[redacted]

CERTIFIED RECORD OF TRIAL

(and accompanying papers)

of

Keaty	Matthew	L.	[redacted]	SN
(Last Name)	*(First Name)*	*MI*	*(DoD ID No.)*	*(Rank)*

[redacted]	USCG	Portsmouth, New Hampshire
(Unit/Command Name)	*(Branch of Service)*	*(Location)*

By

Special Court-Martial (SPCM) COURT-MARTIAL

(GCM, SPCM, or SCM)

Convened by Commander

(Title of Convening Authority)

Coast Guard Atlantic Area

(Unit/Command of Convening Authority)

Tried at

Norfolk, VA	On	June 7 2023
(Place or Places of Trial)		*(Date or Dates of Trial)*

Companion and other cases None

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

[redacted]

CONVENING ORDER

SPECIAL COURT-MARTIAL	)	COMMANDER
	)	
	)	COAST GUARD ATLANTIC AREA
CONVENING ORDER NO. 1-22	)	PORTSMOUTH, VA
	)	
	)	Dated: OCT 27 2022

COMMANDER
COAST GUARD ATLANTIC AREA

1. A special court-martial is hereby convened. It may try such persons as may properly be brought before it, and shall meet at Norfolk, Virginia, unless otherwise directed. Designation of this convening authority is Secretarial and pursuant to Article 23, UCMJ.

2. The court-martial will be convened with the following members:

Commander [redacted]
Commander [redacted]
Commander [redacted]
Lieutenant Commander [redacted]
Lieutenant [redacted]
Lieutenant Junior Grade [redacted]
Lieutenant [redacted]
Chief Warrant Officer [redacted]

3. In all cases in which the accused submits a request pursuant to Article 25(c)(2), UCMJ, the court-martial will be convened with the following members:

Commander [redacted]
Commander [redacted]
Commander [redacted]
Lieutenant Commander [redacted]
Chief Intelligence Specialist [redacted]
Chief Gunner's Mate [redacted]
Intelligence Specialist First Class [redacted]
Yeoman Second Class [redacted]

4. Should any officer in paragraph two (2) or in the officer portion of paragraph three (3) be properly excused prior to impanelment, that member will be replaced with an officer listed below, in the order listed:

Commander [redacted]
Commander [redacted]
Lieutenant Commander [redacted]

Lieutenant Commander [redacted]
Lieutenant [redacted]
Ensign [redacted]
Ensign [redacted]
Chief Warrant Officer [redacted]
Lieutenant [redacted]
Lieutenant [redacted]

5. Should any enlisted member in paragraph three (3) be properly excused prior to impanelment, that member will be replaced with an enlisted member below, in the order listed:

Chief Yeoman [redacted]
Operations Specialist Second Class [redacted]
Maritime Enforcement First Class [redacted]
Intelligence Specialist First Class [redacted]
Electronics Technician Second Class [redacted]
Chief Electrician's Mate [redacted]
Chief Intelligence Specialist [redacted]
Storekeeper First Class [redacted]
Culinary Specialist Third Class [redacted]
Information Systems Technician First Class [redacted]

6. The use of alternate members is not authorized.

[redacted]
K. E. Lunday
Vice Admiral, U. S. Coast Guard
Commander
Coast Guard Atlantic Area

CHARGE SHEET

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, MI)	2. EMPLID	3. GRADE OR RANK	4. PAY GRADE
Keaty, Matthew, L.	[redacted]	SN	E-3

5. UNIT OR ORGANIZATION	6. CURRENT SERVICE	
[redacted]	a. INITIAL DATE	b. TERM
	20200317	4 years

7. PAY PER MONTH			8. NATURE OF RESTRAINT OF ACCUSED	9. DATE(S) IMPOSED
a. BASIC	b. SEA/FOREIGN DUTY	c. TOTAL		
~~$2,296.50~~ $2,547.50	$155.00	~~$2,451.50~~ $2,702.50	None	N/A

II. CHARGES AND SPECIFICATIONS

10. [redacted] TJW23 [redacted] TJW03

CHARGE I: Violation of the UCMJ, Article 134

Specification 1: In that SN Matthew Keaty, U.S. Coast Guard, at or near Portsmouth, New Hampshire, did, on one or more occasions, from on or about June 2020 to on or about November 2020, knowingly and unlawfully disseminate photographs of himself engaging in sexual activity with [redacted] on the Internet without the express consent of [redacted] to disseminate such photographs, in violation of Title LXII, Chapter 644, Section 9, of the New Hampshire Revised Statutes, and that such conduct was of a nature to bring discredit upon the armed forces.

Specification 2: In that SN Matthew Keaty, U.S. Coast Guard, at or near Portsmouth, New Hampshire, did,on or about ~~August~~ MARCH THROUGH SULY 2020, knowingly and unlawfully disseminate videos of himself engaging in sexual activity with [redacted] on the Internet without the express consent of [redacted] to disseminate such videos, in violation of Title LXII, Chapter 644, Section 9, of the New Hampshire Revised Statutes, and that such conduct was of a nature to bring discredit upon the armed forces.

[redacted] TJW23

CHARGE II: Violation of the UCMJ, Article 107

Specification: In that ~~SN Matthew~~ Keaty, U.S. Coast Guard, did at or near Kittery, ME, on or about April 2021, with intent to deceive, make to CGIS Special Agent [redacted] an official statement, to wit: that he had not posted any content of [redacted] on the Internet website Pornhub.com, or words to that effect, which statement was false in that he had posted videos of [redacted] to Pornhub.com, and was then known by the said SN Keaty to be so false. [redacted] TJW23

III. PREFERRAL

11a. NAME OF ACCUSER (Last, First, Middle Initial)	b. GRADE	c. ORGANIZATION OF ACCUSER
[redacted]	YN1/E-6	Legal Service Command

d. SIGNATURE OF ACCUSER	e. DATE (YYYYMMDD)
[redacted]	20220920

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 20th day of September, 2022, and signed the foregoing charges and specifications under oath that he is a person subject to the Uniform Code of Military Justice and that he either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his knowledge and belief.

Anthony M. Rodrigues	Legal Service Command
LCDR/O-4	Commissioned Officer
Grade	*Official Capacity to Administer Oaths (See R.C.M. 307(b)—must be commissioned officer)*

RODRIGUES.ANTHONY.MARINUS.[redacted] Digitally signed by RODRIGUES.ANTHONY.MARINUS.[redacted] Date: 2022.09.20 12:50:21 -04'00'

Signature

DD FORM 458, MAY 2000 PREVIOUS EDITION IS OBSOLETE.

12.
On 03 October 2022, the accused was informed of the charges against him and of the name(s) of the accuser(s) known to me *(See R.C.M. 308(a)). (See R.C.M. 308 if notification cannot be made.)*

[redacted]
Typed Name of Immediate Commander

[redacted]
Organization of Immediate Commander

CAPT/O6
Grade

[redacted]
Signature

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13.
The charges were received at 0811 hours, 2 November, 2022, at United States Coast Guard
Designation of Command or Officer exercising
Atlantic Area
Summary Court-Martial Jurisdiction (See R.C.M. 403).

Kevin E. Lunday
Typed Name of Officer

~~FOR THE~~ [1]

VADM
Grade

Commander
Official Capacity of Officer Signing

VADM K. E. Lunday Digitally signed by VADM K. E. Lunday Date: 2022.11.02 08:12:19 -04'00'
Signature

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY	b. PLACE	DATE *(YYYYMMDD)*
Coast Guard Atlantic Area	Portsmouth, VA	20221102

Referred for trial to the Special court–martial convened by Coast Guard Atlantic Area Special Court-Martial Convening
Order #1-22 of
27 October, 2022 subject to the following instructions: [2]

None By _____ of _____
Command or Order

Kevin E. Lunday
Typed Name of Officer

Commander
Official Capacity of Officer Signing

VADM
Grade

VADM K. E. Lunday Digitally signed by VADM K. E. Lunday Date: 2022.11.02 08:12:49 -04'00'
Signature

15.
On 02 November, 2022, I caused to be served a copy hereof on the above named accused.

Christopher J. Humphrey
Typed Name of Trial Counsel

LT
Grade or Rank of Trial Counsel

HUMPHREY.CHRISTOPHER.JAMES.[redacted] Digitally signed by HUMPHREY.CHRISTOPHER.JAMES.[redacted] Date: 2022.11.03 16:34:57 -04'00'
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.

DD FORM 458, (BACK), MAY 2000

TRIAL COURT MOTIONS & RESPONSES

COAST GUARD TRIAL JUDICIARY
EASTERN JUDICIAL CIRCUIT
SPECIAL COURT-MARTIAL

UNITED STATES **v.** **MATTHEW L. KEATY** **SEAMAN/E3** **U.S. COAST GUARD**	**JOINT MOTION FOR CONTINUANCE** **03 JANUARY 2023**

MOTION

Pursuant to R.C.M. 906(b)(1), the Government and Defense respectfully move the court for a continuance of the motions and response deadlines.

SUMMARY OF THE FACTS AND DISCUSSION

Per the Trial Management Order dated 18 November 2022, motions are due on 5 January 2023, with responses due on 13 January 2023, and an Article 39(a) hearing is scheduled for 26 January 2023. The Defense and the Government have been engaged in plea negotiations, but due to scheduling conflicts, have been unable to discuss the proposed plea agreement with [redacted] the named victim in this case, to obtain her input. The earliest date on which [redacted] is available to provide her input is 9 January 2023.

The Government and the Defense desire to postpone the motions due date, and the response date by one week each to enable the parties enough time to determine whether a resolution short of trial will be feasible in this case. The Government and Defense will be prepared to proceed with the motions hearing scheduled for 26 January 2023.

A trial judge should be liberal in the granting of continuances where there is good cause for the delay. *United States v. Daniels*, 28 C.M.R. 276 (C.M.A. 1959); *United States v. Nichols*, 6 C.M.R. 27 (C.M.A. 1952); *United States v. Sutton*, 46 C.M.R. 826 (A.C.M.R. 1972). Where

the accused is the moving party, the military judge must weigh the underlying basis for the continuance against the adverse consequences to the prosecution from delaying the trial. *United States v. Thomas*, 33 M.J. 694 (A.C.M.R. 1991). In this case, where the Government and Defense are making a joint motion, the request for a continuance will not adversely affect the Government, and will allow Defense counsel sufficient time to prepare its motions in the event a plea agreement cannot be reached.

RELIEF REQUESTED

The Government and Defense respectfully request that the Trial Management Order be revised as follows:

k. Motions filed and notice pursuant to M.R.E 412/513: 13 January 2023

l. Responses to motions: 20 January 2023

Respectfully Submitted,

HATHAWAY.NICHOLAS.JEANFREY [redacted]

Nicholas J. Hathaway,
Lieutenant Commander, USCG
Detailed Defense Counsel

HUMPHREY.CHRISTOPHER.JAMES [redacted]
Digitally signed by HUMPHREY.CHRISTOPHER.JAMES [redacted]
Date: 2023.01.03 09:05:17 -05'00'

Christopher J. Humphrey,
Lieutenant, U.S. Coast Guard,
Assistant Trial Counsel.

Certificate of Service

I certify that I have served a true copy (via e-mail) of the above on Judge Fowles on 3 January 2022.

HATHAWAY.NICHOLAS.JEANFREY [redacted]
Digitally signed by HATHAWAY.NICHOLAS.JEANFREY [redacted]
Date: 2023.01.03 12:49:07 -05'00'

Nicholas J. Hathaway,
Lieutenant Commander, USCG
Detailed Defense Counsel

HUMPHREY.CHRISTOPHER.JAMES. [redacted]
Digitally signed by HUMPHREY.CHRISTOPHER.JAMES [redacted]
Date: 2023.01.03 14:12:06 -05'00'

Christopher J. Humphrey,
Lieutenant, U.S. Coast Guard,
Assistant Trial Counsel.

Appellate Exhibit VI
Page 2 of 2

COAST GUARD TRIAL JUDICIARY
EASTERN JUDICIAL CIRCUIT
SPECIAL COURT-MARTIAL

UNITED STATES **v.** **MATTHEW KEATY** **SN** **U.S. COAST GUARD**	**DEFENSE MOTION TO COMPEL DISCOVERY** **15 March 2023**

MOTION

Pursuant to 10 U.S.C. § 846, Article 46, Uniform Code of Military Justice (UCMJ), and Rule for Courts-Martial (R.C.M.) 701(a)(2)(A), the Defense respectfully moves this Court to compel disclosure to the Defense of the items detailed below.

BURDEN

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

FACTS

1. SN Keaty is charged with two specifications of a novel Article 134, UCMJ, offense, alleging he distributed nude pictures and videos of [redacted] without her consent. He is also charged with one specification of a violation of Article 107, UCMJ. Charge Sheet.
2. On 18 November 2022, the Defense submitted its initial discovery request and request for production. Enclosures 1, 2.

3. On 29 November 2022, the Government responded to the Defense's initial discovery request and request for production. Enclosure 3.
4. The Government denied various Defense requests. Those denials are detailed below. The Government also indicated it would produce certain items that the Defense has not yet received. Those responses are also detailed below.
5. Relevant to a specific Defense request for discovery, the Government obtained data from the website Reddit via a Stored Communications Act Search Warrant. Enclosure 4. The Government has not provided all materials listed in the CGIS ROI Action report documenting Reddit's response to the warrant. *Id.* Relevant to the Defense request for production, this case originated when the Instagram user [redacted] reviewed the posts of the Reddit user [redacted] then contacted Ms. [redacted] and Ms. [redacted] who also reviewed the posts of the same user. Ms. [redacted] and Ms. [redacted] contacted [redacted] who contacted the Coast Guard. [redacted] never reviewed the posts by [redacted] *Id.*

Defense Request	**Government Denial/Response**
Paragraph 1(b)(1) Any evidence that is material to either the issue of guilt or the sentence, regardless of admissibility, that is known to the government or agents thereof, including closely aligned civilian authorities or entities, witnesses, or consultants.	Material responsive to this request has been previously provided. If and when the United States becomes aware of additional materials responsive to this request, the material will be provided to defense counsel.
Paragraph 1(b)(3) Any books, papers, documents, photographs, tangible objects, media, electronic records, or copies or portions thereof, which are within the possession, custody, or control of the government or agents thereof, including closely	Material responsive to this request has been previously provided.

aligned civilian authorities or entities, and which are relevant to defense preparation or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at tri	
Paragraph 1(c)(2): Any agency or law enforcement documents and data, made in connection with this case, including all attachments. This request includes all forms and documents, including witness reliability forms, data sheets, and other relevant documents. This request includes, but is not limited to, the following relevant documentation: interview logs, interview records and agent notes, investigative records checks, including NCIC checks, run on any person during the investigation of this case, any documents related to searches and seizures, all records reflecting the chain of custody of any evidence seized and/or tested, all personal or business notes, memoranda, and other writings prepared by investigators in the case that are not furnished pursuant to any other provisions of this request, and any other documents collected in the course of the investigation of this case.	Some responsive material has been previously produced. Additional responsive materials have been requested and will be produced upon receipt.
Paragraph (1)(c)(2)(H), (I): (H) Internal communications, emails, or other documents used to brief, respond to, and/or request investigative activities related to this case. This request specifically includes any communication including email between, to, from, or among law enforcement, a member of the Accused's command, the convening authority, the staff judge advocate, or any officer directing the investigation, and it includes any communication including email briefing or otherwise updating senior Coast Guard leadership, including Coast Guard JAG leadership, on the subject case; (I) Copies of all communications, emails, or other documents exchanged between law enforcement, trial counsel, the Accused's command, the convening authority, the staff	In response to (h) and (i), your request is denied as being overbroad.

judge advocate, or any officer directing the investigation or any other private, quasi-governmental, or government entity consulted with involving evidence related to this case;	
Paragraph (1)(h)(1): Any and all communications, written or otherwise, including email, between or among the Trial Counsel, Special Victim's Counsel, the Staff Judge Advocate, or the Convening Authority regarding the case, including the quality or scope of the investigation or the statement of [redacted] perfecting charges (draft or proposed charges), prosecution, or docketing. This information is in the possession of the Government and relevant to the preparation of the defense.	Responsive material, to the extent it exists, has been produced.
Paragraph (1)(h)(2): The time and date of any and all meetings between the Trial Counsel and any potential witness in this case, and all notes by Trial Counsel or support staff taken contemporaneously with these meetings. This information is in the possession of the Government and relevant to the preparation of the defense.	Your request is denied.
Paragraph (1)(a) of Request for Production: The Instagram account information for the Instagram user identified as [redacted] as identified on page 4 of the report of investigation as [redacted] is relevant and necessary for the reasons described below. As indicated in the ROI, this case began when [redacted] contacted Ms. [redacted] and Ms. [redacted] who, according to the ROI, subsequently identified the alleged victim, Ms. [redacted] had allegedly identified Ms. [redacted] and Ms. [redacted] and potentially Ms. [redacted] from reviewing the posts of a reddit user named [redacted] is one of only three witnesses in this case to review the actual posts on reddit by the reddit user [redacted] Since the actual posts on reddit are the basis for the two specifications in Charge I in this case, ascertaining what [redacted] observed being	Your request for production set forth in reference (b) is denied.

posted by the user [redacted] is a central issue in this case. Therefore, his Instagram Account information is relevant and necessary in order to contact and interview [redacted] regarding the actual posts of the reddit user account [redacted] which allegedly belonged to SN Keaty. This information can be obtained from the parent company of Instagram, Meta Platforms,Inc. [redacted] All legal process can be submitted tohttps://www.facebook.com/records	

LAW

a. Discovery under R.C.M. 701.

Parties to a court-martial "shall have equal opportunity to obtain witnesses and other evidence." Article 46, UCMJ. Trial counsel's obligation under Article 46, UCMJ, includes "removing obstacles to defense access to information and providing such other assistance as may be needed to ensure that the defense has an equal opportunity to obtain evidence." *United States v. Stellato*, 74 M.J. 473, 481 (C.A.A.F. 2015). The Rules for Court-Martial pertaining to discovery aid in the enforcement of Article 46 and "[t]he parties to a court-martial should evaluate pretrial discovery and disclosure issues in light of this liberal mandate." *Id.* (quoting *United States v. Roberts*, 59 M.J. 323, 325 (C.A.A.F. 2004)). "Discovery in the military justice system, which is broader than in the federal civilian criminal proceedings, is designed to eliminate pretrial gamesmanship, reduce the amount of pretrial motions practice, and reduce the potential for surprise and delay at trial." *United States v. Jackson*, 59 M.J. 330, 333 (C.A.A.F. 2004).

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

> The Government shall permit the defense to inspect any books, papers, documents, data, photographs, tangible objects, buildings, or places, or copies of portions of these items, if the item is within the possession, custody or control of military authorities and – (i) the item is relevant to defense preparation [...].
>
> R.C.M. 701(a)(2)(A)(i)

Generally speaking, items held by an entity outside of the Federal Government are not in the possession, custody, or control of military authorities. *Stellato*, 74 M.J. at 484. However, trial counsel "cannot avoid R.C.M. 701(a)(2)(A) by the simple expedient of leaving relevant evidence to repose in the hands of another agency while utilizing his access to it in preparing his case for trial." *Id.* (internal citations and quotation marks omitted). Even evidence not in the physical possession of the prosecution team might still be within its possession, custody, or control. *Id.* And, "of course, it matters not whether the item is within the possession, custody, or control of the prosecution team. The issue is whether it is in possession, custody, or control of 'military authorities.'" *Id.* at 492 n. 1 (J. Stucky, concurring) (citing R.C.M. 701(a)(2)(A)). When information requested by the Defense is *not* in the possession of the prosecution team or office but *is* in the possession, custody, or control of other military authorities, Article 46, UCMJ demands that trial counsel actively facilitate the Defense's receipt of those materials by "removing obstacles to defense access to information and providing such other assistance as may be needed." *Id.* at 481.

Items may be subject to discovery even though not in the physical possession of the Government, including when: "(1) the prosecution has both knowledge of and access to the object; (2) the prosecution has the legal right to obtain the evidence; (3) the evidence resides in

another agency but was part of a joint investigation; and (4) prosecution inherits a case from a local sheriff's office and the object remains in the possession of the local law enforcement." *Id.* at 485. Evidence may still be in the "possession, custody or control of military authorities" even if it does not fit neatly into any of these scenarios, and the determination must rest on the particular facts of each case. *Id.* at 484-85.

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

With respect a Defense request for production, "each party is entitled to the production of evidence which is relevant and necessary." R.C.M. 703(f)(1). Military Rule of Evidence 401 (MRE) defines relevant evidence as that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." 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." R.C.M. 703(f)(1) discussion." *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004). The Defense "as the moving party, who was required as a threshold matter to show that the requested material existed." *Id.*

5. <u>Argument.</u>

Throughout the Government's response to the Defense discovery request, the Government repeatedly states in response to specific requests "Materials responsive to this request have been

previously provided." *See* Enclosure 3. That statement is not responsive to the Defense requests, and is made inconsistently throughout the Government's response. For example, in response to paragraph 1.b.1., of the Defense request the Government replied "[m]aterial responsive to this request has been previously provided. If and when the United States becomes aware of additional materials responsive to this request, the material will be provided to defense counsel." Enclosure 3. But in response to paragraph 1.b.3., of the Defense request the Government replied "[m]aterial responsive to this request has been previously provided." It is unclear in that response whether the Government is indicating it will provide additional materials to the Defense. Such a response does not indicate whether the Government is granting or denying the request, whether the Government has turned over all responsive materials, or whether the Government will turn over additional materials in the future. The Defense requests the Court order the Government to provide a responsive answer to each Defense discovery request.

The following discussion addresses each item requested by the Defense that has been denied by the Government.

a. **Paragraph 1(b)(3)**: While the Government stated "Material response to this request has been provided," it is clear the Government has additional materials it has not provided, which highlights the confusing nature of this response. As seen in enclosure 4, SN Keaty consented to the Government searching his cellular phone. While the Government has turned over certain materials which appear to be from SN Keaty's phone, it has not turned over an electronic copy of its digital image of the phone. This is particularly important in this case as the Government will almost certainly be introducing evidence from SN Keaty's phone at trial, and some the photos and videos SN Keaty allegedly posted on the internet were located on his phone, making the

digital image vital to Defense preparation. Additionally, the Defense has retained a Digital Forensic Examiner as an expert consultant. Without the electronic copy of the digital image of SN Keaty's phone, the Defense expert is unable to actually be of use in the case. This Court should compel the Government to turn over the entirety of the electronic evidence it seized from SN Keaty's phone.

b. **Paragraph 1(c)(2)**: While the Government has continued to turn over materials included in the investigation, it is unclear to the Defense if there are any remaining materials in the Government's possession which were collected or are associated with the investigation in this case. It is vital the Government expeditiously discover to the Defense all items which fall under this request, including items obtained from outside entities, such as [redacted] in order for the Defense to conduct a full investigation of the merits and all possible legal issues. More specifically, the Government has not provided all materials returned by Reddit in response to the Government's search warrant. The Government appears to have discovered only one of the five excel spreadsheets Reddit provided.

c. **Paragraph (1)(c)(2)(H),(I)**: In these two requests, the Defense requested any communications between law enforcement, SN Keaty's command, the Convening Authority, the SJA, Trial Counsel, and other entities, which are related to this case. The Government denied the Defense's request, stating "In response to (h) and (i), your request is denied as being overbroad." First, the Government did not object to the Defense request as irrelevant to Defense preparation, most likely because communications between various Government agents is clearly vital to Defense preparation. The listed communications could, among other things, impact how the Defense goes about its investigation, assist in determining which motions to file, evaluate the strength of the Government's case, determine the character of the relationship between the

Government and the alleged victim, and reveal additional materials the Defense may be entitled to in discovery. Further, the Defense requests are not overbroad, but are specifically targeted to a discrete group of people involved in this case, and only seeking information related to this case. Those parameters significantly narrow the scope of the requests, and make it relatively easy for Trial Counsel to obtain responsive items. Moreover, the vast majority of communications is likely to be in the form of government emails or text messages, which are electronic communications the Government is easily able to access and retrieve. Further, the Government cites no authority which authorizes it to deny a relevant discovery request because of the breadth of the request.

The novel charges in this case make underscore how this requests meets the standard for discovery. The decision to prefer and refer charges in this case was likely influenced by at least two legal offices, the Legal Service Command and the Staff Judge Advocate to the Convening Authority. It is highly likely those offices exchanged some sort of written product, such as a formal prosecution memo or email advice, while providing or receiving legal advice.

Evidence like a LSC prosecution memo, or Staff Judge Advocate input is highly relevant to Defense preparation. The analysis and decision-making processes of leaders directly involved in the administration of the military justice process in this case are clearly relevant to the Defense's preparations for trial, which not only includes presenting an effective Defense during the contested trial in the courtroom but also includes numerous other decisions concerning whether to file any motions or requests that could affect the manner in which the trial process proceeds (e.g., for defective referral, unlawful command influence, etc.) as well as appropriate possible remedies for potential defects in the trial process. The Court should compel the discovery of these items to the Defense.

d. **Paragraph (1)(h)(1)**: While the Government agreed to discover the items listed in this request, the Defense notes the request here because it overlaps, in part, with the items requested in paragraph 1(c)(2)(H) and (I) of the Defense requests. If the Government has not turned over all items which fall under this request, or denies this request, the Defense requests the Court order the Government to discover the requested materials on the same basis as the previous request.

e. **Paragraph (1)(h)(2)**: The Government provided no basis to deny this request, because there is no basis. Just as the Government is required to turn over all investigative documents, including handwritten notes, from the CGIS investigation, it is required to turn over all documents which relate to an investigation by a non-law enforcement entity. Here, the Government denied the Defense request to turn over the most basic portions of an investigation, actual statements by witnesses in the case. These items are relevant to Defense preparation for numerous reasons, most fundamentally because they form the basis of the evidence the Government will use to meet its burden at trial. They are also relevant because they could show inconsistencies in witnesses statements to different entities, help decide how the Defense should investigate, provide evidence for additional motions, and numerous other ways. *See United States v. Eshalomi*, 22 M.J. 12 (C.M.A. 1986).

f. **Paragraph (1)(a) of the Request for Production**: The items requested are relevant and necessary. As seen in enclosure 4, the original basis for this investigation was when a Instagram user with the name [redacted] contacted Ms. [redacted] and Ms. [redacted] who then contacted [redacted] reviewed the Reddit posts of user [redacted] one of only three people involved in this case to do so. Since the Government is alleging SN Keaty posted photos of [redacted] on Reddit through the username [redacted] the persons who actually saw the

posts on Reddit are highly relevant to verify and corroborate the Government's allegations. Importantly, the Government does not have any electronic copies of the actual photos which were posted on Reddit. Therefore, like Ms. [redacted] and Ms. [redacted] identifying and interviewing [redacted] is highly relevant, and necessary to determine the veracity of the Government's allegations. Enclosure 4 shows [redacted] is a user of the website Instagram, and the Government can obtain his subscriber information by sending a subpoena to Instagram. The Defense has met its burden to show the requested evidence is relevant and necessary, and is identifiable by the Government. The Court should order the Government to produce the requested evidence.

RELIEF REQUESTED

The Defense respectfully moves the Court to order the Government disclose the foregoing items to the Defense in a timely fashion.

EVIDENCE AND HEARING

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

Enclosure 1: Defense Initial Request for Discovery

Enclosure 2: Defense Initial Request for Production

Enclosure 3: Government Response to Defense Initial Request for Discovery and Production

Enclosure 4: Relevant pages from the Report of Investigation

Unless the Government concedes the motion or this Court grants the relief requested on the basis of pleadings alone, the Defense requests oral argument on this motion pursuant to R.C.M. 905(h).

HATHAWAY.NICHOLAS.JEANFREY.[redacted] Digitally signed by HATHAWAY.NICHOLAS.JEANFREY.[redacted] Date: 2023.03.15 15:24:06 -04'00'

N. Hathaway

Appellate Exhibit VI
Page 12 of 13

LCDR, USCG
Defense Counsel

CERTIFICATION OF SERVICE

A true copy of this motion was served on the opposing party, and the court on 15 March 2023.

HATHAWAY.NICHOLAS.JEANFREY.[redacted] Digitally signed by HATHAWAY.NICHOLAS.JEANFREY.[redacted] Date: 2023.03.15 15:24:41 -04'00'

N. Hathaway
LCDR, USCG
Defense Counsel

Appellate Exhibit VII
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SPECIAL COURT-MARTIAL
UNITED STATES COAST GUARD
EASTERN JUDICIAL CIRCUIT

UNITED STATES	)	
	)	
	)	**UNITED STATES RESPONSE TO**
v.	)	**DEFENSE MOTION TO COMPEL**
	)	**DISCOVERY**
	)	
	)	
	)	
MATTHEW KEATY,	)	**22 March 2023**
SN / E-3, USCG	)	

NATURE OF MOTION AND RELIEF SOUGHT

The United States respectfully submits that the defense has failed to meet their burden to demonstrate that the requested materials actually exist and that they are discoverable under RCM 701. The Government requests this Court deny the Defense's motion to compel discovery.

HEARING

The United States respectfully requests oral argument on this motion.

FACTS & PROCEDURAL HISTORY

1. The accused is charged with two specifications of violating Article 134, UCMJ for posting photos and videos of himself engaging in sexual activity with his girlfriend, [redacted] on the Internet without her permission, and one specification of Article 107, UCMJ for making a false official statement to CGIS. (*Enclosure 1*)
2. [redacted] and SN Keaty met while they were both attending [redacted] and started dating in 2019. In approximately May of 2020, after joining the Coast Guard, while living off-base in New Hampshire, SN Keaty started posting nude pictures of [redacted] on reddit.com. (*Enclosure 1*)

3. An unknown individual by the name of [redacted] saw on Reddit that SN Keaty was reposting images of two women from Instagram. The images that SN Keaty was reposting were screenshots from Instragram which included the women's Instagram handles, [redacted] and [redacted] reached out via Instagram to the two women and alerted both of them that their Instagram photos were being reposted on Reddit. (*Enclosure 1*)
4. The two women, Ms. [redacted] and Ms. [redacted] then went onto Reddit to view the profile of the person reposting their images, and when they did, they recognized the profile as belonging to SN Keaty, their former high school classmate. They were able to determine it was SN Keaty because he had also posted a video of himself boxing, and they recognized his face. (*Enclosure 1*)
5. When viewing SN Keaty's profile, they also saw that he was posting nude images of an unknown woman, but noticed SN Keaty captioned the photos with "my girlfriend," or "my girlfriend sent this, this morning." They also saw a logo in the photo which associated the unknown woman with [redacted] (*Enclosure 1*)
6. From there, Ms. [redacted] and Ms. [redacted] were able to identify [redacted] from her photo on Instagram and her association with SN Keaty, at which point they notified [redacted] of what they had seen. (*Enclosure 1*)
7. [redacted] confronted SN Keaty about what he was doing, and he admitted through text messages to posting approximately 30 pictures of her online since May of 2020. (*Enclosure 1*)

8. CGIS agents met with SN Keaty and he admitted to posting images to the [redacted] known as [redacted] under his Reddit username [redacted] SN Keaty told CGIS he had posed approximately 60-90 images of her on Reddit. (*Enclosure 1*)
9. SN Keaty consented to a search of his phone, and CGIS agents reviewed various photos within his iPhone's hidden album. SA Keaty identified several images he had uploaded to Reddit and placed his initials beside the pictures that he remembered uploading. (*Enclosure 1*)
10. In response to several Reddit messages, SN Keaty was also sending Reddit users links to videos of [redacted] that he had uploaded to Pornhub.com as well as sharing them on Kik and Snapchat. (*Enclosure 1*)
11. On 21 November 2022, the defense submitted a seven (7) page standard initial discovery request, largely consisting of boiler plate language. On 29 November 2022, the Government responded to the defense's discovery request. To date, the Government has provided over 400 pages of discovery to the defense.
12. On 15 March 2023, the defense moved this Court to compel discovery, pursuant to R.C.M. 701(a)(2)(A) and Article 46 U.C.M.J.

For the reasons detailed below, the Government opposes this motion and respectfully requests that this Court deny the defense's motion to compel discovery.

BURDEN OF PROOF

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

exists." *United States v. Waldrup*, 30 M.J. 1126, 1129 (N-M. C.M.R. 1989) ("In both R.C.M. 701(a)(2) and 703(f) …it is incumbent upon the defense to show that the requested material actually exists."). See also, *United States v. Crump*, ACM 39628, 2020 WL 6817741, at *31 (A.F. Ct. Crim. App. Nov. 10, 2020), review denied, 81 M.J. 177 (C.A.A.F. 2021) ("Defense failed to carry its initial burden that some of the evidence ever existed such that it could be discovered or produced.")

APPLICABLE LAW

The Rules for Courts-Martial provide very distinct rules and standards for the discovery of documents and evidence from the respective parties and for the production of evidence not within the possession and control of the parties but otherwise subject to compulsory process. The former rules and standards are outlined in R.C.M. 701 which governs discovery between the parties. On the other hand, the latter rules and standards are outlined in R.C.M. 703 which governs the production of evidence and witnesses subject to compulsory process. This distinction is crucial because of the substantially different standards which apply and the respective burdens that are imposed on the defense in requesting materials potentially subject to them.

Discovery under R.C.M. 701:

Under R.C.M. 701, the Government must permit the defense to inspect, among other things, "[a]ny books, papers, documents, photographs, tangible objects, buildings, or places" if and only if (1) they are "within the possession, custody, or control of military authorities" and (2) they are either (i) relevant to defense preparation, (ii) the government intends to use the item in the case-in-chief at trial, (iii) the government anticipates using the item in rebuttal, or (iv) the item belongs to the accused. R.C.M. 701(a)(2)(A)(i). By its plain language, R.C.M. 701(a)(2) is limited to documents and other tangible evidence or materials that already exist; it does not

require the disclosure of information itself or provide a general right to the discovery of information beyond that required by *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny. In other words, "the government has no duty to create records to satisfy discovery demands." *United States v. Figueroa*, 55 M.J. 525, 528 (A.F. Ct. Crim. App. 2001).

In general terms, R.C.M. 701(a)(2) limits the scope of the government's discovery obligations to evidence or materials that are "within the possession, custody, or control of military authorities." However, in meeting its discovery obligations, the core files that must be reviewed include the prosecution's own files for the case as well as law enforcement files of those acting on the government's behalf in the case, including the files of other government entities. See *United States v. Simmons*, 38 M.J. 376, 381-82 (C.M.A. 1993). "The scope of the due-diligence requirement with respect to governmental files beyond the prosecutor's own files generally is limited to: (1) the files of law enforcement authorities that have participated in the investigation of the subject matter of the charged offenses; (2) investigative files in a related case maintained by an entity closely aligned with the prosecution; and (3) other files, as designated in a defense discovery request, that involved a specified type of information within a specified entity." *United States v. Williams*, 50 M.J. 436, 441 (C.A.A.F. 1999) (citations and internal quotations omitted).

"[T]he parameters of the review that must be undertaken outside the prosecutor's own files will depend in any particular case on the relationship of the other governmental entity to the prosecution and the nature of the defense discovery request." *United States v. Craven*, 202200066, 2022 WL 2314767, at *3 (N-M. Ct. Crim. App. June 28, 2022). For the purposes of R.C.M. 701, the prosecution team has possession, custody, or control of materials or evidence when (1) the trial counsel has both knowledge of and access to the evidence; (2) the trial counsel

has the legal right to obtain the evidence; (3) the evidence resides in another agency but was part of a joint investigation; and (4) the trial counsel inherits the case from another law enforcement agency, and the evidence remains in the possession of that law enforcement agency. See *United States v. Stellato*, 74 M.J. 473, 484-85 (C.A.A.F. 2015). With respect to files not related to the investigation of the matter that is the subject of the prosecution, "[t]he Article 46 interest in equal opportunity of the defense to obtain such information can be protected adequately by requiring the defense to provide a reasonable degree of specificity as to the entities, the types of records, and the types of information that are the subject of the request." *Williams*, 50 M.J. at 443. "A request for information under R.C.M. 701(a)(2) must be specific enough that the trial counsel, through the exercise of due diligence, knows where to look (or where to provide the defense access)." *United States v. Shorts*, 76 M.J. 523, 535 (A. Ct. Crim. App. 2017) (no discovery violation under R.C.M. 701(a)(2) where trial counsel did not "produce something that was not requested" and "had no knowledge whatsoever of its existence"). After all, "the prosecution is not required to search for the proverbial needle in a haystack[.]" *Williams*, 50 M.J. at 441 (internal quotations omitted).

Additionally, R.C.M. 701 specifically addresses whether privileged documents are discoverable. R.C.M. 701(f) states that "[n]othing in this rule shall be construed to require the disclosure of information protected from disclosure by the Military Rules of Evidence [and] [n]othing in this rule shall require the disclosure or production of notes, memoranda, or similar working papers prepared by counsel and counsel's assistants and representatives." R.C.M. 701(f) does not relieve Trial Counsel of providing exculpatory material required by *Brady*, but it does protect non-*Brady* work-product from discovery. The importance of the doctrine is firmly rooted in case law and adopted by military courts. In *United States v. Romano*, the Court of Appeals for

the Armed Forces admonished "[a]bsent a disclosure requirement, documents specifically compiled and prepared with a reasonable anticipation of trial will be encompassed within the privilege if they encapsulate the attorney's thought processes." *United States v. Romano*, 46 M.J. 269, 275 (C.A.A.F. 1997). The work-product doctrine is not narrowly limited to only material that Trial Counsel prepares in anticipation of litigation but can include material prepared by any member of the prosecution team. *See United States v. Vanderwier*, 25 M.J. 263, 268 (C.M.A. 1987); *see also United States v. Barnes*, No. ACM 38720, 2016 WL 2343333, at *8 (A.F. Ct. Crim. App. Apr. 27, 2016).

Production under R.C.M. 703:

For materials or evidence not within the possession, custody, or control of military authorities, R.C.M. 703(e) states that "each party is entitled to the production of evidence that is relevant and necessary." M.R.E 401 defines "relevant evidence" as evidence having any tendency to make the existence of a fact of consequence more or less probable than it would be without the evidence. Relevant evidence is "necessary" when it is "not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue." *United States v. Lofton*, 48 M.J. 247, 248-49 (C.A.A.F. 1998). See also, R.C.M. 703(f)(1) discussion. While an accused has an equal opportunity to benefit from compulsory process, he is not entitled to the issuance of a subpoena under R.C.M. 703 as a general means of discovery or investigation. *United States v. Rodriguez*, 57 M.J. 765, 772 (N-M. Ct. Crim. App. 2002), aff'd, 60 M.J. 239 (C.A.A.F. 2004) (citing *Bowman Dairy v. United States*, 341 U.S. 214, 220 (1951)). Evidence which is not in the possession, custody, or control of military authorities is not subject to the discovery rules outlined in R.C.M. 701 but may be obtained by subpoena subject to the limitations imposed by R.C.M. 703. R.C.M. 703(f)(4)(B). All defense requests for the production

of evidence pursuant to R.C.M. 703 "shall list the items of evidence to be produced and shall include a description of each item sufficient to show its relevance and necessity, a statement where it can be obtained, and, if known, the name, address, and telephone number of the custodian of the evidence."

ARGUMENT

With respect to all of the defense discovery requests at issue, the defense has failed to meet its burden to demonstrate that the information or materials actually exist and are discoverable under R.C.M. 701 or must be produced under R.C.M. 703.

Paragraph 1(b)(3):

In paragraph 1(b)(3), the defense requested "[a]ny books, papers, documents, photographs, tangible objects, media, electronic records, or copies or portions thereof, which are within the possession, custody, or control of the government or agents thereof, including closely aligned civilian authorities or entities, and which are relevant to defense preparation or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial." Defense's motion makes clear that they were missing the complete CFE extract of SN Keaty's phone. The government is working with CGIS to obtain a copy and produce the same. The government is not aware of any additional responsive materials. The Government has turned over to Defense all responsive materials in this case. These requests are too broad. The Government counsel is left with the impractical task of looking for any type of tangible item in any corner of the world for which various levels of government control could be argued.

Paragraph 1(c)(2):

In paragraph 1(c)(2), Defense has requested "[a]ny agency or law enforcement documents and data, made in connection with this case, including all attachments. This request includes all

forms and documents, including witness reliability forms, data sheets, and other relevant documents. This request includes, but is not limited to, the following relevant documentation: interview logs, interview records and agent notes, investigative records checks, including NCIC checks, run on any person during the investigation of this case, any documents related to searches and seizures, all records reflecting chain of custody of any evidence seized and/or tested, all personal or business notes, memoranda, and other writings prepared by investigators in the case that are not furnished pursuant to any other provisions of this request, and any other documents collected in the course of the investigation of this case." Defense's motion makes clear that they are interested in any documents turned over from [redacted] This private University did a reverse image search to assist their student before the Government was aware of the misconduct (therefore not at the behest of the Government). This effort was obtained by CGIS and has been turned over to the Defense. Trial counsel have conducted a search of their emails, and have asked CGIS to conduct a search of their emails, and have turned over all responsive documents. Trial counsel is not aware of any further responsive materials.

Paragraphs 1(c)(2)(H) and (I):

In paragraph 1(c)(2)(H), Defense requests "[i]nternal communications, emails, or other documents used to brief, respond to, and/or request investigative activities related to this case. This request specifically includes any communication including email between, to, from, or among law enforcement, a member of the Accused's command, the convening authority, the staff judge advocate, or any officer directing the investigation, and it includes any communication including email briefing or otherwise updating senior Coast Guard leadership, including Coast Guard JAG leadership, on the subject case". In paragraph 1(c)(2)(I), Defense requests "[c]opies of all communications, emails, or other documents exchanged between law

enforcement, trial counsel, the accused's command, the convening authority, the staff judge advocate, or any officer directing the investigation or any other private, quasi-governmental, or government entity consulted with involving evidence related to this case".

These requests are overly broad, as they exceed "[t]he scope of the due-diligence requirement with respect to governmental files beyond the prosecutor's own files" *United States v. Williams*, 50 M.J. 436, 441 (C.A.A.F. 1999) (citations and internal quotations omitted). Trial counsel has searched its own files, requested responsive materials from CGIS and the SJA's office, and discovered the same to Defense, but Defense demands discovery of a very broad and generic list of people and entities, and it is impossible to determine from which specific entities and individuals, Defense seeks the government to obtain further responsive material. Defense has made no effort to meet its burden to demonstrate that any such evidence actually exists or that it is actually relevant in some way to defense preparation. As the cases cited above demonstrate, this type of request is far outside the scope of permissible discovery under R.C.M. 701 absent sufficient evidence that the records exist, that they are actually within the possession, custody, and control of military authorities, and that they would contain information that actually is relevant to the defense's preparation. The defense has provided none of that required evidence. Accordingly, this portion of the defense motion to compel discovery should also be denied as the Government has to date met its discovery obligation regarding communications from these entities.

Paragraph 1(h)(1)

In paragraph 1(h)(1), Defense seeks "any and all communications, written or otherwise, including email, between or among the Trial Counsel, Special Victim's Counsel, the Staff Judge Advocate, or the Convening Authority regarding the case, including the quality or scope of the

investigation or the statement of [redacted] perfecting charges (draft or proposed charges), prosecution, or docketing." Communications to the SJA containing legal analysis of the case and charging scheme are completely outside of the scope of RCM 701. While a written memorandum from LSC to the SJAdoes exist, it is not relevant to defense's preparation as it does not make any fact of consequence more or less probable. *See* M.R.E. 401. Further, the The memorandum to the SJA contains a factual synopsis of the case, together with legal analysis and the proposed charging scheme, and a disposition recommendation. Such analysis is the trial team's own thoughts on the case. This memo to the SJA was *not* subsequently given to the CA. Even if Defense could articulate some minimal level of relevance, such memorandum is privileged under the work-product doctrine. *See* RCM 701(f); see also *United States v. Mellette*, 82 M.J. 374 (the attorney work-product privilege is separate and distinct from the attorney-client privilege; the attorney-client privilege is the protection that applicable law provides for confidential attorney-client communications, while the work-product protection is the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial).

Paragraph 1(h)(2):

In paragraph 1(h)(2), Defense seeks "the time and date of any and all meetings between the Trial Counsel and any potential witness in this case, and all notes by Trial Counsel or support staff taken contemporaneously with these meetings." Defense is not entitled to the date and time of all meetings with potential witnesses, and any notes by Trial Counsel or support staff are protected attorney work product. *See United States v. Vanderwier*, 25 M.J. 263, 268 (C.M.A. 1987)(Naval Investigation Services agent was assisting trial counsel in case preparation, the court found that the agent's notes from an interview of a witness conducted by trial counsel were

not discoverable as they were protected by the work-product doctrine) *see also United States v. Barnes*, No. ACM 38720, 2016 WL 2343333, at *8 (A.F. Ct. Crim. App. Apr. 27, 2016)(Trial Counsel Paralegal's notes taken during Trial Counsel pre-trial interview of victim were not discoverable as they were protected by the work-product doctrine). Trial Counsel recognizes and understands its obligation to provide any evidence favorable to defense, as well as any verbatim, or substantially verbatim, notes with witnesses. However, even if this Court were to determine Defense is entitled to such materials, those materials do not exist in this case.

Paragraph 1(a) of Request for Production:

In its Request for Production, Defense seeks "[t]he Instagram account information for the Instagram user identified as [redacted] The government does not have any additional information with respect to [redacted] within its possession, custody, or control, and therefore Defense must provide sufficient facts to show that the information (1) has a tendency to make the existence of a fact of consequence more or less probable than it would be without the evidence, and (2) that it is not cumulative and would contribute to Defense's presentation of the case in some positive way on a matter in issue. *See United States v. Lofton*, 48 M.J. 247, 248-49 (C.A.A.F. 1998). See also, R.C.M. 703(f)(1) and M.R.E. 401.

Here, Defense proffers that [redacted] "had allegedly identified Ms. [redacted] and Ms. [redacted] and *potentially* Ms. [redacted] (emphasis added)[Defense Motion]. The CGIS ROI makes clear that [redacted] did in fact identify Ms. [redacted] and Ms. [redacted] The ROI also makes clear that [redacted] did not identified [redacted] in any way. [redacted] did not have any communications with [redacted] Further, neither Ms. [redacted] nor Ms. [redacted] spoke to [redacted] about [redacted] Defense speculates that because [redacted] saw two of SN Keaty's Reddit posts, that he must have seen all of SN Keaty's Reddit posts.

Even if [redacted] had seen [redacted] that does not make any fact of consequence more or less probable,. Defense argues that "ascertaining what [redacted] observed being posted by the user [redacted] is a central issue in the case". Beyond this mere assertion, the government fails to understand why [redacted] observations are a central or tangential issue in this case. Additionally, it would be cumulative of the evidence already produced to Defense. The government has produced to Defense statements from two actual witnesses who can testify as what they saw (Ms. [redacted] and Ms. [redacted] together with digital evidence showing the posts, and the admissions of SN Keaty himself. Defense seeks user information from an unknown individual so they can contact and interview him about whether he may or may not have seen photos of a woman he has neither met, nor communicated with, from over 16 months ago. Defense is free to contact [redacted] using the Instagram contact information contained within the ROI, but the SCA should not be abused to invade the privacy of another individual as part of Defense's fishing expedition.

CONCLUSION & REQUESTED RELIEF

For the reasons detailed above, the United States respectfully requests that this Court enter an order denying the Defense Motion to Compel Discovery. The United States respectfully requests oral argument.

Respectfully Submitted,

HUMPHREY.CHRISTOPHER.JAMES.[redacted]
Digitally signed by HUMPHREY.CHRISTOPHER.JAMES[redacted]
Date: 2023.03.22 16:52:17 -04'00'

C. J. Humphrey, LT, USCG
Trial Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the above motion was served, via e-mail, on the Court and Defense Counsel on 22 March 2023.

Respectfully Submitted,

HUMPHREY.CHRISTOPHER.JAMES.[redacted] Digitally signed by HUMPHREY.CHRISTOPHER.JAMES.[redacted] Date: 2023.03.22 16:52:32 -04'00'

C. J. Humphrey, LT, USCG
Trial Counsel

COAST GUARD TRIAL JUDICIARY
EASTERN JUDICIAL CIRCUIT
SPECIAL COURT-MARTIAL

UNITED STATES **v.** **MATTHEW KEATY** **SN** **U.S. COAST GUARD**	**DEFENSE MOTION TO DISMISS – DEFECTIVE PREFERRAL** **15 March 2023**

MOTION

Pursuant to 10 U.S.C. § 830, Article 30, Uniform Code of Military Justice (UCMJ), and Rule for Courts-Martial (R.C.M.) 307(b)(2) the Defense respectfully moves this Court to dismiss the Sole Specification of Charge II, without prejudice, because it was improperly preferred.

BURDEN

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

FACTS

1. SN Matthew Keaty is charged with the below specification of a violation of Article 107, UCMJ. Charge Sheet.

> Specification: In that SN Matthew Keaty, U.S. Coast Guard, did at or near Kittery, ME, on or about April 2021, with intent to deceive, make to CGIS Special Agent [redacted] an official statement, to wit: that he had not posted any content of [redacted] on the Internet website Pornhub.com, or words to that effect, which statement was false in that he had posted videos of [redacted] to Pornhub.com, and was then known by the said SN Keaty to be so false.

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2. Charge II was preferred on 20 September 2022 by YN1 [redacted] Charge Sheet.
3. YN1 [redacted] was asked by her CPO if she would review GBS 1-69, and prefer charges against SN Keaty. Enclosure 1.
4. Relevant to the Sole Specification of Charge II, YN1 [redacted] reviewed GBS 1-69, and the relevant portions of the Manual for Courts-Martial. *Id.*
5. GBS 1-69 consists primarily of the Coast Guard Investigative Service (CGIS) Report of Investigation (ROI). Enclosure 2. The ROI contains a summary of both CGIS interviews of SN Keaty. Enclosure 2, at 5-6, 9-10. Neither summary contains any mention or reference to the website Pornhub.com.[1]
6. While the ROI indicates both interviews of SN Keaty were recorded, YN1 [redacted] did not review those recordings. Enclosure 1.

LAW

To prefer charges and specifications, 10 U.S.C. § 30(b)(1)-(2) requires "the signer has personal knowledge of, or has investigated, the matters set forth in the charges and specifications; and the matters set forth in the charges and specifications are true, to the best of the knowledge and belief of the signer." "Generally, any person subject to the UCMJ may prefer charges, however, the accuser must state that the charges 'are true in fact to the best of his knowledge and belief.'" *United States v. Givens*, 82 M.J. 211, 214 (C.A.A.F. 2018) (quoting *United States v. Hamilton*, 41 M.J. 32, 36 (C.M.A. 1994)). Under Rule for Court-Martial (RCM) 307(b)(2)(a)-(b), the accuser must swear they have personal knowledge or have investigated the charges and specifications. "[T]he traditional purpose of the military charging

[1] Not included in Enclosure 2 are GBS 68-69, which are videos that depict intimate sexual activities between SN Keaty and [redacted] Given the nature of the videos, and because they are not relevant to the Court's determination of this motion, the videos are not included in Enclosure 2.

provisions is 'to insure the charges were not frivolous, unfounded, or malicious, but' are founded 'in good faith.'" *United States v. Miller*, 33 M.J. 235, 237 (C.M.A. 1991) (Quoting W. Winthrop, *Military Law and Precedents* 151 (2d ed. 1920 Reprint)).

ARGUMENT

This Court should dismiss the Sole Specification of Charge I without prejudice because the preferral of the specification was defective because YN1 [redacted] did not have personal knowledge, nor did she investigate, the Sole Specification of Charge II. As shown by a review of GBS 1-69, and specifically the summaries of SN Keaty's interviews, there is no evidence contained within anything reviewed by YN1 [redacted] which show SN Keaty made any statement in relation to the website Pornhub.com.

In GBS 1-69, which is all the evidence YN1 [redacted] reviewed, the word Pornhub only appears in the in the message logs that were provided by Reddit when it responded to the Government's Stored Communications Act search warrant. Enclosure 2, p. 30-37. While those messages could have provided YN1 [redacted] some evidence that SN Keaty sent links from the website Pornhub to other Reddit user, it does not provide evidence those were links to videos of his girlfriend. More importantly, regardless of those messages, since the interview summaries contain no mention of SN Keaty's statements regarding Pornhub, it would have been impossible for YN1 [redacted] to know if SN Keaty had made any statement about Pornhub. As such, YN1 [redacted] could not have sworn that she had personal knowledge of such a statement, or that it was true in fact.

Case law supports the conclusion the Sole Specification of Charge II should be dismissed. In a remarkably similar fact pattern, the Navy-Marine Corps Court of Criminal Appeals upheld a Military Judge's dismissal of a specification in *United States v. Floyd*, 82 M.J.

821, 832-33 (N.M. Ct. Crim. App. 2022). In that case, the accuser "only reviewed the NCIS ROI summary of [the alleged victim's] statements . . . none of which serve to support the allegation." *Id.* As the accuser had no actual evidence of the alleged offense, the preferral was defective and the Military Judge dismissed the specification. *Id.* The same occurred here. YN1 [redacted] had no evidence SN Keaty made any statement about the website Pornhub. Therefore, the preferral of the Sole Specification of Charge II was defective.

RELIEF REQUESTED

The Defense respectfully moves the Court dismiss the Sole Specification of Charge I without prejudice because its preferral was defective.

EVIDENCE AND HEARING

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

Enclosure 1: Notes of Defense Interview with YN1 [redacted]

Enclosure 2: GBS 1-69

The Defense also intends to call YN1 [redacted] as a witness. YN1 [redacted] is both relevant and necessary to the resolution of this motion. As the accuser it is vital for the Court to hear directly from YN1 [redacted] regarding what knowledge she had regarding Charge II at the moment charges were preferred. Only YN1 [redacted] can provide the evidence necessary for the Defense to definitively establish she had no knowledge of any statements SN Keaty had made regarding the website Pornhub.com in his interviews with CGIS. As such, she is relevant and necessary and should be produced by the Government.

Unless the Government concedes the motion or this Court grants the relief requested on the basis of pleadings alone, the Defense requests oral argument on this motion pursuant to R.C.M. 905(h).

HATHAWAY.NICHOLAS.JEANFREY.[redacted] Digitally signed by HATHAWAY.NICHOLAS.JEANFREY[redacted] Date: 2023.03.15 15:31:11 -04'00'

N. Hathaway
LCDR, USCG
Defense Counsel

CERTIFICATION OF SERVICE

A true copy of this motion was served on the opposing party, and the court on 15 March 2023.

[redacted]

N. Hathaway
LCDR, USCG
Defense Counsel

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SPECIAL COURT-MARTIAL
UNITED STATES COAST GUARD
EASTERN JUDICIAL CIRCUIT

UNITED STATES	)	
	)	
	)	**GOVERNMENT OPPOSITION TO**
v.	)	**DEFENSE MOTION TO DISMISS FOR**
	)	**DEFECTIVE PREFERRAL**
	)	
	)	
	)	
MATTHEW KEATY	)	22 March 2023
SN/E-3, U.S. COAST GUARD	)	

NATURE OF MOTION

The United States files this opposition to the Defense motion to dismiss for defective preferral.

HEARING

The United States will be prepared for oral argument, if the Court finds that oral argument is necessary.

BURDEN

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

STATEMENT OF FACTS

1. On 20 September 2022, charges were preferred by YN1 [redacted] Charge Sheet.

2. YN1 [redacted] reviewed evidence, Bates No. 1-69, and 77 before preferring charges. Enclosure 2.

3. On 11 November 2022, SN Keaty's charges were referred to court-martial. Charge Sheet.

Appellate Exhibit XIII
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4. In Charge II, the Government charged SN Keaty with one specification of Article 107, UCMJ.

5. Sole Specification, Charge II states:

> Sole Specification: In that SN Matthew Keaty, U.S. Coast Guard, did, at or near Kittery, ME, on or about April 2021, with intent to deceive, make to CGIS Special Agent [redacted] an official statement, to wit: that he had not posted any content of [redacted] on the Internet website Pornhub.com, or words to that effect, which statement as false in that he had posted videos of [redacted] to Pornhub.com, and was then known by the said SN Keaty to be so false.

EVIDENCE

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

Enclosure 1: Bates 77 (S) Matthew Keaty Interview

Enclosure 2: Affidavit of LCDR Anthony Rodrigues, Trial Counsel

LAW AND ARGUMENT

In *United States v. Floyd*, decided last year, the Navy-Marine Corps Court of Criminal Appeals explained that to maintain the validity of the purposes of this oath, "an accuser need only generally believe that the allegations contained in the charges are true at the time they are preferred." 82 M.J. 821, 829 (N-M. Ct. Crim. App. 2022). In this case, YN1 [redacted] the accuser, was oriented to the evidence by Trial counsel, read over the charges, reviewed the evidence, and took the applicable oath before accusing SN Keaty for violation Article 107, UCMJ. The Defense claims YN1 [redacted] did not have personal knowledge, nor did she investigate the Sole Specification of Charge II. However, this statement is incorrect.

The Defense states that YN1 [redacted] only reviewed what is now Bates 1-69 within which Pornhub.com is only mentioned in Reddit.com message logs. Def. Motion at 3. However, YN1 [redacted] also reviewed the video recorded CGIS interview of SN Keaty (Enclosure 1). *Proffered testimony*. At the time of her Defense interview, YN1 [redacted] thought she only reviewed what is

now Bates 1-69 because of insufficient notetaking by Trial Counsel in memorializing the preferral package. Enclosure 2. YN1 [redacted] remembers key details of the video recorded subject interview that proves she reviewed the video. *Proffered testimony*. Trial Counsel also ensured that YN1 [redacted] had both the MCM and the applicable New Hampshire statutes available.

Additionally, the Trial Counsel who set up the accusing session brought a stand-alone laptop with the evidence loaded onto it and, when pointing out the applicable files to review, stated that the two videos of sexual acts with [redacted] (Bates 68-69) were videos recovered from Pornhub.com. Enclosure 2.

YN1 [redacted] did review evidence that reasonably supported that SN Keaty had lied about not sending content of [redacted] to Pornhub. There is an exchange between SN Keaty and CGIS where SN Keaty denies having other accounts to share the content and CGIS also summarizes what SN Keaty told them during a previous audio recorded interview which the agents now knew were false statements. Enclosure 1 at 00:21:22 to 00:24:15. After looking through the evidence, YN1 [redacted] believed the charges and specifications to be true, to the best of her knowledge as required by Art. 30(b), UCMJ; R.C.M. 307(b)(2).

In *Military Law and Precedents*, Colonel Winthrop states that the formality associated with accusing charges is to make sure the charges are not "frivolous, unfounded, or malicious." *Winthrop*, page 151. *See also United States v. Westergren*, 14 C.M.R. 560 (A.F.B.R.1953) ("Since it appears that the accuser was apprised of the results of the investigation into the accused's conduct which he, the accuser, had ordered to be made, it is the opinion of the board that the accuser 'investigated' the matters set forth in the charges and specifications and thus substantially complied with the provisions of Art 30(a)")). YN1 [redacted] was apprised of the results of CGIS's investigation and trial counsel's orientation of the evidence when reviewing

the charge for making a false official statement. Although she looked through Bates No. 1-69, and 77. She was told by Trial Counsel that Bates 68 and 69 were recorded sexual acts with [redacted] that the Government had recovered from Pornhub.com. This was personally enough for YN1 [redacted] to satisfy her knowledge and belief that SN Keaty had made a false official statement in violation of the UCMJ.

Objectively, considering what YN1 [redacted] reviewed, the charges are not "frivolous, unfounded, or malicious." *Winthrop*. Unlike *Miller*, YN1 [redacted] never expressed any doubts to Trial Counsel before taking the oath and signing as accuser. *United States v. Miller*, 33 M.J. 235, 236 (CMA 1991). In her interview with the Defense, YN1 [redacted] explains that trial counsel had asked her to make sure the charges and evidence matched. She did so personally; she was not told by trial counsel that she had to prefer. She signed as accuser once satisfied with her own knowledge and belief. Hence, Charge II was not preferred defectively.

REQUESTED RELIEF

The United States respectfully requests this Court deny the Defense's motion to dismiss.

Respectfully Submitted,

HUMPHREY.CHRISTOPHER.JAMES.[redacted] Digitally signed by HUMPHREY.CHRISTOPHER.JAMES.[redacted] Date: 2023.03.22 15:59:33 -04'00'

Christopher Humphrey, LT
Trial Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the above motion was served, via e-mail, on the Court and Defense Counsel on 22 March 2023.

Respectfully Submitted,

HUMPHREY.CHRISTOPHER.JAMES.[redacted] Digitally signed by HUMPHREY.CHRISTOPHER.JAMES.[redacted] Date: 2023.03.22 16:00:00 -04'00'

C.J. Humphrey, LT, USCG
Trial Counsel

Appellate Exhibit XIII
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COAST GUARD TRIAL JUDICIARY
EASTERN JUDICIAL CIRCUIT
SPECIAL COURT-MARTIAL

UNITED STATES **v.** **MATTHEW KEATY** **SN/E-3** **U.S. COAST GUARD**	**DEFENSE MOTION** **TO DISMISS - PREEMPTION** **March 15, 2023**

MOTION

The Defense requests this Court dismiss, with prejudice, Specifications 1 and 2 of Charge I because the specifications are preempted by Article 117a, UCMJ.

BURDEN

As the moving party, the Defense bears the burden of persuasion and the burden of proof on any factual issue necessary to decide the motion. R.C.M. 905(c).

FACTS

1. In Charge I, the Government charged SN Keaty with two novel specifications alleging a violation of Article 134, UCMJ. The Government also charged SN Keaty with violating Article 107, UCMJ. Charge Sheet.
2. This case stems from a Coast Guard Investigative Service (CGIS) investigation into nude photos of [redacted] allegedly posted on the website Reddit by SN Keaty. Enclosure 1.
3. The Government investigated, and obtained evidence, under the theory SN Keaty violated Article 117a, UCMJ. *See* Enclosure 2, 3, 4
4. Instead of charging violations of Article 117a, UCMJ, the Government allegedly charged SN Keaty with violations of Clause 2 of Article 134, UCMJ, including a claim he violated a

specific New Hampshire statute. Charge Sheet. The New Hampshire statute, Title LXII, Chapter 644, Section 9, is similar to Article 117a, UCMJ.

5. Article 117a, UCMJ, was enacted in the FY2018 National Defense Authorization Act (NDAA). FY2018 NDAA, Pub. Law 115-91, Sec. 533.
6. Article 117a, UCMJ, originally was a standalone bill in the House, titled "Protecting the Rights of Individuals Against Technological Exploitation Act (PRIVATE Act)." Enclosure 5, (last accessed March 10, 2023).
7. The bill was introduced in the wake of the Marines United scandal. In early 2017, it was discovered that active duty and veteran Marines were non-consensually posting nude photographs of women in a Facebook group titled Marines United. *Id* at 2. Often the photographs would include degrading and abusive language. *Id*. Thousands of nude pictures were posted of both active duty Marines as well as civilian alleged victims. *Id*.
8. Both the House and Senate heard testimony from either senior civilian and military leaders, or directly from women who had their pictures posted online. In testimony before the Senate Armed Services Committee during a hearing specifically on the Marines United scandal, the then Acting-Secretary of the Navy Sean Stackley and then-Commandant of the Marine Corps General Robert Neller made clear the Government were investigating Marines who had posted pictures of civilians, and were treating civilians as victims of an offense. Enclosure 6, at 15, 57, 58. *Id.* In response to question regarding whether any pictures of civilians were posted, Acting Secretary Stackley stated "NCIS is investigating all criminal allegations under NCIS' jurisdiction. Throughout the investigation, civilians and military family members have been identified." *Id*.at 57. Mr. Stackley also stated NCIS "During the course of the ongoing investigation, NCIS has identified civilians and former servicemembers as potential

victims and potential suspects." *Id.* at 61. General Neller stated "Marines, their dependents, and civilians impacted online by this misconduct our are highest priority. We will take care of them." *Id.* at 58. The witnesses also reported civilians had been provided a safe, discreet and anonymous option to report offense. *Id.*

9. In addition, multiple Senators asked Acting Secretary Stackley and General Neller their opinions of whether the UCMJ should be amended to include a specific offense for the non-consensual distribution of intimate images. *Id.* at 8, 19, 34, 36. In response to a question on whether the UCMJ, prior to the enactment Article 117a, UCMJ, could hold Marines accountable, Acting Secretary Stackly replied " . . . we can hold them accountable in accordance with [A]rticles 120 and 134." *Id.* at 8. In response to another question, General Neller, stated the UCMJ may need to be amended to deal with this type of act. *Id.* at 19. When asked specifically whether the UCMJ should be amended to include a "so-called revenge porn" offense, General Neller replied "I think that would be helpful in the accountability process." *Id.* at 36.
10. Members of each House were also well aware pictures of civilians had been posted as a part of Marines United. In addition, to floor speeches during the introduction of the PRIVATE Act, enclosure 5, the House held floor time specifically to raise awareness of the Marines United scandal, as well as to provide testimony from two witnesses, one active duty female Marine and one female former Marine, whose pictures had been posted on the website. Enclosure 7.

LAW

By its text, Article 134, UCMJ, applies only to "article and disorders not mentioned" in other Articles of the UCMJ. Through the Manual for Courts-Martial (MCM), the President has explained the limitations of Article 134 offenses:

> The preemption doctrine prohibits application of Article 134 to conduct covered by Articles 80 through 132. For example, larceny is covered in Article 121, and if an element of that offense is lacking—for example, intent—there can be no larceny or larceny-type offense, either under Article 121 or, because of preemption, under Article 134. Article 134 cannot be used to create a new kind of larceny offense, one without the required intent, where Congress has already set the minimum requirements for such an offense in Article 121.
>
> MCM, Part IV, para 91.c.(5)(a).

"[P]reemption is the legal concept that where Congress has occupied the field of a given type of misconduct by addressing it in one of the specific punitive articles of the code, another offense may not be created and punished under Article 134, UCMJ, by simply deleting a vital element." *United States v. Kick*, 7 M.J. 82, 85 (C.M.A. 1979) (citing *United States v. Wright*, 5 M.J. 106 (C.M.A. 1978)). The doctrine of preemption is "'designed to prevent the government from eliminating elements from ... offenses under the UCMJ, in order to ease [its] evidentiary burden at trial.'" *United States v. Avery*, 79 M.J. 363, 366 (C.A.A.F. 2020) (quoting *United States v. Wheeler*, 77 M.J. 289, 293 (C.A.A.F. 2018)) (alterations in original); *see United States v. Norris*, 2 C.M.A. 236, 239, 8 C.M.R. 36, 39 (1953) ("We cannot grant to the services unlimited authority to eliminate vital elements from common law crimes and offenses expressly defined by Congress and permit the remaining elements to be punished as an offense under Article 134.")

"However, simply because the offense charged under Article 134, UCMJ, embraces all but one element of an offense under another article does not trigger operation of the preemption doctrine." *Kick*, 7 M.J. at 85. "In addition, it must be shown that Congress intended the other punitive article to cover a class of offenses in a complete way." *Id.* An offense is preempted from being charged

under Article 134 when "(1) Congress intended to limit prosecution for ... a particular area of misconduct to offenses defined in [those] specific articles of the Code, and (2) the offense charged is composed of a residuum of elements of a specific offense." *United States v. Curry*, 35 M.J. 359, 360-61 (C.M.A. 1992). Congressional intent can be shown "through direct legislative language or express legislative history that particular actions or facts are limited to the express language of an enumerated article, and may not be charged under Article 134, UCMJ." *United States v. Anderson*, 68 M.J. 378, 387 (C.A.A.F. 2010). In the elements analysis, a court does "not consider the terminal element of Article 134, UCMJ." *Avery*, 78 M.J. at 368.

ARGUMENT

Specifications 1 and 2 of Charge I are preempted by Article 117a, UCMJ. First, both the direct text and legislative history of Article 117a, UCMJ, indicates Congress intended to cover a class of offenses, the non-consensual distribution of intimate images or videos, in a complete way. Second, the elements of Specification 1 and 2 of Charge I are a residuum of the elements Article 117a, UCMJ.

The text of Article 117a, UCMJ, demonstrates Congress intended for the Article to occupy the field. First, the title of the Article is broad, and does not indicate Congress intended to limit its application to any class of people. Article 117a, UCMJ ("Wrongful broadcast or distribution of intimate visual images.") Second, by including "another person" in the first element, Congress did not limit the application of Article 117a, UMCJ, solely to active duty alleged victims, but any person, including civilians, who had their picture posted online by a servicemember. Third, the specific elements of Article 117a, UCMJ, demonstrate thoughtful, intentional drafting. The Article requires the Government to prove specific kinds of harms to an alleged victim, and an impact on the military. Article 117a, UCMJ. This is in contrast with

Article 134, UCMJ, which simply requires an act or omission which either is prejudicial to good order and discipline or service discrediting. Article 134, UCMJ. By enacting a statute with elements that require precise evidence, Congress made clear it intended Article 117a, UCMJ, to be used anytime an intimate image was disclosed non-consensually.

The legislative history of Article 117a, UCMJ, reinforces the conclusion Congress intended for the Article to occupy a class of offenses. The context in which Article 117a, UCMJ, was enacted is key to understanding how it preempts both specifications of Charge I in this case. Members of both the House and Senate were specifically aware of civilian alleged victims of the Marines United scandal. Enclosure 5, 6, 7. Nowhere in the Congressional Record does a Senator for Congressman qualify the application of Article 117a, UMCJ. In fact, the House report makes clear the Article applies generally. "[Article 117a, UMCJ] would prohibit the nonconsensual sharing of intimate images, including cases in which the images were initially obtained with consent." Enclosure 8. The Senate Armed Services Committee Report on the FY2018 NDAA reads similarly. "[Article 117a, UCMJ,] [] would prohibit the wrongful broadcast or distribution of intimate visual images of another person or visual images of sexually explicit conduct involving a person." Enclosure 9.

Moreover, the specific testimony by Acting Secretary Stackley and General Neller makes clear Congress intended Article 117a, UCMJ, to be used for this type of offense. Take, for example, Acting Secretary Stackley's statement that Article 120 and 134, UCMJ, could be used to hold members accountable for non-consensually sharing intimate photos. Enclosure 6, at 8. By enacting Article 117a, UCMJ, Congress specifically rejected the testimony and conclusion of the Navy's senior civilian leader, when he testified Article 134, UCMJ, could be used in an

instance like the present case. In contrast, Congress agreed with General Neller when he stated a new offense, specific to this type of conduct would be useful. *Id.* at 36.

Case law supports the conclusion that when Congress enacts an Article to specifically address a type of conduct, that enumerated Article preempts a novel Article 134, UCMJ, offense. In *Curry*, the appellant alleged his Article 134, UCMJ, conviction for bribery was preempted by Article 92, UCMJ, because bribery was covered by a Navy general regulation. 35 M.J. at 360. The Court of Military Appeals rejected that argument under the first part of the preemption test because "[n]one of the punitive articles of the UCMJ specifically cover bribery." *Id* at 361. Here, in contrast, Congress has enacted an offense which specifically covers the conduct alleged by the Government. In *United States v. Marcelle*, ARMY 20130339, 2015 WL 376433, at *1 (A. Ct. Crim. App. January 26, 2015), the appellant was charged with a novel Article 134, UMCJ, offense for applying "for an Army Emergency Relief (AER) loan by signing his first sergeant's name on the application." The Army Court of Criminal Appeals found the specification was preempted because there was an enumerated article which covered that class of offense, namely Article 107, UCMJ, False Official Statement. *Id.* at 2.

Here, in Article 117a, UCMJ, Congress enacted a specific offense for the non-consensual distribution of intimate images. And the Government agreed with that proposition, as all its investigative efforts were conducted under the guise SN Keaty had violated Article 117a, UCMJ. *See* Enclosures 2, 3, 4. *Curry* and *Marcelle* show that when Congress has enacted an enumerated offense which address a particular type of misconduct, a novel Article 134, UCMJ, offense is preempted by the enumerated offense.

Second, the elements of the Specifications in Charge I are a residuum of the elements of Article 117a, UCMJ. The elements of Specification 1 and 2 are virtually identical, with the only

difference being Specification 1 alleges the dissemination of photographs and Specification 2 alleges the dissemination of videos. Charge Sheet. The elements of Specification 1 are:

> (1) In that SN Matthew Keaty, U.S. Coast Guard, at or near Portsmouth, New Hampshire did, on one or more occasions, from on or about June 2020 to on or about November 2020, knowingly and unlawfully disseminated photographs of himself engaging in sexual activity with [redacted] on the Internet without the express consent of [redacted] to disseminate such photographs;
>
> (2) his conduct was in violation of Title LXII, Chapter 644, Section 9, of the New Hampshire Revised Statutes, and;
>
> (3) that such conduct was of a nature to bring discredit upon the armed forces.
>
> *Id.*

The elements of Specification 2 are:

> (1) In that SN Matthew Keaty, U.S. Coast Guard, at or near Portsmouth, New Hampshire did, on one or more occasions, on or about August 2020, knowingly and unlawfully disseminated videos of himself engaging in sexual activity with [redacted] on the Internet without the express consent of [redacted] to disseminate such photographs;
>
> (2) his conduct was in violation of Title LXII, Chapter 644, Section 9, of the New Hampshire Revised Statutes, and;
>
> (3) that such conduct was of a nature to bring discredit upon the armed forces.

Id.

The elements of Article 117a, UCMJ, are:

> (1) That the accused knowingly and wrongfully broadcasted or distributed a visual image;
>
> (2) That the visual image is an intimate visual image of another person or a visual image of sexually explicit conduct involving another person;
>
> (3) That the person depicted in the intimate visual image or visual image of sexually explicit conduct - (a) is at least 18 years of age at the time the intimate visual image or visual image of sexually explicit conduct was created; (b) is identifiable from the intimate visual image or visual image of sexually explicit conduct itself or from information displayed in connection with the intimate visual image or visual image of sexually explicit conduct; and (c) does not

explicitly consent to the broadcast or distribution of the intimate visual image or visual image of sexually explicit conduct;

(4) That the accused knew or reasonably should have known that the intimate visual image or visual image of sexually explicit conduct was made under circumstances in which the person depicted retained a reasonable expectation of privacy regarding any broadcast or distribution of the intimate visual image or visual image of sexually explicit conduct;

(5) That the accused knew or reasonably should have known that the broadcast or distribution of the intimate visual image or visual image of sexually explicit conduct was likely to (a) cause harm, harassment, intimidation, emotional distress, or financial loss for the person depicted in the intimate visual image or visual image of sexually explicit conduct; or (b) harm substantially the depicted person with respect to that person's health, safety, business, calling, career, financial condition, reputation, or personal relationships; and

(6) That the conduct of the accused, under the circumstances, had a reasonably direct and palpable connection to a military mission or military environment.

Executive Order 14062 of January 26, 2022, p. 1-3, available at https://www.govinfo.gov/content/pkg/FR-2022-01-31/pdf/2022-02027.pdf.

Element (1) the novel Article 134, UCMJ, specifications fall neatly within the elements (1), (2), and (3) of Article 117a, UCMJ, but Specifications 1 and 2 of Charge I eliminate elements (4), (5), and (6), thereby lessening the Government's burden at trial, in direct violation of the principles of the preemption doctrine. *Avery*, 79 M.J. at 367 (stating the preemption doctrine was specifically intended to guard against "[creating] an enumerated offense in order to ease the government's evidentiary burden with respect to a listed offense enacted by Congress.) Element (1) of Specifications 1 and 2 of Charge I prohibits "knowingly and unlawfully" "disseminating" videos or photos of SN Keaty engaging in sexual activity with [redacted] without her consent to disseminate the videos. Charge Sheet. Article 117a, UMCJ, does the same. In elements (1), (2), and (3), it prohibits any person subject to the UCMJ from "knowingly and wrongfully" "distribut[ing]" "a visual image of sexually explicit conduct involving another person" when that person "does not explicitly consent to the . . . distribution of the . . . visual image of sexually

explicit conduct." Executive Order 14062 of January 26, 2022, p. 1-3 available at https://www.govinfo.gov/content/pkg/FR-2022-01-31/pdf/2022-02027.pdf.

As shown the novel Article 134, UCMJ, specifications in this case prohibit, using the nearly identical elements, just what is prohibited by Article 117a, UMCJ, while easing the Government's burden at trial by eliminating elements (4), (5), and (6) of Article 117a, UCMJ. This is the paradigmatic example of what the MCM prohibits. MCM, Part IV, para 91.c.(5)(a) ("Article 134 cannot be used to create a new kind of [non-consensual distribution of intimate images] offense, one without the required [elements], where Congress has already set the minimum requirements for such an offense . . .")

The fact the specifications also allege SN Keaty violated a New Hampshire statute do not save them preemption for at least two reasons. First, the Government seemingly copied the elements of the alleged New Hampshire statute when drafting element (1) of Specifications 1 and 2. *See* NH Revised Statutes § 644:9(III). Given that, it appears the Government's position is that by proving element (1) of each specification it has shown SN Keaty violated NH Revised Statutes § 644:9(III), and therefore no additional proof is required to meet the Government's burden as to element (2). Therefore, element (2) does not require some additional proof which would fall outside what is required for Article 117a, UCMJ. Second, and more fundamentally, the entire doctrine of preemption would be undermined if the Government simply had to add a reference to a state statute analogous to a Congressionally enacted offense under the UCMJ when it charged a novel Article 134, UCMJ, offense. The Court should not allow the Government to charge a novel Article 134, UCMJ, offense which is clearly preempted solely because the offense is based on a state statute.

Most fundamentally, in this case the Government has attempted what the preemption doctrine is specifically designed to prevent, the creation of a new offense which lessens the Government's burden. The Government specifically investigated this case as if it were a violation of Article 117a, UCMJ. *See* Enclosures 2, 3, 4. But when the Government could not find evidence of elements 4, 5, 6 of Article 117a, UCMJ, it changed tactics and charged a novel Article 134, UCMJ. Importantly, elements 4 and 5 of Article 117a, UCMJ, are intent elements, the elimination of which both the MCM, Part IV, para 91.c.(5)(a)., and case after case have prohibited in novel specifications. *United States v Wheeler*, 77 M.J. 289, 293 (C.A.A.F.); *Kick*, 7 M.J. at 85; *United States v. Wright*, 5 M.J. 106, 110-11 (C.M.A. 1978); *Norris*, 2 C.M.A. at 239, 8 C.M.R. at 39 (1953). In contrast to what the Court of Appeals for the Armed Forces found in *Avery*, this is "the situation against which the preemption doctrine was intended to guard: namely, *creating* an enumerated offense in order to ease the government's evidentiary burden with respect to a listed offense enacted by Congress." 79 M.J. at 367 (emphasis in original). This Court should not allow the Government to violate such an express prohibition.

RELIEF REQUESTED

The Defense requests this Court dismiss Specifications 1 and 2 of Charge I with prejudice.

EVIDENCE AND HEARING

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

Enclosure 1: GBS 4-9 – Excerpts of ROI

Enclosure 2: Article 31(b), UCMJ, Form for SN Keaty Interview

Enclosure 3: GBS 110-112 – Investigative Subpoena Application – Pornhub.com

Enclosure 4: GBS 95-108 – Affidavit in Support of Reddit Search Authorization

Enclosure 5: *Protecting the Rights of Individuals Against Technological Exploitation Act*, 115 Cong. Rec. H4477 (daily ed. May 23, 2017) (statements of House Members)

Enclosure 6: *Briefing on Information Surrounding the Marines United Website, Hearing Before the Senate Committee on Armed Services* 115th Cong. 667 (2019) (statements of Hon. Sean Stackley, Acting Secretary of the Navy, General Robert Neller, Commandant of the Marine Corps)

Enclosure 7: *Raising Awareness of Marines United Offensive Facebook Page*, 115 Cong. Rec. H3052 (daily ed. May 2, 2017) (statements of House Members)

Enclosure 8: H.R. 2810, House of Representatives Committee on Armed Services Report of NDAA for FY2018.

Enclosure 9: S.R. 115-125, Senate Committee on Armed Services Report on NDAA for FY2018.

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

HATHAWAY.NICHOLAS.JEAN.FREY.[redacted] Digitally signed by HATHAWAY.NICHOLAS.JEAN.FREY.[redacted] Date: 2023.03.15 15:32:32 -04'00'

N. Hathaway
LCDR, USCG
Defense Counsel

CERTIFICATE OF SERVICE

I hereby attest that a copy of the foregoing motion and all exhibits was served on the Court and opposing counsel by email on 15 March 2023

[redacted]

N. Hathaway
LCDR, USCG
Defense Counsel

COAST GUARD TRIAL JUDICIARY
EASTERN JUDICIAL CIRCUIT
SPECIAL COURT-MARTIAL

UNITED STATES	)	
	)	
	)	**UNITED STATES RESPONSE TO**
v.	)	**DEFENSE MOTION TO DISMISS -**
	)	**PREEMPTION**
	)	
	)	
	)	
MATTHEW KEATY,	)	**22 March 2023**
SN / E-3, USCG	)	

COMES NOW, the United States of America, by and through the undersigned counsel, and hereby responds to the defense motion to dismiss due to preemption. For the reasons detailed below, the United States respectfully requests this Court deny Defense's motion because Specifications 1 and 2 of Charge I are not preempted by Article 117a, UCMJ.

FACTS & PROCEDURAL HISTORY

1. The accused is charged with two specifications of violating Article 134, UCMJ for posting photos and videos of himself engaging in sexual activity with his girlfriend, [redacted] on the Internet without her permission, and one specification of Article 107, UCMJ for making a false official statement to CGIS.
2. [redacted] and SN Keaty met while they were both attending [redacted] in Ohio, and started dating in 2019. In approximately May of 2020, after joining the Coast Guard, while living off-base in New Hampshire, SN Keaty started posting nude pictures of [redacted] on reddit.com, as well as non-nude images he had taken from Instagram of two of his former high school classmates. (*Enclosure 1, Bates 000004*)

3. SN Keaty's high school classmates were notified by a third-party who had seen the repost of their Instagram photos. When they visited the profile of the account that was reposting their images, they recognized the account belonged to SN Keaty and further discovered he had been posting nude images of [redacted] at which time they reached out to [redacted] and informed her. (*Enclosure 1, Bates 000004*)
4. [redacted] confronted SN Keaty about what he was doing, and he admitted through text messages to posting approximately 30 pictures of her online since May of 2020. (*Enclosure 1, Bates 000004; 000015-000017*)
5. CGIS agents met with SN Keaty and he admitted to posting images to the [redacted] known as [redacted] under his Reddit username [redacted] SN Keaty told CGIS he had posed approximately 60-90 images of her on Reddit. (*Enclosure 1, Bates 000005*)
6. SN Keaty consented to a search of his phone, and CGIS agents reviewed various photos within his iPhone's hidden album. SA Keaty identified several images he had uploaded to Reddit and placed his initials beside the pictures that he remembered uploading. (*Enclosure 1, Bates 000009*)
7. In response to several Reddit messages, SN Keaty was also sending Reddit users links to videos of [redacted] that he had uploaded to Pornhub.com as well as sharing them on Kik and Snapchat. (*Enclosure 1, Bates 000009; 000030-000037*)
8. On 15 MAR 2023, Defense filed a motion to dismiss Specifications 1 and 2 of Charge I, as being preempted under Article 117a.

APPLICABLE LAW

Article 134 makes punishable acts in three categories of offenses not specifically covered in any other article of the UCMJ. MCM, Pt. IV, ¶ 91(c)(1). These are referred to as "clauses 1, 2,

and 3" of Article 134. Id. Clause 1 offenses involve disorders and neglects to the prejudice of good order and discipline in the armed forces. Clause 2 offenses involve conduct of a nature to bring discredit upon the armed forces. Clause 3 offenses involve noncapital crimes or offenses which violate federal civilian law including law made applicable through the Federal Assimilated Crimes Act. *Id.* In this case, the government charged the accused with violation of 134 under clause (2).

When prosecuting a case under clause (2), the term "discredit" means to injure the reputation of. MCM, Pt. IV, ¶ 91(c)(3). This clause of Article 134 makes punishable conduct which has a tendency to bring the service into disrepute or which tends to lower it in public esteem. Acts in violation of a local civil law or a foreign law may be punished if they are of a nature to bring discredit upon the armed forces. *Id.* Novel offenses may be charged under clause (2) as long as not prosecutable elsewhere. *United States v. Wright*, 5 M.J. 106 (C.M.A. 1978).

The preemption doctrine prohibits application of Article 134 to conduct already prohibited by Congress in the UCMJ by Articles 80 through 132. MCM, Pt. IV, ¶91c(5)(a). Conduct is already covered if: (1) Congress intended to limit prosecutions for certain conduct to offenses defined in specific articles of the UCMJ, and (2) the offense sought to be charged is composed of a residuum of elements of an enumerated offense under the UCMJ. *Wright* at 111.

"Where Congress has occupied the field of a given type of misconduct by addressing it in one of the specific punitive articles of the code, another offense may not be created and punished under Article 134, UCMJ, by simply deleting a vital element." *United States v. McGuinness*, 35 M.J. 149, 152 (C.M.A. 1992) (citing *United States v. Kick*, 7 M.J. 82, 85 (C.M.A. 1979)) "However, simply because the offense charged under Article 134, UCMJ, embraces all but one element of an offense under another article does not trigger operation of the preemption doctrine.

[] In addition, it must be shown that Congress intended the other punitive article to cover a class of offenses in a complete way." *Kick* at 82 (C.M.A. 1979) (citing *United States v. Maze*, 45 C.M.R. 34, 37 (CMA 1972) and *United States v. Taylor*, 38 C.M.R. 393 (CMA 1968)).

BURDEN

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

ARGUMENT

1. Congress did not intend for Article 117a to cover the broadcast of an individual's intimate images by a military accused in a civilian setting.

Under the preemption doctrine, the defense must prove that Congress intended to "occupy the field", or in other words, limit prosecution for all broadcasts of intimate visual images by an accused to only Article 117a. *See United States v. McGuinness*, 35 M.J. at 152; *see also United States v. Erickson*, 61 M.J. 230 (C.A.A.F. 2005) (holding that prosecution under Article 134, Clause 1 for "huffing" nitrous oxide is not preempted by Article 112a because the legislative record indicates that Congress did not intend for Article 112a to be a comprehensive law covering all drug-related offenses). Here, the background as to why Article 117a was drafted, and its development from drafting to final enactment shows that Congress did not intend for Article 117a to be a comprehensive law covering all circumstances related to the distribution of nude images.

Article 117a, UCMJ, was originally introduced in the wake of the Marines United scandal. (*Defense Enclosure 5*). In early 2017, it was discovered that active duty and veteran Marines were non-consensually posting nude photographs of women in a Facebook group titled Marines United. (*Defense Enclosure 5*). In testimony before the Senate Armed Services Committee during a hearing specifically on the Marines United scandal, the then Acting-

Secretary of the Navy Sean Stackley and then-Commandant of the Marine Corps General Robert Neller testified as to their opinions of whether the UCMJ should be amended to include a specific offense for the non-consensual distribution of intimate images. (*Defense Enclosure 6*). In response to a question on whether the UCMJ, prior to the enactment Article 117a, UCMJ, could hold Marines accountable, Acting Secretary Stackly replied " . . . we can hold them accountable in accordance with [A]rticles 120 and 134." (*Defense Enclosure 6* at 8). When asked whether the UCMJ should be amended to include a "so-called revenge porn" offense, General Neller replied "I think that would be helpful in the accountability process." (*Defense Enclosure 6* at 36).

While the final version of the bill that made it into the NDAA for FY2018 contained only a new Article 117a, the original bill contained two sections: Sections 521 and 532. Section 521 was a proposal to amend the Manual for Courts-Martial to include a less severe, specific enumerated offense under article 134 of the UCMJ that dealt with the distribution of a visual depiction of the private area of a person or of sexually explicit conduct involving a person. Whereas, Section 532 was the proposal to add what is now Article 117a. Sometime after Acting Secretary Stackly testified that the UCMJ could already hold servicemembers accountable using existing tools (Articles 120 and 134), Congress discarded Section 521. Defense urges this Court to interpret the passage of Article 117a as an express rejection of the "testimony and conclusion of the Navy's senior civilian leader when he testified that Article 134 could be used in an instance like the present case" (*Defense Motion at 6*). However, a more reasonable interpretation would be that Congress came to understand that Articles 120 and 134 were already useful tools for holding servicemembers accountable for such conduct so they discarded Section 521, and instead added a third tool (Article 117a) to address a specific wrong brought to the forefront by the Marines United scandal. It was not meant to address the situation in this case, where a

military member broadcasts intimate visual images to other civilians, in a civilian setting, without any connection to a military mission or the military environment.

Defense spends a considerable amount of explaining that many of the victims in the Marines United scandal were veterans and civilian family members of servicemembers to prove Congress intended to cover civilians with Article 117a. Defense's focus is misplaced; the government agrees with defense that Article 117a does cover civilian victim, but that is not the proper question. The question that must be addressed instead, is whether Article 117a was intended to cover images shared with other civilians, in a civilian setting. Given the final language of the bill—the answer is clearly no. Congress chose to address very narrow and specific conduct when it passed Article 117a – the sharing of private intimate images of another person (civilian or military) within the military environment by a military accused. This choice should not be construed as Congressional intent to occupy "the field" for the purpose of preemption analysis. See *McGuiness* at 152.

2. The offense charged is not composed of a residuum of elements of Article 117a.

Even if this Court does find that Congress intended to limit prosecutions for distribution of nude images of another in both a military and a civilian environment to Article 117a only, the offense charged in this case is not composed of a residuum of elements of Article 117a. See *Wright*, at 111.

Defense argues that the New Hampshire statute, Title LXII, Chapter 644, Section 9, is similar to Article 117a, UCMJ. While it is true New Hampshire does have an analogous offense to Article 117a, that offense is Title LXII, Chapter 644, Section 9-a (Nonconsensual Dissemination of Private Sexual Images), not Title LXII, Chapter 644, Section 9 (Violation of

Privacy), as is charged here. The below table compares the two New Hampshire Statutes, together with Article 117a.

Violation of Privacy (Charged Offense)	Nonconsensual Dissemination of Private Sexual Images	Wrongful Broadcast or Distribution of Intimate Visual Images
New Hampshire Title LXII, Chapter 644, Section 9	New Hampshire Title LXII, Chapter 644, Section 9-a	Article 117a, UCMJ
The accused knowingly disseminates or causes the dissemination of any photography or video recording;	The accused purposely disseminates an image of another person;	The accused knowingly and wrongfully distributed a visual image;
That the photograph or video recording is **of himself engaging in sexual activity with another person**; and (emphasis added)	The person is engaged in a sexual act or such person's intimate parts are exposed in whole or in part;	That the visual image is an intimate visual image of another person;
That the other person did not expressly consent to such dissemination.	That the person is identifiable from the image itself or information displayed in connection with the image;	That the person depicted in the intimate visual image was 18 at the time it was created; is identifiable; and did not consent to the distribution;
	The accused obtains the image under circumstances in which a reasonable person would know or understand that the person in the image intended that the image was to remain private; and	That the accused know or reasonably should have known that the intimate visual image was made under circumstances in which the victim retained a reasonable expectation of privacy;
	The accused does so with intent to harass, intimidate, threaten, or coerce.	That the accused knew or reasonably should have known that the distribution of the intimate visual image was likely to cause harm, harassment, intimidation, emotional distress, or financial loss; and
		That the conduct of the accused had a reasonably direct and palpable connection to a military mission or military environment.

In this case, the charged conduct is not a residuum of Article 117a, but instead requires proof of an element not contained within Article 117a, that the accused was *himself engaged in sexual activity with the victim.*

3. The Coast Guard Judiciary considered this exact issue in 2021 and determined Article 117a did not preempt a novel Article 134 specification under nearly identical circumstances.

In *United States v. Grijalva*, the Coast Guard trial court considered a motion to dismiss a novel Article 134 charge on the basis that it was preempted by Article 117a. In that case, the accused unlawfully gained access to a civilian's Snapchat account and downloaded 5 sexually explicit images. Using fake "Tinder" and "OKCupid" accounts, the accused then communicated with several civilian individuals and privately exchanged the sexually explicit images of the victim for money.

In holding that Article 117a did not preempt the novel Article 134 charge, the court reasoned that

> "without clear intent that Congress 'intended to cover a class of offenses in a complete way' the preemption doctrine does not apply. That a military member could broadcast intimate visual images of a civilian without their consent to other civilians, and because the conduct has no connection to a military mission or military environment prevents it from being charged under Article 134 as service discrediting, cannot stand to reasonably reflect Congress' intent when it enacted Article 117a. Not being permitted to charge such a crime committed by a service member simply because the victim is a civilian *would be* service discrediting and necessarily lower the reputation of the armed forces in public esteem. Thus, it cannot be reasonably inferred that Congress intended Article 117a to

'occupy the field' of what is a massive field made infinitely larger through the internet's reach. Just the opposite, it appears that Congress intended Article 117a to occupy only a limited portion of that field when it comes to the prosecution of wrongful broadcasting of visual images offenses. In this case, the accused's conduct falls outside of that narrow field covered by Article 117a, which does not preempt his prosecution as service discrediting conduct under Article 134." (internal citations omitted) *United States v. Grijalva* (Oct. 2021)(court ruling on defense motion to dismiss) (*Enclosure 2*)

While certainly not binding precedent, the court should consider it highly persuasive to promote the evenhanded, predictable, and consistent development of legal principles, foster reliance on judicial decisions, and contribute to the integrity of the judicial process.

CONCLUSION & REQUESTED RELIEF

WHEREFORE, and for the reasons detailed above, the United States opposes the Defense's motion and respectfully requests this Court deny the Defense's motion and rule that Specifications 1 and 2 of Charge I are not preempted by Article 117a, UCMJ.

EVIDENCE

The Government submits the following documentary evidence in support of this response:

Enclosure (1) – Portion of CGIS ROI

Enclosure (2) – Trial Court Ruling on Defense MTD, U.S. v. Grijalva

Respectfully Submitted,

HUMPHREY.CHRISTOPHER.JAMES.[redacted] Digitally signed by HUMPHREY.CHRISTOPHER.JAMES.[redacted] Date: 2023.03.22 16:32:12 -04'00'

C.J. Humphrey, LT, USCG
Trial Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the above motion was served, via e-mail, on the Court and Defense Counsel on 22 March 2023.

Respectfully Submitted,

HUMPHREY.CHRISTOPHER.JAMES.[redacted] Digitally signed by HUMPHREY.CHRISTOPHER.JAMES.[redacted] Date: 2023.03.22 16:32.26 -04'00'

C.J. Humphrey, LT, USCG
Trial Counsel

Appellate Exhibit XVIII
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COAST GUARD TRIAL JUDICIARY
EASTERN JUDICIAL CIRCUIT
SPECIAL COURT-MARTIAL

UNITED STATES **v.** **MATTHEW KEATY** **SN** **U.S. COAST GUARD**	**DEFENSE MOTION TO SUPPRESS REDDIT SEARCH WARRANT** **15 March 23**

MOTION

Pursuant to Rule for Courts-Martial (R.C.M.) 905(b)(3) and Military Rules of Evidence (M.R.E.) 311, the Defense moves to suppress the contents of SN Matthew Keaty's Reddit account on the basis that the Government obtained the materials as a fruit of its unlawful seizure.

SUMMARY

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

The contents of SN Keaty's personal Reddit account, including private messages, were seized at the Government's direction under the claimed authority of a federal statute, 18 U.S.C. § 2703(f) ("the preservation statute"). The preservation statute provides that, "upon the request

of a governmental entity," internet providers "shall . . . retain[]" files in a user's account "for a period of 90 days," renewable for another 90 days. *Id.*

The Government believes that the preservation statute allows it to order copies made of the contents of any person's internet-based digital accounts, and to have those contents held for the government for up to 180 days without any cause whatsoever. Based on this understanding, Reddit acting at the government's agent, seized the private contents of SN Keaty's account upon receiving the initial request from the Coast Guard Investigative Service (CGIS) dated 22 January 2021, and held them on the government's behalf for thirty-eight (38) days, until a search warrant was granted on 2 March 2021.

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

BURDEN

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

FACTS

1. On 20 September 2022, charges were preferred against SN Keaty alleging violations of two novel Article 134, UCMJ specifications. An Article 107, UCMJ, false official statement

specification was also preferred. The Article 134, UCMJ, specifications alleged SN Keaty disseminated photographs and videos of himself and [redacted] engaging in sexual activity on the internet without her consent. All charges and specifications were referred on 2 November 2022. Charge Sheet.

2. CGIS received a report on 21 January 2021 that SN Keaty had allegedly posted images of sexual activity between himself and [redacted] on the internet without the express consent of [redacted] Enclosure 1. CGIS interviewed [redacted] who reported she had been contacted by two women, whom she did not know, who told her SN Keaty had been posting nude pictures of her on the website Reddit.com. *Id.* [redacted] never saw any of the alleged nude photos herself. *Id.* [redacted] reportedly confronted SN Keaty and told CGIS he admitted to posting the photos. *Id.* She provided a series of text messages of a conversation between herself and SN Keaty. *Id.*

3. On 22 January 2021, CGIS Special Agent (SA) [redacted] sent a letter to Reddit requesting the preservation of the contents of a Reddit account [redacted] and associated with Matthew Keaty "pending further other legal process." The legal authority cited was Title 18, United States Code Section 2703(f). The letter also instructed Reddit not to disclose the preservation to anyone. Enclosure 2.

4. On 2 March 2021 CGIS SA [redacted] and Trial Counsel sought a search warrant for all Reddit subscriber information associated with a SN Keaty's Reddit account. Enclosure 3.

5. On 2 March 2021, a military judge signed the search warrant. Attachment B describes the information to be seized, and it includes all subscriber information and all records, including communications, for 1 March 2019 to 1 March 2021. Attachment A lists SN Keaty's name and a mobile phone number. Enclosure 4.

6. On 3 March 2021 Reddit provided data in response to the search warrant. Enclosure 5. Relevant here, Reddit provided messages sent between the user [redacted] and other Reddit users. *Id.* Those messages included various links to the website Pornhub.com. *Id.* Reddit also provided Internet Protocol (IP) logs identifying devices used to access the [redacted] Reddit account. *Id.*

7. The Government used the materials received from Reddit as the basis to subpoena the website Pornhub.com. Enclosure 6.

LAW

I. M.R.E. 311: Analytical Framework.

The Fourth Amendment to the U.S. Constitution protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. A warrantless search is "per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967). At court-martial, evidence obtained unlawfully by Government officials may ordinarily not be introduced against the accused if the accused had a reasonable expectation of privacy in the person, place or property searched, and the accused makes a timely motion to suppress. Mil. R. Evid. 311(a). The Government bears the burden to prove that the evidence was obtained lawfully. Mil. R. Evid. 311(d)(5)(A). "[T]he Supreme Court defines a Fourth Amendment 'search' as a Government intrusion into an individual's reasonable expectation of privacy." *United States v. Daniels*, 60 M.J. 69, 71 (C.A.A.F. 2004) (reversing conviction after determining that cocaine seized by roommate at direction of Leading Chief Petty Officer should have been suppressed as warrantless search and seizure).

Alternatively, the Government may prove by a preponderance of the evidence that (1) the officials who conducted the search acted "reasonably and with good faith relied on the issuance of an authorization to search," or (2) that exclusion of the evidence in question would not result in "appreciable deterrence of future unlawful searches or seizures and the benefits of such deterrence outweigh the costs to the justice system." *Id.* The "good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal in light of all the circumstances." *Herring v. United States*, 555 U.S. 135, 145 (2009) (citing *United States v. Leon* 468 U.S. 897, 922 (1984)). "These circumstances frequently include a particular officer's knowledge and experience, but that does not make the test any more subjective than the one for probable cause, which looks to an officer's knowledge and experience." *Id.* at 145-146 (citations omitted). To trigger the exclusionary rule under the Fourth Amendment, "police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." *Id.* at 144. Put another way, "[t]he exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." *Id.*

II. <u>The Stored Communications Act: Analytical Framework</u>.

The Stored Communications Act, 18 U.S.C. §§ 2701-11, is a federal statute that regulates Government access to the private records of internet users. Internet providers such as Reddit hold their users' records on their computer network servers. When criminal investigators seek copies of records from the accounts of criminal suspects, investigators obtain the records directly from the internet providers. The Stored Communications Act establishes the responsibilities and duties of both the Government and internet providers when the Government seeks user information. See

generally 2 Wayne LaFave, ET AL, Criminal Procedure § 4.8 (4th ed. 2015) (presenting overview of the statute).

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

> (f) Requirement To Preserve Evidence.
> (1) In general.— A provider of wire or electronic communication services or a remote computing service, upon the request of a governmental entity, shall take all necessary steps to preserve records and other evidence in its possession pending the issuance of a court order or other process.
>
> (2) Period of retention.— Records referred to in paragraph (1) shall be retained for a period of 90 days, which shall be extended for an additional 90-day period upon a renewed request by the governmental entity.

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

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

make complete copies of target accounts and save them exclusively for later Government use. *See id.* at 784-85.

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

ARGUMENT

The warrantless preservation of SN Keaty's Reddit account violated his Fourth Amendment and M.R.E. 311 rights. The preservation was Government action because it Reddit acted only at the behest of the Government. Preservation triggered a Fourth Amendment seizure because it eliminated SN Keaty's exclusive control of his account. It was an unreasonable seizure because it was not based on probable cause or even reasonable suspicion and was not followed promptly by a warrant. The contents of the account must be suppressed because they are fruits of the unconstitutional preservation and the good-faith exception does not apply. The analysis below addresses each point in turn.

I. <u>The preservation of SN Keaty's Reddit account was Fourth Amendment Government action</u>.

Reddit's act of preserving SN Keaty's account pursuant to 18 U.S.C. § 2703(f) was Government-directed action regulated by the Fourth Amendment. The Fourth Amendment applies to acts of private individuals acting as "instrument[s] or agent[s]" of the Government.

Coolidge v. New Hampshire, 403 U.S. 443, 487 (1971). A private party acts as a Government agent when the Government "compelled a private party to perform a search" or the private party otherwise acted pursuant to the "encouragement, endorsement, and participation" of the Government. *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 613–614 (1989). *See also United States v. Wicks*, 73 M.J. 93, 100 (C.A.A.F. 2014) (a private search does not violate the Fourth Amendment, but the Government cannot conduct or participate in the search for it to be considered a private search, and the Fourth Amendment is implicated if the Government encouraged, endorsed, or participated in the search).

The preservation in this case is Fourth Amendment Government action even if compliance with § 2703(f) is considered voluntary instead of a mandatory obligation. *See, e.g.*, *United States v. Daniels*, 60 M.J. 69, 71 (C.A.A.F. 2004) (reversing conviction after determining that cocaine seized by roommate at direction of Leading Chief Petty Officer should have been suppressed as warrantless search and seizure); *United States v. Quillen*, 27 M.J. 312, 314 (C.M.A. 1988) (civilian security employed by base exchange was Government actor for purposes of Article 31(b), UCMJ); *United States v. Spiess*, 71 M.J. 636, 644 (A. Ct. Crim. App. 2012) (roommate's inadvertent search and discovery of child pornography did not implicate Fourth Amendment, but sergeant's directing and conducting of further searching did); *see also United States v. Hardin*, 539 F.3d 404 (6th Cir. 2008) (apartment manager was a Fourth Amendment state actor where he entered an apartment at the request of the Government officers to see if the defendant was present); *Commonwealth v. Gumkowki*, 167 N.E.3d 803 (Mass. 2021) (phone company Sprint's voluntary disclosure without warrant constituted Fourth Amendment state action because law enforcement instigated the search by contacting the cell phone company to request information).

The *Skinner* test is satisfied here. Section 2703(f) states that "upon the request of a Governmental entity," the provider "*shall take all necessary steps* to preserve records and other evidence" in its possession, and that the records "*shall be retained* for a period of 90 days, which *shall be extended* for an additional 90-day period upon a renewed request by the Governmental entity." 18 U.S.C. § 2703(f) (emphasis added). By triggering the preservation statute with its "requests," the Government directed what Reddit must do. In response, Reddit fulfilled the Government's wishes on the Government's behalf. In fact, the statute provides no discretion to the company, but forces it to preserve the requested account. Regardless, whether the preservation is construed as ordering or merely instigating the act of preservation, it is Government action under the Fourth Amendment.

II. <u>Preservation of SN Keaty's Reddit account was a Fourth Amendment Seizure</u>.

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

Preservation of SN Keaty's account over the course of 32 days caused a Fourth Amendment seizure because it dispossessed him of control over the account. Internet providers "execute preservation requests by making a copy of the full contents of the relevant account and storing it separately." Kerr, *Internet Content Preservation*, at 771. Although this process is labeled

'preservation,' in reality it is "a dynamic process of entry, copying, and storage." *Id.* at 782. As internet providers have themselves explained, this is done by performing a "data pull" of the contents of the account that take a "snapshot" of the account contents. *Id.* (quoting public statements from Twitter and Apple). The copy is then stored outside the user's control so the user cannot alter or delete any files. *Id.* at 784-85.

The Government-directed act of creating a Government copy of the account, and storing it away for later Government access, caused a "meaningful interference" with SN Keaty's "possessory interests in that property" because it denied him control over his private information. *Jacobsen*, 466 U.S. at 113. "Possession" is defined as the "the fact of having or holding property in one's power; the exercise of dominion over property," or "[t]he right under which one may exercise control over something to the exclusion of all others." BLACK'S LAW DICTIONARY (9th ed). Before preservation occurred, SN Keaty had control of his account contents. He could view his files, alter his files, and delete his files as he wished. And logically, this is the only meaningful definition of ownership when it comes to digital accounts, as there is no tangible object for the owner to otherwise exercise control over.

Preservation eliminated that control. Preservation ensured that a perfect copy of the account contents was generated and detained outside his control exclusively for the Government's future use. This was done for the express purpose, and with the exact effect, that SN Keaty could no longer control the contents of his account. Preservation therefore triggered a seizure. *See United States v. Bach*, 310 F.3d 1063, 1067-68 (8th Cir. 2002) (analyzing the copying and review of stored internet contents held by an internet provider as a Fourth Amendment "seizure" and a "search" of the contents); *Vaugh v. Baldwin*, 950 F.2d 331, 334 (6th Cir. 1991) (noting that, in the absence of consent, the government had "no right to . . . photocopy" a person's private

documents); *United States v. Loera*, 333 F. Supp. 3d 172, 185 (E.D.N.Y. 2018) ("Most courts that have addressed duplication, including digital duplication, have analyzed it as a seizure."); Fed. R. Crim. Pro. 41(e)(2)(B) (equating the seizure of electronically stored information with the copying of the information).

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

It should be especially clear that preservation is a Fourth Amendment "seizure" given how internet search warrants are executed under the Stored Communications Act as required by the Fourth Amendment. *See United States v. Long*, 64 M.J. 57, 63-64 (C.A.A.F. 2006) (Marine had reasonable expectation of privacy in emails on work computer where agency recognized privacy interests and users had personal password); *see also Warshak v. United States*, 631 F.3d 266, 274

(6th Cir. 2010) (holding that accessing private emails is a Fourth Amendment search that requires a warrant). When the Government serves a warrant on a provider under § 2703(a), the provider will run off a copy of the account and send the copy to the government for its review.

The provider conducts the initial "seizure," and the Government conducts the subsequent "search." *Cf. Bach*, 310 F.3d at 1067-68. Preservation under § 2703(f) is the "seizure" part of the Stored Communications Act's procedure for obtaining internet account contents. Preservation does not cause a search to occur, because information is not yet revealed to the Government. But the transfer of control of account contents under § 2703(f) is a seizure independent of any subsequent search, and it must be independently justified as reasonable. *See Soldal,* 506 U.S. at 61 (explaining that seizures must be justified under the Fourth Amendment independently of any searches).

III. The Government cannot satisfy its burden of establishing that the warrantless seizure of SN Keaty's Reddit account was reasonable.

Upon motion by the Defense to suppress evidence under M.R.E. 311(d), the Government has the burden of establishing that the evidence was not obtained as a result of an unlawful search and seizure. M.R.E. 311(d)(5). The Government must prove, by a preponderance of the evidence, that the evidence was obtained by a lawful search and seizure before the evidence may be admitted into evidence. *Id.* The Government cannot meet that burden. The contents of SN Keaty's internet account were seized on 22 January 2021. Those contents were held without a warrant until 02 March 2021, when probable cause was finally asserted, and a warrant was served to permit the disclosure of the account contents to the Government. This Government-directed seizure, lacing in probable cause, occurring for 32 days, cannot be upheld as reasonable under the Fourth Amendment.

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

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

The seizure of SN Keaty's Reddit account cannot be justified on this basis for two reasons. First, the seizure of the account was not based on probable cause. The temporary warrantless seizure of property must be justified "at its inception." *United States v. Sharpe*, 470 U.S. 675, 482 (1985). But the Government did not have the probable cause needed to justify preservation at its inception. At the time CGIS sent the preservation request, the only actual evidence they had of pictures posted were statements by [redacted] that another person, who she did not know, had told her photos of her were on Reddit. Enclosure 1. [redacted] had not seen the photos to verify they

were of her, and the text messages she provided indicate her face could not be seen in any of the photos. *Id.* Since CGIS relied on witness repeating what second witness told her, and since the second witness had never met or seen the first witness, the Government did not have probable cause at the inception of the seizure.

The warrantless seizure was unreasonable for a second reason. Even assuming the Government could establish probable cause at the time of preservation, the seizure was unreasonable because the government waited an unreasonably long period to obtain a warrant. When the Government seizes property without a warrant based on probable cause, "the Fourth Amendment requires that they act *with diligence* to apply for a search warrant." *United States v. Smith*, 967 F.3d 198, 202 (2d Cir. 2020) (emphasis added). When the Government fails to seek a warrant expeditiously, the warrantless seizure violates the Fourth Amendment even if a warrant is later obtained. *See id.*; *see also United States v. Mitchell*, 565 F.3d 1347 (11th Cir. 2009) (suppressing a computer hard drive where government seized it then allowed 21 days to elapse). Here, 32 days elapsed before the Government sought a warrant. There is no justification for the delay in seeking the warrant.

Neither can this seizure be justified on reasonableness grounds. The Government may also try to meet its burden of justifying the seizure of SN Keaty's account on general reasonableness grounds in the absence of probable cause. There are three distinct lines of cases that the Government might rely on: (a) the investigative detention principles of *Terry v. Ohio*, 368 U.S. 1 (1968); (b) the "special needs" exception; and (c) the rules for detention during the execution of search warrants. None of these arguments holds water for reasons explained below.

First, Investigative detention cannot justify the preservation. First, the preservation seizure cannot be justified by the investigative detention principles of *Terry*. It is true that *Terry*'s stop-

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

Such a limited detention authority cannot justify the seizure of SN Keaty's account for the 32 days that elapsed after the account was preserved before the Government obtained a warrant. That period was far too long. Further, even if *Terry* and *Place* can permit a seizure that long in theory, it could not do so here because the Government did not have the required reasonable suspicion at the inception of the seizure that the seized account contained evidence.

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

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

Second, even if preservation were somehow deemed a special need, it cannot satisfy the reasonableness requirement imposed on special needs seizures. *See, e.g.*, *Illinois v. Lidster*, 540 U.S. 419, 427-78 (2004) (considering whether a special-needs seizure was constitutionally reasonable by weighing the Government interests advanced by the seizure and the citizen interests infringed by it). The preservation authority the Government claims to have is astonishing. It is the power to seize any person's online account, at any time, for any reason—or even for no reason at all. In the Government's view, anyone's online account—even *everyone*'s online account, as the Government can preserve multiple accounts at once—can be seized entirely at the Government's discretion. The limitless discretion the Government claims cannot satisfy any reasonableness test. *See Delaware v. Prouse*, 440 U. S. 648 (1979) (program of

suspicionless traffic stops to check for license and registration was unreasonable seizure, especially because almost everyone would be affected as "[a]utomobile travel is a basic, pervasive, and often necessary mode of transportation").

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

Finally, rules for detention during the execution of a warrant cannot justify this preservation. The government might also try to justify the seizure of SN Keaty's Reddit account under the detention principles of *Michigan v. Summers*, 452 U.S. 692 (1981). *Summers* held that officers executing a search warrant can detain persons on the premises without additional particularized suspicion. *See id.* at 701. This is justified, the Court reasoned, by the government's interest in preventing flight as well as protecting officer safety. *See id.* at 701-05.

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

is justified" made it "constitutionally reasonable to require that citizen to remain while officers of the law execute a valid warrant to search his home." *Id.* at 704-05.

The opposite happened here. The Government ordered preservation just in case probable cause might eventually emerge. A warrant was obtained, but not until 32 days later. This case involves seizing just in case a warrant might someday be legally obtained, not seizing as part of the execution of an existing warrant. *Summers* does not apply.

IV. The entire contents pf SN Keaty's Reddit account must be suppressed as fruits of the poisonous tree.

The preserved copies of SN Keaty's Reddit account were in the data turned over to the Government by Reddit on 03 March 2021. Because the Government only had access to that preserved copy as a result of its prior constitutional violation, the entire contents of SN Keaty's account must be suppressed as fruits of the poisonous tree under *Wong Sun v. United States*, 371 U.S. 471 (1963).

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

Here, the Government directed Reddit to seize data without reasonable suspicion or probable cause, in clear violation of the statute. The Government's overreach was grave, indeed.
The exceptions to the exclusionary rule identified in *Wicks* are that the evidence: was derived from an independent source; the evidence has only an attenuated link to the illegal evidence; or would have inevitably been discovered. Here, the Reddit data would not have been obtained at all but for the Government's unconstitutional seizure, so none of the exceptions apply.

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

Suppression of the evidence in this case would have a powerful effect "in deterring Fourth Amendment violations in the future." *Herring*, 555 U.S. at 141. A single court ruling would alter practices throughout the Coast Guard. Many, if not most, preservations that occur today likely violate the Fourth Amendment. A decision from this Court suppressing the evidence would be read and digested by Government lawyers and law enforcement agents servicewide. A suppression order in this case would force the Government to bring its preservation practices into constitutional bounds. It would both limit when investigators seek preservation and could trigger provider scrutiny of preservation requests. Inversely, not excluding the Reddit evidence in this case would encourage this kind of unconstitutional overreach in the future, likely on a wider scale, and allow the Government to continue its practice of violating the Constitution. This Court can show here that such practices are unacceptable, and promote a correction before they proliferate and become standard operating procedure and expand from there.

Finally, the good-faith exception of *Illinois v. Krull*, 480 U.S. 340 (1987), poses no barrier to suppression, as the unconstitutional act here were the actions of the agents, not the enactment of an unconstitutional statute by Congress. *Krull* held that the exclusionary rule does not apply "when officers act in objectively reasonable reliance upon a statute authorizing warrantless

administrative searches, but where the statute is ultimately found to violate the Fourth Amendment." *Id.* at 342. In the military context, *Krull* has been codified in M.R.E. 311(c)(4). *Krull*, and M.R.E. 311(c)(4), do not apply because the mistake here belongs to law enforcement instead of Congress. When Congress enacted 18 U.S.C. § 2703(f), it did not make any legislative judgments about what law enforcement seizures are permitted or when they are constitutional. The preservation statute is not directed to Governments at all. The preservation statute merely specifies what internet providers such as Reddit must do when a Government preservation request is made. "[U]pon the request of a governmental entity," the statute says, "[a] provider . . . shall take all necessary steps to preserve records and other evidence in its possession" 18 U.S.C. § 2703(f)(1). The violation of the Fourth Amendment here is not based on the preservation statute, but the actions of CGIS in not obtaining a warrant when requesting Reddit preserve SN Keaty's account.

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

RELIEF REQUESTED

Pursuant to M.R.E. 311, the Defense moves to suppress the Reddit data the Government obtained via the search warrant, well as any derivative evidence obtained therefrom to include any evidence obtained from an investigative subpoena returned from the website Pornhub.com.

EVIDENCE AND HEARING

The Defense provides the following enclosures as evidence for this motion:

Enclosure 1: GBS 4-9 – Excerpts from ROI

Enclosure 2: GBS 115-116_Preservation Letter - Reddit - SN Keaty

Enclosure 3 – GBS 94_FINAL Keaty_Reddit_DD3057_Application for search and seizure warrant pursuant to 18 usc 2703.[redacted]Signed-

Enclosure 4: GBS 93-108, 109 – Reddit Search Warrant Application

Enclosure 5: GBS 30-37 – Excerpts from ROI

Enclosure 6: GBS 110-112 – Investigative Subpoena – Pornhub.com

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

HATHAWAY.NICHOLAS.JEAN FREY[redacted] Digitally signed by HATHAWAY.NICHOLAS.JEANFREY[redacted] Date: 2023.03.15 15:47:33 -04'00'

N. Hathaway
LCDR, USCG
Detailed Defense Counsel

I certify that on 15 March 2023 I have served a true copy via e-mail of the above on Military Judge and Trial Counsel

[redacted]
N. Hathaway
LCDR, USCG
Detailed Defense Counsel

COAST GUARD TRIAL JUDICIARY
EASTERN JUDICIAL CIRCUIT
SPECIAL COURT-MARTIAL

UNITED STATES	)	
	)	
	)	**UNITED STATES RESPONSE TO**
v.	)	**DEFENSE MOTION TO SUPPRESS –**
	)	**REDDIT SEARCH WARRANT**
	)	
	)	
	)	
MATTHEW KEATY,	)	**22 March 2023**
SN / E-3, USCG	)	

The United States respectfully requests this Court deny Defense's motion because the Government did not obtain the materials as a fruit of an unlawful seizure by simply requesting an entity to preserve user data. The Government followed the law as passed by Congress in the Stored Communications Act.

FACTS & PROCEDURAL HISTORY

1. The accused is charged with two specifications of violating Article 134, UCMJ for posting photos and videos of himself engaging in sexual activity with his girlfriend, [redacted] on the Internet without her permission, and one specification of Article 107, UCMJ for making a false official statement to CGIS.
2. On 21 JAN 2021, CIGS interviewed Ms. [redacted] over iPhone FaceTime to discuss allegations that SN Keaty was posting nude photographs of her on the Internet without her permission. [redacted] stated that she confronted SN Keaty about the allegations on 1 DEC 2020, and that he admitted through text message that he had posted approximately 30 photos of her since May of 2020. [redacted] then provided CGIS with a screen shot of SN Keaty's text messages. [redacted] did

not see the pictures of herself online because SN Keaty deleted his Reddit account as soon as he was confronted. (*Enclosure 1, Bates 000004-00005; 000015-000017*);

3. On 21 JAN 2021, CGIS interviewed SN Keaty. SN Keaty was advised of his rights and agreed to speak with CGIS regarding the alleged conduct. During his interview, SN Keaty admitted to posting 60-90 images of [redacted] on the subreddit community called [redacted] using his username [redacted] During his interview, SN Keaty showed the CGIS agents a photo of [redacted] that he still had on his cell phone that he had remembered posting to Reddit. (*Enclosure 1, Bates 000005-00006*)
4. On 21 JAN 2021, CGIS interviewed Ms. [redacted] via iPhone FaceTime regarding nude photographs she had seen of [redacted] on Reddit. Ms. [redacted] believed the nude pictures were of [redacted] because the nude pictures had captions that read "my girlfriend," or "my girlfriend sent this, this morning." Ms. [redacted] remembered and could describe two of the approximately five pictures she saw of [redacted] on Reddit. One was of [redacted] and SN Keaty having sexual intercourse, and another was [redacted] nude body in the reflection of a mirror. (*Enclosure 1, Bates 000007*)
5. On 21 JAN 2021, CGIS interviewed Ms. [redacted] via iPhone FaceTime regarding nude photographs she had seen of [redacted] on Reddit. Ms. [redacted] believed the nude pictures were of [redacted] because she saw an item in a photo that associated her with [redacted] and then recognized her picture on Instagram. At 1630 on 01 DEC 2020, Ms. [redacted] observed between 10-15 images of [redacted] nude on SN Keaty's Reddit account. (*Enclosure 1, Bates 000007-00008*)

6. On 23 JAN 2021, two days ***after*** having interviewed [redacted] SN Keaty, Ms. [redacted] and Ms. [redacted] CGIS submitted a preservation request pursuant to 18 USC § 2703(f), to Reddit for SN Keaty's account under username: [redacted] (Note the request letter is dated 22 Jan 2021, but was digitally signed and sent on 23 Jan 2021). (*Enclosure 1, Bates 000008*)
7. On 2 MAR 2021, CGIS applied for, received, and served on Reddit a search warrant for SN Keaty's account, pursuant to 18 U.S.C. § 2703, issued by a military judge, CDR Jeffery Barnum. (*Enclosure 1, Bates 000008*); (*Enclosure 2, Bates 000244*)
8. On 3 MAR 2021, Reddit legal support responded to the search warrant and provided a copy of their records for SA Keaty's Reddit user account. (*Enclosure 1, Bates 000008*)
9. On 15 MAR 2023, Defense filed a motion to suppress contents of SN Keaty's Reddit account on the basis that they were the fruits of an unlawful seizure.

BURDEN

The Defense has the burden as the moving party by the standard of a preponderance of the evidence. R.C.M. 905. When the defense makes an *appropriate motion* or objection under M.R.E. 311(d), the prosecution has the burden of proving by a preponderance of the evidence that the evidence was not obtained as a result of an unlawful search or seizure; that the evidence was obtained by officials who reasonably and with good faith relied on the issuance of an authorization to search, seize, or a search warrant. However, the burden does not shift to the Government in this matter because the Defense's motion is not appropriate under M.R.E. 311(d)—Defense's imagined predicate "seizure" of user data is not a seizure at all, as the Government did not possess or have access to the user data merely because it was preserved.

APPLICABLE LAW & ARGUMENT

The Fourth Amendment ensures that people have a right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. Amend. IV. Accordingly, government seizure of personal communications generally requires the issuance of a warrant based on probable cause due to a person's reasonable expectation of privacy. Though sending electronic communication requires users to provide information to third parties, and the Fourth Amendment "generally does not protect private information shared with third parties." U.S. Congressional Research Service. Overview of Governmental Action Under the Stored Communications Act (SCA), (LSB10801; August 03, 2022), by Jimmy Balser. As such, Congress passed the SCA to provide statutory protections for electronic communications that may not be protected by the Fourth Amendment. *Id* at 2.

Stored Communications Act

The Stored Communications Act (SCA), 18 U.S.C. § 2701-2713 protects and regulates the disclosure of stored electronic communications and other information by providers of communication services, hereinafter "providers." Specifically, subsections of § 2703 provide requirements and procedures for the disclosure of information to government entities. In § 2703(a)-(c), it describes how a government entity may compel a provider to disclose certain categories of information related to subscribers or customers. These methods include warrants, courts orders, or administrative subpoena. In addition, § 2703(f) provides guidance to providers regarding the preservation of records, upon request of a governmental entity pending the issuance of a search warrant or other process. The provider is then required to take "all necessary steps" to preserve the information for a period of 90 days, which "shall be extended for an additional 90-day period upon a renewed request." *See* 18 U.S.C. § 2703(f)(2). After the required

preservation period has lapsed, the provider is free to dispose of the information.

Preservation Requests Are Not Searches or Seizures

When a government entity makes a preservation request to a provider, the preservation of the data is not a seizure. When a seizure occurs, there is "some meaningful interference with an individual's possessory interest in that property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). A preservation pursuant to § 2703(f) notifies the online provider to take the necessary steps to preserve records, it does not interfere with the use of the account or entitle the Government to obtain and review the information. *See United States v. Basey*, 2021 WL 1396274, at 5 (D. Alaska Apr. 13, 2021), *certificate of appealability denied*, No. 21-35554, 2022 WL 636115 (9th Cir. Jan. 18, 2022), *cert. denied*, 212 L. Ed. 2d 413, 142 S. Ct. 1434 (2022). More similarly, the Supreme Court in *California Bankers Ass'n v. Shultz*, 416 U.S. 21 (1974) concluded that recordkeeping provisions within the Bank Secrecy Act, that required banks to maintain records of its customers, did not violate the Fourth Amendment. The court in *California Bankers Ass'n* also concluded that the maintenance of records by the banks under government regulations did not constitute a seizure, as a distinguishing factor was that the government's ability to inspect, review, or access the records required to be maintained is governed by existing legal processes. *Id.* at 34.

Defense's motion relies on a theoretical framework and fails to establish case law that supports the position that preservation requests under § 2703(f) are a seizure. In fact, one of the only courts to address the constitutionality of 18 USC § 2703(f) was *United States v. Rosenow*, 2018 WL 6064949 (S.D. Cal. Nov. 20, 2018), and the court ruled "the preservation did not interfere with the Defendant's use of his accounts and did not entitle the Government to obtain

any information without further legal process." *Id* at 10. In fact, the SCA expressly prohibits the provider from giving the information to the government without a search warrant or court order as specified in §2703.

For a seizure to occur, there must be government action to take possession. Similarly here, and in *California Bankers Ass'n,* Reddit is not serving as a government agent just due to the preservation and maintenance of records per federal statute. The distinguishing factor is that the Government's ability to inspect, review, or access the records required to be maintained is governed by existing legal processes. *Id.* at 34. Here, the Government submitted a preservation request for the initial 90-day period on 23 Jan 2021 and 38 days later, on 02 Mar 2021, the military judge issued a search warrant. During the 38 day preservation period, the Government did not have access to those records and would not be allowed to have access to those until a court order or other process (in this case a warrant) was issued. 18 U.SC. § 2703(f)(1). According to § 2703(f), after the initial 90-day period, without a renewal request, Reddit would have been free to dispose of the content.

In fact, Reddit expressly tells users that while using their service, the content and information provided is stored and used on their own servers and cloud providers. Reddit Privacy Policy, October 2020. (*See Enclosure 3*). Other courts have supported that the entities under the SCA are not acting as government agents engaged in unreasonable searches and seizures due to the maintenance and storage of information. *Basey* at 5 (determining entities such as Yahoo routinely preserve information for longer period of time because they have a "monetary incentive" to preserve emails under § 2706 which reimburses ISPs for their compliance with the Stored Communications Act "regardless of when legal process arrives").

Defense argues that the preservation of SN Keaty's account "dispossessed him of control over the account" because Reddit is making a copy of the records. Making a copy of the data is one way to preserve it, but it is not the only way. Defense cites to Twitter and Apple preservation procedures as proof that Reddit operates in the same manner, but they simply fail to offer any evidence in support of that conclusion. However, even if Reddit did follow Twitter's and Apple's preservation procedures, those procedures are developed internally and not at the direction of the Government—if the private company elects to create a copy, that is solely private action, not government action.

Nonetheless, courts have found that making a copy of data is not a seizure under the Fourth Amendment because it does not interfere with anyone's possessory interest, it remains intact and unaltered, and the information is still accessible by the individual. *See United States v. Gorshkov*, 2001 WL 1024026 (W.D. Wash. May 23, 2001). Defense argues that before the preservation, the accused could have viewed files, altered files, and deleted files. Reddit's October 2020 privacy policy, which was in effect at the time of the offense and at the time of the preservation request, describes the various ways in which Reddit uses a person's information, making it clear that the user does not exercise exclusive control:

> "We use information about you to: Provide, maintain, and improve the Services; Research and develop new services; Help protect the safety of Reddit and our users, which includes blocking suspected spammers, addressing abuse, and enforcing the Reddit User Agreement and our other policies; Send you technical notices, updates, security alerts, invoices, and other support and administrative messages; Provide customer service; Communicate with you about products,

services, offers, promotions, and events, and provide other news and information we think will be of interest to you (for information about how to opt out of these communications, see "Your Choices" below); Monitor and analyze trends, usage, and activities in connection with our Services; Measure the effectiveness of ads shown on our Services; and Personalize the Services, and provide and optimize advertisements, content, and features that match user profiles or interests."

Reddit's privacy policy further informs users as to its policy regarding a person's ability to delete their account:

"You may delete your account information at any time from the user preferences page. You can also submit a request to delete the personal information Reddit maintains about you by following the process described in the "Your Rights - Data Subject and Consumer Information Requests" section below. When you delete your account, your profile is no longer visible to other users and disassociated from content you posted under that account. Please note, however, that the posts, comments, and messages you submitted prior to deleting your account will still be visible to others unless you first delete the specific content. We may also retain certain information about you as required by law or for legitimate business purposes after you delete your account." (*Enclosure 3*)

The Defense asserts that the Government has violated SN Keaty's Fourth Amendment and MRE 311 rights because it "eliminated SN Keaty's exclusive control of his account." (*Defense Motion at 10*). To the contrary, as Reddit makes clear in their privacy policy above, Reddit is in control SN Keaty's account and his private messages. This is further evidenced by the fact that SN

Keaty attempted to delete his account on 01 DEC 2020, but Reddit retained control of that information for nearly two months before the Government's preservation request. To the extent SN Keaty was ever in control of his account, he abandoned that control on 01 DEC 2020 when he attempted to delete it.

Defense has not provided any law that supports that a preservation request under the SCA is a seizure or that Reddit conducted a search. Instead, Defense asks this court to analogize a preservation request (essentially prohibiting Reddit from deleting their files) with the "photocopying of a person's private documents." (*Defense Motion at 10*). In addition, Defense has not provided any supporting law that an internet service provider or a provider of an electronic communication service is considered a "government agent" when abiding by a preservation request under 18 U.S.C. § 2703(f). The preservation request was a not a seizure and the Accused did not experience "some meaningful interference" with his possessory interest in the records that were preserved and later disclosed to the Government.

The Defense also wholly fails to do a constitutional statutory analysis. The executive branch is not acting unguided by the legislative branch. Here the Government is following exactly what Congress decided could be done by government agents under the SCA. Yet the Defense does not perform any statutory analysis under any level of scrutiny. They have failed to meet their burden.

No Reasonable Expectation of Privacy

Assuming, *arguendo*, that a preservation request constituted a seizure, a subscriber or user does not have a reasonable expectation of privacy, or significantly diminished at best, for two reasons; first, the records obtained are kept during the course of business by the provider;

and second, it has been long held that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Smith v. Maryland*, 442 U.S. 735 (1979) (pen register for phone numbers from the phone company do not acquire the contents of communications and are not subject to Fourth Amendment warrant requirements); see also *United States v. Miller*, 425 U.S. 435 (1976) (subpoena for bank records not search because bank records were not respondent's private papers); *United States v. Forrester*, 512 F.3d 500, 510 (9th Cir. 2008) (warrantless government surveillance of email to/from addresses and IP addresses do not constitute search because defendant voluntarily turned over the information in order to direct the third party server). A search or seizure can be authorized by a "third party who possessed common authority over or other sufficient relationship to the premises of effects sought to be inspected." *United States v. Ziegler*, 474 F.3d 1184, 1191 (2007). Many providers require that users, customers, and subscribers agree to their terms of service, which includes the providers ability to copying, using and storing content and information provided by the users.

When downloading the application and using the services Reddit provides, users grant Reddit a license to use content and information that is stored on servers, as indicated in its privacy policy, creating that relationship and that level of access to the information diminishes SN Keaty's expectation of privacy. Reddit's October 2020 privacy policy expressly describes what types of information Reddit collects and who it shares that information with:

> "We collect the content you submit to the Services. This includes your posts and comments including saved drafts, videos you broadcast via RPAN, your messages with other users (e.g., private messages, chats, and modmail), and your reports and other communications with moderators and with us. Your content may

include text, links, images, gifs, and videos."

"Reddit only shares nonpublic information about you in the following ways. We do not sell this information...*To comply with the law.* We may share information in response to a request for information if we believe disclosure is in accordance with, or required by, any applicable law, regulation, legal process, or governmental request, including, but not limited to, meeting national security or law enforcement requirements. To the extent the law allows it, we will attempt to provide you with prior notice before disclosing your information in response to such a request. Our Transparency Report has additional information about how we respond to government requests." (*Enclosure 3*)

There was no privacy impact to SN Keaty from the preservation request—the data stayed right where SN Keaty put it—on Reddit. The "[p]reservation request[did] not result in disclosure of information. [It did] not result in collection of information not already stored by the provider. [It did] not hinder an account holder's access to his account. [The duration was] brief, and afterwards the provider [was] free to delete the preserved information. In addition, the government must obtain appropriate legal process, such as a search warrant, in order to actually obtain information from the account." *See United States v. Basey*, 2019 WL 2234564 (C.A.9) (Appellee's Answering Brief), which is exactly what happened here.

The government has an extremely compelling interest in preservation requests. Especially in the ability to access electronic evidence during criminal investigations. The unique and easy ability to delete or modify electronic evidence makes preservations requests significant to ensure that data is not lost and remains accurate—especially in this case, where the accused did in fact

attempt to delete the electronic evidence. Balancing the government's and SN Keaty's interests, the government's reliance on the procedures set forth in § 2703(f) is reasonable. *See Id.*

Preservation is Supported by Probable Cause

Even if the court were to determine that the preservation request was a seizure, it still wouldn't be a violation of the Fourth Amendment because not only did CGIS have sufficient evidence to meet the probable cause standard, but they arguably satisfy the burden beyond a reasonable doubt—**two days prior to the preservation request** CGIS had (1) spoken with the victim, who also provided a documentary admission of SN Keaty, (2) spoke with two separate witnesses who had seen the nude images of [redacted] and most importantly, (3) spoke with SN Keaty himself who admitted to posting the images on his Reddit account.

Good Faith Exception

Even if the preservation request constituted as seizure in violation of the Fourth Amendment, the "good faith exception" applies under M.R.E. 311. The Supreme Court held that the good-faith exception to the exclusionary rule applies where law enforcement reasonably relies on a statute later determined to be unconstitutional. *See United States v. Korte,* 918 F.3.d 750, 757-79 (9th Cir. 2019) citing *Illinois v. Krull*, 480 U.S. 340, 349-50 (1987) (holding the good-faith exception to the exclusionary rule applies where law enforcement reasonable relies on a statute later determined to be unconstitutional). Moreover, if a law enforcement agent reasonably relies on a search authorization or warrant that is determined unlawful or not supported by probable cause, there shall be no exclusion if "the agent executing the search had an objectively reasonable belief that the magistrate had a substantial basis for determining the existence of probable cause." *United States v. Perkins,* 78 M.J. 381, 388 (2019).

Suppression of evidence gathered pursuant to a warrant is a "has always been our last resort, not our first impulse." *Herring v. United States*, 555 U.S. 135, 140 (2009), quoting *Hudson v. Michigan*, 547 U.S. 586, 591 (2006). Under Fourth Amendment jurisprudence, the exclusionary rule only applies when it "results in appreciable deterrence." *Herring* at 141 (citing *United States v. Leon*, 468 U.S. 897 (1984)). Deterrence per se is not the only trigger for the exclusionary rule because the "benefits of deterrence must outweigh the costs." *Id.* "To the extent that application of the exclusionary rule could provide some incremental deterrent, that possible benefit must be weighed against its substantial social costs." *Id.* (quoting *Illinois v. Krull*, 480 U.S. 340, 352-53 (1987)). "[T]he exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." *Id.* at 144. The determination of good faith on the part of the law enforcement conduct at issue is an objective standard of "whether a reasonably well trained officer would have known that the search was illegal in light of all of the circumstances." *Id.* at 145 (quoting *Leon*, 468 U.S. at 922, n 23) (internal quotations omitted).

When submitting the preservation request pursuant § 2703(f) and applying for the Search Warrant under § 2703 agents reasonably relied on the procedures well established by Congress within the SCA—in fact, as Defense points out, preservation requests are used across hundreds of thousands of internet accounts. (*Defense Motion at 7*) As such, the standard in *Krull* precludes suppression. Moreover, the fact that a military judge had issued a warrant following preservation procedures "is the clearest indication that the officers acted in an objectively reasonable manner or... in objective good faith." *Messerschmidt v. Millender*, 565 U.S. 535, 546 (2012) (internal quotation marks omitted) (citation omitted).

CONCLUSION & REQUESTED RELIEF

The Government respectfully requests the Court deny Defense's motion to suppress and find that the preservation request was not a seizure, that Reddit is not serving as a government actor, that the Defense failed to make an attempt or meet any burden to challenge the constitutionality of the SCA, and the preservation under the SCA did not violate the Accused's Fourth Amendment Rights.

EVIDENCE

The Government submits the following documentary evidence in support of this response:

Enclosure (1) – Portion of CGIS ROI

Enclosure (2) – Reddit Search Warrant

Enclosure (3) – Reddit Privacy Policy (October 2020)

Respectfully Submitted,

HUMPHREY.CHRISTOPHER.JAMES.[redacted] Digitally signed by HUMPHREY.CHRISTOPHER.JAMES.[redacted] Date: 2023.03.22 15:49:09 -04'00'

C.J. Humphrey, LT, USCG
Trial Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the above motion was served, via e-mail, on the Court and Defense Counsel on 22 March 2023.

Respectfully Submitted,

HUMPHREY.CHRIST OPHER.JAMES. [redacted] Digitally signed by HUMPHREY.CHRISTOPHER.JAMES [redacted] Date: 2023.03.22 15:49:35 -04'00'

C.J. Humphrey, LT, USCG
Trial Counsel

COAST GUARD TRIAL JUDICIARY
EASTERN JUDICIAL CIRCUIT
SPECIAL COURT-MARTIAL

UNITED STATES **v.** **MATTHEW KEATY** **SN/E-3** **U.S. COAST GUARD**	**DEFENSE MOTION TO DISMISS – FAILURE TO STATE AN OFFENSE** **March 15, 2023**

MOTION

The Defense requests this Court dismiss, without prejudice, Specifications 1 and 2 of Charge I because the specifications fail to state an offense.

BURDEN

As the moving party, the Defense bears the burden of persuasion and the burden of proof on any factual issue necessary to decide the motion. R.C.M. 905(c).

FACTS

In Charge I, the Government has charged SN Keaty with two novel specifications of Article 134, UCMJ. The Government alleged:

> Specification 1: In that SN Matthew Keaty, U.S. Coast Guard, at or near Portsmouth, New Hampshire, did, on one or more occasions, from on or about June 2020 to on or about November 2020, knowingly and unlawfully disseminate photographs of himself engaging in sexual activity with [redacted] on the Internet without the express consent of [redacted] to disseminate such photographs, in violation of Title LXII, Chapter 644, Section 9, of the New Hampshire Revised Statutes, and that such conduct was of a nature to bring discredit upon the armed forces.
>
> Specification 2: In that SN Matthew Keaty, U.S. Coast Guard, at or near Portsmouth, New Hampshire, did,on or about August 2020, knowingly and unlawfully disseminate videos of himself engaging in sexual activity with [redacted] on the Internet without the express consent of [redacted] to disseminate such videos, in violation of Title LXII, Chapter 644, Section 9, of the New Hampshire Revised

Statutes, and that such conduct was of a nature to bring discredit upon the armed forces.

Charge Sheet.

LAW

"A specification is a plain, concise, and definite statement of the essential facts constituting the offense charged. A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication." R.C.M. 307(c)(3); *United States v. Fosler*, 70 M.J. 225, 229 (C.A.A.F. 2011); *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006) ("A specification states an offense if it alleges, either expressly or by implication, every element of the offense, so as to give the accused notice and protection against double jeopardy.)

Under Clause 3 of Article 134, UCMJ, the Government may allege violations of state criminal law as incorporated by the Assimilative Crimes Act. "The [Assimilative Crimes Act] applies state law to a defendant's acts or omissions that are 'not made punishable by *any enactment* of Congress.'" *Lewis v. United States*, 523 U.S. 155, 159 (1998) (quoting 18 U.S.C. § 13(a)) (emphasis in original). "The ACA's basic purpose is one of borrowing state law to fill gaps in the federal criminal law that applies on federal enclaves." *Id* at 160. "For areas under the exclusive or concurrent jurisdiction of the United States, the ACA incorporates the penal laws of the State in which that area is located. *United States v. Irvin*, 21 M.J. 184, 186 (C.M.A. 1986) (internal quotations and citation omitted). "However, this Act cannot be invoked with respect to crimes committed in places which—although they may be owned by the United States—are not subject to its exclusive or concurrent jurisdiction." *Id* (internal quotations and citation omitted). To that end, when charging an offense under the ACA, the Government is required to allege in the specification the United States had exclusive or concurrent jurisdiction

over the geographical area where the alleged offense occurred. *United States v. Kline*, 21 M.J. 366, 367 (C.M.A. 1986); *Irvin*, 21 M.J. at 186.

In addition, the Manual for Courts-Martial (MCM) specifically requires additional elements when alleging a Clause 3 violation. The MCM requires the Government to allege each element of the federal statute, each element of the state statute if applicable, and expressly state "an offense not capital." MCM, Part IV, para 91.c.(6)(b). The Military Judges Bench Book also instructs Judges and Parties that the Government is required include jurisdiction as an element of the offense, as well as expressly allege the specification is not a capital offense. Military Judges Bench Book, para. 3a-58-2C.

ARGUMENT

Specifications 1 and 2 of Charge I fail to state an offense. As seen in the charge sheet, both specifications allege SN Keaty violated a state law. However, the Government fails to allege multiple elements required when charging a violation of Article 134, UCMJ, and the Assimilative Crimes Act. First, the Government fails to allege that the offense occurred in a place under exclusive or concurrent federal jurisdiction. Charge Sheet. Second, the Government fails to allege the offenses were not capital. As these are required elements for a specification when the Government alleges a violation of state law through the ACA, Specifications 1 and 2 of Charge I fail to state an offense.

Citing *United States v. Sadler*, 29 M.J. 370 (C.M.A. 1990), the Government will likely claim that Specifications 1 and 2 of Charge I are violations of Clause 2 of Article 134, UCMJ, but this assertion is unfounded for two reasons. First, *Sadler* has been implicitly overruled by subsequent cases. Second, even if it has not been overruled the Government relies on non-binding dicta, and this Court is not required to, and should not, adhere to *Sadler*.

The facts in *Sadler* are somewhat analogous to this case. In *Sadler*, the Government charged the accused with two novel Article 134, UCMJ, offenses, alleging he violated two different New Mexico statutes, but were not charged under the ACA. *Id.* at 372. The elements of each Article 134, UCMJ, offense required the Government to prove the accused had in fact violated the New Mexico statute. *Id.* at 373. Acknowledging that violating a state offense is usually charged under Clause 3 of Article 134, UCMJ, the Court of Military Appeals (CMA) stated "a servicemember may not be found guilty under Article 134 solely because his conduct violated a state or foreign law." *Id.* at 375. However, the CMA continued "a statutory violation would be a circumstance to consider in deciding whether his conduct was service-discrediting." *Id.* While dicta in *Sadler* provides some support for the position the Government can charge a violation of a state offense outside the ACA context, ultimately *Sadler* does not allow the Government to charge as it has in this case.

Sadler has been implicitly overruled by *Fosler*. In *Fosler*, the Court of Appeals for the Armed Forces (CAAF) made clear that if an Article 134, UCMJ, specification fails to include the terminal element it fails to provide an accused notice of the crime he must defend, and must be dismissed. *Fosler*, 70 M.J. at 232. While *Fosler* dealt with the terminal element, the reasoning in the opinion requires the Government to specifically allege the elements of a violation of a state offense in the specification. *See id* at 229-231.

Regardless of whether *Sadler* has been overruled, this Court is not bound by, and should not follow, its dicta. Black's Law Dictionary (2019 ed) defines "obiter dictum" as "A judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential." Here, the statement in *Sadler*, 29 M.J. at 375, that a state law "statutory violation would be a circumstance to consider in deciding whether his

conduct was service discrediting" was not necessary to the decision. In that case, the appellant had raised the issue of whether the Military Judge had properly instructed on the members. *Id.* at 371. Nowhere did the CMA address whether the offenses were preempted by any other statute or failed to state an offense. As the statement regarding whether a state law violation can be alleged in an Article 134, UCMJ, Clause 2 offense was not necessary to the holding of *Sadler*, it is not binding on this Court.

In addition to being not binding, the dicta in *Sadler* is at odds with Article 134, UCMJ, and the ACA, and this Court should decline to follow it. The charging scheme in this case would render Clause 3 of Article 134, UCMJ, as well as the ACA entirely superfluous. The Government could simply charge a violation of any state offense as a novel Article 134, UCMJ, to get around the elements of an actual federal offense, or around the jurisdictional requirements of the ACA if charging a state offense. Likely for this reason, only one case since 1990 has cited *Sadler* for the proposition that the Government may include an alleged violation of state law in a novel Article 134, UCMJ, offense. *See United States v. Yancey*, 36 M.J. 859, 860 (A.C.M.R. 1993). And even in that case, the Government intended to charge the appellant with a violation of Clause 3 of Article 134, UCMJ, but incorrectly drafted the specification. *See id* at 861. As the charging practice in this case undermines the Congressional intent of Article 134 and the ACA, this Court should not follow *Sadler* and find the specifications fail to state and offense.

RELIEF REQUESTED

The Defense requests this Court dismiss specifications 1 and 2 of Charge I without prejudice as they fail to state an offense.

EVIDENCE AND HEARING

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

HATHAWAY.NICHOLAS.JEANFREY [redacted] Digitally signed by HATHAWAY.NICHOLAS.JEANFREY [redacted] Date: 2023.03.15 15:30:02 -04'00'

N. Hathaway
LCDR, USCG
Defense Counsel

CERTIFICATE OF SERVICE

I hereby attest that a copy of the foregoing motion and all exhibits was served on the Court and opposing counsel by email on 15 March 2023

[redacted]

N. Hathaway
LCDR, USCG
Defense Counsel

SPECIAL COURT-MARTIAL
UNITED STATES COAST GUARD
EASTERN JUDICIAL CIRCUIT

UNITED STATES	)	
	)	
	)	**GOVERNMENT OPPOSITION TO**
v.	)	**DEFENSE MOTION TO DISMISS FOR**
	)	**FAILURE TO STATE AN OFFENSE**
	)	
	)	
	)	
MATTHEW KEATY	)	22 March 2023
SN/E-3, U.S. COAST GUARD	)	

NATURE OF MOTION

The United States files this opposition to the Defense motion to dismiss for failure to state an offense and respectfully asks this Court to deny the Defense motion.

HEARING

The United States will be prepared for oral argument.

BURDEN

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

STATEMENT OF FACTS

1. On 11 November 2022, SN Keaty's charges were referred to court-martial. Charge Sheet.
2. In Charge I, the Government charged SN Keaty with two specifications of Article 134, UCMJ.
3. Specifications 1 and 2, Charge I state:

   Specification 1: In that SN Matthew Keaty, U.S. Coast Guard, at or near Portsmouth, New Hampshire, did on one or more occasion, from on or about June 2020 to on or about

November 2020, knowingly and unlawfully disseminate photographs of himself engaging in sexual activity with [redacted] on the Internet without the express consent of [redacted] to disseminate such photographs, in violation of Title LXII, Chapter 644, Section 9, of the New Hampshire revised Statutes, and that such conduct was of a nature to bring discredit upon the armed forces.

Specification 2: In that SN Matthew Keaty, U.S. Coast Guard, at or near Portsmouth, New Hampshire, did, on or about August 2020, knowingly and unlawfully disseminate videos of himself engaging in sexual activity with [redacted] on the Internet without the express content of [redacted] to disseminate such videos, in violation of Title LXII, Chapter 644, Section 9, of the New Hampshire Revised Statutes, and that such conduct was of a nature to bring discredit upon the armed forces.

LAW AND ARGUMENT

"The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet; and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction." *United States v. Sell*, 11 C.M.R. 202 (CMA 1953)

Here, SN Keaty is aware of what exact acts the Government alleges that he did. The personal jurisdiction, time, place, conduct, mens rea, and clause 2 terminal element are all written into the specification with no defects. The Government also gave notice of the state statute. Hence, the Court should deny the Defense's motion and allow the Government to put on its case.

In their motion, the Defense claims *United States v. Sadler*, 29 M.J. 370 (CMA 1990), has been implicitly overruled by *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011). But *Fosler* was simply a case about failing to plead the terminal Article 134 element. The Government has plead the terminal element in the instant case. Charge Sheet. In fact, *Sadler* is

not mentioned once in the *Fosler* opinion and *Sadler* has no negative treatment by subsequent cases.

In *Sadler*, the Government used New Mexico statutes to charge the Accused for taking photos of a child then under 16 years of age. 29 M.J. at 372. The Court of Military Appeals acknowledged that the Government charged the Accused under the second clause of Article 134, UCMJ, by also alleging state law the transgression of which was service discrediting. *Id.* at 374. The Court recognized the Government's reasoning: the Accused's activity with the child had taken place at his home off base, and not some place exclusive or concurrent with Federal jurisdiction. *Id.* Similarly, the Government here has charged SN Keaty under Clause 2 because his conduct happened at or near his home, a place not subject to exclusive or concurrent Federal jurisdiction. The Government is not limited to charging SN Keaty under clause 3. Since SN Keaty is on exact notice of what the Government must prove—including clause 2's terminal element—the specifications do not fail to state an offense. *Sadler* also tells us that the Court must instruct the members that they cannot find the accused guilty of Article 134 simply because they find that the accused violated State law, but rather the members must find the act service discrediting. In fact, the high court noted in the *Sadler* opinion that it would be tempted to agree that the pleading of the state statute was mere surplusage if raised at the trial level. *Id.* at 375. Here, the Government plead the State statute to give extra notice as to the source of the elements of the criminal act based on where SN Keaty was located when the crimes occurred. Other courts have also stated that a violation of a local or foreign law may constitute an offense under Article 134 clause 1 or 2 and note that instructing an accused on the elements of the state statute that underlies a novel Article 134 offense is "tantamount" in advising an accused as to the elements of the offense. *United States v. Vines*, 57 M.J. 519, 528 (A.F. Ct. Crim. App. 2002).

When charging an Article 134 offense, the government has the discretion to charge under a clause (1), clause (2), or clause (3) theory or any combination thereof. Here, the government chose to bring charges under clause (2) alone, and is not subject to Defense's preferred charging scheme. As is clear the above case law, clause (2) is a valid and permissible manner in which to charge violation of state crimes, so long as the terminal element is met, which is exactly what the government will prove in this case.

REQUESTED RELIEF

The United States respectfully requests this Court deny the Defense's motion to dismiss.

Respectfully Submitted,

HUMPHREY.CHRISTOPHER.JAMES.[redacted]
Digitally signed by HUMPHREY.CHRISTOPHER.JAME S[redacted]
Date: 2023.03.22 16:34:00 -04'00'

Christopher Humphrey, LT
Trial Counsel

Appellate Exhibit 27
Page 4 of 5

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the above motion was served, via e-mail, on the Court and Defense Counsel on 22 March 2023.

Respectfully Submitted,

HUMPHREY.CHRISTOPHER.JAMES.[redacted] Digitally signed by HUMPHREY.CHRISTOPHER.JAMES.[redacted] Date: 2023.03.22 16:34:16 -04'00'

C.J. Humphrey, LT, USCG
Trial Counsel

Appellate Exhibit 27
Page 5 of 5

COAST GUARD TRIAL JUDICIARY
EASTERN JUDICIAL CIRCUIT
SPECIAL COURT-MARTIAL

UNITED STATES **v.** **MATTHEW KEATY** **SN/E-3** **U.S. COAST GUARD**	**DEFENSE MOTION TO COMPEL WITNESS PRODUCTION** **15 March 2023**

MOTION

Pursuant to 10 U.S.C. §846, Article 46, Uniform Code of Military Justice, and Rule for Courts-Martial 703, as well as the Sixth Amendment to the U.S. Constitution, the Defense respectfully moves this Court to compel production of ENS [redacted] who is necessary for trial.

BURDEN

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

FACTS

1. In Charge I, the Government has charged SN Keaty with two novel specifications of Article 134, UCMJ, and in Charge II, one specification of Article 107, false official statement. Charges were referred to Special Court-Martial on 111 November 2022. Charge Sheet.

2. Specification 1 and 2 of the Charge I state:

> Specification 1: In that SN Matthew Keaty, U.S. Coast Guard, at or near Portsmouth, New Hampshire, did, on one or more occasions, from on or about June 2020 to on or about November 2020, knowingly and unlawfully disseminate photographs of himself engaging in sexual activity with [redacted] on the Internet without the express consent of [redacted] to disseminate such photographs, in violation

of Title LXII, Chapter 644, Section 9, of the New Hampshire Revised Statutes, and that such conduct was of a nature to bring discredit upon the armed forces.

Specification 2: In that SN Matthew Keaty, U.S. Coast Guard, at or near Portsmouth, New Hampshire, did,on or about August 2020, knowingly and unlawfully disseminate videos of himself engaging in sexual activity with [redacted] on the Internet without the express consent of [redacted] to disseminate such videos, in violation of Title LXII, Chapter 644, Section 9, of the New Hampshire Revised Statutes, and that such conduct was of a nature to bring discredit upon the armed forces.

3. The Sole Specification of Charge II states:

In that SN Matthew Keaty, U.S. Coast Guard, did at or near Kittery, ME, on or about April 2021, with intent to deceive, make to CGIS Special Agent [redacted] an official statement, to wit: that he had not posted any content of [redacted] on the Internet website Pornhub.com, or words to that effect, which statement was false in that he had posted videos of [redacted] to Pornhub.com, and was then known by the said SN Keaty to be so false.

4. On 16 December 2022, the Defense submitted to the Government a request for the production of certain witnesses for trial on the merits and pre-sentencing. Enclosure 1.

5. On 19 December 2022, the Government responded to the Defense's witness production request, approving all requested witnesses except ENS [redacted] Enclosure 2.

6. ENS [redacted] is SN Keaty's supervisor in deck department on [redacted] and has been since November of 2021. Enclosure 1. She has observed SN Keaty in a variety of situations on which she could base her option of his character for truthfulness and good military character. *See id.* ENS [redacted] is also a prior enlisted member. *Id.*

LAW

The Sixth Amendment to the U.S Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right [...] to have compulsory process for obtaining witnesses in his favor." U.S. Const. amend. VI, cl. 7. This right is "well established in military law and has been guarded by [our highest Court]." *United States v. Hinton*, 21 M.J. 267, 269

(C.M.A. 1986) (citing *United States v. Carpenter*, 1 M.J. 384 (C.M.A. 1976; *United States v. Iturralde-Aponte*, 1 M.J. 196 (C.M.A. 1975)). Consistent with the constitutional mandate, the prosecution and the defense at a court-martial "shall have equal opportunity to obtain witnesses and evidence, including the benefit of compulsory process," R.C.M. 703(a), and "[e]ach party is entitled to the production of any witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary." R.C.M. 703(b)(1). Moreover, "each party is entitled to the production of a witness whose testimony on sentencing is required under R.C.M. 1001(f). RCM 703(b)(2).

Evidence is relevant when it has "any tendency to make the existence of any fact more probable or less probable than it would be without the evidence; and the fact is of consequence to the determination of the action." Mil. R. Evid. 401. Evidence is necessary when it is not cumulative and would contribute to a party's presentation of the case in some positive way on a matter in issue. R.C.M. 703(b)(1), Discussion, Manual for Courts-Martial, United States (2019 ed.); *see United States v. Williams*, 3 M.J. 239 (C.M.A. 1977). In determining whether a requested witness' testimony is cumulative of a witness whose appearance at trial is assured, the military judge should consider: whether the requested witness' credibility is greater than that of the attending witness; whether the testimony of the requested witness is relevant to the accused with respect to character traits or other evidence observed during a different time period from the attending witness; and whether there is any benefit to the accused from having an additional witness say the same thing other witnesses have said. *United States v. Jones*, 20 M.J. 919, 927 (N-M. Ct. Crim. App. 1985) (internal citations omitted). If the court determines that a defense witness is cumulative, the Defense is entitled to choose which of the cumulative witnesses it desires to call. *United States v. Harmon*, 40 M.J. 107, 108 (C.A.A.F. 1994).

An accused's "right to present his own witnesses to establish a defense" is a "fundamental element of due process of law." *United States v. McAllister*, 64 M.J. 248, 249 (C.A.A.F. 2007) (quoting *Washington v. Texas*, 388 U.S. 14, 19 (1967)). Therefore, his "opportunity to obtain witness and other evidence" must be equal to the Government's. *United States v. Warner*, 62 M.J. 114, 118 (C.A.A.F. 2005) (internal quotation marks omitted).

The court-martial rules which implement these rights require that in order to obtain witnesses for trial, the Defense must first submit a request to trial counsel. R.C.M. 703(c)(2). The request must include the witness' 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." R.C.M. 703(c)(2)(B). It must also include a synopsis of the witness' expected testimony. *Id.* If the trial counsel contends that production is not required under the rule, the Defense may submit the matter to the military judge. R.C.M. 703(c)(2)(D). If the military judge grants the motion, trial counsel "shall produce the witness or the proceedings shall be abated." *Id.* These same procedures apply to the production of evidence. R.C.M. 703(f). The presence of witnesses not on active duty and evidence not under control of the Government may be obtained by a subpoena issued by the trial counsel. R.C.M. 703(g)(3).

ARGUMENT

The following discussion explains why the production of ENS [redacted] is relevant, necessary, and not cumulative.

1. **ENS** [redacted]

In its response to the Defense's witness production request, the Government explained its denial of ENS [redacted] production by stating: "The production of ENS [redacted] is denied as cumulative." By only denying production of ENS [redacted] because she is allegedly cumulative,

the Government concedes her testimony both on the merits and pre-sentencing is relevant and necessary.

ENS [redacted] is not cumulative to the other witnesses the Government agreed to produce in this case. As explained in the Defense's witness production request, ENS [redacted] has been able to observe and supervise SN Keaty for close to 18 months, which forms a large portion of his service in the Coast Guard. Significantly, she provides a different perspective than all the other witnesses the Government granted in this case. ENS [redacted] provides not only the prospective of a junior who can compare SN Keaty's performance to all other enlisted members in her division, but also that of a former enlisted member who has made the transition to being an officer. Enclosure 1. No other witness in this case would be able to provide testimony with that background and experience. Further, if ENS [redacted] was not produced, the Defense would not be able to provide testimony regarding SN Keaty's character for truthfulness or good military character from an officer. CAPT [redacted] was only requested as a sentencing witness, enclosure 1, and is not going to testify on the merits.

Significantly, given this case involves Article 107, False Official Statement, testimony as to SN Keaty's truthfulness and good military character is vital to his defense. What's more, the number of witnesses who testify to those character traits can be very impactful for the members, especially when each witness brings different backgrounds and experiences to their testimony.

Taking into account the factors laid out in *United States v. Jones*, 20 M.J. 919, 927 (N-M. Ct. Crim. App. 1985), ENS [redacted] has more credibility because of her experience both as an enlisted member and officer, the period of time she has supervised and observed SN Keaty does not directly overlap with that of any other witness, and there is significant benefit to her testifying as to his truthfulness in addition to the other witnesses. As stated she is an officer, and

the higher the number of witnesses who testify to SN Keaty's truthfulness is key to the defense of the Article 107, UCMJ, charge.

EVIDENCE AND HEARING

The Defense intends to call the following witness by telephone at the motions hearing for this matter:

ENS [redacted] ENS [redacted] can testify to her relationship and interactions with SN Keaty to demonstrate why his testimony as a witness would be appropriate pursuant to R.C.M. 703(c)(2) and R.C.M. 1001(f). ENS [redacted] can also demonstrate how his testimony may add value for ET2 [redacted] defense in a manner different from all other witnesses.

The Defense respectfully submits the following documents for consideration as evidence in this matter:

Enclosure 1: Defense Witness Production Request dated 27 July 2022

Enclosure 2: Government Response to Defense Request dated 1 August 2022

The Defense requests oral argument if the Government opposes this motion.

RELIEF REQUESTED

Pursuant to 10 U.S.C. §846, Article 46, Uniform Code of Military Justice, and Rule for Courts-Martial 703, as well as the Sixth Amendment to the U.S. Constitution, the Defense respectfully moves this Court to compel production of ENS [redacted]

Respectfully submitted,

HATHAWAY.NICHOLAS.JEANFREY.[redacted]
Digitally signed by HATHAWAY.NICHOLAS.JEANFREY[redacted]
Date: 2023.03.15 15:29:04 -04'00'

N. Hathaway
LCDR, USCG

Detailed Defense Counsel

I certify that I have served a true copy, via e-mail, of the above on the Court and Government Counsel on 15 March 2023.

[redacted]
N. Hathaway
LCDR, USCG
Detailed Defense Counsel

Appellate Exhibit 36
Page 7 of 7

REQUESTS

THERE ARE NO REQUESTS

NOTICES

COAST GUARD TRIAL JUDICIARY
EASTERN JUDICIAL CIRCUIT
SPECIAL COURT-MARTIAL

UNITED STATES **v.** **Matthew Keaty** **SN/E-3** **U.S. Coast Guard**	**DEFENSE NOTICE OF ANTICIPATED PLEAS AND FORUM** **1 May 2023**

1. Pursuant to the Trial Management Order, SN Matthew Keaty provides the following notice of his elections with respect to pleas and forum:

a. Pleas: Per Coast Guard Court-Martial Rule of Practice 5.2.6, SN Keaty respectfully requests to reserve entry of pleas until ten days prior to the date of trial. As trial is scheduled to begin on 5 June 2023, SN Keaty specifically requests to reserve entry of plea until 26 May 2023.

b. Forum: SN Keaty elects trial by a panel of members with enlisted representation.

2. SN Keaty will formally enter these elections on the record during an Article 39(a) session prior to trial.

HATHAWAY.NICHOLAS.JEANFREY.[redacted] Digitally signed by HATHAWAY.NICHOLAS.JEANFREY[redacted] Date: 2023.05.01 15:01:11 -04'00'

N. Hathaway
LCDR, USCG
Detailed Defense Counsel

Appellate Exhibit 31
Page 1 of 2

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Certificate of Service

I certify that I have served a true copy (via e-mail) of the above on the Court and the Trial Counsel on 1 May 2023.

[redacted]
N. Hathaway
LCDR, USCG
Detailed Defense Counsel

COURT RULINGS & ORDERS

SPECIAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. SN MATTHEW KEATY U.S. Coast Guard	RULING ON DEFENSE MOTION TO COMPEL DISCOVERY 11 April 2023

RELIEF SOUGHT

The Defense moved this Court to compel the production of various records. AE VI, VII. The Government opposes the Defense motion. AE VIII, IX. This Court heard oral arguments at an Article 39(a) hearing on 28 March 2023.

In summary, the Defense's motion to compel is DENIED. Additional findings of fact and conclusions of law are included below.

ISSUES PRESENTED

Does R.C.M. 701, 703, and applicable caselaw require the Government to produce the records requested by the Defense?

FINDINGS OF FACT

In reaching its findings of fact and conclusions of law, the Court considered all legal and competent evidence presented and the reasonable inferences drawn therefrom, and resolved all issues of credibility. Specifically, the Court considered the Defense and Government briefs (AE VI and VIII) and attachments thereto (AE VII and IX), and the argument of counsel on 28 March 2023. In doing so, the Court makes the following findings of fact by a preponderance of the evidence.

1. SN Keaty is charged with two specifications under Article 134, UCMJ, and making a false official statement under Article 107, UCMJ. The Article 134, UCMJ, specifications allege that SN Keaty disseminated photographs and videos of himself and [redacted] engaging in sexual activity on the internet without her consent.

2. An unknown individual by the name of [redacted] contacted two women through Instagram, who used the Instagram handles [redacted] and [redacted]

3. [redacted] informed them that he had seen photographs of them on Reddit and that the photographs appeared to have been posted by Reddit user [redacted]

4. The two women, Ms. [redacted] and Ms. [redacted] then went onto Reddit to view the profile of [redacted] and when they did, they recognized the profile as belonging to SN Keaty, their former high school classmate.

5. When viewing SN Keaty's profile, they saw that he was posting nude images of an unknown woman. They also noticed that SN Keaty captioned the photos with "my girlfriend," or words to that effect. They also saw a logo in the photo which associated the unknown woman with [redacted]

6. From there, Ms. [redacted] and Ms. [redacted] were able to identify [redacted] from her photo on Instagram and her association with SN Keaty, at which point they notified [redacted] of what they had seen.

7. Neither [redacted] nor [redacted] ever saw any of the alleged nude photos of [redacted]

8. [redacted] confronted SN Keaty via text message, and SN Keaty indicated that he posted "probably 30" photographs of [redacted]

9. On 21 January 2021, CGIS interviewed SN Keaty. After acknowledging his rights, SN Keaty stated that the had posted approximately 60 – 90 nude images of [redacted] on the internet website Reddit without her permission. SN Keaty also indicated that he used the Reddit username [redacted]

Further facts necessary for an appropriate ruling are contained within the Analysis section.

PRINCIPLES OF LAW

Article 46, U.C.M.J. provides that "[t]he trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence." R.C.M. 701 directs that "[e]ach party shall have adequate opportunity to prepare its case and equal opportunity to interview witnesses and inspect evidence." Appellate courts have recognized that "[m]iltary law provides a much more direct and generally broader means of discovery by an accused than is normally available to him in civilian courts." *United States v. Reece*, 25 M.J. 93, 94 (C.M.A. 1987).

Rule for Courts-Martial 701(a)(2)(A)(i) provides that the Government shall permit Defense access to materials "which are within the possession, custody, or control of military authorities, and which are…relevant to the defense preparation." The Analysis to the Rules for Courts-Martial explains:

> This rule is taken from Rule 701 of the MCM (2016 editions) as amended by Exec. Order No. 13825, 83 Fed. Reg. 9889 (March 1, 2018), with the following amendments: R.C.M. 701(a)(2)(A)(i) and (a)(2)(B)(i) are amended and specify the scope of trial counsel discovery obligations. The provisions broaden the scope of discovery obligations. The provisions broaden the scope of discovery, requiring disclosure of items that are "relevant" rather than "material" to defense

preparation of a case, and adding a requirement to disclose items the government anticipates using in rebuttal.

R.C.M. 701(a)(6) states, "Trial counsel shall, as soon as practicable, disclose to the defense the existence of evidence known to trial counsel which reasonably tends to – (1) Negate the guilt of the accused of an offense charged; (B) Reduce the degree of guilt of the accused of an offense charged; (C) Reduce the punishment; or (D) Adversely affect the credibility of any prosecution witness or evidence."

A prosecutor must review his or her own files for discoverable material, and beyond those, the determination is made on a "case by case basis." *See United States v. Williams,* 50 M.J. 436, 441 (C.A.A.F. 1999). "The scope [however] of the due-diligence requirement with respect to governmental files beyond the prosecutor's own files generally is limited to: (1) the files of law enforcement authorities that have participated in the investigation of the subject matter of the charged offenses; (2) investigative files in a related case maintained by an entity "closely aligned with the" prosecution and (3) other files, as designated in a defense discovery request, that involved a specified type of information within a specified entity." *Id.*

In *United States v. Ellis*, the Army Court of Criminal Appeals provided the a test for assessing whether a request is a "specific request" under R.C.M. 701(a)(2). *See* 77 M.J. 671, 681 (A.C.C.A. 2018). The Court held:

> First, the request must, on its face or by clear implication, identify the specific file, document or evidence in question. Second, unless the request concerns evidence in the possession of the trial counsel, the request must reasonably identify the location of the evidence or its custodian. Third, the specific request should include a statement of the expected [relevance] of the evidence to preparation of the defense's case unless the relevance is plain.
>
> *Id.*

There is, however, generally no duty on prosecutors to search for or obtain exculpatory evidence that is in the possession of parties unaffiliated with the government. *See United States v. McClure*, 2021 WL 4065525 (A. Ct.Crim.App. 2021) (citing *United States v. Stellato*, 74 M.J. 473, 486 (C.A.A.F. 2015)).

If a party identifies evidence that is not in the possession of the Government, R.C.M. 703(e)(1) instructs that "[e]ach party is entitled to the production of evidence which is relevant and necessary." The Discussion section to R.C.M. 703(e)(1) states, "[r]elevance is defined by Mil. R. Evid. 401. Relevant evidence is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue. The moving party must show that the requested evidence exists and is subject to compulsory process. *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004).

R.C.M. 703(f) identifies the process for courts to order the production of witnesses and evidence. The rule states that the same procedures in R.C.M. 703(c) shall apply, except that "any defense request for the production of evidence shall list the items of evidence to be produced and shall include a description of each item sufficient to show its relevance and necessity, a statement where it can be obtained, and if known, the name, address and telephone number of the custodian of evidence.

ANALYSIS

The parties resolved several of the requests specified in the Defense's motion prior to and during the Article 39(a) held on 28 March 2023. The requests addressed below remain outstanding:

Paragraph 1(c)(2)(H) and (I) of the Defense's Discovery Request: Internal communications, emails, or other documents used to brief, respond to, and/or request investigative activities related to this case. This request specifically includes any communication including email between, to, from, or among law enforcement, a member of the Accused's command, the convening authority, the staff judge advocate, or any officer directing the investigation, and it includes any communication including email briefing or otherwise updating senior Coast Guard leadership, including Coast Guard JAG leadership, on the subject case; and copies of all communications, emails, or other documents exchanged between law enforcement, trial counsel, the Accused's command, the convening authority, the staff judge advocate, or any officer directing the investigation or any other private, quasi-governmental, or government entity consulted with involving evidence related to this case;

During the Article 39(a) hearing, the Government indicated that it had granted this request, searched for responsive documents, and produced documents responsive to this request. The Government objected to the request beyond what it had provided, indicating the request was overbroad.

To the extent the Defense's production request concerning this set of communications is still pending, the motion is DENIED. In *Williams*, the Court of Appeals for the Armed Forces explained the scope of the government's due-diligence requirement regarding files beyond the prosecutor's own files, generally limiting their responsibilities to "(1) the files of law enforcement authorities that have participated in the investigation of the subject matter of the charged offenses; (2) investigative files in a related case maintained by an entity "closely aligned with the" prosecution and (3) other files, as designated in a defense discovery request, that involved a specified type of information within a specified entity." *See* 50 M.J. 436, 441 (C.A.A.F. 1999). Regarding the third category – other files as designated in a defense request for specified information - the Army Court of Criminal Appeals expanded on the test for assessing whether a request is a "specific request" under R.C.M. 701(a)(2). *See* 77 M.J. 671, 681 (A.C.C.A. 2018). The Court held:

> First, the request must, on its face or by clear implication, identify the specific file, document or evidence in question. Second, unless the request concerns evidence in the possession of the trial counsel, the request must reasonably identify the location of the evidence or its custodian. Third, the specific request should include a statement of the expected [relevance] of the evidence to preparation of the defense's case unless the relevance is plain.
>
> *See United States v. Ellis*, 77 M.J. 671, 681 (A.C.C.A. 2018).

Applied here, regarding entities the Government has not contacted seeking responsive documents, the Defense's request lacks specificity, is overbroad, and falls short of the requirements articulated in *Ellis*. The request is for any communications or documents "between, to, from, or among" unspecified members of law enforcement, the Accused's command, the convening authority, staff judge advocate, and "any other private, quasi-governmental, or government entity" regarding the case. Other than those specifically identified by position (e.g. convening authority) the Court is unclear what individuals are being referenced, what records are being sought, and how those records might be relevant to the Defense's preparation. The Defense has not specified any command or individual by name, indicated what within the unspecified communications and documents they seek or expect to be found, and has not proffered their expected relevance to its preparation, other than wanting to see their contents to the extent they relate to unspecified future motions and strategy development.

Further, the Government has met its due diligence requirement under R.C.M. 701(a)(2) based on the level of specificity provided by the defense. This is not a case where the Government has denied that it has discovery requirements under R.C.M. 701. Trial Counsel has proffered that following the request, the Government contacted the Coast Guard Investigative Service special agents working on the case, requested, and disclosed responsive documents. The Government also contacted the Staff Judge Advocate's Office, requested, and disclosed responsive documents or communications its members may have had with the Convening Authority and SN Keaty's command. Finally, Trial Counsel also reviewed their own internal communications and records and disclosed responsive records. The Trial Counsel did not communicate directly with the Convening Authority or SN Keaty's command about the Defense's request, but they reasonably passed the request to the SJA's office to handle for them. There is no evidence or suggestion that responsive records were missed by seeking them through the SJA. Further, the Defense has presented no indication of why the Judge Advocate General of the Coast Guard or other senior leaders would have any knowledge of or documents concerning this case, a special court-martial concerning a junior member. In response to a broad and unspecified request, the Government's actions were sufficient.

Paragraph 1(h)(1) of the Defense's Discovery Request: Any and all communications, written or otherwise, including email, between or among the Trial Counsel, Special Victim's Counsel, the Staff Judge Advocate, or the Convening Authority regarding the case, including the quality or scope of the investigation or the statement of [redacted] *perfecting charges (draft or proposed charges), prosecution, or docketing. This*

information is in the possession of the Government and relevant to the preparation of the defense.

The Defense's request is DENIED concerning the Trial Counsel's prosecution memorandum. The Court finds that the prosecutor's views on the case contained within the prosecution memorandum are not relevant to the Defense's preparation under R.C.M. 701. What the prosecutor thinks about the evidence or how the case should be charged is simply not relevant to the Defense. To the extent, however, the memorandum contains information not yet discovered that is relevant to defense preparation under R.C.M. 701(a)(2) or favorable to the Defense under R.C.M. 701(a)(6), *Brady*, and its progeny, the information is discoverable and must be provided to the Defense.

Additionally, the Court finds that the attorney work product privilege was not waived when Trial Counsel sent its prosecution memorandum to the Staff Judge Advocate's Office. "[T]he work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case," and protects both "material prepared by agents for the attorney as well as those prepared by the attorney himself." *United States v. Nobles*, 422 U.S. 225, 238–39 (1975); *see also* R.C.M. 701(f). "The privilege derived from the work-product doctrine is not absolute. Like other qualified privileges, it may be waived." *Id.* at 239. The "overwhelming majority of [the federal courts of appeal] have espoused or acknowledged the general principle that the voluntary disclosure of work product waives the protection only when such disclosure is made to an adversary or is otherwise inconsistent with the purpose of work-product doctrine—to protect the adversarial process." *United States v. Sanmina Corporation*, 968 F.3d 1107, 1120 (9th Cir. 2020) (citing other federal circuit courts of appeal for same proposition). "Put another way, disclosing work product to a third party may waive the protection where such disclosure, under the circumstances, is inconsistent with the maintenance of secrecy from the disclosing party's adversary." *Id.* at 1121 (citing *Rockwell Int'l Corp. v. U.S. Dep't of Justice*, 235 F.3d 598, 605 (D.C. Cir. 2001) (internal quotation marks and citation omitted).

Applied here, Trial Counsel's disclosure was neither made to an adversary nor done in a manner inconsistent with preventing disclosure to the party's adversary. Trial Counsel prepared a prosecution memorandum in anticipation of a future case against SN Keaty. The memorandum contains "a factual synopsis of the case, together with legal analysis and the proposed charging scheme, and a disposition recommendation." As such, the memorandum constitutes attorney work product. R.C.M. 701(f). Trial Counsel then sent its prosecution memorandum to the Staff Judge Advocate to the Convening Authority to assist in the SJA's formulation of his Article 34 advice to the Convening Authority. The SJA did not further disclose the memorandum. Given these facts, the Court declines to find that Trial Counsel waived its attorney work privilege through the disclosure to the SJA, another Government attorney.

Regarding additional documents falling within this category, the Defense's request is DENIED. The Government has stated that it provided all responsive materials

to this request. The Defense has provided no additional evidence or argument suggesting other responsive documents are being withheld.

Paragraph (1)(h)(2) of the Defense's Discovery Request: The time and date of any and all meetings between the Trial Counsel and any potential witness in this case, and all notes by Trial Counsel or support staff taken contemporaneously with these meetings. This information is in the possession of the Government and relevant to the preparation of the defense.

The Defense's request is DENIED. Regarding the time and date of any and all meetings between Trial Counsel and any potential witness, "the government has no duty to create records to satisfy discovery demands." *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980). Thus, to the extent a document exists that contains this information, the Government must disclose it under R.C.M. 701(a)(2), but the Government is not required to create a document in response to the request.

Regarding the notes of Trial Counsel, the Defense's request is DENIED. Such notes are protected by the attorney work product privilege. R.C.M. 701(f). The Government has acknowledged its discovery obligations regarding the factual information contained within those notes. To the extent, however, the notes contain information not yet discovered that is relevant to defense preparation under R.C.M. 701(a)(2) or favorable to the Defense under R.C.M. 701(a)(6), *Brady*, and its progeny, the information is discoverable and must be provided to the Defense.

Paragraph (1)(a) of Defense's Request for Production: Production of [redacted] Instagram contact information through SCA

The Defense's request is DENIED. The Defense moves the court to compel the Government to seek contact information concerning [redacted] held by Instagram. First, the Defense has not demonstrated that they are not already in possession of what they seek. The Government provided an Instagram email address associated with [redacted] in discovery, and Defense has not contacted [redacted] using it. It's unclear that additional contact information is necessary when the Defense has not attempted to contact [redacted] with the information provided. Second, the Defense has failed to demonstrate the relevance and necessity of the contact information. The Defense intends to use this information to contact [redacted] to interview him, arguing that he is one of only three known individuals to see Reddit posts of user [redacted] a user name allegedly associated with the accused. The Defense, however, has failed to meet its burden to show that [redacted] contact information and an interview with [redacted] is relevant and necessary to the case. There is no evidence suggesting that [redacted] ever viewed any of the photos specified in the charges. Instead, [redacted] only viewed photographs of Ms. [redacted] and Ms. [redacted] Ms. [redacted] and Ms. [redacted] then notified [redacted] that [redacted] may also be pictured in other Reddit posts associated with [redacted] The fact that [redacted] saw photos of Ms. [redacted] and Ms. [redacted] is relevant to this case only insofar as it eventually resulted in notification to [redacted] Based on its proffer, the Government does not intend to admit the images of Ms. [redacted] and Ms [redacted] but only to call Ms [redacted] and Ms. [redacted] to describe their role in

making [redacted] aware of the images on Reddit. In short, [redacted] contact information is not relevant to the case and certainly not necessary under R.C.M. 703.

CONCLUSIONS OF LAW

Neither R.C.M. 701(a)(2), R.C.M. 703, nor applicable caselaw requires the Government to produce or search within the records identified above, in response to the Defense's request.

RULING

The Defense motion for appropriate relief is DENIED consistent with the above conclusions of law.

11 April 2023

CRONIN.TIMOTH Digitally signed by CRONIN.TIMOTHY.N [redacted]
Y.N [redacted] Date: 2023.04.11 15:59:34 -04'00'

CDR Timothy Cronin, USCG
Military Judge

Appellate Exhibit X
Page 8 of 8

SPECIAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. SN MATTHEW KEATY U.S. Coast Guard	RULING ON DEFENSE MOTION TO DISMISS FOR DEFECTIVE PREFERRAL 11 April 2023

RELIEF SOUGHT

The Defense moved this Court to dismiss the sole specification of Charge II due to a defective preferral. AE XI. The Government opposes the motion. AE XIII. This Court heard oral arguments at an Article 39(a) hearing on 28 March 2023. In summary, the Defense's motion is denied.

ISSUE PRESENTED

1. Was the sole specification of Charge II improperly preferred?

FINDINGS OF FACT

In reaching its findings of fact and conclusions of law, the Court considered all legal and competent evidence presented and the reasonable inferences drawn therefrom, and resolved all issues of credibility. Specifically, the Court considered the Defense and Government briefs, *see* AE XI and XIII, and attachments thereto, AE XII and XIV, and the argument of counsel on 28 March 2023. In doing so, the Court makes the following findings of fact by a preponderance of the evidence.

1. SN Keaty is charged with two novel specifications under Article 134, UCMJ, and making a false official statement under Article 107, UCMJ. The Article 134, UCMJ, specifications allege that SN Keaty disseminated photographs and videos of himself and [redacted] engaging in sexual activity on the internet without her consent.

2. The sole specification of Charge II states:

> Specification: In that SN Matthew Keaty, U.S. Coast Guard, did at or near Kittery, ME, on or about April 2021, with intent to deceive, make to CGIS Special Agent [redacted] an official statement, to wit: that he had not posted any content of [redacted] on the Internet website Pornhub.com, or words to that effect, which statement was false in that he had posted videos of [redacted] to Pornhub.com, and was then known by the said SN Keaty to be so false.

3. On 20 September 2022, charges were preferred by YN1 [redacted]

4. In terms of documentary evidence, YN1 [redacted] reviewed Bates No. 1-69, and 77 before preferring charges. AE XII.

5. YN1 [redacted] also watched a recording of special agents of the Coast Guard Investigative Service interviewing SN Keaty on 7 April 2021.

6. This interview on 7 April 2021 was the second time SN Keaty was interviewed by CGIS. YN1 [redacted] did not watch the video of SN Keaty's first interview.

7. At the time of the preferral, Trial Counsel brought YN1 [redacted] a stand-alone laptop, opened the laptop, and pointed out two videos depicting sexual content of [redacted] Trial Counsel told YN1 [redacted] that they were obtained from Pornhub.com.

8. On 11 November 2022, SN Keaty's charges were referred to court-martial.

Further facts necessary for an appropriate ruling are contained within the Analysis section.

PRINCIPLES OF LAW

To prefer charges and specifications, Article 30(b)(1)-(2) of the UCMJ requires "the signer has personal knowledge of, or has investigated, the matters set forth in the charges and specifications; and the matters set forth in the charges and specifications are true, to the best of the knowledge and belief of the signer." "Generally, any person subject to the UCMJ may prefer charges, however, the accuser must state that the charges 'are true in fact to the best of his knowledge and belief.'" *United States v. Givens*, 82 M.J. 211, 214 (C.A.A.F. 2018) (quoting *United States v. Hamilton*, 41 M.J. 32, 36 (C.M.A. 1994)). Under Rule for Court-Martial (RCM) 307(b)(2)(a)-(b), the accuser must swear they have personal knowledge or have investigated the charges and specifications. "[T]he traditional purpose of the military charging provisions is to insure the charges were not frivolous, unfounded, or malicious, but' are founded in good faith.'" *United States v. Miller*, 33 M.J. 235, 237 (C.M.A. 1991) (internal quotations omitted).

In *United States v. Floyd*, decided last year, the Navy-Marine Corps Court of Criminal Appeals explained that to maintain the validity of the purposes of the accuser's oath, "an accuser need only generally believe that the allegations contained in the charges are true at the time they are preferred." 82 M.J. 821, 829 (N.M.C.C.A. 2022).

ANALYSIS

The Court finds that YN1 [redacted] investigated and had sufficient personal knowledge to prefer the sole specification of Charge II against SN Keaty. The basis of this motion appears to have stemmed from what, at the time, was a well-founded belief by the Defense that YN1 [redacted] only reviewed the documentary evidence found in AE XII. This turned out not to be the case. At the Article 39(a) hearing, YN1 [redacted] testified that she did in fact view a video recording of CGIS interviewing SN Keaty. Based on YN1 [redacted] description of the video, what was said, and who was involved, the Court finds that she viewed the video depicted in AE XIV, which was a recording of

SN Keaty's second interview with CGIS. In this video, between minutes 00:21:22 to 00:24:15, there is an exchange between CGIS special agents and SN Keaty. During this exchange, CGIS reminds SN Keaty that in his first interview with them, he denied sharing photos of [redacted] with any other person or on any other website besides Reddit. SN Keaty goes on to acknowledge these prior statements to CGIS and apologizes.

Trial Counsel also declared in a signed affidavit that at the time of the preferral, he brought YN1 [redacted] a stand-alone laptop, opened the laptop, and pointed out two videos depicting sexual content of [redacted] Trial Counsel told YN1 [redacted] that they were obtained from Pornhub.com. Finally, in the message logs from Reddit, there are numerous communications between individuals and Reddit username [redacted] which is associated with SN Keaty. In these communications, [redacted] appears to send Pornhub.com links to other users.

Based on the evidence described above, the Court finds that YN1 [redacted] investigated and had sufficient personal knowledge to prefer the sole specification of Charge II against SN Keaty. The Defense draws the Court's attention to the specific verbiage of the charge, arguing that there is no evidence of the specific statement to CGIS charged - that "[SN Keaty] had not posted any content of [redacted] on the Internet website Pornhub.com, or words to that effect." While the Court agrees that there is no evidence suggesting SN Keaty made that exact statement, there was sufficient evidence for YN1 [redacted] to generally believe that the allegation contained in the sole specification of Charge II was true at the time it was preferred. 82 M.J. 821, 829 (N.M.C.C.A. 2022). This conclusion is supported by the fact that the Government included "or words to that effect" in the specification.

CONCLUSIONS OF LAW

1. The sole specification of Charge II was not improperly preferred.

RULING

The Defense's motion is DENIED, consistent with the above conclusions of law.

11 April 2023

CRONIN.TIMOTHY.N.[redacted] Digitally signed by CRONIN.TIMOTHY.N.[redacted] Date: 2023.04.11 19:14:21 -04'00'

CDR Timothy Cronin, USCG
Military Judge

SPECIAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. SN MATTHEW KEATY U.S. Coast Guard	RULING ON DEFENSE MOTIONS TO DISMISS FOR FAILURE TO STATE AN OFFENSE AND PREEMPTION 11 April 2023

RELIEF SOUGHT

The Defense moved this Court to dismiss Specifications 1 and 2 of Charge I because: (1) they fail to state an offense, AE 26, and (2) they are preempted by Article 117a, UCMJ, AE XVI. The Government opposes both of the Defense's motions. AE XVIII and 27. This Court heard oral arguments at an Article 39(a) hearing on 28 March 2023. In summary, the Defense's motions are denied.

ISSUES PRESENTED

1. Do Specifications 1 and 2 of Charge I fail to state offenses?

2. Are Specifications 1 and 2 of Charge I preempted by Article 117a, UCMJ?

FINDINGS OF FACT

In reaching its findings of fact and conclusions of law, the Court considered all legal and competent evidence presented and the reasonable inferences drawn therefrom, and resolved all issues of credibility. Specifically, the Court considered the Defense and Government briefs, *see* AE XVI, XVIII, 26, and 27, and attachments thereto, AE XVII and XIX, and the argument of counsel on 28 March 2023. In doing so, the Court makes the following findings of fact by a preponderance of the evidence.

1. SN Keaty is charged with two novel specifications under Article 134, UCMJ, and making a false official statement under Article 107, UCMJ. The Article 134, UCMJ, specifications allege that SN Keaty disseminated photographs and videos of himself and [redacted] engaging in sexual activity on the internet without her consent.

2. The specifications of Charge I state:

Specification 1: In that SN Matthew Keaty, U.S. Coast Guard, at or near Portsmouth, New Hampshire, did, on one or more occasions, from on or about June 2020 to on or about November 2020, knowingly and unlawfully disseminate photographs of himself engaging in sexual activity with [redacted] on the Internet without the express consent of [redacted] to disseminate such photographs, in violation of Title LXII, Chapter 644, Section 9, of the New Hampshire Revised Statutes, and that such conduct was of a nature to

bring discredit upon the armed forces.

Specification 2: In that SN Matthew Keaty, U.S. Coast Guard, at or near Portsmouth, New Hampshire, did,on or about August 2020, knowingly and unlawfully disseminate videos of himself engaging in sexual activity with [redacted] on the Internet without the express consent of [redacted] to disseminate such videos, in violation of Title LXII, Chapter 644, Section 9, of the New Hampshire Revised Statutes, and that such conduct was of a nature to bring discredit upon the armed forces.

3. Article 117a, UCMJ, was enacted in the FY2018 National Defense Authorization Act (NDAA). FY 2018 NDAA, Pub. Law 115-91, Sec. 533.

4. The bill was introduced in the wake of the Marines United scandal. In early 2017, it was discovered that active duty and veteran Marines were non-consensually posting nude photographs of women in a Facebook group titled Marines United.

5. Both the House and Senate heard testimony from either senior civilian and military leaders, or from women who had their pictures posted online, and various drafts of the bill were circulated before Article 117a, in its present format, became law.

Further facts necessary for an appropriate ruling are contained within the Analysis section.

PRINCIPLES OF LAW

Sufficiency of a Specification

The military is a notice pleading jurisdiction. *United States v. Sell*, 11 C.M.R. 202, 206 (1953). A charge and specification will be found sufficient if they, "first, contain the elements of the offense charged and fairly inform a defendant of the charge against which he must defend, and, second, enable him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling v. United States*, 418 U.S. 87, 117 (1974); *see also United States v. Resendiz-Ponce*, 549 U.S. 102, 108 (2007); *United States v. Sutton*, 68 M.J. 455, 455 (C.A.A.F. 2010); *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006). The rules governing courts-martial procedure encompass the notice requirement: "A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication." R.C.M. 307(c)(3); *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011).

The requirement to allege every element expressly or by necessary implication ensures that an accused understands what he must defend against. "No principle of procedural due process is more clearly established than . . . notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge." *Cole v. Arkansas*, 333 U.S. 196, 201 (1948)(citations omitted); *see also United States v. Miller*, 67 M.J. 385, 388 (C.A.A.F. 2009).

The elements of a violation of Art. 134, UCMJ (Conduct of a nature to bring discredit upon the armed forces (clause 2)) are:

(a) That the accused did or failed to do certain acts; and

(b) That, under the circumstances, the accused's conduct was of a nature to bring discredit upon the armed forces.

Preemption

The general article, Article 134, UCMJ, provides:

> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

Article 134, UCMJ, the "General Article," is an expansive, flexible, and amorphous prosecutorial tool within the military justice system with no analog in Title 18. *United States v. Rice*, 80 M.J. 36, 41 (C.A.A.F. 2020). The Discussion to Article 134(c)(4)(a)(2) states "if the direct prosecution of the state and federal crimes under Article 134, clause 3 is unavailable because the offense is committed outside of otherwise applicable areas of jurisdiction, the substance of these crimes may still be prosecuted, in an appropriate case, under clause 1 or 2 of Article 134." *See United States v. Sadler*, 29 M.J. 370 (C.M.A. 1990) (stating in dicta that the violation of a state statute would be a circumstance in deciding whether conduct was service discrediting under clause 2).

The "preemption doctrine" limits the general article's expansive scope, prohibiting "application of Article 134 to conduct covered by Articles 80 through 132." *United States v. Avery*, 79 M.J. 363, 366 (C.A.A.F. 2020) (internal citation omitted). "An offense listed in Articles 80 through 132, UCMJ, will only preempt an Article 134, UCMJ, offense if "(1) Congress intended to limit prosecution for ... a particular area of misconduct to offenses defined in [those] specific articles of the Code, and (2) the offense charged is composed of a residuum of elements of a specific offense." *Id.* (citing *United States v. Curry*, 35 M.J. 359, 360–61 (C.M.A. 1992) (first alteration in original) (internal quotation marks omitted); *see also United States v. Kick*, 7 M.J. 82, 85 (C.M.A. 1979) ("[S]imply because the offense charged under Article 134, UCMJ, embraces all but one element of an offense under another article does not trigger operation of the preemption doctrine. In addition, it must be shown that Congress intended the other punitive article to cover a class of offenses in a complete way." (citation omitted)). The Court of Appeals for the Armed Forces "will only find a congressional intent to preempt in the context of Article 134, UCMJ, where Congress has indicated through direct legislative language or express legislative history that particular actions or facts are limited to the express language of an enumerated article." *Id.* (citing *United States v. Anderson*, 68 M.J. 378, 387 (C.A.A.F. 2010) (internal quotation marks omitted).

ANALYSIS

Sufficiency of Specifications 1 and 2 of Charge I

The Court finds that Specifications 1 and 2 of Charge I properly state an offense. Both specifications allege that the accused did certain acts. For Specification 1 of Charge I, the act is "knowingly and unlawfully disseminate photographs of himself engaging in sexual activity with [redacted] on the Internet without the express consent of [redacted] to disseminate such photographs, in violation of Title LXII, Chapter 644, Section 9, of the New Hampshire Revised Statutes." For Specification 2 of Charge II, the act is "knowingly and unlawfully disseminate videos of himself engaging in sexual activity with [redacted] on the Internet without the express consent of [redacted] to disseminate such videos, in violation of Title LXII, Chapter 644, Section 9, of the New Hampshire Revised Statutes." Both specifications of Charge I also properly allege the terminal element, as required by R.C.M. 307(c)(3) and *Fosler*.

Further, the specifications both specifically incorporate each element of the specific New Hampshire statutory provision charged. Section 9 of Title LXII, Chapter 644 of the New Hampshire Revised Statutes criminalizes violations of privacy when (1) the accused knowingly disseminates or causes the dissemination of any photography or video recording; (2) that the photograph or video recording is of himself engaging in sexual activity with another person; and (3) that the other person did not expressly consent to such dissemination. The specifications here specifically allege each of those elements, and as such, "contain the elements of the offense charged and fairly inform a defendant of the charge against which he must defend, and... enable him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling*, 418 U.S. at 117.

Specifications 1 and 2 of Charge I are not preempted by Article 117a

The Defense argues that Congress intended to completely occupy the field concerning prohibitions to the non-consensual distribution of intimate images by adding Article 117a, UCMJ. In support, the Defense cites both the text of Article 117a and excerpts from the extensive testimony given by various senior military and civilian leaders to both chambers of Congress prior to Article 117a becoming law. From the language of the statute and this testimony, the Defense infers a clear intent to limit prosecution in the area. The Government concurs with Defense's citations to the Congressional record preceding the passage of Article 117a, but from the same statutory language and the same testimony cited by Defense, the Government infers the opposite conclusion, urging the Court to interpret this evidence as an intent by Congress to simply add an additional punitive article to address a specific wrong.

The Court finds insufficient evidence to conclude that Congress intended to completely occupy the field concerning the non-consensual distribution of intimate images. The law is clear that a congressional intent to preempt will only be found where "Congress has indicated through direct legislative language or express legislative history that particular actions or facts are limited to the express language of an enumerated article." *Avery*, 79 M.J. at 366. No such direct indication exists. The only clear conclusion supported by direct legislative language and express legislative history is that Article 117a was drafted and passed in response to the Marines United scandal and was intended to provide a means for holding military members accountable for the type of

misconduct involved in the scandal. The Defense and Government's conflicting interpretations of the same indirect evidence is telling and supports the Court's finding. That a senior civilian or general officer testified that the scandal involved both military and civilian members or that there are other enumerated offenses within the UCMJ that may be used to charge similar misconduct is not direct evidence of Congress's intent to occupy the field or not. And it is certainly not evidence that Congress intended to occupy the field in a way that prohibited the prosecution of allegedly service discrediting, non-consensual broadcasting of intimate images of a civilian without a "reasonably direct and palpable connection to a military mission or military environment" in violation of state law – i.e. the nature of the misconduct involved in this case.

The Court also finds that Specifications 1 and 2 of Charge I are not composed of a residuum of Article 117a's elements. The chart provided by the Government in its response to the motion illustrates the point. While the state statute charged and Article 117a appear similar, the conduct charged in Specifications 1 and 2 of Charge I differ in several critical respects. Section 9 of Chapter 644, New Hampshire Title LXII requires proof of an element not contained within Article 117a - that the accused was himself engaged in sexual activity with the victim. Whereas Article 117a requires that the victim be identifiable from the image, Section 9 requires proof that the accused be identifiable while engaging in sexual activity. In this way, the focus of section 9 differs from that of either Article 117a or Section 9-a of Chapter 644, New Hampshire Title LXII. *See Avery*, 79 M.J. at 368 (comparing and distinguishing the conduct targeted by Article 120b(c) and indecent language under Article 134).

CONCLUSIONS OF LAW

1. Specifications 1 and 2 of Charge I state offenses.

2. Specifications 1 and 2 of Charge I are not preempted by Article 117a, UCMJ.

RULING

The Defense's motions are DENIED, consistent with the above conclusions of law.

11 April 2023

CRONIN.TIMOTHY.N[redacted] Digitally signed by CRONIN.TIMOTHY.N[redacted] Date: 2023.04.11 12:47:19 -04'00'

CDR Timothy Cronin, USCG
Military Judge

SPECIAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. SN MATTHEW KEATY U.S. Coast Guard	RULING ON DEFENSE MOTION TO SUPPRESS REDDIT SEARCH WARRANT 11 April 2023

RELIEF SOUGHT

Pursuant to R.C.M. 905(b)(3), Mil. R. Evid. 311 and the Fourth Amendment, the Defense moved to suppress the contents of SN Keaty's Reddit account. AE 21, 22. The Government opposes the Defense motion. AE 23, 24. This Court heard oral arguments at an Article 39(a) hearing on 28 March 2023. In summary, the Defense's motion is DENIED.

ISSUES PRESENTED

1. Did Reddit's actions in response to a preservation request submitted by special agents of the Coast Guard Investigative Service (CGIS) constitute a seizure under the Fourth Amendment to the U.S. Constitution?

2. Did Reddit act as an instrument or agent of the government when it took action in response to the preservation request?

3. Did SN Keaty have a reasonable expectation of privacy in the data associated with his Reddit account?

4. Assuming the applicability of the Fourth Amendment, did CGIS violate SN Keaty's Fourth Amendment rights?

FINDINGS OF FACT

In reaching its findings of fact and conclusions of law, the Court considered all legal and competent evidence presented and the reasonable inferences drawn therefrom, and resolved all issues of credibility. Specifically, the Court considered the Defense and Government briefs (AE 21 and 23) and attachments thereto (AE 22 and 24), and the argument of counsel on 28 March 2023. In doing so, the Court makes the following findings of fact by a preponderance of the evidence.

1. SN Keaty is charged with two specifications under Article 134, UCMJ, and making a false official statement under Article 107, UCMJ. The Article 134, UCMJ, specifications allege that

SN Keaty disseminated photographs and videos of himself and [redacted] engaging in sexual activity on the internet without her consent.

2. An unknown individual by the name of [redacted] contacted two women through Instagram, who used the Instagram handles [redacted] and [redacted]

3. [redacted] informed them that he had seen photographs of them on Reddit and that the photographs appeared to have been posted by Reddit user [redacted]

4. The two women, Ms. [redacted] and Ms. [redacted] then went onto Reddit to view the profile of [redacted] and when they did, they recognized the profile as belonging to SN Keaty, their former high school classmate.

5. When viewing SN Keaty's profile, they saw that he was posting nude images of an unknown woman. They also noticed that SN Keaty captioned the photos with "my girlfriend," or words to that effect. They also saw a logo in the photo which associated the unknown woman with [redacted]

6. From there, Ms. [redacted] and Ms. [redacted] were able to identify [redacted] from her photo on Instagram and her association with SN Keaty, at which point they notified [redacted] of what they had seen.

7. Neither [redacted] nor [redacted] ever saw any of the alleged nude photos of [redacted]

8. [redacted] confronted SN Keaty via text message, and SN Keaty indicated that he posted "probably 30" photographs of [redacted]

9. On 21 January 2021, CGIS interviewed SN Keaty. After acknowledging his rights, SN Keaty stated that the had posted approximately 60 – 90 nude images of [redacted] on the internet website Reddit without her permission. SN Keaty also indicated that he used the Reddit username [redacted]

10. On 22 January 2021, CGIS Special Agent (SA) [redacted] sent a letter to Reddit requesting the preservation of the contents of the Reddit account [redacted] "pending further legal process." The legal authority cited was Title 18, United States Code Section 2703(f).

11. The specific request stated:

> I request that [Reddit] preserve, for a period of 90 days, the information described below currently in your possession in a form that includes the complete record. This request applies only retrospectively. It does not in any way obligate you to capture and preserve new information that arises after the date of this request. Furthermore, this request does not obligate you to produce any information at this time.

12. The letter also instructed Reddit not to disclose the preservation to anyone.

13. Forty days later, on 2 March 2021, CGIS SA [redacted] and Trial Counsel sought a search

warrant for all Reddit subscriber information associated with a SN Keaty's Reddit account.

14. On 2 March 2021, a military judge signed the search warrant, which ordered Reddit to provide all subscriber information and all records, including communications, for 1 March 2019 to 1 March 2021.

15. On 3 March 2021 Reddit provided data in response to the search warrant..

16. Amongst other records, Reddit provided messages sent between the user [redacted] and other Reddit users. Those messages included various links to the website Pornhub.com.

17. Reddit also provided Internet Protocol (IP) logs identifying devices used to access the [redacted] Reddit account.

18. The Government used the materials received from Reddit as the basis to subpoena the website Pornhub.com.

Further facts necessary for an appropriate ruling are contained within the analysis section below.

PRINCIPLES OF LAW

Burden of Proof

The burden of proof is on the Government to establish by a preponderance of the evidence that the search was not unlawful, that an exception applies, or that the deterrence of future unlawful searches is not appreciable, or such deterrence does not outweigh the costs to the justice system of excluding the evidence. Mil. R. Evid. 311(d)(5).

Stored Communications Act

The Stored Communications Act (SCA), 18 U.S.C. §§ 2701-2713 regulates the disclosure of stored electronic communications and other information by providers of communication services, hereinafter "providers." Specifically, subsections of section 2703 provide requirements and procedures for the disclosure of information to government entities. Sections 2703(a)-(c) describes how a government entity may compel a provider to disclose certain categories of information related to subscribers or customers. In addition, section 2703(f) provides guidance to providers regarding requests from government entities to preserve of records. It states:

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

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

Fourth Amendment and Governmental Action

The Fourth Amendment guarantees the right to be free from "unreasonable searches and seizures." U.S. Const. amend. IV. As the Supreme Court explained in *United States v. Jacobsen*, "this text protects two types of expectations, one involving "searches," the other "seizures." A "search" occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. A "seizure" of property occurs when there is some meaningful interference with an individual's possessory interests in that property." 466 U.S. 109, 113 (1984) (internal quotation marks and citations omitted). This protection "[proscribes] only governmental action; it is wholly inapplicable to a search or seizure, even an unreasonable one, effected by a private individual..." *Id; see also United States v. Buford*, 74 M.J. 98 (C.A.A.F. 2015). A private search or seizure, however, may implicate the Fourth Amendment where the private party acts "as an agent of the Government or with the participation or knowledge of any governmental official." *Id.* "Whether a private party should be deemed an agent or instrument of the Government for Fourth Amendment purposes necessarily turns on the degree of the Government's participation in the private party's activities, a question that can only be resolved in light of all the circumstances." *Skinner v. Ry. Lab. Execs.' Ass'n*, 489 U.S. 602, 614–15 (1989) (internal quotation marks and citations omitted).

In *United States v. Rosenow*, 33 F.4th 529, 540 (9th Cir. 2022) amended and superseded on denial of rehearing by *United States v. Rosenow*, 50 F.4th 715 (9th Cir. 2022), the U.S. Cout of Appeals for the Ninth Circuit compared the regulatory scheme at issue in *Skinner* and the provisions of the Stored Communications Act. In holding that the Stored Communications Act (SCA) does not transform private searches by electronic service providers (ESP) into government action, for Fourth Amendment purposes, the Court highlighted significant differences between the Federal Railroad Administration's regulations governing employee drug testing by private railroads at issue in *Skinner* with the provisions of the Stored Communications Act. Whereas the scheme in Skinner involved regulations that "preempted conflicting state laws and collective-bargaining terms, prohibited the railroad companies from contracting away their right to require the tests, required the companies to report certain evidence derived from the tests, and prohibited private employees from refusing to comply with the tests," the Court noted that the Stored Communications Act does not authorize ESPs to do anything more than access information already contained on their [own] servers as dictated by their terms of service." Further, the Court noted that there was no indication that the SCA prevented an ESP from contracting away its right to search user's communications. On these grounds, the Ninth Circuit found that "the Stored Communications Act does not mandate, encourage, or endorse private searches."

The *Rosenow* Court further found insufficient government involvement in the case to implicate the Fourth Amendment.

ANALYSIS

The Defense argues that Reddit, acting as an agent of the government, seized SN Keaty's records being held by Reddit at the time of the preservation request. While this initial seizure is conceded to be constitutional, Defense argues that the seizure violated the Constitution after CGIS waited an unreasonably long period of time before obtaining a search warrant and receiving the preserved data. As further explained below, the Court finds the preservation of SN Keaty's information was not a seizure for Fourth Amendment purposes; that Reddit was not acting as an instrument or agent of the government; and that SN Keaty did not have a reasonable expectation of privacy in the records at issue.

Reddit's preservation of the information requested by CGIS did not constitute a seizure

A "seizure" of property requires "some meaningful interference [by the government,] with an individual's possessory interests in [his] property." *Jacobsen*, 466 U.S. at 113. The Defense argues that such a meaningful interference occurred here "because [preservation] dispossessed [SN Keaty] of control over the account." The Court disagrees. Here, Special Agent [redacted] requested that [redacted] He was clear that [redacted] and that "[redacted] By its own terms, the request did not request that Reddit do anything more than "preserve" pending further legal process. Like the preservation requests at issue in *Rosenow*, the preservation request issued to Reddit "did not meaningfully interfere with [the accused's] possessory interests in his digital data because they did not prevent [the accused] from accessing his account. Nor did they provide the government with access to any of [the accused's] digital information without further legal process." *Rosenow*, 33 F.4th at 546. There is no indication that CGIS requested Reddit to search, seize, copy, reproduce, provide, etc any information related to the accused; that Reddit actually took such an action; or that Reddit prevented SN Keaty from continuing to access his account. While Reddit did preserve the requested records, Reddit's actions did not amount to a seizure.

Further, the Defense's assertion that Reddit physically copied relevant information of the accused and then maintained a copy is unsupported by the record. And even assuming the truth of the assertion, there is no evidence to suggest that Reddit's own actions in response to the preservation request were anything other than volitional. Thus, to the extent Reddit did physically copy the records, Reddit did so without any input from the Government.

Reddit was not an instrument or agent of the government.

The Court finds that Reddit was not acting as an agent on behalf of the government. The Defense argues that the *Skinner* test is satisfied – that the preservation request forced Reddit to take certain action on behalf of the Government. The Court disagrees.

First, as discussed above, Special Agent [redacted] requested only that Reddit preserve records pending further legal process. He did not direct Reddit to take any additional action. While Reddit complied with the request, the decision about how to preserve those records was determined entirely by Reddit. Neither CGIS nor the SCA itself directed Reddit to take any

particular action in furtherance of Reddit's statutory responsibilities. As such, "the degree of the Government's participation in [Reddit's] activities" was far less than would be required to transform Reddit into an agent of the Government. *See United States v. Basey*, 2021 WL 1396274, at *5 (D. Alaska 2021).

Second, the Court finds that the SCA's preservation provisions in section 2703(f) did not transform Reddit's preservation actions into governmental action. The Ninth Circuit's comparison in *Rosenow* of the regulatory scheme in *Skinner* and the provisions of the Stored Communications Act is persuasive. Whereas the regulatory scheme in *Skinner* involved regulations that "preempted conflicting state laws and collective-bargaining terms, prohibited the railroad companies from contracting away their right to require the tests, required the companies to report certain evidence derived from the tests, and prohibited private employees from refusing to comply with the tests," the SCA's preservation provision at section 2703(f) does not even require a provider to access a user's information. Section 2703(f) states only that providers "shall take all necessary steps to preserve records and other evidence in its possession pending the issuance of a court order or other process." While the law requires a provider to "preserve" information, the statute does not prevent a provider from otherwise contracting away its right to search or view a user's communications.

Assuming, arguendo, that Reddit's actions constituted a seizure attributable to the government, the seizure did not violate SN Keaty's Fourth Amendment rights.

SN Keaty did not have a reasonable expectation of privacy over the files he placed on Reddit because he voluntarily turned those files over to Reddit. "A person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Smith v. Maryland*, 442 U.S. 735 (1979). Defense is correct that in *Carpenter v. United States*, the Supreme Court held that law enforcement "must generally obtain a warrant supported by probable cause before acquiring [cell site location] records." 138 S.Ct. 2206, 2221 (2018). This holding was based primarily on the Court's finding that "an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI." *Id.* at 2217. In rejecting the third party doctrine's applicability to the case, the Court highlighted that the CSLI generated by cell phones is done involuntarily, as opposed to the voluntary actions at issue in *Smith v. Maryland*. In fact, cell phones generate CSLI "without any affirmative action on the part of the user beyond powering it up." *Carpenter*, 138 S. Ct. at 2220 (noting that "[v]irtually any activity on the phone generates CSLI," such that there is "no way to avoid leaving behind a trail of location data" unless an individual disconnects the phone from the network).

This case is distinguishable from *Carpenter*. Unlike the involuntary generation of CSLI on a cell phone, there has been no indication that SN Keaty's actions in signing up, using Reddit, and giving Reddit access to his data were anything but voluntary. Reddit's privacy policy explicitly states "[w]e may share information in response to a request for information if we believe disclosure is in accordance with, or required by, any applicable law, regulation, legal process, or governmental request, including, but not limited to, meeting national security or law enforcement requirements" and that "we may also retain certain information about you as required by law or for legitimate business purposes after you delete your account." Moreover,

the records at issue here are communications between user [redacted] and other Reddit users. Each time [redacted] posted or responded to a thread on Reddit, the person voluntarily accessed Reddit and affirmatively posted the information. *See, e.g., United States v. Bledsoe*, 2022 WL 3594628, at *7 (D.D.C., 2022) (finding no reasonable expectation of privacy in location data voluntarily provided to Facebook consistent with its privacy policy)(citing consistent opinions of other federal circuit and district courts). There was nothing involuntary about the nature of [redacted] actions. Finally, the information preserved by Reddit is limited to communications on the platform; there has been no suggestion that Reddit preserved physical location data. The Supreme Court was careful to limit the applicability of *Carpenter*, and the Court is unaware of another jurisdiction extending Carpenter to a situation similar to this one.

Assuming, arguendo, that Reddit's actions constituted a seizure attributable to the government, CGIS had probable cause and acted reasonably by obtaining a search warrant within 40 days of the preservation request.

CGIS's actions were supported by probable cause and its actions were not unreasonable under the Fourth Amendment. First, at the time of the preservation request, CGIS had probable cause to search the records held by Reddit. As established by the government, CGIS had, at the time of the preservation request, (1) spoken with [redacted] who provided a documentary admission of SN Keaty via text message, (2) spoken with two separate witnesses who had seen the nude images of [redacted] and (3) spoken with SN Keaty who admitted to posting images of [redacted] on his Reddit account.

Second, as explained by the District Court of Alaska in *United States v. Basey*, the very nature of electronic records such as those held by Reddit supports a finding that law enforcement could seize them based on probable cause and without a warrant based on exigent circumstances. 2021 WL 1396274, at *5.

Further, there is no indication that CGIS's action in waiting 40 days to seek a search warrant was unreasonable. The 40 days falls well within the 90 period contemplated by the statute; they did not have possession of any property of SN Keaty during the 40 day period; and the Court is unaware of any caselaw supporting Defense's argument. *See id.*

CONCLUSIONS OF LAW

1. Reddit's actions in response to a preservation request submitted by special agents of the Coast Guard Investigative Service (CGIS) did not constitute a seizure under the Fourth Amendment to the U.S. Constitution.

2. Reddit did not act as an instrument or agent of the government when it took action in response to the preservation request.

3. SN Keaty did not have a reasonable expectation of privacy in the data associated with his Reddit account.

4. Assuming the applicability of the Fourth Amendment, CGIS did not violate SN Keaty's Fourth Amendment rights.

RULING

The Defense's motion is DENIED, consistent with the above conclusions of law.

So ordered this 11th day of April, 2023.

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Y.N. [redacted] Date: 2023.04.11 13:10:06 -04'00'

Timothy N. Cronin
Commander, U.S. Coast Guard
Military Judge

SPECIAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. SN MATTHEW KEATY U.S. Coast Guard	RULING ON DEFENSE MOTIONS TO DISMISS FOR FAILURE TO STATE AN OFFENSE AND PREEMPTION 11 April 2023

RELIEF SOUGHT

The Defense moved this Court to dismiss Specifications 1 and 2 of Charge I because: (1) they fail to state an offense, AE 26, and (2) they are preempted by Article 117a, UCMJ, AE XVI. The Government opposes both of the Defense's motions. AE XVIII and 27. This Court heard oral arguments at an Article 39(a) hearing on 28 March 2023. In summary, the Defense's motions are denied.

ISSUES PRESENTED

1. Do Specifications 1 and 2 of Charge I fail to state offenses?

2. Are Specifications 1 and 2 of Charge I preempted by Article 117a, UCMJ?

FINDINGS OF FACT

In reaching its findings of fact and conclusions of law, the Court considered all legal and competent evidence presented and the reasonable inferences drawn therefrom, and resolved all issues of credibility. Specifically, the Court considered the Defense and Government briefs, *see* AE XVI, XVIII, 26, and 27, and attachments thereto, AE XVII and XIX, and the argument of counsel on 28 March 2023. In doing so, the Court makes the following findings of fact by a preponderance of the evidence.

1. SN Keaty is charged with two novel specifications under Article 134, UCMJ, and making a false official statement under Article 107, UCMJ. The Article 134, UCMJ, specifications allege that SN Keaty disseminated photographs and videos of himself and [redacted] engaging in sexual activity on the internet without her consent.

2. The specifications of Charge I state:

Specification 1: In that SN Matthew Keaty, U.S. Coast Guard, at or near Portsmouth, New Hampshire, did, on one or more occasions, from on or about June 2020 to on or about November 2020, knowingly and unlawfully disseminate photographs of himself engaging in sexual activity with [redacted] on the Internet without the express consent of [redacted] to disseminate such photographs, in violation of Title LXII, Chapter 644, Section 9, of the New Hampshire Revised Statutes, and that such conduct was of a nature to

bring discredit upon the armed forces.

Specification 2: In that SN Matthew Keaty, U.S. Coast Guard, at or near Portsmouth, New Hampshire, did,on or about August 2020, knowingly and unlawfully disseminate videos of himself engaging in sexual activity with [redacted] on the Internet without the express consent of [redacted] to disseminate such videos, in violation of Title LXII, Chapter 644, Section 9, of the New Hampshire Revised Statutes, and that such conduct was of a nature to bring discredit upon the armed forces.

3. Article 117a, UCMJ, was enacted in the FY2018 National Defense Authorization Act (NDAA). FY 2018 NDAA, Pub. Law 115-91, Sec. 533.

4. The bill was introduced in the wake of the Marines United scandal. In early 2017, it was discovered that active duty and veteran Marines were non-consensually posting nude photographs of women in a Facebook group titled Marines United.

5. Both the House and Senate heard testimony from either senior civilian and military leaders, or from women who had their pictures posted online, and various drafts of the bill were circulated before Article 117a, in its present format, became law.

Further facts necessary for an appropriate ruling are contained within the Analysis section.

PRINCIPLES OF LAW

Sufficiency of a Specification

The military is a notice pleading jurisdiction. *United States v. Sell*, 11 C.M.R. 202, 206 (1953). A charge and specification will be found sufficient if they, "first, contain the elements of the offense charged and fairly inform a defendant of the charge against which he must defend, and, second, enable him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling v. United States*, 418 U.S. 87, 117 (1974); *see also United States v. Resendiz-Ponce*, 549 U.S. 102, 108 (2007); *United States v. Sutton*, 68 M.J. 455, 455 (C.A.A.F. 2010); *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006). The rules governing courts-martial procedure encompass the notice requirement: "A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication." R.C.M. 307(c)(3); *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011).

The requirement to allege every element expressly or by necessary implication ensures that an accused understands what he must defend against. "No principle of procedural due process is more clearly established than . . . notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge." *Cole v. Arkansas*, 333 U.S. 196, 201 (1948)(citations omitted); *see also United States v. Miller*, 67 M.J. 385, 388 (C.A.A.F. 2009).

The elements of a violation of Art. 134, UCMJ (Conduct of a nature to bring discredit upon the armed forces (clause 2)) are:

(a) That the accused did or failed to do certain acts; and

(b) That, under the circumstances, the accused's conduct was of a nature to bring discredit upon the armed forces.

Preemption

The general article, Article 134, UCMJ, provides:

> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

Article 134, UCMJ, the "General Article," is an expansive, flexible, and amorphous prosecutorial tool within the military justice system with no analog in Title 18. *United States v. Rice*, 80 M.J. 36, 41 (C.A.A.F. 2020). The Discussion to Article 134(c)(4)(a)(2) states "if the direct prosecution of the state and federal crimes under Article 134, clause 3 is unavailable because the offense is committed outside of otherwise applicable areas of jurisdiction, the substance of these crimes may still be prosecuted, in an appropriate case, under clause 1 or 2 of Article 134." *See United States v. Sadler*, 29 M.J. 370 (C.M.A. 1990) (stating in dicta that the violation of a state statute would be a circumstance in deciding whether conduct was service discrediting under clause 2).

The "preemption doctrine" limits the general article's expansive scope, prohibiting "application of Article 134 to conduct covered by Articles 80 through 132." *United States v. Avery*, 79 M.J. 363, 366 (C.A.A.F. 2020) (internal citation omitted). "An offense listed in Articles 80 through 132, UCMJ, will only preempt an Article 134, UCMJ, offense if "(1) Congress intended to limit prosecution for ... a particular area of misconduct to offenses defined in [those] specific articles of the Code, and (2) the offense charged is composed of a residuum of elements of a specific offense." *Id.* (citing *United States v. Curry*, 35 M.J. 359, 360–61 (C.M.A. 1992) (first alteration in original) (internal quotation marks omitted); *see also United States v. Kick*, 7 M.J. 82, 85 (C.M.A. 1979) ("[S]imply because the offense charged under Article 134, UCMJ, embraces all but one element of an offense under another article does not trigger operation of the preemption doctrine. In addition, it must be shown that Congress intended the other punitive article to cover a class of offenses in a complete way." (citation omitted)). The Court of Appeals for the Armed Forces "will only find a congressional intent to preempt in the context of Article 134, UCMJ, where Congress has indicated through direct legislative language or express legislative history that particular actions or facts are limited to the express language of an enumerated article." *Id.* (citing *United States v. Anderson*, 68 M.J. 378, 387 (C.A.A.F. 2010) (internal quotation marks omitted).

ANALYSIS

Sufficiency of Specifications 1 and 2 of Charge I

The Court finds that Specifications 1 and 2 of Charge I properly state an offense. Both specifications allege that the accused did certain acts. For Specification 1 of Charge I, the act is "knowingly and unlawfully disseminate photographs of himself engaging in sexual activity with [redacted] on the Internet without the express consent of [redacted] to disseminate such photographs, in violation of Title LXII, Chapter 644, Section 9, of the New Hampshire Revised Statutes." For Specification 2 of Charge II, the act is "knowingly and unlawfully disseminate videos of himself engaging in sexual activity with [redacted] on the Internet without the express consent of [redacted] to disseminate such videos, in violation of Title LXII, Chapter 644, Section 9, of the New Hampshire Revised Statutes." Both specifications of Charge I also properly allege the terminal element, as required by R.C.M. 307(c)(3) and *Fosler*.

Further, the specifications both specifically incorporate each element of the specific New Hampshire statutory provision charged. Section 9 of Title LXII, Chapter 644 of the New Hampshire Revised Statutes criminalizes violations of privacy when (1) the accused knowingly disseminates or causes the dissemination of any photography or video recording; (2) that the photograph or video recording is of himself engaging in sexual activity with another person; and (3) that the other person did not expressly consent to such dissemination. The specifications here specifically allege each of those elements, and as such, "contain the elements of the offense charged and fairly inform a defendant of the charge against which he must defend, and... enable him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling*, 418 U.S. at 117.

Specifications 1 and 2 of Charge I are not preempted by Article 117a

The Defense argues that Congress intended to completely occupy the field concerning prohibitions to the non-consensual distribution of intimate images by adding Article 117a, UCMJ. In support, the Defense cites both the text of Article 117a and excerpts from the extensive testimony given by various senior military and civilian leaders to both chambers of Congress prior to Article 117a becoming law. From the language of the statute and this testimony, the Defense infers a clear intent to limit prosecution in the area. The Government concurs with Defense's citations to the Congressional record preceding the passage of Article 117a, but from the same statutory language and the same testimony cited by Defense, the Government infers the opposite conclusion, urging the Court to interpret this evidence as an intent by Congress to simply add an additional punitive article to address a specific wrong.

The Court finds insufficient evidence to conclude that Congress intended to completely occupy the field concerning the non-consensual distribution of intimate images. The law is clear that a congressional intent to preempt will only be found where "Congress has indicated through direct legislative language or express legislative history that particular actions or facts are limited to the express language of an enumerated article." *Avery*, 79 M.J. at 366. No such direct indication exists. The only clear conclusion supported by direct legislative language and express legislative history is that Article 117a was drafted and passed in response to the Marines United scandal and was intended to provide a means for holding military members accountable for the type of

misconduct involved in the scandal. The Defense and Government's conflicting interpretations of the same indirect evidence is telling and supports the Court's finding. That a senior civilian or general officer testified that the scandal involved both military and civilian members or that there are other enumerated offenses within the UCMJ that may be used to charge similar misconduct is not direct evidence of Congress's intent to occupy the field or not. And it is certainly not evidence that Congress intended to occupy the field in a way that prohibited the prosecution of allegedly service discrediting, non-consensual broadcasting of intimate images of a civilian without a "reasonably direct and palpable connection to a military mission or military environment" in violation of state law – i.e. the nature of the misconduct involved in this case.

The Court also finds that Specifications 1 and 2 of Charge I are not composed of a residuum of Article 117a's elements. The chart provided by the Government in its response to the motion illustrates the point. While the state statute charged and Article 117a appear similar, the conduct charged in Specifications 1 and 2 of Charge I differ in several critical respects. Section 9 of Chapter 644, New Hampshire Title LXII requires proof of an element not contained within Article 117a - that the accused was himself engaged in sexual activity with the victim. Whereas Article 117a requires that the victim be identifiable from the image, Section 9 requires proof that the accused be identifiable while engaging in sexual activity. In this way, the focus of section 9 differs from that of either Article 117a or Section 9-a of Chapter 644, New Hampshire Title LXII. *See Avery*, 79 M.J. at 368 (comparing and distinguishing the conduct targeted by Article 120b(c) and indecent language under Article 134).

CONCLUSIONS OF LAW

1. Specifications 1 and 2 of Charge I state offenses.

2. Specifications 1 and 2 of Charge I are not preempted by Article 117a, UCMJ.

RULING

The Defense's motions are DENIED, consistent with the above conclusions of law.

11 April 2023

CRONIN.TIMOTHY.N. [redacted] Digitally signed by CRONIN.TIMOTHY.N. [redacted] Date: 2023.04.11 12:47:19 -04'00'

CDR Timothy Cronin, USCG
Military Judge

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
Keaty, Matthew, L.	Coast Guard	E-3	[redacted]

5. CONVENING COMMAND	6. TYPE OF COURT-MARTIAL	7. COMPOSITION	8. DATE SENTENCE ADJUDGED
Coast Guard Atlantic Area	Special	Judge Alone - MJA16	Jun 7, 2023

SECTION B - FINDINGS

SEE FINDINGS PAGE

SECTION C - TOTAL ADJUDGED SENTENCE

9. DISCHARGE OR DISMISSAL	10. CONFINEMENT	11. FORFEITURES	12. FINES	13. FINE PENALTY
Not applicable	N/A	N/A	N/A	N/A

14. REDUCTION	15. DEATH	16. REPRIMAND	17. HARD LABOR	18. RESTRICTION	19. HARD LABOR PERIOD
E-3	Yes ○ No ◉	Yes ○ No ◉	Yes ○ No ◉	Yes ○ No ◉	N/A

20. PERIOD AND LIMITS OF RESTRICTION

N/A

SECTION D - CONFINEMENT CREDIT

21. DAYS OF PRETRIAL CONFINEMENT CREDIT	22. DAYS OF JUDICIALLY ORDERED CREDIT	23. TOTAL DAYS OF CREDIT
0	0	0 days

SECTION E - PLEA AGREEMENT OR PRE-TRIAL AGREEMENT

24. LIMITATIONS ON PUNISHMENT CONTAINED IN THE PLEA AGREEMENT OR PRE-TRIAL AGREEMENT

No confinement may be judged. No forfeitures may be adjudged. No fine may be adjudged. No punitive discharge may be adjudged. No other lawful punishments may be adjudged.

SECTION F - SUSPENSION OR CLEMENCY RECOMMENDATION

25. DID THE MILITARY JUDGE RECOMMEND SUSPENSION OF THE SENTENCE OR CLEMENCY?		26. PORTION TO WHICH IT APPLIES	27. RECOMMENDED DURATION
	Yes ○ No ◉		

28. FACTS SUPPORTING THE SUSPENSION OR CLEMENCY RECOMMENDATION

SECTION G - NOTIFICATIONS

29. Is sex offender registration required in accordance with appendix 4 to enclosure 2 of DoDI 1325.07?	Yes ○ No ◉
30. Is DNA collection and submission required in accordance with 10 U.S.C. § 1565 and DoDI 5505.14?	Yes ◉ No ○
31. Did this case involve a crime of domestic violence as defined in enclosure 2 of DoDI 6400.06?	Yes ○ No ◉
32. Does this case trigger a firearm possession prohibition in accordance with 18 U.S.C. § 922?	Yes ○ No ◉

SECTION H - NOTES AND SIGNATURE

33. NAME OF JUDGE (last, first, MI)	34. BRANCH	35. PAYGRADE	36. DATE SIGNED	38. JUDGE'S SIGNATURE
Ohley, Tereza, Z.	Coast Guard	O-5	Jun 7, 2023	OHLEY.TEREZA.ZAMBRANO.[redacted] Digitally signed by OHLEY.TEREZA.ZAMBRANO.[redacted] Date: 2023.06.07 15:14:54 -04'00'

37. NOTES

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:	134	Specification 1	Guilty	Guilty			134-Z-
		Offense description	General article clause 1 or 2 offense				
		Specification 2	Guilty	Guilty			134-Z-
		Offense description	General article clause 1 or 2 offense				
Charge II:	107	Specification	Not Guilty	W/D			107-B-
		Offense description	False official statement				
		Withdrawn and Dismissed	Withdrawn and dismissed without prejudice to ripen into prejudice upon completion of appellate review in accordance with plea agreement.				

MILITARY JUDGE ALONE SEGMENTED SENTENCE

SECTION J - SENTENCING

CHARGE	SPECIFICATION	CONFINEMENT	CONCURRENT WITH	CONSECUTIVE WITH	FINE
Charge I:	Specification 1	None	N/A	N/A	N/A
	Specification 2	None	N/A	N/A	N/A
Charge II:	Specification	None	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
Keaty, Matthew, L	E-3	[redacted]
4. UNIT OR ORGANIZATION	**5. CURRENT ENLISTMENT**	**6. TERM**
United States Coast Guard	17 March 2020	4 years

7. CONVENING AUTHORITY (UNIT/ORGANIZATION)	8. COURT-MARTIAL TYPE	9. COMPOSITION	10. DATE SENTENCE ADJUDGED
Coast Guard Atlantic Area	Special	Judge Alone	Jun 7, 2023

Post-Trial Matters to Consider	Yes	No
11. Has the accused made a request for deferment of reduction in grade?		X
12. Has the accused made a request for deferment of confinement?		X
13. Has the accused made a request for deferment of adjudged forfeitures?		X
14. Has the accused made a request for deferment of automatic forfeitures?		X
15. Has the accused made a request for waiver of automatic forfeitures?		X
16. Has the accused submitted necessary information for transferring forfeitures for benefit of dependents?		X
17. Has the accused submitted matters for convening authority's review?		X
18. Has the victim(s) submitted matters for convening authority's review?		X
19. Has the accused submitted any rebuttal matters?		X
20. Has the military judge made a recommendation to suspend the sentence?		X
21. Has the trial counsel made a recommendation to suspend the sentence?		X
22. Did the court-martial sentence the accused to a reprimand issued by the convening authority?		X

23. Notes.

24. Convening Authority Name	25. SJA or Legal Officer Name
VADM Kevin E. Lunday, Commander Atlantic Area	CAPT [redacted] Staff Judge Advocate
26. SJA or Legal Officer signature	27. Date:
[redacted]	Aug 11, 2023

SECTION B - CONVENING AUTHORITY ACTION

28. Having reviewed the Statement of Trial Results, as well as any matters submitted by the accused and the victim(s), 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 based on suspension recommendations.]:

Sentence is approved as adjudged.

29. Convening authority's written explanation of the reasons for taking action on offenses with mandatory minimum punishments or offenses for which the maximum sentence to confinement that may be adjudged exceeds two years, or offenses where the adjudged sentence includes a punitive discharge (Dismissal, DD, BCD) or confinement for more than six months, or a violation of Art. 120(a) or 120(b) or 120b:	
30. Convening authority or designee's signature	31. Date:
[redacted] Nathan A. Moore [redacted] Rear Admiral Acting, Commander Atlantic Area	15AUG23
32. Date convening authority action was forwarded to military judge.	

ENTRY OF JUDGMENT

SECTION C - ENTRY OF JUDGMENT

Must be signed by the Military Judge (or Circuit Military Judge) within 10 days of receipt

33. Findings of each charge and specification referred to trial [summary of each charge and specification (include at a minimum the gravamen of the offense), the plea of the accused, and the findings. Account for any modifications made by reason of any post-trial action by the convening authority or any post-trial ruling, order, or other determination by the military judge.]:

Example [if necessary, add continuation page]:
Charge I: Violation of the UCMJ, Article 120(b)
Plea: Not Guilty Finding: Guilty
Spec. 1: Sexual assault to wit: penetration of vagina with penis without victim's consent.
Plea: Not Guilty Finding: Guilty
Spec 2: Sexual assault to wit: penetration of victim's mouth with penis when victim was incapable of consenting to the sexual act.
Plea: Not Guilty Finding: Not Guilty

Charge I: Violation of the UCMJ, Article 134
Plea: Guilty Finding: Guilty
Spec. 1: Unlawful dissemination of photographs engaging in sexual activity without victim's consent
Plea: Guilty Finding: Guilty
Spec. 2: Unlawful dissemination of videos engaging in sexual activity without victim's consent
Plea: Guilty Finding: Guilty

Charge II: violation of UCMJ, Article 107
Plea: Not Guilty Finding: Withdrawn
Sole spec: False Official statement
Plea: Not Guilty Finding: Withdrawn

34. Sentence adjudged. Account for any modifications made by reason of any post-trial action by the convening authority, or any post-trial rule, order, or other determination by the military judge:

Example: Member sentencing: 19 years confinement, DD, total forfeitures, $15,000 fine, reduction to E-1.

Example: Military judge:
Charge I: Violation of the UCMJ, Article 120(b): Total Forfeitures, reduction to E-1, Reprimand
Spec 1: 6 years confinement and $4,000 fine
Spec 2: 2 years confinement and $1,000 fine
Confinement will run concurrently
Total confinement time is 6 years.
Total fine is $5,000.

Charge I: Violation of UCMJ Article 134: No punishment
Spec 1: No punishment
Spec 2: No punishment

35. Deferment and Waiver of Forfeitures. If accused requested deferment and/or waiver of forfeitures, include the details of the request and the impact of CA's Action:

N/A

36. Action convening authority took on any suspension recommendation from the military judge:

N/A

37. Judge's signature:	38. Date judgment entered:
OHLEY.TEREZA.ZAMBRANO.[redacted] Digitally signed by OHLEY.TEREZA.ZAMBRANO[redacted] Date: 2023.09.07 16:31:24 -04'00'	9/7/2023
39. In accordance with RCM 1111(c)(1), the military judge who entered a judgment may modify the judgment to correct computational or clerical errors within 14 days after the judgment was initially entered. Include any modifications here and resign the Entry of Judgment.	
40. Judge's signature:	41. Date judgment entered:
42. A copy of the judgment shall be provided to the accused or the accused's defense counsel.	
43. A copy of the judgment shall be provided upon request to any crime victim or crime victim's counsel, without regard to whether the accused was convicted or acquitted of any offense.	

APPELLATE MOTIONS

IN THE UNITED STATES
COAST GUARD COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee* v. Matthew L. Keaty SN (E-3) U.S. Coast Guard, *Appellant*	22 March 2024 MOTION FOR FIRST ENLARGEMENT OF TIME TO FILE ANSWER ON BEHALF OF THE UNITED STATES Dkt. No. 1493 Case No. CGCMSP 25021 Before McClelland, Brubaker, Judge Tried at Norfolk, VA by a Special Court-Martial convened by Commander, Coast Guard Atlantic Area on 7 June 2023.

TO THE HONORABLE JUDGES OF THE UNITED STATES
COAST GUARD COURT OF CRIMINAL APPEALS

In accordance with Rule 23.2 of this Court's Rules, the United States, through undersigned counsel, hereby moves for a 30-day enlargement of time in which to file an answer to Appellant's Assignment of Error (AOE) in the above-captioned case, which is currently due Monday, 1 April 2024. This is the Government's first enlargement of time.

Additional time is needed to finish review of the 780-page record of trial and complete the requisite legal research to comprehensively respond to Appellant's AOE.

To ensure the Answer in this case is complete, informed by relevant facts, and consistent with the United States' position, the United States requests an enlargement of time up to, and including, Wednesday, 1 May 2024 to file its Answer to Appellant's AOE.

Respectfully submitted,

ULAN.ELIZABETH.MARIE.[redacted]
Digitally signed by ULAN.ELIZABETH.MARIE.[redacted]
Date: 2024.03.22 15:48:58 -04'00'

DATE: 22 March 2024

Elizabeth Ulan
Lieutenant, U.S. Coast Guard
Appellate Government Counsel
Commandant (CG-LMJ)
[redacted]

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was delivered to this Honorable Court, Special Victim's Counsel, and opposing counsel on 22 March 2024.

ULAN.ELIZABETH.MARIE.[redacted]
Digitally signed by ULAN.ELIZABETH.MARIE.[redacted]
Date: 2024.03.22 15:49:14 -04'00'

Elizabeth Ulan
Lieutenant, U.S. Coast Guard
Appellate Government Counsel
Commandant (CG-LMJ)
[redacted]

IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

v.

Matthew L. KEATY
Seaman (E-3)
U.S. Coast Guard,
Appellant

27 March 2024

APPELLEE'S MOTION FOR FIRST ENLARGEMENT OF TIME TO FILE ANSWER, FILED 22 MARCH 2024

CGCMSP 25021

DOCKET NO. 1493

ORDER

Appellee seeks an enlargement of time in accordance with Rule 23.2, which requires a showing of good cause. Appellee provides minimal cause. On consideration of Appellee's motion, it is, by the Court, this 27th day of March, 2024,

ORDERED:

That Appellee's Motion for Enlargement of Time is hereby granted in part, up to and including 16 April 2024.

For the Court,
VALDES.SARAH.P.[redacted] Digitally signed by VALDES.SARAH.P.[redacted] Date: 2024.03.27 09:35:45 -04'00'
Sarah P. Valdes
Clerk of the Court

Copy: Judge Advocate General's Representative
Appellate Government Counsel
Appellate Defense Counsel

IN THE UNITED STATES
COAST GUARD COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee* v. Matthew L. KEATY SN / E-3 U.S. Coast Guard, *Appellant*	01 March 2024 APPELLANT'S ASSIGNMENTS OF ERROR AND BRIEF Docket No. 1493 Case No. CGCMSP 25021 Before: McClelland, Brubaker, Judge Tried at Norfolk, VA, on June 7, 2023, before a Special Court-Martial convened by Commander, Coast Guard Atlantic Area.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COAST GUARD COURT OF CRIMINAL APPEALS

Thad Pope
LCDR, USCG
Appellate Defense Counsel
[redacted]

ISSUE PRESENTED

WHETHER THE UNENUMERATED ARTICLE 134, UCMJ, OFFENSES CHARGED IN SPECIFICATIONS 1 AND 2 OF CHARGE I ARE PREEMPTED BY ARTICLE 117a, UCMJ, WHICH CONGRESS ENACTED TO ADDRESS THE WRONGFUL BROADCAST OR DISTRIBUTION OF INTIMATE VISUAL IMAGES.

STATEMENT OF STATUTORY JURISDICTION

This case is within this Court's jurisdiction under Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (effective 23 December 2022), as Appellant was provided notice of his right to appeal on 27 September 2023 and timely filed this appeal on 18 October 2023.

STATEMENT OF THE CASE

On June 7, 2023, a military judge sitting as a special court-martial convicted Appellant, in accordance with his pleas, of violating two specifications of Article 134, UCMJ.[1] The Military Judge awarded no punishment, pursuant to the terms of Appellant's plea agreement.[2] The Convening Authority approved the findings and sentence, which the Military Judge entered into judgment.[3]

[1] Statement of Trial Results.
[2] AE-34 (Plea Agreement); Statement of Trial Results, at 1 (note that Block 14 erroneously indicates reduction in grade to E-3. However, Appellant was an E-3 at the time of trial, and his plea agreement in para. 10(d) indicates that the parties agreed to no reduction or other punishments).
[3] Post-Trial Action at 10.

STATEMENT OF FACTS

I. Appellant was convicted of two Article 134 specifications using the language of Article 117a minus a couple of elements.

Appellant dated [redacted] in college in 2019.[4] After joining the Coast Guard in 2020, he posted consensually taken sexual images of [redacted] online without her consent.[5] But instead of charging Appellant under Article 117a, which was specifically enacted to cover such misconduct, the Government charged him with two unenumerated Article 134 offenses.[6] In the relevant specifications, the Government charged Article 117a's first element, omitted its second and third elements, then referenced a New Hampshire statute and substituted a terminal service-discrediting element for an Article 134 Clause 2 offense.

The specifications read as follows: [7]

CHARGE I: Violation of the UCMJ, Article 134

Specification 1: In that SN Matthew Keaty, U.S. Coast Guard, at or near Portsmouth, New Hampshire, did, on one or more occasions, from on or about June 2020 to on or about November 2020, knowingly and unlawfully disseminate photographs of himself engaging in sexual activity with [redacted] on the Internet without the express consent of [redacted] to disseminate such photographs, in violation of Title LXII, Chapter 644, Section 9, of the New Hampshire Revised Statutes, and that such conduct was of a nature to bring discredit upon the armed forces.

[redacted]

Specification 2: In that SN Matthew Keaty, U.S. Coast Guard, at or near Portsmouth, New Hampshire, did,on or about ~~August~~ 2020, knowingly and unlawfully disseminate videos of himself engaging in sexual activity with [redacted] on the Internet without the express consent of [redacted] to disseminate such videos, in violation of Title LXII, Chapter 644, Section 9, of the New Hampshire Revised Statutes, and that such conduct was of a nature to bring discredit upon the armed forces.

The cited New Hampshire statute, found at Title LXII, Chapter 644, Section 9, lists six different crimes under Section 9. However, the specifications drafted by the Government do not notify Appellant as to which of the six crimes he was accused of violating. Trial Defense Counsel argued in his motion to dismiss that the specifications failed to state an offense under

[4] AE-IX at 1 (Gov. Resp. to Motion to Compel Discovery enclosures (CGIS Rpt.)).
[5] *Id* at 2.
[6] Charge Sheet.
[7] Charge Sheet.

Clause 3,[8] and noted during oral argument that the Government did not specify which portion of the statute was at issue.[9] Although the specifications are silent in this regard, Trial Counsel discussed during oral argument[10] subsection III of Section 9, which reads:[11]

> III. A person is guilty of a class A misdemeanor if that person knowingly disseminates or causes the dissemination of any photograph or video recording of himself or herself engaging in sexual activity with another person without the express consent of the other person or persons who appear in the photograph or videotape.

Trial Defense Counsel argued that each specification was improper, and twice moved the trial court to dismiss the charges.[12] In the first motion, Trial Defense Counsel argued that Congress intended Article 117a to preempt Article 134.[13] In a subsequent motion, the Defense argued that a violation of state law should fall under the Assimilative Crimes Act.[14] Notwithstanding the Government's acknowledgment of its references to the New Hampshire statute, Trial Counsel asserted that each specification was properly charged under Clause 2 of Article 134, not the Assimilated Crimes Act under clause 3 of Article 134.[15] The Military Judge denied both motions.[16] Appellant then entered into a plea agreement, which included a boilerplate term waiving "all motions except those that are non-waivable."[17]

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[8] AE-26 (Def. Mot. to Dismiss for Failure to State an Offense).
[9] R. at 71-72.
[10] R. at 69.
[11] N.H. Rev. Stat. Ann. § 644:9 (2024).
[12] AE-26 (Def. Mot. To Dismiss for Failure to state an Offense).
[13] AE-XVI (Def. Mot. to Dismiss – Preemption).
[14] AE-26 (Def. Mot. to Dismiss – Failure to state an Offense).
[15] AE-27 at 3-4 (Gov't Opp. to Def. Mot. to Dismiss for Failure to State an Offense) ("Here, the government chose to bring charges under clause (2) alone, and is not subject to Defense's preferred charging scheme.").
[16] AE-28 (Ruling on Defense Motions to Dismiss for Failure to state an Offense, and Preemption).
[17] AE-34 at 5 (Plea Agreement).

II. Statutory Background of Article 117a, Wrongful Broadcast or Distribution of Intimate Visual Images.

A. The "Marines United" Scandal.

In March 2017, a journalist exposed a private Facebook group called "Marines United."[18] Servicemembers used the group to share intimate images of active-duty, veteran, and civilian women.[19] These images often contained nudity and were created during consensual sexual encounters. However, they were distributed without the subjects' consent.[20]

B. Congress Responds to the Scandal by Creating Article 117a.

The Marines United scandal prompted congressional inquiries, beginning with a hearing by the U.S. Senate Committee on Armed Services. The Senate questioned military leaders to better understand the gravity of the situation and examine why the military struggled to hold the servicemembers involved responsible.[21] Notably, Senator Elizabeth Warren revealed the existence of a gap in Article 120c, UCMJ.[22] This offense dealt with images *taken without consent*, as opposed to images taken with consent and then *distributed without consent*.[23] At the time, the latter was not punishable under the UCMJ.[24]

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[18] Thomas J. Brennan, *Hundreds of Marines investigated for sharing photos of naked colleagues*, THE WAR HORSE (Mar. 4, 2017), https://revealnews.org/blog/hundreds-of-marines-investigated-for-sharing-photos-of-naked-colleagues/.
[19] Hearing to Receive a Briefing on Information Surrounding the Marines United Website: Before the S. Comm. on the Armed Services, 115th Cong. 57 (2017) at 13-15 (statement of Sen. Kirsten Gillibrand).
[20] Brennan, *supra* note 11.
[21] *Id*.
[22] Hearing to Receive a Briefing on Information Surrounding the Marines United Website: Before the S. Comm. on the Armed Services, 115th Cong. (2017) at 36; 10 U.S.C. § 920c (2018).
[23] *Compare* 10 U.S.C. § 920c (2018) *with* 10 U.S.C. § 917a (2018).
[24] Hearing to Receive a Briefing on Information Surrounding the Marines United Website: Before the S. Comm. on the Armed Services, 115th Cong. (2017) at 36.

Given this gap, prosecutors and their respective commands adopted inventive interpretations of existing Articles to prosecute this conduct.[25] By August 2017, a Marine was convicted under Article 127 (Extortion) for threatening to distribute sexually explicit content.[26] A month later, another Marine was convicted of "conspiracy to commit indecent broadcasting" and "attempted indecent broadcasting."[27] These instances further underscored the importance of heeding Senator Warren's earlier call for a revision of the UCMJ,[28] highlighting the necessity for more a precise legal framework to penalize the sharing of private, intimate visual images without consent.

This framework is precisely what Representative Martha McSally aimed to accomplish when she introduced H.R. 2052, known as the PRIVATE Act, which created Article 117a:

> We have a couple of articles, Article 133 and Article 134. Article 133 is conduct unbecoming of an officer. Article 134 is what we call anything that is prejudicial to good order and discipline. This is one I would say as a commander we often use as the catchall article. When we could not prosecute someone under another article, we go to Article 134 because we knew their behavior was degrading good order and discipline. Civilian law faces challenges in prosecuting this crime. Thirty-five States and the District of Columbia have statutes against *sharing private, intimate digital media without consent*, but the State laws vary in their proof, the elements, and the punishment. The Marines recently created a regulation where they can charge these Neanderthals who commit these violations, but creating regulation isn't the same thing as strengthening the law. That is why I introduced the [Protecting the Rights of Individuals Against Technological Exploitation Act] PRIVATE Act. Again, this is a bipartisan bill. *My bill provides a clear, unambiguous charge that gives commanders a sharper tool in the UCMJ for targeting and prosecuting this behavior*. It clearly defines this behavior as a crime, and it also addresses the issues of intent and free speech.[29]

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[25] Shawn Snow, *Seven Marines court-martialed in wake of Marines United scandal*, MARINE CORPS TIMES (Mar. 1, 2018), https://www.marinecorpstimes.com/news/your-marine-corps/2018/03/01/seven-marines-court-martialed-in-wake-of-marines-united-scandal/.
[26] *Marine Corps General and Special Court-Martial Dispositions*, 1 (August 2017), https://media.defense.gov/2018/Apr/04/2001899479/-1/-1/0/COURTSMARTIAL-201708.PDF.
[27] *Id*. at 4.
[28] *Id*.
[29] The Protecting the Rights of Individuals Against Technology Exploitation Act (The PRIVATE Act), H.R. 2052, 115th Cong. (2017)); 163 CONG. REC. H3052, at 3058 (daily ed. May 2, 2017) (statement of Rep. Martha McSally) (cleaned up and emphasis added)).

Similarly, Representative Jackie Speier emphasized that "a federal law is needed to provide a single, clear articulation of the elements of this crime to ensure that Americans in every part of the country—civilian and military—are protected if they are subjected to this heinous abuse."[30] Her specific comments about the UCMJ, noting the structural deficiencies in both Articles 120c and 134, reinforced her urgency to resolve the matter quickly.[31] Both Senators Warren and Joni Ernst reemphasized the same urgency, stressing the broader societal implications:

> Senator Warren: I know you are committed to pursuing this, but if we are going to shut down this conduct, then you ought to have every possible legal tool at your disposal.[32]
>
> Senator Ernst: This is an absolute issue that impacts our entire society. It is an absolutely horrible issue impacting us, but it is one that *we* must stop. *And I say we. It is not just the Marine Corps. It is those of us who are sitting here today*.[33]

Recognizing that the military often mirrors the broader community, the Senate Armed Services Committee aimed to find a solution that safeguarded the well-being of both civilians and servicemembers.[34] Their solution was Article 117a.

C. Framing Art. 117a: Addressing First Amendment Concerns.

During the initial drafting phase of the PRIVATE Act, Congress did not include an element requiring that the wrongful broadcast or distribution of intimate visual images have any military nexus, except for the accused being subject to personal jurisdiction under the UCMJ.[35]

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[30] *Id*.
[31] 163 CONG. REC. H4477, at 4478 (daily ed. May 23, 2017) (statement of Rep. Jackie Speier)).
[32] Hearing to Receive a Briefing on Information Surrounding the Marines United Website: Before the S. Comm. on the Armed Services, 115th Cong. (2017) at 36.
[33] *Id* at 20 (emphasis added).
[34] Hearing to Receive a Briefing on Information Surrounding the Marines United Website: Before the S. Comm. on the Armed Services, 115th Cong. (2017) at 2 (statement of Sen. John McCain).
[35] H.R. 2052, 115th Cong. (2017-2018).

However, before the final version of Article 117a was approved and voted on, Congress received correspondence from the Department of Justice (DOJ) that Article 117a, as originally drafted, "would raise First Amendment concerns."[36] In a letter to Congress, the DOJ recommended including an element requiring that the offending conduct have a "reasonably direct and palpable connection" to "the military mission or the military environment."[37] This language was lifted verbatim from the Court of Appeals for the Armed Forces' decision in *United States v. Wilcox*, in which the Court addressed an accused member's free speech concerns.[38] The DOJ also cited *Parker v. Levy*, stressing that Article 117a needed a military nexus element for its legal efficacy with respect to accused servicemembers, at whose conduct the statute was aimed.[39]

Promptly responding to these concerns, Congress added the exact language requested by the DOJ and passed the bill a month later.[40] The final version of Article 117a retained the original three elements while adding the *Wilcox* language as a fourth military-connection element:

[36] Letter from the Office of the Assistant Attorney General, at 9-11 (Nov. 8, 2017), https://www.justice.gov/ola/page/file/1010611/download.
[37] *Id*. at 11 (quoting *United States v. Wilcox*, 66 M.J. 442, 449 (C.A.A.F. 2008)).
[38] *Id*.
[39] *Parker v. Levy*, 417 U.S. 733, 758 (1974) ("While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections").
[40] National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 553(a) (2017)).

§917a. Art. 117a. Wrongful broadcast or distribution of intimate visual images

(a) PROHIBITION.-Any person subject to this chapter-

(1) who knowingly and wrongfully broadcasts or distributes an intimate visual image of another person or a visual image of sexually explicit conduct involving a person who-

(A) is at least 18 years of age at the time the intimate visual image or visual image of sexually explicit conduct was created;

(B) is identifiable from the intimate visual image or visual image of sexually explicit conduct itself, or from information displayed in connection with the intimate visual image or visual image of sexually explicit conduct; and

(C) does not explicitly consent to the broadcast or distribution of the intimate visual image or visual image of sexually explicit conduct;

(2) who knows or reasonably should have known that the intimate visual image or visual image of sexually explicit conduct was made under circumstances in which the person depicted in the intimate visual image or visual image of sexually explicit conduct retained a reasonable expectation of privacy regarding any broadcast or distribution of the intimate visual image or visual image of sexually explicit conduct;

(3) who knows or reasonably should have known that the broadcast or distribution of the intimate visual image or visual image of sexually explicit conduct is likely-

(A) to cause harm, harassment, intimidation, emotional distress, or financial loss for the person depicted in the intimate visual image or visual image of sexually explicit conduct; or

(B) to harm substantially the depicted person with respect to that person's health, safety, business, calling, career, financial condition, reputation, or personal relationships; and

(4) whose conduct, under the circumstances, had a reasonably direct and palpable connection to a military mission or military environment,

is guilty of wrongful distribution of intimate visual images or visual images of sexually explicit conduct and shall be punished as a court-martial may direct. [41]

ARGUMENT

THE GOVERNMENT'S UNENUMERATED ARTICLE 134 OFFENSES IN CHARGE 1 ARE PREEMPTED BY ARTICLE 117a, WHICH CONGRESS SPECIFICALLY ENACTED TO COVER THE OFFENSE OF NONCONSENSUAL BROADCAST OR DISTRIBUTION OF INTIMATE VISUAL IMAGES.

Standard of Review

Whether an offense is preempted depends on statutory interpretation, which is a question of law this Court reviews de novo.[42]

[41] 10 U.S.C. § 917a (2018).

[42] *United States v. Avery*, 79 M.J. 363, 366 (C.A.A.F. 2020) (quoting *United States v. Wheeler*, 77 M.J. 289, 291 (C.A.A.F. 2018)); *United States v. Grijalva*, 83 M.J. 669, 672 (C.G. Ct. Crim. App. 2023).

Law and Analysis

I. Appellant did not waive the issue of preemption by pleading guilty.

The Court of Appeals for the Armed Forces (CAAF) has recognized that jurisdictional questions are not subject to waiver.[43] While the CAAF has not addressed whether preemption is waivable in the context of Clause 2 of Article 134, the Court determined in the context of Clause 3 that an appellant's guilty plea does *not* waive the ability to contest preemption on the grounds of subject-matter jurisdiction:

> [T]he issue relates to subject-matter jurisdiction. If the offense was improperly assimilated, it was not cognizable by a court-martial. Thus, we hold that the preemption issue was not waived by the guilty plea or appellant's failure to raise it at trial.[44]

Read broadly, as it should be, this holding stands for the proposition that the issue of preemption is not be waived because of a guilty plea or failure to raise the issue at trial. Even if read narrowly as only impacting preemption issues under Clause 3 of Article 134, this holding supports that preemption under Clause 2 is similarly non-waivable. This is because preemption "relates to a question of subject-matter jurisdiction"[45] and ultimately goes to "whether the specification states an offense," as service courts of criminal appeals have held.[46]

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[43] *United States v. Alexander*, 61 M.J. 266 (C.A.A.F. 2005); *see also United States v. Cotton*, 535 U.S. 625, 630 (2002) ("the term 'jurisdiction' means. . . 'the courts' statutory or constitutional power to adjudicate the case.' This latter concept of subject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived.") (quoting *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 89 (1998)).

[44] *U.S. v. Robbins*, 52 M.J. 159, 160 (C.A.A.F. 1999).

[45] *United States v. Jones*, 66 M.J. 704, 706 (A.F. Ct. Crim. App. 2008); *see also United States v. Dominguez-Sandoval*, 2022 WL 987041, *6 (A.F. Ct. Crim. App. Mar. 31, 2022) ("A claim of preemption, therefore, presents a question of subject-matter jurisdiction of the trial court, and cannot be waived by either a plea or failure to object."); *United States v. Bailey*, 2017 WL 4404564, *2 (A.F. Ct. Crim. App. Sept. 26, 2017) ("This court has ruled that preemption relates to a question of subject matter jurisdiction, and is thereby not waived by Appellant's guilty plea").

[46] *United States v. Taylor*, 2007 WL 1704159, n. 7 (N-M. Ct. Crim. App. May 23, 2007) ("We will not apply waiver for failing to raise this issue at trial, because preemption can involve both

Here, Appellant challenges the subject-matter jurisdiction for the Clause 2 offenses, arguing that Article 117a preempts charges under Article 134 for the non-consensual broadcast or distribution of intimate visual images that were consensually obtained.

II. Article 117a occupies the field of the nonconsensual broadcast or distribution of consensually taken intimate visual images.[47]

The preemption doctrine prohibits the application of Article 134 to conduct already covered by Articles 80 to 132 of the UCMJ.[48] "Where Congress has *occupied the field* of a given type of misconduct by addressing it in one of the specific punitive articles of the code, another offense may not be created and punished under Article 134, UCMJ, by simply deleting a vital element."[49] Congress has "occupied the field" if it "intended the other punitive article to cover a class of offenses in a complete way."[50]

To determine the applicability of the preemption doctrine, the Court of Military Appeals set out a two-part test, requiring an affirmative answer to both questions.[51] The first question is "whether Congress intended to limit prosecution for wrongful conduct within a particular area or field to offenses defined in specific articles of the Code."[52] Such intent must be expressed

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jurisdiction and whether the specification states an offense"); *see also United States v. Costianes*, 2016 WL 4191236, *1 (A.F. Ct. Crim. App. June 30, 2016) ("The basis for the preemption doctrine is the principle that, if Congress has occupied the field for a given type of misconduct, then an allegation under Article 134, UCMJ, fails to state an offense. A claim of preemption, therefore, presents a question of subject-matter jurisdiction of the trial court, and cannot be waived by either a plea or failure to object").

[47] The CAAF recently held oral argument addressing this exact issue, though it has not yet rendered a decision; *See United States v. Grijalva*, 83 M.J. 433 (C.A.A.F. 2023) (pet. for rev. granted).

[48] 10 U.S.C. § 934 (2018).

[49] *United States v. Kick*, 7 M.J. 82, 85 (C.M.A. 1979) (emphasis added).

[50] *United States v. Anderson*, 68 M.J. 378, 386–87 (C.A.A.F. 2010) (citing *Kick*, 7 M.J. at 85).

[51] *McGuinness*, 35 M.J. at 151; *Anderson*, 68 M.J. at 386–87 (referencing *United States v. Taylor*, 12 C.M.A. 44, 45–47 (1960)) (emphasis added).

[52] *McGuinness* 35 M.J. at 151–52 (quoting *United States v. Wright*, 5 M.J. 106, 110–11 (C.M.A. 1978)); *see also Avery*, 79 M.J. at 366.

"through direct legislative language or express legislative history,"[53] which courts generally analyze through statutory interpretation, comparing articles to other federal statutes, and reviewing legislative history.[54] The second question is "whether the offense charged is composed of a residuum of elements of a specific offense.[55]

A. The plain language of Article 117a shows Congress' intent to cover the entire constitutionally available field.

The language of the UCMJ is interpreted according to the traditional rules of statutory interpretation, which apply equally when interpreting both the statutory language itself and other provisions within the Manual for Courts-Martial.[56] Those rules provide that all questions of statutory interpretation must begin with the text.[57] In doing so, "sections of a statute should be construed in connection with one another as 'a harmonious whole' manifesting 'one general purpose and intent.'"[58] "The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent."[59]

i. Article 117a broadly applies to all adult persons.

Paragraph (a)(1) of Article 117a identifies the broad swath of people protected by the statute. The statute criminalizes the broadcasting of "an intimate visual image of *another person* or a visual image of sexually explicit conduct involving *a person*."[60] Although the statute does

[53] *Anderson*, 68 M.J. at 386–87 (emphasis added).
[54] *Id*. (citing *Taylor*, 12 C.M.A. at 45–47).
[55] *McGuinness*, 35 M.J. at 151-52 (quoting *Wright*, 5 M.J. at 110-11); *see also Avery*, 79 M.J. at 366.
[56] *United States v. Hiser*, 82 M.J. 60, 64 (C.A.A.F. 2022); *see United States v. Murphy*, 74 M.J. 302, 305 (C.A.A.F. 2015).
[57] *Republic of Sudan v. Harrison*, 139 S. Ct. 1048, 1056 (2019).
[58] *United States v. Quick*, 74 M.J. 517, 520 (N-M. Ct. Crim. App. 2014) (quoting Norman J. Singer, Statutes and Statutory Construction § 46:05 (6th ed. 2014)).
[59] *United States v. McPherson*, 73 M.J. 393, 395 (C.A.A.F. 2014) (internal quotation marks omitted) (quoting *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002)).
[60] 10 U.S.C. § 917a(a)(1) (emphasis added).

not define the term, the plain reading of the word "person" means *any* individual. Indeed, "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the words "person" and "whoever" include . . . individuals."[61] The Oxford English Dictionary provides several definitions for "person," almost all of which relate to actual individuals.[62] Black's Law Dictionary similarly defines "person" as "[i]n general usage, a human being."[63]

None of the language in Article 117a indicates that Congress intended to deviate from this meaning of "person," which Congress used throughout the statute: "intimate visual image of another person";[64] "the person depicted in the intimate visual image";[65] and "depicted person."[66] Indeed, the statute contains no language requiring the victim to be on active-duty or a veteran. Rather, all that is required under Article 117a(a)(1) is the victim be "at least 18 years of age," "identifiable from the . . . visual image," and "does not explicitly consent to the broadcast or distribution of the intimate visual image."[67]

Nonetheless, this Court recently held in *United States v. Grijalva* that:

> "Notwithstanding the First Amendment impetus for the addition [of the military connection element], we see this addition as also strengthening the argument that *Congress did not intend to cover civilian victims* or preempt use of Article 134 for such victims [emphasis added.]."[68]

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[61] 1 U.S.C. § 1.
[62] *See* Person, *The Compact Oxford English Dictionary*, (2nd ed. 1991) (defining "person" as "an individual human being; a man, woman, or child," "a man or woman of distinction or importance," "a self-conscious or rational being," "a human being (*natural person*) or body corporate or corporation (*artificial person*), having rights and duties recognized by the law," and "the living body of a human being").
[63] Person, *Black's Law Dictionary*, (6th ed. 1990).
[64] 10 U.S.C. § 917a(a)(1) (2018).
[65] *Id*.
[66] *Id*.; 10 U.S.C. § 917a(a)(3)(b).
[67] *Hiser*, 82 M.J. at 66.
[68] *United States v. Grijalva*, 83 M.J. 669, 673 (C.G. Ct. Crim. App. 2023), *review granted in part*, No. 23-0215/CG, 2023 WL 7529401 (C.A.A.F. Oct. 3, 2023), and *review denied*, No. 23-0215/CG, 2024 WL 645349 (C.A.A.F. Jan. 22, 2024).

The Court further stated,

> "The language of Article 117a, along with the full context of its legislative history, persuades us that Congress intended it to enhance the military's ability to prosecute those who wrongfully broadcast *intimate images of fellow servicemembers and others with a military nexus*, not cover a class of offenses in a complete way so as to preclude prosecution under Article 134 when there is no such nexus [emphasis added.]"[69]

Like *Grijalva*, the present case presents with a civilian victim alleging conduct that was ultimately charged under Article 134 vice Article 117a, without the military connection element.

After obtaining a favorable ruling from this Court, the Government in *Grijalva* abandoned its victim-centric argument at CAAF (ignoring principles of judicial estoppel).[70] Instead, the Government argued that "Congress not intending for the statute to cover civilian victims does not mean that when there is a civilian victim and a direct and palpable military nexus exists that Article 117a, UCMJ, cannot be used to prosecute a servicemember."[71] In other words, the Government would have the court look to congressional intent, except when inconvenient to the Government's position.

In *Grijalva*, the Government further argued to CAAF that "[Article 117a] was not, however, meant to handicap military commanders from prosecuting the same misconduct [under Article 134] when a servicemember commits it in a completely civilian setting with no military nexus."[72] Congressional intent was to cover as broad a field as possible, but not at the expense of First Amendment rights. As such, based on *Wilcox* and DOJ guidance, Congress provided commanders with Article 117a, a tool to cover the available field.

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[69] *Id*.
[70] Appellee's Brief, *U.S. v. Grijalva*, USCA Dkt. No. 23-0215CG, https://www.armfor.uscourts.gov/briefs/2023Term/Grijalva230215AppelleeBrief.pdf.
[71] *Id*.
[72] *Id*.

Moreover, Congress has demonstrated through its passage of other federal statutes that it knows how to explicitly restrict offenses to protect only military victims.[73] Article 117a does not contain such restrictive language. Congress could have legislated with such particularity if it had wanted to for this offense, but it declined to do so.

Section (a)(1) of Article 117a sets the only criteria for victims: they must be "at least 18 years of age," be "identifiable from the . . . visual image," and not "explicitly consent to the broadcast or distribution of the intimate visual image."[74] The CAAF has clarified that Article 117a "requires that the person depicted in an image be [*simply*] 'identifiable' *without further qualification*,"[75] suggesting a broad application of Article 117a, which is what Congress intended when it chose these limited criteria in the first place.

In *United States v. Jones*, the Air Force Court of Criminal Appeals upheld a conviction for Article 117a, wherein a servicemember shared intimate images of his *civilian* spouse.[76] Despite the victim's civilian status, the court established that the appellant's conduct was sufficiently linked to a military environment because of the intentional transmission to another military member.[77]

If anything, the military nexus element shows Congress' intent for Article 117a to apply to a broad range of *conduct* that has nothing to do with the military status of the victim. In *United States v. Hiser*, the CAAF emphasized that a military connection in an Article 117a prosecution

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[73] *See* Articles 89-91, UCMJ (10 U.S.C. § 889 - 891); *cf. United States v. Biggs*, 22 C.M.A. 16, 18 (1972) (concluding there was sufficient evidence "to support the court's determination that, *at the time of the offenses* . . . the accused knew the military identity" of his victims (emphasis added)).
[74] 10 U.S.C. § 917a(a)(1).
[75] *United States v. Hiser*, 82 M.J. 60, 66 (C.A.A.F. 2022) (emphasis added).
[76] *United States v. Jones*, No. ACM 40226, 2023 WL 3720848, *5 (A.F. Ct. Crim. App. May 30, 2023).
[77] *Id*.

"may be established if the broadcasted images actually do reach a service member,"[78] without necessitating that the "person depicted in the image" (the victim) *be* a service member. In other words, the focus of the military nexus requirement is on the offending *conduct*, not the victim's *status* as a member of the military. This reading of Article 117a accords with the holding in *Jones* and with the DOJ's concerns that the statute would be overbroad and thus subject to constitutional challenge absent the military nexus language.

Additionally, Article 117a explicitly excludes individuals under the age of 18, indicating Congress' intent to focus on adult victims, not minors. Sexual offenses against children have been universally and historically treated as a separate class of offenses with their own conviction and sentencing regimes.[79] Indeed, the UCMJ already addresses the distribution of sexual imagery involving minors, which shows that this area was not within the "field" Congress intended to address through Article 117a.[80] The explicit exclusion of minors in Article 117a reflects Congress' understanding that the legal protections for minors were adequately established by existing legislation.

ii. Article 117a filled the gap of what Article 120c did not criminalize.

"Congress does not create new articles that achieve the same end or prohibit the same conduct as do existing articles."[81] As such, Article 117a criminalizes different conduct than Article 120c. While paragraph (a)(3) of Article 120c refers to "broadcast or distribution," it is only referring to images created *without consent*. Article 117a, on the other hand, focuses on the harm (physical, emotional, financial, professional) that the *nonconsensual* broadcast or

[78] *Hiser*, 82 M.J. at 66.
[79] *See, e.g.*, Article 119b (Child endangerment), Article 120b (rape and sexual assault of a child), and Article 134 (Child pornography), UCMJ, Manual for Courts-Martial (2024 ed.).
[80] *See*, Article 134 (Child pornography), UCMJ, Manual for Courts-Martial (2024 ed.).
[81] *United States v. Page*, 80 M.J. 760, 765 (N-M. Ct. Crim. App. 2021).

distribution of an intimate image may cause a victim (who may well have consented to the making of the image at the time it was recorded). When Congress created 117a, it did so to close the legal gap revealed by the Marines United scandal: that nonconsensual broadcast of consensually obtained images was not a crime. With the addition of Article 117a, Congress acted to close this gap, criminalizing the entire field of not only the nonconsensual *making* of intimate visual images, but the nonconsensual *broadcast and distribution* of intimate images, too.

B. Legislative history shows Congress' intent to occupy the entire field. It also shows that Congress added the military nexus element to address overbreadth concerns, not to limit the scope of the field covered by 117a.

The legislative history of Article 117a demonstrates that Congress intended Article 117a to cover a broad range of conduct, extending its protections to anyone (military or civilian) depicted in an intimate image that is broadcasted or distributed to others without their consent. Representative Jackie Speier's comments on the PRIVATE Act, which created Article 117a, underscores this position:

> I also want to note that the passage of the PRIVATE Act does not apply to the civilian people in our country. Although 34 States have passed laws to address nonconsensual pornography, their approaches vary widely, and some are very flawed. That is why a Federal law is needed to provide a single, clear articulation of the elements of this crime to ensure that Americans in every part of the country—*civilian and military*—are protected if they are subjected to this heinous abuse.[82]

This language indicates that while the PRIVATE Act cannot generally be used to *prosecute* civilians (unless they are subject to the UCMJ), it was certainly intended to *protect* them, indicating that Congress envisioned a broad application of the statute.[83]

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[82] 163 Cong. Rec. H4477-80 (daily ed. May 23, 2017) at 4479 (statement of Rep. Speier) (emphasis added).

[83] *Id*.; *see* Ryan Browne, *First Marine tied to 'Marines United' Facebook group court-martialed*, CNN POLITICS (July 10, 2017) https://www.cnn.com/2017/07/10/politics/marines-united-facebook-group-court-martial/index.html ("The Naval Criminal Investigative Service scanned 'nearly 131,000 images across 168 social media sites' and was reviewing information relating to '89 persons of interest as a result of incidents related to the nonconsensual sharing of explicit

Regarding the fourth element ("military nexus"), the legislative history shows that the only reason Congress included it was to preserve the statute's constitutional integrity against the threat of an overbreadth challenge. In short, Congress added the element to address the DOJ's concerns about potential statutory overreach under the First Amendment. While doing so, Congress never strayed from its original intent for comprehensive coverage of this conduct by those subject to the UCMJ.

In its letter to Congress, the DOJ articulated its First Amendment concerns with Article 117a as then drafted. In that letter, the DOJ recommended that the conduct prohibited by Article 117a have a "reasonably direct and palpable connection" to the "military mission or the military environment."[84] This language was pulled verbatim from *United States v. Wilcox*, a First Amendment CAAF case.[85]

In the letter, the DOJ expressed its fear that Article 117a would not survive a First Amendment facial challenge. As the Supreme Court has stated,

> The First Amendment doctrine of overbreadth is an exception to our normal rule regarding the standards for facial challenges. The showing that a law punishes a substantial amount of protected free speech, judged in relation to the statute's plainly legitimate sweep, suffices to invalidate *all* enforcement of that law, until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression.[86]

The DOJ was concerned that, without additional language, any defendant could facially challenge Article 117a on overbreadth grounds. If that happened, the entirety of Article 117a would be ruled unconstitutional.

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photos and other online misconduct.' Of those 89 people, *22 are civilians* and 67 are active duty or reserve Marines.") (emphasis added).

[84] Letter from the Office of the Assistant Attorney General, at 11 (Nov. 8, 2017), https://www.justice.gov/ola/page/file/1010611/download.

[85] *Wilcox*, 66 M.J. at 449.

[86] *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003) (citations and internal quotation marks omitted) (emphasis in original).

In response to these concerns, Congress incorporated a military-connection element into Article 117a, using the exact language recommended by the DOJ that the conduct have a "reasonably direct and palpable connection to a military mission or military environment." Again, this language was taken directly from *Wilcox*. Thus, the purpose behind including this element was to address potential constitutional challenges to the statute based on First Amendment overbreadth. To the extent this element limits the field of Article 117a's protections, that field is still as broad as the Constitution permits. Said differently, there is no field remaining beyond Article 117a that does not run afoul of the First Amendment (or *Wilcox*).

Before Article 117a was enacted, the Government could have properly charged this conduct under Article 134 if it included the same terminal military connection element required by *Wilcox* (which it did not include here). However, Congress chose to stove-pipe charges for this conduct through Article 117a because it covered the remaining field not occupied by Article 120c, while baking-in the terminal element required by *Wilcox*. This would give commanders a tailored and fool-proof accountability tool that did not previously exist before Marines United.

The contrary position—that Article 117a did not occupy the entire field since some conduct may be service-discrediting under Article 134 yet not meet the military connection element of 117a—ignores both *Wilcox* and Congress' First Amendment concerns. The only field that remains uncovered by Article 117a is the field that Congress and CAAF determined runs afoul of the First Amendment. In Congress' eyes, there is no remainder that would survive a First Amendment challenge. Congress believed that, as it demonstrated in explicitly acting on the DOJ's input when it incorporated *Wilcox* into 117a. This is direct evidence of Congressional intent to occupy the entire available field. This Court does not need to address whether the

conduct at issue raises First Amendment concerns because Congress already decided that it did, and preempted the field in such a way as to avoid potential challenges.

Thus, the military nexus requirement does not narrow the field that Congress intended to occupy beyond what the First Amendment inherently requires—Congress intended Article 117a to cover all cases in the military in which an adult was victimized by the nonconsensual distribution of intimate visual images.

C. Specifications 1 and 2 of Charge I are composed of a residuum of elements of Article 117a.

As summarized below, the unenumerated Article 134 specifications the Government charged are composed of a residuum of elements of Article 117a:[87]

#	**Art. 117a Elements (summarized)**	**CH1, Spec 1 Elements**	**CH2, Spec 2 Elements**	**NH Criminal Statute[88]**
1	who knowingly and wrongfully broadcasts or distributes an intimate visual image of another person or a visual image of sexually explicit conduct involving a person who: (A) is [redacted] years old at time image taken; (B) is identifiable from the image; and (C) does not explicitly consent to broadcast or distribution of the image;	Knowingly & unlawfully disseminate photos of himself engaging in sexual activity w/ [redacted] on the internet, without express consent of [redacted] (Age & identifiability not charged)	Knowingly & unlawfully disseminate videos of himself engaging in sexual activity w/ [redacted] on the internet, without express consent of [redacted] (Age & identifiability not charged)	knowingly discloses or causes the dissemination of any photo or video of him or herself engaging in sexual activity with another person without the express consent of the other person or persons who appear in the photograph or videotape.
2	who knows or reasonably should have known that the intimate visual image or visual	Not charged	Not charged	n/a

[87] Article 117a, UCMJ (Manual for Courts-Martial, 2019 ed.); Charge Sheet.
[88] N.H. Rev. Stat. Ann. § 644:9 (2024).

	image of sexually explicit conduct was made under circumstances in which the person depicted in the intimate visual image or visual image of sexually explicit conduct retained a reasonable expectation of privacy regarding any broadcast or distribution;			
3	who knows or reasonably should have known that the broadcast or distribution of the intimate visual image or visual image of sexually explicit conduct is likely: (A) to cause harm, harassment, intimidation, emotional distress, or financial loss; or (B) to harm substantially the depicted person's health, safety, business, calling, career, financial condition, reputation, or personal relationships; and	Not charged	Not charged	n/a
4	whose conduct, under the circumstances, had a reasonably direct and palpable connection to a military mission or military environment.	Not charged; swapped with 134's service-discrediting element, referenced NH statute.	Not charged; swapped with 134's service-discrediting element, referenced NH statute.	n/a

The reason the Government charged Appellant under the unenumerated Article 134 specifications—other than to impermissibly lessen its burden of proof under Article 117a—is unclear. Trial defense counsel filed motions to dismiss Specifications 1 and 2 of Charge I, asserting the specifications failed to state an offense under the Assimilative Crimes Act, and for preemption by Article 117a.[89] In response, the Government stated the specifications were

[89] AE-XVI (Def. Mot. to Dismiss – Preemption); AE-26 (Def. Mot. To Dismiss for Failure to state an Offense).

charged as Article 134, clause 2 offenses,[90] despite references to New Hampshire statutes in the specifications.

While the Government's failure to charge the second and third elements of Article 117a could perhaps be attributed to an initial failed effort to charge the offenses as an assimilated crime under clause 3 (which was later abandoned in favor of clause 2), ultimately it does not matter whether the Government incorrectly charged the offense under clause 3 or clause 2. What matters is that Congress preempted this field of conduct by enacting Article 117a. Any imprecision or other failure by the Government to charge correctly should not be held against Appellant in this preemption analysis. Ignoring the Government's admitted surplusage,[91] the remaining charged elements consist of a residuum of the elements found in Article 117a.

In relying on Clause 2 of Article 134, the Government may have thought it lacked evidence that Appellant's conduct had a reasonably direct and palpable connection to a military mission or military environment. Without that evidence, the Government could not charge Appellant's conduct as a crime under Article 117a and thus sought to cure that evidentiary problem by simply replacing Article 117a's final element with the service discrediting terminal element under Article 134, Clause 2.

But that is exactly what the preemption doctrine prohibits—creating an unenumerated Article 134 specification by subtracting an element from an enumerated offense that the Government does not have the evidence to prove. Moreover, this action conflicts with the notion that "a servicemember must have fair notice that his conduct is punishable before he can be

[90] AE-27 at 4 (Gov't Opp. to Def. Mot. to Dismiss for Failure to State an Offense) ("Here, the government chose to bring charges under clause (2) alone, and is not subject to Defense's preferred charging scheme.").
[91] R. at 70.

charged under Article 134 with a service discrediting offense."[92] The remedy for this prosecutorial overreaching is dismissal of the affected specification.[93]

III. There is a substantial basis in law and fact to question Appellant's Guilty Plea.

Ordinarily, courts of criminal appeals will consider whether there is a "substantial basis" in law and fact for questioning a guilty plea.[94] Appellant has articulated a substantial basis to question the court-martial's subject-matter jurisdiction over Specifications 1 and 2 of Charge I due to preemption. In addition to the facts that determine subject-matter jurisdiction, Appellant asserts that Article 117a preempts the two Article 134 specifications. Inherent in that claim is an argument that the facts do not support convictions under Article 117a because the Government did not charge or prove all of the elements—specifically, elements two, three or four—of that offense. Notably absent is the terminal element of Article 117a, requiring a "reasonably direct and palpable connection" to the "military mission or the military environment,"[95] which was not charged or proved here.

[Conclusion follows]

[92] *See United States v. Vaughan*, 58 M.J. 29, 31 (C.A.A.F. 2003).
[93] *Kick*, 7 M.J. at 85.
[94] *United States v. Simpson*, 81 M.J. 33, 36 (C.A.A.F. 2021) (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991).
[95] Article 117a, UCMJ, Manual for Courts-Martial (2019 ed.).

Conclusion

For the foregoing reasons, Appellant respectfully requests that this Court set aside the findings as to Charge I, Specifications 1 and 2.

Respectfully submitted,

POPE.THADEUS.JACKSON.[redacted]
Digitally signed by POPE.THADEUS.JACKSON.[redacted]
Date: 2024.03.01 22:48:08 -05'00'

Thad Pope
LCDR, USCG
Appellate Defense Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was filed electronically with this Court and that a copy was delivered to opposing counsel and Special Victim's Counsel via email on 01 March 2024.

POPE.THADEUS.J
ACKSON.[redacted]
[redacted]
Digitally signed by POPE.THADEUS.JACKSON[redacted]
Date: 2024.03.01 22:49:02 -05'00'

Thad Pope
LCDR, USCG
Appellate Defense Counsel
[redacted]

IN THE UNITED STATES
COAST GUARD COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee* v. Matthew L. Keaty SN (E-3) U.S. Coast Guard, *Appellant*	16 April 2024 GOVERNMENT'S ANSWER TO APPELLANT'S ASSIGNMENT OF ERROR Dkt. No. 1493 Case No. CGCMSP 25021 Before McClelland, Brubaker, Judge Tried at Norfolk, VA by a Special Court-Martial convened by Commander, Coast Guard Atlantic Area on 7 June 2023.

Elizabeth Ulan
Lieutenant, U.S. Coast Guard
Appellate Government Counsel
Commandant (CG-LMJ)
[redacted]

TO THE HONORABLE JUDGES OF THE UNITED STATES COAST GUARD COURT OF CRIMINAL APPEALS

The United States, through undersigned counsel, submits this Answer in response to Appellant's Assignment of Error.

STATEMENT OF STATUTORY JURISDICTION

This Court has jurisdiction under Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (effective Dec. 23, 2022). Appellant was provided notice of his right to appeal on 27 September 2023 and filed his notice of appeal on 18 October 2023.

STATEMENT OF THE CASE

A military judge alone special court-martial convicted Appellant, consistent with his pleas, of violating two specifications of Article 134, UCMJ, 10 U.S.C. § 934. (Statement of Trial Results (STR) at 1.) Pursuant to the plea agreement, the Article 107, UCMJ, 10 U.S.C. § 907 charge was withdrawn and dismissed. (STR at 2.) On 7 June 2023, the military judge awarded no punishment in accordance with the plea agreement. (STR at 1; App. Ex. 34 at 6.) The convening authority approved the findings and sentence. (Post-Trial Action at 6.)

STATEMENT OF FACTS

a. Appellant's misconduct and court-martial.

In 2019 while in college, Appellant and [redacted] started a romantic relationship. (R. at 201.) In 2020, after Appellant joined the Coast Guard, he posted around 30 images of himself with [redacted] engaging in sexual intercourse on the website Reddit without her consent. (R. at 203–05, 207–09.) These images were viewable by others on the internet. (R. at 203–04.) Appellant also posted two videos of himself with [redacted] engaging in sexual intercourse on the website Pornhub.com without her consent. (R. at 215–18.) These videos could be viewed by anyone on the internet. (R. at 217.) Appellant at the time of posting the images and videos was in New

Hampshire. (R. at 207, 219.) Appellant was charged with two specifications of Article 134, UCMJ, which state:

> Specification 1: In that SN Matthew Keaty, U.S. Coast Guard, at or near Portsmouth, New Hampshire, did, on one or more occasions, from on or about June 2020 to on or about November 2020, knowingly and unlawfully disseminate photographs of himself engaging in sexual activity with [redacted] on the Internet without the express consent of [redacted] to disseminate such photographs, in violation of Title LXII, Chapter 644, Section 9, of the New Hampshire Revised Statutes, and that such conduct was of a nature to bring discredit upon the armed forces.
>
> Specification 2: In that SN Matthew Keaty, U.S. Coast Guard, at or near Portsmouth, New Hampshire, did, on or about March through July 2020, knowingly and unlawfully disseminate videos of himself engaging in sexual activity with [redacted] on the Internet without the express consent of [redacted] to disseminate such videos, in violation of Title LXII, Chapter 644, Section 9, of the New Hampshire Revised Statutes, and that such conduct was of a nature to bring discredit upon the armed forces.

(Charge Sheet at 1.)

After pleading guilty to both specifications of Charge I, Appellant admitted he believed posting images of [redacted] without her express consent was service discrediting. (R. at 190, 206, 208.) Additionally, when questioned by the military judge, Appellant admitted that posting the videos without express consent is service discrediting and "would strongly diminish the public's respect for the Coast Guard." (R. at 219–20.)

Defense counsel filed a motion to dismiss alleging that Specifications 1 and 2 of Charge I were preempted by Article 117a, UCMJ, 10 U.S.C. § 917a. (App. Ex. XVI.) The Government opposed the motion, and the military judge ultimately denied it. (App. Ex. XVIII; App. Ex. XX.)

b. <u>The Marines United scandal and Article 117a's enactment</u>.

In March of 2017, the Marines United scandal became public news. Andrea Januta, *How The Marines United Investigation and Scandal Unfolded*, The War Horse (July 11, 2017), https://thewarhorse.org/how-the-marines-united-investigation-and-scandal-unfolded/. Marines

United was a "males-only and invite-only Facebook group with 30,000 members" which included active-duty military members. *Id*. One member in the group shared explicit images of servicewomen without their consent which led to other members sharing additional images. *Id*. The shared information also included personal information identifying the servicewomen in the images. Alicia Ferguson, *From Veteran to Victim: An in-Depth Analysis of the Military's New Revenge Porn Statute*, 46 U. Dayton L. Rev. 79, 83 (2020). The shared images were reported to the Marine Corps. *Id*. at 82.

Under the UCMJ, it was difficult to hold the servicemembers who participated in distributing the explicit images accountable, particularly under Article 120c, UCMJ, 10 U.S.C. § 920c, which does not account for nonconsensual photograph sharing when the photograph was originally received or taken with consent. Ferguson, *supra*, at 85; 163 Cong. Rec. H4478 (daily ed. May 23, 2017) (statement of Rep. Speier) ("Right now, the reprehensible acts of nonconsensually distributed and consensually obtained photographs is not clearly defined as illegal under the [UCMJ]."). Accordingly, Congress crafted an additional tool to facilitate prosecution of this conduct by enacting Article 117a, UCMJ.

The first iteration of Article 117a, UCMJ, was proposed as H.R. 2052, Protecting the Rights of IndiViduals Against Technological Exploitation Act (PRIVATE Act). H.R. 2052, 115th Cong. (2017). During the first House debate, the majority of the eight speakers mentioned servicewomen as the victims the new legislation sought to protect. *See* 63 Cong. Rec. H3052–58 (daily ed. May 2, 2017). The House passed H.R. 2052 on 24 May 2017. The Senate did not pass separate legislation but later included it in Section 533 of the National Defense Authorization Act (NDAA) for Fiscal Year 2018. *See* S. 1296, 115th Cong. (2017).

Prior to the enactment of the NDAA, the Department of Justice (DOJ) suggested Congress add the final element of Article 117a, UCMJ, requiring the conduct have a "reasonably direct and palpable connection" to "the military mission or military environment." Letter from [redacted] Assistant Att'y Gen., U.S. Dep't of Just., Office of Legis. Aff., to Sen. John McCain, Chairman, U.S. Senate Comm. on the Armed Servs., and Rep. Mac Thornberry, Chairman, U.S. House of Representatives Comm. on the Armed Servs. 10 (Nov. 8, 2017) [hereinafter DOJ Letter]. The DOJ provided this suggestion to avoid First Amendment concerns. *Id*. Congress included DOJ's recommendation in Article 117a(a)(4), UCMJ, which requires that the accused's "conduct, under the circumstances, [have] a reasonably direct and palpable connection to a military mission or military environment."

ARGUMENT

ARTICLE 117a, UCMJ, DOES NOT PREEMPT THE UNENUMERATED ARTICLE 134, UCMJ, OFFENSES CHARGED IN SPECIFICATION 1 AND 2 OF CHARGE I.

A. The standard of review is de novo.

"Whether an offense is preempted depends on statutory interpretation, which is a question of law" this Court reviews de novo. *United States v. Wheeler*, 77 M.J. 289, 291 (C.A.A.F. 2018) (citing *United States v. Cooley*, 75 M.J. 247, 257 (C.A.A.F. 2016)).

B. Charge I, Specifications 1 and 2 are not preempted as Article 117a's plain language and legislative history does not explicitly or implicitly show Congress intended to cover the offense of wrongful broadcast or distribution of intimate visual images in a complete way and the specifications are not a residuum of elements of Article 117a, UCMJ.

"The preemption doctrine prohibits application of Article 134 to conduct covered by Articles 80 through 132." *Manual for Courts-Martial, United States* (2024 ed.) [*MCM*], pt. IV, para. 91.c.(5)(a) at IV-143. This doctrine "is designed to prevent the government from

eliminating elements from congressionally established offenses under the UCMJ, in order to ease their evidentiary burden at trial." *Wheeler*, 77 M.J. at 293 (citations omitted).

The preemption doctrine is not triggered "simply because the offense charged under Article 134, UCMJ, embraces all but one element of an offense under another article." *United States v. Kick*, 7 M.J. 82, 85 (C.M.A. 1979) (citation omitted). It also "must be shown that Congress intended the other punitive article to cover a class of offenses in a complete way." *Id*. If the following two questions are answered in the affirmative, then preemption applies:

> The primary question is whether Congress intended to limit prosecution for wrongful conduct within a particular area or field to offenses defined in specific articles of the Code; the secondary question is whether the offense charged is composed of a residuum of elements of a specific offense and asserted to be a violation of either Articles 133 or 134.

United States v. McGuinness, 35 M.J. 149, 152 (C.M.A. 1992) (quoting *United States v. Wright*, 5 M.J. 106, 110–11 (C.M.A. 1978)).

This Court, however, has "required Congress to indicate through direct legislative language or express legislative history that particular actions or facts are limited to the express language of an enumerated article, and may not be charged under Article 134, UCMJ." *United States v. Anderson*, 68 M.J. 378, 387 (C.A.A.F. 2010) (citations omitted). Congress occupies the field if it "intended for one punitive article of the Code to cover the type of conduct concerned in a comprehensive . . . way." *McGuinness*, 35 M.J. at 151 (quoting *United States v. Maze*, 45 C.M.R. 34, 36 (1972)).

1. <u>The plain language of Article 117a, UCMJ, does not cover the entire field of wrongful broadcast or distribution of intimate visual images</u>.

When determining the scope of a statute, courts "look first to its language." *United States v. Murphy*, 74 M.J. 302, 305 (C.A.A.F. 2015) (citations omitted); *United States v. McPherson*, 73 M.J. 393, 395 (C.A.A.F. 2014). "When statutory language is unambiguous, the

statute's plain language will control." *United States v. Jacobsen*, 77 M.J. 81, 84 (C.A.A.F. 2017) (citation omitted); *see also United States v. Andrews*, 77 M.J. 393, 400 (C.A.A.F. 2018) (citations omitted) (stating as a first step in statutory construction the court uses a plain language analysis and applies the common and ordinary understanding of the words in the statute).

a. The military nexus element of Article 117a, UCMJ, shows the statute does not cover the entire field as it does not cover the same misconduct when it occurs in a solely civilian setting.

After the Department of Justice recommended the language to address First Amendment concerns, Congress included the final element of Article 117a, UCMJ, which requires the "conduct, under the circumstances, [to have] a reasonably direct and palpable connection to a military mission or military environment[.]" DOJ Letter, *supra*; *see also United States v. Wilcox*, 66 M.J. 442, 447 (C.A.A.F. 2008). This element demonstrates that the plain language of Article 117a, UCMJ, is focused on protecting the military mission and environment and does not apply in instances where there is no direct or palpable connection to the military. *See United States v. Grijalva*, 83 M.J. 669, 673 (C.G. Ct. Crim. App. 2023) ("Notwithstanding the First Amendment impetus for the addition, we see this addition as also strengthening the argument that Congress did not intend to cover civilian victims or preempt use of Article 134 for such victims.")

Appellant cites to *United States v. Jones* and *United States v. Hiser*[1] to argue that "the military nexus element shows Congress' intent for Article 117a to apply to a broad range of conduct that has nothing to do with the military status of the victim."[2] (Appellant's Br. at 15.)

[1] In *Jones*, the appellant sent intimate photos of his then wife without her consent to another female military member, [redacted] *United States v. Jones*, No. ACM 40226, 2023 WL 3720848, at *1–2 (A.F. Ct. Crim. App. May 30, 2023), *review denied*, 83 M.J. 478 (C.A.A.F. 2023). In *Hiser*, the appellant plead guilty to violating Article 117a, UCMJ, for uploading sexually explicit videos of him and his then wife without her permission to the website Pornhub. *United States v. Hiser*, 82 M.J. 60, 62–63 (C.A.A.F. 2022). His wife was also in the military. *Id.*

[2] The victim's status in the context of an Article 117a, UCMJ, charge is relevant to whether there is a military nexus. For a factfinder to examine the conduct's connection to the military,

Unlike *Jones* and *Hiser*, however, the misconduct here did not sufficiently contain a military nexus as the victim was a civilian and the associated misconduct occurred in a civilian setting on the internet which did not reach into the military environment.

In *Jones*, the victim was a military spouse and [redacted] was known by the appellant to be a military member. *Jones*, 2023 WL 3720848, at *1–2, 5. The reason the appellant sent the images was to facilitate a sexual liaison between the victim, himself, and [redacted] *Id*. at *5. In *Hiser*, the victim was in the military, she found the explicit videos online, and the appellant attested that other members in the command could view the videos and think that it degrades the military and that it caused a negative impact on the military community. *Hiser*, 82 M.J. at 66–67. The appellant uploaded the explicit videos online where any member in the appellant's and victim's command could view and identify the victim and himself based on a combination of the visual images in the videos and the information displayed with the videos. *Id*. at 65.

In this case, the victim was a civilian and the images and videos were posted on the internet. Appellant's dissemination of the photographs and videos were not connected to a military mission or environment. Individuals that interacted with the photograph could not know Appellant was an active-duty military member or that he disseminated the photographs or videos without the victim's consent. Unlike *Hiser* and *Jones*, the misconduct here occurred against a civilian victim with no ties to the military other than knowing Appellant and occurred in a solely civilian setting with no impact on a military mission or environment.

The plain language of Article 117a, UCMJ, does not cover analogous misconduct when the misconduct occurs in a civilian setting against civilian victims with no military nexus. This is precisely what occurred in this case. Appellant's misconduct fell into an existing gap between

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particularly its impact on a military mission or environment, while ignoring the status of the victim especially if it were a servicemember victim, would be illogical.

Articles 120c, UCMJ, and 117a, UCMJ. As such, the Government properly charged Appellant with violating Article 134, UCMJ, given that his conduct discredited the Coast Guard in the eyes of civilians.[3] (*See* R. at 206, 208, 219–20.)

b. Article 117a, UCMJ, does not apply to minors under the age of eighteen which further supports that the statute does not cover this class of offense in a complete way.

The protection under Article 117a, UCMJ, explicitly does not apply to someone under the age of eighteen. This excludes a vulnerable class of victims of this type of offense. By not protecting minors under the age of eighteen, Article 117a, UCMJ, leaves a gap as Article 134 (Child Pornography), UCMJ, does not cover all instances of wrongfully distributing intimate visual images of children based on the definition of child pornography. Child pornography under Article 134 means "material that contains either an obscene visual depiction of a minor engaging in sexually explicit conduct or a visual depiction of an actual minor engaging in sexually explicit conduct." *MCM*, pt. IV, para. 95.c.(4) at IV-147. With the definition of child pornography, there could be cases where a servicemember distributes a photograph of a topless seventeen-year-old female which does not display sexually explicit conduct, but the military would not be able to prosecute the misconduct as Article 117a, UCMJ, precludes minors under the age of eighteen. *See United States v. Gilbert*, No. ARMY 20190766, 2020 WL 4458493, at *3 (Army Ct. Crim. App. July 31, 2020) (stating "not every picture of a nude underage person constitutes child pornography")

[3] Additionally, the inclusion of the "service discrediting" element in Charge I, Specifications 1 and 2 protects against a constitutional overbreadth challenge while also encompassing Appellant's misconduct, which did not violate Article 117a, UCMJ, but still served to violate Article 134, UCMJ. *See Parker v. Levy*, 417 U.S. 733, 757–58 (1974) (rejecting the contention that Article 134 is facially invalid because of overbreadth).

Certainly, Congress did not intend to prohibit military commanders from charging perpetrators under Article 134, UCMJ, of the same misconduct solely because the victim is under the age of eighteen. Accordingly, it reasonably cannot be inferred that by promulgating Article 117a, UCMJ, Congress intended to fully occupy the field for an offense which has infinite reach through the internet. Instead, Congress intended to occupy a portion of the field to provide military commanders a specific tool to ensure the wrongful broadcast or distribution of intimate visual images which occurred in the Marines United scandal is prohibited. *See* 163 Cong. Rec. H4478 (daily ed. May 23, 2017) (statement of Rep. Kuster) ("I am proud to support H.R. 2052, the PRIVATE Act, which will update the Uniform Code of Military Justice to ensure that the type of explicit image sharing we saw in the Marines United scandal is expressly prohibited.").

c. Article 117a, UCMJ, does not fully cover the constitutionally permissible field of wrongful distribution of intimate visual images without consent.

The First Amendment protects freedom of speech. U.S. Const. amend. I. The Supreme Court "has long recognized that not all speech is of equal First Amendment importance." *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 56 (1988). "[W]here matters of purely private significance are at issue, First Amendment protections are often less rigorous." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (citations omitted); *see also People v. Austin*, 155 N.E.3d 439, 461 (Ill. 2019) ("[W]e observe that the United States Supreme Court has never declared unconstitutional a restriction of speech on purely private matters that protected an individual who is not a public figure for an invasion of privacy."). Additionally, the Supreme Court has stated that although servicemembers are not excluded from First Amendment protection,

> the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.

Parker, 417 U.S. at 758; *see also United States v. Rapert*, 75 M.J. 164, 172 (C.A.A.F. 2016).

The nonconsensual sharing of explicit images has become a widespread problem. To combat this, forty-eight states have enacted similar laws to Article 117a, UCMJ, which prohibit the nonconsensual distribution of intimate visual images. *See* Katherine G. Foley, *"But, I Didn't Mean to Hurt You": Why the First Amendment Does Not Require Intent-to-Harm Provisions in Criminal "Revenge Porn" Laws*, 62 B.C. L. Rev. 1365, 1368 (2021). These state laws do not contain a similar military nexus element yet have been upheld by the state's highest court. *See State v. Katz*, 179 N.E.3d 431, 439 (Ind. 2022) (holding the Indiana statute banning nonconsensual distribution of an intimate image did not violate the First Amendment free speech clause); *State v. Casillas*, 952 N.W.2d 629, 634 (Minn. 2020) (holding the Minnesota statute criminalizing the nonconsensual dissemination of private sexual images does not violate the First Amendment); *Austin*, 155 N.E.3d at 448 (finding the Illinois statute criminalizing the nonconsensual dissemination of private sexual images does not unconstitutionally restrict the rights of free speech or due process); *State v. VanBuren*, 214 A.3d 791, 795 (Vt. 2019) (holding that the Vermont statute prohibiting the disclosure of nonconsensual pornography is constitutional). The Supreme Court has yet to hear a case regarding the constitutional validity of these types of statutes. Foley, *supra*, at 1392.

Appellant argues that based on *United States v. Wilcox*, "there is no field remaining beyond Article 117a that does not run afoul of the First Amendment (or *Wilcox*)." (Appellant's Br. at 19.) In *Wilcox*, the accused was charged with wrongfully advocating anti-government and disloyal sentiments and advocating racial intolerance on the Internet. *Wilcox*, 66 M.J. at 443–45. CAAF examined whether the charged offense was legally sufficient considering the First Amendment. *Id*. at 446. CAAF held no evidence established the second element of the Article

134, UCMJ, offense. *Id*. at 451–52. The "substantive messages conveyed therein, while distasteful, constitute Appellant's ideas on issues of social and political concern, which has been recognized as 'the core of what the First Amendment is designed to protect.'" *Id*. at 447. Additionally, CAAF found that "a direct and palpable connection between speech and the military mission or military environment is also required for an Article 134, UCMJ, offense charged under a service discrediting theory." *Id*. at 448–49.

The conduct in *Wilcox* is dissimilar to the misconduct Article 117a, UCMJ, criminalizes. *Wilcox* examined traditional speech, i.e. spoken and written word, and should not apply when the "speech" at issue is expression in the form of nonconsensual distribution of intimate images.[4] CAAF in *Wilcox* was concerned with servicemember's opinions, ideas, and speech being held to a subjective standard of what some member or members of the public would find offensive. *Id*. at 449. The nonconsensual sharing of intimate visual images, however, is not traditional speech and similar conduct to Article 117a, UCMJ, is something Congress could criminalize in the military regardless of whether there is a military nexus in light of the almost nonexistent public value of the speech and the substantial harm it causes victims. *See VanBuren*, 214 A.3d at 800 (finding the state interest to be compelling in light of the Supreme Court's "recognition of the relatively low constitutional significance of speech relating to purely private matters, evidence of potentially severe harm to individuals arising from nonconsensual publication of intimate depictions of them, and a litany of analogous restrictions on speech that are generally viewed as

[4] At least one military court has recognized this distinction. *See United States v. Adair*, No. ARMY 20100933, 2013 WL 4647553, at *6 (Army Ct. Crim. App. Aug. 28, 2013) ("We need not decide whether *Wilcox's* 'direct and palpable' requirement is limited to the facts of that case, that is, to traditional speech in the form of the spoken or written word, or whether it's requirements reach all potentially protected speech to include images portraying virtual child pornography.").

uncontroversial and fully consistent with the First Amendment"); *Casillas*, 952 N.W.2d at 642 ("Victims suffer from post-traumatic stress disorder, anxiety, depression, despair, loneliness, alcoholism, drug abuse, and significant losses in self-esteem, confidence, and trust."); Major Joshua B. Fix, *The Revenge of Preemption How to Correct Unintended Consequences of the Military's "Revenge Porn" Statute*, 2021-3 Army Law. 52, 57 (2021) ("The substantial government interests that Article 117a furthers include the protection of individual privacy interests and prevention of the individual and societal harms that result from [wrongful distribution of intimate images]."). The Government including the military has a substantial interest in prohibiting the nonconsensual distribution of intimate visual images even when it occurs solely in a civilian setting against a civilian victim.

Accordingly, Article 117a, UCMJ, does not fully cover the constitutionally permissible field of criminalizing the nonconsensual distribution of intimate visual images.

2. Article 117a's legislative history shows that Congress enacted the statute in response to the Marines United scandal to provide military commanders with an additional tool to ensure servicemembers are protected in similar circumstances. It does not occupy the field of wrongful broadcast or distribution of intimate visual images especially when the misconduct occurs in a solely civilian setting.

There is no direct legislative language that shows Congress limited the prosecution for all wrongful broadcast and distribution of intimate visual images to Article 117a, UCMJ. *See United States v. Avery*, 79 M.J. 363, 369 (C.A.A.F. 2020) (finding that no direct legislative language or express legislative history compelled "the conclusion that Congress intended to wholly subsume the field of indecent language communicated to children within Article 120b(c), UCMJ" and therefore it was not shown that Congress intended to limit prosecution to that provision). The Congressional Record on the PRIVATE Act, however, demonstrates Congress enacted Article 117a, UCMJ, to protect servicemembers from similar conduct that occurred in

the Marines United scandal and provide military commanders an additional tool to combat this behavior. Specifically, "The PRIVATE Act . . . would amend the [UCMJ] to ensure that the type of explicit sharing that was seen in the Marines United scandal is expressly prohibited." 163 Cong. Rec. H3054 (daily ed. May 2, 2017) (statement of Rep. Kuster). For the first House debate on 2 May 2017, Representative Frankel opened the debate by discussing the Marines United Facebook page stating that "male [M]arines posted nude or intimate photos of female servicemembers and veterans without their consent." 163 Cong. Rec. H3052 (daily ed. May 2, 2017). Various representatives described the misconduct as unacceptable, shocking, disturbing, degrading, etc. 163 Cong. Rec. H3054, 3056, 3058 (daily ed. May 2, 2017).

During the debate, Congress was particularly focused on the victims of the Marines United scandal supporting the enactment of a new law "to protect victims of nonconsensual sharing of intimate media in the Armed Forces and to hold those who engage in this dishonorable practice accountable under the military law." 163 Cong. Rec. H3056 (daily ed. May 2, 2017). Representative Bacon reasoned that "Congress has an obligation to act and to remove any doubt that those who traffic in intimate pictures of their teammates and wrongfully share them not only violate the bonds of human decency, but are breaking the law." *Id*. The proponent for this Act, Representative McSally, acknowledged that

> [t]he unearthing of this widespread problem has highlighted the difficulty in prosecuting Active Duty military members, though, who do this, who share private, intimate photos of their teammates without consent. This action is harmful, and it destroys the bonds of trust in the unit that are so critical for our warfighting capabilities.

163 Cong. Rec. H3058 (daily ed. May 2, 2017).

On 23 May 2017, the House held their second debate on the PRIVATE Act. 163 Cong. Rec. H4477 (daily ed. May 23, 2017). At the beginning, Representative McSally articulated that

> the notion that any servicemember would think it is acceptable to upload, view, or comment on nude photos of their fellow servicemembers is a serious problem that must be fixed. This bill will help hold perpetrators of these types of crimes accountable . . . . The PRIVATE Act is designed to protect our servicemen and -women . . . .

163 Cong. Rec. H4478 (daily ed. May 23, 2017). The focus during this debate was again on the servicewomen victims of the Marines United scandal. Specifically, Representative Speier stated, "That is why this bill is a critical step in ensuring that our female servicemembers aren't distracted from protecting the country by having to also protect themselves against online abusers and colleagues within the services." *Id.* Speaking directly to "those warriors whose honor was violated" Representative Frankel said, "We stand with you today to declare that you were targets of behavior that we will not tolerate; and we will seek to punish those who offended and prevent similar conduct . . . because that conduct is not only degrading to brave patriots, it threatens the safety and security of our Nation." 163 Cong. Rec. H4479 (daily ed. May 23, 2017).

Anticipating a gap in the PRIVATE Act, Representative Speier explicitly stated:

> I also want to note that the passage of the PRIVATE Act *does not apply to the civilian people* in our country. Although 34 States have passed laws to address nonconsensual pornography, their approaches vary widely, and some are very flawed. That is why a Federal law is needed to provide a single, clear articulation of the elements of this crime to ensure that Americans in every part of the country—civilian and military—are protected if they are subjected to this heinous abuse.[5]

163 Cong. Rec. H4478 (daily ed. May 23, 2017) (emphasis added).

[5] Appellant argues that "[t]his language indicates that while the PRIVATE Act cannot generally be used to *prosecute* civilians (unless they are subject to the UCMJ), it was certainly intended to *protect* them . . . ." (Appellant's Br. at 17.) Representative Speier during her allotted time, however, made clear that her focus was on the victims of this type of behavior. She was highlighting that the PRIVATE Act does not protect civilian victims to emphasize that a federal law is needed so that both military and civilian victims are properly protected as she articulated at the end of her statement above.

During both debates, the PRIVATE Act was described as an *additional* tool for military commanders to utilize. Specifically, during the first debate, Representative McSally stated the bill is "not going to solve it by itself, but it is going to give the commanders *another tool*." 163 Cong. Rec. H3058 (daily ed. May 2, 2017) (emphasis added). During the second debate, Representative McSally highlighted that "[w]hile the [UCMJ] currently contains two general articles under which these crimes can already be prosecuted, this new provision will give commanders an *additional specific tool* and send a clear message to servicemembers that this behavior is unacceptable and is, in fact, a crime." 163 Cong. Rec. H4478 (daily ed. May 23, 2017) (emphasis added). She also stated, "I know that you need to give commanders *all the tools* they need to hold perpetrators accountable . . . . This bill gives commanders an *additional tool* in order to address this culture and to hold people accountable for their abhorrent behavior." 163 Cong. Rec. H4480 (daily ed. May 23, 2017) (emphasis added).

Representative Lee added, "I know that this legislation that gives the military leadership *additional tools* to ensure that the depiction of women and others in the United States military, against their will, on social media, will not be tolerated and will not be viewed as an honorable act under the [UCMJ]." *Id*. (emphasis added). Instead of the PRIVATE Act being the only tool military commanders could use to combat this misconduct, Congress intended for it to be an *additional tool* they could utilize. Overall, the Congressional Record demonstrates Congress was concerned with addressing the misconduct that occurred in the Marines United scandal and ensuring that servicemembers are protected from that misconduct.

Lastly, this Court recently decided this same issue in *United States v. Grijalva* holding that Article 117a's language and legislative history, persuades the Court that "Congress intended it to enhance the military's ability to prosecute those who wrongfully broadcast intimate images

of fellow servicemembers and others with a military nexus, not cover a class of offenses in a complete way so as to preclude prosecution under Article 134 when there is no such nexus." *Grijalva*, 83 M.J. at 673. Accordingly, this Court should find that Article 117a, UCMJ, does not preempt Specification 1 and 2 of Charge I. *See United States v. Cardenas*, 80 M.J. 420, 423 (C.A.A.F. 2021) (citation omitted) ("Stare decisis is the doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again. '[A]dherence to precedent is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'").

3. Specification 1 and 2 of Charge I are not a residuum of elements of Article 117a, UCMJ.

The concern "that the government would take an extant UCMJ offense and remove a vital element to create a diluted crime under Article 134, UCMJ—is the very impetus for the preemption doctrine." *Avery*, 79 M.J. at 367 (citing *Wheeler*, 77 M.J. at 293). The preemption doctrine "is designed to prevent the government from eliminating elements from congressionally established offenses under the UCMJ, in order to ease their evidentiary burden at trial." *Wheeler*, 77 M.J. at 293 (citations omitted). Neither specification is composed of a residuum of elements of Article 117a, UCMJ. The below table provides a comparison of the specifications, the New Hampshire statute, and Article 117a, UCMJ.

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Charge I Specification 1	**Charge I Specification 2**	**New Hampshire Revised Statutes Annotated § 644:9** (Violation of Privacy)	**Article 117a, UCMJ** (Wrongful broadcast or distribution of intimate visual images) (summarized)
knowingly and unlawfully disseminate photographs of	knowingly and unlawfully disseminate videos of	knowingly disseminates or causes the dissemination of any photograph or video recording of	knowingly and wrongfully distributed an intimate visual image of another person or a visual image of sexually explicit conduct involving a person who: is at least 18 years of age at the time it was created; is identifiable; does not explicitly consent to distribution
himself engaging in sexual activity with [redacted] on the Internet	**himself engaging in sexual activity with** [redacted] on the Internet	**himself or herself engaging in sexual activity with another person**	knows or reasonably should have known that the intimate visual image was made under circumstances in which the victim retained a reasonable expectation of privacy;
without the express consent of [redacted] to disseminate such photographs, in violation of Title LXII, Chapter 644, Section 9, of the New Hampshire Revised Statutes,	without the express consent of [redacted] to disseminate such videos, in violation of Title LXII, Chapter 644, Section 9, of the New Hampshire Revised Statutes,	without the express consent of the other person or persons who appear in the photograph or videotape	knows or reasonably should have known that the distribution of the intimate visual image is likely to cause harm, harassment, intimidation, emotional distress, or financial loss; or and to harm substantially the depicted person with respect to that person's health, safety, business, calling, career, financial condition, reputation, or personal relationships; and
and that such conduct was of a nature to bring discredit upon the armed forces.	and that such conduct was of a nature to bring discredit upon the armed forces.		conduct had a reasonably direct and palpable connection to a military mission or military environment.

The Government here did not lessen its evidentiary burden as both specifications required proof of an element not contained in Article 117a, UCMJ. Specifically, that the accused himself engaged in sexual activity with the victim in the images and videos.[6] Article 117a, UCMJ,

[6] R. at 202, 209, 215–17.

requires that the victim be identifiable, but does not require that the accused be identifiable while engaging in sexual activity. *See United States v. Seeto*, No. ACM 39247, 2018 WL 5623638, at *8 (A.F. Ct. Crim. App. Oct. 26, 2018) (finding the indecent conduct specification was not composed of a residuum of elements of a specific offense because it added an element not required by any Article 120 or 128, UCMJ, offense—that the conduct was indecent); *United States v. Kowalski*, 69 M.J. 705, 707 (C.G. Ct. Crim. App. 2010) (finding "the offenses as charged are not composed of a residuum of elements of an offense under another article. On the contrary, they have an obvious additional element: use of a means of interstate commerce").

Therefore, Specification 1 and 2 of Charge I are not preempted by Article 117a, UCMJ.

C. Appellant had fair notice that his conduct was punishable.

Appellant argues that prosecuting him under Specification 1 and 2 of Charge I conflicts with the notion that a servicemember must have fair notice.[7] (Appellant's Br. at 22.) Appellant, however, had adequate notice of the criminality of his conduct from the New Hampshire statute which prohibits Appellant's conduct here. N.H. Rev. Stat. Ann. § 644:9 (2013); *see United States v. Vaughan*, 58 M.J. 29, 31 (C.A.A.F. 2003) (finding the *MCM*, federal law, state law, military case law, military custom and usage, and military regulations are sources of fair notice).

CONCLUSION

WHEREFORE, the United States respectfully requests this Court affirm the findings and sentence.

[7] "The military is a notice pleading jurisdiction." *United States v. Fosler*, 70 M.J. 225, 229 (C.A.A.F. 2011) (citation omitted). Servicemembers must have "fair notice" that their conduct is punishable under the UCMJ. *United States v. Bivins*, 49 M.J. 328, 330 (C.A.A.F. 1998) (quoting *Parker*, 417 U.S. at 756).

Respectfully submitted,

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Elizabeth Ulan
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[redacted]

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Answer was delivered to this Honorable Court, Special Victim's Counsel, and opposing counsel via email on 16 April 2024.

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Elizabeth Ulan
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Appellate Government Counsel
Commandant (CG-LMJ)
[redacted]

IN THE UNITED STATES
COAST GUARD COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee* v. Matthew L. KEATY SN / E-3 U.S. Coast Guard *Appellant*	23 April 2024 APPELLANT'S MOTION FOR ORAL ARGUMENT Docket No. 1493 Case No. CGCMSP 25021 Before: McClelland, Brubaker, Judge Tried at Norfolk, VA, on 7 June 2023, before a Special Court-Martial convened by Commander, Coast Guard Atlantic Area.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
COAST GUARD COURT OF CRIMINAL APPEALS

Pursuant to Rules 23 and 25 of the Joint Rules of Appellate Procedure, Seaman (SN) Matthew L. KEATY, through counsel, hereby requests this Court order oral argument for Appellant's assigned error; specifically, whether the unenumerated Article 134, Uniform Code of Military Justice (UCMJ) offenses charged in Specifications 1 and 2 of Charge I are preempted by Article 117a, UCMJ.

This Court should order oral argument because oral argument would provide the opportunity to develop and focus the parties' positions on this issue.

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WHEREFORE, Appellant respectfully requests that this Court grant the instant motion.

Respectfully submitted,

POPE.THADEUS.JACKSON.[redacted]
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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was filed electronically with this Court and that a copy was delivered to opposing counsel and Special Victim's Counsel via email on 23 April 2024.

POPE.THADEUS.JAC[redacted] Digitally signed by POPE.THADEUS.JACKSON.[redacted]
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Thad Pope
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COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee* v. Matthew L. KEATY SN / E-3 U.S. Coast Guard *Appellant*	23 April 2024 APPELLANT'S REPLY Docket No. 1493 Case No. CGCMSP 25021 Before: McClelland, Brubaker, Judge Tried at Norfolk, VA, on June 7, 2023, before a Special Court-Martial convened by Commander, Coast Guard Atlantic Area.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COAST GUARD COURT OF CRIMINAL APPEALS

Thad Pope
LCDR, USCG
Appellate Defense Counsel
[redacted]

COMES NOW, SN Matthew KEATY, in Reply to the Government's Answer:

I. The preemption doctrine prohibits the Government's application of Article 134 for Appellant's conduct because Article 117a occupies the field of the nonconsensual broadcast or distribution of consensually taken intimate images of adults.

Preemption occurs "where Congress has occupied the field of a given type of misconduct by addressing it in one of the specific punitive articles of the code, another offense may not be created and punished under Article 134, UCMJ, by simply deleting a vital element."[1] The Government is preempted from charging Appellant under Article 134 because Congress intended Article 117a to cover this class of offenses in a complete way[2] and the offense charged was composed of a residuum of elements from another specific offense.[3]

a. The plain language of Article 117a shows Congress intended all persons over 18 to be eligible victims, regardless of military status.

As previously identified in Appellant's Brief, the statute criminalizes the broadcasting or distribution of another person's consensually provided intimate image without consent.[4] The Government argues that Article 117a does not preempt the current charge because it does not apply: (1) in a "solely civilian setting"; (2) to a minor under 18; and (3) to the constitutionally available field.

In response to the Government's first argument, Appellant would like to initially point out the Government's argument in a strikingly similar case: *U.S. v. Grijalva*.[5] The Government

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[1] *United States v. Kick*, 7 M.J. 82, 85 (C.M.A. 1979).
[2] *United States v. Anderson*, 68 M.J. 378, 386–87 (C.A.A.F. 2010) (citing *Kick*, 7 M.J. at 85).
[3] *United States v. McGuinness*, 35 M.J. 149, 151-52 (C.M.A. 1992), (quoting *United States v. Wright, 5 M.J. 106, 110-11 (C.M.A. 1978)*); see also *United States v. Avery*, 79 M.J. 363, 366 (C.A.A.F. 2020).
[4] 10 U.S.C. § 917a (2018).
[5] *United States v. Grijalva*, 83 M.J. 669, 673 (C.G. Ct. Crim. App.), *review granted in part*, 84 M.J. 103 (C.A.A.F. 2023), and *review denied*, No. 23-0215/CG, 2024 WL 645349 (C.A.A.F. Jan. 22, 2024).

argued to this Court that (1) Article 117a did not cover cases involving civilian victims; (2) *Grijalva* featured a civilian victim; and therefore (3) the Article 134 charge in *Grijalva* was not preempted by Article 117a.[6] This Court was persuaded by the Government's "victim-centric" argument regarding Article 117a and accordingly affirmed.

But after the Court of Appeals for the Armed Forces (CAAF) certified the case for review, the Government changed its argument. The Government abandoned its "victim-centric" approach and adopted one wherein Article 117a can be applied in cases involving a civilian victim when a military nexus exists.[7] The appellant argued to CAAF that the Government should be judicially estopped from adopting a legal position that contradicted its prior one in the same case.[8]

While the CAAF's decision is still pending in *Grijalva*, this Court should consider applying the concept of judicial estoppel in Appellant's case. In short, "the integrity of the judicial process" must be protected "by prohibiting parties from deliberately changing positions according to the exigencies of the moment."[9]

Turning back to the Government's current position in Appellant's case, it largely follows the "military nexus" argument they made before CAAF, but does mix in the previously featured

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[6] Government's Answer at 17, *United States v. Grijalva*, 83 M.J. 669 (C.G. Ct. Crim. App.) (Docket No. 1482) (The Government filed this Answer with the Court on February 27, 2023. Copies can be provided upon request. Briefs anticipated to be shared publicly by the Court at: https://stjececmsdusgva001.blob.core.usgovcloudapi.net/public/documents/us_v_grijalva_mark_uscg.pdf).

[7] Brief on Behalf of Appellee, *United States v. Grijalva*, 84 M.J. 103 (C.A.A.F. 2023) (*review granted in part*), https://www.armfor.uscourts.gov/briefs/2023Term/Grijalva230215AppelleeBrief.pdf.

[8] Reply on Behalf of Appellant, *United States v. Grijalva*, 84 M.J. 103 (C.A.A.F. 2023) (*review granted in part*), https://www.armfor.uscourts.gov/briefs/2023Term/Grijalva230215AppellantReplyBrief.pdf.

[9] *New Hampshire v. Maine*, 532 U.S. 742 (2001).

"victim-centric" argument[10] and invites this Court to apply its holding in *Grijalva* to the current case.[11] The gist of this argument is that by adding an element to the offense that required the conduct to have a military nexus, Congress did not intend to cover the entire field. This argument should be rejected as it both ignores the original draft of Article 117a, that did not feature this element, and that the element was only added after DoJ's recommendations. In other words, the plain language of the previous draft indicates Congress intended Article 117a to cover the entire field. They only added the final element, per DoJ guidance, to survive First Amendment challenges, in effect covering the entire field available to them.

Turning to the second part of the argument, limiting Article 117a to adults, Congress has already occupied the field when victims are under the age of 18 and obviously did not want to have Article 117a overlap with Article 134.[12] In addition, Article 117a is limited to consensually taken intimate images, wherein those under 18 years old often lack the ability to consent. Any gap in the separate field of child-related offenses covered by Article 134 does not equate to a gap in the field occupied by Article 117a. Furthermore, this Court stated in *Grijalva* that "[t]he statutory language makes clear that Article 117a is tailored to address nonconsensual sharing of intimate images *of adults* that, "under the circumstances, had a reasonably direct and palpable connection to a military mission or military environment" [emphasis added].[13]

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[10] *See* Footnote 5 of the Government's Answer, wherein it characterizes Representative Speier's testimony as "highlighting that the PRIVATE ACT does not protect civilian victims…."
[11] Page 15 of Government Answer. Basically, although the Government has mostly abandoned the "victim-centric" argument it used before this Court in *Grijalva*, it is urging the Court to apply its *Grijalva* decision, seemingly based on that position, to Appellant's case. Once again, this Court should consider applying judicial estoppel principles.
[12] Article 134 (Child pornography).
[13] *United States v. Grijalva*, 83 M.J. 669, 673 (C.G. Ct. Crim. App.), review granted in part, 84 M.J. 103 (C.A.A.F. 2023), and review denied, No. 23-0215/CG, 2024 WL 645349 (C.A.A.F. Jan. 22, 2024).

As for the Government's third argument, the Government states, *inter alia*, "[t]he conduct in *Wilcox* is dissimilar to the misconduct Article 117a criminalizes. *Wilcox* examined traditional speech (i.e., spoken and written word) and should not apply when the 'speech' at issue is expression in the form of nonconsensual distribution of intimate images."[14] The Government goes on to argue that because "the nonconsensual sharing of intimate visual images is not traditional speech . . . Congress could criminalize it in the military" regardless of a military nexus. In other words, according to the Government, Congress needlessly limited Article 117a by including a military nexus element. As such, there is a whole area of available conduct left uncovered by Article 117a, which means, ultimately, that the current Article 134 charge is not preempted by Article 117a.

This analysis and argument flies in the face of the DoJ's analysis. The DoJ presumably considered the issues raised by the Government and rejected them. Congress presumably considered the issues raised by the Government and rejected them. DoJ clearly made its recommendation because without this element Article 117a would be unconstitutional. The reason Congress adopted it was to ensure Article 117a would survive First Amendment challenges. Had Article 117a been codified without the military nexus element, Congress believed that the statute would likely not withstand a facial challenge under the First Amendment.[15] A successful facial challenge could have resulted in the invalidation of any and all convictions under Article 117a. Contrary to the Government's Answer, it does not matter whether reasonable legal minds can differ as to the scope of *Wilcox* or the First Amendment's protections of the speech at issue here. All that matters is that *Congress decided* that the First Amendment

[14] Government's Answer at 11.
[15] *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003); *United States v. Wilcox*, 66 M.J. 442, 449 (C.A.A.F. 2008)).

applies to this speech, and limited the available field and thus prosecution of this conduct to only that which includes a military nexus. This Court need not conduct its own First Amendment or *Wilcox* analysis, or wait on CAAF, because Congress has spoken and occupied the field with Article 117a.

b. The legislative history show that Congress intended Article 117a to cover the class of offenses relating to servicemembers distributing consensually taken intimate images of adults without obtaining consent to distribute the images in a complete way.

Appellant agrees with the Government that the PRIVATE Act was enacted in response to the Marine United scandal.[16] However, both servicemembers and civilians were victimized by the Marines United scandal,[17] and Appellant's Brief details how legislative history supports that the PRIVATE Act was intended to protect servicemembers and civilians.[18] Although the PRIVATE ACT was not created to prosecute civilians, it was created in part to protect civilians when they are the victims of servicemembers' conduct.[19]

c. Specifications 1 and 2 of Charge I are composed of a residuum of elements of Article 117a.

The preemption doctrine is "designed to prevent the Government from eliminating elements from congressionally established offenses under the UCMJ in order to ease their evidentiary burden at trial."[20] Based on their arguments at trial and to this Court, it is clear the

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[16] Appellee's Answer at 12.
[17] Shawn Snow, *Seven Marines court-martialed in wake of Marines United scandal*, MARINE CORPS TIMES (Mar. 1, 2018), https://www.marinecorpstimes.com/news/your-marine-corps/2018/03/01/seven-marines-court-martialed-in-wake-of-marines-united-scandal/.
[18] The Protecting the Rights of Individuals Against Technology Exploitation Act (The PRIVATE Act), H.R. 2052, 115th Cong. (2017)); 163 CONG. REC. H3052, at 3058 (daily ed. May 2, 2017) (statement of Rep. Martha McSally); Hearing to Receive a Briefing on Information Surrounding the Marines United Website: Before the S. Comm. on the Armed Services, 115th Cong. (2017) at 2 (statement of Sen. John McCain).
[19] 163 Cong. Rec. H4477-80 (daily ed. May 23, 2017) at 4479 (statement of Rep. Speier).
[20] *United States v. Wheeler*, 77 M.J 289, 293 (C.A.A.F. 2018).

Government believed it had insufficient evidence to prove a nexus between the conduct and the military. At trial, instead of investigating further regarding a potential nexus, they decided to create an unenumerated Article 134 clause 2 violation, featuring elements of 117a and Article 134, along with admittedly surplus language[21] from a New Hampshire State law. They obviously did so to cure the evidentiary issues posed by proceeding under either Article 117a or state law. This is exactly what the preemption doctrine is supposed to prevent. The preemption doctrine is "designed to prevent the Government from eliminating elements from congressionally established offenses under the UCMJ in order to ease their evidentiary burden at trial."[22]

Conclusion

For the foregoing reasons, Appellant respectfully requests that this Court set aside the findings as to Charge I, Specifications 1 and 2.

Respectfully submitted,

POPE.THADEUS.JACKSON [redacted] Digitally signed by POPE.THADEUS.JACKSON [redacted] Date: 2024.04.23 15:22:24 -04'00'

Thad Pope
LCDR, USCG
Appellate Defense Counsel
[redacted]

[21] R. at 69-70.
[22] *United States v. Wheeler*, 77 M.J. 289, 293 (C.A.A.F. 2018).

Certificate of Filing and Service

I certify that a copy of the foregoing was delivered to the Court, opposing counsel, and Special Victims' Counsel via email on 23 April 2024.

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KSON.[redacted]
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Thad Pope
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Appellate Defense Counsel
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APPELLATE BRIEFS

IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee v. Matthew L. KEATY Seaman (E-3) U.S. Coast Guard, Appellant	21 August 2024 SUA SPONTE ORDER CGCMSP 25021 DOCKET NO. 1493 ORDER

This Court issued a sua sponte order on 12 July 2024, ordering the Government to submit a brief addressing the decision of the Court of Appeals for the Armed Forces in *United States v. Grijalva* of 26 June 2024, and providing for an Answer by Appellant. The Government submitted its brief on 12 August 2024.

During a bench conference on 20 August 2024, Appellant submitted an oral motion for leave to file Supplemental Assignments of Error, and an oral motion for enlargement of time to submit the brief provided for by this Court's order of 12 July 2024. The motions were accepted as such. We conclude there is good cause to grant the motions.

Accordingly, it is, by the Court, this 21st day of August, 2024,

ORDERED

That Appellant may file Supplemental Assignments of Error, which may be combined with Appellant's Answer to the Government's brief provided for by this Court's order of 12 July 2024. This combined pleading shall be filed by 13 September 2024. The Government may file a responsive pleading by 16 October 2024.

For the Court,
VALDES.SARAH.P[redacted] Digitally signed by VALDES.SARAH.P[redacted] Date: 2024.08.21 08:53:42 -04'00'
Sarah P. Valdes
Clerk of the Court

Copy: Judge Advocate General's Representative
Appellate Government Counsel
Appellate Defense Counsel

IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

v.

Matthew L. KEATY
Seaman (E-3)
U.S. Coast Guard,
Appellant

12 July 2024

SUA SPONTE ORDER

CGCMSP 25021

DOCKET NO. 1493

ORDER

In his assignments of error, Appellant asserts that two specifications alleging unenumerated offenses under Article 134, Uniform Code of Military Justice (UCMJ), are preempted by Article 117a, UCMJ. After briefing was completed, the Court of Appeals for the Armed Forces, reviewing *United States v. Grijalva,* 83 M.J. 669 (C.G. Ct. Crim. App. 2023), on 26 June 2024 held that a specification alleging an unenumerated offense under Article 134, UCMJ, as charged, covered the same conduct as Article 117a, UCMJ, and was therefore preempted. The Court desires additional briefing on whether *Grijalva* is dispositive in this case or whether the different manner of pleading the specification, including its invocation of a state statute, distinguishes it from *Grijalva*.

Accordingly, it is, by the Court, this 12th day of July, 2024,

ORDERED:

That, within 30 days of this order, the Government show cause as to why the holding in *Grijalva* does not compel the same result in this case. Appellant may file an Answer within 14 days of receipt of Government's brief. Absent good cause shown, no reply brief shall be filed.

For the Court,
VALDES.SARAH.P.[redacted] Digitally signed by VALDES.SARAH.P.[redacted] Date: 2024.07.12 11:07:32 -04'00'
Sarah P. Valdes
Clerk of the Court

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Appellate Government Counsel
Appellate Defense Counsel

REMAND

THERE WERE NO REMANDS

NOTICE OF COMPLETION OF APPELLATE REVIEW