

CERTIFIED RECORD OF TRIAL

(and accompanying papers)

of

Leger

Tyler

J

LCpl

(Last Name)

(First Name)

MI

(DoD ID No.)

(Rank)

USMC

Kaneohe Bay, MCBH

(Unit/Command Name)

(Branch of Service)

(Location)

By

General Court-Martial (GCM)

COURT-MARTIAL

(GCM, SPCM, or SCM)

Convened by

Major General J. W. Bierman, Commanding General

(Title of Convening Authority)

(Unit/Command of Convening Authority)

Tried at

MCBH

On

9 July 21 - 15 July 21

(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")

CONVENING ORDER



UNITED STATES MARINE CORPS



IS JUDY REED TO

5817

SJA

02 JUL 2021

GENERAL COURT-MARTIAL CONVENING ORDER 1a-20:

General Court-Martial Convening Order 1-20 is hereby modified for the case of *United States v. Lance Corporal Tyler J. Leger, U.S. Marine Corps*. It may proceed at Oahu, Hawaii, or elsewhere as I direct. Per R.C.M. 912A(a)(4)(B), I authorize the military judge to impanel alternate members only if, after the exercise of all challenges, excess members remain.

DELETE

Colonel [REDACTED] U.S. Marine Corps;
Lieutenant Colonel [REDACTED] U.S. Marine Corps;
Major [REDACTED] U.S. Marine Corps;
Major [REDACTED] U.S. Marine Corps;
Captain [REDACTED] U.S. Marine Corps;
Captain [REDACTED] U.S. Marine Corps;
First Lieutenant [REDACTED] U.S. Marine Corps; and
Second Lieutenant [REDACTED] U.S. Marine Corps.

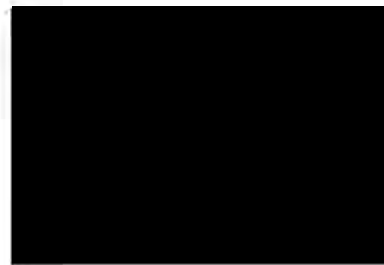
ADD

Lieutenant Colonel [REDACTED] U.S. Marine Corps;
Major [REDACTED] U.S. Marine Corps;
Major [REDACTED] U.S. Marine Corps;
First Lieutenant [REDACTED] U.S. Marine Corps;
First Lieutenant [REDACTED] U.S. Marine Corps;
Second Lieutenant [REDACTED] U.S. Marine Corps;
Gunnery Sergeant [REDACTED] U.S. Marine Corps;
Staff Sergeant [REDACTED] U.S. Marine Corps;
Staff Sergeant [REDACTED] U.S. Marine Corps;
Staff Sergeant [REDACTED] U.S. Marine Corps;
Sergeant [REDACTED] U.S. Marine Corps;
Sergeant [REDACTED] U.S. Marine Corps;
Sergeant [REDACTED] U.S. Marine Corps;
Sergeant [REDACTED] U.S. Marine Corps;

The general court-martial, as now established, is constituted as follows:

MEMBERS

Lieutenant Colonel [REDACTED] U.S. Marine Corps;
Major [REDACTED] U.S. Marine Corps;
Major [REDACTED] U.S. Marine Corps;



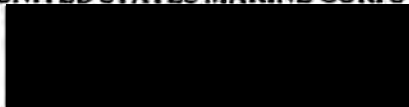
First Lieutenant [REDACTED] U.S. Marine Corps;
First Lieutenant [REDACTED] U.S. Marine Corps;
Second Lieutenant [REDACTED] U.S. Marine Corps;
Gunnery Sergeant [REDACTED] U.S. Marine Corps;
Staff Sergeant [REDACTED] U.S. Marine Corps;
Staff Sergeant [REDACTED] U.S. Marine Corps;
Staff Sergeant [REDACTED] U.S. Marine Corps;
Sergeant [REDACTED] U.S. Marine Corps;
Sergeant [REDACTED] U.S. Marine Corps;
Sergeant [REDACTED] U.S. Marine Corps;
Sergeant [REDACTED] U.S. Marine Corps.

In accordance with R.C.M. 505(c)(1)(B) and before this general court-martial is assembled, the Staff Judge Advocate, [REDACTED], may excuse members without cause shown.

[REDACTED]
[REDACTED]
[REDACTED]
J. W. BIERMAN
Major General
U.S. Marine Corps
Commanding General



UNITED STATES MARINE CORPS



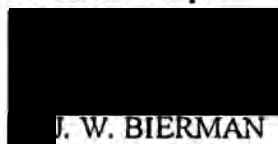
IN REPLY REFER TO
5817
SJA
25 AUG 2020

GENERAL COURT-MARTIAL CONVENING ORDER 1-20:

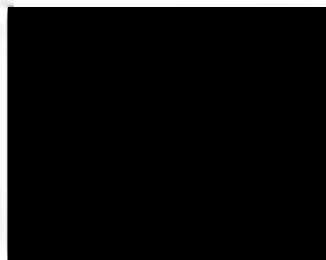
A general court-martial is hereby convened. It may proceed at [REDACTED] Kaneohe Bay, Hawaii, or elsewhere as I direct to try such persons that may be properly brought before it. The court will be constituted as follows:

MEMBERS

Colonel [REDACTED] U.S. Marine Corps;
Lieutenant Colonel [REDACTED] U.S. Marine Corps;
Major [REDACTED] U.S. Marine Corps;
Major [REDACTED] U.S. Marine Corps;
Captain [REDACTED] U.S. Marine Corps;
Captain [REDACTED] U.S. Marine Corps;
First Lieutenant [REDACTED] U.S. Marine Corps; and
Second Lieutenant [REDACTED] U.S. Marine Corps.



J. W. BIERMAN
Major General
U.S. Marine Corps
Commanding General



CHARGE SHEET

CHARGE SHEET				
I. PERSONAL DATA				
1. NAME OF ACCUSED (Last, First, MI) LEGER, TYLER J.		2. EDIPI [REDACTED]	3. RANK/RATE LCPL	4. PAY GRADE E-3
5. UNIT OR ORGANIZATION [REDACTED]		6. CURRENT SERVICE		
		a. INITIAL DATE 21 Aug 17	b. TERM 4 yrs	
7. PAY PER MONTH		8. NATURE OF RESTRAINT OF ACCUSED		9. DATE(S) IMPOSED
a. BASIC \$ 2371.80 \$2,302.80	b. SEA/FOREIGN DUTY NONE	c. TOTAL \$2,302.80	NONE	N/A
II. CHARGES AND SPECIFICATIONS				
10.				
CHARGE: VIOLATION OF THE UCMJ, ARTICLE 120				
Specification 1 (Sexual Assault – Without Consent): In that Lance Corporal Tyler J. Leger, U.S. Marine Corps, while on active duty, did on the island of Oahu, Hawaii, on or about 21 September 2019, commit a sexual act upon [REDACTED] by				
(a) penetrating [REDACTED] mouth with the said Lance Corporal Leger's penis; and				
(b) penetrating [REDACTED] vulva with the said Lance Corporal Leger's penis;				
without the consent of the said [REDACTED]				
Specification 2 (Sexual Assault – Asleep, Unconscious, or Otherwise Unaware): In that Lance Corporal Tyler J. Leger, U.S. Marine Corps, while on active duty, did on the island of Oahu, Hawaii, on or about 21 September 2019, commit a sexual act upon [REDACTED] by				
(a) penetrating [REDACTED] mouth with the said Lance Corporal Leger's penis; and				
(b) penetrating [REDACTED] vulva with the said Lance Corporal Leger's penis;				
when he reasonably should have known that [REDACTED] was asleep and unconscious. <i>Withdrawn and dismissed without prejudice.</i>				
III. PREFERRAL				
11a. NAME OF ACCUSER (Last, First, MI) [REDACTED]		b. GRADE LCpl E-3	c. ORGANIZATION OF ACCUSER HQBN, MCBH, KANEOHE BAY, HI	
d. SIGNATURE OF ACC [REDACTED]		e. DATE 20201104		
AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this <u>4th</u> day of <u>November</u> , 2020, 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.				
A. T. WALSH <i>Typed Name of Officer</i> MAJOR, U.S. MARINE CORPS <div style="border: 1px solid black; height: 40px; width: 100%; margin-top: 5px;"></div>		HQBN, MCBH, KANEOHE BAY, HI <i>Organization of Officer</i> TRIAL COUNSEL <i>Official Capacity to Administer Oaths</i> <i>(See R.C.M. 307(b)—must be commissioned officer)</i>		

ORIGINAL

12. On 11 NOVEMBER, 20 20, the accused was informed of the charges against him/her and of the name(s) of the accuser(s) known to me. (See R.C.M. 308(a)). (See R.C.M. 308 if notification cannot be made.)

Typed Name of Immediate Commander

Organization of Immediate Commander

2NDLT, U.S. MARINE CORPS

Signature

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13. The sworn charges were received at 1630 hours, 11 NOV 20 20 at _____
Designation of Command or

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

FOR THE COMMANDING OFFICER

LEGAL OFFICER

Official Capacity of Officer Signing

Typed Name of Officer

2NDLT, U.S. MARINE CORPS

Signature

V. REFERRAL; SERVICE OF CHARGES

14. DESIGNATION OF COMMAND OR CONVENING AUTHORITY

b. PLACE

c. DATE

25 FEB 2021

Referred for trial to the GENERAL court-martial convened by

GCMCO 1-20

dated 25 AUGUST 20 20, subject to the following instructions:² None.

By _____ of _____
Command or Order

J. W. BIERMAN

Typed Name of Officer

COMMANDING GENERAL

Official Capacity of Officer Signing

MAJOR GENERAL, U.S. MARINE CORPS

15. On 1 March, 20 201, I (caused to be) served a copy hereof on (each of) the above named accused.

A. T. WALSH

MAJOR U.S. MARINE CORPS

Grade or Rank of Trial Counsel

FOOTNOTES

1 - When an appropriate commander signs personally, inapplicable words are stricken.

2 - See R.C.M. 601(a) concerning instructions. If none, so state.

ORIGINAL

TRIAL COURT MOTIONS & RESPONSES

**GENERAL COURT-MARTIAL
UNITED STATES MARINE CORPS
HAWAII JUDICIAL CIRCUIT**

UNITED STATES

v.

TYLER J. LEGER
LANCE CORPORAL
U.S. MARINE CORPS

GOVERNMENT RESPONSE
TO MOTION FOR
APPROPRIATE RELIEF
(IMPROPER ARGUMENT)

16 April 2021

1. Nature of the Motion. This is the Government's response to the Defense motion to preclude certain evidence and argument relating to the Accused's omission of incriminating information to investigators with the Naval Criminal Investigative Service ("NCIS"). The Government requests this Court **DENY** the Defense motion.

2. Summary of the Facts

a. Lance Corporal Tyler J. Leger ("Accused") is charged with two specifications for a violation of Article 120 (Sexual Assault) of the Uniform Code of Military Justice ("UCMJ"). See Charge Sheet.

b. [REDACTED] *Enclosure (1).*

c. On or about 21 September, the Accused, the Victim, [REDACTED] and

[REDACTED] *Enclosure (2) at 07:42:00.*

d. Once inside the room, the Victim and the Accused shared the Victim's bed, while The Victim's Roommate shared her bed with the additional Male Guest. *Enclosure (3) and Enclosure (5) at 07:40.*

e. The Victim remembers waking to the Accused inserting his penis into her mouth and the Accused telling her that she was "just dreaming." *Enclosures (3) at 07:45:30.*

f. The Male Guest, described observing an interaction between the Accused and the Victim the next morning as follows: "[a]t approximately, 6:00AM I woke up to a low pitch murmuring

from [the Accused] which sounds like arguing. I fall back asleep, but wake again to him arguing again, but this time I hear him standing on the floor facing [the Victim] appearing to explain/defend/ make her understand something by his tone of voice and gestures.” Enclosure (4).

- g. The Victim’s Roommate described the exchange between the Victim and the Accused in the following: “I woke up when it was the crack of dawn and [the Accused] and [the Victim] were bickering at each other.” *Enclosure (5) at 08:20.*
- h. The Roommate additionally described the Victim as trying to push the Accused away while crying. *Enclosure (5) at 08:20*
- i. Later that morning, the Accused texted the Victim asking “Do I need to be worried or something. Law wise and then later.” and then stated “My intentions were not malicious. I’m just making sure that you sent gonna call Rape or something,” and “Like. The “R” word. And me getting fried.” Enclosure (6).

3. Discussion

STATEMENT OF LAW

Under Military Rule of Evidence (“M.R.E.”) 401, the test for relevant evidence is whether the offered evidence has any tendency to make a fact more or less probable than it would be without the evidence, and whether that fact is of consequence in determining the action. *M.R.E. 401*. Relevant evidence is admissible unless provided otherwise. *M.R.E. 402*.

Article 31(b) of the Uniform Code of Military Justice (“U.C.M.J.”) holds that “[n]o person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.” *Art 31(b), U.C.M.J. (2019)*

ed.)

The U.S. Court of Appeals for the Armed Forces ("C.A.A.F.") has found that lies and omissions are sufficient to uphold convictions for false official statements, related to statements given to investigators after Article 31(b) rights advisement. In the Case of *United States v. Wright*, The appellant had pled guilty to making a false official written statement to an officer investigating the theft of computers. *United States v. Wright*, 65 M.J. 373, 373 (C.A.A.F. 2007). The appellant told investigators that, while loading the computer boxes, he noticed that some computers were missing. *Id.* However, during a providence inquiry, the appellant admitted that he had in fact stolen the missing computers. *Id.* On appeal of his conviction, the appellant argued that the trial level military judge erred in accepting his guilty pleas to making a false official statement because the statement, although misleading, was true. *Id.* The C.A.A.F. held that the lower court did not err in its finding upholding the plea as provident. *Id.* Within the context of the circumstances of the case as set forth in the providence inquiry, the C.A.A.F. held that the appellant's statement was false. The court found that the appellant had lied when he asserted that, while loading the boxes, he noticed the computers were missing and said that he had no explanation for their absence. The court found that the statement falsely suggested that the computers went missing at a particular time, that is, while he was loading the boxes. *Id.*

In *United States v. Nicola*, C.A.A.F. discussed the permissible use of an accused's statement, stating, "[b]ut one risk of testifying, recognized long ago, is that the trier of fact may disbelieve the accused's testimony and then use the accused's statements as substantive evidence of guilt in connection with all the other circumstances of the case." 78 M.J. 223, 227 (C.A.A.F. 2019); *See Also United States v. Lloyd*, No. ARMY 9801781 (A. Ct. Crim. App. 2000) (Army Court of Criminal Appeals finding that lies and omissions to criminal investigators are relevant in determining the credibility of the Accused's statement; *United States v. Vega*, No. ARMY 20190009 (A. Ct. Crim. App. 2020) (Finding appellant's prior false statements to law enforcement also support the government's theory).

“Trial counsel has the duty of prosecuting a case, and he is permitted to comment earnestly and forcefully on the evidence, as well as on any inferences which are supported reasonably by the testimony. He may strike hard blows, but they must be fair.” *United States v. Haney*, 64 M.J. 101, 104 (C.A.A.F. 2006); *United States v. Doctor*, 7 C.M.A. 126, 133-34, 21 C.M.R. 252, 259-60 (1956) (citations omitted); see *United States v. Ruiz*, 54 M.J. 138, 143-44 (C.A.A.F. 2000).

ANALYSIS

The recorded interview of the Accused’s statement to NCIS is relative and highly probative as to the charged misconduct. The Accused discusses his version of the alleged misconduct, and specifically admits to both penile-oral and penile-vaginal sexual acts. The Accused’s statement corroborates the Victim’s statement as to the element of sexual acts, but is also self-serving. Given the biased nature of the Accused’s statement, the Government should be able to admit and argue omissions to allow the factfinder to determine the weight to give the self-serving portions.

Throughout the Accused’s interview with NCIS, he adopts a demeanor that suggests, surprise and bewilderment in relation to why the Victim would report that he sexually assaulted her. The Accused told the investigators that the Victim began “acting weird,” so he decided to leave, but omitted two critical facts from his statement – omissions which tend to discredit his version of the events. First, the Accused did not describe arguing with the Victim just prior to him leaving, which was heard by the Roommate and the Male Guest. Second, the Accused omitted that after he left, he texted the Victim asking “Do I need to be worried or something. Law wise and then later.” and then stated “My intentions were not malicious. I’m just making sure that you sent gonna call Rape or something,” and “Like. The “R” word. And me getting fried.”

While relevant and probative, the Accused’s NCIS statement is also self-serving. The Accused describes the encounter as consensual and describes the Victim as initiating many of the sexual acts. However, the statements of the Roommate, the Male Guest, and the Accused text messages belie the

Accused version and call into questions his surprise at the allegations. The Defense fails to cite any rule or case law that would preclude the Prosecution from admitting relevant portions of the Accused's statement. The facts of this case are analogous to the facts of *United States v. Wright*, in which the appellant, charged with a false official statement, stated that at some point the stolen computers "were not there," but omitted that he was the one who took the computers. In the instant case, the Accused informs the investigators that he decided to leave, but omits that he had an argument with the Victim that caused him to send her text messages voicing his concern that she would report a rape. The *Wright* case involved whether the respondent was provident to a guilty plea of false official statement to the investigator. Here, the bar of admission is lower, as the government seeks only to admit and make fair comment on the evidence – as opposed to sustaining a criminal conviction beyond a reasonable doubt. As noted in *United States v. Lloyd*, omission of fact by the Accused tends to diminish the credibility of his version of events. The prosecution will be unaware whether the Accused will testify and be subject to cross examination until the Defense case-in-chief, and should not be precluded from drawing the fact finder's attention to inconsistencies and omissions in the Accused's NCIS statement.

The Defense assertion that commenting on an accused's lies or omissions subsequent to Article 31(b) advisement in some way implicates the Accused's right to remain silent is without merit. The Accused was free to decline to talk with investigators and invoke his right to remain silent, but once waived, the statement may be used against him and is subject to fair and just argument.

4. Burden of Proof and Evidence

Burden: The burden of proof and persuasion rests on the Defense as the proponent. The standard as to any factual issue necessary to resolve this motion is to a preponderance of the evidence. *RCM 905(c)(1)*.

Evidence: In support of its motion the Government offers the following evidence:

- (1) The Recorded NCIS Interview of the Victim
- (2) The Recorded NCIS Interview of the Accused

- (3) The Written Statement of the Male Guest dtd 7 Feb 2020.
- (4) The Audio Recording of the Article 32 in the Subject Case
- (5) Text Messages between the Accused and The Victim dtd 21 Sept 2019

5. Relief Requested

The Government requests this Court deny the Defense motion as the Accused NCIS interview is relevant, a statement of a party opponent, and the Defense has failed to cite an authority which would justify limiting the scope of the Government's case in the manner requested.

6. Oral Argument. The Government requests oral argument.

//S//

A. T. WALSH
Major, U.S. Marine Corps
Trial Counsel

**UNITED STATES MARINE CORPS
NAVY-MARINE CORPS TRIAL JUDICIARY
PACIFIC JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL**

UNITED STATES

v.

**TYLER J. LEGER
LANCE CORPORAL
U.S. Marine Corps**

)
)
) **GOVERNMENT RESPONSE TO
DEFENSE MOTION FOR UNANIMOUS
VERDICT INSTRUCTION**
)

16 Apr 21

1. Nature of Motion:

This is the Government's response to Defense motion seeking a unanimous verdict instruction in the case of United States v. Lance Corporal (LCpl) Tyler J. Leger, U.S. Marine Corps. This Court should **DENY** the Defense's motion because the Sixth Amendment right to a trial by jury does not apply to Courts-Martial and legal precedent has consistently recognized non-unanimous verdicts as proper within the military.

2. Statement of Facts.

a. For purposes of this motion, the Government adopts the defense statement of facts.

3. Law.

Under long standing precedent, the Court-Martial process has been distinguished from the civilian jury trial process in both application of the Fifth and Sixth Amendments to the U.S. Constitution.¹ "[T]he framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the sixth amendment, to those persons who were subject to the indictment of presentment in the fifth."²

¹ Ex parte Milligan, 71 U.S. 2, 123 (1866).

² Id.

a. The Fifth Amendment

The Fifth Amendment to the U.S. Constitution provides:

No person shall be held answerable for a capital, or otherwise infamous crime, unless On a presentment or indictment of a Grand Jury, *except in cases arising in the land or naval forces, or in the Militia* ... nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property be taken for public use, without just compensation. [Emphasis Added]³

In *United States v. Begani*, The Navy and Marine Corps Court of Criminal Appeals (N.M.C.C.A.) found that the Fifth Amendment “reveals a design whereby the Constitution explicitly allows Congress, as the creator of all Federal tribunals and courts-martial, to withhold certain otherwise fundamental constitutional rights from those in the profession of arms.”⁴ Moreover, the *Begani* court found that “While there is no question the right to a grand jury and the right to a trial by jury are fundamental constitutional rights, they are only fundamental to the extent (and to the persons to whom) the Constitution grants them in the first place.”⁵

The Supreme Court addressed the requirements of the Fifth Amendment Due Process Clause in *Weiss v. United States*, noting that when Congress legislates in military affairs, courts “must give particular deference to the determination of Congress.”⁶ The *Weiss* standard established by the Supreme Court is “whether the factors militating in favor of the claimed right “are so extraordinarily weighty as to overcome the balance struck by Congress.”⁷ Furthermore,

³ U.S. Const. Amend. V.

⁴ *United States v. Begani*, 79 M.J. 767, 776 (N-M Ct. Crim. App. 2020) Citing: *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 123, 18 L. Ed. 281 (1866).

⁵ *Id.*

⁶ *Weiss v. United States*, 510 U.S. 163 (1994).

⁷ *Id.* At 177-78; See Also: *United States v. Bramel*, 32 M.J. 3 (C.M.A. 1990) (CMA summarily affirming a finding over defense argument that denial of fundamentally fair criminal trial as guaranteed by the Fifth and Sixth Amendments where the findings of guilty were announced by less than a unanimous verdict of eight members.)

the Supreme Court has expressly found that “military society” is unique due to its mission to fight and win wars.⁸

b. The Sixth Amendment Does Not Apply to Courts-Martial

The Fifth Amendment to the U.S. Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.⁹

The Supreme Court in their decision in *Ramos v. Louisiana*, held that the Sixth Amendment jury trial right carries with it a requirement that verdicts for “serious” offenses be rendered by unanimous vote.¹⁰ However, it is well established that “there is no Sixth Amendment right to trial by jury in courts-martial” in the armed forces.¹¹ The express exception relating to “*land or naval forces*” found in the Fifth Amendment and discussed *supra*, has been “read over into the Sixth Amendment, so that the requirements of jury trial are inapplicable.”¹² Moreover, the Supreme Court and the C.A.A.F. have, over time, repeatedly held that the Sixth Amendment right to a jury trial does not apply to courts-martial.¹³ C.A.A.F. has also expressly recognized that military criminal practice “requires neither unanimous panel members, nor panel

⁸ *Parker v. Levy*, 417 U.S. 733

⁹ U.S. Const. Amend. VI.

¹⁰ *Ramos v. Louisiana*, 590 U.S. ___, No. 18-5924 (2020), Slip. Op. at 3-5.

¹¹ *United States v. Easton*, 71 M.J. 168, 175 (C.A.A.F. 2012); Citing: *Ex parte Quirin*, 317 U.S. 1, 39, 63 S. Ct. 2, 87; *United States v. Riesbeck*, 77 M.J. 154 (C.A.A.F. 2018); *United States v. Tulloch*, 47 M.J. 283, 285 (C.A.A.F. 1997); *United States v. Smith*, 27 M.J. 242, 248 (C.M.A. 1988); *United States v. Wiesen*, 57 M.J. 48, 50 (C.A.A.F. 2002). L. Ed. 3 (1942); *United States v. Wiesen*, 57 M.J. 48, 50 (C.A.A.F. 2002).

¹² *Reid v. Covert*, 354 U.S. 1, 37 n.68 (1957).

¹³ *Ex parte Quirin*, 317 U.S. 1 (1942); *United States v. Easton*, 71 M.J. 168, 175 (C.A.A.F. 2012) (surveying different application of constitution to service members and noting “there is no Sixth Amendment right to trial by jury in courts- martial”).

agreement on one theory of liability, as long as two-thirds of the panel members agree that the government has proven all the elements of the offense.”¹⁴

In *United States v. Easton*, the military’s highest court held that “[b]y enacting Article 29, UCMJ, Congress evinced the intent that, in light of the nature of the military, an accused does not have the same right to have a trial completed by a particular court panel as a defendant in a civilian jury does.”¹⁵

Moreover, in *United States v. Rollins*, the N.M.C.C.A. provided persuasive authority, when the court again rejected a challenge to non-unanimous verdicts, finding such verdicts do not violate the Sixth Amendment. ¹⁶

The Supreme Court has regularly and consistently distinguished between civilian law and military law. “The military is, by necessity, a specialized society separate from civilian society.”¹⁷ Just as military society is distinct from the civilian sector, so too the Supreme Court has recognized, military law “is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment.” ¹⁸ The Uniform Code of Military Justice “cannot be equated to a civilian criminal code.”¹⁹

¹⁴ *United States v. Brown*, 65 M.J. 356, 359 (C.A.A.F. 2007) Citing: *United States v. Vidal*, 23 M.J. 319, 325 (C.M.A. 1987).

¹⁵ *United States v. Easton*, 71 M.J. 168, (C.A.A.F. 2012).

¹⁶ *United States v. Rollins*, No. 201700039, 2018 CCA LEXIS 372, at *25 (N-M Ct. Crim. App. July 30, 2018).

¹⁷ *Parker v. Levy*, 417 U.S. 733, 743 (1974).

¹⁸ *Id.*

¹⁹ *Id.*

c. Stare Decisis and Congressional Authority

In order to provide for the common defense, the Constitution gives Congress the power to raise, support, and regulate the Armed Forces.²⁰ Clearly, it is Congress who holds the primary responsibility for the “delicate task of balancing the rights of servicemen against the needs of the military.”²¹ The Supreme Court has recognized that “The discipline necessary to the efficiency of the army and navy, required other and swifter modes of trial than are furnished by the common law courts; and, in pursuance of the power conferred by the Constitution.”²² Under the “Military Deference Doctrine,” courts defer to Congress’ exercise of its powers under Article I, to regulate the military justice system. The Supreme Court has even gone so far as to describe Congress’ authority as “plenary” in this area.²³ “[J]udicial deference ... is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged.”²⁴

Under the doctrine of stare decisis, a lower court is required to uphold the precedent established by its superior courts.²⁵ In the recent Supreme Court case of *June Medical Services L.L.C. Et Al v. Russo*, Chief Justice Roberts, in his concurring opinion, opined that adherence to the principle of stare decisis and the authority of legal precedent is necessary to “avoid an arbitrary discretion in the courts.”²⁶ Respect for precedent is the “means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion.”²⁷ Lower courts should not assume that a new higher-court decision implicitly overrules precedent.²⁸ Instead, lower courts should follow the precedent that directly controls, and leave overruling precedent to the higher court that created the precedent.²⁹

4. Discussion.

The defense Sixth Amendment and Fifth Amendment due process claims fail because non-unanimous verdicts in the military have consistently been recognized by higher courts and the decision in *Ramos* does nothing to overturn that precedent. In *United States v. Brown*, C.A.A.F. addressed this very issue and expressly recognized that military criminal practice does not require a unanimous verdict. In the *United States v. Rollins* decision, N.M.C.C.A., recently returned to the issue and in 2018 again recognized that military courts-martial do not require unanimous verdicts. While *Rollins* did not establish precedent, it provides clarity and confirmation that precedent controls this issue.

Since the decision in *Ex parte Quirin* in 1942, the Supreme Court and Court of Appeals for the Armed Forces have repeatedly held that the Sixth Amendment right to a jury trial does not apply to courts-martial. With respect to the Due Process Claim, even assuming arguendo, that the overwhelming precedent supporting non-unanimous verdicts within the military was not clear, the defense has failed to satisfy the *Weiss* standard. They have not alleged any factors so “extraordinarily weighty” as to overcome the balance struck by Congress, and long recognized

²⁰ U.S. Constitution. Art 1, § 8, cl. 14.

²¹ *Solorio v. United States*, 483 U.S. 435, 447 (1987).

²² *Ex parte Milligan*, 71 U.S. 2, 123 (1866) (“Everyone connected with these branches of the public service is amenable to the jurisdiction which Congress has created for their government, and, while thus serving, surrenders his right to be tried by the civil courts.”)

²³ *Chappell v. Wallace*, 462 U.S. 296, 301 (1983) (“It is clear that the Constitution contemplated that the Legislative Branch have plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline....”)

²⁴ *Chappell v. Wallace*, 462 U.S. 296, 301 (1983).

²⁵ *United States v. Andrews*, 77 M.J. 393, 399 (C.A.A.F. 2018).

²⁶ *June Medical Services L.L.C. Et Al v. Russo*, 591 U. S. ____ (2020).

²⁷ *Id.* Citing: *Vasquez v. Hillery*, 474 U. S. 254, 265 (1986).

²⁸ *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

²⁹ *Id.*

by the Supreme Court.³⁰ Due to the ever present threat of unlawful command influence, the military system has a strong interest in ensuring anonymity of members voting, which a unanimous verdict requirement would eliminate. Furthermore, the specter of hung juries and re-trials would slow the military justice process and detract from the force's ability to fight and win battles.

The defense moves the Court to provide the members with an instruction that is not supported by the law, precedent, or procedure. The defense asks the Court to supplant the near plenary role of Congress – tasked with balancing the rights of servicemen against the needs of the military. The essence of the defense motion asks this Court to set aside the law and create new law and procedure in light of the Ramos decision. However, the Supreme Court has clearly stated lower courts should not assume that a new higher court's decision implicitly overrules precedent. This Court should follow the guidance provided by the Supreme Court in the Rodriguez de Quijas decision, and follow the precedent that directly controls, and leave overruling precedent to the higher court that created the precedent.

5. **Conclusion.**

The Supreme Court has consistently recognized the military is a unique society in which the constitutional rights of service members must be balanced against the needs of good order and discipline. The Supreme Court, C.A.A.F., and N.M.C.C.A. have each recognized that the Sixth Amendment does not apply to courts-martial and due process protections are less than that which may be afforded a civilian. While the Ramos decision may have upset non- unanimous verdicts

³⁰ The defense motion argues that a unanimous finding is required for proof beyond a reasonable doubt, the attendant effects of a court-martial conviction mandate unanimous findings, and the scope of the modern court-martial favors unanimous findings, and no concerns underpinning the court-martial system justify non-unanimous findings.

for civilians, it does not apply to courts-martial. This Court should find that the defense failed to carry its “heavy burden” to demonstrate “the factors militating in favor of [the accused’s interest] are so extraordinarily weighty to overcome the balance struck by Congress” and decline to create a procedural rule where Congress and the President have already done so.

6. **Burden of Proof.**

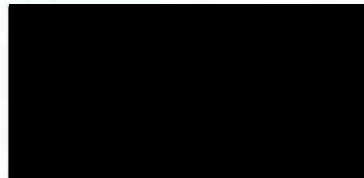
The burden of proof and persuasion rests with the Defense as the moving party.³¹

7. **Relief Requested.**

The Government respectfully requests that the Court deny the Defense motion for a unanimous verdict instruction.

8. **Argument.**

The Government does not request oral argument.



C. A. LUCAS
Captain, U.S. Marine Corps
Trial Counsel

³¹ R.C.M. 905(c)(1) and (c)(2)(A), Manual for Courts-Martial (2019).

**NAVY-MARINE CORPS TRIAL JUDICIARY
HAWAII JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL**

UNITED STATES

V.

**TYLER J. LEGER
LANCE CORPORAL
U.S. MARINE CORPS**

**DEFENSE MOTION TO
DISMISS**

**(Unlawful Command
Influence)**

7 May 2021

MOTION

Pursuant to R.C.M. 306, 907 and Article 37 of the UCMJ, the Defense moves this Court to dismiss the charge and all specifications with prejudice because apparent unlawful command influence (UCI) would give a neutral outside observer serious doubts about the fairness of military justice proceedings with respect to the present case. No remedy short of dismissal would cure this issue because a reasonable outside observer would conclude that, absent the command influence surrounding this case, these charges would not have been referred at all.

FACTS

a. LCpl Leger is charged with two specifications of UCMJ Article 120 (sexual assault without consent, and sexual assault when [REDACTED] was asleep and unconscious) against [REDACTED] a [REDACTED] (See charge sheet).

b. On 26 January 2021, an Article 32 preliminary hearing was held in the subject case. Two witnesses testified under oath regarding their observations that night. (Encl. 1).

c. Specifically, Mr. [REDACTED] testified that they were with LCpl Leger and [REDACTED] the entire night, remained sober, and slept in a bed in [REDACTED] just a few feet away from LCpl Leger and [REDACTED] Both of them testified that

they were only awoken by what sounded like quiet bickering early the next morning, around 0500. Ms. [REDACTED] specifically recollected seeing LCpl Leger and [REDACTED] sitting side by side in her bed. Ms. [REDACTED] went back to sleep, and woke up next when LCpl Leger was packing up to leave. (Encl. 2).

[REDACTED]

e. The PHO had this testimony, as well as the video of [REDACTED] NCIS interview wherein she described these encounters. (Encl. 3).

f. In his written report dated 12 February 2021, the Preliminary Hearing Officer (PHO) recommended that, despite the existence of probable cause, the charge and both specifications should be dismissed because the evidence was unlikely to support a conviction at trial by court-martial. (Encl. 3).

g. On 19 February 2021, Secretary of Defense Lloyd Austin gave a press briefing that addressed an online video that had gone viral earlier that week in which a female Marine alleging that her commanding general had elected to allow a man she had accused of sexual misconduct to remain in the Marine Corps. (See, e.g., Helene Cooper & Jennifer Steinhauer, *Viral Video Moves Sexual Harassment in Marine Corps to Forefront*, NEW YORK TIMES, Feb. 19, 2021, available at <https://www.nytimes.com/2021/02/19/us/politics/lloyd-austin-military-sexual-assault.html>; Missy Ryan & Dan Lamothe, *Austin vows stronger actions against sexual assault in the military*, WASHINGTON POST, Feb. 19, 2021, available at https://www.washingtonpost.com/national-security/lloyd-austin-military-video-sexual-crimes/2021/02/19/4ef4ddfc-72dc-11eb-a4eb-44012a612cf9_story.html; W.J. Hennigan, *Defense*

Secretary Calls Viral TikTok Video 'Disturbing,' Seeks To Rid Military of Sexual Assault Scourge, TIME MAGAZINE, Feb. 19, 2021, available at <https://time.com/5941224/defense-secretary-sexual-assault-video/>; Judy Woodruff, *U.S. military grapples with a rising epidemic of sexual assault in its ranks*, PBS NEWS HOUR, Feb. 19, 2021, available at <https://www.pbs.org/newshour/show/u-s-military-grapples-with-a-rising-epidemic-of-sexual-assault-in-its-ranks>; Philip Athey, "I found the video deeply disturbing," MARINE CORPS TIMES, Feb. 19, 2021, available at <https://www.marinecorpstimes.com/news/your-marine-corps/2021/02/19/i-found-the-video-deeply-disturbing-heres-what-we-know-about-the-viral-video-of-a-female-marine-claiming-her-alleged-perpetrator-will-be-allowed-to-stay-in-the-corps/>; Caitlin M. Kenney, *Marine posts video attacking military's handling of her sexual assault*, STARS AND STRIPES, Feb. 19, 2021, available at <https://www.stripes.com/news/us/marine-posts-video-attacking-military-s-handling-of-her-sexual-assault-1.662905>; Gina Harkins, *Marines Investigating Woman's TikTok Video Claims that General Allowed Perpetrator to Stay in Uniform*, MILITARY.COM, Feb 19, 2021, available at <https://www.military.com/daily-news/2021/02/19/marines-investigating-womans-tiktok-video-claims-general-allowed-perpetrator-stay-uniform.html> [collectively Encl. 4]).

h. Secretary Austin specifically stated that he found the video "deeply disturbing" and that he was in contact with that Marine's command to ensure "that someone is looking out for her needs." (See Woodruff, *supra*, PBS NEWS HOUR). Transitioning from the video to the broader issue of sexual assault in the military in general, Secretary Austin remarked, "We have been looking at this for a long time in earnest, but we haven't gotten it right." (See Ryan & Lamothe, *supra*, WASHINGTON POST; Hennigan, *supra*, TIME MAGAZINE).

i. On 19 February 2021, a spokesperson for Senator Kirsten Gillibrand—a member of the

Senate Armed Services Committee—issued a statement that the Senator had sent inquiries to the Department of Defense and the Marine Corps regarding this Marine’s specific case.

j. That same day, an aide for Representative Jackie Speier stated that her office was also reaching out to the Marine Corps, noting that Representative Speier was “concerned about the situation.” (Athey, *supra*, MARINE CORPS TIMES; Kenney, *supra*, STARS AND STRIPES).

k. On 23 February 2021, Senator Gillibrand published a Tweet linking to the PBS News Hour piece cited above, lambasting the military’s failure to “protect and deliver justice” to sexual assault survivors. (Encl. 5, available at <https://twitter.com/SenGillibrand/status/1364377123083980803>).

l. Several of the above cited articles noted that there are numerous proponents of stripping commanders of authority to handle sexual assault cases, including Senator Gillibrand and Representative Speier. (See, e.g., Cooper & Steinhauer, *supra*, NEW YORK TIMES; Hennigan, *supra*, TIME Magazine; Athey, *supra*, MARINE CORPS Times; Kenney, *supra*, STARS AND STRIPES).

m. Just a couple of weeks earlier—during the confirmation hearings for Deputy Secretary of Defense Kathleen H. Hicks—Senator Gillibrand asked whether commanders should remain in charge of deciding “which sexual assaults and complex criminal cases should go forward to be prosecuted.” The Secretary responded that she was open to “removing the commander from that prosecution chain.” (See HEARING TO CONSIDER THE NOMINATION OF HONORABLE KATHLEEN H. HICKS TO BE DEPUTY SECRETARY OF DEFENSE, pp. 50-51, Feb. 2, 2021, full text available at https://www.armed-services.senate.gov/imo/media/doc/21-03_02-02-2021.pdf (hereinafter HICKS HEARING) [Encl. 6]).

n. On 23 February 2021—four days after Secretary Austin’s public comments—the

commanding officer of [REDACTED] recommended trial by general court-martial. He acknowledged that the PHO did not believe that a probability of success at trial existed and had recommended against referral, but stated simply that he “disagree[d].” (Encl. 7).

o. On 25 February 2021, the [REDACTED] staff judge advocate advised the commanding general, referencing the PHO’s report and the [REDACTED] commanding officer’s recommendation. The SJA also recommended referral of charges, but did not cite to any facts or circumstances that would cut against the PHO’s conclusion—made in light of all of the evidence received—that there was no real chance of success at trial. (Encl. 8).

n. On 25 February 2021, the charges were referred to trial by general court-martial by the Commanding General of [REDACTED], Major General Bierman.¹ (See charge sheet).

BURDEN

The Defense bears the initial burden of demonstrating that certain facts, if true, constitute UCI, and that an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding. *United States v. Boyce*, 76 M.J. 242, 248-49 (C.A.A.F. 2017). The threshold for this initial showing is low—“some evidence” is sufficient. *Id.* at 249. The burden then shifts to the Government to prove beyond a reasonable doubt that the facts do not constitute UCI or that the UCI did not place an “intolerable strain” on the public’s perception of the military justice system. *Id.*

LAW

1. Unlawful Command Influence is a Due Process Violation not Governed Solely by Article 37, UCMJ.

The prohibition against UCI is codified in Article 37 of the UCMJ, which specifically

¹ NB that because the convening authority sits in [REDACTED] this date reflects that time difference, and the SJA’s advice and referral decision actually occurred on 24 February local Hawaii time.

provides that “[n]o person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal . . . or the action of any convening, approving, or reviewing authority with respect to his judicial acts.” 10 U.S.C. § 837(a).² However, the Courts have repeatedly recognized that command influence is “an error of constitutional dimension.” *United States v. Bigase*, 50 M.J. 143, 150 (C.A.A.F. 1999), citing *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986). “The exercise of command influence tends to deprive servicemembers of their constitutional rights,” in particular the right to an impartial forum where conduct by superiors can be interpreted as generating a fear of reprisal for failures to achieve intended results. *Thomas*, 22 M.J. at 393, citing *Tumey v. Ohio*, 273 US. 510 (1927). It is for this reason that the government must prove beyond a reasonable doubt that the UCI does not exist, or that it did not place an “intolerable strain” on the public’s perception of the military justice system. *Id.*, citing *Chapman v. California*, 386 U.S. 18 (1967).

Indeed, “an accused has a due process right to a fair trial . . . free from the undue influence of superiors, whether they are military officers or civilians in policy and administrative positions.” *United States v. Hutchins*, 72 M.J. 294, 313 (C.A.A.F. 2013), Baker, C.J., dissenting; *accord Boyce*, 76 M.J. at 249, n.8 (applying the beyond a reasonable doubt standard to a claim of UCI because “in the military justice system both the right to a trial that is fair, and the right to a trial that is objectively seen to be fair, have constitutional dimensions sounding in due process”); *United States v. Bergdahl*, 79 M.J. 512, 531, n.32 (A.C.C.A. 2019); *United States v. Bergdahl*, 80 M.J. 230, 246-47 (C.A.A.F. 2020), Stucky, J., dissenting (*Bergdahl II*). As such, trial courts should—and indeed are duty bound, based on their role as stewards of the fair administration of justice, *United States v. Barry*, 78 M.J. 70, 76 (C.A.A.F. 2018); *Boyce*, 76 M.J. at 253—to

² This includes retired military personnel entitled to pay. *See Bergdahl II*, 80 M.J. at 234-35.

evaluate “unlawful command influence by civilians who are in positions of authority in the military civilian hierarchy, but not subject to the UCMJ.” *Hutchins*, 72 M.J. at 313 & n.10 (collecting cases).

2. Apparent Unlawful Command Influence Exists Where Actions by Superior Authorities Give Rise to the Perception that the Military Justice System is Subject to Outside Influences Rendering it Unfair.

An accused need not show any actual prejudice or impact to his court-martial in order to prevail on a claim of apparent UCI. Rather, the “prejudice” in these circumstances is to the appearance of a fair system of military criminal justice. *Boyce*, 72 M.J. at 248-49 & n.5 (noting that the fact that a particular accused was not prejudiced, or that any prejudice was ultimately cured “is not dispositive of the underlying issue of whether the public taint of an appearance of unlawful command influence still remains”).

It is likewise irrelevant whether or not the persons exercising command influence sought to influence a particular proceeding, and irrelevant whether or not that influence was actually felt by particular decision makers. *Barry*, 78 M.J. at 76; *Boyce*, 76 M.J. at 251; *Hutchins*, 72 M.J. at 301 (Ryan, J., concurring); *United States v. Allen*, 31 M.J. 572, 590 (N.M.C.M.R. 1990). “In a system of justice operating within a well-defined and fairly cohesive community, the mere threat of command influence may be as debilitating to the system as its actual presence.” Moreover, “the fact that the system *appears* vulnerable to command pressures may be as damaging as the occasional exercise of such pressures.” *Allen*, 31 M.J. at 590, citing *United States v. Rosser*, 6 M.J. 267, 273, n.19 (C.M.A. 1979) (emphasis added).

The decision to refer charges to a court-martial is a matter within the sole discretion of the convening authority. While this authority can be limited by law or regulation, “once [a convening authority] is entitled to exercise discretion that exercise must be without interference.” *Allen*, 31 M.J. at 591; *accord Boyce*, 76 M.J. at 252-53. Even absent *actual*

interference, “[t]he very perception that a person exercising this awesome power is dispensing justice in an unequal manner or is being influenced by unseen superiors is wrong.” *Allen* at 593.

To that end, “higher-ranking military officers or civilians in policy positions . . . must refrain from sending signals down the chain of command as to expected results in a criminal case.” *Allen*, 31 M.J. at 593. “It is not only unprofessional but a fraud on the system for a superior to ‘send the word’ down to a convening authority as to a desired result in a criminal case which will please the leadership of our armed forces.” *Id.* It is irrelevant in this regard whether or not those superiors know of or affirmatively intend to influence a particular case. “No showing of knowledge or intent on the part of government actors is required in order for an appellant to successfully demonstrate that an appearance of unlawful command influence arose in a specific case.” *Boyce*, 76 M.J. at 251.

In *Boyce*, the Court determined that charges were improperly referred to a court-martial because they were tainted by apparent UCI. 76 M.J. at 252. There, the convening authority had previously set aside findings in an unrelated sexual assault case, and had declined to refer charges in another, which decisions had received considerable media and congressional attention. *Id.* at 244-45. Shortly after these decisions, the convening authority received a phone call from the Air Force Chief of Staff informing him that the Secretary of the Air Force had “lost confidence” in him, and that he had the option of retiring voluntarily or being removed. *Id.* at 245. The convening authority received the appellant’s referral package that same day, and referred charges ten days later. *Id.* at 246.

In finding apparent UCI, the Court noted several significant facts, including: (1) the media attention surrounding the convening authority’s earlier decisions; (2) a senator’s comment that convening authorities needed to be held “accountable” for their handling of sexual assault

charges; and (3) that the convening authority was still subject to adverse personnel action, even though he had put in a request to retire. *Id.* at 251-52. In light of all the surrounding circumstances, the Court held that “members of the public would understandably question whether” actions by these superiors “improperly inhibited [the convening authority] from exercising his court-martial convening authority in a truly independent and impartial manner as is required to ensure the integrity of the referral process.” *Id.* at 252-53.

Three additional factors are important to note from *Boyce*. First, the Court reversed findings and sentence on the basis of apparent UCI, despite the fact that the PHO who conducted the preliminary hearing in that case recommended trial by court-martial. *Id.* at 250, 253. Second, the Court deemed the convening authority’s assurances that he was not influenced in his referral decision irrelevant. *Id.* at 251. Finally, the Court addressed the possibility that the Secretary’s actions with respect to this convening authority had a potential “chilling effect . . . on other convening authorities and in other criminal cases” not presently before the Court. *Id.* at 253.

In *Allen*, the appellant argued that the referral of charges in his case was tainted by apparent UCI in the form of an ALNAV, which provided that certain cases involving national security concerns ““should ordinarily be referred to trial by general court-martial if referral of charges is warranted at all.”” 31 M.J. at 593. The Court rejected this position, noting that the language clearly preserved the convening authority’s discretion. *Id.* Moreover, the Court determined that any perceived error would have been harmless because the appellant’s own sworn statement admitted to relatively serious misconduct, and “referral to a general court-martial was the likely result in any case.” *Id.* at 593-94 & n.12.

Similarly, in *United States v. Lawson*, the Court found that public comments from the

Commandant of the Marine Corps regarding a case arising out of a training mishap that resulted in the death of a Marine did not amount to UCI. 33 M.J. 946, 948-51. Specifically, the Court determined that the comments were “primarily general policy pronouncements” on leadership and accountability that did not tend to mandate any specific action be taken in the case. *Id.* at 951. Moreover, the Court found it significant that the PHO had already recommended trial by general court-martial for the charges that arose out of those circumstances before the Commandant made his comments on the matter. *Id.* at 952.

Cases surrounding the trainee abuse scandal from Aberdeen Proving Grounds are illustrative. In *United States v. Simpson*, the Court found that public comments from members of Congress, civilian leaders in the Department of Defense, and military leadership in the Army did not create an appearance of UCI in part because the “overall tenor” of those officials “did not constitute an express or implied command position on disposition or adjudication,” and they could not “reasonably be perceived as carrying the force of command influence.” 58 M.J. 368, 374-75 (C.A.A.F. 2003). The comments consisted of recitations of the Army’s “zero tolerance” policy, and general statements about the impropriety of the type of misconduct that had been alleged. *Simpson*, 54 M.J. at 375-76. The Court found—contrary to appellant’s argument—that his trial was not subjected to the appearance of unfairness, in large part because of extensive measures taken early on to shield the investigation and members from such influences. Specifically, he was transferred to a different command and disposition authority during the pendency of his investigation, the court-martial venire was composed of personnel from outside the School, and the trial judge ordered the members to avoid media pertaining to the investigation of any related cases. *Id.* at 376. The Court closed, however, by noting that its holding was limited to the specific facts of that case. *Id.* at 377.

In *United States v. Ayers*, the appellant—an instructor at Fort Lee—argued that the media attention and public comment surrounding the Aberdeen scandal prejudiced his trial. 54 M.J. 85, 87-88. The Court rejected his position, noting that he was part of a different command and the views of leadership were not “injected” into the court martial through the argument of counsel—in short, that there was no appearance these comments impacted findings or sentence at his trial. *Id.* at 95. The Court also noted that the PHO had recommended trial by court-martial, and that the appellant did not argue that his charges were referred because of UCI. *Id.* at 92-93. Again, the Court limited its holding to these specific findings. *Id.* at 95.

Nevertheless, command actions do not need to be explicit directives in order to constitute UCI. In *United States v. Gerlich*, the convening authority originally disposed of the appellant’s case via Article 15 non-judicial punishment, and only reevaluated his position after he received a letter from his superior simply asking the convening authority to take another look at the case to determine whether he believed additional action under the UCMJ might be warranted. 45 M.J. 309, 311-12 (C.A.A.F. 1996). The Court reversed the appellant’s conviction despite the convening authority’s assurances that he did not feel pressured, and that he did not have any concern that a failure to refer charges would have garnered a negative perception. *Id.* at 312-13.

ARGUMENT

1. The Secretary of Defense and Members of Congress Can Commit Unlawful Command Influence.

Article 37 applies to Secretary Lloyd Austin—he is a retired military officer entitled to pay. *See Bergdahl II*, 80 M.J. at 234-35. However, given that UCI “sound[s] in due process” as well, this Court’s analysis should not ignore statements and actions by members of Congress who would not otherwise fall within the strict terms of Article 37. *See Boyce*, 76 M.J. at 249, n.8; *Bigase*, 50 M.J. at 150; *Thomas*, 22 M.J. at 393. To do otherwise would fall short of

extending the full measure of protection to LCpl Leger's due process right to a proceeding that appears fair to an outside observer. *See Boyce*, 76 M.J. at 249, n.8; *Allen*, 31 M.J. at 590.

2. The Timing and Sequence of Events in this Case Created the Perception that the Convening Authority Abdicated his Discretion due to Command and Political Influence in Referring LCpl Leger's Case to Trial.

Every significant command action in this case—the regimental commander's endorsement, the SJA's advice, and the commanding general's referral of charges—followed in trace of the media firestorm that had erupted around the military's handling of sexual assault allegations precipitated by a Marine Corps case. Less than a week had elapsed since the Secretary of Defense made his public comments on the issue—with specific attention to the viral video published by a female Marine—before the regimental commander forwarded his recommendation, and the convening authority had the case for one day before making his referral decision.

Secretary Austin took two actions that constitute apparent UCI. First, his office reached down to a Marine command directly to ensure that the Marine who made the allegation was being cared for appropriately. In doing so, he demonstrated his willingness to involve himself in cases where he believes that commanders have mishandled an issue that garners media attention. Second, Secretary Austin stated that, on the issue of sexual assault in the military, “we haven't gotten it right.” The implication of this statement is that there is a right way and a wrong way to handle allegations of sexual assault, and taking action that is favorable to an accused is the wrong way.

These comments were both preceded and followed by vocal members of Congress—chiefly, Senator Gillibrand—proposing to strip commanders of authority over allegations of sexual assault, signaling to members of the Department of Defense that their endorsement of that proposal might be a condition of continued employment. *See HICKS HEARING*, at 50-51. Indeed,

field grade officers depend on Congress for their promotions to higher grades. *See* 10 USC § 624(c). Senator Gillibrand specifically referenced the February 2021 TikTok video as an example of the military's failure to "protect and deliver justice" to a service member who made an accusation of sexual assault. *See* Encl. 5. The implication here is that when a commander takes any action that does not result in prosecution, conviction, and separation from the service for an accused, they are unworthy of command responsibility. This constitutes apparent UCI. *See Boyce*, 76 M.J. at 245, 248-49.

While removing the authority to convene courts-martial in sexual assault cases from commanders may be an appropriate policy consideration that can properly be the subject of public debate and discussion, under these circumstances, it tends to appear as a sign that retention of that authority—and likely command authority in general—is contingent upon achieving desired results. This implication is squarely prohibited by *Allen*, because it operates to create the appearance of requiring an abdication of discretion. *See Allen*, 31 M.J. at 592-93. In fact, from the perspective of an outside observer, this is precisely what happened. A case that did not warrant prosecution on its own merits was nevertheless referred to trial because an alternative disposition would not "please the leadership of our armed forces." *See id.* at 593.

These circumstances are most closely akin to *Boyce*. In that case, the Secretary of the Air Force had declared a loss of confidence in one convening authority, which the Court recognized could have a chilling effect on those commanders not singled out by the Secretary. *See Boyce*, 76 M.J. at 245, 253. Here, there are comments amounting to representations of a loss of confidence in all convening authorities across all services coming from civilian superiors that exercise oversight for the entire Department of Defense. At the very least, they would cause a reasonable citizen to question whether Major General Bierman was inhibited from "exercising

his court-martial convening authority in a truly independent and impartial manner as is required to ensure the integrity of the referral process.” *See id.* at 252-53.

This is not a case like *Allen*, where the statement complained of explicitly reserved discretion—i.e. “if referral of charges is warranted at all.” *Allen*, 31 M.J. at 593. Rather, the overall tenor of the comments implies a command position on the issue of sexual assault allegations. *Compare Simpson*, 58 M.J. at 374-75. In *Simpson* the comments were directed at a specific set of circumstances at a specific command, and the command and the trial court took numerous steps to shield the appellant’s trial from the impact of those statements. *See id.* at 375-76. The Court acknowledged, however, that similar comments in different circumstances could create the appearance of UCI. *Id.* This is precisely such a case. The action at issue in this case, however, was not targeted to a specific case but rather considered the entire military establishment. Unlike in *Simpson*, no action was taken to shield LCpl Leger’s referral from the appearance that it would be influenced by Secretary Austin’s comments.

Moreover, the context and tenor of statements in this case carries a much stronger implication that those in charge of the military desire specific outcomes. Secretary Austin, after addressing a claim that a Marine accused of sexual misconduct had been allowed to remain on active duty, told reporters that the military has not “gotten it right” when it comes to sexual assault in the military. Senator Gillibrand used those same facts as an example of a failure to “deliver justice” for a purported victim. These were not statements like those at issue in *Lawson*, where the Commandant made broad pronouncements about general leadership principles without appearing to direct any particular action. *See Lawson*, 33 M.J. at 951. Rather, their import is that anything less than a criminal conviction and separation from the service is the “wrong” way to handle these allegations, and a failure on the part of the military.

Ayers is inapposite because the PHO had recommended referral of charges, and the appellant did not argue that the decision to refer charges in his case was tainted. *See Ayers*, 54 M.J. at 92-93. Indeed, if one fact sets this case apart from all others it is that the Article 32 process ran its full course and the PHO determined that this case should not go forward because the facts would be insufficient to support a conviction at trial. In that regard, this case is similar to *Gerlich*, insofar as comments from a superior implied that stronger action should be taken despite the fact that an examination of the case and the evidence supported an alternative—i.e. lower—disposition as the appropriate course of action. *See Gerlich*, 45 M.J. at 311-12.

It would be inappropriate to hold, in the present case, that because the relevant remarks were not specifically targeted at LCpl Leger's case or his command, that there was no appearance of UCI. In fact, the opposite is true. While directed comments may place a proverbial target on the back of a *particular* convening authority, *see Barry*, 78 M.J. 70, comments unconstrained to a particular set of facts can be seen as an effort to influence *all* convening authorities. The Court in *Boyce* recognized as much when it acknowledged the possibility that comments directed at a specific commander had the potential to influence other convening authorities. *See Boyce*, 76 M.J. at 253. It would likewise be inappropriate to hold that the Defense has not met its burden because it has not shown that Major General Bierman's referral decision was actually impacted, because the Defense needs only to establish facts that create the appearance of vulnerability. *See Allen*, 31 M.J. at 590.

The Government may endeavor to argue that these comments do not amount to UCI at all, rendering the question of public perception moot. Not so. Comments that imply that there is a "right" and a "wrong" way to handle allegations of sexual misconduct create the appearance that the Secretary of Defense is endorsing certain outcomes as more desirable than others.

Threats to withdraw command authority due to perceived failures to achieve preferred outcomes—as seen from Senator Gillibrand—give the impression that convening authorities have a vested interest in achieving certain results, and a concomitant fear of reprisal should they fail to do so. *See Thomas*, 22 M.J. at 393. This effect is not limited to the authority to convene courts-martial, but extends to the perceived chance of achieving higher echelons of command, given the influence that the Armed Services Committee and Congress in general has over General Officer promotions.

The enclosed articles are illustrative because they provide a snapshot of how members of the public view the Secretary's comments in conjunction with pressure from lawmakers—that is, as a de facto directive urging commanders to take stronger actions against those accused of sexual offenses against the risk of losing command authority.

Collectively, the Defense has shown “some evidence” that creates the appearance to an outside observer that the military justice system is vulnerable to extra-judicial influences in deciding which cases will go to trial.³ *See Allen*, 31 M.J. at 590; *Boyce*, 76 M.J. at 248, 251-53. If a member of the public learned that these charges had been referred to trial despite the fact that a neutral, experienced judge advocate had recommended this case be dismissed after reviewing all of the evidence and taking witness testimony, they would certainly wonder why. In considering the timing of the referral decision—with specific regard to the Secretary of Defense's actions and comments regarding a different Marine Corps case—that person would conclude that Major General Bierman may have felt some pressure to achieve a specific result in

³ The Defense is not contending that every sexual assault case referred after 19 February 2021 is tainted by UCI. Certainly, the passage of time and other intervening circumstances will serve to mute the impact of the actions complained of here. Rather, it is the timing and sequence in this case that renders the referral decision inherently suspect in light of the surrounding circumstances.

this case, lest he be the next commander to be questioned by Secretary Austin. At the very least, it would create the perception in the mind of a reasonable person that the military system is vulnerable to influence from civilians in charge of the military establishment, and cause them to question whether the process is fair. The Government cannot prove beyond a reasonable doubt that these circumstances did not place this precise type of strain on the public's perception of the military justice system.

EVIDENCE

In addition to the charge sheet, the Defense requests that the Court consider the following materials in deciding this motion:

Enclosure 1: Preliminary Hearing Officer's Report

Enclosure 2: Art 32 audio

Enclosure 3: PHO's written comments

Enclosure 4: Cited Articles

Enclosure 5: Sen Gillibrand's tweet, dtd 23 Feb 21

Enclosure 6: Committee Hearing Transcript Excerpt

Enclosure 7: [REDACTED] forwarding letter

Enclosure 8: [REDACTED] SJA advice letter


RELIEF REQUESTED

The Defense respectfully requests that the charge and both specifications be dismissed with prejudice. No other form of relief is adequate, because anything short of dismissal still requires going forward with a contested trial under circumstances that would give an objective observer significant doubts about the fairness of the military justice system. *See Barry*, 78 M.J. at 79 (holding that any alternative would "only serve to lengthen a protracted litigation that has

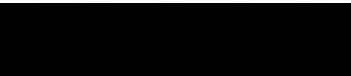
already reached its natural conclusion,” and that no other remedy would “ensure the public perception of fairness in the military justice system”). Here, the natural conclusion of this case was dismissal in accordance with the PHO’s recommendation.

The Defense requests oral argument.

Respectfully submitted,


E. A. FERGUSON
Captain, U.S. Marine Corps
Defense Counsel

I certify that I have served a true copy of the above on Lieutenant Colonel Melanie J. Mann, U.S. Marine Corps, Military Judge, and Major Aran T. Walsh, U.S. Marine Corps, Trial Counsel and Captain Chelsea A. Lucas, U.S. Marine Corps, Trial Counsel on 7 May 2021.


E. A. FERGUSON
Captain, U.S. Marine Corps
Defense Counsel

UNITED STATES MARINE CORPS
NAVY-MARINE CORPS TRIAL JUDICIARY
PACIFIC JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES

v.

TYLER J. LEGER
LANCE CORPORAL
U.S. Marine Corps

GOVERNMENT RESPONSE TO
DEFENSE REQUEST FOR MEMBER
VIEWING/INSPECTION OF SCENE

UNDER R.C.M.
913(c)(3)

14 May 21

MOTION

This is the Government's response to Defense motion for a viewing and inspection of [REDACTED]

[REDACTED] This Court should **DENY** the Defense motion because the request is needlessly cumulative given available and anticipated testimony, photographs, and diagram illustrating the floor plan layout of the crime scene. The requested inspection will also lead to undue delay and waste of time.

FACTS

For purposes of this response motion, the Government adopts the Defense statement of facts.

The Government adds the following additional facts:

- a. NCIS conducted a crime scene documentation of another alleged victim in this case, [REDACTED]
(Encl.1)
- b. NCIS created a floor plan diagram of the layout of the dorm room of the other alleged victim in this case, [REDACTED] (Encl.2)

c.



LAW

Pursuant to R.C.M 913(c)(3), the “military judge may, as a matter of discretion, permit the court-martial to view or inspect premises or a place or an article or object.” The Defense correctly identifies that the discussion to R.C.M. 913(c)(3) was recently amended such that views and inspections are no longer limited to ‘extraordinary circumstances’. The discussion to R.C.M. 913(c)(3) now states, “The fact that a view or inspection has been made does not necessarily preclude the introduction in evidence of photographs, diagrams, maps, or sketches of the place or item viewed, if these are otherwise admissible.”¹

M.R.E. 401 provides that evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence, and the fact is of consequence in determining the action.

M.R.E. 403 provides that the military judge may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence.

DISCUSSION

The Court should exercise its discretion and deny Defense motion for the court-martial to view or inspect the crime scene of [REDACTED] The

¹ R.C.M 913(c)(3) (discussion).

Defense argues that a viewing and inspection in this case is warranted in part because the alleged offense is a sexual assault without consent which is a serious alleged incident and the unique nature of said offense is an "extraordinary circumstance" which warrants a site view. Defense fails to articulate why alternative forms of evidence would be inadequate and implies that members would be unable to appreciate the size of a dorm room without a visit.

This case involves a sexual assault that took place in a dorm room with two other people present – two witnesses, who will testify at trial, and can speak to those facts identified by Defense as significant enough to necessitate a site view. The witnesses' testimony will speak to the following: the witnesses' close proximity to [REDACTED] and the Accused at the time of the alleged assault, the spatial limitation of open space due to furniture (illustrating the feel and size of the room), and how easily they were accessible to provide help or assistance to [REDACTED]. Defense further states that there is a "complete lack of other visual evidence depicting [REDACTED]." This statement is a mischaracterization of available evidence in this case. There are NCIS crime scene photographs that document a dorm room that belonged to another alleged victim in this case, with the exact same floor plan as that of [REDACTED]. There is also a diagram created by NCIS of the layout of that dorm room. The lack of a visual depiction of [REDACTED] can be remedied through these photographs and diagram since they depict the exact same floor plan and sufficiently illustrate the spatial layout of the rooms at the [REDACTED]. Thus, a site view is not justified.

Contrary to Defense's position, the requested site visit is not the only way to demonstrate the compact nature and characteristics of this dorm room. The Defense can introduce the crime scenes' characteristics through testimony of witnesses familiar with the area, to include [REDACTED] Ms. [REDACTED] and Mr. [REDACTED] in addition to the NCIS crime scene photographs of

██████████ and the diagram of the layout of that room. Given the numerous ways with which the Defense can present the crime scene, the probative value of the court-martial viewing or inspecting the scene is seriously diminished.

Defense cites to *United States v. Wells*, which states that Defense must show there is some unique aspect about the scene that requires the presence of the court-martial.² However, Defense fails to identify and explain what is so unique about this particular dorm room that members would not be able to conceptualize the layout of the compact space from the expected testimony, photographs, and diagrams, or sketches of the dorm room space. Members are able to use their experience, common sense and knowledge of the ways of the world when evaluating and weighing evidence. Defense's argument that a site visit is the only way Members could understand the compact nature of a dorm room with two twin beds and four people inside is absurd. Defense has not identified any unique aspect of this dorm that makes it so different from any other typical dorm room or barracks room's "small communal shared space," that would merit the necessity of a site visit to allow members to understand the spatial limitations of the dorm. Further, Defense has failed to demonstrate that the pictures and diagram of a substantially similar dorm room in the same housing complex with the same exact floor plan is not sufficient to convey the layout of ██████████ to members.

Given the limited probative value, M.R.E. 403 weighs in favor of excluding the requested inspection or visit. The requested inspection would be needlessly cumulative with the presentation of testimony, photographs, video, and sketches or diagrams of the room that could be prepared in this case. Additionally, contrary to Defense assertion that the "site visit can be

² See *United States v. Wells*, No. 9601349, 1998 WL 85571, at *7 (N-M. Ct. Crim. App. Feb. 27, 1998) (defense made no showing that anything "unique to the case" would be accomplished with a crime scene viewing; parties were able to educate the panel by other means).

accomplished very quickly,” the location of the crime scene requires transporting the Court-Martial, all members and parties involved, down to Honolulu, HI, from Marine Corps Base Hawaii, Kaneohe Bay. In the best conditions this is a thirty to thirty-five minute one-way trip. Additionally, it will require coordination and approval with the University, as new residents currently occupy the dorm room in question. Facilitating this unnecessary site visit will result in significant undue delay and waste of time in conducting this court-martial.

Without question, the Accused has the Constitutional right to present a defense. “However, the Constitution does not confer upon an accused the right to present any and all types of evidence at trial, but only that evidence which is legally and logically relevant.” *United States v. Dimberio*, 56 M.J. 20, 24 (C.A.A.F. 2001). Given the multiple means of presenting evidence related to the crime-scene and Defense lack of asserting any unique aspect of this site which cannot be conveyed by those other means, denying the requested inspection and visitation will not deprive the accused of his ability to present a defense. After balancing the minimal probative value against the dangers identified in M.R.E. 403, the Court should deny the Defense motion.

BURDEN

As the proponent of the motion, the burden of proof and persuasion rests on the Defense. R.C.M. 905(c)(2). The standard as to any factual issue necessary to resolve this motion is a preponderance of the evidence R.C.M. 905 (c)(1).

EVIDENCE

The Government submits the following in support of this motion:

- (1) NCIS Photographs of [REDACTED]
- (2) NCIS Diagram of Floor Plan Layout of [REDACTED]

(3) [REDACTED]

information.

RELIEF REQUESTED

The Government respectfully requests that the Court DENY the Defense motion for a viewing and inspection of [REDACTED] the alleged crime scene.

ARGUMENT

The Government does not request oral argument on the motion. The Court may issue a ruling on the filings.

[REDACTED]
C. A. LUCAS
Captain, U.S. Marine Corps
Trial Counsel

I certify that I have served a true copy of the above via electronic mail upon the Military Judge and Defense Counsel on 14 May 2021.

[REDACTED]
C. A. LUCAS
Captain, U.S. Marine Corps
Trial Counsel

mission to prevent sexual assault and harassment and ensuring a safe, secure, and productive environment for all personnel and dependents. The statement then transitioned into his discussion of the Extremism Stand-down.

d. On 6 May 2021, the Department of Defense published a statement in which the Department of Defense Sexual Assault Prevention and Response Office (SAPRO) Director spoke on the Department of Defense's previous statements and reiterated the importance of sexual assault prevention and victim support following an allegation. (*See*, Terri Moon Cronk, *SAPRO Director Addresses Progress in Sexual Assault Prevention, Victim Support*, U.S. Department of Defense, May 6, 2021, available at <https://www.defense.gov/Explore/News/Article/Article/2598157/sapro-director-addresses-progress-in-sexual-assault-prevention-victim-support/> [Encl. 2]).

e. Army Maj. Gen. Coward further clarified the Secretary of Defense's statements by reiterating the Department of Defense priority "to take care of our victims," and that he supports "Secretary of Defense Lloyd J. Austin III's guidance to boost our crime prevention efforts and explore all other options to ensure ... an environment where dignity, inclusion and respect is the norm." The statement further discusses SAPRO, SAPRO's assistance in helping crime victims, and the importance of reporting and prevention.

f. On 7 May 2021, the Department of Defense published their statement regarding the Independent Review Commission's initial recommendations following the Commission's comprehensive sex assault review. (*See*, Jim Garamone, *Leaders Discuss Initial Sex Assault Review Commission Recommendation*, U.S. Department of Defense, May 7, 2021, available at <https://www.defense.gov/Explore/News/Article/Article/2600363/leaders-discuss-initial-sex-assault-review-commission-recommendation/> [Encl. 3]).

g. The Secretary of Defense stated that he is taking all options into consideration—with revamping the accountability line of effort being just the first of many options discussed. The Secretary of Defense then discussed the importance of service chiefs reviewing the many options and engaging in dialogue with him. The Secretary of Defense and chairman of the Joint Chiefs of Staff then discussed holding off on making any policy decisions until the final results of the review commission.

3. Discussion

Defense's motion has not alleged any actual unlawful command influence affecting this court-martial, only that the statements of public officials, particularly the Secretary of Defense and select members of Congress, have created the appearance of UCI. Apparent UCI refers to actions that affect "the perception of fairness in the military justice system as viewed through the eyes of a reasonable member of the public." *United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006). An appearance of UCI exists where "an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding." *Id.* To raise the issue of UCI, the Defense must show "some evidence," that is "the accused must show facts which, if true, constitute unlawful command influence, and that the alleged unlawful command influence has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings." *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999). While the Defense's burden is low, they must show "more than mere 'command influence in the air' or speculation." *United States v. Harvey*, 64 M.J. 13, 18 (C.A.A.F. 2006), citing *United States v. Johnson*, 54 M.J. 32, 34 (C.A.A.F.). The burden then shifts to the Government to prove beyond a reasonable doubt either that there is no UCI or that the UCI will not affect the proceedings.

**A. SENATOR KRISTEN GILLIBRAND, REPRESENTATIVE JACKIE SPEIER,
AND THEN-NOMINEE FOR DEPUTY SECRETARY OF DEFENSE
KATHLEEN HICKS ARE NOT CAPABLE OF COMMITTING UCI.**

In their motion, the Defense has failed to provide a scintilla of evidence as to whether Senator Gillibrand or Representative Speier are capable of committing UCI. In *Bergdahl*, the Court ruled that Senator McCain was only capable of committing UCI because of his status as a retired member of the United States Navy and was thus subject to the UCMJ. *United States v. Bergdahl*, 80 M.J. 230, 234 (C.A.A.F 2020). Neither Senator Gillibrand nor Representative Speier have served in the armed forces and are not subject to the UCMJ and thus not capable of committing UCI. Additionally, to make a blanket statement, as Defense's position does, that any public comments, by members of Congress, critical of the military, should be treated as *de facto* UCI for any tangentially-related court-martial procedure that may follow would serve to gridlock the entire military justice system. The Court has made it unequivocally clear that members of Congress, including members of the Senate Armed Services Committee, have a wide latitude to do their jobs without committing UCI. "Senator McCain did not make this public comment in the context of conducting congressional oversight of the armed forces regarding military justice issues generally, or the disposition of certain categories of cases, or even the disposition of a particular case that was already final. Rather, Senator McCain made his public threat to hold a hearing in a specific case *that was currently pending* if the sentence imposed in that specific case was not to his liking." *Id.*, at 236.

Regarding the statements of *then*-Nominee Deputy Secretary of Defense Kathleen Hicks, the Court in *Bergdahl* is again clear that a citizen not subject to the Code cannot commit UCI. When addressing, then-Candidate, President Donald Trump's statements, the court reiterated, "And yet, we underscore the fact that as a presidential *candidate*, Mr. Trump was neither a person 'subject

to the [C]ode' as a retiree or otherwise, nor a convening authority. *See* Articles 2, 22, UCMJ. Consequently, by their terms, neither Article 37, UCMJ, nor R.C.M. 104(a)(1), applied to comments that Mr. Trump made as a presidential candidate, no matter how inaccurate or unfair those statements were." *Id.* At 238.

B. SECRETARY OF DEFENSE AUSTIN'S STATEMENTS, ON THEIR FACE AND IN ISOLATION, WERE NOT UCI AS THEY HAD NEITHER A NEXUS TO THE CASE NOR AN INFLUENCE OVER THE CASE.

Defense's motion has failed to show facts, which, if true, constitute UCI, and that the alleged UCI has a *logical connection* to this court-martial, investigation, or the Command's decision to prefer charges. It is clear from the articles and videos cited in the Defense's motion that the comments by the Secretary of Defense concerns the Department of Defense's handling of sex crimes as a whole both inside and outside of the military justice system. Not—as the Defense's motion speculates—the Secretary of Defense demanding that commands treat accusations as a default conviction or as the Secretary of Defense's public declaration of his wanting to meddle in active trials. The Secretary of Defense has been speaking publicly on sex crimes and extremism as the Department of Defense has been working on data collection for prevention and awareness of sex crimes and extremism within the department of defense. (Encl. 1). When the entire context of these statements is considered, and not just Defenses' hand-picked statements, it is clear that there is not the slightest evidence presented to suggest that the Department of Defense and Secretary of Defense's months long data collection and policy analysis process had any improper influence over the convening authority or anyone else associated with the Defendant's trial. *United States v. Easterly*, No. NMCCA 201300067, 2014 CCA LEXIS 40, at *25 (NMCCA 2014).

Defense, to meet their burden, must do more than speculate over vague statements that they may disagree with professionally. Defense's motion must present "evidence that a plan or scheme" existed. *United States v. Shea*, 76 M.J. 277, 282 (C.A.A.F. 2017). "[T]here must be something more than an appearance of evil to justify action by an appellate court in a particular case. 'Proof of [command influence] in the air, so to speak, will not do.' We will not presume [influence] simply by the proximity of events which give the appearance of command influence in the absence of a connection to the result." *United States v. Allen*, 33 M.J. 209, 212 (C.M.A. 1991). There needs to be a nexus between the alleged statements and the current case at-hand.

The Preliminary Hearing Officer, while finding probable cause, did not believe there was significant chance of success at court martial. The Convening Authority in referring charges simply stated that he "disagree[s]." The defense's position again speculates UCI because the Convening Authority did not address or justify his reasons for disagreeing. Defense's asserted speculation is, at most, command influence in the air. There is no regulation, statute, or authority that requires the Convening Authority to explain why he disagrees with the preliminary hearing officer or to only refer charges in cases which are guaranteed guilty verdicts. *See, Shea*, at 282. (AFCCA not explaining its motives for removing a judge were mere speculation and not "some evidence" of UCI).

Policy makers must be permitted to discuss policy in public forums without every vaguely-related case that follows getting dismissed for UCI. To, again, quote the Court in *Bergdahl*, "Senator McCain did not make this public comment in the context of conducting congressional oversight of the armed forces regarding military justice issues generally, or the disposition of certain categories of cases, or even the disposition of a particular case that was already final. Rather, Senator McCain made his public threat to hold a hearing in a specific case

that was currently pending if the sentence imposed in that specific case was not to his liking.” *Berdahl*, 80 M.J. at 236. Neither the Secretary of Defense’s Statements, nor the aforementioned Congress Members’ statements, in the slightest, can be considered the *quid pro quo* that the *Bergdahl* holding would need to consider a public policy maker guilty of UCI. Defense’s motion has failed to provide any evidence that the Secretary of Defense’s statements have even the slightest nexus to the case at-hand except for the Defense’s speculation that convening authorities are now scared of losing their job or that the Secretary of Defense may want to ensure the mental and physical health of victims in a convening authority’s command is being treated and cared for appropriately.

C. EVEN IF THE STATEMENTS BY THE SECRETARY OF DEFENSE AMOUNTED TO UCI, FURTHER CLARIFYING STATEMENTS REMEDIED OR PREVENTED ANY TAINTING OF THE PROCEDURE.

The Department of Defense has since put out further statements clarifying these initial statements by the Secretary of Defense. Army Maj. Gen. Clement Coward, director of the DOD’s Sexual Assault Prevention and Response Office, spoke on the Secretary of Defense’s “looking out for her needs” statement. Maj. Gen. Coward reiterated that taking care of victims remains a priority of the Department of Defense and that victims are “taken care of” and empowered via “additional reporting options, specialized legal counsel, and a 24/7 confidential helpline.” (Encl. 2). Not, as the Defense’s position surmised, that victims are cared for via Department of Defense interference in the military justice process. Further clarifying, the Department of Defense has stated that “[t]he Secretary wants other defense leaders, the service secretaries and service chiefs to review the recommendations and engage in dialogue with him on the issue. He wants their input and thoughts...” (Encl. 3). This is a clear clarification and signal from the Secretary of Defense and Department of Defense that military leaders are not

only free to make decisions within their statutory discretion, but also push their thoughts, feelings, and recommendations of the process up the chain for any questions, concerns, or clarifications—the opposite of undue command influence.

When taken in totality, an objective, disinterested observer, fully informed of all the facts and circumstances—particularly the fact that the Secretary of Defense’s statements were in regard to mental and physical health protections of victims and alleged victims—would not draw a connection between the comments and this court-martial because the Secretary of Defense’s comments did not have to do with this court-martial and whether he wanted more vigorous charges in the case. And, even if that observer did somehow draw some connection between these leaders’ comments and the military justice system in general, the Department of Defense’s clarifications would remove any doubt about the fairness of these proceedings.

D. DISMISSAL OF CHARGES IS A LAST RESORT FOR ONLY THE MOST EGREGIOUS UCI.

If the Court were to find that these general statements were UCI and that the Department of Defense’s clarifying statements were not sufficient clarification, the Court is supposed to view dismissal as a last resort and seek remedy and clarification of potential UCI whenever possible and only if there is no way to prevent UCI from adversely affecting the findings and sentence. *United States v. Jones*, 30 M.J. 849, at 854 (NMCMR 1990). Remedies and clarifications should be appropriately tailored for each case. *United States v. Roser*, 21 M.J. 883 (A.C.M.R. 1986). Such as the convening authority in this case submitting a sworn affidavit or any further clarifying letters and pronouncements that he has not and will not be influenced by the comments of senior military and civilian leaders when making any decision for which he is responsible as a convening authority. *United States v. Rivers*, 49 M.J. 434. (C.A.A.F. 1998); *United States v. Stoneman*, 57 M.J. 35 (C.A.A.F. 2002); *United States v. Reed*, 65 M.J. 487 (C.A.A.F. 2008).

Should the Court grant the Defense's motion, it will be taking the most drastic measures possible toward remedying an otherwise minor issue. This would serve to harm the public perception of the military justice system more than these statements may have and more than the Defense's motion alleged the statements did.

4. Evidence and Burden of Proof. The Defense bears the initial burden of showing some evidence of UCI. After showing some evidence, the burden shifts to the Government to prove beyond a reasonable doubt that either the UCI does not exist or that it will not affect these proceedings. In support of its motion, the Government offers the following:


Enclosure (1): <https://www.defense.gov/Explore/News/Article/Article/2508894/dod-taking-steps-to-prevent-sexual-assault-and-extremism/>

Enclosure (2): <https://www.defense.gov/Explore/News/Article/Article/2598157/sapro-director-addresses-progress-in-sexual-assault-prevention-victim-support/>

Enclosure (3): <https://www.defense.gov/Explore/News/Article/Article/2600363/leaders-discuss-initial-sex-assault-review-commission-recommendation/>


5. Relief Requested. The Government respectfully requests that the Court deny the Defense's motion. In the event that the burden does shift, the Government requests that the Court grant the government adequate preparation time to further respond.

6. Argument. The Government requests oral argument.


J. C. O'Neil
First Lieutenant, U.S. Marine Corps
Trial Counsel

Certificate of Service

I hereby attest that a copy of the foregoing motion was served on the Court and opposing counsel via electronic mail on 14 May 2021.


J. C. O'Neil
First Lieutenant, U.S. Marine Corps
Trial Counsel

**GENERAL COURT-MARTIAL
UNITED STATES MARINE CORPS
HAWAII JUDICIAL CIRCUIT**

UNITED STATES

v.

**TYLER J. LEGER
LANCE CORPORAL
U.S. MARINE CORPS**

**GOVERNMENT RESPONSE TO
DEFENSE'S MOTION TO COMPEL
WITNESS PRODUCTION**

28 June 2021

1. Nature of the Motion.

This is the Government's response to the Defense Motion to Compel Witness Production. The Court should **DENY** the Defense motion to compel witness production of Corporal Colton Westfelt because the witness is irrelevant or not material and the request is untimely. The Government grants the Defense request to produce Gunnery Sergeant [REDACTED] for trial on the merits in the subject case.

2. Statement of Facts.

For purposes of this motion the Government adopts Defense's statement of facts, but adds the following additional facts:

- a. The Government provided initial discovery to Defense in this case on 6 November 2020. (Encl. 1)
- b. In its initial discovery, the Government provided Defense with the NCIS report of investigation dated 22 December 2019, which included a writing by [REDACTED] that she had spoken with Cpl [REDACTED] about the events in question. (Encl. 2)
- c. The Government interviewed Cpl [REDACTED] on 23 June 2021. (Encl. 3)

3. Law.

An accused has the right to compel the attendance of witnesses at trial.¹ The right to compel the attendance of witnesses, however, is not absolute. The defense must demonstrate that witnesses are both material and necessary before any order to produce is required.² Materiality has been defined as the “reasonable likelihood” that the evidence could have affected the judgment of the military judge or court members.³

Even if a witness is material, the witness’s testimony must not be “merely cumulative.”⁴ The Military Judge must determine if “there is anything to be gained from an additional witness saying the same thing other witnesses have said.”⁵ The Military Judge should balance the accused’s due process rights protecting the court-martial process from abuse.⁶

In requesting witness production, R.C.M. 703(c)(2)(B)(i) requires defense to provide “a synopsis of the expected testimony sufficient to show its relevance and necessity.” “The requirement of R.C.M. 703(c)(2)(B)(i) for a synopsis of expected testimony is not satisfied by merely listing subjects to be addressed; rather, it must set out what the witness is expected to say about those subjects.”⁷

R.C.M. 703(c)(2)(C) provides, “[t]he military judge may set a specific date by which” defense must submit the list of witnesses they are requesting. R.C.M. 703(c)(2)(C) further states, “[f]ailure to submit the name of a witness in a timely manner shall permit denial of a motion for production of the witness, but relief from such denial may be granted for good cause shown.”

¹ Article 46, UCMJ; RCM 703(a), MCM, 2019; *United States v. Carpenter*, 1 M.J. 384 (C.M.A. 1976); *United States v. Jones*, 20 M.J. 919, 925 (N-M.C.M.R. 1985).

² *United States v. Tangpuz*, 5 M.J. 426 (C.M.A. 1978).

³ *United States v. Hampton*, 7 M.J. 284, 285 (C.M.A. 1979).

⁴ *Williams*, 3 M.J. at 243.

⁵ *Id.* at fn 8.

⁶ *Id.*

⁷ *United States v. Rockwood*, 52 M.J. 98, 105 (C.A.A.F. 1999).

4. Discussion.

a. Corporal [REDACTED] Testimony is not Material or Necessary

Defense has not established that the witness is relevant and necessary for the court-martial, nor provided any evidence in support of its proffered testimony. In its request for the production of Cpl [REDACTED] defense stated that Cpl [REDACTED] "was in the truck with [REDACTED] and LCpl Leger from the University of Hawaii to MCBH on the night in question. He will testify that she chose to sit next to LCpl Leger in the truck and did not ever appear defensive or displeased with LCpl Leger." (Encl. 5 to Def. Motion to Compel Witnesses). Defense has not offered any evidence in support of this expected testimony. Rather, in direct contradiction to defense's proffer of the witness's expected testimony, Cpl [REDACTED] stated the following in his interview with the government, "I don't recall the order people got in the truck. I don't remember anyone choosing to sit next to anyone else." (Encl. 3, p. 2). Cpl Westfelt went on to state, "I didn't observe [REDACTED] and Leger in the car, I think they took a picture." (Encl. 3, p. 3). The witness clearly does not have a recollection or personal knowledge of the ride from the University of Hawaii to MCBH to which he could testify at court-martial.

In its request, defense goes on to state that Cpl [REDACTED] "will further testify that he observed her at the barracks, and she did not appear to be overly intoxicated." (Encl. 5 to Def. Motion to Compel Witnesses). Again, defense has not offered any evidence in support of this expected testimony, and, again, Cpl [REDACTED] interviewed in contradiction to defense's expectation of his testimony. In his interview, Cpl [REDACTED] stated, "Leger was drinking in the common room, [REDACTED] drank too, but I don't know what or how much. We all started drinking pretty heavily when we got to base, I'm not sure about [REDACTED]. [REDACTED] was in the room somewhere drinking."

(Encl. 3, p. 3). Cpl [REDACTED] went on to state, "I don't have any memories from when they were in the lounge. Or any memories of Leger and [REDACTED] talking in the common room." (Encl. 3).

In its request for the production of Cpl [REDACTED], the defense additionally expects that the witness "will testify that [REDACTED] appeared to gravitate towards LCpl Leger throughout the night, leaning against him, and that the two of them appeared to be hitting it off well." (Encl. 5 to Def. Motion to Compel Witnesses). Consistent with the other expected testimony from Cpl [REDACTED] defense has not offered any evidence in support of its expectation. As previously mentioned, the witness stated that he did not observe LCpl Leger and [REDACTED] on the ride from the University of Hawaii to MCBH, and that he does not have any memories of LCpl Leger and [REDACTED] while they were at MCBH. (Encl. 3). In his interview with the government, Cpl [REDACTED] clearly stated that he returned to his barracks room alone after the barracks party was broken-up, and that he did not observe LCpl Leger and [REDACTED] leave, nor did he see them at any point after that. (Encl. 3). Significantly, Cpl [REDACTED] stated, "I didn't observe any contact between [REDACTED] and Leger at [REDACTED] or any other time." (Encl. 3, p. 5). Not only has defense not offered any evidence that Cpl [REDACTED] will testify that [REDACTED] "appeared to gravitate towards LCpl Leger throughout the night", that she "leaned against" LCpl Leger, or that the two of them "appeared to be hitting it off well," the evidence that is before the Court demonstrates that Cpl [REDACTED] has a lack of knowledge or memory of the events, and, that one of the few things that he did recall with clarity, that he didn't observe any physical contact between the Accused and [REDACTED], directly contradicts defense's expectation of his testimony. Finally, Defense's request states that it expects the witness to testify "that he never had a conversation with [REDACTED] about her having slept with LCpl Leger." (Encl. 5 to Def. Motion to Compel Witnesses). Defense has not offered any evidence to support this expectation, however.

A witness cannot be material and necessary if he did not observe the events that occurred, or if he cannot remember the events which he did observe. Defense has not established that the witness is material and necessary for the court martial, nor has it provided any evidence in support of its proffered testimony.

b. Defense Request for Production of the Witness is Untimely and there is no Good Cause for the Delay.

In its motion, Defense asserts that "Cpl [REDACTED] initially appeared to defense counsel as a tangential witness, and it was not until he was interviewed at length that his relevance to the case at bar became fully apparent." (Def. Motion to Compel Witnesses). Defense, however, has provided no explanation as to why it did not interview Cpl [REDACTED] until 18 June 2021, when the deadline set by the Court for requesting witnesses was 26 March 2021. On 6 November 2020, the Government provided its initial disclosure of evidence to Defense, which included a writing by [REDACTED] that she had spoken to Cpl [REDACTED] about the events in question. (Encls. 1, 2). Furthermore, Defense has full and confidential access to the Accused, Cpl [REDACTED] roommate (Encl. 3), who could provide information as to who accompanied him to the [REDACTED] [REDACTED] on the night in question.

Defense was provided notice of Cpl [REDACTED] involvement in the subject case as early as 6 November 2020, yet it did not interview him until 18 June 2021. Defense has provided no explanation for its delay in interviewing Cpl [REDACTED] that would allow for relief from a denial of its motion for the production of the witness pursuant to R.C.M. 703(c)(2)(C) due to an untimely request.

5. Burden of Proof.

The Defense bears the burden of establishing the materiality and necessity of its requested witness by a preponderance of the evidence standard. R.C.M. 905(c).

6. Evidence/Enclosures.

Enclosure 1: Government Email to Defense dated 6 November 2020

Enclosure 2: Portion of NCIS Report of Investigation dated 22 December 2019

Enclosure 3: Cpl [REDACTED] Interview Notes

7. Relief Requested.

The Government respectfully requests that the Court deny the defense motion to compel the production of the requested witnesses.

8. Argument.

The Government respectfully requests oral argument.

[REDACTED]

J/M. ALEXANDER
First Lieutenant, U.S. Marine Corps
Trial Counsel

XX

CERTIFICATE OF SERVICE

I hereby certify that a copy of this document was served on Defense on the 28th day of June 2021.



J. M. ALEXANDER
First Lieutenant, U.S. Marine Corps
Trial Counsel

REQUESTS

THERE ARE NO REQUESTS

NOTICES

**UNITED STATES MARINE CORPS
NAVY-MARINE CORPS TRIAL JUDICIARY
HAWAII JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL**

UNITED STATES

v.


**TYLER J. LEGER
Lance Corporal
U.S. Marine Corps**

**NOTICE OF PLEAS AND
FORUM**

21 June 2021

1. **Forum:** Pursuant to Rules for Courts-Martial (R.C.M.) 903(b), Lance Corporal (LCpl) Tyler J. Leger, U.S. Marine Corps, by and through counsel, elects trial by members *with* enlisted representation. This forum election is subject to change pending the outcome of pretrial motions.
2. **Pleas:** Pursuant to R.C.M. 910, by and through counsel, LCpl Leger enters the following pleas: to all charges and specifications thereunder: NOT GUILTY.

Dated this 21st day of June, 2021


E. A. FERGUSON
Captain, U.S. Marine Corps
Detailed Defense Counsel

I certify that I caused a copy of this document to be served on the Court and opposing counsel.

Dated this 21st day of June, 2021.

[REDACTED]

E. A. FERGUSON
Captain, U.S. Marine Corps
Detailed Defense Counsel

COURT RULINGS & ORDERS

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

UNITED STATES

v.

TYLER J. LEGER
LANCE CORPORAL, USMC

RULING ON DEFENSE MOTION
TO DISMISS FOR UNLAWFUL
COMMAND INFLUENCE

1. Nature of the Motion

The defense moves to dismiss the charge and underlying specifications on grounds of apparent unlawful command influence (UCI) based on improper statements by the Secretary of Defense and other government officials regarding; (1) an unrelated [REDACTED] video where an emotional female Marine alleged that her commanding general elected to allow a man she had accused of sexual misconduct to remain in the Marine Corps; (2) the handling of sexual assaults in the military; and (3) whether commander's in the military should retain disposition authority over certain cases involving sexual assault. AE XII, XIII. The government opposes the motion.

The Defense argues that the pretrial statements at issue in this motion have prejudiced this proceeding to the point that they have placed an intolerable strain on the public's perception of the military justice system. AE XIII. The Government contends that there is no evidence of unlawful command influence (UCI) in violation of Article 37. That even if the court finds that some evidence of UCI exists; (1) further clarifying statements by the Department of Defense remedied or prevented any tainting of the procedures; and (2) other less severe remedial measures exist that would cure any potential taint of UCI. AE XVI.

The Court held an Article 39(a) on this motion on 24 May 2021 at Marine Corps Base Hawaii (MCBH). The defense presented no further evidence and rested on its filings; the government offered, AE XVIII, an affidavit from from Major General James W. Bierman, U.S. Marine Corps, the Convening Authority. Both sides presented oral argument on the motion. The court did not issue a ruling at that time. On 1 June 2021, counsel were provided with a Notice and Summary of Rulings detailing the Court's conclusions of law. AE _____. The court now provides its written ruling.

1
2 **2. Issue:** Did the pretrial actions and statements of the SECDEF and other government
3 officials pertaining to a separate unrelated matter alleging a different command's mishandling of
4 a sexual misconduct complaint constitute apparent UCI in violation of Article 37, UCMJ?
5

6 **3. Findings of Fact:** After considering the evidence, filings, and arguments, the court
7 renders the following factual determinations:

- 8 a. LCpl Leger is charged with two specifications of UCMJ Article 120 (sexual assault
9 without consent, and sexual assault when [REDACTED] was asleep and unconscious) against
10 [REDACTED] a civilian [REDACTED]
- 11 b. On 13 January 2021, the Commanding Officer, [REDACTED]
12 located at Marine Corps Base Hawaii, Kaneohe Bay, Hawaii, appointed a Preliminary
13 Hearing Officer and ordered an Article 32 hearing into the alleged sexual misconduct.
- 14 c. On 12 February 2021, the Article 32 Preliminary Hearing Officer (PHO) found probable
15 cause for the charge; however, opined that both specifications should be dismissed
16 because the evidence was unlikely to support a conviction at trial by court-martial. AE II.
- 17 d. At a press briefing, on 19 February 2021, Secretary of Defense Lloyd Austin addressed
18 an online video that had gone viral earlier that week in which a female Marine alleged
19 that her commanding general had elected to allow a man she had accused of sexual
20 misconduct to remain in the Marine Corps. AE XII, XIII.
- 21 e. Secretary Austin stated that he found the video "deeply disturbing;" that he was in
22 contact with that Marine's command to ensure "that someone is looking out for her
23 needs;" and that "[w]e have been looking at this for a long time in earnest, but we haven't
24 gotten it right." AE XII, XIII.
- 25 f. On 19 February 2021, a spokespersons for Senator Kirsten Gillibrand and Representative
26 Jackie Speier issued public statements that they were inquiring into the matter.
27 Representative Speier stated that she was "concerned about the situation." AE XII, XIII
- 28 g. On 23 February 2021, Senator Gillibrand published a Tweet that linked to the PBS News
29 Hour that impugned the military's failure to "protect and deliver justice" to sexual assault
30 survivors. AE XII, XIII

- 1 h. After reviewing the PHO's findings and recommendations, on 23 February 2021, the
2 Commanding Officer, [REDACTED] recommended trial by General Court-
3 Martial. This recommendation was forwarded to Major General (MajGen) Bierman,
4 Commanding General, [REDACTED]
5 i. On 25 February 2021, the [REDACTED] staff judge advocate (SJA) recommended
6 that MajGen Bierman, CG, [REDACTED] refer the charge and its two specifications to
7 general court-martial. The SJA's written recommendation referenced both the PHO
8 report and the [REDACTED] commanding officer's recommendation.
9 j. On 25 February 2021, the charges were referred to trial by general court-martial.
10 k. On 21 May 2021, MajGen Bierman through his Staff Judge Advocate, Colonel [REDACTED]
11 U.S. Marine Corps executed an affidavit stating that "[a]t no point did I permit any
12 comments, news article, briefings, or reports from the Secretary of Defense, any
13 Representative or Senator, or other person to unlawfully influence my decision to refer this
14 case to a GCM."

15
16 **4. Conclusions of Law:**

17 Unlawful command influence (UCI) is the "mortal enemy" of military justice. *United*
18 *States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986). Generally speaking, UCI involves the
19 improper use, or perception of such use, of superior authority to interfere with the court-martial
20 process. *See Gilligan and Lederer, Court-Martial Procedure* § 18-28.00 (4th ed. 2015). In light
21 of its impact on the fairness the military justice system, military judges are charged with serving
22 as "sentinels" to identify and address any instances of UCI that come to their attention. *United*
23 *States v. Boyce*, 76 M.J. 242, 253 n.9 (C.A.A.F. 2017) (citations omitted).

24 Once UCI is raised, it is "incumbent on the military judge to act in the spirit of the Code
25 by avoiding even the appearance of evil in his courtroom and by establishing the confidence of
26 the general public in the fairness of the court-martial proceedings." *United States v. Stoneman*,
27 57 M.J. 35, 43 (C.A.A.F. 2002) (quoting *United States v. Rosser*, 6 M.J. 267, 271 (C.M.A.
28 1979)).

29 To support a claim of UCI, the defense has the initial burden to "show facts which, if
30 true, constitute unlawful command influence." *United States v. Biagase*, 50 M.J. 143, 150
31 (C.A.A.F. 1999). The defense must also show "that the alleged unlawful command influence has

1 a logical connection to the court-martial, in terms of its potential to cause unfairness in the
2 proceedings.” *Id.* “The threshold for raising the issue at trial is low, but more than mere
3 allegation or speculation.” *Id.* Thus, the defense is required to present “some evidence” of UCI.
4 *Id.* (quoting *United States v. Ayala*, 43 M.J. 296, 300 (C.A.A.F. 1995)). Proof of command
5 influence “in the air” is not enough. *United States v. Allen*, 33 M.J. 209, 212 (C.M.A. 1991). If
6 the defense meets its burden of demonstrating some evidence of UCI, the burden shifts to the
7 government to prove beyond a reasonable doubt: (1) that the predicate facts on which the
8 allegation of UCI is based do not exist; (2) that the facts do not constitute UCI; or (3) that the
9 UCI will not prejudice the proceedings. *Biagase*, 50 M.J. at 151.

10 In addition to actual UCI, which results in actual prejudice to an accused, UCI may be
11 apparent, “with no discernible impact on an accused but resulting in a loss of confidence in the
12 fairness of our military justice system.” *United States v. Cooper*, 2018 CCA LEXIS 114, at *49
13 (N.M.C.C.A. 2018). “The appearance of unlawful command influence is as devastating to the
14 military justice system as the actual manipulation of any given trial.” *Allen*, 33 M.J. at 212. To
15 support a claim of apparent UCI, the defense must show:

16
17 (a) facts, which if true, constitute unlawful command influence; and (b) this
18 unlawful command influence placed an intolerable strain on the public's
19 perception of the military justice system because an objective, disinterested
20 observer, fully informed of all the facts and circumstances, would harbor a
21 significant doubt about the fairness of the proceeding.
22

23 *United States v. Boyce*, 76 M.J. 242, 249 (C.A.A.F. 2017) (internal quotations and citations
24 omitted). If the defense presents some evidence of apparent UCI, the burden shifts to the
25 government to prove beyond a reasonable doubt that the proffered facts do not exist, that they do
26 not constitute UCI, or that they do not place an intolerable strain on public perception of the
27 fairness of the proceeding. *Id.* While not dispositive per se of whether any public taint from an
28 appearance of unlawful command influence still remains,
29

30 [a] determination that an appellant was not personally prejudiced by the unlawful
31 command influence, or that the prejudice caused by the unlawful command
32 influence was later cured, is a significant factor that must be given considerable
33 weight when deciding whether the unlawful command influence placed an
34 “intolerable strain” on the public's perception of the military justice system.

1
2 *Boyce*, 76 M.J. at 248 n.5.
3

4 With respect to public pretrial statements and publicity specifically, our superior court
5 has noted that “criticism of military operations—including withering critiques of strategy,
6 tactics, personnel policies, and human rights concerns—is inherent in a democracy.” *United*
7 *States v. Rockwood*, 52 M.J. 98, 103 (C.A.A.F. 1999). The prohibition against UCI does not
8 require senior military or civilian officials to refrain from addressing such concerns through,
9 among other things, public statements; rather, it prohibits those

10 [w]ith the mantle of command authority from deliberately orchestrating pretrial
11 publicity with the intent to influence the results in a particular case or a series of
12 cases, as the pretrial publicity itself may constitute unlawful command influence.
13 Even the perception that pretrial publicity has been engineered to achieve a
14 prohibited end—regardless of the intent of those generating the media attention—
15 may lead to the appearance of unlawful command influence.
16

17 *Id.* Even military personnel acting without the mantle of command authority, and without any
18 intent to interfere with the court-martial process, can commit UCI or other forms of unlawful
19 influence. *United States v. Barry*, 78 M.J. 70 (C.A.A.F. 2018). But in order to constitute UCI,
20 the comments or other actions complained of must still have some logical nexus to the accused’s
21 court-martial. *See United States v. Ayers*, 54 M.J. 85, 95 (C.A.A.F. 2000) (finding comments by
22 senior leaders about appropriate sentencing ranges and SECDEF’s order to “weed out sex
23 offenders” had no logical connection to the accused’s court-martial and were therefore not UCI).

24 Here, the defense argues that statements made by the SECNAV and other government
25 officials constitute actual and/or apparent adjudicative UCI. The court disagrees. Regarding
26 actual UCI, the court concludes that the defense has not met its burden of making a threshold
27 showing of some evidence of UCI. Based on the evidence submitted, there is no basis on which
28 to find any manipulation, intentional or otherwise, of the criminal justice process negatively

1 impacting the fair handling or disposition of the accused's case. There is no evidence the
2 comments or media attention was deliberately orchestrated with the intent, or had the effect, of
3 actually interfering with the fair administration of justice in this or any case.

4 Regarding apparent UCI, the court reaches a similar conclusion. Clearly, responding to
5 queries about the [REDACTED] video that had gone viral, the Secretary of Defense made general
6 comments that he was looking into the matter. Representative Jackie Speier and Senator
7 Gillibrand are not persons subject to the UCMJ, as retirees or otherwise. Neither Art 37 or
8 R.C.M. 104(a)(1) applies to their statements or comments. Statements made by private citizens,
9 even those serving on the Senate Armed Services Committee (SASC), cannot be UCI. See
10 *United States v. Bergdahl*, 79 M.J. 512, 519 (ACCA 2019). While both Representative Speier
11 and Senator Gillibrand have been politically active in addressing how the military handles
12 allegations of sexual assault and whether commanders should retain convening authority in
13 certain categories of cases involving allegations of sexual assault, they are private citizens with
14 no authority over the military. While they may be influential, they cannot commit UCI. *Id.*

15 The Secretary of Defense, Lloyd Austin, is both subject to the UCMJ, and capable of
16 committing UCI. Art. 22, UCMJ; Art. 37 UCMJ. The Defense's contention that Major General
17 Bierman referred charges contrary to the recommendation of an Article 32 Preliminary Hearing
18 Officer, approximately two days after SECDEF's comments constitutes UCI is without merit.
19 First, Major General Bierman, Commanding General, [REDACTED], is not required to
20 adopt the recommendations of a PHO. *Id.* R.C.M. 601. *Bergdahl* at 240. Second, while the PHO
21 recommended that the charges should be dismissed; he also found probable cause to believe the
22 offenses were committed; that the accused committed the offenses; and recommended trial by
23 General Court-Martial. In consideration of his Staff Judge Advocate's advice, the advice of his

1 subordinate commander, the complete Article 32 report (with accompanying evidence), and his
2 own experience, he decided to refer the charges.

3 The Defense failed to meet their burden of demonstrating that the SECDEF's comments,
4 which if true, were "some evidence" that would constitute UCI. See *United States v. Bergdahl*,
5 80 M.J. 230, 2020 CAAF LEXIS 489, 2020 WL 5167358, citing *United States v. Boyce*, 76 M.J.
6 242, 249 (CAAF 2017). While the burden is low, it requires more than "a mere allegation or
7 speculation." *Id.* at *Bergdahl* citing *United States v. Salyer*, 72 M.J. 415, 423 (C.A.A.F. 2013).
8 The Defense has presented no evidence to indicate that Major General Bierman was aware of
9 SECDEF's statements or that they influenced his decision making in this case.

10 Assuming arguendo that the defense had met its initial burden, the facts as presented do
11 not constitute unlawful command influence. The SECDEF's statements, that included; finding
12 the video "deeply disturbing;" "[w]e have been looking at this for a long time in earnest, but we
13 haven't gotten it right;" "[m]y commitment is to my soldiers, sailor, airmen and Marines, and
14 dependents is we're going to do everything in our power to get it right;" and that he was in
15 contact with the command and that "someone is looking out for her needs," does not constitute
16 UCI. The SECDEF's comments were in response to video that had gone viral wherein an
17 extremely emotional and distraught female Marine voiced her frustrations about the disposition
18 of her case. The court does not find the SECDEF's use of the word "right" as some perceived
19 outcome or result. The SECDEF is not censuring, reprimanding, or admonishing, the command's
20 handling of the administrative case or any court-martial proceeding.

21 Similarly, there is no showing that the SECDEF's comments placed an intolerable strain
22 on the military justice system. That is, a reasonable person, with knowledge of all relevant facts,

1 would have no reason to doubt the fairness of the proceedings. See *United States v. Lewis*, 63
2 M.J. 405 (CAAF 2006).

3 The court concludes that, armed with complete knowledge of the above facts and
4 circumstances, an objective, disinterested observer would not harbor a significant doubt about
5 the fairness of the accused's court-martial. In light of the above, even if the defense had shown
6 some evidence of apparent UCI in a senator's or the SECDEF's publically reported statements,
7 the court concludes the evidence disproves beyond a reasonable doubt that his actions placed an
8 intolerable strain on the public's perception of the fairness of the accused's court-martial
9 proceedings.

10 **4. Ruling**

11 Accordingly, the defense motion to dismiss on grounds of UCI is **DENIED**. The Court
12 will provide standard instructions on sexual assault and UCI. Challenges for cause will also be
13 liberally granted to the defense, on these or other grounds, as required by law.

14
15 So **ORDERED** this 20th day of August 20, 2020.

16
17
18
19 M.J. MANN
20 LTCOL, USMC
21 Military Judge

STATEMENT OF TRIAL RESULTS

STATEMENT OF TRIAL RESULTS

SECTION A - ADMINISTRATIVE

1. NAME OF ACCUSED (last, first, MI) LEGER, TYLER J.	2. BRANCH Marine Corps	3. PAYGRADE E-3	4. DoD ID NUMBER [REDACTED]
5. CONVENING COMMAND [REDACTED]	6. TYPE OF COURT-MARTIAL General	7. COMPOSITION Enlisted Members	8. DATE SENTENCE ADJUDGED Jul 15, 2021

SECTION B - FINDINGS

SEE FINDINGS PAGE

SECTION C - ADJUDGED SENTENCE

9. DISCHARGE OR DISMISSAL Dishonorable discharge	10. CONFINEMENT 18 Months	11. FORFEITURES Total	12. FINES N/A	13. FINE PENALTY N/A
14. REDUCTION E-1	15. DEATH Yes <input type="radio"/> No <input checked="" type="radio"/>	16. REPRIMAND Yes <input type="radio"/> No <input checked="" type="radio"/>	17. HARD LABOR Yes <input type="radio"/> No <input checked="" type="radio"/>	18. RESTRICTION Yes <input type="radio"/> No <input checked="" type="radio"/>
19. HARD LABOR PERIOD N/A				
20. PERIOD AND LIMITS OF RESTRICTION N/A				

SECTION D - CONFINEMENT CREDIT

21. DAYS OF PRETRIAL CONFINEMENT CREDIT 0	22. DAYS OF JUDICIALLY ORDERED CREDIT 0	23. TOTAL DAYS OF CREDIT 0 days
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SECTION E - PLEA AGREEMENT OR PRE-TRIAL AGREEMENT

24. LIMITATIONS ON PUNISHMENT CONTAINED IN THE PLEA AGREEMENT OR PRE-TRIAL AGREEMENT There was no plea agreement.
--

SECTION F - SUSPENSION OR CLEMENCY RECOMMENDATION

25. DID THE MILITARY JUDGE RECOMMEND SUSPENSION OF THE SENTENCE OR CLEMENCY? Yes <input type="radio"/> No <input checked="" type="radio"/>	26. PORTION TO WHICH IT APPLIES [REDACTED]	27. RECOMMENDED DURATION [REDACTED]
28. FACTS SUPPORTING THE SUSPENSION OR CLEMENCY RECOMMENDATION [REDACTED]		

SECTION G - NOTIFICATIONS

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

SECTION H - NOTES AND SIGNATURE

33. NAME OF JUDGE (last, first, MI) MANN, MELANIE, J.	34. BRANCH Marine Corps	35. PAYGRADE O-4	36. DATE SIGNED Jul 15, 2021	38. JUDGE'S SIGNATURE [REDACTED]
37. NOTES [REDACTED]				

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 plea: Not Guilty findings: Guilty	120	Specification 1:	Not Guilty	Guilty			120AA2
		Offense description	Sexual assault without the consent of the other person				
		Specification 2:	No plea entered	W/D			120AA2
		Offense description	Sexual assault while asleep, unconscious, or otherwise unaware				
		Withdrawn and Dismissed	Specification withdrawn and dismissed without prejudice.				

ORIGINAL

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
LEGER, TYLER J.		E3	
4. UNIT OR ORGANIZATION		5. CURRENT ENLISTMENT	6. TERM
		20170821	4 YRS
7. CONVENING AUTHORITY (UNIT/ORGANIZATION)	8. COURT- MARTIAL TYPE	9. COMPOSITION	10. DATE SENTENCE ADJUDGED
	General	Enlisted Members	15-Jul-2021

Post-Trial Matters to Consider

11. Has the accused made a request for deferment of reduction in grade?	<input checked="" type="radio"/> Yes	<input type="radio"/> No
12. Has the accused made a request for deferment of confinement?	<input type="radio"/> Yes	<input checked="" type="radio"/> No
13. Has the accused made a request for deferment of adjudged forfeitures?	<input type="radio"/> Yes	<input checked="" type="radio"/> No
14. Has the accused made a request for deferment of automatic forfeitures?	<input checked="" type="radio"/> Yes	<input type="radio"/> No
15. Has the accused made a request for waiver of automatic forfeitures?	<input type="radio"/> Yes	<input checked="" type="radio"/> No
16. Has the accused submitted necessary information for transferring forfeitures for benefit of dependents?	<input type="radio"/> Yes	<input checked="" type="radio"/> No
17. Has the accused submitted matters for convening authority's review?	<input checked="" type="radio"/> Yes	<input type="radio"/> No
18. Has the victim(s) submitted matters for convening authority's review?	<input type="radio"/> Yes	<input checked="" type="radio"/> No
19. Has the accused submitted any rebuttal matters?	<input type="radio"/> Yes	<input checked="" type="radio"/> No
20. Has the military judge made a suspension or clemency recommendation?	<input type="radio"/> Yes	<input checked="" type="radio"/> No
21. Has the trial counsel made a recommendation to suspend any part of the sentence?	<input type="radio"/> Yes	<input checked="" type="radio"/> No
22. Did the court-martial sentence the accused to a reprimand issued by the convening authority?	<input type="radio"/> Yes	<input checked="" type="radio"/> No

23. Summary of Clemency/Deferment Requested by Accused and/or Crime Victim, if applicable.

On 23 July 2021, the Accused through counsel requested that the Convening Authority defer automatic forfeitures and the adjudged reduction of pay grade until the entry of judgment. Additionally, the Accused requests that the Convening Authority suspend the automatic forfeitures and adjudged reduction in pay grade for six months.

24. Convening Authority Name/Title	25. SJA Name
Major General James W. Bierman Commanding General, [REDACTED]	Lieutenant Colonel [REDACTED]
26. SJA signature	27. Date
[REDACTED]	Aug 8, 2021

SECTION B - CONVENING AUTHORITY ACTION

28. Having reviewed all matters submitted by the accused and the victim(s) pursuant to R.C.M. 1106/1106A, and after being advised by the staff judge advocate or legal officer, I take the following action in this case: [If deferring or waiving any punishment, indicate the date the deferment/waiver will end. Attach signed reprimand if applicable. Indicate what action, if any, taken on suspension recommendation(s) or clemency recommendations from the judge.]

I take no action on the case.

I have reviewed all matters the accused submitted, the statement of trial results, and have been advised by the staff judge advocate. After considering the accused's convicted offense (including the effect on the victim), the sentence adjudged, the effect that taking action on the accused's request would have on good order and discipline, and the accused's character, I deny the accused's requests.

29. Convening authority's written explanation of the reasons for taking action on offenses with mandatory minimum punishments or offenses for which the maximum sentence to confinement that may be adjudged exceeds two years, or offenses where the adjudged sentence includes a punitive discharge (Dismissal, DD, BCD) or confinement for more than six months, or a violation of Art. 120(a) or 120(b) or 120b:

30. Convening Authority's signature

BIERMAN.JAMES.
W.JR.

Digitally signed by
BIERMAN.JAMES.W.JR.
Date: 2021.08.12 11:11:04 -10'00'

31. Date

Aug 12, 2021

32. Date convening authority action was forwarded to PTPD or Review Shop.

ENTRY OF JUDGMENT

ENTRY OF JUDGMENT

SECTION A - ADMINISTRATIVE

1. NAME OF ACCUSED (LAST, FIRST, MI)	2. PAYGRADE/RANK	3. DoD ID NUMBER	
LEGER, TYLER J.	E3		
4. UNIT OR ORGANIZATION	5. CURRENT ENLISTMENT	6. TERM	
	20170821	4YRS	
7. CONVENING AUTHORITY (UNIT/ORGANIZATION)	8. COURT-MARTIAL TYPE	9. COMPOSITION	10. DATE COURT-MARTIAL ADJOURNED
	General	Enlisted Members	15-Jul-2021

SECTION B - ENTRY OF JUDGMENT

****MUST be signed by the Military Judge (or Circuit Military Judge) within 20 days of receipt****

11. Findings of each charge and specification referred to trial. [Summary of each charge and specification (include at a minimum the gravamen of the offense), the plea of the accused, the findings or other disposition accounting for any exceptions and substitutions, any modifications made by the convening authority or any post-trial ruling, order, or other determination by the military judge. R.C.M. 1111(b)(1)]

Charge: Violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920.

Plea: Not Guilty.

Finding: Guilty.

Specification 1: Sexual assault without the consent of the other person, on or about 21 September 2019.

Plea: Not Guilty.

Finding: Guilty.

Specification 2: Sexual assault while asleep, unconscious, or otherwise unaware, on or about 21 September 2019.

Plea: No plea entered.

Finding: Withdrawn and dismissed without prejudice.

12. Sentence to be Entered. Account for any modifications made by reason of any post-trial action by the convening authority (including any action taken based on a suspension recommendation), confinement credit, or any post-trial rule, order, or other determination by the military judge. R.C.M. 1111(b)(2). If the sentence was determined by a military judge, ensure confinement and fines are segmented as well as if a sentence shall run concurrently or consecutively.

On 15 July 2021, officer and enlisted members sentenced the Accused to the following:

Reduction to pay grade E-1;

Confinement for 18 months;

Forfeiture of all pay and allowances; and

A dishonorable discharge.

Plea Agreement: There was no plea agreement.

Convening Authority's Action:

The sentence as adjudged, except for the Dishonorable Discharge, is ordered executed. The adjudged Dishonorable Discharge cannot be ordered executed until the case is deemed final on appeal. The defense's request for clemency, to defer automatic forfeitures and the adjudged reduction of pay grade to E-1 until the entry of judgment; and to suspend automatic forfeitures and the adjudged reduction in pay grade to E-1 for six months; was denied. In denying the accused's request, the convening authority considered the accused's convicted offense (including the effect on the victim), the sentence adjudged, the effect that taking action on the accused's request would have on good order and discipline, and the accused's character. Accordingly, the convening authority took no action on the case.

Sentence after Convening Authority's Action:

Dishonorable discharge, 18 months confinement; forfeiture of all pay and allowance, reduction to the pay grade E-1.

13. Deferral and Waiver. Include the nature of the request, the CA's Action, the effective date of the deferral, and date the deferral ended. For waivers, include the effective date and the length of the waiver. RCM 1111(b)(3)

The accused requested that the convening authority defer automatic forfeitures and the adjudged reduction of pay grade to E-1 until the entry of judgment. Additionally, the Accused requested that the convening authority suspend automatic forfeitures and the adjudged reduction in pay grade to E-1 for six months. The convening authority denied this request.

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

N/A

15. Judge's signature:		16. Date judgment entered:	
MANN.MELANIE.J UNE.		Digitally signed by MANN.MELANIE.JUNE. Date: 2021.08.16 14:01:42 -10'00'	
		16 Aug 2021	
17. In accordance with RCM 1111(c)(1), the military judge who entered a judgment may modify the judgment to correct computational or clerical errors within 14 days after the judgment was initially entered. Include any modifications here and resign the Entry of Judgment.			
18. Judge's signature:		19. Date judgment entered:	

APPELLATE INFORMATION

**IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS**

Before Panel No. 2

UNITED STATES

Appellee

v.

Tyler LEGER
Lance Corporal (E-3)
U.S. Marine Corps,

Appellant

NMCCA No. 202100310

**APPELLANT'S CONSENT
MOTION FOR A FIRST
ENLARGEMENT OF TIME**

Tried at Marine Corps Base Hawaii,
Kaneohe Bay, Hawaii, on 11 March,
23 April, 24 May, 29 June, and 8-15
July 2021, before a general court-
martial convened by the Commanding
General, [REDACTED] military
judges LtCol Derek Poteet, U.S.
Marine Corps, and LtCol Melanie
Mann, U.S. Marine Corps, presiding.

**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURTS OF CRIMINAL APPEALS**

COMES NOW the undersigned and respectfully moves for a first
enlargement of time to file a brief and assignments of error. The current due date is
January 15, 2022. The number of days requested is thirty for a requested due date
of February 14, 2022.

Status of the case:

1. The Record of Trial was docketed on November 16, 2021.
2. The Moreno III date is May 16, 2023.

3. Appellant is confined. His minimum release date is in October, 2022.
4. The record consists of 1,028 transcribed pages and 1,859 total pages (the total pages not including sealed material).
5. Appellant has been consulted on and consents to this request.
6. Counsel has reviewed only parts of the record.

Conclusion

Appellant respectfully requests this Court grant this motion.

1/12/2022

X Mary Claire Finnen

Mary Claire Finnen

Signed by: FINNEN.MARY.CLAIRE

Mary Claire Finnen
Major, U.S. Marine Corps
Appellate Defense Counsel
Navy-Marine Corps Appellate Review
Activity 1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copy of the foregoing was delivered to the Court on January 12, 2022, that a copy was uploaded into the Court's case management system on January 12, 2022, that a copy of the foregoing was delivered to Director, Appellate Government Division on January 12, 2022.

[REDACTED]

Subject: RECEIPT - ELECTRONIC FILING-Panel 2--202100310- US v. Leger- D- Consent Motion
for 1st EOT

Signed By: [REDACTED]

RECEIVED
Jan 12 2022
United States Navy-Marine Corps
Court of Criminal Appeals

[REDACTED]
Panel Paralegal
Navy-Marine Corps Court of Criminal Appeals
1254 Charles Morris St SE, Ste 320
Washington Navy Yard, DC 20374

[REDACTED]

[REDACTED]

Subject: ELECTRONIC FILING-Panel 2--202100310- US v. Leger- D- Consent Motion for 1st EOT

To This Honorable Court:

Attached please find Appellant's consent motion for a first EOT ICO U.S. v. LCpl Leger, No 202100310, for electronic filing.

Very Respectfully,

Major Mary Claire Finnen

Appellate Defense Counsel
Appellate Defense Division (Code 45)
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE, Suite 140 Washington Navy Yard, D.C. 20374-5124

Subject: RULING - RECEIPT - ELECTRONIC FILING-Panel 2--202100310- US v. Leger- D- Consent Motion for 1st EOT

Signed By: [REDACTED]

MOTION GRANTED
12 JAN 2022
United States Navy-Marine Corps
Court of Criminal Appeals

[REDACTED]
Panel Paralegal
Navy-Marine Corps Court of Criminal Appeals
1254 Charles Morris St SE, Ste 320
Washington Navy Yard, DC 20374

Subject: RECEIPT - ELECTRONIC FILING-Panel 2--202100310- US v. Leger- D- Consent Motion for 1st EOT

RECEIVED
Jan 12 2022
United States Navy-Marine Corps
Court of Criminal Appeals

[REDACTED]
Panel Paralegal
Navy-Marine Corps Court of Criminal Appeals
1254 Charles Morris St SE, Ste 320
Washington Navy Yard, DC 20374
[REDACTED]

[REDACTED]

Subject: ELECTRONIC FILING-Panel 2--202100310- US v. Leger- D- Consent Motion for 1st EOT

To This Honorable Court:

Attached please find Appellant's consent motion for a first EOT ICO U.S. v. LCpl Leger, No 202100310, for electronic filing.

Very Respectfully,

Major Mary Claire Finnen
Appellate Defense Counsel
Appellate Defense Division (Code 45)
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE, Suite 140 Washington Navy Yard, D.C. 20374-5124
[REDACTED]

**IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS**

Before Panel No. 2

UNITED STATES

Appellee

v.

Tyler LEGER
Lance Corporal (E-3)
U.S. Marine Corps,

Appellant

NMCCA No. 202100310

**APPELLANT’S MOTION FOR A
SECOND ENLARGEMENT OF
TIME**

Tried at Marine Corps Base Hawaii,
Kaneohe Bay, Hawaii, on 11 March,
23 April, 24 May, 29 June, and 8-15
July 2021, before a general court-
martial convened by the Commanding
General, [REDACTED] military
judges LtCol Derek Poteet, U.S.
Marine Corps, and LtCol Melanie
Mann, U.S. Marine Corps, presiding.

**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURTS OF CRIMINAL APPEALS**

COMES NOW the undersigned and respectfully moves for a second
enlargement of time to file a brief and assignments of error. The current due date is
February 14, 2022. The number of days requested is thirty for a requested due date
of March 16, 2022.

Status of the case:

1. The Record of Trial was docketed on November 16, 2021.
2. The Moreno III date is May 16, 2023.

3. Appellant is confined.
4. The record consists of 1,028 transcribed pages and 1,859 total pages not including sealed material.
5. Appellant has been consulted on and consents to this request.
6. Counsel has reviewed only parts of the record.

Good cause for granting the requested enlargement exists due to the serious nature of the charge in this case. Counsel expects to file assignments of error in this contested sexual assault case. Counsel needs additional time to finish reviewing the record, research identified issues, and brief assignments of error for this Court's review.

Conclusion

Appellant respectfully requests this Court grant this motion.

2/9/2022

X Mary Claire Finnen

Mary Claire Finnen

Signed by: FINNEN.MARY.CLAIRE. [REDACTED]

Mary Claire Finnen
Major, U.S. Marine Corps
Appellate Defense Counsel
Navy-Marine Corps Appellate Review
Activity 1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
[REDACTED]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copy of the foregoing was delivered to the Court on February 9, 2022, that a copy was uploaded into the Court's case management system on February 9, 2022, that a copy of the foregoing was delivered to Director, Appellate Government Division on February 9, 2022.

RECEIPT - ELECTRONIC FILING-Panel 2--202100310- US v. Leger- D- Motion for 2nd EOT

RECEIVED

Feb 9 2022

United States Navy-Marine Corps
Court of Criminal Appeals

Subject: ELECTRONIC FILING-Panel 2--202100310- US v. Leger- D- Mo. on for 2nd EOT

To This Honorable Court:

Attached please find Appellant's motion for a second enlargement of time ICO U.S. v. LCpl Leger, No 202100310, for electronic filing.

Very Respectfully,

Major Mary Claire Finnen
Appellate Defense Counsel
Appellate Defense Division (Code 45)
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE, Suite 140 Washington Navy Yard, D.C. 20374-5124

RULING - ELECTRONIC FILING-Panel 2--202100310- US v. Leger- D- Motion for 2nd EOT

MOTION GRANTED

9 FEB 2022

**United States Navy-Marine Corps
Court of Criminal Appeals**

Subject: ELECTRONIC FILING-Panel 2--202100310- US v. Leger- D- Mo. on for 2nd EOT

To This Honorable Court:

Attached please find Appellant's motion for a second enlargement of time ICO U.S. v. LCpl Leger, No 202100310, for electronic filing.

Very Respectfully,

Major Mary Claire Finnen
Appellate Defense Counsel
Appellate Defense Division (Code 45)
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE, Suite 140 Washington Navy Yard, D.C. 20374-5124

**IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS**

Before Panel No. 2

UNITED STATES

Appellee

v.

Tyler LEGER
Lance Corporal (E-3)
U.S. Marine Corps,

Appellant

NMCCA No. 202100310

**APPELLANT’S MOTION FOR A
FIFTH ENLARGEMENT OF TIME**

Tried at Marine Corps Base Hawaii,
Kaneohe Bay, Hawaii, on 11 March,
23 April, 24 May, 29 June, and 8-15
July 2021, before a general court-
martial convened by the Commanding
General, 3d Marine Division, military
judges LtCol Derek Poteet, U.S.
Marine Corps, and LtCol Melanie
Mann, U.S. Marine Corps, presiding.

**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURTS OF CRIMINAL APPEALS**

COMES NOW the undersigned and respectfully moves for a fifth
enlargement of time to file a brief and assignments of error. The current due date is
May 15, 2022. The number of days requested is thirty for a requested due date of
June 14, 2022.

Status of the case:

1. The Record of Trial was docketed on November 16, 2021.
2. The Moreno III date is May 16, 2023.
3. Appellant is confined.

4. The record currently consists of 1,028 transcribed pages and 1,859 total pages not including sealed material.
5. Appellant has been consulted on and consents to this request.
6. Counsel has reviewed approximately seventy-five percent of the record.

Good cause for granting the requested enlargement exists due to the serious nature of the charge in this case. Counsel expects to file assignments of error in this contested sexual assault case. Counsel needs additional time to finish reviewing the record, research identified issues, and brief assignments of error for this Court's review. Counsel has reviewed sealed material.

After filing a reply brief in a different case, Counsel will be working exclusively on this case.

Conclusion

Appellant respectfully requests this Court grant this motion.

5/10/2022

X Mary Claire Finnen

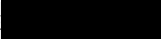
Mary Claire Finnen

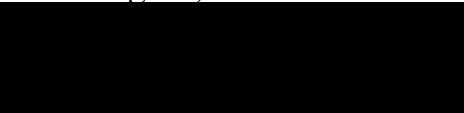
Signed by: FINNEN.MARY.CLAIRE [REDACTED]

Mary Claire Finnen
Major, U.S. Marine Corps
Appellate Defense Counsel
Navy-Marine Corps Appellate Review
Activity 1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
[REDACTED]

CERTIFICATE OF FILING AND SERVICE


I certify that the original and copy of the foregoing was delivered to the Court on May 10, 2022, that a copy was uploaded into the Court's case management system on May 10, 2022, that a copy of the foregoing was delivered to Director, Appellate Government Division on May 10, 2022.

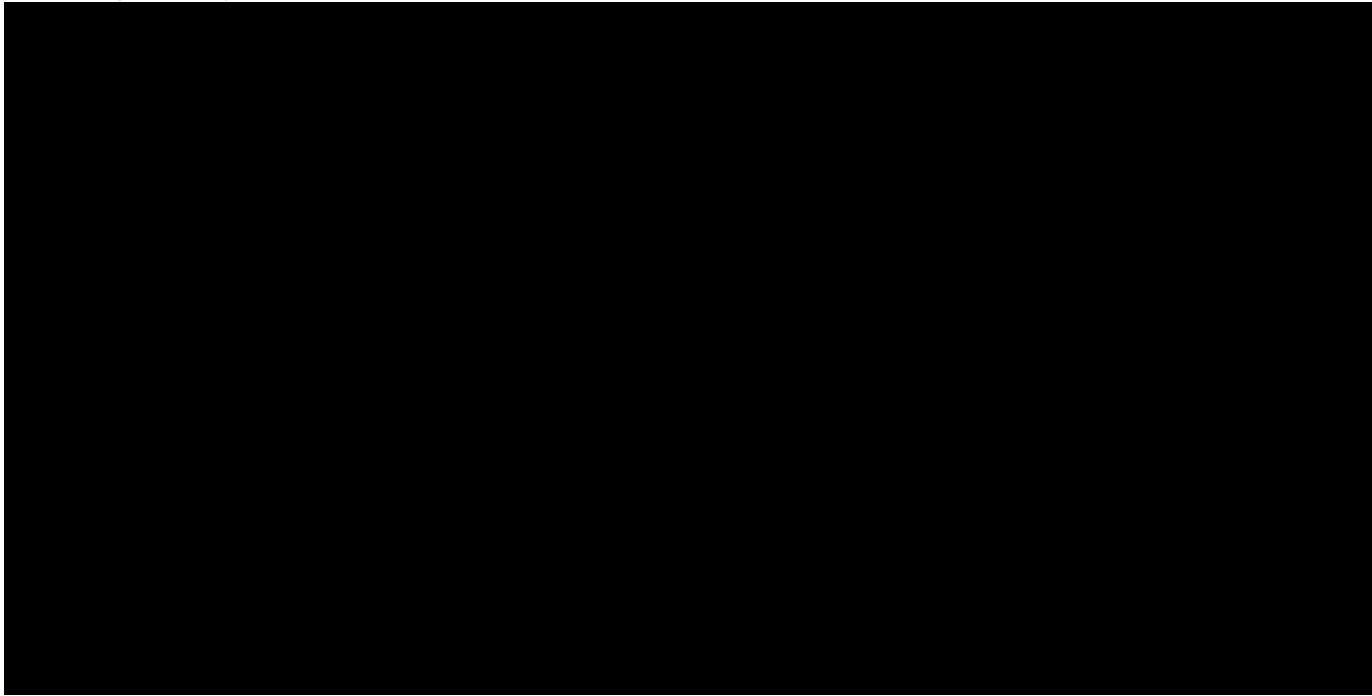
5/10/2022
X Mary Claire Finnen
Mary Claire Finnen
Signed by: FINNEN.MARY.CLAIRE 

Mary Claire Finnen
Major, U.S. Marine Corps
Appellate Defense Counsel
Navy-Marine Corps Appellate Review
Activity 1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374


Subject: RECEIPT - ELECTRONIC FILING-Panel 2--202100310- US v. Leger- D- Fifth enlargement of time
Date: Tuesday, May 10, 2022 4:35:58 PM

RECEIVED
MAY 10 2022
United States Navy-Marine Corps
Court of Criminal Appeals


Panel Paralegal
Navy-Marine Corps Court of Criminal Appeals
1254 Charles Morris St SE, Ste 320
Washington Navy Yard, DC 20374



Subject: ELECTRONIC FILING-Panel 2--202100310- US v. Leger- D- Fifth enlargement of time

To This Honorable Court:

Attached please find Appellant's motion for a fifth enlargement of time ICO U.S. v. LCpl Leger, No 202100310, for electronic filing.

Very Respectfully,

Major Mary Claire Finnen

Appellate Defense Counsel

Appellate Defense Division (Code 45)


Navy-Marine Corps Appellate Review Activity

1254 Charles Morris Street, SE, Suite 140 Washington Navy Yard, D.C. 20374-5124



Subject: RULING - ELECTRONIC FILING-Panel 2--202100310- US v. Leger- D- Fifth enlargement of time
Date: Wednesday, June 1, 2022 3:14:51 PM

MOTION GRANTED
1 JUNE 2022
United States Navy-Marine Corps
Court of Criminal Appeals


Panel Paralegal
Navy-Marine Corps Court of Criminal Appeals
1254 Charles Morris St SE, Ste 320
Washington Navy Yard, DC 20374

Subject: ELECTRONIC FILING-Panel 2--202100310- US v. Leger- D- Fifth enlargement of time

To This Honorable Court:

Attached please find Appellant's motion for a fifth enlargement of time ICO U.S. v. LCpl Leger, No 202100310, for electronic filing.

Very Respectfully,

Major Mary Claire Finnen

Appellate Defense Counsel

Appellate Defense Division (Code 45)

Navy-Marine Corps Appellate Review Activity

1254 Charles Morris Street, SE, Suite 140 Washington Navy Yard, D.C. 20374-5124



**IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS**

Before Panel No. 2

UNITED STATES

Appellee

v.

Tyler LEGER
Lance Corporal (E-3)
U.S. Marine Corps,

Appellant

NMCCA No. 202100310

**APPELLANT’S MOTION FOR AN
EIGHTH
ENLARGEMENT OF TIME**

Tried at Marine Corps Base Hawaii,
Kaneohe Bay, Hawaii, on 11 March,
23 April, 24 May, 29 June, and 8-15
July 2021, before a general court-
martial convened by the Commanding
General, 3d Marine Division, military
judges LtCol Derek Poteet, U.S.
Marine Corps, and LtCol Melanie
Mann, U.S. Marine Corps, presiding.

**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURTS OF CRIMINAL APPEALS**

COMES NOW the undersigned and respectfully moves for an eighth
enlargement of time to file a brief and assignments of error. The current due date is
August 13, 2022. The number of days requested is twenty days for a requested due
date of September 2, 2022.

Status of the case:

1. The Record of Trial was docketed on November 16, 2021.
2. The Moreno III date is May 16, 2023.

3. Appellant is confined.
4. The record currently consists of 1,028 transcribed pages and 1,859 total pages not including sealed material.
5. Appellant has been consulted on and consents to this request.
6. Counsel has reviewed almost all of the record. The only remaining record that she has not reviewed is approximately thirty minutes of an approximately four hour interrogation.

Good cause for granting the requested enlargement exists due to the serious nature of the charge in this case. Counsel needs additional time to complete the draft and forward it through her supervisory review chain for editing.

Counsel is reviewing Government Exhibit 9 (from the Article 32 report), and has currently reviewed about three and half hours of the interrogation. She has had trouble one audio file freezing (CD 3 in her copies). This exhibit was originally missing from the record of trial. Counsel intends to review the Court's copy of the interrogation for the remaining thirty minutes of the audio.

Counsel remains on maternity leave and is continuing to work reduced hours. Counsel has limited access to the internet (through a sometimes-working hot spot) and occasional cell phone coverage until Monday, August 15, 2022.

Conclusion

Appellant respectfully requests this Court grant this motion.



Recoverable Signature

X Mary Claire Finnen



Mary Claire Finnen


Signed by: FINNEN.MARY.CLAIRE

Mary Claire Finnen
Major, U.S. Marine Corps
Appellate Defense Counsel
Navy-Marine Corps Appellate Review
Activity 1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copy of the foregoing was delivered to the Court on August 8, 2022, that a copy was uploaded into the Court's case management system on August 8, 2022, that a copy of the foregoing was delivered to Director, Appellate Government Division on August 8, 2022.

 Recoverable Signature
X Mary Claire Finnen
Mary Claire Finnen
Signed by: FINNEN.MARY.CLAIRE 

Mary Claire Finnen
Major, U.S. Marine Corps
Appellate Defense Counsel
Navy-Marine Corps Appellate Review
Activity1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374


From:
To:
Cc:

Subject: RULING - ELECTRONIC FILING-Panel 2--202100310- US v. Leger- D- Eighth enlargement of time (20 days)
(Finnen)
Date: Thursday, August 11, 2022 2:05:08 PM

MOTION GRANTED
11 AUGUST 2022
United States Navy-Marine Corps
Court of Criminal Appeals

v/r,


Panel 3 secretary
OJAG, NMCCA Code 51
1254 Charles Morris Street SE, Bldg 58, Washington Navy Yard, Washington D. C. 20374


Subject: ELECTRONIC FILING-Panel 2--202100310- US v. Leger- D- Eighth enlargement of time (20 days) (Finnen)

To This Honorable Court:

Attached please find Appellant's motion for an eighth enlargement of time ICO U.S. v. LCpl Leger, No 202100310, for electronic filing.

Very Respectfully,

Major Mary Claire Finnen

Appellate Defense Counsel

Appellate Defense Division (Code 45)

Navy-Marine Corps Appellate Review Activity

1254 Charles Morris Street, SE, Suite 140 Washington Navy Yard, D.C. 20374-5124



IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 2

UNITED STATES,	)	APPELLEE’S MOTION FOR FIRST
Appellee	)	ENLARGEMENT OF TIME
)	
v.	)	Case No. 202100310
)	
Tyler J. LEGER,	)	Tried at Marine Corps Base Hawaii,
Lance Corporal (E-3)	)	Kaneohe Bay, Hawaii, on March 11,
U.S. Marine Corps	)	April 23, May 24, June 29, and July
Appellant	)	8–15, 2021, by a general court-martial
	)	convened by Commanding General,
	)	3d Marine Division, Lieutenant
	)	Colonel M. J. Mann, U.S. Marine
	)	Corps (arraignment, motions, trial),
	)	and Lieutenant Colonel D. A. Poteet,
	)	U.S. Marine Corps (motion),
	)	presiding.

TO THE HONORABLE JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Pursuant to Rule 23.2 of this Court’s Rules of Appellate Procedure, the United States respectfully moves for a thirty-day enlargement of time from October 14, 2022, to November 13, 2022, to answer Appellant’s Brief and Assignments of Error.

A. Information required by Rule 23.2(c)(3).

Pursuant to Rule 23.2(c)(3), the United States provides the following:

- (A) This case was docketed with the Court on November 16, 2021;
- (B) The *Moreno III* date is May 16, 2023;
- (C) Appellant is not confined;
- (D) The Record of Trial consists of 1,028 transcribed pages and 1,859 total pages not including sealed material;
- (E) Counsel has reviewed approximately fifty percent of the Record; and
- (F) The case is moderately complex. Contrary to his plea, Appellant was found guilty at a general court-martial for sexual assault. He now raises three issues alleging legal and factual insufficiency, ineffective assistance of counsel, and lack of unanimous verdict.

B. Good cause exists in light of the need for additional review, research, and drafting.

Good cause exists for this First Enlargement. Counsel needs additional time to review the Record, research the issues, draft the Answer, and ensure the Answer completely and accurately represents the United States' settled position on the Appellant's Assignments of Error.


Conclusion

The United States respectfully requests that the Court grant this Motion and extend the time to file its Answer to November 13, 2022.

James A. Burkart Digitally signed by
James A. Burkart

JAMES A. BURKART
Lieutenant Colonel, U.S. Marine Corps

Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374



Certificate of Filing and Service


I certify this document was emailed to the Court's filing address, uploaded to the Court's case management system, and emailed to Appellate Defense Counsel, Major Mary Claire FINNEN, U.S. Marine Corps, on October 7, 2022.

James A. Burkart Digitally signed by
James A. Burkart

JAMES A. BURKART
Lieutenant Colonel, U.S. Marine Corps
Appellate Government Counsel


Subject: RULING - RECEIPT - FILING - Panel 2 - U.S. v. Leger - NMCCA 202100310 - G - Mot 1st Enlarge (Burkart)
Date: Friday, October 7, 2022 2:33:07 PM

MOTION GRANTED
7 OCTOBER 2022
United States Navy-Marine Corps
Court of Criminal Appeals


Panel Paralegal
Navy-Marine Corps Court of Criminal Appeals
1254 Charles Morris St SE, Ste 320
Washington Navy Yard, DC 20374

Subject: RECEIPT - FILING - Panel 2 - U.S. v. Leger - NMCCA 202100310 - G - Mot 1st Enlarge
(Burkart)

RECEIVED
OCTOBER 7 2022
United States Navy-Marine Corps
Court of Criminal Appeals



Panel Paralegal
Navy-Marine Corps Court of Criminal Appeals
1254 Charles Morris St SE, Ste 320
Washington Navy Yard, DC 20374

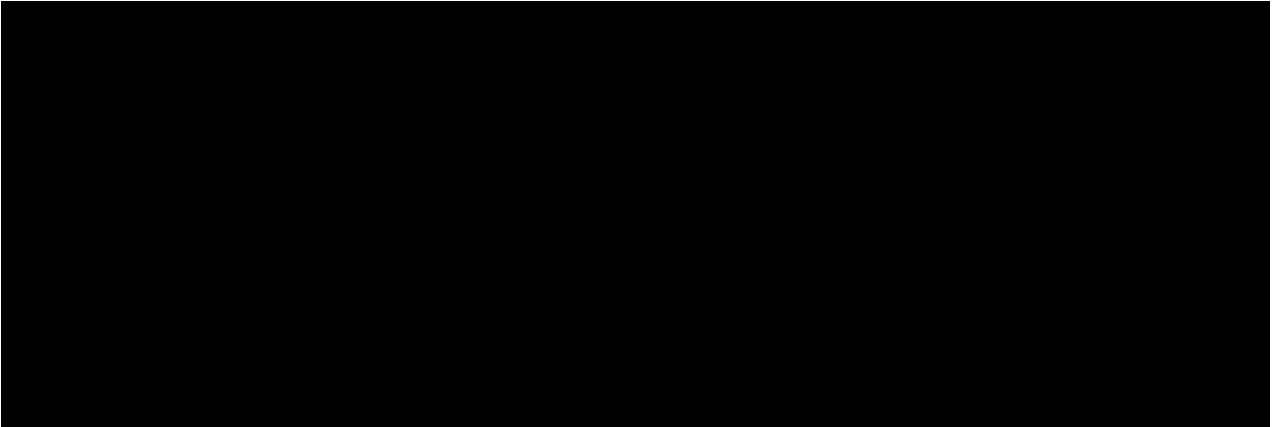


Subject: FILING - Panel 2 - U.S. v. Leger - NMCCA 202100310 - G - Mot 1st Enlarge (Burkart)

To this Honorable Court:

Please find attached the Appellee's Motion for First Enlargement of Time in United States v. Leger
NMCCA No. 202100310.

Semper Fidelis,
James A. Burkart
Lieutenant Colonel, U.S. Marine Corps
Appellate Government Counsel (Code 46)
Navy and Marine Corps Appellate Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374-5124





IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 2

UNITED STATES,	)	APPELLEE’S MOTION FOR
Appellee	)	SECOND ENLARGEMENT OF
	)	TIME
v.)	
	)	Case No. 202100310
Tyler J. LEGER,)	
Lance Corporal (E-3)	)	Tried at Marine Corps Base Hawaii,
U.S. Marine Corps	)	Kaneohe Bay, Hawaii, on March 11,
Appellant	)	April 23, May 24, June 29, and July
	)	8–15, 2021, by a general court-martial
	)	convened by Commanding General,
	)	3d Marine Division, Lieutenant
	)	Colonel M. J. Mann, U.S. Marine
	)	Corps (arraignment, motions, trial),
	)	and Lieutenant Colonel D. A. Poteet,
	)	U.S. Marine Corps (motion),
	)	presiding.

TO THE HONORABLE JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Pursuant to Rule 23.2 of this Court’s Rules of Appellate Procedure, the
United States respectfully moves for a thirty-day enlargement of time from
November 13, 2022, to December 13, 2022, to answer Appellant’s Brief and
Assignments of Error.

A. Information required by Rule 23.2(c)(3).

Pursuant to Rule 23.2(c)(3), the United States provides the following:

(A) This case was docketed with the Court on November 16, 2021;

(B) The *Moreno III* date is May 16, 2023;

(C) Appellant is not confined;

(D) The Record of Trial consists of 1,028 transcribed pages and 1,859 total pages not including sealed material;

(E) Counsel has reviewed the Record; and

(F) The case is moderately complex. Contrary to his plea, Appellant was found guilty at a general court-martial for sexual assault. He now raises three issues alleging legal and factual insufficiency, ineffective assistance of counsel, and lack of unanimous verdict.

B. Good cause exists in light of the need for additional research and drafting.

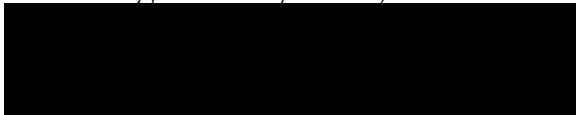
Good cause exists for this Second Enlargement. Counsel needs additional time to research the issues, draft the Answer, and ensure the Answer completely and accurately represents the United States' settled position on the Appellant's Assignments of Error.

Conclusion

The United States respectfully requests that the Court grant this Motion and extend the time to file its Answer to December 13, 2022.

James A. Burkart Digitally signed by
James A. Burkart

JAMES A. BURKART
Lieutenant Colonel, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374



Certificate of Filing and Service

I certify this document was emailed to the Court's filing address, uploaded to the Court's case management system, and emailed to Appellate Defense Counsel, Major Mary Claire FINNEN, U.S. Marine Corps, on November 7, 2022.

James A. Burkart Digitally signed by
James A. Burkart

JAMES A. BURKART
Lieutenant Colonel, U.S. Marine Corps
Appellate Government Counsel

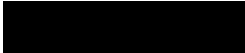
Subject: RULING - RECEIPT - FILING - Panel 2 - U.S. v. Leger - NMCCA 202100310 - G - Mot 2d Enlarge (Burkart)
Date: Monday, November 7, 2022 2:01:37 PM

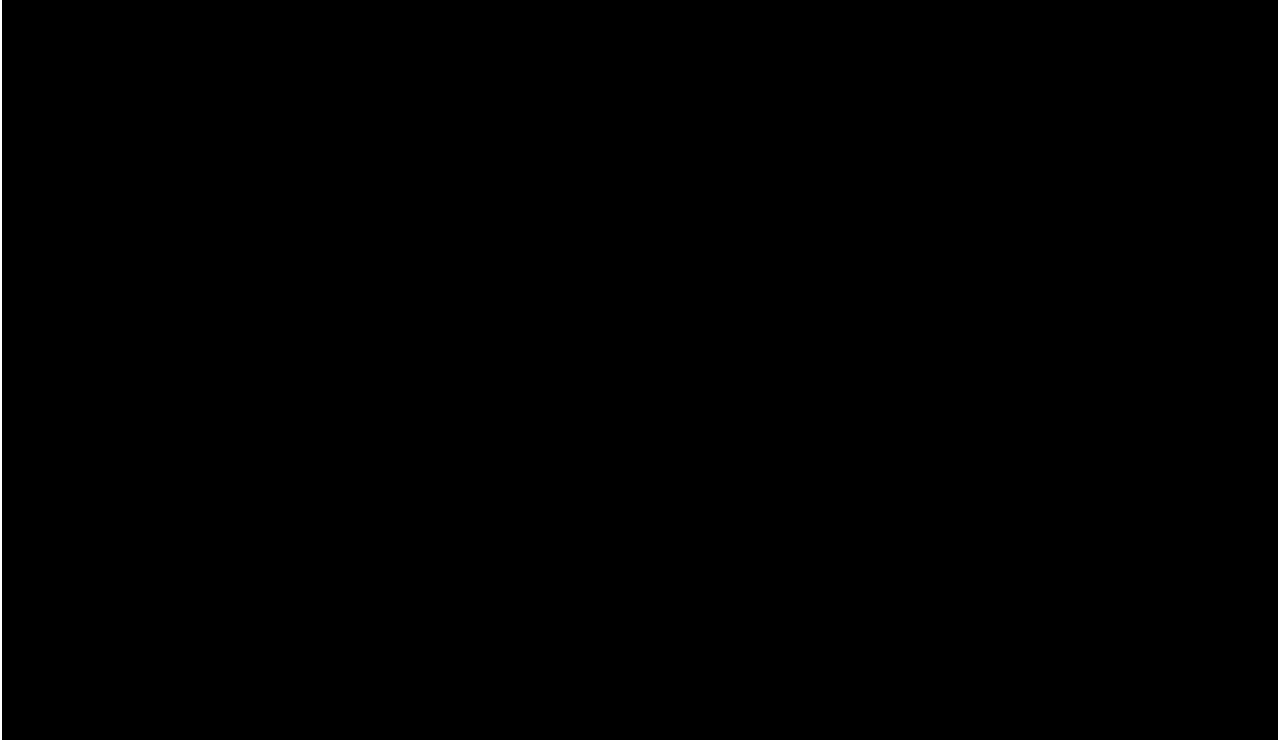
MOTION GRANTED
7 NOVEMBER 2022
United States Navy-Marine Corps
Court of Criminal Appeals

Panel Paralegal
Navy-Marine Corps Court of Criminal Appeals
1254 Charles Morris St SE, Ste 320
Washington Navy Yard, DC 20374

Subject: RECEIPT - FILING - Panel 2 - U.S. v. Leger - NMCCA 202100310 - G - Mot 2d Enlarge (Burkart)

RECEIVED
NOVEMBER 7 2022
United States Navy-Marine Corps
Court of Criminal Appeals


Panel Paralegal
Navy-Marine Corps Court of Criminal Appeals
1254 Charles Morris St SE, Ste 320
Washington Navy Yard, DC 20374

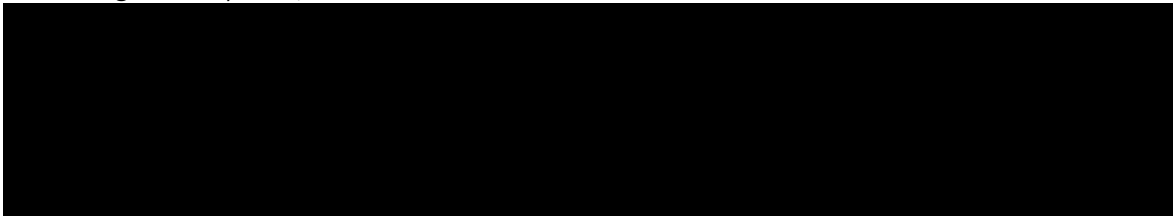


Subject: FILING - Panel 2 - U.S. v. Leger - NMCCA 202100310 - G - Mot 2d Enlarge (Burkart)

To this Honorable Court:

Please find attached the Appellee's Motion for Second Enlargement of Time in United States v. Leger NMCCA No. 202100310.

Semper Fidelis,
James A. Burkart
Lieutenant Colonel, U.S. Marine Corps
Appellate Government Counsel (Code 46)
Navy and Marine Corps Appellate Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374-5124





IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 2

UNITED STATES,	)	APPELLEE’S MOTION FOR
Appellee	)	THIRD ENLARGEMENT OF TIME
)	
v.	)	Case No. 202100310
)	
Tyler J. LEGER,	)	Tried at Marine Corps Base Hawaii,
Lance Corporal (E-3)	)	Kaneohe Bay, Hawaii, on March 11,
U.S. Marine Corps	)	April 23, May 24, June 29, and July
Appellant	)	8–15, 2021, by a general court-martial
	)	convened by Commanding General,
	)	3d Marine Division, Lieutenant
	)	Colonel M. J. Mann, U.S. Marine
	)	Corps (arraignment, motions, trial),
	)	and Lieutenant Colonel D. A. Poteet,
	)	U.S. Marine Corps (motion),
	)	presiding.

TO THE HONORABLE JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Pursuant to Rule 23.2 of this Court’s Rules of Appellate Procedure, the
United States respectfully moves for a thirty-day enlargement of time from
December 13, 2022, to January 12, 2023, to answer Appellant’s Brief and
Assignments of Error.

A. Information required by Rule 23.2(c)(3).

Pursuant to Rule 23.2(c)(3), the United States provides the following:

(A) This case was docketed with the Court on November 16, 2021;

(B) The *Moreno III* date is May 16, 2023;

(C) Appellant is not confined;

(D) The Record of Trial consists of 1,028 transcribed pages and 1,859 total pages not including sealed material;

(E) Counsel has reviewed the Record; and

(F) The case is moderately complex. Contrary to his plea, Appellant was found guilty at a general court-martial for sexual assault. He now raises three issues alleging legal and factual insufficiency, ineffective assistance of counsel, and lack of unanimous verdict.

B. Good cause exists in light of the need for additional research and drafting.

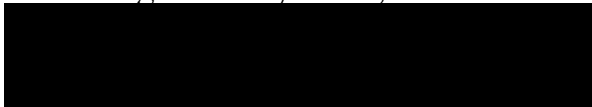
Good cause exists for this Third Enlargement. Counsel needs additional time to further research the issues, complete drafting the Answer, and ensure the Answer completely and accurately represents the United States' settled position on the Appellant's Assignments of Error.

Conclusion

The United States respectfully requests that the Court grant this Motion and extend the time to file its Answer to January 12, 2023.

James A. Burkart Digitally signed by
James A. Burkart

JAMES A. BURKART
Lieutenant Colonel, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374



Certificate of Filing and Service

I certify this document was emailed to the Court's filing address, uploaded to the Court's case management system, and emailed to Appellate Defense Counsel, Major Mary Claire FINNEN, U.S. Marine Corps, on December 7, 2022.


James A. Burkart Digitally signed by
James A. Burkart

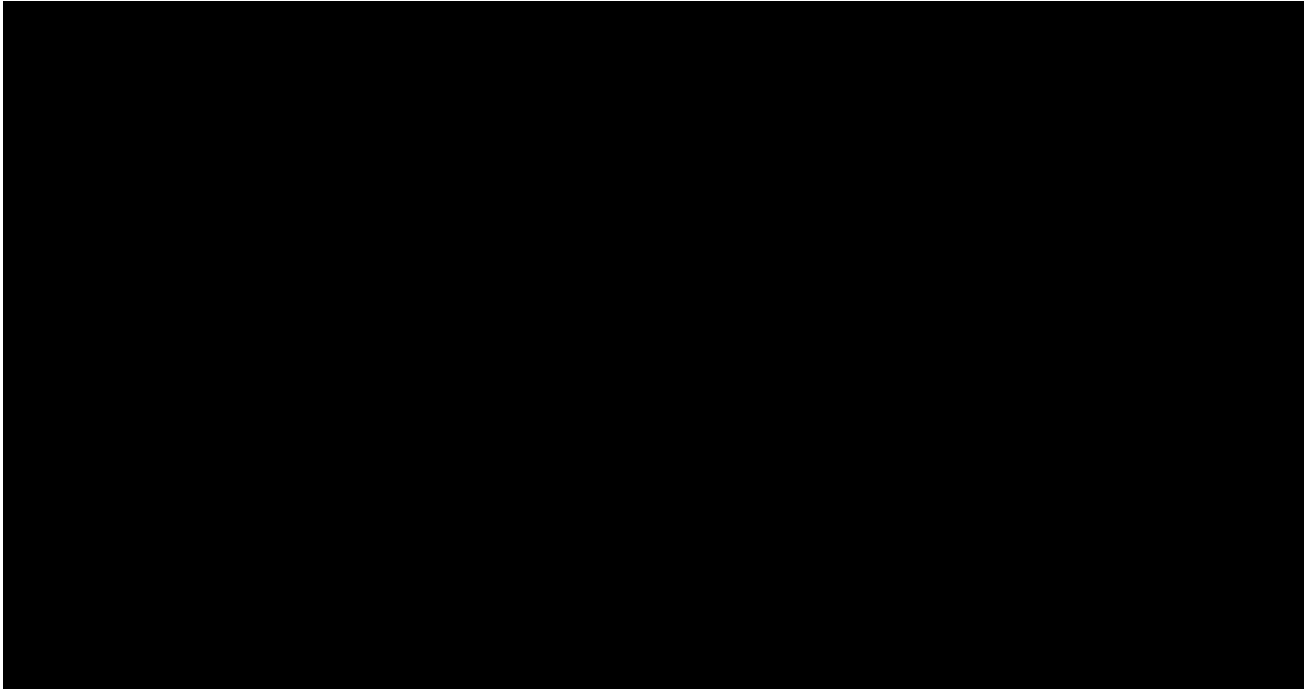
JAMES A. BURKART
Lieutenant Colonel, U.S. Marine Corps
Appellate Government Counsel

Subject: RULING - RECEIPT - FILING - Panel 2 - U.S. v. Leger - NMCCA 202100310 - G - Mot 3d Enlarge (Burkart)
Date: Tuesday, December 13, 2022 10:26:09 AM

MOTION GRANTED
13 DECEMBER 2022
United States Navy-Marine Corps
Court of Criminal Appeals

Very Respectfully,


LT, JAGC, USN
Commissioner
Navy-Marine Corps Court of Criminal Appeals
NMCCA | Code 51
1254 Charles Morris St. SE | Bldg 58, Suite 320
Washington Navy Yard, DC, 20374-5124



Subject: RECEIPT - FILING - Panel 2 - U.S. v. Leger - NMCCA 202100310 - G - Mot 3d Enlarge (Burkart)

RECEIVED
december 7 2022
UNITED STATES NAVY-MARINE CORPS

COURT OF CRIMINAL APPEALS


Panel Paralegal

Navy-Marine Corps Court of Criminal Appeals

1254 Charles Morris St SE, Ste 320

Washington Navy Yard, DC 20374



Subject: FILING - Panel 2 - U.S. v. Leger - NMCCA 202100310 - G - Mot 3d Enlarge (Burkart)

To this Honorable Court:

Please find attached the Appellee's Motion for Third Enlargement in United States v. Leger NMCCA No. 202100310.

Semper Fidelis,

James A. Burkart

Lieutenant Colonel, U.S. Marine Corps

Appellate Government Counsel (Code 46)

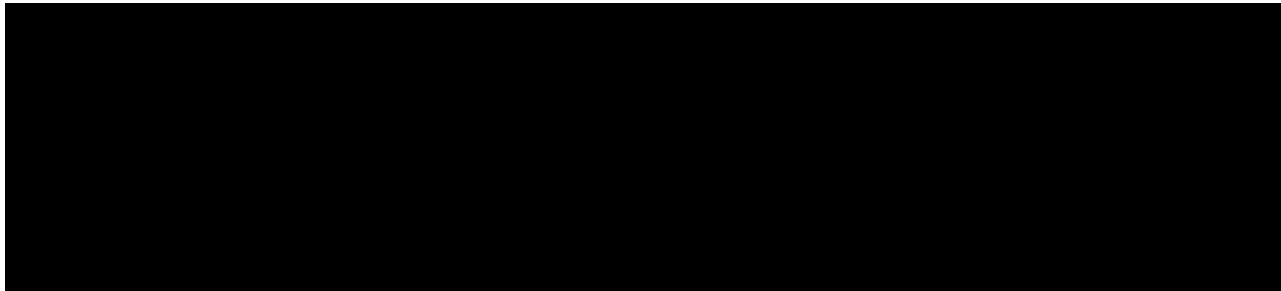
Navy and Marine Corps Appellate Review Activity

Bldg. 58, Suite B01

1254 Charles Morris Street SE

Washington Navy Yard, DC 20374-5124





**IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS**

Before Panel No. 2

UNITED STATES

Appellee

v.

Tyler LEGER

Lance Corporal (E-3)
U.S. Marine Corps,

Appellant

NMCCA No. 202100310

**APPELLANT’S MOTION FOR A
FIRST
ENLARGEMENT OF TIME TO
REPLY**

Tried at Marine Corps Base Hawaii,
Kaneohe Bay, Hawaii, on 11 March,
23 April, 24 May, 29 June, and 8-15
July 2021, before a general court-
martial convened by the Commanding
General, 3d Marine Division, military
judges LtCol Derek Poteet, U.S.
Marine Corps, and LtCol Melanie
Mann, U.S. Marine Corps, presiding.

**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURTS OF CRIMINAL APPEALS**

COMES NOW the undersigned and respectfully moves for a first
enlargement of time to file a reply brief. The current due date is February 16, 2023.
The number of days requested is two days after trial defense counsel’s affidavit or
declaration is produced, for a maximum of eight days for a requested due date of
February 24, 2023.

Status of the case:

1. The Record of Trial was docketed on November 16, 2021.

2. The Moreno III date is May 16, 2023.
3. Appellant is not confined.
4. The record currently consists of 1,028 transcribed pages and 1,859 total pages not including sealed material.
5. Appellant consents to this request.

Good cause for granting the requested enlargement exists. On February 8, 2023, this Court ordered trial defense counsel to produce a sworn declaration or affidavit responding to Appellant's allegation that he was ineffective when he failed to raise a challenge for cause against one of the members. This Court ordered the affidavit or declaration be produced by not later than February 22, 2023. Counsel is requesting two days to review the affidavit or declaration, incorporate the material into Appellant's reply brief, and edit the reply. If the Government produces the affidavit or declaration on February 22, 2023, Counsel requests the due date for the reply be February 24, 2023. If the Government produces the affidavit earlier, Counsel requests the due date be two week days after the affidavit or declaration is produced.

Conclusion

Appellant respectfully requests this Court grant this motion.

Mary Claire Finnen
Major, U.S. Marine Corps
Appellate Defense Counsel

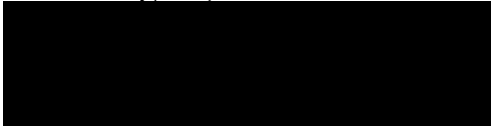
Navy-Marine Corps Appellate Review
Activity1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374



CERTIFICATE OF FILING AND SERVICE

I certify that the original and copy of the foregoing was delivered to the Court on February 14, 2023 that a copy was uploaded into the Court's case management system on February 14, 2023, that a copy of the foregoing was delivered to Director, Appellate Government Division on February 14, 2023.

Mary Claire Finnen
Major, U.S. Marine Corps
Appellate Defense Counsel
Navy-Marine Corps Appellate Review
Activity 1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374



Subject: RULING - ELECTRONIC FILING - Panel 2 - U.S. v. Leger - NMCCA 202100310 - D- 1st EOT for Reply (Finnen)
Date: Wednesday, February 15, 2023 1:49:45 PM

MOTION GRANTED
FEBRUARY 15 2023
UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

V/R,

Corporal, USMC
Panel Secretary
Navy-Marine Corps Court of Criminal Appeals (Code 51)
1254 Charles Morris St SE, Ste 320
Washington Navy Yard, D.C 20374

Subject: ELECTRONIC FILING - Panel 2 - U.S. v. Leger - NMCCA 202100310 - D- 1st EOT for Reply (Finnen)

To this Honorable Court:

Attached please find Defense's motion for a first enlargement of time to file a reply ICO United

States v. Leger NMCCA No. 202100310. The requested additional time is two days after the Government provides trial defense counsel's affidavit or declaration.

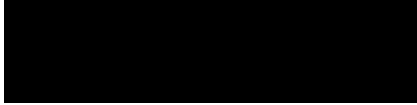
Very Respectfully,

Mary Claire Finnen

Major, U.S. Marine Corps

Navy-Marine Corps Appellate Review Activity

1254 Charles Morris Street, SE, Suite 140 Washington Navy Yard, D.C. 20374-5124



REMAND

THERE WERE NO REMANDS

NOTICE OF COMPLETION OF APPELLATE REVIEW (NOCAR)



DEPARTMENT OF THE NAVY
NAVY-MARINE CORPS APPELLATE REVIEW ACTIVITY
1254 CHARLES MORRIS STREET SE
WASHINGTON NAVY YARD DC 20374-5214

5814
40/ 202100310
10 Oct 23

From: Branch Head, Court-Martial Records Branch (Code 40)
To: Commanding Officer, Navy and Marine Corps Appellate Leave Activity

Subj: NOTIFICATION OF COMPLETION OF APPELLATE REVIEW IN THE GENERAL COURT-MARTIAL OF LANCE CORPORAL TYLER J. LEGER, USMC – NMCCA 202100310

Ref: (a) Article 57 (c)(2), UCMJ
(b) Article 66, UCMJ
(c) RCM 1209 (a)(1)(B)(ii), MCM 2019

Encl: (1) Post Trial Action of 12 Aug 21 and Entry of Judgment of 16 Aug 21
(2) Naval Clemency and Parole Board Review Waiver of 12 Jan 22
(3) NMCCA Opinion of 31 Mar 23
(4) CAAF Denial Order of 23 Aug 23

1. Lance Corporal (LCpl) Tyler J. Leger, USMC – NMCCA 202100310 was arraigned, tried, and convicted at a General Court-Martial convened by the Commanding General, 3d Marine Division. LCpl Leger was sentenced on 15 July 2021, to reduction to E-1, 18 month confinement, forfeiture of all pay and allowances, and to be discharged from the United States Marine Corps with a Dishonorable Discharge. (Encl. 1)

2. The 18 month sentence awarded to LCpl Leger triggered an automatic review by the Naval Clemency and Parole Board (NC&PB). LCpl Leger waived the clemency review on 12 January 2022. (Encl. 2)

3. In an Opinion issued 31 March 2023, the United States Navy-Marine Court of Criminal Appeals (NMCCA), affirmed the findings and the sentence of the General Court-Martial. (Encl. 3)

4. LCpl Leger petitioned the decision of the NMCCA to the United States Court of Appeals for the Armed Forces (CAAF). CAAF Denied the petition for review in a CAAF Denial Order issued 23 August 2023. (Encl. 4)

5. Accordingly, all appellate review is now complete in the General Court-Martial of Lance Corporal Tyler J. Leger, USMC – NMCCA 202100310. The Dishonorable Discharge awarded to Lance Corporal Tyler J. Leger may now be executed.

6. Point of contact for this matter is Mr. [REDACTED] Branch Head, Court-Martial Records;
[REDACTED]
[REDACTED]

Copy to:
Appellant
SJA, 2dMarDiv
LSSS Pacific