement agency investigating his death. CID relinquished control of the investigation to NCIS in September 2017. During the three months it led the investigation, CID Agents conducted numerous investigative steps, including all contemporaneous crime scene analysis and evidence collection, and generated a report that is more than five hundred pages long. This report was classified at the Secret level. It remains so classified.

The Government has provided Defense counsel a classified version of this report that is maintained in the DSO Southeast safe. On 19 February 2020, the Government provided a redacted copy of the CID report to the Defense that was marked as Unclassified. On 28 February 2020, the Government informed the Defense that this document was not actually unclassified, requiring the computers onto which it had been downloaded be wiped and all copies destroyed, a process which took more than a month. During that period, the Defense computers were

unusable and the Defense could not access its files. Since that time, the Government has not discovered any other unclassified version of this CID report.

Due to significant discrepancies and problems with the steps taken by the CID agents during their investigation of this case, the Defense requested the appointment of an expert criminologist to assist defense counsel in analyzing those problems. After the convening authority denied this request, on 10 January 2020, the Court granted a Defense motion to compel the production of the expert consultant. To date, however, the Defense has not been able to consult with this expert because the investigative reports implicating his expertise remain classified and thus cannot be shared with him.

Trial Counsel has stated to the Defense that an unclassified version of the CID report will be provided, but due to the extremely slow review by the U.S. Government entities with interests in the classified information, there appears to be no expectation as to when this will be accomplished.

3. **Discussion**.

Here, the Defense is hamstrung in its ability to prepare for trial by the continued classification of Army CID's report of its investigation into the death of SSG [redacted] As the Court concluded on 10 January when it granted the Defense motion for appointment of an expert consultant criminologist, errors and discrepancies in CID's investigation give rise to potential reasons to doubt the findings of that investigation. But the classified nature of that report – classification that is based on matters at most tangential to the actual findings of the investigation – has prevented the Defense from consulting with that expert. Moreover, as Civilian Defense Counsel lives and works in California, he has only been able to view the CID report on visits to the Norfolk area, further inhibiting Defense preparation. Assistant Defense Counsel has now

moved out of the Norfolk area, meaning she also is unable to view the CID report without physically traveling to Norfolk.

Under R.C.M. 701, an unclassified version of this report is relevant to defense preparation. The Government has proffered to the Court that it intends to introduce evidence gathered by that investigation, including physical evidence and the forensic analysis of that evidence. The Government does not seem to dispute the relevance of the report as it has attempted – and the Defense believes Trial Counsel is still attempting – to provide an Unclassified copy to the Defense. However, nearly three years after Army CID's involvement in this investigation ended and with a trial date set yet again, no more time should be allowed for U.S. Government entities to delay the provision of this report.

M.R.E. 505 provides for the provision of a substitute for classified information to enable the Defense to prepare for trial. That is precisely what the Government has been working to provide here in the form of a redacted and Unclassified version of the CID report, and the Defense has no reason to believe such a substitute will be insufficient for the purposes of preparing for trial. The Defense requests that the Court order the Government to discover this substitute Unclassified CID report and set a deadline of 31 July 2020 for this document to be provided to the Defense to allow sufficient time for Defense counsel, the court-ordered defense expert, and [redacted] DeDolph to prepare for trial using that document.

4. **Evidence**. The Defense proffers that the facts stated above are true and amenable to proof by classified documents. The Defense has elected not to enclose those documents here, both because the classified facts themselves are irrelevant to this motion and in order to prevent this filing from becoming classified. If the Government disputes the facts as set forth above, the

Defense respectfully requests leave of the Court to present classified documents in support of this motion in a closed hearing under M.R.E. 505.

5. **Oral Argument.** The Defense requests oral argument on this motion.

[redacted]

N. J. INNS
LCDR, JAGC, USN
Detailed Defense Counsel

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

U N I T E D S T A T E S **v.** **TONY DEDOLPH** **E-7/[redacted] USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO COMPEL DISCOVERY** **5 JUL 20**

MOTION

The Government requests the Defense motion to compel discovery be denied.

SUMMARY

The Government believes this motion is mistitled, as Discovery has already been provided to Defense. The Government believes the motion to compel should be denied, but the Government is amenable to being required to provide the Court updates regarding progress on the creation of the requested documents.

FACTS

1. The initial Criminal Investigative Division (CID) investigation of the death of SSG [redacted] USA was mislabeled and included classified information owned by separate Original Classification Authorities (OCAs). It has since been treated as SECRET//NO FORN.

2. Previously, after a Security Officer review was conducted a redacted version of the CID report was released with classified information, resulting in a spillage. Following this spillage, there has been significantly elevated concern regarding the handling and transfer of the documents in question, and ensuring there is complete coordination by all of the relevant OCAs.

3. Representatives of both OCAs in this case have submitted redactions in separate documents. These are on systems with different classifications, and while one office has indicated it will assist, combination of the redactions has not yet been effected. However, the Government believes a copy including both redactions will likely be available by the end of July or in August.

BURDEN

Pursuant to R.C.M. 905(c), the Defense bears the burden of persuasion by a preponderance of the evidence.

LAW AND ARGUMENT

The Defense cites Rules for Courts-Martial (RCM) 701 and 505 in its motion, but not in ways applicable to the relief it seeks. Under RCM 701, the Defense has already been provided access to and a copy of the requested material. RCM 701 provides for discovery—it does not compel the creation of new versions of documents the Defense already has access to.

The Defense suggests that it is asking for a "substitute" under RCM 505, but a substitute under RCM 505(h)(2)(ii) is not applicable in this case. Under RCM 505, when the Government is denying Defense access to classified discovery, it can instead offer a substitute summary to Defense in lieu of the classified discovery, to avoid giving the Defense access to the classified information. In this case, the Government decided to give the Defense access to the classified materials, so a summary substitute, classified or not, is not applicable.

The Defense is functionally asking that the Government create new documents because it would be more convenient for them to have a fully redacted and UNCLASS version of the classified discovery for electronic transfer, sharing and the like. And indeed, the Government is seeking to create just such a set of documents for the convenience and assistance of the Defense, and for the ease of presentation of evidence for all parties.

However, the Defense has cited no authority to compel a party to do so, and the Government is not aware of a basis under RCM 505 or RCM 701 to compel the various OCAs in this case to redact documents for the convenience of the Defense, when the Defense has already been provided access to and discovery of the classified information.

EVIDENCE

The Government does not offer further evidence on the motion.

RELIEF REQUESTED

The Government requests that the Defense motion be denied.

The Government respectfully requests oral argument.

Respectfully submitted,

[redacted]

LCDR, JAGC, USN
Trial Counsel

Certificate of Service

I hereby certify that a copy of this motion response was served on the Court and defense counsel on this 5th day of July 2020.

[redacted]

B. B. GARCIA
LCDR, JAGC, USN
Trial Counsel

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

U N I T E D S T A T E S **v.** **TONY DEDOLPH** **[redacted]/E-7 USN**	**DEFENSE MOTION TO COMPEL WITNESS PRODUCTION** **17 Aug 20**

1. Nature of Motion. Pursuant to Rule for Courts-Martial 703, the Defense moves the Court to order the Government to produce Mr. [redacted] Mr. [redacted], and [redacted] as witnesses on the merits at the trial in the above-captioned case as each of those witnesses is relevant and necessary to the Defense.

2. Summary of Facts.

[redacted] DeDolph is charged, *inter alia*, with committing the felony murder of SSG [redacted] in the early morning hours of 4 June 2017. The Government alleges that [redacted] DeDolph, then-[redacted], GySgt [redacted], and then-SSgt [redacted] broke into the bedroom of SSG [redacted] in a house used by the U.S. Navy in order to assault him, including committing a sexual assault against him, and that these acts resulted in his death.

a. Mr. [redacted] and Mr. [redacted]

Two [redacted], were working as [redacted] at the house on the morning of the death of SSG [redacted] On 4 June 2017, Mr. [redacted] were observing [redacted]. As part of their observance, they would both fast from sunrise to sunset. On that morning, they had just finished their pre-fast meal when the 4 Americans returned to the house at approximately 0500.

Mr. [redacted] saw each of the individuals and was able to recognize them as they returned to the house.[1] He and Mr. [redacted] had an exchange with [redacted] DeDolph in the courtyard

[1] Enclosure (1) at 5422-23, 5436.

of the house's compound in which they discussed Mr. [redacted] playing a game of acting like a gorilla.[2] Approximately 45 minutes passed between the Americans returning to the house and Mr. [redacted] hearing them enter SSG [redacted]'s room.[3] After entering the room while the 4 Americans were taping SSG [redacted] Mr. [redacted] quickly left the house to escort a [redacted], out of the compound. He then briefly returned to the room before departing again. At this point, he observed that the sky was light.[4] Immediately thereafter, GySgt [redacted] asked him to call the Embassy for help.[5] Based on Embassy records, this phone call was made at 0604, 1 minute before sunrise and 22 minutes after the start of civil twilight, a period during which "[t]he illumination level is sufficient that most ordinary outdoor activities can be done without artificial lighting."[6]

Mr. [redacted] finished his pre-fasting meal as close to the first prayer and sunrise as possible.[7] Shortly after finishing his meal, the Americans returned shortly after 0500.[8] He was able to recognize them and identify them by their faces.[9] While in the courtyard, he was asked to participate in a "game" with SSG [redacted] that involved him stripping to his underwear and lying next to SSG [redacted] to take photographs to embarrass him.[10] Approximately 30 minutes after the Americans returned to the house, they entered SSG [redacted]'s room.[11] Mr. [redacted] was only in the room very briefly before the men realized that SSG [redacted] was unresponsive. He then left the

[2] Enclosure (1) at 5415.
[3] Enclosure (1) at 5411-12.
[4] Enclosure (1) at 5414.
[5] Enclosure (1) at 5414-15.
[6] Enclosure (3).
[7] Enclosure (2) at 5338.
[8] Enclosure (2) at 5298.
[9] Enclosure (2) at 5341, 5248.
[10] Enclosure (2) at 5305, 5335.
[11] Enclosure (2) at 5308.

room and, from the courtyard, saw quick movements by the Americans to retrieve supplies to administer first aid and contact the Embassy.[12]

On 26 June 2020, the Defense requested the production of Mr. [redacted] and Mr. [redacted] as witnesses. The Government has not formally responded to this request, but did send an email on 30 July 2020 stating that they were attempting to arrange the logistics of producing the two witnesses. In subsequent verbal communications to the Defense, the Government has indicated that both witnesses remain willing to travel to Norfolk for trial and that the Government is finding solutions to many of the logistical hurdles.

b. [redacted]

[redacted] is an American female who was present with [redacted] DeDolph, [redacted] GySgt [redacted] and SSgt [redacted] during the alleged conspiracy to assault SSG [redacted] She socialized with them at the [redacted], during which she participated in joking about pulling a prank on SSG [redacted] She separated from the group prior to returning to the house. The next morning, she sent a text message asking how the "operation" had gone.

Despite her involvement in the alleged conspiracy to haze SSG [redacted] has not been charged with any criminal offenses. Instead, she became the de facto lead investigator during the early stages of NCIS's investigation in October 2017. She conducted an unofficial interview of a witness, CPT [redacted], participated in an oral/wire intercept with GySgt [redacted] and planned and executed an undercover operation designed to elicit information from [redacted] Throughout this time, she was also engaged in a sexual relationship with NCIS Special Agent [redacted], the actual lead investigator into the case.

[12] Enclosure (2) at 5333.

On 16 December 2019, the Defense requested [redacted] as a witness. On 27 December 2019, the Government denied that witness. Since that denial, the Defense has continued to litigate additional discovery matters pertaining to [redacted] and her involvement in this case, several of which remain pending before the court.

3. Discussion.

Under R.C.M. 703, "[e]ach party is entitled to the production of any witness whose testimony on a matter in issue … would be relevant and necessary."[13] Evidence is relevant when it "ha[s] any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence."[14] "Relevant testimony is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue."[15] Here, the testimony of Mr. [redacted] Mr. [redacted] and [redacted] is relevant and necessary to the defense, so the Court must order their production as witnesses at trial.

a. Mr. [redacted]

The charges against [redacted] DeDolph include Burglary in violation of Article 129 and Felony Murder in violation of Article 118 predicated on Burglary as the underlying felony. In order to prove these charges, the Government must prove beyond a reasonable doubt that [redacted] DeDolph broke and entered into SSG [redacted]'s room "in the nighttime." "Nighttime is the period between sunset and sunrise when there is not sufficient daylight to discern a person's face."[16]

[13] R.C.M. 703(b)(1).
[14] M.R.E. 401.
[15] R.C.M. 703(b)(1) Discussion.
[16] Manual for Courts-Martial (2016 ed.), IV-106.

Here, Mr. [redacted]'s testimony is relevant and necessary for the Defense to challenge the Government's allegation that it was nighttime when the alleged breaking and entering occurred. Mr. [redacted] is expected to testify that he finished eating his pre-fast meal shortly before sunrise and a few minutes before the Americans returned to the house. When the Americans returned, he was able to recognize their faces and discern their emotional states. Approximately 45 minutes then passed before the Americans entered SSG [redacted]'s room. Almost immediately after entering the room, Mr. [redacted] left to escort Mr. [redacted] out, briefly returned, then left again, at which time the sky was light. Mr. [redacted]'s testimony directly contradicts the Government's allegation that the breaking and entering occurred in the nighttime. The timeline he lays out, in addition to his ability to recognize individuals' faces upon their return, are exculpatory as to this element of two of the most serious charges the Government has brought against [redacted] DeDolph.

In addition, the Defense expects that a Government witness, PVT [redacted], will testify that the Americans intended to sexually assault SSG [redacted] by having Mr. [redacted] lick his anus as part of the alleged conspiracy to assault him. Mr. [redacted]'s testimony that [redacted] DeDolph asked Mr. [redacted] to act like a gorilla – with no mention of licking his anus – in order to embarrass SSG [redacted] directly contradicts this testimony. This testimony to provide context for the events of that night and to rebut highly prejudicial testimony by a Government witness "would contribute to a party's presentation of the case in some positive way on a matter in issue." For all of these reasons, Mr. [redacted]'s testimony is relevant and necessary and he must be produced as a witness at trial.

b. Mr. [redacted]

Similarly, Mr. [redacted]'s testimony is relevant and necessary to the same issues. His testimony will establish a timeline that rebuts the Government's allegation that any breaking and

entering into SSG [redacted]'s room occurred in the nighttime. In addition, his ability to recognize the Americans returning to the house and determine that they were "joyous" is directly relevant to the Manual for Courts-Martial's definition of "nighttime." Furthermore, his testimony that he was asked to lay next to SSG [redacted] so that photographs could be used to embarrass SSG [redacted] and his lack of any testimony about being asked to lick SSG [redacted]'s anus will directly rebut the expected testimony of PVT [redacted]

Unlike Mr. [redacted] Mr. [redacted] stayed in the room throughout the alleged assault of SSG [redacted] and provide a unique perspective on those events. His different memory of the lighting and timeline further make his testimony not cumulative of any other testimony that can be offered.

c. [redacted]

[redacted]

With respect to her observations of and involvement in the alleged conspiracies, [redacted] who was involved who has not been charged with any crime. Her description of the joking plan to pull a prank on SSG [redacted] and her text message the next morning asking how the "operation" went are necessary to the Defense's ability to present the context of the events leading to SSG [redacted]'s death. This context, and the intent of the parties, including [redacted] DeDolph, is directly probative on the conspiracy and hazing charges as each of those includes intent elements that the Government must prove in order to convict [redacted] DeDolph.

In addition, [redacted] and [redacted] "directly contribute" to the Defense's ability to challenge the bias, integrity, and reliability of the NCIS investigation in this case and of the evidence it collected. Contrary to the Government's assertion in its response denying the production of [redacted] the cross-examination of SA [redacted] is not sufficient to fully expose these issues. Given [redacted] unique role and her professional background, only through her testimony can the Defense demonstrate the full breadth of the corruption of the law enforcement investigation in this case. For all of these reasons, [redacted] testimony is relevant and necessary to the Defense in this case, and the Court should order the Government to produce her as a witness.

4. Evidence.

The Defense presents the following documentary evidence in support of its motion:

Enclosure (1) – Transcript of Deposition of Mr. [redacted]
Enclosure (2) – Transcript of Deposition of Mr. [redacted]
Enclosure (3) – U.S. Naval Observatory Sunrise/Sunset Calculations
Enclosure (4) – NCIS ROI Excerpts Pertaining to [redacted]
Enclosure (5) – LCDR [redacted] ltr of 16 Dec 19
Enclosure (6) – Capt [redacted] ltr of 27 Dec 19
Enclosure (7) – LCDR [redacted] ltr of 26 Jun 20
Enclosure (8) – LCDR [redacted] email of 30 Jul 20

5. Relief Requested. The Defense moves the Court to order the Government to produce Mr. [redacted] as witnesses for trial.

INNS.NICHOLAS.JAMES SHAVER.[redacted]
Digitally signed by INNS.NICHOLAS.JAMES SHAVER[redacted]
Date: 2020.08.17 14:32:39 -04'00'

N. J. INNS
LCDR, JAGC, USN
Detailed Defense Counsel

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

U N I T E D S T A T E S **v.** **TONY DEDOLPH** **[redacted]/E-7 USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO COMPEL WITNESS PRODUCTION** **24 AUG 20**

MOTION

The Government requests the Court deny the Defense's motion to compel production of witnesses.

SUMMARY

The Government agrees the requested witness are relevant, but submits they are inculpatory in nature, and therefore not necessary to the Defense.

BURDEN

Pursuant to R.C.M. 905(c), the Defense bears the burden of persuasion by a preponderance of the evidence.

FACTS

On the evening of 3June 2017, [redacted] Tony DeDolph (DEDOLPH), the Accused, [redacted] ([redacted] and SSgt [redacted] ([redacted] met at a bar in [redacted] along with other friends (military members and other expatriates). During the course of the evening, the four named members began to form a plan to haze SSG [redacted] who had ditched some of the group for a different event that night.

Late in the evening and early morning hours, the group proceeded to another club ("[redacted] where they continued to plan and joke about breaking into SSG [redacted] room to strangle (with a chokehold) and restrain him with duct tape, so as to then have a local national commit a sexual act upon him. Also present for these plans were [redacted], and [redacted] The plan came to be known as "Operation Tossed Salad".

Closer to 0400, the group left [redacted] and after getting food, proceeded back to the Marine residence in [redacted] to secure supplies for the hazing event. [redacted] did not go with the group, but the Accused, DEDOLPH, [redacted] did. After getting

supplies at the Marine residence, they proceeded to the shared Army/Navy house (where DEDOLPH and SSG [redacted] resided).

The group arrived around 0500, and convinced the local [redacted] to assist in their plan. They removed the shirt of one guard, [redacted] put a leash around his neck, and placed a face mask on him. They used a sledgehammer to break into SSG [redacted] room at ~0530. The Accused, [redacted] and DEDOLPH rushed in, while [redacted] fled from the scene. While the other members helped restrain and tape SSG [redacted] DEDOLPH placed him in a rear naked chokehold, pressing his face into the bedding and strangling him into unconsciousness. At some point [redacted] realized that SSG [redacted] was unconscious and not recovering, and acted to get the Accused off of SSG [redacted] Once the group realized he was not breathing, they attempted resuscitation efforts, which were unsuccessful.

Before SSG [redacted] was taken to a nearby clinic, DEDOLPH began coordinating statements between [redacted] the Accused and himself, expressing concern that the event might be seen as hazing. The members agreed to keep the Marines "out of the room." Later, at the clinic, [redacted] stated that the story would just have the Accused and [redacted] involved in the "wrestling".

DEDOLPH later generated falsified timelines and narratives to share with [redacted] and the Accused in order to coordinate their stories. Duct tape was not to be mentioned, and the event was to be characterized as mutual and consensual wrestling for fun, where a tragic and unexpected accident occurred.

The morning of 4 June 2017, [redacted] texted the Accused, asking how "the Operation" went, and learned of SSG [redacted] death.

Later that same morning [redacted] was present at the Army/Navy house when the Accused explained to other members ([redacted] and the Accused) how "duct tape" was not to be mentioned, because that would look like hazing. However, the details of what had happened in the morning were not explained to [redacted]

Army Criminal Investigations Division (CID) arrived a bit over a day later, after DEDOLPH and [redacted] had left country. Initial reports indicated the event was an accident, and when investigating, they were told that it was mutual wrestling and an accident.

Subsequent proceedings and investigative activity have led to five eye witnesses ([redacted] who were at the scene and witnessed the Accused, along with DEDOLPH, [redacted] and [redacted] breaking into SSG [redacted] bedroom with the overtly stated intent to assault and battery him within.

LAW

Per Rule for Courts-Martial 703(b)(1), each party is entitled to the production of a witness whose testimony would be relevant and necessary.

As noted in the discussion to Rule for Courts-Martial 703(b)(1), "[r]elevant testimony is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue. A matter is not in issue when it is stipulated as a fact."

Per Rule for Courts-Martial 703(c)(2)(B)(i), a defense request for a witness must include a synopsis of the expected testimony sufficient to show its relevance and necessity.

ARGUMENT

As a general matter, the proffered testimony from the Defense does not establish that the witnesses are relevant, or where relevant, are necessary. For clarity, the Government will respond by witness:

1. *Mr.* [redacted]

Mr. [redacted]

The Defense proffers the witness will testify to a timeline that directly contradicts the Government theory that it was "night" at the time of the breaking and entering into SSG [redacted] room. Defense contends that because Mr. [redacted] could recognize the conspirators' faces when they returned to the house, and because he claimed the sky was "light" when Mr. [redacted] left, that he directly contradicts the Government's allegation that the breaking and entering occurred in the "nighttime." The Defense also contends Mr. [redacted] will testify "finished eating his pre-fast meal shortly before sunrise and a few minutes before the Americans returned to the house." Defense motion at 5.

Defense neglects to mention that the witness confirmed there was *artificial lighting* in the courtyard, and that he never testified he could see the conspirators' faces solely by natural light. Moreover, Mr. [redacted] when asked specifically about the moment of entry (that is, the moment corresponding to the "banging noise, something breaking" after the conspirators entered the building), Mr. [redacted] testified that while there was the light of the bulbs, the sky was dark. Defense enclosure (1) at 22-23. Mr. [redacted] did not indicate the sky was "light" when the "fifth man" left, but rather that the sky was still "a bit dark," *Id.* at 25 or "dim." *Id* at 89. Finally, Mr. [redacted] based on his mealtime, put the arrival of the Americas at 5 AM, an hour before sunrise. Defense enclosure (1) at 15-17.

For the above reasons, the witness' testimony on the question of nighttime is clearly relevant, but it is not *necessary* for the Defense because it is inculpatory in nature, and supports, rather than refutes the Government theory.

The Defense further contends that Mr. [redacted] did not understand the "game" to be played with SSG [redacted] to include Mr. [redacted] licking SSG [redacted] anus, which "directly

contradicts" Pvt [redacted] who described the plan as including having a [redacted] do so (and SO2 [redacted] and [redacted] who also described the plan in similar terms). Of note, these witnesses indicate the plan was described as such at the [redacted]—none of them indicated it was so explicitly laid out at the Army/Navy house.

As such, the Defense is mistaken that this "directly contradicts" Pvt [redacted] as Mr. [redacted] cannot testify to what the conspirators originally planned or joked about planning at previous locations. All he can confirm is that he did not understand the Americans to have described the licking of the anus to the [redacted] up to the point they entered the room and the assault occurred. Moreover, he acknowledged a language barrier between the [redacted] and the Americans when they were trying to explain the "game" and have Mr. [redacted] undress. While this may be relevant in some small way in sentencing, it does not go to any of the elements of the charged crimes, and whatever minor probative value might exist cannot be said to be necessary.

As such, his proffered testimony is not relevant or necessary for the Defense, and he should not be compelled to be produced.

2. *Mr.* [redacted]

Mr. [redacted]

The Defense contends that Mr. [redacted] negates the element of "nighttime" in burglary because he could recognize the Americans as they returned to the Army/Navy house. Again, the Defense neglects to mention that Mr. [redacted] testified that there were lights in the courtyard and over the door to house, providing light in the courtyard when the Americans returned, and that even with that light, it was [redacted] Defense enclosure (2) at 82. As with Mr. [redacted] this is not exculpatory evidence, and is therefore not necessary for the Defense.

The Defense indicates that he was only asked to disrobe and lay next to SSG [redacted] but had not understood anyone to ask him to lick SSG [redacted] anus before the assault. As noted above, this testimony does not "directly contradict" Pvt [redacted] (and SO2 [redacted] and [redacted]'s testimony. Moreover, this is not evidence relevant to any of the charged elements, and is at best mitigation evidence for sentencing, if the Government produces evidence that the initial plan involved the licking of SSG [redacted] anus.

Finally the Defense generally contends his unique perspective "memory of the lighting and timeline" make his testimony non-cumulative with other witnesses. However, the Defense fails to proffer any particular relevant items. This extremely general proffer, without any details on differences, fails to establish how Mr. [redacted] is necessary for the Defense.

As such, his proffered testimony, while relevant, is not necessary for the Defense, and he should not be compelled to be produced.

1. [redacted]

The Defense proffers the witness is important because she was A) a witness to the alleged conspiracy, B) she was a de facto law enforcement agent and C) she was engaged in a sexual relationship with the actual lead NCIS investigator.

The Defense is correct on the first point—in so much as [redacted] will testify that the Accused, along with his co-conspirators, planned to break into the bedroom of SSG [redacted] and haze him, to include duct taping him and potentially exposing him to a sexual contact. [redacted] would testify that the conspirators left together, with the apparent intention to carry out the plan, and that [redacted] texted the Accused the morning after to ask how the "Operation" went.

Of note, the Defense is mistaken that [redacted] is somehow unique in not being charged with a crime. The only persons charged with crimes were the servicemembers who broke into SSG [redacted] room and who were directly involved in strangling and killing him. (notably, SFC [redacted] and GySgt [redacted] were also not charged with crimes).

The Defense claims the testimony is "directly probative on the conspiracy and hazing charges as each of those includes intent elements." Defense motion at 6. But Defense fails to explain how [redacted]s testimony would do anything but *establish* the intent elements. As described above, their testimony directly supports a conspiracy to assault and batter SSG [redacted] and to haze him.

Although their testimony is *relevant*, it is inculpatory—none of their testimony would tend to negate any element of any of the charged crimes. As the Defense notes in their filing, they are entitled to "witnesses in his favor." *Taylor v. Illinois*, 484 U.S. 400, 408 (1988). Per R.C.M. 703, a witness needs to "contribute to a party's presentation of the case in some positive way on a matter in issue." to be necessary. See R.C.M. 703, Discussion.

[redacted] was a cooperating witness, not a law enforcement officer, as laid out in Defense enclosure (4). [redacted] did participate in an inappropriate sexual relationship with SA [redacted] That relationship was unethical, unprofessional and unacceptable for SA [redacted] as a law enforcement officer and lead investigating agent, to engage in. However, SA [redacted] will testify to exactly those points, which will undoubtedly be a rich and fruitful ground for Defense examination.

While Defense contends their testimony will show "the full breadth of the corruption of the law enforcement investigation," the Defense neglects to proffer any testimony aside from the unethical relationship SA [redacted] engaged in. This is unsurprising, because [redacted] despite cooperating with NCIS, failed to develop or elicit any new material information in the NCIS investigation. (as evidenced in Defense enclosure (5), BS 54-56, Government enclosure (1))

As such, [redacted] testimony is not necessary to the Defense, and they should not be compelled to testify, unless SA [redacted] denies the inappropriate and unethical relationship with [redacted] while they were a critical witness in his investigation. Certainly in such a scenario, they would become a relevant and necessary witness.

EVIDENCE

Enclosure (1): Results of controlled meeting between [redacted]

RELIEF REQUESTED

The Government requests the Defense motion to compel production be denied.

The Government does request oral argument.

Respectfully submitted,

B. B. GARCIA
LCDR, JAGC, USN
Trial Counsel

Certificate of Service

I hereby certify that a copy of this motion response was served on the Court and defense counsel on this 24th day of August 2020.

B. B. GARCIA
LCDR, JAGC, USN
Trial Counsel

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

UNITED STATES **v.** **TONY DEDOLPH** **[redacted]/E-7 USN**	**GOVERNMENT** **MOTION *IN LIMINE*** **(MRE 401 & 403)** **17 AUGUST 2020**

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1. **Nature of Motion.** This is a Government motion in limine to preclude the Defense from introducing evidence of 1) SSG [redacted] relationship with Ms. [redacted] marital status and infant child, into the court-martial under M.R.E. 401 & 403.

2. **Summary of Facts.**

   a. The Accused has been charged with a Violations of Article 81, 92, 118, 119, 129, and 134, UCMJ, stemming from the murder of Army Staff Sergeant (SSG) [redacted] during a hazing incident.

   b. SSG [redacted] hung out frequently with Ms. [redacted] and the two were rumored to be "dating." (Encl. 1)

   c. Prior to SSG [redacted] murder, Pvt [redacted] They then agreed that it was a poor idea and decided never to do so again. (Encl. 2)

   d. SA [redacted] during the course of his investigation. When he began [redacted]. (Encl. 3)

3. **Burden of Proof.** The burden of proof and persuasion rests with the Defense by a preponderance of the evidence. R.C.M. 905(c).

4. Discussion of Law and Analysis.

"Irrelevant evidence is not admissible."[1] "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."[2] The military judge should exclude evidence that is unfairly prejudicial.[3] The *Wright* factors, which create a balancing test for determining if evidence should be admitted over an M.R.E. 403 objection, include: "Strength of proof of prior act - conviction versus gossip; probative weight of evidence; potential for less prejudicial evidence; distraction of factfinder; and time needed for proof of prior conduct."[4]

Argument

These evidentiary items are not relevant to anything of consequence in this court-martial. There are no facts of consequence made more or less probable by the admission of the aforementioned evidence. Therefore, the evidence should be excluded from this trial.

None of three incidents are relevant in this court-martial. First, the nature of SSG [redacted] no bearing on this court-martial. Any insinuations about the victim's [redacted] can only be seen as an attempt to smear the deceased and embarrass his family. Their relationship does not have a tie to any charged offense and nor does it raise a defense for the accused. Second, the fact that Pvt [redacted] and [redacted] kissed once before also has no bearing on the court-martial. The kiss occurred prior to the murder of SSG [redacted] and was an isolated incident. [redacted] never began a personal relationship and had no other romantic contact. This isolated interaction

[1] M.R.E. 402(b).
[2] M.R.E 401.
[3] M.R.E. 403.
[4] *United States v. Wright*, 53 M.J. 476, 482 (CAAF 2000).

is not relevant for the members to consider in any way. Third, the fact that SA [redacted] and [redacted] is of no consequence to this trial. There is simply no probative value to this evidence. The only purpose of its admission would be to pile on SA [redacted] While his [redacted]

Even if this Court were to find that those items are relevant, the Court should still exclude them under M.R.E. 403 because they are far more prejudicial than probative. First, SSG [redacted] is nothing but gossip. Due to the accused's actions, SSG [redacted] is no longer here to discuss the exact nature of his relationship with Ms. [redacted] The accused should not be permitted to sully SSG [redacted] reputation in an effort to deflect from SSG [redacted] murder. Second, the kiss between [redacted] is also more prejudicial than probative. A one-time kiss between the two does not reveal any relevant bias. [redacted] was not a witness to the murder, and her friendship with Pvt [redacted] did not stop her from turning him in. This evidence is a mere distraction from the real issues at hand and would only serve to sully the character of [redacted] Third, SA [redacted] [redacted] are not. The existence of [redacted] is far more prejudicial than probative because his marriage is not the relevant detail, but the fact that he entered into a [redacted] is an unnecessary pile-on that does not make the fact that he had a [redacted] more or less probable. His marital status is an unnecessary distraction from the main point: that he engaged in an inappropriate relationship with a witness – a fact which he will readily admit.

Conclusion

None of these individual pieces of evidence are relevant to any issue needing to be decided or weighed by the finders of fact, therefore, all of them should be excluded from this court-martial.

5. Relief Requested. The Government respectfully requests this Court exclude the evidence.

6. Evidence.

a. Enclosure 1: NCIS Interview with Ms. [redacted]

b. Enclosure 2: R.C.M. 701 Disclosure for [redacted]

c. Enclosure 3: NCIS Interview of SA [redacted]

7. Oral Argument. If requested by the Defense or this Court, the Government is amenable to oral argument.

[redacted]

Capt, USMC
Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion was served electronically on defense counsel on 17 August 2020.

[redacted]

Capt, USMC
Trial Counsel

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

U N I T E D S T A T E S **v.** **TONY DEDOLPH** **[redacted]/E-7 USN**	**DEFENSE RESPONSE TO GOVERNMENT MOTION *IN LIMINE* (MRE 401 & 403)** **24 AUGUST 2020**

1. Nature of the Motion. The Defense respectfully requests the Court deny the Government's motion with regards to 1) [redacted] and 2) SA [redacted]

2. Summary of Facts.

While [redacted] and prior to the allegations, she got to know a number of the witnesses and people in this case, to include Pvt [redacted] She developed [redacted] discussed the encounter via text message.

In November 2017, [redacted] At the time, SA [redacted] on the

investigation. On several occasions, SA [redacted] traveled to Washington, D.C. where [redacted] was located, while she made a couple of trips to Virginia Beach, Virginia. SA [redacted] interviews and other official involvement in the case actually ended in early December 2017.

3. Burden. As the proponent of the evidence, the Defense has the burden of proof and persuasion by a preponderance of the evidence. R.C.M 905(c).

4. Discussion.

The Government's motion requested the Court preclude the Defense from introducing evidence of 1) SSG [redacted] 2) [redacted] The Defense does not intend to introduce evidence of SSG [redacted] close personal [redacted] nor does the Defense intend to admit evidence of SA [redacted]. However, the Defense must be allowed to explore issues of [redacted] bias with regards to other witnesses, as well as SA [redacted] haracter for truthfulness – issues to which [redacted] encounter with Pvt [redacted] marital status are relevant.

For evidence to be relevant under M.R.E. 401, it must a) have any tendency to make a fact more or less probable than it would be without the evidence when b) that fact is of consequence in determining the action. M.R.E. 401. Evidence of a witness's bias, prejudice, or other motive to misrepresent the truth is relevant and "may be shown to impeach the witness

either by examination of the witness or by evidence otherwise adduced." M.R.E. 608(c). A party may, on cross-examination, attack a witness's character for truthfulness by inquiring into specific instances of that witness's conduct. M.R.E. 608(b). If an objection to evidence is raised under M.R.E. 403, the Court can look to several factors, to include "strength of proof of prior act – conviction versus gossip; probative weight of evidence; potential for less prejudicial evidence; distraction of factfinder; and time needed for proof of prior conduct." *United States v. Wright*, 53 M.J. 476, 482 (C.A.A.F. 2000).

a. [redacted]

In describing the [redacted] or [redacted] once," the Government significantly downplays what is actually evidence of a close personal relationship that is relevant to [redacted] wher [redacted] lived, apparently felt comfortable enough to arrive unannounced and seemingly unplanned, on her doorstep, at night, in [redacted] and enter her home, is indicative of the fact that their relationship was in fact personal. Indeed, their interaction after [redacted] sexual intercourse.

[redacted] is expected to testify as to the events leading up to the charged offenses, as well as those of the day after, to include the actions and behavior of the other people involved in the allegations – people like Pvt [redacted] How she characterizes the events of that evening and the next day, her own behavior, and the behavior and actions of Pvt [redacted] will be potential areas of cross-examination for the Defense. Being able to bring out evidence of her personal bias is therefore necessary to the defense's ability to fully engage in a robust cross-examination.

Further, this evidence does not run afoul of any of the *Wright* factors. The evidence comes from the witness's own recorded statements to NCIS, so does not have the potential to distract the members with lengthy machinations to prove gossip or rumor. There is no other evidence that can as effectively communicate the extent of [redacted] relationship, nor is it overtly prejudicial.

b. SA [redacted]

The Government asserts that SA [redacted] marriage is not the relevant detail, only the fact that he entered into a romantic relationship with a witness. It is true that whether SA [redacted] does not tend to make his relationship with her more probable, but it *is* highly probative to his character for truthfulness. The repeated misrepresentations of the truth necessary to carry on his affair with [redacted] are the exact kind of evidence into which the Defense should be allowed to inquire under M.R.E. 608(b). As the lead NCIS case agent during the bulk of the investigative steps taken, his character for truthfulness is certainly relevant. Indeed, the use of the investigation into [redacted] DeDolph as cover for his affair is of particular relevance to the credibility of his testimony regarding the investigation itself.

Like the evidence regarding [redacted] the *Wright* factors are similarly not a concern. The evidence of the lengths to which SA [redacted] went to disguise his relationship with [redacted] comes from both her recorded statements to NCIS and SA Pickett's own recorded statements to NCIS.

The Defense is not seeking to engage in an unrestricted smear campaign against SSG [redacted] or the Government's witnesses. However, when it comes to the issues of witness

credibility – whether from bias or untruthful conduct, the Defense must be allowed to explore the full range of potential lines of cross-examination.

5. <u>Relief Requested</u>. The Defense requests the Court deny the Government's motion with regards to evidence regarding [redacted] encounter with Pvt [redacted] and with regards to SA [redacted] marital status.

6. <u>Evidence</u>.

a. Enclosure 1: Recording of NCIS IG Interview with [redacted]

b. Enclosure 2: Recording of NCIS IG Interview with SA [redacted]

7. <u>Oral Argument</u>. The Defense respectfully requests oral argument.

PORTZER.J OELLE.C. [redacted] Digitally signed by PORTZER.JOELLE.C. [redacted] Date: 2020.08.24 19:45:59 -04'00'

J. C. PORTZER
LT, JAGC, USN
Defense Counsel

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

U N I T E D S T A T E S **v.** **TONY DEDOLPH** **[redacted]/E-7 USN**	**DEFENSE MOTION TO DISMISS** **6 Nov 20**

"As necessity creates the rule, so it limits its duration."[1] For more than two centuries, "necessity" has been used to override the Constitution's text and deprive members of the United States' Armed Forces of the rights guaranteed to all Americans facing criminal prosecution. Today, the Uniform Code of Military Justice (UCMJ) elaborates a military justice system that continues to deny these rights. Article 16 provides for panels of eight members.[2] Article 25 allows a convening authority to hand pick those members.[3] Article 26 provides for courts-martial to be presided over by military judges lacking Senate confirmation or life tenure.[4] Article 32 replaces grand jury indictment with a "preliminary hearing."[5] Article 52 provides for conviction by the vote of only three-fourths of panel members.[6]

Of all these, only one is justified by the plain language of the Constitution; the Fifth Amendment's Grand Jury right does not extend to courts-martial, having an explicit exception for "cases arising in the land or naval forces."[7] But courts have gone further, holding without explanation or tenable justification that these eight words in the Fifth Amendment, in

[1] Ex Parte Milligan, 71 U.S. 2, 127 (1866).
[2] 10 U.S.C. § 816.
[3] 10 U.S.C. § 825.
[4] 10 U.S.C. § 826.
[5] 10 U.S.C. § 832.
[6] 10 U.S.C. § 852.
[7] U.S. Const. amend. V.

conjunction with fourteen words in Article I granting Congress the power "to make Rules for the Government and Regulation of the land and naval Forces,"[8] also strip servicemembers of the Article III and Sixth Amendment guarantees of a trial by jury and the Article III right to have their cases presided over by a life-tenured judge exercising the judicial power of the United States. As a result, Americans who have volunteered to serve in the United States military find themselves subject not only to ordinary state and federal criminal jurisdiction, but also to military's "rough form of justice emphasizing summary procedures, speedy convictions and stern penalties with a view to maintaining obedience and fighting fitness in the ranks."[9] This legal infirmity can no longer hold.

Since the Supreme Court's first conclusory upholding of a "rough" military justice system that deprives servicemembers of fundamental rights, the legal framework and practical circumstances originally justifying that ruling have collapsed. The invocation of "military discipline" to justify trials that take place in major American cities far removed from the battlefield and years after the alleged offenses took place can no longer justify the UCMJ's departures from the rights the Constitution guarantees all Americans. The time has come to abandon the anachronism, hew to the plain text of the Constitution, and restore these rights to the men and women who serve in the Armed Forces. Accordingly, the Defense moves the Court to hold that Articles 16, 25, 26, and 52 of the UCMJ violate Article III and the Sixth Amendment to the Constitution and dismiss all charges and specifications currently pending against [redacted] DeDolph.

[8] U.S. Const. art. I, § 8.
[9] Reid v. Covert, 354 U.S. 1, 35-36 (1957).

A. The Uniform Code of Military Justice and Dated Precedent Deprive Servicemembers of Fundamental Rights.

On its face, the UCMJ stands in contradiction to two important principles elaborated by the Constitution. First, Article III establishes the Judicial Branch and provides the structure for the exercise of "the judicial power of the United States."[10] Among these structural rules is the requirement that judges exercising this judicial power "shall hold their offices during good Behavior."[11] Article II further provides that these judges be appointed by the President with the advice and consent of the Senate.[12]

In contrast to these vital aspects of the Separation of Powers, the UCMJ provides for neither presidential appointment with the advice and consent of the Senate nor for life tenure for the military judges who preside over courts-martial. Instead, Article 26 provides that military judges are "designated for detail" by the service Judge Advocate General,[13] and that assignment as a military judge "shall be for appropriate minimum periods."[14]

Second, both Section 2 of Article III and the Sixth Amendment guarantee the right to trial by jury in criminal cases. The Supreme Court has elaborated certain minimum requirements for this jury trial right: A jury must be selected from a "representative cross section of the community."[15] A jury must consist of at least six people in order "to promote group deliberation, free from outside attempts at intimidation and to provide a fair possibility for obtaining a representative cross-section of the community."[16] Any conviction by a jury must be by

[10] U.S. Const. art. III, § 1.
[11] Id.
[12] Id. art. II, § 2.
[13] 10 U.S.C. § 826(c)(1).
[14] 10 U.S.C. § 826(c)(4).
[15] Taylor v. Louisiana, 419 U.S. 522, 528 (1975).
[16] Williams v. Florida, 399 U.S. 78, 100 (1970); see Ballew v. Georgia, 435 U.S. 223 (1978) (holding five-person jury to be unconstitutional).

unanimous vote.[17] The jury trial right – including each of these constituent parts – applies to the trial for any offense "where imprisonment for more than six months is authorized."[18]

Falling short of these Constitutional guarantees, the UCMJ provides for fewer rights for servicemembers facing trial by court-martial. Article 25 empowers the convening authority – the same individual who elected to prosecute a case in the first place – to select members of a court-martial based on specific criteria that have no correlation to the fair cross-section requirement.[19] That Article further undermines the community representation aspect of jury composition by categorically excluding members junior in rank to an accused.[20] Article 52 then permits conviction by as few as three-quarters of the members of the court-martial,[21] a proportion even lower than the 10-2 votes for conviction the Supreme Court struck down as unconstitutional earlier this year.[22] Thus, servicemembers facing trial for serious crimes enjoy virtually no aspect of the right to trial by jury that is "fundamental to the American scheme of justice."[23]

In nonetheless upholding this lesser system of justice for those who are serving in the armed forces, the courts – including the Supreme Court – have offered little justification for their rulings. In two cases from the mid-nineteenth century, the Supreme Court almost summarily exempted courts-martial from the requirements of Article III and the Sixth Amendment.[24] Since that era, the Supreme Court and military courts have relied on those decisions with virtually no additional explanation to continue upholding the military justice system.[25] But these nearly two

[17] Ramos v. Louisiana, 140 S. Ct. 1390 (2020).
[18] Baldwin v. New York, 399 U.S. 66, 69 (1970) (opinion of White, J.).
[19] 10 U.S.C. § 825(e)(2).
[20] 10 U.S.C. § 825(e)(1).
[21] 10 U.S.C. § 852(a)(3).
[22] Ramos, 140 S. Ct. at 1394.
[23] Duncan v. Lousiana, 391 U.S. 145, 149 (1968).
[24] See Dynes v. Hoover, 61 U.S. 65 (1858); Ex Parte Milligan, 71 U.S. 2 (1866).
[25] See, e.g., United States v. Easton, 71 M.J. 168, 175 (C.A.A.F. 2012) (stating without analysis that no Sixth Amendment jury trial right exists in courts-martial); United States v. Loving, 41 M.J. 213, 285 (C.M.A. 1994) (stating that right to trial by jury has been "long-recognized" as inapplicable to courts-martial).

century-old precedents can no longer justify depriving servicemembers of fundamental rights enjoyed by all other Americans facing criminal trial.

B. Although precedent must be respected, it is not immutable, and when its reasoning no longer holds, it must be overturned.

To be sure, the principle of *stare decisis* is an important aspect of the American judicial system. However, a past ruling itself does not do the major work in the value of precedent. Rather, "[i]t is usually a judicial decision's reasoning – its *ratio decidendi* – that allows it to have life and effect in the disposition of future cases."[26] As the Supreme Court further explained earlier this year in overturning decades of precedent permitting non-unanimous jury convictions in state court:

> *[S]tare decisis* isn't supposed to be the art of methodically ignoring what everyone knows to be true. Of course, the precedents of this Court warrant our deep respect as embodying the considered views of those who have come before. But *stare decisis* has never been treated as "an inexorable command." And the doctrine is "at its weakest when we interpret the Constitution" because a mistaken judicial interpretation of that supreme law is often "practically impossible" to correct through other means. To balance these considerations, when it revisits a precedent this Court has traditionally considered "the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision."[27]

In the present case, each of these four factors points in the same direction: precedent upholding the exemption of the military justice system from the requirements of Article III and the Sixth Amendment must be overturned and the UCMJ held to be unconstitutional.

1. The Precedent Approving of the Military Justice System Lacks Quality Reasoning.

In originally upholding the military justice system, the Supreme Court relied on three distinct constitutional provisions: Article I, Section 8's grant of power to Congress to "make Rules for the Government and Regulation of the land and naval forces," Article II, Section 2's designation of the President as the Commander in Chief of the Armed Forces, and the Fifth

[26] Ramos, 140 S. Ct. at 1404.
[27] Id. at 1405 (internal citations omitted).

Amendment's explicit exception to the grand jury indictment requirement for "cases arising in the land or naval forces."[28] But these textual arguments are unsupported by either the manner in which the provisions were enacted or the text of those provisions and defy accepted canons of statutory interpretation.

First, the historical circumstances of the adoption of the Constitution and Bill of Rights undermine the Court's textual rationales for its decisions in Dynes and Milligan. In excepting courts-martial from the jury trial requirement of Article III, the courts leaned heavily on the Fifth Amendment's explicit military exception to the grand jury indictment requirement. Article III, however, was adopted in 1789, and the Fifth Amendment was not ratified until two years later. The Court never explains how the Fifth Amendment retroactively modified the jury trial requirement of Article III.

Second, in exempting courts-martial from the Sixth Amendment's jury trial right, the Court states without explanation that the Founders intended that right only to apply to cases subject to grand jury indictment under the Fifth Amendment.[29] This bald conclusion ignores the textual differences of the two amendments, which were passed by the same Congress in September 1789 and ratified at the same time in December 1791. That Congress deliberately included an explicit military exception to the grand jury requirement in the Fifth Amendment but included no such exception to the jury trial right in the Sixth Amendment strongly supports the opposite conclusion, as does the widely-accepted analogous linguistic interpretive canon: *expression unius est exclusion alterius*. The plain text of the two amendments makes clear that Congress knew how to create military exceptions to the Bill of Rights but chose not to do so, demonstrating its intent that the jury trial right to apply to "cases arising in the land or naval

[28] See Dynes, 61 U.S. at 78-79; Milligan, 71 U.S. at 123.
[29] Milligan, 71 U.S. at 123.

forces." Indeed, courts have accepted that Congress meant to apply the Sixth Amendment to courts-martial with respect to each of the other rights in that amendment, holding that military accused enjoy the constitutional right to the assistance of counsel,[30] to a speedy trial,[31] to a public trial,[32] and to confront witnesses.[33] Absent any textual reason for divergence, all rights contained in the Sixth Amendment – including the right to trial by jury – must likewise apply to military cases.

Third, in relying on Article I, section 8's grant of power to Congress to "make Rules" for the armed forces, the Dynes and Milligan Courts never attempt to reconcile that grant of power with the other counter-balancing Separation of Powers and individual rights provisions of the Constitution. The Court does not attempt to explain how courts-martial – which can sentence individuals to lengthy terms of confinement and even death – are not an exercise of the "judicial power" of the United States. Instead, leaning heavily on the concept of "military necessity," the Court merely concludes that courts-martial lie within the sole province of Congress.[34] Subsequently, even the Supreme Court itself seemed unable to grasp the reasoning, referring to the upholding of the jurisdiction of courts-martial as being "derived from the cryptic language in Article I [section 8]."[35] This reliance on the existence of Congress's Make Rules power with no analysis of whether specific exercises of that power violated other provisions of the Constitution stands in contrast to the ordinary manner in which the Court considers exercises of congressional

[30] See, e.g., United States v. Jameson, 65 M.J. 160 (C.A.A.F. 2007).
[31] See, e.g., United States v. Danylo, 73 M.J. 183 (C.A.A.F. 2014).
[32] See, e.g., United States v. Short, 41 M.J. 42 (C.M.A. 1994).
[33] See, e.g., United States v. McGrath, 39 M.J. 158 (C.M.A. 1994).
[34] As discussed in section XXX, below, to the extent that "military necessity" ever justified the Court's exemption of courts-martial from the requirements of Article III and the Sixth Amendment, the modern iteration of the military justice system has undone that justification.
[35] Reid v. Covert, 354 U.S. 1, 21 (1957).

power.[36] Without such analysis, the reasoning upholding the military justice system does not warrant the reflexive deference it has received for nearly two centuries.

This conclusory and unexplained constitutional interpretation is precisely the type of low quality reasoning that should not "have life and effect in the disposition of future cases."[37] Where, as here, the decision of a precedential case is not supported by accordingly compelling reasoning, that precedent cannot and must not continue to deprive Americans of fundamental rights.

2. The Exemption of the Military Justice System from the Requirements of Article III is not consistent with related decisions ensuring that the Judicial Power of the United States is exercised only as permitted by the Constitution.

"Article III is 'an inseparable element of the constitutional system of checks and balances' that 'both defines the power and protects the independence of the Judicial Branch.'"[38] The separation of powers established by each of the first three Articles of the Constitution not only protects the branches from incursions by the others, but protects individuals as well.[39] The Court has traditionally held that military courts – along with territorial courts – are categorically excluded from Article III,[40] but not only is that determination poorly rationalized, as discussed above, but it also also inconsistent with the Supreme Court's recent jurisprudence on the permissible scope of "public rights" adjudications outside Article III.

In determining what disputes can constitutionally be settled outside Article III, the Supreme Court has considered a number of non-exhaustive factors. "Among the factors upon

[36] See Stephen I. Vladeck, *Military Courts and Article III*, 103 Georgetown L. J. 933, 963 (2015).
[37] Ramos, 140 S. Ct. at 1404.
[38] Stern v. Marshall, 564 U.S. 462, 482-83 (2011) (quoting N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 58 (1982) [hereinafter Northern Pipeline].
[39] Id. at 483.
[40] See Northern Pipeline, 458 U.S. at 66.

which we have focused are the extent to which the 'essential attributes of judicial power' are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III."[41] Each of these factors shows that courts-martial are an exercise of the judicial power that must not be allowed outside the parameters of Article III.

The Schor factors confirm this conclusion. First, virtually none of the "essential attributes of judicial power" in the adjudication of courts-martial are reserved to Article III courts. After trial before a non-Article III court-martial, any appeal is heard by a non-Article III service Court of Criminal Appeals.[42] Decisions of those non-Article III courts are then subject to discretionary review by the non-Article III Court of Appeals for the Armed Forces.[43] An accused may file a writ of certiorari for Supreme Court review *only* if the Court of Appeals for the Armed Forces agreed to hear their case; "[t]he Supreme Court may not review by a writ of certiorari under this section any action of the United States Court of Appeals for the Armed Forces in refusing to grant a petition for review."[44] In fiscal year 2019, the Court of Appeals for the Armed Forces granted only 52 of 438 petitions for review filed with it.[45] The remaining 386 servicemembers were denied any ability to even ask an Article III court for direct review of their convictions. Thus, none of the "essential attributes of judicial power" are reserved to Article III courts in the overwhelming majority of courts-martial.

[41] Commodity Futures Trading Com. V. Schor, 478 U.S. 833, 851 (1986).
[42] 10 U.S.C. § 866.
[43] 10 U.S.C. § 867.
[44] 10 U.S.C. §§ 867a, 942.
[45] Annual Report of U.S.C.A.A.F. for Fiscal Year 2019, *available at* https://armfor.uscourts.gov/annual/FY10AnnualReport.pdf.

Second, despite this lack of recourse to Article III courts, the jurisdiction of courts-martial is expansive. Although their *in personam* jurisdiction is limited by the military status of an accused,[46] for those individuals, courts-martial have jurisdiction over any alleged crime.[47] Indeed, in addition to more than fifty enumerated crimes under the U.C.M.J., the "General Article" allows for the prosecution of all "crimes and offenses not capital."[48] In presiding over these cases, military judges enjoy the full range of powers ordinarily vested only in Article III judges. This scope of non-Article III adjudication far exceeds anything the Supreme Court has permitted outside the military context.

Third, each court-martial implicates the most important and long-standing rights enjoyed by Americans: the rights to life, liberty, and property. The importance and fundamental nature of these rights stand in stark contrast to the concept of "public rights." Although subject of various rationales since the concept of "public rights" cases was first discussed in the mid-nineteenth century,[49] the concept is limited to cases in which a party has a right to a remedy "only by virtue of legislative grace,"[50] that is, no right would exist were Congress not to create one. There is no conceivable way that the rights at issue in courts-martial can be said to fit this description, as each court-martial is a direct assault by the Government on an individual's liberty, a fundamental right the Constitution guarantees to all Americans. Such vital interests must only be subject to adjudication in Article III courts exercising the Judicial Power of the United States.

Lastly, the concerns that drove Congress to establish courts-martial outside the parameters of Article III cannot justify that extra-constitutional adjudication. Not only are those

[46] See 10 U.S.C. § 802.
[47] See Solorio v. United States, 483 U.S. 435 (1987).
[48] 10 U.S.C. § 934.
[49] Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272 (1856).
[50] Vladeck, supra at 978.

concerns largely obsolete in light of modern laws and practices, as discussed below, but "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution."[51] Exceptions to Article III must be narrowly construed,[52] and despite the traditional conclusory exclusion of military courts from the requirements of Article, that exclusion is not consistent with the Court's more rationalized and justified elaboration of when disputes can be resolved without invoking the Judicial Power of the United States.

3. Changes in the military justice system since the mid-nineteenth century make the precedent upholding that era's military justice system untenable.

Since the time of Dynes and Milligan, the legal structure of the military justice system and the way it is used have changed so dramatically as to be unrecognizable. The scope of the crimes triable by court-martial has increased massively. Other constitutional rights previously inapplicable to courts-martial have been held to apply. No longer a matter of internal military discipline, court-martial convictions carry the same permanent and expansive collateral consequences as civil criminal convictions. And rather than being a "swifter mode[] of trial,"[53] courts-martial take place years after the offenses they are addressing and take longer to litigate than felony trials in U.S. District Courts. The circumstances of [redacted] DeDolph's case crystalize these changes and demonstrate why the court-martial system is no longer a "prompt, ready-at-hands means of compelling obedience and order,"[54] but is rather a separate, lesser criminal justice system that can no longer exist outside the protections of Article III and the Sixth Amendment.

[51] Stern, 564 U.S. at 501 (quoting INS v. Chadha, 467 U.S. 919, 944 (1983)).
[52] Id. at 502-03.
[53] Milligan, 71 U.S. at 123.
[54] Toth v. Quarles, 350 U.S. 11, 22 (1955).

Judicial approval of the court-martial system has relied heavily on understandings about prevailing beliefs at the time of the adoption of the Constitution.[55] At the time of the framing, however, the scope of the military justice system was radically narrower than the modern UCMJ. The 1775 Rules for the Regulation of the Navy contained a total of 44 Articles and authorized trial by court-martial for offenses tied to the order and discipline of the ship at sea.[56] The 1776 Articles of War likewise subjected to court-martial only offenses directly related to the good order of the Army, such as disrespect, false muster, and mutiny.[57] The same held true at the time of Dynes and Milligan; both the Articles for the Government of the Navy and the Articles of War limited courts-martial to crimes against military order.[58] Thus, when the Supreme Court approved those systems as existing outside Article III and independent of the jury trial right, it was approving a system of military discipline, not a parallel criminal justice system.

Since that time, however, and with a brief regression during the reign of O'Callahan's service connection test from 1969 to 1987,[59] the scope of crimes subject to trial by court-martial has steadily expanded. Today, in stark contrast to the system prevailing in the 1850's, *any* crime committed by a service member, no matter how unrelated to military order and discipline is subject to trial by court-martial. Indeed, Article 134, the "General Article" makes this expansion plain, as it transforms any ordinary "crime or offense not capital" into a military offense.[60] This

[55] See, e.g., Ex Parte Quirin, 317 U.S. 1, 39 (1942).
[56] Rules for the Regulation of the Navy of the United Colonies of North-America, Nov. 28, 1775, *available at* https://www.history.navy.mil/research/library/online-reading-room/title-list-alphabetically/r/navy-regulations-17751.html.
[57] Articles of War, Sep. 20 1776, *available at* https://avalon.law.yale.edu/18th_century/contcong_09-20-76.asp.
[58] *See* Articles for the Government of the Navy, ch. 33, 2 Stat. 45 (1800); Articles of War of 1806, ch. 20, 2 Stat. 359 (1806).
[59] O'Callahan v. Parker, 395 U.S. 258 (1969). The Supreme Court overruled O'Callahan in Solorio v. United States, 483 U.S. 435 (1987).
[60] 10 U.S.C. § 934.

system bears virtually no resemblance to the system of "rough justice"[61] the Supreme Court previously permitted for military discipline.

Not only has the scope of crimes subject to trial by court-martial broadened massively beyond offenses directly tied to military discipline, but the crimes that are actually brought before courts-martial have diverged from military order even further. In Fiscal Year 2019, the military services conducted 1,503 trials by court-martial.[62] In that same year, charges were preferred against servicemembers in 795 sexual assault cases.[63] Although these cases do not correspond exactly due to the lag time in resolving them, these numbers epitomize the reality of the military justice system: the vast majority of trials are of civil crimes that happen to be alleged against military members rather than crimes that truly pertain to military discipline and order.

Along with the expansion of the substantive scope of the military justice system, courts have increasingly found constitutional rights applicable to trial by courts-martial. The Court of Appeals for the Armed Forces made this explicit: "[c]onstitutional rights identified by the Supreme Court generally apply to members of the military unless by text or scope they are plainly inapplicable."[64] Simultaneously, statutory and regulatory changes have brought court-martial procedures more in line with those of civil criminal trials.[65]

In addition, courts-martial have come to carry all of the consequences of civil criminal trials. Court-martial convictions are reported to the F.B.I.'s national database and appear on

[61] Reid v. Covert, 354 U.S. 1, 35 (1957)
[62] Reports of the Services on Military Justice for Fiscal Year 2019, May 6, 2020, *available at* https://jsc.defense.gov/Annual-Reports/.
[63] Department of Defense Fiscal Year 2019 Annual Report on Sexual Assault in the Military, Appendix B: Statistical Data on Sexual Assault, 18 *available at* https://www.sapr.mil/sites/default/files/3_Appendix_B_Statistical_Data_on_Sexual_Assault.pdf.
[64] United States v. Marcum, 60 M.J. 198, 206 (C.A.A.F. 2004).
[65] For example, recent statutory changes removed the possibility of holding a Special Court-Martial without a military judge.

background checks for the remainder of an individual's life.[66] Sexual assault convictions carry all of the same collateral registration requirements as do convictions in civil criminal courts.[67] For all practical purposes, a servicemember convicted at court-martial is in the same position as a person convicted in state or federal court despite being denied the right to a jury trial and an Article III judge.

The manner in which the court-martial system is used has also radically changed, further undermining the rationale for the Supreme Court's historical upholding of it. "Traditionally, military justice has been a rough form of justice emphasizing summary procedures, speedy convictions, and stern penalties with a view to maintaining obedience and fighting fitness in the ranks. Because of its very nature and purpose the military must place great emphasis on discipline and efficiency."[68] The Court relied on this "military necessity" to justify accepting the "dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution."[69] The modern military justice system does not resemble one required by "military necessity" and its dangers cannot continue to be justified in that way.

Nothing reveals this divergence from the "summary procedures [and] speedy convictions" that justified the military justice system more than the time taken to prosecute cases in modern courts-martial. Data on Navy cases in Fiscal Year 2019 show that, on average, 131 days passed from the report of a crime until the completion of a criminal investigation. Another 50 days passed before prosecutors made a charging recommendation, and 39 more days elapsed before a charging decision was made. After charges were filed, the average General Court-

[66] See DODI 7730.47, Defense Incident-Based Reporting System (DIBRS).
[67] See 34 U.S.C. §§ 20901 *et seq.*; DODI 1325.07, Administration of Military Correctional Facilities and Clemency and Parole Authority.
[68] Reid, 354 U.S. at 35-36.
[69] Toth, 350 U.S. at 22.

Martial took 230 days to reach a verdict.[70] Even this lengthy judicial process is swift compared to recent experience with Navy General Courts-Martial tried in Norfolk. The 23 General Courts-Martial that reached a disposition in Fiscal Year 2019 took, on average, 281 days from charge to verdict. For the 20 General Courts-Martial of Fiscal Year 2020, that number went up to 300 days. By way of comparison, felony cases filed in U.S. District Courts are resolved in, on average, 6.4 months.[71] Thus the "military necessity" for efficiency and speedy convictions actually results in cases processed significantly more slowly than felony cases in U.S. District Courts.

The specific circumstances of this case crystallize the degree to which the modern military justice system does not resemble a system of military discipline that can be justified by resort to "military necessity." [redacted] DeDolph is charged with committing offenses that occurred in June of 2017. During the intervening period of more than three years, he has remained on active duty but has not performed any duties for which he has been trained. He has essentially been on hold for more than half of his current enlistment. The convening authority – Commander, Navy Region Mid-Atlantic – who referred charges against [redacted] DeDolph and must approve or deny witness requests, funding requests, and any plea agreement, is nowhere in [redacted] DeDolph's chain of command. Indeed, the [redacted] community writ large have been almost completely removed from any legal decision-making in this case despite being the commands with responsibility for [redacted] DeDolph. The United States District Courts could have jurisdiction over this case under the Military

[70] Comprehensive Review of The Department of the Navy's Uniformed Legal Communities, 90-91, Dec. 9, 2019, *available at* https://media.defense.gov/2020/May/18/2002301989/-1/-1/1/COMPREHENSIVE%20REVIEW%20DON%20UNIFORMED%20LEGAL%20COMMUNITIES.PDF.
[71] United States District Courts – National Judicial Caseload Profile, 1, June 30, 2020, *available at* https://www.uscourts.gov/statistics/table/na/federal-court-management-statistics/2020/06/30-1.

Extraterritorial Jurisdiction Act,[72] and could try this case at the Eastern District of Virginia's courthouse in Norfolk, less than ten miles from the site of this court-martial. But instead of being tried in a federal court before an Article III judge and a jury, [redacted] DeDolph is instead subject to the less protective, "rough justice" of the court-martial system. Denying such essential rights to a man who has distinguished himself with valor on multiple occasions and been wounded in service of the United States is fundamentally unjust and cannot be justified by antiquated precedent.

The military justice system of 2020 bares no more than a passing resemblance to the mid-nineteenth century system that the Supreme Court previously approved. Massive legal and practical changes have altered the system so much that precedent upholding the old system cannot be relied on to continue permitting the new one. That precedent must be overturned and all fundamental rights restored to members of the Armed Forces.

4. Reliance on the erroneous precedent does not warrant continuing to deny servicemembers the fundamental rights to which they are entitled.

Lastly, the degree of reliance on the Supreme Court's misbegotten precedent does not warrant continuing this erroneous interpretation of the constitution and improper denial of fundamental rights to servicemembers. As in the Supreme Court's recent overturning of its own precedent permitting non-unanimous jury convictions, there can be no claim here of "anything like the prospective economic, regulatory, or social disruption litigants seeking to preserve precedent usually invoke. No one, it seems, has signed a contract, entered a marriage, purchased a home, or opened a business" in reliance on courts-martial being exempted from Article III and the Sixth Amendment.[73] At most, the reliance interests at stake in requiring that servicemembers

[72] 18 U.S.C. §§ 3261 *et seq.*
[73] Ramos, 140 S. Ct. at 1406.

be afforded the same fundamental rights as other Americans charged with serious crimes are the Government's interests in preserving convictions in cases not yet finalized in the now-existing military justice system. From the most recent data available, in Fiscal Year 19, 702 servicemembers were convicted by General Courts-Martial and 547 were convicted by Special Courts-Martial.[74]

Although this reliance interest is substantial, it is not enough to justify the denial of constitutional rights to those men and women who have volunteered to serve in the Armed Forces. Indeed, each of the hundreds of U.S. District Judges – who could constitutionally hear most of the cases in which convictions are invalidated by overruling this erroneous precedent – handles more than 100 felony cases per year.[75] Adding military retrials to this load would not be an insurmountable obstacle. As the Supreme Court observed in Ramos:

> "[R]etrying or plea bargaining these cases will surely impose a cost. But new rules of criminal procedures usually do, often affecting significant numbers of pending cases across the whole country. For example, after *Booker* v. *United States* held that the Federal Sentencing Guidelines must be advisory rather than mandatory, this Court vacated and remanded nearly 800 decisions to the courts of appeals. Similar consequences likely followed when *Crawford v. Washington* overturned prior interpretations of the Confrontation Clause or *Arizona v. Gant* changed the law for searches incident to arrests.[76]

As in Ramos, Booker, Crawford, and Gant, a decision re-establishing the proper constitutional rights of servicemembers who stand accused at courts-martial will have consequences for the Government, but that level of reliance on an erroneous constitutional interpretation does not justify continuing that error.

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[74] Reports of the Services on Military Justice for Fiscal Year 2019, May 6, 2020, *available at* https://jsc.defense.gov/Annual-Reports/.
[75] United States District Courts – National Judicial Caseload Profile, 1, June 30, 2020, *available at* https://www.uscourts.gov/statistics/table/na/federal-court-management-statistics/2020/06/30-1.
[76] Ramos, 140 S. Ct. at 1406-07.

C. Conclusion.

The Supreme Court's precedent upholding the military justice fails each of the criteria the Supreme Court itself has announced for when precedent ought to be maintained. To the extent the minimally rationalized conclusions of Dynes and Milligan could be justified in light of the mid-nineteenth century of military discipline, modern courts-martial bear no resemblance to that antiquated system. As such, that out-dated precedent must be overruled and the Uniform Code of Military Justice held to be an unconstitutional infringement of [redacted] DeDolph's rights.

4. Relief Requested.

For all of the foregoing reasons, the Defense moves the Court to rule that the Uniform Code of Military Justice violates Article III and the Sixth Amendment of the United States Constitution by denying [redacted] DeDolph a trial before a duly appointed judge exercising the judicial power of the United States and further denying his fundamental right to a jury trial. In light of these constitutional deficiencies, the Court must dismiss all charges and specifications against [redacted] DeDolph.

N. J. INNS
LCDR, JAGC, USN
Detailed Defense Counsel

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

U N I T E D S T A T E S **v.** **TONY DEDOLPH** **[redacted]/E-7 USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO DISMISS (CONSTITUTIONALITY OF UCMJ)** 13 **NOV 20**

MOTION

The Government requests the Court deny the Defense's motion to dismiss.

SUMMARY

Articles 16, 25, 26 and 52 of the UCMJ have not been held to violate Due Process or improperly deny servicemembers fundamental rights. Congress has the primary responsibility to balance the rights and needs of the military justice system, and the Defense has not provided a compelling justification to overturn Congress' prerogative.

BURDEN

Pursuant to R.C.M. 905(c), the Defense bears the burden of proof and persuasion by a preponderance of the evidence.

LAW

The current law and procedure of Congressional appointment satisfies the Appointments Clause with respect to military judges, and further appointment is not required for a military officer to discharge the duties of such a judge. *Weiss v. United States*, 510 U.S. 163, 177 (1994).

A fixed term of office is not required for military judges, and the Uniform Code of Military Justice and corresponding regulations sufficiently preserve judicial impartiality to satisfy the Due Process Clause. *Id. at* 180.

Within the context of "military society" the right to a jury trial a court-martial is not a "fundamental right" under the Fifth Amendment. *United States v. Begani*, 79 M.J. 767, 777 (N.M.C.C.A. 2020). *See also Parker v. Levy*, 417 U.S. 733, 743 (1974). The Supreme Court has rejected the Sixth Amendment's right to a trial by jury applies to courts-martial. *See Ex parte Quirin*, 317 U.S. 1, 40 (1942), which has been more recently reiterated by the Court of Appeals for the Armed Forces (CAAF), in *United States v. Riesbeck*, 77 M.J. 154, 152 (C.A.A.F. 2017).

"Military criminal practice requires neither unanimous panel members, nor panel agreement on one theory of liability" *United States v. Leonard*, 63 M.J. 398, 399 (C.A.A.F. 2006).

The Supreme Court has previously recognized that the military is a "specialized society separate from civilian society." *Parker at* 743. "Just as military society has been a society apart from civilian society, so 'military law…is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment.'" *Parker* at 743 (citing *Burns v. Wilson*, 346 U.S. 137 (1953)). The UCMJ "cannot be equated to a civilian criminal code." *Parker* at 749.

Courts "must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces, U.S. Const., Art. I, § 8." *Middendorf v. Henry*, 425 U.S. 25, 43, 47 (1976). Congress has "plenary control over rights, duties, and responsibilities in the framework of Military Establishment, including regulations, procedures, and remedies related to military discipline." *Chappell v. Wallace*, 462 U.S. 296, 301 (1983).

Congressional legislation in military affairs is subject to the Due Process Clause, which does provide some protection to those accused in military proceedings. *Rostker v. Goldberg*, 453 U.s. 57, 67, 69 (1981). Judicial deference to Congress "is at its apogee" when reviewing Congressional action in military affairs. *Id, at 70.*

Under the "Military Defense Doctrine" courts defer to Congress' exercise of its powers under Article I, § 8, Clause 14 to regulate the military justice system. "Congress has primary responsibility for the delicate task of balancing the rights of service[members] against the needs of the military . . . We have adhered to this principle of deference in a variety of contexts where, as here, the constitutional rights of service[members] were implicated." *Solorio v. United States*, 483 U.S. 435, 447-448 (1987).

As a result, in *Weiss* and *Middendorf*, *supra*, the Supreme Court determined the appropriate standard for considering what the Due Process Clause required with respect to a particular requirement was whether the factors militating in favor of the requirement were "so extraordinarily weighty as to overcome the balance struck by Congress." *Weiss* at 177-78, citing *Middendorf* at 44. Military courts have repeatedly used the *Weiss* standard in weighing Due Process challenges against Congressional exercise of Article I authority. *See United States v. Vazquez,* 72 M.J. 13, 19 (C.A.A.F. 2013); *United States v. Gray*, 51 M.J. 1, 50 (C.A.A.F. 1999) and *United States v. Easton*, 71 M.J. 168, 174-76 (C.A.A.F. 2012).

"For the reasons which differentiate military society from civilian society, we think Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which the former shall be governed than it is when prescribing rules for the latter." *Loving v. United States*, 517 U.S. 748, 759, 768 (1996).

Lower courts should follow controlling precedent, and leave the overruling of precedent to the higher authorities which created (or review) the precedent. They should not assume a new

higher court decision implicitly overrules precedent. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

ARGUMENT

The Defense makes an impressively footnoted argument[1] which can be fairly summarized as thus: because of the way Article 16 and Article 25 provide for members (and thereby fail to provide the right to a trial by a jury), because Article 26 does not provide military judges with tenure, and because Article 52 allows for non-unanimous findings by members, the UCMJ fails to provide fundamental rights and due process protections.

The Defense then argues that there is no longer a basis for allowing this difference in rights or Due Process, because amendments to military justice have broadened the scope of the UCMJ, and the court-martial process is not as expeditious as desired.[2]

The Defense also contends that the military justice system is an exercise of federal judicial power which must fall within the requirements of Article III of the Constitution.

They contend these two points together result in the present UCMJ being unconstitutional.

This argument is flawed on the following fronts:

1) Precedent is against the Defense.

2) The Defense appears to ignore the "Military Deference Doctrine"—or implicitly presumes it should be overturned in whole.

3) The unique society of the military justifies the different justice system afforded military members, and Defense provides no compelling basis for overturning the balance struck by Congress.

A. Supreme Court and CAAF precedent is controlling for this Court.

First and foremost, the Defense acknowledges precedent is against them, but attacks the prior Supreme Court decisions as "misbegotten". However, in doing so, the Defense fails to distinguish between vertical and horizontal *stare decisis*. In short, vertical *stare decisis* is the obedience of lower courts to the decisions of higher courts, while horizontal *stare decisis* is the weight an appellate authority affords its own decisions, requiring a compelling reason to overrule itself.[3] While their assault on the poor reasoning of the Court of Appeals for the Armed Forces

[1] This is genuinely meant without sarcasm, and in full acknowledgement of the relative paucity of citations provided for in this filing.
[2] Ironically, the strong implication of the Defense motion is that were the UCMJ to provide fewer protections for servicemembers (i.e. more "rough justice") then it would pass constitutional muster.
[3] *See United States v. Andrews,* 77 M.J. 393, 399 (C.A.A.F. 2018).

and the Supreme Court might be reasonable before those appellate authorities, they do not provide a basis for this Court to ignore the current applicable precedents.

Per *Weiss,* military judges do not need to have tenure to fulfill their duties in a manner which meets the requirements of Due Process.[4] Per *Ex parte Quirin*[5], and *Riesbeck*[6], the Sixth Amendment right to a trial does not apply to courts-martial.[7] Per *Leonard*[8], unanimous verdicts are not required in courts-martial.

Given the above precedent, this Court should not find that Articles 16, 25, 26 and 52 violate Due Process or otherwise deprive servicemembers of fundamental rights. As such, any further analysis or weighing of the Defense's Due Process concerns is unnecessary.

The Defense properly notes in their filing that the Supreme Court has held that military courts are categorically excluded from Article III[9] but argues it is a poor decision, which is not consistent with other Supreme Court jurisprudence. However, as noted above, this Court should not generally presume this controlling precedent has been overturned implicity.[10] *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

B. Congress, is the primary responsibility for balancing the rights of servicemembers in military justice affairs.

The Defense analysis argues that because military courts-martial are not as expeditious as federal courts,[11] the balance struck by Congress between military discipline and efficiency against the rights of servicemembers is a poor one. The Defense seems to argue that the Courts have only allowed the difference between civilian and military justice because the Courts approved of the need for "rough justice" in the military context.

However, this argument either ignores or wholly seeks to reverse the "Military Deference Doctrine"[12], which provides that the primary responsibility for weighing that responsibility is Congress, not the Judiciary.

In short, Congress may well agree with the Defense's analysis, and decide that the robust discovery and protections afforded under the UCMJ are undermining efficiency and military discipline, requiring further amendments to correct the balance. But it is Congress that should

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[4] *Weiss* at 180.
[5] 317 U.S. at 40.
[6] 77 M.J. at 152
[7] *See also Parker,* 417 U.S. 733, 765 (1974) (Douglas, dissenting).
[8] 63 M.J. at 399. *See also United States v. Rollins*, 2018 CCA LEXIS 372 (N.M.C.C.A. 2018) (recently reiterating that military practice did not require unanimous panel members).
[9] *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.,* 458 U.S. 50, 66 (1983).
[10] *Rodriguez de Quijas* at 484.
[11] The relative speed of federal proceedings offered in the statistics provided by Defense counsel is far less impressive when considering that over 90% of federal criminal cases resolve in guilty pleas. *See* https://www.uscourts.gov/about-federal-courts/types-cases/criminal-cases, accessed 13 Nov 2020. Defense's own statistics highlight the proportion of military cases which are sexual assault cases, which are generally far less amenable to plea negotiations, due to the stakes involved.
[12] *Solorio* at 447.

weigh that balance, and it would be usurpation of that role for the Court to decide to weigh the overall "efficiency" of military justice and decide that the balance is incorrect, requiring the entire system to be dismantled.

This is all the more striking when considering the history presented in the Defense motion. The Defense notes over 200 years, from the initial Articles of War, to Supreme Court review during the Civil War, to the past few decades—and suggests that now, because courts-martial are not quick enough, and the scope of prosecutorial misconduct considered in military society is broader, this Court should intervene.[13]

Of note, that same history also strongly reinforces the implication (held up by the previously cited precedent) that the founders did not intend for the full protections of the Sixth Amendment to apply to military proceedings, as it had never been the case, and did not become the case after the ratification of the Constitution.

C. *Middendorf* provides the appropriate analysis for considering whether the UCMJ fails to provide a Due Process right, and the Defense has failed to provide an "extraordinarily weighty" justification sufficiently compelling to overturn the UCMJ.

First, the Defense narrowly misconstrues what "military discipline and order" means in the context of military justice and general courts-martial. The Defense suggests that prosecuting the sexual assaults of servicemembers against each other is simply "civil crimes that happen to be alleged against military members rather than crimes that truly pertain to military discipline and order."

On the contrary, the prosecution of such crimes is essential to protecting the military community. As noted above, the military represents a unique and somewhat insular American community. It is tasked with special responsibilities for the nation, both mobile, spread across the United States and other international stations. Moreover, in many environments, it is fair to say that a servicemember's workplace is also their social environment, as well as their immediate law enforcement resource. This is why the Supreme Court has recognized that the military is a "specialized society separate from civilian society."[14] It continues to be true.

The notion that crimes committed against other servicemembers, in unique military environments and communities[15] have no reasonable bearing or connection to the military mission or community does not pass muster. It continues to make eminent sense that military authorities have a vested interest in the discipline and community standards of the military environment.

In contrast, the Defense has not provided any new "extraordinarily weighty" justification to justify overturning the balance of rights afforded by Congress. For example, while the Defense

[13] The Defense also notes that court-martial convictions have serious consequences which may be analogous in civilian life (e.g. sex offender registrsation). However, Defense does not cite evidence showing this is a material change from years past—moreover, death has been an authorized punishment since the inception of military justice, and it is hard to conceive of a more serious consequence (and which is analogous to a civilian criminal outcome).
[14] *Parker at 743.*
[15] Indeed, the facts of this case seem especially apropos.

notes that military judges are not afforded tenure as Article III (and some Article I) judges are, it does not explain how the UCMJ fails to provide adequate safeguards for the impartiality and effectiveness of military judges.[16] Likewise, the Defense notes that the UCMJ does not provide for unanimous verdicts in findings, but the Defense fails to weigh that concern against the virtues of a final result[17] and the prophylactic power against undue and unlawful influence.[18]

RELIEF REQUESTED

The Government requests the Defense motion to dismiss be denied.

The Government does not request oral argument.

Respectfully submitted,

[redacted]
CDR, JAGC, USN
Trial Counsel

Certificate of Service

I hereby certify that a copy of this motion response was served on the Court and defense counsel on this 13th day of November 2020.

[redacted]
B. B. GARCIA
CDR, JAGC, USN
Trial Counsel

[16] And as noted in *Weiss at 180*, the Supreme Court has held that the UCMJ does.
[17] Otherwise, with jury hung by a single member voting to find an Accused guilty, the Government is free to proceed forward to trial again, whereas an Accused is fully acquitted at court-martial if less than three-fourths of the members vote to convict.
[18] In so much as in either a conviction or an acquittal, an observer in military court should never know how any individual member votes; in contrast, in a civilian trial, the public knows how every juror voted in a non-hung jury. This is also striking in sentencing, which is controlled by military members. While imperfect, the contrast with undue influence in civilian systems is striking—where studies have demonstrated that judges are less likely to acquit, more likely to punish severely, and more likely to impose or affirm the death penalty when facing re-election or retention. *See* https://www.brennancenter.org/sites/default/files/publications/How_Judicial_Elections_Impact_Criminal_Cases.pdf accessed on 13 Nov 2020.

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

UNITED STATES **v.** **TONY DEDOLPH** **[redacted]/E-7 USN**	**GOVERNMENT MOTION FOR RECONSIDERATION AND CLARIFICATION OF THE COURT'S RULING ON THE DEFENSE ORAL MOTION IN LIMINE UNDER MRE 403** **18 JANUARY 2021**

Nature of Motion

This is a Government motion to reconsider the court's ruling on an oral Defense motion *in limine* to exclude all discussion or reference to "Operation Tossed Salad" under M.R.E. 401 & 403 and R.C.M. 1001(b)(4). The Government requests the Court reverse that ruling, allow evidence of the Accused's efforts to push the plan in a sexually demeaning direction, and provide a limiting instruction to the members.

In the alternative, the Government requests clarification regarding particular items of evidence and their admissibility.

Summary of Facts

On 3-4 June 2017, the Accused, along with GySgt [redacted], SSgt [redacted], and Mr. [redacted] (the "conspirators") met at the [redacted] and travelled to [redacted] a late-night restaurant (alternately described as a [redacted] the Marine residence, and then the shared Army/Navy house.

At the [redacted] they began to joke about and make a plan to break into SSG [redacted] bedroom, strangle and restrain him, and then have a prostitute lick his anus, which became known as "Operation Tossed Salad". At this initial stage, Mr. [redacted] and SSgt [redacted] all presumed the entire plan was just a joke. However, the plan continued to be raised through the night, with different roles identified for the conspirators, and the Accused proposed having one of the guards of the house, [redacted] (Mr. [redacted] do the licking, because [redacted]

After the restaurant, the Accused and others elected to go to the Marine residence to secure supplies and actually put the plan into action. At this stage, several members of the conspiracy realized the plan was sufficiently crystallized and not simply a joke, and would be put into action.

Upon arriving at the Army/Navy house, the Accused told the [redacted] (Mr. [redacted]) about the plan, to include the "ass-licking", but Mr. [redacted] did not speak English. Mr. [redacted] spoke a little English, and attempted to translate. In preparation for the plan, a leash was placed on Mr. [redacted] he was stripped down to his underwear, and he was given a mask to wear. He did not like the plan, even though he was told it was just a "game", and was afraid SSG [redacted] would not like it, but felt afraid he would lose his job if he disobeyed. Mr. [redacted] claimed he had not been told he would be touching SSG [redacted] Mr. [redacted] is a Muslim-majority country.

After the guards had been briefed on the plan, the Accused went to SFC [redacted] (SSG [redacted] team lead) to advise him of the expected hazing, and SSgt [redacted] heard the Accused advise SFC [redacted] about the expected "ass-licking."

After the breach of SSG [redacted] door, Mr. [redacted] fled the scene. However, the remaining conspirators brought the guards into the room as they attacked SSG [redacted] and strangled and restrained him while he resisted. He died during the strangling and restraint, and the guards were ushered out of the room.

a. On 15 January 2021, the Defense made an oral motion in limine to exclude all evidence related to the stated plan to commit sexual acts upon SSG [redacted]

b. The Court held "[t]he Government may introduce evidence exactly what Mr. [redacted] did and was told to do" **and** "when it comes to the abusive sexual contact discussion such evidence under MRE 403, the Court grants the Defense motion. The Government will not be allowed to present that evidence in the case or mention it."

c. The Court noted that "[t]here was no evidence that there would be prostitutes for hire or that this was more than anything than just a joke."

d. The Court referenced a Defense enclosure and noted [redacted] specifically states the idea was discussed with the guard of the house liking his anus, that it was my presumption it began with male prostitutes and not guards it was just a joke." (AE 28 at BS2000)

e. Both SSgt [redacted] Mr. [redacted] and [redacted] initially thought the entire hazing "plan" when discussed at the [redacted] was a joke. (AE28 at BS1065, BS4511, BS2000)

f. [redacted] later realized the Accused's desire to haze SSG Melgar was serious, and he realized the plan to haze him was not a joke.

g. The plan evolved to having the guards do the licking. AE 28 at BS4536

h. The Accused was heard by [redacted] telling "[redacted]) "you're going to either lick his ass or you're going to pretend to lick his ass or something like that." AE 28 at BS2175

i. The Accused, with the other conspirator, was heard by SSgt [redacted] advising Mr. [redacted] of the plan, which included Mr. [redacted] licking SSG [redacted] anus. AE 28 at 1066

j. Subsequently, the Accused was heard by SSgt [redacted] describing having [redacted] ass" as part of the expected hazing when seeking [redacted] team lead. AE 28 at BS1066-[redacted]

k. The conspirators were heard talking about the plan with the guards by Mr. [redacted] Mr. [redacted] identified that the [redacted] with a belt around his neck was supposed to lick and sexually assault SSG [redacted] AE 28 at BS 4539-40

l. Mr. [redacted] noted that the Accused, when previously talking about getting [redacted] to cooperate, said "he'll do anything for money or something like this, like touching. We'll just throw him enough money and he will, he will say yes." [redacted]

m. Mr. [redacted] claims he tried to advise the conspirators against the assault, but was told "it happens all the time". At no point did any conspirator indicate to him or reassure him that some steps wouldn't be followed. AE 28 at BS4636-37

n. At the Army-Navy house, Mr. [redacted] said something along the lines of "you're not really going to do this" and the conspirators reaffirmed that they would, and attempted enlist him in grabbing SSG [redacted] legs. When he refused, they elected to have a guard hold his legs. AE 28 at 4540-43

o. [redacted] believed that although the plan as described involved Mr. [redacted] licking SSG [redacted], and Mr. [redacted] was told the same by the Accused, SOC [redacted] did not think they would have allowed Mr. [redacted] to lick SSG [redacted] Instead, he hypothesized that SSG [redacted] would be put in a "compromising situation"—such as having his underwear pulled down and being threatened with the anal contact. However, he confirmed there was no overt discussion of these limitations, nor did he indicate the video would cease at any such point. AE 28 at BS2011-214

p. The [redacted], did not speak English well, and [redacted] DeDolph explained the plan to them in English. AE 28 at BS2174

q. Mr. [redacted] claimed Mr. [redacted] spoke a little English, so he tried to explain to Mr. [redacted] what the Accused was saying, which included stripping down to his underwear. BS5300-2.

r. Mr. [redacted] did not like the "game" but felt obliged to play because the Accused was "the boss," and because he was scared if he did not play the game, he would lose his job. BS5303-05, 07.

s. Mr. [redacted] claimed he was told it was a "game" that was "friendly for [redacted] but he was afraid SSG [redacted] might kick or hit him, because he had the feeling that SSG [redacted] "did not like the game." BS5346.

t. Mr. [redacted] when interviewed by NCIS, claimed the plan was to transform [redacted] into a gorilla, with a leash on his neck, and [redacted] would try and kiss [redacted] Encl (1) at BS4986.

u. Mr. [redacted] when interviewed by NCIS, claimed the plan was for him to undress and to his underwear and lay by [redacted] Encl (2) at BS4931.

Burden of Proof

The burden of proof and persuasion for the motion to reconsider rests with the Government, and the burden for the motion to exclude evidence rests with the Defense by a preponderance of the evidence. R.C.M. 905(f) and (c).

Discussion of Law and Analysis

Under R.C.M. 905(f), the Court may, in its discretion, reconsider any ruling which was not a finding of Not Guilty. Rule 10.8 of the NMCTJ Uniform Rules of Practice permits a reconsideration of a ruling based on "the availability of new evidence" and "the need to correct clear error or prevent manifest injustice."

Under R.C.M. 905(f), the Government respectfully requests reconsideration of the Court's ruling on the Defense's oral motion in limine to exclude all evidence relating to [redacted] DeDolph's stated plan to sexually assault and humiliate SSG [redacted]

The Government was derelict in its duty to support a professional and capable proceeding, and when the Defense made an oral motion regarding significant evidence, and then grossly mischaracterized the evidence to the Court, the Government should have requested written submissions on the matter to ensure the Court was properly briefed. The Government respectfully submits that some of the Court's statements reflect the mischaracterization of the evidence pushed by Defense, and which are not supported by the relevant enclosures to the matter.

In short, the Government respectfully submits the Court was led to a clear factual error which is material to the motion, and should therefore reconsider.

In the alternative, the Government requests clarification regarding the evidence which could be admitted, as limitations on the Defense characterization of the nature of the events.

In its ruling, the Court stated the Government could introduce evidence of what was said to Mr. [redacted] about the plan, and as noted above, two witnesses would testify that the Accused discussed the sexual elements of the plan to the guards. The Government suspects that the Court may have meant that it can only introduce evidence of what Mr. [redacted] claimed he understood about the plan, rather than what was said to him, either by the Accused or Mr.

[redacted]—but it would like confirmation and clarification.

Absent the "anus licking" plan, the Government would still seek to introduce evidence that:

(1) That the plan involved humiliating SSG [redacted] by video recording him while he was restrained, and his underwear pulled down.

(2) That Mr. [redacted] disrobed to his underwear, in a mask and on a leash, was planned to be included in the recording.

If the Government is limited in introducing the full nature of the Accused's statements and actions about the plan, the Government submits that the Defense should not be allowed to offer evidence characterizing the plan as just "a prank", a "ridiculous trick", or otherwise innocent, playful or non-malicious.

1. Bifurcation of analysis (a planned sexual assault vs. a joke)

The Government understands the analytical framework of the Court's 403 analysis, to attempt to divide the evidence into two possibilities that can be weighed under 403, and then deciding which is supported by the weight of the evidence.

However, the Government submits that the "either-or" analysis of "Operation Tossed Salad" being either a concrete plan *or* "just a joke" is misleading, especially in the context of hazing and conspiracies.

The Government submits that there is a third factual possibility: that the Accused was pushing and "egging on" his co-conspirators, pushing for the plan to include an element of sexual humiliation. This is especially significant in hazing, where a member could dare or egg on the group, and thereby encourage the group to act more abusively and maliciously.

As noted below, the Government believes that the weight of evidence strongly supports that either the sexual assault was genuinely intended, or that, at a minimum, the Accused was repeatedly pushing for the hazing to be more malicious in nature and to include an element of sexual humiliation. Both possibilities are powerfully probative as to the malicious intent and nature of the conspiracy to assault and batter, the hazing, the attack that lead to involuntary manslaughter, and the underlying motivation of the Accused for the obstruction of justice.

2. Central evidence regarding the nature of the plan

a. [redacted] ***do not reasonably support the Court's finding of fact***

In its oral ruling, the Court appear to rely on two central pieces of evidence in finding that the plan in question was "just a joke." First, the Court noted that [redacted] in his interview proffer (on BS2000) claimed that he understood that the plan was a just a joke. Second, that Mr. [redacted] did not report that the plan included a sexual element.

Regarding [redacted] statement, it should be noted *all the witnesses* believed the *entire* plan was just a joke earlier in the night. It wasn't until later in the night as the plan crystallized, that they realized it was actually going to happen. Moreover, [redacted] *later in the same interview*, reported that the Accused told the guards about the plan "either lick his ass or you're going to pretend lick his ass or something like that." (AE 28 at BS2175). [redacted] also stated that when he realized the Accused was serious about the plan, he pushed to ensure the Accused sought permission from SFC [redacted] before proceeding.

[redacted] did indicate he believed the plan would not get actual contact with SSG [redacted]—but he did not indicate he believed it was "just a joke". Rather, he believed that the sexually demeaning element of the plan would be used to threaten SSG [redacted] He also agreed that this limitation was never vocalized by the Accused. And the plan included video recording SSG [redacted] in this humiliating position regardless.

Although Mr. [redacted] did not report the sexual element of the plan, as noted in more detail below, he does not speak English, and therefore does not credibly contradict the two witnesses who observed the Accused advising the guards about the sexual portion of the plan.

Moreover, there is no reason to think that the Accused or others could not have further encouraged other acts, either through further direction or pantomime. Even if Mr. [redacted] did not fully understand the plan at the time, that does not establish that there would not be further efforts to guide or direct his behavior.

b. ***All three cooperating co-conspirators and the weight of the evidence support that the Accused's comments about the plan were more than "just a joke."***

The Accused brought up the plan to video record a [redacted] licking SSG [redacted] anus. He did so repeatedly—and when a [redacted] rostitute appeared infeasible, he evolved the plan to a more practical option—to use [redacted] When others questioned the feasibility of the plan, he didn't claim it was obviously just a joke—instead, he claimed that Mr. [redacted] "like to eat ass," and that he would end up doing anything for money.

More importantly, the evidence supports that the push for this plan continued when the group arrived at the Army/Navy house. Two witnesses confirm that the Accused attempted to instruct Mr. [redacted] on the plan, to include the sexual elements, albeit through a poor interpreter. Other elements of the plan were successfully advanced, to include disrobing Mr. [redacted] down to his underwear, putting a leash and mask on him, getting video recording and music ready, as well as a sledgehammer and duct tape for the breach into the bedroom and restraint of SSG [redacted] Finally, evidence shows that prior to the breach, the Accused sought permission from SFC [redacted] and described the "ass-licking" as part of the plan.

Because SSG [redacted] died before the conspirators could take advantage of his restrained state to video and humiliate him, we cannot know for certain if the Accused would have called off the last step at the very last second. However, what is clear is that the Accused repeatedly and continually pushed for the plan to involve elements to sexually abuse and humiliate SSG [redacted] and that he never told anyone that that portion of the plan was "just a joke." As a result, of the three members of the conspiracy who have provided evidence on the

plan, two believed it was an actual element of the plan (Mr. [redacted] and one [redacted] thought that the element was meant to be more of a threat or apprehension-style assault. But none of the three thought it was "just a joke" at the point when they are breaking into SSG [redacted] room.

That Mr. [redacted] claimed he did not believe he would be touching SSG [redacted] is not surprising under the facts. First, as noted above, Mr. [redacted] *does not speak English*. As such, his understanding is not an effective contradiction of the two witnesses who reported that the Accused was explaining a sexual element of the plan to the guards. Second, Mr. [redacted] was afraid, and afraid of giving evidence in the case (as demonstrated by his repeated lies to law enforcement about being involved at all). Third, if he understood the plan to involve licking SSG [redacted] anus, describing it would be admitting to planning to commit a sexual assault on a U.S. national to U.S. law enforcement—and admitting to agreeing to an arguably homosexual contact as a Muslim man in a Muslim-majority country. In that light, it is eminently understandable that Mr. [redacted] may not have understood the full plan, or minimized portions of the plan he did understand.

Moreover, as noted in Enclosure (1), Mr. [redacted] who had some limited English, did report that the plan included an element not mentioned by Mr. [redacted]—that Mr. [redacted] would "try and kiss" SSG [redacted] Encl (1) at BS4986. Mr. [redacted] also previously claimed that he was supposed to "lay down" with SSG [redacted] after he had undressed. Encl (2) at BS4931. Both items support the contention that Mr. [redacted] is understandably minimizing whatever parts of the plan he did comprehend.

3. Proposed instruction

"The evidence of the (potentially sexual elements of the crime) (potentially sexually demeaning/humiliating elements of the hazing) has been admitted because of its relevance to the nature and intent of the charged crimes; in particular, Specification One of Charge One, Conspiracy to Assault and Batter, the sole Specification of Charge Two, Involuntary Manslaughter and the sole Specification of Charge Three, Violation of a Lawful General Order—Hazing. You should only use it when weighing the gravity and nature of these crimes.

The Accused has not been charged with an attempted sexual contact or sexual assault—and you must only sentence the Accused for the crimes for which he has been convicted. This evidence is only to be used in judging the character of the crimes for which he has been convicted.

Relief Requested

The Government respectfully requests this Court reconsider its ruling, and then deny the Defense motion in part, allowing the Government to introduce evidence of the Accused's statements to Mr. [redacted] and Mr. [redacted] to SFC [redacted] and his planning and explanations for the potential sexual contact to his co-conspirators. The Government further requests that an appropriate limiting instruction in line with the Government proposal above be given to the members.

Absent the above, the Government would seek further clarification

Evidence

Enclosure 1: Transcript of NCIS interview of Mr. [redacted]
Enclosure 2: Transcript of NCIS interview of Mr. [redacted]

Oral Argument

The Government requests oral argument.

[redacted]
[redacted]Benjamin B. Garcia
CDR, JAGC, USN
Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion was served electronically on defense counsel on 18 January 2021.

[redacted]
[redacted]Benjamin B. Garcia
CDR, JAGC, USN
Trial Counsel

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

UNITED STATES v. Tony DeDolph [redacted]/E-7 U.S. Navy	))))))))	**Post Trial Motion for Mistrial and New Sentencing (Amended)**

Nature of Motion

Pursuant to Rules for Courts-Martial (R.C.M.) 701, 915, and 1104[1] the defense moves this Court to direct a post-trial 39(a) and to order a mistrial as to the proceedings that occurred post-findings due to the government's impeachment of the stipulation of fact, impeachment of the guilty plea, improper sentencing evidence and argument, and violating *Brady v. Maryland*.

This initial motion was filed 1-2 days out of time due to [redacted] DeDolph being moved from his initial confinement facility to a different confinement facility and our inability to contact him during the transition and the holiday weekend. The defense asks for leave to file. Minor amendments have been made

[1] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 701, 915 & 1104 (2019) [hereinafter R.C.M. XXX].

and filed on February 17, with the 2 enclosures previously mentioned.

1. <u>Summary of Relevant Facts</u>

a. On December 13, 2020, the accused and defense counsel signed a stipulation of fact with the prosecutor (Garcia) in this case. (See PE 1)

b. On January 14, 2010, [redacted]DeDolph pleaded guilty to conspiracy to commit assault, conspiracy to obstruct justice, hazing (Article 92), involuntary manslaughter, and obstruction of justice.

c. The January 14, 2020 guilty plea was based upon the stipulation of fact and providency (Care) inquiry with the accused and the facts were consistent.

d. Specifically, as it pertains to the:

i. conspiracy to commit assault (strangled SSG [redacted] by placing him in a chokehold);

ii. involuntary manslaughter (assault consummated by a Battery, did unlawfully kill the said SSG [redacted] by strangling him with a chokehold, i.e. the same chokehold, supra.); and,

iii. hazing (assaulted and strangled with a chokehold, i.e. the same chokehold, supra.)

the relevant choke hold was described by [redacted] DeDolph in the following way: when I say chokehold, I mean that, from behind, I placed my arm around SSG [redacted] neck and applied pressure to the sides.

e. The description is consistent with [redacted] DeDolph's providency (Care) inquiry, unsworn statement, the sworn testimony of SO2[redacted] and Private [redacted] USMC.[2]

f. During the sentencing case, over objection, the prosecutor impeached the stipulation of fact by presenting expert testimony evidence and argument that [redacted]DeDolph killed SSG [redacted]when he crushed SSG [redacted] throat, specifically the Larynx.

g. Also, during the sentencing case, over defense objection, the prosecutor impeached the stipulation of fact by presenting expert testimony evidence and argument that impeached the cause of death, positing SSG [redacted] died from, specifically, *suffocation* by pressing weight on the back of SSG [redacted] and having his face pressed into a pillow vice choking.

h. Further, during the sentencing case and argument, over defense objection, the government introduced the concept

[2] While [redacted] described two choke holds being performed, he is the only person to allege there were two choke holds and the description is, at best, the first was set deep and the second was not as deep and SSG [redacted] struggled.

that [redacted] DeDolph performed a cricothyrotomy upon SSG [redacted] as a means to cover-up the aforementioned crushed throat/Larynx. This allegation was considered by the PHO during the article 32, UCMJ, hearing and the theory lacked probable cause. It was also rejected by both the SJA in the Article 34, UCMJ, letter and the Convening Authority.

i. In addition to impeaching the stipulation of fact and the providency (Care) inquiry, the government repeatedly attempted to introduce allegations that the Raiders and SEALs were going to commit a sexual assault offense during the period that SSG [redacted] was taped as part of the hazing. The judge properly kept out that evidence, but the prosecutors repeatedly introduced evidence that SSG [redacted] underwear was going to be pulled down or was pulled down and he was going to be videoed in an embarrassing (compromising) position.

j. This conduct was not charged, in fact it was specifically rejected over and over again by the PHO and the Convening Authority. Further, SSG [redacted] was never exposed to this conduct, i.e. it was never communicated to him, he never became aware of it, and it did not cause any impact on the victim whatsoever.

k. Finally, the government violated the Due Process rights under the 14th Amendment, US Constitution, and Brady v. Maryland.

l. [redacted] DeDolph was charged with involuntary manslaughter in the following charge, that [redacted] DeDolph, during an assault consummated by a Battery, did unlawfully kill the said SSG [redacted] by strangling him with a chokehold, i.e. the same chokehold, supra.

m. During the direct examination of Dr. [redacted] the government's retained expert forensic pathologist, he stated that a possible cause of death was that SSG [redacted] was suffocated by piling on top of SSG [redacted] when he was lying face-down on his bed, weight being pressed upon the back of SSG [redacted] (making it harder for his lungs to fill with air) and pressing his face into his pillow (making it harder for him to intake air into the lungs).

n. The suffocating cause of death described at trial by the prosecution's own retained expert and above was never presented to the defense and it is a completely different mechanism of death than that which was charged.

o. This different mechanism of death could not stand as a minor change.

p. The different mechanism of death could not stand as a variance to the charge if made by the members.

q. This different mechanism is also mitigating because even less intent would be required than was present in the

charged offense and other members of the hazing party were on top of SSG [redacted] besides [redacted] DeDolph.

r. During the sentencing hearing itself, after being surprised by this evidence being adduced by the prosecutor, even the Military Judge, *sua sponte*, discussed the impeachment of the providence (Care) inquiry and theory upon which a plea of guilty was accepted by the court.

2. Issues Presented

a. Whether the impeachment of the stipulation and fact and providency (Care) inquiry violated the pretrial agreement and/or impeached the guilty plea of the accused, thereby requiring the court to declare a mistrial as to the sentencing case and order a new sentencing case.

b. Whether the introduction of improper aggravating evidence, over defense objection, necessitates the court to declare a mistrial as to the sentencing case and order a new sentencing case.

c. Whether the prosecution's failure to disclose an alternate cause (mechanism) of death discovered by the prosecution's retained expert necessitates the court to declare a mistrial as to the sentencing case and order a new sentencing case.

3. Discussion of the Law

Impeaching the stipulation of fact / Impeaching the care inquiry

Title 10 § 845(a) (Art. 45(a), UCMJ) provides that if after a plea of guilty the accused sets up matter inconsistent with the plea, or if it appears that he has entered the plea of guilty improvidently, a plea of not guilty shall be entered in the record, and the court shall proceed as though he had pleaded not guilty.

The same is true if the prosecutor sets up matters inconsistent with the plea and impeaches the agreed to stipulation of fact.

In this case, [redacted] DeDolph described the theory in which his actions led to the death of SSG [redacted] i.e. placing him in a martial arts choke hold (rear-naked choke) and applying pressure to both sides of his neck, resulting in SSG [redacted] dying, albeit unexpectedly. This was consistent with the stipulation of fact signed by the prosecutor (Garcia).

Strangulation has a specific definition in military law and, quite frankly, common parlance. [redacted] DeDolph pleaded guilty to causing the death of SSG [redacted] by applying pressure to both sides of SSG [redacted] neck, not crushing his larynx. AR 27-9 defines strangling as: “intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of a person by applying pressure to the *throat or neck*, regardless of whether that conduct results in any visible injury or whether

there is any intent to kill or protractedly injure the victim." (Emphasis added)

The government could have used language that [redacted] DeDolph applied pressure to SSG [redacted] throat where the larynx is located if that was the theory of their case and then [redacted] DeDolph would not have been able to plead under the theory stated in the providency (Care) inquiry **and stipulation of fact.**

In accepting appellant's pleas of guilty, the military judge had to ensure the pleas had a factual basis and appellant did not set up matters inconsistent with guilt. *See, e.g., United States v. Clark,* 28 M.J. 401 (C.M.A. 1989). In essence, the military judge was bound by appellant's rendition of the facts in determining the providency of the pleas. If the prosecutor objected that appellant's factual basis did not coincide with the government's theory of the case, the military judge could have properly rejected appellant's pleas. Here, the prosecutor did not interpose such an objection. *United States v. Perlsen*, ACM 30849, 1995 CCA LEXIS 49, at *4-5 (A.F. Ct. Crim. App. Jan. 24, 1995) *See also United States v. Bobroff,* 23 M.J. 872 (N.M.C.M.R.), *pet. denied,* 25 M.J. 480 (1987).

Instead of objecting, the prosecutor impeached the providency (Care) inquiry, over objection, and posited two heretofore undisclosed theories of [redacted] DeDolph causing SSG [redacted] death – one being more aggravating (crushing the

throat/Larynx) and one, arguably, less aggravating (suffocating).[3]

The prosecutor then posited an additional (and previously rejected) theory of obstruction of justice (cover-up) by doing a cricothyrotomy to secret the crushed throat. A theory that was previously rejected by the PHO, SJA, and Convening Authority.[4]

Again, here, the Military judge had good cause to reject accused's guilty plea, and should have, when it was learned that factual basis upon which accused was relying to establish guilt had nothing to do with prosecution's theory of case as, under circumstances. *United States v. Bobroff*, 23 M.J. 872 (N-M.C.M.R. 1987) In *Bobroff*, the accused was charged with, *inter alia*, drug distribution of controlled substances. Apparently, in this case, due to the accused's extensive criminal drug activities, he was able to reach into his bag of "crimes committed" and pull out ones which would technically suffice to establish his guilt under the broad language of the pleadings.

[3] It should not be lost on the court that the AR 27-9 also provides a specific definition for suffocation. "Suffocating" means intentionally, knowingly, or recklessly impeding the normal breathing of a person by covering the mouth of the person, the nose of the person, or both, regardless of whether that conduct results in any visible injury or whether there is any intent to kill or protractedly injure the victim.)

[4] The prosecutor may posit their belief new evidence supported such a claim; however, the Art. 32, UCMJ, hearing was not moved to be reopened and no new discovery was presented to the defense on this issue.

Bobroff had always been aware of the Government's theory of the case and he was not misled. In the [redacted] DeDolph's case, [redacted] DeDolph and counsel were misled and not aware of the government's theory, especially given the rejection by the PHO, SJA, and GCMCA; and the signed and agreed to stipulation of fact. The government's theory of how the death was caused was contained clearly and unequivocally in the stipulation of fact and the government did not object to the stipulation or the providency (Care) inquiry confession. In fact, the prosecutor gave the stipulation of fact to the members. [redacted] DeDolph's theory of how the death was caused was contained clearly and unequivocally in the stipulation of fact and the providency (Care) inquiry confession.

The Government was never misled. *However*, [redacted] DeDolph and his defense counsel were absolutely misled as to the government's theory or perhaps better said theories as to how SSG [redacted] died and because [redacted] DeDolph was misled, he was irreparability harmed by the prosecutor's action.

RCM 915 provides that the military judge may, as a matter of discretion, declare a mistrial when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings. A mistrial may be declared as

to some or all charges, and as to the entire proceedings or *as to only the proceedings after findings*. (Emphasis added)

The Court of Military Appeals has held that "a mistrial is a drastic remedy [that] is reserved for only those situations where the military judge must intervene to prevent a miscarriage of justice." United States v. Garces, 32 M.J. 345, 349 (C.M.A. 1991), *United States v. Short*, 77 M.J. 148 (C.A.A.F. 2018) (holding that a mistrial is an unusual and disfavored remedy and should be applied only as a last resort to protect the guarantee for a fair trial or where the military judge must intervene to prevent a miscarriage of justice.) (internal citations omitted).

However, in this case, as the mistrial is only for the proceedings after findings, the remedy is a new sentencing proceeding – not a new trial. While it may appear to be a drastic remedy to the prosecutors, not granting a mistrial as to the sentencing proceedings in this case is would be a drastic result.

For the prosecutors, the providency inquiry and guilty plea to the charges would remain intact. The costs in money and man-hours associated with a new sentencing case is small in comparison to the lengthy appeals that will follow this case based upon their errors. The experts, if needed in resentencing,

have their testimony memorialized and can be presented to the jury in that way.

For [redacted] DeDolph, the plea agreement remains intact and he will remain bound by its terms. However, the irreparable harm in not declaring a mistrial and ordering a resentencing/new sentencing is great. The appellate process from the Navy-Marine Corps Court of Criminal Appeals and Court of Appeals of the Armed Forces is *slow.* Appeals to the military's senior court of appeals can take several years – extended if *Dubay* hearings are ordered. Each day he remains in confinement beyond that which is imposed upon a proper sentencing case, especially given his significant medical conditions, e.g. PTSD, causes irreparable damage.[5]

Counsel and accused may not introduce information inconsistent with guilty plea and then leave information in suspension after concluding it is unlikely to result in finding of not guilty; *unless they disavow such inconsistent matter*, the guilty plea must fall as improvident. United States v. Lewis, 18 C.M.A. 287, 39 C.M.R. 287, 1969 CMA LEXIS 526 (C.M.A. Apr. 25, 1969). Generally, this seems to occur when the accused does so after a plea of guilty; however, in this case, the prosecutor

[5] [redacted] DeDolph's medical record transcript is included in the sentencing Defense Exhibits.

has absolutely impeached the pleas of guilty. The court should declare a mistrial as to the post plea proceedings and begin sentencing proceedings anew, to include requiring the prosecutor to disavow the two alternate causes of death presenting during the previous proceedings or the court should set aside the guilty plea.

Improper evidence in aggravation:

During the sentencing proceeding, the government introduced, over defense objection, speculative evidence that SSG [redacted] larynx was crushed during the hazing and, by clear implication, that the cricothyrotomy procedure was performed to *cover-up*, i.e. obstruct the investigation, into the hazing death of SSG [redacted]

The allegation of crushing of the larynx was in conflict with the medical examiner and the forensic anthropologist she consulted with at the medical examiner office and the defense forensic pathologist who also relied upon the medical examiner report and testimony and the forensic anthropologist report as well.

Over objection, the prosecutors improperly continued to pursue this speculative theory with their paid expert to both aggravate the death of SSG [redacted] to impeach the providency

(Care) inquiry, and seek a more aggravated sentence due to the pressure that would be required to crush a larynx vice compress a jugular or carotid. Again, this is a completely different theory of Strangulation. To point out the obvious, strangulation provides impeding the **normal breathing or circulation of the blood** of a person by applying pressure to the ***throat or neck***. These different theories are provided in the disjunctive not conjunction. For example, by applying pressure to the sides of the neck – [redacted] DeDolph's theory of pleading guilty and provided for in the stipulation of fact signed by the prosecutor (Garcia), you can not impede normal breathing. Further, applying pressure to the throat, the theory upon which the prosecutor argued at sentencing, cannot impede blood the circulation of blood.[6]

The prosecutors also spun the baseless theory that [redacted] DeDolph performed the cricothyrotomy procedure to obstruct the speculative larynx crushing in conflict with all of the evidence presented. Even the fact that the medical examiner had never seen a cricothyrotomy performed like that which was done on SSG [redacted] was explained by SO2 [redacted] (who was testifying under an order to cooperate and testimonial immunity) when he described the difficulty in the procedure and the fact the

[6] Recall the testimony of Dr. [redacted] – that applying the pressure to the jugular or the carotid restricts blood flow, i.e. the circulation of blood.

procedure continued while in the back of an SUV racing to a medical facility.

The argument of the prosecutor, as recalled by the undersigned without the benefit of a transcript, was:

A. The cricothyrotomy procedure was not needed if the larynx was not crushed; however, the uncontested evidence was that an advanced air-way is needed if breathing assistance is required for long term (hours), that a cricothyrotomy is an advanced air-way, and it was at least a 3-hour lead to medevac out of [redacted]

B. [redacted] DeDolph was a skilled medic; however, the uncontested evidence was that [redacted] DeDolph was a former medic (years ago) and was currently a Breacher, that the procedure was started under stressful conditions unlike that in combat, and that the procedure was finished in a moving SUV racing through third world streets toward a medical facility. Also uncontested was that something was done to SSG [redacted] body *after* [redacted] DeDolph left his side, as evidenced by, at a minimum, the fact the tube had been removed and a bandage of some sort had been applied. What remains unknown is who did what to SSG [redacted] body between the time after [redacted] DeDolph left his side and SSG [redacted] body arrived at the medical examiner's office.

C. That [redacted] DeDolph, by explicit or implicit implication, performed a botched cricothyrotomy, not because of the stress and sub-optimal conditions, but to cover-up the (speculatively) crushed larynx; however, the uncontested evidence was that SO2 [redacted] asked [redacted] DeDolph if the procedure was necessary, that the procedure was initiated, that [redacted] DeDolph was having difficulty getting the tube inserted into the prepared hole, that the evac vehicle was ready before the tube was inserted, and that the procedure continued in the evac vehicle as it raced through the streets.

The fact the cricothyrotomy was less than optimal and may have cause minor/non-life-threatening damage to SSG [redacted] larynx would be a matter relating to or resulting from the conduct of which the accused pleaded guilty; however, impugning a criminal motive (explicitly or implicitly) that was summarily rejected by the PHO as lacking probably cause is reversable error and should be remedied by granting the mistrial as to the post-findings phase of the trial.

Brady violation:

The court should look first at whether the government failed to disclose evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) and

R.C.M. 701. Criminal defendants must be given "a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984); *United States v. Webb,* 66 M.J. 89, 92 (C.A.A.F. 2008).

That guarantee requires the prosecution to disclose evidence that is material and favorable to the defense. Brady, 373 U.S. at 87; Webb, 66 M.J. at 92. Whether undisclosed evidence is "material" is a question of law, which revieing courts review de novo. United States v. Morris, 52 M.J. 193, 198 (C.A.A.F. 1999).

In this case, material evidence, with respect to a specific request, is that which "might have affected the outcome of the trial." See *United States v. Agurs*, 427 U.S. 97, 106, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976).

When an accused demonstrates error with respect to a Brady nondisclosure, that accused is entitled to relief only if there is a reasonable probability that there would have been a different result at trial had the evidence been disclosed. See *United States v. Santos*, 59 M.J. 317, 321 (C.A.A.F. 2004).

Rule for Courts-Martial 701, "which sets forth specific requirements with respect to evidence favorable to the defense... implements the Supreme Court's decision in *Brady v.*

Maryland...." *United States v. Williams*, 50 M.J. 436, 440 (C.A.A.F. 1999) (internal quotations and emphasis omitted). Rule for Courts-Martial 701(a)(6) directs the trial counsel to disclose as soon as is practicable... the existence of evidence known to the trial counsel which reasonably tends to:

> (A) Negate the guilt of the accused of an offense charged;
>
> (B) Reduce the degree of guilt of the accused of an offense charged; or
>
> (C) Reduce the punishment.

R.C.M. 701(a)(6).

The court is required to analyze nondisclosure issues under the statutory and executive order standards set forth by R.C.M. 701 and Article 46, UCMJ, which are broader than the Brady constitutional standard." *United States v. Trigueros*, 69 M.J. 604 (Army Ct. Crim. App. 2010), pet. denied, 69 M.J. 269 (C.A.A.F. 2010). See also *Santos*, 59 M.J. at 321; *United States v. Roberts*, 59 M.J. 323, 326-27 (C.A.A.F. 2004).

As a result, the government bears the higher burden of proving, as a matter of law, a nondisclosure in response to a specific request is harmless beyond a reasonable doubt. *Webb*, 66

M.J. 92; *Roberts*, 59 M.J. at 327. See also *United States v. Behenna*, 70 M.J. 521, 527-28 (A. Ct. Crim. App. 2011).

During the conduct of the pretrial phase, the defense filed standard and specific requests for discovery which will be forwarded to the court under a separate filing. Based upon information and belief, both the standard and specific requests for discovery encompassed theories and mechanisms of death. None were provided to the defense that impeached the providency (Care) inquiry.

Further, as set out above, the alternate mechanism of death as it pertains to suffocating would be a defense to the allegation as charged. Suffocation as a result of placing weight on the back of SSG [redacted] and at the same time SSG [redacted] face being pressed into a pillow is a complete and different mechanism of death. While it does not dimmish the tragedy of the unintentional death of SSG [redacted] it is a major variance to the offense as charged. In fact, it's a completely different theory of death, not just a mechanism, when reading in context the AR 27-9.

According to the evidence presented by the prosecutors, multiple people were on top of SSG [redacted] while they were wrestling on the bed, moving SSG [redacted] into a submission. If SSG Melgar's Death was not caused by strangulation, but instead

suffocation, [redacted] DeDolph may still well be responsible for his death – but not death by strangulation as charged.[7]

The defense was not alerted to this new cause of death until Dr. [redacted] testified at the sentencing hearing, which, as the court may recall surprised the defense and the court. This surprise alternate cause of death should have been disclosed to the defense as it clearly negates the guilt of the offense as charged, it reduces the degree of guilt as it pertains specifically to [redacted]DeDolph, and it would have clearly reduced the punishment if that were the mechanism of death.

Since this new information was not disclosed, a mistrial should be ordered by this court as to the sentencing proceedings.

5. Relief Requested: The defense respectfully requests that the Court direct a post-trial 39(a) session and order a mistrial for the proceedings that took place after findings.

6. Burden of Proof and Standard of Proof: Per R.C.M. 905(c), the defense has the burden on any factual issues by a preponderance of the evidence.

[7] It would strain credulity for the prosecution to intimate to the court that the charged cause of death was other than the chokehold described paragraph 10 of the stipulation.

7. Evidence: The defense encloses the following in support of its motion:

A. PE 1

B. Excerpts trial transcript

C. The defense requests the production of Dr. [redacted] to testify on the motion – remote testimony is acceptable

D. [redacted] DeDolph will testify at the motion

E. Discovery Requests served

8. Argument: The defense requests oral argument. In an email sent by the court prior to this amended motion, the court properly pointed out the change in the rule regarding compulsory motion hearings when oral argument is requested. I submit that *Brown v. United States*, 79 M.J. 833, 847 (N-M Ct. Crim. App. 2020) citing *United States v. Savard*, 69 M.J. 211, 212-13 (C.A.A.F. 2010) is still informative as to the importance of holdling hearings on significant matters such as this motion hearing.

/s/
Phillip Stackhouse
Civilian Defense Counsel

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I certify that I caused a copy of the original document to be served on the Court and opposing counsel this February 15, 2021.

/s/
Phillip Stackhouse
Civilian Defense Counsel

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

U N I T E D S T A T E S **v.** **TONY DEDOLPH** **E-1/SOSR USN**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO FOR POST-TRIAL MISTRIAL** **24 FEB 21**

MOTION

The Government requests the Court deny Defense's motion in its entirety.

SUMMARY

The Government submits the Defense motions to reconsider the Court's rulings with respect to evidence in aggravation have been forfeited under Rule for Courts-Martial 905, should not be reconsidered, and were properly decided.

The Government further submits the mistrial motion should be denied because no discovery or *Brady* violation occurred, because the Defense affirmatively waived the issue, and because no prejudice remains, even if a violation did occur.

FACTS

1. The Accused placed SSG [redacted] in a chokehold, while SSG [redacted] resisted and while pressing SSG [redacted] face-down into his bed. (Testimony of SO2 [redacted] Pvt [redacted]

2. SSG [redacted] went unconscious after the Accused applied a chokehold to him. (Testimony of the Accused, SO2 [redacted] and Pvt [redacted]

3. SSG [redacted] died of asphyxiation. Asphyxiation is the deprivation of oxygen from the brain, which can occur from either the blood supply to the brain or the air supply of a victim being compromised. (Prosecution Exhibit 3, Testimony of Dr. [redacted] and Dr. [redacted]

4. After the conspirators had recognized SSG [redacted] was non-responsive, they began to remove his restraints, and moved him onto his back, on the bed. Resuscitation efforts began immediately thereafter, in the form of CPR, and the gate guards were removed from the room. (Testimony of SO2 [redacted] and Pvt [redacted]

5. The Marines were directed to get a defibrillator, and left the room. At some point thereafter, SO2 [redacted] and the Accused moved SSG [redacted] to the floor, and continued to perform CPR. Throughout the resuscitation efforts, neither SO2 [redacted] nor the Accused identified any response, to include breathing or a pulse from SSG [redacted] (Testimony of SO2 [redacted] the Accused)

6. The floor was a flat, even surface, without any significant obstructions. (Testimony of SO2 [redacted], Prosecution Exhibit 4 at 4-5).

7. There was electrical lighting in the room. (Testimony of SO2 [redacted] PE 4 at 2)

8. The Accused initiated a supposed "cricothyrotomy" after several minutes of resuscitation efforts, while SSG [redacted] was lying on the floor (Testimony of SO2 [redacted]

9. The cricoid cartilage is a hyaline cartilage ring which fully encircles the trachea, and is the first ring below the thyroid cartilage. The thyroid cartilage is the thicker layer of cartilage which forms the larynx and laryngeal prominence "Adam's Apple," and is the thickest structure and cartilage of the windpipe. The cricothyroid membrane is just below the thyroid cartilage, and is just made of ligament. (Testimony of Dr. [redacted]

10. A cricothyrotomy is an incision made through the skin and cricothyroid membrane to establish a patent airway, conducted when the obstructed airway is indicated, in order to create an airway below the obstruction. (Testimony of Dr. [redacted]

11. Cutting through the cricothyroid membrane to create an airway is relatively easy, whereas cutting through cartilage is more challenging. (Testimony of Dr. [redacted] and Dr. [redacted]

12. The larynx and thyroid cartilage are important, as they provide structure for the trachea. (Testimony of Dr. [redacted]

13. A cricothyrotomy is an emergency battlefield procedure, medically indicated when there is an obstruction to an airway. (Testimony of Dr. [redacted] Dr. [redacted] Dr. [redacted]

14. The "cricothyrotomy" performed in this case cut through the entire front of the thyroid cartilage and larynx, laterally cutting it in half. There were multiple cuts and incisions, with evidence of jagged cutting. (Testimony of Dr. [redacted] Prosecution Exhibit 3)

15. The damage to the larynx and neck was substantial, ripping open the entire larynx. (Prosecution Exhibit 2 for identification)

16. Dr. [redacted] Dr. [redacted] and Dr. [redacted] collectively, have performed approximately 15,000 autopsies. Dr. [redacted] and Dr. [redacted] has supervised many more as Chief Medical Examiners. None had ever seen a "cricothyrotomy" placed in a manner like it was in this case. (Testimony of Dr. [redacted] Dr. [redacted] and Dr. [redacted]

17. The Accused manipulated and felt the neck prior to beginning the "cric". Prior to commencing, SO2 [redacted] asked him if he was sure, and the Accused claimed he "needed to do this." (Testimony of SO2 [redacted]

18. After the Accused commenced the "cric" and created an incision in the airway, he was unable to insert a breathing tube into SSG [redacted] (Testimony of SO2 [redacted]

19. After the Accused had begun the "cric" and made an incision, he and others decided to transport SSG [redacted] to "Clinique Pasteur", a nearby medical facility, where they had been directed by embassy medical personnel. (Testimony of SO2 [redacted]

20. The Accused, SO2 Matthews and SFC [redacted] transported SSG [redacted] to a truck, after the "cricothyrotomy" has been started, but before the Accused had inserted a breathing tube into SSG [redacted] The Accused continued working on and cutting SSG [redacted] body while the vehicle drove to the clinic. (Testimony of the Accused, SO2 [redacted]

21. Prior to the "cric" SO2 [redacted] had been administering rescue breaths to SSG [redacted] successfully, albeit with difficulty. (Testimony of SO2 [redacted]

22. The Accused was able to communicate clearly and cogently with his co-conspirators before, during and after the "cric" procedure commenced. No one observed evidence of irrationality, confusion, shaking or other signs of panic on the part of the Accused. (Testimony of SO2 [redacted] Pvt [redacted]

23. The Accused was a prior Hospital Corpsman and had attended "18 Delta" training as a Special Operations Medic. (Testimony of Mr. [redacted] Defense Exhibits)

24. 18 Delta training is the best medical training available to enlisted personnel. The Accused was an honor graduate from his 18 Delta class. (Testimony of Mr. [redacted])

25. The Accused was an exceptional and trusted medic. (Testimony of Mr. [redacted] SO2 [redacted]

26. SO2 Matthews deferred to the Accused as the medic. The Accused continued to maintain a medical bag in [redacted] which included a cricothyrotomy kit. (Testimony of SO2 [redacted]

27. The Accused has extensive experience with extremely stressful situations, to include: engaging in close quarters combat and receiving fire (to include being struck by enemy fire), racing to victims of an IED blast while still under threat of mines or IEDs, and treating a victim who had lost his legs in the blast. The Accused had been on multiple extended and stressful deployments, in challenging conditions. He repeatedly evidenced an ability to stay collected and professional while in the most stressful situations, and he has evidenced no tendency to panic under stress. (Testimony of Mr. [redacted] and CWO3 [redacted]

28. Extensive hemorrhaging was identified in the strap muscles of the neck (along the windpipe). Hemorrhaging is caused by blood entering the tissue. It can be caused by blunt force trauma, or by an incision. Hemorrhaging requires blood pressure to occur, by forcing the blood into tissue. (Prosecution Exhibit 22, Testimony of Dr. [redacted] Dr. [redacted] and Dr. [redacted]

29. Blood follows the path of "least resistance"—when there is an incision, this is normally to the open air (outside the body), as that is an easier path than into tissue. (Testimony of Dr. [redacted]

30. No significant amount of blood was found in the trachea or on the floor where the Accused cut into SSG [redacted] neck. (Testimony of Dr. [redacted] Prosecution Exhibit 4)

31. Muscle tissue hemorrhage was also identified near a cartilage "horn" connected to the thyroid cartilage, more distant from the windpipe and incision. (Testimony of Dr. [redacted] Dr. [redacted] and Prosecution Exhibit 22)

32. Retropharengeal hemorrhaging, deeper in the neck, was also identified in the autopsy. (Testimony of Dr. [redacted] and Dr. [redacted]

33. During rescue breaths, SSG [redacted] body made a fleshy "snoring" sound as the breath left the body. (Pvt [redacted]

34. The autopsy identified a dangling piece of cartilage found in the airway. (Testimony of Dr. [redacted] Prosecution Exhibit 3)

35. During a "blood" chokehold, given resistance, the chokehold can be converted to a "bar" chokehold (where the forearm presses against the airway), placing pressure against the windpipe. (Testimony of Dr. [redacted] and Dr. [redacted]

36. A "bar" chokehold can collapse the trachea if sufficient force is used. (Testimony of Dr. [redacted] and Dr. [redacted]

37. The diaphragm uses "negative pressure" to pull air into the lungs. The windpipe is made of cartilage, which is flexible—if it is broken or compromised, that negative pressure can pull the airway closed, cutting off the air supply. In contrast, rescue breaths use positive pressure to blow air into the lungs, which can, with some effort, open the airway. (Testimony of Dr. [redacted]

38. A blood chokehold cuts off blood flow to the brain, causing unconsciousness in just a few seconds. If blood flow is fairly quickly re-established, and the blood is oxygenated, a victim should regain consciousness. However, if their air supply is restricted, their blood may not re-oxygenate, and they will not regain consciousness. (Testimony of Dr. [redacted]

39. While unconscious, a victim may not be able to engage in reflexive behavior to re-establish an air supply (such as turning one's head) or otherwise signal for help or rescue. (Testimony of Dr. [redacted]

40. In prior filings, motions hearings and the Article 32 hearing, the Government repeatedly emphasized the evidence of the Accused pressing SSG [redacted] face into the bed while strangling him. (Enclosure 2 at 3, Appellate Exhibits)

41. The Government previously specifically argued, in writing, copied to Defense, that the Accused was "simultaneously choking and likely suffocating SSG [redacted] by pressing his face into bedding." (Enclosure 1)

42. The Government specifically argued, in writing, copied to Defense, that the most plausible explanation of an obstruction to the airway was that the Accused's chokehold collapsed SSG [redacted] trachea by placing pressure on the laryngeal prominence (the Adam's Apple). (Enclosure 1) This was sent in writing to the Defense on 7 August 2019. (Enclosure 1 and 2)

43. Dr. [redacted] and Dr. [redacted] both testified that in their medical opinion, there was evidence of blunt force trauma to the neck. (Testimony of Dr. [redacted] and Dr. [redacted]

44. The forensic anthropologist noted secondary manipulation of the neck (such as during the "cric") could have caused damage to the cartilage. The forensic anthropologist did not exclude blunt force trauma as a cause. (Testimony of Dr. [redacted]

45. Through the Article 32 process, the Government advanced the theory that the Accused had collapsed the victim's trachea with his chokehold, and conducted a cricothyrotomy in order to, at least in part, conceal it. (Enclosure 1)

46. The Government identified Dr. [redacted] and Dr. [redacted] as witnesses on its pretrial matters as witnesses for the presentencing hearing. (Appellate Exhibit) The Defense did not object to any absence of notice with regards to their appearance as expert witnesses in this case.

47. The Accused and the Government stipulated to the following with respect to Charge IV (Involuntary manslaughter):

> - While in [redacted] and while perpetrating an assault consummated by a battery, the Accused caused the death of SSG [redacted] by placing him in a chokehold as part of a hazing.
> - The Accused placed SSG [redacted] in a chokehold on 4 June 2017.
> - At the time that SSG [redacted] died, the Accused was engaged in an assault consummated by a battery against SSG [redacted] as part of a hazing—specifically, the Accused knowing and intentionally had him in a chokehold. SSG [redacted] death is the result of the Accused placing him in a chokehold.
> - The chokehold cause bodily harm to SSG [redacted] was done with unlawful force, and was done without legal justification or excuse.
> - SSG [redacted] death was without legal justification or excuse.
> (Prosecution Exhibit 1 at 3)

BURDEN

Pursuant to R.C.M. 905(c), the Defense bears the burden of persuasion by a preponderance of the evidence.

TABLE OF AUTHORITIES

United States v. Terlep, 57 M.J. 344 (C.A.A.F. 2002)
United States v. Howell, 2019 CCA Lexis 248 (N.M.C.C.A. 2019) (unpub)
United States v. Scaff, 29 M.J. 60 (C.M.A. 1989)
United States v. Kunishige, 79 M.J. 693 (N.M.C.C.A. 2019)
United States v. Webb, 66 M.J. 89 (C.A.A.F. 2008)
*United States v. Bobroff*23 M.J. 872 (N-M.C.M.R. 1987)
United States v. Shupe, 36 M.J. 431 (C.M.A. 1993)
United States v. Martin, 20 M.J. 227 (C.M.A. 1985)
United States v. Vickers, 13 M.J. 403 (C.M.A. 1982)
United States v. Fosler, 70 M.J. 225 (C.A.A.F. 2011)
Hamling v. United States, 418 U.S. 87 (1974)
United States v. English, 79 M.J. 116 (C.A.A.F. 2019)
United States v. Garces, 32 M.J. 345 (C.A.A.F. 1991)

LAW AND ARGUMENT

Although titled as a motion for mistrial, the Defense filing is functionally two separate requests. The Defense essentially asks the Court to reconsider and reverse itself with respect to the Court's rulings on permissible argument and evidence in aggravation (as this Court previously considered and denied Defense objections on those questions). Second, the Defense moves for a mistrial under Rule for Courts-Martial 915, due to an alleged *Brady* violation, (and the sentencing evidence and argument, if the prior ruling of the Court is reconsidered and reversed). For the reasons set forth below, the Court should deny these requests.

A. <u>The Defense motion is not appropriate under R.C.M. 1104, as no post-trial matters have arisen which need to be addressed</u>.

Rule for Courts-Martial 1104(a) allows a military judge to direct a post-trial 39(a) session before the entry of judgment, for the purpose of inquiring into matters that arise after trial that substantially affect the legal sufficiency of any findings of guilty or the sentence. None of the matters that the Defense raises in its motion have arisen after trial, and therefore do not fit within the purpose of Rule for Courts-Martial 1104.

Rule for Courts-Martial 1104(b) authorizes other post-trial motions, but does not authorize a motion for the matters raised by Defense counsel. As a result, Rule for Courts-Martial 1104 does not authorize a post-trial 39(a) for the matters raised by the Defense's motion, absent some matter which has arisen post-trial which must be addressed. If this motion is to be considered, it is as a matter of discretion under Rule for Courts-Martial 915(a).

B. <u>The Defense has forfeited the motions and objections</u>.

Per Rule for Courts-Martial 905(e), motions (except lack of jurisdiction or failure to state an offense) must be raised before adjournment of the court-martial. Failure to do so forfeits the motion.

The court-martial was adjourned on 23 January 2021. As such, the motions to reconsider have been forfeited.

The motion for a mistrial, based on information known during the proceedings, should likewise be considered forfeit. The alleged "*Brady*" violation, even crediting the Defense pleading,[1] was known days prior to the sentencing argument and adjudged sentence in this case. Rather than seek a continuance or file a motion for any other remedy, the Defense elected to proceed through sentencing, and has only filed this motion after receiving a sentence and adjournment. By knowingly doing so, they have forfeited and waived their motion.[2]

Per *United States v. Scaff*, and its progeny, the military judge does have the authority under Article 39(a) to hold a post-trial hearing to consider newly discovered evidence and to take what remedial action is appropriate.[3] However, there is no newly discovered evidence in this case.

The Government also notes but distinguishes the recently NMCCA case *United States v. Kunishige*,[4] which dealt with post-trial litigation (and request for a mistrial) surrounding a discovery violation regarding member selection. The NMCCA found that the Accused had not waived the issue. However, in *Kunishige,* as in *Scaff*, the litigation centered around matters which arose after adjournment, and there is no apparent analysis of Rule for Courts-Martial 905 in the decision.

In this case, the Defense has not identified new evidence or anything else which arose following adjournment which the Court must address.

The Government notes that Rule for Courts-Martial 915(a) may give the Court the discretion to entertain a post-trial mistrial motion. However, given the posture of the case and the points above, the Government submits that the Court should, in its discretion, elect not to do so.

C. <u>The motions to reconsider should be denied</u>.

The Defense has not identified any new facts or law which was not properly considered by the Court in the prior rulings, nor has it pointed to any evidence on the record which was not properly considered in the Court's prior rulings.

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[1] Although the Government argues, *infra*, that the Defense was on notice of the issue of suffocation since 2019, and no *Brady* violation occurred.
[2] *See infra* for a discussion of comparable waiver in *United States v. Howell*, 2019 CCA Lexis 248 (N.M.C.C.A. 2019).
[3] 29 M.J. 60, 65-66 (C.M.A. 1989). See also *United States v. Webb*, 66 M.J. 89 (2008).
[4] 79 M.J. 693 (N.M.C.C.A. 2019).

As such, the motions to reconsider, if not forfeit, should simply be denied.

D. <u>The Government evidence did not impeach the Accused's guilty plea</u>

During the guilty plea inquiry, the Accused testified that he placed SSG [redacted] in a blood chokehold (causing a "bloodchoke"), while wrestling to get control of him. He testified that SSG [redacted] struggled against his chokehold, and was rendered unconscious. He testified that it was not consensual, and that the chokehold was an assault and battery. And he agreed that the strangling caused the death of SSG [redacted] When asked by the military judge about causing SSG [redacted] death, the Accused did not explain or identify a particular mechanism in the cause of death, but simply noted that their forensic pathologist had reviewed the case, and said he had caused SSG [redacted] death.

The Government introduced further evidence in its case that the Accused inflicted blunt force trauma during his strangling of SSG [redacted] which collapsed SSG [redacted] windpipe. Dr. [redacted] also noted that by strangling SSG [redacted] while pressing his face into bedding, the Accused was heightening the risk of harm to SSG [redacted] by creating a suffocation risk.[5] Dr. [redacted] opined, and the Government argued, that if the airway was blocked (either by suffocation and/or due to a crushed windpipe) then SSG [redacted] would not be able to regain consciousness or recover naturally from a bloodchoke, as his blood would not be able to re-oxygenate, which would lead to death by asphyxia.

<u>1. The Government evidence did not impeach the Accused's pleas of guilty or contradict the stipulation of fact.</u>

The Government did not impeach the basis for the Accused's guilty plea. The Government's evidence and argument agreed with the elemental aspects of his *Care* inquiry: that he was strangling SSG [redacted] that doing so was an assault and battery, and that it caused the death of SSG [redacted] The Government further agreed the Accused performed a bloodchoke on SSG [redacted] which the Government maintains was a proximate cause of SSG [redacted] death.

Perhaps non-intuitively, rather than undercutting the *Care* inquiry, the Government evidence actually bolsters the Accused's plea. The Accused did not provide a mechanism for the cause of death when testifying about strangling SSG [redacted] although he agreed his strangulation killed SSG [redacted] The Government's evidence provides a clearer explanation which explains how the actions and elements of the Accused's plea led to the death of SSG [redacted] The Government's evidence is in line with, and in addition to, all of the statements with the stipulation of fact.

The Defense presumably believes the Government evidence is conflict with the stipulation of fact[6], where it states "SSG [redacted] death is the result of my placing him in a chokehold." As noted repeatedly, the Government believes the chokehold was a proximate cause of SSG [redacted] death, introduced evidence to that end, and argued the same. The

[5] Defense counsel claims these were "two heretofore undisclosed theories of [redacted] DeDolph causing SSG [redacted] death". As noted in the facts above and the enclosures, this is, bluntly put, untrue.
[6] Prosecution Exhibit 1 at 3.

Defense has not otherwise identified any conflict between the Government evidence and the stipulation of fact.

As noted at trial, the Government may not contradict facts it has stipulated to or undercut the factual basis for the guilty plea,[7] and it did not do so in this case. The Government is not otherwise bound by the statements of the Accused in the providency inquiry.

In *United States v. Terlep*,[8] the Court of Appeals for the Armed Forces held that while Rule for Courts-Martial 811(e) prohibits parties from contradicting a stipulation of fact, it does "not prohibit trial counsel from presenting evidence as to aggravating facts not expressly or implicitly covered by [the] stipulation."[9] *Terlep* also held "[g]enerally speaking, stipulations of fact do not prohibit proof of facts which are neither designated nor necessarily implied in the stipulation."[10] As noted at trial, the Government introduced evidence which went beyond the stipulation of fact, but not evidence which contradicted it. The evidence was admitted over Defense objection, and the Accused did not move for reconsideration.

2. U.S. v. Bobroff is not analogous to the pleas in this case

The Defense cites to *United States v. Bobroff*,[11] although it is not entirely clear to what end. The Defense appears to suggest that the argument regarding the "cric" being used to destroy evidence was a new "theory" of obstruction of justice which was not in line with providency, and which therefore gave the Court cause to reject the Accused's guilty plea.[12] This either misapprehends the evidence introduced in the hearing, the holding of *Bobroff*, or both.

First, the Government theory regarding the "cric" wasn't a theory or interpretation of the specification of Obstruction of Justice which the Accused pled to. It was uncharged misconduct which was an aggravating circumstance directly relating to and resulting from the offenses to which the Accused was found guilty, under Rule for Courts-Martial 1001(b)(4).

In *Bobroff*, the accused was charged with multiple specifications of distributing marijuana, and attempted to plead guilty despite the opposition of the Government.[13] The accused attempted to offer up other instances of misconduct for a plea—that is, instances where he simply passed around a marijuana joint among friends, rather than the for-profit transactions that the Government insisted were the basis of the specifications, and which the Government insisted were completely unrelated to the accused's factual scenario. The military judge rejected the accused's pleas of guilty when he learned the accused's factual basis for his pleas had

[7] The Government would note that Article 45 and the related case law cited by Defense (*Clark, Lewis)* only apply to the Accused and Defense counsel, certainly the Government should not introduce evidence which undermines the verdict of the Court or otherwise is inconsistent with the Accused's pleas of guilty.
[8] 57 M.J. 344 (C.A.A.F. 2002).
[9] 57 M.J. at 348. In *Terlep*, the accused pleaded guilty (and entered a stipulation of fact) to an assault and battery and the trial counsel introduced evidence of the rape of the assault victim.
[10] 57 M.J. at 349.
[11] 23 M.J. 872 (N-M.C.M.R. 1987).
[12] Defense motion at 9.
[13] 23 M.J. at 872.

nothing to do with the Government's case, and the Navy-Marine Court of Military Review held the military judge rejected it with good cause.[14]

Bobroff is not analogous because that accused was not pleading guilty to a minimized version of the Government's theory—but rather, to a wholly different crime than the government charged. The accused in *Bobroff* was attempting to plead guilty (over the objection of the Government) to instances of similar but distinct misconduct which were wholly unrelated to the charged misconduct. *Bobroff* would only be analogous if the accused had offered to plead guilty to the exchanges actually charged in the specifications, but simply neglected to describe them as for-profit cash transactions, and failed to explain the full weight exchanged.[15] Had that happened, the Court would have likely have accepted his pleas and allowed the Government to introduce the evidence, as per *United States v. Shupe*.[16]

In this case, *Shupe* is analogous. The Accused pleaded guilty to the charges and specifications alleged—and the specific instance charged—and met every element of each offense, but minimized his culpability. The Government then introduced evidence in aggravation to show the full impact and nature of the crimes.

E. <u>The evidence and argument that the Accused crushed SSG [redacted] windpipe was appropriate evidence in aggravation</u>

The Defense claims in their motion that the allegation of crushing the larynx was in conflict with the medical examiner, Dr. [redacted] and the forensic anthropologist she consulted with. This is simply inaccurate. Dr. [redacted] testified there *was* evidence of blunt force trauma to the neck (consistent with crushing of the windpipe). The anthropologist she consulted with did identify other potential causes (e.g., secondary manipulation of the neck), but they did not exclude blunt force trauma. Further, Dr. [redacted] noted that the destruction caused by the "cric" ripping through the larynx had destroyed much of the evidence, making it hard to tell conclusively.

Dr. [redacted] the Government's forensic pathologist, identified eight different items of evidence which supported his conclusion of the blunt force trauma which crushed the windpipe.[17] Although the Defense forensic pathologist disputed this conclusion, he only cited potential alternate causality for two of the items (the dangling cartilage in the airway and the extensive hemorrhaging of the strap muscles), and did not address the other six. Moreover, he

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[14] 23 M.J. at 873-4.

[15] Or, for instance, if the Accused in this case had attempted to plead guilty to the hazing by offering up a completely separate day where he lightly teased SSG [redacted] unrelated to his assault and killing of SSG [redacted]

[16] 36 M.J. 431, 432-35 (C.M.A. 1993).

[17] They were 1) the difficulty noted in getting rescue breaths into SSG [redacted] (from SO2 [redacted] testimony), 2) the blood which sprayed onto SO2 Matthews' face from a rescue breath, evidencing trauma in the airway (from SO2 [redacted] testimony), the fleshy "snoring" sound created by the rescue breaths evidencing an obstruction (from Pvt [redacted] testimony), the dangling cartilage found in the airway in the autopsy (from the Dr. [redacted] testimony), the extensive hemorrhaging to the strap muscles of the neck (from the PE 22), the hemorrhaging around the "horn" cartilage in the neck (also from PE 22), the deeper "retropharengeal" hemorrhaging (from Dr. [redacted] and Dr. [redacted] testimony), and the description of the violent strangling of SSG [redacted] while he was resisting (multiple witnesses, including the Accused).

was identifying an alternate potential cause (the cutting of the larynx)—he did not identify any significant evidence which contradicted blunt force trauma.

Finally, unlike Dr. [redacted] Dr. [redacted] was cross-examined, and on cross-examination, he acknowledged that the hemorrhaging was extensive, that hemorrhaging would be significantly limited after SSG [redacted] no longer had a heartbeat (when the cutting of the larynx occurred) and that there was no significant bleeding which would correspond to hemorrhaging due to the cutting of the larynx (vice blunt force trauma). He also acknowledged that a cricthyrotomy was medically indicated when there was an obstruction to the airway, and there was no evidence discovered in the autopsy of an obstruction above the larynx.

In short, although the Defense describes the evidence of SSG [redacted] larynx being crushed as "speculative" they fail to grapple with the fact that the weight of the testimony and evidence supports the Government's theory over the Defense's.

The Accused's plea does not prohibit the Government from admitting evidence of uncharged misconduct which are circumstances directly relating to or resulting from the offenses to which the accused has been found guilty. *United States v. Shupe*[18] is instructive: where the accused pleaded guilty to a small and more limited conspiracy selling 10 doses of LSD on one occasion, and the Government dismissed other specifications and languages demonstrating the greater extent of the conspiracy. The Government then introduced evidence of the greater extent of the conspiracy.[19] The Court of Appeals for the Armed Forces held it was proper aggravation evidence under 1001(b)(4) to show the full nature and impact of the charged conduct.[20]

Likewise, here, the evidence of the blunt force trauma to the neck and the crushed windpipe is admissible aggravation evidence, directly relating to the offense to which the Accused was found guilty, which shows the full impact and nature of the charged conduct.

F. <u>The evidence and argument presented regarding the "cric" was appropriate evidence in aggravation</u>

As a review, significant evidence was introduced regarding the nature of the cricothyrotomy ("cric") performed in this case, and generally. A "cric" is an emergency battlefield procedure, employed when there is an obstruction to the airway which requires intervention, such as serious facial trauma from an explosive blast.

Here, the Accused laterally cut through the entire larynx of SSG [redacted] ostensibly to perform a "cric". Evidence noted this was not a minor variation or slight error. A "cric" should create an entry through the ligament between the thyroid cartilage and cricoid ring of cartilage, in effect cutting through the least amount of tissue to create an entry to the windpipe, and minimizing the damage. In contrast, the Accused cut through the single largest and thickest piece of cartilage in the windpipe—the thyroid cartilage and the larynx. This cutting, rather than

[18] 36 M.J. 431 (C.A.A.F. 1993).
[19] 36 M.J. at 434-36.
[20] 36 M.J. at 436.

being a simple incision through ligament, required repeated (and jagged) cutting through the cartilage.

A medical examiner and two forensic pathologists (prior medical examiners)—who between them had handled ~15,000 autopsies—all testified. Each agreed a "cric" was indicated where there was an obstruction to the airway, to be placed below the obstruction. None identified any evidence of any obstruction above the site of the "cric" in this case. None had ever seen a "cric" applied (or misapplied) in this manner. The extensive damage caused by the "cric" made determination of blunt force trauma and damage to the cartilage tissues significantly more difficult to analyze.

The Accused performed the "cric" while SSG [redacted] body was on a flat surface, in a bedroom with electric lighting. The room was a controlled environment, without any threats present. The Accused elected to continue the "cric" later in a truck, a moving vehicle, while driving to a clinic which was preparing to receive SSG [redacted]

The Defense introduced evidence highlighting multiple instances of the Accused acting capably and resolutely under pressure and stress, to include receiving enemy fire, being threatened by nearby IEDs, and dealing with patients with the most grievously life threatening wounds. In this instance, prior to the "cric", resuscitation efforts had been underway for 10-15 minutes. During this time, the Accused had not obviously panicked, and continued to act and speak in a coherent manner. When performing the "cric", he was able to consider his actions, physically examine the scene of the incision prior to cutting, and answer questions about his actions before beginning.

The Accused's prior rate was Hospital Corpsman. He had attended special operations' "18 Delta" medic training, considered the best medical training available to enlisted operators, and he was an honor graduate. Again, the Defense presented extensive evidence that the Accused was an exceptional and trusted medic—including by those present at the killing of SSG [redacted]

Given the Defense's repeated claims the Government's inferences on the facts are "baseless", it is worth considering the relative plausibility of their proposed version of events.

The Defense argues that the "cric" was performed, *not* as a life-saving emergency procedure due to an obstructed airway, but simply to provide a more convenient airway for rescue breaths in anticipation of what could potentially be a long-distance medical evacuation (medevac).

The Defense also suggests that the Accused was not especially competent to perform the procedure, arguing he had not actively acted as a medic in years. And the Defense suggests the conditions where the "cric" was performed were undesirable (despite evidence that this is a *battlefield* procedure).

Despite these limitations, the Defense argues that the Accused was nevertheless conducting the procedure, *when it was not urgently necessary,* and the Accused, from pressure or

incompetence, performed the "cric" incorrectly. However, after the Accused had started and compromised the airway, but before the Accused had established a new airway, the Accused *paused* mid-procedure to transport SSG Melgar to the clinic, and then continued the "cric" while in a moving vehicle. As such, he was being transported *without a functioning airway,* to be operated upon in moving vehicle, for a procedure that under the Defense theory, wasn't medically urgent, and where superior facilities and medical personnel would shortly be available.

It does not require a medical professional to understand that the victim is exceptionally vulnerable mid-procedure, while there is no functioning airway. Reasonable life-saving efforts would make it imperative to complete the procedure and re-establish an airway as soon as possible—and certainly *before transport*—and to do so in the relatively optimal conditions of a flat surface in a controlled room with an electric light source.

In summary, the Defense theory is that in anticipation of a possible extended medevac, the Accused elected to perform a "cric" when no airway obstruction existed (and thus was not medically indicated), even though SSG [redacted] was about to be transported to a medical facility. Further, he started the "cric" in fairly optimal conditions, and compromised the airway, but then elected to pause *mid-procedure*, move him to a truck while there was no functioning airway, and then continue the procedure in the moving vehicle.

The Government argued that an obstruction did exist (because the windpipe was collapsed by the Accused's poorly placed chokehold), and that the Accused elected to cut *at* the location of the obstruction (the larynx) rather than below it, prior to going to the medical facility (where other medical professionals would be able to examine the injury).

The Defense concedes in its motion that evidence of the misapplication of the "cric" would be admissible in sentencing, but submits that the above Government theory regarding the purpose is impermissible.

Respectfully, the Government submits that its theory is a reasonable inference given the evidence adduced, and in this case, is a more sensible explanation of events than that proffered by Defense.

The Defense suggests that because this obstruction of justice had previously been included in charged language which was dismissed without prejudice,[21] that the Government is somehow barred from admitting the evidence in sentencing. They cite no case law for this proposition, and the general law is that the pleas of the accused do not control what may be admitted as proper aggravation evidence.[22]

G. No Brady violation occurred

The Defense claims that the Government failed to give it notice that the nature of the Accused's assault on SSG [redacted] risked killing SSG [redacted] by suffocation (in addition to the

[21] At the request of the Government and per the recommendation of the Preliminary Hearing Officer.
[22] *See Shupe, supra; see also United States v. Martin,* 20 M.J. 227 (C.M.A. 1985) and *United States v. Vickers*, 13 M.J. 403 (C.M.A. 1982).

other means of asphyxia). The Defense states that suffocation, if it occurred, would be a defense to the allegation, and that variance would be impossible.

Significantly, the Defense does not appear to submit that they were unaware of the possibility of suffocation in this case. Moreover, the Defense did not describe or submit any sort of prejudice to the Accused as a result of the purported *Brady* violation.

It is axiomatic that "[t]he military is a notice pleading jurisdiction."[23] Fundamentally, the Government must place the Accused on notice of the elements of the offense charged, and fairly inform the Accused of the charge against which they must defend themselves.[24]

In the present case, the Government has alleged all of the necessary elements to Involuntary Manslaughter (and the Defense does not allege otherwise). The Government alleged the act the Accused committed which led to SSG [redacted] death—strangling him with a chokehold. As a result, the Accused was on notice of all of the elements of the crime, and the actions in question (and in the case of the Involuntary Manslaughter, the underlying crime of Assault and Battery).

The Defense seems to believe that if it could demonstrate that the Accused killed SSG [redacted] with his actions by some other related means, such as breaking his neck during the strangling, causing a heart attack through the assault, or suffocating him in the bedding while strangling him, that it would constitute a "defense" to the allegation. The Defense is mistaken.[25]

Rule for Courts-Martial 918(a)(1) allows variance so long as it does not substantially change the nature of the offense.[26] In every example where the Accused, in the course of the Assault and Battery (the strangulation) kills the Victim through his assault, the nature of the offense is substantially the same. While strangling SSG [redacted] and while committing an Assault and Battery against him, the Accused killed him with said assault. The fact that there were multiple risk factors for asphyxia in the Accused's assault is not a legal defense nor exculpatory. As noted in this case, multiple overlapping causes of asphyxia could be present in the cause of death. The notion that the Accused was cutting off both the blood *and* air flow of SSG [redacted] is somehow a defense to the allegation is absurd—in so much as the Accused was clearly on notice with respect to the elements and relevant acts involved.

Regardless, the Defense was on notice of the risk factor of suffocation in the assault of SSG [redacted] and knew or reasonably should have known that the Government would present such evidence. It is without merit to suggest that the Government somehow hid such evidence from the Defense. The risk factor was self-evident, the general nature of the risk was repeatedly noted by the Government, relevant experts were made available to the Defense, and the Government had previously specifically identified that the Accused was likely suffocating SSG [redacted] while he was strangling him.

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[23] *United States v. Fosler*, 70 M.J. 225, 229 (2011)
[24] *Hamling v. United States*, 418 U.S. 87, 117 (1974)
[25] And cites no case law supporting this theory.
[26] *United States v. English*, 79 M.J. 116, 121 (2019)

In multiple different examinations, *in the presence of current Defense counsel*, the Government repeatedly reaffirmed the danger presented to SSG [redacted] by the Accused applying a chokehold while on top of SSG [redacted] and pressing SSG [redacted] face into the bedding. It does not require a forensic pathologist to recognize the obvious danger of obstructing SSG [redacted] airway.

Moreover, the Government approved an extremely experienced forensic pathologist for the Defense, and specifically engaged with Defense to coordinate any desired pre-trial interviews of Dr. [redacted] the Government forensic pathologist. This likely explains why, during the examination of Dr. [redacted] the Defense asserted the recess provided to confer with their own expert was sufficient, and then elected *not to cross-examine Dr.* [redacted]

Finally, although obvious, the Government also overtly mentioned the risk factor of suffocation to Defense, in writing, commenting on the facts presented in the Article 32 report (sent to Defense) that:

> "[t]hese facts, [] indicate [redacted] Dedolph simultaneously choking and likely suffocating SSG [redacted] by pressing his face into bedding…"

Although the Defense claims in their motion that both theories (the crushing of the windpipe and the heightened risk presented by pressing SSG [redacted] face into the bedding) were "hitherto undisclosed", both had been presented as parts of the Government's theory of the case from August of 2019, and the presented to the Defense in writing.

The Defense was fully on notice, and no *Brady* violation of any sort occurred.

H. <u>The appropriate remedy for any discovery violation in this case was already provided, and would not be a mistrial</u>

As noted above, the Defense has not identified any prejudice from the purported *Brady* violation, let alone any which could justify a mistrial.

During the cross-examination of Dr. [redacted] Defense counsel was offered a recess to confer with their forensic pathologist, Dr. [redacted] Defense counsel used that recess (at least thirty minutes). They indicated the time to confer was sufficient and did not request any further time. The Defense then elected *not* to cross examine Dr. [redacted]

These facts are analogous to *United States v. Howell*,[27] an unpublished N.M.C.C.A. decision where the defense sought post-trial relief, attempting to exclude expert testimony while alleging a discovery violation. The defense, as here, was aware of the potential violation when handling the examination of the government expert, and declined to take advantage of further preparation time. As such, the Court held that the defense had affirmatively waived the issue and that as a result, the military judge acted well within his discretion to deny the defense post-trial motion for mistrial.[28]

[27] 2019 CCA Lexis 248.
[28] *Id.* at 16.

Given the nature of the evidence in question, if the Defense truly had been surprised and unprepared, the appropriate remedy would have been a continuance to ensure they were properly equipped to address the evidence in question. But Defense disclaimed such an opportunity when this Court offered it the chance—likely because, as in their filing, the Defense has not identified any other evidence they would admit or argument they would tender in light of the "suffocation" evidence. [29] In so doing, they have waived the issue.

As such, even assuming *arguendo* there were a *Brady* violation *and* the Defense was surprised in this case, they have not identified a prejudice to their overall case, nor *any* to their sentencing case in particular[30], and certainly nothing that would require the drastic and disfavored remedy of a mistrial. Indeed, "a mistrial is a drastic remedy and is reserved for only those situations where the military judge must intervene to prevent a miscarriage of justice."[31] The Defense has presented nothing that resembles a miscarriage of justice. Rather, to the contrary, any perceived prejudice was properly cured by affording the Defense adequate time to consult with their expert prior to cross-examination and to prepare for sentencing argument. No prejudice could remain which would justify a mistrial.

I. Conclusion

In summary, the Defense was on notice of all of the evidence that they now claim they were surprised by. They did not either request further time to consult or prepare a response to the evidence. As such, no discovery or *Brady* violation occurred, and if a discovery violation did occur, the Defense waived the issue when they indicated they did not need further time to prepare in light of the evidence. As a result, the motion for a mistrial should be denied.

The motions to reconsider are forfeit, and the Defense has provided no new law or evidence to justify reconsideration even if they were not forfeit. The evidence in aggravation was substantial and probative, supported through multiple witnesses and exhibits. Although it went "beyond" the stipulation of fact, it did not contradict the facts the Defense and Government stipulated to with respect to the charge of Involuntary Manslaughter. As such, it was appropriate evidence in aggravation.

The motion should be denied in its entirety.

RELIEF REQUESTED

The Government requests that the Defense motion be denied.

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[29] *United States v. Avery* is also instructive—where the Government failed to provide defense requested discovery before trial, but the defense has multiple opportunities to address the issue, and chose not to do so, and the defense's tactical decision not to present evidence regarding issue covered in discovery waived any error on the part of the Government. 52 M.J. 496, 498-99 (C.A.A.F. 2000).

[30] Which in this case, is critical, because the Defense indicates no desire to litigate the case on the merits using "suffocation" as a defense to the charges. If there is a prejudice relevant to their remedy, it must apply to their sentencing case.

[31] *United States v. Garces,* 32 M.J. 345, 349 (C.A.A.F. 1991).

The Government does not request oral argument, unless the Court directs an Article 39(a) hearing.

EVIDENCE

Aside from the items contained in the record of trial, the Government further submits:
Enclosure (1) – Government Counsel comments on evidence dtd 7 Aug 19
Enclosure (2) – LCDR Garcia email dtd 7 Aug 19

Respectfully submitted,

[redacted]
CDR, JAGC, USN
Trial Counsel

Certificate of Service

I hereby certify that a copy of this motion response was served on the Court and Defense counsel on this 24th day of February 2021.

[redacted]
CDR, JAGC, USN
Trial Counsel

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

UNITED STATES v. Tony DeDolph [redacted]/E-7 U.S. Navy	))))))))	**Reply Brief Post Trial Motion for Mistrial and New Sentencing (Amended)**

The defense post-trial motion for mistrial and new sentencing is incorporated by reference as if set forth fulling herein.

Without restating the argument in its entirety, the prosecutor posits that RCM 1104 is not appropriate for the defense motion; however, the rule specifically states, in the first example, a post-trial motion is appropriate for, among other reasons, an allegation of error in the acceptance of a plea of guilty. As set out in the defense motion, by the prosecutor's significant and prejudicial impeachment of the defense theory of pleading guilty – there was an error in accepting the plea of guilty or an error in allowing the government to impeach the defense theory of pleading guilty, i.e. the stipulation of fact and providency (Care) inquiry which, under the circumstances, requires the court to grant the defense motion.

Further, RCM 1104(b) sets out a non-exclusive list of examples appropriate for a post-trial motion and hearing, not an exclusive or exhaustive list.

The prosecutor's twisting of the simple facts to which [redacted] DeDolph pleaded guilty, as agreed to by the convening authority and upon which the prosecutor agreed by stipulation, should be rejected. There were not different chokeholds for the different charges to which [redacted] DeDolph pleaded guilty, there was one. The relevant assault consummated by a battery alleged in the conspiracy to commit assault was [redacted] DeDolph placing SSG [redacted] in the one and only chokehold; the relevant assault consummated by a battery alleged in the involuntary manslaughter that served as the "perpetrating an offense directly affecting the person of Staff Sergeant [redacted] is the "strangling him with a choke hold" that references the same one and only chokehold; and, the relevant hazing by "strangled with a chokehold" references the same one and only chokehold.

The choke hold was clearly set out in the providency (Care) inquiry and the stipulation of fact as

1. I participated in the plan by wrestling with SSG [redacted] and placing him in a chokehold like is used in jujitsu (rear naked choke) or judo (shimewaza), which caused SSG [redacted] bodily harm. This harm was done with unlawful force.

2. When I say chokehold, I mean that, from behind, I placed my arm around SSG [redacted] neck and applied pressure to the sides.

The stipulation of fact sets out the agreed to definition of "chokehold" as to be used in the pretrial agreement and pleading guilty.[1] Nowhere in the stipulation of fact is there any agreement that [redacted] DeDolph caused the death of SSG [redacted] by crushing his throat or suffocating him.

In their motion, the prosecutor explains his gamesmanship of *gotcha*. The prosecutor signed the stipulation of fact. It can be no clearer than is set out in the stipulation of fact and the providency (Care) inquiry that [redacted] DeDolph was pleading guilty to causing SSG [redacted] death by choking SSG [redacted] – by applying a *blood choke* as defined by the stipulation of fact as applying pressure to both sides of the neck as he explained – a rear-naked-choke. Before the plea, it was discussed with our expert, Dr. [redacted] that a blood choke can cause death, and in Dr. [redacted] opinion, the blood choke combined with the massaging of the Carotid Sinus caused the death of SSG [redacted] There was no further inquiry to cover this detail because the judge understood the cause of death as described by the stipulation and the Care inquiry. Regardless, this gave [redacted] DeDolph the requisite confidence and belief that he caused the death of SSG

[1] Admittedly, even though the stipulation went back to the deliberation room as a PE, the defense was remiss in not requiring the prosecutor to read verbatim the stipulation of fact to the members – so the members could hear the evidence coming from the prosecutor's own mouth – as required by NMCTH Uniform Rules of Practice 1 Aug 19 Rule 28.4.

[redacted] That is the context of the description by the government that [redacted] DeDolph noted that their forensic pathologist had reviewed the case, and said he caused SSG [redacted] death. **The prosecutor's theory of death is different**, i.e. SSG [redacted] didn't die from the blood choke at all, instead SSG [redacted] died because [redacted] DeDolph crushed SSG [redacted] throat and pressing SSG [redacted] face into the bedding and could not breathe and suffocated. The court will recall, during is unsworn testimony [redacted] DeDolph denied the crushing of SSG [redacted] throat and denied SSG [redacted] face was pressed into bedding when the choke was being applied, because [redacted] DeDolph could see his face. This testimony was not objected to as impeaching the government theory or the providency inquiry, or the plea of guilty.

Imagine, Able applies a blood choke to Baker – but before it is determined if Baker will recover, Able throws Baker off a 10 story building onto hard pavement. Baker is dead. This scenario is more extreme that we have between [redacted] DeDolph and SSG [redacted] but – like DeDolph - Able is responsible for the regardless of if he died from the choke or the fall. However, if Able pleads guilty by agreement and stipulation to killing [redacted] by choking him, the prosecutor cannot impeach the plea by saying he died from the fall – but it's really the choke because the

fall prevented him from recovering from the choke. That is what the prosecutor is doing in this case.

The prosecutor posits that "[t]he Accused did not provide a mechanism for the cause of death when testifying about strangling SSG [redacted] although he agreed his strangulation killed SSG [redacted] That's just not true. As set out above, there's one chokehold and that blood choke-hold caused this death.

What the government posited is analogous to the case the defense cited in it's brief, *United States v. Bobroff*, 23 M.J. 872 (N-M.C.M.R. 1987). The defense theory was and still is that [redacted] DeDolph caused the death of SSG [redacted] albeit unintentionally, by performing a rear-naked-choke as defined by the stipulation of fact as applying pressure to both sides of the neck. The prosecutor's theory of death is that after the rear-naked-choke was performed – [redacted] DeDolph crushed SSG [redacted] throat and suffocated him in his bedding so that he could not get the oxygen he needed.

But for [redacted] DeDolph's crushing the throat and pushing SSG [redacted] face in the bedding – SSG [redacted] would have lived is what the prosecutor says in context. That is not the defense theory.

The prosecutor's has not, and can not now, on this motion say the additional injury is resulting from or related to the cause of death, the prosecutor is say it *is the cause* of death.

Finally, as a small aside, [redacted] DeDolph was never a Hospitalman, he was a Machinery Repairman before attending [redacted] as part of the [redacted] Challenge Program enlistment.

8. Argument: The defense continues to request oral argument.

/s/
Phillip Stackhouse
Civilian Defense Counsel

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I certify that I caused a copy of the original document to be served on the Court and opposing counsel this March 1, 2021.

/s/
Phillip Stackhouse
Civilian Defense Counsel

REQUESTS

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

UNITED STATES **v.** **TONY DEDOLPH** **[redacted]/E-7 USN**	**GOVERNMENT REQUEST FOR EXPERT DISCLOSURES & *DAUBERT* CHALLENGE DEADLINES** **17 AUGUST 2020**

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1. Nature of Filing. This is a Government request to set filing dates for the disclosure of expert witnesses and *Daubert* challenges.

a. The Government respectfully requests this Court to establish a final disclosure date for all expert witnesses and related discovery.

b. Additionally, the Government requests that a *Daubert* motion filing and a tentative 39(a) date be established prior to trial to litigate all potential *Daubert* issues. The Government requests that the 39(a) to address the *Daubert* challenges be placed at least one month prior to the start of the trial.

[redacted]
Jason D. Samuel
Capt, USMC
Trial Counsel

NOTICES

NAVY-MARINE CORPS TRIAL JUDICIARY

U N I T E D S T A T E S	)
	) CIVILIAN COUNSEL
v.	) COURT-MARTIAL NOTICE
	) OF APPEARANCE
[redacted] Tony DeDolph	)

1. I, Phillip Stackhouse, admitted to practice law, currently in good standing before the bar of the highest court of the State(s) of Massachusetts, North Carolina, District of Columbia, Colorado, and Wyoming, and, having appeared as counsel in United States military courts-martial on over 400 occasions during my legal career, military or civilian, hereby enter appearance as attorney on behalf of the accused in the above captioned court-martial to do all that is necessary in connection therewith. I certify that I am not now de-certified or suspended from practice in Navy-Marine Corps courts-martial by the Judge Advocate General of the Navy.

2. I hereby certify that I have obtained a copy and agree to abide by: (1) the Rules for Courts-Martial and the Military Rules of Evidence set forth in the current editions of the Manual Courts-Martial; (2) United States, JAG INSTRUCTION 5803.1 series (Professional Conduct of Attorneys Practicing Under the Supervision of the Judge Advocate General); (3) NAVMARCORTRIJUDIC INSTRUCTION 5813.4, Appendix B (Uniform Rules of Practice Before Navy-Marine Corps Courts-Martial); (4) Local Circuit Court Rules; and, (5) if published, the local District Rules of Practice for the Judicial District within which the above-captioned is currently pending. I further certify and agree to provide, upon request by the Circuit Military Judge or designee, a copy of the professional responsibility rules applicable to the Bar of the State in which I am licensed to practice law.

3. Unless indicated otherwise by the accused, all post-trial matters, including the staff judge advocate's or legal officer's recommendation and the accused's copy of the record of trial should be served on the ***detailed trial counsel***. For purposes of this trial and all subsequent review matters, notice to and service upon the undersigned may be affected at the address of the ***detailed trial counsel***.

4. I swear or affirm all information on this notice of appearance is true, correct and complete, to the best of my knowledge and belief. Signed this date, Monday, December 30, 2019.

[redacted]

Signature

Phillip Stackhouse
Printed full name under which licensed to practice law



Phillip Stackhouse, Esq.
MILITARYDEFENDER
[redacted]

Attorneys for [redacted] Tony DeDolph

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

UNITED STATES OF AMERICA,

Government

vs.

[redacted] TONY DEDOLPH [redacted]
[redacted] U.S. Navy

Defendant.

NOTICE OF MOTION AND MOTION TO DISMISS CHARGE II VIOLATION OF THE UCMJ, ARTICLE 129 (BURGLARY); CHARGE III VIOLATION OF THE UCMJ, ARTICLE 118, SPECIFICATION 1 (FELONY MURDER); AND MEMORANDUM OF POINTS & AUTHORITIES

[R.C.M. 907]

Date: TBD
Time: TBD
Judge: Captain Michael J. Luken
Dept.: Bldg. A-50, Naval Station, Norfolk, Virginia 23511
Action Filed: November 14, 2018
Trial Date: March 23, 2020
Date: December 27, 2019

TO THE GOVERNMENT AND ITS ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that on December 27, 2019, in the above-mentioned Court, located at building A-50, Naval Station, Norfolk, Virginia 23511, before Captain Michael J. Luken presiding, Defendant moves the Court to dismiss charges in this action.

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This motion will be based upon this Notice, this Memorandum of Points and Authorities, as well as the pleadings, records and files of this Court, and upon such other evidence and arguments that may be presented before the time of the court's ruling on the motion.

I.
RELIEF SOUGHT

Defendant brings this motion at the early onset of litigation to stave off an unconstitutionally specified felony murder charge that the Defense believes will most likely be reversed on appeal if not appropriately handled at the Trial Court level.

As a result, Defendant requests that this Court dismiss Charge III, Violation of the UCMJ, Article 118, Specification 1 (Felony Murder) as Unconstitutional, in violation of the merger doctrine, and of Defendant's rights because "assault" cannot be used as the underlying crime to "felony murder," even when hidden in a scheme to exploit its use through a subterfuge charge of "burglary." As a matter of law, the merger doctrine prevents such scheme.

II.
BURDEN OF PERSUASION AND BURDEN OF PROOF

In accordance with R.C.M. 905(c), unless otherwise provided in the Manual for Court-Martial, the burden of proof on any factual issue the resolution of which is necessary to decide a motion shall be by a preponderance of the evidence. See Mil. R. Evid. 104(a).

Once the Defendant has met its burden in showing that as a matter of law the convening authority inappropriately charged Defendant with a crime that violates settled doctrine, the burden shift to the prosecution to show that it did not overreach and violate doctrinal principals in its charging scheme.

Later determination of whether the prosecution charging scheme violated well settled principles of law, is reviewable on appeal as to whether the trial judge abused its discretion in determination of whether the merger doctrine precluded the prosecutorial charging scheme against Defendant and whether taken as true, the facts of the face of the pleading give rise to a proper burglary charge.

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III.
PROCEDURAL BACKGROUND

This case is before the Court as a result of incidents that occurred on 4 June 2017. Therein, Defendant [redacted] Tony DeDolph ("DeDolph" or "Accused"), U.S. Navy, on active duty, was roommates with Staff Sergeant [redacted] when roughhouse wrestling amongst DeDolph, [redacted] (decedent), and other friends, became fatal. Consequently, charges were preferred against DeDolph on 14 November 2018, and thereafter referred to a General Court-Martial. The parties are still engaged in active discovery.

IV.
INTRODUCTION

Just because the prosecution found a way to charge felony murder does not means that it should have done so. This motion is not a recital of the typical platitudes that accuse the prosecution of haphazardly charging lesser included offenses by multiplicity or multiplication of charges (although those concepts are present in this case). Instead, the issue of this motion is much more nuanced, as it challenges the intent of the legislature when crimes are charged and orchestrated in a way that would maximize punishment rather than adhere to traditional common law principals. This motion exposes the oversight of congress in its draft of the MCM when certain charges are strung together exploit such inadvertent oversight. And, even if each fact alleged is taken as true, the charging scheme still violates settled doctrinal principals. Namely, a subterfuge charge cannot be a vehicle to circumvent the law. This motion will demonstrate how the prosecution uses the subterfuge charge of Burglary to reach its felony murder charge.

The merger doctrine excludes from the offenses, that qualify as underlying offenses, any felony that is presupposed by a murder charge. For example, nearly all murders involve some type of assault and so do many cases of manslaughter. To therefore count any death that occurred during the course of an assault as felony murder would obliterate a distinction that is carefully set by the legislature. *State v. Huynh*, 92 P. 3d 571, 278 Kan. 99 (2004). "The felony that eliminates the quality of the intent must be one that is independent of the homicide and of the assault merged therein." Judge Cardozo: *People v. Moran* 246 N.Y. 100, 158 N.E. 35 (1927). In this case, a subterfuge charge of Burglary is used to disguise the assault the prosecution uses to satisfy felony murder. This must be undone.

Careful consideration and analysis should be undertaken when the alleged crimes at issue would otherwise be limited in their charging scheme. In the instant case, there are three crimes that are strung together to formulate the crime under Article 118(a) "Felony Murder." Where felony murder ordinarily is limited in its reach by invocation of the "merger doctrine," it dilutes justice when the prosecution usurps congressional intent by using the same acts in an assault that are the proximate cause for the homicide. This is not simply a case of multiplicity reserved for post-findings; rather, it's an abuse of discretion to architect a charge scheme that circumvents constitutional limitations on charging; i.e. using assault, in a charge scheme in such a way to satisfy felony murder, while sidestepping the merger doctrine by alleging a burglary that clearly, as a matter of law, cannot be said to be burglary. The perversion of burglary in the charging scheme exploits congressional oversight as strict interpretation of the string of charges could create absurd results. We therefore request this Court to scrutinize the scheme the prosecution has chosen to charge DeDolph, find it unconstitutional, and dismiss the requested charges.

V.
BACKGROUND FACTS

Other parties not previously introduced and relevant in this motion are roommates, Staff Sergeant [redacted] U.S. Navy, and GySgt [redacted] (hereinafter "[redacted]"), U.S. Marine Corps. Various other witnesses relevant to the incident will be introduced in a subsequent breakdown within.

The defense will demonstrate through facts, and not merely conjecture, that DeDolph had a superior present possessory interest in the tenancy, was friends with [redacted] considered [redacted] a friend and brother-in-arms, and the household was an open close-knit friendly environment where the roommates would often play practical jokes, wrestle, and get rowdy. [redacted] and [redacted] worked-out together at the gym, worked alongside one-another, shared the same groceries, the same pool, the same family room, watched Netflix movies together, went out to the clubs together, knew each other's stories from home, and were on similar missions serving the United States abroad. By all accounts, the home was a shared space where these roommates shared stories, shared memories, and where this unfortunate tragic incident occurred.

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On the day at issue, it had been early in the morning and DeDolph, with his roommates/friends decided to participate in playing a practical joke on [redacted] as it was not uncommon for this type of shenanigans to occur. In this instance, earlier in the evening, [redacted] had ditched some of the others and went to a private party. The others went out and Melgar returned before the others and turned-in. As a result of [redacted] not wanting to bond with his *brothers*, DeDolph and others were going to play a practical joke upon him.

DeDolph asserts, as well as other evidence will demonstrate, that DeDolph and others that lived in the [redacted] went into went into each other's bedrooms at will. Although the house had space for each roommate to have their own belongings, the course of dealing among the roommates was that often for various reasons, or ordinary interaction, the roommates would enter each other's rooms. Significantly, the house was under the control of DeDolph for all intents and purposes. The morning of June 4, 2017 was no different when DeDolph entered the room where [redacted] was staying, except that it was done very loudly for effect of the practical joke that was to be played and what happened when they entered, i.e. the practical joke and horseplay.

Moreover, the house was technically under DeDolph's control and responsibility. While the house was being paid for by the U.S. Navy, DeDolph had a superior right to use and control all of the spaces therein. [redacted] was merely a temporary tenant more akin to a guest. [redacted] did not have exclusive control of his room. Even if such exclusivity was alleged, such exclusivity was waived by the ordinary course of implied permissive entry when all roommates frequently, without objection, entered each other's rooms. Accordingly, no burglary can be established if at the place the alleged burglary occurred, Defendant had permission to be there.

Early that morning DeDolph, et al entered [redacted] room. Half-asleep, he still was able to recognize it was the roommates as [redacted] proclaimed, "oh, it's you guys." The roommates, giving [redacted] a fair warning, in a somewhat menacing yet friendly way said, "Don't worry, it's just a tapping" alluding to the practical joke that was being played upon [redacted] seemed aware of the horseplay ritual and joined in the challenge of wrestling the roommates by saying "come on mother fuckers" or words to that effect. DeDolph, et al, thought it would be funny to get a picture of [redacted] in a submissive posture with his hands bound as the roommates would take pictures

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together with him. Perhaps in bad taste, this behavior was meant to be sort of a bonding experience that has occurred in the military for decades.

To pretend that service-members (perhaps especially those in combat arms) don't often challenge each other or engage in rough horse-play is, quite frankly, disingenuous at any level..

Admittedly, one won't too often see higher ranking enlisted and officers engage in the aforementioned horse-play, but it is a well-known frequent occurrence in the circles of those close-knit communities where they share tight spaces together - whether it be the barracks, shared households, or even workspaces where wrestling it out occurs daily. In hindsight, it was not the most mature or sound decision the roommates and friends could have played around, but it's not unusual. Their judgment was flawed. But they also never anticipated the grave consequences of the playful roughhousing. The intent was never to hurt [redacted] except to maybe have his pride sting a little.

During this rough-housing, the DeDolpoh, et al never engaged in any serious eye-gouging, biting, or any extreme tactics. Egos were on the line. But no ill will was present. No serious life-threatening feud was at bay. Again, no serious biting, kicking, punching or anything that would run afoul of wrestling decorum was present. Rather, DeDolph got [redacted] into a submission hold. Instead of tapping out, [redacted] had too much pride and where DeDolph was looking for [redacted] to tap, he instead fainted, a not uncommon temporary result from wrestling and a sleeper hold submission. In this moment, the original plan stinging his pride through pictures was equally achieved when [redacted] refused to tap and instead fainted. At first, perhaps a sense of victory was present, but such sentiment quickly faded and was immediately replaced by genuine concern when [redacted] became nonresponsive.

DeDolph contends that he has engaged in this sort of rough-housing before and that it is well known that a sleeper hold submission can knock someone out for a few seconds, if that, if the person doesn't tap-out, and that the person will wake up a little groggy but absolutely fine without any serious consequences to their body. Others related to this case have in the past testified to the same and will testify to the same in the support of this motion. In effect, the brain is just deprived of oxygen long enough to merely temporarily lose consciousness. This was the extent and understanding of DeDolph. Never did DeDolph intend to seriously or permanently harm his his

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roommate, his colleague and brother-in-arms. Rather, DeDolph, et al were alarmed and immediately frightened for [redacted] wellbeing when it took longer than usual for [redacted] to snap-out of his sleep. Unresponsive, DeDolph, et al utilized the only training they knew and that was to engage in emergency life-saving techniques they had learned in the military. DeDolph, et al immediately called for help, took measures to get [redacted] to the hospital as swiftly as possible and was physically and emotionally distraught by the entire situation as he may have just been responsible for seriously injuring his friend.

The facts without conjecture are simply to understand. This is an unfortunate situation where roughhousing resulted in unexpected circumstances. DeDolph admits to roughhousing and wrestling, but contends such ordinary play between the roommates and friends often occurred. DeDolph admits that he went into the bedroom of [redacted] but that the intent was only to merely play a practical joke on [redacted] and not to actually hurt [redacted] DeDolph never intended to take any of [redacted] property or to commit any felony while inside [redacted] bedroom. The facts and evidence are that DeDolph's behavior could at best be described as reckless roughhousing.

DeDolph cared for [redacted] and considered him a brother-in-arms. DeDolph is remorseful and suffers emotional trauma from the unintended result of possibly being the cause of what killed his roomate. DeDolph must live his life with the guilt of how his roughhousing and play with his buddy turned to tragedy. But nothing of what happened constitutes burglary, and certainly not the culpability for felony murder.

VI.
WITNESSES/EVIDENCE

1. Defendant requests that the Court take judicial notice of the facts alleged in the prosecution's charge sheet. Therein, slightly hidden within Charge II, Violation of the UCMJ, Article 129, Specification (Burglary) lies the "assault consummated by a battery" facts. Such acts are the proximate cause of the death of the Felony Murder homicide, and thus assault cannot be the basis for the underlying felony to satisfy felony murder.

2. Moreover, the Defendant requests that the Court take judicial notice of the elements to satisfy Article 129 "Burglary" and the Articles to satisfy the underlying crime that was intended to be committed therein as Articles 118 through 128a.

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3. In addition, Defendant requests that the Court take judicial notice of the elements to satisfy felony murder and the Articles to satisfy the underlying crime that satisfies the independent felony as Articles Articles 118 through 128a.

4. The defense requests the production of [redacted] and Gunnery Sergeant [redacted] to be present for the 39a to address these motions. There physical presence is necessary in order to demonstrate several matters for the court's consideration inside the court-room. Both are percipient witnesses to the allegations, both saw actions from different perspectives, and both havea different history with the service-members involved, i.e. they are not cumulative.

VII.
ARGUMENT

A. The Felony Murder Charge Violates The Merger Doctrine And Is Therefore Unconstitutional.

In the military, the merger doctrine has been addressed to a varying degree with the concepts of unreasonably multiplication of charges and multiplicity – two distinct concepts dealing with government overreach and double jeopardy; concepts that although present, are not the crux of this motion. In this instance, we examine how the merger doctrine also bars charging schemes where lesser included offenses are not charged but still used to accomplish a similar result. For example, in this case, assault is not charged. However, it is the basis for the felony murder charge, masquerading as a burglary. The prosecution attempts to assert a subterfuge charge of burglary, to side-step the merger doctrine that would otherwise prevent assault from establishing the underlying crime for the so-called felony murder. Assault historically, cannot be the basis for felony murder. Rather, another specification of murder must be alleged. See *Emmund v. Florida*, 458 U.S. 782 (1982) and its progeny. For example, in *People v. Chun*, 45 Cal. 4th 1172 (2009), under the new *Chun* standard, all felonies that contain an "assaultive" element merge per se with the resulting homicide and may no longer serve as the basis of a felony-murder charge.

Although, felony murder is multiplicious with premeditated murder, *United States v. Teeter*, 16 M.J. 68 (C.M.A. 1983), and with unpremeditated murder, *United States v. Hubbard*, 28 M.J. 27 (C.M.A. 1989), this motion focuses on the violation of the merger doctrine as it pertains to the interplay of assault and felony murder and how the prosecution used burglary to undermine the merger doctrine.

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Felony murder itself is a doctrine of common law that was established in 1536 where most felonies were punishable by death. It therefore quickly came to establishment that only certain egregious acts or inherently dangerous felonies would satisfy the underlining basis for a felony murder. In shaping such categories limitations were also constructed. The merger doctrine specifically bared "assaults" from being used as the underlying offense for felony murder because nearly every homicide has an element of assault and it would therefore fast-track any assault to felony murder. As such, we examine why as presently charged, the prosecution violated this sacred principle.

The Uniform Code of Military Justice, Article 118(4), is the last category under 118, and reserved as society has always recognized certain crimes being so dangerous that they are likely to result in the death of the victim or another. Among those crimes are *sodomy – rape – robbery - aggravated arson* and lastly burglary.

Although it is sufficient in protest to point-out that the prosecution failed to meet the basic elements of the UCMJ, Article 129, we must examine the scheme the prosecution took in creating its fictitious burglary charge. In this instance, the so-called burglary was not even a situation of burglary in the traditional sense, or even the type of a scenario that would give rise to why burglary-laws were created. Rather, the subterfuge burglary charge in question arises out of a situation where a roommate, that had superior tenancy to the entire house, including [redacted] bedroom, that frequently went into the other roommates' room, went into [redacted] room with his buddies to to play a common practical joke on his friend and roommate. We remind the court that these roommates were friends, lived, and worked together abroad in a foreign country where in their household they considered themselves as extended family, as they would often refer to each other as brothers. Never was any assault contemplated by DeDolph that would inflict any serious bodily harm but rather more simply to just tease [redacted] and perhaps get a rise out of him.

Notwithstanding, the prosecution twists and construes the close relationships amongst the roommates as something isolated and shutoff. The prosecution attempts to diminish the openness of the shared house, the common understanding of its usage, and attempts to create a fictitious reality that [redacted] room was somehow off limits to his friends and roommates. This was not the case. The prosecution highlights handpicked facts in an attempt to orchestrate and architect a

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scenario that could satisfy its burglary elements only to therefore satisfy a felony murder charge. However, where the prosecution most egregiously is mistaken, is where the basic elements of a building or structure of another are not met. Further, it completely ignores DeDolph's superior tenancy of the property and premises, including [redacted] bedroom which [redacted] was a temporary guest in DeDolph's home.

The prosecution realizes how much of a stretch it is to allege that DeDolph wanted to take the life of his fellow operator. The prosecution knows it lacks any evidence of such notion. Instead of appropriately charging DeDolph only for negligent homicide, the prosecution attempts to get creative and in so doing, crosses the boundaries where it should know of the limiting principals of why the facts in this case do not satisfy felony murder. Instead, with disregard for the ramification of DeDolph's life, the prosecution recklessly strings together charges that have no business being before this Court. As a result, the prosecution's burglary based on assault, a crime ordinarily limited under by the merger doctrine, is defective, unconstitutional, and must be dismissed.

Moreover, Defendant must also bring to this Court's attention that it was not congress' intent to allow certain crimes to satisfy Burglary and then to be fast-tracked to felony murder without careful analysis. The prosecution realized the congressional oversight and instead of using restraint, exploits the opportunity to manufacture a method to charge DeDolph with felony murder when ordinarily, such charge would be precluded by the merger doctrine, given these facts.

Although the MCM enumerates crimes to satisfy Burglary, which underlying crimes could range from Articles 118 through 128a, an absurd result occurs if the said burglary with the underlining crime of 118(4) "felony murder" is then allowed to satisfying felony murder, Art. 118(4). Where the Burglary charge with an intent to commit an offense from 118 to 128a carries a maximum punishment of 10 years of confinement, twisting facts to achieve a felony murder penalty of life in prison was never congress' intent. Nor was it the intent of congress to allow felony murder to be the underlying element for felony murder. Such notion demonstrates the oversight congress had when dealing with these separate UCMJ Articles and not contemplating all the convoluted ways a prosecutor might string them together.

Had congress contemplated that a prosecutor would not carefully limit its charging from other guiding principles, namely the merger doctrine, congress might have explicitly prevented,

MILITARYDEFENDER [redacted]

for instance, felony murder from satisfying the element of felony murder when strung together by Burglary then Felony murder. Allowing a prosecutor to merely string these offenses together without scrutiny, robs DeDolph of his constitutional rights. As such, the Court should give great difference to the guiding principles of the merger doctrine and such authority that limits the prosecution's convoluted and unconstitutional charging scheme.

B. The Burglary Charge Is Flawed Because The House Was A Shared Space Including The Bedroom And The Assault Intended To Be Committed Upon Entry Nonetheless Was To Be Harmless, Minor And In Jest; At Best Mere Harassment, Annoyance, or Hazing

Courts in various jurisdictions have given burglary, the dwelling home and shared living arrangements, different interpretations. Not in even the most egregious circumstances has a court completely ignored the significance of whether a defendant had the right to enter the premises or room. It has always been interpreted that entry must be without consent for a burglary to occur. However, the UCMJ is susceptible to only one rational interpretation, and that is a burglary remains an entry into the building or structure of another, which must be committed by a person who has no right to be in the building.

In relevant part, the UCMJ describes burglary as, "Any person subject to this chapter who, with intent to commit an offense under this chapter, breaks and enters **the building or structure of another** shall be punished as a court-martial may direct." [emphasis added] Unlawful entry is described as [any person who] unlawfully enters the real property **of another**; or the **personal** property of another which amounts to a structure usually used for **habitation or storage** [e.g. a tent, garage]; Article 129 elements are, "(a) that the accused **unlawfully** broke and entered the **building or structure of another**; and (b) that the breaking and entering were done with the intent to commit an offense punishable under the UCMJ." [emphasis added]. DeDolph does not meet this standard.

As to the first element, although varying jurisdictions have their interpretations of what amounts to the structure or dwelling of another, a strict reading of the code requires the building to be not only of another, but where DeDolph would have unlawfully entered. The evidence establishes that consent was understood and given between the roommates where no room, even the bedrooms were to the exclusion of others. DeDolph cannot be said to have unlawfully entered

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the room where [redacted] was staying when DeDolph had responsibility and right to his entire home.

As to the second element, it is DeDolph's contention, and the facts and evidence show, that DeDolph's intent was to merely play a practical joke on [redacted] through friendly horseplay. Never was it the intent of DeDolph to commit any crime, let alone a felony or an unwelcomed assault that could formulate the basis for burglary. Perhaps offensive and bothersome, being rudely aroused from one's tranquil sleep, the roommates wanted nothing more than to engage their buddy in a horse-play ritual, i.e. a tapping; but otherwise, not a scenario that at its furthest stretch, constitutes burglary. The prosecution attempts to paint the friends' relationship and this circumstance into something far more menacing and nefarious than any facts show. This simply was not the case. And the prosecution fails to even allege facts that satisfy the basic elements of burglary. For this reason, the burglary charge must be dismissed.

VIII.
ORAL ARGUMENT

The defense respectfully requests oral argument.

IX.
CONCLUSION

The prosecution's conjecture, as it relates to the facts, is motivated by its desire to get creative in its trial practice and charging of DeDolph. However, such reckless behavior with DeDolph's life should not be tolerated when well-founded and established principals of the merger doctrine would ordinarily provide prosecutorial restraint. Even if inadvertent, the error must be corrected. Insomuch as Congress's oversight gives the prosecution leeway in not explicitly limiting all the infinite ways in which the prosecution might combine its charges, it does not give the prosecution a carte blanc green light to ignore the fundamental and constitutional principles meant to limit its reach. See R.C.M. 907(b)(3)(B) and R.C.M. 1003(c)(1)(C). The prosecution erred in charging DeDolph of burglary by not meeting the required elements and erred in its charging of felony murder when the basis of the underlying crime of burglary was based on assault, a crime the merger doctrine ordinarily would prevent from being a basis for felony murder. Rather than wait on appeal to correct such error, it is in the parties' and the Court's

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interest to see that justice is had at the trial stage by dismissing the felony murder charge in this action. The defense contends that it is up to the finder of fact to decide whether DeDolph committed involuntary manslaughter, but as a matter of law, sufficient facts exists for the Court to make a determination that both burglary and felony murder do not exist in this case.

DATED: December 26, 2019

MILITARYDEFENDER

[redacted]

Ph[redacted]e
At[redacted]endant
[redacted] Tony DeDolph

MILITARYDEFENDER [redacted]

Phillip Stackhouse, Esq.
MILITARYDEFENDER
[redacted]

Attorneys for [redacted] Tony Dedolph

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

UNITED STATES OF AMERICA,

Government

vs.

[redacted] TONY DEDOLPH, [redacted]
[redacted] U.S. Navy

Accused.

NOTICE OF MOTION AND MOTION TO COMPEL PRODUCTION OF DEFENSE EXPERT WITNESS; AND MEMORANDUM OF POINTS & AUTHORITIES (Forensic Pathology)

[R.C.M. § 701(d)]

Date: TBD
Time: TBD
Judge: Captain Michael J. Luken
Dept.: Bldg. A-50, Naval Station, Norfolk, Virginia 23511
Action Filed: November 14, 2018
Trial Date: March 23, 2020
Date: December 27, 2019

TO THE GOVERNMENT AND ITS ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that on December 27, 2019, in the above-mentioned Court, located at building A-50, Naval Station, Norfolk, Virginia 23511, before Captain Michael J. Luken presiding, Accused moves the Court to Compel the prosecution to retain Accused's Expert Consultant and possibly later Expert Witnesses as previously requested and denied.

MILITARYDEFENDER [redacted]

This motion will be based upon this Notice, this Memorandum of Points and Authorities, as well as the pleadings, records and files of this Court, and upon such other evidence and arguments that may be presented before the time of the court's ruling on the motion.

I.
RELIEF SOUGHT

The defense in the above case moves this court to compel the Government to retain the services of Dr. [redacted] as a defense expert consultant and possibly later expert witness in the field of Forensic Pathology.

II.
BURDEN OF PERSUASION AND BURDEN OF PROOF

The burden of persuasion is on the defense and is by a showing of a preponderance of the evidence.

III.
BACKGROUND FACTS

In this case, the accused, [redacted] Dedolph, is alleged to have murdered his colleague, SSG [redacted] who had been injured during wrestling/horseplay and to whom the accused and others were providing combat lifesaving treatment e.g. cardiopulmonary resuscitation and a cricothyrotomy, but were unable to revive their injured colleague. The alleged murder technique was grappling wherein the roommate became unresponsive and went limp. Further, the roommate was taken to a hospital in [redacted] with staff that was possibly reckless in their assessment and treatment, or lack thereof, regarding SSG [redacted]

The medical procedures that were being performed on SSG [redacted] included, inter alia, a cricothyrotomy and cardiopulmonary resuscitation. An analysis is required to determine whether the treatment methods performed by the accused and others would have been sufficient to sustain the colleague's life if reasonable hospital treatment would have been available and implemented. Further, an expert would be able to further assess the likely cause of death, to refute the government's expert analysis, and to assist in preparing the cross examination of the government witness in this complex area of medicine and science. That analysis must be performed by a specialist skilled in determining causes of death.

MILITARYDEFENDER

The evidence discovered in this case includes images of the alleged victim, who is now deceased. Other evidence includes medical reports, images, charts, and graphs that require independent expert analysis. Further analysis is required for the scene of the alleged crime, and reviewing and analyzing the body of the decedent to attempt to observe possible wounds, signs of injury, signs of bleeding, possible types of bleeding or injuries and possible cause of death, are not within the purview of a Trauma doctor, but are within the expertise of a Forensic Pathologist and Medical Examiner. Dr. [redacted] is a Forensic Pathologist and Medical Examiner whose expertise is in examining deceased bodies and observing and obtaining forensic evidence to help determine thing like cause of death, other possible injuries suffered, and developing other evidence from the deceased body.

IV.
WITNESSES AND EVIDENCE

a. Charge Sheet [not enclosed]

b. CV/Fee Schedule [Enclosure (1)]

c. Defense request [Enclosure (2)]

d. Government Denial [Enclosure (3)]

e. Dr. [redacted] will testify telephonically for the motion if necessary.

V.
LEGAL AUTHORITY AND ARGUMENT

The defense is requesting that Dr. [redacted] be paid for by the Government as an expert consultant and possibly later expert witness in the field of Forensic Pathology in accordance with Rules for Court-martial 703(d), Article 46, UCMJ, and applicable case law.

In accordance with Article 46, UCMJ, "[t]he 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." This ensures that "[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 of law.' " *United States v. McAllister*, 64 M.J. 248, 249 (C.A.A.F.2007) (quoting Washington v. Texas, 388 U.S. 14, 19 (1967)).

MILITARYDEFENDER
401 B Street, Suite 2030 San Diego, California 92101

An expert consultant is provided to the defense as a matter of [military and constitutional] due process, in order to prepare properly for trial and otherwise assist with the defense of a case. *United States v. Langston,* 32 M.J. 894, 896 (A.F.C.M.R.1991).

The Court of Appeals for the Armed Forces has determined that in order to require production of an expert consultant and possibly later expert witness, the moving party must establish: (1) the qualifications of the expert; (2) the subject matter of the expert testimony; (3) the basis for the expert testimony; (4) the legal relevance of the evidence; (5) the reliability of the evidence; and (6) whether the probative value of the testimony outweighs other considerations. United States v. Boston, No. NMCCA 200900157, 2010 CCA LEXIS 59, at *6-7 (N-M Ct. Crim. App. May 11, 2010), *United States v. Ruth*, 46 M.J. 1, 3 (C.A.A.F. 1997) (quoting *United States v. Houser*, 36 M.J. 392, 397 (C.A.A.F. 1993)).

A. <u>The qualification of the expert.</u>

Dr. [redacted] CV is attached at Enclosure (1) and is hereby incorporated as evidence of his qualifications as an expert in the field of forensic Pathology.

B. <u>The subject matter of the expert counsel and testimony.</u>

The subject matter – including life-saving medical procedures performed – necessitates expert analysis from the highly specific and technical field of a forensic Pathology.

C. <u>The basis for the expert counsel and testimony.</u>

The expert would review the witness statements and the objective records and both photographic and video evidence that has been provided thus far. He would consult with other defense experts and the accused to determine whether the defense theory is reasonable under the circumstances given the evidence available. Further, he would review the evidence to determine inconsistencies or implausibility in the statements made by the witnesses. Among other things, the expert would also assist us in crafting appropriate cross-examination questions for government expert witnesses.

D. <u>The legal relevance of the evidence.</u>

Dr. [redacted] consultation will provide the defense with the expertise to understand the intricacies of forensic pathology, assist the defense in developing its trial strategy given the complexity of forensic pathology, and assist the defense in preparing to cross examine

MILITARYDEFENDER [redacted]

government experts in the relevant fields. Further, if relevant to the defense after reviewing the evidence in the case, Dr. [redacted] testimony will provide direct evidence for the jurors to consider when deciding whether or not they should make any inference pertaining to the life-saving treatment administered and cause of death.

E. <u>The reliability of the evidence.</u>

Dr. [redacted] has been qualified as an expert of in the field of Pathology on numerous occasions and is recognized in his scientific field.

F. <u>The probative value of the counsel and testimony outweighs other considerations.</u>

The probative value of Dr. [redacted] counsel and possible testimony cannot be overstated. He will provide expert consultant and possibly later expert testimony that will go toward elements of the allege offense that creates a defense for the accused. Again, Dr. [redacted] CV is attached, as is his fee schedule. The defense respectfully requests that Dr. [redacted] be initially authorized 30 hours for preparation time, plus travel and expenses as required at the fee quoted.

VI.
ORAL ARGUMENT

The defense respectfully requests or argument.

V.
CONCLUSION

The defense requests the government be compelled to retain Dr. [redacted] as an expert consultant and possibly later expert witness or that the proceedings be abated. The ability to present matters to the court, and establish a defense, is imperative.

DATED: December 27, 2019

MILITARYDEFENDER
[redacted]
P[redacted]
A[redacted]sed
[redacted] Tony Dedolph

MILITARYDEFENDER [redacted]

Phillip Stackhouse, Esq.
MILITARYDEFENDER
[redacted]

Attorneys for [redacted] Tony Dedolph

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

UNITED STATES OF AMERICA,

Government

vs.

[redacted] TONY DEDOLPH, [redacted]
[redacted] U.S. Navy

Accused.

NOTICE OF MOTION AND MOTION TO COMPEL PRODUCTION OF DEFENSE EXPERT WITNESS; AND MEMORANDUM OF POINTS & AUTHORITIES (Forensic Trauma Medicine)

[R.C.M. § 701(d)]

Date: TBD
Time: TBD
Judge: Captain Michael J. Luken
Dept.: Bldg. A-50, Naval Station, Norfolk, Virginia 23511
Action Filed: November 14, 2018
Trial Date: March 23, 2020
Date: December 27, 2019

TO THE GOVERNMENT AND ITS ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that on December 27, 2019, in the above-mentioned Court, located at building A-50, Naval Station, Norfolk, Virginia 23511, before Captain Michael J. Luken presiding, Accused moves the Court to Compel the prosecution to retain Accused's Expert Consultant and possibly later Expert Witnesses as previously requested and denied.

MILITARYDEFENDER [redacted]

This motion will be based upon this Notice, this Memorandum of Points and Authorities, as well as the pleadings, records and files of this Court, and upon such other evidence and arguments that may be presented before the time of the court's ruling on the motion.

I.
RELIEF SOUGHT

The defense in the above case moves this court to compel the Government to retain the services of Dr. [redacted] as a defense expert consultant and possibly later expert witness in the field of forensic Trauma Medicine.

II.
BURDEN OF PERSUASION AND BURDEN OF PROOF

The burden of persuasion is on the defense and is by a showing of a preponderance of the evidence.

III.
BACKGROUND FACTS

In the instant case, the accused, [redacted] Dedolph, is alleged to have murdered his colleague, SSG [redacted] who had been injured while wrestling/horseplay and to whom the accused and others were providing combat lifesaving treatment e.g. cardiopulmonary resuscitation and a cricothyrotomy, but were unable to revive their injured colleague. The alleged murder technique was grappling wherein the roommate became unresponsive and went limp. Further, the roommate was taken to a hospital in [redacted] with staff that was possibly reckless in their assessment and treatment, or lack thereof, regarding SSG [redacted]

The medical procedures that were being performed on SSG [redacted] included, inter alia, a cricothyrotomy and cardiopulmonary resuscitation and transportation to the nearest medical facility. An analysis is required to determine whether the treatment methods performed were reasonable under the circumstances, were conducted in a reasonable manner, and if different life saving actions would have resulted in a different outcome. These answers will go toward issues on the merits and matters in mitigation. Dr. [redacted] will review all available records, evidence, and speak to witnesses as needed.

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MILITARYDEFENDER

IV.
WITNESSES AND EVIDENCE

a. Charge Sheet [not enclosed]

b. CV/Fee Schedule [Enclosure (1)]

c. Defense request [Enclosure (2)]

d. Government Denial [Enclosure (3)]

e. Dr. [redacted] will testify telephonically for the motion if necessary.

V.
LEGAL AUTHORITY AND ARGUMENT

The defense is requesting that Dr. [redacted] be paid for by the Government as an expert consultant and possibly later expert witness in the field of Forensic Trauma Medicine in accordance with Rules for Court-martial 703(d), Article 46, UCMJ, and applicable case law.

In accordance with Article 46, UCMJ, "[t]he 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." This ensures that "[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 of law.' " *United States v. McAllister*, 64 M.J. 248, 249 (C.A.A.F.2007) (quoting Washington v. Texas, 388 U.S. 14, 19 (1967)).

An expert consultant is provided to the defense as a matter of [military and constitutional] due process, in order to prepare properly for trial and otherwise assist with the defense of a case. *United States v. Langston,* 32 M.J. 894, 896 (A.F.C.M.R.1991).

The Court of Appeals for the Armed Forces has determined that in order to require production of an expert consultant and possibly later expert witness, the moving party must establish: (1) the qualifications of the expert; (2) the subject matter of the expert testimony; (3) the basis for the expert testimony; (4) the legal relevance of the evidence; (5) the reliability of the evidence; and (6) whether the probative value of the testimony outweighs other considerations. United States v. Boston, No. NMCCA 200900157, 2010 CCA LEXIS 59, at *6-7 (N-M Ct. Crim. App. May 11, 2010), *United States v. Ruth*, 46 M.J. 1, 3 (C.A.A.F. 1997) (quoting *United States v. Houser*, 36 M.J. 392, 397 (C.A.A.F. 1993)).

[redacted]

A. The qualification of the expert.

Dr. [redacted] CV is attached at Enclosure (1) and is hereby incorporated as evidence of her qualifications as an expert in the field of Forensic Trauma Medicine.

B. The subject matter of the expert counsel and testimony.

The subject matter – including emergency life-saving medical procedures performed – necessitates expert analysis from the highly specific and technical field of a forensic Trauma Medicine.

C. The basis for the expert counsel and testimony.

The expert would review the witness statements and the objective photographic and video evidence that has been provided thus far. She would consult with other defense experts and the accused to determine whether the defense theory is reasonable under the circumstances given the evidence available. Further, he would review the evidence to determine inconsistencies or implausibility in the statements made by the complaining witnesses. Among other things, the expert would also assist us in crafting appropriate cross-examination questions for the government expert.

Doctor [redacted] would also review all appropriate training manuals to determine the skill level of those who are anticipating in the treatment of the combatant and the proficiency in which there treatment was performed, review statements pertaining to the treatment that was provided by the witnesses that will be taken in the future, and specifically interview the accused to discuss the treatment that he performed on SSG [redacted]

D. The legal relevance of the evidence.

Dr. [redacted] consultation will provide the defense with the expertise to understand the intricacies of forensic trauma medicine, assist the defense in developing its trial strategy given the complexity of forensic trauma medicine, and assist the defense in preparing to cross examine government experts in the relevant fields. Further, if relevant to the defense after reviewing the evidence in the case, Dr. [redacted] testimony will provide direct evidence for the jurors to consider when deciding whether or not they should make any inference pertaining to the life-saving treatment administered.

E. The reliability of the evidence.

MILITARYDEFENDER [redacted]

Dr. [redacted] has been qualified as an expert of in the field of trauma medicine on numerous occasions and is recognized in her scientific field.

F. <u>The probative value of the counsel and testimony outweighs other considerations.</u>

The probative value of Dr. [redacted] counsel and possible testimony cannot be overstated. She will provide expert counsel and possibly later expert testimony that will go toward elements of the allege offense that creates a defense for the accused. Again, Dr. [redacted] CV is attached, as is her fee schedule. The defense respectfully requests that Dr. [redacted] be initially authorized 30 hours for preparation time, plus travel time and expenses as required at the fee quoted.

VI.
ORAL ARGUMENT

The defense respectfully requests or argument.

V.
CONCLUSION

The defense requests the government be compelled to retain Dr. [redacted] as an expert consultant and possibly later expert witness or that the proceedings be abated. The ability to present matters to the court, and establish a defense, is imperative.

DATED: December 27, 2019

MILITARYDEFENDER

[redacted]

Phillip Stackhouse
Attorney for Accused
[redacted] Tony Dedolph

MILITARYDEFENDER [redacted]

Phillip Stackhouse, Esq.
MILITARYDEFENDER
[redacted]

Attorneys for [redacted] Tony Dedolph

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

UNITED STATES OF AMERICA,

Government

vs.

[redacted]TONY DEDOLPH, [redacted]
[redacted]U.S. Navy

Accused.

NOTICE OF MOTION AND MOTION TO COMPEL PRODUCTION OF EXPERT WITNESS; AND MEMORANDUM OF POINTS & AUTHORITIES

[R.C.M. § 701(d)]

Date: TBD
Time: TBD
Judge: Captain Michael J. Luken
Dept.: Bldg. A-50, Naval Station, Norfolk, Virginia 23511
Action Filed: November 14, 2018
Trial Date: March 23, 2020
Date: December 27, 2019

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MILITARYDEFENDER [redacted]

This motion will be based upon this Notice, this Memorandum of Points and Authorities, as well as the pleadings, records and files of this Court, and upon such other evidence and arguments that may be presented before the time of the court's ruling on the motion.

I.
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II.
BURDEN OF PERSUASION AND BURDEN OF PROOF

The burden of persuasion is on the defense and is by a showing of a preponderance of the evidence.

III.
BACKGROUND FACTS

In this case, the accused, [redacted] Dedolph, is alleged to have murdered his colleague, SSG [redacted] who had been injured during wrestling/horseplay and to whom the accused and others were providing combat lifesaving treatment e.g. cardiopulmonary resuscitation and a cricothyrotomy, but were unable to revive their injured colleague. The alleged murder technique was grappling wherein the roommate became unresponsive and went limp. Further, the roommate was taken to a hospital in [redacted] with staff that was possibly reckless in their assessment and treatment, or lack thereof, regarding SSG [redacted]

The evidence discovered in this case includes images of the alleged victim, who is now deceased, the scene of the alleged crime and of other items of evidence. Other evidence includes images, charts, and graphs that require independent expert analysis. Further analysis is required for the scene of the alleged crime and review and analysis of the government's evidence. Mr. [redacted] is a forensic Criminalist whose expertise are in examining crime scene evidence and obtaining forensic evidence to help determine thing like proper processes, analysis and custody of evidence. Mr. [redacted] will be able to assess whether the crime scene was properly preserved, and whether the processes in obtaining and preserving such evidence were adhered to. Mr. [redacted] is

MILITARYDEFENDER

expected to give his independent opinion based on the evidence and to refute any opinions the government offers that are not consistent with his expert analysis.

IV.
WITNESSES AND EVIDENCE

a. Charge Sheet [not enclosed]

b. CV/Fee Schedule [Enclosure (1)]

c. Defense request [Enclosure (2)]

d. Government Denial [Enclosure (3)]

e. Mr. [redacted] will testify telephonically for the motion if necessary.

V.
LEGAL AUTHORITY AND ARGUMENT

The defense is requesting that Mr. [redacted] be paid for by the Government as an expert consultant and possibly later expert witness in the field of forensic Criminology in accordance with Rules for Court-martial 703(d), Article 46, UCMJ, and applicable case law.

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The Court of Appeals for the Armed Forces has determined that in order to require production of an expert consultant and possibly later expert witness, the moving party must establish: (1) the qualifications of the expert; (2) the subject matter of the expert testimony; (3) the basis for the expert testimony; (4) the legal relevance of the evidence; (5) the reliability of the evidence; and (6) whether the probative value of the testimony outweighs other considerations. United States v. Boston, No. NMCCA 200900157, 2010 CCA LEXIS 59, at *6-7 (N-M Ct. Crim.

MILITARYDEFENDER

App. May 11, 2010), *United States v. Ruth*, 46 M.J. 1, 3 (C.A.A.F. 1997) (quoting *United States v. Houser*, 36 M.J. 392, 397 (C.A.A.F. 1993)).

A. The qualification of the expert.

Mr. [redacted] CV is attached at Enclosure (1) and is hereby incorporated as evidence of her qualifications as an expert in the field of forensic Criminology.

B. The subject matter of the expert counsel and testimony.

The subject matter – including life-saving medical procedures performed – necessitates expert analysis from the highly specific and technical field of a forensic Criminology.

C. The basis for the expert counsel and testimony.

The expert would review the witness statements and the objective photographic and video evidence that has been provided thus far. He would consult with other defense experts and the accused to determine whether the defense theory is reasonable under the circumstances given the evidence available. Further, he would review the evidence to determine inconsistencies or implausibility in the statements made by the complaining witnesses. Among other things, the expert would also assist us in crafting appropriate cross-examination questions for government expert witnesses.

D. The legal relevance of the evidence.

Mr. [redacted] consultation will provide the defense with the expertise to understand the intricacies of crime scene analysis, assist the defense in developing its trial strategy given the complexity of forensic crime scene analysis, and assist the defense in preparing to cross examine government experts in the relevant fields. Further, if relevant to the defense after reviewing the evidence in the case, Mr. [redacted] testimony will provide direct evidence for the jurors to consider when deciding whether or not they should make any inference pertaining to the life-saving treatment administered.

E. The reliability of the evidence.

Mr. [redacted] has been qualified as an expert of in the field of Criminology on numerous occasions and is recognized in his scientific field.

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///

MILITARYDEFENDER [redacted]

F. The probative value of the testimony outweighs other considerations.

The probative value of Mr. [redacted] counsel and possible testimony cannot be overstated. He will provide expert counsel and possibly later expert testimony that will go toward elements of the allege offense that creates a defense for the accused. Again, Mr. [redacted] CV is attached, as is his fee schedule. The defense respectfully requests that Mr. [redacted] be initially authorized 30 hours for preparation time, plus travel time and expenses as required at the fee quoted.

VI.
ORAL ARGUMENT

The defense respectfully requests or argument.

V.
CONCLUSION

The defense requests the government be compelled to retain Mr. [redacted] as an expert consultant and possibly later expert witness or that the proceedings be abated. The ability to present matters to the court, and establish a defense, is imperative.

DATED: December 27, 2019

MILITARYDEFENDER
[redacted]
Phillip Stackhouse
Attorney for Accused
[redacted] Tony Dedolph

MILITARYDEFENDER [redacted]

Phillip Stackhouse
[redacted]

NAVY-MARINE CORPS TRIAL JUDICIARY

UNITED STATES, vs. [redacted] Tony DeDolph, USN, ACCUSED	MRE 505 Notice to Government

The defense gives the following notice of its intent to introduce classified material in the case of the accused:

1. Under the umbrella of [redacted] all operations Tony participated in between 2014 and 2017, including but not limited to the operations reflected on his Purple Heart, Joint Commendation Medal (with Valor), and Navy Commendation Medal (with Valor). In addition, still under the [redacted] umbrella, we intend on introducing evidence on the mission Tony was engaged in while in [redacted]
2. Evidence of the operation Tony participated in as a member of [redacted] 7 in 2009 in [redacted]
3. Evidence of [redacted] employment and the specific US Government agency she works for and her actions in [redacted]
4. Evidence of the mission Tony was engaged in while in [redacted] that was a [redacted]

5. Evidence from the CID investigation that remains classified at this time.

6. Evidence pertaining to a witness known as [redacted] to include her position/appointment, her employment record, her purpose in [redacted] her telephones, several motives to fabricate, and her relationship with a lead investigator in the case.

These list may be supplemented as new information becomes available.

[redacted]

Phillip Stackhouse

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

U N I T E D S T A T E S **v.** **TONY DEDOLPH** **[redacted]/E-7 USN**	**Notice of Pleas and Forum** **10 January 2020**

[redacted] **TONY DEDOLPH,** through counsel, hereby gives notice of election of pleas and forum.

[redacted] DeDolph pleads: **NOT GUILTY** to all charges and specifications thereunder. [redacted]

Dedolph elects trial by **MEMBERS WITH ENLISTED REPRESENTATION**.

PORTZER.JOEL[redacted] Digitally signed by PORTZER.JOELLE.C[redacted]
LE.C.[redacted] Date: 2020.01.10 09:52:26 -05'00'
[redacted]

J. PORTZER
LT, JAGC, USN
Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of January, 2020, a copy of this notice was served on Trial Counsel.

PORTZER.JOEL[redacted] Digitally signed by PORTZER.JOELLE.C[redacted]
LE.C.[redacted] Date: 2020.01.10 09:53:05 -05'00'
[redacted]

J. PORTZER
LT, JAGC, USN
Defense Counsel

COURT RULINGS & ORDERS

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

UNITED STATES **v.** **TONY DEDOLPH** **[redacted], U.S. NAVY**	**COURT ORDER REGARDING COVID-19 MITIGATION MEASURES FOR A CONTESTED MEMBER'S TRIAL**

1. **Nature of Order**. The subject case is currently docketed for a contested member's trial in Courtroom 1 of Building A-50, Norfolk, Virginia for the dates 14 January – 22 January 2021. In order to mitigate COVID-19 health risks to all trial personnel and any members of the general public who may desire to attend the proceedings, the Court orders the following mitigation measures implemented during the trial of the subject case. These mitigation measures address only those measures that will be taken within Courtroom 1 of Building A-50, the judicial chambers, and members deliberation room. In addition to these measures, any other measures imposed by the Base Commander for Naval Station Norfolk or Commander, Navy Region Mid-Atlantic, will also be observed. However, should there be any conflict between the measures imposed by this Court and any other official direction, the measures ordered by the Court shall be enforced.

2. **The following mitigation measures are hereby ordered by the Court to be observed within Courtroom 1 of Building A-50, the judicial chambers, and members' deliberations room during the proceedings conducted in the General Court-Martial of United States v. [redacted] U.S. Navy.**

3. Measures related to courtroom spaces.

a. Absent good cause, sessions of court will be held from 0900-1700 each day.

b. Prior to the commencement of any session of court, all tables, podiums, chairs, and surfaces within the courtroom, the judicial chambers, and members deliberation rooms will be cleaned with appropriate cleaning agents. The cleaning of these spaces and items will occur before the start of each day's proceedings, during the mid-day recess, and at the conclusion of each day's proceedings.

c. To reduce "mask fatigue" and to allow for the "airing out" of the courtroom, the Court will observe frequent recesses throughout the proceedings. Typically, the session will be recessed every 45 minutes for a period of 15 minutes. During these recesses, the courtroom doors should be opened and fans should be used to the greatest extent possible to maximize fresh air flow within the courtroom.

d. Because the members deliberation room adjacent to Courtroom 1 in Building A-50 insufficient to maintain appropriate social distancing and lack adequate airflow for use over extended periods of time, Courtroom 2 will be utilized for the members. The Court will conduct an inspection, in the presence of the parties, of this alternate deliberation room prior to its use in deliberations.

e. In order to maximize social distancing, the Court is limiting the number of spectators[1] allowed in Courtroom 1 to 34 individuals. Trial counsel is directed to designate seating in the spectators' box to ensure minimum social distancing occurs consistent with this order. Nothing in this order is intended to interfere with the requirements of an open trial pursuant to RULE FOR COURTS-MARTIAL 806.

f. The cameras within Courtroom 2 will be obscured so that no person may view what is occurring within the temporary deliberation room.

4. Measures related to counsel. All counsel will wear face masks at all times while within Courtroom 1 of Building A-50 unless granted specific permission by the Court to remove their mask. Should the Court grant counsel permission to remove their mask, counsel will maintain six (6) feet distance from any other participant at all times while unmasked.

5. Measures related to the accused. The accused may, but is not required to, wear a face mask while court is in session. Should the accused choose not to wear a mask while court is in session, defense counsel will arrange seating at counsel table in order to observe appropriate social distancing from the accused. When consulting with counsel in the courtroom, the accused will wear a face mask. During all periods of recess, the accused will wear a face mask while within the courtroom.

6. Measures related to members.

a. As currently convened, the court panel venire is comprised of 16 members. To mitigate the increased chance of exposure that may occur with a large venire, the Court directs that the gallery in Courtroom 1 be utilized to initially assemble the court martial, swear in the members, and allow for the military judge to provide initial instructions.

b. Subsequently, the members will be questioned in groups of eight (8). Following the first group of eight, Counsel will be allowed to question these eight members individually. The second group of 8 will be provided instructions on when they are to arrive. The court will liberally permit follow on questions during individual *voir dire* to ensure the parties have had adequate opportunity to develop potential challenges. During individual *voir dire*, members will not wear masks in order to allow the military judge and counsel to have an unobstructed view.

[1] Spectators are any member of the general public and any individual not specifically detailed to this court-martial, including, but not limited to, the accused's or victim's family members and supporters, members of the press, trial team support staff, and supervisory counsel.

c. At all other times, members are required to wear a face mask while within Courtroom 1 of Building A-50.

d. During deliberations, members may, but are not require to, remain unmasked. While in the deliberation room, members should maintain social distancing at all times.

7. Measures related to other participants and spectators.

a. The court reporter is required to wear a face mask at all times within Courtroom 1 of Building A-50.

b. Witnesses are required to wear a face mask when entering and exiting Courtroom 1 of Building A-50. Prior to swearing in, the trial counsel will direct witnesses to remove their face mask which will not be worn during testimony. During examination, counsel will remain at least six (6) feet away from the witness at all times. Should counsel need to pass any exhibit to a witness on the witness stand, that exhibit will be passed to the witness via the bailiff. Once a witness is excused from the stand and prior to the next witness taking the stand, the witness chair and all surfaces in the witness box will be cleaned with appropriate cleaning agents.

c. All spectators will wear a mask while within Courtroom 1 of Building A-50. Any spectator who fails to wear a mask will not be permitted to enter the courtroom.

So **ORDERED,** this 13th Day of January 2021.



H.C. LARSEN
CDR, JAGC, USN
Military Judge

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

U N I T E D S T A T E S **v.** **TONY DEDOLPH** **[redacted]/E-7 USN**	)	**RULING ON DEFENSE MOTION FOR APPROPRIATE RELIEF – UNLAWFUL INFLUENCE** **23 January 2021**

1. Nature of Motion

On 28 June 2020, the Defense filed AE XIV, moving this Court to grant the Defense additional five preemptory challenges because then-Acting Secretary of the Navy, Thomas Modly; RADM Collin Green, USN; BG Donald Boluc, USA; and other unidentified individuals tainted any potential jury pool. The Government responded in AE XIV(a), urging this Court to deny the Defense's motion.

On 7 July 2020, an Article 39(a) session was held where the parties presented evidence and argument. Following that hearing, and after a lengthy continuance was granted in this case, the Court provided notice of its ruling denying the Defense's motion and requested relief. The Court reserved the right to supplement its oral ruling with a written ruling. The Court takes the opportunity to do so now.

The Defense's motion is **DENIED** for the reasons set forth below.

2. Issue

Did the Defense present some evidence that raised the issue of apparent unlawful command influence?

3. Findings of Fact

In reaching its findings and conclusions, the court considered all legal and competent evidence presented by the parties and the reasonable inferences to be drawn therefrom. The court makes the following findings of fact:

At the time of SSG [redacted] death, on 4 June 2017, BG Donald Bolduc was Commander [redacted]

Several months after the death of SSG [redacted] on 4 June 2017, his cause of death was reported on in civilian news outlets. On 12 November 2017, the Daily Beast published an article alleging that [redacted] DeDolph and other unnamed individuals intentionally murdered SSG [redacted] The article suggested a possible motive and cited anonymous sources such as "former [redacted] official[s] and "special operations sources." Ret. BG Bolduc was not cited in the 12 November 2017 article. Opinions attributed to him regarding the investigation came solely from anonymous sources.[1]

Prior to this article, on 29 June 2017, BG Bolduc was relieved as [redacted] by Major General Marcus Hicks

On 1 October 2017, BG Bolduc retired from active duty.

On 12 November 2017, The Daily Beast published the article discussed above.

On 13 November 2017, an NBC News article cited the Army's preliminary investigative report and raised several possible motives for the alleged crime. The article noted that the motives listed in the investigative report differed from the motive previously reported in the Daily Beast by anonymous sources. In the 13 November 2017 NBC News article, a spokesperson for the Pentagon, Col. [redacted] "cautioned against speculating about [the] incident before the full investigation is complete." In this article, Ret. BG Bolduc confirmed that "special operators do have access to cash on the ground in places like [redacted] Ret. BG Bolduc did not comment or speculate about the guilt or innocence of the accused or the veracity of any potential motive.

On 18 November 2017, Ret. BG Bolduc shared an image on Twitter of SSG [redacted] and offered thoughts and prayers to the family of SSG [redacted]

On 20 August 2019, Rear Admiral Collins Green issued "Guidance from the Commander" addressed to [redacted] community. This memorandum called on leaders to take action to get "back to basics" to maintain good order and discipline across the [redacted]. The memorandum did not identify the accused or any specific incidents of misconduct.

In December 2019, Acting Secretary of the Navy Thomas Modly spoke at a U.S. Naval Institute Defense forum where he explained that 20 years of war has had an effect on our forces. The Acting Secretary did not make comments about the accused or specific incidents of misconduct.

[1] This article claimed that [redacted] DeDolph was stealing money from operational funds and killed SSG [redacted] to prevent him from reportingthis embezzlement. Both sides agree that these allegations were false and not supported by any of the three-year investigation into SSG [redacted] death.

In January 2020, Ret. BG Bolduc commented negatively on the Navy's decision to promote the accused despite being under investigation for the death of SSG [redacted].[2]

4. **Principles of Law**

Unlawful command influence (UCI) is the "mortal enemy of military justice." *United States v. Thomas*, 22 MJ 388, 393 (C.M.A. 1986). Article 37, of the Uniform Code of Military Justice (UCMJ) prohibits commanders and convening authorities from attempting "to coerce, or by unauthorized means, influence the action of a court-martial, … or any member thereof, in reaching the findings or sentence in any case." Article 37(a), UCMJ. UCI rises from the improper use, or perception of use, of superior authority to interfere with the court-martial process. Gilligan and Lederer, COURT-MARTIAL PROCEDURE, Volume 2 §18-28.00, 153 (2d Ed. 1999). UCI "may consist of interference with the disposition of charges, with judicial independence, with the obtaining or presentation of evidence, or with the independence and neutrality of members." *Id.* at 154-55.

When assessing whether UCI exists in a particular case, the court must consider the potential impact of actual UCI and apparent UCI. *United States v. Boyce*, 76 M.J. 242, 247 (C.A.A.F. 2017). The military judge must take affirmative steps to ensure that both forms of UCI are eradicated from the court-martial in question. *United States v. Lewis,* 63 M.J. 405, 413 (C.A.A.F. 2006).[3] The key to the court's UCI analysis is the effect on the proceedings, not the knowledge or intent of the government actors whose actions are in question. *Boyce,* 76 M.J. at 251. In a recent opinion, the C.A.A.F. stated that

> "the plain language of [Article 37, UCMJ] does not require one to operate with the imprimatur of command." *U.S. v. Barry,* 78 M.J. 70 at 76 (C.A.A.F. 2017). In *Barry*, the C.A.A.F. reinforced the fundamental principle that a military court must "protect court-martial processes from improper command influence and to prevent interference from non-command sources as well in order to foster public confidence in the actual and apparent fairness of the military system of justice. *Id*.

Actual UCI occurs when there is an improper manipulation of the criminal justice system which negatively effects the fair handling and/or disposition of a case." *Id.* at 247. In *United States v. Biagase,* C.A.A.F. set forth the analytical framework to be applied to allegations of UCI at trial. 50 M.J. 143, 150 (C.A.A.F. 1999). C.A.A.F. placed the initial burden on the defense to raise the issue by "some evidence." *Id.* To meet this "some evidence" standard, the Defense must show some facts which, if true, would constitute UCI. *Id.* at 150. The Defense must then show that such evidence has a "logical connection" to the court-martial at issue in terms of potential to cause unfairness in the proceedings. *Id.* While the initial Defense burden is "low,"

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[2] He referred to the decision to promote [redacted] DeDolph as "another failure in leadership" and "utter bullshit."
[3] *See also Rosser*, 6 M.J. at 271 (stating that once UCI is raised, "it is incumbent on the military judge to act in the spirit of the Code by avoiding even the appearance of evil in his courtroom and by establishing the confidence of the general public in the fairness of the court-martial proceedings.").

the Defense is required to present more than an allegation or speculation. *United States v. Ashby*, 68 M.J. 108, 128 (C.A.A.F. 1998)(noting that "mere speculation that UCI occurred because of a specific set of circumstances is not sufficient"); *see also United States v. Johnston,* 39 M.J. 242, 244 (C.M.A. 1991)("The threshold for triggering further inquiry should be low, but it must be more than a bare allegation or mere speculation."). If the Defense satisfies its burden, the burden shifts to the government to: (1) disprove "the predicate facts upon which the allegation of UCI is based," (2) persuade the court that the facts do not constitute UCI, or (3) prove that the UCI will not affect these specific proceedings. *Biagase*, 50 M.J. at 151. "Whichever tactic the government chooses; the required quantum of proof is beyond a reasonable doubt." *United States v. Stoneman,* 57 M.J. 35, 41 (C.A.A.F. 2002)(citing *Biagase*, 50 M.J. at 151).

To establish apparent UCI, the accused must demonstrate: (1) facts, if true, that constitute UCI, and (2) the UCI placed an intolerable strain on the public's perception of the military justice system because "an objective, disinterested observer, fully informed of all of the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding." *Boyce*, 76 M.J. at 249; s*ee also Stoneman*, 57 M.J. at 42. In *Lewis*, CAAF explained that the "objective test for the appearance of UCI is similar to the tests we apply in reviewing questions of implied bias on the part of court members or in reviewing challenges to military judges for an appearance of a conflict of interest." 63 M.J. at 415.

If the court finds either actual or apparent UCI, the court "has broad discretion in crafting a remedy to remove the taint of unlawful command influence." *United States v. Douglas,* 68 MJ 349, 354 (C.A.A.F. 2010)(quoting *United States v. Houser*, 36 M.J. 392, 397 (C.M.A. 1991)). The court should attempt to take proactive, curative steps to remove the taint of UCI and, therefore, ensure a fair trial. *Id.* C.A.A.F has long recognized that, once UCI is raised "…it is incumbent on the military judge to act in the spirit of the UCMJ by avoiding even the appearance of evil in his courtroom and by establishing the confidence of the general public in the fairness of the court-martial proceedings." *United States v. Gore*, 60 MJ 178, 186 (C.A.A.F. 2004).

5. Conclusions of Law

Anonymous Statements to News Outlets

The Court first addresses the Defense's contention that unnamed [redacted] officials created apparent UCI. The Court finds that the Defense has not met its initial burden of showing some evidence of UCI. As these sources were anonymous, there is no evidence they were made by persons subject to the UCMJ. In its motion, Defense argues the statements are highly likely to have been made by active duty personnel because they were attributed to former [redacted] officials and accepted as credible by a Daily Beast reporter. [redacted] is a command made up of personnel who are military, federal civilians, and contactors, any of whom may have spoken

to the Daily Beast.[4] There has been no evidence presented that these unnamed sources are subject to the UCMJ.

Assuming, but not deciding, that these statements could be attributed to a person subject to the UCMJ, they do not amount to UCI. The unattributed statements - published in 2017 - amount to little more than rumors about a potential motive at the early stages of the investigation. In subsequent articles, the Daily Beast contradicted the initial reports and quoted a Pentagon official cautioning against speculating prior to the completion of the investigation. As such, the potential for any influence deriving from these anonymous sources amounts to little more than a belief that "influence [is] in the air."[5]

Statements Made by Retired BG Bolduc

The Defense argues that BG Bolduc's comments insinuated his support for these false theories and motives written in the Daily Beast. His comments, they argue, fueled the false reporting about this incident while the investigation was still ongoing and has tainted any potential jury pool. The Court disagrees.

While Ret. BG Bolduc, a retiree, is a person subject to the UCMJ, none of his actions amount to actual or apparent UCI. First, the opinion attributed to Ret. BG Bolduc in this Daily Beast article came solely from an unnamed source. Without more, there is no evidence Ret. BG Bolduc acted in any unauthorized manner by expressing skepticism of the initial investigation. The mere fact this *alleged* skepticism leaked to the media and was published by a reporter does not convert his opinion into UCI. Similarly, there was nothing unauthorized about Ret. BG Bolduc confirming that special operators have access to cash in places like [redacted] While the Daily Beast may have tried draw an inference from this fact, no such inference was drawn by Ret. BG Bolduc, the person subject to the UCMJ. While his comments regarding the promotion of [redacted] DeDolph may have been intemperate, they do not amount to apparent UCI.

Next, Defense offers a Tweet by Ret. BG Bolduc as another source of potential UCI. Defense argues by responding to someone on the internet who called SSG [redacted] a whistleblower, Ret. BG Bolduc was endorsing that statement as true. The Court disagrees. Ret. BG Bolduc responded to the person who created the post in question by thanking her for her comment and stating that SSG [redacted] family had earned "our support." At the time of this Tweet, Ret. BG Bolduc was retired from active duty and acting in his personal capacity. As a retiree who has no UCMJ authority over anyone, there was nothing unauthorized or unlawful about a retired servicemember responding to a post on the internet. The Court finds that the Defense has failed its threshold burden. Looking at the potential for apparent UCI, the Tweet about SSG [redacted] was written over 3 years ago and is difficult for anyone who is not

[4] The Court takes judicial notice of the fact that U.S. [redacted] has approximately 2,000 assigned personnel, including military, U.S. federal civilian employees, and U.S. contractor employees. (according to its website)
[5] *US v. Johnston*, 39 M.J. 242 (C.M.A. 1994) citing *United States v. Allen*, 33 MJ 209, 212 (CMA 1991).

specifically searching for this tweet to find it. The remoteness of this tweet further diminishes the potential for it to have any influence, actual or apparent, on the accused's court martial.

Assuming, but not deciding, that any of the alleged statements by anonymous sources or Ret. BG Bolduc amount to UCI, Defense cannot meet its burden in showing they would put an intolerable strain on the perception of fairness by a disinterested observer. A fully informed observer would recognize that a handful of comments made over three years ago, speculating on a possible motive at the earliest stage of the investigation, are unlikely to have any influence on the accused's ability to receive a fair trial. Likewise, Tweets offering praise for SSG [redacted] and his family - over three years ago - by a retiree acting in his personal capacity, would not cause a fully informed observer to question the fairness of the court martial process.

This finding is buttressed by the well-known and public nature of a court martial, to include its robust voir dire process. A fully informed observer, armed with the knowledge that military judges are enjoined to liberally grant defense's challenge for cause, would understand that is the exact mechanism designed to root out and address any Defense's concerns about bias that exist in any particular case.[6] The Defense will be permitted robust voir dire to illicit any potential knowledge of the facts of the case. Members are presumed to follow the Court's instructions, which includes the requirement to answer all questions truthfully. The Court is confident that the voir dire process, along with standard instructions from the Military Judge, will alleviate any perception of fairness in the accused's case and jury selection process.

Statements by Admiral Green and Acting Secretary Modly

The Defense has failed to present evidence of unlawful command influence by Admiral Green or then Acting Secretary Modly. To the contrary, both Admiral Green and Acting Secretary Modly were exercising lawful influence by commenting on issues that were apparent in the communities over which they are responsible. First, Admiral Green was acting within his authority as [redacted] when he issued the memorandum to his subordinate commanders addressing the culture in the [redacted] The memorandum did not identify the accused or any specific incident of misconduct, nor did it comment on the court-martial process. While Admiral Green called attention to a cultural problem within the community, his call to action can be fairly characterized as getting "back to the basics" to prevent future misconduct in the special warfare community. His actions were not only lawful, but were warranted considering the circumstances and potential issues facing his community. Admiral Green did not make any statements addressing the accused's case or

[6] The Military Judge's Benchbook has standard voir dire questions to ask when a case has received visibility in the press. "This case has received some attention in the local and national press. By press, I mean newspapers, magazines, online news sites. Is there any member who has not seen any mention of this case in the press?Do all members agree with the proposition that press reports can be incomplete, inaccurate or misleading? Can each of you put aside all the matters that you have read, heard, or seen in the press and decide the case based solely on the evidence you receive in this court martial?"

suggesting a desired outcome in his court martial process. Further, the memorandum, published in August 2019, is over two years removed from the allegations against the accused. This temporal remoteness undercuts any perception that the guidance was tied directly to the allegations against the accused. While Defense cites media coverage during this time as tying Admiral Green's memorandum to the accused's case, media coverage does not convert Admiral Green's authorized actions to *unlawful* ones. As his comments were neither unauthorized, nor likely to influence the accused's court martial, Defense has not met its burden in showing some evidence of UCI.

Similarly, the general statements made by the Acting Secretary of the Navy regarding the effect of 20 years of war on our forces do not amount to UCI. The Secretary of the Navy has the statutory responsibility to oversee all affairs of the Department of the Navy, including recruiting, training, and administering the forces. His statements regarding the welfare and culture of the forces after decades of war are well within his authority. In his statements, he did not identify the accused, discuss any desired outcome in his court marital process, or in any other way influence the accused's ability to receive a fair trial. As his comments were neither unauthorized, nor likely to influence the accused's court marital, Defense has not met its burden in showing some evidence of UCI.

Even assuming that the Defense had met its burden, looking at the totality of the circumstances and the context in which these statements were made, the Court believes a fully informed observer would not harbor a significant doubt about the fairness of the proceeding. As stated above, there are tools designed and already in place to handle perceived "HIVIS" cases that have attracted attention in the press and perhaps from leadership. Specifically, the voir dire process, with the liberal grant mandate, is the appropriate tool to ensure that no member has any actual or implied bias that would prevent them from being an impartial member. Such a fully informed observer would know that Defense will fully vet potential members during voir dire to determine if any potential member has actual or implied biases regarding the culture in the special warfare community. A fully informed observer would know that if a potential member is shown to have actual or implied bias relating to the culture in the special warfare community, that member would be challenged for cause, and with the liberal grant mandate in place, the challenge would be granted.

6. Ruling

The Defense Motion is **DENIED.**

[redacted]

Hayes C. Larsen
CDR, JAG, USN
Military Judge

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

U N I T E D S T A T E S **v.** **Tony DeDolph** [redacted] **USN**	**RULING ON DEFENSE MOTION FOR MISTRIAL AND NEW SENTENCING PROCEEDINGS** **13 May 2021**

1. **Nature of Motion.** The accused was found guilty, pursuant to his pleas, and was sentenced by members on 23 January 2021. Before the convening authority's action, trial Defense Counsel filed a Motion under Rules for Courts-Martial 915 and 1104, on 15 February 2021 requesting this Court declare a mistrial (AE XXXVII). The Government responded on 24 February 2021 (AE XXXVII(a)). The Defense then filed a further reply brief on 2 March 2021 (AE XXXVII(b)). In its motions, the Defense requested a hearing to litigate these issues.[1]

On 12 March 2021, the Court denied the Defense's motions and denied the request for a post-trial hearing. In its notification of its ruling, the Court reserved the right to supplement its ruling in writing. The Court takes the opportunity to do so now.

Based on the filings from the parties and the evidence presented, the Court concluded under R.C.M. 905(h) that a hearing was not necessary to resolve the submitted issues.

2. **Findings of Fact.**

On December 13, 2020, the Accused and his Defense Counsel signed a stipulation of fact with the trial counsel. On 14 December 2020, the Convening Authority approved the accused's pretrial agreement. On January 14, 2020, [redacted] Dedolph, in accordance with his pretrial agreement, pleaded guilty to conspiracy to commit assault, conspiracy to obstruct justice, hazing (in violation of Article 92), involuntary manslaughter, and obstruction of justice. This Court conducted an extensive inquiry into the stipulation of fact, the pretrial agreement, and the pleas of the Accused. After completing its inquiry, the Court found, on the record, that the accused's pleas were provident and accepted them. The Court entered a finding of guilty on the record.

[1] For purposes of the completeness of the record, the Court is including the email correspondence from the parties, and they will be marked as Appellate Exhibit XXXVII(d).

Following the acceptance of the accused's pleas, both parties presented their respective sentencing cases in accordance with R.C.M. 1001 to a panel of members. This hearing lasted several days and included significant witness testimony, expert witness testimony and hundreds of pages of exhibits. Throughout the sentencing proceedings, several Article 39(a) sessions were held to handle specific objections by the Defense that the Government was presenting improper evidence in aggravation and that they were impeaching the finding of guilt. [2] The Court ruled on each of those objections, all of which is accurately captured in the complete record of trial.

3. Conclusions of Law.

In its motion, the Defense seeks a mistral as to the sentence because (a) the prosecution impeached the stipulation of fact; (b) the prosecution impeached the finding of guilt; (c) during the sentence proceeding the government introduced improper evidence in aggravation; (d) the prosecution made improper sentencing arguments; and (e) the Government committed a *Brady* violation.

A military judge "may, as a matter of discretion, declare a mistrial when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings."[3] But, "a mistrial is an unusual and disfavored remedy. It should be applied only as a last resort to protect the guarantee for a fair trial."[4]

Regarding issues (a) – (d), the Court finds that those issues were sufficiently argued and ruled on throughout the proceedings and prior to adjournment of the court martial. None of these issues, even when considered with their potential cumulative effect, warrant the severe remedy of a mistrial. Even though it captions its motion as a "motion for a mistrial," the Defense is moving the Court, in essence, to reconsider its rulings and reverse itself. The Court declines to do so. None of the issues argued in (a) – (d) arose post-trial. The Defense has not identified any new facts or law which was not properly considered by the Court in its prior oral rulings, nor has it pointed to any evidence on the record which was not properly considered in the Court's prior rulings. The Court's rulings to the Defense's specific objections are found within the record. The Defense simply disagrees with how the Court ruled.

Regarding the alleged *Brady* violation, without stating that the Defense has forfeited this issue, the Court simply notes that following the direct examination of Dr. [redacted] the Court offered the

[2] Much of the tension during the Accused's court martial centered around what had been stipulated to, what the accused had pleaded guilty to during his providency inquiry, and what the Government later introduced during its case in aggravation.
[3] R.C.M. 915(a).
[4] *United States v. Diaz*, 59 M.J. 79, 90 (C.A.A.F. 2003)

Defense counsel a recess to confer with its expert consultant. The Defense was granted at least a 30 minute recess and did not indicate to the Court that they needed more time to consult with their forensic pathologist. Nor did they ask for a continuance. Finally, the Defense did not conduct a cross-examination of Dr. [redacted]

The Defense also seeks a post-trial hearing under R.C.M. 1104. Rule for Courts-Martial 1104(a) allows a military judge to direct a post-trial 39(a) session before the entry of judgment, for the purpose of inquiring into matters that arise after trial that substantially affect the legal sufficiency of any findings of guilty or the sentence. As mentioned above, the Court finds that none of the matters that the Defense raises in its motion have arisen after trial; they do not fit within the purpose of Rule for Courts-Martial 1104. While R.C.M. 1104(b) does authorize certain post-trial motions, the Court does not find that the matters requested by the Defense fall within the scope of R.C.M. 1104(b). These matters are best left to be assessed by our appellate courts.

4. **Post-trial processing.** This Court highlights these post-trial motions filed by the parties in this case and the time it took for the Court to rule. Specifically, the Court notes that the Defense filed its first motion on 15 February 2021. Based on the issues raised by the Defense, the Court afforded the trial counsel an adequate opportunity to respond, and the Trial Counsel responded on 24 February 2021. Upon receiving the government's response, the Defense requested an opportunity to file a reply brief, which the Court allowed. The Defense filed its reply brief on 2 March 2021. The Court ruled on the motions on 12 March 2021. The Court simply notes these matters when assessing post-trial processing in accordance with the Government's *Moreno* obligations.

5. **Ruling.** The Defense's ruling is DENIED for the reasons stated above.

[redacted]
Military Judge
[redacted]

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
DEDOLPH, TONY E.	Navy	E-7	[redacted]

5. CONVENING COMMAND	6. TYPE OF COURT-MARTIAL	7. COMPOSITION	8. DATE SENTENCE ADJUDGED
CDR, NAVY REGION MID-ATLANTIC	General	Enlisted Members	Jan 23, 2021

SECTION B - FINDINGS

SEE FINDINGS PAGE

SECTION C - ADJUDGED SENTENCE

9. DISCHARGE OR DISMISSAL	10. CONFINEMENT	11. FORFEITURES	12. FINES	13. FINE PENALTY
Dishonorable discharge	10 YEARS	TOTAL	N/A	N/A

14. REDUCTION	15. DEATH	16. REPRIMAND	17. HARD LABOR	18. RESTRICTION	19. HARD LABOR PERIOD
E-1	Yes ○ No ◉	Yes ○ No ◉	Yes ○ No ◉	Yes ○ No ◉	N/A

20. PERIOD AND LIMITS OF RESTRICTION

N/A

SECTION D - CONFINEMENT CREDIT

21. DAYS OF PRETRIAL CONFINEMENT CREDIT	22. DAYS OF JUDICIALLY ORDERED CREDIT	23. TOTAL DAYS OF CREDIT
0	0	0 days

SECTION E - PLEA AGREEMENT OR PRE-TRIAL AGREEMENT

24. LIMITATIONS ON PUNISHMENT CONTAINED IN THE PLEA AGREEMENT OR PRE-TRIAL AGREEMENT

All confinement in excess of 15 years will be suspended for the period of confinement adjudged, at which time, unless sooner vacated, the suspended portion will be remitted without further action.

SECTION F - SUSPENSION OR CLEMENCY RECOMMENDATION

25. DID THE MILITARY JUDGE RECOMMEND SUSPENSION OF THE SENTENCE OR CLEMENCY?		26. PORTION TO WHICH IT APPLIES	27. RECOMMENDED DURATION
	Yes ○ No ◉		

28. FACTS SUPPORTING THE SUSPENSION OR CLEMENCY RECOMMENDATION

SECTION G - NOTIFICATIONS

29. Is sex offender registration required in accordance with appendix 4 to enclosure 2 of DoDI 1325.07?	Yes ○ No ◉
30. Is DNA collection and submission required in accordance with 10 U.S.C. § 1565 and DoDI 5505.14?	Yes ◉ No ○
31. Did this case involve a crime of domestic violence as defined in enclosure 2 of DoDI 6400.06?	Yes ○ No ◉
32. Does this case trigger a firearm possession prohibition in accordance with 18 U.S.C. § 922?	Yes ◉ No ○

SECTION H - NOTES AND SIGNATURE

33. NAME OF JUDGE (last, first, MI)	34. BRANCH	35. PAYGRADE	36. DATE SIGNED	38. JUDGE'S SIGNATURE
LARSEN, HAYES C.	Navy	O-5		LARSEN.HAYES.CHRISTIAN.[redacted] Digitally signed by LARSEN.HAYES.CHRISTIAN.[redacted] Date: 2021.01.23 16:14:10 -05'00'

37. NOTES

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STATEMENT OF TRIAL RESULTS - FINDINGS

SECTION I - LIST OF FINDINGS

CHARGE	ARTICLE	SPECIFICATION	PLEA	FINDING	ORDER OR REGULATION VIOLATED	LIO OR INCHOATE OFFENSE ARTICLE	DIBRS
Charge I	81	Specification 1:	**Guilty**	Guilty			128-B-C
		Offense description	Conspiracy, Assault				
		Specification 2:	**Guilty**	Guilty			134-U2C
		Offense description	Conspiracy, Obstruction of Justice				
Charge II	129	Specification:	**Not Guilty**	W/D			129---
		Offense description	Burglary				
Charge III	118	Specification:	**Not Guilty**	W/D			118-D-
		Offense description	Felony murder (on or after 28 June 2012)				
Charge IV	119	Specification:	**Guilty**	Guilty			119-B1
		Offense description	Involuntary Manslaughter				
Charge V	92	Specification:	**Guilty**	Guilty			092-A0
		Offense description	Hazing, SECNAVINST 1610.2A, Para 7h, dtd 15 Jul 05				
Charge VI	134	Specification:	**Guilty**	Guilty			134-U2
		Offense description	Obstruction of Justice				

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CONVENING AUTHORITY'S ACTIONS

POST-TRIAL ACTION

SECTION A – STAFF JUDGE ADVOCATE REVIEW

1. NAME OF ACCUSED (LAST, FIRST, MI)	2. PAYGRADE/RANK	3. DoD ID NUMBER
DeDolph, Tony E.	E7	[redacted]

4. UNIT OR ORGANIZATION	5. CURRENT ENLISTMENT	6. TERM
[redacted]	4 January 2017	4 years

7. CONVENING AUTHORITY (UNIT/ORGANIZATION)	8. COURT-MARTIAL TYPE	9. COMPOSITION	10. DATE SENTENCE ADJUDGED
Commander, Navy Region Mid-Atlantic	General	Enlisted Members	23 January 2021

Post-Trial Matters to Consider

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

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

- On 12 February 2021, [redacted] DeDolph, through counsel, requested you order a proceeding in revision, with respect to his presentencing hearing, citing "highly prejudicial conduct by the Government."
- Pursuant to Article 60, UCMJ (2016 ed.), a convening authority may order a proceeding in revision "if there is an apparent error or omission in the record or if the record shows improper or inconsistent action by the court-martial with respect to the findings or sentence that can be rectified without material prejudice to the substantial rights of the accused."
- The family of the victim did not submit matters in this case.
- You may not set aside, disapprove, or take any other action with regard to the findings in this case. Nor may you disapprove, commute, or suspend, in whole or in part, the adjudged sentence to confinement or the punitive discharge. You may, however, disapprove, commute, or suspend, in whole or in part, the adjudged total forfeitures and the adjudged reduction to the paygrade of E-1.

24. Convening Authority Name/Title	25. SJA Name
RADM C.W. ROCK, Commander, Navy Region Mid-Atlantic	[redacted] CDR, JAGC, U.S. Navy

26. SJA signature	27. Date
[redacted]	Mar 18, 2021

SECTION B - CONVENING AUTHORITY ACTION

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

1. Sentence adjudged. On 23 January 2021, members awarded [redacted] DeDolph a dishonorable discharge, ten years' confinement, total forfeitures, and reduction to the pay grade of E-1.
2. Action. In the case of [redacted] Tony E. DeDolph, U.S. Navy, [redacted], the sentence is approved.
3. Pretrial Confinement Credit. There was no pretrial credit awarded in this case.
4. Initial Place of Confinement. Naval Consolidated Brig Chesapeake, Virginia.
5. Companion Cases. There are three companion cases: 1) United States v. [redacted] USN. [redacted] was awarded a bad-conduct discharge, 12 months' confinement, and reduction to pay grade E-5. You have not taken action in this case. 2) United States v. SSgt [redacted] USMC. SSgt [redacted] was sentenced to a bad-conduct discharge, four years' confinement, and reduction to pay grade E-1. You have not taken action in this case. 3) United States v. GySgt [redacted] docketed for trial at a general court-martial 7 June 2021.
6. Statutory Reporting Requirements. DNA collection and submission are required in accordance with 10 U.S.C. 1565 and DoDI 5505.14. Sex offender registration is not required in accordance with appendix 4 to enclosure 2 of the DoDI 1325.07. The Gun Control Act, 18 U.S.C. 922, does apply in this case.
7. Deferral and waiver. There were no requests for deferral or waiver in this case.
8. Matters Considered. In taking this action, I have considered the Memorandum of Pretrial Agreement of 13 December 2020, the Statement of Trial Results of 23 January 2021, and defense counsel's clemency request of 12 February 2021. After careful consideration, I decline to order a proceeding in revision under Article 60, UCMJ (2016 ed.).

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

30. Convening Authority's signature	31. Date
[redacted]	3/24/21

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

ENTRY OF JUDGMENT

ENTRY OF JUDGMENT

SECTION A - ADMINISTRATIVE

1. NAME OF ACCUSED (LAST, FIRST, MI)	2. PAYGRADE/RANK	3. DoD ID NUMBER
DEDOLPH, TONY E.	E7	[redacted]

4. UNIT OR ORGANIZATION	5. CURRENT ENLISTMENT	6. TERM
[redacted]	4 JUN 2017	4 YEARS

7. CONVENING AUTHORITY (UNIT/ORGANIZATION)	8. COURT-MARTIAL TYPE	9. COMPOSITION	10. DATE COURT-MARTIAL ADJOURNED
Commander, Navy Region Mid-Atlantic	General	Enlisted Members	23-Jan-2021

SECTION B - ENTRY OF JUDGMENT

****MUST be signed by the Military Judge (or Circuit Military Judge) within 20 days of receipt****

11. **Findings of each charge and specification referred to trial.** [Summary of each charge and specification (include at a minimum the gravamen of the offense), the plea of the accused, the findings or other disposition accounting for any exceptions and substitutions, any modifications made by the convening authority or any post-trial ruling, order, or other determination by the military judge. R.C.M. 1111(b)(1)]

CHARGE I: VIOLATION OF UCMJ, ARTICLE 81
PLEA: GUILTY FINDING : GUILTY

Specification 1 (Conspiracy, Assault): In that [redacted] Tony Dedolph, U.S. Navy, on active duty, did, on or about 4 June 2017, at or near [redacted] conspire with [redacted] U.S. Navy, Gunnery Sergeant [redacted] U.S. Marine Corps, and Staff Sergeant [redacted], U.S. Marine Corps to commit an offense under the Uniform Code of Military Justice, to wit: an Assault consummated by a Battery of Staff Sergeant [redacted] U.S. Army, and in order to effect the object of the conspiracy, the said members of the conspiracy did the following:
a. drove to the Marine quarters to obtain duct tape;
b. drove to the shared Army and Navy quarters;
c. entered the bedroom of SSG [redacted] by breaking through his locked door;
d. physically restrained SSG [redacted] and bound him with duct tape; and
e. strangled SSG [redacted] by placing him in a chokehold.
PLEA- GUILTY, FINDING-GUILTY

Specification 2 (Conspiracy, Obstruction of Justice): In that [redacted] Tony Dedolph, U.S. Navy, on active duty, did, between on or about 4 June 2017 to on or about 5 December 2017, at or near [redacted] and Camp Lejeune, North Carolina, conspire with [redacted] U.S. Navy, Gunnery Sergeant [redacted], U.S. Marine Corps, and Staff Sergeant [redacted] U.S. Marine Corps to commit an offense under the Uniform Code of Military Justice, to wit: Obstruction of Justice, to impede the investigation of the assault and death of Staff Sergeant [redacted], U.S. Army, and in order to effect the object of the conspiracy, the said members of the conspiracy did the following:
a. provided a false timeline of events to the Navy chain of command;
b. shared information with each other about what had been communicated to the Navy chain of Command;
c. made statements purposefully omitting mention of the use of duct tape during the assault;
d. made statements purposefully omitting mention of the Marines being present in the room during the assault;
e. disposed of the alcohol kept in the shared Army and Navy quarters; and
f. made false statements to CID and NCIS investigators.
PLEA- GUILTY, FINDING-GUILTY

CHARGE II: VIOLATION OF THE UCMJ, ARTICLE 129

Specification (Burglary): In that [redacted] Tony Dedolph, U.S. Navy, on active duty, did, on or about 4 June 2017, at or near [redacted] in the nighttime, unlawfully break and enter the private bedroom of Staff Sergeant [redacted] U.S. Army, with the intent to commit assault consummated by a battery therein.
PLEA- NOT GUILTY, FINDING- WITHDRAWN/DISMISSED

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 23 January 2021, members awarded [redacted] Dedolph:

A dishonorable discharge.
To be confined for 10 years.
Total Forfeitures.
Reduction to the Paygrade E-1.

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

N/A

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

N/A

15. Judge's signature:	16. Date judgment entered:
[redacted]	May 14, 2021

17. In a[redacted] RCM 1111(c)(1), the military judge who entered a judgment may modify the judgment to correct [redacted] 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)

CHARGE III: VIOLATION OF ARTICLE 118, UCMJ
PLEA: NOT GUILTY, FINDING: WITHDRAWN AND DISMISSED

SPECIFICATION (Felony Murder): In that [redacted] Tony Dedolph, U.S. Navy, on active duty, did, on or about 4 June 2017, at or near [redacted] while perpetrating a Burglary, murder Staff Sergeant [redacted] U.S. Army by means of strangling him with a chokehold.
PLEA: GUILTY, FINDING: WITHDRAWN AND DISMISSED

CHARGE IV: VIOLATION OF ARTICLE 119, UCMJ
Plea: GUILTY (with excepted language) Finding: Guilty (to the specification as excepted).

Specification: In that [redacted] Tony Dedolph, U.S. Navy, on active duty, did, on or about 4 June 2017 at or near [redacted] by culpable negligence and while perpetrating an offense directly affecting the person of Staff Sergeant [redacted] U.S. Army, to wit: Assault consummated by a battery, did unlawfully kill the said SSG [redacted] by strangling him with a chokehold.

PLEA: Guilty, excepting the words "by culpable negligence and", to the excepted words NOT GUILTY, to the specification as excepted GUILTY.
FINDING: Guilty to the specification as excepted. (the excepted language was withdrawn and dismissed)

CHARGE V: VIOLATION OF ARTICLE 92, UCMJ
PLEA: GUILTY, FINDING: GUILTY
Specification (Hazing): In that [redacted] Tony Dedolph, U.S. Navy, on active duty, did, on or about 4 June 2017 at or near [redacted] violate a lawful general order, to wit: SECNAVINST 1610.2A para 7b dated 15 July 2004, by hazing SSG [redacted] U.S. Army, by breaking into his private bedroom while he was sleeping, and participating in an assault where SSG [redacted] was restrained with duct tape, assaulted and strangled with a chokehold.
PLEA: Guilty, FINDING: Guilty

CHARGE VI: VIOLATION OF ARTICLE 134, UCMJ
PLEA: GUILTY, FINDING: GUILTY

Specification (obstruction of justice): In that [redacted] Tony Dedolph, U.S. Navy, on active duty, did, on or about 4 June 2017 at or near [redacted] wrongfully endeavor to impede an investigation into the assault and death of SSG [redacted] U.S. Army, when he purposefully did:
a. advise GySgt [redacted] and [redacted] of information he would be omitting when reporting the circumstances of SSG [redacted] death
b. Make false statements to ARSO [redacted] RSO [redacted] CPT [redacted] and his chain of command regarding the nature and circumstances of SSG [redacted] assault and death!
c. purposefully omit material information regarding the assault and death of SSG [redacted], including the use of duct tape to restrain SSG [redacted] during his assault, and the participation of GySgt [redacted] and SSgt [redacted]
which conduct was to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit to the armed forces.
PLEA: GUILTY, FINDING: GUILTY

APPELLATE INFORMATION

This opinion is subject to administrative correction before final disposition.

United States Navy–Marine Corps Court of Criminal Appeals

Before
HOUTZ, MYERS, and KISOR
Appellate Military Judges

UNITED STATES
Appellee

v.

Tony E. DEDOLPH
Special Warfare Operator Chief (E-7), U.S. Navy
Appellant

No. 202100150

Decided: 15 November 2022

Appeal from the United States Navy-Marine Corps Trial Judiciary

Military Judges:
M. J. Luken (arraignment, motions)
H. C. Larsen (motions, trial)

Sentence adjudged 23 January 2021 by a general court-martial convened at Naval Station Norfolk, Virginia, consisting of officer and enlisted members. Sentence in the Entry of Judgment: reduction to E-1, confinement for 10 years, and a dishonorable discharge.

For Appellant:
Captain Jasper W. Casey, USMC

For Appellee:
Lieutenant Catherine M. Crochetiere, JAGC, USN
Lieutenant John L. Flynn IV, JAGC, USN

Senior Judge HOUTZ delivered the opinion of the Court, in which Judge MYERS and Judge KISOR joined.

This opinion does not serve as binding precedent, but may be cited as persuasive authority under NMCCA Rule of Appellate Procedure 30.2.

HOUTZ, Senior Judge:

Appellant was convicted, pursuant to his pleas, of conspiracy to commit assault and obstruct justice, violation of a lawful general order, involuntary manslaughter, and obstruction of justice, in violation of Article 81, 92, 119, and 134, Uniform Code of Military Justice [UCMJ].[1] All of the offenses relate to the death of Army Staff Sergeant [SSG] Mike, who died while on deployment in [redacted] in June, 2017.

Appellant asserts 6 assignments of error [AOEs]: (1) Appellant was deprived of a meaningful opportunity to cross-examine a key Government witness when the Government did not disclose that the witness was requesting additional clemency from the convening authority; (2) the military judge abused his discretion by admitting improper evidence in aggravation; (3) Appellant's sentence was inappropriately severe and disproportionate; (4) trial counsel committed prosecutorial misconduct; (5) the military judge abused his discretion by denying Appellant's post-trial motion for a mistrial; and (6) cumulative error. We find error in the first AOE and remand for a new sentencing hearing.[2]

I. BACKGROUND

Appellant's convictions arise from an incident that occurred during a deployment to [redacted] that led to the death of SSG Mike, the victim in this case. During the deployment, Appellant lived on a compound in [redacted] that had several multi-person houses to include the "Marine House" and the "Navy-

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[1] 10 U.S.C. §§ 881, 892, 919, and 934 (2016).

[2] Although rendered moot by our resolution of AOE 1, we review AOEs 3, 4, and 5 for reasons of judicial economy.

Army" house where Appellant, SSG Mike, and several other servicemembers lived. The other service members relevant to this incident were Private [Pvt] [redacted] Gunnery Sergeant [GySgt] Mike-Romeo, and Special Operator Second Class [SO2] [redacted] GySgt Mike-Romeo and Pvt [redacted] were Marines and SO2 [redacted] was a Sailor.

On the evening of 3 June 2017 the group made plans to go out on liberty.[4] SSG Mike, GySgt Mike-Romeo and Pvt [redacted] departed the compound and sometime later Appellant and SO2 [redacted] departed after receiving a text that GySgt Mike-Romeo and Pvt [redacted] were at a local bar. After Appellant and SO2 [redacted] arrived at the bar, they learned that SSG Mike had "ditched" GySgt Mike-Romeo and Pvt [redacted] to attend an "embassy party."[5] The group, which now included Appellant, GySgt Mike-Romeo, SO2 [redacted] and Pvt [redacted] began to discuss a "hypothetical joke . . . to break in and haze [SSG Mike]" to embarrass him for the perceived slight.[6] The joke, "involved breaking into the room and then wrestling [SSG Mike] to unconsciousness, binding him,[7] and then inviting one of the local guards in to place [him] into a compromised position."[8] The group went to another bar and the joke began to materialize into an actual plan which included a "drum for theatrical effect," a person assigned to film, and a person assigned to execute a chokehold to render SSG Mike unconscious.[9]

The group returned to the compound at approximately 0500 and went to the Marine House where they "grabbed duct tape, handcuffs, sledgehammer, and some other like materials for binding SSG Mike."[10] The group next went to the Navy-Army House where they enlisted the help of two local nationals who worked as guards on the compound.[11] At that time, SSG Mike had already

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[3] (Convening Authority's Action (C.A.A.) at 2, Mar. 24, 2021.)

[4] R. at 234.

[5] R. at 682.

[6] R. at 683.

[7] Also referred to as a "tape job." R. at 234.

[8] R. at 684.

[9] R. at 687.

[10] R. at 690.

[11] R. at 696 ("We asked Big Man to derobe himself and then walk in with sort of a leash around his neck and eye guard over his face for theatrical effect and to march him inside and to place [SSG Mike] in a compromised position, sir.").

returned to the compound and was asleep in his room. The group then proceeded to execute their plan and entered a tactical formation, also called a "stack," by the door. At that point GySgt Mike-Romeo broke down the door with a sledgehammer and the group entered the room.[12] Once everyone was in the room, Pvt [redacted] raised the mosquito netting that surrounded SSG Mike's bed and Appellant and SO2 [redacted] "jumped on the bed, and they started wrestling with [SSG Mike]."[13] SSG Mike jumped up and said words to the effect of "[o]h it's you guys" or "let's go, [f***s]!" Appellant and SO2 [redacted] both grabbed SSG Mike to subdue him. Appellant tried to control SSG Mike but he was resisting. Appellant then applied a jujitsu-style "rear naked chokehold" on SSG Mike which involved putting one arm around both sides of SSG Mike's neck and applying pressure.[14] SSG Mike was face down with his head turned to the side. The "rear naked chokehold" caused SSG Mike to lose consciousness in about ten seconds and, during that time, SO2 [redacted] and Pvt [redacted] bound SSG Mike's arms and legs with tape.[15]

After they bound his arms and legs, GySgt Mike-Romeo took photographs of SSG Mike. After SSG Mike did not regain consciousness, Appellant attempted to revive him by rolling SSG Mike onto his back, and tapping him on the shoulder blades while calling his name. SO2 [redacted] and Pvt [redacted] removed the tape from SSG Mike and, after these efforts did not result in him gaining consciousness, Appellant and SO2 [redacted] took turns performing CPR. While this was going on, Appellant and SO2 [redacted] directed GySgt Mike-Romeo and Pvt [redacted] to wake up SSG Mike's team leader, Sergeant First Class [SFC] [redacted] to begin notification and medical evacuation procedures. Appellant also retrieved an arterial defibrillator from one his medical bags and at that point determined he would need to perform an emergency cricothyrotomy to open up SSG Mike's airway.[16] Appellant cut the initial incision but had

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[12] R. at 700.

[13] R. at 701.

[14] R. at 236, 260-61 ("It's a--a choke from behind an individual where one arm is around both sides of the neck and another arm is around the back, and it is applied to--in combatives and the sport Jujitsu to subdue opponents.").

[15] R. at 235.

[16] R. at 826 ("So it's a means to--to establish an airway, and it's sort of a preferential choice because you know that a less invasive method would not be successful. So in civilian emergency medical care, usually somebody would use the nasal trumpet to keep the nasal passages open or--or a pharyngeal airway. It keeps the tongue out of

trouble inserting the breathing tube into SSG Mike's airway due to unexpected blockage. The group then decided to use a vehicle to transport SSG Mike to a local medical clinic. SSG Mike was loaded into the back of the car, and Appellant stayed with him to continue life-saving efforts. Appellant cut additional incisions into SSG Mike's airway and was finally able to successfully insert the breathing tube, but these efforts were complicated by the fact that they were riding in the back of a Land Rover that was driving at a rapid speed along the poorly maintained roads of [redacted]

After arriving at the medical clinic, SSG Mike was examined, but the person at the clinic, who identified himself as a doctor, made a visual assessment of SSG Mike and informed the group that he was unable to help. Appellant continued to breathe for SSG Mike through the inserted breathing tube and work "feverishly" to save him, but, eventually, a doctor from the American Embassy arrived at the clinic and pronounced SSG Mike dead.[17]

At that point Appellant "hesitatingly" ceased life-saving efforts.[18] After leaving the clinic Appellant and the other service members discussed a plan to tell investigators that only Appellant and SO2 [redacted] would take the blame for the incident and they would tell investigators that neither of the Marines were present when SSG Mike died.[19] During the investigation, all four claimed that Appellant and SSG Mike were play fighting when SSG Mike suddenly suffered a medical emergency and became unresponsive.[20] They also provided a false timeline of events to investigators, destroyed a phone containing pictures of SSG Mike bound with tape, and disposed of any alcohol that was in the house.

After an investigation, Appellant and his three co-conspirators were charged with various offenses related to SSG Mike's death. Pvt [redacted] pleaded guilty to conspiracy to commit assault, conspiracy to obstruct justice, burglary, hazing, false official statements, obstruction of justice, and negligent homicide. He was initially sentenced to four years' confinement, reduction to

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the--the way, or tracheal intubation where you use a scope and you put a tube directly down into the--through the vocal cords and go through the trachea.").

[17] R. at 1107.

[18] R. at 1108.

[19] R. at 248.

[20] R. at 252.

E-1, and a bad-conduct discharge; however, the convening authority later suspended and remitted confinement in excess of three years as well as the bad-conduct discharge.

SO2 [redacted] pleaded guilty to conspiracy to commit assault, conspiracy to obstruct justice, unlawful entry, assault consummated by a battery, hazing, and obstruction of justice. He was sentenced to twelve months' confinement, reduction to E-5, and a bad-conduct discharge. The convening authority later suspended and remitted the bad-conduct discharge.

GySgt Mike-Romeo pleaded not-guilty at a contested general court-martial and was convicted by members of conspiracy to commit assault, conspiracy to commit obstruction of justice, housebreaking, involuntary manslaughter, and hazing. He was sentenced to six months' confinement, reduction to E-1, ninety days of hard labor, and a letter of reprimand.

Appellant was charged with conspiracy to commit an assault, conspiracy to obstruct justice, burglary, felony murder, involuntary manslaughter, failure to obey a lawful general order, and obstruction of justice.[21] Appellant entered into a pretrial agreement and agreed to plead guilty to conspiracy to commit assault consummated by a battery, conspiracy to obstruct justice, involuntary manslaughter, hazing in violation of a lawful general order, and obstruction of justice.[22] In return, the convening authority agreed to withdraw and dismiss all other charges and specifications and to suspend all confinement in excess of fifteen years.[23]

At Appellant's sentencing hearing the Government called eleven witnesses. The only co-conspirator to testify for the Government was Pvt. [redacted] After Appellant's court-martial, his defense team became aware for the first time that, prior to testifying for the Government, Pvt [redacted] submitted a clemency request to the convening authority and received a material assistance letter from the trial counsel in the case.

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[21] Charge Sheet at 1, 3–4, Nov. 14, 2018.

[22] App. Ex. XXV at 4–6.

[23] App. Ex. XXV, App'x A at 1.

II. DISCUSSION

A. Pvt [redacted] Clemency Request

Appellant asserts that he was deprived of a meaningful opportunity to cross-examine Pvt [redacted] because Appellant was not provided Pvt. [redacted] request for clemency prior to Appellant's guilty plea and sentencing hearing where Pvt [redacted] testified as a government witness.

Prior to Appellant's court-martial, Pvt [redacted] pleaded guilty, pursuant to a pretrial agreement, to conspiracy to commit assault and obstruction of justice, burglary, violation of a lawful general order, false official statement, obstruction of justice, and negligent homicide.[24] The military judge sentenced him to four years of confinement, reduction to pay grade E-1, and a bad-conduct discharge. In his pretrial agreement, Pvt [redacted] agreed to testify, under a grant of testimonial immunity, as a government witness in the prosecutions of Appellant and the other two co-conspirators. Approximately a month after his sentencing, Pvt [redacted] requested an extension to request clemency so the convening authority would not act on his case until his "full cooperation is complete and a matter of record."[25] The convening authority approved that request and approximately two months later trial counsel submitted a material assistance letter to the convening authority discussing Pvt [redacted] material assistance in prosecutions related to SSG Mike's death.[26] Shortly thereafter, Pvt [redacted] submitted his clemency request asking the convening authority to reduce his confinement from four years to two years.

Subsequent to Pvt [redacted] plea, clemency request, and receipt of the material assistance letter from trial counsel, Appellant in his initial discovery request to the Government asked for:

> (4) … evidence affecting the credibility of any potential government witness. This includes information known to the government, agents thereof, and closely-aligned civilian authorities or entities, concerning immunity grants, prior convictions, and evidence of other character, conduct, or *bias bearing on a witness's credibility*, including any letters of reprimand, letters of

[24] App. Ex. XXV, App'x B at 1.

[25] Appellant's Mot. to Attach, Encl. G, at 2.

[26] *Id*., Encl. B.

> caution, records of formal or informal counseling, evidence of Article 15, UCMJ, actions, criminal investigations, or adverse administrative actions.
>
> . . . (6) Any evidence or information of any promises of immunity or leniency made to any potential government witness by trial counsel or military authorities or agents thereof, including closely aligned civilian authorities or entities. This includes the contents of any formal or informal pretrial agreement reached with any co-conspirator or potential witness.[27]

At the time of this discovery request, Appellant was aware that Pvt [redacted] previously pleaded guilty and was granted immunity to testify in Appellant's case, but was not aware of Pvt [redacted] clemency request or the material assistance letter.

Prior to his plea, Appellant stated he intended to cross-examine Pvt [redacted] "on his pretrial agreement but not the sentence that was imposed or what the pretrial agreement called for."[28] Prior to Pvt [redacted] testimony, the Defense was informed that Pvt [redacted] would be testifying in a utility uniform rather than the seasonal dress uniform worn by other witnesses. Civilian defense counsel objected and explained that he intended to cross-examine Pvt [redacted] about the fact that he pleaded guilty, but did not want to introduce the specifics of his sentence so as to not set a benchmark the members could use for Appellant's sentence.[29] The Defense expressed concern that if Pvt [redacted] shall testified out of uniform it would cause the members to speculate that Pvt [redacted] was already serving confinement.[30] The Government explained that it attempted to secure a proper uniform, but they were unable to procure it due to issues with funding.[31] The military judge overruled the Defense objection and allowed Pvt [redacted] to testify out of uniform. Ultimately, neither trial counsel nor Appellant questioned Pvt [redacted] about his pretrial agreement or sentence.

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[27] App. Ex. XXXVII (emphasis added).

[28] R. at 628.

[29] R. at 628.

[30] Recommend citation or delete the words suggested above.

[31] R. at 631.

At Appellant's sentencing hearing, Pvt [redacted] testified on behalf of the Government. He provided testimony describing the assault on SSG Mike, to include a detailed account of the methods Appellant used to render SSG Mike unconscious. After the trial, the Government endorsed Pvt [redacted] request for clemency and the convening authority reduced Pvt [redacted] confinement from four years to three years.

Appellate courts review allegations of non-disclosure of discoverable evidence de novo.[32] In *Brady v. Maryland,* the Supreme Court held, "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[33] The Supreme Court has extended *Brady*, holding "that the duty to disclose such evidence is applicable even though there has been no request by the accused, and that the duty encompasses impeachment evidence as well as exculpatory evidence."[34] Under Article 46, UCMJ, "the trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." Article 46, UCMJ, and its implementing rules provide an accused with greater statutory discovery rights than the constitutional right to due process.[35] Regardless of whether the defense has made a specific request, the United States must disclose known evidence that "reasonably tends to" negate or reduce the degree of the accused's guilt or punishment that the accused may receive if convicted.[36]

Appellate review of an alleged discovery violation follows a two-step process: (1) "determine whether the information or evidence at issue was subject

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[32] *United States v. Roberts*, 59 M.J. 323, 327 n.3 (C.A.A.F. 2004).

[33] *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *see also* Rule for Courts-Martial [R.C.M.] 701(a)(6) (requiring disclosure of evidence known to trial counsel that tends to negate guilt, reduce guilt, or reduce sentence).

[34] *Strickler v. Greene*, 527 U.S. 263, 280 (1999) (citations omitted).

[35] *United States v. Coleman*, 72 M.J. 184, 186-87 (C.A.A.F. 2013); *Roberts*, 59 M.J. at 327.

[36] R.C.M. 701(a)(6).

to disclosure or discovery"; and (2) "if there was non-disclosure of such information, test the effect of that non-disclosure on the appellant's trial."[37] Appellate courts may resolve discovery issues without determining whether there has been a violation if the alleged error would not have been prejudicial.[38]

1. Pvt [redacted] Clemency Was Subject to Disclosure

It is well-settled that impeachment evidence is "material" and "exposure of a witness's motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination."[39] The Government argues that it had no "Constitutional" or "regulatory" obligation to disclose Pvt [redacted] clemency because *United States v. Ruiz* does not require disclosure of impeachment information for guilty pleas.[40] Specifically, the Government argues that in *Ruiz*, the Supreme Court found that disclosure of impeachment information relates to the fairness of a trial, as opposed to the voluntariness of a plea and the Constitution does not require disclosure of impeachment information for guilty pleas.[41] Appellant argues that the Government over-simplifies the holding in *Ruiz:*

> In reality, the Supreme Court wrestled with "whether the Fifth and Sixth Amendments require federal prosecutors, before entering into a binding plea agreement with a criminal defendant, to disclose 'impeachment information relating to any informants or other witnesses.'" So the issue before the Court was whether depriving the accused of such impeachment evidence rendered her plea involuntary. The Court specifically noted that "impeachment information is special in relation to the fairness of a

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[37] *Roberts*, 59 M.J. at 325.

[38] *United States v. Santos*, 59 M.J. 317, 321 (C.A.A.F. 2004).

[39] *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *United States v. Bagley*, 473 U.S. 667, 679-80 (1985). *Davis v. Alaska*, 415 U.S. 308, 316-17 (1974).

[40] Gov't Answer. at 31; *United States v. Ruiz*, 536 U.S. 622, 625 (2002).

[41] Gov't Brief at 31; *Ruiz* 538 U.S. at 629. Given "the random way in which such information may, or may not, help a particular defendant," the "degree of help that impeachment information can provide will depend upon the defendant's own independent knowledge of the prosecution's potential case—a matter that the Constitution does not require prosecutors to disclose." *Id.* at 630. As such, the Court held that the Constitution does not require disclosure of impeachment information for guilty pleas. *Id.* at 633.

> trial, not in respect to whether a plea is voluntary ("knowing," "intelligent," and "sufficiently aware.").[42]

We agree with Appellant that the Court in *Ruiz* focused on whether depriving an accused of impeachment evidence rendered a plea involuntary, specifically noting that "impeachment information is special in relation to the fairness of a trial, not in respect to whether a plea is voluntary ('knowing,' 'intelligent,' and 'sufficiently aware.')."[43] Here, Appellant is not asserting that his plea was involuntary; rather, he is alleging that the non-disclosure of impeachment evidence deprived him of a fair sentencing hearing.

Appellant requested "evidence affecting the credibility of any potential government witness . . . including bias bearing on a witnesses' credibility."[44] The fact that Pvt [redacted] sought additional clemency from the convening authority in exchange for his testimony is clearly information that tended to demonstrate Pvt [redacted] bias, and bore on his credibility. All information related to Pvt [redacted] request for additional clemency was responsive to this specific discovery request.

The Government also cites *Roberts* to support its argument that the United States had no regulatory obligation to disclose Pvt [redacted] clemency request because Appellant had other materials (Pvt [redacted] pretrial agreement, wherein he agreed to testify under a grant of testimonial immunity) "upon which to believe [Pvt [redacted] veracity could be attacked."[45] In *Roberts*, the appellant requested disclosure of derogatory data regarding a law enforcement

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[42] Appellant's Reply Brief at 2 (citing *Ruiz*, 536 U.S. at 625, 629 (2002)).

[43] *Ruiz*, 536 U.S. at 629.

[44] App. Ex. XXVII. In *Ruiz*, the prosecutors' proposed plea agreement contained "a set of detailed terms. Among other things, it specifie[d] that 'any [known] information establishing the factual innocence of the defendant' 'has been turned over to the defendant,' and it acknowledges the Government's 'continuing duty to provide such information.' At the same time it requires that the defendant 'waive the right' to receive 'impeachment information relating to any informants or other witnesses' as well as the right to receive information supporting any affirmative defense the defendant raises if the case goes to trial. Because Ruiz would not agree to this last-mentioned waiver, the prosecutors withdrew their bargaining offer. The Government then indicted Ruiz for unlawful drug possession. And despite the absence of any agreement, Ruiz ultimately pleaded guilty." *Ruiz*, 536 U.S. at 625-26.

[45] *See Roberts,* 59 M.J. at 326.

witness that was not disclosed by the military judge after an in camera review.[46] The Court of Appeals for the Armed Forces [C.A.A.F.] found the military judge erred because the internal investigation showed the witness made a false statement and the evidence was "material to the preparation of the defense" because it "was probative of his truthfulness."[47] Without this evidence "the defense was left with no basis upon which to believe [the witness's] veracity could be attacked."[48]

The Government asserts this case is distinguishable from *Roberts* because the defense had an alternative basis upon which to believe Pvt [redacted] veracity could be attacked – the pretrial agreement and the immunity provision. We disagree with this argument. While the pretrial agreement and grant of immunity are typically grounds for counsel to cross-examine a witness to draw out evidence of bias, they can have a limited effect in many cases. In this case, in addition to the questions, responses, and argument that would have likely resulted from the pretrial agreement, there existed the relatively non-standard request for clemency that was pending approval from the convening authority. This evidence, in the Court's opinion, would have had a much more powerful effect on the members. The Defense team made a tactical decision not to cross-examine Pvt [redacted] with regard to the pretrial agreement; however, they were deprived of making a similar tactical decision with regard to cross-examination on the clemency matters. Pvt [redacted] was a key government witness in this case. His motive to misrepresent was not self-evident (certainly not through the pretrial agreement alone) and the disclosure of the clemency request was material. We provide more discussion on this point below in our prejudice analysis portion . Nevertheless, with regard to disclosure obligations, we find that the evidence at issue was subject to disclosure or discovery. Because there was non-disclosure of this evidence, we next test the effect of that non-disclosure on Appellant's trial.

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[46] *Roberts*, 59 M.J. at 324.

[47] *Id*. at 326.

[48] *Id*.

2. The Non-Disclosure of the Clemency Request was Not Harmless Beyond a Reasonable Doubt

When an accused makes only a general discovery request appellate courts review alleged discovery violations for harmless error.[49] The test for harmless error is whether the accused has shown "a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different."[50] Under this test, the "question is not whether the [accused] would more likely than not have received a different verdict with the evidence, but whether in its absence [the accused] received a fair trial."[51] Thus, a reasonable probability of a different result is shown when the United States' non-disclosure "undermines confidence in the outcome of the trial."[52]

When the accused makes a specific discovery request, appellate courts "apply the heightened, constitutional harmless beyond a reasonable doubt standard."[53]

We agree with the Government that the clemency materials may not have been responsive to the defense request for "evidence related to adverse criminal or administrative actions and promises of immunity or leniency."[54] Nevertheless, they were responsive to Appellant's specific request for "evidence affecting the credibility of any potential government witness . . . including bias bearing on a witness's credibility."[55] We reject the Government's argument that this was not a specific request. This entire AOE is driven by the fact that Appellant was unaware of the clemency request. The language in the discovery request squarely covers the clemency request and we decline to impose, as stated by Appellant in his brief, a requirement that would require "clairvoyant" powers

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[49] *Coleman*, 72 M.J. at 187.

[50] *Id*.

[51] *United States v. Mahoney*, 58 M.J. 346, 349 (C.A.A.F. 2003) (quoting *Kyles*, 514 U.S. at 434).

[52] *Id*.

[53] *Id*.

[54] Gov't Answer at 33.

[55] App. Ex. XXVII.

when drafting such a request.[56] As such, we will apply the constitutional harmless beyond a reasonable doubt standard to the non-disclosure of the clemency matters.[57]

The Government cites *United States v. Coleman* to support its argument that non-disclosure of the clemency request was harmless beyond a reasonable doubt.[58] In *Coleman*, the court held failure to disclose an oral agreement between a co-conspirator and the staff judge advocate "was, at a minimum negligent, and certainly violated" multiple discovery rules.[59] The Court questioned how knowledge of the non-disclosed evidence "would have caused the defense counsel to change strategy or tactics or led to a different result" during cross-examination or closing argument and found ultimately that the failure to disclose was harmless beyond a reasonable doubt because the Government established "disclosure would not have affected the outcome of the trial."[60] The co-conspirator's testimony was "very brief."[61] The court noted the appellant knew the co-conspirator had been convicted and sentenced for the same offenses and could have impeached the witness but chose not to do so.[62] Nonetheless, the appellant argued the co-conspirator testified because he wanted clemency, and the co-conspirator's "motive to misrepresent was self-evident to the court members."[63] Thus, failure to disclose was harmless beyond a reasonable doubt because the Government established "disclosure would not have affected the outcome of the trial."[64]

We disagree with the Government that *Coleman* supports finding that the error in this case was harmless beyond a reasonable doubt. Unlike the facts in *Coleman*, Pvt [redacted] testimony was not "very brief."[65] The Government re-

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[56] Appellant Reply Brief at 4.

[57] *United States v. Tovarchavez*, 78 M.J. 458, 460 (C.A.A.F. 2019).

[58] *United States v. Coleman*, 72 M.J. 184 (C.A.A.F. 2013).

[59] *Coleman*, 72 M.J. at 189.

[60] *Id*. at 189

[61] *Id*. at 187.

[62] *Id*. at 188.

[63] *Id*.

[64] *Id*. at 189.

[65] *Id*. at 187,

lied on his testimony to support the testimony of their expert witness, Dr. Foxtrot, as well as their sentencing argument to the members.[66] It is clear from our review that Pvt [redacted] was a central witness to the Government's sentencing case and we find that that there is a reasonable possibility that the outcome of the trial would have been affected by the disclosure of the clemency request. Even when we apply the lower harmless error standard, we find that the error undermines confidence in the outcome of the sentencing hearing.

The Government argues that Appellant had other materials, to include Pvt [redacted] pretrial agreement and testimonial immunity, which could have been used to cross-examine Pvt [redacted] We agree with Appellant that the error in this case - the undisclosed materials - went specifically to bias and the non-disclosure denied Appellant the ability to expose Pvt [redacted] particular basis for bias. Specifically, that Pvt [redacted] had motive to exaggerate his testimony. The pretrial agreement and sentence would not have accomplished this because it is a "qualitatively different" means to expose bias. The Appellant's tactical decision not to question Pvt [redacted] about the pretrial agreement and sentence is very different than the tactical decision whether to question Pvt [redacted] about his pending request to lessen his sentence. Whether knowledge of non-disclosed evidence "would have caused the defense counsel to change strategy or tactics . . ." is relevant to determining whether non-disclosure is harmless beyond a reasonable doubt.[67] We agree with Appellant that his defense made a strategic decision to not highlight Pvt [redacted] sentence to the members but the government's failure to disclose the clemency materials deprived the defense of the facts it needed to make a similar strategic decision on how to expose Pvt [redacted] specific bias and potential motive to misrepresent events. We also agree that this motive was not self-evident to the court members as the members, like Appellant, also had no knowledge he was seeking additional leniency from the Convening Authority in exchange for his testimony. We take corrective action on this in our decretal paragraph.

B. Evidence in Aggravation

Appellant alleges that the military judge erred by allowing the Government to present other possible mechanisms of death through the testimony of Doctor Foxtrot. Additionally, Appellant alleges that the military judge erred by allow-

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[66] Pvt [redacted] testimony included additional aggravating facts that were captured in his previous statements.

[67] *See Coleman*, 72 M.J. at 189.

ing the Government to argue that Appellant's motive for performing the emergency cricothyrotomy was to obstruct justice by destroying evidence. At trial Appellant admitted to causing SSG Mike's death by strangulation via a "rear naked chokehold."[68] Dr. Foxtrot testified about other mechanisms such as suffocation, fractured windpipe, and cricothyrotomy that could have resulted in the death of SSG Mike.

We review the issue of a military judge's decision to admit sentencing evidence for an abuse of discretion.[69] The "military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect."[70] "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion."[71] "The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous."[72]

Aggravation evidence must: (1) directly relate to the accused's convicted offenses; and (2) satisfy Mil. R. Evid. 403.[73] Aggravation sentencing evidence may consist of any "aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty"[74] and "often highlights 'same course of conduct' misconduct of an accused."[75] Such evidence "includes, but is not limited to, evidence of financial, social, psychological, and medical impact on or cost to any person . . . who was the victim of an offense committed by the accused and evidence of significant adverse impact on the mission" resulting from the accused's offense.[76] As C.A.A.F. has construed R.C.M. 1001(b)(4), uncharged "depth-of-problem evidence" may directly relate

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[68] R. at 262.

[69] *United States v. Stephens*, 67 M.J. 233, 235 (C.A.A.F. 2009).

[70] *United States v. Barnett*, 63 M.J. 388, 394 (C.A.A.F. 2006) (citation omitted).

[71] *United States v. Jones*, 73 M.J. 357, 360 (C.A.A.F. 2014) (citation omitted).

[72] *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000) (cleaned up).

[73] *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F 2007)

[74] R.C.M. 1001(b)(4).

[75] *United States v. Halfacre*, 80 M.J. 656, 660 (N-M. Ct. Crim. App. 2020).

[76] *Id*.

to the charged offenses.[77] "Directly related" may encompass uncharged misconduct that is part of a "continuous course of conduct."[78] Evidence of uncharged misconduct is admissible if it is "closely related in time, type, and/or often outcome, to the convicted crime."[79] Absent a clear abuse, appellate courts will not overturn a military judge's ruling if he conducts a proper Mil. R. Evid. 403 balancing test on the record.[80] Uncharged misconduct against victims can be appropriate aggravation evidence "because it reflects the true impact of crimes upon the victims."[81]

In this case we agree with the Government that the aggravation evidence was directly related to Appellant's pleas because it was "inextricably interwoven" with the facts and circumstances of the convicted offenses.[82]

The military judge found that the Stipulation of Fact was ambiguous in that it discussed a chokehold done with unlawful force, and indicated the Victim's death resulted from the chokehold.[83] We agree that the facts before the court concerning the chokehold, to include testimony about the Victim being face down with Appellant on his back during the second choke, were "fair game" and not outside the scope of the Stipulation of Fact.[84]

Further, we agree that *United States v. Halfacre* is applicable. In *Halfacre* this Court held that evidence of Appellant's sexual assaults of two prostitutes was proper aggravating evidence even though Appellant pleaded guilty to patronizing a prostitute. This Court found that the evidence was admissible "because it was inextricably interwoven with the facts and circumstances of the

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[77] *United States v. Ciulla*, 32 M.J. 186, 187 (C.M.A. 1991).

[78] United States v. *Nourse*, 55 M.J. 229, 232 (C.A.A.F. 2001) (finding evidence of uncharged robberies showed continuous course of conduct in which accused committed similar crimes against same victim and in same location).

[79] *Hardison*, 64 M.J. at 282.

[80] *Stephens*, 67 M.J. at 235.

[81] *Nourse*, 55 M.J. at 231 (citations omitted); *see United States v. Terlep*, 57 M.J. 344, 350 (C.A.A.F. 2002) ("Such rules provide for accuracy in the sentencing process by permitting the judge to fully appreciate the true plight of the victim in each case.") (citations omitted).

[82] Gov't Brief at 41 (quoting *Halfacre,* 80 M.J. at 662).

[83] R. at 892.

[84] Gov't Answer at 19.

convicted offenses and painted a complete picture for the sentencing authority."[85] Similar to *Halfacre*, evidence in this case indicating Appellant suffocated the Victim, fractured his windpipe, and performed a cricothyrotomy to obstruct the investigation was "inextricably interwoven" with Appellant's offenses.[86] Appellant pleaded guilty to conspiracy to assault the Victim by strangling and placing him in a chokehold resulting in the Victim's death.[87] The aggravating evidence at issue consisted of actions Appellant took in committing the offenses to which he pleaded guilty, and are thus "directly related" to his offenses.[88] Finally, we also agree that the aggravating evidence is appropriate under *Hardison* because it was "closely related in time, type, and outcome" to Appellant's offenses.[89]

We reject the Appellant's argument that his pleas limit the scope of aggravating evidence. As cited by the Government, in *Terlep*, the appellant was charged with burglary and rape, but pleaded guilty pursuant to a plea agreement to unlawful entry and assault consummated by a battery.[90] At sentencing, the victim testified that the appellant raped her.[91] The *Terlep* court found the victim's testimony admissible, holding that pretrial agreements, unless expressly agreed to otherwise, do not bar victims from giving their version of the truth to the factfinder at sentencing.[92] In this case, as in *Terlep*, the aggravating evidence was proper because Appellant admitted to executing the deadly chokehold during his providence inquiry and there was nothing in Appellant's pretrial agreement limiting the scope of aggravating evidence.[93] The aggravation evidence at issue in this case provided appropriate additional "depth-of-problem" evidence on Appellant's convictions, including how the physical mechanics of Appellant's actions killed the Victim.[94] This evidence illustrated the violent nature of Appellant's offenses and were properly introduced to show

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[85] *Halfacre*, 80 M.J. at 661–62.

[86] See *id*. at 662.

[87] Pros. Ex. 1 at 2–3.

[88] *See* R.C.M. 1001(b)(4).

[89] *Hardison*, 64 M.J. at 282.

[90] *United States v. Terlap*, 57 M.J. 334, 345. (C.A.A.F. 2002)

[91] *Id*. at 347.

[92] *Id*. at 350.

[93] *See* App. Ex. XXV; *Terlep*, 57 M.J. at 350.

[94] *See Ciulla*, 32 M.J. at 187.

"the circumstances surrounding" Appellant's conviction and its repercussions.[95]

We also reject Appellant's reliance on *United States v. Barker*.[96] As stated by the Government, the prosecution admitted, without objection by the Appellant, Pvt [redacted] testimony about the "fleshy undulating sound" from the Victim's neck and Dr. Foxtrot's testimony about the Victim's fractured windpipe and the unusual size and jaggedness of the incisions from the cricothyrotomy. Appellant fails to show how this testimony about the cricothyrotomy was "new ammunition" against him.[97] The military judge's ruling is entitled to deference because he properly conducted a Mil. R. Evid. 403 balancing test and his decision will not be overturned unless there is a clear abuse of discretion.[98] As the military judge found, Dr. Foxtrot's testimony was relevant under R.C.M. 1001(b)(4) and provided "greater context" to what occurred that evening; specifically relating to the mechanism of death and "the different risk factors that were present describing the events directly relating to the assault consummated by a battery."[99] We agree with the military judge that the probative value was high, the evidence was not cumulative, and the probative value was not substantially outweighed by the dangers of unfair prejudice. Accordingly, the military judge did not abuse his discretion in admitting the aggravating evidence.

We also agree with the Government that the trial counsel did not "ambush" Appellant. Arguments by counsel are not evidence, and trial counsel appropriately argued Appellant performed the cricothyrotomy to obstruct evidence. Appellant's claim is better framed as alleging prosecutorial misconduct and, as discussed in detail later in this opinion, trial counsel may argue evidence of record "as well as all reasonable inferences fairly derived from such evidence."[100] We conclude that the trial counsel did not "ambush" Appellant by arguing he performed the cricothyrotomy to obstruct justice.[101]

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[95] *See Vickers*, 13 M.J. at 406.

[96] *United States v. Barker*, 77 M.J. 337 (C.A.A.F. 2018).

[97] *See Barker*, 77 M.J. at 384; Appellant's Brief at 55.

[98] *United States v. Ediger*, 68 M.J. 243, 248 (C.A.A.F. 2010).

[99] R. at 899–900.

[100] *United States v. Akbar*, 74 M.J. 364, 394 (C.A.A.F. 2014).

[101] *See* Appellant's Brief at 54.

Finally, we note that the military judge admitted the cricothyrotomy evidence during sentencing without defense objection, and the fact that Appellant pleaded guilty to obstruction of justice and conspiracy to obstruct justice, trial counsel appropriately argued "reasonable inferences fairly derived" from the cricothyrotomy evidence.[102]

C. Sentence Appropriateness

We review sentence appropriateness de novo.[103] "The military system must be prepared to accept some disparity even in the sentences of co-defendants, provided each military accused is sentenced as an individual."[104] With this in mind, the appropriateness of a sentence should be determined without reference or comparison to sentences in other cases.[105] This Court is not required to compare specific sentences "except in those rare instances in which sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases."[106] In order to challenge his sentence as inappropriate, an appellant must first demonstrate it is "highly disparate" when compared to a "closely related" case.[107] Only upon a successful showing does the burden then shift to the United States to demonstrate the difference in sentences rests upon a rational basis.[108]

Appellant asks that, should we find his sentence inappropriately severe, we conduct a sentence reassessment to correct the error.[109] As we have already found error in Appellant's first AOE which resulted in this Court ordering a sentence rehearing, a reassessment of Appellant's sentence based on this third AOE would be without any effect. Because there would be no further practical effect on the outcome of Appellant's appeal arising from review of the sentence

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[102] *See id*.

[103] *United States v. Patrick*, 78 M.J. 687, 718–19 (N-M. Ct. Crim. App. 2018).

[104] *United States v. Durant*, 55 M.J. 258, 261–62 (C.A.A.F. 2001) (internal quotations omitted).

[105] *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985).

[106] *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999) (quoting *Ballard*, 20 M.J. at 283).

[107] *Lacy*, 50 M.J. at 288.

[108] *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001).

[109] Appellant's Brief at 64.

appropriateness question, we find that this third AOE is moot and decline to analyze it further.

D. Prosecutorial Misconduct

When an objection at trial properly preserves the issue, appellate courts review questions of improper argument and prosecutorial misconduct de novo.[110]

"Prosecutorial misconduct is 'action or inaction by a prosecutor in violation of some legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon.'"[111] Prosecutorial misconduct can arise out of improper argument and occurs when the "argument overstep[s] the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense."[112] Appellate courts "should gauge the overall effect of counsel's conduct on the trial, and not counsel's personal blameworthiness."[113] Improper argument is "one facet of prosecutorial misconduct."[114] Challenged statements are reviewed in the "context of the entire court-martial" rather than in isolation.[115] As it relates to sentencing, prosecutors are to "steer clear of any improper arguments that may produce a wrongful sentence."[116]

If we find prosecutorial misconduct occurred the next step is to assess for prejudice. In assessing prejudice, this Court is directed to look at the "cumulative impact of any prosecutorial misconduct on the accused's substantial rights and the fairness and integrity of his trial."[117] *United States v. Fletcher* outlines a three factor test to determine whether trial counsel's improper arguments were prejudicial: "(1) the severity of the misconduct, (2) the measures adopted

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[110] *United States v. Sewell*, 76 M.J. 14, 18 (C.A.A.F. 2017).

[111] *United States v. Pabelona*, 76 M.J. 9, 11 (C.A.A.F. 2017) (quotation omitted).

[112] *United States v. Norwood*, 81 M.J. 12, 19 (C.A.A.F. 2021) (cleaned up).

[113] *United States v. Thompkins*, 58 M.J. 43, 47 (C.A.A.F. 2003) (citations omitted).

[114] *Sewell*, 76 M.J. at 18.

[115] *United States v. Baer*, 53 M.J. 235, 238 (C.A.A.F. 2000).

[116] *Baer*, 53 M.J. at 237.

[117] *United States v. Fletcher*, 62 M.J. 175, 178 (C.A.A.F. 2005).

to cure the misconduct, and (3) the weight of the evidence supporting the conviction."[118] These same *Fletcher* factors apply to inquiries into improper sentencing arguments.[119]

Appellant asserts that the Government presented improper argument in three ways. First, they argued about other possible mechanisms of death that violated the stipulation of fact and tended to impeach the military judge's acceptance of Appellant's plea. Second, the Government argued that Appellant performed the emergency cricothyrotomy on SSG Mike in order to obstruct justice – a theory Appellant argues was unsupported by the evidence, inflammatory, and speculative. Finally, Appellant argues the Government committed prosecutorial misconduct by displaying a misleading slide to the members after being specifically instructed by the military judge to no do so.

We find no merit in these arguments and determine there was no prosecutorial misconduct. In this case, trial counsel presented aggravating evidence that did not contradict the stipulation of fact or impeach the military judge's findings that Appellant's chokehold caused the Victim's death. The evidence presented by trial counsel about other mechanisms of death appropriately provided "greater context of exactly what occurred that night."[120] The aggravation evidence and trial counsel's argument provided explanations for exactly how the chokehold brought about the Victim's death—namely, what took place internally to the Victim's body as a result of the chokehold. The military judge properly admitted the evidence after thorough consideration.[121]

Trial counsel's argument regarding how the chokehold brought about asphyxiation and death did not inject inadmissible evidence into the proceeding and did not constitute prosecutorial misconduct.[122] Trial counsel's argument that Appellant performed the cricothyrotomy to obstruct justice was also not improper – in fact, it was admitted into evidence without defense objection.[123] Because trial counsel's argument was based on reasonable inferences

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[118] *Fletcher*, 62 M.J. at 184.

[119] *United States v Halpin*, 71 M.J. 477, 480 (C.A.A.F. 2013).

[120] R. at 900.

[121] Id.

[122] *Cf.* Dep't of the Navy, Judge Advocate General Instr. 5803.1E , Navy-Marine Corps Trial Judiciary [JAGINST 5803.1E], rule 4.a.5. (Jan. 20, 2015)..

[123] *See generally* R. 804–60.

from that evidence and did not allude to inadmissible evidence, it did not constitute prosecutorial misconduct.[124] Appellant's motives for performing the cricothyrotomy were addressed and discussed throughout the course of the court-martial. The military judge: (1) found evidence and surrounding circumstances of the cricothyrotomy were admissible under R.C.M. 1001(b)(4) because they directly related to or resulted from Appellant's offenses, and; (2) did not abuse discretion in ruling the evidence was admissible. Accordingly, trial counsel's argument was not improper.

We agree with the Government that trial counsel did not commit prosecutorial misconduct during sentencing argument by mistakenly displaying content on a presentation slide to the members. Rule of Professional Conduct 3.4 forbids "engag[ing] in conduct involving dishonesty, fraud, deceit, or misrepresentation."[125] This Court has found no improper argument where trial counsel simply misspeak and immediately correct themselves. In *United States v. Masga*, this Court concluded the trial counsel did not improperly argue propensity when he said, "[i]s there any lawful, logical, or innocent person—a reason for searching [search terms] like this?"[126] This Court found, "trial counsel briefly misspoke and immediately corrected the sentence to refer to an 'innocent reason' why a person would use such search terms."[127] Similar to *Masga*, upon realizing he had not corrected his slide, trial counsel immediately corrected the error.[128] The military judge noted trial counsel had not yet discussed that portion of the slide and, upon the members' return after the Article 39(a) session, instructed the members that argument is not evidence.[129] Trial counsel's mistake, as evidenced by his apology and the beginning of his explanation that he had deleted something else, did not "overstep the bounds of propriety and fairness" and did not meet the threshold of prosecutorial misconduct.[130]

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[124] *See Cristini v. McKee*, 526 F.3d 888, 901 (6th Cir. 2008)); *cf.* JAGINST 5803.1E, rule 4.

[125] JAGINST 5803.1E, rule 8.4(a)(3).

[126] *United States v. Masga*, No. 201700276, 2019 CCA LEXIS 56, at *7 (N-M Ct. Crim. App. Feb. 13, 2019).

[127] *Id.* at *10.

[128] *See id.*; R. 1308.

[129] R. 1310.

[130] *See United States v. Andrews*, 77 M.J. 393, 403 (C.A.A.F. 2018).

Even assuming error, Appellant suffered no prejudice. Under Article 59(a), UCMJ, "a finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused."[131] The first and second factors favor the United States. Assuming arguendo that all of the misconduct alleged by Appellant is true, Trial Counsel's argument was confined to sentencing argument and did not excessively refer to the questionable matters. We note, too, that even if we assumed error and prejudice, the proper remedy in that instance would be to order a sentencing rehearing. As Appellant's first AOE has already resulted in this Court ordering a sentencing rehearing, a finding of error and prejudice would be rendered moot in any event since such findings would have no further practical effect on the outcome of this appeal.

E. Post-Trial Mistrial Motion

Appellant alleges that the military judge erred in denying his post-trial motion based on what he described as "pervasive errors throughout Appellant's court-martial.[132] The basis for Appellant's post-trial motion was "the [G]overnment's impeachment of the stipulation of fact, impeachment of the guilty plea, improper sentencing evidence and argument, and violating *Brady v. Maryland*."[133] Appellant requested a new sentencing hearing as the remedy. Additionally, Appellant alleged trial counsel improperly presented evidence of and argued that: (1) Appellant killed the Victim by "crush[ing] the Victim]'s throat," (2) the Victim died from suffocation, and (3) Appellant performed the cricothyrotomy to cover-up the crushed throat.[134] Appellant's motion also noted that trial counsel "repeatedly attempted to introduce allegations" that the co-conspirators "were going to commit a sexual offense" during the hazing. The military judge noted Appellant was "moving the Court, in essence, to reconsider its rulings and reverse itself," and the military judge declined to do so.[135]

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[131] Article 59(a), UCMJ.

[132] App. Ex. XXXVII.

[133] Appellate Ex. XXXVII at 1.

[134] *Id*. at 3.

[135] Appellate Ex. XXXVII(c) at 2.

The military judge held that Appellant's three bases for mistrial were "sufficiently argued and ruled on" through the trial.[136] Even considering "their potential cumulative effect," the military judge held the issues did not "warrant the severe remedy of a mistrial."[137]

A military judge's decision on a motion for a mistrial is will be reversed only if there is clear evidence of an abuse of discretion.[138] A military judge "may, as a matter of discretion, declare a mistrial when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings."[139] "On motion for mistrial or when it otherwise appears that grounds for a mistrial may exist, a military judge shall inquire into the views of the parties on the matter."[140] A military judge has "considerable latitude in determining when to grant a mistrial."[141] "The trial court has a superior point of vantage, and … it is only rarely— and in extremely compelling circumstances—that an appellate panel, informed by a cold record, will venture to reverse a trial judge's on-the-spot decision."[142]

This court agrees with the Government that none of the issues raised by Appellant in his mistrial motion cast substantial doubt as to Appellant's court-martial. The military judge was correct when he determined all of the issues were "sufficiently argued and ruled on" at trial.[143] Appellant also argues that the military judge's R.C.M. 1001(b)(4) ruling "was in error" and that his denial of the mistrial "was influenced by his then-existing erroneous view of

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[136] *Id.*

[137] *Id.*

[138] *United States v. McFadden*, 74 M.J. 87, 90 (C.A.A.F. 2015).

[139] R.C.M. 915(a).

[140] R.C.M. 915(b).

[141] *United States v. Seward*, 49 M.J. 369, 371 (C.A.A.F. 1998); *see also Arizona v. Washington*, 434 U.S. 497, 509 (1978) (a judge "exercise[s] broad discretion in deciding whether or not 'manifest necessity' justifies a discharge of the jury"); *Illinois v. Sommerville*, 410 U.S. 458, 461 (1973) (trial judge has "sound discretion" and "broad discretion" in determining manifest necessity).

[142] *United States v. Diaz*, 59 M.J. 79, 90–91 (C.A.A.F. 2003) (citations and internal quotation omitted).

[143] Appellate Ex. XXXVII(c) at 2; *cf. Coleman*, 72 M.J. at 189; *Commisso*, 76 M.J. at 322–24.

the law."[144] We disagree and, as discussed previously in this opinion, have determined that the military judge's ruling on the aggravating evidence under R.C.M. 1001(b)(4) was proper. Finally, we agree with the Government that even though the military judge incorrectly noted that trial defense counsel did not cross-examine Dr. [redacted] the military judge did not rely on this incorrect fact to support his denial of the mistrial. He "simply note[d]" it, along with three other facts, in relation to discussion of possible forfeiture of the alleged *Brady* violation.[145] The military judge did not make a ruling on the sua sponte issue of forfeiture, instead emphasizing that the issues were sufficiently argued at trial, did not warrant the severe remedy of mistrial, and identified no new facts or law to merit reconsideration. Appellant's motion for a mistrial was properly denied and the military judge did not abuse his discretion by denying Appellant's request. Once more, we note that even if we found error, the proper remedy, a sentencing rehearing, has already been ordered by this Court as a result of Appellant's first AOE. Accordingly, were we to find error related to the military judge's ruling on Appellant's post-trial motion for a mistrial, the error would be moot.

F. Cumulative Error

Allegations of cumulative error are reviewed de novo.[146] "Under the cumulative-error doctrine, 'a number of errors, no one perhaps sufficient to merit reversal, in combination necessitate the disapproval of a finding.'"[147] Assertions of error without merit are insufficient to invoke the cumulative error doctrine.[148]

We agree with the Government that every error alleged in this AOE (with the exception of AOE 1) has been addressed and rebutted in detail and that Appellant's claim therefore lacks merit.[149] Even assuming errors occurred, we find that they were not so severe as to "substantially sway" the findings or

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[144] *See* Appellant's Brief at 70.

[145] Appellate Ex. XXXVII(c) at 2.

[146] *United States v. Pope*, 69 M.J. 328, 335 (C.A.A.F. 2011).

[147] *Id*. (quoting *United States v. Banks*, 36 M.J. 150, 170–71 (C.M.A. 1992)).

[148] *United States v. Gray*, 51 M.J. 1, 61 (C.A.A.F. 1999).

[149] *See Gray*, 51 M.J. at 61.

"materially prejudice Appellant's substantial rights."[150] The prosecution's sentencing case in aggravation was substantial, spanning three days and approximately 233 pages of documentary evidence, Appellant admitted guilt during his pleas, and, with the exception of the first AOE, there were no other alleged errors that denied Appellant the right to a fair trial.[151]

III. CONCLUSION

A sentence rehearing is authorized. The sentence is **SET ASIDE** and the record is returned to the Judge Advocate General of the Navy for remand to an appropriate convening authority with authority to order a sentencing rehearing. [152]

FOR THE COURT:

[redacted]

S. TAYLOR JOHNSTON
Acting Clerk of Court

[150] *See Banks*, 36 M.J. at 171; *Pope*, 69 M.J. at 335; Article 59(a), UCMJ.

[151] *Cf. Pope*, 69 M.J. at 335 (recommend parenthetical explanation of *compare* (*cf)* citation).

[152] Articles 59 & 66, UCMJ.

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

Before Panel No. 3

UNITED STATES Appellee v. **Tony E. DeDolph** Special Warfare Operator Chief (E-7) United States Navy Appellant	**APPELLANT'S MOTION FOR A FIRST ENLARGEMENT OF TIME** NMCCA Case No. 202100150 Tried At Naval Station, Norfolk, Virginia on January 10, 2020, January 30, 2020, July 7, 2020, August 31, 2020, January 14-15 2021, and January 19-23 2021 before a General-Court-Martial Convened by Commander, Navy Region Mid-Atlantic, CAPT M. Luken, and CDR H. Larsen, presiding.

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

COMES NOW undersigned, pursuant to Rule 23.2(c)(3) of this Court's Rules, and respectfully moves for a first enlargement of time to file a brief and assignments of error. The current due date is August 3, 2021. The number of days requested is thirty. The requested due date is September 2, 2021.

The current status of the case:

1. The Record of Trial was docketed on June 4, 2021.

2. The Moreno III date is December 4, 2022.

3. SOC DeDolph is currently confined, with a normal release date of May 20, 2029.

4. The record consists of 1,394 transcribed pages, and 3,300 total pages.

5. Counsel has not completed initial review of the record of trial.

Appellant has been consulted regarding this enlargement request, and consents to this enlargement.

Good cause exists for this enlargement. This is a complex case involving guilty pleas to Article 81 (Conspiracy), Article 119 (Manslaughter), Article 92 (Hazing), and Article 134 (Obstruction of Justice). Through review of the record and discussions with the client, several potential assignments of error have identified. Counsel requests additional time to conduct thorough research and complete the drafting and review process.

WHEREFORE, Appellant respectfully requests this Court grant this motion.

[redacted]
Jasper W. Casey
Captain, U.S. Marine Corps
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
[redacted]
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and three copies of the foregoing were delivered to the Court on July 29, 2021, that a copy was uploaded into the Court's case management system on July 29, 2021, and that a copy of the foregoing was delivered to Director, Appellate Government Division on July 29, 2021.

[redacted]
Jasper W. Casey
Captain, U.S. Marine Corps
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
[redacted]

[redacted]

Subject: RECEIPT - FILING-Panel 3-U.S. v. DeDolph-NMCCA 202100150-Mtn for First Enlargement

Signed By: [redacted]

RECEIVED
July 29 2021
United States Navy-Marine Corps
Court of Criminal Appeals

[redacted]

Subject: FILING-Panel 3-U.S. v. DeDolph-NMCCA 202100150-Mtn for First Enlargement

To this Honorable Court:

Please find attached the Appellant's Motion for a First Enlargement in U.S. v. DeDolph, NMCCA No. 202100150.

Very respectfully,

Jasper Casey
Captain, U.S. Marine Corps

Appellate Defense Counsel (Code 45)
[redacted]

[redacted]

Subject: RULING - FILING-Panel 3-U.S. v. DeDolph-NMCCA 202100150-Mtn for First Enlargement

Signed By: [redacted]

MOTION GRANTED
July 29 2021
United States Navy-Marine Corps
Court of Criminal Appeals

[redacted]

Subject: FILING-Panel 3-U.S. v. DeDolph-NMCCA 202100150-Mtn for First Enlargement

To this Honorable Court:

Please find attached the Appellant's Motion for a First Enlargement in U.S. v. DeDolph, NMCCA No. 202100150.

Very respectfully,

Jasper Casey
Captain, U.S. Marine Corps

Appellate Defense Counsel (Code 45)
[redacted]

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

Before Panel No. 3

UNITED STATES Appellee v. **Tony E. DeDolph** Special Warfare Operator Chief (E-7) United States Navy Appellant	**APPELLANT'S MOTION FOR A SECOND ENLARGEMENT OF TIME** NMCCA Case No. 202100150 Tried At Naval Station, Norfolk, Virginia on January 10, 2020, January 30, 2020, July 7, 2020, August 31, 2020, January 14-15 2021, and January 19-23 2021 before a General-Court-Martial Convened by Commander, Navy Region Mid-Atlantic, CAPT M. Luken, and CDR H. Larsen, presiding.

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

COMES NOW undersigned, pursuant to Rule 23.2(c)(3) of this Court's Rules, and respectfully moves for a second enlargement of time to file a brief and assignments of error. The current due date is September 2, 2021. The number of days requested is thirty. The requested due date is October 2, 2021.

The current status of the case:

1. The Record of Trial was docketed on June 4, 2021.

2. The Moreno III date is December 4, 2022.

3. SOC DeDolph is currently confined, with a normal release date of May 20, 2029.

4. The record consists of 1,394 transcribed pages, and 3,300 total pages.

5. Counsel has completed initial review of the record of trial.

Appellant has been consulted regarding this enlargement request, and consents to this enlargement.

Good cause exists for this enlargement. This is a complex case involving guilty pleas to Article 81 (Conspiracy), Article 119 (Manslaughter), Article 92 (Hazing), and Article 134 (Obstruction of Justice). Through complete review of the record, and numerous discussions with Appellant, several potential assignments of error have been identified. Undersigned counsel requests this enlargement to conduct further research and begin drafting a brief.

WHEREFORE, Appellant respectfully requests this Court grant this motion.

Jasper W. Casey
Captain, U.S. Marine Corps
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and three copies of the foregoing were delivered to the Court on August 26, 2021, that a copy was uploaded into the Court's case management system on August 26, 2021, and that a copy of the foregoing was delivered to Director, Appellate Government Division on August 26, 2021.

Jasper W. Casey
Captain, U.S. Marine Corps
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
[redacted]

[redacted]

Subject: RECEIPT - FILING-Panel 3-U.S. v. DeDolph-NMCCA 202100150-Mtn for Second Enlargement

Signed By: [redacted]

RECEIVED
Aug 26 2021
United States Navy-Marine Corps
Court of Criminal Appeals

[redacted]

Subject: FILING-Panel 3-U.S. v. DeDolph-NMCCA 202100150-Mtn for Second Enlargement

To this Honorable Court:

Please find attached the Appellant's Motion for a Second Enlargement in U.S. v. DeDolph, NMCCA No. 202100150.

Very respectfully,

Jasper Casey
Captain, U.S. Marine Corps

Appellate Defense Counsel (Code 45)
[redacted]

[redacted]

Subject: RULING - FILING-Panel 3-U.S. v. DeDolph-NMCCA 202100150-Mtn for Second Enlargement

Signed By: [redacted]

MOTION GRANTED
Aug 26 2021
United States Navy-Marine Corps
Court of Criminal Appeals

[redacted]

Subject: FILING-Panel 3-U.S. v. DeDolph-NMCCA 202100150-Mtn for Second Enlargement

To this Honorable Court:

Please find attached the Appellant's Motion for a Second Enlargement in U.S. v. DeDolph, NMCCA No. 202100150.

Very respectfully,

Jasper Casey
Captain, U.S. Marine Corps

Appellate Defense Counsel (Code 45)
[redacted]

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

Before Panel No. 3

UNITED STATES Appellee v. **Tony E. DeDolph** Special Warfare Operator Chief (E-7) United States Navy Appellant	**APPELLANT'S MOTION FOR A THIRD ENLARGEMENT OF TIME** NMCCA Case No. 202100150 Tried At Naval Station, Norfolk, Virginia on January 10, 2020, January 30, 2020, July 7, 2020, August 31, 2020, January 14-15 2021, and January 19-23 2021 before a General-Court-Martial Convened by Commander, Navy Region Mid-Atlantic, CAPT M. Luken, and CDR H. Larsen, presiding.

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

COMES NOW undersigned, pursuant to Rule 23.2(c)(3) of this Court's Rules, and respectfully moves for a third enlargement of time to file a brief and assignments of error. The current due date is October 2, 2021. The number of days requested is thirty. The requested due date is November 1, 2021.

The current status of the case:

1. The Record of Trial was docketed on June 4, 2021.

2. The Moreno III date is December 4, 2022.

3. SOC DeDolph is currently confined, with a normal release date of May 20, 2029.

4. The record consists of 1,394 transcribed pages, and 3,300 total pages.

5. Counsel has completed initial review of the record of trial.

Appellant has been consulted regarding this enlargement request, and consents to this enlargement.

Good cause exists for this enlargement. This is a complex case involving guilty pleas to Article 81 (Conspiracy), Article 119 (Manslaughter), Article 92 (Hazing), and Article 134 (Obstruction of Justice). Through complete review of the record, and numerous discussions with Appellant, several potential assignments of error have been identified. Undersigned counsel has begun drafting a brief, but requests additional time to conduct further research and to continue the writing and editing process.

WHEREFORE, Appellant respectfully requests this Court grant this motion.

[redacted]
Jasper W. Casey
Captain, U.S. Marine Corps
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and three copies of the foregoing were delivered to the Court on September 27, 2021, that a copy was uploaded into the Court's case management system on September 27, 2021, and that a copy of the foregoing was delivered to Director, Appellate Government Division on September 27, 2021.

[redacted]
Jasper W. Casey
Captain, U.S. Marine Corps
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
[redacted]

[redacted]

Subject: RECEIPT - FILING-Panel 3-U.S. v. DeDolph-NMCCA 202100150-Mtn for Third Enlargement

Signed By: [redacted]

RECEIVED
Sep 27 2021
United States Navy-Marine Corps
Court of Criminal Appeals

[redacted]
Panel Paralegal
Navy-Marine Corps Court of Criminal Appeals
[redacted]

[redacted]

Subject: FILING-Panel 3-U.S. v. DeDolph-NMCCA 202100150-Mtn for Third Enlargement

To this Honorable Court:

Please find attached the Appellant's Motion for a Third Enlargement in U.S. v. DeDolph, NMCCA No. 202100150.

Very respectfully,

Jasper Casey
Captain, U.S. Marine Corps

Appellate Defense Counsel (Code 45)
[redacted]

[redacted]

Subject: RULING - FILING-Panel 3-U.S. v. DeDolph-NMCCA 202100150-Mtn for Third Enlargement

Signed By: [redacted]

MOTION GRANTED
6 Oct 2021
United States Navy-Marine Corps
Court of Criminal Appeals

[redacted]

Subject: FILING-Panel 3-U.S. v. DeDolph-NMCCA 202100150-Mtn for Third Enlargement

To this Honorable Court:

Please find attached the Appellant's Motion for a Third Enlargement in U.S. v. DeDolph, NMCCA No. 202100150.

Very respectfully,

Jasper Casey
Captain, U.S. Marine Corps

Appellate Defense Counsel (Code 45)
[redacted]

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

Before Panel No. 3

UNITED STATES,

Appellee

v.

Tony E. DeDolph
Special Warfare Operator Chief
(E-7)
United States Navy,

Appellant

APPELLANT'S BRIEF AND ASSIGNMENTS OF ERROR

NMCCA No. 202100150

Tried At Naval Station, Norfolk, Virginia on January 10, 2020, January 30, 2020, July 7, 2020, August 31, 2020, January 14-15, 2021, and January 19-23, 2021 before a General-Court-Martial Convened by Commander, Navy Region Mid-Atlantic, CAPT M. Luken, and CDR H. Larsen, presiding.

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

Jasper W. Casey
Captain, U.S. Marine Corps
Appellate Defense Counsel
Navy-Marine Corps
Appellate Review Activity
1254 Charles Morris Street SE
Building 58, Suite 100
[redacted]

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Issues Presented

I. ***Was Appellant deprived of a meaningful opportunity to cross-examine a key government witness when the Government did not disclose that the witness was requesting additional clemency from the convening authority?***

II. ***Evidence in aggravation must be directly related to or resulting from an offense of which Appellant was convicted. Appellant was not convicted of suffocating SSG [redacted] fracturing SSG [redacted] windpipe, or obstructing justice by performing a cricothyrotomoy for corrupt purposes. Did the Military Judge abuse his discretion by admitting evidence of such conduct and argument over defense objection?***

III. ***Was the sentence awarded by the members inappropriately severe and disparate?***

IV. ***Was the effect of prosecutorial misconduct so prejudicial that this Court cannot be confident that the members sentenced Appellant based solely on the admissible evidence?***

V. ***Did the Military Judge err by denying the defense post-trial motion for a mistrial?***

VI. ***Did the cumulative effect of the all error in SOC DeDolph's court-martial deprive him of a fair trial?***

Statement of Statutory Jurisdiction

The approved sentence includes confinement for more than two years and a punitive discharge. Therefore, this Court has jurisdiction under Article 66(b)(3), Uniform Code of Military Justice (UCMJ).[1]

Statement of the Case

A general court-martial composed of a Military Judge sitting alone convicted Special Warfare Operator Chief (SOC) Tony E. DeDolph, consistent with his pleas, of two specifications of Article 81 (conspiracy); one specification of Article 119 (involuntary manslaughter); one specification of Article 92 (hazing); and one specification of Article 134 (obstruction of justice).

Per the pre-trial agreement, the government conditionally dismissed Charge II (violation of Article 129 – burglary); Charge III (Article 118 – felony murder), and excepted the words "by culpable negligence and" from Charge IV (Article 119 – involuntary manslaughter).[2]

SOC DeDolph elected to be sentenced by members with enlisted representation and was adjudged ten years' confinement, reduction to the pay grade of E-1, and a dishonorable discharge.[3]

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[1] 10 U.S.C. § 866 (2016).
[2] *See* Entry of Judgement.
[3] R. at 1390.

Statement of Facts

A. Staff Sergeant (SSG) [redacted] died as a result of an accident during a hazing incident in [redacted].

SOC DeDolph was on a deployment to [redacted] on or about June 4, 2017.[4] That evening, SOC DeDolph and several other servicemembers (including SOC [redacted], GySgt [redacted] and Pvt [redacted] visited some local bars and restaurants.[5] While the group was socializing, GySgt [redacted] expressed frustration that SSG [redacted] (the decedent) ditched the group to attend a party at the [redacted] The group joked throughout the night that they should pull a "tape job" prank on SSG [redacted] as payback.[7]

The group returned home around 0500.[8] They then decided to pull the prank on SSG [redacted] who was asleep in his room.[9] They then "stacked" by the door in a tactical formation and GySgt [redacted] broke down the door with a sledge-hammer.[10] Once everyone entered the room, Pvt [redacted] pulled aside the

[4] Pros. Ex. 1.
[5] R. at 234.
[6] R. at 234, 1247.
[7] R. at 234.
[8] R. at 234.
[9] R. at 235.
[10] R. at 235.

mosquito netting around SSgt [redacted] bed.[11] At that same moment, SSG [redacted] jumped up and said something like "[o]h it's you guys" or "let's go, fuckers!"[12]

SOC DeDolph and SOC [redacted] both grabbed SSG [redacted] to subdue him.[13] SOC DeDolph initially tied to control SSG [redacted] with a "Gable grip," but SSG [redacted] was "buck[ing]" too much.[14] SOC DeDolph then applied a jujitsu-style "rear naked chokehold" on SSG [redacted].[15] This involved SOC DeDolph putting one arm around both sides of SSG [redacted] neck, applying pressure.[16] At this point, SSG [redacted] was face down, but his head was turned to the side allowing SOC DeDolph to see his face.[17]

This chokehold caused SSG [redacted] to lose consciousness in about ten seconds.[18] SOC [redacted] and Pvt [redacted] bound SSG [redacted] arms and legs with tape.[19] After this, GySgt [redacted] played music and took photographs of SSG [redacted].[20] Two [redacted] who worked as guards in the house, were also enlisted to help with the prank.[21]

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[11] R. at 236.
[12] R. at 1252.
[13] R. at 703.
[14] R. at 1252.
[15] R. at 235-236, 261.
[16] R. at 260.
[17] R. at 1254.
[18] R. at 261.
[19] R. at 235-36.
[20] R. at 235.
[21] R. at 235.

After about thirty seconds, however, SSG [redacted] still had not regained consciousness.[22] SOC DeDolph took immediate steps to revive SSG [redacted] First, SOC DeDolph rolled SSG [redacted] over onto his back, and tapped SSG [redacted] on the shoulder blades while calling his name.[23] While this was happening, SOC [redacted] and Pvt [redacted] worked to unbind SSG [redacted] by removing all the tape.[24]

After these initial attempts did not work, SOC DeDodolph "took control" over medical recovery efforts.[25] While SOC DeDolph was not the team's primary medic, he did go through advanced "18D" medic training many years prior.[26]

SOC DeDolph and SOC [redacted] took turns performing CPR while SSG [redacted] laid on the bed.[27] They were able to administer rescue breaths, but SSG [redacted] still did not regain consciousness.[28] SOC DeDolph moved SSG [redacted] to the floor for a more stable surface to perform CPR, but this still did not work.[29]

After attempting CPR for a few minutes, SOC DeDolph and SOC [redacted] directed GySgt [redacted] and Pvt [redacted] to wake up SSG [redacted] team

[22] R. at 261.
[23] R. at 1255.
[24] R. at 710.
[25] R. at 1103.
[26] R. at 1256.
[27] R. at 711.
[28] R. at 711.
[29] R. at 1103.

leader, SFC [redacted] to begin notification and medical evacuation procedures. SOC DeDolph also retrieved an arterial defibrillator from one his medical bags.[30]

SOC DeDolph assessed that he would need to perform an emergency cricothyrotomy to open up SSG [redacted] airway because he was not breathing on his own and it could take several hours to get a MEDEVAC.[31] However, after cutting the incision SOC DeDolph had trouble inserting the breathing tube into SSG [redacted] airway due to unexpected blockage.[32]

The decision was made to use one of the team's vehicles to transport SSG [redacted] to a local clinic.[33] SSG [redacted] was loaded into the back of the car, and SOC DeDolph stayed with him to continue life-saving efforts.[34] SOC DeDolph cut additional incisions into SSG [redacted] airway to successfully insert the breathing tube.[35] These efforts were complicated by the fact that SOC DeDolph was trying to perform this technique while riding in the back of a Land Rover that was driving at a rapid speed along the poorly maintained roads of [redacted].[36]

[30] R. at 1104.
[31] R. at 1105; 1257.
[32] R. at 1105.
[33] R. at 1106.
[34] R. at 1106.
[35] R. at 1106
[36] R. at 1260.

The group soon arrived at the clinic.[37] The person at the clinic who identified himself as a doctor made a visual assessment of SSG [redacted] and informed the group that he was unable to help.[38] Even after this occurred, SOC DeDolph continued to breathe for SSG [redacted] through the inserted breathing tube and work "feverishly" to save him.[39] Eventually, a doctor from the American Embassy arrived at the clinic and pronounced SSG [redacted] dead.[40] It was only then that SOC DeDolph "hesitatingly" ceased life-saving efforts after being told to stop.[41]

Afterwards, SOC DeDolph was "shocked and deeply disturbed" by SSG [redacted] death.[42] SOC [redacted] who had known SOC DeDolph for many years, later testified that SOC DeDolph "imploded."[43]

SOC DeDolph and the other servicemembers made a plan to obscure details of SSG [redacted] death from investigators.[44] SOC DeDolph and SOC [redacted] told GySgt [redacted] and Pvt [redacted] that they would take the blame for the incident and tell investigators that neither of the Marines were present when SSG [redacted] died.[45] The servicemembers initially claimed that SOC DeDolph and SSG

[37] R. at 1107.
[38] R. at 1107.
[39] R. at 1107.
[40] R. at 1108.
[41] R. at 1108; 1261.
[42] R. at 248.
[43] R. at 1110.
[44] R. at 242.
[45] R. at 248.

[redacted] were playfighting when SSG [redacted] suddenly suffered a medical emergency and became unresponsive.[46] The servicemembers also gave a false timeline of events to investigators, destroyed a phone containing pictures of SSG [redacted] bound with tape, and decided to dispose of any alcohol that was in the house.[47] But while SOC DeDolph took these steps to mislead investigators, he always maintained that he was going to take responsibility for putting the chokehold on SSG [redacted].[48]

B. Pvt [redacted] testified for the Government at SOC DeDolph's trial. Prior to SOC DeDolph's trial, Pvt [redacted] requested additional clemency from the convening authority. This was never disclosed to SOC DeDolph.

Ultimately, SOC DeDolph and his three co-conspirators were charged with various offenses related to SSG [redacted] death and the following cover-up.

Pvt [redacted] pleaded guilty on 1 March 2019, approximately one and a half years before SOC DeDolph's trial.[49] Pursuant to the pretrial agreement, the convening authority limited Pvt [redacted] confinement to a maximum of four years.[50] In return, Pvt [redacted] agreed to testify in any future proceedings involving SOC DeDolph and the remaining co-conspirators.[51]

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[46] R. at 248.
[47] R. at 249.
[48] R. at 767.
[49] *United States v.* [*Marshall*] Pretrial Agreement.
[50] *Id.*
[51] *Id.*

About six months after Pvt [redacted] promised to testify against Appellant in exchange for a limit on his confinement, SOC DeDolph submitted an initial discovery request to the Government, which included a specific request for "…evidence affecting the credibility of any potential government witness. This includes information known to the government . . . including bias bearing on a witness's credibility."[52]

At the time this discovery request was filed, SOC DeDolph was aware that Pvt [redacted] previously pleaded guilty. But the Government did not later disclose that Pvt [redacted] was seeking to cut his confinement time in half by seeking additional clemency, which would have been responsive to this specific request.

Three months before SOC DeDolph's trial, on October 9, 2020, the lead trial counsel signed a "Material Assistance Letter" and provided it to Pvt [redacted] defense team.[53] To undersigned counsel's knowledge, this was not disclosed to SOC DeDolph.

11 days later, on October 20, 2020, Pvt [redacted] submitted a letter to the Convening Authority via the Staff Judge Advocate, requesting clemency in the form of a reduction in confinement from 4 years to 2 years.[54] This was not disclosed to SOC DeDolph.

[52] App. Ex. XXVII.
[53] Appellant's Motion to Attach, Ex. C.
[54] Appellant's Motion to Attach, Ex. D.

Pvt [redacted] testified as a Government witness during SOC DeDolph's trial.[55] Following this, Pvt [redacted] defense team submitted another clemency letter to the convening authority again requesting a reduction in confinement.[56] The lead trial counsel also sent a letter to the convening authority recommending that one year of Pvt [redacted] confinement term and his bad-conduct discharge be suspended and later remitted.[57] Ultimately, the convening authority took action and reduced Pvt [redacted] term of confinement by one year.[58] In doing so, the convening authority stated that he was taking action "pursuant to a recommendation from the trial counsel. . . ." This was not disclosed to SOC DeDolph.

To date, the Government has never provided any of this information to SOC DeDolph. Rather, SOC DeDolph and his counsel became aware of this information through independent means.

Below is a distilled timeline of events:

DATE	Event
4 June 2017	SSG [redacted] dies in [redacted]
1 March 2019	Pvt [redacted] signs Pretrial Agreement

[55] R. at 673.
[56] Appellant's Motion to Attach, Ex. E.
[57] Appellant's Motion to Attach, Ex. F.
[58] Appellant's Motion to Attach, Ex. G.

13 March 2019	Convening Authority grants immunity to Pvt [redacted]
6 June 2019	Pvt [redacted] guilty plea and sentencing hearing
9 July 2019	Pvt [redacted] submits Request for Extension of Clemency Consideration to Convening Authority.*****
18 July 2019	Convening Authority grants Pvt [redacted] Clemency Extension*****
21 October 2019	SOC DeDolph submits initial Discovery Request (App. Ex. XXXVII)
9 October 2020	Lead Trial Counsel provides Material Assistance Letter to Pvt [redacted]
20 October 2020	Pvt [redacted] submits Clemency Considering to Convening Authority requesting reduction of confinement from 48 months to 24 months*****
10-14 January 2021	SOC DeDolph's plea and sentencing hearing. Pvt [redacted] testifies as Government witness
3 February 2021	Pvt [redacted] submits Additional Clemency Consideration, renewing request for reduction in confinement time*
26 February 2021	Trial Counsel endorses Pvt [redacted] request for clemency. Recommends suspending all confinement in excess of 36 months*
13 April 2021	Convening Authority takes post-trial action in Pvt [redacted] court-martial. All confinement in excess of 36 months is suspended pursuant to Trial Counsel's recommendation*

**** never disclosed to SOC DeDolph***

C. The Government failed to ensure that Pvt [redacted] testified in the appropriate uniform.

Prior to Pvt [redacted] testimony, the defense was informed that Pvt [redacted] would be testifying in a MARPAT utility uniform and objected.[59] Civilian defense counsel explained that the defense was taking care to not

[59] R. at 625.

introduce evidence of the specific sentence awarded Pvt [redacted].[60] While the defense intended to cross-examine Pvt [redacted] about the fact that he pleaded guilty, they did not want to introduce the specifics of his sentence so as to not set a benchmark the members could use for SOC DeDolph's sentence.[61] The defense expressed concern that if Pvt [redacted] testified out of uniform, it would signal to the members that "there's something different about him," which could cause the members to speculate that Pvt [redacted] was already serving confinement.[62]

Trial counsel explained that Pvt [redacted] was not in his seasonal service uniform because Pvt [redacted] was still confined and "his seabag no longer contains that uniform."[63] The trial counsel further explained that they attempted to secure a proper uniform, but "the administrative channels for the funding of the like is bizarrely [sic] byzantine." Trial counsel offered no further explanation as to why the United States Government was unable to locate a Marine Corps Private's seasonal service uniform (which would require no rank insignia) anywhere in the vicinity of Naval Station Norfolk. Ultimately, the Military Judge overruled the defense objection and allowed Pvt [redacted] to testify out of uniform.[64]

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[60] R. at 628.
[61] R. at 628.
[62] R. at 628.
[63] R. at 626.
[64] R. at 631.

D. Pvt [redacted] testimony provided new details about SSG [redacted] assault that were not contained in any of his pretrial statements.

During Pvt [redacted] testimony he described the assault on SSG [redacted] According to Pvt [redacted] SOC DeDolph actually applied two separate chokeholds to SSG [redacted].[65] Pvt [redacted] stated that SOC DeDolph applied an initial "standard rear naked chokehold" that caused SSG [redacted] to lose consciousness.[66] At this point, SSG [redacted] was lying on his stomach, face-first into the bed.[67] But according to Pvt [redacted] SSG [redacted] "came conscious again" and started struggling.[68] So, SOC DeDolph applied a second chokehold while on top of SSG [redacted] which eventually caused SSG [redacted] to lose consciousness again.[69]

Pvt [redacted] provided several statements pretrial.[70] But during this testimony, for the first time, offered that while SOC DeDolph was performing CPR on SSG [redacted] he could hear air coming out "in like a weird fleshy undulating sound, similar to snoring."[71]

On cross-examination, Trial Defense Counsel pointed out that Pvt [redacted] had been drinking for several hours the day SSG [redacted] died.[72] Pvt [redacted]

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[65] R. at 706.
[66] R. at 705.
[67] R. at 706.
[68] R. at 706-07.
[69] R. at 707-08.
[70] Pros Ex. 9; *see also United States v.* [redacted] providence inquiry.
[71] R. at 711; *compare to* Pros. Ex. 9 (containing no mention of a sound).
[72] R. at 764.

agreed that he was intoxicated, and had trouble recalling specific timelines and orders of events.[73] Pvt [redacted] also stated that details were "hazy."[74]

E. Conduct by the lead trial counsel during the Government's case prompted numerous objections from the defense and rebuke from the Military Judge.

Prior to the Government's presentencing case, the defense bought a motion to prohibit any evidence that SOC DeDolph and his co-conspirators joked about one of the [redacted] licking SSG [redacted] anus or otherwise putting him in fear of being sexually assaulted.[75] Trial Defense Counsel objected on grounds that such evidence was improper evidence in aggravation under R.C.M. 1001(b)(4), and that it was barred by M.R.E. 403.[76] The core of the defense argument was that since no such "sexual assault" actually occurred, evidence of these jokes was not relevant and unfairly prejudicial.[77]

The Military Judge ruled for the defense, and only permitted the Government to introduce a sanitized version of events that "the parties showed a callousness that evening toward [SSG [redacted] and that they were joking about the hazing incident."[78]

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[73] R. at 764.
[74] R. at 712.
[75] R. at 585-86.
[76] R. at 587.
[77] R. at 587.
[78] R. at 616.

Immediately after the Military Judge's ruling, Trial Counsel continued to offer alternative theories about the admissibility of this information, which caused the Military Judge to state, "the Court is not reversing its ruling."[79] Later, the Government filed a Written Motion to Reconsider.[80] During argument, the Trial Counsel stated that the Military Judge's ruling indicated a "disconnect" and suggested that the Military Judge had a "confusion of the facts."[81] Without needing to hear argument from the defense, the Military Judge denied the Government's motion.[82]

Following the testimony of Pvt [redacted] the Government once again asked to introduce evidence of the "anus licking" joke.[83] The Military Judge rejected the Government's theory, stating "Government, I'm not going to allow you to get into the anus licking. The Court has already ruled on that issue."[84] This prompted even more argument from trial counsel who suggested that without the introduction of specific details about this joke, the defense would be allowed to argue that "nothing bad happened" to SSG [redacted].[85] In response, civilian defense counsel stated "how can I possibly stand up there and say nothing bad happened when a

[79] R. at 617.
[80] App. Ex. XXVIII(a); R. at 634.
[81] R. at 634.
[82] R. at 635.
[83] R. at 769.
[84] R. at 779.
[85] R. at 780.

man died?"[86] The Military Judge agreed and suggested that the Government was "missing the big picture."[87]

Later, the defense called its forensic consultant, Dr. [redacted].[88] After the defense tendered Dr. [redacted] as an expert witness, the Government indicated they wanted to conduct "voir dire" of the witness.[89] Rather than ask Dr. [redacted] about his expertise, the Government asked a question about the circumstances of Dr. [redacted] leaving public service.[90] This prompted the Military Judge to immediately state, "[Trial Counsel], that was not voir dire. That was cross-examination. Don't do that again."[91]

F. The testimony of the medical examiner, Dr. [redacted] was consistent with SOC DeDolph's description of events.

Dr. [redacted] is a Regional Medical Examiner for the Armed Forces Medical Examiner System (AFMES), who performed the autopsy of SSG [redacted].[92]

Dr. [redacted] explained that in her opinion, the cause of SSG [redacted] death was asphyxia, which is a condition where insufficient oxygen is provided to the brain.[93] According to Dr. [redacted] no other possible cause of death was identified

[86] R. at 780.
[87] R. at 780.
[88] R. at 1151.
[89] R. at 1155.
[90] R. at 1156.
[91] R. at 1156.
[92] R. at 808.
[93] R. at 837.

during her autopsy.[94] Dr. [redacted] provided information about how strangulation can lead to asphyxia through either a "blood choke" (which occludes blood-flow to and from the brain), or an "air choke" (which occludes the airway itself).[95] However, Dr. [redacted] stated it was not possible to definitively determine whether a "blood choke" or "air choke" caused SSG [redacted] death.[96]

Dr. [redacted] also described that she noted hemorrhaging in SSG [redacted] throat.[97] She opined that the hemorrhaging appeared consistent with an incision (i.e. the cricothryrotomy) rather than an alternative cause such as blunt force trauma.[98] Dr. [redacted] also noted the cricothyrotomy wound but explained that the wound was unusual for this type of procedure.[99] However, Dr. [redacted] agreed that the specific conditions of this cricothyrotomy, such as it being performed under emergency conditions in the back of a moving vehicle, could explain the irregularities with the incision.[100] She agreed that this was a "suboptimal" environment to perform this procedure, as opposed to a sterile surgical environment.[101]

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[94] R. at 840.
[95] R. at 833.
[96] R. at 840.
[97] R. at 832.
[98] R. at 832.
[99] R. at 829.
[100] R. at 846-47.
[101] R. at 848.

Dr. [redacted] also noted fragments of free-floating cartilage in SSG [redacted] airway.[102] While Dr. [redacted] could not provide a definitive explanation for this free-floating cartilage, she agreed that the fragments could be explained by the insertion of the breathing tube through the cartilage.[103] Similarly, Dr. [redacted] also agreed that "secondary manipulation" in SSG [redacted] during the cricothyrotomy could also explain the free-floating cartilage.[104]

G. The defense objected to portions of Dr. [redacted] testimony as being improper evidence in aggravation, and impeaching the stipulation of fact. The Government presented alternative theories as to the mechanism of SSG [redacted] death, which caused the Military Judge to remark, "we'll see what the Appellate Court does."

Dr. [redacted] is a forensic pathologist who testified for the Government.[105] Dr. [redacted] did not perform an autopsy on SSG [redacted].[106]

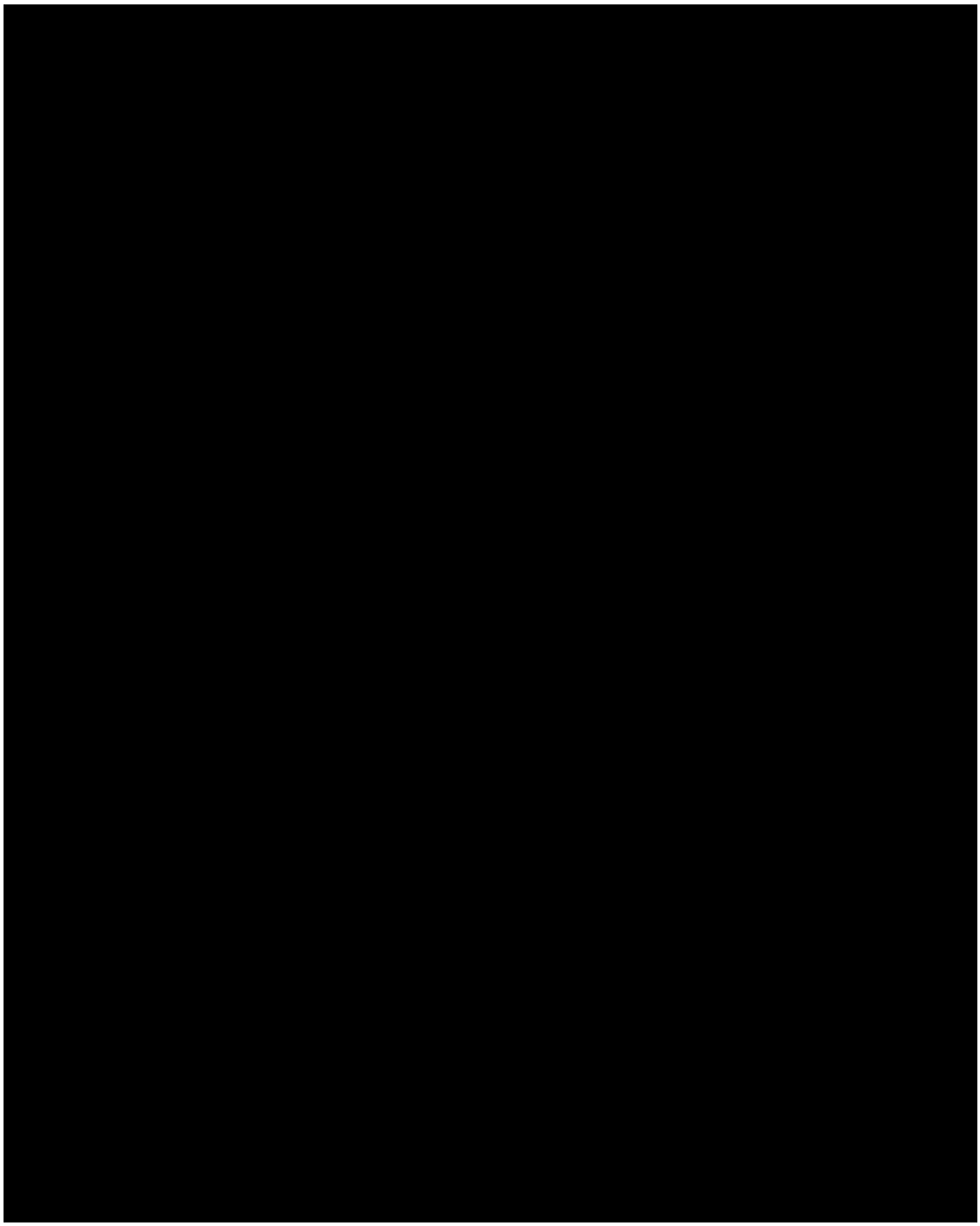
Prior to Dr. [redacted] testimony, the defense objected to his testimony as being cumulative to Dr. [redacted].[107] In response to the Government's proffer, the

[102] R. at 847.
[103] R. at 848.
[104] R. at 850.
[105] R. at 875-76.
[106] [redacted] later gained national notoriety for his testimony for the defense in *Minnesota v. Derek Chauvin.* Following this trial, and based on criticism from other forensic pathologists, the State of Maryland announced they would conduct an independent review of cases involving law enforcement connected deaths that were examined by Dr. [redacted] office.

[redacted]

[107] R. at 863.

defense objected on grounds that the Government was attempting to impeach both SOC DeDolph's providence inquiry and the agreed-upon stipulation of fact.[108] This prompted the following exchange between the Military Judge and Trial Counsel:



[108] R. at 864.

[redacted]

Based on the proffers of counsel, the Military Judge ruled that the testimony of Dr. [redacted] as proffered, was admissible.[110] In doing so, the Military Judge found that Dr. [redacted] testimony was not cumulative because he could offer a different perspective than Dr. [redacted].[111] The Military Judge also conducted an M.R.E. 403 balancing test.[112]

During Dr. [redacted] testimony, he agreed that the cause of SSG [redacted] death was asphyxia.[113] Dr. [redacted] also agreed that manual strangulation can be fatal through the occlusion of blood and oxygen flow to the brain.[114]

But contrary to the Government's proffer, Dr. [redacted] opined that SSG [redacted] could have been killed by a mechanism of asphyxia other than manual strangulation or a crushed windpipe.[115] Specifically, Dr. [redacted] opined that SSG [redacted] could have suffocated due to having someone's weight on his back while he

[109] R. at 864-65 (emphasis added).
[110] R. at 869.
[111] R. at 870.
[112] R. at 870.
[113] R. at 879.
[114] R. at 883.
[115] R. at 883-84.

was face down on the bed.[116] Alternatively, Dr. [redacted] opined that SSG [redacted] could have been asphyxiated due to a fragment of material being "potentially present" inside his airway.[117]

At this point, the defense objected again, arguing that the Government was impeaching SOC DeDolph's providence inquiry and the stipulation of fact.[118] The defense argued that the alternative theories offered by Dr. [redacted] were inconsistent with SOC's DeDolph's guilty plea and stipulation of fact.[119]

The Military Judge also asked the Government why they were offering evidence of alternative mechanisms of death.[120] The Military Judge asked, ". . . are we just getting a buffet of possibilities or are we going to get to the crushed windpipe that you said this was all about?"[121] In response, the Government proffered that they were seeking to introduce evidence of factors that "greatly magnifies the danger that [SSG [redacted] was exposed to . . . We also believe he cracked his windpipe, and that made it certain that he would die, but it's also possible one of the other methods killed him before they got to that stage."[122] This

[116] R. at 884.
[117] R. at 884.
[118] R. at 886.
[119] R. at 886.
[120] R. at 886.
[121] R. at 886-87.
[122] R. at 887.

prompted the military judge to caution "But that's not—that is not what you stipulated to, [trial counsel]."[123]

The Government offered further argument that Dr. [redacted] testimony was necessary because otherwise SSG [redacted] death "would not make sense; and the Government wants to explain that, explain his likely mode and manner of death."[124] This prompted the Military Judge to say, "[s]o it sounds like you're saying the accused's pleas were improvident . . . would you like me to reopen providency? Would you like to get out of the deal?"[125] After more back-and-forth, the Military Judge directly asked, "is the Court incorrect in taking the plea for involuntary manslaughter."[126]

Ultimately, the Military Judge found that the stipulation of fact was "ambiguous enough" that the government was permitted to introduce Dr. [redacted] opinions.[127] The Military Judge found the Government was not bound by SOC DeDolph's statements during the *Care* inquiry, and the information they sought to introduce through Dr. [redacted] was "directly relating to" SOC DeDolph's misconduct.[128]

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[123] R. at 887-88.
[124] R. at 889.
[125] R. at 889.
[126] R. at 891.
[127] R. at 892.
[128] R. at 892.

However, in making this ruling the Military Judge continued to express "significant concerns" about Dr. [redacted] testimony.[129] The Military Judge also stated "I believe the Government is walking a very dangerous line here, but I do believe they have articulated a basis why this is relevant under 1001(b)(4)."[130] Then after explaining his rationale in detail, including conducting another M.R.E. 403 balancing test, the Military Judge stated, "Your standing objection, though, [defense counsel], is noted, and *we'll see what the Appellate Court does*."[131]

H. The defense expert, Dr. [redacted] disagreed with Dr. [redacted] opinion that SSG [redacted] windpipe was crushed.

Dr. [redacted] agreed that SSG [redacted] cause of death was asphyxia due to neck compression, consistent with SOC DeDolph's description of events.[132] Dr. [redacted] was aware of the hemorrhaging in SSG [redacted] neck, but opined that there were related to the cricothyrotomy, rather than any blunt force trauma.[133] In fact, Dr. [redacted] testified that there was no evidence in the autopsy report to conclude that there was any additional trauma to SSG [redacted] neck independent of the rear naked chokehold and cricothyrotomy.[134] Dr. [redacted] testified "[t]here is no

[129] R. at 893.
[130] R. at 899.
[131] R. at 900 (emphasis added).
[132] R. at 1158-59.
[133] R. at 1159.
[134] R. at 1162.

evidence that would indicate to me or permit me to conclude, for instance, that the larynx had been crushed."[135]

Dr. [redacted] also rendered an opinion as to why the cricothyrotomy incision appeared irregular.[136] Dr. [redacted] explained that it is understandable that the "crike site" would not look like a textbook surgical cite.[137] He agreed that trying to perform the procedure while bouncing around in the back of a vehicle under low light conditions would be challenging.[138]

I. Over defense objection, the Military Judge allowed the Government to argue that SOC DeDolph performed the cricothyrotomy as a means of obstructing justice. The Government made this argument with little evidentiary support and failed to follow the Military Judge's instruction to edit a slide.

After the defense was able to review the Government's intended closing argument slide deck, they brought an oral motion to prohibit the Government from arguing that SOC DeDolph actually performed life-saving measures on SSG [redacted] to obstruct justice.[139] Specifically, the defense objected to the Government's argument that SOC DeDolph performed the cricothyrotomy to cover-up the fact that he allegedly fractured SSG [redacted] vocal chords.[140] The defense argued that

[135] R. at 1162.
[136] R. at 1169.
[137] R. at 1170.
[138] R. at 1170.
[139] R. at 1283.
[140] R. at 1283.

this theory was not supported by the facts, was not proper evidence in aggravation, and was merely inflammatory.[141]

The defense also pointed out that this theory of obstruction was rejected by the Article 32 Preliminary Hearing Officer who found no probable cause, leading to a related specification being dismissed.[142] The defense expressed concern that allowing the Government to argue "something that's uncharged, that has been dismissed . . . puts us in the position to argue a negative which is really saying 'Well, prove you didn't do it.'"[143]

The Government argued that the atypical nature of the cricothyrotomy indicated SOC DeDolph's allegedly nefarious motives for performing the procedure.[144] The Government also argued that SOC DeDolph's "18D" Medic Training, and the well-lit conditions of SSG [redacted] bedroom were factors that would have allowed him to perform a better cricothyrotomy if he had actually wanted to.[145] Finally, the Government argued the fact that the cricothyrotomy complicated the autopsy also indicated nefarious motive.[146]

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[141] R. at 1283; 1291.
[142] R. at 1283; 1289.
[143] R. at 1289.
[144] R. at 1284.
[145] R. at 1284.
[146] R. at 1286.

Ultimately, the Military Judge allowed the Government to make their argument. The Military Judge reasoned that the argument was proper because the cricothyrotomy was evidence that was "directly relating to or resulting from the incident in the case" per R.C.M. 1001(b)(4).[147] But the Military Judge also noted there was ample other evidence that would allow the defense to rebut the Government, making this a better question of fact for the members to decide.[148] But in making his ruling, the Military Judge also agreed "the Government has been dancing on the head of a pin on many issues that just seem to be beyond the scope, are really not germane to the issues, but this is an issue that has been presented."[149][150]

The defense also raised an objection to language on one the slides the Government intended to display during its sentencing argument.[151] Specifically the slide attributed Dr. [redacted] with saying that there was a violent strangulation of SSG [redacted].[152] The defense pointed out that Dr. [redacted] never said this.[153] The Military Judge agreed, and directed the Government to "take out the line."[154]

[147] R. at 1295.
[148] R. at 1288.
[149] R. at 1290-91.
[150] The Military Judge also noted the defense objection to the Government's sentencing argument "has been preserved." R. at 1295.
[151] R. at 1297.
[152] R. at 1297.
[153] R. at 1297.
[154] R. at 1298.

But the Government did not follow the Military Judge's order, and the slide was displayed to members unedited.[155] The defense immediately objected.[156] The Military Judge sustained the objection and reminded the Government, "I had specifically directed that the [redacted] testimony be removed."[157] The Military Judge issued only a brief curative instruction, telling the members "I'll just remind you again that arguments of counsel are not evidence."[158]

During the Government's sentencing argument there was reference to the notion that there were actually two chokeholds, with the second chokehold being one where SSG [redacted] was "fighting, fighting as hard as he could, although he didn't know it, fighting for his life."[159] Pvt [redacted] testimony was the only evidence the Government could attribute for the notion that there were two chokeholds.[160]

The Government also focused on Dr. [redacted] testimony and opinion that SSG [redacted] windpipe was fractured.[161] In doing so, the lead trial counsel told the members that Dr. [redacted] "noted in [Pvt [redacted] testimony a fleshy snoring

[155] R. at 1307.
[156] R. at 1307
[157] R. at 1308.
[158] R. at 1310.
[159] R. at 1305.
[160] R. at 1305.
[161] R. at 1307.

sound."[162] The Government argued that a crushed windpipe caused SSG [redacted] death, and that SSG [redacted] "just laid there on the bed, in the bedding, suffocating to death," despite SOC DeDolph not stipulating that these were the causes of death.[163]

Finally, the Government argued the theory that the cricothyrotomy was performed to obstruct justice. In doing so, the Government alleged that SOC DeDolph knew that SSG [redacted] windpipe was crushed and would not be able to recover.[164] According to the Government, at this point SOC DeDolph had been performing CPR for five-to-10 minutes, which gave him "time to think."[165] So, SOC DeDolph intentionally cut through SSG [redacted] "Adam's Apple" which would be in violation of the "basic tenets" of performing a circothryotomy.[166] The Government argued, "[t]here is simply no way that a hardened, seasoned, experienced and capable [redacted] with 18D training who was considered exceptional by his peers and trusted as the medic did that by accident."[167]

[162] R. at 1307.
[163] R. at 1314.
[164] R. at 1315.
[165] R. at 1316.
[166] R. at 1315.
[167] R. at 1317.

J. SOC DeDolph presented a case in mitigation and extenuation, including character statements from more than sixty people, descriptions of several acts of heroism, evidence that SOC DeDolph suffered a gunshot wound in combat, and descriptions of a long and successful career as a Navy [redacted]

SOC DeDolph is a highly decorated [redacted] with multiple combat deployments.[168] His personal awards include the Purple Heart; Bronze Start with a Combat V; two Navy and Marine Corps Commendation Medals (one with a Combat V); two Joint Service Commendation Medals (one with a Combat V); Navy and Marine Corps Achievement Medal; Army Achievement Medal, Combat Action Ribbon (two awards); and the Navy Presidential Unit Citation (two awards); among many others.[169]

SOC DeDolph was inspired to join the Navy after the attacks of September 11, 2001 and the invasion of Iraq in March 2003.[170] Despite having a Bachelor of Science degree and job at a laboratory, he made the decision to enlist and pursue becoming a [redacted].[171] SOC DeDolph was honored as his division's "Honor Recruit" when he completed boot camp in early 2004.[172]

[168] Def. Ex. A.
[169] Def. Ex. A.
[170] R. at 1239.
[171] R. at 1239-40.
[172] Def. Ex. A.

Based on his enlistment contract, SOC DeDolph was then able to attend [redacted] Because of injuries, SOC DeDolph had to go through "hell week" three times before successfully completing [redacted] After completing [redacted] Qualification Training and earning his [redacted] SOC DeDolph agreed to attend the challenging [redacted] (the "18D long course")[174] where he finished as the Distinguished Honor Graduate.[175]

After this, SOC DeDolph checked in to [redacted] During his tenure with the team, SOC DeDolph experienced several combat deployments.[177]

During one deployment, SOC DeDolph was assigned as the team's "breacher."[178] However, given his medical background, SOC DeDolph also served as a secondary corpsman.[179] He recalled the first combat casualty he responded to, which involved an [redacted] getting shot through an artery in his leg.[180] SOC DeDolph executed combat lifesaving techniques, including applying a tourniquet

[173] R. at 1240.
[174] R. at 1241.
[175] Def. Ex. A.
[176] R. at 1241.
[177] R. at 1242.
[178] R. at 1243.
[179] R. at 1265.
[180] R. at 1265.

and a pressure dressing before the soldier was medically evacuated.[181] Several weeks later, the soldier returned and thanked SOC DeDolph.[182]

SOC DeDolph estimates he provided some form of medical services to hundreds of locals during this deployment.[183] Many of the villagers called him [redacted].”[184] SOC DeDolph found this very rewarding because he enjoys helping people.[185]

Retired Senior Chief Mr. [redacted] testified about serving with SOC DeDolph.[186] Mr. [redacted] was the [redacted] troop handler during SOC DeDolph’s time with that unit.[187] Mr. [redacted] described SOC DeDolph’s first deployment as a [redacted] to [redacted].[188] During this deployment, the [redacted] SOC DeDolph was one of six [redacted] members selected for this sensitive mission.[190] During this

[181] R. at 1265.
[182] R. at 1265.
[183] R. at 1266.
[184] R. at 1059.
[185] R. at 1265.
[186] R. at 1038.
[187] R. at 1041.
[188] R. at 1044.
[189] R .at 1044.
[190] R. at 1044.

deployment, Mr. [redacted] was with SOC DeDolph the first time he saw combat.[191] Mr. [redacted] said that SOC DeDolph performed "admirably."[192]

SOC DeDolph's former platoon commander at [redacted], Mr. [redacted] also testified at trial.[193] Mr. [redacted] described how in garrison, SOC DeDolph was essential to building a positive culture within the platoon.[194] Mr. [redacted] was the platoon commander during the same [redacted] described Mr. [redacted] where the [redacted] provided village stability operations.[195] This was in a part of [redacted] that was hotly contested between the [redacted], and other "foreign actors."[196]

Mr. [redacted] described how SOC DeDolph went out of his way to provide medical care to wounded [redacted].[197] Mr. [redacted] recalled one incident where a local was shot in the face and had shrapnel wounds.[198] SOC DeDolph also provided care to a number of local children for situations like, "burn victims, dog bites. You

[191] R. at 1046.
[192] R. at 1046.
[193] R. at 1052.
[194] R. at 1054.
[195] R. at 1056.
[196] R. at 1056.
[197] R. at 1058.
[198] R. at 1058.

know, one child was dropped in a fire. One was—boiling water was—somehow affected the kid."[199]

Mr. [redacted] recalled an incident during a kinetic "clearance operation," in which the [redacted] operated alongside sixty to seventy [redacted] During this mission, an [redacted] stepped on an IED, which sparked a panic among the troops.[201] While everyone else took cover, SOC DeDolph "ran into the fight" to provide care to the wounded [redacted] who had lost both legs at the hip.[202] SOC DeDolph took immediate steps to provide emergency care.[203] A surgeon who later operated on the [redacted] later told Mr. [redacted] that but for SOC DeDolph's actions, the solider would have "certainly died."[204]

A [redacted] referred to on the record as "Witness Number 3" described the incident that resulted in SOC DeDolph being awarded the Bronze Start with Valor.[205] On that day the [redacted] position came under sporadic rocket and gunfire.[206] As time progressed the incoming fire become more intense, and the [redacted] became pinned down.[207] SOC DeDolph then grabbed a [redacted]

[199] R. at 1059.
[200] R. at 1060.
[201] R. at 1060.
[202] R. at 1061.
[203] R. at 1061.
[204] R. at 1062.
[205] R. at 1077.
[206] R. at 1077.
[207] R. at 1077.

recoilless rifle, exposed himself to enemy fire, and fired a number of rockets at the enemy.[208] This effectively suppressed the enemy, allowing the rest of the team to maneuver to a more advantageous fighting position.[209] "Witness Number 3" was adamant that "his (SOC DeDolph's) courage and his selflessness is what provided us opportunity a little bit quicker. And seconds matter."[210]

In 2013 SOC DeDolph was selected to join [redacted][211] SOC Murphy discussed his many years serving with SOC DeDolph in [redacted]. While not allowed to discuss specifics, SOC [redacted] described a recent deployment where SOC DeDolph was integral in developing a productive relationship with a foreign partner force.[212] Even though many of these partner troops had significant combat experience, they still looked up to SOC DeDolph because of his tactical proficiency and leadership.[213]

SOC [redacted] recalled a specific large-scale operation where the force found themselves ambushed along an exposed road in channelizing terrain.[214] During the

[208] R. at 1078.
[209] R. at 1078.
[210] R. at 1080.
[211] R. at 1244.
[212] R. at 1114.
[213] R. at 1113-14.
[214] R. at 1115-16.

following multi-hour engagement, SOC DeDolph exposed himself to fire several times to treat casualties and pull them to safety.[215]

After SSG [redacted] death, SOC DeDolph was removed from his team and put to work in the shipping and receiving department.[216] In that role he was under the supervision of "Witness Number 5."[217] This witness described how SOC DeDolph remained focused and positive and was a valuable member of the team, even though he was facing investigation and prosecution.[218] SOC DeDolph was even asked to mentor other sailors in the department.[219]

SOC DeDolph's wife, Ms. [redacted] described SOC DeDolph's qualities as a citizen and husband.[220] She discussed what a loving and supportive husband SOC DeDolph is even despite regular combat deployments.[221] At home, SOC DeDolph often volunteered to spend time with terminally-ill children.[222] He and other teammates would spend time with these children doing fun activities like rock climbing.[223] SOC DeDolph regularly volunteered at food banks as well.[224]

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[215] R. at 1116.
[216] R. at 1205.
[217] R. at 1204.
[218] R. at 1206.
[219] R. at 1206.
[220] R. at 1208-22
[221] R. at 1220-22.
[222] R. at 1227.
[223] R. at 1227.
[224] R. at 1228.

Ms. [redacted] described being notified when SOC DeDolph was shot in the shoulder during a combat deployment.[225] She described how SOC DeDolph was offered the opportunity to rotate home to recuperate.[226] However, SOC DeDolph refused to do so.[227] Instead, he remained in-country to rehabilitate while continuing to support his teammates.[228]

SOC DeDolph provided a lengthy unsworn statement during which he "absolutely" agreed that he was responsible for SSG [redacted] death.[229] SOC DeDeolph even addressed SSG [redacted] wife, telling her "I'm responsible for the death of [SSG [redacted] I'm responsible for the pain that you and your children have; and to the men behind you, I'm responsible for the loss of your teammate, and I'm sorry. And I know that words—I know that words can do no justice. I'm sorry, and I pray that—that you forgive me."[230]

SOC DeDolph explained why he made the decision to hide facts from investigators.[231] He explained that he did not want SSG [redacted] death to be remembered as a hazing incident.[232] SOC DeDolph felt that explaining SSG

[225] R. at 1223.
[226] R. at 1224.
[227] R. at 1224.
[228] R. at 1224.
[229] R. at 1264.
[230] R. at 1273.
[231] R. at 1262.
[232] R. at 1263.

[redacted] death this way "would not be fair to him."[233] Also, SSG [redacted] family "wouldn't have to think about him being taped up in that manner on the floor like that."[234]

After SSG [redacted] death, SOC DeDolph went through a great deal of personal struggles, including guilt, grief, and depression.[235] SOC DeDolph made the decision to check himself into an [redacted] which included an [redacted] course.[236] He found the therapy to very beneficial, explaining that he was "broken down" when he entered [redacted] but was built "back up."[237]

At the time of the incident, SOC DeDolph had been enrolled in the M.B.A. Program at University of Virginia – Darden School of Business in preparation for his eventual retirement from the Navy.[238] However, following his stint in [redacted] SOC DeDolph changed his focus and decided that he would like to pursue a future as a social worker or therapist.[239] He feels he has a message of "experience,

[233] R. at 1263.
[234] R. at 1263.
[235] R. at 1270.
[236] R. at 1269.
[237] R. at 1270.
[238] R. at 1271.
[239] R. at 1272.

strength, and hope that I do believe that I will be able to carry on and help – and help people like I have been helped, and I will."[240]

Some portions of SOC DeDolph's presentencing case remain classified and under seal. However, these portions also depict acts of tremendous valor and professional excellence.

More than sixty written character statements were introduced as well.[241] These letters were contributed by people from throughout SOC DeDolph's personal and military life, and describe a man of great honor and kindness.[242] SOC DeDolph also introduced numerous documents. These includes his service record, evaluations, training certificates, and award citations.[243]

Included in this package is a copy of SOC DeDolph's Purple Heart citation which he received for wounds received in action, "in support of oversea contingency operations."[244] SOC DeDolph received a separate Joint Service Commendation Medal with Valor for this same operation.[245] According to the citation, on that date SOC DeDolph maneuvered his support force through thick vegetation to within 20 meters of an enemy position.[246] The enemy became aware

[240] R. at 1272.
[241] Def. Ex. G.
[242] Def. Ex. G.
[243] Def. Ex. A-F.
[244] Def. Ex. A at 11.
[245] Def. Ex. A at 13.
[246] Def. Ex. A at 13.

of the assault force's presence and a firefight ensued.[247] SOC DeDolph bounded forward without cover when he was shot.[248] However, SOC DeDolph continued to attack the enemy, and did not seek medical attention for his wound until the enemy was eliminated.[249]

SOC DeDolph also introduced medical records which show extensive [redacted].[250] This includes a diagnosis for [redacted].[251] SOC DeDolph also has a history of [redacted].[252] SOC DeDolph also suffers from [redacted].[253]

Even the Government agreed that SOC DeDolph had a robust case in extenuation and mitigation.[254] During the Government's sentencing argument the trial counsel stated, "[t]he Government agrees that rehabilitation here is not the concern or the specific deterrence to make sure Chief DeDolph doesn't do this again, that's not relevant to this case."[255]

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[247] Def. Ex. A at 13.
[248] Def. Ex. A at 13.
[249] Def. Ex. A at 13.
[250] Def. Ex. E.
[251] Def. Ex. E.
[252] Def. Ex. E.
[253] Def. Ex. E.
[254] R. at 1331.
[255] R. at 1331.

K. The members sentenced SOC DeDolph to ten years of confinement, reduction to E-1, and a Dishonorable Discharge after only brief deliberation.

Prior to recessing the court for deliberation, the Military Judge provided standard instruction to the members on what matters they should consider.[256] The Military Judge listed each live witness, and stated, "[n]ow, Members, there are including those, over 60 other witnesses who have provided statements . . . all those statements must be considered by you."[257] Each member was provided with a binder containing copies of Defense Exhibits A through G, which totaled more than 180 pages.[258]

The military judge recessed the court for deliberation at 1319. The members returned a sentence less than two hours later at 1510.[259]

L. SOC DeDolph filed a mistrial motion post-trial which was rejected by the Military Judge.

After trial, the defense filed a Post-Trial Motion for Mistrial and New Sentencing Proceedings.[260]

The defense counsel wrote, "[t]he suffocating cause of death described at trial by the prosecution's own retained expert and above was never presented to the defense and it is a completely different mechanism of death that that which was

[256] R. at 1377.
[257] R. at 1378.
[258] Def. Ex. A-G.
[259] R. at 1388-89.
[260] App. Ex. XXXVII.

charged."[261] Because of this, the defense was misled as to the Government's theory.[262] The defense further argued that this "suffocation" theory of death is mitigating because it would require a lesser degree of intent than the charged mechanism, and because other members of the "hazing party" were on top of SSG [redacted] besides SOC DeDolph.[263]

The Military Judge denied the defense motion without taking oral argument.[264] The Military Judge found that the majority of issues raised had already been sufficiently argued and ruled on.[265]

The Military Judge also rejected an issue that alleged a *Brady* violation.[266] The Military Judge did not address whether or not the Government failed to disclose the other possible mechanisms of death to the defense. Rather, the Military Judge only addressed the fact that defense had an opportunity to consult with their own expert after Dr. [redacted] testified.[267] The Military Judge also wrote that "the Defense did not conduct a cross-examination of [Dr. [redacted] even though defense did conduct a brief cross-examination.[268]

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[261] App. Ex. XXXVII.
[262] App. Ex. XXXVII.
[263] App. Ex. XXXVII.
[264] App. Ex. XXXVII(c).
[265] App. Ex. XXXVII(c).
[266] App. Ex. XXXVII(c).
[267] App. Ex. XXXVII(c).
[268] App. Ex. XXXVII(c); *contra.* R. at 914-15.

M. SOC DeDolph's three co-conspirators all received less severe sentences.

Pvt [redacted] pleaded guilty to conspiracy to commit assault; conspiracy to obstruct justice; burglary; hazing; false official statements, obstruction of justice; and negligent homicide.[269] He was initially sentenced to four years' confinement, reduction to E-1, and a Bad-Conduct Discharge.[270] The convening authority later suspended and remitted confinement in excess of three years as well as the Bad-Conduct Discharge.[271]

SOC [redacted] pleaded guilty to conspiracy to commit assault; conspiracy to obstruct justice; unlawful entry; assault consummated by battery; hazing; and obstruction of justice. He was sentenced to twelve months' confinement, reduction to E-5, and a Bad-Conduct Discharge.[272] The convening authority later suspended and remitted the Bad-Conduct Discharge.[273]

GySgt [redacted] pleaded not-guilty at contested General Court-Martial.[274] He was convicted by members of conspiracy to commit assault; conspiracy to commit obstruction of justice; housebreaking; involuntary

[269] *See United States v.* [*Marshall*], Convening Authority's Action.
[270] *Id*.
[271] *Id*.
[272] *See United States v.* [*Murphy*], Post-Trial Action.
[273] *Id.*
[274] *See United States v.* [*Mike-Romeo*], Entry of Judgment.

manslaughter; and hazing.[275] He was sentenced to six months' confinement, reduction to E-1, ninety days of hard labor, and a letter of reprimand. GySgt [redacted] who instigated the attack on SSG [redacted] did not receive a punitive discharge.

Summary of Argument

When Pvt [redacted] testified to new and inflammatory details that supported the government's case in aggravation, he had a pending request for clemency over and above what he had already received from the government. In the face of SOC DeDolph's request for this kind of information, the government hid this fact from DeDolph and the members, and then granted additional clemency to Pvt [redacted] after his testimony. Because knowledge of this this obvious source of bias could have affected members' assessment of Pvt [redacted] credibility, SOC DeDolph was prejudiced by the Government's failure.

The Military Judge erred by allowing the Government to introduce other potential mechanisms of SSG [redacted] death through the testimony of Dr. [redacted] because this was not proper evidence in aggravation. The Military Judge also erred by allowing the Government to argue that SOC DeDolph actually performed the emergency cricothyrotomy on SSG [redacted] to obstruct justice, which was contradictory to the actual evidence in this case.

[275] *Id.*

SOC DeDolph accepted responsibility for serious crimes. But the sentence adjudged was inappropriately severe given SOC DeDolph's service record and robust case in extenuation and mitigation. Similarly, the sentence adjudged is inappropriately disparate when compared to the sentence awarded to his three co-conspirators, none of whom even received a bad-conduct discharge.

The record of trial is littered with instances of overzealous prosecutors committing misconduct. The effect of the prosecutorial misconduct during presentencing and argument was so prejudicial that this Court cannot be confident that the members sentenced SOC DeDolph on the admissible evidence alone.

Given the number of errors in SOC DeDolph's court-martial, the Military Judge should have granted the post-trial Motion for Mistrial. He erred by denying this motion.

Finally, this Court should find that the cumulative effect of all the errors in SOC DeDolph's court-martial deprived him of a fair trial.

Argument

I

Appellant was deprived of a meaningful opportunity to cross-examine Pvt [redacted] a key Government witness because the Government did not disclose that Pvt [redacted] was requesting additional clemency from the convening authority.

Standard of Review

The Government violates an accused's Constitutional right to due process when it fails to disclose evidence that is favorable to the defense on the issue of guilt or sentencing.[276] When the defense has made a discovery request covering the undisclosed evidence, the test for prejudice is whether the error is harmless beyond a reasonable doubt.[277]

Analysis

The failure to disclose requested material evidence favorable to the defense is not harmless beyond a reasonable doubt if the undisclosed evidence *might* have affected the outcome of the trial.[278] Evidence is "material" if there is merely a "reasonable probability" that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.[279] There is no difference

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[276] *Brady v. Maryland*, 373 U.S. 83, 87 (1963).
[277] *Id.* at 87; *United States v. Coleman*, 72 M.J. 184 (C.A.A.F. 2013).
[278] *United States v. Agurs*, 427 U.S. 97, 103 (1976) (emphasis added); *Kyles v. Whitely* 514 U.S. 419 (1994).
[279] *United States v. Bagley*, 473 U.S. 667, 679-80 (1985).

between exculpatory and impeachment evidence for *Brady* purposes.[280] In courts-martial, when there has been a specific request made by the defense, the evidence will be considered material unless failure to disclose can be demonstrated to be harmless beyond a reasonable doubt.[281]

The Supreme Court has clarified that whether a discovery failure violates an accused's due process rights is not based on the good faith or bad faith of the prosecution.[282] The point is not to punish society for prosecutorial error, but to avoid accused persons from facing unfair trials.[283] "A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him *or reduce the penalty* helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice . . ."[284]

It is well settled that "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination."[285] Through cross-examination the defense can "expose to the jury

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[280] *Id.*
[281] *United States v. Hart*, 29 M.J. 407, 410 (C.M.A. 1990).
[282] *Brady*, 373 U.S. at 87.
[283] *Id.*; *Mooney v. Holohan*, 294 U.S. 103, 112 (1935).
[284] *Brady*, 373 U.S. at 87-89 (emphasis added).
[285] *Davis v. Alaska*, 415 U.S. 308, 316-17 (1974).

the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness."[286]

In *United States v. Coleman,* the C.A.A.F. found that it was error for the Government to fail to disclose to the defense that the staff judge advocate had agreed to recommend the convening authority reduce a co-accused's sentence in exchange for his testimony against Appellant.[287]

The only question left before the *Coleman* Court was whether this discovery violation was harmless beyond a reasonable doubt.[288] Ultimately, the Court found that the error was harmless beyond a reasonable doubt because the co-accused's direct testimony for the Government was "very brief," the co-accused also provided favorable testimony to the defense, and the defense still had information sufficient to argue that the co-accused had a motive to lie when he provided testimony for the Government because he wanted clemency.[289] The Court also noted that the Government was prepared to rehabilitate the co-accused's credibility with a prior consistent statement made well before his counsel approached the staff

[286] *Id.* at 318.
[287] *United States v. Coleman*, 72 M.J. 184 (C.A.A.F. 2013).
[288] *Id.* at 186.
[289] *Id.* at 187-88.

judge advocate about clemency.[290] The Court concluded that disclosure of the clemency negotiations would not have affected the outcome of the trial.[291]

But in his concurrence in *Coleman*, Chief Judge Baker wrote "I hesitate to assume that actual knowledge of a clemency agreement can never enhance the effectiveness of a cross-examination or closing statement."[292] He further noted that an actual agreement to recommend clemency to a co-accused offers a "qualitatively different opportunity to cross-examine and expose bias than does the knowledge alone that a witness was a co-actor and might hope for clemency."[293] Disclosure of such an agreement could allow the defense to present actual evidence of the co-accused's bias, rather than mere argument of the co-accused's motive to testify for the Government. [294] This "could affect the outcome of a trial."[295]

In the present case, SOC DeDolph submitted a specific discovery request for "evidence affecting the credibility of any potential Government witness. This includes information know to the Government . . . including bias bearing on a witness's credibility."[296] The fact that Pvt [redacted] requesting additional clemency would have been responsive to this request.

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[290] *Id.* at 188.
[291] *Id.*
[292] *Id.* at 188 (Baker C.J., concurring).
[293] *Id.* at 189-90.
[294] *Id.* at 190.
[295] *Id.* at 190.
[296] App. Ex. XXVII.

Unlike the discovery violation in *Coleman*, here the failure to disclose that Pvt [redacted] was already engaged in clemency negotiations was not harmless beyond a reasonable doubt. Pvt [redacted] was a key Government witness at trial, whereas the co-accused in *Coleman* only provided brief testimony for the Government. Pvt [redacted] is the only source for the proposition that SOC DeDolph applied two separate chokeholds to SSG [redacted] Pvt [redacted] is also the only source for there being a "fleshy undulating sound" coming from SSG [redacted] [297] Importantly, SOC DeDolph's court-martial is apparently the first time Pvt [redacted] ever said anything like this (unlike the witness in *Coleman*).[298]

Dr. [redacted] then used these points from Pvt [redacted] testimony to form his opinion that SOC DeDolph fractured SSG [redacted] windpipe.[299] The Government then made this allegation of a fractured windpipe a prominent piece of its sentencing argument. Clearly, Pvt [redacted] testimony was critical to the Government's case.

Unlike in *Coleman*, it remains unknown whether SOC DeDolphs's command had already agreed to grant or recommend clemency to Pvt [redacted] at the time he testified at SOC DeDolph's trial. As of this writing, the Government has still not disclosed any information regarding Pvt [redacted] additional

[297] R. at 711.
[298] R. at 711; *compare to* Pros. Ex. 1 (containing no mention of a sound).
[299] R. at 909.

clemency to SOC DeDolph. But the rationale behind *Coleman*, and especially Chief Judge [redacted] concurrence is still applicable to the present case.

Had the defense known that Pvt [redacted] request for additional clemency was pending with the convening authority at the time of his testimony, they could have exposed this clear bias. This could have undermined Pvt [redacted] credibility. This in turn could have influenced the weight the members gave to Pvt [redacted] testimony, Dr. [redacted] opinions, and the Government's sentencing argument.

The defense does not need to prove that the sentence awarded to SOC DeDolph definitely *would* have been less severe if the defense had known to expose Pvt [redacted] bias. The standard is only whether the discovery violation *might* have affected the sentence such that this Court cannot have confidence in the fairness of the trial.[300] That standard is met here.

Certainly, SOC DeDolph was aware prior to his trial that Pvt [redacted] had already pleaded guilty and been sentenced for his own misconduct.[301] The defense explained their cross-examination strategy for Pvt [redacted] and discussed why they wanted to avoid informing the members of the specifics of Pvt [redacted] sentence.[302] However, this does not render the Government's discovery violation

[300] *Kyles v. Whitely*, 514 U.S. 419 (1994).
[301] R. at 632.
[302] R. at 632.

harmless beyond a reasonable doubt. SOC DeDolph was denied this "qualitatively different opportunity" to expose Pvt [redacted] clear bias.[303]

Conclusion

Appellant respectfully requests this Court set aside the sentence and remand Appellant's case to the convening authority to authorize a rehearing on sentencing.

II

The Military Judge erred by admitting evidence of other possible mechanisms of death and allowing the Government to argue that SOC DeDolph performed the emergency cricothyrotomy to obstruct justice. Such argument and evidence was not appropriate evidence in aggravation.

Standard of Review

The decision of the military judge to admit aggravation evidence at sentencing is reviewed for an abuse of discretion.[304]

Discussion

The Government may introduce evidence during presentencing "as to any aggravating circumstances directly relating to or resulting from the offense of which the accused has been found guilty."[305] This includes evidence of uncharged misconduct that is preparatory to, accompanies, or follows "the offense of which

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[303] *Coleman*, 72 M.J. at 189-90 (Baker, C.J., concurring).
[304] *United States v. Ashby*, 68 M.J. 108, 120 (C.A.A.F. 2009).
[305] MANUAL FOR COURTS-MARTIAL, UNITED STATES (2016) [hereinafter MCM], Rule for Courts-Martial 1001(b)(4).

the accused has been convicted."[306] Aggravation evidence includes evidence of the impact "to any person or entity who was the victim of an offense committed by the accused."[307] This information helps the Military Judge to place the offenses "in context, including the facts and circumstances surrounding the offense."[308]

As the C.A.A.F. explained in *United States v. Hardison*, the link between the evidence in aggravation and the crimes "must be direct as the rule states, and closely related in time, type, [and] often outcome, to the convicted crime."[309] Evidence offered in aggravation must still be excluded if its "probative value is substantially outweighed by the danger of . . . unfair prejudice."[310]

R.C.M. 811(e) states, "[u]nless properly withdrawn or ordered stricken from the record, a stipulation of fact that has been accepted is binding on the court-martial and may not be contradicted by the parties thereto."[311]

Here, it was error for the Military Judge to allow the Government to present other evidence of other possible mechanisms of death through the testimony of Dr. [redacted] SOC DeDolph pleaded guilty to causing SSG [redacted] death through a specific means—strangulation via a rear naked chokehold.[312] Yet, the Government

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[306] *United States v. Wingart*, 27 M.J. 128, 135 (C.M.A. 1988).
[307] MCM, R.C.M. 1001(b)(4) (2016).
[308] *United States v. Mullens*, 29 M.J. 398, 400 (C.M.A. 1990).
[309] *United States v. Hardison,* 64 M.J. 279, 282 (C.A.A.F. 2007).
[310] MCM, MIL. R. EVID. 403 (2016).
[311] MCM, R.C.M. 811(e) (20016).
[312] R. at 262; Pros. Ex. 1.

offered evidence of other mechanisms of death that would constitute a completely different criminal act. This was not appropriate evidence in aggravation because it was not "directly" related to the misconduct that SOC DeDolph actually pleaded guilty to under the requirements of R.C.M. 1001(b)(4) and *United States v. Hardison*. The Military Judge even demonstrated that he was concerned about the appropriateness of the Government presenting this evidence when he said "we'll see what the Appellate Court does."[313]

Allowing the Government to present evidence of other mechanisms of death also had the effect of violating R.C.M. 811(e). The Government and SOC DeDolph stipulated to a very specific mechanism of death—strangulation.[314] SOC DeDolph described this in detail during his providence inquiry, and his plea was accepted by the Military Judge.[315] Even though the lead trial counsel stated that he did not intend to contradict the Stipulation of Fact, he described doing just that when he explained, "[t]he Government believes that a 10-second blood chokehold is not a plausible explanation for [SSG [redacted] death."[316]The other potential mechanisms of death described by Dr. [redacted] went far beyond both the stipulation of fact and

[313] R. at 900 (emphasis added).
[314] Pros. Ex. 1.
[315] R. at 262.
[316] R. at 866.

SOC DeDolph's providence inquiry. It was error for the military judge to allow the Government to do this.

It was also error for the Military Judge to allow the Government to argue that SOC DeDolph's actual motive for performing the emergency cricothyrotomy was to obstruct justice by essentially destroying evidence of his misconduct.[317] This argument is contrary to the actual evidence presented during the court-martial that SOC DeDolph performed this procedure in a desperate attempt to save SSG [redacted] life.[318] The Government even rejected this theory previously through the Article 32 and referral process.[319] Yet, the trial counsel ambushed SOC DeDolph by arguing this point anyways. Advance knowledge that the Government intended to do this could have affected the manner in which SOC DeDolph approached his guilty plea and sentencing hearing.

In overruling the defense objection and allowing the Government to present this argument, the Military Judge explained "[t]his criciotomy[sic] clearly is relating to and resulting from the actions of the co-conspirators that night." This is flawed reasoning. There was no dispute that SOC DeDolph performed this emergency procedure. The defense even acknowledged and agreed that the incision was irregular and less than ideal. But the Government did not argue that SOC

[317] R. at 1317.
[318] R. at 1259.
[319] R. at 1283; 1289.

DeDolph performed the procedure poorly. Rather, they argued that SOC DeDolph had a corrupt motive, but without any evidentiary basis. This argument had no probative value and was highly prejudicial. The Military Judge erred by allowing the Government to make this inflammatory argument.

An appellant is prejudiced by error in the admission of sentencing evidence when "the error substantially influenced the adjudged sentence."[320] Whether an error has a substantial influence on a sentence depends on four factors: "(1) the strength of the Government's case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question."[321] It is more likely that an error is prejudicial when the facts were not already obvious from the other evidence presented at trial and "would have provided new ammunition against an appellant."[322]

Here, the Government focused a substantial portion of its case on Dr. [redacted] opinions regarding other possible mechanisms of death. Similarly, the allegation that SOC DeDolph performed the cricothyrotomy for a corrupt purpose was a key piece of the Government's sentencing argument. As in *Barker*, the quality of this evidence was high, and offered "new ammunition" against SOC DeDolph. This increased the prejudicial effect at sentencing.

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[320] *United States v. Sanders*, 67 M.J. 344, 346 (C.A.A.F. 2009).
[321] *United States v. Barker*, 77 M.J. 377, 384 (C.A.A.F. 2018).
[322] *Id.*

Other portions of the Government's case were strong and impactful, especially the evidence related to the impact of SSG [redacted] death on his family and command. But SOC DeDolph's presentencing case was also strong, as described in great detail elsewhere in this brief. Yet the sentence awarded by the members did not reflect the strength of SOC DeDolph's presentencing case—indeed, the truncated deliberations show they did not even consider all of it, contrary to the military judge's specific instructions. In short, the erroneous admission of this evidence and inflammatory argument substantially influenced the sentence.

Conclusion

SOC DeDolph respectfully requests this Court set aside the sentence and remand for new sentencing proceedings. Alternatively, SOC DeDolph requests that this court reassess the sentence and affirm a more appropriate sentence.

III

Appellant's sentence is inappropriately severe because (1) Appellant's sentence is highly disparate to sentences awarded in three closely related cases; and (2) Appellant presented evidence of a military career involving no prior offenses, but detailed acts of heroism and service connected injuries.

Standard of Review

This Court reviews the appropriateness of a sentence *de novo*.[323]

Discussion

This Court "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved."[324] The appropriateness of a sentence must be judged by an "individualized consideration" of "the nature and seriousness of the offense and the character of the offender."[325] The sentence should not be more severe than that "warranted by the offense, the circumstances surrounding the offense, [the offender's] acceptance or lack of responsibility for [the] offense, and his [or her] prior record."[326]

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[323] *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006).
[324] 10 U.S.C. § 866 (2016).
[325] *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).
[326] *United States v. Aurich*, 31 M.J. 95, 97 (C.M.A. 1990).

This Court recognizes its responsibility to maintain general sentence uniformity among cases under its cognizance.[327] The authority of this Court to review a court-martial sentence for appropriateness includes considerations of uniformity and even-handedness.[328] In raising an argument related to sentence uniformity, Appellant bears the burden of demonstrating that any cited cases are "closely related" to his case and the sentences are "highly disparate."[329]

To be "closely related," the cited cases must be "similar in both nature and seriousness *or* arise from a common scheme or design."[330] There is no limitation on this Court's discretion to consider and compare other court-martial sentences when reviewing a case for sentence appropriateness and relative uniformity.[331] In fact, in those "rare instance[s]" when sentence appropriateness can be fairly determined by comparing closely-related or companion cases, military Courts of Criminal Appeals are to "engage in sentence comparison with specific cases."[332]

A. The sentence is inappropriately severe and highly disparate compared to closely related cases.

Appellant's awarded sentence of 10 years confinement, reduction to E-1, and a dishonorable discharge is both inappropriately severe and highly disparate

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[327] *United States v. Lacy*, 50 M.J. 266, 267 (C.A.A.F. 1999).
[328] *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001).
[329] *United States v. Lacy*, 50 M.J. 287-88 (C.A.A.F. 1999).
[330] *United States v. Kelly*, 40 M.J. 558, 570 (N.M.C.M.R. 1994) (emphasis added).
[331] *United States v. Wacha*, 55 M.J. 266, 267-68 (C.A.A.F. 2001).
[332] *Lacy*, 50 M.J. at 267 (emphasis in original).

when compared to the approved sentences stemming from the three companion cases involving Pvt [redacted] SOC [redacted] and GySgt [redacted]

Notably, SOC DeDolph is now the only one of the four co-accused to receive a punitive discharge. He is also the only one to have an approved sentence including more than three years' confinement, despite accepting responsibility for his actions and pleading guilty.

Pvt [redacted] pleaded guilty to conspiracy to commit assault; conspiracy to obstruct justice; burglary; hazing; false official statements; obstruction of justice; and negligent homicide.[333] After the Convening Authority granted clemency, his sentence was reduction to E-1, and three years' confinement.[334]

SOC [redacted] who was SOC DeDolph's squadron lead petty officer,[335] pleaded guilty to conspiracy to commit assault; conspiracy to obstruct justice; unlawful entry; assault consummated by battery; hazing; and obstruction of justice. His approved sentence was twelve month's confinement, and reduction to E-5.

GySgt [redacted] anger at SSG [redacted] was the genesis of the entire hazing plan.[336] But for GySgt [redacted] instigating the attack, SSG [redacted] tragic death would have never happened. GySgt [redacted] pleaded not-guilty at

[333] *United States v.* [*Marshall*], Convening Authority's Action.
[334] *Id*.
[335] R. at 1245.
[336] R. at 1247.

contested General Court-Martial.[337] He was convicted by members of conspiracy to commit assault; conspiracy to commit obstruction of justice; housebreaking; involuntary manslaughter; and hazing.[338] He was sentenced to six months' confinement, reduction to E-1, ninety days of hard labor, and a letter of reprimand.

SOC DeDolph is clearly culpabe for SSG [redacted] death, because he applied the chokehold. However, the record indicates that the hazing plot was a fast-developing situation.[339] It was only at the last minute, when the four service members "stacked" at SSG [redacted] bedroom door that SOC DeDolph received his specific assignment.[340] So it is only by unfortunate chance that SOC DeDolph was put in the position to apply the chokehold to SSG [redacted] It is clear that SSG [redacted] death was a tragic accident. But SOC DeDolph is not so much more culpable than his co-accused that he warrants such as highly-disparate sentence.

B. The sentence is inappropriately severe for this specific Appellant.

During his unsworn statement, SOC DeDolph unequivocally accepted responsibility for his actions, and even apologized directly to SSG [redacted] family.[341] He was an otherwise exemplary [redacted] who was heroic under fire on multiple

[337] *United States v.* [*Mike-Romeo*], Entry of Judgment.
[338] *Id.*
[339] R. at 234-35.
[340] R. at 235-36.
[341] R. at 1273.

occasions, who suffers from significant physical and mental pain as a direct result of service to our county, and is a beloved member of his family and community.

During his time with both [redacted] and [redacted] SOC DeDolph was valorous under fire on multiple occasions. Some of these events remain classified and cannot be discussed in this brief.

"Witness Number 3" described the actions that resulted in SOC DeDolph being awarded the Bronze Star with Valor.[342] On that particular day, the [redacted] position came under attack, and the [redacted] became pinned down.[343] SOC DeDolph then grabbed a [redacted] recoilless rifle, exposed himself to enemy fire, and fired a handful of rockets at the enemy.[344] This effectively suppressed the enemy fire, allowing the rest of the team to maneuver to a more advantageous fighting position.[345]

SOC [redacted] described an occasion when he and SOC DeDolph, along with their partner forces, were ambushed along an exposed road in channelizing terrain.[346] During the following multi-hour engagement, SOC DeDolph exposed himself to fire several times to treat casualties and pull them to safety.[347]

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[342] R. at 1077.
[343] R. at 1077.
[344] R. at 1078.
[345] R. at 1078.
[346] R. at 1115-16.
[347] R. at 1116.

On another occasion, SOC DeDolph's received a Purple Heart after suffering a gunshot wound "in support of overseas contingency operations."[348] Even after suffering his gunshot wound, continued to attack the enemy, and did not seek medical attention for his wound until the enemy was eliminated.[349]

SOC DeDolph's former platoon commander, Mr. [redacted] described an incident in which an [redacted] lost both legs at the hip after stepping on an IED.[350] He described how SOC DeDolph "ran into the fight" to save the [redacted] life by providing life-saving aid.[351]

SOC DeDolph also introduced medical records which show extensive service-related injuries and complications.[352] This includes a diagnosis for [redacted] and related complications such as [redacted] and [redacted][353] SOC DeDolph also has a history of [redacted] SOC DeDolph also suffers from [redacted]

[348] Def. Ex. A at 11.
[349] *Id*.
[350] R. at 1060.
[351] R. at 1062.
[352] Def. Ex. E.
[353] Def. Ex. E.
[354] Def. Ex. E.
[355] Def. Ex. E.

After SSG [redacted] lost consciousness, SOC DeDolph took immediate steps to attempt to save his life.[356] He and SOC [redacted] took turns conducting CPR.[357] When this was ineffective, SOC DeDolph performed an emergency cricothyrotomy to provide an airway for SSG [redacted].[358] SOC DeDolph continued to attempt to provide life-saving aid to SSG [redacted] in the back of the Land Rover, and upon arriving at the local clinic.[359] Even after the Embassy doctor pronounced SSG [redacted] dead, SOC DeDolph did not want to stop providing aid.[360]

During the Government's sentencing argument they focused on the fact that SOC DeDolph was instrumental in the "cover up" that was the basis of the conspiracy and obstruction of justice charges.[361] However, SOC DeDolph explained his motivations for providing misleading information to investigators. SOC DeDolph wanted to protect the two Marines, GySgt [redacted] and Pvt [redacted] and take full responsibility for SSG [redacted] death.[362] Moreover, SOC DeDolph wanted to protect SSG [redacted] legacy by not having SSG [redacted] tragic death remembered as a hazing incident.[363]

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[356] R. at 1256.
[357] R. at 1257.
[358] R. at 1258-59.
[359] R. at 1260.
[360] R. at 1261.
[361] R. at 1324.
[362] R. at 1260.
[363] R. at 1263.

The Government even acknowledged SOC DeDolph's robust and effective case in extenuation and mitigation.[364] During the Government's sentencing argument the Trial Counsel stated, "[t]he Government agrees that rehabilitation here is not the concern or the specific deterrence to make sure Chief DeDolph doesn't do this again, that's not relevant to this case."[365]

Finally, SOC DeDolph was the subject of salacious news articles pretrial that falsely accused him of embezzling money and intentionally killing SSG [redacted].[366]

Given all of this, the sentence imposed on SOC DeDolph is inappropriately severe. SOC DeDolph is not a danger to society, does not require deterrence from future misconduct, and has demonstrated clear rehabilitative potential.

Conclusion

SOC DeDolph's sentence is inappropriately severe considering the large disparity between SOC DeDolph's sentence and that of his three co-accused, as well as SOC DeDolph's individual characteristics and valorous service. This Court can correct the lack of uniformity and the inappropriate severity of the sentence by reassessing a more appropriate sentence.

[364] R. at 1331.
[365] R. at 1331.
[366] App. Ex. XIV.

IV

Prosecutorial misconduct occurred throughout SOC DeDolph's court-martial such that this court cannot be confident that the members adjudged a sentence based on the evidence alone. Even if no instance of misconduct individually warrants relief, the cumulative effect of the misconduct deprived SOC DeDolph of a fair trial.

Standard of Review

This Court reviews claims of prosecutorial misconduct and improper argument *de novo.*[367] When properly objected to at trial, this Court tests findings of prosecutorial misconduct and improper argument for prejudicial error.[368]

Discussion

Prosecutorial misconduct occurs when a prosecutor "oversteps the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense."[369] The conduct of the trial counsel, "must be viewed within the context of the entire court-martial . . . not [just] on words in isolation."[370] As it relates to sentencing, prosecutors are to "steer clear of any improper arguments that may produce a wrongful sentence."[371]

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[367] *United States v. Andrews*, 77 M.J. 393, 398 (C.A.A.F. 2018).
[368] *Id.*
[369] *United States v. Fletcher*, 62 M.J. 175, 178 (C.A.A.F. 2005).
[370] *United States v. Baer*, 53 M.J. 235, 238 (C.A.A.F. 2000).
[371] *Baer*, 53 M.J. at 237.

In assessing prejudice, this Court is directed to look at the "cumulative impact of any prosecutorial misconduct on the accused's substantial rights and the fairness and integrity of his trial."[372] *United States v. Fletcher* outlines a three-factor test to determine whether Trial Counsel's improper arguments were prejudicial: "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction."[373] *Id.* These same *Fletcher* factors apply to inquiries into improper sentencing arguments as well.[374]

Under the first *Fletcher* factor (severity of the misconduct), there are several indicators Courts can consider: (1) the raw number of instances of misconduct; (2) whether the misconduct was confined to the trial counsel's rebuttal or spread throughout the argument or the case as a whole; (3) the length of the trial; (4) the length of the panel's deliberations, and (5) whether the trial counsel abided by any rulings from the military judge.[375]

Here, the Government presented improper argument in three key ways. First, they argued about other possible mechanisms of death that violated the agreed-upon stipulation of fact and tended to impeach the Military Judge's acceptance of

[372] *Fletcher*, 62 M.J. at 184.
[373] *Fletcher*, 62 M.J. at 184.
[374] *United States v Halpin*, 71 M.J. 477, 480 (C.A.A.F. 2013).
[375] *Fletcher*, 62 M.J. at 184.

SOC DeDolph's plea.[376] Second, the Government argued that SOC DeDolph performed the emergency cricothyrotomy of SSG [redacted] in order to obstruct justice.[377] This theory was wholly unsupported by the evidence, and is purely inflammatory and speculative. This theory had even been previously rejected by the Government through the Article 32 and referral processes. SOC DeDolph was ambushed when it was presented during the sentencing argument. Finally, the Government displayed a misleading slide to the members after being specifically instructed by the Military Judge to no do so.[378]

In weighing the first *Fletcher* factor (severity), the Government's improper points of argument permeated throughout the approximately 30 pages of transcribed argument.[379] The prosecutorial misconduct was not confined to the sentencing argument, as testimony from Dr. [redacted] during the government's presentencing case was also error because it contradicted the agreed upon-stipulation of fact. The fact that the members deliberated for less than two hours, despite having hundreds of pages of documents to review indicates the outsized prejudicial effect of the prosecutorial misconduct.[380] The Government even defied an order form the military judge when it failed to correct the misleading slide.

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[376] R. at 1314.
[377] R. at 1317.
[378] R. at 1308.
[379] R. at 1302-32.
[380] R. at 1388-89.

Regarding the second factor (curative measures), this Court has also previously noted that "repeated and essentially generic" curative instructions in response to repeated defense objection may be inadequate.[381]

Here, the curative measures adopted were inadequate or non-existent. In fact, the military judge allowed the Government to contradict the stipulation of fact, and allowed the Government to argue that the cricothyrotomy was performed for corrupt purposes. After the Government failed to edit the misleading slide as instructed, the military judge only provided a cursory instruction of "[m]embers, I'll remind you again that arguments of counsel are not evidence."[382]

Regarding the third *Fletcher* factor (strength of the Government's case), this factor weighs in favor of the Government because this was guilty plea. But, this is not dispositive given the severity of the prosecutorial misconduct and the lack of curative measures. One key exception is the Government's argument about SOC DeDolph's allegedly corrupt motive for performing the cricothyrotomy. This point of argument was directly contrary to the actual evidence presented during the court-martial.

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[381] *United States v. Boyer*, No. 201100523, 2012 CCA LEXIS 908 (N-M. Ct. Crim. App. Dec. 27, 2012).
[382] R. at 1310.

Conclusion

This Court cannot be convinced that SOC DeDolph was sentenced solely on the admissible evidence in this case. As such, this Court should set aside the sentence and authorize a rehearing.

V.

The Military Judge erred by denying SOC DeDolph's post-trial mistrial motion.

Standard of Review

This Court reviews a military judge's denial of a mistrial motion for an abuse of discretion.[383]

Discussion

A military judge abuses his discretion "when [the military judge's] findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law."[384]

Here, the defense raised a post-trial mistrial motion based on the pervasive errors throughout SOC DeDolph's court-martial.[385]

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[383] *United States v. Ashby*, 68 M.J. 108, 122 (C.A.A.F. 2009).
[384] *United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F. 2008).
[385] App. Ex. XXXVII.

In denying the defense mistrial motion, the Military Judge relied on his evidentiary rulings during trial.[386] The Military Judge essentially viewed the defense motion as a motion for reconsideration on these issues, and declined to change any of his previous rulings.[387]

As described above, the Military Judge erred during trial by allowing the Government to contradict the Stipulation of Fact, allowing Dr. [redacted] to discuss other mechanisms of death, and allowing the Government to make inflammatory argument about the cricothyrotomy that was unsupported by the evidence. The Military Judge's ruling that this was permissible pursuant to R.C.M. 1001(b)(4) and not prohibited by M.R.E. 403 was in error. The Military Judge's denial of the mistrial motion was influenced by his then-existing erroneous view of the law, and was unreasonable given the particular facts of SOC DeDolph's case.

Regarding the mistrial motion's asserted *Brady* violation, the Military Judge did not apply or even discuss the standard for discovery violations. Rather, he only discussed the fact that the defense had the opportunity to cross-examine Dr. [redacted].[388] The Military Judge even wrote that "the Defense did not conduct a cross-examination of [Dr. [redacted]]," even though trial defense did, in fact, conduct a brief

[386] App. Ex. XXXVII(c).
[387] App. Ex. XXXVII(c).
[388] App. Ex. XXXVII(c).

cross-examination.[389] Because this particular portion of the Military Judge's ruling relied on an erroneous finding of fact, it was also in error.

Conclusion

SOC DeDolph respectfully requests this Court set aside the sentence and remand for new sentencing proceedings. Alternatively, SOC DeDolph requests that this court reassess a more appropriate sentence.

VI.

Error was pervasive throughout SOC DeDolph's court-martial. Even if no particular error warrants relief, the cumulative effect of all the error deprived SOC DeDolph of a fair trial.

Courts recognize the doctrine of cumulative error, "under which a number of errors, no one perhaps sufficient to merit reversal, in combination necessitate the disapproval of a finding (or sentence)."[390] It is well-established that appellate courts can order a rehearing based on the accumulation of errors not reversible individually.[391]

Here, error was pervasive throughout all stages of SOC DeDolph's court-martial such that he was deprived of a fair trial. The Government erred when it failed to inform SOC DeDolph that Pvt [redacted] a crucial Government witness,

[389] App. Ex. XXXVII(c); *contra.* R. at 914-15.
[390] *United States v. Banks*, 36 M.J. 150, 170-71 (C.A.A.F. 1992).
[391] *United States v. Flores*, 69 M.J. 366, 373 (C.A.A.F. 2011).

was already engaged in clemency negotiations. During trial, the Military Judge erred by allowing Dr. [redacted] to present testimony regarding other mechanisms of death. The government committed other misconduct throughout the presentencing hearing, including attacking Dr. [redacted] under the guise of "voire dire," directly contradicting the agreed-upon stipulation of fact, presenting inflammatory argument that SOC DeDolph performed the emergency cricothyrotomy for a corrupt purpose, failing to ensure Pvt [redacted] was in the proper uniform, and failing to correct its slide deck in direct violation of the Military Judge's order, among other misconduct. The Military Judge erred post-trial when he denied SOC DeDolph's motion for a mistrial.

Even if this Court is not satisfied that any error individually warrants remedy, the cumulative effect of all this error deprived SOC DeDolph of a fair trial. SOC DeDolph respectfully requests that this Court set aside the sentence and remand for new sentencing proceedings.

Respectfully submitted,

[redacted]
Jasper W. Casey
Captain, U.S. Marine Corps
Appellate Defense Counsel
Navy-Marine Corps
Appellate Review Activity
[redacted]
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copy of the foregoing was delivered to the Court on 28 December 2021 that a copy was uploaded into the Court's case management system on 28 December 2021, and that a copy of the foregoing was delivered to Director, Appellate Government Division on 28 December 2021.

[redacted]
Jasper W. Casey
Captain, U.S. Marine Corps
Appellate Defense Counsel
Navy-Marine Corps
Appellate Review Activity
[redacted]
[redacted]

[redacted]

Subject: RECEIPT - FILING - Panel 3 - U.S. v. DeDolph - NMCCA No. 202100150 - Appellant's Brief and AOE (Capt Casey)

Signed By: [redacted]

RECEIVED
Dec 28 2021
United States Navy-Marine Corps
Court of Criminal Appeals

[redacted]

Subject: FILING - Panel 3 - U.S. v. DeDolph - NMCCA No. 202100150 - Appellant's Brief and AOE (Capt Casey)

Good morning,

Attached is Appellant's Brief and Assignment of Error in the Panel 3 case, U.S. v DeDolph, 202100150

A Table of Pseudonyms will be filed separately under seal.

Very respectfully,

Jasper Casey
Captain, U.S. Marine Corps

Appellate Defense Counsel (Code 45)
1254 Charles Morris Street SE, Bldg. 58
Washington Navy Yard, DC 20374
[redacted]

[redacted]



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

Before Panel No. 3

UNITED STATES, Appellee v. Tony E. DeDolph, Chief Special Warfare Officer (E-7) U.S. Navy Appellant	)	APPELLEE'S CONSENT MOTION FOR FIRST ENLARGEMENT OF TIME Case No. 202100150 Tried at Naval Station Norfolk, Virginia, on January 10 and 30, July 7, and August 31, 2020, and January 14–15 and 19–23, 2021, by a general court-martial convened by Commander, Navy Region Mid-Atlantic, Captain [redacted] JAGC, U.S. Navy (arraignment), Commander H. C. Larsen, JAGC, U.S. Navy (motions and trial), presiding.

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

Pursuant to Rule 23.2 of this Court's Rules of Appellate Procedure, the United States respectfully moves for a thirty-day enlargement of time from January 27, 2022, to February 26, 2022, to answer Appellant's Brief and Assignments of Error.

The Record of Trial consists of approximately 1393 transcribed pages, and Appellant consents to the enlargement. A showing of good cause is therefore not required. *See* N-M. Ct. Crim. App. R. 23.2(c)(2).

Conclusion

The United States respectfully requests that the Court grant this Motion and extend the time to file its Answer to February 26, 2022.

Catherine M. Crochetiere Digitally signed by Catherine M. Crochetiere

CATHERINE M. CROCHETIERE
Lieutenant, JAGC, U.S. Navy
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
[redacted]

Certificate of Filing and Service

I certify this document was emailed to the Court's filing address, uploaded to the Court's case management system, and emailed to Appellate Defense Counsel, Captain Jasper CASEY, U.S. Marine Corps, on January 21, 2022.

Catherine M. Crochetiere Digitally signed by Catherine M. Crochetiere

CATHERINE M. CROCHETIERE
Lieutenant, JAGC, U.S. Navy
Appellate Government Counsel

RECEIPT - FILING – Panel 2 – U.S. v. DeDolph – NMCCA 202100150 – G Consent Mot 1st Enl (Crochetiere)

[redacted]

RECEIVED
Jan 21 2022
United States Navy-Marine Corps
Court of Criminal Appeals

[redacted]

Subject: FILING – Panel 2 – U.S. v. DeDolph – NMCCA 202100150 – G Consent Mot 1st Enl (Crochetiere)

To this Honorable Court:

Please find attached Appellee's Consent Motion for First Enlargement of Time, for electronic filing in United States v. DeDolph, NMCCA No. 202100150.

Thank you.

Very respectfully,

Catherine Crochetiere ("Cro-shet-tair")
LT, JAGC, USN
Navy and Marine Corps Appellate Review Activity
Appellate Government Counsel (Code 46)

[redacted]

[redacted]

[redacted]

[redacted]

RULING - FILING – Panel 2 – U.S. v. DeDolph – NMCCA 202100150 – G Consent Mot 1st Enl (Crochetiere)

[redacted]

MOTION GRANTED
21 JAN 2022
United States Navy-Marine Corps
Court of Criminal Appeals

[redacted]

Subject: FILING – Panel 2 – U.S. v. DeDolph – NMCCA 202100150 – G Consent Mot 1st Enl (Crochetiere)

To this Honorable Court:

Please find attached Appellee's Consent Motion for First Enlargement of Time, for electronic filing in United States v. DeDolph, NMCCA No. 202100150.

Thank you.

Very respectfully,

Catherine Crochetiere ("Cro-shet-tair")
LT, JAGC, USN
Navy and Marine Corps Appellate Review Activity
Appellate Government Counsel (Code 46)

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

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

Before Panel No. 3

UNITED STATES, Appellee v. Tony E. DeDolph, Chief Special Warfare Officer (E-7) U.S. Navy Appellant	)	APPELLEE'S MOTION FOR SECOND ENLARGEMENT OF TIME Case No. 202100150 Tried at Naval Station Norfolk, Virginia, on January 10 and 30, July 7, and August 31, 2020; and January 14–15 and 19–23, 2021, by a general court-martial convened by Commander, Navy Region Mid-Atlantic, Captain [redacted] JAGC, U.S. Navy (arraignment), Commander Hayes C. Larsen, JAGC, U.S. Navy (motions and trial), presiding.

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

Pursuant to Rule 23.2 of this Court's Rules of Appellate Procedure, the United States respectfully moves for a thirty-day enlargement of time from February 26, 2022, to March 28, 2022, to answer Appellant's Brief and Assignments of Error.

A. Information required by Rule 23.2(c)(3).

Pursuant to Rule 23.2(c)(3), the United States provides the following:

(A) This case was docketed with the Court on June 4, 2021;

(B) The *Moreno III* date is December 4, 2022;

(C) Appellant is confined with a normal release date of May 20, 2029;

(D) The Record of Trial consists of 1393 transcribed pages and approximately 3300 total pages;

(E) Counsel has reviewed approximately three-fourths of the Record; and

(F) This case is complex. Appellant pled guilty to conspiracy, manslaughter, violation of a lawful order, and obstruction of justice. He now alleges six Assignments of Error, including deprivation of the right to meaningful cross-examination, admission of improper aggravation evidence, sentence appropriateness, prosecutorial misconduct, mistrial, and cumulative error.

B. Good cause exists given the need for review and drafting.

Good cause exists for a Second Enlargement. The Record is large, and most Assignments of Error require in-depth, fact-specific analysis. Counsel needs additional time to review the Record, draft the Answer, and ensure the Answer accurately represents the United States' settled position on Appellant's Assignments of Error.

Conclusion

The United States respectfully requests that the Court grant this Motion and extend the time to file its Answer to March 28, 2022.

Catherine M. Crochetiere Digitally signed by Catherine M. Crochetiere

CATHERINE M. CROCHETIERE
Lieutenant, JAGC, U.S. Navy
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
[redacted]

Certificate of Filing and Service

I certify this document was emailed to the Court's filing address, uploaded to the Court's case management system, and emailed to Appellate Defense Counsel, Captain Jasper CASEY, U.S. Marine Corps, on February 22, 2022.

Catherine M. Crochetiere Digitally signed by Catherine M. Crochetiere

CATHERINE M. CROCHETIERE
Lieutenant, JAGC, U.S. Navy
Appellate Government Counsel

[redacted] [redacted]

RECEIPT - FILING – Panel 3 – U.S. v. DeDolph – NMCCA 202100150 – Gov Mot 2nd Enl (Crochetiere)

[redacted]

RECEIVED
Feb 22 2022
United States Navy-Marine Corps
Court of Criminal Appeals

[redacted]

Subject: FILING – Panel 3 – U.S. v. DeDolph – NMCCA 202100150 – Gov Mot 2nd Enl (Crochetiere)

To this Honorable Court:

Please find attached Appellee's Motion for Second Enlargement of Time, for electronic filing in United States v. DeDolph, NMCCA No. 202100150.

Thank you.

Very respectfully,

Catherine Crochetiere ("Cro-shet-tair")
LT, JAGC, USN
Navy and Marine Corps Appellate Review Activity
Appellate Government Counsel (Code 46)

[redacted]

[redacted]

[redacted] [redacted]

RULING - FILING – Panel 3 – U.S. v. DeDolph – NMCCA 202100150 – Gov Mot 2nd Enl (Crochetiere)

[redacted]

MOTION GRANTED
22 FEB 2022
United States Navy-Marine Corps
Court of Criminal Appeals

[redacted]

Subject: FILING – Panel 3 – U.S. v. DeDolph – NMCCA 202100150 – Gov Mot 2nd Enl (Crochetiere)

To this Honorable Court:

Please find attached Appellee's Motion for Second Enlargement of Time, for electronic filing in United States v. DeDolph, NMCCA No. 202100150.

Thank you.

Very respectfully,

Catherine Crochetiere ("Cro-shet-tair")
LT, JAGC, USN
Navy and Marine Corps Appellate Review Activity
Appellate Government Counsel (Code 46)
1254 Charles Morris St. SE, Bldg 58, Ste B01
Washington Navy Yard, D.C. 20374-5124

[redacted]

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

Before Panel No. 3

UNITED STATES, Appellee v. Tony E. DEDOLPH, Chief Special Warfare Operator (E-7) U.S. Navy Appellant	)	APPELLEE'S MOTION FOR THIRD ENLARGEMENT OF TIME Case No. 202100150 Tried at Naval Station Norfolk, Virginia, on January 10 and 30, July 7, and August 31, 2020; and January 14–15 and 19–23, 2021, by a general court-martial convened by Commander, Navy Region Mid-Atlantic, Captain [redacted] JAGC, U.S. Navy (arraignment), Commander H. C. Larsen, JAGC, U.S. Navy (motions and trial), presiding.

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

Pursuant to Rule 23.2 of this Court's Rules of Appellate Procedure, the United States respectfully moves for a thirty-day enlargement of time from March 28, 2022, to April 27, 2022, to answer Appellant's Brief and Assignments of Error.

A. Information required by Rule 23.2(c)(3).

Pursuant to Rule 23.2(c)(3), the United States provides the following:

(A) This case was docketed with the Court on June 4, 2021;

(B) The *Moreno III* date is December 4, 2022;

(C) Appellant is confined with a normal release date of May 20, 2029;

(D) The Record of Trial consists of 1393 transcribed pages and approximately 3300 total pages;

(E) Counsel has reviewed approximately ninety percent of the Record; and

(F) This case is complex. Appellant pled guilty to conspiracy, manslaughter, violation of a lawful order, and obstruction of justice. He now alleges six Assignments of Error, including deprivation of the right to meaningful cross-examination, admission of improper aggravation evidence, sentence appropriateness, prosecutorial misconduct, mistrial, and cumulative error.

B. Good cause exists given the need for review and drafting.

Good cause exists for a Third Enlargement. The Record is large, and most Assignments of Error require in-depth, fact-specific analysis. Counsel has begun drafting the Answer, but needs additional time to review the Record, complete the Answer, and ensure the Answer accurately represents the United States' settled position on Appellant's Assignments of Error.

Conclusion

The United States respectfully requests that the Court grant this Motion and extend the time to file its Answer to April 27, 2022.

Catherine M. Crochetiere Digitally signed by Catherine M. Crochetiere

CATHERINE M. CROCHETIERE
Lieutenant, JAGC, U.S. Navy
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
[redacted]

Certificate of Filing and Service

I certify this document was emailed to the Court's filing address, uploaded to the Court's case management system, and emailed to Appellate Defense Counsel, Captain Jasper CASEY, U.S. Marine Corps, on March 22, 2022.

Catherine M. Crochetiere Digitally signed by Catherine M. Crochetiere

CATHERINE M. CROCHETIERE
Lieutenant, JAGC, U.S. Navy
Appellate Government Counsel

[redacted]

Subject: RECEIPT - FILING – Panel 3 – U.S. v. DeDolph – NMCCA 202100150 – G Mot 3rd Enl (Crochetiere)
Date: Tuesday, March 22, 2022 9:58:49 AM

RECEIVED
Mar 21 2022
United States Navy-Marine Corps
Court of Criminal Appeals

[redacted]

Subject: FILING – Panel 3 – U.S. v. DeDolph – NMCCA 202100150 – G Mot 3rd Enl (Crochetiere)

To this Honorable Court:

Please find attached Appellee's Motion for Third Enlargement of Time, for electronic filing in United States v. DeDolph, NMCCA No. 202100150.

Thank you.

Very respectfully,

Catherine Crochetiere ("Cro-shet-tair")
LT, JAGC, USN
Navy and Marine Corps Appellate Review Activity
Appellate Government Counsel (Code 46)

[redacted]

[redacted]

[redacted]

Subject: RULING - FILING – Panel 3 – U.S. v. DeDolph – NMCCA 202100150 – G Mot 3rd Enl (Crochetiere)
Date: Wednesday, March 23, 2022 12:53:25 PM

MOTION GRANTED
23 MAR 2022
United States Navy-Marine Corps
Court of Criminal Appeals

[redacted]

Subject: FILING – Panel 3 – U.S. v. DeDolph – NMCCA 202100150 – G Mot 3rd Enl (Crochetiere)

To this Honorable Court:

Please find attached Appellee's Motion for Third Enlargement of Time, for electronic filing in United States v. DeDolph, NMCCA No. 202100150.

Thank you.

Very respectfully,

Catherine Crochetiere ("Cro-shet-tair")
LT, JAGC, USN
Navy and Marine Corps Appellate Review Activity
Appellate Government Counsel (Code 46)

[redacted]

[redacted]

This opinion is subject to administrative correction before final disposition.

United States Navy–Marine Corps Court of Criminal Appeals

Before
HOUTZ, MYERS, and KISOR
Appellate Military Judges

UNITED STATES
Appellee

v.

Tony E. DEDOLPH
Special Warfare Operator Chief (E-7), U.S. Navy
Appellant

No. 202100150

Decided: 15 November 2022

Appeal from the United States Navy-Marine Corps Trial Judiciary

Military Judges:
M. J. Luken (arraignment, motions)
H. C. Larsen (motions, trial)

Sentence adjudged 23 January 2021 by a general court-martial convened at Naval Station Norfolk, Virginia, consisting of officer and enlisted members. Sentence in the Entry of Judgment: reduction to E-1, confinement for 10 years, and a dishonorable discharge.

For Appellant:
Captain Jasper W. Casey, USMC

For Appellee:
Lieutenant Catherine M. Crochetiere, JAGC, USN
Lieutenant John L. Flynn IV, JAGC, USN

Senior Judge HOUTZ delivered the opinion of the Court, in which Judge MYERS and Judge KISOR joined.

This opinion does not serve as binding precedent, but may be cited as persuasive authority under NMCCA Rule of Appellate Procedure 30.2.

HOUTZ, Senior Judge:

Appellant was convicted, pursuant to his pleas, of conspiracy to commit assault and obstruct justice, violation of a lawful general order, involuntary manslaughter, and obstruction of justice, in violation of Article 81, 92, 119, and 134, Uniform Code of Military Justice [UCMJ].[1] All of the offenses relate to the death of Army Staff Sergeant [SSG] Mike, who died while on deployment in Bamako, Mali in June, 2017.

Appellant asserts 6 assignments of error [AOEs]: (1) Appellant was deprived of a meaningful opportunity to cross-examine a key Government witness when the Government did not disclose that the witness was requesting additional clemency from the convening authority; (2) the military judge abused his discretion by admitting improper evidence in aggravation; (3) Appellant's sentence was inappropriately severe and disproportionate; (4) trial counsel committed prosecutorial misconduct; (5) the military judge abused his discretion by denying Appellant's post-trial motion for a mistrial; and (6) cumulative error. We find error in the first AOE and remand for a new sentencing hearing.[2]

I. BACKGROUND

Appellant's convictions arise from an incident that occurred during a deployment to Bamako, Mali that led to the death of SSG Mike, the victim in this case. During the deployment, Appellant lived on a compound in Bamako that had several multi-person houses to include the "Marine House" and the "Navy-

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[1] 10 U.S.C. §§ 881, 892, 919, and 934 (2016).

[2] Although rendered moot by our resolution of AOE 1, we review AOEs 3, 4, and 5 for reasons of judicial economy.

Army" house where Appellant, SSG Mike, and several other servicemembers lived. The other service members relevant to this incident were Private [Pvt] Marshall, Gunnery Sergeant [GySgt] Mike-Romeo, and Special Operator Second Class [SO2] Murphy.[3] GySgt Mike-Romeo and Pvt Marshall were Marines and SO2 Murphy was a Sailor.

On the evening of 3 June 2017 the group made plans to go out on liberty.[4] SSG Mike, GySgt Mike-Romeo and Pvt Marshall departed the compound and sometime later Appellant and SO2 Murphy departed after receiving a text that GySgt Mike-Romeo and Pvt Marshall were at a local bar. After Appellant and SO2 Murphy arrived at the bar, they learned that SSG Mike had "ditched" GySgt Mike-Romeo and Pvt Marshall to attend an "embassy party."[5] The group, which now included Appellant, GySgt Mike-Romeo, SO2 Murphy, and Pvt Marshall, began to discuss a "hypothetical joke . . . to break in and haze [SSG Mike]" to embarrass him for the perceived slight.[6] The joke, "involved breaking into the room and then wrestling [SSG Mike] to unconsciousness, binding him,[7] and then inviting one of the local guards in to place [him] into a compromised position."[8] The group went to another bar and the joke began to materialize into an actual plan which included a "drum for theatrical effect," a person assigned to film, and a person assigned to execute a chokehold to render SSG Mike unconscious.[9]

The group returned to the compound at approximately 0500 and went to the Marine House where they "grabbed duct tape, handcuffs, sledgehammer, and some other like materials for binding SSG Mike."[10] The group next went to the Navy-Army House where they enlisted the help of two local nationals who worked as guards on the compound.[11] At that time, SSG Mike had already

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[3] (Convening Authority's Action (C.A.A.) at 2, Mar. 24, 2021.)

[4] R. at 234.

[5] R. at 682.

[6] R. at 683.

[7] Also referred to as a "tape job." R. at 234.

[8] R. at 684.

[9] R. at 687.

[10] R. at 690.

[11] R. at 696 ("We asked Big Man to derobe himself and then walk in with sort of a leash around his neck and eye guard over his face for theatrical effect and to march him inside and to place [SSG Mike] in a compromised position, sir.").

returned to the compound and was asleep in his room. The group then proceeded to execute their plan and entered a tactical formation, also called a "stack," by the door. At that point GySgt Mike-Romeo broke down the door with a sledgehammer and the group entered the room.[12] Once everyone was in the room, Pvt Marshall raised the mosquito netting that surrounded SSG Mike's bed and Appellant and SO2 Murphy "jumped on the bed, and they started wrestling with [SSG Mike]."[13] SSG Mike jumped up and said words to the effect of "[o]h it's you guys" or "let's go, [f***s]!" Appellant and SO2 Murphy both grabbed SSG Mike to subdue him. Appellant tried to control SSG Mike but he was resisting. Appellant then applied a jujitsu-style "rear naked chokehold" on SSG Mike which involved putting one arm around both sides of SSG Mike's neck and applying pressure.[14] SSG Mike was face down with his head turned to the side. The "rear naked chokehold" caused SSG Mike to lose consciousness in about ten seconds and, during that time, SO2 Murphy and Pvt Marshall bound SSG Mike's arms and legs with tape.[15]

After they bound his arms and legs, GySgt Mike-Romeo took photographs of SSG Mike. After SSG Mike did not regain consciousness, Appellant attempted to revive him by rolling SSG Mike onto his back, and tapping him on the shoulder blades while calling his name. SO2 Murphy and Pvt Marshall removed the tape from SSG Mike and, after these efforts did not result in him gaining consciousness, Appellant and SO2 Murphy took turns performing CPR. While this was going on, Appellant and SO2 Murphy directed GySgt Mike-Romeo and Pvt Marshall to wake up SSG Mike's team leader, Sergeant First Class [SFC] Mu, to begin notification and medical evacuation procedures. Appellant also retrieved an arterial defibrillator from one his medical bags and at that point determined he would need to perform an emergency cricothyrotomy to open up SSG Mike's airway.[16] Appellant cut the initial incision but had

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[12] R. at 700.

[13] R. at 701.

[14] R. at 236, 260-61 ("It's a--a choke from behind an individual where one arm is around both sides of the neck and another arm is around the back, and it is applied to--in combatives and the sport Jujitsu to subdue opponents.").

[15] R. at 235.

[16] R. at 826 ("So it's a means to--to establish an airway, and it's sort of a preferential choice because you know that a less invasive method would not be successful. So in civilian emergency medical care, usually somebody would use the nasal trumpet to keep the nasal passages open or--or a pharyngeal airway. It keeps the tongue out of

trouble inserting the breathing tube into SSG Mike's airway due to unexpected blockage. The group then decided to use a vehicle to transport SSG Mike to a local medical clinic. SSG Mike was loaded into the back of the car, and Appellant stayed with him to continue life-saving efforts. Appellant cut additional incisions into SSG Mike's airway and was finally able to successfully insert the breathing tube, but these efforts were complicated by the fact that they were riding in the back of a Land Rover that was driving at a rapid speed along the poorly maintained roads of Bamako, Mali.

After arriving at the medical clinic, SSG Mike was examined, but the person at the clinic, who identified himself as a doctor, made a visual assessment of SSG Mike and informed the group that he was unable to help. Appellant continued to breathe for SSG Mike through the inserted breathing tube and work "feverishly" to save him, but, eventually, a doctor from the American Embassy arrived at the clinic and pronounced SSG Mike dead.[17]

At that point Appellant "hesitatingly" ceased life-saving efforts.[18] After leaving the clinic Appellant and the other service members discussed a plan to tell investigators that only Appellant and SO2 Murphy would take the blame for the incident and they would tell investigators that neither of the Marines were present when SSG Mike died.[19] During the investigation, all four claimed that Appellant and SSG Mike were play fighting when SSG Mike suddenly suffered a medical emergency and became unresponsive.[20] They also provided a false timeline of events to investigators, destroyed a phone containing pictures of SSG Mike bound with tape, and disposed of any alcohol that was in the house.

After an investigation, Appellant and his three co-conspirators were charged with various offenses related to SSG Mike's death. Pvt Marshall pleaded guilty to conspiracy to commit assault, conspiracy to obstruct justice, burglary, hazing, false official statements, obstruction of justice, and negligent homicide. He was initially sentenced to four years' confinement, reduction to

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the--the way, or tracheal intubation where you use a scope and you put a tube directly down into the--through the vocal cords and go through the trachea.").

[17] R. at 1107.

[18] R. at 1108.

[19] R. at 248.

[20] R. at 252.

E-1, and a bad-conduct discharge; however, the convening authority later suspended and remitted confinement in excess of three years as well as the bad-conduct discharge.

SO2 Murphy pleaded guilty to conspiracy to commit assault, conspiracy to obstruct justice, unlawful entry, assault consummated by a battery, hazing, and obstruction of justice. He was sentenced to twelve months' confinement, reduction to E-5, and a bad-conduct discharge. The convening authority later suspended and remitted the bad-conduct discharge.

GySgt Mike-Romeo pleaded not-guilty at a contested general court-martial and was convicted by members of conspiracy to commit assault, conspiracy to commit obstruction of justice, housebreaking, involuntary manslaughter, and hazing. He was sentenced to six months' confinement, reduction to E-1, ninety days of hard labor, and a letter of reprimand.

Appellant was charged with conspiracy to commit an assault, conspiracy to obstruct justice, burglary, felony murder, involuntary manslaughter, failure to obey a lawful general order, and obstruction of justice.[21] Appellant entered into a pretrial agreement and agreed to plead guilty to conspiracy to commit assault consummated by a battery, conspiracy to obstruct justice, involuntary manslaughter, hazing in violation of a lawful general order, and obstruction of justice.[22] In return, the convening authority agreed to withdraw and dismiss all other charges and specifications and to suspend all confinement in excess of fifteen years.[23]

At Appellant's sentencing hearing the Government called eleven witnesses. The only co-conspirator to testify for the Government was Pvt. Marshall. After Appellant's court-martial, his defense team became aware for the first time that, prior to testifying for the Government, Pvt Marshall submitted a clemency request to the convening authority and received a material assistance letter from the trial counsel in the case.

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[21] Charge Sheet at 1, 3–4, Nov. 14, 2018.

[22] App. Ex. XXV at 4–6.

[23] App. Ex. XXV, App'x A at 1.

II. DISCUSSION

A. Pvt Marshall's Clemency Request

Appellant asserts that he was deprived of a meaningful opportunity to cross-examine Pvt Marshall because Appellant was not provided Pvt. Marshall's request for clemency prior to Appellant's guilty plea and sentencing hearing where Pvt Marshall testified as a government witness.

Prior to Appellant's court-martial, Pvt Marshall pleaded guilty, pursuant to a pretrial agreement, to conspiracy to commit assault and obstruction of justice, burglary, violation of a lawful general order, false official statement, obstruction of justice, and negligent homicide.[24] The military judge sentenced him to four years of confinement, reduction to pay grade E-1, and a bad-conduct discharge. In his pretrial agreement, Pvt Marshall agreed to testify, under a grant of testimonial immunity, as a government witness in the prosecutions of Appellant and the other two co-conspirators. Approximately a month after his sentencing, Pvt Marshall requested an extension to request clemency so the convening authority would not act on his case until his "full cooperation is complete and a matter of record."[25] The convening authority approved that request and approximately two months later trial counsel submitted a material assistance letter to the convening authority discussing Pvt Marshall's material assistance in prosecutions related to SSG Mike's death.[26] Shortly thereafter, Pvt Marshall submitted his clemency request asking the convening authority to reduce his confinement from four years to two years.

Subsequent to Pvt Marshall's plea, clemency request, and receipt of the material assistance letter from trial counsel, Appellant in his initial discovery request to the Government asked for:

> (4) … evidence affecting the credibility of any potential government witness. This includes information known to the government, agents thereof, and closely-aligned civilian authorities or entities, concerning immunity grants, prior convictions, and evidence of other character, conduct, or *bias bearing on a witness's credibility*, including any letters of reprimand, letters of

[24] App. Ex. XXV, App'x B at 1.

[25] Appellant's Mot. to Attach, Encl. G, at 2.

[26] *Id.*, Encl. B.

> caution, records of formal or informal counseling, evidence of Article 15, UCMJ, actions, criminal investigations, or adverse administrative actions.
>
> . . . (6) Any evidence or information of any promises of immunity or leniency made to any potential government witness by trial counsel or military authorities or agents thereof, including closely aligned civilian authorities or entities. This includes the contents of any formal or informal pretrial agreement reached with any co-conspirator or potential witness.[27]

At the time of this discovery request, Appellant was aware that Pvt Marshall previously pleaded guilty and was granted immunity to testify in Appellant's case, but was not aware of Pvt Marshall's clemency request or the material assistance letter.

Prior to his plea, Appellant stated he intended to cross-examine Pvt Marshall "on his pretrial agreement but not the sentence that was imposed or what the pretrial agreement called for."[28] Prior to Pvt Marshall's testimony, the Defense was informed that Pvt Marshall would be testifying in a utility uniform rather than the seasonal dress uniform worn by other witnesses. Civilian defense counsel objected and explained that he intended to cross-examine Pvt Marshall about the fact that he pleaded guilty, but did not want to introduce the specifics of his sentence so as to not set a benchmark the members could use for Appellant's sentence.[29] The Defense expressed concern that if Pvt Marshall testified out of uniform it would cause the members to speculate that Pvt Marshall was already serving confinement.[30] The Government explained that it attempted to secure a proper uniform, but they were unable to procure it due to issues with funding.[31] The military judge overruled the Defense objection and allowed Pvt Marshall to testify out of uniform. Ultimately, neither trial counsel nor Appellant questioned Pvt Marshall about his pretrial agreement or sentence.

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[27] App. Ex. XXXVII (emphasis added).

[28] R. at 628.

[29] R. at 628.

[30] Recommend citation or delete the words suggested above.

[31] R. at 631.

At Appellant's sentencing hearing, Pvt Marshall testified on behalf of the Government. He provided testimony describing the assault on SSG Mike, to include a detailed account of the methods Appellant used to render SSG Mike unconscious. After the trial, the Government endorsed Pvt Marshall's request for clemency and the convening authority reduced Pvt Marshall's confinement from four years to three years.

Appellate courts review allegations of non-disclosure of discoverable evidence de novo.[32] In *Brady v. Maryland,* the Supreme Court held, "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[33] The Supreme Court has extended *Brady*, holding "that the duty to disclose such evidence is applicable even though there has been no request by the accused, and that the duty encompasses impeachment evidence as well as exculpatory evidence."[34] Under Article 46, UCMJ, "the trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." Article 46, UCMJ, and its implementing rules provide an accused with greater statutory discovery rights than the constitutional right to due process.[35] Regardless of whether the defense has made a specific request, the United States must disclose known evidence that "reasonably tends to" negate or reduce the degree of the accused's guilt or punishment that the accused may receive if convicted.[36]

Appellate review of an alleged discovery violation follows a two-step process: (1) "determine whether the information or evidence at issue was subject

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[32] *United States v. Roberts*, 59 M.J. 323, 327 n.3 (C.A.A.F. 2004).

[33] *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *see also* Rule for Courts-Martial [R.C.M.] 701(a)(6) (requiring disclosure of evidence known to trial counsel that tends to negate guilt, reduce guilt, or reduce sentence).

[34] *Strickler v. Greene*, 527 U.S. 263, 280 (1999) (citations omitted).

[35] *United States v. Coleman*, 72 M.J. 184, 186-87 (C.A.A.F. 2013); *Roberts*, 59 M.J. at 327.

[36] R.C.M. 701(a)(6).

to disclosure or discovery"; and (2) "if there was non-disclosure of such information, test the effect of that non-disclosure on the appellant's trial."[37] Appellate courts may resolve discovery issues without determining whether there has been a violation if the alleged error would not have been prejudicial.[38]

1. Pvt Marshall's Clemency Was Subject to Disclosure

It is well-settled that impeachment evidence is "material" and "exposure of a witness's motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination."[39] The Government argues that it had no "Constitutional" or "regulatory" obligation to disclose Pvt Marshall's clemency because *United States v. Ruiz* does not require disclosure of impeachment information for guilty pleas.[40] Specifically, the Government argues that in *Ruiz*, the Supreme Court found that disclosure of impeachment information relates to the fairness of a trial, as opposed to the voluntariness of a plea and the Constitution does not require disclosure of impeachment information for guilty pleas.[41] Appellant argues that the Government over-simplifies the holding in *Ruiz:*

> In reality, the Supreme Court wrestled with "whether the Fifth and Sixth Amendments require federal prosecutors, before entering into a binding plea agreement with a criminal defendant, to disclose 'impeachment information relating to any informants or other witnesses.'" So the issue before the Court was whether depriving the accused of such impeachment evidence rendered her plea involuntary. The Court specifically noted that "impeachment information is special in relation to the fairness of a

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[37] *Roberts*, 59 M.J. at 325.

[38] *United States v. Santos*, 59 M.J. 317, 321 (C.A.A.F. 2004).

[39] *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *United States v. Bagley*, 473 U.S. 667, 679-80 (1985). *Davis v. Alaska*, 415 U.S. 308, 316-17 (1974).

[40] Gov't Answer. at 31; *United States v. Ruiz*, 536 U.S. 622, 625 (2002).

[41] Gov't Brief at 31; *Ruiz* 538 U.S. at 629. Given "the random way in which such information may, or may not, help a particular defendant," the "degree of help that impeachment information can provide will depend upon the defendant's own independent knowledge of the prosecution's potential case—a matter that the Constitution does not require prosecutors to disclose." *Id.* at 630. As such, the Court held that the Constitution does not require disclosure of impeachment information for guilty pleas. *Id.* at 633.

> trial, not in respect to whether a plea is voluntary ("knowing," "intelligent," and "sufficiently aware.").[42]

We agree with Appellant that the Court in *Ruiz* focused on whether depriving an accused of impeachment evidence rendered a plea involuntary, specifically noting that "impeachment information is special in relation to the fairness of a trial, not in respect to whether a plea is voluntary ('knowing,' 'intelligent,' and 'sufficiently aware.')."[43] Here, Appellant is not asserting that his plea was involuntary; rather, he is alleging that the non-disclosure of impeachment evidence deprived him of a fair sentencing hearing.

Appellant requested "evidence affecting the credibility of any potential government witness . . . including bias bearing on a witnesses' credibility."[44] The fact that Pvt Marshall sought additional clemency from the convening authority in exchange for his testimony is clearly information that tended to demonstrate Pvt Marshall's bias, and bore on his credibility. All information related to Pvt Marshall's request for additional clemency was responsive to this specific discovery request.

The Government also cites *Roberts* to support its argument that the United States had no regulatory obligation to disclose Pvt Marshall's clemency request because Appellant had other materials (Pvt Marshall's pretrial agreement, wherein he agreed to testify under a grant of testimonial immunity) "upon which to believe [Pvt Marshall's] veracity could be attacked."[45] In *Roberts*, the appellant requested disclosure of derogatory data regarding a law enforcement

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[42] Appellant's Reply Brief at 2 (citing *Ruiz*, 536 U.S. at 625, 629 (2002)).

[43] *Ruiz*, 536 U.S. at 629.

[44] App. Ex. XXVII. In *Ruiz*, the prosecutors' proposed plea agreement contained "a set of detailed terms. Among other things, it specifie[d] that 'any [known] information establishing the factual innocence of the defendant' 'has been turned over to the defendant,' and it acknowledges the Government's 'continuing duty to provide such information.' At the same time it requires that the defendant 'waive the right' to receive 'impeachment information relating to any informants or other witnesses' as well as the right to receive information supporting any affirmative defense the defendant raises if the case goes to trial. Because Ruiz would not agree to this last-mentioned waiver, the prosecutors withdrew their bargaining offer. The Government then indicted Ruiz for unlawful drug possession. And despite the absence of any agreement, Ruiz ultimately pleaded guilty." *Ruiz*, 536 U.S. at 625-26.

[45] *See Roberts,* 59 M.J. at 326.

witness that was not disclosed by the military judge after an in camera review.[46] The Court of Appeals for the Armed Forces [C.A.A.F.] found the military judge erred because the internal investigation showed the witness made a false statement and the evidence was "material to the preparation of the defense" because it "was probative of his truthfulness."[47] Without this evidence "the defense was left with no basis upon which to believe [the witness's] veracity could be attacked."[48]

The Government asserts this case is distinguishable from *Roberts* because the defense had an alternative basis upon which to believe Pvt Marshall's veracity could be attacked – the pretrial agreement and the immunity provision. We disagree with this argument. While the pretrial agreement and grant of immunity are typically grounds for counsel to cross-examine a witness to draw out evidence of bias, they can have a limited effect in many cases. In this case, in addition to the questions, responses, and argument that would have likely resulted from the pretrial agreement, there existed the relatively non-standard request for clemency that was pending approval from the convening authority. This evidence, in the Court's opinion, would have had a much more powerful effect on the members. The Defense team made a tactical decision not to cross-examine Pvt Marshall with regard to the pretrial agreement; however, they were deprived of making a similar tactical decision with regard to cross-examination on the clemency matters. Pvt Marshall was a key government witness in this case. His motive to misrepresent was not self-evident (certainly not through the pretrial agreement alone) and the disclosure of the clemency request was material. We provide more discussion on this point below in our prejudice analysis portion . Nevertheless, with regard to disclosure obligations, we find that the evidence at issue was subject to disclosure or discovery. Because there was non-disclosure of this evidence, we next test the effect of that non-disclosure on Appellant's trial.

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[46] *Roberts*, 59 M.J. at 324.

[47] *Id.* at 326.

[48] *Id.*

2. The Non-Disclosure of the Clemency Request was Not Harmless Beyond a Reasonable Doubt

When an accused makes only a general discovery request appellate courts review alleged discovery violations for harmless error.[49] The test for harmless error is whether the accused has shown "a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different."[50] Under this test, the "question is not whether the [accused] would more likely than not have received a different verdict with the evidence, but whether in its absence [the accused] received a fair trial."[51] Thus, a reasonable probability of a different result is shown when the United States' non-disclosure "undermines confidence in the outcome of the trial."[52]

When the accused makes a specific discovery request, appellate courts "apply the heightened, constitutional harmless beyond a reasonable doubt standard."[53]

We agree with the Government that the clemency materials may not have been responsive to the defense request for "evidence related to adverse criminal or administrative actions and promises of immunity or leniency."[54] Nevertheless, they were responsive to Appellant's specific request for "evidence affecting the credibility of any potential government witness . . . including bias bearing on a witness's credibility."[55] We reject the Government's argument that this was not a specific request. This entire AOE is driven by the fact that Appellant was unaware of the clemency request. The language in the discovery request squarely covers the clemency request and we decline to impose, as stated by Appellant in his brief, a requirement that would require "clairvoyant" powers

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[49] *Coleman*, 72 M.J. at 187.

[50] *Id.*

[51] *United States v. Mahoney*, 58 M.J. 346, 349 (C.A.A.F. 2003) (quoting *Kyles*, 514 U.S. at 434).

[52] *Id.*

[53] *Id.*

[54] Gov't Answer at 33.

[55] App. Ex. XXVII.

when drafting such a request.[56] As such, we will apply the constitutional harmless beyond a reasonable doubt standard to the non-disclosure of the clemency matters.[57]

The Government cites *United States v. Coleman* to support its argument that non-disclosure of the clemency request was harmless beyond a reasonable doubt.[58] In *Coleman*, the court held failure to disclose an oral agreement between a co-conspirator and the staff judge advocate "was, at a minimum negligent, and certainly violated" multiple discovery rules.[59] The Court questioned how knowledge of the non-disclosed evidence "would have caused the defense counsel to change strategy or tactics or led to a different result" during cross-examination or closing argument and found ultimately that the failure to disclose was harmless beyond a reasonable doubt because the Government established "disclosure would not have affected the outcome of the trial."[60] The co-conspirator's testimony was "very brief."[61] The court noted the appellant knew the co-conspirator had been convicted and sentenced for the same offenses and could have impeached the witness but chose not to do so.[62] Nonetheless, the appellant argued the co-conspirator testified because he wanted clemency, and the co-conspirator's "motive to misrepresent was self-evident to the court members."[63] Thus, failure to disclose was harmless beyond a reasonable doubt because the Government established "disclosure would not have affected the outcome of the trial."[64]

We disagree with the Government that *Coleman* supports finding that the error in this case was harmless beyond a reasonable doubt. Unlike the facts in *Coleman*, Pvt Marshall's testimony was not "very brief."[65] The Government re-

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[56] Appellant Reply Brief at 4.

[57] *United States v. Tovarchavez*, 78 M.J. 458, 460 (C.A.A.F. 2019).

[58] *United States v. Coleman*, 72 M.J. 184 (C.A.A.F. 2013).

[59] *Coleman*, 72 M.J. at 189.

[60] *Id*. at 189

[61] *Id*. at 187.

[62] *Id*. at 188.

[63] *Id*.

[64] *Id*. at 189.

[65] *Id*. at 187,

lied on his testimony to support the testimony of their expert witness, Dr. Foxtrot, as well as their sentencing argument to the members.[66] It is clear from our review that Pvt Marshall was a central witness to the Government's sentencing case and we find that that there is a reasonable possibility that the outcome of the trial would have been affected by the disclosure of the clemency request. Even when we apply the lower harmless error standard, we find that the error undermines confidence in the outcome of the sentencing hearing.

The Government argues that Appellant had other materials, to include Pvt Marshall's pretrial agreement and testimonial immunity, which could have been used to cross-examine Pvt Marshall. We agree with Appellant that the error in this case - the undisclosed materials - went specifically to bias and the non-disclosure denied Appellant the ability to expose Pvt Marshall's particular basis for bias. Specifically, that Pvt Marshall had motive to exaggerate his testimony. The pretrial agreement and sentence would not have accomplished this because it is a "qualitatively different" means to expose bias. The Appellant's tactical decision not to question Pvt Marshall about the pretrial agreement and sentence is very different than the tactical decision whether to question Pvt Marshall about his pending request to lessen his sentence. Whether knowledge of non-disclosed evidence "would have caused the defense counsel to change strategy or tactics . . ." is relevant to determining whether non-disclosure is harmless beyond a reasonable doubt.[67] We agree with Appellant that his defense made a strategic decision to not highlight Pvt Marshall's sentence to the members but the government's failure to disclose the clemency materials deprived the defense of the facts it needed to make a similar strategic decision on how to expose Pvt Marshall's specific bias and potential motive to misrepresent events. We also agree that this motive was not self-evident to the court members as the members, like Appellant, also had no knowledge he was seeking additional leniency from the Convening Authority in exchange for his testimony. We take corrective action on this in our decretal paragraph.

B. Evidence in Aggravation

Appellant alleges that the military judge erred by allowing the Government to present other possible mechanisms of death through the testimony of Doctor Foxtrot. Additionally, Appellant alleges that the military judge erred by allow-

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[66] Pvt Marshall's testimony included additional aggravating facts that were captured in his previous statements.

[67] *See Coleman*, 72 M.J. at 189.

ing the Government to argue that Appellant's motive for performing the emergency cricothyrotomy was to obstruct justice by destroying evidence. At trial Appellant admitted to causing SSG Mike's death by strangulation via a "rear naked chokehold."[68] Dr. Foxtrot testified about other mechanisms such as suffocation, fractured windpipe, and cricothyrotomy that could have resulted in the death of SSG Mike.

We review the issue of a military judge's decision to admit sentencing evidence for an abuse of discretion.[69] The "military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect."[70] "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion."[71] "The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous."[72]

Aggravation evidence must: (1) directly relate to the accused's convicted offenses; and (2) satisfy Mil. R. Evid. 403.[73] Aggravation sentencing evidence may consist of any "aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty"[74] and "often highlights 'same course of conduct' misconduct of an accused."[75] Such evidence "includes, but is not limited to, evidence of financial, social, psychological, and medical impact on or cost to any person . . . who was the victim of an offense committed by the accused and evidence of significant adverse impact on the mission" resulting from the accused's offense.[76] As C.A.A.F. has construed R.C.M. 1001(b)(4), uncharged "depth-of-problem evidence" may directly relate

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[68] R. at 262.

[69] *United States v. Stephens*, 67 M.J. 233, 235 (C.A.A.F. 2009).

[70] *United States v. Barnett*, 63 M.J. 388, 394 (C.A.A.F. 2006) (citation omitted).

[71] *United States v. Jones*, 73 M.J. 357, 360 (C.A.A.F. 2014) (citation omitted).

[72] *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000) (cleaned up).

[73] *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F 2007)

[74] R.C.M. 1001(b)(4).

[75] *United States v. Halfacre*, 80 M.J. 656, 660 (N-M. Ct. Crim. App. 2020).

[76] *Id.*

to the charged offenses.[77] "Directly related" may encompass uncharged misconduct that is part of a "continuous course of conduct."[78] Evidence of uncharged misconduct is admissible if it is "closely related in time, type, and/or often outcome, to the convicted crime."[79] Absent a clear abuse, appellate courts will not overturn a military judge's ruling if he conducts a proper Mil. R. Evid. 403 balancing test on the record.[80] Uncharged misconduct against victims can be appropriate aggravation evidence "because it reflects the true impact of crimes upon the victims."[81]

In this case we agree with the Government that the aggravation evidence was directly related to Appellant's pleas because it was "inextricably interwoven" with the facts and circumstances of the convicted offenses.[82]

The military judge found that the Stipulation of Fact was ambiguous in that it discussed a chokehold done with unlawful force, and indicated the Victim's death resulted from the chokehold.[83] We agree that the facts before the court concerning the chokehold, to include testimony about the Victim being face down with Appellant on his back during the second choke, were "fair game" and not outside the scope of the Stipulation of Fact.[84]

Further, we agree that *United States v. Halfacre* is applicable. In *Halfacre* this Court held that evidence of Appellant's sexual assaults of two prostitutes was proper aggravating evidence even though Appellant pleaded guilty to patronizing a prostitute. This Court found that the evidence was admissible "because it was inextricably interwoven with the facts and circumstances of the

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[77] *United States v. Ciulla*, 32 M.J. 186, 187 (C.M.A. 1991).

[78] United States v. *Nourse*, 55 M.J. 229, 232 (C.A.A.F. 2001) (finding evidence of uncharged robberies showed continuous course of conduct in which accused committed similar crimes against same victim and in same location).

[79] *Hardison*, 64 M.J. at 282.

[80] *Stephens*, 67 M.J. at 235.

[81] *Nourse*, 55 M.J. at 231 (citations omitted); *see United States v. Terlep*, 57 M.J. 344, 350 (C.A.A.F. 2002) ("Such rules provide for accuracy in the sentencing process by permitting the judge to fully appreciate the true plight of the victim in each case.") (citations omitted).

[82] Gov't Brief at 41 (quoting *Halfacre,* 80 M.J. at 662).

[83] R. at 892.

[84] Gov't Answer at 19.

convicted offenses and painted a complete picture for the sentencing authority."[85] Similar to *Halfacre*, evidence in this case indicating Appellant suffocated the Victim, fractured his windpipe, and performed a cricothyrotomy to obstruct the investigation was "inextricably interwoven" with Appellant's offenses.[86] Appellant pleaded guilty to conspiracy to assault the Victim by strangling and placing him in a chokehold resulting in the Victim's death.[87] The aggravating evidence at issue consisted of actions Appellant took in committing the offenses to which he pleaded guilty, and are thus "directly related" to his offenses.[88] Finally, we also agree that the aggravating evidence is appropriate under *Hardison* because it was "closely related in time, type, and outcome" to Appellant's offenses.[89]

We reject the Appellant's argument that his pleas limit the scope of aggravating evidence. As cited by the Government, in *Terlep*, the appellant was charged with burglary and rape, but pleaded guilty pursuant to a plea agreement to unlawful entry and assault consummated by a battery.[90] At sentencing, the victim testified that the appellant raped her.[91] The *Terlep* court found the victim's testimony admissible, holding that pretrial agreements, unless expressly agreed to otherwise, do not bar victims from giving their version of the truth to the factfinder at sentencing.[92] In this case, as in *Terlep*, the aggravating evidence was proper because Appellant admitted to executing the deadly chokehold during his providence inquiry and there was nothing in Appellant's pretrial agreement limiting the scope of aggravating evidence.[93] The aggravation evidence at issue in this case provided appropriate additional "depth-of-problem" evidence on Appellant's convictions, including how the physical mechanics of Appellant's actions killed the Victim.[94] This evidence illustrated the violent nature of Appellant's offenses and were properly introduced to show

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[85] *Halfacre*, 80 M.J. at 661–62.

[86] See *id*. at 662.

[87] Pros. Ex. 1 at 2–3.

[88] *See* R.C.M. 1001(b)(4).

[89] *Hardison*, 64 M.J. at 282.

[90] *United States v. Terlap*, 57 M.J. 334, 345. (C.A.A.F. 2002)

[91] *Id*. at 347.

[92] *Id*. at 350.

[93] *See* App. Ex. XXV; *Terlep*, 57 M.J. at 350.

[94] *See Ciulla*, 32 M.J. at 187.

"the circumstances surrounding" Appellant's conviction and its repercussions.[95]

We also reject Appellant's reliance on *United States v. Barker*.[96] As stated by the Government, the prosecution admitted, without objection by the Appellant, Pvt Marshall's testimony about the "fleshy undulating sound" from the Victim's neck and Dr. Foxtrot's testimony about the Victim's fractured windpipe and the unusual size and jaggedness of the incisions from the cricothyrotomy. Appellant fails to show how this testimony about the cricothyrotomy was "new ammunition" against him.[97] The military judge's ruling is entitled to deference because he properly conducted a Mil. R. Evid. 403 balancing test and his decision will not be overturned unless there is a clear abuse of discretion.[98] As the military judge found, Dr. Foxtrot's testimony was relevant under R.C.M. 1001(b)(4) and provided "greater context" to what occurred that evening; specifically relating to the mechanism of death and "the different risk factors that were present describing the events directly relating to the assault consummated by a battery."[99] We agree with the military judge that the probative value was high, the evidence was not cumulative, and the probative value was not substantially outweighed by the dangers of unfair prejudice. Accordingly, the military judge did not abuse his discretion in admitting the aggravating evidence.

We also agree with the Government that the trial counsel did not "ambush" Appellant. Arguments by counsel are not evidence, and trial counsel appropriately argued Appellant performed the cricothyrotomy to obstruct evidence. Appellant's claim is better framed as alleging prosecutorial misconduct and, as discussed in detail later in this opinion, trial counsel may argue evidence of record "as well as all reasonable inferences fairly derived from such evidence."[100] We conclude that the trial counsel did not "ambush" Appellant by arguing he performed the cricothyrotomy to obstruct justice.[101]

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[95] *See Vickers*, 13 M.J. at 406.

[96] *United States v. Barker*, 77 M.J. 337 (C.A.A.F. 2018).

[97] *See Barker*, 77 M.J. at 384; Appellant's Brief at 55.

[98] *United States v. Ediger*, 68 M.J. 243, 248 (C.A.A.F. 2010).

[99] R. at 899–900.

[100] *United States v. Akbar*, 74 M.J. 364, 394 (C.A.A.F. 2014).

[101] *See* Appellant's Brief at 54.

Finally, we note that the military judge admitted the cricothyrotomy evidence during sentencing without defense objection, and the fact that Appellant pleaded guilty to obstruction of justice and conspiracy to obstruct justice, trial counsel appropriately argued "reasonable inferences fairly derived" from the cricothyrotomy evidence.[102]

C. Sentence Appropriateness

We review sentence appropriateness de novo.[103] "The military system must be prepared to accept some disparity even in the sentences of co-defendants, provided each military accused is sentenced as an individual."[104] With this in mind, the appropriateness of a sentence should be determined without reference or comparison to sentences in other cases.[105] This Court is not required to compare specific sentences "except in those rare instances in which sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases."[106] In order to challenge his sentence as inappropriate, an appellant must first demonstrate it is "highly disparate" when compared to a "closely related" case.[107] Only upon a successful showing does the burden then shift to the United States to demonstrate the difference in sentences rests upon a rational basis.[108]

Appellant asks that, should we find his sentence inappropriately severe, we conduct a sentence reassessment to correct the error.[109] As we have already found error in Appellant's first AOE which resulted in this Court ordering a sentence rehearing, a reassessment of Appellant's sentence based on this third AOE would be without any effect. Because there would be no further practical effect on the outcome of Appellant's appeal arising from review of the sentence

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[102] *See id*.

[103] *United States v. Patrick*, 78 M.J. 687, 718–19 (N-M. Ct. Crim. App. 2018).

[104] *United States v. Durant*, 55 M.J. 258, 261–62 (C.A.A.F. 2001) (internal quotations omitted).

[105] *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985).

[106] *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999) (quoting *Ballard*, 20 M.J. at 283).

[107] *Lacy*, 50 M.J. at 288.

[108] *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001).

[109] Appellant's Brief at 64.

appropriateness question, we find that this third AOE is moot and decline to analyze it further.

D. Prosecutorial Misconduct

When an objection at trial properly preserves the issue, appellate courts review questions of improper argument and prosecutorial misconduct de novo.[110]

"Prosecutorial misconduct is 'action or inaction by a prosecutor in violation of some legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon.'"[111] Prosecutorial misconduct can arise out of improper argument and occurs when the "argument overstep[s] the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense."[112] Appellate courts "should gauge the overall effect of counsel's conduct on the trial, and not counsel's personal blameworthiness."[113] Improper argument is "one facet of prosecutorial misconduct."[114] Challenged statements are reviewed in the "context of the entire court-martial" rather than in isolation.[115] As it relates to sentencing, prosecutors are to "steer clear of any improper arguments that may produce a wrongful sentence."[116]

If we find prosecutorial misconduct occurred the next step is to assess for prejudice. In assessing prejudice, this Court is directed to look at the "cumulative impact of any prosecutorial misconduct on the accused's substantial rights and the fairness and integrity of his trial."[117] *United States v. Fletcher* outlines a three factor test to determine whether trial counsel's improper arguments were prejudicial: "(1) the severity of the misconduct, (2) the measures adopted

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[110] *United States v. Sewell*, 76 M.J. 14, 18 (C.A.A.F. 2017).

[111] *United States v. Pabelona*, 76 M.J. 9, 11 (C.A.A.F. 2017) (quotation omitted).

[112] *United States v. Norwood*, 81 M.J. 12, 19 (C.A.A.F. 2021) (cleaned up).

[113] *United States v. Thompkins*, 58 M.J. 43, 47 (C.A.A.F. 2003) (citations omitted).

[114] *Sewell*, 76 M.J. at 18.

[115] *United States v. Baer*, 53 M.J. 235, 238 (C.A.A.F. 2000).

[116] *Baer*, 53 M.J. at 237.

[117] *United States v. Fletcher*, 62 M.J. 175, 178 (C.A.A.F. 2005).

to cure the misconduct, and (3) the weight of the evidence supporting the conviction."[118] These same *Fletcher* factors apply to inquiries into improper sentencing arguments.[119]

Appellant asserts that the Government presented improper argument in three ways. First, they argued about other possible mechanisms of death that violated the stipulation of fact and tended to impeach the military judge's acceptance of Appellant's plea. Second, the Government argued that Appellant performed the emergency cricothyrotomy on SSG Mike in order to obstruct justice – a theory Appellant argues was unsupported by the evidence, inflammatory, and speculative. Finally, Appellant argues the Government committed prosecutorial misconduct by displaying a misleading slide to the members after being specifically instructed by the military judge to no do so.

We find no merit in these arguments and determine there was no prosecutorial misconduct. In this case, trial counsel presented aggravating evidence that did not contradict the stipulation of fact or impeach the military judge's findings that Appellant's chokehold caused the Victim's death. The evidence presented by trial counsel about other mechanisms of death appropriately provided "greater context of exactly what occurred that night."[120] The aggravation evidence and trial counsel's argument provided explanations for exactly how the chokehold brought about the Victim's death—namely, what took place internally to the Victim's body as a result of the chokehold. The military judge properly admitted the evidence after thorough consideration.[121]

Trial counsel's argument regarding how the chokehold brought about asphyxiation and death did not inject inadmissible evidence into the proceeding and did not constitute prosecutorial misconduct.[122] Trial counsel's argument that Appellant performed the cricothyrotomy to obstruct justice was also not improper – in fact, it was admitted into evidence without defense objection.[123] Because trial counsel's argument was based on reasonable inferences

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[118] *Fletcher*, 62 M.J. at 184.

[119] *United States v Halpin*, 71 M.J. 477, 480 (C.A.A.F. 2013).

[120] R. at 900.

[121] Id.

[122] *Cf.* Dep't of the Navy, Judge Advocate General Instr. 5803.1E , Navy-Marine Corps Trial Judiciary [JAGINST 5803.1E], rule 4.a.5. (Jan. 20, 2015)..

[123] *See generally* R. 804–60.

from that evidence and did not allude to inadmissible evidence, it did not constitute prosecutorial misconduct.[124] Appellant's motives for performing the cricothyrotomy were addressed and discussed throughout the course of the court-martial. The military judge: (1) found evidence and surrounding circumstances of the cricothyrotomy were admissible under R.C.M. 1001(b)(4) because they directly related to or resulted from Appellant's offenses, and; (2) did not abuse discretion in ruling the evidence was admissible. Accordingly, trial counsel's argument was not improper.

We agree with the Government that trial counsel did not commit prosecutorial misconduct during sentencing argument by mistakenly displaying content on a presentation slide to the members. Rule of Professional Conduct 3.4 forbids "engag[ing] in conduct involving dishonesty, fraud, deceit, or misrepresentation."[125] This Court has found no improper argument where trial counsel simply misspeak and immediately correct themselves. In *United States v. Masga*, this Court concluded the trial counsel did not improperly argue propensity when he said, "[i]s there any lawful, logical, or innocent person—a reason for searching [search terms] like this?"[126] This Court found, "trial counsel briefly misspoke and immediately corrected the sentence to refer to an 'innocent reason' why a person would use such search terms."[127] Similar to *Masga*, upon realizing he had not corrected his slide, trial counsel immediately corrected the error.[128] The military judge noted trial counsel had not yet discussed that portion of the slide and, upon the members' return after the Article 39(a) session, instructed the members that argument is not evidence.[129] Trial counsel's mistake, as evidenced by his apology and the beginning of his explanation that he had deleted something else, did not "overstep the bounds of propriety and fairness" and did not meet the threshold of prosecutorial misconduct.[130]

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[124] *See Cristini v. McKee*, 526 F.3d 888, 901 (6th Cir. 2008)); *cf.* JAGINST 5803.1E, rule 4.

[125] JAGINST 5803.1E, rule 8.4(a)(3).

[126] *United States v. Masga*, No. 201700276, 2019 CCA LEXIS 56, at *7 (N-M Ct. Crim. App. Feb. 13, 2019).

[127] *Id.* at *10.

[128] *See id.*; R. 1308.

[129] R. 1310.

[130] *See United States v. Andrews*, 77 M.J. 393, 403 (C.A.A.F. 2018).

Even assuming error, Appellant suffered no prejudice. Under Article 59(a), UCMJ, "a finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused."[131] The first and second factors favor the United States. Assuming arguendo that all of the misconduct alleged by Appellant is true, Trial Counsel's argument was confined to sentencing argument and did not excessively refer to the questionable matters. We note, too, that even if we assumed error and prejudice, the proper remedy in that instance would be to order a sentencing rehearing. As Appellant's first AOE has already resulted in this Court ordering a sentencing rehearing, a finding of error and prejudice would be rendered moot in any event since such findings would have no further practical effect on the outcome of this appeal.

E. Post-Trial Mistrial Motion

Appellant alleges that the military judge erred in denying his post-trial motion based on what he described as "pervasive errors throughout Appellant's court-martial.[132] The basis for Appellant's post-trial motion was "the [G]overnment's impeachment of the stipulation of fact, impeachment of the guilty plea, improper sentencing evidence and argument, and violating *Brady v. Maryland*."[133] Appellant requested a new sentencing hearing as the remedy. Additionally, Appellant alleged trial counsel improperly presented evidence of and argued that: (1) Appellant killed the Victim by "crush[ing] the Victim]'s throat," (2) the Victim died from suffocation, and (3) Appellant performed the cricothyrotomy to cover-up the crushed throat.[134] Appellant's motion also noted that trial counsel "repeatedly attempted to introduce allegations" that the co-conspirators "were going to commit a sexual offense" during the hazing. The military judge noted Appellant was "moving the Court, in essence, to reconsider its rulings and reverse itself," and the military judge declined to do so.[135]

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[131] Article 59(a), UCMJ.

[132] App. Ex. XXXVII.

[133] Appellate Ex. XXXVII at 1.

[134] *Id.* at 3.

[135] Appellate Ex. XXXVII(c) at 2.

The military judge held that Appellant's three bases for mistrial were "sufficiently argued and ruled on" through the trial.[136] Even considering "their potential cumulative effect," the military judge held the issues did not "warrant the severe remedy of a mistrial."[137]

A military judge's decision on a motion for a mistrial is will be reversed only if there is clear evidence of an abuse of discretion.[138] A military judge "may, as a matter of discretion, declare a mistrial when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings."[139] "On motion for mistrial or when it otherwise appears that grounds for a mistrial may exist, a military judge shall inquire into the views of the parties on the matter."[140] A military judge has "considerable latitude in determining when to grant a mistrial."[141] "The trial court has a superior point of vantage, and … it is only rarely— and in extremely compelling circumstances—that an appellate panel, informed by a cold record, will venture to reverse a trial judge's on-the-spot decision."[142]

This court agrees with the Government that none of the issues raised by Appellant in his mistrial motion cast substantial doubt as to Appellant's court-martial. The military judge was correct when he determined all of the issues were "sufficiently argued and ruled on" at trial.[143] Appellant also argues that the military judge's R.C.M. 1001(b)(4) ruling "was in error" and that his denial of the mistrial "was influenced by his then-existing erroneous view of

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[136] *Id.*

[137] *Id.*

[138] *United States v. McFadden*, 74 M.J. 87, 90 (C.A.A.F. 2015).

[139] R.C.M. 915(a).

[140] R.C.M. 915(b).

[141] *United States v. Seward*, 49 M.J. 369, 371 (C.A.A.F. 1998); *see also Arizona v. Washington*, 434 U.S. 497, 509 (1978) (a judge "exercise[s] broad discretion in deciding whether or not 'manifest necessity' justifies a discharge of the jury"); *Illinois v. Sommerville*, 410 U.S. 458, 461 (1973) (trial judge has "sound discretion" and "broad discretion" in determining manifest necessity).

[142] *United States v. Diaz*, 59 M.J. 79, 90–91 (C.A.A.F. 2003) (citations and internal quotation omitted).

[143] Appellate Ex. XXXVII(c) at 2; *cf. Coleman*, 72 M.J. at 189; *Commisso*, 76 M.J. at 322–24.

the law."[144] We disagree and, as discussed previously in this opinion, have determined that the military judge's ruling on the aggravating evidence under R.C.M. 1001(b)(4) was proper. Finally, we agree with the Government that even though the military judge incorrectly noted that trial defense counsel did not cross-examine Dr. Fisher, the military judge did not rely on this incorrect fact to support his denial of the mistrial. He "simply note[d]" it, along with three other facts, in relation to discussion of possible forfeiture of the alleged *Brady* violation.[145] The military judge did not make a ruling on the sua sponte issue of forfeiture, instead emphasizing that the issues were sufficiently argued at trial, did not warrant the severe remedy of mistrial, and identified no new facts or law to merit reconsideration. Appellant's motion for a mistrial was properly denied and the military judge did not abuse his discretion by denying Appellant's request. Once more, we note that even if we found error, the proper remedy, a sentencing rehearing, has already been ordered by this Court as a result of Appellant's first AOE. Accordingly, were we to find error related to the military judge's ruling on Appellant's post-trial motion for a mistrial, the error would be moot.

F. Cumulative Error

Allegations of cumulative error are reviewed de novo.[146] "Under the cumulative-error doctrine, 'a number of errors, no one perhaps sufficient to merit reversal, in combination necessitate the disapproval of a finding.'"[147] Assertions of error without merit are insufficient to invoke the cumulative error doctrine.[148]

We agree with the Government that every error alleged in this AOE (with the exception of AOE 1) has been addressed and rebutted in detail and that Appellant's claim therefore lacks merit.[149] Even assuming errors occurred, we find that they were not so severe as to "substantially sway" the findings or

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[144] *See* Appellant's Brief at 70.

[145] Appellate Ex. XXXVII(c) at 2.

[146] *United States v. Pope*, 69 M.J. 328, 335 (C.A.A.F. 2011).

[147] *Id*. (quoting *United States v. Banks*, 36 M.J. 150, 170–71 (C.M.A. 1992)).

[148] *United States v. Gray*, 51 M.J. 1, 61 (C.A.A.F. 1999).

[149] *See Gray*, 51 M.J. at 61.

"materially prejudice Appellant's substantial rights."[150] The prosecution's sentencing case in aggravation was substantial, spanning three days and approximately 233 pages of documentary evidence, Appellant admitted guilt during his pleas, and, with the exception of the first AOE, there were no other alleged errors that denied Appellant the right to a fair trial.[151]

III. CONCLUSION

A sentence rehearing is authorized. The sentence is **SET ASIDE** and the record is returned to the Judge Advocate General of the Navy for remand to an appropriate convening authority with authority to order a sentencing rehearing. [152]

FOR THE COURT:

[redacted]

Acting Clerk of Court

[150] *See Banks*, 36 M.J. at 171; *Pope*, 69 M.J. at 335; Article 59(a), UCMJ.

[151] *Cf. Pope*, 69 M.J. at 335 (recommend parenthetical explanation of *compare* (*cf)* citation).

[152] Articles 59 & 66, UCMJ.

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

Before Panel No. 3

UNITED STATES, Appellee v. Tony E. DEDOLPH, Special Warfare Operator Chief (E-7) U.S. Navy Appellant	)	APPELLEE'S OPPOSITION TO APPELLANT'S MOTION FOR ORAL ARGUMENT Case No. 202100150 Tried at Naval Station Norfolk, Virginia, on January 10 and 30, July 7, and August 31, 2020; and January 14–15 and 19–23, 2021, by a general court-martial convened by Commander, Navy Region Mid-Atlantic, Captain [redacted] JAGC, U.S. Navy (arraignment and motions), and Commander H. C. Larsen, JAGC, U.S. Navy (motions and trial), presiding.

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

Pursuant to Rule 23.3(a) of this Court's Rules of Appellate Procedure, the United States respectfully opposes Appellant's Motion for Oral Argument.

The pleadings of the Parties and the Record of Trial provide all necessary facts and legal arguments needed to decide the three Assignments of Error

Appellant proposes for argument. None of the issues are novel, and oral argument will not significantly aid the Court's decisional process.

The United States does not oppose Appellant's proposed date and time for the oral argument. However, the case should now proceed to opinion, completion of appellate review, and appellate finality. This avoids the delay that prejudices both Appellant and the United States. *Cf. United States v. Gorski*, 47 M.J. 370, 375 (C.A.A.F. 1997).

Conclusion

The United States respectfully requests that the Court deny Appellant's Motion for Oral Argument.

Michael A. Tuosto
Digitally signed by Michael A. Tuosto

MICHAEL TUOSTO
Lieutenant, JAGC, U.S. Navy
Appellate Government Counsel
Navy-Marine Corps Appellate Review Activity
[redacted]

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Defense Counsel, Captain Jasper W. CASEY, U.S. Marine Corps, on June 16, 2022.

Michael A. Tuosto Digitally signed by Michael A. Tuosto

MICHAEL TUOSTO
Lieutenant, JAGC, U.S. Navy
Appellate Government Counsel

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

Before Panel No. 3

UNITED STATES, *Appellee* v. **Tony E. DeDolph** Special Warfare Operator Chief (E-7) United States Navy, *Appellant*	**APPELLANT'S REPLY BRIEF** NMCCA No. 202100150 Tried At Naval Station, Norfolk, Virginia on January 10, 2020, January 30, 2020, July 7, 2020, August 31, 2020, January 14-15, 2021, and January 19-23, 2021 before a General-Court-Martial Convened by Commander, Navy Region Mid-Atlantic, CAPT M. Luken, and CDR H. Larsen, presiding.

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

Jasper W. Casey
Captain, U.S. Marine Corps
Appellate Defense Counsel
Navy-Marine Corps
Appellate Review Activity
[redacted]

COMES NOW, detailed counsel in the above-captioned case, and provides the following Reply to the government's Answer.

A. Information about Pvt [redacted] pending clemency request was discoverable and material to the preparation of the defense.

Due process requires the government to "avoid . . . an unfair trial" by providing evidence "favorable to an accused . . . where the evidence is material either to guilt or to punishment."[1]

It is well-settled that impeachment evidence is "material" and covered by *United States v. Brady*.[2] It is also well-settled that "exposure of a witness's motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination."[3]

The government argues that it had no "Constitutional" or "regulatory" obligation to disclose this impeachment material.[4] The government makes these arguments despite also acknowledging the existence of Constitutional and statutory authority that would impose such a discovery obligation.[5]

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[1] *Brady v. Maryland*, 373 U.S. 83, 87 (1963).
[2] *United States v. Bagley*, 473 U.S. 667, 679-80 (1985).
[3] *Davis v. Alaska*, 415 U.S. 308, 316-17 (1974).
[4] Gov Ans. at 32.
[5] Gov. Ans. at 29-30.

i. The government misconstrues the narrow holding of *United States v. Ruiz. Ruiz* does not relieve the Government of its obligation to discover impeachment material in an adversarial presentencing hearing.

The government argues that *United States v. Ruiz* stands for the broad proposition that "the Constitution does not require disclosure of impeachment information for guilty pleas."[6] This is an over-simplification of the holding of that case.

In reality, the Supreme Court wrestled with "whether the Fifth and Sixth Amendments require federal prosecutors, before entering into a binding plea agreement with a criminal defendant, to disclose 'impeachment information relating to any informants or other witnesses.'"[7] So the issue before the Court was whether depriving the accused of such impeachment evidence rendered her plea involuntary.[8] The Court specifically noted that "impeachment information is special in relation to the *fairness of a trial*, not in respect to whether a plea is *voluntary* ("knowing," "intelligent," and "sufficiently aware.").[9]

Here, SOC DeDolph is not arguing that the government's failure to disclose information about Pvt [redacted] clemency request rendered his plea involuntary.

[6] Gov. Ans. at 31.
[7] *United States v. Ruiz*, 536 U.S. 622, 625 (2002).
[8] *Id.* at 629.
[9] *Id.*

Rather, SOC DeDolph's argument is that the government's failure to provide him with this clear impeachment material deprived him of a fair court-martial.

ii. Appellant made a specific request for this information. Thus, this Court should apply the harmless beyond reasonable doubt standard.

The government argues that the materials SOC DeDolph requested were *not* responsive to the defense request for "evidence related to adverse criminal or administrative actions and promises of immunity or leniency."[10] But it was responsive to another request. SOC DeDolph also requested "evidence affecting the credibility of any potential government witness . . . including bias bearing on a witnesess's credibility."[11] So it does not matter that the requested evidence was not responsive to the separate basis for discovery the government cited.

The fact that Pvt [redacted] sought additional clemency from the Convening Authority in exchange for favorable testimony is clearly information that tended to demonstrate Pvt [redacted] bias, and beared on his credibility. All information related to Pvt [redacted] request for additional clemency was responsive to this specific discovery request.[12] As the government even acknowledges, when the

[10] Gov. Ans. at 33.
[11] App. Ex. XXVII.
[12] The government also concedes that it would have a duty to disclose *Brady* evidence even absent a discovery request from SOC DeDolph. (Gov. Ans. at 29-30) (citing *Strickler v. Greene*, 527 U.S. 263, 280 (1999); R.C.M. 701(a)(6)).

defense has made a discovery request covering the undisclosed evidence, the test for prejudice is whether the error is harmless beyond a reasonable doubt.[13]

Certainly, the defense did not make a request as particularly specific as "[Pvt [redacted] Request for Extension of Clemency Consideration to Convening Authority dated 9 July 2019," or any other specific documents. But that is because the defense counsel was unaware such documents existed until long after SOC DeDolph's court-martial concluded. Defense Counsel cannot be clairvoyant. To require a specific discovery request to have this level of granularity when the government fails to abide by its discovery obligations would be an unworkable standard.

iii. That defense had alternative means to cross-examine Pvt [redacted] does not render the discovery violation non-prejudicial. The error deprived SOC DeDolph of *meaningful* cross-examination. Relief is warranted.

The government argues that it did not error because SOC DeDolph had other materials (specifically Pvt [redacted] pretrial agreement and testimonial immunity), which could have been used to cross-examine Pvt [redacted] But this misses the point. The error here was that SOC DeDolph was denied the ability to expose Pvt [redacted] particular basis for bias. Specifically, that Pvt [redacted] had

[13] *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *United States v. Coleman*, 72 M.J. 184 (C.A.A.F. 2013).

motive to exaggerate his testimony in hopes of receiving additional clemency, which the Convening Authority ultimately awarded.

The government asserts that Pvt [redacted] "pretrial agreement provided the same basis for impeachments as Pvt [redacted] clemency request . . . ."[14] This is just not so. As discussed in *United States v. Coleman*, exposing Pvt [redacted] bias to exaggerate testimony is the type of "qualitatively different" opportunity to expose bias than the mere fact that Pvt [redacted] was a co-actor who had already received the benefit of a plea agreement.[15] Whether knowledge of nondisclosed evidence "would have caused the defense counsel to change strategy or tactics . . ." is relevant to determining whether nondisclosure is harmless beyond a reasonable doubt.[16]

The government argues that it had "no regulatory obligation to disclose Private [redacted] clemency request because [SOC DeDolph] had other materials upon 'which to believe [Private [redacted] veracity could be attacked.'" The government is arguing a position contrary to the law. Under that line of reasoning, if a particular witness had numerous grounds on which his/her credibility could be attacked, the government would only be obligated to disclose *one* of those grounds. That is contrary to the law.

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[14] Gov. Ans. at 33.
[15] *See United States v. Coleman*, 72 M.J. 184, 189 (C.A.A.F. 2013).
[16] *Id.*

The record is clear that the defense made a strategic decision to not highlight Pvt [redacted] sentence to the members.[17] But the government's discovery violation deprived the defense of the facts it needed to make a similar strategic decision on how to expose this distinct basis for Pvt [redacted] bias. Contrary to the government's assertion, Pvt [redacted] motive to misrepresent events was *not* "self-evident to the court members."[18] The members had no idea he was seeking additional favor from the Convening Authority in exchange for helpful testimony.

Accordingly, this Court should harbor significant concerns about the fairness of SOC DeDolph's court-martial.

The present case is analogous to *United States v. Roberts*, which the government cited.[19] Here, as in *Roberts*, information was kept from the defense that was probative of Pvt [redacted] credibility and was "material to the preparation of the defense."[20] As in *Roberts*, by keeping information regarding Pvt [redacted] clemency request from the defense, SOC DeDolph was left without this important basis on which to attack Pvt [redacted] credibility.[21]

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[17] R. at 628, 632.
[18] Gov. Ans. at 37.
[19] *See United States v. Roberts*, 59 M.J. 323, 326 (C.A.A.F. 2004).
[20] *Id.*
[21] *See id.*

SOC DeDolph was certainly aware prior to his trial that Pvt [redacted] had already pleaded guilty and been sentenced for his own misconduct.[22] However, this does not render the government's discovery violation harmless beyond a reasonable doubt. The defense explained their cross-examination strategy for Pvt [redacted], and discussed why they wanted to avoid informing the members of the specifics of Pvt [redacted] sentence.[23] SOC DeDolph was denied this "qualitatively different opportunity" to expose Pvt [redacted] clear bias.[24]

[22] R. at 632.
[23] R. at 632.
[24] *Coleman*, 72 M.J. at 189-90 (Baker, C.J., concurring).

iv. Even if the court applies the "harmless error" standard, SOC DeDolph merits relief.

Even under the harmless error standard, "the question is not whether the [accused] would more likely than not have received a different verdict (or sentence) with the evidence, but whether in its absence [the accused] received a fair trial."[25] A reasonable probability of a different result is shown when the United States' nondisclosure "undermines confidence in the outcome of the trial."[26]

That standard is met here. Even under the "harmless error" standard, the government's nondisclosure of this critical impeachment evidence undermines confidence in SOC DeDolph's court-martial.

B. Government's reliance on Pvt [redacted] version of events demonstrates why the discovery violation prejudiced Appellant.

In reciting facts related to SSG [redacted] death, the government almost exclusively relies on Pvt [redacted] version of events.[27] This has the effect of painting a more government-friendly version of events.

For example, the government asserts that SSG [redacted] was "surprised and slightly frightened" after the group broke into his room.[28] The government later

[25] *United States v. Mahoney*, 58 M.J. 346, 349 (C.A.A.F. 2004).
[26] *Id.*
[27] Gov. Ans. at 7-8.
[28] Gov. Ans. at 7.

writes that SSG [redacted] was "frightened" when SOC DeDolph placed him in a chokehold.[29]

But this ignores other witnesses' version of events. According to SOC DeDolph, when the group broke into the room, SSG [redacted] jumped up and took a "fighter" like position and said something like "let's go, fuckers!"[30] SOC [redacted] similarly described that when SSG [redacted] recognized everyone in the group he said "[o]h, hey, it's you guys."[31] SOC [redacted] testified that SSG [redacted] demeanor at this point was "relaxed."[32]

All this demonstrates that SSG [redacted] was not frightened. Rather, he recognized the prank for what it was and welcomed the roughhousing.

The government also asserts as fact that SOC DeDolphy applied two separate chokeholds.[33] But contrary to Pvt [redacted] assertion that two separate chokeholds were applied, SOC DeDolph described only one.[34] This involved SOC DeDolph putting one arm around both sides of SSG [redacted] neck and applying pressure.[35] At this point, SSG [redacted] was face down, but his head was turned to the

[29] Gov. Ans. at 7.
[30] R. at 1252.
[31] R. at 1099.
[32] R. at 1099.
[33] Gov. Ans. at 7.
[34] R. at 260.
[35] R. at 260.

side allowing SOC DeDolph to see his face, rendering suffocation impossible.[36] SOC [redacted] also only described SOC DeDolph apply a single chokehold.[37]

The government also focuses on the fact that Pvt [redacted] described hearing a "weird fleshy undulating sound, similar to snoring."[38] Once again, SOC DeDoDolph's court-martial was the first time Pvt [redacted] ever provided this highly-detailed and technical description. Remarkably, Dr. [redacted] and the Trial Counsel later cited this description as evidence to support the theory that SSG [redacted] windpipe was fractured.

The members were presented with this similarly skewed version of events. Pvt [redacted] court-martial testimony presented a more sensational and dramatic version of events than that presented in any of his many pretrial statements. However, because SOC DeDolph's trial defense team was unaware that Pvt [redacted] was actively seeking additional benefit from the Convening Authority in exchange for his embellished testimony, they were left unable to expose this clear bias and motive to exaggerate.

The government's reliance on Pvt [redacted] version of events acknowledges why his testimony was so critical to its presentencing case. Even now on appeal, the government relies on Pvt [redacted] to be a credible witness. By

[36] R. at 1254.
[37] R. at 1100.
[38] Gov. Ans. at 8.

depriving the defense of the ability to impeach Pvt [redacted], the government's discovery violation greatly prejudiced SOC DeDolph and provided the government with an unfair advantage.

C. Dr. [redacted] testimony about alternative mechanisms of death was not relevant, and was contrary to the Stipulation of Facts. This irrelevant, inflammatory testimony greatly prejudiced SOC DeDolph.

SOC DeDolph acknowledges the permissive nature of R.C.M. 1001(b)(4), which permits the government to introduce "aggravating circumstances directly relating to or resulting from the offense[s] of which the accused has been found guilty." This can include uncharged "depth-of-problem evidence."[39] But evidence in aggravation must still conform with the requirements of M.R.E. 403.[40]

Here, the government argues that the "[t]he Parties did not stipulate to the exact actions leading to the Victim's death or how many chokeholds were administered."[41] But in the Stipulation of Fact, SOC DeDolph specifically admitted that he "caused the death of [SSG [redacted] by placing him in a chokehold."[42] In the Stipulation of Fact, SOC DeDolph also described that he used a "chokehold like is used in jujitsu (rear naked choke) or judo (shimewaza) . . . ."[43] So SOC DeDolph

[39] *United States v. Ciulla*, 32 M.J. 186, 187 (C.M.A. 1991).
[40] *See United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007).
[41] Gov. Ans. at 6.
[42] Pros. Ex. 1.
[43] Pros. Ex. 1.

used highly-technical terms which relate to particular means of force in these martial-arts disciplines.

SOC DeDolph further described, "[w]hen I say chokehold, I mean that, from behind, I placed my arm around SSG [redacted] neck and applied pressure to both sides."[44] So the Stipulation of Fact actually does contain a description of "exact actions" leading to SSG [redacted] death. Further, the only reasonable interpretation of the phrase "a chokehold" is that SOC DeDolph is referencing a single chokehold. Contrary to the military judge's ultimate ruling, the Stipulation of Fact was not "ambiguous."[45]

When Dr. [redacted] argued that other actions—such as suffocation—may have caused SSG [redacted] death, it was in clear contradiction to the Stipulation of Fact. As such, any discussion of suffocation or other "risk factors" were not relevant because they do not relate to or result from the offense to which SOC DeDolph plead guilty.[46]

The government argues that "evidence that Appellant suffocated the Victim, fractured his windpipe, and performed a cricothyrotomy to obstruct the investigation was 'inextricably interwoven' with Appellant's offenses."[47] The

[44] Pros. Ex. 1.
[45] R. at 892.
[46] R. at 899.
[47] Gov. Ans. at 41.

government also asserts that this evidence "consisted of actions Appellant took . . . ."[48] But in reality, Dr. [redacted] theories about alternative causes of death are contrary to the actual evidence in the case.

For example, whereas Dr [redacted] speculated that SSG [redacted] may have suffocated in the bedding, SOC DeDolph actually described that while SSG [redacted] was face down, his head was turned to the side allowing SOC DeDolph to see his face.[49] Dr. [redacted] alternatively opined that a cracked windpipe could have caused SSG [redacted] death.[50] But this opinion was contrary to Dr. [redacted] the Medical Examiner's, autopsy findings.[51] The defense expert, Dr. [redacted] also disagreed with Dr. [redacted] theory that SSG [redacted] windpipe was crushed.[52] Thus, the reliability of Dr. [redacted] testimony is very low.

In looking at the standard underlying M.R.E. 403, this testimony was not legally relevant because it was unfairly prejudicial, confused the issues (because it related to only speculative causes of death that SOC DeDolph did not plead guilty to), and was misleading.

The Military Judge even demonstrated that he was concerned about the appropriateness of the Government presenting this evidence when he said "we'll

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[48] Gov. Ans. at 41.
[49] R. at 1254.
[50] R. at 887.
[51] R. at 840.
[52] R. at 1162.

see what the Appellate Court does."[53] The military judge's instincts were correct. He erred by allowing Dr. [redacted] to testify to alternative mechanisms of death. This Court should grant relief.

D. Arguing that the cricothyrotomy was performed to obstruct justice is not a "reasonable inference" fairly derived from the evidence.

The government argues that because the evidence related to the cricothyrotomy was admitted into evidence, and because Appellant pleaded guilty to conspiracy and obstruction of justice, Trial Counsel appropriately argued "reasonably inference fairly derived" from the evidence.[54]

As an initial matter, the government fails to establish how the fact that SOC DeDolph pleaded guilty to obstructing justice through very specific acts would give the government carte blanche to argue that SOC DeDolph obstructed justice by other uncharged and purely speculative means. Arguing that SOC DeDolph performed the cricothyrotomy for corrupt means is not a "reasonable inference" derived from any of the evidence related to obstruction.

In reality, the evidence overwhelmingly shows that SOC DeDolph actually performed the cricothyrotomy in a desperate attempt to save SSG [redacted] life. The unusual nature of the incision is clearly explained in the record.

[53] R. at 900 (emphasis added).
[54] Gov. Ans. at 44-45.

After cutting the incision, SOC DeDolph had trouble inserting the breathing tube into SSG [redacted] airway due to unexpected blockage.[55] These efforts were complicated by the fact that SOC DeDolph tried to perform this technique while riding in the back of a Land Rover that was driving at a rapid speed along the poorly maintained roads of [redacted].[56] Dr. [redacted] even agreed that the specific conditions of this cricothyrotomy, such as it being performed under emergency conditions in the back of a moving vehicle, could explain the irregularities with the incision.[57] Even at the clinic, after the [redacted] "doctor" pronounced SSG [redacted] dead, SOC DeDolph continued to breathe for SSG [redacted] through the inserted breathing tube and worked "feverishly" to save his life.[58]

Arguing that SOC DeDolph had a nefarious motive in performing the cricothyrotomy is not a reasonable inference fairly derived from the evidence. This argument served no purpose other than to inflame the passions of the members.[59] This Court cannot be convinced that SOC DeDolph was sentenced solely on the

[55] R. at 1105.
[56] R. at 1260.
[57] R. at 846-47.
[58] R. at 1107.
[59] In analyzing the *Fletcher* factors on this point and other prosecutorial misconduct, the government argues that "deliberations lasted less than three hours." (Gov. Ans. at 50). But the government's calculation seemingly includes time the members were recessed for lunch, and thus not deliberating. (R. at 1386). In reality, the members deliberated for less than *two* hours. (R. at 1388-1389).

admissible evidence in this case. As such, this Court should set aside the sentence and authorize a rehearing, or grant sentencing relief.

E. The government highlights Appellant's degree of culpability, while ignoring the critical role that others played in the hazing plan and ultimate cover-up.

In arguing the appropriateness of SOC DeDolph's sentence, the government highlights specific acts that SOC DeDolph allegedly engaged in related to the hazing incident as well as the ultimate cover-up.[60] But in doing so, the government disregards the key role that other individuals played in these tragic events. As a result, the government presents a version of events that tends to exaggerate SOC DeDolph's degree of culpability.

For example, the government argues that SOC DeDolph "originated the plan to haze the Victim."[61] But this is contrary to Pvt [redacted] the key government witness's, version of events. Pvt [redacted] described that the hazing plan was actually a collaborative effort amongst a "bunch of people" that was "intertwined throughout the night."[62] As another example, SOC [redacted] described how he took affirmative steps to brief the [redacted] house guards on the plan to haze the victim.[63]

[60] Gov. Ans. at 50.
[61] Gov. Ans. at 50.
[62] R. at 755-56.
[63] R. at 1120.

The government also highlights specific actions SOC DeDolph took in furthering the cover-up.[64] But again, Pvt [redacted] described how the cover-up was actually a more collaborative effort. For example, he agreed to speak with a British National who witnessed the events and instructed him on what to say about SSG [redacted] death. SOC [redacted] similarly described how because SOC DeDolph was traumatized following SSG [redacted] death, he (SOC [redacted] took an active-role in leading the team because "we had a lot of work to do at that point."[65]

These are just a few examples. What is clear from a review of the entire record is that SOC DeDolph was just one actor in fast-developing plans to both haze SSG [redacted] and ultimately obstruct justice. [66]

SSG [redacted] death was a tragic accident. But SOC DeDolph is not so much more culpable than his co-accused that he warrants such as highly-disparate sentence.

[64] Gov. Ans. at 50.
[65] R. at 1110.
[66] R. at 234-35.

Conclusion

The cumulative effect of all error in this court-martial deprived SOC DeDolph of a fair trial. SOC DeDolph respectfully requests that this Court set aside the sentence and remand for new sentencing proceedings, or grant sentencing relief.

Respectfully submitted,

[redacted]
Jasper W. Casey
Captain, U.S. Marine Corps
Appellate Defense Counsel
Navy-Marine Corps
Appellate Review Activity
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copy of the foregoing was delivered to the Court on 26 June 2022 that a copy was uploaded into the Court's case management system on 26b June 2022, and that a copy of the foregoing was delivered to Director, Appellate Government Division on 26 June 2022.

[redacted]
Jasper W. Casey
Captain, U.S. Marine Corps
Appellate Defense Counsel
Navy-Marine Corps
Appellate Review Activity
[redacted]

DEPARTMENT OF THE NAVY
NAVY-MARINE CORPS APPELLATE REVIEW ACTIVITY
1254 CHARLES MORRIS STREET SE SUITE B01
WASHINGTON NAVY YARD DC 20374-5124

IN REPLY REFER TO:
5814
40/AJM
12 Dec 22

From: Branch Head, Court-Martial Records Branch (Code 40)
To: Commander, Navy Region Mid-Atlantic, Norfolk, Virginia
Via: Officer-In-Charge, Region Legal Service Office Mid Atlantic, Norfolk, Virginia

Subj: UNITED STATES V. SPECIAL WARFARE OPERATOR CHIEF TONY E. DEDOLPH, USN – NMCCA 202100150

Encl: (1) NMCCA Opinion of 15 Nov 22

1. Enclosure (1) is forwarded for compliance with the order of the United States Navy-Marine Corps Court of Criminal Appeals (NMCCA). Per enclosure (1), the findings are affirmed. A sentence rehearing is authorized. The sentence is set aside and the record is returned to the Judge Advocate General of the Navy for remand to an appropriate convening authority with authority to order a sentence rehearing. Thereafter, the record will be returned to the Court for completion of appellate review.

2. Accordingly, the record of trial is returned to you for action consistent with the order of the NMCCA within the time limits prescribed. Upon completion, the record will be returned to: Branch Head, [redacted] Navy-Marine Corps Appellate Review Activity (Code 40), 1254 Charles Morris Street, SE, Suite B01, Washington Navy Yard, DC 20374-5124, for completion of appellate action.

3. Please advise this office (Code 40) of case status by 9 January 2023, and weekly thereafter. Point of contact for case status is: [redacted] Code 40, [redacted]. Point of contact at Appellate Government (Code 46) is: Lieutenant Catherine M. Crochetiere, USN, at [redacted].

[redacted]

Copy to:
02
NMCCA
NAMALA
NAVMACJUDIC
JAD
ADC (Capt. Casey)
AGC (LT. Crochetiere)

IN UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Before Panel No. 3

UNITED STATES *Appellee* v. **Tony E. Dedolph** Chief Petty Officer (E-7), U.S. Navy *Appellant*	NMCCA Case No. 202100150 **APPELLANT'S MOTION FOR SECOND ENLARGEMENT OF TIME** Tried at Washington Navy Yard, D.C., 3 October – 6 October 2023 before a General Court-Martial convened by Commander, Navy Region Mid-Atlantic, Captain Derek Butler, U.S. Navy presiding

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

COMES NOW the undersigned, pursuant to Rule 23.2(c)(2) of this Court's Rules of Appellate Procedure, and respectfully moves for a second enlargement of time to file a brief and assignments of error. The current due date is March 16, 2024. The number of days requested is thirty. The requested due date is April 15, 2024.

Status of the case:

1. The Record of Trial was docketed on December 19, 2023.
2. The Moreno III date is June 19, 2025.
3. Appellant was sentenced to eighteen months' confinement and is presently not confined.
4. The record consists of 571 transcribed pages.

Undersigned counsel respectfully requests this Court grant a second enlargement of time to allow counsel time to finish review of the record, develop a case strategy with Appellant, and draft a brief.

Respectfully submitted.

[redacted]

Major, U.S. Marine Corps
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity

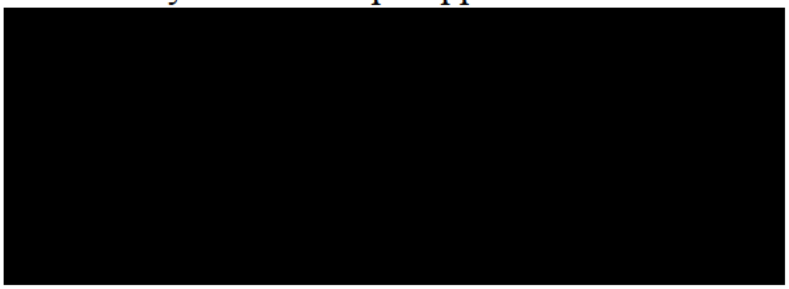
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify the foregoing was electronically delivered to the Court, uploaded into the Court's case management system, and electronically delivered to Director, Appellate Government Division on March 12, 2024.



Major, U.S. Marine Corps
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity



IN UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Before Panel No. 3

UNITED STATES *Appellee* v. **Tony E. Dedolph** Chief Petty Officer (E-7), U.S. Navy *Appellant*	NMCCA Case No. 202100150 **SUBMISSION OF CASE WITHOUT SPECIFIC ASSIGNMENTS OF ERROR** Tried at Washington Navy Yard, D.C., 3 October – 6 October 2023 before a General Court-Martial convened by Commander, Navy Region Mid-Atlantic, Captain Derek Butler, U.S. Navy presiding

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

COMES NOW Appellant, by and through counsel, and states that I have carefully examined the record of trial in the case, that I do not admit that the findings and sentence are correct in law and fact, and that I submit the case on its merits to this Honorable Court without specific assignments of error or brief.

Respectfully submitted,

[redacted]

Major, U.S. Marine Corps
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify the foregoing was electronically delivered to the Court, uploaded into the Court's case management system, and electronically delivered to Director, Appellate Government Division on April 15, 2024.

[redacted]

Major, U.S. Marine Corps
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
[redacted]

United States Navy-Marine Corps
Court of Criminal Appeals

UNITED STATES ***Appellee*** **v.** **Tony E. DEDOLPH** **Chief Petty Officer (E-7)** **U.S. Navy** ***Appellant***	**NMCCA NO. 202100150R** **Special Panel 3** **ORDER** ***Designating Special Panel***

On behalf of the Chief Judge of the United States Navy-Marine Corps Court of Criminal Appeals, as of 26 June 2024, this case is assigned to the following Special Panel:

Senior Judge KISOR
Judge MIZER
Judge THORNHILL

FOR THE COURT:

[redacted]

MARK K. JAMISON
Clerk of Court

Copy to:
45 (Maj Keefe);
46;
02;

This opinion is subject to administrative correction before final disposition.

United States Navy-Marine Corps Court of Criminal Appeals

Before
KISOR, MIZER, and THORNHILL
Appellate Military Judges

UNITED STATES
Appellee

v.

Tony E. DEDOLPH
Chief Petty Officer (E-7), U.S. Navy
Appellant

No. 202100150 (f rev)

Decided: 27 June 2024

Appeal from the United States Navy-Marine Corps Trial Judiciary

Military Judges:
Hayes C. Larsen (motions, trial)
Derek D. Butler (rehearing on sentence)

Sentence adjudged 6 October 2023 by a general court-martial convened at Washington Navy Yard, Washington, DC, consisting of a military judge sitting alone. Sentence in the Entry of Judgment: reduction to E-4, confinement for 18 months, and a bad-conduct discharge.[1]

For Appellant:
Major Joshua P. Keefe, USMC

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[1] Appellant was credited with having served 701 days of pretrial confinement.

28 June 2024: Administrative Correction to reflect that Appellant was initially sentenced by officer and enlisted members.

This opinion does not serve as binding precedent under NMCCA Rule of Appellate Procedure 30.2(a).

PER CURIAM:

A military judge sitting as a general court-martial convicted Appellant, pursuant to his pleas of conspiracy to commit assault and obstruct justice, violation of a lawful general order, involuntary manslaughter, and obstruction of justice, in violation of Articles 81, 92, 119, and 134, Uniform Code of Military Justice (UCMJ).[2] A panel of officer and enlisted members sentenced Appellant to reduction to E-1, confinement for 10 years, and a dishonorable discharge

We affirmed the findings on initial appeal, but set aside the sentence and returned to record to the Judge Advocate General of the Navy for remand to an appropriate convening authority with authority to order a sentencing rehearing.[3] At the rehearing, a military judge sentenced Appellant to reduction to E-4, confinement for 18 months, and a bad-conduct discharge.

After careful consideration of the post-appellate record, submitted without assignment of error, and having already affirmed the findings, we have determined that the sentence is correct in law and fact and that no error materially prejudicial to Appellant's substantial rights occurred.[4]

The sentence is **AFFIRMED**.

FOR THE COURT:

[redacted]

Clerk of Court

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[2] 10 U.S.C. §§ 881, 892, 919, and 934 (2016).

[3] *United States v. Dedolph*, No. 202100150, 2022 CCA LEXIS 658 (N-M. Ct. Crim. App. Nov. 15, 2022) (unpublished).

[4] Articles 59 & 66, Uniform Code of Military Justice, 10 U.S.C. §§ 859, 866.

REMAND

THERE WERE NO REMANDS

SUPPLEMENTAL COURT-MARTIAL ORDER

DEPARTMENT OF THE NAVY
NAVY-MARINE CORPS APPELLATE REVIEW ACTIVITY
1254 CHARLES MORRIS STREET SE
WASHINGTON NAVY YARD DC 20374-5214

IN REPLY REFER TO
5814
40/202100150
22 Aug 24

From: Branch Head, Court-Martial Records Branch, Navy and Marine Corps Appellate Review Activity (Code 40)
To: Commanding Officer, Navy and Marine Corps Appellate Leave Activity

Subj: NOTIFICATION OF COMPLETION OF APPELLATE REVIEW IN THE GENERAL COURT-MARTIAL OF CHIEF PETTY OFFICER TONY E. DEDOLPH, USN – NMCCA 202100150

Ref: (a) Article 57 (c)(2), UCMJ
(b) Article 66, UCMJ
(c) RCM 1209 (a)(1)(B)(i), MCM 2019

Encl: (1) Post Trial Action of 15 Nov 23 and Entry of Judgment of 11 Dec 23
(2) NMCCA Opinion of 27 Jun 24
(3) Naval Clemency and Parole Board Clemency Review Waiver of 28 Jul 24

1. Chief Petty Officer (CPO) Tony E. Dedolph, USN – NMCCA 202100150 was arraigned, tried, and convicted at a General Court-Martial convened by the Commander, Navy Region Mid-Atlantic, Norfolk, Virginia. CPO Dedolph was sentenced on 6 October 2023, to reduction to E-4, confinement for 18 months, and to be discharged from the United States Navy with a Bad Conduct Discharge, Encl (1).

2. In an Opinion issued on 27 June 2024, the United States Navy-Marine Corps Court of Criminal Appeals (NMCCA) affirmed the findings and the sentence of the General Court-Martial, Encl (2).

3. The 18 months confinement awarded to CPO Dedolph triggered an automatic review by the Naval Clemency & Parole Board (NC&PB). However, CPO Dedolph, through his appellate defense counsel, waived clemency by the NC&PB on 28 July 2024, Encl (3).

4. Accordingly, all appellate review is now complete in the General Court-Martial of CPO Tony E. Dedolph, USN – NMCCA 202100150. The Bad Conduct Discharge awarded to CPO Dedolph may now be executed.

5. Point of contact for this matter is Ms. [redacted] Branch Head, Court-Martial Records Branch; Navy and Marine Corps Appellate Review Activity, [redacted]

[redacted]

Copy to:
Appellant
SJA of Navy Region Midlant
RLSO Midlant
File