[redacted]

CERTIFIED RECORD OF TRIAL

(and accompanying papers)

of

Eubanks	Justin	B	[redacted]	CDR
(Last Name)	*(First Name)*	*MI*	*(DoD ID No.)*	*(Rank)*

ATC Mobile	U.S. Coast Guard	Alameda, CA
(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)

U.S. Coast Guard Force Readiness Command

(Unit/Command of Convening Authority)

Tried at

Alameda, CA	On	11 July 2023
(Place or Places of Trial)		*(Date or Dates of Trial)*

Companion and other cases: NONE

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

[redacted]

CONVENING ORDER

THERE IS NO CONVENING ORDER:

Referred for trial to the General Court-Martial to be tried by judge alone pursuant to Article 16(c)(2)(A) UCMJ.

CHARGE SHEET

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, MI)	2. EMPLID	3. GRADE OR RANK	4. PAY GRADE
Eubanks, Justin, B	[redacted]	CDR	O-5

5. UNIT OR ORGANIZATION	6. CURRENT SERVICE	
	a. INITIAL DATE	b. TERM
Aviation Training Center Mobile	04-09-2012	Indefinite

7. PAY PER MONTH			8. NATURE OF RESTRAINT OF ACCUSED	9. DATE(S) IMPOSED
a. BASIC	b. SEA/FOREIGN DUTY	c. TOTAL		
~~$7,869.30~~ $10,861.80	0.00	$7,869.30	N/A	N/A

II. CHARGES AND SPECIFICATIONS

10. [redacted] 7/11/2022

See attached continuation page.

III. PREFERRAL

11a. NAME OF ACCUSER (Last, First, Middle Initial)	b. GRADE	c. ORGANIZATION OF ACCUSER
[redacted]	E-5	USCG District 11
d. SIGNATU[redacted]		e. DATE (YYYYMMDD) 20220512

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 12th day of May, 2022, and signed the foregoing charges and specifications under oath that he is a person subject to the Uniform Code of Military Justice and that he either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his knowledge and belief.

Anthony Myers
Typed Name of Officer

Legal Service Command (LSC-LMJ)
Organization of Officer

LCDR / O-4
Grade

Commissioned Officer
Official Capacity to Administer Oaths
(See R.C.M. 307(b)—must be commissioned officer)

[redacted]

DD FORM 458, MAY 2000 PREVIOUS EDITION IS OBSOLETE.

12.

On 13 May , 2022, the accused was informed of the charges against him and of the name of the accuser known to me *(See R.C.M. 308(a)). (See R.C.M. 308 if notification cannot be made.)*

[redacted]
Typed Name of Immediate Commander

Aviation Training Center Mobile
Organization of Immediate Commander

CDR / O-5
Grade

[redacted]
Signature

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13.

The charges were received at 1227 hours, 13 May , 2022 at Aviation Training Center Mobile
Designation of Command or Officer exercising

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

[redacted]
Typed Name of Officer

~~FOR THE~~ [1]

CAPT / O-6
Grade

[redacted]
Signature

Commanding Officer, Aviation Training Center Mobile
Official Capacity of Officer Signing

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY	b. PLACE	DATE *(YYYYMMDD)*
U.S. COAST GUARD FORCECOM	Norfolk, VA	20221007

Referred for trial to the General court-martial convened by U.S. COAST GUARD FORCECOM,

Convening Order No. 01-22, subject to the following instructions: [2]

NONE By XXXXXXXXXXXX of XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
Command or Order

[redacted]
Typed Name of Officer

Acting Commander, FORCECOM
Official Capacity of Officer Signing

Captain (O-6)
Grade

[redacted]
Signature

15.

On 17 OCTOBER , 2022, I caused to be served a copy hereof on the above named accused.

Anthony J. Myers
[redacted]

LCDR/ O-4
Grade or Rank of Trial Counsel

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

DD FORM 458, (BACK), MAY 2000

DD 458 – Continuation Sheet
United States v. CDR Justin Eubanks

CHARGE I: Violation of the UCMJ, Article 120c (Indecent Exposure)

Specification 1: In that Commander Justin Eubanks, U.S. Public Health Service, on active duty, assigned to and serving with the U.S. Coast Guard, did, on board Aviation Training Center Mobile, Alabama, on or about December 2020, intentionally expose his genitalia, in an indecent manner, to wit: touching his penis while in the view of HS3 [redacted]

Specification 2: In that Commander Justin Eubanks, U.S. Public Health Service, on active duty, assigned to and serving with the U.S. Coast Guard, did, on board Aviation Training Center Mobile, Alabama, on or about October 2020 to February 2021, intentionally expose his genitalia, in an indecent manner, to wit: touching his penis while in the view of Ms [redacted]

CHARGE II: Violation of the UCMJ, Article 128 (Assault Consummated by a Battery)

Specification: In that Commander Justin Eubanks, U.S. Public Health Service, on active duty, assigned to and serving with the U.S. Coast Guard, did, at or near Aviation Training Center Mobile, Alabama, on or about November 2019, unlawfully hug and kiss Ms. [redacted]

CHARGE III: Violation of the UCMJ, Article 133 (Conduct Unbecoming an Officer and Gentleman)

Specification 1: In that Commander Justin Eubanks, U.S. Public Health Service, on active duty, assigned to and serving with the U.S. Coast Guard, did, at or near Mobile, Alabama, on divers occasions from on or about January 2019 to February 2021, commit certain acts, to wit: communicating unwanted messages of a sexual nature to female coworkers, and that, under the circumstances, his conduct was unbecoming an officer and gentleman.

Specification 2: In that Commander Justin Eubanks, U.S. Public Health Service, on active duty, assigned to and serving with the U.S. Coast Guard, did, on board Aviation Training Center Mobile, Alabama, on divers occasions from on or about December 2019 to November 2020, commit a certain act, to wit: masturbating in a government office, and that, under the circumstances, his conduct was unbecoming an officer and a gentleman.

DD 458 – Continuation Sheet
United States v. CDR Justin Eubanks

CHARGE I: Violation of the UCMJ, Article 120c (Indecent Exposure)

Specification 1: In that Commander Justin Eubanks, United States Public Health Service, on active duty, assigned to and serving with the United States Coast Guard, did, at or near Spanish Fort, Alabama, on or about 21 September 2022, intentionally expose his genitalia, in an indecent manner, to wit: intentionally displaying his genitalia through a glass door to [redacted], a United States Postal Service Employee engaged in the performance of her official duties.

Specification 2: In that Commander Justin Eubanks, United States Public Health Service, on active duty, assigned to and serving with the United States Coast Guard, did, at or near Spanish Fort, Alabama, on or about 06 October 2022, intentionally expose his genitalia and buttocks, in an indecent manner, to wit: posing nude in view of [redacted] a United States Postal Service Employee engaged in the performance of her official duties and in view of other residences and the public street.

CHARGE II: Violation of the UCMJ, Article 128 (Assault Consummated by a Battery)

Specification: In that Commander Justin Eubanks, United States Public Health Service, on active duty, assigned to and serving with the United States Coast Guard, did, at or near Spanish Fort, Alabama, on or about 06 October 2022, unlawfully touch the hand of [redacted] with his hand and without her consent.

CHARGE III: Violation of the UCMJ, Article 133 (Conduct Unbecoming an Officer and Gentleman)

Specification: In that Commander Justin Eubanks, United States Public Health Service, on active duty, assigned to and serving with the United States Coast Guard, did, at or near Spanish Fort, Alabama, on or about 04 October 2022, commit certain acts, to wit: leave a note with his name, phone number and a hand drawn penis in his mailbox for [redacted], a United States Postal Service Employee engaged in the performance of her official duties, and that, under the circumstances, said acts were unbecoming an officer and gentleman.

[redacted]

WITHDRAWN DISMISSED WITH PREJUDICE IAW RCM 604 JUNE 12, 2023

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, MI)	2. EMPLID	3. GRADE OR RANK	4. PAY GRADE
Eubanks, Justin, B	[redacted]	CDR	O-5

5. UNIT OR ORGANIZATION	6. CURRENT SERVICE	
	a. INITIAL DATE	b. TERM
Aviation Training Command (ATC) Mobile	04-09-2012	Indefinite

7. PAY PER MONTH			8. NATURE OF RESTRAINT OF ACCUSED	9. DATE(S) IMPOSED
a. BASIC	b. SEA/FOREIGN DUTY	c. TOTAL		
~~$7,869.30~~ $10,861.30	~~[redacted]~~ [redacted] 7/11/2023	$7,869.30	N/A	N/A

II. CHARGES AND SPECIFICATIONS

10. THE CHARGE: Violation of UCMJ, Article 120c (Indecent Exposure)

Specification: In that Commander Justin Eubanks, United States Public Health Service, on active duty, assigned to and serving with the United States Coast Guard, did at or near Spanish Fort, Alabama, on one or more occasions from on or about September 2022 to on or about October 2022, intentionally expose his genitalia, in an indecent manner, to wit: intentionally standing nude in the view of Ms. [redacted] an individual who did not consent to the viewing of his genitalia.

III. PREFERRAL

11a. NAME OF ACCUSER (Last, First, Middle Initial)	b. GRADE	c. ORGANIZATION OF ACCUSER
[redacted]	O-3	Legal Service Command

d. SIGNATURE OF ACCUSER	e. DATE (YYYYMMDD)
[redacted]	20230621

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 21st day of June, 2023, and signed the foregoing charges and specifications under oath that he is a person subject to the Uniform Code of Military Justice and that he either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his knowledge and belief.

[redacted]
Typed Name of Officer

Office of the Chief Prosecutor
Organization of Officer

Lieutenant Commander / O-4
Grade

Commissioned Officer
Official Capacity to Administer Oaths
(See R.C.M. 307(b)—must be commissioned officer)

[redacted]
Signature

12.

On 23 June, 2023, the accused was informed of the charges against him and of the name of the accuser known to me *(See R.C.M. 308(a)). (See R.C.M. 308 if notification cannot be made.)*

[redacted]
Typed Name of Immediate Commander

Aviation Training Center (ATC) Mobile
Organization of Immediate Commander

Commander / O-5
Grade

[redacted]
Signature

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13.

The charges were received at 1144 hours, 23 June, 2023 at Aviation Training Center (ATC) Mobile
Designation of Command or Officer exercising

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

[redacted]
Typed Name of Officer

~~FOR THE~~ [1] XXXXXXXXXXXXXX

Captain / O-6
Grade

Commanding Officer, ATC Mobile
Official Capacity of Officer Signing

[redacted]
Signature

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY	b. PLACE	DATE *(YYYYMMDD)*
U.S. COAST GUARD FORCECOM	Alameda, CA	20230624

Referred for trial to the General court-martial convened by U.S. COAST GUARD FORCECOM,

Convening Order No. 01-22, dated 07 OCT 2022, subject to the following instructions: [2]

None By XXXXXXXXXX of XXXXXXXXXXX
Command or Order

Jeffrey K. Randall
Typed Name of Officer

Commander, FORCECOM
Official Capacity of Officer Signing

Rear Admiral / O-7
Grade

[redacted]
Signature

15.

On 26 June, 2023, I caused to be served a copy hereof on the above named accused.

Anthony J. Myers
Typed Name of Trial Counsel

LCDR / O-4
Grade or Rank of Trial Counsel

[redacted]
Signature

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

TRIAL COURT MOTIONS & RESPONSES

U.S. COAST GUARD TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **J. B. EUBANKS** **CDR / O-5** **U.S. PUBLIC HEALTH SERVICE**	**DEFENSE MOTION FOR APPROPRIATE RELIEF** **(Compel Discovery)** **23 DEC 22**

MOTION

Pursuant to Article 46, UCMJ, 10 U.S.C. § 846, R.C.M. 701, the Defense requests this Court compel the Government to discover and produce the below requested matters which are relevant to CDR Eubank's preparation.

BURDEN

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

FACTS

1. CDR Eubanks is a member of the Public Health Service Commissioned Corps, assigned to the Coast Guard. He is charged with a single specification of violation of Article 120c, UCMJ 10 U.S.C. § 920c, and two specifications of violation of Article 133, UCMJ, 10 U.S.C. § 933. (Charge Sheet, May 12, 2022)

2. CAPT [redacted] is the Staff Judge Advocate to the Convening Authority, Force Readiness Command. He is also the Commanding Officer of the Legal Service Command. (Encl. A).

3. CDR [redacted] at the time, was also assigned to the Legal Service Command, and acted as the Staff Judge Advocate for Aviation Training Center Mobile, CDR Eubanks's unit and subordinate command to Force Readiness Command. (Encl. A).

4. CDR [redacted] is the detailed assistant trial counsel assigned to this case.

5. In discovery, the Defense received in discovery a thread of emails between CAPT [redacted] and CDR [redacted] discussing the pre-Article 32 advice in CDR Eubanks's case. This email read:

[redacted]

(Encl. A).

6. On December 14, 2022, the Defense requested discovery of the attachments referenced in this email. This included the referenced comments and track changes made by CDR [redacted] (Encl. B.)

7. On December 16, 2022, the Government responded that "With regards to internal tracked changes of word documents this request is denied, outside the scope of R.C.M. 701 and is attorney work product." (Encl. C).

8. In the Defense's initial discovery request, the Defense requested the following:

[redacted]

(Encl. D).

9. To which the Government responded that "[redacted]." (Encl. E.)

10. Later, having received evidence of the police report referenced in the Defense's initial discovery request, the Defense again requested:

[redacted]

(Encl. B).

11. To which the Government responded: "[redacted]." (Encl. C).

12. These were in addition to the Defense's requests in standard discovery wherein it requested "All Coast Guard Investigative Service (CGIS) Interim Reports of Investigations" and "[a]ny evidence that is material to either the issue of guilt or the sentence, regardless of admissibility, that is known to the Government or agents thereof, including closely aligned civilian authorities or entities, witnesses, or consultants." (Encl. B.)

12. The Defense also requested in initial discovery:

[redacted]

(Encl. D).

13. The Government responded that "This request is overbroad. It seeks information that is outside the scope of R.C.M. 701. Written communications between CDR Curran and HS3 [redacted] have been previously provided." (Encl. E).

14. Defense also requested in initial discovery:

> Under reference (i), evidence of any direct communication, whether written or oral, in any way relating to this case, between any member of the Office of the Commandant or his staff, the Deputy Commandant for Mission Support, the Public Health Service, the Office of the Judge Advocate General, and…the Convening Authority
>
> [and]
>
> All communications, including emails, text messages, phone records, or associated attachments, between the members of the Legal Service Command, the USPHS, representatives from HSWL-SC, or the USPHS Liaison, regarding the investigation, charges, disposition or any possible disposition of CDR Eubanks's case. This requests specifically includes, but is not limited to, communications regarding potential plea agreements, resignations, or other administrative consequences of this case.

(Encl. D).

15. The Government provided the respective responses that: that they were "unaware of any such materials" and "Previously provide. [sic] The Government is aware of its continuing discovery obligations. If/when any such additional responsive material becomes available, it will be provided." (Encl. E.)

16. In discovery however, the Defense received the following email from then-CDR [redacted] to CDR [redacted] the Legal Service Command Executive Officer, which read:

(Encl. F).

17. RADM [redacted] is the Director of Health Safety and Worklife for the U.S. Coast Guard. (Encl. G.)

18. RADM [redacted] is the Senior Advisor to the Assistant Secretary for Health and the U.S. Surgeon General. (Encl. H.)

19. CDR Eubanks revoked consent to seize and search his cell phone. This prompted several communications between CGIS, ATC and the Forensic Lab, culminating in the issuance of search authorization on February 25, 2022 that was ultimately used to search CDR Eubanks's phone. (Encl. I.)

20. In initial Discovery, the Defense requested:

(8) A complete copy of the search authorization and its accompanying proceedings related to the search CDR Eubanks's cell phone. This request specifically includes any affidavits or forms submitted by law enforcement to the military judge, draft affidavits exchanged between the Legal Service Command and law enforcement, emails and their attachments between the legal service command and the military judge related to this authorization, or any other material related to this authorization viewed or received by the military judge prior to issuing the authorization.

(Encl. D.)

21. To which the Government responded, "Previously provided." (Encl. E.)

22. The Defense has yet to receive material surrounding the execution of the 25 February, 2022 search authorization.

LAW

a. Congress provides in Article 46 liberal discovery at court-martial that exceeds constitutional protections.

Parties to a court-martial "shall have equal opportunity to obtain witnesses and other evidence." 10 U.S.C. §846. Trial counsel's obligation under Article 46, U.C.M.J., includes "removing obstacles to defense access to information and providing such other assistance as may be needed to ensure that the defense has an equal opportunity to obtain evidence." *United States v. Stellato*, 74 M.J. 473, 481 (C.A.A.F. 2015)(internal quotations omitted.). The Rules for Court-Martial pertaining to discovery aid in the enforcement of Article 46 and "[t] parties should evaluate pretrial discovery and disclosure issues in light of [its] liberal mandate. *Id.* (quoting *United States v. Roberts*, 59 M.J. 323, 325 (C.A.A.F. 2004).

The President amended Rule for Courts-Martial 701(a)(2)(A)(1) in 2018 "to broaden the scope of discovery, requiring disclosure of items that are "relevant" rather than "material" to defense preparation of a case[…]." App.15-9, Manual for Courts-Martial (2019 ed.). Upon defense request and after service of charges:

> The Government shall permit the defense to inspect any book, papers, documents, data, photographs, tangible objects, buildings, or places, or copies of portions of these items, if the item is within the possession, custody or control of military authorities and – (i) *the item is relevant to defense preparation* [...].

R.C.M. 701(a)(2)(A)(i)(emphasis added).

As a threshold matter, discoverable material is "in the possession, custody or control of military authorities. *Id.* Generally speaking, items held by an entity outside of the Federal Government does not satisfy this required. *Stellato*, 74 M.J. at 484. However, trial counsel "cannot avoid R.C.M. 701(a)(2)(A) by the simple expedient of leaving relevant evidence to repose in the hands of another agency while utilizing his access to it in preparing his case for trial." *Id.* (internal citations and quotation marks omitted). Even evidence not in the physical possession of the prosecution team might still be within its possession, custody, or control. *Id.* Examples include instances when: "(1) the prosecution has both knowledge of and access to the object; (2) the prosecution has the legal right to obtain the evidence; (3) the evidence resides in another agency but was part of a joint investigation; and (4) prosecution inherits a case from a local sheriff's office and the object remains in the possession of the local law enforcement." *Id.* at 485. Evidence may still be in the "possession, custody or control of military authorities" even if it does not fit neatly into any of these scenarios, and the determination must rest on the particular facts of each case. *See Stellato*, 74 M.J. 484-85.

Evidence is material if it is of "such a nature that knowledge of [it] would affect a person's decision-making process." Black's Law Dictionary 1066 (9th ed. 2009). Evidence may be relevant and even material despite its inadmissibility at trial. *See United States v. Luke*, 69 M.J. 309, 320 (CA.A.F. 2011)(internal citations omitted). Material evidence includes inadmissible materials "that would assist the defense in formulating a defense strategy." *Id.* The standard for determining "relevance" to defense preparation is still broader than that.

ARGUMENT

a. The attachments to CDR DeStefano's email containing draft pre-trial advice is subject to discovery and is relevant to Defense preparation—it must be disclosed.

As a preliminary matter, the Staff Judge Advocate nor his subordinates, are "counsel" to this case, and therefore the talismanic incantation of "work-product" does not bar discovery under R.C.M. 701. R.C.M. 701(f) states "[n]othing in this rule shall require disclosure or production of notes, memoranda, or similar working papers prepared by *counsel* and *counsel's* assistants and representatives." R.C.M. 701(f), Manual for Courts-Martial 2019 (emphasis added). R.C.M. 502(d) discusses "counsel" in a Courts-Martial. Nowhere does this section discuss the Staff Judge Advocate—only that of Trial and Defense Counsel. Accordingly, the material requested by the Defense is subject to disclosure under R.C.M. 701.

This material is also relevant to the Defense's preparation as it likely contains evidence giving rise to a subsequent motion of law. Here, CDR DeStefano, who at the time was the defacto Staff Judge Advocate to the Special Court-Martial convening authority is preparing the pre-preferral advice for CAPT [redacted] to provide to the General Courts-Martial Convening Authority. In the development of this advice, CDR [redacted] apparently consulted with CDR [redacted]—Trial Counsel in this case. CDR [redacted], through what appears to be an offline discussion with CDR [redacted] gave input on the Staff Judge Advocate's advice. This caused CDR [redacted] to modify the draft advice at CDR [redacted] suggestion in an effort to avoid information being "disclosed" *i.e.* discovery to the Defense. It is relevant for the Defense to know what was changed and *why*. If significant enough, this could lead to a motion to dismiss or disqualify either the Trial Counsel, the Staff Judge Advocate or both. This material is therefore relevant to Defense preparation and must be disclosed.

b. Communications between the Government and local authorities regarding CDR Eubanks are relevant to Defense preparation and must be disclosed.

The Government has knowledge of and has disclosed evidence of civilian investigation into CDR Eubanks for misconduct which allegedly occurred subsequent to the charged offenses—material which came from an external source. In turn, the Defense requested the Government's communications with the local authorities surrounding this evidence. If these communications were through CGIS, those interaction would certainly have been documented in a supplemental Report of Investigation, or emails. This material is relevant to Defense preparation as the communications between the Government and the local authorities would likely indicate whether CDR Eubanks is facing additional charges, is subject to additional investigation, or if there are other potential witnesses in this case. This is relevant to Defense preparation as it effects CDR Eubanks decision on whether to offer to plead guilty, whether to accept a plea offer, what he would be willing to plead or stipulate to and whether or not testify on the merits or at sentencing. Without this information, CDR Eubanks is blind to whether a plea or any other decision his trial team makes could impact a civilian criminal case waiting in the wings. Moreover, any evidence related to subsequent misconduct would be material to how CDR Eubanks's prepares a sentencing case. Accordingly, this information influences nearly every aspect of his preparation, and if known by Government unfairly advantages them. Accordingly, because this material is in the Government's possession and relevant to CDR Eubank's preparation it must be disclosed.

c. The willingness of a witness to participate are relevant to Defense preparation and thus subject to discovery.

Here, the Defense requested evidence in the Government's possession regarding the participation of any alleged victims in this case. The Government's indication that this request is "overbroad" is concerning as that would seem to indicate they are unaware of who constitutes as

a victim in their charges. Presumably, they are aware of the victims they have alleged in this case, specifically with regard to Specification 1 of Charge III. This request therefore clearly orients the Government to what the Defense is seeking—notes, emails, text messages or any other documentation regarding the desires or not, of these witnesses to participate in these proceedings. Material concerning victim participation is clearly relevant to Defense preparation and must be disclosed, as do other relevant contents of Trial Counsel's discussions with these individuals e.g. inconsistent statements, *Brady* material, or any material falling under R.C.M. 914 or *Jenks*.

d. CDR [redacted] email indicates that communications between Senior Public Health Service officials, including those assigned to the Coast Guard, are involved in the disposition of CDR Eubanks's case. The extent of their involvement or communications with the Convening Authority are subject to discovery and the Trial Counsel must make a diligent search for this information.

Both of the defense's requests are clear—communications between the Public Health Service and the Coast Guard are relevant to Defense preparation. Here, there is tangible evidence that a Senior Public Health Service Officer and *the* senior most Public Health Service Officer assigned to the Coast Guard had interest in the outcome of CDR Eubanks's case even before charges were preferred. This evidence was in the Government's possession, yet the Government never followed up on the extent of these communications or whether either of these individuals ever reached out to the Convening Authority directly about the case. At a minimum, RADM Thomas's influence reached the Legal Service Command and the Deputy Staff Judge Advocate to the Convening Authority. The Government's response does not indicate that they have conducted the diligent search necessary under the Rule. This material is relevant to Defense preparation as influence from senior officers regarding the outcome of CDR Eubanks's case

raises the specter of unlawful command influence, and could give rise to a motion under that theory.

e. CDR Eubanks's cell phone was searched after consent was revoked, all communications and circumstances surrounding this revocation and subsequent search are relevant to Defense preparation.

Here, CDR Eubanks revoked consent to search his phone to his command. Which in turn required ATC Mobile to notify CGIS and prompted S/A [redacted] not to immediately give the phone back, but seek a 2nd Search Authorization. All material surrounding this transaction including the search authorization itself, is relevant to Defense preparation to evaluate the lawfulness of this interaction and could support a motion to suppress. The Government has yet to disclose the referenced communication nor the search authorization ultimately used to search CDR Eubanks's phone.

RELIEF REQUESTED

The Defense respectfully requests the Court compel the Government to discover the requested material, or, as appropriate order the Government to perform the diligent search for the material required under R.C.M. 701.

EVIDENCE

The Defense offers the following evidence in support of this motion:

A. CDR [redacted] email thread of May 2, 2022

B. Defense Supplemental Discovery Req. of December 14, 2022

C. Government Resp. to Defense Supplemental Discovery Request of December 16, 2022

D. Defense Initial Discovery Request of October 28, 2022

E. Government Resp. to Defense Initial Disc. Req. of November 14, 2022

F. CDR [redacted] email of April 22, 2022

G. RADM Dana Thomas Biography

H. RADM Susan Orsega Biography

I. CGIS ROI Excerpt

ORAL ARGUMENT

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

CAOUETTE.STEVEN.PAUL.JR.[redacted] Digitally signed by CAOUETTE.STEVEN.PAUL.JR.[redacted]
Date: 2023.01.20 13:53:12 -08'00'

S. P. CAOUETTE
LCDR, USCG
Detailed Defense Counsel

Appellate Exhibit VII
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COAST GUARD TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **JUSTIN B. EUBANKS** **CDR / O-5** **U.S. PUBLIC HEALTH SERVICE**	**GOVERNMENT RESPONSE TO DEFENSE MOTION FOR APPROPRIATE RELIEF (Compel Discovery)** **13 January 2023**

RESPONSE

The Government opposes the Defense's Motion for appropriate relief, specifically to compel discovery. For the reasons detailed below, the Government respectfully requests this Court enter an order denying the Defense motion.

BURDEN OF PROOF

As the moving party, pursuant to R.C.M. 905(c)(1) and R.C.M. 701, the Defense bears the burden of proof and persuasion to demonstrate that the requested materials are within the custody or control of the government and discoverable under some provision of R.C.M. 701.

FACTS

This case was referred to a General Court-Martial on 10 October 2022. The accused, CDR Eubanks, is charged with a single charge and specification of Article 120c (Indecent Exposure) and two specifications of Article 133 (Conduct Unbecoming an Officer and Gentlemen). The discovery timeline, including the written evidence provided by Defense Counsel, specifically Ex. B – E. in the Motion for Appropriate Relief (Compel Discovery) is adopted.

Subsequent to the charged misconduct that occurred between January 2019 and February 2021, Ms. [redacted], a postal worker, made a report to the Baldwin County Sheriff's Office on 07

Appellate Exhibit IX
Page 1 of 8

October 2022, that while she was in uniform discharging her duties that CDR Eubanks exposed his naked body on two occasions and grabbed her arm in September and October 2022. (Encl. 1)

LEGAL BACKGROUND

The Government is required to produce records within the possession, custody or control of military authorities that are "relevant to defense preparation." R.C.M. 701(a)(2). C.A.A.F. has held that trial counsel's obligation under Article 46, UCMJ, includes removing "obstacles to defense access to information" and providing "such other assistance as may be needed to ensure that the defense has an equal opportunity to obtain evidence." *U.S. v. Williams*, 50 M.J. 436, 442 (C.A.A.F. 1999).

R.C.M. 701 is explicitly based on Federal Rule of Crim. P. 16(a). See, *Analysis* to R.C.M. 701. The requirement to disclose all documents and information "material to the preparation to the defense" is a carbon copy from FRCP 16(a).

The Court of Military Appeals has repeatedly construed these provisions in unison and cited to the federal rule and federal case law when applying RCM 701. See, *U.S. v. Stone*, 40 M.J. 420, 422 (C.M.A. 1994), citing to *U.S. v. Lloyd,* 992 F.2d 348, 351 (D.C.Cir.1993); *U.S. v. Charles*, 40 M.J. 414, 417 (C.M.A. 1994), citing to *Lloyd*, 992 F.2d at 351 and Fed.R.Crim.P. 16(a)(1)(C).

Accordingly, both in federal criminal courts and military courts, "materiality is a necessary prerequisite to discovery. *U.S. v. Ness*, 652 F.2d 890, 892 (9th Cir.1981); *U.S. v. Marshall*, 532 F.2d 1279 (9th Cir.1976).

In interpreting the "material to the preparation of the defense" provision of Fed.R.Crim.P. 16(a), "[t]he courts of appeals have displayed remarkable uniformity in concluding that it is not enough that what is sought "bears some abstract logical relationship to the issues in the case."

U.S. v. Ross, 511 F.2d 757, 762 (5th Cir. 1975). Rather, a showing of materiality requires "a strong indication that it will 'play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal.'" *U.S. v. Lloyd*, 992 F.2d 348, 351 (D.C. Cir. 1993), quoting *U.S. v. Caicedo–Llanos*, 960 F.2d 158, 164 n. 4 (D.C.Cir.1992); *U.S. v. Ross*, 511 F.2d 757, 762–63 (5th Cir.1975) (emphasis added). This significant alteration may take place in a myriad of ways, such as "uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal." *Lloyd* at 351 (citations omitted)." *U.S. v. Goris*, 876 F.3d 40, 44–45 (1st Cir. 2017).

When analyzing materiality, a court should focus first on the charging document itself which sets out the issues to which the defendant's theory of the case must respond. *U.S. v. George*, 786 F. Supp. 56, 58 (D.D.C. 1992).

Materiality is, to some degree, a sliding scale; when the requested documents are only tangentially relevant, the court may consider other factors, such as the burden on the government that production would entail or the national security interests at stake, in deciding the issue of materiality. *See id.* at 763; *Poindexter,* 727 F.Supp. at 1473. It may also be relevant that the defendant can obtain the desired information from other sources. *See Ross,* 511 F.2d at 763. *George* at 58.

Where the defense presents no facts whatsoever indicating that the information would have actually helped prove his defense, the Court should deny a motion to compel discovery. *U.S. v. Caro*, 597 F.3d 608, 621 (4th Cir. 2010). *See also, U.S. v. Mandel,* 914 F.2d 1215, 1219 (9th Cir.1990) ("Neither a general description of the information sought nor conclusory allegations of materiality suffice; a defendant must present facts which would tend to show that the Government is in possession of information helpful to the defense.").

It is a settled issue that the government generally need not produce documents that are in the possession, custody, or control of a separate state or local government agency. See *Stellato,* 74 M.J. 484; *U.S. v. Poulin*, 592 F. Supp. 2s. 137, 142-143 (D. Me. 2008); *U.S. v. Libby* 429 F.Supp. 3, 6 (D.D.C. 2006); *U.S. v. Marshall,* 132 F.3d 63, 68 (D.C.Cir.1998).

In order to warrant the production of state records not in the possession or control of the government, the defense must show that the state records contain material which is relevant and necessary. Under R.C.M. 703(f)(1), "[e]ach party is entitled to the production of evidence which is relevant and necessary."

Additionally, there are limits to what is required of the government. The "prosecutor's obligation... is to remove obstacles to defense access to information.... These obligations, however, do not relieve the defense of its responsibility to specify the scope of its discovery request." *U.S. v. Williams*, 50 M.J. 436 (C.A.A.F. 1999).

Ultimately, courts have made clear that discovery is not a tool for a broad "fishing expedition;" the defense must establish that the requested evidence exists and articulate how it is relevant and material. *See U.S. v. Rodriguez*, 60 M.J. 239 (C.A.A.F. 2004); See *U.S.. v. Abrams*, 50 M.J. 361, 362 (C.A.A.F. 1999); *U.S. v. Briggs*, 48 M.J. 143 (C.A.A.F. 1998); *U.S. v. Franchia*, 32 C.M.R. 315, 320 (U.S.C.M.A. 1962).

ANALYSIS

The Government asks the Court to deny the motion to compel discovery. The Defense has not met its burden to establish the requested discovery contains evidence relevant and necessary to the Defense preparation. The Defense has requested five categories of discovery some of which have been produced and many of which have not been adequately established as relevant.

1. The attachments to CDR DeStefano's email containing draft pre-trial advice.

First, the track changes in draft documents provided to the Staff Judge Advocate by his staff are protected from discovery by R.C.M. 701(f) as they would qualify as writing and other written instruments prepared by counsel as well as attorney-client privileged under M.R.E. 502.

Further, Defense counsel has failed to articulate why any of the requested information is relevant or material in the preparation of their case. Instead of articulating with specificity and a focus on the charges how track changes on pre-decisional advice would be helpful, the defense broadly asserts speculative possibilities. Ultimately, only the final advice, signed by the Staff Judge Advocate was provided to the Convening Authority (which has been disclosed). (Encl 2). Interim products that were not shared with any member of the prosecution, nor the Convening Authority, are irrelevant and not material. This is a fishing exercise based on the highly speculative assertions that track changes from a staff attorney to his boss *could* establish that a senior officer acted improperly in his discharge of duties. The Defense request should be denied.

2. Communications between the Government and local authorities regarding CDR Eubanks.

While it may be helpful to CDR Eubanks to leverage discovery rights in one criminal case to get information the Defense is not entitled to under the law in a separate criminal investigation, that desire does not make matters material to this criminal case. The Government has not provided notice, nor does the Government intend to introduce evidence that CDR Eubanks allegedly pressing his naked body against a glass door and exposed his naked body to a postal woman in separate occasions in September and October 2022. The Government did provide the Baldwin County Sheriff's Office report with Ms. [redacted] statement. Her contact information was provided. The Defense knows the allegations of the subsequent, and unrelated, misconduct. Those allegations from September and October of 2022 and communications

between the Government and local authorities have minimal, not the strong indicator of value, that materiality requires when focusing on the charges in this case that serve as the basis for discovery rights. Therefore, communications between the Government and local authorities regarding law enforcement investigations or the strength of a separate case arising are outside the scope of RCM 701. The Defense request should be denied.

3. The willingness of a witness to participate.

Any documents or writings involving a witness' willingness to participate have been provided to Defense Counsel. Of note, Ms. [redacted] was previously a named victim on two Charges, that have now been dismissed by the Convening Authority. Communications regarding her willingness to participate was provided to Defense Counsel prior to the Article 32 proceeding and the Defense Counsel's waiver of the Article 32. (Encl. 3) The Government is aware of its requirement under RCM 701 and 914, as well as *Brady* and *Jenks,* and will continue to comply with its obligations.

4. Communications between the Senior Public Health Service officials, including those assigned to the Coast Guard, with the Convening Authority.

Here, the Defense broadly requests any communications, written or oral, involving communications between a litany of officials, including all Senior Public Health Service officials and the Convening Authority, relating in any way about this case. This is a broad request for documents that the Defense has no evidence exist. Nor are these documents related to the merits of the case. The Government's willingness to go above and beyond RCM 701 responsibilities do not indicate that there were any communications between the Convening Authority and Senior Public Health Service officials.

This request is posited by the Defense as a means to look for UCI. Inherent in this brief and unsupported justification by the Defense is the fact that there is no evidence of UCI in this

case. A senior officer assigned to the Coast Guard from the Public Health Service is charged with serious misconduct at General Court-Martial. It is not nefarious that Senior Public Health Service officials would have questions regarding the timing and status of the disposition and resolution of these allegations. However, without evidence that these officials ever did reach out to the Convening Authority, this is merely a fishing exercise.

Without waving the objection, the Government is unaware of any communications responsive to this request. Should any indication of UCI become know to the Government, or communications that may implicate UCI, the Government will provide that information to the Defense as required by R.C.M. 701.

5. 2nd Search Authorization.

The Government has provided responsive materials and met the Defense Request.

RELIEF REQUEST

The United States asks this Court deny the Defense's Motion for Appropriate Relief, specifically to compel discovery. The Government respectfully requests oral argument.

CURRAN.KRISTEN.ANN.[redacted]

KRISTEN A. CURRAN
Commander, USCG
Assistant Trial Counsel

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CERTIFICATE OF SERVICE

I certify that I have served or caused to be served a true copy (via e-mail) of the above on the Defense Counsel and the Military Judge on 13 January 2023.

Appellate Exhibit IX
Page 7 of 8

CURRAN.KRISTEN.ANN.[redacted] Digitally signed by CURRAN.KRISTEN.ANN.[redacted] Date: 2023.01.13 14:54:16 -08'00'

KRISTEN A. CURRAN
Commander, USCG
Assistant Trial Counsel

Appellate Exhibit IX
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U.S. COAST GUARD TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **J. B. EUBANKS** **CDR/O-5** **U.S. PUBLIC HEALTH SERVICE**	**DEFENSE MOTION FOR APPROPRIATE RELIEF (To Have the Military Judge Swear in Members & Witnesses)** **23 DEC 22**

MOTION

Pursuant to Rules for Courts-Martial (R.C.M.) 807 and 906, Manual for Courts-Martial (2019 ed.), as well as Article 136, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 936 (2016), and the Fifth Amendment to the U.S. Constitution, the Defense moves this Court to order that the Military Judge shall swear in all witnesses and members at trial.

SUMMARY

The UCMJ and the Rules for Courts-Martial do not require that the trial counsel swear in witnesses or members.[1] In fact, any judge advocate may administer the necessary oaths.[2] The custom of having trial counsel administer oaths at court-martial unnecessarily confers the perception of special authority and trustworthiness upon the prosecution and relegates the defense attorneys to a secondary role. Therefore, CDR Eubanks requests that the Military Judge

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[1] *See* Article 136, UCMJ, 10 U.S.C. § 936; R.C.M. 807. The Discussion under R.C.M. 807 in the Manual for Courts-Martial suggests forms of administering oaths wherein the trial counsel does swear witnesses and members; however, this section is published by the Department of Defense as a supplement to the Rules, and it does not have the force of law. Manual for Courts-Martial (2019 ed.), pt. I ¶. 4. Moreover, the oaths suggested are couched in the language of what "may" be used.

[2] Article 136, UCMJ, 10 U.S.C. § 936(a)(1) and (b)(1) (specifically including the military judge for a general court-martial).

administer all oaths in front of court members in his case. This is a question of preserving CDR Eubanks's right to due process and fundamental fairness.[3]

BURDEN

The Defense, as the moving party, bears the burden of proof on any factual issue the resolution of which is necessary to decide the motion by a preponderance of the evidence.[4]

FACTS

CDR Eubanks is charged with a single specification of Indecent Exposure in violation of Article 120c, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920c (2018) and two Specifications of Conduct Unbecoming an Officer in violation of Article 133, UCMJ, 10 U.S.C. § 133 (2018). The Defense presently expects that he will elect trial by members.

He is represented by two military defense counsel and no civilian attorneys. The Military Judge in his case is a judge advocate.

LAW

"Each witness before a court-martial shall be examined on oath."[5] The members of a court-martial must also take an oath "to perform their duties faithfully."[6] When administering oaths, "[a]ny procedure which appeals to the conscience of the person to whom the oath is administered and which binds that person to speak the truth, or, in the case of one other than a witness, properly to perform certain duties is sufficient."[7]

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[3] Service members are entitled to due process at trial by court-martial. *United States v. Graf*, 35 M.J. 450, 460 (C.A.A.F. 1992) (citing *Middendorf v. Henry*, 425 U.S. 24, 43 (1976)); *see also United States v. Culp*, 14 U.S.C.M.A. 199, 206 (1963) ("We have held that an accused shall not be denied 'fundamental fairness, shocking to the universal sense of justice [. . .].'").
[4] Article 42(b), UCMJ, 10 U.S.C. §842(b); R.C.M. 905(c)
[5] Article 42(a), UCMJ, 10 U.S.C. §842(a); R.C.M. 807(b)(1)(B)
[6] R.C.M. 807(a)(1)(A)
[7] R.C.M. 807(a)(2)

Neither the UCMJ nor the Rules for Courts-Martial require the trial counsel to administer the necessary oaths. In fact, all judge advocates, including the military judge of a general court-martial, are authorized to administer oaths for the purposes of military justice.[8] The Discussion to R.C.M. 807 suggests a process by which the trial counsel administers oaths to witnesses and members; however, these suggestions do not have the force of law."[9]

Service members are entitled to due process,[10] and courts must ensure the accused at court-martial is not denied fundamental fairness.[11]

ARGUMENT

No law requires trial counsel to swear in witnesses or members of a court-martial. Still, the Joint Trial Guide—which, like the Military Judge's Benchbook, is not a primary source of law[12]—contemplates having the trial counsel administer most oaths. Nevertheless, this Court should not allow custom or convenience to override CDR Eubanks's right to have a trial free from unnecessary signals of official bias toward the prosecution.

When trial counsel swears the members to their oath, they are extracting a commitment to "impartially try . . . the case of the accused."[13] But the impact of having the prosecutor secure such a commitment should not be discounted. The same impact occurs with respect to the oaths administered to every witness, including those called by the Defense.

When the military judge asks the prosecution to administer oaths, they confer upon the Government counsel a mantel of judicial authority above and beyond the traditional role of

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[8] Article 136, UCMJ, 10 U.S.C. § 936 (2016)
[9] Manual for Courts-Martial (2019 ed.), pt. I para. 4
[10] *Graf*, 35 M.J. at 460 (citations omitted)
[11] *See Culp*, 14 U.S.C.M.A. at 206
[12] *See United States v. Riley*, 72 M.J. 115, 122 (C.A.A.F. 2013)
[13] Joint Trial Guide Section V p. 45–46.

parties to a criminal proceeding. The fact that we countenance this in the Navy is a historical anomaly. When one lawyer acts as counsel for the United States and for the accused—as they did for much of U.S. military history prior to the enactment of the UCMJ—it would make sense to have that person administer oaths.[14] This situation no longer exists.

Instead, this quirk now only serves to undermine CDR Eubanks's right to due process and the perception of judicial neutrality. It is conceivable and even likely that having Trial Counsel administer oaths could cause some or all of the members to infer the prosecutor's evidence and argument is inherently more trustworthy than anything put forward by the Defense. There is no rational basis to take that chance, because there is an easily available remedy—having the Military Judge swear in the Members and witnesses at trial.

RELIEF REQUESTED

The Defense requests that the Military Judge administer all oaths before the Members in CDR Eubanks's court-martial.

EVIDENCE AND ORAL ARGUMENT

Unless this Motion is granted without hearing by this Court, the Defense requests an Article 39(a) session to present oral argument.

CAOUETTE.STEVEN.PAUL.JR.[redacted] Digitally signed by CAOUETTE.STEVEN.PAUL.JR.[redacted] Date: 2022.12.23 07:18:52 -08'00'

S. P. CAOUETTE
LCDR, USCG
Detailed Defense Counsel

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[14] Article 69, U.S. Articles of War (1806) (Tellingly, the provision that trial counsel swear in witnesses and provision that they serve as counsel for both parties are contained in the same Article).

COAST GUARD TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES v. JUSTIN B. EUBANKS CDR / O-5 U.S. PUBLIC HEALTH SERVICE	GOVERNMENT RESPONSE TO DEFESE MOTION FOR APPROPRIATE RELIEF (Military Judge Swear in Witnesses) 13 January 2022

The United States makes no argument for or against the Defense's motion for the Military Judge to swear in witnesses. The United States defers to this Honorable Court's decision.

MYERS.ANT[redacted] Digitally signed by MYERS.ANTHONY.J[redacted]
HONY.J[redacted]
[redacted] Date: 2023.01.13 16:10:47 -08'00'

Anthony J. Myers
LCDR, USCG
Trial Counsel

I certify that I have served or caused to be served a true copy (via e-mail) of the above on the Military Judge and Defense Counsel on 13 January 2022.

MYERS.ANT[redacted] Digitally signed by MYERS.ANTHONY.J[redacted]
HONY.J[redacted]
[redacted] Date: 2023.01.13 16:11:12 -08'00'

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Trial Counsel

Appellate Exhibit XIV
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U.S. COAST GUARD TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **J. B. EUBANKS** **CDR/O-5** **U.S. PUBLIC HEALTH SERVICE**	**DEFENSE MOTION FOR APPROPRIATE RELIEF** **(Findings Instruction on Unanimity)** **23 DEC 22**

MOTION

Pursuant to R.C.M. 906(a) and 920(c), as well as Fifth and Sixth Amendments of the U.S. Constitution, the Defense moves this Court to instruct the members, prior to findings, that conviction of the accused on any specification may be had only upon the unanimous agreement of all panel members.

BURDEN

As the moving party, the Defense bears the burden of persuasion, and the burden of proof on facts necessary to resolve the motion is by a preponderance of evidence. R.C.M. 905(c).

FACTS

CDR Eubanks is charged with a single specification of Indecent Exposure in violation of Article 120c, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920c (2018) and two Specifications of Conduct Unbecoming an Officer in violation of Article 133, UCMJ, 10 U.S.C. § 133 (2018). The Defense presently expects that he will elect trial by members.

LAW

a. At court-martial, an accused is entitled to due process, which includes the right to have his guilt or innocence determined by an impartial panel of members.

The Due Process Clause of the Fifth Amendment applies to a service member at a court-martial. *United States v. Graf*, 35 M.J. 450, 460 (C.A.A.F. 1992) (citing *Middendorf v. Henry*, 425 U.S. 25, 43 (1976)). "As a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel." *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001) (internal citations omitted). An impartial panel is, in fact, the "sine qua non for a fair court-martial." *United States v. Modesto*, 43 M.J. 315, 318 (C.A.A.F. 1995).

b. Due process, as applied to trial by court-martial, requires the unanimous consent of the members for the conviction of an accused, because non-unanimous verdicts are not impartial.

The Sixth Amendment to the Constitution requires trial by "an impartial jury." U.S. Const. Amend. VI. The Supreme Court has recently held that an "impartial jury" "must reach a unanimous verdict in order to convict." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1421 (2020) (citing *Thompson v. Utah*, 170 U.S. 343, 351 (1989)).

The Fourteenth Amendment to the Constitution ensures that individual States may not "deprive any person of life, liberty, or property, without *due process* of law." U.S. Const. Amend. XIV. (emphasis added). The right to trial before an impartial jury in criminal cases "is a fundamental right and hence must be recognized by States as part of their obligation to extend due process of law." *Duncan v. Louisiana*, 391 U.S. 145, 154 (1968). Being as it is an essential feature of an impartial jury, unanimity is thus also required in State criminal trial verdicts under the Due Process Clause of the Fourteenth Amendment. *See Ramos*, 140 S. Ct. at 1397.

While a court-martial panel is not a Sixth Amendment jury, it must be impartial to satisfy due process. *Wiesen*, 56 M.J. at 174. Part and parcel of being "impartial," *Ramos* instructs, is a unanimous finding as to a criminal offense. *See Ramos,* 140 S. Ct. at 1395. A non-unanimous verdict calls into question whether the panel of members was truly impartial, or whether they truly applied the reasonable doubt standard correctly: surely a doubt is reasonable it is held by one or two out of eight members who were hand-selected by the Convening Authority as the "best qualified" for the duty and subjected to a rigorous voir dire process to ferret out potential bias. An impartial court-martial panel—the only one permitted by due process—is one that reaches its decision unanimously.

Of course, Articles 51 through 53 of the UCMJ, as well as R.C.M. 921(c)(2) require only three-fourths agreement of the members present for a finding of guilty as to any charge. 10 U.S.C. §851-53 (2019). However, courts are not bound by unconstitutional statutory or executive enactments. *Norton v. Shelby County*, 118 U.S. 425 (1886) ("An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is in legal contemplation, as inoperative as though it had never been passed.") As written, the provisions of the UCMJ and the Manual for Courts-Martial which purport to allow non-unanimous court-martial verdicts violate the Constitution.

Nonetheless, the Navy-Marine Corps Court of Criminal Appeals has recently declined to apply these protections to Courts-Martial. *See United States v. Causey*, 82 M.J. 574 (N-M Ct. Crim. App. 2022). However, the Court of Appeals for the Armed Forces has yet to rule directly on this issue, instead denying review of *Causey* on procedural grounds—not the merits. *United States v. Causey*, 2022 CAAF LEXIS 618, 2022 WL 4182420 (C.A.A.F., Aug. 26, 2022)

ARGUMENT

CDR Eubanks is entitled to trial by an impartial panel. As discussed above, impartiality requires unanimity. Should he be found guilty of the charged offenses, CDR Eubanks faces a number of consequences otherwise attendant only to State and Federal criminal convictions. He faces three years in confinement if convicted of the charge and both of its specifications. Likewise, if convicted of Charge I and its Specification, federal law requires CDR Eubanks's inclusion in the National Sex Offender Registry and notification to States for potential sex offender registration. *See* 34 U.S.C. §20931; DoDI 1325.07.

The Court of Appeals for the Armed Forces has long held that due process requires court-martial panels to be impartial. Recently, in *Ramos v. Louisiana*, the Supreme Court affirmed that impartially rendering a verdict as to any serious criminal offense requires unanimity. In order to preserve CDR Eubanks's right to due process, including his right to an impartial panel, the Court must instruct the panel that conviction requires the unanimous agreement of all members. While this instruction is inconsistent with statutory and regulatory rules, it is required by the Constitution.

RELIEF REQUESTED

The Defense moves the Court to charge the panel, prior to findings, that their verdict must be reached by unanimous agreement of all the members, and proposes the following instruction:

> The Accused may be convicted of each charged specification only upon your unanimous agreement that the Government has proved every element of each offense by legal and competent evidence beyond a reasonable doubt. A guilty verdict as to any charge and specification must represent the considered judgment of each member. A verdict of guilty must be unanimous. The accused may not be found guilty by you unless all eight of you unanimously find that the government has proved his guilt beyond a reasonable doubt.

ORAL ARGUMENT

The Defense does not request oral argument.

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Appellate Exhibit XVII
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COAST GUARD TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **JUSTIN B. EUBANKS** **CDR / O-5** **U.S. PUBLIC HEALTH SERVICE**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO DISMISS FAILURE TO STATE AN OFFENSE (Charge I)** **13 January 2023**

RELIEF SOUGHT

The Sixth Amendment right to a trial by jury has long been held inapplicable to courts-martial. Binding precedent dictates that this Court should deny the Defense's motion requesting its proposed panel instruction.

BURDEN

As the moving party, pursuant to R.C.M. 905(c)(1) and R.C.M. 703, the Defense bears the burden of proof and persuasion.

FACTS

The accused is charged, among other charges, indecent exposure. Charges were referred to a general court-martial which necessitates a panel of eight officers. For a guilty verdict of any specification, three-fourths of the members must concur that the Government proved each element of an offense beyond a reasonable doubt. UCMJ Article 52; R.C.M. 921(c)(2).

LAW

In order to provide for the common defense, the Constitution gives Congress the power to raise, support and regulate the Armed Forces. U.S. CONST. Art 1, § 8, cl. 14. 11. Under this authority, Congress enacted the Uniform Code of Military Justice (UCMJ). 10 U.S.C. §§ 801-946a (Articles 1 – 146a). The UCMJ is the code of military criminal law and procedure applicable to all U.S. military members worldwide. In exercising this Constitutional authority to establish a disciplinary system for the military, Congress created court-martial panels under Article 29, UCMJ, and authorized non-unanimous verdicts in Article 52, UCMJ.

The Sixth Amendment's Impartial Jury Clause provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall be previously ascertained by law....

The question, then, is whether for purposes of the Sixth Amendment a court-martial is a "criminal prosecution." Middendorf v. Henry, 425 U.S. 25, 34 (1976).

The Fifth Amendment's Due Process Clause states, "No person shall be ... deprived of life, liberty, or property, without due process of law...." In determining what process is due at a court-martial, 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. 1, § 8." Middendorf, 425 U.S. at 43 (1976). Whether a certain process must be provided at a court-martial under the Due Process Clause, courts must ask "whether the factors militating in favor of [the process] are so extraordinarily weighty as to overcome the balance struck by Congress" where it did not provide for the certain process. Id. at 44.

The Supreme Court has thus far upheld the court-martial system put in place by Congress holding that the Sixth Amendment right to a trial "by an impartial jury" does not extend to military courts-martial. See, Ex parte Milligan, 71 U.S. 2, 123 (1866); Ex Parte Quirin, 317 U.S. 1 (1942). ("[T]he framers of the Constitution doubtless meant to limit the right of trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth."); *see also* United States v. Dowty, 60 M.J. 163, 169 (C.A.A.F. 2004) ("Congress has established the court-martial as the institution to provide military justice to service members.").

ARGUMENT

"Although the Constitution, in accord with our English roots, guarantees a trial by jury in civilian criminal trials, this fundamental right is inapplicable to members of the armed forces." 1 FRANCIS A. GILLIGAN & FREDERIC I. LEDERER, COURT-MARTIAL PROCEDURE § 15-11.00 (Matthew Bender & Co. 3rd ed. 2006); United States v. New, 55 M.J. 95, 103 (C.A.A.F. 2002) ("Accused servicemembers are tried by a panel of their superiors, not by a jury of their peers."[1]). Because *Ramos*, cited by the Defense, only addressed unanimity in the context of the Sixth Amendment's impartial jury trial right, and there is no jury trial right in courts-martial, then necessarily, there can be no right to a unanimous jury verdict at a court-martial.[2] *See* United States v. Pritchard, 82 M.J. 686 (A.C.C.A. 2022) (holding no violation of Sixth Amendment or Fifth Amendment equal protection clause); United States v. Causey, 82 M.J. 574 (N.M.C.C.A. 2022); United States v. Westcott, 2022 WL 807944 (A.F.C.C.A. Mar. 17, 2022). *Ramos* does not explicitly or implicitly extend the scope of the Sixth Amendment to courts-martial. Further, due process under the Fifth Amendment does not require unanimous court-martial verdicts, and this

[1] Section 523 of the National Defense Authorization Act for Fiscal Year 2022 will amend Article 25, UCMJ, to permit the randomized selection of qualified personnel available to the convening authority for detail as members. However, the bill provides that the randomized selection process created by the President "may include parameter controls that... allow for controls based on military rank." H.R. 4350, 117th Cong. (2021), https://congress.gov/bill/117th-congress/house-bill/4350/text

[2] Service members are entitled to an impartial panel; however, the Court of Appeals for Armed Forces; has grounded that right "as a matter of due process," United States v. Wiesen, 56 M.J. 172 (C.A.A.F. 2001) (citing United States v. Mack, 41 M.J. 51, 54 (C.M.A. 1994), not the Sixth Amendment. Neither the C.A.A.F. nor any service court of criminal appeals has found that a fair and impartial panel means that it must render a unanimous finding.

court must give deference to the balance struck by Congress in Article 52 of the UCMJ where they decided the military conditions necessitate non-unanimous verdicts. *See* United States v. Anderson, 2022 WL 884313 (A.F.C.C.A. Mar. 26, 2022).

Stare decisis requires this Court to follow precedent of our higher courts. Military trial courts remain bound by longstanding precedent from superior courts that the Sixth Amendment right to a jury trial is inapplicable to trial by courts-martial. Thus, the Government requests this Court deny the Defense's request for a panel instruction requiring the panel to reach a unanimous verdict.

ORAL ARGUMENT

The United States does not request oral argument.

[redacted]
ANTHONY J. MYERS
LCDR, USCG
Trial Counsel

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CERTIFICATE OF SERVICE

I certify that I have served or caused to be served a true copy (via e-mail) of the above on the Defense Counsel and the Military Judge on 13 January 2023.

[redacted]
Anthony J. Myers,
LCDR, USCG
Trial Counsel

Appellate Exhibit XIX
Page 3 of 3

U.S. COAST GUARD TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **J. B. EUBANKS** **CDR/O-5** **U.S. PUBLIC HEALTH SERVICE**	**DEFENSE MOTION TO SUPPRESS** **(Unwarned Statements)** **23 DEC 22**

MOTION

Pursuant to 10 U.S.C. §31, Article 31, UCMJ, R.C.M. 905(d)(3), and Mil. R. Evid. 304 and 305, the Defense moves to suppress statements made by CDR Eubanks to the Coast Guard Investigative Service (CGIS).

BURDEN

Upon motion by the Defense to suppress statements of the Accused under Mil. R. Evid. 304, the prosecution has the burden of establishing the admissibility of the statement. Mil. R. Evid. 304(f)(6). The military judge must find by a preponderance of the evidence that the Accused's statement was made voluntarily before the statement may be admitted into evidence. Mil. R. Evid. 304(f)(7).

FACTS

1. CDR Eubanks is a member of the Public Health Service Commissioned Corps, assigned to the Coast Guard. He is charged with a single specification of violation of Article 120c, UCMJ 10 U.S.C. § 920c, and two specifications of violation of Article 133, UCMJ, 10 U.S.C. § 933. (Charge Sheet, May 12, 2022)

2. On January 29, 2021, CGIS began investigating allegations that CDR Eubanks had sent a lewd picture to an enlisted Coast Guardsman at Sector Mobile. (Encl. A.)

3. From February 4, 2022 to February 5, 2022, CGIS Special Agents interviewed seven different witnesses, several of whom accused CDR Eubanks of sending images of a penis to their cellular phones and along with other communications. (Encl. A)

4. Of note, HS3 BM was interviewed twice. During her second interview, which took place at 0903 on February 5th, HS3 BM alleged she saw CDR Eubanks exposing himself in the window of the ATC Mobile Pharmacy. *Id.*

5. That same day, at 1822, CGIS Special Agents [redacted] and [redacted] interviewed CDR Eubanks. (Encl. B, C).

6. During CDR Eubanks interview, the Special Agents provided CDR Eubanks with an Article 31b Rights Advisement form which stated in relevant part:

[redacted]

(Encl. B).

7. At no point prior to the waiver of rights did Special Agent [redacted] or Special Agent [redacted] clarify these accusations. (Encl. C).

8. At minute 11:30 of the interview, Special Agent [redacted] asks CDR Eubanks "at this time are you willing to discuss the offenses under investigation and make a statement without talking to a lawyer and without having a lawyer present with you?" (Encl. C).

9. At minute 11:44, CDR Eubanks responds [redacted]

10. Special Agent [redacted] then responds:

[redacted]

(Encl. C).

11. To which CDR Eubanks responded: "[redacted]" (Encl. C.)

12. CDR Eubanks eventually signs the rights waiver. (Encl. B, C).

13. Immediately thereafter, CDR Eubanks and Special Agent [redacted] engaged in the following exchange:

[redacted]

13. At minute 16:55, CDR Eubanks states "..[redacted]

(Encl. D).

13. At minute 17:00, again, after CDR Eubanks had already signed the rights waiver, Special Agent [redacted] tells CDR Eubanks this is about "inappropriate text messages to people you work [redacted] (Encl. C).

LAW

Article 31 prohibits a person subject to the UCMJ from interrogating or eliciting a statement from a service-member accused or suspected of an offense without first (1) informing them of the nature of the accusation, (2) advising them that they have the right to remain silent, and (3) advising them that anything they say may be used against them later at court-martial. 10 U.S.C. §31(b). These rights warnings are required when (1) a person subject to the UCMJ (2) interrogates or requests any statement (3) from an accused or person suspected of an offense, and (4) the statements pertain to the offense of which the person is suspected or accused. *United States v. Jones*, 73 M.J. 357, 361 (C.A.A.F. 2014). "No statement obtained from any person in violation of this Article [...] may be received in evidence against him in a trial by court-martial." 10 U.S.C. §831(d). Military Rules of Evidence 304 and 305 implement the Code's prescription.

> Article 31(b) requires that an accused must be informed of the nature of the allegations and Courts apply a three part test in determining the sufficiency of this information.

An adequate rights advisement under Article 31(b) must include "informing the accused or suspect of the nature of the accusation." Mil. R. Evid. 305(c)(1)(A). The purpose of informing a suspect of the nature of the accusation "is to orient him to the transaction or incident in which he is allegedly involved." *United States v. Rogers*, 47 M.J. 135, 137 (C.A.A.F. 1997)(citing *United States v. Rice*, 11 U.S.C.M.A. 524, 526 (1960)(internal citations omitted). While "technical nicety" is not required in this regard, *id.*, the suspect "must be informed of the general nature of the allegation, to include the area of suspicion that focuses the person toward the circumstances surrounding the event." *Simpson*, 54 M.J. at 284.

Among the factors to be considered in reviewing the sufficiency of this requirement are "whether the conduct is part of a continuous sequence of events, whether the conduct was within the frame of reference supplied by the warnings, or whether the interrogator had previous knowledge of the unwarned offenses. *Id.* (internal citations omitted). "Necessarily, in questions of

this type, each case must turn on its own facts." *United States v. Pipkin*, 58 M.J. 358, 361(CA.A.F. 2003)(quoting *United States v. Nitschke*, 12 C.M.A. 489, 492 (1961)).

For example, in *United States v. Blayton*, the Navy Marine Courts-Court of criminal appeals found that a rights waiver listing "misconduct" did not sufficiently orient the accused to the circumstances surrounding an otherwise unreferenced "bribery" allegation. Here, the accused was notified of (1) playing strip dice with students; (2) the assault of a student by an instructor; and (3) the sexual harassment of students and (4) misconduct. The Court found that even though actions amounting to bribery occurred at the same time "the language "and misconduct" was overly broad. While the frame of reference provided by the language "and misconduct" fairly includes allegations of bribery, it would also fairly include *any* UCMJ violation. Thus, although bribery would be included in the frame of reference provided, this overbroad frame of reference provided the appellant no orientation as to the nature of the bribery allegations so "as to allow him intelligently to weigh the consequences of responding to [Captain S's] inquiries." *United States v. Blanton*, No. 201400419, 2019 CCA LEXIS 198, at *27 (N-M Ct. Crim. App. May 8, 2019) (*unpublished). See Also United States v. Nelson*, 80 M.J. 748 (N-M Ct. Crim. App. 2021); *United States v. Reynolds*, 16 37 C.M.R. 23 (C.M.A. 1966), *United States v. Johnson*, 43 C.M.R. 160 (U.S. C.M.A. 1971) *United States v. Willeford*, 5 M.J. 634, 636 (A.F.C.M.R. 1978).

A statement obtained in violation of Article 31 is involuntary and inadmissible against an Accused at court-martial pursuant to Mil. R. Evid. 304 and 305.

Under Mil. R. Evid. 305, a "statement obtained from the accused in violation of an accused's rights under Article 31 is involuntary and is therefore inadmissible against the accused," subject to a handful of exceptions. Mil. R. Evid. 305(c)(1). The Government bears the burden to establish compliance with the rights warning requirements by a preponderance of the evidence. Mil. R. Evid. 304(e); *see also United States v. Simpson,* 54 M.J. 281, 283 (C.A.A.F. 2000).

Even if a rights warning is sufficient for one charge, Courts will regularly preclude the portions of a statement related to the unwarned offenses. *See Generally, United States v. Nelson*, 82 M.J. 336 (C.A.A.F. 2022).

ARGUMENT

The rights advisement provided by CGIS was deficient and deprived CDR Eubanks of even the bare minimum orientation to the offenses that the law requires.

CDR Eubanks's Article 31(b) rights warning lists "indecent conduct," "fraternization," and "failure to obey a lawful general order." None of which Special Agent [redacted] explained nor clarified prior to the waiver of rights. This failed to provide CDR Eubanks with even the general nature of the allegations ahead of his waiver as required by our Rules.

The Special Agents were aware of the indecent exposure allegation having learned of it only hours earlier from HS3 [redacted] Given that CGIS believed this encounter was non-consensual, this could not be considered a continuous course of conduct with "Fraternization" nor the nebulous catch all of an unspecified orders violation. To that end, even when CDR Eubanks asks for further clarification *after* the rights waiver, Special Agent [redacted] tells him "we're talking about inappropriate text messages to people you work with." Indecent exposure, nor any sex offense for that matter, was mentioned. The closest CGIS comes to orienting CDR Eubanks to this offense is "indecent conduct" —an offense which still falls short under the circumstances. Other than sharing the word "indecent," a warning for "indecent conduct" does not carry the same connotation of "indecent exposure" to a lay-person such as CDR Eubanks, and cannot be expected to orient him to the discrete incident the Agents were asking about. Given the significant possible consequence of sex offender registration that comes with "indecent exposure"—something even most lay people recognize. CDR was deprived of the ability to intelligently to weigh the consequences of responding to Special Agent [redacted] questions.

While Special Agent [redacted] specifically accuses CDR Eubanks of conduct unbecoming minutes *after* he signs the rights warning, it too is conspicuously absent from the warning. The offense of "fraternization" connotes a consensual, albeit inappropriate relationship—something wholly different than the conduct which the CGIS Special Agents actually suspected him of—sexual harassment. Nor does the ambiguous invocation of an orders violation help further save CGIS's deficiency here, as it has no amplifying information to indicate which order or regulation had been allegedly violated, e.g. the *Civil Rights* manual for example—rendering it nearly as meaningless as the "misconduct" at issue in *Blanton*.

At the time CDR Eubanks agreed to speak with CGIS he was clueless as to what he was suspected of, and fell short of even the bare minimum notice our Rules requires. Even when asked for clarification of the offenses so as to make a knowing and voluntary decision, CGIS capitalized on this ambiguity and told him he needed to "ante up", rather than providing the bare minimum notice required by our Courts to ensure an effective waiver of rights. This error merits relief and render CDR Eubanks's statements involuntary and thus inadmissible.

RELIEF REQUESTED

The Defense moves the Court to suppress the statements made by CDR Eubanks to the Coast Guard Investigative Service. If not suppressed in full, the Defense requests this Court suppress those statements relating to Charge I and its Specification.

EVIDENCE AND ORAL ARGUMENT

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

A. Excerpts from CGIS Report of Investigation

B. Rights Advisement of February 5, 2022

C. CDR Eubank's Interview Excerpt of February 5, 2022

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

CAOUETTE.STEVEN.PAUL.JR.[redacted] Digitally signed by CAOUETTE.STEVEN.PAUL.JR.[redacted] Date: 2023.01.20 13:52:28 -08'00'

S. P. CAOUETTE
LCDR, USCG
Defense Counsel

COAST GUARD TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **JUSTIN B. EUBANKS** **CDR / O-5** **U.S. PUBLIC HEALTH SERVICE**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO SUPRESS UNWARNED STATEMENTS** **13 January 2023**

RESPONSE

The Government opposes the Defense motion to suppress the Accused's statement to Coast Guard Investigative Service (CGIS) Special Agents. For the reasons detailed below, the Government respectfully requests this Court enter an order denying the Defense motion to suppress.

FACTS

1. This case was referred to a General Court-Martial on 10 October 2022. The accused, CDR Eubanks, the accused, is charged with one charge of Article 120c (Indecent Exposure) and two specifications of Article 133 (Conduct Unbecoming an Officer and Gentlemen).

2. Since 2000, CDR Eubanks served in the military as a Coast Guard Enlisted Reservist, U.S. Naval Officer, and as Commissioned Officer of the Public Health Service Commissioned Corps serving with the U.S. Coast Guard. See Enclosure (1).

3. CDR Eubanks scored in the ninety-first percentile (91%) on his ASVAB examine. See Enclosure (2).

4. CDR Eubanks completed the following General Mandated Training in 2019, 2020, and 2021 See Enclosure (3).

1) Preventing and Addressing Workplace Harassment;
2) Sexual Harassment Prevention (SHP);
3) DHS No Fear & Anti-Harassment Course.

4. CDR Eubanks took his first sexual harassment training in June 2000. See Enclosure (2).

5. CDR Eubanks has a Doctorate in Pharmacy. See Enclosure (2).

6. CDR Eubanks is a licensed pharmacist in the states of Florida and Georgia. See Enclosure (2).

7. Since 2012, CDR Eubanks served as a commissioned officer in the U.S. Coast Guard from 2012 to 2017 at Base Elizabeth City followed by ATC Mobile in 2017 to present. See Enclosure (2).

8. CDR Eubanks was promoted in 2017 to the rank of Commander (O-5). See Enclosure (2).

9. The U.S. Navy definition of fraternization "is an unduly familiar personal relationship between an officer member and an enlisted member that does not respect the difference in rank or grade. Relationships between officer members and between enlisted members that are prejudicial to good order and discipline or of a nature to bring discredit on the Naval service are unduly familiar and also constitute fraternization." U.S. Navy Regulations 1165.

10. On 29 January 2021, ATC Mobile's Executive Officer notified CGIS RAO Mobile, AL about an Anti-Harassment / Hate Incident (AHHI) investigation being opened regarding allegations of a lewd picture sent to HSC [redacted] from CDR Eubanks. See Enclosure (1).

11. On 3 February 2021, ATC Mobile's Commanding Officer contacted CGIS RAO Mobile, AL to initiate a criminal investigation into alleged misconduct by CDR Eubanks after notification that there may be additional Coast Guard victims. See Enclosure (1).

12. On 5 February 2021, S/A [redacted] and S/A [redacted] interviewed HS3 [redacted] In December 2021, HS3 [redacted] is in the car in her parking lot and gets a text message emoji of eyeballs. HS3 [redacted] looks around see CDR Eubanks standing in the pharmacy window. CDR Eubanks was completely nude. S/A [redacted] asks HS3 [redacted] [CDR Eubanks], [redacted]" See Enclosure (4).

13. On 5 February 2021, at approximately 1823 local, S/A [redacted] and S/A [redacted] interviewed CDR Eubanks. The interview concluded at 1953 local. See Enclosure (1).

14. At 1831 local, S/A [redacted] explained CDR Eubanks (JE) his 31(b) rights and S/A [redacted] gave CDR Eubanks a CGIS right warning certificate See Enclosure (1):

[redacted]

15. The CGIS rights warning certificate in front of CDR Eubanks and read by S/A [redacted] advised CDR Eubanks CGIS Special Agents wanted to speak to him about the following offense:

(1) Indecent Conduct; (2) Fraternization; and (3) Failure to Obey a General Order. See Enclosures (4 and 5).

16. CDR Eubanks was provided a rights warning waiver certificate, signing Section A. rights 1 to 5 affirming his understanding that the S/A made it clear that he had the following rights. See Enclosure (4 and 5).

[redacted]

17. CDR Eubanks (JE) had the following exchange with S/A [redacted] after signing section A of the CGIS rights warning certificate. See Enclosure (1):

[redacted]

18. CDR Eubanks signed Section B. Waiver, part 3 signature of interviewee that "I [CDR Eubanks] understand my rights as stated above. I am now willing to discuss the offense(s) under investigation and make a statement without talking to a lawyer first and without having a lawyer present with me. See Enclosure (4 and 5).

[redacted]

19. The interview lasted for approximately one hour and twenty-five minutes. This duration included a five-minute break wherein the CGIS agents left the room to compare notes and fetch CDR Eubanks a water. See Enclosure (1).

20. CDR Eubanks was forthcoming and spoke willingly with CGIS agents, even asserting at one point that he was [redacted] See Enclosure (1).

21. CDR Eubanks demonstrated an understanding that his statements could be used in future criminal proceedings, stating that he wanted certain facts "on the record." See Enclosure (1).

BURDEN

The Prosecution has the burden of establishing the admissibility of the Accused's statements, which must be met by a preponderance of the evidence. Military Rule of Evidence (M.R.E.) 304(f)(6)-(7).

LAW

Article 31, UCMJ Rights Waiver

Article 31(b), UCMJ, states that no person subject to the code may "interrogate . . . a person suspected of an offense without first informing him of the nature of the accusation." In regard to the military, Congress has provided military members, under Article 31(b), with a rights' warning requirement that is broader than those required by Miranda. Miranda v. Arizona, 384 U.S. 436 (1966). See United States v. Swift, 53 M.J. 439, 445 (C.A.A.F. 2000). Article 31(b), UCMJ, states that an accused may not be interrogated or requested to make a statement if that person is suspected of committing an offense without first informing the accused "of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial." "The Article 31(b) warning requirement provides members of the armed forces with statutory assurance that the standard military requirement for a full and complete response to a superior's inquiry does not apply in a situation when the privilege against self-incrimination may be invoked." Swift, 53 M.J. at 445.

Mil. R. Evid. 305(c)(1). A person subject to the code who is required to give warnings under Article 31(b) may not interrogate or request any statement from an accused or suspect without first informing him/her:

1. of the nature of the accusation;
2. that he/she has the right to remain silent; and,
3. that any statement he/she does make may be used as evidence against him/her.

An individual must be provided a frame of reference for the impending interrogation by being told generally about known offenses. "It is not necessary to spell out the details of his connection with the matter under inquiry with technical nicety." Informing the accused that he was suspected of larceny of ship's store funds was held sufficient to cover wrongful appropriation of store funds during an earlier period. United States v. Quintana, 5 M.J. 484 (C.M.A. 1978). See also United States v. Rogers, 47 M.J. 135 (C.A.A.F. 1997) (informing of "sexual assault" of one victim held sufficient to orient the accused to the offense of rape of a separate victim that occurred 4 years earlier). Advising the accused that he was going to be questioned about rape implicitly included the offense of burglary. In United States v. Kelley, the A.C.C.A determined that the burglary was a part of the accused's plan to commit the rape. Therefore, by informing the accused that he was suspected of rape, he was sufficiently oriented to the particular incident, even though it involved several offenses. 48 M.J. 677 (A. Ct. Crim. App. 1998).

To determine whether the warning provided to the Accused was sufficient to provide notice, the court must make the determination based on the totality of the circumstances on whether the accused was oriented towards the focus of the investigation. See United States v. Erie, 29 M.J. 1008 (A.C.M.R 1990) (a rights warning for suspected use of hashish was judged sufficient to cover distribution of hashish and cocaine) See also United State v. Pipkin, 58 M.J. 358 (C.A.A.F. 2003) (warning covering distribution of a controlled substance was sufficient to cover conspiracy to distribute). "The precision and expertise of an attorney in informing an accused of the nature of the accusation under Article 31 is not required. It is not necessary that an accused or suspect be advised of each and every possible charge under investigation, nor that the advice include the most serious or any lesser-included charges being investigated. Nevertheless, the accused or suspect must be informed of the general nature of the allegation, to include the area of suspicion that focuses the person toward the circumstances surrounding the event." United States v. Simpson, 54 M.J. 281, 284 (C.A.A.F. 2000).

The "key to the inquiry as to sufficiency of the notice requires considering the precise wording of the warning in the context "of the surrounding circumstances and the manifest knowledge of the accused."" United States v. Rice, 11 C.M.A. 524, 29 (1960) (citing United States v. Davis, 8 C.M.A. 196, 198 (1957). The "crux of the warning "lies in its requirement of a warning that the suspect is obliged to make no statement – not in its direction that he be informed of the nature of the offense under investigation." Id. at 137-138 (citing United States v. O'Brien, 3 C.M.A. 105, 109 (1953)). Accordingly, the failure "in this latter particular does not warrant the emphatic proscription." O'Brien, 11 C.M.R. 105, 109. The Court in O'Brien went on to state that "in the vast majority of instances a military person subjected to questioning will not long be in doubt as to the object of his interrogators. Although we believe that a failure to advise such a person of the nature of the offense of which he is accused or suspected may constitute error, it is at the same time one which will be deemed prejudicial in only the rare and unusual case." Id. at 109.

Voluntary Statement

An involuntary statement of the accused, or evidence derived therefrom, is generally inadmissible at trial, provided the accused makes a timely motion to suppress or other objection to its use. M.R.E. 304(a). Once the defense has made an appropriate motion or objection, the government bears the burden of establishing the admissibility of the evidence by a preponderance of the evidence. M.R.E. 304(f)(6)-(7). The voluntariness of a confession is a question of law. Arizona v. Fulimante, 499 U.S. 279, 287 (1991).

An "involuntary statement" is a statement "obtained in violation of the self-incrimination privilege or Due Process Clause of the Fifth Amendment, Article 31, or through the use of coercion, unlawful influence, or unlawful inducement." M.R.E. 304(a)(1)(A). There is no "talismanic definition of 'voluntariness'" that is "mechanically applicable to all statements. Schneckloth v. Bustamonte, 412 U.S. 218, 224 (1973). Whether a statement is involuntary depends on the "totality of the circumstances – both the characteristics of the accused and the details of the interrogation." Bustamonte, 412 U.S. at 226 (1973). In examining the totality of the circumstances, the "necessary inquiry is whether the confession is the product of an essentially free and unconstrained choice by its maker. If, instead, the maker's will was overborne and his capacity for self-determination was critically impaired, use of his confession would offend due process." United States v. Bubonics, 45 M.J. 93 (C.A.A.F. 1996), referencing Columbe v. Connecticut, 367 U.S. 568 (1961). Ultimately, courts have found that the "Voluntariness turns on whether an accused's 'will has been overborne.'" Lewis, 78 M.J. at 453 (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 225 (1973)).

In general, courts have approached coercion cases with a focus on the facts of each individual case. See e.g., United States v. Ellis, 57 M.J. 375, 391 (C.A.A.F. 2000); United States v. O'Such, 37 C.M.R. 157 (C.M.A. 1967); United States v. Murray, 45 M.J. 554 (N-M Ct. Crim. App. 1996). Factors to be considered include: the mental condition of the accused; the youth of the accused, or his low intelligence; the lack of any advice to the accused of his constitutional rights; the length of detention; the repeated and prolonged nature of the questioning; and the manner of the interrogation, including the use of physical punishment such as the deprivation of food or sleep. Bustamonte, 412 U.S. at 226; United States v. Lewis, 78 M.J. 447 (C.A.A.F. 2019); U.S. v. Sojfer, 47 U.S. 425, 429 (C.A.A.F. 1998); United States v. Bresnahan, 62 M.J. 137, 141 (C.A.A.F. 2005). In making a legal conclusion, the Court should assess the factual circumstances surrounding the confession, the psychological impact on the accused, and the legal significance of how the accused reacted. Id.; Culombe, 367 U.S. at 603. A finding of voluntariness does not depend on the presence or absence of a single controlling criterion; instead, courts must perform "a careful scrutiny of all surrounding circumstances." Bustamonte, 412 U.S. at 226.

ARGUMENT

I. CDR Eubanks was Provided Sufficient Notice and Orientation towards his Misconduct

Here, there is no disagreement that an article 31(b) Rights Advisement was required and that CGIS Special Agents initiated one. The issue at hand, alleged by Defense, is that CDR Eubanks' rights advisement deprived him of the "bare minimum orientation to the offenses." An

individual must be oriented towards the focus of the investigation. The C.A.A.F. stated "[i]t is not necessary that an accused be advised of each and every possible charge under investigation, nor that the advice include the most serious or any lesser-included charges being investigated." United States v. Pipkin, 58 M.J. 358 (C.A.A.F. 2003). See also United v. Kelley, 48 M.J. 677 (A. Ct. Crim. App. 1998). The Right Advisement CDR Eubanks signed states, "CGIS wanted to question me about the following offense(s) which I am suspected/accused." See Enclosure (4 and 5). The Special Agents properly advised CDR Eubanks about the suspected offenses they wanted to question him about. This advisement properly oriented CDR Eubanks towards the focus of the investigation. Therefore, no relief is warranted.

S/A [redacted] advised CDR Eubanks both in writing and orally of the alleged offenses the Special Agents wanted to discuss with him. See Fact 16. The offenses included: (1) Indecent Conduct; (2) Fraternization; and (3) Failure to Obey a General Order. On its face these three offenses more than sufficiently oriented CDR Eubanks to the area of suspicion for the interrogation. The Special Agents wanted to talk to CDR Eubanks about sexual interactions with subordinates, specifically lewd pictures and exposing himself to and potentially masturbating in front of HS3 [redacted] These three charges direct CDR Eubanks to the focus of the investigation and allow him to make an informed and intelligent decision whether he would or would not speak to the Special Agents about the alleged offenses. The Special Agents methodically went through the rights advisement form and CDR Eubanks acknowledged and signed each section. See Fact 16. After CDR Eubanks properly understood his rights and that he could stop talking to the Agents at any time during the interview, CDR Eubanks willingly stated "where do I sign?" The analysis should end at this point. On its face the three offenses the Agents told CDR Eubanks they suspected him of and wanted to discuss clearly should have oriented CDR Eubanks. Nevertheless, the three offenses are analyzed, *infra*.

(1) Indecent Conduct

Assuming *arguendo*, CDR Eubanks was only advised that he was suspected of indecent conduct, he would have been provided a sufficient orientation for the requested interview and could have waived his rights or not. The Manual for Courts-Martial defines indecent as "that form of immorality relating to sexual impurity, which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations." The C.A.A.F. in Simpson stated "[t]he accused must be informed of the general nature of the allegation, to include the area of suspicion that focuses the person toward the circumstances surrounding the event." 54 M.J. 281, 284 (C.A.A.F. 2000). Every suspected offense CDR Eubanks was advised on and that the Special Agents wanted to discuss with him could be substituted for indecent conduct. The warning about indecent conduct, alone without fraternization and failure to obey a general order, should have oriented CDR Eubanks towards the "area of suspicion." Id. CDR Eubanks told the CGIS agents he sent several female coworkers unsolicited pictures of his penis, masturbated often in his office, and stood on the pharmacy desk naked except for his socks, where medicine is placed and distributed to members, and flipped his penis back and forth intentionally exposing himself to the ATC Mobile base parking lot trying to get the attention of a Third-Class Petty Officer, who he knew was leaving for lunch, while at the same time hoping no one else was in the parking lot. The misconduct CDR Eubanks admitted to CGIS in his interview related to indecent sexual acts. No reasonable officer could consider such conduct to be "decent." The focus of the investigation was exactly what CDR Eubanks talked

about in his interview. Thus, no relief is warranted.

Defense further alleges a warning for "indecent conduct" does not carry the same connotation of "indecent exposure" to a lay person such as CDR Eubanks and cannot expect to orient him. CDR Eubanks has served in the military since 2000, he is not an 18-year-old non-rate two weeks removed from Cape May speaking to his new Chief. Indecent conduct and indecent exposure carry similar if not the same connotation to orient CDR Eubanks to the alleged misconduct. "The precision and expertise of an attorney in informing an accused of the nature of the accusation under Article 31 is not required." United States v. Simpson, 54 M.J. 281, 284 (C.A.A.F. 2000). See, e.g., United States v. Johnson, 43 CMR 160 (C.M.A. 1971). Again, the focus of the investigation was exactly what CDR Eubanks talked about in his interview: misconduct of a sexual nature towards subordinates. As the C.A.A.F. stated in Simpson "[i]t is not necessary that an accused be advised of each and every possible charge under investigation." 54 M.J. 281, 284 (C.A.A.F. 2000). What the C.A.A.F. did state must happen is the accused must be in informed of the "general nature of the allegation." Id. Defense fails to demonstrate how (1) Indecent Conduct; (2) Fraternization; and (3) Failure to Obey a General Order does not orient CDR Eubanks towards the focus of the investigation. Thus, no relief is warranted, and the interview must be admitted.

(2) Fraternization

Defense alleges the offense of fraternization "connotates a consensual inappropriate relationship" something wholly different than sexual harassment. The U.S. Navy defines fraternization to its servicemembers as misconduct that does not respect the difference in rank, which involve an officer and an enlisted member. Being advised about the suspicion of Fraternization sufficiently orients CDR Eubanks, a former U.S. Naval Officer who has been serving in the U.S. Military as an enlisted member and officer since 2000, to his alleged misconduct. Every single Coast Guard Active-Duty victim in this case is enlisted, from HSCS to HS3. Here, Defense attempts to parse language with the "precision and expertise of an attorney." See Simpson. The C.A.A.F. explicitly states that a rights warning informing the accused of the nature of the accusation does not require such "precision." Id. After being advised of indecent conduct and fraternization, CDR Eubanks is oriented towards suspected sexual misconduct towards enlisted members. At this point, CDR Eubanks, with a Doctorate degree, is properly oriented to the focus of the investigation and why the agents want to talk with him. CDR Eubanks had the freedom and understanding to make an intelligent decision whether or not to talk the investigators. Thus, no relief is warranted, and the interview must be admitted.

(3) Failure to Obey a General Order

Defense alleges the "ambiguous invocation of an orders violation" does not save CGIS's deficiency here. Defense claims CDR Eubanks could have interpreted Failure to Obey a General Order as a Civil Rights violation. CDR Eubanks has received Coast Guard Sexual Harassment training since 2000, served as a U.S. Naval Officer, and continually served in the U.S. Coast Guard since 2012. In 2019, 2020, 2021, CDR Eubanks completed: 1) Preventing and Addressing Workplace Harassment Training; 2) Sexual Harassment Prevention Training (SHP); 3) DHS No Fear & Anti-Harassment Course Training. See Fact 4. CDR Eubanks was provided notice of the

nature of offenses of which he was suspected and questioned on. The C.A.A.F. states in Simpson "the accused must be informed of the general nature of the allegation." 54 M.J. 281, 284 (C.A.A.F. 2000). Requiring CGIS to advise the accused with the precision of a prosecutor charging the case is not the standard. No court has ever held such. It would strain credulity to believe that, given the above warning regarding Article 31(b) rights, CDR Eubanks would not have been "oriented" towards the misconduct the Agents wanted to discuss with him. The CGIS Article 31(b) warnings for Indecent Conduct and Fraternization pointed the accused's mind towards sexual offenses, generally, and towards conduct directed at enlisted members, in particular. Therefore, no relief is warranted because the United States has demonstrated CDR Eubanks should have been properly oriented and put on notice.

All conduct to which CDR Eubanks confessed in his interview was reasonably related to the warnings of Indecent Conduct, Fraternization, and/or Failure to Obey a General Order. The Article 31(b) warnings were sufficiently broad to encompass all alleged misconduct while still being sufficiently narrow to properly orient CDR Eubanks towards the conduct at issue in this case. Thus, the interview must be admitted.

II. CDR Eubanks statement was made voluntarily and must be admitted

a. Voluntariness

CDR Eubanks' admissions and confessions during the CGIS interview were voluntary. Whether or not a statement was made voluntarily is determined by an examination of the totality of the circumstances surrounding that statement, including "both the characteristics of the accused and the details of the interrogation." Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973) (*regarding* voluntariness of consent to a search; however, the Supreme Court in that case based their standard upon that for confessions. Id. at 223-24).

Defense makes the remarkable claim that CDR Eubanks is a lay person. CDR Eubanks states he has a served since 2000 as a Coast Guard enlisted member, US Naval Officer, and by serving again with the Coast Guard since 2012 as Officer. CDR Eubanks is a far cry from the young, inexperienced, and unsophisticated accused in Bubonics. CDR Eubanks has served in or with the United States Military in an active or reserve capacity for over twenty years. He has served in his current capacity as a pharmacist with the U.S. Coast Guard for nearly a decade, beginning in 2012. He has held the rank of Commander since 2017. Unlike Bubonics, CDR Eubanks is not an adolescent whose brain has not yet fully developed; he is a [redacted]-year-old man. While Bubonics read below an eighth-grade level, CDR Eubanks is a licensed pharmacist – a career which required years of specialized training even beyond his college degree – who scored in the ninety-first percentile on the ASVAB and has Doctoral degree. As a senior officer, CDR Eubanks also cannot be considered to have been "conditioned" to respond to any and all authority figures in the same way that Bubonics, a junior enlisted man, had been. CDR Eubanks entered the interview with a silver oak leaf on his uniform. With substantially more experience working with the armed forces than even the accused in Chatfield, *supra*, CDR Eubanks should have known what he agreed to when he signed his Article 31(b) paperwork and declined the presence of an attorney. Indeed, after CDR Eubanks confirmed he could stop the interview at any time he states [redacted] Near the end of the interview, after providing admissions to CGIS, CDR Eubanks states "[redacted]

feel like 500 pounds is off of me." Considering his age, experience, education, and intelligence, CDR Eubanks was fully capable of making his own decisions. Defense fails to explain why a Commander who has served with the U.S. Coast Guard and U.S. Navy since 2000 and has a Doctorate degree is a lay person. Thus, the interrogation was voluntary, arguably enthusiastically given, and must be admitted.

b. Details of the Interview

The CGIS interview in question was well within the bounds of normalcy. One significant factor in determining the voluntariness of a confession is whether or not the accused was advised of, and understood, their Article 31(b) rights. In sharp contrast to Davis, *supra*, CGIS agents began to explain CDR Eubanks' rights under Article 31(b) within four minutes of the moment the accused had entered the room. When CDR Eubanks indicated that he was not entirely clear on his right to an attorney, the agents explained it to him, assured him that he could stop the questioning at any time, and only proceeded with questioning once CDR Eubanks had understood and signed his waiver of an attorney.

Similarly, unlike in Chambers, *supra*, CGIS agents did not detain or question CDR Eubanks for an unreasonably long period. CDR Eubanks was not detained at all prior to his interview; in fact, even the formal "arrest" with mugshot and fingerprinting was rescheduled for a later time. All told, the interview with CDR Eubanks lasted less than ninety minutes. This is also not a case where the accused was roused from his bed in the middle of the night; the entire affair was concluded by 2000 hours. While the interview was indeed conducted after usual business hours, this was not done to weaken CDR Eubanks' resolve. On the contrary, the interview was scheduled for that time out of consideration to the accused, allowing him to avoid the embarrassment of being paraded past his coworkers and other service members.

Unlike in Bubonics, the interviewers did not employ dubious psychological ploys like the much-maligned "Mutt-and-Jeff" routine but maintained a courteous and respectful demeanor throughout the interaction. Nothing in the recording suggests that CDR Eubanks was anything but comfortable during his interview. CGIS agents even offered (and procured) a bottle of water for the accused. CDR Eubanks stated near the end of the interview "[redacted]" Considering the totality of the circumstances, the CGIS interview was well within the normal parameters of a law-enforcement interaction and his will was not overborne.

In sum, CDR Eubanks' interview bears none of the hallmarks, be they attributes of the accused or the interrogation, of a coerced or otherwise involuntary confession. CDR Eubanks is an experienced, intelligent, and generally competent officer who was fully capable of understanding the situation and his rights regarding it. The interview was conducted professionally and well within the confines of acceptable police procedure. Under the totality of the circumstances, CDR Eubanks' statements to CGIS were made voluntarily, and as a result those statements should be admitted as evidence for his court-martial.

RELIEF REQUEST

The United States asks this Court to deny the Defense's Motion to Suppress the Accused's statement to CGIS. The Government respectfully requests oral argument.

MYERS.ANT HONY.J. [redacted] Digitally signed by MYERS.ANTHONY.J. [redacted] Date: 2023.01.13 16:29:14 -08'00'

ANTHONY J. MYERS
Lieutenant Commander, USCG
Trial Counsel

****

CERTIFICATE OF SERVICE

I certify that I have served or caused to be served a true copy (via e-mail) of the above on the Defense Counsel and the Military Judge on 13 January 2023.

MYERS.ANT HONY.J [redacted] Digitally signed by MYERS.ANTHONY.J. [redacted] Date: 2023.01.13 16:29:34 -08'00'

Anthony J. Myers,
LCDR, USCG
Trial Counsel

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COAST GUARD TRIAL JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES **v.** **CDR JUSTIN B. EUBANKS** **CDR/O-5** **U.S. PUBLIC HEALTH SERVICE**	**DEFENSE MOTION TO DISMISS FOR FAILURE TO STATE AN OFFENSE** **23 December 2022**

MOTION

Pursuant to Rule for Court-Martial ("R.C.M.") 907(b)(2)(E), CDR Eubanks, through counsel, respectfully requests that Charge I be dismissed for failure to state an offense. In the specification of Charge I, the Government alleges facts that, even if true, do not constitute a violation of Article 120c, Uniform Code of Military Justice ("UCMJ"). Because this defect fails to articulate a violation of the statute, CDR Eubanks is not notice for the actions that constitute the alleged offense. *See* R.C.M. 307(c)(3).

SUMMARY OF FACTS

In the Specification of Charge I, the government alleges that CDR Eubanks, USPHS, violated Article 120c, UCMJ, 10 U.S.C. § 920c (2019), when he:

> . . . on board Aviation Training Center Mobile, Alabama, on or about December 2020, intentionally expose his genitalia, in an indecent manner, to wit: touching his penis while in the view of HS3 [redacted]

(Charge Sheet at 3, October 7, 2022)

DISCUSSION OF LAW

1. A court-martial specification must provide notice of the elements and ensure that the same act or omission is not subject to re-prosecution, but a specification can do neither when it alleges facts that do not constitute the charged offense.

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"When an accused servicemember is charged with an offense at court-martial, each specification will be found constitutionally sufficient only if it alleges, either expressly or by necessary implication, every element of the offense." *United States v. Turner*, 79 M.J. 401, 403 (C.A.A.F. 2020) (citations and internal quotations omitted); *see* R.C.M. 307(c)(3).

"A specification is sufficient if it first, contain[s] the elements of the offense charged and fairly inform[s] a defendant of the charge against which he must defend, and, second enable[s] him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *United States v. Fosler*, 70 M.J. 225, 229 (C.A.A.F. 2011) (citations and internal quotations omitted). The sufficiency requirement "ensures that a defendant understands what he must defend against. *Id.* "Indeed, '[n]o principle of procedural due process is more clearly established than…notice of the specific charge and a chance to be heard in a trial of the issues raised by that charge.'" *Id.* (quoting *Cole v. Arkansas*, 333 U.S. 196, 201 (1948).

Where the facts alleged in a specification do not support the charge identified, the specification fails its basic sufficiency requirement and must be dismissed. This was the result in *United States v. Sutton*, where the Government charged the appellant with soliciting indecent liberties under Article 134, UCMJ. 68 M.J. 455, 459 (C.A.A.F. 2010). There, the specification alleged that Sutton solicited his step-daughter "to engage in indecent liberties by asking her to lift her shirt and show him her breasts for $20.00." *Id.* at 456. The Court of Appeals for the Armed Forces held that, while the facts could have supported a charge of committing indecent liberties, because solicitation under Article 134 requires soliciting *another person* to commit an offense, the facts alleged failed to state an offense. *Id.* at 459 (noting "elements of indecent liberties with a child clearly contemplated two actors," and step-daughter could not have "commit[ted] the offense of indecent liberties with a child on herself").

2. The specification of Charge I fails to meet the low sufficiency bar when the facts allege, if anything, indecent conduct – a wholly different theory of liability from the charged indecent *exposure.*

The government's theory of criminal liability in the specification of Charge I is that CDR Eubanks is guilty of an indecent exposure by virtue of having touched his penis "while in the view of HS3 [redacted]" The conduct described in Charge I does not meet the elements of indecent exposure under Article 120c, UCMJ, which requires a showing that the accused "exposed his or her genitalia." Manual for Courts-Martial ("MCM") (2019 ed.), Part IV, ¶ 63.b.(5). While touching one's penis in the presence of a shipmate may be the basis for another offense under the UCMJ, the government fails to allege the crucial element of indecent exposure – namely, that CDR Eubanks's genitalia were exposed to HS3 [redacted] The Court can easily imagine how a person could engage in the conduct described in Charge I without exposing himself. A person could, for example, have his hands down his pants and touch his penis in a public area while he remained clothed. Such conduct may well be indecent, but it is not an exposure. By failing to articulate a factual basis for an indecent exposure, the government has to put CDR Eubanks on proper notice.

3. This Article 120c alleges nothing more than CDR Eubanks touched his penis in the presence of HS3 [redacted], it does not describe an exposure. Thus even if true, the facts would not state the offense for which CDR Eubanks is charged.

"The due process principle of fair notice mandates that an accused has a right to know what offense and under what legal theory he will be convicted." *United States v. Tunstall*, 72 M.J. 191, 192 (C.A.A.F. 2013) (citing *United States v. Jones*, 68 M.J. 465, 468 (C.A.A.F. 2010) (internal quotation marks and citation omitted)). "'[T]he Due Process Clause of the Fifth Amendment also does not permit convicting an accused of an offense with which he has not been charged.'" *Id.* (quoting *United States v. Girouard*, 70 M.J. 5, 10 (C.A.A.F. 2011)) (alteration in

original). As charged, the government could obtain a conviction for indecent exposure on the theory that CDR Eubanks touched his penis in the presence of another person, without that person ever having actually seen or been exposed to CDR Eubanks's genitalia. Such a conviction would contravene CDR Eubanks's right to Due Process under the Fifth Amendment and subject him to a criminal conviction for an offense that the government has not charged.

4. The Court should adopt an interpretation of Charge I that closely follows the plain text of the charge sheet.

When a servicemember first raises the issue of an insufficient specification at trial, as CDR Eubanks does here, the Court "will only adopt interpretations that hew closely to the plain text." *Fosler*, 70 M.J. at 230. Hewing closely to the plain text means that the Court will consider only the language contained in the specification to decide whether or not the specification properly states the offense at issue. *Turner*, 79 M.J. at 403. The plain text of Charge I fails to establish a factual basis to try and convict CDR Eubanks of an indecent exposure

RELIEF REQUESTED

Because the specification of Charge I fails to state an offense, the defense respectfully requests that the Military Judge dismiss the charge. *See Turner*, 79 M.J. at 403-4.

ORAL ARGUMENT

Unless conceded by the government or granted by the Military Judge based on pleadings alone, the Defense requests oral argument on this matter.

[redacted]

T. R. DRISCOLL
LT, JAGC, USN
Defense Counsel

COAST GUARD TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **JUSTIN B. EUBANKS** **CDR / O-5** **U.S. PUBLIC HEALTH SERVICE**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO DISMISS FAILURE TO STATE AN OFFENSE (Charge I)** **13 January 2023**

RESPONSE

The Government opposes the Defense Motion to Dismiss for Failure to State an Offense for Charge I (Article 120c). For the reasons detailed below, the Government respectfully requests this Court enter an order denying the Defense motion.

FACTS

1. This case was referred to a General Court-Martial on 10 October 2022. The accused, CDR Eubanks, has been charged with one charge of Article 120c (Indecent Exposure) and two specifications of Article 133 (Conduct Unbecoming an Officer and Gentlemen).

2. On 29 January 2021, ATC Mobile's Executive Officer notified CGIS RAO Mobile, AL about an Anti-Harassment / Hate Incident (AHHI) investigation being opened regarding allegations CDR Eubanks sent a lewd picture to HSC [redacted] See Enclosure (1).

3. On 3 February 2021, ATC Mobile's Commanding Officer contacted CGIS RAO Mobile, AL to initiate a criminal investigation into alleged misconduct by CDR Eubanks after notification that there may be additional Coast Guard victims. See Enclosure (1).

4. On 5 February 2021, at approximately 1823 local, S/A [redacted] and S/A [redacted] interviewed CDR Eubanks about alleged misconduct. The interview concluded at 1953 local. See Enclosure (2).

5. During the interview CDR Eubanks (JE) explained to S/A [redacted] the actions he took when he exposed himself to HS3 [redacted] See Enclosure (2):

[redacted]

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[redacted]

6. During the same interview, S/A [redacted] asks CDR Eubanks (JE) for further clarification regarding the actions he took when he exposed himself to HS3 [redacted] See Enclosure (2):

[redacted]

7. CDR Eubanks was forthcoming and spoke willingly with CGIS agents, even asserting at one point that he was "glad [he] got caught." See Enclosure (2).

8. CDR Eubanks demonstrated an understanding that his statements could be used in future criminal proceedings, stating that he wanted certain facts "on the record." See Enclosure (2).

9. On May 12, 2022, the United States charged CDR Eubanks with, in relevant part:

CHARGE I: Violation of the UCMJ, Article 120c (Indecent Exposure)

Specification [redacted]: In that Commander Justin Eubanks, U.S. Public Health Service, on active duty, assigned to and serving with the U.S. Coast Guard, did, on board Aviation Training Center Mobile, Alabama, on or about December 2020, intentionally expose his genitalia, in an indecent manner, to wit: touching his penis while in the view of HS3 [redacted]

BURDEN

Under R.C.M. 905(c)(1), the burden of proof is by a preponderance of the evidence. Under R.C.M. 905(c)(2), the Defense, as the moving party, bears the burden of persuasion on any factual issue the resolution of which is necessary to decide the motion.

LAW

The military is a notice pleading jurisdiction. See United States v. Sell, 11 C.M.R. 202, 206 (1953). While the Sixth Amendment ensures the accused be afforded notice, the Fifth amendment requires the accused be protected from further prosecution for the same offense. Russell v. United States, 369 U.S. 749 (1962); Wong Tai v. United States, 273 U.S. 77 (1927). A charge and specification will be found sufficient if they, "first, contain the elements of the offense charged and fairly inform a defendant of the charge against which he must defend, and, second, enable him to plead an acquittal or conviction in bar of future prosecutions for the same offense." Hamling v. United States, 418 U.S. 87, 117, (1974); see also United States v. Resendiz-Ponce, 549 U.S. 102, 108, (2007); United States v. Sutton, 68 M.J. 455, 455 (C.A.A.F. 2010); United States v. Crafter, 64 M.J. 209, 211 (C.A.A.F. 2006). In accordance with the C.A.A.F., a charge is legally sufficient if all three prongs of the Dear Test are met: (1) the essential elements of the offense, (2) notice of the charge, and (3) protection against double jeopardy. United States v. Dear, 40 M.J. 196 (C.M.A. 1994).

(1) Dear Prong (1)

The first prong of the Dear test to determine if a specification states an offense requires the essential elements of the offense be stated. The rules governing courts-martial procedure encompass the notice requirement: "A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication." R.C.M. 307(c)(3); United States v. Fosler, 70 M.J. 225 (C.A.A.F. 2011). "The true test of the sufficiency of [a specification] is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet..." United States v. Sell, 11 C.M.R. 202, 206 (1953).

(2) Dear Prong (2)

The second prong of the Dear test to determine if a specification states an offense requires notice of what he is accused of and what he must defend against. The requirement to allege every element expressly or by necessary implication ensures that a defendant understands what he must defend against. Indeed, "[n]o principle of procedural due process is more clearly established than . . . notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge." Cole v. Arkansas, 333 U.S. 196, 201 (1948); see also United States v. Miller, 67 M.J. at 385, 388 (C.A.A.F. 2009). Trial counsel should "meticulously follow the language contained in the UCMJ sample specifications" when crafting UCMJ charges and that failure to do so may call a specification's sufficiency into question. United States v. Turner, 79 M.J. 401, 404 n.2 (C.A.A.F. 2020). "The charge sheet itself gives content to that general language, thus providing the required notice of what an accused must defend against." United States v. Jones, 68 M.J. 465, 472 (C.A.A.F. 2010) (citing Parker v. Levy, 417 U.S. 733, 753-756 (1974)).

(3) Dear Prong (3)

The third prong of the Dear test to determine if a specification states an offense is whether there is double jeopardy protection. "The Fifth Amendment to the United States Constitution commands that "[n]o person shall ... be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V, cl. 2. The primary purpose of the Double Jeopardy Clause is to "protect the integrity of a final judgment." United States v. Scott, 437 U.S. 82 (1978) (citing Crist v. Bretz, 437 U.S. 28 (1978)). Under the Double Jeopardy Clause, "once a defendant is placed in jeopardy for an offense, and jeopardy terminates with respect to that offense, the defendant may neither be tried nor punished a second time for the same offense." Sattazahn v. Pennsylvania, 537 U.S. 101 (2003). In Dear, the C.M.A. determined the third prong (double jeopardy protection) to be important at common law, but its relevance significantly diminished today (1984) because the Defendant has the entire record of trial to raise double jeopardy protection. 40 M.J. 196, 197 (C.M.A. 1994). The record of trial will include the charge sheet, bill of particulars, and any testimony at trail.

ARGUMENT

I. Dear Test Prong (1) is met because the essential elements of the offense are present

On its face Charge I expressly list every element of the offense. Defense alleges Charge I does not meet the elements of indecent exposure because the charge does not contain the language "exposed his or her genitalia" to HS3 [redacted] Defense must demonstrate a charge and specification is insufficient when the charge does not contain the elements of the offenses and inform the accused against what he must defend.

The Manual for Courts-Martial, Part IV indicate that the elements of indecent exposure are:

(1) That (state the time and place alleged), the accused exposed (his) (her) [(genitalia) (anus) (buttocks) (female areola) (female nipple)];
(2) That such exposure was done in an indecent manner; and
(3) That such exposure was intentional.

The sample specification contained in the Manual for Courts-Martial, Part IV, for Article 120c states, In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, intentionally expose [his (genitalia) (anus) (buttocks)] [her (genitalia) (anus) (buttocks) (areola) (nipple)], in an indecent manner, to wit: _____.

Defense has failed to show that Charge I does not include the essential elements because Charge I specifically states CDR Eubanks "on or about December 2020, intentionally expose his genitalia, in an indecent manner, to wit: touching his penis while in the view of HS3 [redacted]" Here, Defense asks this Court to add an element to an Article 120c offense. The *to wit* "touching his penis while in the view of HS3 [redacted] advises the indecent manner which the accused intentionally exposed himself to HS3 [redacted] As C.A.A.F. instructed in Turner, here the Government followed the language contained in the UCMJ sample specification. Therefore, no relief is warranted because the defense fails to demonstrate, their burden, that the Government has not alleged all the necessary elements of the offense to sufficiently inform CDR Eubanks of the conduct charge and to prepare a defense. Under the principles of law, the true test of sufficiency is whether the charge contains the essential elements of the offense, see Sell. Defense has failed to show how the Government has not contained the essential elements of an Article 120c in the charged offense. Therefore, no relief is warranted.

II. Dear Test Prong (2) is met because the accused has sufficient notice of what he is accused of and what he must defend against

Defense alleges the Government does not provide sufficient notice and must articulate a factual basis for the Article 120c. The military is a notice pleading jurisdiction, not a fact pleading jurisdiction, see Sell. Defense must show the Government does not provide sufficient notice of what he is accused of and what he must defend against. Here, the accused has sufficient notice within R.C.M. 307 of the charged offense. Charge I provides a discrete location, a discrete time, and one discrete act, which provides the accused notice of what he is charged with and what he must defend against. CDR Eubanks is on notice the charged offense occurred onboard ATC Mobile, on or about December 2020, where he intentionally exposed his genitalia in an indecent manner to HS3 [redacted] The *to wit* "touching his penis while in the view of HS3 [redacted] provides notice to CDR Eubanks the indecent manner which he intentionally exposed himself. Indeed, CDR Eubanks states to CGIS Special Agents he was 1) naked, except for his socks; 2) that he climbed onto a little platform in the pharmacy; and 3) was trying to get HS3 [redacted] [her] attention. Additionally, CDR Eubanks, through his counsel's filings, alleges consent regarding his intentional exposure through the pharmacy window inferring the accused is sufficiently apprised of Charge I conduct. CDR Eubanks knows that which he must defend against through this charge and is preparing a defense. Therefore, no relief is warranted.

III. Dear Test Prong (3) is met because the accused will have the record of trial

The third prong is satisfied because the specification alleges sufficient facts of the

accused to use in a claim of double jeopardy if he is later prosecuted for the same offense. Charge I provides a discrete location, a discrete time, and one discrete act, which provides the accused notice of what he is charged with and what he must defend against. If another prosecutor wants to charge CDR Eubanks under the same act, they will be barred because the charge provides the necessary detail to afford the accused double jeopardy protection. Further, the accused will have the entire record of trial, which includes the charge sheet and trial testimony. Defense fails to demonstrate the integrity of the final judgement in this case will not afford the accused double jeopardy protections. Thus, no relief is warranted.

RELIEF REQUEST

The Government has expressed every element of the offense to sufficiently inform CDR Eubanks of the conduct charge, to prepare a defense, and to protect against double jeopardy. Therefore, the Defense motion to dismiss Charge I must be denied.

MYERS.ANTHONY.J[redacted] Digitally signed by MYERS.ANTHONY.J[redacted] Date: 2023.01.13 16:01:41 -08'00'

ANTHONY J. MYERS
Lieutenant Commander, USCG
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CERTIFICATE OF SERVICE

I certify that I have served or caused to be served a true copy (via e-mail) of the above on the Defense Counsel and the Military Judge on 13 January 2023.

MYERS.ANTHONY.J[redacted] Digitally signed by MYERS.ANTHONY.J[redacted] Date: 2023.01.13 16:02:05 -08'00'

Anthony J. Myers,
LCDR, USCG
Trial Counsel

U.S. COAST GUARD TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **J. B. EUBANKS** **CDR/O-5** **U.S. PUBLIC HEALTH SERVICE**	**DEFENSE MOTION TO DISMISS** **(Failure to State an Offense)** **23 DEC 22**

MOTION

Pursuant to the Fifth Amendment and R.C.M. 905(c)(2)(B), the Defense moves this Court to dismiss Specification 1 of Charge III for failure to state an offense.

BURDEN

Under R.C.M. 905(c)(2)(b), the Government bears the burden of persuasion.

FACTS

1. On May 12, 2022, the Government charged CDR Eubanks with, in relevant part:

> **CHARGE III: Violation of the UCMJ, Article 133 (Conduct Unbecoming an Officer and Gentleman)**
>
> **Specification 1**: In that Commander Justin Eubanks, U.S. Public Health Service, on active duty, assigned to and serving with the U.S. Coast Guard, did, at or near Mobile, Alabama, on divers occasions from on or about January 2019 to February 2021, commit certain acts, to wit: communicating unwanted messages of a sexual nature to female coworkers, and that, under the circumstances, his conduct was unbecoming an officer and gentleman.

(Charge Sheet)

2. On June 15, 2022, the Defense initially requested a Bill of Particulars requesting the Government clarify this charge. (Encl. A).

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3. On June 21, 2022, the Government responded that "In response to your request, the Government will provide a Bill of Particulars" to which the Defense followed up on July 19, 2022. (Encl. B.)

4. Without notice, the Government changed their position and refused to provide a Bill of Particulars once the Defense raised the issue to the Preliminary Hearing Officer. (Encl. C).

5. Nearly three months later, following referral and arraignment, on 28 October 2022, the Defense renewed its request for a Bill of Particulars, to which the Government responded. (Encl. D, E.)

6. The Bill of Particulars identifies HSC [redacted] HS1 [redacted] HSCS [redacted] and YN1 [redacted] as the "female coworkers" referenced in the specification. (Encl. E.)

7. The Government's Bill of Particulars does not define "message" or "sexual nature." *Id.*

8. The Government's Bill of Particulars does not provide the contents of any "message of a sexual nature" allegedly sent by CDR Eubanks. *Id.*

9. However, the Government's Bill of Particulars also adds "text message[s] with a picture of a penis" as separate conduct in addition to "unwanted messages of a sexual nature" purportedly alleged under the Specification. *Id.*

LAW

a. Constitutional due process requires fair notice both that the alleged conduct is forbidden and the standard applicable to that conduct's criminality.

"Under the Due Process Clause of the Fifth Amendment, 'no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.'" *United States v. Moore*, 58 M.J. 466, 469 (C.A.A.F. 2003) (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)); *United States v.*

Warner, 73 M.J. 1, 4 (C.A.A.F. 2013) ("It is well settled . . . that a servicemember must have fair notice that an act is criminal before being prosecuted.") (citations omitted).

The Clause thus demands both "fair notice that an act is forbidden and subject to criminal sanction," as well as "fair notice as to the standard applicable to the forbidden conduct." *United States v. Vaughan*, 58 M.J. 29, 31 (C.A.A.F. 2003) (internal quotations omitted). As the Navy-Marine Corps Court puts it: "A fundamental feature of due process law is that one's guilt or innocence of a criminal accusation be determined by objective, clearly understood standards of criminality." *United States v. Peszynski*, 40 M.J. 874, 878 (N.M.C.M.R.) (citing *Smith v Goguen*, 415 U.S. 566 (1974))

Moreover, "[t]he due process principle of fair notice mandates that an accused has a right to know what offense and under what legal theory he will be convicted." *United States v. Tunstall*, 72 M.J. 191, 192 (C.A.A.F. 2013) (quoting *United States v. Jones*, 68 M.J. 465, 468 (C.A.A.F. 2010) (internal quotation marks and citation omitted)). The Due Process Clause "'also does not permit convicting an accused of an offense with which he has not been charged.'" *Id.* (quoting *United States v. Girouard*, 70 M.J. 5, 10 (C.A.A.F. 2011)).

b. <u>In trial by court-martial, the Government commonly satisfies its notice burden through the requirement that a specification state an offense—to ensure informed defenses and to protect against double jeopardy</u>.

"A specification is a plain, concise, and definite statement of the essential facts constituting the offense charged." R.C.M. 307(c)(3). A specification "is sufficient if [it] first, contain[s] the elements of the offense charged and fairly inform[s] a defendant of the charge against which he must defend, and, second, enable[s] him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *United States v. Fosler*, 70 M.J. 225, 229 (C.A.A.F. 2011) (citations and internal quotations omitted); *see also United States v. Turner*, 79 M.J. 401, 404

(C.A.A.F. 2020); *United States v. Sutton*, 68 M.J. 455, 457 (C.A.A.F. 2010); *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006).

This two-pronged analysis gives effect to the President's Rule: "A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication." R.C.M. 307(c)(3). And the sufficiency requirement itself "ensures that a defendant understands what he must defend against." *Fosler*, 70 M.J. at 229. "Indeed, '[n]o principle of procedural due process is more clearly established than . . . notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge.'" *Id.* (quoting *Cole v. Arkansas*, 333 U.S. 196, 201 (1948)); *see also United States v. Amazaki*, 67 M.J. 666, 669-70 (A. Ct. Crim. App. 2009) (distinguishing between "failure to state an offense" as "concerned with pleading and double jeopardy," and "void for vagueness" as "based upon the Due Process Clause of the Fifth Amendment").

While the C.A.A.F. has upheld this type of conduct as conduct unbecoming, the Specifications at issue in those cases did not suffer from the same notice deficiencies at issue here. *See* e.g. *United States v. Lofton*, 69 M.J. 386, 390 (C.A.A.F. 2011) and *United States v. Brown*, 55 M.J. 375, 376 (C.A.A.F. 2001). Instead, the issue here not "is this conduct unbecoming" it is "what is this conduct."

In *United States v. Enriquez*, the Army Court of Criminal Appeals found a specification a set of specifications alleging violations of Article 134, UCMJ 10 U.S.C. 934 for disorderly conduct so vague that they did not provide the accused sufficient notice nor provide him adequate protection from double jeopardy such that the specification was legally deficient. *United States v. Enriquez*, 2013 CCA LEXIS 530 (Army Ct. Crim. App. 2013) (rev'd denied). The Court specifically found "the specifications merely alleged appellant committed disorderly conduct but

failed to notify him of the exact conduct deemed to be disorderly." *Id.* at *11. In doing so, the Court further noted that "the government may have prosecuted certain behavior, appellant may have defended against different but related behavior, and the military judge may have convicted on yet other behavior. We cannot countenance such confusion." *Id.*

Similarly, in *United States v. Curtiss,* despite a plea of guilty, the court dismissed several specifications indicating an accused did wrongfully appropriate "personal property." *United States v. Curtiss,* 19 C.M.R. 4 (C.M.A. 1970). The court stated n allegation of this kind "totally deprives the accused, appellate reviewing agencies, and those who may in the future examine the charge, of any information concerning the nature of the *res* which" the accused misappropriated, and is legally insufficient. *Id. citing United States v Autrey,* 30 CMR 252 (1961).

c. The Government may issue a bill of particulars to protect against surprise and enable clarity of pleadings, but not to cure a defective specification.

The Rules for Courts-Martial provide that, where necessary, a military judge may order a bill of particulars. R.C.M. 906(b)(6). As the Manual provides, a bill may be necessary

> to inform the accused of the nature of the charge with sufficient precision to enable the accused to prepare for trial, to avoid or minimize the danger of surprise at the time of trial, and to enable the accused to plead the acquittal or conviction in bar of another prosecution for the same offense with the specification itself is too vague and indefinite for such purposes.

Id., Discussion, Manual for Courts-Martial, United States (2019 ed.). But it is black letter law that "[a] bill of particulars cannot be used to repair a specification which is otherwise not legally sufficient." R.C.M. 906(b)(6), Discussion, Manual for Courts-Martial, United States (2019 ed.); *see also United States v. Fosler*, 70 M.J. 225, 231 (C.A.A.F. 2011) (citing *Russell v. United States*, 369 U.S. 749, 770 (1962).

ARGUMENT

a. This Specification fails does not fairly inform CDR Eubanks against which he must defend and therefore must be dismissed.

This Specification spans over two years of time. In that time, CDR Eubanks is alleged to have sent "unwanted messages of a sexual nature"—an otherwise undefined term—to "female co-workers"—an unspecified group of individuals. This provides CDR Eubanks no notice of the alleged victim, nor the type or content of the messages which the Government has criminalized let alone what constitutes a "sexual nature." This deficiencies deprive CDR Eubanks of against what he must Defense and require the Court to dismiss this Specification.

First, CDR Eubanks is not on notice of what types of messages he's alleged to have sent or their contents. The Specification simply alleges "messages of a sexual nature," however, in the Bill of Particulars—something the Defense requested at the outset of this case several months ago—the Government seemingly considers "messages of sexual nature" to differ from "text message[s] with a picture of a penis," making a point to differentiate between the two. But, the Specification on its face gives no notice that CDR Eubanks is charged with sending any pictures or digital images at all, only "messages." This leaves CDR Eubanks unaware of whether his allegedly offending messages are text messages, emails, instant messages, imessages, or any other form of written communication sent to the unspecified victims over the 700 plus days implicated in the Government's charging scheme. The Government's attempts to repair these errors through the bill of particulars cannot overcome these deficiencies.

Similarly, there is no definition of "sexual nature" or test for what makes a message "of a sexual nature." It is undefined in statute, policy, service regulation, or even the Government's bill of particulars. The closest the Government could come is "sexual harassment," as derived

from our service regulations, but that is not alleged, nor even articulated in the Bill of Particulars. Instead, this term is something that the Government appears to have come up with out of thin air, and can mean whatever they want it to mean once they get to trial. The Government certainly will allege that it is something far more innocuous—and thus easier to prove. Accordingly, this case differs *United States v. Rogers*, 54 M.J. 244, 257 (C.A.A.F. 2000), in that the only issue for the Court there was necessity of identifying a specific service regulation in the Specification itself to notice the accused to his conduct. Here the definition just doesn't exist, anywhere, let alone in the Specification. Likewise, the Specification in also *Rogers* did not suffer from the more basic defects also present here.

The error present here is akin those rejected by our sister service in *Enriquez* and our superior court's predecessor in *Curtiss*. Here, "messages" and "sexual nature" fall victim to the ambiguity that was fatal to the "disorder" and "personal property" in those cases. This is only exacerbated by the overly broad date range and unidentified recipients. This sets the Government's charging scheme apart from both *Lofton* and *Brown*. In *Brown*, the specifications at issue each specifically articulated the offending messages utilizing a "to wit," were limited to each a single named victim per specification, and were alleged at worst over a few month period and at best over a mere three day period. *See Brown* 55 M.J. 391. Similarly, in *Lofton*, at least the specification specifically articulated to whom the messages were sent—a luxury CDR Eubanks is not afforded here. *Lofton*, 69 M.J. 388.

The fact that this level of confusion and ambiguity about what CDR Eubanks must defend against still exists after the Government's issuance of a bill of particulars demonstrates that even under the liberal auspices of "notice pleading" this specification fails. It is a culmination of errors when taken together, cannot survive review.

b. This Specification deprives CDR Eubanks of protection from Double Jeopardy and therefore must be dismissed.

Additionally, the unspecified nature of the Government's specification leaves CDR Eubanks eternally vulnerable for re-prosecution for this offense. Because the Government has not defined "sexual nature," nor the messages or victims at issue, CDR Eubanks could simply be recharged for the same conduct over and over until the Government found a definition of "sexual nature" and a "message" that sticks. This too is fatal to this Specification.

RELIEF REQUESTED

The Defense moves this Court to dismiss Specification 1 of Charge III.

EVIDENCE AND ORAL ARGUMENT

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

Enclosure A: Defense Request for Bill of Particulars of June 15, 2022

Enclosure B: Trial Counsel Email of June 21, 2022 and Defense Email of July 19, 2022

Enclosure C: Preliminary Hearing Officer Email Thread of 20 July, 2022

Enclosure D: Defense Second Request for a Bill of Particulars of October 28, 2022

Enclosure E: Bill of Particulars of 28 October, 2022

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

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S. P. CAOUETTE
LCDR, USCG
Detailed Defense Counsel

COAST GUARD TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **JUSTIN B. EUBANKS** **CDR / O-5** **U.S. PUBLIC HEALTH SERVICE**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO DISMISS FAILURE TO STATE AN OFFENSE (Charge II, Spec 1)** **13 January 2023**

RESPONSE

The Government opposes the Defense Motion to Dismiss for Failure to State an Offense for Charge II, Specification 1. For the reasons detailed below, the Government respectfully requests this Court enter an order denying the Defense motion.

SUMMARY

For Charge II, Specification 1 the Government listed the essential elements of the offense in order to sufficiently inform CDR Eubanks of the conduct charged which he must defend against and enable him to plead an acquittal or conviction in bar of future prosecution for the same offense.

FACTS

1. This case was referred to a General Court-Martial on 10 October 2022. The accused, CDR Eubanks has been charged with one charge of Article 120c (Indecent Exposure) and two specifications of Article 133 (Conduct Unbecoming an Officer and Gentlemen). The Accused waived his right to a preliminary hearing on 8 August 2022.

2. Since 2000, CDR Eubanks served in the military as a Coast Guard Enlisted Reservist, U.S. Naval Officer, and as Commissioned Officer of the Public Health Service Commissioned Corps serving with the U.S. Coast Guard. See Enclosure (1).

3. 4. CDR Eubanks completed the following General Mandated Training in 2019, 2020, and 2021 See Enclosure (2):

    1) Preventing and Addressing Workplace Harassment;
    2) Sexual Harassment Prevention (SHP);
    3) DHS No Fear & Anti-Harassment Course.

4. CDR Eubanks took his first sexual harassment training in June 2000. See Enclosure (3).

5. Since 2012, CDR Eubanks served as a commissioned officer with the U.S. Coast Guard. From 2012 to 2017, CDR Eubanks served at U.S. Coast Guard Base Elizabeth City followed by Aviation Training Command (ATC) Mobile from 2017 to present. See Enclosure (3).

6. In 2017, CDR Eubanks was promoted to the rank of Commander (O-5). See Enclosure (3).

7. On 29 January 2021, ATC Mobile's Executive Officer notified CGIS RAO Mobile, AL about an Anti-Harassment / Hate Incident (AHHI) investigation being opened regarding allegations of a lewd picture sent to HSC [redacted] from CDR Eubanks. See Enclosure (4).

8. On 3 February 2021, after notification of potential additional Coast Guard victims, ATC Mobile's Commanding Officer contacted CGIS RAO Mobile, AL to initiate a criminal investigation into alleged misconduct by CDR Eubanks. See Enclosure (4).

9. On 5 February 2021, at approximately 1823 local, S/A [redacted] and S/A [redacted] interviewed CDR Eubanks about alleged misconduct. The interview concluded at 1953 local. See Enclosure (1).

10. During the interview CDR Eubanks (JE) explained to S/A [redacted] the following. See Enclosure (1):

[redacted]

11. During the interview CDR Eubanks (JE) discusses with S/A [redacted] sending messages to HSC [redacted] See Enclosure (1):

[redacted]

[redacted]

12. During the interview CDR Eubanks (JE) discusses sending messages to HS1 [redacted] See Enclosure (1):

[redacted]

13. During the interview CDR Eubanks (JE) discusses sending messages to [redacted] See Enclosure (1):

[redacted]

14. During the interview CDR Eubanks (JE) discusses sending messages to HSCS [redacted] (See Enclosure (1):

[redacted]

[redacted]

15. During the interview CDR Eubanks (JE) discusses sending messages to YN1[redacted] See Enclosure (1):

[redacted]

16. S/A[redacted] asks CDR Eubanks (JE) for further clarification See Enclosure (1):

[redacted]

[redacted]

17. CDR Eubanks was forthcoming and spoke willingly with CGIS agents, even asserting at one point that he was "[redacted]" See Enclosure (1).

18. On May 12, 2022, the United States charged CDR Eubanks with, in relevant part:

> **CHARGE III: Violation of the UCMJ, Article 133 (Conduct Unbecoming an Officer and Gentleman)**
>
> **Specification 1:** In that Commander Justin Eubanks, U.S. Public Health Service, on active duty, assigned to and serving with the U.S. Coast Guard, did, at or near Mobile, Alabama, on divers occasions from on or about January 2019 to February 2021, commit certain acts, to wit: communicating unwanted messages of a sexual nature to female coworkers, and that, under the circumstances, his conduct was unbecoming an officer and gentleman.

19. On October 28, 2022, the Government provided a Bill of Particulars upon Defense request, in relevant part:

> **Specification 1:** The following provides foundation for this specification:
>
> Female Coworker HSC [redacted]
>
> 1. On or about September 2020, CDR Eubanks sent a text message with a picture of a penis to HSC [redacted]
> 2. On or about December 2020, CDR Eubanks communicated an unwanted message of a sexual nature to HSC [redacted]
>
> Female Coworker HS1 [redacted]
>
> 1. On or about August 2020 to November 2020, CDR Eubanks sent a text message with a picture of a penis to HS1 [redacted]
> 2. On or about December 2020 to February 2021, CDR Eubanks communicated unwanted messages of a sexual nature to HS1 [redacted]
>
> Female Coworker Ms [redacted]
>
> 1. On or about September 2020, CDR Eubanks communicated an unwanted message of a sexual nature to Ms [redacted]
>
> Female Coworker HSC5 [redacted]
>
> 1. On or about January 2019, CDR Eubanks communicated an unwanted message of a sexual nature to HSC5 [redacted]

[redacted]

BURDEN

Under R.C.M. 905(c)(1), the burden of proof is by a preponderance of the evidence. Under R.C.M. 905(c)(2), the Defense, as the moving party, bears the burden of persuasion on any factual issue the resolution of which is necessary to decide the motion.

LAW

The military is a notice pleading jurisdiction. See United States v. Sell, 11 C.M.R. 202, 206 (1953). "While the Sixth Amendment ensures the accused be afforded notice, the Fifth amendment requires the accused be protected from further prosecution for the same offense." Russell v. United States, 369 U.S. 749 (1962); Wong Tai v. United States, 273 U.S. 77 (1927). A charge and specification will be found sufficient if they, "first, contain the elements of the offense charged and fairly inform a defendant of the charge against which he must defend, and, second, enable him to plead an acquittal or conviction in bar of future prosecutions for the same offense." Hamling v. United States, 418 U.S. 87, 117, (1974). See also United States v. Resendiz-Ponce, 549 U.S. 102, 108, (2007); United States v. Sutton, 68 M.J. 455, 455 (C.A.A.F. 2010); United States v. Crafter, 64 M.J. 209, 211 (C.A.A.F. 2006). In accordance with the C.A.A.F., a charge is legally sufficient if all three prongs of the Dear Test are met: (1) the essential elements of the offense, (2) notice of the charge, and (3) protection against double jeopardy. United States v. Dear, 40 M.J. 196 (C.M.A. 1994).

(1) Dear Prong (1)

The first prong of the Dear test to determine if a specification states an offense requires the essential elements of the offense be stated. The rules governing courts-martial procedure encompass the notice requirement: "A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication." R.C.M. 307(c)(3); United States v. Fosler, 70 M.J. 225 (C.A.A.F. 2011). "The true test of the sufficiency of [a specification] is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet..." United States v. Sell, 11 C.M.R. 202, 206 (1953).

(2) Dear Prong (2)

The second prong of the Dear test to determine if a specification states an offense requires notice of what he is accused of and what he must defend against. The requirement to allege every element expressly or by necessary implication ensures that a defendant understands what he must defend against. Indeed, "[n]o principle of procedural due process is more clearly established than . . . notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge." Cole v. Arkansas, 333 U.S. 196, 201 (1948); See also United States v. Miller, 67 M.J. at 385, 388 (C.A.A.F. 2009). Trial counsel should "meticulously follow the language contained in the UCMJ sample specifications" when crafting UCMJ charges and that failure to do so may call a specification's sufficiency into question. United States v. Turner, 79

M.J. 401, 404 n.2 (C.A.A.F. 2020). "The charge sheet itself gives content to that general language, thus providing the required notice of what an accused must defend against." United States v. Jones, 68 M.J. 465, 472 (C.A.A.F. 2010) (citing Parker v. Levy, 417 U.S. 733, 753-756 (1974)).

(3) Dear Prong (3)

The third prong of the Dear test to determine if a specification states an offense is whether there is double jeopardy protection. "The Fifth Amendment to the United States Constitution commands that "[n]o person shall ... be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V, cl. 2. The primary purpose of the Double Jeopardy Clause is to "protect the integrity of a final judgment." United States v. Scott, 437 U.S. 82 (1978) (citing Crist v. Bretz, 437 U.S. 28 (1978)). Under the Double Jeopardy Clause, "once a defendant is placed in jeopardy for an offense, and jeopardy terminates with respect to that offense, the defendant may neither be tried nor punished a second time for the same offense." Sattazahn v. Pennsylvania, 537 U.S. 101 (2003). The C.M.A. determined Dear prong (3) (double jeopardy protection) to be important at common law, but its relevance significantly diminished today (1984) because the Defendant has the entire record of trial to raise double jeopardy protection. See United States v. Dear, 40 M.J. 196, 197 (C.M.A. 1994). The record of trial will include the charge sheet, bill of particulars, and any testimony at trail an accused may use to protect against double jeopardy.

Article 133 – Conduct Unbecoming an Officer and Gentlemen

The C.A.A.F. uses the "reasonable officer" standard in order to determine whether an officer is put on notice that his or her acts or omissions constitute "conduct unbecoming an officer." United States v. Modesto, 39 M.J. 1055, (A.C.M.R. 1994), aff'd, 43 M.J. 315 (C.A.A.F. 1995). See also Parker v. Levy, 417 U.S. 733, (1974); United States v. Hartwig, 39 M.J. at 130 (C.M.A. 1994); United States v. Frazier, 34 M.J. 194, (C.M.A.1992). In Hartwig, the C.A.A.F. states, "[w]e are satisfied that any reasonable officer would know that such conduct falls below the "limit of tolerance based on customs of the service and military necessity below which the personal standards of an officer ... cannot fall without seriously compromising ... [his] standing as an officer ... or ... [his] character as a gentleman." 39 M.J. 125 (C.M.A. 1994).

"Even conduct of a private or unofficial nature by an officer may be prohibited if that conduct compromised the person's standing as an officer and 'brought scandal or reproach upon the service.'" United States v. Hartwig, 39 M.J. 125 (C.M.A.1994) (quoting Smith v. Whitney, 116 U.S. 167, 185 (1886)). See also United States v. Moore, 38 M.J. 490, 493 (C.M.A. 1994) (Accused's conduct was in private, but clearly "unbecoming to an honorable, decent, man" as any reasonable military officer would recognize.") "Indeed, we have recognized that '[c]onduct which is entirely unsuited to the status of an officer and a gentleman often occurs under circumstances where secrecy is intended.'" United States v. Norvell, 26 M.J. 477, 478 (C.M.A. 1988). Conduct that violates Article 133, UCMJ, may consist of an "action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the officer personally, seriously compromises the person's standing as an officer." MCM pt. IV, para. 59.c.(2) (emphasis added). United States v. Meakin, 78 M.J. 396, 404 (C.A.A.F. 2019). "All that is

required is for the offender's conduct to fall below the level of conduct expected of officers and to seriously expose him to public opprobrium." United States v. Harvey, 67 M.J. 758, 762 (A.F. Ct. Crim. App. 2009) (citing United States v. Rogers, 54 M.J. 244, 256 (C.A.A.F.2000)).

"Thus, even conduct that has no bearing on military discipline might establish the basis for an Article 133, UCMJ, charge." United States v. Meakin, 78 M.J. 396, 404 (C.A.A.F. 2019). See also United States v. Fletcher, 148 U.S. at 91–92 (1893) (finding that failure to pay certain debts was facially sufficient to establish the offense of conduct unbecoming an officer and gentleman). The C.A.A.F. continues in Meakin, "Finally, Appellant argues that even if his conduct wasn't constitutionally protected (and it was not) the charge of Article 133, UCMJ, was legally insufficient because he (1) couldn't know that private consensual communications were illegal or would pose "a clear and present danger" to his status as an officer, and (2) there was "no connection at all between Appellant's speech and the military mission." We are unpersuaded." United States v. Meakin, 78 M.J. 396, 403 (C.A.A.F. 2019).

"Nor is there a requirement that the conduct constitute an offense elsewhere under the UCMJ." United States v. Harvey, 67 M.J. 758, 762 (A.F. Ct. Crim. App. 2009). "Moreover, military law is replete with examples of conduct protected by the Constitution when engaged in by civilians, but which becomes criminal when engaged in by military members." Id.

ARGUMENT

I. Defense alleges CDR Eubanks does not have fair notice that his conduct was unbecoming

Defense alleges CDR Eubanks does not have fair notice that his conduct was unbecoming and because of this the charge must be dismissed. In accordance with the C.A.A.F., a charge is legally sufficient if all three prongs of the Dear Test are met: (1) the essential elements of the offense, (2) notice of the charge, and (3) protection against double jeopardy. United States v. Dear, 40 M.J. 196 (C.M.A. 1994). Each of the three Dear prongs are met in this case and analyzed *infra.*

(1) Dear Prong (1) is met because the Government lists the essential elements of the Offense in the Specification

Dear prong (1) requires the charge state the essential elements of the offense. The Manual for Courts-Martial, Part IV states that the elements for conduct unbecoming an officer and gentlemen are:

> (1) That the accused did a certain act, and
>
> (2) That, under the circumstances, the accused's conduct was unbecoming an officer and a gentleman.

Specification 1 of Charge II states the essential of elements of the offense as proscribed in the Manual for Courts-Martial, Part IV. See also United States v. Amazaki, 67 M.J. 666, 670 (A. Ct. Crim. App. 2009) ("The elements of Article 133, UCMJ, are deceptively simple: first, the

accused must do or omit to do certain acts; and second, under the circumstances, the acts or omissions must constitute conduct unbecoming an officer."). Therefore, Dear prong (1) is met.

(2) Dear Prong (2) is met because the charge fairly informs CDR Eubanks of what he must defend against

Defense alleges the Government does not provide a factual basis for the Specification 1 of Charge II. The military is a notice pleading jurisdiction, not a fact pleading one. See Sell. Defense must show the Government does not provide sufficient notice of the charged offenses and what he must defend against. Here, the accused has sufficient notice within R.C.M. 307 of the charged offense. CDR Eubanks is on notice the charged offense occurred at or near ATC Mobile, from on or about January 2019 to February 2021, where he communicated unwanted messages of a sexual nature to female coworkers, and that, under the circumstances, his conduct was unbecoming an officer and a gentleman. In addition, on October 28, 2022, the Government provided a Bill of Particulars upon request by the Defense. Unlike in Fosler, every element of the Article 133 is expressly alleged in this specification. The specification provides the required notice to inform the accused of what he is accused of and thus what he must defend against. Therefore, no relief is warranted.

Defense next alleges "female coworkers" to be an unspecified group of individuals that does not provide notice to CDR Eubanks of who the victims in this case are. The rule requires the charge "sufficiently apprises the defendant of what he must be prepared to meet." United States v. Sell, 11 C.M.R. 202, 206 (1953). There is a finite number of female coworkers at the ATC Mobile clinic who served there between the dates of the specification. CDR Eubanks admits to sending unwanted messages of sexual nature to each female coworker listed in the Bill of Particulars. When CGIS asks CDR Eubanks about the details of the picture he sent to YN1 [redacted]., CDR Eubanks responds "[redacted]" When CGIS asks CDR Eubanks about the details of the picture he sent to HSC [redacted] CDR Eubanks responds "[redacted]" When CGIS asks CDR Eubanks about using the Coast Guard network to send obscenities to victims CDR Eubanks states, "[redacted]" Clearly, CDR Eubanks was and is on notice of his conduct related to Charge II, Specification 1 and what he must defend against. Therefore, CDR Eubanks through the charge sheet, the Bill of Particulars, and through his own admissions is sufficiently informed of what he must defend against.

Defense subsequently alleges CDR Eubanks is not on notice of what types of messages he sent to female coworkers. A plain reading of the specification provides notice to the accused that he is charged with sending, not that just any messages, but "unwanted messages of a sexual nature" to female coworkers during the charged period. The specification places CDR Eubanks on notice that he must defend against sending messages that are 1) unwanted; 2) of a sexual nature; 3) to a defined class of persons, i.e. female coworkers at ATC Mobile; 4) during the charged period, January 2019 to February 2021. On its face the defense argument has no merit and should be dismissed. The Defense focuses on a definition of sexual nature as at issue. The argument is not based on any law or Rule for Courts-Martial on point for an Article 133 offense. Unwanted messages of a "sexual nature" is not beyond the province of a typical factfinder. "Sexual" is not an obtuse word, but one that is commonly understood both at law and for the

average factfinder. Defense cites to no authority that each term in a charge must be defined. Whether or not a novel instruction is warranted to define "sexual" may be addressed by Defense at a later time. It is for the panel of officers sitting as a general court-martial to decide whether sending the messages to female coworkers was conduct unbecoming an officer and gentlemen. The issue at hand is whether the specification puts CDR Eubanks on notice about what he must defend against. The specification clearly does, and the Defense motion must be denied.

(3) Dear Test Prong (3) is met because the accused will have the record of trial

Defense alleges this specification leaves CDR Eubanks eternally vulnerable for re-prosecution because the Government has not defined sexual nature. Defense states the specification covers over 700 days. The third prong is satisfied because the specification alleges sufficient facts of the accused to use in a claim of double jeopardy, if he is later prosecuted for the same offense. As in Dear, here the accused will have the entire record of trial. Double jeopardy protection is not just from the charge sheet, but the record of trial, which includes the Government's Bill of Particulars. Adopting *arguendo,* the Defense framing of double jeopardy, the Accused has 700 plus days of protection for unnamed victims. If additional victims who are female coworkers come forward after findings at trial CDR Eubanks is protected for prosecution within this timeframe. If another prosecutor wants to charge CDR Eubanks under the same act, they will be barred because the charge provides the necessary detail to afford the accused double jeopardy protection. Further, the accused will have the entire record of trial, which includes the charge sheet, bill of particulars, and trial testimony. Here, a more general specification is to the accused benefit. Defense fails to demonstrate how the charge at hand places CDR Eubanks eternally vulnerable to re-prosecution. Therefore, Dear prong (3) is met, and no relief is warranted.

RELIEF REQUEST

The Government has expressed every element of the offense to sufficiently inform CDR Eubanks of the conduct charge in for him to prepare a defense and to protect against double jeopardy. Therefore, the Defense motion to dismiss Charge II, Specification 1 must be denied.

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ANTHONY J. MYERS
Lieutenant Commander, USCG
Trial Counsel

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CERTIFICATE OF SERVICE

I certify that I have served or caused to be served a true copy (via e-mail) of the above on the Defense Counsel and the Military Judge on 13 January 2023.

MYERS.ANT HONY.J [redacted] Digitally signed by MYERS.ANTHONY.J [redacted] Date: 2023.01.13 14:57:08 -08'00'

Anthony J. Myers,
LCDR, USCG
Trial Counsel

Appellate Exhibit 44
Page 11 of 11

U.S. COAST GUARD TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **J. B. EUBANKS** **CDR/O-5** **U.S. PUBLIC HEALTH SERVICE**	**DEFENSE MOTION TO DISMISS** **(Failure to State an Offense)** **23 DEC 22**

MOTION

Pursuant to the Fifth Amendment and R.C.M. 905(c)(2)(B), the Defense moves this Court to dismiss Specification 2 of Charge III for failure to state an offense.

BURDEN

Under R.C.M. 905(c)(2)(b), the Government bears the burden of persuasion.

FACTS

1. On May 12, 2022, the Government charged CDR Eubanks with, in relevant part:

> **Specification 2**: In that Commander Justin Eubanks, U.S. Public Health Service, on active duty, assigned to and serving with the U.S. Coast Guard, did, on board Aviation Training Center Mobile, Alabama, on divers occasions from on or about December 2019 to November 2020, commit a certain act, to wit: masturbating in a government office, and that, under the circumstances, his conduct was unbecoming an officer and a gentleman.

(Charge Sheet)

2. On 28 October, 2022, the Government stated in a bill of particulars that "The government office was the office space that was CDR Eubanks' primary work space during the time period of on or about December 2019 to November 2020; it is the office that is immediately adjacent to the ATC Mobile pharmacy." (Encl. A.)

3. The Government's theory is that a single instance of masturbation occurred during working hours, the rest of the divers occasions occurred after the working hours. (Encl. B.)

4. In CDR Eubanks's statement, he only stated "it is possible that he has masturbated while in his office after a workday." (Encl. D.)

5. CDR Eubanks's office is behind two lockable doors. (Encl. E.)

LAW

a. For a conviction under Article 133 to stand on its own apart from a specific enumerated offense, "the government must present a theory of liability at trial and prove how the conduct exceeded the 'limit of tolerance based on customs of the service' and for which the Accused is on notice.

"A specification is a plain, concise, and definite statement of the essential facts constituting the offense charged." R.C.M. 307(c)(3). A specification "is sufficient if [it] first, contain[s] the elements of the offense charged and fairly inform[s] a defendant of the charge against which he must defend, and, second, enable[s] him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *United States v. Fosler*, 70 M.J. 225, 229 (C.A.A.F. 2011).

Article 133 contains two elements: (1) that the accused did or omitted to do certain acts; and (2) that under the circumstances, these acts or omissions constituted conduct unbecoming an officer and a gentleman. Article 133, UCMJ 10 U.S.C. § 933 (2018).

The focus of Article 133 is the effect of the accused's conduct on his status as an officer, cadet, or midshipman: [T]he essence of an Article 133 offense is not whether an accused officer's conduct otherwise amounts to an offense . . . but simply whether the acts meet the standard of conduct unbecoming an officer. . . . [T]he appropriate standard for assessing criminality under Article 133 is whether the conduct or act charged is dishonorable and compromising . . . this notwithstanding whether or not the act otherwise amounts to a crime. *United States v. Nelson*, 80

M.J. 748, 756 n.41 (N-M Ct. Crim. App. 2021) (citing *United States v. Conliffe*, 67 M.J. 127, 132 (C.A.A.F. 2007))

Article 133 can cover "acts made punishable by any other article, provided these acts amount to conduct unbecoming." Manual for Courts-Martial, pt. IV, para. 59.c(2). (2019 ed.) Whenever the offense charged is the same as a specific enumerated offense charged in the *MCM*, the elements of proof are the same for that specific offense plus proof that the conduct was unbecoming. *Id.*

However, the underlying act or omission does not have to independently amount to an offense. *See United States v. Livingstone*, 78 M.J. 619, 624 (C.G. Ct. Crim. App. 2018). "[T]he appropriate standard for assessing criminality under Article 133 is whether the conduct or act charged is dishonorable and compromising . . . notwithstanding whether or not the act otherwise amounts to a crime." *United States v. Schweitzer*, 68 M.J. 133, 137 (C.A.AF. 2009)

For a conviction under Article 133 to stand on its own apart from a specific enumerated offense, "the government must present a theory of liability at trial and prove how the conduct exceeded the 'limit of tolerance based on customs of the service,' *MCM*, pt. IV, ¶ 59.c.(2) notwithstanding—that is, independent of—whether it constituted a specific [enumerated] offense. However, despite the high standards of accountability to which an officer is held, it still is necessary that, through custom, regulation, or otherwise, he be given notice that his conduct is unbecoming. *United States v. Guaglione*, 27 M.J. 268, 272 (C.M.A. 1988) (citing *United States v. Johanns*, 20 MJ 155 (CMA), *cert. denied*, 474 U.S. 850, 106 S. Ct. 147, 88 L. Ed. 2d 122 (1985)).

For example, in *United States v. Johanns*, the C.A.A.F.'s predecessor found that the intermediate Air Court was correct in dismissing a charge of Conduct Unbecoming an Officer for

engaging in consensual, non deviate behavior with enlisted women. 20 MJ 155 (CMA). In doing so, upholding the lower Court's finding that "as a matter of fact and law the custom in the Air Force against fraternization has been so eroded as to make *criminal prosecution* against an officer for engaging in mutually voluntary, private, non-deviate sexual intercourse with an enlisted member, neither under his command nor supervision, unavailable." *United States v. Johanns*, 20 M.J. 155, 157-58 (C.M.A. 1985). Ultimately, the court found "it appears that Captain Johanns lacked the notice from custom or otherwise which, even under the relaxed standard of review established by *Parker v. Levy, supra*, is constitutionally necessary to meet the due process requirements of the Fifth Amendment." *Id.* at 160.

Relatedly, in *United States v. Shober*, 26 M.J. 501 (A.F.C.M.R. 1986) (unpublished) (aff'd *United States. v. Shober*, 23 M.J. 249 (C.A.A.F. 1986), the Air Force Court found that taking nude photos of a civilian waitress an officer was having intercourse with on base, failed to state an offense as the Specification was too vague and lacked words of criminality.

In the context of Article 134, the Air Force Court of Criminal Appeals recently found an airman was not on notice of the criminality for indecent conduct of masturbating with a child-like sex doll in his barracks room. *United States v. Rocha*, No. ACM 40134, 2022 CCA LEXIS 725 (A.F. Ct. Crim. App. Dec. 16, 2022).

b. Service-members do not check their constitutional liberty interests at the door when it comes to private consensual conduct involving adults.

The Supreme Court in *Lawrence v. Texas*, 539 U.S. 558, 578, 123 S. Ct. 2472, 2484 (2003) found that individuals enjoyed a constitutional liberty interest in private, consensual condut between adults. In *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004). the C.A.A.F found constitutional challenges to Article 125 based on the Supreme Court's decision in *Lawrence* must

be addressed on an as applied, case-by-case basis. In *United States v. Harvey*, 67 M.J. 758 (A.F. Ct. Crim. App. 2009), the Air Force Court found that Article 133, UCMJ was not immune to *Marcum* analysis. In analyzing *Lawrence* challenges in the military context, C.A.A.F. applies a three factor test:

> First, was the conduct that the accused was found guilty of committing of a nature to bring it within the liberty interest identified by the Supreme Court? Second, did the conduct encompass any behavior or factors[1] identified by the Supreme Court as outside the analysis in *Lawrence*? Third, are there additional factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest?

United States v. Stirewalt, 60 M.J. 297, 304 (C.A.A.F. 2004) (citing *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004).

In *Stirewalt*, the C.A.A.F. affirmed an enlisted Coast Guardsman's conviction for violation of Article 125, UCMJ for consensual conduct with his officer department head. In reaching that conclusion, C.A.A.F. found the Coast Guard regulation prohibited such relationships reflected an important military interest here given the senior subordinate relationship at issue.

In *United States v. Harvey*, 67 M.J. 758 (A.F. Ct. Crim. App. 2009) the Air Force Court applied Marcum to Article 133, UCMJ, and found, as applied to that case Article 133, UCMJ to be constitutional as applied in that case to that accused, in light of the nature of the officer's known off-base homosexual with a [redacted] National.

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[1] The Supreme Court considered cases involving minors, persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused, public conduct or prostitution or cases in which the government must give formal recognition to the relationship *See Lawrence v. Texas*, 539 U.S. 558, 578, 123 S. Ct. 2472, 2484 (2003).

ARGUMENT

a. The conduct at issue in this case does not amount to that which is "unbecoming" in violation of custom of the service, thus CDR Eubanks did have notice of its criminality.

Here, the Government does not attempt to incorporate any enumerated offense, if that is their theory of liability, then the Specification fails on even a cursory review. Accordingly, the Government must show that the conduct alleged is "dishonorable and compromising . . . notwithstanding whether or not the act otherwise amounts to a crime." *United States v. Schweitzer*, 68 M.J. 133, 137 (C.A.AF. 2009) and that 'limit of tolerance based on customs of the service. *MCM*, pt. IV, ¶ 59.c.(2). Moreover, CDR Eubanks must be on notice of those things.

As a preliminary matter, the Government has again charged an overbroad time frame—amounting to nearly a year, deficiently allowing him to prepare a defense, e.g. an alibi for when these alleged incidents may have occurred. This deprives him of even the bare notice pleading requirements service members are entitled to under *Fosler*.

Turning to the charged conduct itself, CDR Eubanks is alleged to have engaged in wholly private activity in the confines of his private office behind two lockable doors onboard Aviation Training Center Mobile—largely alleged to have occurred after work, or at worst, during the lunch hours. This conduct is alleged to have occurred in an office CDR Eubanks shares with no one and during which no one else was present or even aware of CDR Eubanks's actions. This conduct would otherwise not be subject to any sanction, but for the fact it allegedly occurred "in a government office." This does not pass muster. The Coast Guard Discipline and Conduct Manual prohibits "engaging in sexually intimate behavior aboard any Coast Guard vessel, or in any Coast Guard-controlled work place." *See* Discipline and Conduct, COMDTINST M1600.2. This proscription however, clearly contemplates activity between two individuals, not a wholly private act with just oneself. If "sexually intimate behavior" is interpreted to include private

masturbation it would implicate far more than CDR Eubanks. Coast Guard controlled workplaces include a variety of places under Coast Guard control where this type of private behavior most certainly occurs, e.g. officer's state rooms which double as their offices on cutters, duty rooms, berthing, barracks, etc.. In practice, this private activity which occurs in these private, albeit "Coast Guard controlled" spaces is never sanctioned despite being in a "Coast Guard controlled workspace" and thus technically falling within the auspices of the regulation.

Finally, the Government has not alleged in the specification conduct here was dishonorable, disgraceful, or even wrongful, merely that it happened. This is akin to the same deficiency at issue in *Shobert*. While our jurisprudence is replete of instances that make masturbation or sexually adjacent acts on a military installation "unbecoming" they generally raise a separate circumstance— either someone else saw the conduct, *see e.g. United States v. Cooper*, ACM 32388, 1997 CCA LEXIS 595 (A.F. Ct. Crim. App. Dec. 31, 1997), *United States v. Mann*, No. NMCCA 200301265, 2004 CCA LEXIS 305 (N-M Ct. Crim. App. Nov. 15, 2004), *United States v. Cohlmeyer*, No. NMCCA 201200200, 2012 CCA LEXIS 601 (N-M Ct. Crim. App. Sep. 28, 2012)—or it involved children, *see e.g. United States v. Henley*, 53 M.J. 488 (C.A.A.F. 2000) (relying on the fact that content in the appellant's desk was of nude children, not its location to find the conduct unbecoming). Here, the only "circumstance" this conduct presents is that it allegedly took place in the privacy of CDR Eubanks's office onboard ATC Mobile. While this may well be inappropriate and unsanitary, it does not rise to level of "unbecoming" conduct such to be subject to criminal prosecution or to have given CDR Eubanks adequate notice.

b. CDR Eubanks's has a constitutional liberty interest in his private, consensual, conduct.

Here, the case at bar sails through *Marcum* analysis such that CDR Eubanks's conduct should not be subject to criminal prosecution.

CDR Eubanks's conduct here was private, most certainly consensual, and involved only an adult. Accordingly, the liberty protections of *Lawrence* apply to the conduct at issue and satisfy the first prong of *Marcum*. CDR Eubanks's conduct does not involve any of the other factors identified by the Supreme Court in *Lawrence,* e.g. this does not involve minors, public conduct, coercion, or prostitution and thus satisfies the second prong of *Marcum*. Finally, this conduct satisfies the third prong of *Marcum*, as the "additional factors relevant solely in the military environment" are so attenuated that they cannot overcome the constitutional interests at play.

Here, the only factor relevant to the military environment is that this conduct occurred on base—albeit in the privacy of a single office behind two lockable doors unknown to anyone but CDR Eubanks. This single fact cannot overcome the liberty interest in *Marcum.* The mere situs of the conduct without more, does not implicate military discipline at issue in *Stirewalt*, and certainly not the notoriety at issue in *Harvey.* Given that this conduct involved no one else and occurred in private, even if the proscriptions of the Discipline and Conduct Manual did reach CDR Eubanks's actions as they did in *Stirewalt*, under the circumstances, this technical violation does not have the direct prejudicial effect on military discipline or mission accomplishment that the Court was concerned with in *Stirewalt* – especially if these incidents occurred after the workday. Instead, because of the wholly private nature of the conduct, the only detriment to military mission and accomplishment would have been, assuming the charged conduct did take place during the workday, the fleeting minutes that it took to have occurred—no more detrimental to mission accomplishment than someone scrolling through social media or making a

personal phone call. A constitutional liberty interest this does not overcome. Accordingly, as applied to CDR Eubanks, this Specification is unconstitutional.

RELIEF REQUESTED

The Defense moves this Court to dismiss Specification 2 of Charge III.

EVIDENCE AND ORAL ARGUMENT

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

Enclosure A: Bill of Particulars of October 28, 2022

Enclosure B: Excerpt from Convening Authority's Briefing

Enclosure C: CGIS Summary of CDR Eubanks's Interview

Enclosure D: CGIS Summary of HSC [redacted] CGIS Interview

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

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S. P. CAOUETTE
LCDR, USCG
Detailed Defense Counsel

COAST GUARD TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **JUSTIN B. EUBANKS** **CDR / O-5** **U.S. PUBLIC HEALTH SERVICE**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO DISMISS FAILURE TO STATE AN OFFENSE (Charge II, Specification 2)** **13 January 2023**

RESPONSE

The Government opposes the Defense Motion to Dismiss for Failure to State an Offense under Art. 133 (Charge II, Specification 2). For the reasons detailed below, the Government respectfully requests this Court enter an order denying the Defense motion.

SUMMARY

For Charge II, Specification 2 the Government listed the essential elements of the offense in order to sufficiently inform CDR Eubanks of the conduct charged which he must defend and enable him to plead an acquittal or conviction in bar of future prosecution for the same offense. Through its filing, Defense alleges CDR Eubanks has a Constitutional liberty interest under Lawrence to masturbate in a government (pharmacy) office during the workday. In addressing Lawrence liberty challenges C.A.A.F. applies the Marcum tripartite framework in order to determine if a military member has a liberty interest in said conduct. In applying the Marcum test to this case, the conduct fails under every prong, therefore there is not a protected Constitutional liberty interest to masturbate in a public government (pharmacy) office during the workday.

FACTS

1. This case was referred to a General Court-Martial on 10 October 2022. The accused, CDR Eubanks, has been charged with one charge of Article 120c (Indecent Exposure) and two specifications of Article 133 (Conduct Unbecoming an Officer and Gentlemen).

2. On 29 January 2021, ATC Mobile's Executive Officer notified CGIS RAO Mobile, AL about an Anti-Harassment / Hate Incident (AHHI) investigation being opened regarding allegations of a lewd picture sent to HSC [redacted] from CDR Eubanks. See Enclosure (1).

3. On 3 February 2021, After notification of potential additional Coast Guard victims, ATC Mobile's Commanding Officer contacted CGIS RAO Mobile, AL to initiate a criminal investigation into alleged misconduct by CDR Eubanks. See Enclosure (1).

4. On 5 February 2021, at approximately 1823 local, S/A [redacted] and S/A [redacted] interviewed CDR Eubanks about alleged misconduct. The interview concluded at 1953 local. See Enclosure (2).

5. During the interview CDR Eubanks (JE) explained to S/A [redacted] and S/A [redacted] the following. See Enclosure (2):

[redacted]

6. During the interview CDR Eubanks (JE) explained to S/A [redacted] that he accidentally walked in on a female clinic staff member changing in their office during lunch. See Enclosure (2):

[redacted]

7. During the interview CDR Eubanks (JE) explained to S/A [redacted] that HS3 [redacted] serving as duty corpsman, had accidentally viewed CDR Eubanks changing in the pharmacy. See Enclosure (2).

[redacted]

8. The Cellbrite extraction of CDR Eubanks' phone uncovered numerous images of CDR Eubanks masturbating and erect in the government pharmacy on divers occasions.

9. The Cellebrite extraction uncovered an image of CDR Eubanks masturbating in the government pharmacy office on 25 March 2020 at 1224 local time. Additional images display CDR Eubanks masturbating between 1500 to 1700 in March, May, July, October, and November 2020.

10. The Cellbrite extraction uncovered an image of CDR Eubanks ejaculating in the pharmacy, next to a Government workstation and GSA Safe which stores narcotics and vaccines, on 12 November 2020 at 1633 local times.

11. On May 12, 2022, the Government charged CDR Eubanks with, in relevant part:

> **Specification 2**: In that Commander Justin Eubanks, U.S. Public Health Service, on active duty, assigned to and serving with the U.S. Coast Guard, did, on board Aviation Training Center Mobile, Alabama, on divers occasions from on or about December 2019 to November 2020, commit a certain act, to wit: masturbating in a government office, and that, under the circumstances, his conduct was unbecoming an officer and a gentleman.

12. On October 28, 2022, the Government provided a Bill of Particulars, upon Defense request, in relevant part:

> **Specification 2:**
>
> The Government informed the accused of the nature of the charge with sufficient precision with the following addition:
>
> The government office was the office space that was CDR Eubanks' primary work space during the time period of on or about December 2019 to November 2020: it is the office that is immediately adjacent to the ATC Mobile pharmacy.

BURDEN

Under R.C.M. 905(c)(1), the burden of proof is by a preponderance of the evidence. Under R.C.M. 905(c)(2), the Defense, as the moving party, bears the burden of persuasion on any factual issue the resolution of which is necessary to decide the motion.

LAW

The military is a notice pleading jurisdiction. See United States v. Sell, 11 C.M.R. 202, 206 (1953). "While the Sixth Amendment ensures the accused be afforded notice, the Fifth amendment requires the accused be protected from further prosecution for the same offense." Russell v. United States, 369 U.S. 749 (1962); Wong Tai v. United States, 273 U.S. 77 (1927). A charge and specification will be found sufficient if they, "first, contain the elements of the offense charged and fairly inform a defendant of the charge against which he must defend, and, second, enable him to plead an acquittal or conviction in bar of future prosecutions for the same offense." Hamling v. United States, 418 U.S. 87, 117, (1974). See also United States v. Resendiz-Ponce, 549 U.S. 102, 108, (2007); United States v. Sutton, 68 M.J. 455, 455 (C.A.A.F. 2010); United States v. Crafter, 64 M.J. 209, 211 (C.A.A.F. 2006). In accordance with the C.A.A.F., a charge is legally sufficient if all three prongs of the Dear Test are met: (1) the essential elements of the offense, (2) notice of the charge, and (3) protection against double jeopardy. United States v. Dear, 40 M.J. 196 (C.M.A. 1994).

(1) Dear Prong (1)

The first prong of the Dear test to determine if a specification states an offense requires the essential elements of the offense be stated. The rules governing courts-martial procedure encompass the notice requirement: "A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication." R.C.M. 307(c)(3); United States v. Fosler, 70 M.J. 225 (C.A.A.F. 2011). "The true test of the sufficiency of [a specification] is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet..." United States v. Sell, 11 C.M.R. 202, 206 (1953).

(2) Dear Prong (2)

The second prong of the Dear test to determine if a specification states an offense requires notice of what he is accused of and what he must defend against. See Hamling v. United States, 418 U.S. 87, 117, (1974) The requirement to allege every element expressly or by necessary implication ensures that a defendant understands what he must defend against. R.C.M. 307(c)(3); See also United States v. Fosler, 70 M.J. 225 (C.A.A.F. 2011). Indeed, "[n]o principle of procedural due process is more clearly established than . . . notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge." Cole v. Arkansas, 333 U.S. 196, 201 (1948); See also United States v. Miller, 67 M.J. at 385, 388 (C.A.A.F. 2009). Trial counsel should "meticulously follow the language contained in the UCMJ sample specifications" when crafting UCMJ charges and that failure to do so may call a specification's sufficiency into question. United States v. Turner, 79 M.J. 401, 404 n.2 (C.A.A.F. 2020). "The charge sheet itself gives content to that general language, thus providing the required notice of what an accused must defend against." United States v. Jones, 68 M.J. 465, 472 (C.A.A.F. 2010) (citing Parker v. Levy, 417 U.S. 733, 753-756 (1974)).

(3) Dear Prong (3)

The third prong of the Dear test to determine if a specification states an offense is whether there is double jeopardy protection. "The Fifth Amendment to the United States Constitution commands that "[n]o person shall ... be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V, cl. 2. The primary purpose of the Double Jeopardy Clause is to "protect the integrity of a final judgment." United States v. Scott, 437 U.S. 82 (1978) (citing Crist v. Bretz, 437 U.S. 28 (1978)). Under the Double Jeopardy Clause, "once a defendant is placed in jeopardy for an offense, and jeopardy terminates with respect to that offense, the defendant may neither be tried nor punished a second time for the same offense." Sattazahn v. Pennsylvania, 537 U.S. 101 (2003). The C.M.A. determined Dear prong (3) (double jeopardy protection) to be important at common law, but its relevance significantly diminished today (1984) because the Defendant has the entire record of trial to raise double jeopardy protection. See United States v. Dear, 40 M.J. 196, 197 (C.M.A. 1994). The record of trial will include the charge sheet, bill of particulars, and any testimony at trail an accused may use to protect against double jeopardy.

Article 133 – Conduct Unbecoming an Officer and Gentlemen

The C.A.A.F. uses the "reasonable officer" standard in order to determine whether an officer is put on notice that his or her acts or omissions constitute "conduct unbecoming an officer." United States v. Modesto, 39 M.J. 1055, (A.C.M.R. 1994), aff'd, 43 M.J. 315 (C.A.A.F. 1995). See also Parker v. Levy, 417 U.S. 733, (1974); United States v. Hartwig, 39 M.J. at 130 (C.M.A. 1994); United States v. Frazier, 34 M.J. 194, (C.M.A.1992). In Hartwig, the C.A.A.F. states, "[w]e are satisfied that any reasonable officer would know that such conduct falls below the "limit of tolerance based on customs of the service and military necessity below which the personal standards of an officer ... cannot fall without seriously compromising ... [his] standing as an officer ... or ... [his] character as a gentleman." 39 M.J. 125 (C.M.A. 1994).

"Even conduct of a private or unofficial nature by an officer may be prohibited if that conduct compromised the person's standing as an officer and 'brought scandal or reproach upon the service.'" United States v. Hartwig, 39 M.J. 125 (C.M.A.1994) (quoting Smith v. Whitney, 116 U.S. 167, 185 (1886)). See also United States v. Moore, 38 M.J. 490, 493 (C.M.A. 1994) (Accused's conduct was in private, but clearly "unbecoming to an honorable, decent, man" as any reasonable military officer would recognize.") "Indeed, we have recognized that '[c]onduct which is entirely unsuited to the status of an officer and a gentleman often occurs under circumstances where secrecy is intended.'" United States v. Norvell, 26 M.J. 477, 478 (C.M.A. 1988). Conduct that violates Article 133, UCMJ, may consist of an "action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the officer personally, seriously compromises the person's standing as an officer." MCM pt. IV, para. 59.c.(2) (emphasis added). United States v. Meakin, 78 M.J. 396, 404 (C.A.A.F. 2019). "All that is required is for the offender's conduct to fall below the level of conduct expected of officers and to seriously expose him to public opprobrium." United States v. Harvey, 67 M.J. 758, 762 (A.F. Ct. Crim. App. 2009) (citing United States v. Rogers, 54 M.J. 244, 256 (C.A.A.F.2000)).

"Thus, even conduct that has no bearing on military discipline might establish the basis for an Article 133, UCMJ, charge." United States v. Meakin, 78 M.J. 396, 404 (C.A.A.F. 2019). See also United States v. Fletcher, 148 U.S. at 91–92 (1893) (finding that failure to pay certain debts was facially sufficient to establish the offense of conduct unbecoming an officer and gentleman). The C.A.A.F. continues in Meakin, "Finally, Appellant argues that even if his conduct wasn't constitutionally protected (and it was not) the charge of Article 133, UCMJ, was legally insufficient because he (1) couldn't know that private consensual communications were illegal or would pose "a clear and present danger" to his status as an officer, and (2) there was "no connection at all between Appellant's speech and the military mission." We are unpersuaded." United States v. Meakin, 78 M.J. 396, 403 (C.A.A.F. 2019).

"Nor is there a requirement that the conduct constitute an offense elsewhere under the UCMJ." United States v. Harvey, 67 M.J. 758, 762 (A.F. Ct. Crim. App. 2009). "Moreover, military law is replete with examples of conduct protected by the Constitution when engaged in by civilians, but which becomes criminal when engaged in by military members." Id.

Constitutional Lawrence Liberty Interest applied to Military Justice

The Supreme Court in Lawrence v. Texas, 539 U.S. 558 (2003) overruled Bowers v. Hardwick, 478 U.S. 186 (1986) holding that a statute criminalizing homosexual sodomy violated the Due Process Clause of the Fourteenth Amendment. With respect to the Lawrence petitioners the Supreme Court stated:

> The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.

United States v. Marcum, 60 M.J. 198, 203 (C.A.A.F. 2004) (Citing Lawrence v. Texas, 539 U.S. 558, 578 (2003)).

The C.A.A.F. held that Constitutional challenges based on Lawrence, must be addressed on an as applied, case-by-case basis within the "military context." See United States v. Marcum, 60 M.J. 198, 206 (C.A.A.F. 2004). Constitutional rights apply differently to servicemembers than to civilians because "the military is, by necessity, a specialized society." Id. at 205. (Citing Parker v. Levy, 417 U.S. 733, 743 (1974)). The C.A.A.F. identified a three-prong test for addressing Lawrence liberty challenges within the military context. Under the Marcum three-prong test, Courts ask:

> (1) Was the conduct of the accused of a nature to bring it within the liberty interest identified by the Supreme Court in Lawrence?
> (2) Did the conduct encompass any behavior or factors identified by the Supreme Court as outside the analysis in Lawrence?
> (3) Are there additional factors relevant solely in the military environment that affect the nature and reach of the Lawrence liberty interest?

United States v. Harvey, 67 M.J. 758, 760–61 (A.F. Ct. Crim. App. 2009).

For Marcum prong (1), the C.A.A.F. in United States v. Meakin, determined the Lawrence holding grounded its analysis in a "fundamental liberty interest to form intimate, meaningful, and personal bonds that manifest themselves through sexual conduct. Lawrence did not purport to include any and all behavior touching on sex within its purview and did not 'conclude that an even more general right to engage in private sexual conduct would be a fundamental right.'" 78 M.J. 396, 402–03 (C.A.A.F. 2019). See also Seegmiller v. LaVerkin City, 528 F.3d 762, 771 (10th Cir. 2008) (no protection for off-duty sexual conduct of police officers that violated department ethics guidelines). For Marcum prong (2), one of the factors identified by the Supreme Court in determining whether the conduct in question may be

protected by Constitutional liberty interests is whether the conduct is public. See Lawrence v. Texas, 539 U.S. 558, 578 (2003).

The Air Force Court of Appeals determined, and review was denied by the C.A.A.F., that even if conduct survives scrutiny under Marcum analysis, the conduct "can nonetheless be proscribed as conduct unbecoming an officer and a gentleman." United States v. Harvey, 67 M.J. 758, 762 (A.F. Ct. Crim. App. 2009). In Harvey, the Air Force Court of Appeals held "[a]gainst this backdrop, we conclude that the fact that conduct may fall within a recognized liberty interest under the Constitution does not mean that the conduct cannot be proscribed under Article 133, UCMJ. Such is true even if the infringement of the liberty interest would not pass constitutional scrutiny as a violation of another punitive article, e.g., Article 125, UCMJ." Id.

ARGUMENT

I. Defense alleges CDR Eubanks does not have fair notice that his conduct was unbecoming

Defense alleges CDR Eubanks does not have fair notice that his conduct was unbecoming and because of this the charge must be dismissed. In accordance with the C.A.A.F., a charge is legally sufficient if all three prongs of the Dear Test are met: (1) the essential elements of the offense, (2) notice of the charge, and (3) protection against double jeopardy. United States v. Dear, 40 M.J. 196 (C.M.A. 1994). Each of the three Dear prongs are met in this case and analyzed *infra*.

(1) Dear Prong (1) is met because the Government list the essential elements of the Offense in the Specification

Dear prong (1) requires the charge state the essential elements of the offense. The Manual for Courts-Martial, Part IV states that the elements for conduct unbecoming an officer and gentlemen are:

> (1) That the accused did a certain act, and
>
> (2) That, under the circumstances, the accused's conduct was unbecoming an officer and a gentleman.

Specification 2 of Charge II states the essential of elements of the offense as proscribed in the Manual for Courts-Martial, Part IV. See also United States v. Amazaki, 67 M.J. 666, 670 (A. Ct. Crim. App. 2009) ("The elements of Article 133, UCMJ, are deceptively simple: first, the accused must do or omit to do certain acts; and second, under the circumstances, the acts or omissions must constitute conduct unbecoming an officer."). Therefore, Dear prong (1) is met.

(2) Dear Prong (2) is met because the charge fairly informs CDR Eubanks of what he must defend against

Defense alleges the Government does not provide a factual basis for Specification 2 of

Charge II. The military is a notice pleading jurisdiction, not a fact pleading one. See United States v. Sell, 11 C.M.R. 202, 206 (1953). Defense must show the Government does not provide sufficient notice of what CDR Eubanks is accused of and what he must defend against. Here, the accused has sufficient notice within R.C.M. 307 of the charged offense. CDR Eubanks is on notice the charged offense occurred on board ATC Mobile, from on or about December 2019 to November 2020, where he masturbated in a government (pharmacy) office. On October 28, 2022, the Government provided additional notice in a Bill of Particulars stating, "the government office was the office space that was CDR Eubanks' primary workspace during the time period of on or about December 2019 to November 2020; it is the office that is immediately adjacent to the ATC Mobile pharmacy." Indeed, CDR Eubanks, after initially stating to CGIS that he did not masturbate on base, CDR Eubanks states "Yeah" to the question about masturbating in the pharmacy office. CDR Eubanks is fairly informed through the charge and knows what he must defend against, conduct which he admits to doing. Thus, the charge provides sufficient notice o what he must defend against, and no relief is warranted.

Defense next alleges the conduct in question was not in violation of customs of the service, therefore CDR Eubanks did not have notice. The C.A.A.F. uses the "reasonable officer" standard in order to determine whether an officer is put on notice that his or her acts or omissions constitute "conduct unbecoming an officer." United States v. Modesto, 39 M.J. 1055, (A.C.M.R. 1994), aff'd, 43 M.J. 315 (C.A.A.F. 1995). It is for the panel of officers sitting as a general court-martial to decide whether a Commander masturbating in a pharmacy during the workday falls below the "reasonable officer standard" put forth by C.A.A.F. Defense's motion demonstrates CDR Eubanks is fairly informed of the charged conduct through Defense's motion asking this Court to dismiss the charge because Defense does not believe the conduct rises to the level of conduct unbecoming. Determining whether CDR Eubanks' conduct is unbecoming is for a panel of officers sitting as a general court-martial. Any challenge to the factual sufficiency of a charge may be raised at trial by Defense under R.C.M. 917, not in a pre-trial motion. CDR Eubanks is sufficiently informed of the conduct stated in Charge II, Specification 2 and knows what he must defend against.

Defense further alleges said conduct of Charge II, Specification 2 occurs often in Coast Guard cutters and workspaces but is never sanctioned. While this argument is for the panel of officers sitting as a general court-martial to weigh, not for a pre-trial motion, it further demonstrates Defense is on proper notice of the charge as Defense is already preparing for trail against the charge. Thus, the charge fairly informs the accused of the conduct and what he must defend against. Thus, no relief is warranted, and the charge is sufficient.

(3) Dear Test Prong (3) is met because the accused will have the record of trial

The third prong is satisfied because the specification alleges sufficient facts of the accused to use in a claim of double jeopardy, if he is later prosecuted for the same offense. Charge II, Specification 2 provides a discrete location and a discrete act, which provides the accused notice of what he is charged with and what he must defend against. If another prosecutor wants to charge CDR Eubanks under the same act, they will be barred because the charge provides the necessary detail to afford the accused double jeopardy protection. Further, the accused will have the entire record of trial, which includes the charge sheet, bill of particulars, and trial testimony. Defense fails to demonstrate the integrity of the final judgement in this case

will not afford the accused double jeopardy protections. Thus, no relief is warranted.

II. Defense alleges CDR Eubanks has a constitutional liberty interest to masturbate within a Government pharmacy during the workday

Defense alleges this specification sails through Marcum analysis such that CDR Eubank's conduct should not be subject to criminal prosecution and the specification should be dismissed because CDR Eubanks has Constitutional liberty protection in said conduct. In addressing Lawrence liberty challenges the C.A.A.F. applies the Marcum tripartite framework in order to determine if a military member has a liberty interest in said conduct. In applying Marcum to this case, the conduct fails under every prong, therefore there is not a Constitutional liberty interest to masturbate in a public government workspace during the workday.

(1) Defense argument fails Prong (1) of Marcum Analysis

Defense alleges liberty protections of Lawrence apply to the conduct at issue and satisfy prong (1) of Marcum because the conduct was "private, most certainly consensual, and involved an adult." The C.A.A.F. stated in 2019 "Lawrence grounded its analysis in a fundamental liberty interest to form intimate, meaningful, and personal bonds that manifest themselves through sexual contact. Lawrence did not purport to include any and all behavior touching on sex within its purview and did not conclude that an even more general right to engage in private sexual conduct would be a fundamental right." United States v. Meakin, 78 M.J. 396 (C.A.A.F. 2019). Defense has the burden to demonstrate the constitutional liberty interest the accused has of masturbating in a federal pharmacy in a U.S. Coast Guard clinic onboard a U.S. Coast Guard Base during the workday. Defense cites to no case law because no court has ever held such a position. Lawrence was about two individuals in an intimate relationship expressing their intimacy physically within the confines of their private home. 539 U.S. 558 (2003). Lawrence was about two individuals' right to liberty under the Constitution to engage in their conduct without intervention of the government and about "a promise of the Constitution that there is a realm of personal liberty which the government may not enter." Id. Here, we have a Commander masturbating during the workday in a public pharmacy office onboard a federal military installation within inches of a GSA safe storing medicines and vaccines for servicemembers and retirees. The facts of Lawrence are distinguished in every way from the facts before this Court. Here, Defense seeks to put masturbating in a government pharmacy during the workday "on par with the liberty interest and fundamental right to form intimate, meaningful, personal bonds that manifest themselves through sexual conduct described in Lawrence." United States v. Meakin, 78 M.J. 396 (C.A.A.F. 2019). The charged conduct does not involve in anyway forming intimate meaningful intimate bonds with another person, instead this is conduct unbecoming of an officer and gentlemen. The C.A.A.F. rejected putting transmitting obscenity over the internet and encouraging sexual exploitation in Meakin behavior on par with the Constitutional issues in Lawrence. Id. Defense fails to demonstrate how masturbating during the workday applies to said Constitutional liberty protections. Therefore, the Accused does not have a Constitutional liberty interest in masturbating during the workday in an office pharmacy onboard a U.S. Coast Guard base. Thus, Marcum prong (1) fails.

After applying the facts and circumstances of CDR Eubanks conduct in this case to Marcum prong (1) no further analysis is needed because CDR Eubanks does not have a

Constitutional liberty interest under Lawrence in his conduct, as applied through Marcum, *supra*. Thus, the defense motion should be denied. Assuming *arguendo,* Marcum prong (2) and prong (3) will be discussed, but no further analysis is required.

(2) Defense argument fails Prong (2) of Marcum Analysis

Defense alleges the liberty protections of Lawrence apply because the conduct does not involve any other factors identified by the Supreme Court in Lawrence. In order to apply liberty protections in Lawrence the conduct must be private. Unlike the conduct in Lawrence, here, we have public conduct. Defense has the burden to demonstrate the conduct is private when it occurred in a federal pharmacy in a U.S. Coast Guard clinic onboard a U.S. Coast Guard Base during the workday. CDR Eubanks states to CGIS the pharmacy is a weird setup with an office, drug storage, working area, and dispensary. After describing the office to CGIS, CDR Eubanks states he was changing and HS3 [redacted] serving as the duty corpsman, accidentally saw him changing through the pharmacy window. CDR Eubanks in his interview with CGIS explains he has walked in on clinic staff changing during lunch. Walking in on others in the clinic appears to be a common occurrence and a fact that further demonstrates the public nature of the clinic and pharmacy office. The pharmacy is not CDR Eubanks private home office, which he controls access to. While it is not the Government's burden to prove so, the ATC Mobile Commanding Officer, duty corpsman, base security, and other clinic staff such as the HS2 pharmacy technician, likely have access to this space at any time. Defense concedes the conduct occurred on base in arguing Marcum Prong (3), while simultaneously stating CDR Eubanks' conduct meets Marcum Prong (2) satisfying a Lawrence liberty interest of private conduct. Defense states in its motion, "[h]ere, the only factor relevant to the military environment is that the conduct occurred on base." The conduct occurred in public, on base, during the workday, in an office that is not CDR Eubanks private space. Thus, Marcum Prong (2) is not satisfied and there is not a liberty interest in this public conduct.

(3) Defense's argument fails Marcum Prong (3)

Defense acknowledges Marcum Prong (3) as a relevant factor but one so attenuated that it cannot overcome CDR Eubanks' Constitutional liberty interest. Marcum prong (3) addresses whether there are additional factors relevant solely in the military environment, not addressed by the Supreme Court in Lawrence. Defense must show the conduct does not implicate factors specific to the military environment. The additional factor relevant solely to military environment is that the said conduct is conduct unbecoming CDR Eubanks rank and privilege serving as a Commander with the U.S. Coast Guard. Here, Defense fails to show how a Commander masturbating during the workday in a public pharmacy office and ejaculating inches from a GSA safe which stores essential vaccines and narcotics does not somehow implicate the C.A.A.F. "reasonable officer" standard for conduct unbecoming an officer and a gentleman. See Modesto. Defense fails to show how said conduct does not fall below the level of conduct expected of officers during the workday and expose CDR Eubanks to "public opprobrium." See Harvey. CDR Eubanks conduct fails under Marcum prong (3) because the relevant additional factor is that said conduct in a pharmacy during the workday with patients in the building was and is conduct unbecoming for an officer and a gentlemen. While this actual question will be answered by a panel of officers sitting as a general court-martial, the said conduct by CDR Eubanks is the additional relevant factor unique to the military "specialized society." See

Marcum. Thus, the said conduct fails under Marcum prong (3).

Defense likens the said conduct to making a personal phone call or scrolling through social media during the workday. Again, first this conduct is not private, CDR Eubanks does not own the office he works in. The Base Commander authorizes and determines where members work onboard the base. Unlike, CDR Eubanks' home, CDR Eubanks is not the only person who can access the space at any time, even if the door is locked. If CDR Eubanks went to his home during his authorized lunch break and masturbated there would be a Constitutional liberty interest in said conduct. Here, he is taking pictures ejaculating sitting on his government chair in front of his government workstation inches from a GSA safe which stores narcotics and vaccines. CDR Eubanks states part of the weird setup of the pharmacy space is that it also serves as the dispensary and storage space for prescriptions and vaccines where are issued to servicemembers and retirees. Again, CDR Eubanks states in his interview that he mistakenly walked into a colleague's office while she was changing during lunch. If as Defense argues, CDR Eubanks' conduct is analogous to someone making a personal phone call or scrolling social media during the workday than there would be no greater effect if someone walked in on CDR Eubanks masturbating during the workday. Additionally, if Defense's hypothetical member was scrolling porn social media sites watching videos or on a personal phone dishonoring POTUS this too would be prohibited. On its face this argument fails.

The Coast Guard Discipline and Conduct Manual Section 2.A.2.g prohibits engaging in sexually intimate behavior aboard any Coast Guard vessel, or in any Coast Guard-controlled workplace. Masturbation is not so attenuated, if at all, from the Coast Guard Discipline and Conduct manual prohibition of engaging in sexually intimate behavior in any Coast Guard controlled workspace. Furthermore, the conduct in this Specification not only is onboard a military base but occurred within the clinic and within the pharmacy, where narcotics and prescriptions are dispersed to servicemembers and retirees. Defense states in its motion said conduct "[m]ay well be inappropriate and unsanitary." The Government agrees and affirms said conduct falls under additional relevant factors which do not afford the accused a protected Constitutional liberty interest to masturbate in a public government workspace (pharmacy) during the workday. Thus, no relief is warranted.

RELIEF REQUEST

The Government has expressed every element of the offense to sufficiently inform CDR Eubanks of the conduct charge in for him to prepare a defense and to protect against double jeopardy. Therefore, the Defense motion to dismiss Charge II, Specification 2 must be denied.

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ANTHONY J. MYERS
LCDR, USCG
Trial Counsel

****

CERTIFICATE OF SERVICE

I certify that I have served or caused to be served a true copy (via e-mail) of the above on the Defense Counsel and the Military Judge on 13 January 2023.

MYERS.ANT HONY.J. [redacted] Digitally signed by [redacted] Date: 2023.01.13 16:15:30 -08'00'

Anthony J. Myers,
LCDR, USCG
Trial Counsel

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U.S. COAST GUARD TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **J. B. EUBANKS** **CDR / O-5** **U.S. PUBLIC HEALTH SERVICE**	**DEFENSE MOTION TO COMPEL** **(Discovery)** **1 FEB 23**

MOTION

Pursuant to Article 46, UCMJ, 10 U.S.C. § 846, R.C.M. 701, the Defense requests this Court compel the Government to discover and produce the below requested matters as they are relevant to Defense preparation and in the possession of military authorities.

GOOD CAUSE

The Defense requests leave of the Court to file this motion out of time with the deadlines set by the Trial Management Order for good cause shown. Specifically, the Government failed to discover the Search Authorization issued on February 24, 2021 until January 11, 2023, and only after the Defense filed a motion asking this Court to compel such disclosure. The discovery request giving rise to this motion was predicated on information contained in this late discovery.

BURDEN

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

FACTS

1. CDR Eubanks is a member of the Public Health Service Commissioned Corps, assigned to the Coast Guard. He is charged with a single specification of violation of Article 120c, UCMJ 10 U.S.C. § 920c, and two specifications of violation of Article 133, UCMJ, 10 U.S.C. § 933. (Charge Sheet, May 12, 2022)

2. On February 5, 2021, CDR Eubanks consented to the search of his cellular phone following his interview with the Coast Guard Investigative Service (CGIS). (Encl. A.)

3. On February 9, 2021, CGIS Special Agent [redacted] provided Gulf Coast Technology, a civilian forensic lab, CDR Eubanks's phone to perform a digital extraction. (Encl. B.)

4. On February 24, 2021, CDR Eubanks's inquired with CDR [redacted] the ATC Mobile Deputy XO, about the status of his phone; prompting CDR [redacted] to contact Special Agent [redacted] who indicated that she would contact the forensic laboratory. (Encl. C.)

5. That same day, CDR [redacted] contacted Special Agent [redacted] again to inform her that CDR Eubanks had contacted him again and specifically indicated that at the advice of counsel, he was asking for his phone back. (Encl. C.)

6. Upon learning of this revocation, Special Agent [redacted] sought a Search Authorization from CDR [redacted] a collateral duty Special Courts-Martial Judge to search the phone. (Encl. D.)

7. This search authorization was not signed until 2034 on February 24, 2021. (Encl. D.)

8. However, the extraction report of CDR Eubanks's cellular phone prepared by Gulf Coast Technology indicates the extraction took place at 1200 on 24 February, 2021. (Encl. B, E.)

9. On 28 October, 2022, in its initial discovery request, the Defense requested the search authorization related to the search of CDR Eubanks's phone. (*Def. Mot. Compel Disc.*, Dec 23, 2022)

10. Despite Trial Counsel representing that this material was "previously provided" in its November 14, 2022 discovery response, the Defense did not receive any material related to the 24 February, 2021 search authorization until 11 January, 2023—following the Defense's filing of a Motion to Compel Discovery. (*Def. Mot. Compel Disc.*, Dec 23, 2022 and Encl. F.)

11. On January 26, 2023, the Defense requested discovery of the following material:

> a. All written communications, including emails, text messages, or phone logs, between the Coast Guard Investigative Service and Gulf Coast Technology Center regarding CDR Eubanks's cellular phone or the search thereof. This specifically includes all communications regarding CDR Eubanks's revocation of consent to search the phone, the issuance of the search authorization, chain of custody, pick-up, and delivery.
>
> b. Communications between CDR [redacted] and Special Agent [redacted] regarding CDR Eubanks's revocation of consent to search his phone as referenced on Bates 000033, or otherwise. This includes any and all emails, text messages, teams messages, or other written media.

(Encl. G.)

12. On January 31, 2023, the Government respectively responded to these requests that this material was "Denied. Outside the scope of R.C.M. 701" and "Denied. Outside the scope of R.C.M. 701. Notwithstanding the denial, the Government will provide correspondence within the possession of S/A [redacted] between S/A [redacted] and CDR [redacted] regarding CDR Eubanks's phone" (Encl. H.)

LAW

a. Congress provides in Article 46 liberal discovery at court-martial that exceeds constitutional protections.

Parties to a court-martial "shall have equal opportunity to obtain witnesses and other evidence." 10 U.S.C. §846. Trial counsel's obligation under Article 46, U.C.M.J., includes "removing obstacles to defense access to information and providing such other assistance as may be needed to ensure that the defense has an equal opportunity to obtain evidence." *United States v. Stellato*, 74 M.J. 473, 481 (C.A.A.F. 2015)(internal quotations omitted.). The Rules for Court-Martial pertaining to discovery aid in the enforcement of Article 46 and "[t] parties should evaluate pretrial discovery and disclosure issues in light of [its] liberal mandate. *Id.* (quoting *United States v. Roberts*, 59 M.J. 323, 325 (C.A.A.F. 2004).

The President amended Rule for Courts-Martial 701(a)(2)(A)(1) in 2018 "to broaden the scope of discovery, requiring disclosure of items that are "relevant" rather than "material" to defense preparation of a case[...]." App.15-9, Manual for Courts-Martial (2019 ed.). Upon defense request and after service of charges:

> The Government shall permit the defense to inspect any book, papers, documents, data, photographs, tangible objects, buildings, or places, or copies of portions of these items, if the item is within the possession, custody or control of military authorities and – (i) *the item is relevant to defense preparation* [...].

R.C.M. 701(a)(2)(A)(i)(emphasis added).

As a threshold matter, discoverable material is "in the possession, custody or control of military authorities. *Id.* Generally speaking, items held by an entity outside of the Federal Government does not satisfy this required. *Stellato*, 74 M.J. at 484. However, trial counsel "cannot avoid R.C.M. 701(a)(2)(A) by the simple expedient of leaving relevant evidence to repose in the hands of another agency while utilizing his access to it in preparing his case for trial." *Id.* (internal citations and quotation marks omitted). Even evidence not in the physical possession of the prosecution team might still be within its possession, custody, or control. *Id.* Examples include instances when: "(1) the prosecution has both knowledge of and access to the object; (2) the prosecution has the legal right to obtain the evidence; (3) the evidence resides in another agency but was part of a joint investigation; and (4) prosecution inherits a case from a local sheriff's office and the object remains in the possession of the local law enforcement." *Id.* at 485. Evidence may still be in the "possession, custody or control of military authorities" even if it does not fit neatly into any of these scenarios, and the determination must rest on the particular facts of each case. *See Stellato*, 74 M.J. 484-85.

Evidence is material if it is of "such a nature that knowledge of [it] would affect a person's decision-making process." Black's Law Dictionary 1066 (9th ed. 2009). Evidence may be relevant and even material despite its inadmissibility at trial. *See United States v. Luke*, 69 M.J. 309, 320 (CA.A.F. 2011)(internal citations omitted). Material evidence includes inadmissible materials "that would assist the defense in formulating a defense strategy." *Id.* The standard for determining "relevance" to defense preparation is still broader than that.

ARGUMENT

The requested evidence is relevant to Defense preparation as it is critical to the Defense's analysis of a potential suppression motion regarding the search of CDR Eubanks's cellphone.

Here, there is evidence that CDR Eubanks revoked consent to search his phone at some point on February 24, 2021 which prompted the Special Agent [redacted] to seek a search authorization. However, despite CDR Eubanks's apparent revocation, the forensic lab extracted CDR Eubanks's phone at 1200 that same day—despite the search not being authorized by a military judge until after 2000 that night. Communications between CDR Cowell, CGIS, and the forensic lab regarding the status of CDR Eubanks's consent, and in turn, their authority to search the phone, are relevant to Defense preparation because the information known by these Government actors and *when* is critical to the Defense's analysis of a potential motion to suppress. This material is in the possession military authorities and relevant to Defense preparation—it must be disclosed.

RELIEF REQUESTED

The Defense respectfully requests the Court compel the Government to discover the requested material.

EVIDENCE

The Defense offers the following evidence in support of this motion:

A. Consent to Search of February 5, 2021
B. Gulf Coast Technology Center Intake and Chain of Custody
C. CGIS ROI Excerpt (Bates 000033-000034)
D. Search Authorization of February 24, 2021
E. Cellbrite Extraction Report
F. Discovery Receipt of January 11, 2023
G. Supplemental Discovery Request of January 26, 2023
H. Response to Supplemental Discovery Request of January 31, 2023

ORAL ARGUMENT

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

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S. P. CAOUETTE
LCDR, USCG
Detailed Defense Counsel

Appellate Exhibit 52
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COAST GUARD TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **JUSTIN B. EUBANKS** **CDR / O-5** **U.S. PUBLIC HEALTH SERVICE**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO COMPEL DTD 02FEB2023 (DISCOVERY)** **10 February 2023**

RESPONSE

The Government opposes the Defense Motion to Compel Discovery. For the reasons detailed below, the Government respectfully requests this Court enter an order denying the Defense motion based on the law and the issue being moot.

FACTS

1. This case was referred to a General Court-Martial on 10 October 2022. The accused, CDR Eubanks, has been charged with one charge of Article 120c (Indecent Exposure) and two specifications of Article 133 (Conduct Unbecoming an Officer and Gentlemen).

2. On 29 January 2021, ATC Mobile's Executive Officer notified CGIS RAO Mobile, AL about an Anti-Harassment / Hate Incident (AHHI) investigation being opened regarding allegations CDR Eubanks sent a lewd picture to HSC [redacted] See Enclosure (1) of Government Response to Defense Motion Failure to State an Offense (Charge I).

3. On 3 February 2021, ATC Mobile's Commanding Officer contacted CGIS RAO Mobile, AL to initiate a criminal investigation into alleged misconduct by CDR Eubanks after notification that there may be additional Coast Guard victims. See Enclosure (1) of Government Response to Defense Motion Failure to State an Offense (Charge I).

4. On 5 February 2021, at approximately 1823 local, S/A [redacted] and S/A [redacted] interviewed CDR Eubanks about alleged misconduct. The interview concluded at 1953 local. See Enclosure (2) of Government Response to Defense Motion Failure to State an Offense (Charge I).

5. On 5 February 2021, at approximately 1900 local time, CDR [redacted] singed a search authorization permitting CGIS to seize CDR Eubanks' mobile personal cellphone and search the data on the device within 30 days of 05 February 2021. See Enclosure (1).

6. On 5 February 2021, at approximately 2005 local time, CDR Eubanks voluntarily consented to the search of his phone after being interview by S/A [redacted] and S/A [redacted] of CGIS RAO Mobile. See Defense Enclosure (A).

7. On 24 February 2021 at approximately 1015, CDR [redacted] Deputy Executive Officer, ATC Mobile contacted S/A [redacted] regarding CDR Eubanks' phone. CDR Eubanks requested an update on when his phone would be returned. See Defense Enclosure (C).

8. On 24 February 2021, after receiving the request from CDR [redacted] for an update on when CDR Eubanks' phone would be returned, S/A [redacted] contacted Gulf Coast Technology Center to inquire about the status of the extraction. See Enclosure (2).

9. On 24 February 2021 at approximately 1200, [redacted] Gulf Coast Technology Center, conducted an extraction of CDR Eubanks' phone. See Defense Enclosure (B).

10. On 25 November 2022, the Government provided to the Defense the 05 February 2021 Search Authorization to Defense titled 777-778 Search Authorization _CDR Eubanks_05FEB21 signed (Bates No. 777-778).

11. On 31 January 2023, the Government provided to the Defense responsive material to its Discovery request dtd 26 January 2023. See Enclosure (3).

12. On 08 February 2023, the Government provided to the Defense responsive material to its Discovery request dtd 26 January 2023. See Enclosures (4) and (5).

BURDEN

Under R.C.M. 905(c)(1), the burden of proof is by a preponderance of the evidence. Under R.C.M. 905(c)(2), the Defense, as the moving party, bears the burden of persuasion on any factual issue the resolution of which is necessary to decide the motion.

LAW

R.C.M. 701 and Discovery

Under R.C.M. 701(a)(2), the Government must permit the defense to inspect, among other things, "[a]ny books, papers, documents, photographs, tangible objects, buildings, or places" if and only if (1) the item is "within the possession, custody, or control of military authorities" and (2) "the item is relevant to defense preparation." R.C.M. 701(a)(2)(A)(i).

The C.M.A. in United States v. Simmons, 38 M.J. 376, 381 (C.M.A.1993) analyzed trial counsel's duty to disclose under R.C.M. 701(a)(2)(B), specifically regarding disclosure of scientific reports. R.C.M. 701(a)(2)(B) also only applies to materials that are (1) "within the possession, custody, or control of military authorities," and (2) material to preparation of the defense (now "relevant to defense preparation"). In Simmons, the court indicated that "[t]rial counsel must exercise due diligence in discovering [favorable evidence] not only in his

possession but also in the possession ... of other 'military authorities' and make them available for inspection." The court specified that it is not a requirement for trial counsel to search for "...the proverbial needle in a haystack. He need only exercise due diligence in searching his own files and those police files readily available to him." emphasis added Id. at n. 4. The opinion by the Court of Military Appeals in Simmons clearly states that the scope of disclosures under the possession of "military authorities" does not refer to the military as a whole but to the authorities within the military, i.e., law enforcement authorities. Appellate courts continue to uphold those parameters and that the rules for discovery are not a sweeping grant for any information that is possessed by the government. The scope of review that must be undertaken outside the prosecutor's own files is dependent on the relationship of the other governmental entity to the prosecution and the nature of the defense discovery request. See United States v. Williams, 50 M.J. 436, 441 (C.A.A.F. 1999).

The Army Criminal Court of Appeals specified that "military authorities" encompasses the prosecutors' files and another government entity, but it is dependent on the relationship with the prosecution and whether the entity was acting on the government's behalf in the case. See United States v. Shorts, 76 M.J. 523, 532 (Army Ct. Crim. Appeals 2017), citing Kyles, 514 U.S. at 437, 115 S.Ct. 1555; See also United States v. Mahoney, 58 M.J. 346, 348 (C.A.A.F. 2003). It is highly recognized that trial counsel has a duty to search, but within reasonable limits. R.C.M. 701 requires that the prosecution "engage[ ] in 'good faith efforts' to obtain [requested] material." United States v. Williams, 50 M.J. 436, 441 (C.A.A.F. 1999); R.C.M. 701(a)(2). The court in United States v. Jackson, 59 M.J. 330, 334 (C.A.A.F. 2004) additionally provides the scope of a military prosecutor's duty as to matters not within the prosecutor's personal knowledge, and again explains that the prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf." (emphasis added) citing United States v. Mahoney, 58 M.J. 346, 348 (C.A.A.F. 2003)(quoting Strickler v. Greene, 527 U.S. 263 (1999)).

The Court of Military Appeals has repeatedly construed R.C.M. 701 and Federal Rule of Crim. P. Rule 16(a) in unison and cited to the federal rule and federal case law when applying R.C.M. 701. See United States v. Stone, 40 M.J. 420, 422 (C.M.A. 1994), citing to United States v. Lloyd, 992 F.2d 348, 351 (D.C. Cir. 1993). Under Article 36 of the U.C.M.J, the Manual for Courts-Martial shall apply the principles of the federal rules as far as practicable, therefore any reference to Rule 16 by the Supreme Court should apply to R.C.M. 701. In United States v. Armstrong, 517 US 456, 462 (1996), the Supreme Court concluded that within the context of the Federal Rule of Crim. P., Rule 16, "the 'defendant's defense' means the defendant's response to the Government's case in chief." Further, that Rule 16 establishes that the requests can refer only to defenses in response to the Government's case in chief. Id. at 463 (the court determined that the request for information related to an allegation of selective-prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution). The accused in Armstrong argued that the rule applies for "any claim that results in 'non conviction' if successful is a 'defense.'" However, the Supreme Court explicitly rejected that argument, stating, "the term may encompass only the narrower class of "shield" claims, which refute the Government's arguments that the defendant committed the crime charged. Id. at 462.

ARGUMENT

The requested materials at issue are outside the scope of R.C.M. 701. However, all responsive materials that exist have been provided to Defense. See Enclosure (3), (4), and (5).

Defense's Discovery memorandum dtd 26 January 2023 requested the following materials under R.C.M. 701:

1. *Written Communications between CGIS and Gulf Coast Technology Center regarding CDR Eubanks' phone and search thereof.*
2. *Communications between CDR [redacted] and S/A [redacted] regarding CDR Eubanks' alleged revocation of consent.*

The Government has provided all requested materials that exist and met the Defense request, this issue is moot. Thus, no relief is warranted.

MYERS.ANTHONY.J.[redacted] Digitally signed by MYERS.ANTHONY.J.[redacted] Date: 2023.02.10 16:13:05 -08'00'

Anthony J. Myers,
Lieutenant Commander, USCG
Trial Counsel

****

CERTIFICATE OF SERVICE

I certify that I have served or caused to be served a true copy (via e-mail) of the above on the Defense Counsel and the Military Judge on 10 February 2023.

MYERS.ANTHONY.J.[redacted] Digitally signed by MYERS.ANTHONY.J.[redacted] Date: 2023.02.10 16:13:40 -08'00'

Anthony J. Myers,
LCDR, USCG
Trial Counsel

Appellate Exhibit 54
Page 4 of 4

U.S. COAST GUARD TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **J. B. EUBANKS** **CDR / O-5** **U.S. PUBLIC HEALTH SERVICE**	**DEFENSE MOTION TO COMPEL** **(Discovery)** **10 FEB 23**

MOTION

Pursuant to Article 46, UCMJ, 10 U.S.C. § 846, R.C.M. 701, the Defense requests this Court compel the Government to discover and produce the below requested matters as they are relevant to Defense preparation and in the possession of military authorities.

GOOD CAUSE

The Defense requests leave of this Court to file this Motion out of time for good cause shown. Specifically, on January 18, 2023, the Government charged CDR Eubanks with a second set of charges which currently pend an Article 32 Preliminary Hearing. The Government subsequently provided a plea offer to resolve both sets of charges. The requests for discovery giving rise to this motion were predicated on information gained after the preferral of the second set of charges and the Government's plea offer—both of which took place following this Court's original deadline for motions.

BURDEN

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

FACTS

1. CDR Eubanks is a member of the Public Health Service Commissioned Corps, assigned to the Coast Guard. He is charged with one specification of violating Article 120c, UCMJ, 10 U.S.C. § 920c, and two specifications of violating Article 133, UCMJ, 10 U.S.C. § 933. (Charge Sheet, May 12, 2022.)

2. On December 21, 2022, CDR Eubanks sent a plea offer to the Government in which he disclosed that he had begun to receive counseling and treatment. (Encl. A.)

3. On January 18, 2023, the Government charged CDR Eubanks with a second set of charges alleging additional violations of Article 120c, UCMJ, 10 U.S.C. § 920c, Article 128, UCMJ, 10

U.S.C. § 928, and a violation of Article 133, UCMJ, 10 U.S.C. § 933, all involving a civilian postal worker, [redacted] and occurring in September and October of 2022. (Encl. B.)

4. On January 9, 2023, CGIS Special Agent [redacted] interviewed [redacted] and she discussed her allegations against CDR Eubanks. (Encl. C.)

5. During her interview with Special Agent [redacted] brought up her communications, which she references on her cell phone, with a "Coast Guard lawyer" that convinced her to testify against CDR Eubanks. She later identified this lawyer by name as Assistant Trial Counsel (ATC). (Encls. C, D.)

[redacted]

6. On February 1, 2023, the Defense sent the below discovery request for copies of these communications between [redacted] and [redacted] (Encl. E.)

[redacted]

7. On February 9, 2023, the Government responded to the Defense's February 1 discovery request stating "Denied. Outside the Scope of R.C.M. 701. Notwithstanding the denial, the requested communications were previously provided." On February 10, the Government responded to the Defense request for clarification, indicating the Defense had all written communications with [redacted]—prompting the Defense to request an interview with Assistant Trial Counsel. (Encl. E., F.)

8. Meanwhile, on February 2, 2023, the Government sent CDR Eubanks a plea offer indicating the Government intended on proceeding with two concurrent Courts-Martials, but would endorse an attached plea agreement that would resolve both sets of charges. (Encl. G.)

9. On February 6, 2023, the Defense sent the following discovery request for additional investigative material related to the second set of charges for which the Government has refused to provide a response. (Encl. H., I.)

[redacted]

10. The Government has not arranged a Defense interview with [redacted] despite the Defense's request. (Encl. F, J.)

11. On February 9, 2023, the Government disclosed another CGIS interview conducted on February 3, 2023 with CDR Eubanks's wife during which they specifically inquire about the charges facing this Court-Martial. (Encl. K.)

12. Prior to the dismissal of what was Charge II, on July 19, 2022, the Defense had a meeting with Trial Counsel and the Staff Judge Advocate to discuss alternative disposition options for CDR Eubanks's case. (Encl. L.)

13. After those plea discussions, on July 20, 2022, Trial Counsel disclosed an email that [redacted] the charged victim in then Charge II, had declined participation in April 2022. (Encls. M-N.)

LAW

a. Congress provides in Article 46 liberal discovery at court-martial that exceeds constitutional protections.

Parties to a court-martial "shall have equal opportunity to obtain witnesses and other evidence." 10 U.S.C. §846. Trial counsel's obligation under Article 46, U.C.M.J., includes "removing obstacles to defense access to information and providing such other assistance as may be needed to ensure that the defense has an equal opportunity to obtain evidence." *United States v. Stellato*, 74 M.J. 473, 481 (C.A.A.F. 2015)(internal quotations omitted.). The Rules for Court-Martial pertaining to discovery aid in the enforcement of Article 46 and "[t] parties should evaluate pretrial discovery and disclosure issues in light of [its] liberal mandate. *Id.* (quoting *United States v. Roberts*, 59 M.J. 323, 325 (C.A.A.F. 2004).

The President amended Rule for Courts-Martial 701(a)(2)(A)(1) in 2018 "to broaden the scope of discovery, requiring disclosure of items that are "relevant" rather than "material" to defense preparation of a case[...]." App.15-9, Manual for Courts-Martial (2019 ed.). Upon defense request and after service of charges:

> The Government shall permit the defense to inspect any book, papers, documents, data, photographs, tangible objects, buildings, or places, or copies of portions of these items, if the item is within the possession, custody or control of military authorities and – (i) *the item is relevant to defense preparation* [...].

R.C.M. 701(a)(2)(A)(i)(emphasis added).

As a threshold matter, discoverable material is "in the possession, custody or control of military authorities. *Id.* Generally speaking, items held by an entity outside of the Federal Government does not satisfy this required. *Stellato*, 74 M.J. at 484. However, trial counsel "cannot avoid R.C.M. 701(a)(2)(A) by the simple expedient of leaving relevant evidence to repose in the hands of another agency while utilizing his access to it in preparing his case for trial." *Id.* (internal citations and quotation marks omitted). Even evidence not in the physical possession of the prosecution team might still be within its possession, custody, or control. *Id.* Examples include instances when: "(1) the prosecution has both knowledge of and access to the object; (2) the prosecution has the legal right to obtain the evidence; (3) the evidence resides in another agency but was part of a joint investigation; and (4) prosecution inherits a case from a local sheriff's office and the object remains in the possession of the local law enforcement." *Id.* at 485. Evidence may still be in the "possession, custody or control of military authorities" even if it does not fit neatly into any of these scenarios, and the determination must rest on the particular facts of each case. *See Stellato*, 74 M.J. 484-85.

Evidence is material if it is of "such a nature that knowledge of [it] would affect a person's decision-making process." Black's Law Dictionary 1066 (9th ed. 2009). Evidence may be relevant and even material despite its inadmissibility at trial. *See United States v. Luke*, 69 M.J. 309, 320 (CA.A.F. 2011) (internal citations omitted). Material evidence includes inadmissible materials "that would assist the defense in formulating a defense strategy." *Id.* The standard for determining "relevance" to defense preparation is still broader than that.

CDR Eubanks must knowingly, intelligently, and voluntarily enter any guilty plea. *See Brady* v. *United States,* 397 U.S. 742, 748, 25 L. Ed. 2d 747, 90 S. Ct. 1463 (1970). However, the Supreme Court has opined that material impeachment evidence falls outside the auspices of *Brady* and need not be disclosed prior to plea bargaining. *See United States v. Ruiz*, 536 U.S. 622, 122 S. Ct. 2450 (2002). Nonetheless, our Courts have indicated that exculpatory information must be disclosed. *See United States v. Garlick*, 61 M.J. 346, 349-50 (C.A.A.F. 2005) (assuming without deciding that *Brady* compelled disclosure of exculpatory evidence in a guilty plea scenario). *See also United States v. Riederer*, No. ARMY 20180183, 2019 CCA LEXIS 323 (A. Ct. Crim. App. Aug. 9, 2019).

ARGUMENT

a. The Reports of Investigation and other investigative material are relevant to Defense preparation because CDR Eubanks is unable to appropriately evaluate the Government's plea offer without them and the Government has continued to seek evidence related to the charges before this Court-Martial under the guise of this second investigation.

The Government has now preferred a second set of charges against CDR Eubanks. The Government indicated it intends to proceed with a concurrent court-martial unless CDR Eubanks moves for joinder, or agrees to plead guilty to both sets of charges in a single forum as offered by the Government. However, the Government has not disclosed the CGIS ROI related to the second investigation, despite CGIS having conducting multiple interviews since at least January 9, 2023. Without the CGIS investigation or other law enforcement material, the Defense cannot adequately advise CDR Eubanks on the merits of the Government's plea offer, and CDR Eubanks's ability to knowingly, intelligently, and voluntarily enter into a plea with is impaired. The requested discovery is not simply impeachment information, rather it is basic investigatory material normally provided upon preferral of charges. This plea offer without discovery is especially concerning given the Government's past disclosure practice surrounding plea negotiations in this case.

Even absent the Government's plea offer, this material is relevant to Defense preparation. Information related to the second set of allegations is certain to form the Government's case in aggravation against CDR Eubanks at sentencing and the Government is likely to use this material in its case in rebuttal against CDR Eubanks. Moreover, CGIS is continuing to seek substantive evidence regarding the charges in this Court-Martial under the guise of this second investigation.

This material therefore must be disclosed because it is in the possession of military authorities and relevant to defense preparation.

b. Communications between the Government and [redacted] the complaining witness in the second set of charges are relevant to (1) evaluate the merits of that case in light of the Government's plea offer, and (2) investigate the Government's conduct in interacting with witnesses.

Here, [redacted] indicated she would testify at court-martial based predominately on her communications with the "Coast Guard lawyer," later identified as the Assistant Trial Counsel detailed to both courts-martial. Specifically, [redacted] apparently based this decision on the predicate that CDR Eubanks doesn't want "help." But, several weeks earlier, CDR Eubanks disclosed to the Government in a plea offer that he was in fact seeking help. At best, this evinces a bias of this witness that may aid in CDR Eubanks's defense to these second charges—a critical, if not exculpatory fact that must be evaluated prior to acceptance of a plea. At worst, Assistant Trial Counsel provided inaccurate information about CDR Eubanks and this Court-Martial to a witness to influence her participation or bias her testimony against CDR Eubanks in another case which the Government now seeks to leverage. Considering this is the same Assistant Trial Counsel in both cases, the impact of these actions permeates into this case. This is information the Defense has a duty to fully investigate.

While the Government has turned over some text message communications and represented that these form the entirety of their written communications with [redacted] it is clear from that discovery and the witness's interview that other substantive conversations occurred that were apparently only witnessed by [redacted] and the Assistant Trial Counsel as no prover notes have been discovered. Accordingly, the Defense requests this Court order the Government to make [redacted] and the Assistant Trial Counsel available for a Defense interview.

RELIEF REQUESTED

The Defense respectfully requests this Court compel the Government to discover the requested material, and order the Government to make [redacted] and the Assistant Trial Counsel available for a Defense interview.

EVIDENCE

The Defense offers the following evidence in support of this Motion:

A. LCDR Caouette email and ltr of December 21, 2022
B. Charge Sheet of January 18, 2023
C. Excerpted Transcript of CGIS Interview with [redacted] of January, 9, 2023
D. Excerpt of CGIS Interview with [redacted] of January, 9, 2023
E. Supplemental Discovery Request of February 1, 2023 and Government Response of February 9, 2023
F. CDR [redacted] email of February 10, 2023 w/ referenced discovery
G. LCDR [redacted] email of February 2, 2023
H. Supplemental Discovery Request of February 6, 2023
I. LCDR Caouette email of February 10, 2023
J. LCDR Caouette email of February 1, 2023

K. Excerpt from [redacted] interview of February 3, 2023
L. LCDR [redacted] email of July 19, 2022
M. CDR [redacted] email of July 20, 2022 w/ attachment
N. LCDR [redacted] email of July 21, 2022

ORAL ARGUMENT

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

CAOUETTE.STEVE.N.PAUL.JR.[redacted] Digitally signed by CAOUETTE.STEVEN.PAUL.JR.[redacted] Date: 2023.02.10 17:24:11 -08'00'

S. P. CAOUETTE
LCDR, USCG
Detailed Defense Counsel

COAST GUARD TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **JUSTIN B. EUBANKS** **CDR / O-5** **U.S. PUBLIC HEALTH SERVICE**	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO COMPEL DTD 10FEB2023 (DISCOVERY)** **24 February 2023**

RESPONSE

The Court should deny the Defense motion because the Government provided the Defense with the records it motioned the court to compel and because the Defense asks for ancillary relief that is both unauthorized by the Rules of Courts-Martial and the Uniform Code of Military Justice.

FACTS

1. On 29 January 2021, ATC Mobile's Executive Officer notified CGIS RAO Mobile, AL about an Anti-Harassment / Hate Incident (AHHI) investigation being opened regarding allegations CDR Eubanks sent a lewd picture to HSC [redacted] See Enclosure (1) of Government Response to Defense Motion Failure to State an Offense (Charge I).

2. On 3 February 2021, ATC Mobile's Commanding Officer contacted CGIS RAO Mobile, AL to initiate a criminal investigation into alleged misconduct by CDR Eubanks after notification that there may be additional Coast Guard victims. See Enclosure (1) of Government Response to Defense Motion Failure to State an Offense (Charge I).

3. On 5 February 2021, S/A [redacted] and S/A [redacted] interviewed CDR Eubanks about alleged misconduct. See Enclosure (2) of Government Response to Defense Motion Failure to State an Offense (Charge I).

4. On 13 May 2022, CDR Eubanks was served charges at Aviation Training Center, Mobile Alabama. CDR Eubanks is charged with misconduct from 2019 to 2021, to include one charge of Article 120c (Indecent Exposure) and two specifications of Article 133 (Conduct Unbecoming an Officer and Gentlemen).

5. On 21 September 2022, CDR Eubanks intentionally exposed his genitalia, in an indecent manner, to Ms. [redacted], a United States Postal Service employee engaged in her official duties. See Enclosure (1).

6. On 04 October 2022, CDR Eubanks left a note with his name, phone number, and a hand drawn penis in his mailbox for Ms. [redacted] a United States Postal Service employee engaged in her official duties. See Id.

7. On 06 October 2022, CDR Eubanks grabbed the hand of Ms. [redacted] without her consent as she delivered mail in her official capacity as a United States Postal Service employee. CDR Eubanks then intentionally exposed his genitalia and buttocks, in an indecent manner, by posing nude in the view of [redacted] and in view of other residences and the public street. See Id.

8. On 07 October 2022, Ms. [redacted] reported the multiple exposures and misconduct by CDR Eubanks to Baldwin County Sheriff's Office. See Enclosure (2) and (3).

9. On 10 October 2022, CDR Eubanks' charged misconduct from 2019 to 2021 was referred to a General Court-Martial.

10. On 25 October 2022, CDR Eubanks' arraignment for charged misconduct from 2019 to 2021 was held in Alameda, CA.

11. On 21 November 2022, Trial Counsel sent Defense Counsel the Baldwin County Sheriff's Office (BSCO) Report. The Sheriff's Report details Ms. [redacted] police interview, after Ms. [redacted] reported CDR Eubanks' misconduct to the police, where she goes into detail about CDR Eubanks' multiple exposures and assault against her in September and October 2022. See Enclosure (4).

12. On 06 December 2022, Trial Counsel sent Defense Counsel three images of CDR Eubanks exposing himself to Ms. [redacted] See Enclosure (5).

13. On 14 December 2022, CGIS Special Agents contacted Ms. [redacted] Ms. [redacted] agreed to meet with CGIS Special Agents for an interview. See Enclosure (6).

14. On 19 December 2022, Trial Counsel contacted Ms. [redacted] to meet Trial Counsel Victim / Witness responsibilities. See Enclosure (7) and (8).

15. On 09 January 2023, CGIS Special Agents interviewed Ms. [redacted] See Enclosure (6).

16. On 18 January 2023, charges were preferred for the multiple exposures and misconduct directed at Ms. [redacted] from September to October 2022. See Enclosure (1).

17. On 23 January 2023, Trial Counsel sent Defense Counsel Ms. [redacted] CGIS interview. See Enclosure (13).

18. On 02 February 2023, Trial Counsel sent Defense Counsel Ms. [redacted] number in accordance with 404A disclosure obligations in preparation for an Article 32 hearing. See Enclosure (9).

19. On 10 February 2023, Trial Counsel advised Defense Counsel on the phone that when the CGIS Report of Investigation was generated regarding CDR Eubanks' misconduct from September and October 2022 Trial Counsel would disclose the document to Defense Counsel. See Enclosure (10).

20. Later that day, on 10 February 2023, Defense filed an out-of-time motion requesting this Court, convened for misconduct conducted between 2019 to 2021 to compel discovery of the CGIS ROI regarding misconduct in 2022 and to compel pre-trial defense interviews with [redacted] and Trial Counsel.

21. On 14 February 2023, an Article 32 Hearing was held in Alameda, CA regarding CDR Eubanks' multiple exposures and misconduct towards Ms. [redacted] in September and October 2022.

22. On 20 February 2023, a Federal Holiday, CGIS disseminated a Report of Investigation (ROI) regarding CDR Eubanks exposing himself multiple times to Ms. [redacted] between September to October 2022. See Enclosure (11).

23. The very next day and the same business day Trial Counsel received the ROI, on 21 February 2023, Trial Counsel sent Defense Counsel the CGIS ROI regarding the multiple exposures and misconduct towards Ms. [redacted] See Enclosure (12).

24. To date, Defense has provided no evidence of their attempts to contact Ms. [redacted] or her unwillingness to speak to Defense.

BURDEN

Under R.C.M. 905(c)(1), the burden of proof is by a preponderance of the evidence. Under R.C.M. 905(c)(2), the Defense, as the moving party, bears the burden of persuasion on any factual issue the resolution of which is necessary to decide the motion.

LAW

I. Article 46, UCMJ

Article 46, UCMJ, provides the trial counsel, defense counsel, and the court-martial with the "equal opportunity to obtain witnesses and other evidence in accordance with" the rules prescribed by the President. UCMJ Art. 46(a). "Discovery in the military justice system, which is broader than in federal civilian criminal proceedings, is designed to eliminate pretrial gamesmanship, reduce the amount of pretrial motions practice, and reduce the potential for surprise and delay at trial." United States v. Jackson, 59 M.J. 330, 333 (C.A.A.F. 2004) (citation omitted) (internal quotation marks omitted). "Our superior court has held that trial counsel's "obligation under Article 46," UCMJ, includes removing "obstacles to defense access to information" and providing "such other assistance as may be needed to ensure that the defense has an equal opportunity to obtain evidence." United States v. Williams, 50 M.J. 436, 442 (C.A.A.F. 1999).

II. R.C.M. 701.

Under R.C.M. 701(a)(2), the Government must permit the defense to inspect, among other things, "[a]ny books, papers, documents, photographs, tangible objects, buildings, or places" if and only if (1) the item is "within the possession, custody, or control of military authorities" and (2) "the item is relevant to defense preparation." R.C.M. 701(a)(2)(A)(i). Per R.C.M. 401, relevant evidence is that which has "'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 that evidence' Relevant evidence is defined as "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'" United States v. Abrams, 50 M.J. 361, 362 (C.A.A.F. 1999).

R.C.M. 701 requires that the prosecution "engage in 'good faith efforts' to obtain [requested] material." United States v. Williams, 50 M.J. 436, 441 (C.A.A.F. 1999); R.C.M. 701(a)(2). The court in United States v. Jackson, additionally provides the scope of a military prosecutor's duty as to matters not within the prosecutor's personal knowledge, and again explains that the prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf." 59 M.J. 330, 334 (C.A.A.F. 2004) citing United States v. Mahoney, 58 M.J. 346, 348 (C.A.A.F. 2003)(quoting Strickler v. Greene, 527 U.S. 263 (1999)).

The Court of Military Appeals has repeatedly construed R.C.M. 701 and Federal Rule of Crim. P. Rule 16(a) in unison and cited to the federal rule and federal case law when applying R.C.M. 701. See United States v. Stone, 40 M.J. 420, 422 (C.M.A. 1994), citing to United States v. Lloyd, 992 F.2d 348, 351 (D.C. Cir. 1993). Under Article 36 of the U.C.M.J, the Manual for Courts-Martial shall apply the principles of the federal rules as far as practicable, therefore any reference to Rule 16 by the Supreme Court should apply to R.C.M. 701. In United States v. Armstrong, 517 US 456, 462 (1996), the Supreme Court concluded that within the context of the Federal Rule of Crim. P., Rule 16, "the 'defendant's defense' means the defendant's response to the Government's case in chief." Further, that Rule 16 establishes that the requests can refer only to defenses in response to the Government's case in chief. Id. at 463 (the court determined that the request for information related to an allegation of selective-prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution). The accused in Armstrong argued that the rule applies for "any claim that results in 'non conviction' if successful is a 'defense.'" However, the Supreme Court explicitly rejected that argument, stating, "the term may encompass only the narrower class of "shield" claims, which refute the Government's arguments that the defendant committed the crime charged." Id. at 462.

III. The Law Does Not Require the Government to Disclose Alleged Impeachment Evidence Prior to the Accused Entering a Plea Agreement.

The Supreme Court held in United States v. Ruiz, "Brady rights serve a part of the Constitution's basic "fair trial" guarantee; therefore "[w]hen a defendant pleads guilty he or she, of course, forgoes not only a fair trial, but also other accompanying constitutional guarantees." 536 U.S. 622, 628-629 (2002). As such, disclosure of material impeachment information is more appropriately described as "special in relation to the *fairness of a trial,* not in respect to whether a plea is *voluntary* ('knowing,' 'intelligent,' and 'sufficient[ly] aware')." Id. At 629. In Ruiz, the Supreme Court stated that, in the context of a guilty plea, Brady "does not require the Government to disclose material *impeachment evidence* prior to entering a plea agreement with a criminal defendant." Id. at 633. See also United States v. Garlick, 61 M.J. 346, 349 (C.A.A.F. 2005) (the Government withholding information about factual inaccuracies in an FBI search warrant affidavit was harmless error and the accused guilty plea was knowing and voluntary without the disclosure of the affidavit to Defense before ethe guilty plea).

The Defense motion cites to United States v. Riederer. In Riederer, the accused entered into a plea agreement with the Government pleading to two specifications of abusive sexual contact. No. ARMY 20180183, 2019 WL 3778358, at *1 (A. Ct. Crim. App. Aug. 9, 2019). After the accused entered a plea agreement the SVC for one of the victim's of abusive sexual contact provided the Government a memorandum stating the victim did not wish to participate. Id. at *1. A week after the Government received the SVC memorandum, the accused plead guilty, and the military judge found the accused provident and accepted the plea. The government never disclosed the SVC's memorandum to appellant. Id. at *1. The Army Court of Criminal Appeals (ACCA) held, "[i]n order to show a Brady violation, appellant must prove that (1) evidence was favorable to him, because it was either exculpatory or impeaching, (2) the government suppressed the evidence, either willfully or inadvertently, and (3) he was prejudiced by the nondisclosure." Id. At *2. The ACCA held "In sum, the Government did not violate Brady. The memorandum was neither impeachment nor exculpatory evidence. Even if it were, it was not material. Finally, even if the memorandum constituted impeachment evidence, the government was not constitutionally required to disclose such information prior to appellant entering a guilty plea." Id. at *3.

In Reiderer, the ACCA also analyzed whether the Government committed a discovery violation under Article 46(a), UCMJ, by not disclosing the SVC memorandum prior to the appellant's guilty plea. The ACCA held there was not an Article 46(a) violation by withholding the SVC memorandum prior to the guilty plea. Id. at *3.

IV. The Court Does Not Have the Authority To Compel a Pre-Trial Interview.

There is no Rule for Courts-Martial which enables Defense Counsel to compel a pre-trial interview of a witness and no court has such authority. In United States v. Morris, the C.A.A.F. states "[a]ppellant concedes from the outset that a witness has no obligation to submit to a pretrial interview. We agree." 24 M.J. 93, 95 (C.M.A. 1987). See United States v. Killebrew, 9 M.J. 154 (C.M.A.1980). See also United States v. Black, 767 F.2d 1334, 1338 (9th Cir.), cert. denied, 474 U.S. 1022 (1985). The Navy-Marine Corps Court of Criminal Appeals in United States v. Rollins in 2018 cites to C.M.A.'s ruling from 1980, "[h]arkening back to their decision in Killebrew, our superior court has also affirmatively stated that a witness has no obligation to submit to a pretrial interview." No. 201700039, 2018 WL 3616867, at *3 (N-M. Ct. Crim. App. July 30, 2018).

Appellate Courts also have analyzed defense pre-trial interview request under Article 46(a), UCMJ. Article 46(a), UCMJ, provides that "[t]he counsel for the government, the counsel for the accused, and the court-martial shall have equal opportunity to obtain witness and other evidence in accordance with such regulations as the President may prescribe." R.C.M. 701(e) provides that "[e]ach party shall have ... equal opportunity to interview witnesses" and "[n]o party may unreasonably impede the access of another party to a witness or evidence." Absent of evidence that Trial Counsel actively deterred a witness from meeting with Defense Counsel there is no basis for finding an Article 46, UCMJ, violation. See United States v. Martinez, No. ACM 39903 (F REV), 2022 WL 1831083, at *27 (A.F. Ct. Crim. App. May 31, 2022), review denied, 83 M.J. 19 (C.A.A.F. 2022).

ARGUMENT

I. The Defense Motion to Compel Discovery is Moot.

The CGIS ROI regarding CDR Eubanks' flashing his penis and buttocks at Ms. [redacted] in September and October 2022 was provided to Defense counsel on 21 February 2023. On 10 February 2023, Trial Counsel told Defense Counsel that the Government would provide the ROI once it was generated and distributed to Trial Counsel. Trial Counsel did not have the ROI when the Defense filed its motion on 10 February. Defense now has the CGIS ROI (discovered on 21 February 2023) and the original Baldwin County Sheriff's Report (discovered on 22 November 2022). This issue is moot. No other material currently exists to be discovered. Accordingly, this issue is moot and no relief is warranted.

II. Defense Attempts to Leverage Discovery Obligations for a GCM towards Separate Charges, Not Yet Referred.

Defense attempts to leverage discovery obligations for a General Court Martial towards

separate misconduct with separate charges, which are not yet referred and where R.C.M. 701 discovery obligations are not yet in force. See Fact 20. Defense alleges the CGIS ROI for CDR Eubanks' multiple exposures and misconduct in 2022 is required discovery in the pending Court Martial, scheduled for June 2023, related to misconduct from 2019 to 2021 in order for CDR Eubanks to enter a plea agreement.

Defense relies on United States v. Riederer in support of this claim. However, in Riederer, the ACCA held: 1) that the Government not disclosing the SVC memo regarding victim participation prior to the guilty plea did not violate Brady; 2) the SVC memo was not exculpatory evidence; and 3) the SVC memo disclosure was not constitutionally required prior to appellant entering a plea deal. Here, the Government sent Defense Counsel documents related the misconduct directed towards Ms. [redacted] three months before charges were preferred. See Facts (11), (12), and (16).

The Government will continue to meet its discovery obligations to Defense counsel related to preferred charges. See Enclosure (4) and (12). However, Defense is not entitled to evidence in a case not yet referred by leveraging discovery obligations pursuant to R.C.M. 701 for a convened court martial with a trial date of June 2023. Further, Defense states in its motion it needs the CGIS ROI or other law enforcement material to advise CDR Eubanks regarding a potential plea deal. Yet, Defense received the Baldwin County Sherriff Police Report, which documented in detail the multiple exposures and misconduct towards Ms. [redacted] on 21 November 2022, displaying once again the Government expeditiously providing material to Defense. See Enclosure (4). Again, this issue is moot because the same business day Trial Counsel received the CGIS ROI, Trial Counsel sent the document to Defense Counsel.

III. Compelling Pre-Trial Defense Witness Interviews is Not an Authorized Remedy.

The Defense request for an order from this Honorable Court to compel pre-trial interviews of Ms. [redacted] and Trial Counsel is unsupported by the law and unwarranted by the facts. The Defense cites to no rule or case law which grants the Military Judge authority to compel pre-trial Defense interviews. The C.A.A.F. affirmatively stated in several cases, *supra*, that witnesses cannot be compelled to a pre-trial Defense interview. See Killebrew. Further, the Government provided Ms. [redacted] cell phone number to Defense Counsel on 02 February 2023. See Enclosure (9). Defense has provided no evidence that it or its investigators either in DSO Pensacola or DSO Bremerton have attempted to reach Ms. [redacted] Has Defense attempted to contact Ms. [redacted]? If not, why? This Honorable Court should not deviate from the Rules for Courts Martial and the U.C.M.J., as interpreted by C.A.A.F. The Court should deny the Defense request for a remedy that is not authorized.

MYERS.ANTHONY.J[redacted] Digitally signed by MYERS.ANTHONY.J[redacted] Date: 2023.02.24 15:00:56 -08'00'

Anthony J. Myers,
Lieutenant Commander, USCG
Trial Counsel

****

CERTIFICATE OF SERVICE

I certify that I have served or caused to be served a true copy (via e-mail) of the above on the Defense Counsel and the Military Judge on 24 February 2023.

MYERS.ANTHONY.J[redacted] Digitally signed by MYERS.ANTHONY.J Date: 2023.02.24 15:01:21 -08'00'

Anthony J. Myers,
LCDR, USCG
Trial Counsel

COAST GUARD TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **J. B. EUBANKS** **CDR/O-5** **U.S. PUBLIC HEALTH SERVICE**	**REPLY TO GOVERNMENT RESPONSE TO DEFENSE MOTION TO COMPEL (Discovery)** **17 MAR 23**

REPLY

The Government's assertion that the two cases against CDR Eubanks are so separate such that they are not reciprocally relevant to Defense preparation is untenable. If not already relevant based on each case's impact on one another and the Government's continued investigation of the first case under the guise of an investigation into the second, the Government has further made the evidence in the subsequent case relevant to Defense preparation in this case by offering a joint plea agreement seeking to dispose of both sets of charges—going so far as to leverage the prospect of a second trial against CDR Eubanks. While the Government alleges that this issue is moot based on their disclosures in the second case following the Defense's motion, the Government has yet to provide any written discovery response to the Defense's request—an effective denial in this case. The Defense requests the Court order a response and compel discovery of the requested material in this case.

After another request from the Defense, on March 15, 2023, the Government assisted in contacting [redacted] and she has since declined a Defense interview. *See* Encl. A. The Defense does not seek further remedy with regard to an interview of [redacted] at this time. However, this still leaves the Defense without access to the statements made to or by [redacted] during Assistant Trial Counsel's conversation with her. While this conversation may have predated the Defense's December 21, 2022 plea offer, it nonetheless remains relevant to the Defense's preparation in this case and must be investigated. To the Defense's knowledge there was no one else present for these communications, and there are no recordings or notes—leaving Assistant Trial Counsel as the only witness and the Defense without equal access to this information.

EVIDENCE

A. CDR [redacted] email and attachment of March 15, 2023

CAOUETTE.STEVEN.PAUL.JR.[redacted] Digitally signed by CAOUETTE.STEVEN.PAUL.JR.[redacted] Date: 2023.03.17 11:30:09 -07'00'

S. P. CAOUETTE
LCDR, USCG
Detailed Defense Counsel

Appellate Exhibit 64
Page 1 of 1

REQUESTS

THERE ARE NO REQUESTS

NOTICES

THERE ARE NO NOTICES

COURT RULINGS & ORDERS

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES **v.** **J.B. EUBANKS** **CDR/O-5** **U.S. COAST GUARD**	**RULING ON DEFENSE MOTION FOR APPROPRIATE RELIEF** **(Compel Discovery)** **28 FEBRUARY 2023**

RELIEF SOUGHT

Pursuant to Article 46, UCMJ, 10 U.S.C. § 846, R.C.M. 701, the Defense requests this Court compel the Government to discover and produce the below requested matters which are relevant preparation. AE VII. The Government opposes the motion. AE XIV. An Article 39(a) session was held on February 13, 2023.

FACTS

1. The accused, CDR Eubanks, is charged with one specification of violating Article 120c (Indecent Exposure), and two specifications of violating Article 133 (Conducting Unbecoming an Officer), all under the Uniform Code of Military Justice (UCMJ).

2. The charges were preferred on 12 May 2022.

3. Charges were referred on 7 October 2022.

4. The Special Court-Martial Convening Authority is Aviation Training Center Mobile.

5. The General Court-Martial Convening Authority is FORCECOM.

6. CAPT [redacted] is the Staff Judge Advocate to the General Court-Martial Convening Authority, Force Readiness Command. He is also the Commanding Officer of the Legal Service Command.

7. CDR [redacted] is assigned to the Legal Service Command and acted as the Staff Judge Advocate for the Special Court-Martial Convening Authority, Aviation Training Center Mobile.

8. On 2 May 2022, CDR [redacted] sent an email to CAPT [redacted] with the Sexual Assault – Initial Disposition Authority advice memo attached. In the memo, CDR [redacted] made some suggested changes. The email also indicates that CDR [redacted] reduced some of the detail after consulting with assistant trial counsel.

9. On 25 October 2022, assistant trial counsel referenced knowledge of an external investigation involving the accused that was being handled by state or local law enforcement.

Appellate Exhibit XI

Appellate Exhibit XI
Page 1 of 4

10. Trial counsel subsequently provided the defense with a copy of a report from the Baldwin County Sheriff's Office.

11. On 25 October 2022, defense requested in discovery the communications in the possession of the Coast Guard that related specifically to the Baldwin County Sheriff investigation.

12. On 22 April 2021, the Executive Officer at Legal Service Command received an email from a commander who is pharmacy consultant for the Coast Guard requesting estimates on the timeline for the investigation and how long it would be until charges are filed. The email specially mentions that RADM Dana Thomas was approached by RADM Orsega.

13. RADM Dana Thomas is the Director of Health Safety and Worklife for the U.S. Coast Guard.

14. RADM Susan Orsega is the Senior Advisor to the Assistant Secretary for Health and the U.S. Surgeon General.

PRINCIPLES OF LAW

At a court-martial, the parties and the court shall have an equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe. Art. 46, UCMJ. R.C.M. 701 directs that "[e]ach party shall have adequate opportunity to prepare its case and equal opportunity to interview witnesses and inspect evidence." For evidence in the possession of the government, defense is permitted to inspect any evidence that is relevant to defense preparation Mil. R. Evid. 701(a)(2)(A). Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence the fact is of consequence in determining the action. Mil. R. Evid. 401.

ANALYSIS

1. The attachments to CDR [redacted] email containing draft pre-trial advice.

The Defense argues the above-requested documentation likely contains evidence giving rise to a subsequent motion of law. CDR [redacted] was preparing draft advice for the signature of CAPT [redacted] the SJA to the GCMCA. In in the email to CAPT [redacted] CDR [redacted] states that "[c]onsidering the evidence must be disclosed," he has both substantive and formatting suggestions. Some of the detail was apparently reduced after consulting with assistant trial counsel. The government argues these conversations are protected under R.C.M. 701(f) as well as Mil.R.Evid. 502. However, the government failed to cite to any case law in support of this argument. The Court is not persuaded by either of these arguments.

However, the government also highlights that no evidence exists that the draft products were shared with any party outside the two staff judge advocates involved in the case. The defense states that the material is relevant as "it likely contains evidence." Given the speculative nature of the defense's argument and the lack of evidence regarding the impact of these changes, including whether or not CAPT [redacted] elected to even accept these suggested changes, the Court

finds the Defense has not met their burden and this request is DENIED.

2. Communications between the Government and local authorities regarding CDR Eubanks.

Defense seeks the communications between the Coast Guard and civilian investigators for misconduct that allegedly occurred subsequent to this offense. The defense demonstrated that these communications are relevant. How civilian authorities and the Coast Guard intend to resolve additional allegations involving the accused will influence the defense's posture in this case. Relevant issues include being cognizant of additional charges, additional witnesses, as well as the potential impact of testifying in this court-martial and that testimony being used as evidence in other prosecutions. As such, the Court finds the Defense has met their burden and this request is GRANTED.

3. Evidence related to the willingness of a witness to participate.

This government proffers in their response and during the Article 39(a) session that all responsive material was provided to the Defense. Accordingly, the Court considers this issue resolved. The government is aware of their on-going discovery obligations and will continue to comply with this obligation if any additional material is discovered.

4. Communications between Senior Public Health Service Officials and the Convening Authority.

The defense demonstrated the relevance of this request. Given the date of the initial email regarding the status of the case, and the presumptive language regarding the disposition of the charges, it gives the appearance that a court-martial was expected even though it was early in the investigation. Charges were not preferred in the case until nearly a year later. In addition, the record also demonstrates that the senior most Public Health Service Officer in the Coast Guard was personally interested in the outcome of the case. Accordingly, the government is ordered to provide all communications between the Legal Service Command, the USPHS, HSWL-SC, or the USPHS Liaison, regarding the investigation, charges, disposition, or any possible disposition of CDR Eubanks' case.

CONCLUSIONS OF LAW

1. The attachments to CDR [redacted] email containing a draft document with suggested changes to the SJA advising the GCMCA are not relevant.

2. Communications between the Government and local authorities regarding CDR Eubanks are relevant.

3. Evidence related to the willingness of a witness to participate are relevant.

4. Communications between Senior Public Health Service Officials and the

Convening Authority are relevant.

RULING

The Defense motion to compel discovery is GRANTED in part, and DENIED in part, consistent with the above conclusions of law. The government will endeavor to provide the ordered materials no later than close of business 17 March 2023. The government will promptly notify the Court if they are unable to comply with this deadline.

So ordered.

FOWLES.TED.R [redacted] Digitally signed by FOWLES.TED.[redacted] Date: 2023.02.28 18:13:43 -05'00'

Ted R. Fowles
Captain, U. S. Coast Guard
Military Judge

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES **v.** **J.B. EUBANKS** **CDR/O-5** **U.S. COAST GUARD**	**ORDER TO PROVIDE SUPPLEMENTAL RESPONSE** **2 MARCH 2023**

On 23 December 2023, defense filed a motion for appropriate relief asking that the Court swear in all witnesses and members at trial. AE XII. The Government deferred to the Court in their response. AE XIV.

1. I am the presiding military judge for the General Court-Martial in the above captioned case. Having been duly designated to serve as a Military Judge under the provision of Article 26, Uniform Code of Military Justice (Title 10, United States Code, Section 826), I hereby order the Government to provide a supplementary response taking a specific position, either concurring with or opposing, the defense's request. In the event the Government elects to concur with Defense's position, the Court orders the Government to identify other personnel of courts-martial under R.C.M. 502 that may be suitable for swearing in witnesses.

2. The Government's supplemental response is due by close of business on Friday, 24 March 2023.

So ordered.

FOWLES.TED.R [redacted]

Ted R. Fowles
Captain, U. S. Coast Guard
Military Judge

Appellate Exhibit XVI
1 of 1

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. J.B. EUBANKS CDR/O-5 U.S. COAST GUARD	RULING ON DEFENSE MOTION FOR APPROPRIATE RELIEF (Findings Instruction on Unanimity) 15 February 2023

RELIEF SOUGHT

Pursuant to R.C.M. 906(a) and 920(c), as well as Fifth and Sixth Amendments of the U.S. Constitution, the Defense moves this Court to instruct the members, prior to findings, that conviction of the accused on any specification may be had only upon the unanimous agreement of all panel members. AE XVII. The Government opposed the motion. AE XIX. An Article 39(a) session was held on 24 January 2023.

ISSUE PRESENTED

Does the Constitution require unanimous verdicts in courts-martial?

FINDINGS OF FACT

In reaching its findings of fact and conclusions of law, the Court considered all legal and competent evidence presented and the reasonable inferences drawn therefrom, and resolved all issues of credibility. Specifically, the Court considered the Defense and Government briefs. The Court finds the following facts by a preponderance of the evidence:

1. The accused, CDR Eubanks, is charged with one specification of violating Article 120c (Indecent Exposure), and two specifications of violating Article 133 (Conducting Unbecoming and Officer), all under the Uniform Code of Military Justice (UCMJ).

2. Counsel for the accused proffers that he expects to elect to be tried by members.

BURDEN OF PROOF

The burden of proof and persuasion rests with the Defense as the moving party. RCM 905(c)(1) and (c)(2)(A).

PRINCIPLES OF LAW

"[J]udicial deference...is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged." Solorio v. United States, 483 U.S. 435, 447 (1987). This principle applies even when the constitutional rights of a servicemember are implicated by a statute enacted by Congress. Id. at 448. Accord United States v. Easton, 71 M.J. 168, 180 n.12 (C.A.A.F. 2012) (citing United States v. Weiss, 36 M.J. 224, 226 (C.M.A. 1992)).

With regard to Due Process challenges to Congressional enactments regulating the Armed Forces, the Supreme Court of the United States imposes upon the Defense the heavy burden to demonstrate that "the factors militating in favor of [the Accused's interest] are so extraordinarily weighty as to overcome the balance struck by Congress." Middendorf v. Henry, 425 U.S. 25, 44 (1976); Weiss v. United States, 510 U.S. 163, 177 (1994). Accord United States v. Vazquez, 72 M.J. 13, 19 (C.A.A.F. 2013) ("The Weiss standard controls Appellee's [due process] claim that Article 29(b), UCMJ, and the procedures to implement it set forth in R.C.M. 805(d)(1) are unconstitutional as applied to him."); United States v. Spear, No. ACM 38537, 2015 WL 4625004, at *3 (A.F. Ct. Crim. App. July 30, 2015)(defense bears the "heavy burden to demonstrate Congress' determinations about panel size and unanimity should not be followed.").

Applying this burden in court-martial litigation, the Court of Appeals for the Armed Forces (CAAF) requires "the burden of showing that military conditions require a different rule than that prevailing in the civilian community is upon the party arguing for a different rule." United States v. Easton, 71 M.J. 168, 175 (C.A.A.F. 2012). However, CAAF also acknowledges the modified application of the Bill of Rights to members of the military subject to a specific exemption or "certain overriding demands of discipline and duty." Id. at 174-75 (citing Courtney v. Williams, 1 M.J. 267, 270 (C.M.A. 1976) (quoting Burns v. Wilson, 346 U.S. 137, 140 (1953)).

Constitutional Overview

In the United States Constitution, Congress is given the power "[t]o make Rules for the Government and Regulation of the land and naval Forces." U.S. Const., Article I, § 8, Clause 14.

While Article III of the U.S. Constitution provides for the right to jury trials in the civilian system, the foundation of the military court-martial system arises in Article I, which grants to Congress the authority to make rules for governing and regulating the land and naval forces. *Compare* U.S. Const., Article 1, § 8, *with* U.S. Const., Article 3, §2.

The Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. amend. VI.

The Fourteenth Amendment provides:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

Military Courts-Martial

In Dynes v. Hoover, the Supreme Court confirmed the constitutionality of military courts-martial. 61 U.S. 65 (1857).

The Supreme Court has "long recognized that the military is, by necessity, a specialized society separate from civilian society.... The differences between the military and civilian communities result from the fact that 'it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.'" Parker v. Levy, 417 U.S. 733, 743 (1974) (citing United States ex rel. Toth v. Quarles, 350 U.S. 11, 17 (1955)).

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.'" Levy, 417 U.S. at 743 (citing Burns v. Wilson, 346

U.S. 137 (1953). Thus, the UCMJ "cannot be equated to a civilian criminal code." Id. at 749.

Under the "Military Deference Doctrine," courts defer to Congressional exercise of its powers under Article I, Section 8, Clause 14, to regulate the military justice system. Indeed, the Courts have noted, "Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military." Solorio, 483 U.S. at 447. Indeed, the Supreme Court has gone so far as to describe Congress' authority as "plenary" in this area. Chappell v. Wallace, 462 U.S. 296, 301 (1983) ("It is clear that the Constitution contemplated that the Legislative Branch have plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline....").

Further, "judicial deference...is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged." Id.; see also Parker v. Levy, 417 U.S. 733, 756 (1974) ("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 government than it is when prescribing rules for the latter."); see also Loving v. U.S., 517 U.S. 748, 759, 768 (1996) (The Supreme Court "give[s] Congress the highest deference in ordering military affairs" under its constitutional mandate "[t]o make Rules for the Government and Regulation of the land and naval Forces").

Fifth Amendment Due Process

In Weiss v. United States, the Supreme Court addressed the requirements of the Due Process Clause when legislating in military affairs, noting courts "must give particular deference to the determination of Congress." 510 U.S. 163, 176 (1994). To evaluate a Due Process challenge, the Court evaluated "whether the factors militating in favor of" the claimed right "are so extraordinarily weighty as to overcome the balance struck by Congress." Id. at 177-78.

Military and civilian courts have repeatedly affirmed that the Weiss standard applies to due process claims at courts-martial challenging Congress' express exercise of its Article I authority. See e.g., United States v. Vazquez, 72 M.J. 13, 19 (C.A.A.F. 2013) ("The Weiss standard controls Appellee's [due process] claim that Article 29(b), UCMJ, and the procedures to implement it set forth in R.C.M. 805(d)(1) are unconstitutional as applied to him."); United States v. Spear, No. ACM 38537, 2015 WL 4625004, at *3 (A.F. Ct. Crim. App. July 30, 2015)("[The Weiss standard is the appropriate test to determine whether a due process violation has occurred in the court-martial setting.") (citing Vazquez, 72 M.J. at 18); United States v. Gray, 51 M.J. 1, 50 (C.A.A.F. 1999) (noting the Weiss standard was "the appropriate test to determine due process violations in court-martial procedure"); see also United States v. Easton, 71 M.J. 168, 174-76 (C.A.A.F. 2012) (holding Article 44(c), UCMJ, is constitutional as applied to trials by court members when Congress appropriately exercised its Article I power).

Fifth Amendment Equal Protection

In court-martial jurisprudence, any right to equal protection is based on the Fifth Amendment due process clause. Under the Fifth Amendment, an "equal protection violation" is "discrimination that is so unjustifiable as to violate due process." See United States v. Akbar, 74 M.J. 364, 406 (C.A.A.F. 2015) (quoting United States v. Rodriguez-Amy, 19 M.J. 177, 178 (C.M.A. 1985)).

"This question of unjustifiable discrimination in violation of due process is not raised, however, unless the Government makes distinctions using 'constitutionally suspect classifications' such as 'race, religion, or national origin...or unless there is an encroachment on fundamental constitutional rights like freedom of speech or...assembly.'" Rodriguez-Amy, 19 M.J. at 178 (quoting United States v. Means, 10 M.J. 162, 165 (C.M.A. 1981)). Otherwise, a rational basis suffices for treating similarly situated people differently. See United States v. Hennis, 77 M.J. 7, 10 (C.A.A.F. 2017); Akbar, 74 M.J. at 406.

Within the context of the "military society," which has been consistently recognized as unique due to its mission to fight and win wars, the right to a jury trial at a court-martial is *not* a "fundamental right" under the Fifth Amendment. See Levy, 417 U.S. at 743; United States v. Begani, 79 M.J. 767, 777 (N-M. Ct. Crim. App. 2020).

The Fifth Amendment "reveals a design whereby the Constitution explicitly allows Congress, as the creator of all Federal tribunals and courts-martial, to withhold certain otherwise fundamental constitutional rights from those in the profession of arms." Begani, 79 M.J. at 776. "While there is no question the right to a grand jury and the right to a trial by jury are fundamental constitutional rights, they are only fundamental to the extent (and to the persons to whom) the Constitution grants them in the first place." Id.

With respect to whether people are "similarly situated," "[t]he law of equal protection leaves to the legislature the initial discretion to determine what is 'different' and what is 'the same,' and also broad latitude to establish classifications depending on the nature of the issue, the competing public and private concerns it involves, and the practical limitations of addressing it." Begani, 79 M.J. at 776. "Generally, these discretionary legislative decisions are valid and enforceable as long as the classification is drawn in a manner rationally related to a legitimate governmental objective." Id. "[T]he broad deference owed to Congress in the area of military affairs makes this an area [Courts] do not lightly second-guess." Id.

In light of the deference owed to Congress in the area of military affairs, equal protection claims based upon "fundamental rights" are treated differently when dealing with Congress' authority to regulate the military as opposed to civilian matters. Statutes regulating the military affairs are not subject to heightened scrutiny when dealing with "fundamental rights" equal protection claims. Begani, 79 M.J. at 780. This is because Congress is due deference "in military matters for equal protection challenges based upon the deprivation of a fundamental right." Id. at 780. As the Navy Court in Begani explained, with respect to "fundamental rights" claims, Courts recognize that anyone in the military is "depriv[ed] of certain fundamental rights...that is often the very nature of the profession of arms." Id. at 778.

"Under the rational basis test, the burden is on the appellant to demonstrate that there is no rational basis for the rule he is challenging. The proponent of the classification 'has no obligation to produce evidence to sustain the rationality of a statutory classification.'" United States v. Paulk, 66 M.J. 641, 643 (A.F. Ct. Crim. App. 2008)(quoting Heller v. Doe, 509 U.S. 312, 320 (1993)). "As long as there is a plausible reason for the law, a court will assume a rational reason exists for its enactment and not overturn it." Id. (quoting Heller, 509 U.S. at 320; United States v. Carolene Products Co., 304 U.S. 144, 153 (1938)).

Military courts have held no unjustifiable discrimination when death-eligible servicemembers are treated differently than their similarly situated civilian counterparts. See United States v. Akbar, 74 M.J. 364 (C.A.A.F. 2015). In Akbar, the Court held that it did not violate equal protection that military members in capital cases did not receive the same death penalty protocols as civilians in federal courts. As the Court explained, "We do not find any unjustifiable discrimination in the instant case because Appellant, as an accused servicemember, was not similarly situated to a civilian defendant." (citing Parker v Levy, 417 U.S. 733, 743 (1974).

Sixth Amendment

In Ramos v. Louisiana, the Supreme Court held the rules in Louisiana and Oregon that permit non-unanimous jury verdicts in criminal cases violate the Sixth Amendment, as incorporated against the States through the Fourteenth Amendment. 140 S. Ct. 1390 (2020).

Several of the Sixth Amendment rights are applicable to military members, including: speedy trial, see e.g., United States v. Danylo, 73 M.J. 183, 186 (C.A.A.F. 2014); public trial, see e.g., United States v. Hershey, 20 M.J. 433, 435 (C.M.A. 1985); confrontation of witnesses, see e.g., United States v. Blazier, 69 M.J. 218, 222 (C.A.A.F. 2010); notice, see e.g., United States v. Fosler, 70 M.J. 225, 229 (C.A.A.F. 2011); compulsory process, see e.g., United States v. Bess, 75 M.J. 70, 75 (C.A.A.F. 2016); counsel, see e.g., United States v. Wattenbarger, 21 M.J. 41, 43 (C.M.A. 1985); and effective assistance of counsel, see e.g., United States v. Gooch, 69 M.J. 353, 361 (C.A.A.F. 2011).

However, in the armed forces, "there is no Sixth Amendment right to trial by jury in courts-martial." United States. v. Easton, 71 M.J. 168, 175 (C.A.A.F. 2012) (citing Ex Parte Quirin, 317 U.S. 1, 39 (1942); United States v. Wiesen, 57 M.J. 48, 50 (C.A.A.F. 2002) (per curiam)). See also Reid v. Covert, 354 U.S. 1, 37 n.68 (1957) ("The exception in the Fifth Amendment...has been read over into the Sixth Amendment so that the requirements of jury trial are inapplicable.").

In Quirin, the Supreme Court addressed the constitutional history behind the creation of military tribunals, addressing both the authority to try enemy combatants for law of war violations as well as the application of the Bills of Rights to military courts-martial. See Ex Parte Quirin, 317 U.S. 1 (1942). The Court held military tribunals were exempted from the Sixth Amendment requirement for a jury trial and this deliberate exception, which dated back to the Continental Congress of 21 August 1776, was to

extend that exception "to trial of all offenses, including crimes which were of the class traditionally triable by jury at common law." Id. at 43.

Instead of a "jury," a military Accused has a right to a court-martial "panel" composed of "members." An Accused's right to select trial by members derives from statute; specifically Article 29, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 829 (2019). The right to a court-martial panel includes the right to a fair and impartial panel. United States v. Riesbeck, 77 M.J 154, 163 (C.A.A.F. 2018).

Prior to 2019, two-thirds concurrence of court-martial panel members was required to convict and sentence an Accused in a trial with members, unless the sentence included confinement for more than 10 years, in which case, three-fourths concurrence was required. A sentence of death required the unanimous concurrence of all members. See Article 52, UCMJ (2016).

Under the Military Justice Act of 2016, three-fourths concurrence of court-martial panel members is now required to convict and sentence an Accused in a trial with members. A sentence of death requires the unanimous concurrence of all members. See Article 52, UCMJ (2019).

As the Army Court explained in United States v. Mayo, Congress legislated non-unanimous verdicts in the modern UCMJ as a guard against unlawful command influence, the "mortal enemy" of military justice. No. ARMY 20140901, 2017 WL 1323400, at *8 (A. Ct. Crim. App. Apr. 7, 2017).

Stare Decisis

Stare decisis encompasses two distinct concepts: (1) vertical *stare decisis* – the principal that courts "must strictly follow the decisions handed down by higher courts," and (2) horizontal *stare decisis* – the principal that "an appellate court[] must adhere to its own prior decisions, unless it finds compelling reasons to overrule itself." See United States v. Andrews, 77 M.J. 393, 399 (C.A.A.F. 2018) (quoting United States v. Quick, 74 M.J. 332, 343 (C.A.A.F. 2015) (Stucky, J., dissenting)).

Lower courts should not assume that a new higher court decision implicitly overrules precedent. Instead, lower courts should follow the precedent that directly controls, and leave overruling precedent to the higher court that created the precedent. See Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989).

ANALYSIS

Overview

Relying on Ramos v. Louisiana, the Defense argues the accused is entitled to an impartial panel and that an impartial panel requires unanimity. 140 S. Ct. 1390 (2020). However, by its own terms, Ramos does not address courts-martial. Id. Neither does Ramos purport to explicitly overrule the Supreme Court's own precedent in Ex Parte Quirin, which expressly exempted courts-martial from the Sixth Amendment requirement for a jury trial. Ramos v. Louisiana, 140 S. Ct. 1390 (2020); Ex Parte Quirin, 317 U.S. 1 (1942).

Applying the rules of "vertical stare decisis," CAAF remains bound by existing, explicit Supreme Court precedent holding the Sixth Amendment jury trial right does not apply to courts-martial. Accordingly, Ramos does not impact existing CAAF precedent holding there is no Sixth Amendment right to a "jury trial" in the military context. 140 S. Ct. 1390 (2020); see e.g., United States v Easton, 71 M.J. 168, 175 (C.A.A.F. 2012). Rather, an Accused's right to select trial by a panel of members at court-martial derives from statute (Article 29, UCMJ).

Considering the Accused's Fifth Amendment Due Process and Equal Protection claims, it is important to note the Supreme Court has historically and consistently recognized the unique needs of the "military society" in providing a disciplined force to safeguard the national security of the United States. To achieve this end, Congress lawfully exercised its constitutional authority under Article I, Section 8, Clause 14, by enacting both Article 29, UCMJ (creating court-martial panels, not "juries") and Article 52, UCMJ (authorizing non-unanimous verdicts). In doing so, Congress did not violate the Accused's due process or equal protection rights.

For the reasons set forth below, this Court holds the Defense has failed to carry its "heavy burden" to demonstrate "the factors militating in favor of [the Accused's interest] are so extraordinarily weighty to overcome the balance struck by Congress." Middendorf v. Henry, 425 U.S. 25, 44 (1976). Specifically, this Court finds, consistent with the standard set forth by CAAF in Easton, two specific "military conditions require a different rule than that prevailing in the civilian community, including (1) finality of verdicts and (2) avoidance of unlawful command influence. 71 M.J. 168, 175 (C.A.A.F. 2012). These conditions firmly support the "balance struck by Congress" in legislating non-unanimous verdicts at courts-martial.

The Sixth Amendment

Ramos v. Louisiana neither explicitly nor implicitly overrules prior Supreme Court precedent regarding the inapplicability of the Sixth Amendment jury trial right to courts-martial. 140 S. Ct. 1390 (2020). Under the doctrine of *stare decisis*, this Court is required to uphold the precedent established by its superior courts. Absent explicit holdings by the Court of Appeals for the Armed Forces and the Supreme Court of the United States regarding the scope of their own precedents, this court-martial cannot, and will not, depart from binding precedent holding the right to a jury trial and unanimous verdicts inapplicable to military courts-martial. Defense argues that the Court is not bound by unconstitutional laws or executive enactments. For the reasons set forth below, this Court does not find that Article 52, UCMJ, is unconstitutional.

The Supreme Court's decision in Ramos v. Louisiana does not change the binding precedent that applies to this Court. Id. The decision in Ramos is predicated upon the right to a jury trial in the civilian context, where the Court held the right to an impartial jury trial includes the right to a unanimous verdict in order to convict the defendant. Id. The Court's holding in Ramos does not apply to military courts-martial.

While the Court recognizes several Sixth Amendment protections extend to military service members, the right to a jury trial does not. Congress has great power to regulate

the armed forces, in order to provide a disciplined force ready to safeguard the national security of the United States. To meet this requirement, Congress has created trial by court-martial panels, rather than juries. In doing so, Congress has determined unanimity is not required for court-martial panels.

While the Supreme Court in Ramos held the Sixth Amendment required unanimous verdicts, the holding was part and parcel of the Sixth Amendment right to a jury trial. Id. As there is no right to a jury trial in military courts-martial, the Court is not persuaded that unanimous verdicts are applicable to military courts-martial.

Moreover, in contrast to the facts before the Supreme Court in Ramos, non-unanimous verdicts in the military were not predicated by any "discriminatory intent" by Congress. Id. Part of the Supreme Court's rationale in Ramos for overturning non-unanimous verdicts was because they found the historic basis for those laws was racially discriminatory. 140 S. Ct. at 1394; Ramos, 140 S. Ct. 1410 (Sotomayor, J. concurring); Ramos 140 S. Ct. at 1417-18 (Kavanaugh, J. concurring). There is no evidence before the Court that non-unanimous verdicts under Article 52, UCMJ, were motivated by the racial animus identified in Ramos. 140 S. Ct. 1390 (2020).

The Fifth Amendment: Due Process

Defense argues that military members should have the same constitutional protections as civilian members of society in criminal prosecutions, arguing that a right to a unanimous verdict is implicit in the right to a fair and impartial panel guaranteed by United States v. Wiesen, 56 M.J. 172, 174 (2001) and codified in R.C.M. 912(f)(1)(N). The Court disagrees.

Court-martial procedures exist in a unique military context, a context explicitly recognized in Parker v. Levy and supported by 163 years of Supreme Court precedent: beginning with Dynes v. Hoover; extending through Ex Part Quirin; and defended by a robust burden placed upon the party challenging Congress' plenary authority in this arena as articulated by Middendorf and Weiss. Additionally, Supreme Court jurisprudence reflects the continued applicability of the "Military Deference Doctrine," which compels all reviewing courts to consider unique military circumstances in ruling upon Due Process challenges in the military context.

As noted previously, our superior courts have repeatedly held there is no due process violation for non-unanimous verdicts in courts-martial. Further, for the Defense to prevail on a due process challenge, they must demonstrate the factors "militating in favor of" a unanimous verdict "are so extraordinarily weighty as to overcome the balance struck by Congress." Weiss, 510 U.S. at 177. While the Defense posits several factors, none are "so extraordinarily weighty" such that this Court will overrule the balance struck by Congress.

Further reinforcing the "balance struck by Congress," Congress recently revisited the issue of non-unanimous verdicts in Article 52, UCMJ. As a result of the Military Justice Act of 2016, Congress amended 10 U.S.C. § 852 to now require a concurrence of three-fourths of the members to convict and sentence an Accused, except in cases involving death. Prior to the enactment of the Military Justice Act of 2016, the concurrence of two-thirds was necessary to convict and sentence an Accused for any

confinement less than 10 years. A sentence greater than 10 years required the concurrence of at least three-fourths of the members, except in cases involving death. The enactment of the Military Justice Act of 2016 was the most sweeping reform to the UCMJ in 30 years and revealed a deliberate decision by Congress not to require unanimous verdicts from court-martial panels.

In Weiss, the Supreme Court utilized the frequency of congressional involvement in military justice reform as a basis for finding no due process violation. 510 U.S. 163 (1994). The Weiss court found it significant that Congress had continually made changes to the military justice system, yet never deemed it necessary to grant tenure to military judges. Id. Accordingly, the Court affirmed that congressional determination, finding no Fifth Amendment due process violation for Congress declining to provide "tenure" to military judges. See Weiss, 510 U.S at 181; Accord Middendorf, 425 U.S. at 44, n.21 (relying upon persistent Congressional revisions of the UCMJ without amending particular practices as indicative of congressional intent to preserve those practices). So here too, clear Congressional intent and action is present in Article 52, UCMJ, which revisited and preserved non-unanimous verdicts in courts-martial (with a higher three-fourths voting quorum) as recently as 2016.

Additionally, the Court respectfully rejects the Defense's assertion that a non-unanimous verdict somehow undermines the "beyond a reasonable doubt" standard for conviction at a court-martial. A non-unanimous verdict does not affect the Government's requirement to prove its case beyond a reasonable doubt. The panel has always been instructed on the burden of proof and such instruction will continue.

Finally, two specific military conditions exist that require a different rule than that prevailing in the civilian community. They include (1) finality of verdicts and (2) avoidance of unlawful command influence.

First, the balance struck by Congress provides finality of verdicts in the military context. Although the Supreme Court in Ramos dismissed the "finality of cases" state interest, there are different considerations for the military. In the military, there is an increased need for finality because of our unique military needs and military missions. The Supreme Court recognized this need in Quarles:

> [I]t is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. But trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function. To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served.

United States ex rel. Toth v. Quarles, 350 U.S. 11, 17 (1955). In the military, finality of judgments is necessary to resolve cases and return the military to its primary mission of protecting the national security of the United States.

Second, the balance struck by Congress avoids unlawful command influence, the "mortal enemy of military justice." As a concept unique to the military, Congress enacted Article 37, UCMJ, in an effort to combat unlawful command influence by, *inter*

alia, prohibiting any reprisal against court-martial members based on the exercise of their duties. Congress also sought to further insulate members from unlawful command influence by providing anonymity for their votes via non-unanimous verdicts. A requirement for unanimous verdicts would frustrate this goal of avoiding unlawful command influence in court-martial proceedings.

The need for finality of verdicts and avoiding unlawful command influence constitute "overriding demands of discipline and duty." Easton, 71 M.J. at 174-75 (citing Courtney v. Williams, 1 M.J. 267, 270 (C.M.A. 1976) (quoting Burns v. Wilson, 346 U.S. 137, 140, (1953)). These conditions firmly support the "balance struck by Congress" in legislating non-unanimous verdicts at courts-martial.

The Fifth Amendment: Equal Protection

Defense argues a non-unanimous verdict requirement violates the Accused's equal protection under the Fifth Amendment because he is treated differently than his civilian counterpart. This Court is not persuaded.

Contrary to Defense's assertion, the right to a jury trial and a unanimous verdict are not fundamental rights under equal protection jurisprudence. At its core, a military court-martial does not have a jury, from which a unanimous verdict could be required; instead, a military court-martial has a panel.

Even if the right to a jury trial and unanimous verdicts were fundamental rights, statutes regulating military affairs are not subject to heightened scrutiny when dealing with equal protection claims. As a result, the Government must pass only rational basis scrutiny. Congress has a legitimate objective in securing court-martial verdicts and avoiding unlawful command influence; a panel's voting requirement is rationally related to achieve that objective. However, even if heightened scrutiny were applied, Congress' legislation of trial by panel with non-unanimous verdicts would meet that burden as the statutes were implemented as a guard against unlawful command influence.

The United States Constitution provides Congress the power to regulate the armed services under Article I, Section 8, Clause 14. In an exercise of that power, Congress created a military justice system with court-martial panels (Article 29, UCMJ) where unanimity is not required to render a verdict (Article 52, UCMJ). The Supreme Court's recent decision in Ramos requiring unanimous verdicts is predicated on the Sixth Amendment right to a jury, does not apply in the military. 140 S. Ct. 1390 (2020). As a result, the requirement for unanimous verdicts is inapplicable to the military justice system. Accordingly, non-unanimous verdicts at courts-martial do not violate the Sixth Amendment, Fifth Amendment Due Process, or Fifth Amendment Equal Protection, as applied to the military.

CONCLUSION OF LAW

The Constitution does not require unanimous verdicts in courts-martial.

RULING

The Defense motion is DENIED. The Court, however, will consider any requests

for reconsideration supported with additional evidence or argument if timely raised by either party. This ruling also remains subject to revision and clarification until entry of judgment and I reserve the right to supplement the ruling as necessary and appropriate.

So ordered.

FOWLES.TED.R [redacted]

Ted R. Fowles
Captain, U.S. Coast Guard
Military Judge

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. J.B. EUBANKS CDR/O-5 U.S. COAST GUARD	RULING ON DEFENSE MOTION TO SUPPRESS (Unwarned Statements) 21 February 2023

RELIEF SOUGHT

Pursuant to 10 U.S.C. § 31, Article 31, Uniform Code of Military Justice (UCMJ) Rule for Court-Martial (R.C.M.) 905(d)(3) and Military Rule of Evidence ("Mil. R. Evid.") 304 and 305, the Defense moves this Court to suppress statements made by CDR Eubanks to the Coast Guard Investigative Service (CGIS). AE 32. The Government opposed the motion. AE 34. An Article 39(a) session was held on 13 February 2023.

ISSUES PRESENTED

1. Was the accused sufficiently warned of his Article 31(b), UCMJ rights?

2. Was the accused's statement voluntary?

FINDINGS OF FACT

In reaching its findings of fact and conclusions of law, the Court considered all legal and competent evidence presented and the reasonable inferences drawn therefrom, and resolved all issues of credibility. Specifically, the Court considered the Defense and Government briefs. The Court finds the following facts by a preponderance of the evidence:

1. The accused, CDR Eubanks, is charged with one specification of violating Article 120c (Indecent Exposure), and two specifications of violating Article 133 (Conducting Unbecoming an Officer), all under the Uniform Code of Military Justice (UCMJ).

2. CDR Eubanks is a pharmacist at Coast Guard Aviation Training Center Mobile. He is an officer in the Public Health Service assigned to the Coast Guard. He also previously served as an enlisted member in the Coast Guard. He has approximately 21 years of total military service. He graduated pharmacy school in 2005. At the time of the interview with CGIS, he was approximately 44 years old. He is married and the father of three children.

3. CGIS interviewed CDR Eubanks on February 5, 2021 at 1823. The interview was conducted at the CGIS Office in Mobile, Alabama in a conference room with two Special Agents (S/A), [redacted] and [redacted]

4. Both agents were wearing casual civilian attire. CDR Eubanks was in his Operational Dress Uniform. Due to COVID concerns, CDR Eubanks was wearing a medical mask.

5. During the first three and a half minutes, the agents gathered general background information.

6. At 1831, SA [redacted] started reviewing the Article 31(b) rights form with CDR Eubanks. In addition to handing the form to CDR Eubanks to review, the agent advised CDR Eubanks that before they talk, he has certain rights and we have to advise you of those rights.

7. SA [redacted] then oriented CDR Eubanks to which paragraph he is reading out loud while CDR Eubanks appears to read that paragraph.

8. SA [redacted] then advised CDR Eubanks that he is with the CGIS and wanted to question CDR Eubanks about offenses of which he is suspected or accused of including indecent conduct, fraternization, and failure to obey a general order.

9. SA [redacted] then stated to CDR Eubanks that before asking him any questions, he had certain rights. SA [redacted] stated that he is going to read each one and if CDR Eubanks agrees, he is to initial the form indicating he understands each right. SA [redacted] also made clear that placing initials for each right on the form does not mean he is waiving those rights, just acknowledging them.

10. SA [redacted] then stated the following:

    a. First, I do not have to answer any question or say anything.
    b. Second, anything I say or do can be used against me in a criminal trial.
    c. Third, I have the right to talk privately with a lawyer before, during, or after the questioning and have a lawyer present during questioning. The lawyer could be a civilian at no expense to the government or a military lawyer at no expense to me.

11. SA [redacted] then skipped the section applicable to civilians. CDR Eubanks, who was following along on the form, asked the agent to orient him to which section he was now reading.

12. SA [redacted] then asked CDR Eubanks if he was now willing to discuss the offenses under investigation with or without a lawyer present, he had the right to stop answering questioning at any time, and he had the right to speak privately with a

lawyer before answering further even if he signed the waiver below.

13. CDR Eubanks acknowledged this last question by nodding his head and signing the waiver form.

14. SA [redacted] then asked CDR Eubanks whether he understands his rights as the agents has explained to him. CDR Eubanks, without hesitation, answered "[redacted]"

15. SA [redacted] then asked if he has ever requested a lawyer after being read his rights before to which CDR Eubanks responded without hesitation "[redacted]

16. SA [redacted] then asked whether CDR Eubanks wants a lawyer at this time. CDR Eubanks replied "[redacted]"

17. SA [redacted] next asked CDR Eubanks "[redacted] CDR Eubanks responded "[redacted]"

18. SA [redacted] then responded:

[redacted]

19. To which CDR Eubanks responded: "[redacted]

20. SA [redacted] then directed CDR Eubanks' attention to a particular portion of the Article 31(b) rights advisement form and while pointing to that portion with a pen states:

[redacted]

21. CDR Eubanks responded [redacted]

22. If you don't want a lawyer, we are going to sign this, you going to say you understand all these rights and that your waiving these rights and then we are going to talk about everything right now.

23. CDR Eubanks responded: [redacted] SA [redacted] responded [redacted] CDR Eubanks then said [redacted] The agent responded hang on one second, let's get to it. So that is a yes."

24. The agent then asked CDR Eubanks to read out loud the section which states: "[redacted]" SA and told him that when he is done reading that section, he should sign in block 3.

25. After reading that language, CDR Eubanks signed as the interviewee in Section B, block 3.

26. SA [redacted] then started the interview with an open-ended question: [redacted] CDR Eubanks replied, [redacted]

27. SA [redacted] replied, [redacted]

28. CDR Eubanks replied: [redacted]

29. SA [redacted] then asked him if he [redacted]" To which CDR Eubanks replied "[redacted]"

30. SA [redacted] then replied: "[redacted] After an 18 second pause, CDR Eubanks inquires of the agent "[redacted]"

31. The two then engage in some preliminary discussions about the role of CGIS and personal and career questions about CDR Eubanks.

32. At time stamp 20:12, SA [redacted] states to CDR Eubanks, [redacted]

33. Indecent conduct has three elements: (a) That (state the time and place alleged), the accused engaged in certain conduct, to wit: (state the conduct alleged); (b) That the conduct was indecent; and (c) That, under the circumstances, the conduct of the accused was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces or of a nature to bring discredit upon the armed forces).

34. "Indecent" is defined as that form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations.

35. "Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline.

36. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

37. The elements of fraternization include: (a) That, the accused was a commissioned officer; (b) That the accused fraternized on terms of military equality with an enlisted member by the manner in which the fraternization is alleged to have occurred); (c) That the accused then knew individual was an enlisted member; (d) That such fraternization violated the custom of the United States Coast Guard that officers shall not fraternize with enlisted members on terms of military equality; and, (e) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or of a nature to bring discredit upon the armed forces.

38. The elements of indecent exposure are: (a) That (state the time and place alleged), the accused exposed (his) (her) [(genitalia) (anus) (buttocks) (female areola) (female nipple)]; (b) That such exposure was done in an indecent manner; and, (c) That such exposure was intentional.

39. "Indecent manner" means conduct that amounts to a form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations.

40. "Intentional" is defined as willful or on purpose. An act done as the result of a mistake or accident is not done "intentionally."

41. The elements of conduct unbecoming an officer are: (a) That (state the time and place alleged), the accused (did) (omitted to do) a certain act(s), to wit: (state the alleged act or omission); and, (b) That, under the circumstances, the accused's conduct was unbecoming an officer and a gentleman.

42. "Gentleman" is defined to include both male and female commissioned officers, cadets, and midshipmen.

43. "Conduct unbecoming an officer and a gentleman" is defined as action or behavior in an official capacity which, in dishonoring or disgracing the person as an officer, seriously compromises the officer's character as a gentleman, or action or behavior in

an unofficial or private capacity which, in dishonoring or disgracing the officer personally, seriously compromises the person's standing as an officer. There are certain moral attributes common to the ideal officer and the perfect gentleman, a lack of which is indicated by acts of dishonesty, unfair dealing, indecency, indecorum, lawlessness, injustice, or cruelty. Not everyone is or can be expected to meet unrealistically high moral standards, but there is a limit of tolerance based on customs of the Service and military necessity below which the personal standards of an officer, cadet, or midshipman cannot fall without seriously compromising the person's standing as an officer, cadet, or midshipman or the person's character as a gentleman.

Further facts necessary for an appropriate ruling are contained within the Analysis section.

BURDEN OF PROOF

When the defense makes an appropriate and timely objection, the government bears the burden of establishing the admissibility of the evidence by a preponderance of the evidence. M.R.E. 304(b).

PRINCIPLES OF LAW

An involuntary statement of the accused, or evidence derived therefrom, is generally inadmissible at trial, provided the accused makes a timely motion to suppress or other objection to its use. Mil. R. Evid. 304(a). Once the defense has made an appropriate motion or objection, the government bears the burden of establishing the admissibility of the evidence by a preponderance of the evidence. M.R.E. 304(f)(6)-(7).

An "involuntary statement" is a statement "obtained in violation of the self-incrimination privilege or Due Process Clause of the Fifth Amendment, Article 31, or through the use of coercion, unlawful influence, or unlawful inducement." M.R.E. 304(a)(1)(A). Whether a statement is involuntary depends on the "the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973).

In examining the totality of the circumstances, "the necessary inquiry is whether the confession is the product of an essentially free and unconstrained choice by its maker." United States v. Bubonics, 45 M.J. 93, 95 (C.A.A.F. 1996)(citations omitted). Due process is offended where the confession is the product of someone whose "will was overborne and his capacity for self-determination [] critically impaired . . . ." Id. Factors to be examined in this regard include "rights warnings, the length of the interrogation, the characteristics of the individual, including age and education, and the nature of the police conduct, including threats, physical abuse, and incommunicado detention." United States v. Sojfer, 47 M.J. 425, 429-30 (C.A.A.F. 1998).

Article 31(b) provides in pertinent part that the accused must be informed of "the nature of the accusation" and advised "that he does not have to make any statement regarding the offense of which he is accused or suspected." While Article 31(b) does not spell out the degree of specificity required, case law sets forth that

> The purpose of informing a suspect or accused of the nature of the accusation is to orient him to the transaction or incident in which he is allegedly involved. It is not necessary to spell out the details of his connection with the matter under inquiry with technical nicety.

United States v. Rogers, 47 M.J. 135, 137 (C.A.A.F. 1997) (citations omitted). It is not required that:

> An accused or suspect be advised of each and every possible charge under investigation, nor that the advice include the most serious or any lesser-included charges being investigated. Nevertheless, the accused or suspect must be informed of the general nature of the allegation, to include the area of suspicion that focuses the person toward the circumstances surrounding the event.

United States v. Simpson, 54 M.J. 281, 284 (C.A.A.F. 2000) (citations omitted). Likewise, "it is not necessary to spell out the details of [the accused's] connection with the matter under inquiry with technical nicety."' United States v. Pipkin, 58 M.J. 358, 360 (C.A.A.F. 2003) (quoting United States v. Rice, 11 C.M.A. 524, 526). Factors to be considered in determining whether the nature of the accusation requirement is met include "whether the conduct is part of a continuous sequence of events, whether the conduct was within the frame of reference supplied by the warnings, or whether the interrogator had previous knowledge of the unwarned offenses." Id. Finally, "[t]he key to the inquiry as to sufficiency of the notice requires considering the precise wording of the warning in the context of the surrounding circumstances and the manifest knowledge of the accused. . . .'" Rogers, 47 M.J. at 137 (quoting United States v. Davis, 24 C.M.R. 6, 8 (C.M.A. 1957)).

ANALYSIS

Article 31(b)

The government has met their burden by a preponderance of the evidence that Article 31(b) was complied with in this case. The accused was informed that the general nature of the allegations against him, namely that he was suspected of indecent conduct, fraternization, and failure to obey general order. The offenses of indecent conduct and indecent exposure are sufficiently related. The definition of indecent, under indecent conduct under Article 134, and indecent manner, under Article 120c, both include a form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations. Advising the accused that he was suspected of indecent conduct embraces a larger range of potential conduct when compared to the elements indecent exposure given that indecent exposure focuses on conduct only where an accused exposes genitalia, anus, buttocks, female areola, and female nipple. Indecent conduct includes engaging in conduct that fits within the definition of indecent—anything grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations. Based on the surrounding circumstances

and the manifest knowledge of the accused, it is readily apparent that at the outset and during the course of the interview, the accused was informed about the general nature of the allegations. The rights advisement related to conduct that was within the general frame of reference for conduct involving an allegation of being indecent which served to put him on notice. As such, the Court concludes that advising the accused that he was suspected of indecent conduct was sufficient regarding the general nature of the allegations and included the type of conduct he was suspected of committing.

Similarly, the elements of fraternization include: (a) That the accused was a commissioned officer; (b) That the accused fraternized on terms of military equality with an enlisted member by a certain act or acts; (c) That the accused then knew the individual was an enlisted member; (d) That such fraternization violated the custom of the United States Coast Guard that officers shall not fraternize with enlisted members on terms of military equality; and, (e) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or of a nature to bring discredit upon the armed forces.

The elements of conduct unbecoming an officer include: (a) That the accused did a certain act, to wit: (state the alleged act or omission); and, (b) That, under the circumstances, the accused's conduct was unbecoming an officer and a gentleman. Conduct unbecoming an officer and a gentleman" is defined as action or behavior in an official capacity which, in dishonoring or disgracing the person as an officer, seriously compromises the officer's character as a gentleman, or action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the officer personally, seriously compromises the person's standing as an officer. There are certain moral attributes common to the ideal officer and the perfect gentleman, a lack of which is indicated by acts of dishonesty, unfair dealing, indecency, indecorum, lawlessness, injustice, or cruelty.

Advising the accused that he was suspected of fraternization includes behavior in terms of military equality as an officer with an enlisted member that violates the custom of the United States Coast Guard. It also requires that the conduct be to the prejudice of good order and discipline in the armed forces or of a nature to bring discredit upon the armed forces. Conduct unbecoming an officer was not specifically included in the rights advisement. The elements of Conduct Unbecoming include doing a certain act; and, that under the circumstances, the conduct was unbecoming an officer and a gentleman. Such conduct includes action or behavior in an official capacity which, in dishonoring or disgracing the person as an officer, seriously compromises the officer's character as a gentleman, or action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the officer personally, seriously compromises the person's standing as an officer.

While Conduct Unbecoming was not specifically listed on the rights advisement, based on the surrounding circumstances and the manifest knowledge of the accused, it is readily apparent during the course of the interview that the accused was oriented to the suspected activities even though the initial advisement was for fraternization and not conduct unbecoming. The rights advisement related to conduct that was within the frame of reference supplied by the warnings, putting him on notice. As such, the Court concludes that advising the accused that he was suspected of fraternization knowing that

the accused had exchanged images via text with an enlisted member was sufficient regarding the general nature of the allegation and included the area of suspicion that focused the accused toward the circumstances surrounding the event.

Voluntariness

With respect to the defense's arguments regarding the voluntariness of the accused's admissions as a whole, the court concludes that under the totality of the circumstances the accused's statements were not the product of coercion, unlawful influence, or unlawful inducement, as the defense maintains. The interrogation itself, including breaks, lasted less than two hours and was conversational throughout. The agents spoke in a conversational tone with the accused as a means of getting him to talk to them. While the agents minimized at times and did confront and challenge the accused, there is no indication that in doing so they overbore his will. To the contrary, throughout the interview the accused spoke intelligently and candidly, repeatedly demonstrating his ability to stand his ground and not provide further information even when confronted with the agents' stated belief that he was either lying or at least not being forthcoming enough. The accused was a college-educated, [redacted]year-old commander with a medical background licensed as a pharmacist. The accused stated during the interrogation that he wanted to get this off his chest. Repeatedly during the interview, when he could not recall specific events, he took responsibility for the actions. The facts and circumstances revealed in this interrogation are in no way suggestive of psychological coercion or other factors amounting to unlawful influence or inducement. Rather, based on the totality of the circumstances presented, the court concludes that the accused's admissions were the product of an essentially free and unconstrained choice by the accused, were therefore voluntary, and may be admitted at trial.

CONCLUSIONS OF LAW

1. The accused was sufficiently warned about the scope and nature of the investigation.
2. The accused's statements were voluntary.

RULING

For the reasons stated above, the Defense Motion to Suppress is DENIED.

So ordered.

FOWLES.TED.R [redacted] Digitally signed by FOWLES.TED.R [redacted] Date: 2023.02.21 14:23:35 -05'00'

Ted R. Fowles
Captain, U.S. Coast Guard
Military Judge

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES **v.** **J.B. EUBANKS** **CDR/O-5** **U.S. COAST GUARD**	**RULING ON DEFENSE MOTION TO DISMISS FOR FAILURE TO STATE AN OFFENSE (Charge I)** **1 MARCH 2023**

RELIEF SOUGHT

Pursuant to Rule for Court-Martial ("R.C.M.") 907(b)(2)(E), the defense requests that Charge I be dismissed for failure to state an offense. In the specification of Charge I, the defense avers that the alleged facts, even if true, do not constitute a violation of Article 120c, Uniform Code of Military Justice ("UCMJ"). The defense further argues that because this defect fails to articulate a violation of the statute, CDR Eubanks is not notice for the actions that constitute the alleged offense. See R.C.M. 307(c)(3). AE 37. The Government opposes the motion. AE 39. An Article 39(a) session was held on 13 February 2023.

ISSUE PRESENTED

Does the Specification of Charge I fail to state an offense?

SUMMARY OF FACTS

In Specification of Charge I, the Government alleges that CDR Eubanks violated Article 120c, UCMJ: . . . on active duty, assigned to and serving with the U.S. Coast Guard, did, on board Aviation Training Center Mobile, Alabama, on or about December 2020, intentionally expose his genitalia, in an indecent manner, to wit: touching his penis while in the view of Ms. [redacted]

PRINCIPLES OF LAW

A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication. R.C.M. 307(c)(3). The specification should inform the accused of the conduct charged, enable the accused to prepare a defense, and to protect against double jeopardy. R.C.M. 307(c)(3) discussion at (G)(iii); United States v. Crafter, 64 M.J. 209, 211 (C.A.A.F. 2006) (citation omitted).

"The true test of the sufficiency of [a specification] is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet..." United States v. Sell, 11 C.M.R. 202, 206 (1953). A charge and specification are sufficient that, "first, contain the elements of the offense charged and fairly inform a defendant of the charge against which he must defend, and, second, enable him to plead an acquittal or conviction in bar of future prosecutions for the same offense." Hamling v. United States, 418 U.S. 87, 117 (1974); United States v. Sutton, 68 M.J. 455, 457 (C.A.A.F. 2010); United States v. Crafter, 64 M.J. 209, 211 (C.A.A.F. 2006). The rules governing courts-martial procedure encompass the notice

requirement: "A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication." R.C.M. 307(c)(3); United States v. Fosler, 70 M.J. 225 (C.A.A.F. 2011).

The requirement to allege every element expressly or by necessary implication ensures that a defendant understands what he must defend against. Indeed, "[n]o principle of procedural due process is more clearly established than [] notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge." Cole v. Arkansas, 333 U.S. 196, 201 (1948); see also, U.S. v Miller, 67 M.J. 385, 388 (C.A.A.F 2009).

The elements of a violation of Article 120c, UCMJ include: (1) That (state the time and place alleged), the accused exposed his genitalia; (2) That such exposure was done in an indecent manner; and (3) That such exposure was intentional. Manual for Courts-Martial [MCM], United States (2019 ed.), pt. IV, ¶63.b.(6). Indecent manner is defined as conduct that amounts to a form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations. MCM, pt. IV, ¶63.d.(6).

ANALYSIS

The specification alleges, either expressly or by necessary implication, every element of the offense. The defense avers that the specific act alleged, "touching his penis in the view of HS3 [redacted]' should be read without regard for the fact that an element of the offense is that the government must prove the touching included an exposed genitalia. This is consistent with common-law where, in order to convict someone of the offense of indecent exposure, it must be shown that there was a willful and intentional exposure of the private parts of the body. 50 Am. Jur. 2d Lewdness, Indecency, Etc. § 15. However, Article 120c, UCMJ does not specifically define the word expose. In the absence of a statutory definition, we look to whether the language has a plain and unambiguous meaning. The plain language of a statute will control unless it is ambiguous or leads to an absurd result. United States v. Lewis, 65 M.J. 85, 88 (C.A.A.F.2007). Expose is defined as "to cause to be visible or open to view." "expose" Merriam-Webster. 2023. www.merriam-webster.com (21 February 2023). Or, "to uncover it so that it can be seen." "expose" Collins Dictionary. 2023. www.collinsdictionary.com/us/dictionary/english/expose. (21 February 2023). Thus, read in conjunction with the word exposure, while the accused was touching his penis, it was visible or open to the view of HS3 [redacted]

As every element was contained in the specification, CDR Eubanks is on notice that he was charged with indecent exposure. United States v. Crews, No. ARMY 20130766, 2016 WL 792213, at *8 (A. Ct. Crim. App. Feb. 29, 2016)(citation omitted). It is a question for the trier of fact as to whether or not his genitalia was in fact exposed while the accused touched his penis.

CONCLUSION AND RULING

Accordingly, the Defense request to dismiss the Specification under Charge I is DENIED.

So ordered.

[redacted]

Ted R. Fowles
Captain, U. S. Coast Guard
Military Judge

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES **v.** **J.B. EUBANKS** **CDR/O-5** **U.S. COAST GUARD**	**RULING ON MOTION TO DISMISS FOR FAILURE TO STATE AN OFFENSE (Charge II, Specification 1)[1]** **2 March 2023**

RELIEF SOUGHT

Pursuant to the Fifth Amendment and R.C.M. 905(c)(2)(B), the Defense moves this Court to dismiss Specification 1 of Charge II for failure to state an offense. AE 42. The Government opposes the motion. AE 44. An Article 39(a) session was held on 13 February 2023.

ISSUE PRESENTED

Does Specification 1 of Charge II fail to state an offense?

FACTS

1. In Specification 1 of Charge III, the Government alleges that CDR Eubanks violated Article 133, UCMJ:

   . . . on active duty, assigned to and serving with the U.S. Coast Guard, did, at or near Mobile, Alabama, on divers occasions from on or about January 2019 to February 2021, commit certain acts, to wit: communicating unwanted messages of a sexual nature to female coworkers, and that, under the circumstances his conduct was unbecoming an officer and gentleman.

2. The accused obtained the phone numbers for the co-workers from the office recall list.

3. On June 15, 2022, the Defense initially requested a Bill of Particulars (BOP).

4. On 28 October 2022, the Defense renewed its request for a Bill of Particulars to which the Government responded.

5. In the BOP, the government identifies the five co-workers, provides that three of the listed individuals received messages that included a picture of male genitalia,

[1] The original Charge Sheet contained Charge II with two specifications under Article 128, UCMJ. Those charges were dismissed. For clarity, what is referred to as Charge II in this ruling is the original Charge III under Article 133, UCMJ.

and indicated that all five received additional messages of a sexual nature. The BOP provides a date range in which each message was received.

PRINCIPLES OF LAW

A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication. R.C.M. 307(c)(3). The specification should inform the accused of the conduct charged, enable the accused to prepare a defense, and to protect against double jeopardy. R.C.M. 307(c)(3) discussion at (G)(iii); United States v. Crafter, 64 M.J. 209, 211 (C.A.A.F. 2006) (citation omitted).

"The true test of the sufficiency of [a specification] is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet..." United States v. Sell, 11 C.M.R. 202, 206 (1953). A charge and specification are sufficient that, "first, contain the elements of the offense charged and fairly inform a defendant of the charge against which he must defend, and, second, enable him to plead an acquittal or conviction in bar of future prosecutions for the same offense." Hamling v. United States, 418 U.S. 87, 117 (1974); United States v. Sutton, 68 M.J. 455, 457 (C.A.A.F. 2010); United States v. Crafter, 64 M.J. 209, 211 (C.A.A.F. 2006). The rules governing courts-martial procedure encompass the notice requirement: "[a] specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication." R.C.M. 307(c)(3); United States v. Fosler, 70 M.J. 225 (C.A.A.F. 2011).

The requirement to allege every element expressly or by necessary implication ensures that a defendant understands what he must defend against. Indeed, "[n]o principle of procedural due process is more clearly established than [] notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge." Cole v. Arkansas, 333 U.S. 196, 201 (1948); see also, U.S. v Miller, 67 M.J. 385, 388 (C.A.A.F 2009).

The elements of Article 133, UCMJ are: (1) That (state the time and place alleged), the accused did certain acts, to wit: (state the alleged act or omission); and (2) That, under the circumstances, the accused's conduct was unbecoming an officer and a gentleman. *Manual for Courts-Martial*, United States (2019 ed.) [*MCM*], pt. IV, ¶ 90.b.

DISCUSSION

The specification alleges, either expressly or by necessary implication, every element of the offense. The defense avers that the accused was not on fair notice that the charged act was forbidden and subject to criminal sanction. Accordingly, as an initial matter the Court looks to the plain meaning of the words "communicating unwanted messages of a sexual nature to female coworkers." The word message is broadly defined and includes "a communication in writing, in speech, or by signals." "Message." Merriam-Webster. 2023. www.merriam-webster.com (21 February 2023). Accordingly, the use of the word communication is broad in nature and encompasses various specific sub-types of communications including text messages.

The word sexual is defined as "of, relating to, or associated with sex or the sexes," or "having or involving sex." "Sexual." Merriam-Webster. 2023. www.merriam-webster.com (21 February 2023). Finally, in the BOP, the Government specifically identified each co-worker. Accordingly, the language used in the specification sufficiently provides notice of the type of

conduct engaged in by the accused, when, to who, and the manner in which the government alleges the acts were committed.

The accused was also on notice that his behavior was unbecoming. Conduct unbecoming an officer and a gentleman is a centuries-old offense focused on preserving the ability of officers to lead and to command. United States v. Livingstone, 78 M.J. 619, 623 (C.G. Ct. Crim. App. 2018)(citing Parker v. Levy, 417 U.S. 733, 743–45 (1974); United States v. Schweitzer, 68 M.J. 133, 137 (C.A.A.F. 2009)). The issue is whether the appellant had sufficient warning. The Manual for Courts-Martial provides that:

> Conduct violative of this article is action or behavior . . . in an unofficial or private capacity which, in dishonoring or disgracing the officer personally, seriously compromises the person's standing as an officer. There are certain moral attributes common to the ideal officer and the perfect gentleman, a lack of which is indicated by acts of dishonesty, unfair dealing, indecency, indecorum, lawlessness, injustice, or cruelty. Not everyone is or can be expected to meet unrealistically high moral standards, but there is a limit of tolerance based on customs of the Service and military necessity below which the personal standards of an officer, cadet, or midshipman cannot fall without seriously compromising the person's standing as an officer, cadet, or midshipman or the person's character as a gentleman. This article prohibits conduct by a commissioned officer, cadet, or midshipman which, taking all the circumstances into consideration, is thus compromising. MCM, pt. IV, ¶ 90.c.(2).

Examples described in the manual include "knowingly making a false official statement; dishonorable failure to pay a debt; cheating on an exam; opening and reading a letter of another without authority; using insulting or defamatory language to another officer in that officer's presence or about that officer to other military persons; being drunk and disorderly in a public place; public association with known prostitutes; committing or attempting to commit a crime involving moral turpitude; and failing without good cause to support the officer's family." MCM, pt. IV, ¶ 90.c.(3).

The test for an offense under Article 133 is whether the conduct has fallen below the standards established for officers. U.S. v. Diaz, 69 M.J. 127, 135 (C.A.A.F. 2010)(citation omitted). Said another way, the test is would a reasonably prudent officer of the accused's grade and experience understand that the alleged misconduct under the circumstances was unofficer-like within the meaning of Article 133. United States v. Van Steenwyk, 21 M.J. 795, 802 (N-M. C.M.R. 1985)(citation omitted). The answer is yes. A commander serving in or with the United States Coast Guard understands that sending an unsolicited and unwanted picture of male genitalia to your co-workers dishonors and disgraces the accused personally and seriously compromises the person's standing as an officer. As does communicating unwanted messages of a sexual nature. The dishonor and disgrace is only exacerbated by the conduct being performed by a senior officer to enlisted. While perhaps not as egregious, sending unwanted messages of a sexual nature also dishonors and disgraces the accused personally and seriously compromises the person's standing as an officer. As a well-educated individual serving as the pharmacist and senior officer at a small clinic in Mobile, Alabama, the impact on the respect each individual would have on the accused's authority and standing is not in question.

CONCLUSION AND RULING

Accordingly, the Defense request to dismiss Specification 1 under Charge II is DENIED.

So ordered.

FOWLES.TED.R.[redacted]

Ted R. Fowles
Captain, U. S. Coast Guard
Military Judge

Appellate Exhibit 46
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GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES **v.** **J.B. EUBANKS** **CDR/O-5** **U.S. COAST GUARD**	**RULING ON MOTION TO DISMISS FOR FAILURE TO STATE AN OFFENSE (Charge II, Specification 2)**[1] **2 March 2023**

RELIEF SOUGHT

Pursuant to the Fifth Amendment and R.C.M. 905(c)(2)(B), the Defense moves this Court to dismiss Specification 2 of Charge II for failure to state an offense. AE 47. The Government opposes the motion. AE 49. An Article 39(a) session was held on 13 February 2023.

ISSUE PRESENTED

Does Specification 2 of Charge II fail to state an offense?

FACTS

1. In Specification 2 of Charge III, the Government alleges that CDR Eubanks violated Article 133, UCMJ:

   > . . . on active duty, assigned to and serving with the U.S. Coast Guard, did, on board Aviation Training Center Mobile, Alabama, on divers occasions from on or about December 2019 to November 2020, commit a certain act, to wit: masturbating in a government office, and that, under the circumstances his conduct was unbecoming an officer and gentleman.

2. On June 15, 2022, the Defense initially requested a Bill of Particulars (BOP).

3. On 28 October 2022, the Defense renewed its request for a Bill of Particulars to which the Government responded.

4. In the BOP, the government states that "[t]he government office was the office space that was CDR Eubanks' primary work space during the time period of on or about December 2019 to November 2020; it is the office that is immediately adjacent to the ATC Mobile Pharmacy."

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[1] The original Charge Sheet contained Charge II with two specifications under Article 128, UCMJ. Those charges were dismissed. For clarity, what is referred to as Charge II in this ruling is the original Charge III under Article 133, UCMJ.

5. The CGIS investigation states that the Cellbrite evidence shows that masturbation in the office occurred in March, May, July, October, and November of 2020.

6. CDR Eubanks stated during his CGIS interview that it is possible he masturbated in his office.

PRINCIPLES OF LAW

Sufficiency of a Specification

A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication. R.C.M. 307(c)(3). The specification should inform the accused of the conduct charged, enable the accused to prepare a defense, and to protect against double jeopardy. R.C.M. 307(c)(3) discussion at (G)(iii); United States v. Crafter, 64 M.J. 209, 211 (C.A.A.F. 2006) (citation omitted).

"The true test of the sufficiency of [a specification] is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet..." United States v. Sell, 11 C.M.R. 202, 206 (1953). A charge and specification are sufficient that, "first, contain the elements of the offense charged and fairly inform a defendant of the charge against which he must defend, and, second, enable him to plead an acquittal or conviction in bar of future prosecutions for the same offense." Hamling v. United States, 418 U.S. 87, 117 (1974); United States v. Sutton, 68 M.J. 455, 457 (C.A.A.F. 2010); United States v. Crafter, 64 M.J. 209, 211 (C.A.A.F. 2006). The rules governing courts-martial procedure encompass the notice requirement: "[a] specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication." R.C.M. 307(c)(3); United States v. Fosler, 70 M.J. 225 (C.A.A.F. 2011).

The requirement to allege every element expressly or by necessary implication ensures that a defendant understands what he must defend against. Indeed, "[n]o principle of procedural due process is more clearly established than [] notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge." Cole v. Arkansas, 333 U.S. 196, 201 (1948); see also, U.S. v Miller, 67 M.J. 385, 388 (C.A.A.F 2009).

The elements of Article 133, UCMJ are: (1) That (state the time and place alleged), the accused did certain acts, to wit: (state the alleged act or omission); and (2) That, under the circumstances, the accused's conduct was unbecoming an officer and a gentleman. *Manual for Courts-Martial*, United States (2019 ed.) [*MCM*], pt. IV, ¶ 90.b.

Liberty Interest

In Lawrence v. Texas, the Supreme Court identified a constitutionally protected liberty interest in private sexual activity between "full[y] and mutual[ly] consent[ing]" adults. 539 U.S. 558, 578 (2003). Lawrence grounded its analysis in a fundamental liberty interest to form intimate, meaningful, and personal bonds that manifest themselves through sexual conduct. Id. at 567. Lawrence did not purport to include any and all behavior touching on sex within its purview, and did not "conclude that an even more general right to engage in private sexual conduct would be a fundamental right." Seegmiller v. LaVerkin City, 528 F.3d 762, 771 (10th Cir. 2008) (no protection for off-duty sexual conduct of police officers that violated department

ethics guidelines); see also Erotic Service Provider Legal Education and Research Project v. Gascon, 880 F.3d 450, 455–57 (9th Cir. 2018) (no fundamental due process right to engage in prostitution).

The United States Court of Appeals for the Armed Forces addressed the applicability of Lawrence in the military context where an officer was convicted of, inter alia, non-forcible sodomy in violation of Article 125, UCMJ. United States v. Marcum, 60 M.J. 198 (2004). While examining the constitutional issue presented by Lawrence, the court directed that a "contextual, as applied analysis, rather than facial review" was required when reviewing convictions for non-forcible sodomy because "[i]n the military setting, . . . an understanding of military culture and mission cautions against sweeping constitutional pronouncements that may not account for the nuance of military life." Id. at 206.

The court explained that the "as-applied analysis" requires a court to consider three questions:

> First, was the conduct that the accused was found guilty of committing of a nature to bring it within the liberty interest identified by the Supreme Court? Second, did the conduct encompass any behavior or factors identified by the Supreme Court as outside the analysis in Lawrence? 539 U.S. at 578. Third, are there additional factors relevant solely in the military environment that affect the nature and reach of the Lawrence liberty interest?

Id. at 206-07. In addition, with respect to the first question, the court must consider whether "[the accused's] conduct involve[d] private, consensual sexual activity between adults?" Id. at 207. As for the second question, the court must consider whether the conduct involved (1) minors, (2) public conduct or prostitution, or (3) "persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused?" Id. (citing Lawrence).

DISCUSSION

Sufficiency of the Specification

The specification alleges, either expressly or by necessary implication, every element of the offense. The defense avers that the accused was not on fair notice that the charged act exceeded the limit of tolerance based upon customs of the service and for which the accused was on notice.

Whether an officer is on notice of whether his conduct will be considered unbecoming, conduct unbecoming an officer and a gentleman is a centuries-old offense focused on preserving the ability of officers to lead and to command. United States v. Livingstone, 78 M.J. 619, 623 (C.G. Ct. Crim. App. 2018)(citing Parker v. Levy, 417 U.S. 733, 743–45, (1974); United States v. Schweitzer, 68 M.J. 133, 137 (C.A.A.F. 2009)). The issue is whether the appellant had sufficient warning. The Manual for Courts-Martial provides that:

> Conduct violative of this article is action or behavior . . . in an unofficial or private capacity which, in dishonoring or disgracing the officer personally, seriously compromises the person's standing as an officer. There are certain moral attributes common to the ideal officer and the perfect gentleman, a lack of which is indicated by acts of dishonesty, unfair dealing, indecency, indecorum, lawlessness, injustice, or cruelty. Not everyone is or can

> be expected to meet unrealistically high moral standards, but there is a limit of tolerance based on customs of the Service and military necessity below which the personal standards of an officer, cadet, or midshipman cannot fall without seriously compromising the person's standing as an officer, cadet, or midshipman or the person's character as a gentleman. This article prohibits conduct by a commissioned officer, cadet, or midshipman which, taking all the circumstances into consideration, is thus compromising. *MCM*, pt. IV, ¶ 90.c.(2).

Examples described in the manual include:

> knowingly making a false official statement; dishonorable failure to pay a debt; cheating on an exam; opening and reading a letter of another without authority; using insulting or defamatory language to another officer in that officer's presence or about that officer to other military persons; being drunk and disorderly in a public place; public association with known prostitutes; committing or attempting to commit a crime involving moral turpitude; and failing without good cause to support the officer's family." *MCM*, pt. IV, ¶ 90.c.(3).

The test for an offense under Article 133 is whether the conduct has fallen below the standards established for officers. U.S. v. Diaz, 69 M.J. 127, 135 (C.A.A.F. 2010)(citation omitted). Said another way, the test is would a reasonably prudent officer of the accused's grade and experience understand that the alleged misconduct under the circumstances was unofficer-like within the meaning of Article 133. United States v. Van Steenwyk, 21 M.J. 795, 802 (N-M. C.M.R. 1985)(citation omitted).

The defense avers that, similar to an airman in United States v. Rocha, the accused was not on notice of the criminality of conduct unbecoming an officer for masturbating in the workplace. United States v. Rocha, No. ACM 40134, 2022 WL 17730741, at *1 (A.F. Ct. Crim. App. Dec. 16, 2022). However, the conduct here is not a "fully private matter." Id at *7. Unlike a barracks room, a government office space is shared with others during the workday. Meetings and interactions with staff regularly occur within an office. Additionally, the charge in this case involved conduct unbecoming, arguably a broader offense aimed at the minimal conduct expected of an officer. In Rocha, the government charged the member with indecent conduct under Article 134, UCMJ, for conduct that occurred in the privacy of a barracks room. Id. at *2.

A commander serving in or with the United States Coast Guard understands that masturbating in a public office space, even if you can lock the door, dishonors and disgraces the accused personally and seriously compromises the person's standing as an officer. This is particularly true for activity that takes place during the workday. Accordingly, the Court finds that an officer is on notice that masturbating in the workplace is unbecoming.

Liberty Interest

The defense asserts that CDR Eubanks has a constitutional liberty interest in his private, consensual conduct. Masturbating in a federal workplace, a military workplace at that, is conduct outside the Lawrence liberty interest. The Supreme Court "has never indicated that the mere fact that an activity is sexual and private entitles it to protection as a fundamental right." Williams v. Att'y Gen. of Ala., 378 F.3d 1232, 1236 (11th Cir. 2004). The conduct in this case

does not involve forming intimate, meaningful, and personal bonds through sexual contact, nor does it involve conduct that occurred in the privacy of one's home. Rather, CDR Eubanks seeks to place masturbating in a government controlled and government assigned workplace on par with those liberty interests. The Court was unable to find any precedent to support the proposition that a fundamental constitutional right includes masturbating in the workplace. To the contrary, under General Service Administration regulations, government employees have a duty to use government property only for authorized purposes. 5 C.F.R. § 2635.704; see also, United States v. Brantner, 54 M.J. 595, 597 (C.G. Ct. Crim. App. 2000); United States v. Farence, 57 M.J. 674, 678 (C.G. Ct. Crim. App. 2002). Authorized purposes are those purposes for which Government property is made available to members of the public or those purposes authorized in accordance with law or regulation. 5 C.F.R. § 2635.704(b)(2).

Assuming arguendo the conduct falls within the liberty interest, it is true the conduct does not involve minors, persons who might be injured or coerced, those who might not easily refuse consent, or public conduct or prostitution. Lawrence, 539 U.S. at 560. However, under the third prong "[t]he fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it." Parker, 417 U.S. at 748. There are additional factors relevant solely in the military environment that affect the nature and reach of the Lawrence liberty interest. Marcum, 60 M.J. at 207. In addition, officers are held to a more exacting standard of conduct. United States v. Meakin, 78 M.J. 396,404 (2019). The discussion to Article 133, UCMJ states:

> There are certain moral attributes common to the ideal officer . . . a lack of which is indicated by acts of . . . indecency, indecorum, lawlessness, injustice, or cruelty. Not everyone is or can be expected to meet unrealistically high moral standards, but there is a limit of tolerance based on customs of the Service and military necessity below which the personal standards of an officer, cadet, or midshipman cannot fall without seriously compromising the person's standing as an officer, cadet, or midshipman or the person's character as a gentleman

MCM, pt. IV, ¶ 90.c.(2). The purpose of this heightened standard is to "command[] respect and obedience and preserve[] their ability to lead and command their subordinates." Meakin, 78 M.J. at 404; (citing Parker, 417 U.S. at 743-45.). The Court has little doubt that the act of masturbating in the military workplace detracts from the heightened standard expected of an officer and is not a protected liberty interest.

Finally, the Court notes that whether a Marcum factor exists is a determination to be made by the trier of fact based on the military judge's instructions identifying facts or factors that are relevant to the constitutional context presented. United States v. Castellano, 72 M.J. 217 (C.A.A.F. 2013).

CONCLUSION AND RULING

The Defense request to dismiss Specification 2 under Charge II is DENIED.

So ordered.

FOWLES.TED.R [redacted] Digitally signed by FOWLES.TED.R [redacted] Date: 2023.03.02 17:25:14 -05'00'

Ted R. Fowles
Captain, U. S. Coast Guard
Military Judge

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. CDR JUSTIN B. EUBANKS U.S. Coast Guard	RULING ON DEFENSE MOTION TO COMPEL DISCOVERY 17 Apr 2023

PROCEDURAL HISTORY

Defense moved this Court to compel the Government to produce discovery. AE 58. The Government opposed the Defense motion. AE 60. The Court authorized and defense filed a Reply. AE 69. The parties did not request oral argument.

ISSUES PRESENTED

Are the requested documents in possession or control of the government relevant to the Defense preparation of their case under R.C.M. 701(a)(2)(A)?

FINDINGS OF FACT

In reaching its findings of fact and conclusions of law, the Court considered all legal and competent evidence presented and the reasonable inferences drawn therefrom, and resolved all issues of credibility. Specifically, the Court considered the Defense and Government briefs and attachments thereto. The Court finds the following facts by a preponderance of the evidence:

1. CDR Eubanks is a member of the Public Health Service Commissioned Corps, assigned to the Coast Guard. He is charged with one specification of violating Article 120c, UCMJ (Indecent Exposure), and two specifications of violating Article 133, UCMJ (Conduct Unbecoming an Officer and a Gentleman). These charges stem from alleged conduct from on or about December 2019 through February 2021.

2. On 07 Oct 2022, Ms. [redacted] a U.S. Postal Service employee, CDR Eubanks to the Baldwin County Sheriff's Office for allegedly exposing his genitalia in an indecent manner, leaving a note with his name, phone number and a hand drawn penis in his mailbox and grabbing her hand without her consent while she was engaged in her official duties as a mail carrier.

3. On 10 Oct 2022, CDR Eubanks' charged misconduct from 2019 to 2021 was referred to a General Court-Martial and he was arraigned on 25 Oct 2022.

4. On 21 Nov 2022, Trial Counsel sent Defense Counsel the Baldwin County Sheriff's Office (BSCO) Report that details Ms. [redacted] allegations and police interview.

5. On 06 Dec 2022, Trial Counsel sent Defense Counsel three images of CDR Eubanks

exposing himself to Ms. [redacted]

6. On 14 Dec 2022, CGIS Special Agents contacted Ms. [redacted] Ms. [redacted] agreed to meet with CGIS Special Agents for an interview.

7. On 19 Dec 2022, CDR Kristen Curran, assistant trial counsel, called Ms. [redacted] to meet Victim Witness responsibilities.

8. On 21 Dec 2022, CDR Eubanks sent a plea offer to the Government in which he disclosed that he had begun to receive counseling and treatment.

9. On 09 Jan 2023, CGIS special agents interviewed Ms. [redacted] At this interview, [redacted] told CGIS agents she thought the accused needed to get help and she was told by a Coast Guard attorney that the accused did not want to get help. [redacted] stated, " . . . [redacted]

10. On 18 January 2023, charges were preferred for the CDR Eubank's conduct towards Ms. [redacted] from September to October 2022.

11. On 23 January 2023, Trial Counsel sent Defense Counsel Ms. [redacted] CGIS interview and followed up with providing her phone number on 02 Feb 2023 as part of R.C.M. 404A disclosures obligations in preparation for an Article 32 hearing for the second set of charges.

12. On 01 Feb 2023, defense counsel sent a discovery request for the original charges and requested, "Text messages, emails, or other digital communications between Trial Counsel, or any other Coast Guard attorney and [redacted] These communications are specifically referenced by [redacted] during her January 9, 2023 interview with the Coast Guard Investigative Service. This material is in the possession of military authorities and is relevant to Defense preparation. Specifically, the Defense believes that [redacted] may have been provided incorrect or false information in an effort to impermissibly induce her participation or otherwise influence or bias her against CDR Eubanks."

13. On 09 Feb 2023, the government denied the 01 Feb 2023 discovery request as outside the scope of R.C.M. 701, but also stated that the communications were previously provided. Assistant trial counsel confirmed that all written communications between [redacted] and the prosecution team were previously provided in Govt Bates No. 000941-000941 and 000951.

14. On 2 Feb 2023, trial counsel proposed a plea agreement that would resolve both sets of charges. The plea offer was available until 01 Mar 2023.

15. On 06 Feb 2023, defense counsel sent a discovery request for All Coast Guard Investigative Service Reports of Investigations (ROI) or other law enforcement reports in the possession of military authorities related to the charges preferred against CDR Eubanks on January 18, 2023 on the basis that the law enforcement reports for the second set of charges were necessary for the accused to decide whether to accept the plea offer to resolve both sets of charges. Trial counsel indicated they would not provide the discovery in response to the 06 Feb 2023 request.

16. On 10 Feb 2023, defense filed the present motion in advance of an Article 39(a) hearing for the first set of charges held on 14 Feb 2023. The military judge granted the filing out of time and set a pleadings schedule for a response on 24 Feb 2023.

17. On 21 Feb 2023, the accused received the CGIS ROI into the allegations by [redacted]

18. On 06 Mar 2023, a new military judge was detailed to the case. An R.C.M. 802 conference was held on 10 Mar 2023. Of relevance to this motion, defense still sought clarification on the government's position and the Court authorized the defense to file a reply brief by 17 Mar 2023.

19. On 15 Mar 2023, assistant trial counsel texted [redacted] to facilitate a meeting with defense counsel. [redacted] declined to meet with defense counsel. On the same day, the second set of charges against the accused was referred to a separate, non-joined, general court-martial.

Further facts necessary for an appropriate ruling are contained within the analysis section below.

PRINCIPLES OF LAW

Article 46, U.C.M.J. provides that "[t]he trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence." R.C.M. 701 directs that "[e]ach party shall have adequate opportunity to prepare its case and equal opportunity to interview witnesses and inspect evidence." Appellate courts have recognized that "[m]ilitary law provides a much more direct and generally broader means of discovery by an accused than is normally available to him in civilian courts." United States v. Reece, 25 M.J. 93, 94 (C.M.A. 1987).

Rule for Courts-Martial 701(a)(2)(A)(i) provides that the Government shall permit Defense access to materials "which are within the possession, custody, or control of military authorities, and which are…relevant to the defense preparation." The Analysis to the Rules for Courts-Martial explains:

> This rule is taken from Rule 701 of the MCM (2016 editions) as amended by Exec. Order No. 13825, 83 Fed. Reg. 9889 (March 1, 2018), with the following amendments: R.C.M. 701(a)(2)(A)(i) and (a)(2)(B)(i) are amended and specify the scope of trial counsel discovery obligations. The provisions broaden the scope of discovery obligations. The provisions broaden the scope of discovery, requiring disclosure of items that are "relevant" rather than "material" to defense preparation of a case, and adding a requirement to disclose items the government anticipates using in rebuttal.

Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence and, the fact is of consequence in determining the action. Mil. R. Evid. 401. Evidence relevant to defense preparation under 701(a)(2)(A)(i) does not need to be favorable or admissible. United States v. Luke, 69 M.J. 309 (C.A.A.F. 2011). This includes information that may influence the accused's decision on how to plead. United States v. Adens, 56 M.J. 724 (Army Ct. Crim. App. 2002); United States v. Trigueros, 69 M.J. 604 (Army Ct. Crim. App. 2010). Relevant material under R.C.M. 701(a)(2)(A)(i) can also include material that influences trial strategy, defenses and investigation. United States v. Eshalomi, 22 M.J. 12 (C.M.A. 1986); United States v. Webb, 66 M.J. 89 (C.A.A.F. 2008).

Under R.C.M. 701(a)(6), evidence known to trial counsel that is favorable to the defense must be disclosed. Trial counsel are required to review their own files and exercise "due diligence and good faith in learning about any evidence favorable to the defense 'known to the others acting on government's behalf in the case, including the police.'" United States v. Stellato, 74 M.J. 473, 486 (C.A.A.F. 2015) (quoting United States v. Williams, 50 M.J. 437, 441 (C.A.A.F. 1999)). The government cannot remain "willfully ignorant" of evidence that reasonably tends to be exculpatory. Id. at 473.

ANALYSIS

Since the original defense motion, defense counsel received the CGIS ROI into allegations reported to the Baldwin County Sheriff's Office by Ms. [redacted] and assistant trial counsel attempted to facilitate a defense interview with Ms. [redacted] Thus, these issues are moot.

Regarding statements made by or to Ms. [redacted] during a conversation with assistant trial counsel on 19 Dec 2022, the Court finds defense did not meet its burden to demonstrate how this information is relevant to defense preparation for the charges in this court-martial. The conversation between assistant trial counsel and Ms. [redacted] occurred two days prior to transmission of the defense plea offer and there is no information before the court to support an inference that assistant trial counsel otherwise knew the accused sought treatment. Further, the plea offer by the government to resolve both sets of charges closed on 01 Mar 2023. Thus, there is no evidence before the court to support the argument that the statements made to or by Ms. [redacted] on 19 Dec 2022 are relevant to these unrelated charges. This analysis and ruling has no bearing on the government's discovery obligations in the separate general court-martial for charges referred based on Ms. [redacted] allegations.

CONCLUSIONS OF LAW

1. The motion to compel as it pertains to law enforcement investigations into [redacted] allegations and an interview of [redacted] is moot.

2. The Defense did not meet its burden under R.C.M. 701 for the disclosure of [redacted] statements to assistant trial counsel for this courts-martial.

RULING

The Defense Motion to Compel Discovery is DENIED, consistent with the above conclusions of law.

So ordered this 17th day of April, 2023.

REUTER.EMILY.PATRICIA.[redacted] Digitally signed by REUTER.EMILY.PATRICIA.[redacted] Date: 2023.04.17 12:09:08 -07'00'

Emily P. Reuter
Captain, U.S. Coast Guard
Military Judge

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES **v.** **J.B. EUBANKS** **CDR/O-5** **U.S. COAST GUARD**	**ORDER TO PROVIDE SUPPLEMENTAL RESPONSE** **2 MARCH 2023**

On 23 December 2023, defense filed a motion for appropriate relief asking that the Court swear in all witnesses and members at trial. AE XII. The Government deferred to the Court in their response. AE XIV.

1. I am the presiding military judge for the General Court-Martial in the above captioned case. Having been duly designated to serve as a Military Judge under the provision of Article 26, Uniform Code of Military Justice (Title 10, United States Code, Section 826), I hereby order the Government to provide a supplementary response taking a specific position, either concurring with or opposing, the defense's request. In the event the Government elects to concur with Defense's position, the Court orders the Government to identify other personnel of courts-martial under R.C.M. 502 that may be suitable for swearing in witnesses.

2. The Government's supplemental response is due by close of business on Friday, 24 March 2023.

So ordered.

FOWLES.TED.R [redacted]

Ted R. Fowles
Captain, U. S. Coast Guard
Military Judge

Appellate Exhibit 67

Appellate Exhibit 67
Page 1 of 1

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
Eubanks, Justin B.	Coast Guard	O-5	[redacted]

5. CONVENING COMMAND	6. TYPE OF COURT-MARTIAL	7. COMPOSITION	8. DATE SENTENCE ADJUDGED
U.S. Coast Guard FORCECOM	General	Judge Alone - MJA16	Jul 11, 2023

SECTION B - FINDINGS

SEE FINDINGS PAGE

SECTION C - TOTAL ADJUDGED SENTENCE

9. DISCHARGE OR DISMISSAL	10. CONFINEMENT	11. FORFEITURES	12. FINES	13. FINE PENALTY
Not adjudged	Not Adjudged	Not Adjudged	$8,000	None.

14. REDUCTION	15. DEATH	16. REPRIMAND	17. HARD LABOR	18. RESTRICTION	19. HARD LABOR PERIOD
N/A	○ 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

Punitive discharge, confinement, forfeiture, and reduction may not be adjudged. A fine shall be adjudged in accordance with Table A in the Memorandum of Plea Agreement. A reprimand shall be adjudged.

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
Reuter, Emily P.	Coast Guard	O-6	Jul 12, 2023	REUTER.EMILY.PATRICIA.[redacted] Digitally signed by REUTER.EMILY.PATRICIA.[redacted] Date: 2023.07.12 14:01:22 -07'00'

37. NOTES: This STR supersedes the 11 Jul 23 STR and corrects errors in Section G.

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:	120c	Specification:	**Not Guilty**	Dismissed			120CC3
		Offense description	Indecent exposure				
		Withdrawn and Dismissed	Withdrawn and Dismissed without prejudice by Convening Authority				
Charge II:	133	Specification 1:	**Guilty**	Guilty			133-D-
		Offense description	Conduct unbecoming generally				
		Specification 2:	**Not Guilty**	Dismissed			133-D-
		Offense description	Conduct unbecoming generally				
		Withdrawn and Dismissed	Withdrawn and Dismissed without prejudice by Convening Authority				
Additional Charge:	120c	Specification:	**Guilty**	Guilty			120CC3
		Offense description	Indecent exposure				

MILITARY JUDGE ALONE SEGMENTED SENTENCE					
SECTION J - SENTENCING					
CHARGE	**SPECIFICATION**	**CONFINEMENT**	**CONCURRENT WITH**	**CONSECUTIVE WITH**	**FINE**
Charge I:	Specification:	N/A	N/A	N/A	N/A
Charge II:	Specification 1:	N/A	N/A	N/A	$4,000
	Specification 2:	N/A	N/A	N/A	N/A
Additional Charge:	Specification:	N/A	N/A	N/A	$4,000

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
Eubanks, Justin B.	O5	[redacted]

4. UNIT OR ORGANIZATION	5. CURRENT ENLISTMENT	6. TERM
ATC MOBILE	March 2022	INDEF

7. CONVENING AUTHORITY (UNIT/ORGANIZATION)	8. COURT-MARTIAL TYPE	9. COMPOSITION	10. DATE SENTENCE ADJUDGED
U.S. Coast Guard FORCECOM	General	Judge Alone	Jul 11, 2023

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.

CDR Eubanks requested the guilty verdict be set aside and to suspend or set aside the $8,000 fine and Punitive Letter of Reprimand.

24. Convening Authority Name/Title	25. SJA Name
Jeffrey K. Randall, RDML/ FORCECOM	[redacted] CAPT

26. SJA signature	27. Date
[redacted]	Aug 2, 2023

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.]

Pursuant to the sentence of the court a letter of reprimand is this date being served upon the accused and a copy thereof is hereby incorporated as an integral part of this action.

I decline to set aside the findings of guilty against CDR Eubanks. I decline to suspend or set aside the punishment awarded to CDR Eubanks.

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:

N/A.

30. Convening Authority's signature	31. Date
RANDALL.JEFFREY.K. [redacted] Digitally signed by RANDALL.JEFFREY.K. [redacted] Date: 2023.08.03 14:44:34 -04'00'	Aug 1, 2023

32. Date convening authority action was forwarded to PTPD or Review Shop.

ENTRY OF JUDGMENT

SECTION C - ENTRY OF JUDGMENT

****MUST be signed by the Military Judge (or Circuit Military Judge) within 20 days of receipt****

33. **Findings of each charge and specification referred to trial.** [Summary of each charge and specification (include at a minimum the gravamen of the offense), the plea of the accused, the findings or other disposition accounting for any exceptions and substitutions, any modifications made by the convening authority or any post-trial ruling, order, or other determination by the military judge. R.C.M. 1111(b)(1)]

Charge I: Violation of the UCMJ, Article 120c
Offense Description: Indecent Exposure
Sole Specification Plea: Not Guilty
Sole Specification Finding: Withdrawn and Dismissed

Charge II: Violation of the UCMJ, Article 133
Offense Description: Conduct Unbecoming an Officer and Gentleman
Specification 1 Plea: Guilty
Specification 2 Plea: Not Guilty
Findings:
Specification 1 Finding: Guilty
Specification 2 Finding: Withdrawn and Dismissed

Additional Charge: Violation of the UCMJ, Article 120c
Offense Description: Indecent Exposure
Sole Specification Plea: Guilty
Sole Specification Finding: Guilty

34. **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.

To be fined as follows:

Charge II, Specification 1: To pay the United States a fine of $4,000;

Additional Charge, the sole Specification: To pay the United States a fine of $4,000.

To a reprimand.

35. **Deferment and Waiver.** Include the nature of the request, the CA's Action, the effective date of the deferment, and date the deferment ended. For waivers, include the effective date and the length of the waiver. RCM 1111(b)(3)

N/A

36. Action convening authority took on any suspension recommendation from the military judge:

N/A

37. Judge's signature:	38. Date judgment entered:
REUTER.EMILY.PA TRICIA. [redacted] Digitally signed by REUTER.EMILY.PATRICIA. [redacted] Date: 2023.08.21 10:59:47 -07'00'	14-Aug-2023

39. In accordance with RCM 1111(c)(1), the military judge who entered a judgment may modify the judgment to correct computational or clerical errors within 14 days after the judgment was initially entered. Include any modifications here and resign the Entry of Judgment.

On 14 Aug 2023, I entered judgment, but inadvertently signed block 40 instead of block 37.

On 17 August 2023, I made the clerical correction and signed block 37 to accurately reflect when judgment was entered.

On 17 August 2023, I notified trial and defense counsel that a clerical correction needed to be made to append the reprimand to the action consistent with COMDTINST 5810.1H, the Coast Guard Military Justice Manual, and RCM 1111.

On 21 August 2023, trial counsel resubmitted the EOJ with the Reprimand appended to this form, consistent with the Military Justice Manual and RCM 1111.

40. Judge's signature:	41. Date judgment entered:
REUTER.EMILY.PA TRICIA. [redacted] Digitally signed by REUTER.EMILY.PATRICIA. [redacted] Date: 2023.08.21 11:00:02 -07'00'	21-Aug-2023

42. Return completed copy of the judgment to the Post-Trial Department/Review Shop for distribution to the defense counsel and/or accused as well as the victim and/or victims' legal counsel.

CONTINUATION SHEET - CA'S ACTION AND ENTRY OF JUDGMENT

34. Sentenced (Continued)

33. Findings (Continued)

CONTINUATION SHEET - CA'S ACTION AND ENTRY OF JUDGMENT

28. CA's Action - Continued

CONTINUATION SHEET - CA'S ACTION AND ENTRY OF JUDGMENT

23. Notes (Continued)

APPELLATE INFORMATION

THERE IS NO APPELLATE INFORMATION AT THIS TIME

REMAND

THERE WERE NO REMANDS

NOTICE OF COMPLETION OF APPELLATE REVIEW