[redacted]

CERTIFIED RECORD OF TRIAL

(and accompanying papers)

of

Hadley	Joshua	D	[redacted]	MK3
(Last Name)	*(First Name)*	*MI*	*(DoD ID No.)*	*(Rank)*

[redacted]	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 Pacific Area

(Unit/Command of Convening Authority)

Tried at

Alameda, CA	On	16 February 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

GENERAL COURT-MARTIAL	)	COMMANDER
	)	
	)	COAST GUARD PACIFIC AREA
	)	ALAMEDA, CALIFORNIA
AMENDMENT NO. 1	)	
CONVENING ORDER	)	
NO. 1-21	)	Date: JAN 3 1 2021
	)	

COMMANDER
COAST GUARD PACIFIC AREA

1. The General Court-Martial convened by order no. 1-21, dated 11 March 2021, is hereby amended, in the case of *United States v. MK3 Joshua Hadley, USCG*, only.

2. The following members detailed to the General Court-Martial convened by order no. 1-21, dated 11 March 2021, are hereby relieved:

CAPT [redacted]
CAPT [redacted]
CAPT [redacted]
CAPT [redacted]
CDR [redacted]
CDR [redacted]
CDR [redacted]
CDR [redacted]
CDR [redacted]
CDR [redacted]
CDR [redacted]
CDR [redacted]
CDR [redacted]
CDR [redacted]
CDR [redacted]
LCDR [redacted]
LCDR [redacted]
LCDR [redacted]
LCDR [redacted]
LCDR [redacted]
LCDR [redacted]
LT [redacted]
LT [redacted]
LT [redacted]
LT [redacted]
LT [redacted]
LT [redacted]
LT [redacted]
LT [redacted]

LT [redacted]
LT [redacted]
LTJG [redacted]
LTJG [redacted]
LTJG [redacted]
ENS [redacted]
F&S3 [redacted]
PERS3 [redacted]
BOSN2 [redacted]
DIV2G. [redacted]
AETCS [redacted]
HSCS [redacted]
ISCS [redacted]
YNC [redacted]
MEC [redacted]
ISC [redacted]
OSC [redacted]
MKC [redacted]
OSC [redacted]
AET1 [redacted]
ME1 [redacted]
SK1 [redacted]
SK1 [redacted]
SK1 [redacted]
YN2 [redacted]
PA2 [redacted]
YN2 [redacted]
BM2 [redacted]

3. The following replacement members previously identified in paragraph (4) of order no. 1-21, dated 11 March 2021, are hereby detailed as primary members:

CDR [redacted]
CDR [redacted]
LCDR [redacted]
LT [redacted]
LT [redacted]

4. In the case of *United States v. MK3 Joshua Hadley, USCG*, the following members are hereby detailed as members of the General Court-Martial convened by order no. 1-21:

CDR [redacted]
LT [redacted]
AMTC [redacted]

5. I authorize the military judge to impanel one (1) alternate member if excess members are available after identification of the primary panel members.

[redacted]

A. J. Tiongson
Vice Admiral, U.S. Coast Guard
Commander
Coast Guard Pacific Area

CHARGE SHEET

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, MI)	2. EMPLID	3. GRADE OR RANK	4. PAY GRADE
Hadley, Joshua D.	[redacted]	MK3	E-4

5. UNIT OR ORGANIZATION	6. CURRENT SERVICE	
[redacted]	a. INITIAL DATE	b. TERM
	08/28/2017	6 YR

7. PAY PER MONTH			8. NATURE OF RESTRAINT OF ACCUSED	9. DATE(S) IMPOSED
a. BASIC	b. SEA/FOREIGN DUTY	c. TOTAL		
2914.80 [redacted] ~~2,786.70~~	N/A	2914.80 [redacted] ~~2,786.70~~	None	N/A

II. CHARGES AND SPECIFICATIONS

10.

(See attached continuation page)

III. PREFERRAL

11a. NAME OF ACCUSER (Last, First, Middle Initial)	b. GRADE	c. ORGANIZATION OF ACCUSER
[redacted]	LT/03	USCG

d. SIGNATURE OF ACCUSER	e. DATE (YYYYMMDD)
[redacted]	20220622

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 22 day of June, 2022, and signed the foregoing charges and specifications under oath that she is a person subject to the Uniform Code of Military Justice and that she either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of her knowledge and belief.

Erin Callahan	Legal Service Command (LSC-LMJ)
Lieutenant Commander / O-4	Commissioned Officer
Grade	*Official Capacity to Administer Oaths (See R.C.M. 307(b)—must be commissioned officer)*

[redacted]

12.

On 27 JUNE, 2022, the accused was informed of the charges against her and of the name(s) of the accuser(s) known to me *(See R.C.M. 308(a)). (See R.C.M. 308 if notification cannot be made.)*

[redacted]
Typed Name of Immediate Commander

U.S. Coast Guard Base Honolulu
Organization of Immediate Commander

Captain / O-6

[redacted]

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13.

The charges were received at 1256 hours, JUNE, 2022, at [redacted]
Designation of Command or Officer exercising

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

[redacted]
Typed Name of Officer

~~FOR THE~~ [1]

Captain / O-6

[redacted]
Official Capacity of Officer Signing

[redacted]

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY	b. PLACE	DATE *(YYYYMMDD)*
Coast Guard Pacific Area	Alameda, CA	20221007

Referred for trial to the GEN court-martial convened by CG PAC GCMCO 1-21, dtd 11MAR21, subject to the following instructions: [2]

By XXXXXXXX of XXXXXXXXXXXXXXXXXX
Command or Order

Andrew J. Tiongson
Typed Name of Officer

Commander, Coast Guard Pacific Area
Official Capacity of Officer Signing

[redacted]

15.

On 13 OCTOBER, 2022, I caused to be served a copy hereof on the above named accused.

Erin Callahan
Typed Name of Trial Counsel

Lieutenant Commander / O-4
Grade or Rank of Trial Counsel

[redacted]

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

DD FORM 458, (BACK), MAY 2000

CHARGE I: Violation of the UCMJ, Article 92 (Lawful General Order)

Specification 1: In that Machinery Technician Third Class Petty Officer Joshua D. HADLEY, U.S. Coast Guard, on active duty, did, at or near Honolulu, Hawaii, from on or about January 2020 to August 2020, on divers occasions, violate a lawful general order, to wit: ALCOAST Commandant Notice 003/20 (General Order Prohibiting Sexual Harassment) dated 7 January 2020, by wrongfully transmitting unsolicited sexually offensive material and sexual requests from his Snapchat account to male Coast Guard members.

Specification 2: In that Machinery Technician Third Class Petty Officer Joshua D. HADL U.S. Coast Guard, on active duty, did, at or near Honolulu, Hawaii, from on or about January 2019 to December 2019, on divers occasions, violate a lawful general order, to wit: ALCOAST Commandant Notice 085/18 (General Order Prohibiting Sexual Harassment) dated 27 August 2018, by wrongfully transmitting unsolicited sexually offensive material and sexual requests from his Snapchat account to male Coast Guard members.

CHARGE II: Violation of the UCMJ, Article 120 (Abusive Sexual Contact)

Specification: In that Machinery Technician Third Class Petty Officer Joshua D. HADLEY, U.S. Coast Guard, on active duty, did, at or near Honolulu, Hawaii, on or about 31 May 2020, touch with his hand the penis and scrotum of DC3 with an intent to gratify his own sexual desire, without the consent of DC3

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

Specification: In that Machinery Technician Third Class Petty Officer Joshua D. HADLEY, U.S. Coast Guard, on active duty, did, at or near Honolulu, Hawaii, on or about 31 May 2020, unlawfully touch with his hand the penis and scrotum of DC3

CHARGE IV: Violation of the UCMJ, Article 134 (Sexual Act with an Animal)

Specification: In that Machinery Technician Third Class Petty Officer Joshua D. HADLEY, U.S. Coast Guard, on active duty, did, at or near Honolulu, Hawaii, on or about March 2021, wrongfully engage in a sexual act with an animal, to wit: contact between the accused's penis and the mouth of a dog, and that said conduct was of a nature to bring discredit upon the armed forces.

[redacted] 10/18/22

CHARGE IV: Violation of the UCMJ, Article 134 (Child Pornography)

Specification: In that Machinery Technician Third Class Petty Officer Joshua D. HADLEY, U.S. Coast Guard, on active duty, did, at or near Honolulu, Hawaii, on or about March 2021, knowingly and wrongfully view and possess child pornography, to wit: ~~one or more images or~~ videos of a minor, ~~or what appears to be a minor,~~ engaging in sexually explicit conduct, and that said conduct was of a nature to bring discredit upon the armed forces.

DISMISSED WITHOUT PREJUDICE BY DIRECTION OF THE CA [redacted] 2/16/23

a [redacted] 8/22/22

[redacted] 8/22/22 [redacted] 8/22/22

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, MI)	2. EMPLID	3. GRADE OR RANK	4. PAY GRADE
Hadley, Joshua D.	[redacted]	MK3	E-4

5. UNIT OR ORGANIZATION	6. CURRENT SERVICE	
[redacted]	a. INITIAL DATE	b. TERM
	08/28/2017	6 YR

7. PAY PER MONTH			8. NATURE OF RESTRAINT OF ACCUSED	9. DATE(S) IMPOSED
a. BASIC	b. SEA/FOREIGN DUTY	c. TOTAL		
2914.80 [redacted] 2,786.70	N/A	2914.80 2,786.70 [redacted]	None	N/A

II. CHARGES AND SPECIFICATIONS

10. ADDITIONAL CHARGE

ADDITIONAL CHARGE: Violation of the UCMJ, Article 120 (Abusive Sexual Contact) [redacted] 2/16/23

Specification: In that Machinery Technician Third Class Petty Officer Joshua D. HADLEY, U.S. Coast Guard, on active duty, did, at or near Honolulu, Hawaii, on or about 31 May 2020, touch the penis of DC3 [redacted] with MK3 Hadley's hand, with an intent to gratify the sexual desire of MK3 Hadley, when he knew that DC3 [redacted] was asleep.

DISMISSED WITHOUT PREJUDICE BY DIRECTION OF THE C.A.

III. PREFERRAL

11a. NAME OF ACCUSER (Last, First, Middle Initial)	b. GRADE	c. ORGANIZATION OF ACCUSER
[redacted]	LT/O3	USCG

d. SIGNATURE OF ACCUSER	e. DATE (YYYYMMDD)
[redacted]	20220823

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 23 day of August, 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.

[redacted]

Lieutenant Commander / O-4
Grade

[redacted]

Legal Service Command (LSC-LMJ)

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

12

On 25 August at 0830, 2022, the accused was informed of the charges against him and of the name(s) of the accuser(s) known to me *(See R.C.M. 308(a)). (See R.C.M. 308 if notification cannot be made.)*

[redacted]
Typed Name of Immediate Commander

U.S. Coast Guard Base Honolulu
Organization of Immediate Commander

Captain / O-6

[redacted]

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13

The charges were received at _____ hours, _____, 2022, at [redacted]
Designation of Command or Officer exercising

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

[redacted]
Typed Name of Officer

FOR THE [1] _____

Captain / O-6

[redacted]
Signature

[redacted]
Official Capacity of Officer Signing

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY	b. PLACE	DATE *(YYYYMMDD)*
Coast Guard Pacific Area	Alameda, CA	20221007

Referred for trial to the GEN court-martial convened by PAC GCMCO 1-21,dtd 11MAR21, subject to the following instructions: [2] _____

_____ By XXXXXXXX of XXXXXXXXXXXXXXXXX
Command or Order

Andrew J. Tiongson
Typed Name of Officer

Commander, Coast Guard Pacific Area
Official Capacity of Officer Signing

[redacted]

15

On 13 OCTOBER, 2022, I caused to be served a copy hereof on the above named accused.

Erin Callahan
Typed Name of Trial Counsel

Lieutenant Commander / O-4
Grade or Rank of Trial Counsel

[redacted]

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

TRIAL COURT MOTIONS & RESPONSES

COAST GUARD TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **JOSHUA HADLEY** **MK3/E-4** **U.S. COAST GUARD**	**DEFENSE MOTION TO DISMISS OR FOR OTHER APPROPRIATE RELIEF** **(Defective Preferral)** **17 NOV 22**

MOTION

Pursuant to R.C.M. 906(b)(1), the Defense moves this Court to issue appropriate relief from the Government's improper and defective preferral of both specifications of Charge I.

SUMMARY

Both specifications of Charge I were improperly preferred, because the evidence reviewed by the accuser, LT [redacted] is insufficient to establish probable cause that MK3 Hadley's actions violated ACN 085/18 or ACN 003/20. This is because the evidence reviewed by LT [redacted] does not include evidence that MK3 Hadley's actions created a hostile work environment or unreasonably interfered with any person's work performance. Accordingly, the Defense moves this Court to dismiss both specifications of Charge I as improperly preferred.

BURDEN

As the moving party, the Defense bears the burden of proof by a preponderance of the evidence with regard to each factual issue necessary for resolution of this motion. RC.M. 905(c).

FACTS

1. LT [redacted] served as the Accuser to prefer the initial set of charges in this case. (Charge Sheet, 22 June 2022, 1.)

2. Before recommending preferral of charges, LT [redacted] reviewed the Coast Guard Investigative Service (CGIS) Report of Investigation (ROI), which contained sanitized screenshots of media pulled from the case, and "witness statements."[1] He reviewed nothing else when evaluating probable cause in this case. (Enclosure A.)

[1] Defense Counsel understands LT [redacted] description of what he reviewed to include the two CGIS ROIs in this case, and understands "witness statements" to mean the summaries of witness interviews incorporated into the ROIs. Defense Counsel further understands the "sanitized

3. LT [redacted] did not view any video evidence before recommending preferral. (Enclosure A.)

4. LT [redacted] did not review the elements for each charge as written in the Manual for Court Martial. (Enclosures A and B.)

5. LT [redacted] did not recall reviewing any ALCOAST Notices or the text of any general orders. (Enclosure A).

6. Charges for this case were preferred on 22 June 2022. LT [redacted] served as the Accuser and he was sworn before LCDR Erin Callahan. Among other charges, MK3 Hadley was charged with two specifications of Article 92 Violations for allegedly violating general orders prohibiting sexual harassment. The charge sheet states, in relevant part:

> **CHARGE I: Violation of the UCMJ, Article 92 (Lawful General Order)**
>
> **Specification 1:** In that Machinery Technician Third Class Petty Officer Joshua D. HADLEY, U.S. Coast Guard, on active duty, did, at or near Honolulu, Hawaii, from on or about January 2020 to August 2020, on divers occasions, violate a lawful general order, to wit: ALCOAST Commandant Notice 003/20 (General Order Prohibiting Sexual Harassment) dated 7 January 2020, by wrongfully transmitting unsolicited sexually offensive material and sexual requests from his Snapchat account to male Coast Guard members.
>
> **Specification 2:** In that Machinery Technician Third Class Petty Officer Joshua D. HADLEY, U.S. Coast Guard, on active duty, did, at or near Honolulu, Hawaii, from on or about January 2019 to December 2019, on divers occasions, violate a lawful general order, to wit: ALCOAST Commandant Notice 085/18 (General Order Prohibiting Sexual Harassment) dated 27 August 2018, by wrongfully transmitting unsolicited sexually offensive material and sexual requests from his Snapchat account to male Coast Guard members. [redacted] 8/12/22 [redacted] 8/12/22

(Charge Sheet, 22 June 2022, 3.)

7. ALCOAST Commandant Notice 085/18 and ALCOAST Commandant Notice 003/20 make it a crime for Coast Guard members to engage in sexual harassment as defined in the general orders. (Enclosure C; Enclosure D.)

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screenshots" to refer to still images of the alleged child pornography video cut to render them non-contraband. Defense Counsel communicated with LT [redacted] again via text message on 17 November 2022 to clarify what he reviewed, asking whether everything he reviewed was contained in the ROI or whether he reviewed anything not contained in the ROI. LT [redacted] responded: "I honestly can't remember if it was in a CGIS ROI or outside of it. I know that I reviewed the documents carefully and ensured they comported with t[he] charges I signed off on." Defense Counsel anticipates requesting his testimony at the 39(a) session to obtain the necessary clarification. The other person likely to know what the Accuser reviewed would be the Trial Counsel who provided the information and swore him as Accuser.

8. ACN 003/20 reissues ACN 085/18's definition of sexual harassment without changes and so both general orders define sexual harassment as:

a. Definition: sexual harassment is unwelcome sexual advances, requests for sexual favors, and other conduct of a sexual nature, when:

a. Submission to such conduct is made either implicitly or explicitly a term or condition of employment;

b. Submission to or rejection of such conduct is used as a basis for employment decisions; or

c. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. This definition also includes unwelcome display or communication of sexually offensive materials. Physical proximity is not required. Conduct may occur telephonically, virtually, or by way of other electronic means. (ACN 085/18; ACN 003/20.)

9. The CGIS Report of Investigation does not cite or reference ALCOAST 085/18 or ALCOAST 003/20 anywhere in its contents, nor do any of the witness statement summaries contained within it. (*See*, Enclosure E; Enclosure F.)

10. The initial CGIS ROI addressed only the abusive sexual contact from June 2020. There is no information in the initial ROI addressing sexual harassment in the workplace: no witness saying anything about adverse effects on work performance or an intimidating, hostile or offensive working environment. (Enclosure E.)

11. When CGIS performed the supplemental investigation, they purported only to report on indecent exposure, indecent conduct, and abusive sexual contact. CGIS did not investigate sexual harassment. As a result, CGIS did not ask the witnesses questions related to the impact requirement in the general orders prohibiting sexual harassment. Additionally, none of the interview summaries in either ROI address sexual harassment: nothing about adverse effects on work performance or an intimidating, hostile or offensive working environment. (Enclosure E; Enclosure F, *see* Page 2 Report of Adjudication.)

12. The Defense requested a Bill of Particulars from the Government. On 4 Nov 22 the Government provided the Defense with a Bill of Particulars. On Charge I, Specification 1, the people to whom MK3 Hadley allegedly sent unwelcome messages are OS2 [redacted] CS3 [redacted] CS2 [redacted] and BM2 [redacted] On Charge I, Specification 2, MK3 [redacted] is listed as the only person to whom MK3 Hadley sent unwelcome messages. (Enclosure G.)

13. Nowhere in the ROIs is MK3 [redacted] mentioned as having worked with MK3 Hadley. MK3 [redacted] is mentioned only in the Supplemental ROI as being MK3 Hadley's roommate in the barracks before the alleged unwelcome messaging began. His witness interview summary does not indicate any sort of working relationship with MK3 Hadley and it does not provide any

information addressing sexual harassment in the workplace: nothing about adverse effects on work performance or an intimidating, hostile or offensive working environment. (Enclosure F.)[2]

LAW

1. Article 30 of the UCMJ provides that charges and specifications "shall be preferred by presentment in writing, signed under oath before a commissioned officer of the armed forces who is authorized to administer oaths" and that the writing shall ensure that "the signer has personal knowledge of, or has investigated, the matters set forth in the charges and specifications; and (2) the matters set forth in the charges and specifications are true, to the best of the knowledge and belief of the signer." 10 U.S.C § 830.

2. The purpose of the military charging provisions are to ensure that the charges are not "frivolous, unfounded, or malicious, but are founded in good faith." *United States v. Miller*, 33 M.J. 235, 237 (C.A.A.F. 1991).

3. If, at the time of preferral, the charges are unfounded, then preferral of charges is improper even if the accusations were made in good faith. *Miller*, at 237; *United States v. Floyd*, 2022 CCA LEXIS 560, at *23 (N-M.C.C.A. 2022). Even if evidence supporting a charge did exist at the time of preferral, preferral is still defective if the accuser did not actually review such evidence. *Floyd*, 2022 CCA LEXIS 560, at *30 ("Because the evidence actually reviewed could not have served as a foundation for Specification 4, we find that military judge did not abuse his discretion in determining that the preferral was defective and dismissing Specification 4 without prejudice.").

4. Where there is no evidence to support an element of an offense, then the charge is unfounded and the preferral is defective. *Floyd*, at *23.

5. Creating an offensive working environment is an essential element of proving a violation of ALCOAST 085/18. *See United States v. Brown*, 82 M.J. 702, 709 (C.G. Ct. Crim. App. 2022).

6. Dismissal of charges is an appropriate remedy for improperly preferred charges and specifications. *Floyd*, at *2.

ARGUMENT

a. Preferral of both specifications of Charge I was improper because the Accuser did not review any evidence suggesting that MK3 Hadley's actions unreasonably interfered with any person's work performance or that they created an intimidating, hostile, or offensive working environment in 2019 or 2020.

1. In *United States v. Floyd*, the Navy-Marine Corps Court of Criminal Appeals upheld a military judge's decision to dismiss two charges for defective preferral because there was insufficient evidence to support essential elements of the charges at the time of the preferral.

[2] MK3 [redacted] is referred to as FN [redacted] in the Supplemental ROI because he was a Fireman at the time he spoke with CGIS. In the time since that interview he was promoted to MK3, which is how he is referred to both in this motion and in the Government's Bill of Particulars.

Floyd, at *24. In that case, the Appellant was accused of sexual abuse of a child involving indecent conduct, and the specification alleged that he "direct[ed] [the victim] to expose her breasts and touch her body." *Id.* at *8. The evidence of this allegation came from the statements of two witnesses, Ms. [redacted] and Ms. [redacted] *Id.*

2. The defense moved to dismiss the charge as defectively preferred, and on the stand the accuser testified that when she preferred the charges, she considered the ROIs summarizing the interviews of Ms. [redacted] and Ms. [redacted] but not the statements themselves. *Floyd*, at *7. The specification was dismissed because the Accuser had failed to review the evidence in which the accused told the victim to "expose her breasts and touch her body" prior to preferral. *Id.* at *12. The judge noted that "his analysis regarding the defective or improper preferral would be different had the accuser reviewed the statements of Ms. [redacted] and Ms. [redacted]" *Id.* At the same time, the judge also dismissed a second charge for indecent communication because the evidence of the words used in the allegation "did not exist at the time of the preferral." *Id.* Accordingly, because there was no evidence to support preferral, the preferral was improper. *Id.*

3. In *U.S. v. Brown*, the Coast Guard Criminal Court of Appeals set aside a service member's conviction for a violation of ACN 085/18 because he was not found guilty of "creating an offensive work environment." *U.S. v. Brown*, 82 M.J. at 708. In that case, the service member was originally convicted of violating a lawful general order by sending an unsolicited sexual video to a junior service member who was not attached to his command. *Id.* at 705. His conviction was set aside because the Court of Appeals held that, while it was undisputed that the service member had sent the video to the service member, the Government failed to prove that sending the video "created an offensive working environment." *Id.* at 708.

4. Like in *Floyd*, the accuser in this case, LT [redacted] did not review evidence necessary to establish an essential element of the charges. LT [redacted] did not review the ACNs establishing the Coast Guard's sexual harassment policy, but merely reviewed the ROIs given to him by CGIS. Perhaps he applied a lay definition of 'sexual harassment,' but that does not meet the elements of a the charged violations of Article 92.

5. Additionally, the ROIs reviewed by LT [redacted] do not provide any evidence that MK3 Hadley's actions had the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment in violation of ACN 085/18 or 003/20. No witness mentions that his alleged conduct negatively impacted their work or caused their work environment to feel hostile, offensive, or intimidating. On the contrary, they all agree that his conduct occurred outside of work, and none say it impacted their work. The ROIs largely do not explore the effect MK3 Hadley's actions had on the workplace environment aboard the [redacted] and to the extent that they do, the witnesses agree that it did not affect their work performance.

6. On the contrary, the few instances that mention MK3 Hadley's conduct in the workplace in the ROIs suggest that he was a positive and well-liked member of the command.

7. The CGIS summary from the interview of MK3 [redacted] arguably comes the closest to providing evidence of MK3 Hadley's alleged actions' effects on the workplace. Even still, the witness summary of MK3 [redacted] interview does not explore whether MK3 [redacted] workplace

performance was affected or if MK3 Hadley's alleged actions created an intimidating, hostile, or offensive working environment for him or anyone else. MK3 [redacted] interview summary does not even address whether they interacted at work at all. This fact is not a given, because even on the same cutter there exist different work sections. Working condition changes were also everywhere during the height of the COVID-19 pandemic. The mere fact that MK3 [redacted] spoke to someone in his chain of command about the alleged behavior of another member does not address the elements of a violation of the general orders prohibiting sexual harassment.

8. Moreover, MK3 [redacted] is not listed in the government's Bill of Particulars as a complaining witness for the violation of ACN 003/20. The Bill of Particulars notes that he sent unwelcome messages to OS2 [redacted] CS3 [redacted] CS2 [redacted] and BM2 [redacted] But none of the witness interview summaries of these persons in the ROIs suggest that they felt sexually harassed by MK3 Hadley's conduct. Nor do their interview summaries indicate that MK3 Hadley's actions affected any person's work performance or contributed to an intimidating, hostile, or offensive working environment. On the contrary, CS3 [redacted] witness interview summary mentions that MK3 Hadley "was popular amongst the cutter crew" and that Hadley was "someone people liked to hang out with."

9. In any event, MK3 Hadley's alleged actions towards MK3 [redacted] all occurred in 2020. Even if MK3 [redacted] interview with CGIS were read so broadly as to allow an inference about the elements of the lawful general order prohibiting sexual harassment, LT [redacted] did not review any evidence in the ROIs that MK3 Hadley's conduct impacted anyone's performance or created a hostile environment in the workplace in 2019 in violation of ACN 085/18.

10. The only evidence of alleged messaging in 2019 comes from the witness interview summary of MK3 [redacted] who told CGIS that he had received suggestive photos from MK3 Hadley "in the early months of 2019, possible [sic] January or February." Encl. B. MK3 [redacted] however, did not work with MK3 Hadley. Rather, he was roommates with MK3 Hadley while the two lived in the barracks together. Nowhere in the ROIs does it mention that MK3 [redacted] worked with MK3 Hadley in 2019, nor does it mention that MK3 Hadley's actions had a negative effect on MK3 [redacted] workplace performance or that they contributed to an intimidating, hostile, or offensive working environment. Here, as it was in *U.S. v. Brown*, there is no evidence that MK3 Hadley's actions created an offensive working environment or affected any person's workplace performance.

11. Additionally, at the time LT [redacted] reviewed the ROIs for preferral of Charge I Specification 2 for the violation of ACN 085/18, the language of the charge said that MK3 Hadley wrongfully transmitted "sexually offensive material and sexual requests from his Snapchat account to male Coast Guard *members*." *See,* Charge Sheet (emphasis added). The language in the charge specified that MK3 Hadley wrongfully requested sexual content from more than one male Coast Guard member. But the ROIs only indicate that he ever requested sexual material from one person—MK3 [redacted] Therefore, at the time of preferral, there was no evidence that LT [redacted] reviewed which suggested that MK3 Hadley solicited sexual content from more than one Coast Guard member in 2019.

RELIEF REQUESTED

For the reasons outlined above, the Defense respectfully requests that the Military Judge dismiss both specifications of Charge I.

ORAL ARGUMENT

If this Motion is opposed by the Government, the Defense requests an Article 39(a) session to present oral argument and additional evidence as necessary.

SERRILL-ROBINS.MIRA.ROSE.[redacted]
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Date: 2022.11.17 14:59:31 -10'00'

M. R. SERRILL-ROBINS
LT, USCG
Detailed Defense Counsel

I certify that I have served a true copy via e-mail of the above on Military Judge, CDR Emily Reuter, and Trial Counsel, LCDR Erin Callahan, LCDR Amanda Hood, and LCDR Case Colaw, on 17 Nov 2022.

SERRILL-ROBINS.MIRA.ROS[redacted]
E.[redacted]
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M. R. SERRILL-ROBINS
LT, USCG
Detailed Defense Counsel

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. JOSHUA HADLEY Machinery Technician Third Class U.S. Coast Guard	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO DISMISS OR FOR OTHER APPROPRIATE RELIEF (Defective Preferral)** 01 December 2022

RESPONSE

The United States files this response to the Defense motion under R.C.M. 906(b)(1) and respectfully requests that the Court deny the Defense motion because the Defense has failed to meet its burden.

SUMMARY

The Defense motion relies on two incorrect assertions: the Accuser did not review or have knowledge of the subject lawful general orders at issue in this case; and that the evidence the Accuser reviewed was insufficient to establish probable cause that MK3 Hadley's actions created a hostile work environment or unreasonably interfered with any person's work performance. In fact, the Accuser did review the relevant lawful general orders and will testify to such at the Article 39(a). Also, the evidence clearly established probable cause that MK3 Hadley's actions created a hostile work environment and unreasonably interfered with his shipmate's work performance. Accordingly, he Defense motion should be denied because it is not supported by the law or facts.

FACTS

1. This case was referred to a General Court-Martial on 07 October 2022. The accused, MK3 Hadley, has been charged with two specifications of Article 92 (Violation of a Lawful General Order), one charge of Article 120 (Abusive Sexual Contact), one charge of Article 134 (Sexual Act with an Animal), one charge of Article 134 (Viewing and Possessing Child Pornography), and an additional charge of Article 120 (Abusive Sexual Contact). The Accused waived his right to a preliminary hearing on 25 August 2022 and was arraigned on 20 October 2022.

2. LT [redacted] served as the Accuser to prefer the initial set of charges. He signed the charges on 22 June 2022.

3. Prior to signing the charges, he reviewed the following materials: (1) a copy of ALCOAST

COMMANDANT NOTICE 003/20; (2) a copy of ALCOAST COMMANDANT NOTICE 152/20; (3) a copy of ALCOAST COMMANDANT NOTICE 085/18; (4) the DD458 continuation sheets containing the draft charges; (5) CGIS Report of Investigation [redacted] and (6) CGIS Report of Investigation [redacted] The materials were included in a white three ring binder provided to LT [redacted] (Enclosure 1)1

4. CGIS Report of Investigation (ROI) [redacted] contains the allegations supporting both specifications under Charge I in this case. The ROI contains the following:

   a. In July 2020, MK3 Hadley texted and messaged OS2 [redacted] on multiple social media applications. MK3 Hadley eventually sent OS2 [redacted] money on the Venmo application. OS2 [redacted] thought MK3 Hadley was "[redacted]" and "[redacted]" OS2 [redacted] told Special Agents that it was his "[redacted]" that MK3 Hadley was trying to "[redacted]" OS2 [redacted] also told Special Agents that after he blocked MK3 Hadley on social media, MK3 Hadley texted his cell phone requesting that he re-add MK3 Hadley to his social media accounts. (Enclosure 1, Bates 082199).

   b. CGIS Special Agents also interviewed BM3 [redacted] regarding messages OS2 [redacted] received from MK3 Hadley. She told Special Agents that OS2 [redacted] showed her "[redacted]" She saw other message from MK3 Hadley on [redacted] phone, including "[redacted]" Special Agents asked BM3 [redacted] what she interpreted these messages from MK3 Hadley to mean and she explained and eggplant emoji referenced "[redacted]" and that MK3 Hadley was apparently "[redacted]" from OS2 [redacted] (Enclosure 1, 082202)

   c. In February 2020, MK3 Hadley Snapchat messaged CS3 [redacted] on multiple occasions, requesting CS3 [redacted] send him "[redacted]" CS3 [redacted] told Special Agents that "[redacted]" (Enclosure 1, Bates 082200-082201)

   d. CGIS Special Agents interviewed CS3 [redacted] regarding messages MK3 Hadley sent to CS3 [redacted] via Snapchat. These messages included pictures of MK3 Hadley's legs; messages that called CS3 [redacted] a "[redacted]" or saying that CS3 [redacted] was "[redacted]"; messages that MK3 Hadley wanted to "[redacted]" CD3 [redacted]

1 While the Accuser received both complete ROIs for reviewer, Enclosure 1 contains only the portions of the subject ROIs that are relevant to this Response and the United States Response to the Defense Motion to Dismiss or For Other Appropriate Relief (Unreasonable Multiplication of Charges) so as to minimize redactions or sharing of PII. All 171 pages of material reviewed by the Accuser have been produced in discovery and are available for the Court to review should it be necessary.

This happened multiple times. CS3 [redacted] responded by sending a picture of his face, to which MK3 Hadley sent the message "[redacted]" CS3 [redacted] told Special Agents that a "[redacted]" MK3 Hadley sent CS3 [redacted] a picture of what appeared to be MK3 Hadley having sex with a girl. The girl was not facing the camera, but the picture showed MK3 Hadley's penis "[redacted]" of the unknown female. MK3 Hadley included a message with the picture: "[redacted]" CS3 [redacted] told Special Agents that he "[redacted]" and informed MK3 Hadley not to send him "[redacted]" and that he did not want to see "[redacted]" (Enclosure 1, Bates 082209)

e. CGIS Special Agents interviewed BM3 [redacted] who met MK3 Hadley in February 2019 "[redacted]" (Emphasis added). BM3 [redacted] told Special Agents that on one occasion MK3 Hadley sent him repeated messages on Snapchat, lasting for about 1.5 hours, requesting BM3 [redacted] send "[redacted]" photos of himself. BM3 [redacted] told Special Agents that the messages were "[redacted]" and included photos MK3 Hadley took of himself, including pictures of his leg and "[redacted]" BM3 [redacted] eventually blocked MK3 Hadley on Snapchat after MK3 Hadley asked BM3 [redacted] if "[redacted]" (Enclosure 1, Bates 082212-082213).

f. CGIS Special Agents interviewed MK3 [redacted] (then FN [redacted]) who used to be MK3 Hadley's roommate at the BASE HONOLULU barracks. MK3 [redacted] told Special Agents that MK3 Hadley sent him videos of MK3 Hadley engaging in sexual acts with an unknown female and naked pictures of MK3 Hadley. MK3 [redacted] told Special Agents that he did not want to receive these messages and digital media and that he blocked MK3 Hadley on social media platforms as a result. He also told Special Agents that MK3 Hadley is "[redacted]" but needed to "[redacted]" and that "[redacted]" but not separated from the Coast Guard. MK3 [redacted] said that he provided this information to a preliminary inquiry officer from the [redacted] on a previous occasion. (Enclosure 1, Bates 82203-82204).

5. LT [redacted] is currently attending law school as part of the Coast Guard's funded legal program. Defense counsel called LT [redacted] on 15 November 2022 while LT [redacted] was at school studying for a class. The call was not scheduled. (Enclosure 2-3 and anticipated live testimony of LT [redacted])

6. LT [redacted] recalls reviewing the hard copies of records provided to him by trial counsel in the three-ring binder. (Enclosure A; Enclosure 2-3; anticipated live testimony of LT [redacted]) The three-ring binder contained annotated copies of the ALCOAST notices. (Enclosure 1)

7. LT [redacted] was familiar with the text of the ALCOAST notices prior to serving as the Accuser in this case and reviewing the materials in the three-ring binder provided by trial counsel.

(Enclosure 3)

BURDEN

As the moving party, the Defense bears the burden of persuasion and the burden of proof. The burden of proof for any contested factual issue is a preponderance of the evidence. R.C.M. 905(c)(1).

LAW

According to Article 30 of the UCMJ, charges and specifications "shall be preferred by presentment in writing, signed under oath before a commissioned officer of the armed forces who is authorized to administer oaths" and that the writing shall ensure that "the signer has personal knowledge of, or has investigated, the matters set forth in the charges and specifications; and that the matters set forth in the charges and specifications are true, to the best of the knowledge and belief of the signer." 10 U.S.C. 830; R.C.M. 307(b).

The "signer" (Accuser) may base their belief upon the reports of other in whole or in part. *United States v. Miller*, 33 M.J. 235, 237 (1991); Discussion section to R.C.M. 307(b). Article 30 does not require "a final or conclusive determination of an accused's guilt" prior to their court-martial. *Id.* "Instead, the simple purpose of these provisions, like Fed. R. Crim. P. 7(c)(1), is accountability for charging…" *Id.* It is ultimately to determine that the charges are not "frivolous, unfounded, or malicious, but are founded in good faith." *Miller*, 33 M.J. at 237; *United States v. Floyd*, 2022 WL 4544622 *13 (N.M.Ct.Crim.App.)

The Manual for Courts Martial (2019 ed.) nor Article 30, UCMJ, "specifically provides" the standard for preferral is probable cause; however, military courts have held that probable cause is required when an Accuser swears the charges are true to the best of their knowledge and belief. *United States v. Mapes*, 59 M.J. 60, 76 (2003) (Crawford, S., dissenting).

ARGUMENT

In its motion, the Defense basis their entire argument on alleged similarities between this case and the facts discussed in *United States v. Floyd*; however, the facts concerning preferral in this case and in *Floyd* are completely different.

In *Floyd*, the Accuser did not review witness interviews that allegedly contained specific explicit statements that were an essential element to the charge at issue. In fact, those interviews did not even contain the specific explicit statements that underpinned the subject charge. Indeed, the Court in *Floyd* found it would have been impossible for the Accuser to review such evidence because "it did not exist at the time of preferral." *Floyd*, 2022 WL 4544622*4.

Here, the Accuser not only had knowledge of the lawful general orders at issue because he had prior knowledge of them before reviewing the materials but also because he was given copies of

them to review along with the evidence contained in the CGIS ROIs. The Defense's claims otherwise are simply not true.

In addition, the evidence that Accuser reviewed in this case demonstrates that there was probable cause regarding each of the elements of Charge I, including that MK3 Hadley's actions created a hostile work environment and unreasonably interfered with his shipmates' work performance. Indeed, the ROI provided to the Accuser contained interview statements from five of MK3 Hadley's fellow crewmembers who stated that they received sexual messages from MK3 Hadley, in the form of solicitations for photos, or videos and photos of sexually explicit material sent to them by MK3 Hadley - some of which depicted MK3 Hadley himself. Each of crewmember stated that they did not ask for MK3 Hadley to send them this material, but MK3 Hadley sent them the material anyways. Each of them told Special Agents that they eventually blocked MK3 Hadley from being able to message them further. Several of these crewmembers told Special Agents that they discussed MK3 Hadley's conduct with other crewmembers and even showed some of the messages to others. For example, CS3 [redacted] told Special Agents that he "[redacted]" on MK3 Hadley after he received a message that "[redacted]." The message contained a video of MK3 Hadley having sex with an unknown female. FN [redacted] told Special Agents that even though he liked MK3 Hadley personally, his conduct demonstrated that he needed to learn boundaries and that he should receive some form of disciplinary action for his inappropriate behavior.

Here, the evidence reviewed by the Accuser concerning MK3 Hadley clearly demonstrates that it is not a case like *Floyd*, where there is "no evidence in existence at the time of preferral" to support the charges. *Floyd*, 2022 WL 4544622*7-8. To the contrary, there is ample evidence to support Charge I. The Defense, in its motion, invites this Court to do what the *Floyd* court explicitly said was improper - review or question the "weight and sufficiency" of the evidence. *Id.*; See also *United States v. Arma*, 2014 WL 5511503 (A.F. Ct. Crim. App. Oct. 22, 2014). For those reasons, the Court should deny the Defense motion.

RELIEF REQUESTED

The United States respectfully requests the Court deny Defense's motion and respectfully requests oral argument.

ENCLOSURES AND EVIDENCE

Enclosure 1 – Relevant portions of material provided to Accuser, LT [redacted]

Enclosure 2 – Prover notes from interview with [redacted] on 15 November

Enclosure 3 – Prover notes from interview with [redacted] on 23 November

The United States intends to produce LT [redacted] for live testimony at the Article 39(a).

COLAW.CASE.ALEXANDER KNOX CHARL[redacted]
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Date: 2022.12.01 07:26:10 -07'00'

CASE A. COLAW
Lieutenant Commander, USCG
Trial Counsel

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the above was served on the military judge and defense counsel via electronic mail on 01 December 2022.

COLAW.CASE.ALEXANDER KNOX CHARL[redacted]
Digitally signed by COLAW.CASE.ALEXANDER KNOX CHARL[redacted]
Date: 2022.12.01 07:26:33 -07'00'

Case A. Colaw
Lieutenant Commander, USCG
Trial Counsel

Appellate Exhibit IX
Page 6 of 6

COAST GUARD TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **JOSHUA HADLEY** **MK3/E-4** **U.S. COAST GUARD**	**DEFENSE MOTION TO COMPEL** **(Expert Consultation)** **2 DEC 22**

MOTION

Pursuant to 10 U.S.C. § 846, Article 46, Uniform Code of Military Justice, R.C.M. 703 and 906(b), and the Sixth Amendment to the U.S. Constitution, the Defense moves this Court to compel the Government to provide funding for Dr. [redacted] to act as an expert consultant for the Defense.

SUMMARY

Dr. [redacted] is an expert in the specialized forensic field of false confessions within the field of forensic psychology.[1] The expert assistance of Dr. [redacted] is essential to enable the Defense to investigate several factual issues in the case, including: (1) MK3 Hadley's particular susceptibility to false confession based on coercive interrogation techniques, including his suggestibility, and (2) the effect of contamination (CGIS supplying key facts during the interrogation) on MK3 Hadley's subsequent statements. Dr. [redacted] will be able to assist the Defense in investigating and presenting information about why MK3 would agree with CGIS's version of events, even if he did not independently remember the facts they provided.

BURDEN

The burden of proof rests on the Defense to establish any factual issue necessary to resolve this motion by a preponderance of the evidence. R.C.M 905(c)(1).

FACTS

1. On 7 November 2022, the Defense requested leave of the Court to file one additional expert consultant request, based on conversations with expert consultants in other fields that the Defense sought to retain. The Court granted that request, and the Defense timely submitted a

[1] Enclosure A, Dr. [redacted] CV, Fee Schedule, and Summary of Potential Testimony.

detailed request memorandum.[2] Afterwards, the Defense attempted to send the Enclosures to the request, but, due to the file size, the email did not send. Defense Counsel noticed this and successfully sent the Enclosures via DoDSAFE on 11 November 2022.[3]

2. On 29 November 2022, Defense Counsel received an email[4] attaching the Convening Authority's denial of the Defense request for Dr. [redacted] assistance.[5] The denial memorandum cites as references the Defense memo and R.C.M. 703. The denial memorandum provides absolutely no explanation of why the Convening Authority denied the Defense request for expert assistance from Dr. [redacted]

3. The 29 November 2022 email from Trial Counsel also attached the Trial Counsel's First Endorsement to the Defense request. Trial Counsel's Endorsement recommends denying the Defense request because "[t]he Defense alleges zero facts that suggest MK3 Hadley is susceptible or may be susceptible to the alleged coercive techniques in question," "the defense has produced no evidence that any part of the accused's confession was in fact false," "the Reid technique . . . is an effective technique at obtaining true confessions from those suspects who may be reluctant to admit wrongdoing for obvious reasons," and "Defense has shown a mere possibility of actual assistance from Dr. [redacted] which is insufficient to demonstrate necessity." Trial Counsel's recommendation of denial goes on to argue: "Defense fails to show they are unable to gather and present the evidence to the court of potential issues with Reid and related techniques through cross-examination and through the other forensic psychologist already appointed, Dr. [redacted] Defense also fails to show that the denial of expert assistance would result in a fundamentally unfair trial. If the Defense proffer was sufficient, then an expert in false confessions would be constitutionally required in any case where the accused makes a confession due to the routine nature of the interrogation techniques used in the vast majority of criminal cases."[6]

4. On 3 June 2020 CGIS interrogated MK3 Hadley at BASE HONOLULU about an alleged instance of abusive sexual contact on 31 May 2022. (Enclosures G and H.)

5. At the time of the interview, MK3 Hadley was [redacted] years old. He had no education beyond high school. His score on the Armed Services Vocational Aptitude Battery (ASVAB) Armed Forces Qualification Test (AFQT) was below the overall average of test takers,[7] with some of his

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[2] Enclosure B, Def Exp Req – False Confession ([redacted]).

[3] Enclosure C, DoDSAFE email confirmation of 11 Nov 22.

[4] Enclosure D, LCDR [redacted] email of 29 Nov 22.

[5] Enclosure E, Convening Authority's denial of Defense Expert Request – False Confession ([redacted]).

[6] Enclosure F, Trial Counsel's First Endorsement to Defense Expert Request – False Confession ([redacted]).

[7] Enclosure I, Military.com article explaining ASVAB AFQT Scores. The AFQT is scored as a percentile, so a score of 50 means the test taker answered more questions correctly than 50

lowest individual section scores in verbal ability and word knowledge.[8] He is a member of the Coast Guard, where he has been trained from Day One to submit to authority.

6. As he tells CGIS during the investigation, MK3 Hadley was heavily intoxicated on the night of 30 to 31 May 2022, and he did not remember many of the details of that night. During the interrogation, CGIS Special Agents (SA) tell MK3 Hadley that he can use the restroom during the interrogation, but not that he is free to leave. (Enclosure G; Enclosure H at 7:1-4.) Throughout the beginning of the interrogation, he denies that the abusive sexual contact did happen or would happen, and throughout he states that he does not remember some of the details CGIS provides. (Enclosure G; Enclosure H, *see, e.g.*, at 27:4; 31:18-19, 22; 41:13-14.) All of the specific, material details about the alleged abusive sexual contact originates with CGIS. (Enclosures G, H, and K.) For a period of time, a CGIS agent speaks over and interrupts MK3 Hadley, displaying the confrontational Reid Method of interrogation, which has been called into question. (Enclosure G; Enclosure H, *see, e.g.*, 32-35.) A CGIS agent threatens MK3 Hadley with additional charges for lying to them and tells him that the case is going to go to court and a lot more is going to come his way. (Enclosure G; Enclosure H, *e.g.* at 25:20-21, 34:14-24, 35:18-20) The CGIS agents discuss the idea and functioning of a polygraph exam multiple times throughout the interrogation. (Enclosure G; Enclosure H at 32:19-22, 46:4-6.) Eventually, MK3 Hadley begins to agree with the CGIS agents, sometimes making a key admission by saying "yes, sir," rather than actually describing anything that happened. (Enclosure G; Enclosure H, *e.g.* at 36:22-24, 38:5-9, 42:8-9) When the details MK3 Hadley provides don't match the story that the CGIS agents have scripted, they go back and correct them. (Enclosure G; Enclosure H, *e.g.* at 38:5-9) Even *after* MK3 Hadley has given in and agreed with CGIS about the alleged touching, he is unable to come up with even nonincriminating details about the event, like what DC2 [redacted] was wearing. (Enclosure G; Enclosure H, *e.g.* at 45:13-19.) The CGIS agents ask questions about the homosexual nature of the allegation, which visibly seems to heighten MK3 Hadley's discomfort. (Enclosures G and H.)

7. The occurrence of false confessions is well documented. "[T]here is one circumstance when a confession may be considered false on psychological grounds. This happens when the confession is not based on actual knowledge or memory of the facts." [9] This is the circumstance addressed in Enclosure L. Experts in the social psychology of false confessions recognize different kinds of false confessions, including: voluntary false confessions (perceiving some gain to falsely confessing), coerced-compliant false confessions, and coerced-internalized false confessions.[10] In reality, false confessions tend to occur due to a combination of factors:

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percent of other test takers. Any score under 50 is below average. The *minimum* AFQT score to join the Coast Guard is 40.

[8] Enclosure J, Coast Guard Member Information for MK3 Joshua Hadley.

[9] Enclosure L at 7; *see also* https://innocenceproject.org/research-resources/ (approximately 25 percent of people exonerated by The Innocence Project through DNA evidence had confessed).

[10] Enclosure L at 8.

> Memory distrust and suggestibility have both trait and state like features. A high trait of either memory distrust or suggestibility makes people potentially vulnerable to pressured internalized false confessions, but this does not exclude the possibility that such confessions can be elicited in the absence of trait vulnerabilities. In real life cases a false confession to a serious crime typically occurs due to a combination of background (e.g., pressure on police to solve the case, the relationship between the victim and the suspect, relationship between suspects), contextual (e.g., the nature and seriousness of the case, nature and duration of interrogation and custody), health, personality and lack of support factors.[11]

8. There is also scholarship about interrogation techniques and the pressure investigators are trained to exert on suspects.[12] One major interrogation technique is the Reid 9-Step method. The Reid method is controversial because of its confrontational style.[13] This method starts out with non-confrontational interviewing to establish background, then transitions to a confrontational interrogation with a direct accusation that the suspect committed the crime in question. The interrogator steadfastly maintains that the suspect is guilty, and refuses to accept any defense or alternative explanation, creating a feeling of hopelessness in the suspect. This feeling can be increased when the suspect can be pushed into a traditionally stigmatized role (especially in the context of alleged sexual assault) like "gay male." Another part of the technique includes invoking strong evidence, even if the interrogator does not have that evidence, for example, polygraph evidence. As the Reid method progresses, the interrogator sells confession to the subject as the way to achieve the best possible outcomes. Here, the interrogator casts the interrogation as a negotiation and threatens worse outcomes if the suspect does not confess. In the end, the interrogator takes the confession. False confessions almost always include non-public details provided by the interrogator—this information is referred to as contamination. (Enclosures M and N.)

9. In the practice of interrogation, "coercion" includes "[t]he use of intimidation, force, or suggestion to influence a suspect's answers."[14] "Contamination can occur when investigators intentionally fact-feed information to the subject, or alter their statements to match the theory of the crime. This same issue can happen unintentionally if an investigator presents evidence, or even discloses information using inappropriate leading questions."[15]

10. Defense Litigation Support Specialist for Defense Service Office Pacific, Mr. [redacted] reviewed the video of the 3 June 2020 CGIS interrogation of MK3 Hadley. Using his law enforcement training and investigative experience, Mr. [redacted] observed clear indicators of the Reid method, and also of contamination. In fact, all of the key details are supplied by the CGIS agents. MK3

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[11] Enclosure L at 9-10.

[12] Enclosure M, Dr. [redacted] et al on Interrogation Technique. The lead author of this article is the expert consultant that the Defense seeks via this motion.

[13] Enclosure N, Wicklander-Zulawski Press Release and False Confessions Information Pages.

[14] Enclosure N at 5.

[15] Enclosure N at 6.

Hadley states that he does not remember putting his hand in DC2 [redacted] pants, then that he strongly does not believe it happened. Later, the CGIS agent gets MK3 Hadley to agree that it might have happened, but he isn't sure. At one point, MK3 Hadley states his hand was on the outside of DC2 [redacted] pants. From there, it's quick work for CGIS to supply the specifics they want, and MK3 Hadley then agrees with them that his hand was inside DC2 [redacted] pants. (Enclosure C.)

11. Pressured confessions implicate both coercive law enforcement tactics and complicated and counterintuitive science related to the formation and malleability of memory.[16] These issues are compounded when law enforcement interrogators fail to implement a standard strategic tactic of sound interviewing: "Withholding the evidence is a strategic tactic that not only strengthens the power of the information but also prevents an innocent subject from gaining knowledge of the crime they would otherwise be unaware of."[17]

LAW

a. Entitlement to the assistance of an expert consultant upon a showing that such assistance is necessary.

A defendant's right to present a defense is part of their Fourteenth Amendment right to a fair trial. *United States v. McAllister*, 64 M.J. 248, 252 (C.A.A.F. 2007). An accused at a court-martial is entitled to "investigative or other expert assistance when necessary for an adequate defense." *United States v. Garries*, 22 M.J. 288, 290 (C.M.A. 1986), *cert. denied* 479 U.S. 985 (1987); *see also* Article 46, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 846 (2018) (establishing "equal opportunity to obtain witnesses and other evidence" for the defense); R.C.M. 703(d).

While the Defense currently seeks Dr. [redacted] as an expert consultant, her work on the case will help the Defense to determine whether testimony from a false confession expert is necessary at trial. Separate from the right to assistance from an expert consultant, an accused also has a right to equal opportunity to obtain witnesses, and this includes expert witnesses. *United States v. Bunton*, 82 M.J. 752, 781 (N-M. Ct. Crim. App. 2022) (setting aside convictions where trial court denied expert in forensic psychiatry to address the effects of alcohol on memory), *review denied without prejudice*, No. 22-0270/MC, 2022 WL 16951554 (C.A.A.F. Oct. 18, 2022). "Where a military judge deprives an appellant of expert testimony and consequently deprives him or her of the right to present a defense, the error is constitutional and the test for prejudice on appellate review is whether the appellate court is able to declare a belief that it was harmless beyond a reasonable doubt." *Id.*, 82 M.J. at 782.

[16] Enclosure O, Arkowitz and Lilienfeld, Why Science Tells Us Not to Rely on Eyewitness Accounts.

[17] Enclosure N at 6.

The right to expert assistance attaches when the defense demonstrates such assistance is necessary. *United States v. Ndanyi*, 45 M.J. 315, 319 (C.A.A.F. 1996); *United States v. Gonzalez*, 39 M.J. 459, 461 (C.A.A.F. 1994).

Such a demonstration requires "something more than a mere possibility of assistance from a requested expert . . . . [Rather,] a defendant must show the trial court that there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial." *United States v. Robinson*, 39 M.J. 88, 89 (C.M.A. 1994) (quoting *Moore v. Kemp*, 809 F.2d 702, 712 (11th Cir.), *cert. denied*, 481 U.S. 1054 (1987)).

This right implicates not only expert witnesses but also expert consultants:

> One important role of expert consultants is to help counsel develop evidence. Even if the defense-requested expert consultant [does not] become an expert witness, he would [assist] the defense in evaluating, identifying, and developing evidence. Another important function of defense experts is to test and challenge the Government's case.

United States v. Warner, 62 M.J. 114, 118 (C.A.A.F. 2005); *see also, United States v. Axe, 80 M.J. 578, 582 (N-M Ct. Crim. App. 2020)*; R.C.M. 703(d)(2)(A)(ii).

The Court of Appeals for the Armed Forces has adopted a three-pronged test for determining necessity: (1) why the expert is needed; (2) what the expert would accomplish for the accused;[18] and (3) why defense counsel is unable to gather and present the evidence that the expert would be able to develop. *United States v. Lee*, 64 M.J. 213, 217 (C.A.A.F. 2006).

A military judge has wide latitude with regard to this necessity test, *United States v. Short*, 50 M.J. 370, 373 (C.A.A.F. 1999), *cert. denied*, 528 U.S. 1105 (2000), but the Government "must provide the expert if the accused establishes" that the expert is necessary. *United States v. Anderson*, 68 M.J. 378, 383 (C.A.A.F. 2010).

b. An accused may present evidence calling into question the voluntariness of a statement, and expert assistance is appropriate to develop this evidence.

The Supreme Court has held that "evidence about the manner in which a confession was obtained is often highly relevant to its reliability and credibility." *Crane v. Kentucky*, 476 U.S. 683, 691 (1986). In fact, the issue of an admission is central and essential because it raises "the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt?" *Id.* at 689.

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[18] In examining this aspect of the test, military courts have phrased this prong in terms of how the requested expert assistant would aid the Defense in preparing its case. In other words, how would ". . . the requested expert evidence help the Defense undermine . . . " the prosecution's case in chief? *Ndanyi*, 45 M.J. at 319.

"'[F]alse confessions' do occur. Expert testimony could assist the members in understanding *why* they occur without running afoul of any longstanding prohibition against 'human lie detector' testimony, that is, without stating that the confession at issue is false." *United States v. McGinnis*, No. ARMY20071204, 2010 WL 3931494, at *9 (A. Ct. Crim. App. Aug. 19, 2010) (overturning conviction where trial court denied false confession expert consultant).

The question of voluntariness does not turn on the truth or falsity of the statement at issue. In criminal cases the Constitution "forbids 'fundamental unfairness in the use of evidence, *whether true or false*.'" *Blackburn v. Alabama*, 361 U.S. 199, 206 (*emphasis* added) (quoting *Lisenba v. California*, 314 U.S. 219, 236 (1941); *see also Rogers v. Richmond*, 365 U.S. 534, 543-44 (1961) ("[W]hether Rogers' confessions were admissible into evidence was answered by reference to a legal standard which took into account the circumstances of probable truth or falsity. And this is not a permissible standard under the Due Process Clause of the Fourteenth Amendment.").

Coercion or pressure that results in a statement by the accused need not be exerted in physical form. *See, e.g.*, *Garrity v. New Jersey*, 385 U.S. 493 (1967) (holding confession involuntary where defendants were threatened with termination of employment); *Lynumn v. Illinois*, 372 U.S. 528, 531-32 (1963) (conviction overturned where confession came after threats of lost financial assistance for children and removal of children); *United States v. Martinez*, 38 M.J. 82, 87 (C.M.A. 1993) (upholding suppression of statement, considering "appellant's psychological state" in finding that he "cracked and gave up," telling a polygraph examiner what he "wanted to hear"); *United States v. Handsome*, 45 C.M.R. 104, 107 (1972) (overturned a conviction because it was error to admit a confession obtained by polygraph examiner using coercive tactics, where "an exhortation or adjuration to speak the truth is connected with suggestions of a threat or benefit.").

ARGUMENT

Each prong, addressed separately, favors the Defense here, so the Government must provide the expert funding for Dr. [redacted] whose assistance is necessary to provide the Defense a fundamentally fair opportunity to evaluate and challenge the reliability of MK3 Hadley's apparently coerced and contaminated statements to CGIS. The Supreme Court has explained that it is crucial to a defense case to address the circumstances surrounding any statements made by the accused, because a key question for panel members is, how can someone not be guilty if they previously said they did it? Mounting a robust challenge to any statements the Government intends to use is absolutely central and necessary to the ability to put on a defense.

a. ***Why is expert assistance needed?***

There are red flags indicating a pressured false confession rife with contamination, elicited from a susceptible and suggestive target. Dr. [redacted] assistance is necessary to apply the study of coercive interrogation techniques, why they work, and how some of MK3 Hadley's specific characteristics and the circumstances of this case may have made him particularly vulnerable to the interrogators' coercive techniques. The denial of such assistance would deny MK3 Hadley the opportunity to present a meaningful defense.

There is evidence that MK3 Hadley was particularly susceptible to being coerced into falsely confessing: he scored below average on the AFQT with some his lowest scores in verbal subjects, has only a high school education, was just [redacted] at the time of the interrogation, and came straight from high school into the Coast Guard, where submission is drilled into him from Day One of Boot Camp. Dr. [redacted] is needed to evaluate the impact of these traits and their impact on suggestibility and susceptibility to false confession.

The records of the interrogation itself provide evidence that the statements later on are not coming from MK3 Hadley's own memory, but from his willingness to take CGIS's word and agree with the information they provide to fill in the time missing from or hazy in his memory: MK3 Hadley states that he was extremely intoxicated, describes the copious alcohol he consumed, says he doesn't remember the night well. Again, at the end of the interrogation, he cannot remember the simple details of what DC2 [redacted] was wearing, even though that is not incriminating information, and he had already agreed with the incriminating information that CGIS provided. Dr. [redacted] is needed to evaluate the interplay between memory issues and interrogations techniques and contamination.

The CGIS agents used coercive tactics, including intimidation, threatening, and suggestion. The CGIS agents pointed out that the door was closed and that he could use the head if necessary, but not that he was free to go at any time (they later said that he could stop talking, but not that he was free to go). They talked over him, interrupted him, told him what he was saying was "shit[,] shipmate," threatened him with additional charges for lying to them, suggested that he could avoid court by confessing to them ("If this makes it to court, there's going to be a lot more----"). They provided all of the key details of the alleged offense. CGIS took someone who they knew lacked a clear memory of a particular time period, then filled in the blanks, provided the puzzle pieces, to tell the story they wanted. The Defense needs Dr. [redacted] to assist with a more nuanced understanding of how the CGIS agents' questioning applied pressure and supplied information, and what impact that may have had on MK3 Hadley's statements.

In Trial Counsel's advice to the Convening Authority recommending denial of the Defense request, they assert that the Defense request is not sufficiently particularized, and requiring a false confession expert in this case would mean requiring one in every case with a confession. This is at odds with Trial Counsel's earlier characterization of the Defense's request: "Defense's request is focused on the situational factors, personal characteristics of the accused, and possible investigative tactics." Those factors, characteristics, and tactics are exactly why Dr. [redacted] is required in this case, and the Defense has made a specific showing of relevance and necessity to the extent of the reasonable ability of an attorney lacking a PhD in social psychology and decades of research experience.

b. ***What would the expert accomplish?***

Dr. [redacted] is highly skilled at assessing an individual's particular susceptibility and suggestibility in the context of coerced and contaminated confessions, and she can analyze MK3 Hadley's particular risk factors relative to the risk factors of CGIS's techniques (and errors, like contamination). Given the relative scarcity of other evidence, MK3 Hadley's statements will

likely be central to the Governments case. It is therefore essential that the Defense be afforded the tools to fairly evaluate those statements, and challenge their reliability.

Dr. [redacted] would review all records of the interrogation, including the recordings of the interrogations, the records reflecting the complaining witness's allegations (which provided the CGIS agents with the information that contaminated MK3 Hadley's statement), and records pertaining to the circumstances surrounding the interrogation affecting the physical or mental condition of the defendant. She would also review records relevant to characteristics of the defendant that research has shown to affect vulnerability to suggestion and false statements in interrogation. These include both chronic characteristics, such as personality, cognitive functions, mental health, educational background, and military training and conditioning; and acute characteristics such as intoxication, fatigue, distress, and other aspects of physical or mental condition. Dr. [redacted] would then advise counsel of avenues to pursue in investigation, trial arguments, and examination and cross-examination of witnesses. She could also advise Defense Counsel of her expert opinion about whether and how the statements were coerced or suggested, and whether they were voluntary, in whole or in part.

c. ***Why is Defense Counsel unable to gather and present this evidence?***

Forensic psychology and social science are evolving, multi-disciplinary fields that require continuous review of published studies and reports in order to maintain currency. Defense Counsel have no training or experience in these fields. While we could potentially obtain some marginal level of education as to some basic facets of these specialized areas (*see* enclosures (2) and (3)), we cannot reasonably become competent, much less experts, in such complex fields. It is both impractical and unreasonable for Defense Counsel to obtain the proper competency by consulting primary and secondary materials alone. Dr. [redacted] expertise is the result of years of research, study, and pragmatic application. We would be unable to apply any principles gleaned through our own efforts to the specifics of this case.

In particular, false confessions are a counterintuitive phenomenon, and are caused by a combination of situational factors (including the interrogation itself and surrounding circumstances) and personal characteristics or acute conditions of the suspect. While Defense Counsel can achieve some basic knowledge of these causes, an expert such as Dr. [redacted] is much better able to assess the combined influences present in this case that can lead to false statements to the interrogators.

Likewise, Defense Counsel cannot testify as to any opinions regarding any of these important issues. Without working with Dr. [redacted] as a consultant, Defense Counsel cannot determine whether or not a false confession expert witness is necessary. If, in consultation with her, Defense Counsel determines that such testimony is necessary, then Dr. [redacted] would be able to testify, should the Court admit her testimony (as other courts have done). Her testimony, if the Defense were to choose to use it, would help the members to understand what is known about why people falsely confess. Even if some members are vaguely aware that that false confessions can and do occur, they will not know (a) how interrogations are typically conducted, (b) how these tactics can work to convince persons that confession will actually work to their benefit rather than harm them, (c) why these tactics can work even if the person is innocent, (d) what makes a particular individual more or less susceptible to false confession in interrogation and

why they are more vulnerable, or (e) what is known regarding how to evaluate a confession for voluntariness or validity. Among the issues, Dr. [redacted] could address is the role of intoxication and fuzzy or absent memories for the event in question in promoting vulnerability to false confession. She would also address the issue of how (based on relevant scientific research) to analyze the interrogation to identify indicators of truth or falsity. There are many areas of permissible testimony that would not impinge on a question solely in the province of the triers of fact, but that would assist them.

As shown in a number of surveys of lay persons and mock jury research, much of this is not common knowledge among lay persons. Though many may recognize the potential for false confession, understanding of why it occurs and who is most vulnerable is much more limited. Therefore Dr. [redacted] testimony would assist the triers of fact, and is impossible for Defense Counsel to present. Even if the Defense does not seek Dr. [redacted] testimony, she can assist the Defense in finding other ways to clearly and accurately speak to the members about false confessions.

Dr. [redacted] highly specialized expertise is necessary to a fundamentally fair trial in this case, in addition to that of Dr. [redacted] the clinical and forensic psychologist approved in this case to evaluate the case more broadly and conduct sex offender and recidivism assessments. False confession science is a very different specialty from sex offender and recidivism, and the Defense spoke to many experts seeking the most effective assistance for this particular case, but no expert was well equipped to address both areas. Yet both subjects are equally necessary to mounting a proper defense, and therefore to advancing a fundamentally fair trial. Clinical and forensic psychology expert Dr. [redacted] will review and analyze the discovery (which is over 80,000 pages and counting, including electronic communications), evaluate the relative strength of the government's case from a clinical and forensic psychology perspective, identify potential exculpatory evidence, identify potential avenues for independent defense investigation (an essential professional obligation of defense attorneys), and help Defense Counsel prepare to cross-examine and confront the government's evidence and witnesses on a broader basis. Like Mr. [redacted] Dr. [redacted] is capable of spotting the red flags of a pressured confession, but as his CV[19] clearly indicates, he does not have the expertise to carefully evaluate the interrogations or analyze the interplay between MK3 Hadley's specific characteristics and the coercive interrogation techniques used in this case.

d. ***If the Defense is denied the benefit of Dr. [redacted] assistance, the trial will be fundamentally unfair.***

The Defense has provided detailed, particularized information about why Dr. [redacted] assistance is needed and crucially important to the Defense's development of its case, and why a skilled expert is required. MK3 Hadley's statements are central to the Government's likely case, and it is essential to a proper defense that the reliability of those statements be challenged. The Government advised the Convening Authority that MK3 Hadley's case is average, and if a false confession expert is required here, it is required every time. But that is demonstrably inaccurate, given the Defense's specific showings regarding MK3 Hadley's specific vulnerabilities (personal characteristics and situational vulnerability based on memory issues) and CGIS's interrogation

[19] Dr. [redacted] CV.

technique (confrontation, bullying, coercing, threatening, and promising, all of which may be in keeping with training, as well as contamination, which is certainly not a best interrogation practice). The Defense has reached the limit of a non-expert's ability to assess and identify red flags, but an expert like Dr. [redacted] is necessary to assist the Defense in pulling these red flags into a cohesive picture, and clearly and accurately presenting that picture to the members. Without her assistance, a fundamentally flawed collection of evidence, which is nonetheless a highly persuasive form of evidence, may be used against MK3 Hadley, and the Defense will be unable to effectively challenge it based on the complex social science involved.

RELIEF REQUESTED

The Defense moves this Court to compel the Government to provide funding for Dr. [redacted] to act as an expert consultant for the Defense.

EVIDENCE & ORAL ARGUMENT

If this motion is opposed by the Government, and pursuant to R.C.M. 905(h), the Defense requests an Article 39(a), UCMJ, hearing to present additional evidence and oral argument on this Motion. Additionally, the Defense may call Dr. [redacted] for testimony on this Motion, or provide a declarations from Dr. [redacted] prior to the hearing.

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M. R. SERRILL-ROBINS
LT, USCG
Detailed Defense Counsel

I certify that I have served a true copy via e-mail of the above on Military Judge, CDR Emily Reuter, and Trial Counsel, LCDR Erin Callahan, LCDR Amanda Hood, and LCDR Case Colaw, on 2 Dec 2022.

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Detailed Defense Counsel

COAST GUARD TRIAL JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES v. JOSHUA HADLEY Machinery Technician Third Class U.S. Coast Guard	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO COMPEL EXPERT CONSULTANT** 12 December 2022

RESPONSE

The Government opposes the Defense motion to compel the appointment of two more expert consultants. For the reasons detailed below, the Government respectfully requests this Court enter an order denying the Defense motion to compel.

SUMMARY

The Court should deny the Defense motion because the Defense has failed to meet their burden to demonstrate that the expert consultant they seek to compel, Dr. [redacted] is necessary and that denying the motion would result in a fundamentally unfair trial. The Defense fails to explain why an already approved forensic psychologist is not sufficient.

FACTS

1. This case was referred to a General Court-Martial on 07 October 2022. MK3 Joshua Hadley, hereinafter the Accused, has been charged with two specifications of Article 92 (Violation of a Lawful General Order), one charge of Article 120 (Abusive Sexual Contact), one charge of Article 134 (Sexual Act with an Animal), one charge of Article 134 (Viewing and Possessing Child Pornography), and an additional charge of Article 120 (Abusive Sexual Contact). The Accused waived his right to a preliminary hearing on 25 August 2022 and was arraigned on 20 October 2022.

2. CGIS Report of Investigation (ROI) [redacted] contains the allegations supporting both specifications under Charge I in this case. The ROI contains the following:

3. In July 2020, the Accused texted and messaged OS2[redacted] on multiple social media applications. The Accused eventually sent OS2[redacted] money on the Venmo application. OS2[redacted] thought the Accused was "[redacted]" and "[redacted]" OS2[redacted] told Special Agents that it was his "[redacted]" that the Accused was trying to "[redacted]" OS2[redacted] also told Special Agents that after he blocked the Accused on social media, the Accused texted his cell phone requesting that he re-add The Accused to his social media accounts. (Enclosure 1, Bates 082199).

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4. CGIS Special Agents also interviewed BM3 [redacted] regarding messages OS2 [redacted] received from the Accused. She told Special Agents that OS2 [redacted] showed her "[redacted]' She saw other message from The Accused on [redacted] phone, including "[redacted]" Special Agents asked BM3 [redacted] what she interpreted these messages from The Accused to mean and she explained and eggplant emoji referenced "[redacted]" and that The Accused was apparently "[redacted]" from OS2 [redacted] (Enclosure 1, 082202)

5. In February 2020, the Accused Snapchat messaged CS3 [redacted] on multiple occasions, requesting CS3 [redacted] send him "[redacted]" CS3 [redacted] told Special Agents that "[redacted]" (Enclosure 1, Bates 082200-082201)

6. CGIS Special Agents interviewed CS3 [redacted] regarding messages The Accused sent to CS3 [redacted] via Snapchat. These messages included pictures of The Accused's legs; messages that called CS3 [redacted] a "[redacted]" or saying that CS3 [redacted] was "[redacted]"; messages that The Accused wanted to "[redacted] CS3 [redacted] This happened multiple times. CS3 [redacted] responded by sending a picture of his face, to which The Accused sent the message "'Venmo' followed by a question mark." CS3 [redacted] told Special Agents that a "[redacted]" The Accused sent CS3 [redacted] a picture of what appeared to be the Accused having sex with a girl. The girl was not facing the camera, but the picture showed the Accused's penis "[redacted]" of the unknown female. The Accused included a message with the picture: "[redacted]" CS3 [redacted] told Special Agents that he "[redacted]" (Enclosure 1, Bates 082209)

7. CGIS Special Agents interviewed BM3 [redacted] who met the Accused in February 2019 "[redacted]". BM3 [redacted] told Special Agents that on one occasion The Accused sent him repeated messages on Snapchat, lasting for about 1.5 hours, requesting BM3 [redacted] send "[redacted]" photos of himself. BM3 [redacted] told Special Agents that the messages were "[redacted]" and included photos The Accused took of himself, including pictures of his leg and "[redacted]" BM3 [redacted] eventually blocked The Accused on Snapchat after the Accused asked BM3 [redacted] if "[redacted]" (Enclosure 1, Bates 082212-082213).

8. On 03 June 2020, CGIS Special Agents [redacted] and [redacted] interviewed the Accused at U.S. Coast Guard Base Honolulu, HI. The purpose of the interview was to gather factual information regarding the allegations against the Accused that he had touched the penis and scrotum of DC3 [redacted] while he was sleeping and without his consent. (Enclosure 22 and Enclosure 23, Bates 087962-082017)

9. At the outset of the interview, S/A [redacted] and S/A [redacted] provided the Accused his rights warning and waiver certificate and the Accused waived those rights and voluntarily made and

provided a statement. The Accused was provided the opportunity to leave whenever he wanted and told he could decide not to make a statement at any time. (Enclosure 28).

10. On 24 March 2021, CGIS Special Agents [redacted] and [redacted] interviewed the Accused at U.S. Coast Guard Base Honolulu, HI. The purpose of the interview was to gather factual information regarding the allegations against the Accused that he was sending and requesting unwelcome messages and images that were sexually explicit in nature. (Enclosure 49 and 51).

11. At the outset of the interview, S/A [redacted] and S/A [redacted] provided the Accused his Rights Warning, which consisted of his right to not make a statement or answer questions, understanding that anything he does choose to say can be used as evidence against him at a criminal trial, that he has the right to speak to an attorney, and that if he choses to make a statement and answer questions he has the ability to stop answering questions at any time. The Accused waived those rights and voluntarily provided a statement to the CGIS agents. (Enclosure 48).

Defense Expert Witness Requests

1. On 04 November 2022, Defense counsel made two requests for expert consultants, Dr. [redacted] field of forensic and clinical psychology, and Roloff Digital Forensics, in the field of digital forensic examination. (See Enclosure 44).

2. On 10 November 2022, the Convening Authority approved both expert consultants. (Enclosure 45).

3. On 08 November 2022, the Government received a supplemental request for an additional expert consultant in the field of forensic psychology, specializing in false confessions. The Government did not receive enclosures for the request until 12 November 2022. The Government forwarded the request to the Convening Authority on 12 November 2022 and submitted its negative endorsement to the Convening Authority on 16 November 2022. (Enclosures 46).

4. On 22 November 2022, the Convening Authority disapproved Defense's request for Dr. [redacted] to serve as an expert consultant in false confessions within the field of forensic psychology. (Enclosure 47).

BURDEN

The Defense bears the burden to establish "a reasonable probability exists both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial." *United States v. Bresenahan*, 62 M.J. 137, 143 (C.A.A.F. 2005) (internal quotations omitted). Moreover, as the moving party, the Defense bears the burden of production and persuasion by a preponderance of the evidence on any fact necessary for resolution of the instant motion. R.C.M. 905(c).

LAW

Service members are entitled to investigative or other expert assistance when necessary for an adequate defense." *United States v. Garries*, 22 M.J. 288, 290 (C.M.A. 1986). However, an accused does have the right to the assistance of an expert upon a showing of necessity. *Bresnahan*, 62 M.J. at 143 (C.A.A.F. 2005) (citing *United States v. Gunkle*, 55 M.J. 26, 31 (C.A.A.F. 2001)). Necessity requires more than the "mere possibility of assistance from a requested expert." *United States v. Robinson*, 39 M.J. 88, 89 (C.M.A.1994). The accused must show that a reasonable probability exists that "both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial.'" *Bresnahan* at 143 (citing *Robinson* at 89).

In order to determine if expert assistance is necessary, courts apply a three-pronged test: "[t]he defense must show: (1) why the expert assistance is needed; (2) what the expert assistance would accomplish for the accused; and (3) why the defense counsel were unable to gather and present the evidence that the expert assistance would be able to develop." *Id.*, see also *United States v. Freeman,* 65 M.J. 451 (C.A.A.F 2008). The defense's desire to "explor[e] all possibilities" does not satisfy the required showing of necessity. *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010) (citations omitted). The defense is required to show more than a mere possibility of assistance. See *United States v. Short*, 50 M.J. 370,372 (C.A.A.F. 1999). To receive expert assistance, defense must request "assistance in a subject or field that is beyond the ken of a competent, diligent attorney who has put forth reasonable effort to recognize, learn, comprehend, understand, or perceive the subject or field as it relates to the facts and circumstances of his particular case." *United States v. Thomas*, 33 M.J. 644 (N.M.C.M.R. 1991).

With regard to the Defense's ability to show that denial of expert assistance would result in a fundamentally unfair trial, one factor courts use to determine this is whether the content of the expert's knowledge is central to the government's case. Where scientific analysis is the "linchpin" of the government's case, the Court of Appeals for the Armed Forces (C.A.A.F.) held the denial of an expert by the military judge constitutes an abuse of discretion. See *United States v. McAllister,* 55 M.J. 270, 276 (C.A.A.F. 2001). On the other hand, where the content of the expert's expertise does not constitute the "linchpin" of the government's case, military courts have readily distinguished *McAllister*. See *United States v. Lloyd*, 69 M.J. 95, 100 (C.A.A.F. 2010) (citations omitted) ("Absent a more precise explanation of the theory they hoped to pursue through the assistance of a blood spatter expert, we cannot find that the military judge abused her discretion when she denied the defense motion for expert assistance.").

ARGUMENT

a. The Defense has failed to establish that an expert in false confessions is necessary, and that denial of Dr. [redacted] would result in a fundamentally unfair trial

The Defense motion, like its initial request to the convening authority, fails to meet its burden to demonstrate why the appointment of Dr. [redacted] is necessary. It is unclear how the approved forensic psychologist, Dr. [redacted] could not provide the requested assistance. Dr. [redacted] has been approved to provide to help Defense fully develop and present theories related to intoxication, sleep, and assorted paraphilias. Defense suggests that Dr. [redacted] may

conduct psychosexual, psychological, and recidivism analyses on the Accused, while potentially testifying to opinions regarding intoxication and any associate effects on behavior or *memory*. In addition, Defense clearly has been utilizing the experience of the Defense Litigation Support Specialist in analyzing the interviews of the Accused. Therefore, even though Dr. [redacted] specialty, false confessions, is technically a different specialty, it is apparent from the Defense's requests that they are focusing on the psychological impact of investigations and possible issues with memory due to the Accused's use of alcohol. Defense has failed to explain why they need two experts to consult regarding the same evidence. The Defense request is further undermined by that fact that the Government has retained only an expert in digital forensics.

Defense's request is focused on the situational factors, personal characteristics of the accused, and possible investigative tactics, alleging some elements of the Reid technique were used, that could lead to false confessions. Defense suggests that Dr. [redacted] could be helpful in explaining how the assumed questioning techniques by law enforcement could have impacted on the Accused's statements. In *Bresnahan,* Defense's request for an expert consultant in false confessions was denied due to defense failing to present any evidence that the Appellant's confession was false, failed to present any evidence that the Appellant suffered from any abnormal mental or emotional problems, and that no evidence suggesting that the appellant had a "submissive personality so weak or disoriented as to make false incriminatory statements in response to accusations of serious criminal misconduct." *Id.* at 143. The Defense counsel in this case have also failed to provide any evidence that the Accused's statement was false. The Defense alleges zero facts that suggest the Accused is susceptible or may be susceptible to the alleged coercive techniques in question. Defense counsel has also never presented any evidence to suggest that Appellant's statement and admission was actually false. At most, the Defense has presented evidence that the memory or the Accused may be at issue but that will be a determination for the fact finder on the weight given to the Accused's statement, and it is not evidence supporting that the statement is false.

The Defense motion and initial request states that neither Defense counsel has the requisite psychological training to properly prepare a defense based on Dr. [redacted] subject matter expertise, e.g. it is "beyond the ken" of their collective experience. However, they fail to explain why it is beyond the collective training and experience of Dr. [redacted] already approved forensic psychologist, the Defense Litigation Support Specialist, Mr. [redacted] and Defense Counsel. Defense fails to show they are unable to gather and present the evidence to the court of potential issues with Reid and related techniques through cross-examination.

Finally, the Defense also fails to show that the denial of expert assistance would result in a fundamentally unfair trial. Again, if the Defense's proffer was sufficient, then an expert in false confessions would be constitutionally required in any case where the accused makes a confession due to the routine nature of the interrogation techniques used in most criminal cases, both military and civilian. Therefore, the Defense's proffer is insufficient, and the request should be denied. Accordingly, the Defense request for Dr. [redacted] should be denied because she is not necessary and the denial would not result in a fundamentally unfair trial. As indicated in the courts in *McCallister* and *Lloyd,* one factor courts use to make a determination is whether the content of the expert's knowledge is central to the government's case or the "linchpin," which is not the case here. The Accused only makes statements related to three of the five charged

offenses on the charge sheet. Although the Accused's statements are highly probative, the Government also has corroborating evidence and witness testimony to support those three charges and is not relying solely on the Accused's statement to prove its case. Further, the Government is not seeking an expert in false confessions. All demonstrating that the issue is not central to the Government's case and therefore, the request should be denied.

RELIEF REQUEST

The Government asks that this Court deny the Motion to Compel the expert witness consultant request. The Defense has failed to meet its burden to show that Dr. [redacted] is necessary and how a denial would result in a fundamentally unfair trial. The Government respectfully requests oral argument.

ENCLOSURES

Enclosure 44- Trial Counsel Endorsement with Defense Initial Request for Expert Consultant
Enclosure 45- Convening Authority Approval for Expert Consultants
Enclosure 46- Trial Counsel Endorsement with Defense Request for Expert False Confessions, Dr. [redacted]
Enclosure 47- Convening Authority Disapproval, Dr. [redacted]

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ERIN C. CALLAHAN,
Lieutenant Commander, USCG
Trial Counsel

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the above was served on the military judge and defense counsel via electronic mail on 12 December 2022.

CALLAHAN.ERIN.CATHERINE.[redacted] Digitally signed by CALLAHAN.ERIN.CATHERINE.[redacted] Date: 2022.12.12 17:00:51 -08'00'

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Lieutenant Commander, USCG
Trial Counsel

APPELLATE EXHIBIT XIV
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COAST GUARD TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **JOSHUA HADLEY** **MK3/E-4** **U.S. COAST GUARD**	**DEFENSE MOTION TO SUPPRESS** **(Pressured Statements of the Accused)** **17 NOV 2022**

MOTION

Pursuant to Rule for Courts-Martial (R.C.M.) 905(b)(3), Military Rule of Evidence (Mil. R. Evid.) 304(f), and the Fifth Amendment to the U.S. Constitution, the Defense moves to suppress all statements made by MK3 Hadley to the Coast Guard Investigative Service (CGIS) on 3 June 2020, as well as all derivative evidence. The statements were involuntary.

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. On 3 June 2020 CGIS interrogated MK3 Hadley at BASE HONOLULU about an instance of alleged abusive sexual contact on 31 May 2022. (Enclosure A.[1])

2. At the time of the interview, MK3 Hadley was [redacted] years old. He had no education beyond high school. His score on the Armed Services Vocational Aptitude Battery (ASVAB) was below the overall average of test takers, with some of his lowest individual section scores in verbal ability and word knowledge. (Enclosure B.) He is a member of the Coast Guard, where he has been trained from Day One to submit to authority.

3. As he told CGIS during the investigation, MK3 Hadley was heavily intoxicated on the night of 30 to 31 May 2022, and he did not remember many of the details of that night. Throughout the beginning of the interrogation, he does not agree that the abusive sexual contact did happen or

[1] The Defense has requested that the Government order a transcription of the 3 June 2020 interrogation, which the Defense will file as supplemental Enclosure H when received.

would happen. (Enclosure A.) All of the specific, material details about the abusive sexual contact originated with CGIS. (Enclosure C.) For a period of time, a CGIS agent speaks over and interrupts MK3 Hadley, displaying the confrontational Reid Method of interrogation, which has been called into question. (Enclosure A; Enclosure C.) A CGIS agent threatens MK3 Hadley with additional charges for lying to them and tells him that the case is going to go to court and a lot more is going to come his way. The CGIS agents discuss the idea and functioning of a polygraph exam multiple times throughout the interrogation. Eventually, MK3 Hadley begins to agree with the CGIS agents, sometimes making a key admission by saying "yes, sir," rather than actually describing anything that happened. When the details MK3 Hadley provides don't match the story that the CGIS agents have scripted, they go back and correct them. The CGIS agents ask questions about the homosexual nature of the allegation, which visibly seems to heighten MK3 Hadley's discomfort. (Enclosure A.)

4. The existence of false confessions is well documented. (Enclosure (D); *see also* https://innocenceproject.org/research-resources/ (approximately 25 percent of people exonerated by The Innocence Project through DNA evidence had confessed).)

5. There is also scholarship about interrogation techniques and the pressure investigators are trained to exert on suspects.[2] (Enclosure E.) One major interrogation technique is the Reid 9-Step method. The Reid method is controversial because of its confrontational style. (Enclosure F.) This method starts out with non-confrontational interviewing to establish background, then transitions to a confrontational interrogation with a direct accusation that the suspect committed the crime in question. The interrogator steadfastly maintains that the suspect is guilty, and refuses to accept any defense or alternative explanation, creating a feeling of hopelessness in the suspect. This feeling can be increased when the suspect can be pushed into a traditionally stigmatized role (especially in the context of alleged sexual assault) like "gay male." Another part of the technique includes invoking strong evidence, even if the interrogator does not have that evidence, for example, polygraph evidence. As the Reid method progresses, the interrogator sells confession to the subject as the way to achieve the best possible outcomes. Here, the interrogator casts the interrogation as a negotiation and threatens worse outcomes if the suspect does not confess. In the end, the interrogator takes the confession. False confessions almost always include non-public details provided by the interrogator—this information is referred to as contamination. (Enclosure E; Enclosure F.)

6. Defense Litigation Support Specialist for Defense Service Office Pacific, Mr. [redacted] reviewed the video of the 3 June 2020 CGIS interrogation of MK3 Hadley. Using his law enforcement training and investigative experience, Mr. [redacted] observed clear indicators of the Reid method, and also of contamination. In fact, all of the key details are supplied by the CGIS agents. MK3 Hadley states that he does not remember putting his hand in DC2 [redacted] pants, then that he strongly does not believe it happened. Later, the CGIS agent gets MK3 Hadley to agree that it might have happened, but he isn't sure. At one point, MK3 Hadley states his hand was on the outside of DC2 [redacted] pants. From there, it's quick work for CGIS to supply the specifics they

[2] The Defense has requested the assistance of an expert consultant in the field of the psychology of involuntary confessions, given the complex set of psychological factors that go into interrogation and confession. As of this writing, Defense has not received a determination from the Convening Authority about whether that request will be granted.

want, and MK3 Hadley then agrees with them that his hand was inside DC2 [redacted] pants. (Enclosure C.)

LAW

a. Involuntary statements may not be offered against an accused at trial.

Upon motion or objection by the Defense, "an involuntary statement from the accused, or any evidence derived therefrom, is inadmissible at trial." Mil. R. Evid. 304(a).[3] A statement is involuntary when it is "obtained in violation of the self-incrimination privilege or Due Process Clause of the Fifth Amendment of the Constitution of the United States, Article 31 [of the Uniform Code of Military Justice], or through the use of coercion, unlawful influence, or unlawful inducement." Mil. R. Evid. 304(a)(1)(A); *see* 10 U.S.C. § 831(d) (2018) ("No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against [the accused] in a trial by court-martial."). The Rule embeds the Constitution's proscription that "[n]o person . . . 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." U.S. Const., amend V.

b. Voluntariness is determined with reference to the totality of the circumstances surrounding a statement, including the nature of the interrogation and characteristics of the accused, but not to the statement's veracity.

There is no "talismanic definition of voluntariness" which is "mechanically applicable" to all statements. *Schneckloth v. Bustamonte*, 412 U.S. 218, 224 (1961) (citing *Culombe v. Connecticut*, 367 U.S. 568, 604-605 (1961)) (internal quotation marks omitted). Generally, our courts test for voluntariness by asking "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). "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." *Id.* (citing *Culombe*, 367 U.S. at 602.)

The voluntariness inquiry "involves an assessment of the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." *Id.* (quoting *Schneckloth*, 412 U.S. at 226); *see also Arizona v. Fulminante*, 499 U.S. 279, 285-86 (1991). Courts have considered myriad factors in evaluating voluntariness, including:

- the mental condition, including psychological abnormality, and intelligence of the accused, *e.g.*, *Fikes v. Alabama*, 352 U.S. 191, 197 (1968) (noting uneducated prisoner was "certainly of low mentality, if not mentally ill");
- whether the statement was composed by law enforcement agents, *e.g.*, *Blackburn v. Alabama*, 361 U.S. 199, 204, 207-08 (1960);

[3] Except to impeach or in a later prosecution for perjury or false swearing.

- threats or inducements like loss of financial benefits or aid, *e.g.*, *Lynumn v. Illinois*, 372 U.S. 528, 534; and

- whether the accused had any prior experience with law enforcement practices and techniques, *id.*

Again, a finding of voluntariness does not turn "on the presence or absence of a single controlling criterion," but "on a careful scrutiny of all the surrounding circumstances." *Schneckloth*, 412 U.S. at 226.

The truthfulness of the statement, however, is not a factor because in criminal cases the Constitution "forbids 'fundamental unfairness in the use of evidence, *whether true or false*." *Blackburn v. Alabama*, 361 U.S. 199, 206 (emphasis added) (quoting *Lisenba v. California*, 314 U.S. 219, 236 (1941); *see also Rogers v. Richmond*, 365 U.S. 534, 543-44 (1961) ("[W]hether Rogers' confessions were admissible into evidence was answered by reference to a legal standard which took into account the circumstances of probable truth or falsity. And this is not a permissible standard under the Due Process Clause of the Fourteenth Amendment."). Even factually accurate statements can "be the product of constitutionally impermissible methods in their inducement [where] a defendant had been subjected to pressures to which, under our accusatorial system, an accused should not be subjected." *Rogers*, 365 U.S. at 541.

c. Coercion does not require physical violence, and words alone may suffice to overcome an accused's free will.

"Coercion can be mental as well as physical, and the blood of the accused is not the only hallmark of an unconstitutional inquisition." *Fulminante*, 499 U.S. at 287 (internal quotation marks, ellipsis, and citations omitted). Coercion "need not depend upon actual violence by a government agent." *Id.* at 287. For example, in *Garrity v. New Jersey*, 385 U.S. 493 (1967), the Supreme Court rejected the voluntariness of a confession where the defendants, city police officers, were questioned concerning their alleged "fixing" of traffic tickets and advised by the state police that if they refused to answer questions, their employment could be terminated." 385 U.S. at 492. The Court in *Garrity* reflected that the "option to lose their means of livelihood or pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent." *Id.* at 497.

Similarly, the Court in *Lynumn v. Illinois*, considered the statement of a woman charged with marijuana distribution who was told by police that her children "would be taken away . . . and strangers would have them . . . and if I could cooperate [the police officer] would see they weren't . . . ." 372 U.S. 528, 531-32 (1963). The Court overturned the defendant's conviction in that case, because it was "abundantly clear that [her] oral confession was made only after the police had told her that state financial aid for her infant children would be cut off, and her children taken from her, if she did not cooperate." *Id.* at 534 (internal quotation marks omitted). Military courts have not deviated from the Supreme Court's lead.

In *United States v. Martinez*, 38 M.J. 82 (C.M.A. 1993), the court reversed the service court of appeals and upheld the military judge's suppression of a statement when the trial court properly considered the "appellant's psychological state" in finding that he "cracked and gave

up," telling a polygraph examiner what he "wanted to hear." 38 M.J. at 87. In another case involving coercive interrogation tactics by a polygraph examiner, the Court of Military Appeals overturned a conviction because it was error to admit a confession where "an exhortation or adjuration to speak the truth is connected with suggestions of a threat or benefit." *United States v. Handsome*, 45 C.M.R. 104, 107 (1972).

a. The Court should analyze a contaminated confession like an unduly suggestive police eyewitness identification process.

Just as the voluntariness of a statement to law enforcement requires assessing the totality of the circumstances, courts also analyze the admissibility of eyewitness identification testimony by analyzing several factors to try to get a view of the totality of the circumstances. In that context, the Supreme Court has explained "that reliability is the linchpin in determining the admissibility of identification testimony" when the out-of-court identification process is suggestive. *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977). In the identification context, suggestive police techniques can lead a third person to wrongly identify an accused. In the coerced confession context, police techniques combined with undue suggestion (in this context referred to as "contamination") during an interrogation can lead an accused to falsely make statements against his own interest.

The same popular fallacies about memory that lead to over-reliance on eyewitness identifications are also concerns with respect to statements to law enforcement. Questioning can create false memories. Researchers have created such real memories in subjects that the subjects were certain the memories were real. (Enclosure G.)

Courts evaluating the reliability of police-run identification procedures consider several factors: "opportunity to view," "degree of attention," "accuracy of the description," "witness's level of certainty," and "time between the crime and the confrontation." *Brathwaite*, 432 U.S. at 114-15. In order to fairly assess the reliability of an accused's statement to law enforcement, a similar test could be applied, including factors like: accuracy of statement, knowledge of specific details (as opposed to those details originating with law enforcement), level of certainty, and time between the crime and the interrogation. Of course, it would be important to complete this analysis in conjunction in addition to the voluntariness inquiry used to assess the pressure behind statements by the accused already.

ARGUMENT

a. CGIS used coercive tactics to elicit a pressured statement from MK3 Hadley.

MK3 Hadley does not fall neatly into one box to explain why he was susceptible to manipulative and contaminative interrogation techniques. Instead, a totality of the circumstances analysis is required. There were several factors that indicate MK3 Hadley's suggestibility and special susceptibility to pressure during his interrogation: he was just [redacted] years old, of below average intelligence according to the ASVAB, more deferential to authority than the average member of the public due to military training and discipline, uncomfortable with the homosexual nature of the allegations and the discussion about it with strangers, and, by his own statement

during the interrogation, lacking in full and clear memory of the night at issue to combat CGIS's contamination of his memory.

If we apply the proposed test lain out above: MK3 Hadley's statements do not initially match CGIS's, so they are not highly accurate, using that as the measuring stick. MK3 Hadley was not the first to offer relevant details specific to the alleged offense, and when his details were "wrong," CGIS corrected them with their own. MK3 Hadley was very uncertain about the events surrounding the offense throughout the interrogation. There was a short time between the events and the interrogation, so any memories should have been fresh. Taking these facts, on the whole, MK3 Hadley's statements to CGIS were not reliable.

CGIS bullied and cajoled, threatened and offered, and provided the details of the story they wanted to hear. They used the Reid Method to make MK3 Hadley more pliable, but broke one of its cardinal rules by not withholding key details to elicit as markers of reliability in any eventual statement. CGIS did not merely suggest the answers, they provided the answers.

Any statements that MK3 Hadley made after that can only be highly suspect. They do not bear the markers of reliability that are required under the Constitution before MK3 Hadley's statement can fairly be used against him. The Government bears the burden of showing that such use is Constitutional. The contamination of this interrogation is too pervasive and overwhelming for them to do so.

RELIEF REQUESTED

The Defense moves the Court to suppress all statements made by MK3 Hadley to CGIS on 3 June 2020, as well as any derivative evidence.

EVIDENCE AND HEARING

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.

SERRILL-ROBINS.MIRA.ROSE[redacted]
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M. R. SERRILL-ROBINS
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Defense Counsel

I certify that I have served a true copy via e-mail of the above on Military Judge, CDR Emily Reuter, and Trial Counsel, LCDR Erin Callahan, LCDR Amanda Hood, and LCDR Case Colaw, on 17 Nov 2022.

SERRILL-ROBINS.MIRA.ROSE[redacted]
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Detailed Defense Counsel

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. JOSHUA HADLEY Machinery Technician Third Class U.S. Coast Guard	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO SUPRESS:** **ACCUSED'S STATEMENTS ON 03 JUNE 2020** 01 December 2022

RESPONSE AND SUMMARY

The Government respectfully requests that this court deny the Defense's motion to suppress the statements of the accused because the accused was read his rights, voluntarily waived his rights, and then voluntarily made statements to Coast Guard Investigative Service Agents.

FACTS

1. The case was referred to a General Court-Martial on 07 October 2022. MK3 Hadley (hereinafter: the "Accused") has been charged with two specifications of Article 92 (Violation of a Lawful General Order), one charge of Article 120 (Abusive Sexual Contact), one charge of Article 134 (Sexual Act with an Animal), one charge of Article 134 (Viewing and Possessing Child Pornography), and an additional charge of Article 120 (Abusive Sexual Contact). The Accused waived his right to a preliminary hearing on 25 August 2022 and was arraigned on 20 October 2022.

2. On 03 June 2020, CGIS Special Agents [redacted] and [redacted] interviewed MK3 Joshua Hadley at U.S. Coast Guard Base Honolulu, HI. The purpose of the interview was to gather factual information regarding the allegations against MK3 Hadley that he had touched the penis and scrotum of DC3 [redacted] while he was sleeping and without his consent. (Enclosure 22 and Enclosure 23, Bates 087962-082017)

3. At the outset of the interview, S/A [redacted] and S/A [redacted] provided MK3 Hadley the Article 31(b) and MK3 Hadley waived those rights and voluntarily made provided a statement. MK3 Hadley was provided the opportunity to leave whenever he wanted and told he could decide not to make a statement at any time. (Enclosure 28).

4. MK3 Hadley joined the Coast Guard in 2017 and took the Armed Services Vocational Aptitude Battery (ASVAB) in May 2017, scoring within average range. (See Enclosure 29, Bates No. 000003).

BURDEN

The prosecution has the burden of establishing the admissibility of the evidence. M.R.E 304(f)(6). "The burden on the prosecution extends on the ground upon which the defense moved to suppress or object to the evidence. *Id* The standard of proof is preponderance of the evidence. M.R.E. 304(f)(7).

LAW

"A confession is involuntary, and thus inadmissible, if it was obtained in violation of the self-incrimination privilege or due process clause of the Fifth Amendment to the Constitution of the United States, Article 31, or through the use of coercion, unlawful influence, or unlawful inducement." *Freeman*, 65 M.J. at 453 (citing M.R.E. 304(a), (c)(3); see 10 U.S.C. § 831(d) (Article 31(d), UCMJ). Courts look at the totality of the surrounding circumstances" to determine "whether the confession is the product of an essentially free and unconstrained choice by its maker." *Bubonics*, 45 M.J. at 95.

In *Schneckloth v. Bustamonte*, the U.S. Supreme Court requires assessing the "totality of all surrounding circumstances" to determine if an accused acted voluntarily. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). Pertinent circumstances for courts to evaluate include "the characteristics of the accused and the details of the interrogation." *Id.* The Court listed a number of possible factors to assess which included the following: the accused's youth, lack of education, low intelligence, lack of advice to accused as to his constitutional rights, the length of his detention, the repeated and prolonged nature of questioning, and the use of physical punishment.

Ultimately, there is a two part-test when looking at the totality of the circumstances "appl[ying] the two-part test from *Schneckloth*, looking to both the personal characteristics of the accused as well as the circumstances of the interrogation." *United States v. Nelson, 82 M.J. 251, 255 (C.A.A.F. 2022)* citing *United States v. Lewis*, 78 M.J. 447, 453 (citation omitted) (internal quotation marks omitted). Regarding personal characteristics, "[s]ome of the factors taken into account have included the youth of the accused, his lack of education, or his low intelligence." *Id.* (internal quotation marks omitted) (quoting *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008)). Then regarding the circumstances of the interrogation, "[s]ome of the factors taken into account have included ... 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 use of physical punishment such as the deprivation of food or sleep." *Id.* (internal quotation marks omitted) (quoting *Freeman*, 65 M.J. at 453).

In *United States v. Ellis*, the C.A.A.F. explained that "the totality of the circumstances include the condition of the accused, his health, age, education, and intelligence; the character of the detention, including the conditions of the questioning and rights warning; and the manner of the interrogation, including the length of the interrogation and the use of force, threats, promises, or deceptions." *United States v. Ellis*, 57 M.J. 375, 379 (C.A.A.F. 2002). The absence of

maltreatment to an accused is also a factor that needs to be considered. The *Ellis* court states, "[n]ot only must we examine the circumstances surrounding the taking of the statement regarding what was done or said, but we must also examine what was not done or not said." *Id.* 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, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973)).

ARGUMENT

The Defense does not identify any actions from the Accused's interview that would suggest the statement provided was made involuntarily. The Defense attempts to suggest that the Accused was "pressured" and that based on the totality of the circumstances that the Accused is highly suggestible and that has made his statement involuntary. An involuntary statement means a statement obtained in violation of the self-incrimination privilege or Due Process Clause of the Fifth Amendment to the Constitution, Article 31, or through the use of coercion, unlawful influence, or unlawful inducement. None of which are applicable to this case or directly alleged by Defense.

The Personal Characteristics of the Accused Do Not Make Him Susceptible to Coercion

First, Defense suggests that due to the Accused's age, that he was "below average intelligence" due to his scores on the Armed Services Vocational Aptitude Battery (ASVAB), and due to his military training is more deferential to authority. These characteristics are similar to those of the Accused in the *Nelson* case and that court concluded that "the appellant was not somehow peculiarly susceptible to coercion. To the contrary, he was [redacted] years old and had been a marine for nearly four years. As the military judge found, Appellant also was 'articulate with the ability to communicate clearly.'" *Id* at 256. The Accused in the case before the court was almost [redacted]-years old at the time of the interview and had been in the Coast Guard for about 3-years. Defense suggests that due to the Accused's military training that he is more deferential to authority, however, that could then lead to the argument that *any* military member could be susceptible to coercion.

Defense also alleges that the Accused has "below average intelligence" due to his score on the ASVAB, which is a conjecture. The ASVAB is not a test of intelligence, but "measures developed abilities and helps predict future academic and occupational success in the military" and assists members and the Coast Guard in determining which specialty/rate would be ideal for the member based on their strengths and weaknesses. The Accused scores, Enclosure 29, are about average, if not above. see Enclosure 40.

Lastly, Defense suggests that the Accused was susceptible to coercion because of his level of comfortability regarding the allegations and the discussion of his sexuality with strangers and his concern regarding his memory. An individual feeling uncomfortable regarding the subject matter does not rise to the level of demonstrating

The Accused's Statements Were Not a Product of Coercion

As noted above, coercion renders an admission involuntary and therefore inadmissible. See *Freeman*, 65 M.J. at 453. Coercion is not limited to physical abuse, but can include threats to an individual's job and family. *Garrity v. N.J.*, 385 U.S. 493, 494 (1967) (quoting *Blackburn v. Alabama,* 361 U.S. 199, 206 (1960). Defense suggests that the agents used "coercive tactics," however, none of the actions taken by the agents in this case were coercive. Throughout the interview the agents spoke to the accused in a calm, sympathetic tone.

When looking at the circumstances of the interrogation, "[s]ome of the factors taken into account have included ... 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 use of physical punishment such as the deprivation of food or sleep, threats, promises, or deceptions." *Nelson* at 255, see also *Ellis* at 379.

The CGIS agents, S/A [redacted] and S/A [redacted] begin the interview by introducing themselves, asking the Accused typical biographical information and administrative questions, and tells the Accused that anytime during the interview he is able to leave, take a break, and reassures him that the door is closed for privacy purposes. When made sure to meticulously read through the rights advisement and ensure that the Accused understood every section. The Accused confirmed each section with the agents and then waived his Article 31 rights forthrightly and unambiguously. Even while reviewing the Article 31 rights form, S/A [redacted] reiterates that if they start talking the Accused can tell the agents, at any time, he does not want to talk anymore. See Enclosure 23. The Accused's knowing and voluntary waiver of this Article 31(c) rights strongly support the voluntariness of his statements.

Once the CGIS agents begin the substantive questions the Accused answers most without issue, up until the time of the incident. When S/A [redacted] asks directly about the acts alleged, he recognizes the Accused's uneasiness and tries to reassure him that the agents "are not judging" him. Never in the interview do the agents threaten, use force, make promises, or use any type of deception. Although the Accused shows hesitation in providing the truth, he nonetheless demonstrates his willingness to answer questions voluntarily.

RELIEF REQUESTED

The Government respectfully requests the Military Judge deny the Defense's motion to suppress

ENCLOSURES

Enclosure 22- CGIS First Interview of MK3 Hadley
Enclosure 23- Transcript of Interview with MK3 Hadley
Enclosure 28- MK3 Hadley's Rights Waiver
Enclosure 29- Mk Hadley's Member Info

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ERIN C. CALLAHAN
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Trial Counsel

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the above was served on the military judge and defense counsel via electronic mail on 01 December 2022.

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Trial Counsel

APPELLATE EXHIBIT XIX
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COAST GUARD TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **JOSHUA HADLEY** **MK3/E-4** **U.S. COAST GUARD**	**DEFENSE MOTION TO SUPPRESS** **(Involuntary Statements of the Accused)** **29 NOV 2022**

MOTION

Pursuant to Rule for Courts-Martial (R.C.M.) 905(b)(3), Military Rules of Evidence (Mil. R. Evid.) 304(f) and 305, Article 31, UCMJ, and the Fifth Amendment to the U.S. Constitution, the Defense moves to suppress, for all purposes, all statements made by MK3 Joshua Hadley to the Coast Guard Investigative Service (CGIS) on 24 March 2021 and 16 June 2021, as well as all evidence derived from either, or both. The 24 March 2021 statements were involuntary and were unlawfully obtained because the rights advisement that CGIS provided to MK3 Hadley was deficient and defective under both Article 31, UCMJ, and the Fifth Amendment. The 16 June 2021 statements were also involuntary, as CGIS questioned MK3 Hadley long before getting to the rights advisement, and continued to question him long after he invoked his right to consult with an attorney. Because MK3 Hadley's rights under Article 31(b) and the Fifth Amendment were violated with respect to these statements, the charge of violating Article 92, UCMJ, and both specifications thereunder, should also be dismissed.

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. On 24 March 2021, CGIS interrogated MK3 Hadley at BASE HONOLULU about alleged sexual harassment of other Coast Guard members, in violation of Article 92, Uniform Code of Military Justice (UCMJ), general orders prohibiting sexual harassment. (Enclosures A and B.)

2. After conducting 24 transcript pages of preliminaries and rapport-building (none of which included telling MK3 Hadley he was free to leave at any time), the two CGIS agents conducting the interrogation advised MK3 Hadley of his rights, as they are required to do by Article 31(b),

APPELLATE EXHIBIT 22
PAGE 1 OF 8 PAGE (S)

UCMJ. An agent had completed the "Rights Warning Procedure/Waiver Certificate" form by hand, writing in the section for "offense(s) of which I am suspected/accused:" "violations of UCMJ articles 134: Indecent Conduct, 120: Abusive Sexual Contact, and 120c: Indecent Exposure (Requesting/Sending sexually explicit/nude images) (Touching someone's inner thigh)[.]" (Enclosures B and C.)

3. The agents directed MK3 Hadley to read the form aloud and initial on the line by each of the rights, which he did. (Enclosures A, B, and C.)

4. The 24 March 2021 rights advisement form did not mention Article 92, UCMJ, did not mention sexual harassment (workplace, pursuant to the general orders, or otherwise), and did not mention that any of the suspected conduct involved coworkers or the workplace. (Enclosure C.)

5. Immediately after completing the rights advisement, the CGIS agents brought up an administrative investigation being conducted on [redacted][1] and asked MK3 Hadley about the allegations that form the basis for the sexual harassment charge in the current case: [redacted]." (Enclosure A; Enclosure B at 29: 15-22.) Most of the interrogation consisted of questioning about the allegations that form the basis for the sexual harassment specifications in the current case. (Enclosures A and B.)

6. Towards the end of the 24 March 2022 interrogation, CGIS informed MK3 Hadley that they had a "search auth" for his phone, so they were seizing it. They asked him for the password to the phone. The form indicates that MK3 Hadley did not consent to the seizure and search of his phone, but provided "access" via the passcode pursuant to the search authorization CGIS told him they had. (Enclosures A and D.)

7. On 16 June 2021, CGIS interviewed MK3 Hadley a third time. Again they did not tell him he was free to leave at any time. They finally provided a rights advisement[2] at pages 22 to 26 of the transcript, and MK3 Hadley invoked his right to consult with an attorney at his first opportunity. CGIS acknowledged the invocation, but continued to speak with MK3 Hadley and question him about his life for another 11 pages of typed transcript. (Enclosures E, F, and G.)

8. CGIS closely coordinated the interrogations with MK3 Hadley's command, who supplied personnel to escort him to and from each CGIS interrogation. (*See* Enclosure B at 117:1, 8-10; 118: 10, 22-23; 119:1-2; Enclosure F at 6:4-7; 26:21; 27: 1-3, 6.)

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[1] The partial information provided in discovery with respect to this administrative investigation indicates that it related entirely to MK3 Hadley allegedly messaging other Coast Guard members via Snapchat, which is the substance of the allegations underlying the Article 92, UCMJ, charge in this case.

[2] They warned MK3 Hadley that he was suspected of violating Articles 120b (rape and sex assault of a child); 120 (abusive sexual contact); 134 (child pornography, child exploitation); 134 (indecent conduct); 134 (pandering and prostitution); and 112a (wrongful use, possession, et cetera, of controlled substance).

9. On 22 June 2022, charges were preferred against MK3 Hadley alleging violations of Article 92, UCMJ (violation of a lawful general order prohibiting sexual harassment from January 2019 to December 2019 and from January 2020 to August 2020), Articles 120 and 128 (abusive sexual contact for and assault consummated by a battery on 31 May 2020, in touching the penis and scrotum of DC2 [redacted] without his consent), and Article 134 (sexual act with an animal and viewing and possessing child pornography, both on or about March 2021). On 23 August 2022 an additional charge was preferred for violation of Article 120 (an alternate theory for the same abusive sexual contact already charged, for touching the penis of DC2 [redacted] knowing that he was asleep, on 31 May 2020). On 24 August, the Government modified the previously preferred charges and dismissed the charge under Article 128. (Charge Sheet of 22 June 2022 as amended on 24 August 2022; Additional Charge on Charge Sheet of 23 August 2022.)

10. On 17 November 2022, Trial Counsel provided supplemental discovery to the Defense, including typed transcripts of the three CGIS interrogations of MK3 Hadley. (Enclosure H.)

LAW

a. Involuntary statements may not be offered against an accused at trial.

Upon motion or objection by the Defense, "an involuntary statement from the accused, or any evidence derived therefrom, is inadmissible at trial." Mil. R. Evid. 304(a).[3] A statement is involuntary when it is "obtained in violation of the self-incrimination privilege or Due Process Clause of the Fifth Amendment of the Constitution of the United States, Article 31 [of the Uniform Code of Military Justice], or through the use of coercion, unlawful influence, or unlawful inducement." Mil. R. Evid. 304(a)(1)(A); *see* 10 U.S.C. § 831(d) (2018) ("No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against [the accused] in a trial by court-martial."); Mil. R. Evid. 305(c)(1) ("A statement obtained from the accused in violation of the accused's rights under Article 31 is involuntary and therefore inadmissible against the accused."). The Rule embeds the Constitution's proscription that "[n]o person . . . 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." U.S. Const., amend V.

b. Article 31(b) framework.

Article 31(b) requires advisement of rights and suspected offenses before questioning:

> No person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of ***the nature of the accusation*** and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

[3] Except to impeach or in a later prosecution for perjury or false swearing.

10 U.S.C. § 831 (***emphasis*** added).

The United States Court of Appeals for the Armed Forces (CAAF) recently addressed remedies for violations of the Article 31(b) warnings requirement in *U.S. v. Nelson*, 82 M.J. 336, 337 (CAAF 2022). In *Nelson*, the appellant was read his Article 31(b) rights and was advised that he was suspected of violating Article 134, Prostitution, but was not also warned that he was suspected of violating Article 133, conduct unbecoming an Officer, by failing to report similar prostitution-related misconduct by others. CAAF upheld the trial judge's decision to dismiss the specification regarding the unwarned offense. Moreover, some of CAAF's judges felt this was an insufficient remedy and that the appellant's statement in its entirety should have been suppressed. However, CAAF did not settle the issue of the proper remedy for a violation of Article 31(b) because some of the judges in the majority affirmed the dismissal of only the unwarned offense based on their determination that the appellant, before the trial court, had waived the issue of suppression of the statement in its entirety. Two judges dissented on the grounds that the deficiently warned statement should have been suppressed in its entirety, writing: "Recognizing that a rights advisement has particular significance in the military context, this Court has repeatedly described this provision as a strict enforcement mechanism to implement the rights warning requirements of Article 31(b), UCMJ." *United States v. Nelson*, 82 M.J. 336, 347 (C.A.A.F. 2022) (internal quotation marks omitted) (quoting *United States v. Gardinier*, 65 M.J. 60, 63 (C.A.A.F. 2007) (quoting *United States v. Swift*, 53 M.J. 439, 448 (C.A.A.F. 2000))).

If a suspect in custodial interrogation requests counsel, anything he says afterwards is inadmissible against him unless counsel was present. Mil. R. Evid. 304(c)(2) and (4).

The protections of Article 31(b) are not exactly duplicative of rights under the Fifth Amendment to the U.S. Constitution (as explained and effectuated in *Miranda v. Arizona*, 384 U.S. 436 (1966), and its progeny, including *United States v. Tempia*, 16 C.M.A. 629, 631, 37 (1967), applying it to military members), and in some respects are broader. *United States v. Evans*, 75 M.J. 302, 303 (C.A.A.F. 2016).

c. Fifth Amendment and *Miranda v. Arizona* framework.

Miranda and the Fifth Amendment require a rights advisement before custodial interrogation, which turns on "whether a suspect reasonably believed that his freedom of action was curtailed to a degree associated with formal arrest." *United States v. Evans*, 75 M.J. 302, 305-06 (C.A.A.F. 2016) (affirming dismissal only of specification that turned primarily on evidence gained in violation of Article 31(b), but not in violation of Fifth Amendment) (internal quotation marks omitted) (quoting *United States v. Schake*, 30 M.J. 314, 318 (C.M.A. 1990)). In determining whether someone was subjected to custodial interrogation, courts consider: "(1) whether the person appeared for questioning voluntarily; (2) the location and atmosphere of the place in which questioning occurred[;] and (3) the length of the questioning." *United States v. Chatfield*, 67 M.J. 432, 438 (C.A.A.F. 2009).

Mil. R. Evid. 305(b)(3) defines custodial interrogation as "questioning that takes place while the accused or suspect is in custody, could reasonably believe himself or herself to be in custody, or is otherwise deprived of his or her freedom of action in any significant way."

In a military context, the totality of the circumstances must take into account that "[t]here inarguably exist subtle pressures in military society that are not present in the civilian world, and these pressures—in concert with other, case-specific circumstances—may cause [even] a servicemember who is not in a custodial setting to nonetheless involuntarily inculpate himself. *Evans*, 75 M.J. at 306 (internal citation omitted).

The remedy under *Miranda* for a statement taken in violation of the Fifth Amendment is that the court must deem the statement inadmissible. *Miranda*, 384 U.S. at 479.

d. Evidence derived from unlawfully obtained evidence is also inadmissible.

Evidence derived from an unlawful search or seizure constitutes "fruit of the poisonous tree" and is subject to exclusion. *Wong Sun v. United States*, 371 U.S. 471, 488 (1963). The exclusionary rule encompasses both the direct results of an illegal search or seizure and evidence discovered derivative of those results, the so-called tainted "fruit of the poisonous tree." *Id.*

e. Article 92: General order prohibiting sexual harassment.

"[C]reating an offensive working environment [is] an essential element of" a violation of a general order prohibiting sexual harassment. *See United States v. Brown*, 82 M.J. 702, 709 (C.G. Ct. Crim. App. 2022), *review granted*, No. 22-0249/CG, 2022 WL 16973007 (C.A.A.F. Oct. 3, 2022) (review granted on grounds related to Article 91 charge, not Article 92).

f. Article 134: Indecent Exposure and Indecent Conduct.

The elements of Indecent Exposure under Article 120c, UCMJ, are: (1) That the accused exposed his genitalia; (2) That such exposure was done in an indecent manner; and (3) That such exposure was intentional. The Navy-Marine and Army Courts of Criminal Appeals, the only military courts of appeals to have considered the question, have held that the offense of Indecent Exposure under Article 120c(c), UCMJ, requires in-person exposure "to view the *actual* body parts listed in the statutes, not images or likenesses of the listed parts." *United States v. Uriostegui*, 75 M.J. 857, 865 (N-M. Ct. Crim. App. 2016) (*emphasis* in original); *see also United States v. Williams*, 75 M.J. 663, 666 (A. Ct. Crim. App. 2016).

The elements of Indecent Conduct under Article 134, UCMJ, are: "(1) That the accused engaged in certain conduct; (2) That the conduct was indecent; and (3) 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, or to the prejudice of good order and discipline in the armed forces or of a nature to bring discredit upon the armed forces." For the purposes of Indecent Conduct, "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."

ARGUMENT

CGIS violated MK3 Hadley's rights under Article 31(b) and the Fifth Amendment during the interrogations on both 24 March 2021 and 16 June 2021. Both sets of statements must be

excluded from evidence in their entirety. Additionally, the charge alleging a violation of Article 92, and both specifications thereunder, should be dismissed.

a. Each CGIS interrogation of MK3 Hadley was custodial.

During each interrogation, CGIS coordinated the time and place with MK3 Hadley's command, who designated an escort to bring MK3 Hadley over at the appointed time. When CGIS was finished with MK3 Hadley, they did not let him leave until they called the command and an escort was sent to pick him up. MK3 Hadley did not appear for questioning voluntarily. The location was unfamiliar to MK3 Hadley, a sterile conference room of CGIS's choosing that they set up as they preferred, and they were there waiting when MK3 Hadley arrived, controlling the space. Over three interrogations, CGIS has subjected MK3 Hadley to over three-and-a-half hours of two-on-one questioning. And it is impossible to overstate the pressure put upon an E-4 being taken to an unfamiliar area by someone from his command well senior to him, with no explanation or warning, waiting upon the convenience of whomever summoned him, being sat down in a room, and being confronted by two shiny CGIS badges. The CGIS agents never told MK3 Hadley he was free to leave. The CGIS agents also made it clear to MK3 Hadley that they had a direct line to the XO of his major cutter, and that helpful behavior would be reported, leaving the elliptical inference that unhelpful behavior would also be reported. Even after MK3 Hadley invoked his right to counsel, CGIS kept him in the room, answering questions, until his escort finally arrived—because he was in custody, not free to leave. Even if the Government argues he could have left had he tried because he wasn't physically restrained, a reasonable person could and would have believed himself to be in custody. He was deprived of freedom in significant ways. The CGIS interrogations on 24 March 2021 and 16 June 2021 were custodial.

b. CGIS violated Article 31(b) and the Fifth Amendment during the 24 March 2021 interrogation, so the statements must be suppressed, the specifications dismiss, and the evidence from the phone search excluded.

On 24 March 2021, CGIS warned MK3 Hadley that he was suspected of "violations of UCMJ articles 134: Indecent Conduct, 120: Abusive Sexual Contact, and 120c: Indecent Exposure (Requesting/Sending sexually explicit/nude images) (Touching someone's inner thigh)[.]" They then proceeded immediately to ask him about alleged actions that are currently charged as violations of Article 92, UCMJ, two general orders prohibiting sexual harassment. None of the listed offenses, either the names or the UCMJ articles, gave MK3 Hadley notice of the workplace sexual harassment offenses for which he now faces charges, although CGIS started immediately with that line of questioning, so it is evident they suspected MK3 Hadley of it before the interrogation—in fact, it was the *primary purpose* of the interrogation. CGIS interviewed all of the complaining witnesses before interrogating MK3 Hadley, and had all of the same information at that point that the Government used in deciding to charge MK3 Hadley with violating Article 92, UCMJ. CGIS did not ask MK3 Hadley about similar messaging with respect to non-Coast Guard members. Still, CGIS did not give him notice of the crucial, *essential* workplace aspect of the offense of which he was suspected, and for which he has now been charged.

This failure is directly analogous to the warnings the trial judge and CAAF found deficient in *Nelson*. There, the appellant was warned that he was suspected of violating Article

134, Prostitution, but was not also warned that he was suspected of violating Article 133, conduct unbecoming an Officer, by failing to report similar prostitution-related misconduct by others. Putting him on notice of prostitution-related offenses generally was insufficient with respect to the suspected offense of failing to report the prostitution-related activities of others, even though both offenses related to prostitution.

Likewise, here, MK3 Hadley was warned generally that he was suspected of Indecent Exposure or Indecent Conduct related to "requesting/sending sexually explicit/nude images."[4] He was *not* given any indication of the significance of the workplace aspect of the suspected offense. The warnings did not put him on notice that it was relevant that the alleged message recipients were other Coast Guard members—even though that is an *essential* element of the Article 92 specifications in this case, but is completely irrelevant to the offenses of Indecent Exposure and Indecent Conduct.

Because this statement was taken in violation of Article 31(b), it is *inadmissible at trial* against MK3 Hadley. Additionally, as in *Nelson*, the charge for violating Article 92, and both specifications thereunder, should be dismissed due to this violation.

As addressed in paragraph a. *supra*, this interrogation was custodial, or a reasonable person could have thought it so, and MK3 Hadley's freedoms were significantly curtailed given the totality of the circumstances, so the Fifth Amendment also applies to this interrogation, and CGIS violated MK3 Hadley's rights under it, as well as under Article 31(b). The statements from 24 March 2021 must be suppressed under the Fifth Amendment, too.

MK3 Hadley provided the passcode to his cellular phone (although not consent to search) at the end of, and as a result of, the interrogation that started with defective warnings. Given that, MK3 Hadley's provision of his iPhone passcode was the fruit of an illegal interrogation. Different law enforcement agencies have differing abilities to access different mobile phone devices without the passcode, and different types and amounts of data on those phones. It is likely that CGIS would not have been able to access the phone, or everything on the phone, without the illegally obtained passcode. The evidence found through this derivatively illegal phone search must also be suppressed, unless the Government can prove that the evidence would have been obtained without the illegally obtained passcode.

c. <u>CGIS violated Article 31(b) and the Fifth Amendment during the 16 June 2021 interrogation</u>.

MK3 Hadley was again subjected to a custodial interrogation on 16 June 2021. This time, he invoked his right to consult with counsel at his first opportunity. At that point, both the Fifth Amendment (and case law interpreting it) and Mil. R. Evid. 305(c)(2) and (4) required questioning to stop until a lawyer was present. But it didn't. The Government provided transcripts of the three interrogations on 17 November, but has not informed the Defense what

[4] The Indecent Exposure warning was especially irrelevant and unhelpful with respect to putting MK3 Hadley on notice, given that such offenses, with respect to adult complaining witnesses, must occur in person, and cannot be completed by sending images. Notably, before the third and final interrogation, CGIS dropped Indecent Exposure from the warnings.

portions or which transcripts it seeks to use at trial. CGIS gathered 37 transcript pages' worth of information during the 16 June 2021 interrogation, in spite of MK3 Hadley's invocation of the right to counsel at his first opportunity. These statements are inadmissible against MK3 Hadley at trial, and they must be excluded.

RELIEF REQUESTED

The Defense moves the Court to suppress all statements made by MK3 Hadley to CGIS on 24 March 2021 and 16 June 2021, as well as any derivative evidence, including the search of his cellular telephone (which is also the subject of a separate Defense Motion to Suppress on additional grounds). Given the failure to warn MK3 Hadley that they suspected him of workplace sexual harassment, the Defense further moves that the charge that MK3 Hadley violated Article 92, UCMJ, and both specifications thereunder, be dismissed.

EVIDENCE AND HEARING

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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M. R. SERRILL-ROBINS
LT, USCG
Defense Counsel

I certify that I have served a true copy via e-mail of the above on Military Judge, CDR Emily Reuter, and Trial Counsel, LCDR Erin Callahan, LCDR Amanda Hood, and LCDR Case Colaw, on 29 Nov 2022.

SERRILL-ROBINS.MIRA.RO[redacted].SE[redacted]
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M. R. SERRILL-ROBINS
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Detailed Defense Counsel

COAST GUARD TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES v. JOSHUA HADLEY Machinery Technician Third Class U.S. Coast Guard	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO SUPRESS ACCUSED STATEMENTS ON 24 MARCH 2021** 12 December 2022

RESPONSE

The Government opposes the Defense motion to suppress the Accused's statement on 24 March 2021. For the reasons detailed below, the Government respectfully requests this Court enter an order denying the Defense motion to suppress.

SUMMARY

The Defense moves this Court to suppress the Accused's statements made during his 24 March 2021 CGIS interview and his 16 June 2021 CGIS interview. First, the Government does not intend to offer the Accused's interview conducted on 16 June 2021 at trial; transcripts of all of the Accused's interviews were made out of best practice. Next, Defense argues that the 24 March 2021 interview should be suppressed due to deficient Article 31(b) rights advisement, violation of the Fifth Amendment due to the interview being a "custodial interrogation." However, the evidence shows the Accused received a sufficient Article 31(b) rights advisement to put him on notice regarding the nature of the offenses he was suspected, that he was not in custody, and that his statement was voluntary. Accordingly, the Defense motion should be denied.

FACTS

1. This case was referred to a General Court-Martial on 07 October 2022. The accused, MK3 Hadley, hereinafter the Accused, has been charged with two specifications of Article 92 (Violation of a Lawful General Order), one charge of Article 120 (Abusive Sexual Contact), one charge of Article 134 (Sexual Act with an Animal), one charge of Article 134 (Viewing and Possessing Child Pornography), and an additional charge of Article 120 (Abusive Sexual Contact). The Accused waived his right to a preliminary hearing on 25 August 2022 and was arraigned on 20 October 2022.

2. CGIS Report of Investigation (ROI) CS2010001707 contains the allegations supporting both specifications under Charge I in this case. The ROI contains the following:

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3. In July 2020, the Accused texted and messaged OS2 on multiple social media applications. The Accused eventually sent OS2 money on the Venmo application. OS2 thought the Accused was " " and " " OS2 told Special Agents that it was his " " that the Accused was trying to " " OS2 also told Special Agents that after he blocked the Accused on social media, the Accused texted his cell phone requesting that he re-add the Accused to his social media accounts. (Enclosure 1, Bates 082199).

4. CGIS Special Agents also interviewed BM3 regarding messages OS2 received from the Accused. She told Special Agents that OS2 showed her " " She saw other message from the Accused on phone, including " " Special Agents asked BM3 what she interpreted these messages from the Accused to mean and she explained and eggplant emoji referenced " " and that the Accused was apparently " " from OS2 (Enclosure 1, 082202)

5. In February 2020, the Accused Snapchat messaged CS3 on multiple occasions, requesting CS3 send him " " CS3 told Special Agents that " " (Enclosure 1, Bates 082200-082201)

6. CGIS Special Agents interviewed CS3 regarding messages the Accused sent to CS3 via Snapchat. These messages included pictures of the Accused's legs; messages that called CS3 a " " or saying that CS3 was " "; messages that the Accused wanted to " " CD3 This happened multiple times. CS3 responded by sending a picture of his face, to which the Accused sent the message " " CS3 told Special Agents that a " " The Accused sent CS3 a picture of what appeared to be the Accused having sex with a girl. The girl was not facing the camera, but the picture showed the Accused's penis " " of the unknown female. The Accused included a message with the picture: " " CS3 told Special Agents that he " "" (Enclosure 1, Bates 082209)

7. CGIS Special Agents interviewed BM3 who met the Accused in February 2019 " " (Emphasis added). BM3 told Special Agents that on one occasion The Accused sent him repeated messages on Snapchat, lasting for about 1.5 hours, requesting BM3 send " " photos of himself. BM3 told Special Agents that the messages were " " and included photos the Accused took of himself, including pictures of his leg and " " BM3 eventually blocked the Accused on Snapchat after the Accused asked BM3 if " " (Enclosure 1, Bates 082212-082213).

8. On 03 June 2020, CGIS Special Agents [redacted] and [redacted] interviewed MK3 Joshua Hadley at U.S. Coast Guard Base Honolulu, HI. The purpose of the interview was to gather factual information regarding the allegations against the Accused that he had touched the penis and scrotum of DC3 [redacted] while he was sleeping and without his consent. (Enclosure 22 and Enclosure 23, Bates 087962-082017)

9. At the outset of the interview, S/A [redacted] and S/A [redacted] provided the Accused his rights warning and waiver certificate and the Accused waived those rights and voluntarily made and provided a statement. The Accused was provided the opportunity to leave whenever he wanted and told he could decide not to make a statement at any time. (Enclosure 28).

10. On 24 March 2021, CGIS Special Agents [redacted] and [redacted] interviewed the Accused at U.S. Coast Guard Base Honolulu, HI. The purpose of the interview was to gather factual information regarding the allegations against the Accused that he was sending and requesting unwelcome messages and images that were sexually explicit in nature. (Enclosure 49 and 51).

11. At the outset of the interview, S/A [redacted] and S/A [redacted] provided the Accused his Rights Warning, which consisted of his right to not make a statement or answer questions, understanding that anything he does choose to say can be used as evidence against him at a criminal trial, that he has the right to speak to an attorney, and that if he choses to make a statement and answer questions he has the ability to stop answering questions at any time. The Accused waived those rights and voluntarily provided a statement to the CGIS agents. (Enclosure 48).

12. At the end of the interview on 24 March 2021, the CGIS agents indicated that they had been issued a search authorization by a military judge to seize and search his cell phone. (Enclosure 30). The agents asked the Accused if he would be willing to consent to providing his passcode to his phone, while clarifying that it was not required. The Accused provided consent to his passcode knowingly and voluntarily. (Enclosure 31).

BURDEN

The prosecution has the burden of proving by a preponderance of the evidence that the accused's statement was made voluntarily. M.R.E. 304(f)(6).

LAW

Article 31, UCMJ

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*. 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 all known offenses. "It is not necessary to spell out the details . . . 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 and orient the accused to 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) and see *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).

Fifth Amendment, *Miranda* Rights, and Custodial Interrogations

Generally, an accused must be informed of his *Miranda* rights prior to custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). A person is in custody if he is taken into custody, could reasonably believe himself to be in custody, or otherwise deprived of his freedom of action in any significant way. See Mil. R. Evid. 305(b)(3). Custody is evaluated based on an objective test from the perspective of a "reasonable" subject. The test for custody under *Miranda* is an objective examination of whether there was formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. *Stansbury v. California*, 511 U.S. 318 (1994).

The subjective views harbored by either the interrogating officer or the person being questioned are irrelevant. *United States v. Miller*, 46 M.J. 80 (C.A.A.F. 1997). In *Miller*, C.A.A.F applied the following "mixed question of law and fact" analysis in determining custody: 1) what were the circumstances surrounding the interrogation (question of fact); and, 2) given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave (question of law). Applying this objective standard, the court in *Miller* found no custody where the accused (1) was not under formal arrest; (2) voluntarily accepted an invitation to talk with an officer about the alleged misconduct; (3) voluntarily participated in the interview; (4) was treated cordially by the officer; and, (5) was left alone in the station house for a short period of time.

Voluntary Statement

"A confession is involuntary, and thus inadmissible, if it was obtained in violation of the self-incrimination privilege or due process clause of the Fifth Amendment to the Constitution of the United States, Article 31, or through the use of coercion, unlawful influence, or unlawful inducement." *Freeman*, 65 M.J. at 453 (citing M.R.E. 304(a), (c)(3); see 10 U.S.C. § 831(d) (Article 31(d), UCMJ). To determine whether a statement is involuntary, the court must assess by analyzing the totality of the circumstances. Ultimately, there is a two part-test when analyzing the totality of the circumstances surrounding a statement; 1) the characteristics of the accused; and 2) the details of the interrogation. See *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). This includes the condition of the accused, his health, age, education, and intelligence; the character of the detention, including the conditions of the questioning and rights warning; and the manner of the interrogation, including the length of the interrogation and the use of force, threats, promises, or deceptions." *United States v. Ellis*, 57 M.J. 375, 379 (C.A.A.F. 2002). 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, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973)).

ARGUMENT

The Accused was Provided Accurate Notice

Here, there is no disagreement that an Article 31b Rights Advisement was required and that CGIS Special Agents initiated one. The issue at hand is whether the rights advisement provided sufficient notice regarding the nature of the charges. An individual must be provided a frame of reference for the impending interrogation by being told generally about all known offenses. "It is not necessary to spell out the details . . . with technical nicety" but sufficiently oriented the Accused to the focus of the investigation. *United v. Kelley*, 48 M.J. 677 (A. Ct. Crim. App. 1998), see also *United States v. Pipkin,* 58 M.J. 358 (C.A.A.F. 2003). By looking at the totality of the circumstances, the Accused in this case was well aware of the nature of the accusation and that the focus of the interview was regarding him sending sexually explicit messages and photos to Coast Guard members and requesting sexually explicit photos of Coast Guard members in exchange for money.

When determining whether the nature of the accusation requirement has been met and considering the totality of the circumstances, the court will examine; whether the conduct is part

of a continuous sequence of events; whether the conduct was within the frame of reference supplied by the warnings; and, whether the interrogator had previous knowledge of an unwarned offense. *United States v. Simpson,* 54 M.J. 281

Defense argues that this case is analogous to the facts in *United State v. Nelson,* 82 M.J. 251, 255 (C.A.A.F. 2022), however, the cases are very different. In *Nelson,* the court found that the Article 31 Rights advisement was deficient because it did not provide notice of the nature of the offense for an Article 133, Conduct Unbecoming. The basis for this offense was the accused's involvement of other individuals patronizing sex workers, whereas he was provided notice regarding his own action. Separately, the agents in *Nelson* told the accused they did not care about his involvement with others. In addition, the N.M.C.C.A. and C.A.A.F. upheld military judge's determination that the warning as to the Article 134 offense, was sufficient for later Article 133 charges related to cohabitating and patronizing prostitutes.

This is decidedly different from the rights advisement provided to the Accused in this case. This case involved only the Accused's misconduct – no one else. In addition, the line of cases above, the Article 92 offense not specifically being listed on the Article 31(b) form is not dispositive if the Accused is generally oriented to nature of the alleged misconduct. This is especially true when misconduct can be charged in many different ways under different UCMJ articles. Here, the Defense is attempting to create a new standard for Article 31B rights. They claim that because the Accused was not specifically told he was being questioned about the general order concerning sexual harassment but *was* advised that the Special Agents were going to question him about the underlying conduct that led to the charge, then his statement should be suppressed. The law does not support this narrow standard. The rights advisement provided to the Accused in this case referenced: Article 134, Indecent Conduct; Article 120, Abusive Sexual Contact; and 120c, Indecent Exposure, and then briefly describes the actions that are the focus of the interview "(Requesting/Sending sexually explicit/nude images)…" See Enclosure 48. The Defense is attempting to argue that the Accused needs to be put on notice of every element within a suspected offense as well as any and all offenses that could be related to the actions in question. Again, this is not the law.

From the evidence, it is clear the Accused is well aware of the nature of the offenses that he is discussing, as it is evident in the little initial questioning from the agents, yet the Accused expands on a narrative specifically related to the actions referenced on the Article 31 rights advisement. As the factors described in *United States v. Simpson,* to determine whether the nature of the accusation requirement has been met and considering the totality of the circumstances it is clear that 1). the conduct was the same conduct initially described and 2). the conduct was within the frame of reference, if not the same acts, supplied by the warnings. The totality of the circumstances would indicate that there was no violation of the Accused's rights under Article 31(b), UCMJ.

<u>The Accused was Not in Custody, Yet CGIS Still Advised him of his Fifth Amendment Rights.</u>

An accused must be informed of his *Miranda* rights prior to custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436 (1966). Custody is evaluated based on an objective test from the perspective of a "reasonable" subject of whether there was formal arrest or restraint on freedom

of movement of the degree associated with a formal arrest. *Stansbury v. California*, 511 U.S. 318 (1994). Reviewing the totality of the circumstances, a reasonable subject would not have felt that their restraint on freedom of movement was to the degree associated with a formal arrest.

Here, when the CGIS interview begins on 24 March 2021, prior to issuing the Accused's Article 31(b) rights, both agents were cordial with the Accused, introduced themselves and asked him about his interests, and even exchange benefits related to TSA Precheck with a military ID. The Accused seems comfortable and relaxed. As the Accused has been interviewed before, the agents assure him the process is [redacted]." The agents have the Accused read over the rights advisement form and reiterate that if he has any questions to ask.

On page 27 of the interview transcripts, see Enclosure 49, the Accused reads out loud "[redacted]..." see also Paragraph 4 of Enclosure 48, and timestamp 00:20:51 of Enclosure 51, the Accused stated that he understood that if he was willing to discuss the offenses under investigation, "[redacted]" even if he signed the waiver. After ensuring that the Accused completely understood his rights and everything he just read the agents ask, "[redacted]?" and the Accused responds confidently, "[redacted] see Enclosure 51.

Following the Accused's signature waiving his right to counsel and his right not to make a statement the agents again reference the earlier interview and thank the Accused for coming, indicating that he had a choice not to come. After CGIS goes into further detail regarding the information related to this interview the Accused begins sharing, CGIS even interrupts him and in an attempt to calm any nerves and tells the Accused, [redacted]." The Accused continues his narrative reflecting on his actions and recognizing that they were wrong. The CGIS agents thank the Accused multiple times for opening up and being honest, again recognizing he had a choice, and then even states that people being honest is not typical.

CGIS agents did not use any threatening or coercive actions to make the Accused feel guilty for not making a statement, in fact they indicate that everyone they have spoken to "love[s] [him], love[s] [him] to death." See page 32 of transcripts. There is no suggestion of coercion to continue with interview; rather Agents made an attempt to make the Accused feel relatively comfortable considering the circumstances. The CGIS agents at no point prohibited the Accused from leaving, nor did the Accuse ever request to leave or end the interview early.

S/A [redacted] will testify to the procedures and best practices of escorting individuals who have called to speak to CGIS. In particular, the reasons for escorting the Accused in this case was for safety and privacy concerns, which is also referenced at the end of the interview when CGIS provides the Accused a pamphlet of services. Considering the number of allegations and types of allegations the Accused was being investigated for, CGIS wants to ensure that at individual is aware of all of the available support resources and provides awareness for the Command when the interview has concluded so that the Command can ensure the Accused feels supported during this stressful situation.

In reviewing the totality of the circumstances, a reasonable subject would not have felt that their restraint on freedom of movement was to the degree associated with a formal arrest. The agents did not prohibit his movement, nor was there any suggested or perceived limitation on his movement.

Even if this court does find that the Accused was in custody, the military form used reasonably and adequately conveyed the Fifth Amendment and *Miranda* rights even if it did not mention those rights by name. A court in the Eleventh Circuit upheld a decision to deny a Navy sailor's motion to suppress due to the rights advisement form used by military investigators indicating that the subject had a right to a lawyer at no cost to him and was consistent with *Miranda* and accurately stated the subject's Fifth Amendment rights, the determination of whether the interview was custodial was not necessary. See *Unite States v. Woods,* 684 F.3d 1045 (11th Cir. 2012). The Fifth Amendment provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V. Under the Fifth Amendment, statements a defendant makes during a custodial interrogation may not be used against him in court unless the government first advises the defendant of his rights as set forth in *Miranda v. Arizona*, 384 U.S. 436, 479 (1966). *United States v. Adams*, 1 F.3d 1566, 1575 (11th Cir.1993). These rights include the right to silence, the right to have an attorney present during interrogation, and if the defendant is indigent, the right to have a lawyer appointed for him. *Miranda*, 384 U.S. at 479. The *Miranda* warnings need not be perfect; rather, the warnings need only "reasonably convey[ ]" the defendant's rights. *Florida v. Powell*, 559 U.S. 50 (2010); see *California v. Prysock*, 453 U.S. 355, 359 (1981) (explaining the Supreme Court "has never indicated that the rigidity of *Miranda* extends to the precise formulation of the warnings given a criminal defendant .... Quite the contrary, *Miranda* itself indicated that no talismanic incantation was required to satisfy its strictures." (internal quotation marks omitted)). Same as in this case, the form used and reviewed by the Accused indicated the Accused had a right to remain silent, informed him that anything he did choose to say could be used against him in a criminal trial, and that he had the right to an attorney and the right to speak to a lawyer "before, during, and after questioning and to have a lawyer present" during questioning. See Enclosure 48. So even if this court determines that the Accused was in custody, the interview did not violate the Accused's *Miranda* and Fifth Amendment Rights.

The Accused's Statement Made on 24 March 2021 Was Voluntary

When determining voluntariness related to a statement, courts look at the totality of the surrounding circumstances" to determine "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). During the Accused's interview on 24 March 2021, the second interview that the Accused had with CGIS, the Accused knowingly waived his right to have a lawyer present and waived his right not to make a statement. The Accused decided to make a statement voluntarily without threats or promises made by the CGIS agents. When applying the two-part test in *Schneckloth*, looking at both the personal characteristics of the accused as well as the circumstances of the interrogation it is easy to find by a preponderance that his will was not "overborne" *Lewis*, 78 M.J. at 453.

First, Defense suggests that due to junior rank that he is susceptible to forced interviews.

However, the reason for the Article 31(b) Rights "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. These characteristics are similar to those of the Accused in *United States v. Nelson,* 82 M.J. 251 (C.A.A.F 2022) case and that court concluded that "the appellant was not somehow "peculiarly susceptible to coercion." To the contrary, he was [redacted] years old and had been a marine for nearly four years. As the military judge found, Appellant also was 'articulate with the ability to communicate clearly.'" *Id* at 256. The Accused in the case before the court was almost [redacted]-years old at the time of the interview and had been in the Coast Guard for about 3-years. Defense suggests that due to the Accused's military training that he is more deferential to authority, however, that could then lead to the argument that any military member could be susceptible to coercion.

In addition, the Court must also look at the circumstances surrounding the interview. Although the second interview recording lasts about 2 hours the actual questioning of the Accused occurs for less than an hour. A good portion of the interview involves the agents ensuring the Accused is aware and understands his rights, reviewing the process, and then ensuring he has the support he needs following the interview. This includes the special agents indicating that the door is closed for privacy, if he needs to take a break or get water to just let the agents know. There was no coercion, fear or threats, or promises indicated in this interview. As noted above, coercion renders an admission involuntary and therefore inadmissible. See *Freeman*, 65 M.J. at 453. Coercion is not limited to physical abuse but can include threats to an individual's job and family. *Garrity v. N.J.*, 385 U.S. 493, 494 (1967) (quoting *Blackburn v. Alabama,* 361 U.S. 199, 206 (1960). Defense suggests that the agents used "coercive tactics," however, none of the actions taken by the agents in this case were coercive. As described above, throughout the interview the agents spoke to the accused in a calm, sympathetic tone. Nothing suggestive of coercion to continue with the interview, rather an attempt to make the Accused more comfortable and create an environment that the Accused feels relatively comfortable considering the circumstances. The CGIS agents at no point prohibited the Accused from leaving, nor did the Accuse ever request to leave or end the interview early. Again, none of the above circumstances indicate that the Accused's will was overborne when making the decision to make a statement and therefore the statement was voluntary.

Not Fruit from the Poisonous Tree

Understanding that evidence that would not have been found but for illegal activity by the government is admissible if the causal connection between the illegal act and the finding of the evidence is so attenuated as to purge that evidence of the primary taint. See *Wong Sun v. United States*, 371 U.S. 471, 484-87 (1963). The Accused's cell phone passcode and subsequent lawful search, via search authorization, is not "fruit of the poisonous tree." Not only because the warnings were not defective, but also because the interview and the questions related to the Accused providing consent have no causal relationship. When determining whether there was a causal break the court shall look to *United States v. Conklin,* 63 M.J. 333 (C.A.A.F. 2006) which established three factors to determine whether an accused's consent was an independent act of free will, breaking the causal chain between the consent and a prior unconstitutional search: (1) the temporal proximity of the illegal search and the consent; (2) the presence of intervening

circumstances; and (3) the purpose and the flagrancy of the initial search. See also *United States v. Jones*, 64 M.J. 596 (A. Ct. Crim. App., 2007).

The Accused in this case provided consent to his passcode to his cell phone was an independent act of free will. The discussion regarding the Accused's passcode, although closer in time with the interview and the reviewing of his rights, was addressed separately with separate consent. The agents indicate that questioning regarding facts has concluded and asks if the Accused has anything for them before the agents review support services offered through the Coast Guard. The agents then describe procedurally the next steps and reviewing the search authorization that they received to seize his phone. Then at time stamp 1:13:00 of the interview, S/A [redacted] requests consent for his passcode. S/A [redacted] further explains that they can get access but wanted to ask for consent to the Accused providing his passcode. S/A [redacted] in the interview even reiterated that the Accused did not have to give the agents the passcode and separately told him they had a search authorization to seize his phone. Then the CGIS agents have the Accused review the consent form and read it out loud to ensure, again, that he understands the form he is signing. The Accused even asks a follow up question about whether he "has" to give his passcode and the Agents confirm that he does not, but they do have a search authorization from a military judge to seize the phone. The decision the Accused made to provide his passcode was a separate and distinct decision without a causal relationship to his original statement.

If the court does not agree with the above analysis, the search and seizure of the Accused's phone would have been inevitably discovered following the execution of the search and seizure authorization. Investigators often request consent for the passcode when lawfully seizing a cell phone to expedite the process, however, it is not required to access the contents of the cell phone. S/A [redacted] will testify that if the Accused had not provided consent to the passcode for his cell phone, the cell phone would have been sent to CGIS's Electronic Crimes Branch to be unlocked and analyzed. This type of inevitable discovery of cell phone contents is supported by the court in *United States v. Painter,* 2020 WL 7690551 (A.F.F.C.A 2020). In *Painter*, the inevitable discovery exception applied when the agent was confident that a digital forensic examiner would have been able to access the contents of a cell phone, even after the agent *directed* the subject to provide the passcode. In the case in front of this court, the agents were provided consent from the Accused. Therefore, the passcode and subsequent search should not be suppressed.

This exclusionary rule is designed to "deter, to compel respect for the constitutional guaranty in the only effective available way, by removing the incentive to disregard it." *Mapp v. Ohio,* 367 U.S. 643, 656 (1961). Evidence obtained from illicit government activity. However, even if this court felt that there was a violation of the Accused's rights in relation to his statement associated with the Article 92 violation, dismissal of the offense is not the appropriate remedy, as the Accused's statement is not the only evidence available related to the charged Article 92, UCMJ, violation.

RELIEF REQUEST

The Government asks that this Court deny the Defense's Motion to Suppress the Accused's statement on 24 March 2021. The Government respectfully requests oral argument.

ENCLOSURES

Enclosure 31- Accused's Consent with Passcode
Enclosure 48- Accused's Right's Advisement and Non-Disclosure on 24 March 2021 (Gov. Bates No. 217-219)
Enclosure 49- Interview Transcript of Accused's Interview 24 March 2021 (Gov. Bates No. 82018-82139)
Enclosure 50- Interview Transcript Certification for 24 March 2021 (Bates No. 82178)
Enclosure 51- Interview Recording of Accused on 24 March 2021

CALLAHAN.ERIN.CATHERINE.[redacted] Digitally signed by CALLAHAN.ERIN.CATHERINE.[redacted] Date: 2022.12.12 17:44:26 -08'00'

ERIN C. CALLAHAN
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 on 12 December 2022.

CALLAHAN.ERIN.CATHERINE[redacted] Digitally signed by CALLAHAN.ERIN.CATHERINE[redacted] Date: 2022.12.12 17:44:59 -08'00'

Erin C. Callahan,
LCDR, USCG
Trial Counsel

APPELLATE EXHIBIT 24
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COAST GUARD TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **JOSHUA HADLEY** **MK3/E-4** **U.S. COAST GUARD**	**DEFENSE MOTION TO SUPPRESS** **(Cellular Telephone)** **17 NOV 22**

MOTION

Pursuant to Rule for Courts-Martial (R.C.M.) 905(b)(3) and Military Rule of Evidence (Mil. R. Evid.) 311, the Defense moves to suppress all evidence derived from the unconstitutional search of MK3 Hadley's cellular telephone. The Government's search authorization was not founded on probable cause and was not particularized, in violation of the Fourth Amendment to the United States Constitution.

SUMMARY

MK3 Hadley's private cellular telephone was seized and searched pursuant to a search authorization signed by a military judge, first in March 2021 and again in November 2021. In the course of the Coast Guard Investigative Service's (CGIS) unbounded review of all of the photos and videos in the phone data based on the first search authorization, CGIS found two videos that it considered of note, one depicting an alleged sexual act with an animal and one depicting alleged child pornography. There is absolutely no other evidence related to either of these videos, so they are the sole basis for charges under Article 134, UCMJ, alleging a sexual act with an animal and viewing and possession of child pornography. CGIS knew that they were authorized to look only for evidence of violations of 120c, UCMJ, yet when they found the first video well outside their parameters, they did not pause searching immediately to seek a broader search authorization. CGIS also did not stop to seek a broader search authorization when they found a picture they believed to show illegal drugs, instead looking further into the metadata of that picture to learn the contact name and phone number with whom it had been exchanged—this despite the fact that illegal drugs have *nothing* to do with Article 120c. Rather than seeking an additional, proper authorization, CGIS searched all of the "over 90,000 photographs and over 7,500 videos," everywhere and anywhere on the phone, from any time, and with or without a connection to Snapchat, which was the medium that underlay the basis for the first search authorization. CGIS did not seek a broader search authorization until approximately seven months later, and until after they had searched every picture and video on the phone.

The first search authorization was not based on probable cause for the offense identified in the search authorization, nor delimited by any particularity based on the information that CGIS alleged in an effort to support probable cause. According to the Government's own affidavit in

support of the search authorization, the two videos were saved to the phone at least eight months after any of the alleged offenses the Government cited as probable cause for the search authorization. The actual execution of the search authorization shows the unreasonableness of both the execution and the unfounded, overbroad search authorization underlying it. The authorization was limited to all pictures and videos evidencing a violation of Article 120c. CGIS's *ultra vires* execution of the search went well beyond even the minimal, insufficient limitations in the search authorization itself.

But for the Government's unconstitutional searches of MK3 Hadley's phone, MK3 Hadley would not be facing two additional extremely serious charges, which add a combined potential 15 years' confinement to the maximum penalty available at a General Court-Martial. Allowing this extreme potential increase in jeopardy based on an unconstitutional search is manifestly unjust.

BURDEN

Upon motion by the Defense to suppress evidence under Mil. R. Evid. 311(d), the prosecution has the burden of establishing that the evidence was not obtained as a result of an unlawful search and seizure. Mil. R. Evid. 311(d)(5). The military judge must find by a preponderance of the evidence that the evidence was obtained by a lawful search and seizure before the evidence may be admitted into evidence. *Id.*

FACTS

1. On 22 June 2022, charges were preferred against MK3 Hadley alleging violations of Article 92, UCMJ (violation of a lawful general order prohibiting sexual harassment from January 2019 to December 2019 and from January 2020 to August 2020), Articles 120 and 128 (abusive sexual contact for and assault consummated by a battery on 31 May 2020, in touching the penis and scrotum of DC2 [redacted] without his consent[1]), and Article 134 (sexual act with an animal and viewing and possessing child pornography, both on or about March 2021). On 23 August 2022 an additional charge was preferred for violation of Article 120 (abusive sexual contact for touching the penis of DC2 [redacted] knowing that he was asleep, on 31 May 2020). On 24 August the Government modified the previously preferred charges and dismissed the charge under Article 128. (Charge Sheet of 22 June 2022 as amended on 24 August 2022; Additional Charge on Charge Sheet of 23 August 2022.)

2. On 20 October 2020, CGIS received a report that MK3 Hadley had allegedly messaged other Coast Guard members **via Snapchat** and asked for nude pictures or videos of themselves in exchange for money. Two[2] members also alleged that MK3 Hadley had sent them videos or images of himself having sex with unidentified women, again **via Snapchat**. After that date, CGIS conducted a supplemental inquiry. (Enclosure A.)

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[1] In May 2020 [redacted] was a DC3, but is now a DC2, and is referred to as such in this brief.

[2] The Affidavit at paragraph 4 lists 3 members who alleged this, but a review of paragraph 7 of the affidavit does not indicate this with respect to that member. (Enclosure A.)

3. According to CGIS Special Agent (SA) [redacted] affidavit, MK3 Hadley allegedly sent explicit pictures or videos of **himself, via Snapchat**, around March 2019, July 2019, October 2019, and July 2020. He allegedly sent, **via Snapchat**, explicit images of what the recipient believed was MK3 Hadley **having sex with an unknown woman** around April or May 2020, and July 2020. He allegedly **requested explicit pictures** of other Coast Guard members around February to March 2020, and July 2020. (Some of the paragraphs discussing allegations by an individual member do not indicate alleged dates.) **There is no evidence in the affidavit or discovery that the Snapchat messaging to Coast Guard members, to send or request images, or any alleged offenses at all, occurred after July 2020.** (Enclosure A, Affidavit.)

4. Eventually, on 19 March 2021, CGIS and Trial Counsel sought a search authorization to search for MK3 Hadley's personal cellular telephone on his person, in his workspace, or in his car, to seize the phone, and to search it "for electronic data contained therein limited to the following: photos, videos (with the associated geotag and other metadata) and snapchat data (with associated geotag and metadata)." A military judge signed the search authorization the same day. (Enclosure A.)

5. Attachment A describes the location and description of items to be searched. It states "any electronic device" in the spaces to be searched (MK3 Hadley's person, workspace, or car). It says that the electronic devices will be searched "for electronic data contained therein limited to the following: photos, videos (with their associated geotag and other metadata) and snapchat data (with associated geotag and metadata)." (Enclosure A.)

6. The search authorization application (CG-5810F) states that the search was "related to a violation of Article 120C [*sic*], UCMJ." The Search Authorization, at paragraph 3, states "that the property contains evidence a of [*sic*] crime, to wit: Article 120c UCMJ, Indecent Exposure." The CG-5810I Search and Seizure Authorization form states that CGIS "may seize and search electronic data contained within subject phone for evidence of violations of UCMJ Article 120c." These documents were each electronically signed by the military judge. (Enclosure A.)

7. Attachment B, the affidavit, states that "there is probable cause to believe that evidence of violations of Article 120c: Indecent Exposure; Indecent Broadcasting; and Other Sexual Misconduct, is currently located" in the phone. This document was not signed by the military judge, although it is referenced on the CG-5810F in this way: "The search is related to a violation of Article(s) 120C [*sic*], UCMJ, and the application is based on these facts; (See attachment B)." (Enclosure A.)

8. Paragraphs 12 through 14 of the affidavit, Attachment B, all summarily state some version of the following: "Based on my training and experience, I believe there is probable cause that evidence containing or associated with indecent broadcasting, indecent exposure and other sexual misconduct by MK3 Hadley is currently located" in the phone. The affidavit does not explain the theory of Indecent Exposure or Indecent Broadcasting. (Enclosure A.)

9. The search authorization document states: "Once seized, agent may search said device(s) for collection and exploitation of the following file types: photos, videos and snapchat data, as well as the associated geotag and metadata associated with these type files listed." The search authorization also required execution within 10 days of its issuance. (Enclosure A.)

10. On **24 March 2022**, CGIS interrogated MK3 Hadley. That day, they seized his iPhone. On the evidence custody form they noted under "Purpose" that the phone was seized "IAW Search Auth." (Enclosure A; Enclosure D.)

11. CGIS informed MK3 Hadley that they were seizing and searching his phone pursuant to a Search Authorization. MK3 Hadley provided the passcode to his phone based on the Search Authorization, but did not consent to a search of his phone. (Enclosure B.[3])

12. On 29 March 2021 SA [redacted] "obtained a digital extraction of the contents of" MK3 Hadley's phone, and an "Advanced Logical Extraction was completed." The narrative title for this entry in the CGIS Report of Investigation (ROI) is "cell phone extraction – working copy." (Enclosure C.[4])

13. On 8 April 2021, in an ROI entry titled "cell phone extraction – evidentiary copy," SA [redacted] again extracted the contents of MK3 Hadley's phone. (Enclosure C.)

14. On 21 April 2021, SA [redacted] reviewed the data from the cell phone (although he did not enter this into the ROI until 16 June 2021). He did not describe any limitations or focus of his review, just that he reviewed the "over 90,000 photographs and over 7,500 videos" found on the phone. SA [redacted] described that there were a number of explicit images, but only described two videos in any detail. Both of those videos were "created" on **5 March 2021**. SA [redacted] wrote in the ROI that "[c]reation dates for digital media can be the date the media was captured, saved or archived; and is set by the operating system." These videos were not in any folder or file related to Snapchat. One of the two videos that SA [redacted] describes is of a dog licking an unknown substance from a white man's penis; only the man's penis and part of his hand were visible. The other video that SA [redacted] describes shows what SA [redacted] believes to be a male child under the age of 12 fellating an unidentified white male. (Enclosure C; Enclosure D.)

15. CGIS asserted in the affidavit in support of the second search authorization (hereinafter the "second affidavit") that, "[w]hile looking for images related to violations of Article 120c, CGIS uncovered an image . . . that captures four ziplock bags of dried mushrooms. The photograph was received on 11/19/2019 via iMessage SMS attachment from a contact stored as 'M.' from phone number [redacted]." (Enclosure D.)

16. On 20 May 2021, SA [redacted] conducted an advanced logical extraction of MK3 Hadley's phone. (Enclosure C; Enclosure D.)

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[3] Although not known to the authorizing officer, this Enclosure is included to address any suggestion that the search authorization is moot due to consent. *See* Mil. R. Evid. 311(d)(4)(A).

[4] Although not known to the first authorizing officer, the Defense is challenging both probable cause for the authorization and the reasonableness of the search itself, and the course and conduct of the search is relevant. Furthermore, this Enclosure describes events between the first and second search authorizations, and demonstrates why the second is directly and inextricably derived from the first. *See* Mil. R. Evid. 311(d)(4)(A).

17. On 7 April 2021 CGIS received data in response to a search warrant submitted to Snapchat for the account of MK3 Hadley. (Enclosure D.)

18. On or about 9 November 2021, CGIS sought a new search authorization from a military judge for MK3 Hadley's phone. On 10 or 11 November 2021, a military judge signed a search authorization. (Enclosure D.)

19. The November 2021 search authorization was based on a finding of probable cause to believe the phone contained evidence of violations of: "Articles 134 (possession of child pornography; pandering and prostitution; animal abuse), 120(c) [*sic*] indecent exposure, indecent broadcasting, and other sexual misconduct, [and] 112 (a) wrongful use, distribution or possession of Controlled Substance." The allegations in the second affidavit were a compilation of exactly the same information as in the first affidavit, descriptions of the two videos described above found during the first phone search, information about the photo of dried mushrooms found during the first search, and a small amount of information derived from the Snapchat search warrant data. (Enclosure D.)

20. The second phone search authorization permitted CGIS to "[s]earch the seized cellular telephone of MK2 Hadley or the forensic extraction for evidence of the crimes listed" in the previous paragraph, without limitation. (Enclosure D.)

21. On 12 November 2021, SA [redacted] conducted his second review of the cell phone extraction. (Enclosure C.)

LAW

a. Mil. R. Evid. 311: Analytical Framework.

1. The Fourth Amendment of the U.S. Constitution protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV; *see also Payton v. New York,* 445 U.S. 573, 587 (1980). This right is codified in the Military Rules of Evidence under Mil. R. Evid. 311, with the exclusionary remedy at Mil. R. Evid. 311(a)(3), stating that evidence resulting from unreasonable search and seizure by a person acting in a government capacity is inadmissible if the exclusion of the evidence results in appreciable deterrence of future unlawful searches or seizures and the benefits of such deterrence outweigh the cost to the justice system.

2. Evidence derived from an unlawful search or seizure constitutes "fruit of the poisonous tree" and is subject to exclusion. *Wong Sun v. United States*, 371 U.S. 471, 488 (1963). The exclusionary rule encompasses both the direct results of an illegal search or seizure and evidence discovered derivative of those results, the so-called tainted "fruit of the poisonous tree." *Id.* Suppression as a remedy turns on the gravity of the government overreach, the applicability of specific exceptions, and the likely deterrence that exclusion would achieve. *United States v. Wicks*, 73 M.J. 93, 103 (C.A.A.F. 2014) (affirming exclusion of evidence where government cell phone search exceeded scope of prior private search, discussing exclusionary rule). Suppression is appropriate when it "results in appreciable deterrence." *Herring v. United States*, 555 U.S. 135, 141 (2009).

3. The exceptions to the exclusionary rule identified in *Wicks* are that the evidence: was derived from an independent source; the evidence has only an attenuated link to the illegal evidence; or would inevitably have been discovered. *Id.* at 103. "The independent source doctrine allows trial courts to admit evidence obtained in an unlawful search if officers independently acquired it from a separate, independent source." *Utah v. Strieff*, 579 U.S. 232, 238 (2016); *see Murray v. United States*, 487 U.S. 533, 537 (1988) (holding that the independent source doctrine applies to "evidence initially discovered during . . . an unlawful search, but later obtained independently from activities untainted by the initial illegality"). Under the attenuation doctrine, "[e]vidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained." *Strieff*, 579 U.S. at 238 (internal quotation marks omitted). The inevitable discovery doctrine allows admission of evidence that would have been discovered "even without the unconstitutional source." *Id.* However, the inevitable discovery doctrine "cannot rescue evidence obtained via an unlawful search simply because probable cause existed to obtain a warrant when the government presents no evidence that the police would have obtained a warrant." *Wicks*, 73 M.J. at 103. "To take advantage of this doctrine, the prosecution must establish, by a preponderance of the evidence, that *when the illegality occurred*, the government agents possessed, or were actively pursuing, evidence or leads that would have inevitably led to the discovery of the evidence and that the evidence would inevitably have been discovered in a lawful manner had not the illegality occurred." *United States v. Hoffmann*, 75 M.J. 120, 124–25 (C.A.A.F. 2016) (internal quotation marks omitted).

4. If the Defense alleges that a search authorization lacks probable cause, which is only one of the allegations about why the phone search in this case was unconstitutional, then the "good faith exception" set forth in Mil. R. Evid. 311(c)(3) might apply. That exception has three elements: (1) "the search or seizure resulted from an authorization . . . issued by an individual competent to issue the authorization;" (2) "the individual issuing the authorization or warrant had a substantial basis for determining the existence of probable cause;" and (3) "the officials seeking and executing the authorization or warrant reasonably and with good faith relied on the issuance of the authorization or warrant." Mil. R. Evid. 311(c)(3); *see also United States v. Perkins*, 78 M.J. 381, 385–86 (C.A.A.F. 2019); *United States v. Nieto*, 76 M.J. 101, 107 (C.A.A.F. 2017).

b. Reasonable Expectation of Privacy and Probable Cause.

1. "[T]he Supreme Court defines a Fourth Amendment 'search' as a government intrusion into an individual's reasonable expectation of privacy." *United States v. Daniels*, 60 M.J. 69, 71 (C.A.A.F. 2004) (reversing conviction after determining that cocaine seized by roommate at direction of Leading Chief Petty Officer should have been suppressed as warrantless search and seizure); *see also* Mil. R. Evid. 311.

2. "While a warrant makes a search presumptively reasonable, a warrant does not guarantee the constitutionality of a search or relieve the Government of the burden of establishing that the warrant did not authorize an unreasonable search." *United States v. Gurczynski*, 76 M.J. 381, 386 (C.A.A.F. 2017) (internal quotation marks omitted) (affirming suppression where search for child pornography was not covered in warrant and that search happened after accused was convicted of offense that underlay warrant).

3. Under the Military Rules of Evidence, a seizure made pursuant to a search authorization must be based upon probable cause. Mil. R. Evid. 315(f)(1); Mil. R. Evid. 316(c)(5)(A); *see also Nieto*, 76 M.J. at 106. Probable cause is a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched. *Illinois v. Gates*, 462 U.S. 213, 232 (1982). *See also*, Mil. R. Evid. 315. Probable cause to seize property or evidence exists where there is a reasonable belief that the property is in fact evidence of crime. MRE 316(c)(1). If there is an insufficient basis for that probable cause determination, the seizure is illegal and the evidence seized is suppressed under MRE 311.

4. In *Nieto*, the Court of Appeals for the Armed Forces (CAAF) explained probable cause requirements in detail:

> Probable cause determinations are inherently contextual, dependent upon the specific circumstances presented as well as on the evidence itself, and probable cause is founded upon the overall effect or weight of all factors presented to the magistrate. Stated differently, in order for there to be probable cause, a sufficient nexus must be shown to exist between the alleged crime and the specific item to be seized. The question of nexus focuses on whether there was a fair probability' that contraband or evidence of a crime will be found in a particular place. A nexus may be inferred from the facts and circumstances of a particular case, including the type of crime, the nature of the items sought, and reasonable inferences about where evidence is likely to be kept.

Nieto, 76 M.J. at 106 (internal quotation marks, brackets, ellipses, citations, parentheticals omitted).

5. CAAF went on in *Nieto* to explain the role that may be played by a law enforcement officer's 'training and experience' about a particular kind of person or a particular kind of offense:

> "[A] law enforcement officer's generalized profile about how people normally act in certain circumstances does not, standing alone, provide a substantial basis to find probable cause to search and seize an item in a particular case; there must be some additional showing that the accused fit that profile or that the accused engaged in such conduct. While courts have relied on such profiles to inform search determinations, a law enforcement officer's profile alone without specific nexus to the person concerned cannot provide the sort of articulable facts necessary to find probable cause to search or seize.

Nieto, 76 M.J. at 106 (internal quotation marks, brackets, ellipses, citations, omitted).

6. Also in *Nieto*, the Court of Appeals for the Armed Forces (CAAF) recognized the importance of probable cause in the context of modern smart phones. *United States v. Nieto*, 76 M.J. 101, 107 (C.A.A.F. 2017). Citing the Supreme Court's decision in *Riley v. California*, 573 U.S. 373, 396 (2014), the CAAF explained that "[modern] cell phones . . . are 'in fact minicomputers' that have 'immense storage capacity' allowing them to store 'thousands of pictures, or hundreds of videos.' *Id.* In rejecting the ability of the government to conduct a warrantless search of a cell phone, the Supreme Court in *Riley* remarked: "Indeed, a cell phone search would typically

expose to the government far *more* than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form . . . ." *Riley v. California*, 573 U.S. 373, 396-97 (2014). The Supreme Court in *Riley* addressed at length the ways in which modern smart phones implicate privacy concerns unlike any other ubiquitous, easily carried item in history, providing, as one example that "[a] person might carry in his pocket a slip of paper reminding him to call Mr. [redacted] he would not carry a record of all his communications with Mr. [redacted] for the past several months, as would routinely be kept on a phone." *Id.* at 394-95.

c. Search Authorization: Particularity.

1. "The Fourth Amendment . . . provides that 'no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and *particularly describing* the persons or things to be seized.'" *Wong Sun v. United States*, 371 U.S. 471, 481 n.9 (1963) (internal ellipses omitted, *emphasis* added). "[T]he ultimate touchstone of the Fourth Amendment is reasonableness." *Gurczynski*, 76 M.J. at 386 (internal quotation marks omitted).

2. A search authorization that is based on probable cause for a particular offense does not authorize a generalized search for evidence of other offenses—the Constitution prohibits "a general rummaging about." *Gurczynski*, 76 M.J. at 386. "In the absence of some exception to the warrant requirement, to allow the seizure of objects not particularly described in the warrant would violate the familiar principle that no amount of probable cause can justify a warrantless search or seizure." *Id.* (internal quotation marks, ellipsis omitted).

3. CAAF has recognized the difficulty, when searching electronic devices, of balancing the Fourth Amendment's particularity requirement with allowing some flexibility based on the different ways that electronic files can be stored. In *United States v. Richards*, 76 M.J. 365 (C.A.A.F. 2017), the first search authorization did not include a temporal limitation where the underlying suspected offense occurred during a particular timeframe, and an image of suspected child pornography was found during a search of "unallocated" storage space on the device where the files did not have an immediately clear date associated with them. *Richards*, 76 M.J. at 370-71. As soon as the agent found the image of suspected child pornography, "he stopped his search and sought an additional authorization to search for child pornography." *Id.* at 368.

4. However, the *Richards* court was clear that allowing some flexibility in a search authorizations up front does not obviate the requirement that the search be, on the whole, reasonable when reviewed in hindsight: "Of course our reluctance to prescribe ex ante limitations or require particular search methods and protocols does not render them immune from an ex post reasonableness analysis." *Id.* at 370. *See, e.g.*, *United States v. Osorio*, 66 M.J. 632, 637 (A.F. Ct. Crim. App. 2008) (holding computer search invalid where investigator enlarged thumbnail photo outside scope of search authorization).

d. Article 120c, UCMJ: Other Sexual Misconduct.

1. Article 120c, UCMJ, groups together several types of "other sexual misconduct," specifically: Indecent Viewing, Visual Recording, or Broadcasting; Forcible Pandering; and

Indecent Exposure. It is not a sort of general article for anything that is deemed to be "other sexual misconduct" outside of those enumerated offenses.

2. Indecent Broadcasting is defined this way: "Any person subject to this chapter who, without legal justification or lawful authorization knowingly broadcasts or distributes any such recording that the person knew or reasonably should have known was made under the circumstances proscribed in paragraphs (1) and (2)," i.e., a recording of the private area of another person made without that person's consent and under circumstances when that person had a reasonable expectation of privacy, "is guilty of an offense under this section." 10 U.S.C. § 920c(a).

3. Indecent Exposure is defined this way: "Any person subject to this chapter who intentionally exposes, in an indecent manner, the genitalia, anus, buttocks, or female areola or nipple is guilty of indecent exposure." 10 U.S.C. § 920c(c).

4. The Navy-Marine and Army Courts of Criminal Appeals have held that the offense of Indecent Exposure under Article 120c(c), UCMJ, requires in-person exposure "to view the *actual* body parts listed in the statutes, not images or likenesses of the listed parts." *United States v. Uriostegui*, 75 M.J. 857, 865 (N-M. Ct. Crim. App. 2016); *United States v. Williams*, 75 M.J. 663, 666 (A. Ct. Crim. App. 2016).

ARGUMENT

1. The military judge did not have probable cause for the alleged offense that formed the basis of the search authorization for MK3 Hadley's phone, Article 120c. This is true whether one considers only Indecent Exposure, which was the only named offense on any document the military judge signed, or whether one also considers Indecent Broadcasting, which was listed in the affidavit, but not in any document the military judge signed.

2. Even if the affidavit had provided probable cause for one of these offenses, the search authorization and the search itself were unreasonable under all of the circumstances. The search authorization was not reasonably limited. The search execution jumped even the unconstitutionally broad bounds of the search authorization.

3. The illegal phone search, based on a phone seizure on 24 March 2021 and a phone extraction on 29 March 2021, located one video of alleged child pornography, and one video of a dog licking a white man's penis that the Government alleges is a video of MK3 Hadley himself (only a hand, a penis, and a dog are visible in the video). CGIS did not stop its search upon discovering the first of these videos. They did not pause their search when they found a picture of dried mushrooms, instead looking into the metadata for that picture, despite the fact that it had absolutely no nexus to Article 120c. CGIS came across evidence the far exceeded the scope of the authorization, and looked further into that evidence, and continued to look for more evidence regardless of whether it was within the scope of Article 120c. CGIS continued the full search of "over 90,000 photographs and over 7,500 videos," not seeking a broader search authorization until approximately seven months later. The two videos, which are the fruit of an unconstitutional, unfounded, and overbroad search (both the authorization and the search itself) of MK3 Hadley's phone, form the *sole basis* for two charges which add a combined potential 15

years' confinement to the maximum penalty available at a General Court-Martial. Allowing this extreme potential jeopardy based on an unconstitutional search is manifestly unjust.

4. MK3 Hadley provided his phone passcode only based on the representation that there was a valid search authorization. That provision was not actually voluntary, but coerced by the representation that a judge had ordered a search of the phone. Not only was it coerced, it was coerced through the power of a search authorization that was invalid for all of the reasons addressed in this motion.

5. The second search authorization, in November 2021, was based entirely on: the same information as the first unconstitutional search authorization, the evidence derived from the unconstitutional phone search, and the evidence derived from an unconstitutional search warrant executed upon Snapchat.

6. None of the exceptions that might shield the Government from the exclusionary rule apply.

7. The evidence derived from the illegal phone search, and any fruits thereof, must be suppressed. The analysis below addresses each point in turn.

a. The military judge did not have probable cause for a violation of Article 120c, UCMJ.

1. The case at bar is analogous to *United States v. Morales*, 77 M.J. 567 (A. Ct. Crim. App. 2017). In *Morales*, the affidavit provided to the military magistrate did not mention that the victim of a sexual assault charge told law enforcement that she had seen a nude photograph of herself on the accused's phone, only that the victim stated she had exchanged text messages with the accused about the sexual assault. *Id.* at 571-73. On this basis, the accused moved to suppress incriminating photos found within a photo editing application. *Id.* The Army Court of Criminal Appeals (ACCA) found that there was probable cause to search for text messages on appellant's phone, but that the military magistrate "did not have a substantial basis to conclude probable cause existed to search for any photographs," even though the affidavit could have included such information. *Id.* at 573. ACCA also found that the search authorization ran afoul of the probable cause and particularity requirements of the Fourth Amendment, because it was broadly for the search and seizure of "digital communication" pertaining to the alleged sexual assault. *Id.* at 575. ACCA also found that the government had not met their burden for the good faith exception to the exclusionary rule, because the exception does not extend to situations involving the "unlawful execution of a valid warrant." *Id.* at 576.

2. Here, similar to *Morales*, the search authorization was based on the facts laid out in the affidavit. The affidavit did not contain facts sufficient to support a finding of probable cause to believe that evidence of a violation of Article 120c would be found on the phone. The affidavit discussed three different types of messaging, that is, messages: attaching images of MK3 Hadley engaged in sex with a woman, attaching nude images of MK3 Hadley himself, and containing requests for nude images of other Coast Guard members. The last set of messages is not cognizable under Article 120c at all, so we can set those aside.

3. The affidavit did not provide a basis to find probable cause that the alleged messages containing images of what the recipients believed to be MK3 Hadley having sex with a woman

violated Article 120c(a), Indecent Broadcasting. Indecent Broadcasting requires that the picture or video recording be made without the person's consent. There is not so much as an unfounded allegation in the affidavit that the woman or women in the images did not consent to the recording. It is common for people to consensually record themselves having sex and there is no evidence even alleging the recordings might have been non-consensual, which removes this from the ambit of Article 120c(a).

4. Additionally, the alleged messages containing images of MK3 Hadley's nude body do not qualify as Indecent Exposure in violation of Article 120c(c). While there is no binding precedent on this Court addressing whether Indecent Exposure can be achieved by sending electronic images, the intermediate appellate courts for the other services that have considered the question, the Army and the Navy-Marine Courts of Criminal Appeals, have held that it cannot. *See United States v. Uriostegui*, 75 M.J. 857, 865 (N-M. Ct. Crim. App. 2016); *United States v. Williams*, 75 M.J. 663, 666 (A. Ct. Crim. App. 2016). They came to this determination by comparing the text of Article 120b(c) with the text of Article 120c(c), and holding that the inclusion in the former of exposure "via any communication technology," and the exclusion of similar language in the latter, indicated Congress's intent to require in-person exposure for a violation of Article 120c(c). *Id.*

5. Finally, the affidavit states that the affiant believes there is probable cause to believe that evidence of "violations of Article 120c: Indecent Exposure; Indecent Broadcasting; and Other Sexual Misconduct" will be found on the phone. "Other Sexual Misconduct" is listed serially after the first two offenses, but it is a grouping of several specific offenses, not a catch-all general article for assorted sexual misconduct. So this non-offense must also be set aside without further consideration as a basis for the search authorization.

6. Because the affidavit did not support a finding of probable cause for either Indecent Broadcasting or Indecent Exposure under Article 120c, like the search authorization in *Morales*, the search authorization was not supported by probable cause, and was therefore illegal. The evidence from the search and all fruits derived therefrom must be excluded.

b. <u>The search authorization and search were neither particularized nor reasonable, and were unconstitutional</u>.

1. The search authorization purported to permit searching MK3 Hadley's phone for evidence of violation of Article 120c, UCMJ, within the file types of photos, videos, and Snapchat data, as well as the geotag data and metadata associated with those file types. There were no other limitations. This was true despite two gaps in the affidavit's basis for searching that should have provided reasonable limits on the search authorization: First, the lack of about a logical connection between the alleged Snapchat messages and the *entire* collection of photos and videos stored everywhere and anywhere else on the phone. Second, the lack of any time limitation, despite the short period of time during which any of the alleged violations of Article 120c took place.

2. Paragraph 3 of the affidavit purports to explain how Snapchat works, but it does not explain any relationship between all of the photos and videos stored everywhere on a cellular telephone, and messages or content related to the Snapchat application. According to the affidavit, all of the

allegedly offending messages were sent using Snapchat. (Paragraphs 5 through 9 specifically say at the end that all of the messages were sent using Snapchat, paragraph 10, but earlier in the paragraph it refers to a Snapchat message, and does not refer to any other application.) To permit a search of **all** videos and photos on a cell phone, and here CGIS reviewed "over 90,000 photographs and over 7,500 videos," without any stated connection between Snapchat and all of the places on a phone they could be stored, is overbroad and facially unreasonable. The basis for the search, and the search itself, should have been connected in some way to Snapchat, based on all of the information the military judge had in the affidavit.

3. The March 2021 search authorization included no time limitation (nor any other reasonable limitation beyond very broad file types), even though the actual periods during which violations of Article 120c were alleged in the affidavit only included March 2019, July 2019, October 2019, and July 2020 (alleged Indecent Exposure), and April or May 2020, and July 2020 (Alleged Indecent Broadcasting). That covers 7 months out of the 25 months from March 2019 through March 2021. Even if the search authorization had covered the entire period of the alleged offenses, from March 2019 through July 2020, there was an eight-month gap between that period and when the phone was searched. According to CGIS's analysis, the two videos which form the sole basis for two additional charges were "created," *i.e.*, "captured, saved, or archived," on 5 March 2021. Any reasonable time limitation on the search would have precluded the discovery of these videos. The facts in the affidavit provided ample basis to create such a limit.

4. CGIS knew that they were authorized to look only for evidence of violations of 120c, yet when they found the first video or photo well outside their parameters, they did not pause searching immediately to seek a broader search authorization. This is in stark contrast to the examiner in *Richards*, who paused while searching in the unallocated computer space where files did not have easily located date information when he found evidence of a different offense, and got another search authorization before continuing. Instead, CGIS searched all of the "over 90,000 photographs and over 7,500 videos," everywhere and anywhere on the phone, from any time. CGIS did not stop to seek a broader search authorization to go into photos or videos. CGIS did not even stop to seek a broader search authorization when they found the picture of the dried mushrooms, instead looking further into the metadata of that picture to learn the contact name and phone number with whom it had been exchanged. They did not seek a broader search authorization until approximately seven months later, and until after they had searched every picture and video on the phone.

c. <u>The second search warrant was based inextricably on the first, is even more unparticularized, and is equally unreasonable and unconstitutional</u>.

The second search authorization, in November 2021, was based entirely on: the same information as the first unconstitutional search authorization (see sections a. and b. above), the evidence derived from the unconstitutional phone search (see sections a. and b. above), and the evidence derived from an unconstitutional search warrant executed upon Snapchat (the last is the subject of another Defense motion). Thus, for the same reasons outlined above, this search authorization was also unreasonable and unconstitutional. As a result, the fruits of this search should be suppressed.

d. All evidence derived from the unconstitutional search of MK3 Hadley's phone must be suppressed. Exceptions which could make this evidence admissible do not apply.

1. Upon motion by the Defense to suppress evidence under Mil. R. Evid. 311(d), the prosecution has the burden of establishing that the evidence was not obtained as a result of an unlawful search and seizure. Mil. R. Evid. 311(d)(5). The Government must prove, by a preponderance of the evidence, that the evidence was obtained by a lawful search and seizure before the evidence may be admitted into evidence. *Id.* Here, for the reasons outlined above, the government cannot meet that burden. The search authorization lacked particularity, and the execution of the search authorization exceeded even the merest of limits applied in the search authorization. The search was unlawful. Given the multi-layered illegality and the gravity of the evidence that resulted from it, suppression is the only appropriate remedy.

2. The videos obtained from the phone have no independent source, the link is not attenuated as the illegal search is the direct and only connection to the phone evidence, and the Government would not inevitably have discovered the evidence without executing the search authorization on the phone as they did. The Government may argue now that, *post hoc*, they could have submitted a proper request for a search authorization. But, like ACCA explained in *Morales*, the question is not what evidence "could have" formed the basis for probable cause to search the phone for photographs, but what information was actually conveyed to the military judge. *Morales*, 77 M.J. at 574. Here, the government is unable to establish, by a preponderance of the evidence, that *when the illegality occurred*, the government agents possessed, or were actively pursuing, evidence or leads that would have inevitably led to the discovery of the evidence and that the evidence would inevitably have been discovered in a lawful manner had not the illegality occurred.

3. Also, like in *Morales*, the good faith exception (which the Government can invoke only in response to probable cause challenges, not all challenges to searches) does not apply. The military judge who issued the first search authorization did not have a substantial basis for finding probable cause based on the facial insufficiency described previously, so the second element is not met. Similarly, reasonable law enforcement officials investigating the case, researching possible charges, and preparing the search request would have realized, after even a cursory comparison between the elements of the offenses providing the basis for the authorization and the evidence stated in the affidavit, with the barest of case law research, that the request lacked probable cause and particularity. As addressed previously, there is no assertion of the non-consent needed for Indecent Broadcasting, and no live exposure as required for Indecent Exposure, and the officials executing the search knew that. The search authorization was approved the same day, the authorization documents say various different things, and they all say less than the affidavit (at most, the authorization only refers to Indecent Exposure, not Indecent Broadcasting, but there is no indication of any communication to clarify that there was a meeting of the minds about what the search authorization permitted. The Government cannot meet the third requirement.

4. Suppression is appropriate when it "results in appreciable deterrence." *Herring v. United States*, 555 U.S. 135, 141 (2009). That is the case here. Suppression of the evidence in this case would have a powerful effect "in deterring Fourth Amendment violations in the future." *Id.* at 141. A single court ruling would alter practices throughout the Coast Guard. A decision from this

Court suppressing the evidence would be read and digested by government lawyers and law enforcement agents service wide, who would consider and research their search authorization requests more carefully. Inversely, not excluding the phone search evidence in this case would encourage this kind of unconstitutional overreach in the future.

5. Suppression of the fruits of the unlawful phone search would have an impact proportional to the violation: the two videos, which each for the *sole basis*, for their respective charges, would be suppressed, but suppression would not significantly impact the other charges and specifications, for which there is other evidence not linked to the unlawful phone search.

RELIEF REQUESTED

Pursuant to Military Rule of Evidence 311, the Defense moves to suppress the evidence derived from the unconstitutional seizure and searches of MK3 Hadley's personal cellular phone, as well as any further evidence derived therefrom.

ORAL ARGUMENT

Unless the Government concedes the motion or this Court grants the relief requested on the basis of pleadings alone, the Defense requests an Article 39(a) session to present oral argument and additional evidence as necessary pursuant to R.C.M. 905(h).

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I certify that I have served a true copy via e-mail of the above on Military Judge, CDR Emily Reuter, and Trial Counsel, LCDR Erin Callahan, LCDR Amanda Hood, and LCDR Case Colaw, on 17 Nov 2022.

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GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. JOSHUA HADLEY Machinery Technician Third Class U.S. Coast Guard	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO SUPRESS ACCUSED'S CELL PHONE** 01 December 2022

MOTION

The Government respectfully requests the Court deny the Defense's motion because the Coast Guard Investigative Service obtained a lawful search authorization of the accused's phone based on probable cause, the evidence containing child pornography and sexual acts with an animal were found in plain view while conducting the search, and there would be no appreciable deterrence from suppression.

SUMMARY

In their motion, Defense challenges the evidence seized, and subsequently searched, pursuant to a search authorization on the grounds that the authorization was not based upon probable cause. Per Military Rules of Evidence 311(4), the evidence relevant to their motion is limited to evidence concerning the information presented to or otherwise known by the authorizing officer.

In addition, Defense attempts to also argue that the evidence obtained from the search conducted of MK3 Hadley's cell phone was outside the scope of the search authorization.

FACTS

1. The case was referred to a General Court-Martial on 07 October 2022. MK3 Hadley (hereinafter: the "Accused") has been charged with two specifications of Article 92 (Violation of a Lawful General Order), one charge of Article 120 (Abusive Sexual Contact), one charge of Article 134 (Sexual Act with an Animal), one charge of Article 134 (Viewing and Possessing Child Pornography), and an additional charge of Article 120 (Abusive Sexual Contact). The Accused waived his right to a preliminary hearing on 25 August 2022 and was arraigned on 20 October 2022.

2. On 01 June 2020, an unrestricted report of abusive sexual contact was provided to Coast Guard Investigative Service (CGIS) Resident Agent Office (RAO) Honolulu that DC3 [redacted] (now DC2) reported to the [redacted] command that the Accused touched the penis of DC3 [redacted] after DC3 [redacted] had fallen asleep on a couch after attending a party at the Accused's

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home.

3. On 03 June 2020, CGIS agents interviewed the Accused related to the Article 120, UCMJ, offense. The Accused was provided his Article 31b rights and waived his right to counsel and made a statement.

4. On 20 October 2020, following an administrative investigation, the Coast Guard Investigative Service was contacted regarding allegations of the Accused sending sexually explicit photos and videos of himself, and requesting sexually explicit photos of Coast Guard members in exchange for money. CGIS initiated an investigation regarding these allegations. (Enclosure 21).

5. On 19 March 2021, CGIS S/A [redacted] applied for a search authorization, through a military judge, to seize and search the personal cellular telephone and any other mobile device(s) to include tablets, or similar mobile electronic devices within his possession, custody, or control, for electronic data contained therein limited to the following: photos, videos (with their associated geotag and other metadata) and snapchat data (with associated geotag and metadata) of the Accused related to evidence of a crime, contraband, fruits of a crime, or other items illegally possessed. (Enclosure 30).

6. The military judge made a determination that probable cause existed to believe that the Accused's cell phone contained evidence of a crime, to wit: Article 120c UCMJ. The military judge granted the search authorization for the personal cellular telephone, and any other mobile devices to include tablets, or similar mobile electronic devices of the Accused, and authorized S/A [redacted] to seize and search electronic data contained within the phone for evidence of UCMJ violation 120c. The agent was authorized to search the devices for collection and exploitation of the following file types: photos, videos, and SnapChat data, as well as the associated geotag and metadata associated with these types of files listed. *Id.*

7. On 24 March 2021, CGIS interviewed the Accused related to the new allegations. The Accused was provided his Article 31b rights and waived his right to counsel and made a statement.

8. At the end of the interview on 24 March 2021, CGIS gave the Accused the search authorization for his cell phone and requested the Accused's passcode. The Accused gave consent to providing his passcode to his phone. (Enclosure 31).

9. CGIS reviewed the extraction on 21 April 2021, and during that initial review found the video related to Charge III (Animal Abuse) is Josh's iPhone/mobile/Media/DCIM/[redacted] and the file path for the video related to Charge IV containing contraband/child sexual abuse material, "Josh's iPhone/mobile/Media/DCIM/[redacted] (Enclosure 21, Govt. Bates No. 000167).

10. When CGIS agents reviewed the contraband video, they submitted a request to the National

Center for Exploited Children (NCMEC). The submission resulted in a match with a known series that contained child pornography. (Enclosure 41).

11. On 11 November 2021, CGIS S/A [redacted] applied for a search authorization, through a military judge, CDR Bryan Tiley, to seize and search the personal cellular telephone for evidence of Article 134 (Child Pornography), Article 120c, and Article 122(a) and the search authorization was granted. (Enclosure 32).

BURDEN

Per M.R.E. 311(d)(5), the prosecution has the burden of proving by a preponderance of the evidence that the evidence was not obtained as a result of an unlawful search or seizure; that the evidence was obtained by officials who reasonably and with good faith relief on the issuance of an authorization to search, seize, or a search warrant.

LAW

The Fourth Amendment ensures that people have a right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. Amend. IV. The focus of the Fourth Amendment right is the protection against unreasonable searches and seizures that result "general, exploratory rummaging in a person's belongings." *Coolidge v. New Hampshire,* 403 U.S. 443, 467 (1971). As such, a search warrant must: (1) be based on probable cause; (2) be supported "by Oath or affirmation"; and (3) "particularly describ[e] the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. A warrant or authorization based on probable cause are presumptively reasonable. *United States v. Gurczynski,* 76 M.J. 381, 386 (C.A.A.F 2017). Evidence obtained from a reasonable search conducted pursuant to a search warrant or search authorization is admissible at trial when relevant and not otherwise inadmissible under the Military Rules of Evidence or the Constitution of the United States. M.R.E. 315.

M.R.E 311 governs the use of evidence obtained from unlawful searches and seizures at trial. Per M.R.E. 311, "evidence obtained as a result of an unlawful search or seizure…is inadmissible against the accused" if:

a) The accused makes a timely motion to suppress or an objection to the evidence under this rule;

b) The accused had a reasonable expectation of privacy in the person, place, or property searched; and

c) Exclusion of the evidence results in appreciable deterrence of future unlawful searches or seizures and the benefits of such deterrence outweigh the costs of the justice system.

However, under the exclusionary rule of MRE 311 suppression of evidence is not an automatic

consequence of a potential violation, if one exists, and exceptions to the exclusionary rule do exist. This includes an investigator's good faith reliance on a search authorization, MRE 311(c)(3), which states that evidence that was obtained as a result of an unlawful search or seizure still may be used at trial if certain factors are met.

Probable Cause

Defense's main claim in its motion is that the search authorization was unlawful because the military judge did not have probable cause to issue the search. When reviewing a search authorization, the court shall "not review a probable cause determination *de novo*;" rather, assess whether "the authorizing official had a 'substantial basis' for concluding that probable cause existed." *United States v. Hoffmann*, 75 M.J. 120, 125 (C.A.A.F 2016). A substantial basis exists when a sufficient nexus between the alleged crime and the item to be seized." *US v. Nieto*, 76 M.J. 101, 106 (C.A.A.F 2017). The nexus should be focused on whether there was a "fair probability" that contraband or evidence of a crime will be found in a particular place and should be determined based on the totality of the circumstances. *United States v. Morales*, citing *United States v. Clayton*, see also *Illinois v. Gates*, U.S. 213 (1982). Due to the Fourth Amendment's strong preference for searches conducted pursuant to a warrant, "great deference" should be given to magistrate's or military judge's probable cause determinations, see *United States v. Morales* citing, *Nieto*. See also *Massachusetts v. Upton*, 466 U.S. 727, 733 and *US v. Blackburn*, 80 M.J. 205, 211. *United States v. Beck*, ACM 39793, 2021 WL 1566807, at *11 (A.F. Ct. Crim. App. Apr. 21, 2021), review denied, 81 M.J. 449 (C.A.A.F. 2021)

Although the magistrate or military judge's determination of probable cause is afforded great deference, the determination "cannot be a mere ratification of the bare conclusions of others." *United States v. Carter*, 54 M.J. 414, 415-419 (C.A.A.F. 2001). There are three exceptions recognized in this general rule; first, the affidavit upon which the determination was based was prepared with knowing or reckless falsity, see *Franks v. Delaware*, 438 U.S. 154 (1978); second, the magistrate is not a neutral or detached function and serves merely as a "rubber stamp" for the police. *Aguilar v. Texas*, *supra*, at 111; and third, if the warrant was based on an affidavit that does not "provide the magistrate with a substantial basis for determining the existence of probable cause." *Illinois v. Gates*, 462 U.S., at 239."

Reasonable and Particular

Even based upon a search authorization and probable cause, a search must also be conducted in a reasonable manner and with a level of particularity to prevent general searches. U.S. Const. Amend. IV. See also *Maryland v. Garrison*, 480 U.S. 79. "Searches conducted after obtaining a warrant or authorization based on probable cause are presumptively reasonable whereas warrantless searches are presumptively unreasonable unless they fall within a few specifically established and well-delineated exceptions." *Hoffmann*, 75 M.J. at 123–24 (internal quotation marks omitted) (quoting *United States v. Wicks*, 73 M.J. 93, 99 (C.A.A.F. 2014)). While a warrant makes a search presumptively reasonable, a warrant "does not guarantee the constitutionality" of a search "or relieve the Government of the burden of establishing that the

warrant did not authorize an unreasonable search." *United States v. Smeal*, 23 C.M.A. 347, 350, 49 C.M.R. 751, 754 (1975); see also Camara v. Municipal Court of San Francisco, 387 U.S. 523, 539, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967) ("The warrant procedure is designed to guarantee that a decision to search private property is justified by a reasonable government interest. But reasonableness is still the ultimate standard."). To assess whether a search is reasonable, we must assess, "on the one hand, the degree to which [the search] intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Riley v. California*, 573 U.S. 373 (2014) (quoting *Wyoming v. Houghton,* 526 U.S. 295, 300, 119 S.Ct. 1297, 143 L.Ed.2d 408 (1999)).

In regards to the search of electronic devices there must be an affirmative limit to the either the specific crime or specific type of material. However, there is considerable support in federal law that there "needs to be a balance by not overly restricting the ability to search electronic devices." *United States v. Richards*, 76 M.J. 365 (CAAF 2017). Particularity will be dependent on the totality of the circumstances, especially with electronic devices. As many courts recognize the difficulties accessing hidden data or materials but still want to avoid "general searches." For example, the court in *Richards* concluded that an authorization did not require date restrictions because the search authorization of a personal computer related to sexual communication between the accused and a minor was already sufficiently particularized "to prevent a general search." *Id.* At 370.

Plain View Doctrine

Once an investigator is provided a valid search authorization and begins to execute the search they are limited to the scope of the search authorization provided by the magistrate. That limitation can be to a specific area, folder, application, or file type. However, if while in the course of an otherwise lawful activity an investigator "observes in a reasonable fashion property or evidence that the person has probable cause to seize" it may be seized for use in evidence and is admissible at trial when relevant and not otherwise inadmissible. M.R.E 316. The "Plain View" doctrine allows law enforcement officials conducting a lawful search to seize items in plain view if they are 1). acting within the scope of their authority and 2). have probable cause to believe the item is contraband or evidence of a crime." See *United States v. Fogg,* 52 M.J. 144, 149 (C.A.A.F) 1999). This exception applies even if "an officer is interested in an [unauthorized] item of evidence and fully expects to find it" there. *Horton v. California*, 496 U.S. 128, 138, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990).

"Good Faith Execution of a Warrant or Search Authorization."

If a court does find the magistrate judge did not have probable cause or the evidence was otherwise obtained by an unlawful search or seizure, under M.R.E. 311(c)(3), the evidence still may be used if the following factors are met:

a) The search or seizure resulted from an authorization to search, seize or apprehend issued by an individual competent to issue the authorization under Mil. R. Evid. 315(d) or from

a search warrant or arrest warrant issued by competent civilian authority;

b) The individual issuing the authorization of warrant had a substantial basis for determining the existence of probable cause; and

c) The officials seeking and executing the authorization or warrant reasonably and with good faith relief on the issuance of the authorization or warrant. Good faith is to be determined using an objective standard.

This M.R.E. was intended to incorporate the good faith exception to the exclusionary rule first articulated in *United States v. Leon*, 468 U.S. 897 (1984). *United States v. Carter*, 54 M.J. 414, 420 (C.A.A.F. 2001). There are only four bars to the good-faith exception: (1) when part of the information given to the authorizing official is intentionally false or given with reckless disregard for the truth; (2) if there is "no reasonably well trained officer should rely on the warrant; third, the exception will not apply if the affidavit is to lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable;" and fourth, if the authorization is so "facially deficient" that the executing officers cannot reasonably presume it to be valid. *United States v. Blackburn citing, United States v. Leon*, 468, U.S. 897 (1984). None of those bars apply in this case. "(1) False or reckless affidavit--Where the magistrate was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth; (2) Lack of judicial review--Where the magistrate wholly abandoned his judicial role or was a mere rubber stamp for the police; (3) Facially deficient affidavit--Where the warrant was based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; and (4) Facially deficient warrant--Where the warrant is so facially deficient -- i.e., in failing to particularize the place to be searched or the things to be seized -- that the executing officers cannot reasonably presume it to be valid." *Carter* at 419-20.

For clarification, a "substantial basis" means if the *law enforcement officer* (emphasis added) had a reasonable belief that the magistrate judge had a substantial basis. *United States v. Perkins* 78 M.J. 381 (CAAF 2019), see also *United States v. Blackburn*.

Again, the primary purpose of the exclusionary rule is to deter law enforcement misconduct and the exclusionary rule should not apply where there has been no law enforcement misconduct, and a deferential standard of review toward the magistrate judge should be used.

ARGUMENT

Lawful Search Authorization and Probable Cause

A search pursuant to a warrant is lawful under the Fourth Amendment where the military judge has a substantial basis to determine that evidence exists in the location or place to be searched based on probable cause. On 19 March 2021, the military judge, CDR Brendan Gavin, reviewing the search authorization application, looked at the totality of the circumstances and made the

determination that there was a fair probability that the evidence related to Article 120c: Indecent Exposure; Indecent Broadcasting; and Other Sexual Misconduct would be found in the photo and video files and Snap Chat data on the Accused's cell phone. The military judge made this determination based off the application and affidavit that was provided by the Coast Guard Investigative Service Agent, S/A [redacted]

The affidavit included specific facts related to the ongoing investigation to include, CGIS conducting numerous interviews of Coast Guard members that were reporting that the Accused had been sending unwanted pictures of his genitals, sexually explicit videos, and soliciting pictures of other member's penises for money over the social media application SnapChat, for over a year beginning in early-2019 to mid-2020. In addition, S/A [redacted] included that when the application, SnapChat, is downloaded on mobile devices the user provides SnapChat permission to access their mobile device's camera, contacts, location, microphone, phone, and storage. (Enclosure 30). In his affidavit, S/A [redacted] also explains how photos taken using the application can be saved in other applications on the mobile phone, including a photo's standard photo application.

CDR Brendan Gavin, a Coast Guard military judge qualified and authorized to issue search authorizations received the application, reviewed the affidavit and considered any verbal claims presented during the Article 30a session, made his determination, and issued the search authorization for the Accused's personal cell phone and any other mobile devices. see M.R.E. 315(d)(2) and Rules of Practice before Coast Guard Courts-Martial (Rev. October 2020). The search authorization was limited to specific file types, which included: "photos, videos, and snapchat data, as well as the associated geotag and metadata associated with these type of files listed." The search authorization did not limit the agent's search with dates.

In reviewing the affidavit submitted, it is highly reasonable to believe that the military judge would have come to that determination by the totality of the circumstances, the nexus between the SnapChat application and the Accused's photo and video library on his phone, and the existence of evidence related to violations of Article 120c: Indecent Exposure; Indecent Broadcasting; and Other Sexual Misconduct is evident.

Defense argues that the Search Authorization signed by the military judge was limited to Article 120c, UCMJ, violation of indecent exposure and not related to any other possible specifications or offenses under Article 120c, despite the agent listing all offenses under Article 120c in the affidavit. Defense further agues that due to the Army and Navy-Marine Courts of Criminal Appeals held an accused, at courts-martial, could not be found guilty of indecent exposure because the accused used their phone or the internet to show images of their genitals due to a possible in-person or temporary element. The Government argues that the referenced cases are not binding on this court, nor applicable or relevant on the military judge's determination that probable cause existed for the search warrant in this case.

Looking at the totality of the circumstances, the affidavit drafted by the agent, and both pages of the search authorization that the military judge signed, is clear that the search authorization was

not limiting the scope of the search to only evidence related to violations of "indecent exposure" but addressing the any violation of Article 120c, UCMJ, which includes indecent exposure, indecent broadcasting, and other sexual misconduct. When deciding whether probable cause exists the authorizing official is free to draw reasonable inferences from the material supplied by those applying for the authority to search. Again, a finding of probable cause "merely requires that a person of reasonable caution could believe that the search may reveal some evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. *United States v. Hernandez,* 81 M.J. 432 *citing United States v. Bethea*, 61 M.J. 184, 187 (C.A.A.F. 2005) (quoting Texas v. Brown, 460 U.S. 730, 742 (1983)).

The second search was also pursuant to a warrant is lawful under the Fourth Amendment where the military judge has a substantial basis to determine that evidence exists in the location or place to be searched based on probable cause. On 11 November 2021, the military judge, CDR Bryan Tiley, reviewing the search authorization application, looked at the totality of the circumstances and made the determination that there was a fair probability that the evidence related to Article 134 (possession of child pornography; pandering and prostitution; animal abuse), 120c indecent exposure, indecent broadcasting, and other sexual misconduct, and 112(a) wrongful use of distribution or possession of controlled substance, would be found in the photo and video files and Snap Chat data on the Accused's cell phone. See Enclosure 32) The military judge made this determination based off the application and affidavit that was provided by the Coast Guard Investigative Service Agent, S/A [redacted]

The affidavit included specific facts related to the ongoing investigation to include, CGIS conducting numerous interviews of Coast Guard members that were reporting that the Accused had been sending unwanted pictures of his genitals, sexually explicit videos, and soliciting pictures of other member's penises for money over the social media application SnapChat, for over a year beginning in early-2019 to mid-2020. In addition to the facts in the first authorization, S/A [redacted] included information and details of the images and videos that were found in plain view during the previous search and expanded the locations to the entire phone.

Reasonableness and Particularity

Defense also argues that the search authorization lacks particularity and is unreasonable. A search conducted pursuant to a validly issued warrant is presumptively reasonable. *Hoffmann*, 75 M.J. at 123–24. The principle of reasonableness necessarily relies on the scope of the warrant, the execution, and timing. *United States v. Gurczynski*, at 381. The search authorization issued on 19 March 2021 was limited to specific locations within the Accused's phone, i.e., his photo and video library and any SnapChat data. This is reasonable considering the allegations are related to the sending of explicit, sexual photos and videos of the Accused to other Coast Guard members. Once the agents received the authorization they served the Accused after a CGIS interview and then requested consent for his passcode, which he provided. Then upon searching his phone agents acted within the scope of the authorization and limited their search to those locations. It is important to note there is considerable support in federal law that there "needs to be a balance by not overly restricting the ability to search electronic devices." *US v. Richards*, 76

M.J. 365 (CAAF 2017).

"The manifest purpose of the particularity requirement was to prevent general searches. By limiting the authorization *to search to the specific area and things for which there is probable cause to search*, the requirement ensures that the search will be carefully tailored to its justifications and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." (emphasis added) *United States v. Richards,* 76 M.J. 365, 369 (C.A.A.F 2017). In the search of electronic devices there must be an affirmative limit to the either the specific crime or specific type of material. Courts advise that particularity is dependent on the totality of the circumstances, especially with electronic devices and many recognize the difficulties accessing hidden data or materials but still want to avoid "general searches." For example, the court in *Richards* concluded that an authorization did not require date restrictions because the search authorization of a personal computer related to sexual communications between the accused and a minor was already sufficiently particularized "to prevent a general search." *Id.* At 370.

The search authorization did not have a specific time identified, but due to the allegations spanning over a year and half, possibly more, a removing any limitation of time reasonable, especially with electronic devices. In addition, C.A.A.F has found that an authorization does not require a date restriction if it was already sufficiently particularized to prevent a general search and "is by no means a requirement." See *United States v. Richards* at 370. The military judge reasonably limited the scope of the search authorization to specific file types, avoiding a potential for a general search without restricting the legitimate search objectives. See *Richards* at 369.

Plain View Doctrine

One exception to the warrant requirement for items not otherwise subject to a lawful search is the plain view doctrine or plain view exception, which allows law enforcement officials conducting a lawful search to seize items in plain view if they are acting within the scope of their authority and have probable cause to believe the item is contraband or evidence of a crime. See *United States v. Fogg*, 52 M.J. 144, 149 (C.A.A.F. 1999) (citing M.R.E. 316(d)(4)(C)). In order for this "plain view" exception to apply, (1) the officer must not violate the Fourth Amendment in arriving at the spot from which the incriminating materials can be plainly viewed; (2) the incriminating character of the materials must be immediately apparent; and (3) the officer must have lawful access to the object itself. In this regard, the Supreme Court has noted that the "distinction between looking at a suspicious object in plain view and moving it even a few inches is much more than trivial for the purposes of the Fourth Amendment," and the plain view exception must "not be used to extend a general exploratory search from one object to another until something incriminating at last emerges."

Specifically, The plain view exception applies in this case to the two explicit videos found involving the Accused's dog and child pornography. First, the agent did not violate the Fourth Amendment upon arriving at the two videos that Defense argues are outside the scope of the

search authorization. While conducting the search, in accordance with the issued search authorization, the agent reviewed the video files on the cell phone of the Accused, file path is listed in Enclosure 21. The agent discovered over 180 homemade-type images and video files displaying sexually explicit content, similar to that alleged by the witnesses, including videos and photos of the Accused. Within the video folder, S/A [redacted] discovered two videos stored on the Accused's phone, a seven second video of a yellow Labrador retriever licking an unknown substance from the tip of a penis. The other video that was found was a nine second video of containing child sexual abuse material. Second, each video's content is immediately apparent and can be identified by the first couple second of each video playing. Third, S/A [redacted] had had obtained a search authorization that explicitly provided him lawful authority to seize and search the Accused's phone, specifically video files and folders, which is where these videos were found.

Although the videos discovered may not have been directly related to the offenses in the search authorization, the images should not be excluded due to the agent's actions meeting all of the factors related to the plain view exception.

Good Faith Exception

Even if the court rules that the evidence within the Accused's cell phone was obtained by an unlawful search, the evidence should still be admitted under the good faith exception. Suppression of evidence gathered pursuant to a warrant is a "last resort, not our first impulse." *Herring v. United States*, 555 U.S. 135, 140, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009) (internal quotation marks omitted) (citation omitted). Moreover, "[t]he fact that a neutral magistrate has issued a warrant is the clearest indication that the officers acted in an objectively reasonable manner or... in objective good faith." *Messerschmidt v. Millender*, 565 U.S. 535, 546, 132 S.Ct. 1235, 182 L.Ed.2d 47 (2012) (internal quotation marks omitted) (citation omitted).

The good faith exception to the exclusionary rule is applicable when investigators "act with an objectively reasonable good faith belief" that their conduct is lawful. *US v. Morales,* 77 M.J. 567, 576. Evidence obtained from an unlawful search or seizure is still admissible when: (1) the search and seizure was executed pursuant to a search warrant issued by a competent authority; (2) the individual issuing the search warrant had a substantial basis for determining the existence of probable cause; and (3) the officials seeking and executing the warrant reasonably and with objective good faith relief on the issuance of the warrant. M.R.E. 311(c)(3).

It is important to point out that the meaning "substantial basis" does not have the same meaning as the term "substantial basis" in *Illinois v. Gates.* Rather, "substantial basis" in terms of the good faith exception is satisfied, "if law enforcement official had an objectively reasonable belief that the magistrate had a 'substantial basis' for determining the existence of probable cause. *US v. Morales,* 77 M.J. 567, 577 (C.A.A.F 2017). In this case, it is clear through the agent's affidavit, which the location of the requested search was broader than the authorization signed by the military judge, that he had reasonable belief that the military judge had a substantial basis to determine the existence of probable cause. The only actions that bar the use of the good faith

exception are "(1) False or reckless affidavit; (2) Lack of judicial review; (3) facially deficient affidavit; and (4) facially deficient warrant. See also *Carter* at 419-20. The Defense has not offered any evidence to support that any of above occurred.

Under Fourth Amendment jurisprudence, the exclusionary rule only applies when it "results in appreciable deterrence." *Herring v. United States*, 555 U.S. 135, 141 (2009) (quoting *Leon*, 468 U.S. at 909). Deterrence per se is not the only trigger for the exclusionary rule because the "benefits of deterrence must outweigh the costs." *Id.* (quoting *Leon*, 468 U.S. at 910). "To the extent that application of the exclusionary rule could provide some incremental deterrent, that possible benefit must be weighed against its substantial social costs." *Id.* (quoting *Illinois v. Krull*, 480 U.S. 340, 352-53 (1987) (internal alterations omitted)). "[T]he exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." *Id.* at 144. The determination of good faith on the part of the law enforcement conduct at issue is an objective standard of "whether a reasonably well trained officer would have known that the search was illegal in light of all of the circumstances." *Id.* at 145 (citing Leon, 468 U.S. at 922, n 23) (internal quotations omitted).

Again, even if the court found the search authorization to be unlawful, the good faith exception would apply and suppression would not result in any appreciable deterrence, as the factors listed in *Carter* all weigh in favor of admission. The agent in this case obtained a search warrant by providing a military judge with an affidavit that established the specific allegations from witnesses and relevant digital evidence to the case. The military judge had reviewed the agent's affidavit and was briefed on the allegations against the accused, had sufficient nexus between the location to be search and evidence related to a crime, and reviewed the affidavit for probable cause. Further none of the bars to the good faith exception apply here. The affidavit was not intentionally or recklessly false, nor is it a "bare bones recital of conclusions." *Carter* 54 M.J. at 421. Rather the affidavit specifically lays out the allegations made by Coast Guard members regarding the Accused's persistent and pervasive requests for photos of their penises, sending explicit sexual content include video and images of himself, and through the agent's knowledge and experience communicated the nexus between the use of the SnapChat application and the storage capabilities with one's personal cell phone device. Lastly, the military judge had a substantial basis for issuing the search warrant and did not merely "rubber stamp" the document. The process worked as it should with the agent requesting through the proper channels and the military judge reviewing the affidavit and making his probable cause determination. There would be no appreciable deterrence from suppressing this evidence.

RELIEF REQUESTED

The Government respectfully requests the Court deny Defense's motion to suppress and find that the search authorization was based on probable cause. The government respectfully requests oral argument.

ENCLOSURES

Enclosure 21- CGIS Report of Investigation Part 2
Enclosure 30- Search Authorization dtd 19 March 2021
Enclosure 31- MK3 Hadley's Signed Consent to Provide Passcode
Enclosure 32- Search Authorization dtd 11 November 2021
Enclosure 41- NCMEC Report

CALLAHAN.ERIN.CATHERINE.[redacted] Digitally signed by CALLAHAN.ERIN.CATHERINE.[redacted] Date: 2022.12.01 17:15:46 -08'00'

ERIN C. CALLAHAN
Lieutenant Command, USCG
Trial Counsel

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the above was served on the military judge and defense counsel via electronic mail on 01 December 2022.

CALLAHAN.ERIN.CATHERINE.[redacted] Digitally signed by CALLAHAN.ERIN.CATHERINE.[redacted] Date: 2022.12.01 17:16:06 -08'00'

ERIN C. CALLAHAN
Lieutenant Commander, USCG
Trial Counsel

APPELLATE EXHIBIT 29.
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COAST GUARD TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **JOSHUA HADLEY** **MK3/E-4** **U.S. COAST GUARD**	**DEFENSE MOTION TO SUPPRESS** **(Snapchat Search Warrant)** **17 NOV 22**

MOTION

Pursuant to Rule for Courts-Martial (R.C.M.) 905(b)(3) and Military Rules of Evidence (Mil. R. Evid.) 311 and 401-403, the Defense moves to suppress the content of MK3 Hadley's Snapchat account on the basis that the Government obtained the materials as a fruit of its unlawful suspicionless seizure, and as the result of an unconstitutionally overbroad search warrant, in violation of the Fourth Amendment to the United States Constitution.

SUMMARY

MK3 Hadley's private messages in his personal Snapchat account were seized at the government's direction under the claimed authority of a federal statute, 18 U.S.C. § 2703(f) (hereinafter, "the preservation statute"). The preservation statute provides that, "upon the request of a governmental entity," Internet providers "shall . . . retain[]" files in a user's account "for a period of 90 days," renewable for another 90 days. *Id.*

The government believes that the preservation statute allows the government to order copies made of the contents of any person's Internet accounts, and to have those contents held for the government for up to 180 days, without any cause whatsoever. Based on this understanding, SNAP INC. (referred to herein as Snap Inc. or Snapchat)), acting at the government's agent, seized accused's private contents upon receiving the initial request from the Coast Guard Investigative Service (CGIS) dated **19 June 2020**, and held them on the government's behalf for **268** days, until CGIS eventually sought a search warrant on grounds completely different from the June 2020 investigation.

At the beginning, in June 2020, CGIS was investigating an alleged violation of Article 120, Uniform Code of Military Justice (UCMJ) (abusive sexual contact). Months later, in October 2020, CGIS began to investigate a possible violation of Article 92, UCMJ (violation of a lawful general order prohibiting sexual harassment), Article 120c, UCMJ (indecent recording and broadcasting), and Article 134, UCMJ (indecent conduct), allegedly achieved through the transmission of Snapchat messages containing explicit images or videos. When CGIS finally sought the search warrant in March 2021, the June 2020 alleged abusive sexual contact was not even mentioned in the supporting affidavit as one of the offenses for which evidence was likely

to be found in the Snapchat data (it was briefly mentioned in one paragraph of case history). The affidavit failed to inform the military judge that CGIS had previously requested the preservation of Snapchat data, or that the three preservation requests far exceeded the time period permitted by statute. The search warrant itself covered an unfounded and unconstitutionally broad two-year period, extending well after even the affidavit in support of the search warrant alleged any criminal Snapchat messages were sent. It had no limitations at all with respect to content of messages or message recipients to be searched for, presenting an egregious facial violation of the Fourth Amendment's particularity requirement.

This long-term, government-directed, suspicionless seizure of MK3 Hadley's personal messages cannot be reconciled with the Fourth Amendment. Instead of preservation occurring "pending the issuance of a court order," 18 U.S.C. § 2703(f)(1), as the Fourth Amendment and the plain text of the statute require, the government used the preservation statute to gain control of Accused's account just in case probable cause eventually developed.

The Fourth Amendment protects the private Internet communications in a password-protected online account. A government-directed copying and setting aside of a person's private account is a Fourth Amendment seizure. Such a warrantless seizure is permitted under the Fourth Amendment only in very limited circumstances, generally based on probable cause and permitted only for a brief period of time. Because the warrantless seizure in this case occurred without any justification and for an extended period, the fruits of that seizure—the contents of the preserved account—must be suppressed.

BURDEN

Upon motion by the Defense to suppress evidence under Mil. R. Evid. 311(d), the prosecution has the burden of establishing that the evidence was not obtained as a result of an unlawful search and seizure. Mil. R. Evid. 311(d)(5). The military judge must find by a preponderance of the evidence that the evidence was obtained by a lawful search and seizure before the evidence may be admitted into evidence. *Id.*

FACTS

1. On 22 June 2022, charges were preferred against MK3 Hadley alleging violations of Article 92, UCMJ (violation of a lawful general order prohibiting sexual harassment from January 2019 to December 2019 and from January 2020 to August 2020), Articles 120 and 128 (abusive sexual contact for and assault consummated by a battery on 31 May 2020, in touching the penis and scrotum of DC2 [redacted] without his consent[1]), and Article 134 (sexual act with an animal and viewing and possessing child pornography, both on or about March 2021). On 23 August 2022 an additional charge was preferred for violation of Article 120 (abusive sexual contact for touching the penis of DC2 [redacted] knowing that he was asleep, on 31 May 2020). On 24 August the Government modified the previously preferred charges and dismissed the charge under Article 128. (Charge Sheet of 22 June 2022 as amended on 24 August 2022; Additional Charge on Charge Sheet of 23 August 2022.)

[1] In May 2020 [redacted] was a DC3, but is now a DC2, and is referred to as such in this brief.

2. CGIS received a report on 1 June 2020 of a possible sexual assault on 31 May 2020. (Enclosure A.)

3. On 19 June 2020, CGIS Special Agent (SA) [redacted] sent a letter to Snapchat, Inc. requesting the preservation of "[redacted] The basis for the preservation demand was that the account [redacted]" and the legal authority cited was Title 18, United States Code Section 2703(f). The letter also instructed Snapchat not to disclose the preservation to anyone. (Enclosure C.)

4. On 17 September 2020, SA [redacted] sent a letter to Snapchat, Inc. with the subject "[redacted] The letter is otherwise identical to the 19 June letter. (Enclosure C.)

5. On 14 December 2020, SA [redacted] sent another letter to Snapchat, Inc. with the subject [redacted] The username is all lowercase, but otherwise the letter is identical to the 17 September letter, and other than the [redacted] notation is also identical to the 19 June letter. (Enclosure C.)

6. On 20 October 2020, CGIS received a report that MK3 Hadley had allegedly sent unsolicited sexually explicit photographs and videos of himself to other Coast Guard members via Snapchat, and had requested explicit pictures of them. After that date, CGIS conducted a supplemental investigation. According to SA [redacted] affidavit in support of the Snapchat search warrant, the explicit media was sent around March 2019, July 2019, October 2019, February to March 2020, April or May 2020, and July 2020. There is no evidence in the affidavit or discovery that the messaging to Coast Guard members continued after July 2020. (Enclosure D, Affidavit ISO Snapchat Search Warrant; Enclosure E.)

7. Eventually, around 12 March 2021 CGIS and Trial Counsel sought a search warrant for all Snapchat subscriber information associated with a telephone number and, for 1 March 2019 to 1 March 2021, [redacted] as described in Attachment B to the warrant. (Enclosure D.)

8. On 13 March 2021, a military judge signed the search warrant. Attachment B describes the information to be seized, and it includes all subscriber information and all records, including communications, for 1 March 2019 to 1 March 2021. Attachment A lists MK3 Hadley's name and a mobile phone number. (Enclosure D.)

9. On 7 April 2021 Snap Inc. provided data in response to the search warrant, including nearly a gigabyte of data, and a spreadsheet containing over 11,000 lines of messages. Of those 11,000 messages, none appear to contain relevant communications between MK3 Hadley and any of the alleged sexual harassment complaining witnesses. (Enclosure D.)

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[2] Snapchat was created in 2011, and it is known for letting users send messages that disappear. As of 2016, over 40 percent of Americans from 18 to 34 used Snapchat. (Enclosure B.)

LAW

a. Mil. R. Evid. 401-403: Analytical Framework.

1. Mil. R. Evid. 401 provides that evidence is relevant if: "(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Under Mil. R. Evid. 402(b), "[i]rrelevant evidence is not admissible." Under the Mil. R. Evid. 403 balancing test, the military judge "may exclude evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence." Where the probative value of the evidence is low and the danger of unfair prejudice is high, the evidence should be excluded. *United States v. Pratt*, 73 F.3d 450 (1st Cir. 1996).

b. Mil. R. Evid. 311: Analytical Framework.

1. The Fourth Amendment of the U.S. Constitution protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. This right is enforced in the Military Rules of Evidence under Mil. R. Evid. 311(a), stating that evidence resulting from unreasonable search and seizure by a person acting in a government capacity is inadmissible if the accused makes a timely motion to suppress, the accused had a reasonable expectation of privacy in the property searched, and the exclusion of the evidence results in appreciable deterrence of future unlawful searches or seizures and the benefits of such deterrence outweigh the cost to the justice system. "[T]he Supreme Court defines a Fourth Amendment 'search' as a government intrusion into an individual's reasonable expectation of privacy." *United States v. Daniels*, 60 M.J. 69, 71 (C.A.A.F. 2004) (reversing conviction after determining that cocaine seized by roommate at direction of Leading Chief Petty Officer should have been suppressed as warrantless search and seizure).

c. The Stored Communications Act: Analytical Framework.

1. The Stored Communications Act, 18 U.S.C. §§ 2701-11, is a federal statute that regulates government access to the private records of Internet users. Internet providers such as Snapchat hold their users' records on their computer network servers. When criminal investigators seek copies of records from the accounts of criminal suspects, investigators obtain the records directly from the Internet providers. The Stored Communications Act establishes the responsibilities and duties of both the government and Internet providers when the government seeks user information. See generally 2 WAYNE LAFAVE, ET AL., CRIMINAL PROCEDURE § 4.8 (4th ed. 2015) (presenting overview of the statute).

2. This case involves the Stored Communications Act's preservation statute found at 18 U.S.C. § 2703(f). The statute provides:

> (f) Requirement To Preserve Evidence.
> (1) In general.— A provider of wire or electronic communication services or a remote computing service, upon the request of a governmental entity, shall take all necessary steps to preserve records and other evidence in its possession pending the issuance of a court order or other process.

(2) Period of retention.— Records referred to in paragraph (1) shall be retained for a period of 90 days, which shall be extended for an additional 90-day period upon a renewed request by the governmental entity.

3. The preservation statute was enacted to ensure government access to user records that might otherwise be deleted before the government obtained legal process. Because obtaining legal process can be time-consuming, the preservation statute "permits the government to direct providers to 'freeze' stored records and communications" of suspects pending the issuance of a warrant or other court order. U.S. DEP'T OF JUST., SEARCHING AND SEIZING COMPUTERS AND OBTAINING ELECTRONIC EVIDENCE IN CRIMINAL INVESTIGATIONS 139 (2009).

4. The key question is when the preservation statute can be used. The government and major Internet providers interpret 18 U.S.C. § 2703(f) to permit unlimited preservation of Internet accounts. *See* Orin S. Kerr, *The Fourth Amendment Limits of Internet Content Preservation*, 65 St. Louis U. L.J. 753, 766-78 (2021) (summarizing government and provider practices) (hereinafter Kerr, *Internet Content Preservation*). As the government interprets the law, the statute allows any government agent, at any time, to order any provider to make and set aside a copy of every file, of any Internet account, without any suspicion whatsoever. *See id.* The government calls this process "preservation," but it is really just suspicionless seizing. Acting on the government's instruction, and as the government's agents, Internet providers make complete copies of target accounts and save them exclusively for later government use. *See id.* at 784-85.

5. Based on the belief that the § 2703(f) permits such mass-scale seizures without cause, the federal government and state governments order the preservation of hundreds of thousands of Internet accounts every year. *See id.* at 767-69. This dragnet surveillance practice has gone unchallenged for many years. *See id.* at 755-56. Major Internet providers and the government work together to make this process both automatic and largely secret. *See id.* at 775-78. When a government agent makes a § 2703(f) request, providers will copy and preserve the account contents without question. *See id.* at 772. In the ordinary case, this process is hidden from users. Internet providers do not tell their customers that preservation occurred.

ARGUMENT

1. As an initial point, before examining the Fourth Amendment implications of this case at length, the Snapchat data are irrelevant for the purposes outlined in the search warrant request, and should be excluded under Mil. R. Evid. 403 because their probative value is substantially outweighed by the extremely high risk of unfair prejudice, confusion of the issues, and waste of time. There appear to be no relevant chat messages between MK3 Hadley and any of the complaining witnesses with respect to the sexual harassment specifications. The Government's notice of intent to introduce evidence of other acts under Mil. R. Evid. 404(b) includes only evidence of Snapchat data.[3] (Enclosure F.) The Government seeks to peripherally bolster its evidence of the charged offenses with illegally and improperly obtained evidence of uncharged acts.

[3] The Government's notice under Mil. R. Evid. 404(b) is also the subject of a separate Defense motion.

2. The warrantless preservation of MK3 Hadley's Snapchat account, and the overbroad search warrant that later issued for the preserved data, violated his Fourth Amendment rights. The preservation was government action because it required Snapchat to act on the Government's behalf. Preservation triggered a Fourth Amendment seizure because it eliminated MK3 Hadley's exclusive control of his account. It was an unreasonable seizure because it was not based on probable cause or even reasonable suspicion and was not followed promptly by a warrant; in fact, the period of preservation exceeded the two 90-day periods permitted under statute. The preservation was initiated pursuant to one investigation, then continued for an entirely separate one which ultimately led to a search warrant 268 days after the first preservation letter. The contents of the account must be suppressed because they are fruits of the unconstitutional preservation and the good-faith exception does not apply. The search warrant that eventually issued purported to contain a time limit, but that time limit was facially unreasonable given the facts alleged in the affidavit in support of the search warrant. The analysis below addresses each point in turn.

a. <u>The preservation of MK3 Hadley's Snapchat account was Fourth Amendment Government action</u>.

1. Snapchat's act of preserving MK3 Hadley's account pursuant to 18 U.S.C. § 2703(f) was government-directed action regulated by the Fourth Amendment. The Fourth Amendment applies to acts of private individuals acting as "instrument[s] or agent[s]" of the Government. *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971). A private party acts as a government agent when the government "compelled a private party to perform a search" or the private party otherwise acted pursuant to the "encouragement, endorsement, and participation" of the government. *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 613–614 (1989). *See also United States v. Wicks*, 73 M.J. 93, 100 (C.A.A.F. 2014) (a private search does not violate the Fourth Amendment, but the government cannot conduct or participate in the search for it to be considered a private search, and the Fourth Amendment is implicated if the government encouraged, endorsed, or participated in the search). The preservation in this case is Fourth Amendment government action even if compliance with § 2703(f) is considered voluntary instead of a mandatory obligation. *See, e.g., United States v. Daniels*, 60 M.J. 69, 71 (C.A.A.F. 2004) (reversing conviction after determining that cocaine seized by roommate at direction of Leading Chief Petty Officer should have been suppressed as warrantless search and seizure); *United States v. Quillen*, 27 M.J. 312, 314 (C.M.A. 1988) (civilian security employed by base exchange was government actor for purposes of Article 31(b), UCMJ); *United States v. Spiess*, 71 M.J. 636, 644 (A. Ct. Crim. App. 2012) (roommate's inadvertent search and discovery of child pornography did not implicate Fourth Amendment, but sergeant's directing and conducting of further searching did); *see also United States v. Hardin*, 539 F.3d 404 (6th Cir. 2008) (apartment manager was a Fourth Amendment state actor where he entered an apartment at the request of the government officers to see if the accused was present); *Commonwealth v. Gumkowki*, 167 N.E.3d 803 (Mass. 2021) (phone company Sprint's voluntary disclosure without warrant constituted Fourth Amendment state action because law enforcement instigated the search by contacting the cell phone company to request information).

2. The *Skinner* test is satisfied here. Section 2703(f) states that "upon the request of a governmental entity," the provider "*shall take all necessary steps* to preserve records and other evidence" in its possession, and that the records "*shall be retained* for a period of 90 days, which

shall be extended for an additional 90-day period upon a renewed request by the governmental entity." 18 U.S.C. § 2703(f) (*emphasis* added). By triggering the preservation statute with its serial "requests," the government directed what Snapchat must do. In response, Snapchat fulfilled the government's demands on the government's behalf. Whether the preservation is construed as ordering or merely instigating the act of preservation, it is government action under the Fourth Amendment.

b. Preservation of MK3 Hadley's Snapchat account was a Fourth Amendment Seizure.

1. A Fourth Amendment seizure occurs "when there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). The classic example of a seizure is physical taking away of property. Being "dispossessed" of your property by government action causes a seizure of it that implicates the Fourth Amendment. *Soldal v. Cook County*, 506 U.S. 56, 61 (1992) (sheriff colluding with mobile home park operator whose employees towed away a mobile home without legal eviction order violated Fourth Amendment prohibition on unreasonable seizure, even where government did not enter or search trailer).

2. Preservation of MK3 Hadley's account pursuant to three separate demands over the course 268 days caused a Fourth Amendment seizure because it dispossessed him of control over the account. Internet providers "execute preservation requests by making a copy of the full contents of the relevant account and storing it separately." Kerr, *Internet Content Preservation*, at 771. Although this process is labeled 'preservation,' in reality it is "a dynamic process of entry, copying, and storage." *Id.* at 782. As Internet providers have themselves explained, this is done by performing a "data pull" of the contents of the account that take a "snapshot" of the account contents. *Id.* (quoting public statements from Twitter and Apple). The copy is then stored outside the user's control so the user cannot alter or delete any files. *Id.* at 784-85.

3. The government-directed act of creating a government copy of the account, and storing it away for later government access, caused a "meaningful interference" with MK3 Hadley's "possessory interests in that property" because it denied him control over his private information. *Jacobsen*, 466 U.S. at 113. "Possession" is defined as the "detention and control . . . of anything which may be the subject of property." BLACK'S LAW DICTIONARY 1047 (5th ed. 1979). Before preservation occurred, MK3 Hadley had control of his account contents. He could view his files, alter his files, and delete his files as he wished.

4. Preservation eliminated that control. Preservation ensured that a perfect copy of the account contents was generated and detained outside his control exclusively for the government's future use. This was done for the express purpose, and with the exact effect, that MK3 Hadley could no longer control the contents of his account. Preservation therefore triggered a seizure. *See United States v. Bach*, 310 F.3d 1063, 1067-68 (8th Cir. 2002) (analyzing the copying and review of stored Internet contents held by an Internet provider as a Fourth Amendment "seizure" and a "search" of the contents); *Vaugh v. Baldwin*, 950 F.2d 331, 334 (6th Cir. 1991) (noting that, in the absence of consent, the government had "no right to . . . photocopy" a person's private documents); *United States v. Loera*, 333 F. Supp. 3d 172, 185 (E.D.N.Y. 2018) ("Most courts that have addressed duplication, including digital duplication, have analyzed it as a seizure."):

Fed. R. Crim. Pro. 41(e)(2)(B) (equating the seizure of electronically stored information with the copying of the information).

5. In the data context, of course, the government dispossesses a person of control without physically removing the data. But that makes no legal difference. Copying private files triggers a seizure because the government gains control of the data (even though the Internet company safeguards that data for the government, as the statute requires). The government's gaining control and a user's losing exclusive control causes a seizure even though the user still has access to a prior copy of the data. *See United States v. Jefferson*, 571 F. Supp. 2d 696, 703 (E.D. Va. 2008) (holding that "recording . . . information by photograph or otherwise" is a seizure, "even if the document or disc is not itself seized," because "the Fourth Amendment privacy interest extends not just to the paper on which the information is written or the disc on which it is recorded but also to the information on the paper or disc itself"). The government cannot simply take control of the contents of everyone's private Internet messages, just as long as the government does not (yet) look at the files, entirely at the government's whim. Preservation triggers copying of the account, and that copying is a Fourth Amendment seizure permitted only if it is constitutionally reasonable. *See id.*

6. It should be especially clear that preservation is a Fourth Amendment "seizure" given how Internet search warrants are executed under the Stored Communications Act as required by the Fourth Amendment. *See United States v. Long*, 64 M.J. 57, 63-64 (C.A.A.F. 2006) (Marine had reasonable expectation of privacy in emails on work computer where agency recognized privacy interests and users had personal password); *see also Warshak v. United States*, 631 F.3d 266, 274 (6th Cir. 2010) (holding that accessing private emails is a Fourth Amendment search that requires a warrant). When the government serves a warrant on a provider under § 2703(a), the provider will run off a copy of the account and send the copy to the government for its review. The provider conducts the initial "seizure," and the government conducts the subsequent "search." *Cf. Bach*, 310 F.3d at 1067-68. Preservation under § 2703(f) is the "seizure" part of the Stored Communications Act's procedure for obtaining Internet account contents. Preservation does not cause a search to occur, because information is not yet revealed to the government. But the transfer of control of account contents under § 2703(f) is a seizure independent of any subsequent search, and it must be independently justified as reasonable. *See Soldal*, 506 U.S. at 61 (explaining that seizures must be justified under the Fourth Amendment independently of any searches). In April 2022, a Ninth Circuit panel held that a preservation request did not meaningfully interfere with the accused's possessory interests in his digital data, but that holding was struck when the opinion was amended in October 2022. *United States v. Rosenow*, 33 F.4th 529, 546 (9th Cir.), *opinion amended and superseded on denial of reh'g*, 50 F.4th 715 (9th Cir. 2022). In the amended opinion, the court expressly "decline[d] to reach the question of whether these preservation requests implicate the Fourth Amendment." *Id.*

c. <u>The Government cannot satisfy its burden of establishing that the warrantless seizure of MK3 Hadley's Snapchat account was reasonable</u>.

1. Upon motion by the Defense to suppress evidence under Mil. R. Evid. 311(d), the prosecution has the burden of establishing that the evidence was not obtained as a result of an unlawful search and seizure. Mil. R. Evid. 311(d)(5). The Government must prove, by a preponderance of the evidence, that the evidence was obtained by a lawful search and seizure

before the evidence may be admitted into evidence. *Id.* The government cannot meet that burden. The contents of MK3 Hadley's Internet account were seized on 19 June 2020, 17 September 2020, and 14 December 2020. Those contents were held without a warrant until 13 March 2021, when probable cause was finally asserted (for reasons CGIS had no inkling of on 19 June or 17 September) and a warrant was served to permit the disclosure of the account contents to the government. This government-directed suspicionless seizure, occurring for 268 days, cannot be upheld as reasonable under the Fourth Amendment.

2. The government might seek to justify the seizure as reasonable on two grounds. First, it might claim that the seizure was justified by the existence of probable cause. Second, it might claim that the seizure was permitted by general reasonableness principles without probable cause. As the discussion below shows, neither argument is persuasive.

3. ***The Seizure Cannot Be Justified Based on Probable Cause.*** Probable cause at the inception of a seizure permits the government to temporarily detain property pending the issuance of a warrant. *See United States v. Place*, 462 U.S. 696, 701 (1983) ("Where law enforcement authorities have probable cause to believe that a container holds contraband or evidence of a crime, but have not secured a warrant, the Court has interpreted the Amendment to permit seizure of the property, pending issuance of a warrant to examine its contents, if the exigencies of the circumstances demand it or some other recognized exception to the warrant requirement is present."). This authority allows the government to seize property based on probable cause so long as agents proceed to work diligently to obtain a warrant that permits the property's long-term seizure and subsequent search. *See id.* The preservation statute expressly contemplates this temporary and limited role, as it limits preservation to circumstances "pending the issuance" of a warrant (for contents) or other legal process (for non-content records). 18 U.S.C. § 2703(f)(1).

4. The seizure of MK3 Hadley's Snapchat account cannot be justified on this basis for two reasons. First, the seizure of the account was not based on probable cause. The temporary warrantless seizure of property must be justified "at its inception." *United States v. Sharpe*, 470 U.S. 675, 482 (1985). But the Government did not have the probable cause needed to justify preservation at its inception: it did not even open the investigation outlined in the probable cause affidavit for the Snapchat search warrant until 20 October 2020, and it did not cite abusive sexual contact as a basis when it ultimately sought the search warrant.

5. The warrantless seizure was unreasonable for a second reason. Even assuming the government could establish probable cause at the time of preservation, the seizure was unreasonable because the government waited an unreasonably long period to obtain a warrant. When the government seizes property without a warrant based on probable cause, "the Fourth Amendment requires that they act *with diligence* to apply for a search warrant." *United States v. Smith*, 967 F.3d 198, 202 (2d Cir. 2020) (emphasis added). When the government fails to seek a warrant expeditiously, the warrantless seizure violates the Fourth Amendment even if a warrant is later obtained. *See id.*; *see also United States v. Mitchell*, 565 F.3d 1347 (11th Cir. 2009) (suppressing a computer hard drive where government seized it then allowed 21 days to elapse).

6. ***The Seizure Cannot Be Justified By General Reasonableness Principles.*** The Government may also try to meet its burden of justifying the seizure of MK3 Hadley's account on general reasonableness grounds in the absence of probable cause. There are three distinct lines of cases

that the Government might rely on: (a) the investigative detention principles of *Terry v. Ohio*, 368 U.S. 1 (1968); (b) the "special needs" exception; and (c) the rules for detention during the execution of search warrants. None of these justifications apply in this case for the reasons explained below.

7. *Investigative Detention Doctrine Cannot Justify The Preservation.* First, the preservation seizure cannot be justified by the investigative detention principles of *Terry*. It is true that *Terry*'s stop-and-frisk framework can permit a very brief investigative detention of property based only on reasonable suspicion. *See, e.g., United States v. Place*, 462 U.S. 696, 707 (1983) (allowing the warrantless seizure of luggage based on reasonable suspicion that it contained narcotics); *United States v. LaFrance*, 879 F.2d 1, 10 (1st Cir. 1989) (allowing detention of FedEx package for 135 minutes based on reasonable suspicion). But that rule cannot justify the seizure here. A *Terry*-stop detention must be brief. The government can detain property based on reasonable suspicion only to "*quickly* confirm or dispel the authorities' suspicion." *Place*, 462 U.S. at 702 (emphasis added). The seizure can last only as long as the "the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions *quickly*." *Sharpe*, 470 U.S. at 686 (*emphasis* added) (90-minute detention of luggage based only on reasonable suspicion was excessive).

8. Such a limited detention authority cannot justify the seizure of MK3 Hadley's account for the 268 days that elapsed after the account was preserved before the government obtained a warrant. That period was far too long. Further, even if *Terry* and *Place* can permit a seizure that long in theory, it could not do so here because the government did not have the required reasonable suspicion at the inception of the seizure that the seized account contained evidence.

9. *The "Special Needs" Doctrine Cannot Justify the Preservation.* The seizure also cannot be justified under the "special needs" doctrine. The special needs doctrine can permit suspicionless searches and seizures "where the program was designed to serve special needs, beyond the normal need for law enforcement." *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000). For example, the Court has allowed some kinds of drunk-driving checkpoints when it has been shown to advance a public interest in safety. *See Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 455 (1990).The special needs doctrine does not justify preservation of MK3 Hadley's account for two reasons.

10. First, the preservation was not conducted for a special need beyond the normal needs of law enforcement. As the United States Department of Justice itself has emphasized, the purpose of preservation under § 2703(f) is to help criminal investigators with their criminal investigations: Preservation is designed "to minimize the risk" that "evidence may be destroyed or lost before law enforcement can obtain the appropriate legal order compelling disclosure." U.S. DEP'T OF JUST., SEARCHING AND SEIZING COMPUTERS AND OBTAINING ELECTRONIC EVIDENCE IN CRIMINAL INVESTIGATIONS 139 (2009). That is not a special need. Instead, it is a classic law enforcement interest in seizing evidence of crime to prevent its destruction. *See Edmond*, 531 U.S. at 48 (concluding that narcotics checkpoints cannot be justified under the special needs exception because their "primary purpose . . . is ultimately indistinguishable from the general interest in crime control"); *Ferguson v. City of Charleston*, 532 U.S. 67, 83-84 (2001) (ruling that drug testing program was not covered by the special needs doctrine because "the immediate objective of the searches was to generate evidence for law enforcement purposes").

11. Second, even if preservation were somehow deemed a special need (which it clearly is not), it cannot satisfy the reasonableness requirement imposed on special needs seizures. *See, e.g., Illinois v. Lidster*, 540 U.S. 419, 427-78 (2004) (considering whether a special-needs seizure was constitutionally reasonable by weighing the government interests advanced by the seizure and the citizen interests infringed by it). The preservation authority the government claims to have is astonishing. It is the power to seize any person's online account, at any time, for any reason—or even for no reason at all. In the government's view, anyone's online account—even *everyone*'s online account, as the government can preserve multiple accounts at once—can be seized entirely at the government's discretion. The limitless discretion the government claims cannot satisfy any reasonableness test. *See Delaware v. Prouse*, 440 U. S. 648 (1979) (program of suspicionless traffic stops to check for license and registration was unreasonable seizure, especially because almost everyone would be affected as "[a]utomobile travel is a basic, pervasive, and often necessary mode of transportation").

12. Even if the Government attempted to articulate a special need to preserve all Internet accounts, that authority would be unreasonable. Under that reading, the Coast Guard could send a permanent preservation demand to every operator of every Internet communication company for every incoming member to periodically seize a copy of their records, just in case CGIS were ever to develop probable cause to search those records.

13. *Rules for Detention During the Execution of a Warrant Cannot Justify Preservation.* The government might also try to justify the suspicionless seizure of MK3 Hadley's Snapchat account under the detention principles of *Michigan v. Summers*, 452 U.S. 692 (1981). *Summers* held that officers executing a search warrant can detain persons on the premises without additional particularized suspicion. *See id.* at 701. This is justified, the Court reasoned, by the government's interest in preventing flight as well as protecting officer safety. *See id.* at 701-05.

14. *Summers* cannot justify a preservation seizure because its reasoning was expressly dependent on the government having already obtained a warrant. "Of prime importance in assessing the intrusion," the Court explained, "is the fact that the police had obtained a warrant to search respondent's house for contraband." *Id.* at 701. Detention of those on the premises was reasonable without additional cause because "[a] neutral and detached magistrate had found probable cause to believe that the law was being violated in that house and had authorized a substantial invasion of the privacy of the persons who resided there." *Id.* The warrant had to come first, and obtaining it then justified the lesser intrusion of brief detention. Establishing probable cause "sufficient to persuade a judicial officer that an invasion of the citizen's privacy is justified" made it "constitutionally reasonable to require that citizen to remain while officers of the law execute a valid warrant to search his home." *Id.* at 704-05.

15. The opposite happened here. The government ordered preservation just in case probable cause might eventually emerge. A warrant was obtained, but not until 268 days later. This case involves seizing just in case a warrant might someday be legally obtained, not seizing as part of the execution of an existing warrant. *Summers* does not apply.

d. Snapchat's Terms of Use did not eliminate MK3 Hadley's Fourth Amendment rights.

1. The violation of MK3 Hadley's Fourth Amendment rights was not lessened or eliminated by the Terms of Use that apply to Snapchat's accounts. Terms of Use found in contracts of adhesion between Internet providers and their users cannot control users' Fourth Amendment rights. As an initial matter, the Terms of Use govern, at most, the relationship between the user and the company in question. They do not govern the relationship between individuals and the government, and it is the government that violates Fourth Amendment rights.

2. Every Internet account is governed by Terms of Use, also known as Terms of Service. Terms of Use are contractual terms, drafted by lawyers for the provider, that govern when Internet users can sue the corporation that provides the service for the service that it provides. As a condition of using the service, every user must agree to the Terms of Use. And to ensure that users cannot sue providers for complying with law enforcement requests, it is standard for Terms of Use to state that the provider retains the right to comply with those requests. *See, e.g.*, Meta Terms of Service, *available at* [redacted] (reserving the right to "access, preserve and share your information with . . . law enforcement . . . [i]n response to a legal request"). Again, acknowledging that a company will comply with a law enforcement demand and agreeing not to sue that company is not tantamount to waiving a challenge to Fourth Amendment rights when the violation of those rights results in evidence the government seeks to use in a criminal case.

3. Whatever legal effect such Terms of Use may have, they do not eliminate Fourth Amendment rights. The Supreme Court has held that form language in a contract of adhesion between companies and their users does not control reasonable expectations of privacy. *See Byrd v. United States*, 138 S.Ct. 1518, 1529 (2018) ("As anyone who has rented a car knows, car-rental agreements are filled with long lists of restrictions. . . . Few would contend that violating provisions like these has anything to do with a driver's reasonable expectation of privacy in the rental car—as even the Government agrees.") Such contracts are about "risk allocation" between companies and customers, and they have "little to do with whether one would have a reasonable expectation of privacy" in the item used. *Id.* (concluding that language in a rental car contract does not control whether the person has Fourth Amendment rights in the car).

4. What was true for rental car contracts in *Byrd* is equally true for Terms of Use in this case. Like terms of rental car contracts, Terms of Use for Internet accounts are written by corporate lawyers to allocate corporate risk. Terms of Use ensure that a company cannot be sued for violating the service's privacy policy when taking steps the company is legally obligated to take or may want to take for legitimate business reasons. *See* Judith A. Powell & Lauren Sullins Ralls, *Best Practices for Internet Marketing and Advertising*, 29 Franchise L.J. 231, 235 (2010) (advising website operators on considerations for crafting terms of use). To limit corporate liability, Terms of Use are written to limit user permissions while granting providers broad rights. *See, e.g., United States v. Nosal*, 676 F.3d 854, 860–63 (9th Cir. 2012) (providing examples). Such form language designed to minimize corporate risk did not eliminate Fourth Amendment rights in *Byrd* and cannot do so here. *See Byrd*, 138 S.Ct. at 1529-30.

5. The irrelevance of Terms of Use to Fourth Amendment rights is further emphasized by *Carpenter v. United States*, 138 S. Ct. 2206 (2018). In *Carpenter*, the Supreme Court rejected the

view that using a cell phone eliminates a user's Fourth Amendment rights in his phone location because operating a cell phone necessarily discloses the user's location to the user's cell phone provider. *See id.* at 2220-21. Fourth Amendment rights cannot be so easily eliminated, the Court reasoned, because using a cell phone is "a pervasive and insistent part of daily life" that is "indispensable to participation in modern society." *Id.* at 2220. "As a result, in no meaningful sense does the user *voluntarily*" disclose location information to the provider. *Id.* (*emphasis* added).

6. The Supreme Court's reasoning in *Carpenter* is equally applicable here. Consent to a search or seizure must be voluntary. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 222-27 (1973). But using the Internet is "such a pervasive and insistent part of daily life" that it is "indispensable to participation in modern society." *Carpenter*, 138 S.Ct. at 2220. It is standard for Internet accounts to be governed by broad Terms of Use that permit providers to comply with legal process. "As a result, in no meaningful sense does the user voluntarily" waive their Fourth Amendment rights by using an account with such Terms of Use. *Id.* Indeed, no one could have any Fourth Amendment rights online otherwise because everyone would be deemed to have "consented" to searches and seizures merely by using the Internet and going along with the required terms drafted by company lawyers. As *Carpenter* shows, that is not the law.

7. Finally, even if Terms of Use could eliminate Fourth Amendment rights in theory, they cannot do so in practice because the formal act of clicking on a box to agree to Terms of Use cannot be construed as granting consent under *Florida v. Jimeno*, 500 U.S. 248 (1991). *Jimeno* held that the scope of consent is determined by asking "what would the typical reasonable person have understood by the exchange" purporting to grant consent. *Id.* at 251. As applied to Internet accounts, the question is whether a reasonable person observing a user's formal agreement to Terms of Use would understand the user to have actually consented to its specific language.

8. The answer to that question is "no." A reasonable person would not understand the formality of agreeing to Terms of Use as signifying actual agreement to its terms for a simple reason: Internet users almost never read Terms of Use. *See* Caroline Cakebread, *You're Not Alone, No One Reads Terms of Service Agreements*, Business Insider, November 17, 2017, [redacted] (discussing studies).

9. For example, in one study, academic researchers created a fake social media site called NameDrop. The Term of Use required "all users" of NameDrop "to immediately assign their first-born child to NameDrop, Inc." Jonathan A. Obar &Anne Oeldorf-Hirsch. *The Biggest Lie on the Internet: Ignoring the Privacy Policies and Terms of Service Policies of Social Networking Services*. Information, Communication & Society 12 (2018). Only about 2 percent of site users objected to the term, as 74 percent of users did not view the Terms of Use and most who viewed them scrolled through the legalese too quickly to understand them. *See id.* at 2. Obviously, a "typical reasonable person" would not interpret a user's clicking on a box to express agreement with NameDrop's Terms of Use as actually consenting to give their first-born child away. *Jimeno*, 500 U.S. at 251. Rather, a reasonable person would interpret clicking on the box as just agreeing to use the site without concern for what the Terms say. *See* Obar & Oeldorf-Hirsch, *supra*. The same is true for MK3 Hadley's act of clicking on the box to use a Snapchat

account. Whatever legal effect the Terms of Use may have in other contexts, clicking on a box to use the service did not eliminate MK3 Hadley's Fourth Amendment rights.

e. The entire contents of MK3 Hadley's Snapchat account must be suppressed as fruits of the poisonous tree.

1. The preserved copies of MK3 Hadley's Snapchat account were likely inextricably included in the data turned over to the Government when it served a warrant on SNAP INC. on 13 March 2021. Because the Government only had access to that preserved data as a result of its prior constitutional violation, the entire contents of MK3 Hadley's account must be suppressed as fruits of the poisonous tree under *Wong Sun v. United States*, 371 U.S. 471 (1963).

2. Suppression as a remedy turns on the gravity of the government overreach, the applicability of specific exceptions, and the likely deterrence that exclusion would achieve. *United States v. Wicks*, 73 M.J. 93, 103 (C.A.A.F. 2014) (affirming exclusion of evidence where government cell phone search exceeded scope of prior private search, discussing exclusionary rule).

3. Here, the Government directed Snapchat to seize data, not once, but three times, without reasonable suspicion or probable cause, in clear violation of the statute (which allows preservation for 90 days, with the possibility of **one** 90-day extension), and without informing the military judge who signed the search warrant about the preservation demands (so he did not know what he was actually authorizing). In addition, there was no evidence of the allegedly criminal Snapchat messaging after summer 2020. But the search warrant the Government requested and the military judge granted was for all data from 1 March 2019 to 1 March 2021. Perhaps the Government wanted to include the period subject to the preservation seizures, to increase the data available for them to rummage through to see what else they might find. This is exactly what the Fourth Amendment prohibits. The Government's overreach was grave, indeed.

4. The exceptions to the exclusionary rule identified in *Wicks* are that the evidence: was derived from an independent source; has only an attenuated link to the illegal evidence; or would have inevitably been discovered. Here, the Snapchat data would not have been obtained at all but for the Government's unconstitutional seizures, so none of the exceptions apply. *Wicks*, 73 M.J. at 103.

5. Suppression is appropriate when it "results in appreciable deterrence." *Herring v. United States*, 555 U.S. 135, 141 (2009). That is the case here. Suppression is needed to deter massive-scale and ongoing violations of the Fourth Amendment. Every year, hundreds of thousands of Internet accounts are preserved based on the erroneous assumption that 18 U.S.C. § 2703(f) permits unlimited and suspicionless preservation. *See* Kerr, *Internet Content Preservation*, at 755. Preservation has occurred on a massive scale nationwide because it has been treated—wrongly, and in the absence of caselaw—as a constitution-free process.

6. Suppression of the evidence in this case would have a powerful effect "in deterring Fourth Amendment violations in the future." *Herring*, 555 U.S. at 141. A single court ruling would alter practices throughout the Coast Guard. Many, if not most, preservations that occur today likely violate the Fourth Amendment. A decision from this Court suppressing the evidence would be read and digested by government lawyers and law enforcement agents servicewide. A

suppression order in this case would force the government to bring its preservation practices into constitutional bounds. It would both limit when investigators seek preservation and could trigger provider scrutiny of preservation requests.

7. Inversely, not excluding the Snapchat evidence in this case would encourage this kind of unconstitutional overreach in the future, likely on a wider scale. The unconstitutional preservation practices in this case are being used as a model within the Coast Guard, without any guidance about appropriate basis for sending the preservation demand, or about a reasonable and lawful duration of preservation extensions. (Enclosure H.) The Court can show here that such practices are unacceptable, and promote a correction before they proliferate and become standard operating procedure and expand from there.

8. Finally, the good-faith exception of *Illinois v. Krull*, 480 U.S. 340 (1987), poses no barrier to suppression. *Krull* held that the exclusionary rule does not apply "when officers act in objectively reasonable reliance upon a statute authorizing warrantless administrative searches, but where the statute is ultimately found to violate the Fourth Amendment." *Id.* at 342. *Krull* does not apply because the mistake here belongs to law enforcement instead of Congress. When Congress enacted 18 U.S.C. § 2703(f), it did not make any legislative judgments about what law enforcement seizures are permitted or when they are constitutional. The preservation statute is not directed to governments at all. The Fourth Amendment governs when a preservation request can be made, and the preservation statute does not say otherwise. The preservation statute merely specifies what Internet providers such as Snapchat must do when a government preservation request is made. "[U]pon the request of a governmental entity," the statute says, "[a] provider . . . shall take all necessary steps to preserve records and other evidence in its possession" 18 U.S.C. § 2703(f)(1).

9. It may be that investigators erroneously believed that § 2703(f) authorizes unlimited preservation. But, if so, that is a law enforcement mistake that falls outside *Krull*. Because there is no legislative error to defer to, the government cannot rely on *Krull* to avoid suppression. *See United States v. Wallace*, 885 F.3d 806, 811 n.3 (5th Cir. 2018) (noting, in a Fourth Amendment challenge brought to surveillance claimed to be authorized by the Stored Communications Act, that "[t]he holding of *Krull* does not extend to scenarios in which an officer erroneously, but in good faith, believes he is acting within the scope of a statute"); *People v. Madison*, 520 N.E.2d 374, 380 (Ill. 1988) (ruling that *Krull* cannot apply where a "police officer reasonably relies on his own interpretation of a valid statute in conducting a search and seizure" but courts later reject that interpretation).

RELIEF REQUESTED

Pursuant to Military Rules of Evidence 311 and 403, the Defense moves to suppress the Snapchat data the Government obtained via search warrant, as well as any derivative evidence obtained therefrom.

ORAL ARGUMENT

Unless the Government concedes the motion or this Court grants the relief requested on the basis of pleadings alone, the Defense requests an Article 39(a) session to present oral argument and additional evidence as necessary pursuant to R.C.M. 905(h).

SERRILL-ROBINS.MIRA.ROSE.[redacted] Digitally signed by SERRILL-ROBINS.MIRA.ROSE.[redacted] Date: 2022.11.17 14:33:38 -10'00'

M. R. SERRILL-ROBINS
LT, USCG
Detailed Defense Counsel

I certify that I have served a true copy via e-mail of the above on Military Judge, CDR Emily Reuter, and Trial Counsel, LCDR Erin Callahan, LCDR Amanda Hood, and LCDR Case Colaw, on 17 Nov 2022.

SERRILL-ROBINS.MIRA.ROSE.[redacted] Digitally signed by SERRILL-ROBINS.MIRA.ROSE.[redacted] Date: 2022.11.17 14:33:57 -10'00'

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GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. JOSHUA HADLEY Machinery Technician Third Class U.S. Coast Guard	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO SUPRESS EVIDENCE FROM SNAPCHAT** 01 December 2022

MOTION

The United States files this motion in response to the Defense motion suppress the evidence obtained from a search warrant pursuant to 18 U.S.C. § 2703. The United States respectfully requests that the court deny the defense motion and determine admissibility under R.C.M. 906(b)(13) and M.R.E. 311.

SUMMARY

In their motion, Defense challenges the evidence seized, and subsequently searched, pursuant to a search authorization on the ground that the authorization was not based upon probable cause. Per Military Rules of Evidence 311(4), the evidence relevant to their motion is limited to evidence concerning the information actually presented to or otherwise known by the authorizing officer.

In addition, Defense attempts to also argue that the evidence obtained from the search conducted of MK3 Hadley's cell phone was outside the scope of the

FACTS

1. The case was referred to a General Court-Martial on 07 October 2022. MK3 Hadley (hereinafter: the "Accused") has been charged with two specifications of Article 92 (Violation of a Lawful General Order), one charge of Article 120 (Abusive Sexual Contact), one charge of Article 134 (Sexual Act with an Animal), one charge of Article 134 (Viewing and Possessing Child Pornography), and an additional charge of Article 120 (Abusive Sexual Contact). The Accused waived his right to a preliminary hearing on 25 August 2022 and was arraigned on 20 October 2022.

2. CGIS Report of Investigation (ROI) [redacted] contains the allegations supporting both specifications under Charge I in this case. The ROI contains the following:

    a. In July 2020, MK3 Hadley texted and messaged OS2 [redacted] on multiple social media

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applications. MK3 Hadley eventually sent OS2 money on the Venmo application. OS2 thought MK3 Hadley was " and " " OS2 told Special Agents that it was his " " that MK3 Hadley was trying to " " OS2 also told Special Agents that after he blocked MK3 Hadley on social media, MK3 Hadley texted his cell phone requesting that he re-add MK3 Hadley to his social media accounts. (Enclosure 1, Bates 082199).

b. CGIS Special Agents also interviewed BM3 , regarding messages OS2 received from MK3 Hadley. She told Special Agents that OS2 showed her " " She saw other message from MK3 Hadley on phone, including " " Special Agents asked BM3 what she interpreted these messages from MK3 Hadley to mean and she explained and eggplant emoji referenced " " and that MK3 Hadley was apparently " " from OS2 (Enclosure 1, 082202)

c. In February 2020, MK3 Hadley Snapchat messaged CS3 , on multiple occasions, requesting CS3 send him " " CS3 told Special Agents that " " (Enclosure 1, Bates 082200-082201)

d. CGIS Special Agents interviewed CS3 , regarding messages MK3 Hadley sent to CS3 via Snapchat. These messages included pictures of MK3 Hadley's legs; messages that called CS3 a " " or saying that CS3 was " "; messages that MK3 Hadley wanted to " " CD3 This happened multiple times. CS3 responded by sending a picture of his face, to which MK3 Hadley sent the message "' " CS3 told Special Agents that a " " MK3 Hadley sent CS3 a picture of what appeared to be MK3 Hadley having sex with a girl. The girl was not facing the camera, but the picture showed MK3 Hadley's penis " " of the unknown female. MK3 Hadley included a message with the picture: " " CS3 told Special Agents that he " " (Enclosure 1, Bates 082209)

3. On 19 June 2020, S/A Coast Guard Investigative Service submitted a preservation request pursuant to 18 USC § 2703(f) to SnapChat, Inc. (SnapChat) to preserve the records related to the SnapChat username for 90 days. On 14 December 2020, S/A submitted a request for an extension of the original pursuant to 18 USC section § 2703(f) to SnapChat, Inc. (SnapChat) to preserve the records related to the

SnapChat username [redacted] for 90 days. On 14 December 2020, S/A [redacted] submitted a request for an extension of the original pursuant to 18 USC § 2703(f) to SnapChat, Inc. (SnapChat) to preserve the records related to the SnapChat username [redacted] for another 90 days. (Enclosure 24).

4. S/A [redacted] applied for a search warrant pursuant to 18 U.S.C. § 2703 from a military judge, CDR Jeffrey Barnum, on 13 March 2021. The military judge issued the search warrant pursuant to 18 U.S.C. § 2703 and found that the affidavit and/or sworn testimony established probable cause. (Enclosure 24).

5. On 07 April 2021, SnapChat provided responsive records to the search authorization and provided a certificate of authenticity, indicating that the servers Snap Inc. uses record this data automatically at or near the time it is entered or transmitted by the user; this data is kept in the ordinary course of business activity; and it is the regular practice and custom of Snap Inc. to make such a record. (Enclosure 26).

BURDEN

The prosecution has the burden of proving by a preponderance of the evidence that the evidence was not obtained as a result of an unlawful search or seizure; that the evidence was obtained by officials who reasonably and with good faith relief on the issuance of an authorization to search, seize, or a search warrant.

LAW

The Fourth Amendment ensures that people have a right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. Amend. IV. Accordingly, government seizure of personal communications generally requires the issuance of a warrant based on probable cause due to a person's reasonable expectation of privacy. Though sending electronic communication requires users to provide information to third parties, which the Fourth Amendment "generally does not protect private information shared with third parties." U.S. Congressional Research Service. Overview of Governmental Action Under the Stored Communications Act (SCA), (LSC10801; August 02, 2022), by Jimmy Balser. As such, congress passed the SCA to provide statutory protections for electronic communications that may not be protected by the Fourth Amendment. *Id* at 2.

Stored Communications Act

The Stored Communications Act (SCA), 18 U.S.C. § 2701-2713 protects and regulates the disclosure of stored electronic communications and other information by providers of communication services, hereinafter "providers." Specifically, subsections of § 2703 provide requirements and procedures for the disclosure of information to government entities. In § 2703(a)-(c), it describes how a government entity may compel a provider to disclose certain categories of information related to subscribers or customers. These methods include warrants,

courts orders, or administrative subpoena. In addition, § 2703(f) provides guidance to providers regarding the preservation of records, upon request of a governmental entity, when a court order or other process is pending. The provider is then required to take "all necessary steps" to preserve the information for a period of 90 days, which "shall be extended for an additional 90-day period upon a renewed request." *See* 18 U.S.C. § 2703(f)(2). After the required preservation period has lapsed, the provider is free to dispose of the information.

Preservation Requests Are Not Seizures

When a government entity makes a preservation request to a provider the preservation of the data is not a seizure. When a seizure occurs, there is "some meaningful interference with an individual's possessory interest in that property." *See US v. Jacobsen,* 466 U.S. 109, 113. A preservation pursuant to § 2703(f) notifies the online provider to take the necessary steps to preserve records, it does not interfere with the use of the account or entitle the Government to obtain and review the information. *See U.S. v. Basey*, No. 4:14-CR-00028-RRB, 2021 WL 1396274 (D. Alaska Apr. 13, 2021). The preservation request is also not a seizure because the provider is not acting as a government agent, but is a private party. For a private party to be viewed as serving as a government agent for circumstances related to a search or seizure, there must be "clear indices of the Government's encouragement, endorsement, and participation." *Skinner v. Railway Labor Executives*, 489 U.S. 602, 615 (1989). More similarly, the Supreme Court in *California Bankers Ass'n v.* Shultz, 416 U.S. 21 (1974) concluded that recordkeeping provisions within the Bank Secrecy Act, that required banks to maintain records of its customers, did not violate the Fourth Amendment. The court in *California Bankers Ass'n* also concluded that the banks were not serving as a government agent and the maintenance of records by the banks under government regulations did not constitute a seizure, as a distinguishing factor was that the government's ability to inspect, review, or access the records required to be maintained is governed by existing legal processes. *Id.* at 34.

No Reasonable Expectation of Privacy

Even if a preservation request constituted a search or seizure, a subscriber or user does not have a reasonable expectation of privacy, or significantly diminished at best, for two reasons; first, the records obtained are kept during the course of business by the provider; and second, it has been long held that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Smith v. Maryland*, 442 U.S. 735 (1979) (pen register for phone numbers from the phone company do not acquire the contents of communications and are not subject to Fourth Amendment warrant requirements); see also *United States v. Miller*, 425 U.S. 435 (1976) (subpoena for bank records not search because bank records were not respondent's private papers); *United States v. Forrester,* 512 F.3d 500, 510 (9th Cir. 2008) (warrantless government surveillance of email to/from addresses and IP addresses do not constitute search because defendant voluntarily turned over the information in order to direct the third party server). A search or seizure can be authorized by a "third party who possessed common authority over or other sufficient relationship to the premises of effects sought to be inspected." *U.S. v. Ziegler,* 474 F.3d 1184. 1191 (2007). Many providers require that users, customers, and

subscribers agree to their terms of service, which includes the providers ability to copying, using and storing content and information provided by the users. However, even if an individual did have a reasonable expectation of privacy in regards to the records kept by providers. The concern regarding a search without probable cause is not at issue with this case, as investigators obtain a search warrant on the basis of probable cause.

Good Faith Exception Precludes Suppression

Finally, even if the preservation request and ultimate search of records provided by a provider was a violation of the Fourth Amendment, the "good faith exception" under M.R.E. 311 and *Illinois v. Krull*, 480 U.S. 340, 349 (1987), where the Supreme court held that good-faith exception to the exclusionary rule applies where law enforcement reasonable relies on a statute later determined to be unconstitutional. Moreover, if a law enforcement agent reasonably relies on a search authorization or warrant that is determined unlawful or not supported by probable cause, there shall be no exclusion if "the agent executing the search had an objectively reasonable belief that the magistrate had a substantial basis for determining the existence of probable cause." See *U.S. v. Perkins*, 78 M.J. 381, 388 (2019).

ARGUMENT

Lawful Search and Seizure Pursuant to 18 U.S.C. § 2703

A search pursuant to a warrant is lawful under the Fourth Amendment where the military judge has a substantial basis to determine that evidence exists in the location or place to be searched based on probable cause. S/A [redacted] applied for a search warrant pursuant to 18 U.S.C. § 2703 on 12 March 2021. The military judge, CDR Jeffrey Barnum, reviewed the search application, considered the totality of the circumstances, and made the determination that there was a fair probability that evidence of was authorized by a military judge that made the determination that there was a fair probability that the evidence related to Article 92(1), violation of a general order, specifically sexual harassment; Article 120c, indecent recording and broadcasting; and Article 134, indecent conduct would be found within SnapChat records associated with the Accused's account. The military judge, qualified and authorized to issue search authorizations, made this determination based off the application and affidavit that was provided by the Coast Guard Investigative Service Agent, S/A [redacted]

The affidavit included specific facts related to the ongoing investigation to include, CGIS conducting numerous interviews of Coast Guard members that were reporting that the Accused had been sending unwanted pictures of his genitals, sexually explicit videos, and soliciting pictures of other member's penises for money over the social media application SnapChat, for over a year beginning in early-2019 to mid-2020. In addition, S/A [redacted] included that when the application, SnapChat, is downloaded on mobile devices the user provides SnapChat permission to access their mobile device's camera, contacts, location, microphone, phone, and storage. In his affidavit, S/A [redacted] also explains how photos taken using the application can be saved in other applications on the mobile phone, including a photo's standard photo application.

The search warrant was reasonable and particular, by limiting the request to basic information regarding the customer and subscriber account and the requesting all records to a specific time period to 01 March 2019 to 01 March 2021, correlated to the allegations made by witnesses, related to the same subscriber account. See Enclosure 25.

Preservation Requests Are Not Searches or Seizures

A seizure means there is "some meaningful interference with an individual's possessory interest in that property." *See US v. Jacobsen,* 466 U.S. 109, 113. The Fourth Amendment, does not reach conduct by a private individual not acting as an agent of the government. See *United States v. Jacobsen,* 466 U.S. 109, 113 (1984). For a private party to be viewed as serving as a government agent for circumstances related to a search or seizure, there must be "clear indices of the Government's encouragement, endorsement, and participation." *Skinner v. Railway Labor Executives*, 489 U.S. 602, 615 (1989).

In Defense's motion there is significant reliance on a theoretical framework and fails to establish case law that supports the position that preservation requests under § 2703(f) are a seizure. In fact, one of the only courts to address the constitutionality of 18 USC § 2703(f) was *United States v. Rosenow*, No 17-cr-3430, 2018 WL 6064949 (S.D. Cal. Nov. 20, 2018) and the court ruled "the preservation did not interfere with the Defendant's use of his accounts and did not entitle the Government to obtain any information without further legal process." *Id* at 10. Further, the court concluded that preservation requests do not amount to an intrusion to Fourth Amendment Requirements, since during the preservation the government never had access to the records and would not have until a warrant was issued, which is the same as in this case. In fact, the law under § 2703 does not allow the provider to give the information to the government without a search warrant or court order.

For a seizure to occur, there requires government action. Similarly here, and in *California Bankers Ass'n,* SnapChat is not serving as a government agent just due to the preservation and maintenance of records per federal statute. The distinguishing factor was that the government's ability to inspect, review, or access the records required to be maintained is governed by existing legal processes. *Id.* at 34. The Government submitted a preservation request for the initial 90-day period on 19 June 2020 and then made the second 90-day request on 17 September 2020, and then submitted a third request on 14 December 2020. During the entire duration the Government did not have access to those records and would not be allowed to have access to those until a court order or other process (in this case a warrant) was issued. 18 U.SC. § 2703(f)(1). According to § 2703(f), a request for "an additional 90-day period upon a renewed request" after the required preservation period ended on 16 December 2020 SnapChat would have been free to dispose of the content.

In fact, outside of a preservation request, SnapChat tells users that while using the service the content and information provided is stored and used on their own servers and with other third-parties. Snapchat states that most messages, "Snaps" or "Chats" sent in Snapchat will be

automatically deleted by default from servers after it is detected that the message has been opened…[o]ther content, like Story posts, are stored for longer." In addition to other content that is to be shared with third-parties, impact user experience, . Snap Chat Privacy Policy, 29 June 2022. (See Enclosure 27). Other courts have supported that the entities under the SCA are not acting as government agents engaged in unreasonable searches and seizures due to the maintenance and storage of information. *United States v. Basey*, 2021 WL 1396274 (D. Alaska, April 13, 2021)(determining entities such as Yahoo routinely preserve information for longer period of time because they have a "monetary incentive" to preserve emails under § 2706 which reimburses ISPs for their compliance with the Stored Communications Act "regardless of when legal process arrives").

Defense also argues that the preservation "dispossessed him of control over the account" because SnapChat is making a copy of the records. Making a copy of the data is one way to preserve it, but it is not the only way. Nonetheless, courts have found that making a copy of data is not a seizure under the Fourth Amendment because it does not interfere with anyone's possessory interest, it remains intact and unaltered, and the information is still accessible by the individual. See *United States v. Gorshkov*, No. CR00-550C, 2001 WL 1024026 (W.D. Wash. May 23, 2001). Further, argues that the before the preservation, the Accused could have viewed files, altered files, and deleted files. Although SnapChat provides numerous ways for users to access, correct, delete, their account, Defense has failed to show that the Accused has actually attempted to delete any information from his account.

Through the Terms of Service, that user must agree to before using the application and service, SnapChat describes how customers are able to "take control of their account," as well as providing notice that there may be situations where they are required to legally store data and be unable to delete:

> "If you ever decide to stop using Snapchat, you can just ask us to delete your account. We'll also delete most of the information we've collected about you after you've been inactive for a while!
>
> Keep in mind that, while our systems are designed to carry out our deletion practices automatically, we cannot promise that deletion will occur within a specific timeframe. *There may be legal requirements to store your data and we may need to suspend those deletion practices if we receive valid legal process asking us to preserve content*, if we receive reports of abuse or other Terms of Service violations, or if your account, content created by you, or content created with other users is flagged by others or our systems for abuse or other Terms of Service violations. Finally, we may also retain certain information in backup for a limited period of time or as required by law." [emphasis added] See Enclosure 27.

The Defense has not provided any law that supports that a preservation request under the SCA is a seizure or that SnapChat conducted a search. In addition, Defense has not provided any supporting law that an internet service provider or a provider of an electronic communication

service is considered a "government agent" when abiding by a preservation request under 18 U.S.C. § 2703(f). The preservation request was a not a seizure and the Accused did not experience "some meaningful interference" with his possessory interest in the records that were preserved and later disclosed to the Government.

Preservation is Reasonable

Defense also argues that "the seizure" was unreasonable and the agent lacked probable cause. Probable cause is a "totality of the circumstances" test and means "fair probability," not certainty or even a preponderance of the evidence." *United States v. Basey*, at 6. If the court determines that the preservation request was a seizure, it would still not be a violation of the Fourth Amendment due to the reasonableness standard. To determine reasonableness the court must balance "the degree to which [the search] intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Riley v. California*, 573 U.S. 373 (2014) (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300, 119 S.Ct. 1297, 143 L.Ed.2d 408 (1999)).

As indicated above, any user or subscriber that uses the services of SnapChat has a diminished expectation of privacy. A search or seizure can be authorized by a "third party who possessed common authority over or other sufficient relationship to the premises of effects sought to be inspected." *U.S. v. Ziegler*, 474 F.3d 1184. 1191 (2007). When downloading the application and using the services Snapchat provides, users grant Snapchat a license to use content and information that is stored on servers, as indicated in its Terms of Services, creating that relationship and that level of access to the information diminishes the Accused's, and any users', expectation of privacy. Similarly to the cases in *Smith* and *Miller*, the records maintained by Snapchat are business records, created and maintained by the company as indicated on the Certificate of Authenticity, see Enclosure 26.

The privacy impact of preservation request on the Accused was minimal. SnapChat did not disclose any information strictly as a result of the preservation request and it did not result in collection of information not already stored by SnapChat. The Defense failed to show how the preservation directly impacted the Accused's access to information. The required duration is brief, and afterward Snapchat was free to delete the preserved information. In addition, the government must obtain appropriate legal process, such as a search warrant, in order to actually obtain the information." *United States v. Basey*, 2019 WL 2234564 (C.A.9)(Appellate Brief).

In the interest towards the government, the government has an extremely compelling interest in preservation requests. Especially in the ability to access electronic evidence during criminal investigations. The unique and easy ability to delete or modify electronic evidence makes preservations requests significant to ensure that data is not lost and remains accurate.

Balancing these interests, the government's reliance on the procedures set forth in § 2703(f) is reasonable. *United States v. Basey*, 2019 WL 2234564 (C.A.9)(Appellate Brief).

Good Faith Exception

Even if the court rules that the preservation request was a violation of the Fourth Amendment, the evidence should still be admitted under the good faith exception. Suppression of evidence gathered pursuant to a warrant is a "last resort, not our first impulse." *Herring v. United States*, 555 U.S. 135, 140, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009) (internal quotation marks omitted) (citation omitted). The Supreme Court held that the good-faith exception to the exclusionary rule applies where law enforcement reasonably relies on a statute later determined to be unconstitutional. *See United States v. Korte,* 918 F.3.d 750, 757-79 (9th Cir. 2019) citing *Illinois v. Krull*, 480 U.S. 340, 349-50 (1987).

Under Fourth Amendment jurisprudence, the exclusionary rule only applies when it "results in appreciable deterrence." *Herring v. United States*, 555 U.S. 135, 141 (2009) (quoting *Leon*, 468 U.S. at 909). Deterrence per se is not the only trigger for the exclusionary rule because the "benefits of deterrence must outweigh the costs." *Id.* (quoting *Leon*, 468 U.S. at 910). "To the extent that application of the exclusionary rule could provide some incremental deterrent, that possible benefit must be weighed against its substantial social costs." *Id.* (quoting *Illinois v. Krull*, 480 U.S. 340, 352-53 (1987) (internal alterations omitted)). "[T]he exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." *Id.* at 144. The determination of good faith on the part of the law enforcement conduct at issue is an objective standard of "whether a reasonably well trained officer would have known that the search was illegal in light of all of the circumstances." *Id.* at 145 (citing Leon, 468 U.S. at 922, n 23) (internal quotations omitted).

When submitting the preservation request pursuant § 2703(f) and applying for the Search Warrant under § 2703 agents reasonably relied on the procedures of established within the SCA, and as such the standard in *Krull* precludes suppression. Moreover, the fact that a military judge had issued a warrant following preservation procedures "is the clearest indication that the officers acted in an objectively reasonable manner or... in objective good faith." *Messerschmidt v. Millender*, 565 U.S. 535, 546, 132 S.Ct. 1235, 182 L.Ed.2d 47 (2012) (internal quotation marks omitted) (citation omitted).

RELIEF REQUESTED

The Government respectfully requests the Court deny Defense's motion to suppress and find that the preservation request was not a seizure, that Snapchat is not serving as a government actor and did not violate the Accused's Fourth Amendment Rights.

ENCLOSURES

Enclosure 1- Excerpts from CGIS ROI
Enclosure 24 Snapchat Preservation Requests

Enclosure 25- SCA Warrant for Snapchat Records
Enclosure 26- Snapchat Response and Certificate of Authenticity
Enclosure 27 Snapchat Policy Documents

CALLAHAN.ERIN.CATHERINE.[redacted] Digitally signed by CALLAHAN.ERIN.CATHERINE.[redacted] Date: 2022.12.01 17:29:55 -08'00'

ERIN C. CALLAHAN
Lieutenant Commander, USCG
Trial Counsel

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the above was served on the military judge and defense counsel via electronic mail on 01 December 2022.

CALLAHAN.ERIN.CATHERINE.[redacted] Digitally signed by CALLAHAN.ERIN.CATHERINE.[redacted] Date: 2022.12.01 17:30:15 -08'00'

ERIN C. CALLAHAN
Lieutenant Commander, USCG
Trial Counsel

APPELLATE EXHIBIT 34
PAGE 10 OF 10 PAGE(S)

[redacted]

COAST GUARD TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **JOSHUA HADLEY** **MK3/E-4** **U.S. COAST GUARD**	**DEFENSE MOTION TO COMPEL DISCOVERY AND PRODUCTION OF EVIDENCE** **17 NOV 22**

MOTION

Pursuant to Uniform Code of Military Justice (UCMJ), Article 46 and Rules for Courts-Martial (R.C.M.) 701(a)(2)(A) and 703(e)(1), the Defense respectfully moves this Court to compel the Government to discover and produce relevant and necessary evidence within its possession that it has erroneously denied.

BURDEN

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

FACTS

1. The Government preferred charges against MK3 Hadley on 6 June 2022. Charges were referred on 9 September 2022. All alleged criminal acts occurred on 7 October 2022.[1]

2. MK3 Hadley is charged with two specifications of a violation of Article 92, UCMJ for allegedly violating two iterations of a General Order Prohibiting Sexual harassment over time frames of January to December 2019 and January to August 2020, respectfully. Additionally, he is charged with two specifications of a violation of Article 120, UCMJ for allegations of abusive sexual contact stemming from a single incident on 31 May 2020. He is also charged with two specifications of a violation of Article 134, UCMJ, for allegations of child pornography and sexual act with an animal.[2]

3. On 24 October 2022, the Defense submitted its initial and first supplemental discovery requests to the Government. The Government responded on 28 October 2022.

4. The Defense requested "All written communications, emails, or other documents used to brief, respond to, request, or discuss investigative activities related to this case. This request specifically includes any communication between law enforcement and a member of the

[1] Charge Sheet.
[2] *Id.*

accused's command, the Convening Authority, the staff judge advocate, Trial Counsel or anyone working at the direction of Trial Counsel, or any officer directing the investigation." The Government responded that "This request is overbroad, vague, and ambiguous. It seeks information that is outside the scope of R.C.M. 701. It also seeks information that is not discoverable according to R.C.M. 701(f)."[3]

5. The Defense requested "Records of any victim/witness contact or consultation between any Coast Guard Trial Counsel or anyone working at the direction of Trial Counsel and any possible or alleged victim, including dates, locations, and individuals present for the consultations." The Government responded that "This request is not relevant to Defense preparation and is therefore denied."[4]

6. The Defense requested "Copies of any written communications between any Trial Counsel, or anyone working at the direction of Trial Counsel, and any witnesses, regarding the content or logistics of their potential testimony, including communications with the commands of potential military witnesses about any potential testimony." The Government responded that "This request is overbroad, vague, and ambiguous. It seeks information that is outside the scope of R.C.M. 701."[5]

7. The Defense requested "All statements of each government witness relating to the subject matter of the witness's testimony, including but not limited to all emails, text messages, and other communications or notes memorializing communications between the witness and Trial Counsel or Legal Services Command or [redacted] or PAC-094 personnel." The Government responded that "This request is overbroad, vague, and ambiguous. It seeks information that is outside the scope of R.C.M. 701."[6]

8. The Defense requested "A Blue Ribbon copy of the PDR or service record book of each potential military witness." The Government responded that "This request is not relevant to Defense preparation and is therefore denied. It seeks information that is outside the scope of R.C.M. 701."[7]

9. The Defense requested "evidence affecting the credibility of any potential government witness. This includes information known to the government, agents thereof, and closely-aligned civilian authorities or entities, concerning immunity grants, prior convictions, and evidence of other character, conduct, or bias bearing on a witness's credibility, including any letters of reprimand, letters of caution, records of formal or informal counseling, evidence of Article 15, UCMJ, actions, criminal or administrative investigations, or adverse administrative actions." The Government responded "This request exceeds the scope of R.C.M. 701 and is therefore denied. Without waiving said objection, all responsive materials presently known to the Government have been previously provided. The Government is aware of its Brady/Giglio

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[3] Enclosure (1) at 6.
[4] *Id.* at 8.
[5] *Id.*
[6] *Id.*
[7] *Id.*

obligations."[8]

10. The Defense requested "evidence of any direct communication, whether written or oral, in any way relating to this case, between any member of the Office of the Secretary of Homeland Security, the Commandant of the Coast Guard or her staff, the Office of the Judge Advocate General" and officials involved in this case. The Government responded that "The above request (i)-(vii) is denied as irrelevant to Defense preparation. Without waiving said objection, the Government is not aware of the above communications responsive to this request."[9]

11. The Defense requested "Any evidence that any potential witness has been diagnosed as an alcoholic, alcohol abuser, or controlled substance abuser." The Government responded that "This request exceeds the scope of R.C.M. 701 and is therefore denied. Without waiving said objection, the Government is not aware of any documents or information responsive to this request. All requests for mental health records must be made in accordance with M.R.E. 513."[10]

12. The Defense requested "Any evidence that any potential witness sought or received mental health treatment, including specifically the mental health treatment records of any complaining witness." The Government responded that "This request exceeds the scope of R.C.M. 701 and is therefore denied. All requests for mental health records must be made in accordance with M.R.E. 513."[11]

13. The Defense requested "Any evidence that any potential witness sought or received mental health treatment, including specifically the mental health treatment records of any alleged victim or complaining witness, including records reflecting the dates and times of treatment, names and employers of treatment providers, diagnoses, treatment plans, and prescriptions." The Government responded that "This request exceeds the scope of R.C.M. 701 and is therefore denied. All requests for mental health records must be made in accordance with M.R.E. 513."[12]

LAW

Parties to a court martial "shall have equal opportunity to obtain witnesses and other evidence."[13] Trial Counsel's obligation under this rule "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."[14] The R.C.M.s pertaining to discovery aid in the enforcement of Article 46 and "[t]he parties should evaluate pretrial discovery and disclosure issues in light of [its] liberal mandate."[15]

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[8] *Id.* at 9.
[9] *Id.* at 12.
[10] *Id.* at 10.
[11] *Id.*
[12] *Id.*
[13] UCMJ, Article 46.
[14] *United States v. Stellato*, 74 M.J. 473, 481 (C.A.A.F 2015) (internal quotations omitted).
[15] *Id.* (quoting *United States v. Roberts*, 59 M.J. 323, 325 (C.A.A.F. 2004)).

In 2018, the President amended R.C.M. 701(a)(2)(A)(i) to "broaden the scope of discovery, requiring disclosure of items that are 'relevant' rather than 'material' to defense preparation of a case."[16] Therefore, upon defense request, "the Government shall permit the defense to inspect any books, 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 – the item is *relevant to defense preparation* [...]"[17] An accused's right to discovery "is not limited to evidence that would be known to be admissible to trial. It includes materials that would assist the defense in formulating a defense strategy."[18] As discovery only deals with evidence relevant to defense preparation, the threshold determination for discovery is lower and envisions a wider breadth of material.

As a threshold matter, discoverable material is "in the possession, custody, or control of military authorities."[19] Generally, items held by an entity outside of the Federal Government does not satisfy this requirement.[20] "However, a trial counsel cannot avoid R.C.M. 701(a)(2)(A) through '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.'"[21] Even evidence not in the physical possession of the prosecution team might still be within its possession, custody, or control.[22] This could happen when: "1) the prosecution has both knowledge of and access to the object; 2) the prosecution has a legal right to obtain the evidence; 3) the evidence resides in another agency but was part of a joint investigation; and 4) the prosecution inherits a case from a local sheriff's office and the object remains in the possession of the local law enforcement."[23] Evidence may still be in the possession, custody, or control of military authorities even if it "may not fit neatly within any of the circumstances outlined above" and that the determination must rest on the particular facts of each case.[24]

Relevant evidence is evidence that has any tendency to make a fact of consequence more or less probable.[25] "When construing [the Military Rules of Evidence, military courts] apply the standard principles of statutory construction."[26] "When the language of a rule is susceptible to only one interpretation, [military courts] enforce the rule according to its terms."[27]

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[16] App. 15-9, Manual for Courts-Martial (2019 ed).
[17] R.C.M. 701(a)(2)(A)(i).
[18] *United States v. Luke*, 69 M.J. 309, 320 (C.A.A.F. 2011) (quoting *United States v. Webb*, 66 M.J. 89, 92 (C.A.A.F. 2008)).
[19] R.C.M. 701(a)(2)(A)(i).
[20] *Stellato*, 74 M.J. at 484.
[21] *Id.* (quoting *United States v. Marshall*, 132 F.3d 63, 69 (D.C. Cir. 1998)).
[22] *Id.*
[23] *Id.* at 485.
[24] *Id.*
[25] Mil. R. Evid. 401.
[26] *United States v. Mellette*, No. 21-0312 Crim. App. No. 201900305, 6 (C.A.A.F. 2022) (quoting *United States v. Kohlbeck*, 78 M.J. 326, 330 (C.A.A.F. 2019)).
[27] *Id.* (citing *Hartford Underwriters Ins. Co. v. Union Planters Bank*, N.A., 530 U.S. 1, 6 (2000)).

"When interpreting M.R.E. 513, we must also account for the Supreme Court's guidance that '[t]estimonial exclusionary rules and privileges contravene the fundamental principle that the public has a right to every man's evidence…' and our own view that 'privileges 'run contrary to a court's truth-seeking function.'"[28] Mil. R. Evid. 513, by its own language, "protects confidential communications between a patient and a psychotherapist made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition."[29] "The phrase 'communication made between the patient and a psychotherapist" does not naturally include other evidence, such as routine medical records, that do not memorialize actual communications between the patient and the psychotherapist."[30] In its analysis of the "statutory construction" of Mil. R. Evid. 513, CAAF noted the intentionality of the President choosing the word "communication" instead of "broader nouns such as 'documents,' information,' or 'evidence.'"[31] CAAF went on to reason that this intentional decision to use only the word "communication," coupled with the "limiting phrase" of "made between the patient and a psychotherapist" *must* have meaning, otherwise the language of Mil. R. Evid. 513(a) could be stretched to encompass "all documents made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition."[32] Extending Mil. R. Evid. 513(a)'s protection to such a broad category of "evidence" undermines the specificity of the President's chosen language and detracts from the rule's focus on communications. As such, "diagnoses and treatments contained within medical records are not themselves uniformly privileged" and CAAF has ruled that it is error to extend the privilege so broadly, again relying on the strictly construed language of the rule and its emphasis only on communications *between* a patient and a psychotherapist.[33]

Mil. R. Evid. 513(e) governs the procedure to determine admissibility of *protected* records of communications.[34] Subsection (e)(2) directs the military judge to conduct a closed hearing prior to ordering the production or admission of *protected* records or communications.[35] This provision still does not "overcome[ ] the plain language of M.R.E. 513(a), especially given that [CAAF is] required to narrowly construe the language of the rule."[36] Mil. R. Evid. 513(e) authorizes the judge to perform an *in camera* review only if such a review "is necessary to rule on the production or admissibility of *protected* records or communications."[37] This permissive authorization "does not mean that every document or record related to the diagnosis or treatment of a patient's mental health is privileged."[38] This analysis relies on the distinction between the

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[28] *United States v. Mellette*, No. 21-0312 Crim. App. No. 201900305, 6 (C.A.A.F. 2022) (quoting *Trammel v. United States*, 445 U.S. 40, 50 (1980) and *United States v. Jasper*, 72 M.J. 276, 280 (C.A.A.F. 2013)).
[29] *Id* (quoting Mil. R. Evid. 513).
[30] *United States v. Mellette*, No. 21-0312 Crim. App. No. 201900305, 7 (C.A.A.F. 2022).
[31] *Id.*
[32] *Id.*, at 7-8.
[33] *Id.*, 2.
[34] Mil. R. Evid. 513(e); *United States v. Mellette*, No. 21-0312 Crim. App. No. 201900305, 9 (C.A.A.F. 2022).
[35] *Id.*
[36] *United States v. Mellette*, No. 21-0312 Crim. App. No. 201900305, 9 (C.A.A.F. 2022).
[37] *Id.*
[38] *Id.*

content of privileged communications vice the associated underlying facts, commonly found in cases dealing with attorney-client issues, of which the latter is not inherently covered.[39]

ARGUMENT

a. The Government must discover the relevant and necessary evidence within its possession that it has erroneously denied.

The evidence in question will be addressed in turn:

i. **All written communications, emails, or other documents used to brief, respond to, request, or discuss investigative activities related to this case.** This evidence is relevant to the Defense's preparation in this case because the investigation supporting the allegations against MK3 Hadley, and its associated quality, or lack thereof, will be one of the most contested issues at trial, as is the case with any criminal trial. The communications relating to the investigative activities of this case are likely the only means through which the Defense can demonstrate points of failure and/or find impeachment evidence pertaining to the investigators themselves. This evidence is relevant and necessary to the Defense's preparation because it enables an attack on the credibility of the underlying investigation, which ultimately goes to the Government's burden of proof.

ii. **Records of any victim/witness contact or consultation between any Coast Guard Trial Counsel or anyone working at the direction of Trial Counsel and any possible or alleged victim, including dates, locations, and individuals present for the consultations.** This evidence is in control and possession of the Government and relevant to the Defense's preparation in this case. This evidence will be used to help the Defense understand the number of meetings between Trial Counsel and various witnesses, as well as understand potential witnesses who could testify to what was said during the meetings. This information is not privileged and should be provided to the Defense.

iii. **All statements of each government witness relating to the subject matter of the witness's testimony, including but not limited to all emails, text messages, and other communications or notes memorializing communications between the witness and Trial Counsel or Legal Services Command or [redacted] or PAC-094 personnel.** Contrary to the Government's assertion, this information is not outside R.C.M. 701 and is highly relevant to the Defense's preparation, since the Defense is asking for actual witness communications and interview notes, which are not privileged and should be provided to the Defense as matter of course.

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[39] *Id*, at 10-11 (citing *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981)("The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney)).

iv. **A Blue Ribbon copy of the PDR or service record book of each potential military witness.** Military records of Government witnesses are highly relevant to the Defense preparation and are a source of developing impeachment material, understanding potential witness bias, and locating previous witness supervisors and co-workers. Additionally, this evidence is clearly in the possession of the Government.

v. **The Defense requested "evidence affecting the credibility of any potential government witness. This includes information known to the government, agents thereof, and closely-aligned civilian authorities or entities, concerning immunity grants, prior convictions, and evidence of other character, conduct, or bias bearing on a witness's credibility, including any letters of reprimand, letters of caution, records of formal or informal counseling, evidence of Article 15, UCMJ, actions, criminal or administrative investigations, or adverse administrative actions.** This evidence is in the possession of the Government and is not outside the scope of R.C.M. 701. In fact, the Government has an obligation to seek out credibility evidence for all its witnesses. This evidence is highly relevant to the preparation of a Defense since the requested evidence goes directly towards the credibility of Government witnesses.

vi. **Evidence of any direct communication, whether written or oral, in any way relating to this case, between any member of the Office of the Secretary of Homeland Security, the Commandant of the Coast Guard or her staff, the Office of the Judge Advocate General" and officials involved in this case.** Potential evidence of Unlawful Command Influence is within the bounds of R.C.M. 701 and would be within the possession of the Government. The Government has an obligation to determine if such evidence exits, yet its response is a simple denial that such evidence is relevant and a disclaimer that it is not aware of any such evidence. At a minimum, the Government should provide an assurance to the Defense that it sought out the information and it does not exist.

b. <u>The Government must discover the relevant evidence it has erroneously stated falls under M.R.E. 513</u>

The evidence in question will be addressed in turn:

i. **Any evidence that any potential witness has been diagnosed as an alcoholic, alcohol abuser, or controlled substance abuser.** Contrary to the Government's assertion, this information is not outside R.C.M. 701 and does not fall under M.R.E. 513 privilege. As discussed above, a diagnosis is not a privileged communication. This information is highly relevant to the Defense's preparation and goes to potential perception, memory, and credibility issues of Government witnesses.

ii. **Any evidence that any potential witness sought or received mental health treatment, including specifically the mental health treatment records of any complaining witness.** This information is not outside R.C.M. 701 and does not fall under M.R.E. 513 privilege. As discussed above, seeking treatment is not a privileged communication. This information is highly relevant to the Defense's preparation and goes to potential perception, memory, and credibility issues of Government witnesses.

iii. **Any evidence that any potential witness sought or received mental health treatment, including specifically the mental health treatment records of any alleged victim or complaining witness, including records reflecting the dates and times of treatment, names and employers of treatment providers, diagnoses, treatment plans, and prescriptions.** This information is not outside R.C.M. 701 and does not fall under M.R.E. 513 privilege. As discussed above, seeking mental health treatment and other general records are not privileged. This information is highly relevant to the Defense's preparation and goes to potential perception, memory, and credibility issues of Government witnesses.

RELIEF REQUESTED

The Defense respectfully moves this Court to compel the Government to discover the relevant and necessary evidence within its possession that it has erroneously denied.

EVIDENCE AND ORAL ARGUMENT

As evidence in support of this Motion, the Defense offers the following enclosure:

1. Government response to Defense discovery request dtd 28 Oct 2022

If this Motion is opposed by the Government, the Defense requests an Article 39(a) session to present oral argument and additional evidence as necessary.

[redacted]
J. T. COLE
LCDR, USN
Assistant Defense Counsel

I certify that I have served a true copy via e-mail of the above on the Military Judge and Trial Counsel on 17 Nov 2022.

[redacted]
D. T. COLE
LCDR, USN
Assistant Defense Counsel

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. JOSHUA HADLEY Machinery Technician Third Class U.S. Coast Guard	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO COMPEL DISCOVERY AND PRODUCTION OF EVIDENCE** 01 December 2022

MOTION

The United States files this motion in response to the Defense motion compel discovery. As set forth below for each requested item, the Government objects to Defense's requests are overly broad and beyond the scope of discovery requirement.

SUMMARY

In their motion, Defense makes overly broad requests for various evidence that does not meet the standard of Rules for Courts-Martial (R.C.M.) 701 or 703. The Defense's motion because the Defense fails to meet its burden to demonstrate that the requested material in fact exists. Should the court rule that the Defense met this burden, the Defense also fails to meet its burden to show how the requested evidence is relevant to their preparation for trial. Additionally, in some cases the discovery requested would require a *in camera* review per Military Rule of Evidence (M.R.E.) 513. Court should deny the Defense's motion because the Defense fails to meet its burden under R.C.M. 701 and 703.

FACTS

1. The case was referred to a General Court-Martial on 07 October 2022. MK3 Hadley (hereinafter: the "Accused") has been charged with two specifications of Article 92 (Violation of a Lawful General Order), one charge of Article 120 (Abusive Sexual Contact), one charge of Article 134 (Sexual Act with an Animal), one charge of Article 134 (Viewing and Possessing Child Pornography), and an additional charge of Article 120 (Abusive Sexual Contact). The Accused waived his right to a preliminary hearing on 25 August 2022 and was arraigned on 20 October 2022.

2. On 24 October 2022, the Defense submitted its initial and first supplemental discovery requests to the Government. The Government responded on 28 October 2022. (Encl 33 at 6).

3. The Defense requested "All written communications, emails, or other documents used to brief, respond to, request, or discuss investigative activities related to this case. This request

specifically includes any communication between law enforcement and a member of the accused's command, the Convening Authority, the staff judge advocate, Trial Counsel or anyone working at the direction of Trial Counsel, or any officer directing the investigation." The Government responded that "This request is overbroad, vague, and ambiguous. It seeks information that is outside the scope of R.C.M. 701. It also seeks information that is not discoverable according to R.C.M. 701(f)." (Encl 33 at 8).

4. The Defense requested "Records of any victim/witness contact or consultation between any Coast Guard Trial Counsel or anyone working at the direction of Trial Counsel and any possible or alleged victim, including dates, locations, and individuals present for the consultations." The Government responded that "This request is not relevant to Defense preparation and is therefore denied." (Encl 33 at 8).

5. The Defense requested "Copies of any written communications between any Trial Counsel, or anyone working at the direction of Trial Counsel, and any witnesses, regarding the content or logistics of their potential testimony, including communications with the commands of potential military witnesses about any potential testimony." The Government responded that "This request is overbroad, vague, and ambiguous. It seeks information that is outside the scope of R.C.M. 701." (Encl 33 at 8).

6. The Defense requested "All statements of each government witness relating to the subject matter of the witness's testimony, including but not limited to all emails, text messages, and other communications or notes memorializing communications between the witness and Trial Counsel or Legal Services Command or [redacted] or PAC-094 personnel." The Government responded that "This request is overbroad, vague, and ambiguous. It seeks information that is outside the scope of R.C.M. 701." (Encl 33 at 8).

7. The Defense requested "A Blue Ribbon copy of the PDR or service record book of each potential military witness." The Government responded that "This request is not relevant to Defense preparation and is therefore denied. It seeks information that is outside the scope of R.C.M. 701." (Encl 33 at 8).

8. The Defense requested "evidence affecting the credibility of any potential government witness. This includes information known to the government, agents thereof, and closely-aligned civilian authorities or entities, concerning immunity grants, prior convictions, and evidence of other character, conduct, or bias bearing on a witness's credibility, including any letters of reprimand, letters of caution, records of formal or informal counseling, evidence of Article 15, UCMJ, actions, criminal or administrative investigations, or adverse administrative actions." The Government responded "This request exceeds the scope of R.C.M. 701 and is therefore denied. Without waiving said objection, all responsive materials presently known to the Government have been previously provided. The Government is aware of its Brady/Giglio obligations." (Encl 33 at 9).

9. The Defense requested "evidence of any direct communication, whether written or oral, in any way relating to this case, between any member of the Office of the Secretary of Homeland Security, the Commandant of the Coast Guard or her staff, the Office of the Judge Advocate General, and:

i. Any officers acting under R.C.M. 305 in this case;

ii. The person who preferred Charges under R.C.M. 307;

iii. The Article 32 hearing Convening Authority;

iv. The Preliminary Hearing Officer;

v. Any forwarding official under R.C.M. 401 through 404;

vi. The Staff Judge Advocate or other legal advisor under Article 34, UCMJ, and R.C.M. 406; or

vii. The Convening Authority."

The Government responded that "The above request (i)-(vii) is denied as irrelevant to Defense preparation. Without waiving said objection, the Government is not aware of the above communications responsive to this request." (Encl 33 at 12).

10. The Defense requested "Any evidence that any potential witness has been diagnosed as an alcoholic, alcohol abuser, or controlled substance abuser." The Government responded that "This request exceeds the scope of R.C.M. 701 and is therefore denied. Without waiving said objection, the Government is not aware of any documents or information responsive to this request. All requests for mental health records must be made in accordance with M.R.E. 513." (Encl 33 at 10).

11. The Defense requested "Any evidence that any potential witness sought or received mental health treatment, including specifically the mental health treatment records of any complaining witness." The Government responded that "This request exceeds the scope of R.C.M. 701 and is therefore denied. All requests for mental health records must be made in accordance with M.R.E. 513." (Encl 33 at 10).

12. The Defense requested "Any evidence that any potential witness sought or received mental health treatment, including specifically the mental health treatment records of any alleged victim or complaining witness, including records reflecting the dates and times of treatment, names and employers of treatment providers, diagnoses, treatment plans, and prescriptions." The Government responded that "This request exceeds the scope of R.C.M. 701 and is therefore denied. All requests for mental health records must be made in accordance with M.R.E. 513." (Encl 33 at 10).

BURDEN

As the movant, the Defense bears the burden of proof by a preponderance of the evidence. R.C.M. 905(c).

LAW

R.C.M. 701(a)(2) is the discovery standard, and is limited to items that are within the

control of military authorities. To meet the R.C.M. 701 standard, the Defense must show that the item(s) exist, and that they are relevant to the Defense's preparation for trial. Evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence" and "is of consequence in determining the action." M.R.E. 401.

R.C.M. 701(f) pertains to *Information not subject to disclosure*. Nothing in this rule shall be construed to require the disclosure by the Military Rules of Evidence. Nothing in this rule shall require the disclosure or production of notes, memoranda, or similar working papers prepared by counsel and counsel's assistants and representatives. The importance of the attorney work product privilege stated in R.C.M. 701(f) is rooted in case law and adopted by military courts. See United States v. Vanderwier, 25 M.J. 263 (C.M.A. 1987) ("Even though liberal, discovery in the military does not 'justify unwarranted inquiries into the files and the mental impressions of an attorney.'").

R.C.M. 703 is the production standard, for all other evidence not within the control of military authorities. Under R.C.M. 703, the Defense must show that the item(s) exist, and that they are relevant and necessary to their theory of the case at trial. "Relevant evidence is 'necessary' when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue." United States v. Rodriguez, 60 M.J. 239, 246 (C.A.A.F. 2004); R.C.M. 703(e)-(f). The concepts of discovery and production are the lens through which the Prosecution evaluates the Defense's requests.

The discovery standards under R.C.M. 701 and the production standard under R.C.M. 703 place the burden on the Defense to show that the requested material actually exists. United States v. Waldrup, 30 M.J. 1126, 1129 (N.M.C.M.R. 1989) ("in both R.C.M. 701(a)(2) and 703(f), MCM, 1984, it is incumbent upon the defense to show that the requested material actually exists.") Discovery is not an opportunity for the Defense to turn the Trial counsel into their investigators.

Under M.R.E. 513(a), "a patient has a privilege...to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist." (emphasis added). Furthermore, a military judge may not order the production of any mental health records for in camera review until both the defense and the Court have fully complied with the procedural requirements set forth in M.R.E. 513(e). This procedure states in pertinent part that "in any case in which the production...of records...of a patient other than the accused is a matter in dispute, a party may seek an interlocutory ruling by the military judge." M.R.E. 513(e)(1) (emphasis added). "Patient" is defined broadly as "a person who consults with or is examined or interviewed by a psychotherapist for purposes of advice, diagnosis, or treatment of a mental or emotional condition." M.R.E. 513(b)(1). Thus, anytime a party is seeking the production of "records" of a person who consults with or is examined by a psychotherapist for the above referenced purposes, the party and the Court must comply with the procedural requirements set forth in M.R.E. 513(e). These requirements include the following: filing a written motion "specifically describing the evidence and stating the purpose for which it is sought or offered," notifying the patient or their representative that the motion has been filed, conducting a closed hearing, and providing the patient with an opportunity

to attend the hearing and be heard. M.R.E. 513(e)(1)-(2). Moreover, "[p]rior to conducting an in camera review, the military judge must find by a preponderance of the evidence that the moving party showed at very specific items. M.R.E. 513(3).

Recently, the Court of Appeals for the Armed Forces reaffirmed the mandatory nature of this above described procedure, notwithstanding its conclusions that the M.R.E. 513 privilege only applies to confidential communications and not to underlying facts such as a patient's diagnosis. See United States v. Mellette, 21-0312, 2022 WL 3036184, at *7 (C.A.A.F. July 27, 2022). In remanding the case for further proceedings, the C.A.A.F stated that any mental health records of the victim, including those referencing her diagnosis "should have been produced or admitted subject to the procedural requirements of M.R.E. 513(e)." Id. (emphasis added).

ARGUMENT

1. With respect to all of the defense discovery requests at issue, the defense has failed to meet its burden to demonstrate that the information or materials actually exist and are discoverable under R.C.M. 701. All of these requests are outside the scope of the government's discovery obligations and are boilerplate requests where the defense is asking the government to go on the proverbial "fishing expedition" into unknown and unidentified files far outside the core prosecution files referenced above, including confidential and sensitive medical or personnel records of service members.

a. The Defense request additional discovery with the possession of the Government. For the Court's ease of reference, the Government has organized its response by discovery item request, to mirror the Defense's motion.

i. All written communications, emails, or other documents used to brief, respond to, request, or discuss investigative activities related to this case.

The Defense has failed to identify that this information exists and their request is overly broad. The Defense states that the information is relevant to identifying points of failure or impeachment evidence yet does not provide any evidence that such points of failure or impeachment exists. The request is an attempt to turn the Government into the Defense's investigators, which is beyond the scope of R.C.M. 701 or 703. Additionally, large portions of these requests would be 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.

Without waiving the above objection, the Government has turned over several communications within the Government's control in the spirit of avoiding gamesmanship and the Government's on-going duty to provide discovery,

ii. Records of any victim/witness contact or consultation between any Coast Guard Trial Counsel or anyone working at the direction of Trial Counsel and any possible or

alleged victim, including dates, locations, and individuals present for the consultations.

This request is overly broad and runs afoul of R.C.M. 701(f), nothing in this rule shall require the disclosure or production of notes, memoranda, or similar working papers prepared by counsel and counsel's assistants and representatives. Similarly, the details of who is present and when Trial Counsel meets with witnesses does not fall withing R.C.M. 701. The Defense fails to identify how this information is relevant to the Defense's preparation for trial. Without waiving the above objection, in the spirit of disclosure and avoiding gamesmanship, the Government has turned over notes prepared by administrative staff present at all Trial Counsel witness interviews. This arguably goes beyond the requirements for R.C.M. 701.

iii. **All statements of each government witness relating to the subject matter of the witness's testimony, including but not limited to all emails, text messages, and other communications or notes memorializing communications between the witness and Trial Counsel or Legal Services Command or [redacted] or PAC-094 personnel.**

This request is overly broad and runs afoul of R.C.M. 701(f), nothing in this rule shall require the disclosure or production of notes, memoranda, or similar working papers prepared by counsel and counsel's assistants and representatives. Without waiving the above objection, in the spirit of disclosure and avoiding gamesmanship, the Government has turned over notes prepared by administrative staff present at all Trial Counsel witness interviews. This arguably goes beyond the requirements of R.C.M. 701.

Additionally, the Defense has failed to state how the memorialization of communications is relevant to the Defense's preparation. The Defense has failed to articulate that even if the communications exist, let alone how they are relevant to the Defense's preparation. Therefore, the request is outside the requirements of M.R.E. 701.

iv. **A Blue Ribbon copy of the PDR or service record book of each potential military witness.**

This request is overly broad. The Defense has failed to demonstrate how this material will be relevant to Defense preparation. The Defense alleges that this material is relevant to impeachment and witness bias but per the Government's review, there is no documents relevant to this purpose. The Government's responsibility to disclose to the defense the existence of evidence known to trial counsel which reasonably tends to adversely affect the credibility of any prosecution witness or evidence. M.R.E. 701(a)(6). The Government has provided all material responsive to this obligation. Additionally, Defense sites the discovery of supervisors and co-worker, but this document is unlikely to provide this information and is available to Defense's own investigative resources. Therefore, the request should be denied.

v. **The Defense requested "evidence affecting the credibility of any potential government witness. This includes information known to the government, agents thereof, and**

closely-aligned civilian authorities or entities, concerning immunity grants, prior convictions, and evidence of other character, conduct, or bias bearing on a witness's credibility, including any letters of reprimand, letters of caution, records of formal or informal counseling, evidence of Article 15, UCMJ, actions, criminal or administrative investigations, or adverse administrative actions. T

This request exceeds the scope of R.C.M. 701 and 703 in that it is overly broad and does not provide any indication that such evidence exists and includes information outside the Government's control. "In regard to the latter point, a trial counsel's duty to search beyond his or her own prosecution files is generally limited to: (1) the files of law enforcement authorities that have participated in the investigation of the subject matter of the charged offenses; (2) investigative files in a related case maintained by an entity closely aligned with the prosecution; and (3) other files, as designated in a defense discovery request, that involved a specified type of information within a specified entity." United States v. Stellato, 74 M.J. 473 (C.A.A.F. 2016). Without at least identifying specifically evidence that outside information exists for a witness in the case, the Defense is requesting the Government to act as their own investigator. Therefore, the request should be denied.

Without waiving said objection, the Government has completed its due diligence and provided all responsive materials presently known to the Government have been previously provided. The Government is aware of its *Brady/Giglio* obligations. If/when any such additional responsive material becomes available, it will be provided.

vi. **Evidence of any direct communication, whether written or oral, in any way relating to this case, between any member of the Office of the Secretary of Homeland Security, the Commandant of the Coast Guard or her staff, the Office of the Judge Advocate General" and officials involved in this case.**

Here, the Defense broadly requests any communications, written or oral, involving communications between a litany of officials, including the Secretary, Commandant, and the Convening Authority, relating in any way about this case. This is yet another example of a broad request for documents that the Defense has no evidence exist. Nor are these documents are not related to the merits of the case. It is extremely broad listing twelve types of individuals, including unknown numbers of "staff."

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. 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.

Additionally, large portions of these requests would be 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. Here, the Defense is specifically requesting

communications between the Staff Judge Advocate and the Convening Authority. The SJA meets the M.R.E. 502 definition of a lawyer and convening authorities meet the definition of a client.

b. The following requests relate to documents which are outside the requirements of M.R.E. 701 and 702 and implicate M.R.E. 513. The evidence in question will be addressed in turn:

i. Any evidence that any potential witness has been diagnosed as an alcoholic, alcohol abuser, or controlled substance abuser.

This request is overly broad and the Defense has no evidence any responsive material exist and therefore does not meet the requirements of R.C.M. 701. Indeed, material responsive to their request is also likely not to be within the control of the Government, requiring additional specificity under R.C.M. 703. Further, the Defense has failed to show how the requested information is relevant to their preparation, especially as this information is not relevant to this case and may constitute, at best, improper impeachment evidence. Without waiving the objection, the Government reviewed the military PDR's of the witnesses in this case and found no responsive to this request.

Should the Defense produce evidence that such items exist, M.R.E. 513 will still apply. The Defense's request for diagnosis would be located in a service member's Coast Guard medical record and is likely to include confidential communications and would require in camera review prior to production. As the C.A.A.F. recently made clear in Mellette, these records have a "partially protected" status because they frequently contain both privileged and non-privileged information. Mellette, 2022 WL 3036184, at *5. In order to prevent unauthorized disclosures of privileged information to third parties (*e.g.* clinic personnel who are not psychiatrists or their assistants, the Court, the HSWL counsel, or a records custodian), the President of the United States has created one and only one process for parsing privileged and non-privileged information in mental health records or producing such records for *in camera* review, which would be required for the requested information if it exists. Therefore, a request for this information would have to comply with the M.R.E. 513(e) process.

ii. Any evidence that any potential witness sought or received mental health treatment, including specifically the mental health treatment records of any complaining witness.

This request is overly broad and the Defense has no evidence any responsive material exist and therefore does not meet the requirements of R.C.M. 701. Indeed, material responsive to their request is also likely not to be within the control of the Government, requiring additional specificity under R.C.M. 703. Further, the Defense has failed to show how the requested information is relevant to their preparation.

Should the Defense produce evidence that such items exist, M.R.E. 513 will still apply. The Defense's specifically requests treatment records which are located in a service member's Coast Guard medical record and is likely to include confidential communications and would

require in camera review prior to production. Therefore, an *in camera* review, which would be required for the requested information if it exists. Therefore, a request for this information would have to comply with the M.R.E. 513(e) process.

iii. **Any evidence that any potential witness sought or received mental health treatment, including specifically the mental health treatment records of any alleged victim or complaining witness, including records reflecting the dates and times of treatment, names and employers of treatment providers, diagnoses, treatment plans, and prescriptions.**

This request is overly broad and the Defense has no evidence any responsive material exist and therefore does not meet the requirements of R.C.M. 701. Indeed, material responsive to their request is also likely not to be within the control of the Government, requiring additional specificity under R.C.M. 703. Further, the Defense has failed to show how the requested information is relevant to their preparation.

Should the Defense produce evidence that such items exist, M.R.E. 513 will still apply. The Defense's request specifically includes treatment records and treatment plans, which are located in a service member's Coast Guard medical record and is likely to include confidential communications and would require in camera review prior to production. Therefore, an *in camera* review, which would be required for the requested information if it exists. Therefore, a request for this information would have to comply with the M.R.E. 513(e) process.

RELIEF REQUESTED

The Government respectfully requests the Court deny Defense's motion.

The government respectfully requests oral argument if this motion is opposed.

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AMANDA L. HOOD
Lieutenant Commander, USCG
Trial Counsel

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the above was served on the military judge and defense counsel via electronic mail on 1 December 2022.

HOOD.AMAND A.L. [redacted] Digitally signed by HOOD.AMANDA.L [redacted] Date: 2022.12.01 16:40:26 -08'00'

AMANDA L. HOOD
Lieutenant Commander, USCG
Trial Counsel

APPELLATE EXHIBIT 49
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COAST GUARD TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **JOSHUA HADLEY** **MK3/E-4** **U.S. COAST GUARD**	**DEFENSE MOTION TO DISMISS OR FOR OTHER APPROPRIATE RELIEF (Unreasonably Multiplied Charges)** **17 NOV 2022**

MOTION

Pursuant to R.C.M. 906(b)(12), the Defense moves this Court to issue appropriate relief from the Government's unreasonable multiplication of Charge II and the Additional Charge by dismissing Charge II and the specification thereunder.

BURDEN

As the moving party, the Defense bears the burden of proof by a preponderance of the evidence with regard to each factual issue necessary for resolution of this motion. RC.M. 905(c).

FACTS

1. The Government has alleged that on one occasion, 31 May 2022, MK3 Hadley touched the penis of DC2 [redacted][1] with his hand, with an intent to gratify his own sexual desire. (Final Charge Sheet of 13 Oct 22 at 3, 5).

2. The Convening Authority referred the five charges and six specifications in this case for trial by General Court-Martial, including, in relevant part:

a. First, in the sole specification of Charge II, the Government alleges that MK3 Hadley committed an Abusive Sexual Contact on DC2 [redacted] on or about 31 May 2020 pursuant to Article 120, UCMJ:

CHARGE II: Violation of the UCMJ, Article 120 (Abusive Sexual Contact)

Specification: In that Machinery Technician Third Class Petty Officer Joshua D. HADLEY, U.S. Coast Guard, on active duty, did, at or near Honolulu, Hawaii, on or about 31 May 2020, touch with his hand the penis [redacted] 5/22/22 ~~and scrotum~~ of DC3 [redacted] with an intent to gratify his own sexual desire, without the consent of DC3 [redacted]

[1] DC2 [redacted] was a DC3 in May 2020, but is now a DC2 and is referred to as such in this brief.

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b. Second, in the sole specification of the Additional Charge, the Government again alleges MK3 Hadley committed an Abusive Sexual Contact on DC2 [redacted] on or about 31 May 2020, also pursuant to Article 120, UCMJ:

> **ADDITIONAL CHARGE: Violation of the UCMJ, Article 120 (Abusive Sexual Contact)**
>
> **Specification:** In that Machinery Technician Third Class Petty Officer Joshua D. HADLEY, U.S. Coast Guard, on active duty, did, at or near Honolulu, Hawaii, on or about 31 May 2020, touch the penis of DC3 [redacted] with MK3 Hadley's hand, with an intent to gratify the sexual desire of MK3 Hadley, when he knew that DC3 [redacted] was asleep.

(Final Charge Sheet of 13 Oct 22 at 3, 5).

LAW

a. The prohibition on unreasonable multiplication is grounded in reasonableness and protects against prosecutorial overreach.

"What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." R.C.M. 307(c)(4); *United States v. Quiroz*, 55 M.J. 334, 336-39 (C.A.A.F. 2001). This prohibition against unreasonable multiplication of charges "has long provided courts-martial and reviewing authorities with a traditional legal standard—reasonableness—to address the consequences of an abuse of prosecutorial discretion in the context of the unique aspects of the military justice system." *Quiroz*, 55 M.J. at 338 (contrasting multiplicity and unreasonable multiplication doctrines); *see also United States v. Roderick*, 62 M.J. 425, 433 (C.A.A.F. 2006) (same).

A military judge must "exercise sound judgment to ensure that imaginative prosecutors do not needlessly 'pile on' charges against a military accused." *United States v. Foster*, 40 M.J. 140, 144 n.4 (C.M.A. 1994), *overruled in part on other grounds, United States v. Miller*, 67 M.J. 385 (C.A.A.F. 2009). In service of this obligation, a trial court considers four factors in testing whether charges are unreasonably multiplied:

- Is each charge and specification aimed at distinctly separate criminal acts?
- Does the number of charges and specifications misrepresent or exaggerate the accused's criminality?
- Does the number of charges and specifications unfairly increase the accused's punitive exposure?
- Is there evidence of prosecutorial overreaching or abuse in the drafting of the charges?

United States v. Anderson, 68 M.J. 378, 386 (C.A.A.F. 2010) (citing *Quiroz*, 55 M.J. at 338).

In *United States v. Solomon*, the Navy-Marine Corps Court of Criminal Appeals held that an accused's conviction of abusive sexual conduct and indecent exposure for the same incident was

an unreasonable multiplication of charges. *United States v. Solomon*, No. NMCCA 201100582, 2014 CCA LEXIS 599, at *4 (N-M Ct. Crim. App. 2014). In that case, the appellant pulled the victim's pants down to his ankles and rubbed his own genitals against the victim's, and the government charged him with both abusive sexual contact and indecent exposure. *Id.* The court held that "what was one transaction became the basis of two separate charges," because the two charges arose out of the same set of facts in which the appellant "exposed himself in order to affect [*sic*] the sexual contact with [the victim]." This resulted in prejudice to the appellant, since he was sentenced to an additional year in prison for the unreasonably multiplied charge. *Id.*

In *United States v. Cooper*, the Army Court of Criminal Appeals found that a military judge abused his discretion in failing to dismiss a specification of aggravated assault with grievous bodily harm charged under Article 128, UCMJ, as an unreasonable multiplication of attempted murder charged under Article 80, UCMJ. *United States v. Cooper* 2016 CCA LEXIS 661 (Army Ct. Criminal App. 2016) (unpublished) (*aff'd by United States v. Cooper*, 2017 CAAF LEXIS 341, (C.A.A.F. 2017)). The court found that the gravamen of the two specifications was the same criminal act—the stabbing of the victim in the neck and back, and that the accused should not have been subject to findings on both. *Id.* at *5. Accordingly, the court set aside the conviction for aggravated assault as an unreasonable multiplication of attempted murder. *Id.* at *5-6.

Likewise, in *United States v. Sanks*, the Army Court found the military judge erred in failing to dismiss a specification of maiming in violation of Article 128a, UCMJ, where the exact same criminal act was charged in violation of Article 80 for attempted murder. *United States v. Sanks*, 2016 CCA LEXIS 182 (Army Ct. Crim. App. 2016) (unpublished) (*review den'd United States v. Sanks*, 2016 CAAF LEXIS 561 (C.A.A.F. 2016)). The Court did so despite finding "the remaining [*Quiroz*] factors [did] not weigh heavily for either the appellant or Government." *Id.* at *14. The court ultimately dismissed the maiming specification as an unreasonable multiplication of the attempted murder, setting aside the conviction. *Id.*

b. A military judge has wide discretion to remedy unreasonable multiplications of charges, up to and including dismissal.

When charges are unreasonably multiplied, the military judge has wide latitude to craft a remedy, including dismissing offenses, merging them for findings, or merging offenses only for sentencing. *United States v. Thomas*, 74 M.J. 563, 568 (N-M. Ct. Crim. App. 2014) (citing *United States v. Campbell*, 71 M.J. 19, 25 (C.A.A.F. 2012)) (holding military judge had discretion to not dismiss or merge specifications for findings but to merge them for sentencing). The Court of Appeals for the Armed Forces has held that it was prejudicial error for a military judge to no consider dismissal an available option when confronted with unreasonably multiplied charges. *United States v. Roderick*, 62 M.J. 425, 433 (C.A.A.F. 2006). The *Roderick* court dismissed indecent liberties convictions that arose from the same criminal acts—taking photographs of underage girls—as the appellant's child pornography convictions under 18 U.S.C. § 2251(a). *Id.*

In *Quiroz*, where the factor-test originated, the Navy-Marine Corps Court of Criminal Appeals dismissed a conviction for wrongfully disposing of military property by selling C-4, which was the same act that led to a conviction for violating 18 U.S.C. § 842 (where 18 U.S.C.

§ 842 criminalizes the unlawful distribution and transportation of explosive materials). *United States v. Quiroz*, 52 M.J. 510, 513 (N-M. Ct. Crim. App. 1999)

Finally, when convictions result from specifications that were charged for exigencies of proof, a military judge must "'consolidate or dismiss [the contingent] specification[s].' not merely merge them for sentencing purposes." *Thomas*, 74 M.J. at 568 (quoting *United States v. Elespuru*, 73 M.J. 326, 329-30 (C.A.A.F. 2014)) (additional citation omitted). Where consolidation is impractical, military judges are encouraged to conditionally dismiss convictions, *id.* at 570, mindful that "each additional conviction imposes an additional stigma and causes additional damage to the defendant's reputation." *United States v. Doss*, 15 M.J. 409, 412 (C.M.A. 1983)15 M.J. 409, 412 (*quoting Missouri v. Hunter*, 459 U.S. 359, 373 (1983), Marshall, J., dissenting.

ARGUMENT

All four *Quiroz* factors weigh in MK3 Hadley's favor. Charge II and the Additional Charge are unreasonably multiplied. For both charges to go to the members would irremediably misrepresent the level of criminality at issue in this case. The appropriate remedy is dismissal of Charge II.

a. Charges II and the Additional Charge both allege a single criminal act rather than separate or distinct acts.

Charge II and the Additional Charge both target the exact same alleged criminal act: MK3 Hadley allegedly touching the penis of DC2 [redacted] to gratify his own sexual desire.

b. This charging scheme significantly exaggerates and misrepresents MK3 Hadley's criminality.

These charges and specifications misrepresent and exaggerate MK3 Hadley's alleged criminality by giving the appearance that he engaged in abusive sexual contact more than once. The Additional Charge and Charge II both allege that MK3 Hadley wrongfully touched DC2's penis, on the same occasion, with the same alleged intent. This would unfairly prejudice members, and this issue should not be permitted to reach them.

c. This charging scheme also unfairly increases MK3 Hadley's punitive exposure.

The addition of this charge and its specification also unfairly increase MK3 Hadley's punitive exposure. Adding a second abusive sexual contact charge on top of the first necessarily doubles MK3 Hadley's punitive exposure for this single alleged act, from 7 years to 14 years.

d. The prosecutorial overreach and abuse here establish that dismissal of the offending Charges and Specifications is the only appropriate remedy.

At the time of drafting the initial charge sheet on 22 June 2022, the Government sought to criminalize the single alleged act of MK3 Hadley's touching of DC2 [redacted] penis and scrotum with a single Abusive Sexual Contact Charge and specification (and a charge for the same act

under Article 128, UCMJ, which the Government later dismissed). It was not until 23 August 2022 that the Government sought to double MK3 Hadley's punitive exposure by tacking on the second Article 120 charge for this very same act. The Defense is aware of no new evidence that was discovered between June 2022 and August 2022 that would have been material to the decision about how to charge the alleged abusive sexual contact; all of the relevant facts were known as of June 2020.

The Government's choice of charging structure further indicates an intent to amplify and multiply the prejudicial impact of the charge sheet: rather than having one charge of abusive sexual contact with two specifications (which would still constitute unreasonable multiplication of charges), the charge sheet has two separate charges, in two separate places, for the same alleged abusive sexual contact. This is in contravention to the charging norms as addressed in the Discussion section of R.C.M. 307: "Charges preferred after others have been preferred are labeled 'additional charges" . . . . These ordinarily relate to offenses *not known at the time* or *committed after* the original charges were preferred. (*emphasis* added.)

This overcharging scheme exceeds the reasonableness limits imposed by R.C.M. 307 and *U.S. v. Quiroz* and is indicative of the "piling on" of charges and specifications that precedent prohibits. Dismissal is therefore the appropriate remedy to protect MK3 Hadley from being convicted of two charges for the exact same alleged offense, and from the prejudice of the appearance of being charged with two instances of abusive sexual contact for that single alleged offense. *See United States v. Doss*, 15 M.J. 409, 412 (C.M.A. 1983) (noting that when unreasonable multiplication may have impacted verdict "on the merits as to all the multiplied charges—much like the threat posited by Justice Marshall—we have not hesitated to set aside all tainted findings of guilty"); *United States v. Sturdivant*, 13 M.J. 323 (C.M.A. 1982)). "[W]here the prosecution's evidence is weak, its ability to bring multiple charges may substantially enhance the possibility that, even though innocent, the defendant may be found guilty on one or more charges as a result of a compromise verdict." *Missouri v. Hunter*, 459 U.S. 359, 372 (1983) (Marshall, J., dissenting).

RELIEF REQUESTED

The Defense requests that the Military Judge dismiss Charge II and the specification thereunder because it is unreasonably multiplied with the Additional Charge and its specification.

ORAL ARGUMENT

If this Motion is opposed by the Government, the Defense requests an Article 39(a) session to present oral argument and additional evidence as necessary.

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Date: 2022.11.17 14:17:51 -10'00'

M. R. SERRILL-ROBINS
LT, USCG
Detailed Defense Counsel

I certify that I have served a true copy via e-mail of the above on Military Judge, CDR Emily Reuter, and Trial Counsel, LCDR Erin Callahan, LCDR Amanda Hood, and LCDR Case Colaw, on 17 Nov 2022.

SERRILL-ROBINS.MIRA.ROSE.[redacted] Digitally signed by SERRILL-ROBINS.MIRA.ROSE.[redacted] Date: 2022.11.17 14:18:11 -10'00'

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COAST GUARD TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **JOSHUA HADLEY** **MK3/E-4** **U.S. COAST GUARD**	**DEFENSE MOTION FOR APPROPRIATE RELIEF** **(Request for Findings Instruction on Unanimity)** **17 NOV 22**

MOTION

Pursuant to Rules for Courts-Martial 906(a) and 920(c), as well as Amendments V and VI of the U.S. Constitution, the Defense now moves the Court to instruct the members, prior to findings, that conviction of MK3 Hadley 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

1. MK3 Hadley is charged with sexual harassment, abusive sexual contact, committing a sexual act with an animal, and viewing and possessing child pornography. He faces a potential of 33years' imprisonment if convicted.

2. These offenses have been referred for trial by General Court Martial, and MK3 Hadley intends to request trial by members with enlisted representation.

LAW

a. <u>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.</u>

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, 454 (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 (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. And 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, 1395 (2020).

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. 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). Given that 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. *Ramos*, 140 S. Ct. at 1397.

A court-martial panel is not a Sixth Amendment jury, but it must be impartial to satisfy due process. *Wiesen*, 56 M.J. at 164. And part and parcel of being "impartial," *Ramos* instructs, is a unanimous finding as to a criminal offense. *Ramos*, 140 S. Ct. at 1395. At bottom, this makes sense. 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 if it is held by one of four or 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 eliminate potential bias. An impartial court-martial panel—the only one permitted by Due Process—is one that reaches its decision unanimously, a *panel* who finds an accused guilty beyond a reasonable doubt.

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. § 851-853 (2019). However, courts are not bound by unconstitutional statutory or executive enactments. *Norton v. Shelby County*, 118 U.S. 425, 442 (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 U.C.M.J. and the Manual for Courts-Martial, which purport to allow non-unanimous court-martial verdicts, violate the Constitution.

ARGUMENT

In *United States v. Causey*, the Navy-Marine Corps Criminal Court of Appeals held that the Sixth Amendment's right to trial by an impartial jury, as interpreted by the Supreme Court in *Ramos* to require a unanimous verdict for serious offenses in state or Article III criminal courts, "is still not applicable to courts-martial." *United States v. Causey*, 82 M.J. 574, 588 (N-M. Ct. Crim. App. 2022); *see also United States v. Vance*, No. 202100024, 2022 WL 2236317, at *13 (N-M. Ct. Crim. App. June 22, 2022); *United States v. Anderson*, No. ACM 39969, 2022 WL 884314, at *18 (A.F. Ct. Crim. App. Mar. 25, 2022), *review granted*, No. 22-0193/AF, 2022 WL

3219303 (C.A.A.F. July 25, 2022). That decision was incorrectly decided. MK3 Hadley is entitled to trial by an impartial panel. As discussed above, impartiality requires unanimity. Should he be found guilty of the charged offenses, MK3 Hadley faces a number of consequences otherwise attendant only to State and Federal criminal convictions, including more than 33 years' imprisonment.

The Court of Appeals for the Armed Forces has long held that due process requires court-martial panels to be impartial. The recent Supreme Court decision in *Ramos v. Louisiana* is clear that impartially rendering a verdict as to any serious criminal offense requires unanimity. In order to preserve MK3 Hadley'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 current statutory and regulatory rules, it is required by the Constitution.

RELIEF REQUESTED & ORAL ARGUMENT

The Defense moves the Court to charge the panel, prior to findings, that its verdict must be reached by unanimous agreement of all 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 of you unanimously find that the government has proved his guilt beyond a reasonable doubt.

SERRILL-ROBINS.MIRA.ROSE.[redacted]
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Date: 2022.11.17 14:18:49 -10'00'

M. R. SERRILL-ROBINS
LT, USCG
Detailed Defense Counsel

I certify that I have served a true copy via e-mail of the above on Military Judge, CDR Emily Reuter, and Trial Counsel, LCDR Erin Callahan, LCDR Amanda Hood, and LCDR Case Colaw, on 17 Nov 2022.

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M. R. SERRILL-ROBINS
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Detailed Defense Counsel

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. JOSHUA HADLEY Machinery Technician Third Class U.S. Coast Guard	**GOVERNMENT RESPONSE TO DEFENSE MOTION FOR APPROPRIATE RELIEF (Request for Findings Instruction on Unanimity)** 01 December 2022

RESPONSE

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. Because the United States opposes the Defense's motion, the United States will provide oral argument at the next Article 39(a), UCMJ, hearing.

SUMMARY

The Defense has not shown that the Sixth Amendment's Impartial Jury Clause applies to courts-martial and has not shown that under the Fifth Amendment's Due Process Clause the current framework is fundamentally unfair. In addition, *stare decisis* requires this Court to follow precedent of our higher courts and deny the Defense's request for an instruction requiring the panel to reach a unanimous verdict.

FACTS

1. This case was referred to a General Court-Martial on 07 October 2022. MK3 Hadley (hereinafter: the "Accused") has been charged with two specifications of Article 92 (Violation of a Lawful General Order), one charge of Article 120 (Abusive Sexual Contact), one charge of Article 134 (Sexual Act with an Animal), one charge of Article 134 (Viewing and Possessing Child Pornography), and an additional charge of Article 120 (Abusive Sexual Contact). The Accused waived his right to a preliminary hearing on 25 August 2022 and was arraigned on 20 October 2022.

2. For a guilty verdict of any specification, three-fourths of the members must concur that the United States proved each element of an offense beyond a reasonable doubt. UCMJ Article 52; R.C.M. 921(c)(2).

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BURDEN

As the moving party, the Defense bears the burden of persuasion and the burden of proof. The burden of proof for any contested factual issue is a preponderance of the evidence. R.C.M. 905(c)(1).

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.").

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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 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 United States requests this Court deny the Defense's request for a panel instruction requiring the panel to reach a unanimous verdict.

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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), [redacted]

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.

RELIEF REQUESTED

The United States respectfully requests the Court deny Defense's motion and request oral argument.

COLAW.CASE.ALEXANDER KNOX CHARL[redacted]
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CASE A. COLAW
Lieutenant Commander, USCG
Trial Counsel

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the above was served on the military judge and defense counsel via electronic mail on 01 December 2022.

COLAW.CASE.ALEXANDER KNOX CHARL[redacted]
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CASE A. COLAW
Lieutenant Commander, USCG
Trial Counsel

APPELLATE EXHIBIT 56
PAGE 4 OF 4 PAGE (S)

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. JOSHUA HADLEY Machinery Technician Third Class U.S. Coast Guard	**GOVERNMENT MOTION IN LIMINE (EXCLUDE IRRELEVANT EVIDENCE OF DC3 [redacted] NEGATIVE ADMINISTRATIVE REMARKS)** 04 January 2023

MOTION

Pursuant to R.C.M. 906(b)(13), the United States moves to prevent any testimony by witnesses, questioning of witnesses by Defense counsel, or comment by Defense counsel regarding negative administrative remarks issued to DC2 [redacted] in October 2019.

SUMMARY

The United States respectfully requests this Court issue an order preventing any testimony by witnesses, questioning of witnesses by Defense counsel, or comment by Defense counsel regarding a negative administrative remark and counseling DC2 [redacted] received in October 2019, because such extrinsic evidence cannot be used to impeach DC2 [redacted] on a collateral matter. In addition, the evidence is irrelevant and even if relevant, fails an M.R.E. 403 balancing test.

FACTS

1. This case was referred to a General Court-Martial on 07 October 2022. The Accused, MK3 Hadley, waived his right to a preliminary hearing on 25 August 2022 and was arraigned on 20 October 2022.

2. Charge II and the Additional Charge relate to the same factual events that took place on the night of 30 May and into the morning of 31 May 2020 in Honolulu, HI. As a result of these events, Coast Guard Investigative Service Special Agents conducted a reactive investigation that included interviewing several members of the crew of [redacted] to include MK3 Hadley and then DC3 [redacted] (victim).

3. MK3 Hadley shared an apartment with his [redacted] crewmember BM3 [redacted]. On the night of 30 May 2020, DC3 [redacted] attended a party with a small group of [redacted] crew members at MK3 Hadley and BM3 [redacted] apartment. (Enclosure 1 to the Government's Response to Defense Motion to Dismiss or Fore Other Appropriate Relief (Unreasonably Multiplied Charges)).

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4. DC3 [redacted] ordered an Uber ride share to commute to MK3 Hadley's apartment, arriving sometime between 2030-2130. The group played drinking games such as Beer Pong and King's Cup for approximately 3 hours. Id.

5. At approximately 2330 the other guests began to leave the apartment. DC3 [redacted] decided to stay the night, sleeping on MK3 Hadley and BM3 [redacted] couch, alone. DC3 [redacted] remembers seeing MK3 Hadley go to his bedroom before DC3 [redacted] fell asleep on the couch. Id.

6. A few hours later, between 0030 and 1330 on 31 May, DC3 [redacted] awoke to MK3 Hadley "massaging" DC3 [redacted] penis and scrotum. Id.

7. DC3 [redacted] was "shocked and upset" when he woke up. He asked MK3 Hadley why he was touching him and pushed MK3 Hadley away. DC3 [redacted] then grabbed all of his personnel belongings, left the apartment, and ordered an Uber. Id.

8. The next day, 01 June 2020, DC3 [redacted] reported the assault to his command while onboard [redacted] Id.

9. CGIS Special Agents interviewed MK3 Hadley on 3 June 2020. During the interview, MK3 Hadley corroborated DC3 [redacted] account of the evening. He stated the following:

    a. MK3 Hadley said that as two crew members left his apartment, he and BM3 [redacted] went to their respective bedrooms and DC3 [redacted] went to sleep on the couch. Id.

    b. MK3 Hadley said that left his room at some point during the night to go to the restroom and get a glass of water from the kitchen. Then he laid down on the couch next to DC3 [redacted] Id.

    c. MK3 Hadley admitted to placing his hand inside DC3 [redacted] pants while DC3 [redacted] was sleeping. He told Special Agents that he touched DC3 [redacted] penis and that DC3 [redacted] awoke saying, "what the heck." MK3 Hadley said he told DC3 [redacted] he was going back to his bedroom and then left immediately and returned to his room. Id.

    d. MK3 Hadley told Special Agents that DC3 [redacted] had not given him any signs that DC3 [redacted] wanted MK3 Hadley to touch his penis. He also acknowledged that if someone had done what he had done to DC3 [redacted] he would have "freaked out." Id.

10. Over seven months prior to this incident, on 7 October 2019, DC2 [redacted] received a Coast Guard 3307 Administrative Remarks form (page 7) from the then Acting Commanding Officer of [redacted] The form documents a counseling session DC2 [redacted] received for having "perceived to be in an unacceptable romantic relationship" with

another [redacted] crew member. (Enclosure 1)

11. The crew member DC2 [redacted] was perceived to have been involved with was a female and is not a witness to any of the charged misconduct in this case. (Anticipated Declaration of DC2 [redacted])

BURDEN

As the moving party, the Government bears the burden of proof by a preponderance of the evidence with regard to each factual issues necessary for resolution of this matter. R.C.M. 905(c).

LAW

The Constitution does not confer upon an accused the right to present any and all types of evidence at trial, but only that evidence which is legally and logically relevant. *Chambers v. Mississippi*, 410 U.S. 284 (1973).

M.R.E. 401-403 set forth what is legally and logically relevant. *United States v. Dimberio*, 56 M.J. 20, 24 (C.A.A.F. 2001). Relevant evidence is any evidence that tends to make a fact of consequence to the determination of the action more or less probable. M.R.E. 401. Irrelevant evidence is not admissible. M.R.E. 402.

Even if evidence is relevant, the military judge may exclude it if the evidence's probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence. M.R.E. 403.

In determining whether the probative value is substantially outweighed by the danger of unfair prejudice, the court should consider the following non-exhaustive factors: the strength of the proof of the prior act; the probative weight of the evidence; the potential to present less prejudicial evidence; the possible distraction of the fact-finder; the time needed to prove the prior conduct; the temporal proximity of the prior event; the frequency of the acts; the presence of any intervening circumstances; and the relationship between the parties. *United States v. Wright*, 53 M.J. 476. 482 (C.A.A.F. 2000).

The Court Guard Court of Criminal Appeals recently addressed the use of relevant extrinsic evidence when impeaching witnesses:

> The use of extrinsic evidence to impeach a witness is highly circumscribed. The rules on the use of extrinsic evidence to impeach depend on the method of impeachment. Broadly, there are four methods of impeachment: character for untruthfulness; prior inconsistent statements; bias, prejudice, or motive to misrepresent; or impeachment by contradiction. On the other hand, extrinsic evidence is permitted to show bias, prejudice, or motive to misrepresent.

In Re Y.B., No.001-23 (C.G.Ct.Crim.App. 2022), at page 4 [citations omitted].

When impeaching a witness based on an alleged bad character for truthfulness, "the inference which may be drawn from the witness' bad character for truth telling is that [the witness] is not telling the truth at trial." *United States v. Banker*, 15 M.J. 207, 210 (C.M.A. 1983). M.R.E. 608 provides the legal framework for proving a witness's character for truthfulness. M.R.E. 608(b) states, "Except for a criminal conviction under M.R.E. 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness' character for truthfulness." The military judge may allow cross examination on a specific instance of a testifying witness's conduct *if* it is probative of the testifying witness's character for truthfulness. M.R.E. 608(b)(1) (emphasis added). "Impeachment under M.R.E. 608(b) may not be based merely upon any instance of misconduct but, rather, upon conduct that relates to untruthfulness." *United States v. Robertson*, 39 M.J. 211, 214 (C.M.A. 1994).

Impeachment by contradiction "involves showing the tribunal the contrary of a witness's asserted fact, so as to raise an inference of general defective trustworthiness." *Banker*, 15 M.J. at 210. "The general rule is that if a witness's asserted fact is 'collateral,' then extrinsic evidence to contradict it is inadmissible." *In Re Y.B.*, No.001-23, at page 4. "A matter is 'collateral' if 'the fact could not be shown in evidence for any purpose independent of the contradiction.'" *Id* (citing *United States v. Langhorne*, 77 M.J. 547, 555 (A.F. Ct. Crim. App. 2017). "As a narrow exception to the general rule, military courts allow that a witness who makes a collateral assertion *on direct examination* may be contradicted by extrinsic evidence." *Id.*

ARGUMENT

DC2[redacted] is a named victim in this case and will testify to the facts of when he was accused sexually assaulted by MK3 Hadley while he was sleeping on the MK3 Hadley's couch in May 2020. The issue presented by this motion is: should the Defense be permitted to cross examine DC2[redacted] with the fact that he was counseled about, and received negative administrative remarks regarding, a perceived inappropriate relationship with someone other than the accused and any other witness in this case that occurred seven months prior to the facts at issue in this case, and for which DC2[redacted] did not receive any additional punishment? Under Military Rules of Evidence, the answer is clearly no.

The United States does not intend to elicit testimony concerning the October 2019 counseling or the Page 7. Thus, for this evidence to be presented to the fact finder, the Defense must attempt to impeach DC2[redacted] on cross examination, or present it during the Defense rebuttal case.

Out of the four methods of impeachment permitted under the Military Rules of Evidence, only two could reasonably apply here: character for untruthfulness and contradiction. There is no evidence that DC2[redacted] was asked about the October 2019 counseling or Page 7 during the investigation in this case, and therefore he has not made any statements about the events to contradict. Nor is there any evidence to support that what occurred in October 2019, seven months prior to facts underlying the sexual assault, shows bias, prejudice, or motive to misrepresent; indeed, the alleged perceived inappropriate relationship did not involve the

accused or any other witness in this case, and there is no evidence that DC2 [redacted] was concerned about his own misconduct when reporting his being sexually assaulted by the MK3 Hadley.

The Court should not allow Defense to inquire into October 2019 counseling because it does not satisfy the requirements of M.R.E. 608. The October counseling is not a conviction and therefore it is not admissible under M.R.E. 609. There is no evidence showing that the underlying facts that caused DC2 [redacted] to be counseled and receive the page 7 involved dishonesty or a false statement. Accordingly, the evidence is not probative of his character for truthfulness – a prerequisite for attack via extrinsic matters under M.R.E. 608(b).

The Court should also preclude the Defense from seeking to question DC2 [redacted] about this matter for the purpose eliciting contradictory statements under M.R.E. 607 because it is clearly collateral for the reasons stated above. The October 2019 counseling does not relate to any other matter concerning the charges against the accused; it only pertains to DC2 [redacted] It fits squarely within the general rule barring the use of extrinsic evidence to raise the inference that DC2 [redacted] is untrustworthy.

Finally, the Defense should also be precluded from attempting to introduce this evidence in its rebuttal case as it is irrelevant. Assuming, *arguendo*, that the Court finds it is relevant, its marginal probative value is substantially outweighed by the M.R.E. 403 factors. To introduce this evidence, the Defense will need re-call DC2 [redacted] in their own case and ask about the October 2019 counseling, or they will need to call another witness to testify solely about this matter. This will not only waste time and unduly delay the trial, but it is very likely to confuse and distract the fact finder from their task: to determine the MK3 Hadley's guilt or innocence regarding the charges.

RELIEF REQUEST

The United States respectfully requests this Court issue an order preventing any testimony by witnesses, questioning of witnesses by Defense counsel, or comment by Defense counsel regarding a negative administrative remark and counseling DC2 [redacted] received in October 2019, because it is inadmissible under Military Rules of Evidence 401-403, 607-609, and 613.

ENCLOSURES

Enclosure 1. DC2 [redacted] CG-3307 dtd 07 October 2019.
Enclosure 2. Anticipated Declaration of DC2 [redacted]

COLAW.CASE.ALEXANDER KNOX CHARL[redacted]
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CASE A. COLAW
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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the above was served on the military judge and defense counsel via electronic mail on 04 January 2023.

COLAW.CASE.ALEXANDER KNOX CHARL[redacted]
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APPELLATE EXHIBIT 64
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COAST GUARD TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **JOSHUA HADLEY** **MK3/E-4** **U.S. COAST GUARD**	**DEFENSE RESPONSE TO GOVERNMENT MOTION IN LIMINE (Exclude Evidence of DC3 [redacted] Negative Administrative Remarks)** **18 January 23**

MOTION

Pursuant to the Rule of Court Martial (R.C.M.) 906(b)(13) and Military Rule of Evidence (M.R.E.) 608(c), the Defense moves this Court to deny the Government's motion to exclude evidence regarding negative administrative remarks issued to DC2 [redacted] in October 2019.

SUMMARY

The Defense requests this Court deny the Government's motion to exclude any testimony by witnesses, questions of witnesses by Defense counsel, or comment by Defense counsel regarding a negative administrative remark and counseling DC2 [redacted] received in October 2019. Mere questioning of DC2 [redacted] about the page 7 and counseling is not extrinsic evidence and, more importantly, extrinsic evidence of bias, prejudice, or any motive to misrepresent is permissible under M.R.E. 608(c). Additionally, evidence that DC2 [redacted] was counseled not to engage in inappropriate relationships with any [redacted] crewmember does not fall under the protections of M.R.E. 412, whether introduced through cross examination or extrinsic evidence.

BURDEN

As the proponent of the evidence, the Government bears the burden of proof, by a preponderance of the evidence, to establish facts necessary to determine admissibility. R.C.M. 905(c).

FACTS

1. MK3 Hadley is charged with two specifications of a violation of Article 120, Uniform Code of Military Justice (U.C.M.J.) for allegations of abusive sexual contact stemming from a single incident on 31 May 2020. DC2 [redacted] is the complaining witness for both alleged offenses.[1]

[1] Charge sheet.

APPELLATE EXHIBIT Cvv
PAGE 1 OF 4 PAGE (S)

2. At the time of the alleged offenses, both MK3 Hadley and DC2 [redacted] were attached to [redacted].[2]

3. At the time of the alleged offenses, DC2 [redacted] was sleeping at MK3 Hadley's apartment.[3]

4. On 7 October 2019, DC2 [redacted] received a Coast Guard 3307 Administrative Remarks form from the acting Commanding Officer of [redacted] because he was counseled for a perceived unacceptable romantic relationship with another member of the ship. The counseling included an order "not to engage in any sexual or romantic relationships with any [redacted] crewmember" and "not to reside together in the same residence."[4]

LAW

a. M.R.E. 412(a) states that in any proceeding involving an alleged sexual offense, the following evidence is not admissible unless an exception applies: "(1) Evidence offered to prove that a victim engaged in other sexual behavior; or (2) Evidence offered to prove a victim's sexual predisposition."[5]

b. Under M.R.E. 412(d), sexual behavior includes "any sexual behavior not encompassed by the alleged offense. Sexual predisposition includes evidence of an alleged victim's "mode of dress, speech, or lifestyle that does not directly refer to sexual activities or thoughts but that may have a sexual connotation for the fact finder."[6]

c. Ulterior motives are never collateral and may be proved extrinsically. M.R.E. 608(c) states "Bias, prejudice, or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced."[7]

ARGUMENT

a. <u>Evidence of DC2 [redacted] negative administrative remarks do not fall under the protections of M.R.E. 412</u>

The page 7 received by DC2 [redacted] on 7 October 2019 does not constitute M.R.E. 412 evidence. It does not describe any sexual behavior or discuss sexual predisposition. It only documents that DC2 [redacted] was counseled for having a perceived romantic relationship with another member of [redacted] Evidence of a romantic relationship is no different than evidence a complaining witness having a spouse or a dating relationship with someone. The Defense has no intention of questioning DC2 [redacted] beyond the fact that he received administrative counseling for having a perceived romantic relationship with someone else on the ship, including that he was reminded that "Crew members who feel a romantic attraction for one

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[2] Adopting fact from Government MIL to exclude evidence of negative administrative remarks.
[3] Adopting fact from Government MIL to exclude evidence of negative administrative remarks.
[4] Enclosure (1) to Government MIL to exclude evidence of negative administrative remarks.
[5] M.R.E. 412(a).
[6] M.R.E. 412(d).
[7] M.R.E. 608(c).

another shall not purchase or spend the night together…Such activity is prejudicial to good order and discipline," as well as given a direct order not to engage in sexual or romantic relationships with any [redacted] crewmember." The Defense does not intend to ask any specifics about the relationship that he was counseled for other than he received the counseling. None of this evidence falls under M.R.E. 412.

b. Evidence of DC2 [redacted] negative administrative remarks are admissible under M.R.E. 608(c) both extrinsically and through questioning of DC2 [redacted]

Evidence that DC2 [redacted] received negative counseling for a perceived romantic relationship with a [redacted] crewmember in October 2019 is permissible under M.R.E. 608(c), both through questioning of DC2 [redacted] and extrinsically. This evidence goes directly towards the bias of DC2 [redacted] and his motive to fabricate and misrepresent the alleged incident that occurred on 31 May 2020. DC2 [redacted] was counseled for having a perceived romantic relationship with a crewmember. He was given an order not to engage in any sexual or romantic relationships with a crewmember. This provides motivation to misrepresent the nature of the alleged incident with MK3 Hadley, since if the alleged offenses did occur and were consensual, DC2 [redacted] would be in violation of the order provided in his written counseling.

While the Government argues the evidence could only be admitted as character for untruthfulness or contradiction, this is simply incorrect. The page 7 has nothing to do with DC2 [redacted] character for truthfulness and, as a specific occurrence, would be inadmissible under M.R.E. 608(a), which only permits reputation or opinion evidence. It could potentially be contradiction evidence depending on DC2 [redacted] testimony at trial. More importantly, however, M.R.E. 608(c) permits evidence of bias, prejudice, or any motive to misrepresent through cross-examination or extrinsic evidence. Although the counseling occurred months before the alleged offenses and DC2 [redacted] did not receive additional punishment, the page 7 provides a clear motivation for DC2 [redacted] to misrepresent what allegedly occurred with MK3 Hadley, and therefore is permitted by M.R.E. 608(c). If the alleged incident with MK3 Hadley was anything but nonconsensual, DC2 [redacted] would be in violation of his counseling.

RELIEF REQUESTED

The Defense requests that the Military Judge deny the Government's motion to exclude evidence regarding negative administrative remarks issued to DC2 [redacted] in October 2019.

EVIDENCE AND ORAL ARGUMENT

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

[redacted]

J. T. COLE
LCDR, USN
Assistant Defense Counsel

APPELLATE EXHIBIT 64
PAGE 3 OF 4 PAGE (S)

I certify that I have served a true copy via e-mail of the above on Military Judge and Trial Counsel on 18 January 2023.

[redacted]
A. T. COLE
LCDR, USN
Assistant Defense Counsel

APPELLATE EXHIBIT 66
PAGE 4 OF 4 PAGE (S)

COAST GUARD TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **JOSHUA HADLEY** **MK3/E-4** **U.S. COAST GUARD**	**DEFENSE MOTION FOR APPROPRIATE RELIEF (Bill of Particulars)** **4 JAN 2023**

MOTION

Pursuant to Rule for Courts-Martial (R.C.M.) 906(b)(6), as well as Amendments V and VI to the U.S. Constitution, the Defense moves this court to order the Government provide a Bill of Particulars (BOP) as to the act or acts alleged in both specifications of Charge I.

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 is by a preponderance of the evidence. R.C.M. 905(c).

FACTS

1. In each of the two specifications of Charge I, MK3 Hadley is charged with violating Article 92, Uniform Code of Military Justice (UCMJ), "wrongfully transmitting unsolicited sexually offensive material and sexual requests from his Snapchat account to" one or more male Coast Guard members, in violation of a lawful general order. (Final charge sheet.)

2. Specification 1 alleges that messages were sent from on or about January 2020 to August 2020, on divers occasions, to male Coast Guard members. Specification 1 alleges that MK3 Hadley violated a lawful general order, citing to ALCOAST Commandant Notice (ACN or

ALCOAST) 003/20 (General Order Prohibiting Sexual Harassment) dated 7 January 2020. (Final charge sheet.)

3. Specification 2, as amended in pen-and-ink on 22 August 2022, after preferral, alleges that the messages were sent from on or about January 2020 to December 2019, on divers occasions, to a male Coast Guard member. Specification 2 alleges that MK3 Hadley violated a lawful general order, citing to ALCOAST Commandant Notice 085/18 (General Order Prohibiting Sexual Harassment) dated 27 August 2018. (Final charge sheet.)

4. On 31 October 2022, the Defense requested a BOP. The request asked, in relevant part, which section(s) of each of ACN 003/20 and ACN 0815/18 MK3 Hadley is alleged to have violated with respect to Specification 1 and Specification 2, respectively. (Enclosure A.)

5. On 4 November 2022, the Government responded as follows, but did not address which section(s) of each ALCOAST the Government alleges that MK3 Hadley violated:

> CHARGE I, SPECIFICATION 1. Specifically, the Defense requests that the Government detail "a. Which sexually offensive material and sexual requests MK3 Hadley is being charged with transmitting; b. The name(s) of the individual(s) to whom MK3 Hadley is alleged to have transmitted the sexually offensive material and sexual requests in violation of ACN 003/20; c. The date(s) and time(s) of such transmissions; d. Which section(s) of ACN 003/20 MK3 Hadley is alleged to have violated." with regard to Charge I, Specification 1, Violations of Article 92 (Failure to Obey a General Order):
>
> a. On or about June 2020 through August 2020, MK3 Hadley sent unwelcome messages of a sexual nature to OS2[redacted]
> b. On or about February 2020 through May 2020, MK3 Hadley sent unwelcome messages of a sexual nature to CS3[redacted]
> c. On or about February 2020 through May 2020, MK3 Hadley sent unwelcome messages of a sexual nature to CS2[redacted]
> d. On or about July through August 2020, MK3 Hadley sent unwelcome messages of asexual nature to BM2[redacted]
>
> CHARGE I, SPECIFICATION 2. Specifically, the Defense requests that the Government specifically detail "a. Which sexually offensive material and sexual requests MK3 Hadley is being charged with transmitting; b. The name(s) of the individual(s) to whom MK3 Hadley is alleged to have transmitted the sexually offensive material and sexual requests in violation of ACN 003/20; c. The date(s) and time(s) of such transmissions; d. Which section(s) of ACN 085/18 MK3 Hadley

is alleged to have violated." with regard to Charge I, Specification 2, Violation of Article 92 (Failure to Obey a General Order):

a. On or about January 2019 through August 2019, MK3 Hadley sent unwelcome messages of a sexual nature to MK3 [redacted]

(Enclosure B.)

6. Among the documents provided to the accuser who preferred Charge I against MK3 Hadley is a copy of ACN 003/20, ACN 085/18, and 152/20. In the copy of ACN 003/20 that Trial Counsel provided to the accuser, Trial Counsel highlighted the release date and only this text in the body of the ALCOAST: "Definition: sexual harassment is unwelcome sexual advances, requests for sexual favors, and **other conduct of a sexual nature, when:** . . . This definition also includes unwelcome display or communication of sexually offensive materials." (Enclosure C.)

LAW

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

"The Fifth Amendment provides that no person shall be 'deprived of life, liberty, or property, without due process of law,' and the Sixth Amendment provides that an accused shall 'be informed of the nature and cause of the accusation.' Both amendments ensure the right of an accused to receive fair notice of what he is being charged with." *United States v. Girouard*, 70 M.J. 5, 10 (C.A.A.F. 2011) (citations omitted).

"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); *see also United States v. Tucker*, 82 M.J. 553, 561 (C.G. Ct. Crim. App. 2022). 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. 1994) (citing *Smith v Goguen*, 415 U.S. 566 (1974)). The *Peszynski* court set aside sexual harassment convictions and dismissed the underlying sexual harassment specifications, holding:

> Comments and gestures described only as "repeated," "unwelcome," and "of a sexual nature" simply do not, by themselves, provide a definitive standard of behavior subject to punitive sanction. These descriptive terms are not inherently criminal or even necessarily pejorative in nature; they are basically neutral. As such, they do not serve as an adequate standard by which to determine criminal behavior.

Peszynski, 40 M.J. at 879-80.

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 *Girouard*, 70 M.J. at 10). "While people are presumed to know the law, they can hardly be presumed to know that which is a moving target and dependent on the facts of a particular case." *Jones*, 68 M.J. 465, 468 (internal citation omitted).

b. 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.

"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 quotation marks omitted); *see also 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.* (quotation marks, brackets, ellipsis in original) (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").

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 n.4 (C.A.A.F. 2011) (citing *Russell v. United States*, 369 U.S. 749, 770 (1962).

ARGUMENT

The two specifications of Charge I fail to inform MK3 Hadley of the offenses charged with sufficient specificity to allow him to adequately defend against the charge and both specifications. Each of the ALCOASTs lays out at least three different ways that conduct of a sexual nature can constitute sexual harassment (and there can be combinations among the three core forms of sexual harassment). The two specifications each describe the alleged offense *act* as MK3 Hadley "transmitting unsolicited sexually offensive material and sexual requests from his Snapchat account to" one or more male Coast Guard members. Each specification says this act was done "wrongfully." Each specification cites to an ALCOAST. Nothing in either specification provides notice about *why* or in what manner the charged act was "wrongful." Nothing in either specification states what elements the Government will need to prove at trial beyond a reasonable doubt.

Trial Counsel's highlighting on ACN 003/20 in the printout provided to the first accuser in preparation for preferral suggests that the alleged offense is "conduct of a sexual nature . . . [in the form of] unwelcome display or communication of sexually offensive materials." The Government's response to the Defense Request for a Bill of Particulars indicates either that the Government ignored the request to know what section of each ALCOAST was violated, or that

the Government believed it *was* responsive to state that "on [date], MK3 Hadley sent unwelcome messages of a sexual nature to [recipient]." These bare statements, alone, do not state an offense—merely sending an "unwelcome message of a sexual nature" does not and could not qualify as "wrongful" under the ALCOASTs. It is therefore unclear what offense the Government is attempting to state in each specification of Charge I, or if each specification states an offense at all.[1]

If the Government intends to charge that the alleged conduct was wrongful because it "unreasonably interfere[ed] with an individual's work performance or creat[ed] an intimidating, hostile, or offensive working environment," that workplace connection with an actual hostile working environment is an essential element of the offense. *See United States v. Brown*, 82 M.J. 702, 708 (C.G. Ct. Crim. App. 2022), *review granted on other ground*, No. 22-0249/CG, 2022 WL 16973007 (C.A.A.F. Oct. 3, 2022). If the Government is charging some other violation of each ALCOAST, there are other impact elements that are essential to the offense. The specifications, as written, shed no light on the essential impact elements of the alleged offenses.

A Bill of Particulars cannot cure a legally insufficient charge. However, even where the elements are pled correctly in a specification, a Bill of Particulars may still be still necessary to provide the accused an adequate opportunity to defend against the charge. MK3 Hadley has a constitutional right to be informed which section of each ALCOAST he is charged with violating. The different types of sexual harassment are very different from one another. It is impossible for him to develop and present a defense to a murky charge citing to an ALCOAST

[1] In a previous round of motions, the Defense filed a separate motion seeking dismissal of both specifications of Charge I based on defective preferral. The Defense expected that Charge I might be explained through the Government's briefing and argument on that motion, but Charge I remains unclear.

that can be violated in several different ways, and that is also subject to misinterpretation. *See, e.g.*, *Brown*, 82 M.J. at 708. MK3 Hadley is likewise entitled to know what elements the Government will need to prove beyond a reasonable doubt in order for him to be found guilty, and to know that in time for the Defense to prepare its theory and gather evidence based on those elements.

Depending on what the Government intends to charge, it may also turn out that the specifications fail to state an offense and the Defense may need to file a motion seeking dismissal of one or both specifications of Charge I on that ground. But the Defense is unable to determine that without some indication of which section of each ALCOAST Charge I alleges was violated.

Without greater specificity with respect to the charged act, MK3 Hadley is unable to adequately prepare or execute his defense. The Defense has already been hobbled in conducting witness interviews because neither the allegations in Charge I nor the discovery clearly address what section of each ALCOAST was allegedly violated, so witness interviews can't aim squarely at gathering information to elucidate upon and refute Charge I. The Defense cannot clearly consult with its experts about a defense theory with respect to Charge I because it is unclear what is charged. As matters stand, the Defense will not know what section of each ALCOAST the Government alleges was violated until Defense Counsel attempt to interpret the Government's direct examination of witnesses, or until a conference on member instructions, or perhaps not until Trial Counsel's closing argument. This violates MK3 Hadley's constitutional right to due process.

RELIEF REQUESTED

The Defense moves the Court to order the Government to provide a Bill of Particulars identifying with sufficient precision the misconduct alleged in the two specifications of Charge I to permit the development of a defense to those specifications.

EVIDENCE AND HEARING

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

A. Defense request for Bill of Particulars of 31 Oct 2022
B. Government Response to Defense Request for BOP of 4 Nov 2022
C. ALCOASTs containing allegedly violated general orders excerpted from documents provided to accuser in preparation for preferral

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.

SERRILL-ROBINS.MIRA.ROSE.[redacted]
Digitally signed by SERRILL-ROBINS.MIRA.ROSE[redacted]
Date: 2023.01.04 13:24:15 -10'00'

M. R. SERRILL-ROBINS
LT, USCG
Detailed Defense Counsel

I certify that I have served a true copy via e-mail of the above on Military Judge, CDR Emily Reuter, and Trial Counsel, LCDR Erin Callahan, LCDR Amanda Hood, and LCDR Case Colaw, on 4 Jan 2023.

SERRILL-ROBINS.MIRA ROSE[redacted]
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Date: 2023.01.04 13:24:45 -10'00'

M. R. SERRILL-ROBINS
LT, USCG
Detailed Defense Counsel

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. JOSHUA HADLEY Machinery Technician Third Class U.S. Coast Guard	**GOVERNMENT RESPONSE TO DEFENSE MFAR (BILL OF PARTICULARS)** 18 JANUARY 2023

MOTION

The United States files this motion in response to the Defense's request for a bill of particulars.

SUMMARY

The Defense motion should be denied because they have failed to meet their burden. The specifications at issue contain the elements of the charged offense and the Government provided a bill of particulars on 04 November 2022 stating, in sufficient detail, the facts and evidence that support the specification. Therefore, the Defense's motion should be denied.

FACTS

1. The case was referred to a General Court-Martial on 07 October 2022. MK3 Hadley (hereinafter: the "Accused") has been charged with two specifications of Article 92 (Violation of a Lawful General Order), one charge of Article 120 (Abusive Sexual Contact), one charge of Article 134 (Sexual Act with an Animal), one charge of Article 134 (Viewing and Possessing Child Pornography), and an additional charge of Article 120 (Abusive Sexual Contact). The Accused waived his right to a preliminary hearing on 25 August 2022 and was arraigned on 20 October 2022.

2. On 31 October 2022, Defense counsel provided their initial request for a bill of particulars.

3. On 04 November 2022, the Government provided their initial response to Defense's request.

4. On 17 November 2022, per the TMO, the first set of motions were due. Defense counsel did not submit a MFAR for a Bill of Particulars.

5. On 22 November 2022, Defense counsel provided the Accused's written notice of pleas and forum.

BURDEN

As the moving party, the defense must prove its factual claims by a preponderance of evidence. Rule for Courts-Martial 905(c)(1)-(2). The decision to grant a bill of particulars is within the discretion of the military judge. *United States v. Williams*, 40 M.J. 379, 381 n.4 (C.M.A. 1994). However, a military judge should only grant a bill of particulars if appellant has shown he would suffer "actual surprise or prejudice at trial." *Id.*

LAW AND ARGUMENT

The purpose of a bill of particulars is 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 pleas the acquittal or conviction in bar of another prosecution for the same offense when the specification itself is too vague and indefinite for such purposes. Rule for Courts-Martial 906(b)(6), Discussion, UNITED STATES (2019). For example, in *United States v. Steele*, the appellant was charged with engaging in conduct unbecoming an officer for, as the specification said, "providing special privileges" to a civilian employee. ARMY 20071177, 2011 WL 414992, *5 (A. Ct. Crim. App. Feb. 3, 2011). The appellant requested a bill of particulars and was provided one, which detailed the special privileges the appellant provided.

In contrast, the drafters of the *Manual for Courts-Martial* do not consider a bill of particulars appropriate for (1) discovery of the government's theory; (2) detailed disclosure of acts underlying a charge; and (3) restricting the government's proof at trial. R.C.M. 906(b)(6), discussion. This guidance has been part of the Manual since 1984 [redacted] More importantly, our superior appellate court's predecessor has recognized this guidance as controlling. *United States v. Mobley*, 31 M.J. 273, 278 (C.M.A. 1990).

Defense's request to know the specific section, or portion, of the definition of sexual harassment the Government intends to use to prove its case is really a request to limit the government to one and only one factual theory. This is because "[w]hen a bill of particulars has been furnished, the government is strictly limited to the particulars which it has specified, i.e., the bill limits the scope of the government's proof at the trial." *United States v. Haskins*, 345 F.2d 111, 114 (6th Cir. 1965). However, because of the general verdict doctrine in the armed forces, the government can proceed on multiple theories and is not required to limit itself to one theory. *United States v. Brown*, 65 M.J. 356, 359 (C.A.A.F. 1997).

Contrary to the Defense's claim, the specifications are sufficient and provide fair notice under the law. The traditional test for determining if a specification is sufficient is if it contains the elements of the offense intended to be charged. See *United States v. Williams*, 40 M.J. 379, 382 (1994), citing *United States v. Schwarz*, 15 MJ 109, 111 (CMA 1983), quoting *United States v. Sell*, 3 USCMA 202, 206, 11 CMR 202, 206 (1953); see *Hamling v. United States*, 418 U.S. at

117, 94 S.Ct. at 2907. Per R.C.M. 307(c), "a specification is a plain, concise, and definite statement of the essential facts constituting the offense charged. A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication…" The test is not whether it could be made more definite or certain so as to better assist defense counsel in interviewing witnesses or consulting with experts.

Fair notice relates to the standard applicable to the forbidden conduct. The United States Court of Appeals for the Armed Forces (CAAF) has found fair notice in "the [Manual for Courts-Martial], federal law, state law, military case law, military custom and usage, and military regulations." *United State v. Vaughan*, 58 M.J. at 31 (citations omitted). "Training, pamphlets, and other materials may also serve as sources of notice because they may give context to regulations and explain the differences between permissible and impermissible behavior." *United States v. Pope*, 63 M.J. 68, 73 (C.A.A.F. 2006) (citation omitted).

Here, the Government has charged the Accused with two specifications under Article 92(1), UCMJ, violation of a general order. The Defense initially requested a bill of particulars from the Government on 31 October 2022. The Government provided an initial response to the Defense's request five days later, on 4 November 2022, identifying the witnesses, dates of misconduct, and description of conduct related to Charge I.[1]

The below are the elements that the government must prove for a violation of an Article 92(1), UCMJ:

(1) That there was in effect a certain lawful general order or regulation;

(2) That the accused had a duty to obey such order; and

(3) That the accused violated or failed to obey the order or regulation.

All the above elements have been addressed in the charge sheet and the bill of particulars originally provided. The military judge has the ability to enumerate the specific acts and any state of mind or intent alleged which must be established by the prosecution in order to constitute the violation of the order or regulation. Dep't of Army, Pam 27-9, Legal Services: Military Judges' Benchbook, para. 3-16-1.c.(3) (29 Feb. 2020) [Benchbook].

The Government has provided details, facts, and evidence to give the accused fair notice and sufficient specifications. In addition, the Government filed a request for judicial notice stating specifically what it intends for the members to consider in deciding this charge. The Defense has all that is legally required to defend the accused concerning Charge I. What the defense seeks with their motion – a disclosure of the Government's theory – is not required. Accordingly, the Defense motion should be denied.

CONCLUSION

[1] The Defense has had the Government's response for over two months and within time to file this motion back at the initial motions due date, 17 November 2022, per the Trial Management Order and chose not to. The Defense fails to provide an explanation for why they are filing it now.

Because the defense cannot demonstrate unfair surprise or prejudice at trial on account of the charges and specifications as written, the government respectfully requests the military judge deny their requested relief.

CALLAHAN.ERIN.CA THERINE.[redacted] Digitally signed by CALLAHAN.ERIN.CATHERINE.[redacted] Date: 2023.01.18 16:17:28 -08'00'

ERIN C. CALLAHAN,
Lieutenant Commander, USCG
Trial Counsel

****

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the above was served on the military judge and defense counsel via electronic mail on 18 January 2023.

CALLAHAN.ERIN.CAT HERINE.[redacted] Digitally signed by CALLAHAN.ERIN.CATHERINE.[redacted] Date: 2023.01.18 16:20:02 -08'00'

ERIN C. CALLAHAN
Lieutenant Commander, USCG
Trial Counsel

APPELLATE EXHIBIT 75
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UNITED STATES COAST GUARD
WESTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES v. JOSHUA HADLEY E4/MK3	SVC Response to Government Motion in Limine (Exclude Irrelevant Evidence of DC3 [redacted] Negative Administrative Remarks) 12 January 2023

Motion

Pursuant to UCMJ Article 6b, Special Victims' Counsel (SVC) for DC2 [redacted] (DC3 [redacted] in Government Motion) requests to reserve the right to respond until after Defense filings. At this time, the issue of whether the Negative Administrative Remarks would fall under M.R.E. 412 is not ripe because it is unclear if: (1) Defense seeks to use this evidence and (2) if so, how Defense intends to use it.

Law

"Any analysis under Mil. R. Evid. 412 is necessarily case-specific." *United States v. Alston*, 75 M.J. 875, 881 (A. Ct. Crim. App. 2016).

Relief Requested

DC2 [redacted] requests to reserve the right to respond until Defense has provided their filing.

Respectfully Submitted,

MILLER.ADAM.DA VID.[redacted] Digitally signed by MILLER.ADAM.DAVID.[redacted] Date: 2023.01.12 14:18:11 -08'00'

LCDR Adam D. Miller
Special Victims' Counsel

APPELLATE EXHIBIT 79
PAGE 1 OF 2 PAGE (S)

I certify that I have served a true copy (via email) of the above on Judge Reuter, LCDR Colaw, and LT Serrell-Robins on 12 JAN 22.

MILLER.ADAM.DAVID.[redacted]

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Date: 2023.01.12 14:18:39 -08'00'

LCDR Adam D. Miller
Special Victims' Counsel

APPELLATE EXHIBIT 79
PAGE 1 OF 1 PAGE (S)

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. JOSHUA HADLEY Machinery Technician Third Class U.S. Coast Guard	**MOTION FOR APPROPRIATE RELIEF: RECONSIDERATION OF RULING ON DEFENSE MOTION TO COMPEL DISCOVERY** 27 January 2023

NATURE OF MOTION AND RELIEF SOUGHT

The United States respectfully requests this Court to reconsider and rescind its order requiring the government to provide direct communications regarding this case from the Secretary of Homeland Security, the Commandant of the Coast Guard, or The Judge Advocate General to the accusers, forwarding officials under R.C.M. 401-404, the Staff Judge Advocate or the Convening Authority. The communications requested are outside the scope of R.C.M. 701, as these communications are not in the possession, custody, or control of military authorities in this case. In the alternative, the United States requests this Court narrows the order to just email communications. The United States has attempted to comply with the order and was able to confirm there were no responsive email communications from Secretary, Commandant, and The Judge Advocate General. Any additional communications would be well outside the scope of R.C.M. 701.

The United States also respectfully requests this Court to reconsider and rescind the order compelling the government to disclose any diagnosis or prescriptions being taken by any government merits witness from the date they witnessed the events about which they will testify until present that impact their ability to perceive or recall events. The information ordered is outside the scope of R.C.M. 701, not within the possession, custody, or control of military authorities, and the government is unable to comply with the order as it would be in violation of the Health Insurance Portability and Accountability Act (HIPAA) and the procedural requirements of M.R.E. 513(c).

In the alternative, the United States requests this court amend and clarify its order for diagnosis or prescriptions, as the government is unable to comply with the order as it lacks specificity to the location of the information, lacks clarity regarding which medications or diagnoses to disclose, and the manner in which the information shall be disclosed. The current order is outside the scope of R.C.M. 701 as it orders information, rather than identifying documents, tangible objects, or records. As the Court's order stands, it also indicates that the government shall disclose the requested information of civilian witnesses, CGIS investigators, and disclose information that would be held in civilian treatment facilities, all of which cannot be compelled under R.C.M. 701. The United States requests the Court issue a new order clarifying the above questions and follow the preferred procedure set forth by the Court of Appeals for the Armed Forces in *United States v. Briggs*, 48 M.J. 143, 145 (C.A.A.F. 1998) for reviewing medical

records. Lastly, the United States requests the Court amend its order to expressly preclude the production or *in camera* review of any mental health records of the witnesses unless and until the defense and the Court have followed the required procedures set forth in M.R.E. 513(e). The United States also requests that a protective order be issued for the information provided.

FACTS & PROCEDURAL HISTORY

1. The case was referred to a General Court-Martial on 07 October 2022. MK3 Hadley (hereinafter: the "Accused") has been charged with two specifications of Article 92 (Violation of a Lawful General Order), one charge of Article 120 (Abusive Sexual Contact), one charge of Article 134 (Sexual Act with an Animal), one charge of Article 134 (Viewing and Possessing Child Pornography), and an additional charge of Article 120 (Abusive Sexual Contact). The Accused waived his right to a preliminary hearing on 25 August 2022 and was arraigned on 20 October 2022.

2. Defense moved to compel discovery of any direct communication, whether written or oral, in any way relating to this case, between any member of the Office of the Secretary of Homeland Security, the Commandant of the Coast Guard or her staff, the Office of the Judge Advocate General and officials involved in this case for *potential* evidence of Unlawful Command Influence (UCI).

3. The United States opposed the motion arguing that the request was overly broad and lacked sufficient evidence of UCI.

4. In the Article 39(a) hearing held on 19 December 2022, the defense confirmed that it possessed no evidence showing of potential unlawful command influence in this case but argued that the request was necessary to determine that such evidence does not exist.

5. The Court found that the defense had met its burden under R.C.M. 701 showing that the requested materials were relevant to defense preparation because it informs potential motions in the case.

6. The defense filed a motion to compel discovery of certain mental health records the United States had previously denied. The United States opposed defense's motion.

7. Defense produced no evidence that any of the witnesses involved in the investigation had such any diagnoses or were seeking mental health treatment or were taking any prescriptions that would impact their ability to perceive or recall events that will be presented at trial.

8. The Court, in its ruling on the defense's motion to compel, found that defense met its burden under R.C.M. 701 with regards to diagnosis or prescriptions that impacted witness' ability to perceive or recall events that will be presented at trial. The court did not provide any findings of fact to which diagnoses or prescriptions would qualify or to which degree a person's ability to perceive or recall events would be impaired and be relevant to impeaching witnesses' testimony.

9. The Court then issued an order for the government to disclose the following:

   a. Any diagnosis or prescriptions being taken by DC2 [redacted] from 30 May 2020 through present that impact his ability to perceive or recall events.

   b. Any diagnosis or prescriptions being taken by government merits witness on Charge II and the Additional Charge from 30 May 2020 through present that impact their ability to perceive or recall events.

   c. Any diagnosis or prescriptions being taken by OS2 [redacted] from June 2020 through present that impact his ability to perceive or recall events.

   d. Any diagnosis or prescriptions being taken by CS3 [redacted] from February 2020 through present that impact his ability to perceive or recall events.

   e. Any diagnosis or prescriptions being taken by CS2 [redacted] from February 2020 through present that impact his ability to perceive or recall events.

   f. Any diagnosis or prescriptions being taken by BM2 [redacted] from July 2020 through present that impact his ability to perceive or recall events.

   g. Any diagnosis or prescriptions being taken by MK3 [redacted] from June 2019 through present that impact his ability to perceive or recall events.

   h. Any diagnosis or prescriptions being taken by any government merits witness from the date they witnessed the events about which they will testify until present that impact their ability to perceive or recall events.

10. The military judge did not specify the documents or materials related to the diagnosis or prescriptions that are being ordered.

HEARING

The United States does not request oral argument on this motion.

BURDEN OF PROOF

As the movant, the Government bears the burden of persuasion on its motion by a preponderance of the evidence. R.C.M. 905(c).

APPLICABLE LAW

R.C.M. 701 and Discovery

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." Recognizing that military law has a much more liberal and broader means of discovery by an accused than in civilian

courts, it is not without limits. As stated in *United States v. Reece,* 25 M.J. 93, 94 (C.M.A. 1987), the only restrictions placed upon the liberal discovery is that the evidence "requested must be relevant…to the subject matter of inquiry, and the request must be reasonable." See also R.C.M. 703(e). "Relevance and reasonableness depend, of course, upon the facts of each case." *United States v. Imogene*, 6 M.J. at 591, citing *United States v. Franchia*, 13 U.S.C.M.A. 315, 32 C.M.R. 315 (1962). 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 court 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. 199).

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 'nonconviction' if successful is a 'defense.'" However, the Supreme Court 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.

M.R.E. 513 and Prescriptions and Diagnoses

Assuming the court is referencing the witnesses' mental health records that contain an individual's prescriptions and mental health diagnoses, this evidence involves the access of personal, confidential, and privileged information. Under M.R.E. 513(a), "a patient has a privilege…to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist" (emphasis added). Furthermore, a military judge may not order the production of any mental health records for *in camera* review until both the defense and the Court have fully complied with the procedural requirements set forth in M.R.E. 513(e). This procedure states in pertinent part that "in any case in which the production…of records…of a patient other than the accused is a matter in dispute, a party may seek an interlocutory ruling by the military judge." M.R.E. 513(e)(1) (emphasis added). "Patient" is defined broadly as "a person who consults with or is examined or interviewed by a psychotherapist for purposes of advice, diagnosis, or treatment of a mental or emotional condition." M.R.E. 513(b)(1). Thus, anytime a party is seeking the production of "records" of a person who consults with or is examined by a psychotherapist for the above referenced purposes, the party and the Court must comply with the procedural requirements set forth in M.R.E. 513(e). These requirements include the following: filing a written motion "specifically describing the evidence and stating the purpose for which it is sought or offered," notifying the patient or their representative that the motion has been filed, conducting a closed hearing, and providing the patient with an opportunity to attend the hearing and be heard. M.R.E. 513(e)(1)-(2). Moreover, "[p]rior to conducting an in-camera review, the military judge must find by a preponderance of the evidence that the moving party showed very specific items. M.R.E. 513(3).

Recently, the Court of Appeals for the Armed Forces reaffirmed the mandatory nature of this above-described procedure, notwithstanding its conclusions that the M.R.E. 513 privilege only applies to confidential communications and not to underlying facts such as a patient's diagnosis. *See United States v. Mellette*, 21-0312, 2022 WL 3036184, at 7 (C.A.A.F. July 27, 2022). In remanding the case for further proceedings, the C.A.A.F stated that any mental health records of the victim, including those referencing her diagnosis "should have been produced or admitted subject to the procedural requirements of M.R.E. 513(e)." *Id.* (emphasis added). In addition, the

court *In re AL*, 2022-12, 2022 WL 17484780, at 5, (A.F.C.C.A. December 07, 2022) reiterated the necessary procedure under M.R.E. 513(e)(2) related to ordering the production of evidence of a patient's records, notwithstanding any assertion of privilege. *Id* at 6.

Separately, when a Court determines an active duty military member's medical record may contain exculpatory information, "the preferred practice is for the military judge to inspect the medical records *in camera* to determine whether any exculpatory evidence was contained in the file prior to any government or defense access." *United States v. Briggs*, 48 M.J. 143, 145 (C.A.A.F. 1998), *see also United States v. Trigueros,* 69 M.J. 604, 611. As the C.A.A.F. explained, "[t]his process balances the victim's right against unnecessary intrusion into her medical files with the parties' rights to have equal access to potential evidence" and also "inspires confidence in the fairness of the system and fulfills the spirit of the rules of evidence and our case law." *Id.* This practice was followed in *United States v. Morris*, 52 M.J. 193, 198 (C.A.A.F. 1999), where the military judge ordered all of the victim's medical records be produced for an *in camera* inspection. *See also United States v. Harding*, 63 M.J. 65 (C.A.A.F.2006) (discussing procedures to employ in response to defense discovery request for sexual assault victim's mental health records); *United States v. Rivers*, 49 M.J. 434, 437 (C.A.A.F.1998) ("Where a conflict arises between the defense search for information and the Government's need to protect information, the appropriate procedure is an in camera review by a judge." (citing *Pennsylvania v. Ritchie*, 480 U.S. 39, 61 (1987)); *United States v. Kelly*, 52 M.J. 773 (Army Ct.Crim.App.1999)).

The disclosure of medical records and mental health records are also still protected by the Health Insurance Portability and Accountability Act (HIPAA), and "a covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law *and the use or disclosure complies with and is limited to the relevant requirement of such law.*" (emphasis added) 45 C.F.R. § 164.512(a)(1). The Coast Guard Medical Manual, COMDTINST M6000.1F and the Department of Defense Manual (DoDM) 6025.18, provide procedures related to compliance of privacy regulations adopted under HIPAA. DoDM 6025.18 also applies to certain elements of the U.S. Coast Guard as a Military Health Service, see paragraph 3.3.b. Further, DoDM 6025.18 paragraph 4.4.f. provides that a DoD covered entity may disclose protected health information: … [i]n compliance with, and as limited by, the relevant requirements of: "[a] court order, court-ordered warrant, subpoena, or summons issued by a judicial order," or:

> an administrative request, including an administrative subpoena or summons, a civil or an authorized investigative demand, or similar process authorized under law, if: [t]he information sought is *relevant and material* to a legitimate law enforcement inquiry[;] [t]he request is in writing, specific, and limited in scope to the extent reasonably practicable in light of the purpose for which the information is sought[;] and [d]e-identified information could not reasonably be used.

The court *In re AL*, 2022-12, 2022 WL 17484780, at 5, (A.F.C.C.A. December 07, 2022) analyzed the production of the evidence under the same standard for a production request per R.C.M. 703(g)(2). The court noted that in the government's request for records to the Military Treatment Facility the government followed the HIPAA and made the

determination of whether the request was relevant and material for a legitimate law enforcement purpose, in addition to the other requirements set forth in DoDM 6025.18. In addition, the court reiterated the necessary procedure under M.R.E. 513(e)(2) related to ordering the production of evidence of a patient's records. *Id* at 6.

ARGUMENT

The intent behind items that defense can request under R.C.M. 701 is narrower than this Court's interpretation. None of the ordered information or records are within the scope of R.C.M. 701. Both orders are for items and information that are outside the possession, custody, and control of the military authorities or any government entity that was working on behalf of the government in this case, as described in *Jackson*. Nor is the ordered information or records within trial counsel's files or any law enforcement files, as described in *Simmons*.

A. Order for Communications

The United States moves for a reconsideration due to the communications being outside the scope of R.C.M. 701(a)(2)(A), as the communications are not relevant for Defense's preparation in this case. As stated in *Armstrong*, what is considered relevant to Defense's preparation is associated with preparation in challenging the government's case on the merits. Similarly in this case, the defense is requesting information that would not challenge the government's case on the merits, but rather obtain information for a possible dismissal. This court found that direct communications were relevant to defense preparation to determine whether evidence of UCI exists, which would inform defense for potential motions in the case. This is conflict with the Supreme Court in *Armstrong* which emphasized that that Rule 16 of the Federal Rules of Crim Pr. establishes that the requests can refer only to defenses in response to the Government's case in chief, and that "defense preparation" is not challenging the conduct of the prosecution but rather "refuting the Government's arguments that the defendant committed the crime charged." *Id* at 462. Defense's request in this case for communications of the Secretary, the Commandant, and TJAG, to review for potential UCI is clearly an attempt to challenge any potential misconduct and not in support of their preparation for a defense against the Government's case in chief. Again, falling outside the scope and intent of R.C.M. 701(a)(2)(A).

In the alternative, the United States requests the Court narrow its current order to email communications. As the government did attempt to comply with the Court's order and requested communications of the Secretary of Homeland Security, the Commandant of the Coast Guard, and TJAG to the accuser, forwarding officials, the SJA and the Convening Authority regarding this case. The Convening Authority and the SJA office found no responsive records. A search was conducted by Coast Guard Cyber Command of emails and returned no responsive records regarding this case for the Secretary, Commandant, or TJAG. As currently drafted, the order is broad and encompasses all "direct communications," which is why the government requests reconsideration of any other communications outside the scope of emails. Any additional communications ordered to be disclosed would result in a search of other communication devices of the Secretary, Commandant, and TJAG, including personal cell phones, emails, tablets, and requesting a review of verbal communications resulting in any recollections or mental impressions by the individuals. Again, anything beyond emails would be outside the scope of R.C.M. 701, as not in the possession of military authorities involved in this case.

B. Order for Disclosing Information Regarding Diagnoses and Prescriptions

In addition to the arguments below, the government is unable to comply with the order concerning diagnoses and prescriptions of all government witnesses on its face. The order is requesting information, not documents or tangible items, which is outside the scope of R.C.M. 701. In addition, the court order fails to specify which diagnoses or prescriptions would qualify as impacting a witness' ability to perceive or recall events. There has been no factual determination of which diagnoses or prescriptions would impact a witness' ability to perceive or recall events. Defense had the burden in the request yet provided no evidence for this Court to make the necessary factual bases. This order requires factual determinations as to which prescriptions and diagnoses impact a witnesses' ability to perceive or recall events, and the court should not delegate the responsibility to member of the Coast Guard clinic or trial counsel. The current court order is requiring trial counsel or a third party to review the records and make that determination without the appropriate expertise. In addition, due to defense's lack of evidence of any diagnoses or prescriptions that exists, and lack of a list of qualifying conditions, the order is requiring the review of potentially any and all prescriptions or diagnoses that witnesses may have to meet the defense's requested fishing expedition. This expectation goes beyond exercising due diligence, but rather searching for the "proverbial needle in a haystack" that Court of Military Appeals stated is not required. *See United States v. Simmons* at n.4.

The Court's order also expands the scope of the original request by defense that was related to the mental health records of any "alleged victim or complaining witness." The court cannot compel discovery that has not been requested by defense. As the order expands beyond the named victims or complaining witnesses to include "any diagnosis or prescriptions being taken by *a government merits witness* on Charge II and the additional Charge…" (emphasis added) in paragraph 2, and "any diagnosis or prescriptions being taken by *any government merits witness from the date they witnessed the events about which they will testify until present*..." as indicated in paragraph 8 (emphasis added) of the Court's order. The language specifically related to these paragraphs expands the scope of the original request to witnesses beyond complaining witnesses or named victims, which includes civilian witness. Although perhaps not this Court's intent, the order would include agents from the Coast Guard Investigative Service, since they are part of the government's case and will be testifying to the events witnessed related to their investigations and the accused's statements.

The order also requires the government obtain information that is outside of the scope of R.C.M. 701. As stated by C.A.A.F., the item requested must be within the possession of the trial counsel or a government entity working on behalf of the trial counsel in the case. *See United States v. Jackson* 59 M.J. 330 (C.A.A.F. 2004); *United States v. Mahoney,* 58 M.J. 346 (C.A.A.F. 2003), *see also United States v. Simmons* 38 M.J. 376, (C.M.A. 1993). As previously discussed, any records within military health facilities are not within the possession of the military authorities for the purposes of R.C.M. 701. Holding the standards established by the courts in *Simmons, Jackson,* and *Williams,* any information or records from the military treatment facilities are well outside the trial counsel's own files and is not serving in a law enforcement capacity for this case.

1. **Mental Health Records**

As it stands, this Court's ruling orders the government to disclose any diagnosis or prescriptions being taken by government witnesses that may impact their ability to perceive or recall events. Defense's original request specified mental health records, so to the extent the order was ordering the government, or a third-party, review the mental health records of the government's witnesses it would be in violation M.R.E 513. The procedure under M.R.E. 513(e) does not refer specifically to communications but includes production or admission of a patient's records and are subject to the mandatory procedure prior to disclosure. As noted in the above section and assuming that the court is referencing the military witnesses' records, the Court's order does not distinguish between medical records in the strict sense and mental health records, all of which are located in a service member's Coast Guard medical record (all too frequently, co-mingled within a service member's medical record).

The Court's order's sweeping language to disclose "any diagnosis or prescriptions being taken" by a government witness that impacts their ability to perceive or recall events, plainly implicates patient records as defined by M.R.E. 513(e). To be sure, mental health records are the most likely place where one would find such diagnoses or prescriptions were they to exist. However, to date, neither the defense nor the Court have complied with the mandatory requirements of M.R.E. 513(e). Accordingly, the United States is respectfully requesting reconsideration of this Court's ruling to appropriately narrow the scope of its ruling and order to explicitly exclude any mental health or patient records as defined by M.R.E. 513 and provide the requisite specificity under R.C.M. 701 for the remaining evidence.

This Court has received no evidence that any of the government's merits witnesses have ever received a relevant diagnosis, taken prescriptions, or had any medical or mental health records that might contain such information that would be responsive. In fact, the only evidence that this court has received through the initial CGIS interviews is that the witnesses have not taken any medications that may impact their ability answer questions or recall events. However, this Court's order appears to require members of a medical treatment facility to search through these witnesses' medical or mental health records and then provide copies of those records to trial counsel, which could include potentially privileged, confidential communications between the service member-patient and their respective mental health providers. However, by its plain language, M.R.E. 513(a) provides these patients with a privilege to prevent "any other person," including the medical personnel referenced above, from disclosing any confidential communications contained within their medical or mental health records to third parties. As the C.A.A.F. recently made clear in *Mellette*, these records, specifically service member's medical records, have a "partially protected" status because they frequently contain both privileged and non-privileged information. *Mellette*, 2022 WL 3036184, at 5.

In order to prevent unauthorized disclosures of privileged information to third parties (*e.g.*, clinic personnel who are not psychiatrists or their assistants, the Court, or the trial counsel), the President of the United States has created one and only one process for parsing privileged and non-privileged information in mental health records or producing such records for *in camera* review (which is itself designed for parsing such information on occasion). That process is set forth in M.R.E. 513(e) and detailed above. As the *Mellette* Court made clear, this procedural process is required even if the information sought is ultimately not itself privileged. *Mellette*,

2022 WL 3036184, at 7. This conclusion is buttressed by the plain and unambiguous language of the rule itself which mandates the procedure set forth in M.R.E. 513(e) anytime there is a dispute regarding the production of a patient's mental health records (which is necessarily broader than the confidential communications to which the privilege applies). There is no limiting language within M.R.E. 513(e) for redacted mental health records or authority for other government personnel to review and perform redactions of mental health records for the purposes of *in camera* review. To the contrary, M.R.E. 513(e) sets forth very specific requirements before a Court may order the production of <u>any</u> mental health records for *in camera* review.

To date, that process has not been complied with by the defense or this Court. To the extent that the service members referenced in this Court's order have received mental health treatment and have mental health records in their Coast Guard medical records, they have not been provided with the required notice that a party is seeking production of portions of their mental health records and have not been afforded an opportunity to assert a privilege or be heard at any M.R.E. 513(e) hearing. Accordingly, to the extent this Court's ruling and order attempts to require the disclosure of mental health records to "any other person," including the medical or legal personnel referenced above, or attempts to order the production of redacted portions of a mental health record for *in camera* review without first complying with the procedural requirements set forth in M.R.E. 513(e), said order is *ultra vires*. The United States has an obligation to ensure that all persons involved in this court-martial, including the accused and any witnesses, receive the procedural process they are due under the law. That obligation extends to the procedural due process provided by the President of the United States to mental health patients via M.R.E. 513(e). To ensure strict compliance with M.R.E. 513(a) and (e) and the procedural due process embodied therein, the United States respectfully requests that the Court amend its ruling and order as detailed below.

2. Medical Records

In the alternative, if the court modifies the current order, is able to provide the specificity and guidance required under R.C.M. 701 and standards under HIPAA, and requires the government to obtain the medical records of all the witnesses, the government asks that the Court issue a new order for production of medical records that follows the procedure laid out in *Briggs*. The Court's current order implies that a third-party, or potentially the government, needs to make a decision on what portions of the records are responsive. The order also does not specify who should make that determination of what portions of the records related to prescriptions and diagnoses, are responsive, e.g., whether it is the record's custodian, the counsel for the custodian, a medical doctor, or trial counsel. Additionally, the determination of what diagnosis qualifies as affecting an individual's ability to perceive or recall events is subjective. Compounding this subjectivity, there is currently no recorded evidence, or findings of fact, on what type of diagnosis would qualify. It is unclear which diagnosis the Court believes would fall under these categories or what process or standards should apply to accurately make this determination. Fulfilling this request would require an individual who is well-versed in medical illnesses, essentially an expert, to conduct an in-depth review of each medical record and make a subjective determination about what records meet these fairly amorphous thresholds.

The Court should, instead, follow the practice laid out in *Briggs* and followed in *Morris*. The Court should inspect the medical records personally, and *in camera*, and make a determination as

to whether there is exculpatory or relevant evidence that is discoverable. This method will ensure that all records that meet the Court's order are produced and will ensure confidence in the fairness of the system. As discussed above, the court has not made any factual determinations, and the government cannot make any determinations. In addition, without further specificity, limitation scope, or the ability to assert the that the information sought is relevant and material for a legitimate law enforcement purpose, we will be unable to comply with the Court's order under HIPAA until defense has met its burden.

CONCLUSION & REQUESTED RELIEF

The Court's current orders conflict with what superior courts have held as the scope of what is "within the possession, custody, or control of military authorities," and what is able to be requested through the R.C.M. 701 process and M.R.E. 513(e).

The United States asks this Court to reconsider and rescind the current order related to the "direct communications regarding this case from the Secretary of Homeland Security, the Commandant of the Coast Guard or the Judge Advocate General to the accusers, forwarding officials under R.C.M. 401-404, the Staff Judge Advocate or the Convening Authority." In the alternative, the United States respectfully requests that this Court amend its ruling associated with the order for any further communications from the Secretary of Homeland Security, the Commandant of the Coast Guard, and The Judge Advocate General of the Coast Guard, and narrow the scope of the communications to direct communications via email associated with this case.

The United States also asks this Court to reconsider and rescind the order disclosing "any diagnosis or prescriptions being taken by any government merits witness from the date they witnessed the events about which they will testify until present that impact their ability to perceive or recall events" until Defense is able to meet its burden and procedural requirements under M.R.E. 513. In the alternative, the United States asks this court to amend its order expressly precluding the production or *in camera* review of any mental health records of the witnesses; and clarify and narrow its order with specificity regarding locations of treatment facilities, which medications or diagnoses to disclose, and the manner in which the information shall be disclosed, and only require the relevant records custodian to deliver a copy of the entire Coast Guard medical record for DC2[redacted], OS2[redacted], CS3[redacted], CS2[redacted], BM2[redacted], and MK3[redacted] to the Court for *in camera* review, and order the relevant records custodian to notify the Court in writing if they are unable to comply with the above without reviewing any mental health records of the above referenced patients.

CALLAHAN.ERIN.CATHERINE.[redacted]
Digitally signed by CALLAHAN.ERIN.CATHERINE.[redacted]
Date: 2023.01.27 23:00:34 -08'00'

Erin C. Callahan
Lieutenant Commander, USCG
Trial Counsel

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the above was served on the military judge and defense counsel via electronic mail on 27 January 2023.

CALLAHAN.ERIN.CATHERINE.[redacted] Digitally signed by CALLAHAN.ERIN.CATHERINE[redacted] Date: 2023.01.27 23:01:37 -08'00'

ERIN C. CALLAHAN
Lieutenant Commander, USCG
Trial Counsel

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REQUESTS

THERE ARE NO REQUESTS

NOTICES

UNITED STATES COAST GUARD
WESTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES v. JOSHUA HADLEY E4/MK3	SVC Notice of Appearance 23 January 2023

NOW COMES LCDR Adam Miller, Special Victims' Counsel for DC2 [redacted], a victim specified in the charges, and respectfully submits the following notice of appearance.

1. I am a Special Victims' Counsel for DC2 [redacted], with whom I have entered into an attorney-client relationship. I am admitted to practice in the State of Florida.

2. I am certified under 27(b) of the Uniform Code of Military Justice (UCMJ) and sworn under 42(a) of the UCMJ. I have also been certified by The Judge Advocate General of the United States Coast Guard to serve as a Special Victims' Counsel, and I have not acted in any manner that would tend to disqualify me from representing DC2 [redacted] in the instant case.

3. DC2 [redacted] is a victim in this case as defined under Art. 6b, UCMJ.

4. I respectfully request the parties provide me with informational copies of any motions or accompanying notices filed or submitted by either the government or the defense pertaining to evidentiary matters surrounding the rights, interests, or privileges of DC2 [redacted] including but not limited to those arising under M.R.E. 412, 513, 514, and 615.

5. My client, through counsel, reserves all of his rights provided under Art. 6b, UCMJ, particularly his right to be present throughout the military justice proceedings, with the exception of closed proceedings that do not involve him, and to exercise his limited standing in any hearing

related to this court-martial in order to make factual statements and legal arguments, including argument through his counsel.

6. I respectfully request timely notice of the pertinent dates related to the scheduling of all hearings pending before this court and to attend any Art. 39(a) sessions to represent DC2 [redacted] interests regarding admission of evidence pursuant to M.R.E. 412, 513, and 514.

7. My contact information is as follows: [redacted]

Respectfully Submitted,

MILLER.ADAM.DAVID.[redacted] Digitally signed by MILLER.ADAM DAVID.[redacted] Date: 2023.01.23 11:27:49 -08'00'

LCDR Adam D. Miller
Special Victims' Counsel

APPELLATE EXHIBIT 58
PAGE 2 OF 3 PAGE (S)

I certify that I have served a true copy (via email) of the above on Judge Reuter, LCDR Colaw, and LT Serrell-Robins on 23 JAN 22.

MILLER.ADAM.DA VID.[redacted] Digitally signed by MILLER.ADAM.DAVID.[redacted] Date: 2023.01.23 11:28:10 -08'00'

LCDR Adam D. Miller
Special Victims' Counsel

APPELLATE EXHIBIT 58
PAGE 3 OF 3 PAGE (S)

COAST GUARD TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES **v.** **JOSHUA HADLEY** **MK3/E-4** **U.S. COAST GUARD**	**DEFENSE NOTICE OF INTENT TO USE ELECTRONIC MEDIA AND REMOTE TESTIMONY** **31 JAN 2023**

In accordance with the Trial Management Order, the Defense respectfully makes the following notifications:

1. The Defense intends to use electronic media during arguments and witness examination.

2. The Defense intends to introduce telephonic or video teleconferencing (VTC) during witness examination.

SERRILL-ROBINS.MIRA.ROSE.[redacted] Digitally signed by SERRILL-ROBINS.MIRA ROSE[redacted] Date: 2023.01.29 01:28:28 -10'00'

M. SERRILL-ROBINS
LT, USCG
Detailed Defense Counsel

APPELLATE EXHIBIT 84
PAGE 1 OF 1 PAGE (S)

COAST GUARD TRIAL JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES **v.** **JOSHUA HADLEY** **Machinery Technician Third Class** **U.S. Coast Guard**	**GOVERNMENT M.R.E. 304(f)(2) NOTICE** **31 January 2023**

In accordance with Military Rule of Evidence 304(f)(2), the United States hereby provides notice of the following:

1. On 20 October 2022, the accused in the above referenced case was arraigned.

2. Prior to arraignment, the United States disclosed to the defense the contents of all statements made by the accused that are relevant to the instant case that were known to trial counsel, withing the control of the Armed Forces, and that the United States intended to offer against the accused.

3. On 26 January 2023, Coast Guard Investigative Service (CGIS) interviewed BM2 [redacted], a friend of the accused and previously identified government witness. During that interview, BM2 [redacted] disclosed to CGIS that the accused made several inculpatory statements to her regarding the charged offenses and related events. The statements made by the accused to BM2 [redacted] were during the normal course of their friendship. When the accused made these statements to her, BM2 [redacted] was not acting in any official capacity, including any official law enforcement or disciplinary capacity. None of the statements made to BM2 [redacted] by the accused were the byproduct of any interrogation or law enforcement questioning.

4. The 26 January 2023 interview of BM2 [redacted] by CGIS was video and audio recorded. The recording of this interview contains the contents of the statements made by the accused to BM2 [redacted]

5. On 30 January 2023, the trial counsel received a copy of the recording of the 26 January 2023 interview of BM2 [redacted] by CGIS. On 31 January 2023, a copy of this recorded interview was provided to defense counsel. *See* Gov. Bates No. 082877.

6. Pursuant to Military Rule of Evidence 304(f)(2), the United States now provides notice to the Court and defense counsel of its intent to offer during the trial of the instant case any and all statements of the accused made to BM2 [redacted] as described and detailed in the video recorded interview referenced above.

Very Respectfully Submitted,

CALLAHAN.ERIN.CATHERINE [redacted] Digitally signed by CALLAHAN.ERIN.CATHERINE [redacted] Date: 2023.01.31 17:26:10 -08'00'

ERIN C. CALLAHAN
Lieutenant Commander, USCG
Trial Counsel

****

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the above motion was served, via e-mail, on the Court and Defense Counsel on 31 January 2023.

CALLAHAN.ERIN.CATHERINE.[redacted] Digitally signed by CALLAHAN.ERIN.CATHERINE.[redacted] Date: 2023.01.31 17:26:54 -08'00'

ERIN C. CALLAHAN
Lieutenant Commander, USCG
Trial Counsel

APPELLATE EXHIBIT 88
PAGE 2 OF 2 PAGE (S)

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES	)	
	)	**GOVERNMENT'S NOTICE OF INTENT**
v.	)	**TO USE ELECTRONIC MEDIA**
	)	
	)	
JOSHUA D. HADLEY,	)	31 January 2023
MK3/E-4, U.S. COAST GUARD	)	

In accordance with the Trial Management Order, the Government provides the following notice that it intends to use electronic media.

CALLAHAN.ERIN.C[redacted] Digitally signed by CALLAHAN.ERIN.CATHERINE[redacted] Date: 2023.01.31 17:00:34 -08'00'

Erin C. Callahan
LCDR, USCG
Trial Counsel

APPELLATE EXHIBIT 96
PAGE 1 OF 1 PAGE (S)

COURT RULINGS & ORDERS

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. MK3 JOSHUA HADLEY U.S. Coast Guard	RULING ON DEFENSE MOTION TO DISMISS OR OTHER APPROPRIATE RELIEF (DEFECTIVE PREFERRAL) 31 January 2023

RELIEF SOUGHT

Pursuant to R.C.M. 906(b)(1), the Defense moved the Court to dismiss Charge I or order other appropriate relief. AE VII. The Government opposed the Defense motion. AE IX. This Court heard oral arguments at an Article 39(a) hearing on 19 December 2022.

ISSUES PRESENTED

Did the signer (accuser) have personal knowledge of, or investigate, the matters set forth in Specifications 1 and 2 of Charge I?

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 and the testimony of LT [redacted] The Court finds the following facts by a preponderance of the evidence:

1. The accused, MK3 Joshua Hadley, is charged with two specifications of Article 92 (Violation of a Lawful General Order), one charge of Article 120 (Abusive Sexual Contact), one charge of Article 134 (Sexual Act with an Animal), one charge of Article 134 (Viewing and Possessing Child Pornography), and an additional charge of Article 120 (Abusive Sexual Contact).

Preferral

2. LT [redacted] served as the Accuser to prefer the original Charges and Specifications. He preferred the charges on 22 June 2022.

3. LT [redacted] is on Duty Under Instruction Orders as part of the Coast Guard's funded law school graduate program. He served as an accuser for approximately 4-5 cases in the summer of 2022. He does not remember how he came to be the accuser in this case. Generally, he was asked if he was available.

4. For this case, LT [redacted] initially received the charge sheet and the following materials: (1) a copy of ALCOAST COMMANDANT NOTICE 003/20; (2) a copy of ALCOAST COMMANDANT NOTICE 152/20; (3) a copy of ALCOAST COMMANDANT NOTICE 085/18; (4) the DD458 continuation sheets containing the draft charges; and (5) CGIS Report of Investigation [redacted]

5. These materials were three-hole punched and in a white three ring binder provided to LT [redacted]

6. After reviewing the material, LT [redacted] asked trial counsel for more documentation. Specifically, LT [redacted] requested additional documentation to support the reference to Snapchat in the charges and Charge II (abusive sexual contact).

7. Trial counsel gave LT [redacted] CGIS Report of Investigation [redacted] After reviewing this ROI, LT [redacted] placed it in the pocket folder of the three ring binder.

8. LT [redacted] also reviewed the ALCOASTs on the Coast Guard message board. He was familiar with the messages from when they were first released.

9. LT [redacted] spent 2-3 hours reviewing the material provided. His standard practice was to read the material and looked to see if the charges matched what he reviewed.

10. At the time LT [redacted] swore to the charges, he believed he had sufficient information to prefer the charges. He would have asked for more information if he believed it was needed.

11. GIS Report of Investigation (ROI) [redacted] contains the allegations supporting both specifications under Charge I in this case.

12. The CGIS ROI contained information that in August 2020, [redacted] conducted an administrative investigation after the Executive Officer received a report that multiple crew members reported that MK3 Hadley asked them to send nude photographs via Snapchat.

13. CGIS interviewed OS2 [redacted] on 06 Nov 2020. The CGIS ROI documented that OS2 [redacted] was assigned to [redacted] with MK3 Hadley and then transferred to Sector Honolulu. According to the CGIS interview summary in the ROI, he received photographs from MK3 Hadley that depicted his legs and his underwear. Additionally, MK3 Hadley would send Snapchat messages asking, "[redacted]" and "[redacted]" accompanied by an eggplant emoji that OS2 [redacted] understood to be a request for a "[redacted]" OS2 [redacted] recalled exchanges in June – July 2020 in his CGIS interview. He also provided pictures of several messages on his phone.

14. CGIS interviewed CS3 [redacted] on 05 Nov 2020. The CGIS ROI documented that CS3 [redacted] was stationed onboard [redacted] with MK3 Hadley. According to the CGIS interview summary, he received Snapchat messages requesting "[redacted]" in exchange for money five to six times over a period of one to two months starting in February 2020. CS3 [redacted] reported that he told MK3 Hadley to stop sending pictures. CS [redacted] said that MK3 Hadley would act like nothing happened at work. He described MK3 Hadley as popular amongst the cutter crew.

15. CGIS interviewed CS3 [redacted] on 03 Dec 2020. The CGIS ROI documented that CS3 [redacted] was stationed onboard [redacted] with MK3 Hadley. According to the CGIS interview summary, he received Snapchat messages from MK3 Hadley four times that he interpreted as being requests to send nude pictures in exchange for money. On the fourth time, MK3 Hadley sent a picture that appeared to be MK3 Hadley having sexual intercourse with an unknown female. CS3 [redacted] said he "[redacted]" and told MK3 Hadley not to send him "[redacted]" The last Snapchat exchange between CS3 [redacted] and MK3 Hadley was on or about April or May 2020.

16. CGIS interviewed BM3 [redacted] on 13 Jan 2021. The CGIS ROI documented that BM3 [redacted] was stationed onboard [redacted] with MK3 Hadley prior to transferring to STA South Padre Island. According to the CGIS interview summary, he received Snapchat messages from MK3 Hadley that he interpreted as being requests to send nude pictures in exchange for money. BM3 [redacted] said MK3 Hadley was extremely persistent in his request for pictures. BM3 [redacted] blocked MK3 Hadley on Snapchat after MK3 Hadley asked if he was interested in pursuing a relationship with a guy. BM3 [redacted] spoke to CS3 [redacted] about the communications and CS3 [redacted] told him many people on the cutter were having similar communications. The interview summary does not provide dates of the alleged communications.

17. CGIS interviewed MK3 [redacted] on 06 Nov 2020 and 02 June 2021. The CGIS ROI documented that MK3 [redacted] was roommates with MK3 Hadley in the Base Honolulu barracks. After he moved out of the barrack in January or February 2019, MK3 Hadley sent him photos and a video that showed MK3 Hadley's genitalia via Snapchat. MK3 [redacted] blocked or removed MK3 Hadley from Snapchat after receiving the video. At some point MK3 [redacted] told his chain of command about the communications he received from MK3 Hadley. He was also interviewed for the [redacted] command investigation.

18. The General Order Prohibiting Sexual Harassment promulgated by ACN 003/20 defines sexual harassment as, "unwelcome sexual advances, requests for sexual favors, and other conduct of a sexual nature, when: a. Submission to such conduct is made either implicitly or explicitly a term or condition of employment; b. Submission to or rejection of such conduct is used as a basis for employment decisions; or c. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. This definition also includes unwelcome display or communication of sexually offensive materials. Physical proximity is not required. Conduct may occur telephonically, virtually, or by way of other electronic means."

19. General Order Prohibiting Sexual Harassment promulgated by ACN 085/18 defines sexual harassment as, "Definition: Sexual harassment is defined as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when: a. Submission to such conduct is made either implicitly or explicitly a term or condition of employment; b. Submission to or rejection of such conduct is used as a basis for employment decisions; or c. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. d. This definition also encompasses unwelcome display or communication of sexually offensive materials."

LT [redacted] Conversation with Defense Counsel

20. In mid-November 2022, LT [redacted] received a phone call from defense counsel to discuss the charges. His cell phone number is in the Coast Guard global address system and his out of office.

21. LT [redacted] was not expecting the call. He was studying for finals at law school at the time of the call. He did not have the materials he reviewed for the case accessible at that time.

22. LT [redacted] initially did not recognize the case name. He did not think about the materials since preferring the case. He provided his general recollections to defense counsel, including telling defense counsel that he did not remember reading any ALCOAST messages.

23. LT [redacted] subsequently met with trial counsel in person and reviewed the binder he used to prefer charges. He recognized it as the same binder he used because the ROI with information for Charge II was in the back pocket of the three ring binder.

24. Once LT [redacted] reviewed the binder, he remembered more details about preferring the case.

Further facts necessary for an appropriate ruling are contained within the analysis section below.

PRINCIPLES OF LAW

Article 30(a), UCMJ, requires the person preferring charges to sign under oath that "(1) the signer has personal knowledge of, or has investigated, the matters set forth in the charges and specifications; and (2) the matters set forth in the charges and specifications are true, to the best of the knowledge and belief of the signer." 10 U.S.C. § 830; R.C.M. 307(b). The person preferring charges may base his or her belief upon the reports of others in whole or in part. R.C.M. 307(b) Discussion.

The purpose of preferral is "accountability for charging" by "'insur[ing] the charges were not frivolous, unfounded, or malicious, but' are founded 'in good faith.'" United States v. Miller, 33 M.J. 235, 237 (1991)(quoting W. Winthrop, *Military Law and Precedents* 151 (2d ed. 1920 Reprint). Article 30, UCMJ, does not require "a final or conclusive determination of an accused's guilt" prior to their court-martial. Id.; United States v. Floyd, 82 M.J. 821 (N.M.Ct.Crim.App. 2022)

A preferral is defective when the signer reviews no evidence to support an element of an offense. See Floyd, 82 M.J. at 830-31. However, the military judge may not review the evidence upon which the accuser relied for weight and sufficiency and supplant the judgment of the accuser with her own assessment. Id. at 830. United States v. Arma, No. 2014-09, 2014 WL 5511503 (A.F. Ct. Crim. App. Oct. 22, 2014).

To obtain a conviction on an Article 92, Violating General Order, the Government must prove three elements beyond a reasonable doubt: (a) That there was in effect a certain lawful general order or regulation; (b) That the accused had a duty to obey it; and (c) That the accused violated or failed to obey the order or regulation. 10 U.S.C. §892.

ANALYSIS

The Court finds that LT [redacted] testified truthfully and his account of his review of the materials

prior to preferred is credible. LT [redacted] testified confidently with an objective demeanor. He answered questions with particularity and affirmatively stated when he did not remember. The Court finds that LT [redacted] testimony that he reviewed the relevant ALCOAST messages prior to preferral is credible. LT [redacted] statements to defense counsel in mid-November 2022 that he did not remember reviewing the Coast Guard message traffic is credibly explained as a mistake. Specifically, LT [redacted] testified that at the time he made the statement he was not expecting to be called regarding this case, he was studying for law school finals, had not thought about the preferral for approximately five months and did not specifically remember the case. LT [redacted] credibly explained his recollection was refreshed in preparation for testimony when he reviewed the binder he used as the signer. LT [redacted] knew the materials were the same because he recognized the binder and the materials he received after he asked for additional evidence were still located in the pocket of the binder where he placed them.

The Court finds that LT [redacted] complied with the procedures in Article 30, UCMJ and R.C.M. 307. LT [redacted] preferred several cases during his time as a funded law student intern. He specifically remembered this case due to the sanitized child exploitation material. LT [redacted] explained his process for reviewing material prior to preferral, which included reading the materials provided and comparing them to the charges. LT [redacted] testified that he was familiar with the relevant message traffic from the binder itself and from previously reviewing the messages. He requested additional information when he did not believe the charges were supported. He further testified that he would have asked for additional information prior to preferral if he believed the materials did not support the charges. The Court concludes LT [redacted] had knowledge of the charges, evidence and elements of proof and believed them to be true. See Miller, 33 M.J. at 237.

Defense argued the preferral is defective because LT [redacted] did not review evidence related to each essential element of the specifications of Charge. Specifically, the defense alleged LT [redacted] did not review the ALCOAST messages and there was no evidence that the sexually explicit images and communications sent by the accused impacted the Coast Guard work place or employment of the recipients. The Court disagrees. As detailed above, the Court finds LT [redacted] did review the general orders relevant to each specification. Further, the CGIS ROI LT [redacted] reviewed contained information that the recipients of the Snapchat communications were in the Coast Guard and, for Specification 1, stationed onboard the same ship as the accused. The ROI documented that the conduct captured in Specification 1 resulted in a command-directed administrative investigation because several shipmates reported receiving communications from the accused requesting nude pictures in exchange for money and containing sexually explicit materials. For Specification 2, the ROI documented the recipient was in the Coast Guard and, at some point, talked to his chain of command about the communications. Thus, LT [redacted] reviewed evidence related to the workplace of the recipients. Cf. Floyd, 82 M.J. at 830-32 (The military judge dismissed specifications after finding there was no evidence reviewed by the accuser that supported the essential elements. In Floyd, the specifications at issue were Article 134, Indecent Language, which require that the specifically charged language itself be indecent.)

The Court does not review the evidence for weight or sufficiency. The charges were founded in good faith and preferred in accordance with the requirements of Article 30, UCMJ and R.C.M. 307.

//

CONCLUSIONS OF LAW

1. The signer (accuser) had personal knowledge of, or investigated, each essential element of Specifications 1 and 2 of Charge I.
2. Charge I, Specifications 1 and 2, were founded in good faith.

RULING

The Defense motion is DENIED, consistent with the above conclusion of law.

So ordered this 31st day of January, 2023.

REUTER.EMILY.P ATRICIA.[redacted] Digitally signed by REUTER.EMILY.PATRICIA.[redacted] Date: 2023.01.31 10:46:38 -08'00'

Emily P. Reuter
Commander, U.S. Coast Guard
Military Judge

Appellate Exhibit XI
Page 6 of 6

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. MK3 JOSHUA HADLEY U.S. Coast Guard	RULING ON DEFENSE MOTION TO COMPEL PRODUCTION OF EXPERT CONSULTANT 05 January 2023

RELIEF SOUGHT

The Defense moved this Court to compel approval and funding for an expert consultant, Dr. [redacted] a forensic psychologist specializing in false confessions. AE XII. The Government opposed the Defense motion. AE XIV. This Court heard oral arguments at an Article 39(a) hearing on 19 December 2022.

ISSUES PRESENTED

Is the assistance of a forensic psychologist specializing in false confessions expert consultant necessary for an adequate defense?

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. The accused, MK3 Joshua Hadley, is charged with two specifications of Article 92 (Violation of a Lawful General Order), one charge of Article 120 (Abusive Sexual Contact), one charge of Article 134 (Sexual Act with an Animal), one charge of Article 134 (Viewing and Possessing Child Pornography), and an additional charge of Article 120 (Abusive Sexual Contact).

2. The Abusive Sexual Contact charges stem from an incident on 31 May 2020. The accused, DC2 [redacted] and other friends engaged in a night of socializing and drinking. DC2 [redacted] fell asleep on the couch and the accused slept in his bedroom. During the night, the accused awoke and got up to use the restroom and get a drink of water. The accused then laid down on the couch. DC2 [redacted] alleges that he awoke around 0030 to find the accused's hand touching DC2 [redacted] genitals inside of his pants.

3. The accused is [redacted] years old and has a high school education.

4. The ASVAB Armed Forces Qualification Test (AFQT) score is a percentile that is based on the number of correctly answered questions compared to other test takers. The minimum AFQT to enlist in the Coast Guard is 40.

5. The accused's AFQT was 48. His verbal ability score was 48 and his word knowledge score was 45.

6. At the time of the accused's first interview with CGIS on 03 June 2020, he was an E-4 and had been in the Coast Guard for almost 3 years.

7. The abusive sexual contact allegedly happened on or about 31 May 2020. The named victim, DC2 [redacted] is male.

8. The CGIS interview was 3 days after the alleged actions that underlying the abusive sexual contact charges. The accused was brought to the interview by a command escort on a work day. He denied being drunk, hung over, on medication or under the care of a physician prior to the CGIS special agents reviewing the Article 31(b), UCMJ, rights form and beginning questioning.

9. During his 03 June 2020 interview with CGIS, the accused initially denied knowledge of any incident.

10. Once told that the was accused by DC2 [redacted] of laying next to him on the couch and touching his genitals, the accused acknowledged that he got up during the night to use the restroom and get water and laid down on the couch.

11. The accused strongly denied putting his hands in DC2 [redacted] pants. When CGIS persisted in telling him DC2 [redacted] account of what happened, the accused repeatedly said, [redacted]

12. The accused later said he was pretty intoxicated and does not "[redacted]" doing any of the allegations but admitted it was possible.

13. Once the accused admitted it was possible, one CGIS agent told him that constituted a partial admission and that they already knew some of the facts so he should be honest.

14. The accused then said that he laid next to DC2 [redacted] and "[redacted]" The CGIS agent told the accused that "[redacted]" and "[redacted]"

15. Eventually both agents tell the accused to "[redacted]" The accused then stated, "[redacted]"

16. The accused denied attraction to males throughout his CGIS interview on 03 June 2020. He told CGIS that the situation was "[redacted]" and "[redacted]"

17. The accused recounted being highly intoxicated due to the consumption of alcohol on 31 May 2020 and did not fully remember the night.

18. Mr. [redacted], Defense Litigation Support Specialist at DSO Pacific, submitted an affidavit attesting that the CGIS interview of the accused was based on the Reid Technique. Mr. [redacted] has extensive training in interviews and interrogations.

19. Dr. [redacted] is a forensic psychologist specializing in false confession with nearly 50 years of experience. She is on the faculty of the National Judicial College and a professor at the University of Nevada. She has conducted a voluminous amount of research and published in numerous journals.

20. In an affidavit, Dr. [redacted] stated that, based on a description of the interview provided by defense counsel, there appeared to be contamination and that, as a consultant, she could analyze the video and transcript of the interrogation and information about the accused to "assess his particular suggestibility and susceptibility to providing a coerced false confession."

21. On 07 November 2022, the Defense submitted their Request for Expert Assistance for Dr. [redacted] The attachments were submitted on 11 November 2022 due to technical issues.

22. On 16 November 2022, the Government forwarded the Defense's expert request to the Convening Authority's Staff Judge Advocate recommending the Convening Authority deny the Defense request.

23. On 22 November 2022, the Convening Authority's denied the defense request for an expert consultant.

Further facts necessary for an appropriate ruling are contained within the analysis section below.

PRINCIPLES OF LAW

Article 46, UCMJ, requires trial counsel, defense counsel and the court-martial to have equal opportunity to obtain witnesses and other evidence. 10 U.S.C. § 846. This provision is "a clear statement of congressional intent against Government exploitation of its opportunity to obtain an expert vastly superior to the defense's." United States v. Warner, 62 M.J. 114, 120 (C.A.A.F. 2005).

Rule for Courts-Martial 703(d) establishes the process for obtaining an expert witness or consultant. When the convening authority denies a request for an expert, the request may be renewed before the military judge. R.C.M. 703(d)(2). In the case of an expert witness, the military judge will review whether the testimony of the expert is relevant and necessary. R.C.M. 703(d)(2)(i). In the case of an expert consultant, the military judge will determine "whether the assistance of the expert is necessary for an adequate defense." R.C.M. 703(d)(2)(ii); United States v. Garries, 22 M.J. 288, 290 (C.M.A. 1986). The mere possibility of assistance is not sufficient to prevail on such a request. United States v. Bresnahan, 62 M.J. 137, 143 (C.A.A.F. 2005).

The accused has the burden to establish a reasonable probability (1) the expert would be of assistance to the accused, and (2) denial of the assistance would result in a fundamentally unfair

trial. United States v. Gunkle, 55 M.J. 26, 31-32 (C.A.A.F. 2001). To show reasonable probability of assistance, the accused must establish: (1) why the expert is needed; (2) what the expert would accomplish for the accused, and (3) why the defense counsel is unable to gather and present the evidence the expert assistant would be able to develop. Id; United States. v. Gonzales, 39 M.J. 459 (C.M.A. 1994).

The defense must demonstrate the expert is needed for something other than normal or routine investigative purposes. United States v. Warner, 62 M.J. 114 (C.A.A.F. 2005). When the defense requests a nonmilitary expert, the defense must provide an estimated cost of employment and articulate why a military expert would be inadequate. Id. While the defense is not entitled to the particular expert requested, if the defense shows that expert assistance is necessary, the Government must provide an adequate substitute. Id.

ANALYSIS

Whether the expert is necessary for an adequate defense

Assistance to the accused

The defense argues that a defense expert consultant is necessary to help the defense understand the science behind false confession, assess whether the characteristics of the accused, the CGIS interview technique and the alleged crime raise the issue of a false confession, to challenge the voluntariness of the accused's confession and to determine whether testimony from a false confession expert is necessary at trial. The defense identified characteristics of the accused, the alleged crime and the interview techniques used by CGIS that could indicate the confession was not voluntary or is not credible.

The Court finds that the Defense fails to meet their burden on the third prong of the Gonzales test to show why they cannot gather and present the evidence without the expert. Both defense counsel read articles on false confessions and the assistant defense counsel, who is the Senior Defense Counsel at DSO Pacific, has participated in several cases involving litigation over false confessions. Regarding the personal characteristics of the accused, Dr. [redacted] is not going to interview or evaluate the accused; rather she will review the interview video and transcripts, just as defense counsel are able to do. Regarding interview techniques, the defense counsel have the benefit of Mr. [redacted], a litigation support specialist in the DSO Pacific, who has "extensive" experience with law enforcement interrogation techniques. The Court finds that the resources available to defense counsel will enable them to competently cross-examine the CGIS agents and analyze and present a false confession defense, including determining whether expert witness testimony would be useful.

The court finds that the Gonzalez factors are not met.

Whether denial of the assistance will result in a fundamentally unfair trial

The defense has not met their burden in demonstrating that the denial of an expert consultant would result in a fundamentally unfair trial. The accused's confession is an important piece of

evidence in the government's case. However, the complaining witness, DC2 [redacted], will also testify on these charges. The defense counsel have access to the recorded CGIS interviews with the accused, scholarly articles and an a law enforcement specialist in their office to enable them to attack the voluntariness of and accuracy of the accused's statement to CGIS. Since the defense is not being prevented from testing or rebutting the government's case and they are not being prevented from putting on a defense of false confession, the court finds that denial of this expert assistance would not result in a fundamentally unfair trial.

CONCLUSIONS OF LAW

1. There is not a reasonable probability that an expert in the forensic field of false confessions would be of assistance to the defense.

2. The denial of an expert consultant the forensic field of false confessions will not result in a fundamentally unfair trial.

3. An expert consultant in the forensic field of false confessions is not necessary for an adequate defense.

RULING & ORDER

The Defense motion is DENIED, consistent with the above conclusions of law.

So ordered this 5th day of January, 2023.

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Emily P. Reuter
Commander, U.S. Coast Guard
Military Judge

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. MK3 JOSHUA HADLEY U.S. Coast Guard	RULING ON DEFENSE MOTION TO SUPPRESS (INVOLUNTARY STATEMENTS OF THE ACCUSED) 17 January 2023

RELIEF SOUGHT

Pursuant to R.C.M. 905(b)(3), Mil. R. Evid. 304(f) and the Fifth Amendment, the Defense moved to suppress all statements made by MK3 Hadley to the Coast Guard Investigative Service (CGIS) on 03 June 2020 and all derivative evidence. AE XVII. The Government opposed the Defense motion. AE XIX. This Court heard oral arguments at an Article 39(a) hearing on 19 December 2022.

ISSUE PRESENTED

Were the statements made by the accused to the Coast Guard Investigative Service on 03 June 2020 involuntary?

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 and the testimony of CGIS Special Agent (S/A) [redacted]. The Court finds the following facts by a preponderance of the evidence:

1. The accused, MK3 Joshua Hadley, is charged with two specifications of Article 92 (Violation of a Lawful General Order), one charge of Article 120 (Abusive Sexual Contact), one charge of Article 134 (Sexual Act with an Animal), one charge of Article 134 (Viewing and Possessing Child Pornography), and an additional charge of Article 120 (Abusive Sexual Contact).

2. The Abusive Sexual Contact charges stem from an incident on 31 May 2020. The accused, DC2 [redacted] and other friends engaged in a night of socializing and drinking. DC2 [redacted] fell asleep on the couch and the accused slept in his bedroom. During the night, the accused awoke and got up to use the restroom and get a drink of water. The accused then laid down on the couch. DC2 [redacted] alleges that he awoke around 0030 to find the accused's hand touching DC2 [redacted] genitals inside of his pants.

3. The accused and DC2 [redacted] are both male.

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4. The accused is [redacted] years old and has a high school education.

5. The ASVAB Armed Forces Qualification Test (AFQT) score is a percentile that is based on the number of correctly answered questions compared to other test takers. The minimum AFQT to enlist in the Coast Guard is 40.

6. The accused's AFQT was 48. His verbal ability score was 48 and his word knowledge score was 45.

7. At the time of the accused's first interrogation with CGIS on 03 June 2020, he was an E-4, a graduate of Machinery Technician "A" School and had been in the Coast Guard for almost 3 years.

8. The accused was brought to the interrogation by a command escort on a work day. He was wearing the Coast Guard operational dress uniform.

9. The interrogation was held at a conference room onboard Base Honolulu. At CGIS direction, the accused did not know where he was going or why when the command escorted him to the interrogation.

10. There were two CGIS agents, CGIS S/A [redacted] and CGIS S/A [redacted], present when the accused arrived. They introduced themselves and showed their credentials in a conversational tone. Both special agents remained in the conference room throughout the interrogation and engaged in questioning.

11. The agents shut the conference room window blinds and shut the door before the interrogation began. S/A [redacted] explained the door was closed for privacy and told the accused that he could go to the restroom at any point.

12. S/A [redacted] provided the accused an overview of how the interrogation would proceed, explaining they would take biographical information first.

13. The accused denied being drunk, hung over, on medication or under the care of a physician prior to reviewing the Article 31(b), UCMJ, rights form.

14. The accused read his Article 31(b) rights out loud without issues.

15. S/A [redacted] reiterated to the accused that even if he started talking, he could stop the conversation at any time.

16. The accused agreed to answer questions and signed the waiver.

17. The accused initially denied knowledge of any incident.

18. Once told that DC2 [redacted] alleged he woke up to the accused next to him on the couch and the accused was touching his genitals, the accused acknowledged that he got up during the night to use the restroom and get water and laid down on the couch.

19. The accused strongly denied putting his hands in DC2 [redacted] pants. When CGIS persisted in telling him DC2 [redacted] account of what happened, the accused repeatedly said, "[redacted]"

20. The accused then said he was intoxicated and does not "[redacted]" doing any of the allegations but admitted it was possible.

21. Once the accused admitted it was possible, one CGIS agent told him that constituted a partial admission and that they already knew some of the facts so he should be honest.

22. At several points, the CGIS special agents told the accused that he can get in trouble for lying to them, including additional charges.

23. At one point, S/A [redacted] said "[redacted]" when he was challenging the accused's account of events.

24. The accused then said that he laid next to DC2 [redacted] and "[redacted]" The CGIS agent told the accused that "[redacted]" and "[redacted]"

25. Eventually both agents told the accused to "[redacted]" The accused then stated, [redacted]

26. The accused denied attraction to males throughout his CGIS interrogation on 03 June 2020. He told CGIS that the situation was "[redacted]" and "[redacted]"

27. The accused recounted being highly intoxicated due to the consumption of alcohol on 31 May 2020 and did not fully remember the night.

28. Mr. [redacted] Defense Litigation Support Specialist at DSO Pacific, submitted an affidavit attesting that the CGIS interrogation of the accused was based on the Reid Technique. The Reid Technique is a confrontational style of interrogation.

29. CGIS S/A [redacted] testified that he is not trained in the Reid Technique. His approach is to be slow and methodical.

30. The CGIS special agents did not raise their voices or physically posture or threaten the accused.

31. At various points in the interrogation, the CGIS special agents overtalked or interrupted the accused.

32. At various points in the interrogation, the CGIS special agents emphasized that they did not judge sexual orientation.

33. Throughout the interrogation, the accused made eye contact with the CGIS special agents and spoke clearly.

34. At the end of the interrogation, while CGIS S/A [redacted] was filling out the Non-Disclosure Form, the accused thanked the special agents for being non-judgmental.

35. After filling out the Non-Disclosure Form and signing it, the accused asked the CGIS special agents about their assignment process and chatted with the agents about [redacted] being in drydock.

36. The interrogation was approximately 52 minutes long.

Further facts necessary for an appropriate ruling are contained within the analysis section below.

PRINCIPLES OF LAW

Burden of Proof

The government bears the burden of demonstrating by a preponderance of the evidence that admissions are voluntary. Mil. R. Evid. 304(f)(6).

The military judge must find by a preponderance of the evidence that a statement by the accused was made voluntarily before it may be received into evidence. Mil. R. Evid. 304(f)(7).

"Involuntary statement" means a statement obtained in violation of the self-incrimination privilege or Due Process Clause of the Fifth Amendment to the United States Constitution, Article 31, or through the use of coercion, unlawful influence, or unlawful inducement. Mil. R. Evid.304(a)(1)(A).

Voluntariness of Substantive Statements

A confession must be voluntary to be valid. "The principles for determining whether a pretrial statement was [involuntary] is essentially the same whether the challenge is based on the Constitution, Article 31(d), or Mil. R. Evid. 304." United States v. Bubonics, 45 M.J. 93 (C.A.A.F. 1996).

"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 critically impaired, use of the confession would offend due process." Bubonics, 45 M.J. at 95 (citing Culombe v. Connecticut, 367 U.S. 568, 602 (1961)).

The test for voluntariness "involves an assessment of the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." Id. (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973)); Arizona v. Fulminante, 499 U.S. 279, 285-86 (1991). 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," as opposed to the product of someone whose "will was overborne and his capacity for self-determination critically impaired . . ." Bubonics, 45 M.J. at 95 (citations omitted).

Factors to be considered 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). Courts also consider whether the accused had any prior experience with law enforcement practices and techniques, including threats, inducements, or presentation of false pretenses. Lynumn v. Illinois, 372 U.S. 528, 534 (1963). The Court of Appeals for the Armed Forces specifically recognized the impact of coercive interrogation techniques in the military environment. Bubonics, 45 M.J. at 95. An investigator's use of trickery, artifice, or subterfuge in obtaining a confession is generally permissible, as long as the tactic does not result in coercion or an otherwise involuntary statement. United States v. Campbell, 76 M.J. 644, 654 (A.F. Ct. Crim. App. 2017)(citations omitted).

Courts have ruled that exculpable statements are another indicator to be considered when examining voluntariness. See United States v. Washington, 46 M.J. 477, 482 (1997) (confession voluntary where record shows appellant tried to talk himself out of trouble). See also United States v. Jones, 34 M.J. 899, 909 (N-M.C.M.R. 1992)("At the time the appellant made the statement, which is the relevant time frame for purposes of the voluntariness inquiry, these statements demonstrated the appellant retained the wherewithal to shift for himself. Thus, the facially exculpatory statement made by him is another factor confirming that the appellant's statement was otherwise voluntarily made.")

ANALYSIS

This was the accused's first interaction with CGIS and he did not any law enforcement training in his Coast Guard experience. He was escorted to the interrogation by a member of his command. S/A [redacted] testified that it is CGIS standard practice to ask a command to escort all victims, witnesses and subjects to CGIS interviews and to not inform them where they are being escorted or why. S/A [redacted] did not know the rank of the escort for the accused, but testified that the escort is usually a higher rank than the accused. Although this practice could create an impression of command endorsement and an element of surprise for the accused, as soon as the accused arrived in the conference room, the CGIS special agents introduced themselves in a conversational tone, provided an explanation for why they were there and gave a general overview of the process.

The interrogation lasted less than one hour. The accused was not handcuffed or restrained. The door was not locked and CGIS S/A [redacted] explained that the door was closed for privacy. The accused told that he could take a head break at any time. During the Article 31(b) Rights warning, S/A [redacted] emphasized to the accused that if he decided to speak, he could stop at any time. The accused did not ask for a break or if he could leave during the interrogation.

The Defense argues that the accused's lack of education, ASVAB scores, his role as a junior petty officer and the accusation of homosexual behavior made him susceptible to coercion and suggestibility. The Court disagrees; the accused is a rated petty officer who successfully completed high school and "A" school. His ASVAB skills are above the minimum level required to enter the Coast Guard and he read his Article 31(b) Rights Advisement out loud without difficulty. Throughout the interview, the accused appeared to understand the questioning, was alert and made eye contact. Although appearing nervous, the accused was not unduly deferential. He affirmatively stated when he did not remember certain details and contradicted the characterizations of the special agents when he did not agree. Further, the special agents did not exploit the male-on-male aspect of the allegations. At various points throughout the interview,

the special agents emphasized that they did not judge sexual preference and told him not to be embarrassed.

S/A [redacted] testified that he utilized rapport building with the accused to put him at ease. S/A [redacted] denied using the Reid Technique and stated that his approach is slow and methodical. S/A [redacted] also actively engaged in the questioning of the accused. There is no evidence before the Court as to S/A [redacted] training or use of the Reid Technique. During the interview, the special agents provided details of the accusation and challenged the accused's denial, including by interrupting him and telling him that lying could result in additional criminal charges. Although confrontational at times, the CGIS special agents did not yell, threaten or make false statements about prosecutions. The statement that lying can result in more "trouble" and urging the accused to tell the truth are distinguished from threatening adverse action if the accused did not confess. See Bubonics, 45 M.J. at 95-96.

To the extent there was confrontation during the interrogation, looking at the circumstances as a whole, the conduct of the special agents did not overcome the will of the accused. As previously stated, the accused maintained eye contact. He provided explanations for his version of the events. Once he admitted that he did lay down on the couch with DC2 [redacted] and touched his genitals, the accused still corrected the CGIS special agents when they asked about his intent for touching DC2 [redacted] He rejected the suggestion that he was attempting to gratify his sexual desire or experimenting despite persistent questioning. He also affirmatively stated when he did not remember details, including what DC2 [redacted] was wearing. This assertiveness is evidence that the accused's capacity for self-determination remained intact throughout the interrogation. The accused also thanked the CGIS special agents for not being judgmental, both when questioning was ongoing and after questioning concluded and he was reviewing the Non-Disclosure Form.

A review of the totality of the circumstances surrounding the Accused's 03 June 2020 interrogation with CGIS demonstrate that his statements were voluntary and his will was not overborne.

CONCLUSION OF LAW

The substantive statements made by the accused to the Coast Guard Investigative Service on 03 June 2020 were voluntary.

RULING

The Defense motion is DENIED, consistent with the above conclusion of law.

So ordered this 17th day of January, 2023.

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Emily P. Reuter
Commander, U.S. Coast Guard
Military Judge

APPELLATE EXHIBIT 21
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GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. MK3 JOSHUA HADLEY U.S. Coast Guard	RULING ON DEFENSE MOTION TO SUPPRESS (INVOLUNTARY STATEMENTS OF THE ACCUSED – 2nd CGIS INTERVIEW) 02 February 2023

RELIEF SOUGHT

Pursuant to R.C.M. 905(b)(3), Mil. R. Evid. 304(f), 305 and the Fifth Amendment, the Defense moved to suppress all statements made by MK3 Hadley to the Coast Guard Investigative Service (CGIS) on 24 March 2021 and 16 June 2021 and all derivative evidence. AE 22. The Government opposed the Defense motion as to statements made on 24 March 2021 and does not intend to seek admission for statements made by the accused to CGIS on 16 June 2021. AE 24. This Court heard oral arguments at an Article 39(a) hearing on 19 December 2022.

ISSUE PRESENTED

Were the statements made by the accused to the Coast Guard Investigative Service on 24 March 2021 involuntary?

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 and the testimony of CGIS Special Agent (S/A) [redacted] The Court finds the following facts by a preponderance of the evidence:

1. The accused, MK3 Joshua Hadley, is charged with two specifications of Article 92 (Violation of a Lawful General Order), one charge of Article 120 (Abusive Sexual Contact), one charge of Article 134 (Sexual Act with an Animal), one charge of Article 134 (Viewing and Possessing Child Pornography), and an additional charge of Article 120 (Abusive Sexual Contact).

2. CGIS first interrogated MK3 Hadley on 03 June 2020. At that interrogation, MK3 Hadley was properly read his Article 31(b) rights, voluntarily waived his rights and voluntarily spoke with investigators about the Abusive Sexual Contact charges. See AE 21 (Court's Ruling on Defense Motion to Suppress – Accused Statements).

3. The accused was escorted by his command for a second interview with CGIS on 24 Mar 2021.
4. March 24, 2021 was a work-day. The accused wore the Coast Guard operational dress uniform.

5. CGIS asked the command to escort the accused to and from the interrogation at CGIS request

because the agents were concerned about the accused's welfare. This is a standard practice for all subjects of an investigation when S/A [redacted] seeks an interview with them.

6. The interrogation was held at a conference room onboard Base Honolulu. This was the same location as the accused's first interrogation by CGIS on 03 June 2020.

7. There were two CGIS agents, CGIS S/A [redacted] and CGIS S/A [redacted] present when the accused arrived. They introduced themselves and showed their credentials in a conversational tone. Both special agents remained in the conference room throughout the interrogation and engaged in questioning. The agents generally remained in their seats, located approximately 6 feet away from the accused. At certain points they were closer to the accused to facilitate the signing of paperwork.

8. S/A [redacted] explained the door was closed for privacy and told the accused that if he needed to take a break or get water, he should let him know. S/A [redacted] did not tell the accused, either way, if he was allowed to leave.

9. The agents then discussed University of Alabama basketball and the COVID vaccine with the accused. S/A [redacted] provided the accused an overview of how the interrogation would proceed, explaining they would conduct a COVID questionnaire and handle administrative matters first.

10. While taking down biographical information, the agents discussed sports, primarily amongst themselves. MK3 Hadley spoke about his interests in photography, hiking and shared that he got a dog.

11. After taking biographical data, S/A [redacted] confirmed the accused knew what CGIS is and that he and S/A [redacted] are investigators. He told the accused that he had to advise him of his rights prior to asking questions.

12. S/A [redacted] provided the accused with a form titled "Rights Warning Procedure/Waiver Certificate." The form advised the accused he was suspected of "Violations of UCMJ article 134: Indecent Conduct, 120: Abusive Sexual Contact, and 120c: Indecent Exposure (Requesting/Sending sexually explicit/nude images)(touching someone's inner thigh)."

13. The form provided the following rights:

[redacted]

14. S/A [redacted] had the accused read the form out loud. After each section, including the nature of the allegations, S/A [redacted] asked the accused if he had any questions. The accused did not have any questions and agreed to waive his rights.

15. After the accused signed the form, S/A [redacted] thanked him for coming and immediately oriented the

accused to an administrative investigation being conducted onboard [redacted] into requests sent from the accused to crew members.

16. The accused indicated understanding that there was an ongoing investigation.

17. S/A [redacted] asked the accused what was going on and the accused proceeded to explain his feelings since the last interrogation and his efforts to understand himself, his identity, sexual orientation and utilization of Coast Guard member support services. S/A [redacted] thanked the accused for being open and honest and redirected the accused to the messages he sent to his crew members.

18. S/A [redacted] proceeded to ask the accused about sexually explicit images and requests for pictures he sent to Coast Guard members over Snapchat.

19. Approximately an hour into the questioning, the agents told the accused that they had a search and seizure authorization to take his cell phone. The agents gave the accused the search authorization.

20. S/A [redacted] asked the accused if he would consent to providing his passcode. The accused immediately said yes.

21. S/A [redacted] routinely asks for consent for cellular phone passcodes when there is a search authorization to seize the phone.

22. The accused appears to look at or read the search authorization while the agents look for the consent form.

23. While the agents were looking for the consent form, the accused asked if they want him to just turn the passcode off. However, he could not remember his Apple ID and was unable to do so.

24. S/A [redacted] asked the accused to read the consent form. S/A [redacted] asked if the accused understood and he said yes.

25. Before signing, the accused asked if he had to give to give them his phone.

26. S/A [redacted] told him that he did not have to give them his passcode, but that had a search authorization from a military judge to seize the phone.

27. The accused said he understood and signed the form.

28. S/A [redacted] testified that without the passcode, the CGIS Electronic Crimes Section could still attempt to extract the cell phone.

29. Without the passcode, the extraction can take months longer due to the additional time needed to access the phone.

30. S/A [redacted] is aware of situations where agents did not have a passcode and were still able to access the contents of a secured phone pursuant to a search authorization.

31. The accused was with the agents for approximately 2 hours, including the preliminary biographical questions, the interrogation and finger printing.

32. On 12 March 2021, S/A [redacted] submitted an affidavit in support of a search warrant for Snapchat affidavit that listed Article 92, Violation of the Lawful General Order Prohibiting Sexual Harassment, Article 120c-indicent recording & Broadcasting and 134 (Indecent Conduct) as suspected offenses. The affidavit included an analysis of the Article 92, UCMJ, charge.

Further facts necessary for an appropriate ruling are contained within the analysis section below.

PRINCIPLES OF LAW

Burden of Proof

The government bears the burden of demonstrating by a preponderance of the evidence that admissions are voluntary. Mil. R. Evid. 304(f)(6).

The military judge must find by a preponderance of the evidence that a statement by the accused was made voluntarily before it may be received into evidence. Mil. R. Evid. 304(f)(7).

"Involuntary statement" means a statement obtained in violation of the self-incrimination privilege or Due Process Clause of the Fifth Amendment to the United States Constitution, Article 31, or through the use of coercion, unlawful influence, or unlawful inducement. Mil. R. Evid.304(a)(1)(A).

Voluntariness of Substantive Statements

A confession must be voluntary to be valid. "The principles for determining whether a pretrial statement was [involuntary] is essentially the same whether the challenge is based on the Constitution, Article 31(d), or Mil. R. Evid. 304." United States v. Bubonics, 45 M.J. 93 (C.A.A.F. 1996).

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."[1] The test for voluntariness "involves an assessment of the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." Id. (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973)); Arizona v. Fulminante, 499 U.S. 279, 285-86 (1991). 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," as opposed to the product of someone whose "will was overborne and his capacity for self-determination critically impaired . . ." Bubonics, 45 M.J. at 95 (citing Culombe v. Connecticut, 367 U.S. 568, 602 (1961)).

Factors to be considered 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). Courts also consider whether the accused had any prior experience with law enforcement practices and techniques, including threats, inducements, or presentation of false pretenses. Lynumn v. Illinois, 372 U.S. 528, 534 (1963). The Court of Appeals for the Armed Forces specifically recognized the impact of coercive interrogation techniques in the military environment. Bubonics, 45 M.J. at 95. An investigator's use of trickery, artifice, or subterfuge in obtaining a confession is generally permissible, as long as the tactic does not result in coercion or an otherwise

[1] M.R.E. 304(a)(1)(A).

involuntary statement. United States v. Campbell, 76 M.J. 644, 654 (A.F. Ct. Crim. App. 2017)(citations omitted).

Courts have ruled that exculpable statements are another indicator to be considered when examining voluntariness. See United States v. Washington, 46 M.J. 477, 482 (1997) (confession voluntary where record shows appellant tried to talk himself out of trouble). See also United States v. Jones, 34 M.J. 899, 909 (N-M.C.M.R. 1992)("At the time the appellant made the statement, which is the relevant time frame for purposes of the voluntariness inquiry, these statements demonstrated the appellant retained the wherewithal to shift for himself. Thus, the facially exculpatory statement made by him is another factor confirming that the appellant's statement was otherwise voluntarily made.")

Miranda Warnings

The Fifth Amendment provides that "[n]o person ... shall be compelled in any criminal case to be a witness against [themselves]." U.S. Const., Amend. V. In Miranda v. Arizona, the Supreme Court held that prior to any custodial interrogation, a subject must be warned that he has a right: (1) to remain silent, (2) to be informed that any statement made may b[redacted] used as evidence against him, and (3) to the presence of an attorney. 384 U.S. 436 (1966). These prophylactic measures were adopted to protect a suspect's Fifth Amendment right from the "inherently compelling pressures" of custodial interrogation. Miranda v. Arizona, 384 U.S. 436, 467 (1966). "Once a suspect in custody has 'expressed his desire to deal with the police only through counsel, [he] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication.'" United States v. Mitchell, 76 M.J. 413, 417 (C.A.A.F. 2017); quoting Edwards v. Arizona, 451 U.S. 477, 484-85 (1981); citing M.R.E. 305(e)(3). M.R.E. 305(c)(2) codifies this right in the military, stating "[i]f a person suspected of an offense and subjected to custodial interrogation requests counsel, any statement made in the interrogation after such request, or evidence derived from the interrogation after such request, is inadmissible."

The Fifth Amendment's protection against self-incrimination "addresses 'real and appreciable, and not merely imaginary and unsubstantial, hazards of self-incrimination.'" United States v. Castillo, 74 M.J. 160, 165 (C.A.A.F. 2015); quoting Marchetti v. United States, 390 U.S. 39, 48 (1968). "To qualify for the Fifth Amendment privilege, a communication must be testimonial, incriminating, and compelled." Castillo, 74 M.J. at 165; quoting Hiibel v. Sixth Judicial District Court, 542 U.S. 177, 189 (2004).

Mil. R. Evid. 305(b)(3) defines custodial interrogation as "questioning that takes place while the accused or suspect is in custody, could reasonably believe himself or herself to be in custody, or is otherwise deprived of his or her freedom of action in any significant way."

Article 31(b)

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)).

Passcodes

A request for consent to search a phone is not an interrogation. United States v. Frazier, 34 M.J. 135, 137 (C.M.A. 1992). If consent is granted, agents may request the passcode as an extension of that consent. United States v. Robinson, 77 M.J. 303, 306 (C.A.A.F. 2018)(The investigator's subsequent request for the passcode "for the sole purpose of effectuating the search … was merely a natural and logical extension of the first permissible inquiry.") However, in other scenarios, a request to provide a passcode constitutes an interrogation when the passcode provides "a link in the chain of evidence needed to prosecute." United States v. Mitchell, 76 M.J. 413, 418 (C.A.A.F. 2017)(citing Hoffman v. United States, 341 U.S. 479, 486, 71 S.Ct. 814, 95 L.Ed. 1118 (1951) and United States v. Hubbell, 530 U.S. 27, 37–38, 120 S.Ct. 2037, 147 L.Ed.2d 24 (2000)).

ANALYSIS

The questioning on 24 March 2021 was a custodial interrogation. This was the accused's second interaction with CGIS. He was again escorted to the interrogation by a member of his command, to the same conference room with two CGIS special agents. S/A [redacted] testified that it is CGIS standard practice to ask a command to escort all victims, witnesses and subjects to CGIS interviews and to not inform them where they are being escorted or why. Thus, the accused did not appear to meet with CGIS agents voluntarily. S/A [redacted] did not know the rank of the escort for the accused, but testified that the escort is usually a higher rank than the accused. The door was closed, but not locked. MK3 Hadley knew he was suspected of crimes. While he was told he could "let [S/A [redacted] know" if he needed a break or water, he was not told that he could leave. Under these circumstances, the accused was subject to a "'restraint on freedom of movement' of the degree associated with a formal arrest" and in custody. See Mitchell,76 M.J. at 417-18 (citing California v. Beheler, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983)).

The accused's statements were voluntary. The Court hereby incorporates the findings of fact and analysis relating to MK3 Hadley's personal characteristics from AE 21 (Court's Ruling on Defense Motion to Suppress – Accused Statements). MK3 Hadley had the age, experience and mental acuity to understand his rights warning and the context of the interrogation. He was not handcuffed or restrained and was told he could ask for a break or to get water at any time. The agents spoke to the accused in a conversational tone and with respect. They did not physically posture themselves in a manner that was threatening or intimidating. He was provided rights warning prior to questioning in a methodical manner and given the opportunity to ask questions. The questioning portion of the interrogation lasted approximately 90 minutes. The accused did not ask for a break or if he could leave during the interrogation. A review of the totality of the circumstances surrounding the Accused's 24 Mar 2021 interrogation with CGIS demonstrate that his statements were voluntary and his will was not overborne.

The Article 31(b) Rights warnings were legally sufficient. The accused's conduct that underlies the Article 92, UCMJ, offenses was within the frame of reference provided by the description of the suspected offenses in the Rights Warning form on 24 Mar 2021. The form notified the accused that the conduct related to suspected Article 120c, UCMJ, violations included "Requesting/Sending sexually explicit/nude images." This conduct, for the communications directed at Coast Guard members, is the same conduct that is the basis for the Article 92, UCMJ, charges.

The Court does not find the Defense analogy to United States v. Nelson persuasive. In Nelson, the Court found the accused was not properly warned about Article 133, UCMJ, charges related to a failure to report the use of prostitutes by others even though he was warned that he was suspected of violating Article 134, UCMJ, Prostitution, himself. 82 M.J. 336, 337 (C.A.A.F. 2022). In Nelson, the unwarned charges related to conduct by others. Here, the accused was warned about his own conduct – the very same conduct that was the basis for the Article 92, UCMJ, charges. The accused sent numerous communications requesting and sending explicit imagery both Coast Guard and non-Coast Guard recipients. To the extent that the accused may have been confused as to which communications were at issue in the interrogation, he was immediately oriented to the communications to Coast Guard members by S/A [redacted]

This case is most similar to United States v. Simpson. 54 M.J. 281 (C.A.A.F. 2000). In Simpson, investigators sought search warrants for "Violation of UCMJ Articles: 92 Failure to Obey Order or Regulation, 128 Assault, 134 Indecent Acts or Liberties with a Child, 125 Sodomy, and 120 Rape." Id. at 282. The next day, the same investigators interrogated the accused and provided the accused notice that he was suspected of "indecent acts or liberties with a child." Id. at 283. The Court found that the rights warnings were sufficient because "the offenses of indecent acts and sodomy are sufficiently related so that the warning oriented appellant toward the nature of the accusations against him," even though it would have "been preferable" if the agent had listed all of the offenses he used in the search warrant application. Id. at 284. Similarly, here, it would have been preferable for S/A [redacted] to include Article 92, UCMJ, on the rights warning form. However, the offenses listed sufficiently oriented the accused to the nature of the accusations against him.

The Article 31(b) Rights Warning Form satisfied the *Miranda* requirements. The rights warning form notified the accused that he had the right to remain silent, that his statements could be used against him in a court of law and that he had a right to an attorney. Thus, the requirements of Miranda and the Fifth Amendment were satisfied.

The accused's consent to provide his phone passcode was voluntary. The search authorization for MK3 Hadley's phone was based on suspected evidence of violations of Article 120c, UCMJ. The accused was told he was suspected of violations of Article 120c, UCMJ, waived his rights and agreed to talk to agents about that offense approximately one hour before the agents asked for his consent for his passcode. Prior to giving his consent, the agents provided the accused with the search authorization. S/A [redacted] was explicit in his explanation to MK3 Hadley that he was not required to give consent. At no point did the accused invoke his rights prior to providing the passcode. Thus, the consent to provide the passcode was voluntary.

CONCLUSIONS OF LAW

1. CGIS questioning of the accused on 24 March 2021 was a custodial interrogation.
2. The accused's substantive statements were voluntary.
3. The Article 31(b) Rights warnings were legally sufficient.
4. The accused's Fifth Amendment rights were not violated.
5. The accused's consent to provide his phone passcode was voluntary.

RULING

The Defense motion is DENIED, consistent with the above conclusions of law.

So ordered this 2nd Day of February, 2023.

REUTER.EMILY.PAT[redacted] Digitally signed by REUTER.EMILY.PATRICIA[redacted]
Date: 2023.02.02 15:01:00 -08'00'

Emily P. Reuter
Commander, U.S. Coast Guard
Military Judge

APPELLATE EXHIBIT 24
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GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. MK3 JOSHUA HADLEY U.S. Coast Guard	RULING ON DEFENSE MOTION TO SUPPRESS (CELLULAR TELEPHONE) 26 January 2023

RELIEF SOUGHT

Pursuant to R.C.M. 905(b)(3), Mil. R. Evid. 311 and the Fourth Amendment, the Defense moved to suppress all evidence received and derived from the search of MK3 Hadley's cellular telephone. AE 27. The Government opposed the Defense motion. AE 29. This Court heard oral arguments at an Article 39(a) hearing on 19 December 2022.

ISSUES PRESENTED

1. Did the military judge who issued the first search authorization have a substantial basis for concluding that probable cause existed?
2. Did the first search authorization contain sufficient particularity?
3. Did the CGIS special agent exceed the scope of the search authorization when searching the accused's personal cellular telephone?
4. Should the evidence obtained as a result of the first search authorization be suppressed?

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 and the testimony of CGIS Special Agent (S/A) [redacted] The Court finds the following facts by a preponderance of the evidence:

1. The accused, MK3 Joshua Hadley, is charged with two specifications of Article 92 (Violation of a Lawful General Order), one charge of Article 120 (Abusive Sexual Contact), one charge of Article 134 (Sexual Act with an Animal), one charge of Article 134 (Viewing and Possessing Child Pornography), and an additional charge of Article 120 (Abusive Sexual Contact).

2. On 01 June 2020, an unrestricted report of abusive sexual contact was provided to Coast Guard Investigative Service (CGIS) Resident Agent Office (RAO) Honolulu that DC3 [redacted] (now DC2) reported to the [redacted] command that the Accused touched the penis of DC3 [redacted], after DC3 [redacted] had fallen asleep on a couch after attending a party at the Accused's home.

APPELLATE EXHIBIT 31
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3. On 03 June 2020, CGIS agents interviewed the Accused related to the Article 120, UCMJ, offense. The Accused was provided his Article 31b rights and waived his right to counsel and made a statement.

4. On 20 October 2020, CGIS received a report that MK3 Hadley had allegedly messaged other Coast Guard members via Snapchat and asked for nude pictures or videos of themselves in exchange for money. Two members also alleged that MK3 Hadley had sent them videos or images of himself having sex with unidentified women, again via Snapchat. After that date, CGIS conducted a supplemental inquiry.

First Search Authorization (19 March 2021)

5. On 19 March 2021, CGIS S/A [redacted] applied for a search authorization to search the accused, his workspace and his vehicle (if location on Coast Guard property) for his personal cellular telephone and "any other mobile devices, to include tablets or similar mobile electronic devices." If located, the application further requested to seize and search the accused's cellular telephone and other mobile devices.

6. S/A [redacted] affidavit, included on the search authorization as "Attachment B," requested the search and seizure to search for evidence of violations of Article 120c, UCMJ. The affidavit specifically sought evidence of violations of indecent broadcasting, indecent exposure and "other sexual misconduct."

7. S/A [redacted] affidavit submitted in support of the search authorization application detailed interviews with Coast Guard members who alleged MK3 Hadley sent explicit pictures or videos of himself around March 2019, July 2019, October 2019, and July 2020, as well as allegations that MK2 Hadley also sent explicit images of himself having sex with an unknown woman around April or May 2020, and July 2020. These reports also alleged that MK3 Hadley requested explicit pictures of other Coast Guard members, often in exchange for money, around February to March 2020, and July 2020.

8. The images MK3 Hadley sent to OS3 [redacted] in approximately April or May 2020 depicted MK3 Hadley having sexual intercourse in the "doggie-position." OS3 [redacted] said the image depicted MK3 Hadley [redacted] with the shaft of MK3 Hadley's erect penis and the lower portion of his body visible.

9. All of the allegations reported that MK3 Hadley used Snapchat to send sexually explicit images and communicate his requests.

10. In Paragraph 3 of his affidavit, S/A [redacted] explained that the Snapchat application can be downloaded onto mobile devices. Once downloaded, the mobile user grants Snapchat permission to access the mobile device's camera, contacts, location, microphone, phone and storage.

11. In Paragraph 11 of his affidavit, S/A [redacted] explained that digital information, including phots and videos on a phone can be saved within the Snapchat application. Additionally, images from a mobile application can be "screenshotted" and saved on the mobile device.

12. Attachment "A" of the Search Authorization Application requested to search electronic data in seized mobile devices for "photos, videos (with their associated geotag and other metadata) and snapchat data (with associated geotag and metadata).

13. The military judge authorized the search on 19 March 2021. The Search Authorization includes both the U.S. Coast Guard Search and Seizure Authorization Form CG-5810I and a written memorandum detailing the scope of the authorization.

14. In the written portion of the Search Authorization, the military judge attached the search application and incorporated it into the Search Authorization.

15. The written portion of the Search Authorization also incorporates any verbal claims made to the military judge by S/A [redacted] on 19 March 2021. S/A [redacted] does not remember the military judge having any questions about the affidavit.

16. The Search Authorization Form CG-5810I authorized a search of the "subject phone for evidence of violations of UCMJ Article 120c, UCMJ." The written memorandum authorizes the search for evidence of "Article 120c, UCMJ, Indecent Exposure."

17. The Search Authorization memorandum authorized the seized electronic devices to be searched for "collection and exploitation of the following types of files: photos, videos and snapchat stat, as well as the associated geotag and meta data associated with these type files listed."

Search of the Accused's Personal Cellular Telephone

18. On 24 March 2021, CGIS interviewed the Accused related to the new allegations. The Accused was provided his Article 31b rights and waived his right to counsel and made a statement.

19. At the end of the interview on 24 March 2021, CGIS gave the Accused the search authorization for his cell phone and requested the Accused's passcode. The Accused gave consent to providing his passcode to his phone.[1]

20. The accused did not consent to providing his cell phone for a search. The cell phone was seized pursuant to the search authorization on 24 March 2021.

21. S/A [redacted] believed the military judge had a substantial basis for probable cause.

22. The contents of the cell phone were first extracted on 29 March 2021 as a "working copy." A second extraction was conducted on 08 April 2021. Both extractions were conducted using the Cellebrite Physical Analyzer (PA), Version 7.44.1.3.

23. On 21 April 2021, S/A [redacted] reviewed the data extracted from the accused cell phone.

[1] The accused's consent to provide his passcode is contested in the 29 Nov 2022 Defense Motion to Suppress (Involuntary Statements of the Accused).

24. S/A [redacted] reviewed over 90,000 photographs and over 7,500 videos. Of those, approximately 180 image and video files displayed nudity and sexual acts.

25. S/A [redacted] reviewed the photos and videos by first looking at the thumbnail view of the images. If the image appeared to have sexual content, S/A [redacted] would open the thumbnail.

26. When a thumbnail is opened on the Cellebrite program, the image and the metadata both display on screen.

27. A "creation date" can be the date the file was uploaded or downloaded to the device, vice the date that the image was made or taken.

28. S/A [redacted] had the search authorization next to him when he conducted the search of the cell phone. He relied on the search authorization and had no reason to doubt the validity.

29. S/A [redacted] notes state that he conducted the extraction and search "In Accordance With (IAW) the Search authorization granted on 03/19/201 by a U.S. Military Judge".

30. During the 21 April 2021 review, S/A [redacted] identified an image that "captures four ziplock bags of dried mushrooms," that was received on 19 Nov. 2019. This image is not the basis for any charges against the accused.

31. During the 21 April 2021 review, S/A [redacted] identified a 7-second video that captured a Yellow Labrador Retriever licking an unknow substance from the tip of a white male's penis. The storage path of the video was "Josh's
[redacted]

32. There was no meta-data attached to IMG_0153, but video details show the video was created on 05 March 2021 at 7:25:13PM (UTC-10).

33. IMG_0153 is the sole basis for the Article 134 (Sexual Act with an Animal) charge.

34. During the 21 April 2021 review, S/A [redacted] identified a 9-second video that captured what appeared to be a young male child under the age of 12 providing fellatio to an unknown white male. The storage path of the video was "Josh's
[redacted]

35. There was no meta-data attached to the IMG_0152, but video details show the video was created on 05 March 2021 at 7:12:10 PM (UTC-10).

36. IMG_0152 is the sole basis for the Article 134 (Viewing and Possessing Child Pornography).

37. S/A [redacted] opened the thumbnails of both videos because they showed a penis.

38. S/A [redacted] reviewed the remainder of the photos and videos after seeing IMG_0152 and IMG_0153.

39. On 13 May 2021, CGIS submitted a DVD with the 9-second video clip with the young male

child to the National Center for Missing and Exploited Children (NCMEC).

40. On 25 May 2021, S/A [redacted] conducted a third advanced logical extraction of the accused's cell phone using the Cellebrite Physical Analyzer (PA), Version 7.45.0.96.[2] This is documented as the second extraction, although two previous extractions were conducted.

41. S/A [redacted] then searched the images "for evidence of unwanted exchange of pornographic imagery between (S) MK3 Joshua Hadley and any potential victims, and any Snapchat related imagery which indicates potential additional victims."

42. S/A [redacted] identified 412 photographs and 31 videos containing what appears to be pornography, 59 file names associated with photographs and 31 file names associated file names associated with videos, contain file paths associated with being sent and received as attachments to text messages."

43. The 7-second video depicting the dog and the 9-second video depicting the young male child were not present on this extraction attempt due to "the second extraction forc[ing] multiple power cycles of the device and [that] resulted in numerous files not being captured in the extraction."

44. On 17 September 2021, NCMEC issued a report that identified the video clip as being part of a known child pornography series called [redacted] The child victim in the series was [redacted] years old at the time the video was made.

Second Search Authorization

45. On 11 Nov 2021, S/A [redacted] applied for a second search authorization from a military judge to seize and search the accused's personal cellular telephone or to search the forensic extraction of the cellular phone for evidence of Article 134 (Child Pornography), Article 120c, and Article 112(a). The military judge granted the search authorization.

46. S/A [redacted] requested the expanded search authorization because, in his experience, individuals who possess child exploitation material often hide the material electronically and are linked to a network. He additionally sought the additional search authorization because the first search revealed that many images showing genitalia were linked to multimedia messages.

47. On 12 Nov 2021, S/A [redacted] reviewed the previously extracted data from the accused cell phone pursuant to the second Search Authorization.

Further facts necessary for an appropriate ruling are contained within the analysis section below.

PRINCIPLES OF LAW

Burden of Proof

[2] A 26 May 2021 CGIS Report records this extraction as being conducted on 25 May 2021. A Supplemental Report records this date as 20 May 2021.

The burden of proof is on the Government by a preponderance of the evidence to establish that the search was not unlawful, that an exception applies, or that the deterrence of future unlawful searches is not appreciable, or such deterrence does not outweigh the costs to the justice system of excluding the evidence. Mil. R. Evid. 311(d)(5).

Fourth Amendment

Data stored within a cell phone falls within the Fourth Amendment's protections. Riley v. California, 573 U.S. 373, 401–03 (2014). See also Wicks, 73 M.J. at 99. "A search authorization, whether for a physical location or for an electronic device, must adhere to the standards of the Fourth Amendment of the Constitution. The Fourth Amendment states that 'no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.'" United States v. Richards, 76 M.J. 365, 369 (C.A.A.F. 2017) (quoting U.S. CONST. amend. IV).

Probable Cause

"Probable cause to search exists when there is a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched." Mil. R. Evid. 315(f)(2). "Probable cause deals with probabilities." United States v. Eppes, 77 M.J. 339, 344 (C.A.A.F. 2018) (citing United States v. Leedy, 65 M.J. 208, 213 (C.A.A.F. 2007)). "There is no specific probability required, nor must the evidence lead one to believe that it is more probable than not that contraband will be present." Id. "Probable cause is a flexible, commonsense standard." Id. (citing United States v. Bethea, 61 M.J. 184, 187 (C.A.A.F. 2005) (quoting Texas v. Brown, 460 U.S. 730, 742 (1983))). "It is not a technical standard, but rather is based on the factual and practical considerations of everyday life on which reasonable persons, not legal technicians, act." Id. (citing Leedy, 65 M.J. at 213). A commander considering a request for a search authorization must "make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 U.S. 213, 238 (1983). Probable cause requires not just that the sources of information be sufficiently reliable, but also a sufficient nexus between the alleged crime and the specific place to be searched or item to be seized. Eppes at 345; see also United States v. Nieto, 76 M.J. 101, 106 (C.A.A.F. 2017). "Such a nexus 'may be inferred from the facts and circumstances of a particular case, including the type of crime, the nature of the items sought, and reasonable inferences about evidence is likely to be kept'." Eppes, 77 M.J. at 345 (quoting Nieto, 76 M.J. at 106).

"A search conducted pursuant to a warrant or pursuant to a search authorization is presumptively reasonable." Eppes, 77 M.J. at 344 (citing United States v. Wicks, 73 M.J. 93, 99 (C.A.A.F. 2014) (citing Katz v. United States, 389 U.S. 347, 357 (1967)). "Probable cause determinations by a neutral and detached search authority are entitled to substantial deference." Id. (citing United States v. Nieto, 67 M.J 101, 218 (C.A.A.F. 2017); United States v. Clayton, 68 M.J. 419, 423 (C.A.A.F. 2010); United States v. Macomber, 67 M.J. 214, 218 (C.A.A.F. 2009)). However, when evidence is unlawfully obtained, an accused may make a timely motion to suppress it and the military judge may exclude it pursuant to the exclusionary rule. Eppes, 77 M.J. at 344; see also Murray v. United States, 487 U.S. 533, 536-37 (1988) (explaining the exclusionary rule

prohibits the admission of unlawfully obtained primary and derivative evidence); Mil. R. Evid. 311.

Particularity

The purpose of the particularity requirement was "to prevent general searches. By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justification, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." Maryland v. Garrison, 480 U.S. 79, 84 (1987).

The "particularity" requirement means that a search authorization must "describe the things to be seized with sufficient particularity to prevent a general exploratory rummaging in a person's belongings." Richards, 76 M.J. at 369 (quoting United States v. Carey, 172 F.3d 1268, 1272 (10th Cir. 1999)). A "temporal limitation is one possible method of tailoring a search authorization, [but] it is by no means a requirement." Richards, 76 M.J. at 370. Another possible method of tailoring a search authorization is by limiting "the search to evidence of specific federal crimes or specific types of material." Id. ("They were entitled to search Appellant's electronic media for any communication that related to his possible violation of the Florida statute in his relationship with [redacted]")

When balancing the concerns about the particularity requirement against the "dangers of too narrowly limiting where investigators can [search]" electronic devices, "the courts have looked to what is reasonable under the circumstances." Richards, 76 M.J. at 369–70. "As always under the Fourth Amendment, the standard is reasonableness." Id. (quoting United States v. Hill, 459 F.3d 966, 974–77 (9th Cir. 2006)). Thus, the "proper metric of sufficient specificity" as concerns searches of electronic devices "is whether it was reasonable to provide a more specific description of the items at that juncture of the investigation." Id. at 369 (quoting United States v. Richards, 659 F.3d 527, 541 (6th Cir. 2011)).

In determining how to apply the Fourth Amendment to searches of electronic devices, the Court of Appeals for the Armed Forces allows for a "zone in which such searches are expansive enough to allow investigators access to places where incriminating materials may be hidden, yet not so broad that they become the sort of free-for-all general searches the Fourth Amendment was designed to prevent." Richards, 76 M.J. at 370.

Plain View Doctrine

Law enforcement officials conducing a lawful search may seize items in plain view if they are acting within the scope of their authority and have probable cause to believe the item is contraband or evidence of a crime. United States v. Fogg, 52 M.J. 144, 149 (C.A.A.F. 1999); Mil. R. Evid. 316(c)(5)(C). "In order for the plain view exception to apply: (1) the officer must not violate the Fourth Amendment in arriving at the spot from which the incriminating materials can be plainly viewed; (2) the incriminating character of the materials must be immediately apparent; and (3) the officer must have lawful access to the object itself." Richards, 76 M.J. at 371 (citing Horton v. California, 496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990)).

ANALYSIS

First Search Authorization (March 2021)

The defense argues that the first search authorization was not based on probable cause for the offense identified in the application and did not have sufficient particularity. Further, the Defense argues that the manner in which the search was conducted was unreasonable.

Probable Cause

The Court finds that the military judge had a substantial basis for concluding that probable cause existed. As detailed in the CG-5810F, Application for Search Authorization, the alleged crime was Article 120c, UCMJ. In the attached affidavit, S/A [redacted] specifically alleged there was evidence of Indecent Exposure, Indecent Broadcasting; and Other Sexual Misconduct. "Other sexual misconduct" is the general title of Article 120c, UCMJ. 10 U.S.C. § 920c. This Article criminalizes Indecent Viewing, Visual Recording, or Broadcasting; Forcible Pandering; and Indecent Exposure. 10 U.S.C. § 920c(a)-(c). Although the affidavit's listing of the identified offenses appears to categorize Other Sexual Conduct as a specific offense rather than the title of the statute, the statute referenced is clear, as are the alleged crimes (Indecent Exposure and Broadcasting).

Indecent Broadcasting prohibits the knowing broadcast or distribution of any recording of another person's private area that was made without the other person's consent and under circumstances under which the other person had a reasonable expectation of privacy. 10 U.S.C. § 920c(a)(3). The affidavit identified two Coast Guard members, MK3 [redacted] and CS3 [redacted] who received videos from MK3 Hadley depicting him engaged in sexual intercourse in the "doggy-style" position with unknown females. Both Coast Guard members were direct recipients of the videos. Both members stated that the videos were unsolicited and that they told the accused that they did not want to receive those types of communications. MK3 [redacted] reported that the accused continued to make sexual advances and requests for images after he asked him to stop. Both MK3 [redacted] and CS3 [redacted] reported the communications all occurred over Snapchat. Although there was no direct evidence that the recording were made without the consent of the females in the videos, given the sexual position described (a commonly known slang term for a position where the female is on hands and knees, facing away from the male), the accused's unsolicited distribution of the videos and his persistence in asking for other sexual images, finding probable cause that the videos were without the participants' consent was a reasonable inference.

Indecent Exposure criminalizes the intentional exposure, "in an indecent manner, [of] the genitalia, anus, buttocks, or female areola or nipple." 10 U.S.C. § 920c(a)(c). In addition to the reports from MK3 [redacted] and CS3 [redacted] above, the affidavit included the reports from CS3 [redacted] that he personally received unsolicited sexually explicit photos from MK3 Hadley on Snapchat and that MK3 Hadley would ask CS3 [redacted] to send pictures of his penis ([redacted] in exchange for money. FN [redacted] also reported that he received unsolicited photos that showed MK3 Hadley's genitalia from MK3 Hadley on Snapchat. The affidavit also included reports from two other Coast Guard members who said they received sexually suggestive photos that did not reveal genitalia from MK3 Hadley on Snapchat, along with request for them to send photos in return. Defense argues that under United States v. Uriostegui, 75 M.J. 857, 865 (N-M. Ct. Crim. App. 2016) and United States v. Williams, 75 M.J. 663, 666 (A. Ct. Crim. App. 2016), indecent exposure requires an in-person exposure of the listed body parts and not an image. The Court is

not aware of a Coast Guard Court of Criminal Appeals opinion on this issue. Thus, these cases are persuasive, but not binding on Coast Guard prosecutions. Further, a "cell phone, by itself, [has] the ability to serve both as the instrumentality of the crime and a storage device for the fruit of the crime." Nieto, 76 M.J. at 108. Given the content of the photos sent to the Coast Guard members' cellular phones, the military judge had a substantial basis to find that there was probable cause that there was evidence of a violation of Article 120c, Indecent Exposure, either as evidence of an exposure or the exposure itself.

The evidence before the military judge was not generalized profile evidence. The affidavit included direct evidence, specifically the reports of Coast Guard members who personally received the photos sent by the accused, of potential Article 120c, UMCJ, violations. S/A [redacted] explained, based on his training and experience, the nature of the Snapchat application and why there was a fair probability that evidence of the crimes would be on mobile devices belonging to the accused. The Coast Guard members reported that they all received the images and communications from the accused on their Snapchat accounts. Further, the affidavit included a report from OS2 [redacted] that he blocked the MK3 Hadley from Snapchat and subsequently received a cell phone text from MK3 Hadley asking to be re-added to his Snapchat. Thus, the affidavit contained a sufficient nexus that the evidence of the alleged crimes would be present on MK3 Hadley's cell phone or other mobile devices.

Particularity

Defense argues that the search authorization runs afoul of the Fourth Amendment because the search authorization lacked a temporal limitation and did not sufficiently limit the areas of the device permitted to be searched. The Court disagrees and finds the Government met its burden to establish that the search authorization was sufficiently particularized.

Although limiting a search authorization by time is a recognized method of particularizing a search, it is not required. Richards, 76 M.J. at 370. An authorization is not unconstitutional when it has sufficient constraints to limit the search. Id. The application of the Fourth Amendment to searches of electronic devices requires "a zone in which such searches are expansive enough to allow investigators access to places where incriminating materials may be hidden, yet not so broad that they become the sort of free-for-all general searches the Fourth Amendment was designed to prevent." Id.

A temporal restriction for the search was not required because the military judge reasonably restricted the search to photos, videos and snapchat data that had evidence of Article 120c violations. The limitation was directly based on the application's detail of the anticipated evidence for the alleged criminal activity (photos and videos sent or accessible via Snapchat and Snapchat communications) and the description of how Snapchat worked (videos or photos could be captured and saved in locations on the mobile device other than the Snapchat profile). Additionally, the military judge received information that the accused was sending sexually explicit images to various individuals over a prolonged period. Most of the communications documented in the affidavit occurred between March 2019 and July 2020. Several of the reports did not provide a date for the communications. The CGIS interviews occurred between November 2020 and January 2021. The application for a search authorization was submitted approximately three months later. At this juncture of the investigation, it was not reasonable to provide a more specific limitation of the search based on time. See Richards, 76 M.J. at 369

(citation omitted).

Finally, the military judge's inconsistent documentation of the crime at issue does not negate the particularity of the search authorization. The military judge authorized the search for "evidence of violations of UMCJ Article 120c" in the CG-5810I, for "evidence of a crime, to wit: Article 120c UCMJ, Indecent Exposure" in the written memorandum, and also explicitly incorporated the application and affidavit, which sought evidence of Indecent Exposure and Broadcasting under Article 120c. Viewed in the light most favorable to the government, the evidence supports a finding that the search was authorized for evidence of violations of Article 120c, Indecent Exposure and Broadcasting. See id.

Reasonableness of the Search

S/A [redacted] search conformed to the terms of the Search Authorization. S/A [redacted] testified that he kept the authorization next to him during the search for reference. He initially reviewed the thumbnail images of the photo and video files and opened them if they appeared to contain sexual or nude imagery. Opening files authorized to be searched is a reasonable manner of search. See id. at 370 (quoting United States v. Burgess, 576 F.3d 1078, 1094 (10th Cir. 2009)("...there may be no practical substitute for actually looking in many (perhaps all) folders and sometimes at the documents contained within those folders . . . It is particularly true with image files"). The fact that the accused had a voluminous number of photos (over 90,000) and videos (over 7,500) does not make their review unreasonable.

S/A [redacted] decision to continue the search for evidence authorized by the first search authorization after finding images of other crimes, rather than seek an expanded search authorization, is not a best practice. However, the delay in seeking an additional warrant for evidence of other crimes does not make his initial search for violations of Article 120c unreasonable.

Plain View Exception

The 7-second video (IMG_153) that is the basis for the Article 134 (Sexual Act with an Animal) Charge and the 9-second video (IMG_152) that is the basis for the Article 134 (Viewing and Possessing Child Pornography) were properly seized under the authority of the first search authorization because they contained imagery that could support charges under the specified crimes of Article 120c. However, even if they fell outside the scope of the first search authorization, their seizure is proper under the plain view exception to the Fourth Amendment. First, S/A [redacted] accessed both images while lawfully reviewing photos on the accused's cell phone. S/A [redacted] testified that he was focused on [redacted] images that depicted a penis, based on the nature of the reports that supported the first search authorization. Both IMG_152 and IMG_153 prominently feature a penis. Thus, S/A [redacted] did not violate the Fourth Amendment by opening the thumbnails in his search pursuant to the first search authorization. Second, the incriminating nature of the videos was immediately apparent. S/A [redacted] testified that both videos were very short and the imagery was focused on the sexual activity being performed. He testified that he instantly identified the nature of the videos and subsequently recorded it the CGIS investigation. Finally, S/A [redacted] had lawful access to the files because he was lawfully searching through extracted files pursuant to a valid search authorization.

Second Search Authorization

The second search authorization obtained by S/A [redacted] relied on information used for the first authorization and the search results from the first search authorization. The first search authorization was lawfully executed and IMG_152 and IMG_153 were lawfully seized under the plain view exception, thus the second search authorization was lawful. No additional child exploitation images or images of sexual acts with an animal were identified in the first or second search.

CONCLUSIONS OF LAW

1. The military judge who issued the first search authorization had a substantial basis for concluding that probable cause existed.
2. The first search authorization was not overbroad.
3. The search pursuant to the first search authorization was reasonable.
4. IMG_152 and IMG_153 were lawfully seized.
5. The second search authorization was lawful.
6. There is no legal basis to suppress the evidence resulting from the first search authorization.

RULING

The Defense motion is DENIED, consistent with the above conclusions of law, subject to the Court's ruling on the voluntariness of the accused's consent to provide his passcode.

So ordered this 26th day of January, 2023.

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Emily P. Reuter
Commander, U.S. Coast Guard
Military Judge

UNITED STATES COAST GUARD
GENERAL COURT-MARTIAL

UNITED STATES v. MK3 JOSHUA D. HADLEY U.S. Coast Guard	RULING: MOTION TO COMPEL WITNESSES (TRIAL) 06 January 2023

RELIEF SOUGHT

Pursuant to Rule for Courts-Martial (R.C.M.) 906(b)(7), the Defense moved this Court for the production of witnesses. AE 42. The government opposed the motion. AE 44. The court held oral arguments on 19 December 2022.

ISSUE PRESENTED

Is the production of witnesses relevant and necessary?

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. The accused, MK3 Joshua Hadley, is charged with two specifications of Article 92 (Violation of a Lawful General Order), one charge of Article 120 (Abusive Sexual Contact), one charge of Article 134 (Sexual Act with an Animal), one charge of Article 134 (Viewing and Possessing Child Pornography), and an additional charge of Article 120 (Abusive Sexual Contact).

Abusive Sexual Contact Charges

2. Both Abusive Sexual Contact charges stem from an incident on 31 May 2020. The accused, DC2 [redacted] and other friends engaged in a night of socializing and drinking at MK3 Hadley's shared apartment with his [redacted] crewmember BM3 [redacted] on 30 May 2020.

3. DC2 [redacted] arrived via Uber some time between 2030-2130.

4. The group played drinking games such as Beer Pong and King's Cup for approximately 3 hours.

5. At approximately 2330 the other guests began to leave the apartment. DC3 [redacted] decided to stay the night and sleep on MK3 Hadley and BM3 [redacted] couch.

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6. DC3 [redacted] remembers seeing MK3 Hadley go to his bedroom before DC3 [redacted] fell asleep on the couch.

7. A few hours later, between 0030 and 1330 on 31 May 2022, DC3 [redacted] awoke to MK3 Hadley "cuddled up" next to him on the couch. DC3 [redacted] could, "feel MK3 Hadley's facial hair against his cheeks" and MK3 Hadley's hand inside his pants, beneath his underwear. MK3 Hadley was "massaging" DC3 [redacted] penis and scrotum.

8. DC3 [redacted] was "shocked and upset" when he woke up. The accused heard DC3 [redacted] say words to the effect of, "What the heck?"

9. DC3 [redacted] asked MK3 Hadley why he was touching him and pushed MK3 Hadley away. DC3 [redacted] then grabbed all of his personnel belongings, left the apartment, and ordered an Uber.

Sexual Act with an Animal Charge

10. During a forensic extraction of MK3 Hadley's cellular telephone on 21 April 2021, agents identified a seven second video that captured a yellow Labrador Retriever licking an unknown substance from the tip of a white male's penis. The metadata indicated the video was created on 05 March 2021.

11. CGIS special agents believe the hand and penis seen in the video show similar characteristics to those of the accused seen in other videos.

12. MK3 Hadley has a yellow Labrador Retriever that was 9 months old in March 2021.

Motions to Compel Witnesses

13. On 04 November 2022, the Defense submitted a request for production of witnesses for 4 for presentencing and 3 on the merits, and all were approved.

14. On 07 November 2022, the Defense submitted a supplemental request for production of four merits witnesses (Mr. [redacted], Ms. [redacted], Ms. [redacted], and Ms. [redacted]), three of whom (Mr. [redacted], Ms. [redacted], Ms. [redacted]) were previously approved as presentencing witnesses. All were denied by the Government.

15. On 21 November 2022, the Defense submitted a supplemental request for production of two more witnesses, CWO3 [redacted] and MK1 [redacted], and both were originally denied.

16. On 02 December 2022, the Defense submitted a supplement to the request for production of CWO3 [redacted] on the merits and presentencing, which the Government approved on 02 December 2022.

Witnesses

17. Mr. [redacted] is a family friend of MK3 Hadley's family and supervised MK3 Hadley at

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work while MK3 Hadley was a teenager. He observed MK3 Hadley's treatment of his family animals, stray animals, cattle in the community, fire dogs and fish. The government approved Mr. [redacted] for presentencing but denied his production as a merits witness.

18. Ms. [redacted] is MK3 Hadley's older sister by [redacted] years. She has observed MK3 Hadley's treatment of animals since he was a small child through present. The government approved Ms. [redacted] for presentencing but denied his production as a merits witness.

19. Ms. [redacted] is MK3 Hadley's adoptive mother who has known him since he was [redacted] years old. Ms. [redacted] has observed MK3 Hadley's treatment of the family horses and dogs from age [redacted] through present. The government approved Ms. [redacted] for presentencing but denied his production as a merits witness.

20. Ms. [redacted] is the Senior Community Manager at Kapolei Lofts in Oahu, Hawaii, which is the apartment complex where the alleged actions underlying the Abusive Sexual Contact charges occurred. Ms. [redacted] would testify on the merits regarding her perspective on the building materials, potential for sound to carry and the floor plans of the units.

21. MK1 [redacted] was MK3 Hadley's supervisor at his first unit after bootcamp, [redacted] in 2018 until MK3 Hadley's PCS and has remained a friend and mentor. On presentencing, MK1 [redacted] would testify to matters in mitigation, including MK3 Hadley's military bearing, leadership capabilities, work ethic and respect for authority during his time in service. MK1 [redacted] is approved as a witness on the merits to testify as to the accused's character for kindness towards animals based on his observations of MK3 Hadley with his dog in Hawaii. The Government denied MK1 [redacted] production in presentencing.

Further facts necessary for an appropriate ruling are contained within the analysis section below.

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." R.C.M. 703 contains the process for courts to order the production of witnesses and evidence.

Under R.C.M. 703(b)(1), "[e]ach party is entitled to the production of any witness whose testimony . . . would be relevant and necessary." Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence, and the fact is of consequence in determining the action. Mil. R. Evid. 401. Relevant evidence is "necessary" when it would contribute to a party's presentation of the case in some positive way on a matter in issue. United States v. Reece, 25 M.J. 93, 95 (C.M.A. 1987)(citing R.C.M. 701(f)(1), Discussion, Manual for Courts Martial (2016 ed.). R.C.M. 703(c)(2)(B)(i) requires that counsel include a synopsis of expected testimony

which is "not satisfied by merely listing subjects to be addressed; rather, it must set out what the witness is expected to say about those subjects," United States v. Rockwood, 52 M.J. 98, 105 (C.A.A.F. 1999).

For sentencing, " there shall be much greater latitude than on the merits to receive information by means other than testimony presented through the personal appearance of witnesses." R.C.M. 1001(f). Under R.C.M. 1001(f)(2), a presentencing witness may be produced for in-person testimony at government expense if: (1) the testimony is necessary for a matter of substantial significance to determining an appropriate sentence, (2) the weight or credibility is of substantial significance to determining an appropriate sentence, (3) the other party refuses to enter into a stipulation of fact containing the matters to which the witness would testify, (4) other forms of testimony or testimony by remote means would be insufficient, and (5) the personal appearance outweighs the difficulties, costs, timing, and potential delay of personal production. Id. at 1001(f)(2)(A-E).

Factors to be weighed to determine whether a witness must be produced include:

1. The issues involved in the case and the importance of the requested witness to those issues;
2. Whether the witness was desired on the merits or on sentencing;
3. Whether the witness' testimony would be cumulative;
4. The availability of alternatives to the personal appearance of the witness such as depositions, interrogatories, or previous testimony.

United States v. McElhaney, 54 M.J. 120, 126 (C.A.A.F. 2000)(citing United States v. Tangpuz, 5 M.J. 426, 429 (C.M.A. 1978). When the Court denies production of witnesses solely on cumulative grounds the Defense is allowed to choose which of the available witnesses that they desire to have produced. United States v. Harmon, 40 M.J. 107, 108 (C.M.A. 1994).

ANALYSIS

Character for Kindness Towards Animals (Mr. [redacted], Ms. [redacted], Ms. [redacted])

The accused is charged with one specification of a sexual act with an animal, making demeanor towards animal a pertinent character trait that is relevant to trial. Mil. R. Evid. 404(a)(2). Although the government approved one merits witness, MK1 [redacted] to testify as to MK3 Hadley's character for kindness towards animals, MK1 [redacted] does not have perspective on MK3 Hadley's treatment of animals prior to his time of the alleged offense. The foundation of a witness who has known the accused for a longer period of time could positively contribute to the weight of the character evidence. However, given the limits of character evidence testimony, the different relationships of the requested witnesses who knew the accused in his youth are not so distinct as to make each of their testimony necessary and all three requested witnesses is cumulative. The Court finds that the testimony of one additional witness who has knowledge of MK3 Hadley's treatment of animals since his youth is relevant and necessary.

Ms. [redacted]

Defense argues Ms. [redacted] would authenticate photographs taken of an apartment with identical floor plan to that of the one where the alleged abusive sexual contact occurred. Additionally, she will speak to how sound could have carried in the apartment. The probative value of the apartment layout and sound amplification is low. There is no dispute as to the layout of the apartment or the location of the alleged crime. Although there are no photographs of the apartment, both the accused and DC3 [redacted] drew diagrams of the apartment. Additionally, to the extent that defense want to admit photos to illustrate the layout, MK3 Hadley's roommate, BM3 [redacted] is a witness and can testify as to whether the photos are an accurate representation of his shared apartment. Similarly, BM3 [redacted] can testify as to whether he heard anything on the night of the alleged crime. The defense has failed to establish how the property manager's speculation as to whether sound, of an unknown volume, could be heard within the apartment is probative to whether the alleged crime occurred. The Court finds the Defense did not meet their burden to show that Ms. [redacted] production is relevant and necessary.

MK1 [redacted]

MK1 [redacted] is approved to testify on the merits. The government objects to his testimony in presentencing as cumulative and unnecessary for presentencing matters due to the approval of EMC [redacted], another supervisor of MK3 Hadley on [redacted] CWO3 [redacted] his supervisor on [redacted] and Mr. [redacted], the MK3 Hadley's current supervisor. Defense argues that MK1 [redacted] differs from EMC [redacted] in that MK1 [redacted] has continued as a professional mentor and friend of MK3 Hadley. The Court finds that although there is some overlap in the timing, MK1 [redacted] offers a different perspective than EMC [redacted] given the continued relationship. The accused is facing up to 33 years confinement and a dishonorable discharge. Evidence of the accused's service are important matters in mitigation, especially when offered by a uniformed member. MK1 [redacted] is already approved to be at the court-martial in person for the merits phase. The Court finds that the costs and timing of keeping him at the trial to provide testimony on presentencing, if required, is minimal when balanced against the significance of his personal appearance for the determination of an appropriate sentence.

CONCLUSION OF LAW

1. The testimony of one witness with knowledge of MK3's treatment of animals in his teenage years through present day is relevant and necessary on the merits.

2. The testimony of more than one witness with knowledge of MK3's treatment of animals in his teenage years is cumulative.

3. The testimony of Ms. [redacted] on the merits is not relevant and necessary.

4. The testimony of MK1 [redacted] in presentencing is relevant and necessary.

5. MK1 [redacted] in person production for presentencing is appropriate under R.C.M. 1001(f).

RULING AND ORDER

The Defense motion to compel production is GRANTED in part and DENIED in part, consistent with the above conclusions of law.

The Defense is ORDERED to notify the Government which one witness (Mr. [redacted], Ms. [redacted], or Ms. [redacted]) the accused wants to testify regarding his character for kindness towards animals by 13 January 2023.

So ordered this 6th day of January, 2023

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Emily P. Reuter
Commander, U.S. Coast Guard
Military Judge

APPELLATE EXHIBIT 46
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GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. MK3 JOSHUA D. HADLEY U.S. Coast Guard	RULING ON DEFENSE MOTION TO COMPEL DISCOVERY 13 January 2023

RELIEF SOUGHT

Defense moved this Court to compel the Government to produce discovery and production. AE 47. The Government opposed the Defense motion. AE 49. This Court heard oral arguments at an Article 39(a) hearing on 19 December 2022.

ISSUE PRESENTED

Are the requested documents in possession or control of the government relevant to the Defense preparation of their case?

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. The accused, MK3 Joshua Hadley, is charged with two specifications of Article 92 (Violation of a Lawful General Order), one charge of Article 120 (Abusive Sexual Contact), one charge of Article 134 (Sexual Act with an Animal), one charge of Article 134 (Viewing and Possessing Child Pornography), and an additional charge of Article 120 (Abusive Sexual Contact).

2. The accused is not in pretrial confinement.

3. The accused waived his right to an Article 32, UCMJ, hearing.

4. On 24 October 2022, the Defense submitted its initial and first supplemental discovery requests to the Government. The Government responded on 28 October 2022.

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. Material 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

If a party identifies evidence that is not in the possession of the Government, R.C.M. 703(e)(1) instructs that "[e]ach party is entitled to the production of evidence which is relevant and necessary." R.C.M. 703. The Discussion section to R.C.M. 703(e)(1) states, "[e]vidence is defined by Mil. R. Evid. 401. Relevant evidence is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue." The moving party must show that the requested evidence exists and is subject to compulsory process. Broad "fishing expeditions" for evidence are prohibited. See United States v. Rodriguez, 60 M.J. 239 (C.A.A.F. 2004); United States v. Briggs, 48 M.J. 143 (C.A.A.F. 1998).

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ANALYSIS & CONCLUSIONS OF LAW

All written communications, emails, or other documents used to brief, respond to, request, or discuss investigative activities related to this case.

Defense counsel clarified that the request is specifically looking for communications from law enforcement to various entities within the government, to include the command and trial counsel. At the Article 39(a) hearing Defense argues generally that law enforcement actions are relevant to defense case preparation because it informs the defense assessment of the investigation and access to witnesses. At the Article 39(a) hearing, trial counsel clarified that all communications from the lead CGIS special agent known to trial counsel have been produced to the defense. Trial counsel did not confirm whether other agents sent communications regarding the case.

The Court finds the defense has met its burden under R.C.M. 701 to show the requested law enforcement communications are relevant to defense preparation.

The Government is ORDERED to produce communications from any CGIS agent to trial counsel, members of the prosecution team, the SJA and the Convening Authority regarding the investigation into MK3 Hadley.

Records of any victim/witness contact or consultation between any Coast Guard Trial Counsel or anyone working at the direction of Trial Counsel and any possible or alleged victim, including dates, locations, and individuals present for the consultations.

The parties resolved this matter at the Article 39(a) hearing. The defense clarified their request is for number of times a witness met with the government, who was present, and any notes taken that are not attorney work product. The purpose is to prepare for witness cross-examination. The Government has discovered a summary of an interview for each time trial counsel met with witnesses. Trial counsel proffered that any communications not produced to the defense are purely logistical. Thus, Defense Counsel agreed this item is moot given the fulfilment of the request.

All statements of each government witness relating to the subject matter of the witness's testimony, including but not limited to all emails, text messages, and other communications or notes memorializing communications between the witness and Trial Counsel or Legal Services Command or [redacted] *or PAC-094 personnel.*

The parties resolved this matter at the Article 39(a) hearing. The Government has discovered a summary of an interview for each time trial counsel met with witnesses or otherwise produced responsive material. Trial counsel proffered that any communications or summary of communications not produced to the defense are purely logistical. The government acknowledged their continuing duty to disclose. Thus, Defense Counsel agreed this item is moot given the fulfilment of the request.

A Blue Ribbon copy of the PDR or service record book of each potential military witness.

At the Article 39(a) hearing, the defense clarified this request is for witnesses listed on the government witness list. The defense argues this evidence is necessary to prepare for the defense cause because it assists in developing cross-examination. Defense counsel furthered clarified that

if the government has reviewed the military records of witnesses for impeachment material, the defense considers this item moot. Government counsel confirmed that military record review is ongoing and several responsive documents have been disclosed.

The Court finds the defense has met its burden under R.C.M. 701 to show the requested materials are relevant to defense preparation.

The government is ORDERED to complete the military record review and to provide required materials to the defense.

The Defense requested "evidence affecting the credibility of any potential government witness. This includes information known to the government, agents thereof, and closely-aligned civilian authorities or entities, concerning immunity grants, prior convictions, and evidence of other character, conduct, or bias bearing on a witness's credibility, including any letters of reprimand, letters of caution, records of formal or informal counseling, evidence of Article 15, UCMJ, actions, criminal or administrative investigations, or adverse administrative actions.

The government's review of known materials continued at the time of the Article 39(a) hearing. Trial counsel confirmed that they will exercise due diligence in asking witnesses and reviewing documents for responsive material.

The Court finds the defense has met its burden under R.C.M. 701 to show the requested materials are relevant to defense preparation.

The government is ORDERED to complete the military record review and to provide required materials to the defense.

Evidence of any direct communication, whether written or oral, in any way relating to this case, between any member of the Office of the Secretary of Homeland Security, the Commandant of the Coast Guard or her staff, the Office of the Judge Advocate General" and officials involved in this case.

At the Article 39(a) hearing, the defense confirmed that they do not have any evidence of potential unlawful command influence and argues that this review is necessary to determine whether such evidence does exist. Thus, it is relevant to defense preparation because it informs potential motions in the case. At the time of the hearing, trial counsel had not asked whether communications between the named individuals exists because there is no evidence of unlawful command influence and argued the request is overboard.

The Court finds that the defense has met its burden under R.C.M. 701 with regards to direct communications regarding this case <u>from</u> the Secretary of Homeland Security, the Commandant of the Coast Guard or The Judge Advocate General <u>to</u> the accusers, forwarding officials under R.C.M. 401-404 , the Staff Judge Advocate or the Convening Authority.

The defense did not meet its burden for communications from the other, generally unspecified, individuals.

The government is ORDERED to provide direct communications regarding this case from the Secretary of Homeland Security, the Commandant of the Coast Guard or The Judge Advocate General the accusers, forwarding officials under R.C.M. 401-404, the Staff Judge Advocate or the Convening Authority.

The request for all other materials under this request is DENIED.

Any evidence that any potential witness has been diagnosed as an alcoholic, alcohol abuser, or controlled substance abuser.

At the Article 39(a) hearing, the defense clarified that it is seeking diagnosis only. Defense argues that this is an issue that could impact perception, work performance, or other issues relevant to credibility. Trial counsel is reviewing PDRs for information required to be disclosed to the defense but could not confirm whether a diagnosis of alcoholism or alcohol screening would be documented in a PDR. The government argued that no review of any medical records can be conducted without some evidence that such a condition exists and affirmed the government's duty to disclose any information that impacts the credibility of the witness.

No evidence was produced to the Court to demonstrate that such a diagnosis would impact the perception or ability to recall events for witnesses who were not drinking at the time they witnessed alleged actions of the accused. For the witnesses who consumed alcohol, no evidence was presented to show that these diagnoses would have an additional impact to the witness' memory or perception. The defense has the witness interviews detailing the alcohol consumed during the alleged events. This information is sufficient for the defense to inquire into the quality of the witness's memory. If any of the requested diagnosis contributed to adverse documentation in the witness's Coast Guard records or other derogatory material, the government has affirmed its duty to disclose such material. In this context, an independent medical diagnosis is not relevant to the defense preparation for cross-examination.

The Court finds that the defense did not meet its burden to show how a diagnosis of alcoholism, alcohol abuser, or controlled substance abuser was relevant to the defense preparation. This request is DENIED.

Any evidence that any potential witness sought or received mental health treatment, including specifically the mental health treatment records of any complaining witness.

At the Article 39(a) hearing, defense argued this item as part of the below request and the court will consider the requests together.

Any evidence that any potential witness sought or received mental health treatment, including specifically the mental health treatment records of any alleged victim or complaining witness, including records reflecting the dates and times of treatment, names and employers of treatment providers, diagnoses, treatment plans, and prescriptions.

At the Article 39(a) hearing, the defense narrowed this request to diagnosis or prescriptions for any complaining witness or fact witness that would impact perception or recollection of the alleged charged acts. This information is relevant to defense preparation to assess the credibility of witnesses and to prepare for cross-examination.

The Court finds that the defense met its burden under R.C.M. 701 with regards to diagnosis or prescriptions that impacted a witness' ability to perceive or recall events that will be presented at trial.

The government is ORDERED to disclose the following:

1. **Any diagnosis or prescriptions being taken by DC2 [redacted] from 30 May 2020 through present that impact his ability to perceive or recall events.**
2. **Any diagnosis or prescriptions being taken by a government merits witness on Charge II and the Additional Charge from 30 May 2020 through present that impact their ability to perceive or recall events.**
3. **Any diagnosis or prescriptions being taken by OS2 [redacted] from June 2020 through present that impact his ability to perceive or recall events.**
4. **Any diagnosis or prescriptions being taken by CS3 [redacted] from February 2020 through present that impact his ability to perceive or recall events.**
5. **Any diagnosis or prescriptions being taken by CS2 [redacted] from February 2020 through present that impact his ability to perceive or recall events.**
6. **Any diagnosis or prescriptions being taken by BM2 [redacted] from July 2020 through present that impact his ability to perceive or recall events.**
7. **Any diagnosis or prescriptions being taken by MK3 [redacted] from June 2019 through present that impact his ability to perceive or recall events.**
8. **Any diagnosis or prescriptions being taken by any government merits witness from the date they witnessed the events about which they will testify until present that impact their ability to perceive or recall events.**

RULING AND ORDER

The Defense motion is GRANTED in part and DENIED in part, consistent with the above conclusions of law.

The Government is ORDERED to produce responsive records no later than 27 January 2023.

The Government is ORDERED to provide written notice if the ordered material do not exist.

So ordered this 13th day of January, 2023.

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Emily P. Reuter
Commander, U.S. Coast Guard
Military Judge

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. MK3 JOSHUA D. HADLEY U.S. Coast Guard	RULING: DEFENSE MOTION TO DISMISS OR FOR OTHER APPROPRIATE RELIEF (UNREASONABLY MULTIPLIED CHARGES) 06 January 2023

RELIEF SOUGHT

Pursuant to Rule for Courts-Martial (R.C.M.) 906(b)(12), the Defense moved this Court for appropriate relief for the unreasonable multiplication of Charge II and the Additional Charge. AE 52. The government opposed the motion. AE 53. The court held oral arguments on 19 December 2022.

ISSUE PRESENTED

Are Charge II and the Additional Charge an unreasonable multiplication of charges?

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. The accused, MK3 Joshua Hadley, is charged with two specifications of Article 92 (Violation of a Lawful General Order), one charge of Article 120 (Abusive Sexual Contact), one charge of Article 134 (Sexual Act with an Animal), one charge of Article 134 (Viewing and Possessing Child Pornography), and an additional charge of Article 120 (Abusive Sexual Contact).

2. The Sole Specification of Charge II alleges that, on or about 31 May 2020, the accused "touch[ed] with his hand the penis of DC3 [redacted] with the intent to gratify his own sexual desire, without the consent of DC3 [redacted]."

3. The Sole Specification of the Additional Charge alleges that, on or about 31 May 2020, the accused "did touch the penis of DC3 [redacted] with MK3 Hadley's hand, with the intent to gratify the sexual desire of MK3 Hadley, when he knew that DC3 [redacted] was asleep."

4. Both Abusive Sexual Contact charges stem from an incident on 31 May 2020. The

accused, DC3 [redacted] and other friends engaged in a night of socializing and drinking at MK3 Hadley's shared apartment with his [redacted] crewmember BM3 [redacted] on 30 May 2020.

5. DC3 [redacted] arrived via Uber some time between 2030-2130.

6. The group played drinking games such as Beer Pong and King's Cup for approximately 3 hours.

7. At approximately 2330 the other guests began to leave the apartment. DC3 [redacted] decided to stay the night and sleep on MK3 Hadley and BM3 [redacted] couch.

8. DC3 [redacted] remembers seeing MK3 Hadley go to his bedroom before DC3 [redacted] fell asleep on the couch.

9. A few hours later, between 0030 and 1330 on 31 May 2022, DC3 [redacted] awoke to MK3 Hadley "cuddled up" next to him on the couch. DC3 [redacted] could, "feel MK3 Hadley's facial hair against his cheeks" and MK3 Hadley's hand inside his pants, beneath his underwear. MK3 Hadley was "massaging" DC3 [redacted] penis and scrotum.

10. DC3 [redacted] was "shocked and upset" when he woke up. He asked MK3 Hadley why he was touching him and pushed MK3 Hadley away. DC3 [redacted] then grabbed all of his personnel belongings, left the apartment, and ordered an Uber.

11. Charge II was preferred on 22 June 22. The Additional Charge was preferred on 23 August 2022. All Charges and the Additional Charge were referred on 07 October 2022.

12. The Government charged Charge II and the Additional Charge as exigencies of proof.

Further facts necessary for an appropriate ruling are contained within the analysis section below.

PRINCIPLES OF LAW

R.C.M. 307(c)(4) directs that "[w]hat is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." Unreasonable multiplication of charges is a policy pronouncement by the courts to address the abuse of prosecutorial discretion in instances where multiplicity does not exist. United States v. Quiroz, 57 M.J. 583, 596 at 587 (CAAF 2001). The longstanding principle prohibiting unreasonable multiplication of charges promotes fairness and address those unique features of the military justice system that increase the potential for prosecutorial overreaching. Id.

By its very nature, the proper exercise of prosecutorial discretion cannot be reduced to a formula. Absent direct evidence of abuse, however, a number of non-exclusive factors may circumstantially show that the Government abused its discretion and is "piling on." See Quiroz, 57 M.J. at 585.

For a trial court, the Quiroz factors include, but are not limited to the following:

> (1) whether each charge and specification is aimed at distinctly separate criminal acts,
> (2) whether the number of charges and specifications misrepresent or exaggerate the accused's criminality,
> (3) whether the number of charges and specifications unreasonably increase the accused's punitive exposure, or
> (4) whether there is any evidence of prosecutorial overreaching or abuse in the drafting of the charges.

U.S. v. Campbell, 71 M.J. 19, 23 (CAAF 2012)(Citing Quiroz, 57 M.J. at 338).

The government may properly charge the same sexual act as separate offenses for exigencies of proof. See United States v. Elespuru, 73 M.J. 326, 329 (C.A.A.F. 2014)(quoting United States v. Morton, 69 M.J. 12, 16 (C.A.A.F. 2010); United States v. Thompson, 74 M.J. 563, 568 (N.M.C.C.A. 2014). In such cases, if there is a guilty finding for both specifications, the military judge must either consolidate or dismiss a specification. Elespuru, 69 M.J. at 329-330.

ANALYSIS

The Court applies the Quiroz factors to the specifications as follows:

Are the specifications aimed at distinctly separate criminal acts? No. The sole specifications of Charge II and the Additional Charge are based on the same singular course of conduct by the accused on 31 May 2020.

Do the number of charges and specifications misrepresent or exaggerate the accused's criminality? At this stage of trial, Charge II and the Additional Charge are fairly charged for exigencies of proof. Charging two specifications for this purpose does not misrepresent or exaggerate the accused's criminality. See Elespuru, 73 M.J. at 329-330. Although exigencies of proof are normally presented as two specifications under one charge, doing so through the sole specification of Charge II and a sole specification of an Additional Charge does not impact this analysis. Whether charged as two specifications under a single or a charge and an additional charge, there are still only two specifications, charged in the alternative, on the charge sheet.

Do the number of charges and specifications unreasonably increase the accused's punitive exposure? At this stage of trial, the two specifications are fairly charged for exigencies of proof. If required, the Court will take action in accordance with United States v. Elespuru, 73 M.J. 326 (C.A.A.F. 2014) prior to sentencing.

Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges? No. In their motion and at oral argument, the government agrees that these specifications are charged as exigencies of proof. Based on DC3 [redacted] statement to investigators, he was asleep and then became aware of the accused touching DC3 [redacted] penis with his hand. The government acknowledges charging alternate theories of guilt to account for how the evidence may present at trial. There is no prosecutorial overreaching or abuse and the government's charging in the alternative. See Id.

This case differs from Elespuru in that the Government chose to add the alternative charge after the original charges were preferred. The additional charge was preferred the day before the Convening Authority dismissed Charge III, an Article 128, UCMJ, charge based on the same underlying allegations as Charge II. All charges were referred at the same time. The Court is not aware of any case law that prohibits the addition of a charge on evidence previously known, nor is there evidence that such action in this case was motivated by bad faith or any motivation other than planning for exigencies of proof.

CONCLUSIONS OF LAW

The Court withholds final ruling on this matter. At this stage of the proceedings, the Sole Specification of Charge II and the Sole Specification of the Additional Charge are appropriately charged in the alternative.

RULING

At this stage of the proceedings, the defense motion is DENIED. The Court will reconsider this motion after findings are announced but prior to sentencing.

So ordered this 6th day of January, 2023.

REUTER.EMILY.PAT[redacted] Digitally signed by REUTER.EMILY.PATRICIA[redacted] Date: 2023.01.06 08:31:02 -08'00'

Emily P. Reuter
Commander, U.S. Coast Guard
Military Judge

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GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. MK3 JOSHUA HADLEY U.S. Coast Guard	RULING ON DEFENSE MOTION FOR APPROPRIATE RELIEF: BILL OF PARTICULARS 26 January 2023

RELIEF SOUGHT

Pursuant to R.C.M. 906(b)(6) and the Fifth and Sixth Amendments, the Defense moved the Court to order a Bill of Particulars as to the act or acts alleged in both specifications of Charge I. AE 73. The Government opposed the Defense motion. AE 75. This Court heard oral arguments at an Article 39(a) hearing on 25 January 2023.

ISSUE PRESENTED

Are the Specifications of Charge I sufficient?

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, as well as the CGIS investigation previously submitted to the Court in AE VIII. The Court finds the following facts by a preponderance of the evidence:

1. The accused, MK3 Joshua Hadley, is charged with two specifications of Article 92 (Violation of a Lawful General Order).

2. Specification I of Charge I charges:

Specification 1: In that Machinery Technician Third Class Petty Officer Joshua D. HADLEY, U.S. Coast Guard, on active duty, did, at or near Honolulu, Hawaii, from on or about January 2020 to August 2020, on divers occasions, violate a lawful general order, to wit: ALCOAST Commandant Notice 003/20 (General Order Prohibiting Sexual Harassment) dated 7 January 2020, by wrongfully transmitting unsolicited sexually offensive material and sexual requests from his Snapchat account to male Coast Guard members.

3. Specification 2 of Charge I charges:

Specification 2: In that Machinery Technician Third Class Petty Officer Joshua D. HADLEY, U.S. Coast Guard, on active duty, did, at or near Honolulu, Hawaii, from on or about January 2019 to December 2019, on divers occasions, violate a lawful general order, to wit: ALCOAST Commandant Notice 085/18 (General Order Prohibiting Sexual Harassment) dated 27 August 2018, by wrongfully transmitting unsolicited sexually offensive material and sexual requests from his Snapchat account to male Coast Guard members. [redacted] 8/22/22 [redacted] 8/22/22

4. On 31 October 2022, Defense counsel provided their initial request for a bill of particulars.

5. With regards to Charge I, the Defense requested the following information for each Specification: "Which sexually offensive material and sexual requests MK3 Hadley is being charged with transmitting; b. The name(s) of the individual(s) to whom MK3 Hadley is alleged to have transmitted the sexually offensive material and sexual requests in violation of ACN 003/20; c. The date(s) and time(s) of such transmissions; d. Which section(s) of ACN 003/20 MK3 Hadley is alleged to have violated."

6. On 04 Nov 2022, the Government provided the following information in response for Specification 1:

a. On or about June 2020 through August 2020, MK3 Hadley sent unwelcome messages of a sexual nature to OS2 [redacted]
b. On or about February 2020 through May 2020, MK3 Hadley sent unwelcome messages of a sexual nature to CS3 [redacted]
c. On or about February 2020 through May 2020, MK3 Hadley sent unwelcome messages of a sexual nature to CS2 [redacted]
d. On or about July through August 2020, MK3 Hadley sent unwelcome messages of a sexual nature to BM2 [redacted]

7. On 04 Nov 2022, the Government did provided the following information in response for Specification 2: "On or about January 2019 through August 2019, MK3 Hadley sent unwelcome messages of a sexual nature to MK3 [redacted]"

8. In August 2020, [redacted] conducted an administrative investigation after the Executive Officer received a report that multiple crew members reported that MK3 Hadley asked them to send nude photographs via Snapchat.

9. CGIS interviewed OS2 [redacted] on 06 Nov 2020. OS2 [redacted] was assigned to [redacted] with MK3 Hadley and then transferred to Sector Honolulu. According to the CGIS interview summary, he received photographs from MK3 Hadley that depicted his legs and his underwear. Additionally, MK3 Hadley would send Snapchat messages asking, "[redacted]" and [redacted] accompanied by an eggplant emoji that OS2 [redacted] understood to be a request for a [redacted] According to the CGIS interview summary, OS2 [redacted] recalled exchanges in June – July 2020 in his CGIS interview. He also provided pictures of several messages on his phone.

10. CGIS interviewed CS3 [redacted] on 05 Nov 2020. CS3 [redacted] was stationed onboard the [redacted] with MK3 Hadley. According to the CGIS interview summary, he received Snapchat messages requesting "[redacted]" in exchange for money five to six times over a period of one to two months starting in February 2020. CS3 [redacted] reported that he told MK3 Hadley to stop

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sending pictures. CS [redacted] said that MK3 Hadley would act like nothing happened at work. He described MK3 Hadley as popular amongst the cutter crew.

11. CGIS interviewed CS3[redacted] on 03 Dec 2020. CS3[redacted] was stationed onboard the [redacted] with MK3 Hadley. According to the CGIS interview summary, he received Snapchat messages from MK3 Hadley four times that he interpreted as being requests to send nude pictures in exchange for money. On the fourth time, MK3 Hadley sent a picture that appeared to be MK3 Hadley having sexual intercourse with an unknown female. CS3 [redacted] said he "[redacted]" and told MK3 Hadley not to send him "[redacted]" The last Snapchat exchange between CS3[redacted] and MK3 Hadley was on or about April or May 2020.

12. CGIS interviewed BM3[redacted] on 13 Jan 2021. BM3[redacted] was stationed onboard the [redacted] with MK3 Hadley prior to transferring to STA South Padre Island. According to the CGIS interview summary, he received Snapchat messages from MK3 Hadley that he interpreted as being requests to send nude pictures in exchange for money. BM3[redacted] said MK3 Hadley was extremely persistent in his request for pictures. BM3[redacted] blocked MK3 Hadley on Snapchat after MK3 Hadley asked if he was interested in pursuing a relationship with a guy. BM3 [redacted] spoke to CS3[redacted] about the communications and CS3[redacted] told him many people on the cutter were having similar communications. The interview summary does not provide dates of the alleged communications.

13. CGIS interviewed MK3[redacted] on 06 Nov 2020 and 02 June 2021. MK3[redacted] was roommates with MK3 Hadley in the Base Honolulu barracks. After he moved out of the barrack in January or February 2019, MK3 Hadley sent him photos and a video that showed MK3 Hadley's genitalia via Snapchat. MK3[redacted] blocked or removed MK3 Hadley from Snapchat after receiving the video. At some point MK3[redacted] told his chain of command about the communications he received from MK3 Hadley. He was also interviewed for the [redacted] command investigation.

14. The General Order Prohibiting Sexual Harassment promulgated by ACN 003/20 defines sexual harassment as, "unwelcome sexual advances, requests for sexual favors, and other conduct of a sexual nature, when: a. Submission to such conduct is made either implicitly or explicitly a term or condition of employment; b. Submission to or rejection of such conduct is used as a basis for employment decisions; or c. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. This definition also includes unwelcome display or communication of sexually offensive materials. Physical proximity is not required. Conduct may occur telephonically, virtually, or by way of other electronic means."

15. General Order Prohibiting Sexual Harassment promulgated by ACN 085/18 defines sexual harassment as, "Definition: Sexual harassment is defined as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when: a. Submission to such conduct is made either implicitly or explicitly a term or condition of employment; b. Submission to or rejection of such conduct is used as a basis for employment decisions; or c. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. d. This definition also encompasses unwelcome display or communication of sexually offensive materials.

Further facts necessary for an appropriate ruling are contained within the analysis section below.

PRINCIPLES OF LAW

Pursuant to R.C.M. 307, a specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication. 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 quotation marks omitted).

To obtain a conviction on an Article 92, Violating General Order, the Government must prove three elements beyond a reasonable doubt: (a) That there was in effect a certain lawful general order or regulation; (b) That the accused had a duty to obey it; and (c) That the accused violated or failed to obey the order or regulation

The non-binding discussion section of R.C.M. 307 provides the following guidance for charging violations of general orders:

> A specification alleging a violation of a general order or regulation (Article 92(1)) must clearly identify the specific order or regulation allegedly violated. The general order or regulation should be cited by its identifying title or number, section or paragraph, and date. It is not necessary to recite the text of the general order or regulation verbatim.

R.C.M. 307 discussion (H)(vi)(a).

R.C.M. 906(b)(6) permits the defense to request a Bill of Particulars "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." R.C.M. 906(b)(6), Discussion. A Bill of Particulars "should not be used to conduct discovery of the [g]overnment's theory of the case, to force a detailed disclosure of acts underlying a charge, or to restrict the [g]overnment's proof at trial." Id. The decision to order a Bill of Particulars is within the discretion of the military judge. United States v. Williams, 40 M.J. 379, fn 4 (C.A.A.F. 1994).

ANALYSIS

Both Specifications of Charge I allege every element of the charged offense as required by R.C.M. 307. Both specifications cite the specific applicable general order by its title, promulgation message information and issuance date. The accused's duty to obey the general order is alleged by necessary implication because the specifications list the jurisdictional data of the accused and the nature of the order (general). Finally, the specifications allege the way the accused violated the order – specifically, "by wrongfully transmitting unsolicited sexually offensive material and sexual requests from his Snapchat account to male Coast Guard members."[1] The 04 Nov 2022 Bill of Particulars from the Government supplemented the

[1] Specification 2 of Charge I alleges the same wrongful action, but, as amended, to a single male Coast Guard member.

Specifications by providing the names of the Coast Guard members who received the sexual material and requests and the date ranges they received them.

Defense argues that the Specification needs to allege the specific portion of the definition in the charge – or in a Bill of Particulars – for the defense to adequately prepare for trial. The Court disagrees. Both the General Order Prohibiting Sexual Harassment promulgated by ACN 085/18 and the General Order Prohibiting Sexual Harassment promulgated by ACN 152/20 have the same order: sexual harassment is prohibited in the Coast Guard. The General Orders both provide a definition of "Sexual Harassment." Although slightly different, both definitions provide three general categories of conduct that are considered sexual harassment. All of the categories require a workplace or employment nexus. See United States v. Brown, 82 M.J. 702, 710-711 (2022). By charging the specific nature of the wrongful conduct and stating the nexus to the Coast Guard (the status of the recipients as Coast Guard members), the Government has properly alleged the third element of Charge I in each specification.

Additionally, the specifications provide notice of the place the alleged violations and they are time limited. Specification 1 alleges divers occasions from January 2020- August 2020 and Specification 2 alleges divers occasions from January 2019 to December 2019. The Bill of Particulars provides further granularity by identifying the names of specific individuals with whom the accused communicated and the corresponding date ranges for the communications. For each of those individuals, the Government provided their interviews, the content of the communications, information on the workplace relationship between the accused and the witnesses, and information on a command investigation initiated due to the communications. At the Article 39(a) hearing, the government confirmed that prosecution of the specifications is limited to the conduct identified in the Bill of Particulars and corresponding discovery.

Unlike general orders or regulations that criminalize multiple specific types of behaviors, the General Orders specified prohibit "Sexual Harassment" and the government must prove the behavior of the accused meets the definition in the Orders. The terms of the general order and the language of the Specifications adequately inform the accused of the nature of the charge with sufficient precision to enable the accused to prepare for trial, to avoid surprise at the time of trial, and to enable him to plead the acquittal or conviction in bar of subsequent jeopardy

CONCLUSIONS OF LAW

The Specifications of Charge I are sufficient.

RULING

The Defense motion is DENIED, consistent with the above conclusion of law.

So ordered this 26th day of January, 2023.

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Emily P. Reuter
Commander, U.S. Coast Guard
Military Judge

APPELLATE EXHIBIT 77
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GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. MK3 JOSHUA D. HADLEY U.S. Coast Guard	RULING ON DEFENSE MOTION TO COMPEL DISCOVERY - RECONSIDERATION 30 January 2023

PROCEDURAL POSTURE

Defense moved this Court to compel the Government to produce discovery and production. AE 47. The Government opposed the Defense motion. AE 49. This Court heard oral arguments at an Article 39(a) hearing on 19 December 2022. The Court issued its Ruling on 13 Jan 2023. AE 51. On 27 January 2023, the Government filed a timely motion for reconsideration for two of the Court's Orders in the Ruling.

FINDINGS OF FACT & PRINCIPLES OF LAW

The Court incorporates all Findings of Fact and Principles of Law from the Court's Ruling. AE 51.

ANALYSIS & CONCLUSIONS OF LAW

Evidence of any direct communication, whether written or oral, in any way relating to this case, between any member of the Office of the Secretary of Homeland Security, the Commandant of the Coast Guard or her staff, the Office of the Judge Advocate General" and officials involved in this case.

On reconsideration, the Government's arguments that Supreme Court case law on the scope of Fed. R. Crim. Pro. 16 informs the scope of R.C.M. 701(a)(2) are not based on new case law. The Government did not present these arguments in the underlying response or at the hearing. Thus, the Court will not consider this argument on Reconsideration. C.G. R. of Practice 7.9.

R.C.M. 701(a)(2)'s scope is restricted to "...paper, documents, data, photographs, [and] tangible items . . . " The Court's order is thus limited to these items. To provide clarity, the Court amends the Order, denoted by underlined text, as follows:

The government is ORDERED to provide direct <u>written communications within the possession, custody or control of military authorities</u> regarding this case from the Secretary of Homeland Security, the Commandant of the Coast Guard or The Judge Advocate General the accusers, forwarding officials under R.C.M. 401-404, the Staff Judge Advocate or the Convening Authority.

Based on the Government's filing, the Government has complied with its obligations under this Order.

Any evidence that any potential witness sought or received mental health treatment, including specifically the mental health treatment records of any complaining witness. Any evidence that any potential witness sought or received mental health treatment, including specifically the mental health treatment records of any alleged victim or complaining witness, including records reflecting the dates and times of treatment, names and employers of treatment providers, diagnoses, treatment plans, and prescriptions.

On reconsideration, the Government argues that a request and order under R.C.M. 701 requires the review of privileged materials in violation of Mil. R. Evid. 513 and United States v. Mellette. Further, the Government maintains it is not required to provide such data. The Court disagrees.

United States v. Mellette ruled Mil. R. Evid. 513 is limited to confidential communications made between the patient and a psychotherapist and does not extend generally to underlying diagnoses and treatments. 82 M.J. 374, 380 (C.A.A.F. 2022). The Court of Appeals for the Armed Forces explicitly rejected the argument that Mil. R. Evid. 513 applies to "all patient records related to the diagnosis or treatment." Id. at 379. The Mellette Court's observation that the requested documents in that case should have been reviewed subject to the procedural requirements of Mil. R. Evid. 513 was predicated on the underlying discovery request at issue being for "mental health records to include . . . the treatment provided and recommended, and her diagnosis." Id. at 381.

At the Article 39(a) hearing, the Defense narrowed the discovery request in this case to diagnosis or prescriptions for any complaining witness or fact witness that would impact perception or recollection of the alleged charged acts. The Defense clarified that no protected communications under Mil. R. Evid 513 were sought. Accordingly, and consistent with the motion brought and discussion on the record, the Court's Order was not for mental health records or privileged communications under Mil. R. Evid. 513. The Government should not construe the Court's Ruling and Order to expand to such records or materials.

The Court's Ruling was based on R.C.M. 701. To provide clarity, the Court finds that this evidence is required under both R.C.M. 701(a)(2) and R.C.M. 701(a)(6). A condition or factor that impacts the ability of a witness to perceive and recall events has bearing on witness credibility and knowledge of such conditions is important to preparation for cross-examination. A condition that "[a]dversely affect[s] the credibility of any prosecution witness or evidence" must be disclosed if known to trial counsel. R.C.M. 701(a)(6)(D). This provision applies to "any evidence." Id. R.C.M. 701(a)(6) is not limited to documents or tangible items.

At the time of the Article 39(a) hearing, trial counsel stated that they had not spoken to witnesses about the requested evidence. Trial counsel represented that they would ask witnesses whether they had a diagnosis or were on medication that impacted their ability to recall or perceive events in trial counsel interviews. The Court's Order was broadly worded to account for this representation. If trial counsel became aware of responsive evidence under R.C.M. 701(a)(6) prior to the Court ordered deadline, then a disclosure, appropriate to the nature of the evidence received, should have been provided to the Defense.

If, following this Ruling, the Government still requests a separate Court Order for the review of non-mental health Coast Guard medical records to facilitate compliance with the Court's Ruling,

the Government shall provide the Court with a draft Order tailored for responsive materials. The Court will then issue an Order and conduct an *in camera* review. See C.G. Rule of Practice 7.4.

RULING AND ORDER

The Government Motion for Reconsideration is GRANTED in part and DENIED in part, consistent with the above conclusions of law.

The Government is ORDERED to provide a draft Order to produce responsive materials for *in camera* review or, alternatively, confirm compliance with the Court's Ruling and Orders in AE 51, no later than 1700PST 31 January 2023.

So ordered this 30th day of January, 2023.

REUTER.EMILY.P ATRICIA. [redacted] Digitally signed by REUTER.EMILY.PATRICIA. [redacted] Date: 2023.01.30 16:33:12 -08'00'

Emily P. Reuter
Commander, U.S. Coast Guard
Military Judge

APPELLATE EXHIBIT 87
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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
Hadley, Joshua D.	Coast Guard	E-4	[redacted]

5. CONVENING COMMAND	6. TYPE OF COURT-MARTIAL	7. COMPOSITION	8. DATE SENTENCE ADJUDGED
Coast Guard Pacific Area	General	Judge Alone - MJA16	Feb 16, 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
Bad conduct discharge	4 months	N/A	N/A	N/A

14. REDUCTION	15. DEATH	16. REPRIMAND	17. HARD LABOR	18. RESTRICTION	19. HARD LABOR PERIOD
E-1	Yes ○ No ◉	Yes ○ No ◉	Yes ○ No ◉	Yes ○ No ◉	N/A

20. PERIOD AND LIMITS OF RESTRICTION

N/A

SECTION D - CONFINEMENT CREDIT

21. DAYS OF PRETRIAL CONFINEMENT CREDIT	22. DAYS OF JUDICIALLY ORDERED CREDIT	23. TOTAL DAYS OF CREDIT
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

Bad-Conduct Discharge will be adjudged; confinement shall be adjudged with a minimum of 3 months and maximum of 6 months; Forfeitures may be adjudged; No fines will be adjudged; Maximum reduction in grade that may be imposed is reduction to E-1; No other lawful punishments will 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-5	Feb 16, 2023	REUTER.EMILY.PATRICIA.[redacted] Digitally signed by REUTER.EMILY.PATRICIA.[redacted] Date: 2023.02.16 16:40:59 -08'00'

37. NOTES: None.

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:	92	Specification 1	**Not Guilty**	W/D			092-A0
		Offense description	Violation of a lawful general order				
		Withdrawn and Dismissed					
		Specification 2	**Not Guilty**	W/D			092-A0
		Offense description	Violation of a lawful general order				
		Withdrawn and Dismissed					
Charge II:	120	Specification	**Guilty**	Guilty			120AA4
		Offense description	Abusive sexual contact without the consent of the other person				
Charge III:	134	Specification	**Not Guilty**	W/D			134-A1
		Offense description	Sexual act with an animal				
		Withdrawn and Dismissed					
Charge IV:	134	Specification	**Not Guilty**	W/D			None
		Offense description	Child pornography possessing or receiving or viewing				
		Withdrawn and Dismissed					
Additional Charge:	120	Specification	**Not Guilty**	W/D			120AA4
		Offense description	Abusive sexual contact when the other person is asleep or otherwise unaware				
		Withdrawn and Dismissed					

MILITARY JUDGE ALONE SEGMENTED SENTENCE					
SECTION J - SENTENCING					
CHARGE	**SPECIFICATION**	**CONFINEMENT**	**CONCURRENT WITH**	**CONSECUTIVE WITH**	**FINE**
Charge I:	Specification 1:				
	Specification 2:				
Charge II:	Specification:				
Charge III:	Specification:				
Charge IV:	Specification:				
Additional Charge:	Specification:				

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
Hadley, Joshua D.	E4	[redacted]

4. UNIT OR ORGANIZATION	5. CURRENT ENLISTMENT	6. TERM
Coast Guard Base Honolulu	28AUG2017	6 years

7. CONVENING AUTHORITY (UNIT/ORGANIZATION)	8. COURT-MARTIAL TYPE	9. COMPOSITION	10. DATE SENTENCE ADJUDGED
Coast Guard Pacific Area	General	Judge Alone	16-Feb-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.

Accused request: CA commute, reduce, or suspend the period of confinement and the reduction in pay grade, in whole or in part.

Crime victim input: none.

SJA advised that Convening Authority may grant Accused clemency IAW RCM 1109 and Art. 60a, UCMJ.

24. Convening Authority Name/Title	25. SJA Name
VADM Andrew J. Tiongson, USCG Commander, Coast Guard Pacific Area	CAPT [redacted] USCG

26. SJA signature	27. Date
[redacted]	02 MAR 23

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.]

No action on the sentence.

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
[redacted]	07MAR 23

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 92
Offense Description: Violation of a Lawful General Order
Plea: Not Guilty
Specification 1 Plea: Not Guilty
Specification 2 Plea: Not Guilty
Findings:
Specification 1 Finding: Withdrawn and Dismissed
Specification 2 Finding: Withdrawn and Dismissed

Charge II: Violation of the UCMJ, Article 120
Offense Description: Abusive Sexual Contact without the Consent of the Other Person
Plea: Guilty
Sole Specification Plea: Guilty
Finding: Guilty

Charge III: Violation of the UCMJ, Article 134
Offense Description: Sexual Act with an Animal
Plea: Not Guilty
Sole Specification Plea: Not Guilty
Finding: Withdrawn and Dismissed

Charge IV: Violation of the UCMJ, Article 134
Offense Description: Child Pornography: Possessing or Receiving or Viewing
Plea: Not Guilty
Sole Specification Plea: Not Guilty
Finding: Withdrawn and Dismissed

Additional Charge: Violation of the UCMJ, Article 120
Offense Description: Abusive Sexual Contact When the Other Person is Asleep or Otherwise Unaware
Plea: Not Guilty
Sole Specification Plea: Not Guilty
Finding: Withdrawn and Dismissed

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.

Bad Conduct Discharge;

Confinement for four (4) months;

Reduction to pay grade E-1.

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.PATRICIA.[redacted] Digitally signed by REUTER.EMILY.PATRICIA.[redacted] Date: 2023.03.21 20:52:43 -07'00'	21-Mar-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.

40. Judge's signature:	41. Date judgment entered:

42. Return completed copy of the judgment to the Post-Trial Department/Review Shop for distribution to the defense counsel and/or accused as well as the victim and/or victims' legal counsel.

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