Volume 1 of Volumes 32

CERTIFIED RECORD OF TRIAL

(and accompanying papers)

of

Honstein	Dakota	S	[redacted]	Sgt
(Last Name)	*(First Name)*	*MI*	*(DoD ID No.)*	*(Rank)*

2d ANGLICO, II MIG, II MEF	USMC	Camp Lejeune, NC
(Unit/Command Name)	*(Branch of Service)*	*(Location)*

By

General Court-Martial (GCM) COURT-MARTIAL

(GCM, SPCM, or SCM)

Convened by Commanding General

(Title of Convening Authority)

II Marine Expeditionary Force

(Unit/Command of Convening Authority)

Tried at

Camp Lejeune, NC On 1, 13 Nov, 6 Dec 2024; 27 Jan, 14, 17 Mar, 22-23, 28-30 Apr, and 1-2 May 2025

(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")

This volume contains

Post-Trial Documents, Allied Papers, Audio, and Transcript Pages 1 - 50

CONVENING ORDER

UNITED STATES MARINE CORPS
COMMAND ELEMENT
II MARINE EXPEDITIONARY FORCE
FLEET MARINE FORCE
PSC BOX 20080
CAMP LEJEUNE, NC 28542-0080

IN REPLY REFER TO
5813
GCMCO 1-24
FEB 05 2024

General Court-Martial Convening Order 1-24

Pursuant to the authority in Article 22(a) of the Uniform Code of Military Justice (UCMJ), Rule for Court-Martial (R.C.M.) 504, and Section 0120a of the Manual of the Judge Advocate General (JAGMAN), a General Court-Martial is hereby convened. It may try such persons as may be properly brought before it. The court shall meet at Marine Corps Base Camp Lejeune, North Carolina, unless otherwise directed. The court will be constituted as follows:

Members

Colonel [redacted] U.S. Marine Corps;
Colonel [redacted] U.S. Marine Corps;
Colonel [redacted] U.S. Marine Corps;
Lieutenant Colonel [redacted] U.S. Marine Corps;
Lieutenant Colonel [redacted] U.S. Marine Corps;
Lieutenant Colonel [redacted] U.S. Marine Corps;
Major [redacted] U.S. Marine Corps; and,
Major [redacted] U.S. Marine Corps.

[redacted]

B. A. OTTIGNON
Lieutenant General
U.S. Marine Corps
Commanding General

CHARGE SHEET

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, Middle Initial)	2. EDIPI	3. GRADE OR RANK	4. PAY GRADE
HONSTEIN, Dakota, S.	[redacted]	Sgt	E-5

5. UNIT OR ORGANIZATION	6. EAS	6b. CURRENT SERVICE	
		a. INITIAL DATE	b. TERM
2d ANGLICO, II MIG, II MEF	28 SEP 26	29 SEP 21	5 Yrs

7. PAY PER MONTH			8. NATURE OF RESTRAINT OF ACCUSED	9. DATE(S) IMPOSED
a. BASIC	b. SEA/FOREIGN DUTY	c. TOTAL		
$3,601.80	$00.00	$3,601.80	Pre-Trial Confinement	27 JAN 24 - PRESENT

II. CHARGES AND SPECIFICATIONS

10.

Charge I: **Violation of the UCMJ, Art. 118**

Specification: (*Murder - Act Inherently Dangerous to Another):* In that Sergeant Dakota S. Honstein, U.S. Marine Corps, on active duty, did, onboard Marine Corps Base Camp Lejeune, on or about 27 January 2024, murder [redacted] by means of intentionally pulling the trigger of a loaded firearm while pointing it at her.

Charge II: **Violation of the UCMJ, Art. 119**

Specification: *(Involuntary Manslaughter - Culpable Negligence)* In that Sergeant Dakota S. Honstein, U.S. Marine Corps, on active duty, did, onboard Marine Corps Base Camp Lejeune, on or about 27 January 2024, by culpable negligence, unlawfully kill [redacted] by means of shooting her with a firearm.

Charge III: **Violation of the UCMJ, Art. 92**

Specification: *(Violation of a General Order)* In that Sergeant Dakota S. Honstein, U.S. Marine Corps, on active duty, did, onboard Marine Corps Base Camp Lejeune, on or about 27 January 2024, violate a lawful general order which was his duty to obey, to wit: paragraph 4(c)(1) of MCIEAST-MCB CAMLEJO 5500.1A, dated 16 August 2021, by wrongfully possessing a firearm aboard Marine Corps Base Camp Lejeune.

III. PREFERRAL

11a. NAME OF ACCUSER (Last, First, Middle Initial)	b. GRADE	c. ORGANIZATION OF ACCUSER
[redacted]	E-7	Office of Special Trial Counsel - EAST

[redacted] e. DATE (YYYYMMDD): 20241026

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oath in cases of this character, personally appeared the above named accuser this 26th day of October, 2024, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief

Rhavean D. Anderson
Typed Name of Officer

Office of Special Trial Counsel - EAST
Organization of Officer

Captain, U. S. Marine Corps
Grade

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

ANDERSON.RHAVEAN.DENISE[redacted] Digitally signed by ANDERSON.RHAVEAN.DENISE[redacted] Date: 2024.10.26 16:16:22 -04'00'

Signature

DD FORM 458, MAY 2000 PREVIOUS EDITION IS OBSOLETE.

12.

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

_____ _____

Typed Name of Immediate Commander *Organization of Immediate Commander*

[redacted] Pursuant to R.C.M. 308(a) 20241026

Grade

Signature

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13.

The sworn charges were received at 1627 hours, 26 October , 2024 at II MIG

Designation of Command or

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

FOR THE [1] Commanding Officer

[redacted]

Typed Name of Officer

Gunnery Sergeant, U.S. Marine Corps

Grade

[redacted]

Signature

AOOD II MIG

Official Capacity of Officer Signing

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY	b. PLACE	c. DATE *(YYYY MMDD)*
II Marine Expeditionary Force	Camp Lejeune, NC	20241026

Referred for trial to the General court-martial convened by GCMCO 1-24

dated 5 February , 2024 , subject to the following instructions [2]:

By _____ of _____

Command or Order

T. J. Reese

Typed Name of Officer

Colonel, U.S. Marine Corps

Grade

REESE.TERRANCE.JOSEPH.[redacted] Digitally signed by REESE.TERRANCE.JOSEPH.[redacted] Date: 2024.10.26 17:01:17 -04'00'

Signature

Deputy Lead Special Trial Counsel - USMC

Official Capacity of Officer Signing

15.

On 26 October , 2024 , I caused to be served a copy hereof on (each of) the above named accused

Rhavean D. Anderson

Typed Name of Trial Counsel

Captain, U.S. Marine Corps

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.

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, Middle Initial)	2. EDIPI	3. GRADE OR RANK	4. PAY GRADE
HONSTEIN, Dakota, S.	[redacted]	Sgt	E-5

5. UNIT OR ORGANIZATION	6. EAS	6b. CURRENT SERVICE	
		a. INITIAL DATE	b. TERM
2d ANGLICO, II MIG, II MEF	28 SEP 26	29 SEP 21	5 Yrs

7. PAY PER MONTH			8. NATURE OF RESTRAINT OF ACCUSED	9. DATE(S) IMPOSED
a. BASIC	b. SEA/FOREIGN DUTY	c. TOTAL		
$3,601.80	$0.00	$3,601.80	Pre-Trial Confinement	27 JAN 24 - PRESENT

II. CHARGES AND SPECIFICATIONS

10.

ADDITIONAL CHARGE: **Violation of the UCMJ, Art. 118(3)**

Specification: *(Murder - Act Inherently Dangerous to Another)*: In that Sergeant Dakota S. Honstein, U.S. Marine Corps, on active duty, did, onboard Marine Corps Base Camp Lejuene, on or about 27 January 2024, murder [redacted] by means of intentionally pulling the trigger of a loaded firearm while pointing it at her.

III. PREFERRAL

11a. NAME OF ACCUSER (Last, First, Middle Initial)	b. GRADE	c. ORGANIZATION OF ACCUSER
[redacted]	E-3	Office of Special Trial Counsel
[redacted]		e. DATE (YYYYMMDD) 20241101

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oath in cases of this character, personally appeared the above named accuser this 1st day of November, 2024, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

N. S. HENRY
Typed Name of Officer

Office of Special Trial Counsel
Organization of Officer

Lieutenant Colonel, U. S. Marine Corps
Grade

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

HENRY.NICHOLAS.SEAN.[redacted]
Digitally signed by HENRY.NICHOLAS.SEAN.[redacted]
Date: 2024.11.01 17:59:33 -04'00'
Signature

12.
On 13 November , 2024 , the accused was informed of the charges against him/her and of the name(s) of the accuser(s) known to me *(See R.C.M. 308 (a)). (See R.C.M 308 if notification cannot be made.)*

[redacted]
Typed Name of Immediate Commander

2d ANGLICO, II MIG, II MEF
Organization of Immediate Commander

Lieutenant Colonel
Grade

[redacted]
Signature

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13.
The sworn charges were received at 1539 hours, 2 December , 2024 at 2d ANGLICO, II MIG, II MEF
Designation of Command or Officer Exercising Summary Court-Martial Jurisdiction (See R.C.M. 403)

FOR THE [1] Commanding Officer

[redacted]
Typed Name of Officer

CO (Acting), 2d ANGLICO, II MIG, II MEF
Official Capacity of Officer Signing

Major, U.S. Marine Corps
Grade

[redacted]
Signature

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY	b. PLACE	c. DATE *(YYYY MMDD)*
II Marine Expeditionary Force	Camp Lejeune, NC	20241203

Referred for trial to the General court-martial convened by GCMCO 1-24 ,

dated 5 February , 2024 , subject to the following instructions: [2]

to be tried in conjunction with the charges referred on October 26, 2024

By _____ of _____
Command or Order

K. Scott Woodard
Typed Name of Officer

Lead Special Trial Counsel - USMC
Official Capacity of Officer Signing

Brigadier General, U.S. Marine Corps
Grade

WOODARD.KEVIN.SCOTT. [redacted] Digitally signed by WOODARD.KEVIN.SCOTT [redacted] Date: 2024.12.03 10:57:56 -05'00'
Signature

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

_____
Typed Name of Trial Counsel

_____
Grade or Rank of Trial Counsel

_____
Signature

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

TRIAL COURT MOTIONS & RESPONSES

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

UNITED STATES v. DAKOTA S. HONSTEIN SERGEANT U. S. MARINE CORPS	VICTIM LEGAL COUNSEL'S MOTION TO APPOINT ARTICLE 6b DESIGNEES 25 JUL 24

MOTION

Ms. [redacted] and Ms. [redacted] parents of Ms. [redacted] through Victim Legal Counsel move this court to appoint them as joint designees pursuant to Article 6b(c), UCMJ.

FACTS

Ms. [redacted] the victim in this case, was killed on 27 January 2024 aboard Marine Corps Base Camp Lejeune, North Carolina.

Additional facts pertaining to Ms. [redacted] her background and her parents are contained in Exhibit (1) and are incorporated by reference into this motion. Exhibit (1).

LAW

Per Article 6b(c), UCMJ: "In the case of a victim of an offense under this chapter who is . . . deceased, the legal guardians of the victim or the representatives of the victim's estate, family members, or any other person designated as suitable by the military judge, may assume the rights of the victim under this section." (Emphasis added).

Under the UCMJ, a "victim" is an individual who is alleged to have suffered a direct physical, emotional, or pecuniary harm as a result of a commission of an offense under the UCMJ.

ARGUMENT

Bottom line up front: Ms. [redacted] and Ms. [redacted] parental relationship with [redacted] willingness to communicate with one another about this case, stable employment, and ability to travel for future legal

AE IV
Pg 1 of 4

[redacted]

proceedings, among other attributes, make them the most suitable candidates for assuming the rights of their daughter, [redacted]

As described in Exhibit (1), Ms[redacted] and Ms. [redacted] adopted [redacted] in 2001. Since then they have remained the legal adoptive parents of [redacted] and two other now-grown children, [redacted] and [redacted] While married, Ms. [redacted] and Ms. [redacted] were committed to providing a safe, structured home for their children to grow up in. Their commitment to [redacted] and their other children is best demonstrated by their active participation in their children's upbringing, including traveling with their children to over 25 different countries, enrolling [redacted] in dance lessons, gymnastics, tae kwan do, swimming, surfing and ski lessons as well as music classes. While [redacted] was in school, she showed promise and was even enrolled in the gifted program at her grade school. She was active in several high school sports teams and athletic programs. Before moving to North Carolina, [redacted] had attended El Camino College where she studied Education in the hopes of someday becoming a teacher.

Since divorcing in 2018, Ms[redacted] and Ms. [redacted] have maintained almost constant communication. They maintain a family group chat where they and their children text daily. They also speak on the phone with one another several times a day. There is no reason to believe this will change any time soon.

Ms. [redacted] and Ms. [redacted] are also sufficiently stable in their employment, finances and support systems such that they can actively advocate for [redacted] as her court-appointed representatives. Ms. [redacted] is a graduate of Quincy University and holds dual degrees in Chemistry and Biology. She currently serves as the Senior Manager for Business Intelligence at ServiceTitan in Glendale, California, where she is responsible for several teams of employees. Outside of her job, she serves on the board of directors for Quincy University's National Alumni Board, its Civic Music Association, and the Quincy Humane Society. She also is a member of the Quincy Park Band and the Quincy Community Concert Band.

Ms. [redacted] holds a Bachelor of Arts in Communications from the University of Nevada-Las Vegas. She worked in television news for nine years before entering nursing. For the last 18 years she has

[redacted]

worked as an emergency room nurse in the fast-paced emergency rooms of Harbor UCLA Medical Center, Providence Hospital and Kaiser Pennanente. She recently transitioned to being a hospice nurse. Neither of them foresees any financial hardships in the near future that would prevent them from being able to travel to Camp Lejeune for legal proceedings. Both of their employers are tracking that they are involved in this case and are providing sufficient flexibility so that at least one if not both can be present for future proceedings.

In short, Ms. [redacted] and Ms. [redacted] are suitable candidates to serve as designees for [redacted] As parents of [redacted] they know their daughter far more than this motion can adequately capture and can communicate that to this court better than anyone else. The values and skills they possess as parents of three children, to say nothing of their professional backgrounds and responsibilities, more than demonstrates their ability to advocate for their daughter in a timely, responsible, and zealous manner.

RELIEF REQUESTED

Ms. [redacted] and Ms. [redacted] through counsel, respectfully move this court to appoint them as the designees of Ms. [redacted] rights as a victim pursuant to Article 6b(c), UCMJ.

In support of this motion, Victims Legal Counsel offers the following evidence:

- Exhibit (1): Affidavit of [redacted] and [redacted] dated 26Feb24.

[redacted]
ROBERT C. PYATT
Captain, U.S. Marine Corps
Victims Legal Counsel for Ms. [redacted]
and Ms. [redacted]

AE IV
Pg 3 of 4

[redacted]

****

Certificate of Service

I hereby attest that a copy of the foregoing motion was served on the court and the parties electronically on 25 July 2024.

[redacted]

ROBERT C. PLATT
Captain, U.S. Marine Corps
Victims Legal Counsel for Ms [redacted]
and Ms. [redacted]

AE IV
Pg 4 of 4

[redacted]

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

UNITED STATES **V.** **DAKOTA S. HONSTEIN** **SERGEANT / E-5** **USMC**	**DEFENSE MOTION TO COMPEL EXPERT CONSULTATION (Firearms)** **14 August 2024**

MOTION

Pursuant to R.C.M. 701 and R.C.M. 703(d)(2)(A), the Defense moves to compel the production of Mr. [redacted] as a confidential Defense expert consultant in the field of firearms, for a total of **sixteen (16) hours** of expert consultation to include **physical examination and testing** of the firearm at issue in this case.

SUMMARY

This Court should compel the production of Mr. [redacted] as a confidential Defense expert consultant in the field of firearms because the circumstances and causation of the discharge of the firearm are of central importance to this case. Sgt Honstein is alleged to have accidentally discharged a pistol during a consensual sexual encounter with the named victim, Ms. [redacted] resulting in her death. The Government has charged Sgt Honstein with violations of Article 118, UCMJ (Murder Act Inherently Dangerous to Another), and Article 119, UCMJ (Involuntary Manslaughter). The Defense must have knowledge of and understand the mechanics of the specific firearm that was discharged to adequately prepare a Defense and cross examination of the Government's firearm experts.

AE VIII
Pg 1 of 7

[redacted]

FACTS

1. On 26 July 2024, the Government provided the Defense with its initial witness list.
2. Included in its witness list are the names of sixty-five (65) potential witnesses, including eleven (11) experts.
3. Of the eleven experts, two have been identified by the Government as experts in the field of firearms.
4. Both Government firearm experts are expected to provide expert testimony based on their "experience in that field and [his/her] **examination and analysis of the evidence in this case**."
5. On 2 August 2024, the Defense requested from the Government funding for sixteen (16) hours of expert consultation with Mr. [redacted] an expert in the field of firearms.
6. The Defense later specified that their request for sixteen (16) hours of consultation was based on conversations with Mr. [redacted] who estimated that he required:
    a. Eight (8) hours to review relevant discovery, examine the firearm and physical evidence (ammunition), and test the specific firearm;
    b. Four (4) hours to review and interpret the examination and testing results; and
    c. Four (4) hours to consult with Defense Counsel.
7. On 11 August 2024, Trial Counsel endorsed the Defense's request.
8. In their endorsement, Trial Counsel stated:

> "This case centers on the use and function of a firearm, which will comprise the majority of the evidence the Government expects to use in its case-in-chief to establish guilt as to the violation of Article 118. Moreover, the Government to rely heavily on the testimony of its own firearms expert at trial to establishing the wanton disregard of using this exact firearm in the manner in which the Accused did, as well as to discuss his training with firearms, firearm mechanical safeties, and safe employment of firearms. The Government's expert may also be used in rebuttal should the Accused testify regarding

[redacted]

his alleged attempts to push the slide back in order to take the weapon out of battery, thereby disabling it.

9. Trial Counsel did not recommend that the Defense's request be approved in full because the Defense did not "demonstrate the necessity nor feasibility of retesting the weapon, which was already tested by USACIL."

10. On 14 August 2024, the Commanding General approved the Defense's request in part consistent with Trial Counsel's recommendations.

BURDEN

As the moving party, the Defense has the burden of persuasion as to whether the military judge should compel the production of Mr. [redacted] R.C.M. 905(c)(2). The burden of proof is by a preponderance of the evidence. R.C.M 905(c)(1).

LAW

As a matter of military due process, service members are entitled to expert assistance when necessary for an adequate defense. *United States v. Garries*, 22 M.J. 288, 290 (C.M.A. 1986). The right to supplement the defense team with expert assistance and witnesses is based on Article 46, UCMJ, M.R.E. 706, and R.C.M. 703(d). Denying an accused expert assistance concerning the "linchpin of the prosecution case" amounts to denying the accused the right to present a defense. *United States v. McAllister*, 64 M.J. 248, 252 (CAAF 2007) (citation omitted). "The right to present a defense is a fundamental element of due process of law." *Id.* (internal quotation and citation omitted).

The standard for producing an expert consultant is "whether the assistance of the expert is necessary for an adequate defense." R.C.M. 703(d)(2)(A)(ii). Courts employ the *Freeman*

[redacted]

Gonzalez tests to decide on the production of an expert consultant for the Defense. *United States v. Freeman* sets out a two-part test, under which the Defense has the burden of showing a reasonable probability 1) that the expert would be of assistance; and 2) denial of the expert assistance would result in a fundamentally unfair trial. 65 M.J. 451, 458 (CAAF 2008). According to *United States v Gonzalez*, the first part of the Freeman test is divided into three subparts: 1) why is the expert assistance needed; 2) what would the expert assistance accomplish for the accused; and 3) why is the defense counsel unable to gather and present the evidence the expert assistant would be able to develop. 39 M.J. 459, 461 (CAAF 1991)

Freeman Part One: Mr. [redacted] would be of assistance to the Defense

Gonzalez Part One: Mr. [redacted] expert assistance is necessary. The Government's initial witness list includes Mr. [redacted] who the Government intends to qualify as an expert in the field of firearms, and Ms. [redacted] who the Government intends to qualify as an expert in the fields of forensic firearm and ammunition examination. Ms [redacted] also conducted an examination of the firearm in this case, to include an examination of the safety features of the firearm, test firing, and microscopic comparison of the ammunition. Both witnesses are employed by the Government and are expected to testify as Government witnesses about matters including firearms mechanics, ballistics, and the condition/functionality of the firearm at issue. The Defense cannot adequately review and understand the physical evidence and cannot adequately prepare for a cross examination of these two witnesses without similar expert assistance.

Gonzalez Part Two: What Mr. [redacted] would accomplish. Mr. [redacted] will test, inspect, analyze, and review the firearm in this case, and will compare his results to those produced by Ms. [redacted] Mr. [redacted] will consult with and educate the Defense in several areas to include but

[redacted]

not limited to firearm mechanics, firearms handling, firearm maintenance, firearm mishaps, and mechanical failures. He will also assist the Defense in the presentation of its case and potential cross examination of the Government's witnesses.

Gonzalez Part Three: The Defense Counsel cannot interpret the evidence or develop Mr. [redacted] expertise. Although Sgt Honstein i represented by defense counsel, counsel have neither the required background nor training in firearms to fully understand or develop the issues without the assistance of an expert in this field. The Defense does not have sufficient training or practical experience to perform the necessary laboratory testing analysis and review of the firearm. True expertise in this field takes specialized training and education, as reflected in enclosure (3).

Freeman Part Two: Denying Mr. [redacted] would be fundamentally unfair

The Government intends to offer the testimony of eleven expert witnesses, including two firearm experts. One such expert conducted an examination and testing of the specific firearm at issue in this case. The Defense requests the assistance of Mr. [redacted] because he is an expert in this field and is able to replicate the Government's examinations and testing. He has all of the educational, professional and experimental credentials necessary for this type of case. Denial of this request would result in a fundamentally unfair trial and would impede Sgt Honstein's rights under the Fifth Amendment Due Process Clause, his Sixth Amendment right to effectively confront the witnesses against him, and his Sixth Amendment right to effective assistance of counsel.

[redacted]

AE VIII
Pg 5 of 7

RELIEF REQUESTED

11. **Request.** The Defense respectfully requests that the Court compel six (6) additional hours of confidential expert consultation with Mr. [redacted] for a total of sixteen (16) hours, **to include physical examination and testing of the firearm at issue in this case at Mr. [redacted] lab** in Lowell, Massachusetts

12. **Evidence.** The Defense submits the following enclosures in support of its motion.

    a. Enclosure 1: Government Initial Witness List

    b. Enclosure 2: Defense Expert Consultant Request

    c. Enclosure 3: Mr. [redacted] CV

    d. Enclosure 4: Mr. [redacted] Fee Schedule

    e. Enclosure 5: Defense Counsel Email to Trial Counsel

    f. Enclosure 6: Trial Counsel Endorsement

    g. Enclosure 7: Commanding General Endorsement

    h. Enclosure 8: NCIS Summary of Interrogation

    i. Enclosure 9: USACIL Firearms Report

    j. Enclosure 10: Trial Counsel Emails with Mr. [redacted]

13. **Witnesses**. The Defense requests to call Mr. [redacted] as a witness telephonically in support of its motion.

14. **Oral Argument.** The Defense requests oral argument.

[redacted]

T. J. LIPOSITZ
Captain, U.S. Marine Corps
Defense Counsel

[redacted]

CERTIFICATE OF SERVICE

I certify that I have delivered a copy of the foregoing document by email to the Court 14 August 2024.

[redacted]
T. J. LIPOSITZ
Captain, U.S. Marine Corps
Defense Counsel

AE VIII
Pg 7 of 7

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

UNITED STATES **V.** **DAKOTA S. HONSTEIN** **SERGEANT / E-5** **USMC**	**DEFENSE MOTION TO COMPEL EXPERT CONSULTATION** **(Firearms)** **20 August 2024**

MOTION

Pursuant to R.C.M. 701(a)(2) and R.C.M. 703(d)(2), the Defense moves to compel the production of Mr. [redacted] as a confidential Defense expert consultant in the field of firearms, for **six (6) additional hours** of expert consultation totaling sixteen (16) hours, to include **physical examination and testing** of the firearm at issue in this case.

SUMMARY

This Court should compel the production of Mr. [redacted] as a confidential Defense expert consultant in the field of firearms because the circumstances and causation of the discharge of the firearm are of central importance to this case. Sgt Honstein is alleged to have unintentionally discharged a pistol during a consensual sexual encounter with the named victim, Ms. [redacted] resulting in her death. The Government has charged Sgt Honstein with violations of Article 118, UCMJ (Murder – Act Inherently Dangerous to Another), and Article 119, UCMJ (Involuntary Manslaughter). The Defense must have knowledge of and understand the mechanics of the specific firearm that was discharged to adequately prepare a Defense and cross examination of the Government's firearm experts.

AE __ X __
Pg __ 1 of 7

[redacted]

FACTS

1. On 26 July 2024, the Government provided the Defense with its initial witness list.
2. Included in its witness list are the names of sixty-five (65) potential witnesses, including eleven (11) experts.
3. Of the eleven experts, two have been identified by the Government as experts in the field of firearms.
4. Both Government firearm experts are expected to provide expert testimony based on their "experience in that field and [his/her] **examination and analysis of the evidence in this case**."
5. On 2 August 2024, the Defense requested from the Government funding for sixteen (16) hours of expert consultation with Mr. [redacted] an expert in the field of firearms.
6. The Defense later specified that their request for sixteen (16) hours of consultation was based on conversations with Mr. [redacted] who estimated that he required:
    a. Eight (8) hours to review relevant discovery, examine the firearm and physical evidence (ammunition), and test the specific firearm;
    b. Four (4) hours to review and interpret the examination and testing results; and
    c. Four (4) hours to consult with Defense Counsel.
7. On 11 August 2024, Trial Counsel endorsed the Defense's request.
8. In their endorsement, Trial Counsel stated:

> "This case centers on the use and function of a firearm, which will comprise the majority of the evidence the Government expects to use in its case-in-chief to establish guilt as to the violation of Article 118. Moreover, the Government to rely heavily on the testimony of its own firearms expert at trial to establishing the wanton disregard of using this exact firearm in the manner in which the Accused did, as well as to discuss his training with firearms, firearm mechanical safeties, and safe employment of firearms. The Government's expert may also be used in rebuttal should the Accused testify regarding

[redacted]

his alleged attempts to push the slide back in order to take the weapon out of battery, thereby disabling it.

9. Trial Counsel did not recommend that the Defense's request be approved in full because the Defense did not "demonstrate the necessity nor feasibility of retesting the weapon, which was already tested by USACIL."

10. On 14 August 2024, the Commanding General approved the Defense's request in part consistent with Trial Counsel's recommendations.

BURDEN

As the moving party, the Defense has the burden of persuasion as to whether the military judge should compel the production of Mr. Danas. R.C.M. 905(c)(2). The burden of proof is by a preponderance of the evidence. R.C.M. 905(c)(1).

LAW

As a matter of military due process, service members are entitled to expert assistance when necessary for an adequate defense. *United States v. Garries*, 22 M.J. 288, 290 (C.M.A. 1986). The right to supplement the defense team with expert assistance and witnesses is based on Article 46, UCMJ, M.R.E. 706, and R.C.M. 703(d). Denying an accused expert assistance concerning the "linchpin of the prosecution case" amounts to denying the accused the right to present a defense. *United States v. McAllister*, 64 M.J. 248, 252 (CAAF 2007) (citation omitted). "The right to present a defense is a fundamental element of due process of law." *Id.* (internal quotation and citation omitted).

The standard for producing an expert consultant is "whether the assistance of the expert is necessary for an adequate defense." R.C.M. 703(d)(2)(A)(ii). Courts employ the *Freeman* /

[redacted]

Gonzalez tests to decide on the production of an expert consultant for the Defense. *United States v. Freeman* sets out a two-part test, under which the Defense has the burden of showing a reasonable probability 1) that the expert would be of assistance; and 2) denial of the expert assistance would result in a fundamentally unfair trial. 65 M.J. 451, 458 (CAAF 2008). According to *United States v. Gonzalez*, the first part of the Freeman test is divided into three subparts: 1) why is the expert assistance needed; 2) what would the expert assistance accomplish for the accused; and 3) why is the defense counsel unable to gather and present the evidence the expert assistant would be able to develop. 39 M.J. 459, 461 (CAAF 1991).

Freeman Part One: Mr. Danas would be of assistance to the Defense

Gonzalez Part One: Mr. [redacted] expert assistance is necessary. The Government's initial witness list includes Mr. [redacted] who the Government intends to qualify as an expert in the field of firearms, and Ms. [redacted] who the Government intends to qualify as an expert in the fields of forensic firearm and ammunition examination. Ms. [redacted] also conducted an examination of the firearm in this case, to include an examination of the safety features of the firearm, test firing, and microscopic comparison of the ammunition. Both witnesses are employed by the Government and are expected to testify as Government witnesses about matters including firearms mechanics, ballistics, and the condition functionality of the firearm at issue. The Defense cannot adequately review and understand the physical evidence and cannot adequately prepare for a cross examination of these two witnesses without similar expert assistance.

Gonzalez Part Two: What Mr. [redacted] would accomplish. Mr. [redacted] will test, inspect, analyze, and review the firearm in this case, and will compare his results to those produced by Ms. [redacted] Mr. [redacted] will consult with and educate the Defense in several areas to include but

[redacted]

not limited to firearm mechanics, firearms handling, firearm maintenance, firearm mishaps, and mechanical failures. He will also assist the Defense in the presentation of its case and potential cross examination of the Government's witnesses.

Gonzalez Part Three: The Defense Counsel cannot interpret the evidence or develop Mr. [redacted] expertise. Although Sgt Honstein is represented by defense counsel, counsel have neither the required background nor training in firearms to fully understand or develop the issues without the assistance of an expert in this field. The Defense does not have sufficient training or practical experience to perform the necessary laboratory testing, analysis and review of the firearm. True expertise in this field takes specialized training and education, as reflected in enclosure (3).

Freeman Part Two: Denying Mr. [redacted] would be fundamentally unfair

The Government intends to offer the testimony of eleven expert witnesses, including two firearm experts. One such expert conducted an examination and testing of the specific firearm at issue in this case. The Defense requests the assistance of Mr. [redacted] because he is an expert in this field and is able to replicate the Government's examinations and testing. He has all of the educational, professional and experimental credentials necessary for this type of case. Denial of this request would result in a fundamentally unfair trial and would impede Sgt Honstein's rights under the Fifth Amendment Due Process Clause, his Sixth Amendment right to effectively confront the witnesses against him, and his Sixth Amendment right to effective assistance of counsel.

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[redacted]

RELIEF REQUESTED

11. **Request.** The Defense respectfully requests that the Court compel six (6) additional hours of confidential expert consultation with Mr. [redacted] for a total of sixteen (16) hours, **to include physical examination and testing of the firearm at issue in this case at Mr. [redacted] lab** in Lowell, Massachusetts.

12. **Evidence.** The Defense submits the following enclosures in support of its motion:

    a. Enclosure 1: Government Initial Witness List

    b. Enclosure 2: Defense Expert Consultant Request

    c. Enclosure 3: Mr. [redacted] CV

    d. Enclosure 4: Mr. [redacted] Fee Schedule

    e. Enclosure 5: Defense Counsel Emails with Trial Counsel

    f. Enclosure 6: Trial Counsel Endorsement

    g. Enclosure 7: Commanding General Endorsement

    h. Enclosure 8: NCIS Summary of Interrogation

    i. Enclosure 9: USACIL Firearms Report

    j. Enclosure 10: Trial Counsel Emails with Mr. [redacted]

    k. Enclosure 11: Declaration of Mr. [redacted]

13. **Witnesses**. The Defense may call Mr. [redacted] to testify telephonically in support of this motion.

14. **Oral Argument.** The Defense requests oral argument if opposed by the Government.

[redacted]
T. J. LIPOSITZ
Captain, U.S. Marine Corps
Defense Counsel

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[redacted]

CERTIFICATE OF SERVICE

I certify that I have delivered a copy of the foregoing document by email to Trial Counsel and the Court 20 August 2024.

[redacted]

T. J. LIPOSITZ
Captain, U.S. Marine Corps
Defense Counsel

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[redacted]

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

UNITED STATES v. DAKOTA HONSTEIN SERGEANT E-5 U. S. MARINE CORPS	**GOVERNMENT BRIEF REGARDING WRITTEN DETERMINATION LETTERS FOR REFERRAL** 16 Aug 24

Nature of the Motion

This Government brief is provided in response to the Court's ordered briefing on the below questions:

1. Whether the referral process utilized by the Office of Special Trial Counsel (OSTC) in this case violates Article 34, RCM 406, or paragraph 091702[1] of the OSTC Standard Operating Procedure (SOP) dated 22 Dec 23?

2. Does violation of the SOP amount to a defect in referral?

3. If the referral violated the SOP, and the referral is defective, what is the remedy?

Facts

1. On 30 June 2023, Brigadier General K.S. Woodard issued the Marine Corps Office of Special Trial Counsel Standard Operating Procedures. That document was modified multiple times, with a full revision completed on 22 December 2023.

2. On 29 January 2024, the Office of Special Trial Counsel exercised authority over the covered and known offenses committed by the Accused on or about 27 January 2024.

[1] "Any offense referred to a general or special court-martial by an STC, must be accompanied by a written determination from the referral authority that: 1. Each specification under a charge alleges an offense of the UCMJ; 2. There is probable cause to believe the accused committed the offense charged; and 3. A court-martial would have jurisdiction over the accused and the offense."

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[redacted]

3. On 5 April 2024, the Office of Special Trial Counsel notified the command that it had made the initial disposition decision to prefer charges against the Accused.

4. On 9 April 2024, charges were preferred against the Accused by Corporal [redacted]

5. On 12 April 2024, the charge sheet was served on the Accused by the command.

6. On 12 April 2024, Colonel [redacted] was appointed as Preliminary Hearing Officer by the Convening Authority.

7. On 10 May 2024, a preliminary hearing was held.

8. On 28 May 2024, the Preliminary Hearing Officer provided his report to the Convening Authority recommending referral of the charges to general court-martial.

9. On 28 June 2024, a Written Determination Letter was signed by a Special Trial Counsel, the undersigned, and provided to the Lead Special Trial Counsel along with the charge sheet, preliminary hearing report, and the relevant convening order.

10. On 3 July 2024, the Lead Special Trial Counsel referred the charges to a general court-martial convened by the relevant convening order.

11. On 6 August 2024, the Accused was arraigned. The Military Judge, *sua sponte* ordered briefing on whether the charges were improperly referred.

Burden

The burden of persuasion is on the Defense under RCM 905(b)(1) and RCM 905(c)(2)(a). Although the Military Judge *sua sponte* raised the issue, it is a non-jurisdictional objection to referral which makes the Defense the moving party. The burden of proof for any factual issue is by a preponderance of the evidence under RCM 905(c)(1).

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[redacted]

Law

The military justice system is governed by the Uniform Code of Military Justice (UCMJ), which is a statute passed by Congress and signed into law by the President. The regulations implementing the UCMJ are promulgated by the President of the United States in the Rules for Court-Martial. Article 34 of the UCMJ[3] states in paragraph (c):

> A referral to a general or special courtmartial for trial of charges and specifications over which a special trial counsel exercises authority may only be made—
> (1) by a special trial counsel, subject to a special trial counsel's written determination accompanying the referral that
> (A) each specification under a charge alleges an offense under this chapter;
> (B) there is probable cause to believe that the accused committed the offense charged; and
> (C) a court-martial would have jurisdiction over the accused and the offense

Article 34 is implemented in part by the Rules for Court-Martial. Rule for Court-Martial (RCM) 406, provides in relevant part:

> For all charges alleging covered offenses, and other charges over which special trial counsel has exercised authority and has not deferred, referral to a special or general court-martial may be made only by a special trial counsel and the referral must be accompanied by a special trial counsel's written determination that:
> (1) each specification under a charge alleges an offense under the UCMJ;
> (2) there is probable cause to believe that the accused committed the offense charged; and
> (3) a court-martial would have jurisdiction over the accused and the offense.

RCM 406(b).

Similarly, in RCM 601, the rule states,

"For offenses over which a special trial counsel has exercised authority and has not deferred, if a special trial counsel makes a written determination that each specification under a charge alleges an offense under the UCMJ, there is probable cause to believe that

---

[3] 10 U.S.C. § 834

[redacted]

the accused committed the offense charged, and the court-martial would have jurisdiction over the accused and the offense, a special trial counsel may refer it."
RCM 601(d)(1)(B).

Procedural requirements for referral can be ascertained through the implicit intent of the referral authority's actions. *United States v. Ballan*, 71 M.J. 28 (action by the convening authority showing an intent to refer a particular charge to trial is sufficient to satisfy the jurisdictional requirement of the Rules for Court-Martial). The United States Court of Appeals for the Armed Forces (CAAF) has held that for issues with referral, implicit actions by the referral authority are sufficient to satisfy procedural requirements. In *Ballan*, CAAF held that amending the charge sheet by changing the referred charge, although a major change under RCM 603, could be done implicitly through a plea agreement, even though the charge sheet was not actually amended. *Ballan*, 71 M.J. at 37. Similarly, in *United States v. Wilkins*, the Court held that "[i]mplicit" in the convening authority's entry into a pretrial agreement that provided for a plea of guilty to the charge and specification of indecent acts with another, in violation of Article 134, UCMJ, "was his personal decision that the . . . charge be referred to the general court-martial . . . ." 29 M.J. 421, 424 (C.M.A 1990).

Administrative deficiencies with the procedural requirements for referral do not deprive the court of jurisdiction or warrant any remedy. *United States v. Williams* 55 MJ 302 (CAAF 2001). In *Williams*, the Court held that a referral authority's failure to formally withdraw the charges from a court-martial post-arraignment was just an administrative deficiency because the withdrawal of charges from the first court-martial was implicit in the referral authority's referral of the same charge sheet to a new court-martial. *Id.*

[redacted]

The violation of a service regulation has no jurisdictional significance. *United States v. Kohut*, 44 M.J. 245, 249. Accordingly, there is no justification in "attaching jurisdictional significance to service regulations in the absence of their express characterization as such by Congress." *United States v. Jette*, 25 M.J. 16, 18 (CMA 1987).

Analysis

I. **Charges Were Referred Properly in Accordance with the UCMJ and the Rules for Court-Martial.**

In this case, the charges were properly preferred in accordance with RCM 307 by an accuser, subject to the UCMJ, who signed under oath before a commissioned officer of the armed forces, as documented on the Charge Sheet. The charges were then properly served on the Accused in accordance with RCM 308 by the Accused's immediate commander, also documented on the charge sheet. Following preferral and service, a preliminary hearing was properly held in accordance with RCM 405. The Preliminary Hearing Officer properly provided a report in accordance with RCM 405(m). After receipt of the preliminary hearing report, in accordance with Article 34(c)(1), RCM 401A(a), 406(c)(1), 601(b)(2), 601(d)(1)(B), and 601(e)(1), the Lead Special Trial Counsel referred the charges to a general court-martial by a personal order, accompanied by a written determination letter signed by a subordinate Special Trial Counsel (STC). A copy of the written determination was provided to the Defense Counsel in accordance with RCM 406(c)(2). The referred charges were then properly served on the Accused in accordance with RCM 602(a). After the five-day waiting period had passed, the Accused was properly arraigned in accordance with RCM 602(b)(1)(A).

[redacted]

The procedures laid out by Congress and the President in the relevant binding laws and regulations were properly followed and the charges were properly referred to a general court-martial.

II. The Written Determination Letter was Proper Under Article 34 and the Rules for Court-Martial, Which Require Only That "A" Special Trial Counsel Make a Written Determination.

Article 34(c) has two requirements. First, it requires that referral of charges over which a Special Trial Counsel has exercised authority may only be made by a Special Trial Counsel. Second, it requires that the referral be made subject to a Special Trial Counsel's written determination that the charges and specifications allege an offense, are supported by probably cause, and a court-martial would have jurisdiction over the Accused and the offense.

Here, the written determination letter is signed by a Special Trial Counsel, and it specifically notes that the Special Trial Counsel determined that the charges and specifications allege an offense, are supported by probably cause, and a court-martial would have jurisdiction over the Accused and the offense. The written determination letter lays out the Special Trial Counsel's determination as to each of the issues required to be addressed in Article 34(c)(1). Subject to that written determination, a Special Trial Counsel, referred the charges and specifications over which a Special Trial Counsel had exercised authority to a general court-martial. The referral of charges was properly made following the procedures laid out in Article 34(c).

In conducting statutory interpretation, the Supreme Court has held that words are to be given the meaning that proper grammar and usage would assign them. See *Nielsen v. Preap*, 586 U.S. 392, 407-08 (2019) (quoting A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 140 (2012)); *see also* Bread PAC v. Fed. Election Comm'n, 455 U.S. 577 (1982) ("Our analysis of this issue of statutory construction must begin with the language of the statute

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[redacted]

itself, and absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.") (internal citations omitted). The Supreme Court has noted that "when Congress includes particular language in one section of a statute but omits it in another section of the same Act, we generally take the choice to be deliberate." *Badgerow v. Walters*, 596 U. S. 1, 11 (2022). CAAF has similarly held that in determining the scope of a statute, the court looks first to its language; and the inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent. *United States v. Brown*, 84 M.J. 124 (CAAF 2023); *see also United States v. Jeter*, 84 M.J. 68 (CAAF 2022) (when a statute speaks with clarity to an issue, judicial inquiry into the statutes meaning is finished; the basic and unexceptional rule is that courts must give effect to the clear meaning of the statute as written).

The word "a," when used as an indefinite article, is "used as a function word before singular nouns when the referent is unspecified." Merriam-Webster's Collegiate Dictionary 1294 (11th ed. 2005). "When used as a word, A is an indefinite article, usually meaning one but not a specific one out of a group. It might also mean one of an indeterminate group. The context of the word's use is essential in determining its degree of intended specificity." (Wolters Kluwer Bouvier Law Dictionary Desk Edition, "A as an English Word," 2024). The Supreme Court has noted that in customary usage, "indefinite articles (like 'a' or 'an') precede countable nouns." *Niz-Chavez v. Garland*, 593 U.S. 155, 162 (2021). By contrast, the definite article, "'the' is a function word . . . indicat[ing] that a following noun or noun equivalent is definite or has been previously specified by context." *Nielsen*, 586 U.S. at 408 (citing Merriam-Webster's Collegiate Dictionary 1294 (11th ed. 2005)) (internal quotation marks omitted).

Article 34(c) uses the phrase "a special trial counsel" when describing who must make the determination in writing at referral. Similarly, RCM 406(b) and RCM 601(d)(1)(B) use the

[redacted]

phrase "a special trial counsel" with respect to the written determination letter. In using the indefinite article in this phrase, the meaning is clearly distinguishable from that of the phrase "the special trial counsel." Had the definite article been used, then proper grammar and usage would have assigned the meaning of referring back to the previously specified Special Trial Counsel. With the indefinite article, the phrase "a Special Trial Counsel" has the plain customary meaning of any one of the unspecified Judge Advocates who has been certified as a Special Trial Counsel. In choosing the indefinite article over the definite article, Congress and the President are presumed to have made a deliberate choice. *See Badgerow*, at 11.

Here, both referral and the written determination letter were made by "a special trial counsel." Nothing in Article 34 or the Rules for Court-Martial convey any hint of a requirement that the same Special Trial Counsel take both actions.

III. Charges Were Referred Properly in Accordance with the Internal Office Standard Operating Procedure.

The Office of Special Trial Counsel (OSTC) Standard Operating Procedure (SOP) does not require that the written determination letter that accompanies referral to be "signed" by the referral authority. Rather, it states that it must be "from" the referral authority. When the Special Trial Counsel who refers charges makes that decision, a written determination must accompany that decision from the referral authority for the record. Where, as here, the written determination letter that accompanied the charges was signed by a subordinate within the office of the referral authority (Lead Special Trial Counsel), that letter is "from" the Lead Special Trial Counsel, even if not signed by the referral authority upon the referral of charges.

Furthermore, implicit in the referral authority's decision to refer the charges to a court-martial is his adoption of the determination provided to him in writing by his subordinate Special Trial Counsel. Just as in *Ballan* and *Williams*, the referral authority's action necessarily implies

[redacted]

procedural decision. In *Ballan*, a major change to the charge sheet was made implicitly by the referral authority's action. In *Williams*, withdrawal of charges from a court-martial was done implicitly through the re-referral of the same charges to a separate court-martial. Here, the referral authority had in his possession the signed written determination letter by his subordinate Special Trial Counsel when he referred the charges. Implicit in his action, is his adoption of the conclusions within that written determination letter. He could not have made the decision to refer the charges without having reached the same determinations as those listed in the written determination letter.

IV. The Internal Office Standard Operating Procedure Is Not an Order and Does Not Possess the Binding Force of Law

An internal office policy cannot confer a right or an enforceable benefit upon an accused over the applicable statutory language. The OSTC SOP is, as the name suggests, a standard operating procedure. It has no legal efficacy. It lays out the normal procedures for the OSTC. The first paragraph of the OSTC SOP is titled "PURPOSE" and notes that it "promulgates the standards, policies, and procedures for the provision and functional supervision of military justice within the Marine Corps OSTC." USMC OSTC SOP dtd 22 Dec 23 para 091702. It goes on to note that "[t]he OSTC SOP is a living document..." *Id.* That paragraph ends with the statement to subordinate Special Trial Counsel that "The facts and the law must be your guide!"

Although the OSTC SOP was issued by the Lead Special Trial Counsel and does contain instructions for subordinate Special Trial Counsel as the expressed intent of the Lead Special Trial Counsel, it is not an actual signed order from Brigadier General Woodard. It is merely an SOP to give guidance to subordinates. The OSTC SOP is not signed by the Lead Special Trial Counsel because it is an internal SOP expressing the intent of the Lead Special Trial Counsel for how he intends for the OSTC to operate.

[redacted]

The OSTC SOP states in its opening purpose paragraph that it promulgates "standards, policies, and procedures" and that it is a "source for policy, guidance, and procedures." This language does not suggest any intent to create a binding order with the force of law on subordinates, but rather to provide a resource for the subordinates to more effectively carry out their duties.

The Lead Special Trial Counsel's expressed intent as to the specific execution of duties by Special Trial Counsel remains without force of law. For example, paragraph 091701 states that authority to refer charges is withheld from the line Special Trial Counsel, and authority to refer certain charges is withheld at the Regional, Deputy, and Lead levels. Per RCM 401A(a), this is an explicitly authorized action as a superior competent authority. OSTC personnel follow this guidance as the expressed intent of the superior competent authority. However, a signed withdrawal of authority would be required to legally withhold the statutory authority of the subordinate Special Trial Counsel.[3]

As an internal SOP, the OSTC SOP can have exceptions to policy without any change to the SOP or the law. For example, paragraph 091703 states that after referral, the detailed Special Trial Counsel "will send a copy of the referred charges to...the NCIS case agent...." However, many cases handled by the OSTC do not have NCIS involvement, and sending a copy of the referred charges to an NCIS agent does not occur. Similarly, paragraph 0916 states that any waiver of the preliminary hearing by the Accused "must be reduced to writing and provided to the STC." However, if the Accused sent a waiver of the preliminary hearing to the Staff Judge

[3] *See, e.g.*, Secretary of Defense Memorandum For Susan Escallier, Convening Authority for Military Commissions, Authority to Enter into Pre-Trial Agreements in United States v. Khalid Shaikh Mohammad et al. (United States v. Khalid Shaikh Mohammad; United States v. Wal id Muhammad Salih Mubarak Bin 'Attash; United States v. Mustafa Ahmed Adam Al Hawasawi; United States v. Ramzi Binalshibh; and United States v. Ali Abdul Aziz Ali), dtd 2 August 2024.

[redacted]

Advocate or the Convening Authority, it would not be rejected because it did not follow the internal OSTC SOP.

V. **Even a procedure by a Brigadier General Cannot Operate to Limit or Expand the Procedures Laid Out by Congress And the President.**

Even if the Lead Special Trial Counsel issued a signed order mandating that written determination letters be signed by the same Special Trial Counsel who refers charges, that order would be subordinate to the UCMJ and the Rules for Court-Martial as it relates to the rights of the Accused and could not create a defective referral. A regulation promulgated to implement a statute cannot change the statute. *See Public Lands Council v. Babbitt*, 529 U.S. 728 (2000). Similarly, a subordinate regulation cannot alter a higher regulation. *See United States v. Kreutzer*, 70 M.J. 444, fn.2 (CAAF 2011).

For a referral to be legally defective, it must have violated the procedures laid out by Congress and the President in statute or regulation in some way. An internal SOP cannot alter Article 34 or the RCMs. An internal SOP also cannot create any rights for the Accused or for Victims. *United States v. Hutchins, 4 M.J. 190, 192 (C.M.A. 1978)* (regulations cannot diminish the effectiveness of jurisdiction mandated by Congress); *United States v. Kohut, 44 M.J. 245, 250 (C.A.A.F. 1996)* (Navy regulation specifying TJAG approval on charges that were previously the subject of a state criminal proceedings "did not confer additional rights onto the accused" and its violation does not have jurisdictional significance). An internal SOP is purely guidance intended to assist subordinates in following the actual law.

VI. **Deviation from the Internal Office Standard Operating Procedure Does Not Create a Defect in Referral.**

If the OSTC SOP is deviated from in some way, it is purely an internal matter as to whether it is an authorized exception to policy or an error by the Special Trial Counsel. In either circumstance, it is not a matter for consideration by this Court or an opportunity for the Accused

[redacted]

to gain some benefit. Because an SOP cannot operate to alter statutes or regulations, it also cannot create otherwise non-existent defects in the Rules for Court-Martial. Unless the violation of the SOP also constitutes a violation of the RCMs or an article of the UCMJ, it has no effect on a court-martial.

VII. **The Appropriate Remedy for a Defective Referral is Dependent on the Level of Prejudice to the Accused.**

Where a referral is defective, the appropriate remedy may be nothing, as in *Williams* 55 MJ 302 (CAAF 2001). The appropriate remedy will be determined by the specific prejudice to the Accused resulting from any potential defect. If there would be no difference in the procedural or substantive posture of the court-martial had there been no defect, then there is no prejudice to the Accused and the appropriate remedy is to simply rule that there is no prejudice as a result of the defect.

Evidence Offered

1. Email chain between LSTC and STC on referral of charges, dtd 3 Jul 24

Relief Requested.

The Government requests that the Court find that the charges were properly referred pursuant to Article 34 of the UCMJ and the Rules for Court-Martial.

Oral Argument.

If opposed, the Government requests oral argument on this matter.

[redacted]
R. D. Anderson
Captain, U.S. Marine Corps
Special Trial Counsel

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[redacted]

CERTIFICATE OF SERVICE

I hearby certify that a copy of the foregoing motion was served on the Court and opposing counsel via electronic mail on 16 Aug 24.

[redacted]

R. D. Anderson
Captain, U.S. Marine Corps
Special Trial Counsel

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[redacted]

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

UNITED STATES **V.** **DAKOTA S. HONSTEIN** **SERGEANT / E-5** **USMC**	**DEFENSE RESPONSE TO GOVERNMENT BRIEF REGARDING WRITTEN DETERMINATION LETTERS FOR REFERRAL** **23 August 2024**

NATURE OF THE REPLY BRIEF

This Defense brief is provided in response to the Government's brief and pursuant to the Court's ordered briefing on the following questions:

1. Whether the referral process utilized by the Office of Special Trial Counsel (OSTC) in this case violates Article 34, R.C.M. 406, or paragraph 0917021 of the OSTC Standard Operating Procedure (SOP) dated 22 Dec 23?
2. Does violation of the SOP amount to a defect in referral?
3. If the referral violated the SOP, and the referral is defective, what is the remedy?

DEFENSE REPLY

To the extent that a defective referral is a waivable issue, the Defense does not waive the issue raised *sua sponte* by the military judge.

[redacted]
T. J. LIPOSITZ
Captain, U.S. Marine Corps
Defense Counsel

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[redacted]

CERTIFICATE OF SERVICE

I certify that I have delivered a copy of the foregoing document electronically to the Court and Trial Counsel on 23 August 2024.

[redacted]

T. J. LIPOSITZ
Captain, U.S. Marine Corps
Defense Counsel

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

UNITED STATES

v.

DAKOTA S. HONSTEIN
SERGEANT (E-5)
U.S. MARINE CORPS

GOVERNMENT'S RESPONSE TO DEFENSE MOTION TO COMPEL EXPERT CONSULTATION
(Firearms)

23 August 2024

Nature of the Motion

The Defense filed a motion to compel funding for six hours of consultation with the Defense's firearm expert consultant. This is the Government's response to that motion, requesting the Court deny the Defense's motion as written.

Summary

The Defense requested funding for consultation with its firearm expert consultant in order to provide that expert with funding to test the firearm that killed the victim in this case. The Government denied the Defense's request because the Defense failed to demonstrate that repeating the Government's testing at the Defense Expert's lab was relevant and necessary. The Defense then filed a motion to compel the remaining six hours of expert consultation that the Government had denied on the basis laid out above, but the motion does not provide any further description of the Defense's proposed tests beyond repeating what the Government has already done, nor any basis under R.C.M. 701 or R.C.M. 703 that entitles the Defense to production of a Government exhibit to the location of a Defense expert outside the custody, control, and observation of a Government agent. For those reasons, the Government requests the Court deny the Defense's motion to compel six (6) additional hours of expert consultation.

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and any request that the firearm in this case be turned over to their expert consultant for additional testing at his lab. Or, alternatively, that it orders the testing be conducted at a Government facility in the presence of a Government observer.

Summary of Facts

1. On 19 July 2024, the Government discovered on Defense the United States Army Criminal Investigation Laboratory ("USACIL") firearms report and analysis packet, created by Ms. [redacted] in relation to this case. At the end of that report, Ms [redacted] contact information is listed; specifically her phone number and email address.

2. On 24 July 2024, the Government discovered on Defense the C.V. of Mr. [redacted] the government's firearms expert. Mr. [redacted] C.V. contains his contact information, specifically his cell phone number and email address.

3. On 2 August 2024, the Government requested from the Convening Authority funding for sixteen (16) hours of expert consultation with Mr. [redacted] an expert in the field of firearms.

4. On 11 August 2024, the Government positively endorsed the Defense's request for firearms expert consultation, in part. Specifically, the Government recommended that ten (10) hours be approved to review the relevant discovery, to review physical evidence, and to consult with Defense counsel.

5. In its recommendation to the Convening Authority to deny the remaining six (6) hours, the Government stated that the Defense had not demonstrated the necessity nor feasibility of retesting the weapon, which was already tested by USACIL.

6. On 14 August 2024, the Convening Authority approved the Defense's request consistent with the Government's recommendations.

7. On 20 August 2024, after filing an *ex parte* motion with the Court, the Defense filed a motion to compel the additional six hours of expert consultation, which includes physical

[redacted]

examination and test fire of the firearm.

8. On 21 August 2014, the Government denied the Defense's request to produce the firearm to Mr [redacted].

9. In its denial, the Government maintained that pursuant to its obligations, the Defense including its expert may inspect the weapon upon request.

10. As of this motion filing, the Government has not received a request from the Defense requesting the opportunity to inspect the weapon in person.

11. The weapon is currently located in the evidence locker at NCIS onboard Marine Corps Base, Camp Lejeune.

Burden of Proof and Persuasion

As the moving party, the Defense bears the burden of proof and persuasion.

Law

Under Article 46, UCMJ, both trial and defense counsel shall have equal opportunity to evidence in accordance with such regulations as the President may prescribe.[1] This Article coincides with the Rules for Courts-Martial which govern discovery. After services of charges and upon request of the defense, the Government shall permit the defense to inspect documents if the item is within the possession and control of military authorities and relevant defense preparation.[2] As used in this rule "inspect" includes the right to photograph and copy.[3]

Under R.C.M. 703, "Each party is entitled to the production of evidence which is relevant and necessary."[4] The discussion section for R.C.M. 703 provides additionally, that

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[1] R.C.M. 905(a)
Article 46, UCMJ
[2] R.C.M. 701(a)(2)(A)(ii)
[3] R.C.M. 701(b)

[redacted]

"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 Rules for Courts-Martial are modeled after the Federal Rules of Criminal Procedure, and accordingly, military courts should follow the guidance provided by the federal courts in applying or interpreting the Rules for Courts-Martial.[5] R.C.M. 701(a)(2)(A)(i) mimics Rule 16(a)(1)(E) (formerly Rule 16(a)(1)(C)) of the Federal Rules of Criminal Procedure which states:

> Documents and Tangible Objects. Upon request of the defendant, the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial or were obtained from or belong to the defendant.

However, this rule does not automatically entitle the Defense to take possession of the tangible objects contemplated by the rule, and Courts have weighed the Defense's right to independent testing against the interests of the Government when crafting orders to make such evidence available for testing.[7]

ANALYSIS

The Defense has failed to demonstrate the necessity of testing the weapon in this case at the Defense expert's lab. R.C.M. 701 provides the Defense with the opportunity to inspect the Government's evidence, and R.C.M. 703 provides the Defense with the ability to compel

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United States v. Ortiz, 66 M.J. 335, 338 (C.A.A.F. 2008) (citing *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957)).

See United States v. Pizzo, 1996 U.S. Dist. LEXIS 16800 (United States Ct. App. for the Armed Forces 2009) (finding that where applicable, it may be helpful to look to appropriate federal courts because the standard for deciding the "Manual question" is the same as that provided in the federal statute upon which it is based).

United States v. Rockwood, 60 M.J. 721, 733 (N.M.Ct.Crim.App. 2005) (discussing C.M.A.'s balancing of fundamental fairness and relevance against the minimal burden on the Government).

production by the Government of evidence that is relevant and necessary to the Defense. In its motion the Defense stated, "Mr. [redacted] will test, inspect, analyze, and review the firearm in this case, and will compare his results to those produced by Ms. [redacted] Mr. [redacted] lab in Lowell, Massachusetts." The Defense's motion does not provide any further information regarding what exact tests Mr. [redacted] would conduct, or what tools and facilities would be needed, though implicitly he appears to be conducting the same tests in order to compare his results to those produced by the Government's expert.

Given the charges against the Accused in this case, the firearm is of central importance to the Government's case, as acknowledged in the Government's endorsement of the Defense's expert consultant request. However, as the moving party, the Defense still must meet its burden to show the necessity of producing this weapon up to its expert's lab. Moreover, Courts have weighed the Defense's right to independent testing against the Government's interests in preserving its evidence.[2] In this case, the weapon is neither copiable nor divisible, like the evidence frequently inspected tested by Defense experts (e.g. urinalysis samples, DNA samples, or digital copies of hard-drives, phones etc. containing easily replicable digital information). And, the Government, bearing the burden of proof, has a strong interest in preserving the chain of custody and the functionality of the weapon (as it was recovered at the scene of the crime), in order to prove beyond a reasonable doubt that a malfunction of the weapon was not the cause of the weapon discharging and that it has arrived before the members unaltered. Providing the weapon to the Defense outside of Government control for an unspecified set of testing, which may well include disassembly of the weapon or analysis of the trigger and or firing mechanisms

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[redacted]

[1] Def. Mot. at 6 (Encl. pg. 4).

[2] *United States v. Hicks*, 66 M.J. 721, 723 (N.M.C.C.A. Crim. App. 2008) (discussing C.M.A.'s balancing of fundamental fairness and relevance against the potential burden on the Government).

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creates a significant potential threat to those interests. If the Defense's expert wishes to ensure they retain confidentiality free from Government questioning at this point, in some way alters the functionality of the weapon during disassembly, testing, or assembly, or opines that he received it in a state of disfunction at his lab (contrary to the results of the USACIL tests), the Government will be unable to rebut the Defense expert's analysis without the ability to maintain custody of the weapon and observation of the physical steps the Defense's expert took to administer whatever tests he conducted. Therefore, the Government requests the Court order that the firearm remain in the possession of law enforcement, and that any testing take place at a Government facility in the presence of a Government observer in order to reasonably protect Prosecution Exhibit 1 in the Government's case in chief.

RELIEF REQUESTED

The Government respectfully requests that this Court DENY the Defense's motion to compel six additional hours of expert consultation and production of the Government's evidence to the Defense for testing at Mr. [redacted] lab. If the Court decides to grant the Defense's motion to compel independent testing, the Government requests the Court order that the firearm remain in the possession of law enforcement and that testing take place at a Government facility in the presence of a Government observer, and order any additional funding necessary to enable the testing under those conditions.

[redacted]

[redacted]

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EVIDENCE OFFERED

None, the Defense has the burden of proof.

Oral Argument. The Government is prepared to argue this motion orally on 26 August 2024.

[redacted]
M. T. BLACKBURN
Captain, USMC
Special Trial Counsel

[redacted]

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Government's motion in response to Defense's Motion to compel expert consultation was served electronically on defense counsel on 23 August 2024.

[redacted]
M. T. BLACKBURN
Captain, USMC
Special Trial Counsel

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

UNITED STATES **V.** **DAKOTA S. HONSTEIN** **SERGEANT / E-5** **USMC**	**MOTION *IN LIMINE*** **(Instructions)** **13 September 2024**

MOTION

Pursuant to Rule for Courts-Martial 905(b), the Defense moves the Court, *in limine*, to adopt the following instructions with respect to Charge I:

1. **Article 118, UCMJ - Murder (Act Inherently Dangerous to Another)**:

In the Sole Specification of Charge I, the accused is charged with offense of murder in violation of Article 118, UCMJ. To find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond a reasonable doubt:

a. That Ms. [redacted] is dead;[1]

b. That Ms. [redacted] death resulted from the accused's intentional [shooting of Ms. [redacted] with a firearm] [pulling of the trigger of the firearm];[2]

c. That the accused's [shooting of Ms. [redacted]] [pulling of the trigger of the firearm] was an inherently dangerous act;[3]

d. That the accused's [shooting of Ms [redacted]] [pulling of the trigger of the firearm] showed a wanton disregard for human life;[4]

[1] MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 56(b)(3)(a) (2024) [hereinafter MCM].
[2] MCM, pt. IV, ¶ 56(b)(3)(b)
[3] MCM, pt. IV, ¶ 56(b)(3)(c)
[4] MCM, pt. IV, ¶ 56(b)(3)(c)

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[redacted]

e. That the accused knew that death or great bodily harm was a probable consequence of [shooting Ms. [redacted]] [pulling the trigger of the firearm];[5] and

f. That the killing by the accused was unlawful.[6]

2. **Unlawful**. The killing of a human being is unlawful when done without legal justification or excuse.[7]

3. **Intentional**. To find the accused guilty of the offense, the act of [shooting Ms. [redacted] with a firearm] [pulling the trigger of the firearm] must have been intentional.[8] However, death or great bodily harm need not be the intended result.[9] "Intentional" means willfully or on purpose. An act done as the result of a mistake or accident is not done intentionally.

4. **Wanton Disregard**. An act shows a "wanton disregard for human life" when it is characterized by heedlessness of the probable consequences of the act, or indifference to the likelihood of death or great bodily harm, and demonstrates a total disregard for the known probable results of death or great bodily harm. Put simply, an act shows "wanton disregard for human life" if it is calculated to put a human life in jeopardy.[10]

5. **Knowledge**. To find the accused guilty of the offense, the Government must prove beyond a reasonable doubt the accused had actual knowledge that death or great bodily harm was a probable consequence of [shooting Ms. [redacted] with a firearm] [pulling the trigger of the firearm].[11]

6. **Probable Consequences**. Death or great bodily harm may be considered a "probable consequence" of [shooting Ms. [redacted] with a firearm] [pulling the trigger of the firearm] only if the act of [shooting Ms. [redacted] with a firearm] [pulling the trigger of the firearm] was likely to produce death or great bodily harm.

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[5] MCM, pt. IV, ¶ 56(b)(3)(d)
[6] MCM, pt. IV, ¶ 56(b)(3)(e)
[7] MCM, pt. IV, ¶ 56(c)(1)
[8] MCM, pt. IV, ¶ 56(b)(3)(b)
[9] MCM, pt. IV, ¶ 56(c)(4)(a)
[10] *United States v. Berg*, 30 M.J. 195, 199 (C.A.A.F. 1990)
[11] *United States v. Stokes*, 19 C.M.R. 191, 194-196 (C.M.A. 1955); *United States v. McMonagle*, 38 M.J. 53, 60 (C.A.A.F. 1993); *United States v. Looney*, 48 M.J. 681, 686 (A.Ct. Crim. App. 1998)

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[redacted]

7. **Ignorance or Mistake**. I advised you earlier that to find the accused guilty, you must find beyond a reasonable doubt that the accused had actual knowledge that death or great bodily harm was a probable consequence of [shooting Ms. [redacted] with a firearm] [pulling the trigger of the firearm]. If at the time of the offense the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, death or great bodily harm would not have been a probable consequence of [shooting Ms. [redacted] with a firearm] [pulling the trigger of the firearm], the accused cannot be found guilty of the offense.[12] The ignorance or mistake need not have been reasonable, and need only to have existed in the mind of the accused at the time of the offense.[13]

BURDEN

As the moving party, the Defense has the burden of persuasion. R.C.M. 905(c)(2). The burden of proof is by a preponderance of the evidence. R.C.M. 905(c)(1).

LAW

Article 118(3) of the Uniform Code of Military Justice (UCMJ) criminalizes the unlawful killing of a human being by an "act which is inherently dangerous to another and evinces a wanton disregard of human life."[14] The crime of "murder by an act inherently dangerous to another" was a legislative attempt to incorporate what was traditionally understood as "depraved heart murder" into the UCMJ.[15] The legislative history of Article 118(3), UCMJ expressly states that the offense codified "the well-settled common-law rule that, even in the absence of a specific intent to kill or inflict serious bodily harm, the homicide is murder if the offender's conduct was imminently dangerous to others and evinced a wanton

[12] R.C.M. 916(j)(1); *McMonagle*, 38 M.J. at 60
[13] R.C.M. 916(j)(1); *McMonagle*, 38 M.J. at 60
[14] Article 118(3), Uniform Code of Military Justice
[15] *Berg*, 30 M.J. at 200

[redacted]

disregard of human life," and is "*intended to cover those cases where the acts resulting in death are calculated to put human lives in jeopardy,* without being aimed at any one in particular."[16]

The earliest versions of the Manual for Court Martial defined murder as the unlawful killing of another with "malice aforethought."[17] In cases alleging "depraved heart" murder, malice aforethought existed when the accused acted with knowledge that his actions would "probably cause the death of, or grievous bodily harm to any person."[18] Article 118(3), UCMJ originally covered only those depraved acts that were calculated to put human lives in jeopardy *generally*.[19] That is to say that, historically, "murder by an inherently dangerous act" did not include acts showing a wanton disregard toward the life of any person in particular.[20] However, following the C.A.A.F's decision in *Berg*, the Manual for Courts Martial was amended to include inherently dangerous acts aimed at a particular person. Nevertheless, the "depraved heart" nature of the offense remains intact to this day, to include the requirement that the accused have *actual knowledge* that the probable result of his actions would be the death or grievous bodily harm of another.[21]

Because the Government must prove beyond a reasonable doubt that the accused had *actual knowledge* that death or great bodily harm was a probable consequence of his actions, the accused should not be convicted of depraved-heart murder unless he *in fact*, i.e. subjectively, *knew* the risk he created.[22]

RELIEF REQUESTED

Request. The Defense moves the Court, *in limine*, to adopt the above instructions with respect to Charge I.

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[16] *Id.* at 199 (citing W. LaFave and A. Scott, Substantive Criminal Law § 7.4 at 199-200 (1986))
[17] MCM 1917 at 249
[18] *Id.* at 250-51
[19] *Berg*, 30 M.J. at 199
[20] *Id.* at 200
[21] *McMonagle*, 38 M.J. at 60; *Stokes*, 19 C.M.R. at 194-196
[22] *McMonagle*, 38 M.J. at 60

[redacted]

Oral Argument. The Defense requests oral argument if opposed.

[redacted]
T. J. LIPOSITZ
Captain, U.S. Marine Corps
Defense Counsel

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[redacted]

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

UNITED STATES v. DAKOTA S. HONSTEIN SERGEANT/E-5 U.S. MARINE CORPS	**GOVERNMENT'S RESPONSE TO DEFENSE MIL (INSTRUCTIONS)** 20 September 2024

Nature of Motion

This is the Government's response to the Defense's MOTION IN LIMINE (Instructions), dated 13 September 2024.

Summary

The Accused is charged with violations of Article 118(3) and Article 119, for discharging his 9mm pistol while it was pressed against the chest of Ms. [redacted] on 27 January 2024, which resulted in her death a short time later. The Accused initially reported to PMO officers and NCIS agents that during the course of a consensual sexual interaction involving the weapon, the victim had pulled the trigger, followed by a change in his explanation that she had loaded the gun without his knowledge before he pulled the trigger, which was followed finally by an admission that he knew the weapon was loaded and that he had pulled the trigger intentionally but did he did not believe that the weapon would discharge because he believed he had depressed the slide of the pistol enough to disengage the trigger by pushing the weapon at an angle into her chest. The Defense has made a motion in limine regarding proposed instructions for the trial ordered to begin 28 October 2024. The Government requests the Court issue a preliminary ruling regarding the elements, definitions, and *mens rea* required as to Article 118(3), but withhold ruling on whether the Defense rates such a mistake of fact

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[redacted]

instruction until the evidence that would raise the instruction has been received.

Summary of Facts

1. The Accused is charged with violations of Article 118(3) and Article 119, for discharging his 9mm pistol while it was pressed against the chest of Ms. [redacted] on 27 January 2024, which resulted in her death a short time later.

2. The Accused initially reported to PMO officers and NCIS agents that during the course of a consensual sexual interaction involving the weapon, the victim had pulled the trigger, followed by a change in his explanation that she had loaded the gun without his knowledge before he pulled the trigger, which was followed finally by an admission that he knew the weapon was loaded and that he had pulled the trigger but did he did not believe that the weapon would discharge because he believed he had depressed the slide of the pistol enough to disengage the trigger to prevent it from firing. [Enclosures 1 and 2]

3. The Accused also explained that the pistol was involved in the consensual sexual interaction for his sexual gratification, and that the dangerous nature of the weapon added to his arousal. [3:10:50 3:11:24; 3:42:00 3:42:17].

4. The Government submitted written closing comments as part of the Article 32 process, which in part described its charging theory for Charge I:

> The evidence shows that there is probable cause to charge the accused with Charge I. During his NCIS interrogation, the accused admitted that he made the murder weapon condition 0 and pressed it against the victim's chest because he needed an "adrenaline rush."[1] He also admitted to intentionally pulling the trigger, though he stated he believed the slide was pushed back and out of battery – which he stated he believed would stop it from firing. [Page 1]
>
> The Defense's oral argument against an Art 118(3) charge in this case was flawed in multiple ways. The first argument, wherein the Defense posed a rhetorical question to the PHO by asking, "Would he [the accused] wanted to have hurt her?" fundamentally misunderstands the charging scheme under Art 118(3). There is no legal requirement or element that the accused intended death or bodily harm to the victim; had he intended her death, the more appropriate charge would be for a violation of UCMJ Art 118(1) or

[redacted]

118(2) depending on the circumstances. The charge only requires that he knew of the probable consequences of his actions and acted in a reckless and wanton disregard for said consequences. That requirement is readily met by the evidence in this case.

The discussion references "pointing apistol in jest at another and pulling the trigger, believing, but without taking reasonable precautions to ascertain, that it would not be dangerous." But, in this case the Accused knew the weapon was dangerous because he knew it was loaded and ready to fire and he knew it would be dangerous to pull the trigger while the weapon was aimed over the victim's heart absent some assurance that it would not fire. Believing the slide was pushed back far enough to disengage the firing pin due to pushing it into the victim's breast, a naturally soft surface, was not a reasonable belief, and pulling the trigger under those circumstances evidenced a reckless and wanton disregard for the probable consequence of her death after a 9mm bullet passed through her chest from point blank range. That probable consequence varies greatly from "the basis of a charge of involuntary manslaughter [where] a negligent act or omission which, when viewed in the light of human experience, might foreseeably result in the death of another, *even though death would not, necessarily, be a natural and probable consequence of such act or omission."* [Page 2].

Assuming *arguendo* that the Accused accurately relayed her equal interest in involving the loaded weapon, that consent has no bearing on the basic, relevant facts underlying the Art 118(3): the Accused pulled the trigger of a weapon that had a round in the chamber and no safety engaged while it was pointed directly over her chest, and he did not ensure that it would not fire before doing so. Regardless of her consent to all of the sexual acts, she could not consent to that non-sexual act, which killed her. [Page 4]

Attempts to bind the Government based on the RSTC East's sentences in past cases are inappropriate and misleading, and therefore should be disregarded. The Accused in U.S. v. Rohlfs was operating in a training environment, on a dry-fire range where no live ammunition had been issued that day, had been lined-out twice the day before, did not have a magazine in his weapon, and had no reason to believe his weapon was loaded when he pulled the trigger. **Those facts vary significantly from the facts in this case, where despite the Accused's myriad of initial false exculpatory statements, he eventually admitted he knew the weapon was loaded and that there was a round in the chamber when he pulled the trigger on a weapon that does not have a thumb safety while it was positioned over the victim's chest**. [Page 4, emphasis added]

5. The Defense's comments, submitted after the Government's/in response, acknowledge and reflect the

Summary of Evidence Facts Alleged. The Government alleges that Sergeant (Sgt) Honstein intentionally pulled the trigger of a firearm, resulting in the discharge of said firearm and the death of the Ms. [redacted] The discharge of the firearm occurred during a consensual sexual encounter between Sgt Honstein and Ms. [redacted] The consensual nature of the sexual encounter is not disputed. Neither is the consensual use of the firearm

[redacted]

generally during the sexual encounter, which is evidenced by Sgt Honstein's interrogation (GE 3) and corroborated by Ms. [redacted] (GE 18).

Hours after the shooting, Sgt Honstein was interrogated by NCIS. Sgt Honstein was cooperative and answered NCIS' questions in great detail. Although he initially denied inserting a magazine into the firearm, Sgt Honstein eventually stated that he loaded the firearm and pulled the trigger with the barrel depressed against Ms. [redacted] at Ms. [redacted] request. The firearm discharged to Sgt Honstein's shock, and Sgt Honstein immediately attempted to provide aid to Ms. [redacted] before seeking the assistance of LCpl [redacted] and others in the building. Tragically, Ms. [redacted] was pronounced dead at the scene by medical personnel minutes after the shooting. [Page 3]

The factual allegations of the gravamen offense are that Sgt Honstein intentionally pulled the trigger of a loaded firearm resulting in the shooting and death of Ms. [redacted] [Page 10]

Burden of Proof and Persuasion

6. The moving party generally bears the burden of proof and persuasion under R.C.M. 905(c). However, "instructions on findings ***shall*** include . . . (1) A description of the elements of each offense charged, unless findings on such offenses are unnecessary because they have been entered pursuant to a plea of guilty; (3) A description of any special defense under R.C.M. 916 in issue, *United States v. Dearing*, 63 M.J. 478, 482 (C.A.A.F. 2006), and (7) Such other explanations, descriptions, or directions as may be necessary and which are properly requested by a party or which the military judge determines, *sua* sponte, should be given.

Law

7. If an affirmative defense is reasonably raised by the evidence, the military judge has a *sua sponte* duty to instruct the members on that defense. *United States v. MacDonald*, 73 M.J. 426, 434 (C.A.A.F. 2014). A defense is reasonably raised when "some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they chose." *Id.* The defense theory at trial is not dispositive in determining what affirmative defenses have been reasonably raised, but any doubt regarding whether an affirmative defense instruction is in order should be resolved in favor of the accused. United States v. Davis, 53

[redacted]

M.J. 202, 205 (C.A.A.F. 2000).

8. Murder under Article 118(3) is a general-intent crime. *United States v. McMonagle*, 38 M.J. 53, 60 (C.A.A.F. 1993). Mistake of fact is not a defense to a general intent crime unless it is both honest **and reasonable**. *Id.* (emphasis added). In a depraved-heart murder, the killer's attitude is "not measured in the abstract, but is evaluated in light of the surrounding circumstances that are apparent and known to the perpetrator, **or at least should reasonably be apparent and known by him**." *Id.* (emphasis added).

ANALYSIS

9. The Defense's request to instruct the factfinder as to six elements, rather than five should be rejected. MCM, pt. IV, ¶ (b)(3) lists the following elements:

(a) That a certain named or described person is dead;

(b) That the death resulted from the intentional act of the accused;

(c) That this act was inherently dangerous to another and showed a wanton disregard for human life;

(d) That the accused knew that death or great bodily harm was a probable consequence of the act; and

(e) That the killing was unlawful.

The Defense provided no explanation as to why the third element should be split into two, other than by inference that it would best support their theme and theory of innocence in front of the factfinder and perhaps give at least the appearance of any even higher burden for the Government (a lofty sixth element). Absent any legal support or explanation, the Court should simply instruct the members on the five elements in MCM, pt. IV, ¶ (b)(3) and benchbook instruction 3a–42 3.

[redacted]

10. The Defense's requested instructions with respect to the intentional act in this case should also be rejected by the Court. The Defense provides two alternative acts in its proposed instructions: [shooting of Ms. [redacted] with a firearm] and [pulling the trigger of the firearm]. The first, [shooting of Ms. [redacted] with a firearm] is drafted in a way that misleads the fact-finder and inserts error into the record regarding intent element in this case. The Government has never alleged that the Accused *intentionally* shot Ms. [redacted], and using [shooting of Ms. [redacted] with a firearm] directly after the preceding word "intentional" in the second element misleads the fact-finder as to what they must find the Government has proven in order to convict him of Charge 1. The Government specifically disavowed charging the Accused with intentionally shooting Ms. [redacted] in its Art. 32 comments, and the charge itself under Article 118(3) rather than under Article 118(1) or 118(2) gives indication that the Accused did not have the *mens rea* of intentionally discharging or shooting his pistol into her chest. If there was any question based on the language of the charge itself, the Defense has been on notice of the Government's theory since 13 May 2024, which provided the essentially the same explanation three different times: "the Accused pulled the trigger of a weapon that had a round in the chamber and no safety engaged while it was pointed directly over her chest, and he did not ensure that it would not fire before doing so." The Defense's Article 32 comments reflect their understanding of the Government's charging theory:

> The Government alleges that Sergeant (Sgt) Honstein intentionally pulled the trigger of a firearm, resulting in the discharge of said firearm and the death of the Ms. [redacted] The discharge of the firearm occurred during a consensual sexual encounter between Sgt Honstein and Ms. [redacted] The consensual nature of the sexual encounter is not disputed. Neither is the consensual use of the firearm generally during the sexual encounter, which is evidenced by Sgt Honstein's interrogation (GE 3) and corroborated by Ms. [redacted] (GE 18). . . . Although he initially denied inserting a magazine into the firearm, Sgt Honstein eventually stated that he loaded the firearm and pulled the trigger with the barrel depressed against Ms. [redacted] at Ms. [redacted] request.

[redacted]

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As the above comments demonstrate, both parties understood intentional act underlying Charge I in this case as: [pulling the trigger of a weapon that had a round in the chamber and no safety engaged while it was pointed directly over her chest], and that is the instruction this Court should give.

11. This Court should also reject the Defense's related request for a definition of intention or intent beyond what is listed in MCM, pt. IV, ¶ (c)(4)(a) and benchbook instruction 3a–42–3: "The act must be intentional, but death or great bodily harm does not have to be the intended result." The Defense's requested instruction cites to MCM, pt. IV, ¶ (c)(3)(b), the instruction for "Intent to kill or inflict great bodily harm," under Article 118(2), a requirement that is explicitly rejected by MCM, pt. IV, ¶ (c)(4)(a), and the Defense's request for [shooting Ms. [redacted] with a firearm] followed by "must have been intentional" is misleading to the fact finder as to the *mens rea* required in under Article 118(3)–it should again be rejected by this Court in considering an intent definition in the instructions.

12. The Defense's requested instruction to further define wanton disregard with a *United States v. Berg*, 30 M.J. 195, 199 (C.A.A.F. 1990) citation should also be rejected in favor of the instruction from benchbook instruction 3a-42-3: An act shows a wanton disregard for human life when it is characterized by heedlessness of the probable consequences of the act, or indifference to the likelihood of death or great bodily harm, and demonstrates a total disregard for the known probable results of death or great bodily harm. That instruction is squarely consistent with MCM, pt. IV, ¶ (c)(4)(a) without the addition of "if it is calculated to put a human life in jeopardy" which, again, attempts to elevate the *mens rea* the Government must prove.

13. The Defense's requested "Knowledge" instruction is redundant with the Court's instruction on the second element, "That the accused knew that death or great bodily harm was a probable consequence of [the intentional act](pulling the trigger of a weapon that had a round in

[redacted]

the chamber and no safety engaged while it was pointed directly over her chest), and then adds the word "actual" and the beyond a reasonable doubt standard, which the Court will already instruct the members on. The addition of the word "actual" appears to be in conjunction with the Defense's request, addressed below, for this Court to give the specific-intent crime mistake of fact instruction, requiring only an honest (actual) mistake. As discussed below, Article 118(3) is a general intent crime, and the Defense's request to insert the specific-intent crime language for mistake into the knowledge instruction should be rejected as the rest of its requested instruction is redundant and the "actual" language (without the rest of the general intent crime mistake of fact explanation that it must be reasonable as well) is misleading to the fact finder.

14. The Defense's requested instruction for "Probable Consequences" similarly simply restates the fourth element, "That the accused knew that death or great bodily harm was a probable consequence" but replaces probable with the word likely. Given the language of MCM, pt. IV, ¶ (b)(3)(d) using "probable", it is unclear why the word "likely" would be more instructive, other than to provide a synonym. This Court should give instructions consistent with the MCM and the benchbook that avoid redundancy or alterations of the language where there is no discernable benefit to the factfinder.

15. The Defense has requested the specific-intent crime mistake of fact instruction and this Court should deny that request. Murder under Article 118(3) is a general-intent crime. *United States v. McMonagle*, 38 M.J. 53, 60 (C.A.A.F. 1993). Mistake of fact is not a defense to a general intent crime unless it is both honest[actual] **and reasonable**. *Id.* Therefore, the Court should give the mistake of fact instructions from the benchbook 5-11-2, and not the Defense's requested instruction derived from benchbook 5-11-1.

RELIEF REQUESTED

16. The Government requests the Court issue a preliminary rulings regarding the elements,

[redacted]

definitions, and mens rea required as to Article 118(3), but withhold ruling on whether the Defense rates such an instruction until the evidence that would raise the instruction has been received.

EVIDENCE OFFERED

1. Accused's interrogation (previously provided in another motion)
2. Statements of other witnesses documenting the Accused's explanation of what occurred. (previously provided in another motion)
3. Referred Charge Sheet (allied papers)
4. Government Article 32 comments
5. Defense's responsive Article 32 comments.

Oral Argument. The Government requests oral argument on this issue should the Defense oppose.

[redacted]
M. E. BLACKBURN
Captain, USMC
Special Trial Counsel

[redacted]

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Government's response to Defense's Motion in Limine (instructions) was served electronically on defense counsel and the Court on 20 September 2024.

[redacted]

M. E. BLACKBURN
Captain, USMC
Special Trial Counsel

[redacted]

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

UNITED STATES v. DAKOTA S. HONSTEIN SERGEANT U. S. MARINE CORPS	VICTIM LEGAL COUNSEL'S RESPONSE TO DEFENSE'S MOTION IN LIMINE DATED 13 SEPT 24 23 September 2024

MOTION

Ms. [redacted] and Ms. [redacted] the duly appointed Article 6b, UCMJ rights designees and surviving parents of the named victim, through Victim Legal Counsel, submits their response to the Defense's motion in limine regarding the admission of residual hearsay dated dated 13 September 2024.

STANDING

Ms. [redacted] and Ms. [redacted] have standing to respond to this motion because the Defense's motion seeks to elicit testimony from a witness which directly relates to both the named victim's right to privacy guaranteed under Article 6b(a)(9), UCMJ and the prohibitions against admitting evidence of a victim's sexual behavior and predisposition contained in M.R.E. 412.

FACTS

1. On 13 September 2024, the Defense in this case filed a Motion in Limine asking this court to admit the statements of [redacted] to her friend [redacted] that [redacted] had engaged in various forms of bondage, discipline, sadism, and masochism (BDSM).
2. According to Ms [redacted] stated that she specifically engaged in "blood letting," where two partners would cut themselves and bleed into each others' wounds. She also stated to

AE XXIV

[redacted]

[redacted]

Ms. [redacted] that she engaged in being handcuffed, erotic asphyxiation, and simulated non-consensual sex. This conduct occurred three to four times per week, according to Ms. [redacted]

LAW

Article 6b(a)(9) guarantees victims of crime "The right to be treated with fairness and with respect for the dignity and privacy of the victim . . . "

Military Rule of Evidence 412 applies to all cases "involving" an alleged "sexual offense." An alleged "sexual offense" includes any sexual misconduct punishable under the Uniform Code of Military Justice, federal law, or state law.

MRE 412 makes any evidence of a victim's "sexual behavior" or "sexual predisposition" inadmissible in a court-martial except when 1) offered to contest the source of semen, injury or other physical evidence; 2) offered to prove consent on the part of the victim; or 3) when failing to admit the evidence would violate the accused's constitutional rights.

"Sexual behavior" is defined in MRE 412(d) as any sexual behavior not encompassed by the alleged sex offense at issue in the case. "Sexual predisposition" is defined as a 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.

Article 118 of the UCMJ defines the elements of Murder – Act Inherently Dangerous to Another. The fourth element of this offense requires the Government to prove that the accused "knew that death or great bodily harm was a *probable* consequence of the act[.]" (Emphasis added).

ARGUMENT

Bottom line up front: the court should deny the Defense's motion because MRE 412 makes any evidence of a victim's sexual behavior or sexual predisposition inadmissible with

[redacted]

[redacted]

only three narrow exceptions. The source of semen, injury or other physical evidence is not contested in this case, nor are the parties contesting whether [redacted] consented to her sexual interactions with the accused. While the accused has a constitutional right to present a complete defense, the court should nonetheless deny the Defense's motion in limine because her testimony would violate M.R.E. 412, unfairly prejudices the victim's privacy, and is unnecessary to achieve a trial based on facts and context rather than sensationalism and moral judgment.

Even if the court determines that the accused's right to present a complete defense, regardless of whether M.R.E. 412's applicability, requires admitting Ms. [redacted] testimony, the court should limit the parties' questions and Ms. [redacted] testimony to elicit only that [redacted] had stated that she previously willingly engaged in sexual activities involving weapons in the past, period. The court should order the parties not to elicit or attempt to elicit testimony about irrelevant information such as the number of partners [redacted] had, the specifics of her sexual activities involving weapons, sexual activities unrelated to the use of weapons, and other details which, if elicited, would violate and unfairly prejudice her privacy while offering no information of use in determining the accused's guilt.

Ms. [redacted] testimony is inadmissible under Military Rule of Evidence 412

M.R.E. 412 Applies to this Case

MRE 412 prohibits introducing evidence of a victim's sexual behavior and predisposition in cases "*involving* an alleged sexual offense." The rule makes no reference to the accused having to be *charged* with a sexual offense. "Sexual offense" includes any "sexual misconduct" punishable under the Uniform Code of Military Justice. The phrase "sexual misconduct" is not

[redacted]

specifically defined in the Manual for Courts-Martial.[1] Therefore, what "sexual misconduct" actually means is up for interpretation. VLC submits that "sexual misconduct" constitutes any form of misconduct punishable under the UCMJ that is committed during the course of a sexual encounter. The punitive articles of the MCM make clear that certain crimes (like physical assault) can become part of a larger sex crime when committed during the course of a sexual encounter. Take for example Article 120, where a person commits the crime of Rape when they 1) use unlawful force against another person (i.e. assault) while 2) committing a sexual act upon that person. Taking into consideration the facts that 1) the accused and [redacted] were engaged in BDSM and 2) that [redacted] was killed by the accused while engaging in sexual acts and BDSM, the court should conclude that this constitutes "sexual misconduct" as discussed in M.R.E. 412. The existence of "sexual misconduct" makes this a "case involving an alleged sexual offense," to which MRE 412 applies.

M.R.E. 412 applies to Ms. [redacted] statements regarding the victim's sexual past

MRE 412 makes two kinds of evidence inadmissible: 1) evidence offered to prove the victim engaged in other sexual behavior; and 2) evidence offered to prove a victim's sexual predisposition. "Sexual behavior" includes any sexual behavior not encompassed by the alleged offense. "Sexual predisposition" refers to a 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. In this case, the Defense intends to offer both types of evidence. Specifically, the Defense intends to offer statements by Ms. [redacted] that [redacted] engaged in regular sexual activities with other partners involving weapons, bondage, dominance, sadomasochism, erotic

[1] "Sexual misconduct" appears throughout the MCM, but is never defined. It appears most predominantly in the context of Article 120c (Other Sexual Misconduct), but that article neither defines the term nor limits its meaning to only the offenses listed therein.

[redacted]

[redacted]

asphyxiation, and simulated non-consensual sex, and that [redacted] was involved in the BDSM lifestyle, generally.

The exceptions to M.R.E. 412 do not apply in this case

M.R.E. 412(b) contains several exceptions to the rule's prohibition against admitting evidence of a victim's sexual behavior and predisposition. The first exception, contained in M.R.E. 412(b)(1), allows the admission of such evidence when introduced to dispute the source of semen, physical injury, or other evidence. The source of semen, physical injury or other evidence are not contested issues in this case, making this exception inapplicable.

The next exception to M.R.E. 412 allows evidence of the victim's sexual behavior and predisposition when introduced to show consent on the part of the victim. This also is not a contested issue in this case, therefore making this exception also inapplicable.

The third exception to the rule states that the evidence is admissible if it is required to protect an accused's constitutional rights. These rights will be addressed below.

The accused's constitutional right to present a complete defense does not require eliciting testimony from Ms. [redacted] regarding the victim's sexual proclivities.

As described in the Defense's motion, the accused has a constitutional right to present a complete defense. This and other constitutional rights exist independently of M.R.E. 412, which also makes evidence of a victim's sexual behavior predisposition admissible if offered to protect an accused's constitutional rights. Bottom line: regardless of whether M.R.E. 412 applies, the accused may nonetheless introduce the offered evidence to protect his constitutional rights.

The Defense argues that the accused's constitutional right to present a complete defense depends on the admission of [redacted] statements to Ms. [redacted] for three reasons. First, the Defense argues that the accused could argue that [redacted] killing was the result of her "desired activities" rather than a wanton disregard for her life. Assuming for the moment that she consented to

[redacted]

[redacted]

engaging in "gun play" with a loaded weapon—VLC has no evidence suggesting that is the case—the Defense argues that engaging in "desired activities" and wantonly disregarding [redacted] life as mutually exclusive actions. In other words, accused's conduct was either desired by the victim, or showed wanton disregard for her life, but could not be both. Logically this makes no sense. Anyone with experience and knowledge of the ways of the world knows that a single act can be both desired by Person A and, if acted upon by Person B, would be considered as wanton disregard for Person A's life. Take for example young children who may engage in dangerous forms of play. While "desired" and considered fun by the children, an adult who facilitates and encourages such play may find themselves facing serious consequences. A responsible adult looking out for the children and appreciating the dangerousness of their conduct would step in and stop the dangerous play out of concern for the children's safety. The same should have occurred here. The victim's desire to engage in "gun play" with a loaded weapon does not authorize the accused to act with wanton disregard for her life. As a basically-trained U.S. Marine, he knows the danger associated with loaded weapons and is taught over and again through training and repetition that he should "never point a weapon at anything you do not intend to shoot." Despite this knowledge and training in firearm safety, the accused chose to load the weapon and point it at [redacted] an act displaying a wanton disregard for her life.

The accused's argument that the victim desired this conduct is also contradicted in part by the accused's own statements to law enforcement. [redacted]

[redacted]

[redacted]

[redacted]

The accused next submits that he could use Ms. [redacted] testimony to argue that [redacted] was a willing and knowledgeable participant. Regardless of whether this is true, the accused is again not releaved of his duty to act reasonably with regard to [redacted] life and safety.

The Defense's third and final argument for admitting Ms. [redacted] testimony is to "counter potential biases or misconceptions that might influence the members' perception" and to "ensure that the case is evaluated based on factual and contextual evidence rather than sensationalism and moral judgment." This argument fails for several reasons. First, eliciting detailed descriptions of how [redacted] enjoyed BDSM, simulated non-consensual sex, erotic asphyxiation, gun play, self-injury, and other forms of non-traditional sex acts is wholly irrelevant to determining the elements of the charged offenses, namely whether the accused acted with wanton disregard for human life and whether he knew that death or serious bodily harm were probable results of his conduct. It also risks unfairly prejudicing the victim's privacy while ignoring the fact that the accused has engaged in equally non-traditional sex acts with numerous partners of many past occasions. If the Defense hopes to counter any prejudices against the accused because of his lifestyle, then they should seek to admit testimony about his sex life, not the victim's. The fact that they make no mention of his sex life shows this is nothing more than a thinly-veiled attempt to prejudice the members against the victim by putting her non-traditional sex life, which involved actions and conduct that most people would find uncomfortable if not outright repulsive, on display for all to see. This is the exact conduct that M.R.E. 412 was adopted to protect against. Even if M.R.E. 412 is found not to apply in this case, the accused's can present a complete defense without also delving into unnecessary and uncomfortable details about the victim's sex life that has no relevance beyond showing that she engaged in risky sex in the past and on the night she was killed.

[redacted]

[redacted]

Even if Ms. [redacted] testimony is admissible to protect the accused's constitutional right to present a complete defense, the court should limit the parties' questions and Ms. [redacted] testimony to eliciting only that [redacted] had engaged in risky sexual behavior in the past, with no further details.

If the court determines that the accused's constitutional right to present a complete defense mandates the admission of Ms. [redacted] testimony, the court should narrowly tailor the parties' questions and Ms. [redacted] testimony to establish no more than what the Defense seeks the fact that [redacted] willingly engaged in sex acts involving weapons with the accused. The court should also order the parties not to elicit information regarding specific acts performed by [redacted] her number of partners, the frequency of her sexual encounters, her sexual preferences, and other facts which provide no insight into Sgt Honstein's state of mind and which serve only to embarrass or degrade the deceased in violation of Article 6b, UCMJ.

RELIEF REQUESTED

[redacted]

ROBERT C. PYATT
Captain, U.S. Marine Corps
Victims Legal Counsel

Victims Legal Counsel submits the following evidence in support of this motion:

Exhibit 1: Preliminary Hearing Officer Supplemental Report

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Certificate of Service

I hereby attest that a copy of the foregoing response was served on the court and opposing counsel electronically on 23 September 2024.

[redacted]

ROBERT C. PYATT
Captain, U.S. Marine Corps
Victims Legal Counsel

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[redacted]

[redacted]

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

UNITED STATES **V.** **DAKOTA S. HONSTEIN** **SERGEANT / E-5** **USMC**	**MOTION *IN LIMINE*** **(Residual Hearsay)** **13 September 2024**

MOTION

Pursuant to Rule for Courts-Martial (R.C.M.) 905(b), the Defense moves the Court, *in limine*, to admit Ms. [redacted] statements under Military Rule of Evidence (M.R.E.) 807. Moreover, this motion serves as M.R.E. 807(b) notice that the Defense intends to admit Ms. [redacted] statement to Ms. [redacted] that Ms. [redacted] had engaged in extra-marital sexual conduct that involved Bondage, Discipline, Sadism, and Masochism (BDSM); that that the BDSM included the use of knives and "letting blood," in which two bleeding individuals would bleed into each other's wounds; and that the BDSM also included being handcuffed, asphyxiation, and simulated nonconsensual sex; and finally, that Ms. [redacted] engaged in this activity as often as three to four times a week with people she met on dating apps.

BURDEN

As the moving party, the Defense has the burden of persuasion. R.C.M. 905(c)(2). The burden of proof is by a preponderance of the evidence. R.C.M. 905(c)(1).

Introduction

The accused is charged with murder for tragically shooting Ms. [redacted] as they consensually engaged in Bondage, Discipline, Sadism, and Masochism (BDSM) sexual activity. BDSM practices inherently involve a certain level of risk. Illustrating for the fact finder MS. [redacted] proclivity for seeking those activities for her own pleasure will provide context to the behaviors leading up to the incident. By

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[redacted]

highlighting Ms. [redacted] experience and appetite for BDSM activities, the defense may argue that the death was a tragic result of Ms. [redacted] desired activities rather than the accused's wanton disregard for her life. In addition, the defense will also argue that Sgt Honstein is less likely to perceive any risks associated with such activity if Ms. [redacted] is a knowledgeable and willing participant. Furthermore, addressing Ms. [redacted] proclivity for BDSM can also counter potential biases or misconceptions that might influence the member's perception. In cases involving sexual activities that deviate from societal norms, there can be a tendency to misinterpret or unfairly judge the involved parties. By openly discussing the victim's involvement in BDSM, the defense can challenge any prejudiced views and ensure that the case is evaluated based on factual and contextual evidence rather than sensationalism or moral judgment. This approach aims to ensure that the accused receives a fair trial, with the verdict based on an accurate and impartial assessment of the evidence.

FACTS

1. Naval Criminal Investigative Service interviewed [redacted] on 20 February 2024. (A copy of the NCIS report of the interview is attached hereto as "Enclosure A")
2. Ms. [redacted] considered Ms. [redacted] her best friend.
3. Ms [redacted] and Ms. [redacted] became friends when they worked together at McDonald's and continued to be friends after Ms. [redacted] left to pursue work for another employer.
4. Ms. [redacted] and [redacted] spoke regularly. On many occasions, Ms. [redacted] told Ms. [redacted] that she had engaged in extra-marital sexual conduct that involved Bondage, Discipline, Sadism, and Masochism (BDSM). Ms. [redacted] also told Ms. [redacted] that Ms. [redacted] would engage in sexual conduct that included the use of knives and "letting blood," in which two bleeding individuals would bleed into each other's wounds.
5. Ms. [redacted] indicated that Ms. [redacted] would also engage in other various sexual activities that included being handcuffed, asphyxiation, and simulated nonconsensual sex.

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[redacted]

6. During the interview, Ms. [redacted] said that [redacted] would engage in this activity as often as three to four times a week and would meet people through various dating apps and normally have sex with them the first time [redacted] would meet them.

7. Ms. [redacted] DNA was found on the upper receiver and magazine of the pistol found at the scene.

LAW

In *Chambers v. Mississippi*, the Supreme Court long ago recognized that:

> "Few rights are more fundamental than that of an accused to present witnesses in his own defense. In the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence. Although perhaps no rule of evidence has been more respected or more frequently applied in jury trials than that applicable to the exclusion of hearsay, exceptions tailored to allow the introduction of evidence which in fact is likely to be trustworthy have long existed."[1]

Generally, hearsay is not admissible as evidence at trial unless an exception applies. While there are many enumerated exceptions to the rule against hearsay, the residual hearsay exception works to "accommodate[] ad hoc instances in which statements not otherwise falling within a recognized hearsay exception might nevertheless be sufficiently reliable to be admissible at trial.[2]

A recent and significant amendment to Federal Rule of Evidence 807, known as the residual exception, took effect within the Federal Rules on 1 December 2019. Military Rule of Evidence 807 was similarly amended effective 1 June 2021.[3]

The earlier Rule required a statement to be surrounded by "equivalent circumstantial guarantees of trustworthiness" as statements admitted under the enumerated hearsay exceptions found under Rules 803 and 804. The new Rule requires only that the statement be supported by "sufficient guarantees or trustworthiness" when considering the totality of the circumstances and corroborating evidence of the statement. This new

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[1] *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S. Ct. 1038, 1049 (1973) (internal citations omitted).
[2] *Idaho v. Wright*, 497 U.S. 805, 817 (1990), citing to Senate Judiciary Committee's Note on Fed. Rule Evid. 803(24), 28 U. S. C. App., pp. 786-787; E. Cleary, McCormick on Evidence § 324.1, pp. 907-909 (3d ed. 1984).
[3] Mil. R. Evid. 1102.

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[redacted]

standard presents a lower threshold for admission by relaxing the standard for determining whether hearsay evidence is considered trustworthy.

In accordance with Mil. R. Evid. 807 in its current form, hearsay statements may be admitted as residual hearsay if: (1) the statement is supported by sufficient guarantees of trustworthiness – after considering the totality of the circumstances under which it was made and evidence, if any, corroborating the statement; and (2) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts. [4]

In *United States v. Kelley*, the Court of Appeals for the Armed Forces (CAAF) articulated the test for admitting residual hearsay under the old M.R.E. 807.[5] Under the *Kelley* test, residual hearsay is admissible under Military Rule of Evidence (M.R.E.) 807 if the hearsay meets three requirements: (1) materiality, (2) necessity, and (3) reliability.[6] The amended rule eliminates the materiality factor and the requirement that its introduction into evidence serves the purposes of the rules of evidence and justice.[7]

Reliability

There is a dearth of military justice case law concerning an accused's use of residual hearsay. Instead, most case law in this area concerns the Government's use of residual hearsay against an accused. That case law generally concerns an accused's constitutional right to confrontation. Here, the issue is an accused's constitutional right to present a complete defense. Moreover, because of the recent change to M.R.E. 807, limited military case law exists to clarify the new rule's text.

However, a body of military case law exists related to the old, stricter, rule contemplating circumstantial guarantees of trustworthiness. The Navy-Marine Corps Court of Criminal Appeals (N.M.C.C.A.), in *United States v. Zamora*, citing the United States Supreme Court in *Idaho v. Wright* and analyzing the stricter version of M.R.E. 807, explained, "[a] court should consider the totality of the circumstances … surround[ing] the making of the statement […] that render the declarant particularly

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[4] Mil. R. Evid. 807 (2024).
[5] *United States v. Kelley*, 45 M.J. 275 (C.A.A.F. 1996).
[6] *Id.* at 280.
[7] *Compare* Mil. R. Evid. 807 (2019) *with* Mil. R. Evid. 807 (2024).

[redacted]

worthy of belief and not use a mechanical test for determining particularized guarantees of trustworthiness."[8] The Court in *Zamora* noted four factors to consider: (1) spontaneity and constant repetition; (2) mental state of the declarant; (3) use of terminology unexpected of a child of similar age; and (4) lack of motive to fabricate.[9] N.M.C.C.A. further explained that "[e]vidence admitted under Mil. R. Evid. 807 is not required to be completely free from all questions," and that "military judges [...] should consider both those indicia that add to and detract from a statement's reliability when determining its admissibility under the residual hearsay rules."[10]

The Court of Appeals for the Armed Forces (C.A.A.F.), in *United States v. Donaldson*, still using the old rule, also cataloged a number of indicia of reliability, including, among other things: (1) the mental state of the declarant; (2) the spontaneity of the statement; (3) the use of suggestive questioning; (4) whether the statement can be corroborated; (5) the declarant's age, and (6) the circumstances under which the statement was made.[11]

Regardless, in *Chambers*, the Supreme Court admonished trial judges against applying hearsay rules "mechanistically to defeat the ends of justice" where "constitutional rights directly affecting the ascertainment of guilt are implicated."[12] In *United States v. McAllister*, the C.A.A.F. clearly articulated that servicemembers have a constitutional "due process right to present evidence establishing a defense."[13]

ANALYSIS

The Evidence is Sufficiently Trustworthy

[8] United States v. Zamora, 80 M.J. 614, 621 (N-M Ct. Crim. App. 2020) (quoting Idaho v. Wright, 497 U.S. 805, 819, 822 (1990). Internal citations omitted.
[9] *Id.*
[10] *Zamora*, 80 M.J. at 629 (quoting United States v. Johnson, 49 M.J. 467, 472 (C.A.A.F. 1998)), (citation omitted).
[11] *United States v. Donaldson*, 58 M.J. 477, 488 (C.A.A.F. 2003).
[12] *Id.*
[13] *United States v. McAllister*, 64 M.J. 248, 249 (C.A.A.F. 2007).

[redacted]

The circumstances surrounding Ms. [redacted] statements sufficiently guarantee their trustworthiness. Ms. [redacted] had no motive to lie, the statements were made repeatedly and without any apparent prompting, and the statement is corroborated by the statement of the accused.

First, Ms. [redacted] had no reason to fabricate the stories to her close friend, Ms. [redacted] Further, the information conveyed by Ms. [redacted] is sensitive and potentially even embarrassing. Someone would likely only provide such intimate details to a close friend if they were true. Federal Circuit Courts have found statements trustworthy where the declarant had no motive to lie and common sense suggests a low probability that the statement is a lie.[14]

Second, Ms. [redacted] was Ms. [redacted] trusted confident, and Ms. [redacted] sharing of personal details of her sexual activity with Ms. [redacted] reveals the level of trust Ms. [redacted] had in Ms. [redacted] This further indicates the statements' reliability. Federal Circuit Courts have found a statement to a trusted confidante should be considered more reliable to a total stranger.[15]

Third, rather than recanting or repudiating her statements that she engaged in BDSM, Ms. [redacted] instead repeated them, often, and even recounting similar accounts of her activity. These discussions are not the product of suggestive questioning but rather a consistent, well-considered, and continuing conversation between two friends. Federal Circuit Courts have found carefully considered statements to be trustworthy.[16]

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[14] *See, e.g., United States v. Burdulis*, 753 F.3d 255 (1st Cir. 2015) (inscription on a thumb drive indicating that it was made in China was properly admitted under Rule 807 to prove that it was made in China, as opposed to the United States; a manufacturer marketing a thumb drive in the United States would have no motive to lie by stating it was made in China).

[15] *See, e.g., United States v. Morgan*, 385 F.3d 196 (2d Cir. 2004) (letter written by a codefendant to her boyfriend was properly admitted against the defendant; it was sufficiently trustworthy because it was written to an intimate acquaintance in the privacy of the codefendant's hotel room, with no expectation that it would ever find its way to the police).

[16] *See, e.g., United States v. York*, 852 F.2d 221, 226 (7th Cir. 1988) (where the declarant answered affirmatively to every question asked by the United States Attorney, trustworthiness could not be found: "Apparently, not even a single placebo question was amongst the lot to ensure that Tommy was considering the substance of each question and answering responsively, rather than simply agreeing with every question that the government posed.").

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[redacted]

Lastly, the facts relayed to NCIS by Ms. [redacted] are corroborated by Sgt Honstein's statement to NCIS immediately after the incident, and Ms. [redacted] DNA being discovered on the gun. Sgt Honstein told NCIS that he met Ms. [redacted] through a dating app. He said that Ms. [redacted] met him in person for the first time that day, and Ms. [redacted] consented to sexual contact. Sgt Honstein's statement also corroborates the fact that Ms. [redacted] was familiar with and engaged in BDSM and sexual activity that included the use of weapons. Ms. [redacted] DNA on the gun and magazine reveals that she touched, if not handled, the gun that evening, which is consistent with her statements to Ms. [redacted]

The Evidence is Not Reasonably Available From Any Other Source

The evidence is not available from any other source that Sgt Honstein can obtain through reasonable efforts.

In his interview immediately after the incident, Sgt Honstein told NCIS investigators that he and Ms. [redacted] were involved in BDSM-style sex involving a weapon. This fact is central to this case. Whether he was involved such an activity is more probable if it can be shown that Ms. [redacted] was familiar with it and regularly involved in it.

Ms. [redacted] statements are probative of her desire to find partners to engage with her in BDSM activities. Thus, introducing evidence of Ms. [redacted] familiarity with, and desire for, BDSM involving weapons into evidence makes it far more probable than it would without the evidence that the fact-finder will conclude Ms. [redacted] engaged in a BDSM activity that tragically— but without wanton disregard for her life—led to her death.

There is no other reasonably available evidence to corroborate Sgt Honstein's statement.

The Evidence is Necessary as It is Part of the Accused's Constitutional Right to Present Complete Defense

To prevail on the allegations under Charge I, a violation of Article 118, the Government must prove, beyond a reasonable doubt that Sgt. knew that death or great bodily harm was the probable consequence of his actions. That Ms. [redacted] has experience in these types of encounters bears directly on Sgt

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[redacted]

Honstein's state of mind as whether he would have perceived any such risk If both individuals involved are consenting adults, experienced in this type of activity, any perception of risk is necessarily reduced

RELIEF REQUESTED

The Defense moves the Court, *in limine*, to admit the requested evidence in the form of the testimony of [redacted] The Defense requests oral argument if opposed.

EVIDENCE AND HEARING

In support of this motion, the Defense offers the following enclosures.

Enclosure A BS 000304-000305 NCIS Report of interview of [redacted]
Enclosure B BS 000506 Video of NCIS interview of [redacted]

[redacted]
P E. CARSON
Captain, U.S. Marine Corps
Defense Counsel

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AE I
[redacted]

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

UNITED STATES v. DAKOTA S. HONSTEIN SERGEANT/E-5 U.S. MARINE CORPS	**GOVERNMENT'S RESPONSE TO DEFENSE MIL (RESIDUAL HEARSAY)** 20 September 2024

Nature of Motion

This is the Government's response to the Defense's MOTION IN LIMINE (Residual Hearsay), dated 13 September 2024.

Summary

The Accused is charged with violations of Article 118(3) and Article 119, for discharging his 9mm pistol while it was pressed against the chest of Ms. [redacted] on 27 January 2024, which resulted in her death a short time later. The Accused initially reported to PMO officers and NCIS agents that during the course of a consensual sexual interaction involving the weapon, the victim had pulled the trigger, followed by a change in his explanation that she had loaded the gun without his knowledge before he pulled the trigger, which was followed finally by an admission that he knew the weapon was loaded and that he had pulled the trigger intentionally but did he did not believe that the weapon would discharge because he believed he had depressed the slide of the pistol enough to disengage the trigger by pushing the weapon at an angle into her chest. The Defense has moved the Court to admit significant evidence of Ms. [redacted] sexual history and participation in consensual sexual interactions. The Government requests the Court deny that motion.

Summary of Facts

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[redacted]

1. The Accused is charged with violations of Article 118(3) and Article 119, for discharging his 9mm pistol while it was pressed against the chest of Ms. [redacted] on 27 January 2024, which resulted in her death a short time later.

2. The Accused initially reported to PMO officers and NCIS agents that during the course of a consensual sexual interaction involving the weapon, the victim had pulled the trigger, followed by a change in his explanation that she had loaded the gun without his knowledge before he pulled the trigger, which was followed finally by an admission that he knew the weapon was loaded and that he had pulled the trigger but did he did not believe that the weapon would discharge because he believed he had depressed the slide of the pistol enough to disengage the trigger to prevent it from firing. [Enclosures 1 and 2]

3. The Accused also explained that the pistol was involved in the consensual sexual interaction for his sexual gratification, and that the dangerous nature of the weapon added to his arousal. [3:10:50 – 3:11:24; 3:42:00 – 3:42:17].

Burden of Proof and Persuasion

6. The Defense bears the burden of proof and persuasion as the moving party under R.C.M. 905(c).

Law

MRE 807 provides: (a) *In General*. Under the following conditions, a hearsay statement is not excluded by the rule against hearsay even if the statement is not admissible under a hearsay exception in Mil. R. Evid. 803 or 804: (1) the statement is supported by sufficient guarantees of trustworthiness – after considering the totality of the circumstances under which it is made and evidence, if any, corroborating the statement; and

[redacted]

(2) the statement is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.

However, under MRE 403, "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."

ANALYSIS

I. The Requested Evidence Is Not Constitutionally Required

The Defense has provided several arguments in support of its claim that Ms. [redacted] testimony is constitutionally required—each is addressed below. However, all of those arguments are countered by two facts. First, the Defense has failed to provide any evidence (or even argue) that the Accused was actually aware of any of the information the Defense seeks to admit through Mr. [redacted]. Second, the vast majority of the evidence requested is significantly attenuated from the facts in this case. The Defense provided the following summary of the proposed evidence, derived from NCIS's interview of Ms. [redacted]

[redacted]

That Ms. [redacted] sexual interactions were extra martial and may have occurred as often as three to four times a week is not probative of any issue in this case. Similarly, bloodletting, handcuffing, asphyxiation and simulated non-consensual sex did not take place in this case and are attenuated from any other fact at issue in this case, and indicated only that Ms. [redacted] generally engaged in consensual BDSM. Finally, even a knife—which can also be a deadly weapon—has such a

[redacted]

significantly lower risk of death compared to a loaded pistol that is ready to fire (not on safe) pressed into her chest over her heart. And, Ms. [redacted] explicitly denied that Ms. [redacted] had ever discussed "gun play" with her, further countering the Defense's argument that "Ms. [redacted] DNA on the gun and magazine reveals that she touched, if not handled, the gun that evening, which is consistent with her statements to Ms. [redacted]. The attenuated nature of large portions of the requested evidence, and the Accused's lack of knowledge of those facts weigh against each of the Defense's specific arguments addressed below.

a. Consent is not at issue in this case

The Government has not made any allegation that Ms. [redacted] was not in the Accused's barracks room or participating consensually in their BSDM sexual interaction of her own accord, nor is that a predictable or likely inference that a factfinder would make based on the Government's theory of the case (laid out extensively in the Article 32 comments and again in the Government's response to the Defense's requested instructions motion). Additionally, the Defense's proposition that it "may argue that the death was a tragic result of Ms. [redacted] desired activities rather than the accused's wanton disregard for her life" should be barred by this Court. There is no admissible legal theory that the Defense can or has argued where she can consent to (or "desire") being shot through the heart by the Accused that would relieve him of culpability under the charges he faces. Arguing she desired that, and therefore the Accused is not culpable is an impermissible nullification argument, and should not be allowed by this Court. The Defense's argument that it must constitutionally be allowed to put on evidence of consent is therefore misplaced because her consent to the sexual BDSM interaction with the Accused is not at issue.

Additionally, should the Defense be allowed to put on evidence of consent or put consent at issue by using Ms. [redacted] past sexual history, the Government will seek to put on evidence in rebuttal of three different past sexual partners, all of whom participated in BDSM sexual

[redacted]

encounters where the Accused exceeded their level of consent to the potentially life-threatening acts he was taking. Those acts were choking Ms [redacted] beyond her consent, holding a knife to Ms. [redacted] throat without her consent, and pulling the trigger of a pistol while it was aimed against the head of Ms. [redacted] without her consent. While the Government is not seeking to admit those acts in its case in chief at this point, should the Defense seek to put on evidence of consent or put consent at issue in the case, the Government will offer that evidence in rebuttal.

b. Ms. [redacted] sexual history with BDSM is not probative of the accused's ability to assess the risk of his intentional act

The Defense's motion contains three different versions of the same argument that Ms. [redacted] experience with BDSM somehow made the Accused's actions less wanton:

> (1)In addition, the defense will also argue that Sgt Honstein is less likely to perceive any risks associated with such activity if Ms. [redacted] is a knowledgeable and willing participant.
>
> (2) That Ms. [redacted] has experience in these types of encounters bears directly on Sgt Honstein's state of mind as whether he would have perceived any such risk.
>
> (3) The fact-finder will conclude Ms. [redacted] engaged in a BDSM activity that tragically – but without wanton disregard for her life – led to her death.

This Court should reject that argument by the Defense in any form. There is no amount of experience that Ms [redacted] could have to make her less susceptible to death from a gunshot wound to the chest from a muzzle that was being buried in her chest. An inference that it "bears directly on his state of mind" has no basis; moreover, the Defense has not presented any evidence to meet its burden that is what actually occurred. Again, the Defense has not even provided any evidence (nor did it argue in its motion) that the Accused was actually aware of her experience, and in fact he explicitly denied he was prior to their meeting that day during his interrogation by NCIS.

[redacted]

c. **Admitting the requested evidence is not the appropriate remedy for the Defense's concern regarding an impartial fact-finder.**

The Defense's argument that, addressing Ms. [redacted] proclivity for BDSM can also counter potential biases or misconceptions that might influence the member's perception" should also be rejected. There is no legal basis for that requested remedy and the Defense has not provided any evidence that any such bias will even occur. Even if the Defense could meet its burden on that issue, the proper remedy for this issue is the voir dire process and the Defense's access to the liberal grant mandate, not the admission of evidence that is calculated to equally embarrass the victim.

II. The requested evidence does not pass an MRE 403 balancing test

Given the arguments above, the Defense's requested evidence should not be admitted because it fails an MRE 403 balancing test. Even though MRE 412 does not apply to this case, the Defense should not be allowed to admit the extensive evidence of Ms. [redacted] sexual experiences, all of which warrants a significant privacy right on her part (information she chose only to share it with Ms. [redacted] her best friend,) and much of which appears to be characterized to embarrass her (e.g. extra-martial sex 3-4 times a week with men she had just met over social media apps) the sum of which makes it unfairly prejudicial. As discussed above, there is little to no probative value for any of the requested evidence, and it is misleading to a factfinder because there is no evidence that the Accused knew any of that information, nor that he was affected by it. Accordingly, this evidence fails an MRE 403 balancing test, and the Defense's motion should be denied.

However, should this Court find this evidence is admissible, it should issue an order with significant limitations allowing only the following facts to be admitted: "Ms [redacted] regularly participated in consensual sexual BDSM interactions with men she met over social media or

[redacted]

dating applications" for whatever specific purpose the Court finds the Defense has met its burden to prove.

RELIEF REQUESTED

14. The Government requests the Court deny the Defense's motion.

EVIDENCE OFFERED

1. Accused's interrogation (provided previously by the Defense)
2. Ms [redacted] interview (provided previously by the Defense)

Oral Argument. The Government requests oral argument on this issue.

[redacted]
M. E. BLACKBURN
Captain, USMC
Special Trial Counsel

[redacted]

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this response to Defense's Motion was served electronically on defense counsel and the Court on 20 September 2024.

[redacted]

M. E. BLACKBURN
Captain, USMC
Special Trial Counsel

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[redacted]

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

UNITED STATES v. DAKOTA S. HONSTEIN SERGEANT / E-5 USMC	DEFENSE MOTION FOR APPROPRIATE RELIEF (Compel Production of Defense Witnesses) 13 September 2024

MOTION

Pursuant to Rules for Court-Martial (R.C.M.) 703 and 906(b)(7), the defense moves this Court to compel the production of lay witnesses necessary for the defense to present a case on the merits and, in the event of conviction, sentencing. Specifically, the defense requests the government to be compelled to produce [redacted]

BURDEN

As the moving party, the Defense has the burden of persuasion and the burden of proof under RCM 905(c)(2). Under RCM 905(c)(1), the standard as to any factual issue necessary to resolve this motion is to a preponderance of the evidence.

FACTS

1. On 30 August 2024, the Defense sent the government its initial request for the production of witnesses in accordance with the TMO. This request is included as Enclosure 1.
2. The government responded on 7 September 2024. Their response is included as Enclosure 2.
3. In its response, the trial counsel denied four of the defense-requested witnesses. One of the witnesses [redacted] was denied as cumulative. A copy of Ms. [redacted] affidavit is attached hereto as Enclosure 3.
4. The government denied the production of [redacted]

[redacted]

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because, in the trial counsel's view, "the synopsis of expected testimony failed to demonstrate their relevance and necessity on either the merits or for an interlocutory question." Encl 2.

5. Sgt Honstein is accused of killing Ms. [redacted]. on or about 27 January 2024 in aboard Camp Lejeune. The government alleges Sgt Honstein violated Articles 92, 118 and 119 of the UCMJ.

[redacted]

10. In its 404(b) notice, the government noticed intent to introduce the statements of [redacted]. A copy of the government's supplemental 404(b) notice is attached hereto as Enclosure 7.

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[redacted]

LAW

Article 46, UCMJ, 10 USC § 846, provides that all parties to a court-martial are owed an "equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." Similarly, R.C.M. 703(a) states that, "The prosecution and defense and the court-martial shall have equal opportunity to obtain witnesses and evidence, subject to R.C.M. 701, including the benefit of compulsory process." Moreover, "Each party is entitled to the production of any witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary." R.C.M. 703(b). Testimony is relevant if it has the 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. R.C.M. 703(b)(1), Discussion; Mil. R. Evid. 401. Testimony is necessary within the meaning of this rule 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." *U.S. v. Reveles*, 41 M.J. 388, 394 (CAAF 1995) (citing R.C.M. 703(b)(1), Discussion.)

Additionally, "Under the Sixth Amendment to the Constitution, one accused of a crime is guaranteed the right to compel the attendance of witnesses. Who these witnesses shall be is a matter for the accused and his counsel. He may not be deprived of the right to summon to his aid witnesses who it is believed may offer proof to negate the Government's evidence or to support the defense." *U.S. v. Sweeney*, 14 U.S.C.M.A. 599, 602 (C.M.A. 1964) (citing *U.S. v Seeger*, 180 F Supp 467 (SD NY) (1960); *U.S. v McGaha*, 205 F Supp 949 (ED Tenn) (1962). This right is not absolute, but the military judge has a duty "to assure to the greatest degree possible…equal treatment for every litigant before the bar." *U.S. v Manos*, 17 U.S.C.M.A. 10, 15-16 (C.M.A. 1967).

In *Allen*, the Navy-Marine Corps Court of Criminal Appeals provided the minimum seven factors that the military judge, in exercising his discretion, must balance in determining whether a material witness must be produced. Those seven factors are: (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

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sentencing; (3) whether the witness' testimony would be "merely cumulative;" (4) the availability of alternatives to the personal appearance of the witness such as depositions, interrogatories, or previous testimony; (5) the unavailability of the witness, such as that occasioned by non-amenability to the court's process; (6) whether or not the requested witness is in the armed forces and/or subject to military orders; (7) the effect that a military witness' absence will have on his or her unit and whether that absence will adversely affect the accomplishment of an important military mission or cause manifest injury to the service. *U.S v. Allen*, 31 M.J. 572, 610-611 (N.M.C.M.R. 1990). Additionally, the *Allen* court stated that considerations other than materiality, such as distance, inconvenience, and cost, have no role in determining production. Id.

The Supreme Court explained in in *Washington v. Texas*, 388 U.S. 14, 19 (1967), that "[t]he right to offer the testimony of witnesses...is in plain terms the right to present a defense.... The accused has a right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law."

ANALYSIS

[redacted] is Sgt Honstein's stepmother. She has known Sgt Honstein for much of his life. She began forming a closer relationship to Sgt Honstein in 2017. According to her 22 August 2024, affidavit, she has degree in divinity and is completing a certification in chaplaincy. She is uniquely qualified as his stepmother to provide opinion on his character and, in the event of sentencing, his rehabilitative potential.

[redacted] is a close friend of Ms[redacted] She can provide the fact finder with relevant information regarding Ms. [redacted] familiarity with sex involving weapons and the idiosyncrasies of BDSM and related sexual conduct. This information is highly probative of Sgt. Honstein's state of mind. The fact that Ms. [redacted] has experience with sexual encounters involving weapons is highly relevant to Sgt Honstein's perception of any risk. Sgt Honstein's perception of any risk is necessarily lower if the other participant in the activity is experienced.

[redacted]

Ms. [redacted] is a civilian living in the local area. Her testimony would not be cumulative and is necessary to contest the evidence of the government. NCIS reached out to Ms. [redacted] because she provides pivotal context to the other evidence in this case.

[redacted]

The very first *Allen* factor is the issues involved and the importance of the witness.[1] Here, a central fact in this case is whether Sgt Honstein knew that the death or serious bodily harm was the probable consequence of his actions.[2] The fact that Sgt Honstein has previously engaged in similar activity safely is necessary to a constitutionally guaranteed defense.

The government has listed Ms[redacted] in its 404(b) notice. In that notice, the government asserts that the testimony of Ms. [redacted] will be offered to show, *inter alia*, lack of mistake. This assertion concedes that Ms. [redacted] is necessary to provide relevant information regarding Sgt Honstein's state of mind.

[redacted] can provide background information of the events leading up to the alleged incident. This information is necessary to provide the fact finder with a full picture of the events in question. It is clear why NCIS interviewed Ms.[redacted] and many others present with Sgt Honstein on the night preceding the alleged incident. NCIS needed a full understanding of what happened leading up to the alleged incident. The fact finder has the same need.

[1] *Allen*, 31 M.J. at 610-611.
[2] See Art 118(b)(3), U.C.M.J.

[redacted]

Further, Sgt Honstein calls Ms. [redacted] shortly after the incident and says "I'm not okay, she's dead." This immediate outcry shows that Sgt Honstein, rather than having had knowledge of the risks, is shocked by the outcome.

Evidence

The defense requests the court consider the following evidence in support of this motion:

Enclosure (1): Defense Initial Witness Request dated 30 August 24
Enclosure (2): Government response to Defense Request dated 7 September 24
Enclosure (3): Affidavit of [redacted] dated 22 August 24
Enclosure (4): BS000304 -NCIS report of interview of [redacted]
Enclosure (5): BS000533-000534 -NCIS report of interview of [redacted]
Enclosure (6): BS000266-000267 -NCIS report of interview of [redacted]
Enclosure (7): Government supplemental 404(b) notice dated 12 September 24

Relief Requested

Defense respectfully requests that the court compel production of the above-named witness.

Oral Argument

The Defense respectfully requests oral argument.

Respectfully submitted,

[redacted]
P.E. Carson
Captain, USMC
Defense Counsel

[redacted]

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

UNITED STATES v. DAKOTA S. HONSTEIN SERGEANT/E-5 U.S. MARINE CORPS	**GOVERNMENT MOTION IN RESPONSE TO DEFENSE MOTION TO COMPEL WITNESSES** 20 September 2024

NATURE OF MOTION

This Government motion is filed in response to the Defense Motion to Compel Witnesses filed 13 September 2024. For the reasons set forth below, the Government respectfully requests the Court deny the Defense's motion to compel [redacted]

SUMMARY

Sergeant Dakota S. Honstein, U.S. Marine Corps faces three specifications of violations of three Articles under the UCMJ stemming from an alleged shooting and killing of Ms. [redacted] the victim in this case.

BURDEN OF PROOF AND PERSUASION

"Unless otherwise provided in this Manual the burden of proof on any factual issue the resolution of which is necessary to decide a motion shall be by a preponderance of the evidence." R.C.M. 905(c)(1). "Except as otherwise provided in this Manual the burden of persuasion on any factual issue the resolution of which is necessary to decide a motion shall be on the moving party." R.C.M. 905(c)(2)(A). Here, the Defense, as the moving party, bears the burden of proof and persuasion by a preponderance of the evidence.

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[redacted]

FACTS

1. On 30 August 2024, the Government received the Defense's lay witness request.

2. The Defense requested a total of eleven character witnesses.

3. Five of the Defense's requested character witnesses are active duty military.

4. Six of the Defense's requested character witnesses are family and close friends of the Accused, to include the Accused's biological mother, father, aunt, sister, brother, and family friend.

5. All of the requested family members are expected to testify to the Accused's character for truthfulness, law abidingness, and in the case of sentencing, his rehabilitative potential.

6. The Government responded on 7 September 2024.

7. The Government granted all but four witnesses: [redacted]

8. [redacted] was denied as cumulative with the other character witnesses.

9. [redacted] were denied due to the defense failing to articulate why their production was relevant and necessary.

LAW

The pertinent rule for requesting the Government to produce witnesses on the merits is R.C.M. 703(c)(2)(B)(i), which states:

> A list of witnesses whose testimony the defense considers relevant and necessary on the merits...shall include the name, telephone number, if known, and address or location of the witness such that the witness can be found upon the exercise of due diligence and a synopsis of expected testimony sufficient to show its relevance and necessity.

Military Rules of Evidence 401 defines relevancy as "any tendency to make a fact more or less probable that it would be without the evidence." Evidence is material if it is "of consequence to

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[redacted]

the determination of [the accused's] guilt[.]" *United States v. Dorsey*, 16 M.J. 1, 6 (C.M.A. 1983) (citation and internal quotation marks omitted). In determining whether evidence is of consequence to the determination of guilt, the Court should "consider the importance of the issue for which the evidence was offered in relation to the other issues in this case; the extent to which this issue is in dispute; and the nature of the other evidence in the case pertaining to the issue." *United States v. Smith*, 68 M.J. 445, 448 (C.A.A.F. 2010) (citation omitted).

If the Defense meets its burden of showing the materiality and necessity of a witness, the witness must be produced unless the averments of the defense are inherently incredible on their face, unless the Government shows, either by introducing evidence of from other matters already of record, that the averments are untrue or that the request is otherwise frivolous." *United States v. Allen*, 31 M.J. 572, 610 (N.M.C.C.M.R. 1990) (citations and internal quotation marks omitted).

There are at least seven factors in determining whether a material witness must be produced:

> (1) the issues involved in the case and the importance of the requested witness to those issues; (2) whether the witness was desired on the merits or on sentencing; (3) whether the witness' testimony would be 'merely cumulative'; (4) the availability of alternatives to the personal appearance of the witness such as depositions, interrogatories, or previous testimony; (5) the unavailability of the witness, such that occasioned by nonamenability to the court's process; (6) whether or not the requested witness is in the armed forces and/or subject to military orders; (7) the effect that a military witness' absence will have on his or her unit and whether that absence will adversely affect the accomplishment of an important military mission or cause manifest injury to the service.

Id. at 610-611.

[redacted]

ARGUMENT

The defense has f[redacted]led satisfy its burden of showing why [redacted] the Accused's step-mother, i[redacted]relevant, necessary and non-cumulative to the other Defe[redacted]se character witnesses already granted by the Government. Mrs. [redacted] is married to the Accused's biological father, who has already been granted by the Government. In her affidavit, Mrs. [redacted] stated that she did not know the Accused well because he was raised by his biological mother, and that it was not until 2017 when the Accused developed a relationship with his biological father, did she begin to have a relationship with the Accused. This is the same timeframe that Mr. [redacted] began to have a relationship with the Accused. Mrs. [redacted] stated that she plans to testify to the same character traits on the merits and in sentencing as the other character witnesses who have already been granted.

The defense has failed to satisfy its burden of showing materiality and necessity of Alyanna Jones. The Government's argument on this witness is further articulated in the Government's response to the Defense's motion regarding residual hearsay.

The defense has failed to satisfy its burden of showing materiality and necessity of Ms. [redacted] Per its witness request, the Defense intends to call Ms. [redacted] to elicit testimonial evidence regarding the consensual sexual activities and consensual sexual relationship between Ms. [redacted] and the Accused. The Defense does not articulate why the details concerning the sexual activities and relationship between Ms. [redacted] and the Accused is relevant to this case. Consent is not at issue in this case, and the Government has not alleged a non-consensual sexual act occurred. The Government, in its 404(b) notice, made clear that it intended to elicit that while engaging in gun play with Ms. [redacted] the Accused

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[redacted]

would intentionally point the weapon at her and pull the trigger to show intent and lack of mistake in pulling the trigger of the weapon, which is specific intent element of the Article 118(3) charge in the case.

The defense has failed to satisfy its burden of showing the materiality and necessity of [redacted] The Accused socialized and was in the presence of several people in the hours prior to meeting the victim on 27 January 2024. All of them informed NCIS that while they saw the Accused drinking, none of the believed him to be intoxicated or displaying the effects of alcohol consumption. This testimony is not relevant as the Accused's level of intoxication is not in issue. Furthermore, the Accused's statement to Ms. [redacted] that he was not ok and that "she is dead," is not a material fact in issue.

EVIDENCE

The government adopts the Defense's enclosures attached to its motion to compel witnesses and provides the following additional evidence in support of its motion.

(1) Defense enclosures to its Defense Witness Request, dated 30 August 2024.

RELIEF REQUESTED

Based on the foregoing, The Government respectfully requests this Court DENY the Defense's motion to compel production of the above witnesses.

[redacted]
R. D. ANDERSON
Captain, USMC
Special Trial Counsel

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[redacted]

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Government Motion was served electronically on defense counsel on 20 September 2024.

[redacted]

R. D. ANDERSON
Captain, USMC
Special Trial Counsel

[redacted]

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

UNITED STATES **v.** **DAKOTA S. HONSTEIN** **SERGEANT** **U. S. MARINE CORPS**	**VICTIM LEGAL COUNSEL'S RESPONSE TO DEFENSE'S MOTION TO COMPEL PRODUCTION OF WITNESSES** **20 SEPT 24**

MOTION

Ms [redacted] and Ms. [redacted] the duly appointed Article 6b, UCMJ rights designees and surviving parents of the named victim, through Victim Legal Counsel, submits their response to the Defense's motion to compel the production of witnesses dated 13 September 2024.

STANDING

Ms. [redacted] and Ms. [redacted] have standing to respond to this motion because the Defense's motion seeks to elicit testimony from a witness which directly relates to both the named victim's right to privacy guaranteed under Article 6b(a)(9), UCMJ and the prohibitions against admitting evidence of a victim's sexual behavior and predisposition contained in M.R.E. 412.

FACTS

1. On 30 August 2024, the Defense submitted to the Government their initial request for the production of witnesses to be used at trial.
2. On 7 September 2024, the Government responded, denying four of the Defense's requested witnesses.

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[redacted]

[redacted]

3. On 13 September 2024, the Defense filed a Motion for Appropriate relief, asking this court to compel the production of the witnesses the Government had denied.
4. One witness the Government had denied and which the Defense now requests this court to compel the production of is Ms [redacted]
5. According to the Defense's motion, Ms. [redacted] was interviewed by NCIS shortly after Ms. [redacted]
6. Within hours of having killed [redacted] the accused was interrogated by NCIS investigators. [redacted]

LAW

Article 6b(a)(9) guarantees victims of crime "The right to be treated with fairness and with respect for the dignity and privacy of the victim . . . "

Military Rule of Evidence 412 applies to all cases "involving" an alleged "sexual offense." An alleged "sexual offense" includes any sexual misconduct punishable under the Uniform Code of Military Justice, federal law, or state law.

MRE 412 makes any evidence of a victim's "sexual behavior" or "sexual predisposition" inadmissible in a court-martial except when 1) offered to contest the source of semen, injury or

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[redacted]

[redacted]

other physical evidence; 2) offered to prove consent on the part of the victim; or 3) when failing to admit the evidence would violate the accused's constitutional rights.

"Sexual behavior" is defined in MRE 412(d) as any sexual behavior not encompassed by the alleged sex offense at issue in the case. "Sexual predisposition" is defined as a 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.

Article 118 of the UCMJ defines the elements of Murder Act Inherently Dangerous to Another. The fourth element of this offense requires the Government to prove that the accused "knew that death or great bodily harm was a *probable* consequence of the act[.]" (Emphasis added).

ARGUMENT

Bottom line up front: the court should deny the Defense's motion because MRE 412 makes any evidence of a victim's sexual behavior or sexual predisposition inadmissible with only three narrow exceptions. The source of semen, injury or other physical evidence is not contested in this case, nor are the parties contesting whether [redacted] consented to her sexual interactions with the accused. While the accused has a constitutional right to present a complete defense, the court should nonetheless deny the Defense's motion to compel Ms. [redacted] because his prior statements to NCIS completely contradict his argument for why Ms. [redacted] should testify and are far more probative of his state of mind and knowledge of the risks of "gun play" than [redacted] sexual past.

Even if the accused's right to present a complete defense requires compelling the production of Ms. [redacted] the court should limit the parties' questions and Ms. [redacted] testimony to elicit only that [redacted] had stated that she previously willingly engaged in sexual activities involving

[redacted]

[redacted]

weapons in the past, period. The court should order the parties not to elicit or attempt to elicit testimony about irrelevant information such as the number of partners [redacted] had, the specifics of her sexual activities involving weapons, sexual activities unrelated to the use of weapons, and other details which, if elicited, would violate and unfairly prejudice her privacy while offering no information of use in determining the accused's guilt.

Ms. [redacted] testimony is inadmissible under Military Rule of Evidence 412

M.R.E. 412 Applies to this Case

MRE 412 prohibits introducing evidence of a victim's sexual behavior and predisposition in cases "*involving* an alleged sexual offense." The rule makes no reference to the accused having to be *charged* with a sexual offense. "Sexual offense" includes any "sexual misconduct" punishable under the Uniform Code of Military Justice. The phrase "sexual misconduct" is not specifically defined in the Manual for Courts-Martial.[1] Therefore, what "sexual misconduct" actually means is up for interpretation. VLC submits that "sexual misconduct" constitutes any form of misconduct punishable under the UCMJ that is committed during the course of a sexual encounter. The punitive articles of the MCM make clear that certain crimes (like physical assault) can become part of a larger sex crime when committed during the course of a sexual encounter. Take for example Article 120, where a person commits the crime of Rape when they 1) use unlawful force against another person (i.e. assault) while 2) committing a sexual act upon that person. Taking into consideration the facts that 1) the accused and [redacted] were engaged in BDSM and 2) that [redacted] was killed by the accused while engaging in sexual acts and BDSM, the court should conclude that this constitutes "sexual misconduct" as discussed in M.R.E. 412. The

[1] "Sexual misconduct" appears throughout the MCM, but is never defined. It appears most predominantly in the context of Article 120c (Other Sexual Misconduct), but that article neither defines the term nor limits its meaning to only the offenses listed therein.

[redacted]

existence of "sexual misconduct" makes this a "case involving an alleged sexual offense," to which MRE 412 applies.

M.R.E. 412 applies to Ms. [redacted] statements regarding the victim's sexual past

MRE 412 makes two kinds of evidence inadmissible: 1) evidence offered to prove the victim engaged in other sexual behavior; and 2) evidence offered to prove a victim's sexual predisposition. "Sexual behavior" includes any sexual behavior not encompassed by the alleged offense. "Sexual predisposition" refers to a 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. In this case, the Defense intends to offer both types of evidence. Specifically, the Defense intends to offer statements by Ms. [redacted] that [redacted] engaged in regular sexual activities with other partners involving weapons, bondage, dominance, sadomasochism, erotic asphyxiation, and simulated non-consensual sex, and that [redacted] was involved in the BDSM lifestyle, generally.

The M.R.E. 412(b)(1) exception does not apply in this case

M.R.E. 412(b) contains several exceptions to the rule's prohibition against admitting evidence of a victim's sexual behavior and predisposition. The first exception, contained in M.R.E. 412(b)(1), allows the admission of such evidence when introduced to dispute the source of semen, physical injury, or other evidence. The source of semen, physical injury or other evidence are not contested issues in this case, making this exception inapplicable.

The M.R.E. 412(b)(2) exception does not apply in this case

The next exception to M.R.E. 412 allows evidence of the victim's sexual behavior and predisposition when introduced to show consent on the part of the victim. This also is not a contested issue in this case, therefore making this exception also inapplicable.

[redacted]

[redacted]

The M.R.E. 412(b)(3) exception does not apply in this case

The final exception to M.R.E. 412 allows evidence of a victim's sexual behavior or predisposition if failing to admit such evidence would violate the accused's constitutional rights. The Defense argues that the accused's constitutional right to present a complete defense depends on the admission of [redacted] statements to Ms. [redacted] about [redacted] experience in BDSM and sex with weapons because the victim's statements are "highly probative of Sgt Honstein's state of mind" and his "perception of any risk." The Defense also argues that [redacted] knowledge and experience with BDSM and gun play may have lowered the accused's perception of how risky pointing a loaded weapon at [redacted] was, thereby negating the *mens rea* of the offense. While a creative argument, it completely ignores the fact that Sgt Honstein made statements to NCIS

[redacted]

[redacted]

[redacted]

In simple terms: the accused has already revealed via his statements to NCIS exactly what his perception of the risk was on the night of [redacted] killing. [redacted] perception of risk that night than any statements by [redacted] to Ms [redacted] While the accused has a right to present testimony that is not cumulative and "would contribute to [the accused's] presentation of the case in some positive way," the admission of Ms. [redacted] testimony would only muddy the waters by providing a contradictory and less probative account of what risk the accused perceived that night. *Reveles*, 41 M.J. 388, 394 (CAAF 1995). As such, the accused's constitutional right to present a complete defense will not be prejudiced by denying the Defense's request to admit Ms. [redacted] testimony, and the court should deny the Defense's motion as violative of M.R.E. 412.

Even if Ms. [redacted] testimony is admissible to protect the accused's constitutional right to present a complete defense, the court should limit the parties' questions and Ms. [redacted] testimony to eliciting only that [redacted] had engaged in risky sexual behavior in the past, with no further details.

If the court determines that the accused's constitutional right to present a complete defense regardless of whether M.R.E. 412 applies mandates the admission of Ms. [redacted] testimony, the court should narrowly tailor the parties' questions and Ms. [redacted] testimony to establish no more than what the Defense seeks the fact that [redacted] had willingly engaged in sex acts involving weapons on prior occasions. The court should also order the parties not to elicit

[redacted]

[redacted]

information regarding specific acts performed by [redacted], her number of partners, the frequency of her sexual encounters, her sexual preferences, and other facts which provide no insight into Sgt Honstein's state of mind and which serve only to embarrass or degrade the deceased in violation of Article 6b, UCMJ.

RELIEF REQUESTED

[redacted]

ROBERT C. PYATT
Captain, U.S. Marine Corps
Victims Legal Counsel for Ms. [redacted]
and Ms [redacted]

Victims Legal Counsel submits the following evidence in support of this response:

Exhibit 1: Preliminary Hearing Officer Supplemental Report

****

Certificate of Service

I hereby attest that a copy of the foregoing motion was served on the court and opposing counsel personally / electronically on September 2024.

[redacted]

ROBERT C. PYATT
Captain, U.S. Marine Corps
Victims Legal Counsel for Ms. [redacted]
and Ms. [redacted]

AE XXXII

[redacted]

[redacted]

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

UNITED STATES **V.** **DAKOTA S. HONSTEIN** **SERGEANT / E-5** **USMC**	**MOTION TO DISMISS** **(Defective Referral)** **13 September 2024**

MOTION

Pursuant to Rules for Courts-Martial (RCM) 905(b)(1) and 906(b)(3), the Defense moves to dismiss Charge I due to the defective referral of the charge.

BURDEN

As the moving party, the Defense has the burden of persuasion. R.C.M. 905(c)(2). The burden of proof is by a preponderance of the evidence. R.C.M. 905(c)(1).

FACTS

Sexual Encounter between Ms. [redacted] and Sgt Honstein

1. In January 2024, Ms. [redacted] and Sgt Honstein "matched" on the popular dating application "Bumble."
2. For the next several weeks, Ms. [redacted] and Sgt Honstein conversed with each other via text message, phone calls, and "FaceTime" calls.
3. At 0400 on Saturday, 27 January 2024, Ms. [redacted] messaged Sgt Honstein stating that she "just got locked out of my house."
4. Sgt Honstein responded to Ms [redacted] message by offering to "come get you."
5. Ms. [redacted] accepted Sgt Honstein's offer before sending Sgt Honstein an internet link to her location.
6. Sgt Honstein proceeded to drive from his barracks building, Building WC [redacted] to Ms. [redacted] location, where he picked her up in his vehicle.

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[redacted]

7. At 0448, Sgt Honstein and Ms. [redacted] returned to Building WC [redacted] and proceeded to Sgt Honstein's barracks room.
8. Upon arriving at Sgt Honstein's barracks room, Ms [redacted] and Sgt Honstein began kissing and touching each other on Sgt Honstein's bed.
9. Ms [redacted] and Sgt Honstein began discussing their shared interest in "BDSM," or "Bondage, Discipline, Dominance and Submission, and Sadomasochism."
10. BDSM generally involves one partner taking a dominant role during a sexual encounter while the other partner takes a submissive role.
11. Ms. [redacted] and Sgt Honstein also discussed past their BDSM experiences with other partners, as well as their shared interest in "blood-play," which involves the incorporation of cutting and blood in sexual activities.
12. At some point, Ms. [redacted] accepted a necklace from Sgt Honstein with a pendant containing a vial of blood.
13. Ms [redacted] wore the necklace around her neck for the remainder of the encounter.
14. Ms. [redacted] and Sgt Honstein proceeded to incorporate various consensual BDSM practices into their consensual sexual encounter, to include biting, slapping, and choking.
15. Over the next two hours, Ms [redacted] and Sgt Honstein engaged in several rounds of consensual BDSM activities with short breaks between rounds.
16. Ms [redacted] and Sgt Honstein never engaged in sexual intercourse. However, throughout the sexual encounter Sgt Honstein kissed Ms. [redacted] breasts and buttocks and penetrated her vagina with his fingers, while Ms. [redacted] manually stimulated Sgt Honstein's penis with her hands.
17. During one of the rounds of BDSM activities, Ms [redacted] saw Sgt Honstein's pistol laying on his nightstand.
18. Ms. [redacted] asked Sgt Honstein to incorporate the pistol into their BDSM activities.
19. Specifically, Ms. [redacted] asked Sgt Honstein to hold the pistol against her body while they engaged in sexual activities.

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[redacted]

20. The use of a firearm during sexual activities is colloquially referred to as "gun-play."
21. Sgt Honstein agreed to engage in gun-play with Ms [redacted]
22. Sgt Honstein proceeded to pick up his pistol from the nightstand, which he had "cleared" (i.e. removed the magazine and ammunition) earlier.
23. Ms. [redacted] and Sgt Honstein proceeded to engage in a round of gun play with the cleared pistol.
24. After a round of gun-play, Ms. [redacted] and Sgt Honstein took a short break, during which Sgt Honstein used the bathroom.
25. Upon returning from the bathroom, Ms. [redacted] and Sgt Honstein agreed to engage in another round of gun-play.
26. During the second round of gunplay, the magazine was inserted into the pistol.
27. During the second round of gun play, Sgt Honstein again pressed the pistol against Ms [redacted] body at her request.
28. At approximately 0700, with the pistol pressed against Ms. [redacted] chest, Ms. [redacted] looked at Sgt Honstein and said "do it."
29. Sgt Honstein then pulled the trigger of the pistol, the pistol discharged, and Ms. [redacted] was shot in the chest resulting in her death.

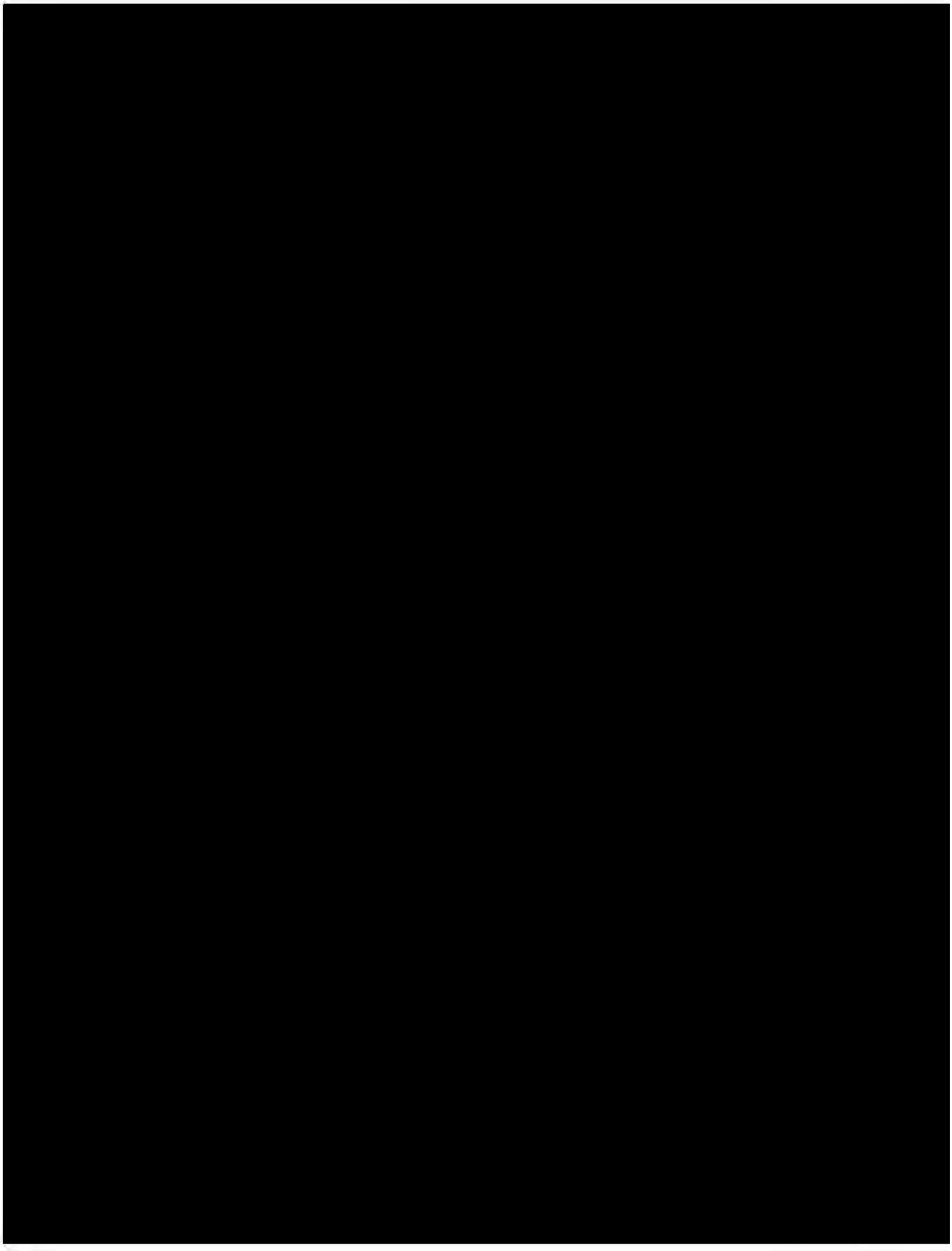
NCIS Interrogation

[redacted]

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[redacted]



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[redacted]

Preliminary Hearing Officer Report

37. A preliminary hearing in this case was held on 10 May 2024.

38. Pursuant to Article 32, UCMJ and R.C.M. 405, the preliminary hearing officer (PHO) was tasked with determining:

    a. Whether each specification alleges an offense;

    b. Whether there is probable cause to believe the accused committed the offenses charged; and

    c. The recommended disposition of the case.

39. Following the preliminary hearing, Government Counsel and Defense Counsel submitted written matters to the PHO pursuant to R.C.M. 405(l).

40. In their written matters, Trial Counsel argued that Sgt Honstein's belief that the pistol would not fire when he pulled the trigger "was not a reasonable belief, and pulling the trigger under those circumstances evidenced a reckless and wanton disregard for the probable consequence of her death."

41. On 28 May 2024, the PHO provided the Government and Defense Counsel his report.

42. In his report, the PHO provided a "Summary of Evidence," which stated in relevant part:

[redacted]

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[redacted]

43. In his report, the PHO provided an "Analysis of Offenses," which stated each element of each alleged offense, and summarized the evidence thereof.

44. In his analysis of Charge I, the PHO found that probable cause existed to believe that Sgt Honstein committed the offense of Article 118(3), UCMJ.

45. The PHO continued:

> "There are five elements of Article 118, Murder - Act Inherently Dangerous to Another, and *the Government submitted probable cause evidence on all five of these elements* (emphasis added)."

46. The PHO proceeded to recite each element of the offense before providing a summary of the evidence establishing probable cause for each element."

47. For element 4 of the offense, the PHO cited to the interrogation of Sgt Honstein and wrote:

[redacted]

Referral of Charges

48. On 28 June 2024, Trial Counsel drafted its written determination letter pursuant to Article 34(c), UCMJ and R.C.M. 406(b).

49. In the letter, Trial Counsel wrote:

> "in accordance with Article 27b, UCMJ, and as a Special Trial Counsel certified in accordance with Article 24a, UCMJ, I submit that:
>
> a. The OSTC has exercised authority over the alleged offenses;
> b. Each specification properly alleges an offense under the UCMJ;
> c. *There is probable cause to believe that the accused committed the offenses charged* (emphasis added); and
> d. A court-martial has jurisdiction over the accused and the offenses.
>
> Based on the circumstances surrounding the misconduct and the seriousness of the offenses, I recommend the charges and specifications be referred to a General Court-Martial."

[redacted]

50. In submitting that there was probable cause to believe that Sgt Honstein committed the offenses charged, Trial Counsel specifically referenced the PHO's report.

51. Trial Counsel sent the letter to the referral authority, Lead Special Trial Counsel Brigadier General (BGen) Kevin S. Woodard.

52. On 3 July 2024, Charge I was referred to General Court Martial by BGen Woodard.

LAW

Preliminary Hearings and Referral of Charges

Article 34(c), UCMJ and R.C.M. 406(b) state that in cases over which a special trial counsel exercises authority, referral of a charge to court martial cannot be made until a special trial counsel makes a written determination that "there is probable cause to believe that the accused committed the offense charged." UCMJ art. 34(c); R.C.M. 406(b).

Although focused on cases in which special trial counsel has not exercised authority, the discussion of RCM 406 provides that written determination letters must include "an independent and informed appraisal of the charges and evidence." R.C.M. 406 discussion (2024). Furthermore:

> "Information which is incorrect or so incomplete as to be misleading may result in a determination that the advice is defective, necessitating appropriate relief. See R.C.M. 905(b)(1), 906(b)(3)." R.C.M. 406 discussion (2024).

If the advice in the pre-referral written determination letter is erroneous, inadequate, or misleading, the substantial rights of the accused may be prejudiced necessitating appropriate relief. *United States v. Rivera*, 42 C.M.R. 198 (C.M.A. 1970); *United States v. Greenwalt*, 20 C.M.R. 285 (C.M.A. 1955); *United States v. Grice*, 23 C.M.R. 390 (C.M.A. 1957); *United States v. Johnson*, 23 C.M.R. 397 (C.M.A. 1957); *United States v. Fields*, 25 C.M.R. 332 (C.M.A. 1958); *United States v. Bennie*, 27 C.M.R. 233 (C.M.A. 1959); *United States v. Foti*, 30 C.M.R. 303 (C.M.A. 1961); *United States v. Collier*, 42 C.M.R. 182 (C.M.A. 1970). The Court in *Rivera* remarked, "[a]s we said in *United States v. Foti*... "[W]hen . . . there are factors which would have a substantial influence on the decision of

the convening authority, they should be furnished to him."" *Rivera*, 42 C.M.R. at 199. For decades, this has been practiced in the military justice system.

As the Court in *Greenwalt* explained:

> "We begin our treatment of the issue here with the premise accepted by all of us in *United States v. Schuller*, 5 U.S.C.M.A. 101, 17 C.M.R. 101, to the effect that in every case a staff judge advocate must fully comply with Article 34 of the Code, 50 U.S.C. § 605. The Article requires that he consider and give advice upon every charge before it is referred to a general court-martial for trial. This is an important pretrial protection accorded to an accused, and Congress had in mind something more than adherence to an empty ritual. It placed a duty on the staff judge advocate to make an independent and informed appraisal of the evidence as a predicate for his recommendation. His is the role of an adviser, and unless he reviews the record thoroughly and accurately, he cannot soundly advise the man who has to make the ultimate decision. Therefore, to the extent that the advice rendered by him is *incomplete, ill-considered, or misleading as to any material matter* (emphasis added), he has failed to comply with the statutory obligation which rests upon him." *Greenwalt*, 20 C.M.R. at 288.

Article 32, UCMJ and R.C.M. 601(d)(3) levy a separate prerequisite to referring a specification to a general court-martial: a preliminary hearing *in substantial compliance* with RCM 405. R.C.M. 405(a) states:

> "The issues for determination at a preliminary hearing are limited to the following: whether each specification alleges an offense; *whether there is probable cause to believe that the accused committed the offense or offenses charged* (emphasis added); whether the convening authority has court-martial jurisdiction over the accused and over the offense; and to recommend the disposition that should be made of the case." R.C.M. 405(a)

Per the discussion of RCM 405(a), "[t]he function of the preliminary hearing is to ascertain and impartially weigh the facts needed for the limited scope and purpose of the preliminary hearing." R.C.M. 405(a) discussion (2024). Similar to the requirements of RCM 406:

> "Failure to substantially comply with the requirements of Article 32, which failure prejudices the accused, may result in delay in disposition of the case or disapproval of the proceedings. See R.C.M. 905(b)(1) and 906(b)(3)." R.C.M. 405(a) discussion (2024).

Given the requirements Articles 32 and 34 of the UCMJ and RCM 405 and 406, proper referral depends on the accuracy of the PHO's determination of the advice and recommendations contained in the written determination letter. See *United States v. Lewis*, No. 201900049, 2020 CCA LEXIS 199, at *37-42 (N-M. Ct. Crim. App. June 8, 2020) (Stephens, J. concurring) (emphasizing the importance of earnest

probable cause determinations and imploring "[s]pecifications lacking probable cause should not find a home on referred charge sheets for general courts-martial").

Probable cause means "more than a bare suspicion but less than evidence that would justify a conviction." Black's Law Dictionary 1321 (9th ed. 2009). In other contexts such as confinement and searches and seizures within the Manual for Courts-Martial, probable cause is defined in terms of "reasonable belief." The Supreme Court has defined probable cause for a preliminary hearing in terms of "facts and circumstances sufficient to warrant a prudent man in believing that the suspect had committed or was committing a crime." *Gerstein v. Pugh*, 420 U.S. 103, 105 (1975). The state of California defines probable cause in the context of a preliminary hearing as "a state of facts as would lead a person of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion of the guilt of the accused." *People v. Nagle*, 25 Cal. 2d 216, 222 (Cal. 1944); see also *Bompensiero v. Superior Court*, 15 Cal. App.3d 244 (Cal. Ct. App. 1982).

Article 118(c), UCMJ

Article 118(3) of the UCMJ criminalizes the unlawful killing of a human being by an "act which is inherently dangerous to another and evinces a wanton disregard of human life." R.C.M. 916(j)(1); *United States v. McMonagle*, 38 M.J. 53, 60 (C.A.A.F. 1993). The crime of "murder by an act inherently dangerous to another" was a legislative attempt to incorporate what was traditionally understood as "depraved heart murder" into the UCMJ. *United States v. Berg*, 30 M.J. 195, 200 (C.A.A.F. 1990). The legislative history of Article 118(3), UCMJ expressly states that the offense codified "the well-settled common-law rule that, even in the absence of a specific intent to kill or inflict serious bodily harm, the homicide is murder if the offender's conduct was imminently dangerous to others and evinced a wanton disregard of human life," and is "intended to cover those cases where the acts resulting in death are *calculated* (emphasis added) to put human lives in jeopardy, without being aimed at any one in particular." *Id.* at 199 (citing W. LaFave and A. Scott, Substantive Criminal Law § 7.4 at 199-200 (1986)).

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The earliest versions of the Manual for Court Martial defined murder as the unlawful killing of another with "malice aforethought." MCM ch. XVII, p. 251 (1917). In cases alleging "depraved heart" murder, malice aforethought existed when the accused acted with knowledge that his actions would "probably cause the death of, or grievous bodily harm to any person." *Id*. Article 118(3), UCMJ originally covered only those depraved acts that were calculated to put human lives in jeopardy generally. *Berg*, 30 M.J. at 199. That is to say that, historically, "murder by an inherently dangerous act" did not include acts showing a wanton disregard toward the life of any person in particular. *Id.* at 200. However, following the C.A.A.F's decision in *Berg*, the Manual for Courts Martial was amended in 1995 to include inherently dangerous acts aimed at a particular person. Nevertheless, the "depraved heart" nature of the offense remains intact, to include the requirement that the accused have actual knowledge that the probable result of his actions would be the death or grievous bodily harm of another. *McMonagle*, 38 M.J. at 60; *United States v. Stokes*, 19 C.M.R. 191, 194-196 (C.M.A. 1955).

Because the Government must prove beyond a reasonable doubt that the accused had actual knowledge that death or great bodily harm was a probable consequence of his actions, the accused should not be convicted of depraved-heart murder unless he *subjectively* knew the probable consequences of his acts were death or great bodily harm. *McMonagle*, 38 M.J. at 60

ARGUMENT

The Article 32 Hearing was Defective

Under Article 32, UCMJ and R.C.M. 405, the PHO is responsible for making a probable cause determination for each offense by impartially weighing the evidence and applying it to the law. The Article 32 hearing and the PHO's determinations are inherently defective if the PHO demonstrates a fundamental misunderstanding of the law with respect to any offense. Here, the PHO determinations and finding of probable cause with respect to Charge I was defective in that it was based on an erroneous understanding of the law. In his report, the PHO, citing only to the interrogation of Sgt Honstein, asserted

[redacted]

that probable cause existed with respect to Charge I because "the actions of the accused reflect that the accused knew *or should have known* (emphasis added) that death or great bodily harm was a probable outcome of his actions." In short, the PHO applied an *objective* standard to the knowledge element of Charge I instead of the *subjective* standard required by law. The "reasonableness" of Sgt Honstein's lack of knowledge of the probable consequences of his acts, i.e. what Sgt Honstein "should have known" under the circumstances is entirely irrelevant to the probable cause determination. As such, the PHOs probable cause determination and recommendations with respect to Charge I are defective, resulting in a "failure to substantially comply with the requirements of Article 32," and necessitating a dismissal of the Charge.

The Written Determination Letter is Defective

Trial Counsel's written determination letter is likewise defective. In the letter, Trial Counsel submitted that there was probable cause to believe that Sgt Honstein committed the offense of Article 118(3), UCMJ. In doing so, Trial Counsel cited to the PHO's report, which applied an erroneous standard to the fourth element of the offense as detailed above. Trial Counsel's own erroneous interpretation of the elements of Article 118(3), UCMJ is further evidenced by the written matters submitted to the PHO in which they argue that Sgt Honstein's belief that the pistol would not fire when he pulled the trigger "was not a *reasonable belief* (emphasis added), and pulling the trigger under those circumstances evidenced a reckless and wanton disregard for the probable consequence of her death." Like the PHO, Trial Counsel, in advising the referral authority, applied an *objective* standard to the knowledge element of Charge I instead of the *subjective* standard required by law. The "reasonableness" of Sgt Honstein's lack of knowledge of the probable consequences of his acts, i.e. what Sgt Honstein "should have known" under the circumstances is entirely irrelevant to the probable cause determination. As such, the written determination letter contains "information which is incorrect," resulting in defective advice and encroachment on the substantial rights of the accused, and "necessitating appropriate relief" in the form of dismissal of the charge.

[redacted]

CERTIFICATE OF SERVICE

I certify that I have delivered a copy of the foregoing document electronically to the Court and Trial Counsel on 13 September 2024

[redacted]
T. J. LIPOSITZ
Captain, U.S. Marine Corps
Defense Counsel

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[redacted]

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

UNITED STATES **V.** **DAKOTA S. HONSTEIN** **SERGEANT / E-5** **USMC**	**GOVERNMENT RESPONSE TO THE DEFENSE MOTION TO DISMISS** **(Defective Referral)** **20 September 2024**

NATURE OF THE MOTION

This is the Government's response requesting the Court deny the Defense's motion requesting the Court dismiss Charge I and the sole specification due to improper referral.

SUMMARY

On 13 September 2024, Defense filed a motion to dismiss Charge I and the sole specification because of an improper referral. The reasoning is that the PHO made an assessment of the law the Defense disagrees with, and that error renders the Article 32 insufficient. The Defense further asserts that because the Art 32 report as referenced in the STC Written determination latter, pursuant to Art 34, UCMJ, that constitutes an adoption of the error and renders that determination defective and, finally, because the LSTC referred the charges considering the STC's Written determination, the referral was also defective. Assuming arguendo, that the PHO had an erroneous view of the law, that does not render the Art 32 Hearing insufficient or the referral defective. The defense also fails to provide any evidence the erroneous view of the law was shared by the STC or the LSTC when the Written determination letter was drafted, or the referral was made. Accordingly, the Defense's motion and requested relief should be **DENIED**.

[redacted]

FACTS

1. On 27 January 2024 Sgt Honstein, shot and killed Ms. [redacted], in his barracks room aboard Camp Lejeune.

2. Following the discharge of the [redacted]ound and while others were attempting life saving measures, Sgt Honstein called MSgt [redacted] and stated, "I fucked up. I killed somebody," or words to that effect.

3. [redacted]

4. On 9 April 2024 the charges were preferred against Sgt Honstein.

5. On 12 April 2024 an Article 32 preliminary hearing was ordered.

6. On 10 May 2024 an Article 32 preliminary hearing was conducted.

7. On 13 May 2024 the Government submitted its written comments.

8. On 15 May 2024 the Defense submitted their written comments to the PHO.

9. On 28 May 2024 the PHO submitted a report to the CA, copying the Government and Defense.

10. No objections to the Art 32 were filed following the PHOs submission of the report.

11. On 28 June 2024, the STC's written determination letter was signed.

[redacted]

12. On 1 July 2024 the preferred charges, Art 32 report and written determination letter were all forwarded the BGen Woodard the LSTC for a referral decision.

13. On 3 July 2024, the LSTC referred the charges against the Sgt Honstein to a general court-martial.

14. On 3 July 2024, Sgt Honstein was served with the referred charges.

15. On 6 August 2024, Sgt Honstein was arraigned on the charges now before the Court.

LAW

Art 32

Before charges may be referred to general court-martial, a preliminary hearing must be conducted in substantial compliance with Article 32, UCMJ, and R.C.M. 405, unless affirmatively waived by the accused. Under R.C.M. 405(a), the issues for determination at an Article 32 preliminary hearing are limited to the following: whether each specification alleges an offense; whether there is probable cause to believe that the accused committed the offense or offenses charged; whether the convening authority has court-martial jurisdiction over the accused and over the offense; and to recommend the disposition that should be made of the case.

Although the Article 32 investigation is an important element of the military justice process, it is not part of the court-martial. *United States v. Davis*, 64 M.J. 445, 449 (2007). The Article 32 investigation is not so integral to a fair trial that an error in the proceeding necessarily falls within the narrow class of defects treated by the Supreme Court as structural error subject to reversal without testing for prejudice. *Id.* When reviewing allegations of error in an Article 32 investigation we will reverse only when there is a showing of prejudice to a substantial right of the accused. *United States v. Stephens*, 66 M.J. 520, 522 (A.F.C.A 2008) (citing to *United States*

[redacted]

v. Davis, 64 M.J. 445 (C.A.A.F. 2007)). Reviewing courts will not "exalt form over substance," when reviewing alleged errors in the Article 32 process. *See United States v. Diaz*, 54 M.J. 880, 882-83 (N.M.C.C.A. 2000). "To substantially comply with R.C.M. 405, the Government must present at least some evidence from which the PHO could find probable cause in support of each specification." United States v. Mercier, 75 M.J. 643, 646 (C.G. Ct. Crim. App. 2016)

R.C.M. 405

R.C.M. 405(a) discussion articulates: "The function of the preliminary hearing is to ascertain and impartially weigh the facts needed for the limited scope and purpose of the preliminary hearing. The preliminary hearing is not intended to perfect a case against the accused and is not intended to serve as a means of discovery or to provide a right of confrontation required at trial. Determinations and recommendations of the preliminary hearing officer are advisory."

118(c), UCMJ

"Murder under Article 118(3) is a general-intent crime. United States v. Craig, 2 USCMA 650, 659, 10 CMR 148, 157, 1953 WL 1795 [**22] (1953). Mistake of fact is not a defense to a general intent crime unless it is both honest and reasonable. United States v. Brown, 22 MJ 448, 451 (CMA 1986)." United States v. McMonagle, 38 M.J. 53, (CMA 1993).

Mistake of Fact

The Military Judges bench book addresses the reasonableness of the mistake of fact in two sections, 5-11-1, for situations where specific intent is at issue and 5-11-2, where general intent is at issue.

5-11-1 states in part:

> "The (ignorance) (mistake), no matter how unreasonable it might have been, is a defense. In deciding whether the accused was (ignorant of the fact) (under the mistaken belief) that

[redacted]

(state the asserted ignorance or mistake), you should consider the probability or improbability of the evidence presented on the matter."

5-11-1 states in part:

The accused is not guilty of the offense of (_____) if:

(1) (he) (she) ((did not know) (*mistakenly believed*)) that (state the asserted ignorance or mistake)

and

(2) if such (ignorance) (belief) on (his) (her) part was *reasonable*.

To be reasonable the (ignorance) (belief) must have been based on information, or lack of it, which would indicate to a reasonable person that _____. (Additionally, the (ignorance) (mistake) cannot be based on a negligent failure to discover the true facts.)" The is both an objective and subjection portion of this defense to be analyzed.

ARGUMENT

The Defense premise of the PHO being incorrect on the law regarding knew or "should have known," is only a misstatement of the law when viewed through the lens of those four words outside the context of the rest of the very same paragraph when the PHO concludes, "The accused's actions of loading the pistol, holding the loaded pistol up against [redacted] chest, and pulling the trigger reflected an "intentional act likely to result in death or great bodily injury" to [redacted] In this case the "likely to result" denotes that the individual had knowledge of the consequences of their intentional acts. Additionally, due to the apparent mistake of fact defense being addressed in the interrogation and comments, addressing the application of a defense on a general intent crime one must address the subjective and objective view of the evidence. While the word choice is not superb, the meaning is not a clear misstatement of the law when read in context of the whole paragraph.

However, regardless of if the PHO's analysis is inarticulate and correct or incorrect, there is still substantial compliance with the Article 32 and R.C.M. 405. Additionally, this report was not objected to by the defense during the R.C.M. 405 allotted timeframe. While not a waiver it does demonstrate the substantial compliance with R.C.M. 405.

[redacted]

The Defense next asserts that any error in analysis by the PHO is imputed to the STC's written determination letter in this case because the Art 32 report is a reference of the written determination letter. Any referral recommendation to general court-martial requires an Article 32 preliminary hearing be completed. The completion of this requirement is the basis for the written determination letter's reference to it. No where in the written determination letter does the STC adopt or imply agreement with the findings or analysis of the PHO. Further, the government's position is clear from the STC's written comments to the PHO where the STC articulates, "His [the Accused's] intentional act of pulling the trigger without being certain that the slide was adequately disengaged, despite his knowledge of the risk that it would fire, evinces his willful disregard for the probable consequences of his actions." Additionally, the written determination letter is an independent determination by the STC, not an assessment of the advisory opinion in the report. This independent assessment is that of the STC, not the PHO. This is clear because the STC states, "**I submit that**:

a. The OSTC has exercised authority over the alleged offenses;

b. Each specification properly alleges an offense under the UCMJ;

c. There is probable cause to believe that the accused committed the offenses charged; and

d. A court-martial has jurisdiction over the accused and the offenses."

Following the Defense's logic that by listing the PHO report as a reference the STC was adopting the PHO's legal analysis would also imply that the STC was adopting the Defense analysis as part of the same PHO report.

Regarding the Referral Authority, the same assessment holds true. There is no evidence that the LSTC adopted the non-binding and advisory analysis in the PHO report. He considered

[redacted]

it, along with the other evidence in the PHO report, the comments from both parties, and the written determination letter and then after his own analysis took the independent action, as the Referral Authority, and signed the referral block of the charge sheet. It is worth noting that unlike past referral authorities who were not lawyers, the LSTC is a Judge Advocate with extensive experience in military justice. Therefore, unlike previous Convening Authorities, who were not attorney's making the referral decision, he is fully equipped to make an independent legal decision, vice relying on a PHO's assessment or findings, while still considering the contents.

The Article 32 Hearing is an important part of the process and provides and outside review of the evidence and a recommendation to the Referral Authority. However, it is advisory in nature. The Article 32 PHO report, even if wrong, is in substantial compliance with R.C.M. 405. Although the PHO report is referenced in the STC's written determination letter, the STC's written determination letter is an independent assessment of the evidence separate from the PHO report, and the LSTC's referral decision yest another independent decision made separate and apart from the PHO's advisory opinion. Given the multiple independent decisions, following a full hearing, the independent referral decision by the LSTC is not defective.

EVIDENCE

The Government adopts the Defense's enclosures and submits the following additional evidence in support of its motion.

Enclosure 1 Government written comments to the PHO

Enclosure 2 – Defense written comments to the PHO

[redacted]

RELIEF REQUESTED

The Government respectfully requests that the court **DENY** Defense's Motion to Dismiss for improper referral. The government respectfully requests oral argument on this motion at the next Article 39(a) hearing.

HENRY.NICHOLAS.SEAN.[redacted] Digitally signed by HENRY.NICHOLAS.SEAN.[redacted] Date: 2024.09.20 22:41:23 -04'00'

N. S. HENRY
LtCol, USMC
Regional Trial Counsel

****

I certify that I served a true copy via NCORS of the above on the Court and Defense Counsel on 20 September 2024.

HENRY.NICHOLAS.SEAN.[redacted] Digitally signed by HENRY.NICHOLAS.SEAN.[redacted] Date: 2024.09.20 22:41:46 -04'00'

N. S. HENRY
LtCol, USMC
Regional Trial Counsel

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

UNITED STATES **V.** **DAKOTA S. HONSTEIN** **SERGEANT/ E-5** **USMC**	**DEFENSE MOTION TO SUPPRESS** **(Statements and Admissions)** **13 September 2024**

MOTION

Pursuant to R.C.M. 905(b)(3), M.R.E. 304, and M.R.E. 305, the Defense moves to suppress all statements, confessions, and admissions made by Sgt Honstein during his 27 January 2024 NCIS interrogation, as well as all evidence derived therefrom. Sgt Honstein's statement was not the product of a free and unconstrained choice because at the time of the interview, Sgt Honstein had not slept for approximately 30 hours and his answers were the result of a desire to end the escalating pressure tactics of the investigators.

BURDEN

As the proponent of the evidence, the burden of persuasion rests with the Government. M.R.E. 305(a), M.R.E. 304(f)(6). The burden of proof is a preponderance of the evidence. M.R.E. 304(f)(7).

FACTS

1. The Government alleges that on or about 27 January 2024, Sgt Honstein violated Article's 118, 119 and 92 of the USMJ.
2. The Government alleges that Sgt Honstein killed Ms. [redacted] in Sgt Honstein's barracks room during a consensual sexual encounter with a firearm.
3. On the night and prior to the incident, Sgt Honstein and Ms[redacted] both did not sleep.
4. The incident that is the basis for the allegation in the instant case is alleged to have occurred at approximately 0700

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[redacted]

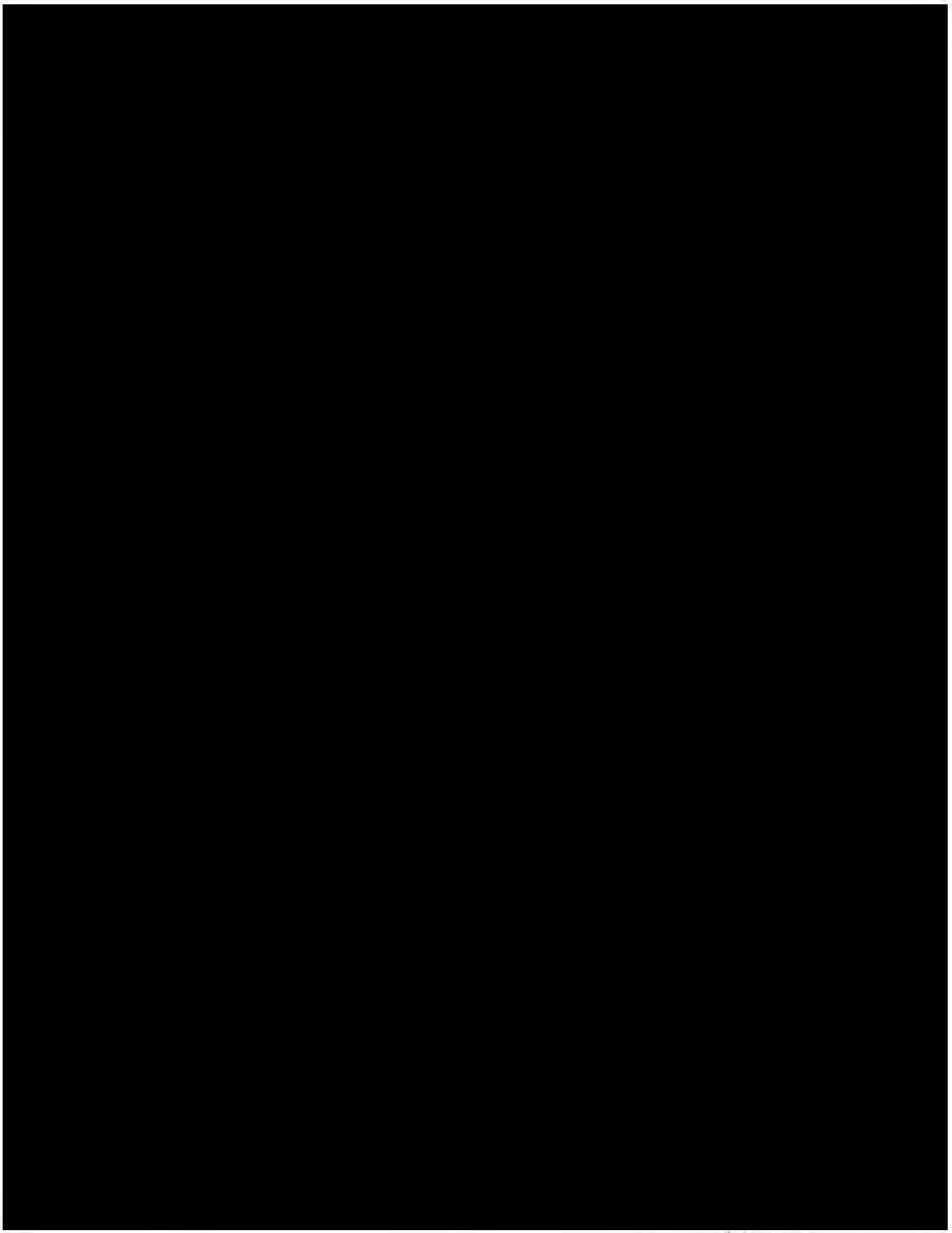
5. Immediately after the incident, Sgt Honstein alerted the nearby Marines and called for help.
6. Shortly after, Sgt Honstein was taken into custody by PMO.
7. At approximately 1200, Sgt Honstein is brought into an NCIS interrogation room and the recording device is activated. A copy of the video recorded interview is attached hereto as "Enclosure 1."
8. NCIS Special Agent [redacted] and NCIS Special Agent [redacted] conduct the interrogation.
9. After obtaining biological information from Sgt. Honstein, SA [redacted] gives a cleansing 31(b) warning. There is no indication was to what questions were asked in any previous interrogations. A copy of a transcript of Sgt. Honstein's interrogation is attached hereto as exhibit "Enclosure 2."
10. In response to the question of who loaded the firearm, Sgt Honstein answers that it was Ms. [redacted] who must have loaded it. Encl 2, 79:4 and 22. When asked again, Sgt Honstein against answers, that "She'd [Ms. [redacted]] have to have loaded it." Encl 2 at 86:7. He reaffirms this statement again. Encl 2, at 86:22.
11. Later when pressed again on the issue of who loaded the firearm, Sgt. Honstein again denies loading the firearm and stated that that Ms [redacted] must have loaded it. Encl 2 at 136:8.
12. NCIS again refused to accept this answer.
13. SA [redacted] states that he has been cordial and accommodating and that when he does those things, he expects those things in return. Encl 2 at 142:7.
14. Still not getting the answer that the investigators wanted, the following exchange takes place:

[redacted]

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[redacted]



AE XXXVI

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[redacted]

LAW

Admissibility of Confessions.

"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." *United States v. Freeman*, 65 M.J. 451, 453 (citing M.R.E. 304(a), (c)(3); Article 31(d), UCMJ).

[redacted]

"Voluntariness turns on whether an accused's 'will has been overborne.' " *United States v. Lewis*, 78 M.J. 447, 453 (C.A.A.F. 2019) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 225, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973). Whether a confession is voluntary or involuntary is determined based on the totality of the circumstances and is a question of "whether the confession is the product of an essentially free and unconstrained choice by its maker." *Id.* at 453 (quoting *United States v. Bubonics*, 45 M.J. 93). Key factors to consider when determining whether a confession was voluntary include:

a. The youth of the accused;
b. His lack of education;
c. Low intelligence;
d. Lack of advice to the accused of his constitutional rights;
e. Length of detention;
f. The repeated, prolonged nature of the questioning;
g. Physical punishment such as the deprivation of food or sleep.

Id. at 454 (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 226).

ARGUMENT

The confession was involuntary based on Sgt Honstein's condition and NCIS' interrogation tactics.

At the time of the interrogation, Sergeant Honstein was an enlisted Marine in his twenties. The highest level of education he received was high school. He was interrogated by multiple NCIS agents for multiple hours after he had not slept for approximately 30 hours. This interrogation occurred after a traumatic event in which a woman died in his presence. He was very likely in shock.

[redacted]

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[redacted]

[redacted]

The above exchange makes it clear that this is not a free and unconstrained choice as required by the 5th Amendment of the Constitution, but rather, a surrender under the pressure of seemingly unending questions and elevating pressure.

RELIEF REQUESTED

26. **Request.** The Defense respectfully requests that all statements, confessions, and admissions made by Sgt Honstein during his 27 January 2024 NCIS interrogation be suppressed, as well as all evidence derived therefrom.

27. **Evidence.** The Defense submits the following enclosures in support of its motion:

    a. Enclosure A: Recorded of Interview of Sgt Honstein

    b. Enclosure B: Transcript of Recorded Interview of Sgt Honstein

    c. Enclosure C: USICIL DNA Report

28. **Oral Argument.** The Defense requests oral argument if opposed.

[redacted]

P.E. CARSON
Captain, U.S. Marine Corps
Defense Counsel

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[redacted]

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

UNITED STATES v. DAKOTA S. HONSTEIN SERGEANT/E-5 U.S. MARINE CORPS	**GOVERNMENT MOTION IN RESPONSE TO DEFENSE MOTION TO SUPPRESS** 20 September 2024

NATURE OF MOTION

This Government motion is filed in response to the Defense Motion to Suppress filed 13 September 2024. For the reasons set forth below, the Government respectfully requests the Court deny the Defense's motion to suppress Sgt Honstein's verbal statements to investigators.

SUMMARY

Sergeant Dakota S. Honstein, U.S. Marine Corps faces three specifications of violations of three Articles under the UCMJ stemming from an alleged shooting and killing of Ms [redacted] the victim in this case. Sergeant Honstein was taken into custody by Camp Lejeune Provost Marshall Officers, and questioned about the incident by NCIS. The NCIS agents informed Sergeant Honstein of his rights against self-incrimination pursuant to Article 31(b), Uniform Code of Military Justice. Sergeant Honstein waived his rights and subsequently made self-incriminating statements the Government will seek to admit at trial.

BURDEN OF PROOF AND PERSUASION

"When the defense has made an appropriate motion or objection under M.R.E. 304, the prosecution has the burden of establishing the admissibility of the evidence" M.R.E. 304(f)(6).

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[redacted]

FACTS

1. On 27 January 2024, Sgt Honstein (hereinafter "the Accused") shot and killed Ms. [redacted] inside his Wallace Creek barracks room onboard Marine Corps Base, Camp Lejeune.[1]

2. Provost Marshall Officers subsequently placed the Accused in custody.

3. Special Agent [redacted] and Special Agent [redacted] NCIS, conducted the interrogation of the Accused.

4. Prior to questioning, SA [redacted] provided the Accused with a meal.[2]

5. Later in the video recording, SA [redacted] and [redacted] enter the room and formally introduce themselves to the Accused by showing him their badges and stating their names.

6. SA [redacted] began asking the Accused questions as they fill out biographical data on the Accused.

7. The Accused answered approximately ten questions about biographical information.[3]

8. The Accused did not complain of fatigue. He did not appear to slur his speech. He recalled information and did not hesitate when answering questions.

9. At no time while giving biographic information did the Accused state that he was tired.

10. At one point, SA [redacted] ask the Accused if his birthday was 4 May 98, to which the Accused corrected him with his actual date of birth.[4]

11. Once the biographical data sheet is complete, SA [redacted] begins to go through the Accused's Article 31(b) rights advisement form.[5]

12. SA [redacted] read each right to the Accused outloud and asked if he understood each right before

[1] Names of victims and witnesses will be redacted IAW EJCR 7.3.
[2] See Defense Enclosure (A) at approximately 00:24:35.
[3] See Defense Enclosure (B) page 5.
[4] See Defense Enclosure (B) page 7.
[5] See Defense Enclosure (B) page 11.

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[redacted]

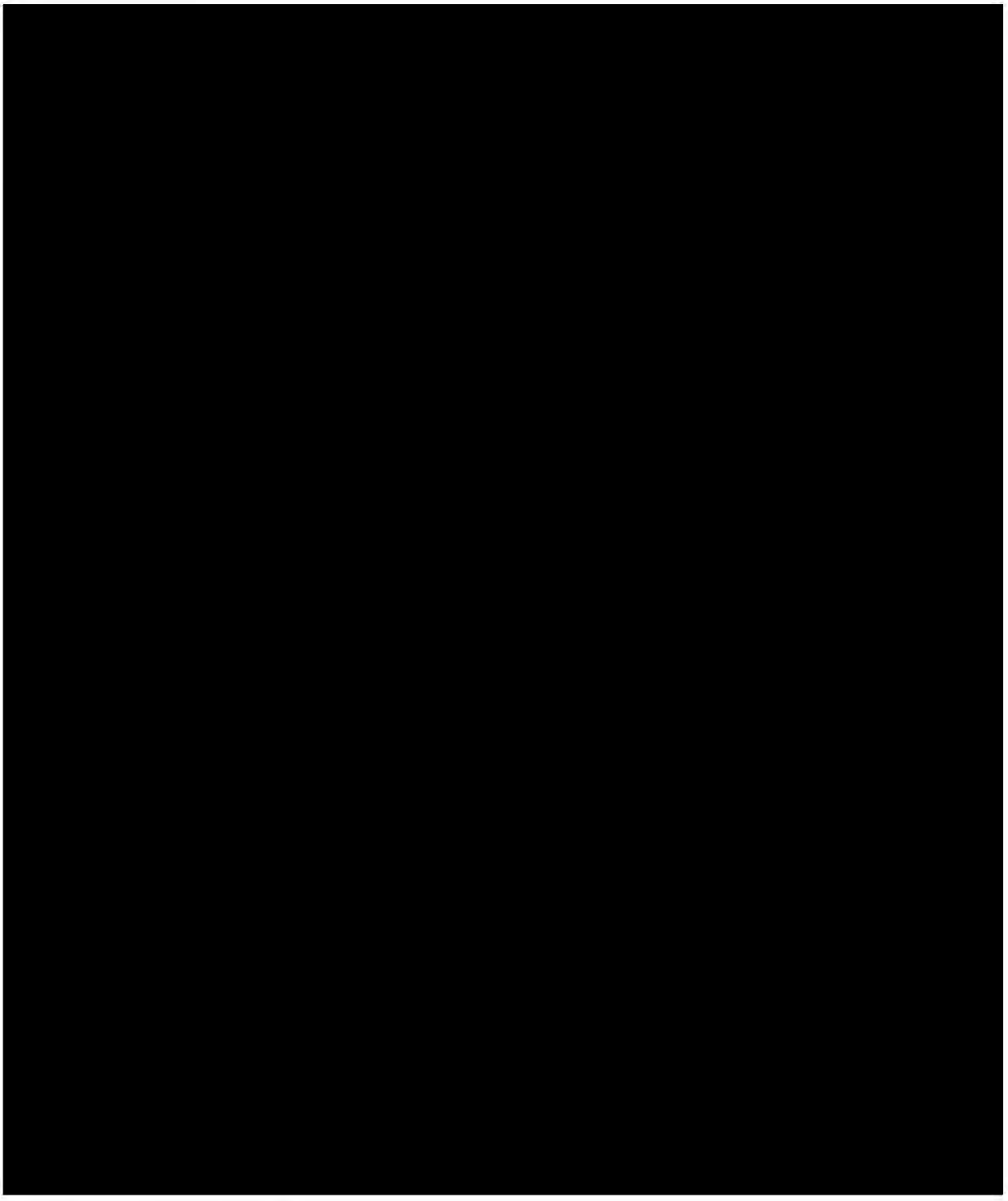
initialing next to each.

[redacted]

[6] See Defense Enclosure (B) page 14.
[7] See Defense Enclosure (B) pages 14-15.

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[redacted]



[8] See Defense Enclosure (B) page 16.



[redacted]

[9] See Defense Enclosure (B) page 47.
[10] See Defense Enclosure (B) page 123.
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] See Defense Enclosure (B) page 144-147.

[redacted]

[redacted]

[15] See Defense Enclosure (B) page 140-141.
[16] See Defense Enclosure (B) page 148.
[17] See Defense Enclosure (B) page 148.

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[redacted]

[redacted]

LAW

Article 31(b), UCMJ, warnings are required when: "(1) a person subject to the UCMJ, (2) interrogates or requests any statement, (3) from an accused or person suspected of an offense, and (4) the statements regard the offense of which the person questioned is accused or suspected." *United States v. Harpole*, 77 M.J. 231, 236, (C.A.A.F. 2018), citing *United States v. Jones*, 73 M.J. 357, 361 (C.A.A.F. 2014) (footnote omitted) (citation omitted).

"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." M.R.E. 304(a)(1)(A).

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[18] *Id.*
[19] See Defense Enclosure (B) page 151.
[20] See Defense Enclosure (B) page 157.
[21] *Id.*

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[redacted]

When determining voluntariness the question is whether the confession is the product of an essentially free and unconstrained choice, and absent police conduct that is causally related to a confession, there is no basis for concluding a confession was involuntarily induced. *United States v. Bickford*, 82 M.J. 507 (N.M.C.C.A. 2021), citing *United States v. Bubonics*, 45 M.J. 93,95 (C.A.A.F. 1996). Furthermore, even if there is a causal connection between actions of the government agents and an accused's confession, it does not automatically follow that the confession was involuntary. *Id.* Factors we consider in determining whether a confession is voluntary 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). "Officers elicit confessions through a variety of tactics, including claiming not to believe a suspect's explanations, making false promises, playing on a suspect's emotions, using his respect for his family against him, deceiving the suspect, conveying sympathy, and even using raised voices. *United States v. Brave Heart*, 397 F.3d 1035 (8th Cir. 2005), citing *United States v. Astello*, 241 F.3d 965 (8th Cir. 2001). These tactics do not render a confession involuntary, unless "the overall impact of the interrogation caused the defendant's will to be overborne." Furthermore, our appellate court has held that law enforcement's use of deception when questioning a suspect does not render the subsequent confession involuntary. *United States v. Mason*, 48 M.J. 946 (N.M.C.C.A. 1998).

ARGUMENT

A. <u>The Accused intelligently and knowingly waived his Article 31(b) rights before speaking to NCIS.</u>

Despite being awake in the hours leading up to the interrogation, the Accused knowingly and intelligently waived his Article 31(b) rights. SA [redacted] made the Accused aware of what articles under the UCMJ, he was suspected of having violated. He then went through each right individually to ensure that the Accused understood each one. The Accused initialed next to each right that was read to him afterwards. Of note, prior to waiving his rights and agreeing to speak to NCIS, the Accused paused and asked multiple clarifying questions about his rights. Specifically, he asked about the process of getting a lawyer to be present during his interrogation. SA [redacted] answered his questions and assured him that if he wanted a lawyer, the interview would terminate, and the Accused would be given the opportunity to get a civilian lawyer or be appointed one by the military. After receiving these answers, the Accused paused and looked at the Article 31(b) rights form before saying "Fuck it," and signed the waiver. This implied, and the NCIS Special Agent's understood it, as the Accused waiving his right to remain silent or have a lawyer present. After the Accused explicitly waived his rights via his signature, SA [redacted] sought verbal clarification as well. SA [redacted] asked the Accused did he understand his rights and did he want to speak to them. The Accused responded affirmatively to both questions. The Accused behavior demonstrates that he intelligently and knowingly waived his Article 31(b) rights. Furthermore, this behavior demonstrates that the Accused was coherent and able to appreciate the importance of his Constitutional rights and the impact that waiver would have before making the informed decision to waive his rights and speak to law enforcement.

The Defense's assertion that the Accused's confession was involuntary due to his condition of being awake for thirty hours and witnessing a traumatic event is unsupported by the facts. As stated above, the Accused's actions demonstrated that he was coherent and able to

[redacted]

appreciate what was happening and ask questions before making decisions. Furthermore, the Accused answered each question fully and coherently. At no time did the Accused fall asleep while being questioned or state to the Agents that he was unable to continue due to sleep deprivation. The Accused was given multiple breaks to go to the bathroom and smoke. Additionally, the Accused informed the Agents that he had suffered a panic attack at the scene. SA [redacted] immediately ceased asking the Accused substantive questions about the events, and asked the Accused if he was still suffering from the panic attack while at NCIS. The Accused responded, "No." SA [redacted] follow up by asking, "..do you feel alert now?" and the Accused answered, "Yeah. Yeah." Therefore, the Accused's physical condition was coherent and he was able to fully understand, perceive and appreciate his surroundings and what was being asked of him at all times.

B. <u>The Accused was not forced or coerced to confess to NCIS.</u>

The Accused's confession was voluntary. At the time of the interrogation, the Accused was twenty-five years old and a Sergeant in the Marine Corps. There is no evidence in the record that the Accused suffers from any mental deficiency or is of low intelligence. SA [redacted] and SA [redacted] did not threaten the Accused in any way or physically harm him. The investigators ensured the Accused was comfortable by feeding him and providing him multiple breaks. At no point in time was the interrogation hostile in nature.

The Accused claimed that the victim loaded the weapon and denied hearing the victim place a round in the chamber due to being in the bathroom. Also, the Accused claimed that he needed a break from the sexual interaction with the victim due to becoming overwhelmed and upon returning from the bathroom the victim handed him the loaded weapon, but he did not notice the weight difference. Initially he claimed he did not notice because he was experiencing

[redacted]

an adrenaline rush. Later, he changed his reasoning and stated that he did check the weapon because he trusted the victim. The investigator's challenged the notion of the Accused did not notice the weight difference of his weapon which he had owned and shot multiple times in the past. Also, they confronted the Accused's premise that he trusted the victim when he had previously stated that he checked the weapon twice while with the victim before taking a break. Furthermore, they challenged the Accused's illogical premise that the did not notice the weight difference of the loaded weapon because he was undergoing the adrenaline rush of being with victim, despite stating that he went to the bathroom to calm down. Lastly, the investigators informed the Accused that his weapon and magazine would be forensically tested, and asked him if the victim's DNA and fingerprints would be present. The Accused waffled in his response at that point making statements such as "Probably," and "It should be," before finally stating that the victim's fingerprints would not be on the weapon because he in fact loaded the weapon.

As stated in *Brave Heart*, officers are authorized to utilize tactics on suspect's such as claiming not to believe the suspect's explanations. Similarly, here, investigators confronted the Accused with the truth: that they did not believe his explanations because of their contradictions and illogical premises that did not make sense. The investigators never stated that the Accused was not free to leave until he confessed to loading the weapon, nor did they threaten him with continued questioning if he did not confess. Instead, investigators confronted him with his own contradictions and illogical statements and SA [redacted] told the Accused, "It's very, very important that we get the facts straight in this room....we're duty-bound to do that. We have no other obligation other than to get the facts straight." This did not overbear the Accused's will to freely confess nor was he constrained in his choice to confess. Instead, this exchange shows that the Accused voluntarily made statements after being confronted with the realization that his

[redacted]

previous false statements were not being believed by the investigators and the possibility that his false statements were going to be further contradicted by forensic testing.

The Accused intelligently and knowingly waived his Article 31(b) rights. At no time did the Accused give any indication to investigators that he was suffering from any medical condition, mental defect, or sleep-depravation that would render him incapable of appreciating his legal rights against self-incrimination.

EVIDENCE

The government adopts the Defense's enclosures to its motion to suppress.

WITNESSES

While it's the government's position that the Accused video and transcript stands on its own, the government reserves the right to call the following witnesses if deemed necessary:

(1) Special Agent [redacted]
(2) Special Agent [redacted] (telephonic)

RELIEF REQUESTED

Based on the foregoing, The Government respectfully requests this Court DENY the Defense's motion to suppress the Accused verbal statements, confessions, and admissions to law enforcement.

[redacted]
R. D. ANDERSON
Captain, USMC
Special Trial Counsel

CERTIFICATE OF SERVICE

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[redacted]

I hereby certify that a copy of this Government Motion was served electronically on defense counsel on 20 September 2024.

[redacted]
R. D. ANDERSON
Captain, USMC
Special Trial Counsel

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[redacted]

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

UNITED STATES v. DAKOTA S. HONSTEIN SERGEANT/E-5 U.S. MARINE CORPS	**GOVERNMENT MOTION *IN LIMINE* (LAWFULNESS OF ORDER)** 13 September 2024

1. Nature of Motion.

The Government requests the Court take judicial notice that Marine Corps Installations East – Marine Corps Base Camp Lejeune Order 5500.1A (MCI-MCB CAMLEJO 5500.1A) is a lawful order and was in effect on 27 January 2024.

2. Burden of Proof and Persuasion.

As the moving party, the Government bears the burden of proof and persuasion.[1]

3. Summary of Facts.

On or about 27 January 2024, Sergeant Dakota Honstein shot and killed [redacted][2] He was taken into custody later that day and placed into pre-trial confinement on 27 January 2024. Charges were preferred against him on 9 April 2024.[3] An Article 32 Preliminary Hearing was held 10 May 2024. On 3 July 2024, the Referral Authority referred the charges to this general court-martial. The accused was arraigned on 6 August 2024.

The order at issue for Charge I and its sole specification is: Marine Corps Installations East – Marine Corps Base Camp Lejeune Order 5500.1A. This order was re-issued and

[1] R.C.M. 905(c)
[2] Names of victims and witnesses will be redacted IAW EJCR 7.3.
[3] Charge Sheet

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[redacted]

published on 16 August 2021 by the Commanding General of Marine Corps Installations East-Marine Corps Base Camp Lejeune.[4] This order was published on the MCI -East website[5] and in effect on 27 January 2024. MCI-MCB CAMLEJO 5500.1A was signed by Colonel [redacted] who was the Chief of Staff for Marine Corps Installations East – Marine Corps Base Camp Lejeune. Colonel [redacted] was authorized to sign on behalf of the Commanding General using his title, Chief of Staff, pursuant to MCIEAST-MCB CAMLEJO 5000.1A,[6] and MCIEAST-MCB CAMLEJO 5400.1A.[7]

The original order was published on 8 May 2015 as MCI-MCB CAMLEJO 5500.1 and signed by the commander of Marine Corps Installations East – Marine Corps Base Camp Lejeune, Brigadier General R.C.[8] This order originated in response to MARADMIN 176/14 directing all installation commanders to promulgate regulations governing the possession and use of privately owned firearms on Marine Corps installations.[9]

4. Discussion of Law and Analysis.

The Law

A general officer in command has the authority to issue general orders or regulations.[10] It is not necessary for the commander issuing the general order to sign it personally so long as the decisional authority remains with the commander.[11] Members of the commander's staff, such as

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[4] Enclosure 1: MCI-MCB CAMLEJO 5500.1A
[5] https://www.mcieast.marines.mil/Staff-Offices/Adjutant/Orders/5000/
[6] Enclosure 2: MCIEAST-MCB CAMLEJO 5000.1A., Enclosure 1, "Chief of Staff (Authorized to sign by 'Title' vice 'By direction')."
[7] Enclosure 3: MCIEAST-MCB CAMLEJO 5400.1A, Chapter 1, Paragraph 6(c), "The establishment of policy rests with the CG. The staff may recommend new policies, as well as modifications or revisions to existing policies. The CG, Dep Comdr, or Chief of Staff (COS) will sign all directives."
[8] Enclosure 4: MCI-MCB CAMLEJO 5500.1
[9] Enclosure 5: MARADMIN 176-14
[10] MCM Paragraph 18(c)(1)(a)(ii).
[11] "It is not necessary for the commander issuing a general regulation to sign it personally. 'So long as 'the decisional authority, which is discretionary in nature, remains with the commander.'" *United States v. Ayers*, 54 M.J. 85, 90 (CAAF 2000).

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[redacted]

the chief of staff, may sign on behalf of the commander.[12] "The signature authority... is wholly ministerial in nature."[13] A general order is entitled to the presumption of regularity if it appears to be regular on its face,[14] and is presumed to be lawful unless it is contrary to the Constitution, the laws of the United States, lawful superior orders, or if the issuing official does not have the authority to issue the order.[15] The general order is valid even if there is a change of command.[16] Knowledge of the order is not an element of the offense.[17] "A general regulation is a proper subject of judicial notice."[18] "The military judge must take judicial notice if a party requests it and the military judge is supplied with the necessary information."[19]

Discussion

MCI-MCB CAMLEJO 5500.1A is a lawful order and the Court should judicially notice it. The order was signed on behalf of the Commanding General by his Chief of Staff, Colonel [redacted] pursuant to his authority in MCIEAST-MCB CAMLEJO 5000.1A and MCIEAST-MCB CAMLEJO 5400.1A. The order does not run afoul of the Constitution, laws of the United States, or any other superior order. It has been properly published on the Marine Corps Installations East website. Given the information supplied here, this Court should take judicial notice that MCI-MCB CAMLEJO 5500.1A is a lawful order and was in effect on 27 January 2024.

5. Relief Requested.

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[12] *United States v. Breault, 30 M.J. 833 (*NMCM 1990).
[13] *United States v. Ayers*, 54 M.J. 85, 90 (CAAF 2000).
[14] "An official document...is entitled to a presumption of regularity if it appears regular on its face." *United States v. Ayers*, 54 M.J. 85, 91 (CAAF 2000).
[15] MCM Paragraph 18(c)(1)(c).
[16] MCM Paragraph 18(c)(1)(b).
[17] MCM Paragraph 18(c)(1)(d).
[18] "A general regulation is a proper subject of judicial notice." *United States v. Ayers*, 54 M.J. 85, 90 (CAAF 2000).
[19] M.R.E. 201(c)(2).

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[redacted]

The Government respectfully requests that this Court take judicial notice of MCI-MCB CAMLEJO 5500.1A.

6. **Evidence.**

   a. Enclosure 1: MCI-MCB CAMLEJO 5500.1A

   b. Enclosure 2: MCIEAST-MCB CAMLEJO 5000.1A.

   c. Enclosure 3: MCIEAST-MCB CAMLEJO 5400.1A

   d. Enclosure 4: MCI-MCB CAMLEJO 5500.1

   e. Enclosure 5: MARADMIN 176-14

7. **Oral Argument.** The Government requests an opportunity to respond to any argument made by Defense Counsel.

[redacted]
R. D. ANDERSON
Captain, USMC
Special Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Government Motion for *In Limine* was served electronically on defense counsel on 13 September 2024.

[redacted]
R. D. ANDERSON
Captain, USMC
Special Trial Counsel

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[redacted]

NAVY-MARINE CORPS TRIAL JUDICIARY
EASTERN JUDICIAL CIRCUIT

UNITED STATES **V.** **DAKOTA S. HONSTEIN** **SERGEANT / E-5 USMC**	GENERAL COURT-MARTIAL **Government Motion for Appropriate Relief (Docketing)** **27 October 2024**

NATURE OF THE MOTION

The Government request the Court to order docketing of the arraignment of the above captioned case on 29 October 2024, a 39(a) session on 1 November 2024, and trial dates of 4-14 November 2024.

JUSTIFICATION

On 26 October 2024, the Lead Special Trial Counsel of the Marine Corps directed all charges preferred on 9 April 2024 in this case, be withdrawn, dismissed, preferred anew to include the previously requested modification to the sole specification of Charge I, and referred to this court-martial. The Accused was also served the preferred anew charges on 26 October 2024. Pursuant to R.C.M. 405(b) no additional Article 32 hearing was required, and when considering the referral of charges, the DLSTC made written determinations pursuant to R.C.M. 406 and then referred the charges to this court-martial.

TRIAL DATES AND DEADLINES

The Government requests the Court docket an arraignment on Tuesday 29 October 2024. The Government acknowledges this is within the statutory waiting period. However, given the Parties were prepared to litigate the case on 31 October 2024, the Government is prepared to proceed to trial as quickly as possible. The Government has not canceled travel of any witness or

expert and is prepared to produce the experts ordered in the previous court-martial. In the alternative the Government requests the Court docket the arraignment of 1 November 2024, following the conclusion of the statutory waiting period. The Government is prepared to hold the trial, should the Defense desire, on the previously docketed dates.

ATTACHMENTS

Enclosures to this motion are:

1. The Referred Charges
2. The General Court-Martial Convening Order
3. The Article 32 Report and Enclosures
4. The Special Trial Counsel's Written Determination Letter

Withdrawn as Enclosures [redacted] 1 NOV 24
Submitted as Allied Papers

PRETRIAL CONFINEMENT AND EXCLUDABLE DELAY

The Accused is currently in pretrial confinement (275 days). At the Accused's previous arraignment, he had been in confinement for (192 days). The R.C.M. 707 Clock at the first arraignment was at 101 Days, with 90 days of excludable delay.

OTHER CONSIDERATIONS

The previous court-martial was docketed with LtCol Lipton as the military judge. While docketing is in the sole province of the Judiciary, the Accused had previously selected Military Judge alone as a forum selection and LtCol Lipton had ruled on several substantive motions. The Government respectfully requests the case be docketed with LtCol Lipton to avoid even the appearance the withdrawal had anything to do with the Accused's forum selection or to obtain another military judge.

HENRY.NICHOLAS.SEAN.[redacted] Digitally signed by HENRY.NICHOLAS.SEAN.[redacted] Date: 2024.10.27 21:06:47 -04'00'

N. S. HENRY
Regional Special Trial Counsel

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NAVY-MARINE CORPS TRIAL JUDICIARY
EASTERN JUDICIAL CIRCUIT

****

Motion Response

1.Defense Counsel, in response to the above motion:

_____ Does not oppose it and agrees to the trial and pretrial dates proposed.

_____ Opposes the dates proposed and requests a 39(a) session on _____.

Date_____

_____
P. CARSON
Capt, U. S. Marine Corps
Defense Counsel

_____
T. LIPOSITZ
Capt, U. S. Marine Corps
Defense Counsel

****

Court Ruling

It is hereby ordered; all parties shall appear before the Court on:

_____, 2024 for an Article 39(a) session; and

_____, 2024 for commencement of trial.

Date_____ Military Judge: _____

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

UNITED STATES **V.** **DAKOTA S. HONSTEIN** **SERGEANT / E-5** **USMC**	**DEFENSE MOTION TO DISMISS** **(Defective Referral)** **30 October 2024**

MOTION

Pursuant to the Amendments V and VI of the Constitution of the United States, Articles 30 and 32 of the Uniform Code of Military Justice (UCMJ), and Rules for Court Martial (R.C.M.) 307, 405, 406(b), 601(e)(2), 603(b), 603(d), 604, 906(b)(4), the Defense moves to dismiss all charges in this case due to the defective referral of the charges.

BURDEN

As the moving party, the Defense has the burden of persuasion. R.C.M. 905(c)(2). The burden of proof is by a preponderance of the evidence. R.C.M. 905(c)(1).

FACTS

1. On 27 January 2024, the Commanding Officer of 2d ANGLICO ordered Sgt Honstein into pretrial confinement.
2. Sgt Honstein has since remained in pretrial confinement, for a total of 277 days as of the date of this filing.
3. On 9 April 2024, charges were preferred against Sgt Honstein.
4. Charge I of the charges preferred on 9 April 2024 read as follows:

> **Specification**: (*Murder - Act Inherently Dangerous to Another*): In that Sergeant Dakota S. Honstein, U.S. Marine Corps, on active duty, did, onboard Marine Corps Base Camp Lejeune, on or about 27 January 2024, murder [redacted] by means of shooting her with a firearm.

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5. On 10 May 2024, Sgt Honstein appeared before a preliminary hearing officer (PHO), who reviewed the preferred charges and evidence pursuant to Article 32 and R.C.M. 405.

6. On 28 May 2024, the PHO provided the Government and Defense Counsel his report.

7. In his report, the PHO provided a summary of the evidence and analysis for each alleged offense.

8. The PHO's analysis of Charge I read in part:

> "Element 4: "That the accused knew that death or great bodily harm was a probable consequence of the act." Here, the actions of the accused reflect that the accused knew *or should have known* (emphasis added) that death or great bodily harm was a probable outcome of his actions, which may be inferred when "a person does an intentional act likely to result in death or great bodily injury." The accused's actions of loading the pistol, holding the loaded pistol up against [redacted] chest, and pulling the trigger reflected an "intentional act likely to result in death or great bodily injury" to [redacted]

9. On 3 July 2024, the charges preferred on 9 April 2024 were referred to general court-martial.

10. On 6 August 2024, Sgt Honstein was arraigned on the referred charges, and trial in his case was scheduled to begin on 28 October 2024.

11. On 13 September 2024, the Defense filed a motion to dismiss for improper referral at the prior court martial.

12. The Defense's motion was based on the PHO's erroneous legal analysis of Charge I, which requires proof beyond a reasonable doubt that the accused had actual knowledge of the probable consequences of the intentional act alleged by the Government.

13. The military judge at the prior court-martial denied the Defense's motion, but stated in his ruling that the PHO's analysis of the Charge I was "confusing and impeachable."

14. On 13 September 2024, the Defense filed a motion *in limine* at the prior court martial requesting that the Court adopt instructions with respect to Charge I.

15. The Defense requested, in part, that the Court instruct the finder of fact that a finding of guilty on Charge I requires that the Government prove beyond a reasonable doubt:

    a. That Sergeant Honstein intentionally shot Ms. [redacted] and

    b. That Sergeant Honstein actually knew that death or great bodily harm was a probable consequence of shooting Ms. [redacted]

AE III

16. The Government filed three (3) briefs in opposition to the Defense's motion *in limine*, the last of which requested that the Court modify the intentional act alleged in Charge I.
17. On 24 September 2024, the parties to the prior court martial litigated several motions at an Article 39(a) session, to include the Defense's *motion in limine*.
18. After litigating the motions, Sergeant Honstein entered a plea of not guilty to Charge I, and pleas of guilty to the remaining charges.
19. The military judge at the prior court-martial ultimately adopted the Defense's requested instructions, and denied the Government's request to amend Charge I. The prior Court's ruling held, in part, that the Government's requested change "would make the specification a different offense."
20. On 26 October 2024, three days after the Court's denial of the Government's request to amend Charge I, and five days before trial was scheduled to begin, the Government withdrew and dismissed all charges, terminating the prior court martial.
21. That same day, the Government preferred and referred new charges against Sergeant Honstein.
22. The newly preferred charges included a murder charge incorporating the major change that the Government requested at the prior court martial.
23. The Government does not believe that Sergeant is entitled to a new preliminary hearing on the newly preferred charges, and seeks to continue toward trial immediately after arraignment, which it moved to docket on 29 October 2024.

LAW

Constitutional Requirements

The Due Process Clause of the Fifth Amendment provides that no person shall be deprived of life, liberty, or property "without due process of law." U.S. CONST. amend. V. The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right…to be informed of the nature and cause" of the charges against him. The military is a notice pleading jurisdiction, and a charge and specification is sufficient provided that it contain "the elements of the offense and fairly informs a

defendant of the charge against which he must defend." *United States v. Fosler*, 70 M.J. 225, 229. "No principle of procedural due process is more clearly established than...notice of the specific charge." *Id.* (citing *Cole v. Arkansas*, 333 U.S. 196, 201).

UCMJ: Procedural Requirements and Protections

The Fifth Amendment further provides that no person shall be held to answer for a capital or otherwise infamous crime absent "a presentment or indictment of a Grand Jury." U.S. CONST. amend. V. However, an exception to the Constitutions Grand Jury requirement is made for "cases arising in the land or naval forces." *Id.*. Although not entitled to review by a grand jury, military personnel are entitled to a variety of procedural due process protections in criminal cases referred to court martial, including those established by Congress under the UCMJ. Article 30 establishes the process for preferral of charges against an accused, and requires that the "proper authority":

(1) Inform the accused of the preferred charges and specifications as soon as practicable; and

(2) Determine what disposition should be made of the charges in the interests of justice and discipline. UCMJ art. 30.

Likewise, Article 32 requires that a preliminary hearing be conducted "before referral of charges and specifications for trial by general court-martial." UCMJ art. 32. Article 32 continues by providing numerous procedural protections for the accused at preliminary hearings, to include:

1. The right to have the hearing conducted by an impartial hearing officer;
2. The right to have the impartial hearing officer opine as to:
    a. Whether each specification alleges an offense;
    b. Whether there is probable cause to believe accused committed the charged offense(s);
    c. Whether the convening authority has court-martial jurisdiction over the accused and over the offense(s); and
    d. The appropriate disposition of the alleged offense(s).
3. The right to counsel;
4. The right to cross examine witnesses; and
5. The right to present evidence.

R.C.M. 405: Preliminary Hearing Requirements and Protections

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The procedural due process protections afforded to the accused under Article 32 were expanded by the President under R.C.M. 405, to include:

1. The right to inspect, as soon as practicable:
    a. The order directing the preliminary hearing;
    b. Statements of witnesses the Government intends to call at the preliminary hearing;
    c. Evidence the Government intends to offer at the preliminary hearing;
    d. Matters provided to the convening authority when deciding to direct the preliminary hearing.
2. The right to request individual military counsel;
3. The right to obtain civilian counsel;
4. The right to be advised of the charges and uncharged misconduct under consideration;
5. The right to be informed of the purpose of a preliminary hearing;
6. The right to be informed of the right against self incrimination;
7. The right to be present at the preliminary hearing;
8. The right to make a sworn or unsworn statement;
9. The right to request the production of witnesses;
10. The right to request the production of evidence; and
11. The right to submit supplemental information. R.C.M. 405.

A preliminary hearing may not be required prior to the referral of a charge if a prior preliminary hearing was conducted concerning the "subject matter" of the alleged offense. R.C.M. 405(b). However, the prior preliminary hearing must have afforded the accused the rights to counsel, cross examination, and *presentation of evidence*. *Id.*. The "subject matter" of an offense is not explicitly defined in the Manual for Courts-Martial. However, the term is derived from Article 32(f), UCMJ, which states that the hearing officer may consider the subject matter of *an uncharged offense* if evidence of an uncharged offense is adduced at the preliminary hearing, and the accused is i) present at the preliminary hearing, ii) *informed of the nature of each uncharged offense considered*, and iii) afforded the opportunity for representation, cross examination, *and presentation of evidence*. UCMJ art. 32(f). R.C.M. 405(f)(2) likewise extends an

accused's procedural rights under R.C.M. 405(g) to uncharged offenses, the "subject matter" of which was examined by the preliminary hearing officer. R.C.M. 405(f)(2). In which case, "the preliminary hearing officer shall inform the accused of the general nature of each offense considered and otherwise afford the accused the same opportunity for representation, cross examination, and presentation afforded during the preliminary hearing of any charged offense." *Id.*.

The accused is entitled to a preliminary hearing that is "in substantial compliance" with all requirements of RCM 405 prior to the referral of any charge to general court-martial. R.C.M. 405.

Referral of Charges

R.C.M. 601 governs the referral of charges generally. R.C.M. 601(e)(2) specifically states that "[a]fter arraignment of the accused upon charges, no additional charges may be referred to the same trial without consent of the accused." R.C.M. 601(e)(2).

R.C.M. 603 governs the process for changing charges and specifications generally. R.C.M. 603(d) governs the process of making a major change post-referral, and specifically prohibits the Government from making any major changes post-referral over objection of the accused. R.C.M. 603(d). If the accused objects to a post-referral major change, the Government can only make such change by withdrawing, amending, and referring the charge anew. Amendments are appropriate when a specification is "unclear, redundant, inartfully drafted, misnames an accused, or is laid under the wrong article." R.C.M. 906(b)(4) discussion.

Withdrawal and Dismissal of Charges

A charge referred to general court-martial by special trial counsel may be withdrawn from the court-martial at any time before findings are announced. R.C.M. 604(a)(2). When a charge is withdrawn from a court-martial, it should be dismissed *unless* the Government intends to refer them anew promptly. R.C.M. 604(a)(2) discussion. However, a charge should be dismissed when it is unsupported by available evidence. R.C.M. 401(c)(1) discussion. A referred charge may be amended in accordance with R.C.M.

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603, in which case the charge should be dismissed and another charge preferred anew when, for example, "the original charge...was so defective that a major amendment was required, or [the original charge] did not adequately reflect the nature or seriousness of the offense." *Id.*. An amendment of a charge pursuant to R.C.M. 603 "may be appropriate when a specification is unclear, redundant, inartfully drafted, misnames and accused, or is laid under the wrong article." R.C.M. 906(b)(4) discussion. Importantly, charges should not be withdrawn from a court-martial "arbitrarily or *unfairly* (emphasis added) to an accused." R.C.M. 604(a)(2) discussion.

Should the Government withdraw charges from a court-martial, they "may be referred to another court-martial, unless the withdrawal was for an improper reason." R.C.M. 604(b). "The purpose of R.C.M. 604(b), as with the Federal rule, is to check potential unfair manipulation of the charging and dismissal processes to gain unfair advantage over an accused, to prevent prosecutorial harassment, and to prevent retaliation against the accused for exercising a right." *United States v. Koke*, 32 M.J. 876, 879 (N.M.C.M.R. 1991) (citing *United States v. Hardy*, 4 M.J. 20 (C.M.A. 1977)). "A convening authority may rerefer charges following withdrawal only where there was good cause for the withdrawal," and "[i]n no event may a withdrawal be arbitrary or unfair to the accused." *Id.* at 880.

Proper reasons for withdrawal and referral to another court-martial exist "under some circumstances," such as:

1. When a referred charge is "withdrawn pursuant to a plea agreement, and the accused fails to fulfil the terms of the agreement." R.C.M. 604(b) discussion; *United States v. Fleming*, 18 U.S.C.M.A 524 (1960);

2. "If the convening authority receives additional charges and a higher level of court-martial or more severe referral instructions are contemplated." *Koke*, 32 M.J. at 880 (citing *United States v. Wells*, 26 C.M.R. 289 (1958));

3. "[I]f the reporter notes of previous court sessions are lost." *Koke*, 32 M.J. at 880 (citing *United States v. Hill*, 45 C.M.R. 904 (1972)); or

4. "If the court has been challenged below quorum." *Koke*, 32 M.J. at 880 (citing United States v. Smiley, 17 M.J. 790 (1983)).

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"[G]ood cause in the context of R.C.M. 604(b) is a sliding standard that becomes more difficult as the stages of trial progress. A finding of good cause is more likely, therefore, where the reason for withdrawal is driven by some event that undermines the appropriateness of being at the stage of the proceedings at which withdrawal occurs." *Koke*, 32 M.J. at 880. Whether a withdrawal and re-referral after arraignment is for a proper reason requires consideration of whether there is "a legitimate command reason that does not 'unfairly' prejudice an accused in light of the particular facts of a case." *United States v. Burnham*, 2007 CCA LEXIS 249 (quoting *United States v. Underwood*, 50 M.J. at 271, 276 (C.A.A.F. 1999).

If charges withdrawn from a court-martial are referred to another court-martial, "the reasons for withdrawal and later referral should be included in the record of the later court-martial, if the later court-martial is more onerous to the accused. Therefore, if further prosecution is contemplated at the time of the withdrawal, the reasons for the withdrawal should be included in or attached to the record of the earlier proceeding." R.C.M. 604(b) discussion.

Assuming that charges are withdrawn and dismissed for a proper reason, the existence of a prior court martial does not relieve the Government of its procedural burdens if the charges are re-preferred or amended and preferred anew. As the Court of Appeals for the Armed Forces stated in *Leahr*, "when charges are dismissed, the R.C.M. contemplates that "[r]einstitution of charges requires the command to start over. The charges must be re-preferred, *investigated* (emphasis added), and referred . . . as though there were no previous charges or proceedings."" *United States v. Leahr*, 73 M.J. 364, 369 (C.A.A.F. 2014) (quoting *United States v. Britton*, 26 M.J. 24, 26 (C.A.A.F. 1988). Important to determining whether the referral authority must "start over" and conduct a preliminary hearing, *even on charges identical to those previously referred and then withdrawn*, is whether the accused "demands further investigation" of the charges at an Article 32 hearing. *Id.*. In this case Sergeant Hostein does demand a preliminary hearing, the absence of which has resulted in the defective referral of the charges.

ARGUMENT

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In a case where Sergeant Honstein stands accused of murder, Government counsel seeks to strip him of virtually all procedural due process rights because they are dissatisfied with a prior Court's rulings. The Government's attempt to circumvent these prior rulings by preferring a new charge and referring it to a new Court Martial without the procedural due process protections ordinarily afforded to an accused is rooted in a tortured interpretation of the Rules for Courts-Martial, eviscerates the distinction between minor and major changes, and should be disavowed by this Court. Make no mistake, if this Court allows the Government to proceed from preferral of new charges directly to trial in a murder case, the message the Government receives will be loud and clear: "The judge ruled against you? Just change the charges on the eve of trial to gain a tactical advantage and proceed to trial like nothing happened."

Withdrawal of the Charges from the Prior Court Martial was Improper

Withdrawal of charges and referral to another court-martial must be for a proper purpose and never done when unfair to an accused. Here, withdrawal of the charges from the prior court-martial was done for an improper purpose, namely the Government counsel's desire to obtain a tactical advantage following their dissatisfaction with the prior Court's rulings concerning their evidentiary burden and their request to change the charge sheet. As a result, the Government has fundamentally altered the nature of a murder charge post-arraignment and on the eve of trial. These actions are *prima facie* unfair to Sergeant Honstein, who, like every American, is entitled to "notice of the specific charge." *Cole v. Arkansas*, 333 U.S. 196, 201. The purpose of withdrawal in this case is fundamentally different from the proper purposes articulated by the Court in *Koke* (the accused's failure to perform pursuant to the terms of a plea agreement; the Convening Authority's desire to refer more severe charges to a higher Court-Martial; loss of the Court Reporter's notes; loss of quorum).

Furthermore, the Government failed to articulate the reason for withdrawal of the charges from the prior court martial at the prior court martial, as required by the Rules for Court Martial. See R.C.M. 604(b) discussion. Nevertheless, the reason for their withdrawal is abundantly clear from the referral authority's R.C.M. 604 letter to Special Trial Counsel dated 26 October 2024: the Government disagreed

with the prior Court's rulings and sought to amend the charges to gain a tactical advantage on the eve of a murder trial. This is not a proper purpose for withdrawal, nor is it fair to Sergeant Honstein.

The Prior Article 32 Preliminary Hearing is Inherently Invalid as Applied to this Case

Every accused is entitled to a preliminary hearing conducted by a neutral hearing officer prior to the referral of preferred charges to general court-martial. The Government seeks to deprive Sergeant Honstein of this right with respect to all charges, but most alarmingly with respect to a murder charge that was never even considered at a prior preliminary hearing. As such, the charges in this case should be dismissed based on their defective referral.

Article 32 of the UCMJ provides every accused important procedural protections, namely the review of charges by a neutral hearing officer who is tasked with opining as to probable cause, jurisdiction, and and the appropriate disposition of the alleged offenses. This importance of the Article 32 hearing was amplified following the Fiscal Year 2022 National Defense Authorization Act (FY22 NDAA) amendments to the UCMJ and Manual for Courts-Martial, which vested referral authority for certain covered offenses with Special Trial Counsel, *who is also responsible for generating a written determination letter* pursuant to R.C.M. 406(b). Prior to these amendments, referral of charges to general court martial could only be made by a convening authority following his review of a pretrial advice letter from the Staff Judge Advocate. The FY22 NDAA amendments removed this procedural requirement for covered offenses, such as those at issue in this case. Now, the accused's only opportunity to have the referral authority review neutral third-party advice on covered offenses prior to referral is via the preliminary hearing officer's report.

Here, the referral authority has charged Sergeant Honstein with murder, basing his decision to refer charges, in part, on his review of a preliminary hearing officer's report from a prior court-martial that *did not analyze the murder charge now referred.* Instead, the preliminary hearing officer analyzed "a different offense," the analysis of which the military judge at the prior court martial stated was "confusing

and impeachable." Every accused is entitled to a preliminary hearing under Article 32 that is in substantial compliance with the requirements of R.C.M. 405. There is simply no universe in which there is substantial compliance with R.C.M. 405 for a murder charge *in this case*, based on a preliminary hearing officer's report from a prior court-martial for a *different murder charge*, the analyses of which was confusing and impeachable.

Additionally, the accused is entitled to present evidence at his preliminary hearing. At the time of the preliminary hearing for the prior court-martial, the Defense was in possession of approximately five-hundred (500) pages of discovery and approximately (12) recorded NCIS interviews. When the charges were withdrawn and dismissed from the prior court martial, the Defense was in possession of approximately five-thousand (5,000) pages of discovery and two (2) additional recorded NCIS interviews, and had been notified of several additional potential Government witnesses, the existence of which the Defense was unaware of at the time of the prior preliminary hearing. Included in the approximately 4,500 pages of documentary discovery not in possession of the Defense at the time of the preliminary hearing for the prior court-martial were results of Government interviews of no less than ten (10) witnesses as well as approximately 800 pages of forensic testing results from the United States Army Criminal Investigative Laboratory (USACIL) concerning DNA testing, firearm testing, latent print analysis, and digital forensic examinations. The evidentiary posture of this court martial is substantially different from that which existed at the time of the prior court-martial's preliminary hearing. To deprive Sergeant Honstein of the opportunity to present evidence to a neutral preliminary hearing officer under these circumstances for the offenses now charged, including a different murder offense not previously charged, is substantially prejudicial and deprives him of the procedural due process protections afforded to all accused.

<u>The Government's Course of Action Eviscerates the Distinction between Minor and Major Changes, and Will Become Standard Practice in the Future</u>

If the Government is permitted to circumvent the prior Court's ruling by proceeding directly to trial on the murder charge in this case, the distinction between a minor and major change under the Rules for Court Martial will be eviscerated. As discussed above, the impetus for the Government's withdrawal, dismissal, and referral of charges to a new court martial was its dissatisfaction with the prior Court's ruling that the Government's proposed change to the murder charge was a major change that would substantially alter the offense charged. Minor changes are those aimed at correcting "slight errors" to charges and specifications. After arraignment, the military judge may permit minor changes any time before findings are announced, so long as the substantial rights of the accused are not prejudiced. R.C.M. 603(e). In contrast, major changes are any changes to the charges or specifications that adds "a substantial matter not fairly included in the preferred charge or specification, or that is likely to mislead the accused as to the offense charged."

In this case, the Government decided to withdraw and dismiss charges from a prior general court-martial to implement a major change to the murder charge with the intent to proceed immediately to trial, as if the change had been minor. In other words, they seek to add a "substantial matter not fairly included" in the withdrawn murder charge, without subjecting it to the procedural due process requirements contemplated by Article 32 and R.C.M. 405. If the Court permits the Government to proceed directly from preferral to trial in this case without the intermediate procedural protections afforded by Article 32, the Court will be signaling to the Government that they are permitted to substantially amend any specification on the eve of trial to gain a tactical advantage over the accused, so long as general "subject matter" of the substantially amended charge was considered at a prior preliminary hearing. If this were to occur in our adversarial system of military justice, we can expect the Government to take the Court up on this opportunity in all contested courts-martial moving forward. We can also expect the Defense bar to respond in kind, perhaps by waiting to file all motions until after jeopardy attaches out of concern that any such motion decided in the Defense's favor prior to jeopardy

attaching will prompt the Government to withdraw, dismiss, amend charges, refer anew, and proceed to trial as originally scheduled.

RELIEF REQUESTED

24. **Request.** The Defense respectfully requests that all charges be dismissed.

25. **Evidence.** The Defense submits the following enclosures in support of its motion:

    a. Pretrial Confinement Order

    b. Prior Court Martial Charge Sheet

    c. Prior Court Martial PHO Report

    d. Prior Court Martial TMO

    e. Prior Court Martial – Defense Motion to Dismiss

    f. Prior Court Martial – Ruling on Defense Motion to Dismiss

    g. Prior Court Martial – Defense Motion *In Limine*

    h. Prior Court Martial – Government Responses to Defense Motion *In Limine*

    i. Prior Court Martial – Ruling on Defense Motion *in Limine*

    j. Withdrawal Documentation

26. **Oral Argument.** The Defense requests oral argument.

[redacted]
T. J. LIPOSITZ
Captain, U.S. Marine Corps
Defense Counsel

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CERTIFICATE OF SERVICE

I certify that I have delivered a copy of the foregoing document by email to the Court and Trial Counsel on 30 October 2024.

[redacted]
T. J. LIPOSITZ
Captain, U.S. Marine Corps
Defense Counsel

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

UNITED STATES **V.** **DAKOTA S. HONSTEIN** **SERGEANT / E-5** **USMC**	**MOTION TO DISMISS** **(Defective Referral)** **13 September 2024**

MOTION

Pursuant to Rules for Courts-Martial (RCM) 905(b)(1) and 906(b)(3), the Defense moves to dismiss Charge I due to the defective referral of the charge.

BURDEN

As the moving party, the Defense has the burden of persuasion. R.C.M. 905(c)(2). The burden of proof is by a preponderance of the evidence. R.C.M. 905(c)(1).

FACTS

Sexual Encounter between Ms. [redacted] and Sgt Honstein

1. In January 2024, Ms. [redacted] and Sgt Honstein "matched" on the popular dating application "Bumble."
2. For the next several weeks. Ms. [redacted] and Sgt Honstein conversed with each other via text message, phone calls, and "FaceTime" calls.
3. At 0400 on Saturday, 27 January 2024, Ms[redacted] messaged Sgt Honstein stating that she "just got locked out of my house."
4. Sgt Honstein responded to Ms. [redacted] message by offering to "come get you."
5. Ms. [redacted] accepted Sgt Honstein's offer before sending Sgt Honstein an internet link to her location.
6. Sgt Honstein proceeded to drive from his barracks building, Building WC [redacted] to Ms. [redacted] location, where he picked her up in his vehicle.

[redacted]

7. At 0448, Sgt Honstein and Ms. [redacted] returned to Building WC [redacted] and proceeded to Sgt Honstein's barracks room.

8. Upon arriving at Sgt Honstein's barracks room, Ms. [redacted] and Sgt Honstein began kissing and touching each other on Sgt Honstein's bed.

9. Ms. [redacted] and Sgt Honstein began discussing their shared interest in "BDSM," or "Bondage, Discipline, Dominance and Submission, and Sadomasochism."

10. BDSM generally involves one partner taking a dominant role during a sexual encounter while the other partner takes a submissive role.

11. Ms. [redacted] and Sgt Honstein also discussed past their BDSM experiences with other partners, as well as their shared interest in "blood-play," which involves the incorporation of cutting and blood in sexual activities.

12. At some point, Ms. [redacted] accepted a necklace from Sgt Honstein with a pendant containing a vial of blood.

13. Ms. [redacted] wore the necklace around her neck for the remainder of the encounter.

14. Ms. [redacted] and Sgt Honstein proceeded to incorporate various consensual BDSM practices into their consensual sexual encounter, to include biting, slapping, and choking.

15. Over the next two hours, Ms. [redacted] and Sgt Honstein engaged in several rounds of consensual BDSM activities with short breaks between rounds.

16. Ms. [redacted] and Sgt Honstein never engaged in sexual intercourse. However, throughout the sexual encounter Sgt Honstein kissed Ms. [redacted] breasts and buttocks and penetrated her vagina with his fingers, while Ms. [redacted] manually stimulated Sgt Honstein's penis with her hands.

17. During one of the rounds of BDSM activities, Ms. [redacted] saw Sgt Honstein's pistol laying on his nightstand.

18. Ms. [redacted] asked Sgt Honstein to incorporate the pistol into their BDSM activities.

19. Specifically, Ms. [redacted] asked Sgt Honstein to hold the pistol against her body while they engaged in sexual activities.

[redacted]

20. The use of a firearm during sexual activities is colloquially referred to as "gun-play."

21. Sgt Honstein agreed to engage in gun-play with Ms [redacted]

22. Sgt Honstein proceeded to pick up his pistol from the nightstand, which he had "cleared" (i.e. removed the magazine and ammunition) earlier.

23. Ms. [redacted] and Sgt Honstein proceeded to engage in a round of gun-play with the cleared pistol.

24. After a round of gun-play, Ms. [redacted] and Sgt Honstein took a short break, during which Sgt Honstein used the bathroom.

25. Upon returning from the bathroom, Ms. [redacted] and Sgt Honstein agreed to engage in another round of gun-play.

26. During the second round of gunplay, the magazine was inserted into the pistol.

27. During the second round of gun play, Sgt Honstein again pressed the pistol against Ms. [redacted] body at her request.

28. At approximately 0700, with the pistol pressed against Ms. [redacted] chest, Ms [redacted] looked at Sgt Honstein and said "do it."

29. Sgt Honstein then pulled the trigger of the pistol, the pistol discharged, and Ms. [redacted] was shot in the chest resulting in her death.

NCIS Interrogation

30. At 0000 on 28 January 2024, Sgt Honstein was brought to an interview room inside the Naval Criminal Investigative Service (NCIS) building aboard Marine Corps Base Camp Lejeune, NC.

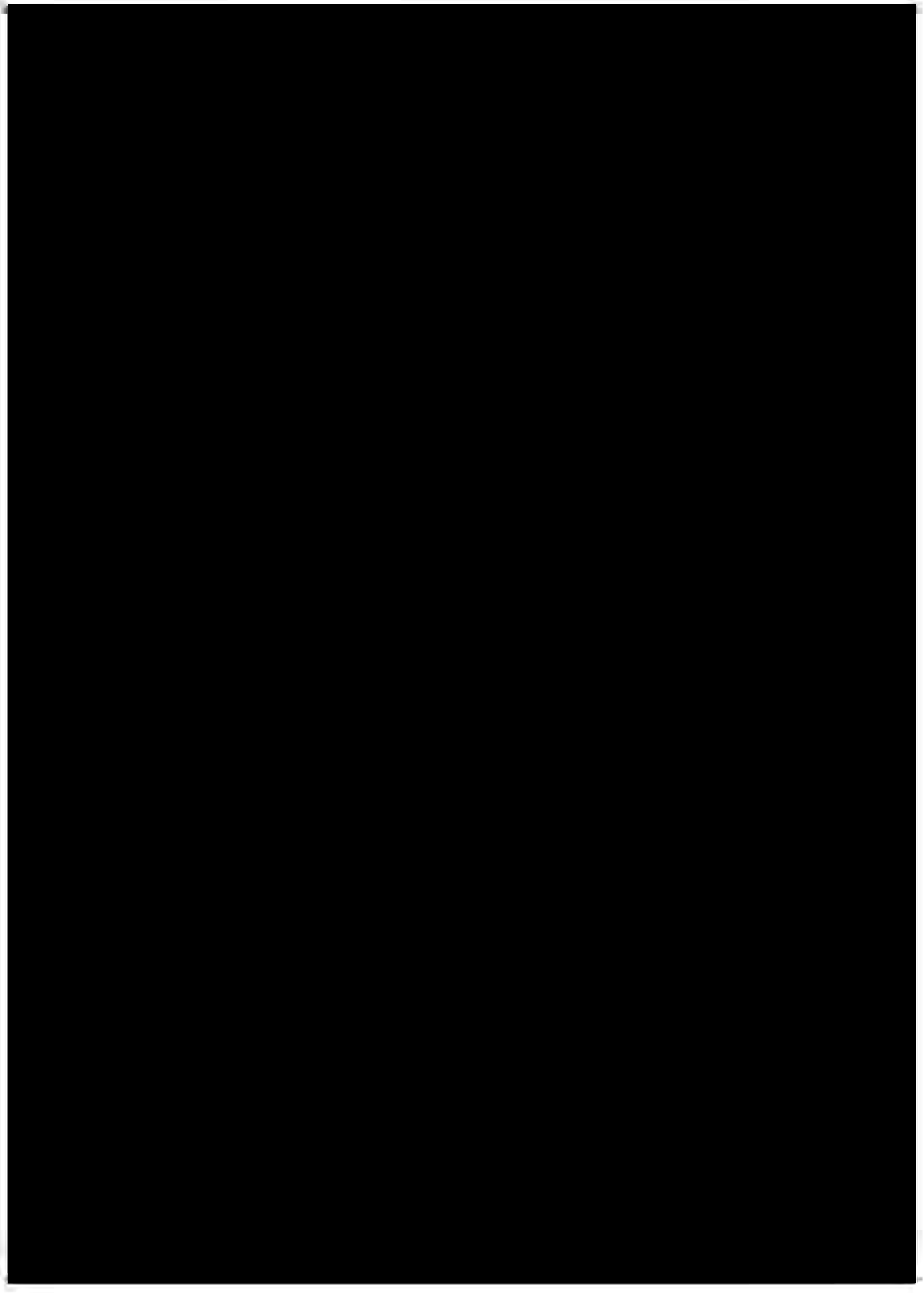
31. Minutes later, NCIS Special Agents (SA) [redacted] and [redacted] began interrogating Sgt Honstein.

32. The interrogation lasted approximately five (5) hours.

33. During the interrogation, Sgt Honstein discussed the events of 27 January 2024.

[redacted]

[redacted]



[redacted]

Preliminary Hearing Officer Report

37. A preliminary hearing in this case was held on 10 May 2024.

38. Pursuant to Article 32, UCMJ and R.C.M. 405, the preliminary hearing officer (PHO) was tasked with determining:

    a. Whether each specification alleges an offense;

    b. Whether there is probable cause to believe the accused committed the offenses charged; and

    c. The recommended disposition of the case.

39. Following the preliminary hearing, Government Counsel and Defense Counsel submitted written matters to the PHO pursuant to R.C.M. 405(l).

40. In their written matters, Trial Counsel argued that Sgt Honstein's belief that the pistol would not fire when he pulled the trigger "was not a reasonable belief, and pulling the trigger under those circumstances evidenced a reckless and wanton disregard for the probable consequence of her death."

41. On 28 May 2024, the PHO provided the Government and Defense Counsel his report.

42. In his report, the PHO provided a "Summary of Evidence," which stated in relevant part:

[redacted]

43. In his report, the PHO provided an "Analysis of Offenses," which stated each element of each alleged offense, and summarized the evidence thereof.

44. In his analysis of Charge I, the PHO found that probable cause existed to believe that Sgt Honstein committed the offense of Article 118(3), UCMJ.

45. The PHO continued:

> "There are five elements of Article 118, Murder - Act Inherently Dangerous to Another, and *the Government submitted probable cause evidence on all five of these elements* (emphasis added)."

46. The PHO proceeded to recite each element of the offense before providing a summary of the evidence establishing probable cause for each element."

47. For element 4 of the offense, the PHO cited to the interrogation of Sgt Honstein and wrote:

[redacted]

Referral of Charges

48. On 28 June 2024, Trial Counsel drafted its written determination letter pursuant to Article 34(c), UCMJ and R.C.M. 406(b).

49. In the letter, Trial Counsel wrote:

> "in accordance with Article 27b, UCMJ, and as a Special Trial Counsel certified in accordance with Article 24a, UCMJ, I submit that:
>
> a. The OSTC has exercised authority over the alleged offenses;
> b. Each specification properly alleges an offense under the UCMJ;
> c. *There is probable cause to believe that the accused committed the offenses charged* (emphasis added); and
> d. A court-martial has jurisdiction over the accused and the offenses.
>
> Based on the circumstances surrounding the misconduct and the seriousness of the offenses, I recommend the charges and specifications be referred to a General Court-Martial."

[redacted]

50. In submitting that there was probable cause to believe that Sgt Honstein committed the offenses charged, Trial Counsel specifically referenced the PHO's report.

51. Trial Counsel sent the letter to the referral authority, Lead Special Trial Counsel Brigadier General (BGen) Kevin S. Woodard.

52. On 3 July 2024, Charge I was referred to General Court Martial by BGen Woodard.

LAW

Preliminary Hearings and Referral of Charges

Article 34(c), UCMJ and R.C.M. 406(b) state that in cases over which a special trial counsel exercises authority, referral of a charge to court martial cannot be made until a special trial counsel makes a written determination that "there is probable cause to believe that the accused committed the offense charged." UCMJ art. 34(c); R.C.M. 406(b).

Although focused on cases in which special trial counsel has not exercised authority, the discussion of RCM 406 provides that written determination letters must include "an independent and informed appraisal of the charges and evidence." R.C.M. 406 discussion (2024). Furthermore:

> "Information which is incorrect or so incomplete as to be misleading may result in a determination that the advice is defective, necessitating appropriate relief. See R.C.M. 905(b)(1), 906(b)(3)." R.C.M. 406 discussion (2024).

If the advice in the pre-referral written determination letter is erroneous, inadequate, or misleading, the substantial rights of the accused may be prejudiced necessitating appropriate relief. *United States v. Rivera*, 42 C.M.R. 198 (C.M.A. 1970); *United States v. Greenwalt*, 20 C.M.R. 285 (C.M.A. 1955); *United States v. Grice*, 23 C.M.R. 390 (C.M.A. 1957); *United States v. Johnson*, 23 C.M.R. 397 (C.M.A. 1957); *United States v. Fields*, 25 C.M.R. 332 (C.M.A. 1958); *United States v. Bennie*, 27 C.M.R. 233 (C.M.A. 1959); *United States v. Foti*, 30 C.M.R. 303 (C.M.A. 1961); *United States v. Collier*, 42 C.M.R. 182 (C.M.A. 1970). The Court in *Rivera* remarked, "[a]s we said in *United States v. Foti*... "[W]hen . . . there are factors which would have a substantial influence on the decision of

[redacted]

the convening authority, they should be furnished to him."" *Rivera*, 42 C.M.R. at 199. For decades, this has been practiced in the military justice system.

As the Court in *Greenwalt* explained:

> "We begin our treatment of the issue here with the premise accepted by all of us in *United States v. Schuller*, 5 U.S.C.M.A. 101, 17 C.M.R. 101, to the effect that in every case a staff judge advocate must fully comply with Article 34 of the Code, 50 U.S.C. § 605. The Article requires that he consider and give advice upon every charge before it is referred to a general court-martial for trial. This is an important pretrial protection accorded to an accused, and Congress had in mind something more than adherence to an empty ritual. It placed a duty on the staff judge advocate to make an independent and informed appraisal of the evidence as a predicate for his recommendation. His is the role of an adviser, and unless he reviews the record thoroughly and accurately, he cannot soundly advise the man who has to make the ultimate decision. Therefore, to the extent that the advice rendered by him is *incomplete, ill-considered, or misleading as to any material matter* (emphasis added), he has failed to comply with the statutory obligation which rests upon him." *Greenwalt*, 20 C.M.R. at 288.

Article 32, UCMJ and R.C.M. 601(d)(3) levy a separate prerequisite to referring a specification to a general court-martial: a preliminary hearing *in substantial compliance* with RCM 405. R.C.M. 405(a) states:

> "The issues for determination at a preliminary hearing are limited to the following: whether each specification alleges an offense; *whether there is probable cause to believe that the accused committed the offense or offenses charged* (emphasis added); whether the convening authority has court-martial jurisdiction over the accused and over the offense; and to recommend the disposition that should be made of the case." R.C.M. 405(a)

Per the discussion of RCM 405(a), "[t]he function of the preliminary hearing is to ascertain and impartially weigh the facts needed for the limited scope and purpose of the preliminary hearing." R.C.M. 405(a) discussion (2024). Similar to the requirements of RCM 406:

> "Failure to substantially comply with the requirements of Article 32, which failure prejudices the accused, may result in delay in disposition of the case or disapproval of the proceedings. See R.C.M. 905(b)(1) and 906(b)(3)." R.C.M. 405(a) discussion (2024).

Given the requirements Articles 32 and 34 of the UCMJ and RCM 405 and 406, proper referral depends on the accuracy of the PHO's determination of the advice and recommendations contained in the written determination letter. See *United States v. Lewis*, No. 201900049, 2020 CCA LEXIS 199, at *37-42 (N-M. Ct. Crim. App. June 8, 2020) (Stephens, J. concurring) (emphasizing the importance of earnest

[redacted]

probable cause determinations and imploring "[s]pecifications lacking probable cause should not find a home on referred charge sheets for general courts-martial").

Probable cause means "more than a bare suspicion but less than evidence that would justify a conviction." Black's Law Dictionary 1321 (9th ed. 2009). In other contexts such as confinement and searches and seizures within the Manual for Courts-Martial, probable cause is defined in terms of "reasonable belief." The Supreme Court has defined probable cause for a preliminary hearing in terms of "facts and circumstances sufficient to warrant a prudent man in believing that the suspect had committed or was committing a crime." *Gerstein v. Pugh*, 420 U.S. 103, 105 (1975). The state of California defines probable cause in the context of a preliminary hearing as "a state of facts as would lead a person of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion of the guilt of the accused." *People v. Nagle*, 25 Cal. 2d 216, 222 (Cal. 1944); see also *Bompensiero v. Superior Court*, 15 Cal. App.3d 244 (Cal. Ct. App. 1982).

Article 118(c), UCMJ

Article 118(3) of the UCMJ criminalizes the unlawful killing of a human being by an "act which is inherently dangerous to another and evinces a wanton disregard of human life." R.C.M. 916(j)(1); *United States v. McMonagle*, 38 M.J. 53, 60 (C.A.A.F. 1993). The crime of "murder by an act inherently dangerous to another" was a legislative attempt to incorporate what was traditionally understood as "depraved heart murder" into the UCMJ. *United States v. Berg*, 30 M.J. 195, 200 (C.A.A.F. 1990). The legislative history of Article 118(3), UCMJ expressly states that the offense codified "the well-settled common-law rule that, even in the absence of a specific intent to kill or inflict serious bodily harm, the homicide is murder if the offender's conduct was imminently dangerous to others and evinced a wanton disregard of human life," and is "intended to cover those cases where the acts resulting in death are *calculated* (emphasis added) to put human lives in jeopardy, without being aimed at any one in particular." *Id.* at 199 (citing W. LaFave and A. Scott, Substantive Criminal Law § 7.4 at 199-200 (1986)).

[redacted]

The earliest versions of the Manual for Court Martial defined murder as the unlawful killing of another with "malice aforethought." MCM ch. XVII, p. 251 (1917). In cases alleging "depraved heart" murder, malice aforethought existed when the accused acted with knowledge that his actions would "probably cause the death of, or grievous bodily harm to any person." *Id.*. Article 118(3), UCMJ originally covered only those depraved acts that were calculated to put human lives in jeopardy generally. *Berg*, 30 M.J. at 199. That is to say that, historically, "murder by an inherently dangerous act" did not include acts showing a wanton disregard toward the life of any person in particular. *Id.* at 200. However, following the C.A.A.F's decision in *Berg*, the Manual for Courts Martial was amended in 1995 to include inherently dangerous acts aimed at a particular person. Nevertheless, the "depraved heart" nature of the offense remains intact, to include the requirement that the accused have actual knowledge that the probable result of his actions would be the death or grievous bodily harm of another. *McMonagle*, 38 M.J. at 60; *United States v. Stokes*, 19 C.M.R. 191, 194-196 (C.M.A. 1955).

Because the Government must prove beyond a reasonable doubt that the accused had actual knowledge that death or great bodily harm was a probable consequence of his actions, the accused should not be convicted of depraved-heart murder unless he *subjectively* knew the probable consequences of his acts were death or great bodily harm. *McMonagle*, 38 M.J. at 60

ARGUMENT

The Article 32 Hearing was Defective

Under Article 32, UCMJ and R.C.M. 405, the PHO is responsible for making a probable cause determination for each offense by impartially weighing the evidence and applying it to the law. The Article 32 hearing and the PHO's determinations are inherently defective if the PHO demonstrates a fundamental misunderstanding of the law with respect to any offense. Here, the PHO determinations and finding of probable cause with respect to Charge I was defective in that it was based on an erroneous understanding of the law. In his report, the PHO, citing only to the interrogation of Sgt Honstein, asserted

[redacted]

that probable cause existed with respect to Charge I because "the actions of the accused reflect that the accused knew *or should have known* (emphasis added) that death or great bodily harm was a probable outcome of his actions." In short, the PHO applied an *objective* standard to the knowledge element of Charge I instead of the *subjective* standard required by law. The "reasonableness" of Sgt Honstein's lack of knowledge of the probable consequences of his acts, i.e. what Sgt Honstein "should have known" under the circumstances is entirely irrelevant to the probable cause determination. As such, the PHOs probable cause determination and recommendations with respect to Charge I are defective, resulting in a "failure to substantially comply with the requirements of Article 32," and necessitating a dismissal of the Charge.

The Written Determination Letter is Defective

Trial Counsel's written determination letter is likewise defective. In the letter, Trial Counsel submitted that there was probable cause to believe that Sgt Honstein committed the offense of Article 118(3), UCMJ. In doing so, Trial Counsel cited to the PHO's report, which applied an erroneous standard to the fourth element of the offense as detailed above. Trial Counsel's own erroneous interpretation of the elements of Article 118(3), UCMJ is further evidenced by the written matters submitted to the PHO in which they argue that Sgt Honstein's belief that the pistol would not fire when he pulled the trigger "was not a *reasonable belief* (emphasis added), and pulling the trigger under those circumstances evidenced a reckless and wanton disregard for the probable consequence of her death." Like the PHO, Trial Counsel, in advising the referral authority, applied an *objective* standard to the knowledge element of Charge I instead of the *subjective* standard required by law. The "reasonableness" of Sgt Honstein's lack of knowledge of the probable consequences of his acts, i.e. what Sgt Honstein "should have known" under the circumstances is entirely irrelevant to the probable cause determination. As such, the written determination letter contains "information which is incorrect," resulting in defective advice and encroachment on the substantial rights of the accused, and "necessitating appropriate relief" in the form of dismissal of the charge.

RELIEF REQUESTED

53. **Request.** The Defense moves this Court to dismiss Charge I.

54. **Evidence.** The Defense submits the following enclosures in support of its motion:

    a. Enclosure 1:

    b. Enclosure 2:

    c. Enclosure 3:

55. **Oral Argument.** The Defense requests oral argument if opposed.

[redacted]
T. J. LIPOSITZ
Captain, U.S. Marine Corps
Defense Counsel

[redacted]

CERTIFICATE OF SERVICE

I certify that I have delivered a copy of the foregoing document electronically to the Court and Trial Counsel on 13 September 2024.

[redacted]
T. J. LIPOSITZ
Captain, U.S. Marine Corps
Defense Counsel

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

UNITED STATES v. DAKOTA S. HONSTEIN SERGEANT/E-5 U.S. MARINE CORPS	**GOVERNMENT'S RESPONSE TO DEFENSE MIL (INSTRUCTIONS)** 20 September 2024

Nature of Motion

This is the Government's response to the Defense's MOTION IN LIMINE (Instructions), dated 13 September 2024.

Summary

The Accused is charged with violations of Article 118(3) and Article 119, for discharging his 9mm pistol while it was pressed against the chest of Ms. [redacted] on 27 January 2024, which resulted in her death a short time later. The Accused initially reported to PMO officers and NCIS agents that during the course of a consensual sexual interaction involving the weapon, the victim had pulled the trigger, followed by a change in his explanation that she had loaded the gun without his knowledge before he pulled the trigger, which was followed finally by an admission that he knew the weapon was loaded and that he had pulled the trigger intentionally but did he did not believe that the weapon would discharge because he believed he had depressed the slide of the pistol enough to disengage the trigger by pushing the weapon at an angle into her chest. The Defense has made a motion in limine regarding proposed instructions for the trial ordered to begin 28 October 2024. The Government requests the Court issue a preliminary ruling regarding the elements, definitions, and *mens rea* required as to Article 118(3), but withhold ruling on whether the Defense rates such a mistake of fact

[redacted]

instruction until the evidence that would raise the instruction has been received.

Summary of Facts

1. The Accused is charged with violations of Article 118(3) and Article 119, for discharging his 9mm pistol while it was pressed against the chest of Ms. [redacted] on 27 January 2024, which resulted in her death a short time later.

2. The Accused initially reported to PMO officers and NCIS agents that during the course of a consensual sexual interaction involving the weapon, the victim had pulled the trigger, followed by a change in his explanation that she had loaded the gun without his knowledge before he pulled the trigger, which was followed finally by an admission that he knew the weapon was loaded and that he had pulled the trigger but did he did not believe that the weapon would discharge because he believed he had depressed the slide of the pistol enough to disengage the trigger to prevent it from firing. [Enclosures 1 and 2]

3. The Accused also explained that the pistol was involved in the consensual sexual interaction for his sexual gratification, and that the dangerous nature of the weapon added to his arousal. [3:10:50 – 3:11:24; 3:42:00 – 3:42:17].

4. The Government submitted written closing comments as part of the Article 32 process, which in part described its charging theory for Charge I:

> The evidence shows that there is probable cause to charge the accused with Charge I. During his NCIS interrogation, the accused admitted that he made the murder weapon condition 0 and pressed it against the victim's chest because he needed an "adrenaline rush."[1] He also admitted to intentionally pulling the trigger, though he stated he believed the slide was pushed back and out of battery – which he stated he believed would stop it from firing. [Page 1]
>
> The Defense's oral argument against an Art 118(3) charge in this case was flawed in multiple ways. The first argument, wherein the Defense posed a rhetorical question to the PHO by asking, "Would he [the accused] wanted to have hurt her?" fundamentally misunderstands the charging scheme under Art 118(3). There is no legal requirement or element that the accused intended death or bodily harm to the victim; had he intended her death, the more appropriate charge would be for a violation of UCMJ Art 118(1) or

[redacted]

118(2) depending on the circumstances. The charge only requires that he knew of the probable consequences of his actions and acted in a reckless and wanton disregard for said consequences. That requirement is readily met by the evidence in this case.

The discussion references "pointing apistol in jest at another and pulling the trigger, believing, but without taking reasonable precautions to ascertain, that it would not be dangerous." But, in this case the Accused knew the weapon was dangerous because he knew it was loaded and ready to fire and he knew it would be dangerous to pull the trigger while the weapon was aimed over the victim's heart absent some assurance that it would not fire. Believing the slide was pushed back far enough to disengage the firing pin due to pushing it into the victim's breast, a naturally soft surface, was not a reasonable belief, and pulling the trigger under those circumstances evidenced a reckless and wanton disregard for the probable consequence of her death after a 9mm bullet passed through her chest from point blank range. That probable consequence varies greatly from "the basis of a charge of involuntary manslaughter [where] a negligent act or omission which, when viewed in the light of human experience, might foreseeably result in the death of another, *even though death would not, necessarily, be a natural and probable consequence of such act or omission.*" [Page 2].

Assuming *arguendo* that the Accused accurately relayed her equal interest in involving the loaded weapon, that consent has no bearing on the basic, relevant facts underlying the Art 118(3): the Accused pulled the trigger of a weapon that had a round in the chamber and no safety engaged while it was pointed directly over her chest, and he did not ensure that it would not fire before doing so. Regardless of her consent to all of the sexual acts, she could not consent to that non-sexual act, which killed her. [Page 4]

Attempts to bind the Government based on the RSTC East's sentences in past cases are inappropriate and misleading, and therefore should be disregarded. The Accused in U.S. v. Rohlfs was operating in a training environment, on a dry-fire range where no live ammunition had been issued that day, had been lined-out twice the day before, did not have a magazine in his weapon, and had no reason to believe his weapon was loaded when he pulled the trigger. **Those facts vary significantly from the facts in this case, where despite the Accused's myriad of initial false exculpatory statements, he eventually admitted he knew the weapon was loaded and that there was a round in the chamber when he pulled the trigger on a weapon that does not have a thumb safety while it was positioned over the victim's chest.** [Page 4, emphasis added]

5. The Defense's comments, submitted after the Government's/in response, acknowledge and reflect the

Summary of Evidence Facts Alleged. The Government alleges that Sergeant (Sgt) Honstein intentionally pulled the trigger of a firearm, resulting in the discharge of said firearm and the death of the Ms[redacted] The discharge of the firearm occurred during a consensual sexual encounter between Sgt Honstein and Ms. [redacted] The consensual nature of the sexual encounter is not disputed. Neither is the consensual use of the firearm

[redacted]

generally during the sexual encounter, which is evidenced by Sgt Honstein's interrogation (GE 3) and corroborated by Ms. [redacted] (GE 18).

Hours after the shooting, Sgt Honstein was interrogated by NCIS. Sgt Honstein was cooperative and answered NCIS' questions in great detail. Although he initially denied inserting a magazine into the firearm, Sgt Honstein eventually stated that he loaded the firearm and pulled the trigger with the barrel depressed against Ms. [redacted]. at Ms. [redacted] request. The firearm discharged to Sgt Honstein's shock, and Sgt Honstein immediately attempted to provide aid to Ms [redacted] before seeking the assistance of LCpl [redacted] and others in the building. Tragically, Ms. [redacted] was pronounced dead at the scene by medical personnel minutes after the shooting. [Page 3]

The factual allegations of the gravamen offense are that Sgt Honstein intentionally pulled the trigger of a loaded firearm resulting in the shooting and death of Ms. [redacted] [Page 10]

Burden of Proof and Persuasion

6. The moving party generally bears the burden of proof and persuasion under R.C.M. 905(c). However, "instructions on findings ***shall*** include . . . (1) A description of the elements of each offense charged, unless findings on such offenses are unnecessary because they have been entered pursuant to a plea of guilty; (3) A description of any special defense under R.C.M. 916 in issue, *United States v. Dearing*, 63 M.J. 478, 482 (C.A.A.F. 2006), and (7) Such other explanations, descriptions, or directions as may be necessary and which are properly requested by a party or which the military judge determines, *sua* sponte, should be given.

Law

7. If an affirmative defense is reasonably raised by the evidence, the military judge has a *sua sponte* duty to instruct the members on that defense. *United States v. MacDonald*, 73 M.J. 426, 434 (C.A.A.F. 2014). A defense is reasonably raised when "some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they chose." *Id.* The defense theory at trial is not dispositive in determining what affirmative defenses have been reasonably raised, but any doubt regarding whether an affirmative defense instruction is in order should be resolved in favor of the accused. United States v. Davis, 53

[redacted]

M.J. 202, 205 (C.A.A.F. 2000).

8. Murder under Article 118(3) is a general-intent crime. *United States v. McMonagle*, 38 M.J. 53, 60 (C.A.A.F. 1993). Mistake of fact is not a defense to a general intent crime unless it is both honest **and reasonable**. *Id.* (emphasis added). In a depraved-heart murder, the killer's attitude is "not measured in the abstract, but is evaluated in light of the surrounding circumstances that are apparent and known to the perpetrator, **or at least should reasonably be apparent and known by him**." *Id.* (emphasis added).

ANALYSIS

9. The Defense's request to instruct the factfinder as to six elements, rather than five should be rejected. MCM, pt. IV, ¶ (b)(3) lists the following elements:

(a) That a certain named or described person is dead;

(b) That the death resulted from the intentional act of the accused;

(c) That this act was inherently dangerous to another and showed a wanton disregard for human life;

(d) That the accused knew that death or great bodily harm was a probable consequence of the act; and

(e) That the killing was unlawful.

The Defense provided no explanation as to why the third element should be split into two, other than by inference that it would best support their theme and theory of innocence in front of the factfinder and perhaps give at least the appearance of any even higher burden for the Government (a lofty sixth element). Absent any legal support or explanation, the Court should simply instruct the members on the five elements in MCM, pt. IV, ¶ (b)(3) and benchbook instruction 3a–42–3.

10. The Defense's requested instructions with respect to the intentional act in this case should also be rejected by the Court. The Defense provides two alternative acts in its proposed instructions: [shooting of Ms[redacted] with a firearm] and [pulling the trigger of the firearm]. The first, [shooting of Ms.[redacted] with a firearm] is drafted in a way that misleads the fact-finder and inserts error into the record regarding intent element in this case. The Government has never alleged that the Accused *intentionally* shot Ms.[redacted] and using [shooting of Ms.[redacted] with a firearm] directly after the preceding word "intentional" in the second element misleads the fact-finder as to what they must find the Government has proven in order to convict him of Charge 1. The Government specifically disavowed charging the Accused with intentionally shooting Ms. [redacted] in its Art. 32 comments, and the charge itself under Article 118(3) rather than under Article 118(1) or 118(2) gives indication that the Accused did not have the *mens rea* of intentionally discharging or shooting his pistol into her chest. If there was any question based on the language of the charge itself, the Defense has been on notice of the Government's theory since 13 May 2024, which provided the essentially the same explanation three different times: "the Accused pulled the trigger of a weapon that had a round in the chamber and no safety engaged while it was pointed directly over her chest, and he did not ensure that it would not fire before doing so." The Defense's Article 32 comments reflect their understanding of the Government's charging theory:

> The Government alleges that Sergeant (Sgt) Honstein intentionally pulled the trigger of a firearm, resulting in the discharge of said firearm and the death of the Ms.[redacted] The discharge of the firearm occurred during a consensual sexual encounter between Sgt Honstein and Ms.[redacted] The consensual nature of the sexual encounter is not disputed. Neither is the consensual use of the firearm generally during the sexual encounter, which is evidenced by Sgt Honstein's interrogation (GE 3) and corroborated by Ms.[redacted] (GE 18). . . . Although he initially denied inserting a magazine into the firearm, Sgt Honstein eventually stated that he loaded the firearm and pulled the trigger with the barrel depressed against Ms.[redacted] at Ms.[redacted] request.

[redacted]

As the above comments demonstrate, both parties understood intentional act underlying Charge I in this case as: [pulling the trigger of a weapon that had a round in the chamber and no safety engaged while it was pointed directly over her chest], and that is the instruction this Court should give.

11. This Court should also reject the Defense's related request for a definition of intentional or intent beyond what is listed in MCM, pt. IV, ¶ (c)(4)(a) and benchbook instruction 3a-42-3: "The act must be intentional, but death or great bodily harm does not have to be the intended result." The Defense's requested instruction cites to MCM, pt. IV, ¶ (c)(3)(b), the instruction for "Intent to kill or inflict great bodily harm," under Article 118(2), a requirement that is explicitly rejected by MCM, pt. IV, ¶ (c)(4)(a), and the Defense's request for [shooting Ms. [redacted] with a firearm] followed by "must have been intentional" is misleading to the fact finder as to the *mens rea* required in under Article 118(3)–it should again be rejected by this Court in considering an intent definition in the instructions.

12. The Defense's requested instruction to further define wanton disregard with a *United States v. Berg*, 30 M.J. 195, 199 (C.A.A.F. 1990) citation should also be rejected in favor of the instruction from benchbook instruction 3a-42-3: An act shows a wanton disregard for human life when it is characterized by heedlessness of the probable consequences of the act, or indifference to the likelihood of death or great bodily harm, and demonstrates a total disregard for the known probable results of death or great bodily harm. That instruction is squarely consistent with MCM, pt. IV, ¶ (c)(4)(a) without the addition of "if it is calculated to put a human life in jeopardy" which, again, attempts to elevate the *mens rea* the Government must prove.

13. The Defense's requested "Knowledge" instruction is redundant with the Court's instruction on the second element, "That the accused knew that death or great bodily harm was a probable consequence of [the intentional act](pulling the trigger of a weapon that had a round in

[redacted]

the chamber and no safety engaged while it was pointed directly over her chest), and then adds the word "actual" and the beyond a reasonable doubt standard, which the Court will already instruct the members on. The addition of the word "actual" appears to be in conjunction with the Defense's request, addressed below, for this Court to give the specific-intent crime mistake of fact instruction, requiring only an honest (actual) mistake. As discussed below, Article 118(3) is a general intent crime, and the Defense's request to insert the specific-intent crime language for mistake into the knowledge instruction should be rejected as the rest of its requested instruction is redundant and the "actual" language (without the rest of the general intent crime mistake of fact explanation that it must be reasonable as well) is misleading to the fact finder.

14. The Defense's requested instruction for "Probable Consequences" similarly simply restates the fourth element, "That the accused knew that death or great bodily harm was a probable consequence" but replaces probable with the word likely. Given the language of MCM, pt. IV, ¶ (b)(3)(d) using "probable", it is unclear why the word "likely" would be more instructive, other than to provide a synonym. This Court should give instructions consistent with the MCM and the benchbook that avoid redundancy or alterations of the language where there is no discernable benefit to the factfinder.

15. The Defense has requested the specific-intent crime mistake of fact instruction and this Court should deny that request. Murder under Article 118(3) is a general-intent crime. *United States v. McMonagle*, 38 M.J. 53, 60 (C.A.A.F. 1993). Mistake of fact is not a defense to a general intent crime unless it is both honest[actual] **and reasonable**. *Id.* Therefore, the Court should give the mistake of fact instructions from the benchbook 5-11-2, and not the Defense's requested instruction derived from benchbook 5-11-1.

RELIEF REQUESTED

16. The Government requests the Court issue a preliminary rulings regarding the elements,

[redacted]

definitions, and mens rea required as to Article 118(3), but withhold ruling on whether the Defense rates such an instruction until the evidence that would raise the instruction has been received.

EVIDENCE OFFERED

1. Accused's interrogation (previously provided in another motion)
2. Statements of other witnesses documenting the Accused's explanation of what occurred. (previously provided in another motion)
3. Referred Charge Sheet (allied papers)
4. Government Article 32 comments
5. Defense's responsive Article 32 comments.

Oral Argument. The Government requests oral argument on this issue should the Defense oppose.

[redacted]
M. E. BLACKBURN
Captain, USMC
Special Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Government's response to Defense's Motion in Limine (instructions) was served electronically on defense counsel and the Court on 20 September 2024.

[redacted]
M. E. BLACKBURN
Captain, USMC
Special Trial Counsel

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

UNITED STATES **V.** **DAKOTA S. HONSTEIN** **SERGEANT / E-5** **USMC**	**GOVERNMENT RESPONSE TO THE DEFNSE MOTION TO DISMISS** **(Defective Referral)** **31 October 2024**

NATURE OF THE MOTION

This is the Government's response to the Defense motion to dismiss for a defective referral.

SUMMARY

The Government took appropriate actions in accordance with the Rules for Court-Martial and the applicable case law to comply with the Military Judge's ruling that the government is required to expressly and specifically plead the intentional act under 118(3). After a request to make an amendment to the charge sheet as a minor change, and a request to the defense for joinder of an amended Charge, the Government was forced to withdraw and prefer the charges anew. No article 32 was required as the amended specification now reflects the exact theory the parties addressed at the previous Article 32 hearing where the Accused was provided with all the rights available under R.C.M. 405. The procedural process was completed in enough time that the Accused is brought back to trial within the currently docketed timeframe without impact to any substantive right of the Accused as the Government has continued to provide access to all witnesses and experts previously ordered produced. There is a legitimate Governmental interest in the appropriate charges being tried at court-martial, regardless of the findings. Accordingly, the Defense's motion and requested relief should be **DENIED**.

FACTS

1. On 27 Jan 24, the Accused was placed in pre-trial confinement. (See Encl. 1).
2. On 5 Feb, the IRO hearing was conducted, and the Accused was retained in the brig.
3. On 9 Apr 24, charges were preferred against the Accused.
4. On 12 Apr 24, the 706 board was conducted.
5. On 17 Apr 24, the Government submitted the Article 32 appointing order to the PHO
6. On 30 Apr 24, the parties received the 706 report.
7. The PHO scheduled the Article 32 hearing for 22 April 2024.
8. On 24 Apr 24, the Defense submitted a continuance request to the Convening Authority requesting that the Article 32 hearing occur on 10 May 24.
9. On 10 May, the Article 32 preliminary hearing was conducted.
10. On 15 May, the Defense submitted its RCM 405(l) comments to the PHO.
11. On 28 May 24, PHO issued the Article 32 report.
12. On 3 July 24, charges were referred against the Accused.
13. On 8 July 24, the Government submitted its motion for docketing, requesting that the Court arraign the Accused on 10 July, the day after the five-day statutory waiting period.
14. On 10 July 24, the Defense requested the arraignment take place on 6 August due to scheduling conflicts between the two defense counsel.
15. On 20 August 2024, the Defense filed a request for expert consultation in the field of firearms, to include physical examination and testing of the firearm at issue in this case.
16. On 23 September 2023, at a 39(a) session for the previous court-marital, the Accused entered pleas of guilty to Charge II and Charge III, and a plea of Not Guilty to Charge I. The

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Accused also selected the forum of Military Judge alone. The Court had the colloquy and approved the forum but did not assemble the Court.

17. On 8 October 2024, the Defense indicated Mr. [redacted] would be an expert witness in the field firearms though their final pretrial matters filed with the Court.

18. On 10 October 2024, the Defense requested Mr. [redacted] be produced for trial as an expert witness in the field of firearms. On 17 October 2024, the Government filed a motion requesting to make a minor change to amend Charge I to read in part "... murder [redacted] by means of intentionally pulling the trigger of a loaded firearm while pointing it at her."

19. On 20 October, the Government interviewed Mr. [redacted]

20. On 21 October, the Defense responded to the motion claiming it was a major change.

21. On 22 October 2024, the Government received Mr. [redacted] firearms report.

22. On 23 October 2024, the Court ruled on the minor change motion.

23. On 26 October 2024, the Government discussed with Defense a government request to withdraw, amend, refer, and join an amended charge I to read in part, "... murder [redacted] by means of intentionally pulling the trigger of a loaded firearm while pointing it at her."

24. On 26 October the Defense indicated they would object to the joinder of a withdrawn and amended Charge I.

25. On 26 October 2024, the Government withdrew, dismissed, amended, preferred anew, referred, and served the current charges on the Accused.

26. On 27 October 2024, the Government filed a motion for docketing with the Court to immediately arraign and maintain formerly docketed trial dates.

27. On 28 October 2024, the Defense articulated they would not waive the statutory waiting period and the Court ordered dates consistent with that right.

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LAW

R.C.M. 308's discussion session states in part "However, in cases where charges are immediately referred after preferral, service of referred charges under R.C.M. 602 fulfills the notice requirement of this rule. In those cases, the notice certificate on the charge sheet need not be completed and should be lined out.

R.C.M. 405(b) states, "(b) *Earlier preliminary hearing.* If a preliminary hearing on the subject matter of an offense has been conducted before the accused is charged with an offense, and the accused was present at the preliminary hearing and afforded the rights to counsel, cross examination, and presentation of evidence required by this rule, no further preliminary hearing is required."

"Congress created, in effect, an exception to the "demand" element in subsection (c) when investigations conducted under Article 32, UCMJ, meet the enumerated conditions of subsection (d). We can discern no material difference between unsworn charges that are investigated ab initio pursuant to Article 32, UCMJ, and uncharged offenses uncovered in the course of a pretrial investigation that are thereafter investigated pursuant to subsection (d) of the same Article. In short, to grant this petition would be to exalt form over substance and, thereby, take a position that is clearly contrary to the purpose of the statute." *Diaz v. United States*, 54 M.J. 880, 883 (N-M Ct. Crim. App. 2000)

"Improper withdrawal includes any interference with the free exercise of a constitutional or Codal right or with the impartiality of a court-martial. *Williams*. Manipulating members to "adjust" court sentences (*Williams*; *Walsh*). retaliation for defense requested witnesses (*Petty*).

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and changing venue to avoid witness expenses (*Fleming*) are among improper reasons for withdrawal. The mere consequential effect of an accused being exposed to potentially more severe punishment, however, is not conclusive of an improper reason. *Hardy*, 4 M.J at 27 (Cook J., dissenting). *Cf. Lord* at 13 U.S.C.M.A. at 81; 32 C.M.R. at 81; *Wells*. The charge joinder policy of R.C.M. 601(e)(2), upon which the convening authority purported to rely, is, by its terms, permissive, not absolute. *United States v. Thomas*, 17 U.S.C.M.A. 22, 37 C.M.R. 286 (1967). The policy is normally applicable at the referral stage of a case. It follows that the strength of the policy weakens as the case moves into subsequent stages where other policies and considerations are brought to bear. *United States v. Koke*, 32 M.J. 876, 881 (N-M.C.M.R. 1991) Changes may also be made at any time before findings if they do not impact on the "substantial right[s] of the accused." RCM 603(c). The comparable element of prejudice to the "substantial rights of the defendant" in the Federal Rule is usually interpreted as requiring some showing of surprise which will interfere with the defendant's presentation at trial. *United States v. Sullivan*, 42 M.J. 360, 365 (1995)(emphasis added). "Since such prejudice may be avoided before trial by granting an appropriate continuance, an amendment made before trial is unlikely to be held to have injured the substantial rights of the defendant where a continuance was granted or none was requested." W. LaFave and J. Israel, 2 *Criminal Procedure* § 19.2(g) at 462 (1984). *United States v. Moreno*, 46 M.J. 216, 218-19 (C.A.A.F. 1997)

When the basic facts remain unchanged, other overt acts may be substituted or amended. We reject the defense argument that the amendment "converts a specification which did not allege an offense into one which does." *Id.*(emphasis added)

It was, however, well-established at the time of appellant's court-martial that he must be prepared to defend against overt acts other than those alleged in the specification. *See United*

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States v. Colllier, 14 M.J. 377 (CMA 1983). Moreover, the prosecution's proof of the amended overt act was drawn from the same witness testifying about the same telephone conversation concerning the same illegal plan to sell the stolen drugs. *See United States v. Adams*, 534 F.2d 31, 39 (3d Cir. 1976) (difference in facts slight). *Id.*

"I do acknowledge that, in *Reese*, the CAAF explicitly held that R.C.M. 603(d) does not have a separate prejudice component. 76 M.J. at 301-02. That said, I do not read Reese to negate the full language of R.C.M. 603(a). Specifically, in my view, Reese does not preclude us from considering the likelihood of misleading the accused in deciding whether a change is major in the first place. In fact, I read Reese to encourage appellate courts to consider both "unfair surprise" and similar concepts to avoid the underlying "evil" it identified: insufficient notice to the accused. *United States v. Moore*, 2019 CCA LEXIS 388, at *16 (A. Ct. Crim. App. Oct. 2, 2019) (Dissent).

"Despite learning that its evidence on this charge was not legally sufficient two days before trial, for some reason the government chose not to amend the charge. There is no dispute that the government controls the charge sheet, and that Reese was on notice that he had to defend against an allegation that he licked the complaining witness's penis. The defense was entitled to rely on the charge sheet and the government's decision not to amend the charge sheet prior to trial. *United States v. Reese*, 76 M.J. 297, 301 (C.A.A.F. 2017)"

"While changing the means by which a crime is accomplished may constitute a slight error under the appropriate circumstances, those circumstances are not present here. *See, e.g., United States v. Murray*, 43 M.J. 507, 511 (A.F. Ct. Crim. App. 1995)." *United States v. Reese*, 76 M.J. 297, 301 (C.A.A.F. 2017).

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"Appellant could have requested a bill of particulars to obtain more precise information about the Government's theory or theories of liability. R.C.M. 906(b)(6) & Discussion. but did not do so." *United States v. Nicola*, 78 M.J. 223, 226 n.2 (C.A.A.F. 2019)

Fairness and common sense, not technicalities, should rule the law." *United States v. Townes*, 52 M.J. 275, 277 (2000)

PREVIOUS LITIGATION

There was a properly appointed and conducted Article 32 hearing, pursuant to R.C.M. 405, regarding the facts and circumstances of this case. The Article 32 Preliminary Hearing Officer (PHO) was appointed on 17 April 2024 to conduct a hearing no later than 23 April 2024.

The Defense requested delay to prepare for the Article 32 on 22 April 204 and 24 April 2024.

The Defense did not request any evidence be produced at the Article 32 hearing.

The Defense did not call any witnesses at the Article 32 hearing.

The Article 32 hearing was conducted on 10 May 2024

Government comments at the Article 32 (13 May 2024):

The evidence shows that there is probable cause to charge the accused with Charge I. During his NCIS interrogation, the accused admitted that he made the murder weapon condition 0 and pressed it against the victim's chest because he needed an "adrenaline rush." He also admitted to *intentionally pulling the trigger*, though he stated he believed the slide was pushed back and out of battery – which he stated he believed would stop it from firing.

Defense Comments on the evidence at the Article 32 hearing (15 May 2024):

"**Summary of Evidence Facts Alleged**. *The Government alleges that Sergeant (Sgt) Honstein intentionally pulled the trigger of a firearm*, resulting in the discharge of said firearm and the death of the Ms. [redacted] The discharge of the firearm occurred during a consensual sexual encounter between Sgt Honstein and Ms. [redacted]

Additionally, the Defense in their comments to the PHO state, "Hours after the shooting, Sgt Honstein was interrogated by NCIS. Sgt Honstein was cooperative and answered NCIS' questions in great detail. Although he initially denied inserting a magazine into the firearm, Sgt Honstein eventually stated that he loaded the firearm and pulled the trigger with the barrel depressed against Ms. [redacted] at Ms. [redacted] request."

The Defense conclude their argument on evidence presented at the Article 32 hearing by stating, "The factual allegations of the gravamen offense are that Sgt Honstein *intentionally pulled the trigger of a loaded firearm* resulting in the shooting and death of Ms. [redacted] (emphasis added)

In the Defense motion to compel and expert consultant in firearms they note, "Sgt Honstein is alleged to have **unintentionally** discharged a pistol during a consensual sexual encounter with the named victim, Ms [redacted] resulting in her death. The Government has charged Sgt Honstein with violations of Article 118, UCMJ (Murder – Act Inherently Dangerous to Another), and Article 119, UCMJ (Involuntary Manslaughter)." Further in that filing of 20 August, approximately 60 days ago, the Defense articulates "[t]his case centers on the use and function of a firearm, which will comprise the majority of the evidence the Government expects to use in its case-in-chief to establish guilt as to the violation of Article 118. Moreover, the Government to rely heavily on the testimony of its own firearms expert at trial to establishing the wanton disregard of using this exact firearm in the manner in which the accused did, as well as to

discuss his training with firearms, firearm mechanical safeties, and safe employment of firearms. The Government's expert may also be used in rebuttal should the Accused testify regarding *his alleged attempts to push the slide back in order to take the weapon out of battery*, thereby disabling it."

The Defense then requested the Firearms Expert to be produced for trial and argued that he should be produced based on the independent tests he conducted. This firearm expert witness was declared to the government on 9 October 2024. He was made available for interview on 20 October 2024. His report was provided on 22 October 2024. The Defense provided RCM 703(d) notice on 25 October 2024 (just 6 days ago, and 21 days past the declaration deadline). Mr. [redacted] report concurs with USACIL, but also conducted an additional test on the poundage to push the slide to the rear. This is not an expert that has relevance to the intentional shooting of the victim, but rather an expert witness addressing the Accused's belief that manipulation of the slide would prevent the weapon from firing when he intentionally pulled the trigger of a loaded firearm while pointing it at Ms. [redacted]

ARGUMENT

The Government's withdrawal action and subsequent referral were not improper, did not interfere with a substantial right of the accused, did not increase the punitive exposure of the Accused and in no way effect the trial preparation or surprise the Defense. From 9 April 2024 until 4 October 2024, the Parties were preparing for the same case. It was not until the Defense's 4 October filing, despite their prior written filings, that the Defense invokes, "[h]ere, the defense contends, pretrial, that the specification fails to provide the constitutionally required notice." (4 Oct 24, DEFENSE BRIEF (Instructions and Failure to State an Offense). This is even contrary to their 15 September 2025 filing requesting specific instructions, where the Defense asked the

Court to consider two theories of liability and noted two distinct acts, "[shooting of Ms [redacted] with a firearm] [pulling of the trigger of the firearm]" (Enclosure 1). Interestingly, the term 'pulling the trigger' does not explicitly appear anywhere in the charging documents, but from the time of the Article 32 until 25 October 2024, that was what the Defense was preparing to meet as evidenced through their comments, their requested witnesses, their funded experts, and their expert's own reports.

When the Government learned of the Defense's confusion on 4 October 2024, contrived or otherwise, the Government sought, in line with the Court's ruling, not contrary to it, to amend the charge to expressly state, what had been previously implied by requesting to make a minor change. This requested amendment would have narrowed the aperture of the criminal act and as the Court noted, "The Court acknowledges that the inherently dangerous act proposed may be an act that avers a lesser degree of culpability (less depravity) than the inherently dangerous act pled." (MJ ruling 23 October 2024) The Court concludes it ruling by noting, "As the defense noted in its written response, the government is certainly free to withdraw, dismiss, and pre-prefer."

The Government next sought permission from the Defense to withdraw, amend, refer anew and join an amended Charge I to the other charges. Prior to the Government action now alleged to be nefarious by the Defense, the Government sought their permission under R.C.M. 601 and 604, to make the amendment. The Defense considered the request and indicated they would object to the joinder. It was only at this point the Government took the action it did to ensure the correct, precise, and now in line with the Court's ruling, expressly plead act was in front of the Court.

Here there is no surprise, no change in jeopardy, no additional offenses, and the amended

offense is a lesser degree of depravity under 118, akin to a lesser offense. A major change does not always necessitate a new Article 32 hearing. The facts and circumstances dictate if there is a need under R.C. M. 405. In this case, the Defense has already provided comments on the theory of liability now expressly plead. Even where the charged offense may be arguably different, in this case the "different," charge the Defense contends, is on its face the charge that was investigated at the previous Article 32 hearing. In fact, the very words they used to articulate the Government's theory in their previous Article 32 hearing comments, are now the words that expressly appear in the specification. The Government's amendment to the charge, in line with the Court's ruling, is akin to a bill of particulars at best. As stated in *Reese*, "[w]hile changing the means by which a crime is accomplished may constitute a slight error under the appropriate circumstances..." While in Reese, those were not the correct circumstances, this case certainly is. The Defense has explicitly articulated the government theory from the inception of this case, prepared to meet it, and now claims surprise when the Government makes the appropriate amendment to the charges as they invited the government to do. In sum the Defense is in the exact same position it was regarding preparation for trial as when the Government took the now challenged action.

Regarding a substantial right to the accused of either preparation or notice, there is no other place in the record that the Defense can point to, prior to the Court raising this issue on 23 September 2024, where the Defense incorrectly articulates the government's theory, as previously implied, and not expressly plead at the Court's direction. As the Court acknowledged on the record during arguments on proposed instructions, the government has been very clear about what it intend to charge, but that the charge sheet did not reflect that. It is only at that time that the Defense began to articulate any sense of confusion about the specification or the

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Government's theory of criminality for the first time in 8 months and contrary to all previous filings. In other cases, there may be a genuine confusion where issues are not so thoroughly litigated. However, in this case the confusion and issue at hand is contrived to try and elicit a procedural windfall for the Accused, because as articulated in the previous written filings submitted to the PHO and this Court, the Defense has been on notice of and preparing for this theory of criminality since the Article 32, through 6 days ago. While the Defense is certainly free to explore different defenses, and even present multiple theories of innocence to the fact finder, they cannot be free to change their assessments of notice as to the substance of the charges. In this case, the word notice does not appear anywhere in the Defense's motion for specific instructions (Encl 1). Additionally, the government's, previously implied, and now expressly plead theory of the criminality in the sole specification of Charge I, appears multiple times because the Defense has been on notice of what to defend against since preferral of charges, despite their current assertions to the contrary.

Finally, there is no right of the Accused impacted and the Defense is not prejudiced, let alone unfairly prejudiced, because the Government has preserved the trial dates for litigation of the charges, continued to prepare travel for the ordered witnesses and experts for the Defense, within 120 days of the R.C.M. 707 clock, and with the counsel of the Accused's choice.

EVIDENCE

The Government submits the following enclosures in support of the motion for the Court's consideration.

1) Def MIL – Instructions dtd 13 September 2024
2) Gov Response to Def MIL – Instructions dtd 20 Sept 2024
3) Audio of 39(a) session 23 September 2024
4) Gov Supplemental filings regarding Def MIL – instructions dtd 27 September 2024 and 4 October 2024
5) Article 32 appointment order dtd.

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6) Governments comments on the evidence following the Article 32 Hearing
7) Defense Comments on the Evidence following the Article 32
8) PHO Article 32 Report
9) Def Brief Instructions and Failure to State and Offense dtd 4 October 2024
10) Court Ruling regarding the instructions and FTSO dtd 15 October 2024
11) Gov MFAR – Request to make a minor change dtd 17 October 2024.
12) Def Response – Request to make a minor Change dtd 20 October 2024.
13) Court's Ruling on the Request to make a minor change dtd 23 October 2024.
14) Parties' communications regarding withdrawal and joinder dtd 26 October 2024
15) R.C.M. 604 letter dtd 26 October 2024.
16) Government MFD and communications

RELIEF REQUESTED

The Government respectfully requests that the Court DENY the Defense motion to dismiss for all the reasons articulated above.

[redacted]
N. S. HENRY
LtCol, U.S. Marine Corps

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I certify that I served a true copy via e-mail of the above on the Court and Defense Counsel on 31 October 2024

[redacted]
N. S. HENRY
LtCol, U.S. Marine Corps

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

UNITED STATES **V.** **DAKOTA S. HONSTEIN** **SERGEANT / E-5** **USMC**	**DEFENSE MOTION FOR APPROPRIATE RELIEF** **(Release from Pretrial Confinement)** **30 October 2024**

MOTION

Pursuant to R.C.M. 305(k)(1), and R.C.M. 906(b)(8), the Defense moves for the release of Sergeant (Sgt) Dakota Honstein from pretrial confinement. The Defense also moves to have credit awarded to Sgt Honstein pursuant to R.C.M. 305(k) based on failure to comply with R.C.M. 305(j).

BURDEN

As the moving party, the Defense has the burden of persuasion. R.C.M. 905(c)(2). The burden of proof is by a preponderance of the evidence. R.C.M. 905(c)(1). The Court shall order the release from pretrial confinement if either, i) the 7-day reviewing officer abused his discretion, ii) new information establishes that the confinee should be released, or iii) the Government has not complied with the provisions of R.C.M. 305(j).

FACTS

1. On 27 January 2024, the Commanding Officer of 2d ANGLICO ordered Sgt Honstein into pretrial confinement following the shooting of Ms. [redacted]
2. On 29 January 2024, the Commanding Officer of 2d ANGLICO sent a 72 hour memorandum to the Initial Review Officer (IRO) aboard Marine Corps Installation East, Marine Corps Base Camp Lejeune.
3. The factual bases for pretrial confinement articulated in the 72 hour memorandum were as follows:

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a. "The possibility of significant confinement make it reasonable that he would not appear at court-martial proceedings;" and

b. The presence of a personal firearm in the barracks demonstrate that Sergeant Honstein is likely to commit further misconduct if not placed in confinement."

4. On 31 January 2024, Sgt Honstein was detailed military defense counsel in this case.

5. Sgt Honstein's Defense Counsel was and is stationed in Quantico, VA.

6. On 31 January 2024, Sgt Honstein's Defense Counsel was provided notice that his IRO hearing was scheduled for the next day.

7. Sgt Honstein's Defense Counsel emailed the IRO and Special Trial Counsel requesting that the IRO hearing be continued to a later date.

8. Special Trial Counsel objected to any continuance, citing the fact that "the 6b victims designees have been flown in from out of state to attend this hearing."

9. Citing his active TAD orders, Sgt Honstein's Defense Counsel requested that the hearing be continued to 9 February 2024, thirteen (13) days after Sgt Honstein's initial confinement.

10. The IRO refused to grant Defense Counsel's request.

11. The IRO hearing was conducted on 5 February 2024, in the absence of Sgt Honstein's Defense Counsel, over Sgt Honstein's objection.

12. The IRO determined that continued pretrial confinement was necessary.

13. On 7 February 2024, Sgt Honstein's Defense Counsel requested that the IRO re-open the hearing on 10 February 2024, pursuant to R.C.M. 305(j)(2)(E).

14. In his request to the IRO, Defense Counsel cited his desire to present evidence, such as Sgt Honstein's lack of passport and strong connection in the local area. Defense Counsel also reiterated that his absence from the initial IRO hearing precluded him from knowing what, if any, evidence was presented to the IRO for consideration.

15. On 12 February 2024, two days *after* the date requested by Defense Counsel for re-opening the IRO Hearing, the IRO denied Defense Counsel's request without explanation.

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16. On 26 October 2024, *273 days after pretrial confinement commenced*, the current charges were referred against Sgt Honstein.
17. The charges allege that Sgt Honstein unlawfully possessed a firearm, and that he intentionally pulled the trigger of said firearm, resulting in Ms. [redacted] death.
18. Since the initial IRO hearing, Sgt Honstein has been provided approximately five-thousand (5,000) pages of discovery.
19. The discovery includes a video recording of NCIS' interrogation of Sgt Honstein, along with evidence that Sgt Honstein's firearm was seized by NCIS during their investigation.
20. In his interrogation, Sgt Honstein repeatedly denied intentionally shooting Ms. [redacted]

LAW

Pretrial confinement is, as a general matter, inappropriate because it deprives the accused of his liberty before he is convicted of a crime. Thus, to justify such confinement, R.C.M. 305(i)(2)(B) requires a finding by a preponderance of the evidence that confinement is necessary because it is foreseeable that either that the confinee will not appear at trial (i.e., he is a flight risk) or he will engage in serious criminal misconduct, and less severe forms of restraint are inadequate. R.C.M. 305(i)(2)(B)

The military's highest court has observed that because there is no bail in the military justice system, "[a]fter the conclusion is reached that one could be detained because of the existence of probable cause, then the next question - whether he should be detained - is all important." *Courtney v. Williams*, 1 M.J. 267, 271 (C.M.A. 1976). Accordingly, less severe forms of restraint must be inadequate in order to justify confinement. "A person should not be confined as a mere matter of convenience or expedience." R.C.M. 305 (i)(2)(B).

ARGUMENT

There is no evidence that Sgt Honstein is a threat to commit serious criminal misconduct if released from pretrial confinement. In his interrogation, Sgt Honstein denied intentionally shooting Ms.

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[redacted] This assertion is supported by the Government's dismissal of a charge alleging that Sgt Honstein intentionally shot Ms. [redacted] from a prior court martial. Additionally, if released, Sgt Honstein will not have access to the firearm that was discharged in this case, as it is currently in the possession of NCIS.

Likewise, there is no evidence that Sgt Honstein is a flight risk. Sgt Honstein does not own a passport. Additionally, Sgt Honstein's personal vehicle, which was under maintenance when he was placed in pretrial confinement, is currently in the possession of a civilian who lives off base and who does not have base access.

Pretrial confinement is the most severe form of pretrial restraint and is a significant deprivation of one's liberty. It should be reserved for the rare case when lesser forms of restraint are inadequate. There is simply no evidence that a lesser form of restraint, akin to pretrial restriction, would not suffice.

Finally, the IRO's decision not to afford Sgt Honstein an opportunity to be represented by Defense Counsel at his IRO hearing, and his subsequent decision not to reconsider his approval of continued pretrial confinement upon Defense Counsel's request, failed to comply with the requirements of R.C.M. 305(j), and credit should be awarded accordingly.

RELIEF REQUESTED

21. **Request.** The Defense respectfully requests that the Court order the immediate release of Sgt Honstein from pretrial confinement and award credit pursuant to R.C.M. 305(k).
22. **Evidence.** The Defense submits the following evidence in support of its motion:
    a. Confinement Order
    b. 72 Hour Memorandum
    c. Email Traffic
    d. Prior Court Martial Charge Sheet
    e. Discovery Transmittal Letters
    f. NCIS ROI (Collection of Evidence)

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g. Interrogation Transcript

23. **Oral Argument.** The Defense requests oral argument.

[redacted]

T. J. LIPOSITZ
Captain, U.S. Marine Corps
Defense Counsel

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CERTIFICATE OF SERVICE

I certify that I have delivered a copy of the foregoing document by email to the Court and Trial Counsel on 30 October 2024.

[redacted]
T. J. LIPOSITZ
Captain, U.S. Marine Corps
Defense Counsel

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

UNITED STATES v. DAKOTA S. HONSTEIN SERGEANT/E-5 U.S. MARINE CORPS	**GOVERNMENT'S ~~MIL (INSTRUCTIONS)~~** RESPONSE TO DEFENSE MOTION FOR APPROPRIATE RELIEF (PTC) 30 October 2024

Nature of Motion

This is the Government's response to the Defense's motion under 10 U.S.C. §830a, R.C.M. 906(b)(8), and R.C.M. 305(j)(1)(B) to release Sergeant Honstein from pretrial confinement (PTC). The Government requests this Court deny the Defense's motion.

Summary

The Accused is charged with violations of Article 118(3) and Article 119, for discharging his 9mm pistol while it was pressed against the chest of Ms. [redacted] on 27 January 2024, which resulted in her death a short time later. The Accused initially reported to PMO officers and NCIS agents that during the course of a consensual sexual interaction involving the weapon, the victim had pulled the trigger, followed by a change in his explanation that she had loaded the gun without his knowledge before he pulled the trigger, which was followed finally by an admission that he knew the weapon was loaded and that he had pulled the trigger intentionally but did he did not believe that the weapon would discharge because he believed he had depressed the slide of the pistol enough to disengage the trigger by pushing the weapon at an angle into her chest. The Defense has failed to present evidence to show the initial reviewing officer (IRO) abused his discretion in retaining the accused in the brig. Additionally, the

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Defense has failed to meet its burden to compel the court to release the accused from pretrial confinement. The evidence shows that the commander abided by the applicable rules concerning placing a Marine in pretrial confinement. That decision should not be overturned by this Court.

Summary of Facts

1. The Accused is charged with violations of Article 118(3) and Article 119, for discharging his 9mm pistol while it was pressed against the chest of Ms. [redacted] on 27 January 2024, which resulted in her death a short time later.

2. The Accused initially reported to PMO officers and NCIS agents that during the course of a consensual sexual interaction involving the weapon, the victim had pulled the trigger, followed by a change in his explanation that she had loaded the gun without his knowledge before he pulled the trigger, which was followed finally by an admission that he knew the weapon was loaded and that he had pulled the trigger but did he did not believe that the weapon would discharge because he believed he had depressed the slide of the pistol enough to disengage the trigger to prevent it from firing. [Enclosures 1 and 2]

3. The Accused also explained that the pistol was involved in the consensual sexual interaction for his sexual gratification, and that the dangerous nature of the weapon added to his arousal. [3:10:50 – 3:11:24; 3:42:00 – 3:42:17].

4. Ms. [redacted] was interviewed by NCIS on 5 February 2024. She relayed to the agents that she was involved in consensual sexual interactions with the Accused on four different occasions and that their interactions involved some choking and scratching. However, on the fourth interaction he choked her with more force and for longer than she consented to and ordered her to beg for her life or words to that effect.

5. Ms. [redacted] was interviewed by NCIS on 15 May 2024. She relayed to the agents

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that she was involved in consensual sex with the Accused during the course of their romantic relationship, and that their interactions involved BDSM including, among other things, a knife and a loaded pistol. However, during two of those interactions with the pistol, the Accused unloaded the pistol without Ms. [redacted] knowledge and then pulled the trigger while the pistol was against her head without her consent. He did not ask her if he could do that, nor had they previously discussed that action.

6. Ms. [redacted] was interviewed by NCIS on 6 September 2024. She relayed to the agents that she was involved in consensual sex with the Accused on one occasion and that their interaction involved some consensual BDSM. However, during that interaction the Accused pulled out his knife and put it against her throat without her consent. He did not ask her if he could do that, nor had they previously discussed that action.

Burden of Proof and Persuasion

7. The moving party generally bears the burden of proof and persuasion under R.C.M. 905(c). However, when an accused's contends that conditions have changed since he was placed in confinement or that new information has been developed which shows that confinement need not be continued requires a de novo review. See RCM 305(j)(1)(B). United States v. Gaither, 45 M.J. 349, 351 (C.A.A.F. 1996). That de novo review places the burden on the Government to show why pre-trial confinement is still necessary by a preponderance of the evidence.

Law

8. Pretrial confinement is warranted when the evidence shows probable cause to believe that: 1) an offense triable by court-martial has been committed; 2) the confinee committed the offense; 3) confinement is necessary because it is foreseeable that the confinee will not appear

at future hearings or that the accused will engage in serious criminal misconduct; and 4) less severe forms of restraint are inadequate. R.C.M. 305(h)(2)(B). Within seven days of confinement, a neutral and detached officer shall review the probable cause determination and necessity for continued pretrial confinement and must determine whether the requirements for confinement have been proven by a preponderance of the evidence. R.C.M. 305 (i)(2). The reviewing officer shall include a review of the memorandum submitted by the confinee's commander under subparagraph (h)(2)(C) of this rule. Furthermore, there is no requirement that lesser forms of restraint be attempted and proven inadequate before confinement can be legally imposed (*United States v. Jenkins*, 2011 CCA LEXIS 473, quoting *United States v. Burke*, 4 M.J. 530 (N.C.M.R. 1977).

9. The confinee and the confinee's counsel, if any, shall be allowed to appear before the 7-day reviewing officer and make a statement, if practicable. R.C.M. 305(i)(2)(A)(i). Both the reviewing officer and the court should consider the nature and the circumstances of both charges and suspected offenses. R.C.M. 305(h)(2)(B). Other factors to be considered include the following: (1) nature and circumstances of the offenses charged or suspected, (2) weight of the evidence, (3) the confinee's local ties, including family, employment, and financial resources, (4) character and mental condition, and service record. *Id.* In instances of approved conefinement by a reviewing officer, the reviewing officer shall upon request, and after notice to the parties, reconsider the decisions to confine the confinee based upon any significant information not previously considered. R.C.M. 305(i)(2)(E).

10. The serious criminal conduct that justifies pretrial confinement "includes intimidation of witnesses or other obstructions of justice, serious injuries of others, or other offenses that pose a serious threat to the safety of the community or to the effectiveness, morale, discipline,

readiness, or safety of the command " R.C.M. 305(h)(2)(B)(iv). Due to the nature of military units and the interdependence of their personnel, "serious misconduct" includes a broader range of misconduct. "For example, the quitter who disobeys orders and refuses to perform duties, while others are expected to carry out or perform unpleasant or dangerous tasks, has an immensely adverse effect on morale and discipline which, while intangible, can be more dangerous to a military unit than physical violence." Analysis of Rule for Courts-Martial 305, MCM, p.A21-18 (2016 edition). This means that the "pain in the neck" (*United States v Heard*, 3 M.J. 14 (C.M.A. 1977)) accused cannot be placed in pretrial confinement solely because his behavior is an annoyance to the commander, but rather because his behavior is an "infection in the unit." MCM, p.A21-18 (2016 edition). The Analysis for Rule for Courts-Martial 305 goes on to state, "Even constant supervision accomplishes little in such cases, and military resources do not permit, nor is it reasonable to require, the establishment of some holding facility other than a confinement facility for such persons." MCM, p.A21-18 (2016 edition).

11. The military judge shall only order a confinee released from pretrial confinement if: (1) the reviewing officer abused his discretion and there is insufficient evidence presented to the military judge to justify continued pretrial confinement under R.C.M. 305(h)(2)(B); or (2) information not presented to the reviewing officer establishes the prisoner should be released under R.C.M. 305(h)(2)(B). Abuse of discretion is also a high bar of review. Ballentine's Law Dictionary states:

> "There is no hard and fast rule by which an abuse of discretion may be determined, but in general an exercise of discretion, not to amount to an abuse, must be legally sound; there must be an honest attempt by the court to do what is right and equitable under the circumstances and the law without the dictates of whim or caprice."

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Abuse of Discretion, Ballentine's Law Dictionary (3rd ed. 2010). The Third Circuit Court of Appeals further explained in *Lindy Bros. Builders*:

> "[D]iscretion is defined as: 'The power exercised by courts to determine questions to which no strict rule of law is applicable but which, from their nature, and the circumstances of the case, are controlled by the personal judgement of the court.' 1 Bouv. Law Dict., Rawles' Third Revision, p.884. Judicial action—discretionary in the sense—is said to the final and cannot be set aside on appeal except when there is an abuse of discretion. [...]. Discretion in that sense, is abused only *where no reasonable man would take the view adopted by the trial court*. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion."

Lindy Bros. Builders v. Am. Radiator & Standard Sanitary Corp., 540 F. 2d 102, 115 (3d Cir. 1976) (*emphasis added*). The Court went on to state that just because the appellate court did not agree with the trial court's use of discretion, did not mean that the trial court abused its discretion, ruling that where there was no error in law or procedure when applied to the facts of that case, deference will be given to the trial court's exercise of discretion. *Id.* (citing *Katz v. Carte Blanche Corp.*, 496 F. 2d 747, 756 (3d Cir.)(in banc), *cert denied*, 419 U.S. 885, 42 L. Ed. 2d 125, 95 S. Ct. 152 (1974).

ANALYSIS

12. The military judge shall only order a confinee released from pretrial confinement if: (1) the reviewing officer abused his discretion and there is insufficient evidence presented to the military judge to justify continued pretrial confinement under R.C.M. 305(h)(2)(B); or (2) information not presented to the reviewing officer establishes the prisoner should be released under R.C.M. 305(h)(2)(B). The Defense has not argued that the IRO abused his discretion or that it has information not presented to the IRO, but rather that there is no evidence that he will

continue to commit serious criminal misconduct and that he is not a flight risk. The Government is therefore containing its arguments solely to those issues raised.

13. There is evidence that the Accused will continue to commit serious criminal misconduct. The Accused has demonstrated a history of intentionally violating Articles of the UCMJ, as he described in his interrogation where he explained that not only had he been concealing a weapon in his room in violation of the order, he took intentional steps to prevent detection during inspections by hiding the vehicle in his car. He took similar steps to conceal the victim's presence in his barracks room on the night of her death for the same reason–he was aware there was an order that prevented her presence, so they took the back stairwell to avoid detection by the duty. The Accused also has a pattern of past interactions with three other women where he suddenly escalates his behavior past their level of consent while using lethal force: choking Ms. [redacted] until she begged for her life at his direction, pulling out a knife and holding it to the throat of Ms. [redacted] without any discussion or consent, and pulling the trigger of the same gun he killed Ms. [redacted] with while it was pointed at the head of Ms. [redacted] without her consent. He has also pointed the weapon at Ms. [redacted] the roommate of Ms[redacted] without her consent. Even if for the sake of argument the Accused could avail himself potentially of a reasonable mistake of fact as to consent for one of these women, the pattern of 4 different women experiencing his application of potentially lethal force against them combined outweighs the argument that he just happened to reasonably misunderstand all of them–including one of them who was not even involved in a sexual interaction. Moreover, the serious criminal nature of his conduct with the victim in this case, Ms. [redacted] compounds that–particularly because it appears to be the final instance in a pattern of young women around him being at risk of his wanton application of deadly force.

14. The pattern of this serious criminal misconduct is further highlighted by his attempts to avoid detection and by his attempts to deceive law enforcement about what occurred in his barracks room on 27 January 2024. The Accused repeatedly told PMO officers that Ms. [redacted] had killed herself, and then told NCIS that she had loaded the weapon without his knowledge–all in an attempt to lessen or eliminate his culpability for her death. Only after being confronted by NCIS with the reality that lying his way out of what happened was likely to be unsuccessful based on the forensic testing they were going to do on the weapon was the Accused forced to admit what actually happened. Those attempts indicate that the Accused was aware that his actions were criminal, but that awareness did not deter his conduct. Accordingly there is reason to believe he will continue to commit serious criminal misconduct.

15. The Defense's argument that the Accused is not a flight risk should also be rejected. The fact that the Accused, through his counsel's proferr, offers that he does not have a passport does not mean that he is not a flight risk–he could easily flee within the United States, or outside via border crossing or some other much less detectable means than using an official passport in a public/official means of travel. The fact that he has strong ties to the local community also is of little to no probative value-those ties appear to be the members of his pool league and/or a local bar. His family members reside outside of this area in Florida and California, and based on the affidavits provided by the Defense regarding their relationships appear to be just as close to those he has locally. Given his pattern of serious criminal misconduct, his attempts to conceal detection and deceive law enforcement, and the seriousness of the charges he now faces, the Accused's risk of flight significantly outweighs his local connections and lack of passport. This Court should accordingly find that continued pre-trial confinement is warranted.

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16. The Defense's request for RCM 305(l) credit should be denied because the Defense Counsel was provided with multiple opportunities to appear in front of the IRO and chose not to. At the outset, this Court should consider that the Chief Defense Counsel chose to detail an out of area Defense Counsel to this case as the initial counsel in this case, after the DSO had been notified (on Monday January 29) of the IRO ordered for February 1. Based on that Counsel's proffer at the time, he already had a docketed Art 39(a) hearing the next day, February 2, and was scheduled to attend DSO worldwide training from February 4–9. The choice to detail an unavailable, out-of-area counsel for an IRO where a limited scope detailing for a local counsel (one of which was detailed a short time later anyway) could easily have been detailed under RCM 305(g), as is frequently the case, should weigh heavily against the Court ordering administrative credit for this issue.

17. That decision, was compounded by the Defense Counsel repeatedly declining to attend the hearing in person. He was given multiple opportunities to be present, and chose not to attend–two of those dates were at his request. Contrary to that Counsel's assertions via email at the time, R.C.M. 305(j)(B), does not contemplate the Accused being able to waive that requirement and continue that review to any time that the Defense Counsel should request. The CDC chose to detail a counsel who by that counsel's own proffer as not available under the timeline required by R.C.M. 305(j)(B), and then that decision was exacerbated by the Defense Counsel's repeated decisions to not attend the IRO–those choices should not be allowed to be used as a sword against the Government. Moreover, as noted below, the Defense Counsel could easily have sought review of those decisions via an Art. 30(a) if they actually believed that the IRO had abused his discretion but instead made a tactical decision not to file that motion.

18. The request for credit based on the denial of the request for a reconsideration by the IRO should also be denied. The IRO denied the Defense's request, which proffered that "significant information not previously considered" would be "any information from defense which would tend to cut against confinement. For example, the [sic] Sgt Honstein's lack of a passport and his many strong connections to the area." As the IRO noted, the Defense was able to immediately avail itself of the EJC under Art. 30A to seek review by this Court of the IRO's decision, including any abuse of discretion based on the alleged procedural error in not allowing the Defense Counsel to continue the IRO to a date convenient for him. Presumably the Defense made a tactical decision to not do that for the intervening approximately 8 months between filing this motion and the IRO's decision, and no administrative credit should be awarded for that reason.

RELIEF REQUESTED

19. The Government requests the Court deny the Defense's motion to release him and deny the request for confinement credit pursuant to R.C.M. 305(k).

EVIDENCE OFFERED

1. Accused's interrogation (previously provided in another motion)
2. IRO Coordination communications
3. NCIS Interviews of Ms. [redacted], Ms. [redacted] Ms. [redacted] and Ms. [redacted]

Oral Argument. The Government requests oral argument on this issue.

[redacted]
M. E. BLACKBURN
Captain, USMC
Special Trial Counsel

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Government's response to Defense's Motion in Limine (instructions) was served electronically on defense counsel and the Court on 30 October 2024.

[redacted]
M. E. BLACKBURN
Captain, USMC
Special Trial Counsel

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

UNITED STATES **V.** **DAKOTA S. HONSTEIN** **SERGEANT / E-5** **USMC**	**DEFENSE MOTION TO DISMISS** **(Speedy Trial)** **30 October 2024**

MOTION

Pursuant to Rule for Courts-Martial (R.C.M.) 707, Article 10 of the Uniform Code of Military Justice (UCMJ), and Amendments V and VI to the Constitution of the United States, the Defense moves to dismiss all charges and specifications in this case with prejudice as the Government has deprived Sergeant Honstein of his right to a speedy trial.

BURDEN

The prosecution bears the burden of persuasion in a motion to dismiss for a speedy trial violation. R.C.M. 905(c)(2)(B). The burden of proof is by a preponderance of the evidence. R.C.M. 905(c)(1).

FACTS

1. The government placed Sgt Honstein into pretrial confinement on 27 January 2024.

2. On 9 February 2024, the government requested 30 days of excludable delay on the grounds that the USACIL testing of the evidence in this case needed to be tested. The period request is from 8 February to 8 March of 2024.

3. On 19 February 2024, the convening authority "approved" 30 days of excludable delay for the period requested.

4. On 8 March 2024, the Government requested an additional 30 days of delay, this time from 9 March to 9 April 2024. In its request, the Government stated that although the previous 30 days of delay were requested for USACIL laboratory testing, the laboratory had yet to begin testing.

5. The Defense objected to the Government's request the same day the request was submitted.

6. On 11 March 2024, the Convening Authority "approved" the Government's request for an additional 30 days of excludable delay over the Defense's objection.

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7. A preliminary hearing was scheduled for 22 April 2024. The defense requested a continuance to 10 May 2024. In his report 28 May 2024 report, the Preliminary Hearing Officer (PHO) found the 17 days between the 22 April and 10 May were attributable to the defense.

8. In the same report, the PHO stated that he had previously requested additional time to prepare his report and determined that those 7 days of delay were excludable. At no point was the Defense advised of the PHO's request for additional time, leading the Defense to surmise that the PHO's request was submitted *ex parte*.

9. On 6 June 2024, the Government requested 10 days of excludable delay for the period from 3 June to 13 June. The reason for this request was, again, time for the Government to perform testing at the USACIL laboratory.

10. The Convening Authority "approved" the request the request the next day, 7 June 2024.

11. On 10 July 2024, the Government requested that the Court grant 27 days of excludable delay. The Government's request indicated that *they were ready for arraignment on 10 July 2024*, and that the scheduled arraignment of 6 August should result in 27 days of delay attributable to the Defense. The judge reserved ruling but noted that the government demonstrated its readiness to proceed.

12. On 6 August 2024, Sgt Honstein was arraigned, and trial was scheduled for 28 October 2024.

13. On 20 September 2024, the Defense moved this Court to issue a ruling concerning, *inter alia*, what inherently dangerous act must the government prove, beyond a reasonable doubt, for a finding of guilty for the sole specification of Charge I.

14. On 24 September at an Article 39(a) session, the Court indicated that the Government would have to prove that Sgt Honstein intentionally shot [redacted] with a firearm, as it was the only act alleged in the specification.

15. The Government requested a written ruling on the matter and indicated that it was considering pursuing an Art 62 appeal.

16. The Court requested that the parties submit additional filings on the matter.

17. On 28 September 2024, the Government submitted its briefing requesting that Government be able to prove the allegations in the sole specification of Charge I by proving acts included by necessary implication rather than the act charged. The Government also requested, in the alternative, leave to amend the specification.

18. On 15 October 2024, this Court again ruled that the Government was responsible for proving the allegations set forth in the specification.

19. On 17 October 2024, the Government again attempted to change its evidentiary burden at trial by filing a motion to make a "minor" change to the sole specification of Charge I. The Government also requested a continuance until 31 Oct.

20. On 21 October 2024, the Defense objected to any continuance or delay.

21. On 23 October 2024 the Court granted the Government's continuance request, but denied the

Government's motion to change to the sole specification of Charge I. The Court found that the proposed change added "a substantial matter not fairly included in the preferred charge." The Court also held that the Government's proposed change would allege "a different offense."

22. On Saturday, 26 October 2024, the Government withdrew and dismissed all charges.

23. New charges were preferred and referred the same day, 26 October 2024.

24. As of the date of this filing, Sgt Honstein has spent 278 days in pre-trial confinement.

LAW

Speedy Trial Right Generally

There are five sources of the right to a speedy trial in the military: (1) The Sixth Amendment speedy trial guarantee; (2) Due Process Clause of the Fifth Amendment; (3) Articles 10 and 33 of Code, 10 U.S.C. §§ 810 and 833; (4) R.C.M. 707 Manual for Courts-Martial; and, (5) case law. *United States v. Vogan*, 35 M.J. 32, 33 (C.A.A.F. 1992).

R.C.M. 707

R.C.M. 707 requires that an accused be brought to trial within 120 days of preferral of charges or pre-trial restraint. An accused is considered to be "brought to trial" at the arraignment. R.C.M. 707(b). R.C.M. 707(d) discusses the remedies for a violation of the rule, stating "failure to comply with this rule will result in dismissal of the affected charges[.]" "The charges must be dismissed with prejudice where the accused has been deprived of his or her constitutional right to a speedy trial." R.C.M. 707(d)(1).

R.C.M. 707(b)(3)(A)(i) states that when charges are dismissed, a new 120-day period begins on the date of the dismissal or mistrial. However, subsection (iii) goes on to state that "In a case in which it is determined that charges were dismissed for an improper purpose or for subterfuge, the time period determined under subsection (a) shall continue to run." R.C.M. 707(b)(3)(A)(iii). While R.C.M. 707 does not provide any guidance on whether a dismissal was for an improper purpose, the R.C.M. 604(b) and the discussion thereunder does. Should the Government withdraw charges from a court-martial, they "may be referred to another court-martial, unless the withdrawal was for an improper reason." R.C.M. 604(b).

If charges withdrawn from a court-martial are referred to another court-martial, "the reasons for withdrawal and later referral should be included in the record of the later court-martial, if the later court-martial is more onerous to the accused. Therefore, if further prosecution is contemplated at the time of the withdrawal, the reasons for the withdrawal should be included in or attached to the record of the earlier proceeding." R.C.M. 604(b) discussion.

CAAF looked to R.C.M. 604(b) when determining what is an improper purpose for dismissal under R.C.M. 707 in *United States v. Leahr*, 73 M.J. 364, 369 (C.A.A.F. 2014). "A proper reason for withdrawal is 'a legitimate command reason which does not 'unfairly' prejudice an accused.." *Id.* Citing *United States v. Underwood*, 50 M.J. 271, 276 (C.A.A.F. 1999).

"The purpose of R.C.M. 604(b), as with the Federal rule, is to check potential unfair manipulation of the charging and dismissal processes to gain unfair advantage over an accused, to prevent prosecutorial harassment, and to prevent retaliation against the accused for exercising a right." *United States v. Koke*, 32 M.J. 876, 879 (N.M.C.M.R. 1991) (citing *United States v. Hardy*, 4 M.J. 20 (C.M.A. 1977)). "A convening authority may refer charges following withdrawal only where there was good cause for the withdrawal," and "[i]n no event may a withdrawal be arbitrary or unfair to the accused." *Id.* at 880.

Proper reasons for withdrawal and referral to another court-martial exist "under some circumstances," such as:

1. When a referred charge is "withdrawn pursuant to a plea agreement, and the accused fails to fulfil the terms of the agreement." R.C.M. 604(b) discussion; *United States v. Fleming*, 18 U.S.C.M.A 524 (1960);

2. "If the convening authority receives additional charges and a higher level of court-martial or more severe referral instructions are contemplated." *Koke*, 32 M.J. at 880 (citing *United States v. Wells*, 26 C.M.R. 289 (1958));

3. "[I]f the reporter notes of previous court sessions are lost." *Koke*, 32 M.J. at 880 (citing *United States v. Hill*, 45 C.M.R. 904 (1972)); or

4. "If the court has been challenged below quorum." *Koke*, 32 M.J. at 880 (citing United States v. Smiley, 17 M.J. 790 (1983)).

Article 10 provides, "When a person subject to this chapter is ordered into arrest or confinement before trial, immediate steps shall be taken (A) to inform the person of the specific offense of which the person is accused; and (B) to try the person or to dismiss the charges and release the person." 10 U.S.C. § 810.

Once Article 10 attaches, a violation occurs once the Government fails to act with reasonable diligence in bringing the charges to trial. *See United States v. Tibbs*, 35 C.M.R. 322, 325 (U.S. C.M.A. 1965) ("[T]he touch stone for measurement of compliance with the provisions of the Uniform Code is not constant motion, but reasonable diligence in bringing the charges to trial.") (citations omitted). Thus, Article 10 may be violated where the Accused is tried in less than 120 days, or even less than 90 days. *See United States v. Kossman*, 38 M.J. 258, 261 (C.A.A.F. 1993) ("We see nothing in Article 10 that suggests that speedy-trial motions could not succeed where a period under 90 — or 120 — days is involved."). "Trial," under this analysis, is not merely arraignment, it is the start of the merits of phase of trial. *United States v. Cooper*, 58 M.J. 54, 59 (C.A.A.F. 2003) ("Article 10 does not by its express terms limit its protection to only that period extending up to arraignment. To the contrary, it imposes an open-ended duty on the Government and the military judge immediately to 'try' the accused, a task that is by no means complete at arraignment when one considers the plain meaning of 'trying' a case.").

In *United States v. Birge*, the court adopted the "Barker Factors," a four-part balancing test, to assess reasonable diligence under Article 10. 52 M.J. 209, 212 (C.A.A.F. 1999). The factors include: "Length of the delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Barker v. Wingo*, 407 U.S. 514, 530 (1972). None of the four Barker factors alone are a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. The *Barker* Court explained, "these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution." *Id.* at 533.

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ARGUMENT

This Court should dismiss the charges pursuant to R.C.M. 707 as the government has failed to bring the current case to arraignment within 120 days of the imposition of Sgt Honstein's pretrial confinement. Even assuming, *arguendo*, that all previously requested and granted delay is legally excludable, that leaves 145 days attributable to the Government as of the date of this filing. The government's last-minute withdrawal and dismissal of the charges also deprives Sgt Honstein of his speedy trial rights guaranteed under the United States Constitution.

The Charges were Dismissed for an Improper Purpose

The reasons for dismissal of the charges were improper and therefore the 120-day clock does not reset pursuant to R.C.M. 707(b)(3)(A)(iii). The Government's motive in dismissing the charges, while not sufficiently stated (as required by the Rules of Court-Martial[1]), is clear. The Government seeks to circumvent this Court's repeated rulings on the issue of the Government's evidentiary burden pertaining to the sole specification of Charge I in the original court-martial.

The Government made repeated attempts to defeat the Court's initial ruling. When its final attempt failed on 23 October 2024, the Government withdrew and dismissed all charges on the eve of trial, with the intent of preferring charges anew, in order to provide them a tactical advantage at trial.

In *Leahr*, CAAF focused on the legitimate command reason for dismissal and the prejudice to the accused. *U.S. v. Leahr*, at 369. In looking at whether there was a legitimate command reason, the Court held that because there were additional charges that could not be joined over the objection of the defense, judicial economy would be served by trying the charges together as is the preference set forth in R.C.M. 601(e)(2) and R.C.M. 401(c). Also see *United States v. Koke*, 34 M.J. 313, 315 (C.M.A. 1992)("withdrawal . . . for the purpose of judicial economy by trying all known charges in a single trial" is proper where an accused was not unfairly prejudiced.")

Here, there are no such additional charges. Judicial economy is not served by the last-minute dismissal and referral of charges that are precisely in line with the government's previous requests to the

[1]See R.C.M. 604(b) discussion.

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Court. The Government's only reason for withdrawal, dismissal, and re-preferral of charges to a new court martial is to circumvent the prior Court's rulings, change its evidentiary burden, and gain a tactical advantage on the eve of trial.

In looking to whether the dismissal would prejudice the accused, CAAF has repeatedly placed emphasis on whether the accused was in pretrial custody. (See *U.S. v. Leahr* at 370, also see *United States v. Underwood*, 50 M.J. 271, 272 (C.A.A.F. 1999)). Sgt Honstein has been in pretrial confinement for 278 days. The CAAF also relied on the fact that there were no motions for prejudicial delay in the second court-martial. The instant motion distinguishes this case.

Perhaps most important to the analysis of prejudice to Sgt Honstein is the fact that Sgt Honstein is presented with a Hobson's choice. The Defense has been preparing for trial for months based on the charges that were preferred, litigated at preliminary hearing, referred, litigated at length at 39(a) and 802 hearings. With five days left to trial, the Government sought to fundamentally change gravamen offense. This Court has ruled that these exact changes are major and include a "substantial matter not fairly included in the preferred charge." Sgt Honstein cannot be forced to choose between his right to adequately prepare a defense to these new charges, and his constitutional and statutory right to speedy trial.

The Government has not Arraigned Sgt Honstein within 120 days.

In the instant court-martial, Sgt Honstein has not been arraigned. Even assuming that all delay requested and provided by the PHO are excludable, the government still failed to arraign Sgt Honstein withing the 120-day period prescribed by R.C.M. 707(a).

Dismissal with Prejudice is the Only Adequate Remedy

Given the foregoing, and pursuant to R.C.M. 707(d)(1), dismissal with prejudice is the only adequate remedy in this case for the simple fact that dismissal without prejudice will only cause further delay and exacerbate the harms suffered to Sgt Honstein and his case. In addition, allowing the Government to violate Sgt Honsteins' right to speedy trial and then re-prefer charges reduces the Constitutional and Regulatory speedy trial guarantees to meaningless technicalities.

RELIEF REQUESTED

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The Defense requests the Court dismiss all charges and all specifications thereunder with prejudice.

The Defense requests oral argument.

EVIDENCE AND HEARING

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

Exhibit A: Government's First Excludable Delay Request
Exhibit B: Government's Second Excludable Delay Request
Exhibit C: Defense's Objection to Government's Second Excludable Delay Request
Exhibit D: Preliminary Hearing Supplemental Report
Exhibit E: Government's Third Excludable Delay Request
Exhibit F: Withdrawn and Dismissed Charge Sheet



P.E. CARSON
Captain, USMC
Defense Counsel

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

UNITED STATES v. DAKOTA HONSTEIN SERGEANT/E-5 U.S. MARINE CORPS	**GOVERNMENT MOTION IN RESPONSE TO DEFENSE MOTION TO DISMISS (SPEEDY TRIAL)** 31 October 2024

NATURE OF MOTION

This Government motion is filed in response to the Defense Motion to dismiss for speedy trial, filed 30 October 2024. For the reasons set forth below, the Government respectfully requests the Court deny the Defense's motion to dismiss.

SUMMARY

The Government properly preferred, conducted an Article 32 hearing, referred, and brought the Accused to arraignment on R.C.M. 707 day 102, which tolled the clock at 102. The Government took appropriate actions in accordance with the Rules for Court-Martial and the applicable case law to comply with the Military Judge's ruling that the government is required to expressly and specifically plead the intentional act under 118(3). After a request to make an amendment to the charge sheet as a minor change, and a request to the defense for joinder of an amended Charge, the Government was forced to withdraw and prefer the charges anew. The Government completed the necessary procedural requirements to withdraw, dismiss, and rerefer charges, which restarted the R.C.M. 707 120 clock and afford the Accused's his right to speedy trial.

BURDEN OF PROOF AND PERSUASION

The burden of proof for this motion rest with the Government.

FACTS

1. On 27 Jan 24, the Accused was placed in pre-trial confinement. (See Encl. 1).
2. On 29 Jan 24, the Defense Services Organization was notified of the Accused's status. (See Encl. 1).
3. The IRO hearing was scheduled for 1 February 2024. (See Encl. 1).
4. On 1 February 2024, detailed defense counsel, Capt Carson emailed the IRO informing him that he would not be available to conduct the IRO hearing due to just being detailed the day before and being stationed in Quantico. Capt Carson requested that the IRO hearing be moved to a later date. (See Encl. 1).
5. Over the Government's objection, the IRO hearing was rescheduled to 2 Feb 24. (See Encl. 1).
6. Capt Carson objected to conducting the hearing on 2 Feb 24, citing that he would be in Court on 2 Feb 24 and executing TAD orders to Charlotte, NC on 4 Feb. Capt Carson requested that the hearing be continued until 9 Feb 24 as his position was that the Defense could waive the 10-day extension limit under R.C.M. 305. (See Encl. 2).
7. The IRO rescheduled the hearing to 4 Feb 24 via teleconference. (See Encl. 2).
8. The IRO was then rescheduled to 5 Feb 24, the 10th day of the Accused's entering pre-trial confinement. The IRO gave all parties the ability to be present in person, via VTC, or teleconference. The Defense continued their objection and refused to be present via VTC or teleconference. (See Encl. 2).
9. On 5 Feb, the IRO hearing was conducted and the Accused was retained in the brig. (See Encl. 3).
10. On 9 Feb, the Government requested excludable delay from the Convening Authority due to multiple evidentiary items being sent to USACIL for forensic testing. The Defense did not object to the Government's request. On 19 Feb, the Convening Authority granted thirty (30) days of excludable delay. (See Encl 9).
11. On 12 Feb, defense counsel requested a rehearing of the IRO. The IRO denied the request and told defense that they could file a motion with the Court pursuant to Article 30a (See Encl. 3).
12. On 4 Mar 24, the Defense requested that the Convening Authority order an R.C.M. 706 hearing. (See Encl. 4).
13. On 8 Mar 24, the Government requested excludable delay from the Convening Authority due to USACIL still testing multiple evidentiary items and the defense's request for an R.C.M. 706 examination. (See Encl 10).
14. On 11 Mar 24, the Convening Authority granted thirty (30) days of excludable delay over the Defense's objection. (See Encl 10).
15. On 9 Apr 24, charges were preferred against the Accused.
16. On 12 Apr 24, the 706 board was conducted.
17. On 17 Apr 24, the Government submitted the Article 32 appointing order to the PHO. (See Encl. 6).

18. On 30 Apr 24, the parties received the 706 report. (See Encl. 5).
19. The PHO scheduled the Article 32 hearing for 22 April 2024. (See Encl. 6).
20. The Defense requested that the Art 32 hearing be moved to a later date, but did not specify a date of availability. (See Encl. 6).
21. The Government emailed Defense in order to ascertain their availability to conduct the Article 32 hearing. The Defense did not respond. (See Encl. 6).
22. On 22 Apr 24, the Government renewed its request with the PHO to schedule the Article 32 hearing to 29 Apr 24, and requesting that all delay be attributable to the defense. (See Encl. 7).
23. The PHO rescheduled the hearing to 29 Apr 24 and ordered that all delay from 22 April to 29 April was attributed to the defense, a period of eight (8) days. (See Encl. 7).
24. On 24 Apr 24, the Defense submitted a continuance request to the Convening Authority requesting that the Article 32 hearing occur on 10 May 24. (See Encl. 7).
25. On 24 Apr 24, the Convening Authority granted the Defense's continuance request and found that the delay between 29 April and 10 May was attributable to the defense, a period of twelve (12) days. (See Encl. 11).
26. On 10 May, the Article 32 preliminary hearing was conducted.
27. On 15 May, the Defense submitted its RCM 405(l) comments to the PHO.
28. On 28 May 24, PHO issued the Article 32 report.
29. On 6 Jun 24, the Government requested excludable delay from the Convening Authority due to USACIL pending the review and publication of forensic reports on multiple evidentiary items. The Defense did not object to the Government's request. (See Encl. 12).
30. On 7 Jun 24, the Convening Authority granted ten (10) days of excludable delay. (See Encl. 12).
31. On 3 July 24, charges were referred against the Accused.
32. On 8 July 24, the Government submitted its motion for docketing, requesting that the Court arraign the Accused on 10 July, the day after the five-day statutory waiting period. (See Encl. 8).
33. On 10 July 24, the Defense requested the arraignment take place on 6 August due to scheduling conflicts between the two defense counsel. (See Encl. 8).
34. The Government requested that all delay from 10 July to 6 August be attributed to the defense. The Court refused to rule on delay, but noted that "the Government has present the case to the Court and demonstrated its readiness to proceed." (See Encl. 8).
35. The Accused was arraigned on 6 August 2024.
36. In total, ninety (90) days of pre-referral excludable delay was granted under R.C.M. 707(c).
37. There is an additional outstanding twenty – seven (27) days of excludable delay that was requested by the Government to the Court post-referral between 10 July and 6 August for the Accused's arraignment.
38. Since the Accused went into pretrial confinement on 27 January 2024, the Defense has never demanded speedy trial.
39. The following table is provided to demonstrate that the previous court-martial's RCM 707 clock tolled on day 102, without considering the still outstanding request from the Government for this Court to exclude twenty-seven days from the request for docketing to the Defense's requested arraignment date:

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EVENT/ACTION	DATE	TOTAL DAYS ELAPSED	EXCLUDED DAYS	R.C.M. 707 DAYS
Pretrial Confinement	27 Jan 2024	0	NONE	0
Excludable Delay #1 requested	9 Feb 2024	13	NONE	13
Excludable Delay #1 granted	19 Feb 2024	23	30	-7
Excludable Delay #2 requested	8 Mar 2024	41	NONE	11
Excludable Delay #2 granted	11 Mar 2024	44	30	-16
Charges Preferred	9 April 2024	73	NONE	13
Article 32 Appointing Order	17 April 2024	81	NONE	21
PHO granted delay attributable to Defense	22 April 2024	86	8	18
Defense request for continuance submitted	24 April 2024	88	NONE	20
Defense continuance request granted and delay excluded	24 April 2024	88	12	8
Article 32 Conducted	10 May 2024	104	NONE	24
Excludable Delay #3 request submitted	6 June 2024	131	NONE	51
Excludable Delay #3 granted	7 June 2024	132	10	42
Charges referred	3 July 2024	158	NONE	68
Motion for Docketing Submitted and excludable delay requested (27 days)	8 July 2024	163	NONE	73
Arraignment	6 August 2024	192	NONE	102

LAW

R.C.M. 707 states, "The accused shall be brought to trial within 120 days after the earlier of (1) preferral of charges; (2) the imposition of restraint under R.C.M. 304(a)(2)-(4); or (3) Entry on active duty under R.C.M. 204" R.C.M. 707(a)(2). "Prior to referral [of charges], all requests for pretrial delay . . . will be submitted to the convening authority or, . . . to a military judge. . . ." R.C.M. 707(c)(1). "After referral, such requests for pretrial delay will be submitted to the military judge for resolution." Id. *United States v. Lazauskas*, 62 M.J. 39, 41 (C.A.A.F. 2005). R.C.M. 707(b)(3) provides for the termination of the 120-day speedy trial clock upon dismissal or upon release from restraint. The 120-day clock also stops ticking when "the accused

is brought to trial [meaning] arraignment under R.C.M. 904." RCM 707(b)(1). However, "if charges are dismissed....a new 120-day time period under this rule shall begin on the date of dismissal....." RCM 707(b)(3)(A). Certain periods of excludable delay in determining the 120 days, including "delays approved by a military judge or the convening authority." RCM 707(c).

A proper reason for withdrawal is "a legitimate command reason which does not 'unfairly' prejudice an accused." *United States v. Lehr*, 73 M.J. 364 (CAAF 2014) citing *United States v. Underwood*, 50 M.J. 271, 276 (C.A.A.F. 1999). Once charges are dismissed, absent a subterfuge, the speedy-trial clock is restarted. In *United States v. Anderson*, 50 M.J. 477, CAAF held, "Even though there is continued restraint, a dismissal of the charges stops the 120-day clock and a new clock is started." Absent a situation where a convening authority's express dismissal is either a subterfuge to vitiate an accused's speedy trial rights, or for some other improper reason, a clear intent to dismiss will be given effect. *See* R.C.M. 604 Drafters' Analysis ("Dismissal of charges disposes of those charges; it does not necessarily bar subsequent disposition of the underlying offenses, . . . although a later preferral and referral would raise the same issues as are discussed under subsection (b)."); *see also United States v. Tippit*, 65 M.J. at 79 ("[O]nce charges are dismissed, absent a subterfuge, the speedy-trial clock is restarted."

"The Accused's right to speedy trial is a shield, not a sword." *United States v. King*, 30 M.J. 59, 66 (CMA 1990). Furthermore, the defense "cannot be responsible for or agreeable to delay and then turn around and demand dismissal for that same delay." *Id.* The Supreme Court has emphasized that "failure to assert the right [to a speedy trial] will make it difficult for a defendant to prove that he was denied a speedy trial." *Barker*, 40 U.S. at 532.

Article 10

Article 10 provides, "When a person subject to this chapter is ordered into arrest or confinement before trial, immediate steps shall be taken (A) to inform the person of the specific offense of which the person is accused; and (B) to try the person or to dismiss the charges and release the person." 10 U.S.C. § 810. Once Article 10 attaches, a violation occurs once the Government fails to act with reasonable diligence in bringing the charges to trial. *See United States v. Tibbs*, 35 C.M.R. 322, 325 (U.S. C.M.A. 1965).

ARGUMENT

A. The Government's decision to withdraw, dismiss, and rerefer was for a proper purpose

The Government withdrew, dismissed, and rereffered charges in this case, not to circumvent this Court's previous ruling, but to align the Sole Specification, Charge I with this Court's ruling and the Defense' notice and prior preparations, while still maintaining trial dates and the availability of the defense experts and witnesses. The Government inquired as to whether or not the defense would object to a joinder of the new specification, and the defense stated that it would object to joinder. Therefore, the Government was forced to withdraw and dismiss in order to align the charge and specification with the Court's ruling and proceed to trial under the Government's theory that has been alleged since the Article 32 hearing took place on 10 May 2024.

Like in *U.S. v. Lehr*, the referral authority in this case withdrew the original charges, and took more than one "additional affirmative action" to dismiss them. *Britton*, 26. M.J.at 26. First, the referral authority's RCM 604 letter expressly stated that charges were

dismissed which satisfies RCM 401(c)(1) Discussion which states, "a recording that a specification [was] dismissed. Second, the Accused, through his counsels, were notified when the referral authority decided on his intent to withdraw and dismiss and were notified again that the charges were indeed withdrawn and dismissed. See *United States v. Tippit*, 65 M.J. 69, 72, 78-79 (CAAF 2007)(noting that the informing the appellant that the charges had been dismisses was important to a finding a dismissal of charges.)

Furthermore, both the Defense and the Court explicitly stated that the Government was free to withdraw, dismiss, and re-prefer in order to amend the specification in line with the court's rulings. This directly cuts against the Defense's assertion that the Government withdrew for an improper purpose. Our highest military appellate court ruled on this same issue in *United States v. Underwood*, 50 M.J. 271 (CAAF 1999). In *Underwood*, the CAAF held that the convening's authority decision to withdraw, dismiss, and rerefer charges was proper and "as stated by the same trial judge who sat at both courts-martial, his earlier rulings did not implicitly preclude, nor did he intend to preclude, the burdensome procedural course of action chosen by the convening authority...the trial judge's ruling was not clearly flouted." Similarly, in the instant case, this Court's rulings regarding the Government's evidentiary burden, and whether a change constituted a major or minor change to the specification and charge did not implicitly or explicitly preclude the referral authority from taking the action he did. To the contrary, this Court, in its denial of the government's motion to make a minor change, adopted the defense's position that "the Government is certainly free to withdraw, dismiss, and [re]-prefer." The Government cannot now be accused of attempting to circumvent or flout this Court's rulings when this Court and the Defense both explicitly stated that the Government was free to take the procedural action that it did, complying with all the other applicable rules.

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Contrast these facts and the facts in *Underwood,* with the facts in *United States v. Vanover v. Clark,* 27 M.J. 345, 348 (CMA 1988). In *Vanover*, an evidentiary ruling specifically prohibiting the admission of certain acts of uncharged misconduct at the first court-martial was flouted when the convening authority flouted the ruling by charging the excluded misconduct at the second court-martial, and the trial counsel requested a different trial judge preside over the second court-martial. CMA held that the convening authority withdrew, dismissed, and pre-referred for the improper purpose of circumventing the trial judge's exclusion of evidence. Here, that is not the case. The referral authority made it clear in the RCM 604 letter that the procedural action taken was to align the sole specification of Charge I with the Government's stated theory of the case and the Court's rulings. Furthermore, the referral authority explicitly stated that the Government seeks to retain the same trial judge in both courts-martial. Therefore, the Government's withdrawal, dismissal and rereferral was for a proper purpose and therefore reset the R.C.M. 707 speedy-trial clock. Furthermore, our appellate court held that continued pretrial restraint does not negate the resetting of the RCM 707 clock, thus, the current R.C.M. 707 day is five (5) as of the day of this filing.

B. The Accused was arraigned within 120 days in his previous court-martial.

a. The table above clearly demonstrates that in the previous court-martial, the Government arraigned the Accused on day 102 pursuant to R.C.M. 707. In every excludable delay request to the Convening Authority, the Defense was afforded the opportunity to object. The Defense did not object to the Government's first or third excludable delay requests submitted on 9 Feb 24 and 6 Jun 24, respectively. The Defense objected to the Government's second excludable delay request, despite the request being based, in part, to their request that their client undergo an R.C.M. 706 evaluation. Despite failing to object to two excludable delay

requests and never demanding speedy trial, it seems as though the Defense is now asserting that the Convening Authority's grant of said delay should somehow not be acknowledged or recognized by this Court. It seems as though the Defense has chosen to not object to two excludable delay request; nor demand speedy trial, and instead lie in wait to demand dismissal in part delays that they never objected to; thereby using speedy trial as a sword instead of the shield that it is meant to be.

b. The Government request the Court grant the Government's request that the time between 10 July and 6 August be attributed to the Defense and excluded.

On 8 July, the Government requested the Court find that all delay between 10 July (the first day after the five-day statutory waiting period) and 6 August (the earliest day the defense counsels were available), a period of 27 days, be excluded as attributable to the defense. The only reason the Accused was not arraigned on 10 July was because the defense counsels were not available until 6 August. While the EJC Chief Judge reserved ruling on the Government's request, he did note that "the Government has presented the case to the Court and demonstrated its readiness to proceed." We were ready to proceed on 10 July, the earliest possible date for the Accused's arraignment. Due to the Defense's filing of this motion, this issue is now ripe. Therefore, the Government respectfully request the Court grant the Government's request and exclude twenty-seven (27) days from the R.C.M. 707 clock, which, if granted, would toll the Government's previous R.C.M. 707 clock to seventy-five (75) days as of August 6.

C. The Accused is not prejudiced by the Government's action.

In its motion, the Defense stated, "Perhaps most important to the analysis of prejudice to Sgt Honstein in the fact that Sgt Honstein is presented with a Hobson's choice. The Defense has been preparing for trial for months based on the charges that were preferred, *litigated at preliminary hearing*, referred, *litigated at length at 39(a)* and 802 hearings. With five days left to trial, the Government sought to fundamentally change [the] gravamen offense." (emphasis added). If this is true, then the Defense has been preparing for this very moment – a specification and charge that now aligns with the Government's theory of the case as we laid it out at the Article 32 preliminary hearing and the Defense reiterated to the Government and PHO in their oral and written comments. In its written comments post Article 32 hearing, the Defense told the PHO, "The Government alleges that Sergeant (Sgt) Honstein ***intentionally pulled the trigger of a firearm***, resulting in the discharge of said firearm and the death of the Ms. [redacted] (See p. 3 of Gov Encl. 7 of Gov Response to DEF MTD Defective Referral). This same theory was presented again at the Article 39(a). Again, the Government never changed its theory. Therefore, the Defense knew about, acknowledged, and have been preparing to defend against this theory since 10 May at the latest. The Court's rulings does not change, nor did it ever change, the Government's theory of the case, a theory the Defense was on full notice of.

EVIDENCE

The Government submits the following in enclosures in support of its motion:

- Enclosure (1): Email Regarding IRO Scheduling
- Enclosure (2): Defense Email Refusing to be Present at IRO hearing
- Enclosure (3): IRO Rescheduled to 5 February.
- Enclosure (4): Defense R.C.M. 706 Evaluation Request
- Enclosure (5): Receipt of R.C.M. 706 Report
- Enclosure (6): PHO's grant of excludable delay and reschedule of IRO hearing
- Enclosure (7): PHO's rescheduling of Article 32 hearing to10 May
- Enclosure (8): Government's Request for Arraignment and Excludable Delay

- Enclosure (9): Government's First Request for Excludable Delay
- Enclosure (10): Government's Second Request for Excludable Delay
- Enclosure (11): Convening Authority's grant of Defense Continuance Request
- Enclosure (12): Government's Third Excludable Delay Request

RELIEF REQUESTED

Based on the foregoing, The Government respectfully requests this Court **DENY** the Defense's motion to dismiss.

[redacted]
R. D. ANDERSON
Captain, USMC
Special Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Government Motion was served electronically on defense counsel on 25 October 2024.

[redacted]
R. D. ANDERSON
Captain, USMC
Special Trial Counsel

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

UNITED STATES v. DAKOTA S. HONSTEIN SERGEANT/E-5 U.S. MARINE CORPS	**GOVERNMENT'S MIL (INSTRUCTIONS)** 30 October 2024

Nature of Motion

This is the Government's motion in limine regarding an instruction for mistake of fact as to the fourth element of Article 118(3).

Summary

The Accused is charged with violations of Article 118(3) and Article 119, for discharging his 9mm pistol while it was pressed against the chest of Ms. [redacted] on 27 January 2024, which resulted in her death a short time later. The Accused initially reported to PMO officers and NCIS agents that during the course of a consensual sexual interaction involving the weapon, the victim had pulled the trigger, followed by a change in his explanation that she had loaded the gun without his knowledge before he pulled the trigger, which was followed finally by an admission that he knew the weapon was loaded and that he had pulled the trigger intentionally but did he did not believe that the weapon would discharge because he believed he had depressed the slide of the pistol enough to disengage the trigger by pushing the weapon at an angle into her chest. The Defense has made a motion in limine regarding proposed instructions for the trial ordered to begin 28 October 2024. The Government requests the Court issue a ruling that the applicable mistake of fact defense instruction applicable based on the Accused's explanation is the general intent mistake of fact instruction found in the benchbook

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at 5-11-2.

Summary of Facts

1. The Accused is charged with violations of Article 118(3) and Article 119, for discharging his 9mm pistol while it was pressed against the chest of Ms [redacted] on 27 January 2024, which resulted in her death a short time later.

2. The Accused initially reported to PMO officers and NCIS agents that during the course of a consensual sexual interaction involving the weapon, the victim had pulled the trigger, followed by a change in his explanation that she had loaded the gun without his knowledge before he pulled the trigger, which was followed finally by an admission that he knew the weapon was loaded and that he had pulled the trigger but did he did not believe that the weapon would discharge because he believed he had depressed the slide of the pistol enough to disengage the trigger to prevent it from firing. [Enclosures 1 and 2]

3. The Accused also explained that the pistol was involved in the consensual sexual interaction for his sexual gratification, and that the dangerous nature of the weapon added to his arousal. [3:10:50 – 3:11:24; 3:42:00 – 3:42:17].

Burden of Proof and Persuasion

4. The moving party generally bears the burden of proof and persuasion under R.C.M. 905(c). However, "instructions on findings ***shall*** include . . . (1) A description of the elements of each offense charged, unless findings on such offenses are unnecessary because they have been entered pursuant to a plea of guilty; (3) A description of any special defense under R.C.M. 916 in issue, *United States v. Dearing*, 63 M.J. 478, 482 (C.A.A.F. 2006), and (7) Such other explanations, descriptions, or directions as may be necessary and which are properly requested by a party or which the military judge determines, *sua* sponte, should be given.

Law

5. If an affirmative defense is reasonably raised by the evidence, the military judge has a *sua sponte* duty to instruct the members on that defense. *United States v. MacDonald*, 73 M.J. 426, 434 (C.A.A.F. 2014). A defense is reasonably raised when "some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they chose." *Id.* The defense theory at trial is not dispositive in determining what affirmative defenses have been reasonably raised, but any doubt regarding whether an affirmative defense instruction is in order should be resolved in favor of the accused. *United States v. Davis*, 53 M.J. 202, 205 (C.A.A.F. 2000).

6. The standard for ignorance or mistake of fact varies with the nature of the elements of the offense involved. If the ignorance or mistake concerns an element of an offense involving specific intent (e.g., desertion, larceny), willfulness (e.g., willful disobedience of an order), knowledge (e.g., assault upon commissioned officer, failure to obey lawful order), or premeditation, the ignorance or mistake need only exist in the mind of the accused. Generally, for crimes not involving specific intent, willfulness, knowledge, or premeditation, (e.g., AWOL) ignorance or mistake must be both honest (actual) and reasonable. Extreme care must be exercised in using this test, however, as ignorance or mistake in some "general intent" crimes need only be honest to be a defense. (See e.g., Instruction 5-11-4, Ignorance or Mistake in Drug Offenses.) Moreover, in some "specific intent" crimes, the alleged ignorance or mistake may not go to the element requiring specific intent or knowledge, and thus may have to be both reasonable and honest. Consequently, the military judge carefully examine the elements of the offense, affirmative defenses, and relevant case law, in order to determine what standard applies. *United States v. Binegar*, 55 M.J. 1, 5 (C.A.A.F. 2001). This Court has suggested a similar rule in *United States v. Peterson*, 47 M.J. 231, 234-35 (1997), and *United States v. Garcia*, 44 M.J. 496, 498 (1996); cf. *United States v. Tucker*, 14 U.S.C.M.A. 376,

380, 34 C.M.R. 156, 160 (1964) (honest mistake of fact applies where mistake made is to facts essential to the existence of the necessary mens rea, i.e., specific intent). United States v. *Id.*

7. Murder under Article 118(3) is a general-intent crime. *United States v. McMonagle*, 38 M.J. 53, 60 (C.A.A.F. 1993). Mistake of fact is not a defense to a general intent crime unless it is both honest **and reasonable**. *Id.* (emphasis added). In a depraved-heart murder, the killer's attitude is "not measured in the abstract, but is evaluated in light of the surrounding circumstances that are apparent and known to the perpetrator, **or at least should reasonably be apparent and known by him.**" *Id.* (emphasis added).

ANALYSIS

8. The Defense has requested the specific-intent crime mistake of fact instruction as to the fourth element of Article 118(3), that "the accused knew that death or great bodily harm was a probable consequence of the act," and this Court should deny that request. While the Court has previously ruled on this issue, that ruling should not bind the Court as to this motion for two reasons. First, R.C.M. 905(g) states in part . . . . "except that . . . a determination of law and the application of law to the facts may be disputed by the *United States*." Additionally, the discussion section defines a final determination and what is not a final determination. Specifically, "a pretrial determination by a convening authority or a special trial counsel is not a final determination under this rule, although some decision may bind the Government under other rules." In this case there was not a final determination made of the matter put in issue, because of the dismissal prior to trial. Additionally, the Court's ruling in the previous court-martial was predicated on a different intentional act. The Court noted during the 39(a) session in that court-martial that the Court would view all the following arguments through the lens of the intentional act of "intentionally shooting." That is no longer the case, and the Government's position is that there was no final determination of this issue, but even if there was, there remains

good cause given the lens through which the MJ made the original ruling has changed warranting reconsideration.

9. Because the Court's previous order is not binding to the question at issue, the Court should issue a ruling that the mistake of fact instruction from the benchbook, 5-11-2, and not the Defense's requested instruction derived from benchbook 5-11-1, is applicable under the binding caselaw from C.A.A.F. Murder under Article 118(3) is a general-intent crime. *United States v. McMonagle*, 38 M.J. 53, 60 (C.A.A.F. 1993). Mistake of fact is not a defense to a general intent crime unless it is both honest[actual] **and reasonable**. *Id* (emphasis added. The *McMonagle* Court addressed the applicability of a mistake of fact defense directly in addressing an appeal based on the Court of Military Review's holding that the Accused's actual belief was not part of the legal analysis. The *McMonagle* and block quoted RCM 916(j) in its analysis (which was contained in the 1984 MCM), and held that the actual or honest belief of the Accused is a part of the analysis, but it must also be reasonable under the circumstances. *McMonagle* at 60(In a depraved-heart murder, the killer's attitude is "not measured in the abstract, but is evaluated in light of the surrounding circumstances that are apparent and known to the perpetrator, **or at least should reasonably be apparent and known by him**."). That prior RCM 916(j) language is identical to the language in RCM 916(j) in the 2024 MCM (and every intervening MCM), meaning the *McMonagle* Court analyzed the same defense available in this case and did not apply the specific intent mistake of fact defense that the Defense in this case has requested.

10. That application is consistent with the C.M.A. analysis in *United States v. Vandenack*, 15 M.J. 230, 233-34 (C.M.A. 1983), the *Vandenack* Accused's plea of guilty to Art 118(3) was upheld:

> While appellant did say at one point during his providence inquiry that **he did not actually realize** at the time of his actions that his conduct could lead to someone's death, he did acknowledge that **he should have known this, in view of the nature of his**

> **actions.** Further, while at another point he said that there was a possibility that someone could be killed by such actions, he subsequently admitted that death actually was a probable consequence of his conduct. Finally, appellant affirmatively responded when the military judge asked him whether he thought that running a red light at a high rate of speed **under the circumstances** of this case was an act "inherently dangerous" to the lives of others "and demonstrated a wanton disregard for human life. . . ."
>
> We entirely agree with Vandenack's conclusions in this regard. The courts which have addressed the question are generally in agreement "that the malice requisite to a murder conviction **may be implied** in vehicular homicide cases from such circumstances as extraordinarily wild driving, aggravated violation of traffic safety regulations, and similar conduct." 21 A.L.R. 3d 116, 126 (footnote omitted) (Annot: Homicide by Automobile as Murder). The common feature of vehicular murder cases is "some form of exceptionally reckless driving, **of so dangerous a nature that the possibility of a fatal collision would suggest itself to any reasonable observer.**" *Id.* at 122 (emphasis added).

While *Vandenack* was considering a plea of guilty, and involved a car rather than a gun, the C.M.A. analysis of the providency inquiry, and the rest of its analysis as to the fourth element of Article 118(3), whether "the accused knew that death or great bodily harm was a probable consequence of the act," is replete with assessment and questions as to reasonableness under the circumstances–during a guilty plea that required the Court to ensure a mistake of fact defense would not preclude providency as to the Article 118(3) plea.

11. The *McMonagle* and *Vandenack* analysis is consistent with the *United States v. Binegar*, 55 M.J. 1, 5 (C.A.A.F. 2001), explanation that the application of the standard for ignorance or mistake of fact varies with the nature of the elements of the offense involved. Under that analysis, the word "knowledge" in the element does not automatically or necessarily mean that the specific intent mistake of fact instruction is required. The Court must examine not only the nature of the elements of the offense involved, but also relevant case law, in order to determine what standard applies. *United States v. Binegar*, 55 M.J. 1, 5 (C.A.A.F. 2001).

12. Here, as noted above, the relevant case law binds this Court in applying the general intent mistake of fact instruction. So too does the nature of the offense, a general intent crime, and the specific element it is being applied to as well. The inherently dangerous act of intentionally

pulling the trigger on a loaded firearm while pointing it a Ms. [redacted] is the actus reas at issue. The fourth element of the crime is that the Accused "knew that death or grievous bodily harm was "a" probable consequence of that act, not "the only" probable consequence. In this case there are a number of probable consequences that could have occurred when the trigger was intentionally pulled: 1) the weapon could have exploded because the slide wasn't locked forward, 2) the weapon could have not fired because it was out of battery, or 3) the weapon could have discharged the bullet through her lungs and heart even though the slide was pushed slightly backward. While all probable consequences, the element does not require knowledge of a specific fact–e.g. that she *will* definitely die or that the gun *will* definitely fire in order to the act to be criminal in a manner similar to a specific intent crime. The requirement for knowledge of one of several probable consequences is distinguishable from the requirement for knowledge of a specific fact like the rank of the person being assaulted, premeditation, or existence of a lawful order (being violated), all of which create specific intent crimes. This understanding is supported by the language of RCM 916(j), that contains the word knowledge in both explanations of the mistake of fact defense, not just the specific intent application (and its application in *McMonagle*).

RELIEF REQUESTED

13. The Government requests the Court issue a ruling that the applicable mistake of fact defense instruction applicable based on the Accused's explanation is the general intent mistake of fact instruction found in the benchbook at 5-11-2.

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EVIDENCE OFFERED

1. Accused's interrogation (previously provided in another motion)

Oral Argument. The Government requests oral argument on this issue should the Defense oppose.

[redacted]
M. E. BLACKBURN
Captain, USMC
Special Trial Counsel

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Government's response to Defense's Motion in Limine (instructions) was served electronically on defense counsel and the Court on 30 October 2024.

[redacted]

M. E. BLACKBURN
Captain, USMC
Special Trial Counsel

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

UNITED STATES v. DAKOTA S. HONSTEIN SERGEANT/E-5 U.S. MARINE CORPS	**GOVERNMENT'S SUPPLEMENTAL RESPONSE TO DEFENSE MIL (807)** 30-Oct-24

Nature of Motion

This is the Government's supplemental brief in response to the Defense's MOTION IN LIMINE (MRE 807), dated 13 September 2024.

Summary

The Accused is charged with violations of Article 118(3) and Article 119 for discharging his 9mm pistol while it was pressed against the chest of Ms [redacted] on 27 January 2024, which resulted in her death a short time later. The Accused initially reported three distinct versions of events to PMO officers and NCIS agents, all of which he claimed occured during the course of a consensual sexual interaction involving the weapon: 1) the victim had pulled the trigger; which was then followed by a change in his explanation that 2) she had loaded the gun without his knowledge before he pulled the trigger; and then finally an admission that 3) he knew the weapon was loaded and that he had pulled the trigger intentionally, but that he did not believe that the weapon would discharge because he believed he had depressed the slide of the pistol enough to disengage the trigger by pushing the weapon at an angle into her chest. The Defense has moved the Court to admit significant evidence of Ms. [redacted] sexual history and participation in consensual BDSM sexual interactions in order to lower his culpability in relation to the Article 118(3) charge against him by showing the victim

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had consented to the use of the weapon. The Government objected that the evidence was not relevant, let alone necessary under MRE 807. The Court ruled that the evidence was admissible under MRE 807 subject to a limiting order. The Government then requested the Court also rule that the evidence it had provided in its MRE 404b notice (regarding the Accused's actions exceeding the consent of three different sexual partners during BDSM sexual interactions) would be admissible to rebut the evidence the Defense seeks to enter regarding Ms. [redacted] sexual history. The Court should now grant that request in light of the additional evidence enclosed and argument below.

Summary of Facts

1. On 24 September 2024, this Court issued a preliminary ruling that testimony by Ms. [redacted] regarding the past sexual history and BDSM interests of Ms. [redacted] the victim in this case, is admissible under MRE 807 to show that Ms. [redacted] consented to the Accused pushing a loaded pistol against her chest and pulling the trigger as part of a BDSM sexual interaction in his barracks room.

2. Ms. [redacted] was interviewed by NCIS on 5 February 2024. She relayed to the agents that she was involved in consensual sexual interactions with the Accused on four different occasions and that their interactions involved some choking and scratching. However, on the fourth interaction he choked her with more force and for longer than she consented to and ordered her to beg for her life or words to that effect.

3. Ms. [redacted] was interviewed by NCIS on 15 May 2024. She relayed to the agents that she was involved in consensual sex with the Accused during the course of their romantic relationship, and that their interactions involved BDSM including, among other things, a knife and a loaded pistol. However, during two of those interactions with the pistol, the Accused unloaded the pistol without Ms. [redacted] knowledge and then pulled the trigger while the pistol

was against her head without her consent. He did not ask her if he could do that, nor had they previously discussed that action.

4. Ms. [redacted] was interviewed by NCIS on 6 September 2024. She relayed to the agents that she was involved in consensual sex with the Accused on one occasion and that their interaction involved some consensual BDSM. However, during that interaction the Accused pulled out his knife and put it against her throat without her consent. He did not ask her if he could do that, nor had they previously discussed that action.

Burden of Proof and Persuasion

5. The moving party generally bears the burden of proof and persuasion under R.C.M. 905(c), and, the proponent of evidence has the burden of showing that it is admissible." *United States v. Billings*, 61 M.J. 163, 168 (C.A.A.F. 2005) (citing *United States v. Palmer*, 55 M.J. 205, 208 (C.A.A.F. 2001)).

Law

6. Only relevant evidence is admissible at courts-martial. M.R.E. 402(b); *United States v. Guihama*, No. 23-0085, 2024 CAAF LEXIS 467, at *16 (C.A.A.F. Aug. 14, 2024). To be relevant, evidence need only have "any tendency to make a fact more or less probable than it would be without the evidence, and . . . the fact is of consequence in determining the action." M.R.E. 401(a)-(b). "The relevance standard is a low threshold." *Guihama*, at 16. However, under MRE 403, "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."

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ANALYSIS

7. The Defense has indicated that it intends to put consent at issue in this case (in conjunction with the Court's ruling), and the Government should be allowed to rebut the Defense's evidence regarding consent. The Defense has articulated that the purpose of its evidence is to attack an element or elements of Article 118(3) that the Government must prove, but those arguments are based on the predicate inference that the victim consented to the murder weapon being used during a BDSM interaction with the Accused, making consent a "fact . . . of consequence in determining the action." *Guihama*, at 16. The Accused's criminal act of killing Ms. [redacted] has deprived the Government and the fact-finder of the best source of evidence to rebut the Defense's arguments as to that inference. However, testimony by Ms. [redacted] Ms. [redacted] and Ms. [redacted] that the Accused exceeded the scope of their consent during BDSM sexual interactions with them in similar situations directly rebuts the Defense's consent evidence and demonstrates the Accused's similar intent, plan, and motives with the victim in this case. There are not one, not two, but three different women whose interviews mirror each other and the factual circumstances of this case. Each was involved in what began as a consensual sexual interaction with the Accused involving BDSM. And each experienced a significant escalation of risk in circumstance during those interactions that exceeded what they had consented to without any conversation or warning, all of which occurred for the Accused's sexual gratification. More specifically, each of those escalations involved life-threatening circumstances: strangulation, a knife to the throat/carotid artery, and a pistol to the brain–all of which bear a strikingly similar level of risk-of-death to a loaded pistol pressed against the heart of the victim in this case. The similarity of their circumstances, and the number of similar experiences makes the evidence from these witnesses highly probative, particularly relative to the Defense's evidence where Ms. [redacted] specifically disavowed any knowledge of Ms.

[redacted] ever being involved in gun play. This Court should therefore issue a ruling that the testimony from Ms. [redacted] Ms. [redacted] and Ms. [redacted] that the Accused exceeded the scope of their consent during BDSM sexual interactions is relevant under MRE 404b and admissible under a MRE 403 analysis based on highly probative nature of their similar stories that appear to corroborate each of their individual reports, and the fact that the unfair prejudice to the Accused is lessened by their control as to whether they "open the door" to consent evidence at trial.

RELIEF REQUESTED

8. The Government requests the Court issue a ruling that the testimony from Ms. [redacted] Ms. [redacted] and Ms. [redacted] that the Accused exceeded the scope of their consent during BDSM sexual interactions is admissible under MRE 404b and MRE 403 should the Defense elicit evidence through Ms. [redacted] that the victim consented to the Accused's use of his pistol during their BDSM interaction in his barracks room based on the victim's past sexual history and interests.

EVIDENCE OFFERED

1. Ms. [redacted] interview (already submitted with the Government's MRE 404b motion)
2. Ms. [redacted] interview
3. Ms. [redacted] interview

Oral Argument. The Government requests oral argument on this issue should the Defense oppose.

[redacted]
M. E. BLACKBURN
Captain, USMC
Special Trial Counsel

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Government's motion in response to Defense's Motion to compel expert consultation was served electronically on defense counsel on 30 October 2024.

[redacted]
M. E. BLACKBURN
Captain, USMC
Special Trial Counsel

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

UNITED STATES **v.** **DAKOTA S. HONSTEIN** **SERGEANT** **U. S. MARINE CORPS**	**VICTIM LEGAL COUNSEL'S MOTION TO APPOINT ARTICLE 6b DESIGNEES** **29 Oct 2024**

MOTION

Ms. [redacted] and Ms. [redacted] parents of Ms. [redacted] through Victim Legal Counsel move this court to appoint them as joint designees pursuant to Article 6b(c), UCMJ.

FACTS

Ms. [redacted] the victim in this case, was killed on 27 January 2024 aboard Marine Corps Base Camp Lejeune, North Carolina.

Additional facts pertaining to Ms. [redacted] her background and her parents are contained in Exhibit (1) and are incorporated by reference into this motion. Exhibit (1).

LAW

Per Article 6b(c), UCMJ: "In the case of a victim of an offense under this chapter who is . . . deceased, the legal guardians of the victim or the representatives of the victim's estate, family members, or any other person designated as suitable by the military judge, may assume the rights of the victim under this section." (Emphasis added).

Under the UCMJ, a "victim" is an individual who is alleged to have suffered a direct physical, emotional, or pecuniary harm as a result of a commission of an offense under the UCMJ.

ARGUMENT

Bottom line up front: Ms. [redacted] and Ms. [redacted] parental relationship with [redacted] willingness to communicate with one another about this case, stable employment, and ability to travel for future legal

proceedings, among other attributes, make them the most suitable candidates for assuming the rights of their daughter, [redacted]

As described in Exhibit (1), Ms. [redacted] and Ms. [redacted] adopted [redacted] in 2001. Since then they have remained the legal adoptive parents of [redacted] and two other now-grown children, [redacted] and [redacted] While married, Ms. [redacted] and Ms. [redacted] were committed to providing a safe, structured home for their children to grow up in. Their commitment to [redacted] and their other children is best demonstrated by their active participation in their children's upbringing, including traveling with their children to over 25 different countries, enrolling [redacted] in dance lessons, gymnastics, tae kwan do, swimming, surfing and ski lessons as well as music classes. While [redacted] was in school, she showed promise and was even enrolled in the gifted program at her grade school. She was active in several high school sports teams and athletic programs. Before moving to North Carolina, [redacted] had attended El Camino College where she studied Education in the hopes of someday becoming a teacher.

Since divorcing in 2018, Ms. [redacted] and Ms. [redacted] have maintained almost constant communication. They maintain a family group chat where they and their children text daily. They also speak on the phone with one another several times a day. There is no reason to believe this will change any time soon.

Ms. [redacted] and Ms. [redacted] are also sufficiently stable in their employment, finances and support systems such that they can actively advocate for [redacted] as her court-appointed representatives. Ms. [redacted] is a graduate of Quincy University and holds dual degrees in Chemistry and Biology. She currently serves as the Senior Manager for Business Intelligence at ServiceTitan in Glendale, California, where she is responsible for several teams of employees. Outside of her job, she serves on the board of directors for Quincy University's National Alumni Board, its Civic Music Association, and the Quincy Humane Society. She also is a member of the Quincy Park Band and the Quincy Community Concert Band.

Ms. [redacted] holds a Bachelor of Arts in Communications from the University of Nevada-Las Vegas. She worked in television news for nine years before entering nursing. For the last 18 years she has

worked as an emergency room nurse in the fast-paced emergency rooms of Harbor UCLA Medical Center, Providence Hospital and Kaiser Permanente. She recently transitioned to being a hospice nurse. Neither of them foresees any financial hardships in the near future that would prevent them from being able to travel to Camp Lejeune for legal proceedings. Both of their employers are tracking that they are involved in this case and are providing sufficient flexibility so that at least one if not both can be present for future proceedings.

In short, Ms. [redacted] and Ms. [redacted] are suitable candidates to serve as designees for [redacted] As parents of [redacted] they know their daughter far more than this motion can adequately capture and can communicate that to this court better than anyone else. The values and skills they possess as parents of three children, to say nothing of their professional backgrounds and responsibilities, more than demonstrates their ability to advocate for their daughter in a timely, responsible, and zealous manner.

RELIEF REQUESTED

Ms. [redacted] and Ms. [redacted] through counsel, respectfully move this court to appoint them as the designees of Ms [redacted] rights as a victim pursuant to Article 6b(c), UCMJ.

In support of this motion, Victims Legal Counsel offers the following evidence:

- Exhibit (1): Affidavit of [redacted] and [redacted] dated 26Feb24.

RICE.CALEBE.LE[redacted] Digitally signed by RICE.CALEBE.LEE[redacted] Date: 2024.10.29 08:52:00 -04'00'

CALEBE L. RICE
Major, U.S. Marine Corps
Victims Legal Counsel for Ms. [redacted]
and Ms. [redacted]

****

Certificate of Service

I hereby attest that a copy of the foregoing motion was served on the court and the parties electronically on 29 October 2024.

RICE.CALEBE.LE[redacted] Digitally signed by RICE.CALEBE.LEE[redacted] Date: 2024.10.29 08:52:17 -04'00'

CALEBE L. RICE
Major, U.S. Marine Corps
Victims Legal Counsel for Ms. [redacted]
and Ms. [redacted]

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

UNITED STATES **V.** **DAKOTA S. HONSTEIN** **SERGEANT / E-5** **USMC**	**DEFENSE MOTION TO DISMISS VIOLATION OF ARTICLE 10, AND R.C.M. 604(B)** **13 December 2024**

Motion

The Government has violated Rule for Courts-Martial (R.C.M.) 604(b) and 10 U.S.C. §810, Article 10, Uniform Code of Military Justice (UCMJ). Through counsel, Sergeant Dakota S. Honstein, USMC, moves this Court to dismiss with prejudice all pending charges and specifications before this Court against him. In the alternative, the Defense moves the Court to dismiss the Additional Charge, and for one day of administrative confinement credit for each day Sergeant Dakota spends in pretrial confinement after 26 October 2024.

Burden

The burden is on the Government to show that it met its burden under Article 10, U.C.M.J. *United States v. Schuber*, 70 M.J. 181, 187-8 (C.A.A.F. 2011). The burden of proof and persuasion rests on the Defense for its improper referral motion. The burden of proof on any factual issue, the resolution of which is necessary to decide the motion by a preponderance of the evidence. R.C.M. 905(c).

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Summary

On 27 January 2024, the Government placed Sergeant (Sgt) Honstein into pretrial confinement. The Government then failed to arraign Sgt Honstein at this Court until 6 December 2014—315 days later. The timeline is remarkable and telling. By 9 April 2024—seventy-four days after placing Sgt Honstein in pretrial confinement—the Government settled on charging him under Article 118(3) with intentionally shooting [redacted] with a firearm. It was not until 263 days had passed that the Government finally recognized the fatal flaw in its Article 118(3) charge. Yet this realization came not from carefully examining the facts or law but only after the Defense moved for correct legal instructions and the military judge ruled in the Defense's favor. The Government's choice in alleging its Charge put its case at a tactical disadvantage, and only through the Court's intervention did it begin to understand its error. In other words, for 263 days, the Government failed to give its charging language the attention and care required by the Office of Special Trial Counsel. That is the inapposite of reasonable diligence.

The Government then began on a course that would ultimately circumvent the Court's rulings. First, the Government attempted to change its Article 118(3) charge so that it would no longer have to prove what it originally alleged. When the Military Judge prohibited that major change, the Government did not back down. Instead, it withdrew the charges just two days before trial was originally scheduled. This withdrawal was done for the improper purpose of amending the Article 118(3) charge in the precise manner the Military Judge had just prohibited. In other words, when the Military Judge was an obstacle for the Government—standing between its overreach and the accused's rights—the Government eliminated the Military Judge from the process.

Sergeant Honstein has borne the brunt of the Government's actions. As a result of this careless conduct, he has lost his counsel of choice. He continues to suffer the unjust deprivation of his liberty in pretrial confinement. The Government's unreasonable behavior—its carelessness in charging, the casting aside the *Honstein I* Court's rulings, and its disregard for Sgt Honstein's rights—has caused this hardship. Article 10, UCMJ, and R.C.M. 604(b) empower the Military Judge to correct this situation.

Facts

a. On 27 January 2024, the Government placed Sgt Honstein into pretrial confinement.

b. Shortly thereafter, in January of 2024, Sgt Honstein formed an attorney-client relationship with his two detailed Defense counsel, Capt Carson and Captain Lipositz. (Court's Ruling R.C.M. 506(c))

c. On 9 April 2024, the Government preferred charges. On 3 July 2024, the Government referred charges. (Court's Ruling R.C.M. 506(c))

d. On 6 August 2024, the prior Court arraigned Sgt Honstein on the originally-preferred and referred charges. That Court docketed trial on the merits for 28 October 2024 – 8 November 2024. (Court's Ruling R.C.M. 506(c))

e. On 13 September 2024, the Defense moved the prior Court to issue a ruling concerning a variety of instructions the Court would be required to provide the factfinder. On 20 September 2024 the Government filed its written response. On 23 September 2024 the parties litigated these issues during an Article 39(a), UCMJ session of court. During that session it became apparent that the parties maintained divergent views of the law with respect to precisely what inherently dangerous act the Government must prove Sgt Honstein committed. During the 23 September 2024 proceeding, the Court, based on the language the Government included in the specification, articulated its inclination to instruct in such a way to require the Government to prove that Sgt Honstein committed the intentional act of "shooting [Ms. [redacted]] with a firearm." After the Government expressed its disagreement, that Court ordered supplemental briefing on that particular issue. The Government filed its supplemental brief on 27 September 2024. The Defense filed its response brief on 4 October 2024. (Court's Ruling R.C.M. 506(c))

f. Final pretrial matters were due 7 October 2024. (*Honstein I*, Trial Management Order)

g. On 15 October 2024, that Court issued a written ruling, finding that Charge I and its sole specification was not defective, but as charged, the Government must prove, beyond a reasonable doubt, that Sgt Honstein intentionally committed the inherently dangerous act of "shooting [Ms. [redacted]] with a firearm." (Court's Ruling R.C.M. 506(c))

h. On 17 October 2024, the Government filed a written motion seeking permission from that prior Court to make a "minor change" to the sole specification of Charge I as follows:

> Specification: (Murder - Act Inherently Dangerous to Another): In that Sergeant Dakota S. Honstein, U.S. Marine Corps, on active duty, did, onboard Marine Corps Base Camp Lejeune, on or about 27 January 2024, murder [redacted] by means of ~~shooting her with a firearm~~ intentionally pulling the trigger of a loaded firearm while pointing it at her.

In the Government's motion for a minor change, it expressed disagreement with the Court's ruling that the unamended Charge required proof beyond all reasonable Sgt Honstein intentionally shot [redacted] with a firearm. (Government's Motion for Appropriate Relief, 17 October 2024)

i. On 23 October 2024, that prior Court DENIED the Government's motion. (Court's Ruling R.C.M. 506(c))

j. On 26 October 2024, two days before trial was originally scheduled, the Government provided notice that the referral authority directed the withdrawal and dismissal of all charges and specifications, with the intent to re-prefer and re-refer an Article 118(3) specification with the inherently dangerous act pled as proposed by the major change. (*Honstein I*, Trial Management Order; Court's Ruling R.C.M. 506(c); Enclosure 1)

k. On 26 October 2024, the Government preferred and referred a new Article 118(3) offense and re-preferred and re-referred identically-drafted Article 119 and Article 92 offenses along with it. Also, on 26 October 2024, the Government served these referred charges on Sgt Honstein. (Court's Ruling R.C.M. 506(c))

l. On 1 November 20204, the Court determined that trial would need to be docketed for dates beyond 20 November 2024—the date Sgt Honstein's lead detailed Defense counsel, Capt Paul Carson, was scheduled to complete his active-duty service. (Court's Ruling R.C.M. 506(c))

m. Captain Carson's 20 November 2024 End of Active Service (EAS) was made known to the prior Court during arraignment on 6 August 2024. At that time, he was tentatively scheduled to begin work in the Federal Public Defender's Office in Los Angeles, California, shortly after his EAS. Sometime after 6 August 2024, Capt Carson's future employment plans changed. He was then scheduled to begin work in

the Federal Public Defender's Office in Miami, Florida on approximately 30 December 2024. (Court's Ruling R.C.M. 506(c))

n. On 1 November 2024, the Court conducted a colloquy with Sgt Honstein concerning the trial dates proposed by the Defense team. In sum, Sgt Honstein explained that if having to choose between more time to prepare for trial and going to trial with Capt Carson representing him, Sgt Honstein preferred to have more time to prepare for trial. However, Sgt Honstein still expressed his preference that both Capt Carson and Capt Lipositz continue to represent him. (Court's Ruling R.C.M. 506(c))

o. Capt Lipositz had also previously made the Court aware that he is scheduled to rotate out of the Defense Services Organization (DSO) in early-December 2024. In particular, Capt Lipositz is scheduled to execute orders to Fort Meade, Maryland to serve in the Office of the Staff Judge Advocate (OSJA) for Marine Corps Forces Cyber Command. (Court's Ruling R.C.M. 506(c))

p. During Sgt Honstein's subsequent colloquy with the Court on 1 November 2024, Sgt Honstein unequivocally expressed his desire to retain Capt Carson as a member of his Defense team. The Accused explained that he did not consent to Capt Carson's excusal under R.C.M. 506(c). Subsequently, Capt Carson orally moved the Court to withdraw from representation under R.C.M. 506(c). Capt Carson's stated good cause for requesting withdrawal was "the withdrawal and dismissal of the charges and re-referral in conjunction with my EAS." (Court's Ruling R.C.M. 506(c))

q. On 1 November 2024, the Court denied Capt Carson's motion for withdrawal. However, the Court granted in part a Defense motion to dismiss due to improper referral for lack of an Article 32 preliminary hearing for the newly preferred Article 118(3) offense. Accordingly, only Charges II and III then remained before the Court. (Court's Ruling R.C.M. 506(c))

r. On 1 November 2024 the Article 118(3) Additional Charge that is now before this Court was preferred.

s. On 6 November 2024, the Government requested this Court author a written order pertaining to Capt Carson's need for continued military service and representation of Sgt Honstein. At that time, the

Government explained that a higher authority had provided "some indication" that a Court Order would be necessary to maintain Capt Carson on active duty beyond his EAS. (Court's Ruling R.C.M. 506(c))

t. On 7 November 2024, Capt Carson informed the Court and the Government that he intended to join the "IMA Det" (Enclosure 2).

u. On 8 November 2024, the Government provided the Court with the following update:

> "[T]he Government has not been able to locate a source of authority to involuntarily extend an officer's EAS outside of legal hold. While there are ample options for extending EAS voluntarily or facilitating travel and TAD through ADOS orders from the reserves, all viable options would require an action by the Officer to initiate those avenues. Knowing all these options, if the DSO serves the relationship, without consent of the Accused, that is a DSO choice. The Government is willing to facilitate Capt Carson's presence through any voluntary means noted above."

In light of that update, the Government also asked the Court to "rescind[] any previous direction or expectation that the Government involuntarily extend Capt Carson's EAS. (Court's Ruling R.C.M. 506(c)); Enclosure 3)

v. On 8 November 2024, Capt Carson expressed to the Court his unwillingness to voluntarily postpone his separation date, or to voluntarily execute funded reserve orders to represent Sgt Honstein. Court's Ruling R.C.M. 506(c))

w. On 13 November 2024, an Article 32 Preliminary Hearing was conducted for the newly-preferred Article 118(3) offense that is not referred to this Court. Both Capt Carson and Capt Lipositz represented Sgt Honstein at the preliminary hearing. Court's Ruling R.C.M. 506(c))

x. On 13 November 2024, Capt Carson explained to this Court that he views his pending EAS and future civilian employment in conflict with continued representation of Sgt Honstein. Capt Carson asserted that based on that conflict, he does not reasonably believe that he will be able to provide competent and diligent representation to Sgt Honstein in compliance with Rule 1.7(b)(1) of JAGINST 5803.1E. The Court then engaged in a colloquy with Sgt Honstein wherein Sgt Honstein intelligently displayed his understanding of the potential conflicts surrounding continued representation by Capt Carson. This Court made Sgt Honstein aware that Capt Carson told this Court that his "personal and professional interests are no longer in line with that of [his] client's…" Additionally, in front of Sgt Honstein, Capt Carson affirmed his unwillingness to continue to voluntarily remain on active duty beyond 20 November 2024, or to voluntarily execute reserve orders, to continue to represent him at this court-martial. Despite understanding all of this and after having received the benefit of conflict-free consultation, Sgt Honstein explained to this Court that he does not consent to the excusal of Capt Carson under R.C.M. 506(c). The Accused explained that, if possible, it would still be his desire for Capt Carson to continue to represent him, even beyond his EAS. (Court's Ruling R.C.M. 506(c))

y. On 13 November 2024 the Court directed Capt Carson to immediately speak to the detailing authority and to subsequently inform this Court of precisely when the detailing authority intends to excuse Capt Carson in accordance with R.C.M. 505(d)(2)(B)(iii). (Court's Ruling R.C.M. 506(c))

z. Captain Carson and Capt Lipositz's detailing authority in this case is and was the Chief Defense Counsel of the Marine Corps. (*Honstein I* arraignment).

aa. On 14 November 2024, Capt Lipositz, on behalf of the Defense team, informed the Court that the DSO would necessarily have to sever Capt Carson from this Case on his EAS (20 November 2024) and that the detailing authority intended to detail the undersigned counsel on or about 18 November 2024.

aa. On 14 November 2024, Capt Lipositz also confirmed to this Court that the detailing authority does not intend to excuse Capt Lipositz prior to, or upon, his rotation from the DSO at Camp Lejeune to the OSJA at MARFORCYBER. (Court's Ruling R.C.M. 506(c))

ab. On 17 November 2024 this Court granted Capt Carson's R.C.M. 506(c) application for withdrawal over the Sgt Honstein's objection. (Court's Ruling R.C.M. 506(c))

ac. On 4 December 2024 the Government referred the Article 118(3) Additional Charge.

ad. On 6 December 2024, Sgt Honstein waived his five-day statutory period, and Capt Lipositz's presence, and the Government arraigned him on the Charges now before this Court.

Additional facts, as necessary, are discussed in the analysis.

Law

A. R.C.M. 604(b) forbids the Government from withdrawing and re-referring charges for an improper purpose. A proper purpose is a legitimate command reason which does not unfairly prejudice an accused.

R.C.M. 604(a) states "[t]he convening authority or a superior competent authority may for any reason cause any charges or specifications to be withdrawn from a court-martial at any time before findings are announced." Yet charges "should not be withdrawn from a court-martial arbitrarily or unfairly to an accused." R.C.M. 604(a), Discussion. "Charges that have been withdrawn from a court-martial may be referred to another court-martial unless the withdrawal was for an improper reason." R.C.M. 604(b); *United States v. Williams*, 55 M.J. 302, 304 (C.A.A.F. 2001).

i. RCM 604(b) forbids the Government to withdraw and rerefer charges for an improper purpose.

United States v. Mann, 32 M.J. 883, 889 (N.M.C.M.R. 1991), and the discussion in R.C.M. 604(b) "illustrate the concept that, while a [referral] authority may withdraw a charge at any time, his discretion concerning the disposition of that charge after withdrawal becomes more and more restricted the closer the original forum gets to accepting evidence on the issue of guilt or innocence." "The scope of what constitutes a proper reason for withdrawal permitting rereferral narrows as that charge progresses along the judicial process in the original forum before the [referral] authority exercises his prerogative to withdraw." *Mann*, 32 M.J. at 889. Thus, the propriety of withdrawal and re-referral is measured on a spectrum as the case progresses.

Before arraignment, charges may be withdrawn because of "reconsideration by the convening authority or by a superior competent authority of the seriousness of the offenses." R.C.M. 604(b), Discussion. However, charges withdrawn *after* arraignment charges may be withdrawn and re-referred only "under some circumstances." *Id. Mann*, 32 M.J. at 888. Thus,

> R.C.M. 604(b) is a sliding standard that becomes more difficult as the stages of trial progress. A finding of good cause is more likely, therefore, where the reason for withdrawal is driven by some event that undermines the appropriateness of being at the stage of the proceedings at which withdrawal occurs.
>
> *United States v. Koke*, 32 M.J. 876, 880 (N-M.C.M.R. 1991).

"The principle driving the [proper purpose] requirement is that once the [referral] authority commits a case to a court-martial, he should not thereafter interfere with the judicial process . . . ." *Id.* The purpose here is "to check potential unfair manipulation of the charging and dismissal processes to gain unfair advantage over an accused, to prevent prosecutorial harassment, and to prevent retaliation against the accused for exercising a right." *Id.* at 879 (citing *United States v. Hardy*, 4 M.J. 20 (C.M.A.1977)).

Precedents for improper purposes for withdrawal include:

1) One that circumnavigates a Military Judge's "formal" ruling because that is an "illegal interference with the exercise of his judicial function." *Petty v. Convening Auth.*, 43 C.M.R. 278, 281 (U.S. C.M.A. 1971).
2) Where the practical effect of the withdrawal and rereferral action is to overturn a Military Judge's ruling. *Vanover v. Clark*, 27 M.J. 345, 347 (C.M.A. 1988).
3) Where the withdrawal and re-referral flouts a Military Judge's ruling. *United States v. Underwood*, 50 M.J. 271, 275 (C.A.A.F. 1999).
4) Where there is "an intent to interfere with the rights of the accused [and] an intent to interfere with the impartiality of a court-martial." *United States v. Haagenson*, 52 M.J. 34, 35 (C.A.A.F. 2009); R.C.M. 604(b) Discussion.

5) Where there is "*any* interference with the free exercise of a constitutional or Codal right *or* with the impartiality of a court-martial." *Koke*, 32 M.J. at 881 (emphasis added) (citation omitted).

6) When it is because of the Government's "delayed appreciation of the seriousness of the offenses." *Mann*, 32 M.J. at 887.

Conversely, a "proper" withdrawal and re-referral "in this context [is] a legitimate command reason which does not unfairly prejudice an accused in the light of the particular facts of a case." *United States v. Underwood*, 50 M.J. 271, 276 (C.A.A.F. 1999) (citations omitted). Proper rationales include "if the accused fails to honor the terms of a pretrial agreement; if the convening authority receives additional charges and a higher level of court-martial or more severe referral instructions are contemplated; if the reporter notes of previous court sessions are lost, or if the court has been challenged below quorum." *Koke*, 32 M.J. at 880, *aff'd*. 34 M.J. 313 (C.M.A.1992) (citations omitted). Additionally, the Court of Appeals for the Armed Forces (CAAF) has found withdrawal for the purpose of judicial economy by trying all known charges in a single trial to be proper.

Finally, R.C.M. 603(d) allows re-referral of charges after a major change to which the appellant has objected. However, re-referral of post-arraignment withdrawn charges are strongly disfavored. That is because, "[a]fter arraignment, the power of the military judge to process the case increases, and the power of the [referral] authority to affect the case decreases." *Cf. United States v. Doty*, 51 MJ. 464, 465-66 (C.A.A.F. 1999) (citing R.C.M. 603(d) and 604(b)). And even then,

> "[t]he scope of what constitutes a proper reason for withdrawal permitting rereferral narrows as that charge progresses along the judicial process in the original forum before the convening authority exercises his prerogative to withdraw. The reason for this constriction is to avoid the possibility or the appearance that the convening authority has manipulated the judicial process to obtain some preconceived result."
>
> *Mann*, 32 M.J. at 889.

It is not simply a question of withdrawal for a major change before or after arraignment. The later the withdrawal, the more suspect the purpose.

Regardless, even a proper purpose for withdrawal and re-referral cannot unfairly prejudice the accused. *United States v. Leahr*, 73 M.J. 364, 369 (C.A.A.F. 2014); *Underwood*, 50 M.J. at 276.

ii. Withdrawal and re-referral of charges must not unfairly prejudice the accused.

Under the controlling standard from *Underwood*, even if withdrawal and rereferral are done for a proper reason, it must not "unfairly prejudice the accused." *Underwood,* 50 M.J. at 276 (internal quotation marks omitted). To determine whether withdrawal and rereferral was unfairly prejudicial the Court in *Underwood* identified five factors: (1) loss (to the accused) of a favorable trial court ruling; (2) whether the accused was in pretrial confinement at the time; (3) whether the second court-martial was the same type as the first; (4) whether the same military judge presided over the second court-martial, and (5) whether the appellant made a motion at the second court-martial for prejudicial delay. *Id.*

The Court of Appeals for the Armed Forces (CAAF) applied the *Underwood* factors most recently in 2014. *See United States v. Leahr*, 73 M.J. 364 (C.A.A.F. 2014). The list of factors in *Underwood* is not exclusive. A withdrawal may be improper for other forms of unfair prejudice, like prejudice to a constitutional or statutory right. *Koke*, 32 M.J. at 881.

An accused servicemember has a statutory and procedural right to members properly instructed on the charged offenses' elements. Article 51(c), UCMJ; R.C.M. 920(e)(1); *United States v. Payne*, 73 M.J. 19, 21 (C.A.A.F. 2014).

Accused servicemembers also have a right to military counsel under Articles 27(b) and 38(b) of the UCMJ and the right to conflict free counsel under the Sixth Amendment. "When Government actions frustrate the continuation of an established attorney-client relationship" CAAF has found "that the accused's Article 38(b) rights were violated as a result." *United States v. Gilmet*, 83 M.J. 398, 406-07 (C.A.A.F. 2023); *see also United States v. Hutchins*, 69 M.J. 282 (C.A.A.F. 2011).

The Government materially prejudices an Accused's substantial rights when its actions present an Accused with a Hobson's choice between statutory and Constitutional rights to his established attorney-client relationship and conflict-free counsel. *Gilmet*, 83 M.J. at 407. Not every Article 38(b) violation prejudices an Accused; however, "the character of the Government action in frustrating an existing

attorney-client relationship is an important consideration when conducting the prejudice inquiry." *Id.* at 408 (citing *Hutchins*, 69 M.J. at 291 (declining to find prejudice and noting that "the personnel action leading to the severance . . . resulted from a request initiated by the assistant Defense counsel, not by the prosecution or the command")).

Finally, a judicial remedy is required to dispel even the "appearances of evil" in the "critical context" of re-referring previously withdrawn charges. *Vanover v. Clark*, 27 M.J. 345, 348 (C.M.A. 1988)

B. Severance of an Attorney-Client Relationship When the Defense Counsel Reaches His End of Active Service.

Marines, like Capt Carson, in an IMA detachment are in billets that augment active component missions of the Marine Corps and support specialized requirements. Marine Corps Order 1001.59A. The Marine Corps has an established category of active duty for reservists—"Active Duty Other Than for Training (ADOT)"—that is used to support active-duty component missions pursuant to 10 U.S.C. §§ 12301, 12302, 12304 that includes involuntarily recalled reservists. *Id.* Marine Corps Order 1001R.1L further instructs that reservists can be involuntarily ordered to active duty to support the Active duty with skilled manpower assets. Marine Corps Order 1001R.1L, Pages 3-1 and 3-15 through 3-17.

10 U.S.C. §12301(b) permits the Secretary of the Navy to involuntarily order reserve members to active duty for fifteen days a year.

10 U.S.C. §12302 permits the mobilization of Selected Reservists for no more than twenty-four consecutive months when the President has declared a national emergency. The President most recently declared a national emergency on 9 September 2024.

10 U.S.C. §12304(a) permits the President to order Selected Reservists to active duty for up to 365 days to augment the active forces. Notably, §12304(a) formerly involuntary mobilization of reservists to "any named operational mission." That provision, which limited the purposes for which the President could order Selected Reservists involuntarily to active duty, was deleted in December 2023 by Public Law 118-31. Therefore, the President can augment the active forces with reservists for 365 days.

In *United States v. Hutchins*, the CAAF cited §12302, finding that

> [a]lthough separation from active duty normally terminates representation, highly contextual circumstances may warrant an exception from this general guidance in a particular case. In any given case, separation from active duty may amount to a routine personnel action or may implicate significant Government interests. Likewise, cancellation or postponement of a separation date, or recall to service in a reserve status, may involve routine action or significant interests. *See, e.g.*, MCO P1900.16F para. 5002; 10 U.S.C. §§ 12301, *12302*. Similarly, considerations pertinent to the role of a particular member of the Defense team in a specific case may range from routine matters to complex considerations."
>
> *Hutchins*, 69 M.J. 282, 290-91 (C.A.A.F. 2011) (emphasis added) (decided before Congress amended §12304(a)).

The lower court in *Hutchins*, stated good cause to sever an attorney

> must be assessed on a sliding scale which considers the contextual impact of the severance on the client. Severance of an attorney/client relationship early in a case will have significantly less impact on an accused's representation rights than severance after work has been done on the Defense case. A severance on the eve of trial after nearly a year of Defense strategizing and preparation has even greater impact . . . Excusal for good cause by the military judge should, as the Court of Appeals for the Armed Forces (C.A.A.F.) stated, be authorized only in cases where there exists truly extraordinary circumstance[s] rendering *virtually impossible* the continuation of the established relationship.
>
> *United States v. Hutchins*, 68 M.J. 623, 629 (N-M. Ct. Crim. App. 2010) rev'd on other grounds *Hutchins*, 69 M.J. 282 (internal quotation marks and citations omitted) (emphasis added).

In *United States v. Spriggs*, decided before *Hutchins,* the Government represented to the Court there that reservists "could be involuntarily ordered to active duty . . . during war or national emergency [10 U.S.C. §12302]." 52 M.J. 235, 244 (C.A.A.F. 2000) (concerning Individual Military Counsel requests). *Spriggs* also favorably cited an Army regulation to note that "[a]bsent Government misconduct, the routine separation of a judge advocate from active duty *normally* terminates any attorney-client relationship established on the basis of the attorney's military status, *except when* . . . the attorney enters the reserves and is ordered to represent the client to the extent permitted by applicable law . . . ." *Id.*at 246 (emphasis added).

In *United States v. Eason*, decided before *Spriggs*, the Court of Military Appeals held that "[c]ircumstances which would justify the denial of the services of an appointed or requested Defense

counsel on the basis of *nonavailability*, may not necessarily justify denial of the aid of counsel who has *established* a bona fide attorney-client relationship and has engaged actively in the preparation and pretrial strategy of a case." 45 C.M.R. 109, 111 (U.S. C.M.A. 1972) (emphasis original). Furthermore, "the right to counsel may not be lightly interfered with. While it may put a financial, logistical, an administrative burden on the Government to guarantee this right, it is the duty and obligation of the Government to shoulder that burden where possible. Slight expense or inconvenience is not an excessive price where such a legal right is concerned." *Id.* at 114.

C. Article 10, UCMJ

Article 10, UCMJ, is a "fundamental, substantial, personal right" that establishes a more stringent and "exacting" speedy trial standard than the Sixth Amendment. *United States v. Cooley*, 75 M.J. 247, 259 (C.A.A.F. 2016); *United States v. Tippit*, 65 M.J. 69, 73 (C.A.A.F. 2007); *United States v. Thompson*, 68 M.J. 308, 312 (C.A.A.F. 2010). This stringent standard "is designed to . . . protect [the accused], while under restraint, from *unreasonable* or oppressive delay in disposing of a charge of alleged wrongdoing, either by trial or by dismissal." *Cooley*, 75 M.J. at 259 (internal quotation marks omitted) (emphasis added). Article 10's stringent protections are triggered when the accused is placed in pretrial confinement. "When any person subject to [the UCMJ] is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him." Art. 10, UCMJ, 10 U.S.C. §810.

"Under Article 10, UCMJ, outside of an explicit delay caused by the Defense, the Government bears the burden to demonstrate and explain reasonable diligence in moving its case forward in response to a motion to dismiss." *Cooley*, 75 M.J. at 260. Moreover, "[t]his explanation must be a particularized showing of why the circumstances require the [delay]." *Id.* (internal quotation marks omitted).

Despite providing more stringent protections than the Sixth Amendment's speedy trial right, when this Court reviews delay for compliance with Article 10, UCMJ, it uses the constitutional speedy trial framework the Supreme Court articulated in *Barker v. Wingo*, 407 U.S. 514 (1972). *United States v. Reyes*, 80 M.J. 218, 226 (C.A.A.F 2020). Those four factors are: (1) the length of the delay; (2) the

reasons for the delay; (3) whether the appellant made a demand for a speedy trial; and (4) prejudice to the appellant. *Cooley*, 75 M.J. at 259. None of these factors alone are a "necessary or sufficient condition to the finding of a deprivation of the right of speedy trial." *Id.* (internal quotation marks omitted) (quoting *Barker*, 407 U.S. at 533).

Additional legal authorities, as necessary, are discussed in the analysis.

Analysis

The Government's decision to withdraw charges two days before Sgt Honstein's first trial with the intention to re-refer those charges is not a matter to be taken lightly. The undersigned counsel is aware that in the Military Judge's R.C.M. 707 ruling, made before the undersigned was detailed, this Court found that the Government did not withdraw and re-refer for an improper purpose. However, since that ruling, the Government has again re-referred the withdrawn Article 118(3) charge as the Additional Charge and the Government's withdrawal has frustrated Sgt Honstein's attorney-client relationship with Capt Carson. Sgt Honstein respectfully requests the Court reconsider its conclusion that there was no improper reason for withdrawing and re-referring the Article 118(3) Charge from *Honstein I* under R.C.M. 604(b) and relevant case law.

The closer the judicial process gets to trial, the more circumscribed the Government's ability to re-refer those withdrawn charges becomes. *Mann*, 32 M.J. at 889. Rule for Courts-Martial 604(b) "is not new to military law, and it reflects limitations on the [referral authority]." *Vanover*, 27 M.J. at 347. And when, as this Court found in its R.C.M. 707 ruling, the Government's withdrawal and re-referral "actions are not a subterfuge for judicial interference, but [are] instead . . . lawful command action[s]," the Military Judge *is still required* to dispel even "appearances of evil" under R.C.M. 604(b). *Id.* If R.C.M. 604(b) did not operate to check the Government's authority, then the Government's ability to withdraw and re-refer charges on the eve of trial *after* a series of Defense friendly rulings would send a message that military justice is fluid and malleable to trial counsel's whims.

A. Regardless of the Government's purpose, the Government's withdrawal and re-referral had the practical effect of overturning the Military Judge's rulings, and therefore, the Additional Charge must be dismissed.

The Government withdrew Charge I, amended it in the precise manner that the Court in *Honstein I* had prohibited in its Minor Change Ruling, and then re-referred it to this Court as the Additional Charge. A comparison of the change the *Honstein I* court denied and the Additional Charge is revealing.

The *Honstein I* Court denied the Government's motion to make this change to Charge I:

> Specification: (Murder - Act Inherently Dangerous to Another): In that Sergeant Dakota S. Honstein, U.S. Marine Corps, on active duty, did, onboard Marine Corps Base Camp Lejeune, on or about 27 January 2024, murder [redacted] by means of ~~shooting her with a firearm~~ intentionally pulling the trigger of a loaded firearm while pointing it at her.

The Additional Charge now before this Court is:

> Specification: (Murder - Act Inherently Dangerous to Another): In that Sergeant Dakota S. Honstein, U.S. Marine Corps, on active duty, did, onboard Marine Corps Base Camp Lejeune [sic], on or about 27 January 2024, murder [redacted] by means of intentionally pulling the trigger of a loaded firearm while pointing it at her.

Thus, the Government's withdrawal and re-referral, regardless of its purpose, had the "practical effect" of overturning the Military Judge's minor change ruling, and therefore it must be dismissed here. *Vanover*, 27 M.J. at 347-48; *see also Mann*, 32 M.J. at 889 (finding the Court must guard against even "the appearance" that the judicial process was manipulated through withdrawal and re-referral).

B. Beyond the Appearance of overturning the Military Judge's rulings, the Government's purpose withdrawing and re-referring the Article 118(3) Charge is improper.

The Government decided to withdraw Charge I, alleging Sgt Honstein violated Article 118(3), days before *Honstein I* with the intention of amending it and immediately re-referring it. While R.C.M. 603 might otherwise allow the government to make a major change by withdrawing, amending, and referring new; however, R.C.M. 604(b) prohibits that course of action when it is for an improper reason. *Koke*, 32 M.J. at 879-81; *see Doty*, 51 MJ. at 465-66 (citing R.C.M. 603(d) and 604(b). What may be a proper reason early in a trial can become improper as trial processes through its milestones. *Mann*, 32 M.J. at 889. Here, the Government only withdrew, amended, and referred anew *days* before trial. The

withdrawal's timing demands this Court review the Government's purpose stringently "to avoid [even] the *possibility* or the appearance that the [referral] authority has manipulated the judicial process." *Id.* (emphasis added).

The Government arraigned Sgt Honstein on Charge I and was ready to go to trial on Charge I for the better part of a year. The Government then came to describe Charge I as containing inartful language. It began using that description only after Defense's motions and the *Honstein I* Court's rulings caused the Government to realize its charging language placed its case at a tactical disadvantage. Specifically, Sgt Honstein moved the *Honstein I* Court to protect his statutory right to have members properly instructed on the elements of the charged offense. *Payne*, 73 M.J. at 21. The Court's responsive ruling highlighted an issue the Trial Counsel reasonably should have already known at the *Honstein I* arraignment: that the Government must prove beyond all reasonable doubt that Sgt Honstein committed the intentional act of "shooting [Ms. [redacted]] with a firearm."[1]

The Government's delayed appreciation for its tactical error in choosing to summarize the intentional act and the surrounding circumstances when it drafted Charge I instead of explicitly alleging the act prompted it to move for what it described as a minor change to its Article 118(3).[2] The Government's motion to amend Charge I could only have been intended to negate Defense's tactical gains, thereby making conviction more likely. The Court denied this Government motion.

Through all this, the Government has laid bare its purpose for its next action: withdrawing and re-referring the Article 118(3) Charge. In its motion to make a "minor" change in *Honstein I*, it informed the Court that it disagreed with the Court's ruling that it "must prove the intentional act of the accused was that of 'shooting,' Ms. [redacted], not pulling the trigger on a loaded firearm while it was pointed at the victim

[1] *See* Court's Ruling, dated 15 October 2024 "[N]o *reasonable* construction of other language in the specification adequately puts the accused on notice as to what intentional act, or combination of intentional acts—falling short of intentionally shooting the victim—amount to the inherently dangerous act(s) that showed a wanton disregard for human life." *Id.* at 5 (emphasis added).
[2] Government's Motion for Appropriate Relief, 17 October 2024 (erroneously dated in its heading as 17 September 2024.

as the Government believed it had necessarily implied."[3] The Government stated it was attempting to resolve that disagreement by moving to align the Charge with the Government's position.[4] In other words, *new evidence did not prompt the Government's desire to change its Charge; Defense litigation prompted it.*[5] Three days after the Court denied the motion, the Government informed the Defense its intent to withdraw the charges and prefer anew and re-refer the Article 118(3) charge "consistent with [its] motion to make a minor change." (Enclosure 1). The Government further stated its intent to continue to then "litigate the case" on the same "trial dates."

Where, as here, the Government does precisely what the Military Judge denies and attempts to move to trial as though nothing has happened, it is flouting the Court's ruling. *Underwood,* 50 M.J. at 275. The nakedness of the Government's attempt to circumvent the Military Judge's ruling in *Honstein I* is further evidenced by their intent to relitigate other instructions, namely the mistake of fact instruction for the Additional Charge, despite the Military Judge's clear indication that he intended to abide by all previous rulings pursuant to RCM 905(g). These rulings were favorable to Sgt Honstein. Any withdrawal and re-referral to circumvent a Military Judge's ruling is improper. *E.g., Petty*, 43 C.M.R. at 281; *Vanover*, 27 M.J. at 347; *Underwood*, 50 M.J. at 275.

C. Even if the Government's withdrawal and re-referral were for a proper purpose, it nonetheless violated RCM 604(b) by unfairly prejudicing Sgt Honstein.

A withdrawal and re-referral under R.C.M. 604(b) is improper if it unfairly prejudices the accused, regardless of the Government's reason. *Underwood* 50 M.J. at 276. To determine whether withdrawal and rereferral was unfairly prejudicial, the Court in *Underwood* listed five factors. *Id.* The first, second, and fifth *Underwood* factors certainly weigh in Sgt Honstein's favor. The fourth *Underwood* factor arguably weighs in Sgt Honstein's favor.

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[3] *Id.*
[4] *Id.*
[5] *Id.* ("However, understanding the Court's ruling and in line with it, the requested minor change would permit the specification to comport with the Court's expectation of the act being expressly pled and what the Parties' have been preparing for since the preferral of charges." *Id.* at 2)

First, Sgt Honstein lost the benefit of favorable trial court rulings. The *Honstein I* Court ruled on 23 October that the Government could not change Charge I. By withdrawing and re-referring to make the change anyway, the Government denied Sgt Honstein the benefit of that 23 October ruling. Second, Sgt Honstein was in pretrial confinement at the time of the Government's withdrawal and had been in pretrial confinement for 274 days. The fifth factor is whether Sgt Honstein complains of prejudicial delay at the second trial, which Sgt Honstein does here below.

The fourth *Underwood* factor is whether the military judge is the same at the first and second trials. Of course, the Military Judge in this case has remained the same. But this factor from *Underwood* is concerned with the personnel making up the courts-martial. And the personnel did change. The delay created by the withdrawal resulted in Sgt Honstein's lead Defense counsel, Capt Carson, being severed from the case —*over Sgt Honstein's objection*. This change in court personnel prejudiced the defendant at least as significantly as changing the military judge might have.

In addition to the *Underwood* factors, unfair prejudice in this case exists in the form of deprivation of counsel. The Government's decision to withdraw and re-refer charges caused a delay beyond Capt Carson's EAS date, forcing Sgt Honstein into a Hobson's choice between equal rights: the right to Capt Carson's representation and the right to conflict-free counsel. "Improper withdrawal includes *any* interference with the free exercise of a constitutional or Codal right" for R.C.M. 604(b) purposes. *Koke* 32 M.J. at 881; *see Gilmet*, 83 M.J. at 407.

This Court's decision to sever Capt Carson, Sgt Honstein's lead counsel, after they prepared for trial together for more than nine months significantly adversely impacted Sgt Honstein's right to counsel. The Government has a "duty and obligation" to guarantee conditions under which the accused can continue to enjoy the right to counsel, even if it places logistical, financial, and administrative burdens on the Government. *Eason*, 45 C.M.R. at 111. The Government failed that duty here by creating the circumstances that interfered with Sgt Honstein's right to counsel.

Worse still, the Government then effectively encouraged that interference with Sgt Honstein's right to counsel. The Government—fully aware that Capt Carson was joining the Marine Corps Reserves

upon his EAS and that Sgt Honstein desired Capt Carson to remain his lead Defense counsel— informed the Court that there are "ample options" for "facilitating travel and TAD through ADOS orders from the reserves, [but] all *viable* options would require an action by the Officer to initiate those avenues." (Enclosure 3 (emphasis added). The Government then informed the Court it was "willing to facilitate Capt Carson's presence [at trial as Sgt Honstein's lead defense counsel] through *any voluntary* means." (Enclosure 3 (emphasis added)) However, at least three legal mechanisms exist to involuntarily recall or mobilize reservists to active duty past their EAS.

Captain Carson's continued representation was far from "virtually impossible" (*Hutchins*, 68 M.J. at 629 rev'd on other grounds). Instead, Marine Corps Orders 1001.59 and 1001R.1L, and 10 U.S.C. §§ 12301, 12302 and 12304 reveal clear authority to involuntarily bring a Marine Corps Officer to active duty from the Reserves. Nevertheless, rather than identifying those authorities to the Court, the Government unilaterally dismissed them as unviable. Then, the Government's email returned the Court's attention to the idea that Capt Carson might not EAS from active duty in the first place. To do so, the Government, having just omitted to inform the Court of the authorities to order reservists to active duty involuntarily, told the Court it was "armed" with information and requested the Court "rescind[] any previous direction or expectation that the Government involuntarily extend Capt Carson's EAS." (Enclosure 3).

In other proceedings, the Government has acknowledged the authority to involuntarily order Defense counsel to be on active duty when, like now, there is a declared national emergency. *See Spriggs*, 52 M.J. at 244. Yet here, the Government cast these authorities aside as unviable, unwilling to pursue them on behalf of Sgt Honstein's right to counsel. The Government's failure to bring Marine Corps Order 1001.59, and 1001R.1L, as well as 10 U.S.C. §§ 12301, 12302 and 12304 to the Court's attention, while simultaneously requesting the Court refrain from ordering the Government ensuring Capt Carson's presence at trial, effectively precluded the Court from meaningfully considering whether it could safeguard Sgt Honstein's right to continued representation by Capt Carson (Sgt Honstein having waived what Capt Carson determined was a conflict of interest and expressing his desire that Capt Carson remain

his defense counsel if possible). The Government's failure to secure Capt Carson's continued ability to represent the accused, or at a minimum identifying relevant authorities that could support such a decision, while opposing the Court's order to compel Capt Carson's presence at trial, interfered with Sgt Honstein's constitutional and statutory rights to counsel.

D. The government's delay in bringing Sgt Honstein to this court-martial violated his Article 10, UCMJ, right to a speedy trial.

Even if the Government can withdraw and re-refer charges to circumnavigate a Military Judge's ruling (which it does not), it cannot do so indefinitely when the accused is in pretrial confinement. Article 10, UCMJ, serves as a safeguard against such practices.

Following the loss of Sgt Honstein's lead counsel, two new defense counsels were detailed to represent Sgt Honstein. These newly detailed defense counsels must thoroughly investigate the law and facts of the case to ensure Sgt Honstein is effectively represented and can mount a complete defense. This requires a reasonable amount of time, which this Court has acknowledged by permitting it through the Trial Milestone Order it signed at arraignment. However, Sgt Honstein's right to effective counsel cannot come at the expense of a speedy trial. Similarly, Sgt Honstein's right to a speedy trial cannot come at the expense of effective counsel. Sergeant Honstein's complaint is that, while he was and remains in pretrial confinement, the Government's actions in *Honstein I* extended to the date of his arraignment in *Honstein II*. *See United States v. Lin*, 78 M.J. 850 (N-M. Ct. Crim. App. 2019) (The Navy-Marine Corps Court of Criminal Appeals has recognized the distinction between pre- and post-arraignment delays under Article 10, UCMJ.).

Applying the *Barker* test here shows that the Government violated Sgt Honstein's Article 10, UCMJ, right to a speedy trial by failing to arraign him at this court-martial until 6 December 2024.

i. The length of delay in bringing Sgt Honstein to trial weighs in favor of finding an Article 10, UCMJ, violation.

"[U]nless the delay is facially unreasonable, the full due process analysis will not be triggered." *United States v. Danylo*, 73 M.J. 183, 186 (C.A.A.F. 2014). The Government arraigned Sgt Honstein after he had been in pretrial confinement for 315 days (27 January – 6 December 2024). These 315 days

exceed the period of pretrial confinement CAAF has previously found trigger the fully speedy trial analysis. *E.g., United States v. Cossio*, 64 M.J. 254, 257 (C.A.A.F. 2007) (finding 117 days in pretrial confinement was sufficient to trigger the full analysis); *United States v. Thompson*, 68 M.J. 308, 312 (C.A.A.F. 2010) (finding the 145-day period the appellant spent in pretrial confinement was sufficient to trigger the full analysis). Therefore, this Court should apply the full analysis here.

ii. The reasons for the delay weigh against the Government.

Article 10 violation should be found where the government "could readily have gone to trial . . . but negligently or spitefully chose not to." *United States v. Kossman*, 38 M.J. 258, 261 (C.A.A.F. 1993). Here, the Government could have readily continued to go to trial in *Honstein I* but chose not to. Therefore, the reasons for the delay weigh entirely on the Government. Consideration of why the Government did not choose to continue to go to trial makes this factor weigh heavily against the Government.

While Article 10 case law generally concerns the Government's inactivity towards trial, the Article 10 "touch stone" is the Government's "reasonable diligence." *Id.* at 262. Black's Law Dictionary defines "reasonable diligence" as "a fair degree of diligence expected from someone of ordinary prudence would exercise under circumstances like those at issue" and refers to the "due diligence" definition. "Due diligence" is defined as "[t]he diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation." *Black's Law Dictionary* (10th ed.).

The trial counsel, let alone trial counsel from the Office of Special Trial Counsel, are expected to understand what they are alleging as they draft charges against an accused. *See United States v. Turner*, 79 M.J. 401, 404 (C.A.A.F. 2020) (discussing whether a charge properly stated an offense); *see also United States v. Hooker*, 841 F.2d 1225, 1232 (4th Cir. 1988) (finding a prosecutor is careless when he fails to omit allegations that he must include on his charge). Moreover, the government's negligent understanding of a legal instrument "seems the polar opposite of *reasonable* diligence." *See United States v. Simmons,* No. ARMY 20070486, 2009 CCA LEXIS 301 (A. Ct. Crim. App. Aug. 12, 2009) (emphasis

original) (discussing the Government's negligent understanding of its Status of Forces Agreement with a host country).

The *Honstein I* Court ruled that the Government's Article 118(3) Charge, as charged, required the Government to prove, beyond a reasonable doubt, that Sgt Honstein intentionally committed the inherently dangerous act of "shooting [Ms. [redacted]] with a firearm." The Court reached this conclusion because "no *reasonable* construction of other language in the [Charge I] specification adequately puts the accused on notice as to what intentional act, or combination of intentional acts—falling short of intentionally shooting the victim—amount to the inherently dangerous act(s) that showed a wanton disregard for human life." (emphasis added). The Government did not file an Article 62, UCMJ, appeal. The Government cannot now dispute that determination of law and the application of law to the facts. R.C.M. 905(g).

The withdrawal from *Honstein I*, and consequential delay in arraigning Sgt Honstein at this court-martial, can only be because the Government did not reasonably understand what it alleged—and thus what it had to prove—as they drafted the original Charge I. Then, when the Court explained what the Government had to prove beyond all reasonable doubt, the Government became uncomfortable with its ability to do so. None of the Government's concerns about the vitality of its case resulted from new evidence. Indeed, the Government admits it always believed that Sgt Honstein pulled the trigger of a loaded firearm while pointing it at Ms. [redacted] The only explanation is that the trial counsel failed to exercise the degree of care and caution expected of trial counsel when it used inartful language to summarize what it alleged in Charge I. As the Army Court of Criminal Appeals ruled in *Simmons*, the Government's failure to reasonably understand its own language is the opposite of diligence. That failure to exercise the proper degree of care has resulted in Sgt Honstein spending 315 days in pretrial confinement before the Government arraigned him on their settled upon Charges.

iii. Sergeant Honstein was receiving a speedy trial before the Government withdrew the charges against him from that trial.

This factor is neutral. Sergeant Honstein has not demanded a speedy trial because he was receiving one. Thus, he had no reason to demand a speedy trial until the Government withdrew the Charges against him. However, because the Government did, and now only arraigned him after 315 days of pretrial confinement, the Article 10, UCMJ, violation is already complete.

Regardless, *Barker* is a balancing test, and none of the four *Barker* factors are dispositive in finding a speedy trial violation. Instead, "they are related factors and must be considered together with such other circumstances as may be relevant." *Barker*, 407 U.S. at 533. In *United States v. Miller*, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) affirmed the Military Judge's dismissal of all charges, with prejudice, for an Article 10, UCMJ, violation where the accused there did not make a demand for speedy trial. 66 M.J. 571, 577 (N-M. Ct. Crim. App. 2008). In *Miller*, the NMCCA expressed particular concern over the convening authority's decision to direct a post-referral R.C.M. 706 board without first obtaining the Military Judge's order or subsequent concurrence. There, like here, this effectively bypassed judicial oversight in a case where the accused was held in pretrial confinement. In essence, when the Government takes actions to circumvent the judicial process, it undermines the fairness of the proceedings, tipping the balance of the *Barker* factors against the Government, even if the accused had not demanded a speedy trial. *See*

iv. The prejudice to Sgt Honstein caused by the delay weighs heavily in finding an Article 10, UCMJ, violation.

There are three interests the speedy trial right protects: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. *Barker*, 407 U.S. at 532. "Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Id.*

As discussed above, the delay interfered with Sgt Honstein's constitutional and statutory rights to counsel. Sgt Honstein losing Capt Carson, his lead defense counsel since January 2024, more the invites

the possibility of impairing his defense. It is significant actual prejudice that weighs heavily in favor of finding an Article 10, UCMJ, violation.

v. Balancing the four *Barker* factors.

The *Barker* balancing test emphasizes that all factors must be considered together. Three of the four factors weigh heavily in Sgt Honstein's favor. After 315 days of pretrial confinement before arraignment in this trial, the Court should find the Government has violated Sgt Honstein's Article 10, UCMJ, right to a speedy trial.

Relief Requested

Sergeant Honstein requests the Military Judge dismiss the Additional Charge for violating R.C.M. 604(b). Sgt Honstein requests the Military Judge dismiss all Charges with prejudice because the Government has violated his Article 10, UCMJ, speedy trial right. In the alternative, Sgt Honstein requests the Military Judge grant an additional day of confinement credit for every day served in pretrial confinement after 26 October 2024.

Evidence

In support of this motion, the Defense respectfully requests the Court consider all matters already included within the Record of trial and offers the following enclosed exhibits:

Enclosure 1 – Government email dated 26 Oct 24

Enclosure 2 – Capt Carson email dated 7 Nov 24

Enclosure 3 – Government email dated 8 Nov 24

Enclosure 4 – Notice on the Continuation of the National Emergency

Enclosure 5 – MCO 1001.59A

Enclosure 6 – MCO 1001R.1L (see Pages 3-1 and 3-15 through 3-17)

[redacted]

M. E. NEELY
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Regional Defense Counsel

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

UNITED STATES v. DAKOTA S. HONSTEIN SERGEANT/E-5 U.S. MARINE CORPS	**GOVERNMENT'S MIL (INSTRUCTIONS)** 13 December 2024

Nature of Motion

This is the Government's motion in limine regarding an instruction for mistake of fact as to the fourth element of Article 118(3).

Summary

The Accused is charged with violations of Article 118(3) and Article 119, for discharging his 9mm pistol while it was pressed against the chest of Ms. [redacted] on 27 January 2024, which resulted in her death a short time later. The Accused initially reported to PMO officers and NCIS agents that during the course of a consensual sexual interaction involving the weapon, the victim had pulled the trigger, followed by a change in his explanation that she had loaded the gun without his knowledge before he pulled the trigger, which was followed finally by an admission that he knew the weapon was loaded and that he had pulled the trigger intentionally but did he did not believe that the weapon would discharge because he believed he had depressed the slide of the pistol enough to disengage the trigger by pushing the weapon at an angle into her chest. The Defense has made a motion in limine regarding proposed instructions for the trial ordered to begin 28 October 2024. The Government requests the Court issue a ruling that the applicable mistake of fact defense instruction applicable based on the Accused's explanation is the general intent mistake of fact instruction found in the benchbook

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at 5-11-2.

Summary of Facts

1. The Accused is charged with violations of Article 118(3) and Article 119, for discharging his 9mm pistol while it was pressed against the chest of Ms. [redacted] on 27 January 2024, which resulted in her death a short time later.

2. The Accused initially reported to PMO officers and NCIS agents that during the course of a consensual sexual interaction involving the weapon, the victim had pulled the trigger, followed by a change in his explanation that she had loaded the gun without his knowledge before he pulled the trigger, which was followed finally by an admission that he knew the weapon was loaded and that he had pulled the trigger but did he did not believe that the weapon would discharge because he believed he had depressed the slide of the pistol enough to disengage the trigger to prevent it from firing. [Enclosures 1 and 2]

3. The Accused also explained that the pistol was involved in the consensual sexual interaction for his sexual gratification, and that the dangerous nature of the weapon added to his arousal. [3:10:50 – 3:11:24; 3:42:00 – 3:42:17].

Burden of Proof and Persuasion

4. The moving party generally bears the burden of proof and persuasion under R.C.M. 905(c). However, "instructions on findings ***shall*** include . . . (1) A description of the elements of each offense charged, unless findings on such offenses are unnecessary because they have been entered pursuant to a plea of guilty; . . . (3) A description of any special defense under R.C.M. 916 in issue, *United States v. Dearing*, 63 M.J. 478, 482 (C.A.A.F. 2006), and . . . (7) Such other explanations, descriptions, or directions as may be necessary and which are properly requested by a party or which the military judge determines, *sua* sponte, should be given.

Law

5. If an affirmative defense is reasonably raised by the evidence, the military judge has a *sua sponte* duty to instruct the members on that defense. *United States v. MacDonald*, 73 M.J. 426, 434 (C.A.A.F. 2014). A defense is reasonably raised when "some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they chose." *Id.* The defense theory at trial is not dispositive in determining what affirmative defenses have been reasonably raised, but any doubt regarding whether an affirmative defense instruction is in order should be resolved in favor of the accused. *United States v. Davis*, 53 M.J. 202, 205 (C.A.A.F. 2000).

6. The standard for ignorance or mistake of fact varies with the nature of the elements of the offense involved. If the ignorance or mistake concerns an element of an offense involving specific intent (e.g., desertion, larceny), willfulness (e.g., willful disobedience of an order), knowledge (e.g., assault upon commissioned officer, failure to obey lawful order), or premeditation, the ignorance or mistake need only exist in the mind of the accused. Generally, for crimes not involving specific intent, willfulness, knowledge, or premeditation, (e.g., AWOL) ignorance or mistake must be both honest (actual) and reasonable. Extreme care must be exercised in using this test, however, as ignorance or mistake in some "general intent" crimes need only be honest to be a defense. (See e.g., Instruction 5-11-4, Ignorance or Mistake in Drug Offenses.) Moreover, in some "specific intent" crimes, the alleged ignorance or mistake may not go to the element requiring specific intent or knowledge, and thus may have to be both reasonable and honest. Consequently, the military judge carefully examine the elements of the offense, affirmative defenses, and relevant case law, in order to determine what standard applies. *United States v. Binegar*, 55 M.J. 1, 5 (C.A.A.F. 2001). This Court has suggested a similar rule in *United States v. Peterson*, 47 M.J. 231, 234-35 (1997), and *United States v. Garcia*, 44 M.J. 496, 498 (1996); cf. *United States v. Tucker*, 14 U.S.C.M.A. 376,

380, 34 C.M.R. 156, 160 (1964) (honest mistake of fact applies where mistake made is to facts essential to the existence of the necessary mens rea, i.e., specific intent).

7. "Murder under Article 118(3) is a general-intent crime. *United States v. McMonagle*, 38 M.J. 53, 60 (C.A.A.F. 1993). Mistake of fact is not a defense to a general intent crime unless it is both honest **and reasonable**. *Id.* (emphasis added). In a depraved-heart murder, the killer's attitude is "not measured in the abstract, but is evaluated in light of the surrounding circumstances that are apparent and known to the perpetrator, **or at least should reasonably be apparent and known by him**." *Id.* (emphasis added).

ANALYSIS

I. RCM 905(g) does not preclude the Government from raising this issue.

8. The Defense's argument that the Government is bound by the Court's previous ruling under RCM 905(g) is incorrect because there was no final determination on this issue at the first court martial. At the outset of the Art 39(a) for the initial motion on this issue at the first Court Martial, the Court noted that it would view all the following arguments through the lens of the charged intentional act of "intentionally shooting." That is no longer the case as the Government has withdrawn and dismissed that charge and referred a charge with a different intentional act. Jury instructions are necessarily fact dependent, and binding the Government to a preliminary ruling regarding an intentional act that is no longer charged (nor was it ever part of the Government's theory or the evidence) is a nonsensical result. The Court cannot give the instruction that a reasonable mistake of fact instruction as to the Accused's knowledge that intentionally "shooting" the victim would have a probable consequence if "shooting" is no longer the intentional act charged. The Defense's profuse arguments that this change in the charge was a major change and resulted in a totally new charge requiring a continuance and a purported whole-sale change in their defense strategy cut in favor of the fact that the Court's previous ruling on the

different charge cannot apply here. The Defense cannot reasonably simultaneously argue that the change was major, but also that the same instruction must apply to the newly charged language. While the Court may well determine the same mistake of fact instruction should apply to the newly charged language, there is no final determination of this issue from the previous court martial. Moreover, even if the Court's ruling was a final determination, the first and third examples in the discussion of RCM 905(g) both contemplate the Government being able to re-raise the issue if the initial ruling was based on an error of law or incorrect interpretation of law. As laid out below, that is what occurred based on *U.S. v. McMonagle*. For those reasons, RCM 905(g) does not bind the Government to the previous ruling.

II. The applicable mistake of fact instruction as to the fourth element of Art. 118(3) is from the benchbook, 5-11-2, requiring an honest and reasonable mistake of fact.

9. Because the Court's previous order is not binding on the question at issue, this Court should issue a ruling that the mistake of fact instruction from the benchbook, 5-11-2, and not the Defense's requested instruction derived from benchbook 5-11-1, is applicable under the binding caselaw. Murder under Article 118(3) is a general-intent crime. *United States v. McMonagle*, 38 M.J. 53, 60 (C.A.A.F. 1993). Mistake of fact is not a defense to a general intent crime unless it is both honest **and reasonable**. *Id* (emphasis added). The *McMonagle* Court addressed the applicability of a mistake of fact defense directly in addressing an appeal based on the Court of Military Review's holding that the Accused's actual belief was not part of the legal analysis. The *McMonagle* court block quoted RCM 916(j) in its analysis (which was contained in the 1984 MCM) and held that the actual or honest belief of the Accused is a part of the analysis, but it must also be reasonable under the circumstances. That prior RCM 916(j) language is identical to the language in RCM 916(j) in the 2024 MCM (and every intervening MCM), meaning the

McMonagle Court analyzed the same defense available in this case and did not apply the specific intent mistake of fact defense that the Defense in this case has requested. The Defense has previously argued that the Government's position on this issue ignores the context of the entire opinion and relies on an out of context reading of one sentence. Accordingly, the Government's position as to the entire holding, to include particularly the underlying internal citations relied on by CMA in its opinion, is laid out below. There are five relevant paragraphs from *McMonagle*, and the purpose and conclusion of each one is where the dispute lies. Each is addressed in turn below.

a. The McMonagle Court's holding is that the "mental state" that underlies Art. 118(3) includes both a subjective and objective assessment and is applicable to the fourth element of Art 118(3).

10. The first paragraph is a recitation of the lower court's CMR's relevant ruling and application of the law as to the third element of Art. 118(3):

> The Court of Military Review held that "mistake . . . must negate a mental state of the accused that the prosecution must necessarily prove to establish the offense." 34 MJ at 864. That court further held that the only two "mental state" elements involved in this case were (1) the intentional [*60] act of shooting and (2) knowledge that death or great bodily harm was a natural and probable consequence of shooting. Finally, that court held that "wanton disregard" characterized by "heedlessness or indifference" is not measured subjectively by the state of an accused's mind but is measured objectively by a "qualitative judgment" of the circumstances of his conduct. 34 MJ at 864.

The relevant parts of that paragraph are (1) that there are only two "mental state" elements, (2) that the third element is not one of those, and (3) that "wanton disregard characterized by heedlessness or indifference" is a purely objective assessment based on the circumstances, without any subjective portion regarding the accused's mind.

11. The first sentence of the second paragraph declares the CMR holdings summarized together in the first paragraph above to be legally incorrect:

> The Court of Military Review's interpretation of the state of mind required for a violation of Article 118(3) **is inconsistent** with the concept of a "depraved heart" which underlies Article 118(3). . . .

The rest of the second paragraph then lays out the correct law according to CAAF. The second sentence clarifies that the third element does "describe" a mental state (contrary to the CMR ruling quoted in paragraph 1, sentence 2, highlighted above):

> The terms "wanton," "disregard," "heedless," and "indifferent" **all describe an attitude, a mental state**. See United States v. Stokes, 6 USCMA 65, 70, 19 CMR 191, 196, [**20] 1955 WL 3419 (1955) (discussing a "so-what" attitude toward probable results).

The third sentence then explains that the third element is measured by BOTH a subjective ("apparent and known") and objective ("or at least should reasonably be apparent and know by him") component, NOT just a purely objective or "abstract" standard (contrary to the CMR ruling quoted in paragraph 1, sentence 3 highlighted above):

> In a depraved-heart murder, the killer's attitude is "not measured in the abstract, but is evaluated in light of the surrounding circumstances that are apparent and known to the perpetrator, or at least should reasonably be apparent and known by him." Milhizer, "Murder without Intent: Depraved-Heart Murder under Military Law," (hereafter Milhizer) 133 Mil.L.Rev. 205, 210 (1991).

12. The third paragraph acknowledges there is a split between courts as to whether the knowledge required under the third element of Art 118(3) is purely objective, or both objective and subjective. It is also where the parties in this case disagree most. The first half of the first sentence of the third paragraph addresses the courts that adhere to the CMR's view that it is a purely objective assessment:

> "Although some courts have held that guilt of a depraved-heart murder should be founded on "an objective assessment of the risk created, regardless of whether the perpetrator actually realized it," id. at 234, ..."

But, the second half of that first sentence states that the majority/weight of authority holds that there is a subjective component as well:

> . . . the weight of authority holds that a person should not be convicted of depraved-heart

> murder "unless he was **subjectively aware** of the risk he created." Id.; W. LaFave and A. Scott, Substantive Criminal Law, § 7.4 at 204-05 (1986).

The second sentence then states that CMA follows the majority view (referred to as the "weight of authority" in the first sentence), with citations:

> This Court follows **the majority view**. See *United States v. Berg*, 30 MJ 195, 199 (CMA 1990) (Article 118(3) intended to cover cases where acts "are calculated to put human lives in jeopardy"); *United States v. Stokes*, supra [**21] (accused must know that acts endangered human life). See also para. 43c(4)(b), Part IV, Manual for Courts-Martial, United States, 1984; Milhizer, supra at 235-36.

The Defense incorrectly reads the second sentence, to mean that the majority view, and CMA's *McMonagle* ruling, is that the knowledge requirement in the third element of Art 118(3) is PURELY subjective, with no objective component (which would therefore give rise to a specific intent type mistake of fact defense instruction as they requested). However, there is no previous discussion or citation in the first or second paragraph of any court that uses ONLY a subjective standard. If it were a purely subjective standard, the third sentence of the second paragraph, laying out the law and citing to Milhizer at 210, makes no sense at all. That citation is a direct quote that includes both a subjective and objective component:

> the degree of risk is not measured in the abstract, but is evaluated in light of the surrounding circumstances that are **apparent** and known to the perpetrator, or at least **should reasonably be apparent and known by him**. For example, conducting target practice in the direction of a group of campers could be extremely risky behavior. If their presence is unknown and not reasonably foreseeable to the gunman, however, any resulting homicide would not amount to a depraved-heart murder.

The citations in the second sentence of the third paragraph do include a second citation to "Milhizer, supra at 235-36." However, Milhizer at 235-236 only summarizes the debate between objective or subjective theories and then discusses *U.S. v. Vandenack*. That portion of Milhizer at 235-236 is not being quoted directly as a recitation of the applicable law in the way the court is citing Milhizer at 210 in the second paragraph. It is a citation provided to support the proposition that the majority of courts include a subjective assessment (as opposed to a purely objective

assessment as proposed by the CMR), consistent with *Berg* and *Stokes*. The *McMonagle* court was clearly aware of Milhizer at 235-36, having directly cited to it, but in the second paragraph where it laid out the correct law, the *McMonagle* court cited to Milhizer at 210, providing *both* an objective and subjective component–a decision that is notably consistent with a general intent crime. That understanding of *McMonagle* accounts for the entirety of the *McMonagle* opinion structure and does not force a reader to totally ignore the second paragraph, which the Defense's reading of *McMonagle* does.

13. That application is also consistent with the C.M.A.'s analysis in United States v. *Vandenack*, 15 M.J. 230, 233-34 (C.M.A. 1983), where the *Vandenack* Accused's plea of guilty to Art 118(3) was upheld:

> While appellant did say at one point during his providence inquiry **that he did not actually realize** at the time of his actions that his conduct could lead to someone's death, he did acknowledge that **he should have known this, in view of the nature of his actions**. Further, while at another point he said that there was a possibility that someone could be killed by such actions, he subsequently admitted that death actually was a probable consequence of his conduct. Finally, appellant affirmatively responded when the military judge asked him whether he thought that running a red light at a high rate of speed **under the circumstances** of this case was an act "inherently dangerous" to the lives of others "and demonstrated a wanton disregard for human life. . . . " We entirely agree with Vandenack's conclusions in this regard. The courts which have addressed the question are generally in agreement "that the malice requisite to a murder conviction may be implied in vehicular homicide cases from such circumstances as extraordinarily wild driving, aggravated violation of traffic safety regulations, and similar conduct." 21 A.L.R. 3d 116, 126 (footnote omitted) (Annot: Homicide by Automobile as Murder). The common feature of vehicular murder cases is "some form of exceptionally reckless driving, of **so dangerous a nature** that the possibility of a fatal collision would **suggest itself to any reasonable observer**. "

Id. at 122 (emphasis added). While *Vandenack* was considering a plea of guilty, and involved a car rather than a gun, the C.M.A. analysis of the providency inquiry, and the rest of its analysis as to the language in the current fourth element of Article 118(3), whether "the accused knew that death or great bodily harm was a probable consequence of the act," is replete with assessment and questions as to reasonableness under the circumstances–during a guilty plea that required the

Court to ensure a mistake of fact defense would not preclude providency as to the Article 118(3) plea.

14. The Defense has previously argued that *Vandenack* is inapplicable/unpersuasive because it pre-dates the 1984 MCM changes that altered the elements of Article 118(3). That position is contravened directly by the *McMonagle* opinion in two ways. First, in its analysis the *McMonagle* court cited multiple times to *Stokes*, a case even older than *Vandenack*. And, notably, both the *Stokes* and *Vandenack* opinions include analysis consistent with the fourth element of Art. 118(3), even if it was not included specifically as an element in the MCM prior to 1984. Second, the *McMonagle* Court was clearly aware of its opinion in *Vandenack* and had the opportunity to distinguish or overturn it–particularly in light of the CMR's repeated citation to *Vandenack* in the opinion that the CMA was overturning. But, the *McMonagle* court declined to distinguish or overturn *Vandenack*, and in fact did not address it at all. Instead, the second paragraph of *McMonagle* laid out the law that is consistent with the *Vandenack* providency inquiry that included ***both*** subjective and objective questions as discussed above. This Court should therefore not read the third paragraph of *McMonagle* to hold that the knowledge requirement for the third element is a subjective one alone, but rather to reinforce that it is both objective and subjective.

15. The fourth relevant *McMonagle* paragraph declares that the CMR opinion, again, the one containing a ***purely*** objective assessment that mistake of fact would not apply to, is the minority view:

> The holding of the court below represents a minority view and is contrary to the decisions of this Court. Accordingly, we hold that the court below erred in holding that mistake of fact cannot rebut the state of mind required for a violation of Article 118(3).

The purpose of that paragraph is not to contradict the second paragraph where the *McMonagle* Court laid out the applicable law. Reading it in that manner is inconsistent with the internal

citations to *Milhizer*. The purpose was simply to reinforce that the caselaw has always required a subjective assessment along with the objective assessment.

16. The language of those four paragraphs, read together, indicates that *McMonagle* stands for the proposition that the assessment of an accused's knowledge as it relates to his wantonness in the third element requires both an objective and subjective component. That assessment is consistent with a general intent crime and would require a mistake of fact to be both honest and reasonable. While the issue before the *McMonagle* court in those four paragraphs related to the Art. 118(3) third element, it is notable that the final sentence of the fourth paragraph references "the state of mind required for a violation of Article 118(3)," and does not distinguish or specify that its analysis only pertains to the third element of Article 118(3), and the Milhizer at 210 citation relied upon by the *McMonagle* Court is also not confined solely to an analysis of the third element. Accordingly, it should also be persuasive in analyzing the knowledge requirement of the fourth element, which is also "a state of mind."

b. The language of the fourth element supports that it is not a specific intent element.

17. That understanding is supported by the language of the element itself. It states that the accused have knowledge of "a" probable consequence, not "the" actual or expected consequence–which is general and not specific knowledge language. In this case there are a number of probable consequences that could have occurred when the trigger was intentionally pulled: 1) the weapon could have exploded because the slide wasn't locked forward, 2) the weapon could have not fired because it was out of battery, or 3) the weapon could have discharged the bullet through her lungs and heart even though the slide was pushed slightly backward. All were probable consequences given the unknown exact distance the slide needed to be pushed back, and the element does not require knowledge of a specific fact–e.g. that she will definitely die or that the gun will definitely

fire in order to the act to be criminal in a manner similar to a specific intent crime where a specific fact must be known.

18. The overlap between the language in the third and fourth element should also be particularly persuasive. The critical part of "show[ing] a wanton disregard for human life" by the Accused (element 3), is that [he] "knew that death or great bodily harm was a probable consequence" of his intentional act (element 4), which is demonstrated by the MCM definitions: "a **wanton disregard for human life** when it is characterized by **heedlessness of the probable consequences of the act**". That is what distinguishes Art. 118(3) from culpable negligence under Art. 119 which includes the instruction that "the death would not necessarily be a natural and probable consequence of such act or omission." The *McMonagle* court's application of the honest and reasonable (subjective AND objective) mistake of fact to the third element, should therefore lead to its application to the fourth element for that reason–the two are inextricably linked by the words used in both elements and the definitions provided that link them. That understanding is consistent with the Milhizer at 210 explanation (again, cited by the *McMonagle* court as the applicable law in the second relevant paragraph), which does not distinguish between element 3 and element 4 in its analysis: "the degree of risk is not measured in the abstract, but is evaluated in light of the surrounding circumstances that are apparent and known to the perpetrator, or at least should reasonably be apparent and known by him."

c. Under the *Binegar* analysis, the fourth element of Art. 118(3) should not be the only specific intent element in Article 118(3).

19. *United States v. Binegar*, 55 M.J. 1, 5 (C.A.A.F. 2001) explains that the military judge must carefully examine the elements of the offense, affirmative defenses, and relevant case law, in order to determine what standard for an ignorance or mistake of fact defense applies in each case. The analysis from *McMonagle* as to justification and mistake of fact (the fifth element of

Art 118(3)), is instructive in assessing whether the fourth element is a specific intent element requiring only an honest mistake of fact. The *McMonagle* analysis as to justification and mistake of fact is laid out in the fifth relevant paragraph from the *McMonagle* opinion:

> Murder under Article 118(3) is a general-intent crime. *United States v. Craig*, 2 USCMA 650, 659, 10 CMR 148, 157, 1953 WL 1795 [**22] (1953). Mistake of fact is not a defense to a general intent crime unless it is both honest and reasonable. *United States v. Brown*, 22 MJ 448, 451 (CMA 1986). See Wharton's Criminal Law, supra § 76 at 370 (honest and reasonable mistake of fact may produce mental state which supports justification). Accordingly, appellant's mistake as to the identity of the victim must have been both honest and reasonable to raise the defense of justification.

The structure of this paragraph is again important in understanding the totality of the Court's ruling regarding that issue. The Court is first laying out the law as applied to *all* of Art. 118(3) in the first two sentences where the Court chose language referring to the crime, and not to an element. Then, in the last sentence, it applies that law specifically to the fifth element of Art. 118(3). The *McMonagle* court's application of an honest and reasonable (subjective AND objective) mistake of fact to the fifth element should be persuasive in applying it to the fourth element because the knowledge in the fifth element is no less specific than the knowledge required in by the fourth element (that "the accused knew that death or great bodily harm was a probable consequence of the act.") The requirement for knowledge of one of any number of "probable consequences" is much less specific than the "identity of the victim," as required by the justification defense to the fifth element, *McMonagle* at 61. In fact, generally the identity/status of the victim is a specific intent element tied to a specific intent crime:

> Actual knowledge is always at issue when the accused's recognition of the status of the victim is an element of the charged offense. The accused's knowledge of the victim's status is an element of several common offenses under military law, including disrespect to a superior commissioned officer; assaulting or willfully disobeying a superior commissioned officer; and insubordinate conduct toward a warrant officer, noncommissioned officer, or petty officer.

Milhizer at 237. And yet, despite that, the *McMonagle* court, clearly in possession of that

information having cited to *Milhizer* repeatedly, declined to find that the specific intent mistake of fact defense applied to the fifth element of Art. 118(3). It did so because Art. 118(3) is a general intent crime.

20. Even if this language was only intended by the *McMonagle* Court to apply to the fifth element (and that the first four paragraphs analyzed above were only intended to apply to the third element) those analyses should be persuasive in assessing the fourth element of Art 118(3). In this case, even under that siloed understanding of *McMonagle* where it was intended to be applied strictly to the third and fifth elements, the result is that Art. 118(3) is a general intent crime, where the second, third and fifth elements are all general intent elements that all require a mistake of fact to be both honest and reasonable (objective and subjective components). But, despite that context, under the Defense's theory the fourth element is somehow still the only specific intent element of Art. 118(3) (as the first element has no mens rea or knowledge requirement). Under the *Binegar* analysis that theory should be rejected considering the general intent nature of the crime, and the context of all the other elements and the analysis in *McMonagle* and *Vandenack*. Accordingly, this Court should find that the fourth element is also a general intent element. For those reasons, the mistake of fact defense that applies to the fourth element of Art. 118(3) is the defense that requires the honest and reasonable (subjective AND objective) mistake of fact.

RELIEF REQUESTED

21. The Government requests the Court issue a ruling that the applicable mistake of fact defense instruction applicable based on the Accused's explanation is the general intent mistake of fact instruction found in the benchbook at 5-11-2. The Government also requests the Court issue a written ruling with its findings of fact and conclusions of law.

EVIDENCE OFFERED

22. Accused's interrogation (appended to the record as AE 1)

[redacted]

M. E. BLACKBURN
Captain, USMC
Special Trial Counsel

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Government's response to Defense's Motion in Limine (instructions) was served electronically on defense counsel and the Court on 13 December 2024.

[redacted]
M. E. BLACKBURN
Captain, USMC
Special Trial Counsel

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

UNITED STATES **V.** **DAKOTA S. HONSTEIN** **SERGEANT / E-5** **USMC**	**DEFENSE RESPONSE TO GOVERNMENT MOTION *IN LIMINE*** **(Instructions)** **20 December 2024**

Nature of Response

This filing serves as the Defense response to the Government's motion *in limine* regarding the Court's adoption of the mistake of fact instruction concerning the Additional Charge.

Additional Facts

1. Before reporting to PMO Officer sand NCIS agents what happened between him and Ms. [redacted] on 27 January 2024, Sgt Honstein called MSgt [redacted] and told him, "I killed somebody." (Enclosure 1 and Enclosure 2)

2. Sergeant Honstein also explained that, in the privacy of his room, he pressed the pistol against Ms [redacted] to bring Ms. [redacted] pleasure in accord with her requests (Enclosure 1 of the Government's motion at 1:29:40 and 2:06:45 – 2:11:08).

Law

R.C.M. 905(g) states:

> Any matter put in issue and finally determined by a court-martial, reviewing authority, or appellate court which had jurisdiction to determine the matter may not be disputed by the United States in any other court-martial of the same accused, except that, when the offenses charged at one court-martial did not arise out of the same transaction as those charged at the court-martial at which the determination was made, a determination of law and the application of law to the facts may be disputed by the United States (emphasis added). This rule also shall apply to matters which were put in issue and finally determined in any other judicial proceeding in which the accused and the United States or a federal governmental unit were parties.

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The "military judge's duty to instruct is not determined by the defense theory; he must instruct if the defense is raised. Any doubt whether an instruction should be given "should be resolved in favor of the accused." *United States v. McMonagle*, 38 M.J. 53, 58 (C.A.A.F. 1993) (internal citation and quotation marks omitted).

Article 118(3)'s third, fourth, and fifth elements are:

> (3) That the accused's act was inherently dangerous to others and showed a *wanton disregard* for human life; (4) That the accused *knew* that death or great bodily harm was a probable consequence of the act; and (5) That the killing was unlawful. (emphasis added)

Rule for Courts-Martial 916(j) states in the relevant part, "[i]f the ignorance or mistake goes to *an element* requiring premeditation, specific intent, willfulness, *knowledge* of a particular fact, the ignorance or mistake *need only have existed in the mind of the accused*." (emphasis added).

The military judge has an affirmative, sua sponte duty to instruct on special defenses, including mistakes of fact, reasonably raised by the evidence. *McMonagle*, 38 M.J. at 58.

In *United States v. McGraw*, the NMCCA considered a case where "mistake of fact that [a] pistol was loaded or would fire was squarely raised by the evidence." 1997 CCA Lexis 424, *2 (N-M. Ct. Crim. App., 1997) (unpub.). There, the NMCCA ruled it was an error to instruct the members that the "mistake of fact that the pistol was not loaded must have been honest and reasonable." *Id.* at *3. "This was error, since the fourth element of an Article 118(3), UCMJ, 10 U.S.C. §918(3), offense is specific knowledge that death or great bodily harm was a probable consequence of the [accused's] act with the pistol." *Id.* Moreover, the Government agreed that the Military Judge's instruction was an error. *Id.* Therefore, the NMCCA ruled that the Military Judge should have instructed that the mistake needed to be honest, but it did not need to be reasonable. *Id.* at *4.

In *United States v. Walton*, 2006 CCA LEXIS 472 (A. Ct. Crim. App. Jan. 30, 2006) (unpub.), the Army Court of Criminal Appeals (ACCA), considered an appellant who received counseling regarding excessive drinking, and his commander gave him specific orders not to drink alcohol. Nonetheless, he was observed drinking alcohol before an accident wherein he drove approximately 50 miles per hour in a

30 mile per hour zone, and his car entered an intersection against a red light and crashed with another car, killing one passenger and severely injuring another. On appeal, the court concluded that appellant's acts did not evince a wanton disregard of human life, and that the evidence did not show that he knew that death or great bodily harm was a probable consequence of his acts to sustain the murder conviction under UCMJ art. 118. Specifically, the evidence showed that appellant knew that he was traveling more than the speed limit, that he was about to cross an intersection against the red light, and that he had been drinking alcohol. Still, the government did not present evidence that the other car was visible to the appellant as he drove into the intersection. Thus, the facts, without more, did not establish beyond a reasonable doubt that appellant subjectively *knew* that death or great bodily harm was a probable result of his acts. *Id.*

Additional legal authorities are discussed below as necessary.

Argument

To gain a tactical advantage on the eve of a murder trial, the Government withdrew and dismissed all charges, preferred new charges to shift their evidentiary burden, and now intends to proceed directly from preferral to trial as if nothing changed. The Government's intent to gain a tactical advantage through the withdrawal, dismissal, and preferral of new charges is now made explicit in their most recent filing, which argues that they should be allowed to circumvent R.C.M. 905(g), which prohibits the Government from disputing the prior Court's rulings, despite the military judge's clear instruction of the Court's intent to apply R.C.M. 905(g).

In its second motion asking this Court to ignore the *Honstein I* Court's rulings, the Government argues it changed the landscape of its case against Sgt Honstein and, consequently, the members should no longer get instructed on the Defense's mistake of fact defense. This is improper. (See Defense's Motion for Appropriate Relief dated 13 December 2024). It's difficult to imagine a clearer indication of the Government's improper withdrawal and dismissal of charges from the prior court-martial than the Government's argument here. The Government argues that because it is now explicitly alleging what it had argued before was implied, Sgt Honstein is no longer entitled to the *Honstein I* Court's ruling that it

would instruct members that a mistake of fact need only have existed in Sgt Honstein's mind to find Sgt Honstein not guilty of violating Article 118(3).

A. Rule for Courts-Martial 905(g) precludes the Government's requested relief.

The Additional Charge arose from the same transaction alleged in Charge I in the *Honstein I* court-martial. The matter put in issue in *Honstein I* was whether the "Government must prove beyond a reasonable doubt that the accused had actual knowledge that death or great bodily harm was a probable consequence of his actions, the accused should not be convicted of depraved-heart murder unless he in fact, i.e. subjectively, knew the risk he created." (Defense Motion in Limine (Instructions) dated 13 September 2024). The *Honstein I* Court made a final determination that the mistake of fact as to Article 118(3)'s fourth element need only be reasonable. The Government cannot dispute this determination. R.C.M. 905(g).

B. The Military Judge's Benchbook specifically calls for the Defense's requested instruction.

Note 4 to the military bench book's instruction 3a-42-3 "Murder while engaging in an act inherently dangerous to another (Article 118)" states "Instruction 5-11-1, Ignorance or Mistake – Where Specific Intent or Actual Knowledge is an Issue, may be applicable to the accused's knowledge of the conditions under which he/she acted."

C. The Government struggles to (i) understand *McMonagle* and (ii) realize *Vandenack* is distinguishable.

i. The Government misidentifies the issue in McMonagle as being relevant here.

McMonagle involved the unintentional shooting of a civilian by the appellant during a sham firefight, where evidence was adduced at trial suggesting that the accused believed that he was shooting at an enemy combatant. *McMonagle*, 38 M.J. 54. There, unlike here, "[t]here was no issue regarding [the accused's] knowledge that death or grievous bodily harm was a probable consequence of his acts." *Id.* at 61. Instead, the appellant in *McMonagle* raised two issues concerning the mistake of fact defense as it relates to: (1) the state of mind required for showing a "wanton disregard for human life" under Article

118(3)'s third element; and, (2) the unlawfulness of the killing under Article 118(3)'s fifth element. *Id.* at 59.

The Government's motion fails to understand CAAF's answer to those two issues. The *McMonagle* Court held that "wanton disregard" describes a mental state requiring a showing that the accused was subjectively aware of the risk he created and a mistake of fact to Article 118(3)'s *fifth element* must be honest and reasonable.

a. *The McMonagle Court did not rule that the mental state underlying "wanton disregard" is assessed by subjective and objective standards.*

The Government's analysis obfuscates the straightforward holding in *McMonagle*. The CAAF's opinion redressed the lower court's holding that "wanton disregard" was measured by an objective, rather than subjective, standard. *United States v. McMonagle*, 34 M.J. 852, 864 (A.C.M.R. 1992) *rev'd United States v. McMonagle*, 38 M.J. 53 (C.A.A.F. 1993). The CAAF held the lower court's conclusion was inconsistent "with the concept of a 'depraved heart' which underlies Article 118(3)." *McMonagle*, 38 M.J. at 60.

The CAAF stated it, along with most courts addressing "depraved heart" murder laws, is determined that "a person should not be convicted of depraved-heart murder unless he was subjectively aware of the risk he created." *Id.* (internal citation and quotation marks omitted). Thus, the CAAF held a mistake of fact defense can rebut the subjective state of mind required for a violation of Article 118(3). *Id.* The CAAF did not, as the Government suggests, indicate that the mistake of fact defense to the third element is subjective and objective.

As the ACCA said in *Walton,* "[t]he key to establishing wanton disregard of human life is appellant's knowledge of the risk his conduct posed under the circumstances." *Walton*, 2006 CCA Lexis at *12. That is why the Military Judge's benchbook requires the Military Judge to instruct that "wanton disregard" is understood as the accused's "total disregard for the *known* probable results of death or great bodily harm" when he undertook the act which caused the death. Instruction 3a–42–3 (emphasis added). Concluding that "wanton disregard" is only assessed subjectively makes sense. As the NMCCA said in

United States v. Cosby, "[t]he presence of malice [i.e., wanton disregard] is the element in *murder* which differentiates that crime from manslaughter." 2015 CCA LEXIS 360, *12-*13 (N-M. Ct. Crim. App. Aug. 31, 2015) (unpub.) (emphasis original).

The Government's motion fondly cites Milhizer. As Milhizer argues, "[c]ommentators have argued persuasively that an actor who is too . . . *absent-minded to realize the seriousness of the risk*, although not insane, ought not be held guilty of murder under a depraved-heart theory." Milhizer, 133 Mil.L.Rev. 205, 237 (1991) (hereafter Milhizer) (internal citations omitted) (emphasis added). "These commentators point out that such a person ordinarily would not escape all criminal responsibility for his actions, and thus could be convicted of manslaughter or some other lesser form of homicide." *Id.* So too here as the Government has charged Sgt Honstein with violating Articles 118(3) and 119.

b. The Government fails to understand CAAF's citation to Milhizer.

The Government misapprehends *McMonagle*'s citations to Milihizer's meaning. *McMonagle*, 38 M.J. at 60. (citing Milhizer, 133 Mil.L.Rev. at 210).

To understand CAAF's reliance on Milhizer in *McMonagle,* it is necessary first to recall *McMonagle* analyzes the mistake of fact defense squarely regarding Article 118(3)'s third and fifth elements. *Id.* at 59. Specifically, whether the mistake of fact goes to "(1) the headless or indifferent state of mind required for wanton disregard for human life and (2) the unlawfulness of the killing." *Id.* Thus, any analysis related to Article 118(3)'s fourth element is incidental. The Government's claim that CAAF's reliance on Milhizer's description of depraved-heart murders as one where the "killer's attitude" is evaluated by a subjective and objective standard for Article 118(3)'s fourth element is incorrect because the opinion's concern is focused on the third and fifth element.

The CAAF's quotation to Milhizer at 210—which the Government relies heavily upon and calls "the correct law"—concerns the two gravamen components for depraved-heart murder *under case law and statutory law generally*: that the perpetrator cause the death of another by an act that 1) has a very high degree of risk of death or serious bodily injury to another, and 2) is unjustified. *Id.* It does *not* concern Article 118(3)'s elements specifically. Instead, to address depraved-heart murder's general first

component, Milhizer states it is the degree of risk that is not measured in the abstract and should be measured subjectively and objectively. Milhizer, 133 Mil.L.Rev. at 210. CAAF quotes this passage to describe why the accused's mental state is relevant to depraved-heart murders generally. *McMonagle*, 38 M.J. at 60 (addressing "the killer's attitude" in relation to the terms "wanton" and "disregard") The CAAF does not cite Milhizer in this instance as support to conclude Article 118(3)'s fourth element—knowledge—is objectively and subjectively assessed.

When CAAF moves away from discussing depraved heart murders *generally* to analyze Article 118(3) *specifically*, it states a person cannot be convicted of Article 118(3) "unless he was subjectively aware of the risk he created." The offense is intended to cover cases where the acts "are *calculated* to put human lives in jeopardy, without being aimed at anyone in particular." *Id.* (emphasis original) (internal citations omitted). And again, the CAAF cites Milhizer here but uses the intro signal "see also."[1] *Id.* at 60 (citing Milhizer, 133 Mil.L.Rev. at 235-36). This citation to Milhizer is where he writes about "knowledge," and thus, CAAF is taking an inferential leap that Milhizer's writing concerning knowledge is relevant to the issue in front of it concerning "wanton disregard." Milhizer, 133 Mil.L.Rev. at 234-36. Therefore, the Government misunderstands what CAAF and Milhizer are discussing when the CAAF cites Milhizer at 235-36. Instead, CAAF is saying that "wanton disregard" is only concerned with what is in the accused's mind.

Indeed, Milihizer at 234-36 is where he responds to "the fourth element of proof for depraved-heart murder under military law provides 'that the accused *knew* that death or great bodily harm was a probable consequence of the act. . . .'" Milhizer, 133 Mil.L.Rev. at 234-36 (emphasis original). It is well-settled law that if ignorance or mistake goes to *an element* requiring *knowledge* of a particular fact, it "*need only have existed in the mind of the accused.*" R.C.M. 916(j) (emphasis added). Therefore, the

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[1] This signal intro is used when the cited authority clearly supports a proposition, but there is an inferential step between the proposition as stated and the cited authority.

Government's suggestion that the CAAF's citation to Milhizer's recitation of depraved heart murder laws *generally* creates an objective and subjective standard for Article 118(3)'s fourth element *specifically* is unfounded.

Moreover, CAAF's reliance on Milhizer to address Article 118(3)'s third element reveals the Government's enormous burden of proof there. The third element contains two clauses connected conjunctively. Specifically, "that [the act from the second element] was inherently dangerous to another *and* showed a wanton disregard for human life." (emphasis added) CAAF's citation to Milhizer at 210 is where Milhizer describes how depraved-heart murder generally ascertains the risk attendant to the act which causes a death. He writes, "the *degree of risk* is not measured in the abstract but is evaluated in the light of the surrounding circumstances that are apparent and known to the perpetrator, or at least should reasonably be apparent and known by him." Milhizer, 133 Mil.L.Rev. at 210 (emphasis added). Therefore, as CAAF cited this about Article 118(3)'s third element, reliance on Milhizer here relates to the first clause of Article 118(3)'s third element. That is, the Government must prove beyond all reasonable doubt that the act was objectively inherently dangerous and that the accused knew or should have known about the circumstances making it inherently dangerous.

In *Walton*, the ACCA similarly concluded Article 118(3)'s third element contains two clauses. 2006 CCA LEXIS 472. There, an opinion that cites *McMonagle* and *Vandenack*, the ACCA found "[n]ot every inherently dangerous act necessarily evinces a wanton disregard for human life." *Id.* at *12. Therefore, to satisfy the third element, the Government must prove beyond all reasonable doubt that the act was inherently dangerous *and* that Sgt Honstein "*knew* about the circumstance surrounding that act" *Id.* (emphasis original) to satisfy the third element. Then, the Government must additionally prove that the accused knew that death or great bodily harm was a probable consequence of the act.

In sum, Milihizer and *McMonagle*'s reliance on it does not support finding Article 118(3)'s fourth element has a subjective and objective component. Instead, these authorities support finding Article 118(3)'s first clause contains an objective and subjective burden of proof, and its second clause

requires the Government to prove Sgt Honstein's mental state was subjectively a wanton disregard for human life.

ii. Vandenack is distinguishable.

Vandenack, decided ten years before *McMonagle*, was not a contested case and concerns a providency inquiry in response to the accused's guilty plea and is a vehicular homicide case. *United States v. Vandenack*, 15 M.J. 230 (C.M.A. 1983). There, the appellant fled the scene of an accident at a high rate of speed, ran through several red lights, struck, and killed the driver. During his providency inquiry, the accused equivocated, when questioned on whether he knew death or grievous bodily harm was a probable consequence of his actions at the time of the offense, but then "subsequently admitted that death actually was a probable consequence of his conduct," before responding in the affirmative when the military judge asked whether he was engaged in an inherently dangerous act that demonstrated a wanton disregard for human life. *Vandenack*, 15 M.J. at 233-234. The Court held that the malice requirement of Article 118(3), like all elements of all offenses in all cases, can be demonstrated by circumstantial evidence. The C.M.A. did not, as the Government argues, lower the mens rea requirement for the fourth element of the Additional Charge at issue in this case. Instead, it found that "*in vehicular homicide cases*" the "malice requisite to a murder conviction may be implied" where there is "an intent to do an unlawful act which may probably deprive a person of life." *Vandenack*, 15 M.J. at 234 (emphasis added).

The issue here is distinguishable in three ways. First, this is not a vehicular homicide, and therefore, it is categorically excluded from the *Vandenack* exception to malice. Second, this is a contested case. Sgt Honstein has not agreed with the Court, under oath, that he has violated all of Article 118(3)'s elements. Third, Sgt Honstein and Ms [redacted] were engaged in consensual BDSM, and Sgt Honstein's action to pull the trigger was responsive to Ms. [redacted] desires. Aside from having a pistol in the barracks, there is no evidence that Sgt Honstein intended to do an unlawful act, and this private and consensual BDSM sexual activity did not become unlawful until the pistol tragically discharged the fatal round. *See Lawrence v. Texas*, 539 U.S. 558 (2003). Therefore, malice cannot be implied here because Sgt Honstein

never intended "to do any unlawful act which may probably deprive a person of life." *Cf, Vandenack*, 15 M.J. at 233.

iii. *The General-Intent standard in McMonagle* applied to the fifth element.'

The Government again quoted from *McMonagle* as follows:

> Murder under Article 118(3) is a general-intent crime. *United States v. McMonagle*, 38 M.J. 53, 60 (C.A.A.F. 1993). Mistake of fact is not a defense to a general intent crime unless it is both honest[actual] and reasonable.

Yet the CAAF framed this issue specifically in relation to Article 118(3)'s fifth element—that the killing was unlawful—in light of the evidence adduced at trial suggesting that he believed he was shooting at an enemy combatant, *and not concerning a mistake of fact for the probable consequences of the accused's acts*. The Court's analysis was as follows:

> The court below also held that **appellant's mistaken belief would not negate the element of unlawfulness** (emphasis added). This holding also is incorrect. The military judge correctly deduced that mistake of fact in this case gave rise to a defense of justification. Under the specific facts of this case, the two special defenses of mistake and justification are interrelated. A mistake of fact can negate unlawfulness because ignorance or mistake a fact can produce "a mental state which in turn supports a defense of justification." Wharton's Criminal Law § 76 at 369-70 (C. Torcia 14th ed.1978).
>
> Murder under Article 118(3) is a general-intent crime. United States v. Craig, 2 USCMA 650, 659, 10 CMR 148, 157, 1953 WL 1795 (1953). Mistake of fact is not a defense to a general intent crime unless it is both honest and reasonable. United States v. Brown, 22 MJ 448, 451 (CMA 1986). See Wharton's Criminal Law, supra § 76 at 370 (honest and reasonable mistake of fact may produce mental state which supports justification). Accordingly, **appellant's mistake as to the identity of the victim** (emphasis added) must have been both honest and reasonable to raise the defense of justification.
>
> *McMonagle*, 38 M.J. at 60.

Thus, the analysis in *McMonagle* that Article 118(3) is a general intent crime applies to an element not at issue here.

The Supreme Court has given examples to illustrate that different elements have different mens rea. In *Carter*, the Supreme Court acknowledged that a defendant can knowingly point a gun at a teller to

take money but deliberately make a quick getaway in the hopes of getting arrested so that he would be returned to prison for alcohol treatment. *Carter v. United States*, 530 U.S. 255, 268 (2000). In this example, the defendant knowingly engaged in the acts of using force and taking money (satisfying the general intent requirement), but he did not intend to permanently deprive the bank of its money (failing to satisfy the specific intent). *Id.* In *Posters 'N'Things, Ltd. V. United States*, the Supreme Court considered a federal statute prohibiting the sale of drug paraphernalia. 511 U.S. 513 (1994). Whether the items in question qualified as drug paraphernalia was an objective question that did not depend on the defendant's state of mind. *Id.* at 517-22. But the Supreme Court held an individual could not be convicted of selling such paraphernalia unless he "knew that the items at issue [were] likely to be used with illegal drugs." *Id.* at 524. Thus, the Supreme Court again applied different mens rea requirements to different elements. So too do different Article 118(3) elements call for different mens rea requirements.

Relief Requested

The Defense requests that the Government's motion be DENIED, and that the Military Judge instruct the members that ignorance or mistake, that need only have existed in the mind of the accused, can negate the second clause of Article 118(3)'s third element and the fourth elements if the evidence at trial raises such ignorance or mistake.

Additional Evidence

1. NCIS results of interview with MSgt [redacted] USMC
2. NCIS results of interview with Cpl [redacted] USMC

[redacted]

M. E. NEELY
Lieutenant Colonel, U.S. Marine Corps
Regional Defense Counsel

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CERTIFICATE OF SERVICE

I certify that I have delivered a copy of the foregoing document by email to the Court and Trial Counsel on 20 December 2024.

[redacted]
M. E. NEELY
Lieutenant Colonel, U.S. Marine Corps
Regional Defense Counsel

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

UNITED STATES **V.** **DAKOTA S. HONSTEIN** **SERGEANT / E-5** **USMC**	**GOVERNMENT MOTION FOR APPROPRIATE RELIEF** **(Reconsideration Of Administrative Credit under R.C.M. 305)** **13 January 2025**

NATURE OF THE MOTION

On 1 December 2024 the Court granted the Accused 267 days of confinement credit based on the conduct and administrative procedures of the IRO in this case. Pursuant to RCM 905(f) the Government respectfully requests the Court reconsider the awarding of judicial credit based on incorrect facts and a misapplication of the R.C.M. and its amplifying case law.

SUMMARY

When the Accused was placed in Pretrial confinement, the defense detailing authority, detailed an out of area counsel, who was unavailable at any time within the 10-day window required by R.C.M.305. The Defense Counsel requested a date outside the 10-day window and asserted the rule was waivable. The base magistrate made three accommodations to the Defense, including holding the IRO on day 10, during a weekend, in an attempt to allow the DC to be present en route to training. Additionally, the DSO did not detail a local counsel to be present at the IRO for the limited purpose of the hearing. Following the IRO the DC requested the hearing be reopened and the base magistrate refused suggesting the DC file a 30a motion with the Court. The Defense them waited from 9 February 2024 until 1 November 2024 to file a motion for

release and request for credit. During argument the Counsel described that delay as a tactical decision. On 1 December 2024, the Court denied the motion for release but granted additional confinement credit from 9 February 2024 until 1 November 2024 totaling 267 days of additional credit for the accused.

FACTS

1. On 27 Jan 24, the Accused was placed in pre-trial confinement. (See Encl. 1)[1].

2. On 29 Jan 24, the Defense Services Organization was notified of the Accused's status. (See Encl. 1).

3. The DSO has a duty defense counsel who is available to provide limited representation at IRO's.

4. By policy, the DSO standard practice does not require a DC who assists the Accused at an IRO be detailed to the case.

5. The IRO hearing was scheduled for 1 February 2024. (See Encl. 1).

6. On 1 February 2024, detailed defense counsel, Capt Carson emailed the IRO informing him that he would not be available to conduct the IRO hearing due to just being detailed the day before and being stationed in Quantico, Virginia. Capt Carson requested that the IRO hearing be moved to a later date. (See Encl. 1). It is now clear Capt Carson was fully aware he would not be available within the 10-day window but withheld that information when asking to delay the hearing from the original date.

7. Over the Government's objection, the IRO hearing was rescheduled to 2 Feb 24. (See Encl. 1).

[1] All enclosures referenced are related to the Government's original response to the Defense MFAR release from PTC. To avoid duplication in the record, the Government requests the Court consider those exhibits in relation to this reconsideration motion.

8. Capt Carson objected to conducting the hearing on 2 Feb 24, citing that he would be in Court on 2 Feb 24 and executing TAD orders to Charlotte, NC on 4 Feb. Capt Carson requested that the hearing be continued until 9 Feb 24 as his position was that the Defense could waive the 10-day extension limit under R.C.M. 305. (See Encl. 2).

9. The IRO rescheduled the hearing to 4 Feb 24 via teleconference. (See Encl. 2).

10. The IRO was then rescheduled to 5 Feb 24, the 10th day of the Accused's entering pre-trial confinement. The IRO gave all parties the ability to be present in person, via VTC, or teleconference. The Defense continued their objection and refused to be present via VTC or teleconference. (See Encl. 2).

11. On 5 Feb, the IRO hearing was conducted and the Accused was retained in the brig. (See Encl. 3).

12. On 12 Feb, defense counsel requested a rehearing of the IRO. The IRO denied the request and told defense that they could file a motion with the Court pursuant to Article 30a (See Encl. 3).

13. On 3 July 24, charges were referred against the Accused.

14. On 8 July 24, the Government submitted its motion for docketing, requesting that the Court arraign the Accused on 10 July, the day after the five-day statutory waiting period. (See Encl. 8).

15. On 10 July 24, the Defense requested the arraignment take place on 6 August due to scheduling conflicts between the two defense counsel. (See Encl. 8).

16. The Government requested that all delay from 10 July to 6 August be attributed to the defense. The Court refused to rule on delay, but noted that "the Government has presented the case to the Court and demonstrated its readiness to proceed." (See Encl. 8).

17. In the MFD, specific deadlines were set to litigate certain motions at arraignment. This TMO deadline had a motion filing deadline of 26 July 2024.

18. The Accused was arraigned on 6 August 2024.

19. During the Arraignment, a Trial Management Order (TMO) was signed by the military judge setting deadlines for motions to be filed on 13 September 2024. This ordered date also had footnote vii stated, "Counsel will litigate all ripe motions on this motions date."

20. On 24 September 2024, the Court held an Article 39(a) session in which multiple motions were litigated. During that session, the Court sua sponte brought up the issue of the charging language of then Sole Specification, Charge I. (See Encl. 9)

21. At the Conclusion of the 24 September 2024 39(a) session, the Accused, following the litigation of several motions, entered pleas of Guilty to Charges II and III and their sole specifications pursuant to the TMO.

22. Following the withdrawal, dismissal, and preferal anew in line with the Court's requirement that the intentional act under 118(3) be explicitly plead and not implied, the Accused was once again arraigned.

23. On 30 October 2024, the Defense filed a Motion to Dismiss due to R.C.M. 707 violation and Defective Referral motion. (See Encl. 19)

24. On 31 October 2024, the Government filed its responses to both motions.

25. On 1 November 2024, the Court ruled that the Government withdrew and rereferred for a proper purpose, thereby restarting the R.C.M. 707 clock on 26 October 2024.

26. The Court also dismissed without prejudice the sole specification of Charge I and stated that the Government would need to conduct and Article 32 hearing for that charge.

27. Pursuant to the Defense and Government's request, the Court did not arraign the Accused on 1 November.

28. On 1 November 2024, the Government preferred Additional Charge I. (See Encl. 20)

29. On 4 November 2024, the Preliminary hearing officer (PHO) ordered the Article 32 Hearing be conducted on 8 November 2024 and set milestones accordingly. (See Encl. 21)

30. On 6 November 2024, the Defense requested that the Article 32 hearing be continued until 13 November 2024. (See Encl. 22)

31. On 6 November 2024, the PHO granted the Defenses request and found that all delay from 8 November to 13 November as attributable to the Defense. (See Encl. 23)

32. On 7 November 2024, the then detailed defense counsel, Capt Carson, informed the Court that his position regarding his conflict with continued representation with the Accused was that his EAS would not need to be involuntarily extended and that he maintained his request for the Court to involuntarily sever his representation of the Accused.

33. On 8 November 2024, the Court ordered the Accused receive conflict-free counseling regarding potential conflicts with Capt Carson and Capt Lipositz, and for the parties to discuss this issue on either 13 November or 14 November following the Article 32 hearing. (See Encl. 24)

34. On 13 November 2024, the Article 32 hearing was conducted.

35. On 14 November 2024, the Defense informed the Court and the Government that the detailing authority intended to detail LtCol Neely and Capt Paganucci. (See Encl. 25)

36. On 14 November 2024, the Government submitted closing comments to the PHO.

37. On 18 November 2024, the Defense submitted its written response to the PHO. (See Encl. 26).

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38. On 19 November 2024, the Court issued a written ruling on the R.C.M. 707 issue. In that ruling, the Court stated that as of 19 November the R.C.M. 707 clock was on day 25. The Court also stated, "Assuming the Government seeks to arraignment on any combination of charges, this Court will re-assess the R.C.M. 707 calculation at that time. (See Encl. 27).

39. On 19 November 2024, the PHO issued his report. (See Encl 28).

40. On 1 December 2024, the Court issued its ruling regarding the release from pretrial confinement and administrative credit.

41. On 3 December 2024, Additional Charge I was referred.

42. On 6 December 2024, the Accused was arraigned on all charges. (See Encl 21).

LAW

"Fairness and common sense, not technicalities, should rule the law." *United States v. Townes*, 52 M.J. 275, 277 (2000).

R.C.M. 305

"Within 7 days of the imposition of confinement, a neutral and detached officer appointed in accordance with regulations prescribed by the Secretary concerned shall review the probable cause determination and necessity for continued pretrial confinement. In calculating the number of days of confinement for purposes of this rule, the initial date of confinement under military control shall count as one day and the date of the review shall also count as one day."

"(B) Extension of time limit. The 7-day reviewing officer may, for good cause, extend the time limit for completion of the review to 10 days after the imposition of pretrial confinement."

"(k) Review by military judge. Once the charges for which the accused has been confined are referred to trial, or in a pre-referral proceeding conducted in accordance with R.C.M. 309, the

military judge shall review the propriety of pretrial confinement upon motion for appropriate relief."

"(l) Remedy. The remedy for noncompliance with R.C.M. 305(g), (i), (j), or (k) shall be an administrative credit against the sentence adjudged for any confinement served as the result of such noncompliance…"

"Counsel may be assigned for the limited purpose of representing the accused only during the pretrial confinement proceedings before charges are referred. If assignment is made for this limited purpose, the confinee shall be so informed. Unless otherwise provided by regulations of the Secretary concerned, a confinee does not have a right under this rule to have military counsel of the confinee's own selection."

R.C.M. 309

"A military judge detailed under regulations of the Secretary concerned may conduct proceedings under Article 30a, before referral of charges and specifications to court-martial for trial, and may issue such rulings and orders as necessary to further the purpose of the proceedings. A military judge may issue such orders and rulings only when the matters would be subject to consideration by a military judge in a general or special court-martial…

(6) Pretrial confinement of an accused. After action by the 7-day reviewing officer under R.C.M. 305(j)(2)(C), a military judge may, upon application of an accused for appropriate relief, review the propriety of pretrial confinement. A military judge may order release from pretrial confinement under the provisions of R.C.M. 305(k)(1)."

Article 30a

The President shall prescribe regulations for matters relating to proceedings conducted before referral of charges and specifications to court-martial for trial, including the following… (E) Pre-referral matters relating to the following: … (i) Pre-trial confinement of an accused."

"The military judge is charged with exercising reasonable control over the proceedings to promote the purposes of the Rules for Courts-Martial. To that end, the military judge issued a case management order that determined when the parties were to comply with their various obligations as the case moved toward trial. He and the parties also agreed to a deadline by which the parties were to submit motions for appropriate relief. Consistent with his role in ensuring a fair and orderly proceeding, the military judge's order urged counsel to "strive to litigate all ripe motions at the first motions date[.]" *United States v Harris*, 2017 CCA LEXIS 547, (N.M.C.C.A. 2017).

"The military judge declined to call defense counsel's decision to accrue credit rather than compel compliance 'gamesmanship,' settling instead on 'smart litigating.' But ultimately the military judge sensed that the appellant was using R.C.M. 305 as a sword rather than a shield, and that to permit the defense to prefer the remedy to actual compliance would be to grant an unwarranted 'windfall.' The military judge granted 23 days of credit, representing day-for-day credit for the violation starting on the day the government delivered the incomplete IRO memorandum (7 October) and lasting through the date the appellant should have moved for production (29 October)." *Id.*[2]

"We have previously held that "[g]enerally, the doctrine of laches bars a claim if there is unreasonable delay and the government is prejudiced." *Johnson v. United States*, 49 M.J. 569, 573-74 (N-M. Ct. Crim. App. 1998). Without using the term, the military judge applied the

[2] This was a 2017 case, so there was no ability for the Defense to approach the Court under R.C.M. 309 or Art 30a.

doctrine of laches to, in the words of R.C.M. 102, "secure simplicity in procedure, [and] fairness in administration" of the court-martial. We disagree with the appellant's contention that the military judge's ruling created a requirement that the accused make "repeated requests" for matters under R.C.M. 305. The military judge was well-within his authority to expect the parties to litigate this motion on 29 October. We find that the military judge's ruling was an appropriate exercise of his responsibility to reasonably control the proceedings and to promote the purposes of the Rules for Courts-Martial. R.C.M. 801. Rather than comply with the agreed upon portions of the draft case management order and the military judge's stated expectations, defense counsel let the matter go unnoticed by the court until the days of potential credit had been maximized. While this approach may have represented "smart litigating," we find that the military judge did not abuse his discretion by declining to reward the appellant with the windfall." *Id.*

ARGUMENT

A. The 10 window for holding an IRO hearing is not waivable.

i. The Court articulated, "Whether the 10-day requirement is actually waivable is an interesting question, but one this Court need not resolve." However, given the situation at hand this is most certainly the threshold question the Court must answer to find if there was a violation. The IRO and this Court are not courts of equity. Rather, they are governed by statute and regulation. If the 10-day requirement is not waivable (as there is no source of law indicating it is either in the statute or otherwise) then there is no violation of R.C.M. 305. The detailing authority detailed a seemingly unavailable counsel, deviated from their standard practice, as contemplated specifically by the rule, refusing to detail a local counsel for the purposes of the IRO, and the detailed counsel, refused to show up despite the IRO making accommodations to hold the IRO on the weekend when the DC was traveling from D.C. to Charlotte, NC and could

have easily been present during that travel, but chose not to.

ii. If the 10-day window is not waivable, the detailing authority cannot dictate or be the cause of the Government being unable to meet the requirements under the rule and then on the back end have the accused benefit from it. This is using the rule as a sword and a shield. The similar reasoning of the invited error doctrine should be applied here. If Capt Carson was truly unavailable – despite traveling within close proximity to Camp Lejeune – the DSO should have detailed local counsel to represent the accused at the IRO. This is routinely done for pre-trial detainees, but was not in this case despite the Counsel, SDC, and CDC knowing Capt Carson's unavailability when he was detailed. Taken to its logical conclusion, is the IRO required to wait until a counsel who is detailed from Japan can attend the IRO? What if that travel takes 14 or 21 days because that counsel is in trial or on leave? Does the Detailing Authority have the authority to overrule the RCMs? The answer is no.

B. The Court had the authority to review the IRO and pretrial confinement beginning on 9 February, but only at the request of the Accused pursuant to R.C.M. 309.

The plain text of R.C.M. 309 only contemplates the Defense filing a pre-referral motion for a review of the IROs decision. This make both logical and legal sense as the Defense Counsel, who have a relationship to the Accused and all of their considerations and concerns, are best suited to make a determination on what motions to file. Therefore, even if in *arguendo*, there is a requirement for the Government to second guess Defense tactical decisions, the Government did not have the Authority to file the motion before the referral of charges, on 3 July 2024. Per RCM 309(b)(6), the Government is never in a position to make an application on behalf of "an accused for appropriate relief." Additionally in light of *Harris* above, any consideration for when the Defense should stop accruing a benefit due to "smart litigating," (as

LtCol Jones, cited at the trial level and the NMCCA ruling stated affirmed) ceased when the TMO deadline to file motions occurred. In this case that was on13 September 2024. This TMO deadline also included the footnote directing, "Counsel will litigate all ripe motions on this date."

C. There is no requirement for the Government to address the tactical decisions of the Defense.

The Government could not locate a single case to stand for the proposition that the Government is responsible or empowered to second guess the tactical decisions of the Accused. That is because the Defense Counsel is best suited to have the necessary information, conduct the proper counseling and assessment, and then make tactical and strategic decisions for the Accused and the Defense team. It should also not be lost in the analysis, that while Capt Carson chose not to attend the IRO., Capt Lipositz, who was detailed after the IRO and has an independent duty to analyze and assess this issue, articulated on the record during argument on the motion for release from pre-trial confinement, that it was a tactical decision to not file the motion, not an oversight, but a reasoned choice:

> *"I think it is fair to say that there was a tactical decision by the defense not to raise it in front of a judge at a 30a session or at a subsequent motion for appropriate relief at the prior court martial, but Sgt Honstein intended to plead guilty at that prior court-martial to involuntary manslaughter."* (2:09:45 - 2:10:17)

This is not unsurprising that given the sentencing guidelines that applied to the charges to which the Accused had previously entered pleas of guilty to, at least some period of the confinement would be served after a likely punitive discharge. In thinking ahead, it made both logical and tactical sense to both accumulate confinement credit and get paid. This would shorten any period of confinement as unpaid on the back end. That is a sound tactical decision. It is not however, a justification to impose a sanction on the Government, where two counsel,

each with an independent duty to the client reviewed, assessed, and chose not to file the motion.

CONCLUSION

There is no authority which permits the IRO to extend the hearing past 10 days, regardless of the assertions of the Defense Counsel. When the detailing authority details a counsel who is out of the area and unavailable in those 10-days, while also breaking from their standard procedure and declining to detail a local counsel for the limited purpose of the IRO in line with R.C.M. 305, the Accused had the opportunity to be represented at the hearing, but the Defense Counsel, the detailing authority, and the DSO refused to comply with the rule despite being granted the maximum flexibility on date, time, and location. Detailing decisions do not dictate the application of the prescribed R.C.M., and this Court should not approve and encourage this behavior by granting credit for their actions.

The Government's position is that the Court incorrectly found that that the first instance it [the Court] had the authority to address the issue was on 1 November, when the Defense chose to file motion for release from Pre-trial Confinement and, in the alternative, ask for credit. In reality, the Court had the Authority since 9 February, but the Defense chose to not bring it to the Court's attention. The Court also incorrectly found that "...at any point between 9 February 2024 through the date the Defense filed this motion could have on its own, scheduled a hearing before a neutral and detached officer while affording the Accused the opportunity to be represented by his counsel." The rule only contemplates the Defense filing the said motion prereferral, not the Government. Further the magistrate declined to reopen the hearing, leaving the Court as the only option. It would not be in line with the rules for the Government to seek a different magistrate or IRO. This certainly would not be acceptable if the Government disagreed with the IRO's decision to release the Accused, and it would certainly not be tolerated by the

Court. The IRO made a decision, declined to revisit that decision and the Defense chose to not avail themselves of the only other option, the Court. To reiterate, the Government taking the actions referenced by the Court would go outside of strictures of R.C.M. 305. The appropriate action, should the Defense have perceived any issues, would have been to file a motion with the Court on 9 February 2024, because the Government filing a motion *on behalf of an accused* is not contemplated by R.C.M. 309. Therefore, if there was an administrative error in the conduct of the hearing, the first date the Government could have filed a motion in accordance with the rules was at the referral of Charges on 3 July 2024, not 9 February 2024.

Additionally, the Court's ruling identified no case law in support of the assertion that the Defense is permitted to lay in wait and file motions to accumulate potential credit. However, there is persuasive caselaw from NMCCA contradicting that assertion. *Harris*, which was decided before the Defense had access to the Court pre-referral under R.C.M. 309 and Art 30a, highlights not only that any point after motions should have been filed under the TMO would be inappropriate to give credit for, but also identifies the negative precedent it would set for future litigation in the Navy Marine Corps Trial Judiciary. It would all but require last minute litigation, more accurately described as gamesmanship, of any judicial credit issue from an R.C.M. 305 or Article 13, UCMJ issue, because a ruling of this nature makes delaying beneficial to the Accused and puts the DC at odds with an accused who would benefit from credit but who should comply with the TMO and judicial efficiency.

The Court is asserting, through its ruling, a precedent that the Government must second guess every tactical decision made by a Defense counsel and either file a motion to make sure it is correct or face an adverse judicial credit award. As the Court's ruling did not reference case law in support of this proposition or supply other case law to distinguish *Harris*, the plain

reading of the rules make the assessment of credit for the entire period from 9 February 2024 to 1 November 2024, inconsistent with the law and therefore it should be reassessed. Accordingly, the Government respectfully requests the Court reconsider the previous ruling and find the following.

1) The 10-day widow to hold the IRO is not waivable under the current R.C.M. or applicable case law.
2) The Accused had the opportunity to be represented at the IRO, but the DSO and Counsel chose to not be present.
3) There was not an administrative violation of R.C.M. 305 upon which credit could be granted.

In the alternative, if the Court finds that the 10-day window is waivable, despite the plain reading of the rule; and there was an administrative error under R.C.M. 305, the Court should find the following:

1) The Court had the authority to hear a Defense motion for release, reconsideration, or remedy, as early as 9 February.
2) The Government is not required to second guess the Defense Counsel's tactical decisions.
3) The earliest the Government could have filed a motion was on 3 July.
4) The Defense should have filed a motion in line with the TMO on 13 September 2024.
5) The duration from 3 July 2024 to 13 September 2024 is 73 days.

Under these findings, if the Court insists upon granting the Accused confinement credit for a penumbrian requirement of the Government to raise the issue, the credit should be limited to the time from 3 July until 13 September. However, the Government strongly objects to assessment of any credit because it is unsupported by any rule or controlling caselaw in the Navy Marine

Corps Trial Judiciary, but also because of the precedent and message it sends to future litigants - paradoxically at odds with this Court's lectures to the parties about the efficient administration of justice. A ruling of this sort flies strongly in the face of that repeated assertion. It sets a precedent that does not promote litigating ripe issues early, rather it encourages and promotes gamesmanship, creating inefficiency in both litigation and alternate resolutions because of its emphasis on technicalities over the facts.

RELIEF REQUESTED

The Government requests the Court reconsider the finding that there was a defect in the R.C.M. 305 IRO hearing and that no additional credit is to be awarded above and beyond the day for day credit the Accused will receive for being in PTC.

EVIDENCE OFFERED

The evidence is already in the record as referenced above. The government does not have any additional evidence to provide. Candidly, the Government's reference to the Defense standard procedure is based on experience and conversations with the past and present RDC East. If the Defense contends this was not a standard or regular procedure, the Government reserves the right to call LtCol Brummond, the RDC East at the time this IRO was conducted.

HENRY.NICHOL AS.SEAN [redacted] Digitally signed by HENRY.NICHOLAS.SEAN [redacted] Date: 2025.01.13 22:06:05 -05'00'

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I certify that I served a true copy via e-mail of the above on the Court and Defense Counsel on 13 January 2025

HENRY.NICHOLAS. SEAN. [redacted] Digitally signed by HENRY.NICHOLAS.SEAN [redacted] Date: 2025.01.13 22:06:24 -05'00'

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

UNITED STATES **V.** **DAKOTA S. HONSTEIN** **SERGEANT / E-5** **USMC**	**DEFENSE RESPONSE TO GOVERNMENT MOTION TO RECONSIDER** **(R.C.M. 305)** **21 January 2025**

Nature of Response

This filing serves as the Defense response to the Government's motion to reconsider the Court's ruling to grant Sgt Honstein 267 days of administrative confinement credit.

Summary

The Court should deny reconsidering its 1 December 2024 ruling.

Additional Facts

1. Col John Stephens, USMC, then Chief Defense Counsel of the Marine Corps, detailed Captain Carson to represent Sgt Honstein.

2. Because the Government recognized Sgt Honstein would not have representation at his R.C.M. 305 hearing (IRO hearing), it implored the IRO hearing officer to not elicit from Sgt Honstein any statements "regardless of the script."

3. The Trial Management Order (TMO) first deadline for filing motions in this Court-Martial was 13 December 2024.

4. On 13 December 2024, the Government filed a motion for appropriate relief.

Law

A. Clear error or prevent manifest injustice.

Parties seeking reconsideration of a military judge's written ruling or order must file a motion within fourteen days after the ruling or order is filed if there is a "need to correct a clear error or prevent

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manifest injustice." Navy-Marine Corps Uniform Rules of Practice, Rule 10.9(c). A Military Judge can extend the fourteen days for good cause shown. *Id.*

A Military Judge's decision is a "clear error" if it "strikes a cord of wrong with the force of a five-week-old, unrefrigerated dead fish." *See United States v. French*, 38 M.J. 420, 425 (C.A.A.F. 1993) (favorably citing a definition for the clearly erroneous standard on appeal); *United States v. Rivera,* 83 M.J. 528, 529 (N-M. Ct. Crim. App. 2022) (further citations omitted)).

A manifest injustice can only be demonstrated in the most exceptional cases. *United States v.* Lewis, 63 M.J. 405, 413 (C.A.A.F. 2006); *United States v. Moran*, 393 F.3d 1, 8 (1st Cir. 2004) ("A litigant seeking to fit within the confines [of the manifest injustice exception] must negotiate a steep uphill climb.")).

B. Rule for Courts-Martial (R.C.M.) 305

Within 7 days of the imposition of confinement, a neutral and detached officer appointed in accordance with regulations prescribed by the Secretary concerned shall review the probable cause determination and necessity for continued pretrial confinement (IRO hearing). The confinee's counsel shall be permitted to appear and make a statement at this hearing. R.C.M. 305(j)(2)(A)(i). No rule or discussion within R.C.M. 305 contemplates the lack of in-person appearance by the confinee's counsel. *Compare* 305(j)(2) with R.C.M. 405(k)(4)(A) and R.C.M. 804(a)(3) and R.C.M. 305(j)(2)(A)(iv) (Discussion) noting personal appearance by the victim is not required, without any indication personal appearance by either the confine or confinee's counsel is similarly not required).

The 7-day reviewing officer may, for good cause, extend the time limit for completion of the review to ten days after the imposition of pretrial confinement. R.C.M. 305(j)(2)(B).

Upon request, the 7-day reviewing officer *shall* reconsider the decision to confine the confinee based on any significant information not previously considered. R.C.M. 305(j)(2)(E).

At sentencing, the military judge shall order administrative credit for any pretrial confinement served as a result of an abuse of discretion *or* failure to comply with the provisions of R.C.M. 305(j).

R.C.M. 305(k)(2). These "two clauses must be understood to have distinct and independent meaning." *Cf. United States v. Adcock*, 65 M.J. 18, 23-24 (C.A.A.F. 2007).

Such credit shall be computed at the rate of one day credit for each day of confinement served as a result of such noncompliance. The military judge *may* order credit in addition to any other credit the accused is entitled to for abuses of discretion in pretrial confinement. R.C.M. 305(k); R.C.M. 305(l).

A Military Jude has broad authority to order administrative credit against adjudged confinement. *United States v. Suzuki*, 14 M.J. 491 (C.M.A. 1983)). "The credit provision is designed—in part, at least—to deter violations of the various requirements of R.C.M. 305, even when an accused might be confined without regard to any such violation." *United States v. White*, 2020 CCA LEXIS 235, at *18 (A.F. Ct. Crim. App. July 15, 2020); *United States v. Williams*, 47 M.J. 621, 623 (A. Ct. Crim. App. 1997).

C. Waiver

Waiver can occur either by operation of law *or by the intentional relinquishment* or abandonment of a known right. *Cf. United States v. Jones*, 78 M.J. 37, 44 (C.A.A.F. 2018) (discussing waiver generally before specifically applying it to the right of confrontation).

The Court of Appeals for the Armed Forces (CAAF) has ruled that an accused *can* waive "any issue founded on noncompliance with RCM 305." *United States v. Chapa*, 57 M.J. 140, 143 (C.A.A.F. 2002).

In *United States v. McCants*, the CAAF considered an Appellant who requested and was permitted to delay his IRO hearing for fifteen days to obtain civilian defense counsel to represent him at the hearing. 39 M.J. 91 (C.A.A.F. 1994). There, the magistrate failed to make his determination for another fourteen days after conducting the R.C.M. 305 hearing. The CAAF granted the appellant an additional fourteen days of confinement credit. *Id.* at 93.

D. Detailing Defense Counsel

Defense counsel shall be detailed for each general and special court-martial. The Secretary concerned must prescribe regulations for how such counsel is detailed and for the persons authorized to detail counsel for such courts-martial. 10 U.S.C. § 827(a)(1), Art. 27, UCMJ.

Through JAGINST 5800.7G, CH-2, Manual of the Judge Advocate General (JAGMAN), the Secretary of the Navy provides Departmental policy and regulations regarding the right to counsel and the formation of the attorney-client relationship.

The JAGMAN delegates prescribing regulations for detailing Marine Judge Advocate defense counsel to Marine Corps Order (MCO) 5800.16 (LSAM). JAGMAN, para. 0130(b)(1)(b).

The LSAM designates the Chief Defense Counsel of the Marine Corps (CDC) as the detailing authority for all judge advocates assigned to the Defense Services Organization (DSO). LSAM, Vol. 3, para. 0110. The detailing authority must detail a defense counsel within ten days of being notified that an accused has been placed in pretrial confinement or arrest under R.C.M. 305. *Id.* at para. 011004(a).

An accused will be detailed a "duty counsel" for the limited purpose of representing an accused at the R.C.M. 305 7-day hearing, *unless* the accused has previously been detailed a defense counsel. *Id.* at para 0111.

E. Courts-Martial are courts of law, not equity.

Courts-martial, the Courts of Criminal Appeals, and CAAF are courts of law, not equity. *Ortiz v. United States*, 585 U.S. 427, 439-40 (2018); *see United States v. Quiroz*, 55 M.J. 334, 340 (C.A.A.F. 2001) (holding that neither the United States Court of Appeals for the Armed Forces nor a Court of Criminal Appeals is a court of equity, but rather a court of law).

Laches is an equitable doctrine found in civil law. *E.g., Petrella v. MGM*, 527 U.S. 663, 675 (2014); Restatement Third, Trusts § 98. This doctrine has been applied once in military justice in a case

on direct appeal. *United States v. Harris*, No. 201600207, 2017 CCA LEXIS 547 (N-M. Ct. Crim. App. Aug. 15, 2017) (unpub.).[1]

F. Purpose and Construction of the Rules for Courts-Martial

The rules shall be construed to promote simplicity, fairness in administration, and eliminate unjustifiable delay. R.C.M.102

Argument

A. The motion to reconsider is untimely and does not reveal a clear error or manifest injustice this Court must correct.

The Government has failed to demonstrate good cause for why this Court should consider its untimely motion. Even if the Government's reasons for filing late were accepted, they remain unconvincing. The Government relies on the TMO's 13 January 2025 deadline to file motions. The Government overlooks its failure to file its motion to reconsider by the 13 December 2024 deadline, which was established by both parties at arraignment as the date for motions requiring immediate resolution. Had the Government utilized the 13 December 2024 deadline, it would have simultaneously complied with the Court's rule requiring a motion to reconsider within fourteen days of the ruling. Therefore, the Government's reliance on the TMO deadline is misplaced, and this Court should not reconsider the ruling.

Addressing the substance of the Government's arguments will reset the Government's clock to file an Article 62, UCMJ, appeal on the ruling's merits rather than on the decision not to reconsider. This would be anything but simple and would call for unjustifiable delay.

[1] In *Johnson v. United States*, 49 M.J. 569, 547 (N-M. Ct. Crim. App. 1998) the NMCCA also applied the doctrine in denying a writ of coram nobis.

B. Far from reeking like a dead fish, the Court's more than five-week-old ruling awarding 267 days of administrative credit should remind the Government that R.C.M. 305's rights have life.

i. The LSAM says to detail a duty counsel to an IRO UNLESS a counsel has been previously detailed.

Following the LSAM, Col Stephens detailed Capt Carson to represent Sgt Honstein within ten days of being notified that the Government had placed Sgt Honstein into pretrial confinement. Despite the Trial Counsel's protests to the contrary, this Government order proscribes detailing a "duty counsel" to the IRO hearing in cases when counsel has otherwise already been detailed. In this case, Col Stephens had already detailed Capt Carson to represent Sgt Honstein at the time of the IRO hearing.

ii. Sgt Honstein can, and did, waive R.C.M. 305's ten-day requirement.

To ensure Capt Carson's presence at the IRO hearing, Sgt Honstein was permitted to and did waive his right to have it within ten days of confinement. *Chapa*, 57 M.J. at 143. He did so by intentionally relinquishing this right in favor of exercising his other right to have his detailed counsel at the IRO hearing. *Jones*, 78 M.J. at 44; *see McCants*, 39 M.J. at 93 (the CAAF's silence on the fifteen days delay requested by the accused is an implicit endorsement of what is otherwise clear—an Accused can relinquish his right to an IRO hearing within ten days of confinement to ensure his counsel's presence at the hearing). This waiver was entirely in accordance with the law. The Government's response to his waiver was not.

iii. The Court's order granting administrative credit in response to the Government violating Sgt Honstein's R.C.M. 305 rights is not a clear error or a manifest injustice.

Aware that Capt Carson represented Sgt Honstein, the Government conducted the IRO hearing without Sgt Honstein's counsel present. That failure to comply with R.C.M. 305(j)(2)(A)(i) entitles Sgt Honstein to administrative credit. R.C.M. 305(k)(2); App. Ex. XXXII at 3. But this failure is only where the reasons for awarding confinement credit begin.

After the defense-less IRO hearing, Capt Carson persisted in trying to secure Sgt Honstein's release. He requested a new hearing, identifying that he could appear and had additional significant new

information. The review officer declined to reconsider despite R.C.M. 305 requiring him to do so under these circumstances. R.C.M. 305(j)(2)(E). That was an abuse of discretion. That abuse independently entitles Sgt Honstein to administrative confinement credit. R.C.M. 305(k)(2).

The reasons for awarding Sgt Honstein additional administrative credit continue. The Government advocated for holding the IRO hearing within ten days not out of fidelity to the rules but for administrative and logistical convenience—prioritizing the victims' Article 6b right to reasonably be heard over the accused's absolute right to make a statement and have counsel present. The outlandish consequence was not lost on the Government. The Trial Counsel implored the IRO hearing officer not to elicit anything from Sgt Honstein despite the rules (and script) explicitly calling for him to do so because Sgt Honstein would not have his counsel. In other words, the Government contentedly kept Sgt Honstein confined knowing that Sgt Honstein had never presented matters for consideration at an IRO hearing. The Court was well within its broad discretion to award administrative credit that deters the Government from advocating against an accused's rights again. *Suzuki*, 14 M.J. at 493; *Williams*, 47 M.J. at 623; *White*, 2020 CCA LEXIS at *18.

iv. The Government's timeliness argument overlooks that R.C.M. 305 credit can help deter violations of pretrial confinement.

The Government makes much of the timeline to argue that 267 days is too much compensation because the Defense Counsel's actions in *Honstein I* could have compelled compliance with R.C.M. 305 earlier. Yet the Government's argument fails to recognize that R.C.M. 305 credit serves to adequately compensate a confinee *and* deter future violations.

Here, the Trial Counsel knew the problem but sat idly by. As the IRO officer waffled, seeking advice from others, neither the Trial Counsel, the Staff Judge Advocate, nor the Command offered any support for the Defense's request for a new IRO hearing. Nor did these Government agents independently seek another IRO hearing during the entire pre-referral process. Despite the Government's protests to the contrary, in these circumstances, its joining the Defense's request would have been entirely appropriate under R.C.M. 305 and without prejudice to Sgt Honstein.

It is well-established that Trial Counsel must ensure justice is served. This includes safeguarding the rights of the accused. To divert the Court's attention from this duty, the Government introduces a misleading argument—that Trial Counsel has no obligation to second-guess the Defense's tactical decisions. Instead of deflecting attention, this only underscores the need for deterrence against future R.C.M. 305 violations.

The Government next misplaces reliance on *Harris*. The Navy-Marine Corps Court of Criminal Appeals (NMCCA) analysis on direct appeal of R.C.M. 305 administrative credit in *Harris*, an unpublished opinion, is not framed in concrete. It does not stand for the proposition that a Military Judge *errs* in exercising his broad discretion to grant administrative credit when the Defense does not file a motion for relief at the earliest opportunity. Instead, the concern in *Harris* was whether a Military Judge acted within his vast discretion to deny administrative credit for a "technical violation" of R.C.M. 305. 2017 CCA LEXIS 547, at *5 (N-M. Ct. Crim. App. Aug. 15, 2017).

Under the facts in *Harris*, the Military Judge determined administrative credit was only necessary for twenty-three days. That remedy addressed the Government's failure to discover to Defense the IRO officer's written factual findings—findings from an IRO hearing that Defense Counsel participated in.[2] The NMCCA read the doctrine of laches into R.C.M. 102 to find the Military Judge did not abuse his discretion in limiting the R.C.M. 305 credit. Importantly, the Military Judge did not use his vast discretion in *Harris* to determine whether additional administrative credit was necessary to deter future indifference to an accused's R.C.M. 305(j) rights.

Here, denying Sgt Honstein his right to counsel at the IRO hearing is more than a technical violation. That alone distinguishes *Harris* and makes reliance upon it inapposite. Additional administrative credit is an appropriate remedy here because the credit for failing to ensure a confinee has counsel present as R.C.M. 305(j)(2) requires can—and should here—include a measure of deterrence against similar future noncompliance. That is particularly true because, as this Court found, "the

[2] The NMCCA found that the IRO hearing was "in accordance with R.C.M. 305(i)(2)" but the NMCCA could only have meant that the hearing was conducted, unlike here, in accordance with R.C.M. 305(j)(2).

Government was well-aware of the deficiency raised by Capt Carson's lack of appearance" but chose to sit idly rather than remedy it. App. Ex. XXXII at 4; *See United States v. Williams*, 68 M.J. 252, 256 (C.A.A.F. 2010) (discussing the Government's violation of a service regulation rather than R.C.M. 305(j)(2), finding "R.C.M. 305(k) provides an independent basis for the award of additional confinement credit where there has been a violation of service regulations when those regulations reflect long-standing concern for . . . the protection of servicemembers' rights." *Id.* (quotation marks omitted)). Thus, the Military Judge's reliance on R.C.M. 305(k)(2), (l) to award 267 days confinement credit is not a clear error or manifest injustice. App. Ex. XXXII at 4.

Moreover, Courts-martial are courts of law, not equity. However, if the unpublished *Harris* opinion suggests arguments invoking the equitable doctrine of laches *could* be cogent here, the Government's position remains unpersuasive. Specifically, the Government relies on the Defense's tactical decisions in *Honstein I* as the reason to deny administrative credit in *Honstein II*. The Government overlooks that *Honstein II* arose precisely because it reevaluated its tactical choices in *Honstein I* and opted to withdraw and dismiss the case in favor of the Charges it brought to *Honstein II*. Therefore, however compelling the Government's laches argument may have been at *Honstein I*, the Government should be equitably estopped from using the Defense's response in *Honstein I* to justify its position here in *Honstein II*.

Beyond *Harris*, the law clearly supports that the Court did not abuse its discretion in recognizing that the Government's misplaces reliance on the Defense's actions in a *different* Court-Martial. The way an accused attempts to resolve an issue in one trial is not binding on how the accused must attempt to resolve it in a separate court-martial even where that issue is identical in the two trials. *See* R.C.M. 905(g) (requiring the Government, *and not the accused*, to be bound by a final determination in an earlier proceeding); *see also United States v. Johnson*, No. 202200125, 2023 CCA LEXIS 472, at *12 (N-M. Ct. Crim. App. Nov. 7, 2023) (holding the Government is permitted to re-litigate an identical issue in separate courts-martial in the same circuit even where the issue's resolution is foreseeable). In *this* Court-Martial the Defense submitted its motion for relief almost immediately. In *this* Court-Martial there was no delay

in raising the issue with the Military Judge. Therefore, the Court should decline the Government's invitation to reconsider its ruling because of a different court-martial's procedural history.

Conclusion

The Court should not entertain this untimely motion to reconsider. If, however, it does, it should discard the Government's reliance on the Defense Counsel's tactical decisions in *Honstein I* since *Honstein II* arose from the Government's own reevaluation of its tactics in *Honstein I*. Instead, the key issue here is that Sgt Honstein waived his right to a timely IRO hearing to ensure his counsel's presence, yet the Government proceeded without counsel. This violated R.C.M. 305(j) and entitles him to credit. Then, despite Capt Carson's efforts to secure a new hearing and the review officer's failure to reconsider the confinement decision, the Government failed to act, compounding the violation. The Court was right to grant administrative credit as a remedy, deterring future violations and acknowledging the Government's disregard for Sgt Honstein's right to counsel.

Requested Relief

The Defense requests that the Government's motion to reconsider be DENIED.

Evidence

In support of this motion, the Defense respectfully requests the Court consider all matters already included within the Record of trial and offers the following enclosed exhibits:

Enclosure 1 - JAGMAN excerpts.

Enclosure 2 - LSAM, Vol. 3 excerpts.

[redacted]
M. E. NEELY
Lieutenant Colonel, U.S. Marine Corps
Regional Defense Counsel

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CERTIFICATE OF SERVICE

I certify that I have delivered a copy of the foregoing document by email to the Court and Trial Counsel on 21 January 2025.

[redacted]
M. E. NEELY
Lieutenant Colonel, U.S. Marine Corps
Regional Defense Counsel

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

UNITED STATES **V.** **DAKOTA S. HONSTEIN** **SERGEANT / E-5** **USMC**	**DEFENSE MOTION TO COMPEL EXPERT CONSULTATION (Forensic Psychology/Mitigation)** **21 January 2025**

MOTION

Pursuant to R.C.M. 701 and R.C.M. 703(d)(2)(A), the Defense moves to compel the production of Dr. [redacted] as a confidential Defense expert consultant in the field of forensic psychology, for a total of **twenty (20) hours** of expert consultation, to include the review of Sgt Honstein's interrogation, interviews of Government witnesses, and assessment of potential mitigating factors to include risk of recidivism.

SUMMARY

This Court should compel the production of Dr. [redacted] as a confidential Defense expert consultant in the field of forensic psychology because the interrogation of Sgt Honstein, the expected testimony of Government witnesses, and any mental health diagnosis will be probative at sentencing when discussing recidivism and mitigation. The Government has charged Sgt Honstein with violations of 118, UCMJ (Murder – Act Inherently Dangerous to Another), and Article 119, UCMJ (Involuntary Manslaughter). Both carrying the potential for significant amount of confinement in sentencing. In a case where the maximum punitive exposure includes life in prison, the Defense must be granted the opportunity to prepare a thorough presentencing

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case that includes a comprehensive analysis of the mitigating factors and extenuating circumstances of the alleged offenses, to include Sgt Honstein's recidivism risk.

FACTS

1. On 26 July 2024, the government provided the Defense with its initial witness list for *Honstein 1*.

2. Included in its witness list are the names of sixty-five (65) potential witnesses, including eleven (11) experts.

3. Dr. [redacted] has been identified by the Government as an expert witness in forensic psychiatry.

4. Dr. [redacted] is expected to provide expert testimony based on his "experience in the field and the examination and analysis of the evidence in this case."

5. On 25 October 24, Trial Counsel sent the Defense an RCM 701 Disclosure, in which Dr. [redacted] discusses recidivism.

6. On 10 January 2025, the Defense requested Government funding for expert consultation with Dr. [redacted] an expert in the field of forensic psychology and a mitigation specialist.

7. The Defense specified that their request for twenty (20) hours of consultation was based on conversations with Dr. [redacted] and was an estimate based on the length of the interrogation, interviews, and other evidence review in this case.

8. On 13 January 25, Trial Counsel negatively endorsed the Defense's request.

9. In their endorsement, Trial Counsel stated: "In the Defense's request, the Defense fails to acknowledge that Dr. [redacted] has been an appointed member of the Defense's team since 9 April 2024, and they fail to articulate any reason why Dr. [redacted] is unqualified to consult on the areas that they have identified."

10. On 16 January 2025, the Commanding General denied the Defense's request for production of Dr. [redacted]

11. On 15 January 2025, Col [redacted] emailed the Defense stating "I have not testified on sentencing mitigation. Although I have training in this area, since I have limited experience, I would not consider myself an expert."

BURDEN

As the moving party, the Defense has the burden of persuasion as to whether the military judge should compel the production of Dr. [redacted] R.C.M. 905(c)(2). The burden of proof is by a preponderance of the evidence. R.C.M. 905(c)(1).

LAW

As a matter of military due process, service members are entitled to expert assistance when necessary for an adequate defense. *United States v. Garries*, 22 M.J. 288, 290 (C.M.A. 1986). The right to supplement the defense team with expert assistance and witnesses is based on Article 46, UCMJ, M.R.E. 706, and R.C.M. 703(d). "The right to present a defense is a fundamental element of due process of law." *Id.* (internal quotation and citation omitted).

The standard for producing an expert consultant is "whether the assistance of the expert is necessary for an adequate defense." R.C.M. 703(d)(2)(A)(ii). Courts employ the

Freeman/Gonzalez test to decide on the production of an expert consultant for the Defense. *United States v. Freeman* sets out a two-part test, under which the Defense has the burden of showing a reasonable probability 1) that the expert would be of assistance; and 2) denial of the expert assistance would result in a fundamentally unfair trial. 65 M.J. 451, 458 (CAAF 2008). According to *United States v. Gonzalez*, the first part of the Freeman test is divided into three subparts: 1) why the expert assistance is needed; 2) what would the expert accomplish for the accused; and 3) why is the defense counsel unable to gather and present the evidence the expert assistant would be able to develop. 39 M.J. 459, 461 (CAAF 1991).

Freeman Part One: Dr. [redacted] would be of assistance to the Defense

Gonzalez Part One: Dr. [redacted] expert assistance is necessary. The Government's initial witness list includes Dr. [redacted] who the Government intends to qualify as an expert in the field of forensic psychiatry. Dr. [redacted] has reviewed the interrogation of Sgt Honstein, the interviews of other Government witnesses, and the short-form RCM 706 report. The Government may call Dr. [redacted] in sentencing, as he has already discussed the risk of recidivism with the Government, as reflected in Enclosure 10. The Defense cannot adequately review and understand the risks of recidivism and any mitigating factors, and cannot adequately prepare for a cross examination of this witness without similar expertise. The Government has recommended that the Defense utilize Col [redacted] to understand mitigation involved in this case, but Col [redacted] has stated that she has limited experience in this field and would not be considered an expert, as seen in enclosure 9.

Gonzalez Part Two: What Dr. [redacted] would accomplish. Dr. [redacted] will review and analyze Sgt Honstein's interrogation, as well as interviews of the Government's witnesses. He will also review the short-form RCM 706 report and conduct his own analysis to determine any

mitigating factors in this case. Lastly, Dr. [redacted] will assist the Defense in sentencing and potential cross examination of the Government's witnesses.

Gonzalez Part Three: The Defense Counsel cannot interpret the evidence or develop Dr. [redacted] expertise. Although Sgt Honstein is represented by defense counsel, counsel have neither the required background nor training in forensic psychology to fully understand or develop the issues without the assistance of an expert in this field. The Defense does not have sufficient training or practical experience to perform the necessary analysis and review of Sgt Honstein's interrogation, background, or short-form RCM 706 report to identify mitigating factors in this case. True expertise in this field takes specialized training and education, as reflected in enclosure (3).

Freeman Part Two: Denying Dr. [redacted] would be fundamentally unfair

The Government intends to offer the testimony of numerous expert witnesses, on the merits and in sentencing, including Dr. [redacted] Dr. [redacted] has reviewed the interrogation of Sgt Honstein, the short-form 706 report, as well as the interviews of other Government witnesses to identify risks of recidivism and identify any mitigation. The Defense requests the assistance of Dr. [redacted] because he is an expert in this field and is able to competently review the evidence in this case to identify factors in mitigation. He has all of the education, professional, and experimental credentials necessary for this type of case. Denial of this request would result in a fundamentally unfair trial and would impede Sgt Honstein's rights under the Fifth Amendment Due Process Clause, his Sixth Amendment right to effectively confront the witnesses against him, and his Sixth Amendment right to effective assistance of counsel.

RELIEF REQUESTED

11. **Request.** The Defense respectfully requests that the Court compel twenty (20) hours of confidential expert consultation with Dr. [redacted] to include the review of all relevant evidence in this case, an evaluation of Sgt Honstein and his background, and analysis of any potential mitigating factors.

12. **Evidence.** The Defense submits the following enclosures in support of its motion:

a. Enclosure 1: Government Initial Witness List

b. Enclosure 2: Defense Expert Consultant Request

c. Enclosure 3: Dr. [redacted] CV

d. Enclosure 4: Dr. [redacted] Fee Schedule

e. Enclosure 5: Trial Counsel Endorsement

f. Enclosure 6: Commanding General Endorsement

h. Enclosure 8: Declaration of Dr. [redacted]

i. Enclosure 9: Email from Col [redacted]

j. Enclosure 10: RCM 701 Disclosure Dr. [redacted]

13. **Oral Argument.** The Defense requests oral argument.

[redacted]
N. J. PAGANUCCI
Captain, U.S. Marine Corps
Defense Counsel

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CERTIFICATE OF SERVICE

I certify that I have delivered a copy of the foregoing document by email and NCORS to the Court on 21 January 2025.

[redacted]
N. J. PAGAN@CCI
Captain, U.S. Marine Corps
Defense Counsel

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

UNITED STATES v. DAKOTA M. HONSTEIN CAPTAIN /O-3 U. S. MARINE CORPS	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO COMPEL PRODUCTION OF AN EXPERT CONSULTANT** 23 Jan 25

1. Nature of the Motion.

The Government respectfully requests that the Court deny the Defense Motion to Compel Dr. [redacted] as an expert consultant.

2. Burden.

Pursuant to R.C.M. 905(c)(2) the Defense as the moving party has the burden of persuasion. The standard of proof is by a preponderance of the evidence.

3. Summary of Facts.

1. On 4 April 2024, the Government identified Colonel [redacted] USAF as a potential adequate government substitute and affirmatively requested that Dr. [redacted] serve as the Defense's confidential consultant.

2. In that request, the Government identified all the areas of forensic psychiatry that would potentially be at issue in this case and known to the Government at that time. Dr. [redacted] responded that she was willing and able to serve as a member of the defense team. On 9 April 2024, the Special Court Martial Convening Authority appointed Dr. [redacted] as the defense's confidential consultant in the field of forensic psychiatry. Per Dr. [redacted] CV, she is qualified to aid the defense in reviewing R.C.M. 706 evaluations and evaluate the risk of recidivism. In the

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Defense's request, the Defense fails to acknowledge that Dr. [redacted] has been an appointed member of the defense's team since 9 April 2024, and they failed to articulate any reason why Dr. [redacted] is unqualified to consult on the areas that they have identified.

3. On 10 January 2025, the Defense submitted a request for expert consultation with Dr. [redacted] in the field of psychology.
4. The Defense stated that Dr. [redacted] would aid the Defense by reviewing the R.C.M. 706 evaluation, the accused's interrogation, and aiding them in the area of mitigation and extenuation.
5. The Government inquired with the defense on the difference between Dr. [redacted] and Col [redacted] qualifications and/or abilities in being able to aid them in these areas.
6. The Defense responded that they planed on utilizing Dr. [redacted] on the merits and Dr. [redacted] in sentencing.
7. The Government routed the Defense's request to the Convening Authority recommending that the Defense's request be denied.
8. On 15 January 2024, after that request and endorsement was routed, the Defense reached out to Dr. [redacted] who stated that while she is trained in the area of recidivism, she has never testified about recidivism and is therefore uncomfortable testifying about recidivism.
9. Other facts in support of this motion are listed below.

3. Statement of Law.

I. Offers of Proof

Rule 29 of the Navy-Marine Corps Trial Judiciary Eastern Judicial Circuits Rules of Practice states: "Absent a stipulation, an offer of proof is not evidence upon which a finding of fact may be based."[1]

[1] *Rules of Practice for Eastern Judicial Circuit*, Navy-Marine Corps Trial Judiciary (28 September 2023).

II. Production of Expert Consultants

The caselaw follows *Freeman/Gonzalez* test to decide on the production of an expert consultant for the Defense. In *United States v. Freeman*, there is a a two-part test, under which the Defense has the burden of showing a reasonable probability 1) that the expert would be of assistance; and 2) denial of the expert assistance would result in a fundamentally unfair trial. 65 M.J. 451, 458 (CAAF 2008). According to *United States v. Gonzalez*, the first part of the Freeman test is divided into three subparts: 1) why the expert assistance is needed; 2) what would the expert assistance accomplish for the accused; and 3) why is the defense counsel unable to gather and present the evidence the expert assistant would be able to develop. 39 M.J. 459, 461 (CAAF 1991).

4. Argument.

The Defense has failed to meet its burden.

As the moving party, the Defense bears the burden of persuasion on any factual issue necessary to decide the motion.[2] The standard of proof is by a preponderance of the evidence.[3] Rule 29 of the Navy-Marine Corps Trial Judiciary Eastern Judicial Circuits Rules of Practice states: "Absent a stipulation, an offer of proof is not evidence upon which a finding of fact may be based."[4]

Turning to the *Freeman/Gonzalez* test, the Defense has failed on all prongs. It is demonstrated in Dr. [redacted] CV, and her email with the Defense that she is trained in all areas identified by the Defense (i.e. R.C.M. 706, recidivism, and interrogations). Notably, it was not until after the request was routed did the Defense inquire with Dr. [redacted] on her level of comfort in testifying about recidivism despite the Government's inquiry. Granting Dr. [redacted] would be cumulative as she is qualified to assist in all the areas identified by the Defense.

[2] MCM, *supra* note 2, R.C.M. R.C.M. 905(c)(2).
[3] MCM, *supra* note 2, R.C.M. R.C.M. 905(c)(1).
[4] *Rules of Practice for Eastern Judicial Circuit*, Navy-Marine Corps Trial Judiciary (28 September 2023).

5. **Relief Requested.**

For the aforementioned reasons, the Government respectfully requests that the Court deny the Defense Motion to Compel Dr. [redacted] as an expert consultant.

6. **Evidence.**

The Government adopts the enclosures in the Defense's Motion to Compel Expert Consultant for Dr. [redacted]

7. **Oral Argument.**

The Government does not oppose oral argument. The Government also reserves the right to supplement this motion in the future.

[redacted]

R. D. ANDERSON
Captai, U.S. Marine Corps
Special Trial Counsel

CERTIFICATE OF SERVICE

I hearby certify that a copy of the foregoing motion was served on the Court and opposing counsel via electronic mail on 23 Jan 25.

[redacted]

R. D. ANDERSON
Captain, U.S. Marine Corps
Special Trial Counsel

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

UNITED STATES **V.** **DAKOTA S. HONSTEIN** **SERGEANT / E-5** **USMC**	**DEFENSE MOTION TO COMPEL EXPERT CONSULTATION (Latent Print)** **21 January 2025**

MOTION

Pursuant to R.C.M. 701 and R.C.M. 703(d)(2)(A), the Defense moves to compel the production of Mr. [redacted] as a confidential Defense expert consultant in the field of latent print examination, for a total of **sixteen (16) hours** of expert consultation, to include physical examination of the ammunition casing and Playstation involved in this case.

SUMMARY

This Court should compel the production of Mr. [redacted] as a confidential Defense expert consultant in the field of latent print examination because the circumstances and causation of the discharge of the firearm are of central importance in this case. Additionally, the interrogation of Sgt Honstein and his recollection of what occurred may play a crucial role. The Government has charged Sgt Honstein with violations of Article 118, UCMJ (Murder – Act Inherently Dangerous to Another), and Article 119, UCMJ (Involuntary Manslaughter). The Defense must have knowledge of and understand the latent prints that were discovered and where latent prints were not discovered in this case to adequately prepare a defense and cross examination of the Government's latent print examiner.

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FACTS

1. On 26 July 2024, the government provided the Defense with its initial witness list for *Honstein 1*.

2. Included in its witness list are the names of sixty-five (65) potential witnesses, including eleven (11) experts.

3. Ms. [redacted] has been identified by the Government as an expert in the field of latent print examination.

4. Ms. [redacted] is expected to provide expert testimony based on her "experience in the field and the examination and analysis of the evidence in this case."

5. On 10 January 2025, the Defense requested the Government funding for sixteen (16) hours of expert consultation with Mr. [redacted] and expert in the field of latent print examination.

6. The Defense specified that their request for sixteen (16) hours of consultation was based on conversations with Mr. [redacted] Mr. [redacted] estimated that he required:

   a. Eight (8) hours to review relevant discovery, examine the ammunition casing and other physical evidence (Playstation and Playstation equipment);

   b. Four (4) hours to review and interpret the examination and any testing results; and

   c. Four (4) hours to consult with Defense Counsel.

7. On 14 January 25, Trial Counsel negatively endorsed the Defense's request.

8. In their endorsement, Trial Counsel stated:

"The Defense has been in receipt of Ms. [redacted] report since the summer of 2024. As of the date of endorsement, no member of the defense team has interviewed or attempted to interview Ms. [redacted] in order to educate themselves about her findings or the field of study involving latent print examination."

9. On 21 January 25, the Defense interviewed Ms. [redacted] about her findings and field of study. During that interview, Ms. [redacted] stated:

a. The forensic latent print examination discipline is not standardized by any national association or entity.

b. Standards for the forensic latent print examination field are determined by the entity you are working for.

c. The forensic latent print examiner determines the suitability of a print for comparison.

d. Reported latent print statistics are generated by FRStat software, developed by a U.S. Criminal Investigation Laboratory (USACIL) forensic examiner and the forensic latent print examiner branch head.

e. Standards within the FRStat software are established by USACIL.

10. On 16 January 25, the Commanding General denied the Defense's request consistent with Trial Counsel's recommendation.

BURDEN

As the moving party, the Defense has the burden of persuasion as to whether the military judge should compel the production of Mr. [redacted] R.C.M. 905(c)(2). The burden of proof is by a preponderance of the evidence. R.C.M. 905(c)(1).

LAW

As a matter of military due process, service members are entitled to expert assistance when necessary for an adequate defense. *United States v. Garries*, 22 M.J. 288, 290 (C.M.A. 1986). The right to supplement the defense team with expert assistance and witnesses is based on Article 46, UCMJ, M.R.E. 706, and R.C.M. 703(d). Denying an accused expert assistance concerning the "linchpin of the prosecution case" amounts to denying the accused the right to present a defense. *United States v. McAllister*, 64 M.J. 248, 252 (CAAF 2007)(citation omitted). "The right to present a defense is a fundamental element of due process of law." *Id.* (internal quotation and citation omitted).

The standard for producing an expert consultant is "whether the assistance of the expert is necessary for an adequate defense." R.C.M. 703(d)(2)(A)(ii). Courts employ the *Freeman/Gonzalez* test to decide on the production of an expert consultant for the Defense. *United States v. Freeman* sets out a two-part test, under which the Defense has the burden of showing a reasonable probability 1) that the expert would be of assistance; and 2) denial of the expert assistance would result in a fundamentally unfair trial. 65 M.J. 451, 458 (CAAF 2008). According to *United States v. Gonzalez*, the first part of the Freeman test is divided into three subparts: 1) why the expert assistance is needed; 2) what would the expert assistance accomplish for the accused; and 3) why is the defense counsel unable to gather and present the evidence the expert assistant would be able to develop. 39 M.J. 459, 461 (CAAF 1991).

Freeman Part One: Mr.. [redacted] would be of assistance to the Defense

Gonzalez Part One: Mr. [redacted] expert assistance is necessary. The Government's initial witness list includes Ms. [redacted] who the Government intends to qualify as an

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expert in the field of latent print examination. Ms. [redacted] also conducted a latent print analysis on the firearm, cartridge case, ammunition, magazines, Playstation console, Playstation headsets, and Playstation controllers found in Sgt. Honstein's barracks room. Ms. [redacted] is employed by the Government and is expected to testify as a Government witness about matters including corresponding ridge detail, transfer of latent prints, and any prints at issue in this case. Ms. [redacted] stated that standards for interpretation and collection of latent prints differ depending on the employer and organization, as there is no national standard. Ms. [redacted] utilizes FRStat, a software developed by USACIL to assist in interpreting her findings. The Defense cannot adequately review and understand the physical evidence, the differences in standards utilized, and cannot adequately prepare for a cross examination of this witness without similar expert assistance.

Gonzalez Part Two: What Mr. [redacted] would accomplish. Mr. [redacted] will inspect items tested by USACIL (ammunition casing, Playstation, and accompanying Playstation equipment), analyze, and review the reports generated by Ms. [redacted] Mr. [redacted] will consult with and educate the Defense in several areas to include fingerprints, the transfer of latent prints, correspondence levels involving latent prints, and the differing standards used by latent print examiners. He will also assist the Defense in the presentation of its case and potential cross examination of the Government's witnesses.

Gonzalez Part Three: The Defense Counsel cannot interpret the evidence or develop Mr. [redacted] expertise. Although Sgt Honstein is represented by defense counsel, counsel have neither the required background nor training in latent print examination to fully understand or develop the issues without the assistance of an expert in this field. The Defense does not have sufficient training or practical experience to perform the necessary testing, analysis and review of the items

found in Sgt Honstein's barracks room. True expertise in this field takes specialized training and education, as reflected in enclosure (3).

Freeman Part Two: Denying Mr. [redacted] would be fundamentally unfair

The Government intends to offer the testimony of numerous expert witnesses, including a latent print examiner, Ms. [redacted] Ms. [redacted] conducted an examination of the firearm, magazines, ammunition, ammunition casing, Playstation, and accompanying Playstation equipment. She then generated a report of her findings. The Defense requests the assistance of Mr. [redacted] because he is an expert in this field and is able to replicate the Government's examination and testing. He has all of the educational, professional and experimental credentials necessary for this type of case. Denial of this request would result in a fundamentally unfair trial and would impede Sgt Honstein's rights under the Fifth Amendment Due Process Clause, his Sixth Amendment right to effectively confront the witnesses against him, and his Sixth Amendment right to effective assistance of counsel.

RELIEF REQUESTED

11. **Request.** The Defense respectfully requests that the Court compel sixteen (16) hours of confidential expert consultation with Mr. [redacted] to include physical examination and testing of the ammunition casing and Playstation with accompanying equipment involved in this case.

12. **Evidence.** The Defense submits the following enclosures in support of its motion:

a. Enclosure 1: Government Initial Witness List

b. Enclosure 2: Defense Expert Consultant Request

c. Enclosure 3: Mr. [redacted] CV

d. Enclosure 4: Mr. [redacted] Fee Schedule

e. Enclosure 5: Trial Counsel Endorsement

f. Enclosure 6: Commanding General Endorsement

g. Enclosure 7: USACIL Latent Print Report - Gaming Devices

h. Enclosure 8: USACIL Latent Print Report - Firearm

i. Enclosure 9: Affidavit – [redacted] Interview

13. **Oral Argument.** The Defense requests oral argument.

[redacted]
N. J. PAGANØCCI
Captain, U.S. Marine Corps
Defense Counsel

CERTIFICATE OF SERVICE

I certify that I have delivered a copy of the foregoing document by email and NCORS to the Court on 21 January 2025.

[redacted]
N. J. PAGANØCCI
Captain, U.S. Marine Corps
Defense Counsel

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

UNITED STATES v. DAKOTA M. HONSTEIN CAPTAIN /O-3 U. S. MARINE CORPS	**GOVERNMENT RESPONSE TO DEFENSE MOTION TO COMPEL PRODUCTION OF AN EXPERT CONSULTANT** 23 Jan 25

1. Nature of the Motion.

The Government respectfully requests that the Court deny the Defense Motion to Compel Mr. Byrd as an expert consultant.

2. Burden.

Pursuant to R.C.M. 905(c)(2) the Defense as the moving party has the burden of persuasion. The standard of proof is by a preponderance of the evidence.

3. Summary of Facts.

1. In July 2024, the Government discovered the USACIL package on the Defense. This discovery included the full latent print report.

2. On 10 January 2025, the Defense requested the Government funding for sixteen (16) hours of expert consultation with Mr. [redacted] and expert in the field of latent print examination.

3. The Defense specified that their request for sixteen (16) hours of consultation was based on conversations with Mr. [redacted]

4. Upon receipt of the request, the Government contacted the USACIL latent print examiner, Ms. [redacted] who informed the Government that the Defense, as of 13 January 2025, had never contacted or attempted to contact her; despite her name and contact information being on

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the Government's witness list.

5. On 14 January 25, Trial Counsel negatively endorsed the Defense's request.

6. Other facts in support of this motion are argued below.

3. Statement of Law.

I. Offers of Proof

Rule 29 of the Navy-Marine Corps Trial Judiciary Eastern Judicial Circuits Rules of Practice states: "Absent a stipulation, an offer of proof is not evidence upon which a finding of fact may be based."[1]

II. Production of Expert Consultants

The caselaw follows *Freeman/Gonzalez* test to decide on the production of an expert consultant for the Defense. In *United States v. Freeman,* there is a a two-part test, under which the Defense has the burden of showing a reasonable probability 1) that the expert would be of assistance; and 2) denial of the expert assistance would result in a fundamentally unfair trial. 65 M.J. 451, 458 (CAAF 2008). According to *United States v. Gonzalez*, the first part of the Freeman test is divided into three subparts: 1) why the expert assistance is needed; 2) what would the expert assistance accomplish for the accused; and 3) why is the defense counsel unable to gather and present the evidence the expert assistant would be able to develop. 39 M.J. 459, 461 (CAAF 1991).

4. Argument.

The Defense has failed to meet its burden.

As the moving party, the Defense bears the burden of persuasion on any factual issue necessary to decide the motion.[2] The standard of proof is by a preponderance of the evidence.[3] Rule 29 of the Navy-Marine Corps Trial Judiciary Eastern Judicial Circuits Rules of Practice states:

[1] *Rules of Practice for Eastern Judicial Circuit*, Navy-Marine Corps Trial Judiciary (28 September 2023).
[2] MCM, *supra* note 2, R.C.M. R.C.M. 905(c)(2).
[3] MCM, *supra* note 2, R.C.M. R.C.M. 905(c)(1).

"Absent a stipulation, an offer of proof is not evidence upon which a finding of fact may be based."[4]

Turning to the *Freeman Gonzalez* test, the Defense has failed on both prongs. First, the Defense has failed to demonstrate why expert assistance in the field of latent print is necessary. It was not until after the Government's negative endorsement did the Defense ever contact Ms. [redacted] about the field of latent print examination, her report, and her findings. The Defense has failed to attached any evidence of how Mr. [redacted] assistance is needed in addition to the assistance provided by Ms. [redacted] They have not provided any evidence, outside of proffer, of how Mr. [redacted] assistance is needed other than they want a latent print examiner.

Second, the Defense has failed the second prong of the test. The Defense proffered that Mr. [redacted] would retest the ammunition and the Playstation. The Defense fails to articulate what this would accomplish or how this would not lead to contamination of evidence as that ammunition has already been sent to not only USACIL, but also Mr. [redacted] the Defense's firearms expert in September 2024. The Defense rests heavily on the fact that the field of latent print examination is not a standardized field, however, the Defense fails to go any further. The Defense fails to articulate why that matters, or even articulate (even proffer) that Mr. [redacted] standards or procedures are different from that of Ms. [redacted]

Lastly, the Defense has failed to demonstrate that they are unable to gather and present evidence with expert assistance. The history of the Defense's request shows that they had not attempted to gather or present evidence prior to requesting expert consultation. Despite having access to Ms. [redacted] for over eight months, the Defense failed to attempt to educate themselves on the field, her findings, etc. When they finally did contact her, on 21 January 2025, they received expert assistance.

Mr. [redacted] requested assistance is cumulative with Mr. [redacted]

[4] *Rules of Practice for Eastern Judicial Circuit*, Navy-Marine Corps Trial Judiciary (28 September 2023).

Although not fully articulated in their motion, in the Defense's request they stated that Mr. [redacted] would not only aid in the field of latent print examination, but also in the field of crime scene examination and analysis. This portion of their request is cumulative with the area of expertise of Mr. [redacted] In addition to being a firearms expert, Mr. [redacted] is also an expert in the field of crime scene examination. Therefore, any additional consultation in this field of expertise is cumulative with the already Defense's already granted confidential consultant, Mr. [redacted]

5. **Relief Requested.**

For the aforementioned reasons, the Government respectfully requests that the Court deny the Defense Motion to Compel Mr. [redacted] as an expert consultant.

6. **Evidence.**

The Government adopts the enclosures in the Defense's Motion to Compel Expert Consultant for Mr. [redacted]

7. **Oral Argument.**

The Government does not oppose oral argument.

[redacted]

R. D. ANDERSON
Captai, U.S. Marine Corps
Special Trial Counsel

CERTIFICATE OF SERVICE

I hearby certify that a copy of the foregoing motion was served on the Court and opposing counsel via electronic mail on 23 Jan 25.

[redacted]

R. D. ANDERSON
Captain, U.S. Marine Corps
Special Trial Counsel

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

UNITED STATES **V.** **DAKOTA S. HONSTEIN** **SERGEANT / E-5** **USMC**	**GOVERNMENT RESPONSE TO THE DEFENSE MOTION TO DISMISS** **(Defective Referral and Art 10)** **20 December 2024**

NATURE OF THE MOTION

This is the Government's response to the Defense motion to dismiss for a defective referral and Art 10. On 13 December the Defense filed a motion to dismiss the charges based on an improper referral and violation of Article 10, UCMJ. The Defense had previously challenged the referral action and the Court denied that Motion. The Defense has also filed a previous speedy trial motion under R.C.M. 707, which was also denied by this Court. While the previous ruling and motions are part of the Record, the Government will reiterate some of the more specific points below as the Court indicated it may rule on the motion without oral argument, given the Defense Counsel's availability.

SUMMARY

The Government took appropriate actions in accordance with the Rules for Court-Martial and the applicable case law to comply with the Military Judge's ruling that the government is required to expressly and with specificity plead the intentional act under 118(3). After a request to make an amendment to the charge sheet as a minor change, and a request to the defense for joinder of an amended Charge, the Government was forced to withdraw and prefer the charges anew. The Court dismissed the Murder charge for lack of a new Article 32 preliminary hearing.

The Government preferred the additional charge and conducted an Article 32 hearing, after additional defense requested delay. The additional charge now reflects the exact theory the parties addressed at the previous Article 32 hearing where the Accused was provided with all the rights available under R.C.M. 405. There is a legitimate Governmental interest in the appropriate charges being tried at court-martial, regardless of the findings. Accordingly, the Defense's motion and requested relief should be **DENIED**.

FACTS

1. On 27 Jan 24, the Accused was placed in pre-trial confinement. (See Encl. 24).
2. On 29 Jan 24, the Defense Services Organization was notified of the Accused's status. (See Encl. 24).
3. The IRO hearing was scheduled for 1 February 2024. (See Encl. 24).
4. On 1 February 2024, detailed defense counsel, Capt Carson emailed the IRO informing him that he would not be available to conduct the IRO hearing due to just being detailed the day before and being stationed in Quantico. Capt Carson requested that the IRO hearing be moved to a later date. (See Encl. 24).
5. Over the Government's objection, the IRO hearing was rescheduled to 2 Feb 24. (See Encl. 24).
6. Capt Carson objected to conducting the hearing on 2 Feb 24, citing that he would be in Court on 2 Feb 24 and executing TAD orders to Charlotte, NC on 4 Feb. Capt Carson requested that the hearing be continued until 9 Feb 24 as his position was that the Defense could waive the 10-day extension limit under R.C.M. 305. (See Encl. 24).
7. The IRO rescheduled the hearing to 4 Feb 24 via teleconference. (See Encl. 24).

8. The IRO was then rescheduled to 5 Feb 24, the 10th day of the Accused's entering pre-trial confinement. The IRO gave all parties the ability to be present in person, via VTC, or teleconference. The Defense continued their objection and refused to be present via VTC or teleconference. (See Encl. 24).

9. On 5 Feb, the IRO hearing was conducted and the Accused was retained in the brig. (See Encl. 24).

10. On 9 Feb, the Government requested excludable delay from the Convening Authority due to multiple evidentiary items being sent to USACIL for forensic testing. The Defense did not object to the Government's request. On 19 Feb, the Convening Authority granted thirty (30) days of excludable delay. (See Encl. 24).

11. On 12 Feb, defense counsel requested a rehearing of the IRO. The IRO denied the request and told defense that they could file a motion with the Court pursuant to Article 30a (See Encl. 24).

12. On 4 Mar 24, the Defense requested that the Convening Authority order an R.C.M. 706 hearing. (See Encl. 24).

13. On 8 Mar 24, the Government requested excludable delay from the Convening Authority due to USACIL still testing multiple evidentiary items and the defense's request for an R.C.M. 706 examination. (See Encl. 24).

14. On 11 Mar 24, the Convening Authority granted thirty (30) days of excludable delay over the Defense's objection. (See Encl. 24).

15. On 3 April 2024, the Government asked Dr. [redacted] USAF if she was willing and available to serve as the Defense's confidential consultant in the area of forensic psychiatry.

The Government stated that topics at issue may include, among other things, R.C.M. 706 evaluations and false confessions (See Enclosure 23)

16. On 4 April 2024, Dr. [redacted] responded that she would be willing and available to serve in as the Defense's confidential consultant. (See Enclosure 23)

17. On 9 Apr 24, charges were preferred against the Accused.

18. On 12 Apr 24, the 706 board was conducted.

19. On 17 Apr 24, the Government submitted the Article 32 appointing order to the PHO. (See Encl. 24).

20. On 30 Apr 24, the parties received the 706 report. (See Encl. 24).

21. The PHO scheduled the Article 32 hearing for 22 April 2024. (See Encl. 24).

22. The Defense requested that the Art 32 hearing be moved to a later date, but did not specify a date of availability. (See Encl. 24).

23. The Government emailed Defense in order to ascertain their availability to conduct the Article 32 hearing. The Defense did not respond. (See Encl. 24).

24. On 22 Apr 24, the Government renewed its request with the PHO to schedule the Article 32 hearing to 29 Apr 24, and requesting that all delay be attributable to the defense. (See Encl. 24).

25. The PHO rescheduled the hearing to 29 Apr 24 and ordered that all delay from 22 April to 29 April was attributed to the defense, a period of eight (8) days. (See Encl. 24).

26. On 24 Apr 24, the Defense submitted a continuance request to the Convening Authority requesting that the Article 32 hearing occur on 10 May 24. (See Encl. 24).

27. On 24 Apr 24, the Convening Authority granted the Defense's continuance request and found that the delay between 29 April and 10 May was attributable to the defense, a period of twelve (12) days. (See Encl. 24).

28. On 10 May, the Article 32 preliminary hearing was conducted.

29. On 15 May, the Defense submitted its RCM 405(l) comments to the PHO.

30. On 28 May 24, PHO issued the Article 32 report.

31. On 6 Jun 24, the Government requested excludable delay from the Convening Authority due to USACIL pending the review and publication of forensic reports on multiple evidentiary items. The Defense did not object to the Government's request. (See Encl. 24).

32. On 7 Jun 24, the Convening Authority granted ten (10) days of excludable delay. (See Encl. 24).

33. On 3 July 24, charges were referred against the Accused.

34. On 8 July 24, the Government submitted its motion for docketing, requesting that the Court arraign the Accused on 10 July, the day after the five-day statutory waiting period. (See Encl. 24).

35. On 10 July 24, the Defense requested the arraignment take place on 6 August due to scheduling conflicts between the two-defense counsel. (See Encl. 24).

36. The Government requested that all delay from 10 July to 6 August be attributed to the defense. The Court refused to rule on delay but noted that "the Government has present the case to the Court and demonstrated its readiness to proceed." (See Encl. 24).

37. The Accused was arraigned on 6 August 2024.

38. In total, ninety (90) days of pre-referral excludable delay was granted under R.C.M. 707(c).

39. There was an additional outstanding twenty – seven (27) days of excludable delay that was requested by the Government to the Court post-referral between 10 July and 6 August for the Accused's first arraignment.

40. The following table is provided to demonstrate that the previous court-martial's RCM 707 clock tolled on day 102, without considering the still outstanding request from the Government for this Court to exclude twenty-seven days from the request for docketing to the Defense's requested arraignment date. Furthermore, this table includes actions by the Government and delay attributable to the defense:

EVENT/ACTION	DATE	TOTAL DAYS ELAPSED	EXCLUDED DAYS	R.C.M. 707 DAYS
Pretrial Confinement	27 Jan 2024	0	NONE	0
Excludable Delay #1 requested	9 Feb 2024	13	NONE	13
Excludable Delay #1 granted	19 Feb 2024	23	30	-7
Excludable Delay #2 requested	8 Mar 2024	41	NONE	11
Excludable Delay #2 granted	11 Mar 2024	44	30	-16
Charges Preferred	9 April 2024	73	NONE	13
Article 32 Appointing Order	17 April 2024	81	NONE	21
PHO granted delay attributable to Defense	22 April 2024	86	8	18
Defense request for continuance submitted	24 April 2024	88	NONE	20
Defense continuance request granted and delay excluded	24 April 2024	88	12	8
Article 32 Conducted	10 May 2024	104	NONE	24
Excludable Delay #3 request submitted	6 June 2024	131	NONE	51
Excludable Delay #3 granted	7 June 2024	132	10	42
Charges referred	3 July 2024	158	NONE	68
Motion for Docketing Submitted and excludable delay requested (27 days)	8 July 2024	163	NONE	73
Arraignment	6 August 2024	192	NONE	102
Withdrawal and dismissal of Charges	26 October 2024	0	NONE	1
Reprefferal and Rereferral of Charges	26 October 2024	0	NONE	1

Court withdrawal of Charge I	1 November 2024	7	NONE	7
Article 32 Appointing Order	4 November 2024	10	NONE	10
PHO granted delay attributable to Defense	6 November 2024	12	NONE	12
Article 32 Conducted	13 November 2024	19	6	13
Additional Charge I referred	3 December 2024	39	None	33
Arraignment	6 December 2024	42	None	36

41. On 24 September 2024, the Court held an Article 39(a) session in which multiple motions were litigated. During that session, the Court *sua sponte* brought up the issue of the charging language of then Sole Specification, Charge I. (See Encl. 1)

42. After supplemental briefings from the parties, on 15 October 2024, the Court issued a written ruling that the Government, based on the charging language, must prove that the Accused intended to shoot the victim, [redacted] (See Encl. 2)

43. On 17 October 2024, the Government filed a request with the Court requested to make a minor change to sole specification of Charge I (See Encl. 3).

44. On 23 October 2024, the Court DENIED the Government's request to make a minor change, ruling instead that the requested change would be a major change. (See Encl. 4)

45. On 26 October 2024, the Government notified the Defense of its intent to withdraw and prefer anew some, or all, of the charges consistent with its motion to make a minor change. The Government inquired as to whether the Defense would object to the new charges being joined pursuant to R.C.M. 601(e)(2). (See Encl. 5)

46. In that same email correspondence, the Government notified the Defense that it would seek to effectuate the withdrawal, preferral and referral so as to preserve the currently docketed trial dates, minimize impact on PTC, and allow the parties an opportunity to litigate

any preliminary issues before the scheduled docketed trial dates. The Government maintained travel for all witnesses and experts. (See Encl. 5).

47. On 26 October 2024, the Defense notified the Government that they would object to any joinder of charges. (See Encl. 5).

48. On 26 October 2024, the Government withdrew, dismissed, amended sole specification of Charge I, re-preferred, and re-referred all charges and specifications. (See Encl. 6).

49. On 27 October 2024, the Government informed the Court of the withdrawal of charges, amendment of sole specification of Charge I and the rereferral of all charges. (See Encl. 7).

50. On 27 October 2024, the Government notified the Defense of its intent to request arraignment to be scheduled on 29 October 2024, which would be within the five-day statutory waiting period. The Government inquired as to whether the Defense would be willing to waive the waiting period. (See Enclosure 8).

51. On 28 October 2024, the Defense objected to the arraignment prior to the expiration of the five day statutory waiting period. (See Encl. 9).

52. On 29 October 2024, the Court ordered that the arraignment would take place on 1 November 2024. (See Encl. 10).

53. On 30 October 2024, the Defense filed a Motion to Dismiss due to R.C.M. 707 violation and Defective Referral motion. (See Encl. 11)

54. On 31 October 2024, the Government filed its responses to both motions.

55. On 1 November 2024, the Court ruled that the Government had withdrew and rereferred for a proper purpose, thereby restarting the R.C.M. 707 clock on 26 October 2024.

56. The Court also withdrew sole specification of Charge I and stated that the Government would need to conduct and Article 32 hearing for that charge.

57. Pursuant to the Defense and Government's request, the Court did not arraign the Accused on 1 November.

58. On 1 November 2024, the Government repreferred Additional Charge I. (See Encl. 12)

59. On 4 November 2024, the Preliminary hearing officer (PHO) ordered the Article 32 Hearing be conducted on 8 November 2024 and set milestones accordingly. (See Encl. 13)

60. On 6 November 2024, the Defense requested that the Article 32 hearing be continued until 13 November 2024. (See Encl. 14)

61. On 6 November 2024, pursuant to the Court's denial of Capt Carson's motion to withdraw and the Court's order that the Government make Capt Carson available for future sessions of trial post his EAS, the Government emailed Capt Carson asking him for information to facilitate the Court's order. Capt Carson did not respond. (See Enclosure 22)

62. On 6 November 2024, the PHO granted the Defenses request and found that all delay from 8 November to 13 November as attributable to the Defense. (See Encl. 15)

63. On 7 November 2024, the then detailed defense counsel, Capt Carson, informed the Court that his position regarding his conflict with continued representation with the Accused was that his EAS would not need to be involuntarily extended and that he maintained his request for the Court to involuntarily sever his representation of the Accused.

64. On 8 November 2024, the Court ordered the Accused receive conflict-free counseling regarding potential conflicts with Capt Carson and Capt Lipositz, and for the parties to discuss this issue on either 13 November or 14 November following the Article 32 hearing. (See Encl. 16)

65. On 13 November 2024, the Article 32 hearing was conducted.

66. On 14 November 2024, the Defense informed the Court and the Government that the detailing authority intended to detail LtCol Neely and Capt Paganucci. (See Encl. 17)

67. On 14 November 2024, the Government submitted closing comments to the PHO.

68. On 18 November 2024, the Defense submitted its written response to the PHO. (See Encl. 18).

69. On 19 November 2024, the Court issued a written ruling on the R.C.M. 707 issue. In that ruling, the Court stated that as of 19 November the R.C.M. 707 clock was on day 25. The Court also stated, "Assuming the Government seeks to arraignment on any combination of charges, this Court will re-assess the R.C.M. 707 calculation at that time. (See Encl. 19).

70. On 19 November 2024, the PHO issued his report. (See Encl 20).

71. On 3 December 2024, Additional Charge I was referred. (See Encl 21).

72. On 6 December 2024, the Accused was arraigned on all charges.

73. As of the date of this filing, the Defense has not demanded speedy trial.

LAW

"Improper withdrawal includes any interference with the free exercise of a constitutional or Codal right or with the impartiality of a court-martial. *Williams*. Manipulating members to "adjust" court sentences (*Williams*; *Walsh*), retaliation for defense requested witnesses (*Petty*), and changing venue to avoid witness expenses (*Fleming*) are among improper reasons for withdrawal. The mere consequential effect of an accused being exposed to potentially more severe punishment, however, is not conclusive of an improper reason." *Hardy*, 4 M.J at 27 (Cook J., dissenting). *Cf. Lord*, at 13 U.S.C.M.A. at 81; 32 C.M.R. at 81; *Wells*. The charge joinder policy of R.C.M. 601(e)(2), upon which the convening authority purported to rely, is, by its terms, permissive, not absolute. *United States v. Thomas*, 17 U.S.C.M.A. 22, 37 C.M.R. 286

(1967). The policy is normally applicable at the referral stage of a case. It follows that the strength of the policy weakens as the case moves into subsequent stages where other policies and considerations are brought to bear. *United States v. Koke*, 32 M.J. 876, 881 (N-M.C.M.R. 1991) Changes may also be made at any time before findings if they do not impact on the "substantial right[s] of the accused." RCM 603(c). The comparable element of prejudice to the "substantial rights of the defendant" in the Federal Rule is usually interpreted as requiring some showing of surprise which will interfere with the defendant's presentation at trial. *United States v. Sullivan*, 42 M.J. 360, 365 (1995)(emphasis added). "Since such prejudice may be avoided before trial by granting an appropriate continuance, an amendment made before trial is unlikely to be held to have injured the substantial rights of the defendant where a continuance was granted or none was requested." W. LaFave and J. Israel, 2 *Criminal Procedure* § 19.2(g) at 462 (1984). *United States v. Moreno*, 46 M.J. 216, 218-19 (C.A.A.F. 1997)

When the basic facts remain unchanged, other overt acts may be substituted or amended. We reject the defense argument that the amendment "converts a specification which did not allege an offense into one which does." *Id.*(emphasis added)

It was, however, well-established at the time of appellant's court-martial that he must be prepared to defend against overt acts other than those alleged in the specification. *See United States v. Collier*, 14 M.J. 377 (CMA 1983). Moreover, the prosecution's proof of the amended overt act was drawn from the same witness testifying about the same telephone conversation concerning the same illegal plan to sell the stolen drugs. *See United States v. Adamo*, 534 F.2d 31, 39 (3d Cir. 1976) (difference in facts slight). *Id.*

"I do acknowledge that, in *Reese*, the CAAF explicitly held that R.C.M. 603(d) does not have a separate prejudice component. 76 M.J. at 301-02. That said, I do not read *Reese* to negate

the full language of R.C.M. 603(a). Specifically, in my view, *Reese* does not preclude us from considering the likelihood of misleading the accused in deciding whether a change is major in the first place. In fact, I read *Reese* to encourage appellate courts to consider both "unfair surprise" and similar concepts to avoid the underlying "evil" it identified: insufficient notice to the accused. *United States v. Moore*, 2019 CCA LEXIS 388, at *16 (A. Ct. Crim. App. Oct. 2, 2019) (Dissent).

"Despite learning that its evidence on this charge was not legally sufficient two days before trial, for some reason the government chose not to amend the charge. There is no dispute that the government controls the charge sheet, and that Reese was on notice that he had to defend against an allegation that he licked the complaining witness's penis. The defense was entitled to rely on the charge sheet and the government's decision not to amend the charge sheet prior to trial. *United States v. Reese*, 76 M.J. 297, 301 (C.A.A.F. 2017)"

"While changing the means by which a crime is accomplished may constitute a slight error under the appropriate circumstances, those circumstances are not present here. *See, e.g., United States v. Murray*, 43 M.J. 507, 511 (A.F. Ct. Crim. App. 1995)." *United States v. Reese*, 76 M.J. 297, 301 (C.A.A.F. 2017).

"Appellant could have requested a bill of particulars to obtain more precise information about the Government's theory or theories of liability, R.C.M. 906(b)(6) & Discussion, but did not do so." *United States v. Nicola*, 78 M.J. 223, 226 n.2 (C.A.A.F. 2019)

Fairness and common sense, not technicalities, should rule the law." *United States v. Townes*, 52 M.J. 275, 277 (2000)

The Accused's right to speedy trial is a shield, not a sword." *United States v. King*, 30 M.J. 59, 66 (CMA 1990). Furthermore, the defense "cannot be responsible for or agreeable to delay

and then turn around and demand dismissal for that same delay." *Id.* The Supreme Court has emphasized that "failure to assert the right [to a speedy trial] will make it difficult for a defendant to prove that he was denied a speedy trial." *Barker*, 40 U.S. at 532.

The invited error doctrine prevents a party from "creat[ing] error and then tak[ing] advantage of a situation of his own making [on appeal]." Eggen, 51 M.J. at 162 (internal quotation marks omitted) (quoting Raya, 45 M.J. at 254). As a result, "[i]nvited error does not provide a basis for relief." Raya, 45 M.J. at 254; *United States v. Crigler*, 10 C.M.A. 263, 265, 27 C.M.R. 337, 339 (1959); *United States v. Beer*, 6 C.M.A. 180, 185, 19 C.M.R. 306, 311 (1955)." *United States v. Martin*, 75 M.J. 321, 325 (C.A.A.F. 2016)

The invited error doctrine recognizes that a party may not invite or provoke error at trial and then complain about the error on appeal. *United States v. Wells*, 519 U.S. 482, 488, 117 S. Ct. 921, 137 L. Ed. 2d 107 (1997); *United States v. Dinges*, 55 M.J. 308, 311 (C.A.A.F. 2001)." *United States v. Harvey*, 67 M.J. 758, 763 (A.F. Ct. Crim. App. 2009)

"The invited error doctrine prevents a party from 'creat[ing] error and then tak[ing] advantage of a situation of his own making [on appeal].'" *Martin*, 75 M.J. at 325 (alterations in original) (quoting *United States v. Eggen*, 51 M.J. 159, 162 (C.A.A.F. 1999)). Invited error provides no basis for relief. Id." *United States v. Gardner*, 2021 CCA LEXIS 604, at *52 (A.F. Ct. Crim. App. Nov. 16, 2021)

Article 10

Article 10 provides, "When a person subject to this chapter is ordered into arrest or confinement before trial, immediate steps shall be taken (A) to inform the person of the specific offense of which the person is accused; and (B) to try the person or to dismiss the charges and release the person." 10 U.S.C. § 810. Once Article 10 attaches, a violation occurs once the

Government fails to act with reasonable diligence in bringing the charges to trial. *See United States v. Tibbs*, 35 C.M.R. 322, 325 (U.S. C.M.A. 1965).

"We review Article 10, UCMJ, speedy trial claims de novo. Article 10 demands that when a servicemember is placed in pretrial confinement, "immediate steps shall be taken . . . to try the person or to dismiss the charges and release the person." In reviewing Article 10 claims, courts do not require "constant motion," from the Government, but do require "reasonable diligence in bringing the charges to trial." This "duty imposed on the Government immediately to try an accused who is placed in pretrial confinement does not terminate simply because the accused is arraigned." Rather, it extends to "at least the taking of evidence." In conducting our review, we give substantial deference to the military judge's findings of fact, reversing only if they are clearly erroneous. Finally, we look at four factors from *Barker v. Wingo* in examining the circumstances surrounding an alleged Article 10 violation: "(1) the length of the delay; (2) the reasons for the delay; (3) whether the appellant made a demand for a speedy trial; and (4) prejudice to the appellant."

"An accused cannot be responsible for or agreeable to delay and then turn around and demand dismissal for that same delay." *United States v. King*, 30 M.J. 59, 66 (C.M.A. 1990)

We recognize that none of the four factors has any "talismanic power. Rather, we must . . . weigh all the factors collectively before deciding whether [an accused's] right to a speedy trial has been violated." *United States v. Terwilliger*, 2021 CCA LEXIS 190, at *8 (N-M Ct. Crim. App. Apr. 21, 2021)

"The length of delay constitutes a triggering mechanism under Article 10. Appellant spent 311 days in PTC. Therefore, we conclude that the delay from Appellant's placement into PTC on 11 August 2018 through trial on 17 June 2019 is sufficient to trigger analysis of the

remaining *Barker* factors. However, we are mindful that 187 of these 311 days, or approximately 60 percent of the time in PTC, was due to either Defense concurrence in or requests for agreed-upon trial dates and continuances." *Id.*

"Following arraignment, "a change in the speedy-trial landscape [took] place. This is because after arraignment, 'the power of the military judge to process the case increases, and the power of the Government to affect the case decreases.'" In short, once Appellant was arraigned, the military judge had the "power and responsibility to force the Government to proceed with its case if justice so require[d]." *Id.*

"We have long held that "the right to speedy trial is a shield, not a sword," and that "failure to assert the right will make it difficult for [an accused] to prove that he was denied a speedy trial." *Id* at 14.

"We disagree and hold that mere opposition to delay, or references to Article 10—without more—do not constitute a demand for a speedy trial. Indeed, the Defense did not raise an Article 10 motion until the second motions hearing. Subsequent to the proper denial of its Article 10 motion, the Defense asked for additional continuances; the exact opposite of a demand of speedy trial." *Id at 15.*

"Finally, we disagree with the dissent that the military judge's decision not to grant Appellant 224 days of pretrial confinement credit somehow created prejudice under the circumstances of this case. As discussed more fully, infra, the military judge properly found that giving Appellant credit for the pretrial confinement credit twice would result in a windfall to Appellant." *United States v. Hemry*, 2024 CCA LEXIS 167, at *20 (N-M Ct. Crim. App. May 2, 2024)

ARGUMENT

A. <u>The Government's decision to withdraw, dismiss, and rerefer was for a proper purpose</u>

The Government withdrew, dismissed, and rereferred charges in this case, not to circumvent this Court's previous ruling, but to align the Sole Specification, Charge I (now the Additional Charge) with this Court's ruling and the Defense' notice and prior preparations, while still maintaining trial dates and the availability of the defense experts and witnesses. The Government inquired as to whether or not the defense would object to a joinder of the new specification, and the defense stated that it would object to joinder. Therefore, the Government was forced to withdraw and dismiss in order to align the charge and specification with the Court's ruling and proceed to trial under the Government's theory, and in line with the Defense's written filings and comments, that had been alleged since the Article 32 hearing which took place on 10 May 2024.

Based on the evidence and the litigation to this point, as well as the Parties initial filings on this matter, the Court found that the purpose of the Government's action was proper. While that should suffice for the Government's need to address that part of the Defense's new motions, it is imperative to reiterate some of the rationale to not lose site how the Parties arrived at this juncture.

The withdrawal action and subsequent referral were not improper, did not interfere with a substantial right of the accused, did not increase the punitive exposure of the Accused or surprise the Defense. From 9 April 2024 until 4 October 2024, the Parties were preparing for the same case. It was not until the Defense's 4 October filing, despite their prior written filings, that the Defense invokes, "[h]ere, the defense contends, pretrial, that the specification fails to provide the

constitutionally required notice." (4 Oct 24, DEFENSE BRIEF (Instructions and Failure to State an Offense). This is even contrary to their 15 September 2025 filing requesting specific instructions, where the Defense asked the Court to consider two theories of liability and noted two distinct acts, "[shooting of Ms. [redacted] with a firearm] [pulling of the trigger of the firearm]" (Enclosure 1). Interestingly, the term 'pulling the trigger' does not explicitly appear anywhere in the charging documents, but from the time of the Article 32 until 25 October 2024, that was what the Defense was preparing to meet as evidenced through their comments, their requested witnesses, their funded experts, and their expert's own reports.

When the Government learned of the Defense's confusion on 4 October 2024, contrived or otherwise, the Government sought, in line with the Court's ruling, not contrary to it, to amend the charge to expressly state, what had been previously implied by requesting to make a minor change. This requested amendment would have narrowed the aperture of the criminal act and as the Court noted, "The Court acknowledges that the inherently dangerous act proposed may be an act that avers a lesser degree of culpability (less depravity) than the inherently dangerous act pled." (MJ ruling 23 October 2024) The Court concludes it ruling by noting, "As the defense noted in its written response, the government is certainly free to withdraw, dismiss, and pre-prefer." However, the Government did not unilaterally take the immediate action of withdrawal, but rather sought permission from the Defense to withdraw, amend, refer anew and join an amended Charge I to the other charges. Prior to the Government action now alleged to be nefarious by the Defense, the Government sought their permission under rule 601 and 604, to make the amendment which would have avoided all the delay the Defense now contends violated Article 10 (addressed below). The Defense considered the request and indicated they would object to the joinder. It was only at this point the Government took the action it did to ensure the

correct, precise, and now in line with the Court's ruling, expressly plead act was in front of the fact finder. Furthermore, this Court in its 19 November written ruling denying the Defense's motion to dismiss, further explained that Government's action was not for an improper purpose: "This Court does not interpret the Government's actions as a circumvention of the prior court's ruling. Instead, the Government sought to amend its charge, consistent with the Rules for Courts-Martial. No rule supports the notion that the government was required to have been stuck with the prior Article 118(3) charge. Additionally, through the government's actions, it is apparent that the government did not dismiss Article 118(3) offense in an effort to delay trial or in an effort to deprive the accused of his speedy trial rights under R.C.M. 707." (MJ ruling dated 19 November 2024). This is important considering the discussion cited in *Terwilliger*, above.

Here there was no surprise, no change in jeopardy, no additional offenses, and the amended offense is a lesser degree of depravity under 118, akin to a lesser offense. The Government's amendment to the charge, in line with the Court's ruling, is akin to a bill of particulars. As stated in *Reese*, "[w]hile changing the means by which a crime is accomplished may constitute a slight error under the appropriate circumstances..." While in *Reese*, those were not the correct circumstances, this case certainly is. The Defense has explicitly articulated the government theory from the inception of this case, prepared to meet it, and now claims surprise when the Government makes the appropriate amendment to the charges as they invited the Government to do. If error, it certainly was invited by the Defense and should not be held against the Government.

Regarding a substantial right to the accused of either preparation or notice, there is no other place in the record prior to the Court raising this issue on 23 September 2024, where the Defense incorrectly articulates the government's theory as previously implied and not expressly

plead at the Court's direction. As the Court acknowledged on the record during arguments on proposed instructions, the government has been clear about what it intended to charge, but according to the Court, the charge sheet did not reflect that. It was only at that time that the Defense began to articulate any sense of confusion about the specification or the Government's theory of criminality for the first time in 8 months. In other cases, there may be a genuine confusion where issues are not so thoroughly litigated. However, in this case the confusion and issue at hand was contrived to try and elicit a procedural windfall for the Accused, because as articulated in the previous written filings submitted to the PHO and this Court, the Defense has been on notice of and preparing for this theory of criminality since the initial Article 32, through 23 September 2024. While the Defense is certainly free to explore different defenses, and even present multiple theories of innocence to the fact finder, they cannot be free to change their assessments of notice as to the substance of the charges. In this case, the word notice did not appear anywhere in the motion for specific instructions. Additionally, the government's, previously implied, and now expressly plead theory of the criminality in the sole specification of Charge I, now the additional charge and its sole specification, appears multiple times throughout the Defense filings, because the Accused has been on notice of what to defend against since preferral of charges, despite past assertions to the contrary. The same arguments are now being rehashed to try and achieve the procedural windfall.

Capt Carson's withdrawal and severance was not necessitated by the Government's action, and the DSO and Detailing Authority's decisions should not be countenanced as weapons in litigation. This is also not the first time these types of DSO actions have arisen in the case. Regarding the IRO, the DSO detailed an unavailable, and out of area counsel who refused to show up at the hearing when scheduled. The DSO has a duty IRO counsel stationed at Camp

Lejeune who works less than a 5-minute drive to the brig, who normally attends every IRO hearing and does not form a full attorney-client relationship. However, in this case the detailing authority chose to deviate from the DSO standard practices and only detail an out of area and unavailable counsel to the IRO hearing. The Defense has already seen the benefit from this Court in that wholly DSO action when they received 267 days of additional credit because the Government did not file a motion to reconsider the IRO's findings, despite the defense articulating on the record it was a tactical decision to not file the release from pre-trial confinement motion or seek credit. The Government should not be placed in the position to constantly second guess the tactical decisions of a qualified and certified judge advocate representing an Accused. However, that appears to be the Defense's position.

Finally, there is no right of the Accused impeded upon and the Defense is not prejudiced, let alone unfairly due to the preferal anew, because the Government preserved the trial dates for litigation of the charges, continued to prepare travel for the ordered witnesses and experts for the defense, within 120 days of the R.C.M. 707 clock, within the confines of Article 10, and with the counsel of the Accused's choice. It was the Defense who requested the continuance that made Capt Carson's unavailable. Despite the public laws that the new defense counsel says the Government disregarded, they do not apply here. Capt Carson stated clearly to the Court that he may seek a reserve commission in the future, but he was not part of the reserves. That places him, at best, in the IRR. The laws referenced by the Defense specifically do not apply to the inactive reserves the way it applies to the ready reserves, which is an important distinction that Defense overlooks. Additionally, the Government offered every opportunity for Capt Carson to remain on active duty or return as a reservist. Capt Carson articulated on the record he did not wish to remain on active duty, return to duty, or be part of the defense team. Taking Capt Carson

at his word, involuntary recall would cause an intolerable strain on the relationship.

The Defense chose to seek a continuance and challenge the properly rereferred charges to avoid trial on the scheduled dates. For the reasons stated above, the Parties had been litigating the same case until 23 September. When the confusion was remedied, the Defense still had access to all the same evidence, witnesses, experts, and counsel. Instead, they demanded a continuance and a new Article 32 for two reasons: 1) They may change their theory base on DNA evidence, and 2) they may want to seek consultation on a false confession. These two reasons were contrived to create the issue with Capt Carson's EAS and the exhibits demonstrate that clearly. First, the DNA expert they sought to base their theory on has been the Government's expert whose report has been present in discovery since 9 July 2024. That is important in comparing the date the Defense FIRST contacted this expert they now claim may be central to their defense, which was 22 October 2023. Yes, 6 days before the start of trial was the first time the defense counsel contacted the DNA expert, despite having her contact information since 9 July 2024. Second, the Defense articulated they wanted to explore possible consultation with a false confession expert and that had not been contemplated until after the Government's action of withdrawal. However, the Defense has had a confidential, Government provided consultant in forensic psychiatry as part of their team since April of 2024, and in September, the Parties litigated a motion to suppress the Accused statement to law enforcement based, in part, on the Defense's argument that his confession that he loaded the murder weapon was false and the product of coercion and undue duress. The Government provided Dr. [redacted] without prompting of the Defense before the initial referral of charges.

While she can consult and review on 706 hearings and other topics, the area of false confessions was specifically requested as part of her expertise to ensure the Defense counsel

explore all their available options and avoid delay. If the Defense chose not to ask the basic questions on this topic, in support of a client who provided a 5-hour interview with NCIS, we must assume that was for a tactical and considered reason. However, that reason cannot be the genesis of an allegation that the Government interfered with a substantial right.

More clearly the appearance of an attempt to insert error in the record rather that litigate the amended charges on the docketed trial date by the previous counsel appeared stronger when the new counsel's filing allege the Government should have involuntary "mobilized" Capt Carson from a reserve unit he has not joined over his objection. The Defense seems insistent that the Government could, and in fact should, have involuntarily forced Capt Carson to join a reserve unit and then involuntarily mobilized him under the MCO 1001R.1L. However, that assertion is as misplaced as the notion that the government has delayed the litigation of this case.

First, as demonstrated in the enclosures, Capt Carson refused to answer the Government's request for the following information, 1) which reserve unit he was joining and 2) for the contact information for his future employer. It was not till after the motion for withdrawal was filed and the Court asked Capt Carson on the record that he answered the question as to if he was currently seeking a reserve commission, to which he replied he was not. Second, Capt Carson was asked specifically if he would voluntarily extend his active-duty service or return on ADOS orders (which is what is contemplated by the defense cited MCO), to which he responded, he would not. Given the Defense's cited order that leaves mobilization of Capt Carson for this court-martial. However, again the Order does not support the position summarily espoused by the Defense Counsel. "Mobilization. Mobilization is involuntary AD, in accordance with reference (c), used to support national objectives in time of war or other emergencies when the President or Congress determines that RC forces are required to augment the AC."

Despite the inapplicability of the cited order and statute, the Defense makes the assertion that the Government cast aside these references in an attempt to support Capt Carson in his motion for withdrawal. However, the defense is silent as to why these, in their opinion controlling orders and statutes, were not brought to the attention of the Court by Capt Carson himself. While contrary to his positions, it would seem that if they are as controlling as purported, Capt Carson would have been required to make the Court aware of these regulations. Additionally, it is not reasonable to think he was unaware of them, as the current DC who is citing the references was Capt Carson's immediate supervisor.

Again, the tactical and strategic decisions of the Defense counsel, their supervisory counsel, and the detailing authority are being weaponized against the Government. The Defense is entitled to make strategic and tactical decisions, they are not entitled to a second chance when those decisions do not work out in their favor.

B. The Government has moved with more than reasonable diligence to bring the case to trial in compliance with Article 10 and all the applicable case law.

In this case despite significant litigation, there has never been a demand for a speedy trial. Interestingly, even the Article 10 motion filed by the Defense here does not contain one and was filed after an agreement to a 4-month TMO and numerous periods of defense unavailability articulated in communications with the Government and the Court. The Defense attempt at shock value stating blanketly that the Government took 315 days to arraign the Accused. While counting the days of PTC, this is accurate, but it is also misleading as it ignores the nearly 123 days of excludable delay at the request of the Defense, the 82 days Honstein I was pending trial, the absence of a single demand for a speedy trial, or the fact that the Parties have been in front of this court the entire time, which is the true protection of Article 10 (see *Terwilliger*, "a change in the speedy-trial landscape [took] place"), not a weapon to try and dismiss every pretrial

confinement case to avoid litigation on the merits. The protection of Article 10 is to keep the Accused for remaining in pretrial confinement, unjustifiably, without government actions moving the case towards trial. In this case, the Government has done nothing but try to litigate the facts of this case since preferral. However, those attempts have been met with Defense delay, Defense inaction (such as calling government experts 4-6 days before trial), and actual or tactical confusion as to the charged offenses at the 11th hour.

The Government's actions are all part of the record and the filings. The Government has sought to take every action in full view of the public, the Court, and the Defense. The Government has moved more than diligently to bring Sgt Holstien to trial for the murder of Ms. [redacted] This motion appears to be an attempt to avoid litigating the facts of the case based on rehashed issues, that if they exist are the product of Defense decisions they now seek to take back or unjustifiably profit from by escaping a trial on the merits. Defense apathy, strategy, or regrettable tactical decisions are not a basis for finding a violation of the Article 10 and certainly not a reason to reconsider the Court's previous ruling regarding the purpose for the withdrawal and preferral anew.

RELIEF REQUESTED

The Government requests the Court deny the Defense's motion to dismiss the charges pursuant to Article 10, UCMJ or provide any additional credit.

EVIDENCE OFFERED

Encl 1: Original TMO
Encl 2: Court's written ruling 15 Oct.
Encl 3: Gov request for minor change
Encl 4: Court's Ruling on Minor Change
Encl 5: Government's notification and defense objection to joinder
Encl 6: Honstein 2.0 Charge Sheet Referred and service
Encl 7: Gov informed Court of withdrawal
Encl 8: Gov Inquiry into 5 day waiting period
Encl 9: DEF Objection to Arraignment date

Encl 10: Court ordered arraignment 1 Nov
Encl 11: DEF file Speedy trial motion
Encl 12: preferral Add Charge
Encl 13: PHO ordered dates
Encl 14: DEF requested continuance of Art 32
Encl 15: PHO approval of DEF Request
Encl 16: Capt Carson severance email
Encl 17: Identification of new DC team
Encl 18: DEF Written Comments
Encl 19: Court's ruling on RCM 707
Encl 20: Issuance of PHO report
Encl 21: Referral Additional Charge
Encl 22: Gov Inquiry to Capt Carson's Reserve Status and future employment
Encl 23: Government Request/Approval for Forensic Psychiatrist for the Defense
Encl 24: Previously submitted enclosures to Government Response to Defense MTD (R.C.M. 707) – to avoid duplication, these are referenced here.

Oral Argument. The Government only requests oral argument should the Count be inclined to grant the Defense motion.

HENRY.NICHOLAS.SEAN[redacted] Digitally signed by HENRY.NICHOLAS.SEAN[redacted] Date: 2024.12.20 19:54:42 -05'00'

N. S. HENRY
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I certify that I served a true copy via e-mail of the above on the Court and Defense Counsel on 20 December 2024

HENRY.NICHOLAS.SEAN.[redacted] Digitally signed by HENRY.NICHOLAS.SEAN[redacted] Date: 2024.12.20 19:55:14 -05'00'

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

UNITED STATES **V.** **DAKOTA S. HONSTEIN** **SERGEANT / E-5** **USMC**	**DEFENSE MOTION FOR APPROPRIATE RELIEF (Mil. R. Evid. 302)** **27 February 2025**

Motion

The Government gave the Defense notice that it intends to introduce derivative evidence from the Rules for Courts-Martial (R.C.M.) 706 inquiry into Sergeant (Sgt) Honstein's mental capacity and responsibility (R.C.M. 706 examination). Sergeant Honstein asserts his Military Rule of Evidence (M.R.E.) 302 privilege and moves the Court to preclude any derivative evidence from Sgt Honstein's R.C.M. 706 examination.

Burden

As the proponent of the evidence, the Government bears the burden of persuasion pursuant to M.R.E. 302(e) and M.R.E. 304(f)(6). The burden of proof is by a preponderance of the evidence. Mil. R. Evid. 302(e), 304(f)(7).

Summary

Military Rule of Evidence 302 is a statutory privilege specific to R.C.M. 706 examinations. Because R.C.M. 706 is compulsory, M.R.E. 302 limits the Government's use of an accused's statements and derivative information from the R.C.M. 706 examination. Despite the limitations, the Trial Counsel are now impermissibly attempting to use derivative evidence from Sgt Honstein's R.C.M. 706 examination.

Facts

a. On 1 February 2024, Defense Counsel informed the Government that Sgt Honstein asserted "all privileges under the law." (enclosure 1)

b. On 4 March 2024, Defense Counsel requested an R.C.M. 706 examination for Sgt Honstein. The Commanding Officer approved that request. (enclosure 2)

c. On 12 April 2024, Sgt Honstein was escorted from pretrial confinement to the R.C.M. 706 examination. The R.C.M. 706 examiners questioned Sergeant Honstein from 0907 until 1725.

d. On 30 April 2024, the R.C.M. 706 board reported back that Sgt Honstein did not have a severe mental disease or defect. Nevertheless, the board still reported to the Defense Counsel *and* Trial Counsel that it diagnosed Sgt Honstein with Borderline Personality Disorder, Histrionic Personality Disorder, and Sexual Sadism Disorder at the time of the alleged offenses and at the time of evaluation. (enclosure 3)

e. On 30 April 2024 Trial Counsel sent the R.C.M. 706 examination to LCDR Jonathan Heller, MD, MBA. (enclosure 4)

f. Dr. Heller "unpack[ed]" the R.C.M. 706 diagnosis for the trial counsel. He stated:

1. The Sexual Sadism Disorder diagnosis "is common in sexually-motivated homicide offenders."

2. The R.C.M. 706 examination diagnosed Sgt Honstein with personality disorders that "convey instability, impulsivity, and a pattern of feeling that [Sgt Honstein] must be the center of attention."

3. If the R.C.M. 706 examination is correct, Sgt Honstein "may have a strong tendency to want to testify and is subject to wide swings of emotion leading him to be a fragile witness."

4. The "Defense could hardly have a 'worse' outcome on the sanity board, akin to pedophilia diagnosed in someone accused of a child offense." (enclosure 4)

e. On 25 October 2024, Dr. [redacted] provided the Government with his notes from reviewing Sgt Honstein's NCIS interview, which includes reference to the R.C.M. 706 examination's diagnoses. (enclosure 5)

f. On 25 October 2024, the Government provided the Defense with an R.C.M. 701 disclosure that the Government received from an interview with Dr. [redacted] that same day. Dr. [redacted] described each of Sgt Honstein's R.C.M. 706 examination diagnoses. He further opined that the Sexual Sadism diagnosis stands

out as a recidivism risk. He specifically concluded the R.C.M. 706 examination's Sexual Sadism diagnosis was a factor to consider in a recidivism assessment. (enclosure 6)

g. The Government notified the Defense that it intends to introduce Dr. [redacted] testimony regarding Sgt Honstein's Sexual sadism diagnosis. (enclosure 7)

h. Dr. [redacted] has never treated or examined Sgt Honstein.

Law

a. R.C.M. 706 is a compulsory process, requiring an inquiry into the mental condition of the accused if, during pretrial or trial proceedings, there is a reasonable basis to believe that the accused lacked the mental responsibility for any offense charged or lacks the capacity to stand trial.

b. Pursuant to M.R.E. 302, the accused has the privilege to prevent any statement made by the accused at an R.C.M. 706 evaluation *and any derivative evidence* obtained through the use of such a statement from being received into evidence against the accused on the issue of guilt or innocence or during sentencing proceedings. An accused may claim this privilege even though the accused may have been warned of the rights provided by Mil. R. Evid. 305 at the examination. Mil.R.Evid. 302.

c. Derivative evidence is any evidence obtained using the accused's statements to the R.C.M. 706 examiners. *United States v. Clark,* 62 M.J. 195, 196 (C.A.A.F. 2005). If an expert uses an R.C.M. 706 examination report to form their opinion, that opinion is derivative evidence. *See id* at 199-200 (There the Defense's expert said that she had read the report but had formed her opinion before doing so. Because her opinion was not based on the report but was instead based on her own treatment of the accused, that expert testimony was not derivative evidence.)

d. An expert may base an opinion on facts or data in the case he has been made aware of. If the facts or data are inadmissible, the proponent of the expert's opinion may only disclose them to the members if the Military Judge finds that their probative value in helping the members evaluate the opinion substantially outweighs their prejudicial effect. Mil. R. Evid. 703.

e. Military Rule of Evidence 302 is equated with testimonial immunity. *Clark*, 62 M.J. at 198.

f. The Government cannot use evidence obtained through immunized testimony unless it establishes an independent, legitimate source for the disputed evidence. *Kastigar v. United States*, 406 U.S. 441, 448 (1972).

g. The prohibition against "use[ing]" immunized testimony against an accused includes evidentiary *and* non-evidentiary uses, including the indirect use of testimony to alter the investigative strategy or to inform the decision to prosecute. *United States v. Morrissette*, 70 M.J. 431, 438 (C.A.A.F. 2012) (citing *United States v. Hubbell*, 530 U.S. 27, 39 (2000)).

h. If prosecutors are exposed to immunized testimony, the Government must demonstrate that the immunized testimony was not used or derivatively used against an accused and was obtained from wholly independent and legitimate sources. *Id.* at 439.

i. The M.R.E. 302 privilege ceases to exist once the accused introduces such statements or derivative evidence into evidence. Mil. R. Evid. 302(b)(1).

j. If the defense presents expert testimony regarding the accused's mental condition, *then* the Government may introduce expert testimony concerning his reasons for making conclusions, presumably including the R.C.M. 706 examination's results. Mil. R. Evid. 302(b)(2).

Analysis

Sergeant Honstein has and continues to assert his M.R.E. 302 privilege.

A. Dr. [redacted] is an irreversibly tainted Government expert consultant and witness.

Dr. [redacted] expert opinion is based on his review of the R.C.M. 706 examination report. That report included the R.C.M. 706 examiners' diagnoses for Sgt Honstein. The board made those diagnoses after listening to Sgt Honstein's statements. Therefore, Dr. [redacted] opinion is impermissible derivative evidence. *See Clark,* 62 M.J. at 199-200. Unless Sgt Honstein waives his M.R.E. 302 privilege, the Government cannot introduce Dr. [redacted] expert opinion in so far as his opinion is based in any part on Sgt Honstein's R.C.M. 706 examination.

B. Dr. [redacted] work tainted the prosecution.

Trial Counsel forwarded the R.C.M. 706 examination's derivative evidence to Dr. [redacted]—the Government's expert consultant and proposed expert witness. The only logical reason for doing so was to have their consultant explain what the R.C.M. 706 examination's derivative evidence meant to the prosecution. A well-constructed wall between the Trial Counsel and Dr. [redacted] is the best way to demonstrate that the Government will not directly or indirectly use the privileged evidence.

There are two remedial measures this Court should take. First, strip Dr. [redacted] from the Trial Counsel as an expert consultant unless and until Sgt Honstein waives his M.R.E. 302 privilege. Second, require the Trial Counsel to demonstrate that the R.C.M. 706 examination's derivative was not and will not be used against Sgt Honstein. Mil. R. Evid. 302; *see Morrissette*, 70 M.J. at 439 (discussing what Trial Counsel must do when they are exposed to immunized testimony); *see also Clark*, 62 M.J. at 198 (holding that M.R.E. 302 is equated with testimonial immunity). If the Government cannot do so, because Brigadier General Woodard is the referral authority, then the Court should order the Government to transfer prosecution of this case to another service's Office of Special Trial Counsel. These remedial measures will ensure Sgt Honstein's compulsory statements to the R.C.M. 706 examination will not be impermissibly used against him.

Relief Requested

Sergeant Honstein requests the Military Judge rule derivative evidence from Sgt Honstein's R.C.M. 706 examination is not admissible unless the Defense acts to waive the M.R.E. 302 privilege.

Sergeant Honstein requests the Military Judge order the Government to demonstrate that the R.C.M. 706 examination was not used or derivatively used against Sgt Honstein.

Evidence

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

Enclosure 1 – Captain Carson's notice of representation

Enclosure 2 – The R.C.M. 706 approval letter

Enclosure 3 – The R.C.M. 706 conclusions

Enclosure 4 – Dr. [redacted] emails with Trial Counsel

Enclosure 5 – Dr. [redacted] false confession notes

Enclosure 6 – R.C.M. 701 disclosure for Dr. [redacted]

Enclosure 7 – Government M.R.E. 404(b) notice

Oral Argument

The Defense requests oral argument if this motion is opposed.

[redacted]

M. E. NEELY
Lieutenant Colonel, U.S. Marine Corps
Regional Defense Counsel

CERTIFICATE OF SERVICE

I certify that I have delivered a copy of the foregoing document by email to the Court, Trial Counsel, and Victims' Legal Counsel on 27 February 2025.

[redacted]

M. E. NEELY
Lieutenant Colonel, U.S. Marine Corps
Regional Defense Counsel

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

UNITED STATES v. DAKOTA S. HONSTEIN SERGEANT/E-5 U.S. MARINE CORPS	**GOVERNMENT'S RESPONSE TO DEFENSE MFAR – MRE 302** 11-Mar-25

Nature of Motion

This is the Government's response to the Defense's motion for appropriate relief under MRE 302 dated 27 February 2025.

Summary

The Accused is charged with violations of Article 118(3) and Article 119, for discharging his 9mm pistol while it was pressed against the chest of Ms. [redacted] on 27 January 2024, which resulted in her death a short time later. The Accused initially reported to PMO officers and NCIS agents that during the course of a consensual sexual interaction involving the weapon, the victim had pulled the trigger, followed by a change in his explanation that she had loaded the gun without his knowledge before he pulled the trigger, which was followed finally by an admission that he actually knew the weapon was loaded and that he had pulled the trigger intentionally but did he did not believe that the weapon would discharge because he believed he had depressed the slide of the pistol enough to disengage the trigger by pushing the weapon at an angle into the Victim's chest, when he intentionally pulled the trigger. The Accused underwent an RCM 706 assessment at his request, and the results ("short form") concluding in relevant part that the Accused had sexual sadism disorder were sent to the Government, which then forwarded those results to the Government's expert forensic

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psychiatrist, Dr. [redacted] Dr. [redacted] explained what the results meant. That explanation was then forwarded to the Defense in discovery. The Government also provided MRE 404b notice regarding some potentially relevant purposes for Dr. [redacted] statements. The Government agrees that as an initial matter, derivative evidence is not admissible by the Government unless the door is opened by the Defense, either intentionally or inadvertently. If that occurs, the Defense has notice of the relevant purposes the Government may seek to enter that evidence, depending on how the Defense opens the door. The Government does not agree with the Defense's requests to sever Dr[redacted] from the Government or to disqualify the LSTC and Marine Corps OSTC, and requests the Court deny that part of the Government's motion as there is no basis for either remedy.

Summary of Facts

1. The Accused is charged with violations of Article 118(3) and Article 119, for discharging his 9mm pistol while it was pressed against the chest of Ms. [redacted] on 27 January 2024, which resulted in her death a short time later.

2. The Accused initially reported to PMO officers and NCIS agents that during the course of a consensual sexual interaction involving the weapon, the victim had pulled the trigger, followed by a change in his explanation that she had loaded the gun without his knowledge before he pulled the trigger, which was followed finally by an admission that he knew the weapon was loaded and that he had pulled the trigger but did he did not believe that the weapon would discharge because he believed he had depressed the slide of the pistol enough to disengage the trigger to prevent it from firing. [Accused's interrogation and statements from PMO, previously provided to the Court]

3. The Accused also explained that the pistol was involved in the consensual sexual interaction for his sexual gratification, and that the dangerous nature of the loaded weapon

added to his arousal. He stated he had handled that pistol on many occasions, and used it many times in sexual encounters with gun play. He qualified as an expert on pistol. [Accused's interrogation and Accused's OMPF]

4. A magazine which holds 15 rounds was recovered at the crime scene with 13 rounds still inside it. One spent round and casing were also found at the scene, and the weapon was cleared by the Accused, likely ejecting the 15th round, though it was not photographed at the scene. At a minimum there were 14 rounds in the magazine when it was loaded into the weapon adding weight to it before it was fired.

5. Charges were originally preferred against the Accused in this case on 9 April 2024, and the PHO was appointed on 12 April 2024.

6. The Government additionally adopts the Defense's facts b – g from its fact section.

Burden of Proof and Persuasion

7. Generally, the moving party bears the burden of proof under RCM 905. However, the Government bears the burden of persuasion pursuant to M.R.E. 302(e) and M.R.E. 304(f)(6), c.f. *United States v. Billings*, 61 M.J. 163, 168 (C.A.A.F. 2005) (citing *United States v. Palmer*, 55 M.J. 205, 208 (C.A.A.F. 2001)), if the Government is seeking to admit statements of the Accused.

Law

8. Pursuant to M.R.E. 302, the accused has the privilege to prevent any statement made by the accused at an R.C.M. 706 evaluation and any derivative evidence obtained through the use of such a statement from being received into evidence against the accused on the issue of guilt or innocence or during sentencing proceedings. MRE 302(e) "*Procedure*," provides: "The privilege in this rule may be claimed by the accused only under the procedure set forth in Mil. R. Evid. 304 for an objection or a motion to suppress." M.R.E. 302 was proposed and implemented to provide "a form

of testimonial immunity intended to protect an accused from use of anything he might say during a mental examination" ordered under R.C.M. 706. *United States v. Clark*, 62 M.J. 195, 198 (C.A.A.F. 2005); 1 Military Rules of Evidence Manual § 302.03 drafters analysis (2025) ("This should be treated as a question of testimonial immunity for the purpose of determining the applicability of the exclusionary rule in the area"). MRE 304 provides the following:

> Confessions and admissions (a) *General rule*. If the accused makes a timely motion or objection under this rule, an involuntary statement from the accused, or any evidence derived therefrom, is inadmissible at trial except as provided in subdivision (e) . . . (1) *Definitions*. As used in this rule: (A) "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.

However, "The Supreme Court has concluded that if a defendant requests the psychiatric evaluation or presents an insanity defense, "The defendant would have no Fifth Amendment privilege against the introduction of [testimony from his psychiatric evaluation] by the prosecution." *United States v. Clark*, 62 M.J. 195, 200 (C.A.A.F. 2005) (finding further that "Because Appellant requested the sanity board, he may not claim a Fifth Amendment violation because the Government did not compel his appearance at the board.")

RCM 706 (c)(3) provides the following:

> *Directions to board.* In addition to the requirements specified in paragraph (c)(2) of this rule, the order to the board shall specify: (A) That upon completion of the board's investigation, a statement consisting only of the board's ultimate conclusions as to all questions specified in the order shall be submitted to the officer ordering the examination, the accused's commanding officer, the preliminary hearing officer, if any, appointed pursuant to Article 32, **and to all government and defense counsel in the case**, the convening authority, and, after referral, to the military judge.

ARGUMENT

9. As an initial matter, the Government agrees that MRE 302 governs the use of evidence derived from the RCM 706 panel and precludes the entry of that evidence by the Government absent the Defense opening the door to that, either intentionally or negligently. The Government

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provided MRE 404b notice consistent with its notice obligations to preserve its ability to seek to enter that evidence should the Defense open the door, which may not occur predictably, or solely for the purposes of an insanity defense. If the Defense were to open the door to the statements under MRE 302 for a purpose other than mental competency (not an issue requiring MRE 404b notice) either intentionally or unintentionally, the Defense would almost certainly still object that the Government failed to provide notice of the other purposes if it was not provided as it was in this case. But, the Government is not obligated under MRE 404b to provide notice specifying every possible manner or branch and sequel where that could occur, and the MRE 404b notice is not intended to be an argument that no other military rule of evidence applies. The Government does not have to provide its response to every single possible Defense objection (e.g. 301–317, 403, 608, 613b, 702, 703, 801 and 802 etc.), which the parties may or may not agree on or may not be ripe until evidence is admitted or arguments made at trial, in order to adequately put the Defense on notice under MRE 404b. Additionally, even if the Accused had not previously asserted his privilege under MRE 302, the Government agrees that its motion has done so.

10. Because the Defense has asserted its privilege under MRE 302, no other remedy is needed and the Defense's motion seeking further relief should be denied for the reasons below. First, Dr. [redacted] explanation as to the RCM 706 panel results is not new, additional, or derivative evidence, e.g. a new witness, object, or fact as envisioned by *United States v. Clark*, 62 M.J. 195, 198 (C.A.A.F. 2005)("even when the actual communications made by the accused are not revealed by the expert witness in open court, under the present *Manual* they may be studied by the prosecution and may be used to *discover* other evidence later admitted against the accused"). The relevant evidence provided by Dr. [redacted] as to the RCM 706 short form provides only definitions and context, e.g. meaning to the lay person, as to what those results are should the Defense open the door. No statements of the Accused were released, and no derivative

evidence to now be entered at trial was discovered–Dr. [redacted] just provided explanations of what the diagnosis means. Absent the Defense opening the door, again, no further remedy other than the protections of MRE 302 that the Accused has availed himself of is appropriate.

11. Second, the short form and its diagnosis forwarded by the panel is not tantamount to privileged information in the manner the Defense proposes. If it were, then under the Defense's theory RCM 706(B)(3) would tend to disqualify every Government counsel and every referral authority on every case where an RCM 706 inquiry is conducted properly and forwarded to Government Counsel in accordance with RCM 706(c)(3). However, the plain language of the MRE 302(e) indicates that the appropriate remedy is suppression of the statements and any derivative evidence under MRE 304. The Defense has not argued any evidence in this case was found as a result of Dr. [redacted] review of the diagnosis by the panel, or his explanations about what it means–likely because there is no such evidence. The charges in this case were preferred prior to the RCM 706 panel results, and the majority of investigative actions–including identifying Ms. [redacted] and Ms. [redacted]–were at least initiated (some forensic examinations were not completed) prior to the RCM 706 panel occurring or Dr. [redacted] providing his explanations. The Defense's reliance on both *Kastigar* and *Morrissette* to argue otherwise is misplaced in this case. Both pertain to compelled testimony of witnesses on the record, not privileged RCM 706 panels. Those instances are not analogous to the RCM 706 panel here because both involved Government counsel having access to compelled testimony. In this case the board simply complied with RCM 706 (c)(3)'s requirements, and Dr. [redacted] provided explanations of what those diagnosis mean. The vast difference between the two warrants no further remedy.

12. Finally, the Defense requested this RCM 706 panel. Where an Accused "requested the sanity board, he may not claim a Fifth Amendment violation because the Government did not

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compel his appearance at the board." *United States v. Clark*, 62 M.J. 195, 200 (C.A.A.F. 2005). While MRE 304 applies to more than just the Fifth Amendment, the extraordinary remedies sought by the Defense are even less appropriate where the Accused was not compelled to make statements at the board (and, again, his statements to that board have not been provided to the Government counsel as they were in *Clark*). The language of MRE 302, the remedies available under MRE 304, and the circumstances at issue here do not support the Defense's request to "strip Dr. [redacted] from the Trial Counsel as an expert consultant" or "transfer prosecution of this case to another service's Office of Special Trial Counsel."

13. Instead, this Court should see the requested remedies for what they are. The request to wall off Dr. [redacted] is a late attempt just before trial to deprive the Government of expert assistance as a consultant or witness even for matters unrelated to the RCM 706 panel's diagnosis because of the unfavorable nature of Dr. [redacted] opinions and his high level of qualifications as an expert. That includes in part testimony about the "the BDSM community's consent expectations based on his expert opinion and his notes from publications reviewed by Col [redacted] and provided by her" consistent with the Government's MRE 404b notice, which have no connection to the RCM 706 panel results. It does, however, have significant probative value to rebutting the Defense's entire theme and theory of this case which is that the Accused was simply giving the victim what she wanted, and he is being attacked by a Government that just cannot understand the nuances of the BDSM community. However, the Government is happy to provide expert testimony about the real BDSM community to the factfinder as it turns out the Accused does not act within the BDSM community's standards regarding consent despite his pretenses to NCIS. Notably, according to that research, the BDSM community has experienced individuals with sexual sadism disorder who hide in the BDSM community to cover up for their actions that occur without consent. While the Defense may object to that testimony

on other grounds, none of it is derivative of the RCM 706 panel–it came directly from the Defense's own expert, Col [redacted] Dr. [redacted] may also provide rebuttal testimony to the Defense's pending potential request for a recidivism expert depending on the report and testimony by that expert–which would again not be derivative of the RCM 706 panel unless the Defense opens the door to that information. Attempting to suppress Dr. [redacted] testimony unrelated to the RCM 706 panel and to wall him off from Government counsel entirely should be denied.

14. The attempt to preclude the LSTC and Marine Corps OSTC from this case as the referral authority is equally unsupported by the law and facts in this case. Instead, it is a thinly veiled attempt to forum shop for a different OSTC office because the LSTC for the Marine Corps will not agree to the Defense's proposed plea agreement. The charges in this case were preferred in this case on 9 April 2024, following a pre-preferral brief to the LSTC on 22 March 2024. The RCM 706 had not even occurred at that time, and the LSTC and the Marine Corps OSTC could not have been influenced in any way by the short form results, to the extent they are derivative of immunized testimony. *Clark, Kastigar,* and *Morrissette* (and the plain language of MRE 302 and 304) do not stand for the proposition that the referral authority would need to be severed because the short form was sent to Government counsel as required by the rule. This Court should recognize the Defense's requests for what they are and deny them in favor of the more appropriate remedies already being provided by MRE 302 as asserted by the Accused.

RELIEF REQUESTED

15. The Government requests this Court deny the Defense's motion.

Oral Argument. The Government requests oral argument on this issue.

[redacted]

M. E. BLACKBURN
Captain, USMC
Special Trial Counsel

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Government's motion in response to Defense's Motion to compel expert consultation was served electronically on defense counsel on 11 March 2025.

[redacted]
M. E. BLACKBURN
Captain, USMC
Special Trial Counsel

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

UNITED STATES **V.** **DAKOTA S. HONSTEIN** **SERGEANT / E-5** **USMC**	**MOTION FOR APPROPRIATE RELIEF (SENTENCING PARAMETERS)** **27 February 2025**

MOTION

Pursuant to the Fifth Amendment Due Process Clause, the Defense moves under Rule for Courts-Martial (R.C.M.) 906 for sentencing in this case, should it be required, to be conducted (1) by the court-martial members and (2) unconstrained by the mandatory military sentencing parameters set forth under Appendices 12B and 12C of the Manual for Courts-Martial (2024 ed.) ("MCM"). Specifically, the Defense moves for a ruling that Articles 53(b)(1) and 56(c)(2), Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 853(b)(1) and 856(c)(2) (2024), as implemented in the R.C.M.—requiring sentencing in non-capital general and special courts-martial to be conducted by the military judge within mandatory sentencing parameters—violate due process and therefore have no effect on this court-martial.

BURDEN

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

FACTS

1. The Government alleges that on 27 January 2024, Sergeant (Sgt) Dakota S. Honstein murdered Ms, [redacted] by means of intentionally pulling the trigger of a loaded firearm while

pointing it at her.

LAW AND ARGUMENT

Congress "is subject to the requirements of the Due Process Clause when legislating in the area of military affairs, and that Clause provides some measure of protection to defendants in military proceedings." *Weiss v. United States*, 510 U.S. 163, 176 (1994). Due process protection applies not only to the merits phase of a court-martial, but also "to determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence." *Apprendi v. New Jersey*, 530 U.S. 466, 484 (2000). While judicial deference "is at its apogee" where Congress is regulating the land and naval forces, congressional enactments in this area are still subject to a constitutional balancing test to assess whether "the factors militating in favor of [a different procedure] are so extraordinarily weighty as to overcome the balance struck by Congress." *Weiss*, 510 U.S. at 177-78. This test balances various factors, including (1) "historical practice with respect to the procedure at issue," (2) "the effect of the asserted right on the military," and (3) "the existence in current practice of other procedural safeguards that satisfy the Due Process Clause of the Fifth Amendment." *United States v. Wheeler*, 2024 CAAF LEXIS 479, at *8-9 (C.A.A.F. 2024) (citations omitted).

Here, all three factors weigh in favor of finding that eliminating the right to discretionary members sentencing and replacing it with sentencing by military judges pursuant to mandatory sentencing parameters violates Fifth Amendment Due Process. In light of the centuries-old right to members sentencing, the effect of this right on the military, and the elimination of virtually every other procedural safeguard that satisfies due process, "the factors militating in favor of [discretionary sentencing by the court-martial members] are so extraordinarily weighty as to overcome the balance struck by Congress." *Weiss*, 510 U.S. at 177-78.

A. **Factor 1. Historical practice: The right to discretionary members sentencing has existed in the military justice system for nearly 200 years.**

First, sentencing by members has been the practice of courts-martial for centuries. In fact, "for nearly 200 years, courts-martial in the United States military consisted *solely* of panels of members . . . [which] continued with the creation of the UCMJ in 1951." *Wheeler*, 2024 CAAF LEXIS 479, at *9 & n.3 (noting an exception only for the "disposition of minor offenses") (citations omitted) (emphasis added). Embedded within this centuries-old tradition was the requirement that when the court-martial members found the accused guilty, the members—not a military judge—would adjudge the sentence. *See, e.g.*, Art. 51(a), UCMJ, 10 U.S.C. § 851(a) (1958) ("Voting by members of a general or special court-martial upon questions of challenge, on the findings, and on the sentence shall be by secret written ballot."). In fact, military judges did not even exist until 1968. *United States v. Wheeler*, 83 M.J. 581, 587 (N-M. Ct. Crim. App. 2023), *aff'd*, 2024 CAAF LEXIS 479 (C.A.A.F. 2024). And in the ensuing more than five decades after military judges began presiding over general and special courts-martial, every accused still had the right to have the members adjudicate not just the findings, but also the sentence. *See* Art. 53(b)(1)(B), UCMJ, 10 U.S.C. § 853(b)(1)(B) (2018).

A key feature of this right to members sentencing was that, with the exception of the few UCMJ articles with established mandatory minimum punishments, the members' sentencing authority was "largely unfettered." *United States v. Geier*, No. ACM S32679 (f rev), 2022 CCA LEXIS 468, at *10 (A.F. Ct. Crim. App. Aug. 2, 2022). Like other sentencing authorities, the members had "discretion to impose any authorized punishment that is below the maximum for the offense." *United States v. Lacy*, 50 M.J. 286, 287 (C.A.A.F. 2001).

So firm was this historic right to discretionary members sentencing that it even extended

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to sentencing by members who may not have believed the accused guilty of the offense. This is because, like members sentencing, "[n]onunanimous verdicts have been a feature of American courts-martial since the founding of our nation's military justice system." *United States v. Anderson*, 83 M.J. 291, 294 (C.A.A.F. 2023). And a consequence of *that* centuries-old practice has been that "panel members, on occasion, are required to vote for a sentence based on court-martial findings with which they do not agree." *United States v. Koch*, No. ARMY 20160107, 2018 CCA LEXIS 34, at *25 (A. Ct. Crim. App. Jan. 29, 2018). As such, the members were instructed of their duty to vote for a proper sentence without regard to how they had voted or viewed the evidence on the issue of the accused's guilt. *See* R.C.M. 1006(d)(1) (2019); *Koch*, 2018 CCA LEXIS 34, at *25; *see also, e.g., Manual for Courts-Martial, U.S. Army* (1928 ed.) ch. XV, para. 80(b) at 68 ("It is the duty of each member to vote for a proper sentence for the offense or offenses of which the accused has been found guilty, without regard to his opinion or vote as to the guilt or innocence of the accused.").

The 200-year history of discretionary members sentencing weighs heavily in favor of construing the removal of this right as a violation of due process—commensurate with the weight courts have given other similarly entrenched historical practices in their due process analyses. *See, e.g.*, *Weiss*, 510 U.S. at 179 (rejecting a due process challenge to the lack of fixed terms for military judges since "[c]ourts-martial . . . have been conducted in this country for over 200 years without the presence of a tenured judge, and for over 150 years without the presence of any judge at all"); *Anderson*, 83 M.J. at 299 ("More than two centuries of nonunanimous verdicts in courts-martial weigh against Appellant's due process challenge."); *Wheeler*, 2024 CAAF LEXIS 479, at *9-10 (finding the centuries-old right to trial by members weighed in favor of concluding the elimination of this right from certain special courts-martial violates due process).

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B. **Factor 2. Effect of discretionary members sentencing on the military: Ensuring fairness and trust in the military justice system, without loss of efficiency, time, or resources.**

Second, the effect of discretionary members sentencing on the military also weighs in favor of finding the elimination of this historic right violates due process. As the Advisory Commission appointed by Congress in 1983 observed, members sentencing has "served the military justice system well" and "fosters understanding of military justice by all service members and belief in the fairness of the system." Military Justice Act of 1983 Advisory Commission Report, at 6 (1984). And it is telling that this Advisory Commission—whose work the Supreme Court noted in *Weiss*, 510 U.S. at 178 n.6—recommended continuing the right to members sentencing within "a system that gives the sentencing authority a wide range of choices." *Id.* at 5.

The unprecedented elimination of such discretionary members sentencing (and its replacement with sentencing by military judges pursuant to mandatory sentencing parameters) appears to be largely the result of a ninety-day review of one year's worth of sentencing data. *See* Honoring Our Duty to Survivors of Military Sexual Assault: Recommendations on Victim Care & Support, Independent Review Commission on Sexual Assault in the Military ("IRC"), *Hard Truths and the Duty to Change: Recommendations from the Independent Review Commission on Sexual Assault in the Military* (July 2021) at 3, 46, https://media.defense.gov/2021/Jul/02/2002755437/-1/-1/0/IRC-FULL-REPORT-FINAL-1923-7-1-21.PDF/IRC-FULL-REPORT-FINAL-1923-7-1-21.PDF (recommending the adoption of "Judge-Alone Sentencing in all Noncapital General and Special Courts-Martial" and the "Establishment of Sentencing Parameters" in courts-martial). During the courts-martial in 2015 that this study reviewed,

"military judges sentenced defendants to confinement in 83.7 percent of sexual assault convictions, while panels of military members sentenced a defendant to confinement only 63 percent of the time." *Id.* at 48. From this limited data set, it was determined to be "clear" that discretionary members sentencing (in its entirety) was "absurd" and that "the military must move to a judge alone sentencing scheme with parameters to hold those who commit sexual assault appropriately accountable for their crimes" and to reduce "sentencing disparity" in courts-martial. *Id.* at 46, 48.

There are two problems with this reasoning. First, a year's worth of sentencing data for one type of offense (sexual assault) does not provide reasonable grounds to remove a centuries-old right from courts-martial involving even that type of offense, let alone also remove it from *every other* court-martial involving *every other* type of offense.

Second, the purported goal of reducing sentencing disparity was the same justification given for the ill-fated, mandatory federal sentencing guidelines that the Supreme Court found unconstitutional nearly twenty years ago in *United States v. Booker*, 543 U.S. 220 (2005). Indeed, the mandatory military sentencing "parameters" are patterned precisely on the mandatory federal sentencing "guidelines" that the Supreme Court struck down in *Booker*. The federal sentencing "guidelines" required that the court "*shall* impose a sentence . . . within the [guideline] range" absent finding certain aggravating or mitigating circumstances to depart from it. *Booker*, 543 U.S. at 270 (quoting 18 U.S.C. § 3553(b)(1) (2000 & Supp. IV)) (emphasis added). Similarly, the military sentencing "parameters" require that the military judge "*shall* sentence the accused . . . within the applicable parameter" absent finding specific facts to depart from it. Art. 56(c)(2)(A)-(B), UCMJ, 10 U.S.C. § 856(c)(2)(A)-(B) (emphasis added). Thus, the new military "parameters" are just the old federal "guidelines" operating under a different name.

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As such, the parameters pose the same constitutional problem that the Supreme Court found with the guidelines: even though they gave the trial judges some leeway to depart in some cases, they were essentially mandatory, or "binding." *Booker*, 543 U.S. at 234. The Court noted in *Booker* that even the analogous state statute it had considered in *Blakely v. Washington*, 542 U.S. 296, 299 (2004), which allowed a departure only for "'substantial and compelling reasons," did not make those sentencing parameters nonbinding. *Booker*, 543 U.S. at 234. Hence, the same logic certainly applies to the mandatory military sentencing parameters, which are cast from the same mold.

And the mandatory nature of the military sentencing parameters violates due process for the same reason the Supreme Court struck down the mandatory nature of the federal sentencing guidelines in *Booker*. In every criminal trial, military or civilian, "the Due Process Clause protects the accused against conviction except upon proof beyond reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970); *see United States v. Verdi*, 5 M.J. 330, 336 (C.M.A. 1978) (applying the *Winship* holding to courts-martial). That same due process principle applies equally to sentencing, such that "any fact (other than a prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999). Thus, not only is it "unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. The mandatory federal sentencing guidelines violated due process because they exposed defendants to increased punishment based on facts that were not proven to the trier of fact beyond a reasonable doubt.

Booker, 543 U.S. at 233. Hence, the Court found the federal sentencing guidelines comported with due process only if their mandatory nature was struck down and they were construed as advisory only. *Id.*

i. The military sentencing parameters violate due process not only because they are mandatory, but also because they are demonstrably arbitrary.

The *Booker* holding and the reasoning behind it applies equally to the mandatory military sentencing parameters, which violate due process in the same way. Issued by Executive Order, they divide offenses under the UCMJ into six categories, five of which contain mandatory minimum confinement terms. *See* MCM app. 12B. An "Offense Category Chart," also established by Executive Order, lists the UCMJ offenses and affixes an Offense Category number next to each. *See* MCM, app. 12C. Like the mandatory federal sentencing guidelines, these mandatory sentencing parameters provide that the trial judge "shall" sentence in accordance with the parameters unless the judge finds specific facts justifying the departure. Art. 56(c)(2)(B), UCMJ. As the statute does not specify otherwise, the standard of proof that applies to such factual findings is preponderance of the evidence. R.C.M. 801(e)(4). Thus, like the mandatory federal sentencing guidelines, the mandatory military sentencing parameters allow for upward departures from the parameters based on facts not found beyond a reasonable doubt by the military members who served as the trier of fact at trial. Therefore, as the Supreme Court held with respect to the federal sentencing guidelines in *Booker*, the mandatory nature of the military sentencing parameters violates due process and must be struck from the statute.

To make matters worse, the methodology by which the categories, their parameters, and the offenses assigned to each category were developed lacks any fidelity to the underlying case statistics that Congress directed be considered. Congress directed the Military Justice Review Panel (MJRP) to "gather and analyze sentencing data collected from each of the armed forces

from general and special courts-martial applying offense-based sentencing." Article 146(f)(2), UCMJ. It directed that "[i]n developing sentencing parameters and criteria, the [Military Sentencing Parameters and Criteria] Board shall consider the sentencing data collected by the Military Justice Review Panel." National Defense Authorization Act for the Fiscal Year 2022 ("NDAA FY22"), Pub. L. No. 117-81, § 539E(e)(4)(F)(iii), 135 Stat. 1541, 1705 (Dec. 27, 2021). And it directed that the "delineated sentencing range for an offense" be "appropriate for a typical violation of the offense" and "sufficiently broad to allow for individualized consideration of the offense and the accused." NDAA FY22, § 539E(e)(2)(A), 135 Stat. at 1704.

The sentencing data collected by the Defense Legal Services Agency (DLSA) on behalf of the MJRP was woefully inadequate for a task of such importance to the fairness of the military justice system. *See Review of Recent Amendments to the Uniform Code of Military Justice and Sentencing Data Report* (December 2021) [herein after "DLSA Report"], Enclosure (1). First, it only analyzed sentencing data from a single year's worth of cases (fiscal year 2020). *Id.* at 10. Second, even though its purpose was to support the unprecedented replacement of discretionary members sentencing, it *excluded member sentences entirely* from its review. *Id.* at 17-18 (only analyzing confinement sentences for the 682 cases that involved judge-alone sentencing, over 95 percent of which were guilty pleas). And even the non-member sentences it did analyze were vastly under-inclusive, as, for example, none of them involved sexual assault convictions for three of the services (i.e., the Navy, Air Force, or Coast Guard). *Id.* at D-13, D-17, D-20, E-14, E-18, E-21.

More shocking still, the sentencing parameters established with purported reference to even those limited statistics bear no reflection to them. Take, for example, the mandatory sentencing parameter for Category III offenses (*30-120 months*), which was applied to the

offense of sexual assault based on a total of thirty-one sentences adjudged by Army and Marine military judges during one year. *DLSA Report,* E-4, E-10. Those thirty-one sentences ranged from zero to seventy-two months' confinement, with an average of *19.67 months* (and a median of eighteen months), and only four of them (12.90%) were above the new mandatory minimum of thirty months. *Id.* In other words, the Category 3 parameter's mandatory minimum of 30 months for sexual assault is *over 10 months higher than the average sentence* in the relevant data set (and a full year higher than the median), and 87.10 percent of the actual sentences for that offense were *below* the mandatory minimum. Meanwhile, the Category 3 parameter's maximum of 120 months for sexual assault is *four years higher* than the highest actual sentence of 72 months and *over six years* higher than the second highest sentence of 40 months.

These numbers shock the conscience and would offend any statistician. The new mandatory minimum is not even in the ballpark of "appropriate for a typical violation" of the offense, as Congress mandated, and in fact, bears no resemblance to the data set Congress directed to be analyzed.[1] To whatever extent Congress can be said to have even tried to strike a "balance" under due process, the entities it charged with creating the sentencing parameters certainly did not, which not only contributes to the due process violation, but also renders the new parameters void as a statutory matter, as the arbitrary mandatory minimums they set are in violation of the direction outlined by Congress.

As the Supreme Court explained in *Booker*, "[t]he Framers of the Constitution understood the threat of 'judicial despotism' that could arise from "arbitrary punishments upon

[1] Nor is the parameters' mandatory minimum for sexual assault alone in this regard. Sexual harassment, for example, has an Offense Category of 2. *See* MCM app. 12B at A12C-8. That means the slightest action constituting an offense that has for decades been handled via adverse administrative action now carries a mandatory minimum term of one month's confinement if charged at court-martial. Similarly, causing damage to a government computer is a Category 3 Offense, carrying a minimum of thirty months' confinement. *See* MCM app. 12B at A12C-7.

arbitrary convictions' without the benefit of a jury in criminal cases." *Booker*, 543 U.S. at 239. Even for service members without a Sixth Amendment jury right, this admonition from the Supreme Court is particularly apt when analyzing the effect of the new mandatory minimums on servicemember's due process rights. This is especially important when considering that the elimination of the historical right to discretionary members sentencing at court-martial was accompanied by the retention of far less protective, nonunanimous verdicts at the same forum.

Before overruling the mandatory federal sentencing guidelines in *Booker*, the Supreme Court had upheld Congress' ability to delegate the authority to create them to the Federal Sentencing Commission because the delegation was "sufficiently specific and detailed." *Mistretta v. United States*, 488 U.S. 361, 374, (1989). The Court analyzed in detail the specific contours of that delegation, including "even more detailed guidance . . . about categories of offenses and offender characteristics." *Id.* at 374-76. It also noted that the Commission "enjoy[ed] significant discretion in formulating guidelines," including "significant discretion to determine which crimes have been punished too leniently, and which too severely." *Id.* at 377 (citing 28 U.S.C. § 944(m)).

The 2022 NDAA, by contrast, granted far less discretion in the establishment of the mandatory military sentencing parameters, which were required to be "appropriate for a typical violation of the offense" and "sufficiently broad to allow for individualized consideration of the offense and the accused." NDAA FY22, § 539E(e)(2)(A), 135 Stat. at 1704. This language does *not* grant the same discretion Congress gave to the Sentencing Commission to determine which crimes had been punished too leniently. But that is, ultimately, what the mandatory military sentencing parameters are seeking to do. The new mandatory minimums bear no reflection to the actual sentencing data and were picked out of thin air in violation of Congress's direction. They

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are significantly higher than typical (or even atypical) military sentences. As in *Booker*, they should be ruled nonbinding on this Court.

ii. Neither members sentencing nor the lack of mandatory sentencing parameters has any effect on military efficiency or readiness to fight wars.

As for the replacement of members with military judges as the sentencing authority, unlike other recent amendments to the UCMJ, Congress eliminated the right to members sentencing not just for the disposition of minor misconduct, but for *every non-capital general and special court-martial*. This greatly distinguishes this congressional action from previous due process claims involving relatively insignificant deprivations of liberty. *See, e.g.*, *Middendorf v. Henry*, 425 U.S. 25, 47 (1976) (addressing whether there is a due process right to counsel at summary courts-martial convened to adjudicate minor misconduct); *Wheeler*, 2024 CAAF LEXIS 479 (addressing whether eliminating the right to trial by members for certain judge-alone special court-martial designed to adjudicate minor offenses violates due process).

Nor is there any data showing that the military's ability to fight wars will be carried out more efficiently by replacing discretionary members sentencing with sentencing by military judges (with or without mandatory sentencing parameters). By contrast, the *Middendorf* and *Wheeler* courts both found there was no due process violation because the procedures at issue—to handle minor misconduct through (a) summary courts-martial without defense counsel and (b) special courts-martial without members, respectively—furthered the military's warfighting readiness by resolving disputes more quickly. *Middendorf*, 425 U.S. at 45-46; *Wheeler*, 2024 CAAF LEXIS 479, at *10-12.

Here, there is no reason to believe that eliminating the centuries-old right to discretionary members sentencing and replacing it with judge-alone sentencing (with or without mandatory parameters) will have any effect on military readiness. The additional time and resources

required for members sentencing are *de minimis*. When members are present for the trial on the merits, the sentencing hearing, instructions, and deliberations typically only take an extra day or two. It strains credulity to believe the world's greatest and most powerful Navy cannot operate seamlessly while a handful of Sailors, who were already absent for the trial on the merits, remain away another day or two to handle sentencing in the same court-martial.

And this is not to mention the benefits of members sentencing to the military, which might explain why it has remained a feature of U.S. courts-martial for centuries: it "fosters understanding of military justice by all service members and belief in the fairness of the system." Military Justice Act of 1983 Advisory Commission Report, at 6 (1984). In other words, in the courtroom as on the battlefield, service members trust in a military justice system that puts their fate in the hands of other service members. And while Congress has great discretion when legislating in the area of military affairs, the Due Process Clause does not allow it to legislate away discretionary members sentencing for no good reason, which is precisely what Articles 53(b)(1) and 56(c)(2) accomplish (and why they are unconstitutional).

C. Factor 3. Other procedural safeguards that exist to satisfy due process: Virtually none, because Congress has *removed* them one by one.

Third, the dearth of other procedural safeguards that satisfy due process also weighs in favor of finding that replacing discretionary members sentencing with sentencing by military judges pursuant to mandatory sentencing parameters violates due process. In *Middendorf*, for example, the Supreme Court found that denying an accused the right to counsel at summary court-martial did not violate due process since an accused can "simply refuse summary court-martial and proceed to trial by special or general court-martial at which he may have counsel." *Middendorf*, 425 U.S. at 47. But this resort to other procedural protections is unavailing here, where the elimination of the right to discretionary members sentencing cannot be avoided

through forum selection. Servicemembers are now subject to judge-alone sentencing pursuant to arbitrary mandatory minimum punishments at every non-capital general and special court-martial.

Similarly, the convening authority's ability to reduce obviously unfair or draconian sentences through clemency has been drastically reduced. Once called "the most critical of all for an accused because of the convening authority's broad powers," *United States v. Wilson*, 26 C.M.R. 3, 6 (C.M.A. 1958), this procedural safeguard against an unusually lengthy sentence essentially no longer exists. *See* Art. 60a(b)(1), UCMJ. Now, convening authorities in courts-martial involving even moderate punitive exposure may only reduce or suspend non-mandatory sentences based on the recommendation of a military judge or trial counsel. Art. 60a(a)-(d), UCMJ. And since military judges are now in charge of all non-capital sentencing, it strains credulity to believe they or the trial counsel will commonly recommend suspending the sentences that they themselves deemed it appropriate to impose.

Additionally, in removing discretionary members sentencing, Congress removed another crucial safeguard to military accused in the only remaining criminal justice system in the United States that allows for a finding of guilty by nonunanimous verdict. Under the prior system, members whose "not guilty" votes were overruled by the panel majority would still play a role in sentencing the accused. *Koch*, 2018 CCA LEXIS 34, at *25. Although each member was instructed "to vote for a proper sentence . . . regardless of the member's vote or opinion as to the guilt of the accused," R.C.M. 1006(d)(1), the task of determining an appropriate sentence was left to all the members who had voted on findings—not a military judge applying binding, arbitrary parameters. This afforded a significant procedural protection to ensure fair sentences in cases where even the evidence of guilt was subject to reasonable disagreement. That protection is

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now gone.

Finally, and most importantly, the new statutory framework effectively makes the new sentencing parameters mandatory not only at trial, but also on appeal. In both *Anderson* and *Wheeler*, the CAAF denied due process claims by pointing to the procedural safeguard of appellate rights. *Anderson*, 83 M.J. at 299; *Wheeler*, 2024 CAAF LEXIS 479, at *15-16. But here, in the same legislation establishing mandatory sentencing parameters, Congress also greatly reduced the accused's right to appeal the appropriateness of the sentence to the courts of criminals appeals (CCA's), which for decades served to ensure "a fair and just punishment for every accused." *United States v. Jefferson*, 21 C.M.R. 319, 320 (C.M.A. 1956) (citation omitted). Under the new regime, CCA's no longer have authority to review a sentence on the grounds that it is "inappropriately severe" unless no parameter applies or the sentence exceeds the parameter. Art. 66(e)(1)(B), UCMJ. Otherwise, a sentence can now be rejected only if it "violates the law," is the "result of an incorrect application of the parameter," or is "plainly unreasonable," Art. 56(d)(1)(A), (C)-(D), UCMJ. Even in the wake of ruling the federal sentencing guidelines non-mandatory in *Booker*, the Supreme Court has found it "probable that the sentence is reasonable" if it is within the guideline range, *Rita v. United States*, 551 U.S. 338, 351, 353 (2007). Applied to the sentencing parameters, this would mean that sentences within these arbitrary, inflated parameters established in derogation of Congress's specification directions will be virtually unassailable at the CCA. Given that the CAAF in both *Anderson* and *Wheeler* found the accused's right to appeal a significant legal safeguard, the effective *removal* of that right vis-à-vis the sentencing parameters is the final nail in the coffin of just, fair sentencing at courts-martial that comports with any semblance of due process.

RELIEF REQUESTED

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Accordingly, on grounds of due process, the Defense requests that the sentencing in this case, if required, be conducted by the members unconstrained by the military sentencing parameters contained in Appendices 12B and 12C of the MCM. As with the federal sentencing guidelines after *Booker*, the mandatory nature of Article 56(c)(2)(A) is unconstitutional, such that the military sentencing parameters are, at best, purely advisory in this court-martial. However, given their arbitrariness vis-à-vis the sentencing data on which they purport to be based, particularly for the Article 118(3) and Article 119 offenses alleged in this case, they should be disregarded in their entirety.

EVIDENCE

Enclosure (1): Defense Legal Services Agency, *Review of Recent Amendments to the Uniform Code of Military Justice and Sentencing Data Report* (December 2021)

ORAL ARGUMENT

If the Government opposes this motion, the Defense requests oral argument.

[redacted]

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Captain, U.S. Marine Corps
Defense Counsel

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

UNITED STATES **V.** **HONSTEIN, Dakota** **Sergeant/E-5** **USMC**	**GOVERNMENT RESPONSE TO DEFENSE MOTION FOR APPROPRIATE RELIEF** **(SENTENCING PARAMETERS)** **11 March 2025**

1. **Nature of Motion**. Pursuant to Rule for Courts-Martial (R.C.M.) 906 and the Due Process Clause of the Fifth Amendment, the Government moves this Court to deny the Defense *Motion for Appropriate Relief (Sentencing Parameters)* dated 27 February 2025 and, in the event that sentencing is required, sentence the Accused in accordance with all applicable provisions of the Uniform Code of Military Justice.

The Defense motion largely conflates the analysis of two questions which should remain distinct: Does the Constitution forbid Congress from mandating sentencing by a Military Judge? And does the Constitution forbid the application of parameters to the Judge's sentencing decision?

As this response will discuss in separate sections below, the answer to both of those questions is "No." The mere fact that a particular rule was applied in the past does not, by itself, create a constitutional right. Congress is entitled to weigh and make new choices regarding the military justice system, particularly where those choices place military members accused of crimes in circumstances that are more, rather than less, like their civilian counterparts. The Defense argument against the system of parameters chosen by Congress relies on a dramatic misreading of Supreme Court precedent regarding the Federal sentencing system, and the Defense argument against the specific parameters chosen by the President misstates the law that guided his discretion.

2. **Facts**.

For purposes of this Response, the Government adopts the statement of Facts in the Defense motion.

3. **Burden**. As the moving party, the Defense bears the burden of proof on any factual question by a preponderance of the evidence. RCM 905(c); *see also United States v. Vazquez*, 72 M.J. 13, 19 (C.A.A.F. 2013) (holding that an accused "has the burden to demonstrate that Congress' determination should not be followed").

4. **Law**.

The Fifth Amendment to the Constitution provides, in part, that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law."[1] This Clause applies to service members and courts-martial generally,[2] but "the Constitution confers broad power on Congress 'to make Rules for the Government and Regulation of the land and naval Forces.'"[3] This means that "Congress has primary responsibility for the delicate task of balancing the rights of service members against the needs of the military"[4] and courts must be broadly deferential to that balancing, being "careful not to substitute [their] judgment of what is desirable for that of Congress, or [their] own evaluation of evidence for a reasonable evaluation by the Legislative Branch."[5] This applies with equal force when a rule governing the court-martial process has been set by the President in accordance with delegation by Congress.[6]

Courts evaluating Due Process challenges to military justice procedures enacted by Congress generally apply a three-part balancing first articulated in *Middendorf*, evaluating "(1) historical practice with respect to the procedure at issue, (2) the effect of the asserted right on the military, and (3) the existence in current practice of other procedural safeguards that satisfy the Due Process Clause of the Fifth Amendment."[7]

5. **Argument**.

a. **Just as *Wheeler* applied *Middendorf* to conclude that a service member has no Due Process right to members' adjudication of guilt, a service member has no Due Process right to members' determination of a sentence.**

1. Historical Tradition

The Defense motion begins by arguing that "[t]he 200-year history of discretionary members sentencing weighs *heavily* in favor of construing the removal of this right as a violation of due process,"[8] citing the analysis used by the U.S. Supreme Court in *Weiss v. United States*[9] and the Court of Appeals for the Armed Forces (CAAF) in *United States v. Anderson*[10] and *United States v. Wheeler*.[11] While it is true that members sentencing has historically been the rule in military courts, this factor provides little support for the Defense

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[1] U.S. Const. amend. V.
[2] *Middendorf v. Henry*, 425 U.S. 25, 29 (1976).
[3] *United States v. Graf*, 35 M.J. 450, 455 (C.M.A. 1992) (quoting U.S. Const., Art. I, § 8, cl. 14).
[4] *Solorio v. United States*, 483 U.S. 435, 436 (1987).
[5] *Graf*, 35 M.J. at 461 (quoting *Rostker v. Goldberg*, 453 U.S. 57, 59 (1981)).
[6] *J.M. v. Payton-O'Brien*, 76 M.J. 782 (C.A.A.F. 2017) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 625 – 37 (1952) (Jackson, J., concurring) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.").
[7] *United States v. Wheeler*, 85 M.J. 70, 2024 CAAF LEXIS 479, at *8–9 (C.A.A.F. 2024) (citations omitted).
[8] Defense *Motion for Appropriate Relief (Sentencing Parameters)* dated 27 February 2025 at 4 (emphasis added).
[9] 510 U.S. 163 (1994).
[10] *United States v. Anderson*, 83 M.J. 291 (C.A.A.F. 2023).
[11] Defense *Motion for Members Sentencing Unconstrained by Sentencing Parameters* at 2–3.

position.

To begin, this factor has never been dispositive as to whether the "right is fundamental."[12] The deference courts owe Congress in governing the land and naval forces extends to changes that Congress might choose to make to even long-established practices of courts-martial. As the *Wheeler* court observed, "there is nothing in the Constitution that suggests that 'court-martial usage at a particular time [must be frozen] in such a way that Congress might not change it.'"[13] Indeed, the line of cases that have repeatedly held that a member is not entitled to either a jury[14] or to a panel of members[15] in determining *guilt* stands strongly against, not for, the Defense position – if an Accused does not have a Constitutional right to trial by members, then an accused does not have a right to sentencing by members.

Looking more deeply at the *Middendorf* factors, there is also a key distinction between the change made by Congress here and those considered in the other cases cited by the Defense: Congress has changed the military system to make it *more* like the civilian justice system, *not less*. *Middendorf*'s Due Process analysis is not some leaden stricture that mechanically favors the old over the new, but rather an analysis of the extent to which a particular provision of the Uniform Code "offends some principle of justice so rooted in the traditions and conscience of *our people* as to be ranked as fundamental."[16] In the absence of such offense, Congress "is free to regulate the procedure of [military] courts in accordance with its own conception of policy and fairness."[17] In *Weiss*[18] and *Anderson*,[19] historical precedent was used to justify an aspect of the military justice system that runs *counter to* traditions of Due Process as a civilian might understand them; and in *Wheeler*, the court was forced to grapple with a change to the system that brought the military system *further away* from the civilian justice system (in that it went from a jury-like system of determining guilty by members to a judge-alone system of determining guilt with little analogue in the civilian world, at least as it concerns serious offenses).[20]

Here, though, Congress has done nothing more than change the military's previously unique system of sentencing by lay military members and bring it in line with the civilian practice of having a sentence determined by a judge with experience in the criminal justice system.

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[12] *United States v. Wheeler*, 83 M.J. 581, 587 (N.M. Ct. Crim. App. 2023).
[13] *Wheeler*, 2024 CAAF LEXIS at *15 (quoting *Solorio v. United States*, 483 U.S. 435, 446 (1987)).
[14] *United States ex. rel. Toth v. Quarles*, 350 U.S. 11 (1955)
[15] *Wheeler*, 2024 CAAF LEXIS at *15
[16] *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (emphasis added) (citations omitted).
[17] *Id.*
[18] 510 U.S. at 179–80 (noting that Congress' specific declination to "give tenure to military judges"—despite "tak[ing] affirmative steps to make the system of military justice more like the American system of civilian justice"—must be weighed against other decisions it has made that create "an acceptable balance between independence and accountability, just as "insulating military judges from the effects of command influence.")
[19] 83 M.J. at 299 (holding that appellant was not entitled to a unanimous verdict under the Due Process Clause, in part due to the preserve of the secret ballot and appellate review of factual sufficiency, observing that "[w]hile these safeguards are not identical to those present in the civilian system, they need not be.")
[20] *Wheeler*, 2024 CAAF LEXIS at *4–5.

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Middendorf's first factor calls on courts to weigh "historical practice with respect of the procedure at issue"—but that should not be construed to be limited to *military* practice with respect to the procedure. Regardless of what choices Congress has made in the past with respect to the military, it is difficult to see how a system which is quite similar to the system employed in nearly every civilian court in the nation could ever be found to "offend[] [a] principle of justice rooted in the traditions and conscience of our people."[21] Member sentencing is not "so old and venerable—so entrenched in the central values of our legal system—as to prevent [Congress] from ever choosing another."[22]

2. <u>Effect on military</u>

The "effect on the military" of the change to judge-alone sentencing is much broader than the cramped reading argued by the Defense. Concededly, the time saved by judge-alone sentencing following a members trial on the merits will usually be relatively minimal. But this narrow focus on "military readiness"—as interpreted *only* in terms of the time it takes to adjudicate a sentence—simply ignores the actual rationales that have been offered in the lead up to the change made by Congress.

The change to judge-alone sentencing dates back to at least the Military Justice Review Group in 2015, which recommended the change, so as to encourage "the potential for greater consistency in military sentencing . . . a better balance between individualized sentences and sentence uniformity . . . facilitat[ing] consideration of a broader range of relevant information in the military sentencing process . . . and mak[ing] it easier to employ segmented sentencing."[23] All of these goals are entirely appropriate reasons for Congress to make alterations to even longstanding practices of military jurisprudence. While the Defense motion cites a dated report from 1983 for the proposition that members sentencing "fosters understanding of military justice," that concern must be weighed (and has been weighed, by Congress) against the desire for sentences which do not vary wildly from case to case based on the whims of members who have, by necessity, little context for what punishments would be typical or atypical for the crimes of conviction in a particular case.[24]

Indeed, even viewed solely through the lens of judicial economy, a narrow focus on the trial process ignores the salutary effect of judge-alone sentencing because of its "elimination of instructional issues" and a "potential for a considerable reduction in appellate litigation and rehearings in the area of military sentencing."[25] Because while it may be true that extending the time commitment of members for a day or two of sentencing *at the first trial* may have relatively

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[21] *Snyder*, 291 U.S. at 105.
[22] *Kahler v. Kansas*, 589 U.S. 271, 279 (2020) ("[I]n assessing [historical] practice, we look primarily to eminent common-law authorities (Blackstone, Coke, Hale, and the like), as well as to early English and American judicial decisions.").
[23] MIL. JUST. REV. GRP., REPORT OF THE MILITARY JUSTICE REVIEW GROUP PART I: UCMJ RECOMMENDATIONS 31 (2015) [MJRP].
[24] *United States v. Mamaluy*, 10 C.M.A. 102, 106 (1959) ("It has long been the rule that the sentences in other cases cannot be given to the court-martial members for comparative purposes.").
[25] MJRP at 31

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little operational impact, the delay and additional time required for a sentencing *rehearing* requires what amounts to an entirely new court-martial: selecting and impaneling a new slate of members, educating them on the facts of the case with the previous record of trial, and then litigating a sentence for a second time.[26] Even if this Court were inclined to disregard Congress's judgement that judge-alone sentencing will reduce the need for rehearings on military sentencing—itself an extraordinary proposition, given the deference owed in this area—a switch to judge-alone sentencing means that when a rehearing *is* required, it will avoid the need to call active-duty members away from their other duties in order to conduct that rehearing.

3. Procedural safeguards

Lastly, the Defense motion argues that the change to judge-alone sentencing results in a "dearth of other procedural safeguards that satisfy due process."[27] To begin, it is not clear why exactly the shift to judge-alone sentencing is necessarily *worse*, or results in less Due Process, for an accused than members' sentencing. While an Accused might occasionally benefit from members who are more sympathetic than a military judge or who "price" a particular offense lower than a military judge, the opposite may be true in other cases. Members may end up sentencing an unsympathetic accused to punishment that is well in excess of what a judge—experienced in the system and more able to follow and understand what is and is not proper evidence in aggravation—might do.[28] As discussed above, it is difficult to say that Due Process protections have been appreciably diminished when the net effect is to make military members more, rather than less, like their civilian counterparts facing criminal process.

Nor is there any merit to the idea that a "crucial safeguard" to the military accused during sentencing is the benefit of residual doubt during sentencing—that is, the hope that one or two members who may have voted "Not Guilty" during the merits portion of trial will vote for lower sentences based on that doubt during the sentencing phase. Far from being a "significant procedural protection" of the system, this possibility is a *defect* of members sentencing, one that courts go to great lengths to stamp out. An Accused, otherwise relatively unconstrained in making an unsworn statement during sentencing, is not allowed to impeach the verdict, and counsel for the Accused are strictly forbidden from arguing to the members that a lower sentence is appropriate as a result of any residual doubt.[29] Indeed, as the Defense motion concedes, members are given instructions prior to sentencing that their vote during the merits phase of trial is *irrelevant* to the question of a proper sentence. And while it is impossible to know as a matter of practice whether an Accused might occasionally benefit from members who choose to ignore

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[26] *See* R.C.M. 810(a)(2)

[27] Defense *Motion for Appropriate Relief (Sentencing Parameters)* dated 27 February 2025 at 13.

[28] *See, e.g., United States v. Balboa*, 33 M.J. 304 (1991) (The accused asserted that "the members, contrary to the judge's instructions and a Manual rule, "imposed an excessive sentence . . .".) (citing *United States v. Wilson*, 28 M.J. 48, 51 (CMA 1989); *United States v. Warner*, 25 M.J. 64 (CMA 1987));

[29] *United States v. Johnson*, 62 M.J. 31, 37 (C.A.A.F. 2005) ("[A]n accused is entitled to vigorously contest his innocence on findings, but is not entitled to do on . . . sentencing."); *see also Oregon v. Guzk*, 546 U.S. 517, 525–26 (2006) (declining to find a constitutional right to the presentation of "residual doubt evidence at sentencing" even in capital cases as "sentencing traditionally concerns *how*, not *whether*, a defendant committed the crime").

this instruction, it cannot be said as a matter of law that the elimination of this potential windfall in some way offends Due Process.

The Defense argument on this score also ignores the myriad procedural protections that remain in place under the system proscribed by Congress, and are in many ways bolstered by the change in sentencing procedure. Military judges are statutorily independent of the chain of command of the Accused, insulated from the Convening Authority in a way that members are generally not;[30] a Judge is presumed to more reliably follow the myriad instructions that are designed to protect the right of the Accused during the sentencing process;[31] and by sentencing in a segmented fashion and articulating deviations from the parameters, sentencing is more transparent and amenable to appellate review because the justification for a particular sentence is put on the record and can be challenged.[32]

The Due Process clause is not offended by a change to a system that is nearly identical to that used in civilian courts every day, and Congress' choice to increase consistency and transparency in sentencing is entitled to this court's deference.

b. **Parameters do not violate Due Process because they are non-binding and non-arbitrary**.

1. Applying the *Middendorf* factors, the Defense has not shown a "need so extraordinarily weighty" to overcome the balance set by Congress.

As with the shift to Judge-alone sentencing, we start with the premise, as stated in *Middendorf* that Congress has struck a balance to meet a particular need to effectuate military necessity and therefore the Defense bears the burden to establish a need so extraordinarily weighty as to overcome the congressional balance. And while the specifics of the parameters were ultimately implemented by the President, his choices are similarly entitled to deference: "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."[33]

As with their argument concerning Judge-along sentencing, the Defense conflates the past existence of a particular procedural options with a fundamental right. That is not the case. Just because military sentencing was previously unconstrained by anything other than the maximum punishment set by the President does not mean that Congress cannot seek to change that balance

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[30] *Weiss*, 510 U.S. at 179–80.
[31] In the cases where an appellate must determine whether to conduct a sentence reassessment or order a sentence rehearing, the court will consider whether the sentencing was conducted by members or military judge alone. *United States v. Winckelmann*, 73 M.J. 11, 14 (C.A.A.F. 2013) ("As a matter of logic, judges of the courts of criminal appeals are more likely to be certain of what a military judge would have done as opposed to members.").
[32] R.C.M. 1002(b)(1). *See Jackson v. Tyler*, 353 U.S. 569, 578–79 (1957) (describing how requiring a court-martial to enter a sentence on each separate offense would make it easier to "know the attitude . . . as to punishment on each of its findings of guilty"); *Cf. United States v. Jacinto*, 81 M.J. 350 (C.A.A.F. 2021) (finding that an "unclear and incomplete" record prevented the Court in making an "informed decision" on review).
[33] *Youngstown*, 343 U.S. at 637.

with implementation of parameters or criteria. Deviation from historical military practice does not *heavily* weigh in the favor of the Defense when the deviation brings military practice more in line with past civilian practice, because doing so cannot be said to "offend[] [a] principle of justice rooted in the traditions and conscience of our people."[34]

The Defense also gives short shrift to the intended benefits of the shift to parameters as it applies to the "effect on the military" and the remaining procedural protections afforded an Accused. The primary reason for changes to sentencing such as guidelines or other changes that reduce the sentencing discretion is the desire to reduce unwarranted or inappropriate disparity in sentences in the system.[35] And while the Defense argues that procedural protections are being eliminated, the Court of Criminal Appeals retains the ability to assess a sentence for severity and weigh whether a judge abused his discretion in applying (or deviating from) the parameters,[36] and will now be aided in that task by specific factual findings supporting a sentence outside the parameters range.

Indeed, the Defense ignores a crucial fact about the shift to sentencing parameters: that they are, in their own right, a procedural protection for the Accused. That is, under a system without sentencing parameters, there is nothing other than the maximum punishment table to protect an accused against a sentence that may be widely disproportionate to what other service members may have received in similar cases.

2. The UCMJ's parameter system is non-mandatory and therefore does not fall for the same reasons as *Booker*, but is instead closely modeled after the post-*Booker* system approved in cases like *Gall*.

The Defense makes an argument that stands slightly to the side of the conventional *Middendorf* Due Process analysis, arguing that the sentencing parameters system fails for the same reason as the "ill-fated" guidelines at question in the *Booker* case.[37] This argument not only misinterprets *Booker*, but also fails to acknowledge more recent precedent in cases like *United States v. Gall*.[38] Furthermore, the parameters system created by Congress for use in the military still provides *more* judicial discretion than the federal sentencing guidelines used every day in civilian district courts.

At the outset, it is not clear that *Booker* applies to the military *at all*: the Supreme Court struck down the mandatory nature of the Federal Sentencing Guidelines on the ground that they

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[34] *Snyder*, 291 U.S. at 105.
[35] *See United States v. Allen*, 488 F.3d 1244, 1260 (10th Cir. 2007) (quoting *United States v. Hanson*, 264 F.3d 988, 996 (10th Cir. 2001)) (recognizing that guidelines reduce unwarranted sentencing disparities).
[36] *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006).
[37] Defense *Motion for Appropriate Relief (Sentencing Parameters)* dated 27 February 2025 at 6.
[38] 552 U.S. 38 (2007) (explaining that *Booker* rendered the Guidelines advisory and changed appellate standard review of sentencing from de novo to abuse of discretion); *see also United States v. Ortiz-Avalrez*, 921 F.3d 313, 317–18 (1st Cir. 2019) (citations omitted) (noting a judge errs when she fails to center the sentencing analysis around the federal sentencing guidelines).

violated the Sixth Amendment right to a trial by jury, which has been recently[39] and repeatedly[40] held to be inapplicable to the military.

What is more, even if this court were inclined to import *Booker*'s Sixth Amendment logic to the military via the Due Process clause, that logic is inapplicable here because of the way it relied on very specific nature of the Federal Sentencing Guidelines as they existed at the time. Under those Guidelines, federal judges were required to sentence a defendant based on facts which were found not by the jury beyond a reasonable doubt but instead based on facts found by the judge by a preponderance of the evidence.[41] In *Booker*, for instance, the district court judge held a post-trial hearing and "concluded by a preponderance of the evidence that Booker had possessed an additional 566 grams of crack and that he was guilty of obstructing justice."[42] These findings drove the Guidelines calculation up and required the district judge to sentence Booker to an additional eight years and two months of confinement.[43]

Understood this way, the *Booker* ruling could never apply to the military sentencing parameters system as they currently exist, because the sentencing parameters are based *solely on the crime of conviction*.[44] That is, in order to determine what sentencing parameter applies to a particular case, a military judge need do nothing more than ascertain what crimes the members found an Accused guilty.[45] Any judicial fact-finding is applied *after* the parameter has been determined, and is used by the Judge as it always has been: to tailor an appropriate sentence to the offense and the Accused (either by selecting within the parameter or deviating above or below the parameter).[46]

Lastly, even if *Booker* were applicable, the Defense argument dramatically misstates the degree to which the military parameter system resembles the guidelines referenced in *Booker*. Those Guidelines were implemented in the Sentencing Reform Act of 1984 and sharply limited the ability of judges to deviate from the Guidelines calculation, permitting it only when "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."[47] In making this determination, the court was bound to consider "only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission."[48] This is easily differentiated from the UCMJ sentencing parameters, which permit deviation from the sentencing parameters "upon finding specific facts that warrant

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[39] *Anderson*, 83 M.J. 294–95.
[40] *See United States v. Begani*, 81 M.J. 273, 280 n.2 (C.A.A.F. 2021); *United States v. Easton*, 71 M.J. 168, 175 (C.A.A.F. 2012); *see also Wheeler*, 2024 CAAF LEXIS at *6 n.2 (acknowledging the Supreme Court's position on this matter since 1866).
[41] *Booker*, 543 U.S. at 226.
[42] *Id.* at 227.
[43] *Id.*
[44] R.C.M. 1002(d).
[45] R.C.M. 1002(a)(2).
[46] R.C.M. 1002(a)(2)(B).
[47] 18 U.S.C.S § 3553(b)(1) (2000 ed., Supp. IV).
[48] *Id.*

such a sentence."[49] The only limitation placed on the Military Judge in doing so is that the judge "shall include in the record a written statement of the factual basis for the sentence."[50] It is therefore a gross mischaracterization to state that the military parameters are simply the "old federal 'guidelines' operating under a different name."[51] In reality, the Military Judge has very broad discretion to divert, and is subject to the same abuse of discretion standard as any other judge should his or her sentence be reviewed on appeal.[52]

Indeed, the military parameters are far more analogous to those utilized in the case of *United States v. Gall*. In *Gall*, the Supreme Court upheld a sentence awarded by a district judge under the federal guidelines (sans the mandatory language). The court validated the guidelines as they are now advisory, thus removing due process concerns, and upholds a sentence in which the trial judge departed from the guidelines on a *factual basis,* which explained on the record and in a sentencing memorandum and written ruling.[53] In other words, the judge made "an individualized assessment based on the facts presented."[54] The very same basis for which an exception may be granted and the very same requirement that a written statement be included in the record justifying that bases defines the military parameters. The U.S. Supreme Court further upheld the federal judge's sentence and found he had not abused his discretion, as he gave necessary weight and consideration to the guideline range and appropriately took into consideration the full factual circumstances of the case.[55] This is exactly what the military parameters permit.

3. <u>The parameters are not arbitrary and were set in accordance with the direction set by Congress.</u>

Aside from challenging Congress' choice to implement a sentencing parameter system, the Defense also argues that the specific parameters selected violate Due Process because they were arbitrary or otherwise not in accordance with Congressional direction. To begin, it is worthwhile to step back and consider the breadth of what the Defense is asking this Court to do: invalidate a sentencing scheme set by the President when "his authority is at its maximum"[56] based solely on what amounts to substantive disagreement with the choices made or a different interpretation of various data sets. This would be an extraordinary step and the Defense does not cite a single case or law for the proposition that this would be an appropriate exercise of the court's judicial power.

But to drill down even further, the entire premise of the Defense argument is flawed. Congress did not direct the mere crystallization of past court-martial sentences into a set of parameters—Congress *empowered* the Executive branch to craft *new* sentencing parameters which would take into account a wide variety of factors that require the application of judgment,

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[49] R.C.M. 1002(a)(2)(B).
[50] *Id.*
[51] Defense *Motion for Appropriate Relief (Sentencing Parameters)* dated 27 February 2025 at 6.
[52] *See Booker*, 543 U.S. at 259 (holding that, to render the statute constitutional, it "sever and excise" the "de novo review of departures from the applicable Guidelines range").
[53] *Gall*, 552 U.S. at 42–43, 49–50.
[54] *Id.* at 49–50.
[55] *Id.* at 54–55.
[56] *Youngstown*, 343 U.S. at 637.

not rigid adherence to past practice.[57] The Due Process Clause does not prohibit either Congress or the Executive from making policy choices, even if those choices have the effect of increasing the likely punitive exposure that applies to a given criminal offense.

The Defense motion takes as granted that any deviation between past results of courts martial and the parameters set by the President is *per se* arbitrary and unreasonable. In support of this, the motion refers to Congress's direction that the President "consider the sentencing data collected by the Military Justice Review Panel."[58] But while Congress did direct that certain aspects of past court-martial data be *considered* as part of the Board's crafting of parameters, it notably did not direct that parameters had to *conform* to past court-martial data. That is, nothing in the law prevents the Board or the President from considering past court-martial sentences and making a policy choice that those sentences (or patterns) were inadequate.

The actual task set by Congress for the President in establishing parameters is discussed only incompletely in the Defense motion, citing to two of the five criteria that Congress directed should be used in crafting parameters for confinement:

> (A) identify a delineated sentencing range for an offense that is appropriate for a typical violation of the offense, taking into consideration—
>
> (i) the severity of the offense;
>
> (ii) the guideline or offense category that would apply to the offense if the offense were tried in a United States district court;
>
> (iii) any military-specific sentencing factors;
>
> (iv) the need for the sentencing parameter to be sufficiently broad to allow for individualized consideration of the offense and the accused; and
>
> (v) any other relevant sentencing guideline.[59]

With this full context, it is clear that Congress quite deliberately gvast discretion to the Executive in crafting parameters—the phrase "*appropriate* for a typical violation of the offense"[60] leaves room for a wide breadth of discretion and policy making choices. This phrase (and the criteria that modify it) does not make any reference whatsoever to past practice of courts-martial. Indeed, the task set by Congress quite explicitly calls for the Executive to consider deviation from past sentences handed down in courts-martial, at least in so far as those

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[57] *See* National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 539E(e), 135 Stat. 1541, 1700 (2021) (effective Dec. 2023) [NDAA]. Additionally, as the Military Justice Review Group recommended "draw[ing] upon practice and experience in the civilian sector, including under the U.S. Sentencing Guidelines," any similarity to the Federal system was likely intentional. MJRP at 511.
[58] NDAA § 539E(e)(4)(F)(iii), 135 Stat. at 1704.
[59] NDAA § 539E(e)(4)(F)(iii), 135 Stat. at 1705.
[60] *Id.* (emphasis added).

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sentences might differ from "the guideline or offense category that would apply to the offense if the offense were tried in a United States district court." [61]

This case is a perfect illustration of that principle. In federal district court, the alleged conduct of the Accused (using the internet to entice a minor into sex) could carry a mandatory minimum of *ten years*.[62] Production of child pornography could carry a mandatory minimum of *fifteen years*.[63] Put in this light, it hardly "shock[s] the conscience"[64] that the President chose parameters which bring military sentences into more close alignment with civilian ones.

In the end, the Defense's nitpicking of past court-martial data misses the point entirely: Congress has entrusted the President, as it has for generations, with setting the ground rules for what is "appropriate" punishment of a given offense.[65] In the past, the President did this by setting maximum punishments and with mandatory minimums;[66] now, the President has the tools to more specifically delineate as a matter of policy what a "typical" violation should get.[67]

To the extent that the Accused believes specific factors in his case call for a different sentence, then the law allows for that too. The Defense may introduce evidence in extenuation and mitigation, and this Court can exercise its discretion to determine whether those "specific facts" justify departure from the parameters set by the President.[68] Due Process demands nothing more.

6. **Evidence and Enclosures**.

The Government has no additional evidence or enclosures in support of this motion. The Government does not request oral argument.

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[61] *Id.*
[62] 18 U.S.C. § 2422.
[63] 18 U.S.C. § 2251.
[64] Defense *Motion for Appropriate Relief (Sentencing Parameters)* dated 27 February 2025 at 10.
[65] NDAA § 539E(e).
[66] *See, e.g.*, Exec. Order No. 13,643, 78 Fed. Reg. 29,559 (May 15, 2013) (amending maximum punishments); Act of Sept. 27, 1890, ch. 998, 26 Stat. 491 (original act delegating authority to the President to set maximum punishments); Pub. L. No. 113-66, § 1705(a), 127 Stat. 672, 959 (2013) (imposing mandatory minimum sentence of a dismissal or dishonorable discharge for rape of a child).
[67] NDAA § 539E(e).
[68] R.C.M. 1002(a)(2)(B).

7. **Relief Requested**. The Government requests this Court deny the Defense *Motion for Members Sentencing Unconstrained by Sentencing Parameters* and, in the event that sentencing is required, sentence the Accused in accordance with all applicable provisions of the Uniform Code of Military Justice.

[redacted]
N. S. HENRY
LtCol, USMC
Regional Special Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of March, 2025, a copy of this motion was served on Defense Counsel.

[redacted]
N. S. HENRY
LtCol, USMC
Regional Special Trial Counsel

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

UNITED STATES **V.** **DAKOTA S. HONSTEIN** **SERGEANT / E-5** **USMC**	DEFENSE MOTION *IN LIMINE* TO EXCLUDE EVIDENCE UNDER M.R.E. 401 and M.R.E. 403 27 February 2025

MOTION

Pursuant to Rule for Courts-Martial 905(b)(3), the Defense moves the Court, *in limine*, to exclude statements made by Ms. [redacted] to NCIS on 6 Sept 2024.

BURDEN

As the proponent of the evidence, the Government carries the burden of persuasion in demonstrating that the proffered evidence complies with the requirements.

FACTS

1. On 6 September 2024, Special Agent (SA) [redacted] conducted a telephonic interview with [redacted]

2. [redacted] agreed to conduct an audio and video recorded interview with SA [redacted] on the evening of 6 September 2024.

3. On 6 September 2024, SA [redacted] and SA [redacted] NCIS conducted an in person interview with Ms. [redacted] in which they asked her questions about her involvement with Sgt Honstein.

4. On 13 January 2024, Sgt Honstein and [redacted] matched on Tinder.

5. On 14 January 2024, Sgt Honstein went to [redacted] home, where they watched a movie, engaged in kissing, and talked.

6. On 15 January 2024, Sgt Honstein returned to [redacted] home, where Sgt Honstein and [redacted] engaged in sexual intercourse.

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7. Ms. [redacted] told SA [redacted] and SA [redacted] about numerous statements made by Sgt Honstein from 13 January to 16 January, specifically:

[redacted]

8. [redacted] and Sgt Honstein had no further contact after 16 January 2024.

LAW

Evidence is relevant is 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. The military judge may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence. Mil.R.Evid. 403.

In conducting the M.R.E. 403 balancing test a military judge should consider the following factors: (1) the strength of the proof of the prior act; (2) the probative weight of the evidence; (3) the potential to present less prejudicial evidence; (4) the possible distraction of the fact-finder; (5) the time needed to prove the prior conduct; (6) the temporal proximity of the prior event; (7) the frequency of the acts; (8) the presence of any intervening circumstances; and (9) the relationship between the parties. *United States v. Berry*, 61 M.J. 91, 95 (C.A.A.F. 2005)

In a case where there is a possibility that the offered evidence shows the appellant as a "bad man," we believe that it would be better practice to keep the nature of the act from the jury (*United States v. Dawkins*, 2 M.J. 898, 900 (A.C.M.R., 1976)

ANALYSIS

The probative of the statements made by Ms. [redacted] to NCIS on 6 September, 2024 is substantially outweighed by a danger of unfair prejudice, confusing the issues, and misleading the members:

[redacted]

There are no allegations of Sgt Honstein cutting himself and enjoying the pain in the sexual encounter with Ms. [redacted] This statement is not relevant to the charges that Sgt Honstein currently faces. Whether or not he "likes to cut himself, enjoys the pain, or likes seeing his own blood" does not have a tendency to make a fact, of consequence, more or less probable regarding the charged act on 27 January 2024.

Even if the statement was found to be relevant, analyzing the factors outlined in *Berry* shows that the probative value is substantially outweighed by unfair prejudice. Moreover, it would be used to simply paint Sgt Honstein as a "bad guy", as admonished against in *U.S. v. Dawkins*. Specifically, when looking at the second *Berry* factor, the probative weight of the evidence is minimal. Again, there is nothing probative about Sgt Honstein's alleged disposition to cut himself, enjoy pain, or enjoying seeing his own blood when deciding whether or not he committed murder or manslaughter. Moving to the fourth *Berry* factor, this testimony has a significant potential to distract the fact finder. Rather than focusing on the evidence before them and determining whether or not the evidence proves the charges allegations, the fact finder will undoubtedly be distracted by this statement and Sgt Honstein's alleged tendencies. This statement would merely be used as inflammatory language to paint Sgt Honstein as a "bad guy". Additionally, outside of Ms. [redacted] there is no corroboration to determine whether this statement was ever made. Their relationship lasted for a mere two days and consisted of messages on Tinder, a few text messages, meeting each other over a period of two days, and a one time occurrence of sexual intercourse.

The bracelet on his wrist was a vial of his own blood

Sgt Honstein's bracelet is of no consequence to the charges against him. It again is not relevant and would be used to paint Sgt Honstein as a "bad guy". Whether or not Sgt Honstein had a vial of blood on his wrist does not have a tendency to make any fact of consequence more or less probable than it would be without the evidence.

Even if this statement was found to be relevant, it should be excluded under M.R.E. 403. There is minimal to no probative weight of this statement. There is significant potential to present less prejudicial evidence regarding Sgt Honstein's tendencies that would be relevant to the charged acts, whether through diagnoses or actions Sgt Honstein took on 27 January 2024. Lastly, the statement would be inflammatory to the fact finder and distract them from whether or not the evidence proves the charged acts or not, they would be distracted by something many would consider odd and simply make a judgment about Sgt Honstein being a "bad guy".

[redacted]

The probative value of the statement "We're all going to die, so why not just do reckless stuff and brace for the outcome", allegedly made by Sgt Honstein, is substantially outweighed by the danger of unfair prejudice. There is no reference to what "stuff" the statement is referring to and Ms. [redacted] does not provide any clarification in her interview with NCIS. Additionally, this statement is alleged to have been made proximate to a sexual encounter with Ms. [redacted] in which BDSM was involved, but no gunplay, which is at issue in shooting of Ms. [redacted]

The risk of unfair prejudice is shown through the *Berry* factors. Specifically, when looking at the strength of proof of the prior act and the relationship between Ms. [redacted] and Sgt Honstein, the strength of proof is minimal. Ms. [redacted] and Sgt Honstein's relationship consisted of a few messages on Tinder, text messages, meeting each other over a period of two days, and a one time occurrence of sexual

[redacted]



There are no allegations of Sgt Honstein and Ms. [redacted] exchanging blood and this statement is not referring to Ms. [redacted] proven by the timeframe of when they met in relation to Sgt Honstein's encounter with Ms. [redacted] This statement is not relevant to the charges that Sgt Honstein currently faces. Whether or not he "exchanged blood with an unidentified female" does not have a tendency to make a fact, of consequence, more or less probable regarding the charged act on 27 January 2024.

This statement would merely be inflammatory and would undoubtedly distract the factfinder. Again, the purpose of this statement would be to paint Sgt Honstein as a "bad guy" rather than prove any fact of consequence relating to the charges Sgt Honstein currently faces.

He enjoyed seeing other people in pain

On 6 September 2024, Ms. [redacted] stated to SA [redacted] and SA [redacted] that [redacted] SA [redacted] later clarifies with Ms. [redacted] asking [redacted]

Sgt Honstein's sexual proclivities regarding choking, slapping, and pulling hair are not relevant to the charges he currently faces. This statement does not make a fact of consequence more or less probable

than it would be without the evidence, in regards to the shooting of Ms. [redacted] The fact that Ms. [redacted] died of a gunshot is undisputed and there is nothing to suggest choking, slapping, or pulling hair played any role.

Even if the statement is found to be relevant, it should be excluded under M.R.E. 403, as it's probative value is substantially outweighed by the potential for unfair prejudice. Similar to statements discussed above, the temporal proximity and strength of proof to determine whether or not this statement was ever made by Sgt Honstein is minimal. Ms. [redacted] with Sgt Honstein [redacted]

You know, one flick and I could kill you

Ms. [redacted] states that during sexual intercourse with Sgt Honstein, he stated "You know, one flick and I could kill you," in reference to a knife used during the BDSM encounter. This statement should be excluded due to the risk of unfair prejudice substantially outweighing its probative value. There is no evidence suggesting a knife was present or relevant on 27 January 2024, during Sgt Honstein's encounter with Ms. [redacted] Sgt Honstein is charged with "Murder – Act inherently dangerous to another" and "Involuntary manslaughter – culpable negligence". Although a firearm and a knife are both weapons, the instrumentality and risk calculus when introducing these items into a BDSM encounter are completely different.

When analyzing the *Berry* factors, the temporal proximity and the relationship between the parties remains the same, as discussed above. The strength of proof regarding this statement is even less, as this statement allegedly occurred during a heightened state of emotion and during sexual intercourse. This statement will be distracting to the fact finder and used as an inflammatory mechanism to paint Sgt Honstein as a "bad guy". Lastly, an alleged statement in reference to a knife is not probative to whether or not Sgt Honstein murdered or committed manslaughter using a firearm against Ms. [redacted]

RELIEF REQUESTED

Defense requests the Court exclude evidence of Sgt Honstein's statements to Ms. [redacted] that the Government intends to use at trial in its case against Sgt Honstein.

ENCLOSURES

Defense offer the following enclosures in support of its motion:

a. Enclosure 1: Interview of [redacted] dtd 6 Sept 2024

b. Enclosure 2: Results of telephonic interview with [redacted] dtd 7 Sept 2024

Argument

Oral argument is requested if this motion is opposed.

PAGANUCCI.NICOLAI.JOSEPH.[redacted] Digitally signed by PAGANUCCI.NICOLAI.JOSEPH.[redacted] Date: 2025.02.27 22:12:48 -05'00'

N.J. PAGANUCCI
Captain, USMC
Detailed Defense Counsel

A copy of this motion was served on the Court and Trial Counsel via NCORS on 27 February 2025.

PAGANUCCI.NICOLAI.JOSEPH.[redacted] Digitally signed by PAGANUCCI.NICOLAI.JOSEPH.[redacted] Date: 2025.02.27 22:13:09 -05'00'

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

UNITED STATES **V.** **DAKOTA S. HONSTEIN** **SERGEANT / E-5** **USMC**	**GOVERNMENT RESPONSE TO THE DEFENSE MOTION TO SUPPRESS (Statements to Ms [redacted])** **11 March 2025**

NATURE OF THE MOTION

This is the Government's response to the Defense motion to suppress statements of the Accused made to Ms. [redacted].

SUMMARY

On 27 February 2025, the Defense sought to suppress Statements made by the Accused during another BDSM encounter using a weapon that bear directly on his knowledge of a probable outcome of introducing a weapon into the encounter and statements that contradict the Defenses continuous and repeated attempts to blame the victim, Ms. [redacted] for the Accused intentional and wonton acts. Accordingly, the Defense's motion and requested relief should be **DENIED**.

FACTS

1. The Government adopts the facts pertaining to this witness as articulated by the Defense.

LAW

In conducting the M.R.E. 403 balancing test a military judge should consider the following factors: (1) the strength of the proof of the prior act; (2) the probative weight of the evidence; (3) the potential to present less prejudicial evidence; (4) the possible distraction of the fact-finder; (5) the time needed to prove the prior conduct; (6) the temporal proximity of the

prior event; (7) the frequency of the acts; (8) the presence of any intervening circumstances; and (9) the relationship between the parties.

United States v. Berry, 61 M.J. 91, 95 (C.A.A.F. 2005)

"We find that the appellant's level of knowledge regarding weapons safety was a fact of consequence the Government was required to prove beyond a reasonable doubt." *United States v. Pimienta*, 66 M.J. 610, 614 (N-M Ct. Crim. App. 2008)

"We disagree with the appellant that the defense of mistake or accident was not raised. Statements made at trial by the trial defense counsel to the members, as well as the evidence adduced at trial through the cross-examination of LCpl Groover, raised the defense that the fatal discharge of the weapon was accidental." *Id.*

Additionally, the appellant's statements to NCIS investigators indicated that the weapon discharged when the appellant picked it up off the rack and tried to sit up to put it in its holster. Although this evidence was offered by the Government (Prosecution Exhibit 4), it was the appellant's own statement and represented the only eyewitness account of the tragic event. *Id.*

The Supreme Court unequivocally determined that evidence of intent and lack of accident may be admitted, regardless of whether a defendant argues lack of intent, because every element of a crime must be proven by the prosecution. *Estelle v. McGuire*, 502 U.S. 62, 69, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991)(citing *Mathews v. United States*, 485 U.S. 58, 64-65, 108 S. Ct. 883, 99 L. Ed. 2d 54 (1988)). Additionally, our superior court in *United States v. Harrow*, 65 M.J. 190 (C.A.A.F. 2007), specifically addressed this issue in interpreting Estelle by holding:

> This Court's intermittent efforts to distinguish Estelle as a Supreme Court case addressing state, rather than federal, law does not detract from the force of the basic tenet asserted by the Supreme Court:

"A simple plea of not guilty . . . puts the prosecution to its proof as to all elements of the crime charged . . . ."*Id. citing, United States v. Harrow,* 65 M.J. at 202 (quoting Mathews, 485 U.S. at 64-65).

"I have instructed you that you must be satisfied beyond a reasonable doubt that the accused knew *death or grievous bodily harm was a* probable consequence of the Accused's intentional act. This knowledge, like any other fact, may be proved by circumstantial evidence. In deciding this issue, you must consider all relevant facts and circumstances including, but not limited to the Accused age, training, experience with weapons, experience with this weapon, and prior experience with weapons during sexual encounters, to include the heightened danger of adding a weapon into the encounter, the Accused's motive for doing so, and the Accused's desire to partake in said action. (emphasis added) *Electronic Bench Book 7-3, Note 3*

ARGUMENT

A. The Accused's Statements to [redacted] are relevant and probative to the accused state of mind regarding the intent for using a weapon during a sexual encounter, to corroborate his confession to NCIS about his "needing and adrenaline rush," to articulate his motivation for involving a weapon in this sexual encounter, and as circumstantial evidence of his actual knowledge of how dangerous using a weapon during a sexual encounter can be and his actual knowledge, and in this case, acknowledgment of the probable consequence of death or grievous bodily harm to a partner when a deadly weapon is introduced into the sexual encounter.

B. The Accused through pretrial filings has routinely sought to address the Victim's mental health diagnosis to allege that she was suicidal and therefore more willing to engage in risky behavior. That evidence, if allowed should be permitted to be met in kind by the same evidence relating to the Accused. Additionally, the Accused's acknowledgement, in his own words that

this type of behavior is "reckless," could not be more relevant given the additional charge, the Accused confession, and the Court's ruling that the accused must have actual knowledge that a probable consequence of his deliberate act was death or great bodily harm.

C. While circumstantial evidence can be compelling and persuasive, there is no stronger evidence of a person's intent and knowledge than their own words. The Relationship with Ms. [redacted] was close in time, similar in circumstance, and substantively. In fact, unlike Ms. [redacted] who was killed during their first in person encounter, Ms. [redacted] had a relationship with the accused and knew him on a deeper level. The statements of the Accused that go directly to his motive for involving a weapon, loading the weapon, feeding off the danger for an "rush," and ultimately attempting to push the loaded weapon out of battery while placed over Ms. [redacted] heart and pulled the trigger are incredibly probative. While there is some risk of prejudice to the Accused it is not unfair prejudice and it certainly does not substantially out weight the high probative value. Given the current procedural posture and the articulated defenses and instructions, the most relevant statements of the Accused to Ms. [redacted] are this following and are highly probative to the central issue in this case, the knowledge of the Accused.

i. *"We're all going to die, so why not just do reckless stuff and just brace for the outcome,"* While the Defense contends there is "no reference to what "stuff" the statement is referring to…" however, the statement is clearly made in the context of Ms. [redacted] description of their sexual encounters and it stuck out to her. While the Government concedes, as most Government proffered evidence is a criminal case, it is prejudicial to the Accused. However, it is not unfairly prejudicial and given the allegations, the proffered defenses, the probative value of this statement is high could not be substantially outweighed by the risk of *unfair prejudice.*

ii. *"You know, one flick and I could kill you" The* Defense contends, "Although a

firearm and a knife are both weapons, the instrumentality and risk calculus when introducing these items into a BDSM encounter are completely different." While the Government does not disagree that the risk calculus is completely different between the use of a knife and a firearm. That is not a helpful fact to the Defense regarding this motion. The Accused acknowledgment that a knife involved in the BDSM encounter, if handled recklessly, while pressed against the partner's throat, could cause death. Certainly, a firearm, used in a way not designed as a safety, while loaded and placed over the Victim's heart, would certainly be recognized by this Marine, with his purported BDSM background, as a much higher risk where millimeters make the difference between a consensual encounter and the death of Ms. [redacted] Again, where the Court has determined the Government must demonstrate actual knowledge of a probable outcome, there is no more probative evidence of the Accused's knowledge that his own words, in a similar circumstance involving as less dangerous weapon.

RELIEF REQUESTED

The Government respectfully request the Court to DENY the Defense's Motion to suppress. Given the requirement to prove actual knowledge and the fact these are statements of the Accused purporting to contradict the proffered Defense to which the Defense team has articulated for months they intend to raise, these statements are central to the Government case and suppression of then would substantially interfere with the Government ability to fairly present a case.

ENCLOSURES

The Government does not have any additional enclosures to the motion as the Defense has submitted the statement of Ms. [redacted]

ARGUMENT

The Government requests oral argument on this motion.

[redacted]
N. S. HENRY
LtCol, USMC
Regional Special Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of March 2025, a copy of this motion was served on Defense Counsel.

[redacted]
N. S. HENRY
LtCol, USMC
Regional Special Trial Counsel

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

UNITED STATES **V.** **DAKOTA S. HONSTEIN** **SERGEANT / E-5** **USMC**	DEFENSE MOTION TO DISMISS UNDER RCM 906 AND RCM 907 27 February 2025

MOTION

Pursuant to Rule for Courts-Martial 906(b)(12) and 907(b)(3)(B), the Defense moves this court to dismiss Charge II for an unreasonable multiplication of charges with Charge I.

BURDEN

Under R.C.M. 905(c), the burden of proof is on the Defense as the moving party.

FACTS

1. On 3 July 2024, charges for violations of Article 118, Article 119, and Article 92, UCMJ were referred against Sgt Honstein by the Lead Special Trial Counsel.

2. On 26 October 2024, the charges against Sgt Honstein were withdrawn and dismissed without prejudice.

3. On 26 October 2024, charges for violations of Article 118, Article 119, and Article 92, UCMJ were re-referred against Sgt Honstein by the Deputy Lead Special Trial Counsel.

3. The Specification in the Additional Charge, Murder – Act Inherently Dangerous to Another, states "In that Sergeant Dakota S. Honstein, U.S. Marine Corps, on active duty, did,

onboard Marine Corps Base Camp Lejeune, on or about 27 January 2024, murder [redacted] by means of intentionally pulling the trigger of a loaded firearm while pointing it at her."

3. The Specification in Charge II, Involuntary Manslaughter – Culpable Negligence, states "In that Sergeant Dakota S. Honstein, U.S. Marine Corps, on active duty, did, onboard Marine Corps Base Camp Lejeune, on or about 27 January 2024, by culpable negligence, unlawfully kill [redacted] by means of shooting her with a firearm."

LAW

R.C.M. 906(b)(12) states "The military judge may provide a remedy, as described in this rule, if he or she finds there has been an unreasonable multiplication of charges as applied to findings or sentence."

"[E]ven if offenses are not multiplicious as a matter of law with respect to double jeopardy concerns, the prohibition against unreasonable multiplication of charges has long provided courts-martial . . . with a traditional standard – reasonableness – to address the consequences of an abuse of prosecutorial discretion in the context of the unique aspects of the military justice system." *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001). Quiroz announced a 5-part test to determine if there is an unreasonable multiplication of charges:

> (1) "Did the accused object at trial that there was an unreasonable multiplication of charges and/or specifications?"; (2) "Is each charge and specification aimed at distinctly separate criminal acts?"; (3) "Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality?"; (4) "Does the number of charges and specifications unfairly increase the

appellant's punitive exposure?"; and (5) "Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

Id. "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). "When the military judge finds, in his or her discretion, that the offenses have been unreasonably multiplied, the appropriate remedy shall be dismissal of the lesser offenses or merger of the offenses into one specification." R.C.M. 906(b)(12). These factors must be balanced, with no single factor necessarily governing the result. *United States v. Pauling*, 60 M.J. 91, 95 (C.A.A.F. 2004). "Dismissal of charges is a remedy available for addressing an unreasonable multiplication of charges." *Campbell*, 71 M.J. at 22-23 (quoting *United States v. Roderick*, 62 M.J. 425, 422 (C.A.A.F. 2006).

ANALYSIS

The Government's charging decision constitutes an unreasonable multiplication of charges. In this case, using the factors outlined in *Quiroz*, the Specification under Charge II is an unreasonable multiplication of charges:

(1) Sgt Honstein does object that there is an unreasonable multiplication of charges.

(2) The Additional Charge and Charge II are not aimed at distinctly separate criminal acts. Rather, they are all based on the same course of alleged conduct; the killing of Ms. [redacted]

(3) The two specifications taken together misrepresent and exaggerate Sgt Honstein's alleged criminality, Sgt Honstein could not have murdered Ms. [redacted] and also committed manslaughter resulting in Ms. [redacted] death.

(4) When taken together, the number of Charges unfairly increases Sgt Honstein's punitive exposure. If Sgt Honstein were found guilty of the Additional Charge and Charge II, he could be sentenced consecutively. This could increase his possible sentence by 10 years.

(5) Evidence of prosecutorial overreach is inherent in the unreasonableness of charging one course of conduct twice. Additionally, the procedural posture resulting from *Honstein I* shows the unreasonableness of charging this course of conduct twice. The Government charged Sgt Honstein with violations of Article 118 and Article 119, UCMJ, on 3 July 2024. The Government then withdrew the charges against Sgt Honstein on 26 October 2024. The Government then re-referred charges against Sgt Honstein for violations of Article 118 and Article 119, UCMJ, on 26 October 2024.

"Dismissal of charges is a remedy available for addressing an unreasonable multiplication of charges." *Campbell*, 71 M.J. at 22-23 (quoting *United States v. Roderick*, 62 M.J. 425, 422 (C.A.A.F. 2006). In this case, dismissal is the most appropriate remedy, due to the inherent overreaching in the drafting of these charges, and the significant prejudice to the Sgt Honstein through the unreasonable and unjust exaggeration of his alleged criminality. The alleged conduct is an action by one person against another one person and cannot be both a violation of Article 118 and Article 119, UCMJ.

RELIEF

The Defense respectfully requests the Court dismiss Charge II as an unreasonable multiplication of the Additional Charge.

EVIDENCE

Enclosure 1: Referred Charge Sheet dtd 26 October 2024

Enclosure 2: Withdrawn Charge Sheet dtd 3 July 2024

Enclosure 3: Referred Additional Charge dtd 3 December 2024.

Argument

Oral argument is requested if this motion is opposed.

PAGANUCCI.NICOLAI.JOSEPH.[redacted] Digitally signed by PAGANUCCI.NICOLAI.JOSEPH.[redacted] Date: 2025.02.27 22:02:48 -05'00'

N.J. PAGANUCCI
Captain, USMC
Detailed Defense Counsel

A copy of this motion was served on the Court and Trial Counsel via NCORS on 27 February 2025.

PAGANUCCI.NICOLAI.JOSEPH.[redacted] Digitally signed by PAGANUCCI.NICOLAI.JOSEPH.[redacted] Date: 2025.02.27 22:03:09 -05'00'

N.J. PAGANUCCI
Captain, USMC
Detailed Defense Counsel

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

UNITED STATES v. DAKOTA S. HONSTEIN SERGEANT/E-5 U.S. MARINE CORPS	**GOVERNMENT'S RESPOND TO DEFENSE MOTION TO DISMISS FOR UMC** 11-Mar-25

Nature of Motion

This is the Government's response to the Defense's motion to dismiss Charge II for an unreasonable multiplication of charges with the Additional Charge, dated 27 February 2025.

Summary

The Accused is charged with violations of Article 118(3) and Article 119, for discharging his 9mm pistol while it was pressed against the chest of Ms. [redacted] on 27 January 2024, which resulted in her death a short time later. The Accused initially reported to PMO officers and NCIS agents that during the course of a consensual sexual interaction involving the weapon, the victim had pulled the trigger, followed by a change in his explanation that she had loaded the gun without his knowledge before he pulled the trigger, which was followed finally by an admission that he actually knew the weapon was loaded and that he had pulled the trigger intentionally but did he did not believe that the weapon would discharge because he believed he had depressed the slide of the pistol enough to disengage the trigger by pushing the weapon at an angle into the Victim's chest, when he intentionally pulled the trigger. The Defense has repeatedly averred, in writing and orally (to both PHOs and the military judge), that the Accused is guilty of Charge II, the violation of Article 119–going so far as to say "there is no doubt that Sgt Honstein's alleged conduct falls squarely within the ambit of

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involuntary manslaughter." However, the Defense now seeks to have Charge II dismissed, arguing it unreasonably multiplies the Accused's punitive exposure for the same act as the Additional Charge. The Government concedes that Charge II and the Additional Charge are charged in the alternative for exigencies of proof, and requests the Court only conditionally dismiss Charge II when the Accused is found guilty of both Charge II and the Additional Charge this Court should deny the Defense's motion and delay dismissal of Charge II until such time as a finding of guilty is returned as to both Charge II and the Additional Charge and appellate review has been completed.

Summary of Facts

1. The Accused is charged with violations of Article 118(3) and Article 119, for discharging his 9mm pistol while it was pressed against the chest of Ms. [redacted] on 27 January 2024, which resulted in her death a short time later.

2. The Accused initially reported to PMO officers and NCIS agents that during the course of a consensual sexual interaction involving the weapon, the victim had pulled the trigger, followed by a change in his explanation that she had loaded the gun without his knowledge before he pulled the trigger, which was followed finally by an admission that he knew the weapon was loaded and that he had pulled the trigger but did he did not believe that the weapon would discharge because he believed he had depressed the slide of the pistol enough to disengage the trigger to prevent it from firing. [Accused's interrogation and statements from PMO, previously provided to the Court]

3. The Accused also explained that the pistol was involved in the consensual sexual interaction for his sexual gratification, and that the dangerous nature of the loaded weapon added to his arousal. He stated he had handled that pistol on many occasions, and used it many times in sexual encounters with gun play. He qualified as an expert on pistol. [Accused's

interrogation and Accused's OMPF]

4. A magazine which holds 15 rounds was recovered at the crime scene with 13 rounds still inside it. One spent round and casing were also found at the scene, and the weapon was cleared by the Accused, likely ejecting the 15th round, though it was not photographed at the scene. At a minimum there were 14 rounds in the magazine when it was loaded into the weapon adding weight to it before it was fired.

Burden of Proof and Persuasion

5. The moving party generally bears the burden of proof and persuasion under R.C.M. 905(c), and, the proponent of evidence has the burden of showing that it is admissible." United States v. Billings, 61 M.J. 163, 168 (C.A.A.F. 2005) (citing United States v. Palmer, 55 M.J. 205, 208 (C.A.A.F. 2001)).

Law

6. "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). At trial, three separate concepts may arise: multiplicity for double jeopardy purposes, unreasonable multiplication of charges as applied to findings, and unreasonable multiplication of charges as applied to sentencing. *United States v. Campbell*, 71 M.J. 19, 23 (C.A.A.F. 2012) "The charging scheme may not implicate the *Quiroz* factors in the same way that the sentencing exposure does." *Id.* Specifically, "[i]n some instances there may be a genuine question as to whether one offense as opposed to another is sustainable. In such a case, the prosecution may properly charge both offenses for exigencies of proof, **a long accepted practice in military law**. *United States v. Morton*, 69 M.J. 12, 16 (C.A.A.F. 2010) (citing *United States v. Villareal*, 52 M.J. 27, 31 (C.A.A.F. 1999)). In such a case, "as recognized in *Quiroz*, 'the nature of the harm requires a remedy that focuses more appropriately on punishment than on findings.'" *Campbell*, 71 M.J. at 23.

7. R.C.M. 906(b)(12) states "The military judge may provide a remedy, as described in this rule, if he or she finds there has been an unreasonable multiplication of charges as applied to findings or sentencing. Within that context, "the military judge generally has wide discretion to dismiss offenses, merge offenses, or merge offenses only for purposes of sentencing." *United States v. Thomas*, 74 M.J. 563, 568 (N-M Ct. Crim. App. 2014). But, "When a panel returns guilty findings for multiple specifications and it was agreed that these specifications were **charged** for exigencies of proof, it is incumbent upon the military judge either to consolidate or dismiss the contingent specifications, not merely merge them for sentencing purposes. *United States v. Elespuru*, 73 M.J. 326, 329-30 (C.A.A.F. 2014) ("Dismissal of specifications charged for exigencies of proof is particularly appropriate" where "the nuances and complexity" of the applicable charge make "charging in the alternative an unexceptional and often prudent decision."). Military judges should ordinarily dismiss one of the charges based on the principle of unreasonable multiplication of charges ***only after findings have been reached***. *Id.* Practitioners are advised to request the military judge to conditionally dismiss until such time as appellate review has been completed. *Id.; see, e.g., United States v. Hines*, 75 M.J. 734 (A. Ct. Crim. App. 2016) *See also United States v. Thomas*, 74 M.J. 563 (N-M. Ct. Crim. App. 2014), *United States v. Parker*, 75 M.J. 603 (N-M. Ct. Crim. App. 2016).

ANALYSIS

8. This Court should not prematurely dismiss the Additional Charge because the Government can, and did, properly charge both offenses for exigencies of proof, "a long accepted practice in military law." *United States v. Villareal*, 52 M.J. 27, 31 (C.A.A.F. 1999). While the Government firmly believes "the accused will, more likely than not, be found guilty beyond a reasonable doubt by a reasonable, unbiased trier of fact and that the conviction will be upheld on appeal," of Charge II and the Additional Charge have different elemental requirements

of proof. And, given the nuance and complexity of Art. 118(3), UCMJ, the Government charged the Accused under Art. 119, UCMJ as well–which should be viewed by this Court as an "unexceptional and . . . prudent decision" (*Elespuru*, at 329-30) under the circumstances of the case. Accordingly, the appropriate remedy under the case law referenced above is the conditional dismissal of Charge II prior to sentencing proceedings.

9. The Defense's arguments that dismissal prior to empanelment and findings should be rejected because they are rooted in the same misguided arguments already rejected by this Court and dismissal now would result in a manifestly unjust windfall for the Accused. The Defense's brief argues that charging in the alternative is a "prosecutorial overreach" based on the "procedural posture resulting from *Honstein I.*" This continued rejection of the reality that there was nothing improper about the procedural posture resulting from *Honstein I*, and that the Government has not "over-charged" the Accused for some improper purpose (as alleged repeatedly during both Art. 32 proceedings and during litigation in front of this Court) is indicative of the Defense still being unwilling to have the "intellectually honest" conversation this Court invited it to have following the re-referral of the charges. This stems from the parties' disagreement on the applicable law writ large, and specifically as to what the reasonable mistake of fact in this case will be. The Defense appears set to rely on the fact that the weapon "discharged to Sgt Honstein's shock, as evidenced by Corporal [redacted] sworn testimony and the statements of SSgt [redacted] and therefore "there is no probable cause with respect to the *mens rea* requirement, which it argues requires that the Government prove beyond a reasonable doubt that Sgt Honstein *actually knew* that death or grievous bodily harm was *a probable* consequence of his actions." E.g., because he believed it would not go off, he had an honest mistake of fact that death or grievous bodily harm was not *a probable* consequence of his actions (pulling the trigger of a loaded pistol while it was pointed at her heart.) The Government believes a

conviction under the Additional Charge is appropriate because all of the elements are met, and, in line with the bench book instructions, that 'the act must be intentional, but death or great bodily harm does not have to be the intended result. The act may even be accompanied by a wish that death will not be caused." The Accused as a 25 year old, active duty sergeant of Marines, well versed in the use of weapons, the weapons safety rules, and the employment of this weapon in sexual encounters with more than 30 other partners, was more than acutely aware that death or Grievous bodily harm was ***a (one of a binary set of probable outcomes, the weapon would either not fire or the weapon would fire and kill or grievously injure Ms.*** [redacted] probable consequence of his actions. The charging scheme with contingencies of proof and the Art. 118(3) charge, along with the subsequent procedural history to align the language of the charge with that scheme reflect that position, and there is no "inherent overreach."

10. That is also particularly true in light of the fact that both parties have been in agreement for the majority of this case that at a minimum, the Accused's criminal actions easily meet the elements of Art. 119, UCMJ. So much so that the Defense has argued in its comments to the PHO in this case that "disposition of the charge in this case pursuant to an agreement in which Sgt Honstein pleads guilty at general court martial to involuntary manslaughter and violation of a lawful general order is a fair, just and reasonable outcome that is 'consistent with the principle of fair and evenhanded administration of the law'" and "there is no doubt that Sgt Honstein's alleged conduct falls squarely within the ambit of involuntary manslaughter" and the Accused previously entered plea a plea of guilty to that charge. While the Accused has not entered that same plea in this court martial (as he is entitled to do), those arguments by his counsel highlight the unjust result that would occur if that charge were dismissed despite being charged in the alternative. Accordingly, this Court should deny the Defense's motion and delay dismissal of Charge II until such time as a finding of guilty is returned as to both Charge II and the Additional

Charge. At that time, Charge II should be conditionally dismissed until such time as appellate review has been completed.

RELIEF REQUESTED

11. The Government this Court deny the Defense's motion and delay dismissal of Charge II until such time as a finding of guilty is returned as to both Charge II and the Additional Charge. At that time, Charge II should be conditionally dismissed until such time as appellate review has been completed.

EVIDENCE OFFERED

1. AE I
2. Allied papers containing Defense's Art. 32 written comments.

Oral Argument. The Government requests oral argument on this issue.

[redacted]

M. E. BLACKBURN
Captain, USMC
Special Trial Counsel

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Government's motion in response to Defense's Motion to compel expert consultation was served electronically on defense counsel on 11 March 2025.

[redacted]

M. E. BLACKBURN
Captain, USMC
Special Trial Counsel

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

UNITED STATES **V.** **DAKOTA S. HONSTEIN** **SERGEANT / E-5** **USMC**	**DEFENSE MOTION TO SUPPRESS** **(Accused's Statements to PMO)** **27 February 2025**

Motion

Pursuant to Rule for Courts-Martial (R.C.M.) 905(b)(3), Military Rule of Evidence (M.R.E.) 304, and M.R.E. 305, the Defense moves to suppress all statements, confessions, and admissions made by Sgt Honstein on 27 January 2024 to the Provost Marshall Office officers in response to unwarned questioning, as well as all evidence derived from those unwarned statements.

Burden

As the proponent of the evidence, the burden of persuasion rests with the Government. M.R.E. 305(a), M.R.E. 304(f)(6). The burden of proof is a preponderance of the evidence. M.R.E. 304(f)(7).

Summary

On 27 January 2024, officers from the Provost Marshall Office (PMO) were dispatched to the [redacted] third deck, in response to a female who suffered a gunshot wound. The PMO officers, led by Sgt [redacted] entered the barracks without pistols drawn and went to room [redacted] occupied by Sgt Honstein. There, Sgt [redacted] observed blood on Sgt Honstein's clothes and a female who appeared deceased lying outside of room [redacted] in the hallway. Sergeant [redacted] immediate action was not to secure the scene but to join the lifesaving care the other Marines had already begun. The other two PMO officers cleared the scene so that it was safe for emergency medical services (EMS) to enter. Meanwhile, Sgt [redacted] valiantly performed two cycles of chest compressions and CPR before EMS arrived and took over.

Then Sgt [redacted] focused on Sgt Honstein—not the other Marines he had been performing CPR with—to pull him aside and ask, "what happened?" The statements Sgt [redacted] obtained from Sgt Honstein without first giving Sgt Honstein his rights are involuntary and inadmissible.

Facts

1. Sometime around 0700, Sgt Honstein began to arouse Marines from their rooms to get lifesaving care for Ms. [redacted] Lance Corporal [redacted] and Sgt [redacted] were two Marines who answered the call. Lance Corporal [redacted] and Sgt [redacted] recognized Ms. [redacted] had a gunshot wound and attempted to provide lifesaving care for Ms. [redacted] (enclosures 1 and 2)

2. At 0706, LCpl [redacted] called 911 and reported a female in the barracks was shot in the chest. (enclosure 3)

3. Sergeant [redacted] Officer [redacted] and LCpl [redacted] were the first PMO officers to arrive at Sgt Honstein's barracks. (enclosures 4, 5, and 6)

4. Sergeant [redacted] joined Sgt [redacted] and LCpl [redacted] and began caring for Ms. [redacted] As Sgt [redacted] was providing care, he observed Sgt Honstein with "blood covered hands" and acting "hysterical." Sergeant [redacted] came to believe Ms. [redacted] had been shot one to two hours before the 911 call was made because of how he interpreted Ms. [redacted] skin. (enclosure 4)

5. Officer [redacted] went inside Sgt Honstein's room to clear it for any suspect so that EMS could come to the scene. Lance Corporal [redacted] assisted in securing the scene. Officer [redacted] advised that the scene was clear for EMS to enter the barracks. (enclosure 5 and 6)

6. Sergeant [redacted] completed two cycles of chest compressions and CPR before emergency medical services arrived and took over. Sergeant [redacted] then pulled Sgt Honstein—not Sgt [redacted] nor LCpl [redacted]—approximately 15 meters to the side and asked him "what happened?" (enclosure 4)

7. Sergeant [redacted] recalled that while talking with Sgt Honstein, he kept saying "she was the one." (enclosure 4).

8. Sergeant [redacted] recalled Sgt Honstein saying, "she took the gun and stated it wasn't loaded, I told her it was loaded, she then turned the gun toward her chest with her thumb on the trigger, I grabbed

her on the thighs and told her no really its loaded, she then pulled the trigger wit her thumb and…" (enclosure 4)

9. Sergeant [redacted] then "prob[ed] for more information." This probing was unsuccessful because Sgt Honstein could not stop crying. (enclosure 4)

10. Sergeant [redacted] then learned that the pistol in Sgt Honstein's barracks room had been cleared out. He returned to Sgt Honstein and asked when the weapon was cleared, to which Sgt Honstein replied, "I cleared it out." Sergeant [redacted] later reported that he began to believe Sgt Honstein shot Ms. [redacted] at this moment. Nonetheless, Sgt [redacted] admitted to then asking Sgt Honstein why he had not mentioned handling the gun before. (enclosure 4)

Law

1. Article 31(a) of the Uniform Code of Military Justice (UCMJ) prohibits anyone subject to the UCMJ from compelling an answer to a question that may be incriminating.

2. Article 31(b) implements the privilege against self-incrimination through a rights warning requirement.

3. Congress enacted Article 31(d) as a strict enforcement mechanism to implement the rights warning requirements of Article 31(b). Article 31(d) provides that no statement obtained from any person in violation of this article may be received in evidence against him in a trial by court-martial. In addition, Military Rule of Evidence (M.R.E.) 305(a) and (c) provide that statements obtained without a proper rights warning are defined as involuntary and excluded from evidence by operation of M.R.E. 304(a))

4. Article 31's protections are statutory and have existed long before the Supreme Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966).

5. Marine Corps Installations East-Marine Corps Base Camp Lejeune Order 5500.1A is punitive and prohibits firearms in the barracks.

6. Whether a person is a suspect is an objective question that is answered by considering all the facts and circumstances at the time of the interview to determine whether the military questioner believed or

reasonably should have believed that the servicemember committed an offense. *United States v. Metz*, 84 M.J. 421, 426 (C.A.A.F. 2024).

7. It can be appropriate, but is not required, to consider the investigator's subjective view of whether the interrogated person was a subject. *Id.*

8. The test is whether the interrogator "reasonably should have believed" that the person was a suspect before asking any questions that, when answered, may tend to incriminate him. The "quantum of evidence required to treat an individual as a suspect" is "low," merely requiring something more than a "hunch." *United States v. Swift*, 53 M.J. 439, 447-48 (C.A.A.F. 2000).

9. In *United States v. Akbar*, a Court of Appeals for the Armed Forces (CAAF) case from 2015, the CAAF acknowledged its predecessor, the Court of Military Appeals (CMA), read into Article 31 the "public safety exception" familiar to *Miranda* warnings. 74 M.J. 364, 402-03 (C.A.A.F. 2015) (citing *United States v. Jones*, 26 M.J. 353, 357 (C.M.A. 1988)). This exception applies when life is endangered. *Id.* The CAAF accordingly dutifully applied the public safety exception in *Akbar*. *Id.* The exception is not found in Article 31 nor in M.R.E. 304 or M.R.E. 305's text. The CMA acknowledged it was reading the public safety exception into Article 31(b)'s text for narrow policy purposes that it believed Congress would "undoubtedly" agree with. *Jones*, 26 M.J. at 357.

10. In *United States v. Bergdahl*, a CAAF case from 2020, the CAAF determined that it cannot "interpose additional language into a rule that is anything but ambiguous." 80 M.J. 230, 235 (C.A.A.F. 2020). Therefore, Courts are to "adhere to the plain meaning of any text." *Id* (citing *Lomax v. Ortiz-Marquez*, 140 S.Ct. 1721, 1725 (2020) (explaining that courts "may not narrow a provision's reach by inserting words Congress chose to omit").

Analysis

A. <u>Sergeant Honstein was objectively a suspect, and Sgt [redacted] asked him incriminating questions without first giving Sgt Honstein a rights advisement.</u>

Sergeant [redacted] arrived outside Sergeant Honstein's barracks room in response to a dispatch regarding a gunshot wound. Upon arrival, he found Sergeant Honstein standing over a

victim, blood on his clothes, and acting hysterically. In contrast, two other Marines at the scene were calm and focused, administering care to the victim. Later, Sgt Honstein indicated he knew the victim by referring to her repeatedly as "the one." Given these circumstances, Sgt [redacted] reasonably should have suspected Sgt Honstein of two crimes: having violated the barracks order prohibiting firearms and having been involved in the shooting.

Indeed, Sgt [redacted] did consider Sgt Honstein a suspect. Sergeant [redacted] investigative actions confirm this conclusion. First, he separated Sgt Honstein from the other Marines for questioning, singling him out for further inquiry. He did not extend this same treatment to the other two Marines. Furthermore, Sgt [redacted] believed that Sgt Honstein had additional information he could "probe for," signaling his suspicion. Lastly, Sgt [redacted] returned to Sergeant Honstein to inquire about when the gun had been cleared, a critical question implying he suspected Honstein's involvement in the crime. These actions contradict Sgt [redacted] later claim that he did not consider Sgt Honstein as a suspect until he learned Sgt Honstein cleared the pistol.

Because Sgt [redacted] either reasonably should have or did suspect Sgt Honstein of a crime, he was required to give him a rights advisement before questioning. Sergeant [redacted] failed to do so. Therefore, Sgt Honstein's answers to those questions and derivative evidence are inadmissible.

B. <u>If there is a public safety exception to Article 31, UCMJ, it does not apply here.</u>

The public safety exception is inapplicable to these circumstances. When Sgt [redacted] arrived on the scene, he did not report having his gun drawn, suggesting he did not perceive any immediate threat. Instead, his primary focus was providing lifesaving care to Ms. [redacted] not determining whether the identity of the attacker was still unknown. Moreover, before questioning Sgt Honstein, he had come to believe that Ms. [redacted] had been deceased for one to two hours. That opinion, however incorrect, firmly indicates he did

not consider the threat to be active. Additionally, Sgt [redacted] did not begin questioning Sgt Honstein until after EMS had entered the scene, signaling that the PMO no longer believed anyone's life was in immediate danger at the barracks. In short, no one believed lives were still endangered when Sgt [redacted] began questioning Sgt Honstein.

C. **There is no longer a public safety exception to Article 31, UCMJ.**

The public policy exception for Article 31(b) is not found in its text. It is, instead, a judicially created exception to a rule whose language is unambiguous. It operates to narrow Article 31(b)'s reach by inserting an exception into the plain text. This is precisely the type of statutory interpretation prohibited by *Bergdahl*. Sergeant Honstein understands that if the Court is inclined to find that the public safety exception applies here, it might also find that *Jones* and its progeny *Akbar* are still good precedents. However, Sgt Honstein raises this argument to preserve the issue on appeal, should an appeal become necessary.

Relief Requested

Sergeant Honstein respectfully the Court suppress all statements, confessions, and admissions made by Sgt Honstein on 27 January 2024 to the Provost Marshall Office officers in response to unwarned questioning, as well as all evidence derived from those unwarned statements.

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Evidence

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

Enclosure 1 – NCIS interview with LCpl [redacted]

Enclosure 2 – NCIS interview with Sgt [redacted]

Enclosure 3 – LCpl [redacted] calls 911

Enclosure 4 – Sgt [redacted] written statement

Enclosure 5 – Officer [redacted] written statement

Enclosure 6 – LCpl [redacted] written statement

Oral Argument

The Defense requests oral argument if this motion is opposed.

[redacted]
M. E. NEELY
Lieutenant Colonel, U.S. Marine Corps
Regional Defense Counsel

CERTIFICATE OF SERVICE

I certify that I have delivered a copy of the foregoing document by email to the Court, Trial Counsel, and Victims' Legal Counsel on 27 February 2025.

[redacted]
M. E. NEELY
Lieutenant Colonel, U.S. Marine Corps
Regional Defense Counsel

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

UNITED STATES v. DAKOTA S. HONSTEIN SERGEANT/E-5 U.S. MARINE CORPS	**GOVERNMENT MOTION IN RESPONSE TO DEFENSE MOTION TO SUPPRESS (Statements to PMO)** 11 March 2025

NATURE OF MOTION

The Government motion is filed in response to the Defense Motion to Suppress filed 27 February 2025. For the reasons set forth below, the Government respectfully requests the Court deny the Defense's motion to suppress Sgt Honstein's verbal statements to Sgt [redacted]

SUMMARY

Sergeant Dakota S. Honstein, U.S. Marine Corps faces three specifications of violations of three Articles under the UCMJ stemming from an alleged shooting and killing of Ms. [redacted] the victim in this case. Sergeant Honstein initially reported to his fellow Marines that the victim's gunshot wound was the result of a self-inflicted gunshot wound to the chest. After Sgt [redacted] PMO, arrived on scene, Sgt Honstein was separated due to his hysteria. To assess the circumstances, Sgt [redacted] inquired with Sgt Honstein about what happened. Sgt Honstein voluntarily repeated his rendition of events that he told his fellow Marines to Sgt [redacted] After further investigation of the scene, it was later determined that Sgt Honstein was a suspect and he was taken into custody.

BURDEN OF PROOF AND PERSUASION

The Government bears the burden for this motion.

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FACTS

1. On 27 January 2024, Sgt Honstein (hereinafter "the Accused") shot and killed Ms. [redacted] inside his Wallace Creek barracks room onboard Marine Corps Base, Camp Lejeune.[1]

2. Around 0700 on 27 January 2024, Sgt Honstein began to beat on the room doors of LCpl [redacted] USMC and Sgt [redacted] USMC.

3. LCpl [redacted] and Sgt [redacted] observed the victim laying in the hallway with an apparent gun shot wound to the chest.

4. LCpl [redacted] asked Sgt Honstein what happened to the victim.

5. Sgt Honstein replied that the victim shot herself.

6. LCpl [redacted] called 911 and reported the situation to the dispatcher.

7. Specifically, LCpl [redacted] reported that he did not know where the weapon was located, that it was not near the victim, and he was unsure if there had been any threats made towards the victim.

8. Sgt [redacted] Officer [redacted] and LCpl [redacted] arrived on scene.

9. Upon reaching the third deck of the Wallace Creek barracks, Sgt [redacted] immediately observed LCpl [redacted] Sgt [redacted] Sgt Honstein, and the victim in the hallway.

10. Sgt [redacted] observed Sgt Honstein crying and hysterical as LCpl [redacted] continued life saving measures. Sgt Honstein later recalled that he was indeed having a panic attack when first responders arrived on scene.

11. Sgt [redacted] did not observe LCpl [redacted] and Sgt [redacted] crying or acting hysterically.

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[1] Names of victims and witnesses will be redacted IAW EJCR 7.3. [2]
See Defense Enclosure (A) at approximately 00:24:35.

12. Sgt [redacted] joined Sgt [redacted] and LCpl [redacted] in life saving measures on the victim.

13. After EMS arrived and took over life saving measures, Sgt [redacted] separated Sgt Honstein from the victim and asked him what happened. (DEF Encl. 4)

14. Sgt Honstein then told Sgt [redacted] "She took the gun and stated it wasn't loaded. I told her it was, she then turned the gun towards her chest with her thumb on the trigger. I grabbed her on the hips and told her no really its loaded, she then pulled the trigger with her thumb and…," or words to that effect. (DEF Encl. 4)

15. Sgt [redacted] later learned that a pistol in the open barracks room had been cleared out by someone other than law enforcement. Sgt [redacted] then returned to Sgt Honstein and asked when the weapon was cleared, to which Sgt Honstein replied, "I cleared it out." Sgt [redacted] asked why Sgt Honstein failed to mention that he had manipulated the weapon. Sgt Honstein then looked at his hands and went silent. At that point, Sgt [redacted] believed Sgt Honstein shot the victim and instructed that he be placed in police custody. (DEF Encl. 4)

16. Sgt [redacted] then stopped asking Sgt Honstein questions after he suspected him of a crime. (DEF Encl. 4)

LAW

Article 31(b), UCMJ, warnings are required when: "(1) a person subject to the UCMJ, (2) interrogates or requests any statement, (3) from an accused or person suspected of an offense, and (4) the statements regard the offense of which the person questioned is accused or suspected." *United States v. Harpole*, 77 M.J. 231, 236, (C.A.A.F. 2018), citing *United States v. Jones*, 73 M.J. 357, 361 (C.A.A.F. 2014) (footnote omitted) (citation omitted).

"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." M.R.E. 304(a)(1)(A).

Furthermore, Article 31(d) provided that no statement obtained from any person in violation of Article 31 may be received in evidence in a trial by court-martial. Whether a person is a suspect is an objective question that is answered by considering all the facts and circumstances at the time of the interview to determine whether the questioner believed or reasonably should have believed that the person committed an offense. *United States v. Metz*, 84 M.J. 421, 426 (C.A.A.F. 2024). It can also be appropriate to consider the subjective view of the investigator when deciding if the investigator considered the person a suspect. *United States v. Muirhead*, 51 M.J. 96 (C.A.A.F. 1999). Designating someone as a suspect for Article 31(b) purposes requires more than a "hunch." *United States v. Swift*, 53 M.J. 439, 447 (C.A.A.F. 2000).

ARGUMENT

A. Sgt Honstein was not a suspect at the time that Sgt [redacted] asked him what happened.

The crux of the motion lies in what did Sgt [redacted] know and when did he know it. Starting from the beginning, when Sgt [redacted] arrived on the third deck of the Wallace Creek barracks, he first observed three males, LCpl [redacted] Sgt [redacted] and Sgt Honstein in the hallway along with the victim. As stated in his written statement, Sgt [redacted] immediately took over chest compressions from Sgt [redacted] until other first responders arrived and took over continuing life

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saving measures on with the victim. Upon arrival, Sgt [redacted] was unaware of which barracks room belonged to Sgt Honstein, where the weapon was located, etc. Of the hree males, Sgt [redacted] only observed one, Sgt Honstein, crying and hysterical near the victim.

Once first responders took over, Sgt [redacted] separated Sgt Honstein from the victim and others. Sgt [redacted] unaware of who Sgt Honstein was or what his involvement was in the situation, asked Sgt Honstein what happened. Sgt Honstein then voluntarily told Sgt [redacted] that the victim's injury was due to a self-inflicted gun shot wound to the chest and that he had tried to stop her from shooting herself immediately before she pulled the trigger.

From an objective standpoint, given what Sgt [redacted] knew at the moment he asked Sgt Honstein what happened, it is unreasonable to believe that Sgt [redacted] knew, or reasonably should have known that Sgt Honstein was a suspect. As stated by the Court in *Swift*, the takes more than a mere "hunch," to label someone a suspect.

Additionally, from a subjective standpoint, Sgt [redacted] stated in his written statement that he did not suspect Sgt Honstein of a crime at the time of asking Sgt Honstein what happened. In fact, Sgt [redacted] makes clear that the moment in which he believed Sgt Honstein to be a suspect was when his fellow officers reported that the pistol was already cleared when the barracks room was secured by law enforcement, Sgt [redacted] asked Sgt Honstein why he did not mention that he had cleared the weapon afterwards in his story, and Sgt Honstein looked down at his hands and went silent.

The Defense's facts as stated in their motion further supports the Government's position that Sgt [redacted] did not know, nor reasonably should have known, that Sgt Honstein was a suspect at the time of questioning. For example, multiple times, the Defense notes that when Sgt [redacted] arrived, his weapon was not drawn. This shows that upon arrival and observation of the

three males in the hallway, Sgt [redacted] did not view any of them as a suspect or an otherwise threat to the victim, himself, or his fellow officers. Furthermore, the Defense argues that because Sgt [redacted] initially observed blood on Sgt Honstein, he should have known that he was a suspect and read his Article 31(b) rights. However, given the totality of the circumstances that Sgt [redacted] came up on three males and life saving measure being started on the victim, blood on one's person would be little more than a hunch, rather than definitive evidence that someone has committed a crime.

EVIDENCE

The government adopts the Defense's enclosures to its motion to suppress.

WITNESSES

The government intends to call Sgt [redacted] in support of its motion.

RELIEF REQUESTED

Based on the foregoing, The Government respectfully requests this Court DENY the Defense's motion to suppress the Accused verbal statements to Sgt [redacted]

[redacted]
R. D. ANDERSON
Captain, USMC
Special Trial Counsel

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Government Motion was served electronically on defense counsel on 11 March 2025.

[redacted]
R. D. ANDERSON
Captain, USMC
Special Trial Counsel

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

UNITED STATES **V.** **DAKOTA S. HONSTEIN** **SERGEANT / E-5** **USMC**	**DEFENSE MOTION TO SUPPRESS** **(Accused's Statements to NCIS)** **27 February 2025**

Motion

Pursuant to Rule for Courts-Martial (R.C.M.) 905(b)(3), Military Rule of Evidence (M.R.E.) 304, and M.R.E. 305, the Defense moves to suppress all statements, confessions, and admissions made by Sgt Honstein during his 27 January 2024 NCIS interrogation, as well as all evidence derived therefrom. Sgt Honstein did not knowingly and intelligently waive his rights, nor was his statement the product of a free and unconstrained choice.

Burden

As the proponent of the evidence, the burden of persuasion rests with the Government. M.R.E. 305(a), M.R.E. 304(f)(6). The burden of proof is a preponderance of the evidence. M.R.E. 304(f)(7).

Summary

Sergeant Honstein averaged less than three hours of sleep a night in his last week free from custody. After such a recent shotty sleep-wake history, medical professionals would posit that Sgt Honstein suffered adverse and impairing effects on his ability to cognition when NCIS agents began his custodial interrogation. But when NCIS presented Sgt Honstein with his rights advisement, he had not had any restorative sleep for more than thirty hours—during which he was present for his military duties, had a whole night out socializing, happened upon a romantic encounter turned traumatic accident, medical treatment, and been ferried about by the Provost Marshal—his mental executive functioning abilities would have deteriorated to the degree that he could not have knowingly waived his rights.

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Additionally, the circumstances surrounding Sgt Honstein's statements to NCIS raise further concerns about the voluntariness of their statement. Accusations of lying, combined with a veiled threat and invoking the victim's family, can create an environment of intense psychological pressure. These tactics may lead to a coerced or falsely made confession, even if the individual does not consciously recognize the pressure they are under or their cognitive impairment due to exhaustion. The threat of harm or emotional manipulation can heavily influence someone's ability to think and act freely. In light of these factors—severe sleep deprivation, emotional coercion, and manipulative police tactics—the statement should be considered involuntary.

Facts

1. On 21 January, Sgt Honstein texted Ms. [redacted] "I don't sleep[.]" The next day, she questioned him, asking "[d]o you truly not get any sleep[?]" Sergeant Honstein responded, "I sleep very little[.]" He could not explain it, telling her, "I can't sleep I don't know[.]" She warned him that this was not good. (enclosure 1)

2. Sergeant Honstein's cell phone regularly recorded activity from the evening of Sunday, January 21, 2024, into Monday morning, January 22, 2024. His phone's last recorded activity was a Safari search at 2:38 AM, followed by a Signal message 212 minutes later at 6:10 AM. This led to a sleep window of three hours and thirty-two minutes, where no significant activities were noted. Later that day, at 2:35 PM, he texted Ms. [redacted] "I'm tired as fuck[.]" He texted her again at 5:30 PM, "I'm so tired[.]" (enclosure 1)

3. On Monday, January 22, 2024, into Tuesday morning, January 23, 2024, his phone recorded an outgoing message at 2:50 AM. The first activity the following morning was 156 minutes later when his phone sent an outgoing message at 5:26 AM to [redacted] This is a sleep window of two hours and thirty-six minutes where no significant activities were noted. At 11:36 AM, he texted Ms. [redacted] "I'm alright just tired. I wanna crawl back I. Bed [sic] and just die[.]" Then, at 8:55 PM, he texted Ms. [redacted] "I'm so frickin tired[.]" (enclosure 1)

4. Tuesday, January 23, 2024, into Wednesday morning, January 24, 2024, had the last activity recorded as an outgoing message at 4:00 AM. The first recorded outgoing activity was eighty-eight

minutes later when his phone sent an outgoing message at 5:28 AM. This is a sleep window of one hour and twenty-eight minutes where no significant activities were noted. That morning, Ms. [redacted] asked him, "How did you sleep?" Sergeant Honstein replied, "I didn't. I'm tired[.]" (enclosure 1)

5. On Wednesday, January 24, 2024, into Thursday morning, January 25, 2024, the last activity was a TikTok search at 4:22 AM. The first activity the following morning was 140 minutes later when he received a text message from the Dental Clinic and created a contact in his phone for the clinic the same minute he received that text message at 6:42 AM. This is a sleep window of 2 hours and 20 minutes. That morning, Ms. [redacted] told Sgt Honstein that she hoped he slept last night. Sergeant Honstein responded, "I got a little. I'm late to work. I'm so exhausted[.]" Later, He texted Ms. [redacted] that "Sleep was never a friend of mine . . . I hardly ever sleep anymore on average I am maybe getting 26-28 hours of sleep a week." (enclosure 1)

6. From Thursday, January 25, 2024, into Friday morning, January 26, 2024, the last recorded activity was a text message to Ms. [redacted] at 2:53 AM. After 185 minutes of inactivity, his phone sent a message at 5:58 AM. This is a sleep window of three hours and five minutes, where no significant activities were noted. That afternoon, at 12:49 PM, he texted Ms. [redacted] "I need a nap, that caines has me feeling right[.] I actually might fall asleep in the dentist chair[.]" At 8:59 PM that evening, he texted Ms. [redacted] "I'm tired [laughing emoji]. Not sleepy tired. Just tired[.]" (enclosure 1)

7. Sergeant Honstein then stayed awake, potentially with a less than thirty-nine-minute nap,[1] through being interrogated the following day. (enclosure 1)

8. Shortly after 0700, but immediately after the incident, Sgt Honstein alerted the nearby Marines and called for help.

9. Provost Marshall Office (PMO) officers quickly arrived on the scene. One PMO officer, Sgt [redacted] asked Sgt Honstein unwarned questions, to which Sgt Honstein provided incriminating answers.

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[1] His phone sent an outgoing message at 5:33 PM and 6:12 PM (a message to Ms. [redacted] and 6:13 PM (a message to Ms. [redacted] stating that he just waking up from a nap)

A second PMO officer, Cpl [redacted] arrested Sgt Honstein, placed him in hand irons, and heard him make a statement to the effect of "she did it." A third PMO officer, Officer [redacted] drove Sgt Honstein to the PMO Office and heard Sgt Honstein say "why did you do that? "what did you do?" and "why?" While at the PMO office, Officer Howard further heard Sgt Honstein state, "you selfish little girl" and similar statements. Then, in the interrogation room, a fourth PMO Officer, LCpl [redacted] asked Sgt Honstein an unwarned question, to which Sgt Honstein responded "she was the love of my life" and something to the effect of "they were doing their thing in bed, she saw the gun, he told her the gun was not loaded, he pointed it at her chest, and it went off." (enclosures, 2, 3, 4).

10. At approximately 1200, Sgt Honstein was brought into an NCIS interrogation room, with handcuffs on, and the recording device is activated. A copy of the video recorded interview is already attached to the Record within Appellate Exhibit I. A copy of a transcript of Sgt Honstein's interrogation is also already attached to the Record. To assist the reader, the transcript will be cited "Transcript At Page#:Line#"

11. In the room, Sgt Honstein meets a fifth and sixth law enforcement officer as NCIS Special Agent [redacted] and NCIS Special Agent [redacted] begin to interrogate him.

12. The NCIS Agents ask Sgt Honstein if he needs anything else, and he replies, [redacted] Transcript at 4:4-5.

13. The NCIS Agents allowed Sgt Honstein to smoke his vape. Transcript at 4:9. Sergeant Honstein had explained that his vape contained nicotine. Transcript at 1:18.

14. Sergeant Honstein suggests the Agents refer to him as [redacted] Transcript at 5:21. The Agents decline to refer to him in that manner.

15. The Agents collected Sgt Honstein's biographical information, including that he is [redacted] Transcript at 7:19-22.

16. As the NCIS Agents prepare their rights advisement form, they each tell Sgt Honstein that what they are working on was [redacted] Transcript at 10:21-22.

17. The Agents then presented what they just described as an unimportant advisement to Sgt Honstein. Transcript at 11:4-5.

18. Before they do so, however, Special Agent [redacted] notices that Sgt Honstein has blood on his hands. Transcript at 11:22. The Agents do not pause and instead proceed to give Sgt Honstein the rights advisement. Transcript at 12.

19. Special Agent [redacted] tells Sgt Honstein that he has to give him a cleansing waiver of rights because Sgt Honstein had already been "talking to some people over there." There is no indication what statements NCIS was referring to, what people they were referring to, or where is "over there." Transcript at 12:7-10 and at 13:18-20.

20. Special Agent [redacted] tells Sgt Honstein that they have to tell him the Charges against Sgt Honstein, but that these are not [redacted] Transcript at 12:13-15.

21. Special Agent [redacted] tells Sgt Honstein that the rights advisement is painful, but they [redacted] Transcript at 12: 19. Sgt Honstein states that [redacted] but that it makes sense. Transcript at 12:18-22. Special Agent [redacted] tells Sgt Honstein that he [redacted] Transcript at 13:1-2.

22. The Agents tell Sgt Honstein to not worry about getting blood on their pen and the rights advisement. Transcript at 14:1-8. The Agents do not pause the advisement.

23. Sergeant Honstein inquired how long it would take to get a lawyer for the interrogation and what that process is. Transcript at 15:15-22.

24. The Agents informed Sgt Honstein that they would terminate the interview, and that the military would give him a lawyer or that he could hire a civilian lawyer. Sgt Honstein replies, [redacted] and initials the waiver. Transcript at 16:1-9.

25. Sergeant Honstein then misstates the calendar year and complains that his phone bill is due. The time is 12:55 PM, 27 January 2024—more than thirty hours since he had any restorative sleep. Transcript at 16:16-21 and enclosure 5.

26. Sergeant Honstein then explained to the Agents that he has been awake all night by giving them a detailed description of what he had done from the afternoon of January 26 through the early morning of January 27. Transcript at 16-34. The Agents do not inquire about when Sgt Honstein last slept.

27. As Sgt Honstein recounted his actions over the last night and morning, he explained to the Agents that he had told Ms. [redacted] that he was [redacted] He then directed his attention to the agents and informed them that his not going to sleep [redacted] Transcript at 31:20.

28. Sergeant Honstein told the Agents that he had received inpatient [redacted] Transcript at 49:20-21. The Agents do not inquire into his [redacted]

29. Sergeant Honstein told the Agents that he had suffered a panic attack that morning while in PMO's custody and received a medical evaluation as a result. Transcript at 49:8-23. The Agents do not inquire into his present mental state.

30. Sergeant Honstein told the Agents that he had been [redacted] Transcript at 50:3-4. The Agents do not inquire into his present mental state.

31. Instead, they begin to press Sgt Honstein with questions. Transcript at 50:7.

32. In response to the question of who loaded the firearm, Sgt Honstein answers that it was Ms. [redacted] who must have loaded it. Transcript at 79:4 and 22. When asked again, Sgt Honstein again answered, that [redacted] Transcript at 86:7. He reaffirms this statement again. Transcript at 86:22.

33. Sergeant Honstein then asks to go [redacted] Transcript at 87:7.

34. The NCIS agents press Sgt Honstein on his assertions that he could have become [redacted] when he is so sexually experienced with BDSM. Sergeant Honstein informs the Agents that he believes the Agents are disrespecting his sexual choices. Transcript at 134-135.

35. Later, when pressed again on the issue of who loaded the firearm, Sgt Honstein again denied loading the firearm and stated that Ms. [redacted] must have loaded it. Transcript at 136:8.

36. NCIS again refused to accept this answer.

37. Special Agent [redacted] states that he has been cordial and accommodating and that when he does those things, he expects those things in return. Transcript at 142:7.

38. Still not getting the answer that the investigators wanted, the following exchange takes place:

[redacted]

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40. The Special Agents accuse Sgt Honstein of lying four times. Four times, Sgt Honstein denies lying. Transcript at 142: 3, 5, 17, 20.

41. Sergeant Honstein takes responsibility for the incident by saying it was his fault for not checking the firearm. He told investigators repeatedly that he was not careful. Transcript at 85:22; 135:22; 139: 20; 143:20; and 144:10-11.

42. Special Agent [redacted] eventually responds, [redacted] Transcript 144:19.

43. Special Agent [redacted] then states, [redacted] Transcript at 144:8.

44. Special Agent [redacted] again states, [redacted] Transcript at 147:5.

45. At 3 hour and 41-minute mark in the recorded video, Sgt Honstein states that he loaded the firearm. Transcript at 148:4.

46. Special Agent [redacted] immediately responds, [redacted]

47. Sergeant Honstein replies, [redacted] Transcript at 148:9.

48. After getting the answer he wanted, Special Agent [redacted] says [redacted] Transcript at 149:9.

49. Sergeant Honstein then asks if the agents will let him go smoke. Transcript at 149:10.

50. Having given the Agents what they wanted, Sgt Honstein says: [redacted] Transcript at 150:18.

51. Then, Sgt Honstein's concern turns to how *he* is [redacted] return his rental car and then pick up his car from the mechanic. Transcript at 152:2-7.

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Law

A. Custodial Interrogations

a. The prime concern of the United States Supreme Court in *Miranda* was interrogation, during which "an individual is taken into custody or otherwise deprived of his freedom in any significant way and is subjected to questioning." *Miranda v. Arizona*, 384 U.S. 436, 478 (1966). In *Yarborough v. Alvarado*, the Court reaffirmed its premise that custody under *Miranda* is to be determined based on how a reasonable person in a suspect's position would perceive the circumstances. 541 U.S. 652, 663 (2004).

b. In *United States v. Tempia*, the Court of Military Appeals held *Miranda* applies to military custodial interrogations. 37 C.M.R. 249, 251 (C.M.A. 1967).

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

d. "[T]he accused's statement during a custodial interrogation is inadmissible at trial unless the prosecution can establish that the accused in fact knowingly and voluntarily waived *Miranda* rights." *Berguis v. Thompkins*, 560 U.S. 370 (2010) (emphasis added) (internal quotation marks omitted); *United States v. Mott*, 72 M.J. 319, 330 (C.A.A.F., 2013) Mil. R. Evid. 305(g)(1) (waiver of the right to counsel "must be made freely, knowingly, and intelligently").

e. "Voluntariness of consent and knowing waiver are two distinct and discrete inquiries." *Mott*, 72 M.J. at 330 (internal quotation marks omitted) (citing *Edwards v. Arizona*, 384 U.S. 436, 475 (1966)).

f. The Government must show that an accused's waiver was "voluntary in the sense that it was the product of a free and deliberate choice" rather than produced by "coercion." *Id.* (quoting *Berguis*, 560 U.S. at 382). The Government must *additionally* show "that the accused understood his right to counsel and intelligently and knowingly relinquished it." *Id.* (internal quotation marks omitted) (quoting *Edwards*, 451 U.S. at 481).

g. The Government has a "heavy burden" to demonstrate a knowing and intelligent waiver. *Miranda v. Arizona*, 384 U.S. 436, 475 (1966).

h. The accused must have "full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Berguis*, 560 U.S. at 382-83.

i. "An express written or oral statement of waiver of the right to remain silent or of the right to counsel is *usually* strong proof of the validity [a *Miranda* waiver], but is not inevitably either necessary or sufficient to establish waiver. The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case." *North Carolina v. Butler*, 441 U.S. 369, 373 (1979); *see Berghuis*, 560 U.S. at 382.

j. The analysis should consider the accused's "age, experience, education, background, and intelligence, and [his] capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights." *Fare v. Michael C.*, 442 U.S. 707, 725 (1979) (emphasis added).

B. Article 31(b), UCMJ.

k. Article 31(b) rights differ slightly from *Miranda* rights. Congress enacted Article 31(d) as a strict enforcement mechanism to implement the rights warning requirements of Article 31(b). Article 31(d) provides that no statement obtained from any person in violation of this article may be received in evidence against him in a trial by court-martial. In addition, Military Rule of Evidence (M.R.E.) 305(a) and (c) provide that statements obtained without a proper rights warning are defined as involuntary and excluded from evidence by operation of M.R.E. 304(a)).

l. In *United States v. Gardinier*, the Court of Appeals for the Armed Forces (CAAF) held that where an earlier statement was involuntary only because the accused had not been properly warned of his Article 31(b), UCMJ, rights, the voluntariness of the second statement is determined by the totality of the circumstances. 65 M.J. 60, 64 (C.A.A.F. 2007). An earlier unwarned statement is a factor in this total picture, but it does not presumptively taint the subsequent statement. If a cleansing warning has been given, that should be considered. *Id.*

m. A proper rights advisement is more than a formality. "[I]t is not just a piece of paper." *United States v. Patterson*, No. 202200262, 2024 CCA LEXIS 130, at *13 (N-M. Ct. Crim. App. Apr. 4, 2024) (internal quotation marks omitted).

C. **Free, knowing, and intelligent waiver of rights.**

n. "[C]oercion can be mental as well as physical, and . . . the blood of the accused is not the only hallmark of an unconstitutional inquisition." *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960).

o. An interrogation lasting thirty-six hours or longer is per se coercive because of the effect it will have on the sleep-deprived and fatigued suspect's inability to make a voluntary statement. *Ashcraft v. Tennessee*, 322 U.S. 143, 161 (1944).

p. Before *Miranda*, the Supreme Court, in *Spano v. New York*, the Court reversed Spano's conviction because his will was overcome by official pressure, fatigue, and sympathy. Moreover, the police were only concerned in securing a statement from Spano on which they could convict him. 360 U.S. 315 (1959).

q. "A statement to be voluntary of course need not be volunteered. But if it is the product of sustained pressure by the police it does not issue from a free choice. When a suspect speaks because he is overborne, it is immaterial whether he has been subjected to a physical or a mental ordeal. Eventual yielding to questioning under such circumstances is plainly the product of the suction process of interrogation and therefore the reverse of voluntary." *Watts v. Indiana*, 338 U.S. 49, 53 (1949).

r. "Law triumphs when the natural impulses aroused by a shocking crime yield to the safeguards which our civilization has evolved for an administration of criminal justice at once rational and effective." *Id.* at 69.

Analysis

A. **Custodial interrogation**

Sergeant Honstein was put under arrest and placed into handcuffs by PMO. The officers then escorted him to NCIS, where he entered the interrogation room wearing handcuffs. He asked the NCIS special agents if he could "stand up" during his interrogation (Transcript at 66:8). Sergeant Honstein was

plainly in custody and reasonably believed himself to be in custody during the NCIS interrogation. Therefore, in addition to his Article 31(b) rights, Sgt Honstein enjoyed his Fifth Amendment Right to Counsel as protected by *Miranda*.

B. Sgt Honstein did not knowingly and intelligently waive his rights.

The totality of circumstances leading to Sgt Honstein's interrogation made him incapable of knowingly and intelligently waiving his rights. He had neither a full awareness of the nature of his rights being abandoned nor did he have a full awareness of the consequences of the decision to abandon in his rights. Therefore, Sgt Honstein's rights waiver is invalid. *Berghuis*, 560 U.S. at 382-83.

The Special Agents approached the sleep deprived and cognitively impaired Sgt Honstein with a rights advisement that they repeatedly undermined. Before interrogating Sgt Honstein, the NCIS agents undermined the rights advisement. First, they portrayed his rights as unimportant. Then the agents told him the allegations against him were not [redacted] Finally, the agents said the rights were something they [redacted] and is something Sgt Honstein should consider as having to [redacted] suggesting that the advisement was nothing more than a mere formality. However well-meant the Agent was in addressing Sgt Honstein's precarious situation, his words frustrated Sgt Honstein's ability to fully understand the consequences of waiving his rights by downplaying the significance of his rights.

Sergeant Honstein's statements then reveal he did not *fully* understand the consequences of waiving his rights. During his conversation with NCIS agents investigating the death of a young girl at his hands, he suggested they refer to him as '[redacted] In such a serious context, this choice of language reveals a troubling level of compromised cognition. Specifically, this request reveals that Sgt Honstein could not think clearly about the legal and personal consequences of his statements to NCIS agents. His desire to [redacted] further indicates he does not fully understand the gravity and consequences of waiving his rights. Finally, when he dismissed his right to counsel with a flippant [redacted] he underscored his incomplete understanding he had of the consequences involved in waiving that right.

His later words and demeanor underscore that he could not fully understand the consequences of waiving his rights. After capitulating to NCIS's pressure to admit that he loaded the pistol used to kill Ms. [redacted] his focus shifted to trivial concerns, like how he would return his rental car and pick up his car from the mechanic. This sudden, misplaced attention to inconsequential issues starkly highlights his inability to understand the full implications of waiving his rights.

Given that occurred amidst significant sleep deprivation, the Government cannot meet its burden of proving that Sgt Honstein knowingly and intelligently waived his rights.

C. The NCIS Agents coerced Sergeant Honstein's statement that he loaded the pistol.

In determining whether NCIS overcame Sgt Honstein's will, the Court must assess the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation. Factors the Court should consider include Sgt Honstein's (1) age and fatigue, (2) that Sgt Honstein gave unwarned statements earlier that morning and (3) that NCIS knew or should have known that Sgt Honstein's cognitive abilities were impaired, before using pressure on Sgt Honstein to cause him to capitulate and provide the answer they demanded.

1. Sergeant Honstein's age and sleep deprivation compromised his ability to withstand NCIS's pressure.

Sergeant Honstein was seriously sleep deprived. Being fatigued makes it more likely that an accused will yield to an interrogator's pressure, which is broadly applicable and predictable. Here, Sgt Honstein's age and fatigue predisposed Sgt Honstein to accept his interrogators' cues and capitulate to their pressure.

At the time of Sergeant Honstein's interview, he was twenty-five years and two months old. Scientifically, adolescence refers to the transition from childhood to adulthood, and medical doctors identify adolescence as extending through age twenty-five, when the brain is fully developed. Medically, the period between ages nineteen and twenty-five is often referred to as late adolescence. Before full brain development, young men have a limited ability for abstract thinking, complex reasoning, and they have

limited impulse control. These cognitive limitations put them at increased risk for thinking errors and acting impulsively.

An individual's level of suggestibility and compliance is not static but constantly changing depending on multiple internal and external factors. For example, one is likely to be more suggestible if they are sleep deprived or more compliant if they are anxious. Just like a juvenile or an intellectually challenged person may struggle with making such complex decisions, severely sleep-deprived individuals may not fully comprehend and process relevant information. In this vein, scientific research shows that those without sleep appear to become inflexible thinkers, pick immediate rewards over future gains, and are less motivated to withstand pressure. Moreover, research shows that people experiencing sleep deprivation are often not aware or not fully aware of their own impairment. This is similar to intoxicated people not recognizing when they are too impaired to drive a car.

Here, Sgt Honstein averaged 156.2 minutes (2.6 hours) of sleep windows per night, suggesting a pattern of fragmented, and astonishingly short sleep sessions in the five days leading up to his encounter with Ms. [redacted] Specifically, Sgt Honstein's cell phone use suggests during the week leading to his 27 January 2024 interrogation he had the following sleep windows:

1. 212 minutes the night of 21-22 January.
2. 156 minutes the night of 22-23 January.
3. 88 minutes the night of 23-24 January.
4. 140 minutes the night of 24-25 January.
5. 185 minutes the night of 25-26 January.

Then, after waking up on 26 January at around 6:28 AM, Sgt Honstein stayed awake (potentially with a less than thirty-nine-minute nap, which is not long enough to be restorative) until the interrogation started at 11:55 AM on 27 January. The totality of Sgt Honstein's sleep deprivation corrupted his cognitive abilities.

Twenty-four hours without sleep (or a similar amount of sleep loss accumulated via restricted sleep over several days) will result in slower reactions, feelings of sleepiness, and feelings of anxiety and

distress. Yet not sleeping for twenty-four hours is unlikely to induce disorientation or psychosis. Put another way, this level of sleep loss produces attentional impairment similar to being slightly drunk (around 0.10% blood alcohol content), a legally prohibited level of intoxication for driving a motor vehicle in most states. Yet averaging less than three hours of sleep for five nights will have powerful additive disruptions to an accused's cognitive and emotional faculties. This increasing fatigue shifts the scales for exerting effort, making it increasingly likely an accused will capitulate to an interrogator's pressures.

Although Sgt Honstein's interrogation was not thirty-six hours long, Sgt Honstein had been awake for nearly the same duration as *Ashcraft*, which brings comparable issues regarding the impact of prolonged wakefulness. Fatigue, especially when coupled with emotional stress, drastically impacts an individual's ability to resist coercive interrogation tactics. Sleep deprivation increases sensitivity to pain and discomfort, and the overall stress response. These physiological effects heighten the subject's vulnerability to coercion, making it easier for the interrogators to manipulate his responses through both subtle threats and direct pressure. Sgt Honstein's increasing discomfort throughout the interrogation—culminating in his desire to simply "go home" and sleep—demonstrates the degree to which his fatigue had worn down his resistance.

Sergeant Honstein's fatigue also compromised his cognitive function. A week of insufficient sleep, followed by a sleepless night compounded by the traumatic experience of Ms. [redacted] death, left him mentally exhausted. Fatigue significantly impaired his judgment and ability to resist coercion, making him more vulnerable to internalizing the NCIS agents' suggestions as his own. In short, his sleep deprivation exacerbated his stress responses and decreased his ability to process information clearly, making it far easier for his interrogators to manipulate him.

2. Sergeant Honstein's earlier unwarned statements

Sergeant Honstein gave unwarned statements to Sgt [redacted] and LCpl [redacted] He made several other statements to Cpl [redacted] and Officer [redacted] These earlier unwarned statements to PMO are a factor that this Court considers in determining the voluntariness of Sgt Honstein's statements to NCIS.

While NCIS did give a cleansing warning, it was opaque and does little to support finding Sgt Honstein's later statements to NCIS were voluntary. Particularly where Sgt Honstein was not subjected to just one questioner but several of them. All played some part, and Sgt Honstein must have felt the cumulative effect. *See Spano*, 360 U.S. at 322 (discussing the effect of multiple interrogators).

3. NCIS Agents knew, or should have known, that Sgt Honstein was vulnerable to having his free will overborn before they pressured him.

i. Sergeant Honstein was vulnerable to having his free will overborn.

In 1946, the Supreme Court noted that "'[i]t has been known since 1500 at least that deprivation of sleep is the most effective torture and certain to produce any confession desired.'" *Ashcraft*, 322 U.S. at 150, n6 (citation omitted).

Sergeant Honstein's responses to NCIS questions highlighted his compromised mental state, suggesting he was so exhausted that his cognitive abilities were impaired. For instance, his suggestion that the agents refer to him as '[redacted] was highly uncharacteristic and inappropriate given the situation. This odd request points to a lack of mental clarity and self-awareness, indicative of the extreme fatigue he was experiencing. Then Sgt Honstein was unsure what calendar year it was. When the Agents corrected the date, he complained that his phone bill was due. Such behavior under the circumstances reflects how deeply his exhaustion affected his judgment and interactions.

Before pressuring Sgt Honstein to acquiesce into giving the Agents the answers they wanted, the Agents also noticed blood from the very incident they were investigating remained on Sgt Honstein's hands. They knew he had suffered a panic attack that morning because of the incident. And then they learned he had recently received *in-patient mental health treatment*. Then, as Sgt Honstein was—as he told the Agents—"reeling from the fact that [he] just shot the love of [his] life," the Agents do not inquire into his mental state.

Even if the Agents missed these subtler indications that Sgt Honstein's mental state left him susceptible to their coercion, what Sgt Honstein did next certainly put the Agents on notice. Sergeant Honstein explained in detail that he had been awake all night. At one point, he even told them specifically

that he had not slept the night before (Transcript at 31:20). The Agents do not inquire when Sgt Honstein last slept. Instead, they began to pressure the sleep deprived Sgt Honstein.

ii. Several key factors—each amplifying the others—contributed to his inability to freely and voluntarily respond to the agents' interrogation.

Psychological coercion is stress or pressure imposed on an individual that weakens or breaks their cognitive capacity to resist. Psychological coercion occurs when emotional distress overwhelms one's thinking abilities and ability to maintain free will. In this state, one's thinking and decision-making capacity are temporarily compromised, so they may say or do things against their will. Moreover, research shows that confessions to crimes, both truthful and false confessions, are associated with one's *perception* of guilt, and external and internal pressures. This means that if one perceives that the deck is stacked against them and they have no chance of being believed if they maintain their innocence, they are more likely to confess. Psychologically coercive interrogation techniques also include pressuring an accused and appealing to their sympathies. These techniques make confession more appealing; thus, the accused's will is overborn.

Sergeant Honstein was subject to the orchestrated interrogation by two skillful NCIS special agents. He was questioned for more than three-and-one-half hours before he capitulated to their repeated demands to say that he, and not Ms. [redacted] loaded the pistol. This tense scene unfolded like a stage production where the agents had already cast Sergeant Honstein in the role of the one who must be responsible for loading the weapon. Ultimately, under the weight of the NCIS agents' tactics, Sgt Honstein's will was overborn, and he gave a statement that NCIS could use to support their Article 118(3) charge.

Sergeant Honstein's emotional distress, mounting pressure and subtle intimidation, and emotional appeals the agents wore down his resolve. These factors are not isolated but instead intertwine to show that Sgt Honstein's capacity to withstand coercive tactics was compromised.

a) First, Sgt Honstein's age and sleep deprivation compromised his ability to withstand NCIS's pressure.

As discussed above, Sgt Honstein's ability to withstand NCIS pressure was compromised.

b) Second, Ms. [redacted] blood was still on Sgt Honstein's hands when NCIS interrogated him.

The interrogation began just hours after Sgt Honstein had experienced the traumatic event of killing Ms. [redacted] through his own admitted negligence. The weight of this trauma, coupled with the emotional strain of losing someone he had developed a deep affection for, left him in a state of distress that influenced his responses. The agents knew he was emotionally vulnerable. As someone who was grappling with guilt and confusion, Sgt Honstein was in no position to rationally assess the situation and resist the pressures placed upon him.

c) Third, the NCIS special agents pressured Sgt Honstein. The special agents wore down Sergeant Honstein's resistance before making an emotional appeal.

From the beginning, Sgt Honstein made confessions and admissions supporting a conviction for involuntary manslaughter. But the special agents "were not merely trying to solve a crime or even to absolve a suspect . . . They were rather concerned primarily with securing a statement from [Sgt Honstein] on which they could convict him" of Article 118(3). *Spano*, 360 U.S. at 323-24. Their "undeviating intent . . . to extract a confession" is relevant, and requires this Court to examine Sgt Honstein's confession "with the most careful scrutiny." *Id.*

The agents accused him of lying multiple times, an accusation he consistently denied. Despite his denials, the agents continued to press, adding to his stress and fatigue. Special Agent [redacted] resorts to a subtle threat, telling Sgt Honstein by saying: [redacted] before asking [redacted] The agents are intentionally adding to Sgt Honstein's distress.

Sergeant Honstein's repeated requests to smoke reveal his stress. They are desperate attempts to find an escape from the interrogation. As Sgt Honstein's discomfort grew, he became more inclined to give answers that would placate the agents and allow him to escape the situation. His escalating distress is evident when he lashes out in frustration, mentioning feeling judged for his sexual choices. His statements reveal a man under intense pressure, willing to concede to the agents' narrative to leave the interrogation.

Then, the NCIS agents strategically invoked Ms. [redacted] family, aiming to exploit Sgt Honstein's already pronounced internal guilt. Special Agent [redacted] statements, such as [redacted]

[redacted] further intensified Sgt Honstein's emotional turmoil. *See Spano*, 360 U.S. at 323. This manipulation of his emotions, combined with his cognitive fatigue, left Sergeant Honstein in a weakened state, vulnerable to the agents' suggestions. After more than three and a half hours of intense questioning, his mental and physical exhaustion, compounded by the relentless pressure from the agents, had eroded his ability to think critically and independently. Ultimately, this culminated in Sgt Honstein providing the statement the agents sought.

iii. Taken together, these circumstances—the emotional trauma of killing Ms. [redacted] Sgt Honstein's fatigue and adolescent cognitive state, the psychological manipulation by the agents, and the coercive pressure—show that his will was overborne during the interrogation.

Sergeant Honstein's final statements were not the product of voluntary and rational decision-making but the result of manipulation, coercion, and exhaustion. *See Watts*, 338 U.S. at 53. Given these factors, Sgt Honstein could not and did not answer NCIS's questions freely and voluntarily. His will was certainly overborn when he raised the white flag and told the Agents that he loaded the pistol. Special Agent [redacted] immediately recognized it, telling Sgt Honstein [redacted] This Court should recognize what Special Agent [redacted] recognized.

Relief Requested

Sergeant Honstein respectfully believes that the Government's Additional Charge will not survive an R.C.M. 917 motion without this evidence. He requests the Military Judge suppress Sgt Honstein's statements to NCIS. In the alternative, Sgt Honstein requests the Military Judge suppress Sgt Honstein's statements that he loaded the pistol, where it is clear that his will was overborn.

Evidence

In support of this motion, the Defense requests the Court consider what is already in the Record. The Defense will call Col [redacted] and Ms. [redacted] as telephonic witnesses. The Defense respectfully requests the Government make NCIS Special Agent [redacted] and NCIS Special Agent

[redacted] available to testify telephonically. Finally, it respectfully offers the following enclosed exhibits:

Enclosure 1 – Timeline of activity on Sgt Honstein's phone.

Enclosure 2 – Cpl [redacted] statement

Enclosure 3 – Officer [redacted] statement

Enclosure 4 – LCpl [redacted] statement

Enclosure 5 – Rights Advisement

Oral Argument

The Defense requests oral argument.

[redacted]

M. E. NEELY
Lieutenant Colonel, U.S. Marine Corps
Regional Defense Counsel

CERTIFICATE OF SERVICE

I certify that I have delivered a copy of the foregoing document by email to the Court, Trial Counsel, and Victims' Legal Counsel on 27 February 2025.

[redacted]

M. E. NEELY
Lieutenant Colonel, U.S. Marine Corps
Regional Defense Counsel

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

UNITED STATES v. DAKOTA S. HONSTEIN SERGEANT/E-5 U.S. MARINE CORPS	**GOVERNMENT MOTION IN RESPONSE TO DEFENSE MOTION TO SUPPRESS** 11 March 2025

NATURE OF MOTION

The Government motion is filed in response to the Defense Motion to Suppress filed 27 February 2025. For the reasons set forth below, the Government respectfully requests the Court deny the Defense's motion to suppress Sgt Honstein's verbal statements to investigators.

SUMMARY

Sergeant Dakota S. Honstein, U.S. Marine Corps faces three specifications of violations of three Articles under the UCMJ stemming from an alleged shooting and killing of Ms. [redacted] the victim in this case. Sergeant Honstein was taken into custody by Camp Lejeune Provost Marshall Officers, and questioned about the incident by NCIS. The NCIS agents informed Sergeant Honstein of his rights against self-incrimination pursuant to Article 31(b), Uniform Code of Military Justice. Sergeant Honstein waived his rights and subsequently made self incriminating statements the Government will seek to admit at trial.

BURDEN OF PROOF AND PERSUASION

"When the defense has made an appropriate motion or objection under M.R.E. 304, the prosecution has the burden of establishing the admissibility of the evidence" M.R.E. 304(f)(6).

FACTS

1. On 27 January 2024, Sgt Honstein (hereinafter "the Accused") shot and killed Ms. [redacted] inside his Wallace Creek barracks room onboard Marine Corps Base, Camp Lejeune.[1]

2. Provost Marshall Officers subsequently placed the Accused in custody.

3. Special Agent [redacted] and Special Agent [redacted] NCIS, conducted the interrogation of the Accused.

4. Prior to questioning, SA [redacted] provided the Accused with a meal.

5. Later in the video recording, SA [redacted] and [redacted] enter the room and formally introduce themselves to the Accused by showing him their badges and stating their names.

6. SA [redacted] began asking the Accused questions as they fill out biographical data on the Accused.

7. The Accused answered approximately ten questions about biographical information. (Encl 1, p. 5)

8. The Accused did not complain of fatigue. He did not appear to slur his speech. He recalled information and did not hesitate when answering questions.

9. At no time while giving biographic information did the Accused state that he was tired.

10. At one point, SA [redacted] ask the Accused if his birthday was 4 May 98, to which the Accused corrected him with his actual date of birth. (Encl. 1, pg 7).

11. Once the biographical data sheet is complete, SA [redacted] begins to go through the Accused's Article 31(b) rights advisement form.

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[1] Names of victims and witnesses will be redacted IAW EJCR 7.3. [2]
See Defense Enclosure (A) at approximately 00:24:35.

12. SA [redacted] read each right to the Accused out loud and asked if he understood each right before initialing next to each.

13. At one point, SA [redacted] read out loud to the Accused, "I have the right to remain silent and make no statement at all," to which the Accused responded, "Of course." (Encl. 1, p. 14)

14. When SA [redacted] got to the last right, the Accused had questions about his rights and the process. The following exchange took place:[2]

[redacted]

[2] See Encl. 1, page 14-15

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[redacted]

15. The Accused paused and looked at the form and the Agents in silence. The next exchange is as follows:[3]

[redacted]

16. The Accused acknowledged that he understood his rights, and knowingly and voluntarily, signed a waiver of his rights.

17. During the interview, the Accused made multiple statements to law enforcement.

[3] See Encl. 1, page 16.

18. As the Accused described the events after the shooting, the Accused informed the Agents that he suffered a panic attack while still on the scene. (Encl. 1, p. 47)

19. SA [redacted] asked the Accused if he was still suffering or had suffered from a panic attack since being in the NCIS interview room. (Encl. 1, p. 123).

20. The Accused responded '[redacted] (Encl. 1, p. 123).

21. SA [redacted] then asked, [redacted] (Encl. 1, p. 123).

22. The Accused responded, [redacted] (Encl. 1, p. 123).

23. The total length of the recorded interrogation is approximately five hours, forty minutes, and twenty seconds.

24. Multiple times throughout the interrogation, the Accused was afforded opportunities to take a break from questioning to go to the bathroom and smoke.

25. The Accused initially denied loading the weapon, and insisted that the victim, [redacted] must have loaded the weapon while he was in the bathroom calming down from an adrenaline rush.

26. The Accused also initially stated that he did not notice the weight difference when he picked up the weapon after returning from the bathroom.

27. SA [redacted] and SA [redacted] confront the Accused on the contradictions and illogical premises contained in the Accused's statements.

28. First, SA [redacted] confronts the Accused with the illogical premise that the Accused did not notice the weight difference or check the weapon upon returning from the bathroom due to being under an adrenaline rush:[4]

[4] See Encl. 1, p. 144-147.

[redacted]

30. After being confronted with the contradictions of his initial statements and the fact that his weapon would be tested for the victim's DNA and fingerprints, the Accused then changed his statement and admitted that he loaded the weapon.

31. SA [redacted] clarified whether the Accused was being truthful or wanting to get out of being questioned by asking, [redacted] (Encl 1, p. 148).

32. The Accused responded, [redacted] (Encl. 1, p. 148)

33. When asked why did he load the weapon, the Accused stated, [redacted] (Encl. 1, p. 148).

34. Later in the interrogation, SA [redacted] ask the Accused if he will sign a Permissive Authorization for Search and Seizure ("PASS") of his vehicle. (Encl. 1, p. 151)

35. SA [redacted] reads the Accused his rights on the PASS form and ask the Accused to read the last sentence out loud.

36. The Accused then reads, [redacted] (Encl. 1, p. 157).

37. The Accused then signed the PASS for his vehicle. (Encl. 1, p. 157).

38. On 14 September 2024, the Defense filed a Motion to Suppress the Accused's interrogation with NCIS.

39. In that motion, the Defense argued that due to the Accused's lack of sleep and law enforcement's interrogation tactics, the Accused's will was overborne and his waiver of rights was not knowing and voluntary.

40. On or about 23 September 2024, the parties orally argued the motion during an Article 39(a) session before the Court.

41. On 15 October 2024, the Court issued its written ruling in which the Court denied the Defense's motion. (Encl. 2).

42. In its ruling, the Court stated, "After considering the totality of the circumstances, the Court finds that the accused's will was not overborne and that his statements were indeed the product of an essentially free and unconstrained choice. In particular, considering the accused's intelligence as evidenced by the coherent and comprehensive nature of his responses to the agents' questioning, the rights advisement he received, the generally respectful nature of the agent's demeanor and questioning, the lack of physical harm or punishment, the lack of any threats, and the lack of any deprivation of food or sleep, the Court finds that the government has met its burden to establish that the accused's statements were not the product of coercion." (Encl. 2)

LAW

Article 31(b), UCMJ, warnings are required when: "(1) a person subject to the UCMJ, (2) interrogates or requests any statement, (3) from an accused or person suspected of an offense, and (4) the statements regard the offense of which the person questioned is accused or suspected." *United States v. Harpole*, 77 M.J. 231, 236, (C.A.A.F. 2018), citing *United States v. Jones*, 73 M.J. 357, 361 (C.A.A.F. 2014) (footnote omitted) (citation omitted).

"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." M.R.E. 304(a)(1)(A).

When determining voluntariness the question is whether the confession is the product of an essentially free and unconstrained choice, and absent police conduct that is causally related to a confession, there is no basis for concluding a confession was involuntarily induced. *United States v. Bickford*, 82 M.J. 507 (N.M.C.C.A. 2021), citing *United States v. Bubonics*, 45 M.J. 93,95 (C.A.A.F. 1996). Furthermore, even if there is a causal connection between actions of the government agents and an accused's confession, it does not automatically follow that the confession was involuntary. *Id.* Factors we consider in determining whether a confession is voluntary 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). "Officers elicit confessions through a variety of tactics, including claiming not to believe a suspect's explanations, making false promises, playing on a suspect's emotions, using his respect

for his family against him, deceiving the suspect, conveying sympathy, and even using raised voices. *United States v. Brave Heart*, 397 F.3d 1035 (8th Cir. 2005), citing *United States v. Astello*, 241 F.3d 965 (8th Cir. 2001). These tactics do not render a confession involuntary, unless "the overall impact of the interrogation caused the defendant's will to be overborne." Furthermore, our appellate court has held that law enforcement's use of deception when questioning a suspect does not render the subsequent confession involuntary. *United States v. Mason*, 48 M.J. 946 (N.M.C.C.A. 1998).

ARGUMENT

A. The Accused intelligently and knowingly waived his Article 31(b) rights before speaking to NCIS.

The Defense submits no good cause for essentially their motion for reconsideration of the Court's 15 October 2024 ruling regarding the Accused's statement to NCIS.

Despite being awake in the hours leading up to the interrogation, the Accused knowingly and intelligently waived his Article 31(b) rights. SA [redacted] made the Accused aware of what articles under the UCMJ, he was suspected of having violated. He then went through each right individually to ensure that the Accused understood each one. The Accused initialed next to each right that was read to him afterwards. Of note, prior to waiving his rights and agreeing to speak to NCIS, the Accused paused and asked multiple clarifying questions about his rights. Specifically, he asked about the process of getting a lawyer to be present during his interrogation. SA [redacted] answered his questions and assured him that if he wanted a lawyer, the interview would terminate, and the Accused would be given the opportunity to get a civilian lawyer or be appointed one by the military. After receiving these answers, the Accused paused and looked at the Article 31(b) rights form before saying [redacted] and signed the waiver. This implied, and

the NCIS Special Agents understood it, as the Accused waiving his right to remain silent or have a lawyer present. Contrary to the Defense's written argument that the Accused's statement of [redacted] demonstrates his lack of appreciation of the waiver, the agents followed up to ensure they understood his intent. After the Accused explicitly waived his rights via his signature, SA [redacted] sought verbal clarification as well. SA [redacted] asked the Accused did he understand his rights and did he want to speak to them. The Accused responded affirmatively and unequivocally to both questions. The Accused behavior demonstrated that he intelligently and knowingly waived his Article 31(b) rights. Furthermore, this behavior demonstrated that the Accused was coherent and able to appreciate the importance of his Constitutional rights and the impact that waiver would have before making the informed decision to waive his rights and speak to law enforcement without an attorney present.

The Defense's assertion that the Accused's confession was involuntary due to his condition of being awake for an extended period of time unsupported by the facts. As stated above, the Accused's actions demonstrated that he was coherent and able to appreciate what was happening and ask questions before making decisions. Furthermore, the Accused answered each question fully and coherently. At no time during the interrogation did the Accused fall asleep while being questioned or state to the Agents that he was unable to continue due to sleep deprivation. Furthermore, at no time did the Accused ever provide any ques that would have suggested to law enforcement that the Accused was experiencing sleep deprivation such as delirium, providing non-answers to questions, etc. The Accused was given multiple breaks to go to the bathroom and smoke.

Additionally, the Accused informed the agents that he had suffered a panic attack at the scene. Contrary to the Defense's written argument, the agents inquired into his mental state to ensure that he was coherent and not in need of medical attention while being questioned. SA

[redacted] asked the Accused substantive questions about the events, and asked the Accused [redacted] SA [redacted] follow up by asking, [redacted] and the Accused answered, [redacted] Therefore, the Accused's physical condition was coherent and he was able to fully understand, perceive and appreciate his surroundings and what was being asked of him at all times. This also cuts against the Defense's position that Special Agents [redacted] and [redacted] whimsically went through the rights advisement and later coerced the Accused into confessing later in the interrogation.

B. <u>The Accused was not forced or coerced to confess to NCIS.</u>

The Accused's confession was voluntary. At the time of the interrogation, the Accused was [redacted] years old and a sergeant in the Marine Corps. There is no evidence in the record that the Accused suffers from any mental deficiency or is of low intelligence. SA [redacted] and SA [redacted] did not threaten the Accused in any way or physically harm him. The investigators ensured the Accused was comfortable by feeding him and providing him multiple breaks. At no point in time was the interrogation hostile in nature.

The Accused claimed that the victim loaded the weapon and denied hearing the victim place a round in the chamber due to being in the bathroom. Also, the Accused claimed that he needed a break from the sexual interaction with the victim due to becoming overwhelmed and upon returning from the bathroom the victim handed him the loaded weapon, but he did not notice the weight difference. Initially he claimed he did not notice because he was experiencing an adrenaline rush. Later, he changed his reasoning and stated that he did check the weapon because he trusted the victim. The investigator's challenged the notion of the Accused did not notice the weight difference of his weapon which he had owned and shot multiple times in the

past. Also, they confronted the Accused's premise that he trusted the victim when he had previously stated that he checked the weapon twice while with the victim before taking a break. Furthermore, they challenged the Accused's illogical premise that the did not notice the weight difference of the loaded weapon because he was undergoing the adrenaline rush of being with victim, despite stating that he went to the bathroom to calm down. Lastly, the investigators informed the Accused that his weapon and magazine would be forensically tested, and asked him if the victim's DNA and fingerprints would be present. The Accused waffled in his response at that point making statements such as "Probably," and "It should be," before finally stating that the victim's fingerprints would not be on the weapon because he in fact loaded the weapon.

As stated in *Brave Heart*, officers are authorized to utilize tactics on suspects such as claiming not to believe the suspect's explanations. Similarly, here, investigators confronted the Accused with the truth: that they did not believe his explanations because of their inherent contradictions and illogical premises that did not make sense. The investigators never stated that the Accused was not free to leave until he confessed to loading the weapon, nor did they threaten him with continued questioning if he did not confess. Instead, investigators confronted him with his own contradictions and illogical statements and SA [redacted] told the Accused, [redacted] important that we get the facts straight in this room....we're duty-bound to do that. We have no other obligation other than to get the facts straight." This did not overbear the Accused's will to freely confess nor was he constrained in his choice to confess. Instead, this exchange shows that the Accused voluntarily made statements after being confronted with the realization that his previous false statements were not being believed by the investigators and the possibility that his false statements were going to be further contradicted by forensic testing.

The Accused intelligently and knowingly waived his Article 31(b) rights. At no time did the Accused give any indication to investigators that he was suffering from any medical condition, mental defect, or sleep-depravation that would render him incapable of appreciating his legal rights against self-incrimination.

EVIDENCE

The government adopts the Defense's enclosures to its motion to suppress. The government also provides the following enclosure in support of its motion:

(1) Transcript of Honstein Interrogation.
(2) Court's written ruling denying Defense's motion to suppress, dated 15 Oct 24

WITNESSES

While it's the government's position that the Accused video and transcript stands on its own, the government reserves the right to call the following witnesses if deemed necessary:

(1) Special Agent [redacted]
(2) Special Agent [redacted] (telephonic)

RELIEF REQUESTED

Based on the foregoing, The Government respectfully requests this Court DENY the Defense's motion to suppress the Accused verbal statements, confessions, and admissions to law enforcement.

[redacted]
R. D. ANDERSON
Captain, USMC
Special Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Government Motion was served electronically on defense counsel on 11 March 2025.

[redacted]

R. D. ANDERSON
Captain, USMC
Special Trial Counsel

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

UNITED STATES **V.** **DAKOTA S. HONSTEIN** **SERGEANT / E-5** **USMC**	**DEFENSE MOTION TO COMPEL EXPERT WITNESS** **(Digital Forensics)** **3 March 2025**

MOTION

Pursuant to R.C.M. 703(d)(2), the Defense moves to compel the production of Mrs. [redacted] as a Defense expert witness in the field of digital forensics.

FACTS

[redacted]

1. On 27 January 2024, Sgt Honstein signed a Permissive Authorization for Search and Seizure (PASS) for his iPhone. [Encl (1)].
2. On 31 January 2024, NCIS Investigator [redacted] extracted data from Sgt Honstein's iPhone, downloading it onto an NCIS server. [Encl (2)].
3. On 1 February 2024, the digital downloaded was completed, at which time NCIS began transferring the data from one NCIS server to another NCIS server. [Encl (2)].
4. During the server-to-server transfer, NCIS Special Agents (SA) [redacted] and [redacted] began a manual review of Sgt Honstein's iPhone. [Encl (2)].
5. While reviewing Sgt Honstein's iPhone, NCIS was notified that Sgt Honstein revoked the PASS. [Encl (2)].

6. SA's [redacted] and H[redacted] ceased their manual review of Sgt Honstein's iPhone, but did not halt the server-to-server transfer. [Encl (2)].

7. During their manual review of Sgt Honstein's iPhone, the NCIS agents noted one missed call and one outgoing call between Sgt Honstein and Ms. [redacted] [Encl (2)].

8. On 21 February 2024, SA [redacted] retrieved a copy of the digital extraction of Sgt Honstein's iPhone from an NCIS internal server. [Encl (3)].

9. Between 21 February 2024 and 8 April 2024, SA [redacted] conducted a digital forensic examination of Sgt Honstein's iPhone using Cellebrite's Physical Analyzer program, "pursuant to a Command Authorization for Search and Seizure (CASS) executed by Col [redacted] [Encl (3)].

10. Col [redacted] signed the CASS on 7 March 2024 as the Acting Commander, MCI-E, Camp Lejeune, NC. [Encl (3)].

11. SA [redacted] examination focused on reviewing results from a "key word" search for the words [redacted] [Encl (3)].

12. During his examination SA [redacted] discovered instant messages, images, web searches, and web history related to and/or depicting firearms, as well as communications between Sgt Honstein and Ms. [redacted] statements indicative of Sgt Honstein's state of mind, death, and self-harm. [Encl (3)].

Mr. [redacted]

13. Between 14 February 2024 and 12 March 2024, Mr. [redacted] conducted a digital forensic review and extraction of Ms. [redacted] iPhone. [Encl (4)].

14. During his review, Mr. [redacted] discovered several messages between Ms. [redacted] and Sgt Honstein, pictures, location data, call logs and web data relevant to the investigation, all of which were noted in an enclosure to his written report. [Encl (4)].

Notices and Requests

15. On 26 July 2024, the Government provided the Defense an initial witness list for the previous trial (hereinafter Honstein I), which included 65 Government witnesses. [Encl (5)].
16. Included in its witness list were Mr. [redacted] and Mr. [redacted] [Encl (5)].
17. On 2 August 2024, the Defense requested that the Convening Authority approve funding for five (5) hours of expert consultation with [redacted] Digital Forensics. [Encl (6)].
18. On 14 August 2024, the Convening Authority approved the Defense's request. [Encl (6)].
19. On 30 August 2024, the Defense requested that the Convening Authority approve funding for an additional fifteen (15) of expert consultation with [redacted] Digital Forensics. [Encl (7)].
20. On 12 September 2024, the Convening Authority approved the Defense's request. [Encl (7)].
21. On 30 October 2024, the Government provided the Defense a revised witness list for Honstein I, which included 46 Government witnesses, to include Mr. [redacted] and SA [redacted] both of whom the Government intends to qualify as expert witnesses in the field of digital forensics. [Encl (8)].
22. The Government has not provided the Defense an updated witness list for the instant trial (hereinafter Honstein II) but indicated that it intends to call the same witnesses noticed in its witness list from 30 October 2024.

Mrs. Carol Peden

23. As part of their confidential consultation with the Defense, Mrs. [redacted] of [redacted] Digital Forensics conducted a digital forensic examination of the digital extraction from Ms. [redacted] iPhone and Sgt Honstein's iPhone.

24. Upon review of the digital extraction of Ms. [redacted] iPhone, Ms. [redacted] constructed an extensive timeline of user activity on Ms. [redacted] iPhone and Sgt Honstein's iPhone before the shooting and discovered messages and photos by and between Sgt Honstein and Ms. [redacted] to include messages pertaining to Ms. [redacted]

BURDEN

As the moving party, the Defense has the burden of persuasion as to whether the military judge should compel the production of Mr. [redacted] R.C.M. 905(c)(2). The burden of proof is by a preponderance of the evidence. R.C.M. 905(c)(1).

LAW

If the Convening Authority denies the Defense an expert witness, the Military Judge may review the denial on the basis of "whether the testimony of the expert is relevant and necessary." R.C.M. 703(d)(2)(A)(i). M.R.E. 702 governs the admissibility of an expert's testimony. "The testimony provided by the expert must: (1) be helpful to the trier of fact in understanding the evidence or in determining a fact in issue; (2) be based on sufficient facts or data; (3) be the product of reliable principles and methods; and (4) in providing his testimony, the expert must reliably apply those principles and methods to the facts of the case." *United States v. Patrick*, 78 M.J. 687, 699 (NMCCA 2018). Courts look to the 6-part test set out in *United States v. Houser*,

36 M.J. 392 (CMA 1993) to determine whether an expert's testimony is relevant and necessary. United States v. *Rivers*, 49 M.J. 434, 446 (CAAF 1998). The six *Houser* criteria are:

1. Whether the expert is qualified;
2. The testimony is on a proper subject matter;
3. The basis for the expert testimony;
4. Relevance;
5. Reliability of the evidence; and
6. Whether the testimony's probative value outweighs other considerations under M.R.E. 403. *Rivers*, 49 M.J. at 446 (citing *Houser*, 36 M.J. at 397).

ARGUMENT

Houser Part One: Qualifications. Mrs. [redacted] is eminently qualified to serve as an expert witness in the field of digital forensics. The Defense provided the Convening Authority with her qualifications when requesting funding for expert consultation, which the Convening Authority granted.

Houser Part Two: The subject matter of the expert testimony. Per M.R.E. 702, expert testimony is admissible when "the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." This is "a very liberal standard." *Houser*, 36 M.J. at 398. In this case, the Government intends to call two witnesses whom they intend to qualify as experts in the field of digital forensics. The basis for Mrs. [redacted] opinions will be similarly rooted in her own technical expertise in the field of digital forensics.

Houser Part Three: The basis for the expert testimony. "An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed." M.R.E. 703. Here, the Mrs. [redacted] testimony will be based on personal observation of the trial, to include observations of the testimony of the Government's own experts, as well as her

extensive investigatory review of the digital extractions of Sgt Honstein's iPhone and Ms. [redacted] iPhone.

Houser Parts Four and Six: Relevance and Probative Value. Mrs. [redacted] conducted a thorough review of the digital data extracted from the iPhones belonging to the accused and victim in this case. During her review, Mrs. [redacted] constructed an extensive timeline of the user activity on each device leading up to the shooting. Mrs. [redacted] also discovered several messages on the victim's phone that were [redacted] is a necessary foundational witness for this digital evidence, which shows i) the nature of the relationship between the Sgt Honstein and Ms. [redacted] and ii) the mental state of the victim before she was shot with a firearm, on which Ms. [redacted] DNA was recovered from areas to include the slide, grip, and trigger.

Houser Part Five: Reliability. Like the Government's own experts, Ms. [redacted] testimony will be based on reliable principles and methods. Digital forensics is a broadly accepted practice in the criminal investigations.

RELIEF REQUESTED

Request. The Defense respectfully requests that the Court compel the Government to produce Mrs. [redacted] as a Defense expert witness.

Evidence:

a) Enclosure (1): PASS

b) Enclosure (2): NCIS Investigative Action dtd 31 Jan 24

c) Enclosure (3): DFE [redacted] Report of Findings

d) Enclosure (4): DFE [redacted] Digital Evidence Report

e) Enclosure (5): Govt Initial Witness List

f) Enclosure (6): Def expert consultation request and approval

g) Enclosure (7): Supplemental Def expert consultation request and approval

h) Enclosure (8): Amended Govt Witness List

Witnesses. The Defense intends to call Mrs. [redacted] to testify in support of this motion.

Oral Argument. The Defense requests oral argument if opposed by the Government.

[redacted]

T. J. LIPOSITZ
Captain, U.S. Marine Corps
Defense Counsel

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CERTIFICATE OF SERVICE

I certify that I have delivered a copy of the foregoing document by email to Trial Counsel and the Court 3 March 2025.

[redacted]
T. J. LIPOSITZ
Captain, U.S. Marine Corps
Defense Counsel

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

UNITED STATES **V.** **DAKOTA S. HONSTEIN** **SERGEANT / E-5** **USMC**	**MOTION *IN LIMINE*** **(Admissibility of Ms. [redacted] September 2022 text message with her husband)** **1 April 2025**

MOTION

Pursuant to Rule for Courts-Martial (R.C.M.) 905(b), the Defense moves the Court, *in limine*, to admit Ms. [redacted] statements under Military Rule of Evidence (M.R.E.) 803.

BURDEN

As the moving party, the Defense has the burden of persuasion. R.C.M. 905(c)(2). The burden of proof is by a preponderance of the evidence. R.C.M. 905(c)(1).

Introduction

The accused is charged with murder for tragically shooting Ms. [redacted] as they consensually engaged in Bondage, Discipline, Sadism, and Masochism (BDSM) sexual activity. Sgt Honstein consistently told the NCIS agents that Ms. [redacted]. must have been the one to load the gun that they used during their BDSM activity, ultimately resulting in her death. The investigators repeatedly pressed Sgt Honstein as to why Ms. [redacted]. would have loaded bullets into the gun she introduced into their encounter. Her prior statements that Defense now seeks to introduce [redacted]

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[redacted]

FACTS

1. In September 2022, Ms. [redacted] and her husband, Cpl [redacted] argued over infidelity. (enclosure 1)
2. Cpl [redacted] announced his intention to leave their relationship because of Ms. [redacted] relationship with another man. (enclosure 1)
3. Ms. [redacted] complained, "you get to leave and move on and find new love. I have to deal with this forever." (enclosure 1)
4. Cpl [redacted] responded that he did not care about Ms. [redacted] distress. (enclosure 1)
5. Ms. [redacted] responded, "Got it" and "Made what I'm boutta [sic] do that much easier." (enclosure 1)
6. Cpl [redacted] responded, "I don't care what you do anymore." (enclosure 1)
7. Ms. [redacted] invited Cpl [redacted] to look at her "snap story." (enclosure 1) (Snapchat is a commonly used social media and messaging application)
8. Cpl [redacted] responded, "why do you have a gun" (enclosure 1)
9. Ms. [redacted] answered, [redacted] (enclosure 1)
10. Cpl [redacted] responded, "Well according to you I'm not there for you so I can't help" (enclosure 1)
11. Ms. [redacted] answered, "You really sealin [sic] my fate here" (enclosure 1)
12. On 27 January 2024, hours before Ms. [redacted] handled Sgt Honstein's pistol, Cpl [redacted] and Ms. [redacted] were again engaged in a fight concerning Ms. [redacted] infidelity. (enclosure 2)
13. This fight caused Ms. [redacted] to attack Cpl [redacted] leaving him with scratch marks. (enclosure 2)
14. Cpl [redacted] then kicked Ms. [redacted] out of their home and locked their doors despite Ms. [redacted] repeated pleas for re-entry. (enclosure 3).
15. Ms. [redacted] then texted Sgt Honstein, who agreed to pick her up under the when Ms. [redacted] told Sgt Honstein her "roommate" was himself engaging in a sexual encounter with somebody else.

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16. Later that morning, Sgt Honstein and Ms. [redacted] engaged in a consensual BDSM encounter that included using a gun. Ms. [redacted] was shot and killed during this encounter.

17. That afternoon, NCIS agents interrogated Sgt Honstein. A copy of a transcript of Sgt Honstein's interrogation is also already attached to the Record. To assist the reader, the transcript will be cited "Transcript At Page#:Line#"

18. The agents repeatedly asked Sgt Honstein who loaded the firearm. In response to the questions Sgt Honstein repeatedly answered, Ms. [redacted] must have loaded it. *E.g.*, Transcript at 79:4, 86:22, 136:8.

19. While denying that he loaded it, Sgt Honstein repeatedly accepted responsibility for failing to check to ensure the gun was clear after Ms. [redacted] handed it to him. *E.g.*, Transcript at 144:22.

20. NCIS again refused to accept this answer, asking, [redacted] *E.g.*, 86:8, 10.

21. NCIS agents pressed the question, asking Sgt Honstein, [redacted] Transcript at 144:17.

LAW

Read together, M.R.E. 801(d), 803, 804, and 807 present an organized codification of legal authority justifying the admission of proof that would otherwise be excluded because of the prohibition against hearsay evidence in M.R.E. 802.

M.R.E. 803(1) permits admitting a declarant's present sense impression if it describes or explains an event or condition and was made while perceiving an event or condition or immediately thereafter.

M.R.E. 803(3) excludes permits hearsay concerning the declarant's then existing state of mind, emotional, or physical condition.

ANALYSIS

Ms. [redacted] September 2022 statement that [redacted] is a direct reflection of her then-existing [redacted] Her contemporaneous assertion that she had a gun is a present sense impression, describing what was in her possession at that moment.

This text message, exchanged during an argument between Ms. [redacted] and Cpl [redacted] over infidelity, is probative because it demonstrates the likelihood that on 27 January 2024, following a similar dispute, Ms. [redacted] found herself in an analogous emotional state. That confrontation ended with her locked out of her home, pleading for help while Cpl [redacted] refused her refuge. This sequence of events underscores a broader pattern: her emotional distress—driven, in part, by her belief that Cpl [redacted] did not care about her—was a recurring reality that she struggled with.

This evidence is not merely relevant; it is essential to Sgt Honstein's right to present a complete defense. The text message is direct evidence that Ms. [redacted] was either willing to introduce a loaded gun into her interaction with Sgt Honstein or was, at the very least, indifferent to the consequences of her doing so. Her September 2022 statements and conduct establish a predictable emotionally volatile response to perceiving her husband's abandonment—precisely the factors that inform her state of mind and emotions at the time of the alleged offense.

The inference is clear: when faced with a similar emotional crisis on 27 January 2024, she may have been prepared to use the gun or was unconcerned about the potential consequences of giving the loaded gun to Sgt Honstein. And that, in turn, answers the very question NCIS sought to resolve—why would Ms. [redacted] have loaded the gun? This evidence provides that answer, and under fundamental principles of due process, as well as M.R.E. 803(1) and (3), the fact finder must hear it.

RELIEF REQUESTED

The Defense moves the Court, *in limine*, to admit the requested evidence in the form of the extracted text messages from Ms. [redacted] telephone. The Defense requests oral argument if opposed.

EVIDENCE AND HEARING

In support of this motion, the Defense requests the Court consider matters already in the Record and offers the following enclosures:

Enclosure 1 – Text Messages between Ms. [redacted] and Cpl [redacted] dated 4 September 2022 (Ms. [redacted] is indicated as the "owner" on the redacted spreadsheet).

Enclosure 2 – BS 000206-000208, 000210 NCIS Report of interview of Cpl [redacted]

Enclosure 3 – Text Messages between Ms. [redacted] and Cpl [redacted] dated 27 January 2024 (time stamped in UTC+0)

If the Government objects on foundation, the Defense will also introduce Ms. [redacted] testimony.

[redacted]
M. E. NEELY
Lieutenant Colonel, U.S. Marine Corps
Defense Counsel

CERTIFICATE OF SERVICE

I certify that I have delivered a copy of the foregoing document by email to the Court, Trial Counsel, and Victims' Legal Counsel on 1 April 2025.

[redacted]
M. E. NEELY
Lieutenant Colonel
U.S. Marine Corps
Regional Defense Counsel

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

UNITED STATES **V.** **DAKOTA S. HONSTEIN** **SERGEANT/E-5** **USMC**	**GOVERNMENT RESPONSE TO DEFENSE MOTION *IN LIMINE*** **(Admissibility of Ms. [redacted] September 2022 text message with her husband)** **11 April 2025**

MOTION

Under Rule for Courts-Martial (R.C.M.) 905(b) and Military Rules of Evidence (M.R.E.) 402, 404, and 803, the Government requests that the Court deny the Defense's motion *in limine* for the reasons outlined below.

BURDEN

The burden of proof is a preponderance of the evidence and rests with Defense as the proponent of the evidence. R.C.M. 905(c).

LAW

M.R.E. 401 provides the following test for relevant evidence: 1) it has any tendency to make a fact more or less probable, and 2) the fact is of consequence. M.R.E. 402(b) states that irrelevant evidence is not admissible. M.R.E. 403 further provides for excluding relevant evidence "if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, [or] misleading the members."

M.R.E. 801(c) defines hearsay as a statement that (1) the declarant does not make while testifying at the current trial or hearing, and (2) a party offers in evidence to prove the truth of the matter asserted. M.R.E. 802 prohibits the admissibility of hearsay statements unless otherwise

provided by law.

M.R.E. 803(1) provides an exception to the rule against hearsay relating to "[a] statement describing or explaining an event or condition, made while or immediately after the declarant perceived it."

M.R.E. 803(3) provides an exception to the rule against hearsay relating to the declarant's then-existing state of mind (*e.g.*, motive, intent, or plan), emotional, sensory, or physical condition (*e.g.*, mental feeling, pain, or bodily health), but not "including a statement of memory or belief to prove the fact remembered or believed."

ARGUMENT

The Defense asks the Court to admit a text messages exchange between Ms. [redacted] and her husband, Cpl [redacted] as exceptions to hearsay, namely M.R.E. 803(1), present sense impression, and 803(3), then-existing emotional and mental state. These arguments are addressed in order below.

a. Admissibility under M.R.E. 803(1)

The Defense argues the following text message exchange in their enclosure 1 is a present sense impression:

Ms. [redacted] "Go head and check my snap story"
Cpl. [redacted] "Why do you have a gun"
Cpl [redacted] "I don't care what you vs care about is two different things"
Ms. [redacted]

The Defense, seemingly without any supporting evidence, makes the assertion "[h]er contemporaneous assertion that she had a gun is a present sense impression, describing what was in her possession at that moment." However, the Defense does not provide any citation to evidence that Ms. [redacted] had a gun her possession "at that moment." Instead, the Defense relies on

a text exchange referencing a snap story, ultimately concluding that Ms. [redacted] was in possession of a firearm at that moment. For this to even be considered under M.R.E. 803(1), the Defense must prove by a preponderance of the evidence the fact that Ms. [redacted] actually had a gun in her possession contemporaneously with the message exchange. The Defense falls short of meeting their burden that this was a present sense impression.

Further, even if their position was supportable, the fact that Ms. [redacted] had a gun in September 2022—over a year before the charged misconduct—is irrelevant. Despite the Defense's assertion, the fact that Ms. [redacted] referenced a gun in a snap story over a year earlier does not make it more likely that she directed Sgt Honstein to point a loaded handgun at her heart and pull the trigger during a sexual encounter. Therefore, it is also inadmissible under M.R.E. 402.

Even if the Court found this text message to be a present sense impression and relevant, it should be excluded under M.R.E. 403, as any probative value is substantially outweighed by a danger of confusing the issues and misleading the members. Instead of focusing on the facts and circumstances surrounding the charged misconduct, the members focus would be shifted to an unrelated incident over a year prior, devoid of context.

b. Admissibility under M.R.E. 803(3)

The Defense argues that the following message is a "direct reflection of her then-existing emotional and mental state"— [redacted] The Defense must prove by a preponderance of the evidence the fact that the messages were a reflection of Ms. [redacted] then-existing mental state and not sent for another purpose. However, the Defense makes this assertion void of context or evidence to support their assertion. Contrary to their positions, the Defense enclosures as a whole demonstrate that it is more likely that Ms. [redacted]

was trying to get attention or a reaction from her husband during an argument. For example, the Defense ignores the responses to these messages by her husband, such as: "I'm going to the beach bye." Responses like this demonstrate that her husband did not take his wife statements as a legitimate [redacted] The Defense also ignores the texts that follow from Ms. [redacted] where she then asks Cpl [redacted] "[h]ow was the beach" and "[h]ey can I borrow like 200$." Further, in Defense's Enclosure 2, Cpl [redacted] tells NCIS about previous behavior by Ms. [redacted] to get his attention, [redacted]

However, despite these issues, the Defense wants the Court to adopt their position that Ms. [redacted] so that the Defense can then argue that "Ms. [redacted] was either willing to introduce a loaded gun into her interaction with Sgt Honstein or was, at the very least, indifferent to the consequences of her doing so." This position is not supportable by the facts or the law cited by the Defense and further fails under M.R.E. 402 and 403 for the reasons outlined in the previous section.

RELIEF REQUESTED

Considering the above, the Government asks the Court to deny the Defense's Motion. In the alternative, the Government request that the Court narrowly tailor what portions of the text messages are admissible and for what purpose.

[redacted]
P. C. Rush
Captain, U.S. Marine Corps
Special Trial Counsel

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I certify that I have served a true copy (via e-mail) of the above on the Court and Defense Counsel on 11 April 2025.

[redacted]
P. C. Rush
Captain, U.S. Marine Corps
Special Trial Counsel

AE CXI
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GENERAL COURT-MARTIAL
NAVY-MARINE CORPS TRIAL JUDICIARY
EASTERN JUDICIAL CIRCUIT

UNITED STATES v. Dakota S. Honstein Sergeant U.S. Marine Corps	VICTIM LEGAL COUNSEL RESPONSE TO DEFENSE MOTION IN LIMINE (Admissibility of Ms. [redacted] September 2022 text message with her husband) 11 April 2025

1. **Nature of Motion.**

The victim, Corporal [redacted] U.S. Marine Corps (Cpl [redacted], through counsel, pursuant to Rules for Court-Martial (R.C.M.) 905(b), requests that the Court deny the Defense's motion to admit Ms. [redacted] statements to Cpl [redacted] via text message from 4 September 2022, as the request fails to meet M.R.E. 401 and 403, as the text messages are irrelevant to the tragic events of 27 January 2024.

2. **Summary of Facts.**

a. The Accused, Sergeant D. Honstein, U.S. Marine Corps (Sgt Honstein), is charged with violations of Articles 118, 119, and 92, UCMJ. Specifically, Sgt Honstein is accused of killing Ms. [redacted] on or about 27 January 2024 with a firearm in his barracks room onboard Marine Corps Base Camp Lejeune.

b. On 1 April 2025, the Defense filed a Motion in Limine requesting that the Court consider allowing the admission of text messages between Cpl [redacted] and Ms. [redacted] from 4 September 2022, almost two (2) years prior to her death on 27 January 2024.

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3. **Discussion**.

Article 6b(a)(9) mandates a victim's right to be treated with fairness and respect in relation to the victim's dignity and privacy. (M.C.M., 2023 ed.) "Privacy" is defined as "[the condition or state of being free from public attention to intrusion into or interference with one's acts or decisions." (Black's Law Dictionary, 4th ed.) "Dignity" is defined as "the quality or state of being worthy, honored, or esteemed." (Merriam Webster) A victim under the UCMJ does not have an absolute right to privacy, but Article 6b mandates that victims be treated with fairness and respect in relation to the victim's privacy.

Defense's request for irrelevant text messages between her and her husband, Cpl [redacted] stemming almost two (2) years prior to Ms. [redacted] death directly infringes upon the right to privacy. The text messages were between a husband and wife where an argument ensued over the possibility that Ms. [redacted] had been unfaithful in September 2022. Arguments in a marriage are common and expected; however, the relevance of such an argument over one (1) year, four (4) months, and twenty-three (23) days prior to Ms. [redacted] death while with Sgt Honstein has no relevance to the events that unfolded in the evening of 26 January and early morning hours of 27 January 2024.

The Defense states in their motion that in the text messages from 4 September 2022 Ms. [redacted] texted Cpl [redacted] about her state of mind that evening, referencing a Snapchat story where she allegedly took a photo with a firearm and then in text messages [redacted] as a result of their verbal argument related to her infidelity. However, the Defense has not identified any text messages or other conversations similar to those from September, on the day of her death, 27 January 2024. In fact, the Defense states in their motion that earlier in the day, Ms [redacted] attacked Cpl [redacted] physically leaving scratch marks on his face after

another verbal argument ensued related to Ms. [redacted] possible infidelity. There were no text messages or other communications indicating Ms. [redacted] state of mind or anything related to [redacted]. For the Defense to attempt to indicate that because Ms. [redacted] made references to [redacted] in 2022 after a similar verbal argument regarding her alleged infidelity, then she likely did the same in January 2024 is unfair and fails under M.R.E. 401 and 403, UCMJ.

Here, the Defense is attempting to draw the conclusion that because [redacted] had an argument with Cpl [redacted] on 4 September 2022 regarding infidelity that led to text messages from her insinuating that [redacted] when she sent a photo of a firearm, that on 27 January 2024 when she and Cpl [redacted] argued again about her infidelity that she was again [redacted] and used the Accused to complete the act with his firearm and without his knowledge. Having an argument almost two (2) years prior regarding infidelity followed by text messages discussing the state of Ms. [redacted] mind at that time in September 2022 is not relevant to what occurred on 27 January 2024. Furthermore, even after the apparent argument between her and Cpl [redacted] that evening was not followed by text messages at all. There was nothing to suggest that Ms. [redacted] that evening or had any intention of harming herself and the Defense's attempt to suggest as such is unfair, prejudicial, and will be misleading. M.R.E. 403

Should this court, however, nonetheless find that the evidence is marginally relevant under M.R.E. 401, this evidence should still be excluded under M.R.E. 403 because its probative value is substantially outweighed by the danger of unfair prejudice, as it is confusing of the issues, and misleading to the members. To offer text messages from an argument that occurred almost two (2) years prior to Ms. [redacted] death in an attempt to suggest that she set up her own death, would be prejudicial. A verbal argument regarding infidelity followed by text messages referencing Ms. [redacted] state of mind following the argument in September 2022 is not relevant to

the evening of 27 January 2024 and the interactions she had with her husband at the time leading up to her death later that night.

The Victim Legal Counsel objects to the Government introducing these text messages from 4 September 2022 and objects to their relevance based on MRE 401, and because of their prejudicial and confusing nature under MRE 403. For these reasons, this evidence should be excluded.

4. Burden of Proof. As the proponent of the evidence, the Government bears the burden of persuasion on this motion. The burden of proof is by a preponderance of the evidence under R.C.M. 905(c).

5. Relief Requested. The Victim Legal Counsel respectfully requests that this court preclude the use of the proposed MRE 404(b) evidence.

[redacted]
Eric M. Kopka
Civilian Defense Counsel

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CERTIFICATE OF SERVICE

I hereby attest that a copy of the foregoing motion was served on the court and opposing counsel via electronic mail on 11 April 2025.

[redacted]
Eric M. Kopka
Civilian Defense Counsel

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

UNITED STATES **V.** **DAKOTA S. HONSTEIN** **SERGEANT / E-5** **USMC**	**MOTION *IN LIMINE*** **(Admissibility of Ms. [redacted] November 2023 text message with her friend)** **1 April 2025**

MOTION

Pursuant to Rule for Courts-Martial (R.C.M.) 905(b), the Defense moves the Court, *in limine*, to admit Ms. [redacted] statements under Military Rule of Evidence (M.R.E.) 803.

BURDEN

As the moving party, the Defense has the burden of persuasion. R.C.M. 905(c)(2). The burden of proof is by a preponderance of the evidence. R.C.M. 905(c)(1).

INTRODUCTION

The accused is charged with murder for tragically shooting Ms. [redacted] as they consensually engaged in Bondage, Discipline, Sadism, and Masochism (BDSM) sexual activity. During his interrogation, Sgt Honstein told NCIS agents that Ms. [redacted] had shared her background, including that she had guns pulled on her in the past and that she found it sexually arousing. A subsequent search of Ms. [redacted] text messages revealed that on 9 November 2023, she similarly told a friend that she "had a gun to my head more times than I can count, you can tell when they don't have the balls to do anything." This message corroborates Sgt Honstein's statements to NCIS that Ms. [redacted] had guns held to her, making his other assertions and denials during the interrogation more reliable up and until NCIS's pressure overcame his will.

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FACTS

1. On 9 November 2023, Ms. [redacted] texted a friend, "Lmao I've had a gun to my head more times than I can count, you can tell when they don't have the balls to do anything" (enclosure 1)
2. On 27 January 2024, NCIS agents interrogated Sgt Honstein. A copy of a transcript of Sgt Honstein's interrogation is also already attached to the Record. To assist the reader, the transcript will be cited "Transcript At Page#:Line#"
3. Sgt Honstein explained to the agents that Ms. [redacted] and he discussed their affinity for BDSM. Transcript at 73:10.
4. Sgt Honstein told the agents that Ms. [redacted] told him that she liked knives and guns held against her. Transcript at 73:11.
5. Sgt Honstein further explained that this led to a conversation about her background, which included drug dealers in Compton who had pulled guns on her, and that she found it arousing. Transcript at 74:1-4.

LAW

Read together, M.R.E. 801(d), 803, 804, and 807 present an organized codification of legal authority justifying the admission of proof that would otherwise be excluded because of the prohibition against hearsay evidence in M.R.E. 802.

If a statement is not offered for the truth of the matter asserted, it is not hearsay. M.R.E. 801(c)(2).

M.R.E. 803(3) excludes permits hearsay concerning the declarant's then existing state of mind, emotional, or physical condition.

ANALYSIS

Ms. [redacted] November 2023 statement that she has had a gun held to her head too many times for her to count is not offered for the truth of the matter asserted. Instead, it corroborates that she made a similar assertion to Sgt Honstein. This distinction is critical. Sgt Honstein relayed this detail to NCIS

investigators without any independent means of knowing about Ms. [redacted] reported history, reinforcing the credibility of his account of what happened between the two. In a case where the credibility of Sgt Honstein's statements to NCIS for three hours and forty-one minutes is paramount, evidence that independently substantiates key aspects of Sgt Honstein's statements is not only relevant but essential to a fair and complete consideration of the facts. Accordingly, this statement should be admitted for that purpose.

Similarly, Ms. [redacted] statement that she can tell when somebody has the courage to pull the trigger of a pistol is admissible for a purpose other than the truth of the matter asserted. It corroborates Sgt Honstein's assertion to NCIS that Ms. [redacted] said "do it" in reference to pulling the pistol's trigger. Again, in a case where the credibility of Sgt Honstein's statements to NCIS for three hours and forty-one minutes is paramount, evidence that independently substantiates key aspects of Sgt Honstein's statements is not only relevant but essential to a fair and complete consideration of the facts. Accordingly, this statement should be admitted for that purpose.

Beyond corroboration, Ms. [redacted] statement about recognizing when someone has the courage to pull the trigger of a pistol is also admissible for its truth as a direct reflection of her then-existing state of mind—her belief that she can accurately assess somebody's intention with a pistol. This is probative of whether, as Sgt Honstein reported to NCIS, she again was of the state of mind during their encounter to direct him to act with the pistol. Such evidence speaks directly to her perception, intent, and confidence in influencing Sgt Honstein's actions during their BDSM encounter. This makes it both relevant and admissible.

RELIEF REQUESTED

The Defense moves the Court, *in limine*, to admit the requested evidence in the form of the extracted text message from Ms. [redacted] telephone wherein she states, "Lmao I've had a gun to my head more times than I can count, you can tell when they don't have the balls to do anything." The Defense requests oral argument if opposed.

EVIDENCE AND HEARING

In support of this motion, the Defense offers the following enclosures:

Enclosure 1 – Text Messages between Ms. [redacted] and [redacted] dated 9 November 2023 (Ms. [redacted] is indicated as the "owner" on the redacted extraction).

If the Government objects on foundation, the Defense will also introduce Ms. Peden's testimony.

[redacted]
M. E. NEELY
Lieutenant Colonel
U.S. Marine Corps
Regional Defense Counsel

CERTIFICATE OF SERVICE

I certify that I have delivered a copy of the foregoing document by email to the Court, Trial Counsel, and Victims' Legal Counsel on 1 April 2025.

[redacted]
M. E. NEELY
Lieutenant Colonel
U.S. Marine Corps
Regional Defense Counsel

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

UNITED STATES **V.** **DAKOTA S. HONSTEIN** **SERGEANT/E-5** **USMC**	**GOVERNMENT RESPONSE TO DEFENSE MOTION *IN LIMINE*** **(Admissibility of Ms. [redacted] November 2023 text message with her friend)** **11 April 2025**

MOTION

Under Rule for Courts-Martial (R.C.M.) 905(b) and Military Rule of Evidence (M.R.E.) 402, 403, and 803, the Government requests that the Court deny the Defense's motion *in limine* for the reasons outlined below.

BURDEN

The burden of proof is a preponderance of the evidence and rests with Defense as the proponent of the evidence. R.C.M. 905(c).

LAW

M.R.E. 401 provides the following test for relevant evidence: 1) it has any tendency to make a fact more or less probable, and 2) the fact is of consequence. M.R.E. 402(b) states that irrelevant evidence is not admissible. M.R.E. 403 further provides for excluding relevant evidence "if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, [or] misleading the members."

M.R.E. 801(c) defines hearsay as a statement that (1) the declarant does not make while testifying at the current trial or hearing, and (2) a party offers in evidence to prove the truth of the matter asserted. M.R.E. 802 prohibits the admissibility of hearsay statements unless otherwise

provided by law.

M.R.E. 803 provides for several exceptions to the rule against hearsay, including statements relating to the declarant's then-existing state of mind (*e.g.*, motive, intent, or plan), emotional, sensory, or physical condition (*e.g.*, mental feeling, pain, or bodily health), but not "including a statement of memory or belief to prove the fact remembered or believed."

ARGUMENT

The Defense makes the following three arguments relating to the admission of the text message by Ms. [redacted] 1) nonhearsay - it corroborates a statement by Sgt Honstein, namely that Ms. [redacted] "made a similar assertion to [him]," 2) nonhearsay - it corroborates Sgt Honstein's assertion that Ms. [redacted] "said 'do it' in reference to pulling the pistol's trigger," and 3) hearsay - that under 803(3), the message is "a direct reflection of her then-existing state of mind—her belief that she can accurately assess somebody's intention with a pistol."

a. Admissibility as nonhearsay

Concerning the Defense's arguments that Ms. [redacted] November 2023 text messages should be admitted for nonhearsay purposes, namely to corroborate statements of the accused, the Government asks the Court to deny the Defense's request under M.R.E. 401, 402, and 403. Specifically, the fact that Ms. [redacted] texted an individual in November 2023 "Lmao I've had a gun to my head more times than I can count, you can tell when they don't have the balls to do anything" is not relevant to whether Ms. [redacted] made statements to Sgt Honstein months later. The context of this single text message is important for the Court's consideration: Ms. [redacted] text message is a response to a stream of 10 text messages sent by a third party:

[redacted]



Ms. [redacted] response: "Lmao I've had a gun to my head more times than I can count, you can tell when they don't have the balls to do anything"

As demonstrated in the text thread, Ms. [redacted] responds after receiving 10 text messages about the third party's history dealing with gang members, threats by gang members, and how he dealt with a specific instance of having a gun pulled on him by someone with gang affiliation. There is nothing sexual about this text thread, there is nothing about liking weapon threats, and there is nothing about finding weapon threats arousing. Instead, the context of the conversation centers around past violent threats by gang members and how those threats were handled. In other words, the fact that this text message was sent to a third party does not make it more likely that Ms. [redacted] discussed BDSM with Sgt Honstein (Def Statement of Fact #3), that Ms. [redacted] "told him that she liked knives and guns held against her" (Def Statement of Fact # 4), that Ms. [redacted] told him about "drug dealers in Compton who had pulled guns on her, and that she found it arousing" (Def Statement of Fact #5), or that Ms. [redacted] purportedly told him to "do it" during a BDSM encounter. Here, the Defense is picking a single text, from an earlier date, to a third party, about a separate topic, and attempting to stretch is far beyond its context.

In addition, admitting this text message into evidence would only serve to confuse the issues and mislead the members. Instead of focusing on the facts and circumstances surrounding the charged misconduct, the members focus would be shifted to an unrelated text message to a third party and some purported occurrences at an unknown time in Ms. [redacted] past. Further, this evidence also risks prejudicing the members against the victim in this case, Ms. [redacted] by asserting

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that she was involved in drugs, gang activity, or other criminal misconduct. In other words, instead of focusing on the relevant facts and circumstances, the members focus would be shifted to past behavior of Ms. [redacted] the probative value of which is substantially outweighed by the danger of unfair prejudice. Painting the victim as a drug user, gang affiliate, and criminal far outweighs the minimal probative nature of the tenuous connection that the victim had guns pointed at her at some unknown time in the past—seemingly under very different circumstances. For these reasons, the Government asks the Court to deny the Defense's request that the November 2023 text messages be admitted for nonhearsay purposes.

If the Court decides that the November 2023 text message is admissible for nonhearsay purposes, the Government request that the Court narrow the scope of what specific portions are admissible in line with M.R.E. 401, 402, and 403.

b. Admissibility under M.R.E. 803(3)

Concerning the Defense's arguments that Ms. [redacted] November 2023 text messages should be admitted as a hearsay exception, namely to assert Ms. [redacted] "belief that she can accurately assess somebody's intention with a pistol," the Government asks the Court to deny the Defense's request as inappropriate under M.R.E. 803(3). Here, the Defense is asking the court to admit an unrelated text message to a third party months earlier as evidence of Ms. [redacted] "then-existing" belief that she could tell whether Sgt Honstein would pull the trigger on 27 January 2024. This application of M.R.E. 803(3)—taking a past statement and transposing it on an unrelated event as evidence of a belief at a later date—is inappropriate, and the Defense fails to cite any law that would allow such an application. As stated in the rule, M.R.E. 803(3) only applies to a "then-existing state of mind," not an occurrence that happened at a later date. In addition, M.R.E. 803(3) prohibits using statements "of memory or belief to prove the fact

remembered or believed." The text message in issue is, at best, a recollection of past events—not a "then-existing" state of mind. Further, the Defense fails to address the completely different circumstances between the text message (memory of handling gang threats) to this case (sexual encounter where Sgt Honstein pointed a loaded handgun as Ms. [redacted] heart and pulled the trigger),

In sum, the Defense is asking the Court to allow a past statement, about past events (date unknown), to be admitted as evidence that Ms. [redacted] believed she could influence "Sgt Honstein's actions during their BDSM encounter." An unrelated text message to a third party, about memories of past events, under different circumstances is not admissible as a "then-existing" state of mind months later. The Defense's request falls far outside the scope of M.R.E. 803(3).

RELIEF REQUESTED

Considering the above, the Government asks the Court to deny the Defense's Motion. In the alternative, the Government request that the Court narrowly tailor what portions of the text message are admissible and for what purpose.

[redacted]
P. C. Rush
Captain, U.S. Marine Corps
Special Trial Counsel

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I certify that I have served a true copy (via e-mail) of the above on the Court and Defense Counsel on 11 April 2025.

[redacted]
P. C. Rush
Captain, U.S. Marine Corps
Special Trial Counsel

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

UNITED STATES **V.** **DAKOTA S. HONSTEIN** **SERGEANT / E-5** **USMC**	**MOTION *IN LIMINE*** **(Admissibility of the Absence of a Public Record)** **1 April 2025**

MOTION

Pursuant to Rule for Courts-Martial (R.C.M.) 905(b), the Defense moves the Court, *in limine*, to admit certification under M.R.E. 902 that a diligent search failed to disclose a public record to prove that a matter did not occur and that a public office regularly kept a record or statement for a matter of that kind.

BURDEN

As the moving party, the Defense has the burden of persuasion. R.C.M. 905(c)(2). The burden of proof is by a preponderance of the evidence. R.C.M. 905(c)(1).

INTRODUCTION

In December 2023, Sgt Honstein's leadership was aware [redacted] even alerted Headquarters Marine Corps to a serious incident concerning Sgt Honstein. Nevertheless, the command subsequently failed to take every reasonable action to ensure he did not have access to a pistol in his barracks room. This failure to uphold a duty of care to a Marine in crisis is mitigating evidence.

FACTS

1. In December 2023, Sgt Honstein [redacted] Enclosure 1.

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2. The Command was aware of that ideation and reported it to Headquarters Marine Corps, via an "OPREP 3 SIR" [operations event/incident report]. Enclosure 1. See Marine Corps Order 3504.2A.
3. The Command was not aware that Sgt Honstein owned a pistol. Enclosure 1.
4. On 31 January 2025, the Government reported that it did not have any records of the following:
    a. Any correspondence, memos, or documents outlining any findings of any inspection of Sgt Honstein's barracks, to include of his barracks room. This includes any identified issues, safety violations, or recommendations for corrective actions between November 2023 and January 26, 2024.
    b. Records detailing the dates and personnel involved in the most recent inspection of Sgt Honstein's barracks, to include his barracks room. Enclosure 2.
5. The Government did find an authorization to conduct a health and comfort inspection from 6 April 2023. Enclosure 4. The Government also had a record of a health and comfort inspection in October 2023. Enclosure 2.
6. On 14 February 2025, Defense requested Maj [redacted] who the Government reported as having conducted the search for responsive documents related to Sgt Honstein's barracks room, or certification under M.R.E. 902 that Sgt Honstein's barracks room was not inspected between November 2023 and January 26, 2024. (See MRE 803(10)(A)(ii)). Enclosure 3.
7. On 27 February the Government denied Maj [redacted] as a requested witness because Sgt Honstein's room was inspected during weekly field days. Enclosure 5. On 28 February, during a phone call between Trial and Defense Counsel, the Trial Counsel represented to Defense Counsel that it would produce the M.R.E. 902 certificate if this Court found the absence of the requested records relevant. At that time the Government declined to produce the certificate until this Court rules on its relevance.

LAW

The Defense is entitled to present matters rebuttal to the Government's sentencing case and matters in extenuation and mitigation upon sentencing. Rule for Courts-Martial (R.C.M.) 1001(d).

M.R.E. 803(10) permits certification under M.R.E. 902 that a diligent search failed to disclose a public record to prove that a matter did not occur and that a public office regularly kept a record or statement for a matter of that kind.

ANALYSIS

During plea negations, the Government has indicated its intent to seek consecutive sentences of confinement. It justifies this position by arguing that maintaining good order and discipline requires imposing consecutive confinement sentences on Sgt Honstein for wrongfully possessing a firearm aboard Marine Corps Base Camp Lejeune, in addition to any other sentence to confinement Sgt Honstein may receive (if sentencing becomes necessary).

Despite this stance, the Government has also asserted that the lack of an orderly inspection of Sgt Honstein for safety and contraband is irrelevant, citing his subjection to field day inspections. However, field day inspections focus on cleanliness, whereas other types of inspections—which the command failed to conduct—are designed to identify and confiscate contraband, including unlawful weapons (*e.g.*, enclosure 4).

If Sgt Honstein is convicted of Charge III, then the Government's failure to properly inspect Sgt Honstein's barracks room and discover his possession of a firearm is relevant as mitigation evidence. The Government knew Sgt Honstein was at risk of self-harm, yet it failed to take reasonable action to prevent his access to contraband. This failure undermines its argument that this Court must promote good order and discipline where the command itself failed to do so. While the Government's inaction did not cause the tragedy, it serves as a mitigating factor in determining whether any sentence for Charge III should run concurrent or consecutively with other potential sentences.

M.R.E. 803(10) permits entry of a M.R.E. 902 certification as evidence that no health and comfort or safety inspection was conducted after the Command became aware of Sgt Honstein's risk in December 2023. The fact that the Command documented similar inspections in April and October 2023 demonstrates that it regularly maintained records of such searches. This absence of documentation serves as admissible proof that no proper inspection of Sgt Honstein's room took place when it should have.

RELIEF REQUESTED

The Defense moves the Court, *in limine*, to admit the M.R.E. 902 certificate.

EVIDENCE AND HEARING

In support of this motion, the Defense requests the Court consider matters already in the Record and offers the following enclosures:

Enclosure 1 – MSgt Sgt [redacted] recorded interview.

Enclosure 2 – Discovery Request and Response

Enclosure 3 – Defense Witness Request

Enclosure 4 – Record of 6 April 2023 Health and Comfort Inspection

Enclosure 5 – Email between Trial and Defense Counsel

The Defense also requests the Government produce the M.R.E. 902 certificate.

[redacted]
M. E. NEELY
Lieutenant Colonel
U.S. Marine Corps
Defense Counsel

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CERTIFICATE OF SERVICE

I certify that I have delivered a copy of the foregoing document by email to the Court, Trial Counsel, and Victims' Legal Counsel on 1 April 2025.

[redacted]
M. E. NEELY
Lieutenant Colonel
U.S. Marine Corps
Regional Defense Counsel

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

UNITED STATES v. DAKOTA S. HONSTEIN SERGEANT/E-5 U.S. MARINE CORPS	**GOVERNMENT'S SUPPLEMENTAL RESPONSE TO DEFENSE MIL (Admissibility of the Absence of a Public Record)** 14-Apr-25

Nature of Motion

This is the Government's response to the Defense's MIL (Admissibility of the Absence of a Public Record) filed on 1 April 2025.

Summary

The Accused is charged with violations of Article 118(3) and Article 119, for discharging his 9mm pistol while it was pressed against the chest of Ms. S. S. on 27 January 2024, which resulted in her death a short time later. The Accused initially reported to PMO officers and NCIS agents that during the course of a consensual sexual interaction involving the weapon, the victim had pulled the trigger, followed by a change in his explanation that she had loaded the gun without his knowledge before he pulled the trigger, which was followed finally by an admission that he knew the weapon was loaded and that he had pulled the trigger intentionally but did he did not believe that the weapon would discharge because he believed he had depressed the slide of the pistol enough to disengage the trigger by pushing the weapon at an angle into her chest. The Defense has moved the Court to "to admit certification under M.R.E. 902 that a diligent search failed to disclose a public record to prove that a matter did not occur and that a public office regularly kept a record or statement for a matter of that kind."

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That motion should be denied because the requested evidence is not relevant, and because the Defense has failed to show that any "public office regularly kept a record or statement" for a field day inspections.

Summary of Facts

1. On 14 Febraury 2025, the Defense requested Maj [redacted] be produced as a witness, stating he "can testify that Sgt Honstein's barracks room was not inspected between November 2023 and January 26, 2024."

2. On 26 February 2025, Major [redacted] was interviewed by the Government, and he stated that Sgt Honstein's barracks room was inspected weekly as part of the regular field day process generally employed by the entire fleet Marine force. He also stated he had not been interviewed by a Defense Counsel on this topic

3. On 27 February 2025, the Government denied the Defense's request for production of Maj [redacted] and provided his contact information.

4. The Accused engaged in the following colloquy with NCIS during his interrogation (page 127 of transcript):

[redacted]

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5. [redacted]

conducted during November 2023. [redacted] interview 20:06

Burden of Proof and Persuasion

6. The moving party generally bears the burden of proof and persuasion under R.C.M. 905(c). And, the proponent of evidence has the burden of showing that it is admissible." *United States v. Billings*, 61 M.J. 163, 168 (C.A.A.F. 2005) (citing *United States v. Palmer*, 55 M.J. 205, 208 (C.A.A.F. 2001)).

Law

7. Only relevant evidence is admissible at courts-martial. M.R.E. 402(b); *United States v. Guihama*, No. 23-0085, 2024 CAAF LEXIS 467, at *16 (C.A.A.F. Aug. 14, 2024). To be relevant, evidence need only have "any tendency to make a fact more or less probable than it would be without the evidence, and . . . the fact is of consequence in determining the action." M.R.E. 401(a)-(b). "The relevance standard is a low threshold." *Guihama*, at 16.

8. MRE Rule 313. Inspections and Inventories in the Armed Forces.

(a) General Rule. Evidence obtained from lawful inspections and inventories in the armed forces is admissible at trial when relevant and not otherwise inadmissible under these rules. An unlawful weapon, contraband, or other evidence of a crime discovered during a lawful inspection or inventory may be seized and is admissible in accordance with this rule.

(b) Lawful Inspections. An "inspection" is an examination of the whole or part of a unit, organization, installation, vessel, aircraft, or vehicle, including an examination conducted at entrance and exit points, conducted as an incident of command the primary purpose of which is

to determine and to ensure the security, military fitness, or good order and discipline of the unit, organization, installation, vessel, aircraft, or vehicle. Inspections must be conducted in a reasonable fashion and, if applicable, must comply with Mil. R. Evid. 312. Inspections may utilize any reasonable natural or technological aid and may be conducted with or without notice to those inspected.

(1) Purpose of Inspections. An inspection may include, but is not limited to, an examination to determine and to ensure that any or all of the following requirements are met: that the command is properly equipped, functioning properly, maintaining proper standards of readiness, sea or airworthiness, sanitation and cleanliness; and that personnel are present, fit, and ready for duty. An order to produce body fluids, such as urine, is permissible in accordance with this rule.

(2) Searches for Evidence. An examination made for the primary purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings is not an inspection within the meaning of this rule.

(3) Examinations to Locate and Confiscate Weapons or Contraband.

(A) An inspection may include an examination to locate and confiscate unlawful weapons and other contraband provided that the criteria set forth in subdivision (b)(3)(B) are not implicated.

(B) The prosecution must prove by clear and convincing evidence that the examination was an inspection within the meaning of this rule if a purpose of an examination is to locate weapons or contraband, and if:

(i) the examination was directed immediately following a report of a specific offense in the unit, organization, installation, vessel, aircraft, or vehicle and was not previously scheduled;

(ii) specific individuals are selected for examination; or

(iii) persons examined are subjected to substantially different intrusions during the same examination.

(c) Lawful Inventories. An "inventory" is a reasonable examination, accounting, or other control measure used to account for or control property, assets, or other resources. It is administrative and not prosecutorial in nature, and if applicable, the inventory must comply with Mil. R. Evid. 312. An examination made for the primary purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings is not an inventory within the meaning of this rule.

9. MRE 315. Probable Cause Searches.

(a) General Rule. Evidence obtained from reasonable searches conducted pursuant to a search warrant or search authorization, or under the exigent circumstances described in this rule, is admissible at trial when relevant and not otherwise inadmissible under these rules or the Constitution of the United States as applied to members of the armed forces.

(b) Definitions. As used in these rules:

(1) "Search authorization" means express permission, written or oral, issued by competent military authority to search a person or an area for specified property or evidence or for a specific person and to seize such property, evidence, or person. It may contain an order directing subordinate personnel to conduct a search in a specified manner.

(2) "Search warrant" means express permission to search and seize issued by competent civilian authority or under R.C.M. 703A.

(3) "Warrant for wire or electronic communications" means a warrant issued by a military judge pursuant to 18 U.S.C. §§ 2703(a), (b)(l)(A), or (c)(l)(A) in accordance with 10 U.S.C. § 846(d)(3) and R.C.M. 309(b)(2) and R.C.M. 703A.

(c) Scope of Search Authorization. A search authorization may be valid under this rule for a search of:

(1) the physical person of anyone subject to military law or the law of war wherever found;

(2) military property of the United States or of nonappropriated fund activities of an armed force of the United States wherever located;

(3) persons or property situated on or in a military installation, encampment, vessel, aircraft, vehicle, or any other location under military control, wherever located; or

(4) nonmilitary property within a foreign country.

(d) Who May Authorize. A search authorization under this rule is valid only if issued by an impartial individual in one of the categories set forth in paragraphs (d)(l), (d)(2), and (d)(3) of this rule. Only a military judge may issue a warrant for wire or electronic communications under this rule. An otherwise impartial authorizing official does not lose impartiality merely because the official is present at the scene of a search or is otherwise readily available to persons who may seek the issuance of a search authorization; nor does such an official lose impartial character merely because the official previously and impartially authorized investigative activities when such previous authorization is similar in intent or function to a pretrial authorization made by the United States district courts.

(1) Commander. A commander or other person serving in a position designated by the Secretary concerned as either a position analogous to an officer in charge or a position of command. who has control over the place where the property or person to be searched is

situated or found. or, if that place is not under military control, having control over persons subject to military law or the law of war;

(2) Military Judge or Magistrate. A military judge or magistrate if authorized under regulations prescribed by the Secretary of Defense or the Secretary concerned; or

(3) Other competent search authority. A competent, impartial official as designated under regulations by the Secretary of Defense or the Secretary concerned as an individual authorized to issue search authorizations under this rule.

(e) Who May Search.

(1) Search Authorization. Any commissioned officer, warrant officer, petty officer, noncommissioned officer, and, when in the execution of guard or police duties, any criminal investigator, member of the Air Force security forces, military police, or shore patrol, or person designated by proper authority to perform guard or police duties, or any agent of any such person, may conduct or authorize a search when a search authorization has been granted under this rule or a search would otherwise be proper under subdivision (g).

(2) Search Warrants. Any civilian or military criminal investigator authorized to request search warrants pursuant to applicable law or regulation is authorized to serve and execute search warrants. The execution of a search warrant affects admissibility only insofar as exclusion of evidence is required by the Constitution of the United States or an applicable federal statute.

(f) Basis for Search Authorizations.

(1) Probable Cause Requirement. **A search authorization issued under this rule must be based upon probable cause**.

(2) Probable Cause Determination. 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. A search authorization may be based upon hearsay evidence in whole or in part. A determination of probable cause under this rule will be based upon any or all of the following:

(A) written statements communicated to the authorizing official;

(B) oral statements communicated to the authorizing official in person, via telephone, or by other appropriate means of communication; or

(C) such information as may be known by the authorizing official that would not preclude the officer from acting in an impartial fashion. The Secretary of Defense or the Secretary concerned may prescribe additional requirements through regulation.

11. The time is long past when scholars disputed the applicability of the Bill of Rights to service personnel. *United States v. Thatcher*, 28 M.J. 20, 22 (C.M.A. 1989) (internal citations omitted). Instead, our premise must be "that the Bill of Rights applies with full force to men and women in the military service unless any given protection is, expressly or by necessary implication, inapplicable" and, therefore, that the Fourth Amendment does shield the American serviceperson. *Id.* Of course, it is only *unreasonable* searches and seizures against which a servicemember–or a civilian–is protected by the Fourth Amendment. *Id.* What is unreasonable depends substantially on the circumstances of the intrusion; and in some instances, an intrusion that might be unreasonable in a civilian context not only is reasonable but is necessary in a military context. *Id.*

12. [Military Courts] long have recognized that unit inspections are necessary and legitimate exercises of command responsibility. *Id.* However, they steadfastly have admonished that any

"inspection" which is, in reality, a subterfuge for a traditional search for evidence of crime will be seen for what it is; and, if conducted without probable cause or in an unreasonable manner, will be condemned. *Id.* Moreover, we have insisted that persons conducting military "inspections" must be ever faithful to the bounds of a given inspection, in terms both of area and purpose." *Id. citing (United States v. Brown,* 12 MJ 420, 423 (CMA 1982)).

ANALYSIS

13. The Defense's motion should be denied because the "inspections" the Defense asserts should have been conducted would have constituted an illegal search and the command had no basis to conduct them, making the evidence they requested irrelevant under MRE 401. The Defense's original request for Maj [redacted] was denied after his interview made clear he would not have testified that the Accused's room was not inspected during the relevant time frame because it was regularly inspected through field-day cleanings. The Accused himself agreed with Maj [redacted] assertion in his interrogation his room was in fact inspected, and he moved the murder weapon to avoid detection by the command. Despite that agreement, the Defense argues in its brief that the command failed to take "*every reasonable action* to ensure he did not have access to a pistol in his barracks room" and that "no proper inspection of Sgt Honstein's room took place *when it should have.*"

14. The Defense's conclusory assertions regarding what reasonable steps should have been taken and what the command should have done are wholly unsupported by any citation to any order, MRE, RCM, or caselaw. The best the Defense proffers is that "field day inspections focus on cleanliness, whereas other types of inspections . . . are designed to identify and confiscate contraband, including unlawful weapons. There is no argument by the Defense that the command should have searched his room, but rather that it should have been inspected. That is presumably because the Defense is conceding that seeking mental health care, being '[redacted] or "being a

[redacted] does not constitute probable cause under MRE 315. The Defense instead appears to be referring, without citation, to "Examinations to Locate and Confiscate Weapons or Contraband" under MRE 314(b)(3). However, the language of the rule itself clearly precludes under (b)(3)(B)(ii) "specific individuals [being] selected for examination." Had the command conducted a health and comfort inspection of the unit solely for the purpose of searching the Accused's barracks room, that inspection would have constituted a subterfuge for a traditional search. Such subterfuge inspections have been condemned by military courts. *Thatcher*, 28 M.J. 20, 22 (C.M.A. 1989).

15. The command did not have probable cause to search the Accused's barracks room, and was unaware he had a weapon which he acknowledged in his interrogation was his own fault. As a policy matter, the Accused should not get a windfall for such actions, nor should the command be deemed to have failed to take an action that would have on its face constituted a violation of the Accused's constitutional rights and undoubtedly have been viewed as retaliation for needing or requesting mental health care. The negative effect of an order granting the Defense's motion as requested would be to send a message to commanders that they should illegally search their Marine's barracks room if the Marines seek mental healthcare, especially if they are suicidal. The second order effect of that would be to deter Marines from seeking the care they need -possibly a deadly issue for those Marines who desperately need that help. This Court should decline the Defense's invitation to send that message.

16. At best, the Defense can say that there is a lack of public records regarding the field day inspections. However, the Defense does not assert, and there is no basis to believe, that any "public office regularly kept a record or statement for a matter of that kind" as required under M.R.E. 902. The Defense's argument therefore also fails for that reason.

RELIEF REQUESTED

17. The Defense's motion should be denied.

EVIDENCE OFFERED

1. Video of Accused's interview (previously attached to the record)
2. Video of MGySgt [redacted] interview

Oral Argument. The Government requests oral argument on this issue should the Defense oppose.

[redacted]
M. E. BLACKBURN
Captain, USMC
Special Trial Counsel

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Government's motion in response to Defense's Motion to compel expert consultation was served electronically on defense counsel on 14 April 2025.

[redacted]
M. E. BLACKBURN
Captain, USMC
Special Trial Counsel

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

UNITED STATES **V.** **DAKOTA S. HONSTEIN** **SERGEANT / E-5** **USMC**	**MOTION *IN LIMINE*** **(Admissibility of Sgt Honstein's Statements)** **1 April 2025**

MOTION

Pursuant to Rule for Courts-Martial (R.C.M.) 905(b), the Defense moves the Court, *in limine*, to admit Ms. [redacted] statements under Military Rule of Evidence (M.R.E.) 803.

BURDEN

As the moving party, the Defense has the burden of persuasion. R.C.M. 905(c)(2). The burden of proof is by a preponderance of the evidence. R.C.M. 905(c)(1).

Introduction

The accused is charged with murder for tragically shooting Ms. [redacted] as they consensually engaged in Bondage, Discipline, Sadism, and Masochism (BDSM) sexual activity. The circumstances under which Sgt Honstein ultimately stated that he loaded the pistol demand scrutiny. In the week leading up to his interrogation, Sgt Honstein averaged less than three hours of sleep a night. Sergeant Honstein repeatedly and contemporaneously acknowledged this severe sleep deficit in text messages during the week leading to his interrogation. Medical professionals would posit that Sgt Honstein suffered adverse and impairing effects on his cognitive ability and would heighten his susceptibility to pressure. For three hours and forty-one minutes, Sgt Honstein denied the agents' repeated assertions that he must have loaded the gun

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that killed Ms. [redacted] Only after this prolonged interrogation—while in a state of profound exhaustion—did he capitulate and adopt the agents' theory.

Sergeant Honstein's repeated statements acknowledging his fatigue during the days leading up to his interrogation are relevant. This evidence provides crucial context for understanding why his eventual statement should be viewed skeptically and casts serious doubt on its reliability. To exclude them would ignore a fundamental principle that a confession is only as credible as the conditions under which it was obtained.

FACTS

1. On 22 January 2024, at 2:35 PM he texted Ms. [redacted] "I'm tired as fuck[.]" He texted her again at 5:30 PM, "I'm so tired[.]" (enclosure 1)
2. On 23 January 2024, at 11:36 AM, he texted Ms[redacted] "And I'm alright just tired. I wanna crawl back I. Bed [sic] and just die[.]" Then, at 8:55 PM, he texted Ms. [redacted] "I'm so frickin tired[.]" (enclosure 1)
3. On 2024, January 2024, Ms. [redacted]. asked him, "How did you sleep?" Sergeant Honstein replied, "I didn't. I'm tired[.]" (enclosure 1)
4. On 25 January 2024, Ms. [redacted]. told Sgt Honstein that she hoped he slept last night. Sergeant Honstein responded, "I got a little. I'm late to work. I'm so exhausted[.]" (enclosure 1)
5. On 26 January 2024, at 8:59 PM, he texted Ms. [redacted] "I'm tired [laughing emoji]. Not sleepy tired. Just tired[.]" (enclosure 1)
6. In the early morning of 27 January 2024, Sgt Honstein and Ms. [redacted] engaged in a consensual BDSM encounter that included using a gun. Ms. [redacted] was shot and killed during this encounter.
7. At about 0700 on 27 January 2024, Sgt Honstein and Ms. [redacted] consensual sexual encounter ended tragically with Ms. [redacted] death.
8. At approximately 1200, Sgt Honstein was brought into an NCIS interrogation room. A copy of the ensuing video recorded interview is already attached to the Record within Appellate Exhibit I. To assist the reader, the transcript will be cited "Transcript At Page#:Line#"

9. For three hours and forty-one minutes, Sgt Honstein repeatedly admitted that he pulled the gun's trigger and caused Ms. [redacted] death and repeatedly denied having loaded the pistol and knowing that the pistol was loaded.

10. At the three hour and forty-one-minute mark in the recorded video, Sgt Honstein states that he loaded the firearm. Transcript at 148:4.

11. Special Agent [redacted] immediately responds, [redacted] Transcript at 148:6.

12. Sergeant Honstein replies, "[t]hey're not difficult questions. I'm going to give you the same answer over and over and over again, and then, we will be running in circles." Transcript at 148:9.

LAW

An accused has a Sixth Amendment right to present a complete defense. *Crane v. Kentucky*, 476 U.S. 683 (1986). Evidence of the voluntariness and the credibility of an accused's confession are not mutually exclusive. *Id.* at 687. Therefore, even where a Court declines to suppress a confession for not being made voluntarily, the Defense is still entitled to present evidence concerning the circumstances surrounding the confession to cast doubt on its credibility. *Id.* at 688.

Read together, M.R.E. 801(d), 803, 804, and 807 present an organized codification of legal authority justifying the admission of proof that would otherwise be excluded because of the prohibition against hearsay evidence in M.R.E. 802.

M.R.E. 803(1) permits admitting a declarant's present sense impression if it describes or explains an event or condition and was made while perceiving an event or condition or immediately thereafter.

M.R.E. 803(3) excludes permits hearsay concerning the declarant's then existing state of mind, emotional, or physical condition.

ANALYSIS

Sergeant Honstein was seriously sleep deprived when the NCIS agents interrogated him. Being fatigued increases the likelihood of an accused yielding to an interrogator's pressure. Sergeant Honstein's statements acknowledging his exhaustion leading up to his interrogation are admissible both as present sense impressions explaining his physical state and as declarations of his then-existing mental and physical condition. They fall squarely within the M.R.E. 803(1) and (3) exceptions.

The evidence does not stand alone. It operates in concert with phone records indicating Sgt Honstein averaged just 2.6 hours of sleep per night in the five days leading up to his interrogation. These circumstances bear directly on the credibility of his eventual capitulation to the assertion that he loaded the pistol—a point the defense will demonstrate to the fact finder was a product of his fatigue-induced susceptibility to the agents' cues and pressure. To ensure the fact finder fully evaluates the reliability of his statements to NCIS, Sgt Honstein's statements leading up to his interrogation that express his fatigue should be admitted.

RELIEF REQUESTED

The Defense moves the Court, *in limine*, to admit the requested evidence in the form of the extracted text messages from Sgt Honstein's telephone. The Defense requests oral argument if opposed.

EVIDENCE AND HEARING

In support of this motion, the Defense requests the Court consider matters already in the Record and offers the following enclosure:

Enclosure 1 – Sgt Honstein's text messages.

If the Government objects on foundation, the Defense will also introduce Ms. Peden's testimony.

[redacted]

M. E. NEELY
Lieutenant Colonel
U.S. Marine Corps
Defense Counsel

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CERTIFICATE OF SERVICE

I certify that I have delivered a copy of the foregoing document by email to the Court, Trial Counsel, and Victims' Legal Counsel on 1 April 2025.

[redacted]
M. E. NEELY
Lieutenant Colonel
U.S. Marine Corps
Regional Defense Counsel

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

UNITED STATES **V.** **DAKOTA S. HONSTEIN** **SERGEANT / E-5** **USMC**	**GOVERNMENT RESPONSE TO THE DEFENSE MOTION *IN LIMINE*** **(Sgt Honstein Jan 2024 Hearsay)** **14 April 2025**

NATURE OF THE MOTION

This is the Government's response to the Defense motion for a preliminary ruling on the admissibility of the Accused's text messages, offered by the Defense, in support of their case in chief.

SUMMARY

The Government respectfully requests this Court DENY the Defense motion.

FACT

For the purposes of this motion the Government will use the Defense iteration of the facts relating to the requested evidence. However, the Government also askes your consider the full interview to include the Accused's responses when his version of evets is challenged with a question about if the forensic evidence will confirm his accounts up to that point, and his previous inconsistent statement to the Sgt [redacted] which is also previously included in the record.

LAW

801(c) Defines Hearsay as, ""Hearsay" means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter asserted in the

statement.

801(d) notes, "Statements that Are Not Hearsay. A statement that meets the following conditions is not hearsay:...

(2) An Opposing Party's Statement. The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity.

M.R.E. 803 lists, **"Exceptions to the rule against hearsay – regardless of whether the declarant is available as a witness."**

M.R.E. 804 lists, **"Exceptions to the rule against hearsay – when the declarant is unavailable as a witness."** M.R.E. 804 (b)(3)(A), continues, "*Statement against Interest.* A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it tends to expose the declarant to criminal liability and is offered to exculpate the accused."

M.R.E. 807 notes, "(a) *In General.* Under the following conditions, a hearsay statement is not excluded by the rule against hearsay even if the statement is not admissible under a hearsay exception in Mil. R. Evid. 803 or 804..."

The C.A.A.F. has analyzed residual hearsay routinely, now under M.R.E. 807, but

previously under 803(24), but in *Kelley* the Court addresses the legislative intent, which is the crux of the argument's below when it points out:

> "Mil.R.Evid. 803(24). The rule is taken from Fed.R.Evid. 803(24) "without change" and should "be employed in the same manner as it is generally applied in the Article III courts." Drafters' Analysis of Mil.R.Evid. 803(24), Manual, supra at A22-53. The residual hearsay rule sets out three requirements for admissibility: (1) materiality, (2) necessity, and (3) reliability. See *United States v. Pollard*, 38 M.J. 41, 49 (CMA 1993); *United States v. Giambra*, 33 M.J. 331, 334 (CMA 1991).... The necessity prong "essentially creates a 'best evidence' requirement." *Larez v. City of Los Angeles*, 946 F.2d 630, 644 (9th Cir. 1991). The legislative history of Fed.R.Evid. 803(24) reflects congressional intent "that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances." S. Rep. No. 1277, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Admin. News 7051, 7066." *U.S. v Kelley*, 45 M.J. 275, (C.A.A.F. 1996).

ARGUMENT

While the rule against Hearsay evidence has many exceptions, there are none that support the Defenses' request here, and one that is clearly contrary, M.R.E. 801(d)(2). While the Fifth Amendment of the U.S. Constitution ensures that no person "shall be compelled in any criminal case to be a witness against himself," that is not a carte blanch permission or invitation for the Court to admit any self-serving statement the Defense desires into evidence. However, the Accused can always be a witness in support of his or her own defense, voluntarily. M.R.E. 801(d)(2) articulates "An Opposing Party's Statement," is not hearsay, not the Party's statement. The rule, while it could have included, but specifically excludes, a Party's own statements as an exception. This is because of the inherent reliability when offered by and opposing party, that does not exist when a statement is offered by the declarant. To do, and admit the Accused own self-serving statements, would be the exception swallowing the rule.

While M.R.E. 807 is a rule that as drafted, will be used "very rarely, and only in exceptional circumstances," the Defense seems to argue it is simply a counterbalance to the

exception of a statement against a party opponent. While the Accused cannot be compelled to testify against himself, he is free to take the stand and submit testimony to the fact finder in his own defense, but it must be subject to cross examination, as all other testimony; not smuggled in through a rarely used exception, in contradiction to well established case law.

RELIEF REQUESTED

The Government respectfully requests that the Court DENY the Defense motion for all the reasons articulated above.

HENRY.NICHOLAS.SEAN.[redacted] Digitally signed by HENRY.NICHOLAS.SEAN.[redacted] Date: 2025.04.14 12:55:57 -04'00'

N. S. HENRY
Lieutenant Colonel, USMC
Regional Special Trial Counsel

****

I certify that I caused a true copy be served via e-mail of the above on the Court and Defense Counsel on 14 April 2025

HENRY.NICHOLAS.SEAN.[redacted] Digitally signed by HENRY.NICHOLAS.SEAN[redacted] Date: 2025.04.14 12:56:09 -04'00'

N. S. HENRY
Lieutenant Colonel, USMC
Regional Special Trial Counsel

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

UNITED STATES **V.** **DAKOTA S. HONSTEIN** **SERGEANT / E-5** **USMC**	**MOTION *IN LIMINE*** **(Admissibility of the EMS Run Sheets)** **1 April 2025**

MOTION

Pursuant to Rule for Courts-Martial (R.C.M.) 905(b), the Defense moves the Court, *in limine*, to admit the Camp Lejeune Fire and Emergency Medical Services (EMS) run sheets under Military Rule of Evidence (M.R.E.) 803(6) and (8).

BURDEN

As the moving party, the Defense has the burden of persuasion. R.C.M. 905(c)(2). The burden of proof is by a preponderance of the evidence. R.C.M. 905(c)(1). If the Government opposes, it must show that the source of information or other circumstances indicate a lack of trustworthiness. M.R.E. 803(6)(E) and M.R.E. 803(8)(B).

INTRODUCTION

The accused is charged with murder for tragically shooting Ms. [redacted] as they consensually engaged in Bondage, Discipline, Sadism, and Masochism (BDSM) sexual activity. At 0710, on the morning of the shooting, Sgt Honstein called his Master Sergeant and stated that he killed somebody. The EMS run sheets reveal EMS first arrived at 0711. After their arrival, Sgt Honstein allegedly told a PMO officer that the victim shot herself. To challenge the Government's reliance on this statement, Sgt Honstein must introduce the EMS run sheets into evidence as part of his defense.

FACTS

1. On 27 January 2024, at 07:06:48, a 911 call was made requesting emergency medical services at the Wallace Creek 300 barracks. Enclosure 1.
2. The Camp Lejeune Fire and Emergency Medical Services responded. Enclosure 1.
3. Battalion 1, Engine 3, and Medic 3 were dispatched at 07:07:48. Enclosure 1.
4. At 07:08:42, Engine 3 were en route. Enclosure 1.
5. At 07:08:49 Medic 3 were en route. Enclosure 1.
6. At 07:10 Sgt Honstein had a phone call on the app "signal" with MSgt [redacted] Enclosure 2. During that phone call Sgt Honstein admitted to killing somebody and stating that PMO was on their way. The call lasted less than one minute. Enclosure 2.
7. Sergeant [redacted] a PMO officer, arrived before EMS and began performing life saving care on the victim.
8. At 07:011:32 Engine 3 and Medic 3 arrived at the barracks. Enclosure 1.
9. At approximately 07:13, after PMO cleared the scene, EMS made their way to the victim and took responsibility for performing medical care. Enclosure 1.
10. After EMS relieved Sgt [redacted] from providing care, Sgt [redacted] asked Sgt Honstein "what happened."
11. Sergeant [redacted] recalled Sgt Honstein saying, "she took the gun and stated it wasn't loaded, I told her it was loaded, she then turned the gun toward her chest with her thumb on the trigger, I grabbed her on the thighs and told her no really its loaded, she then pulled the trigger with her thumb and…"
12. Sergeant [redacted] then probed for more information. This probing was unsuccessful because Sgt Honstein could not stop crying.
13. The EMS Report was completed at 12:38:19 on 27 January 2024. Enclosure 1.
14. This report logs the Fire and EMS dispatch date/time, acknowledge Date, En Route Date/Time, Arrive Date/Time, Clear Date/Time, and Back in Service Date/Time. Enclosure 1.

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15. This log was created by Captain [redacted] who was the Camp Lejeune Fire and Emergency Service Officer in Charge during this incident. He was also present with Engine 3. Enclosure 1.

16. The NCIS Agents retrieved this log on 8 February from the Camp Lejeune Fire and Emergency Service Deputy Chief, Captain [redacted] Enclosure 3.

17. Camp Lejeune Fire and Emergency Service is a public office within Marine Corps Installations-East. Enclosure 4.

LAW

An accused has a Sixth Amendment right to present a complete defense. *Crane v. Kentucky*, 476 U.S. 683 (1986). Evidence of the voluntariness and the credibility of an accused's confession are not mutually exclusive. *Id.* at 687. Therefore, even where a Court declines to suppress a confession for not being made voluntarily, the Defense is still entitled to present evidence concerning the circumstances surrounding the confession to cast doubt on its credibility. *Id.* at 688.

Read together, M.R.E. 801(d), 803, 804, and 807 present an organized codification of legal authority justifying the admission of proof that would otherwise be excluded because of the prohibition against hearsay evidence in M.R.E. 802.

M.R.E. 803(6) excepts from the prohibition against hearsay any record of an act if (1) the record was made at or near the time by - or from information transmitted by – someone with knowledge; (2) the record was kept in the course of a regularly conducted activity of a uniformed service o, profession, organization, occupation, or calling of any kind, whether or not conducted for profit; (3) making the record was a regular practice of the activity; (4) all these conditions are shown by the testimony of a qualified witness, or certification that complies with M.R.E. 902(11); and (5) the opponent does not show that the source of the information or the method or circumstances of preparation indicate a lack of trustworthiness.

M.R.E. 803(8) excepts from the prohibition against hearsay any record or statement of a public office if: (1) it sets out the office's activities and (2) the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness. A log is admissible as a record of a fact or event if made by a person within the scope of the person's official duties and those duties included a duty to know or to ascertain through appropriate and trustworthy channels of information the truth of the fact or event and to record such fact or event.

ANALYSIS

The Camp Lejeune Fire and Emergency Service is a public office, operated by or affiliated with the Marine Corps Installations-East. The EMS run sheet logs factual data about its emergency response, including dispatch time and arrival times. The run sheets are trustworthy because they are corroborated by other evidence in the record, were made contemporaneously, and as part of their job duties. Moreover, the log consists of objective timestamps and factual data rather than evaluations or speculations, making it less susceptible to bias. The EMS run sheet is permissible hearsay under M.R.E. 803(8)(A)(i).

Separately, the logs are admissible under M.R.E. 803(6). The EMS run sheets were made near in time to the emergency response. Responding to emergencies is a regular activity for the Camp Lejeune Fire and Emergency Service. Making a record is a regular practice of Camp Lejeune Fire and Emergency Service as evidenced by it giving this incident an identifying number and recording it on a template form. If the Government objects under M.R.E. 803(6)(D), then Defense requests that the below witnesses be produced to testify at the Article 39(a) hearing. For the reasons articulated in the M.R.E. 803(8) analysis, the EMS run sheets are trustworthy. Therefore, they are admissible.

RELIEF REQUESTED

The Defense moves the Court, *in limine*, to admit the EMS run sheets into evidence. The Defense requests oral argument if opposed.

EVIDENCE AND HEARING

In support of this motion, the Defense requests the Court consider matters already in the Record and offers the following enclosures:

Enclosure 1 – EMS Run Sheets.

Enclosure 2 – Results of NCIS interview with MSgt [redacted]

Enclosure 3 – NCIS ROI

Enclosure 4 – Camp Lejeune Fire and Emergency Service

If the Government objects on foundation, the Defense requests the Government produce the following witnesses from the Camp Lejeune Fire and Emergency Services:

1. Captain [redacted]
2. Captain [redacted]

[redacted]
M. E. NEELY
Lieutenant Colonel
U.S. Marine Corps
Regional Defense Counsel

CERTIFICATE OF SERVICE

I certify that I have delivered a copy of the foregoing document by email to the Court, Trial Counsel, and Victims' Legal Counsel on 1 April 2025.

[redacted]
M. E. NEELY
Lieutenant Colonel
U.S. Marine Corps
Regional Defense Counsel

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

UNITED STATES **V.** **DAKOTA S. HONSTEIN** **SERGEANT / E-5** **USMC**	**DEFENSE MOTION TO COMPEL PRODUCTION OF DEFENSE WITNESSES** **9 April 2025**

MOTION

Pursuant to Rules for Court-Martial (R.C.M.) 703 and 906(b)(7), the defense moves this Court to compel the production of lay witnesses necessary for the defense to present a case on the merits and, in the event of conviction, sentencing. Specifically, the defense requests the government to be compelled to produce Ms. [redacted] and LCDR [redacted] There is good cause to file this motion out of time. On 7 April 2025, the parties received answers to the Court's interrogatories in the case of Ms. [redacted] Those answers identified evidence that makes the requested witnesses relevant.

On 8 April 2025 the Defense has requested production of the witnesses. Because the Defense is mindful of the trial dates and does not desire any delay, it is not waiting for the Government's answer to its request. Instead, it is making this motion on the assumption that the production of the requested records is in dispute.

BURDEN

As the moving party, the Defense has the burden of persuasion. R.C.M. 905(c)(2). The burden of proof is by a preponderance of the evidence. R.C.M. 905(c)(1).

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FACTS

1. Ms. [redacted]. was seen in the emergency department (ED) at St. Marry Medical Center in Long Beach, CA on 29 December 2022.
2. Ms. [redacted] from St. Mary Medical Center in Long Beach on 06 January 2023.
3. Ms. [redacted] on 09 April 2023 and 12 May 2023 [redacted] from 28 to 29 April 2023.
4. Ms. [redacted] from Onslow Memorial Hospital on 23 October 2023.
5. Ms. [redacted] is an operations research analyst for the Defense Health Agency. She searched all TriCare records of payments and claim denials for non-network providers and all TriCare records of payments and claim denials for nonparticipating non-network providers in the case of Ms. [redacted] She found no responsive records for this request.
6. LCDR [redacted] answered the Court's interrogatories by searching for responsive information from Ms. [redacted] records stored within Military Health System Genesis, the DoD's Federal Electronic Health record, and within the Joint Health Information Exchange. LCDR [redacted] found:
    a. No responsive records indicating Ms. [redacted] care at any military treatment facility.
    b. There are no mental health diagnoses listed in the military medical record for Ms. [redacted]

c. There are no medications listed in the military medical records for Ms. [redacted] as a result of any mental health diagnoses.

d. There is nothing in the military medical record to indicate Ms. [redacted] received inpatient, outpatient, or emergency mental health care in the military health system.

e. No responsive records indicating Ms. [redacted] mental health was being actively monitored.

LAW

Article 46, UCMJ, 10 USC § 846, provides that all parties to a court-martial are owed an "equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." Similarly, R.C.M. 703(a) states that, "The prosecution and defense and the court-martial shall have equal opportunity to obtain witnesses and evidence, subject to R.C.M. 701, including the benefit of compulsory process." Moreover, "Each party is entitled to the production of any witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary." R.C.M. 703(b). Testimony is relevant if it has the 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. R.C.M. 703(b)(1), Discussion; Mil. R. Evid. 401. Testimony is necessary within the meaning of this rule 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." *U.S. v. Reveles*, 41 M.J. 388, 394 (CAAF 1995) (citing R.C.M. 703(b)(1), Discussion.)

Additionally, "Under the Sixth Amendment to the Constitution, one accused of a crime is guaranteed the right to compel the attendance of witnesses. Who these witnesses shall be is a matter for the accused and his counsel. He may not be deprived of the right to summon to his aid

witnesses who it is believed may offer proof to negate the Government's evidence or to support the defense." *U.S. v. Sweeney*, 14 U.S.C.M.A. 599, 602 (C.M.A. 1964) (citing *U.S. v Seeger*, 180 F Supp 467 (SD NY) (1960); *U.S. v McGaha*, 205 F Supp 949 (ED Tenn) (1962). This right is not absolute, but the military judge has a duty "to assure to the greatest degree possible...equal treatment for every litigant before the bar." *U.S. v. Manos*, 17 U.S.C.M.A. 10, 15-16 (C.M.A. 1967).

In *Allen*, the Navy-Marine Corps Court of Criminal Appeals provided the minimum seven factors that the military judge, in exercising his discretion, must balance in determining whether a material witness must be produced. Those seven factors are: (1) the issues involved in the case and the importance of the requested witness to those issues; (2) whether the witness was desired on the merits or on sentencing; (3) whether the witness' testimony would be "merely cumulative;" (4) the availability of alternatives to the personal appearance of the witness such as depositions, interrogatories, or previous testimony; (5) the unavailability of the witness, such as that occasioned by non-amenability to the court's process; (6) whether or not the requested witness is in the armed forces and/or subject to military orders; (7) the effect that a military witness' absence will have on his or her unit and whether that absence will adversely affect the accomplishment of an important military mission or cause manifest injury to the service. *U.S v. Allen*, 31 M.J. 572, 610-611 (N.M.C.M.R. 1990). Additionally, the *Allen* court stated that considerations other than materiality, such as distance, inconvenience, and cost, have no role in determining production. *Id.*

The Supreme Court explained in in *Washington v. Texas*, 388 U.S. 14, 19 (1967), that "[t]he right to offer the testimony of witnesses...is in plain terms the right to present a defense....

The accused has a right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law."

ARGUMENT

There is nothing in the military medical records or TriCare payment records to indicate Ms. [redacted] received inpatient, outpatient, or emergency mental health care in the military health system. Ms. [redacted] is necessary and relevant evidence that links her failure to properly manage her diagnosis and the factual theory that Ms. [redacted] loaded the pistol without the Accused's knowledge.

The Defense is willing to agree to a stipulation of fact that Ms. [redacted] did not find any relevant records, or to accept certification under M.R.E. 902, that a diligent search failed to disclose TriCare records of payments and claim denials for non-network providers and all TriCare records of payments and claim denials for nonparticipating non-network providers in the case of Ms. [redacted] (*See* Mil. R. Evid. 803(10)(A)(ii)).

The Defense is willing to agree to a stipulation of fact that LCDR [redacted] did not find any relevant records, or to accept certification under M.R.E. 902, that a diligent search failed to disclose:

A. Responsive records indicating Ms. [redacted] care at any military treatment facility.

B. [redacted] listed in the military medical record for Ms. [redacted]

C. Medications listed in the military medical records for Ms. [redacted] health diagnoses.

D. Military medical records indicating Ms. [redacted] received inpatient, outpatient, or emergency [redacted] in the military health system.

E. Military medical records indicating Ms. [redacted] was being actively monitored.

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Pg 5 of 6

RELIEF REQUESTED

The Defense respectfully requests that the Court compel the Government to produce the requested witnesses.

1. Evidence. The Defense requests the Court consider matters already in the Record and submits the following enclosures in support of its motion:

a. Enclosure 1: Ms. [redacted] memorandum.

b. Enclosure 2: Defense witness request.

2. Oral Argument. The Defense requests oral argument if opposed.

[redacted]
M. E. NEELY
Lieutenant Colonel, U.S. Marine Corps
Defense Counsel

CERTIFICATE OF SERVICE

I certify that I have delivered a copy of the foregoing document electronically to the Court, Trial Counsel, and Victims' Legal Counsel on 9 April 2025.

[redacted]
M. E. NEELY
Lieutenant Colonel, U.S. Marine Corps
Defense Counsel

AE CXXV
Pg 6 of 6

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

UNITED STATES v. DAKOTA S. HONSTEIN SERGEANT/E-5 U.S. MARINE CORPS	**GOVERNMENT'S MFAR DEPOSITION OF MGYSGT [redacted]** 13-Apr-25

Nature of Motion

This is the Government's request for appropriate relief in the form of an order for a deposition of MGySgt [redacted] USMC.

Summary

The Accused is charged with violations of Article 118(3) and Article 119, for discharging his 9mm pistol while it was pressed against the chest of Ms. [redacted] on 27 January 2024, which resulted in her death a short time later. The Accused initially reported to PMO officers and NCIS agents that during the course of a consensual sexual interaction involving the weapon, the victim had pulled the trigger, followed by a change in his explanation that she had loaded the gun without his knowledge before he pulled the trigger, which was followed finally by an admission that he knew the weapon was loaded and that he had pulled the trigger intentionally but did he did not believe that the weapon would discharge because he believed he had depressed the slide of the pistol enough to disengage the trigger by pushing the weapon at an angle into her chest. MGySgt [redacted] is both a Government and a requested Defense witness in this case. The Accused in this case called MGySgt [redacted] shortly after killing the victim and reported words to the effect "MSgt, I fucked up," and "I killed somebody," and "Burn me, get me out." MGySgt [redacted] is unavailable for the entirety of the docketed trial

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Pg 1 of 6

dates and will be TDY for the months of May and June. The Government is requesting the Court order a deposition of MGySgt [redacted] for 17 April 2025.

Summary of Facts

1. MGySgt [redacted] has been listed as a Government witness since July 2024. The Defense added him to their witness request in February 2025. The Government denied the other three newly added witnesses to the Defense's list for unrelated reasons, but failed to address the request for MGySgt [redacted] at all.

2. After a two weeks of attempting to contact MGySgt [redacted] via his @usmc.mil email address previously used to coordinate trial-prep for the first court martial, Government Counsel were informed on 8 April 2025 that MGySgt [redacted] is unavailable for the entirety of the docketed trial dates. MGySgt [redacted] is still administratively on active duty with the USMC, but his current billet is with an outside entity and is classified above the TS level, as is the purpose, location, and exact dates of his TDY. He indicated he could potentially be available for video testimony, but would be between 2-6 time-zones away, would not be in uniform or hygiene standards, and that there may be "missiles firing" in the background.

3. The parties have been negotiating in good faith several stipulations of fact or expected testimony for multiple witnesses, but as of 11 April 2025 have not been able to reach an agreement as to MGySgt [redacted] On 11 April 2025, MGySgt [redacted] indicated he is available for a deposition on either 16 or 17 April 2025.

4. The Government is aware the lead Defense Counsel in this case is on leave until 16 April and is requesting the afternoon of 17 April for a deposition. The Government discussed the likelihood of this motion being filed with the Defense on 11 April as the parties continued to seek a resolution.

Burden of Proof and Persuasion

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Pg 2 of 6

5. The moving party generally bears the burden of proof and persuasion under R.C.M. 905(c). And, the proponent of evidence has the burden of showing that it is admissible." *United States v. Billings*, 61 M.J. 163, 168 (C.A.A.F. 2005) (citing *United States v. Palmer*, 55 M.J. 205, 208 (C.A.A.F. 2001)).

Law

6. Under RCM 702(a)(1), a deposition may be ordered at the request of any party if the requesting party demonstrates that, due to exceptional circumstances, it is in the interest of justice that the testimony of a prospective witness be taken and preserved for use at trial. "Exceptional circumstances" under RCM 702(a)(2) includes circumstances under which the deponent is likely to be unavailable to testify at the time of trial. Under RCM 702(a)(5) "A request for an oral deposition may be approved without the consent of the opposing party."

7. Depositions may be admitted into evidence at trial under the "Former testimony" hearsay exception "if the declarant is unavailable as a witness." For purposes of MRE 804(b), unavailability includes situations where the witness is unavailable due to "military necessity" MRE 804(a)(6). When a deposition is offered against an accused, the Government must establish that the witness is unavailable, both in terms of the hearsay prohibition of MRE 804(b)(1) and in terms of the Confrontation Clause of the Sixth Amendment. *United States v. Cokeley,* 22 M.J. 225 (C.M.A.1986); *United States v. Crockett,* 21 M.J. 423 (C.M.A.1986). "[A] witness is not 'unavailable' for purposes of the" Confrontation Clause "unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." *Barber v. Page,* 390 U.S. 719, 724-25, 88 S. Ct. 1318, 1321-22, 20 L. Ed. 2d 255 (1968). *See Ohio v. Roberts,* 448 U.S. 56, 74, 100 S. Ct. 2531, 2543, 65 L. Ed. 2d 597 (1980). *United States v. Vanderwier*, 25 M.J. 263, 265 (C.M.A. 1987)

8. The Court evaluates whether the Government has made such a good faith effort under a reasonableness standard, considering all the circumstances rather than a per se rule. *United States v. Lovely*, 73 M.J. 658, 679 (A.F. Ct. Crim. App. 2014) (citations omitted). In making this determination, "there is no bright-line rule which will fit every situation"; rather, the military judge "must carefully weigh all facts and circumstances of the case, keeping in mind the preference for live testimony." *Id.* (citing *United States v. Cokeley*, 22 M.J. 225, 228 (C.M.A. 1986)). Considerations the military judge should consider include: "the importance of the testimony, the amount of delay necessary to obtain the in-court testimony, the trustworthiness of the alternative to live testimony, the nature and extent of the earlier cross-examination, the prompt administration of justice, and any special circumstances militating for or against delay." *Id.*

ANALYSIS

9. MGySgt [redacted] is unavailable due to military necessity within the meaning of Article MRE 804(a)(6). The Government made a good faith effort to produce him by tracking him down and attempting to produce him. MGySgt [redacted] testimony is highly relevant considering the temporal link between the Accused's act and his initial call to MGySgt [redacted] at 0710, which is approximately 3-4 minutes after the 911 call, and 5 minutes after the last message out of her phone.

10. Given the timing, the parties should both be well-prepared to question him at a deposition and his prior recorded interview has provided a method to refresh his memory consistent with his recollection on the day he spoke with NCIS. Both the Government and the Defense have significant interests in avoiding any further delay in this trial, and a deposition meets those needs. This Court should therefore order his deposition on 17 April 2025.

RELIEF REQUESTED

11. The Government requests this Court order a deposition of MGySgt [redacted] on 17 April 2025.

EVIDENCE OFFERED

1. Telephonic testimony from MGySgt [redacted] about his unavailability should that fact be disputed.
2. Email from cognizant SJA regarding his availability.

Oral Argument. The Government requests oral argument on this issue should the Defense oppose.

[redacted]

M. E. BLACKBURN
Captain, USMC
Special Trial Counsel

AE CXXIX
Pg 5 of 6

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Government's motion in response to Defense's Motion to compel expert consultation was served electronically on defense counsel on 13 April 2025.

[redacted]
M. E. BLACKBURN
Captain, USMC
Special Trial Counsel

AE CXXIX
Pg 6 of 6

REQUESTS

UNITED STATES MARINE CORPS
MARINE CORPS OFFICE OF SPECIAL TRIAL COUNSEL
MARINE CORPS BASE CAMP LEJEUNE

IN REPLY
REFER TO:
5811
OSTC
9 Feb 24

From: Special Trial Counsel
To: Commanding Officer, 2d Air Naval Gunfire Liaison Company

Subj: REQUEST FOR EXCLUDABLE DELAY IN THE CASE OF UNITED STATES V. SERGEANT DAKOTA HONSTEIN, USMC

Ref: (a) Rules for Courts-Martial 707
(b) Article 10, Uniform Code of Military Justice
(c) 72 Hour Memo With Enclosures dtd 29 January 2024

Encl: (1) USACIL Emails

1. This request is submitted in accordance with Rule 707(c)(1) of reference (a), which provides you the authority to grant pretrial delay prior to referral of a courts-martial. Reasons for granting pretrial delay include, but are not limited to, providing sufficient time to secure evidence, as well as to prepare for trial.

2. On 27 January 2024, you ordered Sergeant Dakota Honstein ("the Accused") into pretrial confinement in accordance with reference (c). This triggered the Accused's speedy trial rights under reference (a) and (b). The Accused was retained in pretrial confinement on 5 February 2024 after the Initial Review Officer determined less severe forms of restraint had been considered and that less severe forms of restraint are inadequate. The Accused is currently under investigation for violations of Articles 92 and 118, UCMJ.

3. Per enclosure (1), multiple evidentiary items are being prepared to be sent to the United States Army Criminal Investigations Laboratory (USACIL) for forensic testing and analysis. These items included DNA swabs of the Accused, gunshot residue test kits, the murder weapon, the victim's phone, SAFE kits of the victim and Accused, and other items. The USACIL-NCIS liaison, [redacted] has estimated that these items will not be completed for at least 30 days from the date received by the lab.

4. The Office of Special Trial Counsel requests that all pretrial delay from 8 February 2024 (inclusive) to 8 March 2024 (inclusive), a period of 30 days, be excluded in accordance with reference (a).

5. The point of contact is Captain Rhavean Anderson, Special Trial Counsel, at [redacted]

R. D. ANDERSON
Captain, U.S. Marine Corps
Special Trial Counsel

AE XI
[redacted]

From: Commanding Officer, 2d Air Naval Gunfire Liaison Company
To: Special Trial Counsel

1. Your request is:

a. ✔ GRANTED. All pretrial delay from 8 February 2024 (inclusive) to 8 March 2024 (inclusive), a period of 30 days, is excluded in accordance with reference (a).

b. ____ GRANTED IN PART, DENIED IN PART. All pretrial delay from _____ (inclusive) until _____ (inclusive) a period of _____ days, is excluded in accordance with reference (c).

c. ____ DENIED.

N. L. GOLIKE
LtCol, U.S. Marine Corps
Commanding Officer

AE XI
[redacted]

DEPARTMENT OF THE NAVY
MARINE CORPS OFFICE OF SPECIAL TRIAL COUNSEL MCB CAMP LEJEUNE
MARINE CORPS BASE CAMP LEJEUNE
PSC BOX 20010
CAMP LEJEUNE, NC 28542-0010

5811
OSTC
8 Mar 24

From: Special Trial Counsel
To: Commanding Officer, 2d Air Naval Gunfire Liaison Company

Subj: SECOND REQUEST FOR EXCLUDABLE DELAY IN THE CASE OF UNITED STATES V. SERGEANT DAKOTA HONSTEIN, USMC

Ref: (a) Rules for Courts-Martial 707
(b) Article 10, UCMJ
(c) 72 Hour Memo dtd 29 January 2024
(d) Request For Excludable Delay dtd 9 Feb 24
(e) CO's ltr 5800/CO of 6 Mar 24 (R.C.M. 706 Order)

Encl: (1) USACIL Email
(2) Email regarding R.C.M. 706 Board Members

1. This second request is submitted in accordance with Rule 707(c)(1) of reference (a), which provides you the authority to grant pretrial delay prior to referral of a courts-martial. Reasons for granting pretrial delay include, but are not limited to, providing sufficient time to secure evidence, as well as to prepare for trial.

2. On 19 February 2024, you approved thirty days of excludable delay from 8 February 2024 to 8 March 2024 because the United States Army Criminal Investigations Laboratory (USACIL) estimated that it would not complete its forensic analysis of several items in the case within thirty days. On 5 March 2024, USACIL provided an update on the current status of the case. USACIL stated that it received the items in the case and that testing will begin the week of 4-8 March 2024. Based on the previous emails enclosed in reference (d), it is unlikely that testing will be complete by the end of March. Furthermore, on 6 March 24, you ordered an R.C.M. 706 evaluation pursuant to the defense's request. On 7 March 2024, available board members were identified, however, the board members estimated that the board's report will not likely be delivered until 30 April 2024. However, the board members are aware of the PTC status of the accused and indicated that they will try to complete the report as early as possible.

3. The government requests that all pretrial delay from 9 March 2024 (inclusive) through 9 April 2024 (inclusive), a period of 30 days, be excluded in accordance with reference (a). To date, the Defense has not demanded a speedy trial.

AE XI
[redacted]

4. The point of contact in this matter is Captain Rhaycan Anderson, Special Trial Counsel, at [redacted]

[redacted]

R. D. ANDERSON

AE XI

[redacted]

UNITED STATES MARINE CORPS
DEFENSE SERVICES ORGANIZATION
CAMP LEJEUNE BRANCH, EASTERN REGION CAMP LEJEUNE
NORTH CAROLINA 28542-0125

IN REPLY REFER TO:
5811
DSO/NJP
6 Jan 25

From: Captain Nicolai J. Paganucci, Detailed Defense Counsel
To: Special Trial Counsel

Subj: REQUEST FOR EXPERT CONSULTANT (FORENSIC PSYCHOLOGIST) ICO *U.S. V. SERGEANT DAKOTA S. HONSTEIN, USMC*; DR. [redacted]

Ref: (a) R.C.M. 703, MCM (2024 ed.)
(b) Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087 (1985)
(c) U.S. v. Ndanyi, 45 M.J. 315 (C.A.A.F. 1996)
(d) U.S. v. Burnette, 29 M.J. 473 (C.M.A. 1990)
(e) U.S. v. Van Horn, 26 M.J. 434 (C.M.A. 1998)
(f) U.S. v. Garries, 22 M.J. 288 (C.M.A. 1986)
(g) U.S. v. Thomas, 41 M.J. 873 (N.M.C.C.A. 1995)

Encl: (1) Dr. [redacted] Curriculum Vitae
(2) Dr. [redacted] Fee Schedule

1. Per reference (a), Sergeant Dakota Honstein, USMC, through counsel, respectfully requests the employment of Dr. [redacted] forensic psychologist and mitigation specialist, to act as a confidential defense consultant. The Defense is requesting funding for Dr. [redacted] so that he can conduct an evaluation of Sgt Honstein's case and determine any factors/circumstances that may be mitigating.

2. The Defense is initially requesting that Dr. [redacted] be provided as an expert consultant. Dr. [redacted] will be a member of the Defense team and all communications between the defense and Dr. [redacted] will be confidential and fall under the umbrella of the attorney-client privilege so long as he is a consultant. If Dr. [redacted] is later declared as an expert witness, he will be subject to discovery by the government as to those matters reasonably anticipated to be breached at trial.

3. As a matter of military due process, service members are entitled to expert assistance when necessary for an adequate defense. The Supreme court has repeatedly recognized that the right to counsel means "the right to effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668 (1984), citing *McMann v. Richardson*, 397 U.S. 759 (1970). In addition, and per the references, effective representation requires the fair opportunity to obtain the services of experts. Here, the Government alleges that Sgt Honstein murdered the named victim by "intentionally engaging in an act inherently dangerous to another." The Government has listed Dr. [redacted] as a witness that may be called at sentencing in this case.

4. Article 46 of the UCMJ provides that Trial Counsel, Defense Counsel and the Court-Martial "shall have equal opportunity to obtain witnesses and other evidence in accordance with appropriate regulations." (emphasis added). "(A)s a matter of military due process, service members (sic) are entitled to investigative or other expert assistance when necessary for an adequate Defense..." *United States v. Garries*, 22 M.K. 288, 290-91 (C.M.A. 1986). See also *United States v. Turner*, 28 M.J. 487, 488 (C.M.A. 1989)("To assure that indigent defendants will not be at a disadvantage in trials where expert testimony is central to the outcome, the Supreme Court has ruled that a defendant must be furnished expert assistance

AE LVI
[redacted]

in preparing his Defense"). However, when an accused applies for the employment of an expert, he must demonstrate the necessity for the services. See *Garries*, supra, at 290-91. The Defense has a right to government-funded assistance of an expert when the Defense shows that such assistance is necessary. *U.S. v. Ndanyi*, 45 315 (CAAF1996). Necessity is demonstrated using a three-step analysis. First, the defense must show why the expert is needed. Second, the Defense must state what the expert assistance will accomplish. Finally, the Defense must show that they are unable to gather and present evidence that the expert assistance would be able to develop. *Id.*

a. **Why Needed:** The Government's initial witness list includes Dr. [redacted] who the government intends to qualify as an expert in the field of forensic psychiatry. Dr. [redacted] has examined the evidence in this case and has provided statements regarding recidivism. The Defense cannot adequately review and understand the factors for recidivism/mitigation and cannot adequately prepare for cross examination of Dr. [redacted] without expert assistance.

b. **What will the expert accomplish:** Dr. [redacted] will analyze the interrogation of Sgt Honstein, the RCM 706 evaluation conducted, and other evidence in this case to evaluate the risk of recidivism and weigh any factors in mitigation. Dr. [redacted] will consult with and educate the Defense in several areas to include but not limited to psychology, interrogations, sexual sadism, and recidivism.

c. **Why can't the defense counsel do this:** Although Sgt Honstein is represented by defense counsel, counsel have neither the required background nor training in forensic psychology to fully understand or develop the issues without the assistance of an expert in this field. The Defense does not have sufficient training or practical experience to perform the necessary analysis of Sgt Honstein's interrogation and RCM 706 evaluation, nor sexual sadism and recidivism. True expertise in this field takes specialized training and education. The Defense requests the assistance of Dr. [redacted] to be that expert in this field. Denial of this request would result in a fundamentally unfair trial and would impede Sgt Honstein's rights under the Fifth Amendment Due Process Clause, his Sixth Amendment right to effectively confront the witnesses against him, and his Sixth Amendment right to effective assistance of counsel.

5. At this time, the defense is requesting funding for twenty (20) hours of expert consultation, due to the amount of evidence in this case.

6. The Defense requests a written response to this request as soon as possible. This request is not exclusive, and the defense reserves the right to submit a request for funding for this expert and for additional expert assistants within the requirements of R.C.M. 703(d).

7. I can be reached at [redacted]

[redacted]
N. J. PAGANUCCI
Captain, U.S. Marine Corps
Defense Counsel

AE LVI
[redacted]

UNITED STATES MARINE CORPS
DEFENSE SERVICES ORGANIZATION
CAMP LEJEUNE BRANCH, EASTERN REGION CAMP LEJEUNE
NORTH CAROLINA 28542-0125

CERTIFICATE OF SERVICE

I certify that I have delivered a copy of the foregoing document by email to the Trial Counsel on 10 January 2025

[redacted]
N. J. PAGANUCCI
Captain, U.S. Marine Corps
Defense Counsel

AE LVI

[redacted]

UNITED STATES MARINE CORPS
DEFENSE SERVICES ORGANIZATION
CAMP LEJEUNE BRANCH EASTERN REGION CAMP LEJEUNE
NORTH CAROLINA 28542-0125

IN REPLY REFER TO:
5811
DSO/NJP
6 Jan 25

From: Captain Nicolai J. Paganucci, Detailed Defense Counsel
To: Special Trial Counsel

Subj: REQUEST FOR EXPERT CONSULTANT (LATENT PRINT) ICO *U.S. V. SERGEANT DAKOTA S. HONSTEIN, USMC*; MR. [redacted] TECHNICAL EXPERT

Ref: (a) R.C.M. 703, MCM (2024 ed.)
(b) Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087 (1985)
(c) U.S. v. Ndanyi, 45 M.J. 315 (C.A.A.F. 1996)
(d) U.S. v. Burnette, 29 M.J. 473 (C.M.A. 1990)
(e) U.S. v. Van Horn, 26 M.J. 434 (C.M.A. 1998)
(f) U.S. v. Garries, 22 M.J. 288 (C.M.A. 1986)
(g) U.S. v. Thomas, 41 M.J. 873 (N.M.C.C.A. 1995)

Encl: (1) Mr. [redacted] Curriculum Vitae
(2) Mr. [redacted] Fee Schedule

1. Pursuant to the references, and in accordance with Article 46 of the UCMJ, M.R.E. 502, and R.C.M. 703, the Defense respectfully requests that the Convening Authority approve funding for sixteen (16) hours of confidential expert consultation by Mr. [redacted] Mr. [redacted] is an expert in the field of latent print and crime scene investigation, and has been qualified as an expert in County, Municipal, State and Federal court. See enclosure (1). The Defense is requesting funding for Mr. [redacted] so that he can conduct independent testing, analysis and review of the crime scene and fingerprints in this case as well as confidential consultation with the Defense.

2. The Defense is initially requesting that Mr. [redacted] be provided as an expert consultant. He will be a member of the Defense team and all communications between the defense and Mr. [redacted] will be confidential and fall under the umbrella of the attorney-client privilege so long as he is a consultant. If Mr. [redacted] is later declared an expert witness, he will be subject to discovery by the government as to those matters reasonably anticipated to be breached at trial.

3. As a matter of military due process, service members are entitled to expert assistance when necessary for an adequate defense. The Supreme Court has repeatedly recognized that the right to counsel means "the right to effective assistance of counsel." Strickland v. Washington, 466 U.S. 668 (1984), citing McMann v. Richardson, 397 U.S. 759 (1970). In addition, and per the references, effective representation requires the fair opportunity to obtain the services of experts. Here, the Government alleges that Sgt Honstein murdered the named victim by "intentionally engaging in an act inherently dangerous to another." This allegation is based in part on the physical evidence present in Sgt Honstein's barracks room, including ammunition and a firearm. The presence of fingerprints in Sgt Honstein's barracks and on any ammunition or firearm are clearly a fact of consequence in this case. The Defense requires the assistance of an expert in the field of latent print and crime scene investigation to test and analyze for fingerprints on any ammunition of firearm found at the scene, and to explain the latent print evidence in this case.

Subj: REQUEST FOR EXPERT CONSULTANT (LATENT FINGERPRINT) ICO *U.S. V. SERGEANT DAKOTA S. HONSTEIN, USMC*; MR. [redacted], TECHNICAL EXPERT

4. Article 46 of the UCMJ provides that Trial Counsel, Defense Counsel and the Court-Martial "shall have equal opportunity to obtain witnesses and other evidence in accordance with appropriate regulations." (emphasis added). "(A)s a matter of military due process, service members (sic) are entitled to investigative or other expert assistance when necessary for an adequate Defense..." United States v. Garries, 22 M.J. 288, 290-91 (C.M.A. 1986). See also United States v. Turner, 28 M.J. 487, 488 (C.M.A. 1989)("To assure that indigent defendants will not be at a disadvantage in trials where expert testimony is central to the outcome, the Supreme Court has ruled that a defendant must be furnished expert assistance in preparing his Defense"). However, when an accused applies for the employment of an expert, he must demonstrate the necessity for the services. See Garries, supra, at 290-91. The Defense has a right to government-funded assistance of an expert when the Defense shows that such assistance is necessary. U.S. v. Ndanyi, 45 315 (CAAF 1996). Necessity is demonstrated using a three-step analysis. First, the defense must show why the expert is needed. Second, the Defense must state what the expert assistance will accomplish. Finally, the Defense must show that they are unable to gather and present the evidence that the expert assistance would be able to develop. Id.

a. **Why Needed**: The Government's initial witness list includes [redacted], who the government intends to qualify as an expert in the field of latent prints. Ms. [redacted] conducted an examination of latent prints found on multiple items in Sgt Honstein's barracks room. The Defense cannot adequately review and understand the physical evidence and cannot adequately prepare for cross examination of Ms. [redacted] without expert assistance.

b. **What will the expert accomplish**: Mr. [redacted] will test, inspect, analyze, and review the items tested by Ms. [redacted] as well as the ammunition and firearm involved in this case. Mr. [redacted] will consult with and educate the Defense in several areas to include but not limited to latent fingerprints and crime scene analysis.

c. **Why can't the defense counsel do this**: Although Sgt Honstein is represented by defense counsel, counsel have neither the required background nor training in latent prints and crime scene analysis to fully understand or develop the issues without the assistance of an expert in this field. The Defense does not have sufficient training or practical experience to perform the necessary testing, analysis and review of the items found in Sgt Honstein's barracks room. True expertise in this field takes specialized training and education. The Defense requests the assistance of Mr. [redacted] to be that expert in this field. Denial of this request would result in a fundamentally unfair trial and would impede Sgt Honstein's rights under the Fifth Amendment Due Process Clause, his Sixth Amendment right to effectively confront the witnesses against him, and his Sixth Amendment right to effective assistance of counsel.

5. At this time, the defense is requesting funding for sixteen (16) hours of expert consultation.

6. The Defense requests a written response to this request as soon as possible. This request is not exclusive, and the defense reserves the right to submit a request for funding for this expert and for additional expert assistants within the requirements of R.C.M. 703(d).

Subj: REQUEST FOR EXPERT CONSULTANT (LATENT FINGERPRINT) ICO *U.S. V. SERGEANT DAKOTA S. HONSTEIN, USMC*; MR. [redacted] TECHNICAL EXPERT

7. I can be reached at [redacted]

[redacted]
N. J. PAGANUCCI
Captain, U.S. Marine Corps
Defense Counsel

CERTIFICATE OF SERVICE

I certify that I have delivered a copy of the foregoing document by email to the Trial Counsel on 10 January 2025

[redacted]
N. J. PAGANUCCI
Captain, U.S. Marine Corps
Defense Counsel

AE LIX

[redacted]

UNITED STATES MARINE CORPS
COMMAND ELEMENT
II MARINE EXPEDITIONARY FORCE
FLEET MARINE FORCE
PSC BOX 20080
CAMP LEJEUNE, NC 28542-0080

IN REPLY REFER TO:
5811
SJA
JAN 16 2025

SECOND ENDORSEMENT on Detailed Defense Counsel's ltr 5811 DSO/njp of 6 Jan 25

From: Commanding General, II Marine Expeditionary Force
To: Detailed Defense Counsel

Subj: REQUEST FOR EXPERT CONSULTANT (LATENT PRINT) ICO U.S. V. SERGEANT DAKOTA S. HONSTEIN, USMC; MR. [redacted] TECHNICAL EXPERT

1. The endorsement and subject lines have been changed for administrative accuracy.

2. After careful consideration, your request for production of an expert witness is denied. Defense fails to provide adequate reasoning that their approved expert consultant cannot meet their needs.

3. The point of contact for this matter is the Staff Judge Advocate, II Marine Expeditionary Force, Colonel [redacted]

C. L. WORTH, JR.

Copy to:
Special Trial Counsel
File

AE UX

[redacted]

NOTICES

NAVY-MARINE CORPS TRIAL JUDICIARY
EASTERN JUDICIAL CIRCUIT

UNITED STATES v Dakota Honstein Sergeant U.S. Marine Corps	GENERAL COURT-MARTIAL CIVILIAN VICTIM LEGAL COUNSEL NOTICE OF APPEARANCE 5 August 2024

1. Pursuant to Rule 5.1 of the Uniform Rules of Practice Before Navy-Marine Corps Courts-Martial (Uniform Rules) and Rule 5.1a of the Eastern Judicial Circuit Rules of Practice (Circuit Rules), I, Eric M. Kopka, hereby provide notice to the Circuit Military Judge of my appearance as Victim Legal Counsel on behalf of Lance Corporal [redacted] U.S. Marine Corps. My office address, phone numbers, and e-mail address are: [redacted] I am an active member in good standing licensed to practice in the following jurisdictions: Washington, D.C., and Rhode Island (Inactive).

2. I understand that practice in the Eastern Judicial Circuit requires me to be familiar with the Uniform and Circuit rules. Additionally, I am aware of the standards of professional conduct required of counsel practicing in Navy-Marine Corps courts-martial as contained in JAG Instruction 5803.1 series. I certify that I am not now, nor have I ever been, de-certified or suspended from practice in Navy-Marine Corps courts-martial by the Judge Advocate General of the Navy. [redacted]

Eric M. Kopka
Attorney At Military Law

[redacted]

AE 11

Pg 1 of 2

AE I

[redacted]

****

Certificate of Service

I hereby attest that a copy of the foregoing notice of appearance was served on the court and opposing counsel personally and or electronically on 5 August 2024.

[redacted]

Eric M. Kopka

[redacted]

AE 11

Pg 2 of 2

AE I

[redacted]

NAVY-MARINE CORPS TRIAL JUDICIARY
EASTERN JUDICIAL CIRCUIT

UNITED STATES v. Dakota Honstein Sergeant U.S. Marine Corps	GENERAL COURT-MARTIAL VICTIMS' LEGAL COUNSEL ENTRY OF APPEARANCE Date: 24 October 2024

1. Pursuant to Rule 36.1 of the Uniform Rules of Practice Before Navy-Marine Corps Courts-Martial (Uniform Rules) and Rule 36.2b of the Eastern Judicial Circuit Rules of Practice (EJC Rules), I, Major Calebe L. Rice, USMC, hereby provide notice to the Circuit Military Judge of my appearance on behalf of Ms. [redacted], of which the UCMJ Art 6b Designees are Ms. [redacted] and Ms. [redacted]. My office address, phone number, and e-mail address are: [redacted]

2. I am detailed as the Victims' Legal Counsel for the above named victim in this case. I am qualified and certified under Article 27(b) and sworn under Article 42(a) of the Uniform Code of Military Justice. I have not acted in any disqualifying manner.

3. I am aware of the standards of professional conduct required of counsel practicing in Navy-Marine Corps courts-martial as contained in JAG Instruction 5803.1E. I certify that I am not now, nor have I ever been, de-certified or suspended from practice in Navy-Marine Corps courts-martial by the Judge Advocate General of the Navy.

4. I have reviewed and am familiar with the Uniform Rules of Practice for the Navy-Marine Corps Trial Judiciary and the Eastern Judicial Circuit rules of Practice.

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AE I
[redacted]

5. My client has standing as a named victim in this court-martial, and she reserves the right to exercise those rights through counsel as needed.

RICE.CALEBE.LEE.[redacted] Digitally signed by RICE.CALEBE.LEE.[redacted] Date: 2024.10.24 11:37:53 -04'00'

CALEBE L. RICE
Major, U.S. Marine Corps
Victims' Legal Counsel

****

Certificate of Service

I hereby attest that a copy of the foregoing notice of appearance was served on the court and counsel via email on 24 October 2024.

RICE.CALEBE.LEE.[redacted] Digitally signed by RICE.CALEBE.LEE.[redacted] Date: 2024.10.24 11:37:39 -04'00'

CALEBE L. RICE
Major, U.S. Marine Corps
Victims' Legal Counsel

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AE I
[redacted]

NAVY-MARINE CORPS TRIAL JUDICIARY
EASTERN JUDICIAL CIRCUIT

UNITED STATES v. Dakota Honstein Sergeant U.S. Marine Corps	GENERAL COURT-MARTIAL VICTIMS' LEGAL COUNSEL ENTRY OF APPEARANCE Date: 29 October 2024

1. Pursuant to Rule 36.1 of the Uniform Rules of Practice Before Navy-Marine Corps Courts-Martial (Uniform Rules) and Rule 36.2b of the Eastern Judicial Circuit Rules of Practice (EJC Rules), I, Major Calebe L. Rice, USMC, hereby provide notice to the Circuit Military Judge of my appearance on behalf of Ms. [redacted] of which the former and current potential UCMJ Art 6b Designees are Ms. [redacted] and Ms. [redacted] My office address, phone number, and e-mail address are: [redacted]

2. I am detailed as the Victims' Legal Counsel for the above named victim in this case. I am qualified and certified under Article 27(b) and sworn under Article 42(a) of the Uniform Code of Military Justice. I have not acted in any disqualifying manner.

3. I am aware of the standards of professional conduct required of counsel practicing in Navy-Marine Corps courts-martial as contained in JAG Instruction 5803.1E. I certify that I am not now, nor have I ever been, de-certified or suspended from practice in Navy-Marine Corps courts-martial by the Judge Advocate General of the Navy.

4. I have reviewed and am familiar with the Uniform Rules of Practice for the Navy-Marine Corps Trial Judiciary and the Eastern Judicial Circuit rules of Practice.

5. My client has standing as a named victim in this court-martial, and she reserves the right to exercise those rights through counsel as needed.

RICE.CALEBE.LEE. [redacted] Digitally signed by RICE.CALEBE.LEE [redacted] Date: 2024.10.29 08:16:01 -04'00'

CALEBE L. RICE
Major, U.S. Marine Corps
Victims' Legal Counsel

****

Certificate of Service

I hereby attest that a copy of the foregoing notice of appearance was served on the court and counsel via email on 29 October 2024.

RICE.CALEBE.LEE. [redacted] Digitally signed by RICE.CALEBE.LEE [redacted] Date: 2024.10.29 08:16:17 -04'00'

CALEBE L. RICE
Major, U.S. Marine Corps
Victims' Legal Counsel

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NAVY-MARINE CORPS TRIAL JUDICIARY
EASTERN JUDICIAL CIRCUIT

UNITED STATES v. Dakota Honstein Sergeant U.S. Marine Corps	GENERAL COURT-MARTIAL CIVILIAN VICTIM LEGAL COUNSEL NOTICE OF APPEARANCE 27 January 2025

1. Pursuant to Rule 5.1 of the Uniform Rules of Practice Before Navy-Marine Corps Courts-Martial (Uniform Rules) and Rule 5.1a of the Eastern Judicial Circuit Rules of Practice (Circuit Rules), I, Eric M. Kopka, hereby provide notice to the Circuit Military Judge of my appearance as Victim Legal Counsel on behalf of Corporal [redacted] U.S. Marine Corps. My office address, phone numbers, and e-mail address are: [redacted] I am an active member in good standing licensed to practice in the following jurisdictions: Washington, D.C., and Rhode Island (Inactive).

2. I understand that practice in the Eastern Judicial Circuit requires me to be familiar with the Uniform and Circuit rules. Additionally, I am aware of the standards of professional conduct required of counsel practicing in Navy-Marine Corps courts-martial as contained in JAG Instruction 5803.1 series. I certify that I am not now, nor have I ever been, de-certified or suspended from practice in Navy-Marine Corps courts-martial by the Judge Advocate General of the Navy. [redacted]

Eric M. Kopka
Attorney At Military Law
[redacted]

AE LXV
Pg 1 of 2

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Certificate of Service

I hereby attest that a copy of the foregoing notice of appearance was served on the court and opposing counsel personally and/or electronically on 27 January 2025.

[redacted]

Eric M. Kopka

[redacted]

AE LXV

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

UNITED STATES V. DAKOTA S. HONSTEIN SERGEANT U.S. MARINE CORPS	NOTICE OF PLEAS AND FORUM ELECTION 27 February 2025

1. **Forum Election.** Pursuant to Rule for Courts-Martial 903(b), Sergeant (Sgt) Dakota S. Honstein by and through counsel, elects to be tried by a court-martial composed of members with enlisted representation. Sgt Honstein reserves the right to modify his election.

2. **Entry of Pleas.** Pursuant to Rule for Courts-Martial 910, Sergeant Dakota S. Honstein, by and through counsel notifies the Court of the following pleas:

Charge	Plea
Charge I: Violation of UCMJ, Article 118	**Not Guilty**
Specification	Not Guilty
Charge II: Violation of UCMJ, Article 119	**Not Guilty**
Specification	Not Guilty
Charge III: Violation of UCMJ, Article 92	**Not Guilty**
Specification	Not Guilty

[redacted]
DAKOTA S. HONSTEIN
Sergeant, U.S. Marine Corps

[redacted]
NICOLAI J. PAGANUCCI
Captain, U.S. Marine Corps
Detailed Defense Counsel

AE C1
Pg 1 of 2

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Certificate of Service

I hereby attest that a copy of the foregoing was served on the court and opposing counsel electronically on 27 February 2025.

[redacted]

NICOLAÍ J. PAGANUCCI
Captain, U.S. Marine Corps
Detailed Defense Counsel

AE CI
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COURT RULINGS & ORDERS

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

UNITED STATES v. DAKOTA S. HONSTEIN SERGEANT U. S. MARINE CORPS	MILITARY JUDGE'S RULING ON VICTIM LEGAL COUNSEL'S MOTION TO APPOINT ARTICLE 6b DESIGNEES

RULING

Victim Legal Counsel's motion to appoint [redacted] and [redacted] as joint victim rights designees pursuant to Article 6b(c), UCMJ is **GRANTED** ~~DENIED~~.

[redacted]

Lieutenant Ryan C. Lipton
Colonel, U.S. Marine Corps
Military Judge

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AE I
[redacted]

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

UNITED STATES V. Dakota S. HONSTEIN Sergeant / E-5 USMC	**COURT ORDER** **(Removal of Restraints of the Accused)** 6 August 2024

1. The Court hereby ORDERS:

   a. That for all future Court proceedings, all restraints shall be removed from Sergeant Dakota S. Honstein immediately prior to entering the courtroom and shall remain removed for the duration of any such proceeding; and

   b. That while in Defense spaces, a single hand restraint shall be removed from Sergeant Dakota S. Honstein at the request of his Defense Counsel in order facilitate review and signature of documents, as well as the consumption of food and drink.

So ORDERED this 6th day of August, 2024.

[redacted]

R. E. Lipton
Lieutenant Colonel, U.S. Marine Corps
Military Judge

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Pg 1 of 1

AE I
[redacted]

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

UNITED STATES V. Dakota S. HONSTEIN Sergeant / E-5 USMC	**COURT ORDER** **(phone extract)** 23 September 2024

1. On 20 September 2024, the defense moved to compel the discovery of a copy of Ms. [redacted] phone extraction, after erroneously being provided with an extraction of a different phone. The government does not oppose the motion. The defense motion is **GRANTED**.

2. **Ruling**. The government shall provide the defense with a copy of Ms. [redacted] phone extraction no later than 25 September 2024.

So ORDERED this 23rd day of September, 2024.

[redacted]

R. Ø. Lipton
Lieutenant Colonel, U.S. Marine Corps
Military Judge

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

UNITED STATES V. Dakota S. HONSTEIN Sergeant / E-5 USMC	**COURT ORDER** **(Testimony of Ms. [redacted] and other evidence pertaining to Ms. [redacted]** 25 September 2024

1. The Defense moved for a preliminary ruling concerning the admissibility of testimony from Ms. [redacted] regarding the sexual interests and history of Ms. [redacted] the victim in this case.

2. **Ruling.** The Court **GRANTS** the defense motion, subject to the following limitations:

a. The parties may offer testimony from Ms. [redacted] concerning the factual assertions listed in paragraphs 2-6 of the FACTS section of the defense motion in limine (residual hearsay), dated 13 September 2024.

b. If either party intends to offer testimony from Ms. [redacted] beyond the scope of those assertions, the proponent of the evidence shall first alert the Court of such intent. This requirement also applies to either party's intent to introduce testimony from any witness pertaining to Ms. [redacted] marriage and Ms. [redacted] involvement with multiple simultaneous partners, to include the "thropple." The parties shall diligently prepare their respective cases by making good faith efforts to avoid the introduction of such evidence.

c. If either party believes that Ms. [redacted] testimony, or any other witness's testimony, cannot be presented in accordance with this Order, the parties shall inform the Court immediately upon the existent of such belief.

So ORDERED this 25th day of September 2024. [redacted]

R. C. Lipton
Lieutenant Colonel, U.S. Marine Corps
Military Judge

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Pg 1 of 1

AE I
[redacted]

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

UNITED STATES V. Dakota S. HONSTEIN Sergeant / E-5 USMC	MOTION TO DISMISS (Defective Referral) **COURT'S RULING** 8 October 2024

1. Pursuant to R.C.M. 905(b)(1) and R.C.M. 906(b)(3), the defense moves this Court to dismiss Charge I and the sole specification thereunder. After considering the parties' written briefs, all evidence attached to record of trial as of the date of this ruling, the applicable law, and oral arguments, the defense's motion is **DENIED** as detailed below.

2. **Findings of Fact**. The preponderance of the evidence supports facts 37-49 asserted in defense's written motion and facts 4-13 asserted in the government's written response. Accordingly, for the purposes of this ruling, the Court adopts those as findings of fact. Any additional findings of fact necessary for the resolution of this matter are included in the analysis below.

3. **Analysis and Conclusions of Law**

The PHO's inclusion of his written analysis concerning whether the accused "knew or *should have known* that death or great bodily harm was a probable consequence of his actions" is not consistent with subjective standard required for element four, but this does not amount to a lack of substantial compliance with R.C.M. 405 and Article 32, UCMJ. Notably, the preceding sentence in the PHO's supplemental report includes a legally-accurate recitation of Element 4, reflecting the element's requirement that the accused "*knew* that death or great bodily harm was a probable consequence of the act." In short, while the PHO's follow-on analysis is confusing and impeachable, the PHO's statement of the law pertaining to the element in question for the sole specification of Charge I is not. Accordingly, this Court finds that contents of the PHO's written report substantially complies with the requirements of R.C.M. 405(m)(2). Similarly, the special trial counsel's citation to the PHO's report does not amount to a referral defect.

4. **Ruling**. The defense motion is **DENIED.**

So ORDERED this 25th day of September 2024.

[redacted]
Lieutenant Colonel, U.S. Marine Corps
Military Judge

AE IV
[redacted]

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

UNITED STATES V. Dakota S. HONSTEIN Sergeant / E-5 USMC	DEFENSE MOTION TO SUPPRESS (Interrogation) **COURT'S RULING** 15 October 2024

1. **Nature of Motion**. Pursuant to the Fifth Amendment to the United States Constitution, Article 31(b), UCMJ, R.C.M. 905(b)(3), M.R.E. 304, and M.R.E. 305, the defense moves this Court to suppress the accused's statements made during his 27 January 2024 NCIS interrogation. After considering the parties' written briefs, oral arguments, all evidence in support thereof, and the applicable law, the defense motion is **DENIED**.

2. **Summary of Findings of Fact, Analysis, and Conclusions of Law**. After considering the totality of the circumstances, the Court finds that the accused's will was not overborne and that his statements were indeed the product of an essentially free and unconstrained choice. In particular, considering the accused's intelligence as evidenced by the coherent and comprehensive nature of his responses to the agents' questioning, the rights advisement he received, the generally respectful nature of the agent's demeanor and questioning, the lack of physical harm or punishment, the lack of any threats, and the lack of any deprivation of food or sleep, the Court finds that the government has met its burden to establish that the accused's statements were not the product of coercion.

3. **Ruling**. The defense motion to suppress the accused's 27 January 2024 NCIS interrogation is **DENIED**. This Court may supplement this ruling with additional findings of fact and conclusions of law prior to the entry of judgment.

So ORDERED this 15th day of October 2024.

[redacted]

R. V. Lipton
Lieutenant Colonel, U.S. Marine Corps
Military Judge

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AE I
[redacted]

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

UNITED STATES V. Dakota S. HONSTEIN Sergeant / E-5 USMC	DEFENSE MOTION (Instructions and Failure to State an Offense) **COURT'S RULING** 15 October 2024

1. **Nature of Motion and Procedural History**

a. On 13 September 2024, the defense moved this Court to issue a ruling concerning a variety of instructions the Court would be required to issue to the factfinder, assuming the accused chose to be tried by a court composed of members. On 20 September 2024 the government filed its written response.

b. On 23 September 2024 the parties litigated the issues during an Article 39(a), UCMJ session of court. During that session it became apparent that the parties maintained divergent view of the law with respect to three distinct issues for the sole specification of Charge I. They are: (1) precisely *what* inherently dangerous act must the government prove the accused committed; (2) what *degree* of probability must the government establish in order to prove element (d); and (3) for the defense of mistake to exist for element (d), must the accused's mistake be both *honest* and *reasonable*, or does the defense of mistake exist if the accused's mistake was merely *honest*?

c. During the 23 September 2024 proceeding, the Court, based on the language the government included in the specification, articulated its inclination to instruct in such a way to require the government to prove that the accused committed the intentional act of "shooting [Ms. [redacted] with a firearm." After the government expressed its disagreement, this Court ordered supplemental briefing on that particular issue issue (1) listed above. The Court did not order supplemental briefing or issue a ruling on issues (2) and (3). The government filed its supplemental brief on 27 September 2024.

d. After receiving the government's 27 September 2024 supplemental brief and considering the arguments therein, this Court also ordered briefing on whether the sole specification of Charge I fails to state an offense. On 4 October 2024, both parties filed their respective briefings on that issue. The defense filed its supplemental response on 4 October 2024. In that brief, the defense moves this Court to dismiss the sole specification of Charge I for its failure to state an offense.

e. During the 23 September 2024 proceeding, after litigating this motion and a variety of others, the accused requested to be tried by military judge alone and this Court granted that request. Although the Court is no longer required to issue instructions on the law, this ruling explains how the Court intends to apply the law with respect to the three aforementioned issues.

2. **Findings of Fact**. The preponderance of the evidence supports facts 1-5 asserted in the government's 20 September 2024 response, and facts 3-14 in the government's 4 October 2023 supplemental brief. Accordingly, for the limited purpose of this ruling, the Court adopts those as findings of fact. Any additional findings of fact necessary for the resolution of this matter are included in the analysis below.

3. **Analysis and Conclusions of Law**

a. *Does the sole specification of Charge I fail to state an offense?*

Rule for Courts-Martial 307(c)(3) explains that "[a] specification is a plain, concise, and definite statement of the essential facts (emphasis added) constituting the charged offense. A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication."

Article 118(3), UCMJ proscribes Inherently Dangerous Act Murder. Under the text of the statute a Service member is guilty of this offense when he, "without justification or excuse, unlawfully kills a human being, when ... engaged in an act which is inherently dangerous to another and evinces a wanton disregard of human life."[1] Through Part IV of the Manual for Courts-Martial (M.C.M.), the President has established five elements of this offense:

> (a) That a certain named or described person is dead;
> (b) That the death resulted from the intentional act of the accused;
> (c) That this act was inherently dangerous to another and showed a wanton disregard for human life;
> (d) That the accused knew that death or great bodily harm was a probable consequence of the act; and
> (e) That the killing was unlawful.[2]

Recently, in *United States v. Helems*, the Navy-Marine Corps Court of Criminal Appeals (N.M.C.C.A.) explained:

> The President's interpretation of the elements of an offense are not binding on [military courts], [but] absent a contrary intention in the Constitution or a statute, this Court should adhere to the Manual's elements of proof. We will defer to the President's "narrowing construction" of an offense which limits "conduct subject

[1] *See* Article 118(3), UCMJ.
[2] *See* M.C.M., Part IV, para 56.b.(3)

to prosecution" when it (1) is "favorable to the accused" and (2) "not inconsistent" with the statutory language.[3]

Accordingly, this Court must consider whether each presidentially-prescribed element is pled expressly, or by necessary implication "by reasonable construction of other language in the . . . specification."[4] Each element is addressed below.

(a) That a certain named or described person is dead;

This element—that Ms. [redacted] is dead—is expressly pleaded through the specification's inclusion of the verb "murder."

(b) That the death resulted from the intentional act of the accused;

There are three sub-components to this element: (1) the act; (2) the *intentionality* of the act; and (3) causation—that is, that the death *resulted from* the intentional act.

The act. The only two acts expressly pled in the sole specification of Charge I are "murder" and "shooting." Of course, the word "murder" in this specification connotes the unlawful nature of the killing, not the intentional act that brought about the killing. Because the act of "shooting" is expressly pled, the specification sufficiently pleads an act.

The intentionality of the act. Notwithstanding the government's correct assertion that Article 118(3) is a general intent crime, Article 118(3) unmistakably requires that the accused's act, which caused the victim's death, be an *intentional* act. Notably, a separate theory of criminal liability for an *unintentional* act resulting in one's death exists under Article 119. The word "intentionally"—or any derivative of the word intent—does not precede the pled act of "shooting," and does not appear anywhere else in the specification. Moreover, the verb "shooting" does not necessarily imply intent because one can certainly unintentionally shoot another. For these reasons, *the intentionality* of the accused's act is not expressly pled in the sole specification of Charge I. However, through a logical process of elimination, the Court does find that the intentionality of the act of shooting is pled by necessary implication. First, Charge I undoubtedly signals an offense under Article 118, UCMJ through the following language: "Charge I: Violation of the UCMJ, Art. 118." There are three theories of murder under Article 118—(1) premediated murder; (2) intent to kill or inflict great bodily harm murder; and (3) inherently dangerous act murder. Because the specification does not include the language "with premeditation," the specification certainly does not allege an Article 118(1) offense. Oddly, the sample specification does not clearly signal drafters to

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[3] *See* United States v. Helems, 2023 CCA LEXIS 72, 8 (N-M. Ct. Crim. App 2023) (citing United States v. Guess, 48 M.J. 69, 71 (C.A.A.F. 1998); United States v. Davis, 47 M.J. 484, 486 (C.A.A.F. 1998)).
[4] United States v. Grijalva, 2024 CAAF LEXIS 358 (C.A.A.F. 2024) (citing United States v. Brecheen, 27 M.J. 67, 68 (C.M.A. 1988)).

distinguish between Article 118(2) and 118(3) offenses.[5] Here, however, one can discern that the sole specification of Charge I does not allege an Article 118(2) and is intended to allege an Article 118(3) because the specification *does* include the following language: "Specification: (*Murder – Act Inherently Dangerous to Another*)."[6] Because an inherently dangerous act must be committed intentionally to amount to an Article 118(3) offense, the intentionality of the alleged act of "shooting" is pled by necessary implication.

Causation. Here, the causation is pled expressly through use of the words "murder … *by means of* (emphasis added)… shooting her with a firearm."

(c) That this act was inherently dangerous to another and showed a wanton disregard for human life;

As explained above, the specification includes the following language: "*Specification: (Murder – Act Inherently Dangerous to Another).*" Accordingly, *part* of this element is expressly pled. The language "showed a wanton disregard for human life" is not expressly pled. However, the wanton nature of the act is directly tied to inherently dangerous nature of the act – the part of the element that *is* expressly pled. Moreover, intentionally *shooting* another is a unique type of act that, on its face, is arguably inherently wanton, when not otherwise justifiable.[7] For these reason, that the accused's act of shooting "showed a wanton disregard for human life" is pled by necessary implication.

(d) That the accused knew that death or great bodily harm was a probable consequence of the act; and

This scienter element is not pled expressly. However, this element is unique to inherently dangerous act murder under Article 118(3). Because the government included the language, "Specification: *(Murder – Act Inherently Dangerous to Another)*, the Court finds that the accused's knowledge that death or great bodily harm was a probable consequence of the alleged act of shooting is pled by necessary implication.

(e) That the killing was unlawful.

This element is pled expressly through inclusion of the word "murder."

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[5] *See* United States v. McMonagle, 34 M.J. 852, 866 (C.M.R. 1992) (J. Johnston, dissenting) ("This specification format is consistent with the sample specification shown in the Manual. It is also consistent with the model specification shown in the Judges' Benchbook to allege a violation of Article 118(2), more commonly known as unpremeditated murder. It is inconsistent, however, with the Benchbook model specification for an Article 118(3) charge, identified as 'murder while engaging in act inherently dangerous to others,' in that the words 'by engaging in an act inherently dangerous to others' are not contained in the specification and the act or acts are not further identified.").

[6] Although that language precedes the standard language drawn from the sample specification, it is nevertheless part of the specification because it follows the word, "Specification."

[7] This is not to suggest that *any* act pled within an Article 118(3) specification is always inherently wanton.

For all of the above reasons, the Court finds that the sole specification of Charge I states an offense.[8]

b. *Based on the language in the charged specification, precisely what inherently dangerous act must the government prove the accused intentionally committed?*

The government asserts that it should be permitted to establish the accused's guilt of the sole specification of Charge I if the government merely establishes beyond a reasonable doubt that the accused intentionally committed the inherently dangerous act of *pulling the trigger* of the firearm. The government argues that the inherently dangerous act of pulling the trigger is necessarily implied through the specification's use of the words "shooting" because one cannot shoot another with a firearm without intentionally pulling trigger of that firearm. In particular, the government asserts that "it should be obvious on its face from the specification and a common understanding of the definition of the word shooting, which requires an intentional act of pulling the trigger."[9] This Court disagrees. The intentionality of the accused pulling the trigger is only "obvious" because the specification alleges that the accused *intentionally shot* Ms. [redacted] The government also asserts that the inherently dangerous of act pulling the trigger is alleged in the specification by necessarily implication through the defense's knowledge of the factual posture of this case as established by the state of the evidence and by written and oral arguments during the Article 32 preliminary hearing. However, as the C.A.A.F. recently explained in *Grijalva*, elements may be pled by necessary implication "so long as they may be found by reasonable construction of other language in the . . . specification."[11] Accordingly, here, when considering whether the inherently dangerous act of intentionally pulling the trigger is pled by necessary implication, this Court must consider whether that act may be found by a reasonable construction of other language in the specification; not whether the act is necessarily implied based on the parties' common understanding of the evidence in the case.

Here, no reasonable construction of other language in the specification adequately puts the accused on notice as to what intentional act, or combination of intentional acts—falling short of intentionally shooting the victim—amount to the inherently dangerous act(s) that showed a wanton disregard for human life. In *Richard*, the Coast Guard Court of Criminal Appeals (C.G.C.C.A.) considered a similar issue involving an involuntary manslaughter specification.[12] In that case, the specification failed to allege the negligent acts or omissions that resulted in the victim's death by asphyxia and the C.G.C.C.A. set aside the conviction and dismissed that specification.[13] The C.G.C.C.A. reasoned that by not expressly or impliedly alleging the specific

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[8] Although the government used the Article 118 sample specification from the M.C.M., elements (b), (c), and (d) promulgated by the President are notably absent from the language proposed in the sample specification. Practitioners should be cautious to not always defer to the sample specification. Instead, practitioners should use the sample specification as a starting point, but critically compare it to the elements outlined in the relevant statute and the elements promulgated by the President.

[9] Gov. Brief dated 27 Sep 24, at 6.

[10] As explained earlier, the *shooting* is expressly-pled, while the *intentionality* of that shooting is impliedly-pled.

[11] United States v. Grijalva, 2024 CAAF LEXIS 358 (C.A.A.F. 2024) (citing United States v. Brecheen, 27 M.J. 67, 68 (C.M.A. 1988)).

[12] *See* United States v. Richard, 84 M.J. 586 (C.G. Ct. Crim. App. 2024).

[13] *Id.* at 592-93.

acts or omissions, the government was granted a free hand to argue, and the members retained a free hand to accept as true, what is was that the accused negligently did or failed to do.[14]

In this case, one of the government's requested remedies is to allow the government to make a minor change to the specification by adding the words "by intentionally pulling the trigger." However, it is apparent from the government's brief that intentionally pulling the trigger is not the only inherently dangerous act that the government believes the accused committed. The government writes:

> There is no requirement the Government alleged [sic] express language of, *did murder Ms.* [redacted] *by means of pulling the trigger while holing [sic] a loaded firearm, in condition zero, over the heart of the victim, while pushing the muzzle into her chest at an angle in an attempt to take the weapon out of battery and prevent the discharge of the weapon, but failing to do so causing the firing pin to strike the primer causing an explosion in the chamber forcing the projectile to leave the muzzle and pierce the heart of Ms.* [redacted] However, that litany of circumstances, surrounding the intentional act of pulling the trigger is best summarized by, did murder Ms. [redacted] by the means of shooting her.[15]

Despite this, the government insists that the factfinder should be permitted to find that the government met its burden with respect to the sole specification of Charge I if it merely establishes that the accused intentionally committed the inherently dangerous act of pulling the trigger of the firearm.

However obvious this "litany" of circumstances may be from the state of the evidence, these circumstances are not necessarily implied from any reasonable construction of the language found within the specification. Based on the language in the specification, there can be no doubt that the expressly-pled act of "shooting her with a firearm" when coupled with the impliedly-pled intentionality of that act, connotes that the accused intended to discharge the firearm and intended for a projectile from that firearm to strike the victim. If the factfinder were permitted to find the accused guilty of the sole specification of Charge I through a commission of inherently dangerous acts *other* than intentionally "shooting [Ms. [redacted]] with a firearm," such a finding would fall short of proving the expressly-pled inherently dangerous act.

Moreover, the record from such a guilty finding would be unclear as to what inherently dangerous acts, or combination of acts, the factfinder determined to have amounted to a wanton disregard for human life. The problems raised by this are easily illuminated when one considers the factual dispute that may arise at trial concerning the accused's knowledge of the loaded state of the firearm. Would the government have to prove that the accused *knew* that the firearm was loaded when he pulled the trigger? Or, could the factfinder still convict if the government fell short of proving that knowledge? If so, the government and the factfinder would seem to have the type of "free hand" the C.G.C.C.A. cautioned against in *Richard*.

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[14] *Id.*

[15] Gov. Brief dated 27 Sep 24, at 8-9

For all of these reasons, the Court finds that in order for the factfinder to convict the accused of the sole specification of Charge I, the government must prove that the accused, beyond a reasonable doubt, intended to shoot Ms. [redacted] with a firearm.

c. *What degree of probability must the government establish to prove element (d)?*

In its 13 September 2024 motion in limine, the defense requested this court issue the following definition of the phrase, probable consequences: "Death or great bodily harm may be considered a 'probable consequence' of [shooting Ms. [redacted] with a firearm] [pulling the trigger of the firearm] only if the act of [shooting Ms. [redacted] with a firearm] [pulling the trigger of the firearm] was likely to produce death or great bodily harm."[16] While on the record, the defense argued that probable consequence means "more likely than not." The government disagreed. This Court is unable to identify any source of law to support that position. However, *United States v. Hermann*, a 2016 Army Court of Criminal Appeals (A.C.C.A.) opinion, serves as persuasive authority for the contrary position.[17] Consistent with *Hermann*, this Court declines to adopt any particular mathematical probability for proof sufficient to establish element (d).[18]

d. *For the defense of mistake to exist as to element (d), must the accused's mistake be both honest and reasonable, or does the defense of mistake exist if the accused's mistake was merely honest?*

Although Article 118(3) is a general intent crime, the government must prove that the accused knew that death or great bodily harm was a probable consequence of his intentionally-committed inherently dangerous act. If the defense of mistake, as to *that* knowledge, is raised by the evidence, then in order for the defense of mistake to exist, the accused's mistake need only be honest. This application of the law is consistent with R.C.M. 916(j) which explains that "[i]f the ignorance or mistake goes to an element requiring premeditation, specific intent, willfulness, or knowledge of a particular fact, the ignorance or mistake need only have existed in the mind of the accused."

4. **Ruling**. The defense motion in limine (instructions) is **GRANTED IN PART** and **DENIED IN PART** as detailed above. The Court will apply the law consistent with the analyses above. The defense's 4 October 2024 written motion to dismiss Charge I and the sole specification thereunder as one form of relief is **DENIED**.

So ORDERED this 15th day of October 2024.

[redacted]

R. Q. Lipton
Lieutenant Colonel, U.S. Marine Corps
Military Judge

[16] Def. Brief dated 13 Sep 24 at 2.
[17] United States v. Hermann, 75 M.J. 672, 675-78 (A. Ct. Crim. App. 2016).
[18] *Id.* at n.7.

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

UNITED STATES V. Dakota S. HONSTEIN Sergeant / E-5 USMC	**Court's Ruling** (R.C.M. 506(c) Application for Withdrawal) 17 November 2024

1. **Nature of Ruling**. This Court denied Capt Paul Caron's 1 November 2024 R.C.M. 506(c) application for withdrawal. For the reasons detailed below, this Court now **GRANTS** Capt Carson's application for withdrawal.

2. **Findings of Fact**. The preponderance of the evidence supports the following factual findings, some of which are procedural in nature:

a. On 27 January 2024, the Government placed the Accused into pretrial confinement.

b. Shortly thereafter, in January of 2024, the Accused formed an attorney-client relationship with his two detailed defense counsel, Capt Carson and Captain Lipositz.

c. On 6 August 2024, the prior Court arraigned the Accused on the originally-preferred and referred charges. That Court docketed trial on the merits for 28 October 2024 – 8 November 2024.[1]

d. On 13 September 2024, the Defense moved the prior Court to issue a ruling concerning a variety of instructions the Court would be required to provide the factfinder, assuming the Accused elected to be tried by a Court composed of members. On 20 September 2024 the Government filed its written response. On 23 September 2024 the parties litigated these issues during an Article 39(a), UCMJ session of court. During that session it became apparent that the parties maintained divergent views of the law with respect to precisely *what* inherently dangerous act the Government must prove the Accused committed. During the 23 September 2024 proceeding, the Court, based on the language the Government included in the specification, articulated its inclination to instruct in such a way to require the Government to prove that the Accused committed the intentional act of "shooting [Ms. [redacted] with a firearm." After the Government expressed its disagreement, that Court ordered supplemental briefing on that particular issue. The Government filed its supplemental brief on 27 September 2024. The Defense filed its response brief on 4 October 2024.

e. On 15 October 2024, that Court issued a written ruling, finding that in order to prevail on the sole specification of Charge I, the Government must prove, beyond a reasonable doubt, that the Accused intentionally committed the inherently dangerous act of "shooting [Ms. [redacted] with a firearm."

f. On 17 October 2024, the Government filed a written motion seeking permission from that prior Court to make a "minor change" to the sole specification of Charge I as follows:

[1] The military judge detailed to that court-martial is the same military judge detailed to this court-martial.

Specification: (*Murder - Act Inherently Dangerous to Another*): In that Sergeant Dakota S. Honstein, U.S. Marine Corps, on active duty, did, onboard Marine Corps Base Camp Lejeune, on or about 27 January 2024, murder [redacted] by means of ~~shooting her with a firearm~~ intentionally pulling the trigger of a loaded firearm while pointing it at her.

g. On 20 October 2024, the Defense filed its written opposition, arguing that the Government's proposed change amounted to a *major* change.

h. On 23 October 2024, that prior Court DENIED the Government's motion, ruling as follows:

> Minor Change: the Court DENIES the Government's motion to make [the] change requested in its 17 October motion. This was a close call, but the Court finds that the proposed change does add "a substantial matter not fairly included in the preferred charge." The Court thoroughly considered the Government's argument that the change would be akin to a lesser offense. The Court acknowledges that the inherently dangerous act proposed may be an act that avers a lesser degree of culpability (less depravity) than the inherently dangerous act pled. However, the Court's concern is that by changing the inherently dangerous act, the Government would be doing more than merely adjusting the offense to reflect a lesser offense; the change would make the specification a different offense. As the Defense noted in its written response, the Government is certainly free to withdraw, dismiss, and []re-prefer.[2]

i. On 26 October 2024, the Government provided notice to that prior Court that the referral authority directed the withdrawal and dismissal all charges and specifications, with the intent to re-prefer and re-refer an Article 118(3) specification with the inherently dangerous act pled as proposed by the major change.

j. On 26 October 2024, the Government preferred and referred to this court-martial a new Article 118(3) offense and re-preferred and re-referred identically-drafted Article 119 and Article 92 offenses along with it. Also on 26 October 2024, the Government served these referred charges on the Accused.

k. On 28 and 29 October 2024, this Court articulated to the parties its intent to maintain the trial dates docketed at the prior court-martial and to conduct trial during the week on 4-8 November 2024. However, the Court expressed its openness to the possibility that newly-raised issues may create the need to docket trial for a later date.

l. This Court held an Article 39(a) session on 1 November 2024, with the intent to arraign the Accused and to litigate a variety of issues raised by the parties.[3] Ultimately, this Court did not arraign the Accused on the newly-preferred and referred charges. During that session the Defense presented this Court with a proposed trial management order which, if granted, would have docketed trial in this case for early-February 2025. However, the Defense was unable to validate the availability of their experts for the dates requested. Nevertheless, the Defense persuaded the Court that in order facilitate necessary defense preparation, the trial would need be docketed for dates beyond 20 November 2024—the date the

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[2] *See* App. Ex. L of first court-martial record of trial.

[3] Notably, at the beginning of the 1 November 2024 session, Capt Carson articulated that he and Capt Lipositz were both detailed to represent the Accused by the "then Chief [Defense] Counsel of the Marine Corps, Colonel John Stephens." This Court interprets that statement to assert that the attorney-client relationship between the detailed defense counsel was not severed upon the government's dismissal of charges on 26 October 2024.

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Accused's lead detailed defense counsel, Capt Paul Carson, is scheduled to complete his active-duty service.[4]

m. Capt Carson's 20 November 2024 End of Active Service (EAS) was made known to the prior Court during arraignment on 6 August 2024. At that time, he was tentatively scheduled to begin work in the Federal Public Defender's Office in Los Angeles, California, shortly after his EAS. Sometime after 6 August 2024, Capt Carson's future employment plans changes. As of the date of this ruling, he is now scheduled to begin work in the Federal Public Defender's Office in Miami, Florida on approximately 30 December 2024.

n. Capt Carson explained to this Court that the Marine Corps offered him career designation—the opportunity to remain on active duty beyond his EAS. Capt Carson declined that offer.

o. On 1 November 2024, the Court conducted a colloquy with the Accused concerning the trial dates proposed by the Defense team. In sum, the Accused explained that if having to choose between more time to prepare for trial and going to trial with Capt Carson representing him, the Accused preferred to have more time to prepare for trial. However, the Accused still expressed his preference that both Capt Carson and Capt Lipositz continue to represent him.

p. While on the record on 1 November 2024, Capt Carson asserted that he advised the Accused about the options for continuing representation to include either postponing his date of separation or by serving as the Accused's defense counsel in a reserve status. Capt Carson also explained to this Court that he advised the Accused "about the potential conflicts … that would potentially arise out of that course of action." This Court asked Capt Carson to explain those potential conflicts, and in response, Capt Carson said, "[e]ssentially … there would be a conflict of interest between me resuming my civilian career, starting a new job if I was put on active duty orders or something like that. Obviously, my -- my interest may not align with my client in that situation." Capt Carson went on to explain:

> "Your Honor, I'll just also add that we -- we discussed the fact that, as lead counsel, I have a specific role. Even if it was possible to do that with a new career and the move and everything, it wouldn't be appropriate for me to -- to remain in that role as lead counsel. So we also talked about my specific role as counsel or part of the defense team, but even if that was possible, there's still the conflict."

q. On 1 November 2024, Capt Lipositz also made the Court aware that he is scheduled to rotate out of the Defense Services Organization (DSO) in early-December 2024. In particular, Capt Lipositz is scheduled to execute orders to Fort Meade, Maryland to serve in the Office of the Staff Judge Advocate (OSJA) for Marine Corps Forces Cyber Command (MARFORCYBER). During that session, Capt

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[4] Importantly, the prior Court denied the Defense motion to suppress the Accused's statements to NCIS. One of the Defense arguments on 1 November 2024 was that the newly pled inherently dangerous act (intentionally pulling the trigger of a loaded firearm while pointing it at Ms. [redacted]) necessarily changes the Defense's anticipated trial strategy. In particular, should *this* Court also not suppress the Accused's statements to NCIS, the Defense anticipates the need to consult with an expert in the field of false confessions to explore the possibility of contesting the truth of the Accused's concession that he *knew* the firearm was loaded when he pointed it at Ms. [redacted] and pulled the trigger—a statement that contradicts his earlier assertions during the interrogation. At the prior court-martial, the Defense was not concerned with advancing this theory because the Defense was confident of the Government's inability to prove the Accused's intent to shoot Ms. [redacted] On 1 November 2024 the Defense also asserted that it intended to consult with a false confession expert for purposes of considering whether to present evidence on the interlocutory issues surrounding suppression—evidence that the Defense did not present when it litigated the suppression motion at the prior court-martial.

Lipositz stated that he intended to arrange for conflict-free counseling for the Accused so that the Accused could determine whether he still desires to be represented by Capt Lipositz following his change of billet.

r. During the Accused's subsequent colloquy with the Court on 1 November 2024, the Accused unequivocally expressed his desire to retain Capt Carson as a member of his defense team. The Accused explained that he did not consent to Capt Carson's excusal under R.C.M. 506(c). Subsequently, Capt Carson orally moved the Court to withdraw from representation under R.C.M. 506(c). Capt Carson's stated good cause for requesting withdrawal was "the withdrawal and dismissal of the charges and re-referral in conjunction with my EAS."

s. This Court denied Capt Caron's motion for withdrawal, reasoning that the combination of his pending completion of active service, his role as lead counsel in this case, the existence of the attorney-client relationship since January of 2024, and the seriousness of the charged offenses, when considered together, did not amount to good cause. The Court then expressed its expectation that: (1) Capt Carson be present at all future sessions of court; and (2) that the United States Government ensure Capt Carson's presence at all future sessions of court. Additionally, this Court also offered Capt Carson the opportunity to re-raise his R.C.M. 506(c) application for withdrawal in writing, with accompanying evidence. Capt Carson indicated that he intended to do so. As of the date of this ruling, Capt Carson has not done so.

t. Also during the 1 November 2024 session, this Court GRANTED IN PART a defense motion to dismiss due to improper referral for the lack of an Article 32 preliminary hearing for the newly-preferred Article 118(3) offense. Accordingly, as of the date of this ruling, Charge I and its sole specification is no longer before this Court, but Charges II and III continue to be referred to this Court.

u. On 6 November 2024, the Government requested this Court author a written order pertaining to Capt Carson's need for continued military service and representation of the Accused. At that time, the Government explained that it was provided "some indication" by a higher authority that a Court Order would be necessary to maintain Capt Carson on active duty beyond his EAS.[5] On 7 November 2024, Capt Carson objected to the Government's proposed order and also explained: "The DSO leadership has indicated that it is their current intention to sever my representation of Sgt Honstein, against his wishes, upon my contractual EAS date." Also on 7 November 2024, Capt Carson explained to the Court:

> "I understand that my representation of Sgt Honstein remains in effect until I am properly severed. However, I remain concerned about the continuing conflict this Court's denial of my severance request has forced. It continues to be the position of the defense that my personal and professional interests are no longer in line with that of my client's based on the Government's withdrawal and referral of amended charges on 26 October. The defense continues to request that the Court grant my application for severance."[6]

v. On 8 November 2024, the Government provided the Court with the following update:

> "[T]he Government has not been able to locate a source of authority to involuntarily extend an officer's EAS outside of legal hold. While there are ample options for extending EAS voluntarily or facilitating travel and TAD through ADOS orders from the reserves, all viable options would require an action by the Officer to initiate those avenues. Knowing all these options, if the DSO serves the relationship, without consent

[5] *See* App. Ex. XXVII.
[6] App. Ex. XXVII.

of the Accused, that is a DSO choice. The Government is willing to facilitate Capt Carson's presence through any voluntary means noted above."[7]

In light of that update, the Government also asked the Court to "rescind[] any previous direction or expectation that the Government involuntarily extend Capt Carson's EAS."[8]

w. In response, on 8 November 2024, the Court asked Capt Carson, whether he was "unwilling to voluntarily postpone [his] separation date or to voluntary execute funded reserve orders to represent Sgt Honstein." In response, Capt Carson wrote, "Given the start date of my new position, and the move of my family, I am unable to continue my active-duty service beyond my contractual EAS." Though not directly, responsive, the Court interpreted Capt Carson's response as an expression of unwillingness to voluntarily postpone his separation date, or to voluntarily execute funded reserve orders to represent the Accused.

x. On 8 November 2024, this Court also ordered the Defense team to facilitate conflict-free counseling for the Accused with respect to the potential conflicts raised by continued representation by Capt Lipositz and Capt Carson. The Court also directed the counsel to identify a date to get on the record during the week of 13-15 November 2024, so that the Court could engage in a colloquy with the Accused about these potential conflicts to determine whether he consents to those conflicts and whether that consent is knowing and voluntary. The parties requested to get on the record during the evening of 13 November 2024 and this Court granted that request.[9]

y. On 13 November 2024, an Article 32 Preliminary Hearing was conducted for the newly-preferred Article 118(3) offense that is not referred to this Court. Both Capt Carson and Capt Lipositz represented the Accused at the preliminary hearing.

z. On 13 November 2024, the Accused received conflict-free counseling from Maj Lauren Neal, the Senior Defense Counsel stationed aboard Camp Lejeune, North Carolina.

aa. Also on 13 November 2024, the Court engaged in a colloquy with the Accused concerning the nature of the potential conflicts surrounding Capt Lipositz and Capt Carson's continued representation. Based on that colloquy it is clear to this Court that the Accused understands and appreciates the nature of both of these potential conflicts.

bb. On 13 November 2024, Capt Lipositz outlined what he perceived to be the potential conflicts with continuing representation of the Accused while concurrently working in the OSJA for MARFORCYBER. However, consistent with Rule 1.7(b)(1) of JAGINST 5803.1E, Capt Lipositz affirmed that he reasonably believes that he will be able to provide competent and diligent representation to the Accused while serving in both roles. He explained that he has been provided sufficient assurances from his future supervisory attorney within the OSJA at MARFORCYBER that he will be afforded the ability to continue to represent the Accused until completion of this court-martial. Additionally, he affirmed that continued representation of the Accused would not violate Rules 1.7(b)(2) and (3) of JAGINST 5803.1E. Finally, Capt Lipositz affirmed that the Accused provided him with written informed consent for continued representation while concurrently working in the OSJA for MARFORCYBER.[10] The Accused unequivocally expressed to this Court his desire to continue to be represented by Capt

[7] App. Ex. XXVII.
[8] App. Ex. XXVII.
[9] App. Ex. XXVII.
[10] Due to the privileged nature of that written document, Capt Lipositz did not desire to attached that written informed consent to this record as an appellate exhibit.

Lipositz, even subsequent to Capt Lipostiz's reassignment to the OSJA for MARFORCYBER. The Accused explained that he discussed these matters with Maj Neal, and that he does not seek excusal of Capt Lipositz under R.C.M. 506(c). Finally, he confirmed to this Court that he did provide written informed consent to Capt Lipositz for continued representation.

cc. On 13 November 2024, Capt Carson explained to this Court that he views his pending EAS and future civilian employment in conflict with continued representation of the Accused. Capt Carson aserted that based on that conflict, he does not reasonably believe that he will be able to provide competent and diligent representation to the Accused in compliance with Rule 1.7(b)(1) of JAGINST 5803.1E. The Court then engaged in a colloquy with the Accused wherein the Accused intelligently displayed his understanding of the potential conflicts surrounding continued representation by Capt Carson. This Court made the Accused aware that Capt Carson told this Court that his "personal and professional interests are no longer in line with that of [his] client's..." Additionally, in front of the Accused, Capt Carson affirmed his unwillingness to continue to voluntarily remain on active duty beyond 20 November 2024, or to voluntarily execute reserve orders, in order to continue to represent him at this court-martial. Despite understanding all of this and after having received the benefit of conflict-free consultation with Maj Neal, the Accused explained to this Court that he does not consent to the excusal of Capt Carson under R.C.M. 506(c). The Accused explained that if it was possible, it is still his desire for Capt Carson to continue to represent him, even beyond his EAS.

dd. Also on 13 November 2024, the Court expressed its concern with Capt Carson's ability to comply with Rule 1.16 of JAGINST 5803.1E, should the detailing authority not excuse Capt Carson under R.C.M. 505(d)(2)(B)(iii) until 20 November 2024—the date of Capt Carson's EAS. In response, Capt Carson explained that he may have not been precise when he told the Court that the detailing authority was not going to excuse him until his EAS. Based on that additional explanation, on 13 November 2024 the Court directed Capt Carson to immediately speak to the detailing authority and to subsequently inform this Court of precisely *when* the detailing authority intends to excuse Capt Carson in accordance with R.C.M. 505(d)(2)(B)(iii). In response, on 14 November 2024, Capt Lipositz, on behalf of the Defense team, provided the following information to this Court:

> After speaking with our leadership concerning severance of Capt Carson and detailing of additional defense counsel, we can provide the following information:
>
> 1. The DSO will no longer have authority over Captain Carson upon his EAS. As such, the detailing authority would necessarily have to (and intends to) sever Capt Carson from this case on the date of his EAS (20 Nov 24).
>
> 2. The detailing authority intends to detail LtCol Matthew Neely (RDC-NCR) as defense counsel in this case, and expects to do so on Monday (18 Nov 24).
>
> 3. LtCol Neely is aware of the factual allegations and charges in this case, and has discussed with Defense team on several occasions in his capacity as RDC-NCR. He is aware of his expected detailing.
>
> 4. Given my impending PCS (detach date of 27 Nov 24), the detailing authority also intends to detail Capt Nicolai Paganucci as additional (local) defense counsel. He is aware of his expected detailing.[11]

[11] App. Ex. XXIX.

ee. Additionally, on 14 November 2024, Capt Lipositz confirmed to this Court that the detailing authority does not intend to excuse Capt Lipositz prior to, or upon, his rotation from the DSO at Camp Lejeune to the OSJA at MARFORCYBER.[12]

ff. As of the date of this ruling, no authority competent to detail Capt Carson has excused Capt Carson under R.C.M. 505(d)(2)(B)(iii).

gg. Any additional findings of fact necessary for the resolution of this matter are included below.

3. **Applicable Law**

a. Pursuant to Article 38(b)(6), UCMJ "[t]he accused is not entitled to be represented by more than one military counsel. However, the person authorized under regulations prescribed under section 827 of this title (Article 27) to detail counsel, in his sole discretion—(A) may detail additional military counsel as assistant defense counsel ..."

b. "The right to effective assistance of counsel and to the continuation of an established attorney-client relationship is fundamental in the military justice system."[13] An established attorney-client relationship of a detailed defense counsel may only be severed in three limited circumstances: (1) *excusal* by the detailing authority for good cause shown on the record under R.C.M. 505(d)(2)(B)(iii); (2) *excusal* of the defense counsel by the military judge with the express consent of the Accused under R.C.M. 506(c); and (3) application to the military judge for *withdrawal* by the defense counsel for good cause under R.C.M. 506(c).

c. Good cause for excusal or withdrawal includes "physical disability, military exigency, and other extraordinary circumstances which render the member, counsel, or military judge or military magistrate unable to proceed with the court-martial within a reasonable time. 'Good cause' does not include temporary inconveniences which are incident to normal conditions of military life." A defense counsel's separation from active duty does not necessarily establish good cause in every case.[14] "Although separation from active duty normally terminates representation, highly contextual circumstances may warrant an exception from this general guidance in a particular case. In any given case, separation from active duty may amount to a routine personnel action or may implicate significant Government interests. Likewise, cancellation or postponement of a separation date, or recall to service in a reserve status, may involve routine action or significant interests."[15] "Similarly, considerations pertinent to the role of a particular member of the defense team in a specific case may range from routine matters to complex considerations."[16] Ultimately, good cause may exist if a detailed counsel's departure from active duty amounts to "extraordinary circumstances that render[] virtually impossible the continuance of the established relationship."[17]

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[12] App. Ex. XXIX.
[13] United States v. Hutchins, 68 M.J. 623 (N-M. Ct. Crim. App. 2010), rev'd and remanded, 69 M.J. 282, (C.A.A.F. 2011) (citations omitted).
[14] *See Hutchins*, 69 M.J. at 290-91.
[15] *Id.*
[16] *Id.*
[17] *See* United States v. Hohman, 2011 CCA LEXIS 14, *9 (N-M. Ct. Crim. App. January 31, 2011) (citing United States v. Iverson, 5 M.J. 440, 442-43 (C.M.A. 1978) (footnote omitted)).

d. JAGINST 5803.1E, Rule 1.7 Conflict of Interest: General Rule

"a. Except as provided by paragraph b, a covered attorney shall not represent a client if the representation of that client involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or
(2) there is a significant risk that the representation of one or more clients will be materially limited by the covered attorney's responsibilities to another client, a former client or a third person or by a personal interest of the covered attorney.

b. Notwithstanding the existence of a concurrent conflict of interest under paragraph a, a covered attorney may represent a client if:

(1) the covered attorney reasonably believes that the covered attorney will be able to provide competent and diligent representation to each affected client;
(2) the representation is not prohibited by law or regulation;
(3) the representation does not involve the assertion of a claim by one client against another client represented by the covered attorney in the same litigation or other proceeding before a tribunal; and
(4) each affected client gives informed consent, confirmed in writing."[18]

e. JAGINST 5803.1E, Rule 1.16 Declining Or Terminating Representation

"c. A covered attorney must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal or other competent authority, a covered attorney shall continue representation notwithstanding good cause for terminating the representation.

d. Upon termination of representation, a covered attorney shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for assignment or employment of other counsel, and surrendering papers and property to which the client is entitled and, where a non-USG attorney provided representation, refunding any advance payment of fee that has not been earned. The covered attorney may retain papers relating to the client to the extent permitted by law.

e. COMMENT. A covered attorney should not represent a client in a matter unless the covered attorney can perform competently, promptly, without improper conflict of interests, and to completion."[19]

"(2) Continued Representation Notwithstanding Good Cause. Notwithstanding the existence of good cause for terminating representation, a covered USG attorney appointed or detailed to represent a client shall continue such representation until properly relieved by competent authority. Who is "competent authority" will differ with the circumstances. For example, in a trial by court-martial, the authority originally appointing or detailing the covered USG attorney would be competent authority prior to trial; the military judge would be competent authority once trial begins."[20]

[18] JAGINST 5803.1E, Rule 1.7.
[19] JAGINST 5803.1E, Rule 1.16(c)-(e).
[20] JAGINST 5803.1E, Rule 1.16(e)(2).

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4. **Analysis and Conclusions of Law**

a. As a preliminary matter, this Court finds that to the extent any conflict exists between Capt Lipositz's continued representation and his future assignment within the MARFORCYBER OSJA, the Accused has knowingly and voluntarily waived the right to be represented by a defense counsel free from conflict and specifically desires that Capt Lipositz continue to represent him.

b. When initially presented with Capt Carson's 1 November 2024 oral application for withdrawal under R.C.M. 506(c), this Court denied that request because Capt Carson failed to meet his burden to establish good cause. At that time, his stated good cause was "the withdrawal and dismissal of the charges and re-referral in conjunction with [his] EAS." During that same 1 November 2024 proceeding, Capt Carson did later tell this Court that he advised the Accused of the possibility of him remaining on active duty or representing the Accused in a reserve status, and that he also advised the Accused about the conflicts that would potentially arise out of that course of action. Capt Carson went on to explain that if he was starting a new job, but then placed on active-duty orders, his interests "may not align with his client in that situation." Then, Capt Carson explained that "[e]ven if it was possible to do that with a new career and the move and everything, it wouldn't' be appropriate [him] to remain in that role as lead counsel." He went on to explain that "even if that was possible, there's still the conflict." After all of this, when considering Capt Carson's original application for withdrawal, this Court was left with the following conclusions: (1) the nature of the potential conflict was that remaining on active duty or executing reserve orders to represent the Accused presents significant professional and personal inconveniences to Capt Carson and his family; (2) the Accused's statement that he nevertheless desired for Capt Carson to represent him likely amounted to a knowing and voluntary waiver of that potential conflict; (3) Capt Carson was still considering how to effectuate continued representation, even if not in the role as lead counsel; and (4) Capt Carson had performed extensive case preparation as lead counsel representing the Accused since January of 2024. For those reasons, coupled with the Court's presumption that the United States Government possessed the authority to involuntarily retain Capt Carson on active duty beyond his 20 November 2024 EAS or to require Capt Carson to execute reserve orders[21], this Court did not find good cause for severance and denied Capt Carson's application for withdrawal under R.C.M. 506(c).

c. In *Hohman*, a post-*Hutchins* unpublished Navy-Marine Corps Court of Criminal Appeals opinion, the Court found that good cause existed to sever the attorney-client relationship between the Accused and his detailed defense counsel when the detailed defense counsel declined career designation, reached his EAS, and became an inactive reservist following the United States Government's denial of his request to remain on active duty to represent his client.[22] The Court in *Hohman* explained that the primary problem in *Hutchins* was that the military judge did not conduct a proper colloquy with the Accused or make any good cause determination on the record.[23] The *Hohman* Court emphasized that "good cause remains a

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[21] Notably, the Government did not provide this Court with details about the specific research the Government conducted that led to its conclusion that it lacked the authority to do this. In *Hutchins*, the C.A.A.F. offered that 10 U.S.C. §§ 12301, 12303 allows for voluntary and involuntary activation of reserve members under specified conditions. The C.A.A.F. also pointed readers to paragraph 5002 of "the Marine Corps Separation and Retirement Manual." Notably, that paragraph explains that "regular"—now referred to as "career designated"—officers "serve at the pleasure of the President as determined by the Secretary of the Navy and no terminal dates are established for their commissions. The Secretary of the Navy has delegated to the CMC (DC M&RA), the authority to approve an officer's resignation on behalf of the President." That paragraph also appears to expressly permit the Marine Corps to not accept an officer's resignation based on the "needs of the service." However, Capt Carson is not a career designated officer and as such, his 20 November 2024 separation date is not the product of a resignation request.

[22] *See Hohman*, 2011 CCA LEXIS 14 at *6-9.

[23] *Id.* at *6-7.

fact specific determination which considers the impact of the severance on the client and the circumstances under which the relationship is extinguished."[24]

d. Since denying Capt Carson's R.C.M. 506(c) withdrawal on 1 November 2024, Capt Carson has explained to this Court that his "personal and professional interests are no longer in line with that of [his] client's." Capt Carson also made clear that he is unwilling to voluntarily postpone his EAS or to voluntarily execute reserve orders to continue to represent the Accused, while simultaneously beginning his civilian employment with the Federal Public Defenders Office in Miami, Florida. Additionally, the United States Government now asserts that it has no administrative authority to retain Capt Carson on active duty beyond his EAS or to require him to execute reserve orders to represent the Accused. Finally, Capt Carson now asserts that he cannot comply with Rule 1.7 of JAGINST 5803.1E. That is, he does not reasonably believe that he will be able to provide competent and diligent representation to the Accused due to his personal and professional desires which are all dependent upon completing his active military service on 20 November 2024 consistent with his contractual agreement with the United States Government. For all of these reasons, this Court now finds there is good cause for Capt Carson's application for withdrawal under R.C.M. 506(c). Like *Hohman*, this Court reasons that Capt Carson's imminent EAS—over which the United States Government asserts it has no control—, his unwillingness to remain on active duty or execute reserve orders to represent the Accused, and his asserted inability to comply with Rule 1.7 of JAGINST 5803.1E, all amount to "extraordinary circumstances that render[] virtually impossible the continuation of the established relationship"[25] between him and the Accused.

5. **Ruling**. Capt Paul Carson's R.C.M. 506(c) application for withdrawal is GRANTED. The Defense shall immediately notify the Accused and the detailing authority of this ruling. Following receipt of this ruling, Capt Carson shall ensure compliance with Rule 1.16(d) of JAGINST 5803.1E. The Defense shall promptly notify this Court once the detailing authority has detailed LtCol Neely, Capt Paganucci, or any other counsel to represent the Accused.

So ORDERED this 17th day of November, 2024.

[redacted]

R.C. LIPTON
Lieutenant Colonel, U.S. Marine Corps
Military Judge

[24] *Id.* at *7 (citing *Hutchins*, 68 M.J. at 629).
[25] *Id.* at *7-8 (citing *Iverson*, 5 M.J. at 442-43).

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

UNITED STATES v. Dakota S. HONSTEIN Sergeant / E-5 USMC	DEFENSE MOTION FOR APPROPRIATE RELIEF: RELEASE FROM PRETRIAL CONFINEMENT **COURT'S RULING** 1 December 2024

1. **Nature of Ruling**. The Defense moves this Court, pursuant to R.C.M.s 305(k), (l) and 906(b)(8) to release the Accused from pretrial confinement and to award administrative credit. After considering the applicable law, all evidence within the record, and the written and oral arguments of counsel, the Court **DENIES** the Defense's request for release from pretrial confinement, but **GRANTS** administrative credit, as detailed below.

2. **Findings of Fact**. The Court finds that the preponderance of the evidence supports the following factual findings:

a. The Court adopts facts 1-2, 4-17, and 19-20 listed in the Defense's 30 October 2024 motion.

b. The Court adopts fact 2-6 listed in the Government's 31 October 2024 response.[1]

c. During the Accused's interrogation with NCIS, the Accused admitted to keeping his personal firearm in his barracks room. He also explained that when his room is subject to an inspection, he usually drops his personal firearm off as "[redacted] house" or "[redacted] house.

d. Additional findings of fact necessary to resolve this matter are included below.

3. **Applicable Law**

a. A person may be confined if that person committed an offense triable by court-martial, less severe forms of restraint are inadequate, and confinement is necessary.[2] Confinement is necessary when it is foreseeable that the confinee will not appear at trial or will engage in serious criminal misconduct.[3] Serious criminal misconduct includes causing serious injury to others or

[1] The Court notes that the Government's response is dated 30 October 2024, but was not actually filed with this Court until 31 October 2024.
[2] R.C.M. 305(d).
[3] R.C.M. 305(h)(2)(B)(iii).

other offenses which pose a serious threat to the safety of the community and command.[4] Factors to be considered in this determination include the nature or circumstances of the offense charged, the weight of the evidence against the confinee, and the likelihood that the confinee will commit further serious criminal misconduct if allowed to remain at liberty.[5] Less severe forms of restraint must be found inadequate to justify confinement.[6]

b. Within seven days of imposition of pretrial confinement, a neutral and detached IRO must review the evidence to determine if the preponderance of the evidence supports the probable cause determination and necessity for continued pretrial confinement.[7] The IRO "may, for good cause, extend the time limit for completion of the review to 10 days after the imposition of pretrial confinement."[8] "The confinee and the confinee's counsel, if any, shall be allowed to appear before the 7-day reviewing officer and make a statement, if practicable."[9] The victim also has the right to be heard before the IRO, but "[p]ersonal appearance by the victim is not required" and the victim's right to be heard "may ... be accomplished telephonically, by video teleconference, or by written statement."[10] However, unlike the presence requirements for preliminary hearings and court-martial proceedings under R.C.M. 405 and 804, respectively, no rule or discussion within R.C.M. 305 similarly contemplates the lack of in-person appearance by the confinee or the confinee' s counsel.[11]

c. R.C.M. 305(k)(1)(A) provides that a Military Judge may order a release from pretrial confinement if the IRO's decision was an abuse of discretion or insufficient information is presented justifying the continuation of pretrial confinement.[12] Abuse of discretion requires that the Military Judge have more than a different opinion from the IRO.[13] Instead, the Judge must find that the IRO's decision was arbitrary, clearly unreasonable or erroneous, or fanciful.[14]

d. Additionally, when newly developed information that was not presented during the seven-day review establishes that the confinee should be released, the Military Judge shall order release.[15] New information is reviewed *de novo* by the Military Judge.[16] The development of new information does not automatically require the release of the confinee.[17] Instead, it is weighed alongside existing evidence to determine whether the confinee should be released.[18] When the Military Judge reviews new information *de novo*, he makes a new determination about

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[4] R.C.M. 305(h)(2)(B).
[5] R.C.M. 305(h)(2)(A) Discussion.
[6] R.C.M. 305(d)(2)(B).
[7] R.C.M. 305(j)(2).
[8] R.C.M. 305 (j)(2)(B).
[9] R.C.M. 305(j)(2)(A)(i).
[10] R.C.M. 305(j)(2)(A)(iv) Discussion.
[11] *See* R.C.M. 405(k)(4)(A); R.C.M. 804(a)(3).
[12] R.C.M. 305(k)(1)(A); United States v. Gaither, 45 M.J. 349, 351 (C.A.A.F. 1996).
[13] *See* United States v. McElhaney, 54 M.J. 120, 130 (C.A.A.F. 2000) (providing the legal standard for abuse of discretion).
[14] *Id.*
[15] R.C.M. 305(j)(1)(B).
[16] *See Gaither*, 45 M.J. at 351 (explaining that the development of new information which suggests that confinement should not be continued requires *de novo* review).
[17] *See* United States v. Lewis, 1996 CCA LEXIS 181, at *12-*13 (A.F.C.C.A. 1996) (upholding the decision of a military judge who chose not to release a confine despite the development of new information).
[18] *Id.*

whether to continue pretrial confinement based on the preponderance of the evidence.[19] The burden of persuasion rests with the Defense.[20]

4. **Analysis and Conclusions of Law**

a. Here, the Defense does not argue that the IRO abused his discretion. Instead, the Defense argues that the additional evidence presented to this Court, but not to the IRO, supports a finding that pretrial confinement is no longer necessary. This Court disagrees. After considering all of the evidence presented, this Court is convinced that the preponderance of that evidence supports the conclusion that the Accused committed offenses triable by court-martial—Articles 92 and 119, UCMJ.[21] This Court is also convinced that the preponderance of the evidence supports the conclusion that less severe forms of restraint are inadequate. In reaching this conclusion, this Court is persuaded by the Government's argument that the Accused admitted to NCIS his willingness to maintain a personal firearm in his barracks room, contrary to an installation order prohibiting such conduct. Finally, the preponderance of the evidence supports the conclusion that confinement is necessary because it is foreseeable that the Accused will engage in serious criminal misconduct.[22]

b. This Court also finds that the Government failed to comply with R.C.M. 305(j)(2)(A)(i) by not affording the Accused's counsel, Capt Carson, the opportunity to appear before the seven-day reviewing officer and represent the Accused. This Court recognizes that the IRO and the Government were navigating a conflict of rules presented by R.C.M. 305. On one hand, R.C.M. 305(j)(2)(B) seemingly only permits the IRO to grant an extension of 10 days from the imposition of pretrial restraint. On the other hand, the Accused's counsel "shall" be allowed to appear. This Court concurs with the Defense's general assertion to the IRO—that the 10-day requirement and limitation is intended to protect the Accused from being subject to pretrial confinement for an unreasonable amount of time prior to a neutral and detached officer's review. And here, Capt Carson unequivocally articulated to the IRO the Accused's waiver[23] of that 10-day requirement. Through Capt Carson, the Accused also unequivocally objected to conducting the hearing without Capt Carson present. The multiple email threads between Capt Carson, the IRO, and Government counsel make it apparent that Capt Carson promptly identified his unavailability for the originally-scheduled hearing date of 1 February 2024 as well as his unavailability for the rescheduled hearing dates of 2 February 2024, 4 February 2024, and 5 February 2024. Capt Carson explained that he was stationed aboard Marine Corps Base Quantico, that he was the Accused's sole counsel, that he was docketed to represent other clients in court-martial proceedings scheduled to occur aboard Quantico on 2 February 2024, and that he was scheduled to execute Government-funded travel from 4-8 February 2024. He reasonably offered to be available as soon as 9 February 2024.

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[19] R.C.M. 305(j); R.C.M. 905(c)(1).
[20] R.C.M. 905(c)(2)(A).
[21] Of course, this Court makes no conclusion as to whether the Government has proved the Accused's guilty beyond a reasonable doubt.
[22] This is supported by the evidence the Government presented concerning the Accused's interactions with other women. The Court notes that none of these women actually testified before this Court and at least one woman no longer wishes to participate in this trial.
[23] To the extent the law actually permits such a waiver, the Accused certainly did so.

c. Ultimately, the IRO chose to ensure compliance with the 10-day requirement, but did not ensure compliance with the requirement that the Accused's counsel *shall* be allowed to be present. Whether the 10-day requirement is actually waivable is an interesting question, but one this Court need not resolve. Assuming it was prudent for the IRO and the Government to ensure the hearing occurred within 10 days of the initiation of pretrial restraint, it would have been similarly-prudent for the IRO and the Government to ensure that the Accused was afforded a second hearing where he could have been represented by Capt Carson.

d. On 6 February 2024, Capt Carson emailed Capt Blackburn to seek a point of contact for travel authorization. In response, Capt Blackburn informed Capt Carson that the IRO hearing was conducted the day before and that the Accused was retained in confinement. Capt Blackburn then asked Capt Carson whether the Defense sought to "reopen the IRO." Capt Blackburn then explained, "[i]f so, we are not opposed but we are not back from training until Friday around midnight so the earliest we are available is Saturday. We are also available Monday Feb 12 if weekend hearings are still not amenable to you." In a later email Capt Blackburn then said "[w]e are not seeking to reopen it as the Government-if you are seeking to do so please copy us on your request to the magistrate so he does not have to forward it to us in separate coms to order to get our input." Capt Carson then contacted the IRO, Maj Shultz, seeking that a hearing be scheduled for Friday, 9 February 2024 or Saturday, 10 February 2024. Capt Carson clarified that he was seeking a request to reconsider approval of continued pretrial confinement under R.C.M. 305(j)(2)(E). In response, on 12 February 2024, Maj Shultz wrote, "[i]n consultation with Maj Yang, I am declining this request and recommending that you bring this to the next level judge via an Article 30(a) motion hearing."[24]

e. While it is certainly the Defense's burden to convince this Court that relief is warranted, it is *not* the Defense's burden to do all that it can to correct the Government's deficient compliance with R.C.M. 305. The Government, at any point between 9 February 2024 through the date the Defense filed this motion could have, on its own, scheduled a hearing before a neutral and detached officer while affording the Accused the opportunity to be represented by his counsel. Indeed, when Capt Carson initially approached Government counsel about scheduling another IRO, Government counsel articulated no opposition. It is almost as if the Government counsel realized at that moment that it would have been prudent to schedule another IRO where the Accused would have had the benefit of representation by his counsel. Ultimately, the Government was well-aware of the deficiency raised by Capt Carson's lack of appearance. The only conclusion this Court may draw is that the Government did not believe the deficiency was meritorious. However, in this Court's view, the deficiency *is* meritorious. And, that the Defense did not file a pre-referral motion in accordance with R.C.M. 309 or a motion for appropriate relief at the prior court-martial does not persuade this Court that the Accused is not entitled to relief for this deficiency.

f. In calculating the appropriate amount of confinement credit under R.C.M. 305(k)(2), (l), this Court considers that the Defense filed its relevant motion at *this* court-martial on 30 October

[24] From the email traffic attached to the record, it is apparent that Maj Yang is another officer aboard Camp Lejeune authorized to serve as a 7-day review officer. It is curious that Maj Shultz based his decision to deny a second hearing, at least in-part, upon his consultation with Maj Yang. On its face, such a decision would seem to cast doubt upon the neutral and detached nature of his decision.

2024 and this Court heard oral argument on that motion on 1 November 2024. At that hearing, this Court articulated its inclination to find that continued pretrial confinement is appropriate in accordance with R.C.M. 305(i)(2)(B). From that point forward, the appropriateness of continued pretrial confinement was a decision within the authority of this Court. However, the Court's delay in finalizing that ruling will not inure to the benefit of the Accused for purposes of calculating the appropriate amount of administrative credit. Accordingly, this Court grants day-for-day administrative credit for noncompliance with R.C.M. 305(j)(2)(A)(i) between the dates of **9 February 2024**—the first date the Accused's defense counsel was reasonably available to participate—and **1 November 2024**—the earliest date this Court had the authority to determine that continued pretrial confinement was appropriate—for a total of **267 days** of credit.

5. **Ruling**. This Court **DENIES** the Defense motion for release from pretrial confinement, but **GRANTS 267 days** of administrative confinement credit.

So ordered this 1st day of December 2024.

[redacted]

R.L. LIPTON
Lieutenant Colonel, U.S. Marine Corps
Military Judge

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

UNITED STATES V. Dakota S. HONSTEIN Sergeant / E-5 USMC	DEFENSE MOTION TO DISMISS (R.C.M. 707) **COURT'S RULING** 19 November 2024

1. **Nature of Ruling**. On 30 October 2024, the Defense moved this Court, pursuant to Rule for Courts-Martial 707, to dismiss all charges and specifications with prejudice. The Government opposes the motion. After considering the parties written briefs, oral arguments, all evidence attached to the record, and the applicable law, this Court **DENIES** the defense motion as detailed below.

2. **Findings of Fact**. The preponderance of the evidence supports the following factual findings:

a. On 27 January 2024, the Government placed the Accused into pretrial confinement.

b. On 6 August 2024, the prior Court arraigned the Accused on the originally-preferred and referred charges. That Court docketed trial on the merits for 28 October 2024 – 8 November 2024.

c. On 13 September 2024, the Defense moved the prior Court to issue a ruling concerning a variety of instructions the Court would be required to provide the factfinder, assuming the Accused elected to be tried by a Court composed of members. On 20 September 2024 the Government filed its written response. On 23 September 2024 the parties litigated these issues during an Article 39(a), UCMJ session of court. During that session it became apparent that the parties maintained divergent views of the law with respect to precisely *what* inherently dangerous act the Government must prove the Accused committed. During the 23 September 2024 proceeding, the Court, based on the language the Government included in the specification, articulated its inclination to instruct in such a way to require the Government to prove that the Accused committed the intentional act of "shooting [Ms. [redacted] with a firearm." After the Government expressed its disagreement, that Court ordered supplemental briefing on that particular issue. The Government filed its supplemental brief on 27 September 2024. The Defense filed its response brief on 4 October 2024.

d. On 15 October 2024, that Court issued a written ruling, finding that in order to prevail on the sole specification of Charge I, the Government must prove, beyond a reasonable doubt, that the Accused intentionally committed the inherently dangerous act of "shooting [Ms. [redacted] with a firearm."

e. On 17 October 2024, the Government filed a written motion seeking permission from that prior Court to make a "minor change" to the sole specification of Charge I as follows:

> **Specification**: (*Murder - Act Inherently Dangerous to Another*): In that Sergeant Dakota S. Honstein, U.S. Marine Corps, on active duty, did, onboard Marine Corps Base Camp Lejeune, on or about 27 January 2024, murder [redacted] by means of ~~shooting her with a firearm~~ intentionally pulling the trigger of a loaded firearm while pointing it at her.

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f. On 20 October 2024, the Defense filed its written opposition, arguing that the Government's proposed change amounted to a *major* change.

g. On 23 October 2024, that prior Court DENIED the Government's motion, ruling as follows:

> Minor Change: the Court DENIES the Government's motion to make [the] change requested in its 17 October motion. This was a close call, but the Court finds that the proposed change does add "a substantial matter not fairly included in the preferred charge." The Court thoroughly considered the Government's argument that the change would be akin to a lesser offense. The Court acknowledges that the inherently dangerous act proposed may be an act that avers a lesser degree of culpability (less depravity) than the inherently dangerous act pled. However, the Court's concern is that by changing the inherently dangerous act, the Government would be doing more than merely adjusting the offense to reflect a lesser offense; the change would make the specification a different offense. As the Defense noted in its written response, the Government is certainly free to withdraw, dismiss, and []re-prefer.[1]

h. On 26 October 2024, the Government provided notice to that prior Court that the referral authority directed the withdrawal and dismissal all charges and specifications, with the intent to re-prefer and re-refer an Article 118(3) specification with the inherently dangerous act pled as proposed by the major change.

i. On 26 October 2024, the Government preferred and referred to this court-martial a new Article 118(3) offense and re-preferred and re-referred identically-drafted Article 119 and Article 92 offenses along with it. Later on 26 October 2024, the Government served these referred charges on the Accused.

j. During the 1 November 2024 Article 39(a) session, this Court GRANTED IN PART a defense motion to dismiss due to improper referral for the lack of an Article 32 preliminary hearing for the newly-preferred Article 118(3) offense. Accordingly, as of the date of this ruling, Charge I and its sole specification is no longer before this Court, but Charges II and III continue to be referred to this Court.

k. Any additional findings of fact necessary for the resolution of this matter are included below.

3. **Applicable Law**

a. R.C.M. 707 provides that, "the accused shall be brought to trial within 120 days of the earlier of: (1) Preferral of charges; (2) the imposition of restraint under R.C.M. 304(a)(2)-(4); or (3) Entry of active duty under R.C.M. 204."[2] "The date of preferral of charges … shall not count for purpose of computing [the 120 days]."[3] "The date on which the accused is brought to trial shall count."[4] "The accused is brought to trial within the meaning of this rule at the time of arraignment under R.C.M. 904."[5] "When charges are preferred at different times, accountability for each charge shall be determined from the appropriate date … for that charge."[6]

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[1] *See* App. Ex. L of first court-martial record of trial.
[2] R.C.M. 707(a).
[3] R.C.M. 707(b)(1).
[4] *Id.*
[5] *Id.*
[6] R.C.M. 707(b)(2).

b. "In the event of dismissal of charges or mistrial, a new 120-day period begins as follows: ... (i) For an accused under pretrial restraint under R.C.M. 304(a)(2)-(4) at the time of dismissal or mistrial, a new 120-day period begins on the date of the dismissal or mistrial."[7]

c. "In a case in which it is determined that charges were dismissed for an improper purpose or for subterfuge, the time period determined under [R.C.M. 707(a)] shall continue to run."[8] The Court of Appeals for the Armed Force (C.A.A.F.) has explained that "[a] proper reason for withdrawal is 'a legitimate command reason which does not 'unfairly' prejudice an accused."[9] The C.A.A.F. "has previously found 'withdrawal . . . for the purpose of judicial economy by trying all known charges in a single trial' to be proper where an accused was not unfairly prejudiced."[10] "Ordinarily all known charges should be referred to a single court-martial."[11]

d. When considering whether the government has complied with the R.C.M. 120-day clock, the Court must consider any excludable delay agreed to by the parties, granted by the CA prior to referral, or granted by the Court after referral.[12]

e. If R.C.M. 707 is violated, the appropriate remedy is dismissal "with or without prejudice to the government's right to reinstitute court-martial proceedings against the accused for the same offense at a later date."[13]

f. "After arraignment of the accused upon charges, no additional charges may be referred to the same trial without consent of the accused."[14]

g. "After referral, a major change may not be made over the objection of the accused unless the charge or specification is withdrawn, amended, and referred anew."[15] "If major changes are necessary, the affected charge should be preferred anew."[16]

4. **Analysis and Conclusions of Law**

a. The preponderance of the evidence supports the conclusion that the Government's dismissal of the charges previously preferred and referred to the prior Court was not for an improper purpose or as a subterfuge to vitiate the accused's right to a speedy trial. Here, the Government withdrew and dismissed the previous Article 118(3) offense to make what would have amounted to a major change to account for the inherently dangerous act the government believes the accused intentionally committed. The Government only did so after thorough litigation on this topic at the previous court-martial. This Court does not interpret the Government's actions as a circumvention of the prior court's ruling. Instead, the Government sought to amend its charge, consistent with Rules for Courts-Martial.[17] No rule supports the

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[7] R.C.M. 707(b)(3)(A)(i).
[8] R.C.M. 707(b)(3)(A)(iii).
[9] United States v. Leahr, 73 M.J. 364, 369 (C.A.A.F. 2014) (citing United States v. Hunter, 65 M.J. 399, 401 (C.A.A.F. 2008).
[10] *Leahr*, 73 M.J. at 369 (citing United States v. Koke, 34 M.J. 313, 315 (C.M.A. 1992)).
[11] *Leahr*, 73 M.J. at 369-70 (citing R.C.M. 601(e)(2) Discussion; R.C.M. 401(c) Discussion).
[12] *See* R.C.M. 707(c).
[13] R.C.M. 707(d).
[14] R.C.M. 601(e)(2).
[15] R.C.M. 603(d)(1).
[16] *See* discussion to R.C.M. 306(c)(citing R.C.M. 603(d)).
[17] *See* R.C.M. 603(d); R.C.M. 306(c) Discussion ("If major changes are necessary, the affected charge should be preferred anew."); *see also* United States v. Oerman, 2022 CCA LEXIS 675 *5-6 (A. Ct. Crim. App. Nov. 18 2022)

notion that the government was required to have been stuck with the prior Article 118(3) charge. Additionally, through the government's actions, it is apparent that the government did not dismiss the Article 118(3) offense in an effort to delay trial or in an effort to deprive the accused of his speedy trial rights under R.C.M. 707. The government expressed its preference to conduct the trial on these charges between 1 November 2024 and 8 November 2024—a date window for the previous trial.

b. Absent an improper purpose or subterfuge, the plain meaning of R.C.M. 707(b)(3)(A)(i) is that a new 120-day R.C.M. 707 clock begins to run on the date of dismissal. Here, the government dismissed the charges on 26 October 2024. Accordingly, as of the date of this ruling, the R.C.M. 707 clock stands at **day 25**. The Accused has not yet been arraigned on Charge II or Charge III—the two charges currently referred to this court-martial. Assuming the Government seeks arraignment on any combination of charges, this Court will re-assess the R.C.M. 707 calculation at that time.

5. **Ruling**. The defense motion to dismiss is **DENIED**.

So ORDERED this 19th day of November, 2024.

[redacted]

R.C. LIPTON
Lieutenant Colonel, U.S. Marine Corps
Military Judge

("Withdrawal and dismissal followed by re-referral are specifically contemplated by [R.C.M.] 603(d)(1) if the accused objects to a major change to a specification post-arraignment.").

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

UNITED STATES V. Dakota S. HONSTEIN Sergeant / E-5 USMC	GOVERNMENT'S MIL (INSTRUCTIONS) **COURT'S RULING** 14 January 2025

1. **Nature of Motion and Procedural History**. On 15 October 2024, the prior Court issued the following written ruling on a Defense Motion regarding that Court's application of appropriate instructions: "Although Article 118(3) is a general intent crime, the government must prove that the [A]ccused knew that death or great bodily harm was a probable consequence of his intentionally-committed inherently dangerous act. If the defense of mistake, as to *that* knowledge, is raised by the evidence, then in order for the defense of mistake to exist, the [A]ccused's mistake need only be honest." On 26 October 2024 the Government withdrew and dismissed the charges from that court-martial. That same day the Government re-preferred and re-referred charges to this court-martial. The language of the Article 118(3) offense referred to this court-martial is different than the language referred to the previous court-martial. On 13 December 2024, the Government moved this Court to issue a ruling concerning the Court's application of the defense of mistake of fact to the sole specification of Charge I—the Article 118(3), UCMJ offense. The Government seeks *this* Court apply the law differently than the *previous* Court. On 20 December 2024, the defense filed its motion in opposition. Notably, the Defense's opposition seeks relief beyond that granted by the previous Court. The Defense, in addition to requesting this Court apply the law consistent with the previous Court's ruling, also seeks this Court rule that "ignorance or mistake, that need only have existed in the mind of the [A]ccused, can negate the second clause of Article 118(3)'s third element…"—that is, whether the [A]ccused's inherently dangerous act showed a wanton disregard for human life.

2. **Analysis, Conclusions of Law, and Ruling**. After considering the parties' written briefs, the record of trial, and the applicable law, the Court **DENIES** the Government's motion, but also **DENIES** the Defense's requested relief concerning the second clause of the third element. Consistent with this Court's interpretation of *United States v. McMonagle*[1] and R.C.M. 916, should the evidence raise the defense of mistake of fact concerning the Accused's subjective knowledge that death or great bodily harm was a probable consequence of the inherently dangerous act, the ignorance or mistake need only have existed in the mind of the Accused. Regardless of the Accused's forum selection, the trial shall be conducted consistent with this principle of law. Concerning the second clause of the third element, "an act shows a wanton disregard for human life when it is characterized by heedlessness of the probable consequences of the act, or indifference to the likelihood of death or great bodily harm, and demonstrates a

[1] *See generally* United States v. McMonagle, 38 M.J. 53 (C.M.A. 1993).

total disregard for the known probable results of death or great bodily harm."[2] Applying this definition from the benchbook, this Court does not discount that this element requires the factfinder to consider whether the Accused's conduct demonstrated a wanton disregard for the *known* probable results of death or great bodily harm. However, the focus of the inquiry is on the *demonstration of wantonness*; the inquiry into the Accused's subjective knowledge of the probable results of his act is the focus of element four—an element for which an honest mistake of fact defense *is* applicable. Element three, unlike element four, does not require "premeditation, specific intent, willfulness, or knowledge of a particular fact" as is referenced i[redacted] R.C.M. 916(j) as the trigger for a mere *honest* mistake of fact defense. For these reasons, if an ignorance or mistake of fact defense is appropriately raised by the evidence for *this* element, to amount to a defense, the ignorance or mistake must be both honest and reasonable. ~~Yet at present, based on the nature of this element, it is not apparent to this Court how one could ignorantly or mistakenly "show[] a wanton disregard for human life." Nevertheless, the Court will remain open to considering this issue at trial.~~

So ORDERED this 14th day of January 2025.

[redacted]

R. G. Lipton
Lieutenant Colonel, U.S. Marine Corps
Military Judge

[2] *See* Military Judges Benchbook, 3a-42-3.

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

UNITED STATES v. Dakota S. HONSTEIN Sergeant / E-5 USMC	DEFENSE MOTION TO COMPEL EXPERT CONSULTANT (Mr. [redacted] **COURT'S RULING** 31 January 2025

1. The Defense failed to meet its evidentiary burden to establish the necessity of Mr. [redacted] consultation. In reaching this conclusion, the Court does not discount the following, as established through its interview of Ms. [redacted]

a. The forensic latent print examination discipline is not standardized by any national association or entity.
b. Standards for the forensic latent print examination field are determined by the entity you are working for.
c. The forensic latent print examiner determines the suitability of a print for comparison.
d. Reported latent print statistics are generated by FRStat software, developed by a U.S. Criminal Investigation Laboratory (USACIL) forensic examiner and the forensic latent print examiner branch head.
e. Standards within the FRStat software are established by USACIL.

2. Despite the lack of standardization in this field, there is no evidence supporting the conclusion that the techniques Mr. [redacted] would apply in analyzing the evidence in this case would yield any result different than USACIL's. Moreover, the Defense presented no evidence of any particular technique or standard that Mr. [redacted] would apply or how Mr. [redacted] techniques or standards actually differ from those that USACIL applied in this case. Accordingly, the Defense failed to establish: (1) how Mr. [redacted] would be of assistance; and (2) that denial of Mr. [redacted] would result in a fundamentally unfair trial.

3. **Ruling**. The Defense motion to compel the production of Mr. [redacted] as an expert consultant latent print examiner is **DENIED**.

So ORDERED this 31st day of January 2025. [redacted]

R.C. Lipton
Lieutenant Colonel, U.S. Marine Corps
Military Judge

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

UNITED STATES V. Dakota S. HONSTEIN Sergeant / E-5 USMC	DEFENSE MOTION TO SUPPRESS (Interrogation) **COURT'S RULING** 15 October 2024

1. **Nature of Motion**. Pursuant to the Fifth Amendment to the United States Constitution, Article 31(b), UCMJ, R.C.M. 905(b)(3), M.R.E. 304, and M.R.E. 305, the defense moves this Court to suppress the accused's statements made during his 27 January 2024 NCIS interrogation. After considering the parties' written briefs, oral arguments, all evidence in support thereof, and the applicable law, the defense motion is **DENIED**.

2. **Summary of Findings of Fact, Analysis, and Conclusions of Law**. After considering the totality of the circumstances, the Court finds that the accused's will was not overborne and that his statements were indeed the product of an essentially free and unconstrained choice. In particular, considering the accused's intelligence as evidenced by the coherent and comprehensive nature of his responses to the agents' questioning, the rights advisement he received, the generally respectful nature of the agent's demeanor and questioning, the lack of physical harm or punishment, the lack of any threats, and the lack of any deprivation of food or sleep, the Court finds that the government has met its burden to establish that the accused's statements were not the product of coercion.

3. **Ruling**. The defense motion to suppress the accused's 27 January 2024 NCIS interrogation is **DENIED**. This Court may supplement this ruling with additional findings of fact and conclusions of law prior to the entry of judgment.

So ORDERED this 15th day of October 2024. [redacted]

R. Q. Lipton
Lieutenant Colonel, U.S. Marine Corps
Military Judge

AE XCU [redacted]

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

UNITED STATES v. Dakota S. HONSTEIN Sergeant / E-5 USMC	**COURT ORDER** (Interrogatories In Case of Ms. [redacted] 27 March 2025

1. **ORDER.** Pursuant to Rule for Courts-Martial (R.C.M.) 703(e)(1) and 703(g)(2), the Commanding Officer of the appropriate military treatment center or other Government custodian is hereby ordered to facilitate responses to the following interrogatories, in writing, pertaining to a deceased Servicemember-dependent patient, Ms. [redacted] (Ms. [redacted]). The Court finds that the information sought by this order is necessary to the above-captioned court-martial and that other means of obtaining this information are not available.

2. Additional Instructions

a. The responses to these interrogatories shall be derived from Ms. [redacted] medical records, but SHALL NOT include copies of any medical records.

b. The individual(s) tasked with providing answers to these interrogatories shall source the responsive information from Ms. [redacted] records stored within Military Health System Genesis, the DoD's Federal Electronic Health record.

c. Because there is reason to believe that the patient may have received mental health care outside of a Military Treatment Facility, the individual(s) tasked with providing answers to these interrogatories shall also source the responsive information from records stored within the Joint Health Information Exchange.

d. Written, typed responses to these questions shall be submitted as soon as practicable, but not later than 9 April 2025.

e. Responses shall be consolidated in a single document and transmitted as an attachment to a single email addressed to the Military Judge at [redacted] and to Ms. [redacted] Victims' Legal Counsel at [redacted] Upon receipt, this Court will place the responsive document under seal pursuant to R.C.M. 1113. Only the military judge and the attorneys detailed to the above-captioned court-martial shall have access to it.

I. Preliminary and Treatment Facility Information

1. Please state the full name, credentials, and professional title of the individual(s) tasked with responding to these interrogatories.

2. Do Ms. [redacted] medical records indicate that she received mental health care from any provider (including but not limited to psychiatric treatment, psychological treatment, counseling services, or crisis interventions)? If so:
   a. Please list all military treatment facilities where Ms. [redacted] received any such mental health care.
   b. Please list all civilian facilities where Ms. [redacted] received any such mental health care, to include any hospitals, clinics, or private practices.
   c. Please provide the dates and duration of treatment at each facility, and any contact information for the individual facility.

II. Diagnoses

3. Please list all of Ms. [redacted] as reflected in her medical records. The response must include all mental health diagnoses to include all those that may be found in The Diagnostic and Statistical Manual of Mental Illnesses (DSM-5).

4. For each diagnosis, please provide the date of initial diagnosis, any subsequent revisions or updates, and whether the diagnosis was considered active, in remission, or resolved.

III. Prescribed Medications

5. Please list all medications prescribed to Ms. [redacted] that are reflected in her medical records. Please articulate:
   a. The name of each prescribed medication;
   b. The specific diagnosis (or other purpose) for which the medication was prescribed;
   c. The prescribing provider and associated treatment facility, if applicable;
   d. The prescribed dosage, prescribed frequency, and duration of use;
   e. The dates associated with each prescription pick-up, to include any renewals, refills, modifications, or discontinuations; and
   f. Any documented noncompliance or provider concerns related to medication adherence.

6. This Court is in possession of credible information that suggests Ms. [redacted] was prescribed [redacted] If there are no responsive answers to question (5) above, please specifically answer the following question: Do Ms. [redacted] medical records provide any indication that she was ever prescribed [redacted]

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IV. Outpatient Treatment, Inpatient Treatment, or Emergency Care

7. Do Ms. [redacted] medical records indicate that she has ever been subject to outpatient mental health treatment, inpatient mental health treatment, or emergency mental health care? If so, please articulate:
    a. The name and location of each hospital or facility;
    b. The relevant date(s) of such treatment or care;
    c. The reason(s) for treatment, hospitalization, or emergency mental health care; and
    d. Any documented treatment plans, discharge summaries, or follow-up care recommendations.

V. Treatment Records and Clinical Notes

8. Does anything in Ms. [redacted] (to include records of medical procedures, treatment records, or clinical notes associated with Ms. [redacted] indicate that:
    a. Ms. [redacted]
    b. Ms. [redacted]
    c. Ms. [redacted]
    d. Ms. [redacted] had concerns about her emotional or psychological well-being?
    e. Ms. [redacted] in calendar year 2023 and early 2024?

So ORDERED this 27th day of March 2025.

[redacted]
R. C. LIPTON
Lieutenant Colonel, U.S. Marine Corps
Military Judge

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

UNITED STATES v. DAKOTA S. HONSTEIN Sergeant / E-5 U.S. Marine Corps	DEFENSE MOTION TO SUPPRESS (Accused's Statements to NCIS) **COURT'S RULING** 7 April 2025

1. **Nature of Motion**. The Defense moves this Court to suppress all statements, confessions, and admissions made by the Accused during his 27 January 2024 NCIS interrogation, as well as all evidence derived therefrom pursuant to Rule for Courts-Martial (R.C.M.) 905(b)(3), Military Rule of Evidence (M.R.E.) 304, and M.R.E. 305. The Government opposes the motion. After considering the briefs, supporting evidence, arguments from counsel, and applicable law, the Court **DENIES** the Defense motion as detailed below.

2. **Findings of Fact**. The Court finds that the preponderance of the evidence supports the following factual findings:

a. In the days leading up to the death of Ms. [redacted] the Accused mentioned to multiple people through text message that he was tired and not sleeping frequently. He told Ms. [redacted] that he averages 26-28 hours of sleep per week.[1]

b. At approximately 0700 on 27 January 2024, the Accused allegedly shot and killed Ms. [redacted] with a pistol in his Wallace Creek barracks room aboard Marine Corps Base, Camp Lejeune.

c. After alerting other Marines to the situation, the Accused was subsequently arrested by Provost Marshall Officers (PMO).

d. At approximately 1200 on 27 January 2024, the Accused was brought into an NCIS interrogation room. NCIS recorded the interrogation.

e. NCIS Special Agents (SA) [redacted] and [redacted] conducted the interrogation of the Accused.

f. After the Accused was first placed in the interrogation room, the Accused was left in the room by himself and with a bottle of water.

[1] Enclosure (1) to Defense motion to Suppress.

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g. For the first twenty-four minutes it is apparent that the Accused nodded off to sleep several times. Each time he fell asleep, a short period of time later his body would jump or twitch, and he would wake up.

h. At the twenty-four-minute mark, the Accused was provided with a full meal and a soft drink from Raisin' Caines. From the interrogation video and audio, the meal appears to include chicken tenders, sides, and dipping sauces. He was provided time to eat the full meal, which took approximately 10 minutes.

i. When asked by SA [redacted] if he needed anything else, to include whether he needed to use the restroom. In response, the Accused replied, [redacted]

j. At the thirty-seven-minute mark, the Accused was provided with the opportunity to use the restroom and the opportunity to smoke using his vaping device.

k. The Accused returned to the interrogation room at the forty-two-minute mark. Between then and the forty-seven minute mark, the Accused appeared to nod off to sleep a couple of times. On these occasions it appears that he twitches his head, but it is unclear whether he is twitching his head to keep himself awake or whether his head is twitching as a result of waking up from falling asleep.

l. The Agents enter the room to begin the interrogation at the forty-eight-minute mark.

m. In response to a question about what he wanted SA [redacted] and SA [redacted] to call him, the Accused listed several names including " [redacted] SA [redacted] and SA [redacted] declined to call the Accused " [redacted] and chose to address him as "Dakota," the Accused's first name. Throughout the interrogation, the agents refer to him as Dakota, and not as Sergeant Honstein or Sergeant.

n. The Accused provided SA [redacted] and SA [redacted] with basic biographical information. At one point, SA [redacted] ask the Accused if his birthday was [redacted] which led the Accused to correct him with his actual date of birth.

o. To initiate the right warning discussion, SA [redacted] explained, [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

r. As SA [redacted] read each right out loud and the Accused initialed next to each right on the rights advisement form.

[redacted]

The final part of the rights advisement form that was read to the Accused stated, [redacted]

t. The Accused then provided SA [redacted] and SA [redacted] with his version of the events that took place beginning on the night of 26 January 2024 and continuing through the morning of 27 January 2024.

u. As the Accused described the events after the shooting, the Accused informed the SA [redacted] and SA [redacted] that he suffered a panic attack while still on the scene.

[2] Though not captured by the transcript, from the video, it also sounds to this Court, more likely than not, that the Accused said, [redacted] immediately after SA [redacted] conveyed that the *charges* are not the [redacted]

v. The Accused then [redacted] hospital several weeks prior to the shooting.

w. Later, SA [redacted] asked the Accused if he was still suffering or had suffered from a panic attack since being in the NCIS interrogation room to which the Accused said no but that he [redacted] This exchange prompted SA [redacted] to ask, [redacted] The Accused responded in the affirmative.

x. Multiple times throughout the interrogation, the Accused was given opportunities to take a break from questioning to go to the bathroom and vape.

y. In response to a question concerning who loaded the pistol, the Accused answered that Ms. [redacted]' while he was in the bathroom due to an alleged adrenaline rush.

z. The Accused stated that he had previously found that Ms. [redacted] had loaded the pistol and that he unloaded it afterwards, including emptying the chamber. However, the Accused also said that he did not notice a weight difference in the pistol when he returned from the bathroom or check to see if it was loaded because he trusted Ms. [redacted]

aa. When further pressed on this issue, the Accused reaffirmed his position over the course of the interrogation that Ms. [redacted] loaded the pistol.

bb. At multiple points during the interrogation, the Accused professed that he was not careful in this particular instance, despite having allegedly engaged in gun play dozens of times.

cc. SA [redacted] and SA [redacted] informed the Accused that his pistol and magazine would be forensically tested for DNA and fingerprints and questioned whether they would find Ms. [redacted] DNA.

dd. At that point, SA [redacted] asserted, [redacted]

ee. SA [redacted] then asked four separate times whether the Accused was lying, which prompted the Accused to say each time that he was telling the truth.

ff. Later in the interrogation, the Accused admitted that *he* was the one who in fact loaded the pistol. SA [redacted] questioned whether the Accused was [redacted] in order to get SA [redacted] and SA [redacted] to stop [redacted]

gg. The Accused responded [redacted]

hh. When asked why he loaded the pistol, the Accused stated, [redacted]

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ii. The Accused then signed a Permissive Authorization for Search and Seizure (PASS) for both his cell phone and rental vehicle. The Accused acknowledged that his decision was made freely and voluntarily, with no threats having been made or promises extended to him.

jj. The total length of the recording is approximately five hours and forty minutes. The interrogation concluded at the four-hour and twenty-eight-minute mark. Accordingly, accounting for the first forty-eight minutes where the Accused is primarily in the interrogation room by himself, the total length of the interrogation is approximately three hours and forty minutes.

kk. During the Article 39(a) session where the parties litigated this motion, the Defense offered the testimony of Colonel (Col) (Dr.) [redacted] U.S. Air Force who the parties stipulate, and this Court recognizes, is an expert in the field of forensic psychiatry. For purposes of this ruling's findings of fact, the Court accepts the entirely of her testimony, both during her direct-examination, and cross-examination, as true, more likely than not. The Court summarizes some key points from her testimony in the findings of fact that follow, however neither party nor any reviewing authorities should interpret the Court's decision to not include below any particular portion of Col [redacted] testimony as any indication that this Court did not consider or accept as true any portion of her testimony.

ll. Col [redacted] explained that the field of forensic psychiatry accepts that there are *personal* risk factors that can make an individual more susceptible to provide a false confession. These are (1) cognitive impairment; (2) age; and (3) personality traits. Col [redacted] also explained that *situational* risk factors that can make an individual more susceptible to providing a false confession. Col [redacted] offered that these personal and situational risk factors are cumulative, meaning that the more risk factors that are present—both situational and personal—the greater the susceptibility there is to an individual providing a false confessions. However, she also explained that susceptibility is individualized because "everyone is different and every individual is different."

mm. She did not opine on the presence of any particular personal or situation risk factors present in this case.[3]

nn. She did not opine on whether any statement of the Accused was more or less likely to be false, or the product of a false confession.

oo. At the time of her testimony, Col [redacted] had no opinion on whether any statement of the Accused was more or less likely to be voluntary.

pp. Col [redacted] discussed the impact of psychological coercion and pressure. Additionally, she did not opine on whether the presence of any psychological pressure in this case impacted the Accused's responses. Instead, when asked how repeated accusations of lying by interrogators might impact a suspect's willingness to confess, she explained that every

[3] While on the record, the Court noted this, discussed with the parties, and intended to ask Col [redacted] these questions. Col [redacted] offered that she had opinions on the presence of risk factors. However, it became clear that the Defense specifically intended to avoid this line of inquiry with Col [redacted]

individual is different, "but *if* accusations of that nature led someone to feel that ... psychological pressure, and that psychological pressure were to lead someone to feel unable to resist, that would impact or limit their ability to, kind of, make those decision making capacities. And those decision-making capacities, if they were limited or broken, would increase someone's risk for making a false statement."

qq. Col [redacted] also offered that invoking a victim's family is a type of psychological coercion that plays on one's emotional vulnerably. She explained that "applying that pressure or stress to an individual that would potentially overwhelm their, kind of, brain functioning, their decision-making capacity, and making them at a higher risk to make a false statement."

rr. Col [redacted] also discussed how sleep deprivation would also create a higher risk that someone makes a false statement.

ss. Additional findings of fact necessary to the resolution of this matter are included in the Court's analysis below.

3. **Statement of the Law**

The Fifth Amendment to the United States Constitution provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself."[4] In *Miranda v. Arizona*, the Supreme Court explained that "without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely."[5]

"In order to combat [the] pressures [of custodial interrogation] and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored."[6] To comply with *Miranda*, an accused subject to custodial interrogation must be advised of the following: (1) the right to remain silent, (2) that anything said can and will be used against the suspect in court, (3) the right to consult with an attorney prior to questioning, and (4) the right to have counsel present during any questioning.[7] Moreover, the suspect must also be advised that "if he is indigent a lawyer will be appointed to represent him."[8] When subject to custodial interrogation, the requirement to receive these *Miranda* warnings applies equally to Servicemembers as it does to civilians.[9]

After being properly advised of their *Miranda* warnings, a suspect may choose to waive such rights. "The requirement of warnings and waiver of rights is [] fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of

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[4] U.S. CONST. amend. V.
[5] Miranda v. Arizona, 384 U.S. 436, 467 (1966).
[6] *Miranda*, 384 U.S. at 467.
[7] *Id.* at 478-79.
[8] *Id.* at 473.
[9] See United States v. Tempia, 16 U.S.C.M.A. 629, 631 (C.M.A. 1967).

interrogation."[10] "[An] accused's statement during a custodial interrogation is inadmissible at trial unless the prosecution can establish that the accused in fact knowingly and voluntarily waived *Miranda* rights."[11] With respect to waiver:

> *Miranda* holds that '[the] defendant may waive effectuation' of the rights conveyed in the warnings 'provided the waiver is made voluntarily, knowingly and intelligently.' The inquiry has two distinct dimensions. First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation' reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.[12]

An inquiry under a totality of the circumstances approach must consider "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."[13] Additionally, the "use of trickery, artifice, and subterfuge in obtaining a waiver of rights or in dissuading invocation of rights in not permissible."[14] "If [an] interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel."[15]

"Article 31, like the Fifth Amendment, focuses on testimonial compulsion."[16] Going a step further than the warnings covered under *Miranda*, Article 31(b) necessitates that the accused be informed of "the nature of the accusation."[17] Article 31(b) warnings are required when: "(1) a person subject to the UCMJ, (2) interrogates or requests any statement, (3) from an accused or person suspected of an offense, and (4) the statements regard the offense of which the person questioned is accused or suspected."[18]

> "Advice as to the nature of the charge need not be spelled out with the particularity of a legally sufficient specification; it is enough if,

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[10] Moran v. Burbine, 475 U.S. 412, 452-53 (1986) (citing *Miranda*, 384 U.S. at 476); *see e.g.* Hart v. Attorney Gen. of the State of Fla., 323 F.3d 884, 894-95 (11th Cir. 2003), *cert. denied*, Christ v. Hart, 540 U.S. 1069 (2003).
[11] Berguis v. Thompkins, 560 U.S. 370, 382 (2010) (citations omitted).
[12] *Burbine*, 475 U.S. at 421 (citations omitted).
[13] United States v. Ellis, 57 M.J. 375, 379 (C.A.A.F. 2002).
[14] United States v. Patterson, 2024 CCA LEXIS 130, n. 62 (citing United States v. Erie, 29 M.J. 1008, 1012 (citations omitted) (A.C.M.R. 1990)).
[15] *Miranda*, 384 U.S. at 475 (citing Escobedo v. Illinois, 378 U.S. 478, 490, n. 14. (1964)).
[16] United States v. Williams, 23 M.J. 362, 366 (C.M.A. 1987).
[17] 10 U.S.C. § 831(b) (2021).
[18] United States v. Harpole, 77 M.J. 231, 236, (C.A.A.F. 2018) (citing United States v. Jones, 73 M.J. 357, 361 (C.A.A.F. 2014) (footnote omitted) (citation omitted)).

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> from what is said and done, the accused knows the general nature of the charge. A partial advice, considered in the light of the surrounding circumstances and the manifest knowledge of the accused, can be sufficient to satisfy this requirement of Article 31, supra."[19]

Similar to the protections afforded by *Miranda*, Article 31(d) prohibits the introduction of statements from suspects obtained "in violation of [Article 31], or through the use of coercion, unlawful influence, or unlawful inducement into evidence.[20]

When the defense has made an appropriate motion or objection under M.R.E. 304, the prosecution has the burden of establishing the admissibility of the evidence.[21] As such, the burden of persuasion rests on the Government for this motion. The standard as to any factual issue necessary to resolve this motion is to a preponderance of the evidence.[22]

4. **Analysis and Conclusions of Law**

In this case the Accused was subject to custodial interrogation, thereby triggering the Accused's Fifth Amendment rights against self-incrimination and NCIS's responsibility to advise the Accused of those rights consistent with *Miranda* and Article 31 prior to conducting any questioning. Consistent with the issues raised by the Defense, This Court must consider: (1) whether the Accused made a voluntary, knowing, and intentional waiver of his Fifth Amendment and Article 31(b) rights and, if so, (2) whether the NCIS agents coerced the Accused's statement that he loaded the pistol used in the shooting death of Ms. [redacted]

The Rights Waiver

In addressing whether the Accused voluntarily, knowingly, and intentionally waived his Fifth Amendment and Article 31 rights, the Court examines the totality of the facts and circumstances in this case.[23] Here, the preponderance of the evidence supports the conclusion that the Accused had a full awareness of the of the nature his rights being abandoned and a full awareness of the consequences of the decision to abandon his rights. The preponderance of the evidence supports the conclusion that the Accused voluntarily, knowingly, and intentionally waived his rights.

Contrary to the Defense's contention, This Court is not persuaded that the agents "portrayed [the Accused's] rights as unimportant." The Agent said, "[n]ow at the very beginning, I have to read you the charges, okay? We're not saying that this is the end-all, be-all. This is just what we have to read you, where we're at right now. Okay?" He then said, "[s]o, if it seems painful, it is what it is. We just got to read it and get through it. Okay?" In response, the Accused said, "[i]t's going to be painful. In response, SA [redacted] asked, "[a]ll right. Does that

[19] United States v. Davis, 8 U.S.C.M.A. 196, 198 (C.M.A. 1957) (citations omitted).
[20] 10 U.S.C. § 831(d) (2021).
[21] Mil. R. Evid. 304(f)(6).
[22] Mil. R. Evid. 304(f)(7).
[23] *See Burbine*, 475 U.S. at 421 (citations omitted).

make sense, Dakota?," to which the Accused responded, "[y]es, sir." In this Court's view, these comments were not an attempt by the agents to trivialize the Accused's rights advisement. Reviewing the entire interaction, to include the Agent's body language, it is apparent that the Agent was attempting to decrease the potential shock to the Accused of being told that he was suspected of murder and manslaughter. However, the Agents in no way attempted to convey to the Accused that he was *not* suspected of serious crimes, or that he should *not* take the rights advisement seriously. The Agent made clear that "if it seems painful [the hear the charges], it is what it is." And, the Agent proceeded to advise the Accused that he was indeed suspected of both murder and manslaughter. The Agent then proceeded to discussion each of the rights on the advisement form with the Accused. The Accused signaled his understanding by initialing next to next to each right that was read to him.

As outlined in the facts above, the Accused asked a specific question about having a lawyer present for the interrogation. After receiving a response from SA [redacted] the Accused asked two follow-up questions. This exchange is important for two reasons. First, SA [redacted] responses were consistent with the law. He made clear that if the Accused asked for a lawyer, the interview would be terminated and the Accused would be given the opportunity to hire a civilian lawyer or to be appointed a military lawyer. He did not attempt to deceive the Accused by downplaying the significance of the Accused's right to counsel. Second, this exchange highlights the Accused's level of mental engagement during the rights advisement. It is apparent to this Court that the Accused comprehended the rights read to him and that he was deliberately weighing his choices. After being advised of his rights in accordance with the law, the preponderance of the evidence supports the conclusion that the Accused voluntarily, knowingly, and intentionally waived those rights.

Throughout the interrogation, the Accused demonstrated an unmistakable ability to perceive and appreciate his circumstances and the agents' questions. The Accused's miscellaneous remarks concerning topics like his vape, phone bill, pool skills, and rental car do not demonstrate an inability to understand the full implications of waiving his rights. While the Accused also uses questionable, profane language, including [redacted] from the outset of the interrogation, the Court does not believe that this behavior demonstrates that the Accused lacked the ability to understand his rights. Nor does the Accused's desire to "get [it] over and done with" indicate that he did not appreciate the gravity and consequences of waiving his rights. Although the Accused said, [redacted] as he signed the rights advisement form and waived his rights, this happened only after the Agents properly answered the Accused's questions concerning his right to counsel and the Accused's deliberation on whether to waive that right—the Accused pause for approximately four seconds before uttering [redacted] and signing the document. Despite the accompanying profanity, in this Court's view the entire exchange indicates that the Accused deliberately weighed his choices. As the Accused said, [redacted] and voluntarily signed the document, the Agents immediately sought clarification on whether the Accused understood his rights and whether he wished to speak with them.

The Court does not discount the evidence that suggests the Accused was not sleeping well in the days leading up to the interrogation. However, the Court is not persuaded that any sleep deprivation casts doubt upon the voluntarily, knowing, and intentional nature of the Accused's rights waiver. The Accused's level of engagement during the rights advisement, to

include specific question the Accused had about the impact of invoking his right to counsel, convinces this Court that despite any sleep deprivation, the Accused understood his rights and had the capacity to waive them.

In sum, considering the totality of the circumstances, the Court is satisfied that the Government has shown by a preponderance of the evidence that the Accused's waiver of his rights preceding the interrogation was knowing, intelligent, and voluntary.

Coercion

Turning now to whether the Agents coerced the Accused into admitting that he loaded the pistol that he used to shoot the victim, the Court again considers the totality of the circumstances.[24] Having done so and for the reasons explained below, the Court finds that the Accused's will was not overborne and that his statements were indeed the product of an essentially free and unconstrained choice.[25]

At the time of the interrogation, the Accused was an educated, [redacted] sergeant of Marines. There is no evidence that suggests that the Accused had low intelligence or cognitive deficiencies, albeit the Defense posits that the Accused was more impulsive on the basis that, generally, [redacted] do not have a fully-developed brain. While there is no explicit evidence regarding the Accused's precise level of education, he held the rank of Sergeant (E-5). Advancement to this rank typically requires a demonstrated ability to exercise leadership, make informed decisions, and adhere to military protocols, all of which suggest a capacity for responsibility and comprehension that is inconsistent with the claim of diminished cognitive function. Moreover, the coherent and comprehensive nature of the Accused's responses to the Agents' questions throughout the interrogation indicate that the Accused is intelligent and was capable of comprehending the nature of the Agents' lines of inquiry.

The Court acknowledges that the evidence suggests the Accused was sleeping poorly in the days and hours leading up to the interrogation. However, in this Court's view, the Accused's sleep deprivation does not convince this Court that the Accused's statements were the product of coercion. The Accused never indicated—explicitly or otherwise—that he was fatigued to the point of incoherence. At one point, the Agent's sought clarity on the Accused's [redacted] The Accused said, [redacted] The Agent then asked, [redacted] In response the Accused said, [redacted] In response, the Agent said, [redacted] In response, the Accused said, [redacted] The agent then proceeded to explain to the Accused that the purpose of asking these questions was to ensure that the Accused was [redacted] The Agent then said, [redacted] In response, the Accused provided a non-verbal nod of his head, indicating that he understood the Agent's

[24] *See Burbine*, 475 U.S. at 421 (citations omitted).
[25] *See* United States v. Freeman, 65 M.J. 451, 453 (C.A.A.F. 2008).

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line of inquiry. The act of posing these questions demonstrates an effort by the Agent to ensure that the Accused was in a condition to engage meaningfully and coherently during the interrogation.

In this Court's view, the Accused's reference to him nodding off in the interrogation room was not intended to suggest to the Agents that he was falling asleep *during the interrogation*. Instead, the Accused was referring to him nodding off at multiple points during the 48 minutes he was alone in the room before the interrogation began. This makes the most logical sense considering the Accused's comment that he was sure the Agents saw it on the camera; it would not have been possible for those Agents to simultaneously observe the Accused in front of them and observe him on the camera. Indeed, during his in-court testimony, SA [redacted] confirmed that if he ever witnessed a suspect nodding off during an interrogation, he would terminate the interrogation.

The Court appreciates that the Accused subjectively viewed the environment as "intimidating." He was in law enforcement's custody, and he was brought to the interrogation room in handcuffs initially. At the outset the Accused certainly understood that he was the primary suspect in the victim's death. At the particular point during the interrogation when the Accused described the environment as "intimidating," based on the nature of the Agents' questions and the tones of their voices, the Accused also understood that the Agents didn't believe the entirety of his version of events. They challenged his narrative. For these reasons, it is not unexpected that he felt intimidated by the environment. The requirement for the advisement of *Miranda* rights and Article 31(b) rights is premised upon the law's recognition of the inherently intimidating feeling of being in police custody and, in the case of military suspects, being subject to questioning by superior military authorities. The advisement of these rights ensures that suspect, and military suspects, are able to make knowing, voluntary, and intelligent decisions. However, it is neither expected nor required that a rights advisement or a law enforcement agents' conduct, removes from existence an Accused's subjective belief that the environment of the interrogation is intimidating.[26]

Consistent with Col [redacted] testimony, the Court recognizes that there are many faces that coercion may take. And here, the Court does not discount the Accused's subjective feeling that the environment was intimidating. However, objectively, the Court does not find that the Agents' conduct created an environment that led to any coerced statements. No doubt the Agents challenged the Accused's narrative concerning who loaded the firearm. And no doubt their tone became more assertive when they challenged him. However, the Agents were generally respectful throughout the interrogation. The Agents did not deprive the Accused of food and beverages. To the contrary, they created an environment where they took breaks, provided the Accused the opportunity to use the restroom, provided the Accused water and sodas, provided the Accused the opportunity to smoke his vaping device, and provided him a full meal before the interrogation began. The Agents kept reasonable verbal volumes throughout the interrogation. They did not scream at the Accused, nor did they engage in any other degrading behavior. They maintained reasonable physical distances from the Accused throughout the interrogation. The Agents did not use or threaten the use of physical force, nor did they promise

[26] Despite being advised earlier that he could terminate the interrogation "at any time, for any reason," the Accused did not terminate the interrogation at this point or at any other point.

the Accused anything. Additionally, and as explained above, the Court does not discount the Accused's lack of sleep leading up to the interrogation. However, unlike *Ashcraft* where the suspect's interrogation lasted thirty-six hours, the Accused's interrogation lasted approximately three hours and forty-eight minutes.[27] Considering the coherent and comprehensive nature of the Accused's responses to the agents' questioning, the Court is convinced that any lack of sleep did not result in statements that were the product of coercion.

No doubt the Agent's tone became more assertive when SA [redacted] said, [redacted] He also told the Accused that he [redacted] He also invoked the victim's family and the trauma that the Accused would have to endure for the rest of his life. The Agents explained how the evidence in the Accused's room, to include the firearm, would be collected and tested for DNA and fingerprints. The Agents made it clear that they could not reconcile how the Accused would not have known that the firearm was loaded. They each explained how in their view, that part of his narrative—that the victim must have loaded the firearm—did not make logical sense when considering other portions of the Accused's narrative. SA [redacted] told him that this was [redacted] SA [redacted] then said:

[redacted]

The Accused then said, [redacted] In response, SA [redacted] said, [redacted]

[27] Ashcraft v. Tennessee, 322 U.S. 143, 150, n. 6 (1944) (citation omitted).

Considering the totality of the circumstances, the Court is not convinced that the strategies employed by the Agents led to the Accused's will being overborne. The Accused was not coerced into making the statement that he loaded the pistol and that his prints would be everywhere. Instead, the Accused proffered these incriminating statements on his own volition after being reasonably challenged by the Agents regarding the illogic nature of his previous narrative. Accordingly, those statements and the ones that followed were the product of an essentially free and unconstrained choice by their maker—the Accused—and were therefore, voluntary.

Despite the conclusion above, the Court appreciates the import of the portion of the interrogation where SA [redacted] cognizant of the fact that the Accused reversed his position after the change in tactics, said, "[redacted] And in response, the Accused said, [redacted] The Court recognizes that one might credibly argue that this suggests that the Accused's statement that he loaded the pistol is untrue. Though the Court does not find that the Accused's statements are the product of coercion for purposes of this interlocutory matter, the factfinder, through evidence and argument, will be permitted to determine which version of events is true, if any.[28]

The Cleansing Warning

Relevant to both the waiver and voluntariness of the subsequent statements, the Court acknowledges that the cleansing warning could have been delivered more effectively. Neither SA [redacted]s cleansing advisement[29] before reading the advisement form, nor the language on the advisement form[30] truly capture the purpose and essence of a cleansing warning, which is to advise an accused that "that a previous statement cannot be used against him."[31] It is not apparent to this Court that the Agents or the Accused had any reason to believe that any particular prior statements he made were illegally obtained. Instead, it appears that the agents provided these warnings in an abundance of caution because they knew the Accused made prior statements generally. Regardless, the Court finds that the cleansing warning met the minimum requirements. Even assuming *arguendo* the cleansing warning was defective, such a determination is not fatal.[32] In considering the totality of the circumstances, the Court does not find that a defective cleansing warning in this case tips the scale in favor of a finding that the Accused's rights

[28] This is in recognition of the distinction between a *coerced* confession—an admission that is not voluntary—and a *false* confession—an admission that although voluntary and not illegally obtained, may nevertheless be untruthful and therefore, false. *See also* Military Judge's Benchbook Instruction 4-1.

[29] SA [redacted] explained, [redacted] He further explained, [redacted]

[30] The form states, [redacted]

[31] United States v. Brisbane, 63 M.J. 106, n. 9 (C.A.A.F. 2006) (citing United States v. Cuento, 60 M.J. 106, 109 (C.A.A.F. 2004)).

[32] *See* United States v. Gardinier 65 M.J. 60, 64 (C.A.A.F. 2007).

waiver was not knowing, voluntary, or intelligent, or that the Accused's subsequent statements were not voluntary. Concerning the later, the Agents, when challenging the Accused's narrative, did not rely on any of the Accused's prior unwarned admissions, to include those limited statements the Accused made to Sergeant [redacted] that this Court suppressed.

5. **Ruling.** The Defense motion is **DENIED**.

So ORDERED this 7th day of April 2025.

[redacted]

R.C. LIPTON
Lieutenant Colonel, U.S. Marine Corps
Military Judge

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

UNITED STATES V. Dakota S. HONSTEIN Sergeant / E-5 USMC	**Court's Ruling** Defense Motion to Dismiss Violation of Article 10 and R.C.M. 604(b) 9 April 2025

1. On 13 December 2024 the Defense moved this Court to Dismiss with prejudice all charges and specifications on the grounds that the Government violated Article 10, UCMJ and Rule for Courts-Martial 604(b). The Government filed its written response on 20 December 2024. After considering the parties' written filings, evidence in support thereof, oral argument, and the applicable law, this Court **DENIES** the Defense motion as detailed below.

2. **Findings of Fact**. The preponderance of the evidence supports the following factual findings:

a. On 27 January 2024, the Government placed the Accused into pretrial confinement.

b. Shortly thereafter, in January of 2024, the Accused formed an attorney-client relationship with his two detailed defense counsel, Capt Carson and Captain Lipositz.

c. On 6 August 2024, the prior Court arraigned the Accused on the originally-preferred and referred charges. That Court docketed trial on the merits for 28 October 2024 – 8 November 2024.[1]

d. On 13 September 2024, the Defense moved the prior Court to issue a ruling concerning a variety of instructions the Court would be required to provide the factfinder, assuming the Accused elected to be tried by a Court composed of members. On 20 September 2024 the Government filed its written response. On 23 September 2024 the parties litigated these issues during an Article 39(a), UCMJ session of court. During that session it became apparent that the parties maintained divergent views of the law with respect to precisely *what* inherently dangerous act the Government must prove the Accused committed. During the 23 September 2024 proceeding, the Court, based on the language the Government included in the specification, articulated its inclination to instruct in such a way to require the Government to prove that the Accused committed the intentional act of "shooting [Ms. [redacted]] with a firearm." After the Government expressed its disagreement, that Court ordered supplemental briefing on that particular issue. The Government filed its supplemental brief on 27 September 2024. The Defense filed its response brief on 4 October 2024.

e. On 15 October 2024, that Court issued a written ruling, finding that in order to prevail on the sole specification of Charge I, the Government must prove, beyond a reasonable doubt, that the Accused intentionally committed the inherently dangerous act of "shooting [Ms. [redacted] with a firearm."

[1] The military judge detailed to that court-martial is the same military judge detailed to this court-martial.

f. On 17 October 2024, the Government filed a written motion seeking permission from that prior Court to make a "minor change" to the sole specification of Charge I as follows:

> **Specification**: (*Murder - Act Inherently Dangerous to Another*): In that Sergeant Dakota S. Honstein, U.S. Marine Corps, on active duty, did, onboard Marine Corps Base Camp Lejeune, on or about 27 January 2024, murder [redacted] by means of ~~shooting her with a firearm~~ intentionally pulling the trigger of a loaded firearm while pointing it at her.

g. On 20 October 2024, the Defense filed its written opposition, arguing that the Government's proposed change amounted to a *major* change.

h. On 23 October 2024, that prior Court DENIED the Government's motion, ruling as follows:

> Minor Change: the Court DENIES the Government's motion to make [the] change requested in its 17 October motion. This was a close call, but the Court finds that the proposed change does add "a substantial matter not fairly included in the preferred charge." The Court thoroughly considered the Government's argument that the change would be akin to a lesser offense. The Court acknowledges that the inherently dangerous act proposed may be an act that avers a lesser degree of culpability (less depravity) than the inherently dangerous act pled. However, the Court's concern is that by changing the inherently dangerous act, the Government would be doing more than merely adjusting the offense to reflect a lesser offense; the change would make the specification a different offense. As the Defense noted in its written response, the Government is certainly free to withdraw, dismiss, and []re-prefer.[2]

i. On 26 October 2024, the Government provided notice to that prior Court that the referral authority directed the withdrawal and dismissal all charges and specifications, with the intent to re-prefer and re-refer an Article 118(3) specification with the inherently dangerous act pled as proposed by the major change.

j. On 26 October 2024, the Government preferred and referred to this court-martial a new Article 118(3) offense and re-preferred and re-referred identically-drafted Article 119 and Article 92 offenses along with it. Also on 26 October 2024, the Government served these referred charges on the Accused.

k. On 28 and 29 October 2024, this Court articulated to the parties its intent to maintain the trial dates docketed at the prior court-martial and to conduct trial during the week on 4-8 November 2024. However, the Court expressed its openness to the possibility that newly-raised issues may create the need to docket trial for a later date.

l. This Court held an Article 39(a) session on 1 November 2024, with the intent to arraign the Accused and to litigate a variety of issues raised by the parties.[3] Ultimately, this Court did not arraign the Accused on the newly-preferred and referred charges. During that session the Defense presented this Court with a proposed trial management order which, if granted, would have docketed trial in this case for early-February 2025. However, the Defense was unable to validate the availability of their experts for the

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[2] *See* App. Ex. L of first court-martial record of trial.

[3] Notably, at the beginning of the 1 November 2024 session, Capt Carson articulated that he and Capt Lipositz were both detailed to represent the Accused by the "then Chief [Defense] Counsel of the Marine Corps, Colonel John Stephens." This Court interprets that statement to assert that the attorney-client relationship between the detailed defense counsel was not severed upon the government's dismissal of charges on 26 October 2024.

dates requested. Nevertheless, the Defense persuaded the Court that in order facilitate necessary defense preparation, the trial would need be docketed for dates beyond 20 November 2024—the date the Accused's lead detailed defense counsel, Capt Paul Carson, was scheduled to complete his active-duty service.[4]

m. Capt Carson's 20 November 2024 End of Active Service (EAS) was made known to the prior Court during the arraignment on 6 August 2024. At that time, he was tentatively scheduled to begin work in the Federal Public Defender's Office in Los Angeles, California, shortly after his EAS. Sometime after 6 August 2024, Capt Carson's future employment plans changes. He informed this Court that he was scheduled to begin work in the Federal Public Defender's Office in Miami, Florida on approximately 30 December 2024.

n. Capt Carson explained to this Court that the Marine Corps offered him career designation—the opportunity to remain on active duty beyond his EAS—and that he declined that offer.

o. On 1 November 2024, the Court conducted a colloquy with the Accused concerning the trial dates proposed by the Defense team. In sum, the Accused explained that if having to choose between more time to prepare for trial and going to trial with Capt Carson representing him, the Accused preferred to have more time to prepare for trial. However, the Accused still expressed his preference that both Capt Carson and Capt Lipositz continue to represent him.

p. While on the record on 1 November 2024, Capt Carson asserted that he advised the Accused about the options for continuing representation to include either postponing his date of separation or by serving as the Accused's defense counsel in a reserve status. Capt Carson also explained to this Court that he advised the Accused "about the potential conflicts … that would potentially arise out of that course of action." This Court asked Capt Carson to explain those potential conflicts, and in response, Capt Carson said, "[e]ssentially … there would be a conflict of interest between me resuming my civilian career, starting a new job if I was put on active duty orders or something like that. Obviously, my -- my interest may not align with my client in that situation." Capt Carson went on to explain:

> "Your Honor, I'll just also add that we -- we discussed the fact that, as lead counsel, I have a specific role. Even if it was possible to do that with a new career and the move and everything, it wouldn't be appropriate for me to -- to remain in that role as lead counsel. So we also talked about my specific role as counsel or part of the defense team, but even if that was possible, there's still the conflict."

q. On 1 November 2024, Capt Lipositz also made the Court aware that he was scheduled to rotate out of the Defense Services Organization (DSO) in early-December 2024. In particular, Capt Lipositz

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[4] Importantly, the prior Court denied the Defense motion to suppress the Accused's statements to NCIS. One of the Defense arguments on 1 November 2024 was that the newly pled inherently dangerous act (intentionally pulling the trigger of a loaded firearm while pointing it at Ms. [redacted]) necessarily changes the Defense's anticipated trial strategy. In particular, should *this* Court also not suppress the Accused's statements to NCIS, the Defense anticipates the need to consult with an expert in the field of false confessions to explore the possibility of contesting the truth of the Accused's concession that he *knew* the firearm was loaded when he pointed it at Ms. [redacted] and pulled the trigger—a statement that contradicts his earlier assertions during the interrogation. At the prior court-martial, the Defense was not concerned with advancing this theory because the Defense was confident of the Government's inability to prove the Accused's intent to shoot Ms. [redacted] On 1 November 2024 the Defense also asserted that it intended to consult with a false confession expert for purposes of considering whether to present evidence on the interlocutory issues surrounding suppression—evidence that the Defense did not present when it litigated the suppression motion at the prior court-martial.

was scheduled to execute orders to Fort Meade, Maryland to serve in the Office of the Staff Judge Advocate (OSJA) for Marine Corps Forces Cyber Command (MARFORCYBER). During that session, Capt Lipositz stated that he intended to arrange for conflict-free counseling for the Accused so that the Accused could determine whether he still desires to be represented by Capt Lipositz following his change of billet.

r. During the Accused's subsequent colloquy with the Court on 1 November 2024, the Accused unequivocally expressed his desire to retain Capt Carson as a member of his defense team. The Accused explained that he did not consent to Capt Carson's excusal under R.C.M. 506(c). Subsequently, Capt Carson orally moved the Court to withdraw from representation under R.C.M. 506(c). Capt Carson's stated good cause for requesting withdrawal was "the withdrawal and dismissal of the charges and re-referral in conjunction with [his] EAS."

s. This Court denied Capt Caron's motion for withdrawal, reasoning that the combination of his pending completion of active service, his role as lead counsel in this case, the existence of the attorney-client relationship since January of 2024, and the seriousness of the charged offenses, when considered together, did not amount to good cause. The Court then expressed its expectation that: (1) Capt Carson be present at all future sessions of court; and (2) that the United States Government ensure Capt Carson's presence at all future sessions of court. Additionally, this Court also offered Capt Carson the opportunity to re-raise his R.C.M. 506(c) application for withdrawal in writing, with accompanying evidence. Capt Carson indicated that he intended to do so.

t. Also during the 1 November 2024 session, this Court GRANTED IN PART a Defense motion to dismiss due to improper referral for the lack of an Article 32 preliminary hearing for the newly-preferred Article 118(3) charge. Accordingly, after that ruling, Charge I and its sole specification were no longer before this Court, but Charges II and III continued to be referred to this Court.

u. On 6 November 2024, the Government requested this Court author a written order pertaining to Capt Carson's need for continued military service and representation of the Accused. At that time, the Government explained that it was provided "some indication" by a higher authority that a Court Order would be necessary to maintain Capt Carson on active duty beyond his EAS.[5] On 7 November 2024, Capt Carson objected to the Government's proposed order and also explained: "The DSO leadership has indicated that it is their current intention to sever my representation of Sgt Honstein, against his wishes, upon my contractual EAS date." Also on 7 November 2024, Capt Carson explained to the Court:

> "I understand that my representation of Sgt Honstein remains in effect until I am properly severed. However, I remain concerned about the continuing conflict this Court's denial of my severance request has forced. It continues to be the position of the defense that my personal and professional interests are no longer in line with that of my client's based on the Government's withdrawal and referral of amended charges on 26 October. The defense continues to request that the Court grant my application for severance."[6]

v. On 8 November 2024, the Government provided the Court with the following update:

> "[T]he Government has not been able to locate a source of authority to involuntarily extend an officer's EAS outside of legal hold. While there are ample options for extending EAS voluntarily or facilitating travel and TAD through ADOS orders from the reserves, all viable options would require an action by the Officer to initiate those

[5] *See* App. Ex. XXVII.
[6] App. Ex. XXVII.

avenues. Knowing all these options, if the DSO serves the relationship, without consent of the Accused, that is a DSO choice. The Government is willing to facilitate Capt Carson's presence through any voluntary means noted above."[7]

In light of that update, the Government also asked the Court to "rescind[] any previous direction or expectation that the Government involuntarily extend Capt Carson's EAS."[8]

w. In response, on 8 November 2024, the Court asked Capt Carson, whether he was "unwilling to voluntarily postpone [his] separation date or to voluntary execute funded reserve orders to represent Sgt Honstein." In response, Capt Carson wrote, "Given the start date of my new position, and the move of my family, I am unable to continue my active-duty service beyond my contractual EAS." Though not directly, responsive, the Court interpreted Capt Carson's response as an expression of unwillingness to voluntarily postpone his separation date, or to voluntarily execute funded reserve orders to represent the Accused.

x. On 8 November 2024, this Court also ordered the Defense team to facilitate conflict-free counseling for the Accused with respect to the potential conflicts raised by continued representation by Capt Lipositz and Capt Carson. The Court also directed the counsel to identify a date to get on the record during the week of 13-15 November 2024, so that the Court could engage in a colloquy with the Accused about these potential conflicts to determine whether he consents to those conflicts and whether that consent is knowing and voluntary. The parties requested to get on the record during the evening of 13 November 2024 and this Court granted that request.[9]

y. On 13 November 2024, an Article 32 Preliminary Hearing was conducted for the newly-preferred Article 118(3) offense that is now referred to this Court. Both Capt Carson and Capt Lipositz represented the Accused at the preliminary hearing.

z. On 13 November 2024, the Accused received conflict-free counseling from Maj Lauren Neal, the Senior Defense Counsel stationed aboard Camp Lejeune, North Carolina.

aa. Also on 13 November 2024, the Court engaged in a colloquy with the Accused concerning the nature of the potential conflicts surrounding Capt Lipositz and Capt Carson's continued representation.

bb. On 13 November 2024, Capt Lipositz outlined what he perceived to be the potential conflicts with continuing representation of the Accused while concurrently working in the OSJA for MARFORCYBER. However, consistent with Rule 1.7(b)(1) of JAGINST 5803.1E, Capt Lipositz affirmed that he reasonably believes that he will be able to provide competent and diligent representation to the Accused while serving in both roles. He explained that he has been provided sufficient assurances from his future supervisory attorney within the OSJA at MARFORCYBER that he will be afforded the ability to continue to represent the Accused until completion of this court-martial. Additionally, he affirmed that continued representation of the Accused would not violate Rules 1.7(b)(2) and (3) of JAGINST 5803.1E. Finally, Capt Lipositz affirmed that the Accused provided him with written informed consent for continued representation while concurrently working in the OSJA for MARFORCYBER.[10] The Accused unequivocally expressed to this Court his desire to continue to be represented by Capt Lipositz, even subsequent to Capt Lipostiz's reassignment to the OSJA for MARFORCYBER. The

[7] App. Ex. XXVII.
[8] App. Ex. XXVII.
[9] App. Ex. XXVII.
[10] Due to the privileged nature of that written document, Capt Lipositz did not desire to attached that written informed consent to this record as an appellate exhibit.

Accused explained that he discussed these matters with Maj Neal, and that he does not seek excusal of Capt Lipositz under R.C.M. 506(c). Finally, he confirmed to this Court that he did provide written informed consent to Capt Lipositz for continued representation.

cc. On 13 November 2024, Capt Carson explained to this Court that he viewed his pending EAS and future civilian employment in conflict with continued representation of the Accused. Capt Carson asserted that based on that conflict, he did not reasonably believe that he will be able to provide competent and diligent representation to the Accused in compliance with Rule 1.7(b)(1) of JAGINST 5803.1E. The Court then engaged in a colloquy with the Accused wherein the Accused intelligently displayed his understanding of the potential conflicts surrounding continued representation by Capt Carson. This Court made the Accused aware that Capt Carson told this Court that his "personal and professional interests are no longer in line with that of [his] client's..." Additionally, in front of the Accused, Capt Carson affirmed his unwillingness to continue to voluntarily remain on active duty beyond 20 November 2024, or to voluntarily execute reserve orders, in order to continue to represent him at this court-martial. Despite understanding all of this and after having received the benefit of conflict-free consultation with Maj Neal, the Accused explained to this Court that he does not consent to the excusal of Capt Carson under R.C.M. 506(c). The Accused explained that if it was possible, it was still his desire for Capt Carson to continue to represent him, even beyond Capt Carson's EAS.

dd. Also on 13 November 2024, the Court expressed its concern with Capt Carson's ability to comply with Rule 1.16 of JAGINST 5803.1E, should the detailing authority not excuse Capt Carson under R.C.M. 505(d)(2)(B)(iii) until 20 November 2024—the date of Capt Carson's EAS. In response, Capt Carson explained that he may have not been precise when he told the Court that the detailing authority was not going to excuse him until his EAS. Based on that additional explanation, on 13 November 2024 the Court directed Capt Carson to immediately speak to the detailing authority and to subsequently inform this Court of precisely *when* the detailing authority intends to excuse Capt Carson in accordance with R.C.M. 505(d)(2)(B)(iii). In response, on 14 November 2024, Capt Lipositz, on behalf of the Defense team, provided the following information to this Court:

> After speaking with our leadership concerning severance of Capt Carson and detailing of additional defense counsel, we can provide the following information:
>
> 1. The DSO will no longer have authority over Captain Carson upon his EAS. As such, the detailing authority would necessarily have to (and intends to) sever Capt Carson from this case on the date of his EAS (20 Nov 24).
>
> 2. The detailing authority intends to detail LtCol Matthew Neely (RDC-NCR) as defense counsel in this case, and expects to do so on Monday (18 Nov 24).
>
> 3. LtCol Neely is aware of the factual allegations and charges in this case, and has discussed with Defense team on several occasions in his capacity as RDC-NCR. He is aware of his expected detailing.
>
> 4. Given my impending PCS (detach date of 27 Nov 24), the detailing authority also intends to detail Capt Nicolai Paganucci as additional (local) defense counsel. He is aware of his expected detailing.[11]

[11] App. Ex. XXIX.

ee. Additionally, on 14 November 2024, Capt Lipositz confirmed to this Court that the detailing authority did not intend to excuse Capt Lipositz prior to, or upon, his rotation from the DSO at Camp Lejeune to the OSJA at MARFORCYBER.[12]

ff. Ultimately, on 17 November 2024, this Court granted Capt Paul Carson's R.C.M. 506(c) application for withdrawal.[13]

gg. On 19 November 2024, this Court issued its ruling on the Defense's motion to dismiss for violation of R.C.M. 707.[14]

hh. Also on 19 November 2024, the preliminary hearing officer detailed to the Article 32 proceeding for the newly-preferred Article 118(3) offense issued his findings and accompanying report in accordance with R.C.M. 405.

ii. On 3 December 2024, the Government referred Additional Charge I—the Article 118(3) offense now referred to this court-martial.

jj. On 6 December 2024, this Court arraigned the Accused on all charges and specifications currently referred to this court-martial. By this date, the Accused was represented by two additional detailed defense counsel—Capt Paganucci, a first-tour defense counsel aboard Camp Lejeune and LtCol Neely, the Regional Defense Counsel for the National Capital Region.

kk. Additional findings of fact necessary for the resolution of this matter are included below.

3. **Applicable Law**

R.C.M. 707

a. R.C.M. 707 provides that, "the accused shall be brought to trial within 120 days of the earlier of: (1) Preferral of charges; (2) the imposition of restraint under R.C.M. 304(a)(2)-(4); or (3) Entry of active duty under R.C.M. 204."[15] "The date of preferral of charges … shall not count for purpose of computing [the 120 days]."[16] "The date on which the accused is brought to trial shall count."[17] "The accused is brought to trial within the meaning of this rule at the time of arraignment under R.C.M. 904."[18] "When charges are preferred at different times, accountability for each charge shall be determined from the appropriate date … for that charge."[19]

b. "In the event of dismissal of charges or mistrial, a new 120-day period begins as follows: … (i) For an accused under pretrial restraint under R.C.M. 304(a)(2)-(4) at the time of dismissal or mistrial, a new 120-day period begins on the date of the dismissal or mistrial."[20]

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[12] App. Ex. XXIX.
[13] App. Ex. XXX.
[14] App. Ex. XXXI.
[15] R.C.M. 707(a).
[16] R.C.M. 707(b)(1).
[17] *Id.*
[18] *Id.*
[19] R.C.M. 707(b)(2).
[20] R.C.M. 707(b)(3)(A)(i).

c. "In a case in which it is determined that charges were dismissed for an improper purpose or for subterfuge, the time period determined under [R.C.M. 707(a)] shall continue to run."[21] The Court of Appeals for the Armed Force (C.A.A.F.) has explained that "[a] proper reason for withdrawal is 'a legitimate command reason which does not 'unfairly' prejudice an accused."[22] The C.A.A.F. "has previously found 'withdrawal . . . for the purpose of judicial economy by trying all known charges in a single trial' to be proper where an accused was not unfairly prejudiced."[23] "Ordinarily all known charges should be referred to a single court-martial."[24]

d. When considering whether the government has complied with the R.C.M. 120-day clock, the Court must consider any excludable delay agreed to by the parties, granted by the CA prior to referral, or granted by the Court after referral.[25]

e. If R.C.M. 707 is violated, the appropriate remedy is dismissal "with or without prejudice to the government's right to reinstitute court-martial proceedings against the accused for the same offense at a later date."[26]

f. "After arraignment of the accused upon charges, no additional charges may be referred to the same trial without consent of the accused."[27]

g. The Court adopts: (1) the events/actions and (2) their associated dates (the two left-most columns) from the table displayed in fact 40 from the Government's responsive motion filed on 20 December 2024. The only correction is that this Court did not "withdraw" Charge I on 1 November 2024. To be clear—this Court *dismissed* Charge I on that date because the language in that charge had not been subject to an Article 32 preliminary hearing.

h. "After referral, a major change may not be made over the objection of the accused unless the charge or specification is withdrawn, amended, and referred anew."[28] "If major changes are necessary, the affected charge should be preferred anew" (emphasis added). [29]

R.C.M. 604

i. "For charges over which a special trial counsel has exercised authority and has not deferred, only a special trial counsel may withdraw or cause to be withdrawn any charge or specification from the court-martial at any time before findings are announced."[30]

j. "Charges that have been withdrawn from a court-martial may be referred to another court-martial unless the referral was for an improper reason."[31] "Improper reasons for withdrawal include an intent to interfere with the free exercise by the accused of constitutional rights or rights provided under the UCMJ,

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[21] R.C.M. 707(b)(3)(A)(iii).
[22] United States v. Leahr, 73 M.J. 364, 369 (C.A.A.F. 2014) (citing United States v. Hunter, 65 M.J. 399, 401 (C.A.A.F. 2008)).
[23] *Leahr*, 73 M.J. at 369 (citing United States v. Koke, 34 M.J. 313, 315 (C.M.A. 1992)).
[24] *Leahr*, 73 M.J. at 369-70 (citing R.C.M. 601(e)(2) Discussion; R.C.M. 401(c) Discussion).
[25] *See* R.C.M. 707(c).
[26] R.C.M. 707(d).
[27] R.C.M. 601(e)(2).
[28] R.C.M. 603(d)(1).
[29] *See* discussion to R.C.M. 306(c)(citing R.C.M. 603(d)).
[30] R.C.M. 604(a)(2).
[31] R.C.M. 604(b).

or [an intent to interfere] with the impartiality of a court-martial."[32] "Whether the reason for a withdrawal is proper, for purposes of the propriety of a later referral, depends in part on the stage in proceedings at which the withdrawal takes place."[33]

Article 10, UCMJ

k. Article 10, UCMJ provides that, "When a person subject to this chapter is ordered into arrest or confinement before trial, immediate steps shall be taken (A) to inform the person of the specific offense of which the person is accused; and (B) to try the person or to dismiss the charges and release the person."[34] Article 10, UCMJ is focused on the specific harm of "causing an accused to languish in confinement or arrest without knowing the charges against him and without bail."[35]

l. Article 10, UCMJ requires "reasonable diligence" by the government in bringing charges to trial while the accused is in confinement.[36] To determine whether the government acted with "reasonable diligence," the Court may use the four *Barker* factors: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of their right, and (4) the prejudice to the defendant.[37] However, the Court must apply the *Barker* factors "in the context of Article 10's 'immediate steps' language and 'reasonable diligence' standard."[38] There is no Article 10 requirement for an instantaneous trial.[39] Rather, military judges are vested with discretion to "determine whether the Government has been foot-dragging."[40] "Brief periods of inactivity in an otherwise active prosecution are not unreasonable or oppressive."[41]

4. **Analysis and Conclusions of Law**

R.C.M. 707

a. Though the Court has previously ruled on the Defense's R.C.M. 707 motion[42] and the Defense has not re-raised that issue, the Court notes that the Accused was brought to trial within the meaning of R.C.M. 707 on day 42. Consistent with this Court's 19 November 2024 ruling, this period of time started on the date the Government dismissed the original charges while the Accused was in pretrial confinement—26 October 2024—and ended the date the Court arraigned the Accused—6 December 2024. This calculation does not account for any periods of excludable delay.

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[32] *See* Discussion to R.C.M. 604(b).
[33] *Id.*
[34] UCMJ art. 10(b)(1) (2024).
[35] United States v. Schuber, 70 M.J. 181, 187 (C.A.A.F. 2011).
[36] United States v. Kossman, 38 M.J. 258, 262 (C.M.A 1993).
[37] *See* United States v. Birge, 52 M.J. 209, 212 (C.A.A.F. 1999); *see also* Barker v. Wingo, 407 U.S. 514, 530 (1972).
[38] *See Birge*, 52 M.J. at 212 ("Article 10 issues cannot be resolved simply by determining whether similar delays would have violated the Sixth Amendment under *Barker v. Wingo*, *supr*. It is appropriate, however, to consider the *Barker v. Wingo* factors—in the context of Article 10's 'immediate steps' language and "reasonable diligence" standard—in determining whether a particular set of circumstances violates a servicemember's speedy trial rights under Article 10.").
[39] United States v. Kossman, 38 M.J. 258, 262 (C.A.A.F. 1993).
[40] *Id.*
[41] *Id.*
[42] *See* App. Ex. XXXI.

R.C.M. 604(b)

b. The Government's referral of Additional Charge I—the Article 118(3) charge referred to this court-martial—cannot amount to a violation of R.C.M. 604(b) because *that* charge was never previously withdrawn from any court-martial. The Government preferred that charge for the first time on 26 October 2024 and referred that charge for the first time to any court-martial that same day. The plain language of R.C.M. 604 provides that "[c]harges (emphasis added) that have been withdrawn from a court-martial may be referred to another court-martial unless the referral was for an improper reason." Accordingly, because the sole specification of Additional Charge I was never withdrawn, there is no R.C.M. 604(b) violation with respect to that charge. The Court certainly appreciates that the Defense's argument is that the Government's withdrawal of the original Article 118(3) charge for the purpose of later referring a corrected Article 118(3) charge amounts to a violation of R.C.M. 604(b). However, as a technical matter, this cannot be the case because the charge now referred is not the charge previously withdrawn in accordance with R.C.M. 604.

c. Notwithstanding the above, the Court finds that the Government's withdrawal and dismissal of all charges and specification referred to the prior court-martial, for the purpose of preferring and referring Additional Charge I and re-referring Charges II and III, to all be tried together at the same court-martial, was not a withdrawal and re-referral executed for an improper purpose. Military appeals courts have upheld similar Government actions in cases where the Government withdrew charges for the purpose of re-referring those charges alongside newly referred charges to be tried at a single court-martial.[43] Unlike *Vanover v. Clark* where "the practical effect of the [Government's] withdrawal and rereferral action was that the first military judge's ruling based on Mil.R.Evid. 403 was overturned," here, the Government's actions do not amount to a circumvention or a flouting of the Court's ruling.[44] Instead, it is apparent to this Court that the Government recognized that it had no desire to prove the offense as alleged in the version of Charge I referred to the prior court-martial. Accordingly, the Government's intent in (1) withdrawing all charges from the previous court-martial, (2) preferring and referring Additional Charge I—a new Article 118(3) offense—and (3) re-referring Additional Charges II and III,[45] was to refer the Article 118(3) offense the Government intended to prove, and for that offense to be tried alongside the other previously-referred offenses. Because the act of modifying the language in the original Article 118(3) offense, so as to be consistent with the Article 118(3) offense the Government intended to prove would have required a major change, the Government's actions were consistent with the law.[46]

d. Importantly, the preponderance of the evidence does not support the conclusion that the Government executed these withdrawal and referral actions in an effort to interfere with the Accused's right to counsel or his right to a speedy trial. The Government genuinely expressed its preference to conduct the trial on the current charges between 1 November 2024 and 8 November 2024—a window of time within which the previous trial was docketed, and before Capt Carson was scheduled to complete his active service obligation.

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[43] *See* United States v. Underwood, 50 M.J. 271, 274-77 (C.A.A.F. 1999); *see also* United States v. Koke, 34 M.J. 313, 315 (C.M.A. 1992); United States v. Grijalva, 83 M.J. 669, 674-75 (C-G. Ct. Crim. App. 2023) *rev'd on other grounds* 84 M.J. 433 (C.A.A.F. 2024).

[44] *See* Vanover v. Clark, 27 M.J. 345, 347-48 (C.M.A. 1988).

[45] The Court notes that although the Government re-preferred Charges II and III, and therefore, those offense are, as a technical matter, not the same offenses that were previously withdrawn, the language in the newly preferred and referred versions is identical to the language previously withdrawn.

[46] *See* R.C.M. 603(d); R.C.M. 306(c) Discussion ("If major changes are necessary, the affected charge should be preferred anew."); *see also* United States v. Oerman, 2022 CCA LEXIS 675 *5-6 (A. Ct. Crim. App. Nov. 18 2022).

e. For the foregoing reasons, the Government's withdrawal and subsequent referral actions were not improper under R.C.M. 604(b).

Article 10

f. Length of Delay and Reason for Delay: For purposes of this ruling and due to the unique facts and procedural history of this case, this Court considers these two *Barker* factors together. The Government brought the Accused to *this* court-martial a total of 315 days after placing the Accused into pretrial confinement. Although this 315 days represents the period of time between the date the Government placed the Accused into pretrial confinement—27 January 2024—and the date this Court arraigned the Accused on the charges currently referred to this court-martial—6 December 2024, the number of days alone does not appropriately capture the unique nature of events over the course of that 315 days. The Government preferred an original set of charges on 9 April 2024. The Government appointed a preliminary hearing officer on 17 April 2024. The parties participated in the Article 32 preliminary hearing on 10 May 2024. The Government referred the original set of preferred charges on 3 July 2024. The Government filed a motion for docketing with the Eastern Judicial Circuit on 8 July 2024. The prior Court arraigned the Accused on the original set of charges on 6 August 2024. That Court, without objection from the parties, docketed trial the on the merits on those original charges for 28 October 2024 – 8 November 2024. Between 6 August 2024 and 26 October 2024, the parties litigated a variety of matters. On 26 October 2024 the Government withdrew and dismissed the original set of charges. That same day, the Government preferred and re-referred Charge II and Charge III. Simultaneously, the Government also preferred and referred a new Article 118(3) offense—Charge I—to be tried in conjunction with Charges II and III. On 1 November 2024, this Court Dismissed without prejudice Charge I because the language in *that* Charge had not been properly subjected to an Article 32 preliminary hearing. The Government appointed an Article 32 preliminary hearing officer on 4 November 2024. The parties participated in the Article 32 preliminary hearing on 13 November 2024. The Government referred *Additional* Charge I on 3 December 2024. This Court arraigned the Accused on the charges currently referred to this Court on 6 December 2024. The preponderance of the evidence before this Court does not support the conclusion that the Government withdrew and dismissed the original set of charges with the intent to force the Accused to languish in confinement without a trial. The Government realized that it did not intend to prove the originally-preferred Article 118(3) offense as drafted, and, consistent with Rules for Courts-Martial, the Government withdrew the deficient Article 118(3) charge and referred a new Article 118(3) charge alongside the re-referred versions of Charges II and III. Though the Government could have recognized and sought to correct this charging deficiency sooner, the Government's conduct in withdrawing, dismissing, and referring anew was permissible under the Rules for Courts-Martial. After executing this course of action, Government genuinely expressed its preference to conduct the trial on the charges now referred to this court-martial between 1 November 2024 and 8 November 2024—a window of time within which the previous trial was docketed, and a period of time before Capt Carson was scheduled to reach his EAS.

g. Defendant's Assertion of his Right: the Defense has never requested a speedy trial, nor requested trial dates sooner than those ordered by this Court. In fact, when this Court was inclined to order trial on the merits on the charges referred to this court-martial for dates within the originally-ordered trial dates from the previous court-martial, the Defense team objected and requested additional time to prepare for this trial.

h. Prejudice: The Defense argues that the Accused has suffered prejudiced because, as a result of the Government's withdrawal, dismissal, and re-referral, the Accused lost his ability to be represented by Capt Carson. The Court does not discount the impact of losing Capt Carson. However, the Accused has continued to be represented by Capt Lipositz and is also now represented by two additional military counsel—Capt Paganucci and LtCol Neely. Furthermore, any prejudice is significantly diminished by the

amount of time that has passed since losing Capt Carson. The Accused has had the benefit of a new trial management order, affording him and his team additional time to prepare for trial. This has provided the Defense team the opportunity file new motions and to seek relief that was not sought at the prior court-martial. The Defense also argues that the Accused lost the benefit of the prior Court's favorable rulings. However, this is not persuasive for two reasons. First, the Court's application of R.C.M. 905(g) has prevented this. Second, the Defense's assertion that the Defense lost the benefit of the Court's ruling, which prohibited Charge I from being amended as the Government requested, is without merit. The Defense has *gained* and has *maintained* the benefit of that ruling—the Government was prohibited from making what amounted to a major change. The Government's follow-on actions—withdrawal, dismissal, preferral of a new charge, and referral of that new charge—are precisely what the Rules for Courts-Martial contemplate.[47] Importantly, the Accused did not suffer prejudice as a result of not being afforded the right to be tried on language in the original Article 118(3) charge. No principle of law provides for such a right.

i. After considering the above factors and the totality of the facts and circumstances surrounding this court-martial, the preponderance of the evidence supports the conclusion that the Government did not violate the Accused's Article 10 rights. The preponderance of the evidence supports the conclusion that since the Accused has been confined, the Government has acted with reasonable diligence in bringing charges to trial.

5. **Ruling**. The Defense motion is **DENIED**.

So ORDERED this 9th day of April 2025.

[redacted]
R.C. LIPTON
Lieutenant Colonel, U.S. Marine Corps
Military Judge

[47] *See* R.C.M. 603(d); R.C.M. 306(c) Discussion ("If major changes are necessary, the affected charge should be preferred anew."); *see also* United States v. Oerman, 2022 CCA LEXIS 675 *5-6 (A. Ct. Crim. App. Nov. 18 2022).

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

UNITED STATES V. Dakota S. HONSTEIN Sergeant / E-5 USMC	DEFENSE MOTION TO COMPEL EXPERT CONSULTATION (Dr. [redacted] **COURT'S RULING** 27 January 2025

1. Consistent with this Court's ruling on the record, the Defense motion to compel Dr. [redacted] as an expert consultant is **GRANTED**. In particular, this Court grants 40 hours of consultation. This consultation includes review of all relevant discovery, in-person examination of the Accused, and the rendering of any confidential expert opinions for the Defense team's trial preparation. The Government shall, as soon as practicable, provide a funding letter to enable Dr. [redacted] to begin consultation. Approved funding shall account for travel to Camp Lejeune to conduct the in-person examination of the Accused.

So ORDERED this 27th day of January 2025. [redacted]

R.C. Lipton
Lieutenant Colonel, U.S. Marine Corps
Military Judge

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

UNITED STATES V. Dakota S. HONSTEIN Sergeant / E-5 USMC	**Court's Ruling** Defense Motion to Dismiss (Unreasonable Multiplication of Charges) 9 April 2025

1. On 27 February 2025, the Defense moved this Court to Dismiss Charge II and its sole specification—the involuntary manslaughter charge—on the basis that it amounts to an unreasonable multiplication of charges. The Government opposes the motion. After considering the parties' written filings, evidence in support thereof, and the applicable law, this Court **DENIES IN PART and RESERVES IN PART.**

2. **Analysis and Conclusions of Law**. Applying the *Quiroz* factors and after carefully considering the N.M.C.C.A.'s guidance in *Thomas*, this Court finds that dismissal of Charge II and its sole specification is not an appropriate remedy to grant prior to the announcement of findings.[1] The conduct captured by Charge II and Additional Charge I is not aimed at distinctly separate criminal acts. Charge II is an alternative, and less severe, theory of criminality to Additional Charge I. The Government alleges both theories and necessarily, the factfinder will consider both theories of criminal liability during deliberations. However, if the factfinder finds the Accused guilty of Charge II and Additional Charge I, the Court will, at that time, consider whether convictions on both Charges amounts to an unreasonable multiplication of charges.

3. **Ruling**. The Defense motion is **DENIED IN PART and RESERVED IN PART** as detailed above.

So ORDERED this 9th day of April 2025. [redacted]

R.C. LIPTON
Lieutenant Colonel, U.S. Marine Corps
Military Judge

[1] *See* United States v. Quiroz, 55 M.J. 334, 338-39 (C.A.A.F. 2011); *see also* United States v. Thomas, 74 M.J. 563 (N-M. Ct. Crim. App. 2014).

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

UNITED STATES v. Dakota S. HONSTEIN Sergeant / E-5 USMC	Government Motion for Appropraite Relief (Reconsideration Of Administrative Credit under R.C.M. 305) **COURT'S RULING** 21 April 2025

On 1 December 2024, this Court GRANTED the Defense's Motion for Appropriate Relief seeking administrative confinement credit. On 13 January 2025, the Government filed a motion seeking the Court reconsider the Court's 1 December 2024 ruling. The Defense filed its written response on 21 January 2025. After considering the parties' written filings, oral argument, all evidence in support thereof, and the applicable law, the Court DENIES the Government motion for reconsideration. The Court makes no additional findings of fact or conclusions of law beyond those included in the 1 December 2024 ruling. The Court DENIES reconsideration on the basis that the Government has not persuaded this Court that the Court's prior ruling amounts to clear error or a manifest injustice.

So ORDERED this 21st day of April 2025.

[redacted]
R.C. LIPTON
Lieutenant Colonel, U.S. Marine Corps
Military Judge

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

UNITED STATES v. Dakota HONSTEIN Sergeant / E-5 USMC	**COURT ORDER** (Sanity Board Interrogatories) 24 March 2025

ORDER. Pursuant to Rule for Courts-Martial (R.C.M.) 703 and in accordance with R.C.M. 706, the previously-convened Sanity Board for the above-captioned case (composed of LCDR [redacted] LCDR [redacted] and LCDR [redacted]) is ordered to answer the following interrogatories, in writing, pertaining to the Board's 30 April 2024 report. The Court finds that the information sought by this order is necessary to the above-caption court-martial and that other means of obtaining this information are not available. The Board's response to these interrogatories SHALL NOT include copies of any medical records or the long form version of your report. Further, the Board's response shall not include any statements of the accused for any reason. Please answer the following:

1. Paragraph 3.a. of the Commanding Officer's 6 March 2024 R.C.M. 706 inquiry asks whether the accused was suffering from a severe mental disease or defect "[a]t the time of the alleged criminal conduct." However, the Board's 30 April 2024 response in paragraph 2.a. is written in the present tense: "No. The accused *does not* suffer from a severe mental disease or defect." Please clarify your response by answering the question again— At the time of the alleged criminal conduct, did the accused have a severe mental disease or defect?

2. Paragraph 3.d. of the Commanding Officer's 6 March 2024 R.C.M. 706 inquiry asks: "Was the accused, at the time of the alleged criminal misconduct and as a result of such severe mental disease or defect, unable to conform his conduct to the requirements of the law?" However, the Board's 30 April 2024 response does not include a response to this question. Please answer this question.

Trial is scheduled to commence on 21 April 2025 and the accused is in pretrial confinement. Accordingly, the Board is directed to respond no later that 31 March 2025.

So ORDERED this 24th day of March 2025.

[redacted]
R.C. LIPTON
Lieutenant Colonel, U.S. Marine Corps
Military Judge

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

UNITED STATES v. Dakota S. HONSTEIN Sergeant / E-5 USMC	**COURT ORDER** (TriCare Records ICO Ms. [redacted] 26 March 2025

ORDER. Pursuant to Rule for Courts-Martial 703(e)(1), the Government is hereby ordered to produce for the Defense, in the case of Ms. [redacted]

a. all TriCare records of payments and claim denials for non-network providers;

b. all TriCare records of payments and claim denials for nonparticipating non-network providers.

So ORDERED this 26th day of March 2025.

[redacted]
R. C. LIPTON
Lieutenant Colonel, U.S. Marine Corps
Military Judge

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

UNITED STATES V. DAKOTA S. HONSTEIN SERGEANT / E-5 USMC	**Court's Ruling** Defense Motion to Compel Expert Witness (Digital Forensic Examiner) 24 April 2025

1. Consistent with this Court's oral ruling of 14 March 2025, the Defense's motion to compel the production of Ms. [redacted] as an expert witness in the field of digital forensic examination is **GRANTED**.

2. The Government shall fund and produce Ms. [redacted] for in-court observation of trial to begin on 28 April 2025, and shall fund all associated expenses to include travel to and from the local area; lodging/per diem, and a local rental car.

So ORDERED on this 24th day of April 2025.

[redacted]
R.E. LIPTON
Lieutenant Colonel, U.S. Marine Corps
Military Judge

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

UNITED STATES V. Dakota S. HONSTEIN Sergeant / E-5 USMC	**COURT ORDER** (Defense Expert Consultation and Examination of Physical Evidence) 3 September 2024

1. **Nature of the Motion**. The Defense moves this Court, pursuant to Rules for Court-Martial 701 and 703, to order six (6) additional hours of funding for expert consultation with Mr. [redacted] The Defense also moves this Court to compel the Government to provide Mr. [redacted] access to the firearm in this case for inspection, examination, and testing at Mr. [redacted] laboratory in Lowell, Massachusetts. After considering the written briefs, supporting evidence, oral arguments, and the applicable law, the Court **GRANTS** the Defense motion as detailed below.

2. **Ruling**

a. The Government shall provide funding for six (6) hours of confidential expert consultation between Mr. [redacted] and the accused's detailed defense counsel in addition to the ten (10) hours previously granted, for a total of sixteen (16) hours;

b. As part of this consultation, the government shall facilitate Mr. [redacted] access to the physical evidence[1] necessary for review at his laboratory located in Lowell, Massachusetts. An Agent of the Government shall transfer temporary custody of the physical evidence to and from Mr. [redacted] at his Laboratory in Lowell, Massachusetts. No agent of the Government may observe Mr. [redacted] confidential inspection, examination, disassembly, re-assembly, and testing (including test-firing) of the firearm.

c. Mr. [redacted] shall video record his inspection, examination, disassembly, re-assembly, and testing (including test-firing) of the firearm. These video recordings shall be maintained and preserved by Mr. [redacted] and the defense team.

So ORDERED this 3rd day of September, 2024.

[redacted]
R.C. Lipton
Lieutenant Colonel, U.S. Marine Corps
Military Judge

[1] This includes the firearm, magazines, and all ammunition recovered or tested by law enforcement agents.

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[redacted]

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

UNITED STATES v. DAKOTA S. HONSTEIN Sergeant / E-5 U.S. Marine Corps	DEFENSE MOTION TO SUPPRESS (Accused's Statements to PMO) **COURT'S RULING** 15 June 2025

1. **Nature of Motion**. The Defense moves this Court to suppress all statements, confessions, and admissions made by the Accused to Provost Marshall Office (PMO) officers pursuant to Rule for Courts-Martial (R.C.M.) 905(b)(3), Military Rule of Evidence (M.R.E.) 304, and M.R.E. 305. The Government opposes the motion. After considering the briefs, supporting evidence, arguments from counsel, and applicable law, the Court **GRANTS IN PART and DENIES** the Defense motion as detailed below.[1]

2. **Findings of Fact**. The preponderance of the evidence supports the following factual findings:

a. At approximately 0700 on 27 January 2024, after the Accused shot Ms. [redacted] he dragged Ms. [redacted] out of his room on the third floor of his barracks aboard Camp Lejeune and began to frantically knock on other Marines' doors. In particular, he knocked on Sgt [redacted] and LCpl [redacted] doors. Sgt [redacted] and LCpl [redacted] exited their rooms and immediately began to attempt lifesaving first aid, to include CPR. Sgt Honstein was in a state of shock and did not render aid. Sgt [redacted] briefly left the scene to retrieve the barracks duty. Upon Sgt [redacted] return, he assisted LCpl [redacted] with first aid.

b. LCpl [redacted] called 911. During the 911 call, LCpl [redacted] reported that a female was shot in the chest, that she was in and out of consciousness, and that it was unknown whether the wound was self-inflicted.

c. At approximately 0705 SSgt (then Sgt) [redacted] a PMO officer on duty aboard Camp Lejeune, was dispatched to the scene. Based on the dispatch call, he knew that that there was a possible gunshot wound to the chest.

[1] On 14 March 2025, the parties presented evidence and oral argument on this matter. That same day this Court GRANTED IN PART and DENIED IN PART the Defense's motion consistent with this written ruling. The Defense also moved to reconsider mid-trial, but this Court DENIED that motion. This written ruling serves to supplement the record of trial.

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d. SSgt [redacted] arrived on scene to the barracks with two other officers, Officer [redacted] (civilian) and LCpl [redacted]. When SSgt [redacted] arrived at the barracks, he did not have his firearm drawn. For SSgt [redacted] in his capacity as a PMO officer, this was his third dispatch within the last 30 days involving a death aboard Camp Lejeune, and the two preceding circumstances were suicides. Accordingly, on 27 January 2024, when he learned that he was being dispatched to the barracks for a gunshot wound, this was his frame of mind—another possible suicide.

e. Upon SSgt [redacted] arrival to the third deck of the barracks, SSgt [redacted] observed three males and the female victim, Ms. [redacted] in the middle of the hallway. He observed two males rendering aid and the third male, Sgt Honstein, standing over them. SSgt [redacted] ran to them and began to assist with rendering aid. At this time, he did not consider any of these three males suspects. He never drew his weapon. SSgt [redacted] observed blood on Sgt Honstein's hands, but he also observed blood on the hands of the other Marines rendering aid.

f. Neither SSgt [redacted] nor any other law enforcement officer or agency aboard Camp Lejeune treated the situation as an active shooter event.

g. A short time later, Camp Lejeune Fire Department and Emergency Medical Services personnel arrived on scene. Upon their arrival, they took over rendering first aid from SSgt [redacted]

h. While SSgt [redacted] was at the scene rendering aid, he observed Sgt Honstein standing over them watching and hysterically crying. He observed Sgt Honstein experiencing "the most trauma."[2] Based on these observations, to include Sgt Honstein's notable emotional response to the situation when compared to other Marines on scene, SSgt [redacted] believed that Sgt Honstein may have seen something. Accordingly, SSgt [redacted] asked Sgt Honstein, "what happened?" Importantly, at that particular moment, SSgt [redacted] did not suspect or have any hunch that Sgt Honstein had committed any offense. A possible suicide was the lens through which SSgt [redacted] was addressing the incident. At that moment, SSgt [redacted] did not have any suspicion that any of the three Marines present had shot the victim.[3] At that moment, SSgt [redacted] did not know that Ms. [redacted] gunshot wound was caused by a pistol inside of Sgt Honstein's room. At that moment, SSgt [redacted] had not yet been inside of Sgt Honstein's room. At that moment, SSgt [redacted] did not know that Sgt Honstein lived in the barracks. Additionally, at that moment, SSgt [redacted] had not yet had any discussions with any of the other officers concerning their observations from the scene in Sgt Honstein's room.

i. In his written statement, SSgt [redacted] reported that after asking Sgt Honstein, "what happened?" Sgt Honstein replied, "she took the gun and stated it wasn't loaded, I told her it was loaded, she then turned the gun towards her chest with her thumb on the trigger. I grabbed her on the hips and told her, no really it's loaded, she then pulled the trigger with her thumb and …".

---

[2] SSgt [redacted] testimony of 14 March 2025.

[3] At trial, on 28 April 2025, SSgt [redacted] testified, "I had no idea what he was responding to. I wasn't sure if it was a suicide or if someone else shot her and then left the scene, so I was just asking what happened, give me general information."

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SSgt [redacted] then attempted to probe for more information, but Sgt Honstein was hysterically crying, and he couldn't get a word out.

j. Separately, when Officer [redacted] and LCpl [redacted] arrived on scene with SSgt [redacted] they did not render first aid. Instead, those two PMO officers, as well as Sgt [redacted] (a fourth PMO officer who arrived on scene) observed the crime scene to assess the situation and entered Sgt Honstein's room. In Sgt Honstein's room, these officers saw a pistol in the middle of the bed, with no magazine inserted and the pistol's slide locked to rear. Additionally, these officers saw two fully loaded magazines on a desk in plain view. LCpl [redacted] also saw two wallets. She opened both of them, one of which contained Sgt Honstein's military identification (ID) card and the other contained an unknown female's driver's license. LCpl [redacted] took possession of both IDs.

k. After receiving Sgt Honstein's version of events (finding of fact (i)), SSgt [redacted] then observed the crime scene, to include Sgt Honstein's room with the other officer. When SSgt [redacted] entered Sgt Honstein's room, he saw Sgt Honstein's name on a placard outside of the door. This was the first time he knew he was entering Sgt Honstein's room. Upon entering, he saw "the gun cleared with a magazine on the counter." SSgt [redacted] then asked the other PMO officers on scene "who cleared out the gun"? In response, the other officers explained that the "crime scene ha[d] not been tampered with." It was at this moment—observing the firearm in Sgt Honstein's room—that SSgt [redacted] began to have "a little suspicion"[4] that the firearm belonged to Sgt Honstein.

l. SSgt [redacted] knew that possessing a personal firearm in the barracks amounted to an "orders violation."[5]

m. After observing the firearm in Sgt Honstein's room, SSgt [redacted] reapproached Sgt Honstein and asked him, "how the weapon was cleared out." In response, Sgt Honstein responded, "I cleared it out." SSgt [redacted] then asked, "why [Sgt Honstein] never mentioned clearing the gun and [Sgt Honstein] looked at his hands and remained silent." At this moment, SSgt [redacted] directed the other officers to place Sgt Honstein in hand irons.

n. At no time did SSgt [redacted] ever advise Sgt Honstein of his Article 31(b), UCMJ rights.

o. Any additional findings of fact are included below.

3. **Applicable Law, Analysis and Conclusions of Law**

a. During SSgt [redacted] first and second lines of inquiry, the Accused was not in custody. Accordingly, SSgt [redacted] questioning without *Miranda* warnings did not amount to a violation of the Fifth Amendment to the United States Constitution.

b. Article 31(b) provides that "no person subject to [the UCMJ] may interrogate, or request any statement from, an accused or a person suspected of any offense without first informing him

[4] SSgt [redacted] testimony of 14 March 2025.
[5] SSgt [redacted] testimony of 14 March 2025.

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 against him in a trial by court-martial."[6]

c. Here, the preponderance of the evidence supports the conclusion that SSgt [redacted] did not suspect Sgt Honstein of committing any offense when SSgt Powell first approached Sgt Honstein and asked, "what happened?" Additionally, the preponderance of the evidence supports the conclusion that there was insufficient information that reasonably should have caused SSgt Powell to suspect Sgt Honstein of committing an offense when SSgt [redacted] *first* approached Sgt Honstein. Accordingly, Sgt Honstein's statements to SSgt [redacted] were not obtained in violation of Article 31(b), UCMJ and are admissible.

d. After Sgt Honstein provided his initial version of events and after SSgt [redacted] entered Sgt Honstein's room and observed the firearm therein, SSgt [redacted] began to have "a little suspicion" that the firearm belonged to Sgt Honstein. SSgt [redacted] also knew that possessing a firearm in the barracks amounted to an "orders violation."[7] Accordingly, when SSgt [redacted] re-approached Sgt Honstein to question him, SSgt [redacted] was required to advise Sgt Honstein of his rights under Article 31(b), UCMJ. Because SSgt [redacted] did not do this, Sgt Honstein's statement to SSgt [redacted] after SSgt [redacted] re-approached him was obtained in violation of Article 31(b) and is therefore inadmissible under M.R.E.s 304 and 305.

4. **Ruling.** The Defense motion is **GRANTED IN PART and DENIED IN PART**. At trial, the Government offered SSgt [redacted] testimony consistent with this ruling.

So ORDERED this 15th day of June 2025.

[redacted]

R.C. LIPTON
Lieutenant Colonel, U.S. Marine Corps
Military Judge

[6] Article 31(b), UCMJ.
[7] SSgt [redacted] testimony of 14 March 2025.

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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
Honstein, Dakota S.	Marine Corps	E-5	[redacted]

5. CONVENING COMMAND	6. TYPE OF COURT-MARTIAL	7. COMPOSITION	8. DATE SENTENCE ADJUDGED
II MEF, Camp Lejeune	General	Judge Alone - MJA16	May 2, 2025

SECTION B - FINDINGS

SEE FINDINGS PAGE

SECTION C - TOTAL ADJUDGED SENTENCE

9. DISCHARGE OR DISMISSAL	10. CONFINEMENT	11. FORFEITURES	12. FINES	13. FINE PENALTY
Dishonorable discharge	8 Years	Total	N/A	N/A

14. REDUCTION	15. DEATH	16. REPRIMAND	17. HARD LABOR	18. RESTRICTION	19. HARD LABOR PERIOD
E-1	Yes ○ No ◉	Yes ○ No ◉	Yes ○ No ◉	Yes ○ No ◉	

20. PERIOD AND LIMITS OF RESTRICTION

SECTION D - CONFINEMENT CREDIT

21. DAYS OF PRETRIAL CONFINEMENT CREDIT	22. DAYS OF JUDICIALLY ORDERED CREDIT	23. TOTAL DAYS OF CREDIT
461	267	728 days

SECTION E - PLEA AGREEMENT OR PRE-TRIAL AGREEMENT

24. LIMITATIONS ON PUNISHMENT CONTAINED IN THE PLEA AGREEMENT OR PRE-TRIAL AGREEMENT

A dishonorable discharge shall be adjudged; confinement shall be adjudged as set forth in Table A; total forf. of all pay and allowances shall be adjudged; no fine shall be adjudged; reduction to the grade of E-1 shall be adjudged; and no other lawful punishments shall be adjudged.

SECTION F - SUSPENSION OR CLEMENCY RECOMMENDATION

25. DID THE MILITARY JUDGE RECOMMEND SUSPENSION OF THE SENTENCE OR CLEMENCY?	26. PORTION TO WHICH IT APPLIES	27. RECOMMENDED DURATION
Yes ○ No ◉		

28. FACTS SUPPORTING THE SUSPENSION OR CLEMENCY RECOMMENDATION

SECTION G - NOTIFICATIONS

29. Is sex offender registration required in accordance with 10 U.S.C. § 20901, appendix 4 to enclosure 2 of DoDI 1325.07, or DoDI 5525.20? 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
Lipton, Ryan C.	Marine Corps	O-5	May 2, 2025	LIPTON.RYAN.C.[redacted] Digitally signed by LIPTON.RYAN.C.[redacted] Date: 2025.05.02 19:00:24 -04'00'

37. NOTES

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STATEMENT OF TRIAL RESULTS - FINDINGS

SECTION I - LIST OF FINDINGS

CHARGE	ARTICLE	SPECIFICATION	PLEA	FINDING	ORDER OR REGULATION VIOLATED	LIO OR INCHOATE OFFENSE ARTICLE	DIBRS
Charge I Plea: No plea entered Finding: Dismissed	118	Specification:	No plea entered	Dismissed			118-C-
		Offense description	Murder while engaging in an inherently dangerous act				
		Withdrawn and Dismissed	Dismissed by MJ prior to entry of pleas				
Charge II Plea: Guilty Finding: Guilty	119	Specification:	Guilty	Guilty			119-B1
		Offense description	Involuntary manslaughter				
Charge III Plea: Guilty Finding: Guilty	92	Specification:	Guilty	Guilty	MCB CAMLEJO		092-A0
		Offense description	Violation of a lawful general order				
Additional Charge Plea: Not Guilty Finding: Not Guilty	118	Specification:	Not Guilty	Not Guilty			118-C-
		Offense description	Murder while engaging in an inherently dangerous act				

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MILITARY JUDGE ALONE SEGMENTED SENTENCE					
SECTION J - SENTENCING					
CHARGE	**SPECIFICATION**	**CONFINEMENT**	**CONCURRENT WITH**	**CONSECUTIVE WITH**	**FINE**
Charge I	Specification	N/A	N/A	N/A	N/A
Charge II	Specification	7 Years	N/A	Charge III, specification	N/A
Charge III	Specification	1 Year	N/A	Charge II, specification	N/A
Additional Charge	Specification	N/A	N/A	N/A	N/A

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
Honstein, Dakota S.	E5	[redacted]

4. UNIT OR ORGANIZATION	5. CURRENT ENLISTMENT	6. TERM
2d ANGLICO, II MIG, II MEF	29 Sep 2021	5 Yrs

7. CONVENING AUTHORITY (UNIT/ORGANIZATION)	8. COURT-MARTIAL TYPE	9. COMPOSITION	10. DATE SENTENCE ADJUDGED
II MEF	General	Judge Alone - MJA16	2 May 2025

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.

I have advised the convening authority of clemency authority based on the earliest findings of guilty for an offense committed on or after 1 January 2019 pursuant to R.C.M. 1109, MCM (2024 Ed.).

24. Convening Authority Name/Title	25. SJA Name
C. L. WORTH Jr./Commanding General	[redacted]

26. SJA signature	27. Date
[redacted]	28 Aug 25

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.]

General Court-Martial Order No. M25-03

Action.
In the General Court-Martial case of United States v. Sgt Honstein, D. S., USMC, I have elected to take no action in this case. The Marine Corps Installations East Regional Brig, Camp Lejeune, North Carolina, is designated as the initial place of confinement.

Confinement Credit.
The accused will be credited with having served 728 days of confinement.

Disposition.
Pursuant to Article 65, Uniform Code of Military Justice, the record of trial will be forwarded to the Navy-Marine Corps Appellate Review Activity (Code 40), Office of the Judge Advocate General, Washington Navy Yard, Washington, D. C. 20374 for review.

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]	AUG 29 2025

32. Date convening authority action was forwarded to PTPD or Review Shop. 20250829

ENTRY OF JUDGMENT

ENTRY OF JUDGMENT

SECTION A - ADMINISTRATIVE

1. NAME OF ACCUSED (LAST, FIRST, MI)	2. PAYGRADE/RANK	3. DoD ID NUMBER
Honstein, Dakota S.	E5	[redacted]

4. UNIT OR ORGANIZATION	5. CURRENT ENLISTMENT	6. TERM
2d ANGLICO, II MIG, II MEF	29 Sep 2021	5 Yrs

7. CONVENING AUTHORITY (UNIT/ORGANIZATION)	8. COURT-MARTIAL TYPE	9. COMPOSITION	10. DATE COURT-MARTIAL ADJOURNED
II MEF	General	Judge Alone - MJA16	2 May 2025

SECTION B - ENTRY OF JUDGMENT

****MUST be signed by the Military Judge (or Circuit Military Judge) within 20 days of receipt****

11. **Findings of each charge and specification referred to trial.** [Summary of each charge and specification (include at a minimum the gravamen of the offense), the plea of the accused, the findings or other disposition accounting for any exceptions and substitutions, any modifications made by the convening authority or any post-trial ruling, order, or other determination by the military judge. R.C.M. 1111(b)(1)]

Charge I: Violation of Article 118, UCMJ.
Plea: No Plea Entered. Finding: Dismissed.

Specification: Did, on or about 27 Jan 2024, murder [redacted] by means of shooting her with a firearm. Plea: No Plea Entered. Finding: Dismissed.

Charge II: Violation of Article 119, UCMJ.
Plea: Guilty. Finding: Guilty.

Specification: Did, on or about 27 Jan 2024, by culpable negligence, unlawfully kill [redacted] by means of shooting her with a firearm. Plea: Guilty. Finding: Guilty.

Charge III: Violation of Article 92, UCMJ.
Finding: Guilty. Finding: Guilty.

Specification: Did, on or about 27 Jan 2024, violate a lawful general order which was his duty to obey, to wit: para. (c)(1) of MCIEAST-MCB CAMLEJO 5500.1A, dtd 16 Aug 2021, by wrongfully possessing a firearm aboard Marine Corps Base Camp Lejeune. Plea: Guilty. Finding: Guilty.

Additional Charge: Violation of Article 118, UCMJ.
Plea: Not Guilty. Finding: Not Guilty.

Specification: Did, on or about 27 Jan 2024, murder [redacted] by means of intentionally pulling the trigger of a loaded firearm while pointing it at her. Plea: Not Guilty. Finding: Not Guilty.

12. **Sentence to be Entered.** Account for any modifications made by reason of any post-trial action by the convening authority (including any action taken based on a suspension recommendation), confinement credit, or any post-trial rule, order, or other determination by the military judge. R.C.M. 1111(b)(2). If the sentence was determined by a military judge, ensure confinement and fines are segmented as well as if a sentence shall run concurrently or consecutively.

Military Judge: Dishonorable Discharge, total forfeitures, reduction to pay grade E-1 and;

Charge II: Violation of Article 119, UCMJ.

Specification: 84 months confinement.

Charge III: Violation of Article 92. UCMJ.

Specification: 12 months confinement.

All confinement is to be served consecutively for a total of 96 months.

The accused is credited with having served 728 days of confinement.

13. **Deferment and Waiver.** Include the nature of the request, the CA's Action, the effective date of the deferment, and date the deferment ended. For waivers, include the effective date and the length of the waiver. RCM 1111(b)(3)

The Defense submitted post-trial matters on 9 May 2025 and requested that the Convening Authority "suspend Sgt Honstein's reduction to E-1 and his total forfeitures."

The Convening Authority elected to take no action in this case.

14. Action convening authority took on any suspension recommendation from the military judge:

N/A.

15. Judge's signature:	16. Date judgment entered:
MILLS.BENJAMIN.ARTHUR.[redacted] Digitally signed by MILLS.BENJAMIN.ARTHUR[redacted] Date: 2025.09.05 16:27:09 -04'00'	Sep 5, 2025

17. In accordance with RCM 1111(c)(1), the military judge who entered a judgment may modify the judgment to correct computational or clerical errors within 14 days after the judgment was initially entered. Include any modifications here and resign the Entry of Judgment.

18. Judge's signature:	19. Date judgment entered:

APPELLATE MOTIONS

[redacted]

Subject: RECEIVED: FILING – Panel 3 – U.S. v. Honstein – NMCCA 202500369 – D - Brief and Assignments of Error (PIETTE)
Date: Wednesday, May 13, 2026 11:53:26 AM

RECEIVED
MAY 13 2026
UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

CUI

Very Respectfully,

Ms. [redacted]
Paralegal
Navy-Marine Corps Court of Criminal Appeals (NMCCA)
Code-51
1254 Charles Morris St. SE, Bldg. 58
Navy Yard, Washington DC 20374-5124
[redacted]

Controlled by: Department of the Navy

Controlled by: OJAG, NMCCA, Code-51
CUI Category: PRVCY, LEGAL PRIVILEGE
Distribution / Dissemination Control: FEDCON
[redacted]

[redacted]

Subject: FILING – Panel 3 – U.S. v. Honstein – NMCCA 202500369 – D - Brief and Assignments of Error (PIETTE)

To this Honorable Court:

Please see the attached for electronic filing in U.S. v. dakota S. Honstein, NMCCA 202500369. Thank you.

Very Respectfully,

Alaric A. Piette
LCDR, JAGC, USN
Office of the Judge Advocate General of the Navy
Appellate Defense Division (Code 45)
1254 Charles Morris St SE, Suite 140
Washington Navy Yard, DC 20374-5047
[redacted]

APPELLATE BRIEFS

THERE ARE NO APPELLATE BRIEFS

AT THIS TIME

REMAND

THERE WERE NO REMANDS

NOTICE OF COMPLETION OF APPELLATE REVIEW